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1/24/11 ALASKA VICTIM-IZATION SURVEY

<TARGET><BILL></BILL><SUBJECT>1-24-11 ALASKA VICTIMIZATION
SURVEY</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska Victimization Survey

Detailed Responses to Intimate Partner Violence and Sexual Violence Questions

André B. Rosay, Ph.D.
Marny Rivera, Ph.D.
Brad Myrstol, Ph.D.
Justice Center, University of Alaska Anchorage

Darryl Wood, Ph.D.
Washington State University Vancouver

With the Council on Domestic Violence and Sexual Assault

JC 1004

Alaska Victimization Survey Questions

Intimate Partner Violence

Now I'm going to ask you some questions about times when any romantic or sexual partner has physically hurt you. Remember that you can skip questions you don't want to answer and you can stop at any time. How many of your romantic or sexual partners have…

1. Made threats to physically harm you?
2. Slapped you?
3. Pushed or shoved you?
4. Hit you with a fist or something hard?
5. Kicked you?
6. Hurt you by pulling your hair?
7. Slammed you against something?
8. Tried to hurt you by choking or suffocating you?
9. Beaten you?
10. Burned you on purpose?
11. Used a knife or gun on you?

Alcohol or Drug Involved Sexual Assault

Sometimes sex happens when a person is unable to consent to it or stop it from happening because they were drunk, high, drugged, or passed out from alcohol, drugs, or medications. This can include times when they voluntarily consumed alcohol or drugs or they were given drugs or alcohol without their knowledge or consent. Please remember that even if someone uses alcohol or drugs, what happens to them is not their fault. When you were drunk, high, drugged, or passed out and unable to consent, how many people have…

1. Had vaginal sex with you? By vaginal sex, we mean that a man or boy put his penis in your vagina.
2. Made you receive anal sex, meaning they put their penis into your anus?
3. Made you perform oral sex, meaning that they put their penis in your mouth or made you penetrate their vagina or anus with your mouth?
4. Made you receive oral sex, meaning that they put their mouth on your vagina or anus?

Forcible Sexual Assault

Some people are threatened with harm or physically forced to have sex when they don't want to, for example, by being pinned or held down, or by the use of violence. How many people have used physical force or threats to physically harm you to…

1. Make you have vaginal sex?
2. Make you receive anal sex?
3. Make you perform oral sex?
4. Make you receive oral sex?
5. Put their fingers or an object in your vagina or anus?
6. Try to have vaginal, oral, or anal sex with you, but sex did not happen?

Weighted Proportions of Alaskan Women Reporting Intimate Partner Violence

Measures of Intimate Partner Violence	Past 12 Months	Lifetime
Partner(s) made threats to physically harm you	5.8%	31.0%
Partner(s) slapped you	3.1%	27.2%
Partner(s) pushed or shoved you	7.9%	39.3%
Partner(s) hit you with a fist or something hard	2.9%	22.2%
Partner(s) kicked you	2.0%	13.3%
Partner(s) hurt you by pulling your hair	2.1%	17.3%
Partner(s) slammed you against something	4.2%	25.4%
Partner(s) tried to hurt you by choking or suffocating you	1.5%	13.8%
Partner(s) beat you	2.0%	17.1%
Partner(s) burned you on purpose	0.6%	2.9%
Partner(s) used knife or gun on you	0.9%	9.7%
Intimate partner violence (composite with all items)	9.4%	47.6%
Physical violence (composite without threats)	8.6%	44.8%

Note. CI = confidence interval.

Weighted Proportions of Alaskan Women Reporting Sexual Violence

Measures of Sexual Violence	Past 12 Months	Lifetime
While intoxicated[a] and unable to consent…		
Someone had vaginal sex with you	2.0%	18.3%
Someone made you receive anal sex	1.0%	6.9%
Someone made you perform oral sex	1.7%	11.5%
Someone made you receive oral sex	1.6%	8.4%
Alcohol or drug involved sexual assault (composite)	3.6%	26.8%
With physical force or threats of physical harm…		
Someone made you have vaginal sex	1.5%	17.9%
Someone made you receive anal sex	0.4%	3.3%
Someone made you perform oral sex	0.9%	7.7%
Someone made you receive oral sex	0.9%	5.3%
Someone put fingers or an object in your vagina/anus	0.9%	9.4%
Someone tried to have vaginal/oral/anal sex with you	1.2%	13.0%
Forcible sexual assault (composite)	2.5%	25.6%
Sexual violence (composite)	4.3%	37.1%

Note. CI = confidence interval.

[a] Includes being drunk, high, drugged, or passed out from alcohol, drugs, or medications.

2010 Alaska Victimization Survey

Report to the Alaska State Legislature 1/24/11

University of Alaska Anchorage Justice Center
André B. Rosay

Council on Domestic Violence and Sexual Assault
Lauree Morton

UAA UNIVERSITY of ALASKA ANCHORAGE

CDVSA
Council on Domestic Violence & Sexual Assault

Presentation Overview

- Update on recent statistics from Uniform Crime Reports
- 2009 Senate Judiciary Committee recommendation for victimization survey
- FY10 Alaska Victimization Survey
- FY11 Alaska Victimization Surveys

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Forcible Rape in Uniform Crime Reports

- **Forcible rape is defined as the carnal knowledge of a female forcibly and against her will**
- **UCR statistics show the number of forcible rapes reported to police each year**
- **Important limitations:**
  - Not all police agencies participate in the UCR program
  - These statistics only include rapes reported to police
  - These statistics exclude:
    - Statutory rapes
    - Incapacitated rapes
    - Rapes with male victims
    - Other sex offenses
    - Rapes with more serious offenses (e.g., homicide)

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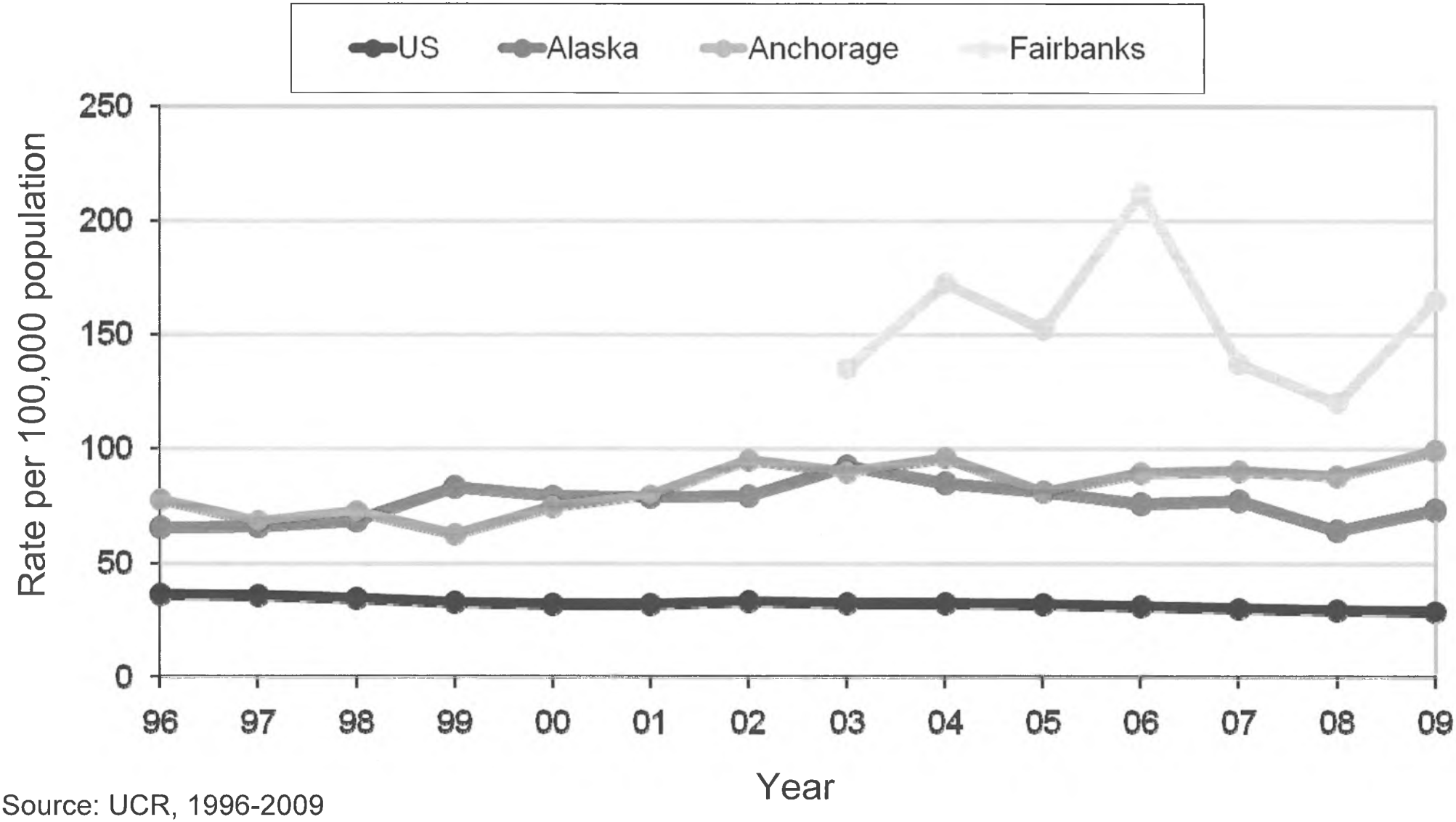
UCR Forcible Rape Statistics: 1996-2009



Source: UCR, 1996-2009

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UCR Forcible Rape Statistics

	2007 to 2008	2008 to 2009
U.S.	-2.3%	-2.1%
Alaska	-16.9%	+12.3%
Anchorage	-2.7%	+11.6%
Fairbanks	-12.5%	+27.1%

- Changes in UCR forcible rape statistics may be attributable to:
  - Changes in victimization rates,
  - Changes in reporting,
  - Changes in both victimization rates and reporting.

Source: UCR, 2007-2009

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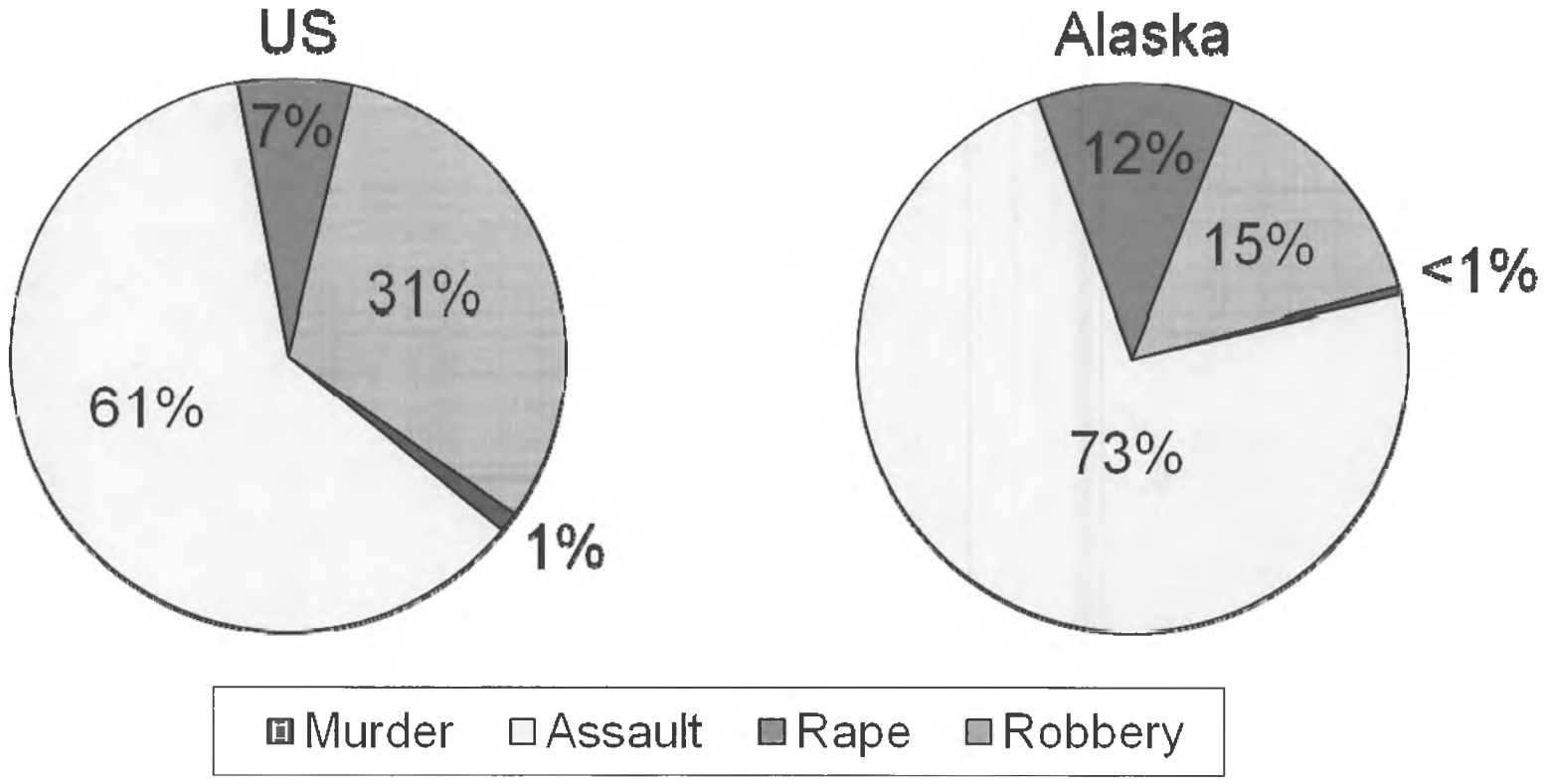
Composition of Violent Crime: 2009

Forcible rape is still a more common form of violent crime in Alaska than in the U.S.



Source: UCR, 2009; Interpretation: 7% of violent crime reported to police in the US is attributable to rape; 12% of violent crime reported to police in Alaska is attributable to rape.

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Senate Judiciary Committee Recommendations

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Dennis Egan
Senator Lesil McGuire
Senator Gene Therriault

Senate Judiciary Committee

Report and Recommendations: Reducing Sexual Assault in Alaska

"The legislature should fund a victimization survey to determine the actual rate of both reported and unreported sexual assaults in Alaska" (Senate Judiciary Committee, 2009).

Source: http://www.aksenate.org/french/101609_Senate_Judiciary_report_on_sexual_assault.pdf

Council on Domestic Violence and Sexual Assault

Council Vision:

Alaska, free from domestic and sexual violence

Council Mission:

Provide safety for Alaskans victimized or impacted by domestic Violence and sexual assault through a system of statewide crisis intervention, perpetrator accountability and prevention services.

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FY10 Alaska Victimization Survey

- Designed to establish a baseline with statewide intimate partner and sexual violence estimates.
- Modeled after the National Intimate Partner and Sexual Violence Surveillance System (CDC, NIJ, DoD) and administered by RTI.
- Utilized a statewide random digit dial dual frame phone survey (both land and cell phone lines).
- Maximized respondent safety and confidentiality.

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Alaska Victimization Survey Questions

- Begin with less sensitive questions
- Use behaviorally specific questions:
  - *Avoid terms which respondents must define: "victim," "rape," "sexual assault," or "domestic violence." Instead, ask about behaviors and define when necessary. Example: "by vaginal sex, we mean that a man or boy put his penis in your vagina."*
- Attribute behaviors to perpetrators rather than respondents:
  - *Avoid asking "did you have vaginal sex with others? Instead, ask "did others have vaginal sex with you?"*
- Respondents were thankful for the survey (94% completed the entire 25 min. survey).

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Survey Respondents

- Survey respondents were limited to English-speaking adult women residing in a household with at least one land or cell phone line.
- Includes 871 adult women throughout Alaska, surveyed in May/June 2010.
- Sample provides an excellent representation of the Alaska population of adult women.
- Sampling weights were used to control for selection, non-response, and coverage.

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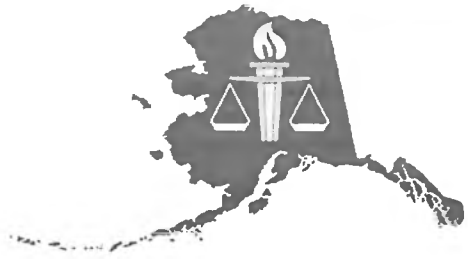
Survey Respondents



- Average age = 46 (ranges from 18 to 80+)
- 72% White, 15% Alaska Native
- 5% Hispanic
- 49% were married
- 35% had a high school degree or less
- 56% reported a household income <$50,000
- Geographically representative (68% are from Anchorage Municipality, Fairbanks North Star Borough, Matanuska-Susitna Borough)

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Intimate Partner Violence Definitions

- Intimate partner violence includes two measures:
  - *A – Threats of physical violence.*
  - *B – Physical violence.*
  - *Both include intimate partners only, defined as romantic or sexual partners.*
  - *Measures are then combined into a single 'intimate partner violence' composite.*
- Threats of physical violence by intimate partners:
  - *Have your romantic or sexual partners made threats to physically harm you?*

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Intimate Partner Violence Definitions

- Physical violence by intimate partners:
  - *Have your romantic or sexual partners…*
    - *Slapped you?*
    - *Pushed or shoved you?*
    - *Hit you with a fist or something hard?*
    - *Kicked you?*
    - *Hurt you by pulling your hair?*
    - *Slammed you against something?*
    - *Tried to hurt you by choking or suffocating you?*
    - *Beaten you?*
    - *Burned you on purpose?*
    - *Used a knife or gun on you?*

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Intimate Partner Violence Estimates

Lifetime Estimates	Estimated %	Estimated N (out of 247,238)
Intimate Partner Violence[1]	47.6%	117,685
A. Threats	31.0%	76,644
B. Physical Violence	44.8%	110,763

1 – Includes both threats of physical violence and physical violence by intimate partners.

- *47.6% of adult women in Alaska (or 117,685) experienced intimate partner violence in their lifetime,*
  - *31.0% (or 76,644) experienced threats of physical violence,*
  - *44.8% (or 110,763) experienced physical violence.*

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Intimate Partner Violence Estimates

Past Year Estimates	Estimated %	Estimated N (out of 247,238)
Intimate Partner Violence[1]	9.4%	23,240
A. Threats	5.8%	14,340
B. Physical Violence	8.6%	21,262

1 – Includes both threats of physical violence and physical violence by intimate partners.

- *9.4% of adult women in Alaska (or 23,240) experienced intimate partner violence in the past year,*
  - *5.8% (or 14,340) experienced threats of physical violence,*
  - *8.6% (or 21,262) experienced physical violence.*

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Sexual Violence Definitions

- Sexual violence includes two measures:
  - *A – Alcohol or drug involved sexual assault.*
  - *B – Forcible sexual assault.*
  - *Measures are not limited to intimate partners.*
  - *Measures are then combined into a single 'sexual violence' composite.*
- Alcohol or drug involved sexual assault:
  - *When you were alcohol or drug intoxicated and unable to consent, has anyone…*
    - *Had vaginal sex with you?*
    - *Made you receive anal sex?*
    - *Made you perform oral sex?*
    - *Made you receive oral sex?*

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Sexual Violence Definitions

- Forcible sexual assault:
  - *Has anyone used physical force or threats to physically harm you to…*
    - *Make you have vaginal sex?*
    - *Make you receive anal sex?*
    - *Make you perform oral sex?*
    - *Make you receive oral sex?*
    - *Put their fingers or an object in your vagina or anus?*
    - *Try to have vaginal, oral, or anal sex with you?*

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Sexual Violence Estimates

Lifetime Estimates	Estimated %	Estimated N (out of 247,238)
Sexual Violence[1]	37.1%	91,725
A. Alcohol or Drug Involved Sexual Assault	26.8%	66,260
B. Forcible Sexual Assault	25.6%	63,293

1 – Includes both alcohol or drug involved sexual assault and forcible sexual assault.

- *37.1% of adult women in Alaska (or 91,725) experienced sexual violence in their lifetime,*
  - *26.8% (or 66,260) experienced at least one alcohol or drug involved sexual assault,*
  - *25.6% (or 63,293) experienced at least one forcible sexual assault.*

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Council on Domestic Violence & Sexual Assault

Sexual Violence Estimates

Past Year Estimates	Estimated %	Estimated N (out of 247,238)
Sexual Violence[1]	4.3%	10,631
A. Alcohol or Drug Involved Sexual Assault	3.6%	8,901
B. Forcible Sexual Assault	2.5%	6,181

1 – Includes both alcohol or drug involved sexual assault and forcible sexual assault.

- *4.3% of adult women in Alaska (or 10,631) experienced sexual violence in the past year,*
  - *3.6% (or 8,901) experienced at least one alcohol or drug involved sexual assault,*
  - *2.5% (or 6,181) experienced at least one forcible sexual assault.*

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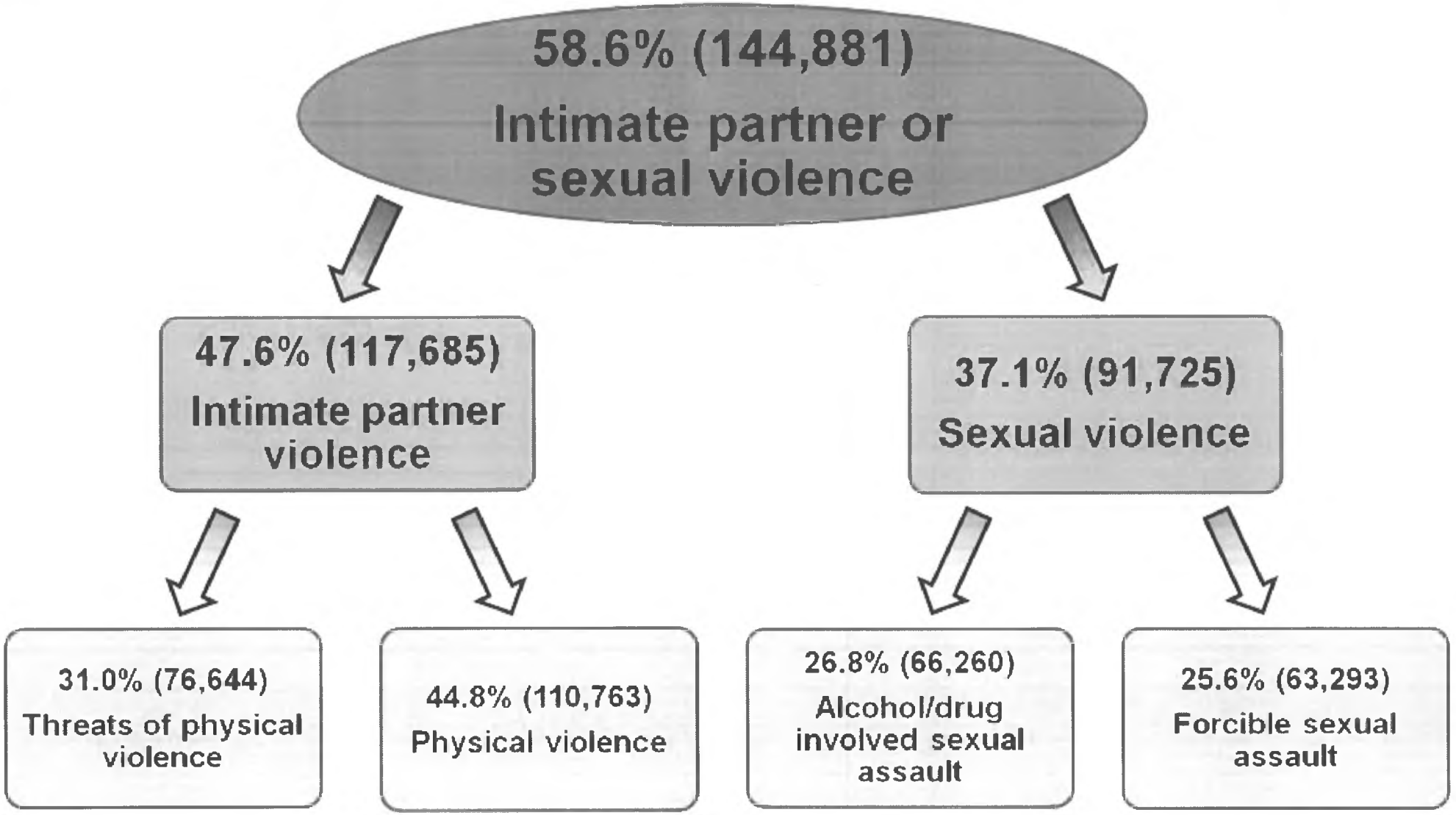
Summary of Lifetime Estimates



Note: percentages do not sum because some respondents experienced multiple victimizations.

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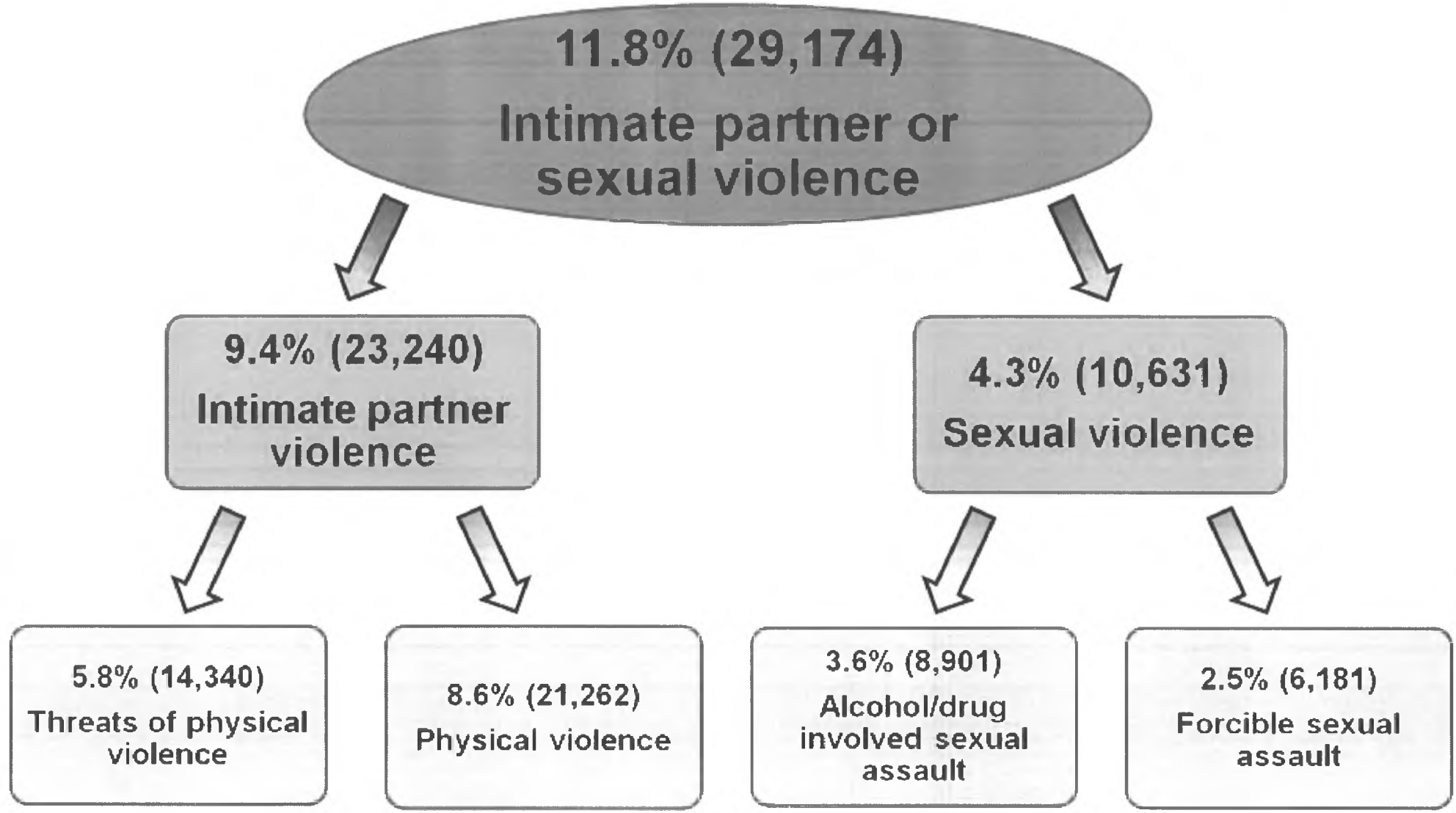
Summary of Past Year Estimates



Note: percentages do not sum because some respondents experienced multiple victimizations.

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Important Limitations

- Survey only provides a statewide average and masks regional differences. Regional estimates may vary significantly.
- Survey excluded non-English speaking women, women without phone access, and women not living in a residence (e.g., shelters, hospitals, homeless, prisons). Estimates may be significantly higher among women excluded from the survey.

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Important Limitations

- Measured *number of victims*, not *number of victimizations*. The number of victimizations is higher than the number of victims.
- Survey did not measure all forms of intimate partner violence or sexual violence. Estimates are therefore conservative.
- Estimates may also be conservative because of the continuing stigma of reporting intimate partner and sexual violence.

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A Special Thank You!

We sincerely thank the women who invested time and effort to participate in the 2010 Alaska Victimization Survey.

They re-lived horrendous experiences – experiences no one should be subjected to – to help the rest of us understand the extent of intimate partner and sexual violence in Alaska. Thank you!

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Council on Domestic Violence & Sexual Assault

FY10 Alaska Victimization Survey

- Survey provides the first statewide, comprehensive, and behaviorally specific measures of violence against Alaskan women
- Establishes a new baseline for Alaska that can be repeated to monitor progress and document change
- National comparisons and comparisons with other states will soon be available
- Results will be used to guide policy and practice

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FY11 Alaska Victimization Surveys

- Surveys will soon begin in Anchorage and Fairbanks
- Surveys will include at least one rural location
- FY11 surveys will include two new questions:
  - Location of victimization (in/out of Alaska)
  - Child witnesses to violence
- FY11 surveys are again funded by the Council on Domestic Violence and Sexual Assault
- Continuing funding is needed and requested in the FY12 Governor's budget

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UAA Justice Center
UNIVERSITY of ALASKA ANCHORAGE

UAA Justice Center Research on Violence Against Women

Prepared for the joint meeting of the Senate Health and Social Services Committee
and the Senate Judiciary Committee, Alaska State Legislature
Monday, January 24, 2011, 1:30 PM

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Sexual Assaults Reported to Alaska State Troopers

André B. Rosay, Greg Postle, Darryl S. Wood, and Katherine TePas

Originally published in the *Alaska Justice Forum* 25(1–2): 1, 6–9 (Spring-Summer 2008).
http://justice.uaa.alaska.edu/forum/25/1-2springsummer2008/d_ast.html

For other articles and publications related to sexual violence and violence against women, see:
http://justice.uaa.alaska.edu/vaw/

Abstract: *This study examined 989 cases with a sexual assault or sexual abuse of a minor charge reported to Alaska State Troopers in 2003 and 2004, and excluded any sexual assault cases reported to local or municipal departments.*

- *Forty-eight percent of reports came from C Detachment (Western Alaska - Kodiak to Kotzebue), and 58% were reported from communities off the road system.*
- *In 69% of cases, the identity of at least one suspect was known. While most suspects (87%) were adults, most victims (73%) were juveniles. Sixty-one percent of victims were Alaska Native and 38% were White. Intra-racial victimizations were much more prevalent than inter-racial victimizations. The most common suspect was a friend or acquaintance of the victim, followed by a relative. Forty-three percent of suspects and 27% of victims had used alcohol.*
- *Sexual penetration occurred in 60% of assaults. Weapons were very rarely used. Most assaults occurred inside private residences. Nineteen percent of victims experienced general physical pain and 10% suffered bruising or swelling. Most victimizations were reported quickly to Troopers and Troopers were quick to respond. Ninety-six percent of victims were interviewed, with 48% interviewed on the day of the report and 80% interviewed within one week of the report.*
- *Forty-six per cent of reported cases were referred for prosecution, 60% of referred cases were accepted for prosecution, and 80% of accepted cases resulted in a conviction. Overall, however, only 22% of reported cases resulted in a conviction. In some cases, the conviction may be for a non-sexual offense. The highest level of attrition occurred from report to referral.*

Most research on sexual assault and the sexual abuse of minors in the state of Alaska has been focused on Anchorage; little has been known about the characteristics of these problems in other communities. The Justice Center, working with the Alaska State Troopers and the Alaska Department of Law, has completed the first thorough review of sexual assault incidents reported to Troopers in 2003 and 2004. The results delineate a first draft of the problem in Alaska's smaller communities, for the population primarily served by the Troopers.

The final sample in this study included 989 cases with a sexual assault or sexual abuse of a minor charge, reported to Troopers in 2003 and 2004, and closed by the time of the study. It is important to note that this study did not include any sexual assault cases reported to local or municipal departments. In addition, this study did not include cases specific to child pornography or online enticement of minors.

Report Characteristics

Almost half of the reports included in the study (48%) came from C Detachment, which covers western Alaska, from Kotzebue to Kodiak (Table 1). The C Detachment headquarters is in Anchorage, with the remaining posts in Aniak, Bethel, Dillingham, Emmonak, King Salmon, Kodiak, Kotzebue, Nome, and St. Mary's. The Bethel post handled 17 percent of all sexual assault and sexual abuse of minor cases reported to Troopers in 2003 and 2004. Thirty percent of the reports came from the Alaska Bureau of Investigation (ABI), whose Major Crime Unit is responsible for investigating sexual assaults and other person offenses statewide. The Alaska Bureau of Investigation has posts in Anchorage, Palmer, Fairbanks, and Soldotna. ABI posts in Palmer and Fairbanks handled 16 percent of all sexual assault and sexual abuse of minor cases reported to Troopers in 2003 and 2004. Together, C Detachment and ABI handled 78 percent of all reports. Forty-two percent of the reported cases originated in communities connected to the State of Alaska highway system, and 58 percent were reported from communities off the road system.

Most reports (86%) were made directly to troopers. The remaining 14 percent were reported to Village Police Officers, Village Public Safety Officers, or Tribal Police Officers. Few of the initial complaints (21%) were made by the victims themselves. Most initial reports to law enforcement (79%) were made by a third party. In over two-thirds of the cases (69%), the identity of at least one suspect was known.

The 989 cases in this study included a total of 1,645 sexual assault charges and 258 non-sexual assault charges (Table 2). The most common sexual assault charges were second degree sexual abuse of a minor, first degree sexual assault, second degree sexual assault, and first degree sexual abuse of a minor—all felonious assaults (Unclassified or Class B). Together, these four offenses accounted for 81 percent of all sexual assault charges. The most common non-sexual assault charges included assaults (in the

Table 1. Total Number of Reports by Detachment

Column percentages.

	Reports	
Detachment	N	%
C	476	48.1 %
ABI	299	30.2
D	79	8.0
E	54	5.5
A	39	3.9
B	24	2.4
ABWE	18	1.8
Total	**989**	

Source of data: *AST data (2003–2004)*

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Table 2. All Sexual Assault Charges

Column percentages.

Charge	Number N	%
Sexual abuse of a minor 2nd degree	481	29.2 %
Sexual assault 1st degree	366	22.2
Sexual assault 2nd degree	292	17.8
Sexual abuse of a minor 1st degree	193	11.7
Sexual assault 3rd degree	130	7.9
Sexual abuse of a minor 3rd degree	99	6.0
Sexual abuse of a minor 4th degree	78	4.7
Sexual assault 4th degree	6	0.4
Total	**1,645**	

Source of data: *AST data (2003–2004)*

second, third, or fourth degree), burglary (in the first or second degree) and kidnapping. Together, these three offenses accounted for 50 percent of all non-sexual assault charges.

Despite the geographical distance that is often present between victims and Troopers, most victimizations were reported quickly to Troopers, and Troopers were quick to respond. Sixty-two percent of cases were reported within 72 hours, which, at the time of the study, was the benchmark for initiating a call to the Sexual Assault Response Team (SART) and collecting evidence with a sexual assault evidence kit. Seventy-seven percent of suspects were interviewed by Troopers (recall that the identity of the suspect was known in 69% of cases). Fifty-seven percent of suspect interviews occurred within one week of the report. Ninety-six percent of victims were interviewed, with 48 percent interviewed on the day of the report and 80 percent interviewed within one week of the report. Ninety-one percent of victim interviews were conducted in-person. On average, cases were closed 18 weeks after they were reported (Table 3). More specifically, 30 percent of cases were closed within three weeks, 50 percent were closed within eight weeks, and 75 percent were closed within 24 weeks.

Table 3. Case Closure Codes

Column percentages.

Closure code		Reports N	%
CA	Closed by arrest	316	32.0 %
CR	Closed, referred	255	25.7
CI	Closed by investigation	232	23.5
CU	Closed, unfounded	150	15.2
CD	Closed, declined	29	2.9
CE	Closed, exception	7	0.7
	Total	**989**	

Source of data: *AST data (2003–2004)*

A majority of cases (61%) were closed and referred for prosecution. These included cases closed by arrest (32%), closed and referred (26%), and closed but declined (3%). The remaining cases were closed after investigation (23%), closed as unfounded (15%), or closed by exception (1%). These latter groups of cases (excluding those closed by exception) were all closed without a suspect being arrested and in some cases without a suspect being identified. Cases that were closed as unfounded were more likely to be reported by third parties who were concerned that a sexual assault may have occurred.

Suspect and Victim Characteristics

From the 989 reports included in this study, we gathered information on 1,050 suspects and 1,082 victims. Most suspects (97%) were male and most (87%) were adults. Conversely, most victims (89%) were female and most (73%) were juveniles. The average age of suspects—29.2—was 13 years greater than the average age of victims—16.2 (Table 4).

Figure 1 displays the number of victim-suspect combinations on the horizontal axis, by victim age on the vertical axis, for five different suspect age groups, in horizontal bars. The top five age group combinations were (1) suspects 31 years old or older and victims 0 to 12 years old (N=137); (2) 16 to 20-year-old suspects and 13 to 15-year-old victims (N=113); (3) 21 to 30-year-old suspects and 13 to 15-year-old victims (N=89); (4) suspects 31 years old or older and victims 31 years old or older (N=76); and (5) suspects 31 years old or older and 13 to 15-year-old victims (N=75). Together, these five age group combinations accounted for 48 percent of the assaults for which both the age of the suspect and victim were known.

Table 4. Demographic Characteristics of Suspects and Victims

Column percentages.

	Suspects N	%	Victims N	%
Age group				
0 to 12	35	3.7 %	380	35.9 %
13 to 15	87	9.2	303	28.6
16 to 20	210	22.2	165	15.6
21 to 30	236	24.9	101	9.5
31 or older	380	40.1	110	10.4
Total	**948**		**1,059**	
Race				
Native	566	59.1 %	638	60.5 %
White	349	36.5	400	37.9
Black	35	3.7	13	1.2
Other	7	0.7	4	0.4
Total	**957**		**1,055**	

Source of data: *AST data (2003–2004)*

Most suspects were Native (59%) or White (37%) and most victims were also Native (61%) or White (38%) (Table 4). Intra-racial victimizations were much more prevalent than inter-racial victimizations, with 91 percent of Native victims assaulted by Native suspects and 84 percent of White victims assaulted by White suspects. Slightly less than half (43%) of the suspects had used alcohol; few (7%) had used drugs. Substance use was most frequent among suspects age 21 to 30, followed by suspects age 31 to 40 and suspects age 16 to 20. Among victims, 27 percent had used alcohol and 5

Figure 1. Victim-Suspect Age Combinations

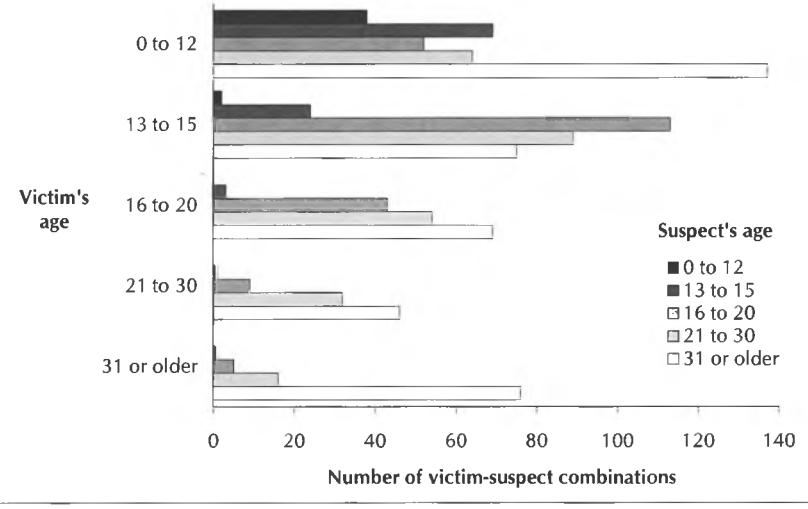

Table 5. Nature of Victim and Suspect Relationship

Column percentages.

	All victims		Minor victims		Adult victims	
Relationships	N	%	N	%	N	%
Friends or acquaintances	477	46.4 %	328	43.3 %	152	57.1 %
Relatives	360	35.1	308	40.6	45	16.9
Current or former partners	124	12.1	80	10.6	44	16.5
Authority figure (to victim)	44	4.3	36	4.7	17	6.4
Strangers	22	2.1	6	0.8	8	3.0
Total	**1,027**		**758**		**266**	

* The "relatives" category in this table includes in-laws, immediate, and extended family members. However, married couples were excluded from the "relatives" category.

Source of data: *AST data (2003–2004)*

percent had used drugs. Substance use was most frequent among victims age 13 to 15, followed by victims age 21 to 30 and victims age 31 or older.

Most victims (all but one) were not homeless, nor were most suspects (99%). Most victims (71%) were not living with the suspect at the time of the assault, but overwhelmingly, the victims reported knowing the suspect in some fashion (98%) (Table 5). Only 2 percent of all victim-suspect relationships involved complete strangers. Nearly half (46%) involved friends or acquaintances, 35 percent involved relatives, 12 percent involved current or past intimate partners (including married couples), and 4 percent involved suspects that were in a position of authority over their victims. Together, friends, relatives, and intimate partners accounted for 94 percent of the victim-suspect relationships in the study sample.

The nature of the victim-suspect relationship varied substantially by the age of the victim. In particular, minor victims were substantially more likely be assaulted by relatives than adult victims. While only 17 percent of adult victims were assaulted by relatives, 41 percent of minor victims were assaulted by relatives. Minor victims were slightly less likely to be assaulted by friends or acquaintances (43%) than adult victims (57%) and slightly less likely to be assaulted by current or former partners (10%) than adult victims (17%).

Assault Characteristics

The five most common ways that victims and suspects came into contact with each other prior to the assault were by living together (32%); the suspect inviting the victim somewhere (20%); the suspect attacking the victim indoors (15%); the victim inviting the suspect somewhere (10%); and the victim and suspect meeting up with each other at a party (9%). Together, these five pickup methods were used in 86 percent of the assaults (Table 6).

The five most common pickup and assault locations were identical, differing only in terms of rank. These locations included mutually shared residences (25% of pickups and 25% of assaults), the suspect's residence (25% of pickups and 30% of assaults), the victim's residence (20% of pickups and 17% of assaults), someone else's residence (14% of pickups and 14% of assaults), and outdoors (10% of pickups and 7% of assaults). Private residences accounted for 84 percent of pickup locations and 87 percent of assault locations (Table 7).

The reported use of weapons by suspects was very rare in this sample of sexual assault cases. The one major exception, however, was suspects' use of their hands and/or arms to restrain or strike their victims during the assaults. In slightly less than one-third of the incidents, suspects used their hand and/or arms to restrict victims' movement or to assault victims physically beyond the sexual assault. Other weapons such as knives, guns, drugs, or blunt objects were reported to have been used in less than 1 percent of the incidents.

Sexual penetration, as defined by Alaska law, was documented in 60 percent of the assaults. On average, suspects engaged in just over two sexual acts (2.16) per assault (Table 8).

As a result of the assault, 19 percent of victims experienced general physical pain. In addition, 10 percent suffered bruising or swelling. Lacerations, bite marks, and bone fractures were rarely reported or documented (less than 3% of victims). Overall, very few victims received any type of emergency medical treatment for injuries suffered as a result of the sexual assault. Only 4 percent of victims received emergency medical care for genital injuries; 2 percent received emergency medical care for non-genital injuries; and less than 1 percent received emergency medical care for alcohol or drug intoxication.

Evidence Collection

Detailed information was gathered on the availability and collection of several types

Table 6. Method of Pickup

Column percentages.

	Incidents	
Method	N	%
Lived together	234	32.4 %
Suspect invited victim	146	20.2
Attacked indoors	109	15.1
Victim invited suspect	71	9.8
Met at a party	63	8.7
Suspect performing service	33	4.6
Jumped outdoors	23	3.2
Entered suspect's vehicle	20	2.8
Met elsewhere	13	1.8
Met in a bar	10	1.4
Total	**722**	

Source of data: *AST data (2003–2004)*

Table 7. Location of Pickup and Assault

Column percentages.

	Pickup		Assault	
Location	N	%	N	%
Suspect's house	221	25.1 %	271	29.7 %
Victim and suspect's house	221	25.1	232	25.4
Victim's house	175	19.9	159	17.4
Other's house	122	13.8	130	14.2
Outdoors	89	10.1	61	6.7
Bar	17	1.9	3	0.3
Vehicle (victim or suspect's)	16	1.8	38	4.2
Work (victim or suspect's)	12	1.4	8	0.9
Hotel	8	0.9	11	1.2
Total	**881**		**913**	

Source of data: *AST data (2003–2004)*

Table 8. Sexual Acts

Row percentages.

Sexual acts	No N	No %	Yes N	Yes %	Total
Touching of the external female genitalia	365	47.7 %	400	52.3 %	**765**
Penile penetration of victim's vagina	582	60.1	387	39.9	**969**
Touching of victim's breasts	483	65.0	260	35.0	**743**
Kissing	563	70.9	231	29.1	**794**
Digital penetration of victim's vagina	597	75.3	196	24.7	**793**
Touching of penis (suspect's or victim's)	714	85.6	120	14.4	**834**
Touching of victim's anus	626	86.1	101	13.9	**727**
Victim performed oral sex on suspect	759	86.9	114	13.1	**873**
Suspect performed oral sex on victim	736	88.0	100	12.0	**836**
Penile penetration of victim's anus	786	91.7	71	8.3	**857**
Digital penetration of victim's anus	816	97.4	22	2.6	**838**

Source of data: *AST data (2003–2004)*

Table 9. Collection of Evidence and Forensic Exams

Row percentages.

Evidence	No N	No %	Yes N	Yes %	Total
Physical evidence from victim	720	78.2 %	201	21.8 %	**921**
Victim sexual assault evidence collection kit	733	79.9	184	20.1	**917**
Physical evidence from scene	796	84.1	150	15.9	**946**
Physical evidence from suspect	820	87.0	122	13.0	**942**
Photographs of scene	797	87.3	116	12.7	**913**
Suspect sexual assault evidence collection kit	874	92.9	67	7.1	**941**
DNA forensic exams	827	85.6	139	14.4	**966**
Trace/latent forensic exams	944	97.7	22	2.3	**966**
Computer forensic exams	942	97.5	24	2.5	**966**

Source of data: *AST data (2003–2004)*

of evidence, including physical evidence, electronic data, and photographic documentation.

Physical evidence from the victim (e.g., clothing) and victim sexual assault evidence collection kits were the most commonly collected types of evidence, gathered in 22 percent and 20 percent of cases respectively (Table 9). Suspect sexual assault kits were collected in only 7 percent of cases, and physical evidence from the suspect was gathered in only 13 percent of cases. In the majority of cases, there was no physical evidence recovered from the scene (84% of cases) and in 87 percent of cases, the scene was not photographed. Search warrants were obtained in 36 percent of cases. The most common warrants were for the victims' medical records (26% of cases) and glass warrants (13% of cases). Forensic exams of evidence were requested in only 16 percent of cases, with forensic DNA exams the most commonly requested (14% of cases).

Photographs of suspect injuries and the recovery of a weapon were the least common types of evidence collected (also the least available) during investigations.

Overall, evidence collection appeared to be somewhat low, although the statistics represent only what was included in the reports (Table 10). This is an important limitation with this study because evidence was counted as collected only if it was included in the report. This is particularly problematic with photographs. In some cases, photographs were taken, but were kept separately from the report (i.e., stored electronically but not printed to include with the report). In these cases, we counted the evidence as not collected because it was not found within the report. The statistics reported here therefore underestimate how frequently evidence was collected by Troopers.

Future analyses will be necessary to determine how these types of evidence impact legal resolutions. Two main factors determine the applicability and availability of evidence: one, the nature, or severity, of the reported incident; two, the timeliness of the report. Both factors impact what evidence is applicable and what evidence is available to be collected.

Legal Resolutions

We examined data from the Alaska Department of Law (DOL) to determine the legal resolution for cases in the study which were referred to DOL. We did not examine referrals to other agencies, such as the Division of Juvenile Justice. From the sample of 989 reported cases, 46 percent (N = 452) were referred to DOL for prosecution. Sixty percent of the cases referred to DOL (N = 273) had at least one charge accepted and filed with the court for prosecution (Table 11). Of those cases with at least one charge accepted by DOL, 80 percent resulted in a conviction. The highest level of attrition occurred from report to referral. Once cases were referred, the likelihood of at least one charge being accepted and resulting in a finding of guilt was quite high.

Additional analyses showed that attrition was less likely in cases with one or more

Table 10. Applicability and Collection of Evidence

Row percentages.

Evidence	Applicable? No N	Applicable? No %	Applicable? Yes N	Applicable? Yes %	Total	Collected, if applicable? No N	Collected, if applicable? No %	Collected, if applicable? Yes N	Collected, if applicable? Yes %	Total
SART exam photos	692	77.1 %	206	22.9 %	**898**	45	21.8 %	161	78.2 %	**206**
Electronic data	898	94.0	57	6.0	**955**	15	26.3	42	73.7	**57**
Victim injury photos	680	75.7	218	24.3	**898**	99	45.4	119	54.6	**218**
Weapon	929	97.5	24	2.5	**953**	18	75.0	6	25.0	**24**
Trace/latent	827	88.5	97	10.4	**934**	77	79.4	20	20.6	**97**
Suspect injury photos	864	90.9	86	9.1	**950**	69	80.2	17	19.8	**86**

Source of data: *AST data (2003–2004)*

Table 11. Number of Cases by Stage

Stage	N	% of reported	% of referred	% of accepted
Reported	989	100.0 %	—	—
Referred	452	45.7	100.0 %	—
Accepted	273	27.6	60.4	100.0 %
Convicted	219	22.1	48.5	80.2

Source of data: *Alaska Department of Law*

witnesses than in cases without witnesses and was less likely among rural cases than among urban cases (rural cases were defined as those emerging from locations not connected to the State of Alaska highway system). (See "Case Attrition of Sexual Violence Offenses: Empirical Findings" in this issue.)

From the 989 reports, a total of 1,171 charges were referred to DOL. Sixty-six percent of these charges were accepted by DOL. Thirty-one percent were declined with a required dismissal and 3 percent were declined without a required dismissal. The most frequently cited reasons for not accepting charges as referred were evidentiary reasons, with the two most common evidentiary reasons being inadequate corroboration and insufficient evidence.

Because evidentiary reasons were the most common reasons for not accepting charges that were referred and because evidence collection was somewhat low, it is imperative that we improve the capacity to collect evidence, when it is available. In "Sexual Assault Nurse Examinations in Alaska," also in this issue of the *Forum*, the importance of documenting non-genital injuries is discussed. In this study, victim injury photos were taken in only 55 percent of applicable cases. Again, this estimate may be low because some victim injury photos are kept separately from the reports. Nonetheless, there is room for improving evidence collection and resources should be provided for these improvements.

The findings presented here constitute a first look at the problem of sexual assault in smaller communities across the state—those served predominately by the Troopers. Further research will undoubtedly provide a more detailed picture.

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Case Attrition of Sexual Violence Offenses: Empirical Findings

Darryl S. Wood and André B. Rosay

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Abstract: *This report examined the legal resolutions for 1,184 contact sexual violence cases reported to Alaska State Troopers in 2003 and 2004, and excluded results from other law enforcement agencies. We determined whether cases were founded with an identifiable suspect, were referred to the Alaska Department of Law for prosecution, were accepted for prosecution, and if the case resulted in a conviction. We only examined whether any conviction on any charge was obtained. In some cases, the conviction may be for a non-sexual offense.*

- *Seventy-five percent of cases were founded with at least one identifiable suspect, 51% of founded cases were referred to the Alaska Department of Law for prosecution, 60% of referred cases were accepted for prosecution, and 80% of accepted cases resulted in a conviction on at least one charge. The greatest point of attrition was from the founding to the referral decision.*
- *For the most part, cases of Alaska Native victims were as likely, or even more likely, to be processed by the criminal justice system relative to the cases of non-Native victims.*
- *Cases of sexual violence in the most rural portions of Alaska had an equal or greater chance of being subject to legal sanction when compared with cases from Alaska's less rural areas, and were as likely or more likely to receive full enforcement and prosecution. Unfortunately, the percentage of founded cases that resulted in a conviction never exceeded 30%.*

The State of Alaska's response to violence in Alaska Native villages has faced increased scrutiny over the past decade, with criticism coming from a number of sources, including the Alaska Advisory Committee to the U.S. Commission on Civil Rights, the Alaska Inter-Tribal Council (in *AITC v. Alaska*, 110 P.3d 947, 2005), and, most recently, Amnesty International. In general, allegations have been made that the state discriminates on a geographic and racial basis in the provision of criminal justice services to Alaska Native villages that are isolated from the main road system. For example, in *AITC v. Alaska* (2005), plaintiffs argued that their equal protection rights were violated by the state's deployment of police resources in a discriminatory fashion that favored those living along the main highway system. Similarly, in a 2007 report on police and court responses to violence against American Indian and Alaska Native women (*Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA*), Amnesty International singled out Alaska for what it considers to be a discriminatory, two-tiered deployment of police into the isolated areas of the state, said to be indicative of the state's "failing to exercise due diligence when it comes to sexual violence against . . . Alaska Native women." Amnesty International argued that with this two-tiered deployment of police resources, villages without a trooper post receive less effective police response than villages with a trooper post.

The evidence put forth in the many critical reports is based primarily upon the written and oral testimony of criminal justice agency personnel as well as Alaska Native crime victims, political leaders, and legal advocates. Although compelling, the case made against the state is largely anecdotal, failing to demonstrate a *systematic* lack of criminal justice system response to sexual violence against Alaska Natives. In this article we consider information gathered from the case files of the Alaska State Troopers (AST) and the Alaska Department of Law (DOL) to determine if there is an empirical basis for claims of unequal enforcement of sexual violence statutes. Specifically, we consider multiple decision-making points within the criminal justice process to compare the outcomes of cases involving Alaska Native victims with cases of non-Native victims.

The results presented below allow for an examination of case attrition of instances of sexual violence reported to AST and prosecuted by DOL. *Case attrition* is a term used to describe the process by which only a portion of offenses reported to the police are eventually dealt with through criminal prosecution. At each specific decision-making point the number of cases deemed worthy of official attention is reduced, with some cases carried forward for additional processing while others are no longer subject to prosecution.

The attrition of sexual violence cases reported to AST in 2003 and 2004 is shown in Figure 1. Overall, there were 1,379 reports of sexual offenses made to AST during those two years. Of those original reports, 1,184 were contact sexual violence cases involving forcible rape, sexual assault, or sexual abuse of a minor. Among the other 195 cases were offenses that occurred outside of AST's geographic area of responsibility, offenses that occurred before 2003, offenses committed by children too young to form criminal intent, and non-contact sexual offenses such as indecent exposure or possession of child pornography.

In the next step in the process the police decide if the reported offense is *founded* (i.e., that it actually occurred) and if there is a suspect responsible for the offense to be subject to prosecution. Roughly three-fourths (74.7%) of the 1,184 reported contact sexual violence cases were deemed by AST to have occurred and to have at least one identifiable suspect.

After the police decide that an offense has indeed occurred and also identify a suspect, the next decision is whether to refer the case for prosecution in criminal court. Half (50.8%) of the 884 founded cases with identified suspects were referred to DOL for prosecution in adult criminal court. The

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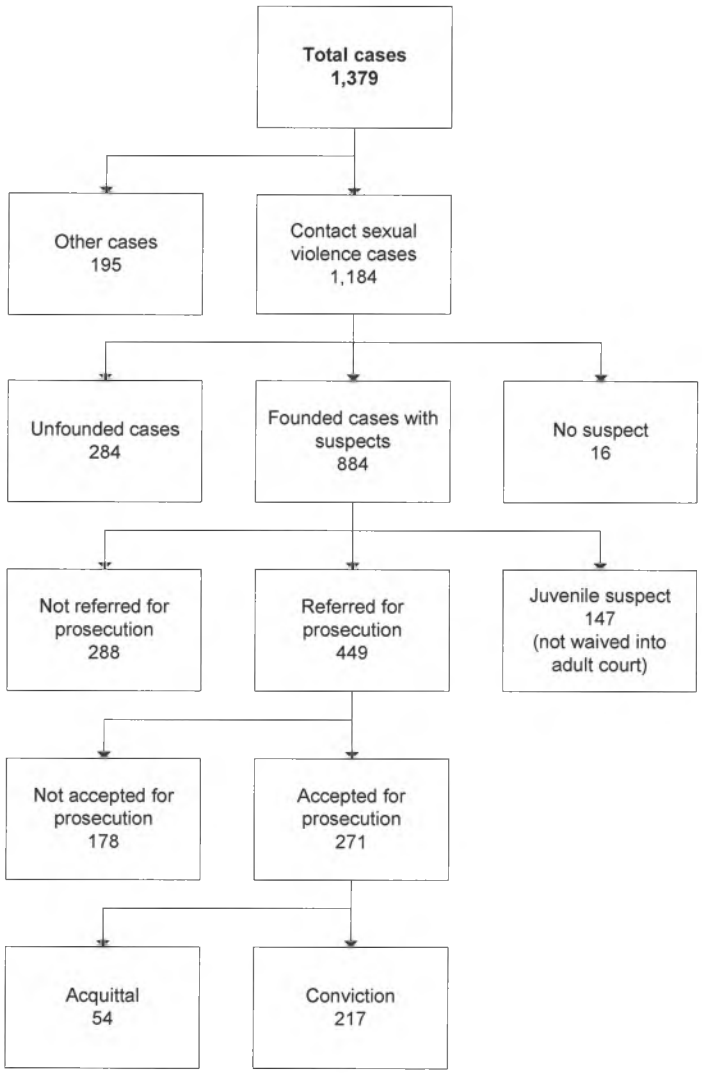
Figure 1. Processing of Sexual Violence Cases Reported to the Alaska State Troopers, 2003–2004



cases excluded from the analysis at that point included those juvenile cases that were not waived into adult court (a sixth—16.6%—of founded cases with suspects) and those that were not referred for reasons such as a lack of evidence or uncooperative victims (a third—32.6%—of founded cases with suspects).

Once referred by the police, prosecutors decide which cases to prosecute; three-fifths (60.4%) of contact sexual violence cases referred by AST to DOL were accepted for prosecution. Cases that are prosecuted eventually result either in a conviction or an acquittal. Of the cases of sexual violence accepted for prosecution by DOL, most (80.1%) resulted in a conviction. Ultimately, only 18 percent of reported cases, 25 percent of founded cases with suspects, and 48 percent of cases referred by AST to prosecution resulted in a conviction—i.e., guilty plea or conviction at trial.

Apart from this general consideration of the winnowing of reported sexual violence offenses as they proceed through the system, it is also possible to examine relative case attrition of offenses involving Alaska Natives versus those of non-Natives. Doing so allows for a determination of the extent to which there is systematic under-enforcement of laws against contact sexual violence in cases with Alaska Native victims. Greater degrees of attrition of Alaska Native victims' cases when compared to that for non-Native victims would lend credence to the anecdotal evidence used in reports critical of the state's provision of policing and prosecution to Alaska Native communities.

Comparisons of attrition of cases of sexual violence are made on a number of levels. First, case attrition for offenses involving Alaska Native victims is compared with attrition of non-Native victims' cases. Next, case attrition in communities located in the rural regions of Alaska is compared with case attrition in communities located outside of the state's rural regions. Finally, the attrition of cases that occurred in isolated villages is compared with the attrition of cases that occurred in less-isolated locations. At each of these levels comparisons are made on the basis of the total of all contact sexual violence offenses, and for rape/sexual assault and sexual abuse of a minor (SAM) separately. Four different decisions are considered: the Troopers' decision on whether reported cases are founded; the Troopers' decision to refer founded cases for prosecution; the prosecutors' decision

Table 1. Attrition of Sexual Violence Cases Reported to Alaska State Troopers, Alaska Native vs. Non-Native Victims, 2003-2004

	Total sexual violence					Rape/sexual assault					Sexual abuse of a minor				
	Alaska Native		Non-Native			Alaska Native		Non-Native			Alaska Native		Non-Native		
Decision	N	%	N	%		N	%	N	%		N	%	N	%	
Founded	512	82.4 %	351	82.0 %		268	87.3 %	148	78.7 %	*	244	77.7 %	203	84.6 %	*
Referred†	289	67.7	159	56.8	*	153	69.9	65	56.0	*	136	65.4	94	57.3	
Accepted	185	64.0	85	53.5	*	105	68.6	29	44.6	*	80	58.8	56	59.6	
Convicted	149	80.5	67	78.8		80	76.2	21	72.4		69	86.3	46	82.1	

†Percentages based on founded cases with adult suspects.

*Difference between Alaska Native and non-Native victims is statistically significant at the $p < .05$ level.

Table 2. Attrition of Sexual Violence Cases Reported to Alaska State Troopers, Bush Stratum vs. Non-Bush Stratum, 2003-2004

	Total sexual violence					Rape/sexual assault					Sexual abuse of a minor				
	Bush		Non-Bush			Bush		Non-Bush			Bush		Non-Bush		
Decision	N	%	N	%		N	%	N	%		N	%	N	%	
Founded	447	76.1 %	453	75.9 %		233	81.5 %	197	75.2 %		214	71.1 %	256	76.6 %	
Referred†	242	65.9	207	55.9	*	129	69.7	89	56.0	*	113	62.1	118	55.9	
Accepted	167	69.0	104	50.2	*	95	73.6	39	43.8	*	72	63.7	65	55.1	
Convicted	136	81.4	81	77.9		72	75.8	29	74.4		64	88.9	52	80.0	

†Percentages based on founded cases with adult suspects.

*Difference between bush and non-bush regions is statistically significant at the $p < .05$ level.

to accept referred cases for prosecution; and the final court decision in cases accepted for prosecution—i.e., whether a conviction was obtained. These results are presented as a comparison between Alaska Native and non-Native victims in terms of the number and percentage of cases that were chosen to be carried forward in the criminal justice process. The results of chi-square tests of statistical significance—a test which measures the likelihood that differences in the percentage of cases carried forward are the result of chance alone and not indicative of an underlying association—are also provided.

Differences in the processing of cases involving Alaska Native and non-Native victims are shown in Table 1. For the most part, these results indicate that the cases of Alaska Native victims are as likely, or are even more likely, to be processed by the criminal justice system relative to the cases of non-Native victims. For the total of all sexual violence offenses, cases involving Alaska Native victims were just as likely as cases with non-Native victims to be founded or to result in a conviction and they were more likely to be referred by AST to prosecutors and to be accepted by DOL for prosecution. Considering only cases involving the offenses of rape and sexual assault, there were statistically significant differences between Alaska Native and non-Native victims at the founding decision and at the decisions to refer cases and accept cases for prosecution; at each of these decision-making points the cases of Alaska Native victims *were more likely* to be carried forward. In terms of SAM cases, those cases involving Alaska Native victims were less likely to be founded. Otherwise, none of the differences in the processing rates of Alaska Native and non-Native victims' SAM cases were statistically significant.

A second set of analyses was conducted to consider the processing of cases occurring in the largely Alaska Native communities of the most rural areas of the state. The dichotomy for these analyses was drawn between cases occurring either inside or outside of what the Department of Health and Social Services in its Alaska Behavioral Risk Factor Surveillance System has termed the "Bush Stratum"—comprising the boroughs and census areas north and west of the Railbelt. Comparisons of case processing from these bush communities with cases from non-bush communities are reported in Table 2. These results indicate that cases of sexual violence that occur in the most rural portions of Alaska have, depending upon the decision, an equal or greater chance of being subject to legal sanction when compared with cases from Alaska's less rural areas. Similar to what was found when comparing attrition in Alaska Native victims' cases versus non-Native victims' cases, victims from bush communities of sexual violence in general and of rape/sexual assault *were more likely* to have their cases referred to prosecutors by AST and to have DOL accept those cases for prosecution.

The final set of analyses considers attrition of cases coming from the most isolated villages compared to places that are less isolated. For these analyses a village was considered isolated if it lacked a local AST post or if Troopers were unable to reach the village by automobile. The premise of this dichotomy is that travel to villages that cannot be reached by highway is more difficult and, because of that hindrance, it could be expected that conducting investigations would be more difficult—thus increasing case attrition. From the perspective behind the allegations against the state, it is in these disconnected villages that lack a locally-posted police agency certified by the Alaska Police Standards Council where the greatest disparities in the enforcement and prosecution of cases of sexual violence would be expected to occur.

The results comparing attrition of cases occurring in villages defined as isolated with cases occurring in places more easily reached are presented in Table 3. As with the previously discussed comparisons of cases, case attrition in isolated villages is no more prevalent than in places that are better connected to AST posts. The results presented in Table 3 indicate that cases from isolated villages are instead *actually more*

Table 3. Attrition of Sexual Violence Cases Reported to Alaska State Troopers, Isolated vs. Non-Isolated Communities, 2003-2004

	Total sexual violence					Rape/sexual assault					Sexual abuse of a minor				
	Isolated		Non-Isolated			Isolated		Non-Isolated			Isolated		Non-Isolated		
Decision	N	%	N	%		N	%	N	%		N	%	N	%	
Founded	437	76.4 %	463	75.7 %		230	81.9 %	200	74.9 %	*	207	71.1 %	263	76.5 %	
Referred†	243	66.8	206	55.2	*	132	71.0	86	54.4	*	111	62.4	120	55.8	
Accepted	166	68.3	105	51.0	*	94	71.2	40	46.5	*	72	64.9	65	54.2	
Convicted	132	79.5	85	81.0		70	74.5	31	77.5		62	86.1	54	83.1	

†Percentages based on founded cases with adult suspects.

*Difference between isolated and non-isolated regions is statistically significant at the $p < .05$ level.

likely to receive full enforcement. Cases of rape/sexual assault in isolated villages *were more likely to be founded, more likely to be referred for prosecution by AST, and more likely to be accepted for prosecution by DOL.* Likewise, across the total of all sexual violence offenses, cases from isolated villages were referred and accepted for prosecution at a rate *greater than* cases from non-isolated locations. No differences were found in the attrition of SAM cases.

Overall, the results presented in this article provide little empirical support for allegations of discrimination in the processing of sexual violence cases by AST or DOL on a racial or geographic basis. With the exception of SAM cases against Alaska Native victims being less likely to be founded, *cases of sexual violence against Alaska Native victims were just as likely or actually more likely to receive full enforcement and prosecution when compared with cases against non-Native victims.* On the basis of geography, cases occurring in locations with predominately Alaska Native populations believed to be underserved by AST were actually more likely to be dealt with by AST or DOL when compared with cases from outside those geographic areas. Our results indicate that the anecdotal evidence found in reports critical of the state's response to sexual violence against Alaska Natives does not accurately reflect the actual processing of cases of rape, sexual assault, and SAM reported to AST and prosecuted by DOL. Ultimately, these results do not support claims of unequal enforcement by the state in response to the victimization of the Alaska Native population. However, Alaska continues to experience high rates of forcible rape, and the prosecution of sexual violence continues to be difficult: the percentage of AST-founded cases that resulted in a conviction never exceeded 30 percent.

Darryl Wood is an Assistant Professor at Washington State University Vancouver. André B. Rosay is an Associate Professor and the Interim Director of the Justice Center. *This project was supported by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice (Grant No. 2005-WGB-GX-0011). Points of view in this article are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.*

ALASKA JUSTICE FORUM
REPRINTS

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Revisiting Alaska's Sex Offender Registration and Public Notification Statute

Deborah Periman

In Alaska and throughout the country sex offender registration requirements have become more inclusive. Almost all convicted sex offenders now must register for very extended periods; the registry is available over the Internet; and more details on the current status of the offender are available to the public. The intent of the registries is to protect the public from convicted offenders, but it can be argued that the increasingly stringent demands placed on offenders may, in fact, be counterproductive. The severity of the registration requirements may prohibit the rehabilitation of offenders and their reintegration into the community, and the increasing burden on law enforcement to monitor and maintain very broad registries may prevent police from focusing on the more serious sexual predators.

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For other articles and publications related to sex offenders and violence against women, see:
http://justice.uaa.alaska.edu/vaw/

Abstract: *This article examines the background and judicial interpretation of Alaska's sex offender registration and public notification statute, the new federal requirements for state sex offender registries and public notice under the Adam Walsh Child Protection and Safety Act, and weaknesses in both Alaska's existing system and the enhanced requirements of the new federal legislation. These weaknesses include:*

- *Absence of incentives for offenders to seek therapy or treatment;*
- *Failure to provide for individualized risk assessment that would differentiate between those offenders who pose a negligible or very low risk of re-offending from those who pose a continuing public risk – a failure that causes unwarranted marginalization of low risk offenders and diminishes the overall effectiveness of the public notification system;*
- *Public notice provisions so broad as to substantially impede offenders' reintegration into their families, their community, and the workforce, and potentially chilling family reporting;*
- *Internet posting requirements associated with severe stigmatization and public harassment, and concomitant emotional destabilization and isolation of offenders – factors that may actually increase the risk of recidivism and community harm.*

Because the Walsh Act conditions state receipt of Byrne Grant funds on compliance with its enhanced registration and notice requirements, there is little Alaska can do to remedy the above weaknesses and still remain eligible for Byrne funds. However, the article concludes with a recommendation for limited changes to our statute that would minimize, to the extent possible, its adverse effect on offenders' ability to find employment; omit the lowest risk offenders from internet posting requirements; and provide those incentives for treatment permissible under the Walsh Act.

Author's Note

This is an extremely abbreviated look at a complex federal initiative and at how specified aspects of the initiative relate to weaknesses in Alaska's sex offender registry. Issues of federalism and due process are not addressed, nor does this piece attempt to identify how the statutory elements of sex and kidnapping offenses under Alaska's code fit within the Walsh Act offender tiers. Finally, the reader should draw no inferences regarding Alaska's overall level of compliance with the Walsh Act requirements. A longer version of this piece, with complete legal citations, is available on the Justice Center website at http://justice.uaa.alaska.edu/workingpapers/.

Background

The Alaska Sex Offender Registration Act, which was enacted in the wake of extensive publicity over the tragic rape and murder of Megan Kanka in New Jersey, rests on specific legislative findings that (1) "sex offenders pose a high risk of reoffending after release from custody" and (2) release of information about sex offenders to the public "will assist in protecting public safety" (1994 Alaska Sess. Laws 41, § 1).

The state legislature's findings were premised on testimony reflecting the commonly held belief that sex offenders as a class are different from other offenders—that they will inevitably reoffend and that they are not receptive to treatment. In light of this testimony, the legislature did not attempt to distinguish among types of offenders or to evaluate which offenders were most likely to recidivate. Instead, it simply divided all offenders into two groups, aggravated and nonaggravated offenders, based on the severity of the offense. These two categories cover offenders ranging from the 18-year-old who has consensual sex with a 14-year-old to the perpetrator of a violent rape and murder.

The registration statute that emerged was, at the time of its enactment, one of the most stringent in the country. In a 2003 case closely watched by state and federal lawmakers, the U.S. Supreme Court upheld its terms against an *ex post facto* challenge. Justice John Paul Stevens, dissenting, summarized the statute's effect:

> In Alaska, an offender who has served his sentence for a single, nonaggravated crime must provide local law enforcement authorities with extensive personal information—including his address, his place of employment, the address of his employer, the license plate number and make and model

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> of any car to which he has access, a current photo, identifying features, and medical treatment—at least once a year for 15 years. If one has been convicted of an aggravated offense or more than one offense, he must report this same information at least quarterly for life. Moreover, if he moves, he has *one* working day to provide updated information. Registrants may not shave their beards, color their hair, change their employer, or borrow a car without reporting those events to the authorities. Much of this registration information is placed on the Internet. In Alaska, the registrant's face appears on a webpage under the label "Registered Sex Offender." His physical description, street address, employer address, and conviction information are also displayed on this page. (*Smith v. Doe,* 538 U.S. 84, 111 (2003))

At the time of its passage, Alaska's statute far exceeded the minimum requirements imposed on the states by the federal Jacob Wetterling Act. This legislation, adopted in 1994, required every state to enact a sex offender registration program meeting certain minimum guidelines or face a reduction in federal grant funding for law enforcement (42 U.S.C.A. § 14071 (West 2008)).

Unlike Alaska, many states attempted to tailor the reach of their registration statutes to the actual risk posed by individual offenders. The Connecticut legislature, for example, adopted a system using individualized clinical assessment to determine which offenders would be subject to registration requirements. Offenders were required to register only if such assessment demonstrated that they were found to pose a high risk of recidivism. This type of classification system has come to be known as an *offender-based* system, reflecting the emphasis on the individual. Alaska's system, in contrast, is *offense-based*, with classification resting solely on the conviction and no individual risk assessment undertaken.

Alaska was one of the relatively few states to require Internet dissemination of registration information for all offenders. Other states attempted to strike a balance between the stigmatization and collateral consequences of public notification and the risk of recidivism. New Jersey, for example, classified its offenders by risk and required no public disclosure for those who posed the least risk of reoffending, a percentage estimated at 45 percent of the entire sex offender class. Widespread disclosure was required only for those at the highest risk of reoffending (approximately five percent) of the whole.

Some of the flexibility afforded states under the original Wetterling Act was reduced through subsequent amendment; the flexibility to utilize individualized risk assessments will disappear almost completely as the provisions of the Adam Walsh Child Protection and Safety Act, PL 109-248, become binding on the states. This act represents an extensive revision and expansion of federal sex offender legislation. One of its many purposes is to standardize and increase minimum registration requirements nationwide. It imposes on the states highly detailed requirements for sex offender registration and public notification—requirements the states must in general implement by July 27, 2009. A state's failure to meet the implementation deadline will trigger a mandatory ten percent reduction in Byrne Justice Assistance Grant funding.

Key provisions of the Walsh Act include broadening the classes of sex offenses for which registration is required and extending it to cover juvenile offenses; requiring covered offenders to consistently remain registered in any jurisdiction in which they live, work, or attend school; expanding the scope of registration information required; imposing a national requirement for periodic in-person appearances by registrants; standardizing the required duration of registration; and widening the availability of information concerning registrants available to the public through required Internet posting. The act adopts an offense-based, three-tiered classification for offenders. It does not authorize the states to implement an offender-based classification using individualized risk assessment, nor, with limited exceptions, does it authorize the states to implement ameliorative programs that would allow offenders to avoid or shorten registration based on treatment and rehabilitation. The net effect of the new federal legislation will be to bring all cooperating states closer to Alaska's registration and publication requirements.

Alaska's Statute and its Federal Counterpart Rest on Disproved Assumptions

The myth of the incorrigible sex offender, all but guaranteed to reoffend, has been largely refuted. A study by the Alaska Justice Statistical Analysis Center of sex offenders released from Alaska corrections facilities in 2001 found that non-sex offenders were more likely to be rearrested than sex offenders. (See "Recidivism of Alaska Sex Offenders Released from Corrections Facilities in 2001" in this issue of the *Forum*.) With respect to sex crimes specifically, the study found no statistically significant difference between the rates at which sex offenders were rearrested for a new sex crime and the rates at which non-sex offenders were arrested for a first sex crime. These patterns are consistent with the results of studies elsewhere finding that sex offenders as a class are somewhat less likely than other categories of offenders to re-offend.

Moreover, recent studies conclude that treatment programs are, in fact, effective in reducing the overall rate of recidivism for many offenders. A Canadian study published in late 2007, for example, found that high-risk sex offenders who participated in a community-based treatment project had lower rates of reoffending of any type than did offenders who did not participate (Wilson, et al., 2007). Although sex offender treatment remains a controversial issue, these results are consistent with the general findings of studies conducted over the last decade or so—studies that refute the earlier belief that sex offenders are impervious to treatment.

The foregoing is particularly true with respect to juvenile offenders. Although offenders as young as 14 are subject to registration and public notification requirements under the Walsh Act, research establishes that recidivism rates for juvenile sex offenders are substantially lower than the rates for other types of juvenile offenders. Juvenile offenders have, in addition, proven highly amenable to treatment.

Problems with the Existing System

The Walsh Act and its antecedents rest on the premise that state registration and notification systems advance public safety, but empirical evidence disproves this premise. Studies show that after more than ten years of national registration and public notice, sex offender registries have made no discernable difference in sex offender recidivism rates (Tewksbury & Lees, 2007). (Although the registries have not curbed the commission of sex offenses, it should be noted that law enforcement officials in Alaska do view the offender database as a useful investigatory tool after an offense occurs.)

The weaknesses of Alaska's registration and notice system are well documented. Supreme Court Justice Ruth Bader Ginsberg, in a dissenting opinion in *Smith v. Doe,* 538 U.S. 84, 116–117 (2003), put it simply—the statute is excessive in relation to its purpose:

> The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed

> not to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated." Moreover, "the Act makes no provision whatever for the possibility of rehabilitation: offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender currently poses no threat of recidivism he will remain subject to long-term monitoring and inescapable humiliation.

Of course, no matter how excessive the reach of the statute in relation to its goals, many would argue that the disabilities imposed on low-risk or rehabilitated offenders are warranted if the system serves to protect even one child. The difficulty, however, is that Alaska's registration and notification system, and others like it, do not demonstrably make the public safer. To the contrary, they are likely to trigger a host of consequences antithetical to the public interest.

Unemployment, Instability and Enhanced Risk of Recidivism

After ten-plus years of national experimentation with sex offender registries, the destabilizing effects of being listed on a sex offender registry are well understood. They include profound humiliation and social isolation, loss of employment and housing, and destruction of family ties. Registrants and their families have experienced vigilantism in the form of harassment, threats of violence, physical attacks and arson.

In *Doe v. State*, 92 P.3d 398, 410 (Alaska 2004), the Alaska Supreme Court made note of the severity of these consequences. Citing examples of Alaska registrants who had lost their jobs, been forced to move their residences, and received threats of violence, the Court observed that "the potentially destructive practical consequences that flow from registration and widespread governmental distribution of disclosed information" are grave. "[O]utside Alaska, there have been incidents of suicide by, and vigilantism against, offenders on state registries, and offenders listed on registries often have unique difficulties locating places to reside and work. Offenders are sometimes subjected to protests and group actions designed to force them out of their jobs and homes." Registrants have suffered neighborhood rallies staged to protest their presence, bricks thrown through windows, and harassing calls to employers.

Of these negative consequences, employment difficulties are perhaps most significant. The Ninth Circuit Court of Appeals concluded that Alaska's system of putting offenders' employment information on the Internet is likely to make registrants "completely unemployable" (*Doe v. Otte*, 259 F.3d 979, 988 (9th Cir. 2001), *rev'd.*, *Smith v. Doe*, 538 U.S. 84 (2003)). The system "creates a substantial probability that registrants will not be able to find work, because employers will not want to risk loss of business when the public learns that they have hired sex offenders." The court cited the experience of one Alaska business owner who suffered community hostility and damage to his business after print ads from the Alaska sex offender registry web site were publicly distributed and posted on a bulletin board.

It may be tempting to dismiss these adverse consequences as the just result of the offender's own conduct, but these consequences also disserve the community in several important ways. First, study after study has identified stress as one of the antecedents to sex offender relapse. Chronic torment and hostility from the public, fractured social relationships, lack of stable housing, and unemployment are likely to cause the registered offender heightened stress, anxiety and resentment, all of which may erode an offender's self-restraint (Cohen & Jeglic, 2007). Lack of social support, in particular, and the accompanying stress on the offender has been identified as a key trigger in sex offense recidivism (Levensen & Cotter, 2005).

These problems are particularly acute for juvenile offenders. Young persons subject to registration have been harassed at school; some have dropped out. The stigma associated with the public notice system causes a loss of social networks, which in turn increases the risk of anti-social behaviors.

The extreme length of the registration period may exacerbate these problems. Under the Walsh Act, states must require a minimum of 25 years registration for mid-level offenses and lifetime registration for the most serious offenses. Studies show, however, that offenders who view punishment as too severe or inescapable may be more likely to reoffend and that many offenders subject to the lifetime registration requirement feel states have opened the door to endless harassment and stigmatization.

The majority of offenders surveyed report that they have experienced first-hand social or psychological effects resulting from the public registries. The consequent shame, isolation, fear, and hopelessness all interfere with an offender's reintegration and recovery.

Lifetime Registration as a Disincentive to Therapy or Recovery

In Alaska, a sex offender "cannot escape the [registration] Act's grasp no matter how clearly he may demonstrate that he poses no future risk to anyone, and no matter how final the judicial determination that he has been successfully rehabilitated..." (*Otte*, 259 F.3d at 994). Alaska's failure to provide any avenue for relief from or mitigation of the registration requirement is one of its statute's failings.

In a recent sampling of individual sex offender perceptions, several offenders observed that the ability to have a risk evaluation completed while on the registry would provide an incentive and motivation "to pursue treatment, to avoid problematic situations, and . . . [maintain] a crime free lifestyle" (Tewksbury & Lee, 2007, p. 400). Another study looking at the social and psychological effects of registration on sex offenders found many experiencing feelings of despair and hopelessness in the absence of individualized assessment. One respondent stated, "no one believes I can change, so why even try?" (Levensen & Cotter, 2005, p. 52).

As written, the statute fails to recognize the possibility of rehabilitation and provides offenders considering treatment no hope that their efforts might eventually reduce the stigma associated with the registry's public notification system.

Mandatory Internet Publication and Chilled Reporting

The inability to avoid publication of an offender's personal information on the internet and the ensuing social obloquy may also discourage family members of some offenders from reporting offenses. The spouse of an offender, particularly of an offender who may be the family's primary source of economic support, faces a terrible dilemma in reporting: While the report may protect the spouse herself or himself, or a child, the report may consign the entire family to a lifetime of poverty, to loss of the family home if the offender is evicted, and to shared shame and harassment once the offender's personal information is placed on the Internet. Studies suggest that reporting may be equally difficult for the parent or sibling of an offender. Thus, to the extent that mandatory Internet publication acts as a disincentive to reporting intra-family offenses, Alaska's notification statute ill-serves Alaska's abused children and spouses.

Obfuscation of More Dangerous Offenders

The extraordinarily broad reach of

Alaska's publication requirement has ramifications beyond its collateral consequences to the offender and his or her family. Indiscriminate posting of information on all offenders tends to obscure from the public pertinent information relating to very dangerous sexual predators. Including low-risk offenders also places an unnecessary administrative burden on state officials responsible for establishing and maintaining the posting, with a concomitant increase in public expense. In addition, the greater the number of postings, the more difficult and expensive it is for the state to ensure accuracy and respond to noncompliant offenders.

Possible Changes

During the 2008 session, the Alaska legislature passed and the governor signed into law CSSB 185, which extends the reach of existing sex offender registration requirements. The new law adds the requirement that offenders provide the Department of Corrections with every email or instant messaging address or other Internet communication identifier they use—information mandated by the Walsh Act. This type of legislative fine-tuning, however, will not solve the most fundamental problems with the statute—overbreadth and the absence of treatment incentives.

Recent data show that those states whose legislation is most narrowly drawn to focus on the highest-risk offenders are most likely to achieve their legislative goals. A sex offender registration system is most effective where it uses actuarial risk-assessment measures to ascertain which sex offenders are at the highest risk of reoffending, distinguishes among offenders based on risk, and imposes the disabilities of registration and publication only on those most likely to recidivate. This type of registration and publication system allows the public to readily identify the most dangerous individuals and allows law enforcement to focus its resources on the most likely threats to the community (Cohen & Jeglic, 2007).

Unfortunately, the Walsh Act, with its offense-based tier structure, has foreclosed to a significant extent the states' ability to implement a true risk assessment scheme and retain eligibility for full Byrne Grant funding. There are, however, a few windows left open for small improvements to Alaska's statute.

Minimize the impact on employment. For reasons stated above, Internet publication of an employer name and address is one of the consequences of registration most likely to de-stabilize an offender socially and psychologically. The risk of consigning an offender to a lifetime of unemployment may also be a factor in deterring some family reporting.

The public interest associated with making employment available to released offenders is implicitly recognized under the new federal guidelines. The Walsh Act authorizes the states to exclude from their websites the name (though not the address) of a sex offender's employer. To facilitate offender reintegration and to protect the economic welfare of offenders' families, Alaska could avail itself of this option. While it is argued that knowing the name of an offender's employer enhances public safety, there is no empirical evidence to support this claim.

Omit the lowest risk offenders from internet publication. Another option granted the states under the new federal guidelines pertains to offenders classified under the statute as "Tier I Sex Offenders." Tier I offenders include those whose registration offense is not punishable by imprisonment for more than one year, whose offense is receipt or possession of child pornography, or whose offense is a sexual assault against an adult that involves sexual contact only.

The Walsh Act provides the states discretion to omit offenders in this category (other than those convicted of specified offenses against a minor) from placement on the state sex offender web site. With respect to this grant of discretion, Alaska legislators should do one of two things: Either adopt an individualized risk assessment program for offenders within this category and exclude from web publication those deemed to pose a low community risk or simply exclude these offenders as a class. The first approach would strike the optimal balance between the competing goals of providing adequate public notice and promoting offender reintegration and rehabilitation. It would also be much more expensive to administer, leaving the second approach a reasonable alternative with respect to these low-level offenders.

Include the limited treatment incentives authorized under the Walsh Act. The new federal requirements also offer states some latitude to include treatment incentives in their registration statutes. The Walsh Act generally requires the states to register Tier I offenders for 15 years, Tier II offenders for 25 years, and Tier III offenders for life. However, Section 115(b) provides that Tier I offenders' registration periods may be reduced by five years if they maintain a clean record within the statutory definition of that term, which includes successful completion of an approved treatment program. No reduction is authorized for offenders classified as Tier II or Tier III (73 Fed. Reg. at 38068). (Tier III offenders whose conviction stemmed from a delinquency proceeding are eligible for a reduction in term. In Alaska, however, a conviction triggering registration is defined as a conviction of an adult or a juvenile charged as an adult (AS 12.63.100(3).)

This window of opportunity for offering reduction of the registration period as a treatment incentive is very small. Nevertheless, in light of recent data showing that treatment is often effective in deterring future offenses, Alaska should take advantage of this limited opportunity to encourage released offenders to seek treatment.

Conclusion

There are ways to refine the current sex offender registration system to ensure that it better protects the public. The revulsion and anger that most of us feel toward those convicted of sex crimes should not blind us to the safety interest served by affording released offenders treatment incentives and the opportunity to live stable and socially productive lives. Within the confines of the federal funding mandates, Alaska can strike a more effective balance between warning the public of the most dangerous sexual predators and promoting the reintegration and rehabilitation of the larger class of offenders.

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For Further Reading

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ALASKA JUSTICE FORUM
REPRINTS

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Sexual Assaults in Anchorage

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http://justice.uaa.alaska.edu/forum/22/4winter2006/b_sxassault.html

For other articles and publications related to sexual assault and violence against women, see:
http://justice.uaa.alaska.edu/vaw/

Abstract: *This study examined the characteristics of all sexual assaults reported to the Anchorage Police Department from 2000 through 2003. Key descriptive findings are summarized.*

- *Victims tended to be young and female, with Native women victims in over 45% of reported sexual assaults.*
- *In a majority of the assaults – over 62% - the assailant was not a stranger to the victim. The most common non-stranger relationships included friends and acquaintances.*
- *A majority of the assaults occurred indoors, with 45% taking place at the residence of one or both of those involved.*
- *Sixty-five percent of victims had used alcohol prior to the assault and 74% of suspects had also.*
- *While assaults occurred all over the Municipality of Anchorage, they happened with more frequency in Spenard, Fairview, and Downtown.*

Information from four years of police files shows that the problem of sexual assault in Anchorage has discernible contours: most assaults take place indoors, between people who are not strangers to each other, with either or both parties having consumed alcohol. The attached tables, figures and map provide an overview of reported sexual assaults in the city from 2000 through 2003. The data come from a recently-completed report by the Justice Center that updates an earlier study released in 2003. The new study was undertaken by the Center in collaboration with the Anchorage Police Department.

The Justice Center study revealed that victims have tended to be young and female, with Native women victims in over 45 percent of reported sexual assaults. In a majority of the assaults—over 62 percent—the assailant was not a stranger to the victim. A majority of the assaults occurred indoors, with 45 percent taking place at the residence of one or both of those involved. Over 65 percent of the victims had used alcohol prior to the assault and close to 74 percent of suspects had also. While assaults occurred all over the city, they happened with more frequency in certain areas of town—particularly in Spenard, Fairview, and Downtown.

The data presented here are already two years old, but figures released by the FBI's Uniform Crime Reporting (UCR) program indicate that the rate of reported forcible rape (a more tightly defined offense than that reflected in the tables presented here) in the Municipality of Anchorage was 96.1 per 100,000 people in 2004. The national rate was only 32.2. These UCR figures are not directly comparable to those presented in the Justice Center study, but they show that the

Table 1. Race of Victims in Sexual Assaults Reported to Anchorage Police, 2000-2003

Race	Percentage of Anchorage population, 2001[1]	Sexual assault victims N	%	Rate per 1,000 population[2]
White	77.6 %	556	45.5 %	2.77
Native	10.6	550	45.0	20.08
Black	7.2	75	6.1	4.04
Hispanic	6.0	17	1.4	1.10
Asian	7.3	22	1.8	1.17
Pacific Islander	1.3	1	0.1	0.30
Total		**1221**		

1 Includes both males and females (95.2% of victims were female), categories are not mutually exclusive
2 Rate is computed as a four-year rate. To obtain average annual rates, divide by four. Population estimates are 2001 estimates and include both males and females.

Source of data: *Anchorage Police Department & U.S. Census Bureau*

Table 2. Race of Suspects in Sexual Assaults Reported to Anchorage Police, 2000-2003

Race	Percentage of Anchorage population, 2001[1]	Sexual assault suspects N	%	Rate per 1,000 population[2]
White	77.6 %	483	39.6 %	2.40
Native	10.6	272	22.3	9.93
Black	7.2	319	26.1	17.18
Hispanic	6.0	95	7.8	6.16
Asian	7.3	46	3.8	2.44
Pacific Islander	1.3	4	0.3	1.20
Total		**1219**		

1 Includes both males and females (99.5% of suspects were male), categories are not mutually exclusive.
2 Rate is computed as a four-year rate. To obtain average annual rates, divide by four. Population estimates are 2001 estimates and include both males and females.

Source of data: *Anchorage Police Department & U.S. Census Bureau*

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sexual assault rate in Anchorage continues to be extremely high. With the problem of sexual assault, it is also important to note that national data show that many assaults are not reported to the police, so it is possible that the figures collected represent only a limited picture of the problem.

André Rosay of the Justice Center was the principal investigator for the study. The complete results from this recent update can be found at http://justice.uaa.alaska.edu/research/2000/0107sxassaultupdate/index.html. The earlier study is available at http://justice.uaa.alaska.edu/ research/2000/0107sxassault/. A lengthier article on the 2003 study, "Forcible Rapes and Sexual Assaults in Anchorage," appeared in the Winter 2004 issue of the *Alaska Justice Forum*.

This project was supported by Grant No. 2004-WG-BX-0003 awarded by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Table 3. Alcohol Use by Victims of Sexual Assaults Reported to Anchorage Police, by Year: 2001-2003

Row percentages.

	Alcohol use		No alcohol use		
Year	N	%	N	%	Total
2001	167	62.3 %	101	37.7 %	**268**
2002	171	63.6	98	36.4	**269**
2003	194	69.8	84	30.2	**278**
Total	**532**	**65.3 %**	**283**	**34.7 %**	**815**

Source of data: *Anchorage Police Department*

Table 4. Alcohol Use by Suspects of Sexual Assaults Reported to Anchorage Police, by Year: 2001-2003

Row percentages.

	Alcohol use		No alcohol use		
Year	N	%	N	%	Total
2001	157	76.2 %	49	23.8 %	**206**
2002	152	72.7	57	27.3	**209**
2003	136	72.0	53	28.0	**189**
Total	**445**	**73.7 %**	**159**	**26.3 %**	**604**

Source of data: *Anchorage Police Department*

Figure 1. Locations of Sexual Assaults Reported to Anchorage Police, 2000-2003

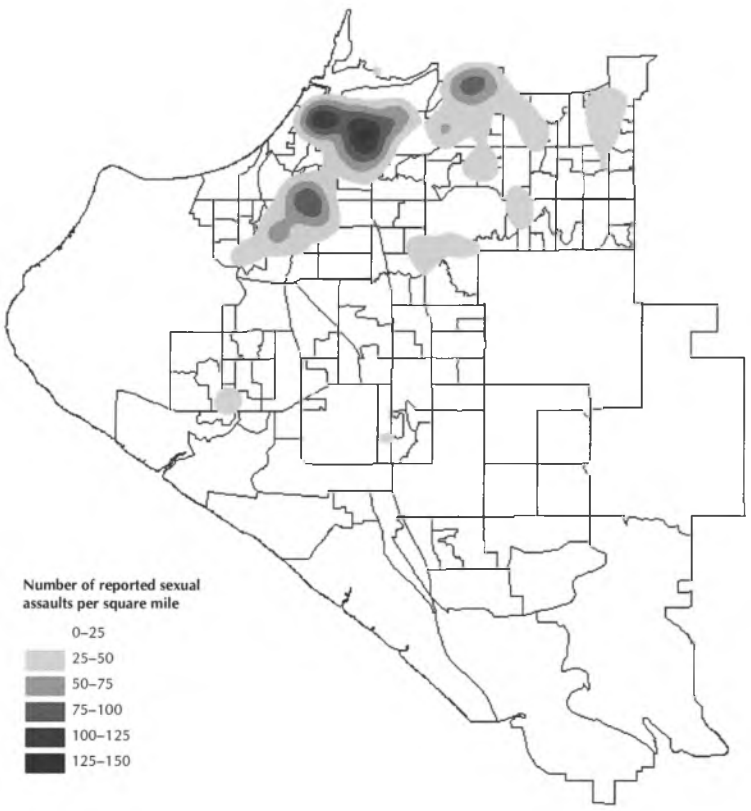


Table 5. Victim-Offender Relationship in Sexual Assaults Reported to Anchorage Police, 2001-2003

Relationship	N	% of total	% of non-stranger
Total non-stranger	**645**	**62.2 %**	**100.0 %**
Acquaintance	330	31.8	51.2
Friend	135	13.0	20.9
Family	83	8.0	12.9
Intimate	97	9.4	15.0
Stranger	**392**	**37.8 %**	–.–
Total	**1037**		

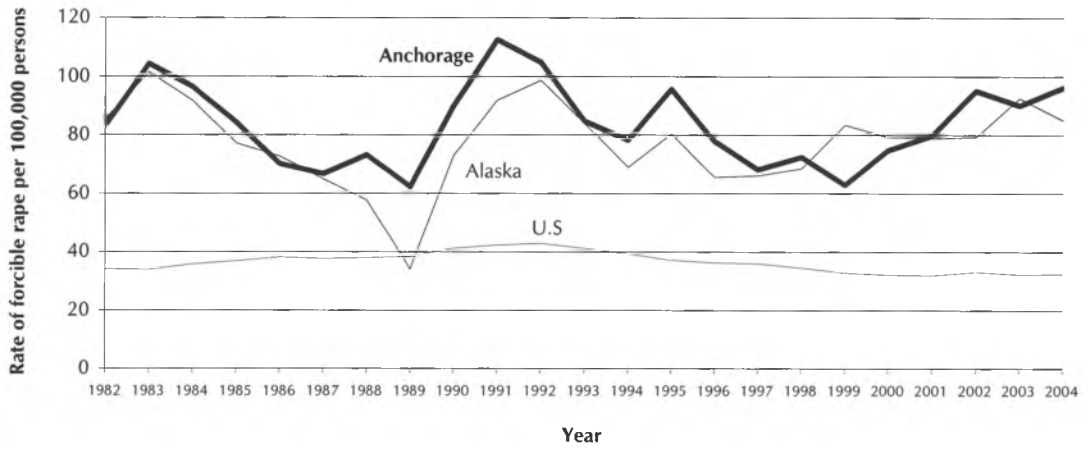
Source of data: *Anchorage Police Department*

Table 6. Assault Location Type for Sexual Assaults Reported to Anchorage Police, 2000-2003

Location	N	%
Victim's house	250	19.5 %
Suspect's house	256	20.0
Victim and suspect's house	75	5.9
Other's house	141	11.0
Hotel	102	8.0
Bar	13	1.0
Outdoors	250	19.5
Other	111	8.7
Unknown	83	6.5
Total	**1281**	

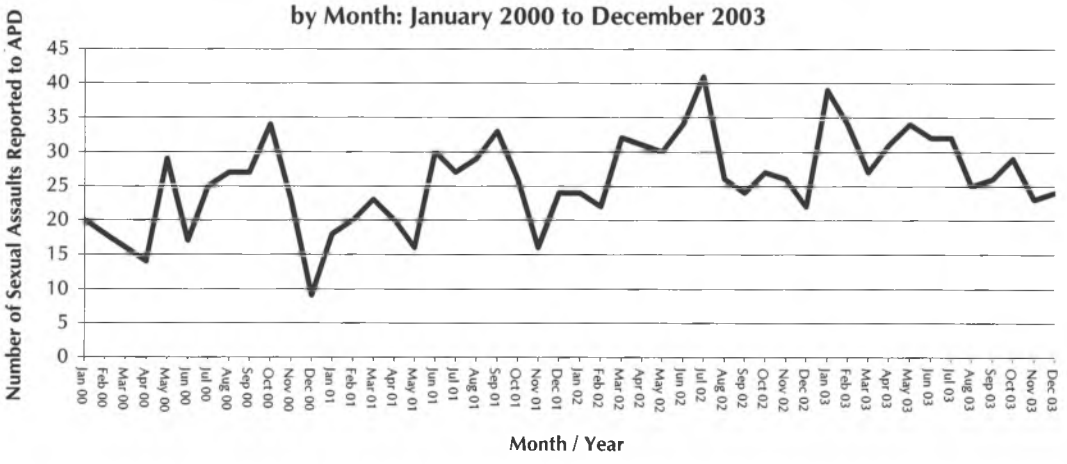
Source of data: *Anchorage Police Department*

Figure 2. Rates of Forcible Rape in the U.S., Alaska, and Anchorage: 1982 - 2004



Source of data: *Uniform Crime Reports, Federal Bureau of Investigation*

Figure 3. Number of Sexual Assaults Reported to the Anchorage Police Department by Month: January 2000 to December 2003



Source of data: *Anchorage Police Department*

ALASKA JUSTICE FORUM
REPRINTS

March 2009 JUSTICE CENTER ♦ UNIVERSITY of ALASKA ANCHORAGE No. 6

Sexual Assault Case Processing: A Descriptive Model of Attrition and Decision Making

G. Matthew Snodgrass

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http://justice.uaa.alaska.edu/forum/23/1spring2006/a_sxassaultcases.html

For other articles and publications related to sexual assault and violence against women, see:
http://justice.uaa.alaska.edu/vaw/

Abstract: *This study examined the outcomes of sexual assault cases reported to the Anchorage Police Department between January 2000 and December 2003. The data include 1,052 cases involving one suspect and one victim (85% of all reported sexual assaults). Cases and charges were tracked through the Alaska Department of Law to determine what was referred, accepted, and convicted.*

- *Overall, 18% of cases were referred for prosecution. The most common referred charge was a sexual assault in the first degree. Seventy-nine percent of referred charges were sexual assault charges.*
- *Overall, 12% of cases were accepted for prosecution. The greatest point of attrition was from report to referral. Once referred, 68% of cases were accepted for prosecution. Sixty-eight percent of charges were accepted by the Department of Law as referred. The most common reasons for not accepting a charge as referred were evidentiary reasons. The most common accepted charge was also a sexual assault in the first degree. Seventy-five percent of accepted charges were sexual assault charges.*
- *Overall, 11% of cases resulted in a conviction. Once accepted, 87% of cases resulted in a conviction. Although convictions were common in accepted cases, accepted charges were often dismissed. While 87% of accepted cases resulted in a conviction, 59% of accepted charges were dismissed. Ninety percent of guilty findings were a result of plea bargaining. With plea bargaining, some charges were dismissed but a conviction was still secured. Fifty-six percent of convicted charges were sexual assault charges. The most common convicted charge was for assault, followed by sexual assault in the second degree.*

A recent Justice Center examination of sexual assault case processing shows that close to 60 percent of cases referred by the Anchorage Police Department to the Alaska Department of Law result in a conviction on some charge—although not necessarily the original charge. The number of cases referred, however, is less than 20 percent of those reported.

Anchorage has a very high incidence of reported rape. Between 2000 and 2003, the rate of reported forcible rape in Anchorage was 163 percent higher than in the U.S. as a whole. Over the past twenty years, Anchorage has been consistently at or near the top of U.S. metropolitan statistical areas for rates of reported forcible rape.

The Justice Center examined the outcomes of all sexual assaults involving one suspect and one victim reported to the Anchorage Police Department (APD) between January 2000 and December 2003. In this article we summarize how the Alaska Department of Law disposed of these reported assaults, detail case and charge outcomes and discuss the reasons given by prosecutors for these outcomes.

Overall, 1,235 sexual assaults were reported to APD from January 2000 through December 2003. We sampled all 1,074 sexual assaults committed by one suspect against one victim (87.0% of all sexual assaults reported from January 2000 to December 2003). Data were collected on 1,052 (98%) of these reports. Of these 1,052, 188 (17.9%) were referred for prosecution and had reached final disposition prior to data collection. Offenses in these 1,052 reports included sexual assaults, forcible rapes, attempted sexual assaults, and attempted forcible rapes. As defined by the Federal Bureau of Investigation's Uniform Crime Reports, forcible rape is "the carnal knowledge of a female forcibly and against her will." Sexual assault is a less restrictive state-defined offense that does not consider the gender of the parties involved and does not require carnal knowledge.

For this article, we consider three stages of prosecution: referral, acceptance, and conviction. These stages can be thought of as formal decision points at which prosecutors record what has transpired with the case, and why that outcome resulted. Referral is the forwarding of charges by APD to the DOL. This is the initial stage of prosecution and the first stage at which prosecutors officially become aware of a report. Once a case has been referred to the DOL, it is screened for acceptance. More specifically, prosecutors will screen each charge within each case for acceptance. The prosecutor's initial screening decision for each charge is recorded with a screening disposition code which indicates in what fashion the charge did or did not move forward. At this decision point, in addition to disposition codes, reason codes are given to charges that are not accepted as referred by law enforcement. The reason code indicates the formal reason that prosecutors gave for the disposition of the charge in that manner.

Acceptance can be considered the second stage of prosecution, or the second formal prosecutorial decision point. At this stage prosecutors formally agree to move forward with criminal prosecution. Once a final outcome has been established, a final disposition code and potentially a reason code are attached to each individual accepted charge within a case. The final disposition code indicates the final outcome of an accepted charge. The reason code associated with this final disposition reflects the prosecutor's reason for the final disposition of the charge. A conviction is an accepted charge result-

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Table 1. Number of Cases By Stage

Stage	N	% of reported	% of referred	% of accepted
Reported	1052	100.0 %	—	—
Referred	188	17.9	100.0 %	—
Accepted	127	12.1	67.6	100.0 %
Convicted	111	10.6	59.0	87.4

Source of data: Alaska Department of Law

ing in a finding of guilt. A finding of guilt can occur through plea bargaining or being found guilty beyond a reasonable doubt by either judge or jury.

Table 1 describes the number of cases reported, referred, accepted, and convicted. Of the 1,052 reported cases, 188 (17.9%) were referred to DOL and 127 (67.6%) were accepted. Finally, 111 (87.4%) of these 127 cases resulted in a conviction. Obviously, the point with the greatest attrition is from report to referral.

For the purposes of this article, two separate levels of analysis are used: a case-level analysis and a charge-level analysis. For case-level analysis, a case as a whole is the unit of analysis. With this level of analysis, we are concerned only with the most serious outcome at a particular stage. The second level of analysis, at the charge level, considers individual charges within a case, using the individual charge as the unit of analysis. Using this level of analysis, we are concerned with all charges at each decision point, not simply the single charge that received the most serious outcome. This distinction is important for understanding many of the results of this project.

From referral to acceptance, there is often cross-movement of charges within a case. While it is necessary that at least one charge be referred for any case to be accepted, the number of charges within a case need not be static from referral to acceptance or from acceptance to conviction. Law enforcement may refer many charges to prosecutors, but upon review of the case, prosecutors agree to move forward with prosecution on a subset of the referred charges (i.e., the number of accepted charges is less than the number referred). Similarly, it is possible that when law enforcement refers only a single charge to prosecutors, upon review, prosecutors feel that additional charges are appropriate (i.e., they create an accepted charge that was not referred).

Table 2. Referred Charges

Charge	N	%
Sexual assault 1	180	41.5 %
Sexual assault 2	99	22.8
Sexual assault 3	11	2.5
Sexual abuse of a minor 1	20	4.6
Sexual abuse of a minor 2	28	6.5
Sexual abuse of a minor 3	3	0.7
Sexual abuse of a minor 4	1	0.2
Assault	38	8.8
Kidnapping	17	3.9
Other charge	37	8.5
Total	**434**	

Source of data: Alaska Department of Law

Table 3. Class of Referred Charges

Class	N	%
Unclassified felony	211	48.6 %
Class A felony	12	2.8
Class B felony	135	31.1
Class C felony	36	8.3
Class A misdemeanor	35	8.1
Class B misdemeanor	4	0.9
Non-classified violation	1	0.2
Total	**434**	

Source of data: Alaska Department of Law

Referral

As mentioned earlier, of the 1,052 reported sexual assault cases, 188 (17.9%) resulted in a referral to the DOL. Fewer than half (41.5%) of the referred cases included one charge; 76.5 percent had three or fewer charges. Overall, the 188 referred cases contained 434 referred charges. Table 2 shows the distribution of these 434 referred charges by charge type. One hundred and eighty (41.5%) of the referred charges were sexual assaults in the first degree. Further, 290 (66.8%) of the 434 referred charges were sexual assaults of some degree. Fifty-two (12.0%) of the referred charges were for sexual abuse of a minor; 38 (8.8%) were assault charges; 17 (3.9%) were kidnapping charges; and 37 (8.5%) were other charges. Examples of other charges included contributing to the delinquency of a minor, driving under the influence, and possession of child pornography.

Table 4. Disposition of Referred Charges

Disposition	N	%
Accepted as referred	296	68.2 %
Accepted—same class	7	1.6
Accepted—higher level	19	4.4
Accepted—lesser felony	6	1.4
Accepted—lesser misdemeanor	2	0.5
Prosecution declined—dismissal required	9	2.1
Prosecution declined—no dismissal required	95	21.9
Total	**434**	

Source of data: Alaska Department of Law

Table 3 is a breakdown of referred charges by class. Over 90 percent (n = 394) of the referred charges were felonies. Almost half of the charges (48.6%) were referred as unclassified felonies, that is, the gravest crimes under Alaska statutes, carrying with them the harshest penalties. Under the statutes, sexual assault is taken very seriously. Further, when a report results in a referral, the charges referred for prosecution are at a high level of class severity and carry with them some of the most significant penalties exacted by the justice system.

All charges referred to the DOL receive screening disposition codes. Table 4 indicates the disposition codes that were attached to the 434 referred charges. Prosecutors agreed to prosecute 68.2 percent of charges as referred by law enforcement. "Prosecution declined" disposition codes were attached to 24.0 percent (n=104) of

Table 5. Reason for Not Accepting Charge as Referred

Reason	N	%
Witness reason	24	17.4 %
Evidentiary reason	63	45.7
Discretionary reason	45	32.6
Procedural/other reason	6	4.3
Total	**138**	

Source of data: Alaska Department of Law

Table 6. Charge Progression from Referral to Acceptance

	Accepted		
Referred	Yes	No	Total
Yes	330	104	**434**
No	83	0	**83**
Total	**413**	**104**	**517**

Source of data: Alaska Department of Law

Table 7. Accepted Charges

Charge	N	%
Sexual assault 1	151	36.6 %
Sexual assault 2	79	19.1
Sexual assault 3	13	3.1
Sexual abuse of a minor 1	27	6.5
Sexual abuse of a minor 2	32	7.7
Sexual abuse of a minor 3	7	1.7
Sexual abuse of a minor 4	1	0.2
Assault	38	9.2
Kidnapping	12	2.9
Other charge	53	12.8
Total	**413**	

Source of data: Alaska Department of Law

referred charges. Interestingly, 92.2 percent (n=400) of charges were either accepted as referred by law enforcement or declined.

Here we make claims about charges, not cases. As stated earlier, a majority of cases (58.5%) have more than one charge. It is therefore possible that at least one charge in a case progresses forward, while others are dismissed.

Only charges that were not accepted as referred receive reason codes. Thus, in our sample, the 138 charges not accepted as referred received reason codes. Reasons for not accepting charges as referred are shown in Table 5. What is important to note is the proportion of reasons, by type, given by prosecutors for a charge not being accepted as referred. At this stage, evidentiary reasons were the most typical reasons (45.7%) for not accepting a charge as referred. Discretionary reasons were the second most common reasons for not accepting a charge as referred—32.6 percent.

Transition between Referral and Acceptance

Of the 434 charges that were referred for prosecution, 330 (76.0%) were accepted, either as referred or as a different charge, while the remaining 104 (24.0%) were dropped. Also, 83 new charges were created by prosecutors from referral to acceptance. This means that there were a total of 517 charges at some stage of prosecution within these 188 cases (see Table 6).

We now briefly focus on the 104 charges that were declined for prosecution and the 83 new charges that were added by prosecutors. Half (n=52) of the 104 charges not accepted by the DOL were sexual assaults in the first degree and an additional 21.2 percent (n=22) were sexual assaults in the second degree. Over half of the charges that were not accepted by prosecutors were unclassified felonies and an additional 27.9 percent were class B felonies. Of the 83 charges added by prosecutors, 32 (38.6%) were sexual assault charges, 20 were sexual abuse of a minor charges, 6 were assault charges, 2 were kidnapping charges, and 23 were other charges. New charges added by prosecutors were most commonly class B felonies or unclassified felonies.

Acceptance

We now turn our attention to the 413 charges that moved forward from referral to acceptance. Within the case-level analysis, 127 cases of the original 188 moved forward from referral to acceptance (see Table 1). Stated differently, prosecutors agreed to move forward on 67.6 percent of the cases referred to them. Of the 127 accepted cases, 28.3 percent contained one charge and 70.8 percent contained three or fewer charges. Overall, 413 charges moved forward between referral and acceptance. Table 7 shows the charge type of these 413

Table 8. Referred Charges Versus Accepted Charges, for Charges that were Both Referred and Accepted

		Accepted charge									
Referred charge	Total	Sexual assault 1	Sexual assault 2	Sexual assault 3	Sexual abuse of a minor 1	Sexual abuse of a minor 2	Sexual abuse of a minor 3	Sexual abuse of a minor 4	Assault	Kidnapping	Other charge
Sexual assault 1	**128**	**123**	2	1	–	–	–	–	2	–	–
Sexual assault 2	**77**	12	**62**	2	1	–	–	–	–	–	–
Sexual assault 3	**9**	1	1	**7**	–	–	–	–	–	–	–
Sexual abuse of a minor 1	**19**	–	–	–	**18**	1	–	–	–	–	–
Sexual abuse of a minor 2	**24**	–	–	–	1	**23**	–	–	–	–	–
Sexual abuse of a minor 3	**1**	–	–	–	–	–	**1**	–	–	–	–
Sexual abuse of a minor 4	**1**	–	–	–	–	–	–	**1**	–	–	–
Assault	**31**	–	–	–	–	1	–	–	**30**	–	–
Kidnapping	**10**	–	–	–	–	–	–	–	–	**10**	–
Other charge	**30**	–	–	–	–	–	–	–	–	–	**30**
Total	**330**	**136**	**65**	**10**	**20**	**25**	**1**	**1**	**32**	**10**	**30**

Source of data: Alaska Department of Law

Table 9. Class of Accepted Charges

Class	N	%
Unclassified felony	179	43.3 %
Class A felony	18	4.4
Class B felony	116	28.1
Class C felony	46	11.1
Class A misdemeanor	40	9.7
Class B misdemeanor	6	1.5
Nonclassified misdemeanor	1	0.2
Misdemeanor probation or SIS revocation	7	1.7
Total	**413**	

Source of data: Alaska Department of Law

Table 10. Referred Charge Class Versus Accepted Charge Class for Charges That Were Both Referred and Accepted

		Accepted class					
Referred class	Total	Unclassified felony	Class A felony	Class B felony	Class C felony	Class A misdemeanor	Class B misdemeanor
Unclassified felony	**151**	**144**	1	3	1	2	–
Class A felony	**10**	2	**8**	–	–	–	–
Class B felony	**106**	11	3	**87**	5	–	–
Class C felony	**29**	1	1	3	**24**	–	–
Class A misdemeanor	**30**	–	–	1	1	**28**	–
Class B misdemeanor	**4**	–	–	–	–	–	**4**
Total	**330**	**158**	**13**	**94**	**31**	**30**	**4**

Source of data: Alaska Department of Law

charges. As with referral, the most common accepted charge was sexual assault in the first degree—36.6 percent (n=151) of the accepted charges. Further, 58.8 percent of all accepted charges were sexual assaults in some degree.

Table 8 shows exactly how charges moved from the referral stage to the accepted stage, for the 330 charges which were both referred and accepted. What is interesting here is the remarkable consistency with which charges fall on the table's diagonal: A charge referred and accepted as the same charge type will fall on a diagonal line from the upper-left to lower-right corners. We see that the vast majority of charges (92.4%) fall on this diagonal.

Table 9 provides the charge class frequencies for the 413 charges that were accepted by the DOL. Most charges were accepted as unclassified felonies. Furthermore, 86.9 percent of the charges in our sample were accepted at the felony level. Knowing that the vast majority of charges are accepted as referred, we could reasonably expect charge class to remain relatively constant from referral to acceptance—as Table 10 shows. For charges that were both referred and accepted, there is a great degree of class congruency between referral and acceptance.

Table 11. Disposition of Accepted Charges

Disposition	N	%
Jury trial—guilty as charged	10	2.4 %
Jury trial—not guilty	17	4.1
Pled as charged	52	12.6
Plea—amended charge	72	17.4
Dismissed by prosecutor	243	58.8
Dismissed by court	9	2.2
Probation/SIS revoked	4	1.0
No true bill	3	0.7
Final disposition outstanding	3	0.7
Total	**413**	

Source of data: Alaska Department of Law

Final Disposition

Once a final outcome has been determined for a charge, prosecutors attach a final disposition code. Table 11 shows the final disposition codes that were attached to the 413 accepted charges in our sample. What is immediately apparent is the large of proportion of charges that are dismissed by prosecutors. Of the 413 accepted charges, 243 (58.8%) were dismissed by prosecutors. Taken as a whole, 61.7 percent of accepted charges were later dismissed, including those for which no true bill was returned. Another point becomes clear from Table 11: For 124 of the 138 accepted charges that resulted in a finding of guilt, the conviction was a result of plea bargaining. This means that plea agreements were responsible for 89.9 percent of guilty findings in our sample. To state this differently: Only 10 percent of guilty findings were a result of court action.

Charges that were dismissed by prosecutors or charges for which prosecutors allowed a plea to an amended charge are given a final disposition reason code. These reasons are shown in Table 12. The most striking result in Table 12 is the degree to which discretionary reasons are cited by prosecutors. Of the reasons given by prosecutors for dismissing a charge or allowing a plea to an amended charge, 70.5 percent were discretionary in nature. Among discretionary reasons for charge dismissal can be the choice of another charge as more accurate, the consolidation of charges, or the suspect pleading to the essence of the offense.

Table 12. Reason for Accepted Charges Being Dismissed or Allowing Plea to an Amended Charge

Reason	N	%
Witness reason	53	16.8 %
Evidentiary reason	34	10.8
Discretionary reason	222	70.5
Procedural/other reason	6	1.9
Total	**315**	

Source of data: Alaska Department of Law

Conviction

Of the 127 cases that were accepted by DOL, 16 cases (12.6%) resulted in no conviction. Most cases (87.4%) resulted in a conviction on at least one charge. When examining the charge-level analysis, 138 (33.4%) of the 413 accepted charges resulted in a finding of guilt. Table 13 is a frequency table of convicted charge types. Table 14 presents the changes in the types of charges between acceptance and conviction. We see much more variation about the diagonal than we did in earlier crosstabulations.

Table 13. Convicted Charges

Charge	N	%
Sexual assault 1	12	8.7 %
Sexual assault 2	35	25.4
Sexual assault 3	10	7.2
Sexual abuse of a minor 1	2	1.4
Sexual abuse of a minor 2	14	10.1
Sexual abuse of a minor 3	3	2.2
Sexual abuse of a minor 4	1	0.7
Assault	30	21.7
Kidnapping	2	1.4
Other charge	29	21.0
Total	**138**	

Source of data: Alaska Department of Law

Table 14. Accepted Charges Versus Convicted Charges, for Accepted Charges that Resulted in a Conviction

		Convicted charge									
Accepted charge	Total	Sexual assault 1	Sexual assault 2	Sexual assault 3	Sexual abuse of a minor 1	Sexual abuse of a minor 2	Sexual abuse of a minor 3	Sexual abuse of a minor 4	Assault	Kidnapping	Other charge
Sexual assault 1	**41**	**12**	18	1	–	–	–	–	5	–	5
Sexual assault 2	**31**	–	**17**	5	–	–	–	–	7	–	2
Sexual assault 3	**4**	–	–	**4**	–	–	–	–	–	–	–
Sexual abuse of a minor 1	**5**	–	–	–	**2**	2	–	–	–	–	1
Sexual abuse of a minor 2	**15**	–	–	–	–	**12**	2	–	–	–	1
Sexual abuse of a minor 3	**1**	–	–	–	–	–	**1**	–	–	–	–
Sexual abuse of a minor 4	**1**	–	–	–	–	–	–	**1**	–	–	–
Assault	**18**	–	–	–	–	–	–	–	**17**	–	1
Kidnapping	**3**	–	–	–	–	–	–	–	1	**2**	–
Other charge	**19**	–	–	–	–	–	–	–	0	–	**19**
Total	**138**	**12**	**35**	**10**	**2**	**14**	**3**	**1**	**30**	**2**	**29**

Source of data: Alaska Department of Law

Table 15. Class of Convicted Charges

Class	N	%
Unclassified felony	10	7.2 %
Class A felony	7	5.1
Class B felony	36	26.1
Class C felony	34	24.6
Class A misdemeanor	42	30.4
Class B misdemeanor	5	3.6
Misdemeanor probation or SIS revocation	4	2.9
Total	**138**	

Source of data: Alaska Department of Law

Table 16. Accepted Charge Class Against Convicted Charge Class, for Charges that Resulted in a Conviction

		Conviction class						
Accepted class	**Total**	Unclassified felony	Class A felony	Class B felony	Class C felony	Class A misde-meanor	Class B misde-meanor	Misdemeanor probation or SIS revocation
Unclassified felony	**44**	**10**	5	13	10	6	–	–
Class A felony	**7**	–	**2**	1	2	1	1	–
Class B felony	**47**	–	–	**22**	11	13	1	–
Class C felony	**16**	–	–	–	**11**	5	–	–
Class A misdemeanor	**18**	–	–	–	–	**17**	1	–
Class B misdemeanor	**2**	–	–	–	–	–	**2**	–
Misdemeanor probation or SIS revocation	**4**	–	–	–	–	–	–	**4**
Total	**138**	**10**	**7**	**36**	**34**	**42**	**5**	**4**

Source of data: Alaska Department of Law

This is an indication that charge types are shifting between acceptance and conviction. Given that a large proportion of cases are disposed of by plea bargaining, this is not surprising.

There is a shift in charge class similar to the shift in charge type we observed between acceptance and conviction. Table 15 presents the convicted charge class, and Table 16 demonstrates the way charge class shifted between acceptance and conviction.

Sexual assaults in some degree formed 60.8 percent of charges that were accepted but failed to result in a conviction.

Conclusions

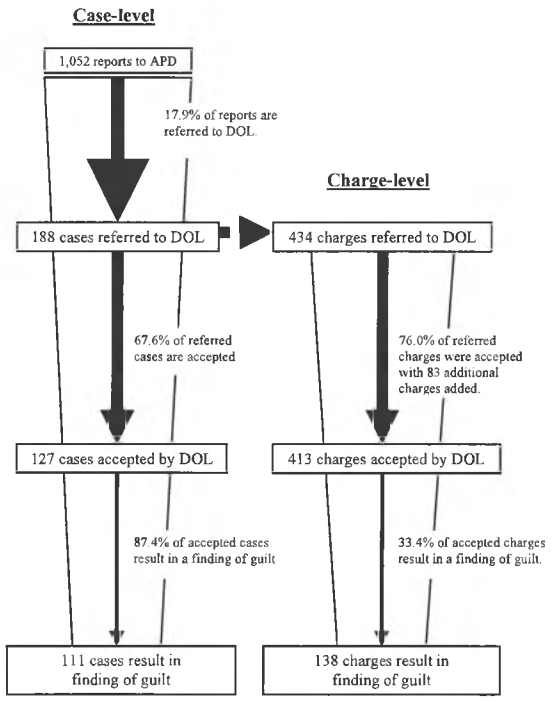
As we have seen, the picture of sexual assault case processing that emerges depends, in large part, on the level of analysis. Conclusions about the prosecution of sexual assaults by the DOL vary substantially depending on which level of analysis we consider. Figure 1 succinctly illustrates the points and rates of attrition for sexual assault cases and charges at the three formal prosecutorial decision points considered in this project. Figure 1 shows that a higher proportion of charges than offenders are being removed from the system at each decision point. Furthermore, results indicate that most offenders whose cases reach prosecutors are being held accountable in some degree; that is, they receive criminal sanctions. Another fact becomes clear when looking at Figure 1: The point of highest attrition is prior to prosecutorial involvement, with 82.5 percent of reported sexual assaults not referred for prosecution. This is by far the largest filtering that occurs at any formal decision point studied in this research. However, determining what precisely is happening between report and referral is beyond the scope of the present project.

In addition to the rates of attrition shown in Figure 1, there is a substantial change in the types of charges that flow through the three decision points examined in this research (Tables 8, 10, 14, and 16). The distribution of charges by type is relatively constant from referral to acceptance, but there is a demonstrable shift in the distribution between acceptance and conviction. The most dramatic shift is observed for the sexual assault in the first degree charges. At referral, charges for sexual assault in the first degree constitute 41.5 percent of all charges. At acceptance, this proportion is relatively unchanged at 36.6 percent. However, sexual assault in the first degree constitutes only 8.7 percent of convicted charges.

Upon first inspection, this result may be startling, but it becomes readily explainable when viewed in light of previous results. We stated earlier that the vast majority (89.9%) of convictions in our sample are a result of plea bargaining, which commonly results in convictions on less serious charges. We could therefore reasonably expect that many charges in our sample would result in convictions on charges that are less severe than those originally referred or accepted.

While the reason codes may not capture all possible reasons for charge dispositions, they offer useful insight into prosecutorial decision making. A comparison of reason codes between those given from referral to acceptance (Table 7) and those given from acceptance to conviction (Table 12) shows that there is a perceptible shift in the reasons attached to case dispositions at the respective decision points. From referral to acceptance, evidentiary reasons account for 47.5 percent of reasons given for a referred charge not being accepted as referred. From acceptance to conviction, this proportion drops substantially to 10.8

Figure 1. Case and Charge Movement Between Decision Points



Source of data: Alaska Department of Law

percent of reasons given by prosecutors. The opposite happens for the proportion of total reasons that are discretionary in nature. Between referral and acceptance, discretionary reasons account for 32.6 percent of the reasons given by prosecutors. This proportion jumps to 70.5 percent of reasons given for a dismissal or plea agreement to an amended charge.

Overall, we began with a total 1,074 sexual assaults reported to the Anchorage Police Department between January 2000 and December 2003 involving one suspect and one victim. Data were collected on 1,052 (98%) of these 1,074 reports. These 1,052 reports to APD resulted in the referral of 188 cases and 434 charges to DOL. These 188 referred cases resulted in the acceptance of 127 cases that included 413 charges. Prosecutors obtained convictions in 111 cases on 138 charges. Thus, the majority of cases resulted in a conviction on at least one charge. For referred cases, a majority of respondents were held accountable for their actions to some degree.

It remains true, however, that a heavy majority of reported sexual assaults are not referred for prosecution. More examination of this point in case processing—between reporting and referral—is urgently needed.

Since the greatest source of case and charge attrition is from report to referral, enhancing offender accountability may depend on increasing the proportion of reported sexual assaults that are referred to the Department of Law.

G. Matthew Snodgrass is a researcher in an ongoing study of sexual assaults in Anchorage. *The study is being directed by André Rosay of the Justice Center. The complete report on which this article is based is available at http://justice.uaa.alaska.edu/research/2000/0611sexassault/0611sxcaseprocess.html.* *This project was supported by Grant No. 2004-WG-BX-0003 awarded by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.*

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Forcible Rapes and Sexual Assaults in Anchorage

André Rosay

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http://justice.uaa.alaska.edu/forum/20/4winter2004/a_rapes.html

For other articles and publications related to sexual assault and violence against women, see:
http://justice.uaa.alaska.edu/vaw/

Abstract: *This study examined the characteristics of all sexual assaults reported to the Anchorage Police Department from 2000 through 2003. Key descriptive findings are summarized.*

- *Victims tended to be young and female, with Native women victims in over 45% of reported sexual assaults.*
- *In a majority of the assaults — over 62% — the assailant was not a stranger to the victim. The most common non-stranger relationships included friends and acquaintances.*
- *A majority of the assaults occurred indoors, with 45% taking place at the residence of one or both of those involved.*
- *Sixty-five percent of victims had used alcohol prior to the assault and 74% of suspects had also.*

Alaska generally, and Anchorage specifically, have been plagued by a high incidence of forcible rapes and sexual assaults. For the first time, solid data on victim and suspect characteristics, time and location of assaults and other details have been assembled and studied. These data contradict some of the more common assumptions regarding Anchorage's rape problem.

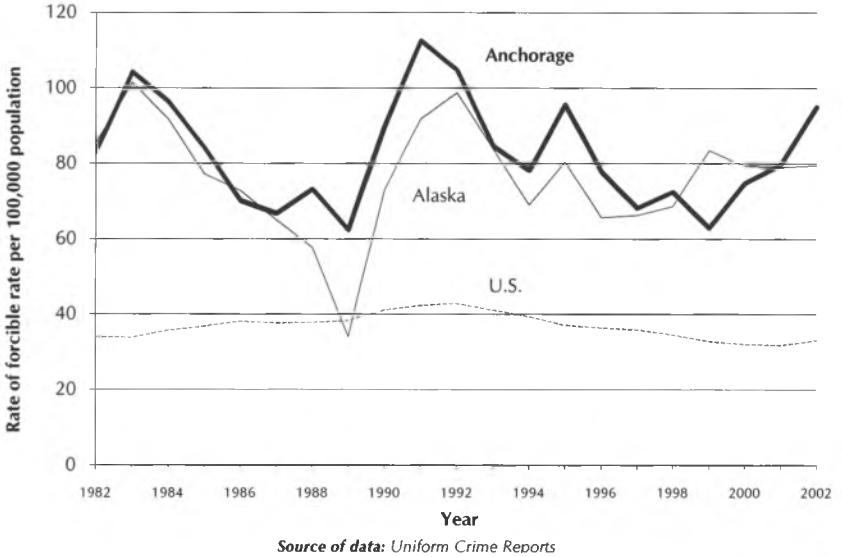
The data are important to designing effective rape prevention efforts. The Anchorage Police Department has recently secured new funding sources directed at reducing the occurrence of forcible rapes and sexual assaults: a $2 million federal grant and a $500,000 municipal grant. The question now is how to best allocate these resources. As discussed in the criminological literature, problem-oriented policing offers a promising approach.

Problem-oriented policing is a strategy in which police (1) define the problems to be solved, (2) diagnose these problems to identify their causes, (3) develop and implement interventions that address these causes, and (4) assess the efficacy of their interventions.

As defined in the Federal Bureau of Investigation's Uniform Crime Reporting (UCR) Program, forcible rape is "the carnal knowledge of a female forcibly and against her will." Attempted forcible rapes are also included in the UCR's measure. Figure 1 displays the rates of forcible rape reported to police from 1982 to 2002 for the United States, Alaska, and Anchorage. In 2002, the state of Alaska had the highest rate of reported forcible rape among the 50 states (79.4 per 100,000) and Anchorage had the second highest rate of reported forcible rape among metropolitan statistical areas in the U.S. (95.0 per 100,000). In 2002, the rates of reported forcible rape were 141 percent higher in Alaska and 188 percent higher in Anchorage than in the U.S.

In addition to forcible rapes, Anchorage also has a high rate of reported sexual assaults (although national comparisons are not available). The definition of a sexual assault is less restrictive than that of a forcible rape: sexual contact with another person, male or female, without the consent of that other person. In 2002, there were 254 forcible rapes and 85 sexual assaults reported to the Anchorage Police Department, for a total of 339 forcible rapes and sexual assaults. Furthermore, according to analysis done by Callie Marie Rennison for the Bureau of Justice Statistics, national statistics indicate that only 36 percent of forcible rapes, 34 percent of attempted forcible rapes, and 26

Figure 1. Rates of Forcible Rape in the U.S., Alaska, and Anchorage, 1982-2002



Source of data: *Uniform Crime Reports*

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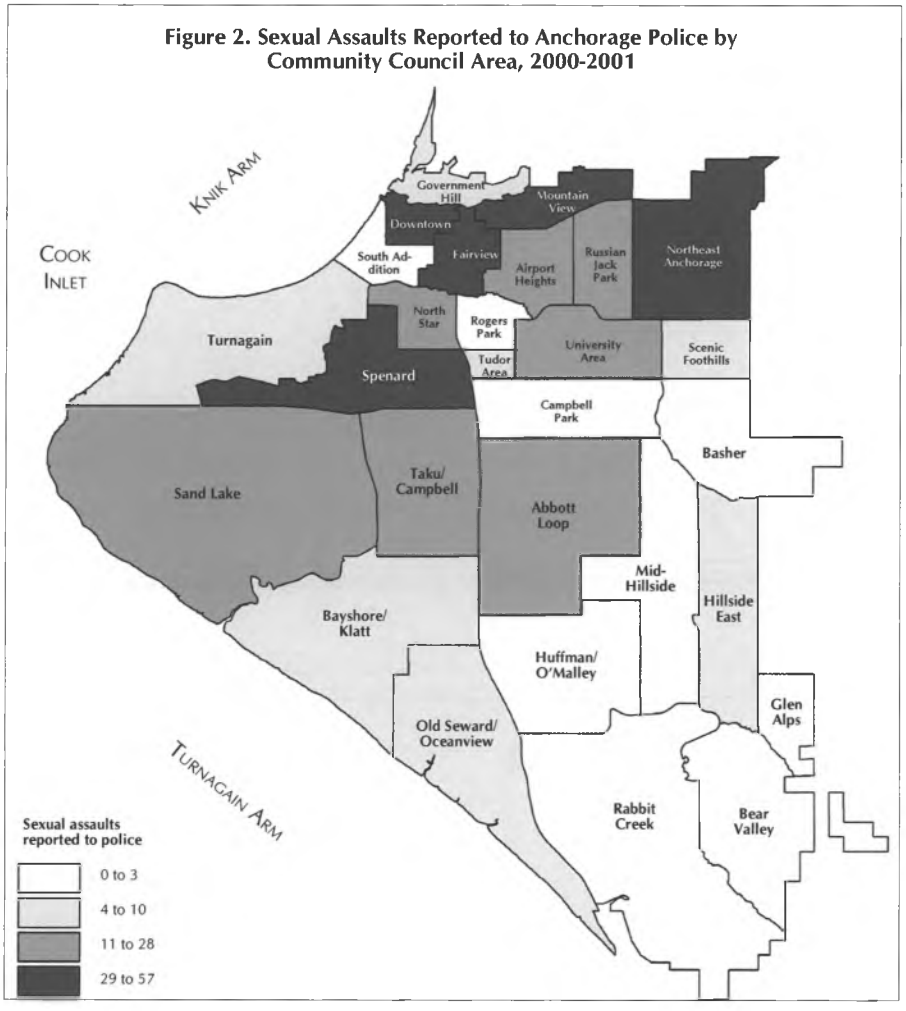
Figure 2. Sexual Assaults Reported to Anchorage Police by Community Council Area, 2000-2001



percent of sexual assaults are reported to the police. In light of this, the forcible rape and sexual assault problem in Anchorage is probably worse than that indicated by police statistics.

A joint project of the UAA Justice Center and the Anchorage Police Department has focused on gaining a better understanding of the parameters of the rape problem in Anchorage. Researchers collected data from all sexual assaults and rapes reported to the Anchorage Police Department in 2000 and 2001. These data contain detailed information on the assaults, victims, and suspects. The findings presented here reflect a quantitative perspective on those assaults that have been reported. It is important to note again that many sexual assaults go unreported.

The key findings from this study suggest that interventions will be successful in Anchorage only insofar as they take into account:

- Geographical and temporal concentration of reported sexual assaults and rapes;
- Demographic characteristics of victims and suspects;
- Types of victim-suspect relationships;
- Locations of assaults; and
- Use of alcohol.

Like all criminal activity, sexual assaults and rapes are neither geographically nor temporally random. In the data studied, reported sexual assaults and rapes were most likely to occur in five community council areas—Downtown, Fairview, Spenard, Mountain View, and, to a lesser extent, Northeast Anchorage (see Figure 2). More specifically, 10.1 percent of the sexual assaults and rapes reported in 2000 and 2001 occurred Downtown, 10.1 percent in Fairview, 13.4 percent in Spenard, 10.1 percent in Mountain View, and 9.0 percent in Northeast. Of the 424 assault locations reported in 2000 and 2001, 52.7 percent were in these five community council areas. Temporally, reported sexual assaults and rapes were most likely to occur on the weekends and from 10 PM to 6 AM. More precisely, 49 percent of sexual assaults and rapes reported in 2000 and 2001 occurred on weekends and 60 percent occurred between 10 PM and 6 AM.

Knowing where and when sexual assaults

Table 1. Race of Victims of Sexual Assaults Reported to Anchorage Police, 2000-2001

Race[1]	Victims[2] N = 539 N	%	Percentage of Anchorage population, 2001[3]	Sexual assault rate per 1,000 population[4]
Caucasian	257	47.7 %	77.6 %	1.28
Native	243	45.1	10.6	8.86
Hispanic	8	1.5	6.0	0.52
African-American	27	5.0	7.2	1.45
Asian	8	1.5	7.3	0.42
Pacific Islander	0	0.0	1.3	0.00

[1] Categories are not mutually exclusive.
[2] Detail adds to greater than total N because victims may be of more than one race.
[3] Includes both males and females (95.5% of victims were female).
[4] Base population includes both males and females.
Source of data: *2000 and 2001 data (N = 539); U.S. Census Bureau, 2001 Supplementary Survey (Anchorage, AK MSA) <www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/380/38000US03801.htm>.*

Table 2. Race of Suspects in Incidents of Sexual Assault Reported to Anchorage Police, 2000-2001

Race[1]	Suspects[2] N = 567 N	%	Percentage of Anchorage population, 2001[3]	Sexual assault suspects per 1,000 population[4]
Caucasian	231	40.7 %	77.6 %	1.15
Native	126	22.2	10.6	4.60
Hispanic	47	8.3	6.0	3.05
African-American	137	24.2	7.2	7.38
Asian	30	5.3	7.3	1.59
Pacific Islander	4	0.7	1.3	1.20

[1] Categories are not mutually exclusive.
[2] Detail adds to greater than total N because suspects may be of more than one race.
[3] Includes both males and females (99.4% of suspects were male).
[4] Base population includes both males and females.
Source of data: *2000 and 2001 data (N = 539); U.S. Census Bureau, 2001 Supplementary Survey (Anchorage, AK MSA) <www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/380/38000US03801.htm>.*

and rapes occur is an important step in defining the problem to be solved. These results provide reliable evidence of the geographical and temporal concentration of sexual assaults and rape—rather than unreliable evidence based on hunches, experience, or common sense. This evidence suggests that police efforts to combat sexual assaults and rape ought to be concentrated on the weekends from 10 PM to 6 AM in Downtown, Fairview, Spenard, Mountain View, and Northeast.

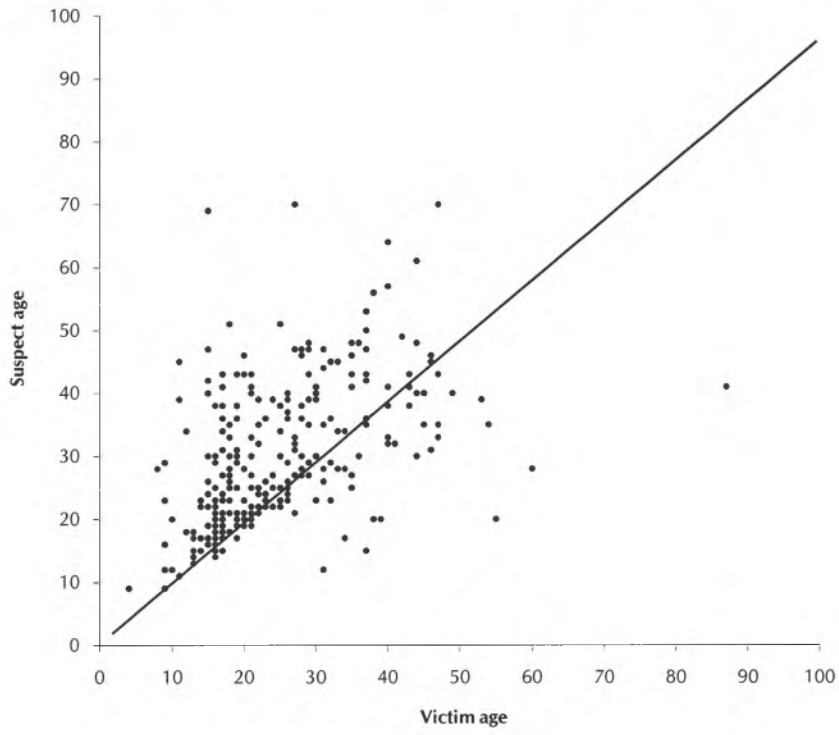
At the same time, police efforts to combat sexual assault and rape need to take into consideration the demographic characteristics of both victims and suspects. The vast majority (95.5%) of victims were female, with most (93.2%) residing in Anchorage. Almost all suspects (99.4%) were male and, again, most (94.3%) resided in Anchorage. Most victims were Caucasian or Native, with Native victims vastly overrepresented (see Table 1). For reported sexual assaults and rapes, Natives were 7.6 times more likely than others to be a victim.

Suspects were more racially diverse than victims (see Table 2). Most suspects were Caucasian, but Native and African-American suspects were overrepresented in proportion to the general population.

The age of victims and suspects is shown in Figure 3. On average, victims were 5 years younger than suspects. For victims, the highest rate of reported sexual assault and rape was for 15-to-19-year-olds (6.76 per 1,000) while for suspects, the highest rate of reported sexual assault and rape was for 20-to-24-year-olds (3.75 per 1,000).

Figure 3. Victim and Suspect Age in Sexual Assault Cases Reported to Anchorage Police, 2000-2001

Analysis includes only those cases with one victim and one suspect (N = 264).



With these demographics characterizing those involved in sexual assaults, interventions should primarily focus on Anchorage residents rather than visitors. Furthermore, it is clear that victim-focused interventions must occur at an earlier age than suspect-focused interventions. The daily routines of 15-to-19-year-olds are substantially different than those of 20-to-24-year-olds. In particular, 15-to-19-year-olds are likely to be in school during the week, making schools an attractive intervention partner for victim-focused interventions. Developing suspect-focused interventions in schools, however, makes little sense as most suspects are beyond school age.

It would also make little sense to develop interventions without considering the relationships between victims and suspects. These relationships are described in greater detail in Table 3. According to the 2002 National Crime Victimization Survey, only 32.5 percent of sexual assaults nationwide and rapes are stranger assaults. In Anchorage, however, stranger assaults are far more common. In 2000 and 2001, 44.3 percent of victims who reported a sexual assault or rape to police did not know the offender beforehand. Among non-stranger assaults, the most common were assaults between casual acquaintances (30.4%) and those between well-known friends (27.1%). Unfortunately, little is known about the differences between stranger and non-stranger assaults. Consequently, the implications of this important finding are still unclear. It is likely, however, that important differences between stranger and non-stranger assaults do exist, requiring separate approaches to reduce occurrence. For example, it is possible that non-stranger assaults are more likely to occur in private places than stranger assaults.

Though we have not yet investigated these differences, our analyses clearly reveal that most sexual assaults reported to police (over 67.7%) occurred indoors (see Table 4). The most common indoor locations included the victim's residence and the suspect's residence. Of the sexual assault locations, 45.3 percent were the victim's residence or suspect's residence (or both), and an additional 9.9 percent took place in some other residence. In comparison, fewer sexual assaults occurred outdoors (22.0%). Common outdoor locations included fields, woods, parks, roads, streets, and parking lots. Few assaults occurred in vacant lots (5.3%), city parks (1.9%), or along park trails (0.5%). Overall, our data show that

Table 3. Victim-Offender Relationship in Incidents of Sexual Assault Reported to Anchorage Police, 2001

Suspect's relationship to victim	N	% of total	% of non-stranger
Total non-stranger	**181**	**55.7 %**	**100.0 %**
Spouse	8	2.5	4.4
Parent	2	0.6	1.1
Sibling	5	1.5	2.8
Grandchild	1	0.3	0.6
Stepparent	3	0.9	1.7
Other family	9	2.8	5.0
Acquaintance	55	16.9	30.4
Friend	49	15.1	27.1
Neighbor	2	0.6	1.1
Babysitter	2	0.6	1.1
Boy/girlfriend	22	6.8	12.2
Ex-spouse	5	1.5	2.8
Employer	1	0.3	0.6
Otherwise known	17	5.2	9.4
Stranger	**144**	**44.3 %**	**–.–**
Total	**325**		

only 4.3 percent of reported sexual assaults *originated* in parks, fields, or woods and that only 7.3 percent *occurred* in these places. Most of these places were vacant lots. Moreover, while only one assault was reported as occurring in a bar, the original pick-up in 54 cases (13.6%) occurred in a bar—a finding that should be seen in relation to the figures on alcohol involvement in sexual assaults.

Consequently, strategies that target outdoor places, particularly ones that target parks or trails, will not appreciably affect the rates of sexual assault and rape in Anchorage. Although the municipality's Trail Watch Program instituted in September 2003 may reduce the fear of crime among trail users (and may reduce other forms of crime), it will probably have negligible effects, if any, on the occurrence of sexual assaults and rapes if these patterns continue. Different strategies must be used to lower the rates of sexual assault and rape in Anchorage, since most rapes occur indoors, in residences.

Finally, interventions must take into account that alcohol use was very frequent among both suspects and victims. During 2000 and 2001, 76.2 percent of suspects and 59.9 percent of victims had used alcohol. Table 5 displays victim and suspect alcohol use for 176 cases (cases with only one victim and one suspect and cases where both victim and suspect alcohol use was known). Both the suspect and the victim had used alcohol in 59.7 percent of these cases. Only the suspect had used alcohol in 13.1 percent of these cases. Only the victim had used alcohol in 1.7 percent of these cases and neither the suspect nor the victim used alcohol in 25.6 percent of these cases. Stated differently, almost 75 percent of these cases involved alcohol—either by the suspect, the victim, or both.

Overall, we have come a long way towards defining the problems to be solved, diagnosing these problems, and identifying their causes. Though the analyses are neither finished nor definitive, we nonetheless now have some reliable information that can be used to enhance the success of community and police rape prevention efforts. We ought to make sure that all interventions take into consideration that:

- Reported sexual assaults and rapes occur mostly on the weekends from 10 PM to 6 AM in Downtown, Fairview, Spenard, Mountain View, and Northeast;
- The highest victimization rates are for 15-to-19-year-olds while the highest offending rates are for 20-to-24-year-olds;
- 44.3 percent of victims are assaulted by strangers;
- 59.6 percent of known assault locations are private residences; and
- Alcohol use is very frequent among both suspects and victims.

It must be understood that police alone cannot solve the sexual assault and rape problem that has plagued Anchorage for well over 20 years. The data suggest that effective solutions to this problem need to be both suspect-focused and victim-focused (as well as event-focused). Many have dismissed the idea of victim-focused interventions for fear that it leads to victim blaming. The reality, however, is that we can educate about sexual assault and rape without blaming victims for sexual assault and rape: we educate homeowners about burglary prevention without blaming them for burglaries and we educate business owners about shoplifting without blaming them for shoplifting.

André Rosay is an assistant professor with the Justice Center. *The Justice Center report on which this article was based,* ***Descriptive Analysis of Sexual Assaults in Anchorage, Alaska****, is available on the Justice Center website, http://www.uaa.alaska.edu/just/.* *This project was supported by Grant No. 2000-RH-CX-K039 awarded by the Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.*

Table 4. Location Type for Pick-Up and Assault of Victims of Sexual Assault Reported to Anchorage Police, 2000-2001

	Pick-up		Assault	
Location type	**N**	**%**	**N**	**%**
Indoors	**389**	**71.9 %**	**397**	**67.7 %**
Victim's residence	110	20.3	129	22.0
Suspect's residence	66	12.2	121	20.6
Victim's and suspect's residence	12	2.2	15	2.6
Other residence	44	8.1	58	9.9
Bar	54	13.6	1	0.2
Hotel	33	6.1	57	9.7
Doctor's office	14	2.6	16	2.7
Other indoors	56	10.4	18	3.1
Outdoors	**104**	**19.2 %**	**129**	**22.0 %**
Road, street	62	11.5	52	8.9
Parking lot	15	2.8	31	5.3
Vacant lot	14	2.6	29	4.9
Park	7	1.3	11	1.9
Trail	2	0.4	3	0.5
Other outdoors	4	0.7	3	0.5
Unknown	**48**	**8.9 %**	**42**	**7.2 %**
Total	**541**		**586**	

Note: Totals differ because there was sometimes more than one assault location for the same pick-up.

Table 5. Victim and Suspect Alcohol Use in Incidents of Sexual Assault Reported to Anchorage Police, 2001

Analysis includes only those cases in which one victim and one suspect were involved.

	Alcohol use by victim		
Alcohol use by suspect	Yes	No	**Total**
Yes	**105**	23	**128**
No	3	**45**	**48**
Total	**108**	**68**	**176**

ALASKA JUSTICE FORUM
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Disposition of Sexual Assault Cases

It is not possible to correlate the figures on reported sexual assaults in Anchorage in 2000-2001 presented in the first article in this issue of the *Alaska Justice Forum* with figures on felony case processing as examined in the Judicial Council felony study, but the Judicial Council felony case study does contain figures specifically related to cases involving sexual offenses that give an idea of how these cases are handled.

According to the Judicial Council study, a sexual offense constituted the most serious charge in 12 percent of the cases studied. Table 1 shows the dispositions for these cases. The data reveal that disposition charges are often lower, sometimes at the misdemeanor level. A majority of all cases, however, resulted in a conviction on a felony charge—and on a sexual offense charge, a disposition that results in placement on the sexual offender registry.

The statistical analysis presented in the Judicial Council study shows that cases involving sexual offenses were handled even-handedly, with no effects associated with ethnicity in charge reduction, pre-disposition incarceration or sentence. Some disparities did appear in association with case location and with type of attorney.

See table on page 2.

Originally published in the *Alaska Justice Forum* 20(4): 8 (Winter 2004).
http://justice.uaa.alaska.edu/forum/20/4winter2004/d_rapedisposition.html

For other articles and publications related to sexual assault and violence against women, see:
http://justice.uaa.alaska.edu/vaw/

Abstract: *This article summarizes findings on cases involving sexual offenses from the Alaska Judicial Council study* ***Alaska Felony Process: 1999*** *(February 2004). (The full Judicial Council report is available online at http://www.ajc.state.ak.us/reports/Fel99FullReport.pdf.) The study examined the original single most serious charge and determined its final disposition. Twelve percent of felony cases included a sexual offense as the original single most serious charge. Charges for sexual abuse of a minor were more likely to be convicted as sexual offenses than sexual assault charges (and were less likely to be convicted as misdemeanors).*

- *The most frequent original single most serious charges included sexual abuse of a minor in the second degree (Class B felony), sexual assault in the second degree (Class B felony), sexual assault in the first degree (Unclassified felony), and sexual abuse of a minor in the first degree (Unclassified felony).*
- *Eighty-one percent of charges for sexual abuse of a minor in the second degree were convicted as sexual offense charges. Forty-one percent were convicted as sexual abuse of a minor in the second degree. Thirteen percent were convicted as misdemeanors.*
- *Fifty-five percent of charges for sexual assault in the second degree were convicted as sexual offense charges. Seventeen percent were convicted as sexual assault in the second degree. Thirty-four percent were convicted as misdemeanors.*
- *Fifty percent of charges for sexual assault in the first degree were convicted as sexual offense charges. Nine percent were convicted as sexual assault in the first degree. Twenty-two percent were convicted as misdemeanors.*
- *Eighty-four percent of charges for sexual abuse of a minor in the first degree were convicted as sexual offense charges. Twenty-one percent were convicted as sexual abuse of a minor in the first degree. Five percent were convicted as misdemeanors.*

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Table 1. Charge Changes for Single Most Serious Charge

Original single most serious charge Final disposition of single most serious charge	N	% of each disposition	Percent convicted of misdemeanor
Sexual abuse minor 1 (unclassified)	**43**	—	**4.7 %**
Sexual abuse minor 1	9	20.9 %	
Attempted sexual abuse minor 1	8	18.6	
Sexual abuse minor 2	15	34.9	
Sexual abuse minor 3	2	4.7	
Sexual assault 1	1	2.3	
Sexual assault 2	1	2.3	
Assault 4 (misd.)	1	2.3	
Contributing to delinquency of minor (misd.)	1	2.3	
Dismissed/acquitted	*5*	*11.6*	
Sexual assault 1 (unclassified)	**46**	—	**21.7 %**
Sexual assault 1	4	8.7 %	
Attempted sexual assault 2	2	4.3	
Attempted sexual assault 1	1	2.2	
Burglary 1	1	2.2	
Perjury	1	2.2	
Sexual assault 2	13	28.3	
Sexual assault 3	2	4.3	
Alcohol to minor (misd.)	1	2.2	
Assault 4 (misd.)	6	13.0	
Attempted sexual assault 3 (misd.)	1	2.2	
Harassment (misd.)	1	2.2	
Criminal mischief 3 (misd.)	1	2.2	
Dismissed/acquitted	*12*	*26.1*	
Attempted sexual abuse minor 1 (Class A)	**1**	—	**0.0 %**
Attempted sexual abuse minor 1	1	100.0 %	
Attempted sexual assault 1 (Class A)	**2**	—	**0.0 %**
Attempted sexual assault 1	1	50.0 %	
Dismissed/acquitted	*1*	*50.0*	
Exploit minor (Class B)	**1**	—	**0.0 %**
Exploit minor	1	100.0 %	
Sexual abuse minor 2 (Class B)	**95**	—	**12.6 %**
Sexual abuse minor 2	39	41.1 %	
Attempted sexual abuse minor 2	20	21.1	
Attempted sexual assault 2	3	3.2	
Coercion	2	2.1	
Probation revocation F	1	1.1	
Sexual assault 3	1	1.1	
Sexual abuse minor 3	8	8.4	
Sexual abuse minor 1	1	1.1	
Sexual assault 2	2	2.1	
Alcohol to minor (misd.)	1	1.1	
Assault 4 (misd.)	3	3.2	
Attempted sexual assault 3 (misd.)	1	1.1	
Attempted sexual abuse minor 3 (misd.)	2	2.1	
Contributing to delinquency of minor (misd.)	4	4.2	
Criminal trespass (misd.)	1	1.1	
Dismissed/acquitted	6	*6.3*	
Sexual assault 2 (Class B)	**47**	—	**34.0 %**
Sexual assault 2	8	17.0 %	
Attempted sexual assault 2	8	17.0	
Burglary 2	1	2.1	
Sexual assault 3	6	12.8	
Assault 4 (misd.)	6	12.8	
Attempted sexual abuse minor 3 (misd.)	2	4.3	
Criminal trespass (misd.)	1	2.1	
Harassment (misd.)	3	6.4	
Reckless endangerment (misd.)	1	2.1	
Sexual abuse minor 4 (misd.)	1	2.1	
Sexual assault 4 (misd.)	1	2.1	
Violation domestic violence pretective order (misd.)	1	2.1	
Dismissed/acquitted	*8*	*17.0*	
Attempted sexual abuse minor 2 (Class C)	**2**	—	**0.0 %**
Attempted sexual abuse minor 2	2	100.0 %	
Attempted sexual assault 2 (Class C)	**3**	—	**33.3 %**
Attempted sexual assault 2	2	66.7 %	
Harassment (misd.)	1	33.3	
Indecent exposure 1 (Class C)	**3**	—	**33.3 %**
Indecent exposure 1	2	66.7 %	
Indecent exposure 2 (misd.)	1	33.3	
Sexual abuse minor 3 (Class C)	**21**	—	**42.9 %**
Sexual abuse minor 3	8	38.1 %	
Probation revocation F	1	4.8	
Alcohol to minor (misd.)	2	9.5	
Assault 4 (misd.)	2	9.5	
Attempted sexual abuse minor 3 (misd.)	3	14.3	
Contributing to delinquency of minor (misd.)	1	4.8	
Resist arrest (misd.)	1	4.8	
Dismissed/acquitted	*3*	*14.3*	
Sexual assault 3 (Class C)	**6**	—	**16.7 %**
Sexual assault 3	2	33.3 %	
Assault 3	1	16.7	
Attempted sexual assault 2	1	16.7	
Assault 4 (misd.)	1	16.7	
Dismissed/acquitted	*1*	*16.7*	

Source: *Alaska Judicial Council*

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Predicting Legal Resolutions in Domestic Violence Cases

Marny Rivera, André B. Rosay, Darryl S. Wood, and Katherine TePas

Introduction

The adoption of such policies as mandatory arrest, pro-arrest, and no-drop prosecution has changed the arrest and prosecution practices in domestic violence cases. Pro-arrest refers to arrest being preferred, but not required. No-drop prosecution allows the prosecutor, with or without the cooperation of the victim, to decide if the evidence merits going forward. Prosecution and conviction practices were the focus of a meta-analysis by Joel Garner and Christopher Maxwell in *Criminal Justice Review* 34(1) in 2009. They looked at 135 published reports emphasizing prosecution and/or conviction of intimate partner and other forms of domestic violence. These researchers found that 34 percent of reports to law enforcement of intimate partner violence (IPV) were prosecuted, and 59 percent of arrests for IPV were prosecuted. Overall, 51 percent of prosecuted cases resulted in conviction. They concluded that prosecution for IPV was not rare, but acknowledged that prosecution rates varied considerably across jurisdictions. They also acknowledged that the data in their 2009 study did not provide enough information to identify factors that predict prosecution and conviction of IPV. Identification of such predictive factors is important because these factors may explain jurisdictional variation in the prosecution of domestic violence cases, and may also suggest policies and practices for enhancing prosecution rates.

HIGHLIGHTS INSIDE THIS ISSUE

- An examination of attrition in criminal justice processing of cases of intimate partner violence against women (page 2).
- A summary of two sets of recommendations to reduce violence against women in Alaska (page 5).
- A look at the relationship between animal abuse and domestic violence (page 6).
- A comparison between leading causes of death in the U.S. and Alaska among different age groups (page 7).

Table 1. Number of Cases by Stage, for Cases with only One Suspect and One Victim

Stage	N	% of reported	% of referred	% of accepted
Reported	1,095	100.0 %	—	—
Referred	874	79.8	100.0 %	—
Accepted	753	68.8	86.2	100.0 %
Convicted	591	54.0	67.6	78.5

Source of data: *Alaska State Trooper data (2004)*

A recent analysis of prosecution for assaults in domestic violence incidents reported to Alaska State Troopers (AST or Troopers) found that prosecution rates in Alaska were even higher than the national average prosecution rates reported by Garner and Maxwell. Data from the study of assaults in domestic violence incidents reported to AST included detailed characteristics associated with these incidents, as well as prosecution data from the Alaska Department of Law. These data allowed for the computation of prosecution and conviction rates, as well as an analysis of characteristics predicting prosecution of domestic violence assaults. The results of those analyses are presented here following a summary of domestic violence statutes in Alaska and descriptive statistics for the characteristics examined as predictors of prosecution and conviction.

Summary of Alaska's Assault Statutes

The findings here come from a study of 1,281 Trooper reports (not including reports to local or municipal police) of assaults in domestic violence incidents in 2004 that resulted in at least one assault charge. Alaska's criminal code defines assault in terms of first, second, third, and fourth degrees (Alaska Statutes §§11.41.200, 11.41.210, 11.41.220, and 11.41.230). First, second, and third degree assault are class A, B, and C felonies, respectively, and fourth degree assault is a class A misdemeanor. The main distinctions between the degrees of assault relate to the level of intent and seriousness of resulting physical injury.

In this study we focus on assaults in domestic violence incidents between household members. *Household member*, as broadly defined in Alaska Statue §18.66.990, includes adults or minors who are current or former spouses, living together or who have lived together, dating or who have dated, engaging in or who have engaged in a sexual relationship, related to each other up to the fourth degree of consanguinity, related or formerly related by marriage, or who have a child together. Unrelated individuals residing together as roommates, and live-in caregivers, also fall under this definition.

The Sample

A subsample of 1,095 cases involving one victim and one suspect was used to conduct analyses to predict legal resolutions. Of the 1,095 cases, 874 (80%) were *referred* for prosecution and 753 (86% of referred cases) were *accepted* for prosecution. The conviction rate was 54 percent for reported cases, 68 percent for referred cases, and 79 percent for accepted cases. (See Table 1.)

Report Characteristics

Several report characteristics were examined as predictors of prosecution: time between the assault incident and the report

*Please see **DV cases**, page 8*

Table 2. Coding for and Frequencies of Report Characteristics Predicting Legal Resolutions

Variables	Reports N	Reports %	Variables	Reports N	Reports %
Time to report			**Time to case closure**		
One or more days = 0	175	16.1 %	Twenty or more days = 0	538	49.2 %
Zero days (day of incident) = 1	914	83.9	Zero through median of 19 days = 1	555	50.8
Person reporting the assault			**Total charges per report**		
Victim = 0	639	58.4 %	One = 0	659	60.2 %
Other = 1	456	41.6	More than one = 1	436	39.8
Detachment			**Number of witnesses per report**		
Other (A, E, or I) = 0	190	17.4 %	Zero = 0	464	42.4 %
B, C, or D = 1	905	82.6	One or more = 1	631	57.6
First agency notified					
AST = 0	870	79.5 %			
VPSO, VPO, local police or other = 1	225	20.5			

Source of data: *Alaska State Trooper data (2004)*

DV cases

(continued from page 1)

of the incident to law enforcement, person reporting the assault, Trooper detachment area receiving the report, agency reported to, time to case closure, total charges per report, and number of witnesses per report. The majority of cases (84%) were reported on the same day as the incident and the victim reported the incident in 58 percent of cases. Most reports (83%) were made in Trooper detachments B (Southcentral Alaska), C (Western Alaska), or D (Interior Alaska). In 80 percent of cases, AST was the first agency notified of the domestic violence assault. In the remaining 21 percent of cases the report was most often received by a Village Public Safety Officer (VPSO) or Village Police Officer (VPO), and less often by a local police department. (Percentages may total to more than 100% due to rounding.) Over half (51%) of the cases were closed between zero and 19 days (the median time to closure for all cases). The majority of domestic violence assaults (60%) involved a single charge, and in 58 percent of cases there was only one witness. (See Table 2).

Table 3. Coding for and Frequencies of Victim Characteristics Predicting Legal Resolutions

Variables	Reports N	Reports %	Variables	Reports N	Reports %
Race of victim			**Present upon Trooper arrival**		
Minority = 0	527	48.1 %	No = 0	43	3.9 %
Caucasian = 1	568	51.9	Yes = 1	1,038	96.1
Victim gender			**Victim was interviewed**		
Male = 0	802	26.6 %	No = 0	32	2.9 %
Female = 1	290	73.4	Yes = 1	1,056	97.1
Age of victim			**Victim cooperated with Troopers**		
33 or older = 0	520	47.9 %	No = 0	151	14.1 %
Infant to 32 = 1	566	52.1	Yes = 1	920	85.9
Victim used alcohol or drugs			**Victim suffered injuries**		
No = 0	687	66.1 %	No = 0	439	40.1 %
Yes = 1	353	33.9	Yes = 1	656	59.9
Victim consulted someone prior to assault					
No = 0	794	73.1 %			
Yes = 1	292	26.9			

Source of data: *Alaska State Trooper data (2004)*

Victim Characteristics

In over half of the cases, the victim was Caucasian (52%) and under 32 years of age (52%). The victim was female in 73 percent of the cases. Most victims (66%) did not use alcohol or drugs prior to the assault in domestic violence incident. Seventy-three percent of the victims contacted no one prior to reporting the assault to law enforcement. In the majority of cases (96%), the victim was present upon Trooper arrival. The victim was interviewed in 97 percent of cases, and most victims (86%) cooperated with the AST investigation. In 60 percent of cases victims suffered documented injuries as a result of the assault in domestic violence incident, but in 40 percent of cases victims did not suffer injuries or their injuries were not documented in the report. (See Table 3.)

Suspect Characteristics

Just over half of the suspects (52%) were Caucasian. Seventy-nine percent were male and 52 percent were in the 12 to 32 years age group. Fifty-eight percent of suspects used alcohol or drugs prior to the assault. Most suspects (77%) were present upon the Trooper's arrival at the scene and were interviewed as part of the Trooper's investigation. The suspect admitted guilt or gave a full confession in 57 percent of cases. In 7 percent of cases the suspect was known to have violated a Domestic Violence Protection Order (DVPO), conditions of release, or conditions of probation. (See Table 4.)

Victim-Suspect Characteristics

In terms of victim-suspect relationship, 67 percent of assaults in domestic violence

Table 4. Coding for and Frequencies of Suspect Characteristics Predicting Legal Resolutions

Variables	Reports N	Reports %	Variables	Reports N	Reports %
Race of suspect			**Present upon Trooper arrival**		
Minority = 0	530	48.4 %	No = 0	249	23.0 %
Caucasian = 1	565	51.6	Yes = 1	835	77.0
Suspect gender			**Suspect was interviewed**		
Female = 0	234	21.4 %	No = 0	248	22.7 %
Male = 1	860	78.6	Yes = 1	843	77.3
Age of suspect			**Suspect admitted guilt or gave a full confession**		
12 to 32 = 0	560	51.5 %	No = 0	360	42.8 %
33 and older = 1	527	48.5	Yes = 1	481	57.2
Suspect used alcohol or drugs			**Suspect violated DVPO, conditions of release, or probation**		
No = 0	415	42.0 %	No = 0	1,012	92.7 %
Yes = 1	574	58.0	Yes = 1	80	7.3

Source of data: *Alaska State Trooper data (2004)*

Table 5. Coding for and Frequencies of Victim-Suspect Characteristics Predicting Legal Resolutions

Variables	Reports N	Reports %
Nature of relationship		
Other family = 0	357	32.7 %
Intimate partners = 1	763	67.3
Living arrangements		
Common = 0	802	75.3 %
Separate = 1	263	24.7
Victim suspect race combination		
Intraracial = 0	925	84.6 %
Interracial = 1	169	15.4
Victim suspect age combination		
Intraage group = 0	447	41.2 %
Interage group = 1	638	58.8

Source of data: *Alaska State Trooper data (2004)*

incidents involved intimate partners while 33 percent involved other family members. Victims and suspects shared common living arrangements in 75 percent of cases. Most assaults in domestic violence incidents (85%) were intraracial—that is between a victim and a suspect of the same race—and 15 percent of cases were interracial—between persons of different races. In 59 percent of cases the victim and suspect were in a different age group. (See Table 5.)

Incident Characteristics

A number of incident characteristics were examined as predictors of prosecution. In 64 percent of cases the victim and suspect came into contact by invitation (either from the victim or the suspect) while in 36 percent of cases the suspect made a forced entry. In 41 percent of cases, a child was present at the time of the assault in domestic violence incident. Suspects used a weapon in five percent of cases. Twenty-eight percent of victims responded aggressively to the domestic violence assault. Victims remained at the scene following 75 percent of assaults in domestic violence incidents. Alcohol and/or drug use was a reported precipitating factor that led to the assault in domestic violence incident in 22 percent of cases, and jealousy was a reported precipitating

*Please see **DV cases**, page 10*

Table 6. Coding for and Frequencies of Incident Characteristics Predicting Legal Resolutions

Variables	Reports N	Reports %	Variables	Reports N	Reports %
Method of contact			**Precipitating factors 1**		
By invitation = 0	93	63.7 %	Not alcohol or drugs = 0	743	77.9 %
Forced entry = 1	53	36.3	Alcohol or drugs = 1	211	22.1
Child present			**Precipitating factors 2**		
No = 0	487	59.0 %	Not jealousy = 0	824	86.4 %
Yes = 1	338	41.0	Jealousy = 1	130	13.6
Use of any weapon			**Location of assault**		
No = 0	1,032	95.5 %	Public = 0	139	12.9 %
Yes = 1	49	4.5	Private = 1	939	87.1
Victim response characteristics 1			**Physical assault**		
Not aggressive = 0	772	72.1 %	No = 0	120	11.0 %
Aggressive = 1	298	27.9	Yes = 1	967	89.0
Victim response characteristics 2			**Any stalking behavior**		
Stayed = 0	802	74.5 %	No = 0	1,022	93.3 %
Left = 1	275	25.5	Yes = 1	73	6.7

Source of data: *Alaska State Trooper data (2004)*

DV cases

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factor in 14 percent of cases. The majority of assaults in domestic violence incidents (87%) took place in a private location and involved physical assaults (89%). Stalking behavior was reported in 7 percent of cases. (See Table 6.)

Predicting Legal Resolutions

Several characteristics of domestic violence incidents were examined as potential predictors of referral, acceptance for prosecution, and conviction: reports to law enforcement of the domestic violence incident, suspects, victims, victim-suspect relationships, and incidents. The analyses involved a three-phase procedure for each type of legal resolution (referral, acceptance, and conviction). In the first phase, individual characteristics within each category were analyzed as predictors of the three legal resolutions using bivariate logistic regression. In the second phase, significant individual predictors of legal resolutions in each category (reports, suspects, victims, etc.) were analyzed using multivariate logistic regression. In the third phase, characteristics found to be significant predictors from phase two, were analyzed across all five categories using multivariate logistic regression to produce a full model of predictors.

Referral

Characteristics that did not predict referral of cases for prosecution. The full model used to predict referral of cases for prosecution included several predictor characteristics found to be significant when analyzed with other characteristics from their respective categories (i.e., reports, suspect, victims, etc.), but not all of these were found to be significant predictors of referral when examined individually and included in the full model. Characteristics analyzed in the full model that did not significantly predict referral of cases for prosecution included: the person who reported the incident (victim or other), the first agency notified (AST, VPSO, VPO, or local police department), the total number of charges associated with the report (one or more than one), victim use of alcohol or drugs, victim injuries, the racial combination of the victim and suspect (intraracial or interracial), the victim's response characteristic (stayed or left the scene), the type of assault (physical or not physical), and precipitating factors to the assault in domestic violence incident (did or did not involve alcohol and/or drugs, did or did not involve jealousy).

Characteristics significantly predicting referral of cases for prosecution. The characteristics predicting referral of domestic violence incidents for prosecution are presented in order of greatest impact to least impact on referral. Each of these characteristics was found to significantly predict referral of domestic violence incidents for prosecution when the other predictive characteristics included in the model were held constant. Cases where the victim was interviewed by a Trooper were 5.8 times more likely to be referred for prosecution than cases where the victim was not interviewed by a Trooper. Cases involving domestic violence incidents that took place between a suspect and victim who were intimate partners were 2.9 times more likely to be referred for prosecution than cases where the victim and suspect were not intimate partners (i.e., family members such as siblings, parent/child, or extended family, etc.). When the suspect was reported to have used alcohol or drugs prior to the domestic violence incident, cases were 2.5 times more likely to be referred for prosecution than in cases with no report of a suspect's use of alcohol and/or drugs. Cases that were closed relatively quickly (less than or equal to a median of 19 days) were 2.3 times more likely to be referred for prosecution than cases that took longer to close. Cases in which the victim and suspect lived together were 2.1 times more likely to be referred for prosecution than cases where the victim and suspect were not cohabiting. Cases with relatively older suspects (older than the mean of 32 years) were two times more likely to be referred for prosecution than cases with younger suspects. (See Table 7.)

Table 7. Characteristics Significantly Predicting Referral for Prosecution

Variable	b	SE(b)	P	Exp(b)
Victim was interviewed	1.757	0.603	0.004	5.794
Intimate partner relationship	1.071	0.205	0.000	2.918
Suspect used alcohol or drugs	0.905	0.226	0.000	2.473
Time to case closure less than or equal to median	0.826	0.199	0.000	2.284
Common living arrangement	0.722	0.239	0.003	2.058
Suspect 33 years or older	0.707	0.203	0.000	2.028

Log Likelihood = 621.10; χ^2 = 117.10; $p < .05$.

Source of data: *Alaska State Trooper data (2004)*

Acceptance

Characteristics that did not predict acceptance of cases for prosecution. Characteristics analyzed in the full model that did not significantly predict acceptance of cases for prosecution included: the time between the incident and the report (one or more days or the same day on which it occurred), the first agency notified (AST, VPSO, VPO, or local police department), the suspect's use or non-use of alcohol or drugs, the victim's gender (female or male), the victim's race (minority or Caucasian), the victim and suspect relationship (intimate partners or other family), the victim and suspect's living arrangement (common or separate), and a precipitating factor to the assault in domestic violence incident (did or did not involve alcohol and/or drugs, did or did not involve jealousy).

Characteristics significantly predicting acceptance of cases for prosecution. The characteristics that significantly predicted whether cases were referred for prosecution were *not* the same characteristics that predicted whether referred cases were *accepted* for prosecution. Each of the following characteristics was found to significantly predict acceptance of domestic violence incidents for prosecution when the other predictive characteristics included in the model were held constant. One of the strongest predictors of acceptance

Table 8. Characteristics Significantly Predicting Acceptance for Prosecution

Variable	b	SE(b)	P	Exp(b)
Suspect admitted guilt or gave a full confession	0.784	0.327	0.003	3.114
Total charges greater than one	0.988	0.351	0.005	2.686
Person reporting was not the victim	0.841	0.351	0.017	2.318
Victim suffered injury	0.839	0.324	0.010	2.315
Child was present	0.825	0.354	0.020	2.282
Suspect male	1.136	0.381	0.016	2.191

Log Likelihood = 243.91; χ^2 = 64.02; $p < .05$.

Source of data: *Alaska State Trooper data (2004)*

for prosecution was whether the suspect admitted guilt or gave a full confession. Cases where suspects admitted guilt or gave a full confession were 3.1 times more likely to be accepted for prosecution, and cases with relatively more charges (cases with more than one charge) were 2.7 times more likely to be accepted for prosecution than cases with only a single charge. When the initial report of domestic violence was made by a person other than the victim, cases were 2.3 times more likely to be accepted for prosecution. Cases in which the victim suffered injury were 2.3 times more likely to be accepted for prosecution than cases in which the victim did not suffer injury. Cases in which a child was reportedly present were 2.3 times more likely to be accepted for prosecution than cases with no report of a child's presence. If the suspect was male, the case was 2.2 times more likely to be accepted for prosecution than if the suspect was female. (See Table 8.)

Table 9. Characteristics Significantly Predicting Conviction

Variable	b	SE(b)	P	Exp(b)
Reported to VPSO, VPO, or other	0.862	0.363	0.018	2.367
Suspect used alcohol or drugs	0.841	0.230	0.000	2.319
Total charges greater than one	0.584	0.237	0.014	1.794
Suspect admitted guilt or gave a full confession	0.561	0.228	0.014	1.752

Log Likelihood = 93.21; χ^2 = 33.57; $p < .05$.

Source of data: *Alaska State Trooper data (2004)*

Conviction

Characteristics that did not predict conviction. One characteristic analyzed in the full model that did not significantly predict conviction was the suspect's age (12 to 32 years *or* 33 years and older).

Characteristics significantly predicting conviction. The characteristics that predicted conviction in cases of domestic violence incidents included some characteristics that predicted referral and acceptance. It is important to note that the term "conviction" used in this article refers to *any* conviction for *any* charge (not necessarily a domestic violence charge), and includes plea bargains, guilty pleas, and convictions resulting from a bench or jury trial. Each of the following characteristics was found to significantly predict conviction of domestic violence incidents when the other predictive characteristics included in the model were held constant. Cases first reported to a VPSO, a VPO, or a local police department were 2.4 times more likely to result in a conviction than cases first reported to AST. Cases in which the suspect was reported to have used alcohol or drugs prior to the domestic violence incident were 2.3 times more likely to result in conviction than cases with no report of a suspect's alcohol or drug use. Cases were 1.8 times more likely to result in a conviction if there was more than one charge involved, or if the suspect admitted guilt or gave a full confession. (See Table 9.)

Conclusion

Based on our analyses, a number of report, victim, suspect, victim-suspect, and incident characteristics predict prosecution of assaults in domestic violence incidents reported to AST. The identification of these characteristics creates an opportunity to modify policy and/or practice in a way that enhances prosecution of these types of assaults. In the development of policy and/or practice changes, the impact of characteristics predicting prosecution at *each level* (referral, acceptance, and conviction) is equally important to consider: cases must progress through the initial stages of prosecution in order to result in conviction. Therefore, the majority of characteristics that predicted conviction also predicted acceptance or referral of cases.

The presence of certain characteristics seemed to increase the gravity of a case and heighten the likelihood of prosecution. Cases more likely to be prosecuted include those in which the victim was injured, there was more than one charge, and/or the report to law enforcement was made by someone other than the victim. Policies for investigation of assaults in domestic violence incidents should ensure extensive documentation of victim's injuries, corroboration of the victim's description of events, and discovery of all associated, justified charges. A victim's injuries and a report by someone other than the victim can corroborate the victim's description of events. Victim interviews and suspect admission of guilt also made prosecution more likely. Rates of victim interviews by Troopers were high (97%), but additional efforts could be made to interview a larger percentage of known suspects. (77% of suspects were interviewed.) It is important to train law enforcement officers to conduct thorough suspect interviews and interrogations and to employ reliable interviewing techniques that encourage suspects to admit guilt or give a full confession.

Other cases more likely to result in prosecution involved suspects who used alcohol or drugs prior to the assault in domestic violence incident. Therefore, it is essential for Troopers to document suspects' substance use every time it is indicated. Also, cases involving male suspects and assaults between intimate partners who live together were more likely to be prosecuted than other cases. As noted previously, the definition of domestic violence in Alaska statute covers a range of relationships. Troopers make arrests for assaults in domestic violence incidents where the victim-suspect relationship is one of several identified in the statute. However, it is more likely that domestic violence assaults between intimate partners who live together will be prosecuted than assaults between persons involved in other statutorily defined relationships. This may suggest a tendency on the part of prosecutors to view intimate partner domestic violence as an offense warranting more urgent prosecution

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than other forms of domestic violence.

In terms of conviction, assaults in domestic violence incidents that took place in communities with a VPSO or a VPO had a greater likelihood of resulting in conviction than other cases. This supports similar findings identifying predictors of prosecution and conviction in sexual assault cases reported to AST, as well as findings noted by Wood, et al. (see "Attrition in Cases of Violence Against Women Reported to the Alaska State Troopers" in this issue), and findings by Wood and Rosay (see "Case Attrition of Sexual Violence Offenses: Empirical Findings" in the Spring/Summer 2008 issue of the *Alaska Justice Forum*). Increased likelihood of prosecution and conviction for cases first reported to a VPSO or a VPO highlights the importance of the VPSO and VPO programs. This finding suggests that the resources provided by these first responders (i.e., reduced response time and enhanced investigation) increases conviction of assaults in domestic violence incidents. The impact of VPSO and VPO programs on conviction, as well as factors that make intimate partner violence different from other forms of domestic violence, should be examined further. Additional studies could assist in better understanding the variation in prosecution of domestic violence assault cases and the policies and practices that enhance prosecution and conviction rates.

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Attrition in Cases of Violence Against Women Reported to the Alaska State Troopers

Darryl S. Wood, André B. Rosay, Marny Rivera, and Katherine TePas

The statutory requirement that arrests be made for all crimes involving domestic violence (Alaska Statute 18.65.530) is an important dimension of the state's efforts to reduce violent victimization occurring among intimate partners. This policy is rooted in research that suggests mandatory arrest has a specific deterrent effect in cases of misdemeanor assault committed by males against their female intimate partners. Although there is reason to believe mandatory arrest may reduce re-victimization in its own right, the impact of the policy upon further criminal justice system intervention is largely unknown. On the one hand, it is possible that caseload pressures make it difficult for prosecutors to continue with zero-tolerance in intimate partner violence (IPV) cases. But it is also possible that mandatory arrest sets the tone for continual rigorous enforcement of IPV assault cases throughout the remainder of the criminal justice process. In this article we consider police, prosecutor, and court decision-making about IPV cases initially dealt with by the Alaska State Troopers (AST or Troopers) in 2004.

Information gathered from AST and Alaska Department of Law (DOL) case files was analyzed for this article to examine IPV assault case processing decisions. Two basic types of analyses were conducted. We first charted the processing of IPV assault cases as they made their way from the Troopers through the court system. We also used commonly employed categories (i.e., Alaska Native vs. Non-Native and isolated location vs. non-isolated location) to determine if there were variations in the processing of IPV cases relative to the victims' race or geographic location. Together, these analyses allow us (1) to understand how likely it is that IPV assault cases from the Troopers' area of responsibility are fully prosecuted, and (2) to begin to determine if particular aspects of the criminal justice environment have an impact upon the likelihood that IPV assault cases are dealt with fully.

The results presented in this article allow us to consider the attrition of cases of IPV assault reported to the Troopers and prosecuted by the DOL. For our purposes here, *case attrition* refers to the manner in which criminal cases are screened out of the criminal justice process as they are considered at successive decision making points. By definition, for a specific offense type, the number of cases resulting in conviction is smaller than the number of prosecutions which, in turn, is smaller than the number of arrests. Put another way, the greater the proportion of cases screened out of the process, the higher the rate of case attrition.

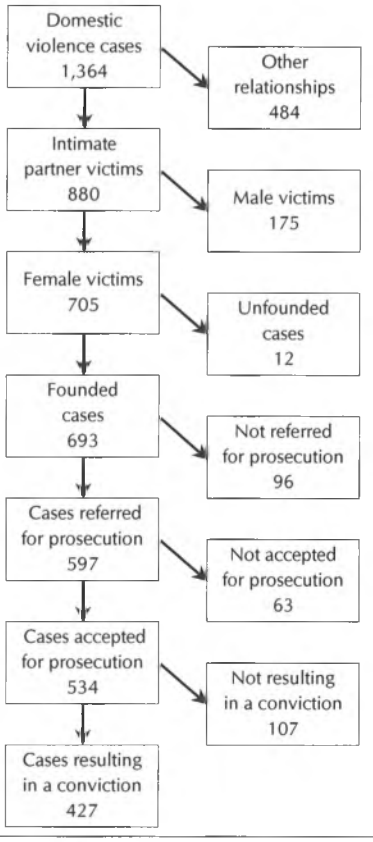
This article focuses upon IPV rather than *domestic violence* because the former is more indicative of the particularly pernicious power-based relationship violence that police and prosecutors have perpetually struggled against and that has served as the impetus for mandatory arrest policies. Under Alaska state law (§18.66.990), domestic violence is inclusive of all violent offenses committed by one household member against another household member where *household members* are broadly defined to include individuals who are related to one-another through common ancestry or marriage, unrelated individuals who are roommates or live-in caretakers, and individuals who are or were intimate partners (i.e., suspects and victims involved together in marital, dating, and/or sexual relationships). From a conceptual standpoint, it makes sense to consider IPV assault separately because it is qualitatively different compared to other types of violence that fall under the umbrella of domestic violence (e.g., child abuse, elder abuse, teenage brothers engaged in fisticuffs) in terms of its etiology and in terms of the nature and severity of official responses.

Likewise, the results presented below focus only on assault cases involving female victims because of the dissimilarities in the IPV assault committed against men compared to that committed against women. (IPV is not a purely heterosexual phenomenon. The analyses presented below include the cases of three women who reported being assaulted by their female partners.) Even though both women and men are violent toward one another when in intimate relationships, the character of women's violence against their male partners is substantially different than men's violence against their female partners in terms of its purpose and its potential for physical harm. Generally speaking, men are much more likely than women to employ physical violence in an instrumental fashion, using it as one method among many to maintain power and control over an intimate partner. Furthermore, the likelihood of physical harm is substantially higher in IPV assault against female victims relative to that of male victims because of the physiological differences between the sexes in terms of size and strength. Given these differences we would expect the victim's sex to have a differential impact on the probability that cases would be screened out during the criminal justice process.

Overall Attrition of IPV Cases

In Figure 1 we consider IPV assault cases reported to AST in 2004 as they made their way through the criminal justice process. First, we see that IPV assault cases made up a majority of the assaults classified as domestic violence. Roughly two-thirds of reported domestic violence cases (65%) involved an assault by one member of an intimate relationship against another member. The remainder of the domestic violence cases included victims and suspects that were connected by some other form of

Figure 1. Processing of Cases of Intimate Partner Violence Against Women Reported to the Alaska State Troopers, 2004



household membership. Of the IPV assault cases reported to police, the large majority (80%) involved a female victim.

Nearly all of the IPV assault cases against female victims that came to the Troopers' attention were *founded* (i.e., deemed to have actually occurred and classified as "crimes known to the police"). Less than two percent of the time was an IPV assault case against a female victim classified as unfounded after further investigation by AST. Some comparison figures are found in Alaska Department of Public Safety data, *Crime Reported in Alaska, 2004*. When compared to the founding rates for all assault cases reported to AST in 2004 regardless of victim-suspect relationship, IPV assault cases against female victims were more likely than simple assaults to be founded (87%) and just as likely as aggravated assaults to be founded (97%).

After establishing that an assault did occur, the next two steps in the process involve decisions about carrying a case forward for prosecution. An investigating Trooper first has to decide whether to refer the case to DOL and then, once referred, a DOL attorney has to choose to accept the case and proceed with prosecution. We see in Figure 1 that a large majority (86%) of IPV assault cases that were known to AST were referred to DOL for prosecution and a slightly larger proportion of those referred cases were accepted by DOL attorneys for further adjudication. Ultimately, of the cases that DOL attorneys accepted for prosecution, most (80%) resulted in a conviction.

To put these rates of prosecution and conviction into context, comparisons can be drawn with similar rates found for other U.S. jurisdictions as published in a recent meta-analysis by Joel Garner and Christopher Maxwell in *Criminal Justice Review* 34(1) in 2009. By any measure, it appears that there is substantially *less* case attrition for IPV assaults reported to AST than any other place in the U.S. where it has been studied. For example, across the studies considered by Garner and Maxwell, the proportion of IPV assault cases known to the police that were not accepted for prosecution was 72 percent. In comparison, only 23 percent of the IPV assault cases known to AST in 2004 were not accepted for prosecution. When the basis of comparison is acquittals per prosecutions, we see that DOL attorneys were much less likely to lose IPV assault cases than what has been reported elsewhere; only 20 percent of the IPV assault cases prosecuted by DOL resulted in acquittal while, on average, half of the cases prosecuted elsewhere in the U.S. did not result in conviction. Overall, of the IPV assaults known to the police, the cases dealt with by AST and DOL were much more likely to result in conviction than what has been found in other U.S. jurisdictions. In 2004, 61 percent of all IPV assault cases known to AST ultimately resulted in a conviction whereas the average conviction rate for founded cases in Garner and Maxwell's meta-analysis was 14 percent. Comparatively speaking, the AST/DOL conviction rate in 2004 was four times greater than is typical in the U.S. With such an extreme difference, it is no wonder that the prosecution and conviction rates shown in Figure 1 rank among or above the highest rates found in individual studies reviewed by Garner and Maxwell. While the DOL rate of prosecuted cases resulting in conviction was surpassed in a few jurisdictions, the AST/DOL rate of prosecutions per founded case and the AST/DOL rate of convictions per founded case were higher than what was reported in any of the American studies considered by Garner and Maxwell. Based upon these comparisons, it is fair to say that the case attrition rate of IPV assaults dealt with by AST and DOL in 2004 was among the lowest anywhere in the U.S.

Comparisons of Attrition by Victim Race and Location

To consider disparities in prosecution rates, we made comparisons of case attrition in terms of the victims' race and in terms of the geographic location where the IPV assault took place. Given the scrutiny placed on the State of Alaska's response to violence against Alaska Native women in rural villages (e.g., *AITC v. Alaska,* 110 P.3d 947, 2005 or Amnesty International's *Maze of Injustice*), these comparisons were made between the cases of Alaska Native and non-Native victims and between the cases that occurred in isolated villages versus cases that occurred in places that are less remote. These results have been used to argue that there is unequal enforcement by the State of Alaska in cases of IPV assault against Alaska Native women.

To test this assertion, we first examined the differences in case attrition of cases of Alaska Native victims compared to cases of non-Native victims. The first two rows of figures in Table 1 allow comparisons between the cases of female Alaska Native and non-Native IPV assault victims in terms of the proportion of all cases reported that were founded, that were referred for prosecution, that were accepted for prosecution, and that resulted in a conviction. With a lack of statistically significant differences between the two groups, it appears that Alaska Native victims' reports of IPV assault are just as likely as non-Native victims' reports of IPV assault to be founded and referred for prosecution by AST, to be accepted for prosecution by DOL, and to result in conviction in state court. In the third and fourth rows of Table 1 the two groups are compared in terms of the proportion of founded cases that resulted in referral for prosecution, acceptance for prosecution, and conviction. Although there was little difference between the referral and acceptance rates for founded cases reported by the two groups of victims, founded IPV assault cases against Alaska Native victims were actually more likely to result in a conviction relative to founded IPV

*Please see **Attrition**, page 4*

Table 1. Attrition of Cases of Intimate Partner Assault Against Women Reported to the Alaska State Troopers, Alaska Native vs. Non-Native Victims, 2004

Total possible cases		Number & percent founded		Number & percent referred		Number & percent accepted		Number & percent convicted	
Alaska Native	Non-Native	Alaska Native	Non-Native	Alaska Native	Non-Native	Alaska Native	Non-Native	Alaska Native	Non-Native
All cases reported									
333	372	325	368	275	322	251	283	213	214
100.0%	100.0%	97.6%	98.9%	82.6%	86.6%	75.4%	76.1%	64.0%	57.5%
Founded cases									
325	368			275	322	251	283	**213**	**214**
100.0%	100.0%			84.6%	87.5%	77.2%	76.9%	**65.5%**	**58.2%**
Referred cases									
275	322					251	283	**213**	**214**
100.0%	100.0%					91.3%	87.9%	**77.5%**	**66.5%**
Accepted cases									
251	283							**213**	**214**
100.0%	100.0%							**84.9%**	**75.6%**

Note: **Bold** type indicates difference between Alaska Native and non-Native victims is statistically significant at the $p < .05$ level.

Attrition

(continued from page 3)

assault cases against non-Native victims. The fifth and sixth rows of figures in Table 1 let us compare the rates of acceptance for prosecution and conviction for those cases that were referred by AST to DOL for prosecution. Once again, the difference in the acceptance rates of referred cases was not statistically significant whereas the conviction rates of the referred cases of Alaska Native victims was higher than the referred cases of non-Native victims. A similar result is found in the bottom two rows of Table 1 in which a greater proportion of cases of Alaska Native victims that were accepted for prosecution resulted in conviction when compared to the corresponding proportion for non-Native victims. Overall, the results of Table 1 indicate that Alaska Native and non-Native IPV assault victims' cases are processed at similar rates and that the only exception is that IPV assault cases are more likely to result in a conviction when the victim is Alaska Native.

Table 2. Attrition of Cases of Intimate Partner Assault Against Women Reported to the Alaska State Troopers, Victims from Isolated vs. Non-Isolated Communities, 2004

Total possible cases		Number & percent founded		Number & percent referred		Number & percent accepted		Number & percent convicted	
Isolated	Non-isolated	Isolated	Non-isolated	Isolated	Non-isolated	Isolated	Non-isolated	Isolated	Non-isolated
All cases reported									
221	484	215	478	179	418	170	364	**149**	**278**
100.0%	100.0%	97.3%	98.8%	81.0%	86.4%	76.9%	75.2%	**67.4%**	**57.4%**
Founded cases									
215	478			179	418	170	364	**149**	**278**
100.0%	100.0%			83.3%	87.4%	79.1%	76.2%	**69.3%**	**58.2%**
Referred cases									
179	418					**170**	**364**	**149**	**278**
100.0%	100.0%					**95.0%**	**87.1%**	**83.2%**	**66.5%**
Accepted cases									
170	364							**149**	**278**
100.0%	100.0%							**87.6%**	**76.4%**

Note: **Bold** type indicates difference between victims from isolated and non-isolated communities is statistically significant at the $p < .05$ level.

To consider the effect of geographic isolation on case attrition, we made comparisons in terms of whether the IPV assault occurred in a village that was difficult for AST to reach to conduct an investigation. Villages were considered isolated if they did not have a local AST post or if they could not be reached by the Troopers from a post via automobile. The results of these comparisons are made in Table 2. In many ways, the results for an isolated/non-isolated comparison mirror the results presented in Table 1 regarding the differences in the processing of Alaska Native and non-Native victims' cases. First, the results indicate that isolation did not have an effect on the proportion of cases that were founded or that were referred for prosecution. In other words, it appears that the difficulty of reaching a village to make an investigation did not make it less likely that an IPV assault case would be carried forward by AST to DOL for prosecution. Next, there is some indication that DOL is more likely to accept IPV assault cases that occurred in isolated villages as compared to those cases that occurred in non-isolated locales; we see in Table 2 that there was a statistically significant difference in the proportion of cases referred by AST that were accepted for prosecution and that it was the cases from the isolated villages that were least likely to be screened out at that point. Finally, the results in Table 2 indicate that the conviction rate for cases that occurred in isolated villages was higher than for cases from non-isolated villages for all possible bases of calculation (i.e., convictions per reported case, convictions per founded case, convictions per case referred for prosecution, and convictions per case accepted for prosecution). Taken as a whole, it appears that the isolation of a village where an IPV assault occurs does not increase the likelihood of case attrition. If anything, these results indicate that IPV assault cases from isolated villages are not neglected by the State of Alaska but are instead more likely to be fully prosecuted.

Conclusion

Although Alaska's mandatory arrest law is the only policy specifically requiring official response to IPV cases, it appears that the law's spirit of full-enforcement guided other decisions regarding IPV cases as they continued through the criminal justice process in 2004. And while attrition still occurred in the IPV cases handled by AST and the DOL, it happened at a rate that was substantially less than what has been found outside of Alaska. By most standards, the fact that at any given decision point there was less than a one-in-five chance that a case would be screened out of the criminal justice process is an indication that IPV is taken seriously in rural Alaska and that AST and the DOL are willing and able to deal with the cases brought to their attention. Furthermore, this appears to be as true for Alaska Native victims as it is for non-Native victims and it does not seem to be affected by the difficulties of travel to conduct investigations.

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Table 3. Prosecution and Conviction Rates for Cases of Intimate Partner Assault Against Women Reported to the Alaska State Troopers in 2004 vs. Rates Reported in National Meta-Analysis.*

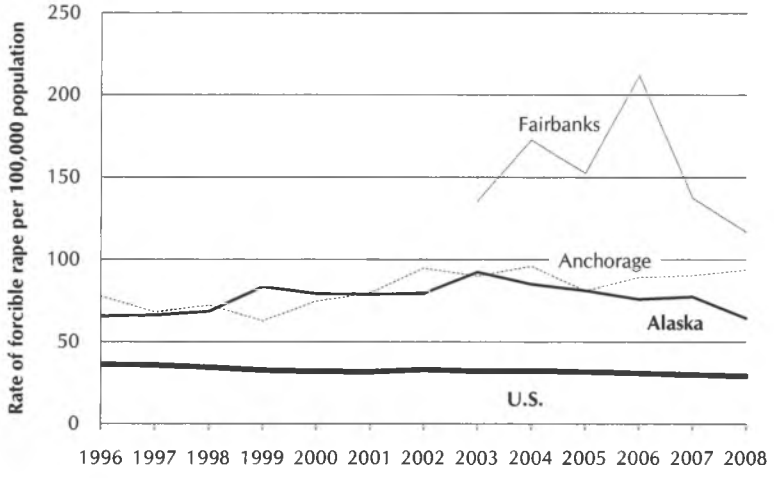
Case source and outcome	AST/DOL rate	U.S. rate	Range of U.S. rates
Known assaults accepted for prosecution	77%	28%	3% to 62%
Prosecuted assaults resulting in conviction	80%	50%	8% to 99%
Known assaults resulting in conviction	61%	14%	4% to 31%

*Adapted from H. Garner, J.H. & Maxwell, C.D. 2009. Prosecution and conviction rates for intimate partner violence. *Criminal Justice Review*, 34(1), 44-79.

Reducing Violence Against Women in Alaska

Alaska has long been plagued by astonishingly high rates of violence against women. National statistics on forcible rapes reported to law enforcement provide one example. Relative to the average U.S. rate from 2003 to 2008, the average Alaska rate was 2.6 times higher, the average Anchorage rate was 2.9 times higher, and the average Fairbanks rate was 5.0 times higher. Alaska has the highest rate of forcible rape reported to law enforcement out of all U.S states. While changing these trends is a daunting task, several initiatives are currently being considered. In chronological order, they include recommendations from the Alaska Senate Judiciary Committee and initiatives from Governor Sean Parnell.

Figure 1. Rates of Forcible Rape Reported to Law Enforcement in the U.S., Alaska, Anchorage, and Fairbanks, 1996–2008



Source of data: *Uniform Crime Reports, 1996–2008*

Alaska Senate Judiciary Committee Recommendations to Reduce Sexual Assault in Alaska

Four major areas are outlined in the recommendations: (1) getting better data on sexual assault, (2) increasing the number of successful prosecutions, (3) addressing the alcohol and sexual assault nexus, and (4) reducing recidivism by known sex offenders.

A brief summary of the recommendations follows:

- Improve data systems to track sexual assault cases statewide from report to conviction.
- Fund a victimization study to determine the actual rates of both reported and unreported sexual assaults.
- Increase the number of villages with local law enforcement through the Village Public Safety Officer (VPSO) program.
- Consider grant funding for local hospitals to provide qualified Sexual Assault Nurse Examiners (SANEs) and continue to support the cost of existing programs.
- Review ways to increase the State Crime Lab's ability to process DNA evidence in a timely way.
- Continue to support, as a state, programs and policies to reduce alcohol consumption.
- Address alcohol use specifically, and its potential negative impact on personal safety, in education programs about sexual assault awareness and prevention.
- Continue to fund and expand Alaska sex offender management programs.
- Expand Alaska's Internet Crimes Against Children Task Force which locates offenders who are looking for victims using the internet.

Governor Sean Parnell's Initiative to Reduce Domestic Violence and Sexual Assault

Three major areas are outlined in the initiative: (1) putting abusers behind bars, (2) helping victims heal, and (3) preventing abuse.

A brief summary of the recommendations follows:

- Launch a public education campaign encouraging Alaska's men to "Choose Respect."
- Increase law enforcement presence in every community that desires it, with new Village Public Safety Officers (VPSOs) and Alaska State Troopers.
- Fund specialized domestic violence/sexual assault training across multiple disciplines.
- Toughen penalties for sexual assault crimes, and toughen guidelines for prosecutors.
- Strengthen sex offender registry requirements.
- Expand prisoner re-entry programs to reduce recidivism among offenders.
- Increase support for victims of abuse including funding for shelters and the availability of *pro bono* legal services.
- Create a position within the Alaska Department of Law to coordinate state, federal, tribal, and non-profit domestic violence and sexual assault programs.
- Work with youth, community leaders, private sector, and religious organizations to raise awareness and develop prevention strategies.

For additional information, see the UAA Justice Center's violence against women webpage: (http://justice.uaa.alaska.edu/vaw/), the Alaska Senate Judiciary Committee's "Report and Recommendations: Reducing Sexual Assault in Alaska" (http://www.aksenate.org/french/101609_Senate_Judiciary_report_on_sexual_assault.pdf), and Governor Sean Parnell's "Choose Respect" Initiative (http://gov.state.ak.us/pdf/DVSA%20Fact%20Sheet%20final.pdf).

Visiting Faculty

Dr. Adrienne Freng, Associate Professor in the Department of Criminal Justice at the University of Wyoming, joins the Justice Center as Visiting Faculty for the Spring 2010 semester. Dr. Freng received her Ph.D. in sociology from the University of Nebraska-Lincoln. Her research areas include juvenile justice, gangs, Native American justice issues, and research methods. Dr. Freng's experience includes serving as a counselor in a group home for delinquent boys and as an intern probation officer.

Animal Abuse and Domestic Violence

Concern that acts of animal abuse are connected with or are predictors of domestic violence prompted a number of specific research studies in the 1990s. This early work focused on describing interviews with women in battered women's shelters and highlighted the frequency with which women reported abuse of pets by their partners. The interviews documented a high rate of pet abuse and appeared to indicate that animal abuse in the home and concern for pets affected *if* and *when* a woman sought assistance at a shelter—particularly because shelters did not normally accept pets.

As more attention was given to animal abuse and its impact in the context of domestic violence assaults, additional studies were undertaken. Frank Ascione discussed the limitations of some of these past studies in his article, "Emerging Research on Animal Abuse as a Risk Factor for Intimate Partner Violence" in the Civic Research Institute's 2007 publication, *Intimate Partner Violence*. He noted that although twelve different studies found (1) a high rate of pet ownership by domestic violence victims in shelters, (2) a substantial rate of children's exposure to pet abuse, and (3) clear indications that domestic violence victims' concern for pets affected their decision to stay in or leave a relationship with a batterer, more research is needed that includes women in domestic violence situations who have not chosen to go to a shelter, in addition to women in shelters. In response to the concern expressed by battered women for their pets, many areas developed "safe haven" programs for free fostering of pets of victims of domestic violence. Anchorage is currently the only area in Alaska with a "safe haven" program. It is administered by Friends of Pets, a local nonprofit animal welfare group, in collaboration with the Abused Women's Aid in Crisis (AWAIC) shelter. Another local nonprofit, the Eva Foundation Pet's Program, provides post-shelter transition services to domestic violence victims and their pets.

In addition, since 2006 ten states have enacted domestic violence protective orders covering pets: California, Colorado, Connecticut, Illinois, Louisiana, Maine, Nevada, New York, Tennessee, and Vermont.

Research involving a larger sample population of women was reported by Ascione, et al. in 2007 in *Violence Against Women*, "Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Partner Violence and Nonabused Women." The findings of this study agreed with earlier research about the high rate of pet abuse reported by victims of intimate partner violence (IPV). Responses showed that women in domestic violence shelters were nearly 11 times more likely to report that their partner had engaged in pet abuse than women who said they had not experienced intimate partner violence. This study again stressed the need for further research on co-occurring pet abuse and IPV with larger and more diverse populations, i.e., urban, suburban, and rural victims of intimate partner violence, as well as non-victims of IPV.

Catherine Simmons and Peter Lehman addressed some of these issues in a 2007 *Journal of Interpersonal Violence* article, "Exploring the Link Between Pet Abuse and Controlling Behaviors in Violent Relationships." In their study of 1,283 women who owned pets and were sheltered at an urban domestic violence center in Texas between 1998 and 2002, they concluded that "[m]en who abuse the family pet appear to be more dangerous than men who do not." The authors did not find that pet abuse was always a form of controlling behavior in incidents of domestic violence assault. However, they did conclude:

> Despite the limitations of this study, it is clear that animal cruelty is an important factor for domestic violence workers to address in assessment and treatment of both victim and perpetrator populations. Batterers who also abuse their pets are both more controlling and use more dangerous forms of violence than batterers who do not. Therefore, addressing whether pet abuse has occurred in the home can help workers in the domestic violence field better understand the behavior of the batterer and the overall risk they present to their partner.

Animal abuse is one factor in the complex dynamic of intimate partner violence, and can be used by law enforcement and domestic violence advocates in assessing risk. In 2008, the Anchorage Police Department (APD) began a program to target animal abuse and to look at its connection to domestic violence. Detective Jackie Conn was assigned as the liaison to the Anchorage Animal Care and Control Center and received training from the Law Enforcement Training Institute National Cruelty Investigations School and from the First Strike program developed by the Humane Society of the United States to raise awareness about the connection between animal cruelty and other violent crime. Detective Conn now trains APD personnel in recognizing animal abuse, and relating it to the possible presence of other types of abuse in the home. She works closely with Alaska Department of Law Assistant District Attorney Joan Wilson who is regularly assigned the prosecution of animal abuse

Further Reading about Animal Abuse and Domestic Violence

Arkow, Phil. (Summer 2007). "Expanding Domestic Violence Protective Orders to Include Companion Animals." *American Bar Association Commission on Domestic Violence ENewsletter* 8. (http://www.abanet.org/domviol/enewsletter/vol8/expertArkow.html).

Ascione, Frank R. (2007). "Emerging Research on Animal Abuse As a Risk Factor for Intimate Partner Violence." In Kathleen A. Kendall-Tackett and Sarah M. Giacomoni, editors, *Intimate Partner Violence*, pp. 3-1 – 3-17. Kingston, NJ: Civil Research Institute. (http://amrric.org/sites/default/files/docs/resources/Chapter%203%20Intimate%20Partner%20Violence%20Ascione.pdf)

Ascione, Frank R.; Weber, Claudia V.; Thompson, Teresa M.; Heath, John; Maruyama, Mika; and Hayashi, Kentaro. (Apr 2007). "Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Violence and by Nonabused Women." *Violence Against Women* 13(4): 354–373. (http://vaw.sagepub.com/cgi/content/abstract/13/4/354).

Ascione, Frank R.; Weber, Claudia V.; and Wood, David S. (1997). "The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered." *Society & Animals: Journal of Human-Animals Studies* 5(3). (http://www.psyeta.org/sa/sa5.3/Ascione.html).

Faver, Catherine A. and Strand, Elizabeth B. (Dec 2003). "To Leave or to Stay: Battered Women's Concern for Vulnerable Pets ." *Journal of Interpersonal Violence* 18(12): 1367–1377. (http://jiv.sagepub.com/cgi/content/abstract/18/12/1367).

Lockwood, Randall. (2006). *Animal Cruelty Prosecution: Opportunities for Early Response to Crime and Interpersonal Violence*. Alexandria, VA: American Prosecutors Research Institute. (http://www.ndaa.org/pdf/animal_cruelty_06.pdf).

Simmons, Catherine A. and Lehman, Peter. (Sep 2007). "Exploring the Link Between Pet Abuse and Controlling Behaviors in Violent Relationships." *Journal of Interpersonal Violence* 22(9): 1211–1222. (http://jiv.sagepub.com/cgi/content/abstract/22/9/1211).

cases. For the period 2002–2009, 121 misdemeanor animal cruelty cases under Alaska Statute 11.61.140 and 11.61.145 were referred and 94 prosecuted. During the same period, one felony case was referred and prosecuted. Case statistics are also being compiled to better understand the relationship between domestic violence and animal abuse.

Leading Causes of Death

A look at recent data on leading causes of death in Alaska and the U.S. shows that malignant neoplasms (cancer) and heart disease rank as the top two causes. Although intentional self-harm (suicide) and assault (homicide) do not rank in the U.S. top ten leading causes of death, they have ranked as leading causes of death in Alaska for many years. A comparison of rankings of suicide and homicide as causes of death for specific age groups in Alaska and the U.S. reveals some similarities in trends.

In 2008 in Alaska, suicide was ranked number 6 among the top ten causes of death for the entire population. Suicide has been ranked number 5 or 6 consistently for the past decade. Homicide has been reported as the number 8 cause of death in 1999, number 10 in 2001, and number 10 again in 2007. The rankings for the leading causes of death by specific age group in Alaska show that suicide and homicide are in the top five for each age group up to the age of 44. In Alaska, and the nation as a whole, people aged 15–34 are more likely to die in an accident, at the hands of another, or by suicide, than by cancer or heart disease. For the period 2005–2007, suicide and homicide were the second and third leading causes of death for both 15–24 and 25–34 year olds. Suicide was the second leading cause of death for 35–44 year olds, and homicide was fifth. Among 45–54 year olds, suicide was the fourth leading cause of death.

Nationally, suicide and homicide are not among the ten leading causes of death according to the most current final data available: 2006. However, suicide ranked number 11 in causes of death for the overall population for 2006; homicide ranked 15.

In the U.S. in 2006, homicide and suicide were the second and third leading causes of death, respectively, for 15–24 year olds, while for 25–34 year olds, suicide ranked second and homicide third. Suicide was the fourth leading cause of death for 35–44 year olds, and the fifth leading cause for 45–54 year olds. These rankings mirror those of Alaska for those aged 15–44, where both suicide and assault were in the top five leading causes of death. Suicide was one of the top five causes of death for 45–54 year olds.

This high ranking of suicide as a cause of death for 15–44 year olds is also seen globally. According to the World Health Organization, suicide is among the top three leading causes of death in 15-44 year olds. For the worldwide population, the top two leading causes of death are coronary heart disease, and stroke and other cerebrovascular diseases.

The leading causes of death for the overall population continue to be related to diseases of the body; however, the growing rate of suicide among young people and the suicide rate among other age groups, as well as the rate of homicide, are the focus of national and international study and prevention programs.

Table 1. Five Leading Causes of Death by Age Group, U.S. (2006) and Alaska (2005–2007)

	U.S. (2006)		Alaska (2005–2007)		
Rank	Cause	Deaths	Rank	Cause	Deaths
	0–4 years				
1	Congenital anomalies	6,334	1	Conditions originating in the perinatal period	68
2	Short gestation	4,841	2	Unintentional injury	49
3	Unintentional injury	2,757	3	Congenital malformations	43
4	SIDS	2,323	4	SIDS	18
5	Maternal pregnancy complications	1,683	5	Assault (homicide)	7
	5–14 years				
1	Unintentional injury	2,258	1	Unintentional injury	48
2	Malignant neoplasms	907	2	Congenital malformations	6
3	Homicide	390	3	Malignant neoplasms	5
4	Congenital anomalies	344	4	Intentional self-harm (suicide)	4
5	Heart disease	253	5	Assault (homicide)	3
			5	Diseases of the heart	3
	15–24 years				
1	Unintentional injury	16,299		Unintentional injury	150
2	Homicide	5,717		Intentional self-harm (suicide)	101
3	Suicide	4,189		Assault (homicide)	34
4	Malignant neoplasms	1,664		Malignant neoplasms	14
5	Heart disease	1,076		Diseases of the heart	10
	25–34 years				
1	Unintentional injury	14,954		Unintentional injury	162
2	Suicide	4,985		Intentional self-harm (suicide)	72
3	Homicide	4,725		Assault (homicide)	29
4	Malignant neoplasms	3,656		Malignant neoplasms	19
5	Heart disease	3,307		Diseases of the heart	17
	35–44 years				
1	Unintentional injury	17,534	1	Unintentional injury	161
2	Malignant neoplasms	13,917	2	Intentional self-harm (suicide)	85
3	Heart disease	12,339	3	Malignant neoplasms	82
4	Suicide	6,591	4	Diseases of the heart	68
5	HIV	4,010	5	Assault (homicide)	26
			5	Chronic liver disease and cirrhosis	26

	U.S. (2006)		Alaska (2005–2007)		
Rank	Cause	Deaths	Rank	Cause	Deaths
	45–54 years				
1	Malignant neoplasms	50,334	1	Malignant neoplasms	328
2	Heart disease	38,095	2	Diseases of the heart	204
3	Unintentional injury	19,675	3	Unintentional injury	184
4	Liver disease	7,712	4	Intentional self-harm (suicide)	78
5	Suicide	7,426	5	Chronic liver disease and cirrhosis	59
	55–64 years				
1	Malignant neoplasms	101,454	1	Malignant neoplasms	546
2	Heart disease	65,477	2	Diseases of the heart	309
3	Chronic lower respiratory disease	12,375	3	Unintentional injury	93
4	Unintentional injury	11,446	4	Chronic lower respiratory diseases	73
5	Diabetes mellitus	11,432	5	Diabetes	69
	65+ years				
1	Heart disease	510,542	1	Malignant neoplasms	1,347
2	Malignant neoplasms	387,515	2	Diseases of the heart	1,249
3	Cerebrovascular	117,010	3	Cerebrovascular diseases	390
4	Chronic lower respiratory disease	106,845	4	Chronic lower respiratory diseases	358
5	Alzheimer's disease	71,660	5	Alzheimer's disease	179
	Total population				
1	Heart disease	631,636	1	Malignant neoplasms	2,341
2	Malignant neoplasms	559,888	2	Diseases of the heart	2,055
3	Cerebrovascular	137,119	3	Unintentional injury	979
4	Chronic lower respiratory disease	124,583	4	Cerebrovascular diseases	506
5	Unintentional injury	121,599	5	Chronic lower respiratory diseases	467

Homicide Suicide

Source of data: *National Vital Statistics System, National Center for Health Statistics, Centers for Disease Control (2006); Alaska Bureau of Vital Statistics (2005–2007)*

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Assaults in Domestic Violence Incidents Reported to Alaska State Troopers

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For other articles and publications related to domestic violence and violence against women, see:
http://justice.uaa.alaska.edu/vaw/index.html

Abstract: *This study examined 1,281 cases with an assault charge involving domestic violence reported to Alaska State Troopers in 2004, and excluded any cases reported to local or municipal departments.*

- *Eighty-two percent of reports were handled by three detachment areas: 32% in C – Western Alaska, 29% in D – Interior Alaska, and 22% in B – Southcentral Alaska. Troopers received 80% of the reports, while 20% were received by Village Police Officers, Village Public Safety Officers, or Tribal Police Officers. Eighty-one percent of the assault charges were in the fourth degree. Eighty-four percent of assaults were reported within 24 hours, and 89% of victims and 81% of suspects were interviewed on the day of the report.*
- *Seventy-six percent of suspects were male and 24% were female. On average, suspects were 33 years old and victims were 32 years old. The majority of assaults in domestic violence incidents (86%) were intra-racial. Fifty-seven percent of suspects and 32% of victims used alcohol. Overall, alcohol was involved in 59% of domestic violence incidents reported to Troopers.*
- *Most assaults in domestic violence incidents (75%) occurred between victims and suspects who were staying or living together. The most common forms of violence (disclosed by victims and documented by officers) included pushing, grabbing, or shoving the victim (in 48% of incidents), punching the victim (in 29%), and slapping or hitting the victim (in 28%). Weapons such as knives or guns were rarely used. The most common injuries included bruising (for 38% of victims), lacerations or bite marks (for 27%), bloody nose or lips (for 10%), and black or swollen eyes (for 10%). Forty-three percent of incidents occurred in the presence of children.*
- *Eighty percent of cases were referred to the Alaska Department of Law for prosecution, 68% were accepted for prosecution, and 54% resulted in a conviction. Overall conviction rates were slightly lower for female suspects, but conviction rates were generally not affected by victim gender or victim-suspect relationship.*

Researchers, criminal justice system professionals, victim advocates, and policymakers agree that domestic violence is an undeniable urban and rural problem in Alaska and the nation. Detailed data on domestic violence incidents in the state are sparse, except for ongoing data collection by the Municipality of Anchorage. Now, a recent joint study by the Justice Center, the Alaska State Troopers, and the Alaska Department of Law looks for the first time at reports of assaults in domestic violence incidents made to Troopers for populations outside of Anchorage. Focusing on reports made in 2004 from communities served primarily by the Troopers, the study reviews a final sample of 1,281 cases with an assault charge involving domestic violence. Only reports to the Troopers were included in this study; reports to local or municipal police were not reviewed.

Some preliminary findings mirror national and Anchorage statistics: the majority of domestic violence assault incidents occur between victims and suspects of the same race, and the victim's home is the most common location of the domestic violence incident. On the other hand, both Anchorage data and the data from this study show a much higher use of alcohol by suspects and victims in Alaska than is reported nationally.

Report Characteristics

The majority of reports to Troopers (82%) were handled by three detachment areas: C—Western Alaska (32%), D—Interior Alaska (29%), and B—Southcentral Alaska (22%) (Table 1). While fifty-eight units received at least one report in 2004, over 90 percent of reports came from roughly 18 units or geographic areas (Table 2). Fairbanks Alaska State Trooper (AST) Enforcement and Investigation Units received the highest number of reports (23%) with Palmer AST Enforcement and Investigation Units and Soldotna AST Enforcement and Investigation Units having the second and third highest percentage of reports (19% and 9% respectively). Units in Nome received seven percent of reports while units in Bethel, Aniak, Kotzebue, and Kodiak each received four or five percent of all reports.

Troopers received 80 percent of reports while the remaining 20 percent were received by Village Police Officers, Village Public Safety Officers, or Tribal Police Officers. Reports of assaults in domestic violence incidents were most likely to come from victims (57%), though third parties, including family members, friends, officials, strangers and others, initiated 43 percent of reports.

The 1,281 cases in this study included a total of 1,803 assault charges and 604 other

Table 1. Total Number of Reports by Detachment

Detachment	Reports N	Reports %
C	409	31.9 %
D	367	28.6
B	275	21.5
E	171	13.3
A	49	3.8
ABI	10	0.8
Total	**1,281**	

Source of data: *Alaska State Troopers (2004)*

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Table 2. Total Number of Reports by Unit for Units with at Least One Percent of all Reports

Detachment	Reports N	Reports %
Fairbanks AST Enforcement and Investigation	295	23.0 %
Palmer/Wasilla AST Enforcement and Investigation	237	18.5
Soldotna AST Enforcement and Investigation	117	9.1
Nome AST Enforcement, VPSO. and WAANT	88	6.9
Bethel AST Enforcement and VPSO	60	4.7
Aniak AST Enforcement	58	4.5
Kotzebue AST Enforcement and VPSO	56	4.4
Kodiak AST Enforcement , VPSO and ABWE	55	4.3
St. Marys AST Enforcement	33	2.6
Ketchikan AST Enforcement	28	2.2
Glennallen AST Enforcement	24	1.9
Homer AST Enforcement	23	1.8
Galena AST Enforcement	19	1.5
King Salmon AST Enforcement	17	1.3
Northway AST Enforcement	17	1.3
Tok AST Enforcement	15	1.2
Juneau AST Enforcement	13	1.0
Talkeetna AST Enforcement	13	1.0
Total	**1,168**	**91.2 %**

Source of data: *Alaska State Troopers (2004)*

charges. The most common assault charges (81%) were for fourth degree assaults and fewer charges were leveled for third through first degree felony assaults. Thirty-one percent of cases involved other charges. The most common other charges included interfering with a report of a crime involving domestic violence, criminal mischief, reckless endangerment, misconduct involving a weapon, DUI/reckless driving, resisting arrest, misconduct involving a controlled substance, and criminal trespass.

The time interval between the incident, the report to Troopers, and the Troopers' response was short, even with transportation and distance issues. The majority of reports (84%) were made the day of the domestic violence assault incident and 97 percent of reports were made within one week.

Suspect and Victim Characteristics

From the 1,281 cases included in this study, we gathered information on 1,356 suspects and 1,523 victims, though information was not always available for every suspect or every victim. Over three-quarters of the suspects were male while only 24 percent were female. Victim ages ranged from under one year to eighty-four years old. Most victims were in the following age groups: 21–30 years (26%), 31–40 years (22%), and 41–50 years (19%). Suspect ages ranged from 10 years old to eighty-eight years old. The majority of suspects were adults (94%). Starting with the group of suspects 21 or older, the number of suspects in each age group decreased as age increased. More specifically, 21–30 year olds made up 31 percent of suspects, 31–40 year olds made up 28 percent of suspects, 41–50 year olds made up 19 percent of suspects, and suspects 51 years or older made up 7 percent of suspects. Most suspects were White (50%) or Native (47%) and most victims were also White (51%) or Native (47%) (Table 3).

The average age of suspects (33) was quite similar to the average age of victims (32). Thirty-nine percent of assaults in domestic violence incidents took place between suspects and victims in the same age group while 61 percent took place between suspects and victims in different age groups. The age groups most commonly shared by suspects and victims involved in assaults in domestic violence incidents included 21 to 30 year olds (38%), 31 to 40 year olds (27%) and 41 to 50 year olds (19%).

In contrast to the age groups of suspects and victims, the majority of assaults in domestic violence incidents (86%) were intraracial (occurring between suspects and victims of the same race). Of all intraracial assaults in domestic violence, 51 percent occurred between White suspects and White victims and 48 percent occurred between Native suspects and Native victims.

We examined alcohol and substance use among victims. Over a third of female victims (35%) and 27 percent of male victims used alcohol prior to the assault in domestic violence incident, but only two percent of female victims and less than one percent of male victims used illicit drugs (Table 4). We also examined alcohol and substance use among suspects. Fifty-eight percent of male suspects and 54 percent of female suspects used alcohol prior to the assault. Only three percent of male suspects and two percent of female suspects used an illicit drug prior to the assault. Overall, alcohol was involved in 59 percent of domestic violence incidents reported to Troopers. Nationally, for the period 2001–2005, 42 percent of victims reported the presence of alcohol or drugs during a domestic violence incident, while in Anchorage for the period 1989–2002 there was documented involvement of alcohol in 49 percent of the reported cases.

Many of the suspects (79%) remained at the location of the assault. Specifically, 76 percent of male suspects and 86 percent

Table 3. Demographic Characteristics of Suspects and Victims

Column percentages.

	Suspects		Victims		Intragroup	
	N	%	N	%	N	%
Age group						
1 to 10	3	0.2 %	54	3.6 %	2	0.3 %
11 to 17	94	6.1	174	11.5	23	3.9
18 to 20	122	8.0	131	8.6	32	5.5
21 to 30	477	31.2	397	26.2	225	38.3
31 to 40	433	28.3	326	21.5	160	27.3
41 to 50	288	18.8	284	18.7	114	19.4
51 or over	113	7.4	151	10.0	31	5.3
Total	**1,530**		**1,517**		**587**	
Race						
Native	722	46.9 %	720	47.3 %	628	48.1 %
White	767	49.8	770	50.6	667	51.1
Black	38	2.5	26	1.7	10	0.8
Other	12	0.8	6	0.4	—	—
Total	**1,539**		**1,522**		**1,305**	

Source of data: *Alaska State Troopers (2004)*

Table 4. Male and Female Victim and Suspect Characteristics

Row percentages.

	Female			Male		
Characteristic	N	%	Total	N	%	Total
Victims						
Gender	1,047	69.6 %	**1,047**	458	30.4 %	**458**
Used alcohol	347	34.7	**1,001**	118	26.9	**438**
Used drugs	16	1.6	**1,021**	2	0.4	**451**
Present when AST arrived	998	96.9	**1,030**	424	95.1	**446**
Interviewed	985	94.1	**1,047**	416	93.3	**446**
Suspects						
Gender	319	23.6 %	**319**	1,034	76.4 %	**1,353**
Used alcohol	159	53.7	**296**	553	58.0	**953**
Used drugs	7	2.3	**299**	26	2.7	**970**
Present when AST arrived	259	86.0	**301**	775	76.2	**1,017**
Interviewed	269	88.8	**303**	775	75.8	**1,023**

Source of data: *Alaska State Troopers (2004)*

of female suspects were still at the scene of the assault when Troopers arrived. Troopers were able to interview 76 percent of male suspects and 89 percent of female suspects.

Eighty-one percent of suspects were interviewed on the day of report. Ninety-six percent of all suspect interviews occurred within one week of the report. Troopers interviewed 95 percent of the victims, with 89 percent being interviewed on the day of the report, and 98 percent of the interviews being completed within one week.

The total number of charges per suspect (including both assault and other charges), the number of assault charges, and the number of other charges are summarized in Table 5. On average, each suspect received a total of 1.78 charges, including an average of 1.33 assault charges and 0.45 other charges. Of the 1,356 suspects, 200 (15%) had multiple assault charges and 401 (29%) had at least one other charge. As a result, 580 (43%) of the suspects therefore had a total number of charges greater than one. Overall, the 1,356 suspects generated a total of 2,407 charges, including 1,803 assault charges and 604 other charges.

Table 5. Number of Total, Assault, and Other Charges per Suspect

Column percentages.

	Total charges		Assault charges		Other charges	
Number	N	%	N	%	N	%
0	0	0.0 %	0	0.0 %	955	70.4 %
1	776	57.2	1,055	77.8	274	20.2
2	344	25.4	216	15.9	82	6.0
3	121	8.9	54	4.0	25	1.8
4	63	4.6	18	1.3	16	1.2
5	26	1.9	7	0.5	3	0.2
6 or more	26	1.9	6	0.4	1	0.1
Total	**1,356**		**1,356**		**1,356**	

Source of data: *Alaska State Troopers (2004)*

Table 6. Suspects with Domestic Violence Protection Orders or who Violated Conditions of Release or Probation

Row percentages.

	No		Yes		
Characteristic	N	%	N	%	Total
DVPO for this victim	1,330	98.7 %	17	1.3 %	**1,347**
Violated conditions of release	1,320	97.9	28	2.1	**1,348**
Violated conditions of probation	1,280	95.6	59	4.4	**1,339**

Source of data: *Alaska State Troopers (2004)*

Despite the number and types of offenses suspects were charged with as a result of the assaults in domestic violence incidents, few suspects (just over 1%) had an existing domestic violence protection order filed against them by the victim at the time of the offense (Table 6). Likewise, few suspects were violating conditions of release or probation. Specifically, two percent of suspects were documented as violating a condition of release with their current charges. Another four percent of suspects violated documented conditions of their probation with the current charges. It is important to note that the percentage of suspects violating conditions of release may be greater than those reported here, because these conditions are not always documented in APSIN (Alaska Public Safety Information Network) and are not readily available to Troopers, or for our analysis.

Incident Characteristics

The presence of children during a domestic violence incident continues to be a serious concern. In this study, the victim's or suspect's children under the age of 18 were witnesses to 43 percent of the incidents (Table 7). In Anchorage during 1999–2002, 42 percent of domestic violence incidents occurred with children under the age of 18 present. Nationwide, in 43 percent of the incidents with female victims during 2001–2005, children under the age of 12 were residing in the household where the incident took place. Studies discussed by John L. Worrall in *Crime Control in America: An Assessment of the Evidence* highlight concern regarding children who are present during domestic violence. Exposure to such violence is associated with both child abuse and later delinquency.

Most assaults in domestic violence incidents (75%) occurred between victims and suspects who were staying or living together at the time of the incident. For the remaining quarter of incidents that occurred between suspects and victims who did not stay or live together, 34 percent occurred between victims and suspects who met in a

Table 7. Presence of Children During Assault

Victim and/or suspect's child present	N	%
No	654	57.0 %
Yes	493	43.0
Total	**1,147**	

Source of data: *Alaska State Troopers (2004)*

public place, and 32 percent resulted from invitation by the suspect or victim. In 25 percent of incidents (where suspects and victims were not living together) the suspect was uninvited or forced entry, and in nine percent of these incidents the suspect entered through an open window or unlocked door.

The use of a traditional weapon such as a knife or a gun was extremely rare; each weapon was used in fewer than four percent of assaults in domestic violence incidents. While still fairly infrequent, suspects were more likely to throw something at the victim (9% of incidents) or hit the victim with an object (10%) rather than use a traditional weapon. Nationwide in 2001–2005, 19 percent of domestic violence incidents with a female victim reported a traditional weapon present, while 31 percent of incidents with a male victim reported a weapon.

We also gathered information about the presence of nine specific violent acts and seven types of threats in the assaults in domestic violence incidents. Only forms of violence that were documented as a result of victim disclosure or officer inquiry, rather than all forms of violence that occurred, were included for analysis. The three most common forms of violence disclosed by victims or documented as a result of officer inquiry included pushing, grabbing or shoving the victim (48%), punching the victim (29%), and slapping or hitting the victim (28%). Documented sexual assault of the victim occurred in only one percent of the cases.

Documented injuries to victims and emergency medical treatment data were also collected and analyzed. The percentage of victims who sustained the most common types of documented injuries included the following: bruising (38%), lacerations or bite marks (27%), bloody nose or lips (10%) and black or swollen eyes (10%). Overall, few victims (12%) received any type of emergency medical treatment for their injuries.

Legal Resolutions

Mandatory arrest in domestic violence cases has been in effect in Alaska since 1996. This law places additional requirements on law enforcement when investigating a domestic violence report and provides criteria for assessing whom to arrest if there are cross complaints "arising from the same incident." (See "Mandatory Arrest in Domestic Violence Cases" accompanying this article.)

Most of the cases (96%) were closed and referred for prosecution including cases that were closed by arrest (79%), and those closed and referred (13%). The remaining cases were closed after investigation (2%) or closed as unfounded (2%) in cases where a suspect was not arrested. On average, it took 6.30 weeks to close a case after it was reported, and 87 percent of cases were closed within 90 days.

An important component of this study involved tracking assaults in domestic

Mandatory Arrest in Domestic Violence Cases

Alaska's mandatory arrest statute was passed as part of the Domestic Violence Prevention and Victim Protection Act of 1996 with the support of prosecutors, law enforcement, and advocates for domestic violence victims in the state. Alaska Statute 18.65.530, "Mandatory arrest for crimes involving domestic violence, violation of protective orders, and violation of conditions of release," sets out conditions for arrest and minimum sentencing requirements. A law enforcement officer is required to make an arrest with or without a warrant:

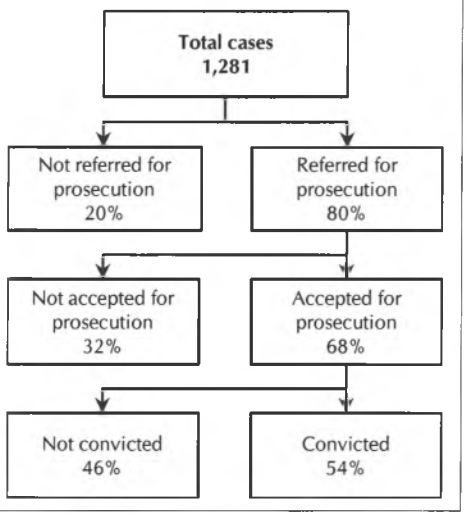
> if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours, (1) committed domestic violence, except an offense under AS 11.41.100-11.41.130, whether the crime is a felony or misdemeanor; (2) committed the crime of violating a protective order in violation of AS 11.56.740; (3) violated a condition of release imposed under AS 12.30.025, 12.30.027, 12.30.029....

The statute provides criteria for an officer to use when determining who is the "principal physical aggressor." A "principal physical aggressor" evaluation must be made in domestic violence cases if there are cross complaints "arising from the same incident." In rare circumstances, an officer may determine that no arrest should be made. An "authorization not to arrest" must first be granted by a prosecutor from "the jurisidiction in which the offense under investigation arose," and the officer must later report in writing why an arrest was not made. A prosecuting attorney is on call and available by phone to law enforcement in all parts of the state to provide an officer with an authorization, if needed.

Under Alaska law, there is a 20-day minimum sentence if the defendant is in violation of a domestic violence protection order, a 30-day minimum sentence if the defendant has a prior conviction for assault or domestic violence assault, and a 60-day minimum sentence if the defendant "has been previously convicted two or more times of a crime against a person or a crime involving domestic violence, or a combination of those crimes." Aggravating factors that can increase the length of the normal minimum sentence required by the statute include the presence of a child under the age of 16 during a felony crime involving domestic violence, as well as a domestic violence offense committed at a shelter or facility providing services to domestic violence and sexual assault victims. In addition, recent legislative changes have upgraded certain misdemeanor assaults to a Class C felony and have added a new provision to the animal cruelty statute dealing with "intent to intimidate, threaten or terrorize another person." Some domestic violence convictions also carry federal legal consequences. Under federal law it is "unlawful to sell or dispose of a firearm" to a person convicted of a qualifying domestic violence misdemeanor.

The terms "domestic violence and "crime involving domestic violence" have a broad meaning under AS 18.66.990(3) & (5). "Acts of domestic violence" as defined under the statute go beyond physical assault; acts of domestic violence also include burglary, criminal trespass, arson or criminally negligent burning, criminal mischief, terrorist threatening, violating a protective order, and harassment. In addition, the statute defines domestic violence as an offense committed "by [one] household member against another household member." The definition of household member encompasses more than persons living in the same residence. It includes many people who do not live together: "adults or minors who are current or former spouses, adults or minors...who have lived together, adults or minors who are dating or have dated, adults or minors who are engaged in or who have engaged in a sexual relationship, adults or minors who are related to each other up to the fourth degree of consanguinity..., adults or minors who are related or formerly related by marriage, persons who have a child of [their] relationship, and minor children in a relationship that is described [in the statute]."

Figure 1. Processing of Domestic Violence Cases Reported to Alaska State Troopers, 2004



violence incidents from reports to Troopers through case resolution by the Department of Law. Because we only examined referrals to the Department of Law (and excluded, for example, referrals to the Division of Juvenile Justice), the following statistics are not directly comparable to the ones reported in the previous paragraph.

When examining case processing with Department of Law data, we find that after Troopers close a case, the next decision is whether to refer the case for prosecution. Results show that 80 percent of the 1,281 cases reported to Troopers were referred for prosecution, 68 percent were accepted for prosecution, and 54 percent resulted in a conviction (Figure 1). Once cases were referred for prosecution, they had a high likelihood of being accepted for prosecution. Specifically, 84 percent of referred cases (N=1,030) were accepted for prosecution, and 67 percent resulted in a conviction (Table 8). Cases accepted for prosecution (N=869) had an 80 percent conviction rate.

In addition to examining case resolution rates for all assaults in domestic violence incidents reported to Troopers, we reviewed case resolution rates separately for male and female suspects comparing cases that had at least one male suspect to cases that had at least one female suspect. In our sample of 1,281 cases, 974 cases included at least one male suspect and 259 included at least one female suspect. Cases with at least one female suspect were slightly less likely to be referred for prosecution, to be accepted for prosecution, and to result in a conviction than cases with at least one male suspect. Of the 259 reported cases with at least one female suspect, 75 percent were referred for prosecution (versus 82% with a male suspect), 56 percent were accepted for prosecution (versus 73% with a male suspect), and 44 percent resulted in a conviction (versus 58% with a male suspect) (Figure 2).

Once referred for prosecution, 89 percent of cases with at least one male suspect (N=707) and 76 percent of cases with at least one female suspect (N=146) were accepted for prosecution. Once accepted for prosecution, the likelihood of cases resulting in a conviction did not vary greatly by suspect gender. Upon acceptance for prosecution, 80 percent of cases with at least one male suspect (N=568) and 78 percent of cases with at least one female suspect (N=114) resulted in a conviction (Table 9).

In addition to examining case resolution rates separately for male and female suspects, we examined case resolution rates separately for male and female victims. In our sample of 1,281 cases, 352 cases included at least one male victim and 925 included at least one female victim. Cases with at least one female victim were as likely to be referred for prosecution, as likely to be accepted for prosecution, and as likely to result in a conviction as cases with at least one male victim. Of the 925 reported cases with at least one female victim, 80 percent were referred for prosecution (versus 81% with a male victim), 59 percent were accepted for prosecution (versus 65% with a male victim), and 54 percent resulted in a conviction for both female and male victims (Figure 3 and Table 10). Although cases involving male suspects had higher case processing and conviction rates, case processing rates were quite similar for victims of both genders. No discernable pattern was found in case processing rates for domestic violence victims based on their gender.

Another variable examined in relation to case processing of assaults in domestic violence incidents was the relationship between the victim and the suspect. We examined the relationship between the victim and suspect separately for male and female victims. Most of the assaults in domestic violence incidents occurred between intimate partners. The most likely relationship identified was current or former intimate partner as seen in 67 percent of assaults in domestic violence incidents with female victims and 38 percent with male victims. The next most likely relationship was parents or children comprising 16 percent of the assaults in domestic violence incidents with female victims and 25 percent with male victims. Another 12 percent of assaults in domestic violence incidents with female victims and 22 percent with male victims took place between other

Table 8. Number of Cases by Stage

Column percentages.

Stage	N	% of reported	% of referred	% of accepted
Reported	**1,281**	100.0 %	—	—
Referred	**1,030**	80.4	100.0 %	—
Accepted	**869**	67.8	84.4	100.0 %
Convicted	**692**	54.0	67.2	79.6

Source of data: *Alaska Department of Law*

Figure 2. Processing of Domestic Violence Cases Reported to Alaska State Troopers, 2004: Male/Female Suspects

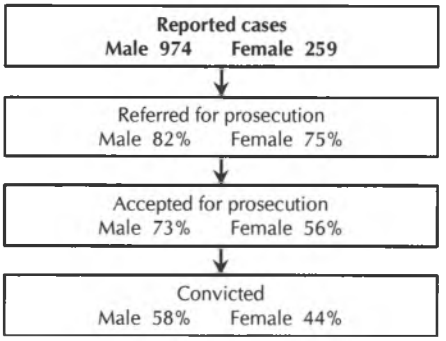


Figure 3. Processing of Domestic Violence Cases Reported to Alaska State Troopers, 2004: Male/Female Victims

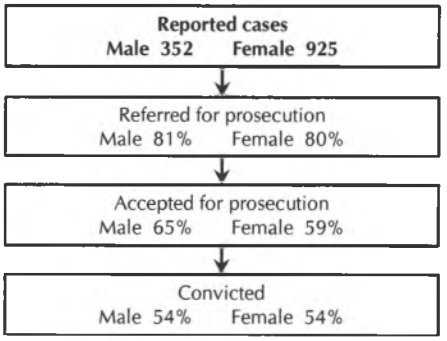


Table 9. Number of Cases by Stage for Cases with Male or Female Suspects

Column percentages.

	N	% of reported	% of referred	% of accepted
Male suspects				
Reported	**974**	100.0 %	—	—
Referred	**798**	81.9	100.0 %	—
Accepted	**707**	72.6	88.6	100.0 %
Convicted	**568**	58.3	71.2	80.3
Female suspects				
Reported	**259**	100.0 %	—	—
Referred	**193**	74.5	100.0 %	—
Accepted	**146**	56.4	75.6	100.0 %
Convicted	**114**	44.0	59.1	78.1

Source of data: *Alaska State Troopers (2004) and Alaska Department of Law*

Table 10. Number of Cases by Stage for Cases with Male or Female Victims

Column percentages.

	N	% of reported	% of referred	% of accepted
Male victims				
Reported	**352**	100.0 %	—	—
Referred	**284**	80.7	100.0 %	—
Accepted	**228**	64.8	80.3	100.0 %
Convicted	**191**	54.3	67.3	83.8
Female victims				
Reported	**925**	100.0 %	–	–
Referred	**743**	80.3	100.0 %	–
Accepted	**639**	59.1	86.0	100.0 %
Convicted	**500**	54.1	67.3	78.2

Source of data: *Alaska State Troopers (2004) and Alaska Department of Law*

family members (including siblings and extended family). Six percent of assaults in domestic violence incidents with female victims and 13 percent with male victims took place between roommates. Overall, most assaults occurred between intimate partners, and this was particularly true for female victims.

An examination of case processing for the different relationship types revealed some differences in the earlier stages of case processing. Regarding referral rates for assaults in domestic violence incidents, 88 percent of cases involving roommates, 86 percent of cases involving intimate partners, 72 percent of cases involving other family members, and 63 percent of cases involving parents or children were referred for prosecution (Table 11). Cases involving victims and suspects who were roommates or intimate partners were more likely to be referred for prosecution than cases involving other family members or parents and children. Of all referred cases, 87 percent of cases involving intimate partners, 82 percent of cases involving parents or children, 81 percent of cases involving other family members, and 74 percent of cases involving roommates were accepted for prosecution. Referred cases involving intimate partners were most likely to be accepted for prosecution, and cases involving roommates were least likely to be accepted for prosecution. Although some differences were found in referral and acceptance rates for different relationship types in assaults in domestic violence incidents, conviction rates for accepted cases were remarkably similar. Eighty-one percent of cases involving intimate partners, 81 percent of cases involving other family members, 80 percent of cases involving parents or children, and 77 percent of cases involving roommates resulted in a conviction, once accepted for prosecution. Despite differences in referral and acceptance rates for assaults in domestic violence incidents involving various relationships between victims and suspects, conviction rates for accepted cases were similar across the different relationship types.

In another examination of assaults in domestic violence incidents, we assessed the combined influence of gender and relationship on case processing. In this examination, cases were classified as intimate partner violence or non-intimate partner violence incidents. Incidents of intimate partner violence were defined as taking place between intimate partners and involving a male suspect and a female victim. Non-intimate partner violence incidents included all other combinations of suspect and victim gender and the various relationship types. (Few cases—1.5%—involved same-sex intimate partner violence. The characteristics of these cases will be included in a future study.) Results showed higher case processing rates for intimate partner violence incidents in the earlier stages of case processing. Specifically, 85 percent of intimate partner violence incidents and 75 percent of non-intimate partner violence incidents were referred for prosecution (Table 12). Once referred, 90 percent of intimate partner violence incidents and 79 percent of non-intimate partner violence incidents were accepted for prosecution. Again, no discernable differences were found in conviction rates for intimate partner and non-intimate partner violence incidents once they were accepted for prosecution. Eighty-one percent of accepted cases involving intimate partner violence incidents resulted in a conviction, and 79 percent of accepted non-intimate partner violence incidents resulted in a conviction. Conviction rates based on the total number of reports to Troopers of intimate partner violence incidents were

Table 11. Nature of Victim and Suspect Relationships and Legal Resolutions

Column percentages.

	N	Intimate partner	Parents or children	Other family	Roommates
Referred	**1,029**	86.1 %	63.4 %	71.8 %	87.9 %
Accepted	**869**	86.5	81.5	81.1	74.1
Convicted	**692**	80.5	80.0	80.8	76.7

Source of data: *Alaska State Troopers (2004) and Alaska Department of Law*

Table 12. Legal Resolutions for Intimate Partner and Non-Intimate Partner Violence

Column percentages.

	N	% of reported		% of referred		% of accepted	
		Intimate partner	Non-intimate partner	Intimate partner	Non-intimate partner	Intimate partner	Non-intimate partner
Reported	**1,279**	100 %	100 %	—	—	—	—
Referred	**1,028**	85	75	100 %	100 %	—	—
Accepted	**862**	76	59	90	79	100 %	100 %
Convicted	**692**	62	47	72	62	81	79

Source of data: *Alaska SANE data and Alaska Department of Law*

higher (62%) than for all reported cases to Troopers of non-intimate partner violence incidents (47%).

A more detailed examination of legal resolutions explored differences in case processing rates for male and female victims in various relationships with suspects. Just as cases with male suspects tended to have higher case processing rates at each stage of prosecution, male victims tended to experience higher case processing rates across different relationship types. One exception to this trend was higher rates of acceptance for referred cases involving intimate partners with female victims (76%) relative to male victims (67%). Similarly, cases involving intimate partners with female victims had higher conviction rates (61% of accepted cases) than cases with male victims (53% of accepted cases) (Table 13). In sum, cases of assaults in domestic violence incidents investigated by Troopers had relatively high referral, acceptance and conviction rates overall, despite variation in rates by gender of the suspects and victims and relationships between them.

The findings presented in this article provide an initial description of case processing and conviction rates for assaults in domestic violence incidents in smaller communities across the state of Alaska. The full report containing more detailed descriptive analyses is published on the Justice Center website. Future studies may focus on comparisons of the data from the Anchorage analysis, this study, and nationwide reports. An important area to examine in more depth is factors affecting legal resolutions. More complex analyses involving multiple predictor variables are required to understand the many influential factors in case processing and conviction of assaults in domestic violence incidents. A growing body of data about domestic violence incidents will enable policymakers to focus on improving ways to deal with this critical issue.

Table 13. Nature of Victim and Suspect Relationships and Legal Resolutions for Female and Male Victims

Column percentages.

	N	Intimate partner	Parents or children	Other family	Room-mates
Female victim					
Referred	**663**	85.3 %	60.8 %	69.6 %	88.2 %
Accepted	**580**	76.2	44.6	57.6	55.9
Convicted	**454**	60.6	34.6	41.3	35.3
Male victim					
Referred	**229**	89.4 %	67.1 %	74.4 %	87.5 %
Accepted	**177**	66.9	61.0	59.0	75.0
Convicted	**148**	53.1	51.2	53.8	65.6

Source of data: *Alaska State Troopers (2004) and Alaska Department of Law*

Figures for national and Anchorage domestic violence incidents are from the Bureau of Justice Statistics (2007) and the Municipality of Anchorage (2006).

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UAA Justice Center
University of Alaska Anchorage

UAA Justice Center
Research Overview

January 2011 No. 11

Stalking Victimization: Comparisons between Alaska and U.S. Data

This research overview presents information on stalking victimization in the United States. Alaska-specific data include Alaska State Trooper cases from 1994–2005 as published in the *Alaska Justice Forum* in 2007. Nationwide data are from the U.S. Bureau of Justice Statistics (BJS) 2009 "Special Report on National Crime Victimization Survey (NCVS), Stalking Victimization in the United States"; the survey was conducted in 2006. It is important to note that Alaska does not yet have stalking victimization estimates. This research overview looks at data that are currently available for Alaska and notes contrasts and similarities with nationwide data. Only adult cases were considered for this purpose.

It is also important to emphasize that Alaska data are only from stalking victimizations that were reported to law enforcement. By comparison, the national NCVS data are from all stalking victimizations, those reported to law enforcement and those not reported to law enforcement. Finally, it is important to emphasize that the Alaska data are only from stalking victimizations reported to Alaska State Troopers (the data do not include victimizations reported to municipal or other law enforcement agencies in Alaska).

Gender of Victim and Offender

- Alaska data show that 89% of stalking victims were female and 11% were male while 88% of offenders were male and 9% were female. In comparison, NCVS data show that nationally 74% of stalking victims were female and 26% male (Table 1).

Table 1. Gender of Victims and Offenders

Column percentages

	Victims		Offenders	
	Alaska	U.S.	Alaska	U.S.
Male	10.6 %	26.0 %	88.0 %	60.2 %
Female	89.4	74.0	9.3	28.4
Don't know	—	—	2.8	11.3

Note: Percentages exceed 100% due to rounding errors.

- In Alaska, nearly 90% of female stalking victims and 74% of male stalking victims were victimized by male offenders. According to the NCVS, nationally, 67% of female victims and 41% of male victims were victimized by male offenders (Table 2).

Table 2. Gender of Stalking Offender, by Victim Gender

Column percentages except where noted.

	Victim gender					
	Alaska			U.S.		
Offender gender	Male	Female	**All offenders**	Male	Female	**All offenders**
Male	73.9 %	89.6 %	**88.0 %**	41.3 %	66.9 %	**60.3 %**
Female	26.1	7.3	**9.3**	42.5	23.5	**28.4**
Don't know	0.0	3.1	**2.8**	16.1	9.6	**11.3**
All victims	**10.7 %**	**89.4 %**		**25.96 %**	**74.02 %**	
	(row percentages)			(row percentages)		

Note: Percentages may not total to 100% due to rounding.

Age of Victim and Offender

- In Alaska, the most common age group for both stalking victims (39%) and offenders (34%) was 30–39 years. NCVS data show that nationally, the most common age group for stalking victims (28%) was 21–29 years while the most common age of offenders (22%) was 30–39 year-olds (Table 3).

Table 3. Ages of Victims and Offenders

Column percentages.

	Victims		Offenders	
	Alaska	U.S.	Alaska	U.S.
18-20	9.4 %	9.3 %	4.4 %	7.3 %
21-29	20.4	27.7	20.4	21.7
30-39	39.2	22.2	33.7	22.3
40-49	23.8	21.2	30.4	18.7
50 and older	7.2	19.5	11.0	15.7
Unknown	0.0	0.0	0.0	14.3

- NCVS data show that stalking victims are most likely to be victimized by an offender in their own age group (Table 4).
- Victims in Alaska, similarly to victims nationwide, are most likely to be victimized by offenders in the same age group. However, in Alaska, victims aged 50 years and older are most likely to be victimized by an offender in the 30–39 year-old age group (Table 4).

Table 4. Age of Stalking Offender, by Victim Age

Column percentages except where noted.

	Victim age					
Offender age	18-20	21-29	30-39	40-49	50 or older	All offenders
Alaska						
18-20	**41.2** %	2.7 %	0.0 %	0.0 %	0.0 %	**4.4 %**
21-29	29.4	**40.5**	18.3	9.3	0.0	**20.4**
30-39	17.6	32.4	**42.3**	18.6	61.5	**33.7**
40-49	5.9	18.9	29.6	**53.5**	23.1	**30.4**
50 or older	5.9	5.4	9.9	18.6	**15.4**	**11.0**
Unknown	0.0	0.0	0.0	0.0	0.0	**0.0**
All victims	**9.4 %**	**20.4 %**	**39.2 %**	**23.8 %**	**7.2 %**	
			(row percentages)			
United States						
18-20	**46.7**	5.7	2.3	3.0	1.0	**7.3**
21-29	26.2	**48.5**	14.1	9.0	3.9	**21.7**
30-39	5.7	23.2	**38.3**	17.1	16.6	**22.3**
40-49	7.5	7.8	21.2	**34.9**	19.1	**18.7**
50 or older	2.7	5.9	10.1	22.1	**35.3**	**15.7**
Unknown	11.2	8.9	14.2	14.0	24.1	**14.3**
All victims	**9.3 %**	**27.7 %**	**22.2 %**	**21.2 %**	**19.5 %**	
			(row percentages)			

Race of Victim and Offender

- Overall, nearly 86% of all Alaska victims were White and 13% were Alaska Native/American Indian. NCVS data show that nationally 84% of stalking victims were White (Table 5).
- Offenders in the Alaska cases were most likely to be White (79%) or Alaska Native (20%). Nationally, offenders were most likely to be White (73%) or Black (12%) in stalking cases (Table 5).

Table 5. Race of Victims and Offenders

Column percentages

	Victims		Offenders	
	Alaska	U.S.	Alaska	U.S.
White	86.0 %	84.1 %	78.7 %	73.3 %
Black	1.0	10.7	1.0	12.2
Alaska Native/American Indian	12.6	—	20.3	—
Some other race	0.5	5.2	—	9.2
Unknown	—	—	—	5.2

Note: Due to rounding errors, percentages may not total 100.

— Alaska data identified Alaska Native as an individual cateogory. NCVS data includes "Alaska Native/American Indian" data with "Some other race."

- Alaska stalking victims are more commonly stalked by offenders of the same race. NCVS data show that, like in Alaska, Whites are more likely to be victimized by White offenders and Blacks are more likely to be victimized by Black offenders (Table 6).
- NCVS data show that victims of other races were most commonly victimized by White (45%) offenders (Table 6).

Table 6. Race of Stalking Offender, by Victim Race

Column percentages except where noted.

	Victim race								
	Alaska					U.S.			
Offender race	White	Black	Native	Other	**All offenders**	White	Black	Other	**All offenders**
White	**88.2 %**	0.0 %	19.2 %	100.0 %	**78.7 %**	82.8 %	12.5 %	45.4 %	**73.3 %**
Black	0.0	**100.0**	0.0	0.0	**1.0**	5.2	65.6	16.0	**12.2**
Alaska Native/ American Indian	11.8	2.0	**80.8**	0.0	**20.3**	—	—	—	—
Some other race	—	—	—	—	—	7.6	11.8	29.8	**9.2**
Unknown	—	—	—	—	—	4.3	10.1	8.8	**5.2**
All victims	**86.0 %**	**1.0 %**	**12.6 %**	**0.5 %**		**84.1 %**	**10.71 %**	**5.22 %**	
		(row percentages)					(row percentages)		

Note: Percentages may not total to 100% due to rounding.

— Alaska data identified Alaska Native as an individual cateogory. NCVS data includes "Alaska Native/American Indian" data with "Some other race."

Victim-Offender Relationship

- Alaska stalking victims most commonly were victimized by ex-boy/girlfriends (30%), acquaintances (29%), and current spouses (16%). NCVS data show that nationally most stalking victimization was committed by an acquaintance (20%), friend (16%), or ex-boy/girlfriend (13%) (Table 7).
- In Alaska, 8% of stalking victims had unknown relationships with the offender. Nationwide, 10% of victims had unknown relationships with their offenders.

Stalking Behaviors

- Alaska stalking victims were most likely to be stalked by offenders showing up at places and/or waiting for the victim (64%), receiving unwanted phone calls and text messsages (51%), and/or by being followed or spied upon (Table 8).
- NCVS data show that the most common types of stalking behaviors were unwanted phone calls and text messages (66%), spreading rumors (36%), and following or spying upon victims (34%) (Table 8).

Table 7. Relationship Between Victims and Offenders

	Alaska	U.S.
Stranger	7.5 %	9.7 %
Current spouse	15.5	5.6
Ex-spouse	6.5	8.4
Current boy/girlfriend	2.5	3.2
Ex-boy/girlfriend	29.5	13.1
Other family	3.5	9.0
Friend	6.5	16.4
Acquaintance	28.5	19.7

Note: Fifteen percent of NCVS data represent unknown relationships between the victim and offender.

Table 8. Nature of Stalking Behaviors Experienced by Victims

	Alaska	U.S.
Unwanted phone calls and text messages	50.5 %	66.2 %
Unwanted letters and email	16.7	30.6
Spreading rumors	2.7	35.7
Following or spying	39.6	34.3
Showing up at places	64.0	31.1
Waiting for victim	64.0	29.0
Leaving unwanted presents	9.9	12.2

Note: "Showing up at places" and "Waiting for victim" were combined for Alaska due to data detail limitations. Percentages may total more than 100% because multiple behaviors may have been reported.

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Secondary data analysis on Alaska State Trooper data was performed by the author with the assistance of Dr. André B. Rosay.

Research compiled by Khristy Parker, Research Assistant

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Stalking in Alaska

André B. Rosay, Greg Postle, Katherine TePas, and Darryl Wood

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For other articles and publications related to stalking and violence against women, see:
http://justice.uaa.alaska.edu/vaw/

Abstract: *This study examined 267 cases with a stalking charge reported to Alaska State Troopers from 1994 to 2005, and excluded any cases reported to local or municipal departments. We also examined the legal resolutions for cases that were reported from1999-2004.*

- *Over 50% of reports occurred in B detachment (Southcentral Alaska) and D detachment (Interior Alaska). Three units (Fairbanks AST Enforcement, Palmer AST Enforcement, and Soldotna AST Enforcement) handled 49% of reports. Thirty-five percent of the charges were for stalking in the first degree and 65% were for stalking in the second degree.*
- *Most suspects (91%) were male and most victims (89%) were female. Most suspects (78%) were White and most victims (86%) were also White. On average, suspects were 36 years old while victims were 33 years old. Twenty percent of suspects had used alcohol, but only 2% of victims had used alcohol. Fifty-four percent of suspects were, or had been, in a romantic relationship with the victim. An additional 35% of suspects were friends or acquaintances of the victim.*
- *The most common forms of stalking included standing outside or visiting the victim's home (in 54% of charges), making unsolicited phone calls to victims (in 51% of charges), following the victim (in 39% of charges), threatening to physically assault the victim (in 36% of charges), harassing the victim's family and friends (in 28% of charges), trying to communicate with the victim in other ways (in 27% of charges), standing outside or visiting the victim's work (in 20% of charges), physically assaulting the victim (in 19% of charges), sending the victim unsolicited mail (in 15% of charges), and vandalizing the victim's home (in 13% of charges). Forty-five percent of behaviors occurred primarily at the victim's home, while 27% occurred primarily in cyberspace.*
- *Seventy-five percent of the cases reported between 1999-2004 were referred for prosecution, 55% were accepted for prosecution, and 40% resulted in a conviction on at least one charge. Cases with suspects who violated protective orders were 20% more likely to be referred for prosecution, were 19% more likely to be accepted, and were 41% more likely to result in a conviction.*

Although the available data are limited, a recent Justice Center examination of Alaska State Trooper case files has revealed that the crime of stalking is probably greatly underreported by victims as well as under-recognized by law enforcement and hence not charged often enough in Alaska. A charge of stalking can be applied in a wide range of situations, and its parameters as a crime can be somewhat ambiguous for both victims and law enforcement. The available data show that a stalking charge is often made in conjunction with other charges, particularly when there has been a prior relationship—which is often the case, with stranger stalking fairly rare.

Stalking, by its nature and its legal definition, induces fear. Statistics from the National Violence Against Women Survey showed that even after the stalking ended, 68 percent of victims thought their personal safety had gotten worse, 42 percent were very concerned about their personal safety, 30 percent were very concerned about being stalked, and 45 percent carried something to defend themselves. Psychological counseling was sought by 30 percent of female victims and 20 percent of male victims.

Moreover, other studies have shown links between stalking and intimate partner homicide among female victims. For example, according to an analysis published in *Homicide Studies* in 1999, 76 percent of female intimate partner homicide victims had been stalked by their intimate partner in the past. Furthermore, 89 percent of female intimate partner homicide victims that were physically abused had also been stalked by their intimate partner in the past. Of all female intimate partner homicide victims, 54 percent had previously contacted police to report they were being stalked.

With funding from the National Institute of Justice, the Justice Center is working with the Alaska State Troopers and the Alaska Department of Law to learn more about the characteristics of stalking in Alaska.

In the first quantitative examination of the crime, data from all stalking incidents reported to Alaska State Troopers from 1994 to 2005 were collected to gather descriptive information. The research provides a first overview of a specific crime whose characteristics are not widely known beyond the justice community. The Alaska statutes defining the crime of stalking are presented on page 5.

Methodology

To conduct this study, Justice Center researchers examined the total 267 cases with a stalking charge reported to Alaska State Troopers from 1994 to 2005. (Alaska stalking statutes went into effect in 1993.) The final sample for analysis comprised 210 cases (Table 1) covering a total of 222 stalking charges, 211 suspects, and 216 victims. Case outcome data were gathered directly

Table 1. Case Closure Codes in Alaska Stalking Cases, 1994–2005
Column percentages

	Reports	
Closure code	N	%
Closed by arrest	140	66.7 %
Closed, declined	6	2.9
Closed by investigation	34	16.2
Closed, referred	22	10.5
Closed, unfounded	8	3.8
Total	**210**	

Source of data: *Alaska State Troopers data (1994-2005)*

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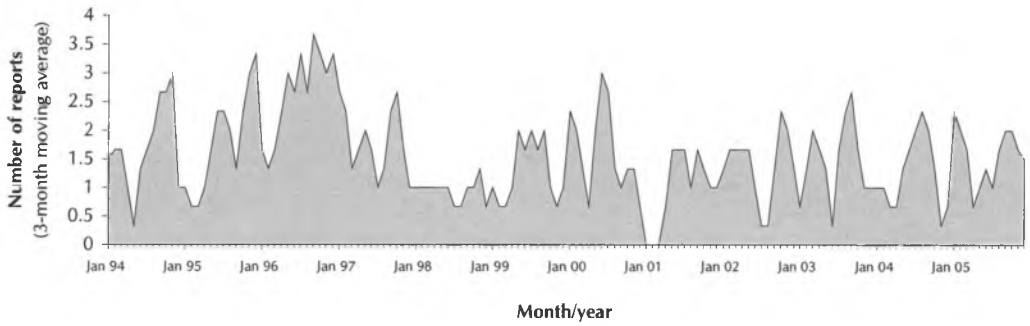
Figure 1. Number of Stalking Reports in Alaska by Month and Year, 1994–2005

3-month moving average



Source of data: *Anchorage State Troopers data (1994–2005)*

from the Alaska Department of Law for a sub-sample of the stalking cases—only those reported from 1999 to 2004 ($N = 92$).

Results

For the first four years included in this investigation (1994 to 1997), the number of reports averaged 22 per year. After that, the average number of reports dropped significantly, to 15 per year. Figure 1 displays the trend of reporting over time, from January 1994 to December 2005, using a three-month moving average. Seasonal variations from January to December in the trend of reporting were not quite statistically significant, but 23 percent of the reports were made in the months of June and October.

Over 50 percent of reports occurred in B and D detachments. B detachment includes five Alaska State Trooper posts (Wasilla, Palmer, Glennallen, Big Lake, and Talkeetna) while C detachment includes nine Alaska State Trooper posts (Coldfoot, Galena, Fairbanks, Nenana, Healy, Cantwell, Delta Junction, Tok, and Northway; see Figure 2). The units with the highest number of stalking reports included Fairbanks AST Enforcement (with 19% of reports), Palmer AST Enforcement (with 18% of reports), and Soldotna AST Enforcement (in E Detachment, with 12% of reports). Together, these three units had 49 percent of all stalking reports. Additional details are shown in Table 2.

Most cases (67%) were closed by arrest, meaning that at least one person was criminally charged, by a physical arrest, summons, warrant, or criminal complaint (see Table 1). Other cases (10%) were closed with a referral to the district attorney for a charging decision. Sixteen percent of cases were closed after the investigation because there were no suspects or because evidence was lacking. Only four percent of cases were closed unfounded (because there appeared to be no basis for the complaint). Finally, only three percent of cases were closed because the prosecution declined to pursue the case, even though a suspect was known.

The 210 stalking incidents reported to troopers from 1994 to 2005 included a total of 222 stalking charges. Seventy-seven (35%) of the 222 stalking charges were for stalking in the first degree (AS §11.41.260) and 145 (65%) were for stalking in the second degree (AS §11.41.270). For each stalking charge, thirty different forms of behavior were examined, shown in Table 3. On average, four forms of stalking behaviors were found per charge. The most common forms of stalking behaviors included standing outside or visiting the victim's home (found in 54% of charges), making unsolicited phone calls to victims (found in 51% of charges), following the victim (found in 39% of charges), threatening to physically assault the victim (found in 36% of charges), harassing the victim's family and friends (found in 28% of charges), trying to communicate with the victim in other ways (found in 27% of charges), standing outside or visiting the victim's work (found in 20% of charges), physically assaulting the victim (found in 19% of charges), sending the victim unsolicited mail (found in 15% of charges), and vandalizing the victim's home (found in 13% of charges).

Figure 2. Alaska State Trooper Locations

Table 2. Total Number of Stalking Reports in Alaska by Unit, 1994–2005

Column percentages

Unit	N	%	Unit	N	%	Unit	N	%
Anchorage AST Enforcement	7	3.3 %	Girdwood AST Enforcement	3	1.4 %	Northway AST Enforcement	1	0.5 %
Aniak AST Enforcement	1	0.5	Glennallen AST Enforcement	6	2.9	Mat-Su Regional Office	1	0.5
Bethel AST Enforcement	7	3.3	Healy AST Enforcement	1	0.5	Palmer AST Enforcement	37	17.6
Big Lake AST Enforcement	1	0.5	Homer AST Enforcement	7	3.3	Palmer AST Investigations	5	2.4
Cooper Landing AST Enforcement	1	0.5	Juneau AST Enforcement	1	0.5	Seward AST Enforcement	4	1.9
ABI Child Abuse Investigation Unit	1	0.5	Ketchikan AST Enforcement	7	3.3	Soldotna AST Enforcement	25	11.9
Cantwell AST Enforcement	3	1.4	Ketchikan AST Investigations	1	0.5	St. Marys AST Enforcement	2	1.0
ABI Cold Case Investigations	1	0.5	Klawock AST Enforcement	9	4.3	Talkeetna AST Enforcement	3	1.4
Cordova ABWE	1	0.5	Kodiak AST Enforcement	9	4.3	Tok AST Enforcement	1	0.5
Delta Junction AST Enforcement	7	3.3	Kotzebue AST Enforcement	6	2.9	Unalakleet AST Enforcement	1	0.5
Fairbanks AST Enforcement	40	19.0	Ninilchik AST Enforcement	1	0.5			
Fairbanks AST Investigations	4	1.9	Nome AST Enforcement	2	1.0			
Galena AST Enforcement	2	1.0	Nome V.P.S.O.	1	0.5	**Total**	**210**	

Source of data: *Alaska State Troopers data (1994-2005)*

The primary location for stalking behaviors was most often the victim's residence. As shown in Table 4, 45 percent of stalking behaviors occurred primarily at the victim's home. Cyberspace was also a common location for stalking behavior, with 27 percent of charges occurring primarily in cyberspace. An additional 10 percent of charges occurred primarily on public roads and parking lots.

The 210 stalking incidents reported to troopers from 1994 to 2005 included a total of 211 suspects and 216 victims. Most suspects (91%) were male and most victims (89%) were female. As shown in Table 5, most suspects (78%) were white and most victims (86%) were also white. On average, suspects were 36 years old while victims were 33 years old; with 13 percent of suspects and 20 percent of victims under 21, 18 percent of suspects and 22 percent of victims between 21 and 30, 37 percent of suspects and 33 percent of victims between

Table 3. Stalking Behaviors in Alaska Stalking Cases, 1994–2005

Row percentages

Behaviors	Yes N	Yes %	Total
Followed victim	86	39.4 %	**218**
Sent victim unsolicited mail	33	14.9	**222**
Made unsolicited phone calls to victim	112	50.5	**222**
Sent victim unsolicited electronic mail	7	3.2	**222**
Sent victim unsolicited text messages	0	0.0	**222**
Tried to communicate in other ways	60	27.0	**222**
Photographed victim without permission	3	1.4	**219**
Abused victim's pets	3	1.4	**221**
Threatened to harm victim's pets	0	0.0	**222**
Physically assaulted victim	42	18.9	**222**
Threatened to physically assault victim	78	35.8	**218**
Sexually assaulted victim	13	5.9	**222**
Threatened to sexually assault victim	8	3.6	**222**
Harassed victim's children	13	5.9	**221**
Threatened victim's children	13	5.9	**220**
Harassed victim's family and friends	62	27.9	**222**
Vandalized victim's home	28	12.7	**221**
Vandalized victim's car	14	6.4	**220**
Vandalized other property	11	5.0	**222**
Stood outside/visited victim's home	120	54.1	**222**
Stood outside/visited victim's work	44	20.0	**220**
Left unwanted items for victim	3	1.4	**222**
Sent victim presents	20	9.0	**222**
Opened victim's mail	1	0.5	**222**
Filed false police reports against victim	1	0.5	**222**
Contacted victim's employer	4	1.8	**222**
Contacted or filed report with children services	1	0.5	**222**
Installed spyware on victim's computer	2	0.9	**222**
Installed/utilized GPS on victim's car	0	0.0	**221**
Relocated residence to follow victim	10	4.5	**222**

Source of data: *Alaska State Troopers data (1994-2005)*

Table 4. Primary Location for Stalking Behavior in Alaska Stalking Cases, 1994–2005

Column percentages

Location	Charges N	Charges %
Cyberspace	60	27.0 %
Victim's house	99	44.6
Other residence	8	3.6
Work / school	17	7.7
Public places	16	7.2
Roads / parking lots	22	9.9
Total	**222**	

Source of data: *Alaska State Troopers data (1994-2005)*

Table 5. Race of Suspects and Victims in Alaska Stalking Cases, 1994–2005

Column percentages

Race	Suspects N	Suspects %	Victims N	Victims %
White	160	78.0 %	183	85.9 %
Native	42	20.5	27	12.7
Black	3	1.5	2	0.9
Other	0	0.0	1	0.5
Total	**205**		**213**	

Source of data: *Alaska State Troopers data (1994-2005)*

Table 6. Age of Suspects and Victims in Alaska Stalking Cases, 1994–2005

Column percentages

Age	Suspects N	Suspects %	Victims N	Victims %
11 to 20	27	13.2 %	43	20.1 %
21 to 30	38	18.5	47	22.0
31 to 40	75	36.6	70	32.7
41 to 50	47	22.9	41	19.2
51 to 60	13	6.3	6	2.8
61 or over	5	2.4	7	3.3
Total	**205**		**214**	

Source of data: *Alaska State Troopers data (1994-2005)*

31 and 40, and 31 percent of suspects and 25 percent of victims over 40. One in five suspects (20%) had used alcohol, but very few victims (2%) had. Drug use was very infrequent (1% or less) for both suspects and victims.

Table 7. Relationship Between Suspects and Victims in Alaska Stalking Cases, 1994–2005

Column percentages

Relationship to victim	Suspects N	Suspects %	Suspects % of non-stranger
Stranger	15	7.5 %	—
Current spouse	31	15.5	16.8 %
Ex-spouse	13	6.5	7.0
Current boy/girlfriend	5	2.5	2.7
Ex-boy/girfriend	59	29.5	31.9
Other family	7	3.5	3.8
Friends	13	6.5	7.0
Acquaintances	57	28.5	30.8
Total	**200**		

Source of data: *Alaska State Troopers data (1994-2005)*

Table 8. Number of Total, Stalking, and Non-Stalking Charges per Suspect in Alaska Stalking Cases, 1994–2005

Column percentages

	N	%	cumulative %
Total charges			
Zero	0	0.0 %	0.0 %
One	89	42.2	42.2
Two	65	30.8	73.0
Three	32	15.2	88.2
Four	9	4.3	92.4
Five	6	2.8	95.3
Six or more	10	4.7	100.0
Total suspects	**211**		
Stalking charges			
Zero	0	0.0 %	0.0 %
One	202	95.7	95.7
Two	7	3.3	99.1
Three	2	0.9	100.0
Total suspects	**211**		
Non-stalking charges			
Zero	94	44.5 %	44.5 %
One	63	29.9	74.4
Two	29	13.7	88.2
Three	9	4.3	92.4
Four	6	2.8	95.3
Five	4	1.9	97.2
Six or more	6	2.8	100.0
Total suspects	**211**		

Source of data: *Alaska State Troopers data (1994-2005)*

Relationships between suspects and victims are shown in Table 7. Half (54%) of the suspects were, or had been, in a romantic relationship with the victim, as an ex-boyfriend or ex-girlfriend (29%) or current spouse (15%). In addition, 35 percent of suspects were friends or acquaintances of the victim, with acquaintances as the more prominent category. Very few suspects (4%) were currently living with the victim. Slightly over half of the relationships (55%) had ended prior to the stalking, and 58 percent had ended by the time the stalking was reported to law enforcement (these statistics were not calculated for strangers or family members).

Most suspects (55%) were not charged solely with a stalking offense. Stalking charges were often accompanied by other charges (Tables 8 and 9). On average, suspects had a total of 2.32 charges, including an average of 1.05 stalking charges and an average of 1.27 other charges. Overall, the 211 suspects were charged with 489 offenses (i.e., 222 stalking offenses and 267 non-stalking offenses). The most common additional non-stalking charges included assault, violating a protective order, and harassment. In addition to these additional charges, 38 percent of suspects had at least one aggravating factor (Table 10). The most common aggravating factors included violating protective orders and prior arrests for stalking the victim—present for 20 percent and 12 percent of suspects respectively. In addition, 22 percent of suspects had a prior arrest for stalking, assaulting, or harassing the victim. More specifically, 12 percent of suspects had a prior arrest for stalking the victim, 8 percent had a prior arrest for assaulting the victim, and 5 percent had a prior arrest for harassing the victim. Almost three quarters (74%) of the victims had previously contacted law enforcement to report harassing behavior by the suspect (e.g., to seek a protective order).

Overall, 75 percent of the 92 cases reported between 1999 and 2004 were referred; 55 percent were accepted; and 40 percent resulted in a conviction (Table 11). The likelihood of referring, accepting, and convicting varied substantially by legal factors (Table 12)—whether suspects violated protective orders, violated conditions of release, violated conditions of probation, had prior arrests for assaulting the victim, had prior arrests for harassing the victim, had multiple stalking charges, or had additional non-stalking charges. In general, these legal factors enhanced the likelihood of referral, acceptance, and conviction.

In particular, violating protective orders and having additional non-stalking charges were important legal factors. Cases with

Table 9. Additional Non-Stalking Charges in Alaska Stalking Cases, 1994–2005

Column percentages

Charge	Non-stalking charges N	Non-stalking charges %
Assault	60	22.5 %
Violating protective order	56	21.0
Harassment	31	11.6
Criminal trespass	23	8.6
Burglary	15	5.6
Criminal mischief	15	5.6
Violating conditions of release	10	3.7
Sexual assault / abuse	10	3.7
Other public administration offense	10	3.7
Other	7	2.6
Misconduct involving controlled substance	6	2.2
Misconduct involving weapon	5	1.9
Driving offense	5	1.9
Theft	4	1.5
Reckless endangerment	4	1.5
Coercion	4	1.5
Kidnapping	2	0.7
Total	**267**	

Source of data: *Alaska State Troopers data (1994-2005)*

Table 10. Aggravating Factors in Alaska Stalking Cases, 1994–2005

Row percentages

Factors	No N	No %	Yes N	Yes %	Total
Violated protective order	165	80.5 %	40	19.5 %	**205**
Violated conditions of release	188	90.8	19	9.2	**207**
Violated conditions of probation	185	90.7	19	9.3	**204**
Had prior arrest for stalking victim	175	87.9	24	12.1	**199**
Had prior arrest for assaulting victim	181	91.9	16	8.1	**197**
Had prior arrest for harassing victim	190	95.0	10	5.0	**200**

Source of data: *Alaska State Troopers data (1994-2005)*

Table 11. Case Outcomes by Stage in Alaska Stalking Cases, 1999–2004

Column percentages

Stage	N	% of reported	% of referred	% of accepted
Reported	92	100.0 %	—	—
Referred	69	75.0	100.0 %	—
Accepted	51	55.4	73.9	100.0 %
Convicted	37	40.2	53.6	72.5

Source of data: *Alaska Department of Law (1999-2004)*

suspects who violated protective orders were 20 percent more likely to be referred for prosecution, were 19 percent more likely to be accepted, and were 41 percent more likely to result in a conviction. Cases that included additional non-stalking charges were 27 percent more likely to be referred, were 84 percent more likely to be accepted,

Table 12. Percent Referred, Accepted, and Convicted in Alaska Stalking Cases by Legal Factors, 1994–2005

Cell percentages

Legal factors		N	% referred	% accepted	% convicted
Violated protective order	No	72	73.6 %	54.2 %	37.5 %
	Yes	17	88.2	64.7	52.9
Violated conditions of release	No	82	74.4	52.4	36.6
	Yes	8	100.0	100.0	87.5
Violated conditions of probation	No	83	74.7	54.2	39.8
	Yes	5	100.0	80.0	60.0
Had prior arrest for stalking victim	No	78	73.1	50.0	34.6
	Yes	6	100.0	100.0	100.0
Had prior arrest for assaulting victim	No	76	72.4	50.0	38.2
	Yes	8	100.0	87.5	37.5
Had prior arrest for harassing victim	No	84	75.0	53.6	38.1
	Yes	2	100.0	100.0	100.0
Had multiple stalking charges	No	88	76.1	56.8	40.9
	Yes	4	50.0	25.0	25.0
Had additional non-stalking charges	No	40	65.0	37.5	22.5
	Yes	52	82.7	69.2	53.8

Source of data: *Alaska State Troopers data & Alaska Department of Law (1999-2004)*

Stalking Cases

The following individual case summaries, drawn from the sample studied in the accompanying article "Stalking in Alaska" illustrate a range of situations and circumstances in which the Alaska State Troopers issued a stalking charge. The details were taken from the AST case file. The initials of those involved have been changed.

B.W. reported receiving phone calls from S.M.; she reported being frightened for herself and for her family. S.M. had previously pled "no contest" to harassment charges and had been ordered to have no contact with her. At the time of the reported phone calls, he was on probation for the previous harassment offense. During the phone calls, S.M. stated that he was in trouble and needed B.W., that he loved her and found her perfect. In response to this report, the troopers charged him with first degree stalking.

***

T.K. reported that she was being stalked and harassed by her boyfriend's ex-wife, M.D. An order forbidding contact between M.D. and her former husband, P.D., was in place, but there was no provision forbidding contact with the girlfriend T.K. The two former spouses were involved in a child custody case.

T.K. reported that M.D. was making threatening phone calls; that she had destroyed T.K.'s personal property—including cutting up clothes—and had followed T.K. and P.D. to a mall and attempted to force her way into their vehicle. On another occasion she had followed the couple on a berry-picking trip.

M.D. was charged with second-degree stalking, criminal mischief involving personal property and misdemeanor assault.

***

N.C. called the troopers to report that P.M., her ex-boyfriend, was in her home yelling and causing a disruption. Another man, who was spending the night, and two of N.C.'s children were present in the house at the time P.M. arrived. She also reported that P.M. had been following her to her workplace and other locations. She had reported to the troopers at least once before. She said she had previously obtained protective orders against P.M. but had let them drop.

N.C.'s employer and a co-worker confirmed that P.M. would regularly appear at the workplace.

N.C. stated that she had made it clear that she no longer wanted a relationship with P.M. He maintained that they still had an active sexual relationship and that he often came to her house late at night. The two have a child together.

P.M. was charged with third degree assault, fourth degree criminal trespass, and second degree stalking.

L.K. reported that her ex-husband S.K. had telephoned her several times that day, leaving threatening messages on her voice mail. He had been served with a protective order two days previously. L.K stated that S.K. could be violent and that he had been trying to obtain a gun.

When contacted by AST, S.K. said he had only been trying to contact his daughter. He was charged with violating a protective order and stalking in the second degree.

***

E.R. called to report that her ex-boyfriend V.L. was pounding on her door and refused to leave. He ran off just before the troopers arrived and was caught shortly afterward.

He had been previously arrested for a crime involving domestic violence against E.R., stalking and criminal trespass. She had had several protective orders against him. She stated that he was violent when drinking and had assaulted her in the past.

The couple had lived together off and on for nine years but not for three years prior to this incident, although they had recently been sexually intimate and he had done work on her property. She stated she had told him she did not want a relationship with him.

For this incident, V.L. was charged with fourth degree assault and second degree stalking.

***

I.W. reported to the VPSO that she was being harassed and threatened by her ex-boyfriend J.T. He had been sending her obsessive letters for some time and was threatening to kill her. (*Copies of some of the letters are in the AST file.)* The two have two children together. They had last lived together three years previously, and she had indicated she no longer wanted a relationship with him.

It appeared that he had followed her from one community to another over a period of time. There had been previous incidents in other towns, including at least one in which the local police were called when J.T. attempted to take one of the children from I.W.

A witness confirmed that J.T. had made threats to kill others if I.W. would not be intimate with him again.

J.T. was charged with second degree stalking.

and were 139 percent more likely to result in a conviction. In other words, cases that included additional non-stalking charges were 2.4 times more likely to result in a conviction than cases that did not include additional non-stalking charges.

It is important not to over-interpret these results because some categories are represented by extremely low sample sizes (e.g., only two suspects had a prior arrest for harassing the victim). Nonetheless, it is interesting to see the variation in the likelihood of cases being referred, accepted, and convicted. For example, although only six cases had suspects who had a prior arrest for stalking the victim, all six were referred for prosecution, all six were accepted, and all six resulted in a conviction. By comparison, only 34.6 percent of other cases resulted in a conviction. When suspects had a prior arrest for stalking the victim, they were 2.9 times more likely to be convicted.

Comparisons with National Data

Few national statistics on stalking are available. The current primary source of information on the offense is the National Violence Against Women Survey (NVAWS). While the numbers are not directly comparable, in looking at the NVAWS statistics and the Alaska figures presented here, we can note several points. First, stalking seems even more underreported and, possibly, underrecognized by law enforcement in Alaska than in the country as a whole. Second, it is likely that this is particularly true among Alaska Natives. Third, it is likely that the prosecution of stalking is more effective in Alaska than nationally.

Based on NVAWS results, an estimated 2.2 percent of men and 8.1 percent of women in the United States have been stalked at some point in the past (for a total of over two million men and over eight million women). Annual stalking estimates (rather than lifetime estimates) are obviously much lower, with 1.0 percent of women and 0.4 percent of men stalked per year. Nationally, this equates to over one million women and over 370,000 men stalked in a given year. Although we must do so with great caution, we can use these statistics to estimate the prevalence of stalking in Alaska.

Using the annual NVAWS statistics that 1.0 percent of women and 0.4 percent of men are stalked (derived from a sample of 8,000 women and 8,000 men), and assuming that annual rates in Alaska would be similar to annual rates in the U.S., we can estimate that around 2,100 adult women and 900 adult men are stalked in Alaska in a given year (see Table 13). Further NVAWS estimates suggest that nationally 55 percent of female stalking victims and 48 percent of male stalking victims report to law enforcement. If similar reporting patterns emerged in Alaska, around 1,100 women and over 530 men in Alaska would report a stalking incident in a given year (see Table 14). Alaska's numbers are much lower than those for the rest of the country, something that may be a factor of underreporting by victims or underrecognition by law enforcement.

More accurate estimates of stalking prevalence and reporting patterns will be available only through additional research; nonetheless, even in the absence of this additional research, it is clear that stalking is greatly underreported in Alaska. In 2005, only 17 stalking incidents were reported to the Alaska State Troopers, and statewide from all jurisdictions only 30 stalking cases were referred to the Alaska Department of Law.

The underreporting may be particularly true among Alaska Natives. NVAWS statistics show that "American Indian/Alaska Native women reveal significantly more stalking victimization than women of other racial and ethnic backgrounds." While 8.2 percent of white women reveal being stalked at some point in their lifetime, 17.0 percent of American Indian/Alaska Native women revealed being stalked at some point in their lifetime. American Indian/Alaska Native women (and men) were the most likely persons to indicate having been stalked at some point in their lifetime—over two times more likely than for whites. This was true for both women and men. (It is important to note that the NVAWS figures do not represent actual reports to law enforcement, but rather self-disclosure of incidents that may or may not have been reported to the police.) By comparison, according to the study, the rates of stalking reported to Alaska State Troopers were 6.6 times higher for white women than for Native women and were 9.1 times higher for White men than for Native men (see Table 15)—rates contradicting national figures. Although these statistical extrapolations are fraught with untested assumptions, it is nonetheless clear that stalking is under-

Table 13. Annual Estimates of Stalking Incidents in Alaska by Gender (With and Without Anchorage)

	Alaska (with Anchorage)			Alaska (without Anchorage)		
Gender	Number of adults	Estimated prevalence	95% confidence interval	Number of adults	Estimated prevalence	95% confidence interval
Women	210,104	2,101	1,681 to 2,521	118,645	1,186	949 to 1,424
Men	226,111	904	678 to 1,130	133,158	533	399 to 666
Total	436,215	3,005	2,359 to 3,651	251,803	1,719	1,348 to 2,090

Source of data: *NVAWS (1998); U.S. Census (2000, SF1)*

Table 14. Annual Estimates of Stalking Reports to Law Enforcement in Alaska by Gender (With and Without Anchorage)

	Alaska (with Anchorage)			Alaska (without Anchorage)		
Gender	Number of victims	Estimated # of reports	95% confidence interval	Number of victims	Estimated # of reports	95% confidence interval
Women	2,101	1,156	1,071 to 1,240	1,186	652	605 to 700
Men	904	434	371 to 497	533	256	218 to 293
Total	3,005	1,590	1,442 to 1,737	1,719	908	823 to 993

Source of data: *NVAWS (1998); U.S. Census (2000, SF1)*

Table 15. Number of Adults and Number of Stalking Reports in Alaska by Gender and Race (Without Anchorage)

	White			Native		
Gender	Number of adults	Number of reports	Rate of reports per 100,000	Number of adults	Number of reports	Rate of reports per 100,000
Women	150,925	165	109.3	150,925	25	16.6
Men	30,554	18	58.9	30,554	2	6.5
Total	**167,513**	**183**	**109.2**	**167,513**	**27**	**16.1**

Source of data: *U.S. Census (2000, SF1); Alaska State Troopers data (1994-2005)*

reported in Alaska, particularly for Alaska Natives.

But, while stalking may be underreported in Alaska, prosecution seems to be somewhat more effective. The Alaska Department of Law secured convictions in the cases accepted more often than occurred nationally: while NVAWS results showed that 54 percent of accepted cases resulted in a conviction, 72 percent of the 51 cases accepted by the Alaska Department of Law between 1999 and 2004 resulted in a conviction.

Reporting and Early Intervention

While we do not have any data on why stalking is so underreported, law enforcement hypothesizes that stalking may be underrecognized by victims. NVAWS statistics show other factors may also come into play. Of the victims that did not report to police, 20 percent believed it was not a police matter, 17 percent believed that police could not help, and 16 percent were afraid of reprisal from the stalker. Of the victims that did report to police, 50 percent were not satisfied with police actions and 46 percent thought that police actions did not improve the situation.

Law enforcement might be trained to capitalize on opportunities for early recognition of stalking patterns. Efforts might also be undertaken to raise public awareness of stalking as a crime and report it as such and to further train law enforcement to recognize the signs of stalking. This will increase the likelihood that suspects who violate stalking statutes are reported to law enforcement and are appropriately charged.

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1/26/11 OVERVIEW: DEPARTMENT OF CORRECTIONS

<TARGET><BILL></BILL><SUBJECT>1-26-11 OVERVIEW DEPARTMENT OF CORRECTIONS</SUBJECT><COMM>SJUD27</COMM></TARGET>

Summary of the Alaska Department of Correction's Presentation to the Senate Judiciary Committee, January 26, 2011.

Cost Effective Justice: What's at Stake for Alaska?

The Alaska Department of Corrections (ADOC) is committed to providing for the secure confinement of offenders and providing for their rehabilitative programming and supervised community reentry. The ADOC 's overarching mission is to improve public safety while being a sound steward of state resources.

Alaska has the 11th fastest growing prison population in the United States. [1]

From 2000 to 2007, the Alaska prison population increased by 106 prisoners per 100,000 residents. Only Kentucky and West Virginia had a greater increase in per capita prison population. During that same period of time, the per capita prison population of twelve states actually decreased, while nationally the rate of incarceration increased by only 28 prisoners per 100,000 residents.[2] Alaska's prison growth has greatly exceeded its population growth.

From 2004 to 2009 the ADOC's total bookings have increased.

Year	CY 2004	CY 2005	CY 2006	CY 2007	CY 2008	CY 2009
Total Admissions	35,472	35,328	36,715	37,688	37,655	38,897

From 2004 to 2009, the number of prisoners occupying a state paid custodial bed or on Electronic Monitoring has steadily increased.

Year	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Daily annual average of state prisoners	4,769	4,805	4,999	5,204	5,383	5,320	5,602

[1] The PEW Center on the States, One in 31, the Long Reach of American Corrections, at 43, March 2009.
[2] Bureau of Justice Statistics, United States Department of Justice, Prisoners in 2007.

The January 2009, ISER Research Summary report, "The Cost of Crime" requested by the Senate Judiciary Committee found that, with no change in the level of intervention and prevention programs in place at the time of the study, Alaska's prison population was projected to grow to 10,513 by 2030. Such an increase in Alaska's prison population would require the state to fund an unsustainable number of new prisons, not to mention the costs of substantial increases in the state court system, and prosecution, defense, and public safety departments to handle Alaska's growing number of offenders.

95% of Alaska's prisoners are eventually released from prison.

As the number of prisoners grows so does the number of prisoners released. In 2000, there were 2,427 prisoners admitted into an Alaskan correctional facility and 2,599 released. In 2008, there were 3,635 prisoners admitted and 3,741 released. [3]

- In 2009, the ADOC released, on average, **295 convicted felons every month, up from 289 per month in 2008.**
- Of the 3,436 prisoners released in 2008, approximately 1,735 were released to Anchorage, 290 to Fairbanks and 106 to Juneau.

In summary, as of 2009, 1 out 36 Alaskans was under the jurisdiction of the ADOC.[4]

Year	1982	2007	2009
# of Alaskans under ADOC jurisdiction	1 out of 90	1 out of 38	1 out of 36

The question is: Are Alaskans getting good value for the criminal justice dollars spent? As of 2008, the state is doing better, but we could do better yet.

- In 2011, ADOC expects to spend $136.00 per day to incarcerate a prisoner or $49,800 per year per individual.
- In FY 2010, ADOC's annual budget was $261,160,400.[5]
- Yet, 2 out of 3 former prisoners return to prison within the first 3 years of release for either a probation violation or for the alleged commission of a new crime.[6]

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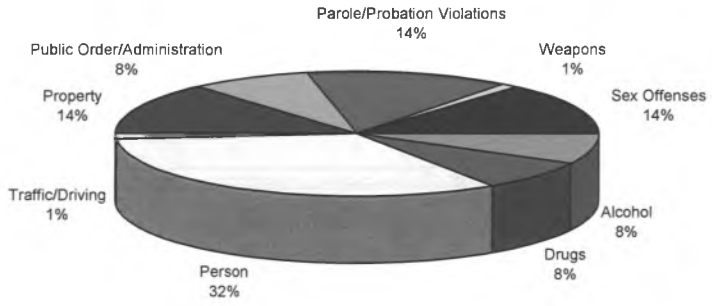
[3] Bureau of Justice Statistics, Alaska prisoner admissions and releases in 2008.
[4] The PEW Center on the States, One in 31, the Long Reach of American Corrections, pg 43, March 2009, available at:
http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf
[5] Departmental FY2010 FINAL Authorized (ADOC Management Plan with Supplemental)
[6] 2007 Alaska Judicial Council Recidivism Study.

As the pie chart below reflects, a snapshot of the ADOC's prison population in 2009 shows that less than 50% of offenders committed crimes against the person or a sex offense.[7]

Institutional Offenders
by Offense Class
December 31, 2009



Yet, 8% of its population consisted of offenders who had committed Public Order/Administration offenses. The majority of offenses in this category included bail condition violations, failure to appear and contempt of court. These are offenses that certainly require consequences, but, at what cost to the state, and is it possible to create less expensive alternatives that will serve to reaffirm societal norms and protect the public?

What's at stake for Alaska?

Currently, the ADOC is constructing the Goose Creek Correctional Center (GCCC) which will have a maximum capacity of 1536 prisoners. The cost to build this facility is approximately $250 million and the annual operating budget is estimated to be approximately $50 million per year.

The ADOC's goal, along with its other stakeholder partners, is to employ cost-effective measures that will promote public safety, reduce Alaska's prison growth rate and successfully reintegrate newly released prisoners back into their communities.

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[7] ADOC Offender Profile 2009, page 18 available at:
http://www.correct.state.ak.us/corrections/admin/docs/profile2009final.pdf

If Alaska expands recent efforts to reduce recidivism, and employs best practice measures that have been proven successful in other states, it stands the greatest chance to slow its prison system growth while improving public safety.

Collaboration and the identification of a leader is the key to success.

Current collaborative efforts are:

- The Criminal Justice Work Group
    - Sub-group: The Alaska Prisoner Reentry Task Force
    - Alaska's Five-Year Prisoner Reentry Strategic Plan, 2011-2016, Purpose is to identify approaches to reduce recidivism in Alaska.
- Probationer Accountability with Certain Enforcement (PACE), Superior Court Pilot Project in Anchorage, July 2010 to the present.[8]
- The National Governor's Association Cross-Governmental Sentencing & Corrections Policy Forum in Annapolis Maryland, Summer 2010.
- The September 18, 2010, Cost Effective Justice Forum, Anchorage, Alaska
    - Pew Public Safety Project
    - National Governor's Association

The Texas Experience

In 2007, the famously "tough on crime" Texas legislature took dramatic, bipartisan action to control crime and corrections costs. This initiative was led by Republican Jerry Madden who was appointed by the majority leader as Chairman of the Corrections Committee. The then speaker of the house instructed Rep. Madden to develop new approaches to slow Texas' rapid prison growth. "Don't build new prisons. They cost too much".[9] With that directive in mind, Rep. Madden, an engineer and graduate from West Point, gathered the data and the facts to develop a systematic approach to break the cycle of crime.

In 2007, Texas' prison population exceeded 100,000 persons.[10]At the start of 2007, the state's corrections department projected a shortfall of 17,000 prison beds over the next five years and recommended the construction of 4,000 new beds at a cost of more than $900 million. Texas legislators requested assistance from the Pew Center on the States' Public Safety Performance Project and its partner, the Council of State Governments Justice Center (CSG), to identify options to avert prison growth while protecting public safety.

Based on their nonpartisan research and the menu of policy options they prepared, the 2007 Texas legislature approved a plan that provided an historic investment of

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[8] For more information on the probation model go to: http://akdocpio.wordpress.com/

[9] Anchorage Daily News editorial, *Be tough, be smart*, September 19, 2010.

[10] Recent & Projected Growth of the Texas Prison Population, Justice Center (2007), The Council of State Governments, found at: http://justicereinvestment.org/files/texas-growth.pdf

just over $241 million in treatment and diversion facilities and substance abuse treatment services (just over a quarter of what was being requested to build new prisons) both behind prison walls and in community-based programs.

The components of Texas' new approach included:

- Funding for probation officers to use for outpatient substance abuse treatment for offenders.
- Funding for a mental health Pre-Trial Diversion Program
- Expansion of in-custody substance abuse Therapeutic Communities (like ADOC's RSSAT program).
- A prison dedicated to providing DWI offenders with intensive substance abuse treatment.
- Use of Intermediate sanction facilities for probationers who violate probation conditions.
- Early school intervention programs
- The Nurse Family Partnership program

With these and other measures, the Texas legislature successfully averted construction of all of the previously planned prison beds through 2012.[11]

According to Rep. Madden, who spoke at the September Cost-Effective Justice Forum held in Anchorage, the Texas prison population completely leveled off as a result of these initiatives. No shortfall in capacity is predicted until 2013, when the system may need a relatively small number of prison beds compared to the previously predicted need for eight prisons. Moreover, following the adoption of these reforms, Texas' crime rate did not increase, but continued to fall.

Summing it up:

The Texas experience is illustrative of what Alaska is clearly able to accomplish with leadership, vision and commitment to invest wisely today in best practices that have been shown to reduce prison growth, cut state corrections spending and serve to make Alaska's community safer and healthier places to live. This is the Cost-Effective justice approach.

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[11] The Texas "justice reinvestment" approach was a dramatic turn in Texas' criminal justice policies. The state legislature committed to ensuring accountability and the continued success of these new measures. Accordingly, the Texas legislature established the Criminal Justice Legislative Oversight Committee to monitor and evaluate the implementation of the new policies and programs and to evaluate their impact on state prison populations.

RESEARCH SUMMARY
Institute of Social and Economic Research
University of Alaska Anchorage • January 2009
R.S. No. 71

The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?

By Stephanie Martin and Steve Colt

Alaska's prison population is among the fastest-growing in the U.S., with five times more inmates in 2007 than in 1981. Spending for the state justice system has nearly doubled since 1981—but the crime rate has dropped only about 30%.

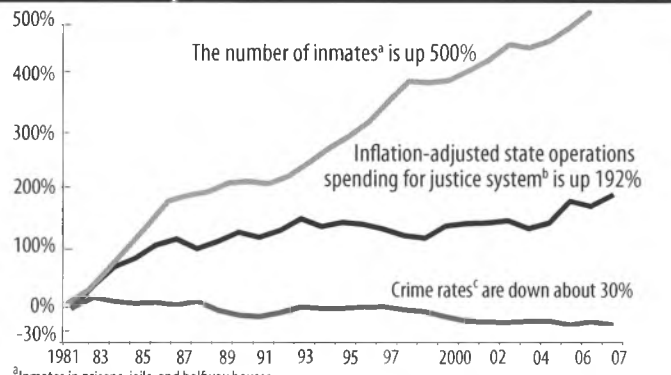
Here's the dilemma for the state, given the pattern shown in Figure 1: what can it do to hold down the number of inmates and stem the rising costs—while at the same time keeping the public safe and using tax dollars effectively?

Senator Hollis French asked ISER to project growth in the number of Alaska inmates and the associated costs—and then evaluate whether the state could reduce that growth by expanding intervention and prevention programs for people already in prison or at risk of ending up there. Alaska currently spends about $17 million a year for such programs, but they aren't available to many of those who might benefit from them.

There are a wide range of such programs. But it is programs for adults who are already in prison or jail that have the most potential to save money and reduce crime in the next 20 years. That's because they can reach the most people.

We know that without any intervention, about two-thirds of those who serve their sentences and are released commit new crimes. Stopping at least some of them from committing more crimes would not only help improve public safety but also reduce growth in both the number of inmates and in spending.

Figure 1. Percentage Changes in Alaska Crime Rate, Spending for Justice System, and Number of Inmates, 1981-2007

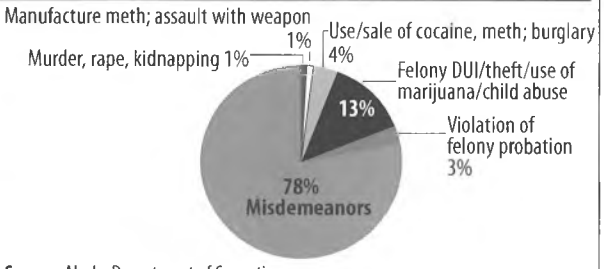


[a]Inmates in prisons, jails, and halfway houses
[b]Spending for Departments of Corrections, Public Safety, and Law; court system; Division of Juvenile Justice; Public Defender Agency; and Office of Public Advocacy. Does not include capital spending or payment on debt.
[c]Rates per 100,000 for murder, rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft.
Sources: U.S. Department of Justice; state budget documents; Alaska Department of Corrections

Also, most of those released committed misdemeanors (Figure 2). Those who commit the most serious crimes serve long sentences and make up a small share of those released in any given year.

To analyze which programs have the most potential to reduce crime *and* save the state money, we worked with the Alaska Criminal Justice Working Group and the Washington State Institute of Public Policy. That institute did a similar analysis for Washington state and provided us with data it collected from program evaluations nationwide (see back page). What did our study show?

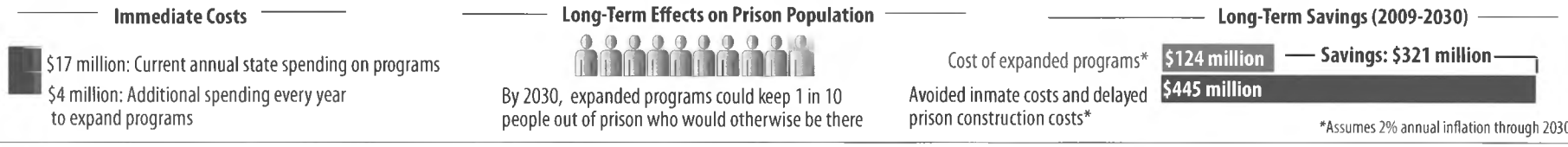
Figure 2. Who Gets out of Jail or Prison in Alaska?
(Total Releases, 2002-2007: 82,339)



Source: Alaska Department of Corrections

- *With no change in policies, the number of Alaska inmates is likely to double by 2030,* from 5,300 to 10,500.
- *If the state spent an additional $4 million a year to expand programs it already has, the prison population in 2030 might be 10% smaller* than projected—about 1,050 fewer inmates.
- *The state would spend about $124 million for expanded programs through 2030 but would avoid $445 million in costs—a savings of $321 million.* It would save money by incarcerating fewer people and by delaying prison construction costs. (Figures 3 and 8).
- *Education and substance-abuse treatment programs—in prison, after prison, and instead of prison—save the state two to five times* what they cost and reach the most people. Programs for teenagers are also very effective at reducing crime and saving money, but they reach fewer people.

Figure 3. Potential Effects, Costs of, and Savings from Expanded Prevention or Intervention Programs



Why Consider Expanding Programs?

In 1980, 2 in 1,000 Alaskans were behind bars; today that share is approaching 10 in 1,000. The sharp increase started in the 1980s, when the state government began collecting large oil revenues. The state used some of that money to expand police agencies, courts, and other parts of the criminal justice system statewide. Also in the 1980s, it made sentencing for the most serious felonies more uniform and stiffened sentences.

The crime rate in Alaska has declined since the 1980s. But the number of Alaskans in prisons, jails, and halfway houses has increased much faster, as have costs for the state justice system. Alaska's prisons are full, and the 1,500-bed prison scheduled to open in 2012 is projected to be full soon after it opens.

Locking people up is expensive, whether their crimes are major or less serious. Alaska spends on average $44,000 a year per inmate in prisons, jails, and halfway houses. Adjusted for inflation, that's actually less than in the 1980s—but it's still a lot (Figure 4).

Studies in other states have shown that some intervention and prevention programs can help cut both costs and crime, either by keeping people who have served their sentences from committing new crimes after they're released, or preventing some people from going to prison in the first place.

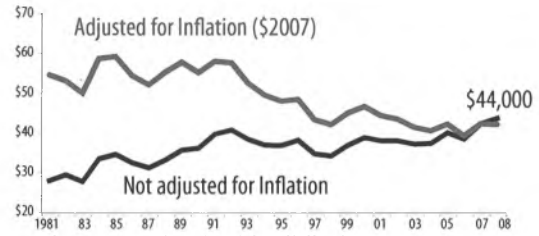
What Programs Did We Analyze?

The Alaska Criminal Justice Working Group gave us a list of programs to analyze. We looked for programs with the biggest potential payoff for the state—those that could reduce growth in both numbers of inmates and in spending for corrections, at a reasonable cost for the state.

Alaska already has a number of programs in place, and we found that expanding some of those would be most cost-effective. Table 1 lists the programs in our final analysis. As a guideline for what was a "reasonable" expansion, we used 10% to 20% of the eligible people not already served—except for very small programs that can't easily be expanded that much.

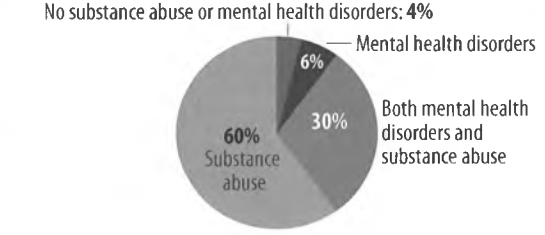
These programs would serve inmates, at-risk juveniles, and young children. They are all intended to reduce future crime in some way. Programs that treat substance-abuse or mental heath disorders have been shown to reduce recidivism—and as Figure 5 shows, almost all current inmates have those disorders.

Figure 4. Annual State Costs Per Inmate,* 1981-2008
(In Thousands of Dollars)



*Average cost of incarcerating people in prisons, jails, and halfway houses.
Source: Alaska Department of Corrections

Figure 5. How Many Alaska Inmates Have Substance Abuse or Mental Health Disorders?



Sources: Alaska Department of Corrections; Alaska Mental Health Trust

Table 1. Current Size and Potential Expansion of Intervention and Prevention Programs[a]

Programs	Currently serve	Reasonable expansion	Potentially eligible (2008)
Prison-based programs			
Education (adult basic; vocational)	More than 1,000	500	Almost all inmates (4,500)
Substance-Abuse (residential; intensive outpatient)	Close to 500	500	90% of inmates (approximately 4,000)
Sex-offender treatment[b]	0	50	10% of 500 eligible inmates
Transition from prison			
Transition for inmates with mental health disorders (Institutional Discharge Project)	70	100	36% of inmates (1,600)
Alternatives to Incarceration	500	500	Approximately 5,000[c]
Mental health, drug, alcohol courts; electronic monitoring; residential substance-abuse treatment			
Juvenile offenders	Approximately 500	1,000	Approximately 3,000
Aggression replacement training; family therapy; residential treatment; institutional transition			
Prevention	3,025	450	Approximately 8,000[e]
Head Start for 3- and 4-year olds from low-income families[d]			

[a] Programs included in our final analysis are those for which we found evidence that expansion would have significant pay-offs for the state at a reasonable cost. We evaluated additional programs not included here, either because there wasn't sufficient evidence to assess their effectiveness or because they weren't feasible to implement in Alaska at this time.

[b] To effectively reduce crime, sex offender treatment programs need to be offered in both prison and the community. Treatment is currently available only in the community, so the number served in prison is currently zero—but there are proposals to add treatment in prison.

[c] People facing low-level charges and with substance-abuse problems.

[d] Head Start is a federal program, but the state supplements federal money and Governor Sarah Palin has proposed additional state funding.

[e] We assume all children from families with up to double the poverty-level income would be eligible.

We looked at but excluded other programs from our final analysis. The criminal justice working group decided that a few programs, while effective elsewhere, wouldn't be feasible to implement in Alaska at this time. For other programs, there wasn't enough available evidence to judge how effective they were in saving money or reducing crime, or the available evidence showed them to be largely ineffective.

How Do the Programs Compare?

As Figure 3 (front page) shows, expanding programs to serve more of the eligible people would save the state about $321 million and reduce the projected number of inmates 10% by 2030. Figures 6 and 7 show how the various programs contribute to costs, savings, and reductions in the number of Alaskans behind bars.

- *Education and substance-abuse treatment programs for inmates save two to four times what they cost*, reduce recidivism by about four percentage points, and can reach the most people.

- *Intervention programs for juveniles who have committed crimes are very effective* at saving money and reducing recidivism, but they serve a much smaller number of people.

- *Programs that set up transition services for inmates with mental-health disorders* coming out of prison are among the most effective—but they can't readily be expanded to serve the many people who could benefit from them.

- *Alternatives to prison for some people charged with lesser offenses save the state money right away, and almost all reduce recidivism*. The exception is electronic monitoring, which is inexpensive but hasn't been shown to reduce future crime.

- *Treatment programs for sex offenders do reduce crime*, but they are very expensive and so don't save the state money.

- *Programs that prevent future crime by helping very young at-risk children are the most effective*. But the effects of spending for those programs aren't apparent until many years later.

Figure 6. How Effective Are Various Programs at Saving Money and Reducing Crime?

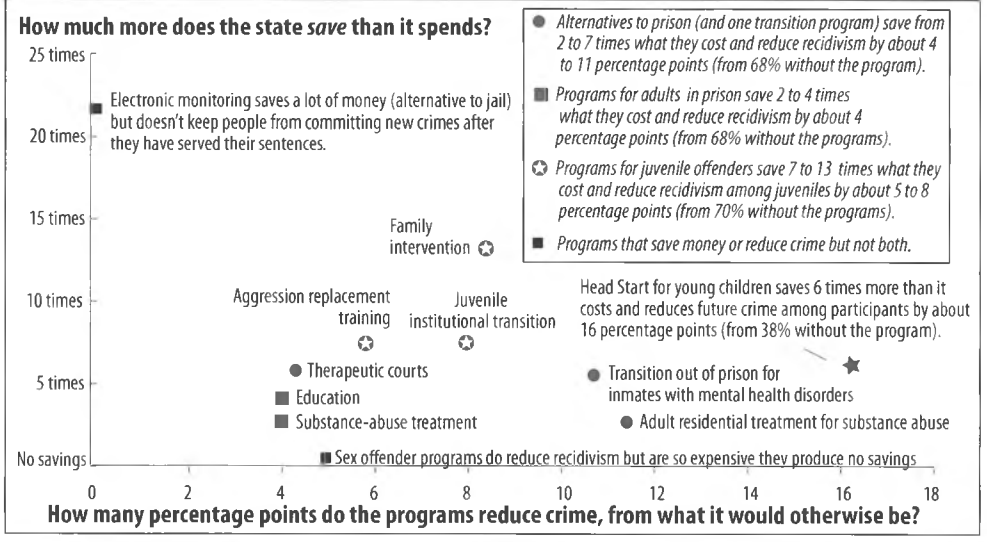
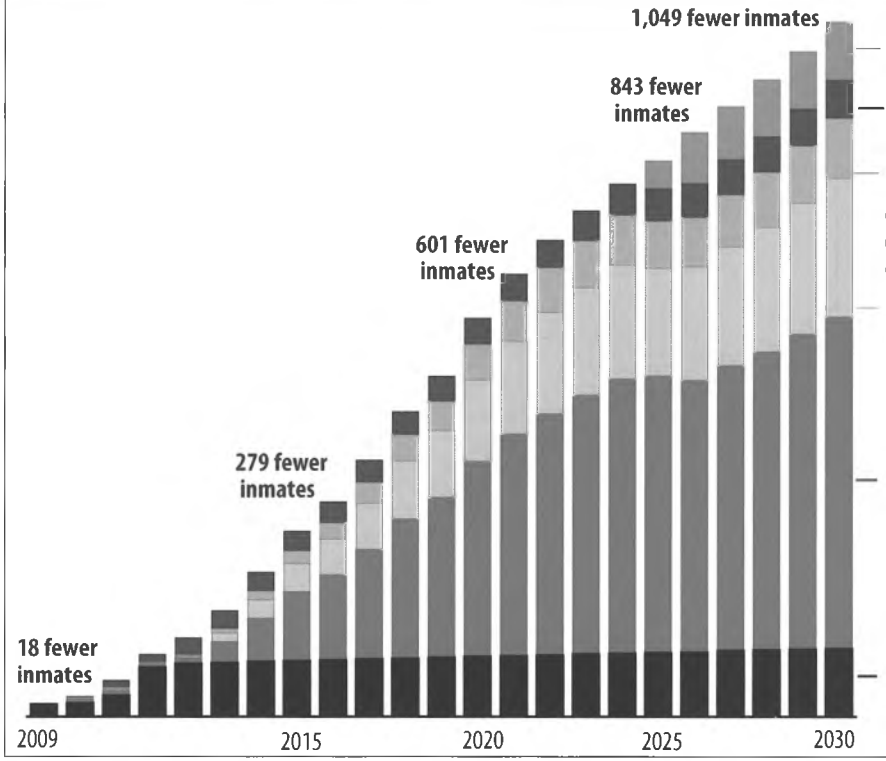


Figure 7. How Would Expanding Specific Programs Contribute to Reducing Growth in Numbers of Inmates?



Pre-school programs for at-risk children cost about $1,000 per child but save many times that much, by reducing future crime. The effects of the spending aren't apparent for years, until the children grow up.

Programs for juveniles offenders cost an average of about $2,500 per person, but save almost 10 times that much by keeping kids out of prison. They serve only a subset of the population of 12- to-17-year-olds.

Transition programs for people with mental health disorders are extremely effective, add about $2,000 per person to inmate costs, and save about four times that much. But the programs currently serve very few people and can't readily be expanded to serve large numbers.

Programs that treat inmates for substance abuse add about $2,000 a person to inmate costs, but over time save about twice as much. They are effective, but can't readily be expanded to reach all the people who need them.

Education and job training programs in prison add about $1,000 to inmate costs, but they reach the most people and save about four times more than they cost. Because they are offered in every facility, they can easily be expanded and can reach more people. (Reductions in the number of inmates as a result of the sex-offender treatment program are also included here, but are only one or two people a year.)

Programs that keep people out of prison save the state money right away, because they cost much less than the $44,000 per person the state spends to lock people up. They include therapeutic courts for substance abuse and mental health disorders, electronic monitoring, and residential substance-abuse treatment.

Conclusion

In conclusion, Figure 8 shows how Alaska's corrections system got where it is and where it's likely to go—if intervention and prevention program are kept at their current levels, and if the most effective programs are expanded to serve more of the eligible people.

We found that the state could both reduce the number of Alaskans in prison or jail and save considerable money over the next 20 years, by adding about $4 million a year to the $17 million it currently spends to keep people from returning to prison— or prevent them from ever going there at all.

Spending more for these programs even as oil prices and state revenues are falling may not seem like a good idea. But Alaska also needs to look to the future—and over time the benefits of strategically expanding those programs that reduce crime and keep more Alaskans out of prison far outweigh the costs.

Method of Analysis

Our job was to assess whether specific programs could reduce long-term state spending for corrections by reducing growth in the number of inmates. As a starting point, we needed evaluations of how effective various programs are at reducing future crime.

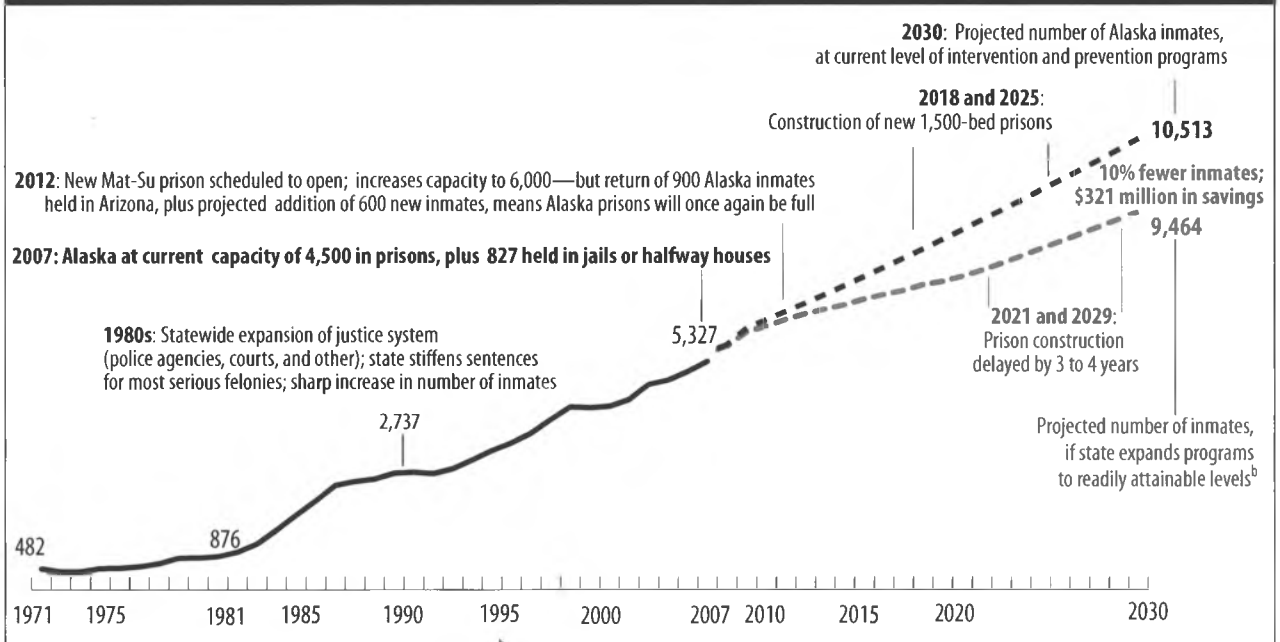
But except for some of the therapeutic court programs, most programs in Alaska have not been rigorously evaluated. Therefore, we used results of a Washington state assessment that systematically reviewed 571 program evaluations from around the country.

To be included, evaluations had to have carefully designed control groups, replicable results in multiple settings, and long-lasting effects. This method is evidence-based public policy, which merges research and practice. It is similar to clinical trials in medicine. Keep in mind that this is a new field, and only about 10% of programs in place nationwide have been evaluated at this standard.

With data from rigorous evaluations, the Washington State Institute of Public Policy created a model that estimated the effects of programs on recidivism—and then combined those results with a cost-benefit analysis to estimate the long-term effects on state spending and inmate populations.

We combined the institute's estimates of recidivism with Alaska data on program costs, eligible groups, and state population to estimate long-term effects on crime and state spending.

Figure 8. Average Number of Alaska Inmates,[a] 1971-2007, and Projected Number, 2008-2030



[a]Average daily number of people in prisons, jails, and halfway houses. [b]The number of people who could be readily added to program rolls varies considerably by program; see Table 1.

Sources: Alaska Department of Corrections; ISER projections of number of prisoners, based on Alaska Department of Labor projections of Alaska population 18-64 and assuming no change in current use of rehabilitation programs as well as expanded use; Washington State Institute of Public Policy

The authors thank the members of the Alaska Criminal Justice Working Group for their help in identifying programs to evaluate and for comments on drafts of this publication. The Alaska Legislature funded this group in 2007 and authorized the Alaska Judicial Council to act as its staff.

The group is chaired by a justice of the Alaska Supreme Court and Alaska's lieutenant governor. Other members include top policymakers from the departments of Corrections, Public Safety, Health and Social Services, and Law, as well as the Alaska Mental Health Trust Authority; the heads of the Alaska Public Defender Agency and the Office of Public Advocacy; the administrative and deputy directors for the Alaska Court System; the executive director of the Judicial Council, the U.S. attorney, and Anchorage's police chief.

This group meets monthly to talk about long-term justice issues, as well as to resolve any inter-branch issues that come up among the many agencies and organizations that deal with aspects of Alaska's justice system.

The authors also thank Elizabeth Drake and Steve Aos of the Washington State Institute of Public Policy for developing the methods and models we used and for helping us apply them to Alaska. For more information go to www.wsipp.wa.gov.

This research summary and many other publications on a wide range of topics are available on ISER's Web site:

www.iser.uaa.alaska.edu

Editor: Linda Leask Graphics: Clemencia Merrill

2/09/11 THERAPEUTIC COURTS AND PRISONER REENTRY PROGRAMS

<TARGET><BILL></BILL><SUBJECT>2-09-11 THERAPEUTIC COURTS AND PRISONER REENTRY PROGRAMS</SUBJECT><COMM>SJUD27</COMM></TARGET>

STATE OF ALASKA

SEAN PARNELL,
GOVERNOR

DEPARTMENT OF CORRECTIONS
OFFICE OF THE COMMISSIONER

P.O. Box 112000
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PHONE: (907) 465-4652
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Date: February 16, 2011

To: Senator Hollis French, Chair
Senate Judiciary Committee

From: Carmen Gutierrez, Deputy Commissioner
Department of Corrections

Re: Response to Questions – SJUD February 9, 2011

During a recent senate hearing held on February 9, 2011, in conversation with the Department of Corrections, two questions were posed:

What would it take to build capacity within the Substance Use Disorder (SUD) treatment service array that provides immediate access to assessment and services?
Assumptions:

- The estimated unmet need was developed using conservative synthetic prevalence estimates based on low-income household population. It is important to note that the State has historically only funded SUD treatment services based on low-income. Individuals with the financial means typically obtain SUD treatment services from private, not state funded service providers. Therefore these estimates reflect only low income households.
    - This establishes an unmet need of service capacity for 4,246 persons. However, we know many people are not motivated and will not avail themselves to seek treatment.
    - Of this total of unmet need, it is estimated that 40% will successfully engage services.
- These estimates do not address any "opportunity costs" associated with bricks and mortar
- These estimates to not address related issues associated with workforce development

Cost of Providing Unmet Substance Abuse Services To Low Income Persons

	Persons Served FY10	Percent Served FY10	Estimated Unmet Need	40% Engaged	Cost per Person*	Total Estimated Cost
Regular Outpatient Treatment	3,549	60%	2,568	1,027	$ 2,743	$ 2,817,061
Intensive Outpatient Treatment	866	15%	627	251	$ 3,810	$ 2,247,900
Methadone Maintenance Treatment	150	3%	109	43	$ 5,944	$ 255,592
Short Term Residential Treatment	552	9%	399	160	$ 6,706	$ 1,072,960
Long Term Residential Treatment	751	13%	543	217	$ 10,364	$ 2,248,988
Sum	5,868	100%	4,246	1,698		$ 8,642,501

**Source: Physician's Leadership on National Drug Policy (PLNDP) 1998 prorated to 2012*

- Multiple studies conclude that every dollar spent on treatment results in an average of $7 in returned benefits.
- The greatest economic savings associated with treatment are in the form of averted criminal activity followed by decreased utilization of health services.

Secondly you inquired as to the number of additional qualified sex offender treatment providers required to meet the current demand.

In the community we currently have the following providers:

Anchorage: 65 offenders receiving treatment with four providers
Palmer: 10 offenders with one provider
Ketchikan: 10 offenders with one provider
Fairbanks: 20 offenders with two providers
Bethel: 30 with two providers
Total served: 135 by 10 providers

The current statewide waiting list state is approximately 150 individuals with court-ordered treatment.

We need approximately 11 more providers. Ed Webster, the ADOC criminal justice planner responsible for the ADOC's sex offender treatment programs, believes he could probably meet the demand of the waiting list with eight providers as long as they were full-time and took on a full caseload of 20 offenders. Currently we have some providers only doing 10 or so because of other obligations or they are new to the profession.

Document Contact:

Mark Haines-Simeon DHSS / Behavioral Health Policy & Planning Section Manager (907) 269-3408	Ed Webster Department of Corrections Criminal Justice Planner (907) 269-7416	Steven King Department of Corrections Criminal Justice Planner (907) 269-7417

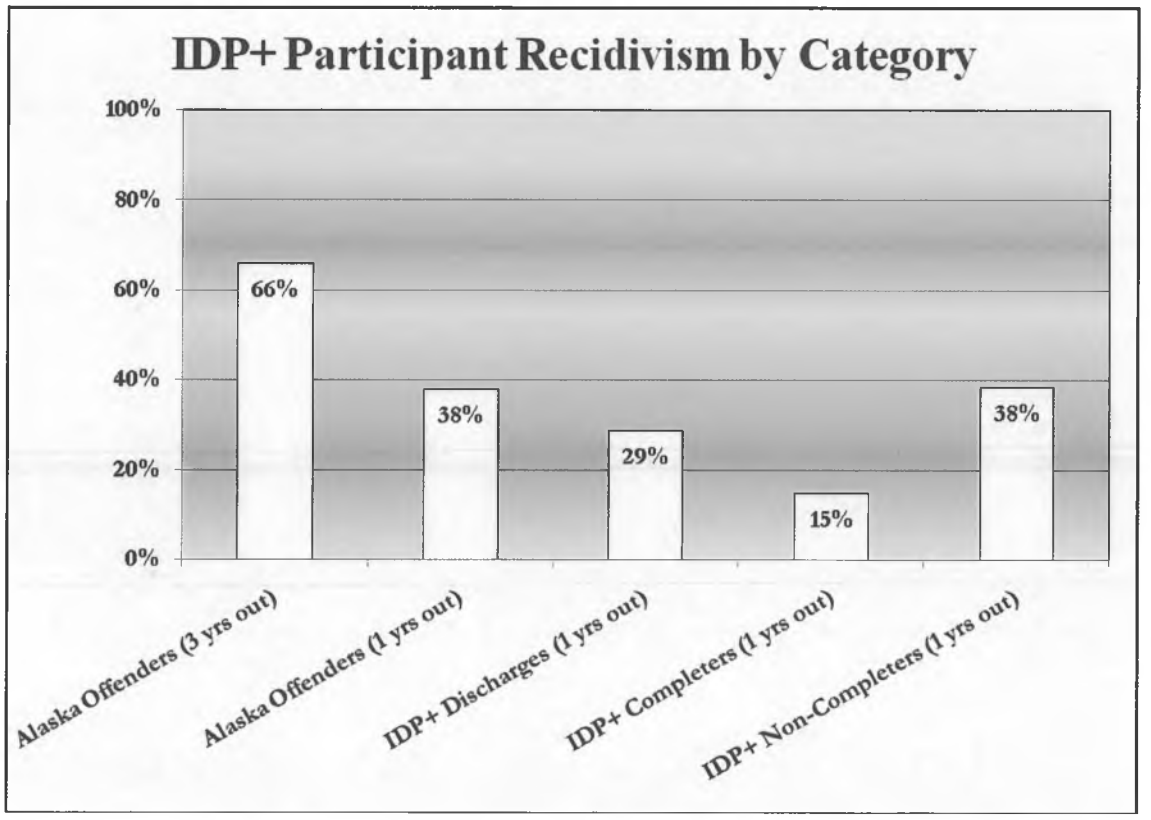
Alaska Department of Corrections Senate Judiciary Committee
Presentation, February 9, 20100

I. DOC Reentry Programs for the Mentally Ill

a. *Institutional Discharge Project Plus (IDP+)*

Since 2002 the Department of Corrections has operated the IDP+ program, a special program that targets felony prisoners with a psychotic disorder who are being released to probation or parole to Alaskan communities. An ADOC mental health clinician, in conjunction with a probation officer and other community behavioral health or other identified agency representatives, develops a treatment and monitoring plan for the releasing prisoner. The current caseload for this clinician is 77. There are also an additional 10 to 15 individuals in IDP+ in locations around the state at any given time. Based upon ADOC clinician experience, the caseload for a single IDP+ clinician should not exceed 30.

Although the IDP+ program as a whole has not been formally evaluated by an outside entity, ADOC internally tracks outcome data on participants. In 2008, the ADOC asked Hornby Zeller Associates to conduct a sample study (n=125) of IDP+ participants. The sample included individuals who were actively being monitored by the IDP+ program, had successfully completed the IDP+ program, or were discharged from the IDP+ program. The sample study found that of those who completed the program, 15 percent recidivated after one year. This is in comparison with the state recidivism rate of 38 percent after one year.



There are several program components that are key to a participant's success and to ensuring public safety, including but not limited to:

1. A trained mental health clinician working actively and collaboratively with probation and community service agency staff to develop, monitor, and adjust community release plans for probationers and parolees that address treatment services and appropriate housing;
2. A reduced probation caseload to compensate for individual mental health, substance abuse, and other complexities that are inherent to participants of this reentry program; and,
3. The ability to respond quickly if an individual is having problems with the release plan or if a community agency has concerns about the individual's compliance with the release plan.

b. Assess, Plan, Identify and Coordinate (APIC)

This program, based on a national evidence-based model, links offenders with mental illness reentering the Alaskan communities of Anchorage, Fairbanks, Juneau and the Mat-Su Valley with needed community services to ensure public safety and success for the individual. This program is available to both felony and misdemeanor offenders who are in custody at the time of referral.

The goal of the program is to link individuals to community treatment services, medication and to secure government benefits to which they are entitled. The APIC program has funding available to pay community agencies under an APIC contract for services up to 90 days before release for release planning and for direct treatment services up to 60 days after release with the possibility of extension in certain cases. This allows time to obtain federal Social Security Administration and Alaska Division of Public Assistance benefits if eligible and for services to be provided at a more intense level to aid reentry. Through this program, the ADOC has succeeded in securing social security disability (primarily SSI) benefits for all ADOC applicants in this program, referring participants to needed community-based support services which has resulted in reduced recidivism rates for this population.

Although the APIC program as a whole has not been formally evaluated by an outside entity, ADOC internally tracks outcome data on participants. In FY10, data on 143 participants in the program showed the following:

1. 100 percent of the participants had been connected to identified community treatment providers on release from an ADOC facility;
2. 89 percent of the participants had an admission for services intake within 10 days of release from an ADOC facility;
3. 55 percent of the participants were released from an ADOC facility to supervised or supported housing, and 39 percent into non-supervised housing; and,
4. As of June 30, 2010, 59 percent of those who completed the program prior to March 31, 2010 had not been re-incarcerated.

There are several program components that are essential to a participant's success and ensuring public safety, including but not limited to:

1. Having dedicated ADOC staff to assist the identified offenders develop a reentry plan;
2. Establishing connections and to identify community services prior to the offenders release;
3. Facilitating a "warm transition" or hand-off of the offender to the community service(s) provider;

4. Ensuring medication regimes for identified offenders are not disrupted during the reentry transition; and,
5. Having 60 days or more for identified cases of ADOC and case coordination to ensure the offender is connected and receiving identified community treatment services and supports.

c. DOC Discharge Incentive Grant for Housing and Related Supports

The ADOC and the DHSS/DBH coordinated Trust funds to provide transitional housing and supports to 53 individuals with complex mental disorders in FY10. Each agency managed a portion of the funds to assist these individuals to successfully transition from jail or prison to a community setting. The ADOC reported FY10 length of stay and recidivism data for the 43 individuals for whom the ADOC managed funding for housing placements. The ADOC has reported the number of jail days in the 12 months prior to Trust funded housing placement, the number of days while in Trust funded housing, and the number of days in jail in FY10 after Trust funded housing ended.

The ADOC authorized Trust funds to pay for a cumulative total of 2,416 days of housing for 43 individuals, ranging from 2 to 30 days in an assisted living facility and 5 to 172 days in a supervised board and care transitional housing setting. In the 12 months prior to housing, the 43 mentally disabled individuals had spent of total of 9,059 days in jail, ranging from one individual who spent no time in a jail bed to 13 individuals who each had 365 jail bed days housing. These 43 individuals spent a cumulative total of 81 days in jail, with 36 having no jail bed days and only one individual jailed for 25days, while in ADOC-managed Trust housing. After the Trust funded housing ended, these same individuals subsequently spent a cumulative total of 1,235 additional days in jail in FY10.The time spent in jail during this period ranged from no jail bed days for 27 to one individual who had 273 days in jail. **The reduction in 7,824 jail bed days** clearly demonstrates that housing contributes strongly to beneficiary success and a reduction in legal recidivism.

The DOC Discharge Incentive Grant improved beneficiary quality of life, enhanced participation in beneficiary participation in community based treatment, improved personal and public safety, and showed dramatic reduction in legal recidivism.

II. PACE – Probationer Accountability with Certain Enforcement

In July 2010, the Anchorage Superior Court, in collaboration with a number of criminal justice partners, started the PACE (Probationer Accountability with Certain Enforcement) pilot project modeled after Hawaii's Project HOPE. [1] Under the model, when a probationer violates probation by testing positive for drugs or alcohol or

[1] Those partners are the Anchorage Police Department, the State Public Defender's Office, the Office of Public Advocacy, Anchorage District Attorney's Office, and the ADOC.

missing an appointment with the probation officer, the probationer is arrested immediately and is brought to court within two business days. During one single hearing, which would normally take at least three court hearings over a six-month period, the probationer is arraigned, counsel appointed, adjudicated on the petition to revoke probation, and sentenced to a short term of incarceration.

Data collected after Honolulu's HOPE program started in 2004 showed that within three months, the rate of positive drug tests for probationers on HOPE dropped by half. More than half of the probationers never missed a drug test or appointment after their first warning meeting with the judge, and of those who did miss, 40 percent missed only once. A randomized study of Project HOPE found that after one year in the program, 9 percent of the HOPE probationers had not appeared for an appointment, as compared to 23 percent of the control group. Only 13 percent of the Project HOPE probationers had positive urine tests, as compared to 46 percent of the control group. Only 21 percent of the HOPE probationers had been rearrested (for any reason), compared to 47 percent of the control group.

The PACE pilot project began after Alaska criminal justice leaders studied HOPE and met Judge Steven Alm who founded it. PACE started out with 29 probationers in Anchorage Superior Court and will increase to 70 probationers by the end of February 2011. Three months after the Anchorage pilot project began, a preliminary report showed early results in Anchorage match the trends found with Project HOPE. The data, as of mid-October, showed the following:

- Thirteen of the 29 probationers originally assigned to PACE have gone for two months with no violations, and have had the frequency of their random urine analysis testing reduced.
- Of the probationers rearrested and sanctioned, most have only been rearrested once. Two probationers are being held on new charges, and probation is working to get at least one other (who has failed several tests) into residential treatment.

The ADOC and its collaborative partners on this project see great promise in the PACE model. Should the PACE trends continue, the goal is to expand the model to other state courts. Significantly, Project HOPE has shown in Honolulu that 50 percent of the probationers with significant drug and alcohol problems were able to stop using solely with the threat of swift and certain sanctions. Accordingly, the limited community-based substance treatment programs can then be made available to those who have demonstrated through their behavior the necessity of treatment.

III. Alaska's Five-Year Strategic Reentry Plan (2011-2016) Recommendations

The recommendations of the Alaska Prisoner Reentry Task are:

1. **Continue the collaborative process.**

State and local agencies, non-profits, local partners and concerned citizens are involved in a number of collaborative processes that address the shared goal of reducing criminal recidivism. These collaborative efforts should be encouraged by the Executive Branch, Legislature, Courts and other policymakers whenever possible. Collaboration increases accountability and the ability of state and local governments and community organizations to deploy resources effectively on the same population.

As part of this continued collaborative process, an existing workgroup should be charged with ongoing tracking and identification of the specific factors contributing to recidivism, and Alaska's rapid prison population growth. Without identification of these factors, policymakers will be less successful in selecting the best practices to reduce recidivism and slow Alaska's prison growth.

2. **Expand the ADOC's institutional substance abuse treatment programs.**

The ADOC currently operates the RSAT and LSSAT substance abuse treatment programs in its institutions. These programs have the capacity to provide treatment to approximately 1,000 prisoners per year of the more than 5,600 prisoners incarcerated. The ADOC is in the process of evaluating these programs. Those programs, or program elements, shown to be effective should be expanded. Those programs, or program elements, shown to be less effective should be modified to become more effective or replaced with more promising programming.

3. **Expand Probationer Accountability with Certain Enforcement (PACE).**

Implemented by a collaborative team, (courts, law, defense and local police and state troopers), the Anchorage PACE pilot project has demonstrated sufficient success to warrant expansion to other judicial districts where core team members are committed to following the model with fidelity, and are able to implement an initial pilot project without additional state resources.

4. **Expand the Electronic Monitoring Program (EMP) in the Mat-Su Valley.**

Operating in seven communities statewide, the EMP has proven to be a cost-effective system of monitoring offenders in the community without

compromising public safety. Information on EMP participant outcomes in Alaska indicates significant reductions in recidivism, as well as immediate savings in incarceration costs.

The Mat-Su Valley EMP cannot be expanded beyond its current capacity without additional state resources: one probation officer, a criminal justice technician and other infrastructure supports. With this expansion, the Mat-Su Valley could accommodate 60 more qualified offenders who would otherwise occupy a prison bed and not be supporting themselves and their families.

5. **Improve the state's ability to collect, analyze and disseminate criminal justice data.**

    a) Alaska should continue to work with the National Governors' Association to obtain technical assistance to help the state to identify and fill in gaps in its data collection systems and improve training and supervision of state employees responsible for data collection, entry and analysis.
    b) The ADOC should seek technical assistance to improve its ability to collect and report on a more comprehensive set of data elements.
    c) The state should investigate establishing an entity that would aggregate criminal justice data across agency lines. This entity would be responsible for producing reports that would provide the context and foundation for policy decisions throughout the state.

6. **Improve former prisoners' access to affordable housing.**

    a) Address the blanket presumption of guilt often used by public and private landlords to automatically preclude individuals with criminal records from being considered as tenants.
    b) As suggested by AHFC CEO/Executive Director Dan Fauske at the last Alaska Council on the Homeless meeting (12/1/10), convene a high level workgroup with a member from AHFC, The Trust, the ADOC, DHSS, and real estate owners and developers to discuss how Alaska may increase the statewide stock of available and affordable housing.
    c) Improve housing information available in the state's 211 system.
    d) Increase the use of subsidized housing programs, recognizing that these programs cost substantially less than incarcerating a recidivist at $136.00 per day or $49,800 per year.

7. **Improve the ADOC's ability to identify and provide for the behavioral health needs of its inmates.**

a) Implement a statewide, on-line health record database system that is standardized and would allow entry of specific types of information pertaining to an offender's health, mental health, and substance abuse screening and treatment.
b) Assess the ability for the ADOC and DHSS to electronically share specifically identified and pertinent information from individual databases (i.e. AK AIMS)
c) Increase the staff capacity of ADOC to manage the APIC and IDP+ programs for offenders reentering Alaskan communities.
d) Work with APIC community providers to enhance their workforce and program capacity to treat and support offenders reentering communities (i.e. peer supports/mentoring).

8. **Reduce the number of misdemeanor offenders recycling in and out of jails.**

a) Identify the laws, rules, policies and practices that lead to the incarceration of individuals who pose no substantial risk to public safety.
b) Expand prosecutorial diversion programs for misdemeanor offenses.
c) Expand the ADOC Electronic Monitoring Program for misdemeanants.
d) Make good use of halfway house stays by assessing sentenced misdemeanants for behavioral health and criminogenic risks and needs.
e) Make good use of halfway house placements by screening sentenced misdemeanants for behavioral health and criminogenic risks and needs and assessing and referring for services as appropriate.
f) Expand therapeutic courts and other problem-solving courts for misdemeanants such as the Mental Health and Addiction Therapeutic Courts, Operating Without License (OWL) Courts, and Anchorage adjudication/disposition courts.

9. **Expand Treatment Services and Housing Options for Sex Offenders.**

a) Determine the effectiveness of the sex offender treatment programs offered by the ADOC with appropriate performance measures.
b) Upon substantiation of their effectiveness, increase the ADOC institutional sex offender treatment program capacity.
c) Increase the number of state approved community sex offender treatment providers.
d) Create a sex offender treatment program for women.

e) Expand the Y-K Delta sex offender treatment model to other communities that need and will embrace the program.
f) Remove counterproductive residential restrictions on housing.

10. **By order of the Governor, require all state agencies to:**

a) Inventory state employment restrictions related to criminal offenders. Consolidate this information in a unified document specifying restricted occupations and the substance and nature of the restrictions making relevant information readily accessible to the public.
b) Analyze the necessity of these restrictions to public safety, identify possible mechanisms to provide relief from the restrictions (time limitations/waivers), and amend and simplify as appropriate.
c) Compile baseline data on:
    i. The number of people affected by restrictions,
    ii. The number of jobs that are restricted,
    iii. The impact of relief mechanisms.

11. **Expand state support for the ADOC chaplaincy program.**

a) Expand the mentoring program including the number of volunteer mentors, recognize the need for better screening, training of and supervision of mentors.
b) Support the efforts of the State Chaplain and Alaska Correctional Ministries (ACM) to develop the Healing Communities model in Alaska. Building this model will bring more support and mentors to those in prison and coming home.
c) Support the hiring of state-paid chaplains for the prisons. The volunteer chaplaincy efforts are laudable, but the role is too important and carrying too many responsibilities to be left to under-paid staff hired by ACM and volunteers.
d) Support the continued expansion of programs such as prison Transformational Living Communities and the transitional community residences.

Recidivism in Alaska's Felony Therapeutic Courts

Alaska Judicial Council

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Recidivism in Alaska's Felony Therapeutic Courts

Executive Summary

The Alaska Judicial Council found that graduates of the Anchorage Felony Driving Under the Influence, Anchorage Felony Drug, and Bethel Therapeutic Courts were rearrested and re-convicted far less frequently than comparison offenders. The Council followed graduates for one year after they completed their program and tracked comparison offenders for one year after they were released from serving their sentence. Therapeutic court graduates were also re-arrested far less frequently than a baseline sample of Alaskan offenders charged with felonies in 1999, discussed in the Council's January 2007 report, *Criminal Recidivism in Alaska*. Findings included:

- The longer the participants stayed in the program, the less likely they were to recidivate even if they did not graduate.
- 54% of the participants in these project graduated.
- 13% of graduates were re-arrested within one year after completing a therapeutic court program compared to a 32% re-arrest rate for comparison offenders and a 38% re-arrest rate for offenders charged with felonies in 1999.
- Participants who were discharged from the programs or who left voluntarily had about the same rate of recidivism as the offenders charged with felonies in 1999.
- Older participants were less likely to be re-arrested than younger participants.
- Participants in the Anchorage Felony DUI Court were less likely to be re-arrested than those in the Anchorage Felony Drug Court and the Bethel Therapeutic Court.
- No participants in the programs who were re-convicted within the first year were convicted of an offense at a more serious level than the one on which they entered the therapeutic courts. None were convicted of a Drug or Sexual offense. In contrast, 3% of the comparison offenders were convicted of offenses at a more serious level. In the Council's companion report on recidivism among 1999 offenders, about 15% of most types of offenders were convicted of offenses at a more serious level.
- Native participants responded as well to the therapeutic court programs as did Caucasian participants. Blacks and other ethnicities did not do as well as Caucasian participants.
- The Council recommended that the state should develop further information about the costs and benefits of therapeutic court programs; should explore the reasons for the relative success of Native participants in the programs; and should determine why ethnic groups other than Natives and Caucasians did not do as well in the programs.

Introduction

In 2001, the legislature created two new therapeutic courts for defendants with alcohol problems: one for felony Driving Under the Influence cases in Anchorage, and one for defendants with alcohol problems in Bethel. At the request of the legislature in its original bill, HB172, the Judicial Council evaluated the two projects in 2005,[1] with funding from the state's Department of Health and Social Services.[2] At the same time, the Council evaluated the Anchorage Felony Drug Court. The present report looks at the recidivism rates for the 117 offenders who participated in the therapeutic courts, and compares them with matched groups of 97 offenders who did not participate in the therapeutic courts.[3] This analysis also compares these groups with the baseline recidivism rates for 1999 offenders,[4] reported by the Judicial Council in *Criminal Recidivism in Alaska*.[5]

[1] EVALUATION OF THE OUTCOMES IN THREE THERAPEUTIC COURTS, Alaska Judicial Council, April 2005. Available on the Judicial Council's website, www.ajc.state.ak.us, under "Publications."

[2] Funding for this report, and the companion report, CRIMINAL RECIDIVISM IN ALASKA, cited below, also came from the Alaska Department of Health and Social Services.

[3] The methodology used in this report is described in Appendix A. Also see below, footnotes 9, 19, and 34.

[4] The offenders included in the report on criminal recidivism had been included in the earlier Council report, ALASKA FELONY PROCESS: 1999, Alaska Judicial Council, February 2004. The report is available from the Council's web site, www.ajc.state.ak.us, under "Publications."

[5] Alaska Judicial Council, CRIMINAL RECIDIVISM IN ALASKA, January 2007. Available from the Council's web site at www.ajc.state.ak.us, under "Publications."

Part 1

Measures of Recidivism

The Council compiled the number of new arrests and convictions[6] for each of the offenders who participated in one of the therapeutic justice projects, and for other defendants who did not participate.[7] The information reported here includes offenders who had been out of the program for at least one year. The comparison group included those who had finished serving any sentence imposed, and had been out of custody for at least one year. The offenders were grouped into three categories:

- All offenders who graduated from one of the programs ("graduates");
- All offenders who were in one of the programs, but were discharged before finishing the program ("discharged");[8] and
- Offenders with similar characteristics to the participants who did not participate in one of the programs ("comparison").[9]

The Council also compared the recidivism of each of the therapeutic court groups to the recidivism of convicted Alaska offenders charged with felonies in 1999.[10]

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[6] The data for new arrests and new convictions came from the Department of Public Safety.

[7] The Council also collected information about the numbers of new cases filed in Alaska courts, using Court system data. There was very little difference in the rates of recidivism between re-arrests and new cases filed. For simplicity and comparability to other reports, only the re-arrest and re-conviction rates are included in this report. Information about cases filed is available from the Judicial Council on request.

[8] The term "discharged" included all participants who did not complete the therapeutic court program for any reason. Some participants "opted out;" that is, they chose to not complete the program. Others were asked to leave the program for a variety of reasons. Most who were asked to leave either had frequent relapses into substance abuse, or had committed new offenses that could not be handled within the context of the therapeutic courts.

[9] The comparison groups were selected separately for each of the three therapeutic courts, by program staff. They were matched on age, ethnicity, gender, offense of conviction, and prior record of convictions. The Anchorage Felony Drug Court had 19% of the comparison offenders, the Anchorage DUI Court had 52%, and the Bethel Court had 29%. The most noticeable difference between the comparison groups and the participant groups was that the comparison offenders had slightly less severe prior records. Analysis showed that the differences did not matter significantly in the recidivism between the groups.

[10] See note 4, above.

Part 2

Amount and timing of recidivism during one year after release

Table 1 shows the recidivism rates for the first six months and the first year after offenders graduated from therapeutic courts; or from serving their sentences, in the cases of the discharged participants, the comparison offenders and the1999 felony report offenders.[11]

Table 1
Recidivism rates for therapeutic court graduates, discharged, comparisons, and baseline offenders, during first six months and first year[12] after end of program

	Graduated[13]	Discharged[14]	Comparison Offenders[15]	1999 Felony Report Offenders (baseline)[16]
% arrested, 1st 6 months	8%	26%	18%	26%
% arrested, 1st year	13%	39%	32%	38%
% convicted, 1st 6 months	4%	10%	8%	13%
% convicted, 1st year	6%	26%	23%	28%

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[11] All of the offenders had been released for at least one year. When comparing the different groups, it is useful to remember that all of the participants in the therapeutic courts were there because they had serious alcohol or drug abuse problems. The comparison group offenders also had substance abuse issues. Of the 1999 felony offenders, 68% had alcohol problems, and 48% had drug problems.

[12] The analysis used 214 offenders who were released from incarceration or the program for at least a year.

[13] Offenders who completed a therapeutic court program.

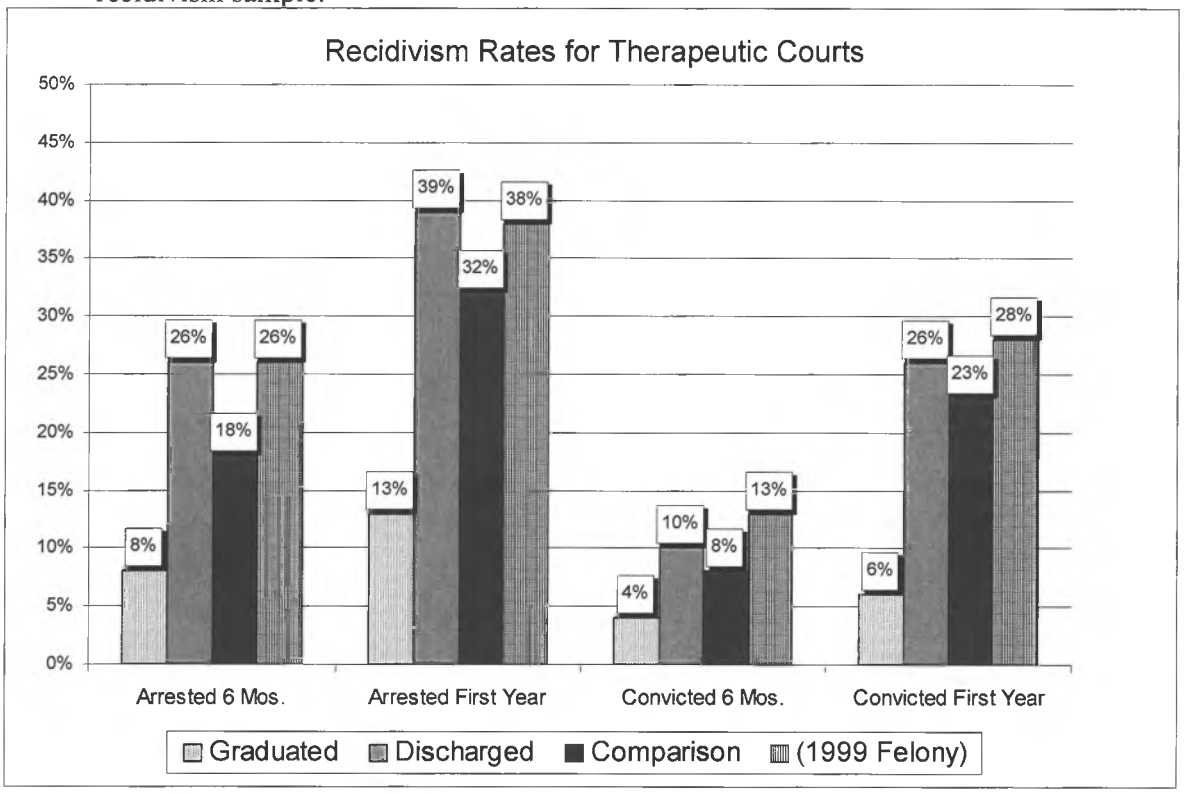
[14] Offenders who were in a therapeutic program but who opted out or were discharged.

[15] Offenders who had characteristics similar to the therapeutic court participants but who did not participate in a therapeutic court program.

[16] Two-thirds sample of all Alaskan offenders charged with a felony in 1999 and convicted of an offense.

Findings

- Graduates of the therapeutic court programs re-offended far less frequently than did any of the other groups measured.[17]
- 13% of the graduates were re-arrested in the first year, a rate about one-third of that for the other groups. 6% of the graduates were convicted of a new offense in the first year, a rate about one-quarter of that for the other groups.
- Participants in the program who were discharged did about as well as offenders in the 1999 recidivism sample.[18]



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[17] Graduates had significantly fewer new arrests than the other two groups in the first six months, and in the first year, and significantly fewer convictions in the first year. There were no significant differences between graduates and other groups for convictions during the first six months after release, probably because there were few convictions during this period. The differences between the discharged group and the comparison group were not statistically significant. The differences between the therapeutic court groups and the 1999 felony recidivism group could not be tested statistically in this report.

[18] Comparison group results were slightly, but not significantly, better than the results for discharged participants. The combined group of graduates and discharged program participants had slightly lower recidivism rates than the comparison group (the differences were not statistically significant), and substantially lower recidivism rates than the 1999 offenders. Graduated and discharged combined rates were: 16% re-arrested in first six months; 25% re-arrested in first year; 7% re-convicted in first six months; 15% re-convicted in first year.

Part 3

Description of Participants

The offenders described here included all of the participants, graduated and discharged, in the three programs reviewed in this report, Anchorage Felony DUI, Anchorage Felony Drug, and Bethel Therapeutic Court.[19]

A. Demographics

1. Gender

- 29% of the graduates were female; as were 24% of the discharged participants.
- Men and women graduated at similar rates.

2. Ethnicity

Overall, about 45% of participants in the program were Caucasians, 44% were Alaska Native, and 11% were "Other" (Black, Hispanic and Asian/Pacific Islander).

- 49% of the graduates were Caucasian; as were 41% of the discharged participants;
- 39% of the graduates were Native; as were 48% of the discharged participants;[20]
- 12% of the graduates were Black and Other ethnicities; as were 11% of the discharged participants.

[19] The total number of offenders in the analysis was 214. Of these, 97 were comparison offenders, 63 were graduates of one of the three programs, and 54 were discharged after participating in one of the programs. The demographic descriptions give data only for the graduates of the programs, and those who were discharged. The descriptive analyses relied on cross-tabulations of the data, or bi-variate analyses. A multivariate analysis, showing which of the variables were independently statistically significant, taking into account all of the other information about offenders, is reported below in Part 4.

[20] Almost all of the Bethel participants and comparison group offenders were Native. The Anchorage felony courts had a mix of ethnicities.

A separate analysis showed that Caucasians, Natives, and "Other" ethnicities did not differ in any statistically significant way in the chances that they would graduate or be discharged.[21]

- Of the Caucasian participants, 57% graduated and 43% were discharged.
- Of the Native participants in the programs, 48% graduated and 52% were discharged.
- Of the "Other ethnicity" participants, 54% graduated and 46% were discharged.

3. Age

The offender's age was not significantly related to the chance that an offender would graduate or be discharged.

- 43% of the graduates were aged 40 and over; as were 33% of the discharged participants.
- 19% of the graduates were between the ages of 18 and 30, as were 35% of the discharged participants.[22]

4. Indigency (type of attorney)

One indicator of an offender's socioeconomic status at the time of admission to the therapeutic court was whether an attorney had been appointed for the offender at public expense.[23] Offenders had to meet specific guidelines to show that they could not afford to employ their own attorneys. Their lack of ability to afford an attorney showed that they had less income and fewer resources than offenders who used a private attorney to represent them.[24]

- 89% of the graduates and 96% of the discharged participants had a public attorney.

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[21] The multivariate analysis, below in Part 4, showed that the chances of re-arrest, which was a different question than likelihood of finishing the program, were statistically significantly greater for "Other" ethnicity offenders.

[22] The multivariate analysis showed that older participants were significantly more likely to have low recidivism rates after they left the program than younger participants. See Part 4, below. 68% of the discharged participants between 18 and 30 had a new arrest, and 37% had a new conviction in the first year. 14% of the discharged offenders and 4% of the graduates aged 40 and over had a new arrest. The Council's companion recidivism report, note 5, above, also showed that younger offenders were significantly more likely to be re-arrested.

[23] Information about the participants' incomes was not consistently available from any source.

[24] Much of the early work in designing and setting up the therapeutic courts was done with the close cooperation of the Public Defender Agency. Public Defender clients may have had a better chance of participation during the early days of the programs. Private attorneys have been encouraged to work with the therapeutic courts also.

B. Criminal history

- 60% of the graduates had at least one prior felony, as did 51% of the discharged participants.

C. Location

- 23% of the participants were in the Anchorage Felony Drug Court, 46% were in the Anchorage DUI Court, and 31% were in the Bethel Court.
- Of the 117 participants in the programs, 54% graduated and 46% were discharged from the program. The rates varied slightly by the programs, with 50% of Bethel participants graduating, 56% of the Anchorage Felony Drug Court participants, and 56% of the Anchorage Felony DUI participants.

D. Type of conviction that brought offender to therapeutic court

All of the offenders entering these three therapeutic courts had an alcohol or drug abuse problem. Some courts also had restrictions on the types of offenses that the offenders had committed. The Anchorage DUI court took only persons convicted of felony Driving Under the Influence (DUI).[25] The Anchorage Felony Drug Court took offenders with a drug abuse problem, who had no violent offenses on their records. The Bethel Therapeutic court took a mix of offenders, both felonies and serious misdemeanors, including some who were convicted of Violent offenses.

- 6% of the graduates had a Violent conviction when they entered the therapeutic court, as did 9% of those discharged from a therapeutic court;
- 11% of the graduates had a Property conviction when they entered the therapeutic court; as did 24% of those discharged;
- 13% of the graduates had a Drug Conviction when they entered the therapeutic court; as did 7% of those discharged;
- 67% of the graduates had a Driving conviction when they entered the therapeutic court, as did 56% of those discharged.
- This analysis suggested that offenders with a Property conviction in the case that brought them to therapeutic court were more likely to be in the discharged group, rather than the graduated group. Driving and Drug offenders were disproportionately represented in the graduated group.

[25] Offenders might also have been convicted of felony refusal of a blood alcohol test.

- All of the Violent offenders were in the Bethel court, either as participants or comparisons.[26]
- Most of the offenders in the three courts had been convicted of a Class C Felony at the time of their admission to the therapeutic programs. A handful had been convicted of Class B offenses, and a small number had been convicted of misdemeanor offenses.[27]

[26] The Bethel court had more leeway to take a variety of offenders. The Anchorage Felony Drug Court was initially limited by the terms of the federal grant that funded it to take only non-violent offenders. The Anchorage DUI Court was limited by the terms of its state legislative mandate to take only felony offenders convicted of DUI and related felonies. The Bethel court worked with alcohol addicted offenders.

[27] All of the misdemeanor offenders were in Bethel.

Part 4

Recidivism rates related to offender characteristics[28]

- Participants in the Anchorage DUI program had fewer re-arrests and new convictions during the first year after release than participants in the other two programs.
- The longer an offender participated in a program, the less likely that participant was to be re-arrested.[29]
- Native and Caucasian participants had about the same chance of being re-arrested after their time in the program.[30] Black and Other participants (combined) were more likely to be re-arrested and re-convicted in the first year. The data are not detailed enough to allow any hypothesis about this finding.
- Older participants were less likely to be re-arrested and re-convicted than younger participants.

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[28] Details of the survival (multivariate) analysis that produced these findings are available from the Council. The findings listed on this page were all statistically significant in the survival analysis. Gender, indigency, prior history of convictions, seriousness of the underlying conviction, a participant's mental health status, and the amount of time incarcerated before trial were all not statistically significantly related to the chance of re-arrest and re-conviction for participants.

[29] There was not enough information about convictions to analyze the relationship between length of time in program and convictions.

[30] The Council's companion report on recidivism (see note 5, above) showed that Natives were significantly more likely to be rearrested after release than were Caucasians. This report's findings that Natives had about the same re-arrest rates as Caucasians, all other things being equal, is even more significant in the context of general information about the relationships between ethnicity and recidivism.

Part 5

Type and Seriousness of New Convictions

A. New convictions by type of conviction that brought offender to therapeutic court

The percentages of offenders in the therapeutic courts who had a new conviction during the first year varied by the type of the original offense with which they entered the therapeutic court.

- 33% of the offenders with a new conviction had been convicted of a Property offense.[31]
- 33% had been convicted of a Driving offense.
- 22% of the participants who were convicted of a new offense had originally been convicted of a Violent offense.
- 11% had been convicted of an "Other" offense.
- None had been convicted of a Drug or Sexual offense.

B. Type of new convictions

To see how often repeat offenders committed the same type of offense as the one they had been convicted of earlier, the Council compared the new convicted offense with the offense of which the offender was convicted in the earlier report. An offender could have been convicted of more than one new type of offense.

- No single group of offenders (e.g., Violent, Property) was more likely than any other group to be convicted of the same type of offense.[32]
- An "Other" conviction was the most common type of new conviction, particularly for those originally convicted of Violent and Driving offenses.[33]

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[31] The Council's baseline recidivism report showed that more Property offenders had a new conviction than did other types of offenders. See CRIMINAL RECIDIVISM IN ALASKA, see note 5, above, at page 3.

[32] The number of graduates and discharged offenders, combined, during the first year out of the program was too small to draw any conclusions about statistical significance. The earlier recidivism report, *id.* at page 6, showed that Driving offenders were the most likely group to be convicted of a new offense in the same category as their earlier offense, but that does not seem to be the case in this group of offenders.

[33] "Other" offenses included perjury, weapons, violation of court orders, escape, and public order offenses.

C. Seriousness of new convictions

- Within the first year after their release from the program,[34] none of the program participants (graduates and discharged) were convicted of an offense at a more serious level than the one for which they were admitted to a therapeutic court.[35] In contrast, about 15% of most types of offenders in the companion recidivism report, and 3% of the comparison offenders in this therapeutic court analysis were convicted of an offense at a more serious level than their 1999 offense.[36]

[34] For graduates, release from the program was measured from their date of graduation. For participants who were discharged from the program or left voluntarily, release was measured from the date on which they were released from serving any sentence that was imposed.

[35] A graduate of one of the therapeutic courts was alleged to have committed a more serious crime two years after graduation from the therapeutic court. Although the Council did not extend its data collection to more than one year out, because of the limited number of cases available, this case is mentioned for the sake of completeness.

[36] CRIMINAL RECIDIVISM IN ALASKA, see note 5, above, at page 6. 18% of Violent offenders, 16% of Driving offenders, 15% of Property offenders, and 14% of Other offenders were convicted of an offense more serious than their 1999 case. 4% of Drug offenders and no Sexual offenders were convicted of more serious offenses.

Part 6
Findings and Recommendations

Findings

1. 54% of the participants in these programs graduated. Within one year of graduating, these graduates were less than half as likely to be re-arrested than comparison offenders with similar characteristics and about one-third as likely to be re-arrested than felony offenders charged in 1999. Therapeutic courts promote public safety by reducing recidivism of felony offenders who have alcohol and drug problems and who graduate from a therapeutic court program.

2. Recent national reports provide support from other programs, showing that many therapeutic programs reduce recidivism and have benefits that exceed costs by as much as ten-to-one ratios.[37]

3. Native groups have urged state agencies to provide treatment programs that are responsive to the differences between Native and Western cultures. This report found that Native and Caucasian participants do about equally well in therapeutic courts.

4. Offenders of other ethnicities (Blacks, Hispanics and Asian/Pacific Islanders were grouped together for this analysis because of the small numbers of each ethnicity) participated in the therapeutic courts in smaller proportions. Participants in these combined ethnic groups were re-arrested at higher rates than Native or Caucasian participants.

Recommendations

1. To build on the success of the therapeutic courts, sponsoring agencies should do additional work on the costs and benefits of this approach.

2. The state should explore the reasons for good response to the therapeutic courts for Native participants. It would be useful to talk with participants and staff, particularly in Bethel, to determine the reasons for these successes.

3. The state should explore possible reasons for the differences among ethnic groups in recidivism rates.

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[37] Aos, Miller and Drake, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES, October 2006, Washington State Institute for Public Policy, Exhibit 4, page 9, shows a variety of treatment and monitoring programs including therapeutic courts from around the country that have been shown to reduce recidivism. Costs and benefits of many of the programs are shown on the chart.

Appendix A

Appendix A

Therapeutic Court Recidivism Methodology

This Appendix describes the procedures that the Judicial Council used to select the subjects and carry out the analyses for the report

Sample

The Council published *Evaluation of the Outcomes in Three Therapeutic Courts*[38] in April 2005. The report included 154 program participants and 104 comparison offenders.[39] Comparison offenders were selected by program staff, after discussion with the Council. Subsequent analyses showed that they matched the participants on age, gender, ethnicity, and type of offense.

At the time of the 2005 report, requested by the legislature in HB 172, 41% of the participants were still active in the programs. The Alaska Department of Health and Social Services funded this follow-up report to find the outcomes for these offenders and the comparison groups one full year after the offenders had completed the therapeutic programs, or had been discharged and completed serving their sentences, or had finished their sentences. Of the original 258 offenders, 214 met the criteria for inclusion in the present report.

Data about release and subsequent recidivism

The Department of Public Safety, the Department of Corrections, and the Alaska Court System provided access to data about the selected offenders. The format of each data set varied among the agencies. More detailed information is available from the Judicial Council.

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[38] EVALUATION OF THE OUTCOMES IN THREE THERAPEUTIC COURTS, Alaska Judicial Council, April 2005. Available on the Judicial Council's website, www.ajc.state.ak.us, under "Publications."

[39] The report included 154 program participants and 104 comparison offenders. The research used matched comparison offenders, the usual methodology for evaluations such as this one. Randomized control groups are rarely used in this type of research because of ethical concerns, sample size issues, and statistical problems. See, letter from Dr. John Roman, The Urban Institute to Chief Justice Fabe and Judicial Council members, February 6, 2007, available from the Judicial Council. Dr. Roman noted that "the numbers of people eligible to participate in an experimental program are small." He also noted that "when small samples are randomized, researchers are often unable to detect a positive program effect even if there was one. Empirical studies have found that a well-matched comparison will yield results that are nearly identical to a randomized design.

Program end and release dates

Each offender had a program end or release date. For participants in the therapeutic courts, the program end date was either the date on which the offender was shown as officially completing the program, or (if the offender was discharged or left the program voluntarily) the date on which the offender finished serving the sentence imposed after discharge from the therapeutic court. For the comparison offenders, the release date was defined as the date on which they were released from incarceration for the sentence they were serving. The time frame for the report was the first twelve months (one year) after the program end or release date. Offenders who had not been out of incarceration or released from a program for at least one year were not included in the analyses.

Arrest and conviction data

The Department of Public Safety provided the Council with a database that included only the offenders' arrests and convictions on or after the date of program end or release. The information included the dates and charges for which the offenders were arrested or convicted. Staff recorded the date of the first arrest for any reason after the release date, the total number of charges and arrests after the release or program end date, the date of the first conviction, and the total number of convicted charges and cases after the release or program end date. The nature of each charge also was recorded.

Database

The Council and its contractor, the Institute for Social and Economic Research (ISER) at the University of Alaska Anchorage, created a database of the 214 offenders who met the criteria for inclusion in this analysis. The database contained details about the offenders in the 2005 therapeutic court evaluation data set: gender, age, type of offense, proceedings in the therapeutic court, type of attorney and other information. The Council added the data from the Department of Public Safety about new arrests and convictions. This new database was used for the analyses in this report.

Analyses and Report

The Council modeled this report and the analyses of therapeutic court recidivism after the companion report, CRIMINAL RECIDIVISM IN ALASKA.[40] The Institute for Social and Economic Research at the University of Alaska Anchorage conducted the analysis. Statistical techniques used included bivariate analyses (cross-tabulations) and survival (multivariate) analyses. The Council also conducted some bivariate analyses in-house.

The Council prepared this report about the data and analyses. Results of significance tests, and greater detail about the data and methods are available by contacting the Council.

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[40] See above, at note 5.

2/14/11 OVERVIEW: DEPARTMENT OF LAW

<TARGET><BILL></BILL><SUBJECT>2-14-11 OVERVIEW
DEPARTMENT OF LAW</SUBJECT><COMM>SJUD27</COMM></TARGET>

S/HJUD 2/14/11

Department of Law

Photo by Sheena Scott, Department of Law Webmaster ©

Civil Division Overview
for the Joint Senate-House Judiciary Committees of the 27th Alaska Legislature
Attorney General Designee John J. Burns

1

MISSION

The mission of the Alaska Department of Law is to prosecute crime and provide legal services to state government for the protection and benefit of Alaska's citizens.

2

S/HJUD 2/14/11

DEPARTMENT OF LAW ORGANIZATIONAL CHART

CRIMINAL DIVISION

Special Prosecution & Appeals
Juneau DA's Office
Ketchikan DA's Office
Sitka DA's Office
Barrow DA's Office
Kotzebue DA's Office
Nome DA's Office
Anchorage DA's Office
Kodiak DA's Office
Fairbanks DA's Office
Dillingham DA's Office
Palmer DA's Office
Kenai DA's Office
Bethel DA's Office

ADMINISTRATIVE SERVICES DIVISION

Management & Financial Forecasting
Budgeting
Fiscal and Accounting
Procurement
Timekeeping and Billing
Information Services

CIVIL DIVISION

Child Protection
Collections & Support
Commercial & Fair Business
Environmental Law
Human Services
Information & Project Support
Labor & State Affairs
Legislation & Regulations
Natural Resources
Oil, Gas & Mining
Opinions, Appeals & Ethics
Regulatory Affairs & Public Advocacy
Torts & Workers' Compensation
Transportation

3

Core Services

- I. Protecting the Safety and Financial Well Being of Alaskans
- II. Fostering Conditions for Responsible Development of Our Natural Resources
- III. Protecting the Fiscal Integrity of the State
- IV. Promoting Good Governance

4

Key Statistics

Attorneys	FY12	FY11	Change
Civil	163	162	1*
Criminal	122	121	1**
Administrative Services	1	1	0
Total	286	284	2

Support Staff	FY12	FY11	Change
Civil	140	139	1
Criminal	118	118	0
Administrative Services	21	21	0
Total	279	278	1

Department offices: *Anchorage, Barrow, Bethel, Dillingham, Fairbanks, Juneau, Kenai, Ketchikan, Kodiak, **Kotzebue, Nome, Palmer, and Sitka

5

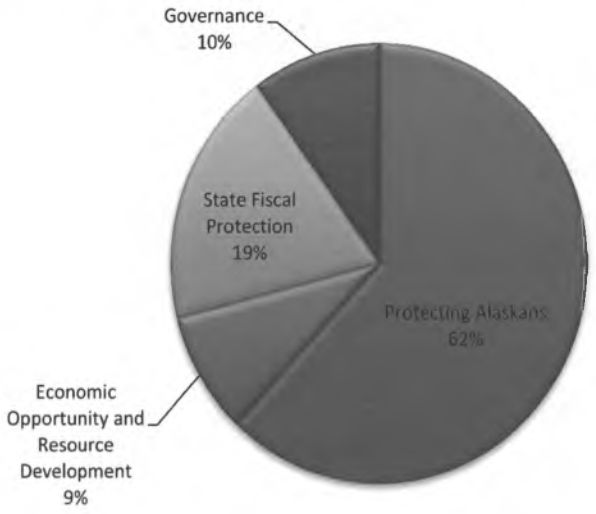
FY 12 Budget Request by Core Service

(In Millions)

Priority Programs	UGF Funds	DGF Funds	Other Funds	Federal Funds	Total Funds	Percentage of Total Funds
Protecting Alaskans	39.1	2.0	10.6	1.5	53.2	62.0%
Economic Opportunity and Resource Development	4.2	-0-	3.2	.1	7.5	8.7%
State Fiscal Protection	8.1	.7	7.6	-0-	16.4	19.2%
Governance	4.4	-0-	4.2	-0-	8.6	10.1%
Department Totals	55.8	2.7	25.6	1.6	85.7	100%

6

Core Services



7

FY 10 Return on Investment

(Millions)

	Awards & Collections	Costs (FY 10 Authorized)	Benefit to Cost Ratio
Return on Total Department Budget	$576.0	$85.4	6.75
Return on the Civil Division Budget	$576.0	$48.9	11.77

✓

8

Criminal Division

- Carries out core function of Protecting Alaskans
  - **13 District Attorney's Offices** - Ketchikan to Kodiak to Kenai to Kotzebue, Barrow to Bethel, Anchorage, Dillingham, Palmer, Fairbanks, Nome and Sitka
  - **Office of Special Prosecutions** – Cold cases; Medicaid, welfare, PFD and insurance and workers' compensation fraud; cybercrimes; fish and game crimes; environmental crimes; alcohol interdiction; criminal non-payment of child support; violations of state tax law
  - **Appeals**
  - **Rural Prosecution Unit** – assists rural offices when work load demands outstrip available prosecutor resources

9

I. Protecting Alaskans Criminal Division

- *State v. Lepping*
  - Fish and Game prosecutor Andrew Peterson tried and convicted Wasilla guide Keith Lepping on 23 counts of fishing and hunting violations including bear baiting
    - Lepping jailed for almost a year, forfeited a C-206 and Super Cub, fined $85,500, lost his guide and transporter licenses
- *State v. Torian*
  - Cold case prosecutor Paul Miovas charged former Anchorage resident with murder in 2000 stabbing death of Genevieve Tetpon
    - One of a series of alleged murders involving Alaska Native women in 1999 and 2000

10

Prosecutors in Statewide Offices

11

How the Civil Division Supports the Department of Law's Four Core Missions

12

Assistant AG's in Statewide Offices

13

I. Protecting Alaskans Civil Division

- Child Protection (23 attorneys)
- Commercial and Fair Business (18 attorneys)
- Human Services (9 attorneys)
- Regulatory Affairs and Public Advocacy (3 attorneys)
- Environmental (10 attorneys)
- Labor and State Affairs (19 attorneys)

14

I. Protecting Alaskans
Child Protection Section

- Child Protection attorneys represent the Office of Children's Services when the welfare of a child is at risk
  - 3,000 Child in Need of Aid cases yearly
    - 2,000 cases ongoing at any time
  - Child protection attorney case load is 113 per attorney—exceeding the recommended national average of 100 cases

15

I. Protecting Alaskans
Child Protection Section

- Prevailed in **all eleven recent Alaska Supreme Court appeals** of superior court orders terminating parental rights, thereby freeing children for adoption by safe families

16

I. Protecting Alaskans Commercial and Fair Business Section

- Consumer Protection Unit suits or settlements
  - Publishers Clearing House, DIRECTV, Dannon Yogurt, "Average Wholesale Price" Drug litigation
  - Local auto dealer making illegal advertisments about "guaranteed trade in allowances"
  - Juneau jewelers falsely advertising "40-75% off" sales

17

I. Protecting Alaskans Commercial and Fair Business Section

- 2010 Department of Law Fuel Price study
  - Why are rural fuel costs so high?
    - Small volumes
    - Remote locations
    - Difficult weather
  - No evidence of price-fixing
    - ISER concurred in separate Western Alaska report

Rural Alaska fuel storage tanks

18

I. Protecting Alaskans

Human Services Section, Labor and State Affairs Section
Commercial and Fair Business Section

- *Patient Protection and Affordable Care Act (PPACA)*
  - Litigating constitutionality with 25 other states
- Ongoing advice to DHSS and Divisions of Insurance and Retirement and Benefits on how PPACA—if constitutional -- will affect Alaska
  - AlaskaCare, the state health care plan
  - Insurance exchange
  - Medicaid expansion

ALASKACARE

19

I. Protecting Alaskans
Human Services Section

- Defending State DHSS in lawsuits for program payments
  - Medicaid
  - Foster care
  - Public assistance
- Representing DHSS in facilities licensing investigations and enforcement actions
  - Hospitals
  - Nursing homes
  - Assisted living facilities
  - Child Care centers
  - Foster homes
- Representing DHSS in Medicaid overpayments
  - Independent auditor said provider service charges excessive
  - Potential recoupment $1.9 million+

20

I. Protecting Alaskans Environmental Section

- *State v. BP Exploration Alaska (BPXA)*
  - Suit to recover civil assessments and revenue losses from the 2006 Prudhoe Bay pipeline shutdown due to corrosion

Leak and spill

Sludge buildup prevented corrosion detection equipment from working

21

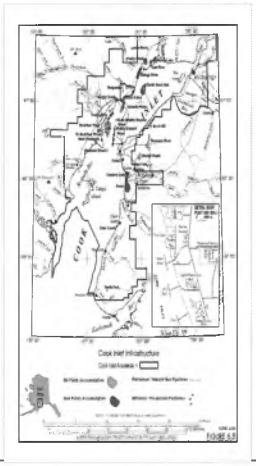
I. Protecting Alaskans Environmental Section

- *Cruise Ship Initiative*
- HB 134 regulating wastewater discharges allows cruise ship owners and operators until 2016 to fully comply with new water quality standards
  - State defending lawsuit challenging DEC's new permit

22

I. Protecting Alaskans
Regulatory Affairs and Public Advocacy Section

- RAPA advocates public interests in regulated utility matters before the Regulatory Commission of Alaska (RCA)
  - *Cook Inlet Natural Gas Storage Alaska* (CINGSA)
    - RCA's decision approving underground gas storage facility issued January 31, 2011



23

I. Protecting Alaskans
Regulatory Affairs and Public Advocacy Section

- *Enstar* Billing Error Refunds
  - RCA ordered Enstar to pay $5.7 in refunds
  - RAPA monitoring to assure refunds paid to eligible customers

ENSTAR
Natural Gas Company

24

I. Protecting Alaskans Civil and Criminal Division

- Played a key role in developing the 10-year Sexual Assault/Domestic Violence Initiative
- Collaborating with agencies and non-profits to support the Initiative
- Coordinated PSA's for the "Choose Respect" campaign
- Sponsored pro-bono summits

25

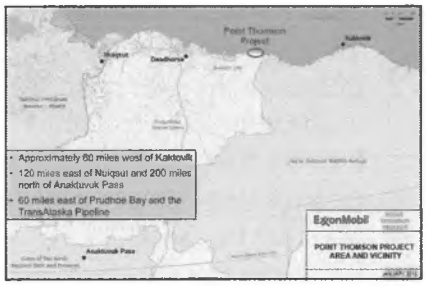
II. Fostering Responsible Development

- Oil Gas and Mining (14 attorneys)
- Transportation and Public Facilities (8 attorneys)
- Environmental (10 attorneys)
- Natural Resources (13 attorneys)

26

II. Fostering Responsible Development
Oil Gas and Mining Section

- *Point Thomson litigation*
  - Continuing to pursue resolution with ExxonMobil



27

II. Fostering Responsible Development
Transportation and Public Facilities Section

- Advising DOTPF and defending state on building projects
  - Goose Creek Prison
  - Alaska Marine Highway System HQ and Ketchikan dry dock expansion
  - Juneau Access Road
  - Knik Arm Crossing
  - In-state gas pipeline and propane projects

28

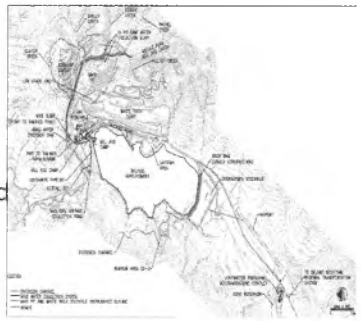
II. Fostering Responsible Development Environmental Section

- Joined Couer Alaska and defended Army Corps of Engineers Clean Water Act permit authorizing disposal of mine tailings
- Prevailed in the United States Supreme Court, allowing **Kensington Mine** to open
- **Mine opening created and preserved hundreds of jobs**

29

II. Fostering Responsible Development Environmental Section

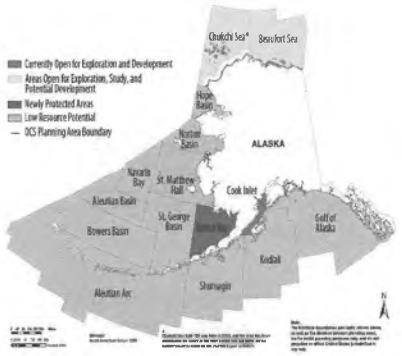
- Red Dog Mine
  - EPA withdrew key components of water pollution discharge permit
  - Assisted DEC in promulgating new regulations
    - Incorporated into a revised Clean Water Act permit
  - Mine operations continued
  - Jobs preserved



30

II. Fostering Responsible Development
Oil Gas and Mining Section

- **Defended Outer Continental Shelf (OCS) leases in court challenges**
  - Opposed a challenge to Interior's grant of Lease 193 to lessees
    - Court clarified that injunction on Lease Sale 193 pending further Interior review did not enjoin seismic testing
  - Defended Interior's approval of Shell's Beaufort and Chukchi Sea OCS exploration plans in lawsuits in federal courts
  - Filed an amicus brief in support of Interior's approval of OCS 5-year plan

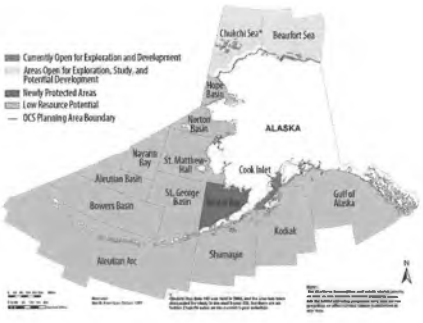


April 6, 2010 Department of Interior Outer Continental Shelf Strategy

31

II. Fostering Responsible Development
Oil Gas and Mining Section

- Challenged Interior's purported imposition of a "moratorium" on development in Alaska OCS
  - In *Alaska v. Salazar,* based on Interior's unequivocal denial of a "moratorium," clarity achieved



32

II. Fostering Responsible Development Natural Resources Section

- **Tongass Timber**
  - State partners with U.S. Forest Service in management of Tongass National Forest
    - State intervenes to defend timber sales where appropriate
      - Supported "Tongass Exemption" to USFS "Roadless Rule"
      - Supported Forest Service authorization of Logjam sale

33

II. Fostering Responsible Development Natural Resources Section

- **Endangered Species Act Developing Comprehensive Strategy**
  - Challenging unwarranted listings
  - Challenging unwarranted critical habitat designations
- Listings and designations can affect shipping, transportation, oil and gas development, mining, commercial, sport and subsistence fishing and hunting

34

II. Fostering Responsible Development Natural Resources Section

- **Endangered Species Act**
  - Listing petitions
    - Polar bears
    - Beluga whales in Cook Inlet
    - Steller sea lions
    - Humpback whales
    - Pacific walrus
    - Seals (ringed and bearded)
    - SE Alaska Pacific herring

  - Critical Habitat Designations
    - Polar bear
    - Cook Inlet Beluga whale

35

II. Fostering Responsible Development Natural Resources Section

- **Endangered Species Act**
  - Pending Lawsuits and appeals
    - Polar bear
    - Beluga whales
    - Steller sea lions
    - Humpback whales
    - Ribbon seal

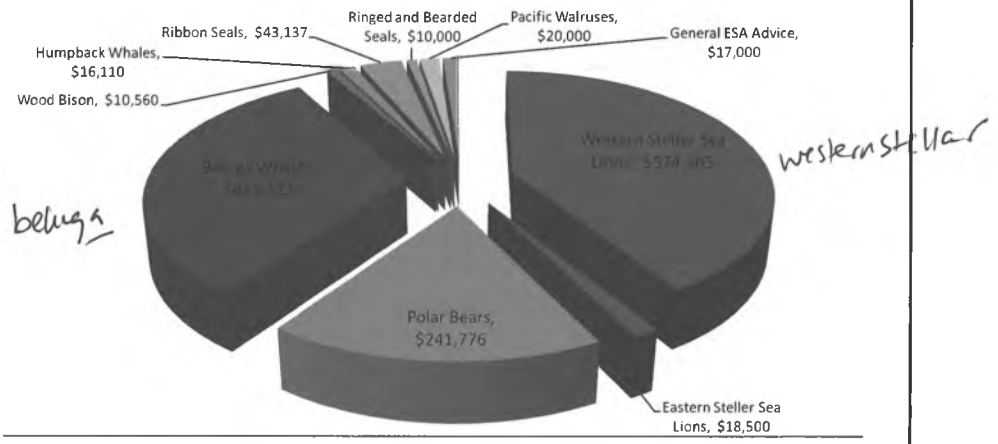
36

II. Fostering Responsible Development
Natural Resources Section

- **Endangered Species Act**
  - Threatened lawsuits
    - State's notice of intent to sue to challenge 187,000 square miles of critical habitat designation for polar bear

37

ESA
FY11 Budget Expenditures
($1,396,875)



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II. Fostering Responsible Development Oil Gas and Mining Section

- Assisting DNR and DEC in requesting prompt federal review of challenges to petroleum exploration in the **National Petroleum Reserve-Alaska** (NPR-A)
  - Clean Water Act wetlands fill permit for CD-5 project

39

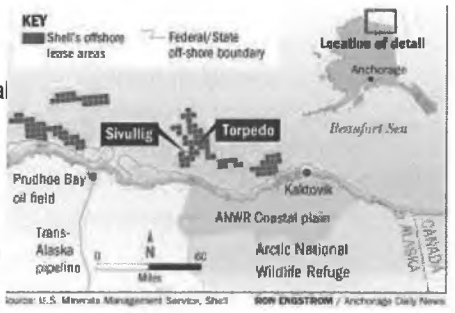
II. Fostering Responsible Development Natural Resources Section

- Advising DNR on response to BLM Wilderness and "Wild Lands" designations
  - Interior Secretary Salazar ordered the evaluation of 72 **million+ acres of federal land in Alaska for wilderness characteristics, potentially** allowing federal government to create de-facto wilderness in Alaska without congressional oversight
  - Affects permitting and right of way determinations
    - Changes the multiple use mandate otherwise applicable to BLM lands
  - U.S. Fish and Wildlife Service revisions to the Arctic National Wildlife Refuge (ANWR) Comprehensive Conservation Plan, evaluating wilderness
    - Dept. of Law provided legal advice to Governor who wrote President Obama urging him to respect ANILCA

40

II. Fostering Responsible Development
Environmental Section

- Assisting DEC's request for prompt EPA action on Shell's Clean Air Act permit application after Environmental Appeals Board (EAB) remanded application for further work
  - EAB questioned EPA's analysis of impacts of nitrogen dioxide emissions from drill ships
  - Shell now postponing plans to drill exploratory wells this summer



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II. Fostering Responsible Development
Environmental and Natural Resources Sections

- Clean Water Act 404(c)
  - EPA by MOA with Corps of Engineers may invoke 404(c) to veto some Corps permit decisions
    - EPA usually exercises veto authority sparingly (only 13 time since 1972)
  - Southwest Alaskans asking EPA to invoke 404(c) process before companies at Pebble prospect apply for development permits on state mining claims
  - Assisting DEC and DNR in evaluating response to EPA's agreement to review

42

II. Fostering Responsible Development
Environmental Section

- *Nunamta Aulukestai v. State*: Defending the State in a suit alleging constitutional violations in statutes and regulations that authorize temporary land and water use permits for mineral exploration at the Pebble project

II. Fostering Responsible Development
Natural Resources Section

- Defending Alaska's Fisheries Management
  - *In Upper Cook Inlet Drift Association v. Locke*, state intervened (with U.S.) in lawsuit where UCIDA wanted to preempt *state* management of salmon fisheries in Cook Inlet (state waters)
  - UCIDA and U.S. settlement requires UCIDA to submit allocation proposals to state Board of Fisheries
- ADF&G request exclusive management

III. Protecting Fiscal Integrity

- Collections and Support (8 attorneys)
- Oil Gas and Mining (14 attorneys)
- Labor and State Affairs (19 attorneys)
- Torts and Workers' Compensation (15 attorneys)

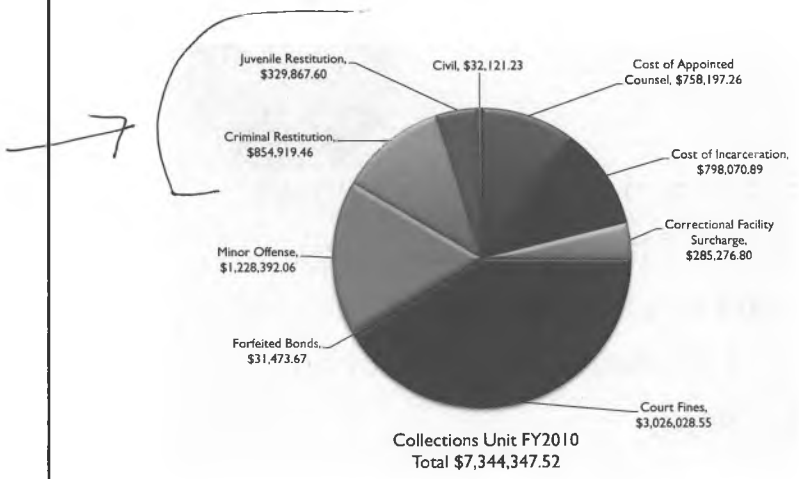
45

III. Protecting Fiscal Integrity
Collections and Support Section

- Collects criminal fines and surcharges owed the State and restitution owed to 3rd parties
  - Collected $7.3 million in FY 10, of which $1.1 million was for victim restitution

46

Collections and Support Recoveries FY 10



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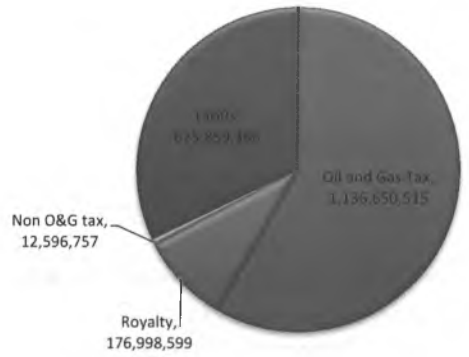
III. Protecting Fiscal Integrity Oil Gas & Mining Section

- Oil and Gas Royalties and Taxes - Summary
  - State operating revenues come from oil and gas corporate income taxes, production taxes, property taxes and royalties on Alaska North Slope crude oil
- Collected nearly $82 million in additional taxes and royalties in *calendar* year 2010
- Collected $95.9 million in FY 11 through February 8, 2011

48

Oil, Gas and Mining Decisions and Settlements FY00-FY10 ($1.95 billion)



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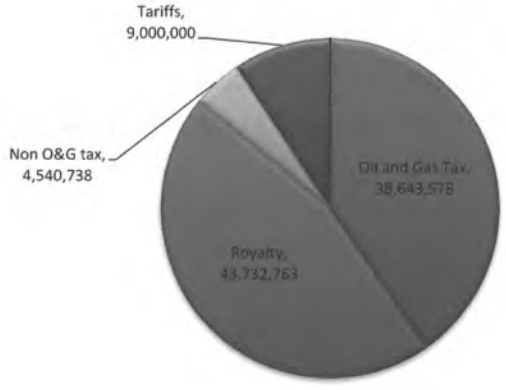
Oil, Gas and Mining Decisions and Settlements FY11 Though February 8, 2011 ($95.9 million)



50

III. Protecting Fiscal Integrity
Oil Gas and Mining Section

- TAPS Tariff Litigation
  - State protested TAPS tariff rates for 2005 and following years before the Federal Energy Regulatory Commission (FERC) and Regulatory Commission of Alaska (RCA)
  - TAPS Strategic Reconfiguration case concurrently before FERC and the RCA
    - State challenge to TAPS' Owners inclusion of hundreds of millions of dollars in imprudently incurred capital project expenditures in the tariffs.
    - Eight-week hearing before the FERC and RCA scheduled for November 2011

51

III. Protecting Fiscal Integrity
Oil Gas and Mining Section

- TAPS Property Tax Litigation
  - Represented Dept of Revenue in Superior court trial on 2006 TAPS property tax valuation
  - Court said State Assessment Review Board (SARB) methodology correct
  - Outcome increased property tax revenues for affected municipalities and state
    - TAPS Owners appealed
      - assessment too high
    - Municipalities also appealed
      - assessment too low

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III. Protecting Fiscal Integrity
Oil Gas and Mining Section

- More TAPS Property Tax litigation
  - Representing Dept of Revenue in Superior Court appeals from SARB's 2007-2009 TAPS property tax assessments
  - Eight-week trial in September 2011

53

III. Protecting Fiscal Integrity
Commercial and Fair Business and Labor and State Affairs Sections

- Cruise Ship Initiative Passenger Tax
  - Cruise ship initiative made income from cruise ship water activities subject to Alaska Net Income Tax and imposed a gambling tax and a "head" tax of $46
  - Cruise industry sued state over the "head tax"
  - Defended Dept of Revenue and assisted in negotiating a settlement
  - Legislature passed new law reducing the tax rate to $34.50
  - Preserves payment of about $34 million per year to defray costs of services and facilities to accommodate passenger visits

54

III. Protecting Fiscal Integrity
Labor and State Affairs Section

- State lawsuit against Mercer, actuary for state pension plans (PERS) and (TERS)
  - Lawsuit settled
  - Mercer paid $500 million

55

III. Protecting Fiscal Integrity
Natural Resources Section

- *Carlson v. State*
  - 26 year old lawsuit by non-resident fishermen
    - They sought refunds of commercial fishing permit fees
      - Nonresident fees used to be 3x higher than resident fees
  - Court ruled against state
    - Judgment is $12 million in principal
      - $82.3 million total
      - Much of it due to 11% prejudgment interest compounded quarterly
      - plus attorney's fees
  - Case on appeal to Supreme Court
  - Successful outcome could be worth $60 million in savings

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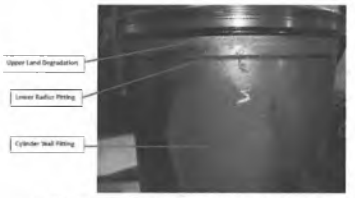
III. Protecting Fiscal Integrity
Transportation Section

- State suing the boat builder and the manufacturer of the state's two fast ferries (*M/V Fairweather* and *M/V Chenega*) for engine defects
- Engine defects have cost the state hundreds of thousands of dollars in repairs
- *M/V Fairweather* still out of service



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III. Protecting Fiscal Integrity
Tort and Workers' Compensation Defense Section

- In 2010, Department successfully defended over 200 tort claims with **no adverse judgments** against the state

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IV. Promoting Good Governance

- Natural Resources (13 attorneys)
- Opinions, Appeals and Ethics (11 attorneys)
- Labor and State Affairs (19 attorneys)

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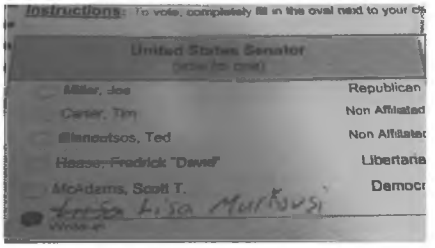
IV. Promoting Good Governance
Labor and State Affairs Section

- Defended Federal Elections (November 2010) lawsuits
  - Write-in candidate's name lawsuit
  - Miller public records lawsuit
  - Miller federal lawsuit (part 1)
  - Miller state lawsuit
  - Miller federal lawsuit (part 2)
  - Other lawsuits
    - Voting Rights Act lawsuit
    - Fairbanks suit filed 1/10/11 (state moved to dismiss as untimely)
- Law advised and defended Division of Elections



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IV. Promoting Good Governance
Labor and State Affairs Section

- *Nick v. State*
  - Defended and settled elections lawsuit in Western Alaska
  - Enhancements to language assistance for Yup'ik speaking voters will be available at elections in Bethel area

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IV. Promoting Good Governance
Opinions, Appeals and Ethics, Labor and State Affairs Sections

- Defending the Initiative Process
  - *Planned Parenthood v. Campbell*
    - State defended lawsuit to overturn certification of ballot initiative to require parental notification of minor daughter's abortion
      - Alaska Supreme Court ruled initiative should appear on the ballot
      - Alaska voters enacted parental notification law by initiative in 2010
        - Constitutionality of that law now being challenged in *Planned Parenthood v. State*
  - *Natural Right to Life (10NRTL)*
    - Department opined initiative should not be certified because proposal "clearly unconstitutional" under federal and state law

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IV. Promoting Good Governance
Opinions, Appeals and Ethics Section

- *Executive Branch Ethics Act* advice and enforcement
  - Adopted new regulations, including standards governing state reimbursement of attorneys fees incurred by state officers exonerated in an ethics complaint proceeding
    - Similar to Rep. Gruenberg's HB 14 authorizing state reimbursement only after exoneration
  - Ethics training for senior managers and boards
  - Advisory opinions and investigations

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IV. Promoting Good Governance
Opinions, Appeals and Ethics Section

- Public Records Requests
  - 26,500 pages of former Governor Palin's emails
    - Legal review to be completed by 3/31/11
    - Governor's Office review to be completed by 5/31/11
  - In 2010, Department of Law
    - Addressed 43 separate voluminous public records requests directed to Law
    - Provided privilege reviews for records requests to other state agencies

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CHALLENGES AND OPPORTUNITIES

WHAT'S AHEAD FY 12 AND BEYOND

65

- Continue to Advance Core Services
- State-Federal Relations
  - Areas where state and federal cooperation is working well
  - Areas where a core state interest requires federal challenge

66

General Examples where State-Federal Cooperation is Working Well

- Department of Environmental Conservation's (DEC) air permitting program
- DEC assumption of National Pollutant Discharge Elimination System (NPDES) permit program under the federal Clean Water Act
- Cleanups at federal facilities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other federal and state laws

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Specific Examples of State Cooperation with Federal Programs

- Defended Army Corps of Engineers Clean Water Act permit authorizing disposal of mine tailings, allowing Kensington Mine to open
- Worked with EPA to incorporate revised DEC regulations into Red Dog Mine Clean Water Act permit
- Intervened on side of U.S. in *Point Hope v. Salazar* and *Center for Biological Diversity v. U.S.*
  - Outer Continental Shelf cases
    - challenging the OCS 5-year plan
    - challenging to OCS Lease Sale 193 (Chukchi Sea)
    - Challenging Shell's Beaufort and Chukchi Sea OCS exploration plans
- Supported U.S. Forest Service authorization of Logjam timber sale

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Areas Where a Core State Interest Requires Challenge Because of Federal Overreach

- **Endangered Species Act**
  - U.S. Fish and Wildlife Service
    - Species listings
    - Critical habitat designations
- **Clean Water Act**
  - Environmental Protection Agency
    - Wetlands fill permit 404(c) elevated scrutiny
      - CD-5
      - Tanana River Bridge
    - Pre-permit scrutiny
      - Pebble prospect
- **Clean Air Act**
  - Environmental Protection Agency
    - Offshore oil and gas exploration
      - Shell Beaufort Sea drilling plans
- **Wilderness and "Wild Lands" designations**
  - Bureau of Land Management
    - Designations could tighten permit requirements
- **Patient Protection and Affordable Care Act**
  - Constitutionality

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Challenges and Opportunities

- Support--as legally appropriate--**responsible resource development**
  - Develop a comprehensive long term development strategy
    - Endangered Species Act
      - Unwarranted listings
      - Unwarranted designations of critical habitat
    - Outer Continental Shelf exploration
      - Challenges when warranted
    - Clean Air and Water Acts
      - Challenges when warranted

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Challenges and Opportunities

- Develop a 5-year **interdepartmental** plan
- Coordinate and cooperate
  - Legislative and executive branches of state government
  - All executive agencies
    - Department of Natural Resources
    - Department of Environmental Conservation
    - Department of Commerce Community and Economic Development
    - Department of Law
    - Department of Fish and Game

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Challenges and Opportunities

- Cooperate and coordinate with stakeholders **outside** *and* **inside** state government
  - Municipalities
  - Boroughs
  - Native corporations and tribes
  - Other states
    - Washington and Oregon joined to de-list the Stellar sea lions
  - Allies like National Association of Attorneys General and Association of Fish and Wildlife Agencies

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- Thank you

Attorney General Designee
John J. Burns

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3/16/11 CONFIRMA-TION HEARING: ATTORNEY GENERAL JOHN BURNS

<TARGET><BILL></BILL><SUBJECT>3-16-11 CONFIRMATION HEARING ATTORNEY GENERAL JOHN BURNS</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE
CONFIRMATION COMMITTEE REPORT

Date: 3/16/11

In accordance with AS 39.05.080, the Judiciary Committee reviewed the following and recommends the appointment be forwarded to a joint session for consideration:

Attorney General – Department of Law
John. J. Burns

This does not reflect an intent by any of the members to vote for or against the confirmation of the individual during any further sessions.

Signature:	Printed Last Name
	PASKVAN
	Wielechowski
	Coghill
Chair:	French

Please return to the Senate Secretary's Office (Room 213).

Alaska State Legislature

Senate

Office of the Secretary

Official Business

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:senate_secretary@legis.state.ak.us

Memorandum

TO: Senator French, Chair
Judiciary Committee

FROM: Kirsten Waid
Secretary of the Senate

DATE: February 2, 2011

SUBJECT: Confirmation of Governor's Appointment

Pursuant to AS 39.05.080, the President has referred the following name for legislative confirmation to your committee for a hearing, recommendation and report:

State of Alaska Attorney General
John Burns
Appointed: 11/30/2010

Resume(s) will be transmitted electronically.

KW:jcs
gl #2

Burns, John
State of Alaska Attorney General

John J. Burns

John J. Burns is Governor Parnell's appointee as Alaska's twenty-second Attorney General. Burns, age 51, is a life-long Alaskan, who grew up in Nome and Fairbanks, where his father was a marine mammal biologist with the Alaska Department of Fish and Game and his mother worked in the airlines industry. Burns graduated from West Valley High School in Fairbanks in 1976 and from the University of Alaska Fairbanks in 1982 with degrees in history and philosophy. In 1986, Burns received his JD degree from University of Puget Sound School of Law in Tacoma, Washington.

Burns spent the summer months of his high school, college, and law school years working as a fisheries technician for the Alaska Department of Fish and Game throughout Western Alaska and in Prince William Sound.

Burns was admitted to the Alaska Bar in 1986 and to the U.S. District Court of Alaska in 1987. He was a judicial extern for Justice Jay Rabinowitz of the Alaska Supreme Court and a law clerk for the Fairbanks Superior Court. Burns entered private practice with the law firm Birch Horton Bittner and Cherot in their Fairbanks office. In 1999, Burns and partner Cory Borgeson formed Borgeson and Burns, PC, providing a full range of legal services, including business law and litigation, public utility practice, property law, insurance defense, estate planning, and family law. Burns' practice focused primarily on business transactions and commercial litigation.

In addition to his legal practice, Burns commercial fished for a number of years in Bristol Bay and taught business law classes for 12 years as an adjunct professor at the University of Alaska Fairbanks. Burns was a member of the Fairbanks Chamber of Commerce, serving as its past president, and he has been active in many other community service organizations, including the Fairbanks Rotary Club, the University's Chancellor Advisory Committee, and Hospice of Alaska.

Attorney General Burns and his wife Christi have been married for twenty-four years. Together they have two daughters, Alissa, a senior at the University of Arizona, and Kate, a high school junior who is currently studying in Poland on a Rotary exchange fellowship.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

UPS

1. Describe your law school experience. Where and when did you attend law school? Did you receive any honors? Did you participate in your school's law review? Moot court? Legal aid clinic? Any other details about that time in your life?

2. Describe your legal employment after law school. What subject areas have you practiced in? How many other lawyers did you practice with? How many jury trials have you completed? How many appearances have you made before the Alaska Supreme Court? Before the Ninth Circuit Court of Appeals? Have you published in any legal journals?

6-10 jury trials

3. Which US President do you admire most? Why?

4. What do you see as the primary mission of the Attorney General?

5. What is the biggest challenge facing the civil division? What actions do you plan to take in reaction to that challenge?

6. What is the biggest challenge facing the criminal division? What actions do you plan to take in reaction to that challenge?

7. Are you satisfied with the turnover rates in the criminal division? If not, what actions do you plan to take to lower the turnover rates?

"new blood"

8. Alaska suffers from some of the highest sex assault and sex abuse rates in the nation. Are prosecutions of this crime increasing? Are trials on these charges increasing? Please provide some statistics on this subject. What actions do you plan to take in this area?

Kresyle : More

9. What will be your Department's approach to the issues of tribes and tribal sovereignty in Alaska? Please discuss the ruling in the recent "Tanana" case.

10. Regarding health care reform, please be prepared to discuss your advice to the Governor that Judge Vinson's ruling was "binding law" in Alaska. Please review the Legislative Legal memo from Dennis Bailey and be prepared to respond to his points.

MEMORANDUM

State of Alaska
Department of Law

TO: John Burns
Attorney General
State of Alaska

DATE: March 15, 2011

SUBJECT: *Impact of decision In Florida v. United States, DHHS*, 3:10-cv-91

FROM: Joanne Grace
Alaska Department of Law

This memorandum addresses the issue of whether Judge Vinson's summary judgment ruling in *Florida v. United States, DHHS* is "binding law" in Alaska. It also responds to the points made in the Legislative Legal memo from Dennis Bailey.

Background. On January 31, 2011, Judge Roger Vinson of the United States District Court for the Northern District of Florida granted summary judgment to the 26 state plaintiffs challenging the Patient Protection and Affordable Care Act. Judge Vinson's order found unconstitutional the "individual mandate" provision of the Affordable Care Act, which would require that everyone, with certain limited exceptions, purchase federally-approved health insurance or pay a penalty. Judge Vinson held that the individual mandate is not severable from the rest of the Act, and he therefore declared the entire Act void.

Answer. Alaska is a party—a plaintiff—in the case, and the parties are bound by the court's judgment that the Act is void. That is black-letter law. As agents of the state, state officials must abide by the decision. For this reason, Dennis Bailey's point that Judge Vinson's order has precedential or stare decisis effect only "in the limited territory" of the Northern District of Florida is irrelevant. By filing this lawsuit, Alaska submitted to the jurisdiction of the court and must follow the court's decision. Thus, to the extent that the Affordable Care Act requires any action or implementation by the State of Alaska, it is "binding law" as to the State of Alaska. The state could not re-

challenge the constitutionality of the Act in either a state or federal court in Alaska or elsewhere.[1]

Of course, the case is stayed pending a decision on appeal, so the parties are relieved of the injunctive effect of the decision until the Eleventh Circuit decides the appeal.

Response to points by Dennis Bailey.

Mr. Bailey reviewed three legal principles that he believed "may affect the application of the decision of the Florida…Court":

1. The principles of claim preclusion or issue preclusion.

I disagree with Mr. Bailey's conclusion that the Florida district court decision would not have preclusive effect in another lawsuit between the same litigants pending appeal in this case. "District court decisions … are binding on the parties unless a stay pending appeal is granted." *Mylan Pharmaceuticals, Inc. v. Shalala*, 81 F.Supp.2d 30, 37 n.10 (D.D.C. 2000) (citing *Pharmacia & Upjohn Co. v. Mylan Pharmaceuticals, Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999) and *Deering Milliken, Inc. v. FTC,* 647 F.2d 1128-29 (D.C. Cir. 1978)). An undecided appeal does not otherwise affect a judgment's finality, which is still binding upon the parties while an appellate court reviews that order. "The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal." *Jaffree v. Wallace*, 837 F.2d 1461 (11th Cir. 1988) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4433, at 308. (1987 & Supp.); *see also Ross ex rel. Ross v. Board of Educ. of Tp. High School Dist. 211*, 486 F.3d 279, 284 (7th Cir. 2007) ("[T]he fact that an appeal was lodged does not defeat the finality of the judgment."); *Collin v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Circ. 2007) (holding that a final judgment retains its

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[1] Mr. Bailey relies on *Totemoff v. State*, 905 P.2d 954 (Alaska 1995) to suggest that Alaska could relitigate the same issue in another court. That case would not apply to a second case challenging the constitutionality of the Affordable Care Act, however. In *Totemoff*, the state relitigated the issue of whether navigable waters are "public lands" under ANILCA, which had earlier been decided by the Ninth Circuit. The Alaska Supreme Court found that the state was not precluded from litigating the issue again—against a different party—because it was a pure question of law and the subject matter of the second case (a criminal prosecution) was "substantially unrelated" to that of the first case (a declaratory judgment action). Thus, the holding of *Totemoff* is limited to a legal issue litigated in a second case in the context of substantially different facts than those in the first case.

collateral estoppel effect pending appeal).[2]

For this reason, I do not concur with Mr. Bailey's conclusion that the Florida district court decision would not have preclusive effect in another lawsuit between the same litigants pending appeal in this case. And Judge Vinson's clarification order made clear that the parties were legally required to follow the order immediately, and that they did not have discretion to ignore it pending appeal—until he issued a stay.

2 & 3. The doctrine of full faith and credit and the precedential effect of a decision.

Mr. Bailey's other points—that the Florida decision is not available for enforcement under the Full Faith and Credit Clause and would not have precedential effect in a different federal district court or state court in a case between other parties—have no relevance to the Florida Affordable Care Act litigation. It is clear that the Florida District Court will not have the final word on the constitutionality of the Act, as the United States has appealed the case to the Eleventh Circuit. It is therefore irrelevant whether another court would give "full faith and credit" to the decision while it is on appeal; the plaintiffs states will not attempt to enforce the judgment in a different court while the Eleventh Circuit or the Supreme Court reviews the district court decision. It also is irrelevant that a decision by one district court is not binding on another; in fact several district courts have considered the constitutionality of this Act and have rendered inconsistent decisions. This is one of the reasons why the issue is likely to be decided ultimately by the Supreme Court. The fact that a different court in a different case—brought by different parties—might decide the case differently does not relieve that parties in *this* case from the force of the judgment made by the Florida court.

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[2] Mr. Bailey suggests that because claim preclusion and issue preclusion require a final judgment, courts will "most likely, require that the appeal process be exhausted." In fact, the Eleventh Circuit follows the majority view that "[w]hen a judgment has been subjected to appellate review, the appellate court's disposition of the judgment generally provides the key to its continued force as res judicata and collateral estoppel. A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel." *See Jaffree*, 837 F.2d at 1466 (quoting 1B *Moore's Federal Practice* Para. 0.416[2], at 517 (1984)).

LEGAL SERVICES

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

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Mail Stop 3101

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

MEMORANDUM February 25, 2011

SUBJECT: Effect of Florida federal district court decision on Alaska (Work Order No. 27-LS0536)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Dennis C. Bailey DCB
Legislative Counsel

You have asked for an opinion with respect to the legal effect on the State of Alaska of the recent decision by the Florida Federal District Court that declared the Patient Protection and Affordable Care Act unconstitutional. Florida v. U.S. Dept. Health and Human Svcs., No. 3:10-cv-91 RV/EMT (ND Fla. Jan 31, 2011). The court stated that the decision was the functional equivalent of an injunction but did not issue an injunction. The decision in the Florida case has not been appealed, but the government has expressed its intent to do so. The federal government has filed a motion to clarify the effect of the decision during appellate review. Defendants' Motion to Clarify, Feb. 17, 2011. [Docket No. 156].

This memorandum focuses on the question of the effect of the Florida District Court decision before a ruling by an appellate court. After appellate review is exhausted, the precedential or binding effect of an appellate decision may differ.

This memorandum describes, in broad terms, three closely related legal principles that may affect the application of the decision of the Florida Supreme Court: the doctrine of Full Faith and Credit, the principles of claim preclusion or issue preclusion, and the precedential effect of a decision. The decisions interpreting these principles are not necessarily consistent, and raise questions concerning the application of the principles to reach a definitive conclusion with respect to how they may be applied to the Florida decision. However, based on the following discussion, it is my opinion that the Florida decision is not available for enforcement under the Full Faith and Credit Clause, nor does it have preclusive effect in another litigation between the same litigants until the appeal process has been exhausted or the time limit for appeal has expired. The decision of a federal district court does not establish legal precedent, although decisions of an appeals court may establish broader legal precedent, and a decision of the United States Supreme Court has national effect.

FULL FAITH AND CREDIT

The Full Faith and Credit Clause of the Constitution, U.S. Const. art. IV, § 1, and its implementing statute, 28 U.S.C. § 1738, as well as interstitial federal common law, dictate that courts in the United States, both state and federal, must recognize and give effect to valid judgments rendered by other courts in the United States, including state and federal courts.[1,2] Recognition of judgments requires both (1) the application of the doctrines of issue and claim preclusion and (2) the enforcement of judgments. 18-130 Moore's Federal Practice - Civil § 130.01. In order to qualify for full faith and credit, a judgment must be final, valid, and "on the merits." A "final judgment" is one that is conclusive of the proceeding before the court. Some courts read 28 U.S.C. § 1963 to require an appellate decision or expiration of the time for appeal before a judgment is considered final for purposes of registration in another court.[3] Finality of a judgment is ascertained based on the law of the jurisdiction in which the judgment was rendered. 18-130 Moore's Federal Practice - Civil § 130.04. The Eleventh Circuit, which covers the State of Florida, requires that a judgment must be final by appeal or the expiration of the time for appeal. Urban Industries, Inc. v. Thevis, 670 F.2d 981 (11th Cir. 1982).

Although 28 U.S.C. 1963 only applies to judgments for the recovery of money or property, the Supreme Court has made it clear that the availability of full faith and credit does not depend on the form of relief sought. Thus, full faith and credit must be extended to actions for damages and for equitable relief. 18-130 Moore's Federal Practice - Civil § 130.07.[4]

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[1] Article IV, § 1 of the U.S. Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

[2] Title 28 U.S.C. § 1738, in relevant part, provides:

> The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[3] Cf., Conopco, Inc. v. Roll Int'l, 231 F.3d 82, 90 (2d Cir. N.Y. 2000), rejecting the proposition that a trial court's final judgment must have been upheld on appeal (or the time for appeal must have passed) before it will be entitled to full faith and credit.

[4] See Baker v. General Motors Corp., 522 U.S. 222, 234, 118 S. Ct. 657, 139 L.Ed.2d 580 (1998) (We see no reason why the preclusive effects of an adjudication on parties and those "in privity" with them, i.e., claim preclusion and issue preclusion (res judicata and collateral estoppel), should differ depending solely upon the type of relief sought in a civil action.).

In essence, the decision of the Florida federal district court is probably not entitled to full faith and credit in other courts until the decision is final on appeal, i.e., when the appeal process has been exhausted (probably to the U.S. Supreme Court) or the time for appeal has occurred without an appeal being filed.

CLAIM PRECLUSION AND ISSUE PRECLUSION

The legal principles of claim preclusion (res judicata) or issue preclusion (collateral estoppel) prevent claims or issues from being relitigated after the claim or issue is finally decided. Claim and issue preclusion address the concerns of preserving the finality of a judgment. A court enforcing a judgment under the full faith and credit clause will apply claim preclusion and issue preclusion principles.

Claim Preclusion

The doctrine of claim preclusion, also referred to as res judicata, means that a final judgment on the merits of an action prohibits the parties or their privies from initiating subsequent litigation arising out of the same transaction or series of transactions. 3-30 Moore's Manual--Federal Practice and Procedure § 30.02. The denial of a summary judgment motion may be an adequate basis for claim preclusion if the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again. Kay-R Elec. Corp. v. Stone & Webster Constr. Co., 23 F.3d 55, 59 (2d Cir. 1994).

Issue Preclusion

The doctrine of issue preclusion, also referred to historically as collateral estoppel, essentially provides that when an issue of fact or law has been determined by a valid and final judgment, that issue may not again be litigated between the same parties in any subsequent legal action. 3-30 Moore's Manual--Federal Practice and Procedure § 30.02. Issue preclusion generally applies when the prior determination is based on a motion for summary judgment. 18-132 Moore's Federal Practice - Civil § 132.03, fn. 43.

The doctrine of full faith and credit discussed above involves the enforcement of a judgment in a different court than the court issuing the judgment. Claim preclusion or issue preclusion apply to both the court issuing a judgment and to a court where the full faith and credit of the judgment of another court is recognized. Both doctrines involve the enforcement of a valid final judgment. The effect of both doctrines is upon the parties involved. A party to an action is precluded from re-litigating a claim or issue if the party was a participant in the original litigation. Both require that the judgment in the original claim be a final judgment, which, in order to be considered a final judgment will, most likely, require that the appeal process be exhausted.

ESTABLISHING PRECEDENT / STARE DECISIS

Organization of the federal court system

The legal effect of a federal district court ruling depends, in part, on the authority of the court issuing the ruling within the structure of the federal court system. Federal courts are organized in three levels. Federal districts courts are the trial courts in the federal system, the 13 federal circuit courts of appeal are the intermediate appellate courts, and

the Supreme Court is the court of final appeal. The jurisdiction of each of 12 of the circuits and the district courts within each circuit is designated geographically. (The Federal Circuit Court of Appeal differs from the 12 geographic circuits. It is not limited geographically, but is limited by the subject and type of case it may consider.) Alaska is located in Ninth Circuit Court of Appeals. Florida is located in the Eleventh Circuit. The U.S. Supreme Court may hear cases appealed from a decision of any circuit court of appeals. One of the reasons the Supreme Court grants certiorari and hears a circuit court case is when decisions of different circuit courts of appeal conflict. A decision of the U.S. Supreme Court deciding questions of federal law is binding in federal and state courts located in all of the federal circuits.

Binding effect of a federal district court

A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case. 18-134 Moore's Federal Practice - Civil § 134.02 fn. 22. Further, a decision of a district court or a federal circuit court of appeal in one circuit does not have binding effect in another circuit. The decisions of the court of appeals for one circuit are not binding upon the courts of appeal for other circuits. 18-134 Moore's Federal Practice - Civil § 134.02 fn. 19.1. Frequently, the decisions of a district court or circuit court of appeal in one circuit conflict with similar decisions in another circuit.

The legal principle that defines the binding effect of a federal district court decision is described by one court as follows:

> Stare decisis does not mandate that a district court in this circuit follow the decision of a district court in another circuit. According to Moore's Federal Practice,
>
> > Stare decisis, briefly stated, makes each judgment a statement of the law, or precedent, binding in future cases before the same court or another court owing obedience to its decisions.
>
> 1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 0.401 (2d ed. 1996). . . .
>
> Moore goes on to explain how stare decisis operates in the federal system:
>
> > The court of appeals in one circuit owes no obedience to decisions of a court of appeals in another circuit, though of course it may find the reasons given for such a decision persuasive, or may be influenced by the accumulation of authority. This freedom of the circuits to come each to its own conclusion is not only tolerated, but is an important feature in the operation of the Supreme Court's certiorari practice. The district courts, like the courts of appeals, owe no obedience to the decisions of their counterparts in other

> districts, nor to the decisions of the courts of appeals in other circuits.

Id. P 0.402. Circuit precedent is consistent with this rule.

Northwest Forest Resource Council v. Dombeck, 107 F.3d 897, 900 (D.C. Cir. 1997).

The Alaska Supreme Court affirmed that it is not required to follow a federal district court decision in the context of a case involving Native rights, stating that it not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law. Totemoff v. State, 905 P.2d 954 (Alaska 1995), citing In re F.P., 843 P.2d 1214, 1215 n.1 (Alaska 1992), cert. denied, 113 S. Ct. 2441 (1993). In In re F.P. the court said:

> Where a federal question is involved, the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme Court. The converse is also true; federal courts in Alaska are not bound by decisions of Alaska state courts on questions of federal law. . . .

Id. at 1215, citing Harrison v. State, 791 P.2d 359 (Alaska App. 1990).

In short, a ruling of a federal district court, the trial court, and the lowest level court in the federal system is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case. Further, the decision of a federal district court only has precedential effect in the limited territory. If it is appealed to the circuit court of appeals, a decision of the court of appeals is only enforceable within the territory of the circuit where the decision was issued. Only a decision of the U.S. Supreme Court is binding outside of the circuit where a decision is issued.

Following the above analysis it is implausible that the decision of the federal district court in Florida would have a binding precedential or binding effect on the state when appellate review has not been exhausted.

If I may be of further assistance, please advise.

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Parnell seeks advice on how to proceed on health care overhaul

The Associated Press
(02/05/11 23:42:15)

JUNEAU -- Gov. Sean Parnell is asking his attorney general to advise him on whether implementing the federal health care overhaul would put Parnell in violation of his oath of office.

A federal judge in Florida this week struck down the law as unconstitutional in a case joined by 26 states, including Alaska. A major point of contention is a provision requiring citizens to buy health insurance.

While Parnell concedes the issue is expected to be decided by the U.S. Supreme Court, he says he has a duty to uphold the law and wants the attorney general to advise him.

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Alaska to implement health care overhaul after losing $1 million

By ERIKA BOLSTAD
Anchorage Daily News
(03/05/11 00:22:17)

WASHINGTON -- After allowing the application deadline to pass for $1 million in federal health care assistance, Gov. Sean Parnell said Thursday he will begin implementing the new health care law after all, now that a Florida judge has told the states to do just that.

That same lower court Judge, U.S. District Judge Roger Vinson of Pensacola, Fla., had earlier found part of the new federal health care law unconstitutional, a decision cited by Parnell as justification for walking away from the federal money to assist the uninsured get health insurance. But Vinson stayed his order Thursday to give the Obama Administration time to appeal, leaving Parnell no choice but to begin putting the law into effect in Alaska.

"We will begin moving forward with state funds, rather than federal funds," said Parnell's spokeswoman, Sharon Leighow.

Federal judges in other jurisdictions have upheld the 2010 Affordable Care Act. But in any event, according to a legal analysis by the Alaska Legislature's legal division, neither Vinson's original ruling nor the rulings of any of the other lower court judges would have any force in Alaska.

State Sen. Hollis French, an Anchorage Democrat who sought the legal analysis, said Parnell should attempt to seek a waiver for his missed deadline.

Alaska, one of 26 states challenging the law's constitutionality, had held back on putting in place some aspects of health care, including turning down federal money to help set up a state insurance exchange. Alaska was the only state to refuse the money, which funds the preparations for an online exchange. Failing to apply for the grant also meant Alaska would be ineligible for an Exchange Establishment Grant, which would fund the exchange's operations through 2014.

In his order Thursday, Vinson reiterated his decision that it's unconstitutional for the law to mandate that individuals buy insurance. But Vinson also said that states must go forward with implementation, as long as the Justice Department files an appeal of his decision within seven days. Nearly everyone, including Vinson, believes the case will be decided by the Supreme Court.

"It would be extremely disruptive and cause significant uncertainty" to stop implementation of the health care act, the judge wrote. "The sooner this issue is finally decided by the Supreme Court, the better off the entire nation will be."

Parnell said Thursday in a statement that his administration "will treat the federal health care law as being in place, as we are directed by the judge in the lawsuit to which our state was a party."

The Justice Department had asked Vinson to clarify his ruling so that states would know whether they should proceed with the Affordable Care Act. A spokeswoman said they will promptly appeal Vinson's ruling.

Alaska appeared to be the only state that was deliberately holding off on implementation, and many questioned the legal backing for Parnell's move. Democrats in the Alaska legislature asked for a legal opinion on the matter; they were told Monday that a court decision by a federal judge in Florida was not binding in Alaska, which is in a different judicial circuit.

French was elated by the Florida judge's latest ruling.

"This is a good day for Alaska," said French, who like Parnell is an attorney. "The Governor can no longer evade the issue." He said it was time for Parnell to help the estimated 115,000 Alaskans who don't have health insurance.

"I hope the governor takes the opportunity to work with his administration and the legislature to implement what are some very good insurance reforms," French said.

Earlier this week, Parnell said he has moved to implement some aspects of the federal health care law into health insurance plans for state employees, including the requirement that children up to age 26 be allowed to stay on their parents' insurance policy.

But he wouldn't say whether he would pursue waivers for Alaska to design its own health care program, an option that opened up to all states earlier this week. On Monday, President Barack Obama told Parnell and other governors at their winter meeting in Washington that he supports a move to let states use waivers to design their own health care systems starting in 2014. Those state systems must meet the goals of the president's health care law, which previously wouldn't allow state waivers until 2017.

Parnell on Monday said he wouldn't apply for waivers because that would be an acknowledgment that the "the law is currently in place."

But Thursday, he said that Alaska will make decisions on a case-by-case basis about how to proceed with health-care reform. That means he'll decide whether the state "will undertake with our own money or with federal money how to implement the provisions of the law," Parnell said.

"My sole responsibility is to act in Alaska's best interests and we will do so," he said. "I continue to strongly prefer to use state resources for state-based health care solutions to increase access and improve affordability, rather than become more entangled."

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Parnell won't implement federal health overhaul in Alaska

By BECKY BOHRER
The Associated Press
(02/18/11 15:37:29)

JUNEAU -- Gov. Sean Parnell took a defiant stand Thursday against the federal health care overhaul Congress passed last year, declaring that he will refuse to implement a law he views as blatantly unconstitutional.

Parnell is the latest Republican governor to lash out against the law as the courts weigh the constitutionality of the overhaul. More than half of all states, including Alaska, have sued or joined lawsuits against the government over the health care plan pushed by President Barack Obama.

It's not immediately clear what impact Parnell's move will have on Alaskans, an estimated 14 percent of whom are uninsured year-round.

Several experts believe Parnell is on shaky legal ground and that his comments are little more than symbolic. The law won't fully take effect until 2015 — just after his first term will have ended — and the constitutionality question will not get settled until the U.S. Supreme Court decides it.

Until then, in Parnell's view the decision by a federal district judge in Florida, striking down the law as unconstitutional, "is the law of the land, as it pertains to Alaska."

Alaska was one of 26 states party to that case. On Thursday, the Justice Department asked the Florida judge to clarify his ruling and tell states that they must continue to enact the Obama administration's health care overhaul while appeals are pending. Alaska Attorney General John J. Burns said Thursday he had not yet seen the filing and could not immediately comment on it.

The Florida court isn't the only one that is looking at the constitutionality of the new health law.

Two other federal judges have upheld the law and another judge ruled a provision requiring citizens to buy health insurance or face penalties — a major point of contention in the Florida case — is unconstitutional but did not strike down the rest of the law.

"This is one renegade judge that has reached this decision," said Timothy S. Jost, a professor at the Washington and Lee University School of Law. He called the opinion "extremist" and likely to be reversed on appeal. In refusing to participate in the law, he said, Alaska "is really the outlier" among states.

PARNELL SHUNS FEDERAL MONEY

Parnell sought Burns' advice on whether enforcing and enacting the law would violate his oath to uphold the state and U.S. constitutions.

Parnell disputed the contention by Jost and others that any refusal by the states to participate in the law is an invitation to the federal government to step in and implement it for them. He reads

U.S. District Judge Roger Vinson's decision as a court order blocking implementation. Vinson is the Florida judge.

"The state of Alaska will not pursue unlawful activity to implement a federal health care regime that has been declared unconstitutional by a federal court," Parnell told the Juneau Chamber of Commerce, to applause, Thursday.

Parnell said the state will pursue lawful, market-based solutions of its own. That includes looking at the potential for a health insurance exchange without the "shiny but poisonous apple" of federal dollars and mandates "that create federal dependency and control."

He faced a Friday deadline for applying for federal funds to help set up an exchange and faced pressure from seven Democratic state senators to do so. He refused.

LAWMAKERS CRITICIZE

Parnell said several of the state lawmakers who petitioned him are attorneys like he is and considering the Florida ruling, they should know better.

Sen. Bill Wielechowski, an attorney from Anchorage who signed the letter, said 49 other states accepted the federal funding for a program that he said is meant to allow for residents to get lower-cost insurance.

"For the governor to stake his flag in the ground and say, 'This is the fight I want,' over this provision, which is really a conservative provision, indicates to me that the governor, I think, is maybe placing politics over what's best for Alaskans," Wielechowski said.

Sen. Hollis French, a supporter of the federal overhaul who has introduced legislation to establish a health benefit exchange, questioned whether Parnell would be open to "meaningful reform."

Parnell said there were four areas of the law where, before the judge's decision, he had taken action. Those areas include setting up a state-run high-risk pool providing a coverage option for Alaskans previously denied insurance for pre-existing conditions. He said about 28 people are on the program list, and he believes the state should continue funding.

Alaska will work to provide more affordable, accessible health care "as a matter of state policy, not as a mandate of the federal government," he told The Associated Press.

Ron Pollack, executive director of Families USA, said currently states have an "enormous amount of discretion" in how they implement provisions of the law. If the governor refuses to exercise that, the federal government will have the say, he said.

Neither he nor Jost knew of any other state taking action similar to Parnell.

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Department of Law Determines Alaska Not Required to Follow Health Care Legislation

Mon, February 14, 2011
Posted in Alaska News, Alaska Politics, Top Stories

Dave Donaldson, APRN – Juneau

The Department of Law has advised Governor Sean Parnell that Alaska is not required to follow the national Health Care legislation that went into effect last year.

The governor plans to follow that advice.

Last month, a Florida federal district court found the act unconstitutional, and Attorney General-designee John Burns told House and Senate Judiciary Committees Monday that he has advised the governor that – unless overturned by the U.S. Supreme Court – the Florida decision is binding in Alaska.

Burns argues the decision leaves compliance up to the states.

But Senate Judiciary Chairman Hollis French disagreed with Burns' advice, saying that without an injunction from the Florida Court, or a confirming opinion by the U.S. Supreme Court, the decision leaves the law in place.

The governor's staff says in an e-mail response, "The governor will not implement a law that has been ruled unconstitutional. He is committed to working to find ways to increase accessibility and improve affordability of health care for Alaskans."

The Florida case has not yet been appealed to the U.S. Supreme Court, however the Justice Department – and the state's challenging the law – have indicated that a national decision is needed.

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Fla. judge strikes down health care overhaul; Alaska one of 26 states in lawsuit

by Christopher Eshleman / ceshleman@newsminer.com
01.31.11 - 11:48 am
• AUDIO: Gov. Parnell reaction to health care ruling

JUNEAU — Gov. Sean Parnell, emboldened by a federal judge's order Monday, has asked federal agencies to pause health care reform.

Parnell's request came hours after the state found itself on the winning side of the court decision, which called last year's health care reform unconstitutional.

The reform law, which requires all able U.S. citizens to obtain health insurance, has been rejected twice and upheld twice in the lower courts. All sides say it'll fall to the U.S. Supreme Court to decide.

"Because the authority of Congress to enact the mandatory health insurance provisions has been ruled unconstitutional, I urge the federal government to voluntarily suspend all efforts to implement these provisions until the U.S. Supreme Court decides the issue," said Parnell.

Critics have accused the governor of dragging his feet in implementing the reforms and on Monday said he was throwing stones rather than offering solutions.

Rep. David Guttenberg, D-Fairbanks, said escalating drug and medical costs threaten to injure the state's relatively healthy financial position. Guttenberg, who has pitched a handful of bills aimed at lowering prescription drug costs here, challenged Parnell to take a more constructive approach toward health care issues at the state and national levels.

"All I've seen is, 'We don't want national health care reform,'" he said. "I want to know when he's going to tackle that problem" — high health care costs — "because as far as I can tell he's not doing it."

The governor said while he was "concerned about rising health care costs, solutions have to be constitutional."

Parnell announced last April the state would join others in the lawsuit. He called the issue a key point in the historic debate about the power-sharing relationship between states and Washington, D.C.

Parnell called the individual mandate a case of inappropriate "federal encroachment."

Florida's U.S. District Judge Roger Vinson, in his decision Monday, said he "reluctantly" rejected Congress' decision to mandate insurance. The mandate is a

linchpin of the 2010 health care reform.

"At a time when there is virtually unanimous agreement that health care reform is needed in this country, it is hard to invalidate and strike down a statute titled 'The Patient Protection and Affordable Care Act,'" Vinson wrote.

U.S. Sen. Lisa Murkowski said in a statement the ruling "confirms what many of us have been saying about the constitutionality of the individual mandate in the law. Clearly, this is not the final word on the matter, and ultimately the U.S. Supreme Court will be the final arbitrator."

Alaska filed suit with 20 other states in April 2010, and six more joined later.

The Alaska Department of Law, in a 49-page memorandum on April 19, said the state should reject Congress' decision to "shortcut" the federal separation of powers through its insurance mandate.

Vinson's decision said the mandate applied the federal government's power to regulate commerce too broadly. He pointed to the states' argument that "not even in the context of insurance under the National Flood Insurance Program did Congress mandate that all homeowners buy flood insurance directly from a private company."

A judge in Virginia also rejected the mandate, but two judges in other states have upheld it.

In his ruling, Vinson went further than the Virginia judge and declared the entire health care law unconstitutional, The Associated Press reported Monday.

"This is obviously a very difficult task. Regardless of how laudable its attempts may have been to accomplish these goals in passing the act, Congress must operate within the bounds established by the Constitution," Vinson wrote in his 78-page ruling.

At issue is whether the government is reaching beyond its constitutional power to regulate interstate commerce by requiring citizens to purchase health insurance or face tax penalties.

Attorneys for President Barack Obama's administration argued the health care system was part of the interstate commerce system. They said the government can levy a tax penalty on Americans who decide not to purchase health insurance because all Americans are consumers of medical care.

But attorneys for the states said the administration was essentially coercing the states into participating in the overhaul by holding billions of Medicaid dollars hostage. The states also said the federal government is violating the Constitution by forcing a mandate on the states without providing money to pay for it.

Florida's former Republican Attorney General Bill McCollum filed the lawsuit just minutes after Obama signed the 10-year, $938 billion health care bill into law

in March. He chose a court in Pensacola, one of Florida's most conservative cities. The nation's most influential small business lobby, the National Federation of Independent Business, also joined.

Other states that joined the suit are Alabama, Arizona, Colorado, Georgia, Indiana, Idaho, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin and Wyoming.

The Associated Press contributed to this report.

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The Washington Post

Judge clears way for implementation of health-care law in states that are challenging it

By N.C. Aizenman
Washington Post Staff Writer
Thursday, March 3, 2011; 9:22 PM

A federal judge in Florida who earlier ruled the new health-care law unconstitutional said Thursday that implementation can proceed in the 26 states that mounted the legal challenge while the Obama administration pursues an appeal.

However, U.S. District Court Judge Roger Vinson attached two conditions to the "stay" of his ruling: The administration must file its appeal within seven days and it must request an expedited review from either the Court of Appeals or the Supreme Court.

"Almost everyone agrees that the Constitutionality of the Act is an issue that will ultimately have to be decided by the Supreme Court of the United States," Vinson wrote. "It is very important to everyone in this country that this case move forward as soon as practically possible."

Justice Department spokeswoman Tracy Schmaler said the administration would seek fast-track consideration from the 11th Circuit, just as it has with other challenges to the law that have reached circuit courts.

However, a direct appeal to the Supreme Court is highly unlikely. The administration has opposed an effort by Virginia to do so in a similar but separate case. And the states party to the Florida suit have made clear they do not intend to pursue that avenue, either.

The suit is one of 20 pending against the law. Vinson's original Jan. 31 decision was one of two to rule against it. Like the judge in Virginia's suit, Vinson found the law's requirement that virtually all Americans obtain health insurance beginning in 2014 to be unconstitutional.

But Vinson, who like the Virginia judge was a Republican appointee, went a step further, ruling that the insurance mandate was so inextricably linked to the rest of the law that the entire statute should be invalidated.

Three other federal judges, all Democratic appointees, have upheld the law, most

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The Washington Post

Judge clears way for implementation of health-care law in states that are challenging it

recently Judge Gladys Kessler in the District of Columbia.

Technically, the administration had not requested a stay of Vinson's order voiding the law, but rather a clarification of whether he had intended to halt the law's rollout pending appeals.

The confusion stemmed from Vinson's decision not to formally enjoin the law in his original order; instead he suggested that it was "the functional equivalent" of an injunction because it's presumed the federal government automatically complies with such judgements.

This formulation provoked a flurry of conflicting interpretations from lawyers for both sides as well as among legal scholars.

Republican governors and attorneys general of three states party to the suit - Alaska, Florida and Wisconsin - immediately declared that in their states, at least, the law is now "dead."

In the weeks since, they have also returned some state planning funds provided through the law. But they have kept other funds, and they did not take steps to undo provisions of the law that had already taken effect.

By contrast, governors of several other states that are also part of the challenge said they believed that until the appeals process is completed, the statute remains in effect and they must comply with it.

In his opinion Thursday, Vinson rebuked the administration for suggesting that his original order was ambiguous, writing that he clearly meant for it to have the "practical" effect of an injunction that could only be lifted if the government requested a stay.

"It was not expected that [the government] would effectively ignore the order and declaratory judgement for two-and-one-half weeks, continue to implement the Act, and only then file a belated motion to 'clarify,' " the judge wrote.

In an example of scathing language he employed throughout the decision, Vinson added that the administration's claim that its delay was due to the need for careful

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Judge clears way for implementation of health-care law in states that are challenging it

analysis, "seems contradictory to media reports that the White House declared within hours after entry of my order that 'implementation will proceed apace.' " And, at another point he wrote that one of the administration's arguments "borders on misrepresentation."

Still, since administration lawyers had made clear that if the judge responded that they needed a stay, they intended to request one, Vinson said he would "save time" by treating the government's motion for clarification as one also requesting a stay.

In granting it, the judge pointed to the other cases pending against the law and the conflicting opinions from other courts.

Alaska Gov. Sean Parnell (R) issued a statement saying that although he now considers the law back in effect, he would still be reluctant to apply for federal implementation funds.

"I continue to strongly prefer to use state resources for state-based health-care solutions to increase access and improve affordability, rather than become more entangled," he said.

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Judge asked to clarify health ruling

By MELISSA NELSON
The Associated Press
(02/17/11 16:31:55)

PENSACOLA, Fla. -- The Justice Department asked a federal judge in Florida on Thursday to tell states that they must continue to enact the Obama administration's health care overhaul despite the judge's ruling that the law is unconstitutional.

In a motion to clarify, administration attorneys asked U.S. District Judge Roger Vinson to make clear that states cannot ignore the new health care laws while his ruling is being appealed.

At stake, according to the government's motion, are provisions of the new law that would create chaos if ignored by the states.

Those provisions include 2011 changes in Medicare payment rates. Delaying those changes "could cause major delays and errors in the payment of the roughly 100 million Medicare claims processed each month," the motion states.

Florida, Alaska and 24 other states filed the lawsuit that said Congress exceeded its authority by requiring all citizens to purchase health insurance or face tax penalties.

Vinson agreed, ruling on Jan. 31 that President Barack Obama's entire health care overhaul law is unconstitutional. The broad challenge seems certain to be resolved only by the Supreme Court.

He declared the law "a plain case of judicial overreaching." Some states, citing Vinson's ruling, have refused to cooperate with the health care law.

For example, earlier Thursday in Alaska, Gov. Sean Parnell said he would not implement the new law because Vinson ruled it was unconstitutional.

"The state of Alaska will not pursue unlawful activity to implement a federal health care regime that has been declared unconstitutional by a federal court," Parnell told the Juneau Chamber of Commerce, to applause.

Parnell said the state would pursue lawful, market-based solutions of its own. That includes planning for a health insurance exchange, meant to offer a choice of health plans, without the "shiny but poisonous apple" of federal dollars and mandates "that create federal dependency and control."

A spokeswoman for Florida Attorney General Pam Bondi said Vinson's ruling indeed does mean the states need not move forward with the health overhaul.

Vinson "clearly stated" that the order equaled an injunction, Jennifer Meale said in an e-mailed statement. An injunction legally halts or forbids something.

But in the filing, the Justice Department said the opposite.

Even though Vinson declared the law unconstitutional, all states in the lawsuit already have an obligation to comply with all the provisions of the Affordable Care Act while the case is being appealed, Justice lawyers argued.

"We believe it is important to put to rest any doubts about the ability of states and other parties to continue to implement these critical programs and consumer protections provided under this statute," said Justice Department spokeswoman Tracy Schmaler.

The issue is expected to be resolved by the Supreme Court. Two other U.S. district judges previously upheld the law, both Democratic appointees to the federal bench.

A Republican appointee in Virginia also ruled against the law. Vinson's ruling is considered the most sweeping against the health overhaul. He was appointed by Republican President Ronald Reagan.

AP Writer Brendan Farrington in Tallahassee and Becky Bohrer in Juneau contributed to this report

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Prior to forming Borgeson & Burns, P.C., partner Cory Borgeson and I formerly staffed the Fairbanks office of Birch Horton Bittner and Cherot, which at that time was a full service law firm with offices in Anchorage, Juneau, and Washington D.C. Birch Horton Bittner and Cherot specialized in government relations, public utilities, construction law, complex litigation, commercial transactions and real estate. My general practice areas while with Birch Horton Bittner and Cherot focused on business law, property law, insurance defense, and related litigation.

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Taught undergraduate and graduate courses in legal aspects of business problems, including general principles, legal characteristics and liability considerations in selecting the appropriate client model for transacting business and administration of law in contracts, agency, employment, personal sales and property transactions.

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1985-1986

Served as law clerk for the four Fairbanks Superior court judges, providing legal research and analysis and preparation of draft orders and decisions.

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1984-1985

Assisted Justice Rabinowitz with legal research and analysis and drafted legal memorandums.

EDUCATION AND PERSONAL INFORMATION

- University of Puget Sound School of Law, Tacoma, Washington, J.D.
- University of Alaska Fairbanks, B.A. history and philosophy
- West Valley High School, Fairbanks, High School graduate
- Born Raleigh North Carolina, March 31, 1959
- Relocated with family from Raleigh, North Carolina to Fairbanks, Alaska in 1960, to Nome, Alaska in 1961, and back to Fairbanks, Alaska in 1970

- Commercial fisherman (drift net) Bristol Bay (approximately 10 seasons)
- Fisheries Technician, Alaska Department of Fish and Game, worked throughout Western Alaska and in Prince William Sound (approximately 10 seasons)
- Married to Christi Burns, 1986
- Two daughters, Alissa, age 22, a senior at the University of Arizona and Kate, age 17, high school junior studying abroad in Poland on a Rotary Exchange fellowship

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COMMUNITY SERVICE

- Greater Fairbanks Chamber of Commerce, Past Member and Chair
- Rotary Club of Fairbanks, Past Member
- University of Fairbanks Chancellor's Advisory Committee
- Hospice of Alaska, Member of the Board of Directors
- Big Brothers/Big Sisters of Fairbanks – "Big Couple"
- Former member of University of Alaska Fairbanks Hockey Team during college

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INTERESTS

- Fly fishing, photography, outdoor activities, and sports (UAF hockey)

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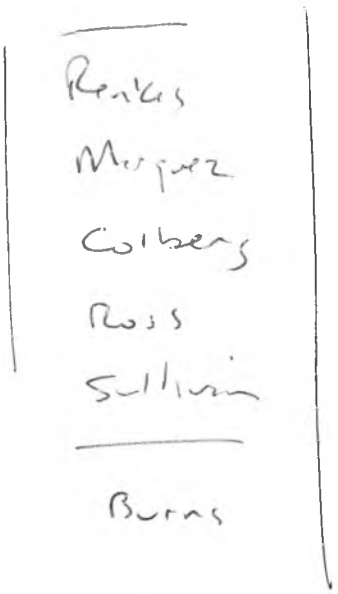

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1998-2010

Taught undergraduate and graduate courses in legal aspects of business problems, including general principles, legal characteristics and liability considerations in selecting the appropriate client model for transacting business and administration of law in contracts, agency, employment, personal sales and property transactions.

Judicial Clerkship
Superior Court of the State of Alaska
Fourth Judicial District
Fairbanks, Alaska 99701
(907) 452-9277
1985-1986

Served as law clerk for the four Fairbanks Superior court judges, providing legal research and analysis and preparation of draft orders and decisions.

Legal Extern
Justice Jay Rabinowitz
Supreme Court of the State of Alaska
Fairbanks, Alaska 99701
1984-1985

Assisted Justice Rabinowitz with legal research and analysis and drafted legal memorandums.

EDUCATION AND PERSONAL INFORMATION

- University of Puget Sound School of Law, Tacoma, Washington, J.D.
- University of Alaska Fairbanks, B.A. history and philosophy
- West Valley High School, Fairbanks, High School graduate
- Born Raleigh North Carolina, March 31, 1959
- Relocated with family from Raleigh, North Carolina to Fairbanks, Alaska in 1960, to Nome, Alaska in 1961, and back to Fairbanks, Alaska in 1970

- Commercial fisherman (drift net) Bristol Bay (approximately 10 seasons)
- Fisheries Technician, Alaska Department of Fish and Game, worked throughout Western Alaska and in Prince William Sound (approximately 10 seasons)
- Married to Christi Burns, 1986
- Two daughters, Alissa, age 22, a senior at the University of Arizona and Kate, age 17, high school junior studying abroad in Poland on a Rotary Exchange fellowship

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COMMUNITY SERVICE

- Greater Fairbanks Chamber of Commerce, Past Member and Chair
- Rotary Club of Fairbanks, Past Member
- University of Fairbanks Chancellor's Advisory Committee
- Hospice of Alaska, Member of the Board of Directors
- Big Brothers/Big Sisters of Fairbanks – "Big Couple"
- Former member of University of Alaska Fairbanks Hockey Team during college

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INTERESTS

- Fly fishing, photography, outdoor activities, and sports (UAF hockey)

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McClatchy Washington Bureau

Print This Article

Posted on Wed, Jan. 12, 2011

Ballot proposal to ban abortion in Alaska ruled unconstitutional

Sean Cockerham | The Anchorage Daily News

last updated: January 12, 2011 06:42:43 AM

Alaska attorney general John Burns has found unconstitutional a proposed ballot initiative that was essentially seeking to outlaw abortion in Alaska.

"The proposed bill meets the 'clearly unconstitutional' standard because it would supersede a woman's constitutional right to privacy," said the opinion, released late Monday. "This right is a federal constitutional right recognized by the U.S. Supreme Court in Roe v. Wade."

Burns, who started work as the new attorney general last month, is recommending that the lieutenant governor refuse to certify the "Natural Right to Life" initiative.

The initiative tries to make it Alaska law that "the natural right to life and body of the unborn child supersedes the statutory right of the mother to consent to the injury or death of her unborn child."

To read the complete article, visit www.adn.com.

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MEMORANDUM February 25, 2011

SUBJECT: Effect of Florida federal district court decision on Alaska (Work Order No. 27-LS0536)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Dennis C. Bailey
Legislative Counsel

You have asked for an opinion with respect to the legal effect on the State of Alaska of the recent decision by the Florida Federal District Court that declared the Patient Protection and Affordable Care Act unconstitutional. Florida v. U.S. Dept. Health and Human Svcs., No. 3:10-cv-91 RV/EMT (ND Fla. Jan 31, 2011). The court stated that the decision was the functional equivalent of an injunction but did not issue an injunction. The decision in the Florida case has not been appealed, but the government has expressed its intent to do so. The federal government has filed a motion to clarify the effect of the decision during appellate review. Defendants' Motion to Clarify, Feb. 17, 2011. [Docket No. 156].

This memorandum focuses on the question of the effect of the Florida District Court decision before a ruling by an appellate court. After appellate review is exhausted, the precedential or binding effect of an appellate decision may differ.

This memorandum describes, in broad terms, three closely related legal principles that may affect the application of the decision of the Florida Supreme Court: the doctrine of Full Faith and Credit, the principles of claim preclusion or issue preclusion, and the precedential effect of a decision. The decisions interpreting these principles are not necessarily consistent, and raise questions concerning the application of the principles to reach a definitive conclusion with respect to how they may be applied to the Florida decision. However, based on the following discussion, it is my opinion that the Florida decision is not available for enforcement under the Full Faith and Credit Clause, nor does it have preclusive effect in another litigation between the same litigants until the appeal process has been exhausted or the time limit for appeal has expired. The decision of a federal district court does not establish legal precedent, although decisions of an appeals court may establish broader legal precedent, and a decision of the United States Supreme Court has national effect.

FULL FAITH AND CREDIT

The Full Faith and Credit Clause of the Constitution, U.S. Const. art. IV, § 1, and its implementing statute, 28 U.S.C. § 1738, as well as interstitial federal common law, dictate that courts in the United States, both state and federal, must recognize and give effect to valid judgments rendered by other courts in the United States, including state and federal courts.[1,2] Recognition of judgments requires both (1) the application of the doctrines of issue and claim preclusion and (2) the enforcement of judgments. 18-130 Moore's Federal Practice - Civil § 130.01. In order to qualify for full faith and credit, a judgment must be final, valid, and "on the merits." A "final judgment" is one that is conclusive of the proceeding before the court. Some courts read 28 U.S.C. § 1963 to require an appellate decision or expiration of the time for appeal before a judgment is considered final for purposes of registration in another court.[3] Finality of a judgment is ascertained based on the law of the jurisdiction in which the judgment was rendered. 18-130 Moore's Federal Practice - Civil § 130.04. The Eleventh Circuit, which covers the State of Florida, requires that a judgment must be final by appeal or the expiration of the time for appeal. Urban Industries, Inc. v. Thevis, 670 F.2d 981 (11th Cir. 1982).

Although 28 U.S.C. 1963 only applies to judgments for the recovery of money or property, the Supreme Court has made it clear that the availability of full faith and credit does not depend on the form of relief sought. Thus, full faith and credit must be extended to actions for damages and for equitable relief. 18-130 Moore's Federal Practice - Civil § 130.07.[4]

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[1] Article IV, § 1 of the U.S. Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

[2] Title 28 U.S.C. § 1738, in relevant part, provides:

> The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[3] Cf., Conopco, Inc. v. Roll Int'l, 231 F.3d 82, 90 (2d Cir. N.Y. 2000), rejecting the proposition that a trial court's final judgment must have been upheld on appeal (or the time for appeal must have passed) before it will be entitled to full faith and credit.

[4] See Baker v. General Motors Corp., 522 U.S. 222, 234, 118 S. Ct. 657, 139 L.Ed.2d 580 (1998) (We see no reason why the preclusive effects of an adjudication on parties and those "in privity" with them, i.e., claim preclusion and issue preclusion (res judicata and collateral estoppel), should differ depending solely upon the type of relief sought in a civil action.).

In essence, the decision of the Florida federal district court is probably not entitled to full faith and credit in other courts until the decision is final on appeal, i.e., when the appeal process has been exhausted (probably to the U.S. Supreme Court) or the time for appeal has occurred without an appeal being filed.

CLAIM PRECLUSION AND ISSUE PRECLUSION

The legal principles of claim preclusion (res judicata) or issue preclusion (collateral estoppel) prevent claims or issues from being relitigated after the claim or issue is finally decided. Claim and issue preclusion address the concerns of preserving the finality of a judgment. A court enforcing a judgment under the full faith and credit clause will apply claim preclusion and issue preclusion principles.

Claim Preclusion

The doctrine of claim preclusion, also referred to as res judicata, means that a final judgment on the merits of an action prohibits the parties or their privies from initiating subsequent litigation arising out of the same transaction or series of transactions. 3-30 Moore's Manual--Federal Practice and Procedure § 30.02. The denial of a summary judgment motion may be an adequate basis for claim preclusion if the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again. Kay-R Elec. Corp. v. Stone & Webster Constr. Co., 23 F.3d 55, 59 (2d Cir. 1994).

Issue Preclusion

The doctrine of issue preclusion, also referred to historically as collateral estoppel, essentially provides that when an issue of fact or law has been determined by a valid and final judgment, that issue may not again be litigated between the same parties in any subsequent legal action. 3-30 Moore's Manual--Federal Practice and Procedure § 30.02. Issue preclusion generally applies when the prior determination is based on a motion for summary judgment. 18-132 Moore's Federal Practice - Civil § 132.03, fn. 43.

The doctrine of full faith and credit discussed above involves the enforcement of a judgment in a different court than the court issuing the judgment. Claim preclusion or issue preclusion apply to both the court issuing a judgment and to a court where the full faith and credit of the judgment of another court is recognized. Both doctrines involve the enforcement of a valid final judgment. The effect of both doctrines is upon the parties involved. A party to an action is precluded from re-litigating a claim or issue if the party was a participant in the original litigation. Both require that the judgment in the original claim be a final judgment, which, in order to be considered a final judgment will, most likely, require that the appeal process be exhausted.

ESTABLISHING PRECEDENT / STARE DECISIS

Organization of the federal court system

The legal effect of a federal district court ruling depends, in part, on the authority of the court issuing the ruling within the structure of the federal court system. Federal courts are organized in three levels. Federal districts courts are the trial courts in the federal system, the 13 federal circuit courts of appeal are the intermediate appellate courts, and

the Supreme Court is the court of final appeal. The jurisdiction of each of 12 of the circuits and the district courts within each circuit is designated geographically. (The Federal Circuit Court of Appeal differs from the 12 geographic circuits. It is not limited geographically, but is limited by the subject and type of case it may consider.) Alaska is located in Ninth Circuit Court of Appeals. Florida is located in the Eleventh Circuit. The U.S. Supreme Court may hear cases appealed from a decision of any circuit court of appeals. One of the reasons the Supreme Court grants certiorari and hears a circuit court case is when decisions of different circuit courts of appeal conflict. A decision of the U.S. Supreme Court deciding questions of federal law is binding in federal and state courts located in all of the federal circuits.

Binding effect of a federal district court

A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case. 18-134 Moore's Federal Practice - Civil § 134.02 fn. 22. Further, a decision of a district court or a federal circuit court of appeal in one circuit does not have binding effect in another circuit. The decisions of the court of appeals for one circuit are not binding upon the courts of appeal for other circuits. 18-134 Moore's Federal Practice - Civil § 134.02 fn. 19.1. Frequently, the decisions of a district court or circuit court of appeal in one circuit conflict with similar decisions in another circuit.

The legal principle that defines the binding effect of a federal district court decision is described by one court as follows:

> Stare decisis does not mandate that a district court in this circuit follow the decision of a district court in another circuit. According to Moore's Federal Practice,
>
> > Stare decisis, briefly stated, makes each judgment a statement of the law, or precedent, binding in future cases before the same court or another court owing obedience to its decisions.
>
> 1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 0.401 (2d ed. 1996). . . .
>
> Moore goes on to explain how stare decisis operates in the federal system:
>
> > The court of appeals in one circuit owes no obedience to decisions of a court of appeals in another circuit, though of course it may find the reasons given for such a decision persuasive, or may be influenced by the accumulation of authority. This freedom of the circuits to come each to its own conclusion is not only tolerated, but is an important feature in the operation of the Supreme Court's certiorari practice. The district courts, like the courts of appeals, owe no obedience to the decisions of their counterparts in other

> districts, nor to the decisions of the courts of appeals in other circuits.

Id. P 0.402. Circuit precedent is consistent with this rule.

Northwest Forest Resource Council v. Dombeck, 107 F.3d 897, 900 (D.C. Cir. 1997).

The Alaska Supreme Court affirmed that it is not required to follow a federal district court decision in the context of a case involving Native rights, stating that it not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law. Totemoff v. State, 905 P.2d 954 (Alaska 1995), citing In re F.P., 843 P.2d 1214, 1215 n.1 (Alaska 1992), cert. denied, 113 S. Ct. 2441 (1993). In In re F.P. the court said:

> Where a federal question is involved, the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme Court. The converse is also true; federal courts in Alaska are not bound by decisions of Alaska state courts on questions of federal law. . . .

Id. at 1215, citing Harrison v. State, 791 P.2d 359 (Alaska App. 1990).

In short, a ruling of a federal district court, the trial court, and the lowest level court in the federal system is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case. Further, the decision of a federal district court only has precedential effect in the limited territory. If it is appealed to the circuit court of appeals, a decision of the court of appeals is only enforceable within the territory of the circuit where the decision was issued. Only a decision of the U.S. Supreme Court is binding outside of the circuit where a decision is issued.

Following the above analysis it is implausible that the decision of the federal district court in Florida would have a binding precedential or binding effect on the state when appellate review has not been exhausted.

If I may be of further assistance, please advise.

DCB:ljw
11-120.ljw

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Notice: This opinion is subject to correction before publication in the PACIFIC REPORTER. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878, email corrections@appellate.courts.state.ak.us.

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, JOEL GILBERTSON in his official capacity as Alaska Commissioner of Health & Social Services, MARCIA KENNAI, in her official capacity as Deputy Commissioner of the Office of Children's Services, PHILLIP MITCHELL, in his official capacity as Chief of the Alaska Bureau of Vital Statistics, and GREGG RENKES, in his official capacity as Attorney General, Appellants, v. NATIVE VILLAGE OF TANANA, DAN SCHWIETERT, THERESA SCHWIETERT, NULATO VILLAGE, VILLAGE OF KALSKAG, AKIAK NATIVE COMMUNITY, VILLAGE OF LOWER KALSKAG, and KENAITZE INDIAN TRIBE, Appellees.	Supreme Court No. S-13332 Superior Court No. 3AN-04-12194 CI OPINION No. 6542 - March 4, 2011

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, John Suddock and Sen K. Tan, Judges.

Appearances: Peter K. Putzier, Assistant Attorney General, Anchorage, Talis J. Colberg, Attorney General, Juneau, for

Appellants. Heather Kendall-Miller, Native American Rights Fund, Anchorage, Lloyd B. Miller, Sonosky, Chambers, Sachse, Miller & Munson, LLP, Anchorage, and Andy Harrington, Alaska Legal Services Corporation, Fairbanks, for Appellees.

Before: Carpeneti, Chief Justice, Fabe, Winfree, and Christen, Justices. [Stowers, Justice, not participating.]

WINFREE, Justice.

I. INTRODUCTION

In this case we revisit ripeness and tribal sovereignty decisions intersecting in a dispute between the State of Alaska and a number of Alaska Native tribes. Procedurally, we are asked whether the narrowed view of ripeness announced in *Brause v. State, Department of Health & Social Services*[1] and recently applied in *State v. ACLU of Alaska*[2] requires dismissal of this case without reaching its merits. Substantively, we are asked (1) whether the inherent sovereign jurisdiction of Alaska Native tribes recognized over a decade ago in *John v. Baker*[3] includes the initiation of "child custody proceedings" as that term is used in the Indian Child Welfare Act (ICWA), and (2) if so, whether tribal court judgments in those proceedings are entitled to full faith and credit by the State.

We conclude that this dispute is ripe for a limited decision, acknowledging that further refinements and qualifications must arise from future adjudications based on specific factual scenarios. Today we decide that (1) federally recognized Alaska Native tribes are not necessarily precluded from exercising inherent sovereign jurisdiction to

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[1] 21 P.3d 357 (Alaska 2001).

[2] 204 P.3d 364 (Alaska 2009).

[3] 982 P.2d 738 (Alaska 1999).

initiate "child custody proceedings" as ICWA defines that term, and (2) judgments issued in those proceedings may be entitled to full faith and credit by the State under ICWA. But lack of specific facts precludes us from defining the extent of any individual Alaska Native tribe's inherent sovereign jurisdiction to initiate "child custody proceedings" or the standards for determining which judgments would be entitled to full faith and credit by the State.

II. PROCEEDINGS

Native Village of Tanana (Tanana), Nulato Village (Nulato), Akiak Native Community (Akiak), Village of Kalskag (Kalskag), Village of Lower Kalskag (Lower Kalskag), and Kenaitze Indian Tribe (Kenaitze) are recognized as Indian tribes by the United States Department of the Interior,[4] and all but Kenaitze are listed as "Alaska Native villages" under the Alaska Native Claims Settlement Act (ANCSA).[5] In this opinion, we refer to the tribal appellees collectively as "the Tribes."[6]

The Tanana Tribal Court, the Nulato Tribal Council, and the Kenaitze Tribal Court all hear children's proceedings initiated by their tribes or transferred from state court, and they issue decrees establishing protection, guardianship, and custody of

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[4] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,368-69 (Oct. 21, 1993) (listing federally recognized tribes); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 68 Fed. Reg. 68,180, 68,183-84 (Dec. 5, 2003) (same).

[5] 43 U.S.C. §§ 1602(c), 1610(b) (2000).

[6] The individual appellees, Dan and Theresa Schwietert, adopted a special-needs Alaska Native child through the Tanana Tribal Court in June 2004 and received a birth certificate from the State. Although plaintiffs below, the Schwieterts participated in the litigation in a collateral supporting role to the Tribes, and the final judgment does not mention the Schwieterts.

children.[7] Akiak's Quanerceraarviat Tribal Court hears children's cases, including tribally initiated child protection cases, and issues orders and adoption decrees. The Kalskag Traditional Council initiates child protection proceedings. The Lower Kalskag Tribal Court hears matters involving allegations of child abuse or neglect.

In late October 2004 the Tribes[8] sued the State of Alaska and — in their official capacities — the Attorney General and heads of the Office of Children's Services (OCS), Bureau of Vital Statistics (BVS), and Department of Health and Social Services (DHSS), collectively "the State." The Tribes alleged that based on an October 1, 2004 opinion letter from then-Attorney General Gregg Renkes (2004 Attorney General Opinion), the State adopted a policy and began taking official action to interfere with tribal rights under ICWA and to deny full faith and credit to tribal adoption decrees and orders issued in tribally initiated child protection cases. The Tribes sought declaratory relief recognizing that Alaska Native tribes "possess inherent and concurrent jurisdiction to adjudicate children's proceedings and issue tribal court decrees" and injunctive relief forcing "the [S]tate and its agencies to grant full faith and credit to tribal court decrees as required by law."

In late December 2004 the State moved to dismiss the suit on ripeness grounds. In response the Tribes moved for leave to file an amended complaint in early January 2005, which the State opposed on ripeness and futility grounds. The superior court granted the Tribes' motion in early March 2005 and accepted the amended

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[7] ICWA defines "tribal court" in relevant part as "a court with jurisdiction over child custody proceedings and which is . . . established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings." 25 U.S.C. § 1903(12) (2000).

[8] The original five plaintiff tribes were Tanana, Nulato, Kalskag, Akiak, and Lower Kalskag. The Tribes amended their complaint twice to add plaintiffs: first to add the Schweiterts and second to add Kenaitze.

complaint. After oral argument Superior Court Judge John Suddock subsequently denied the State's dismissal motion from the bench, stating in part:

> [A]s the pleading[] says, the tribal courts are behaving as if they have original jurisdiction in these matters. They are actually adjudicating them and they are placing children based on them and the [S]tate is here saying . . . ["]that's void. Those courts are [a] nullity. Any of those parents could go get those children back and not be in violation of a binding court order because it's void ab initio.["] Strikes me that that's a bad situation, that there is a very ripe question for a review: whether or not the Attorney General ever put pencil to paper . . . there is a network of tribal courts out there that has assumed a jurisdiction beyond . . . what the [S]tate contends is proper. Ordinary citizens are being affected. Children are being affected. It seems to me that there is a ripe question for declaratory judgment.

In November 2005 the Tribes moved for partial summary judgment on the legal issue of Alaska Native tribes' "inherent sovereign authority . . . to adjudicate children's proceedings." The State opposed the Tribes' motion and cross-moved for summary judgment, arguing that the 2004 Attorney General Opinion accurately interpreted existing Alaska case law and that the Tribes "do not possess the inherent authority to initiate child protection cases."

Superior Court Judge Sen K. Tan granted the Tribes' motion for partial summary judgment in May 2007, ruling that "tribes retain concurrent jurisdiction to legislate, to initiate, and to adjudicate [child in need of aid] cases in tribal courts." Upon the State's urging that the partial summary judgment granted the Tribes all the relief requested in their amended complaint, Judge Tan issued a final judgment on August 26, 2008.

The relevant language from the declaratory judgment portion of the final judgment is as follows:

> 1. [The Tribes] possess inherent [sovereign] jurisdiction to initiate child custody proceedings. . . . The [Tribes] share concurrent jurisdiction with the State . . . over child custody proceedings as the term is defined by the ICWA[,] 25 U.S.C. § 1903.
>
> 2. [The Tribes] are entitled to access . . . confidential reports and other documents in the possession of [OCS] concerning their member children.
>
> 3. [The Tribes] are entitled to full faith and credit under 25 U.S.C. § 1911(d) for their public acts, records, and judicial proceedings to the same extent that the State . . . gives full faith and credit to the public acts, records[,] and judicial proceedings of any other [s]tate.

The final judgment also enjoined the State from: (1) implementing the 2004 Attorney General Opinion by adopting policies or regulations; (2) relying on, enforcing, or carrying out any mandate based on the 2004 Attorney General Opinion that is contrary to the superior court's decision; (3) denying full faith and credit to the Tribes' determinations in ICWA-defined child custody proceedings; (4) refusing to notify the Tribes of reports of harm and provide such reports of harm for investigation; and (5) denying the Tribes information they otherwise are entitled to receive under ICWA.

The State appeals.

III. STANDARD OF REVIEW

We evaluate de novo the issue of ripeness.[9] We evaluate de novo the scope of tribal jurisdiction and the meaning of federal statutes.[10] Under de novo review, we

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[9] *ACLU of Alaska*, 204 P.3d at 367-68 (clarifying standard of review and rejecting abuse of discretion standard suggested in earlier decisions).

[10] *John v. Baker*, 982 P.2d at 744.

apply "the rule of law that is most persuasive in light of precedent, reason, and policy."[11]

IV. DISCUSSION

Today's decision requires a review of: ICWA; Alaska and federal decisions regarding Alaska Native tribal sovereignty over ICWA-defined "child custody proceedings"; *John v. Baker*; and the State's reaction to *John v. Baker* both prior to and after October 1, 2004. This backdrop provides the necessary context for us to address both the procedural ripeness and substantive sovereignty questions before us.

A. ICWA And Relevant Authorities

1. Relevant ICWA provisions

In 1978 Congress enacted ICWA with the goal of:

> protect[ing] the best interests of Indian children and . . . promot[ing] the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[12]

Congress found "that there is no resource . . . more vital to the continued existence and integrity of Indian tribes than their children"[13] and "that an alarmingly high percentage

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[11] *Glamann v. Kirk*, 29 P.3d 255, 259 (Alaska 2001) (quoting *Philbin v. Matanuska-Susitna Borough*, 991 P.2d 1263, 1266 (Alaska 1999)).

[12] Indian Child Welfare Act, Pub. L. No. 95-608, § 3, 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1902 (2000)); *accord A.B.M. v. M.H.*, 651 P.2d 1170, 1172 (Alaska 1982).

[13] 25 U.S.C. § 1901(3) (2000); *see also John v. Baker*, 982 P.2d at 747 ("[T]he statute 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.' " (quoting H.R. Rep. No. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546)).

of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[14] Congress further found that when "exercising their recognized jurisdiction over Indian child custody proceedings" states "have often failed to recognize the essential tribal relations of Indian people and [their] cultural and social standards."[15]

In short, ICWA "constructs a statutory scheme to prevent states from improperly removing Indian children from their parents, extended families, and tribes."[16] "Its most important procedural elements include establishing tribal courts as the required or preferred forum for adjudication of Indian child custody proceedings."[17] The United States Supreme Court declared over 20 years ago that "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. More specifically, [ICWA's] purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings."[18]

ICWA § 1911, titled "Indian tribe jurisdiction over Indian child custody

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[14] 25 U.S.C. § 1901(4); *accord John v. Baker*, 982 P.2d at 746.

[15] 25 U.S.C. § 1901(5).

[16] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 11.01[1], at 820 (Nell Jessup Newton ed., 2005 ed.) (hereinafter COHEN'S HANDBOOK).

[17] CONFERENCE OF W. ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK 571 (4th ed. 2008) (hereinafter INDIAN LAW DESKBOOK); *see also* B.J. JONES, MARK TILDEN & KELLY GAINES-STONER, THE INDIAN CHILD WELFARE ACT HANDBOOK 5 (2d ed. 2008) (hereinafter ICWA HANDBOOK) (identifying one of ICWA's primary objectives as "encourag[ing] tribal court adjudication of child custody proceedings involving Indian children").

[18] *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989) (emphasis in original) (footnote omitted).

proceedings," limits state jurisdiction over ICWA-defined child custody proceedings in two ways.[19] First, § 1911(a) provides that Indian tribes have exclusive jurisdiction of child custody proceedings involving Indian children residing or domiciled in Indian country, unless federal law otherwise vests jurisdiction in the state.[20] Tribes also retain exclusive jurisdiction over tribal court wards regardless of residence or domicile.[21]

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[19] 25 U.S.C. § 1911 (2000). For ICWA's purposes, "child custody proceeding" means and includes foster care placements, actions to terminate parental rights, preadoptive placements, and adoptive placements. 25 U.S.C. § 1903(1). ICWA generally does not apply to divorce or divorce-like child custody proceedings. *See id.*; *John v. Baker*, 982 P.2d at 746-47; INDIAN LAW DESKBOOK, note 17, above, at 574-75; ICWA HANDBOOK, note 17, above, at 27-28.

[20] "Indian child" means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

An "Indian tribe" is "any Indian tribe . . . recognized as eligible for the services provided to Indians by the [Secretary of the Interior]," including "any Alaska Native village" defined in 43 U.S.C. § 1602(c) of ANCSA. *Id.* § 1903(8), (11).

The term "reservation" in ICWA means, in pertinent part, "Indian country" as defined in 18 U.S.C. § 1151. 25 U.S.C. § 1903(10). "Indian country" is defined as "(a) all lands within the limits of any Indian reservation . . . , (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151 (2000).

[21] 25 U.S.C. § 1911(a). Although "ward" is not defined in ICWA,

> and there is very little guidance in the legislative history or [Bureau of Indian Affairs] guidelines as to its import[,] . . . [t]he most commonly accepted understanding of wardship is that when a tribal court, or a tribal governing council, has exercised legitimate jurisdiction over an Indian child in a child custody proceeding and continues to exercise that jurisdiction, a state court's exercise of jurisdiction is precluded, except, of course, on an emergency basis.

(continued...)

Second, § 1911(b) provides that state courts must transfer foster care placement and parental right termination proceedings involving Indian children not residing or domiciled within Indian country to tribal courts upon petition, except in specific circumstances.[22]

ICWA § 1918(a) provides that "[a]ny Indian tribe which became subject to [s]tate jurisdiction pursuant to the provisions of . . . any . . . [f]ederal law, may reassume jurisdiction over child custody proceedings."[23] To reassume jurisdiction, a tribe must petition the Secretary of the Interior and provide a suitable plan for exercising jurisdiction.[24]

ICWA § 1911(d) provides that states "shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian

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[21] (...continued)
ICWA HANDBOOK, note 17, above, at 58 (footnote omitted).

[22] 25 U.S.C. § 1911(b). Section 1911(b) "creates three checks on tribal transfer jurisdiction": (1) either parent's objection; (2) the tribe's declination of jurisdiction; and (3) the state court's finding of good cause to deny transfer. *In re C.R.H.*, 29 P.3d 849, 853 (Alaska 2001); *see generally* ICWA HANDBOOK, note 17, above, at 59-69. ICWA does not address tribes' power to receive adoptive or preadoptive cases, "nor is there much discussion of this apparent discrepancy in case law." *Id.* at 60.

[23] 25 U.S.C. § 1918(a) (2000).

[24] 25 U.S.C. §§ 1903(11), 1918(a). Of Alaska's approximately 230 federally recognized tribes, only two have successfully petitioned to reassume jurisdiction: Native Village of Barrow and Native Village of Chevak both reassumed exclusive jurisdiction over child custody proceedings involving member children residing or domiciled within their respective villages by petition in 1999. Approval of Petition for Reassumption of Exclusive Jurisdiction for Native Village of Chevak, 64 Fed. Reg. 36,391 (July 6, 1999); Approval of Petition for Reassumption of Exclusive Jurisdiction for Native Village of Barrow, 64 Fed. Reg. 36,391 (July 6, 1999); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553, 18,556-57 (Apr. 4, 2008).

child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity."[25]

2. Early Alaska precedent regarding ICWA and Alaska Native tribal sovereignty

In our 1986 decision *Native Village of Nenana v. State, Department of Health & Social Services*, we held that Public Law 280 (P.L. 280) divested Alaska Native tribes of any jurisdiction under ICWA § 1911(a) and (b).[26] *Nenana* concerned a superior court's denial of Native Village of Nenana's petition for transfer of a child protection proceeding to its jurisdiction.[27] Because ICWA § 1918(a) specifically mentions P.L. 280 as a federal law that extends state jurisdiction over some Indian tribes, we concluded that "Congress intended that [P.L.] 280 give certain states, including Alaska, exclusive [rather than concurrent] jurisdiction over matters involving the custody of Indian children, and that those states exercise such jurisdiction until a particular tribe petitions to reassume jurisdiction . . . and the Secretary of the Interior approves [the] tribe's petition."[28] We also noted that § 1911(b) transfer jurisdiction "may actually grant Indian tribes greater authority than they had prior to the Act" because "[r]egardless of whether [P.L.] 280 vests exclusive or concurrent jurisdiction in the applicable states, *prior* to [ICWA], Indian tribes may not have had jurisdiction over custody proceedings . . . where the child

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[25] 25 U.S.C. § 1911(d).

[26] 722 P.2d 219, 221 (Alaska 1986). Provisions of P.L. 280 give enumerated states both criminal and civil jurisdiction in Indian country, with the exception of specified reservations. Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588-89 (codified at 18 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000), respectively). Alaska has been enumerated as a state under P.L. 280 since 1958. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545.

[27] 722 P.2d at 220.

[28] *Id.* at 221.

was domiciled off the reservation."[29]

In 1987[30] and again in 1992[31] we confirmed *Nenana*'s holding that Alaska Native tribes could not exercise jurisdiction under ICWA § 1911(a) or (b) until they had successfully petitioned for reassumption.

Our 1987 decision *In re K.E.* concerned the superior court's denial of a tribe's request for § 1911(b) transfer of a parental rights termination proceeding from state court to tribal court.[32] The tribe argued it had exclusive § 1911(a) jurisdiction based on the child's domicile "within the dependent [I]ndian community of Nenana,"[33] a reference to "Indian country."[34] We recognized *Nenana* as "controlling authority" and held that regardless of whether an Indian child resides or is domiciled in Indian country, the tribe must successfully petition to reassume jurisdiction over child custody proceedings before it can exercise § 1911(a) or § 1911(b) jurisdiction.[35]

Our 1992 decision *In re F.P.* concerned tribal jurisdiction under § 1911(a).[36] After DHSS took emergency protective custody of three Indian children, Native Village of Circle unsuccessfully argued to the superior court that the state court proceeding should be dismissed in light of the tribe's exclusive § 1911(a) jurisdiction over the

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29 *Id.* (emphasis in original).

30 *In re K.E.*, 744 P.2d 1173 (Alaska 1987).

31 *In re F.P.*, 843 P.2d 1214 (Alaska 1992).

32 744 P.2d at 1173.

33 *Id.* at 1174.

34 *See* note 20, above.

35 *In re K.E.*, 744 P.2d at 1174-75.

36 *See* 843 P.2d at 1215 (noting tribe claimed exclusive jurisdiction).

children as tribal court wards.[37] On appeal Circle asked us to review *Nenana* and *K.E.* in light of then-recent Ninth Circuit Court of Appeals cases, particularly one in which the Ninth Circuit concluded that if the two Alaska Native villages involved "were 'modern day successors to sovereign historical bands of [N]atives,' " then those villages had concurrent jurisdiction in child custody matters because they were "entitled to 'the same rights and responsibilities as . . . sovereign bands of [N]ative Americans in the continental United States.' "[38] We concluded the Ninth Circuit opinion was contrary to our prior holding that "Congress intended that most Alaska Native groups not be treated as sovereigns" and held that *F.P.* was controlled by *Nenana*.[39] We reiterated *Nenana*'s holding that ICWA § 1918(a) indicated Congress intended P.L. 280 to give Alaska and certain other states exclusive and not concurrent jurisdiction over matters involving custody of Indian children, unless tribes successfully petitioned to reassume jurisdiction.[40] Chief Justice Rabinowitz was persuaded by the Ninth Circuit's analysis and dissented, asserting that *Nenana* and *K.E.* should be overruled because P.L. 280 is not a divestiture statute, but rather an extension of states' jurisdiction to be exercised concurrently with tribes.[41]

3. Federal precedent regarding ICWA and Alaska Native tribal

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[37] *Id.*; Brief of Appellee at 2, *In re F.P.*, 843 P.2d 1214 (No. S-04742), 1991 WL 11666111, at *2.

[38] *In re F.P.*, 843 P.2d at 1215 (quoting *Native Vill. of Venetie I.R.A. Council v. Alaska* (*Venetie*), 944 F.2d 548, 558-59 (9th Cir. 1991)).

[39] *Id.* (quoting *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32, 34 (Alaska 1988)).

[40] *Id.* at 1215-16.

[41] *Id.* at 1216, 1218-19 (Rabinowitz, C.J., dissenting) (quoting *Venetie*, 944 F.2d at 560-62).

sovereignty

As we observed in *F.P.*, Ninth Circuit case law has held that Alaska Native tribes can have inherent sovereign jurisdiction concurrent with the State in ICWA-defined child custody matters.[42] The 1991 decision *Native Village of Venetie I.R.A. Council v. Alaska* concerned the State's refusal to recognize two adoption decrees issued by Native Villages of Venetie and Fort Yukon.[43] The Ninth Circuit analyzed two substantive issues in resolving the dispute: "whether the [N]ative [V]illages are inherently sovereign, at least insofar as domestic relations or child-custody issues are concerned"; and, if so, "whether Congress has stripped the [V]illages of that aspect of sovereign authority which encompasses child-custody determinations."[44] As to inherent sovereignty, the Ninth Circuit determined "to the extent that Alaska's [N]atives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare," then "modern-day successors to [those] sovereign historical bands of [N]atives . . . are to be afforded the same rights and responsibilities as are sovereign bands of [N]ative Americans in the continental United States."[45] As to whether Congress stripped Alaska Native tribes of their inherent sovereignty over domestic relations and child-custody issues, the Ninth Circuit rejected the divestiture interpretation of P.L. 280 and held neither ICWA nor P.L. 280 "prevent[ed] [sovereign Alaska Native villages] from exercising concurrent jurisdiction."[46]

The Ninth Circuit directed that if on remand the district court determined

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42 *Venetie*, 944 F.2d at 558-59, *cited in In re F.P.*, 843 P.2d at 1215.

43 *Id.* at 550-51.

44 *Id.* at 556.

45 *Id.* at 558-59.

46 *Id.* at 559-62.

either Native Village was "the modern-day successor[] to an historical sovereign band of [N]ative Americans," then the State of Alaska must afford "full faith and credit to adoption decrees issued by [that Native Village's] tribal courts."[47] On remand the District Court for the District of Alaska determined that Venetie was "a sovereign tribe as a matter of law" exercising adoption authority over its members, and accordingly that "the State of Alaska must afford full faith and credit to adoption decrees issued by [its]

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[47] *Id.* at 562. The Ninth Circuit recently relied on *Venetie*'s holding in *Kaltag Tribal Council v. Jackson*, an unpublished opinion. 344 Fed. Appx. 324 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 66 (2010). There the Ninth Circuit relied on *Venetie* in affirming that under ICWA § 1911(d) the State must accord full faith and credit to an adoption decree issued by the Native Village of Kaltag's tribal court. *Id.* at 325. The Ninth Circuit stated that "[r]eservation status is not a requirement of jurisdiction because '[a] [t]ribe's authority over its reservation or Indian country is incidental to its authority over its members.' " *Id.* (quoting *Venetie*, 944 F.2d at 559 n.12). The Ninth Circuit further held that "neither the ICWA nor [P.L.] 280 prevented the Kaltag court from exercising jurisdiction." *Id.*

Even more recently, the District Court for the District of Alaska treated *Venetie* as persuasive authority. In *S.P. v. Native Village of Minto*, the district court concluded P.L. 280 did not divest Native Village of Minto's concurrent inherent sovereign jurisdiction to make a former village resident's child a tribal court ward and to terminate the parents' rights. No. 3:09-cv-0092-HRH, slip op. at 4-5, 12, 14 (D. Alaska Dec. 2, 2009) ("The Native Village of Minto has never petitioned the Secretary to reassume exclusive jurisdiction over Indian child custody proceedings; but the fact that the Native Village . . . does not have exclusive jurisdiction over child custody matters of Indian children who are wards of the tribe does not preclude concurrent jurisdiction with the [S]tate."). The district court relied on *Venetie* and the *Kaltag Tribal Council* district court order in reaching this conclusion. *Id.* at 12-14 (discussing *Venetie*, 944 F.2d at 550, 555-56, 561-62; *Kaltag Tribal Council v. Jackson*, No. 3:06-cv-0211-TMB, slip op. at 10-11 (D. Alaska Feb. 22, 2008)). The district court expressly rejected the argument that tribal courts cannot initiate child custody proceedings as ICWA uses that term. *Id.* at 14-16 (relying in part on *Kaltag Tribal Council*, No. 3:06-cv-0211-TMB, at 7-8). Based in part on its jurisdiction ruling, the district court ultimately dismissed the case on abstention grounds. *Id.* at 16-18.

tribal courts."[48] According to a subsequent Ninth Circuit opinion, the State "later stipulated that Fort Yukon could also meet the requirements for tribal status."[49]

B. *John v. Baker* And Its Aftermath

1. *John v. Baker*

In our September 1999 *John v. Baker* decision, issued when *Nenana*, *F.P.*, and *K.E.* still controlled, we recognized concurrent inherent tribal jurisdiction outside the confines of Indian country to adjudicate non-ICWA child custody disputes between tribal members.[50] In *John v. Baker* a Northway Village member unsuccessfully sought sole custody of his children in the Northway Tribal Court before bringing an identical custody suit in superior court.[51] The children's mother moved to dismiss the superior court case based on the tribal court proceeding, but the superior court awarded the father primary custody of the children.[52] In an amicus brief filed in the ensuing appeal, the State urged us to hold that "Alaska tribes retained concurrent jurisdiction with the [S]tate over civil matters involving the domestic relations of their members" even after the enactment of P.L. 280.[53] The State expressed an interest in "cooperat[ing] more closely with tribes, avoiding duplicative programs and stretching . . . combined resources further than . . .

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[48] *Native Vill. of Venetie I.R.A. Council v. Alaska*, Nos. F86-0075 CIV (HRH) & F87-0051 CIV (HRH), 1994 WL 730893, at *21-22 (D. Alaska Dec. 23, 1994).

[49] *Native Vill. of Venetie I.R.A. Council v. Alaska*, 155 F.3d 1150, 1151 (9th Cir. 1998).

[50] *John v. Baker*, 982 P.2d at 748-49, 759.

[51] *Id.* at 743. The children's mother was a member of Mentasta Village, but consented to the Northway Tribal Court's jurisdiction. *Id.*

[52] *Id.*

[53] Amicus Brief of the State of Alaska at 45, *John v. Baker*, 982 P.2d 738 (No. S-8099), 1998 WL 35180190, at *45.

could [be] manage[d] separately, particularly in the under-served regions of Alaska."[54]

We examined the Department of the Interior's 1993 list of federally recognized tribes, which "included Northway Village and most of the other Native villages in Alaska," and the list's preamble that the "villages and regional tribes listed . . . have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States."[55] We also looked to the Federally Recognized Tribe List Act of 1994, which directs the Department to publish annual lists of tribes eligible for special programs and services because of their status as Indians,[56] and to the recognition in that act's text and legislative history of these tribes' "sovereignty,"[57] "quasi-sovereign status,"[58] and "government-to-government relationship [with] the United States . . . as . . . domestic dependent nation[s]."[59] We noted the Department lists published for 1995 through 1998 all included Alaska Native villages such as Northway.[60] In deference to recognition by Congress and the Executive Branch that particular Native American groups are sovereign tribes, we recognized that "Alaska Native tribes, by virtue of their

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[54] *Id.* at 1.

[55] *John v. Baker*, 982 P.2d at 749-50 (emphasis omitted) (citing and quoting Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. at 54,365-66).

[56] *Id.* at 750 (citing 25 U.S.C. § 479a, 479a-1).

[57] *Id.* (citing Pub. L. No. 103-454, § 103, 108 Stat. 4791 (1994) (codified at 25 U.S.C. § 479a note (2000)).

[58] *Id.* (quoting H.R. Rep. No. 103-781, at 2-3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768, 3769).

[59] *Id.* (quoting H.R. Rep. No. 103-781, at 2).

[60] *Id.*

inherent powers as sovereign nations," possess "inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members."[61] Because "villages like Northway presumably do not occupy Indian country," we held "Northway's jurisdiction to adjudicate child custody disputes between village members" was concurrent with that of state courts.[62]

Although ANCSA extinguished all aboriginal title and claims to Alaska land and revoked all existing Indian reservations except for that of the Metlakatla Indian Community on the Annette Islands,[63] we held that ANCSA's elimination of nearly all Indian country in Alaska did not divest Alaska Native villages of their sovereign powers to adjudicate child custody disputes between village members.[64] We employed "the established principle under federal law that 'Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe's dependent status.' "[65] We then noted that "internal functions involving tribal membership and domestic affairs" are within the "core set of sovereign powers that remain intact even though Indian nations are dependent under federal law."[66]

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61 *Id.* at 748-49.

62 *Id.* at 759.

63 *Id.* at 747-48 & n.43 (citing 18 U.S.C. § 1151; *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530-33 (1998)).

64 *Id.* at 748-59.

65 *Id.* at 751 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982)).

66 *Id.* (citing *Montana v. United States*, 450 U.S. 544, 564 (1981); *United States v. Wheeler*, 435 U.S. 313, 326 (1978), *superseded on other grounds by* Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93 *and* Act of Oct. 28, (continued...)

We acknowledged that "the character of the power that the tribe seeks to exercise, not merely the location of events," determines "whether tribes retain their sovereign powers."[67] We determined that ANCSA did not "express any intent to force Alaska Natives to abandon their sovereignty," particularly "their powers to adjudicate domestic disputes between members,"[68] and that post-ANCSA congressional actions, including passage of ICWA seven years later, indicated Congress did not intend ANCSA to prevent Alaska Natives from continuing to regulate their internal affairs.[69] We concluded that "federal tribes derive the power to adjudicate internal domestic matters, including child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy."[70]

Because we concluded that neither ICWA nor P.L. 280 applied,[71] we

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[66] (...continued)
1991, Pub. L. No. 102-137, § 1, 105 Stat. 646).

[67] *Id.* at 752.

[68] *Id.* at 753.

[69] *Id.* at 753-54 (discussing Federally Recognized Tribe List Act of 1994; ICWA; and Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601-31).

[70] *Id.* at 754; *see also id.* at 748-49.

[71] We held ICWA did not apply because child custody disputes between parents fall under ICWA's divorce exception, even if the parents never married. *Id.* at 746-47; *see* note 19, above.

We held rulings interpreting P.L. 280 did not apply because P.L. 280's text states that it applies only to Indian country and because Northway Village, like most Alaska Native land, ceased to qualify for the "dependent Indian community" definition of Indian country after ANCSA extinquished most Indian country in Alaska. *John v. Baker*, 982 P.2d at 747-48 (quoting 18 U.S.C. § 1151 and citing *Native Vill. of Venetie* (continued...)

determined it was "neither necessary nor appropriate . . . to reach the question of whether *Nenana* and its progeny were wrongly decided."[72] Although we recognized that "generally, Indian nations possess greater powers in Indian country than they do outside it" and that we would "create[] a disjunction in Indian law jurisprudence" by recognizing that Northway had greater powers outside Indian country than the tribal community inside Alaska's only reservation, we concluded "this inconsistency d[id] not create a justification to address issues . . . not squarely before us."[73]

Chief Justice Matthews, joined by Justice Compton, dissented, concluding that "inherent tribal jurisdiction over custody applies only to cases arising within Indian country."[74] Chief Justice Matthews looked to what he termed the "allocative principle"[75] and *Nenana* and *F.P.* in concluding that "if Alaska has exclusive jurisdiction to decide private custody cases which arise in Indian country, it has, by necessary implication, exclusive jurisdiction to decide private custody cases which arise outside of Indian country."[76]

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[71] (...continued)
Tribal Gov't, 522 U.S. at 530-33).

[72] *Id.* at 748.

[73] *Id.* at 748 n.46.

[74] *Id.* at 766 (Matthews, C.J., dissenting).

[75] The chief justice explained that under the allocative principle, unless Congress clearly provides otherwise, (1) state laws generally do not apply to tribal Indians within Indian country and (2) tribal authority does not apply outside of Indian country. *Id.* at 772 (citing *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995)).

[76] *Id.* at 767-68 (citing *In re F.P.*, 843 P.2d at 1215-16; *Nenana*, 722 P.2d at 221). Chief Justice Matthews determined the United States Supreme Court used (continued...)

2. The State's initial position after *John v. Baker*; *In re C.R.H.*

In September 2000, then-Governor Tony Knowles issued an administrative order "acknowledg[ing] the legal and political existence of the federally recognized [t]ribes within the boundaries of Alaska."[77] In addition to expressing "recogni[tion] and respect[]" for the tribes' "governmental status," the governor articulated a policy of "acknowledg[ing] any additional [t]ribes in Alaska that may be recognized by the federal

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[76] (...continued)
language indicating that P.L. 280 gave certain states full jurisdiction over Indian country to the exclusion of tribal jurisdiction. *Id.* at 808-09 (discussing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987); *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 475, 488-89 n.32, 498 (1979); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 383 (1976); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 74 (1962)). He also determined that the 1970 amendment to § 2 of P.L. 280, which the House Report explained was intended to "permit[] the Metlakatla Indian [C]ommunity on the Annette Islands in Alaska to exercise jurisdiction over minor offenses concurrent with . . . Alaska," indicated that prior to 1970 the State exercised criminal jurisdiction exclusive of tribal jurisdiction in all Indian country in Alaska. *Id.* at 808, 810 (quoting H.R. Rep. No. 91-1545 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4783, 4783). The chief justice noted that the 1970 amendment also added language to § 2(c) of P.L. 280 referring to the § 2(a) areas of Indian country as "areas over which the several States have *exclusive jurisdiction*." *Id.* at 810 (emphasis added in dissenting opinion). The chief justice concluded that the amendment demonstrated the 91st Congress's belief that P.L. 280 granted states exclusive jurisdiction. *Id.* at 810-11. Based on parallel language in §§ 2 and 4 of P.L. 280, the chief justice extended the divestiture determination to the civil realm, stating "it is impossible to conclude that Congress intended to confer on the states exclusive criminal jurisdiction, but only concurrent civil jurisdiction." *Id.* at 810.

[77] Administrative Order No. 186 (Sept. 29, 2000); *see generally* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 430-31 & n.409 (2d ed. 2002) (hereinafter CASE & VOLUCK) (describing Governor Knowles's actions and noting change from former Governor Walter J. Hickel's Administrative Order No. 125 (Aug. 16, 1991), generally opposing tribal sovereignty expansion, which in turn had overturned former Governor Steve Cowper's Administrative Order No. 123 (Sept. 10, 1990), recognizing existence of Alaska Native tribes).

government in the future"[78] and "foster[ing] a constructive and harmonious relationship between the [t]ribal and State governments."[79] He acknowledged the value of the "services that Alaska's [t]ribes contribute to the state's economic and social well-being by virtue of their direct [t]ribal authority and responsibility for the delivery of social, economic, cultural, and other programs and services."[80] The governor explained that in December 1999 he had invited Alaska Native tribes "to enter into a government-to-government dialogue with the State for the purpose of establishing a framework for ongoing State-[t]ribal relations."[81] In furtherance of the "promot[ion] and enhance[ment] [of] [t]ribal self-government . . . and social, cultural, spiritual, and racial diversity," among other things, Governor Knowles committed the State "to working with [t]ribes to further strengthen Alaska's ability to meet the needs of Alaska's communities and families."[82]

In April 2001 Governor Knowles and various federally recognized Alaska Native tribes signed the Millennium Agreement, "a framework for the establishment of lasting government-to-government relationships and an implementation procedure to assure that such relationships are constructive and meaningful and further enhance cooperation between the parties."[83] This agreement reflects the State's recognition that

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78 Administrative Order No. 186.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 Millennium Agreement between the Federally Recognized Sovereign Tribes of Alaska and the State of Alaska ¶ 2, Apr. 11, 2001. Although the Millennium Agreement did not address substantive issues, *id.* at ¶ 10, ICWA authorizes agreements (continued...)

"[e]ach [signatory] [t]ribe has its own independent form of government and exercises inherent sovereign authority."[84] In turn, the signatory tribes acknowledged that "[t]he State of Alaska has a major responsibility to provide for the health, safety, and welfare of all Alaskans."[85]

In August 2001, two years after our *John v. Baker* decision, we decided *In re C.R.H.*[86] That case concerned the denial of a request by Native Village of Nikolai to transfer a child protection proceeding from superior court to tribal court.[87] The State, while defending against Native Village of Nikolai's appeal in *C.R.H.*, urged us to overturn *Nenana* and its progeny.[88] The State pointed to the conflict between (1) the Ninth Circuit's *Venetie* holding that some Alaska Native tribes have concurrent inherent authority over child protection matters affecting their members, undivested by P.L. 280, and (2) our *Nenana* holding that Alaska Native tribes may not assert jurisdiction over child protection matters unless they formally reassume jurisdiction over those matters

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[83] (...continued)
between states and Indian tribes "respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements . . . for orderly transfer of jurisdiction on a case-by-case basis and . . . for concurrent jurisdiction between States and Indian tribes." 25 U.S.C. § 1919(a) (2000).

[84] Millennium Agreement between the Federally Recognized Sovereign Tribes of Alaska and the State of Alaska, note 83, above, at ¶ 12(a).

[85] *Id.* at ¶ 13(b).

[86] 29 P.3d 849 (Alaska 2001).

[87] *Id.* at 850-51.

[88] Appellee State of Alaska's Brief at 6, 41, *In re C.R.H.*, 29 P.3d 849 (No. S-9677).

under ICWA § 1918(a) because they were divested of it by P.L. 280.[89] The State explained that it "felt compelled" to oppose the tribe's request for transfer because of *Nenana* and its progeny, but it was "in an untenable position" because *Nenana* and *Venetie* were irreconcilable.[90] The State argued in part that we should reexamine and overrule *Nenana* in light of *John v. Baker*'s holdings that Alaska's federally recognized tribes have " 'inherent power [to] regulat[e] their internal and social relations,' including adjudicatory authority over child custody matters" and that P.L. 280 did not divest that authority outside of Indian country.[91]

We compared ICWA § 1911(a), which provides that tribes lack exclusive Indian country and wardship jurisdiction "where such jurisdiction is otherwise vested in the State by existing Federal law," with § 1911(b), which does not contain a parallel limiting provision for transfer jurisdiction.[92] We concluded that "Congress intended P.L. 280 to affect tribes' exclusive jurisdiction under subsection 1911(a), but did not intend P.L. 280 to affect transfer jurisdiction under subsection 1911(b)."[93] We therefore held that federally recognized tribes in Alaska may accept transfer of ICWA cases under § 1911(b) without formal reassumption of jurisdiction, and we overruled *Nenana*, *F.P.*, and *K.E.* to the extent they were inconsistent with that holding.[94] But having concluded that Congress gave tribes § 1911(b) transfer jurisdiction regardless of their P.L. 280

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89 *Id.* at 5.

90 *Id.*

91 *Id.* at 13, 25 (quoting *John v. Baker*, 982 P.2d at 754-55).

92 *In re C.R.H.*, 29 P.3d at 852.

93 *Id.*

94 *Id.* at 850-52.

status, we found it unnecessary to reconsider whether Alaska Native tribes affected by P.L. 280 retained initiating jurisdiction under § 1911(a) concurrent with the State.[95]

DHSS subsequently requested an opinion from then-Attorney General Bruce Botelho on *C.R.H.*'s effect.[96] In the responsive memorandum, the Attorney General's office acknowledged that "no tribe in Alaska [could] exercise exclusive jurisdiction over its children based on either residency or domicile within the tribe's reservation" because the only tribe occupying a reservation, Metlakatla Indian Community, exercises concurrent jurisdiction.[97] The memorandum also acknowledged Native Village of Barrow's and Native Village of Chevak's successful petitions to reassume exclusive jurisdiction over matters involving their children.[98] As to Alaska's other tribes, the memorandum stated that before a child custody proceeding's initiation, a tribe and the State shared concurrent jurisdiction and either could take steps to protect a member child or membership-eligible child.[99] The memorandum explained that a tribe could exercise exclusive jurisdiction over a child either by (1) initiating a tribal court proceeding regarding an Indian child not already within the State's custody and declaring

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[95] *Id.* at 852. One early commentator noted that "[r]ead together with *John v. Baker*, *C.R.H.* confirms tribal concurrent ICWA jurisdiction as well." CASE & VOLUCK, note 77, above, at 430 n.406.

[96] Memorandum from Assistant Att'y Gen. Donna Goldsmith for Jay Livey, Dep't of Health & Soc. Srvs. Comm'r (Mar. 29, 2002) (No. 441-00-0005) *revoked by* 2004 FORMAL OP. ATT'Y GEN. 135.

[97] *Id.* at 3; *see John v. Baker*, 982 P.2d at 748 n.43 (noting Metlakatla Reservation on Annette Islands is Alaska's only post-ANSCA Indian reservation).

[98] Memorandum From Assistant Att'y Gen. Donna Goldsmith, note 96, above, at 3.

[99] *Id.* at 2.

the child a tribal court ward or (2) receiving transfer of a case initiated in state court.[100] According to the memorandum, the State lacked authority to investigate a report of harm concerning an Indian child it knew was a tribal court ward, but the State could forward risk of harm information to the tribe.[101] Finally, the memorandum advised DHSS that in addition to recognizing cultural adoptions under ICWA § 1911(d), the State was required to "recognize tribal court adoption orders to the extent that it recognize[d] such orders from sister states and other foreign orders" because "*C.R.H.* removed all impediments that historically prevented [recognition of] tribal court adoptions."[102]

3. The State's position after October 1, 2004

On October 1, 2004, then-Attorney General Gregg Renkes issued a direction-changing advisory opinion regarding tribal jurisdiction and ICWA-defined child custody proceedings.[103] The 2004 Attorney General Opinion, based on *C.R.H.* and the *Nenana* remnants left in place after *C.R.H.*, and without acknowledging *John v. Baker*'s implications, concluded that:

> Alaska state courts have exclusive jurisdiction over child custody proceedings involving Alaska Native children unless (1) the child's tribe has successfully petitioned the Department of Interior to reassume exclusive or concurrent jurisdiction under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1918 or (2) a state superior court has transferred jurisdiction of the child's case to a tribal court in accordance

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100 *Id.* at 2, 4 n.7.

101 *Id.* at 4.

102 *Id.* at 5.

103 2004 FORMAL OP. ATT'Y GEN. 135.

with 25 U.S.C. § 1911(b) and the tribal court is exercising its jurisdiction.[104]

OCS then revised its Policy and Procedure Manual, citing the 2004 Attorney General Opinion as authority. The manual still recognizes Native Village of Barrow, Native Village of Chevak, and Metlakatla Indian Community as having exclusive or concurrent ICWA jurisdiction in their specified territories. But the manual redefines the meaning of "concurrent" jurisdiction exercisable by the remaining tribes: the 2002 edition states that until a child custody proceeding is initiated, "the tribe and the [S]tate simultaneously share authority and either government may take the steps necessary to protect a child who may be at risk"; the 2004 edition removed that provision and otherwise limited concurrent jurisdiction to cases transferred from state court.

OCS also changed the way it shared information with tribes. Before 2004 OCS contacted a child's tribe "[a]s soon as possible, and if possible prior to the assignment for investigation" to ascertain whether the tribe already had custody of the child or wanted to take jurisdiction over a child protection proceeding. The 2004 Attorney General Opinion advised that OCS was authorized "to release information concerning minor children for whom state court proceedings have not been initiated" to a "tribe properly exercising jurisdiction over a child protection proceeding involving the tribe's member child," but that "OCS must promulgate regulations governing the release of this information." On March 21, 2005, OCS proposed new regulations for releasing information to tribes "if such a release is in the best interests of the child . . . and the child is not [the subject of a child in need of aid] case where the child's tribe is not a party" or "to assist in an investigation of a report of harm."

One OCS supervisor described actual changes in OCS policy following the 2004 Attorney General Opinion as follows:

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104 *Id.* at 3.

> Policies have changed recently regarding when we contact the tribe in investigations. . . . [W]e don't share information regarding investigations unless the investigation is underway. In other words, . . . the tribe can't have access to allegations that are made unless I have releases from my clients. They can't get copies of Reports of Harm unless . . . the parent in the Report of Harm has signed a release. Until [the tribes] have intervened legally in a [child in need of aid] case. In which case, then, they get all that.

BVS also changed its policies based on the 2004 Attorney General Opinion. The 2004 Attorney General Opinion stated that "the [S]tate retains exclusive jurisdiction over Alaska Native adoption proceedings unless a tribe has reassumed jurisdiction" but the State's "longstanding policy" of "ratif[ying] Indian adoptions that occur under tribal custom as a matter of equity under state law" is unchanged. According to a letter from BVS to the Kaltag Tribal Council, BVS began refusing to accept tribal court adoption paperwork in October 2005 unless it was from Native Village of Barrow, Native Village of Chevak, or Metlakatla Indian Community, and began processing only cultural adoptions for the remaining tribes.

C. Ripeness Analysis For This Case

As noted earlier, the State moved to dismiss the Tribes' suit on ripeness grounds. It contended the Tribes had alleged no actual harm, but rather presented nothing more than an abstract disagreement with an opinion by the Attorney General. The State pointed out the lawsuit was filed shortly after the 2004 Attorney General Opinion was issued and no actual controversy regarding implementation had yet arisen. Relying primarily on our 2001 decision *Brause v. State, Department of Health & Social Services*,[105] the State argued that in the absence of specific facts regarding actual

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[105] 21 P.3d at 358-60 (discussing federal law and affirming, under abuse of discretion standard, superior court's dismissal on ripeness grounds of action for (continued...)

governmental action to provide context, the case was not ripe and there was no need for the superior court to act.

The Tribes opposed the State's dismissal motion, arguing that (1) the State had taken action well beyond the mere issuance of an Attorney General's opinion, including changes in department manuals and actual dealings with tribes, and (2) then-existing Alaska case law on standing, including the concept of ripeness, required only the threat of future injury. Judge Suddock agreed with the Tribes.

During the briefing for this appeal we issued our decision in *State v. ACLU of Alaska*.[106] In that case we continued *Brause*'s new emphasis on federal ripeness law with respect to a narrow line of cases — those involving pre-enforcement constitutional challenges to statutes.[107] We stated that "the constitutionality of a statute generally may not be challenged as an abstract proposition" and looked to see if the plaintiffs had presented the basis for an exception to that general rule.[108] We then noted the similarity of our earlier cases warning against advisory opinions and resolving abstract questions of law to the Ninth Circuit's recent decision in *Alaska Right to Life Political Action*

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[105] (...continued)
declaratory relief in connection with constitutional challenge to statute precluding same-sex marriage because plaintiffs had not alleged any specific denial of rights associated with marriage).

[106] 204 P.3d 364 (Alaska 2009).

[107] *See id.* at 366 (concerning "pre-enforcement challenge to a newly amended statute that prohibits the possession and use of marijuana"); *id.* at 368 (looking to federal law); *see also Brause*, 21 P.3d at 358 (concerning request for declaration that statute denying same-sex marriages recognition is unconstitutional where challengers did not allege they had been denied any specific benefits); *id.* at 358-60 (relying in part on 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532, at 112, 114-15 (2d ed. 1984)).

[108] *ACLU of Alaska*, 204 P.3d at 366.

Committee v. Feldman.[109] We stated: "While pure legal questions that require little factual development are more likely to be ripe, a party bringing a pre[-]enforcement challenge must nonetheless present a concrete factual situation."[110] Looking back to *Brause* and its reliance on federal law, we reiterated the practical formulation for ripeness of pre-enforcement constitutional challenges to statutes: balancing the need for decision against the risks of decision.[111]

The plaintiffs in *ACLU of Alaska* had challenged a newly enacted statute criminalizing the possession of small amounts of marijuana, arguing that the statute was unconstitutional under *Ravin v. State*.[112] We first determined that because the plaintiffs faced federal prosecution for marijuana possession regardless of state law, the threat of the new law did not really create a hardship to them.[113] We then determined that concrete facts regarding the State's enforcement of the new statute might aid in our decision.[114] We also considered the litigation's high-profile nature, with interest by both the legislative and executive branches, and that deference to the legislative branch prohibits us from declaring statutes unconstitutional unless "squarely faced with the need to do

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[109] *Id.* at 368-69; *see Feldman*, 504 F.3d 840 (9th Cir. 2007).

[110] *ACLU of Alaska*, 204 P.3d at 368 (quoting *Feldman*, 504 F.3d at 849) (internal quotation marks omitted).

[111] *Id.* at 369.

[112] *Id.* at 366; *see Ravin,* 537 P.2d 494, 504, 511 (Alaska 1975) (holding Alaskans have fundamental right to privacy in their homes and allowing possession of small amounts of marijuana in home by adults for personal and private use).

[113] *ACLU of Alaska*, 204 P.3d at 369-70.

[114] *Id.* at 372-73.

so."[115] Because of these factors, we concluded that the decisional risks outweighed the need for decision and that the plaintiffs therefore were not entitled to an exception from the general rule against pre-enforcement constitutional challenges to statutes.[116] We vacated the superior court's judgment in the plaintiffs' favor and dismissed the proceedings.[117]

The State and the Tribes disagree on *ACLU of Alaska*'s application here. The State implicitly characterizes this case as a pre-enforcement challenge to the 2004 Attorney General Opinion and asserts that the Tribes are asking "for a sweeping decision" despite the "factual vacuum of this case." The State argues the Tribes have not demonstrated a need for a decision, but the risk of decision is high because "jurisdictional analysis depends on [a variety of different] factual circumstances." The State points to a number of hypothetical fact patterns raising difficult questions and leading to differing results in the jurisdictional analysis, including if only one parent is a tribal member, if the parents are members of different tribes, and if one or both of the parents do not consent to tribal jurisdiction. It concludes that considering the tribal jurisdiction question raised here in the absence of concrete facts "invites an inaccurate[,] broad[,] and unqualified jurisdictional ruling."

The Tribes respond that the State's argument rings hollow because the State contends that no Alaska Native tribe possesses *any* jurisdiction to initiate ICWA-defined child custody proceedings unless the tribe has reassumed jurisdiction under ICWA § 1918. The Tribes assert that this case does not raise an issue about tribal jurisdiction and authority over non-members and expressly ask us to refrain from addressing that issue.

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115 *Id.* at 373.

116 *Id.* at 371-74.

117 *Id.* at 374.

The Tribes point to the existence of tribal court systems and specific examples of the 2004 Attorney General Opinion's effect on tribal jurisdiction and powers,[118] and argue that there is a real case and controversy ripe for decision.

The Tribes distinguish *ACLU of Alaska* by observing that "the [c]ourt in *ACLU* was most influenced by the fact that the actions the plaintiffs sought to engage in, even if protected from criminalization under Alaska law, still remained criminal under federal law" and "[n]o analogue is present here." The Tribes also point out that "the [c]ourt in *ACLU* found that the plaintiffs' declarations did not indicate that the statute at issue would [a]ffect their conduct, or that they would be the subjects of enforcement," while "[h]ere, it is clear . . . that the State is enforcing its new policies vigorously." The Tribes further note that "in *ACLU* a 'narrowing construction' of the new marijuana statute was possible, thus making adjudication of individual cases more appropriate; here, by contrast, the State's position is monolithic, barring *all* child protection proceedings from being initiated in tribal courts absent . . . reassumption . . . and barring [recognition of] *all* tribal court adoption proceedings." (Emphasis in original.) The final distinction drawn by the Tribes is that "in *ACLU* due respect for the legislative branch required some hesitance on the [c]ourt's part before declaring an enacted statute unconstitutional," but "[h]ere, in contrast, state officials are taking actions based upon their interpretation of

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[118] The Tribes point out that based on the 2004 Attorney General Opinion, OCS changed its policy on recognizing existing tribal child custody proceedings, and that the record reflects one application of the new policy involving a member child of the Kenaitze Tribe. The child had been: (1) the subject of several emergency petitions before the Tribe; (2) the subject of multiple reports of harm OCS had transferred to the Tribe for follow-up; and (3) held by a state court to be under the tribal court's jurisdiction. OCS disregarded this previous activity and reopened its investigation, requesting a state court order compelling the child's attendance at an interview regarding allegations the Tribe had already investigated and found unsubstantiated. The Tribes also point out that BVS stopped issuing birth certificates for children adopted in tribal courts shortly after the 2004 Attorney General Opinion was issued.

Alaska Supreme Court case law — a subject on which this [c]ourt is in the best position, and has an obligation, to decide."

The Tribes have the better argument. The State's actions in response to the 2004 Attorney General Opinion go beyond enacting a statute that might be challenged as facially unconstitutional. Indian children may be at risk of harm because of the State's refusal to coordinate and cooperate with tribes regarding reports of harm; Indian children, as well as their natural and putative adoptive parents, may be held in legal limbo by the State's refusal to give full faith and credit to tribal adoption decrees; and both the State and tribal courts need to understand the extent to which tribal court orders in "child custody proceedings," as that term is defined in ICWA, are entitled to full faith and credit. We agree with Judge Suddock: families and children are being affected; State and tribal relations are being affected; the State and Alaska Native tribes, as well as State and tribal courts, are being affected. Under our approach to ripeness in cases not involving pre-enforcement constitutional challenges to statutes, the Tribes have readily established the injury and threat of injury necessary to support this suit.[119]

We conclude that the legal issue before us has been sufficiently narrowed by our previous cases and the conflicting Ninth Circuit cases. There are enough facts before us to resolve the parties' fundamental jurisdictional dispute in limited fashion: We will decide whether — absent formal reassumption of jurisdiction under ICWA § 1918 — Alaska Native tribes have inherent sovereign jurisdiction, concurrent with the

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[119] *See generally ACLU of Alaska*, 204 P.3d at 375-76 (Carpeneti, J., dissenting) ("We interpret standing, and by extension ripeness, leniently in order to facilitate access to the courts: 'The basic idea . . . is that an identifiable trifle is enough for standing to fight out a question of principle.' " (quoting *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 34 (Alaska 2001))); *Brause*, 21 P.3d at 360-61 (Bryner, J., dissenting) ("This court's standing jurisprudence indicates a willingness to adjudicate claims where the injury claimed is but 'an identifiable trifle.' " (quoting *Bowers Office Prods., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1097 (Alaska 1998))).

State, to initiate ICWA-defined child custody proceedings. We therefore affirm Judge Suddock's decision denying the State's motion to dismiss the Tribe's suit and we decline to vacate the superior court judgment and dismiss this appeal on ripeness grounds.

D. Today's Holding Regarding Alaska Native Tribal Sovereignty And ICWA

John v. Baker is foundational Alaska authority regarding Alaska Native tribal jurisdiction over the welfare of Indian children, notwithstanding the sharpness of the debate or the division of the court in reaching its ultimate conclusion.[120] Notably, the State does not ask that *John v. Baker* be overruled.

Having thoroughly outlined *John v. Baker*'s tribal jurisdiction analysis, we reiterate only the following four points from that decision to set the stage for our consideration of the State's arguments here. First, unless and until its powers are divested by Congress, a federally recognized sovereign Indian tribe has powers of self-government that include the inherent authority to regulate internal domestic relations among its members.[121] Second, ANCSA's elimination of nearly all Indian country in Alaska did not divest federally recognized sovereign Alaska Native tribes of their

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[120] The debate continued among commentators after the decision. *See, e.g.*, David M. Blurton, John v. Baker *and the Jurisdiction of Tribal Sovereigns Without Territorial Reach*, 20 ALASKA L. REV. 1, 26 (2003) (criticizing *John v. Baker*'s holding and interpreting United States Supreme Court cases to be "highly indicative . . . that tribes, without Indian country, do not have inherent sovereign powers and lack criminal, civil adjudicatory, and regulatory authority"); Andy Harrington, *Exclusive of What? The Historical Context of the 1970 "Metlakatla" Amendment to PL 280*, 23 ALASKA L. REV. 1, 7-9, 30-32, 38-49 (2006) (criticizing *John v. Baker* dissent's conclusion that 1970 amendment indicates P.L. 280 divested Alaska Native tribes of jurisdiction and taking position that (1) amendment was intended to supercede federal case law holding Metlakatla Reservation was not in Indian country and (2) "exclusive" in P.L. 280 § 2(c) does not mean exclusive of tribal jurisdiction, but instead means exclusive of federal jurisdiction under the General Crimes and Major Crimes Acts, 18 U.S.C. §§ 1152, 1153).

[121] *John v. Baker*, 982 P.2d at 751.

authority to regulate internal domestic relations among their members.[122] Third, we "must resolve ambiguities in statutes affecting the rights of Native Americans in favor of Native Americans" and "we will not lightly find that Congress intended to eliminate the sovereign powers of Alaska tribes."[123] Fourth, "Congress's purpose in enacting ICWA reveals its intent that Alaska Native villages retain their power to adjudicate child custody disputes" and "ICWA's very structure presumes both that the tribes . . . are capable of adjudicating child custody matters . . . and that tribal justice systems are appropriate forums for resolution of child custody disputes."[124]

The State contends that ICWA § 1911 constitutes a "complete jurisdictional scheme" limiting a tribe's initiating jurisdiction to child custody proceedings in Indian country under § 1911(a), but allowing, under certain conditions, transfer jurisdiction for those proceedings outside of Indian country under § 1911(b). According to the State, this scheme "reflects Congress'[s] reasonable balancing of tribal rights, parental rights off-reservation, and state rights off-reservation." The State argues that the superior court's acknowledgment of inherent sovereign jurisdiction to initiate child custody proceedings: (1) "fundamentally upend[s] ICWA's delicate balance of parental, state, and tribal interests"; (2) circumvents transfer jurisdiction limitations; (3) allows tribes to exercise jurisdiction over non-members; and (4) magnifies the disjunction in Indian law that P.L. 280 may have divested Alaska Native tribal powers inside Indian country but not outside

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122 *Id.* at 753.

123 *Id.* at 752-53 (citing *In re F.P.*, 843 P.2d at 1219).

124 *Id.* at 753-54 (citing 25 U.S.C. § 1911).

it — as noted in *John v. Baker*, "generally, Indian nations possess greater powers in Indian country than they do outside it."[125]

The Tribes respond that: (1) ICWA was intended to give tribes more, not less, power and authority to protect the best interests of their children; (2) this case does not present the issues the State raises concerning tribal jurisdiction over non-members; and (3) the remaining vestige of *Nenana*'s divestiture interpretation of P.L. 280 should be overruled, thereby eliminating the alleged jurisdictional disjunction.

We agree with the Tribes. ICWA creates limitations on states' jurisdiction over ICWA-defined child custody proceedings, not limitations on tribes' jurisdiction over those proceedings.[126] And we acknowledge that in the nearly 25 years since our *Nenana* decision, our view of P.L. 280's impact on tribal jurisdiction has become the minority view — other courts and commentators have instead concluded that P.L. 280 merely gives states concurrent jurisdiction with tribes in Indian country.[127] What remains of

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[125] *Id.* at 748 n.46.

[126] *See Holyfield*, 490 U.S. at 44-45 (stating ICWA's purpose was "to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings" because "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities" (emphasis in original)); COHEN'S HANDBOOK, note 16, above, at § 11.01[1], 820 n.2 ("This conclusion is inescapable from a reading of the entire statute, the main effect of which is to curtail state authority."); ICWA HANDBOOK, note 17, above, at 5 (observing ICWA was intended, in part, "to encourage tribal adjudication of child custody proceedings involving Indian children").

[127] *See Kaltag Tribal Council*, 344 Fed. Appx. at 325 ("[N]either the ICWA nor [P.L.] 280 prevented the Kaltag court from exercising jurisdiction."); COHEN'S HANDBOOK, note 16, above, §6.04[3][c], at 560-61 ("The nearly unanimous view among tribal courts, state courts and lower federal courts, state attorneys general, the Solicitor's Office for the Department of the Interior, and legal scholars, is that [P.L.] 280 left the inherent civil and criminal jurisdiction of Indian nations untouched." (footnotes omitted)); ICWA HANDBOOK, note 17, above, at 34 ("It has become clear . . . that the

(continued...)

Nenana must now be overruled. We adopt the view that P.L. 280 did not divest tribes of all jurisdiction under § 1911(a), but rather created concurrent jurisdiction with the State.

Accordingly, in light of our foundational decision *John v. Baker*, ICWA, federal case law regarding Alaska Native tribal sovereignty, and the absence of express contrary Congressional intent, we hold that federally recognized Alaska Native tribes that have not reassumed exclusive jurisdiction under § 1918(a) still have concurrent jurisdiction to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country. Necessarily, federally recognized Alaska Native tribes are entitled to all of the rights and privileges of Indian tribes under ICWA, including procedural safeguards imposed on states[128] and § 1911(d) full faith and credit with respect to ICWA-defined child custody orders to the same extent as other states' and foreign orders.[129]

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[127] (...continued)
retrocession provisions . . . permit Indian tribes to reassume exclusive jurisdiction over their children domiciled in Indian country, but these tribes can exercise concurrent jurisdiction over their children along with state courts and can exercise transfer jurisdiction under § 1911(b) . . . ."); CASE & VOLUCK, note 77, above, at 394 ("[I]t is now generally agreed that [P.L. 280] does not deprive tribes of concurrent jurisdiction."); *id.* at 390 n.134 ("Retrocession does not seem to be required for tribal courts to exercise concurrent jurisdiction over child custody matters, because such jurisdiction was not surrendered to the state under P.L. 280.").

[128] *See, e.g.*, 25 U.S.C. § 1912(a) (2000) (requiring notice to Indian tribes); 25 U.S.C. § 1911(b) (providing Indian tribes with right to petition for transfer to tribal court); *id.* at § 1911(c) (providing Indian tribes with right to intervene); *see generally* ICWA HANDBOOK, note 17, above, at 83-111.

[129] *See John v. Baker*, 982 P.2d at 761-62 ("ICWA requires courts to extend full faith and credit to tribal court decisions involving 'child custody proceedings' as that term is defined by [ICWA]."). This case does not present a specific full faith and credit dispute and we do not need to discuss potential limitations on § 1911(d) full faith and (continued...)

We do not have before us sufficient facts to make determinations about specific limitations on inherent tribal jurisdiction over ICWA-defined child custody proceedings. The nature and extent of tribal jurisdiction in any particular case will depend upon a number of factors, including but not limited to: (1) the extent of the federal recognition of a particular tribe as a sovereign; (2) the extent of the tribe's authority under its organic laws; (3) the tribe's delegation of authority to its tribal court; and (4) the proper exercise of subject matter and personal jurisdiction. Among the many issues we are not deciding today are: (1) whether, parallel to ICWA § 1911(b) transfer jurisdiction limitations, parents of Indian children might have the right to object to tribal jurisdiction; (2) the extent of tribal jurisdiction over non-member parents of Indian children; and (3) the extent of tribal jurisdiction over Indian children or member parents who have limited or no contact with the tribe. We therefore do not need to address the varied hypothetical situations posited by the State as creating difficult jurisdictional questions — we leave those for later determinations under specific factual circumstances.

E. Our Decision's Impact On The Judgment For Declaratory And Injunctive Relief

Our ruling is more limited than the declaratory relief entered by Judge Tan, and we therefore vacate that portion of the declaratory judgment going beyond today's decision. Today's decision should clarify any confusion about jurisdiction that may be held by federally recognized Alaska Native tribes to initiate ICWA-defined child custody proceedings. We are confident the State's agencies will follow our clarifying ruling without the need for further injunctive relief, and out of respect for the executive branch

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[129] (...continued)
credit. *See, e.g.*, *Starr v. George*, 175 P.3d 50, 55-58 (Alaska 2008) (discussing due process requirement for orders afforded § 1911(d) full faith and credit).

we therefore vacate that portion of the judgment entering such relief (but without prejudice to the right of the Tribes to seek future relief if deemed necessary).

V. CONCLUSION

The superior court's judgment is AFFIRMED in part and VACATED in part, as set forth above.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

RUSSELL PETERSON, JR.,

Plaintiff,

v.

STATE OF ALASKA,

Defendant.

Case No. 1JU-10-569 CI

SUBPOENA FOR TAKING DEPOSITION
DUCES TECUM

To: **Jim Duncan, Business Manager**
Alaska State Employees Association
Address: **1577 C Street, Anchorage, AK 99501**

You are commanded to appear in this office to testify under oath in the above case at:

Date and Time: November 3, 2010 @ 9:00 a.m.
Location: Attorney General's Office
1031 W. 4th Ave, Suite 200, Anchorage, AK, 99501

Notice, as required by Civil Rule 45(d), has been served upon Doug Mertz, counsel for Plaintiff on September 29, 2010.

You are ordered to bring with you: the entire ASEA file pertaining to Russell J. Peterson Jr. (DOB: 2/18/64); including but not limited to all written correspondence between ASEA and Mr. Peterson's legal counsel, Doug Mertz, or any other individual providing legal representation to Mr. Peterson.

Date: 10/1/10 Deputy Clerk

Subpoena issued at request of:
AAG John M. Ptacin
Attorney for State of Alaska
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Telephone: (907)269-6612
Fax: (907) 269-4978

Before this subpoena may be issued, the above information must be filled in and proof must be presented to the clerk that notice of deposition has been served upon opposing counsel.

APPENDIX 2

PETITION FOR REVIEW

Statement of the Facts

The petitioner, a former State employee, filed an action for unjust termination against the State. Before filing the court case, he exhausted his administrative remedies by filing a grievance through his union, as required. Under the Collective Bargaining Agreement with the State, only a union representative was allowed to represent the employee in the grievance process; his private attorney could not participate on behalf of the member. After the grievance process ended and the employee filed suit, the State's attorney demanded all the union's records related to the member and the grievance, including all private communications, notes, and files related to the grievance and all communications from the employee's private attorney to the union. The Petitioner objected that these documents should be considered privileged as the union representative was acting in the role of an attorney when no attorney was allowed, and that to allow one side in litigation to have access to all the private factual and strategic communications between the opposing party and his legal representative would violate due process. On March 1, 2011, the trial court ruled that the State could obtain all the union records because the attorney/client privilege applies only to attorney representation, not to a non-lawyer advocate performing the same function. Petitioner contends that it is a fundamental violation of due process to permit one side in litigation to discover private communications, opinions, and strategies between the other party and his legal advocate. There had

been a trial date but the court took it off the calendar so the State could pursue its discovery claims.

Statement of the Question

When a litigant has gone through a mandatory administrative process before filing suit, and was represented in that process by a non-lawyer because the State allows only the union to represent union members, may the State, in subsequent litigation, discover all internal documents, communications, and files of the union, including all communications with the member and all communications with the member's private attorney working on the same matter? Does an advocate-client privilege apply when the party is not allowed to have his attorney represent him?

Why this Petition Should be Granted

This petition should be granted for these reasons:

1. Postponement of consideration of this point until a post-trial appeal will cause great hardship because matters on which the Petitioner has a legitimate reasonable expectation of privacy – his private communications with his own legal representative in an administrative proceeding – would be completely open to discovery, and his own representative in those proceedings could even be called to testify against him.

2. This is an issue of first impression in this court, on which there is substantial disagreement among courts in other states. If left in place, even for a short duration, it will affect many ongoing employment grievances files with the State and other

public employers, and has serious implications for the privacy of negotiations on collective bargaining agreements.

3.This issue is likely to evade review as in this employment action, the probability is that there will be either a settlement or a plaintiff's verdict, in either of which case there will be no appeal in which to address it. The State would then be free to continue this tactic and thereby jeopardize the rights of union members to fair and effective representation in the administrative grievance process.

Why the Ruling Below was Erroneous

This issue is new to this court, and we believe it is new to any Alaska trial court. It also relates to a new tactic by the State: Never before has the State invaded an opposing party's expectation of privacy by attempting to obtain the files of a union representative created in the grievance phase of the litigation. If the State's tactic is successful, it would create a fundamental imbalance in which one side could discover all the materials normally privileged in litigation while the other side maintains a privileged status for its own litigation records.

The union, ASEA, is recognized by the state as the sole legal representative of its members in grievances; both the state and the union refuse to permit a member's private attorney to take part or even observe any proceedings between the union and the state.[1] The union representative (sometimes called a business agent) performs the

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[1] The restriction to a union representative and the exclusion of private attorneys in the administrative phase is found in the contract between the State of Alaska and the General Government Unit (GGU), Section 103, which reads:

The Employer will not negotiate or handle

functions that an attorney would in court: He or she makes arguments, presents evidence to the other side, negotiates settlements, and if a matter goes to arbitration, presents and cross-examines witnesses and delivers arguments to an arbitrator, in exactly the same way an attorney would if one were permitted. In this case the union representative communicated and met numerous times with the plaintiff on strategy and on negotiation goals in the proceedings against the state. The union also received informal advice from the member's private attorney on strategy.

The grievance process failed to resolve the issue, and having exhausted his administrative remedies, the plaintiff filed suit.

Now, the state has subpoenaed *all* the union's records involving the plaintiff, including *all* communications between the union representative and the plaintiff, and between the union representative and the undersigned acting as the plaintiff's attorney. The subpoena is sweeping:

> All union records pertaining to Russell Peterson, Jr. (DOB: 2/28/64), including but not limited to all written correspondence between ASEA and Mr. Peterson's legal counsel, Doug Mertz, or any other individual providing

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> grievances with any individual or employee organization other than the Union with respect to terms and conditions of employment of bargaining unit members in the GGU. When individuals or organizations other than the Union request negotiations or seek to represent bargaining unit members in grievances or to otherwise represent bargaining unit members in Employer/employee matters, the Employer shall advise them that the Union is the exclusive representative for such matters. Similarly, the Union will so advise individuals or organizations making such requests.

legal representation to Mr. Peterson.[2]

This is an outrageous attempt to invade a privilege and to gain materials showing the opposing side's litigation strategy to which the state is not entitled. This attempt should not be countenanced, for these reasons:

1. The State's attorney is attempting to do what he could never do, legally or ethically, if the State had allowed the plaintiff to have attorney representation in the administrative phase. It is beyond denial that the State could not invade the attorney/client privilege by directly seeking communications between the plaintiff and his lawyer or otherwise seek to learn the thought processes and strategies of the lawyer;[3] yet here, the State seeks exactly those things. The State's theory seems to be that since the union business agent -- the plaintiff's legal representative in the administrative phase – was not a lawyer, the State is entitled to all his communications with the client/member, and all the communications of the legal representative with the party's private lawyer who offered assistance in the administrative proceeding.

The following points are incontrovertible: The plaintiff was entitled to legal representation in the administrative phase; the State itself, through the collective bargaining agreement, restricted that representation to a union representative, refusing to deal with a retained attorney; and now the State seeks all private

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[2] Appendix 2.

[3] Ak. Evidence Rule 503, Commentary to Rule 503.

communications between the client and the union legal representative, and between the union legal representative and the client's private attorney who was simultaneously advising the client in different phases of the same cause. So all the client's confidential communications – about legal strategy, about witnesses and evidence, about settlement negotiations and positions, would become open to the State. There is no justification for such an egregious violation of basic privileges.

2. There is no direct case law on this issue by the Alaska Supreme Court. But the court has made a clear analysis of the importance of privileges that should apply here. Moreover, courts elsewhere have dealt with the issue, and although the results are varied, there is a clear consensus that when the employee is restricted to representation by a union representative who is not a lawyer, it would be unfair if not unconstitutional to allow the employer to invade the confidentiality of the employee's relationship with his legal advisors.

a) Alaska law. The Alaska Supreme Court has held that the attorney-client privilege extends to client communications with a non-lawyer,[4] in certain circumstances. Although the facts of that case differ from this case, the court made certain points that matter here:

> ...the very heart of the common-law privilege was to protect the facts given by the client to his attorney. The privilege was based on the necessity that an attorney have

[4] American Nat. Watermattress Corp. v. Manville, 642 P.2d 1330, 1333-1334 (Alaska 1982).

the full disclosure of the facts from his client. [5]

The court has also noted the important public policy purpose of the privilege:

> Other jurisdictions have held, however, that lawyer-client privilege is more than just a testimonial exclusion. "The privilege against disclosure is essentially a means for achieving a policy objective of the law. The objective is to enhance the value which society places upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others will be informed.... If client and counsel must confer in public view and hearing, both privilege and policy are stripped of value." The Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal.App.2d 41, 53-54, 69 Cal.Rptr. 480 (1968) (since superseded by statute).[6]

The court has stated that the attorney-client privilege is entitled to "greater solicitude" than the physician-patient privilege.[7] This makes relevant the court's treatment of the physician-patient privilege. In Allred v. State, 554 P.2d 411 (Alaska 1976), the court found that a common law psychotherapist-patient privilege exists, based on consideration of the following factors that apply to all claims of privilege:

> Professor Wigmore has proposed four canons to be used as a basis for determining whether, for any particular relationship, a common law privilege is desirable. These are:
>
> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to

---

[5] id. at 1334, citations omitted.

[6] Cool Homes, Inc. v. Fairbanks North Star Borough, 860 P.2d 1248, n. 23 (Alaska, 1993).

[7] Lewis v. State, 565 P.2d 846 (Alaska 1977) at note 4.

> the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. 8 J. Wigmore, Evidence, § 2285. (Emphasis in original) [8]

The court found that the need for confidentiality is essential in order to make the relationship work,. The most compelling statement of the need in the context of union representation came from the California Supreme Court in denying a claim that there was no privilege attached to the union-member relationship,

> As Justice Broussard noted at oral argument, the Legislature could not have intended that the only sound advice the authorized [union] representative could give was, "Don't talk to me."[9]

In short, the privilege here – between the union legal representative and the member, which the State itself has required be substituted for the attorney–client relationship, fits all the factors listed above in Wigmore for a common law privilege. It is directly analogous to the attorney-client privilege and most likely should be a necessary extension of it in the circumstances of mandated union representation.

b) Other jurisdictions. Where private attorneys are prohibited, as here, from representing a member, several courts and agencies have had no problem in finding

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[8] 554 P.2d at 417.

[9] Welfare Rights Org. v. Crisan, 190 Cal. Rptr. 919, 923 n. 3, 33 Cal. 3D 776, 771 661 P.2d 1073 (Cal. 1983).

that the communications between member and union representative is privileged. For example, in Seelig v. Shepard, 578 N.Y.S. 2D 965 (Supr. Ct. 1991), the court held:

> ...there arises, in the context of rules regulating relations between management and labor, a species of privilege for labor union leaders. If unions are to function, leaders must be free to communicate with their members about the problems and complaints of union members without undue interference. Members must be able to have confidence that what they tell their representatives on such subjects cannot be pried out of the representatives by an over-zealous governmental agency. Union members must know and be secure in feeling that those whom they elect from among their ranks will be their spokespersons and representatives, not the unwilling agents of the employer. The union leadership councils must be free to confer among themselves, exchange views, make plans and arrive at negotiating strategies without intrusion from the organs of official power.[10]

The California Supreme Court has held that the privileges that would otherwise be applicable to an attorney-client relationship apply to the lay relationship as well when the Legislature has created a system of lay representation. In Welfare Rights Organization v. Crisan, Welfare Rights Org. v. Crisan, 190 Cal. Rptr. 919, 923, 33 Cal. 3D 766, 771, 661 P.2d 1073 (Cal. 1983), the court stated:

> [T]he considerations which support the privilege are so generally accepted that the Legislature must have implied its existence as an integral part of the right to representation by lay persons. Otherwise that right would, in truth, be a trap by inducing confidential communications and then allowing them to be used against the claimant. We do not attribute such a sadistic intent to the Legislature.

[10] Accord, City of Newburgh v. Newman, 421 N.Y.S.2d 673 (App. Div. 1979).

33 Cal.3d at 771.[11]

The same result has been reached by administrative tribunals. In Cook Paint and Varnish Co., 258 NLRB 1230, 1231-1232 (1981), the National Labor Relations Board ruled that the employer committed an unfair labor practice by questioning a union steward, who had been involved in an employee's grievance arbitration, and by threatening to discipline the steward if he didn't turn over his notes:

> Such consultation between an employee potentially subject to discipline and his union steward constitutes protected activity in one of its purest forms. To allow Respondent here to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives. Such actions by Respondent also inhibit stewards in obtaining needed information from employees since the steward knows that, upon demand of Respondent, he will be required to reveal the substance of his discussions or face disciplinary action himself. In short, Respondent's probe into . . . protected activities has not only interfered with the protected activities of those two individuals but has also cast a chilling effect over all of its employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline. [258 NLRB at 1232].[12]

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[11] Other courts have noted that this privilege does not extend to immunizing factual information imparted by the union member, see American Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146 (Cal. App. 2004); Walker v. Huie,142 F.R.D. 497, 500 (D.Utah 1992). The defendants here have gone well beyond a discovery request for factual information.

[12] See also Berbiglia, Inc., 233 NLRB 1476, 1495 (1977); New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police, New Hampshire PELRB Decision No. 94-74 (August 31, 1994); IBEW, Local 77, No. 15544-U-00-3932, 2003 WL 21658695 (Wash. Pub. Employment Relations Comm'n 2003) and see Teamsters Local 391 v. Terry, 494 U.S. 558, 567, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (union has fiduciary duty to protect members' interests. Forcing the union to reveal what it has learned in confidence

In summary, there is solid support for the proposition that the State may not violate the spirit of the rules regarding attorney-client privilege and obtain materials to which it is not entitled, by the device of subpoenaing documents and notes in the possession of a union official, especially when the State has itself required that the member be represented by a union official instead of a lawyer.

3. It should also be obvious that if the union legal representative has a duty to withhold materials that are privileged, that also extends to materials sent to or from a private attorney who is simultaneously representing the same person in regard to the same actions by the State. If that were not the case, the State could in effect prevent

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would breach that relationship of trust by converting it into management's agent for the collection and transmittal of information that employees might not otherwise choose to reveal.) A labor relations privilege has been recognized in several cases.See Int'l Union v. Garner, 102 F.R.D. 108 (M.D. Tenn. 1984); Ill. Educ. Labor Relations Bd. v. Homer Cmty. Consol. Sch. Dist., 547 N.E.2d 182 (Ill. 1989); Labor Relations Bd. v. Chi. Transit Auth., 793 N.E. 2d 730 (Illinois App. Ct. 2003); Children's Village v. Greenburgh Eleven Teachers' Union Fed'n of Teachers, 648 N.Y.S.2d 152 (N.Y. App. Div. 1996) (citing Seelig, op. cit., with approval); cf. Alhambra Police Officers Ass'n v. City of Alhambra Police Dep't., 113 Cal. App. 4th 1413, 1422 (Cal. Ct. App. 2003) (recognizing privilege based upon California statute that privileges police officers from having to disclose information disclosed to another officer in non-criminal matters).

On the other hand, a full labor relations privilege has been rejected by some courts. See Patterson v. Heartland Indus. Partners, 225 F.R.D. 204 (N.D. Ohio 2004) (rejecting labor relations privilege under labor principles, but accepting the proposition that Freedom of Association principles would prevent the disclosure of confidential labor relations information); Ahearn v. Rescare W. Va., 208 F.R.D. 565 (S.D. Va. 2002); In Re Grand Jury Subpoenas Dated Jan. 20, 1998, 995 F. Supp. 332 (E.D.N.Y. 1998); EEOC v. People's Gas, Light and Coke Co., 1981 WL 2332 (N.D. Ill. 1981),appeal dismissed, 1992 WL 20019 (7th Cir. 1982) (supporting policy for protecting confidentiality but finding it not applicable in that case.)

The most extensive commentary on this issue is in Rubinstein, "Is a Full Labor Relations Evidentiary Privilege Developing?," 29 Berkeley Journal of Employment & Labor Relations Law 1.

all cooperation among allied co-counsel working on what is essentially the same effort. To allow such handicapping of a litigant would amount to a critical denial of his due process rights.

4. The subpoena would also violate Evidence Rule 408, by revealing one side's negotiation strategy, including private discussions of what settlements may be acceptable to the plaintiff. The Rule (and the commentary to it) literally relate to admissibility of statements made settlement negotiations. However it is clear from the commentary that the court's concern in promulgating the rule (which codified a common law privilege) was to protect the settlement process and not discourage settlement discussions. In this case, the broad subpoena demands any document communicating between the plaintiff and his union legal representative regarding settlement, what the State was likely to offer, what the plaintiff was willing to accept, and what the plaintiff may be willing to offer. This obviously invades an area which is forbidden to discovery.

5. The trial court's ruling on this issue acknowledged that a number of courts have recognized either a union-member privilege[13] or a privilege in situations in which a statute authorizes lay representation.[14] But the judge ultimately concluded that

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[13] Seelig v Shepard, 578 N.Y.S. 965 (N.Y. Sup. Ct. 1991), which has been relied in several other New York decisions recognizing a privilege, Dist. No. 1-PCD v. Apex Marine Ship Mgmt. Co., 745 N.Y.S. 2D 522, 526-27, n. 2 (N.Y. App. Div. 2002); children's Vill. v. Greenburgh Eleven Teachers' Union, 648 N.R.S.2d 152, 153 (N.Y. App. Div. 1996); In re Suffolk County Ethics Comm'n, 909 N.Y.S.2d 339, 343-44 (N.Y. Sup. Ct. 2010). See also Illinois Educ. Labor Relations Bd. v. Homer Cmt. Consol. Sch. Distr., 547 N.E.182, 185 (Ill. 1989).

[14] Welfare Rights Organization v. Crisan, 190 Cal. Rptr. 919, 923, 33 Cal. 3D 766, 771, 661 P.2d 1073 (Cal. 1983).

Evidence Rule 501 prevents a court from recognizing a new privilege unless it is compelled by court rule, by the U.S. Constitution, the Alaska Constitution, or by an Alaska statute. The judge did not confront our reasoning that protection of such records is required by the due process provisions of the U.S. and Alaska Constitutions in order to provide basic fairness in an adversarial proceeding, or that it is required by the act of the State itself in making a mandatory provision in the collective bargaining agreement that only a union representative will be recognized in the administrative process, i.e., an action that tilts the playing field just as much as if it were a statute, unless the union representative also has a right to keep communications confidential.

6. We note that the cases from other jurisdictions also provide critical information on other misuses that could result if a privilege of confidentiality is not recognized here. For example, if the State can obtain the union's records of internal communications with a member regarding a grievance proceeding, it can also depose the union representative to obtain even more information, and even call the union rep as a witness against his own client. Even further, if there is no union-member confidentiality, the State can, in any dispute over interpreting the collective bargaining agreement, subpoena all union records regarding internal discussions within the union among the members of the union's bargaining team. In short, the State's eagerness to obtain communications that are ordinarily treated as confidential can open a pandora's box by giving the State free access to many areas in which confidentiality is critical to the rights of organized labor and its members.

7. Finally, we note that nothing in our argument would prevent a litigant from using

discovery to obtain factual information relevant to the dispute. In this case the State can and has used interrogatories, requests for production, and depositions to dig into all possible facts concerning the Petitioner and his claim. The only things that would come within a privilege are the communications between the member and his union representative and between the member's private attorney and the union representative, including litigation preparation materials and work product; no privilege would extend to any underlying facts that would otherwise be discoverable.

Relief Requested

We request the court to rule that in these circumstances – an administrative proceeding in which a litigant is required to be represented by a union official, not by a lawyer – the records and files of the union official are entitled to the same confidentiality as would apply to the records and files of an attorney, if one had been allowed to participate.

Conclusion

As the California Supreme Court said,

> [Without a privilege], that right [to a non-lawyer representative] would, in truth, be a trap by inducing confidential communications and then allowing them to be used against the claimant. We do not attribute such a sadistic intent to the Legislature.
> . . . .the Legislature could not have intended that the only sound advice the authorized representative could give was, "Don't talk to me."[15]

[15] Welfare Rights Organization v. Crisan, 33 Cal.3d 766, 771, 190 Cal. Rptr. 919, 923, 661 P.2d 1073 (1983).

This case is of such importance to labor relations and to litigation over employment causes that this court should intervene now and recognize that in the circumstances of this case, the private communications of both sides in litigation should remain private.

Dated: March 10, 2011

Douglas K. Mertz
Alaska Bar No. 7505027
Attorney for the Petitioner

4/29/11 PRESENTATION ACES - AN ASSESSMENT OF ITS EFFECTIVE-NESS

<TARGET><BILL></BILL><SUBJECT>4-29-11 PRESENTATION ACES - AN ASSESSMENT OF ITS EFFECTIVENESS</SUBJECT><COMM>SJUD27</COMM></TARGET>

ACES: Is it Working?

Senator Bill Wielechowski

April 29, 2011

1

A Little History

- In **2006**, the legislature overhauled the state's outdated oil and gas tax system.
- Under the old system, called "ELF," **15 out of 19 oil fields on the North Slope paid no production tax at all.**

2

Alaska's Constitution Requires:

- "The legislature shall provide for the utilization, development and conservation of all natural resources belonging to the State for the maximum benefit of its people." (Art. VIII, § 2)

The consensus was that Alaska was not receiving the maximum benefit of the wealth generated from its own resources.

3

Petroleum Profits Tax (2006)

- The new tax system, called the "Petroleum Profits Tax" or "PPT" taxed net profits, not gross earnings.
- Concerns lingered that the tax deductions were too generous and Alaska was still not getting the "maximum benefit" for its resources

4

Alaska's Clear and Equitable Share

As a result, the legislature re-considered PPT in 2007 and, after much deliberation, replaced it with "Alaska's Clear and Equitable Share" (ACES) to ensure that Alaskans received the maximum benefit for our resources.

5

ACES: Is it working?

- Only 3.5 years have passed since ACES was adopted, but already there are calls for major changes to this system.
- What do the facts say about the effects ACES has had and whether immediate changes are needed?

6

8 Ways to Measure Effectiveness

1. Revenues generated for Alaskans
2. How do we compare?
3. Level of industry investment
4. New exploration and development
5. Number of industry jobs
6. New interest in Alaska
7. Industry profits
8. Oil production levels

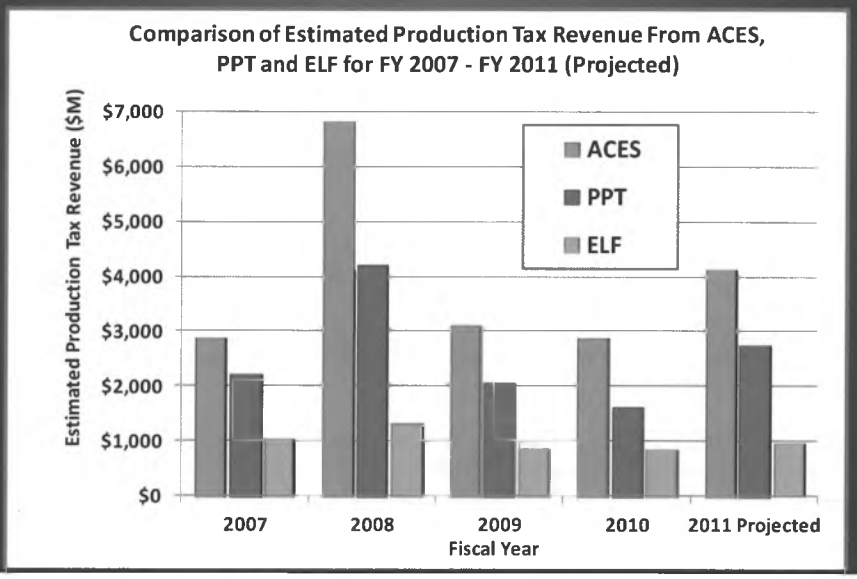
7

Measure #1

How has ACES affected the revenues Alaskans receive for our oil?

8

ACES has generated about $15 billion more than ELF would have.



Source: DOR

Increased Revenue for Alaskans

This has enabled the state to invest more in infrastructure, create jobs, and fund critical state services, dampening the effect of the worldwide recession in Alaska.

10

Biggest Savings Account in the Nation

It has also allowed lawmakers to **pay back a $5.5 billion loan** used to cover prior budget shortfalls and to grow Alaskans' **savings account**, now the **largest in the nation at about $15 billion**.

CBR

11

Measure #2

How do our tax rates compare with other jurisdictions?

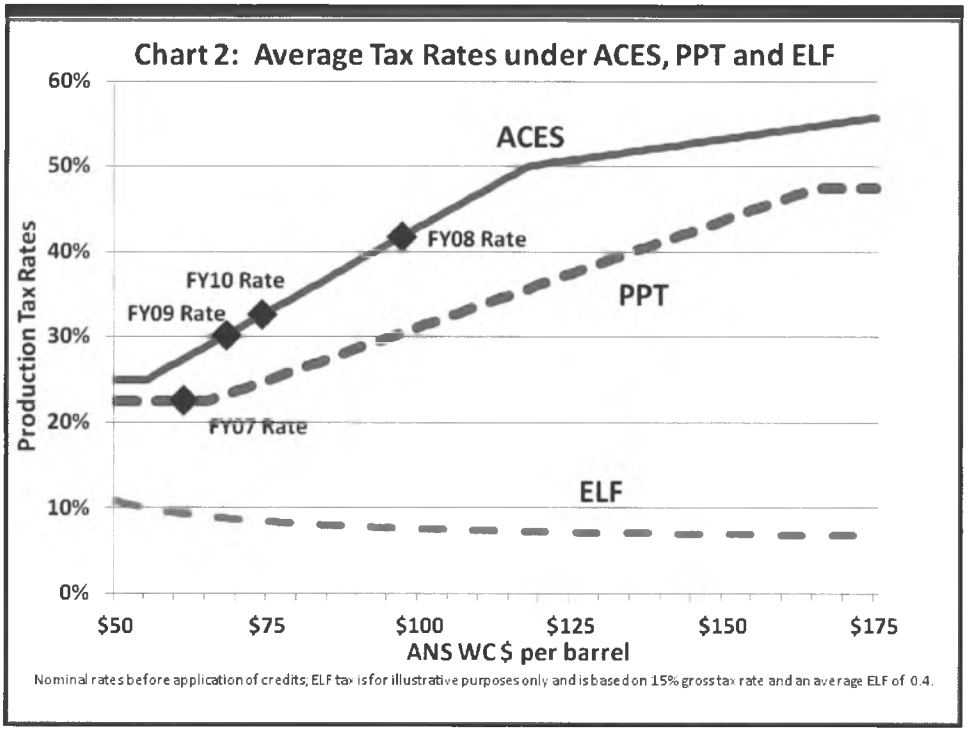
Are we competitive?

12

Alaska's Taxes: Fair or Excessive?

- Some critics of ACES talk about tax rates as high as 90%.
- However, in the 4 years since PPT and ACES passed, the average production tax rate has been 32%, according to the Parnell Administration. This is before generous tax credits are factored in, lowering taxes significantly.

13



Calculating Tax Rates under ACES

No production taxes are paid until a profit is made. It costs about $26 to get a barrel of oil out of the ground and to market. The base tax rate is 25%. After $30 of profit, .4% is added for every dollar increase per barrel.

15

For Example

At $56/barrel oil, the tax rate is 25%. At $57/barrel, the tax rate is 25.4% because the oil company has made over $30 in profit. At $58/barrel, the rate is 25.8%.

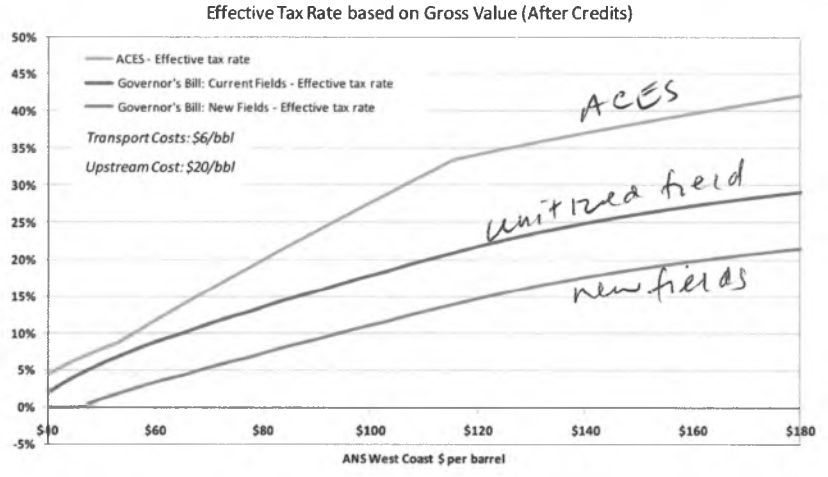
16

Under the Governor's Proposal, Alaska will Lose Billions

- The Governor's bill will lower taxes significantly , costing Alaskans an estimated $8.2 billion over the next five years.
- As the following chart shows, if the Governor's bill passes, Alaska's actual production tax rate will be between 15% and 25% on industry profits at today's prices.

17

Effective Tax Rates on Gross Current law and HB 110



What is the Tax Rate Elsewhere?

- **Is this multi-billion dollar reduction necessary or reasonable?**
- How do our taxes compare with taxes in other world class oil basins?

19

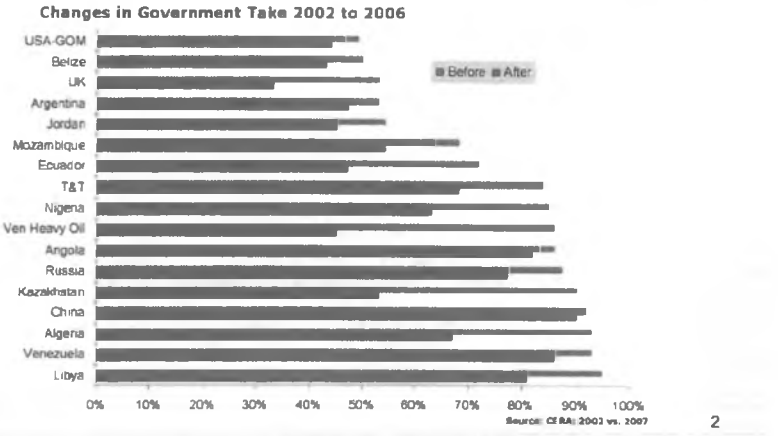
Alaska Is Competitive

- The following slide, developed by Chevron, shows the government take in even more countries.
- As this slide illustrates, governments have generally been increasing their taxes to ensure that their **citizens are fairly reimbursed for selling their non-renewable oil resources.**

20

Capturing "Fair Share"

Assessment of Oil and Gas Jurisdictions is Complex and Continuous



Source: Report of the Alberta Royalty Review Panel, "Our Fair Share", page 29.

2

eff. 2007 Chevron

Worst Fiscal Terms in the World*

Highlighted are places where Alaskan oil companies (BP, ConocoPhillips, Exxon or Repsol) currently do or have done business in recent years

1. Bolivia
2. Venezuela
3. Russia
4. Libya
5. Iran
6. Florida
7. Kuwait
8. Kazakhstan
9. Algeria
10. Iraq
11. Ecuador
12. Argentina

* According to the Frasier Institute Global Petroleum Survey

22

What Would this Loss of Revenue Mean for Alaskans?

- **Depletion of** our Rainy Day **savings account**
- **Future deficits**
- **Drastically reduced spending** on infrastructure and job-creating capital projects
- **Cuts to revenue sharing** and operating budgets with associated **job and service losses and increased local property taxes**

23

In Return?

- **Governor Parnell hopes industry will invest more in Alaska.**
- **However HB 110 and SB 49 require no assurances of increased investment or job creation.**
- **Is this a reasonable gamble to take? Let's look at more facts.**

24

Measure #3

Has industry investment decreased or increased since the passage of ACES?

25

According to the Alaska Department of Natural Resources:*

- **"Alaska is successfully encouraging investment from companies that are new to the state, with the number of petroleum companies doing business in the state almost doubling from 2006 to 2008."**
- **"Legacy producers on the North Slope are investing in their own assets, leaving room for new players…"**

"Alaska: We're Open for Business!"

*State of Alaska ad in the Petroleum News

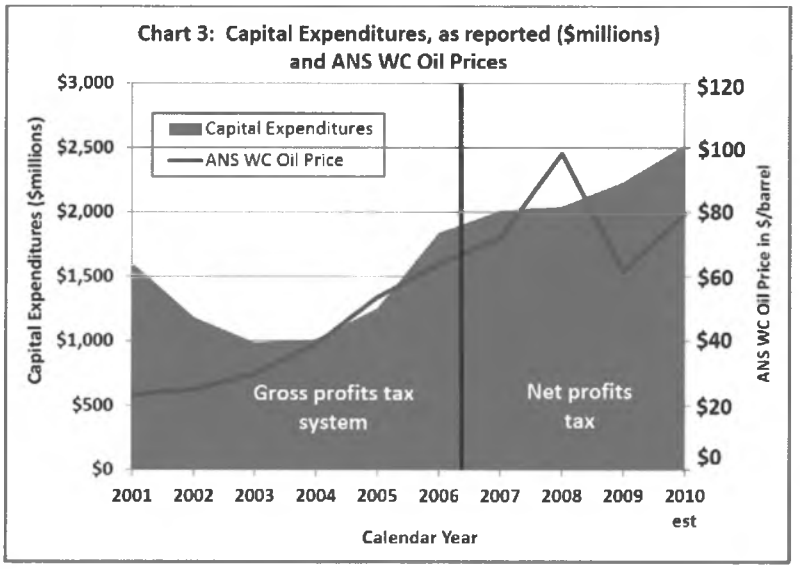
26

Industry Investment: On the rise

In the years since ACES passed, capital expenditures have increased consistently to all-time highs each year, as shown in red on the next chart.

27

Capital expenditures from 2001-2010



Both operating and capital spending are up since ACES went into effect

	FY2007	FY2008	FY2009	FY2010
Operating Expenditures (million $)	2,081	1,881	2,085	2,270
Capital Expenditures (million $)	1,578	1,967	2,212	2,389
Total Capex/Opex (million $)	**3,659**	**3,848**	**4,297**	**4,659**

Source: Revenue Source Books, Alaska Department of Revenue - Fall 2007, Fall 2008, Fall 2009 and Fall 2010

29

And investment is forecast to increase this year and next.

	FY2011 Forecast	FY 2012 Forecast
Operating Expenditures (million $)	2,553	2,558
Capital Expenditures (million $)	2,572	2,937
Total Capex/Opex (million $)	**5,125**	**5,495**

Source: Revenue Sources Book, Alaska Department of Revenue, Fall 2010

30

Oil
CoS
#s

Are increased investments on the North Slope due to maintenance?

In 2010, the Parnell Administration examined this issue. The following slide was presented by the Administration to the Legislature in February 2010.

31

Are the Increasing Spending Levels due to Maintenance Costs?

21

CAPEX- Capital expenditures ("CAPEX") on pipeline repairs at Prudhoe Bay increased after corrosion incidents in 2006. However, the majority of growth in capital expenditures since 2007 is attributable to drilling, seismic and other production related projects.

OPEX - Since 2007, the proportion of total operating expenditures ("OPEX") related to major repairs does not appear to be the key driver in the growth of total operating expenditures

Alaska Department of Revenue 2/4/2010

Many Factors (Including the Economy) Affect Spending Decisions

- In 2009, ConocoPhillips announced that it planned to **layoff 4% of its workforce** and **cut capital spending by 12.6%**.
- "We are **positioning ourselves in the current business environment to live within our means** …" said James Mulva, chief executive of the nation's third-largest oil company.
  (Houston Chronicle, 1/16/09)

33

Taxes Are Just One Factor

- As John Minge, BP's Alaska President, recently said: **"It's not always only about taxes."**
- The worldwide recession, tightening capital markets, fluctuating oil and gas prices, environmental regulations, access to infrastructure, availability of skilled labor and many other factors affect investment decisions.

34

Measure #4

How has ACES affected exploration and development?

35

Stimulating investment

- ACES encourages new investment through tax credits and deductions for exploration and development.
- According to Parnell Administration consultants, these credits and deductions are among the most generous in the world.
- Alaska has paid out over $2 billion in tax credits since ACES passed.

36

New Development Wells On the North Slope

2006: 137 wells
2007: 153 wells
2008: 139 wells
2009: 132 wells
2010: 164 wells – highest # in 5 years

Source: Alaska oil and Gas Conservation Commission

37

Increases in exploration

"The good news is we are seeing a lot of increase in oil exploration."

– Karen Rehfeld, Director of the Governor's Office of Management and Budget, in testimony before House Finance Committee on January 19, 2011, a week before the Governor introduced his bill.

38

Investment is increasing

- Since 2006, the number of applications for exploration tax credits and the amount of qualifying expenditures has generally increased.
- It hit an all-time high under ACES, peaking in 2009.

39

Measure #5

How has ACES affected jobs in the oil and gas industry?

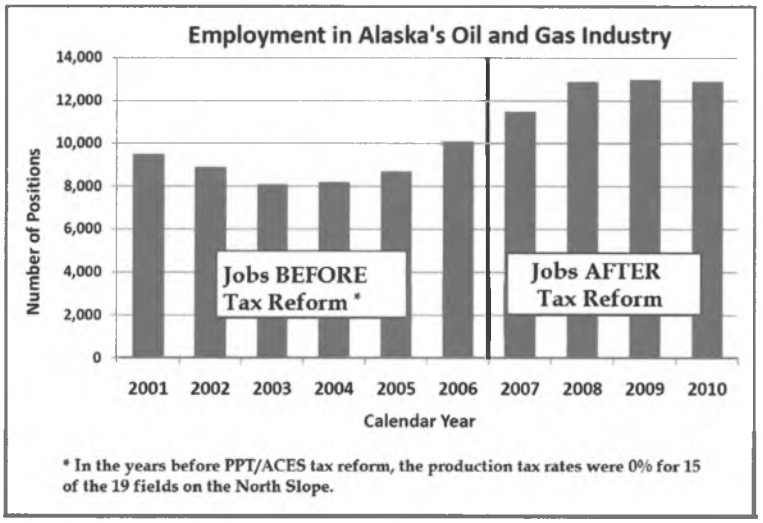
40

Jobs on the rise

- Employment in the oil and gas industry has **increased** since ACES was implemented.
- These are high paying jobs, with average wages of $14,000 per month, according to the Department of Labor.

41

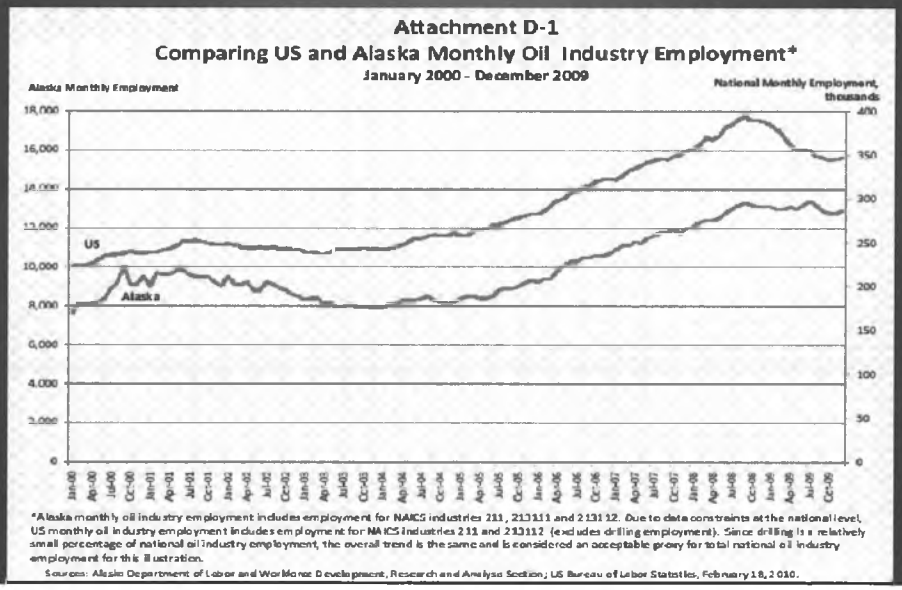
New Jobs in the Oil Patch



42

"up 70%" year over year

Oil Industry Jobs – Alaska Versus U.S.



oil & gas

Who's Getting the New Jobs?

- **According to the Alaska Department of Labor, unemployment claims for Alaskan resident oil and gas workers increased 160% from 793 in 2006 to 2,058 in 2010.**
- **In 2009, roughly 50% of all new oil and gas hires were non-residents.**

44

Measure #6

How has ACES affected industry interest in Alaska?

45

New Companies to Alaska

- The state has seen **new entrants** into Alaska's oil and gas industry since ACES passed.
- At the most recent lease sale in October 2010, a company new to Alaska (Great Bear Alaska) **bid on over 500,000 acres** and **paid more than $9 million** in bonus bids.

46

More companies doing business

- In 2006, the first year that tax filings were made under the net profit tax, **19** companies filed annual returns.
- In 2007, this grew to **26**.
- In 2008, it grew to **36**, and in 2009, **39** companies filed returns.

47

DOR

Recent News

- **In early March, the large Spanish oil company Repsol announced plans to begin exploring in Alaska next winter.**
- **The company hopes to spend at least $768 million under a "broad-reaching exploration and development program."**
- **"The North Slope of Alaska is an especially promising area for Repsol as it has already shown to be oil-rich and carries low exploratory risk," Repsol said.**

48

ACES is Particularly Attractive to "Independent" Oil Companies

"... a lot of the prospects that are readily drillable are **not large enough for the majors** to chase, but for us, they are intriguing," said Greg Vigil, executive vice president at Savant Alaska LLC.

2009

Source: Article, Alaska Business Monthly, December 2009

49

ACES is all about incentives

"One of the big things is to let independent oil and gas companies know is that Alaska is open for business and a big incentive is the ACES legislation,"

Vigil said.

Source: Article, Alaska Business Monthly, December 2009

50

ACES Rewards
New Investment

- The state actually pays for much of the cost of exploration and development activities.
- This fact is generally not highlighted by those who claim Alaska's share of profits is too high.
- Let's look at examples prepared by the Parnell Administration in 2010.

51

Credit Example 1: New Entrant

14

- A new entrant with no current production pursues an exploration project requiring $200 million in investment
- Company receives a 20% - 40% investment credit (depending on location), worth $40 - $80 million
- Company also receives an additional 25% credit for its "tax loss" or "net operating loss (NOL)", worth up to $50 million

Credit Example 1: New Entrant (*cont.*)

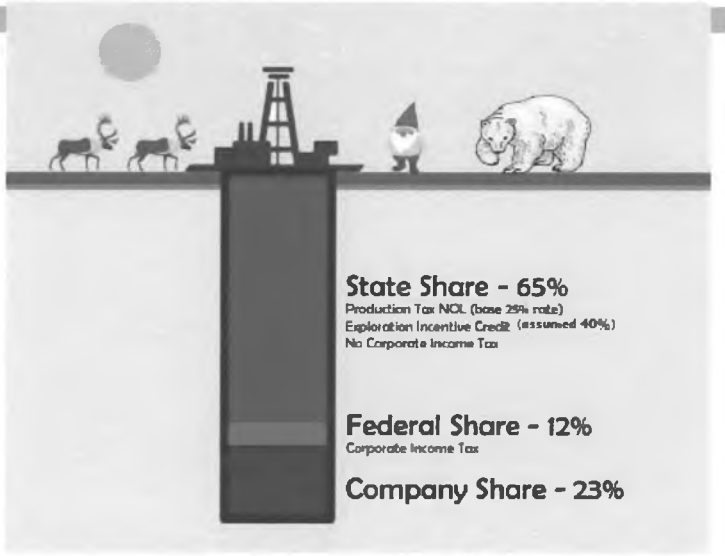
5

- The total credits of $90 - $130 million, can be:
  - Directly recouped (cash) from the state
  - Transferred to a person that does pays tax, so that the Transferee pays $90 - $130 million less in tax
- Either way, State pays $90 - $130 million for the exploration; company pays $70 - $110 million.
- If the exploration effort fails, the state never recoups this money.

  The state bears the risk for failure as does the new entrant

Exploration Dry Hole – New Entrant

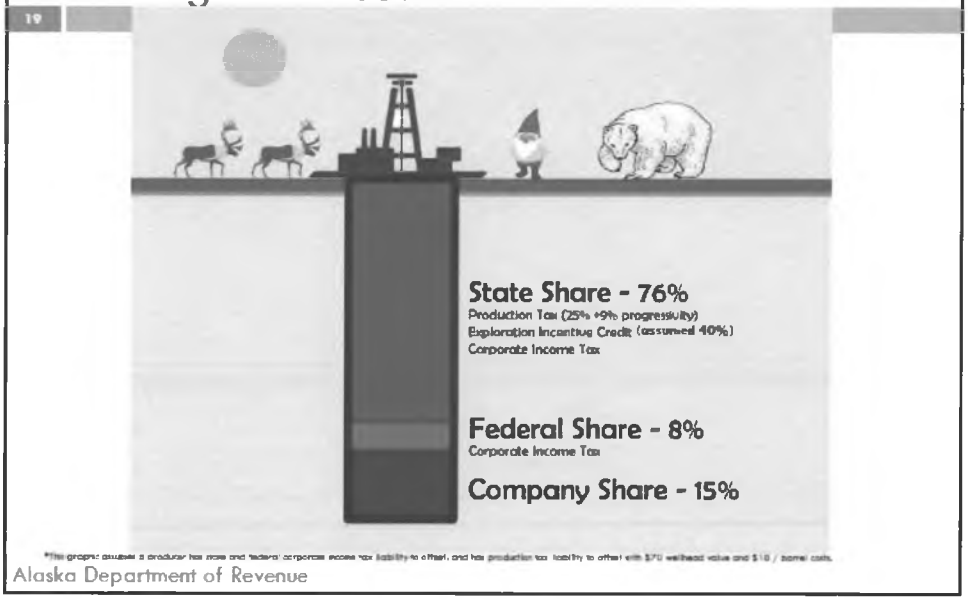
16



*This graphic assumes a producer has federal corporate income tax liability to offset for its state corporate income tax, and does not have other production tax liability to offset.

Alaska Department of Revenue

Unsuccessful Development Project – Existing Producer



Alaska Department of Revenue

Alaska's Clear and Equitable Share

- Given this level of state investment, it is appropriate that Alaskans share in the profits that are sometimes generated.
- Alaskans are major investors in oil exploration and development and as such should reap some of the rewards.

Measure #7

How has ACES affected company profits?

57

Profits Are Strong

From ConocoPhillips Consolidated Income Statements:

US E&P Net Income	2008	2009	2010
Alaska	2.3 Billion	1.5 Billion	1.7 Billion
Lower 48	2.7 Billion	-37 Million	1.0 Billion

58

Alaska Profits vs. World Profits

From Petroleum News (8/16/2009)

Alaska O&G production makes up about **12%** of ConocoPhillips' worldwide output. In the 1st quarter of this year, Alaska operations earned the company $240 million, or **29%** of its worldwide exploration and production income.

ConocoPhillips' acknowledges that **Alaska production tax credits are a significant component in the company's profit.**

In the 2nd quarter, ConocoPhillips had $725 million in E&P worldwide earnings, **more than 55% of that,** $404 million, **came from its Alaska business.**

59

Healthy Rates of Return

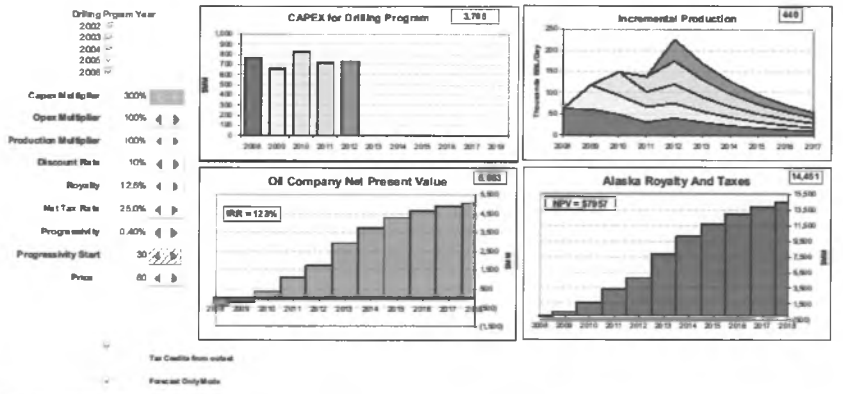
- On 3/23/11, ConocoPhillips executives said Alaska had "strong cash margins" and "very good rates of return"
- In 2007, consultants hired by the Legislature modeled the rate of return an oil company receives when investing in Prudhoe Bay.
- The following slide, developed by internationally recognized oil consultants Gaffney and Cline, estimates **returns at 123%** when oil sells at $80 a barrel.

60

Senate CS – Forecast Mode, $80 oil

- IRR = 123%, NPV10 = $5.375 billion

Modeling the Prudhoe Success contained in AOGA/BP Testimony



Gaffney, Cline & Associates

09 November 2007

Measure #8

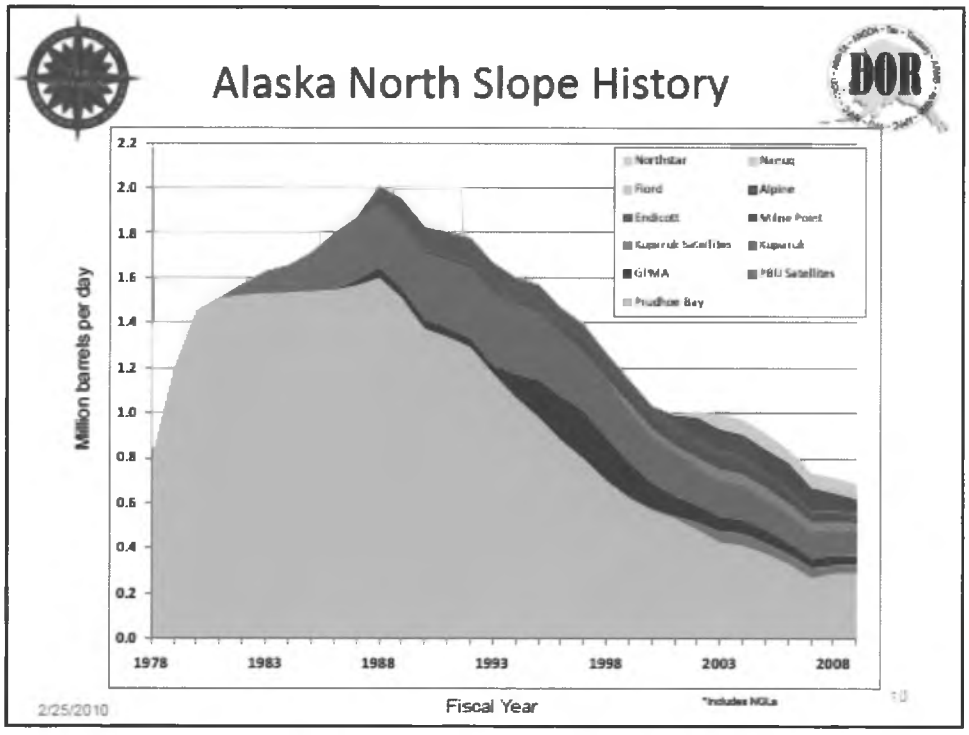
How has ACES affected oil and gas production levels?

62

Declining production

- Oil production on the North Slope has been declining steadily since the late 80s.
- It declined under ELF, when production taxes were zero on most fields, and it has continued to decline under ACES, as the following chart shows.

63



Decline, Year by Year, of North Slope Oil Production

Year	Decline	Year	Decline	Year	Decline
1989	-7%	1996	-6%	2003	-1%
1990	-5%	1997	-7%	2004	-6%
1991	1%	1998	-9%	2005	-5%
1992	-5%	1999	-11%	2006	-14%
1993	-8%	2000	-7%	**2007**	**-2%**
1994	-2%	2001	-1%	**2008**	**-5%**
1995	-5%	2002	2%	**2009**	**-5%**

Average since 1989: -5.2%

Source Data from EIA Crude Oil Production - Alaska North Slope Crude Oil Production

Decline percentage is calculated by comparing one year of production to the preceding year of production.

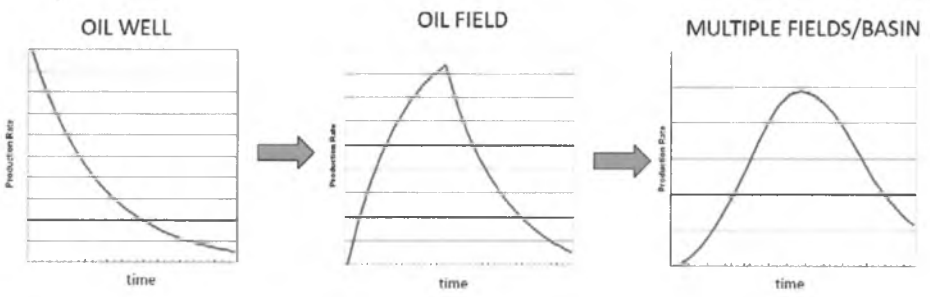
65

Decline is natural as fields mature

- **This pattern of decline is a natural feature of oil fields around the globe, as the following charts show.**
- **The Parnell Administration has calculated that the throughput decline will decrease to about 2% per year.**

66

Typical Production Profile



Production increases at first, reaches a peak, then declines. The decline rate typically levels off in later years.

The field's geology, operator's development plan, and commercial factors, all influence the shape of the curve.

2/25/2010 7

Is the Trans-Alaska Pipeline Going to Shut Down?

- BP Alaska told the SEC they expect continued production in Prudhoe Bay "until the year 2065."
- BP, Conoco & Exxon agreed that TAPS would operate through 2042 and presented evidence in a recent trial that TAPS could function down to 200,000 barrels a day.
- A judge recently determined TAPS will operate at least through 2047.

68

Closing Thoughts

- **Just last year, the Parnell Administration told the legislature that ACES does not appear to be having a negative effect on the oil and gas industry.**

69

Conclusions from the Analysis

28

In general, the information does not indicate that changes in the tax system have had a direct negative impact on industry activity in the state

In fact, the data would indicate that the investment incentive provisions of ACES are contributing to increased levels of expenditure

Alaska Department of Revenue 2/4/2010

What do others think?

- From 12/20/2009 Petroleum News:
- **"Parnell also said that he has already discussed ACES with 10 oil companies. Of those, he said, "four to five" thought the tax system was "just fine," while "two or three" thanked the state for the tax credit program, and two companies wanted to see ACES changed."**

71

Alaska Taxes: Not a Deterrent to Investment

- These informal findings are consistent with a recent global survey of oil and gas industry executives conducted by the Frasier Institute.
- **40% said Alaska's oil taxes "encourage production,"** while **another 34% say** our oil tax regime **"does not deter investment."**
- Only 9% of the 645 executives surveyed said Alaska's oil taxes are a "strong deterrent to investment" or would cause them not to invest in Alaska.

72

Conclusions

- We had a 20+ year experiment in Alaska to see if 0% taxes encouraged investment and created more Alaskan jobs.
- Under ELF, with most fields paying 0% in production taxes, jobs declined, investment declined and production declined.

73

Conclusions

- Under ACES, investment and jobs are at all-time highs, the number of companies doing business has doubled, and profits are strong.

74

1/24-1/25/12 CRIME SUMMIT (FILE 1)

<TARGET><BILL></BILL><SUBJECT>1-24-1-25-12 CRIME SUMMIT (FILE 1)</SUBJECT><COMM>SJUD27</COMM></TARGET>

2012 CRIME SUMMIT

REPORT AND RECOMMENDATIONS

2012 CRIME SUMMIT REPORT AND RECOMMENDATIONS

"I don't think we're going to arrest our way out of some of these problems"
Chief Mark Mew, Anchorage Police Department

Introduction

On January 24-25, 2012, the Senate Judiciary Committee convened a Crime Summit, bringing together the principal criminal justice agencies in the state. Leaders from each agency were asked to report on progress and challenges within their area of expertise, and to give the legislature insights into how we can help in their efforts.

This year's summit built on what was learned from a summit held in 2008, when the Judiciary Committee hosted two days of hearings which featured testimony from police, prosecutors, researchers, court system officials and many other professionals in the criminal justice system. That hearing featured Mr. Steve Aos from the Washington State Institute of Public Policy, who told the committee about the Washington legislature's efforts to implement evidence-based programs to reduce crime and to reduce the costs of imprisonment.

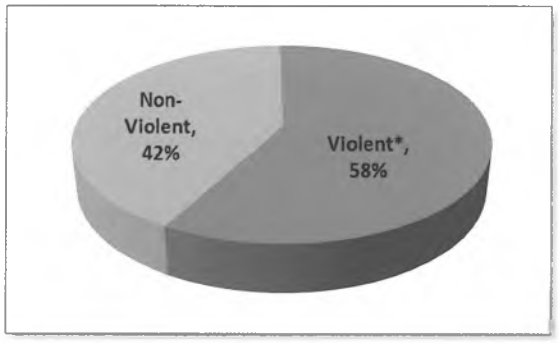
Mr. Aos's testimony led to a study conducted by Alaska's Institute of Social and Economic Research to help policy makers identify Alaska programs that work toward the same end. Since then, many efforts have been undertaken employing evidence-based models, and the legislature began to address programs and policy changes that have been shown to work to increase public safety and reduce criminal offenses.

The focus of this year's summit was on early childhood education as a way to reduce long term crime rates. The opening of the new Goose Creek Prison at a cost of $238 million and annual operating costs of $68 million illustrates the fiscal implications of not taking action.

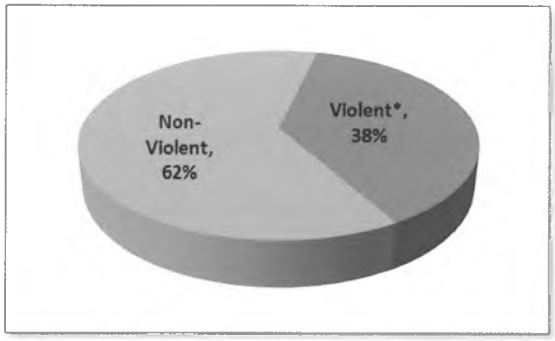
As Senate Judiciary Chairman Hollis French pointed out in his opening remarks, "I am perfectly okay with sending deserving individuals to prison for long periods of time, but we ignore these costs at our peril."

Indeed, the long term trend in Alaska is toward imprisoning more and more nonviolent offenders (see chart below).

PRISON POPULATION BY TYPE OF OFFENSE



2002



2011

The graph on the left indicates that in 2002, almost 60% of prisoners had been convicted of violent offenses, while just over 40% were nonviolent offenders; by 2011 those numbers had reversed, and now over 60% of prisoners are serving time for nonviolent offenses.

As Anchorage District Attorney Adrienne Bachman pointed out, the proportion of crimes her office sees has been relatively constant: about 40% are crimes against a person while 60% are nonviolent offenses.

The Impact of Early Childhood Programs

> "Early childhood education programs consistently increase standardized test scores, increase high school graduation rates, and they reliably decrease crime rates later in the youth's life – and that's fascinating, because that's not an intended impact of these programs but it is definitely an impact."
> Annie Pennucci, Washington State Institute for Public Policy

Guest speaker Annie Pennucci from the Washington State Institute of Public Policy discussed the long term benefits shown in multiple studies of children who attend pre-kindergarten programs.

Penucci explained that she analyzed the findings from 11 individual studies that directly measure crime outcomes and plotted the effect sizes to summarize whether there was more or less crime from the preschool students versus the non-preschool students and if so, the level of the decrease in crime. The students were followed for years (sometimes into adulthood) to see if they had been arrested or convicted of offenses. On average crime went down for low-income preschool students by about 20%, as compared to low-income

students who had not been to preschool. This held true for the students at age 16 as well as into their 30s.

Study after study shows that, as these children grow up, they are more likely to complete high school, more likely to have higher paying jobs and much less likely to end up in the criminal justice system. Pennucci reported that, although it is a front-loaded investment, early childhood education programs are shown to save the state far more money than they cost as the children move through school and into adult life. She noted that the programs have some surprising positive effects: in addition to reducing crime rates, the programs reduce costs in special education and reduce grade repetition. Moreover, the programs lead to lowered health care costs and lowered rates of child abuse and neglect.

Ms. Pennucci said that her analysis of the 11 studies that she examined led her to the conclusion that pre-kindergarten returns $3 in economic value for every $1 dollar invested. The largest economic returns to society are in lower crime rates and to the individual who attends pre-kindergarten in increased earning power.

Ms. Pennucci's report was consistent with the work done by ISER. The 2009 "Cost of Crime" report by ISER showed that Head Start programs save the state six times more money than they cost, and reduce future crime among participants by about 16 percentage points.

Crime Update

"When I was chief of police, if there was a community that was in disorder within the Anchorage area, it was because the people in that neighborhood were not committed to their neighborhood. As long as something didn't happen within their doors after they closed them, they were OK with whatever happened outside the doors."

"**Getting people involved is probably the most effective police force you can have in any community**,"

Walt Monegan, President/CEO, Alaska Native Justice Center

For the most part, police and prosecutors reported flat or declining reports of crime. A notable exception to this was in Palmer, where population growth is pushing crime rates, but where rates of assault and sexual assault seem to be higher than can be accounted for by the population growth.

Agencies are working on a number of projects that improve public safety through improved interagency communications and through proactive efforts to reduce or prevent offenses. One is the "Step Up" program, which provides full-day individualized education services for long-term suspended or expelled teens in order to keep them in school through graduation.

Another is the Municipality of Anchorage's 24/7 sobriety monitoring project, where alcohol offenders are required to take breath tests. The court system is focusing on better tracking of case delays, and on expanding its use of electronic filings to speed up the exchange of information between the prosecution and the defense.

Several projects are being piloted in communities to more closely monitor offenders released on bail. The Department of Corrections is using evidence-based models in providing substance abuse treatment and is piloting a new probation program for offenders leaving jail called PACE (Probationer Accountability with Certain Enforcement) which is initially showing very positive results.

Many agencies pointed out the continued problems of domestic violence and sexual assault. Dr. Andre Rosay from the University of Alaska's Justice Center presented data from the regional victimization surveys done with Alaska's women. These regional surveys, modeled on the National Center for Disease Control's survey, continue to document extremely high rates of violence against women throughout the state.

> "Intimate partner violence is a serious problem throughout the state in every location we've examined so far."
>
> "Unfortunately it's hard to find hope in these numbers. They clearly show that in every location we've examined so far, the rates of violence – both physical violence and sexual violence – are unacceptably high here in Alaska."
>
> Dr. Andre Rosay, Director, UAA Justice Center

The Municipality of Anchorage has been leading the way in making bail conditions electronically available to police officers in the field, thus allowing for better enforcement of court orders. The Municipality of Anchorage's Domestic Violence Prevention program has been successful at holding offenders accountable by providing compliance checks on offenders, victim safety checks, and making arrests for violations of conditions of release.

In Palmer, the Children's Place, the local child advocacy center, was cited as an important partner in helping victims of child abuse.

The special problems confronting rural communities were also discussed by presenters. The importance of Village Public Safety Officers was discussed, with participants citing the finding by the UAA Justice Center showing that having a VPSO involved resulted in reduced injuries to victims and a significantly increased likelihood of prosecution. Increasing numbers of Village Public Safety Officers in communities have helped to provide some law enforcement presence. However, many other communities in Bush Alaska still lack a VPSO, and almost all lack any consistent court presence.

A proposal for a pilot program for tribal community courts was outlined, and other efforts to provide mentoring and leadership by the Public Safety Employees Association were also discussed.

> "I'm an Aleut from Bristol Bay. When I became a trooper, there was another friend of mine – we both graduated from Mt. Edgecumbe High School in the 80's and he's a trooper. He's from Bristol Bay, he's Yupik from Ekwok. And he and I began talking about some of the challenges that were facing our communities since we've left. In my particular situation, I have a family in which over 50% of the women have been sexually assaulted. And I've seen high rates of suicide, violent crimes – I grew up around it, he grew up around it, we both saw it. We began talking about how it was we made choices not to fall into that trap and end up on a different path... how did we become troopers? And that led us to talk about what it is we're going to do from here. "
>
> Trooper Terrence Shanigan, discussing the Public Safety Employee's Association PAWS "People are Worth Saving" community mentorship program.

How the Legislature Can Help

Presenters discussed the following needs:

- **Need for more or better community-based intervention and prevention efforts**

  Pre-kindergarten and early childhood education programs are needed in most communities in Alaska. The Alaska Native Justice Center proposed pilot programs for community/tribal courts in rural communities that have no access to the court system. The "Step Up" program to graduate high-risk kids and trauma-informed care programs for children who are witnesses to family violence were recommended. Aggression Replacement Training for youth, use of Youth Courts, misdemeanor diversion programs and more aggressive use of electronic monitoring for offenders were all suggested by participants.

- **Need to address alcohol abuse, substance abuse and the ongoing levels of domestic violence and sexual assault**

  Participants spoke to the need for increased substance abuse treatment and programs like the 24/7 Sobriety monitoring project in Anchorage; dealing with over-service of alcohol at bars; and using Karluk manor and other "Housing First" initiatives to safely house homeless alcoholics. The Anchorage Domestic Violence Prevention Program (ADVPP), which monitors compliance with bail terms and other court orders, and the Court System's Fairbanks bail project were mentioned as important steps in ensuring offender accountability. Sexual assault response

teams (SART) and Child Advocacy Centers were cited as a critical piece of victim support and case-building, and several law enforcement agencies mentioned the need for more prosecutors. The need for affordable housing was important both for victims of crime and for offenders returning to society after they serve their sentences.

- **Need for faster, more integrated communication and technology systems**

  From law enforcement agencies, communications needs ranging from radio and laptop upgrades, inter-agency electronic information sharing and computer forensic capabilities were all listed as needs. The importance of immediate information delivery from the court on bail conditions, restraining orders, etc., was emphasized: projects are underway in Anchorage and Fairbanks to make more of this information electronically accessible to patrol officers. However, outside these urban areas bail conditions are not generally available to police officers. Consistent data collection and definitions, coordinated data project design and improvement, and other related issues were mentioned by participants. The Court System's MAJIC project is working to connect criminal justices agencies' data platforms. The University Justice Center is in discussions with agencies to explore an integrated justice information center.

Funds or Services Requested:

1. Anchorage Domestic Violence Prevention Project	$1,670,198
2. Anchorage SART matching funds	$350,000
3. 24/7 Sobriety Monitoring Project	$70,000
4. AWARN and Fire Dept radio upgrades	$2,300,000
5. ALEISS upgrades and funding	$126,000
6. Additional prosecutor Palmer/other communities	$150,000
7. CARE program and Child Advocacy Centers	$230,000
8. PACE and other Corrections rehab programs	$200,000
9. Tribal/community pilot project (2 years)	$460,000
10. Pre-K: voluntary pre-K for Alaska	$35,000,000
11. Court e-filing project	$1,985,000
12. Victimization Survey	$400,000

Good Morning and Welcome to the 2012 Crime Summit

Committee members present

Other legislators present --

Thank you coming. I know how busy you are. We are going to make this meaningful.

The Judiciary Committee is here to learn. We have invited you to bring us information from the entire spectrum of the criminal justice system. Prosecutors, police and troopers, the court system, defense attorneys, victim's advocates will all testify. We are dependent on you to give us the unvarnished truth.

My thinking around this summit has been shaped by two graphs:

The first was brought to my attention during the Smart Justice Summit that Senator Ellis put on this fall.

Here's the graph:

In ten years we have significantly changed the population of our prisons. We are incarcerating more and more nonviolent offenders.

Here's why it's an issue: Goose Creek prison, which will begin opening this year, cost $238.5 million to construct.

That's four brand new high schools we did not build.

It will cost $50.5 million to run every year. That's nearly another brand new high school per year we could build, except that the money is going to run a prison.

And as sad as it seems, that's the good news. The bad news is that DOC will be overcapacity by July 2015.

We can't just keep building prisons. I'm still a prosecuting attorney at heart. I'm OK with sending deserving individuals to prison for long periods of time. But we ignore these costs are our peril.

So how do we bend the curve? How do we push that overcapacity date further into the future?

We had a crime summit in 2008. We heard from Steve Aos from the Washington Institute of Public Policy on evidence based rehabilitation systems. His work prompted the Legislature to appropriate $50,000 to have ISER do a similar study looking at programs that are offered here in Alaska.

Here's what they told us:

Graph two: ISER slide

What does this suggest? Education may pay the biggest dividends.

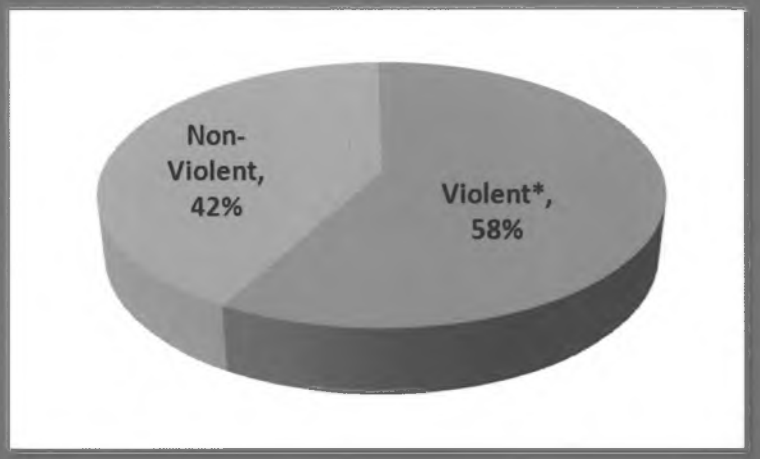
We will see. Our featured presenter will give us more information. Annie Pennuci is here from the Washington Inst. Of Public Policy to tell us about her analytic work in this area.

I'll close by saying this is collaborative work. No single one of us can solve the problem. One collaborator, one ally, is the Governor. He has raised public awareness on the subject through his choose respect campaign. He has also put money in the budget for more VPSOs. I appreciate that.

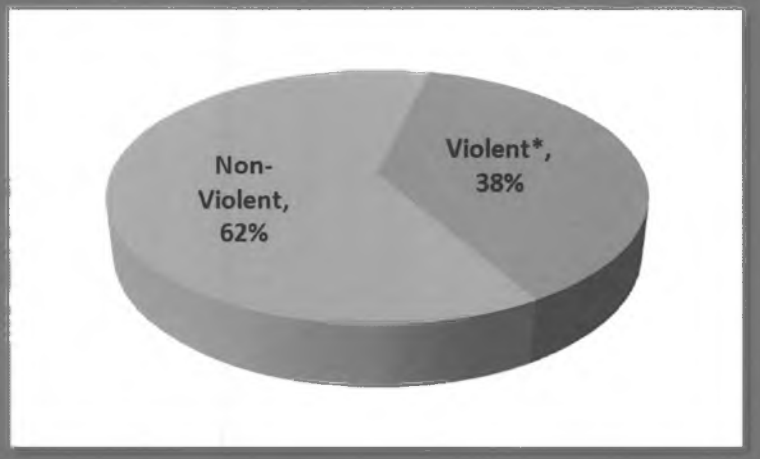
There's a lot of experience and talent in this room. Share your talent and insights with us.

Prison Population & Crime Type

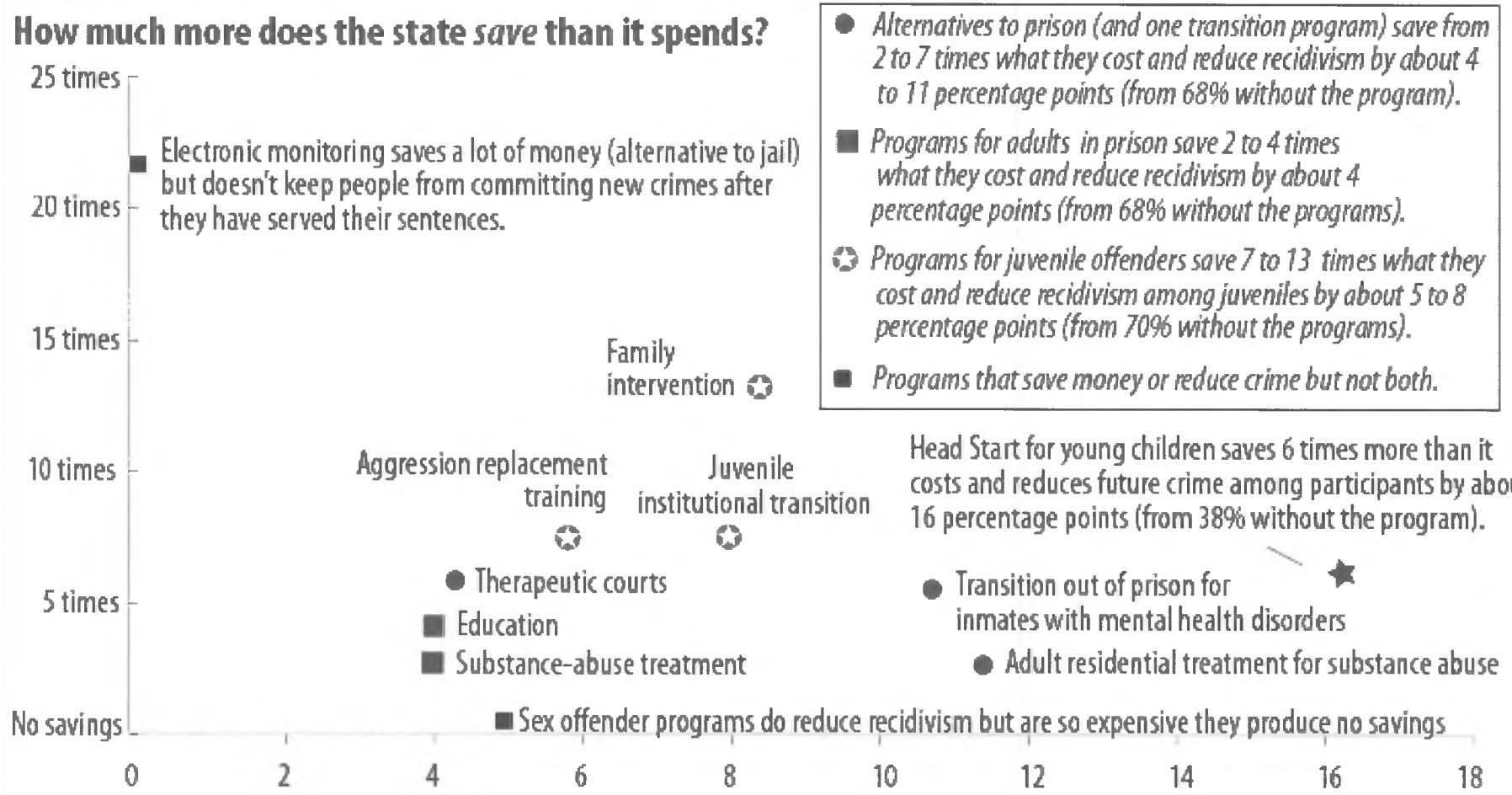
December 31, 2002



December 31, 2011



How Effective Are Various Programs at Saving Money and Reducing Crime?



Source: Stephanie Martin and Steve Colt, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?* Institute of Social and Economic Research, University of Alaska Anchorage, January 2009

2012 Crime Summit

Speaker Bios

Day 1

1) Annie Pennucci, Senior Research Associate,
Washington State Institute for Public Policy

More Education, Less Crime: Research Evidence and Policy Implications

- Has conducted research at the Washington State Institute for Public Policy for 10 years
- Specializes in education topics spanning early childhood, K12, and higher education
- Has experience as a staffer in the Washington State House of Representatives
- Has experience as an evaluator for a nonprofit that provides support services to recently released criminal offenders

BREAK for lunch (1 hour)

2) Karen Loeffler, United States Attorney, District of Alaska

- Appointed U.S. Attorney in October of 2009
- Moved to Anchorage in 1985, worked briefly as an Assistant Attorney General in the Oil and Gas Section of the Attorney General's Office
- Accepted a position as an Assistant U.S. Attorney, a job she has held for 21 years until her appointment as U.S. Attorney
- As an Assistant U.S. Attorney, she has tried a wide variety of cases, including fish and wildlife prosecutions, drugs, homicide, bank robbery, and violations of the marine resource laws, but has specialized, throughout her career, in complex white collar prosecutions

3) a. Rick Svobodny, Acting Attorney General, Department of Law

- Permanent position is Deputy Attorney General for the Criminal Division of the Department of Law
- Has been a prosecutor for the State for the vast majority of his career
- This year marks 35 years of service with the Department of Law

3) b. Adrienne Bachman, District Attorney, 3rd Judicial District (Anchorage), Department of Law

- 25 year prosecutor and has been District Attorney for 4 ½ years
- Tried over 130 cases in 13 communities in our state
- Prosecuted in southeast, the west coast, in the Pribliofs and all over southcentral Alaska

4) Cynthia Franklin, Municipal Criminal Prosecutor, Municipality of Anchorage

- Prosecuted for 17 years in Texas before moving to Alaska in 2007
- Has been with the Anchorage Municipal Prosecutor's Office since early 2008
- Hired as a Domestic Violence prosecutor and became Municipal Prosecutor in December of 2010
- Office prosecutes misdemeanor offenses occurring in the City of Anchorage

5) a. Commissioner Joseph Masters, Department of Public Safety

- Raised in Unalaska
- Worked in law enforcement for more than 24 years, began as a VPSO in Unalakleet and later became a police officer
- Majority of his career in law enforcement was within the ranks of the Alaska State Troopers beginning in 1986
- In 1999 he transferred to the Division of Fish and Wildlife Protection, rose to rank of Captain
- Promoted to deputy director of the Alaska State Troopers in June of 2003 and held this position until his retirement in May of 2005

5) b. Colonel Keith Mallard, Director, Alaska State Troopers

- Director since December 2010
- 15-year veteran of the Troopers
- He's a graduate of both the FBI National Academy and the DEA Drug Unit Commanders' Academy
- Before joining the troopers in 1996, he was a municipal police officer and a deputy sheriff

BREAK (15 minutes)

6) Chief Greg Browning, Alaska Association of Chiefs of Police

- Moved to Juneau, Alaska in 2000 after a 21-year career with the Amarillo, Texas Police Department
- He was the JPD Assistant Chief from 2000 to May 2006 when he was promoted to Chief
- Currently serving as treasurer of the Alaska Association of Chiefs of Police

7) Chief Mark Mew, Anchorage Police Department

- Appointed January 25, 2010
- Retired from the Anchorage Police Department in 2003, as Deputy Chief, after 20 years of service
- While at the APD, worked in patrol, detectives, SWAT, and at various administrative posts
- Through much of his career he was responsible for implementing new police communications and technology systems

8) Sergeant Lance Ketterling, Palmer Police Department

- Currently serving as a Detective Sergeant
- Worked in one capacity or another at PPD for the last 15 years
- Investigates major crime cases

9) Dennis Johnson, Program Director, Alaska Pretrial Services

- Lifelong Alaskan, raised in Fairbanks
- Left Alaska in 1988 and worked in California as a Deputy Sheriff Paramedic in both Los Angeles and Kern Counties
- Returned to Alaska in 1995 and worked as a Paramedic with Division of Emergency Services in the villages of Allakaket and Huges Alaska on the Koyokuk River Flood with FEMA
- Was involved in an off duty shooting in Anchorage in 2010 where his cousin was shot and killed and the shooter attempted to shoot and kill him while he was out on bail for another crime and not supervised
- Has since devoted his energy and efforts into developing a Pre-Trial program in Alaska that provides both public and victim safety in metropolitan and rural Alaska while a defendant is out on bail.

2012 Crime Summit

Speaker Bios

Day 2

1) **Erin Patterson-Sexson, Lead Advocate Direct Services Coordinator, Standing Together Against Rape (STAR)**

- Supervises direct service on-call advocates
- Supervises crisis line volunteer coordinator
- Provides extensive training in Anchorage and across the state

2) **A. Nancy Meade, General Counsel, Alaska Court System**

- Formerly the Court Rules Attorney, a position she held from 2004 through 2011
- Has lived and practiced law in Alaska since 1987 (mostly in the Attorney General's Office doing Oil and Gas tax litigation and Environmental law), when she came here to clerk for Supreme Court Justice Ed Burke

B. Diane Schenker, Project Coordinator, Fairbanks Electronic Bail Conditions Project

- Nancy will introduce

C. Helen Sharratt, Integrated Justice Coordinator

- Nancy will introduce

3) **A. Quinlan Steiner, Director, Public Defender Agency**

- Volunteered at the Public Defender Agency prior to law school as an investigator and during law school as a legal extern
- Started as an Assistant Public Defender in 1998
- Worked in the trial unit and the appellate unit until 2005, when he was appointed to the position of Public Defender.
- **B. Richard Allen, Director, Office of Public Advocacy**
- Born and raised in Fairbanks, AK
- Spent a year as a public defender on the Nez Perce Indian Reservation in Idaho
- Then worked in a general law practice in Houston,TX for several years before moving back to Alaska in late 2003
- Was employed as an assistant district attorney in the Palmer office for over seven years before becoming statewide director of the Office of Public Advocacy in April 2011

4) **Walt Monegan, President/CEO, Alaska Native Justice Center**

- Worked 33 years for the Anchorage Police Department
- Retired as the Chief of Police
- Followed by his appointment as Alaska's Commissioner of the Department of Public Safety
- Sat on ANJC Board of Directors for 10 years prior to being President/CEO

5) **Jake Metcalfe, Executive Director, Public Safety Employees Association (PSEA)**

- Fourth generation Alaskan born in Juneau
- Beginning in 1990, launched a legal career focused on public safety and union labor law
- Began his legal career as a state prosecutor in Bethel
- Served as DA for Bethel region
- In 1997, worked as associate general counsel for IBEW then as general counsel in 2004
- With PSEA since 2008

6) **A. Commissioner Joe Schmidt, Department of Corrections**

- Began his career with DOC as a correctional officer in 1998
- After a few years and several prisons, promoted to Sergeant, then Assistant Superintendent and then Superintendent of the Point Mackenzie Correctional Farm
- Named commissioner in January of 2007
- Previously led the effort to unify the Cook Inlet Pretrial Facility and the Anchorage Jail into the Anchorage Correctional Complex.

B. Deputy Commissioner Carmen Gutierrez, Department of Corrections

- Spent 24 years practicing law in Alaska as a criminal defense attorney, working in the state and federal defender's office and in her own private practice
- Has been the Department of Corrections for the last two and a half years
- Responsible for prisoner rehabilitative programs and successful prisoner reentry

C. Deputy Commissioner Sam Edwards, Department of Corrections

- Began his career with DOC in 1980 as a Correctional Officer I at the Anchorage Jail
- Retired in 2003 as Deputy Director of Institutions
- In 2006 he was asked to return as Deputy Commissioner for Operations and Population Management, where his focus continues to be on the optimum and efficient delivery of services and to effecting a seamless transition from institutions to community supervision
- Was one of the original six Correctional Officers assigned to the Alaska State Troopers SERT team and from 2003-06 he served as security captain at the Port of Anchorage

7) **Dr. Andre Rosay, Director, University of Alaska Anchorage Justice Center**

- Has tremendous expertise in both quantitative and community-based participatory research to impact policy and practice
- Works very closely with community partners throughout urban and rural Alaska to study violence against women
- Recipient of multiple state and federal grant awards
- Has published numerous reports on sexual assault, domestic violence, and stalking
- Has been recognized by public and private entities for his contributions to the justice and research community

8) **Jeff Jessee, CEO, Alaska Mental Health Trust Authority**

- Has served as the CEO of The Trust since its creation 16 years ago
- Represents The Trust as a member of the state's Criminal Justice Working Group
- Active on several non-profit and philanthropic boards

9) **Janet McCabe, Chair, Partners for Progress**

- Co-founder
- In 1999, Janet and Anchorage Judge, Jim Wanamaker coordinated to create the Anchorage Wellness Court, Alaska's first "drug court"
- Many years of work experience with state and federal agencies leading interagency, intergovernmental projects

10) **A. Barbara Henjum**, Director, Division of Juvenile Justice

-

B. Dean Williams, Superintendent, McLaughlin Youth Center

-

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

Crime Summit Agenda

January 24th and 25th, 2012
Butrovich Room, State Capitol

Tuesday, January 24th

10:30 AM	introduction and brief overview
10:45	**Annie Pennucci**, Senior Research Associate Washington State Institute for Public Policy ***More Education, Less Crime: Research Evidence and Policy Implications***
12:00 PM	Lunch break (on your own)
1:00	**Karen Loeffler**, United States Attorney, District of Alaska
1:45	**Rick Svobodny**, Acting Attorney General, Department of Law **Adrienne Bachman**, District Attorney, 3rd Judicial District, Department of Law
2:30	**Cynthia Franklin**, Municipal Criminal Prosecutor, Municipality of Anchorage
2:45	**Commissioner Joseph Masters**, Department of Public Safety **Colonel Keith Mallard**, Director, Alaska State Troopers
3:15	Short break
3:30	**Chief Greg Browning**, Alaska Association of Chiefs of Police
3:45	**Chief Mark Mew**, Anchorage Police Department
4:15	**Sergeant Lance Ketterling**, Palmer Police Department
4:30	**Dennis Johnson**, Program Director, Alaska Pretrial Services

Tuesday, January 24th (continued)

5:00 Adjourn

5:30 - 7:30 Reception at Silverbow Inn, downtown Juneau - *hors d'oeuvres and a no-host bar*

Wednesday, January 25th

8:30 AM	**Erin Patterson-Sexson**, Lead Advocate Direct Services Coordinator Standing Together Against Rape (STAR)
9:00	**Nancy Meade**, General Counsel, Alaska Court System **Diane Schenker**, Project Coordinator, Fairbanks Electronic Bail Conditions Project **Helen Sharratt**, Integrated Justice Coordinator
9:45	**Quinlan Steiner**, Director, Public Defender Agency **Richard Allen**, Director, Office of Public Advocacy
10:15	**Walt Monegan**, President/CEO, Alaska Native Justice Center
10:45	**Jake Metcalfe**, Executive Director, Public Safety Employees Association (PSEA)
11:00	Short break
11:15	**Commissioner Joe Schmidt**, Department of Corrections **Deputy Commissioner Carmen Gutierrez**, Department of Corrections **Deputy Commissioner Sam Edwards**, Department of Corrections
12:00 PM	Working lunch (provided) **Dr. Andre Rosay**, Director, University of Alaska Anchorage Justice Center
1:15	**Jeff Jessee**, CEO, Alaska Mental Health Trust Authority
1:45	**Janet McCabe**, Chair, Partners for Progress
2:00	**Barbara Henjum**, Director, Division of Juvenile Justice **Dean Williams**, Superintendent, McLaughlin Youth Center
2:30	Closing comments
3:00	Adjourn

More Education, Less Crime:

Research Evidence and Policy Implications

Alaska State Legislature
Senate Judiciary Committee
Crime Summit
January 24, 2012

Annie Pennucci
Senior Research Associate
Washington State Institute for Public Policy
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www.wsipp.wa.gov

Washington State Institute for Public Policy

- **Non-partisan, created by 1983 Legislature**
- **General purpose legislative research unit**
- **Projects assigned by legislative bills**

- **Legislative & executive Board**
  - **Equal party representation**
  - **Includes representatives from state universities**

Washington State Institute for Public Policy

Recent study direction from the WA Legislature

- What works?
- What are the costs & benefits of policies to improve these outcomes?

- ✓ *Crime*
- ✓ *Education, Early Ed.*
- ✓ *Child Abuse & Neglect*
- ✓ *Substance Abuse*
- ✓ *Mental Health*
- ✓ *Developmental Disabilities*
- ✓ *Teen Births*
- ✓ *Employment*
- ✓ *Public Assistance*
- ✓ *Public Health*
- ✓ *Housing*

Reporting to the Legislature

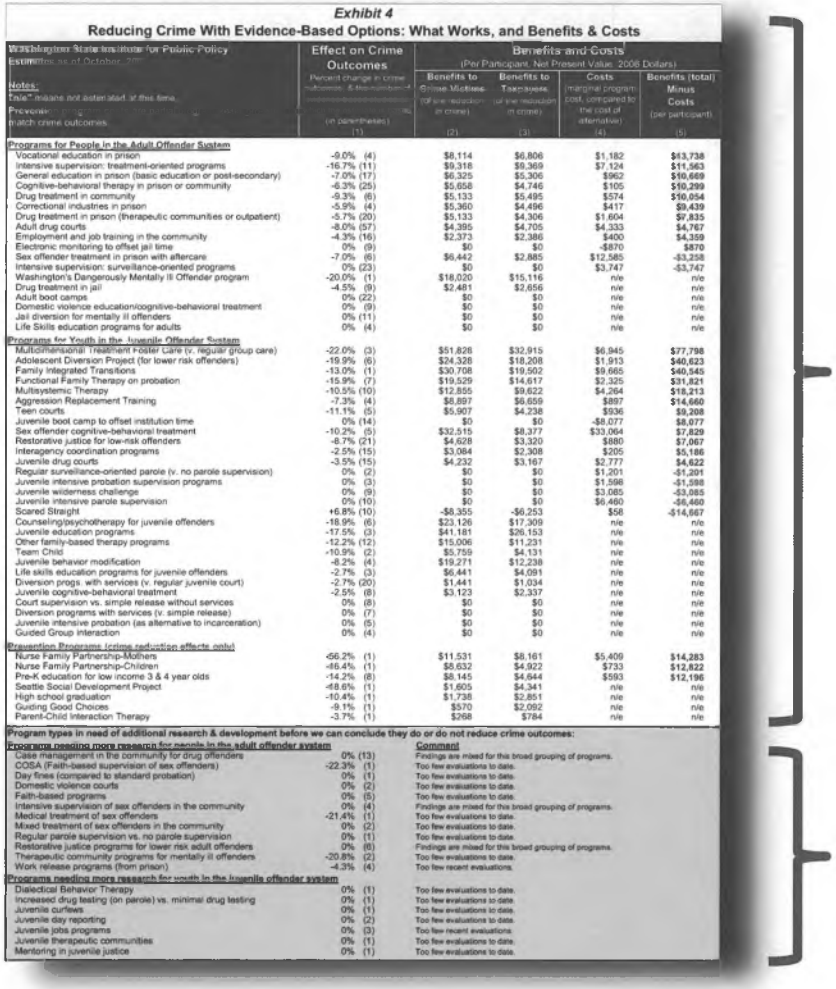


Exhibit 4

Reducing Crime With Evidence-Based Options: What Works, and Benefits & Costs

Washington State Institute for Public Policy
Estimates as of October 2011

Notes:
Table* indicates not asterisked at this time.
Prevents:
(match crime outcomes)

	Effect on Crime Outcomes: Percent change in crime outcomes, & the number of studies (in parentheses) (1)	Benefits and Costs (Per Participant, Net Present Value, 2008 Dollars): Benefits to Crime Victims (if one reduction in crime) (2)	Benefits to Taxpayers (if one reduction in crime) (3)	Costs (marginal program cost, compared to the cost of alternative) (4)	Benefits (total) Minus Costs (per participant) (5)
Programs for People in the Adult Offender System					
Vocational education in prison	-9.0% (4)	$8,114	$6,806	$1,182	$13,738
Intensive supervision: treatment-oriented programs	-16.7% (11)	$9,318	$9,369	$7,124	$11,563
General education in prison (basic education or post-secondary)	-7.0% (17)	$6,325	$5,306	$962	$10,669
Cognitive-behavioral therapy in prison or community	-6.3% (25)	$5,658	$4,746	$105	$10,299
Drug treatment in community	-9.3% (6)	$5,133	$5,495	$574	$10,054
Correctional industries in prison	-5.9% (4)	$5,360	$4,496	$417	$9,439
Drug treatment in prison (therapeutic communities or outpatient)	-5.7% (20)	$5,133	$4,306	$1,604	$7,835
Adult drug courts	-8.0% (57)	$4,395	$4,705	$4,333	$4,767
Employment and job training in the community	-4.3% (16)	$2,373	$2,386	$400	$4,359
Electronic monitoring to offset jail time	0% (9)	$0	$0	-$870	$870
Sex offender treatment in prison with aftercare	-7.0% (6)	$6,442	$2,885	$12,585	-$3,258
Intensive supervision: surveillance-oriented programs	0% (23)	$0	$0	$3,747	-$3,747
Washington's Dangerously Mentally Ill Offender program	-20.0% (1)	$18,020	$15,116	n/e	n/e
Drug treatment in jail	-4.5% (9)	$2,481	$2,656	n/e	n/e
Adult boot camps	0% (22)	$0	$0	n/e	n/e
Domestic violence education/cognitive-behavioral treatment	0% (9)	$0	$0	n/e	n/e
Jail diversion for mentally ill offenders	0% (11)	$0	$0	n/e	n/e
Life Skills education programs for adults	0% (4)	$0	$0	n/e	n/e
Programs for Youth in the Juvenile Offender System					
Multidimensional Treatment Foster Care (v. regular group care)	-22.0% (3)	$51,828	$32,915	$6,945	$77,798
Adolescent Diversion Project (for lower risk offenders)	-19.9% (6)	$24,328	$18,208	$1,913	$40,623
Family Integrated Transitions	-13.0% (1)	$30,708	$19,502	$9,665	$40,545
Functional Family Therapy on probation	-15.9% (7)	$19,529	$14,617	$2,325	$31,821
Multisystemic Therapy	-10.5% (10)	$12,855	$9,622	$4,264	$18,213
Aggression Replacement Training	-7.3% (4)	$8,897	$6,659	$897	$14,660
Teen courts	-11.1% (5)	$5,907	$4,238	$936	$9,208
Juvenile boot camp to offset institution time	0% (14)	$0	$0	-$8,077	$8,077
Sex offender cognitive-behavioral treatment	-10.2% (5)	$32,515	$8,377	$33,064	$7,829
Restorative justice for low-risk offenders	-8.7% (21)	$4,628	$3,320	$880	$7,067
Interagency coordination programs	-2.5% (15)	$3,084	$2,308	$205	$5,186
Juvenile drug courts	-3.5% (15)	$4,232	$3,167	$2,777	$4,622
Regular surveillance-oriented parole (v. no parole supervision)	0% (2)	$0	$0	$1,201	-$1,201
Juvenile intensive probation supervision programs	0% (3)	$0	$0	$1,598	-$1,598
Juvenile wilderness challenge	0% (9)	$0	$0	$3,085	-$3,085
Juvenile intensive parole supervision	0% (10)	$0	$0	$6,460	-$6,460
Scared Straight	+6.8% (10)	-$8,355	-$6,253	$58	-$14,667
Counseling/psychotherapy for juvenile offenders	-18.9% (6)	$23,126	$17,309	n/e	n/e
Juvenile education programs	-17.5% (3)	$41,181	$26,153	n/e	n/e
Other family-based therapy programs	-12.2% (12)	$15,006	$11,231	n/e	n/e
Team Child	-10.9% (2)	$5,759	$4,131	n/e	n/e
Juvenile behavior modification	-8.2% (4)	$19,271	$12,238	n/e	n/e
Life skills education programs for juvenile offenders	-2.7% (3)	$6,441	$4,091	n/e	n/e
Diversion progs. with services (v. regular juvenile court)	-2.7% (20)	$1,441	$1,034	n/e	n/e
Juvenile cognitive-behavioral treatment	-2.5% (8)	$3,123	$2,337	n/e	n/e
Court supervision vs. simple release without services	0% (8)	$0	$0	n/e	n/e
Diversion programs with services (v. simple release)	0% (7)	$0	$0	n/e	n/e
Juvenile intensive probation (as alternative to incarceration)	0% (5)	$0	$0	n/e	n/e
Guided Group Interaction	0% (4)	$0	$0	n/e	n/e
Prevention Programs (crime reduction effects only)					
Nurse Family Partnership-Mothers	-56.2% (1)	$11,531	$8,161	$5,409	$14,283
Nurse Family Partnership-Children	-16.4% (1)	$8,632	$4,922	$733	$12,822
Pre-K education for low income 3 & 4 year olds	-14.2% (8)	$8,145	$4,644	$593	$12,196
Seattle Social Development Project	-18.6% (1)	$1,605	$4,341	n/e	n/e
High school graduation	-10.4% (1)	$1,738	$2,851	n/e	n/e
Guiding Good Choices	-9.1% (1)	$570	$2,092	n/e	n/e
Parent-Child Interaction Therapy	-3.7% (1)	$268	$784	n/e	n/e

Program types in need of additional research & development before we can conclude they do or do not reduce crime outcomes:

Programs needing more research for people in the adult offender system		Comment
Case management in the community for drug offenders	0% (13)	Findings are mixed for this broad grouping of programs.
COSA (Faith-based supervision of sex offenders)	-22.3% (1)	Too few evaluations to date.
Day fines (compared to standard probation)	0% (1)	Too few evaluations to date.
Domestic violence courts	0% (2)	Too few evaluations to date.
Faith-based programs	0% (5)	Too few evaluations to date.
Intensive supervision of sex offenders in the community	0% (4)	Findings are mixed for this broad grouping of programs.
Medical treatment of sex offenders	-21.4% (1)	Too few evaluations to date.
Mixed treatment of sex offenders in the community	0% (2)	Too few evaluations to date.
Regular parole supervision vs. no parole supervision	0% (1)	Too few evaluations to date.
Restorative justice programs for lower risk adult offenders	0% (6)	Findings are mixed for this broad grouping of programs.
Therapeutic community programs for mentally ill offenders	-20.8% (2)	Too few evaluations to date.
Work release programs (from prison)	-4.3% (4)	Too few recent evaluations.
Programs needing more research for youth in the juvenile offender system		
Dialectical Behavior Therapy	0% (1)	Too few evaluations to date.
Increased drug testing (on parole) vs. minimal drug testing	0% (1)	Too few evaluations to date.
Juvenile curfews	0% (1)	Too few evaluations to date.
Juvenile day reporting	0% (2)	Too few evaluations to date.
Juvenile jobs programs	0% (3)	Too few recent evaluations.
Juvenile therapeutic communities	0% (1)	Too few evaluations to date.
Mentoring in juvenile justice	0% (1)	Too few evaluations to date.

A "Consumer Reports" List:

What works?

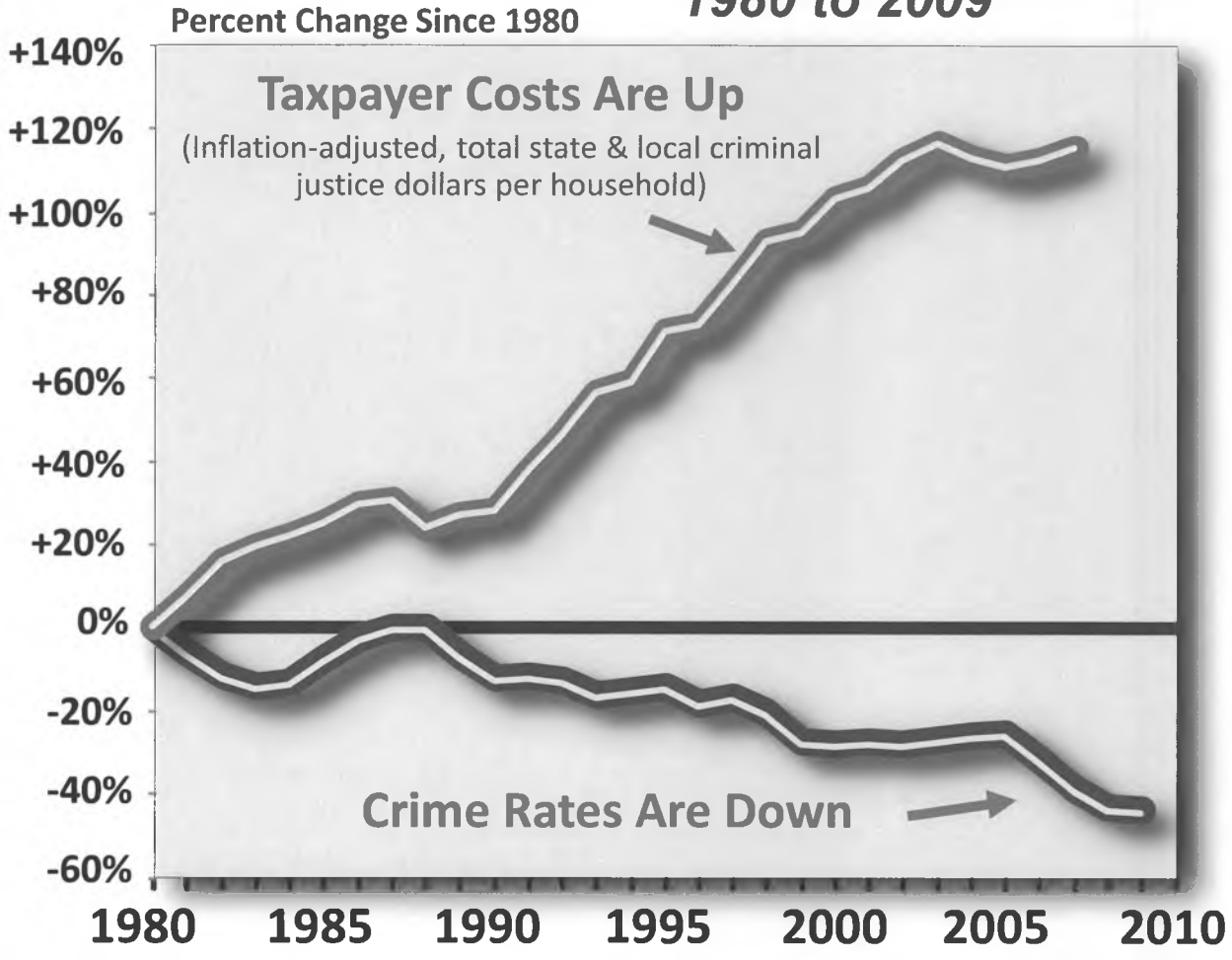
What doesn't?

What can give Washington taxpayers a good return on their money?

Given the current level of rigorous research, what don't we know?

Crime: The Big Picture

Keeping Track of Crime Rates & Taxpayer Costs in Washington: 1980 to 2009



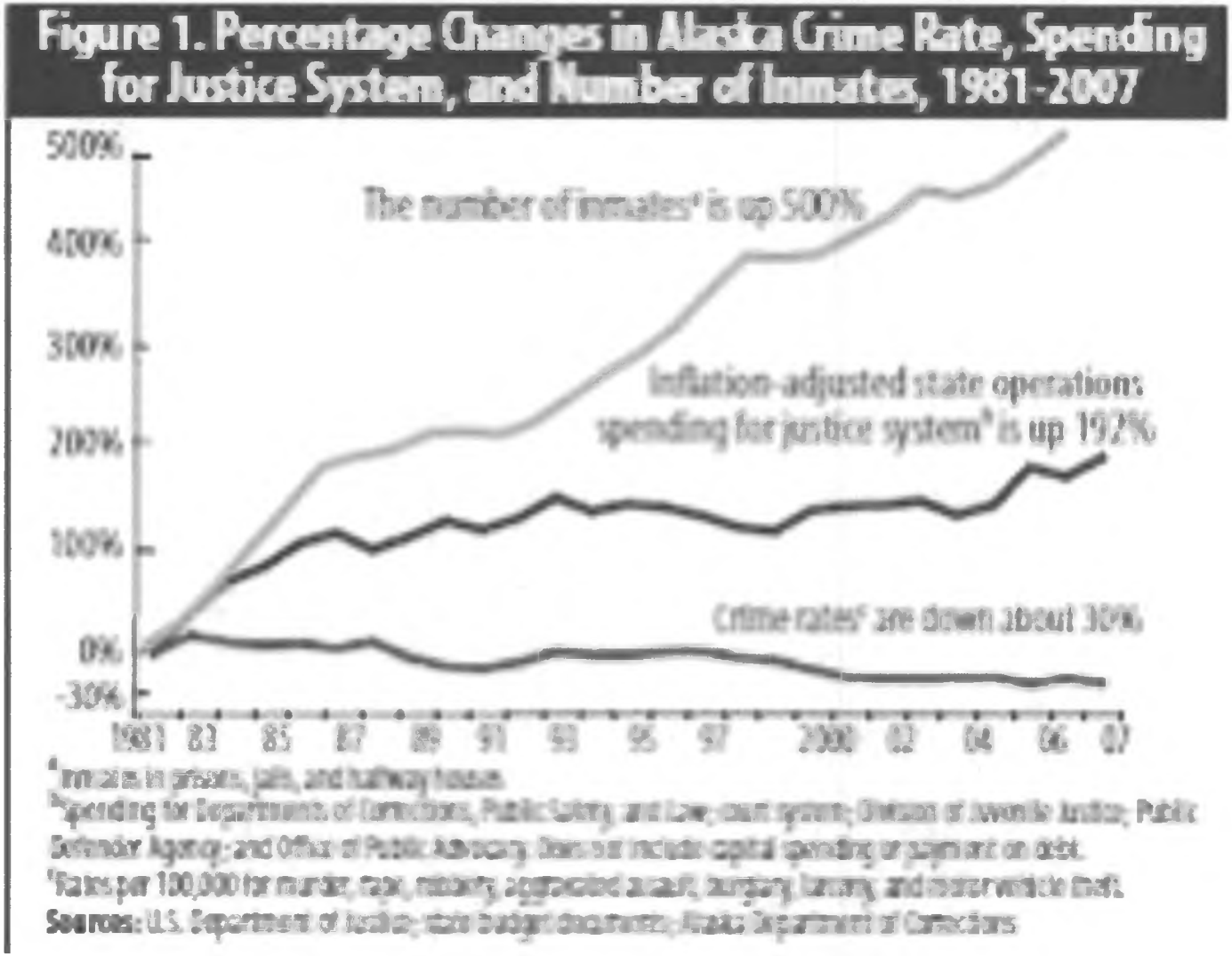
In 1980, taxpayers spent $575 per household on the criminal justice system in WA.

Today they spend $1,250 per year.

A 117% increase.

In 2009, crime rates were 43% lower than they were in 1980.

Source: Washington State Institute for Public Policy. Data are for Washington State. Monetary values in 2008 dollars. Crime rates cover major felony crimes as reported to police.



From: Martin, S. & Colt, S. (2009). *The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?* Institute of Social and Economic Research, University of Alaska Anchorage, R.S. No. 71.

Are There Evidence-Based Policy Options That Improve Public Outcomes and Save Money?

Our 3-Step Research Approach

1. **What works (to improve outcomes); what doesn't?**

   We analyze all, rigorous evaluations of real world ways to improve the key public outcomes.

2. **What are the economics?**

   We compute benefits and costs to the people of Washington using a consistent approach.

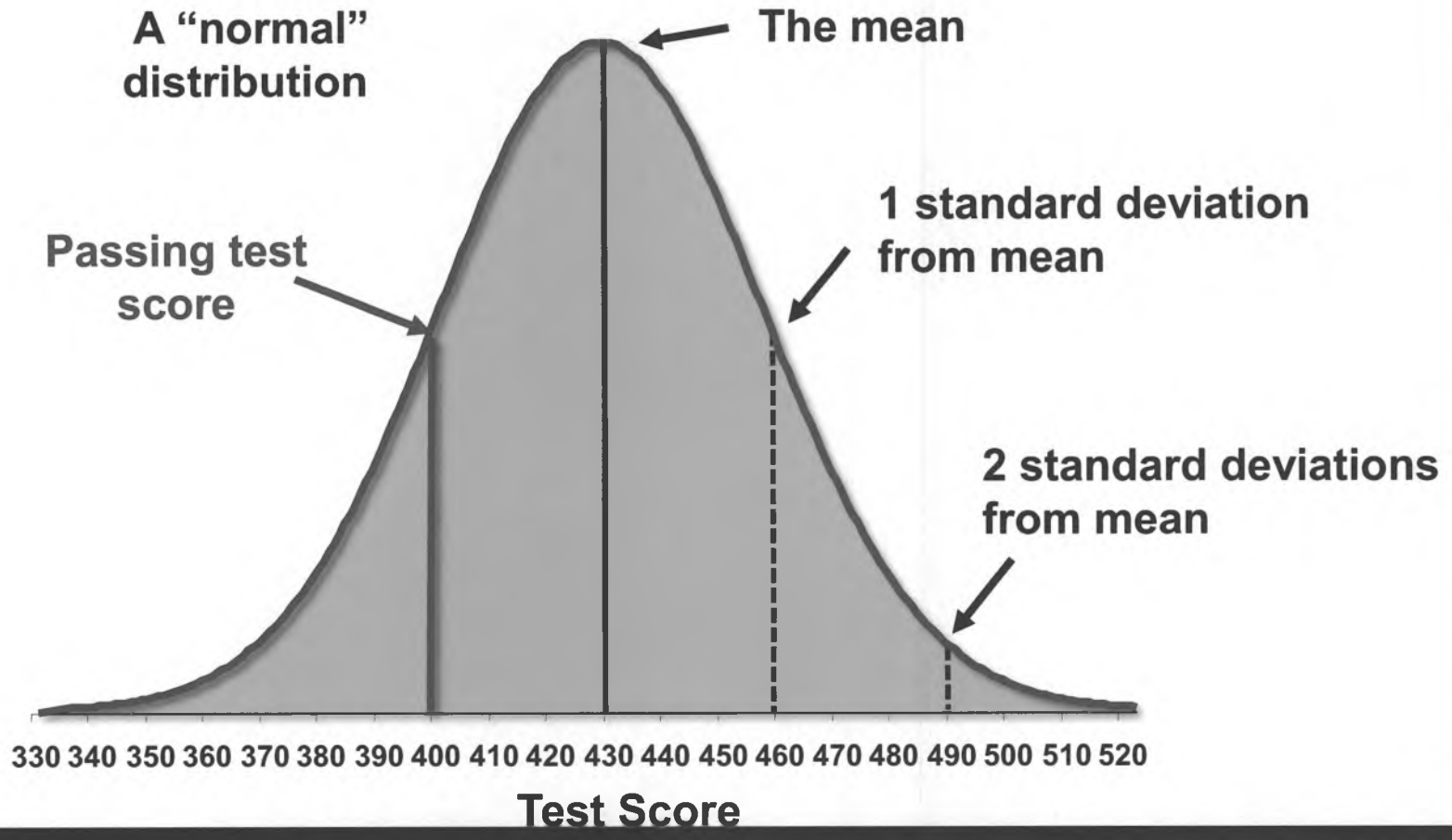
3. **What is the risk of success/failure?**

How Do We Determine What Works?

1. **We gather all the studies we can locate on a topic**
2. **We apply "standards of evidence" to identify the high quality studies**
3. **We analyze all of the higher quality studies to estimate an average effect**

Average Effect = Effect Sizes

- ✓ **Standard deviation = average distance of values from the mean.**
- ✓ **Effect sizes = impacts expressed in magnitude of standard deviations.**



What are the Long-Term Economics?

- **What is the magnitude and timing for each measured outcome (effect size)?**
- **Does the measured outcome have a causal link to another, unmeasured outcome?**
- **What are the long-term impacts on:**
  1. **The participant**
     - ✓ Increased education
     - ✓ Reduced abuse/neglect
  2. **The taxpayer**
     - ✓ Avoided incarceration costs
     - ✓ Avoided child welfare system costs
  3. **Other people in society**
     - ✓ Reduced victimization

Road Map: Overview of WSIPP Benefit-Cost Model

1. Compute Effect Sizes (from 2 literatures)

Program Evaluations: What Works?

Method: Meta-analytic reviews

Example: Does Early Childhood Education reduce crime?

ES & SE

Linkages Between Two Outcomes

Method: Meta-analytic reviews

Example: Does more high school graduation cause reduced crime rates?

ES & SE

2. Compute Unit Changes (from "Base" Info)

Example:

Obtain base crime probability for this population

Compute unit change in crime probability:

ECE on crime: (crimeΔ)

ECE on HSGrad: = ECEΔ X HSGradΔ

HSGrad on Crime: (CrimeΔ)

Compute unit change in Crimeprobability: (via Dcox and RR)

Obtain base HSGrad probability for pop.

3. Apply Monetary Valuation (to Unit Changes)

Direct Monetization of Benefits, Example:

Effect of crime unit change on:

1. Crime victim costs
2. Criminal justice system costs

PV $

Indirect Monetization Example:

Effect of change in HSGrad probability:

1. Lifetime labor market earnings
2. Taxes paid

PV $

4. Compute Benefit-Cost Statistics

Additional Information

1. Cost of program
2. Discount rates
3. Dead-weight costs
4. Tax rates
5. Inflation index

Convert all nominal dollars to base year.

Arrange cash flows from investment year.

Compute:

1. Net Present Value,
2. Benefit-Cost Ratio
3. Internal Rate of Return

Perform Monte Carlo Simulation:

1. Vary all inputs randomly, run the model many times
2. Compute risk: the odds that an investment will <u>not</u> break-even.

NPV $ or IRR

An Example of Prevention: Early Childhood Education (ECE) For Low-income 3 & 4 Year-Olds

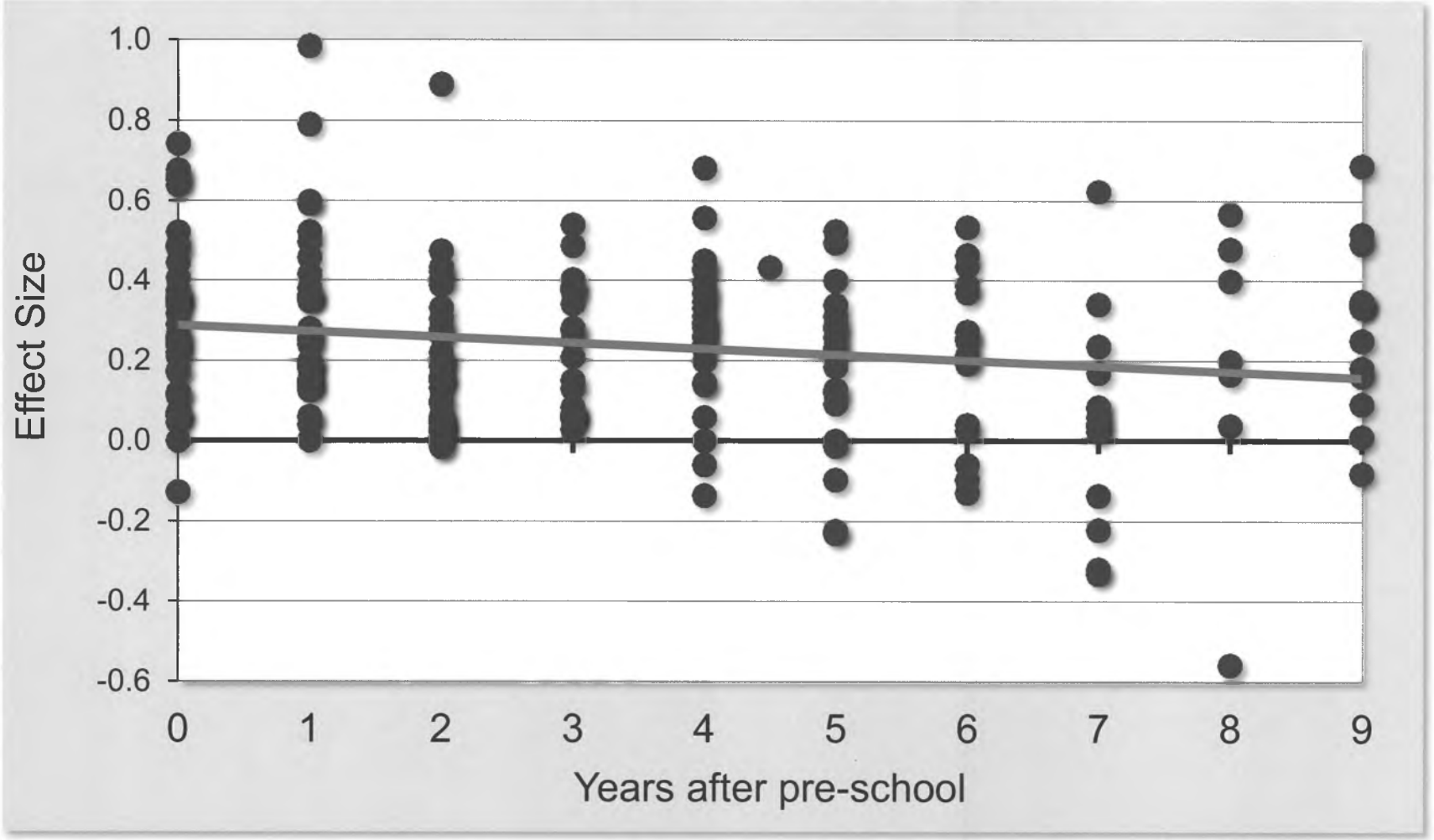
- **66 studies included in the meta-analysis**
- **Population: low-income 3 & 4 year-olds**
- **Range of programs: federal Head Start, state pre-school programs, Perry Preschool, Abecedarian, Chicago Parent Child Centers**
- **Comparison: in program vs. no program**
- **Follow-up period of students: immediately after program to age 40**

An Example of Prevention: ECE For Low-income 3 & 4 Year-Olds

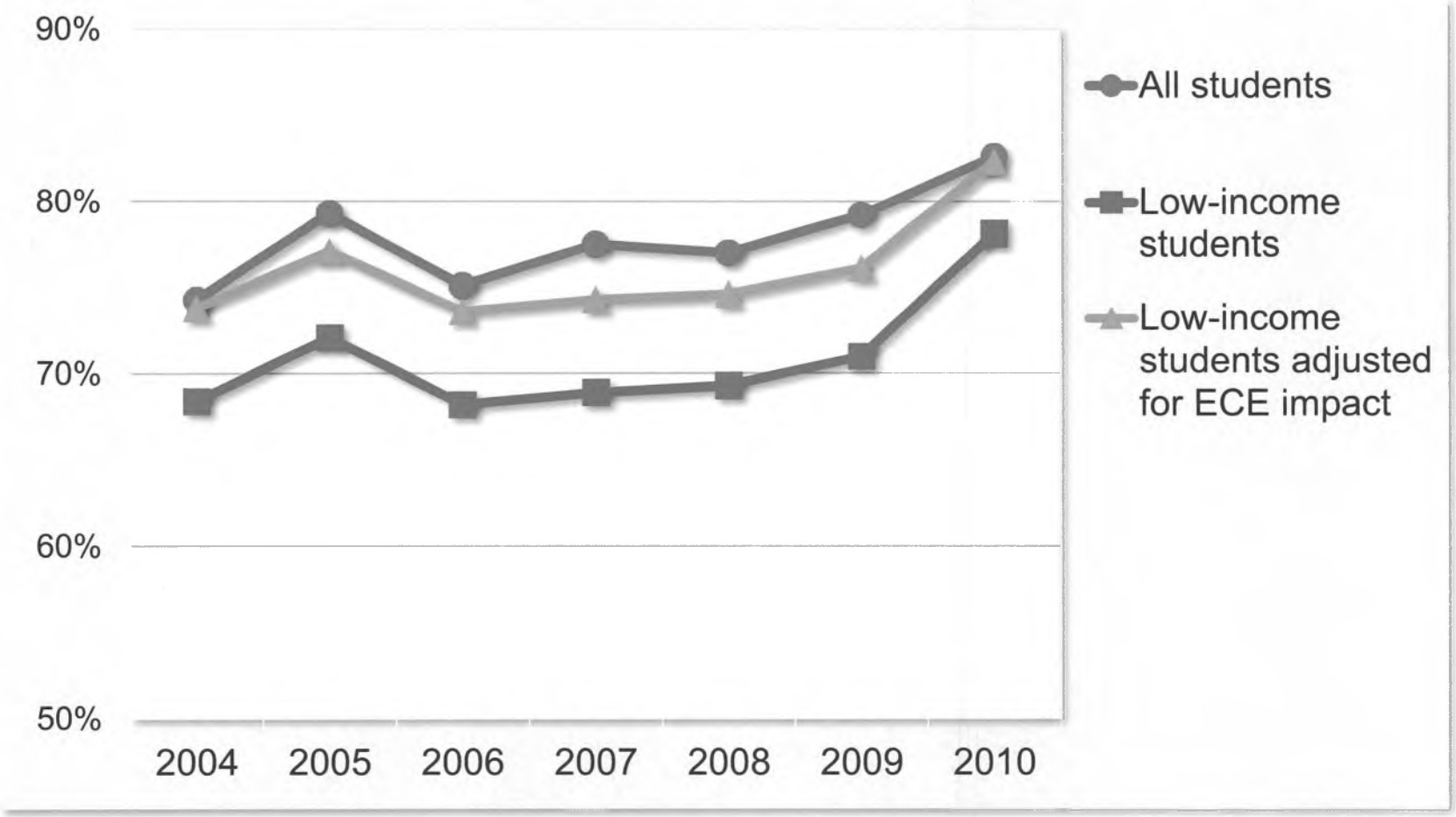
Does Early Childhood Education for 3 & 4 Year-old Low-income Children Affect These Outcomes?	Statistically Significant Impacts
Standardized Test Scores	Increase
High School Graduation	Increase
Crime Rates Later in the Youth's Life	Decrease
K-12 Special Education Placement	Decrease
K-12 Grade Repetition	Decrease
Child Abuse and Neglect	Decrease
Out-of-home Placement	Decrease

Also measured but insufficient data to draw conclusions:
use of public assistance, teen births, college attendance, employment rates

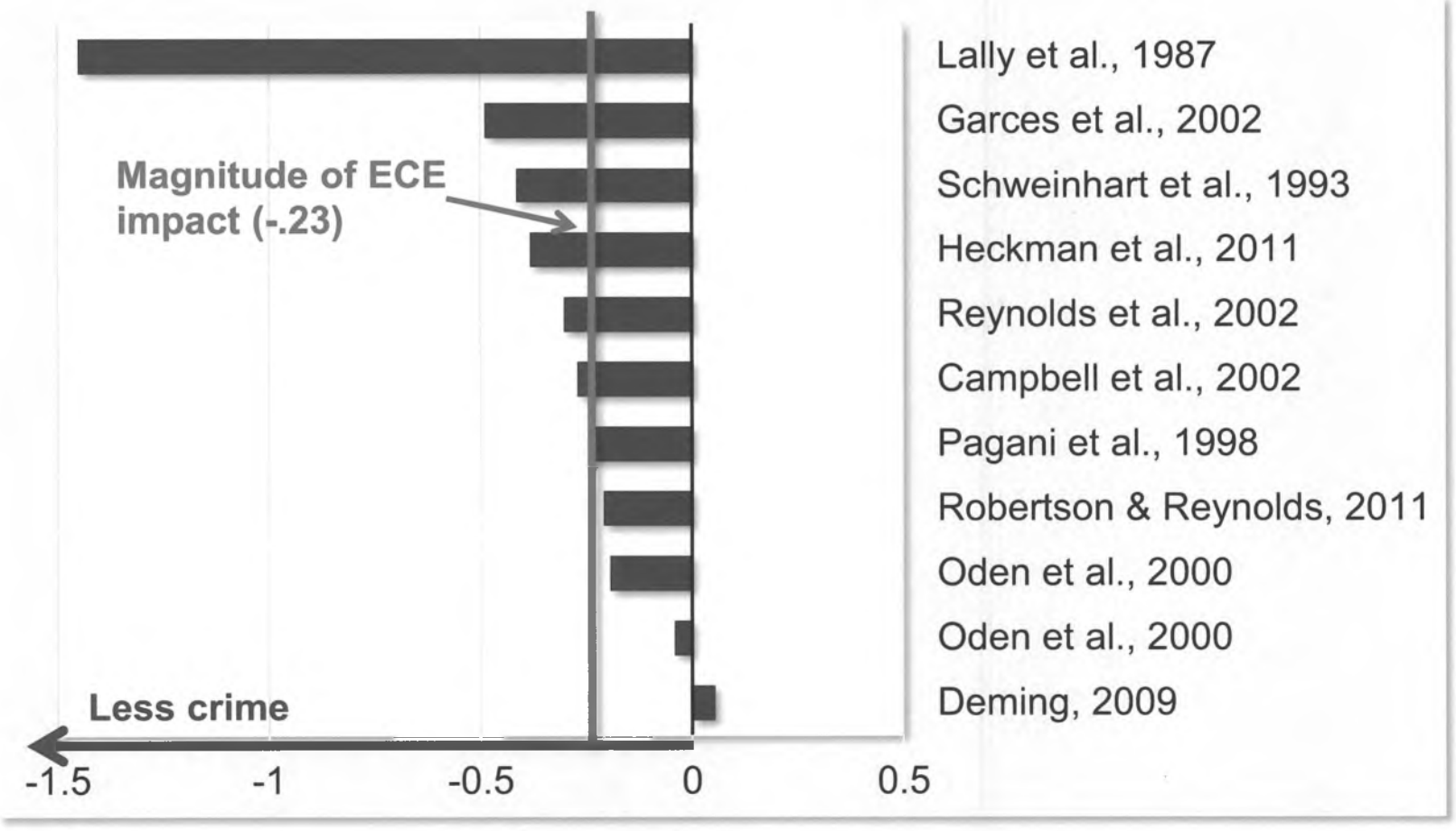
ECE for Low-income 3 & 4 Year-olds: Test Score Impacts and "Fadeout"



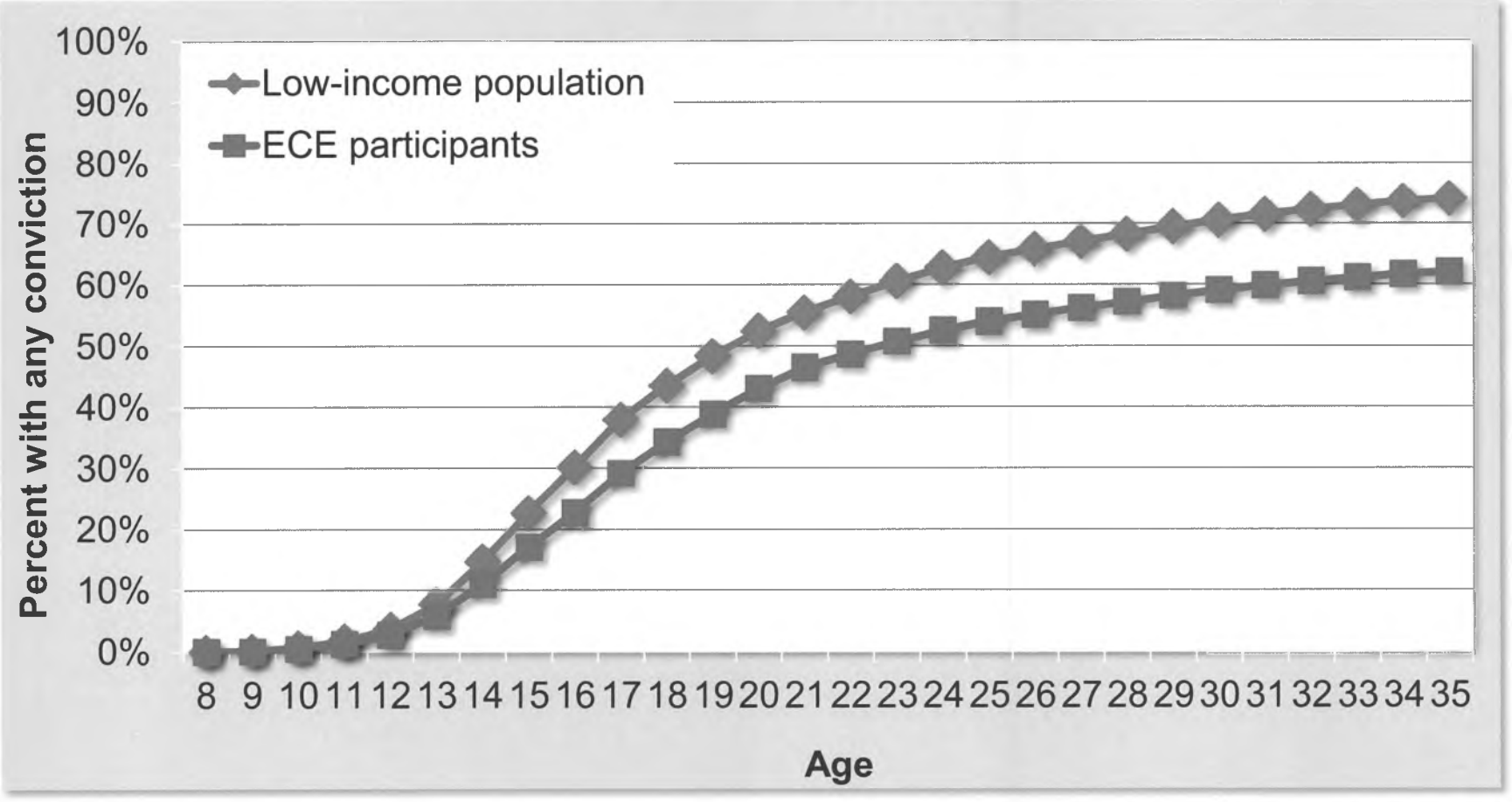
ECE for Low-income 3 & 4 Year-olds: Washington State High School Graduation Rates



ECE for Low-income 3 & 4 Year-olds: Crime Impacts



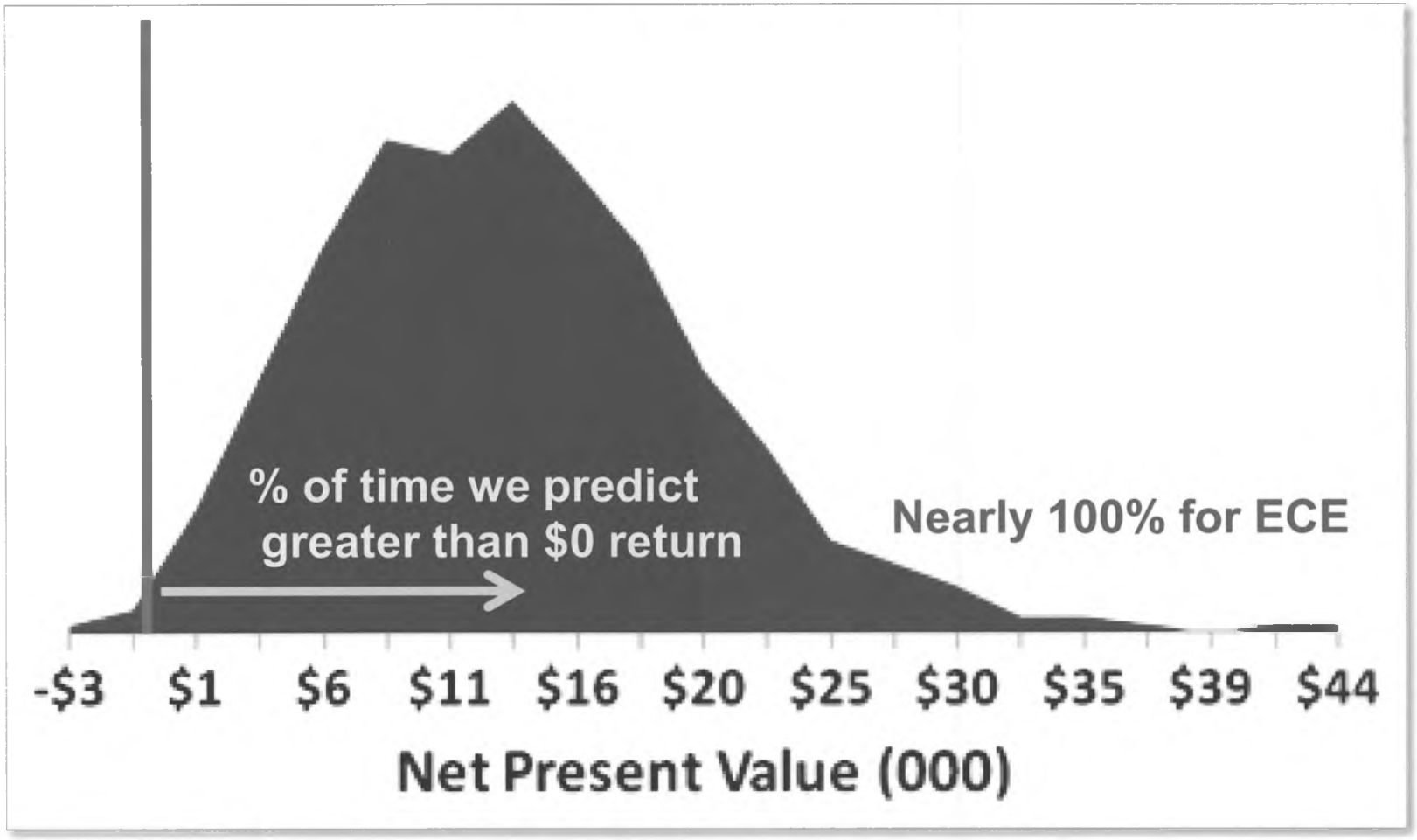
ECE for Low-income 3 & 4 Year-olds: Expected Crime Rates



ECE for Low-Income 3 & 4 Year-Olds: Return on Investment

Benefits Per Individual		**Main Source of Benefits**
Reduced crime	$6,066	**Lower CJ / victim costs**
Educational gains	$9,887	**Increased earnings**
Special ed reduction	$1,098	**Lower K-12 costs**
Grade repetition reduction	$310	**Lower K-12 costs**
Less child abuse & neglect	$637	**Lower CW / victim costs**
Fewer out-of-home placements	$379	**Lower CW / victim costs**
Lower health care system costs	$662	**Lower Medicaid enroll.**
Total Benefits Per Individual	**$21,667**	
Cost Per Individual	**$7,295**	
Benefits Per Dollar of Cost	**$3.01**	**(= 6% ROI)**

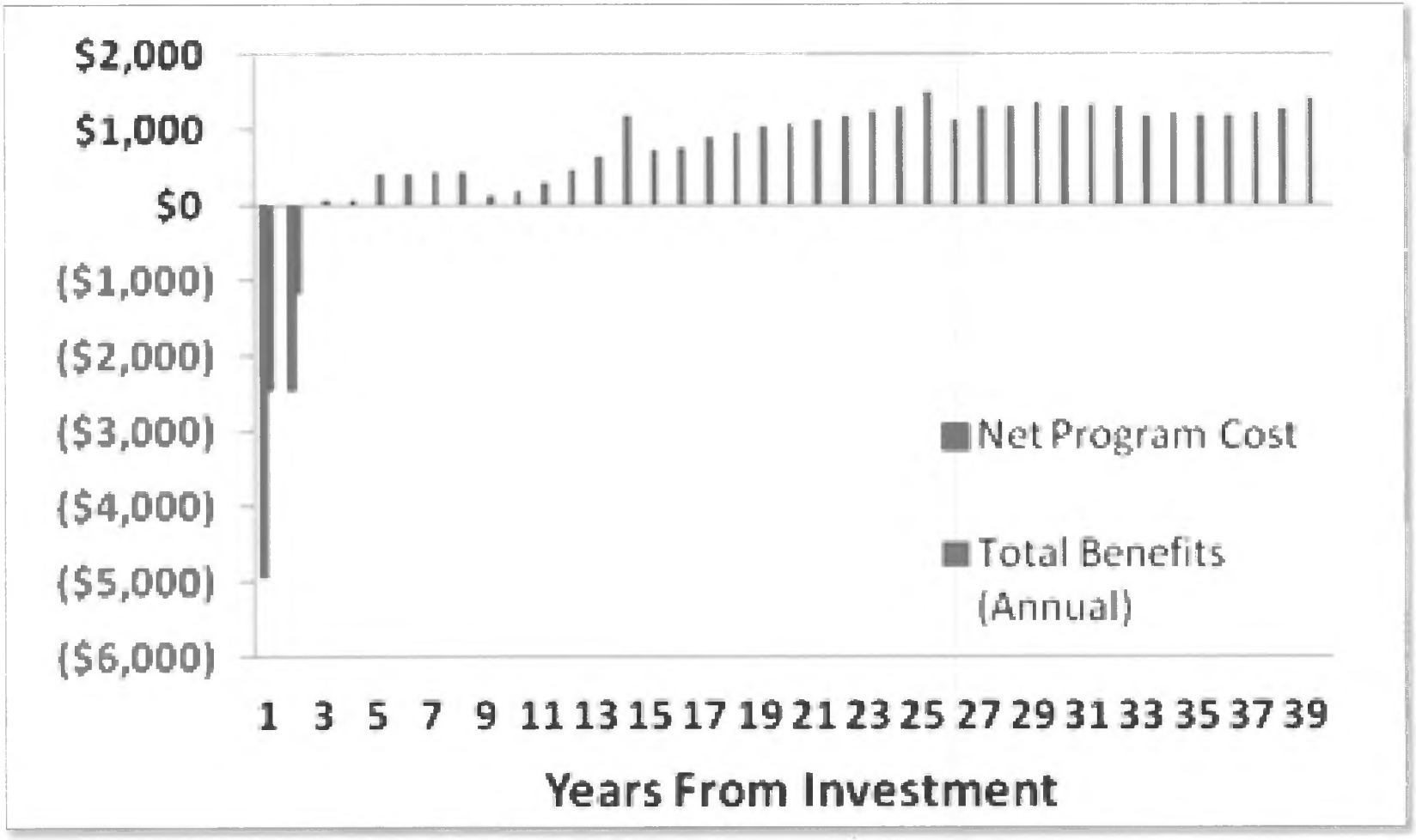
ECE for Low-Income 3 & 4 Year-olds: Investment Risk



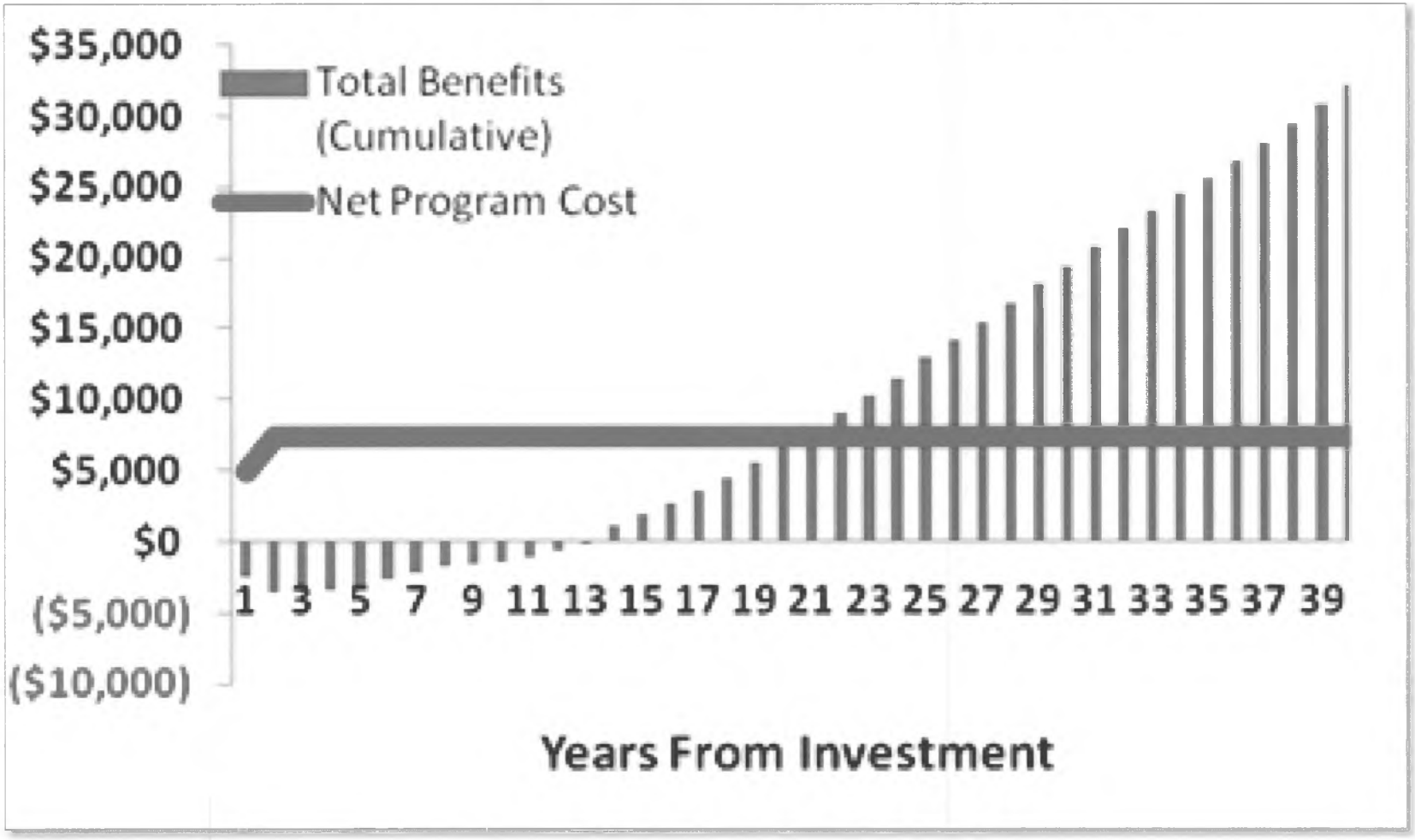
ECE for Low-Income 3 & 4 Year-olds: Estimates of Benefits

Benefit	To participant	To taxpayers	To others	Other indirect	Total
Crime	$0	$1,352	$4,031	$683	**$6,066**
Earnings via hsgrad	$1,431	$527	$0	$265	**$2,223**
Earnings via test scores	$6,353	$2,342	$0	$1,182	**$9,887**
Health care costs via hsgrad	-$136	$1,059	-$792	$532	**$662**
Special education	$0	$730	$0	$368	**$1,098**
Grade repetition	$0	$206	$0	$103	**$310**
Child abuse & negl.	$854	$131	$0	$66	**$1,051**
Out-of-home plcmt.	$0	$251	$0	$128	**$379**

ECE for Low-Income 3 & 4 Year-olds: Investment Returns, Annual



ECE for Low-Income 3 & 4 Year-olds: Investment Returns, Cumulative



ECE for Low-Income 3 & 4 Year-olds: Summary

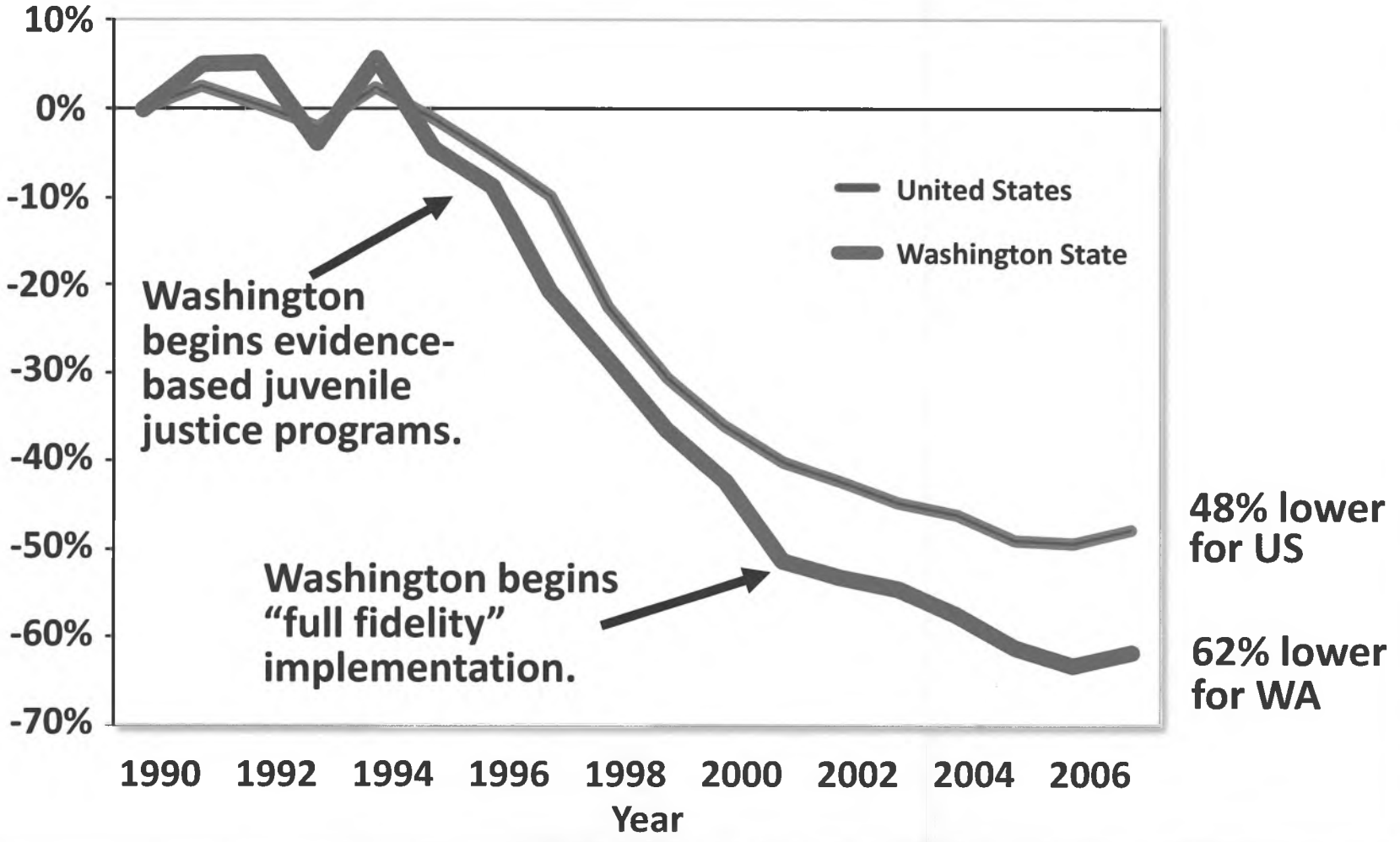
- **The evidence: ECE improves outcomes across multiple dimensions (education, crime, child welfare, health care).**
  - Crime rates among participants are reduced by 20 percent;
  - Earlier educational interventions (preschool vs. high school) have stronger impact on crime.
- **The economics: ECE pays off ($3 per $1 investment).**
- **The risk = low. ECE nearly always breaks even.**

Some Major Washington Legislative Actions

- ✓ **Began funding several evidence-based juvenile justice programs in late 1990s and early 2000s.**
- ✓ **2002 Legislature cut prison sentences (for drug offenders) and diverted some of the fiscal savings to drug courts (from the WSIPP list).**
- ✓ **2007 Legislature funded a portfolio of evidence-based criminal justice programs in adult and juvenile corrections, and prevention.**
- ✓ **2006-present: Early childhood education passes the economic test and the legislature has taken steps to include it as part of Washington's basic education program.**

Keeping Track of Results: Juvenile Arrest Rates

The change since 1990 in the United States and in Washington (WA) State



Three Implementation Issues

- ✓ **Formal Assessment Process (Tools)**
  to align participants with the right programs,
  and to focus resources on higher-risk populations

- ✓ **State-Funded Quality/Fidelity System**
  to assure better adherence to the:
  — assessment system, and
  — the intervention program models

- ✓ **Funding Formulas with the Right Incentives**
  to encourage interest, adherence, and innovations
  in evidence-based programs

Early Childhood Education in Washington State: Recent Developments

- **Department of Early Learning (created 2006)**
- **State-funded voluntary ECE: full phase-in by 2018**
- **WaKIDS: pilot kindergarten assessment**
- **2011 Race to the Top $60 million grant to:**
  - Implement Quality Rating and Improvement System
  - Expand WaKIDS
  - Provide professional development incentives
  - Strengthen data system

Questions?

UNITED STATES ATTORNEYS OFFICE DISTRICT OF ALASKA

Karen L. Loeffler

United States Attorney

DISTRICT OF ALASKA

- 24 Assistant U.S. Attorneys (20 criminal/4 civil)
- Criminal and Civil Cases
- 3 Offices
- Approximately 3 Criminal Special Assistant U.S. Attorneys – I full time

OUTLINE

- USAO's role in Alaska Law Enforcement
- Federal Law Enforcement Agencies
- Federal Crime Priorities
- Joint Task Forces and Cooperative Efforts
- Public/Private Partnerships and how they leverage limited resources
- Examples and Recent successes
- Differences State and Federal
- Challenges

USAO's ROLE

- Federal Crimes
- Anti-terrorism
- Cybercrime
- Immigration
- Identity Theft
- Program Fraud/financial crimes/tax cases
- OCDEFT
- Interstate investigations (Lacey Act)
- Misc Other Statutes

COOPERATIVE EFFORTS

- Project Safe Childhood
  - Child Pornography
  - Interstate Enticement

  ICAC – Alaska's Internet Crimes Against Children Task Force

  Sex Trafficking

Cooperative Efforts

- Rural Alaska Violence
- Alaska's Federal Rural Alaska Prosecutor
- 11 Indictments – firearm crimes
- No Indian Country/ TLOA DV Provisions do not operate in Alaska
- Violence Against Women Act – Issues
- Alaska Rural Justice Law Enforcement Commission

NARCOTICS/SUBSTANCE ABUSE

- OCDEFT – USAO Mission
- Key Federal Tools – GJ/Interstate Connections/ penalties
- Safe Street Task Force/Partnership with MOA
  - – 203 convictions/gang and violence connections

  Trends

  More sophistication

NARCOTICS SUBSTANCE ABUSE

- Juneau Office – September 2009
- Biggest trend is abuse of prescription drugs
- Effort to dismantle organization and take the money
- Southeast Safe Streets Task Force

FORFEITURE

- Feds Give State and Local Law Enforcement Money!
- Proceeds and Facilities of Crime
- 2011 Numbers
  - Over $11 million in judicial forfeitures
  - $29 million in civil collections

Sharing with State and Local Law Enforcement is generally approximately 80%

JOINT TASK FORCES CON'T

- Environmental Crimes
- Fish and Wildlife Crimes
- Financial Crimes

FINANCIAL CRIMES

- National Identity Theft Working Group
- Alaska Financial Crimes Task Force
- Trends – Elder Victimization
- Business Frauds/Embezzelments

PUBLIC PRIVATE PARTNERSHIPS

- Narcotics/Substance Abuse
- Fraud
- Violence

CHALLENGES TO LAW ENFORCEMENT

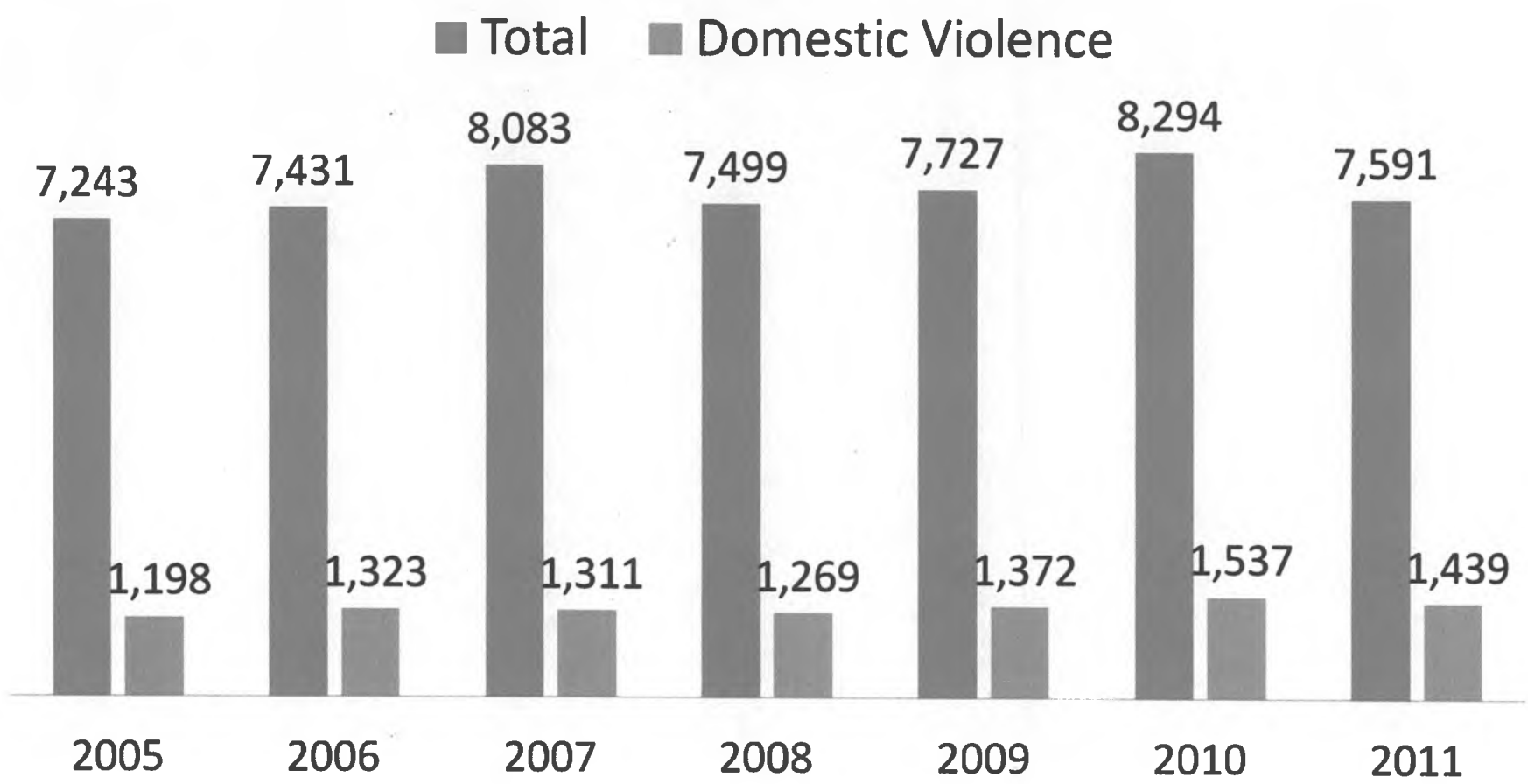
- Keeping up with electronics
- Ease of Access becomes Ease of Infiltration

21st Century Prosecution

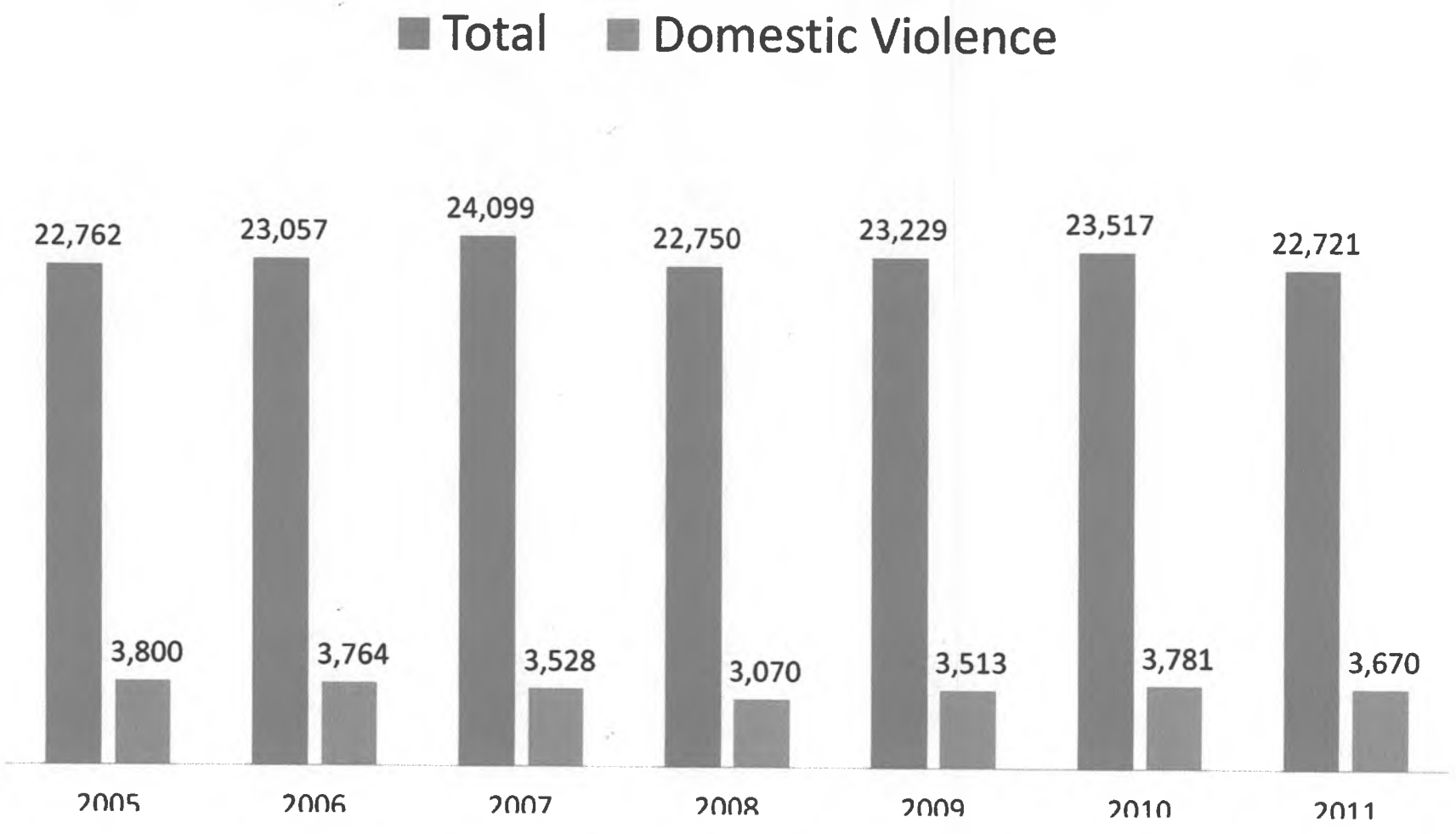
Richard Svobodny
Acting Attorney General

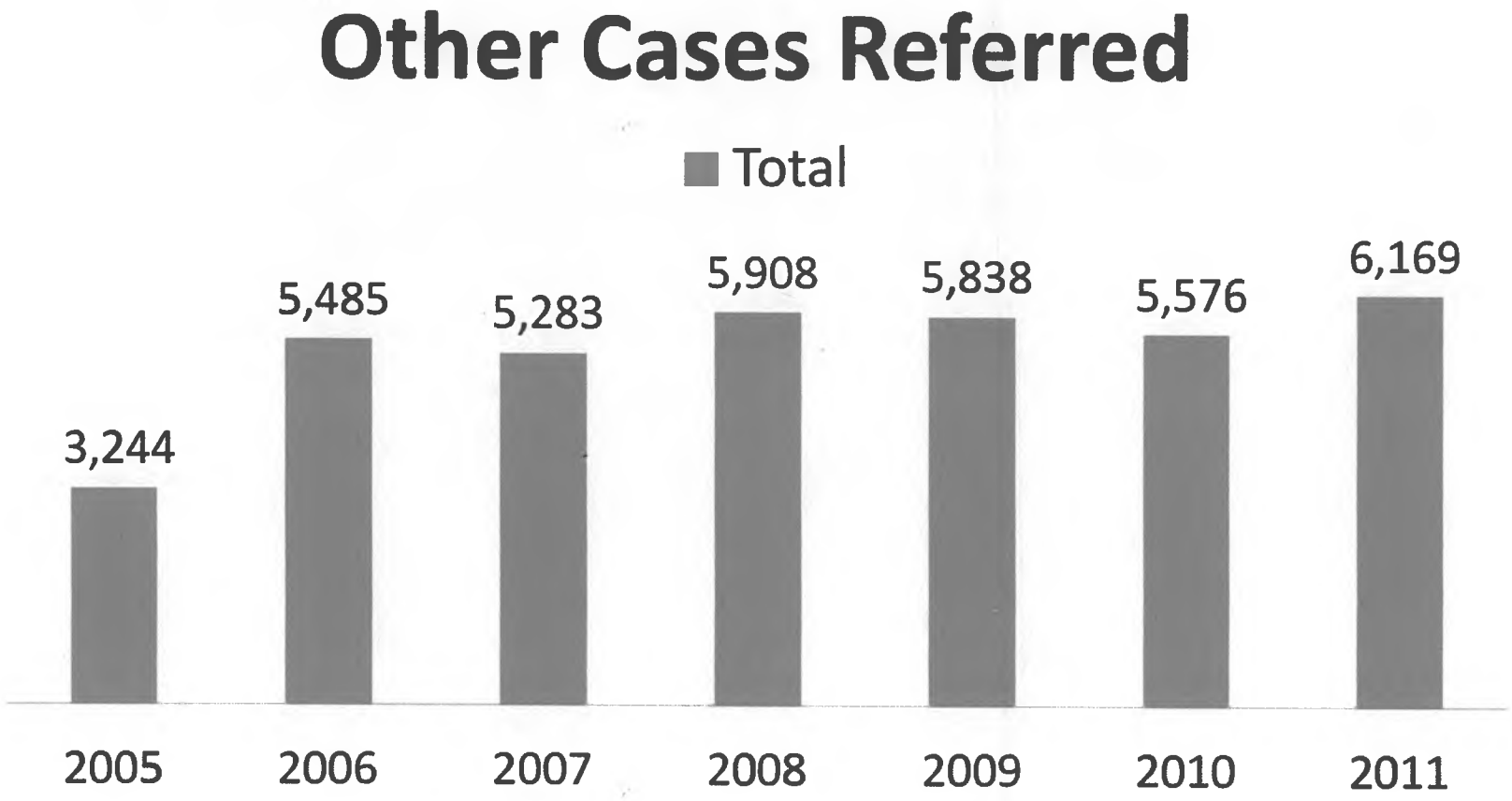
Prosecutors in Statewide Offices

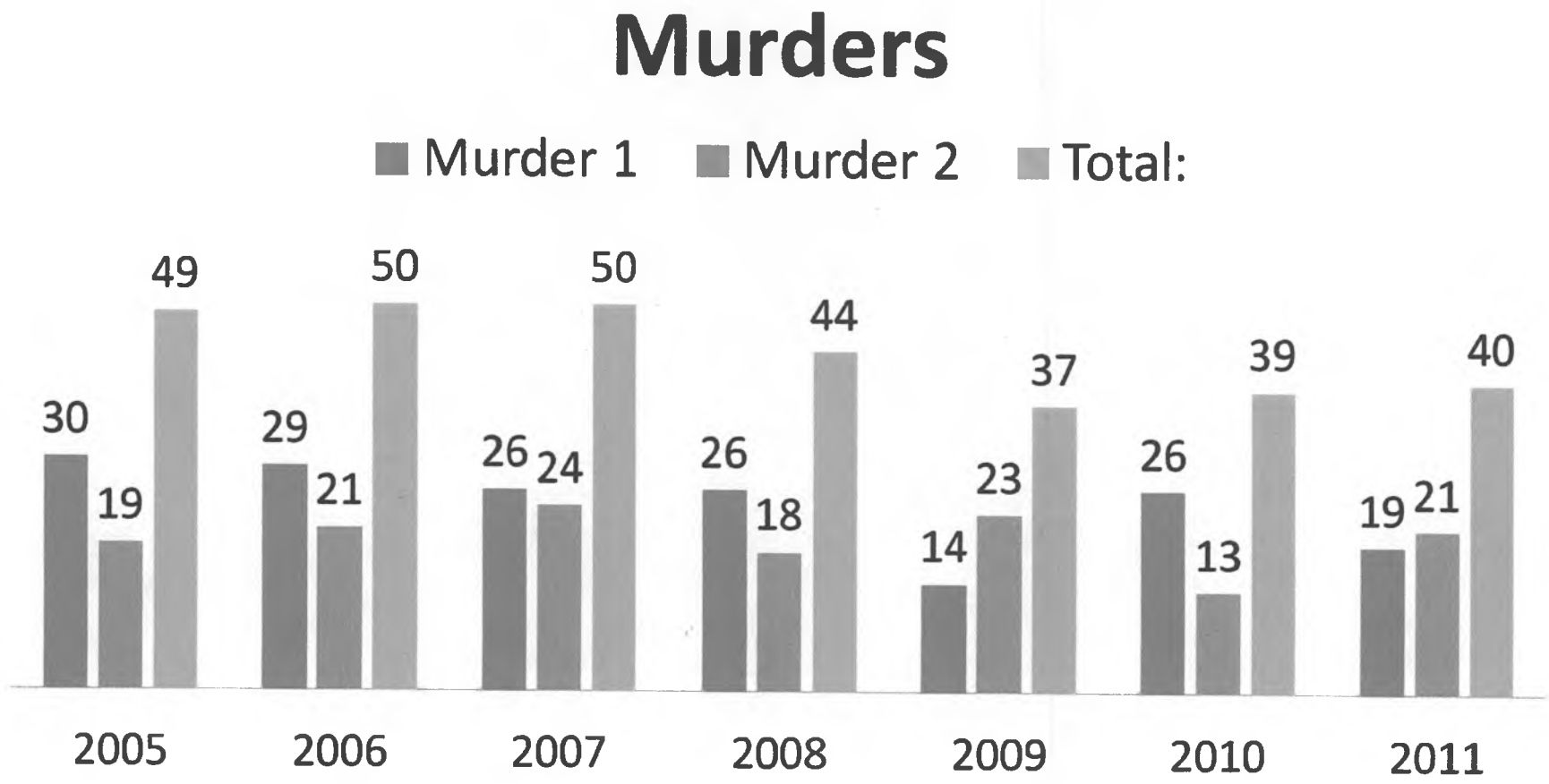
Felonies Referred



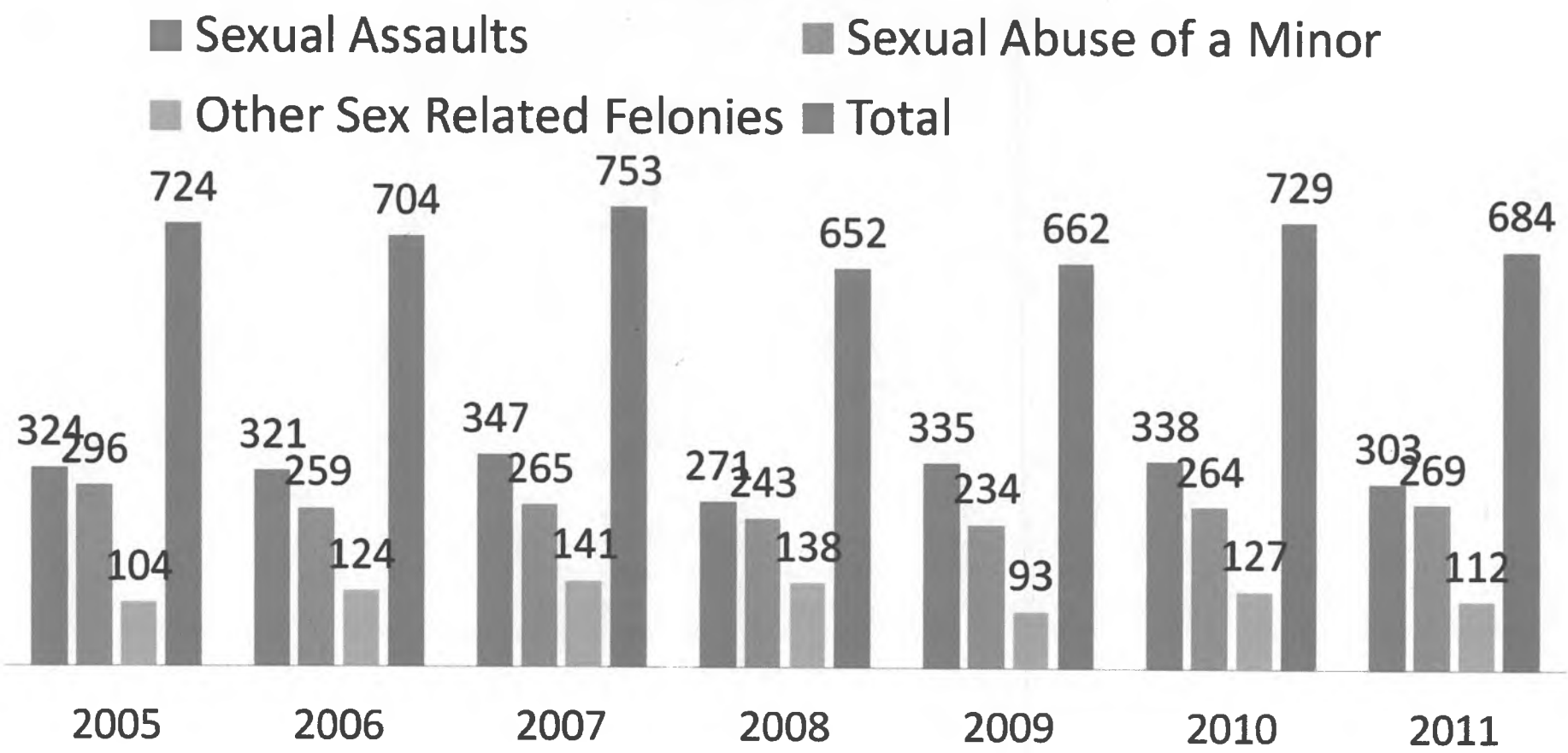
Misdemeanors Referred

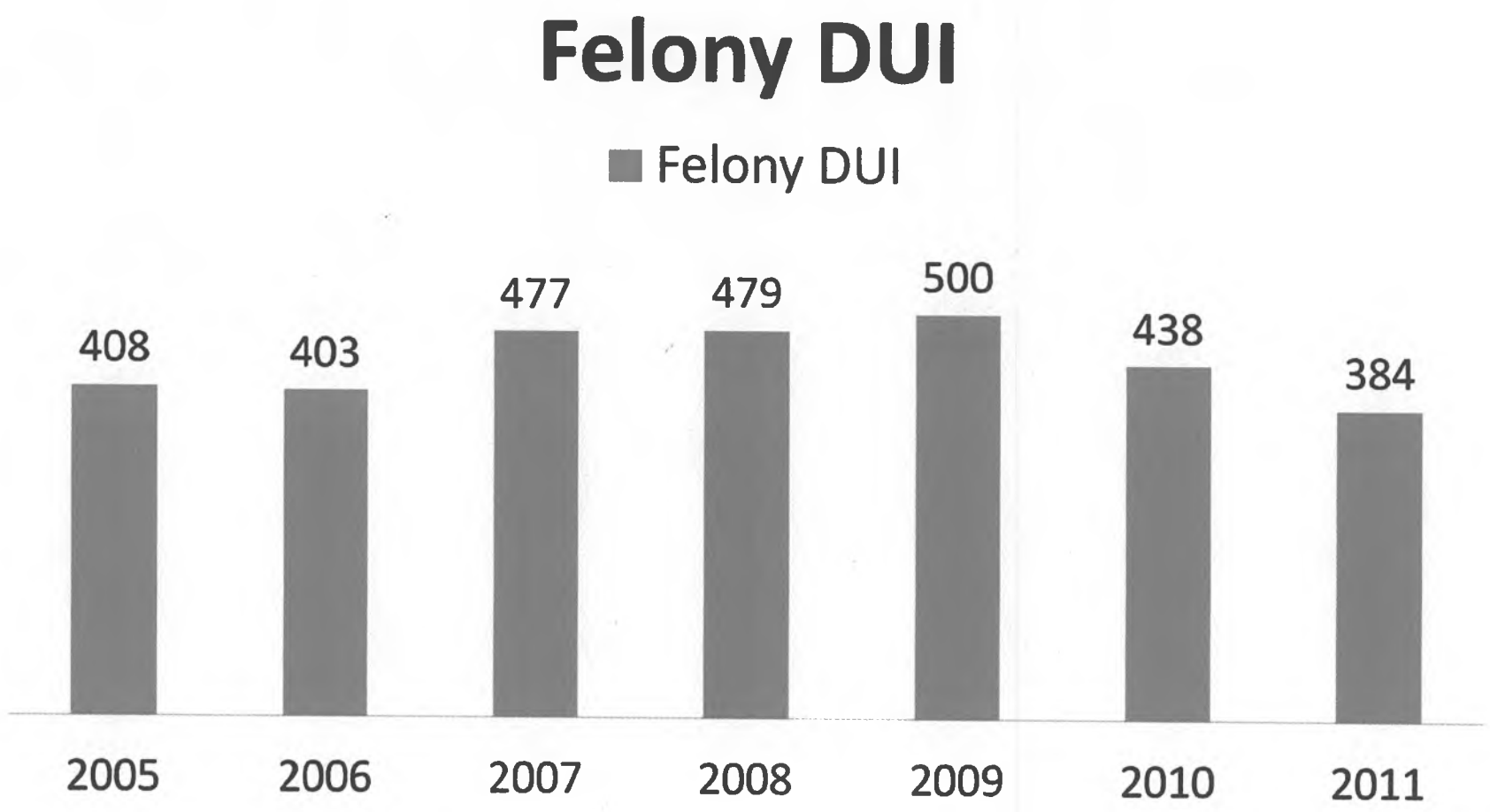


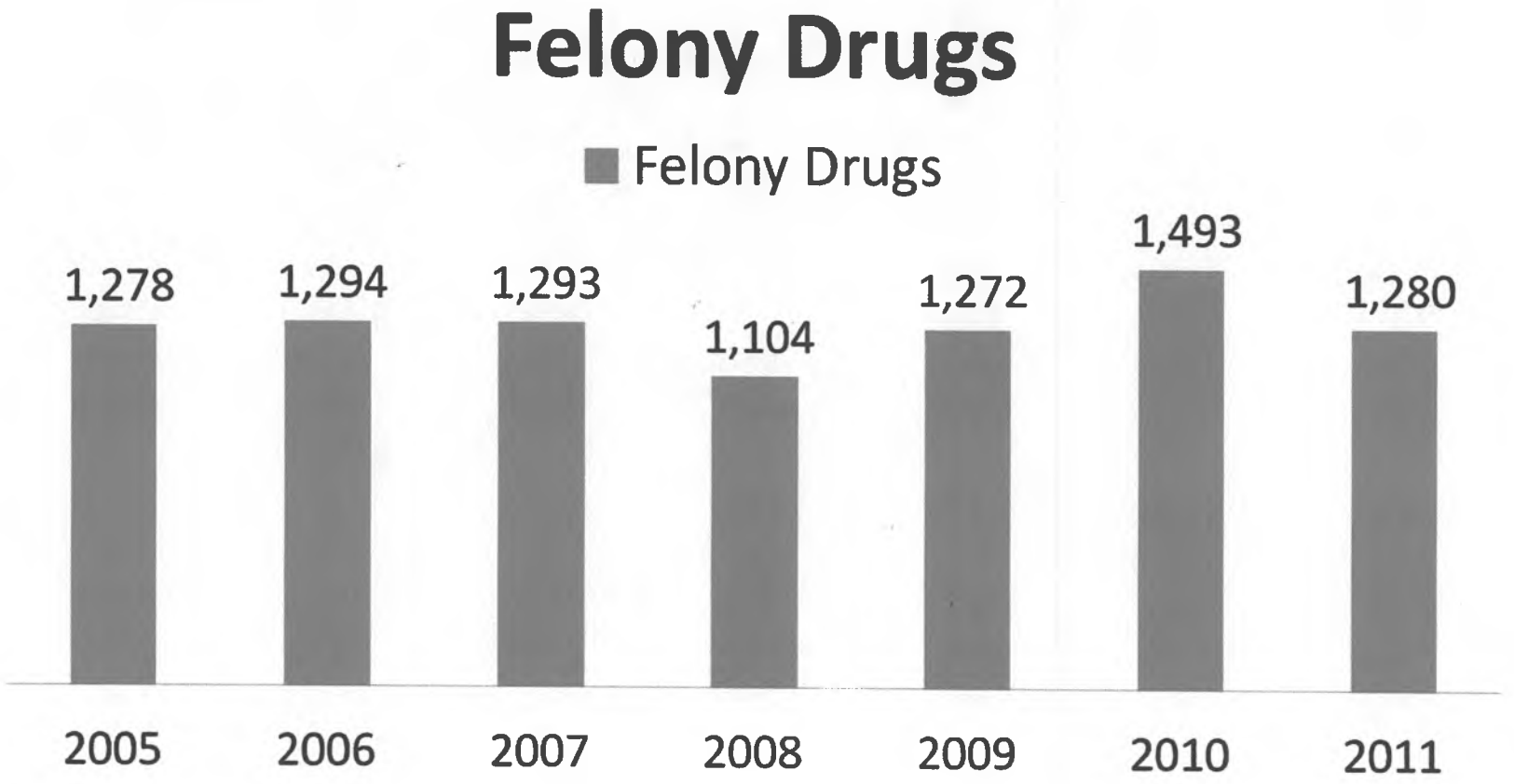

Other Cases Referred
Total
3,244
5,485
5,283
5,908
5,838
5,576
6,169
2005
2006
2007
2008
2009
2010
2011


Murders
Murder 1
Murder 2
Total:
30
19
49
29
21
50
26
24
50
26
18
44
14
23
37
26
13
39
19
21
40
2005
2006
2007
2008
2009
2010
2011

Sexual Offenses




Felony DUI
Felony DUI
408
403
477
479
500
438
384
2005
2006
2007
2008
2009
2010
2011


Felony Drugs
Felony Drugs
1,278
1,294
1,293
1,104
1,272
1,493
1,280
2005
2006
2007
2008
2009
2010
2011

Anchorage Municipal Prosecutor's Office

Cynthia Franklin

MOA Prosecution

- Division of MOA Department of Law
- Misdemeanors Only
- Process 10,000-12,000 cases per year
- 14 attorneys, 18 staff
- Cases filed in District Court (People's Court)

MOA Misdemeanor Case Counts

Cases	2009	2010	2011
Received	11436	10693	10347
Filed	8169	7372	6632
Declined	2638	2658	2424
Diverted	629	663	1291

Declines v. Dismissals

Dismissal = Case filed with Court System, later dismissed

Decline = Case never filed with Court System

Percentage of Total Cases	2009	2010	2011
Dismissals	20.66%	21.09%	18.70%
Declines	23.96%	22.95%	25.90%

Accomplishments

- ADVPP (Anchorage Domestic Violence Prevention Project)
  - MPO has only dedicated DV unit in the State of Alaska
- DV Victim Safety and Bail Condition Enforcement
  - Multi-agency team includes APD, MOA Prosecution, MOA DHHS, AWAIC
- Grant Funded
  - Federal Money ended last year
  - Edward Byrne grant keeping project alive
  - Lack of funding may create gap before SOA E-Bail comes to Anchorage (and E-bail lacks victim piece)
- Anticipate adding Felony DV bail conditions in 2012

Other Successes

- PSN Federal Grant
  - Municipal Prosecutor cross-designated to prosecute in Federal District Court
    - Emphasis on drug and weapons cases
- Technology Upgrades/Streamlining Processes
  - Heading into a paperless future
  - Creating more consistency in filing decisions and contact with victims

Challenges

- Municipal assault ordinance deemed inadequate for State recidivist assaults
  - Rewrote ordinance to match State's A4
  - Must start over in building convictions on many offenders, particularly DV
  - Anchorage DA's Office and APD pulled together with MOA to create smoothest transition possible
- Substance Abuse, especially alcohol

Relationships with Other Criminal Justice Agencies

- Criminal Justice Working Group
- Other inter-agency groups
  - MAJIC (Multi Agency Judicial Information Consortium)
  - Prisoner Reentry Task Force
  - ACPRTF (Anchorage Community Police Relations Task Force)
  - Violent Crime Working Group
  - Anchorage DV and Sexual Assault Caucus, Fatality Review Team, Criminal Rules Committee

Inter-Agency Projects

- ADVPP
- 24/7 Sobriety Monitoring Pilot Project
- PSN grant with US Attorneys Office
- Crime Victims Rights Week
- DVAM (Dom Violence Awareness Month)

Community Prosecution

Prosecutors have a responsibility not only to prosecute cases but to:

- Solve Public Safety Problems
- Prevent Crime
- Improve Public Confidence in the Justice System

MOA and Community Prosecution

- Cooperation of APD who is ramping up Community Policing in tandem with us
- "Nuisance Crimes" lend themselves to community prosecution models
  - Example: Neighborhood Accountability Panels
- Other MOA departments can be brought to bear on problems
  - Code Compliance, Licensing

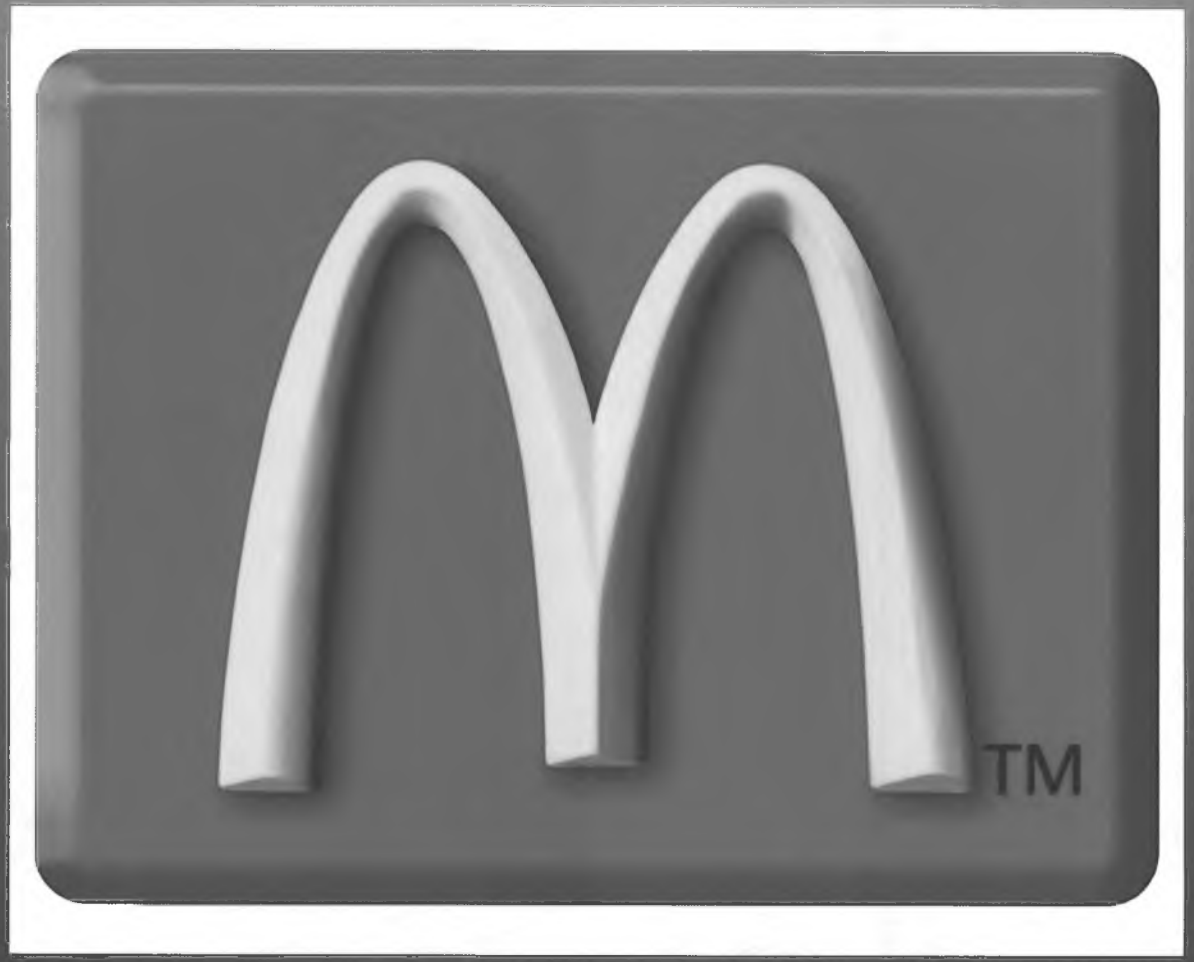
Community Prosecution- Next Steps for MOA Prosecution

- Align case assignments with APD districts, creating prosecutor assignments for 6 areas
- Begin getting community input on justice issues
- Work on specific problems like truancy

What Can Legislature Do?

- Give preference to funding inter-agency or multi-disciplinary projects that incorporate proven alternatives to incarceration
- Fund ADVPP program to avoid a gap in services to victims and loss of extremely effective tool in DV cases
- Fund other programs that can serve as tools across agencies and programs, such as 24/7

Thanks For Listening



MUNICIPALITY OF ANCHORAGE

Department of Health and Human Services 907-343-6718

Mayor Dan Sullivan

Anchorage Domestic Violence Prevention Project
December 2006 – November 2011

The Anchorage Domestic Violence Prevention Project (ADVPP) is a partnership between the Municipal Department of Health and Human Services (DHHS), the Municipal Prosecutor's Office (MPO), the Anchorage Police Department (APD), and the Abused Women's Aid In Crisis, Inc. (AWAIC). ADVPP goals are to: 1) increase offender accountability, and 2) increase victim safety. Serving victims throughout the entire state of Alaska, ADVPP uses Jaqueline Campbell's *Danger Assessment* matrix, and will evaluate the project as a prevention tool.

In 2002 DHHS was awarded **$599,035** by the U.S. Department of Justice, Office on Violence Against Women, to create a management information system to allow law enforcement to share information concerning domestic violence cases. Since then DHHS, on behalf of ADVPP, has received almost **$5,000,000** in federal dollars, culminating most recently (2011) in an **$889,607** grant from the Alaska Department of Public Safety, with Bureau of Justice Assistance funds, which ends in February 2013.

These monies have supported two (2) police detectives, three (3) MPO clerks, a victim advocate at AWAIC and a data analyst/project manager at DHHS. ADVPP is highly successful in meeting its goals:

- Since December 2006 ADVPP has tracked 10,152 misdemeanor domestic violence cases.
- Sixty-four percent (64%) of defendants are males; thirty-six percent (36%) are females.
- Charges and arrests for violations of conditions of release increased 77.5 %.
- ADVPP police detectives conducted 2,613 compliance checks. Compliance increased 21.9 % over the course of the grant; noncompliance decreased 28.2 percent. (Unknowns remained relatively stable.)
- Recidivism during the project period decreased 46.8 percent.
- A total of 7,124 victims have been served through ADVPP from 34 communities across the state: 1,936 victims by AWAIC, and 5,188 victims by the MPO. Over $380,000 in emergency financial assistance has been distributed to enhance victim safety, and 53 victims have been relocated to escape potentially lethal situations.
- The number of domestic violence homicides decreased 54.7 percent between 2000 and 2009, a statistically significant difference. The 5-year average number of domestic violence homicides decreased significantly between 2000-2004 and 2005-2009 (during which time ADVPP operated) (t-test; $p<.05$).
- In August 2010 the Police Executive Research Forum recognized ADVPP as a policing "best practice."[1]

[1] The Anchorage Police Department Staffing and Deployment Study, August 2010, The Police Executive Research Forum, found at: http://www.muni.org/Departments/police/Documents/PERF%20APD%20Deployment%20Study.pdf

Anchorage Domestic Violence Prevention Project II: Summary of Findings

November 2009

Municipality of Anchorage
Department of Health and Human Services
Human Services Division
Safety Links Program
(907) 343-6589
Published May 2010
Revised August 2010

Funding

Funding for the Anchorage Domestic Violence Prevention Project II was awarded to the Municipal Department of Health and Human Services by U.S. Department of Justice, Office on Violence against Women, Grant # 2005-WF-AX-0103. The project period was October 2005 to December 2009. This publication meets reporting requirements for the grant to provide data of the project.

Printing made possible by funding from the Municipal Department of Health and Human Services, Safety Links Program, May 2010.

Carrie Longoria
DHHS Safety Links Program Manager

Bill Miller

APD Captain

Jo-Ann Chung

MPO Domestic Violence Unit

Suzi Pearson

AWAIC, Inc. Acting Director

A Letter from the ADVPP Partners

At the Municipality of Anchorage, we work hard to ensure the health and welfare of citizens. The Municipal Department of Health and Human Service (DHHS), Anchorage Police Department (APD) and Municipal Prosecutor's Office (MPO), along with the Abused Women Aid in Crisis, Inc. (AWAIC), have been working together for more than 20 years to address the problem of violence.

We acknowledge that domestic violence is both a serious public health issue and public safety concern. To address this issue, DHHS, APD, and MPO created the Anchorage Domestic Violence Prevention Project (ADVPP), made possible through grants from the U.S. Department of Justice, Office on Violence Against Women (OVW). This partnership includes AWAIC, the state's largest domestic violence shelter. ADVPP is a community level intervention and prevention strategy founded on data, research, public input, and collaboration with other public and private agencies.

ADVPP II combines the specialized services from each department and now, more than ever, victims of domestic violence can be assured that safety, support and resources are available in Anchorage.

This report presents finding from the successful ADVPP project. We are confident that the community, including policy makers and service providers, will find it a useful tool for sustaining and expanding upon the contributions that ADVPP has made to improve the criminal justice system.

We look forward to continuing to make a difference.

~ The ADVPP Team~

Prevent ~ Promote ~ Protect

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Executive Summary

The Municipal Department of Health and Human Services (DHHS) Safety Links Program provides this report on findings of the Anchorage Domestic Violence Prevention Project II (ADVPP II). ADVPP II is a partnership between DHHS, Anchorage Police Department (APD), the Municipal Prosecutor's Office (MPO), and Abused Women's Aid in Crisis, Inc. (AWAIC). The project design increases offender accountability through the criminal justice system and enhances victim advocacy. The project design is based on the public health model which creates and documents system change, analyzes data to determine success, and reports findings to the public. Data presented in this report covers from May 1, 2006 through October 31, 2009.

The ADVPP II system of service offers:

1. Two DHHS positions to administer the grant, create and maintain a database, collect and analyze data on the project, and report findings;

2. Two APD compliance officers housed at MPO who monitor offender compliance, make arrests, and issue arrest warrants;

3. Three MPO clerks who enter bail conditions and judgments into a database that is accessed by compliance officers, APD dispatch, and MPO attorneys; and,

4. One AWAIC case manager who provides information, referral, and emergency financial assistance to victims of domestic violence.

Data reflects the success of the ADVPP II design:

- The average number of arrest warrants served per month ***increased*** 123.7 percent;
- The number of days to serve an arrest warrant ***decreased*** 92.4 percent, from an average of 38 to 8 days;
- Defendants were 54.7 percent ***less likely*** in October 2009 to have a prior assault charge than defendants in October 2006;
- Arrests for violations of conditions of release (VCRs) ***increased*** 139.3 percent for compliance officers and 496.8 percent for all other officers;
- The average length of time to process a domestic violence case at MPO ***decreased*** 56.5 percent;
- The number of cases with convictions ***increased*** 27.1 percent;
- Defendants with protective orders ***increased*** from 1.8 percent to 5.5 percent;

- MPO clerks made 6,161 victim contacts with 2,361 victims (an average of 2.6 contacts per victim) to inform victims if the defendant was going to be out of jail or when hearings would occur; and,
- AWAIC assisted 1,264[1] victims of domestic violence and provided $181,135 in emergency financial assistance.

Demographics

Domestic violence cases were most likely to have a male defendant and female victim. The average age of defendants and adult victims was comparable to the average age of adults in Anchorage: 34 years for males and 32 for females. Child victims, however, tended to be much younger than children citywide. Also disproportionate was the race and ethnicity of defendants and victims when compared to the race and ethnicity of the general population. For example, only 7.8 percent of Anchorage is Alaska Native but a significant percentage of female defendants and victims were Alaska Native. Demographics are highlighted below.

Defendants in MPO cases:

- 64.7 percent male
- Repeat offenders were three times more likely male than female
- 40.4 percent white, 37.2 percent Alaska Native, 12.4 percent black
- White defendants were 69.8 percent male
- Alaska Native defendants were 51.5 percent male
- Black defendants were 79.9 male
- Mean age of 34 years

Adult victims in MPO cases:

- 59.2 percent female
- 41.6 percent white, 36.4 percent Alaska Native, 8.0 percent black
- White victims were 64.3 percent female
- Alaska Native victims were 74.8 percent female
- Black victims were 65.5 percent female
- Mean age of 31.0 years

[1] By December 31, 2009, the end of the grant term, the total number of victims served was 1,482, and a total of $212,236 emergency financial assistance was dispensed.

Child victims in MPO cases:

- 28.1 percent white, 43.4 percent Alaska Native, and 10.7 percent black
- Mean age of 6.2 years

Victims at AWAIC tended to have different demographic characteristics than victims in MPO cases:

- 96.3 percent female
- 51.7 percent white,16.6 percent Alaska Native, 12.6 percent black
- 64.6 percent were over 31 years of age
- 56.4 percent of children were over six years of age

Furthermore, a majority of victims at AWAIC also recorded that they were abused by their current or former intimate partner, had six or more incidents of domestic violence prior to the currently reported incident, and were victimized in their own home.

Recommendations

ADVPP II partners reviewed the ADVPP II system of services and offer the following recommendations:

- Seek funding to maintain this effective design of service.
- Provide compliance checks on felony domestic violence cases.
- Prioritize electronic dissemination of judicial orders and flagging in the Alaska Public Safety Information Network (APSIN) to ensure information is always current.
- Standardize protocols for 'no contact orders' by magistrates.
- Analyze felony domestic violence and sexual assault cases to capture trends.
- Analyze domestic violence cases that include sexual assault.
- Pursue funding to monitor compliance with judgments and related effectiveness of various treatment programs.
- Research elder abuse in Anchorage by analyzing APD reports and MPO cases, invite collaboration with the Alaska Adult Protective Services to enhance the understanding of risk factors.
- Evaluate relationship of interpersonal violence with alcohol and drug abuse.

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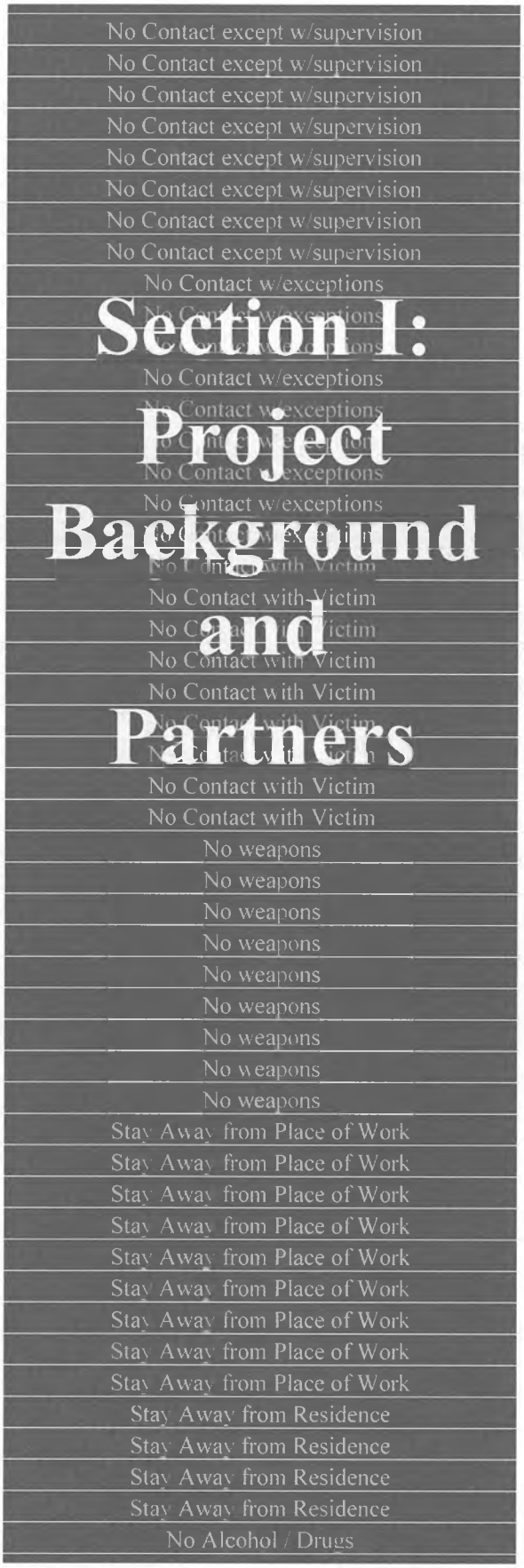


Section I: Project Background and Partners

This section provides an overview of the ADVPP project.

- **Project Background**

  ADVPP I

  ADVPP II

  Special Note on ADVPP III

- **ADVPP Partners & Roles**

Project Background

The Anchorage Domestic Violence Prevention Project (ADVPP) is the result of a long partnership between the Department of Health and Human Services (DHHS) Safety Links Program, Anchorage Police Department (APD), Municipal Prosecutor's Office (MPO), Anchorage Women's Commission (AWC), and Abused Women's Aid in Crisis, Inc. (AWAIC).

In particular, the close working relationship with APD resulted in three domestic violence reports that yielded rich information to respond more effectively to domestic violence in Anchorage. The first report, ***Analysis of Anchorage Police Department Policy and Characteristics of Reported Domestic Violence: 1989-1992***, is one of the first in the nation that assessed officer response and factors leading to an arrest in domestic violence cases. The report also offered demographic information, a comprehensive review of the victim and offender within the context of the relationship and living situation, an assessment of children identified at the scene, types of injury, and the presence of alcohol. The second report, ***Analysis of Police Action and Characteristics of Reported Domestic Violence in Anchorage, Alaska Ten Year Study, 1989-1998***, continued the review of officer response, victim and offender demographics, and incident information. The third report, released in 2006, ***Domestic Violence Analysis, Incidents Reported to Police in Anchorage, AK, Fourteen Year Study, 1989-2002,*** revealed critical information related to child victims and offenders.

The DHHS Safety Links Program also has a long working relationship with AWAIC. In 1996 the program applied for and still receives U.S. Housing and Urban Development monies for the Moving Forward Program. The Moving Forward Program provides case management services and financial assistance to bridge victims from the shelter to safe and secure housing. This partnership with AWAIC allows both agencies to maintain an understanding of victims needs, particularly in regards to homelessness and financial assistance.

Other historical landmarks include a DHHS partnership with the Anchorage Women's Commission (AWC) in 2001 that established a Special Committee on Domestic Violence. The committee brought together local and state interpersonal violence prevention practitioners, criminal justice officials, policymakers, health and human service providers, survivors of interpersonal violence, and concerned citizens. The result of the Special Committee's work was ***The Domestic Violence Action Plan*** (DVAP). Safety Links worked with AWC, APD, MPO, and AWAIC to apply for grant monies to establish the Anchorage Domestic Violence Prevention Program. In 2002, the **Anchorage Domestic Violence Prevention Project I (ADVPP I)** was made possible through funding from the Office of Justice, Office on Violence Against Women Office.

In April 2003, in collaboration with community agencies, DHHS released the ***Action Plan for Interpersonal Violence Prevention*** summarizing the progress of DVAP

initiatives and including new initiatives related to sexual violence. One recommendation of this report was to create an interpersonal violence prevention data analyst position to continue data collection and analysis. With monies provided by APD an analyst position was established at DHHS but eliminated in 2006 as a result of budget cuts. Grant funding has supported all ADVPP data analysis.

ADVPP I

ADVPP I was implemented from September 1, 2002, through June 30, 2005. The primary goals of ADVPP were to hold domestic violence offenders accountable and to increase victim safety. ADVPP I provided an opportunity to assess how the system of services in Anchorage could improve to serve domestic violence victims. ADVPP I staff surveyed 123 victims to determine need and gaps in services. Focus groups were held with AWAIC to confirm the survey findings. ADVPP I offered recommendations to create an integrated system of service. These recommendations were implemented through ADVPP II in a partnership with public health, police, law enforcement, and victim advocacy.

ADVPP I research included quantitative data (survey findings) and qualitative data (focus groups). Identified risk factors included:

- Defendants not complying with bail conditions;
- Law enforcement working with no or outdated information on bail conditions;
- Law enforcement having insufficient staff to monitor offender compliance;
- Domestic violence victims lacking financial resources for emergency housing, medical care, food, or relocation to safety;
- Victims in court cases frequently recanting their testimony against the defendant;
- Victims seldom attending court hearings due to fear, lack of transportation, child care, or notification to attend the hearing; and,
- Administrative staffing insufficient to research and analyze data, track service needs of victims, related system changes, and strategy implementation.

ADVPP II

Based on ADVPP I recommendations and new data analysis from APD records, DHHS applied for and received funding for ADVPP II. The project was active from May 1, 2006, through December 31, 2009, and created a new system of service. This system added a database, resources in the criminal justice and victim advocacy systems, and an analysis of the system of service.

ADVPP II created a comprehensive system of service by adding:

1. Two DHHS positions to administer the grant and collect and analyze data on the project;

2. Two APD officers housed at MPO to monitor offender compliance;

3. Three MPO clerks at the Prosecutor's Office to enter bail conditions and judgment information into a database for APD dispatch, compliance officers, and MPO victim support staff; and,

4. One AWAIC case manager to provide emergency financial assistance to victims of domestic violence.

ADVPP II has been very successful holding domestic violence offenders accountable and increasing victim safety within the Municipality of Anchorage. It is important to integrate and expand the system throughout Alaska for three reasons. One, according to the State Council on Domestic Violence and Sexual Assault STOP Implementation Plan, "Our rural communities endure an unacceptable level of violent crime, which is exacerbated by many rural factors, making it more difficult for rural women to escape abusive relationships." Two, because ADVPP II is located within the jurisdiction of the Municipality, it addresses solely misdemeanor cases. Similar protocols for more serious felony cases are critical to reducing all domestic violence. Third, integrating project objectives with a statewide program enables combining state and local resources through economies of scale.

Special Note on ADVPP III

To address the concept of replicating ADVPP statewide, partners created ADVPP III and received $750,000 from the Office on Violence Against Women's FY 2008 Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program. ADVPP III is a collaboration with the Multi-Agency Justice Integration Consortium (MAJIC) and the Alaska Court System. It works to centralize handling of domestic violence cases and expand the system statewide. Included would be current conditions of release (CORs), judgments, and protective orders for *all* defendants in domestic violence cases, both misdemeanor and felony. Eventually the database will be expanded to include other crimes besides domestic violence. ***Unfortunately, federal funding for ADVPP III expires August 31, 2010, and to date no revenues have been identified to pick up the system of service.***

Through ADVPP III, AWAIC assists domestic violence victims statewide with information, referral, and financial assistance. Many victims come from across the state to the city of Anchorage to access critical care and emergency services. Communities that have received assistance include Anchor Point, Bethel, Chivak, Dillingham, Fairbanks, Homer, Juneau, Kenai, Ketchikan, Net Island, Sand Point and Scammon Bay.

ADVPP Partners and Roles

The strategy for service relies on a strong partnership between agencies. The partner agencies work under ADVPP II to: 1) create and maintain a databank that connects law enforcement and prosecution to court conditions; 2) monitor defendant compliance with court orders; 3) provide victims with emergency support and financial assistance; and 4) monitor the success of the project. ADVPP is a complex project in which each component compliments and supports each other element. The collaborative approach allows each agency to accomplish more than they could with each solitarily agency pursuing their individual missions.

Each partner agency provides a unique role to accomplish the goals of the project as outlined in Table 1. Those partners include:

- Department of Health and Human Services (DHHS)
- Anchorage Police Department (APD)
- Municipal Prosecutor's Office (MPO)
- Abused Women's Aid In Crisis (AWAIC)

Figure 1: Interagency Coordination of ADVPP II

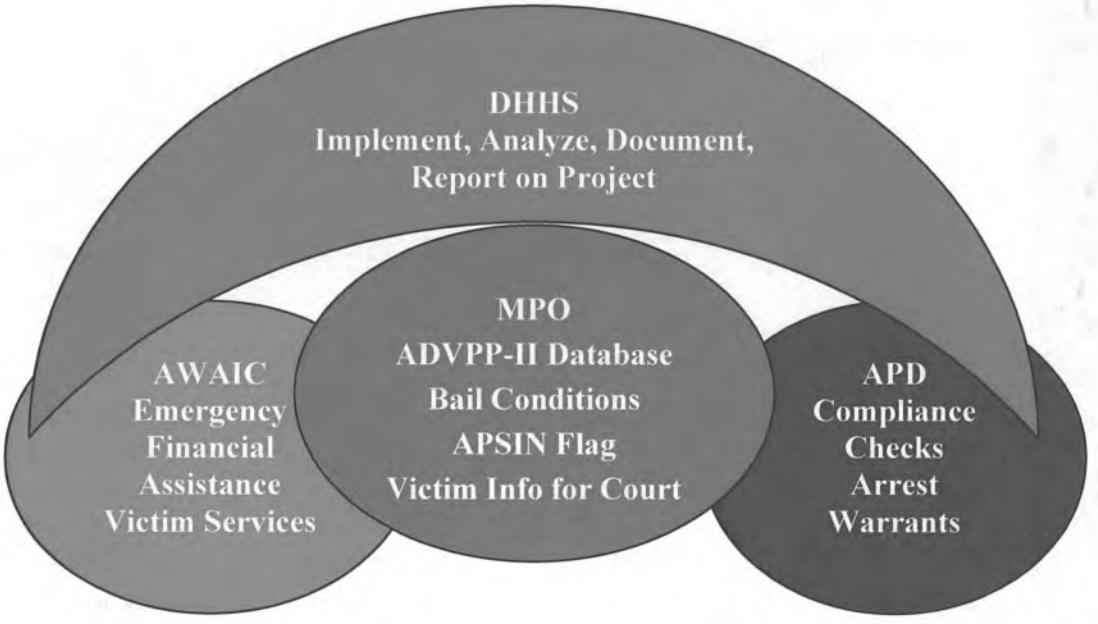
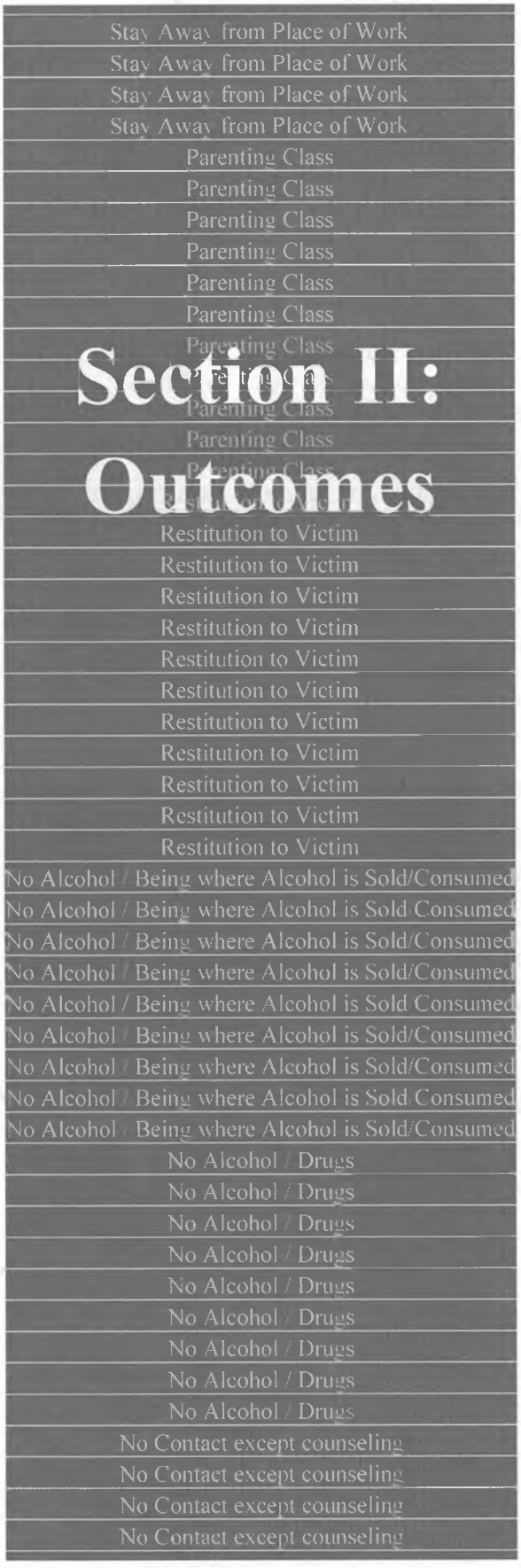


Table 1: Partnerships for ADVPP II

	DHHS	APD	MPO	AWAIC
Agency Role	Public Health Model (Prevention)	Law Enforcement	Criminal Justice System	Victim Advocacy
Objectives	Design, Coordinate, Implement, Data Collection, Report on Systems & Strategies	Compliance and Enforcement of Orders, Issue Warrants and Make Arrests	Maintain Databank, Enter Data to Track Defendants' Court Orders, Support Victims in Hearings	Provide Information & Referral, Emergency Financial Assistance for Victims
Positions	1.0 FTE Project Coordinator 1.0 FTE Data Analyst	2.0 FTE Domestic Violence Compliance Officers	3.0 FTE Court Clerks	1.0 FTE Intake Specialist/Emergency Financial Assistance Funds
Budget	$216,781/year	$286,210/year	$261,452/year	$150,923/year $68,134/year emergency financial assistance
Total Award	$781,335 (includes administrative costs)	$661,654	$504,241	$452,770
Accomplishments	Wrote/ managed $4 million ADVPP grants, designed a tracking database, developed a communication system for law enforcement, working to bring project statewide.	Performed 1,393 compliance checks, arrested 215 defendants in VCRs.	Tracked 5,110 misdemeanor domestic violence cases that involved 22,569 court hearings, 3,890 defendants, and 7,642 victims.	Gave direct support to 1,482 individuals, 362 comprehensive needs assessments and $204,402 in emergency financial aid. by December 31, 2009.



Section II: Outcomes

This section provides an overview of agency function and outcomes.

- **Department of Health and Human Services (DHHS)**

- **Anchorage Police Department (APD)**
  - **Domestic Violence Reports and Cases**
  - **Compliance Checks**
  - **Warrant Service**
  - **Incarcerated Offenders**
  - **Impacts on Domestic Violence**

- **Municipal Prosecutor's Office (MPO)**
  - **Cases**
  - **Hearings**
  - **Charges**
  - **Defendants**
  - **Victims**

- **Abused Women's Aid in Crisis, Inc. (AWAIC)**
  - **Intensive Case Management Services**
  - **Emergency Assistance**
  - **Demographics**

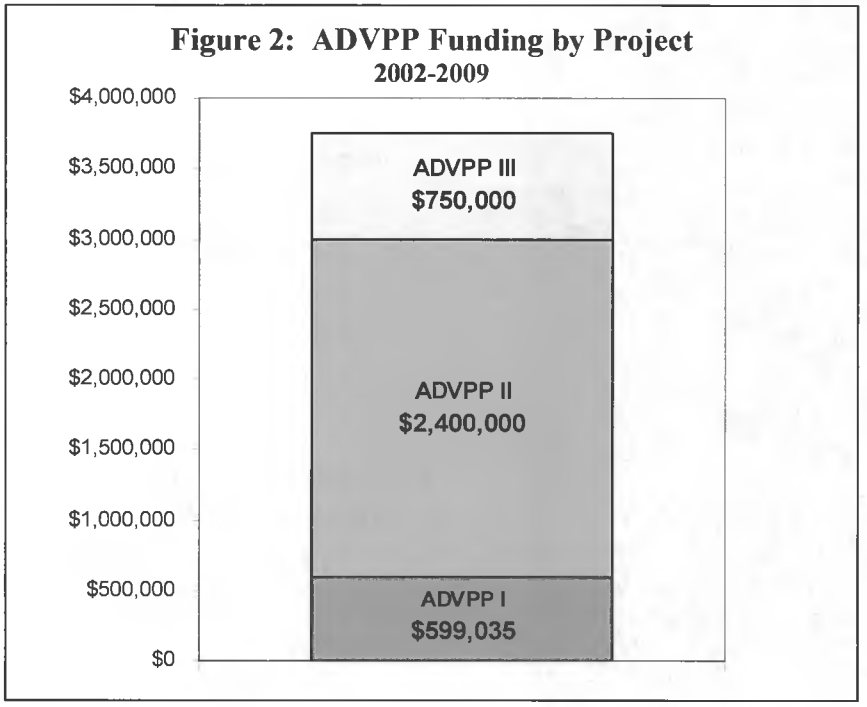
Department of Health and Human Services (DHHS) Strategies

The role of DHHS is to convene partners and facilitate collaboration between agencies with differing missions. For example, AWAIC works to safeguard victims from contact with the perpetrator whereas MPO desires victim participation in court proceedings against the perpetrator to enhance prosecution. Through joint discussions and collaborative project design, individual and collective missions are accomplished under this project.

DHHS Safety Links program has been successful applying for and receiving federal funds to implement ADVPP. To date, Safety Links has brought close to $4 million into Anchorage for domestic violence prevention programming (Figure 2).

DHHS is now collaborating with the Multi-Agency Justice Integration Consortium (MAJIC) and the Alaska Court System to automate and expand Anchorage's successful data management system throughout the State of Alaska.

Figure 2: ADVPP Funding by Project
2002-2009



Project Coordination

DHHS provided oversight of ADVPP to ensure timely and effective project development and completion. In creating ADVPP, DHHS worked with partners to assess needs, set goals and objectives, develop operational budgets, plan work calendars, and coordinate schedules. In managing the project, DHHS monitored, reviewed, and evaluated progress; coordinated and attended meetings; and established and maintained internal and external

contacts. DHHS kept ADVPP project records and maintained all accounting and reporting files. As the lead agency for ADVPP, DHHS served as a liaison between agencies and served as a resource by providing advice, research, analysis, and reporting.

DHHS created interagency agreements with each of the agencies to ensure clarification of roles and funding. DHHS worked with MPO to design the ADVPP II database to capture information on victims, offenders, relationships, children, type of offense, charges, weapons, location of offense, and data fields for judicial conditions (See Appendix A). A close working relationship with the state Department of Public Safety was initiated to create an Alaska Public Safety Notification (APSIN) flag for defendants. A field test was used for three months to ensure ADVPP compliance officers, APD dispatch, patrol officers, and prosecution were receiving accurate and up-to-date information from the database.

The project coordinator works with the Safety Links Program Manager to facilitate all parts of ADVPP and ensure the goals of the project are being met. The coordinator prepares all records of project activities, oversees and ensures timely processing and delivery of required materials, verifies and analyzes the accuracy of data and information generated by the project, and resolves any discrepancies or problems. The data analyst provides analytical project review to support evidence based practices. The analyst also compiles, analyzes and describes data to document project outcomes. The project is housed under the Safety Links Program with staff experience spanning over twenty years in the field of interpersonal violence prevention.

Project Outcomes

DHHS collected, analyzed, disseminated, and monitored ADVPP data. Quantitative and qualitative data provided the background for the prevention model, supported grant funding opportunities, and allowed for project expansion. A key element of ADVPP was a database—designed by DHHS in collaboration with partner agencies—to be used as a tool for MPO and APD to track defendants and for DHHS to monitor project objectives and outcomes. The data fields, as provided in Appendix A, were shared with the Alaska Court System as part of ADVPP III.

DHHS reported project outcomes, such as those found in this report, by using ACCESS, Excel, and SPSS data systems. For the analysis of data from the ADVPP database, ACCESS queries linked MPO and APD information as needed. Data was exported into Excel to be cleaned and coded. Unduplicated data was then exported into SPSS to be statistically analyzed, for example cross-tabulations and frequencies. Statistical results from SPSS were exported back into Excel to be graphed and tabulated for this report. Regression analysis will analyze relationships between gender, ethnicity, offense, and sentencing in the subsequent report.

Project Data

DHHS received project data from MPO, APD and AWAIC, with the ADVPP II database as the primary data source. The database contained 100-percent datasets for all municipal misdemeanor domestic violence cases, charges, defendants, hearings, conditions, sentences, compliance checks, and involved individuals (such as victims and witnesses). AWAIC datasets were monthly aggregates for demographics, incidents, victim needs, and program results. APD officers also provided a separate Excel spreadsheet regarding compliance checks on incarcerated offenders.

The data run for this report was performed on November 18, 2009 to encapsulate data from May 1, 2006 through October 31, 2009. In this report, the date range for MPO, APD, and AWAIC data is generally noted as 2006 to 2009 for ease of readability. However, the datasets vary slightly by month from which the project started for each partner agency. For example, AWAIC's Intake Specialist began serving clients in May 2006, MPO began recording cases in October 2006, and APD officers began compliance checks in December 2006.

Confidentiality

A strict protocol was followed to ensure the confidentiality of the report materials. All data collected from MPO and APD are maintained on a password protected computer system only available to the Safety Links Program domestic violence analysts. Outcomes in this report are presented in aggregate form and do not provide specific information related to an individual person, case, officer or action in each case in conformance with the 2005 reauthorization of Public Law 103-322: *The Violence Against Women Act of 1994 (VAWA)*, Title IV, sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994 HR 3355.

The Safety Links Program Manager, and ADVPP II coordinator, clerks, and analyst were required to pass an extensive background check conducted by APD prior to access to data, similar to APD's background check for non-sworn personnel. Individual names, characteristics of a case, or personal information related to victims or suspects were not shared with anyone outside the approved research staff.

Anchorage Police Department (APD) Enforcement

In most cases, APD dispatch receives a call concerning domestic violence and notifies a police officer to respond on scene. The responding officer assesses the incident for probable cause and makes an arrest if a domestic violence offense occurred. The officer then transports the arrestee to jail, where a magistrate delivers bail requirements and CORs. The officer issues an arrest warrant if the offender has left the scene.

ADVPP II is initiated when court conditions are outlined for the defendant. MPO clerks enter this data into a databank which is accessed by two full-time compliance officers who conduct compliance checks on defendants out on bail with CORs. Such defendants often have court orders such as no contact with the victim, staying away from alcohol, remaining in the presence of a third party custodian, and attending life skills classes. The officers prioritize compliance checks according to the risk of violations of conditions of release (VCRs), using information from MPO and their own investigative experience. They visit homes and other places at unexpected hours in unmarked cars wearing street clothes. The officers also serve outstanding arrest warrants when possible.

Aside from the two compliance officers, APD dispatch also has access to information in the database and routinely informs patrol officers of the offenders' court conditions. This is outlined more fully in the MPO section.

ADVPP II offers critical information to victims through APD. As required by Alaska Statute (AS) 18.65.520, officers read domestic violence victims their rights and provide the *Anchorage Community: Emergency and Advocacy Resources*, also referred to as the *Little Blue Booklet (LBB, s*ee Appendix B). The LBB, created by DHHS and APD, contains information on victims' rights along with other information about essential services, resources, and phone numbers for assistance within Anchorage. On the back page of the booklet is the contact information for ADVPP II's Intake Specialist at AWAIC.

DHHS has also made available, through ADVPP II funding, the statutory information in Spanish, Samoan, Hmong, Tagalog and Korean. The result was the ADVPP Language Line and the Little Green Booklet (LGB, Appendix B), a bi-lingual companion resource. The Language Line provides statutory information orally through a telephone recording service. The LGB contains the mandated statutory information as well as additional information on key services for victims of domestic violence including domestic violence protective orders and immigrant issues.

Domestic Violence Reports and Cases

Between 1999 and 2009, APD received over 44,000 reports of domestic violence, at an average of 4,000 reports per year or over 12 reports per day.

Between 2008 and 2009 the annual number of reports increased 46.4 percent (Trend 1). Factors related to the economic conditions of increased unemployment and homelessness probably account for much of this increase, as APD reports no changes in the categorization of cases.

Trend 1: Number and Rate of Domestic Violence Reports 1999-2009

Year	Number of Reports	% Change from Prior Year	Rate: Reports per 100,000 Population	% Change from Prior Year	ADVPP/MPO Cases	% Change from Prior Year
1999	4,097	-	1,592	-	-	-
2000	3,981	-2.8%	1,535	-3.6%	-	-
2001	3,925	-1.4%	1,482	-3.5%	-	-
2002	4,091	4.2%	1,527	3.0%	-	-
2003	3,906	-4.5%	1,431	-6.3%	-	-
2004	3,582	-8.3%	1,290	-9.9%	-	-
2005	3,710	3.6%	1,335	3.5%	-	-
2006	3,816	2.9%	1,349	1.0%	-	-
2007	3,955	3.6%	1,393	3.3%	1,788	-
2008	3,659	-7.5%	1,310	-6.0%	1,978	10.6%
2009	5,355	46.4%	1,843	40.7%	2,723	37.7%

Source: Number of Reports from the APD Records Management System; Population data from Alaska Department of Labor and Workforce Development.

In 2007, 45.2 percent of reports to APD led to misdemeanor domestic violence cases processed by MPO. This increased to 54.1 percent of reports in 2008 and 50.8 percent of reports in 2009. Cases are discussed further in the following section on the Municipal Prosecutor's Office (MPO).

Compliance Checks (N=1,858)

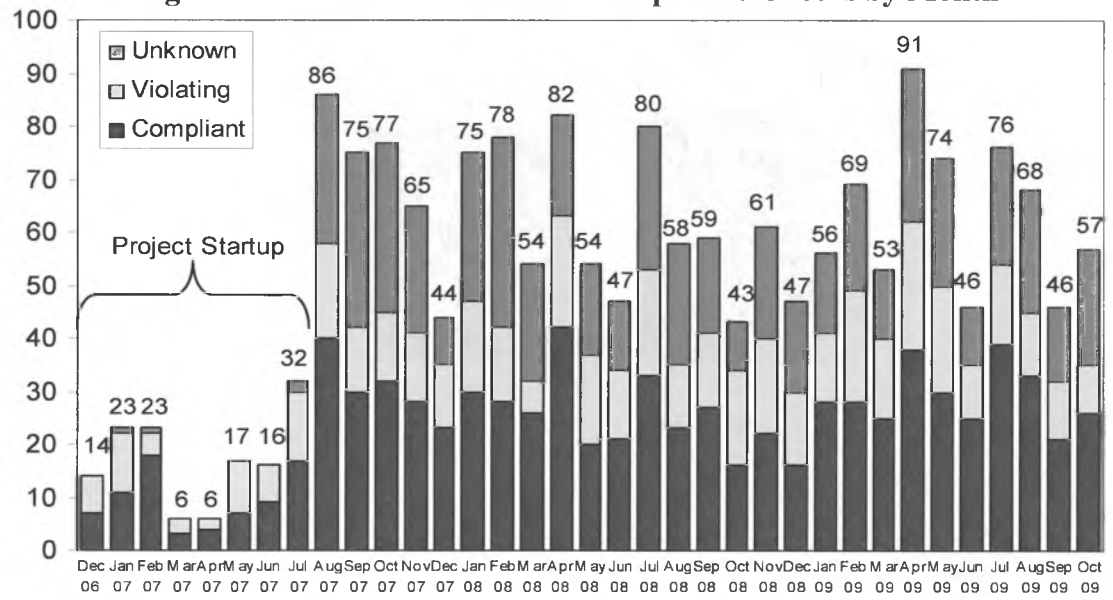
Compliance checks are part of a new system of domestic violence prevention and enforcement service in Anchorage. The period from December 2006 to July 2007 reflects preliminary procedures during which time APD officers developed protocols for conducting compliance checks and coordinating with MPO. Accurate trends are available beginning in August 2007 (Trend 2).

Trend 2: Compliance Checks by Project Period

Project Period	Dates	# Compliance Checks	Average Checks per Month
Startup	December 2006-July 2007	137	17.1
Year 1	August 2007-July 2008	817	68.1
Year 2	August 2008-July 2009	733	61.1
Year 3	August 2009-October 31, 2009	171	57.0
Total	December 2006-October 31, 2009	1,858	53.1

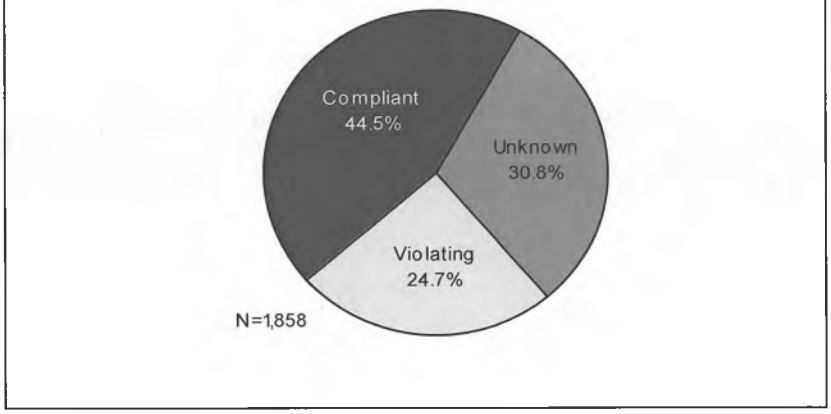
Two officers performed 1,858 compliance checks involving 1,176 defendants. Excluding the startup period, officers made an average of 64 checks per month (Figure 3).

Figure 3: Number and Status of Compliance Checks by Month



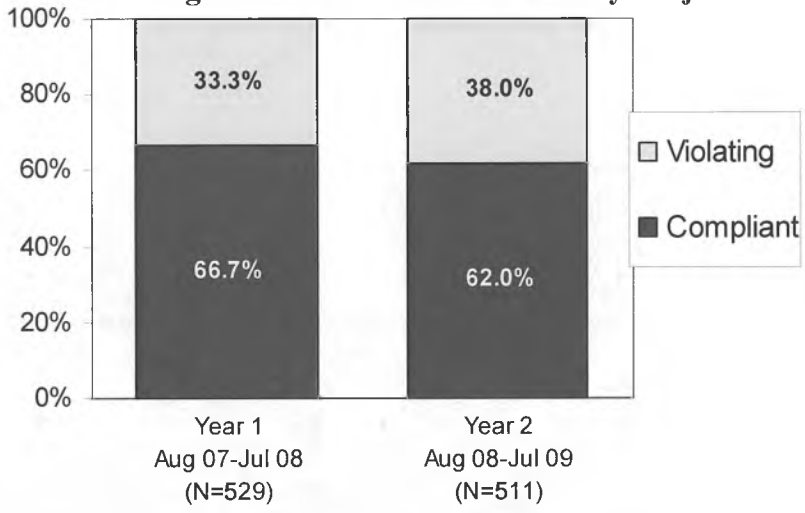
Compliance checks were performed in 1,018 municipal cases, averaging 1.5 checks per case. Figure 4 shows almost half (44.5 percent) of checks had defendants who were compliant, 24.7 percent had defendants who were violating CORs and 30.8 percent had defendants with an unknown compliance status (nobody home, no answer at the door, or residence vacated).

Figure 4: Violation Status by Type



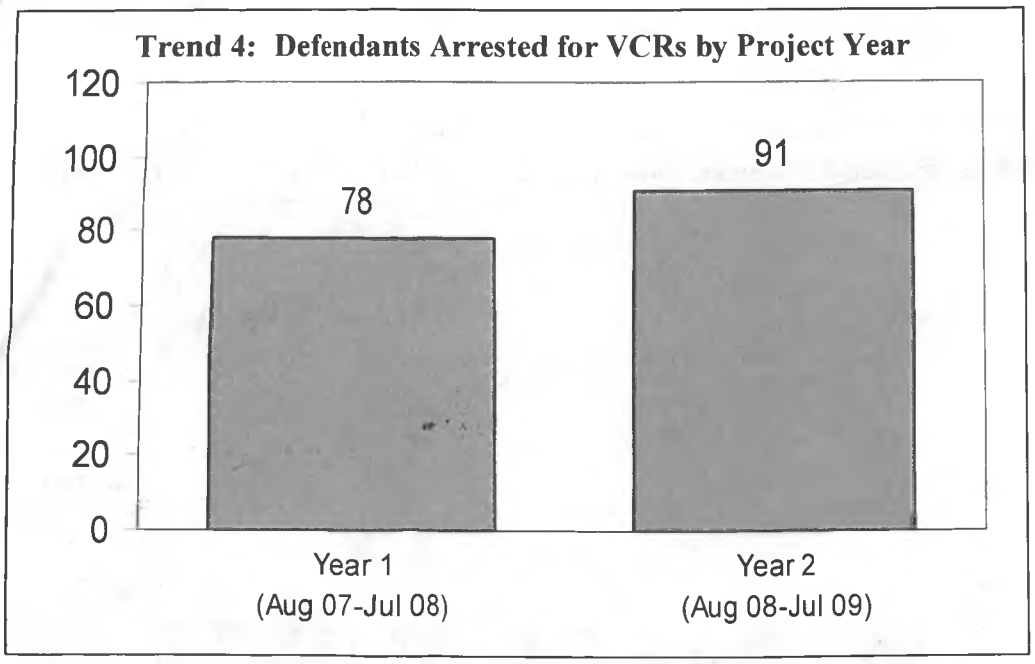
ADVPP compliance officers were increasingly able to locate defendants who were violating their CORs. Of all compliance checks where the victim and/or defendant was home (compliance was known) officers found 33.3 percent violating. During the second year, officers found 38.0 of defendants with known compliance status violating (Trend 3).

Trend 3: Change in Known Violation Status by Project Year

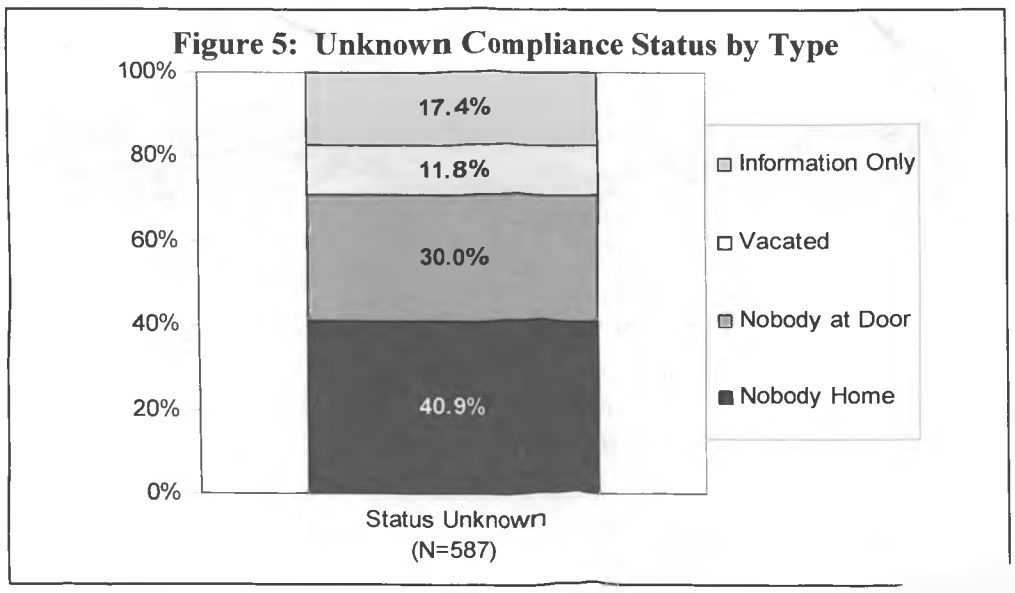


During compliance checks, the ADVPP officers directly arrested 233 defendants for VCRs, issued 11 warrants for arrest, and sent 20 notices of non-compliance to the

tor. Arrests increased 16.7 percent between Year 1 and Year 2 of the project, 8 arrests to 91 arrests (Trend 4).



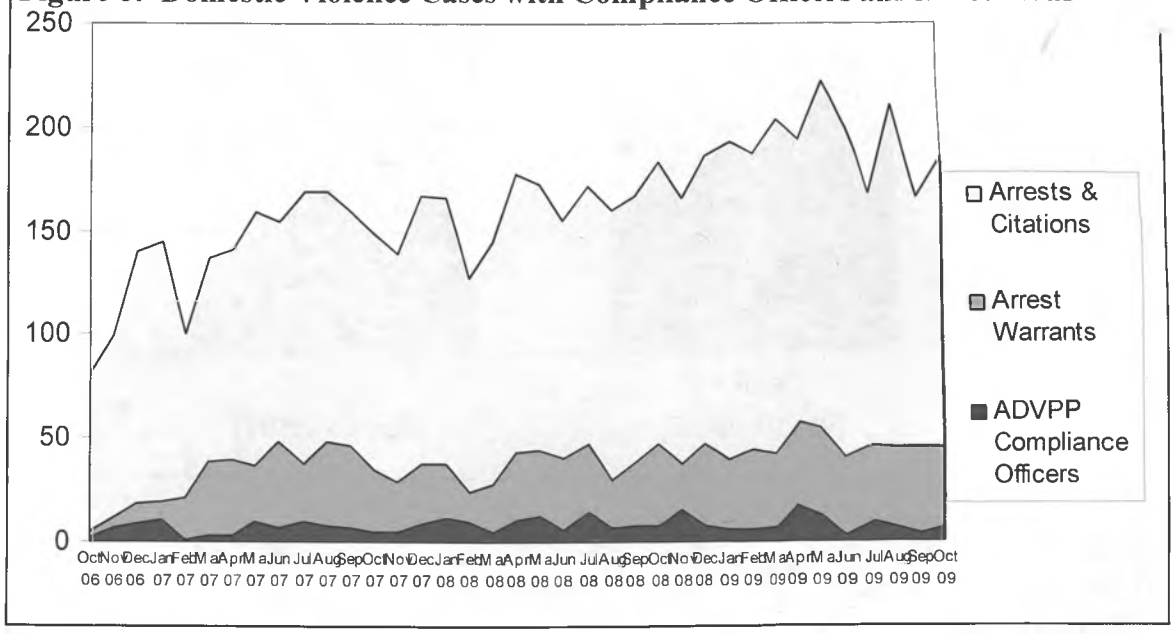
One-third of all checks had an unknown status. Of these, 40.9 percent had no one home, 30.0 percent had no answer at the door but an appearance that someone was at home, and 11.8 percent had moved from the residence (Figure 5). More dangerous offenders often move the victim out of an apartment to evade compliance checks. There was a slight increase in vacated properties over time that may be, in part, due to the increase in publicity and awareness of compliance checks.



Warrant Service (N=1,124)

ADVPP compliance officers increased the number of MPO cases, both through apprehending defendants who were violating their bail conditions and by serving more arrest warrants more quickly (Figure 6).

Figure 6: Domestic Violence Cases with Compliance Officers and Arrest War

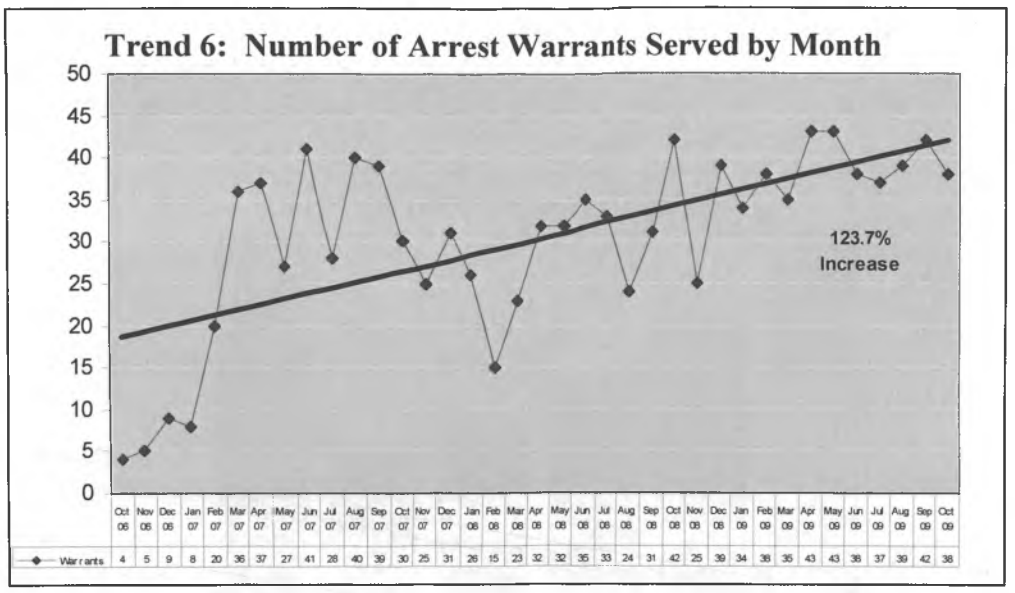


During the startup of ADVPP, officers served 215 warrants at an average of 38.6 days per warrant. During the second year of the project, officers served 429 warrants at an average of 18.1 days. By October 2009, it took only an average of 8.4 days to serve a warrant (Trend 5).

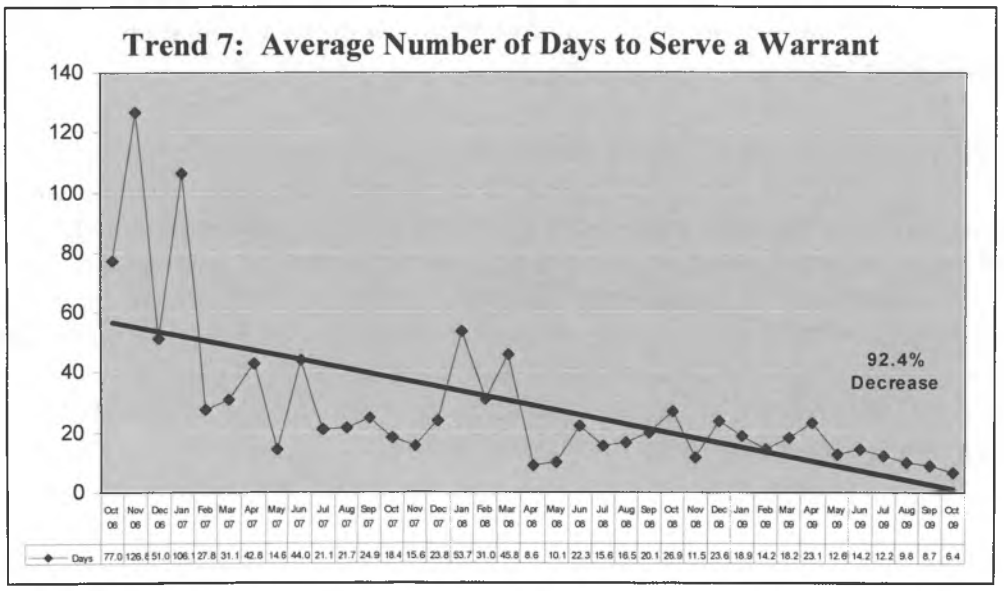
Trend 5: Arrest Warrants by Project Year

Project Period	Dates	Arrest Warrants	Average Days to Serve Warrant
Startup	October 2006-July 2007	215	38.6
Year 1	August 2007-July 2008	361	23.0
Year 2	August 2008-July 2009	429	18.1
Year 3	August 2009-October 2009	119	8.4
Total	October 2006-October 2009	1,124	22.6

The average number of warrants served per month increased 123.7 percent from October 2006 through October 2009 (Trend 6).

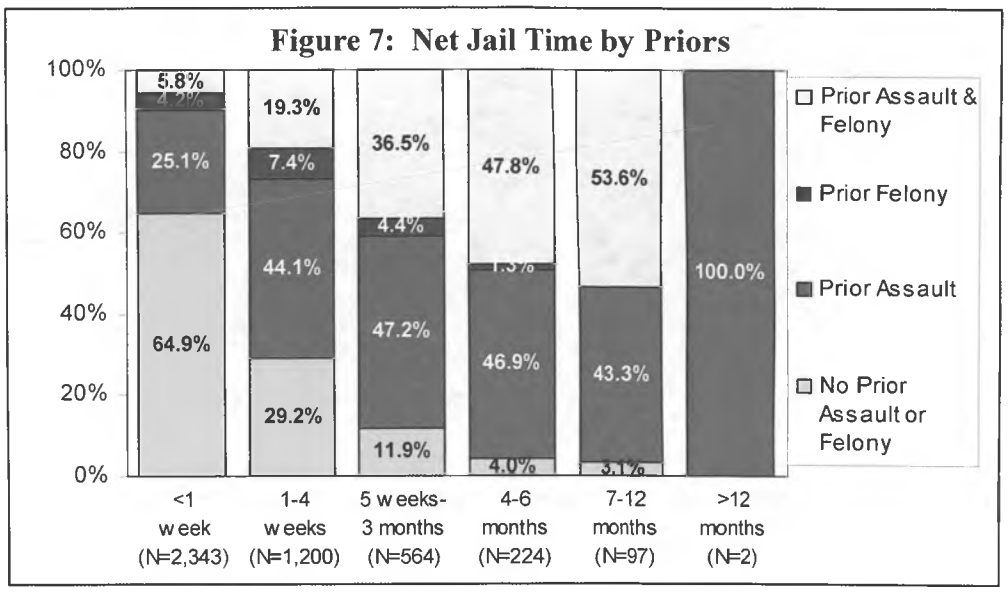


There was a 92.4 percent decrease in the average number of days APD took to serve a warrant in domestic violence cases, from an average of 39 days to 8 days (Trend 7). Specifically, after the startup period, arrest warrants went from an average of 38 days to 23 days the first year, 18 days the second year, and 8 days the third year.



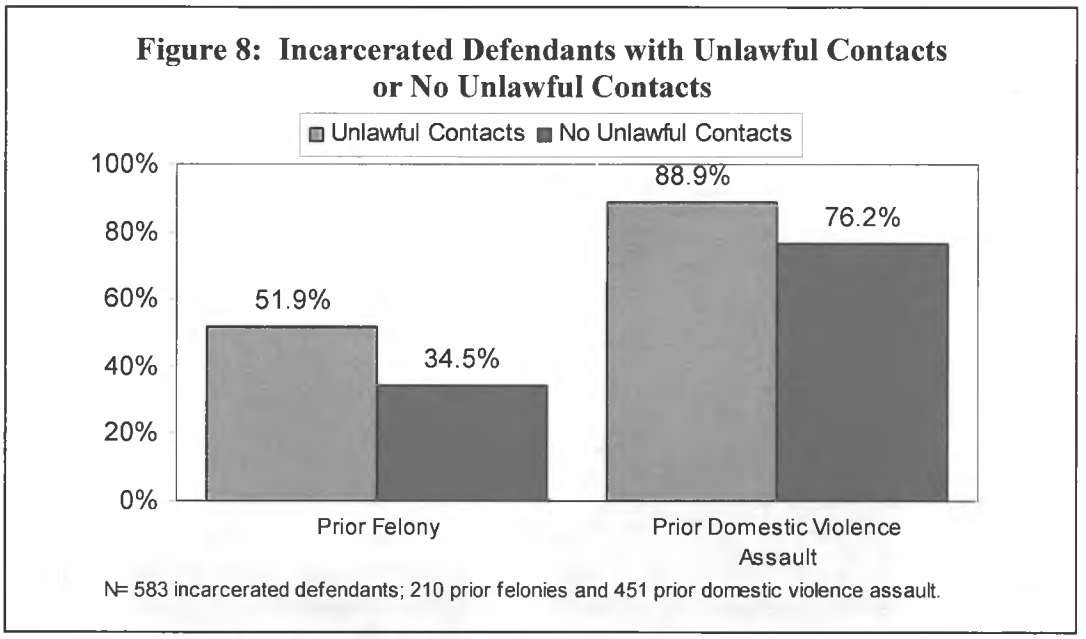
Incarcerated Offenders

More serious offenders (as evidenced by previous felony or domestic violence assault cases) received longer jail sentences. The longer the net jail time received (sentenced minus suspended jail time), the higher the percentage of prior domestic violence assault and felonies (Figure 7). This pattern held for both male and female defendants.



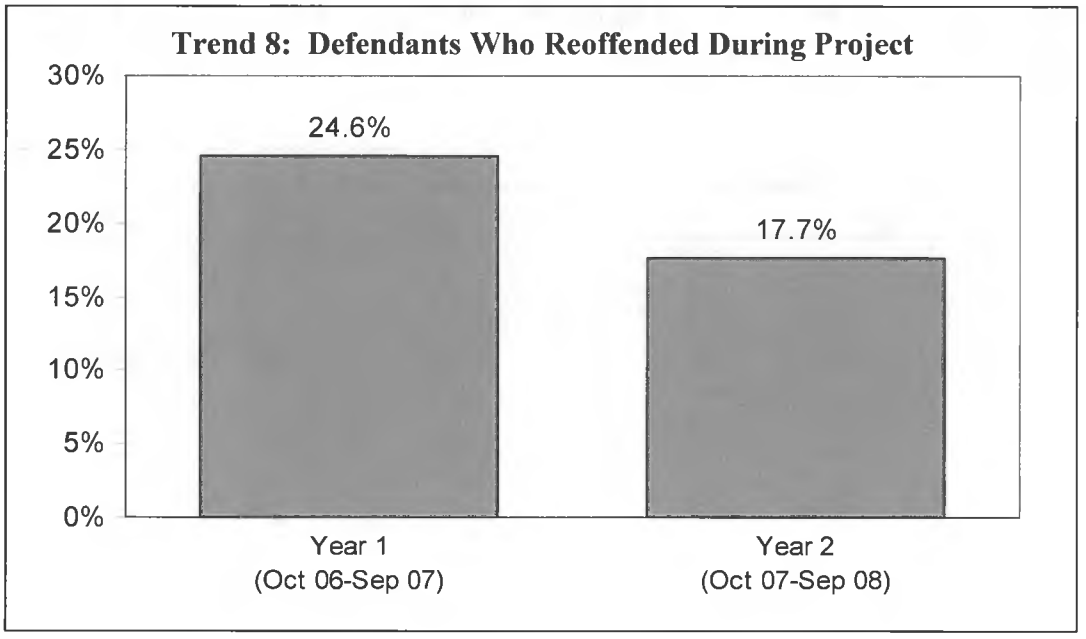
Incarcerated defendants with histories of violence (felonies and/or prior domestic violence assaults) were more likely to have unlawful contact (violating a "no contact' order) with their victims.

Unlawful contacts occurred via telephone calls or visitation at the jail by the victim. Incarcerated defendants who had unlawful contacts with their victims had higher percentages of prior felonies or prior charges of domestic violence assault than those who did not make unlawful contacts. Over half, or 51.9 percent, of incarcerated defendants who made unlawful contacts had prior felonies compared to 34.5 percent of incarcerated defendants who did not make unlawful contact. Similarly, 88.9 percent of incarcerated defendants who made unlawful contacts had prior domestic violence assault charges whereas only 76.2 percent of incarcerated defendants who did not have unlawful contacts had prior domestic violence assault charges (Figure 8).



Impacts on Domestic Violence

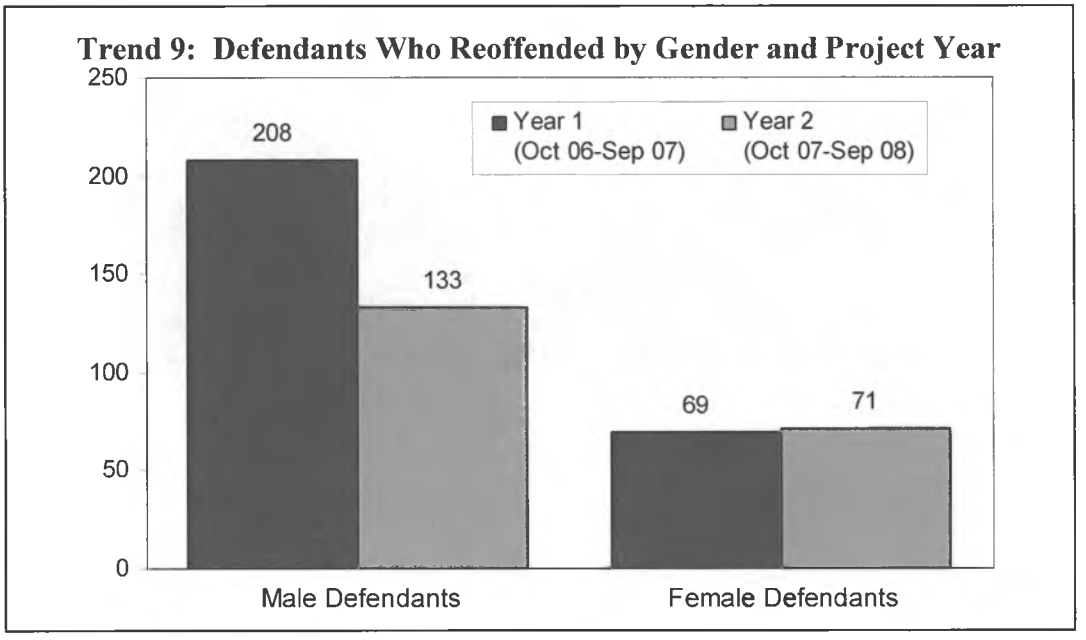
One quarter of defendants who offended during the first year would offend at least one more time during the project term. During the second year, the rate of those who would reoffend dropped to 17.7 percent of defendants (Trend 8).[2]



Those who did not offend again were male defendants. The number of males who would reoffend decreased 36.1 percent—from 208 defendants to 133 defendants—while the

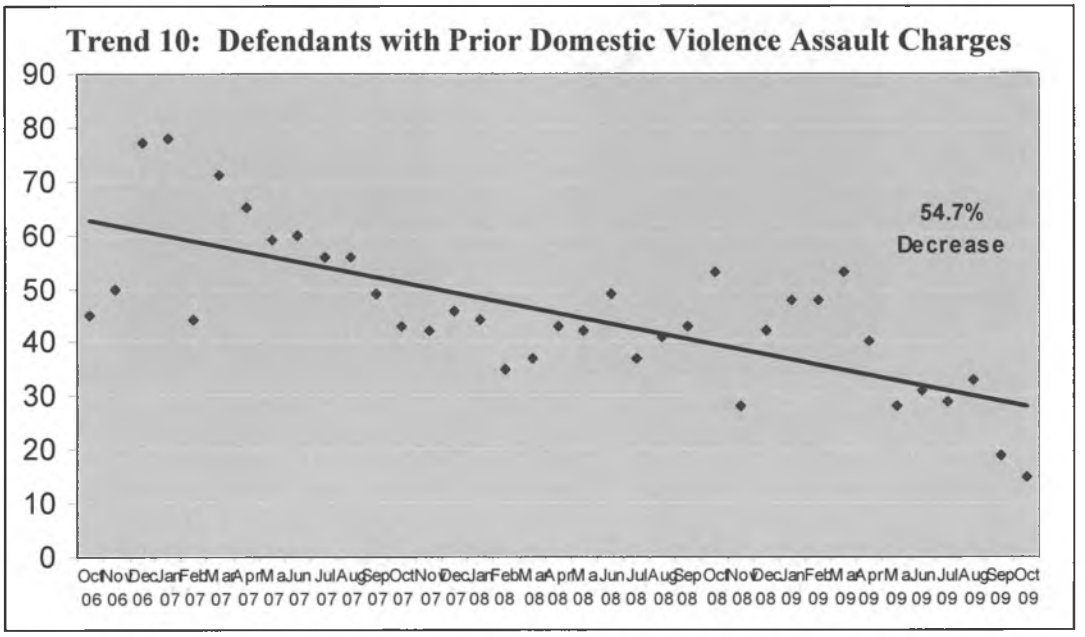
[2] Data range ends September 2008 as data shows most ADVPP defendants will reoffend in one year.

number of females who would reoffend remained at around 70 defendants each year (Trend 9).



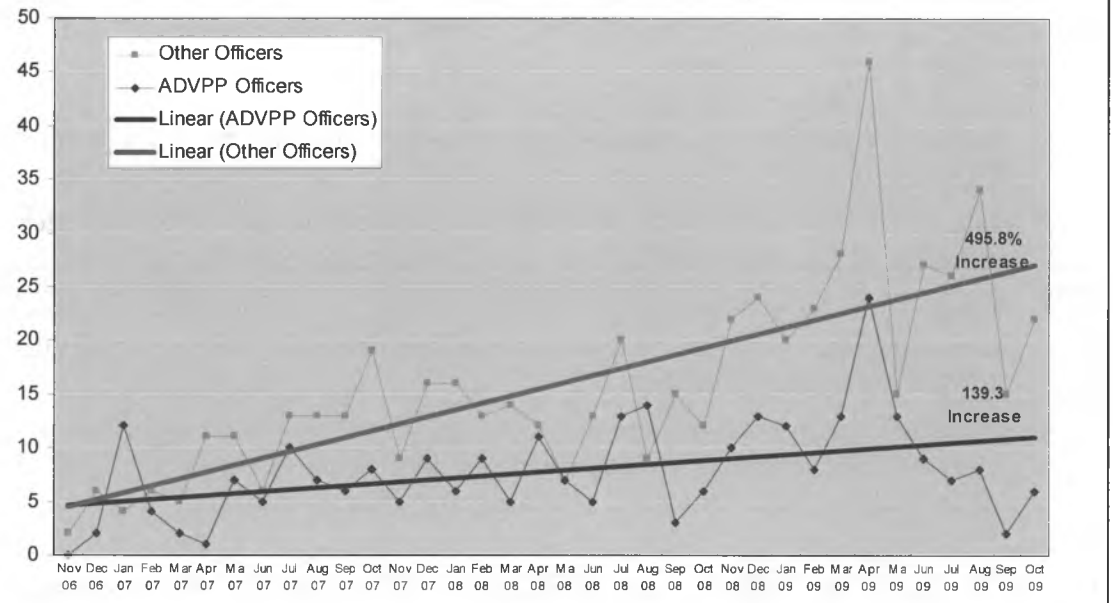
Prior Assault Charges

On average defendants with prior domestic violence assault charges made up 48.9 percent of all defendants. However ***in October 2009 defendants were 54.7 percent less likely to have a prior assault charge than were defendants in October 2006, the beginning of the grant (Trend 10).***



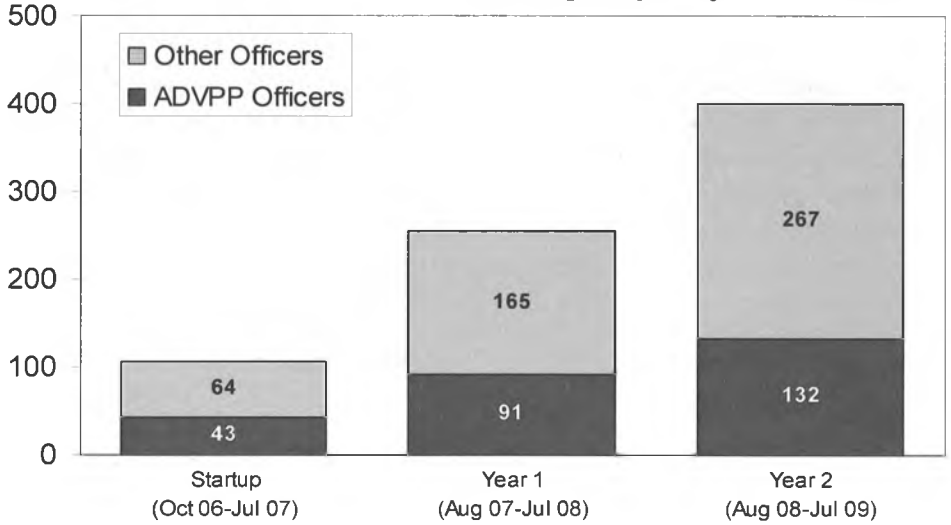
ADVPP II officers and the APSIN flagging system provided for an increase of arrests with charges for VCRs. ***Between 2006 and 2009, compliance officers saw a 139.3 percent increase from around five violations per month to over 10 violations per month. APSIN provided for an increase of 495.8 percent in arrests for VCRs by officers other than ADVPP compliance officers (Trend 11).***

Trend 11: Number of VCRs per Month Charged by ADVPP and Other Officers



Arrests for VCRs increased from 107 arrests during the startup period to 299 arrests two years later (Trend 12).

Trend 12: Number of VCRs Charged by Project Year



Municipal Prosecutor's Office (MPO) Track Defendants and Bail Conditions

The backbone of criminal justice service is housed at MPO through a databank of offender information accessible by law enforcement and municipal prosecution. MPO clerks attended municipal domestic violence hearings and entered case information into the ADVPP II database to include bail conditions and defendant and victim demographics. The MPO clerks:

- Tracked all hearings for misdemeanor domestic violence offenses and document CORs.
- Entered CORs into the ADVPP II database and a flag into APSIN to alert law enforcement that defendants are out on bail from municipal court.
- Along with prosecutors, provided the ADVPP II compliance officers with information regarding cases, defendants, CORs and potential violations to assist with their compliance checks.
- Contacted victims to inform them of their rights, pass on information from attorneys, and respond to inquiries regarding court hearings and procedures, transportation issues, childcare, visitation, and other queries.

The clerks flagged the defendant in APSIN, the database used by all law enforcement throughout Alaska to run background checks on any suspect, whether for a speeding violation or homicide. If police apprehend the defendant for any reason—domestic violence or otherwise—the flag notifies the officer that the defendant has an open domestic violence case in Anchorage. The officer then calls APD dispatch for further information and related CORs. If the defendant is violating his or her CORs, such as being with the victim when there is a "no contact" order, the police arrest and remand the defendant into custody.

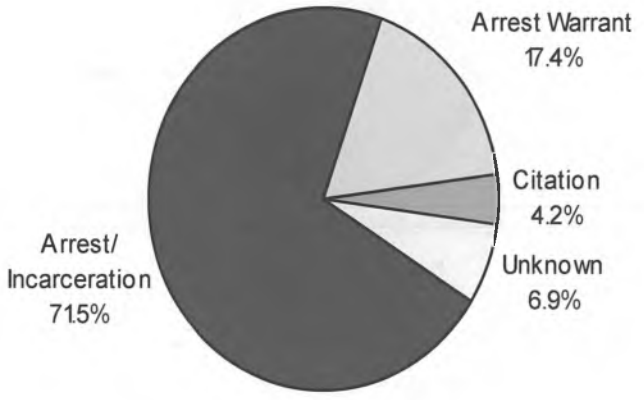
MPO clerks communicated with victims regarding their cases and rights, and passed victim information to their assigned attorneys. Clerks referred clients to AWAIC, the Alaska Women's Resource Center, the State Office of Victims' Rights, the Violent Crimes Compensation Board and Victim Information and Notification Everyday. Clerks also communicated with the Department of Corrections and informed victims when a suspect was released on bail or a sentence had been served.

The following sections provide data regarding the 6,015 cases, 25,803 hearings, 9,686 charges, 7,642 victims, and 3,887 defendants that ADVPP II clerks entered into the database system.

Cases (N=6,015)

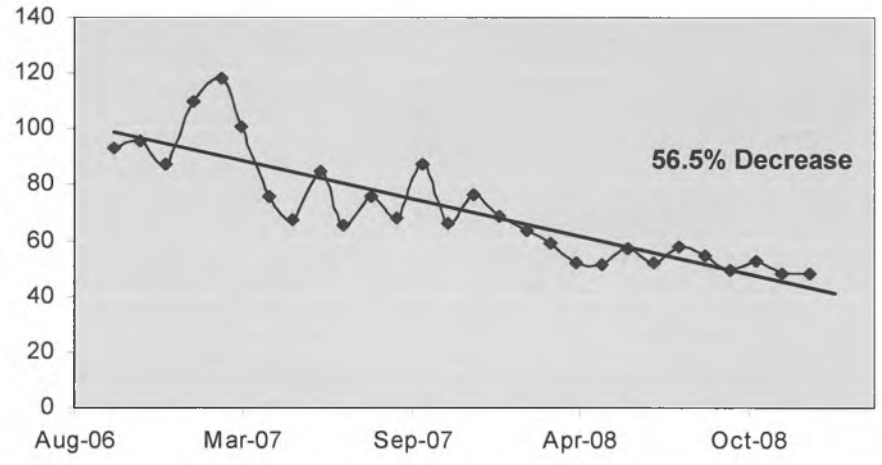
MPO entered and tracked a total of 6,015 cases. Two-thirds of cases entered the court system through the arrest and incarceration of the defendant. In 17.4 percent of cases the defendant received an arrest warrant and 4.2 percent received a citation (Figure 9).

Figure 9: Cases by Arrest Type



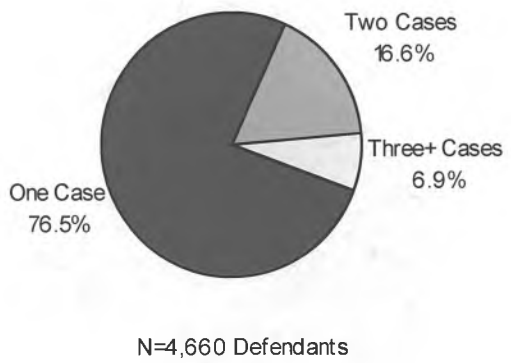
The length of cases with judgments was determined by the number of days between the first and last hearing. The average length of cases during the first year of the project (October 2006 to October 2007) was 87 days, with longest case at 118 days. ***The average length of time to process a case decreased 56.5 percent over the project period (Trend 13.*** To avoid biasing trend analyses with disproportionate numbers of short cases near the end of the sample period, data from the last four months (February to May 2009) were excluded.

Trend 13: Average Length of Cases with Judgments (N=4,434 Cases)



Most defendants (76.5 percent) had only one case during the project period; 16.6 percent had two cases (Figure 10). ***Approximately 326 individuals, or 6.9 percent, had three or more cases.***

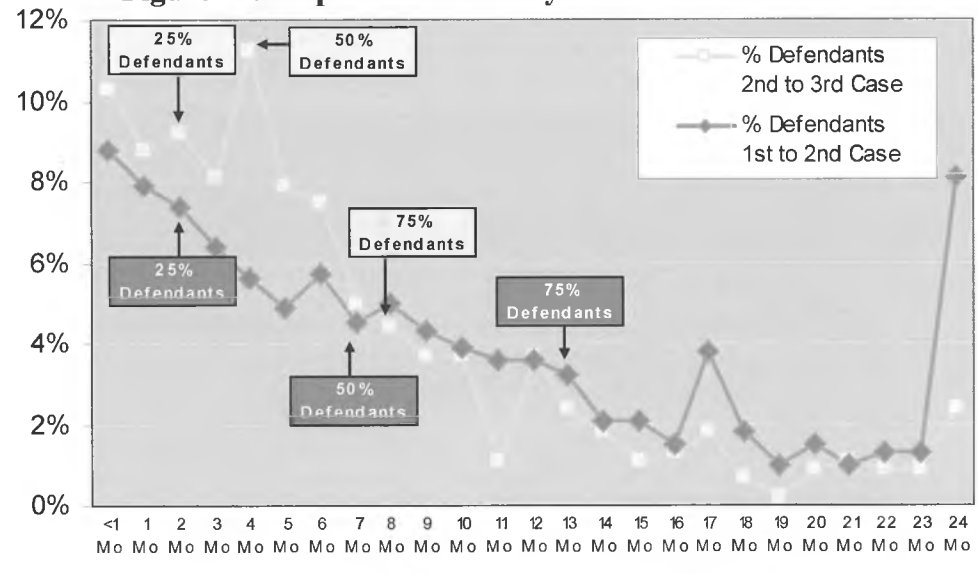
Figure 10: Number of Cases per Defendant



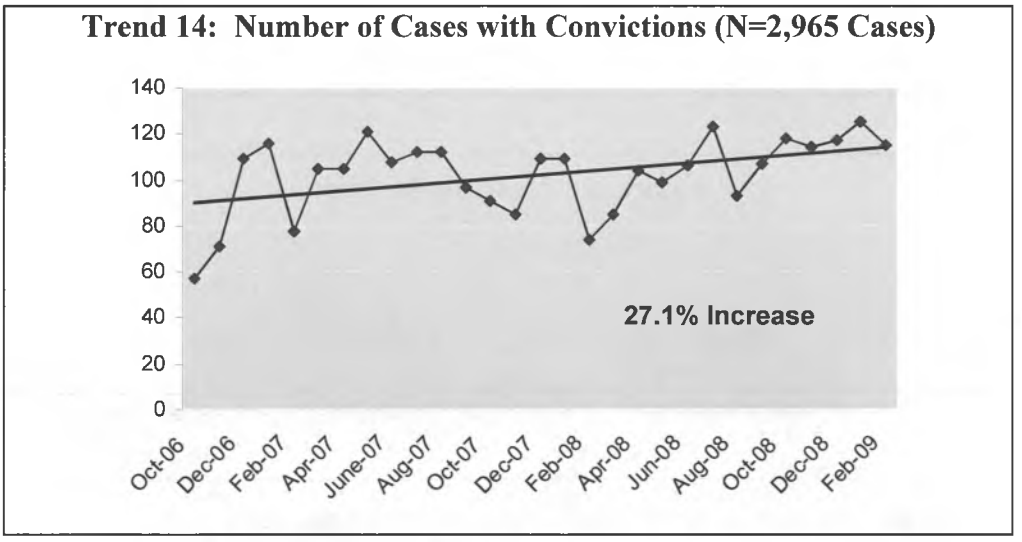
N=4,660 Defendants

Of defendants with more than one case, half offended the second time within six months of their first case and seventy-five percent re-offended a second time within a year (Figure 11). For defendants with three or more cases half offended again within four months of their second case and seventy-five percent reoffended a third time within 8 months of their second offense.

Figure 11: Repeat Offenders by Months Between Cases



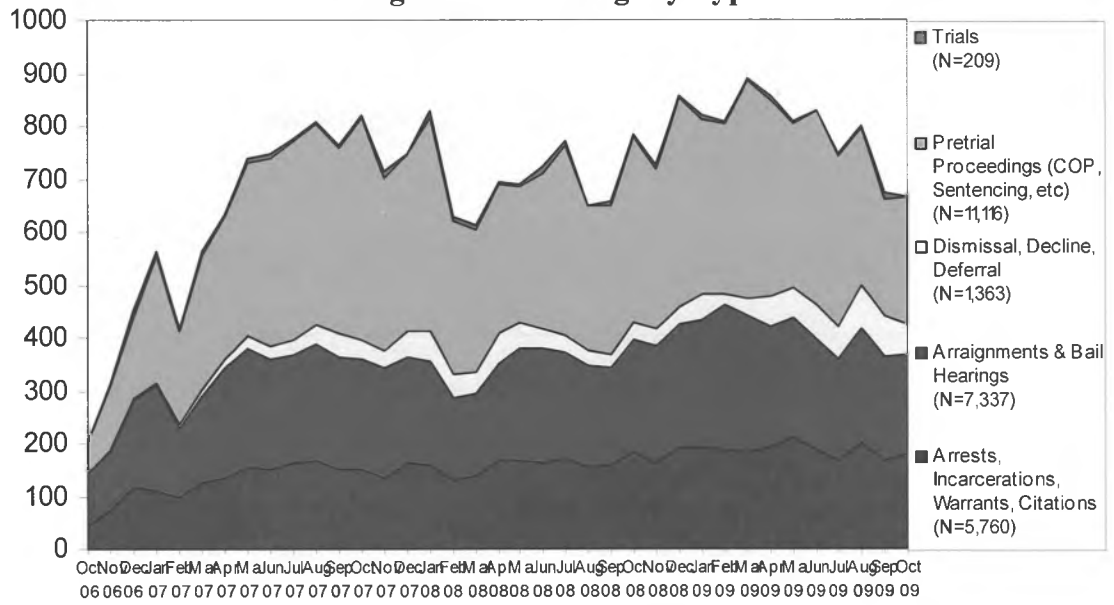
The number of cases with convictions increased by 27.1 percent over the project period (Trend 14). Again, to avoid biasing trend analyses near the end of the sample period, data from the last four months (February to May 2009) were excluded.



Hearings (N=25,803)

Between 2006 and 2009, MPO averaged 697 court proceedings per month for domestic violence cases. Of the 25,803 hearings, 5,760 (22.3 percent) were arrests and incarcerations, 7,337 (28.5 percent) were arraignments or bail hearings, and 11,116 (43.1 percent) were pretrial proceedings, mostly change of plea. Only 1,363 (5.3 percent) were dismissal, declined, or deferral hearings and 209 (0.8 percent) were trials (Figure 12).

Figure 12: Hearings by Type



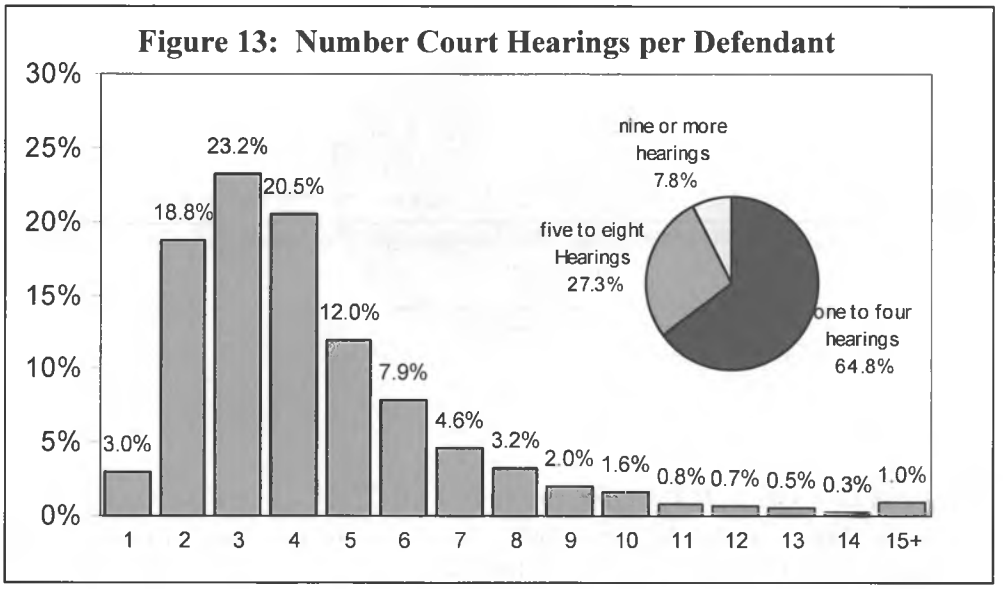
From the first year to the third year of the grant, hearings for arrests, warrants, citations, and incarcerations increased 2.5 percentage points (Trend 15). Arraignment and bail hearings decreased two percentage points; dismissal, declined, and deferral hearings increased 3.6 percentage points; and pretrial hearings decreased three percentage points.

Trend 15: Court Proceedings by Type and Project Year

Court Proceeding	Year 1 Oct 06-Oct 07 (N=7,811)	Year 2 Nov 07-Oct 08 (N=8,505)	Year 3 Nov 08-Oct 09 (N=9,487)	% Point Change Y1 toY3
Arrests, Warrants, Citations, Incarcerations	21.0%	22.3%	23.5%	2.5
Arraignment & Bail Hearings	30.2%	27.2%	28.1%	-2.1
Dismissals, Declines, Deferrals	3.1%	5.7%	6.7%	3.6
Pretrial Proceedings	24.2%	23.3%	21.2%	-3.0
Change of Plea	20.5%	20.7%	19.8%	-0.7
Trials	1.0%	0.8%	0.7%	-0.3

On average, defendants had four court contacts with incarceration and arraignment hearings the most frequent first two contacts (Figure 13). At the arraignment hearing, if the defendant pleads guilty or no contest, the magistrate will convict and sentence with fines, rehabilitation programs, probation, and community service and/or jail time. If the defendant pleads not guilty, the court schedules a trial. Four percent of all cases during the grant period went to trial, 64 percent had a change of plea before the trial (most likely changing to a guilty plea in order to avoid going to trial) and 10 percent of cases were dismissed.

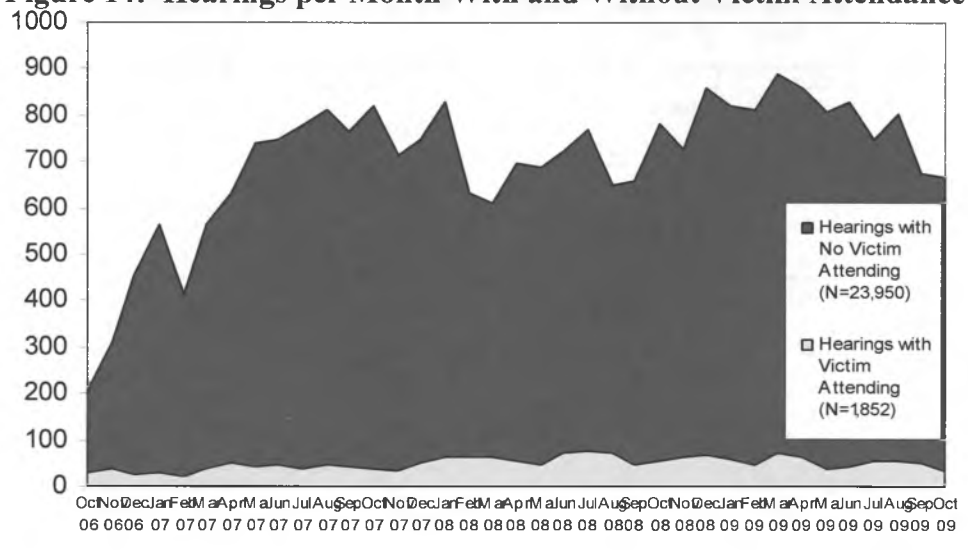
Figure 13: Number Court Hearings per Defendant



Victims Attending Hearings

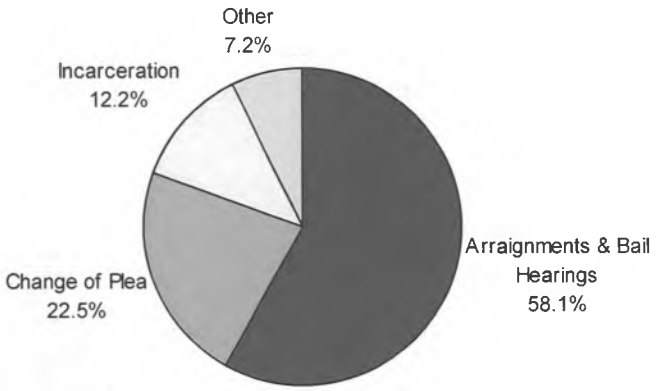
Between 2006 and 2009, 7.2 percent of all hearings were attended by the victim at an average of 50 hearings per month (Figure 14).

Figure 14: Hearings per Month With and Without Victim Attendance



Most victims attended only one hearing. Arraignment or bail hearings were most likely to be attended, at 58.1 percent of all hearing types. One quarter of victims who attended hearings attended the change of plea proceedings and 12.2 percent attended incarceration hearings (Figure 15).

Figure 15: Type of Hearing Victims Attend



The MPO clerks made 6,161 victim contacts with 2,361 victims for an average of 2.6 contacts per victim. The majority of contacts were to inform victims of notifications from the Department of Corrections, the defendant's release from jail, and the dates of hearings (Table 2).

Table 2: MPO Clerk Contacts with Victims by Type

Reason for Contact	Number
Notified by DOC	1,861
Defendant out of Jail	1,356
Hearing Dates	1,128
Courtesy Check-in	784
Bail Conditions	672
Speak to Lawyer	211
Request Assistance	32
Protection Orders	26
Recant	25
Accompaniment to Court	24
Transportation	20
VCRs	11
Referrals	11
TOTAL	**6,161**

Charges (N=9,686)

A total of 9,686 charges in 6,069 cases were entered into the ADVPP II database. Of all charges, 51.9 percent were for assault, 15.8 percent were for family violence, 9.0 percent were for VCRs, 6.9 percent were for child neglect, and 6.3 percent were for the malicious destruction of property (Table 3).

Table 3: Charges by Type

Rank	Charges	N	% Total
1	Assault	5,026	51.9%
2	Family Violence	1,526	15.8%
3	Violating Conditions of Release (VCRs)	873	9.0%
4	Child Neglect	668	6.9%
5	Malicious Destruction of Property	615	6.3%
6	Destruction/Disconnect of Communication Equipment	419	4.3%
7	Child Abuse	133	1.4%
8	Resisting Officers	129	1.3%
9	Failure to Appear	92	0.9%
10	Disorderly Conduct	69	0.7%
11	Illegal Use of Telephone or Electronic Communication	60	0.6%
12	Abuse of Third Party Appt	29	0.3%
13	Unauthorized Entry	26	0.3%
14	Trespass	8	0.1%
15	Stalking	6	0.1%
16	Tampering with Official Proceedings	6	0.1%
17	Vehicle Tampering	1	0.0%
	Total Charges	**9,686**	**100.0%**

Defendants (N=3,887)

A total of 3,887 defendants in 5,110 cases were entered into the database system (Table 4). The average defendant was male, white or Alaska Native, and 34.1 years old.

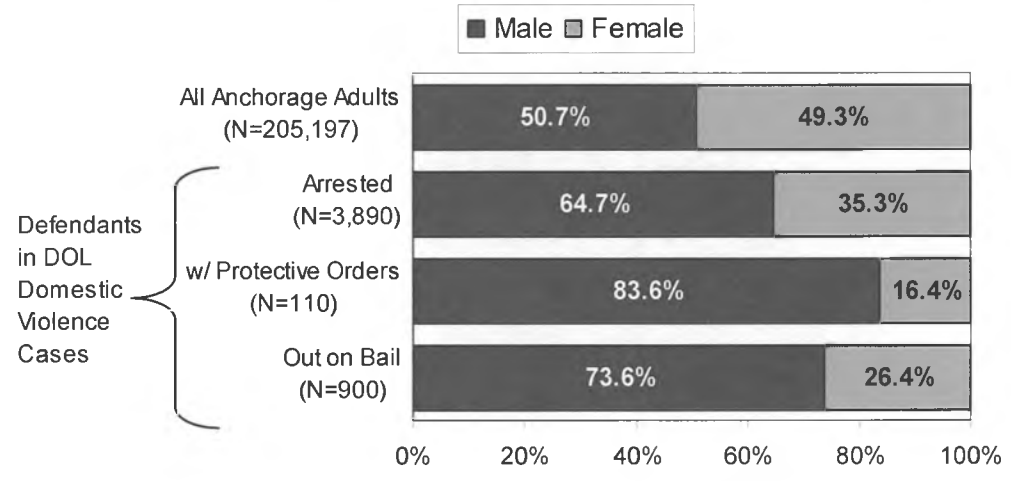
Table 4: Demographic Summary of Defendants

	Male	%	Female	%	Total	%	Ratio of Males to Females
Defendants	2,515	64.7	1,372	35.3	3,887	100.0	2:1
Ethnicity							
White	1,096	69.8	475	30.2	1,571	40.4	2:1
AK Native	745	51.5	702	48.5	1,447	37.2	1:1
Black	386	79.9	97	20.1	483	12.4	4:1
Asian/Pac.Is.	163	76.9	49	23.1	212	5.4	3:1
Hispanic	41	83.7	8	16.3	49	1.3	5:1
Unknown	84	65.6	41	30.2	125	3.3	2:1
Mean Age	34.1		32.3		33.5		

Gender

The Anchorage adult population in 2007 was 50.7 percent male. For domestic violence defendants, males made up 64.7 percent of arrests, 83.6 percent of defendants with protective orders, and 73.6 percent of defendants out on bail (Figure 16).

Figure 16: Gender of Anchorage and Defendants by Type



Source: Anchorage adult population, US Bureau of the Census, 2007 Estimate.

Gender and Charges

Males received over two thirds of all charges except child neglect which was 66.7 percent female and abuse of a third party appointment which was 56.0 percent female (Table 5). Almost 70 percent of assault and family violence—the top two charges—were committed by male defendants. To note, family violence is the charge given when children are at home during the domestic violence incident.

Table 5: Charges by Defendant Gender

Charges	Males	%	Females	%	Total	%
Assault	2,899	70.3	1,225	29.7	4,124	51.5
Family Violence	907	69.6	397	30.4	1,304	16.3
VCRs	487	67.9	230	32.1	717	9.0
Child Neglect	187	33.3	375	66.7	562	7.0
Malicious Destruction of Property	385	77.2	114	22.8	499	6.2
Destruction/ Disconnect of Comm. Equip.	277	79.8	70	20.2	347	4.3
Resisting Officers	70	67.3	34	32.7	104	1.3
Child Abuse	61	61.6	38	38.4	99	1.2
Failure to Appear	55	67.9	26	32.1	81	1.0
Disorderly Conduct	37	69.8	16	30.2	53	0.7
Illegal Use of Telephone/Electronic Comm.	44	86.3	7	13.7	51	0.6
Abuse of Third Party Appointment	11	44.0	14	56.0	25	0.3
Unauthorized Entry	16	76.2	5	23.8	21	0.3
Stalking	5	83.3	1	16.7	6	0.1
Tampering with Official Proceedings	5	100.0	0	0.0	5	0.1
Vehicle Tampering	1	100.0	0	0.0	1	0.0
TOTAL	**5,447**	**68.1**	**2,552**	**31.9**	**7,999**	**100.0**

Male defendants were three times more likely than female defendants to have prior assault charges. Males were eight times more likely to be felons, two times more likely to have other Alaska convictions and five times more likely to have a protective order filed against them (Table 6).

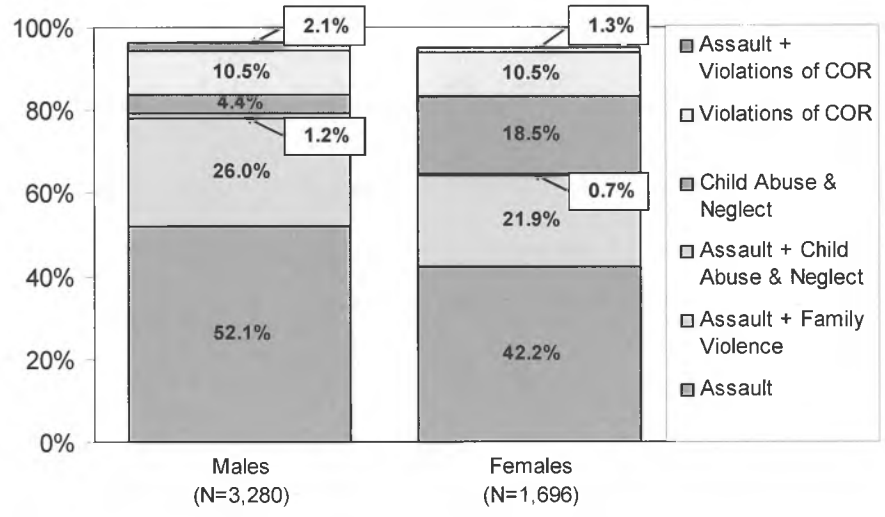
Table 6: Prior Convictions and Protective Orders by Defendant Gender

	Male	%	Female	%	Ratio of Males to Females
Prior Assault Charge	1,215	77.6	349	22.3	3:1
Prior Felony Charges	617	8.5	80	11.5	8:1
Prior Alaska Convictions	1,266	67.8	600	32.2	2:1
Protective Orders	92	83.6	18	16.4	5:1

Gender and Cases

For all cases with male defendants, 81.4 percent had at least one assault charge. For all cases with female defendants, 66.1 percent had at least one assault charge. The percentage of assaults for female defendants was lower compared to male defendants because 18.5 percent of cases with female defendants were for child abuse and/or neglect charges (Figure 17). Child abuse and neglect were charged when the defendant hurt a child or placed a child in a situation with the potential of harm such as driving with a child while under the influence. Serious harm, such as burning, assaulting, or killing a child, involves felony charges.

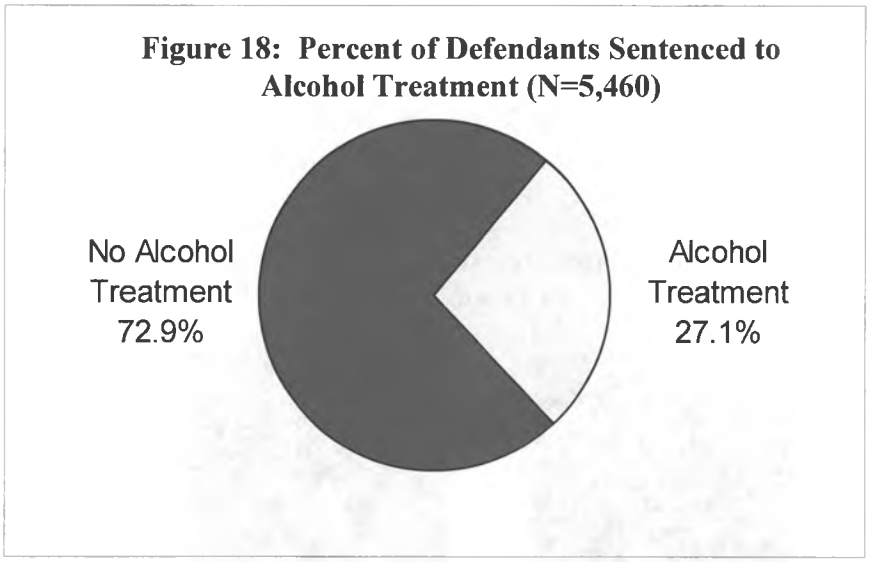
Figure 17: Defendant Gender and Case Types



Gender and Alcohol

For defendants with rendered judgments, 27.1 percent received alcohol treatment conditions; 72.9 percent did not (Figure 18 on page 38). Unfortunately the ADVPP database does not track alcohol use at the time of the incident. However, for a sample of domestic violence police reports between 1999 and 2002 (N=2,417), 40.0 percent indicated alcohol use by the suspect. It is unlikely this percentage has decreased since then. Thus there appears to be a discrepancy between the number of suspects consuming alcohol at the time of the incident and the number sentenced to alcohol treatment. The reasons for this warrant further study.

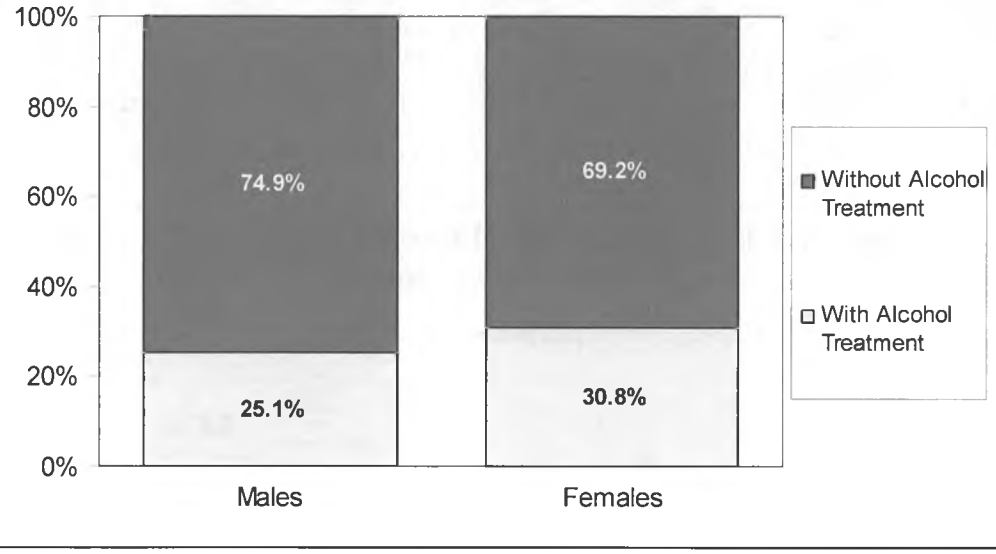
Figure 18: Percent of Defendants Sentenced to Alcohol Treatment (N=5,460)



A total of 5,450 defendants received sentences for their cases: 1,872 females and 3,588 males.

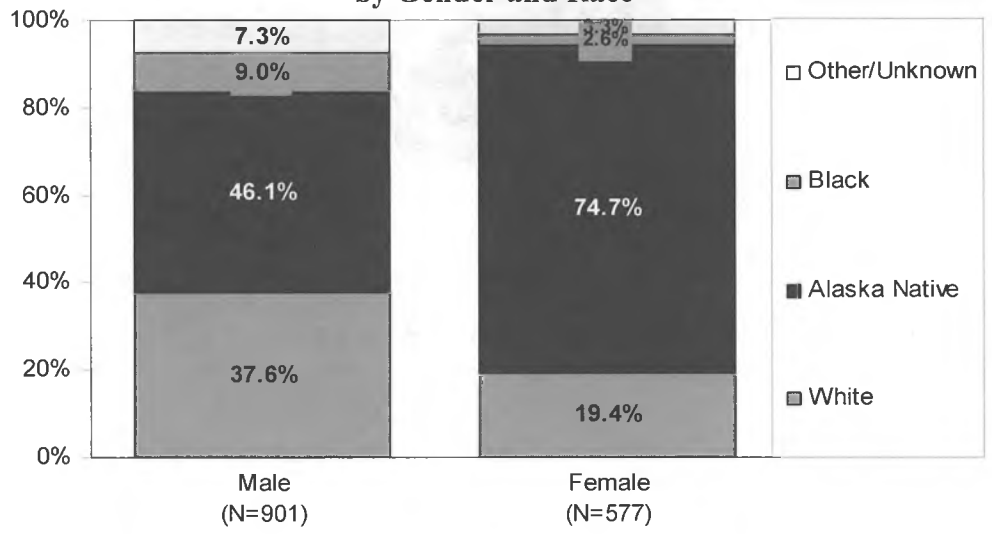
Almost 31 percent (30.8%) of female defendants were sentenced to alcohol treatment, whereas only 25.1 percent of male defendants received alcohol treatment sentences (Figure 19).

Figure 19: Percent of Defendants Sentenced to Alcohol Treatment by Gender



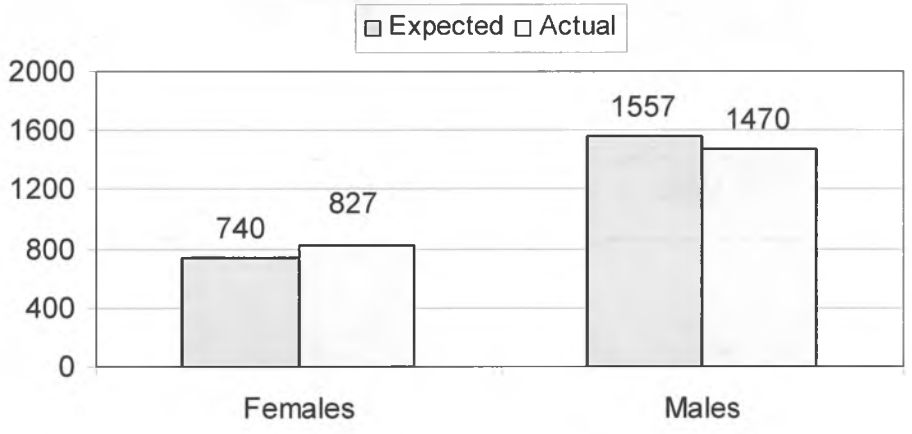
Alaska Native male and female defendants received a disproportionate percentage of alcohol treatment sentences. Alaska Native males made up 46.1 percent of male defendants receiving alcohol sentences compared with 29.8 percent of male defendants. Alaska Native females made up 74.7 percent of females receiving alcohol sentences compared with 51.3 percent of female defendants (Figures 20 and 24).

Figure 20: Defendants Receiving Alcohol Treatment Sentences by Gender and Race



Female defendants received 32.2 percent of all sentence conditions (N=8,030). Assuming no gender bias in the distribution of alcohol treatment conditions (N=2,297), females would be expected to receive 32.2 percent of these sentences as well, or 740 alcohol treatment sentences. Females actually received 827 sentences, which is 11.8 percent more than expected. Males, on the other hand, received 87 (5.6 percent) fewer alcohol treatment sentences than expected (Figure 21).

Figure 21: Expected and Actual Number of Alcohol Treatment Sentences by Gender



Age

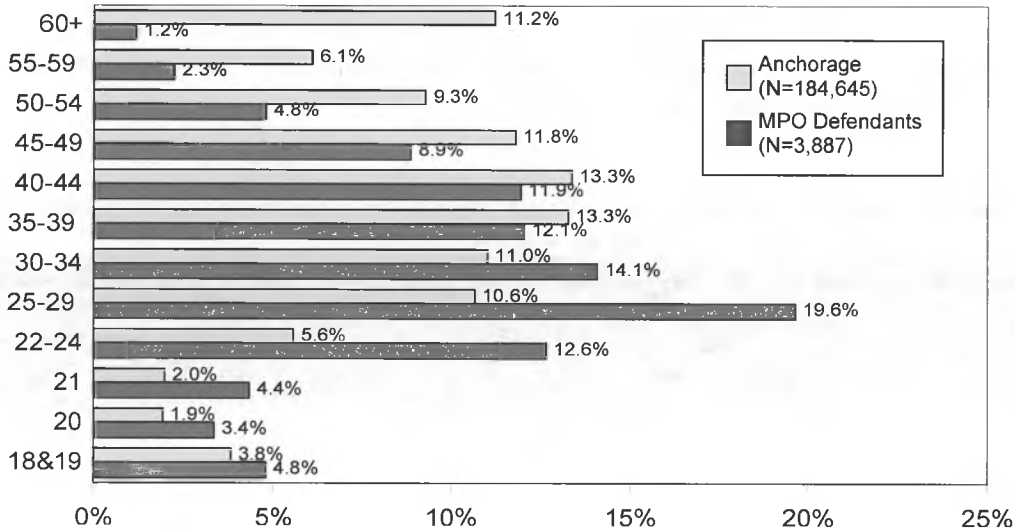
The median (middle) age of defendants was 31 years: 30 years for females and 32 years for males. The mean (average) age was slightly older at 33 years: females at 32 years and males at 34 years (Table 7).

Table 7: Defendant Age by Gender

	Median	Mean
Male	32	34.1
Female	30	32.3
Total	**31**	**33.5**

The majority, or 58.4 percent, of MPO domestic violence cases had defendants aged 22 to 39 years. Defendants between the ages of 22 and 29 were at twice the percentage of the Anchorage population of the same age range (Figure 22).

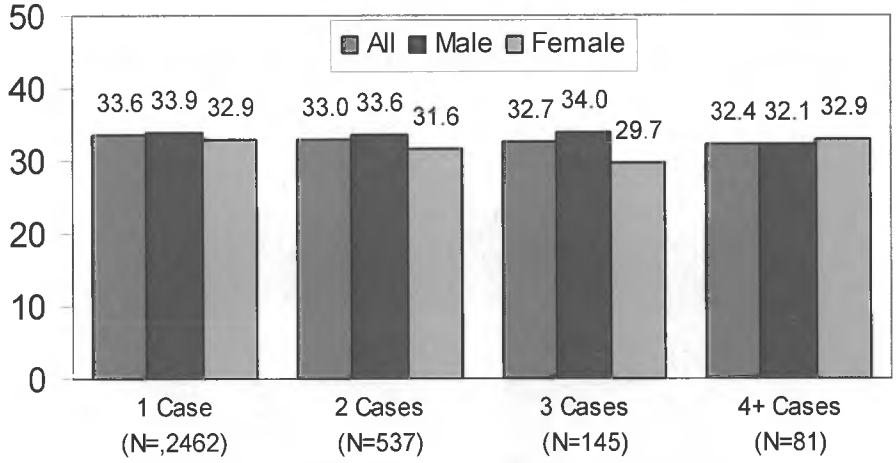
Figure 22: Anchorage and Defendant Population by Age Group



Source: Anchorage Population, US Bureau of the Census, Census 2000

Male defendants averaged 34 years of age regardless of the number of cases per defendant (Figure 23). The exception was males with four or more cases, who averaged 32 years of age. Female defendants on the other hand decreased in age as the number of cases per defendant increased. Those with one case averaged 33 years and those with three cases averaged 30 years. Female defendants with four or more cases also had an average age of 33 years of age.

Figure 23: Defendant Age by the Number of Cases per Defendant



Note: Data through 12/ 31/ 08 .

Half of defendants had no prior charges of domestic violence assault. As the age of the defendants increased, so did the likelihood that they would have prior domestic violence assault charges (Table 8). For defendants 18 and 19 years old, 10.1 percent had a prior domestic violence assault charge. The percentage steadily increased until it peaked at 52.5 percent for defendants who were ages 40 to 44 years old.

Assault charges were most prevalent in cases with defendants ages 18 and 19 years, with assault making up 79.7 percent of these cases. Cases with defendants over 50 years had over 78 percent of cases with an assault charge.

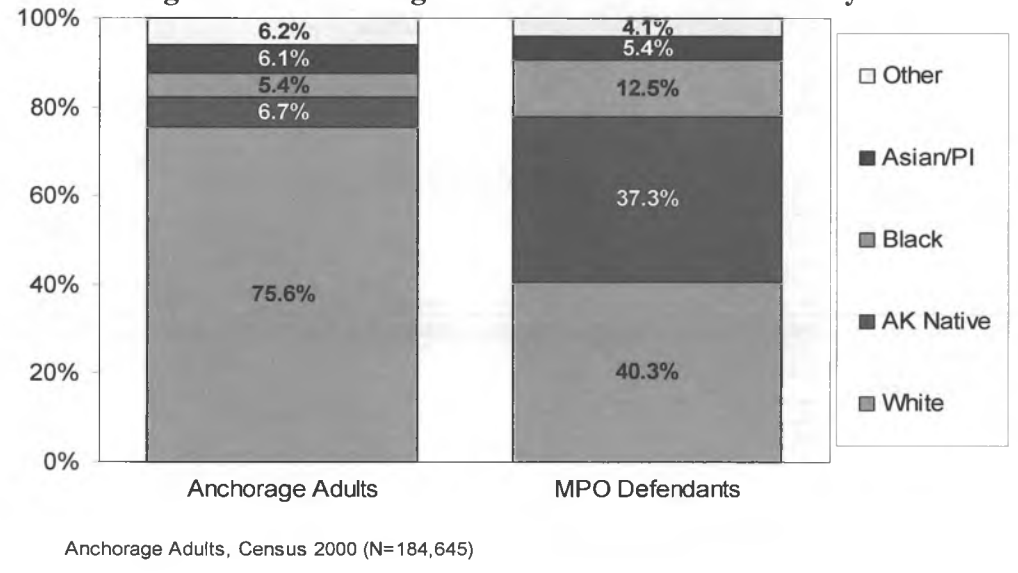
Table 8: Defendant Age and Current and Prior Domestic Violence Assault Charges
(Above Average Bolded)

Age Group	# Defendants	% Defendants with Prior Domestic Violence Assault Charges	# Domestic Violence Cases	% Domestic Violence Cases with at least One Assault Charge
18&19	168	10.1%	194	**79.7%**
20-24	793	26.8%	1,031	**76.4%**
25-29	744	38.2%	1,011	72.2%
30-34	555	44.5%	765	70.4%
35-39	471	**50.7%**	621	72.8%
40-44	453	**52.5%**	606	**74.8%**
45-49	343	**50.9%**	456	**75.5%**
50-54	196	45.8%	251	**78.1%**
55+	134	42.5%	159	**78.7%**
Total	**3,857**	**48.9%**	**5,094**	**74.3%**

Race/Ethnicity

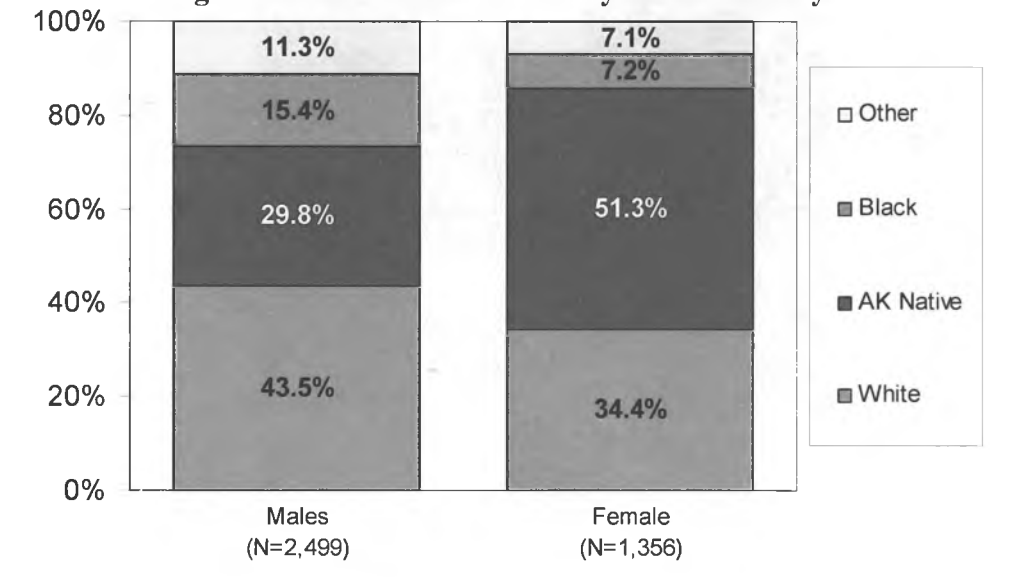
Defendants were mostly white (40.3 percent), Alaska Native (37.3 percent), or black (12.5 percent) while Anchorage adults (2000) were mostly white (75.6 percent), black (6.7 percent), or Alaska Native (5.4 percent), as seen in Figure 24.

Figure 24: Anchorage and Defendant Race/Ethnicity



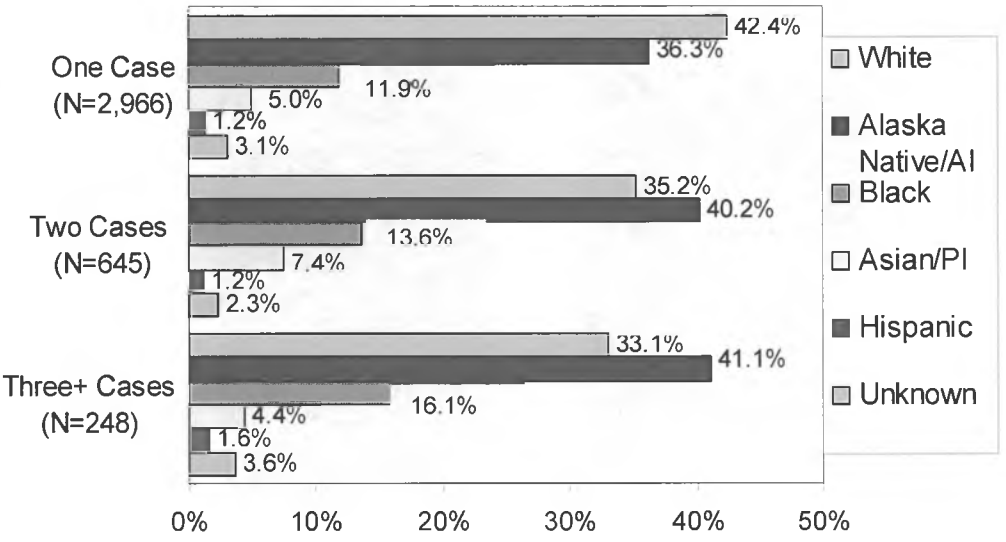
The race/ethnic representation of defendants was disproportionate to the Anchorage population. Alaska Native defendants represented six times the percentage of the Alaska Native population citywide. Alaska Native females were especially overrepresented, making up half of all female defendants. The percentage of Alaska Native female defendants was twice the percentage of Alaska Native male defendants (Figure 25).

Figure 25: Defendant Gender by Race/Ethnicity



The percentage Alaska Native and black defendants increased four percentage points as the number of cases per defendant increased from one case to three or more cases (Figure 26). The percentage of white defendants decreased nine points.

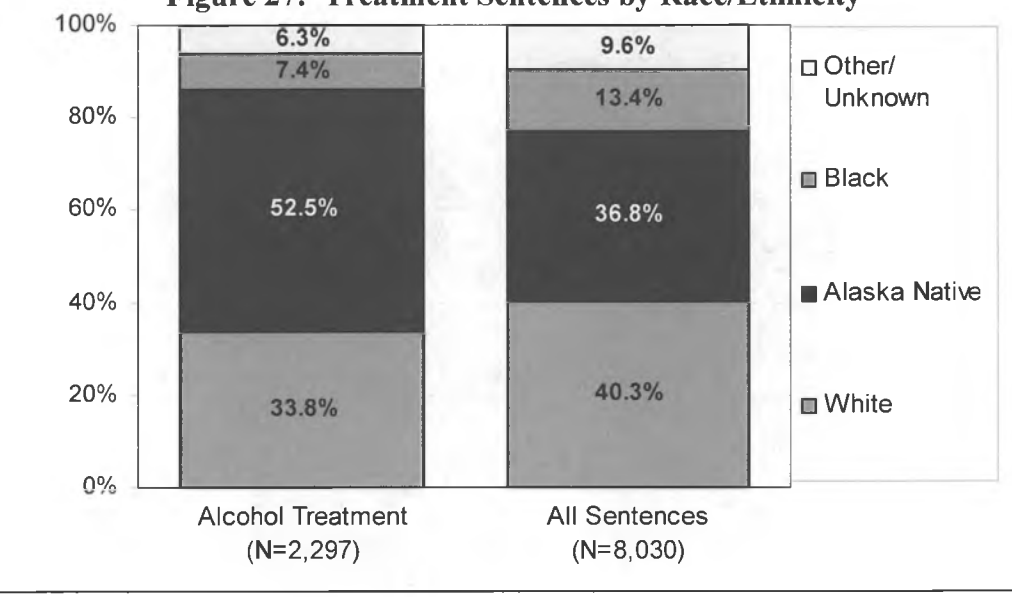
Figure 26: Number of Cases per Defendants by Race/Ethnicity



Race/Ethnicity and Alcohol

All treatment sentences by race/ethnicity paralleled the percentage of MPO defendants (compare to Figure 24). However, alcohol treatment conditions, at 52.5 percent, were disproportionately sentenced to the Alaska Native population (Figure 27).

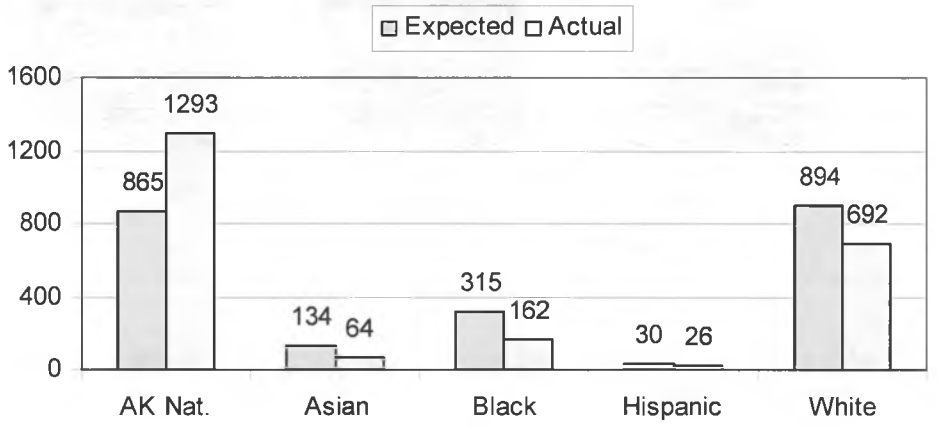
Figure 27: Treatment Sentences by Race/Ethnicity



Defendants with known racial/ethnic identities received a total of 7,781 sentence conditions. Of these, populations who were Alaska Native received 38.7 percent, Asian 6.0 percent, black 14.1 percent, Hispanic 1.3 percent, and white 39.9 percent.

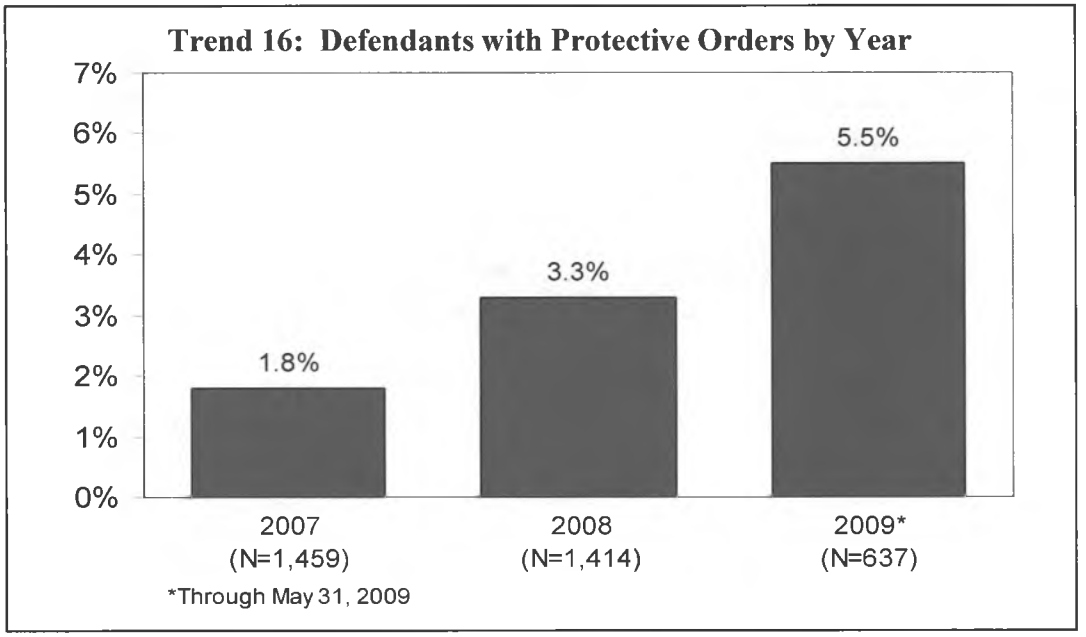
A total of 2,237 alcohol treatment conditions were sentenced. Assuming no racial bias in the distribution of alcohol treatment conditions, Alaska Native populations would be expected to receive 865 conditions; they actually received 1,293 alcohol conditions, 49.5 percent more than expected. People who were Asian received 52.2 percent fewer, black received 48.6 percent fewer, Hispanic received 13.3 percent fewer and white received 22.6 percent fewer alcohol treatment conditions than expected (Figure 28).

Figure 28: Expected and Actual Numbers of Alcohol Treatment Conditions by Race/Ethnicity

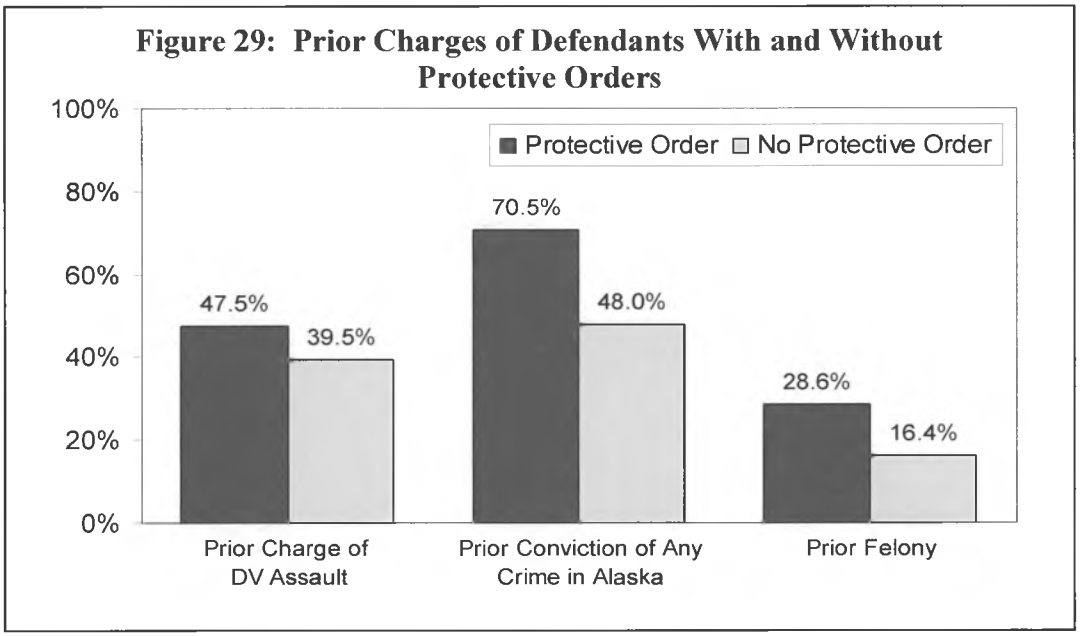


Defendants with Protective Orders

The percentage of defendants with protective orders, as tracked by ADVPP II, steadily increased over the grant period. In 2007, an average of 1.8 percent had protective orders. In 2008, the average was 3.3 percent and during the first six months of 2009, the average was 5.5 percent (Trend 16).

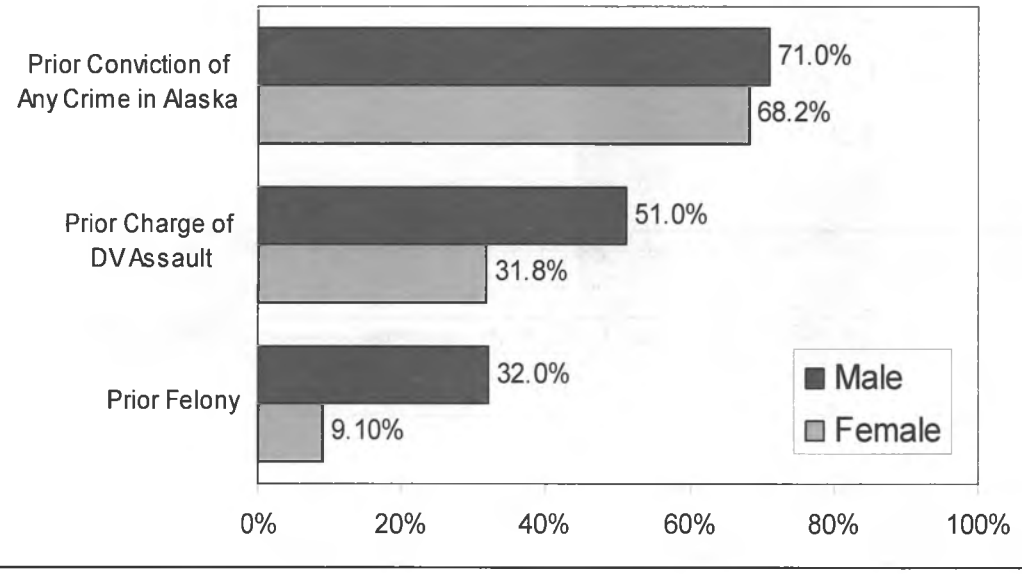


Defendants with protective orders were more likely than defendants without protective orders to have prior criminal charges: domestic violence assaults were 8.0 percentage points higher, previous convictions recorded in Alaska were 22.5 percentage points higher, and prior felonies were 12.2 percentage points higher (Figure 29).



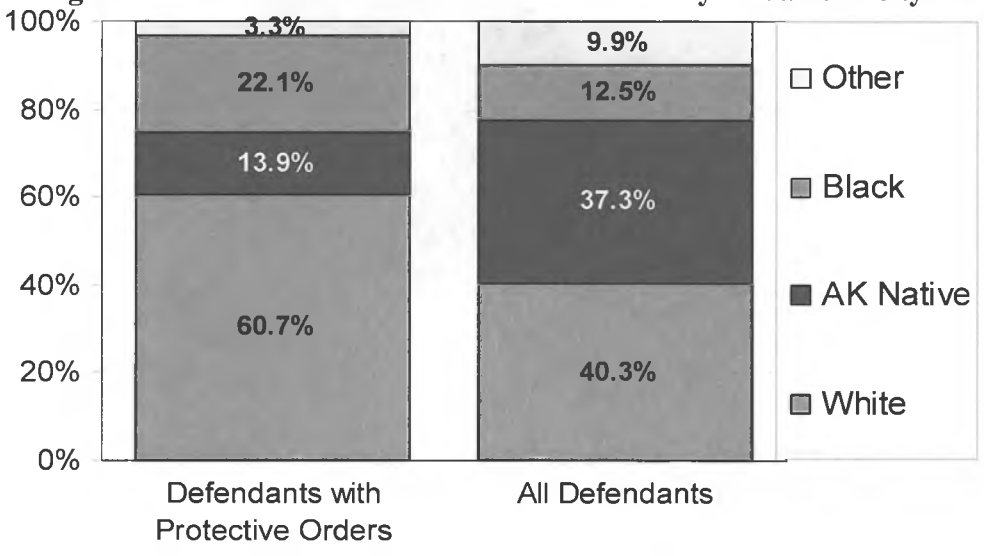
Male defendants with protective orders, when compared with female defendants with protective orders, were slightly more likely to have any prior conviction in Alaska: 71.0 percent for males compared to 68.2 percent for females (Figure 30). Defendants with protective orders were 1.5 times more likely to be male if there were previous charges of assault (51.0 percent male to 31.8 percent female) and three times more likely to be male if there was a felony record (32.0 percent male to 9.1 percent female).

Figure 30: Defendants with Protection Orders by Gender and Priors



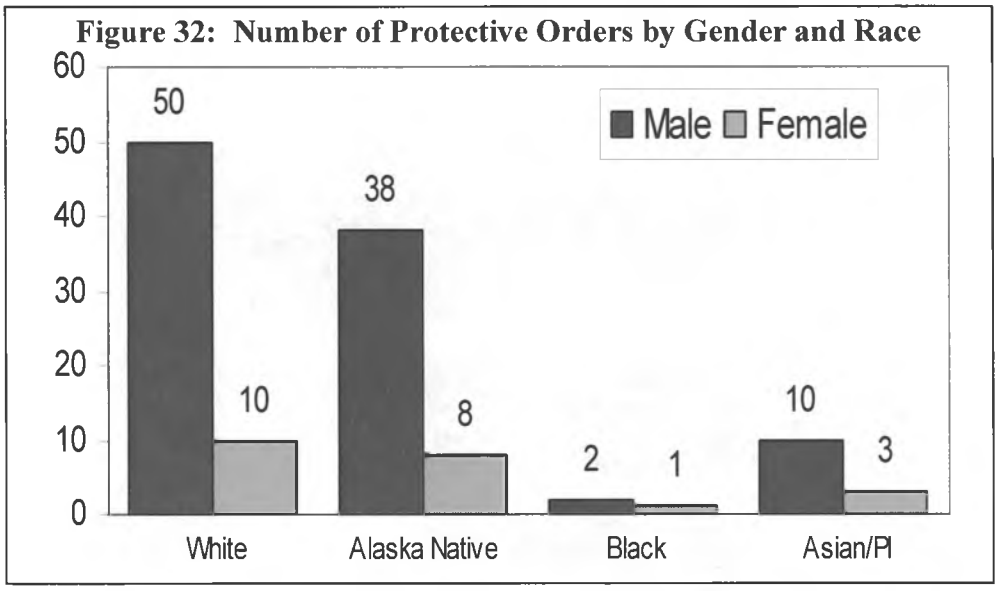
Almost two thirds of defendants with protective orders were white. Compared to all defendants, those with protective orders were one and a half time more likely to be white, twice as likely to be black and half as likely to be Alaska Native (Figure 31).

Figure 31: Defendants with Protective Orders by Race/Ethnicity



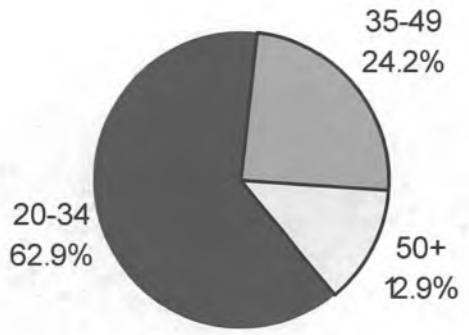
Males were four times more likely to have a protection order filed against them than were females: 100 males to 22 females. White and Alaska Native males were five times more likely to have protective orders than white and Alaska Native females (Figure 32).

Figure 32: Number of Protective Orders by Gender and Race



Younger males were more likely to have a protective order filed against them. Males between the ages of 20 and 34 years accounted for 62.9 percent of all defendants with protective orders, whereas males in this age group accounted for half of all defendants (Figure 33).

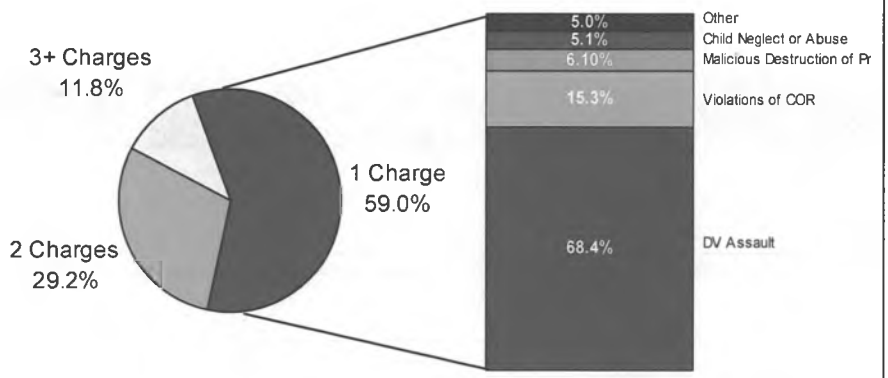
Figure 33: Male Defendants with Protective Orders by Age



Defendants with protective orders had an average of 1.5 cases whereas defendants without protective orders had an average of 1.3 cases.

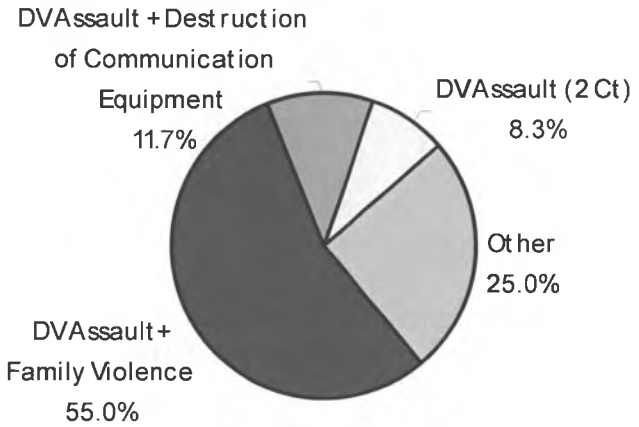
The majority, or 59.0 percent, of defendants with protective orders were in court on a single charge of domestic violence. Almost 68.4 percent of single charges against defendants with protective orders were for assault and 15.3 percent were for VCRs (Figure 34).

Figure 34: Defendants with Protective Orders by Number of Charges and Type



As the number of charges against defendants with protective orders increases from one to two, family violence becomes a significant percentage of the charges. One third of all defendants with protective orders were in court on two charges, and 55.0 percent of those had charges of domestic violence assault with family violence (Figure 35).

Figure 35: Types of Charges for Defendants with Protective Orders and Two Charges



Additional information on Protective orders is provided in Appendix C.

Victims (N=7,551)

The victim profile analyzes the demographics of victims in Anchorage misdemeanor domestic violence cases.

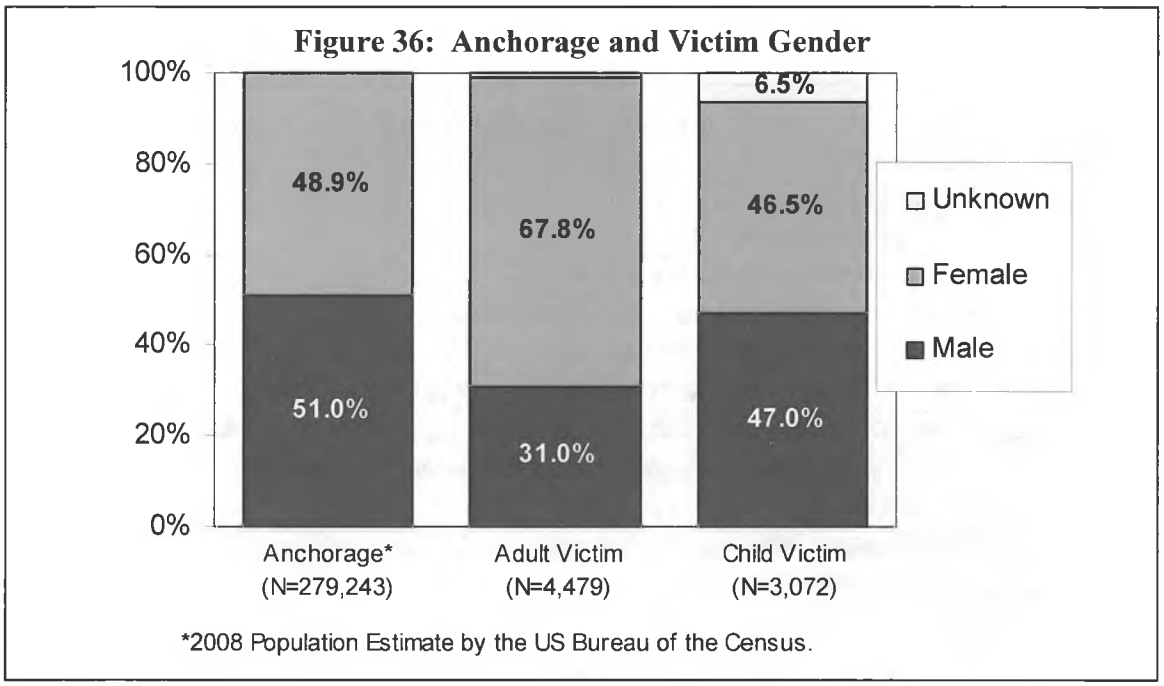
MPO tracked 7,551 victims, as detailed in Table 9, and the average defendant had two victims per case.

Table 9: Demographics of Victims

# Individuals	Male	%	Female	%	Unknown Gender	%	Total	%
Adults	1,387	31.0	3,039	67.8	53	1.2	4,479	59.3
Children	1,443	47.0	1,428	46.5	201	6.6	3,072	40.7
Unknown	0	0.0	0	0.0	0	0.0	0	0
Total	2,830	37.5	4,467	59.2	254	3.4	7,551	
Mean age								
Adults	35.5		31.3				31.0	
Children	6.0		6.5				6.2	
Adult Ethnicity								
White	664	35.7	1,197	64.3	1	0.1	1,862	41.6
AK Native	407	25.0	1,219	74.8	3	0.2	1,629	36.4
Black	123	34.3	235	65.5	1	0.3	359	8.0
Asian/Pacific Island	56	25.0	168	75.0	0	0.0	224	5.0
Hispanic	28	53.8	24	46.2	0	0.0	52	1.2
Unknown Ethnicity	109	30.9	196	55.5	48	13.6	353	7.9
Sub-Total	1,387	31.0	3,039	67.8	53	1.2	4,479	100
Child Ethnicity								
White	425	49.3	424	49.2	13	1.5	862	28.1
AK Native	637	47.8	647	48.6	48	3.6	1,332	43.4
Black	166	50.6	152	46.3	10	3.0	328	10.7
Asian/Pacific Island	102	47.0	103	47.5	12	5.5	217	7.1
Hispanic	16	43.2	17	45.9	4	10.8	37	1.2
Unknown	97	32.8	85	28.7	114	38.5	296	9.6
Sub-Total	1,443	47.0	1,428	46.5	201	6.5	3,072	100.0
TOTAL ETHNICITY	**2,830**	**37.5**	**4,467**	**59.2**	**254**	**3.4**	**7,551**	**100.0**

Gender

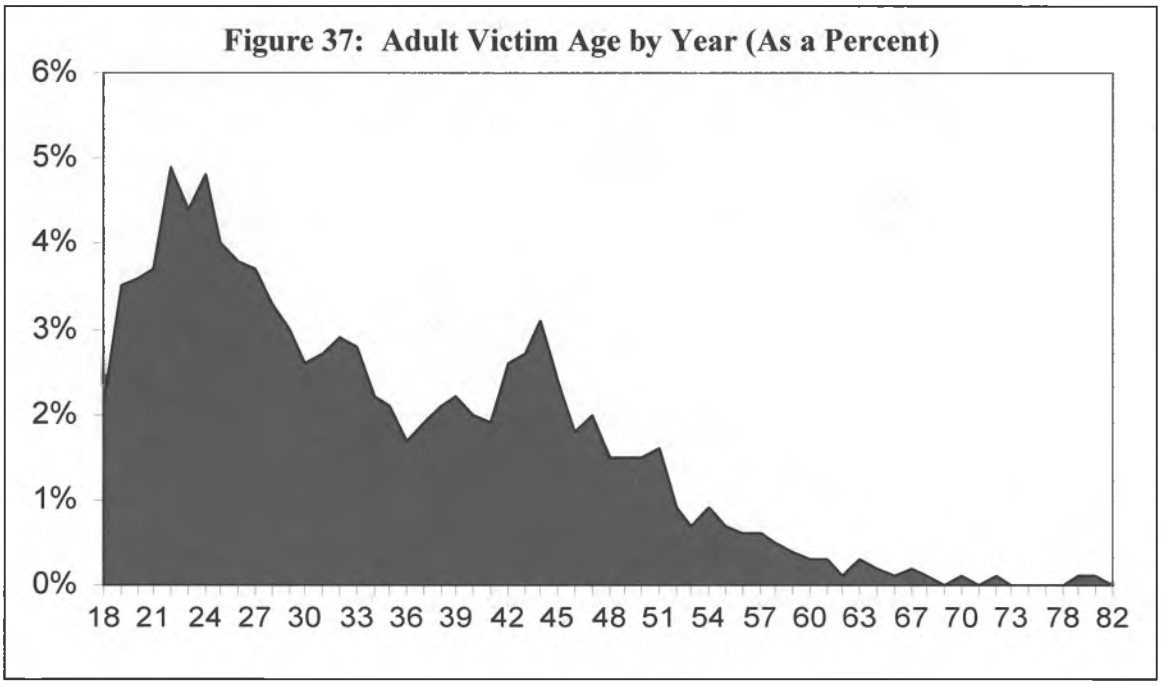
Anchorage's adult and child populations were equally male and female. Child victims in MPO cases were proportionally similar to the general population in gender. Adult victims of domestic violence differed significantly from the general population at 67.8 percent female for MPO cases compared with 48.9 percent female citywide (Figure 36).



Age

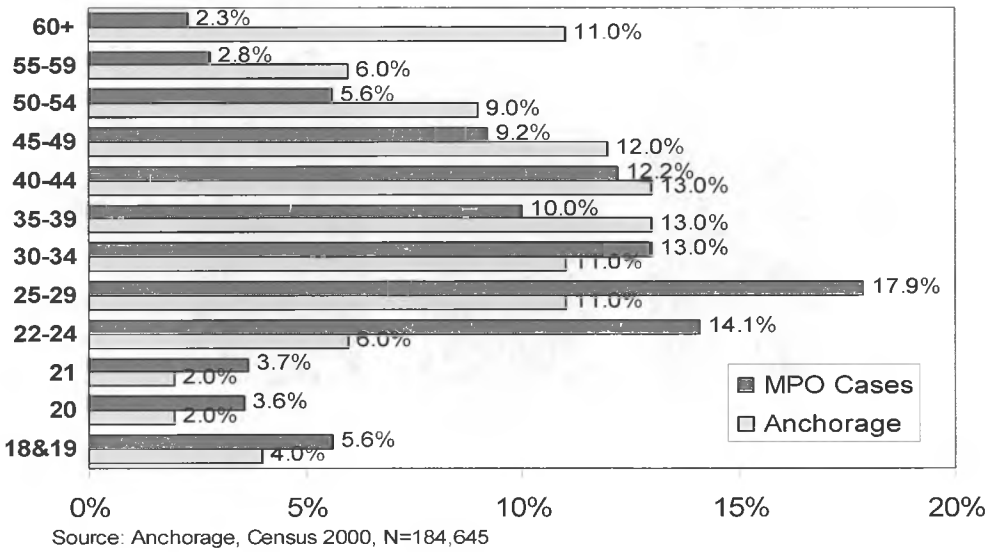
Adults (18 years old and older) represented 59.3 percent of victims; children 40.7 percent.

Adult Victims (N=4,479): Victims of domestic violence in MPO cases tended to be younger than 45 years of age (Figure 37).



Victims who were ages 22 to 29 were most overrepresented when compared to the same age group citywide (Figure 38).

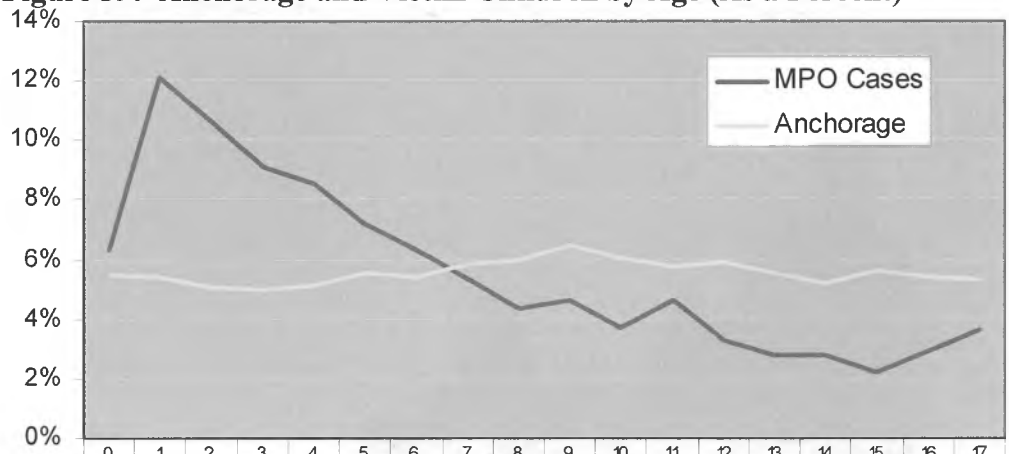
Figure 38: Anchorage and Victim Adults by Age Group



Source: Anchorage, Census 2000, N=184,645

Children (N=3,072): Of all victims in MPO cases, 40.7 percent were children. Children five years and younger made up 53.8 percent of child victims and were twice the percentage of children five years and younger citywide. Children who were one year old were 3 times greater the percentage of children citywide who were one year old (Figure 39).

Figure 39: Anchorage and Victim Children by Age (As a Percent)



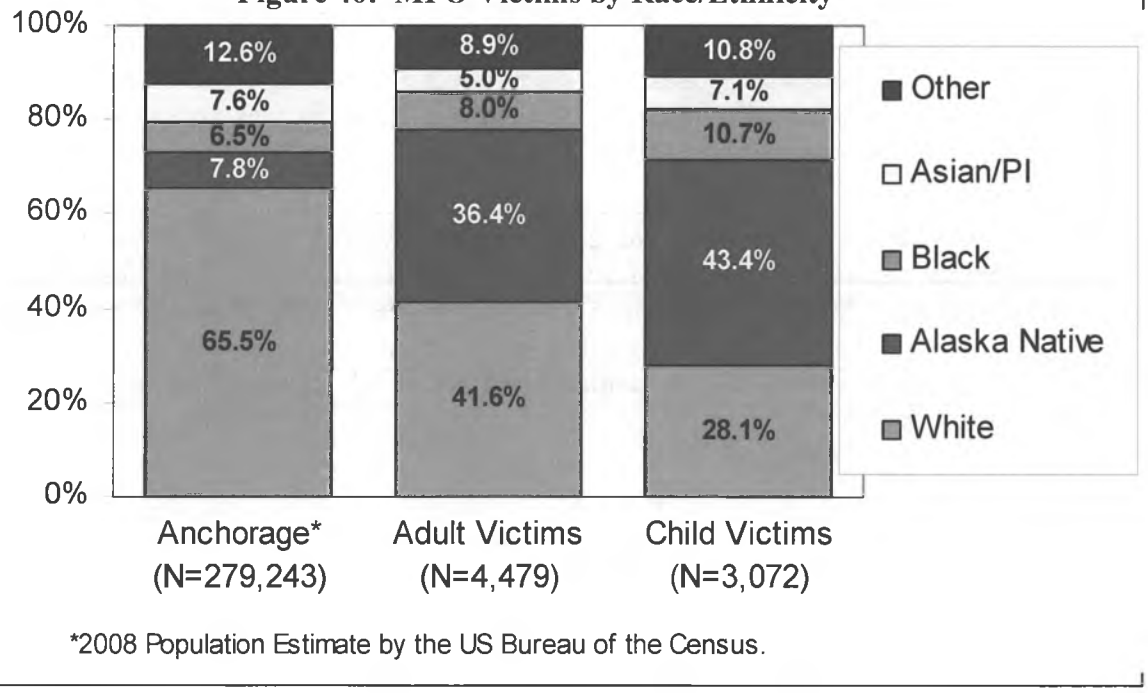
	0	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
MPO Cases	6.3%	12.1%	10.6%	9.1%	8.5%	7.2%	6.3%	5.3%	4.3%	4.6%	3.7%	4.6%	3.3%	2.8%	2.8%	2.2%	2.9%	3.6%
Anchorage	5.4%	5.4%	5.0%	5.0%	5.1%	5.5%	5.4%	5.8%	6.0%	6.5%	6.1%	5.8%	5.9%	5.6%	5.2%	5.6%	5.4%	5.3%

Anchorage 2000 population from the US Bureau of the Census, Census 2000 (N=75,638)

Race/Ethnicity

Victims were significantly overrepresented by the Alaska Native population, especially children. Alaska Native children made up 43.4 percent of all child victims in MPO cases compared with 7.8 percent citywide. Child victims who were white made up 28.1 percent of all child victims compared with a 65.5 percent white population citywide (Figure 40).

Figure 40: MPO Victims by Race/Ethnicity



*2008 Population Estimate by the US Bureau of the Census.

Victims, in general, tended to be of the same race as the perpetrator (Table 10).

Table 10: Number of Charges Based on Race/Ethnicity of Victims and Defendants

	Victim Race					
Defendant Race	White	Alaska Native	Asian/PI	Black	Hispanic	Unknown
White	1,061	260	34	46	20	124
Alaska Native	253	996	21	45	5	109
Asian/PI	42	22	121	4	1	18
Black	135	80	13	209	2	41
Hispanic	14	9	4	2	16	3
Unknown	41	31	3	11	2	36

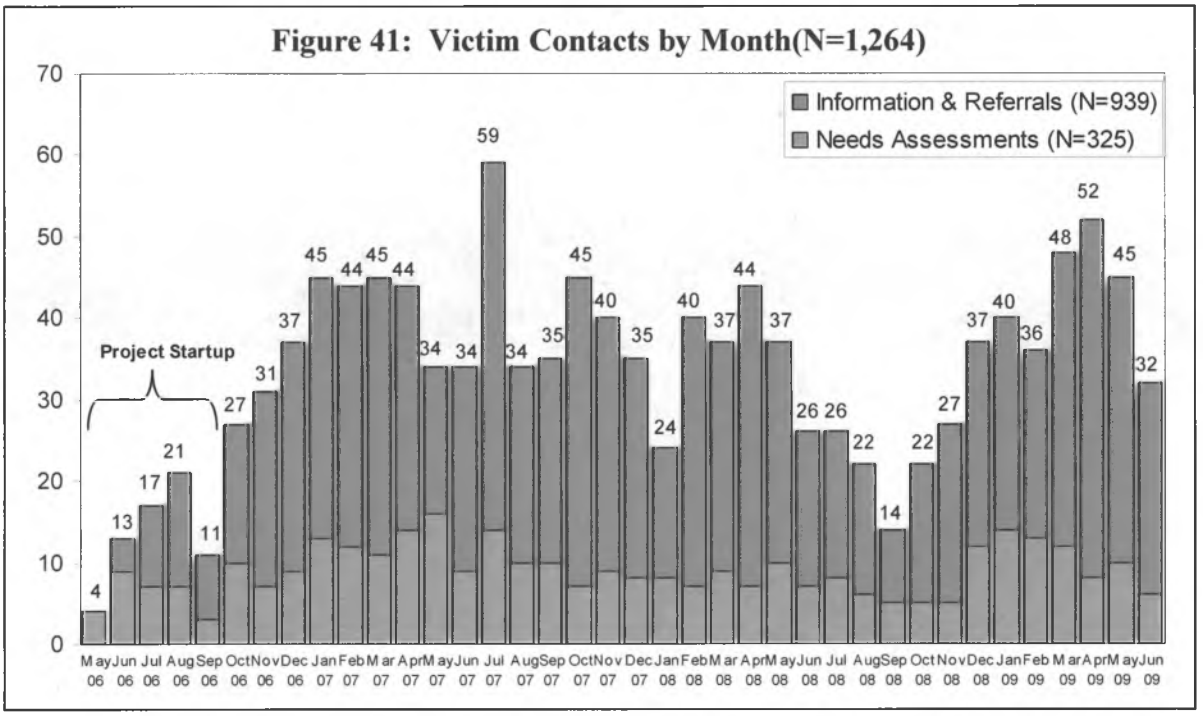
Abused Women in Crisis, Inc (AWAIC) Victim Assistance

The AWAIC Intake Specialist was implemented in May 2006. Victims contact the Intake Specialist through the contact number on the Little Blue Booklet (See Appendix B), MPO, or other referrals. The specialist then works with victims to remove risk factors such as financial dependance to the abuser. The specialist also advocates for the vicims in court; encourages the victim's participation in the criminal justic process (such as attending court hearings); coordinates referrals to the Violent Crimes Victim Compenstion program; and provides financial asistance for rent and utility deposits, transportation, relocation expenses, and other needs. Due to increased needs based on economic stress in the community, a second intake specialist was assigned at AWAIC from August 1 to December 31, 2009.

AWAIC assisted 1,264 victims of domestic violence through ADVPP II (an average of 33 victims per month), as illustrated in Figure 41. Of these, AWAIC provided intensive case management for 325 victims and $181,135 in emergency financial assistance to 294 victims. The majority of victim needs is for rental assistance, medical care, utility deposits, security system, and relocation. A total of 42 women were relocated with ADVPP monies.

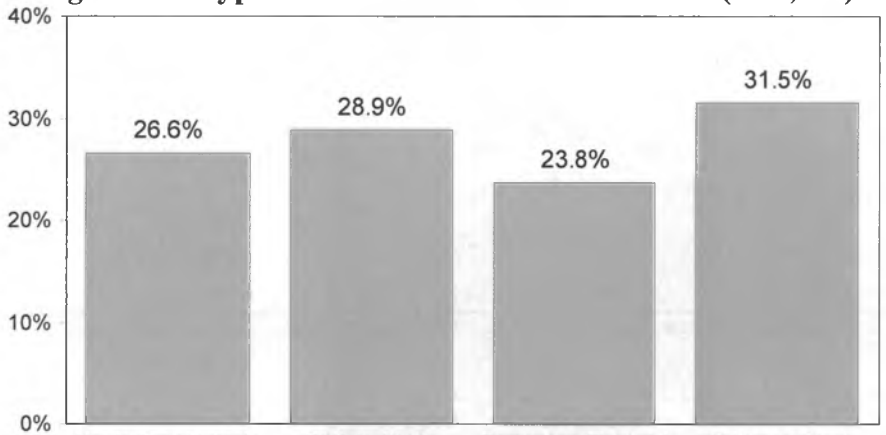
ADVPP allowed AWAIC to reach out to victims who did not want emergency shelter services but did need case management, legal guidance, and emergency financial assistance.

Figure 41: Victim Contacts by Month(N=1,264)



The Intake Specialist gave all victims information and referral services. Moreover, 26.6 percent received case management services, 28.9 percent were encouraged to participate in the criminal justice process, 23.8 percent were given emergency financial assistance, and 31.5 percent received follow-up case management services.

Figure 42: Types of Services Provided to Victims (N=1,264)



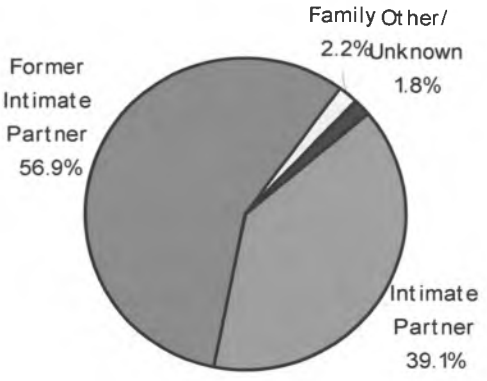
Intensive Case Management Services (N=325)

There were 325 individuals who qualified for intensive case management services out of the 1,264 victims who received information and referrals.

Incidents

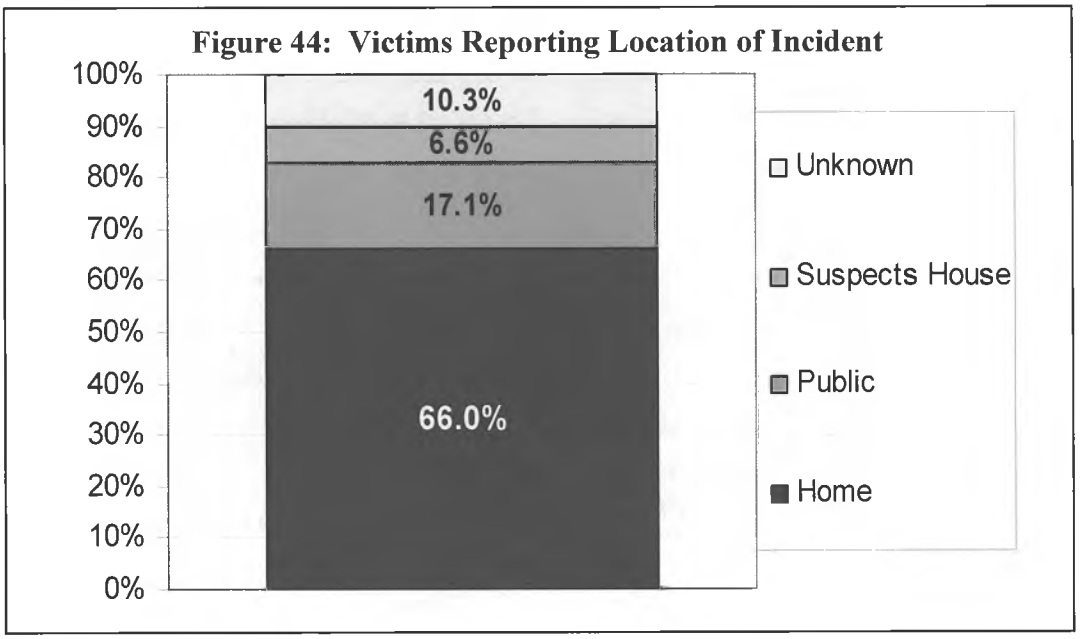
The victim's current or former intimate partner was the abuser in almost all AWAIC cases: 56.9 percent were former intimate partners and 39.1 percent were current intimate partners (Figure 43). Two percent said they were abused by a family member.

Figure 43: Relationship of Abuser to Victim



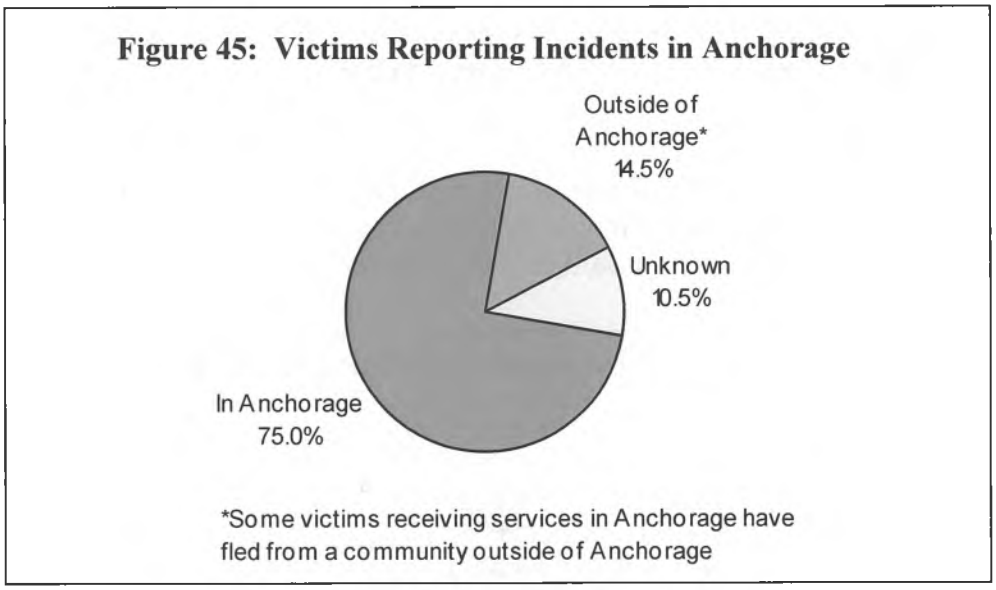
Two thirds of victims reported that the domestic violence incident occurred in their home and 17.1 percent reported the incident occurred in a public place (Figure 44).

Figure 44: Victims Reporting Location of Incident



Three quarters of victims experienced the domestic violence incident in Anchorage; 14.5 percent indicated the incident occured outside of Anchorage or Alaska (Figure 45).

Figure 45: Victims Reporting Incidents in Anchorage



The 325 victims reported an aggregate of 608 incidents of abuse, averaging two incidents of abuse per victim. For example, a victim reporting assault and stalking. Almost half of incidents, or 46.1 percent, involved physical assault, 17.9 percent were threats, 9.4 percent were VCRs, 6.5 percent were stalking, 5.8 percent were for malicious destruction

of property, and 5.3 percent were for sexual assault. Also reported were child abuse, burglary, disconnecting phone equipment, and arson.

The majority of incidents reported to AWAIC were for assault (46.1 percent), similar to charges made against male defendants in MPO cases (53.2 percent assault) as shown in Table 11. Victims were more likely to report threats and stalking than charged against defendants in midemeanor domestic violence cases. Victims were less likely to report family violence than was charged against male defendants in MPO cases.

Table 11: Types of Incidents Reported to AWAIC Compared with Types of Charges Against Male Defendants in MPO Cases

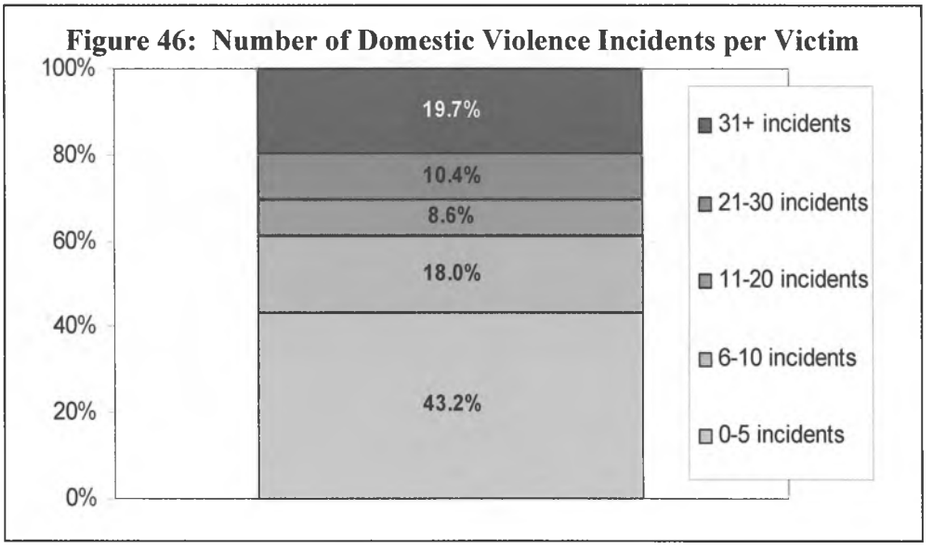
Incident Types	Incidents Reported at AWAIC (N=608)	Charges Against Male Defendants in MPO Cases (N=5,447)	Difference
Assault	46.1%	53.2%	-7.1%
Threats	17.9%	0.0%	17.9%
VCRs	9.4%	8.9%	0.5%
Stalking	6.5%	0.1%	6.4%
Malicious Destruction of Property	5.8%	7.1%	-1.3%
Sexual Assault	5.3%	N/A*	-
Family Violence	2.5%	16.7%	-14.2%
Child Abuse	2.2%	1.1%	1.1%
Burglary	1.7%	0.0%	1.7%
Disconnect of Phone Equipment	0.5%	5.1%	-4.6%
Arson	0.3%	0.0%	0.3%
Other Unknown	1.8%	7.8%	-6.0%
Total	**100.0%**	**100.0%**	**0.0%**

*Sexual Assault is a felony charge

Previous Incidents

Most victims had previous incidents of domestic violence. Over half reported having six or more incidents of abuse prior to the incidents they were currently reporting (Figure 46).

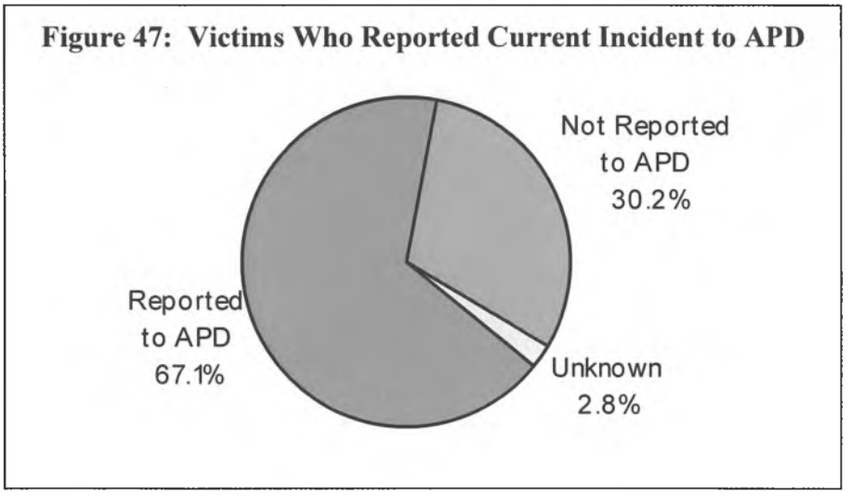
Figure 46: Number of Domestic Violence Incidents per Victim



Reporting to Enforcement

One third of victims did not report their current domestic violence incident to APD (Figure 47).

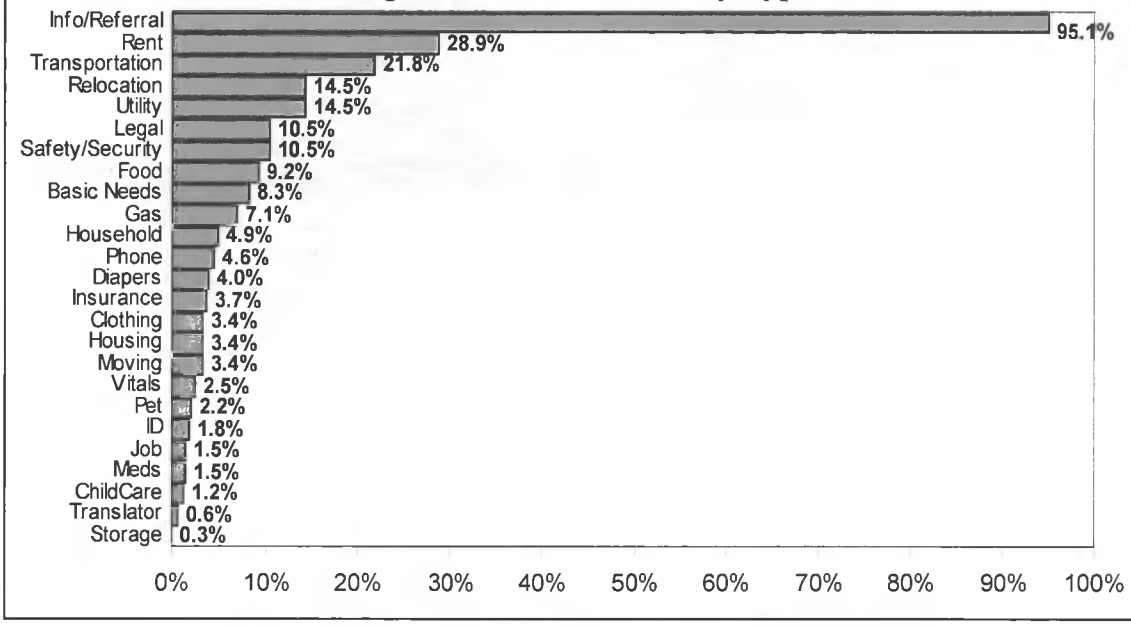
Figure 47: Victims Who Reported Current Incident to APD



Emergency Assistance

Almost all victims stated the need for information and referrals, 28.9 percent needed help with rent, 21.8 percent needed help with transportation, 14.5 percent needed relocation assistance, and 14.5 percent needed utility assistance (Figure 48). Other needs included safety, food, gas, household supplies, phones, identification, help with pet, storage services, diapers, jobs, gas, and insurance.

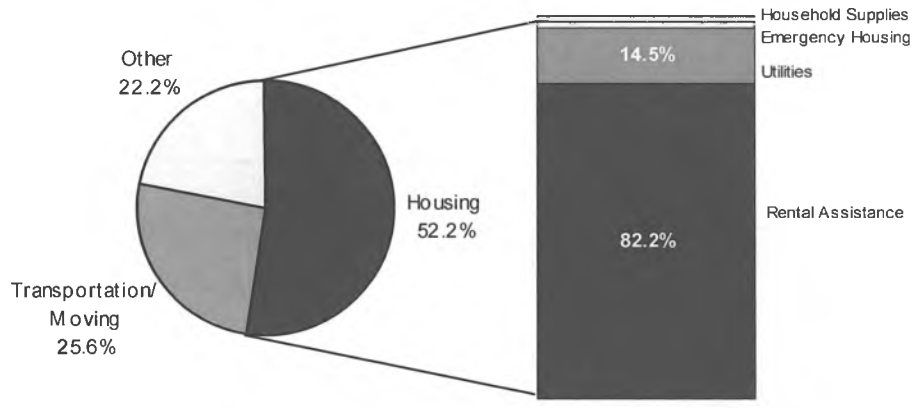
Figure 48: Victim Needs by Type



AWAIC provided $181,135[3] in emergency financial assistance through ADVPP II to aid 294 individuals and families. Housing assistance was the greatest need, at 52.2 percent of all needs (Figure 49). This helped victims with startup or short-term rent and utiltiy payments to prevent homelessness resulting from domestic violence. One quarter of assistance went to transportation and moving expenses, including bus passes, gas cards, cab fare, vehicle insurance, car loan payments, vehicle registration, IM certificates, and ID/Driver's Licenses.

[3] By December 31, 2009 (the end of the grant term), the total number of victims served was 1,482, and a total of $212,236 emergency financial assistance was dispensed.

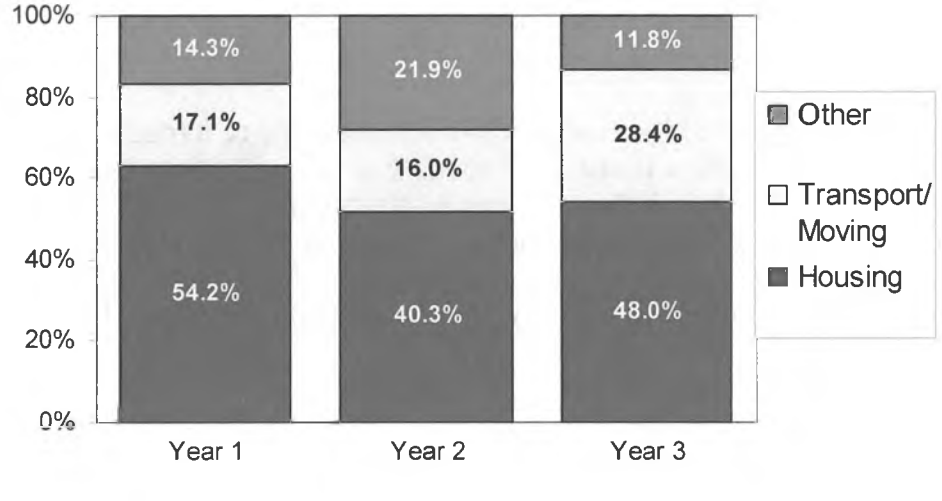
Figure 49: Housing Assistance by Type



Note: "Emergency Housing" means funding assistance for transitional housing or hotels; rental assistance means funding assistance for permanent housing.

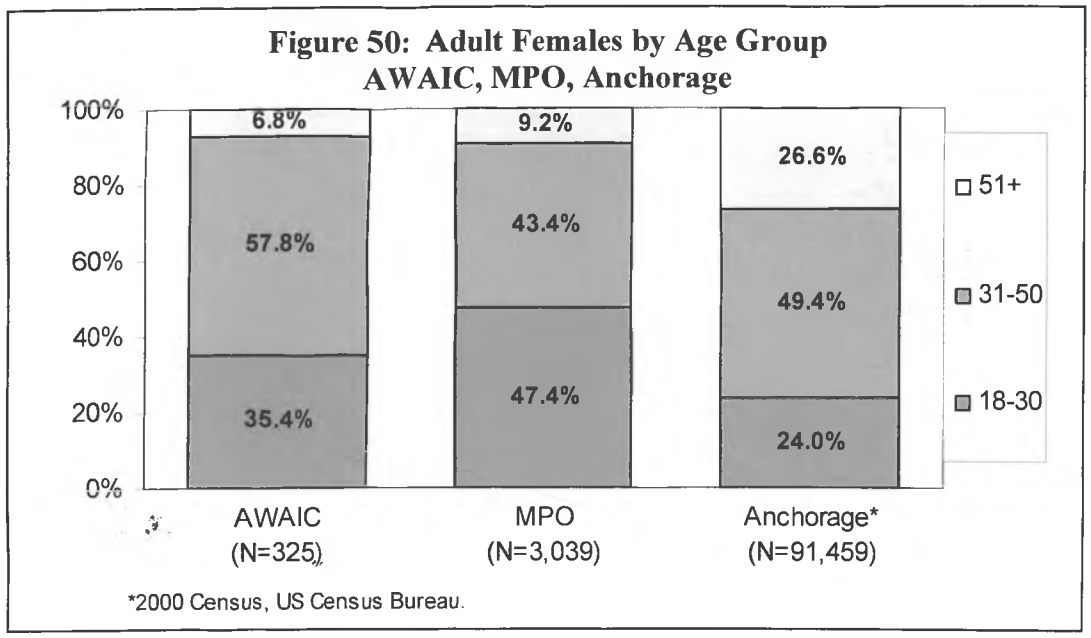
Over the grant period, housing remained nearly half of the need for financial assistance. The need for transportation increased from 17.1 percent ot 28.4 percent of financial assistance (Trend 17).

Trend 17: Financial Assistance by Project Year

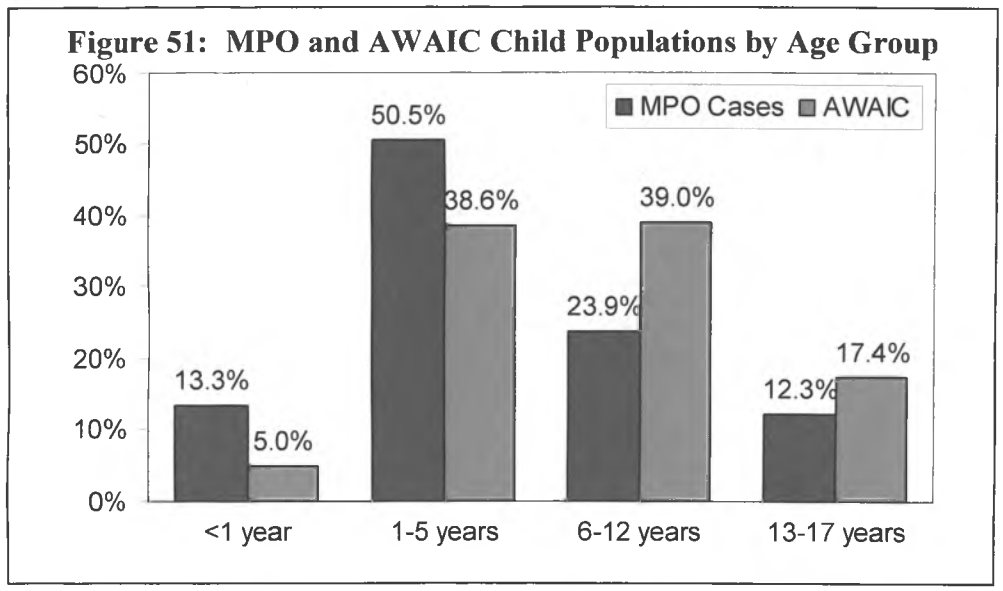


Demographics

AWAIC clients tended to be older than victims in MPO cases and the gene[illegible]. Individuals aged 31 to 50 years accounted for 57.8 percent of clients at AWAIC. comparison, individuals 31 to 50 years made up 49.4 percent of the general population and 43.4 percent of victims in MPO cases (Figure 50).



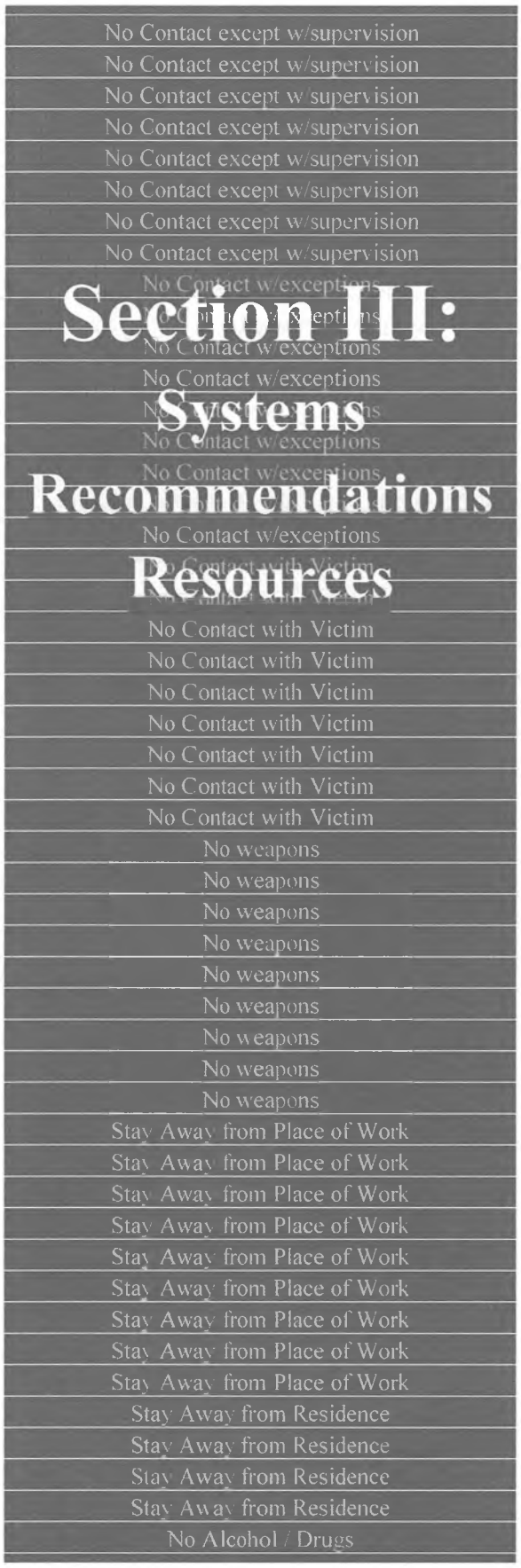
Children of AWAIC clients tended to be older than child victims in MPO cases: 56.4 percent were over five years old. In comparison, children over five made up 68.6 percent of children citywide and 46.2 percent of child victims in MPO cases (Figure 51).



...be Alaska Native, one and a half times more likely
...es more likely to be Hispanic compared to adult victims in
...12).

Table 12: Female Adult Victims by Race/Ethnicity AWAIC and MPO

	AWAIC (N=325)	MPO Cases (N=3,039)
White	51.7%	39.4%
Alaska Native	16.6%	40.1%
Black	12.6%	7.7%
Asian/PI	1.2%	5.5%
Hispanic	8.3%	0.8%
Other	9.6%	6.5%
Total	100.0%	100.0%



Section III: Systems Recommendations Resources

This section provides further information on domestic violence issues as follows:

- **Public Health Model**
- **Batterer Typology**
- **Staff Recommendations**
- **Community Resources**

Criminal Justice and Public Health Models

Domestic violence has traditionally been viewed as a criminal justice issue in which law enforcement investigates a crime in order to bring a suspect to trial. Over the last ten years, the response to domestic violence has evolved to include the public health model, which adds *prevention* to the criminal justice system. The public health model evaluates the links between the individual, the behavior, and the social and physical context of interpersonal violence.

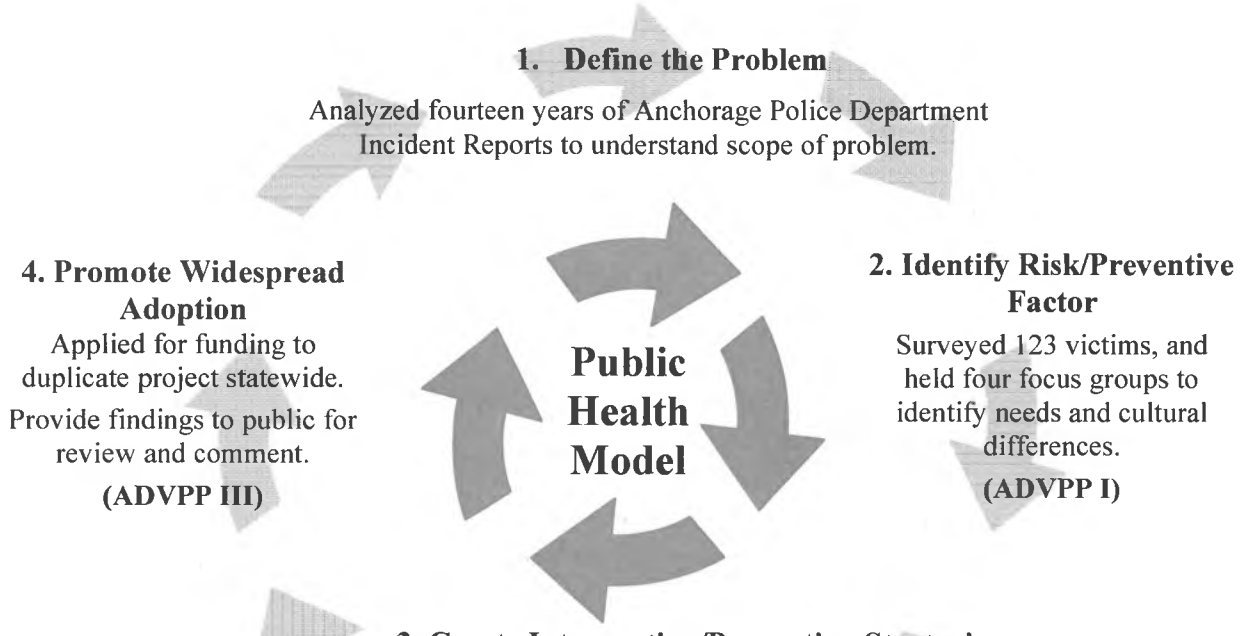
The public health model is a process in which evidence-based practices create population-based strategies. There are four stages to the model: 1) define the problem, 2) identify the risk and protective factors, 3) develop and test the prevention strategies, and 4) ensure widespread adoption. DHHS Safety Links Program follows the public health model in the development and implementation of programs, including ADVPP II.

To define the problem, DHHS Safety Links Program performed a fourteen year study of APD incident reports from 1989 to 2002. The study characterized the high rate of domestic violence in Anchorage. It also provided the foundation for a comprehensive research project (ADVPP I) that identified risk and protective factors through the use of victim surveys, focus groups, agency interviews, and professional literature review.

DHHS was able to identify the risk and protective factors at each level, or domain, for domestic violence. The domains were the strata where the opportunities existed for prevention or intervention: with victims, abusers, enforcement, courts, emergency services, and the community

Identifying risk and protective factors resulted in the creation of ADVPP II, an effective and successful prevention and intervention strategy for domestic violence in Anchorage. This report follows the model, by providing data analysis and feedback to the public on the design of services.

Figure 52: ADVPP II, A Case Study of the Public Health Model



Batterer Typology

There is growing evidence that domestic violence is not a unitary phenomenon and that a number of distinctions should be considered within the context of the violence such as motivation, gender symmetry, per-couple frequency of incidents, average severity of violence and level of injury, among others. Failure to distinguish typologies confuses efforts to assess potential lethality, risk of escalation and recidivism and the criminal justice system's ability to determine appropriate and effective adjudication of domestic violence cases.

DHHS submitted a proposal to the National Institute of Justice (NIJ) to investigate this topic but did not receive finding. Nevertheless, batterer typologies remain a significant issue impacting criminal justice adjudication and treatment, and DHHS will explore other opportunities to conduct this research.

The proposed project to NIJ would develop a "criminal triage" assessment tool using police incident reports to identify different typologies of domestic violence offenders. A review of recent literature revealed a number of different systems for classifying intimate partner violence (IPV) using demographic information, criminal histories, substance abuse data and mental health disorders. There is substantial overlap and convergence between many of these schemas. However, the terminology and conceptual framework that appeared to most closely reflect the variability observed in APD reports was Johnson's (1995) 'Coercive Controlling Violence (CCV)' and 'Situational Couple Violence (SCV).' CCV is what most people think of when they hear "domestic violence": one person, generally male, seeks to exercise universal power and control over his partner through a variety of tactics, of which violence is only one. The Duluth Model, or 'Power and Control Wheel,' describes this type of violence. SCV, on the other hand, is not embedded in a pervasive pattern of power and control. Rather, violence erupts as a response to a particular conflict or situation. While control may be temporarily involved (e.g. to win an argument), the violence doesn't serve a general interest in completely controlling one's partner. Eventually Johnson added two more categories: Violent Resistance (VR), which is a response (by women) to CCV, and Mutual Controlling Violence (MCV), which, as the name suggests, involves two coercive, controlling and violent partners (Johnson 2006).

A criminal triage assessment tool would expedite criminal case processing by enabling prioritization based on predicted risk of lethality, recidivism, escalation etc. Prioritization can help improve decision-making regarding case screening and disposition. For example, classic domestic violence offenders who seek power and control over their victims are more likely to re-offend, escalate in frequency and violence, and need long-term intensive interventions to impact their behaviors. Although appropriate treatment programs for batterers is a much debated topic, there may be defendants, e.g. female defendants and those whose violence is not embedded in power and control, for whom anger management and/or communication classes may be more appropriate and effective. Matching offenders to specific treatment interventions is efficient, cost-effective and

improves the quality of services and successful outcomes within existing programs (Triage and Placement in Treatment Services, 2005). However, it requires reliable screening and assessment to distinguish offender types in order to refer them to appropriate treatment services. Other outcomes will be improved prosecution statistics and adjudication measures and increased victim safety.

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Wilson, M. and M. Daly. 1998. *Lethal and Nonlethal Violence Against Wives and the Evolutionary Psychology of Male Sexual Proprietariness.* In, R.E. Doabash & R.P. Dobash (Eds.), Rethinking Violence Against Women. Sage. Thousand Oaks, Calisfornia.

Staff Recommendations

While implementing ADVPP II partners reviewed the system of services and offer the following recommendations:

- Seek funding to maintain this effective design of service.
- Provide compliance checks on felony domestic violence cases.
- Prioritize electronic dissemination of judicial orders and flagging in the Alaska Public Safety Information Network (APSIN) to ensure information is always current.
- Standardize protocols for 'no contact orders' by magistrates.
- Analyze felony domestic violence and sexual assault cases to capture trends.
- Analyze domestic violence cases that include sexual assault.
- Pursue funding to monitor compliance with judgments and related effectiveness of various treatment programs.
- Research elder abuse in Anchorage by analyzing APD reports, MPO cases and inviting the State Adult Protective Services to enhance the understanding of risk factors.
- Evaluate relationship between interpersonal violence and alcohol and drug abuse.

Community Resources

Abused Women's Aid In Crisis (AWAIC)
24 Hour Crisis Line (907) 272-0100
Business Line (907) 279-9585

Alaska Native Justice Center
(907) 793-3550

Alaska State Troopers
Emergency Only 911
Information (Anchorage) (907) 428-7200

Alaska Police Department
Emergency Only 911
Information (907) 786-8900

Municipal Department of Health and Human Services
Safety Links Program
(907) 343-6589

Standing Together Against Rape (STAR)
24 Hour Crisis Line (907) 276-7273
Business Line (907) 276-7279
Outside of Anchorage Toll Free 1-800-478-8999

State of Alaska, Office of Children's Services
(907) 269-4000

Providence Alaska Medical Center
Alaska Child Abuse Response & Evaluation Services (Alaska CARES)
Information (907) 561-8301
Outside Anchorage Toll Free 1-877-561-8301
24 Hour Assistance call APD (907) 786-8900

Forensic Nursing Services of Providence
24 Hour Pager (907) 212-6080 # 8546
Business Line (907) 212-8544

Appendix A
DHHS Safety Links Data Fields and Sources

Data Received From:

	APD
	MPO
	Unreliable
	ADVPP-II Clerks
	Court
	Unknown

Forms Used to Collect Data

1		Orders and CORs
2		Police Report
3		New Form: To be Created- Info from APD
4		District Court "Judgment"
5		New Form: To be Created- Info from Victim Interview/Contact
6		Municipal Prosecution Information Sheet
7		New Form: To be Created- Monitoring Conditions of Judgment
8		Consent for Contact
9	Not used	MPO Offer for Pre-Trial Disposition

Form	DATA	RECEVIED FROM:
2	**APD Case Number:**	
1	**Court Case Number:**	
	Case Management Number:	
1	**Charges:**	
	Case Status:	
	Related Case Numbers:	
1	**Officer Identifier Number**	
1	**Defendant Name:**	
1	Defendant DOB:	
2	Defendant Gender:	
2	☐ Male	
2	☐ Female	
2	☐ Unknown	
	Defendant Ethnicity:	
2	**Victim Name:**	
	Victim DOB:	
	Victim Gender:	
	☐ Male	
	☐ Female	
	☐ Unknown	
	Victim Ethnicity:	
2	**Relationship Between Parties:**	
	☐ H/W	
	☐ ExH/W	
	☐ BF/GF	
	☐ ExBF/GF	
	☐ P/C (Parent/child)	
	☐ FM (Family member)	
	☐ B/S (Brother/Sister)	
	☐ HM (Housemates)	
	☐ Other: Descibe	
	Number of Children:	
	☐ Children Present in House	
	☐ Children Witness	
	Children Witness' DOB:	
1	**Bail Conditions (CORs):**	
	Date attached to each COR so changes tracked	

	1. **No Contact** ☐	
	☐ except phone	
	☐ except email/writing	
	☐ other exceptions:	
	☐ except supervised, by :	
	☐ except counseling ~~(couples)~~	
	2. **Stay away from Residence** ☐	
	distance:	
	address(es):	
	3. **Stay away from Pl. of Work** ☐	
	distance:	
	address(es):	
	4. **No Alcohol/Drugs** ☐	
	5. No entering bars or places where primary sale of goods is alcohol. ☐	
	6. No weapons ☐	
	7. NJO ☐	
	8. Third Party ☐	
	A. Name	
	Relationship to defendant	
	☐ 24 S/S/	
	☐ Other	
	☐ ATPC (Third Party Charged)	
	B. Name	
	Relationship to defendant	
	☐ 24 S/S/	
	☐ Other	
	☐ ATPC (Third Party Charged)	
	C. Name	
	Relationship to defendant	
	☐ 24 S/S/	
	☐ Other	
	☐ ATPC (Third Party Charged)	
	9. **Other** (Text field)	
	10. CORs Modified ☐	
3	**Bail Checks:**	
	Date:	
	Time:	
	☐ Violations Found	
	Bail Condition #:	
	☐ VCR Charged	
	Date:	
	Time:	
	☐ Violations Found	

	Bail Condition #:	
	☐ VCR Charged	
	Date:	
	Time:	
	☐ Violations Found	
	Bail Condition #:	
	☐ VCR Charged	
3	**VCRs:**	
	Arrest Made:	
	☐ Yes	
	Date	
	☐ No	
	If no Arrest, Warrant Issued:	
	☐ Yes	
	Date	
	☐ No	
	Charged? (with VCR)	
	☐ Yes	
	Date	
	☐ No	
	Reason:	
4	**Hearing/Trial**	
	Judge's Name:	
	Dropped Charges:	
	Reason: (ATN Code, not text)	
	Counts with Convictions of :	
	Count 1:	
	☐ Charge Reduced	Is Rule 11 used per case, not per charge? YES
	ATN Code if reduced:	
	Rule 11 Used ☐	
	Fine:	
	Suspended ☐	
	Jail:	
	Probation: ☐	
	Years:	
	Count 2:	**Papers from**
	☐ Charge Reduced	**Court to**
	ATN Code if reduced:	**Prosecutors'**

	Rule 11 Used ☐	Office
	Fine:	
	Suspended ☐	
	Jail:	
	Probation: ☐	
	Years:	
	Count 3:	
	☐ Charge Reduced	
	ATN Code if reduced:	
	Rule 11 Used ☐	
	Fine:	
	Suspended ☐	
	Jail:	
	Probation: ☐	
	Years:	
5	**Victim Attended**	
	☐ Yes	
	☐ No	
	Reason	
	Clerk Assistance to Victim	
	☐ Notification/Information	
	☐ Accompany	
	☐ Transportation	
	☐ Testimony Support	
	☐ Other:	
6	**Conditions of Judgments**	
7	If Non-Compliant Describe when they fell out. Example 24/36 weeks, etc..)	
	If Unknown, reason why: Phone Disconnect, etc...	
	☐ **DVIP**	
	Date:	
	☐ 60 days	
	☐ 90days	
	☐ 1 year	
	☐ 2 year	
	Compliant	
	☐ Yes	
	☐ No	
	Why:	
	☐ Unknown	
	Why:	
	☐ **DVIP-Type Couseling**	

	Date:	
	☐ 60 days	
	☐ 90days	
	☐ 1 year	
	☐ 2 year	
	Compliant	
	☐ Yes	
	☐ No	
	Why:	
	☐ Unknown	
	Why:	
	☐ **ASAP**	
	Date:	
	☐ 60 days	
	☐ 90days	
	☐ 1 year	
	☐ 2 year	
	Compliant	
	☐ Yes	
	☐ No	
	Why:	
	☐ Unknown	
	Why:	
	☐ **OTHER**	
	Date:	
	☐ 60 days	
	☐ 90days	
	☐ 1 year	
	☐ 2 year	
	Compliant	
	☐ Yes	
	☐ No	
	Why:	
	☐ Unknown	
	Why:	
	Non-Compliance - Judgments	
	PTR ☐ Date filed	
	PTR # 1:	
	For Program/Condition:	
	Program Reassignment:	
	Program Deleted:	
	Fine Assigned:	
	Number of Days of Jail Assigned:	
	PTR # 2:	

	For Program/Condition:	
	Program Reassignment:	
	Program Deleted:	
	Fine Assigned:	
	Number of Days of Jail Assigned:	
	PTR # 3:	
	For Program/Condition:	
	Program Reassignment:	
	Program Deleted:	
	Fine Assigned:	
	Number of Days of Jail Assigned:	
8	**Did Victim sign Consent for Contact:**	
	☐ Yes	
	☐ No	
	☐ Unknown	
	Did Victim revoke Consent for Contact:	
	☐ Yes Date:	
	☐ No for	
	Comments:	
5	**Victim Contact**	
	Date	
	Time: Duration (mins.)	
	☐ Protection Order	
	☐ Bail Conditions	
	☐ VCRs	
	☐ Hearing Date	
	☐ Speak to Lawyer	
	☐ Recant	
	☐ Request assistance	
	Type	
	☐ Referral	
	For:	
	☐ Request accompaniment	
	☐ Request Transportation	
	☐ Defendant out of Jail	
	☐ Notified by DOC	
	☐ Courtesy check-in	
	☐ Other:	
	Notes:	

Appendix B.
Anchorage Community Emergency and Advocacy Resources

The Little Blue Booklet

[redacted]

ANCHORAGE
COMMUNITY
EMERGENCY AND ADVOCACY
RESOURCES
(LITTLE BLUE BOOKLET)

BROUGHT TO YOU BY THE
MUNICIPAL
DEPARTMENT OF HEALTH & HUMAN SERVICES
HUMAN SERVICES DIVISION
SAFETY LINKS PROGRAM
AND THE
ANCHORAGE POLICE DEPARTMENT

SEPTEMBER 2008

CALL SAFETY LINKS AT (907) 343-6589 FOR QUESTIONS OR COMMENTS RELATED TO THIS BOOKLET.

ANCHORAGE
DOMESTIC VIOLENCE
PREVENTION PROJECT II
(ADVPP II)

IF YOU ARE A VICTIM OF DOMESTIC VIOLENCE AND NEED INFORMATION OR FINANCIAL ASSISTANCE, CALL

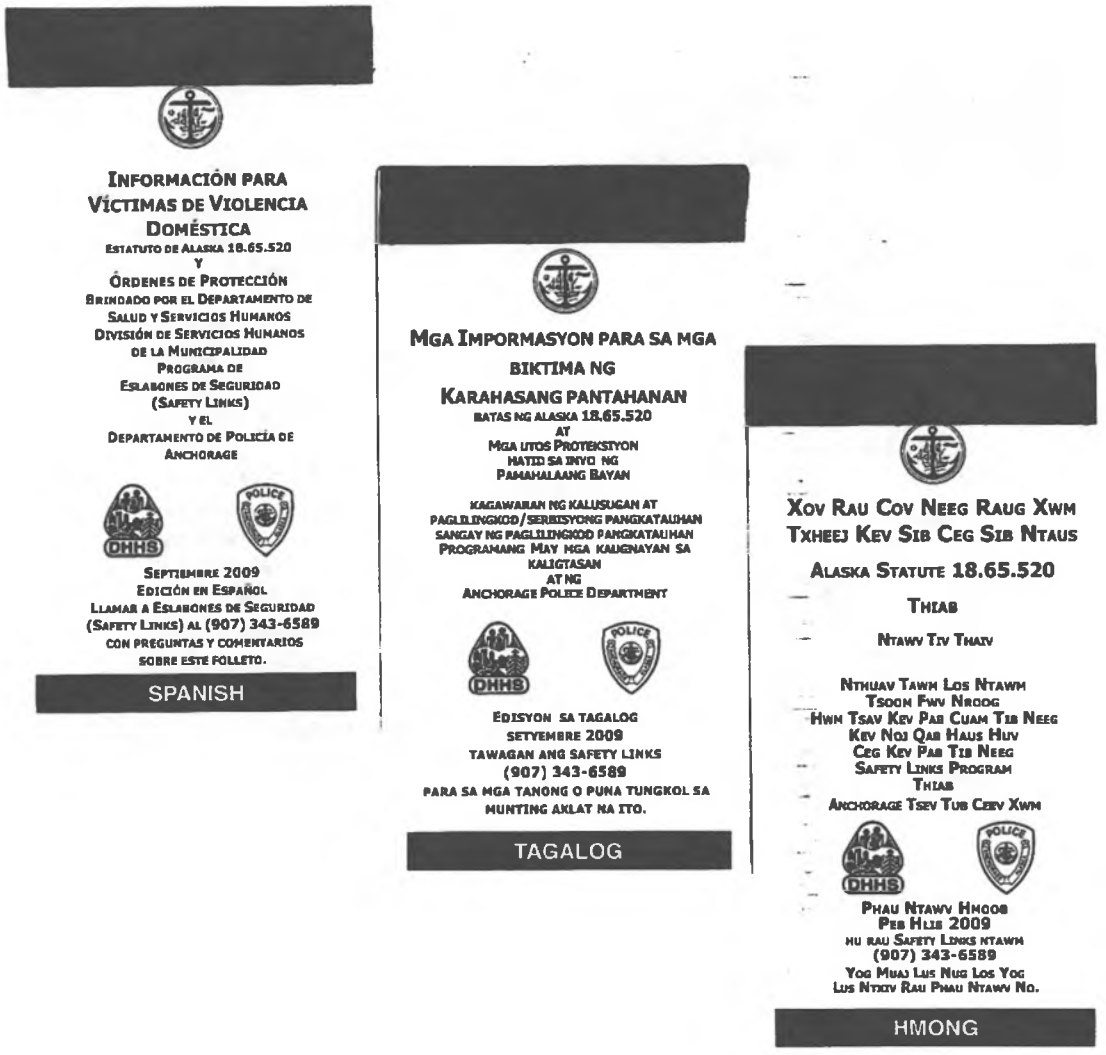
743-5708

THIS PROJECT IS A PARTNERSHIP BETWEEN THE ANCHORAGE POLICE DEPARTMENT, AWAIC, THE MUNICIPAL DEPARTMENT OF LAW, AND THE MUNICIPAL HUMAN SERVICES SAFETY LINKS PROGRAM.

ADVPP II is funded by U.S. D.O.J., Office of Violence Against Women, Grant # 2005-WF-AX-0103 to the Municipal DHHS.

Call 343-6589 for information about the project

The Little Green Booklet



[redacted]

INFORMACIÓN PARA VÍCTIMAS DE VIOLENCIA DOMÉSTICA

ESTATUTO DE ALASKA 18.65.520
Y
ÓRDENES DE PROTECCIÓN
BRINDADO POR EL DEPARTAMENTO DE SALUD Y SERVICIOS HUMANOS
DIVISIÓN DE SERVICIOS HUMANOS
DE LA MUNICIPALIDAD
PROGRAMA DE
ESLABONES DE SEGURIDAD
(SAFETY LINKS)
Y EL
DEPARTAMENTO DE POLICÍA DE
ANCHORAGE

SEPTIEMBRE 2009
EDICIÓN EN ESPAÑOL
LLAMAR A ESLABONES DE SEGURIDAD
(SAFETY LINKS) AL (907) 343-6589
CON PREGUNTAS Y COMENTARIOS
SOBRE ESTE FOLLETO.

SPANISH

[redacted]

MGA IMPORMASYON PARA SA MGA BIKTIMA NG KARAHASANG PANTAHANAN

BATAS NG ALASKA 18.65.520
AT
MGA UTOS PROTEKSIYON
HATID SA INYO NG
PAMAHALAANG BAYAN

KAGAWARAN NG KALUSUGAN AT
PAGLILINGKOD/SERBISYONG PANGKATAUHAN
SANGAY NG PAGLILINGKOD PANGKATAUHAN
PROGRAMANG MAY MGA KAUGNAYAN SA
KALIGTASAN
AT NG
ANCHORAGE POLICE DEPARTMENT

EDISYON SA TAGALOG
SETYEMBRE 2009
TAWAGAN ANG SAFETY LINKS
(907) 343-6589
PARA SA MGA TANONG O PUNA TUNGKOL SA
MUNTING AKLAT NA ITO.

TAGALOG

[redacted]

XOV RAU COV NEEG RAUG XWM TXHEEJ KEV SIB CEG SIB NTAUS

ALASKA STATUTE 18.65.520

THIAB

NTAWV TIV THAIV

NTHUAV TAWH LOS NTAWM
TSOOM FWV NRCOG
HWM TSAV KEV PAB CUAM TIB NEEG
KEV NOJ QAB HAUS HUV
CEG KEV PAB TIB NEEG
SAFETY LINKS PROGRAM
THIAB
ANCHORAGE TSEV TUB CEEV XWM

PHAU NTAWV HMOOB
PEB HLIB 2009
HU RAU SAFETY LINKS NTAWM
(907) 343-6589
YOG MUAJ LUS NUG LOS YOG
LUS NTXIV RAU PHAU NTAWV NO.

HMONG

Appendix C.
Protective Order Information

Victims seeking protection from aggressors can obtain a protective order in two ways: through the police if they are involved in a criminal case, or through the court for civil matters. Several types of protective orders—also called restraining orders—are available: 1) domestic violence, 2) stalking, and 3) sexual assault. The Domestic Violence Restraining Order (DVRO) is for victims who have or have had a household relationship with the aggressor, for example a spouse, intimate partner, roommate, or relative. Restraining Orders for Stalking (SRO) and Sexual Assault (SARO) are for victims who do not have a household relationship with the aggressor: for example friends, co-workers, neighbors, or someone unknown to the victim.

Protection orders cover varying lengths of time. An *emergency order* provides 72 hours of protection; an *ex parte* order lasts 20 days; and a *long term* order covers 6 months for SROs and SAROs or one year for DVROs. After the court grants the victim a protective order, an APD officer delivers a copy of the order, for aggressors in Anchorage.

Enforcement of protective orders is generally the responsibility of the victim. If the defendant violates the protective order, the victim must report the violation to authorities. Violations that present potential or real harm to the victim, such as the aggressor following the victim's car, calling the victim's house or assaulting the victim, are to be reported immediately to the police. All other violations, such as failure to pay child support, are to be reported to the judge.

Appendix D.
Anchorage and Alaska Laws Related to Domestic Violence

Note: Please refer to the Alaska Statutes for repeals, additions, or revisions.

AMC 8.10.050 Family violence.

A. It is unlawful for any person to commit the crime of family violence.
B. A person commits the crime of family violence when the person commits the crime of assault as defined in AMC 8.10.010 with knowledge or reckless disregard of the presence of a child or children in the home.
C. In this section, the word "child" means a person under the age of 16 years.(AO No. 2000-95, § 5, 10-16-00; AO No. 2003-73, § 3, 4-22-03)

AMC 8.20.040 Destruction or disconnect of communication equipment

A. It is unlawful for any person to disconnect, injure, or destroy any communication equipment, regardless of whether owned by such person, with the intent to prevent a family member, as defined by subsection.C.2, from communicating with emergency service agencies or others.
B. Violation of this section shall, upon conviction, be punished by a fine of not more than $2,000.00 or imprisonment for not more than six months, or both such fine and imprisonment.

Chapter 41. Offenses Against the Person

Selected excerpts are provided.
Section 100. Murder in the First Degree.
Section 110. Murder in the Second Degree.
Section 115. Defenses to Murder.
Section 120. Manslaughter.
Section 130. Criminally Negligent Homicide.
Section 135. Multiple Deaths.
Section 140. Definition.
Section 200. **Assault in the First Degree**.

AS 11.41.200. Assault in the First Degree.

(a) A person commits the crime of assault in the first degree if
(1) that person recklessly causes serious physical injury to another by means of a dangerous instrument;
(2) with intent to cause serious physical injury to another, the person causes serious physical injury to any person;

(3) the person knowingly engages in conduct that results in se...
another under circumstances manifesting extreme indifference to the va...
or
(4) that person recklessly causes serious physical injury to another by repeated assaults using a dangerous instrument, even if each assault individually does not cause serious physical injury.
(b) Assault in the first degree is a class A felony.

Anchorage and Alaska Laws Related to Domestic Violence
Section 210. **Assault in the Second Degree**.
AS 11.41.210. Assault in the Second Degree.
(a) A person commits the crime of assault in the second degree if
(1) with intent to cause physical injury to another person, that person causes physical injury
to another person by means of a dangerous instrument;
(2) that person recklessly causes serious physical injury to another person; or
(3) that person recklessly causes serious physical injury to another by repeated assaults, even if each assault individually does not cause serious physical injury.
(b) Assault in the second degree is a class B felony.
Section 220. **Assault in the Third Degree**.

AS 11.41.220. Assault in the Third Degree.

(a) A person commits the crime of assault in the third degree if that person
(1) recklessly
(A) places another person in fear of imminent serious physical injury by means of a dangerous instrument;
(B) causes physical injury to another person by means of a dangerous instrument; or
(C) while being 18 years of age or older
(i) causes physical injury to a child under 10 years of age and the injury reasonably requires
medical treatment;
(ii) causes physical injury to a child under 10 years of age on more than one occasion;
(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member makes repeated threats to cause death or serious physical injury to another person;
(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16
years of age but at least 10 years of age and the injury reasonably requires medical treatment; or
(4) with criminal negligence causes serious physical injury under AS 11.81.900(b)(56)(B) to another person by means of a dangerous instrument.
(b) In a prosecution under (a)(3) of this section, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be 16 years of age or older, unless the victim was under 13 years of age at the time of the alleged offense.

...s family member" means
..., grandchild, parent, grandparent, sibling, uncle, aunt, nephew, or
...,
of the person, whether related by blood, marriage, or adoption;
(2) a person who lives or has lived, in a spousal relationship with the person;
(3) a person who lives in the same household as the person; or
(4) a person who is a former spouse of the person or is or has been in a dating, courtship, or engagement relationship with the person.
(d) Assault in the third degree is a class C felony
Section 230. **Assault in the Fourth Degree.**

AS 11.41.230. Assault in the Fourth Degree.

(a) A person commits the crime of assault in the fourth degree if
(1) that person recklessly causes physical injury to another person;
(2) with criminal negligence that person causes physical injury to another person by means
of a dangerous instrument; or
(3) by words or other conduct that person recklessly places another person in fear of imminent physical injury.
(b) Assault in the fourth degree is a class A misdemeanor.
Section 250. **Reckless Endangerment**.

AS 11.41.250. Reckless Endangerment.

(a) A person commits the crime of reckless endangerment if the person recklessly engages
in conduct which creates a substantial risk of serious physical injury to another person.
(b) Reckless endangerment is a class A misdemeanor.
Section 260. Stalking in the First Degree.
Section 270. Stalking in the Second Degree.
Section 300. Kidnapping.
Section 320. Custodial Interference in the First Degree.
Section 330. Custodial Interference in the Second Degree.
Section 370. Definitions.
Section 410. Sexual Assault in the First Degree.
Section 420. Sexual Assault in the Second Degree.
Section 425. Sexual Assault in the Third Degree.
Section 427. Sexual Assault in the Fourth Degree.
Section 430. Sexual Assault in the Third Degree. [Repealed, Sec. 10 Ch 78 SLA 1983. For Current Law, See AS 11.41.420
Section 432. Defenses.
Section 434. Sexual Abuse of a Minor in the First Degree.
Section 436. Sexual Abuse of a Minor in the Second Degree.
Section 438. Sexual Abuse of a Minor in the Third Degree.

Section 440. Sexual Abuse of a Minor in the Fourth Degree.
Section 443. Spousal Relationship No Defense. [Repealed, Sec. 61 Ch 50 SLA 1989. For Current Law, See AS 11.41.432
Section 445. General Provisions.
Section 450. Incest.
Section 455. Unlawful Exploitation of a Minor.
Section 458. Indecent Exposure in the First Degree.
Section 460. Indecent Exposure in the Second Degree.
Section 468. Forfeiture of Property Used in Sexual Offense.
Section 470. Definitions.
Section 500. Robbery in the First Degree.
Section 510. Robbery in the Second Degree.
Section 520. Extortion.
Section 530. Coercion.

AS 11.51.100. Endangering the Welfare of a Child in the First Degree.

(a) A person commits the crime of endangering the welfare of a child in the first degree if,
being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person
(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;
(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person
(A) is registered or required to register as a sex offender under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;
(B) has been charged by complaint, information, or indictment with a violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or
(C) has been charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; or
(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child.
(b) In this section, "physically mistreated" means
(1) having committed an act punishable under AS 11.41.100 - 11.41.250; or
(2) having applied force to a child that, under the circumstances in which it was applied, or considering the age or physical condition of the child, constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation because of the substantial and unjustifiable risk of
(A) death;
(B) serious or protracted disfigurement;
(C) protracted impairment of health;
(D) loss or impairment of the function of a body member or organ;
(E) substantial skin bruising, burning, or other skin injury;

bleeding or subdural hematoma;
(G) bone fracture; or
(H) prolonged or extreme pain, swelling, or injury to soft tissue.
(c) Endangering the welfare of a child in the first degree under (a)(1) or (2) of this section is a class C felony.
(d) Endangering the welfare of a child in the first degree under (a)(3) of this section is a
(1) class B felony if the child dies;
(2) class C felony if the child suffers sexual contact, sexual penetration, or serious physical injury; or
(3) class A misdemeanor if the child suffers physical injury.

AS 11.51.110. Endangering the Welfare of a Child in the Second Degree.

(a) A person commits the crime of endangering the welfare of a child in the second degree if the person, while caring for a child under 10 years of age,
(1) causes or allows the child to enter or remain in a dwelling or vehicle in which a controlled substance is stored in violation of AS 11.71; or
(2) is impaired by an intoxicant, whether or not prescribed for the person under AS 17.30, and there is no third person who is at least 12 years of age and not impaired by an intoxicant present to care for the child.
(b) In this section,
(1) "impaired" means that a person is unconscious or a person is physically or mentally affected so that the person does not have the ability to care for the basic safety or personal needs of a child with the caution characteristic of a sober person of ordinary prudence;
(2) "intoxicant" has the meaning given in AS 47.10.990 .
(c) Endangering the welfare of a child in the second degree is a violation.

AS 12.30.027. Release in Domestic Violence Cases.

(a) Before ordering release before or after trial, or pending appeal, of a person charged with or convicted of a crime involving domestic violence, the court shall consider the safety of the alleged victim or other household member. To protect the alleged victim, household member, and the public and to reasonably assure the person's appearance, the court may impose bail and any of the conditions authorized under AS 12.30.020 , any of the provisions of AS 18.66.100(c)(1) - (7) and (11), and any other condition necessary to protect the alleged victim, household member, and the public, and to ensure the appearance of the person in court, including ordering the person to refrain from the consumption of alcohol.
(b) A court may not order or permit a person released under (a) of this section to return to the residence of the alleged victim or the residence of a petitioner who has a protective order directed to the person and issued or filed under AS 18.66.100 - 18.66.180.
(c) If the court imposes CORs under (a) of this section, it shall
(1) issue a written order specifying the conditions of release;
(2) provide a copy of the order to the person arrested or charged; and

(3) immediately distribute a copy of the order to the law enforcement agency that arrested the person.
(d) When a person is released from custody under (a) of this section,
(1) from a correctional facility, the correctional facility shall notify the prosecuting authority and the prosecuting authority shall make reasonable efforts to immediately notify the alleged victim of the release, and to furnish the alleged victim with a copy of the order setting any conditions of release;
(2) from other than a correctional facility, the arresting authority shall make reasonable efforts to immediately notify the alleged victim of the release, and to furnish the alleged victim with a copy of the order setting any conditions of release.
(e) A person arrested for a crime involving domestic violence may not be released from custody until the person has appeared in person before a judicial officer or telephonically for arraignment.
(f) A person may not bring a civil action for damages for a failure to comply with the provisions of this section.
(g) In this section, "crime involving domestic violence" has the meaning given in AS 18.66.990 .

AS 18.65.510. Domestic Violence Training.

(a) Each established police training program in the state shall provide training that acquaints police officers with
(1) laws relating to substantive crimes and rules of criminal procedure applicable in cases involving domestic violence;
(2) techniques for handling incidents of domestic violence that promote the safety of the victim and the officer and that reduce the likelihood of recurrence;
(3) the investigation and management of cases involving domestic violence and report writing for those cases;
(4) organizations in the state that offer aid or shelter to victims of domestic violence;
(5) procedures applicable in the prosecution of cases involving domestic violence;
(6) orders that may be issued by or filed with a court under AS 18.66.100 - 18.66.180;
(7) the notification to be given to victims of domestic violence under AS 18.65.520 ; and
(8) the subjects set out in AS 18.66.310 (d).
(b) In providing a training program under this section, each agency or institution offering an established police training program shall consult with the Council on Domestic Violence and Sexual Assault and interested individuals and organizations providing assistance to victims of domestic violence.

AS 18.65.515. Duties of Peace Officer in a Crime Involving Domestic Violence.

(a) A peace officer investigating a crime involving domestic violence shall protect the victim and any member of the victim's family and prevent further violence by
(1) transporting an adult victim and any member of the victim's family from the place of the offense or the place of contact, to a location within the community where the offense

occurred that is a shelter, a safe home, or another location in the community requested by the victim;
(2) assisting the victim in removing from the residence essential items belonging to the victim, such as clothing, vehicles, medication, personal records, and legal documents;
(3) assisting the victim and any member of the victim's family in obtaining medical treatment necessitated by the offense, by contacting emergency medical services or by transporting the victim to a local medical facility, if available in the community where the offense occurred; and
(4) providing notice of the rights of victims and services available to victims of domestic violence as provided in AS 18.65.520 .
(b) If a peace officer investigating a crime involving domestic violence determines that it is necessary to protect the victim or the victim's family from domestic violence or to protect the officer or the public during the investigation, the officer may (1) seize a deadly weapon in plain view of the officer, and (2) if a deadly weapon was actually possessed during or used in the domestic violence, seize all deadly weapons owned, used, possessed, or within the control of the alleged perpetrator. If the weapon is not needed as evidence in a criminal case, the law enforcement agency having custody of the weapon, within 24 hours of making the determination that the weapon is not needed as evidence in a criminal case, shall make the weapon available for pickup by the owner of the weapon during regular business hours.

AS 18.65.520. Notification to Victims of Domestic Violence.

(a) A peace officer investigating a crime involving domestic violence shall orally and in writing inform the victim of the rights of victims of domestic violence and the services available to them. The notice must be in substantially the following form: If you are the victim of domestic violence and you believe that law enforcement protection is needed for your physical safety, you have the right to request that the officer assist in providing for your safety, including asking for an emergency protective order. You may also request the officer to assist you in obtaining your essential personal belongings and locating and taking you to a safe place, including a designated meeting place or shelter, the residence of a household member or friend, or a similar place of safety. In some places in Alaska there are organizations that provide aid and shelter to victims of domestic violence. The nearest organization is located at _____ . If you are in need of medical treatment, you may request that the officer assist you in obtaining medical treatment. You may obtain information about whether the prosecuting attorney will file a criminal complaint about the domestic violence. Additionally, the victim/witness assistance program of the Department of Law may be able to help you. This information is available from the district attorney's office, which is located at _____ . You also have the right to file a petition in court requesting a protective order that may include any of the following provisions:
(1) prohibit your abuser from threatening to commit or committing further acts of domestic violence;
(2) prohibit your abuser from stalking, harassing, telephoning, contacting, or otherwise communicating with you, directly or indirectly;
(3) remove your abuser from your residence;

(4) order your abuser to stay away from your residence, school, place of employment, or any other specified place frequented by you or another designated household member;
(5) prohibit your abuser from entering your vehicle or a vehicle you occupy;
(6) prohibit your abuser from using or possessing a deadly weapon if the court finds your abuser was in the actual possession of or used a weapon during the commission of your abuse;
(7) direct your abuser to surrender any firearm owned or possessed by that person if the court finds your abuser was in the actual possession of or used a firearm during the commission of your abuse;
(8) request a peace officer to accompany you to your residence to ensure your safe possession of the residence, vehicle, or other items, or to ensure your safe removal of personal items from the residence;
(9) award temporary custody of a minor child to the petitioner and may arrange for visitation with a minor child if the safety of the child and the petitioner can be protected;
(10) grant you possession and use of a vehicle and other essential personal effects;
(11) prohibit your abuser from consuming controlled substances;
(12) require your abuser to pay support for you or a minor child in your care if there is an independent legal obligation of your abuser to support you or the child;
(13) require your abuser to reimburse you for your expenses caused by domestic violence, including medical bills, or for your costs in getting a protective order;
(14) order your abuser to participate in an intervention program for batterers; and
(15) other relief the court determines to be necessary for your safety.
The forms you need to obtain a protective order are available from the nearest court. It is not necessary to have an attorney to obtain a protective order, but you may consult an attorney if you choose. If you would like help obtaining a protective order, you may contact the nearest domestic violence program located at _____. The program can also tell you about other resources available in this community for information about domestic violence, treatment of injuries, and places of safety and shelter.
You may also qualify for compensation from the Violent Crimes Compensation Board. The board may be contacted at _____ .
(b) If the victim of domestic violence does not understand English, the police officer shall make reasonable efforts to inform the victim of the services and rights specified in (a) of this section in a language the victim understands.
(c) [Repealed, Sec. 72 ch 64 SLA 1996].

AS 18.65.530. Mandatory Arrest For Crimes Involving Domestic Violence, Violation of Protective Orders, and Violation of Conditions of Release.

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,
(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;
(2) committed the crime of violating a protective order in violation of AS 11.56.740 (a)(1);
(3) violated a condition of release imposed under AS 12.30.027 .

(b) If a peace officer receives complaints of domestic violence from more than one person arising from the same incident, the officer shall evaluate the conduct of each person to determine who was the principal physical aggressor. If the officer determines that one person was the principal physical aggressor, the other person or persons need not be arrested. In determining whether a person is a principal physical aggressor, the officer shall consider
(1) prior complaints of domestic violence;
(2) the relative severity of the injuries inflicted on each person;
(3) the likelihood of future injury from domestic violence to each person; and
(4) whether one of the persons acted in defense of self or others.
(c) A peace officer is not required to make an arrest under (a) of this section if the officer has received authorization not to arrest from a prosecuting attorney in the jurisdiction in which the offense under investigation arose.
(d) When investigating a crime involving domestic violence, a peace officer may not threaten or suggest the possible arrest of all persons involved in the same incident in a manner that would have a tendency to discourage requests for intervention by law enforcement in incidents involving domestic violence.
(e) In addition to the contents of any other report, a peace officer who does not make an arrest after investigating a complaint of domestic violence, or who arrests two or more persons based on the same incident, shall describe in writing the reasons for not making an arrest or for arresting more than one person.
(f) A person may not bring a civil action for damages for a failure to comply with the provisions of this section.

AS 18.65.540. Central Registry of Protective Orders.

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under AS 18.66.100 - 18.66.180. The registry must include for each protective order the names of the petitioner and respondent, their dates of birth, and the conditions and duration of the order. The registry shall retain a record of the protective order after it has expired.
(b) A peace officer receiving a protective order from a court under AS 18.66.100 - 18.66.180, a modified order issued under AS 18.66.120 , or an order dismissing a protective order, must take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.
(c) A petitioner or respondent who is the subject of a protective order may request the Department of Public Safety to correct information about the order in the central registry. The person requesting the correction has the burden of proving that the information is inaccurate or incomplete. The person may appeal an adverse decision to the court under applicable court rules for appealing the decision of an administrative agency. On appeal, the appellant has the burden of showing that the department's action was an abuse of discretion. An appeal filed under this subsection may not collaterally attack a protective order, challenge the grounds upon which the order was based, or challenge the evidence submitted in support of the order.
(d) The Department of Public Safety may adopt regulations to implement this section.
(e) A person may not bring a civil action for damages for a failure to comply with the

provisions of this section.

AS 18.66.100. Protective Orders: Eligible Petitioners; Relief.

(a) A person who is or has been a victim of a crime involving domestic violence may file a petition in the district or superior court for a protective order against a household member. A parent, guardian, or other representative appointed by the court under this section may file a petition for a protective order on behalf of a minor. The court may appoint a guardian ad litem or attorney to represent the minor. Notwithstanding AS 25.24.310 or this section, the office of public advocacy may not be appointed as a guardian ad litem or attorney for a minor in a petition filed under this section unless the petition has been filed on behalf of the minor.
(b) When a petition for a protective order is filed, the court shall schedule a hearing and provide at least 10 days' notice to the respondent of the hearing and of the respondent's right to appear and be heard, either in person or by an attorney. If the court finds by a preponderance of evidence that the respondent has committed a crime involving domestic violence against the petitioner, regardless of whether the respondent appears at the hearing, the court may order any relief available under (c) of this section. The provisions of a protective order issued under (1) (c)(1) of this section are effective until further order of the court; (2) (c)(2) - (16) of this section are effective for six months unless earlier dissolved by court order.
(c) A protective order under this section may
(1) prohibit the respondent from threatening to commit or committing domestic violence, stalking, or harassment;
(2) prohibit the respondent from telephoning, contacting, or otherwise communicating directly or indirectly with the petitioner;
(3) remove and exclude the respondent from the residence of the petitioner, regardless of ownership of the residence;
(4) direct the respondent to stay away from the residence, school, or place of employment of the petitioner or any specified place frequented by the petitioner or any designated household member;
(5) prohibit the respondent from entering a propelled vehicle in the possession of or occupied by the petitioner;
(6) prohibit the respondent from using or possessing a deadly weapon if the court finds the respondent was in the actual possession of or used a weapon during the commission of domestic violence;
(7) direct the respondent to surrender any firearm owned or possessed by the respondent if the court finds that the respondent was in the actual possession of or used a firearm during the commission of the domestic violence;
(8) request a peace officer to accompany the petitioner to the petitioner's residence to ensure that the petitioner
(A) safely obtains possession of the petitioner's residence, vehicle, or personal items; and
(B) is able to safely remove a vehicle or personal items from the petitioner's residence;
(9) award temporary custody of a minor child to the petitioner and may arrange for visitation with a minor child if the safety of the child and the petitioner can be protected; if visitation is allowed, the court may order visitation under the conditions provided in

AS 25.20.061;
(10) give the petitioner possession and use of a vehicle and other essential personal items, regardless of ownership of the items;
(11) prohibit the respondent from consuming controlled substances;
(12) require the respondent to pay support for the petitioner or a minor child in the care of the petitioner if there is an independent legal obligation of the respondent to support the petitioner or child;
(13) require the respondent to reimburse the petitioner or other person for expenses associated with the domestic violence, including medical expenses, counseling, shelter, and repair or replacement of damaged property;
(14) require the respondent to pay costs and fees incurred by the petitioner in bringing the action under this chapter;
(15) order the respondent, at the respondent's expense, to participate in (A) a program for the rehabilitation of perpetrators of domestic violence that meets the standards set by, and that is approved by, the Department of Corrections under AS 44.28.020 (b), or
(B) treatment for the abuse of alcohol or controlled substances, or both; a protective order under this section may not require a respondent to participate in a program for the rehabilitation of perpetrators of domestic violence unless the program meets the standards set by, and that is approved by, the Department of Corrections under AS 44.28.020(b);
(16) order other relief the court determines necessary to protect the petitioner or any household member.
(d) If the court issues a protective order under this section, it shall
(1) make reasonable efforts to ensure that the order is understood by the petitioner and by the respondent, if present; and
(2) have the order delivered to the appropriate local law enforcement agency for expedited service and for entry into the central registry of protective orders under AS 18.65.540 .
(e) A court may not deny a petition for a protective order under this section solely because of a lapse of time between an act of domestic violence and the filing of the petition.

AS 18.66.400. Domestic Violence Fatality Review Teams.

(a) The commissioner of public safety may establish domestic violence fatality review teams in areas of the state. A municipality may establish a domestic violence fatality review team in a municipality. When the investigation of fatal incidents of domestic violence and incidents of domestic violence involving serious physical injury has been completed or adjudicated by law enforcement or at an earlier appropriate time, a domestic violence fatality review team may review those incidents for the purpose of preventing domestic-violence-related fatalities, improving the response of law enforcement and other agencies to domestic violence, and providing consultation and coordination for agencies involved in the prevention and investigation of domestic violence. The review may include a review of events leading up to the domestic violence incident, available community resources, current laws and policies, actions taken by agencies and persons related to the incident and persons involved in the incident, and other information the team determines to be relevant to the review. The confidential and other records of a

department or agency of the state or a municipality relating to the domestic violence incident may be examined by the domestic violence fatality review team or a member of the team. The domestic violence fatality review team and each member of the team shall preserve the confidentiality of any records examined. In this subsection, "serious physical injury" has the meaning given in AS 11.81.900.
(b) The membership of a domestic violence fatality review team shall be determined by the commissioner of public safety or the municipality, as appropriate. Membership may include representatives from
(1) law enforcement agencies within the area or municipality;
(2) the district attorney for the area or municipality and municipal prosecutor if created by a municipality;
(3) the office of the chief medical examiner;
(4) the Department of Corrections;
(5) employees of the Department of Health and Social Services who deal with domestic violence;
(6) local agencies and organizations involved with crime victim and domestic violence protection, reporting, and counseling and assistance;
(7) other organizations, departments, and agencies determined to be appropriate.
(c) The victims' advocate under AS 24.65 is an ex officio member of each domestic violence fatality review team created under this section and may attend any meeting and review any information available to or considered by a team.
(d) Except for a public report issued by a domestic violence fatality review team that does not contain confidential information, records or other information collected by a team or any member of a team related to duties under this section is confidential and not subject to public disclosure under AS 40.25.100 and 40.25.110. Meetings of a domestic violence fatality review team are closed to the public and are not subject to the provisions of AS 44.62.310 and 44.62.312.
(e) The determinations, conclusions, and recommendations of a domestic violence fatality review team or its members are not admissible in a civil or criminal proceeding. A member may not be compelled to disclose a determination, conclusion, recommendation, discussion, or thought process through discovery or testimony in a civil or criminal proceeding. Records and information collected by the team are not subject to discovery or subpoena in connection with a civil or criminal proceeding.
(f) Notwithstanding (e) of this section, an employee of a state or a municipal agency may testify in a civil or criminal proceeding concerning cases reviewed by a domestic violence fatality review team even though the agency's records were reviewed by a team and formed the basis of that employee's testimony and the team's report.
(g) A person who serves on a domestic violence fatality review team is not liable for damages or other relief in an action brought by reason of the performance of a duty, function, or activity of the team.

AS 18.66.990. Definitions.

In this chapter,
(1) "council" means the Council on Domestic Violence and Sexual Assault;

(2) "crisis intervention and prevention program" means a community program that provides information, education, counseling, and referral services to individuals experiencing personal crisis related to domestic violence or sexual assault and to individuals in personal or professional transition, excluding correctional half-way houses, outpatient mental health programs, and drug or alcohol rehabilitation programs;
(3) "domestic violence" and "crime involving domestic violence" mean one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these offenses, or an attempt to commit the offense, by a household member against another household member:
(A) a crime against the person under AS 11.41;
(B) burglary under AS 11.46.300 - 11.46.310;
(C) criminal trespass under AS 11.46.320 - 11.46.330;
(D) arson or criminally negligent burning under AS 11.46.400 - 11.46.430;
(E) criminal mischief under AS 11.46.475 - 11.46.486;
(F) terrorist threatening under AS 11.56.807 or 11.56.810;
(G) violating a domestic violence order under AS 11.56.740 ; or
(H) harassment under AS 11.61.120 (a)(2) - (4);
(4) "domestic violence program" means a program that provides services to the victims of domestic violence, their families, or perpetrators of domestic violence;
(5) "household member" includes
(A) adults or minors who are current or former spouses;
(B) adults or minors who live together or who have lived together;
(C) adults or minors who are dating or who have dated;
(D) adults or minors who are engaged in or who have engaged in a sexual relationship;
(E) adults or minors who are related to each other up to the fourth degree of consanguinity, whether of the whole or half blood or by adoption, computed under the rules of civil law;
(F) adults or minors who are related or formerly related by marriage;
(G) persons who have a child of the relationship; and
(H) minor children of a person in a relationship that is described in (A) - (G) of this paragraph

Brought to you
By
Municipal Department of Health and Human Services

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Department of Public Safety

CRIME SUMMIT

Senate Judiciary Committee

January 24 – 25, 2012

Joseph Masters, Commissioner
Department of Public Safety

Colonel Keith Mallard, Director
Division of Alaska State Troopers

Department of Public Safety

Our Mission:

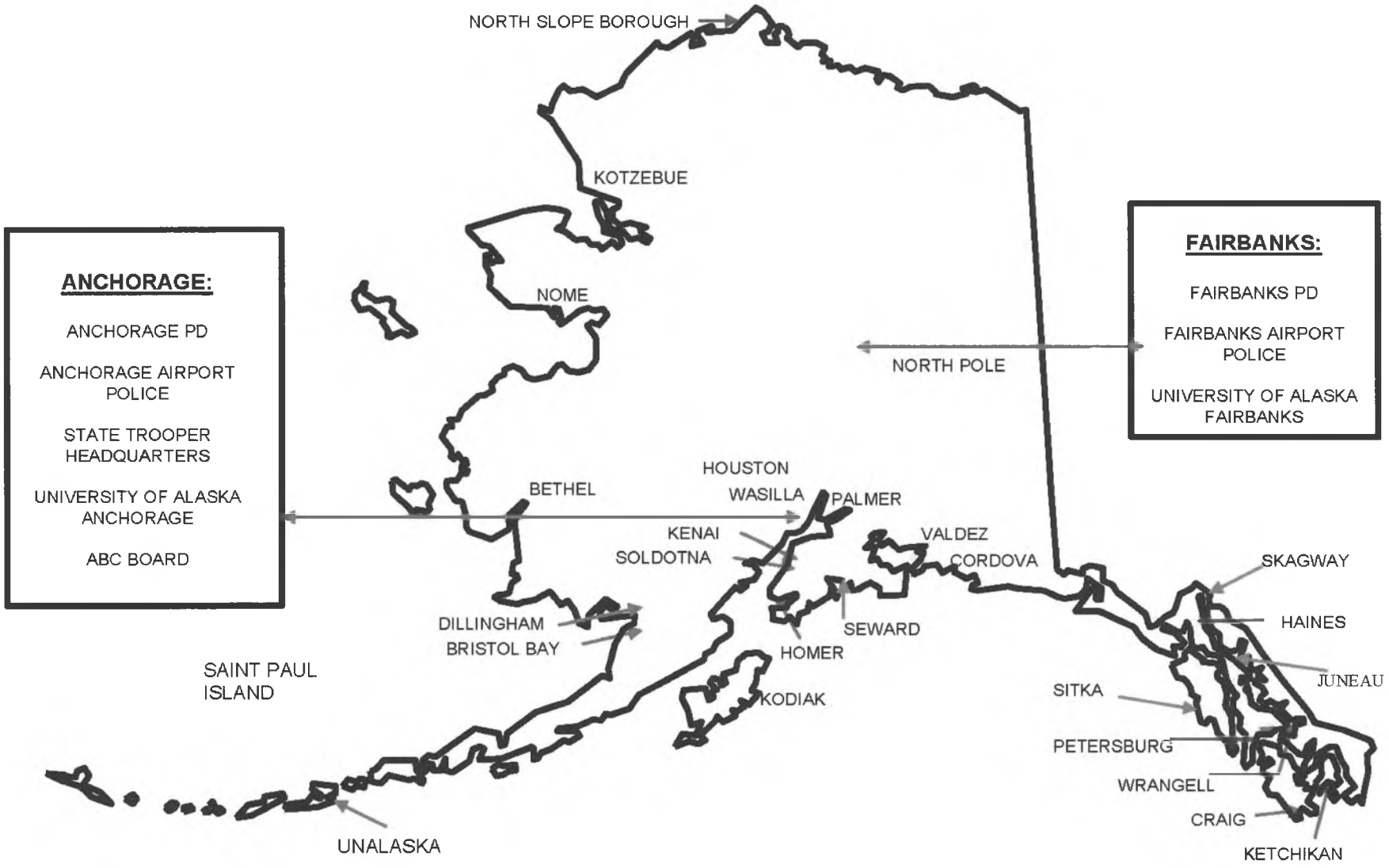
To ensure public safety and enforce fish and wildlife laws

Current Statistics and Trends

- **Uniform Crime Report (UCR) data for Alaska**
  - Calendar Year 2010
    - Statewide data
    - Based on 35 reporting law enforcement agencies
- **Case Activity Data**
  - Calendar Year 2011
    - Alaska State Troopers

DPS UCR Data

ALASKA UCR 2010 REPORTING AGENCIES



ANCHORAGE:

ANCHORAGE PD

ANCHORAGE AIRPORT POLICE

STATE TROOPER HEADQUARTERS

UNIVERSITY OF ALASKA ANCHORAGE

ABC BOARD

FAIRBANKS:

FAIRBANKS PD

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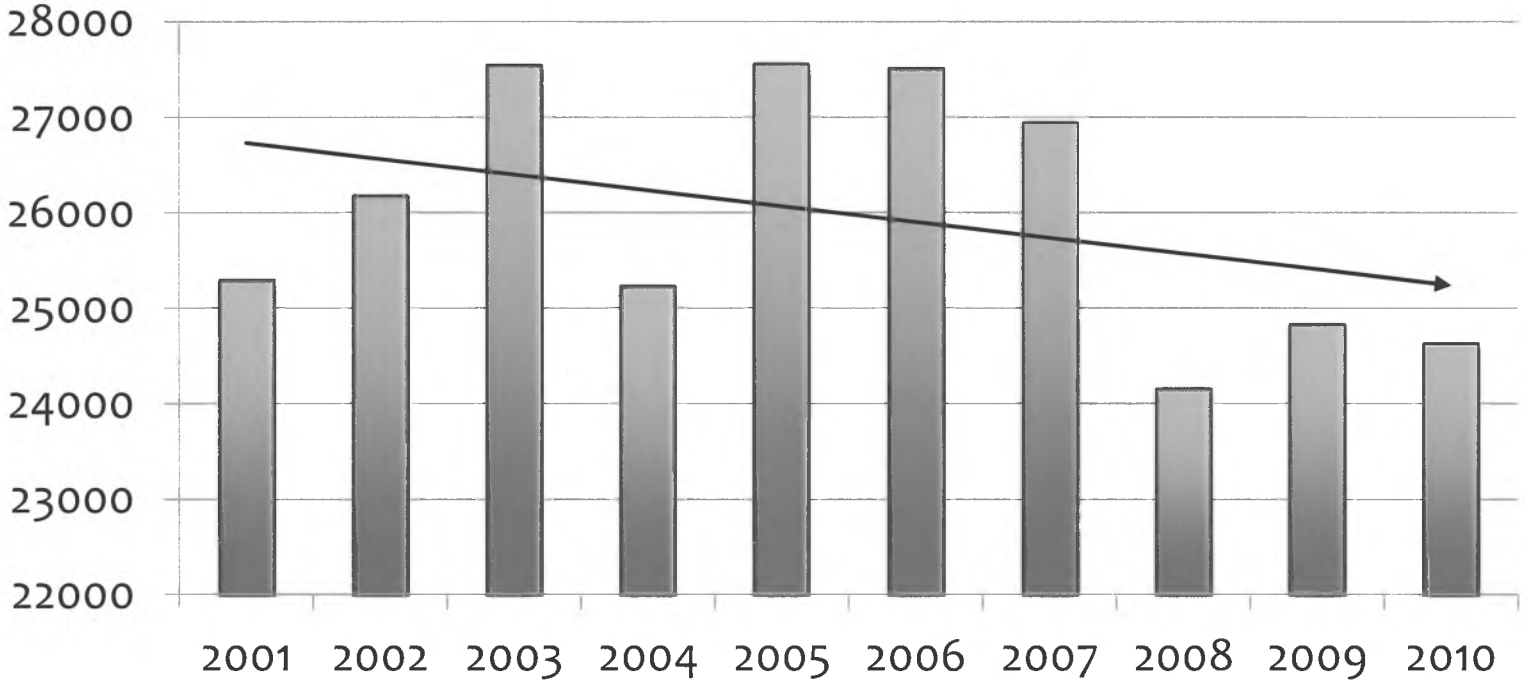
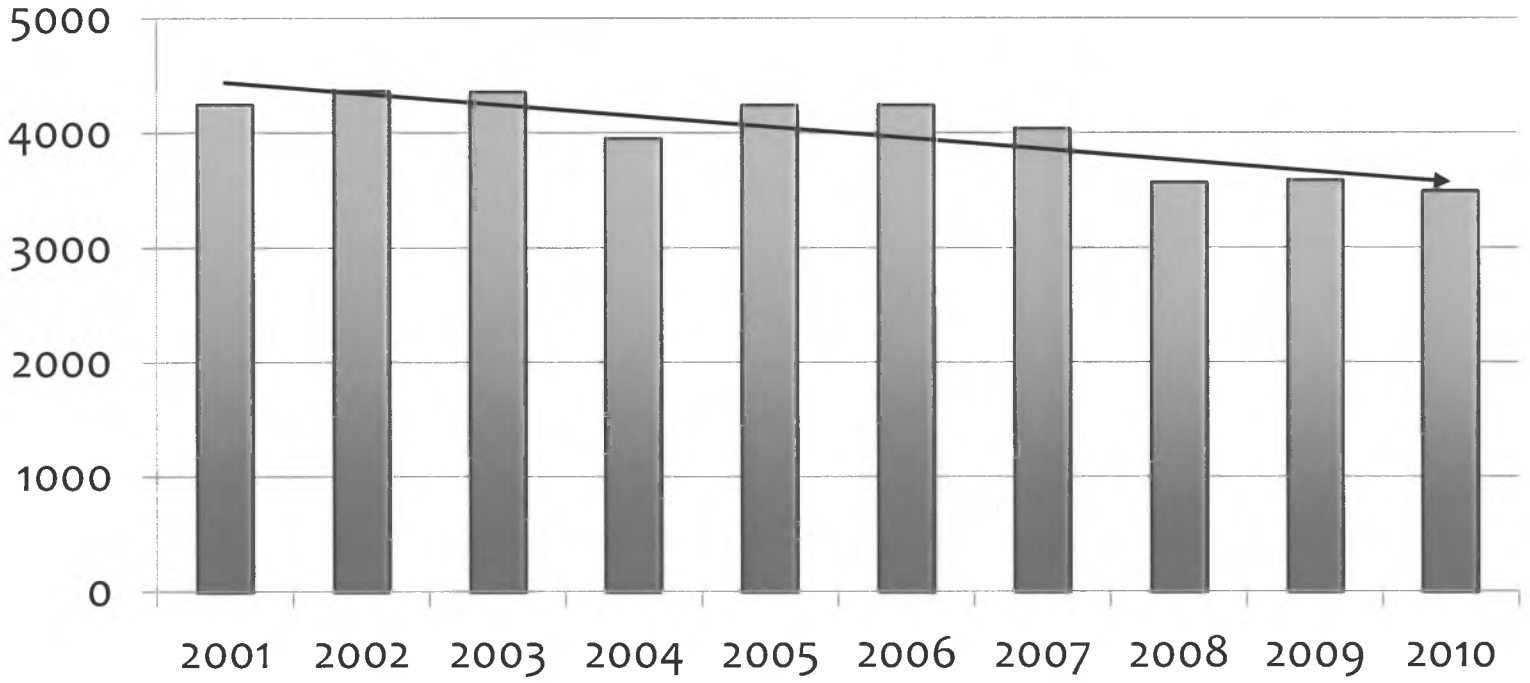


Uniform Crime Reports, *Crime Reported in Alaska,* 2005 & 2010, Dept. of Public Safety, http://dps.alaska.gov/Statewide/UCR.aspx

Alaska Crime Rate Summary



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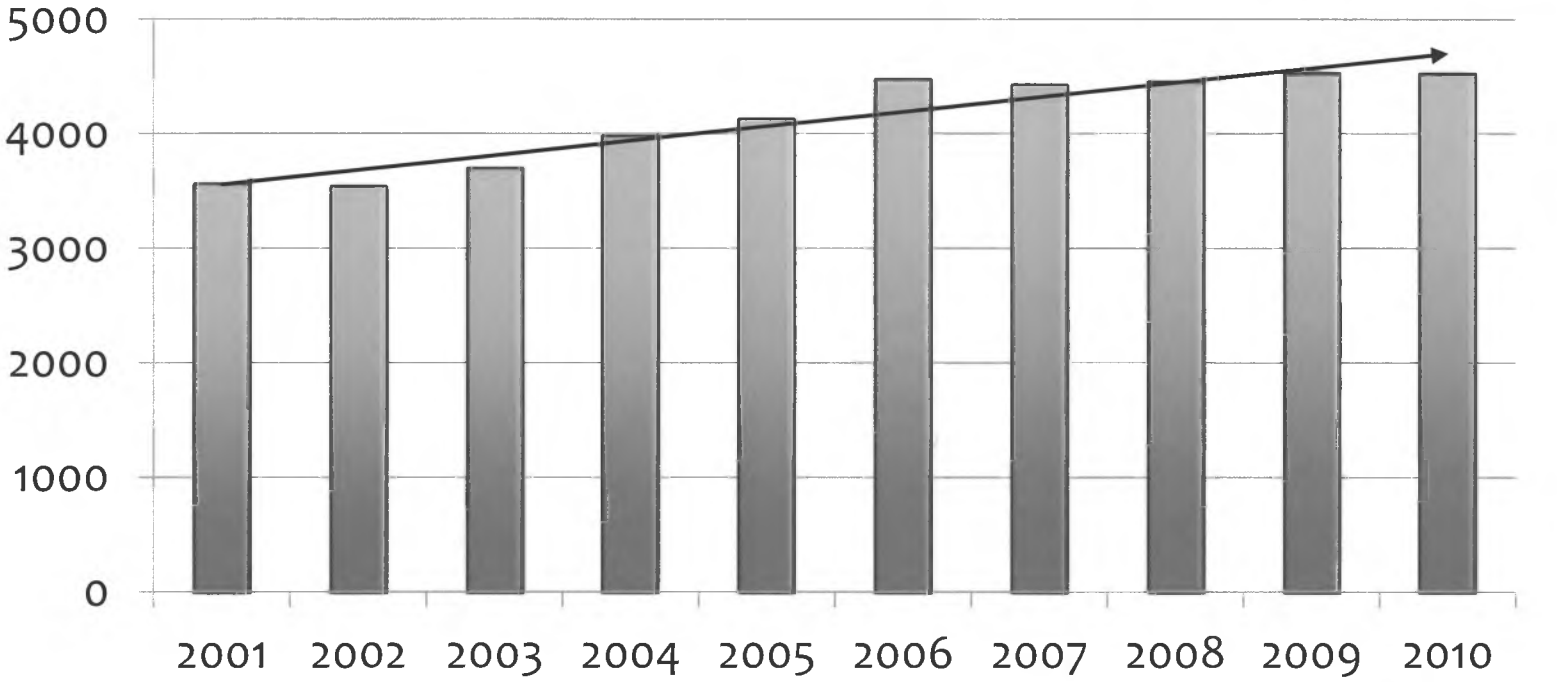
Alaska Violent Crime Offense Summary



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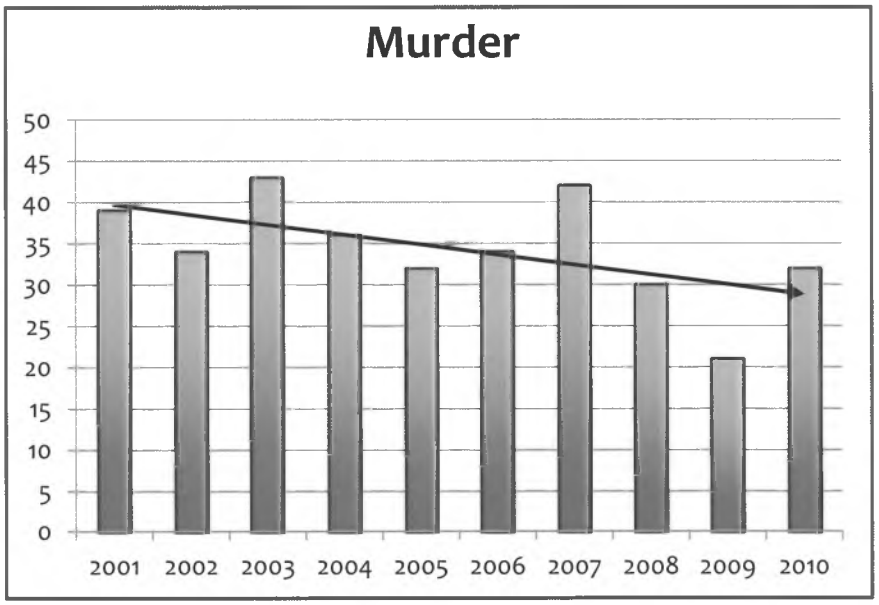
Murder
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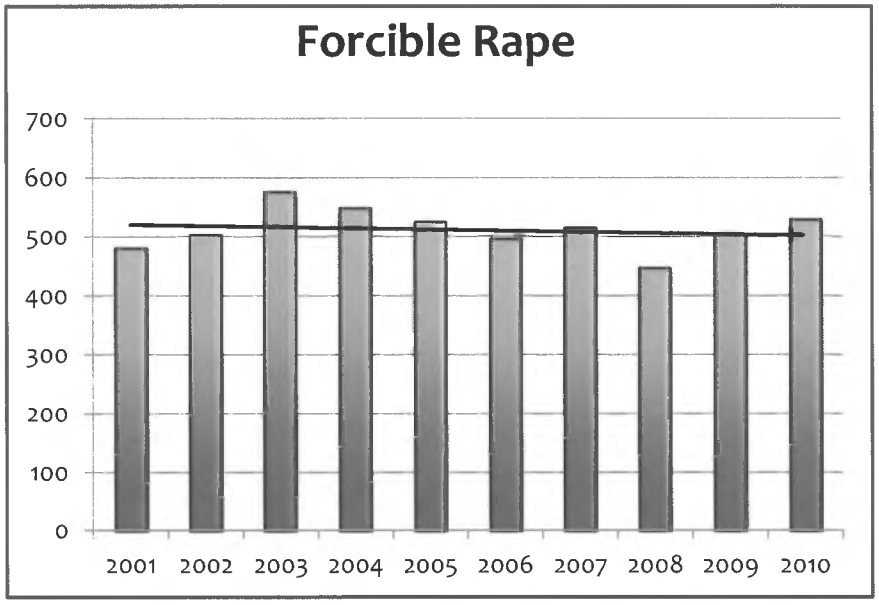
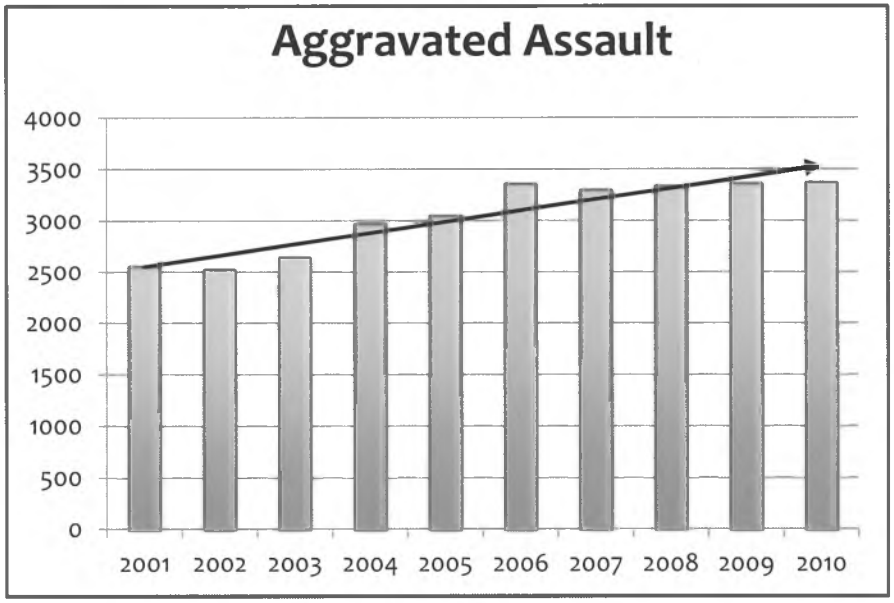
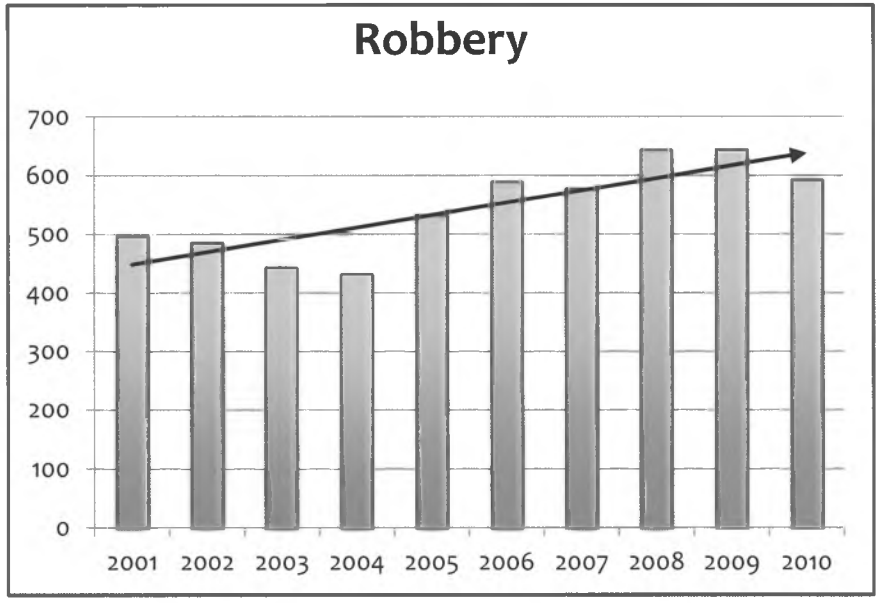
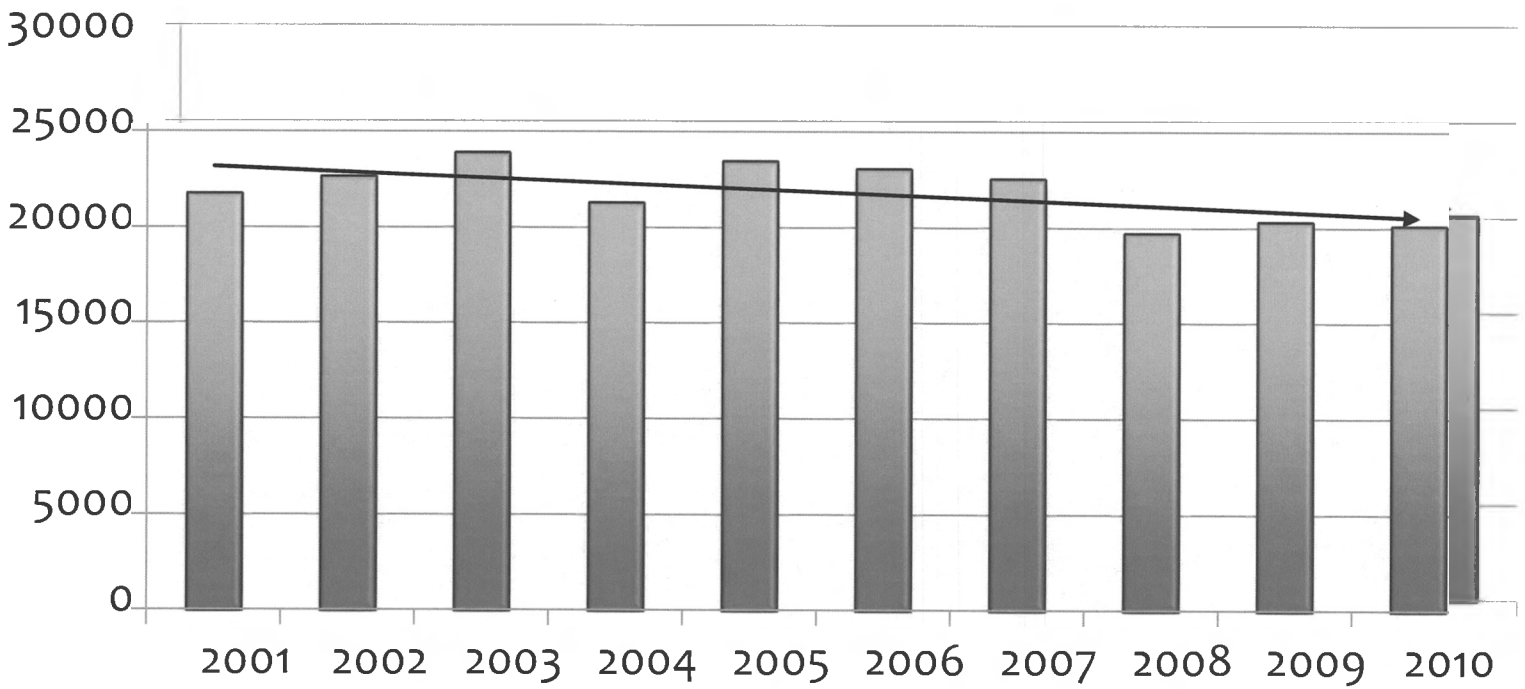
2001 2002 2003 2004 2005 2006 2007 2008 2009 2010


Forcible Rape
700
600
500
400
300
200
100
0
2001 2002 2003 2004 2005 2006 2007 2008 2009 2010

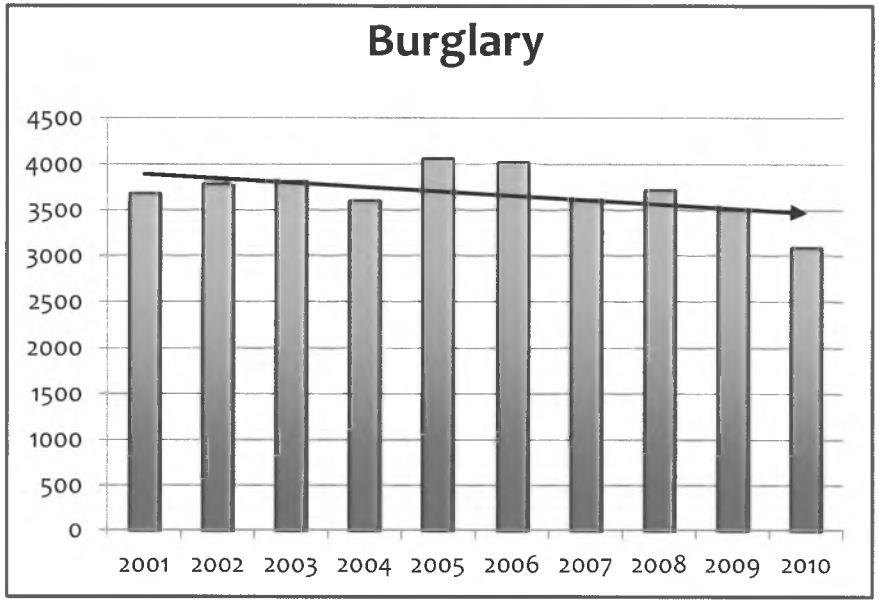

Aggravated Assault
4000
3500
3000
2500
2000
1500
1000
500
0
2001 2002 2003 2004 2005 2006 2007 2008 2009 2010

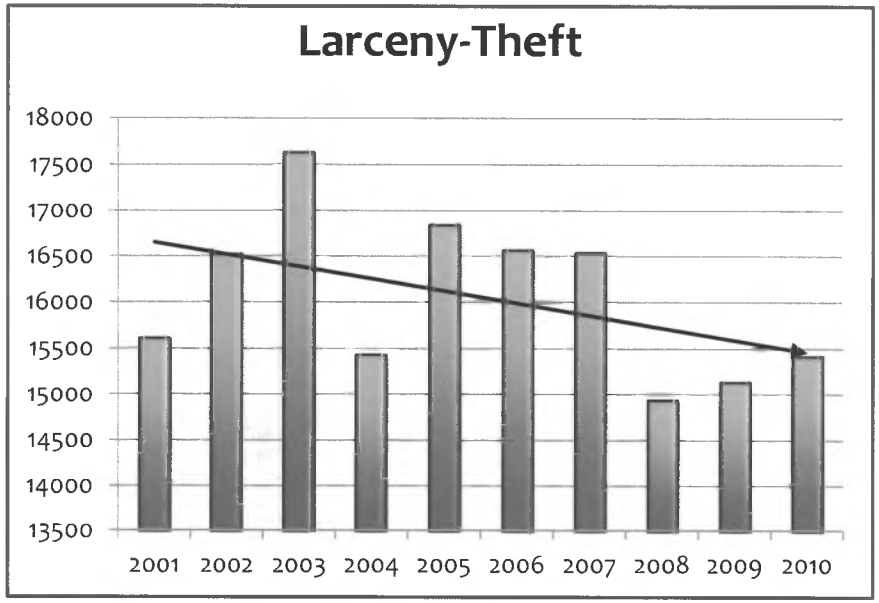

Robbery
700
600
500
400
300
200
100
0
2001 2002 2003 2004 2005 2006 2007 2008 2009 2010

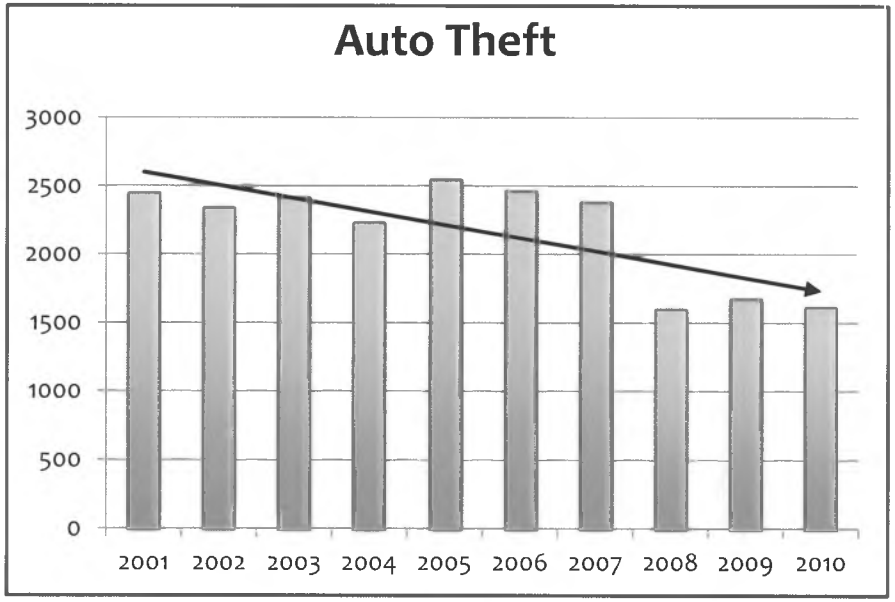
Alaska Property Crime Offense Summary



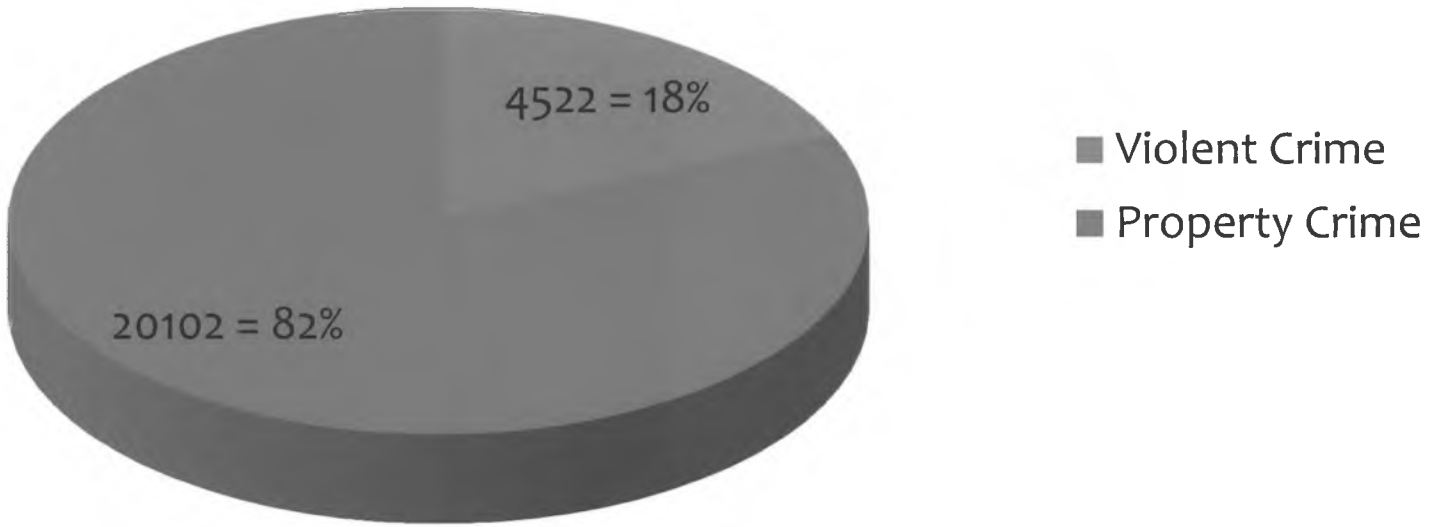
Uniform Crime Reports, *Crime Reported in Alaska,* 2005 & 2010, Dept. of Public Safety, http://dps.alaska.gov/Statewide/UCR.aspx


Burglary
4500
4000
3500
3000
2500
2000
1500
1000
500
0
2001 2002 2003 2004 2005 2006 2007 2008 2009 2010


Larceny-Theft
18000
17500
17000
16500
16000
15500
15000
14500
14000
13500
2001 2002 2003 2004 2005 2006 2007 2008 2009 2010

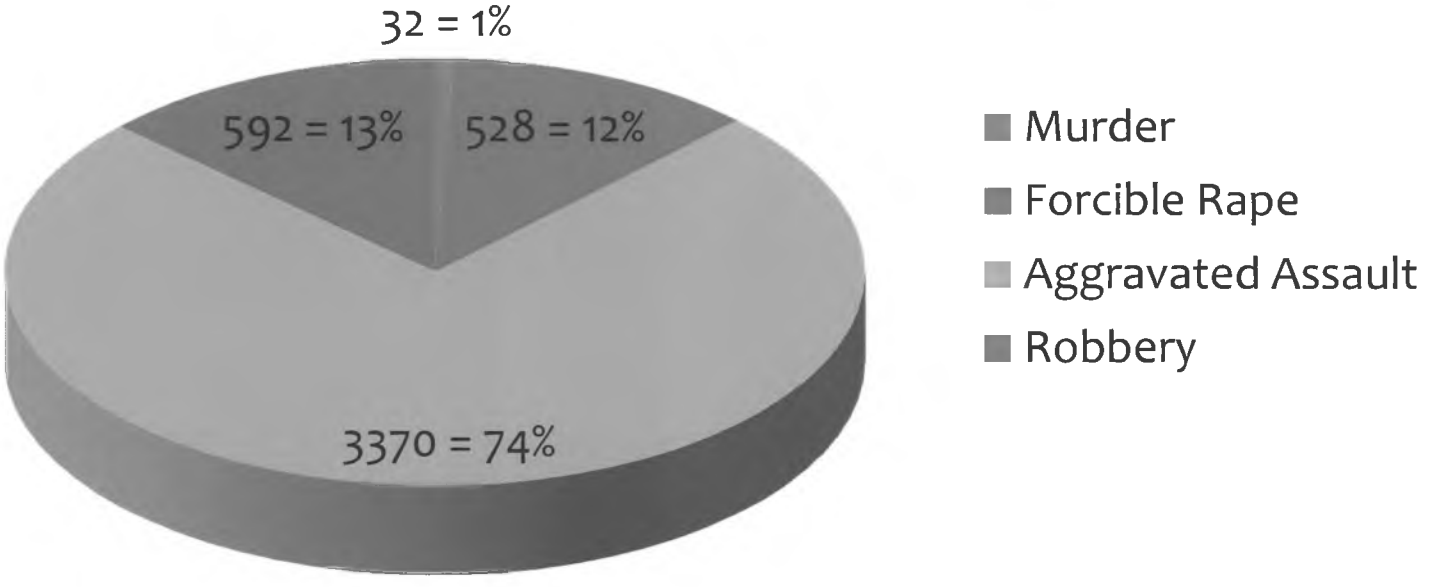

Auto Theft
3000
2500
2000
1500
1000
500
0
2001 2002 2003 2004 2005 2006 2007 2008 2009 2010

2010 Violent Crime vs. Property Crime in Alaska



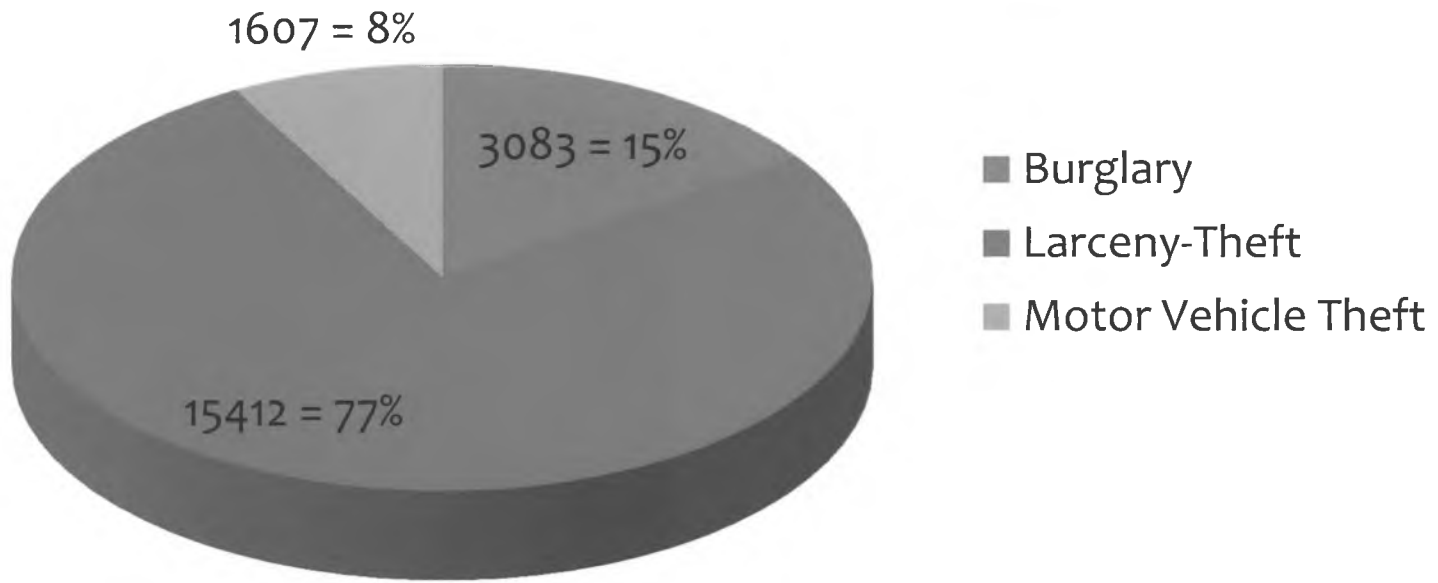
Uniform Crime Reports, *Crime Reported in Alaska 2010*, Dept. of Public Safety http://dps.alaska.gov/statewide/docs/UCR/UCR_2010.pdf

2010 Violent Crime in Alaska



Uniform Crime Reports, *Crime Reported in Alaska 2010*, Dept. of Public Safety http://dps.alaska.gov/statewide/docs/UCR/UCR_2010.pdf

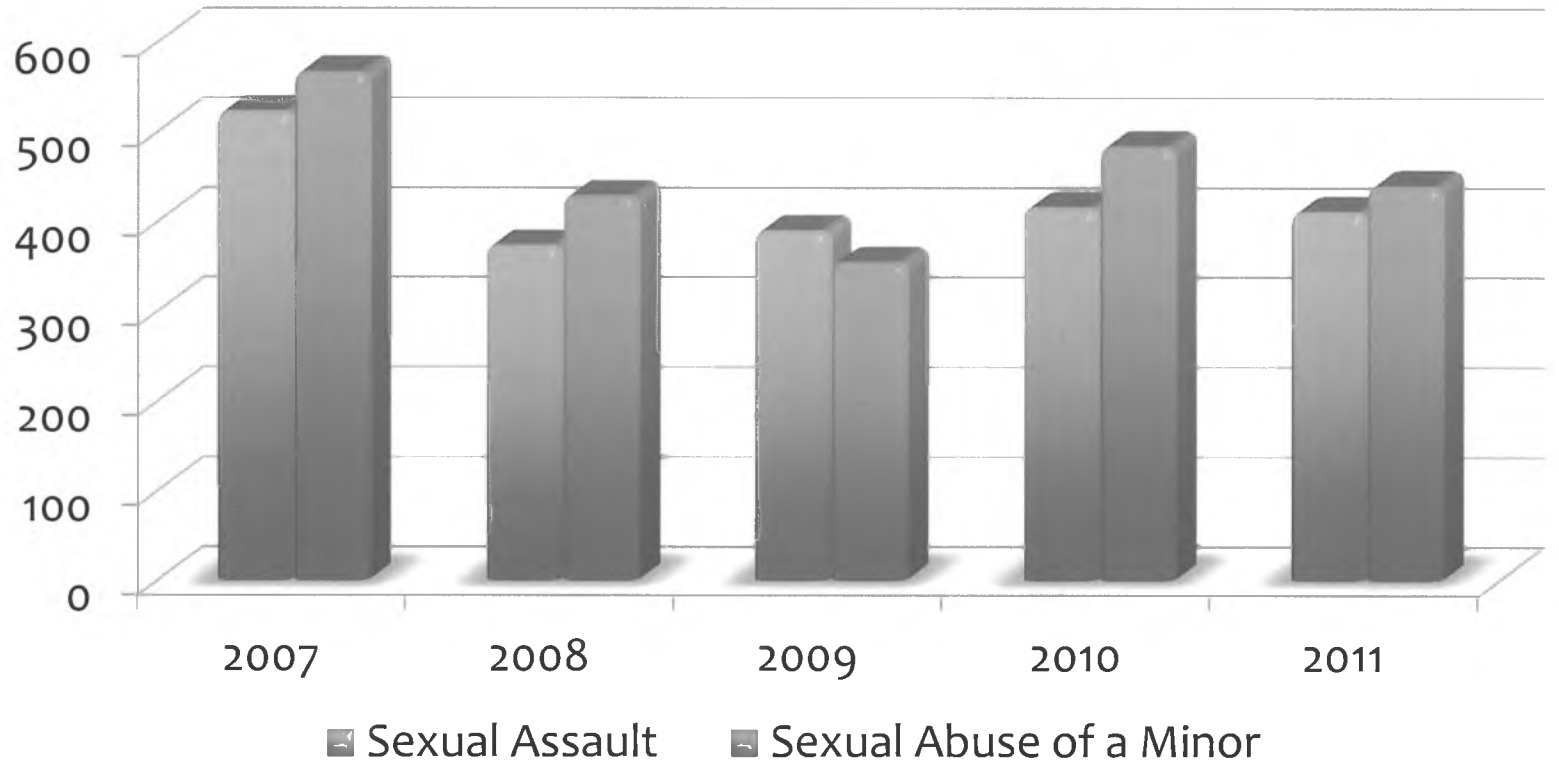
2010 Property Crime in Alaska



Uniform Crime Reports, *Crime Reported in Alaska 2010*, Dept. of Public Safety http://dps.alaska.gov/statewide/docs/UCR/UCR_2010.pdf

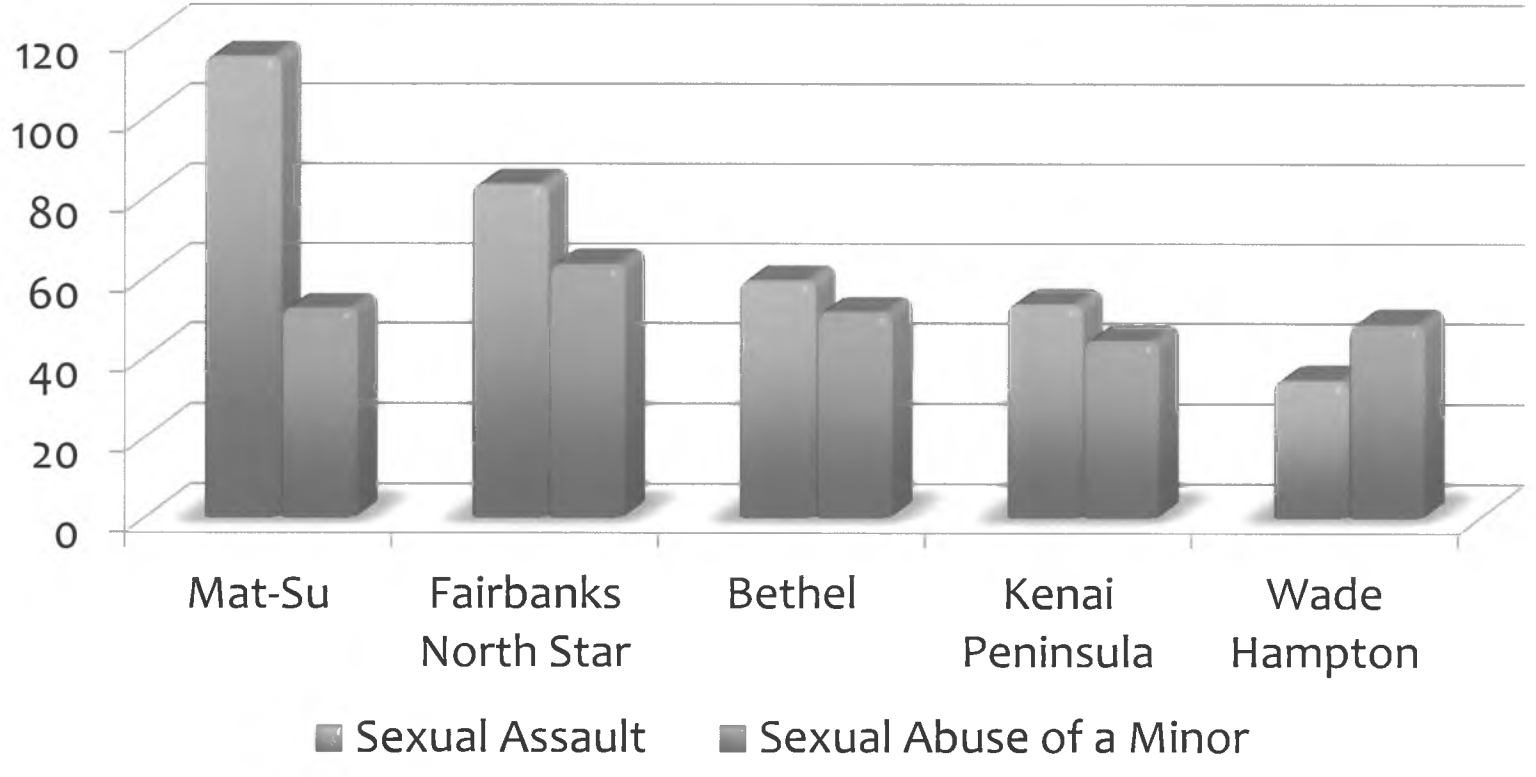
AST Case Activity Data

Sexual Assault/Sexual Abuse of a Minor
Case Activity

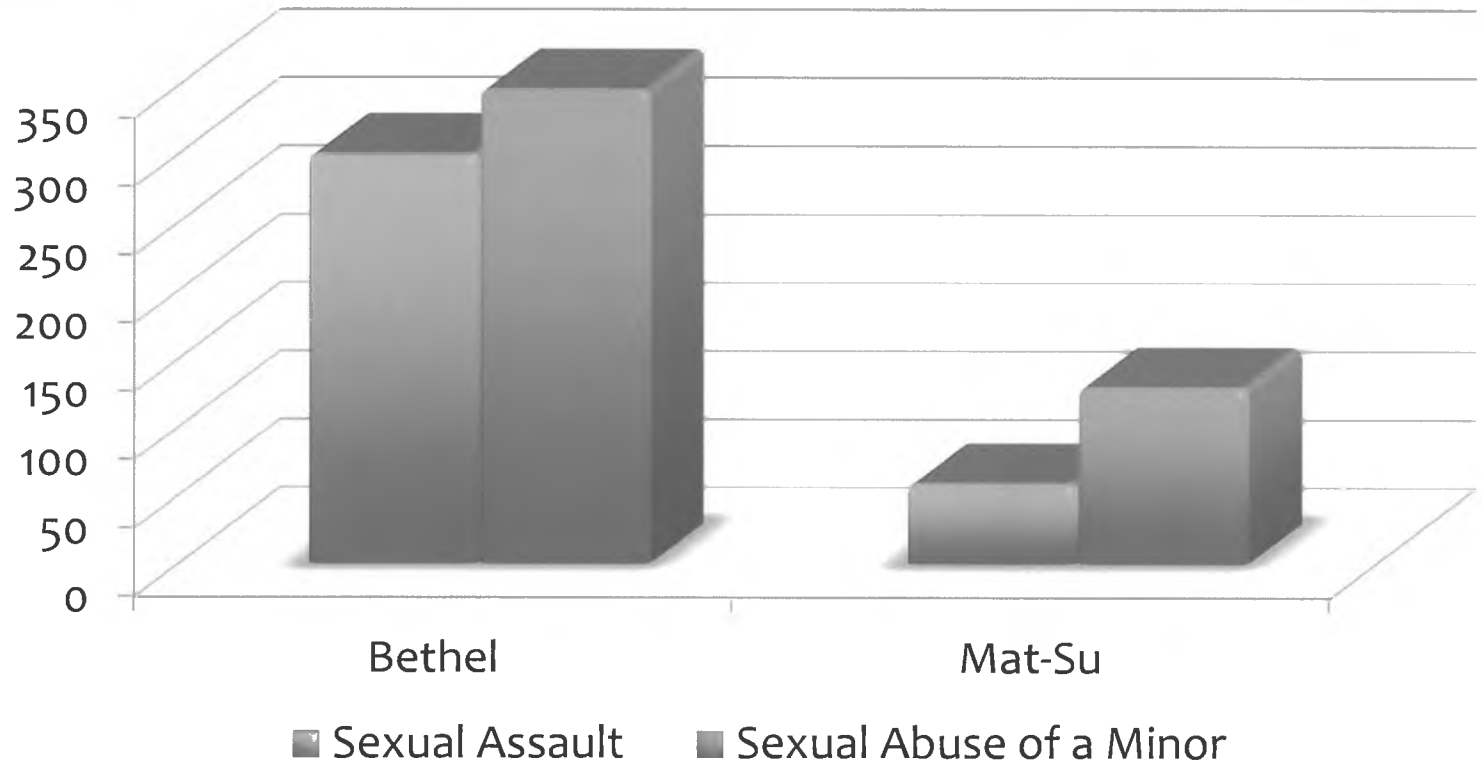


2011 Sexual Assault/Sexual Abuse of a Minor

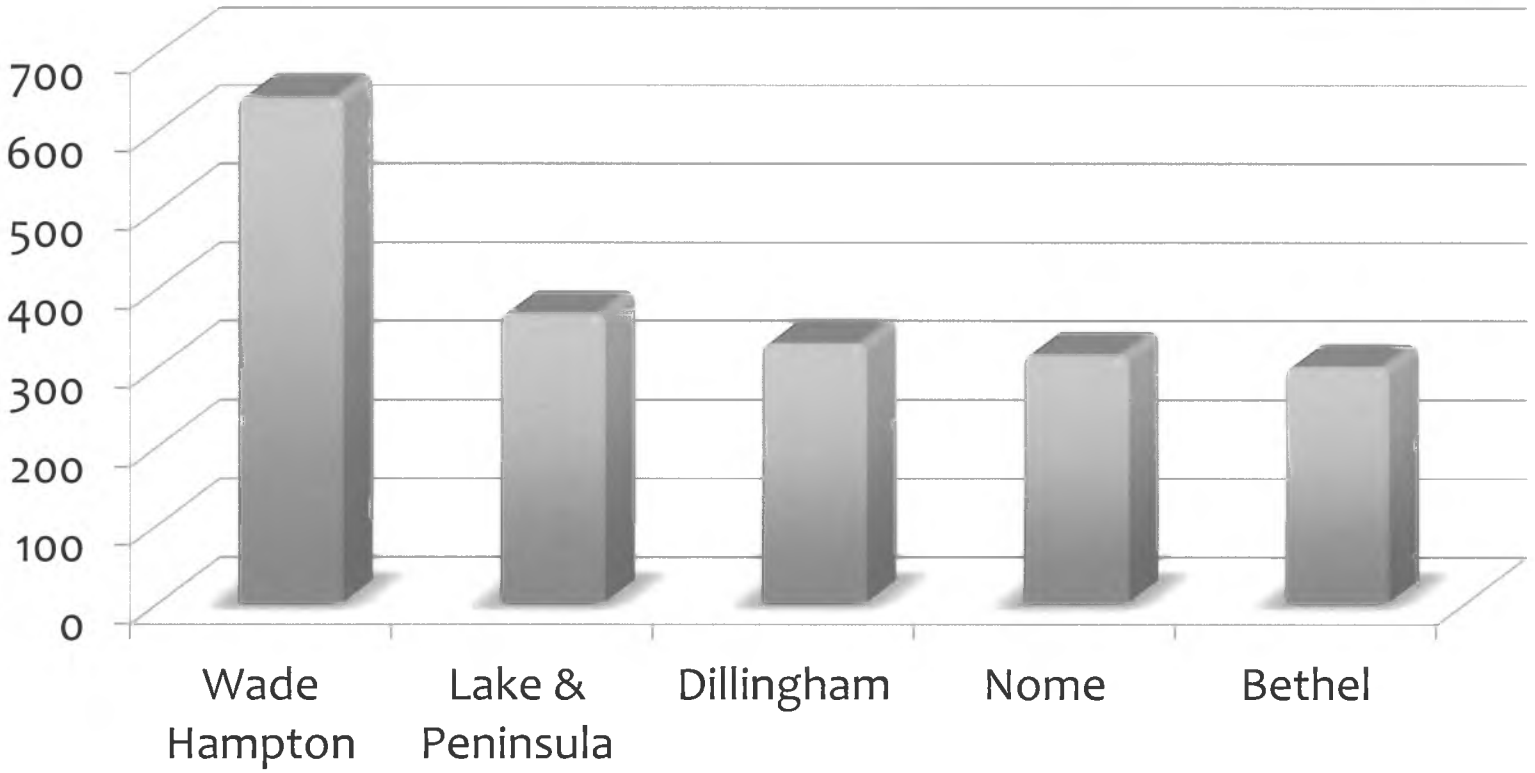
Case Activity



2011 Sexual Assault/Sexual Abuse of a Minor
of Offenses per 100,000

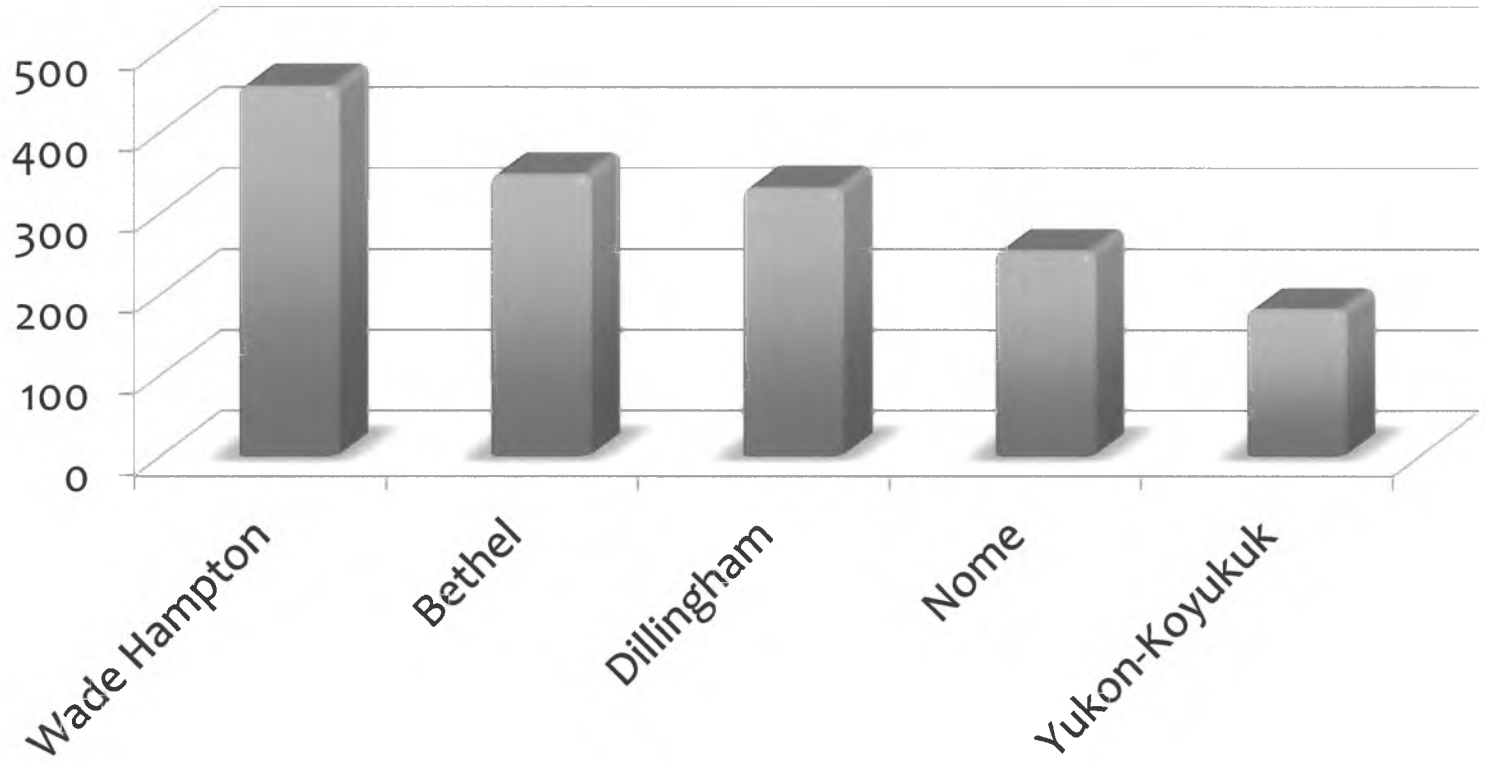


2011 Sexual Assault Case Activity
of Offenses per 100,000

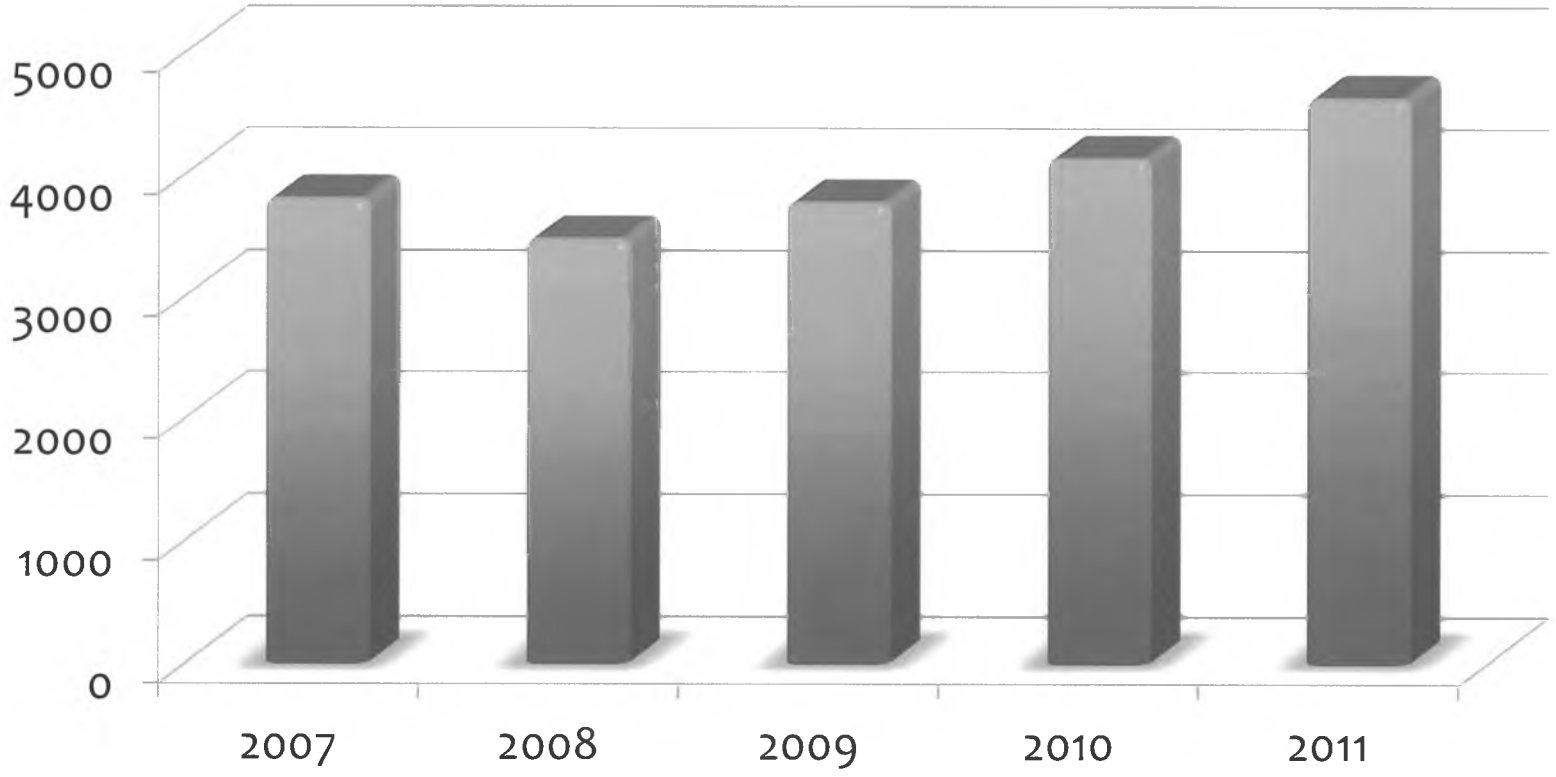


2011 Sexual Abuse of a Minor Case Activity

of Offenses per 100,000

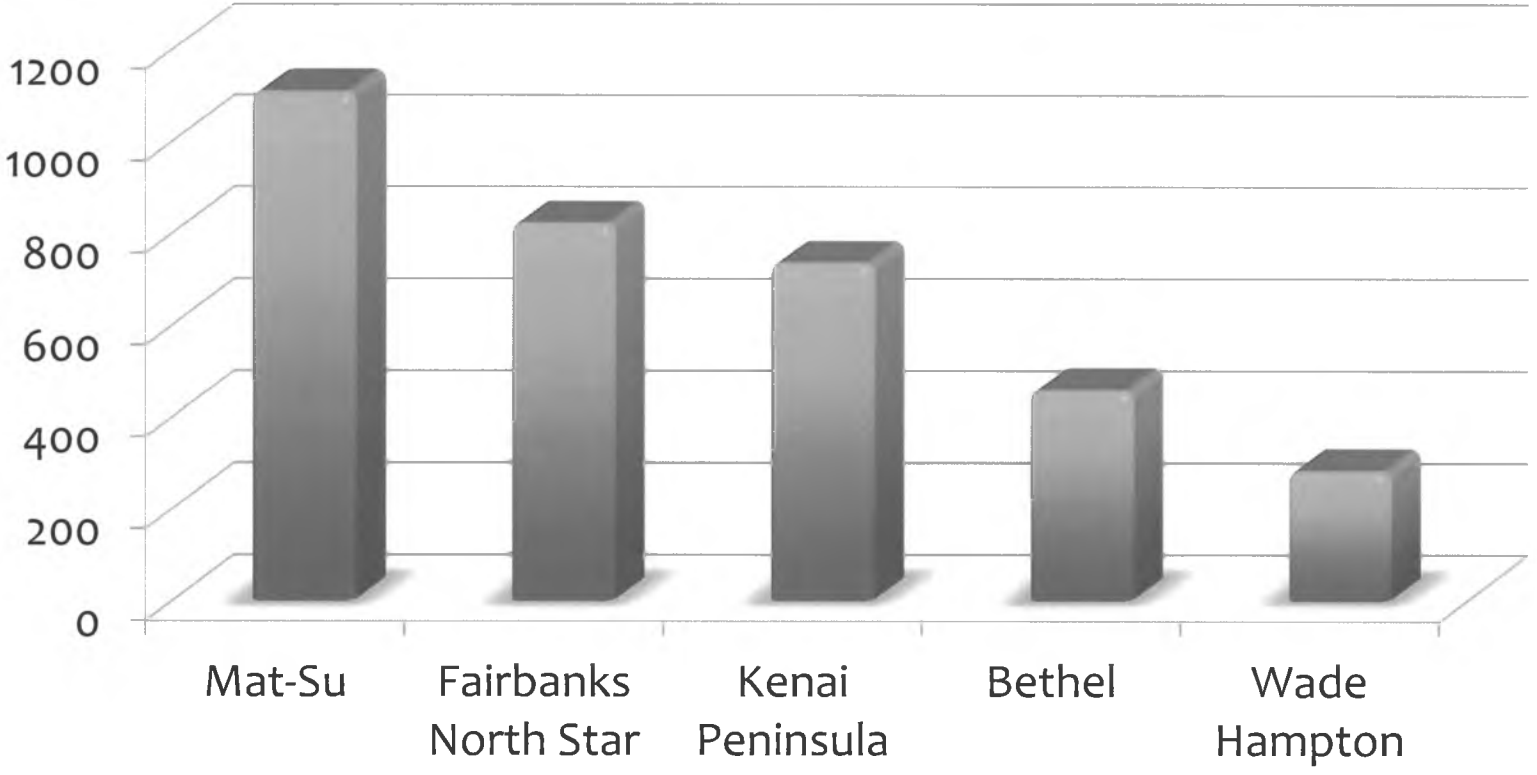


2011 Domestic Violence Case Activity

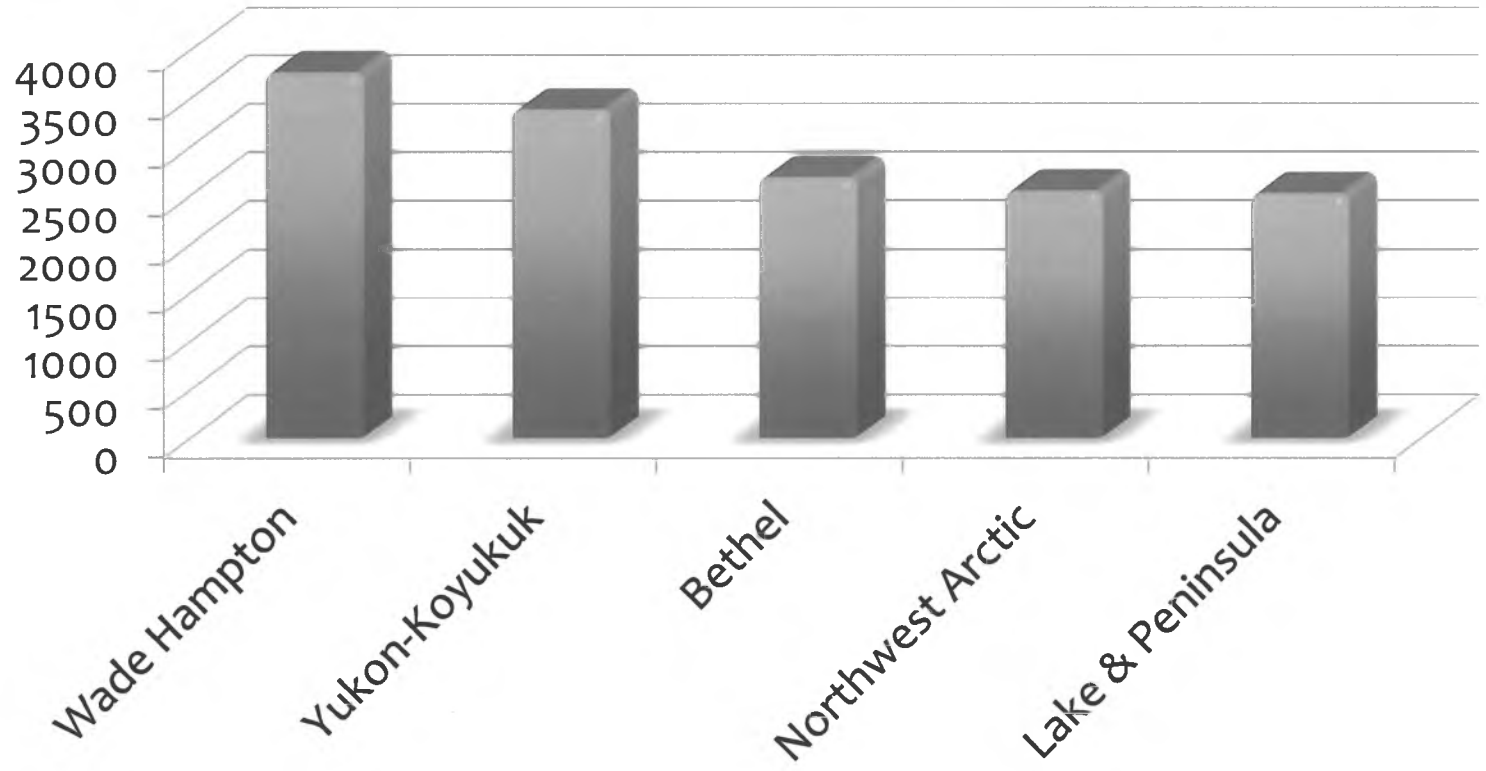


Alaska Department of Public Safety, Calendar Years 2007 – 2011

2011 Domestic Violence Case Activity



2011 Domestic Violence Case Activity
of Offenses per 100,000



Successes

- More law enforcement in more communities
- Online felony reporting system for law enforcement
- Victimization Surveys
  - Statewide
  - Regional
- Technology & Information Sharing
  - Fusion Center
  - ARMS
  - TraCS
  - E-Citations
- New Crime Lab
  - On schedule and on budget

Partnerships

Federal/State/Local

- Multi-Jurisdictional Task Forces
- Criminal Justice Working Group
- Multi-Agency Justice Integration Consortium (MAJIC)

Researcher/Practitioner

- University of Alaska Anchorage Justice Center
  - Victimization Surveys
  - Domestic Violence Study
- Institute for Social & Economic Research (ISER)

Challenges

- Training
- Infrastructure
- Technology & Information Sharing

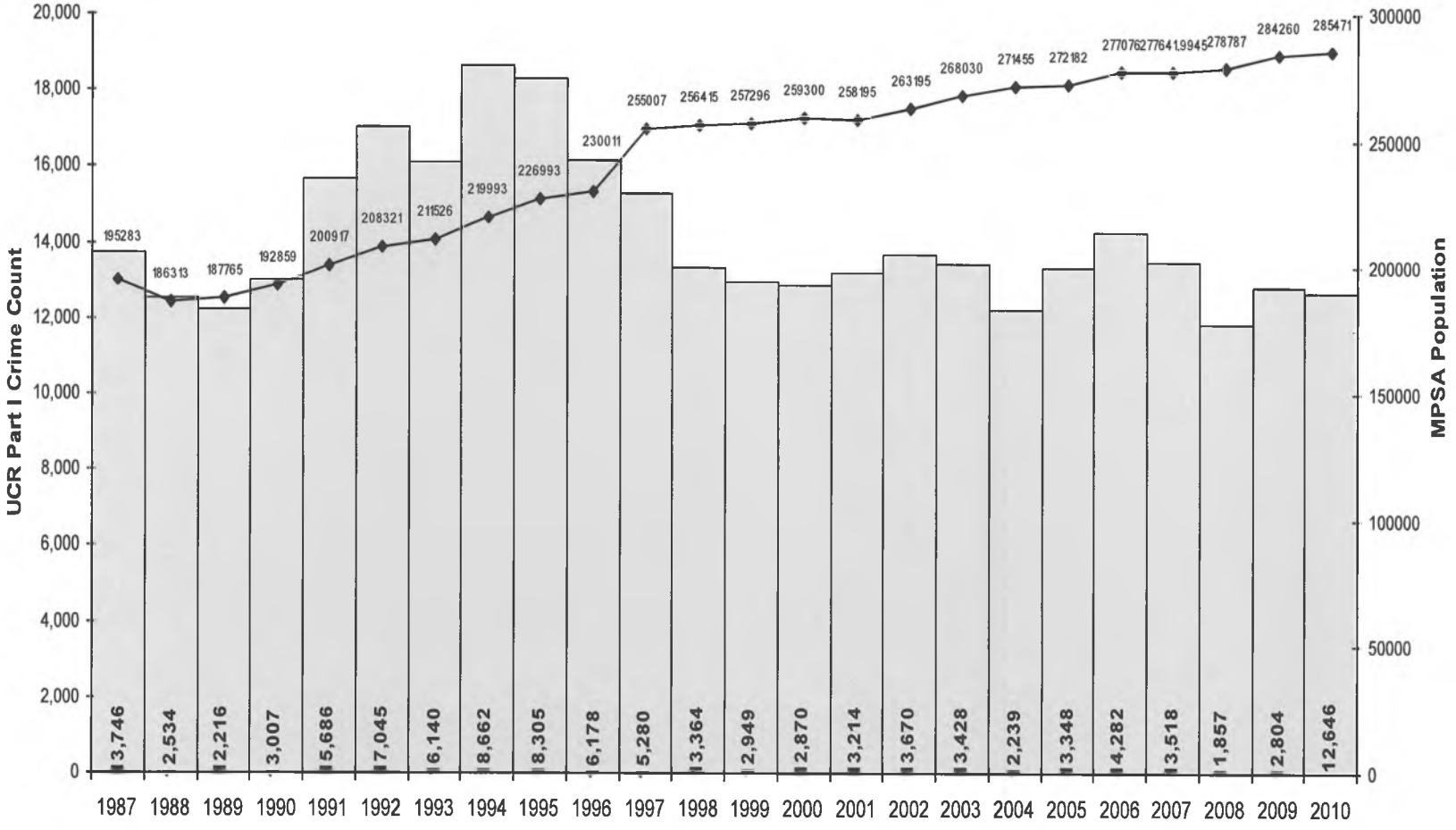
Thank You

Senate Judiciary Crime Summit

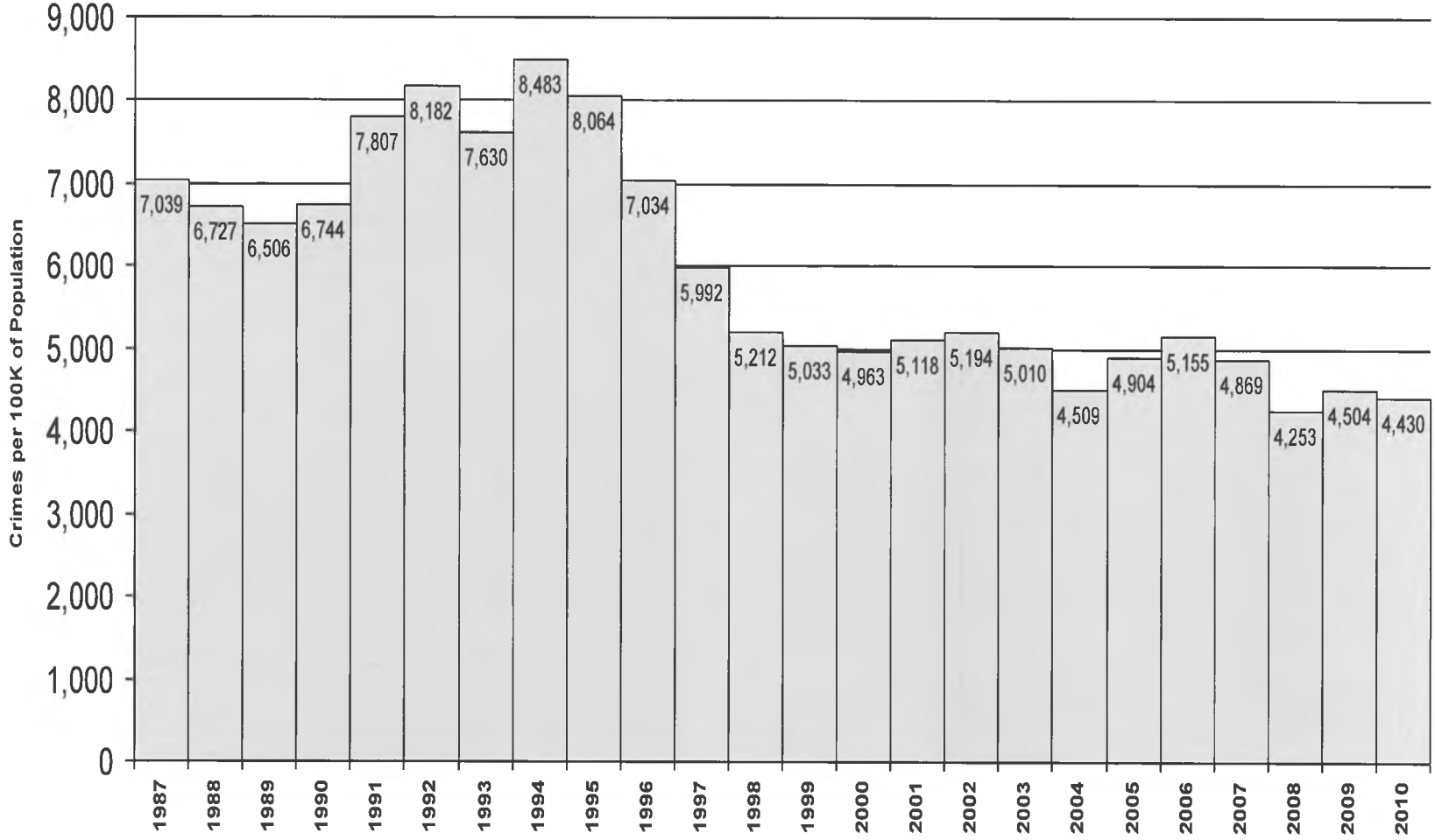
Anchorage Police Department

January 24-25, 2012

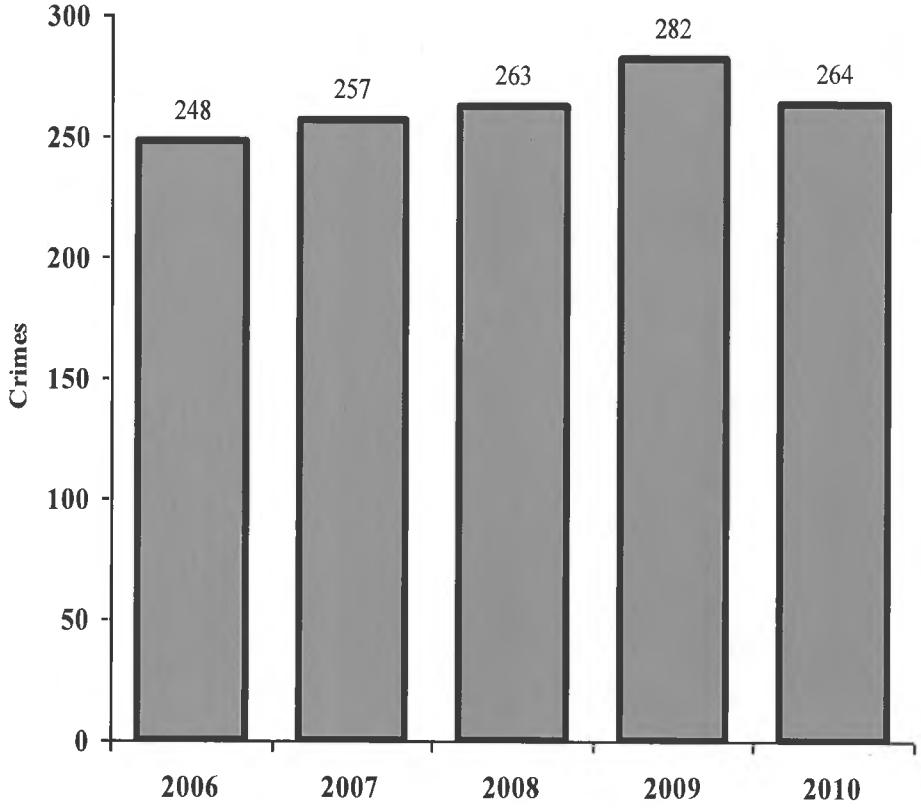
UCR Part I Crime Trend



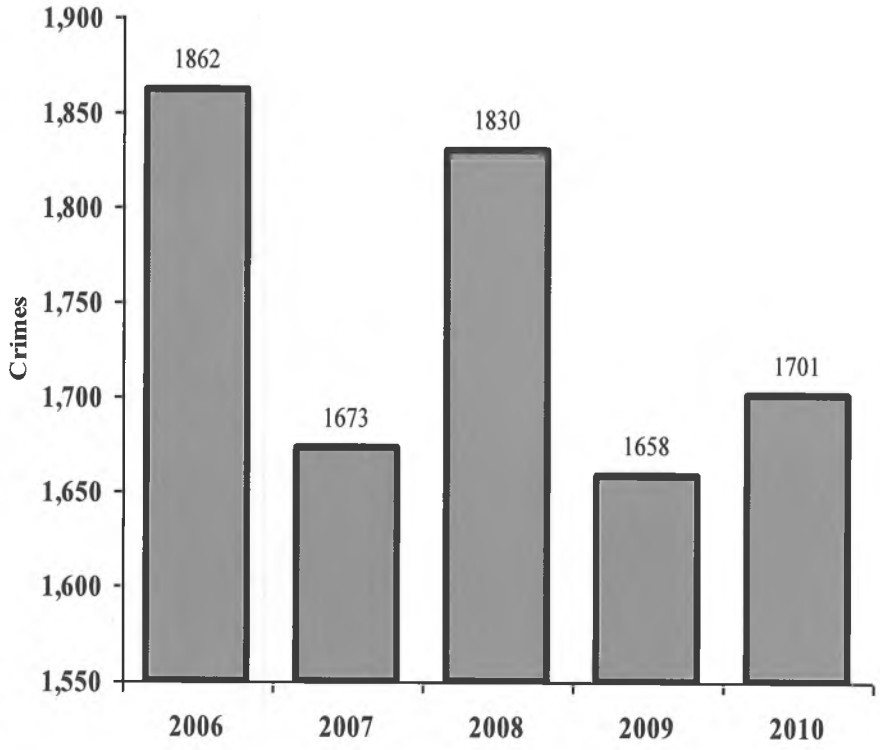
UCR Part I Crimes Per 100K of MPSA* Population



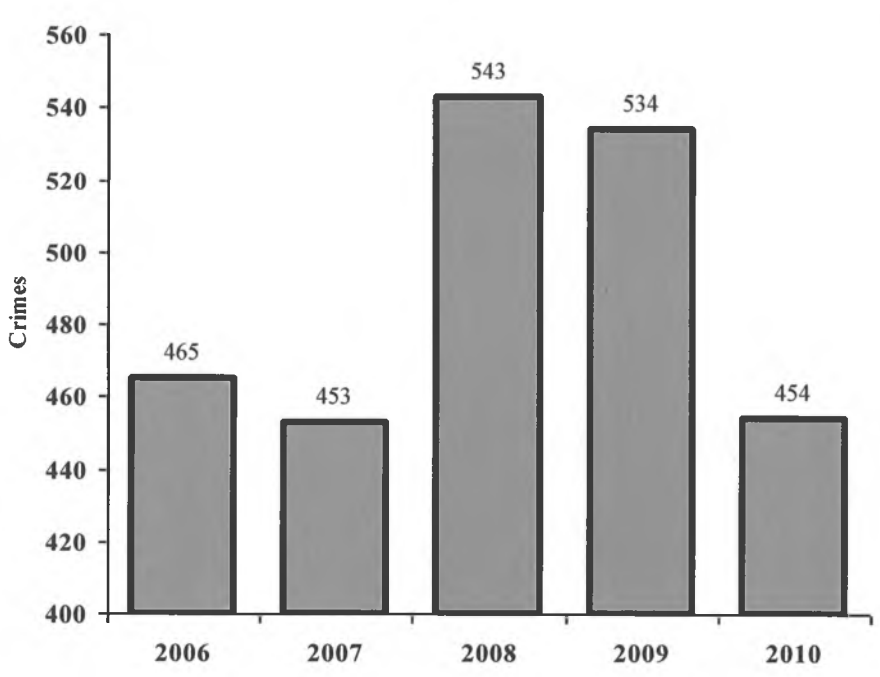
Forcible Rape



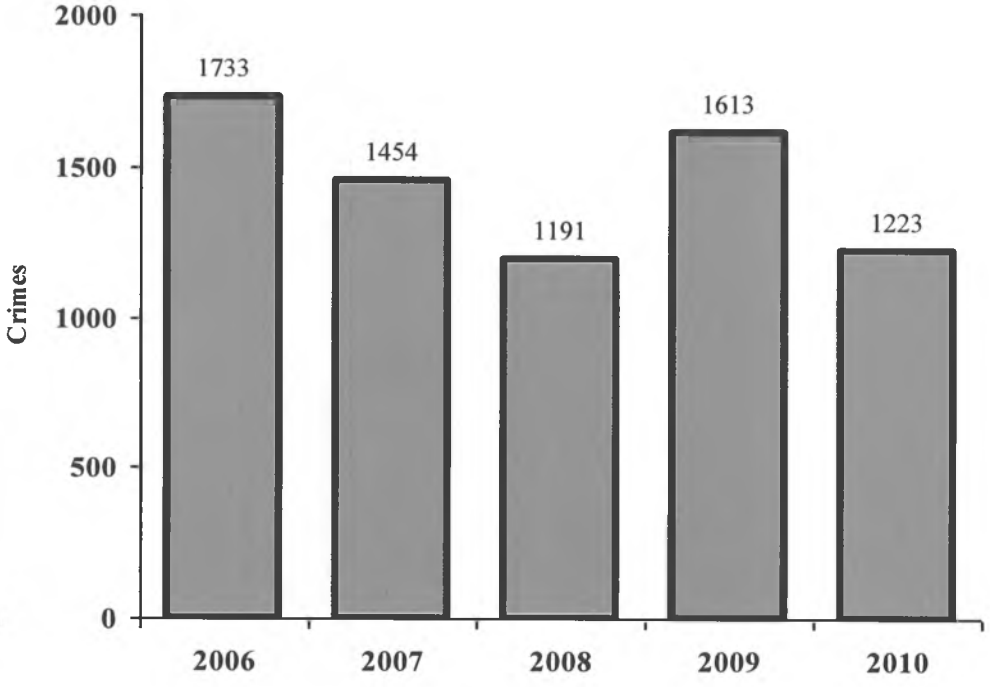
Aggravated Assault



Robbery

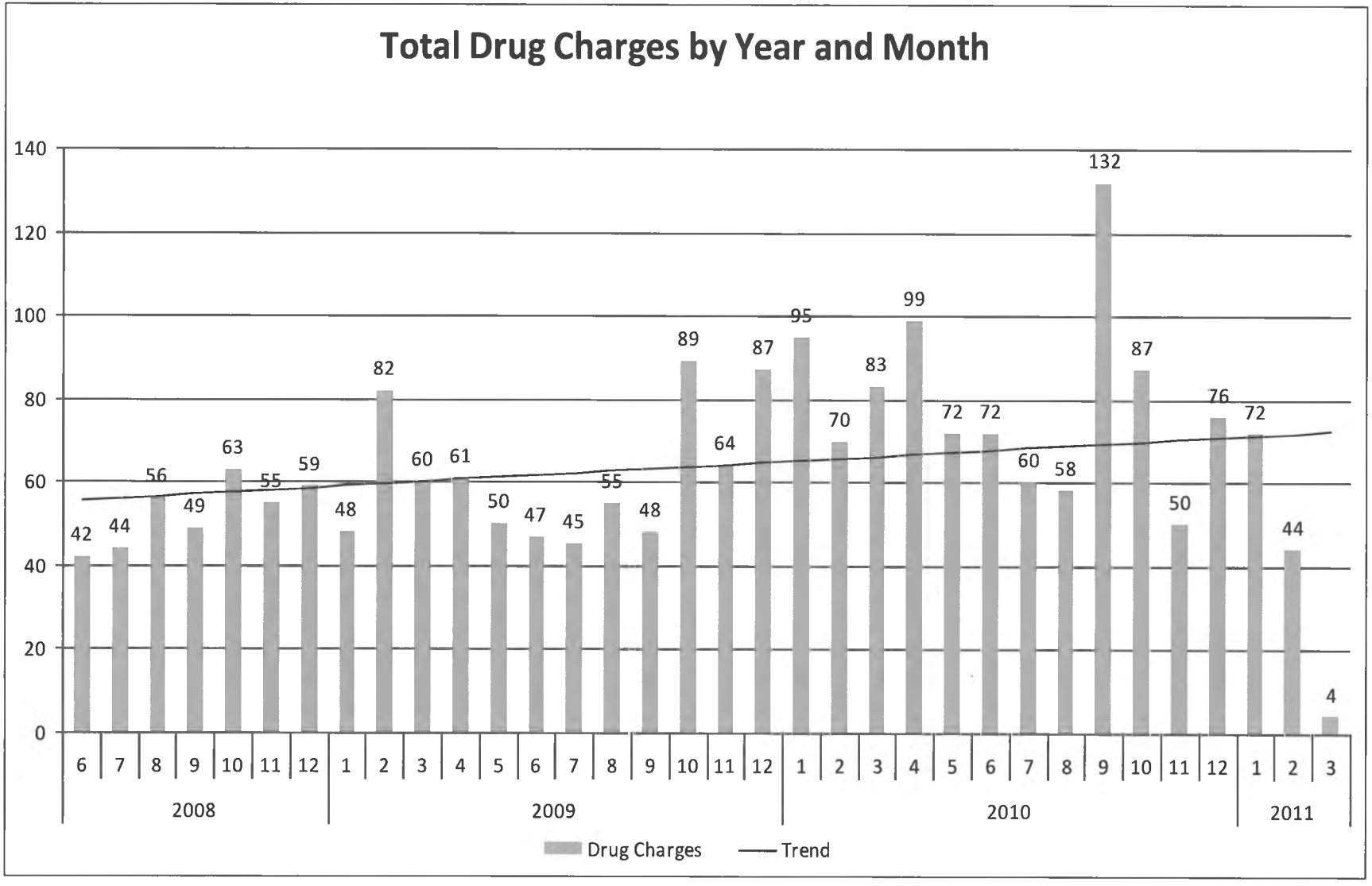


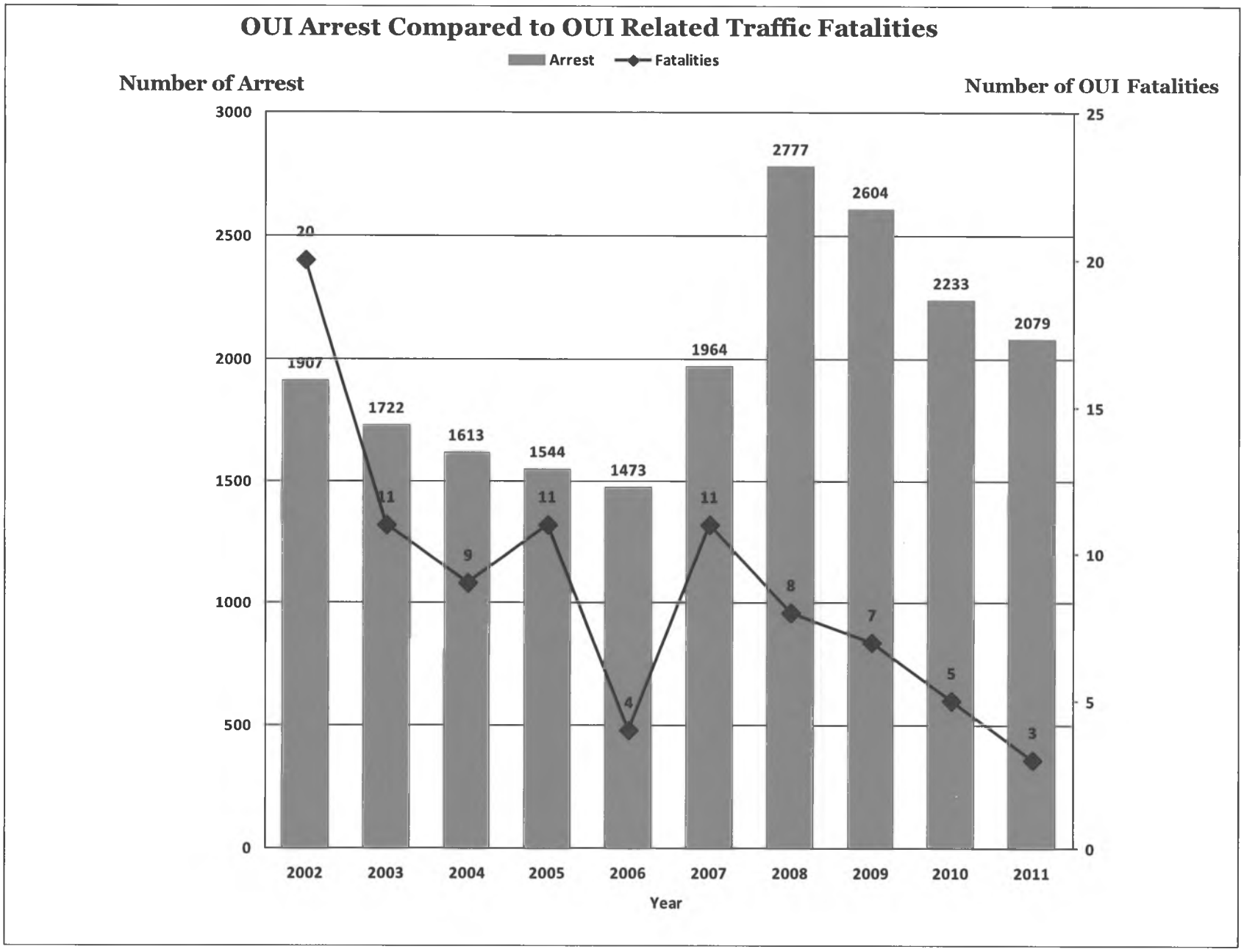
Burglary



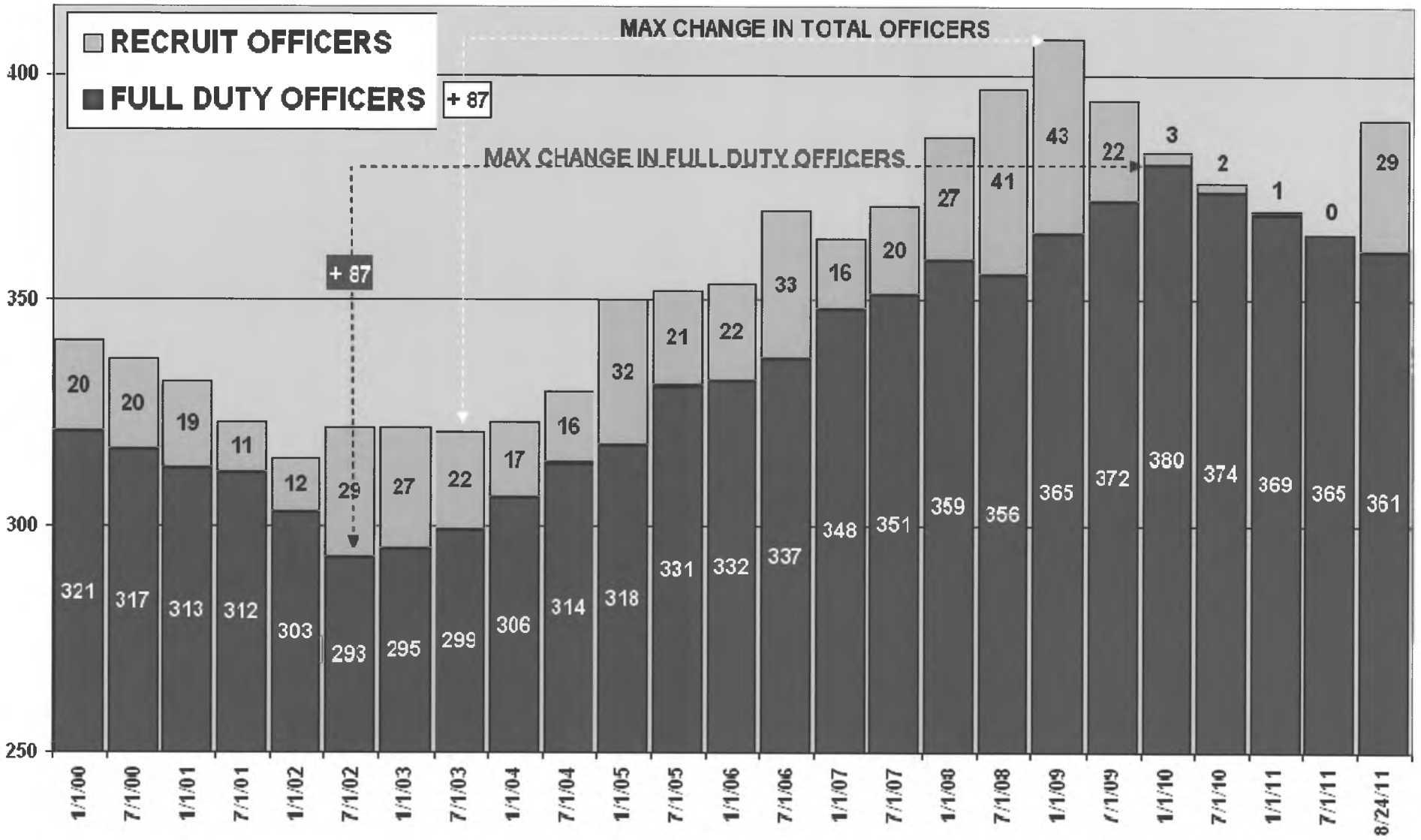
Why the drop in Robberies, Burglaries?

One possible answer:




OUI Arrest Compared to OUI Related Traffic Fatalities
Arrest
Fatalities
Number of Arrest
Number of OUI Fatalities
3000
2500
2000
1500
1000
500
0
25
20
15
10
5
0
1907
1722
1613
1544
1473
1964
2777
2604
2233
2079
20
11
9
11
4
11
8
7
5
3
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
Year

APD ASSIGNED SWORN PERSONNEL STRENGTH COMPARISON
JAN / JUL 2000 - JAN / AUG 2011



The Anchorage Police Department: Staffing and Deployment Study

By

The Police Executive Research Forum

Optimal Staffing

- Time of Study
  - 374 sworn, 156 non-sworn
- Needed for Optimal
  - 390 sworn, 167 non –sworn
- Change
  - +16 sworn, +11 non-sworn

Optimal Staffing

- Patrol Time Utilization
  - Calls for service 46%
  - Self initiated activity 15%
  - Administrative activity 13%

- Total obligated time 74%
- Unobligated time 26%

ALASKA PRETRIAL SERVICES
Third Party Monitoring Solutions

Dennis Johnson
Program Director

6410 DeBarr Road
Anchorage, AK 99504
Phone 907-332-3330
Cell 907-351-6046
Fax 907-332-1283
dennis.johnson@alaskapretrial.org

Alaskan-Owned and Operated

Alaska Pretrial Services

Third Party Custodian and Defendant Monitoring

Alaska Pretrial Services was founded as a tool to assist the criminal justice system with accurate pre-release information, provide innovative programs and services as tools to judicial officers for pretrial release decisions, and to improve public safety through effective compliance monitoring of defendants in a pretrial environment.

APS Defendant Compliance Management includes a variety of other services and incorporates many other compliance management tools to ensure that the defendant is complying with court-ordered pretrial conditions of release.

1. Random Home & Work Visits
2. Phone and In-Office Check-in by Defendants
3. Management of Drug & Alcohol Monitoring Services
4. Agency Coordination with other criminal justice services
5. Implementation of Safety Plans designed to protect alleged victims and the public
6. Continued Verification of Residence
7. Waiver & Consent for Search of defendant, defendant residence, or any vehicle the defendant is in or has control of for the presence of prohibited or illegal items.
8. Curfew Monitoring & Verification
9. Compliance Reporting for courts and prosecuting attorneys.

Defendant Compliance Management functions as the basic monitoring service that APS programs are built upon.

www.alaskapretrial.com

907.332.3330

Page 77, Spring Attorneys Directory

ALASKA PRETRIAL SERVICES

January 24, 2012

Alaska State Judiciary Committee
and Distinquished Guests
2012 Crime Summit
Alaska State Capitol
Juneau, Alaska

Re: Alaska Pretrial Services Project

Committee Members and Guests,

The Alaska Pretrial Services Project is a defendant funded, privately ran pre-trial third party custodian release option. The program was developed as a solution to fill in the gaps in the current Alaska bail statute with regard to third party custodians and defendant supervision.

On February 27, 2010, my family member was shot and killed, and the suspect attempted to shoot and kill me. The suspect is currently in custody with the Alaska Department of Corrections awaiting trial for murder in the first, attempted murder and reckless endangerment. The defendant was out on bail at the time of the shooting and not under supervision.

Alaska Pretrial Services provides the Alaska Criminal Justice System with current and accurate pre-release information on defendants, family members and any employment. This information is used by prosecution and the judiciary to assist in making the safest decision in the interest of public safety and risk of flight on a defendant's pre-trial release. Our programs then continue in active monitoring and supervising defendants while on bail to assure court-ordered compliance and public safety.

This program is currently being run privately throughout Alaska and has provided a tool to allow supervision and compliance in both rural Alaska and the metropolitan areas while a defendant is on bail.

You will find the information contained in this presentation to be both a public safety solution and an option for potential cost savings platform for the State of Alaska and its residents.

Thank you for the honor of being able to share my passion and commitment to public safety and the community that I have called home my entire life.

Sincerely,

Dennis H. Johnson
Program Director, Alaska Pretrial Service

6410 Debarr Road, Anchorage, Alaska 99504 Office (907) 332-3330 Fax (907) 332-1283
525 Second Avenue, Suite 205 Fairbanks, Alaska 99701 Office (907) 374-3988 Fax (907) 332-1283
Alaska Toll Free 1-855-232-3330

ALASKA PRETRIAL SERVICES

Third Party Custodian Solutions

ALASKA PRETRIAL SERVICES

..... is a privately ran, defendant funded Pre-Trial Defendant Monitoring Program that was founded in 2009 and developed in 2010 as a tool to assist the Alaska Criminal Justice System with accurate pre-release information. APS provides innovative programs and services as tools to Judicial Officers for pre-trial release decisions. Most importantly it is an avenue to improve both public and victim safety through effective compliance monitoring of defendants in a pre-trial environment.

EDWING VALENTINO MATOS

June 2, 1980 – February 27, 2010

ALASKA PRETRIAL SERVICES PROJECT

Adam Walsh Child Protection and Safety Act - H.R.4472 United States Congress

- **The Act is also known as the Sex Offender Registration and Notification Act (SORNA)**
- **Introduced in the House as H.R.4472 by Rep. Jim Sensenbrenner (R-WI) on December 8, 2005**
- **Passed the House on March 8, 2006** (unanimous voice vote)
- **Passed the Senate on July 20, 2006** (unanimous voice vote)
- **Signed into law by President George W. Bush on July 27, 2006**

October 21, 2010 11:08 ET

SecureAlert, Inc. Is Awarded Alaska Pretrial Services Contract .....

ReliAlert™ XC
One-Piece GPS Offender Monitoring Device

ReliAlert™ XC sets the standard for reliability and performance in the offender monitoring industry. Advanced features enable agencies to effectively track offender movements and communicate directly with offenders via on-board two/three-way voice communication technology, all in real-time. ReliAlert™ XC offers multiple monitoring options for agencies – collecting and reporting data as frequently as every 15 seconds during a violation to ensure critical information is available when needed. Working in conjunction with SecureAlert's 24/7/365 live Monitoring Center and TrackerPAL™ monitoring software, ReliAlert™ XC acts as a "force multiplier," providing officers with extra eyes, ears and voice in the monitoring of offenders – increasing productivity and offering peace of mind.

Two/Three-Way Voice Communication allows SecureAlert operators and agency officers to call the offender via the ReliAlert™ XC device at any time – providing real-time violation intervention and reducing the effort spent by officers attempting to communicate with offenders.

Onboard 95-db Siren is a unique feature on the ReliAlert™ XC device that can be activated by the SecureAlert Monitoring Center as part of a violation protocol. The siren alerts victims and the public to an offender violation, helps safely assist officers with offender recovery and improves public safety.

SecureCuff™ is an optional, patent-pending, hardened steel encased security cuff for high-risk offenders. The SecureCuff™ provides valuable, extra response time for officers when offenders are attempting to abscond. When used in conjunction with live voice intervention, ReliAlert™ XC becomes the premier GPS solution for monitoring challenging offender populations.

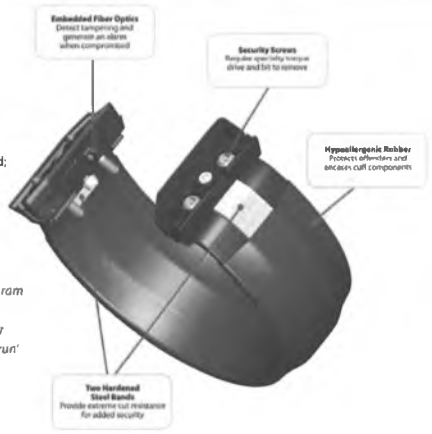
SECUREALERT
Reliability. Peace of Mind.

SecureCuff™
For High-Risk Offenders

SecureAlert's patent pending SecureCuff™ is the only security cuff in the industry specifically made for high-risk offenders. It has encased, hardened steel bands designed to be highly cut resistant and provide officers an additional 10-15 minutes to be on-site before an offender can abscond. The SecureCuff™ includes a fiber-optic technology strap for tampering notification and specialized security screws to secure the strap to the device. The SecureCuff™ solution helps address the critical "strap cut" issue so prevalent in juveniles and high-risk adult offenders. It serves to significantly reduce the number of officer response hours attempting to locate offenders who have absconded and is not offered by any other offender monitoring company.

SecureCuff™ Specifications

- ***Encased, Hardened Steel Bands:*** each hardened steel band is 1/2" wide and 1/16" thick
- ***Anti-Tamper Features:*** extreme cut-resistant, dual steel bands; embedded fiber optics; security screws for installation/removal
- ***Sizing:*** measurement tool provided; multiple, pre-cut sizes available
- ***GPS Device:*** utilized with ReliAlert™ and ReliAlert™ XC



"The reliability of the SecureCuff™ provides peace of mind for our program and the community; and avoids the uncertainty that a defendant's 'spur of the moment decision to 'cut and run' is no longer an available choice."

-Dennis Johnson, Director
Alaska Pretrial Services

SECUREALERT
Reliability. Peace of Mind.

Call 1.866.451.6141 or visit www.securealert.com for more information

Current Agencies Utilizing the Monitoring Technology Nationwide

- Detroit , MI - Wayne County – (juvenile justice)**
- Las Vegas, NV - Clark County – (juvenile justice)**
- New Jersey (adult post trial monitoring)**
- Washington – Franklin County (adult work release)*
- Washington – Asotin County (juvenile justice)
- Oregon – Benton County (juvenile justice)*
- Oregon – Malheur County (adult community corrections)*
- Oregon – Malheur County (juvenile justice)*
- Philadelphia, PA – (juvenile justice)*

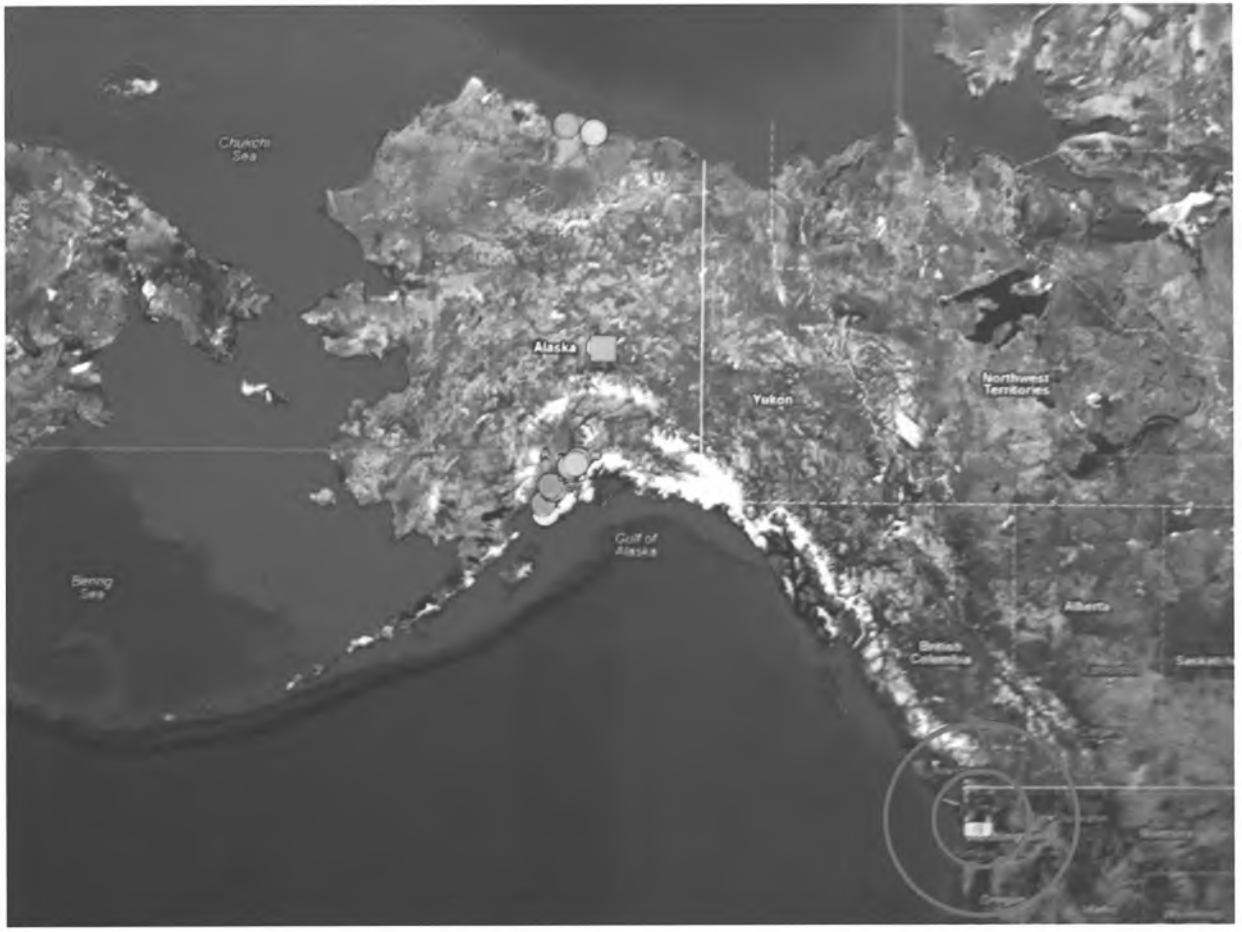
* BRK Management Inc.

** Secure Alert, Inc.

REAL TIME ACTIVE GPS / CELLULAR MONITORING STATEWIDE and Lower 48 States *

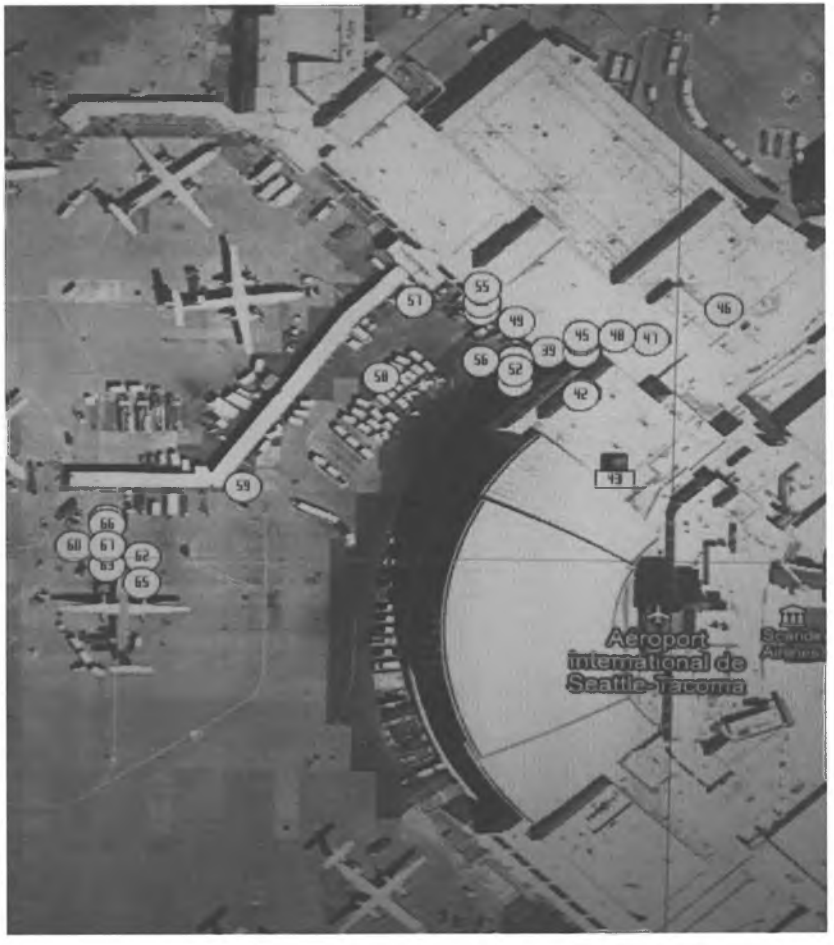
"24/7 SIGHT AND SOUND SUPERVISION"

***photo taken January 17, 2012**



24/7 Real Time Monitoring for the Lower 48 States (Bereavement, Treatment, Etc.)

***photos taken January 17, 2012**



ALASKA PRETRIAL SERVICES DOMESTIC VIOLENCE / ASSAULT and VICTIMS SERVICES

- ACTIVE REAL TIME EXCLUSION ZONES FOR DEFENDANTS

- VICTIM NOTIFACATION AND SAFETY RESPONSE PROGRAM (no cost to victim)

- COORDINATION WITH LAW ENFORCEMENT, PROBATION AND PROSECUTION FOR IMMEDIATE RESPONSE ON VIOLATIONS

Genevieve Tetpon Homicide March 2000 Cold Case
Public Safety and Victim Family Exclusion Zones

***photo taken January 13, 2012**

Defendant released to Alaska Pretrial Services July 14, 2011

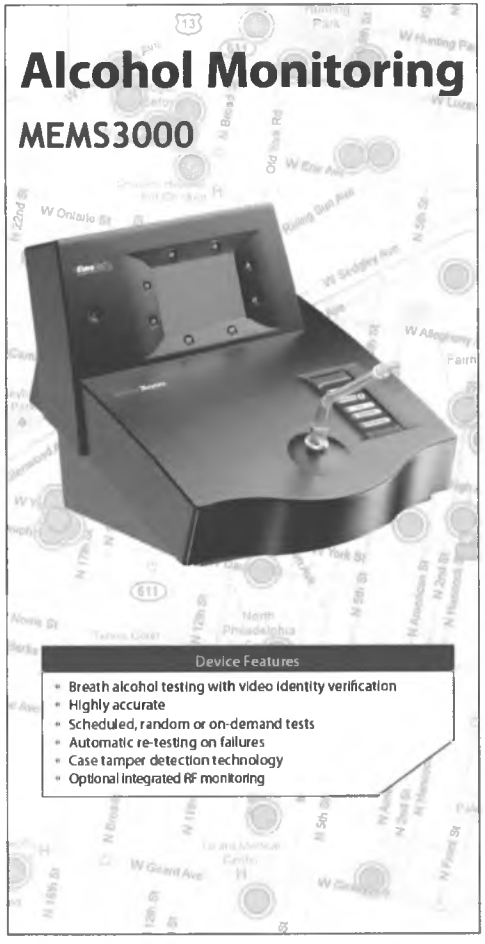
CHARGES

- MIW/ Weapon 3 x 3 – Felon in Possession – Class C Felonies
- MIW/Weapon 4 – Possess while Intoxicated – Class A Mis
- Disorderly Conduct – Class B Mis
- Minor Consuming
- Controlled Substance 4 – Class C Felony
- Theft 2 – Class C Felony
- MIW/Weapon 2 – Drug Crime – Class B Felony

REMANDED By Alaska Pretrial Services 10/31/11

- MIW/Weapons 3 x 2 Class C Felonies
- Violation of Conditions of Release for Felony – Class A Mis

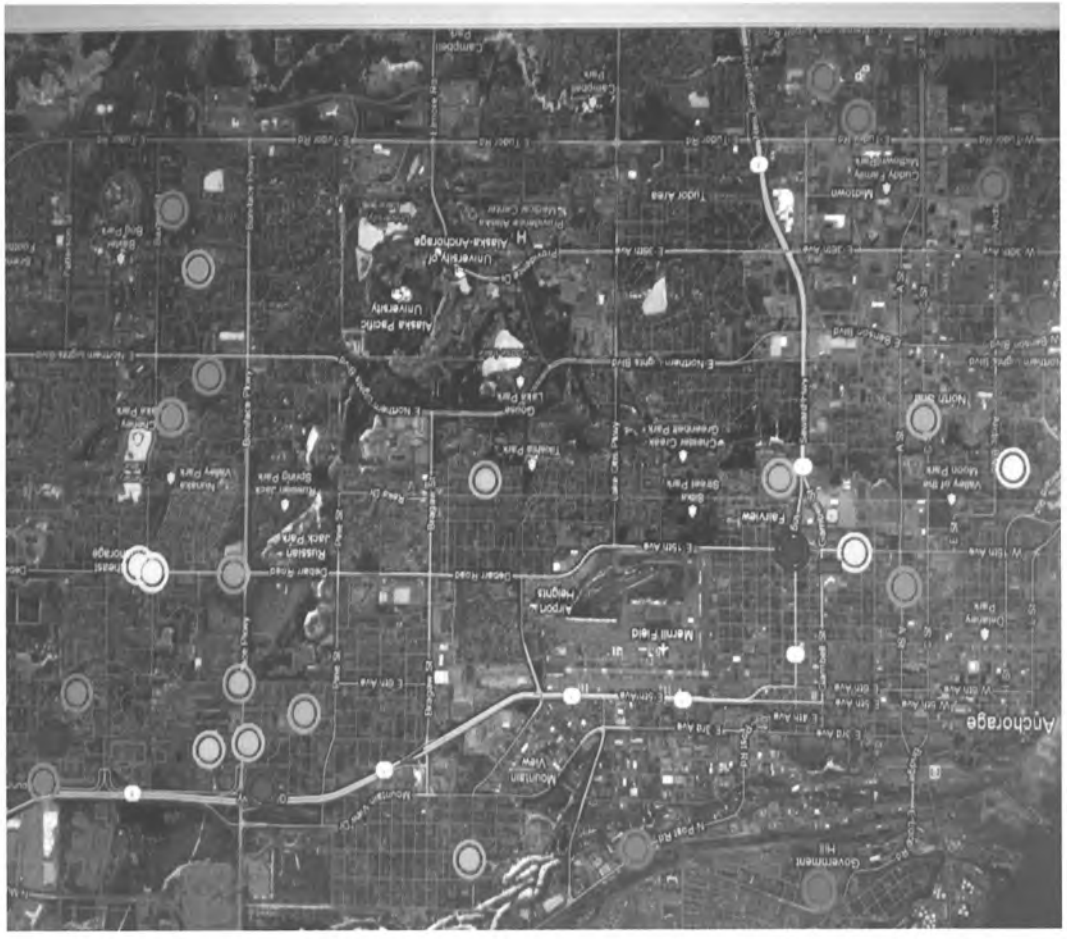
Active Real Time Alcohol Monitoring calibrated PBT with instant reporting



Law Enforcement Crime Scene Reporting

***photo taken January 13, 2012**

Alaska Pretrial Service's Program can provide Law Enforcement Personnel with the exact location of Defendants under our supervision in the area where a crime has occurred. This information can be sorted by different categories to assist the investigation with possible suspects.



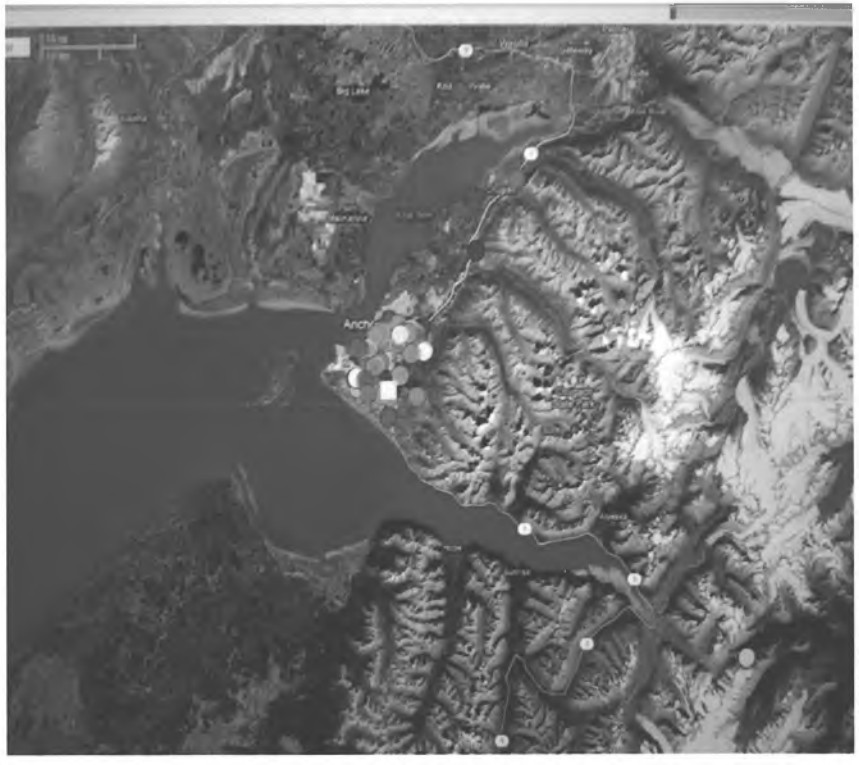
STATE OF ALASKA average cost of incarceration per day per Offender

$134.90*

*2011 Alaska Legislative Session

ALASKA PRETRIAL SERVICES operates at 62.5% less per day at a private level.

… As a defendant funded elective program this is a cost savings to Alaskans of $18,751.10 per day based on the 139 Offenders currently assigned to ALASKA PRETRIAL SERVICES for supervision. (60 day average pre-trial incarceration cost of $1,125,066.00)



2011 ALASKA PRETRIAL SERVICES PROJECT

- From 2011 to date APS has been approved / provided supervision for 236 pre-trial defendants as a Third Party Custodian Entity.
- Of the 236 defendants APS remanded 41 defendants for violations of bail conditions.
- 19 of the defendants received additional felony charges as a direct result of the APS violation remands.
- 5 of the violations were direct immediate threats to domestic violence victims or involved no contact order violations.
- 4 defendants attempted to tamper and remove the device and were remanded by APS back to DOC with bail being revoked.
- 18 defendants were remanded for alcohol violations while out on DUI / OUI charges.
- 56 defendants completed pre-trial supervision successfully without any violations and have been released.

ALASKA PRETRIAL SERVICES

This was accomplished with .....

- 4 Compliance Officers in our Anchorage Main Office
- 2 Compliance Officers in our Fairbanks Office
- 2 Compliance Officers in our Kenai Office
- 3 Full Time administrative assistants

..... 3 of the personnel above on this project are full time volunteers, including myself.

All my staff and I are committed to providing a means of continued public safety while providing a cost effective way to supervise those entitled to fair and reasonable bail.

Dennis Johnson, Director
Alaska Pretrial Services

ALASKA PRETRIAL SERVICES

ALASKA'S
Third Party Custodian Solution

SECURE ALERT
Reliability. Peace of Mind.

Company Solutions

Electronic Monitoring and Services

SecureAlert Delivers a Full Product and Services Portfolio

A Cost Effective Solution To Meet Every Need

ReliAlert™ GPS solutions are designed to match the level of risk of the offender and your budget. Solutions range from cost-effective monitoring of nonviolent offenders and juveniles to specialized solutions for high-risk offenders like gang members, domestic violence and sex offenders. In addition to 30+ hours of battery life, all solutions include:

- Improved Tamper Resistance
- Better Communications Capability
- Easier Access to Critical Reports and Information
- Tracking Accuracy
- 24 x 7 Real-time Monitoring Center Support

ReliAlert™ MAX features our patented, stainless steel, laminated SecureCuff, Watch-dog Services and Live Monitoring Center Intervention for maximum offender visibility and violation intervention.

ReliAlert™ Premium Solutions are effective when budget constraints limit options, but a high level of offender supervision and real-time notification is still required. Premium Solutions report violations as they occur through our cellular communications network and Monitoring Center Intervention is available.

ReliAlert™ Standard Solutions are also active monitoring solutions, but do not include the Live Monitoring Center Intervention and three-way voice communication.

ReliAlert™ Passive Solution works when minimal offender supervision and immediate response to violations is not required. Information is provided on a delayed basis.

ReliAlert™ GPS Device

Watchdog Monitoring Services is part of the ReliAlert™ MAX solution and gives priority in terms of monitoring to ensure a more vigilant resolution to customer-defined protocols.

ReliAlert™ GPS Solutions

This quick reference chart is designed to help you select the SecureAlert Solution that best suits your needs based on each offender's risk profile. Transitioning from one ReliAlert™ solution to another is easy. No equipment change is required for this seamless transistion – a real time savings for your officers.

	ReliAlert™ MAX	ReliAlert™ Premium +	ReliAlert™ Premium	ReliAlert™ Standard +	ReliAlert™ Standard	ReliAlert™ Passive
EM Unit	ReliAlert™ 1 Piece GPS Unit	ReliAlert™ 1 Piece GPS Unit	ReliAlert™ 1 Piece GPS Unit	ReliAlert™ 1 Piece GPS Unit	ReliAlert™ 1 Piece GPS Unit	ReliAlert™ 1 Piece GPS Unit
Strap Type	SecureCuff	Standard	Standard	Standard	Standard	Standard
GPS Trace Frequency	1 Min.	1 Min.	5 Min.	1 Min.	5 Min.	5 Min.
Data Reporting Frequency	1 Min.	1 Min.	5 Min.	1 Min.	5 Min.	30 Min.
24x7 Monitoring Center Support	Yes	Yes	Yes	Yes	Yes	Yes
Live Operator Intervention	Yes w/ 3-Way Voice	Yes w/ 3-Way Voice	Yes w/ 3-Way Voice	No	No	No
Watchdog Services	Yes	No	No	No	No	No
Reporting	Standard & Custom GPS Reports	Standard & Custom GPS Reports	Standard GPS Reports	Standard GPS Reports	Standard GPS Reports	Standard GPS Reports
24x7 Help Desk Support	Yes	Yes	Yes	Yes	Yes	Yes
HomeAware RF Beacon	Available for Additional Fee	Available for Additional Fee	Available for Additional Fee	Available for Additional Fee	Available for Additional Fee	Available for Additional Fee

Remote Alcohol Solutions

Remote Alcohol Solutions Monitoring Systems

TrueDetect MEMS 3000 remote alcohol monitoring system from Elmo Tech is available in landline and cellular versions to manage offenders with alcohol compliance requirements. TrueDetect MEMS 3000 utilizes court approved test methodology used by law enforcement agencies worldwide. The TrueDetect MEMS 3000 enables agencies to accurately monitor an individual's alcohol levels as an independent measure or in combination with a restrictive home detention schedule. The system requires minimal training of staff and program participants.

TrueDetect MEMS 3000 offers a broad array of features including:

- Quick enrollment process with fast, reliable test results
- Support of an unlimited number of tests: scheduled, random, or on-demand tests with automatic re-testing
- Customizable testing frequency
- Sessions take no longer than one-minute to complete
- Immediate report to multiple remote locations

Reliable identification using color picture verification and multiple tamper and malfunction alerts.

MEMS 3000VB/3000 VBR

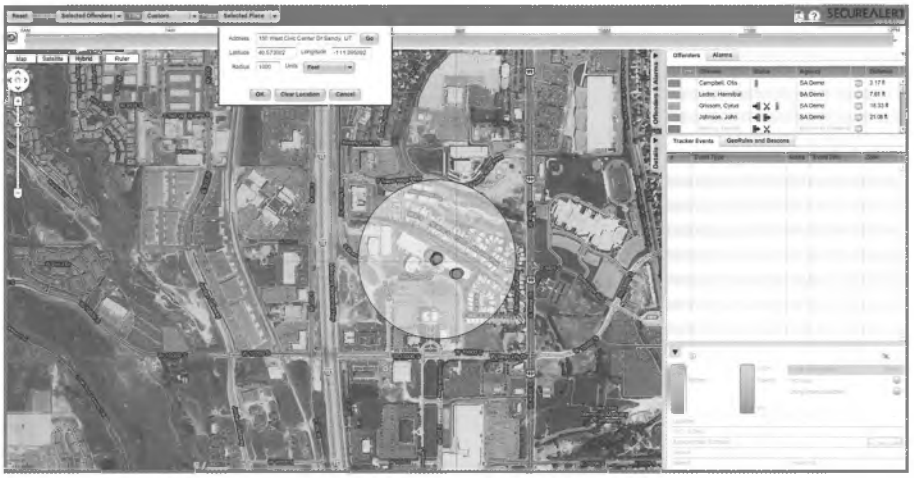
TrueDetect Alcohol Monitoring Solutions

	TrueDetect Alcohol Monitoring (Landline)	TrueDetect Alcohol Monitoring (Cellular)	TrueDetect Alcohol Monitoring w/ RF (Landline)	TrueDetect Alcohol Monitoring w/ RF (Cellular)
EM Unit	MEMS 3000 VB Landline	MEMS 3000 VB Cellular Unit	MEMS 3000 VBR Landline Unit + RF Transmitter	MEMS 3000 VBR Cellular Unit + RF Transmitter
Strap Type	Standard Straps & Clips	Standard Straps & Clips	Standard Straps & Clips	Standard Straps & Clips
Alcohol Compliance Method	Breath Alcohol Test (BAT)	Breath Alcohol Test (BAT)	Breath Alcohol Test (BAT)	Breath Alcohol Test (BAT)
Standard Test Frequency	6 Tests per Day	6 Tests per Day	6 Tests per Day	6 Tests per Day
Verification Method	Color Picture	Color Picture	Color Picture	Color Picture
Data Reporting Frequency	Customized by agency and can be between 1 hour and 24 hours. Immediately upon violation.	Customized by agency and can be between 1 hour and 24 hours. Immediately upon violation.	Customized by agency and can be between 1 hour and 24 hours. Immediately upon violation.	Customized by agency and can be between 1 hour and 24 hours. Immediately upon violation.
24x7 Monitoring Center Support	Yes	Yes	Yes	Yes
Live Operator Intervention	No	No	No	No
Reporting	Standard Alcohol Reports	Standard Alcohol Reports	Standard RF & Alcohol Reports	Standard RF & Alcohol Reports
24x7 Help Desk Support	Yes	Yes	Yes	Yes
Drive-by Unit	Not Available	Not Available	Available for Additional Fee	Available for Additional Fee

Reliably Delivering Peace of Mind *SecureAlert offers a full line of electronic monitoring solutions that includes GPS, RF, and alcohol complemented by a wide range of Professional Services. We work closely with agencies to streamline offender monitoring program workflows; thereby addressing budgetary constraints and increasing officer productivity. ▲ Agencies must be able to rely on the electronic monitoring products and services they choose . With an out-of-box reliability of 99.9%, our ReliAlert™ GPS device provides agencies with peace of mind knowing that they have made the right choice to effectively monitor offenders and ensure community safety. We are committed to offering products and services that make your job easier, as evident with our integration of Google Maps™ into our software interface.*

SecureCuff

Electronic monitoring has been plagued by high-risk offenders that cut straps and run – until now. SecureCuff's patent-pending design gives officers more time to respond to strap tamper alarms. The SecureCuff has a laminated fiber optic tamper alarm cable between two hardened stainless steel bands. If an offender cuts through the first stainless steel band, the fiber optic cable triggers an alarm. The offender still needs more time to cut through the second band, giving officers to time to successfully respond to and prevent a potential "cut and run".

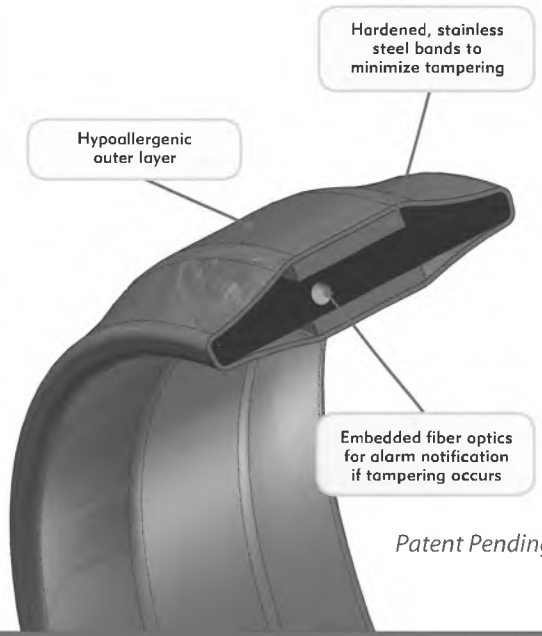


Crime Scene review is simple. Enter the time, address, and radius; then select "OK."

Crime Scene Software

For ease of use, the SecureAlert Crime Scene software seamlessly integrates into our main mapping application through a single dropdown box. Users find that it is "instantaneous" (response within a second or two) vs. running a multi-hour/multi-day batch job.

The map above shows a circle centered on the address entered and displays all offenders that were in the location within the pre-defined timeframe. To make it even easier, the application sorts the list of offenders in order of their nearest approach to the address point.



Patent Pending SecureCuff

Innovation

From our beginnings, SecureAlert has been committed to continuous improvement and delivering industry-leading innovations like:

- ▲ Patent-pending SecureCuff that reduces potential for strap cuts
- ▲ Patented ActiveTrace that immediately increases tracking capability when an alarm is triggered
- ▲ Two-way and Three-way voice communications via the ReliAlert™ GPS device
- ▲ RF HomeAware Beacon that integrates with our ReliAlert™ GPS device

Home Detention Solutions to Meet Your Needs

HomeAware Beacon (Cellular) is a low-cost, easy to install RF transmitting device electronically tethered to the ReliAlert™ GPS device. This solution communicates via cellular technology, therefore no land line is required. The Beacon's internal battery provides more than one year of service. This is an effective solution for reliably monitoring offenders with low risk profiles and confinement requirements.

HomeAware E3 RF is a presence monitoring system from Elmo Tech that features: high reliability land line or cellular communications, shock resistant and waterproof monitoring unit, with a 48 hour back up battery, multiple tamper alerts, flexible schedule options and range settings. Multiple monitoring capabilities of up to 50 offenders are possible. HomeAware E3 RF Drive-By allows officers to reliably monitor offenders using available mobile field tools. Officers can simply drive by offenders homes to determine if the offender is present.

HomeAware Beacon

E3 RF and E3 RF-Cell Monitors
This low-cost, easy-to-install system reliably monitors offenders with low-risk profiles and confinement requirements. The solution is designed to provide the presence accuracy that ensures community safety and peace of mind.

HomeAware Home Detention Solutions

	HomeAware Beacon	HomeAware E3 RF*	TrueDetect Alcohol Monitoring w/ RF (Landline)	TrueDetect Alcohol Monitoring w/ RF (Cellular)
EM Unit	ReliAlert™ 1 Piece GPS Unit + HomeAware RF Beacon	E3 RF Landline Unit + RF Transmitter	MEMS 3000 VBR Landline Unit + RF Transmitter	MEMS 3000 VBR Cellular Unit + RF Transmitter
Strap Type	Standard	Standard Straps & Clips	Standard Straps & Clips	Standard Straps & Clips
Range Settings	No range settings – presence only	Short: 40-65 ft. Medium: 75-105 ft. Long: 120-150 ft. Maximum: 180-240 ft. (based upon open field environment)	Short: 40-65 ft. Medium: 75-105 ft. Long: 120-150 ft. Maximum: 180-240 ft. (based upon open field environment)	Short: 40-65 ft. Medium: 75-105 ft. Long: 120-150 ft. Maximum: 180-240 ft. (based upon open field environment)
RF Ping Frequency	30 Seconds	20 Seconds	20 Seconds	20 Seconds
Data Reporting Frequency	30 Seconds	Customized by agency and can be between 1 hour and 24 hours. Immediately upon violation.	Customized by agency and can be between 1 hour and 24 hours. Immediately upon violation.	Customized by agency and can be between 1 hour and 24 hours. Immediately upon violation.
24x7 Monitoring Center Support	Yes	Yes	Yes	Yes
Live Operator Intervention	No	No	No	No
Watchdog Services	No	No	No	No
Reporting	Standard RF Reports	Standard RF Reports	Standard RF & Alcohol Reports	Standard RF & Alcohol Reports
24x7 Help Desk Support	Yes	Yes	Yes	Yes
Drive -by Unit	Not Available	Available for Additional Fee	Available for Additional Fee	Available for Additional Fee

** E3 RF Cellular is available upon request.*

HomeAware E3 RF Transmitter:

- Simple, fast installation
- Highly secured
- 2 or 3-year batteries
- Re-usable straps
- Shock resistant and waterproof

Our customers receive outstanding monitoring and customer service.

Our training sessions provided via webinars or onsite training.

SecureAlert Monitoring Center

Another difference you will note when choosing SecureAlert as your electronic monitoring service provider is our Monitoring Center. Our customers receive outstanding monitoring and customer service from our highly-qualified staff of operators that are available 24/7/365 via a toll-free number. Consider SecureAlert's live Monitoring Center as an "extension" of your organization. Our highly-trained personnel can assist or even intervene on behalf of your officers, based on their pre-established protocols.

Customer Service

In addition to providing you with reliable products and services that are easy to use, we strive to exceed your expectations. When issues are brought to our attention we don't stop until they are resolved. Services are delivered by three service groups:

- **Technical Support Desk:** In operation 24 hours per day, 7 days per week, 365 days per year to ensure full resolution of technical issues and trouble-free device operation.

- **Monitoring Center:** Operators provide real-time alarm notification to your officers based on the level of support they have selected and the protocols they have established.

- **Account Management:** Account Managers handle all operational issues including: device orders, replacement/ repair requests, and returns. If they are unable to answer or resolve your question; you are immediately escalated to our Technical Help Desk.

Keeping Your Data Secure

SecureAlert's entire network infrastructure features a high security, self- sustained, fully-redundant Class One rated datacenter. The Monitoring Center and its Data Production Center have four layers of power generation redundancy to ensure uninterrupted power and backup Monitoring Center capabilities in case of emergency.

SecureAlert Training

We have a reputation for being an industry-leader in training. Our comprehensive set of offerings are designed to meet the needs of both beginners and users familiar with SecureAlert devices. Remote training sessions via webinars, onsite training and the web-based SecureAlert University means that your personnel will be knowledgeable on the most effective ways to monitor their offenders.

ALASKA PRETRIAL SERVICES

DEFENDANT MONITORING PROGRAMS

6410 DEBARR ROAD

ANCHORAGE, ALASKA 99504

Dennis Johnson, Program Director
dennis.johnson@alaskapretrial.org
907-332-3330 office
907-351-6046 cell
907-332-1283 fax

Standing Together Against Rape

Sexual Assault Victimization

Erin Patterson-Sexson, Lead Advocate
Standing Together Against Rape

The Numbers

FY 2011

- 1143 Clients served
- 900 Hospital/SART/CAC responses
- 259 Adult SART Cases
- 13 Anonymous Victim Report

Standing Together Against Rape

The Numbers

FY 2011

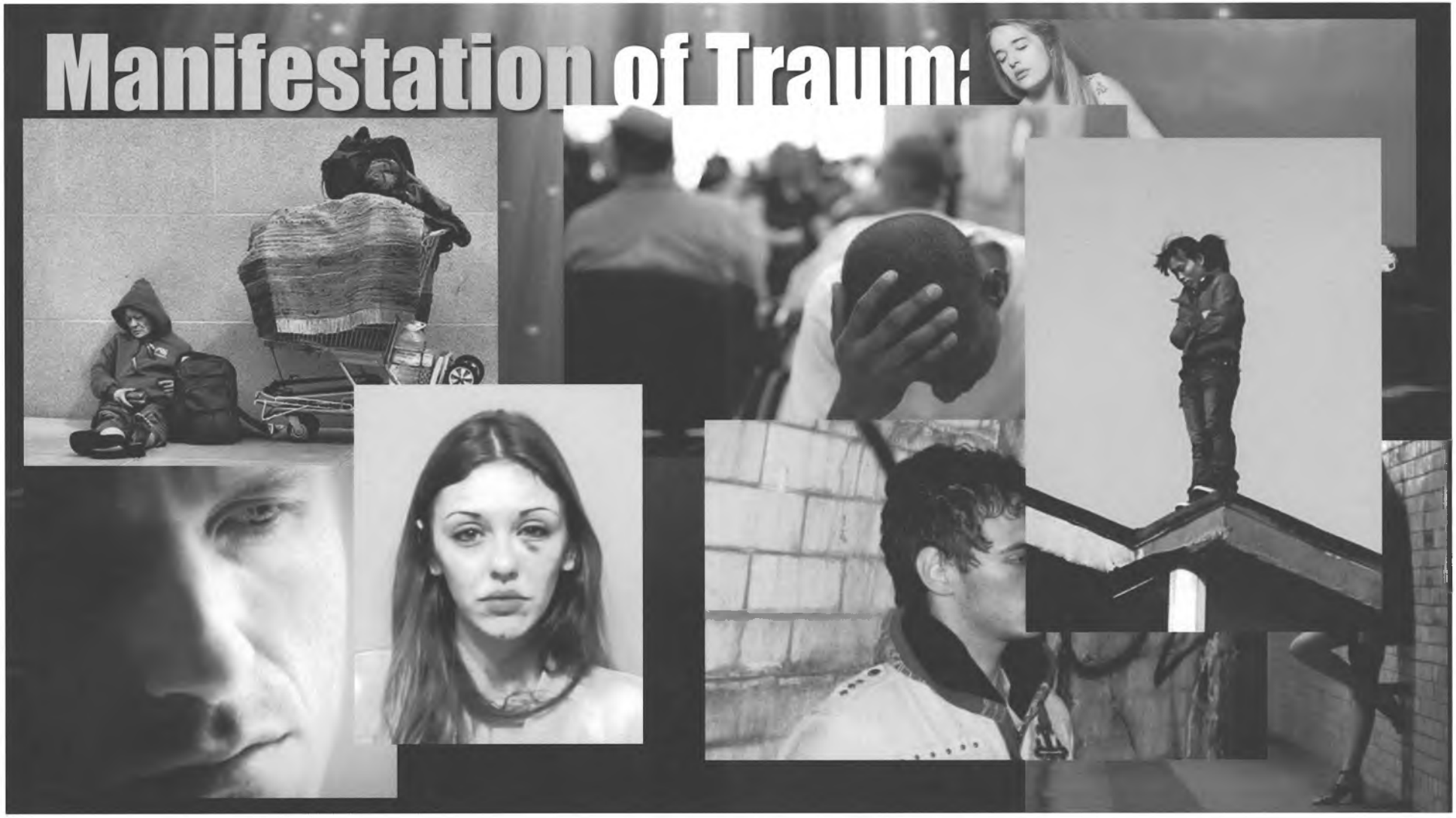
- 5% under 6 years old
- 38% 6-18 years old
- 51% 19-59 years old
- 6% 60 years and older
- 16% are male

The Numbers

FY 2011

- 39% acquaintance
- 31% family member
- 16% stranger
- 14% intimate partner

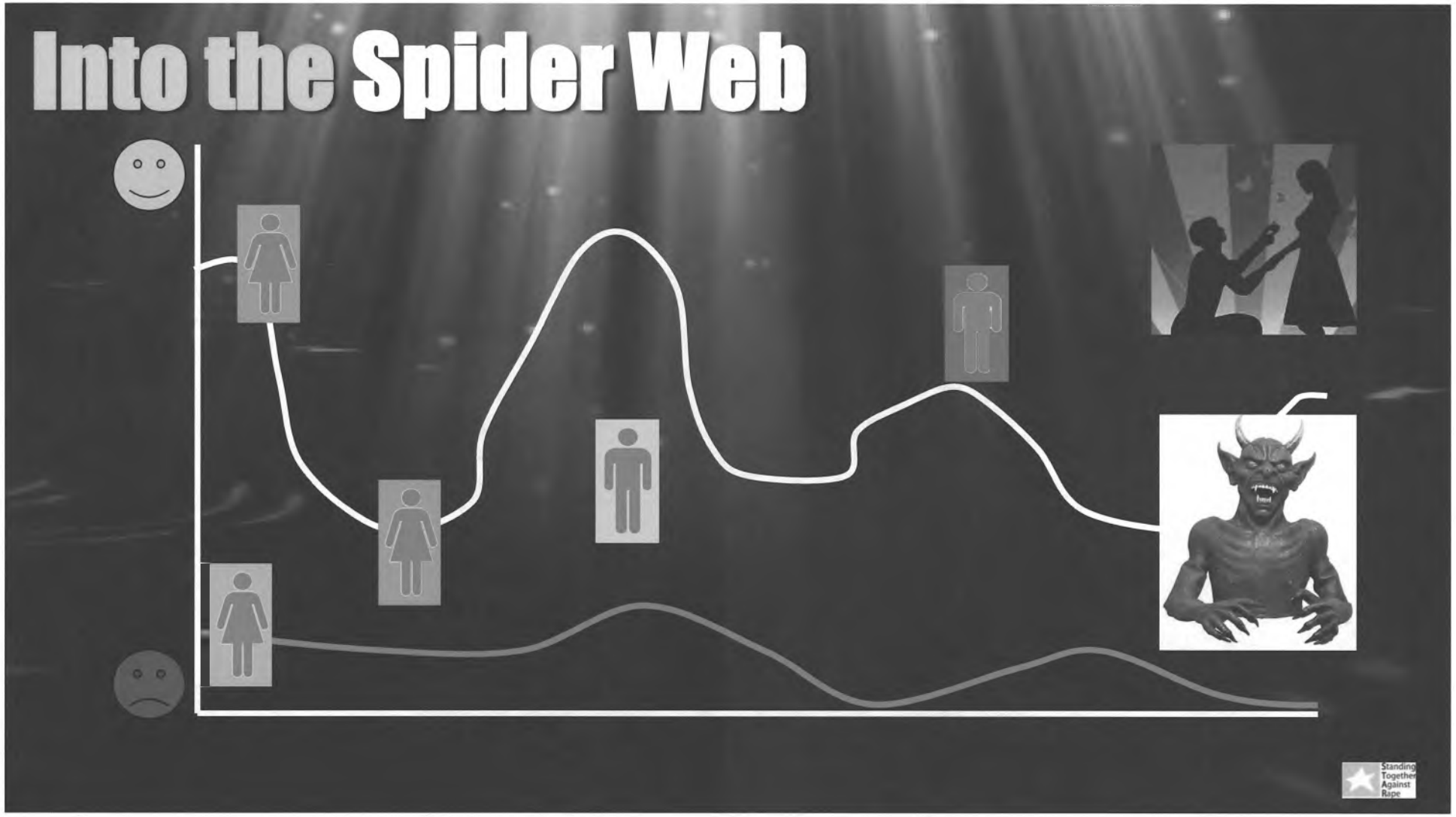
Standing Together Against Rape


Manifestation of Traum

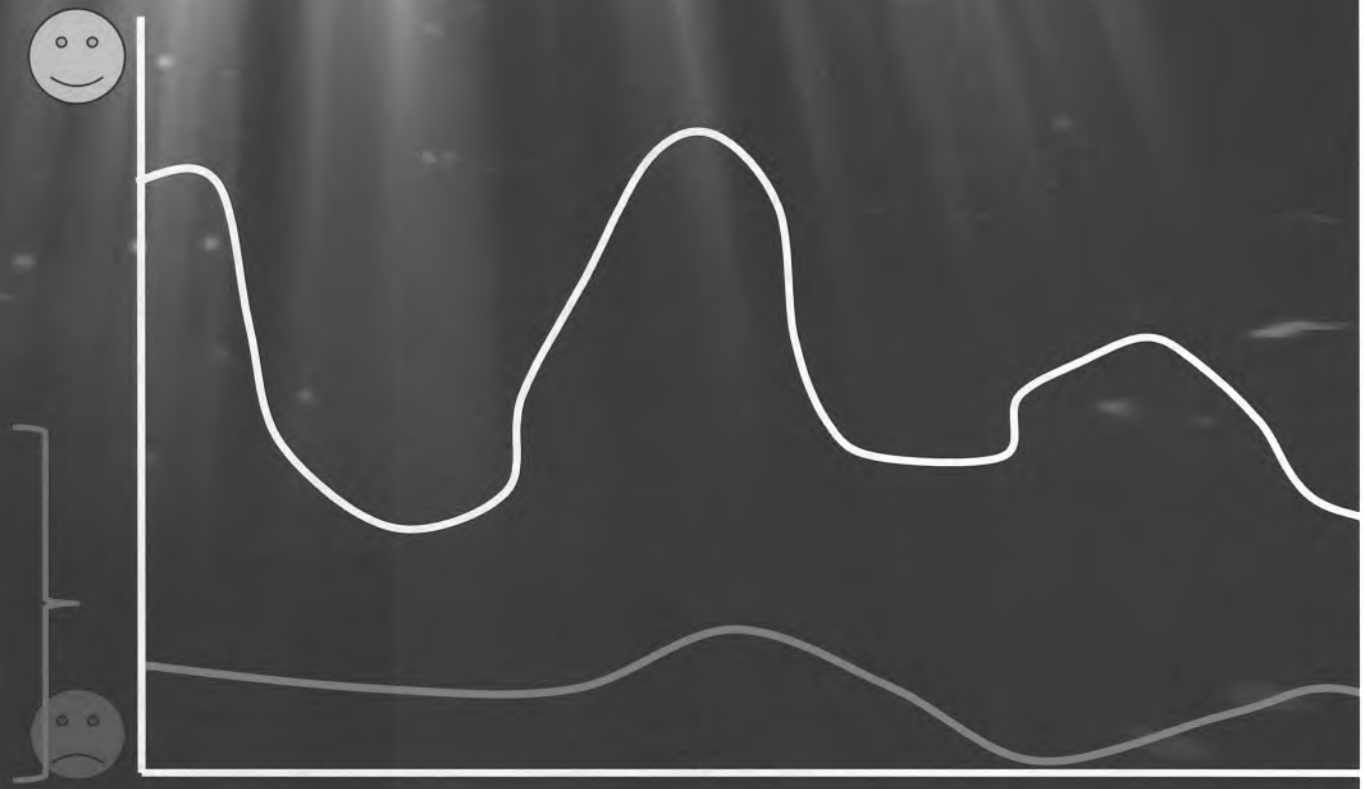
The Offender looks for...

- **Vulnerability**
  - Age. Disability, Intoxication, Distracted, Naive, Innocent
- **A person with a marginalized lifestyle**
  - Questionable credibility, criminal history or behaviors
- **Opportunity**
  - Isolation, in need of assistance, lonely

Standing Together Against Rape


Into the Spider Web
Standing Together Against Rape

Focusing Victim Services



Social Service and Public Safety efforts must be continuously and constantly focused on this population

Standing Together Against Rape

Many victim survivors

- **Lack a safe place to live**

  Homeless, substandard housing, share housing

- **They have no money, no power and at the highest risk for revictimization.**

Our Dilemma

- Many offenders have numerous victims before a crime is reported, investigated, prosecuted and the offender sentenced.
- We release untreated convicted sex offenders to our streets also with no place to go, they end up at homeless shelters and in homeless camps.
- The cycle continues. Victims are victimized and their trauma is magnified.

Standing Together Against Rape

What 's needed?

- Safe, reliable respectful places to go for services.
  - Time to heal
- Less blame and more support.
  - Educated juries
  - Community awareness beyond the myth
- To be believed, to be seen and to be heard.
- To have real and sustainable options.
  - Housing
  - Child Care
  - Treatment
  - Employment
  - Education

Standing Together Against Rape

Trends

- Increased violent/lethal assaults
- More homeless
- Complex issues
  - Immigration
  - Custody
- Internet used to
  - Drawn in
  - Harass
  - Stalk
- Revictimization

But also…

- Increased prosecution in Anchorage
- Greater public awareness
- An exceptional SVU
- Dynamic SART Team

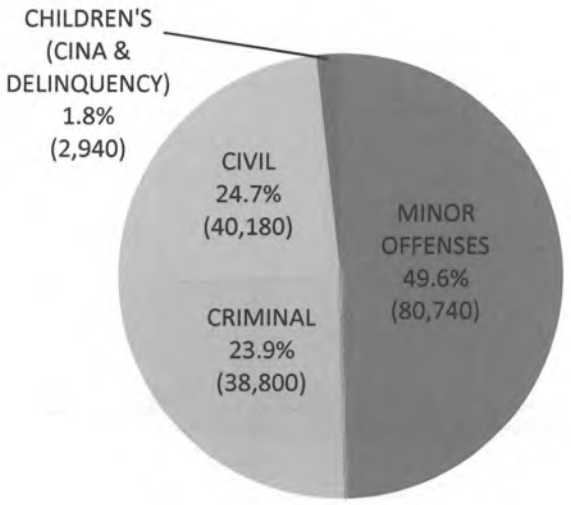
Standing Together Against Rape

Thank you.
Standing
Together
Against
Rape

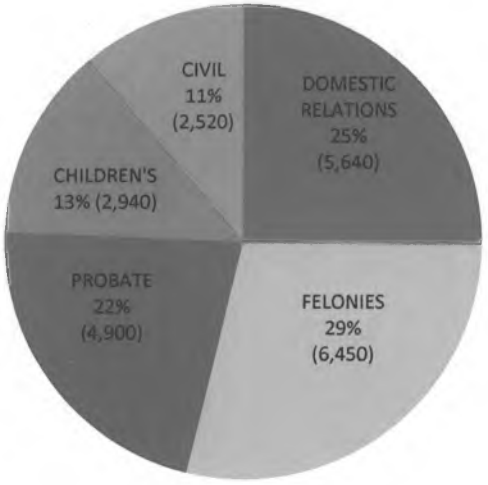
FY11 FILINGS STATEWIDE

SUPERIOR AND DISTRICT COURTS COMBINED

(162,647 total trial court cases filed in FY11)

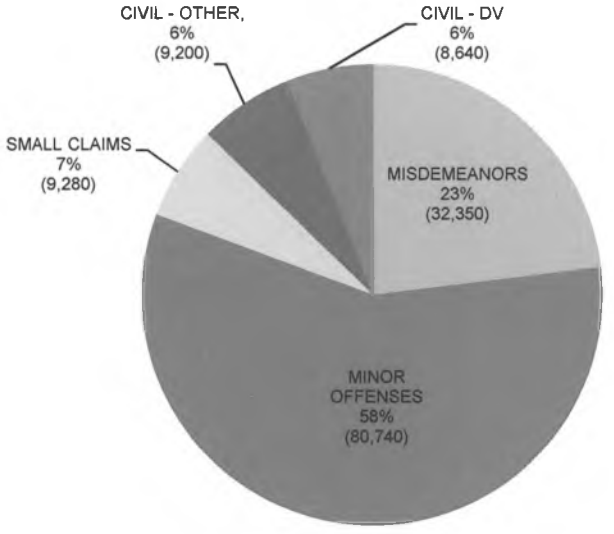


SUPERIOR COURT FILINGS (42 judges)
(22,440 superior court cases filed in FY11)



[In addition to 6450 new felony case filings, superior courts handled 4500 felony PTRPs in FY11]

DISTRICT COURT FILINGS (23 judges & 43 magistrates and masters; 140,207 district court cases filed in FY11)



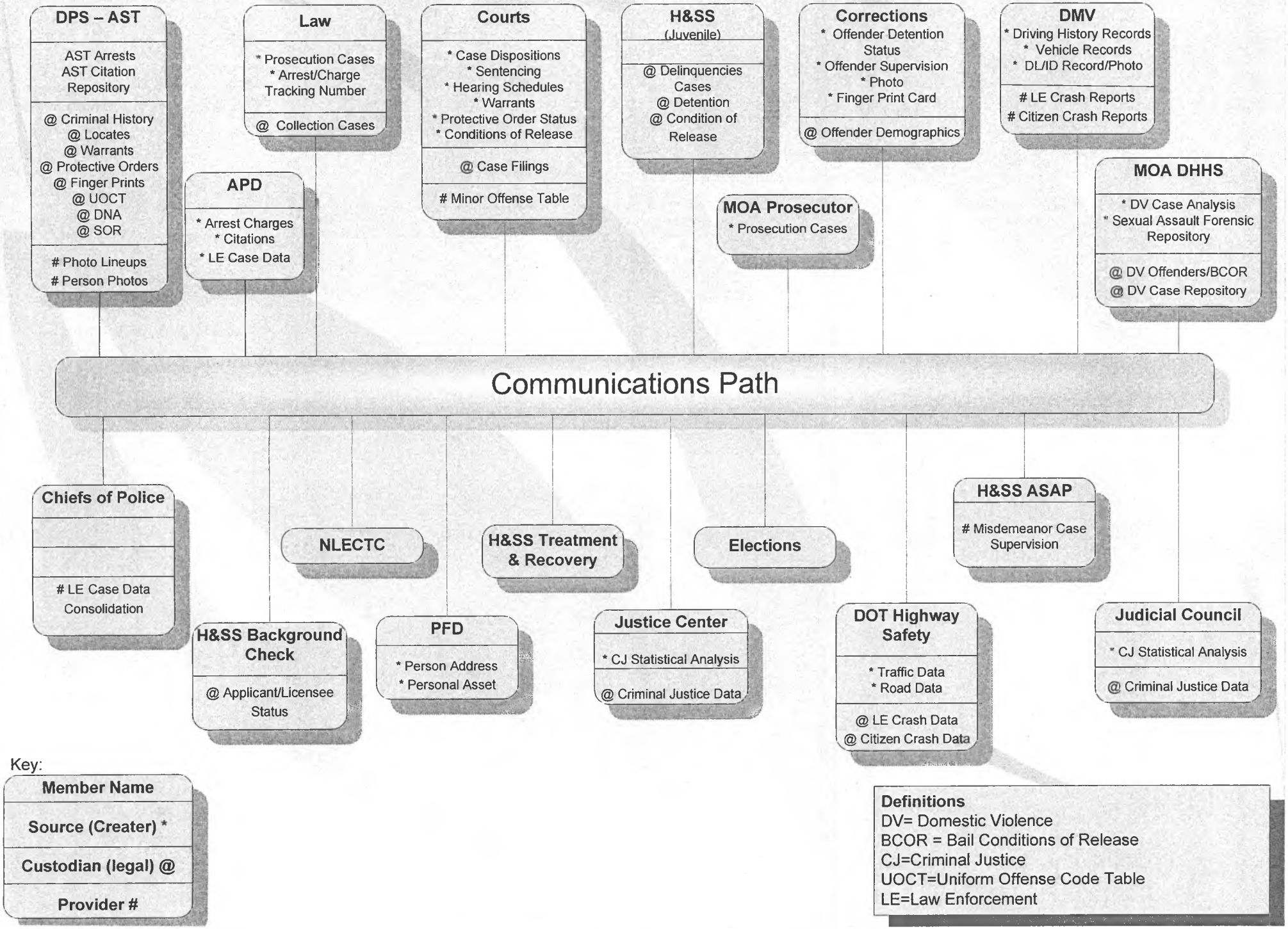
[31% of MO citations statewide were filed electronically]

Numbers of case filings rounded to nearest ten; percentages rounded to the nearest whole percent in superior and district court pie charts.

Prepared for Crime Summit, January 25, 2012

Nancy Meade, General Counsel
Alaska Court System

MAJIC Enterprise



Key:

Member Name
Source (Creater) *
Custodian (legal) @
Provider #

Definitions
DV= Domestic Violence
BCOR = Bail Conditions of Release
CJ=Criminal Justice
UOCT=Uniform Offense Code Table
LE=Law Enforcement

Multi-Agency Justice Integration Consortium (MAJIC)

http://www.ajsac.state.ak.us/majic/

Membership

- Alaska Association of Chiefs of Police
- Alaska Court System
- Alaska Department of Administration, Public Defender Agency
- Alaska Judicial Council
- Alaska Department of Law, Criminal Division
- Alaska Department of Transportation, Program Development
- Alaska Department of Public Safety, Alaska State Troopers
- Alaska Department of Administration, Division of Motor Vehicles
- Alaska DHSS, Division of Behavioral Health/ASAP (Alcohol Safety Action Program)
- Alaska DHSS, Division of Juvenile Justice
- Alaska Department of Corrections
- Alaska DHSS, Division of Health Care Services, Alaska Background Check Program
- Alaska Department of Revenue, Criminal Investigations Unit
- Alaska Department of Transportation, Alaska Highway Safety Office
- Alaska Division of Elections
- Anchorage Police Department
- Municipality of Anchorage, Prosecutor's Office
- Municipality of Anchorage, Department of Health & Human Services
- National Law Enforcement & Corrections Technology Center - Alaska (NLECTC-AK)
- University of Alaska Justice Center, Statistical Analysis Center

Bail Conditions Repository – Phase 2 (Fairbanks Pilot)

September 2010 - June 2012
Responsible Agency: Alaska Court System

Problem

No one can readily determine if a person is subject to bail conditions of release because there is no statewide, electronic repository of bail orders.

Purpose

Demonstrate the feasibility of making bail orders electronically accessible to law enforcement and the public.

Expected Outcomes/Performance Measures

1. Electronic bail orders are created in the courtroom without unreasonably delaying proceedings.
2. All active Fairbanks bail orders (date forward) are in the electronically accessible repository.
3. Expired/inactive bail orders are never erroneously shown in the repository as "active".
4. The bail repository is developed, managed and supported with existing court system resources.

Scope

Phase 1: Bail order "smart" form developed as a proof of concept; in use in Fairbanks since 8/10.
Phase 2: Refine form, create repository (for Fairbanks orders) with on line access
Phase 3+: Expand to all courts.

Accomplished To Date

- ✓ Issued RFP, awarded contract to 4Point (Dec 2010)
- ✓ Gathered requirements from judges, clerks, administrative staff and other agencies (Feb 2011)
- ✓ Set up court IT infrastructure (software, hardware, training) (Mar 2011)
- ✓ Wrote business requirements and system specifications (May 2011)
- ✓ Delivered new bail form and repository for testing (Nov 2011)

Expected within the next 3 months:

- _ Complete testing – outside of courtroom
- _ Train trial court staff
- _ Go live - in courtrooms
- _ Build/test interface with APSIN
- _ Build/test web page for public

Expected within the next 6 months:

- _ Complete live-court acceptance testing
- _ Implement APSIN interface to make repository available to law enforcement
- _ Make repository available to public on court system's web page

What is Needed from Other Agencies?

1. DPS: Implement interface between the bail repository and APSIN.

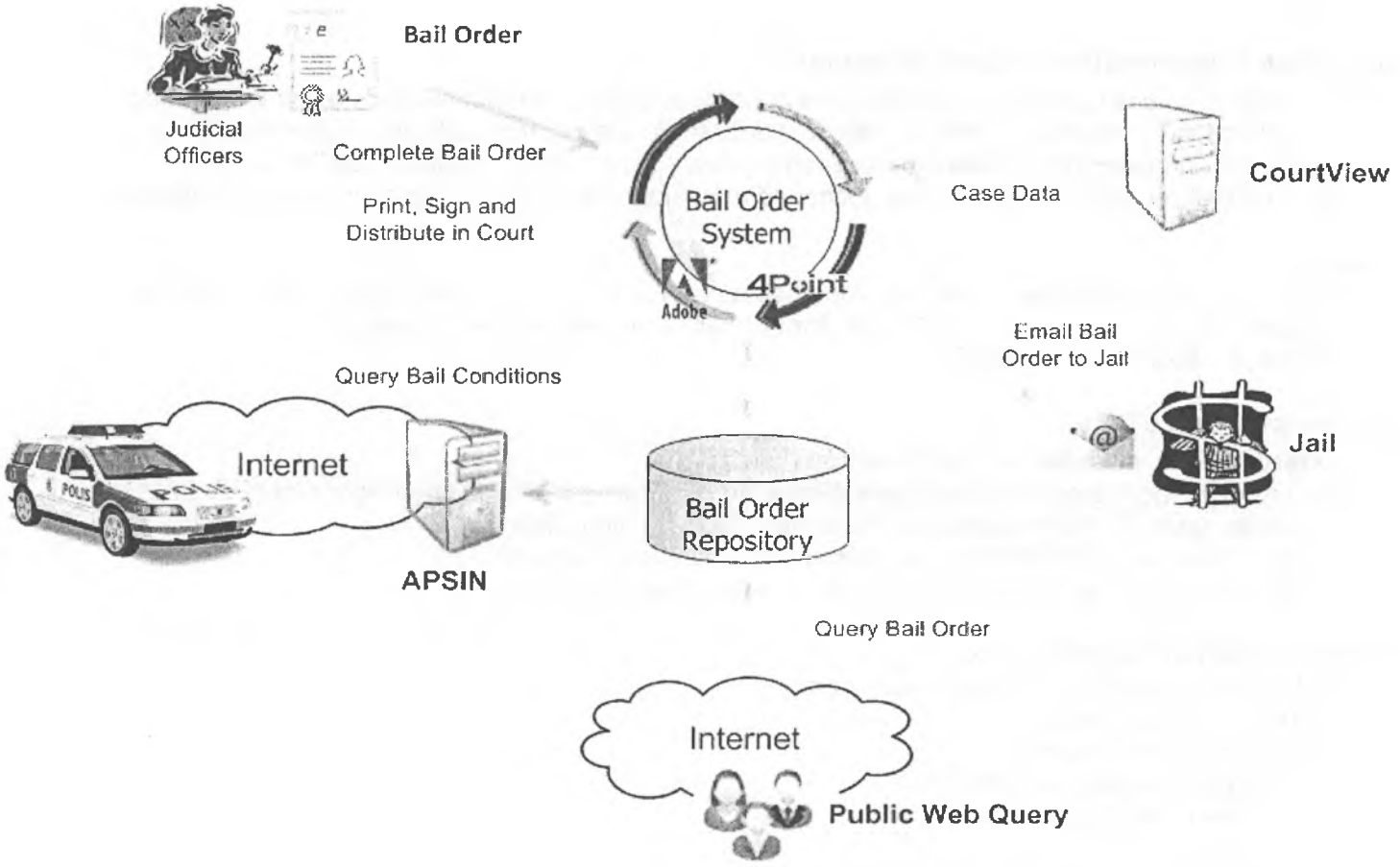
Related Projects (💣 = critical to the success of this project)

1. APSIN ID (MAJIC): APSIN ID for all defendants in court criminal case records (in progress) 💣
2. APSIN Redesign (DPS): Migrate from legacy/mainframe to modern platform (in progress) 💣
3. DV Bail Conditions Database (Muni of Anchorage): Manually flag bail conditions in APSIN

MAJIC Data Standards Relevant to the Project

1. APSIN ID Number - for law enforcement queries of the repository
2. Uniform Offense Citation Table (UOCT) - for offense codes/descriptions on the form
3. Arrest Tracking and Charge Tracking Numbers - for charge information on the form
4. U.S. Dept. of Justice National Information Exchange Model (NIEM) for systems interface

For More Info: Diane Schenker, Alaska Court System, dschenker@courts.state.ak.us, 264-8211


Bail Order
Judicial Officers
Complete Bail Order
Print, Sign and Distribute in Court
Bail Order System
4Point
Adobe
Case Data
CourtView
Email Bail Order to Jail
Jail
Query Bail Conditions
Internet
APSIN
Bail Order Repository
Query Bail Order
Internet
Public Web Query

Tribal Courts

2012 Crime Summit | Our Silent Partner | Alaska Native Justice Center

GOAL –

To **reduce crime and recidivism** through the use of local control and earlier intervention by tribal courts; and to **save money** in part by relieving a portion of the misdemeanor caseload from District Courts, District Attorney's Office, Public Defender Agency, Division of Juvenile Justice, and Corrections. The length of this pilot is two years, followed by an evaluation for its effectiveness in attaining these goals.

PLAN -

Seek slight re-alignment of misdemeanor case budget funding from each of the Department of Corrections (DOC), Department of Law (DOL), Department of Administration (DOA), Department of Health & Social Services, and the Courts respective budgets to fund three selected tribal courts to handle misdemeanor cases within their respective communities. Ask the Governor's Office to contribute to round out the amount and as a symbol of unifying support.

- Department of Public Safety – Alaska Wildlife Troopers can also contribute in the transportation of equipment and personnel for training to selected villages and/or hub centers.
- University of Alaska Anchorage Justice Center can be engaged for an objective review of this pilot meeting stated goals; with a proposed cost for evaluation that is $25K.

The budget re-allocation is $45K a year from each DOC, DOL, DOA, DHHS, and the Courts and $5K from the Governor's Office, giving an annual budget of **$230K @ year**; with a two year pilot total of $460K.

IMPLEMENTATION –

Select three ready functioning tribal courts from different geographical areas of the state and annually fund each approximately $ 67K that will be allocated in two phases; after funding equipment & training.

- Phase One – Provide updated technological **equipment**, software, and training for court recording; and refresher **training** to selected tribal courts from (choice of)
  - Kevin Illingworth, UAF; Interior Aleutians Campus, or
  - Lisa Jaeger, Tanana Chiefs Conference, or
  - Magistrate Mike A. Jackson, State of: Alaska Court System, Kake District Court;
  - and the assigned district attorney, public defender, court clerk, for that geographical area

- Phase Two – The balance of funds would provide stipends for judges and court clerk @ case.

Suggested village tribal courts list may include: Chevak; Kake; Minto; Kenaitze; Barrow; but can include others. This pilot however would be limited to three and should be geographically dispersed.

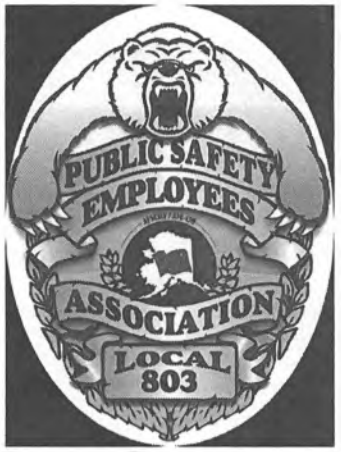
SUMMARY –

This proposal is not asking for an increase in our overall state budget; rather a re-allocation of a slight amount from several key departments who should all realize a reduction in their current workload.

This has been somewhat pioneered by our Youth Courts, where there has been realized reductions and cost savings; albeit through some screening of cases accepted. Also sought is the State's recognition of the contribution tribal courts can have at the local level. Finally, amongst all the crime fighting strategies that exist, the most effective police force any community can have are its own citizens who feel both empowered and encouraged to become involved; let's invest in and engage our communities.

All that is at risk is only a small amount of money; all that can be realized is so much more.

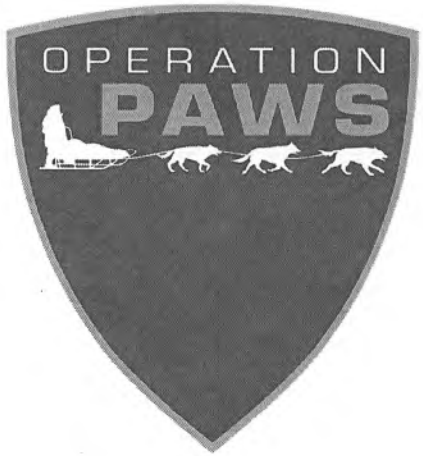
Walt Monegan 793-3551 wmonegan@anjc.net

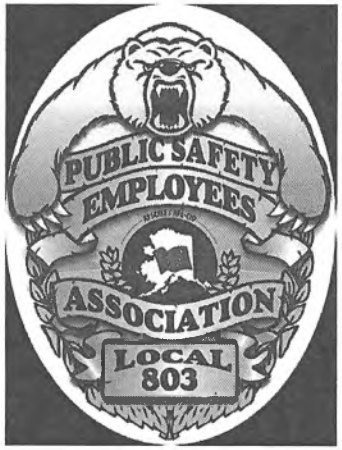


PSEA

The Champions of Public Safety

NON-PROFIT FOUNDATION





P.A.W.S.

People Are Worth Saving

A project aimed at helping to reduce suicide, substance abuse and violent crime in rural Alaska.

P.A.W.S.

A tool aimed at prevention and intervention of suicide, substance abuse and violent crime among Alaska's rural residents and the Alaska Native population. Off-Duty, Alaska Native, LEO's provide proactive versus reactive education, training, mentorship, and leadership. The basis for PAWS is the delivery of the program through traditional dog mushing expeditions.

ELEMENTS OF PAWS

- Humanitarian Mission
- Choices
- Leadership & Team Building
- Public Relations & Recruitment
- Expeditions

WHAT WE DO MATTERS, AND DOES MAKE A DIFFERENCE TO SOMEONE!

CHALLENGES

- Geography
- Weather
- Distance
- Manpower
- Resources
- Communication
- Transportation
- Underreporting

BENEFITS OF PAWS

- Proactive, prevention focused approach to issues
- Unique rapport building using off-duty LEO's
- Alaska Native LEO's establishing and developing trust relationships with rural Alaskans
- Provides tools, strategies, training, and education framework to solve crime issues at a local level
- Shared Values (Pride, Culture, Heritage & Loyalty, Integrity, Courage)

NOT A RACE TO A FINISH...

A RACE TO SAVE LIVES!

OPERATION PAWS

TERRENCE SHANIGAN
OPERATION P.A.W.S.
(907)244-8165

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P.O. BOX 1171
WILLOW, ALASKA 99688

DEPARTMENT OF CORRECTIONS

CRIME SUMMIT 2012

MISSION STATEMENT

The Alaska Department of Corrections enhances the safety of our communities. We provide secure confinement, reformative programs, and a process of supervised community reintegration.

DOC AT A GLANCE

- **1509 staff**: 806 are COs, 483 population management, 153, inmate health care, 58 administrative support, & 10 offender habilitation
- 12 facilities statewide plus one out of state facility at Hudson Correctional Center in Hudson, Colorado
- Alaska is one of six states in the U.S. that operates a unified correctional system.
- 15 contract regional jails
- As of Jan. 20, 2012, **5953** offenders are in prison, a CRC or on EM
- In 2010, DOC booked **38,000** offenders into its facilities
- 13 field probation offices
- FY11, 5934 on probation, expected to climb to 6118 in FY12
- 789 Community Residential Center (CRC) beds statewide
- 354 Offenders on Electronic Monitoring (EM)

DOC'S GOALS

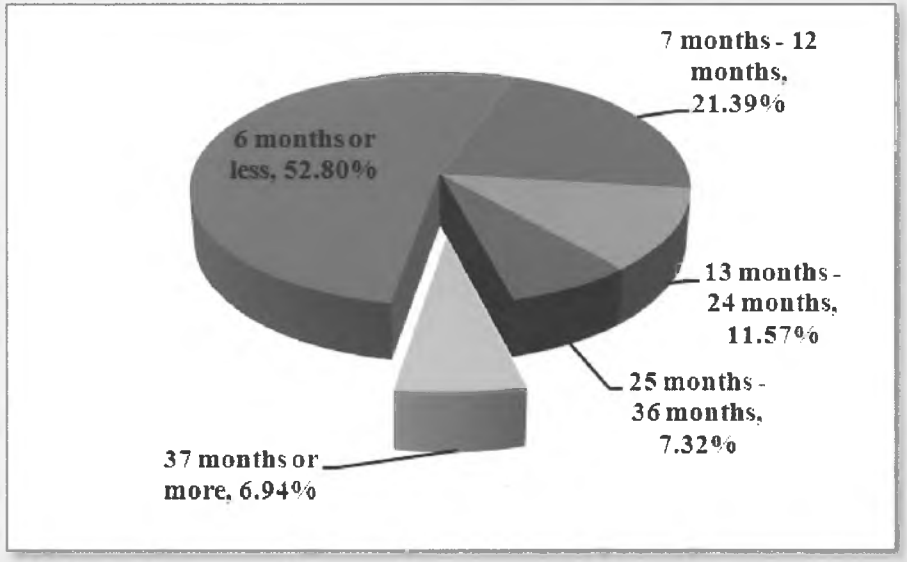
- To protect the public
- To reduce recidivism
- To delay the need for the construction of a new prison for sentenced offenders
- To ensure that incarcerated offenders spend their time in custody productively
- To work collaboratively with outside stakeholders to achieve these goals.

HOW DID WE GET HERE?

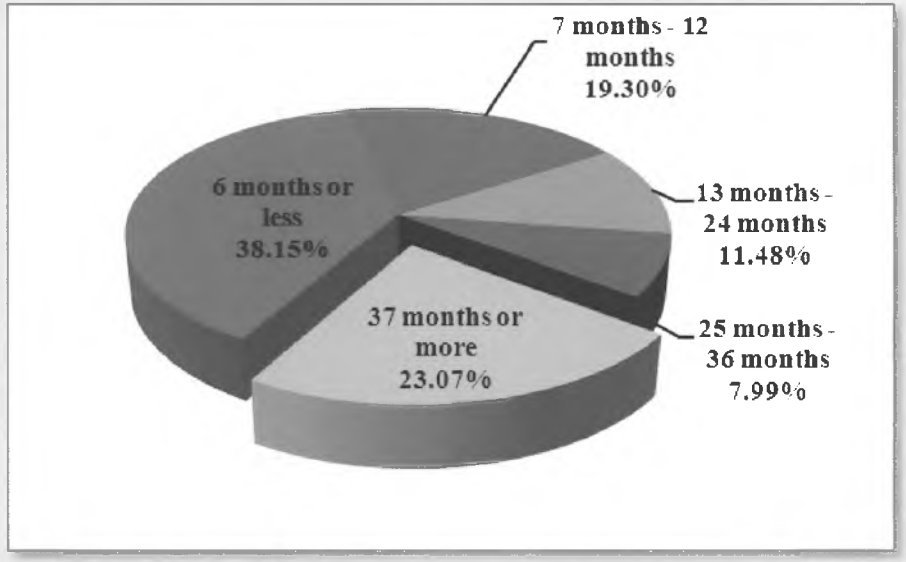
Recidivism, **recidivism**, **recidivism . . .**

PERCENT OF OFFENDERS BY LENGTH OF STAY FROM ADMISSION

As of December 31, 2002

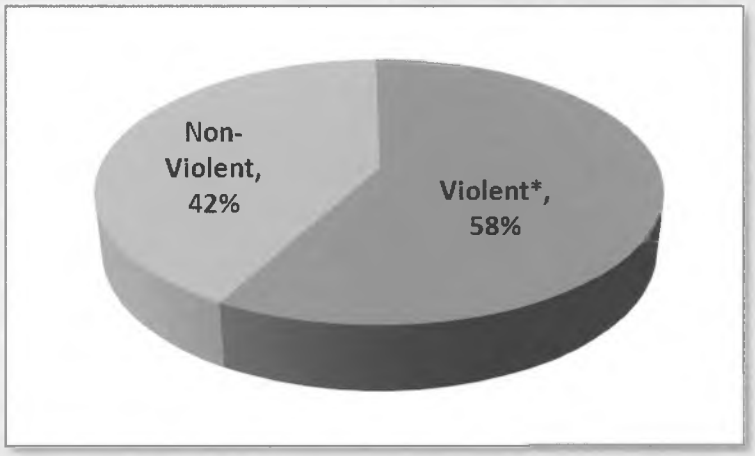


As of December 31, 2011

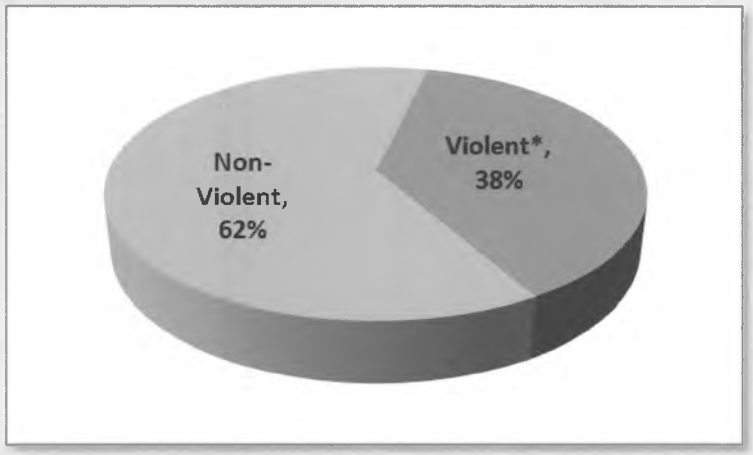


STANDING POPULATION & CRIME TYPE

December 31, 2002

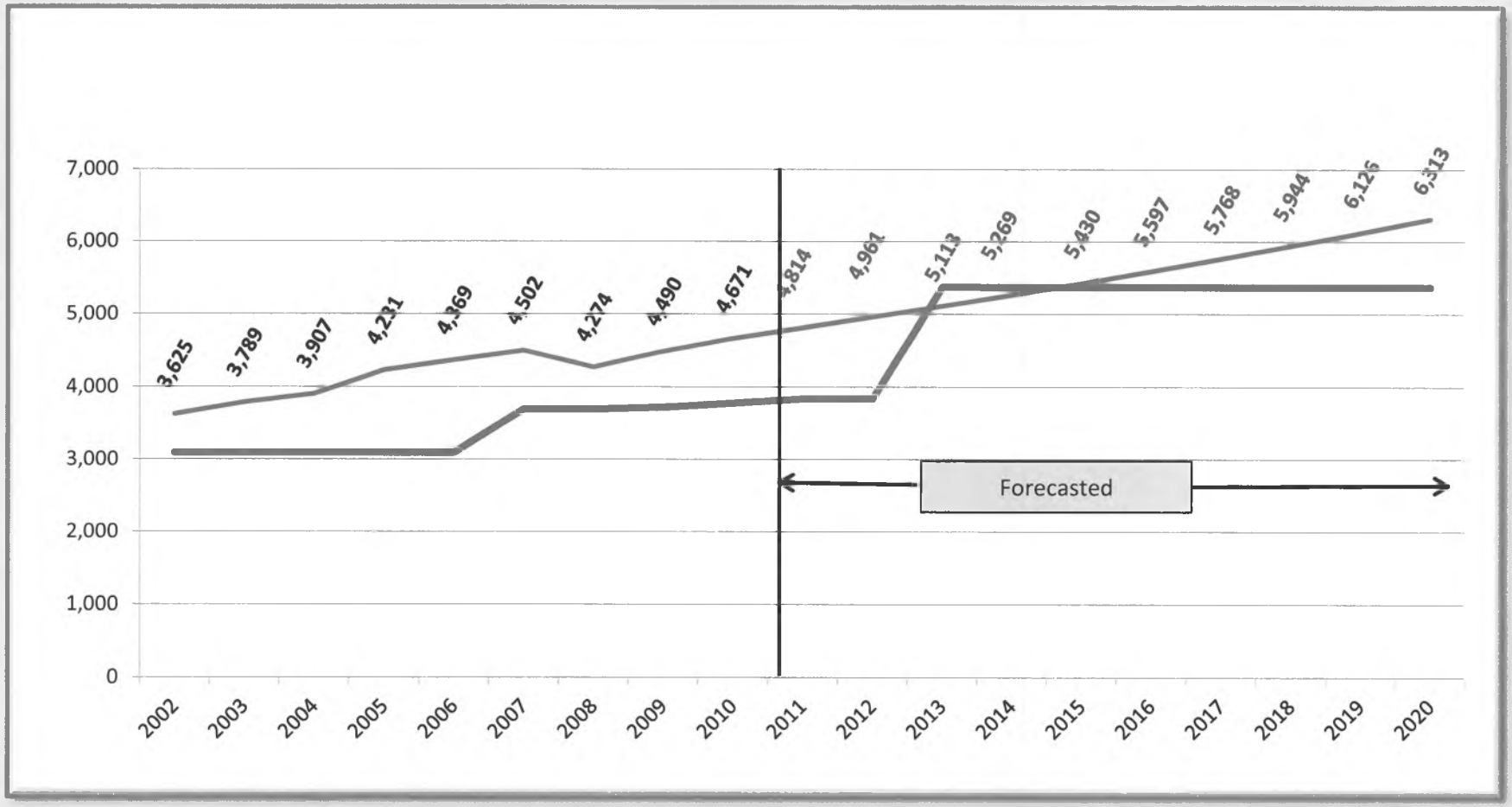


December 31, 2011



* Violent Crimes include all crimes against a person and also includes registerable sex offenses.

INSTITUTIONAL INMATE POPULATION: 2002-2020



From 2002 to 2010, the annual average inmate population grew slightly more than 3% per year. Based on that growth rate, it is estimated inmate population will reach 6,313 by 2020.

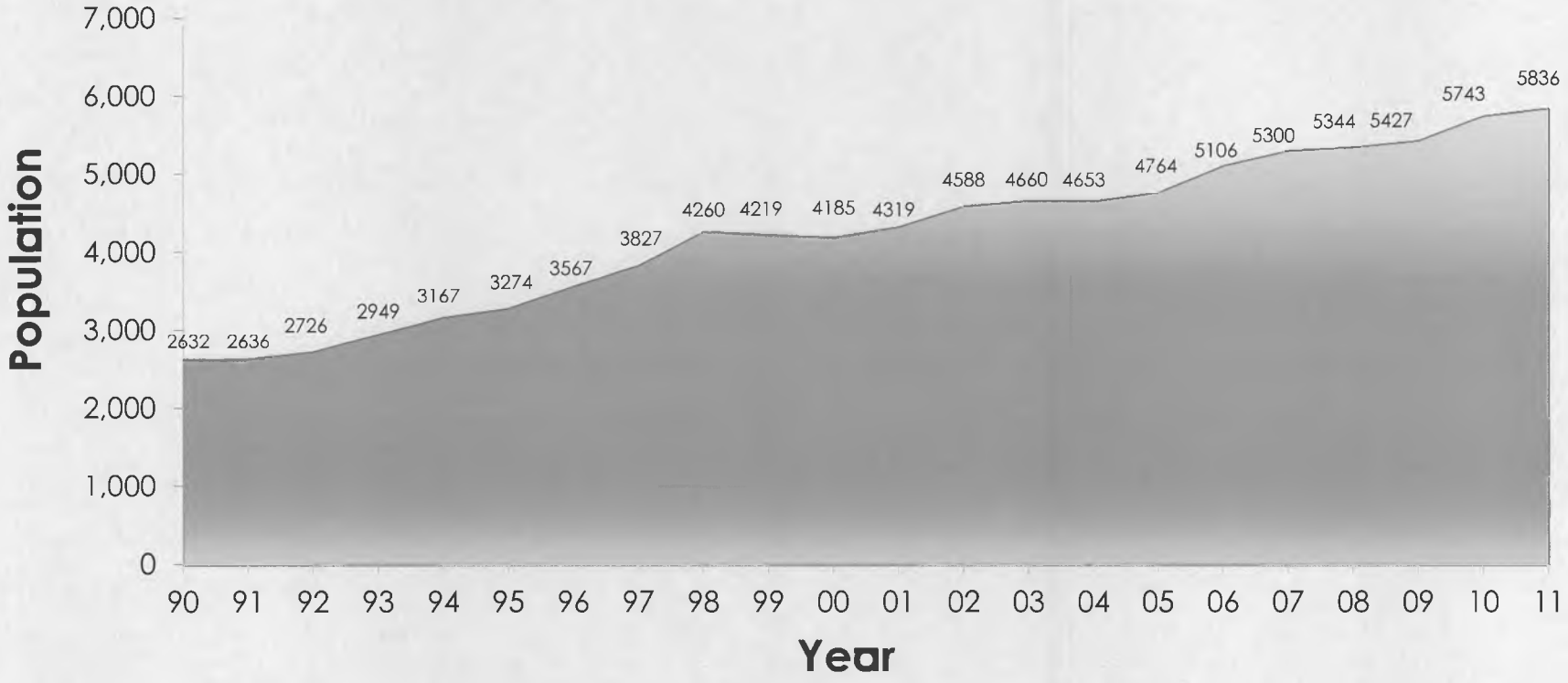
MEDICAL

- Over the past decade, medical care costs in Anchorage have increased by 46%, compared to 27% nationwide. *(Alaska Economic Trends, May 2011)*
- Increases in chronic health issues and an aging inmate population has led to higher acuity and increased need for higher medical care.
- DOC developed a process for early identification & regular review of high cost inmates to determine more cost effective placements.

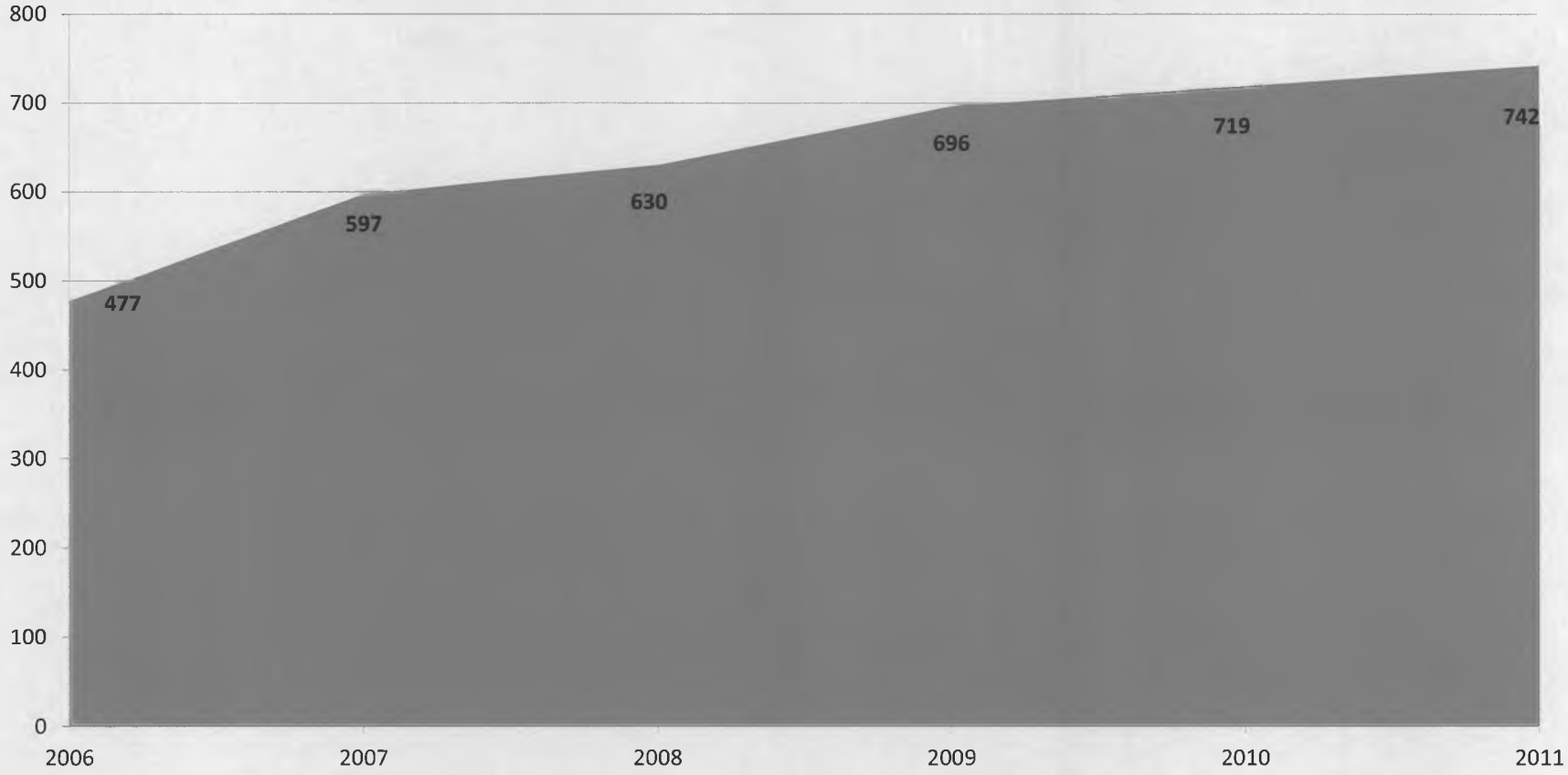
OFFENDER STANDING POPULATION FOR ALL INSTITUTIONS

(INCLUDING CRC'S AND EM)

1990 - 2011

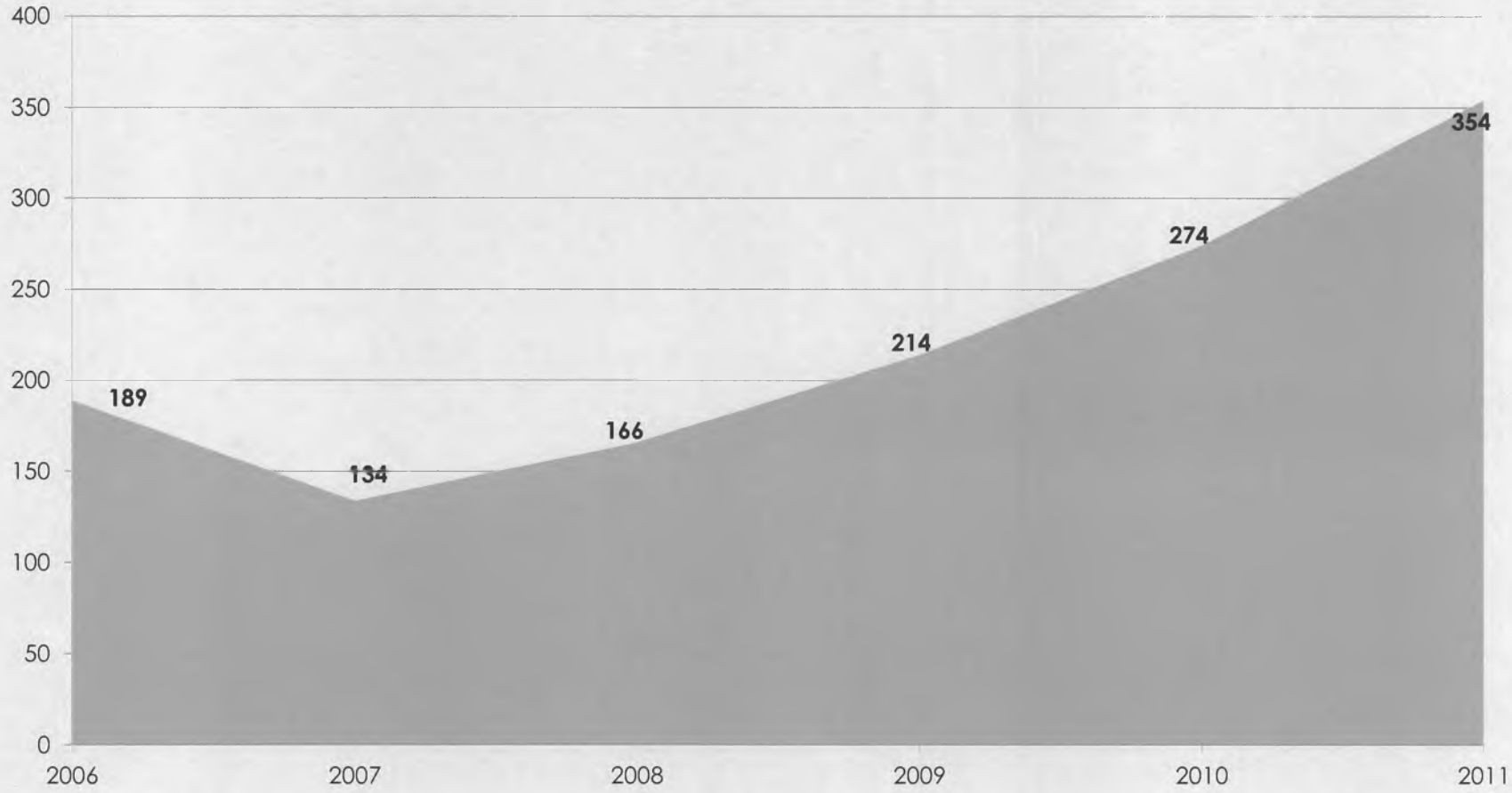


ALASKA COMMUNITY RESIDENTIAL CENTER COUNTS: 2006-2011



From 2006 to 2011, the number of offenders in Community Residential Centers has grown by slightly more than 55 percent (55.55%)

ELECTRONIC MONITORING COUNTS 2006-2011



ELECTRONIC MONITORING

- Electronic Monitoring population has risen significantly since 2007
  - 2007 – 134 on Electronic Monitoring
  - Latest numbers in 2012 show – 354 on Electronic Monitoring
- Electronic Monitoring coverage areas have grown
  - Anchorage
  - Fairbanks
  - Juneau *
  - Kenai
  - Ketchikan
  - Mat-Su *
  - Sitka *
    - Expanding to **Barrow** within the next couple of months.
- Cost Savings and Comparisons
  - Institutional Bed Cost Per Day - $134.90
  - Community Residential Centers (CRC's) - $80.17
  - Electronic Monitoring (EM) - $22.00
- Recidivism & Success Rates on Electronic Monitoring
  - Latest statistics from 2008 show an 86.69% success rate.
  - Latest statistics from 2008 show a 13.31% recidivism rate, while still on EM.
    - Most are for probation violations

* *Year 2008 is the most recent reportable year due to the need to allow for a 3 year recidivism monitoring period.*

DEPARTMENT OF CORRECTIONS RECRUITMENT

- DOC maintained an institutional vacancy rate of 2.6% in FY11
- Actively recruiting at multiple locations:
  - Alaska State Fair
  - Anchorage Daily News Job Fair
  - Annual Alaska Federation of Natives Convention
  - Veterans and spouses of military personnel
  - Kenai Job Fair
  - Great Alaskan Sportsman Show
  - Knik Tribal Council Summer Picnic
  - Military Spouse Job Fair
  - Women in Law Enforcement
  - Oxygen and Octane Expo
  - Job Fairs in Juneau, Mat-Su, Bethel, Kenai, Anchorage & Fairbanks

DEPARTMENT OF CORRECTIONS ACADEMY

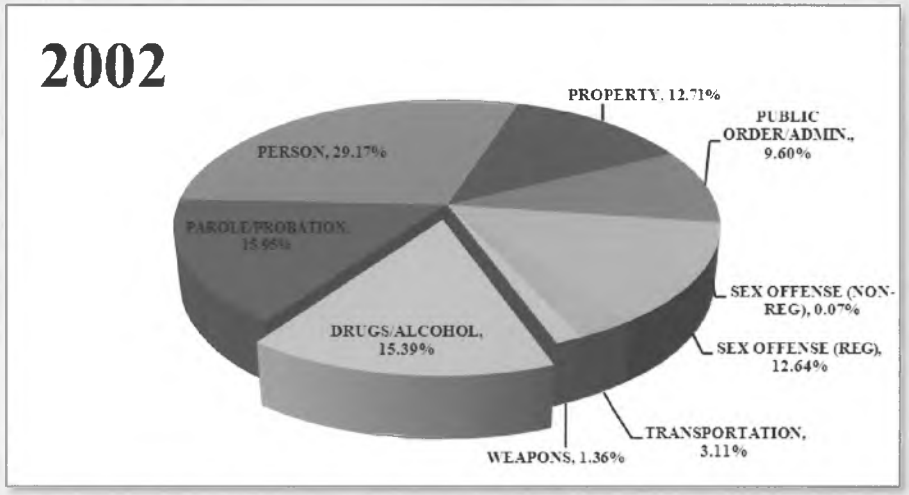
- Six-week curriculum that prepares a candidate to become certified as a Correctional Officer under Alaska Police Standards.

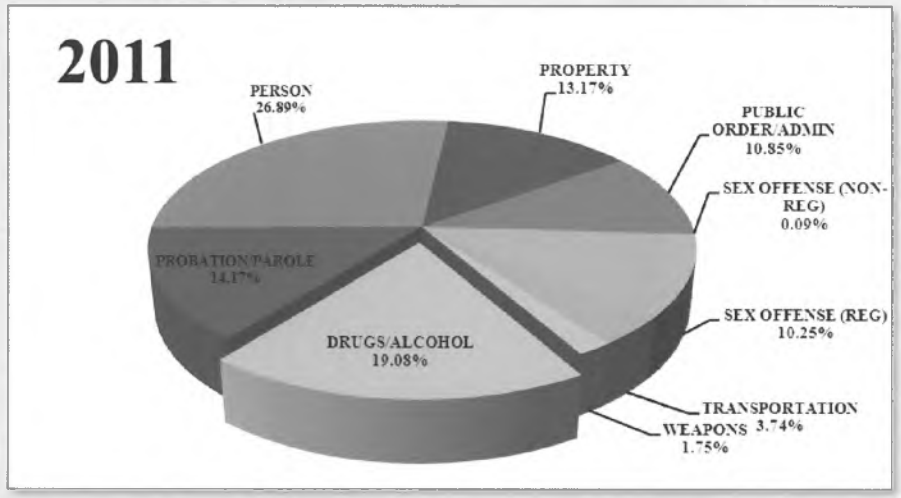
- Performs training that covers the skills and knowledge base an officer needs to effectively and safely perform the duties of a Correctional Officer.
    - Department Policies
    - Communications
    - Civil Law
    - First Aid/CPR
    - Defense Tactics
    - Firearms
    - Officer Survival
    - Searches
    - Restraints

CLASSIFICATION POLICY

- DOC Classification Policies have been updated to emphasize behavioral incentives that encourage compliance with programming and other expectations.
- The updated policies are designed to provide timely and accurate custody designation.
- DOC Offender Reentry policy provides a guide to the process which moves an offender from initial screening to an integrated transition to Supervision upon release.
- New system also includes an Offender Management Plan (OMP), which is the road map for the prisoner to determine what programs are needed and will provide a means of measuring a prisoner's readiness for re-entry into the community.

PERCENT OF STANDING OFFENDER POPULATION BY OFFENSE CLASS





In 2002, 15.39% of Offenders in Alaska were incarcerated for drug or alcohol offenses.

By 2011, Offenders in Alaska incarcerated for drug or alcohol offenses increased to 19.08%.

SUBSTANCE ABUSE TREATMENT PROGRAMS

Purpose: To reduce criminal recidivism

Strategy: To employ evidence-based substance abuse programs to higher risk offenders.

- Life Success Substance Abuse Treatment (LSSAT): A cognitive behavioral, minimum three months medium intensity treatment program.
  - In 8 of our 12 institutions.
  - Capacity 800 offenders per year

- Residential Substance Abuse Treatment (RSAT): An intensive inpatient treatment program using a cognitive behavioral approach. Minimum of six months participation required.
  - Hudson Colorado HCC Facility
  - Eagle River HMCC
  - Capacity at least 140 offenders per year.

- Aftercare: Community based aftercare program designed to complement the offender's custodial treatment. Length of program and program requirements dependent on individual needs.
  - Anchorage
  - Fairbanks
  - Combined capacity over 280 offenders per year.

SUBSTANCE ABUSE TREATMENT PROGRAMS

FY10 Performance Measures (2 years out):

	Count	Returned	**Recidivism Rate***
FY2010 Control Group	2077	1203	57.92%
Participated in and Completed Program	334	122	36.53%

**Percent of offenders returning to incarceration within two years of discharge.*

FY11 Performance Measures (1 year or less out):

	Count	Returned	**Recidivism Rate***
FY2011 Control Group	1877	692	36.87%
Participated in and Completed Program	421	38	9.09% **

**Percent of offenders returning to incarceration within one year of discharge.*
*** The majority of these individuals have been out of custody for one year or less. The recidivism rate will rise. Given these results, it appears that the state is on the road to match or exceed the 9 to 12% national average for recidivism reduction.*

PROBATIONER ACCOUNTABILITY WITH CERTAIN ENFORCEMENT (PACE)

Background:

- Under the leadership of DOC, the PACE pilot program began in Anchorage Superior Court in July 2010.
- The goal is to provide swift, certain and proportionate sanctions to **70 high risk felony** probationers who had an established pattern of noncompliance with court ordered conditions of probation
- The program required the collaboration and cooperation among courts, law enforcement, prosecution, defense and DOC.

PERFORMANCE MEASURES:

RESULTS OF THE ALASKA JUDICIAL COUNCIL'S SEPTEMBER 2011 PRELIMINARY EVALUATION OF PACE

- PACE appears to be successful at reducing positive drug tests.
- Nearly two-thirds of the PACE probationers had no positive drug tests during their first three months on PACE.
- In contrast, prior to their enrollment in PACE, only one-fifth of those probationers were free of positive drug tests.
- These outcomes pattern the results achieved by the original Hawaii HOPE program.

EXPANSION OF PACE

- Fairbanks PACE Misdemeanor Domestic Violence Pilot Project started January 2012.
    - *The goal is through formal probation supervision to hold DV misdemeanor offenders accountable for completion of their court ordered conditions of probation.*
- Palmer Superior Court is moving forward to start the PACE model in their area.

SEX OFFENDER MANAGEMENT PROGRAM

Purpose: Enhance community safety and promote recidivism reduction

Strategies:

- **Polygraph testing**

	FY 07	FY 08	FY 09	FY10	FY11
# of offenders participating	52	247	208	402	442
# of new sex assault convictions	-	1	1	1	1

  - Data shows that probation officers are intervening before the commission of new sexual assault offenses.
  - During FY11, the use of polygraph examinations expanded statewide to all Probation/Parole Offices that supervise sex offenders.

- **Community based treatment:**
  - DOC increased sex offender treatment slots statewide by 15% by adding new providers and increasing contracts with existing providers.
  - DOC increased the number of offenders that pay for their own treatment by 10% statewide
  - DOC contracted with a provider to obtain substance abuse treatment for cognitively disabled sex offenders.

- **Performance Measures:**
  - DOC began a state wide data collection project to track sex offenders released to the community to monitor recidivism rates.

EDUCATION

Goal: To reduce recidivism

Strategies:

- Core Education Curriculum:
  - GEDs (General Education Development) diplomas issued:

FY08	**182**
FY09	**239**
FY10	**247**
FY11	**254**

  - CAP (Criminal Attitudes Program) graduates:

FY 10	**106**
FY 11	**463**

  - Parenting Program

FY 10	**339**
FY 11	**393**

  - Prisoner Reentry Program: Utilizing the Alaska Reentry manual, inmates prepare for reintegration and transition back into the community.
    - In FY 11 411 inmates completed the program.

ALASKA PRISONER RE-ENTRY TASK FORCE 2011 ACCOMPLISHMENTS

MARCH 2011-JANUARY 2012

- Completed the State's first ever Five-year Prisoner Reentry Plan, 2011-2016
- With support of the AK Mental Health Trust Authority and the AK Judicial Council, a project coordinator was hired to facilitate the work of the TF.
- Plan action steps accomplished to date:
  - APSIN ID project: to develop the capacity to accurately track criminal justice data for the purpose of evaluation and statistical monitoring.
  - Special Needs Housing Grant funds: The Alaska Council on the Homelessness approved the use of 1.6 million un-allocated housing grant funds for a prisoner transitional housing program.
  - With DOC support, The Returning Citizens' Center in Anchorage continues to serve former offenders.
  - DOC added an additional Institutional Discharge Project Plus (DP+) counselor
  - DOC is in the process of implementing an electronic medical records system.
  - Under the leadership of Partner's for Progress, the Sobriety 24/7 program was implemented in cooperation with Anchorage Court, APD, Municipal Prosecutor's office and the law firm of Gordon and Logue.
  - Beginning a process to Inventory all state statutes and regulations that provide legal barriers to people with criminal convictions. Alaska has 492 such statutes and regulations.
  - The Alpha Ministries mentoring program was implemented at the Kenai Wildwood institution.
  - Formation of regional Prisoner Reentry Coalitions

RELATIONSHIPS WITH OTHER CRIMINAL JUSTICE AGENCIES

- Criminal Justice Working Group
- Prisoner Re-Entry Task Force
- DOC, DPS & Law work together on community panels in rural areas of Alaska.
- Work with Law, Police Departments and the Courts on expansion of PACE.

HOW CAN THE LEGISLATURE ASSIST?

- Continuing open lines of communication.
- Continuing to hold meetings and allow for forums to discuss department priorities, issues and challenges.
  - Allowing free flowing dialogue
- Encourage joint state department presentations on key public safety issues among.
  - Many state agencies play a role in reducing recidivism and prison population growth including DHSS, Labor, and Education.

THANK YOU!

Fiscal Year 2011 Return on Investment Report

UAA Justice Center

The UAA Justice Center, established by the State Legislature in 1975, has a mandate to provide statewide justice-related education, research, and service. The Justice Center is an interdisciplinary unit that provides undergraduate, graduate, and professional education; conducts research in the areas of crime, law, and justice; and provides service to government units, justice agencies, and community organizations throughout urban and rural Alaska to promote a safe, healthy, and just society.

RETURN ON INSTRUCTION

During fiscal year 2011, the State of Alaska invested $491,415 for instruction. With that investment, the UAA Justice Center:

- Instructed 517 Justice and Paralegal Certificate majors and pre-majors
- Awarded 27 Bachelor of Arts in Justice degrees and 8 American Bar Association approved Paralegal Certificate degrees
- Generated a total of 4,344 credit hours of instruction in Justice and Paralegal courses
- Generated $765,125 in tuition dollars

For every dollar the state invested in instruction,
the UAA Justice Center generated $1.56 in tuition revenue.

RETURN ON RESEARCH

During fiscal year 2011, the State of Alaska invested $401,051 for research. With that investment, the UAA Justice Center:

- Secured and/or maintained 14 externally funded research projects, originally funded for a total of $1,158,766
- Spent a total of $888,684 from externally funded projects
- Generated $74,126 in indirect costs
- Published 7 peer reviewed articles
- Published 15 *Alaska Justice Forum* articles, the UAA Justice Center quarterly research publication
- Published 11 research reports
- Published 2 research overviews
- Made 30 presentations at professional meetings

For every dollar the state invested in research,
the UAA Justice Center spent $2.21 in external funding.

The full FY11 Return on Investment Report is available online: http://justice.uaa.alaska.edu/news/roi_fy11_report.pdf.

RETURN ON SERVICE

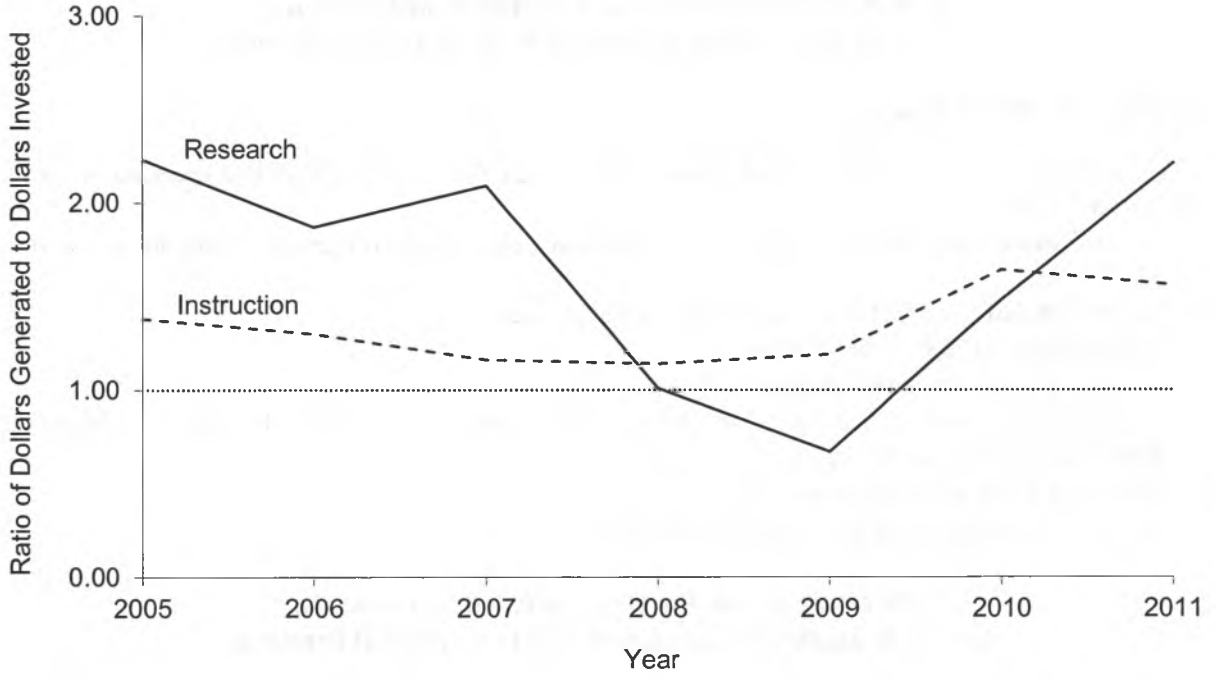
During fiscal year 2011, the State of Alaska invested $296,377 for service. With that investment, the UAA Justice Center:

- Hosted 8 major conferences, workshops, and events
- Served on 54 University committees
- Served on 5 editorial boards
- Reviewed manuscripts and grant applications for 6 different journals and agencies
- Participated in 23 different professional associations
- Collaborated with 79 different community partners
- Advanced its public education efforts with 6 media interviews/mentions and 16 online and print mentions
- Furthered its outreach efforts with 6 events, each involving a different educational/youth organization
- Received 4 awards in recognition of current and former faculty contributions to the justice profession and the community
- Generated 173 entries on the UAA Justice Center blog

FY 2005-2011 SUMMARY

From FY 2010 to FY 2011, the UAA Justice Center's return on instruction decreased by 4.9% and the Center's return on research increased by 49.3%. The FY11 return on instruction was the second greatest return from FY05 to FY11 (down slightly from FY10). The FY11 return on research was the greatest return from FY05 to FY11.

UAA Justice Center
Figure 1. Return on Investment: FY 2005-2011



UAA Justice Center
University of Alaska Anchorage

3211 Providence Drive
Anchorage, AK 99508
http://justice.uaa.alaska.edu

CDVSA
Council on Domestic Violence & Sexual Assault
Safety ★ Prevention ★ Accountability

2012 Alaska Dashboard

Key Issues Impacting

Domestic Violence and Sexual Assault in Alaska

Some of the data below are based on self-disclosures to survey questions on domestic violence (DV) and sexual assault (SA). These estimates are conservative (actual rates are much higher). As the stigma of reporting violence lessens and as we increase victim safety, those experiencing violence will be more likely to report and seek help. Certain estimates may increase over time (e.g., reports of harm, utilization of services, and reports to law enforcement).

Key Population Indicators for Alaska	**Previous AK Data**	**Current AK Data**	**Percent Change**	**Progress**
Childhood Exposure to Domestic Violence				
1. Percent of adults exposed to intimate partner violence of parent (BRFSS)	19.1%	19.2%	+1%	○
2. Percent of mothers whose 3 year old child saw violence or physical abuse (CUBS)	4.0%	7.2%	+80%	●
Child and Youth Victimization				
3. Percent of students experiencing physical dating violence in past year (YRBS)	13.3%	12.0%	-10%	●
4. Percent of students experiencing sexual violence in lifetime (YRBS)	10.1%	9.2%	-9%	●
Reports of Harm (Child and Youth)				
5. Rate of reported child abuse and neglect per 10,000 (US DHHS)	190.1	150.8	-21%	●
6. Rate of reported child sexual maltreatment per 10,000 (OCS)	5.8	6.5	+12%	●
Adult and Elder Victimization				
7. Percent of women experiencing physical intimate partner violence in past year (AVS)	N/A	9.4%	N/A	○
8. Percent of women experiencing sexual violence in past year (AVS)	N/A	4.3%	N/A	○
9. Percent of pregnant women experiencing intimate partner physical abuse (PRAMS)	3.6%	4.0%	+11%	●
Reports of Harm (Adult and Elder)				
10. Number of vulnerable adults reporting abuse or neglect (APS)	176	160	-9%	●
11. Number of vulnerable elders reporting abuse or neglect (APS)	73	76	+4%	○
Primary Prevention and Protective Factors				
12. Percent of pregnant women whose health provider talked to them about DV (PRAMS)	60.0%	61.3%	+2%	○
13. Percent of students comfortable seeking help from 3 or more adults (YRBS)	44.6%	43.8%	-2%	○
14. Percent of schools implementing Fourth R healthy relationship curriculum (DEED)	9.7%	12.5%	+29%	●
Reports to Law Enforcement				
15. Rate of forcible rape reported to law enforcement per 10,000 (UCR)	7.3	7.5	+3%	○
16. Number of domestic violence related homicides reported to law enforcement (DPS)	5	15	+200%	●
17. Number of elderly victims reporting DV-related sexual/physical assaults to AST (DPS)	176	149	-15%	●
Utilization of Services				
18. Rate of children evaluated by child advocacy centers per 10,000 (ACA)	81.9	94.8	+16%	●
19. Rate of adults utilizing services for domestic violence per 10,000 (CDVSA)	84.2	89.7	+7%	●
20. Rate of children with adults in domestic violence services per 10,000 (CDVSA)	74.0	74.4	+1%	○
21. Rate of adults utilizing services for sexual assault per 10,000 (CDVSA)	21.8	21.9	+0%	○
22. Rate of youth utilizing services for domestic violence per 10,000 (CDVSA)	22.5	17.9	-20%	●
23. Rate of youth utilizing services for sexual assault per 10,000 (CDVSA)	43.3	31.4	-27%	●
Offender Accountability				
24. Percent of reported forcible rapes resulting in an arrest (DPS)	24.3%	21.0%	-14%	●
25. Rate of juveniles referred for sex offenses per 10,000 (DJJ)	10.9	13.8	+27%	●
26. Rate of juveniles referred for a DV-related assault per 10,000 (DJJ)	N/A	38.5	N/A	○
27. Number of sexual assault cases accepted for prosecution (DOL)	111	118	+6%	●
28. Percent of accepted sexual assault cases with a conviction (DOL)	63.0%	66.1%	+5%	●
29. Number of sexual abuse of minor cases accepted for prosecution (DOL)	109	123	+13%	●
30. Percent of accepted sexual abuse of minor cases with a conviction (DOL)	84.4%	78.0%	-8%	○
31. Number of domestic violence cases accepted for prosecution (DOL)	2,617	2,977	+14%	●
32. Percent of accepted domestic violence cases with a conviction (DOL)	73.8%	73.1%	-1%	○

Progress: ● Progress Satisfactory ○ Progress Uncertain ● Progress Needs Improvement

Percent change is relative to previous data. See definition on page 3. Percent changes may or may not be statistically significant.

Definitions for each population indicator and dates for current and previous data are found starting on page 3.

Alaska Dashboard, January 2012. State of Alaska, Council on Domestic Violence and Sexual Assault, http://dps.alaska.gov/cdvsa/.

2012 Alaska Dashboard

Key Issues Impacting Domestic Violence and Sexual Assault in Alaska

National Comparisons

National data for comparison purposes are only available for a few of the population indicators on the Alaska dashboard for key issues impacting domestic violence and sexual assault in Alaska. Few of the data sources on the Alaska dashboard are available nationally or in other states. When they are available, data are rarely directly comparable. In particular, different states have different definitions for domestic violence and sexual assault. Listed below are the few indicators that are directly comparable to national data.

Key Population Indicators for Alaska	**Previous AK Data**	**Current AK Data**	**U.S. Data**
Child and Youth Victimization			
3. Percent of students experiencing physical dating violence in past year (YRBS)	13.3%	12.0%	9.8%
4. Percent of students experiencing sexual violence in lifetime (YRBS)	10.1%	9.2%	7.4%
Reports of Harm (Child and Youth)			
5. Rate of reported child abuse and neglect per 10,000 (US DHHS)	190.1	150.8	92.2
Reports to Law Enforcement			
15. Rate of forcible rape reported to law enforcement per 10,000 (UCR)	7.3	7.5	2.8

Percent of students experiencing physical dating violence in the past year (YRBS)
In 2009 (previous AK data), the percentage of Alaska high school students experiencing physical dating violence in the past year was 13.3%, compared to 9.8% of high school students in the U.S. The percentage of high school students experiencing physical dating violence in the past year was 1.4 times higher in Alaska than in the U.S.

Percent of students experiencing sexual violence in lifetime (YRBS)
In 2009 (previous AK data), the percentage of Alaska high school students experiencing sexual violence in their lifetime was 10.1%, compared to 7.4% of high school students in the U.S. The percentage of high school students experiencing sexual violence in their lifetime was 1.4 times higher in Alaska than in the U.S.

Rate of reported child abuse and neglect per 10,000 (US DHHS)
In 2010 (current AK data), the rate of reported and substantiated child abuse and neglect was 150.8 per 10,000 children (ages 0 to 17) in Alaska, compared to 92.2 per 10,000 children in the U.S. The Alaska rate was 1.6 times higher than the U.S. rate.

Rate of forcible rape reported to law enforcement per 10,000 (UCR)
In 2010 (current AK data), the rate of forcible rape reported to law enforcement was 7.5 per 10,000 in Alaska, compared to 2.8 per 10,000 in the U.S. The Alaska rate was 2.7 times higher than the U.S. rate.

Forthcoming Indicators

Reports to Law Enforcement
1. Number of sexual assaults reported to law enforcement (DPS)
2. Number of sexual abuses of minors reported to law enforcement (DPS)
Offender Accountability
3. Percent of juvenile sex offenders who recidivate (DJJ)
4. Percent of adult sex offenders who recidivate (DOC)
Primary Prevention and Protective Factors
5. Percent of students who feel connected to their school (SCCS)

2012 Alaska Dashboard

Key Issues Impacting Domestic Violence and Sexual Assault in Alaska

Percent Change

Percent change is the increase or decrease in the current Alaska data relative to the previous Alaska data. It is not an absolute difference in percent. For example, indicator #2 has increased from 4.0% to 7.2%. The absolute difference in percent is 3.2, but the percent change from the previous to the current Alaska data is 80%, because 3.2 is 80% of the previous Alaska data. Percent changes may or may not be statistically significant since some change randomly occurs from year to year.

$$\text{Percent Change is } \frac{\text{Current AK data - Previous AK data}}{\text{Previous AK data}} \times 100$$

Dashboard Indicator Definitions

Childhood Exposure to Domestic Violence
1. Percent of adults exposed to intimate partner violence of parent Behavioral Risk Factor Surveillance System (BRFSS). Approximately every third year, 2,500 adults in Alaska are asked "As a child, did you ever see or hear one of your parents or guardians being hit, slapped, punched, shoved, kicked or otherwise physically hurt by their spouse or partner?" Most current Alaska data are from 2009 and previous Alaska data are from 2006.
2. Percent of mothers whose 3 year old child saw violence or physical abuse Childhood Understanding Behaviors Survey (CUBS). Each year, over 1,000 mothers of three year old children are asked "Has your child ever experienced seeing violence or physical abuse in person?" Most current Alaska data are from 2010 and previous Alaska data are from 2009.

Child and Youth Victimization
3. Percent of students experiencing physical dating violence in past year Youth Risk Behavior Survey (YRBS). Every two years, over 1,000 students in traditional high schools are asked "During the past 12 months, did your boyfriend or girlfriend ever hit, slap, or physically hurt you on purpose?" Most current Alaska data are from 2011 and previous Alaska data are from 2009.
4. Percent of students experiencing sexual violence in lifetime Youth Risk Behavior Survey (YRBS). Every two years, over 1,000 students in traditional high schools are asked "Have you ever been physically forced to have sexual intercourse when you did not want to?" Most current Alaska data are from 2011 and previous Alaska data are from 2009.

Reports of Harm (Child and Youth)
5. Rate of reported child abuse and neglect per 10,000 US Department of Health and Human Services (US DHHS). Rate of unique victims of reported and substantiated child abuse and neglect per 10,000 children ages 0-17. Child abuse and neglect is defined as any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or an act or failure to act which presents and imminent risk of serious harm. Most current Alaska data are from 2010 and previous Alaska data are from 2009. For the purpose of the dashboard, this indicator is not used to measure rates of victimization. It is used to measure rates of reporting harm.
6. Rate of reported child sexual maltreatment per 10,000 Office of Children's Services (OCS). Rate of non-duplicated children per 10,000 (ages 0-17) that are referred to the Office of Children's Services for substantiated incidents of sexual maltreatment. Sexual maltreatment includes sexual abuse (sexual assault, sexual abuse of a minor, incest, online enticement of a minor, unlawful exploitation of a minor, indecent exposure), sexual exploitation (allowing, permitting, or encouraging child prostitution), and prostitution or promoting prostitution. Most current Alaska data are from 2010 and previous Alaska data are from 2009. For the purpose of the dashboard, this indicator is not used to measure rates of victimization. It is used to measure rates of reporting harm.

Adult and Elder Victimization

7. Percent of women experiencing intimate partner violence in past year

Alaska Victimization Survey (AVS). In 2010, over 800 adult women were asked if in the past year, an intimate partner (a) "Made threats to physically harm you?" (b) "Slapped you?" (c) "Pushed or shoved you?" (d) "Hit you with a fist or something hard?" (e) "Kicked you?" (f) "Hurt you by pulling your hair?" (g) "Slammed you against something?" (h) "Tried to hurt you by choking or suffocating you?" (i) "Beaten you?" (j) "Burned you on purpose?" or (k) "Used a knife or gun on you?" Most current Alaska data are from 2010.

8. Percent of women experiencing sexual violence in past year

Alaska Victimization Survey (AVS). In 2010, over 800 adult women were asked "When you were drunk, high, drugged, or passed out and unable to consent" in the past year, has anyone (a) "Had vaginal sex with you?" (b) "Made you receive anal sex?" (c) "Made you perform oral sex?" or (d) "Made you receive oral sex?" and has anyone in the past year "used physical force or threats to physically harm you to" (a) "Make you have vaginal sex" (b) "Make you receive anal sex?" (c) "Make you perform oral sex?" (d) "Make you receive oral sex?" (e) "Put their fingers or an object in your vagina or anus?" or (f) "Try to have vaginal, oral, or anal sex with you, but sex did not happen?" Most current Alaska data are from 2010.

9. Percent of pregnant women experiencing intimate partner physical abuse

Pregnancy Risk Assessment Monitoring System (PRAMS). Each year, one of every six women who delivered a live-born infant is asked "During your most recent pregnancy, did your husband or partner push, hit, slap, kick, choke, or physically hurt you in any other way?" Most current Alaska data are from 2010 and previous Alaska data are from 2009.

Reports of Harm (Adult and Elder)

10. Number of vulnerable adults reporting abuse or neglect

Adult Protective Services (APS). Number of vulnerable adults with a substantiated allegation of abuse or neglect reported to Adult Protective Services. Vulnerable adults are people 18 years of age or older who, because of physical or mental impairment, are unable to meet their own needs or to seek help without assistance. Abuse includes the willful, intentional, or reckless nonaccidental, and nontherapeutic infliction of physical pain, injury, or mental distress; or sexual assault in the first or second degree. Neglect includes the intentional failure by a caregiver to provide essential care or services necessary to maintain the physical and mental health of the vulnerable adult (self-neglect is not included). Most current Alaska data are from 2011 and previous Alaska data are from 2010. For the purpose of the dashboard, this indicator is not used to measure rates of victimization. It is used to measure rates of reporting harm.

11. Number of vulnerable elders reporting abuse or neglect

Adult Protective Services (APS). Number of vulnerable elders with a substantiated allegation of abuse or neglect reported to Adult Protective Services. Vulnerable elders are people 65 years of age or older who, because of physical or mental impairment, are unable to meet their own needs or to seek help without assistance. Abuse includes the willful, intentional, or reckless nonaccidental, and nontherapeutic infliction of physical pain, injury, or mental distress; or sexual assault in the first or second degree. Neglect includes the intentional failure by a caregiver to provide essential care or services necessary to maintain the physical and mental health of the vulnerable adult (self-neglect is not included). Most current Alaska data are from 2011 and previous Alaska data are from 2010. For the purpose of the dashboard, this indicator is not used to measure rates of victimization. It is used to measure rates of reporting harm.

Primary Prevention and Protective Factors

Primary prevention includes approaches before violence has occurred to prevent initial perpetration or victimization

12. Percent of pregnant women whose health provider talked to them about DV

Pregnancy Risk Assessment Monitoring System (PRAMS). Each year, one of every six women who delivered a live-born infant is asked "During any of your prenatal care visits, did a doctor, nurse, or other health care worker talk with you about physical abuse to women by their husbands or partners?" Most current Alaska data are from 2010 and previous Alaska data are from 2009.

13. Percent of students comfortable seeking help from 3 or more adults

Youth Risk Behavior Survey (YRBS). Every two years, over 1,000 students in traditional high schools are asked "Besides your parents, how many adults would you feel comfortable seeking help from if you had an important question affecting your life?" Most current Alaska data are from 2011 and previous Alaska data are from 2009.

14. Percent of schools implementing Fourth R healthy relationship curriculum

Department of Education & Early Development (DEED). Percentage of public secondary schools that have teachers trained in the Fourth R healthy relationship curriculum. Secondary schools include public high schools, middle schools, and alternative schools. Most current Alaska data are from FY12 and previous Alaska data are from FY11.

Reports to Law Enforcement

15. Rate of forcible rape reported to law enforcement per 10,000

Uniform Crime Reports (UCR). Rate of forcible rape reported to most law enforcement agencies in Alaska per 10,000 population. Forcible rape is defined as the carnal knowledge of a female forcibly and against her will. Attempted forcible rapes are included, regardless of the age of the victim. Statutory offenses (no force used – victim under age of consent) are excluded. To obtain rates per 100,000, multiply the rates per 10,000 by 10. Most current Alaska data are from 2010 and previous Alaska data are from 2009.

16. Number of domestic violence related homicides reported to law enforcement

Alaska Department of Public Safety (DPS). Number of homicides (willful nonnegligent killings) known to law enforcement that occurred in Alaska where the homicide was committed by a household member against another household member. Household members include adults or minors who are current or former spouses, who live together or who have lived together, who are dating or who have dated, who are engaged in or who have engaged in a sexual relationship, who are related to each other up to the fourth degree of consanguinity, who are related or formerly related by marriage, who have a child of the relationship. Household members also include children of a person in any of these relationships. In some cases, the relationship of the victim to the offender is unknown. These cases are not included in the number of domestic violence related homicides. Most current data are from 2010 and previous Alaska data are from 2009.

17. Number of elderly victims reporting DV-related sexual/physical assaults to AST

Alaska Department of Public Safety (DPS). Number of elderly victims (age 60 or older) who reported an assault involving domestic violence or a sexual assault involving domestic violence to Alaska State Troopers. This is the unduplicated count of victims, not the count of offenses or cases. In addition, each victim is counted only once per year. This number does not include offenses reported to local or municipal police departments. This number also does not include other domestic violence offenses (other crimes against the person, burglary, criminal trespass, arson or criminally negligent burning, criminal mischief, terrorist threatening, violating a protective order, and harassment). Crimes are domestic violence related if they occur between household members (i.e., adults or minors who are current or former spouses, who live together or who have lived together, who are dating or who have dated, who are engaged in or who have engaged in a sexual relationship, who are related to each other up to the fourth degree of consanguinity, or who are related or formerly related by marriage; persons who have a child of the relationship; and minor children of a person in any of these relationships). Most current data are from 2010 and previous Alaska data are from 2009.

Utilization of Services

18. Rate of children evaluated by child advocacy centers per 10,000

Alaska Children's Alliance (ACA). Number of children evaluated at a child advocacy center (duplicated count) per 10,000 children ages 0-17. Children are evaluated at child advocacy centers for allegations of child sexual abuse or assault, child physical abuse, drug endangerment, witnessing violent events in the home where they are present, and neglect or medical failure to thrive. Most current Alaska data are from state fiscal year 2010 and previous Alaska data are from state fiscal year 2009.

19. Rate of adults utilizing services for domestic violence per 10,000

Council on Domestic Violence and Sexual Assault (CDVSA). Number of unduplicated adults per 10,000 adults (age 18 and older) who utilized services from a CDVSA-funded domestic violence and sexual assault service agency, and who were recorded at that agency as being a primary victim of domestic violence. Primary victims are adults who are directly harmed, either physically or emotionally, by the actions of another. Domestic violence is defined as any pattern of coercive behavior that is used by one person to gain power and control over a current or former intimate partner. Domestic violence includes dating violence, which is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the program participant. Most current Alaska data are from state fiscal year 2011 and previous Alaska data are from state fiscal year 2010.

20. Rate of children with adults in domestic violence services per 10,000

Council on Domestic Violence and Sexual Assault (CDVSA). Number of unduplicated minors per 10,000 minors (ages 0-17) who utilized services from a CDVSA-funded domestic violence or sexual assault service agency, and who were recorded as being a secondary victim of domestic violence. Secondary victims are minors beyond the immediate victim who have been affected by the repercussions of an event or events. These may include child witnesses who although not the direct target of abuse, have been affected. This number does not include minors who were primary victims of domestic violence (even if they were also secondary victims). Domestic violence is defined as any pattern of coercive behavior that is used by one person to gain power and control over a current or former intimate partner. Domestic violence includes dating violence, which is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the program participant. Most current Alaska data are from state fiscal year 2011 and previous Alaska data are from state fiscal year 2010.

21. Rate of adults utilizing services for sexual assault per 10,000
Council on Domestic Violence and Sexual Assault (CDVSA). Number of unduplicated adults per 10,000 adults (age 18 and older) who utilized services from a CDVSA-funded domestic violence and sexual assault service agency, and who were recorded at that agency as being primary victims of sexual assault. Primary victims are adults who are directly harmed, either physically or emotionally, by the actions of another. Sexual assault includes both assaults committed by offenders who are strangers to the program participants and assaults committed by offenders who are known to, related by blood or marriage to, or in a dating relationship with the program participant. Most current Alaska data are from state fiscal year 2011 and previous Alaska data are from state fiscal year 2010.

22. Rate of youth utilizing services for domestic violence per 10,000
Council on Domestic Violence and Sexual Assault (CDVSA). Number of unduplicated youth per 10,000 youth (ages 12-17) who utilized services from a CDVSA-funded domestic violence and sexual assault service agency, and who were recorded at that agency as being a primary victim of domestic violence. Primary victims are youth who are directly harmed, either physically or emotionally, by the actions of another. Domestic violence is defined as any pattern of coercive behavior that is used by one person to gain power and control over a current or former intimate partner. Domestic violence includes dating violence, which is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the program participant. Most current Alaska data are from state fiscal year 2011 and previous Alaska data are from state fiscal year 2010.

23. Rate of youth utilizing services for sexual assault per 10,000
Council on Domestic Violence and Sexual Assault (CDVSA). Number of unduplicated youth per 10,000 youth (ages 12-17) who utilized services from a CDVSA-funded domestic violence and sexual assault service agency, and who were recorded at that agency as being primary victims of sexual assault. Primary victims are youth who are directly harmed, either physically or emotionally, by the actions of another. Sexual assault includes both assaults committed by offenders who are strangers to the program participants and assaults committed by offenders who are known to, related by blood or marriage to, or in a dating relationship with the program participant. Most current Alaska data are from state fiscal year 2011 and previous Alaska data are from state fiscal year 2010.

Offender Accountability

24. Percent of reported forcible rapes resulting in an arrest
Alaska Department of Public Safety (Crime Reported in Alaska). Number of offenses cleared by arrest or exceptional means per actual offenses reported or known to law enforcement. Unfounded complaints are excluded. Most current Alaska data are from 2010 and previous Alaska data are from 2009.

25. Rate of juveniles referred for sex offenses per 10,000
Alaska Division of Juvenile Justice (DJJ). Rate of non-duplicated juveniles per 10,000 (ages 11-17) that are referred to the Alaska Division of Juvenile Justice for sexual assault in the first to fourth degree or sexual abuse of a minor in the first to fourth degree. Most current Alaska data are from FY11 and previous Alaska data are from FY10.

26. Rate of juveniles referred for a DV-related assault per 10,000
Alaska Division of Juvenile Justice (DJJ). Rate of non-duplicated juveniles per 10,000 (ages 11-17) that are referred to the Alaska Division of Juvenile Justice for domestic violence related assault in the first to fourth degree. An assault is domestic violence related if it occurred between household members (i.e., minors who are current or former spouses, who live together or who have lived together, who are dating or who have dated, who are engaged in or who have engaged in a sexual relationship, who are related to each other up to the fourth degree of consanguinity, or who are related or formerly related by marriage; persons who have a child of the relationship; and minor children of a person in any of these relationships). Most current Alaska data are for FY11 (these were extrapolated from data that were available from 2/23/11 to 6/30/11). These data were not collected prior to 2/23/11.

27. Number of sexual assault cases accepted for prosecution
Alaska Department of Law (DOL). Number of cases referred to the Alaska Department of Law that were accepted for prosecution with a sexual assault charge in the first, second, third, or fourth degree. A case is accepted for prosecution when the district attorney's office, after reviewing the file and evidence, determines that there is sufficient credible evidence to convict a specific person of the particular crime. Most current Alaska data are from 2009 and previous Alaska data are from 2008.

28. Percent of accepted sexual assault cases with a conviction
Alaska Department of Law (DOL). Percent of sexual assault cases accepted for prosecution that resulted in a conviction. Percentage is based on the number of cases accepted for prosecution with a sexual assault charge in the first, second, third, or fourth degree. A conviction is an accepted charge resulting in a finding of guilt (on any charge). A finding of guilt can occur through plea bargaining or being found guilty beyond a reasonable doubt by either a judge or jury. Most current Alaska data are from 2009 and previous Alaska data are from 2008. Conviction data were retrieved on 11/10/11. Data across years are not directly comparable because recent cases are more likely to be pending prosecution at the time of the data retrieval than older cases.

29. Number of abuse of minor cases accepted for prosecution
Alaska Department of Law (DOL). Number of cases referred to the Alaska Department of Law that were accepted for prosecution with a sexual abuse of a minor charge in the first, second, third, or fourth degree. A case is accepted for prosecution when the district attorney's office, after reviewing the file and evidence, determines that there is sufficient credible evidence to convict a specific person of the particular crime. Most current Alaska data are from 2009 and previous Alaska data are from 2008.

30. Percent of accepted sexual abuse of minor cases with a conviction
Alaska Department of Law (DOL). Percent of sexual abuse of minor cases accepted for prosecution that resulted in a conviction. Percentage is based on the number of cases accepted for prosecution with a sexual abuse of a minor charge in the first, second, third, or fourth degree. A conviction is an accepted charge resulting in a finding of guilt (on any charge). A finding of guilt can occur through plea bargaining or being found guilty beyond a reasonable doubt by either a judge or jury. Most current Alaska data are from 2009 and previous Alaska data are from 2008. Conviction data were retrieved on 11/10/11. Data across years are not directly comparable because recent cases are more likely to be pending prosecution at the time of the data retrieval than older cases.

31. Number of domestic violence cases accepted for prosecution
Alaska Department of Law (DOL). Number of cases referred to the Alaska Department of Law that were accepted for prosecution with an assault charge in the first, second, third, or fourth degree involving domestic violence. Most current Alaska data are from 2009 and previous Alaska data are from 2008.

32. Percent of accepted domestic violence cases with a conviction
Alaska Department of Law (DOL). Percent of assault cases involving domestic violence accepted for prosecution that resulted in a conviction for an assault involving domestic violence. Percentage is based on the number of cases accepted for prosecution with an assault charge in the first, second, third, or fourth degree involving domestic violence. Most current Alaska data are from 2009 and previous Alaska data are from 2008. Conviction data were retrieved on 11/10/11. Data across years are not directly comparable because recent cases are more likely to be pending prosecution at the time of the data retrieval than older cases.

Intimate Partner Violence and Sexual Violence in the State of Alaska:

Key Results from the 2010 Alaska Victimization Survey

Out of every 100 adult women who reside in the State of Alaska:

48 experienced intimate partner violence (IPV):

37 experienced sexual violence:

59 experienced intimate partner violence, sexual violence, or both:

These lifetime estimates come from a 2010 survey of adult women in the State of Alaska.
Source: UAA Justice Center, Alaska Victimization Survey, http://justice.uaa.alaska.edu/avs.

Purpose of the Survey

Every human being has the right to be safe and free from violence in their own homes, in their relationships, and in their community. Intimate partner violence and sexual violence are endemic problems. Up until now, comprehensive statewide data were not available to guide planning and policy development or to evaluate the impact of prevention and intervention services. This study provides the first definitive measures of intimate partner violence and sexual violence for the State of Alaska. The survey was designed to establish a baseline for the State. Results can be used to support prevention and intervention efforts that reduce violence against women.

Methodology

A total of 871 adult women in Alaska participated in the survey. Respondents were randomly selected by phone (using both land lines and cell phones) in May and June of 2010. Respondents were asked behaviorally specific questions about intimate partner violence (both threats and physical violence). Intimate partners included romantic and sexual partners. Respondents were also asked about sexual violence (both alcohol or drug involved sexual assault and forcible sexual assault). These questions were not limited to intimate partners. Procedures were designed to maximize the safety and confidentiality of all respondents. The survey was approved by multiple institutional review boards and was supported by the Alaska Council on Domestic Violence and Sexual Assault.

Acknowledgments

We sincerely thank the 871 adult women in Alaska who invested time and effort to participate in this victimization survey. They re-lived horrendous experiences, experiences that no one should be subjected to, to help the rest of us understand the extent of intimate partner and sexual violence in Alaska. Funding for this project was provided by the Alaska Council on Domestic Violence and Sexual Assault. The survey was administered by RTI International. Data were analyzed by the UAA Justice Center.

Intimate Partner Violence and Sexual Violence in the State of Alaska: Key Results from the 2010 Alaska Victimization Survey

Key Estimates

The following table shows the percentage and number of adult women in the State of Alaska who experienced each form of violence. All estimates were weighted to control for selection, non-response, and coverage. Estimates show that 58.6% of adult women in Alaska (or 144,881) experienced sexual violence, intimate partner violence, or both, in their lifetime; and 11.8% (or 29,174) experienced these forms of violence in the past year.

Measures of Violence	Lifetime		Past Year	
	%	N	%	N
Intimate partner violence (composite)	47.6%	117,685	9.4%	23,240
Threats of physical violence	31.0%	76,644	5.8%	14,340
Physical violence	44.8%	110,763	8.6%	21,262
Sexual violence (composite)	37.1%	91,725	4.3%	10,631
Alcohol or drug involved sexual assault	26.8%	66,260	3.6%	8,901
Forcible sexual assault	25.6%	63,293	2.5%	6,181
Any Violence (composite)	**58.6%**	**144,881**	**11.8%**	**29,174**

Intimate Partner Violence Estimates:

The intimate partner violence composite includes both threats of physical violence and physical violence.

- 47.6% of adult women (or 117,685) experienced intimate partner violence in their lifetime, with:
  - 31.0% (or 76,644) experiencing threats of physical violence, and
  - 44.8% (or 110,763) experiencing physical violence.
- 9.4% of adult women (or 23,240) experienced intimate partner violence in the past year, with:
  - 5.8% (or 14,340) experiencing threats of physical violence, and
  - 8.6% (or 21,262) experiencing physical violence.

Sexual Violence Estimates:

The sexual violence composite includes both alcohol or drug involved sexual assault and forcible sexual assault.

- 37.1% of adult women (or 91,725) experienced sexual violence in their lifetime, with:
  - 26.8% (or 66,260) experiencing at least one alcohol or drug involved sexual assault, and
  - 25.6% (or 63,293) experiencing at least one forcible sexual assault.
- 4.3% of adult women (or 10,631) experienced sexual violence in the past year, with:
  - 3.6% (or 8,901) experiencing at least one alcohol or drug involved sexual assault, and
  - 2.5% (or 6,181) experiencing at least one forcible sexual assault.

Important Limitations

The survey excluded non-English speaking women, women without phone access, and women not living in a residence. Estimates may be higher among women excluded from the survey. Estimates may also be conservative because of the continuing stigma of reporting victimization. This survey measured the number of *victims*, not the number of *victimizations*. In addition, not all forms of intimate partner violence or sexual violence were measured.

For additional information on the Alaska Victimization Survey, please visit http://justice.uaa.alaska.edu/avs, or contact André Rosay with the UAA Justice Center (907-786-1821) or Lauree Morton with the Council on Domestic Violence and Sexual Assault (907-465-5503). National, statewide, and local resources for domestic violence, sexual assault, stalking, and teen dating abuse can be found online at: http://gov.alaska.gov/parnell/priorities/choose-respect/links-to-organizations.html.

Intimate Partner Violence and Sexual Violence in the Municipality of Anchorage:

Key Results from the 2011 Alaska Victimization Survey

CDVSA
Council on Domestic Violence & Sexual Assault
Safety ★ Prevention ★ Accountability

Out of every 100 adult women who reside in the Municipality of Anchorage:

42 experienced intimate partner violence (IPV):

30 experienced sexual violence:

51 experienced intimate partner violence, sexual violence, or both:

These lifetime estimates come from a 2011 survey of adult women in the Municipality of Anchorage.
Source: UAA Justice Center, Alaska Victimization Survey, http://justice.uaa.alaska.edu/avs.

Purpose of the Survey

Every human being has the right to be safe and free from violence in their own homes, in their relationships, and in their community. Intimate partner violence and sexual violence are endemic problems. Up until now, regional data were not available to guide planning and policy development or to evaluate the impact of prevention and intervention services. This study provides the first definitive measures of intimate partner violence and sexual violence for the Municipality of Anchorage. The survey was designed to establish a baseline for the Municipality of Anchorage. Results can be used to support prevention and intervention efforts that reduce violence against women.

Methodology

A total of 710 adult women from the Municipality of Anchorage participated in the survey. Respondents were randomly selected by phone (using both land lines and cell phones) from April 2011 to June 2011. Respondents were asked behaviorally specific questions about intimate partner violence (both threats and physical violence). Intimate partners included romantic and sexual partners. Respondents were also asked about sexual violence (both alcohol or drug involved sexual assault and forcible sexual assault). These questions were not limited to intimate partners. Procedures were designed to maximize the safety and confidentiality of all respondents. The survey was approved by multiple institutional review boards and was supported by Standing Together Against Rape (STAR) and Abused Women's Aid in Crisis (AWAIC).

Acknowledgments

We sincerely thank the 710 adult women in the Municipality of Anchorage who invested time and effort to participate in the Alaska victimization survey. They re-lived horrendous experiences, experiences that no one should be subjected to, to help the rest of us understand the extent of intimate partner and sexual violence in the Municipality of Anchorage. We also thank STAR and AWAIC. Funding for this project was provided by the Alaska Council on Domestic Violence and Sexual Assault, with additional funding from the Governor's Choose Respect Initiative to end the epidemic of domestic violence and sexual assault in Alaska. The survey was administered by RTI International. Data were analyzed by the UAA Justice Center.

Intimate Partner Violence and Sexual Violence in the Municipality of Anchorage: Key Results from the 2011 Alaska Victimization Survey

Key Estimates

The following table shows the percentage and number of adult women in the Municipality of Anchorage who experienced each form of violence. All estimates were weighted to control for selection, non-response, and coverage. Estimates show that 50.9% of adult women in the Municipality of Anchorage (or 54,313) experienced sexual violence, intimate partner violence, or both, in their lifetime; and 8.5% (or 9,070) experienced these forms of violence in the past year.

Measures of Violence	Lifetime		Past Year	
	%	N	%	N
Intimate partner violence (composite)	42.2%	45,030	8.2%	8,750
Threats of physical violence	22.8%	24,329	3.6%	3,841
Physical violence	41.6%	44,390	8.1%	8,643
Sexual violence (composite)	29.6%	31,585	1.4%	1,494
Alcohol or drug involved sexual assault	18.0%	19,207	1.2%	1,280
Forcible sexual assault	22.8%	24,329	0.4%	427
Any Violence (composite)	**50.9%**	**54,313**	**8.5%**	**9,070**

Intimate Partner Violence Estimates:

The intimate partner violence composite includes both threats of physical violence and physical violence.

- 42.2% of adult women (or 45,030) experienced intimate partner violence in their lifetime, with:
  - 22.8% (or 24,329) experiencing threats of physical violence, and
  - 41.6% (or 44,390) experiencing physical violence.
- 8.2% of adult women (or 8,750) experienced intimate partner violence in the past year, with:
  - 3.6% (or 3,841) experiencing threats of physical violence, and
  - 8.1% (or 8,643) experiencing physical violence.

Sexual Violence Estimates:

The sexual violence composite includes both alcohol or drug involved sexual assault and forcible sexual assault.

- 29.6% of adult women (or 31,585) experienced sexual violence in their lifetime, with:
  - 18.0% (or 19,207) experiencing at least one alcohol or drug involved sexual assault, and
  - 22.8% (or 24,329) experiencing at least one forcible sexual assault.
- 1.4% of adult women (or 1,494) experienced sexual violence in the past year, with:
  - 1.2% (or 1,280) experiencing at least one alcohol or drug involved sexual assault, and
  - 0.4% (or 427) experiencing at least one forcible sexual assault.

Important Limitations

The survey excluded non-English speaking women, women without phone access, and women not living in a residence. Estimates may be higher among women excluded from the survey. Estimates may also be conservative because of the continuing stigma of reporting victimization. This survey measured the number of *victims*, not the number of *victimizations*. In addition, not all forms of intimate partner violence or sexual violence were measured. All of these limitations may vary across regions. As a result, the validity of regional comparisons remains unknown.

For additional information on the Alaska Victimization Survey, please visit http://justice.uaa.alaska.edu/avs, or contact André Rosay with the UAA Justice Center (907-786-1821) or Lauree Morton with the Council on Domestic Violence and Sexual Assault (907-465-5503). STAR provides options, support, and information to Alaskans affected by sexual violence. Their crisis line is 1-800-748-8999. AWAIC offers safe shelter and intervention to those affected by domestic violence. Their crisis line is 907-272-0100.

Intimate Partner Violence and Sexual Violence in the City of Fairbanks: Key Results from the 2011 Alaska Victimization Survey

CDVSA
Council on Domestic Violence & Sexual Assault
Safety ★ Prevention ★ Accountability

Out of every 100 adult women who reside in the City of Fairbanks:

50 experienced intimate partner violence (IPV):

31 experienced sexual violence:

57 experienced intimate partner violence, sexual violence, or both:

These lifetime estimates come from a 2011 survey of adult women in the City of Fairbanks.
Source: UAA Justice Center, Alaska Victimization Survey, http://justice.uaa.alaska.edu/avs.

Purpose of the Survey

Every human being has the right to be safe and free from violence in their own homes, in their relationships, and in their community. Intimate partner violence and sexual violence are endemic problems. Up until now, regional data were not available to guide planning and policy development or to evaluate the impact of prevention and intervention services. This study provides the first definitive measures of intimate partner violence and sexual violence for the City of Fairbanks. The survey was designed to establish a baseline for the City of Fairbanks. Results can be used to support prevention and intervention efforts that reduce violence against women.

Methodology

A total of 615 adult women from the City of Fairbanks participated in the survey. Respondents were randomly selected by phone (using both land lines and cell phones) from April 2011 to June 2011. Respondents were asked behaviorally specific questions about intimate partner violence (both threats and physical violence). Intimate partners included romantic and sexual partners. Respondents were also asked about sexual violence (both alcohol or drug involved sexual assault and forcible sexual assault). These questions were not limited to intimate partners. Procedures were designed to maximize the safety and confidentiality of all respondents. The survey was approved by multiple institutional review boards and was supported by the Interior Alaska Center for Non-Violent Living and the Fairbanks Domestic Violence Task Force.

Acknowledgments

We sincerely thank the 615 adult women in the City of Fairbanks who invested time and effort to participate in the Alaska victimization survey. They re-lived horrendous experiences, experiences that no one should be subjected to, to help the rest of us understand the extent of intimate partner and sexual violence in the City of Fairbanks. We also thank the Interior Alaska Center for Non-Violent Living and the Fairbanks Domestic Violence Task Force. Funding for this project was provided by the Alaska Council on Domestic Violence and Sexual Assault, with additional funding from the Governor's Choose Respect Initiative to end the epidemic of domestic violence and sexual assault in Alaska. The survey was administered by RTI International. Data were analyzed by the UAA Justice Center.

Intimate Partner Violence and Sexual Violence in the City of Fairbanks: Key Results from the 2011 Alaska Victimization Survey

Key Estimates

The following table shows the percentage and number of adult women in the City of Fairbanks who experienced each form of violence. All estimates were weighted to control for selection, non-response, and coverage. Estimates show that 57.0% of adult women in the City of Fairbanks (or 6,142) experienced sexual violence, intimate partner violence, or both, in their lifetime; and 11.5% (or 1,239) experienced these forms of violence in the past year.

Measures of Violence	Lifetime		Past Year	
	%	N	%	N
Intimate partner violence (composite)	49.5%	5,334	10.8%	1,164
Threats of physical violence	30.2%	3,254	6.8%	733
Physical violence	48.8%	5,258	10.3%	1,110
Sexual violence (composite)	31.4%	3,383	2.7%	291
Alcohol or drug involved sexual assault	18.0%	1,940	2.5%	269
Forcible sexual assault	25.3%	2,726	1.4%	151
Any Violence (composite)	**57.0%**	**6,142**	**11.5%**	**1,239**

Intimate Partner Violence Estimates:

The intimate partner violence composite includes both threats of physical violence and physical violence.

- 49.5% of adult women (or 5,334) experienced intimate partner violence in their lifetime, with:
  - 30.2% (or 3,254) experiencing threats of physical violence, and
  - 48.8% (or 5,258) experiencing physical violence.
- 10.8% of adult women (or 1,164) experienced intimate partner violence in the past year, with:
  - 6.8% (or 733) experiencing threats of physical violence, and
  - 10.3% (or 1,110) experiencing physical violence.

Sexual Violence Estimates:

The sexual violence composite includes both alcohol or drug involved sexual assault and forcible sexual assault.

- 31.4% of adult women (or 3,383) experienced sexual violence in their lifetime, with:
  - 18.0% (or 1,940) experiencing at least one alcohol or drug involved sexual assault, and
  - 25.3% (or 2,726) experiencing at least one forcible sexual assault.
- 2.7% of adult women (or 291) experienced sexual violence in the past year, with:
  - 2.5% (or 269) experiencing at least one alcohol or drug involved sexual assault, and
  - 1.4% (or 151) experiencing at least one forcible sexual assault.

Important Limitations

The survey excluded non-English speaking women, women without phone access, and women not living in a residence. Estimates may be higher among women excluded from the survey. Estimates may also be conservative because of the continuing stigma of reporting victimization. This survey measured the number of *victims*, not the number of *victimizations*. In addition, not all forms of intimate partner violence or sexual violence were measured. All of these limitations may vary across regions. As a result, the validity of regional comparisons remains unknown.

For additional information on the Alaska Victimization Survey, please visit http://justice.uaa.alaska.edu/avs, or contact André Rosay with the UAA Justice Center (907-786-1821) or Lauree Morton with the Council on Domestic Violence and Sexual Assault (907-465-5503). The Interior Alaska Center for Non-Violent Living provides advocacy and support, legal advocacy, shelter, transitional housing, and community education (www.iacnvl.org). 24/7 confidential support is available at (907) 452-2293 or 1(800) 478-7273.

Intimate Partner Violence and Sexual Violence in the City and Borough of Juneau: Key Results from the 2011 Alaska Victimization Survey

Out of every 100 adult women who reside in the City and Borough of Juneau:

47 experienced intimate partner violence (IPV):

35 experienced sexual violence:

55 experienced intimate partner violence, sexual violence, or both:

These lifetime estimates come from a 2011 survey of adult women in the City and Borough of Juneau.
Source: UAA Justice Center, Alaska Victimization Survey, http://justice.uaa.alaska.edu/avs.

Purpose of the Survey

Every human being has the right to be safe and free from violence in their own homes, in their relationships, and in their community. Intimate partner violence and sexual violence are endemic problems. Up until now, regional data were not available to guide planning and policy development or to evaluate the impact of prevention and intervention services. This study provides the first definitive measures of intimate partner violence and sexual violence for the City and Borough of Juneau. The survey was designed to establish a baseline for the City and Borough of Juneau. Results can be used to support prevention and intervention efforts that reduce violence against women.

Methodology

A total of 601 adult women from the City and Borough of Juneau participated in the survey. Respondents were randomly selected by phone (using both land lines and cell phones) from April 2011 to June 2011. Respondents were asked behaviorally specific questions about intimate partner violence (both threats and physical violence). Intimate partners included romantic and sexual partners. Respondents were also asked about sexual violence (both alcohol or drug involved sexual assault and forcible sexual assault). These questions were not limited to intimate partners. Procedures were designed to maximize the safety and confidentiality of all respondents. The survey was approved by multiple institutional review boards and was supported by Aiding Women in Abuse and Rape Emergencies (AWARE).

Acknowledgments

We sincerely thank the 601 adult women in the City and Borough of Juneau who invested time and effort to participate in the Alaska victimization survey. They re-lived horrendous experiences, experiences that no one should be subjected to, to help the rest of us understand the extent of intimate partner and sexual violence in the City and Borough of Juneau. We also thank AWARE. Funding for this project was provided by the Alaska Council on Domestic Violence and Sexual Assault, with additional funding from the Governor's Choose Respect Initiative to end the epidemic of domestic violence and sexual assault in Alaska. The survey was administered by RTI International. Data were analyzed by the UAA Justice Center.

Intimate Partner Violence and Sexual Violence in the City and Borough of Juneau: Key Results from the 2011 Alaska Victimization Survey

Key Estimates

The following table shows the percentage and number of adult women in the City and Borough of Juneau who experienced each form of violence. All estimates were weighted to control for selection, non-response, and coverage. Estimates show that 55.4% of adult women in the City and Borough of Juneau (or 6,521) experienced sexual violence, intimate partner violence, or both, in their lifetime; and 12.6% (or 1,483) experienced these forms of violence in the past year.

Measures of Violence	Lifetime		Past Year	
	%	N	%	N
Intimate partner violence (composite)	47.1%	5,544	12.1%	1,424
Threats of physical violence	23.2%	2,731	7.0%	824
Physical violence	45.2%	5,320	10.4%	1,224
Sexual violence (composite)	35.3%	4,155	1.0%	118
Alcohol or drug involved sexual assault	22.1%	2,601	0.5%	59
Forcible sexual assault	23.4%	2,754	0.6%	71
Any Violence (composite)	**55.4%**	**6,521**	**12.6%**	**1,483**

Intimate Partner Violence Estimates:

The intimate partner violence composite includes both threats of physical violence and physical violence.

- 47.1% of adult women (or 5,544) experienced intimate partner violence in their lifetime, with:
  - 23.2% (or 2,731) experiencing threats of physical violence, and
  - 45.2% (or 5,320) experiencing physical violence.
- 12.1% of adult women (or 1,424) experienced intimate partner violence in the past year, with:
  - 7.0% (or 824) experiencing threats of physical violence, and
  - 10.4% (or 1,224) experiencing physical violence.

Sexual Violence Estimates:

The sexual violence composite includes both alcohol or drug involved sexual assault and forcible sexual assault.

- 35.3% of adult women (or 4,155) experienced sexual violence in their lifetime, with:
  - 22.1% (or 2,601) experiencing at least one alcohol or drug involved sexual assault, and
  - 23.4% (or 2,754) experiencing at least one forcible sexual assault.
- 1.0% of adult women (or 118) experienced sexual violence in the past year, with:
  - 0.5% (or 59) experiencing at least one alcohol or drug involved sexual assault, and
  - 0.6% (or 71) experiencing at least one forcible sexual assault.

Important Limitations

The survey excluded non-English speaking women, women without phone access, and women not living in a residence. Estimates may be higher among women excluded from the survey. Estimates may also be conservative because of the continuing stigma of reporting victimization. This survey measured the number of *victims*, not the number of *victimizations*. In addition, not all forms of intimate partner violence or sexual violence were measured. All of these limitations may vary across regions. As a result, the validity of regional comparisons remains unknown.

For additional information on the Alaska Victimization Survey, please visit http://justice.uaa.alaska.edu/avs, or contact André Rosay with the UAA Justice Center (907-786-1821) or Lauree Morton with the Council on Domestic Violence and Sexual Assault (907-465-5503). AWARE provides comprehensive intervention and prevention, outreach and education regarding domestic violence, sexual assault and child abuse (www.awareak.org). The Juneau crisis line is 907-586-1090. The toll-free crisis line is 1-800-478-1090.

Intimate Partner Violence and Sexual Violence in Bristol Bay:

Key Results from the 2011 Alaska Victimization Survey

CDVSA
Council on Domestic Violence & Sexual Assault
Safety ★ Prevention ★ Accountability

Out of every 100 adult women who reside in the Bristol Bay region:

44 experienced intimate partner violence (IPV):

31 experienced sexual violence:

52 experienced intimate partner violence, sexual violence, or both:

These lifetime estimates come from a 2011 survey of adult women in the Bristol Bay region.
Source: UAA Justice Center, Alaska Victimization Survey, http://justice.uaa.alaska.edu/avs.

Purpose of the Survey

Every human being has the right to be safe and free from violence in their own homes, in their relationships, and in their community. Intimate partner violence and sexual violence are endemic problems. Up until now, regional data were not available to guide planning and policy development or to evaluate the impact of prevention and intervention services. This study provides the first definitive measures of intimate partner violence and sexual violence for the Bristol Bay region. The survey was designed to establish a baseline for the Bristol Bay region. Results can be used to support prevention and intervention efforts that reduce violence against women.

Methodology

A total of 374 adult women from the Dillingham Census Area, the Bristol Bay Borough, and the Lake and Peninsula Borough participated in the survey. Respondents were randomly selected by phone (using both land lines and cell phones) from April 2011 to June 2011. Respondents were asked behaviorally specific questions about intimate partner violence (both threats and physical violence). Intimate partners included romantic and sexual partners. Respondents were also asked about sexual violence (both alcohol or drug involved sexual assault and forcible sexual assault). These questions were not limited to intimate partners. Procedures were designed to maximize the safety and confidentiality of all respondents. The survey was approved by multiple institutional review boards and was supported by the Bristol Bay Native Association and Safe and Fear-Free Environment, Inc. (SAFE).

Acknowledgments

We sincerely thank the 374 adult women in the Bristol Bay region who invested time and effort to participate in the Alaska victimization survey. They re-lived horrendous experiences, experiences that no one should be subjected to, to help the rest of us understand the extent of intimate partner and sexual violence in the Bristol Bay region. We also thank the Bristol Bay Native Association and Safe and Fear-Free Environment, Inc. (SAFE). Funding for this project was provided by the Alaska Council on Domestic Violence and Sexual Assault. Additional funding was provided through the Governor's Choose Respect Initiative to end the epidemic of domestic violence and sexual assault in Alaska. The survey was administered by RTI International. Data were analyzed by the UAA Justice Center.

Intimate Partner Violence and Sexual Violence in Bristol Bay: Key Results from the 2011 Alaska Victimization Survey

Key Estimates

The following table shows the percentage and number of adult women in the Bristol Bay region who experienced each form of violence. All estimates were weighted to control for selection, non-response, and coverage. Estimates show that 51.7% of adult women in the Bristol Bay region (or 1,246) experienced sexual violence, intimate partner violence, or both, in their lifetime; and 14.4% (or 347) experienced these forms of violence in the past year.

Measures of Violence	Lifetime		Past Year	
	%	N	%	N
Intimate partner violence (composite)	44.2%	1,066	12.3%	297
Threats of physical violence	23.7%	571	3.2%	77
Physical violence	43.7%	1,054	12.2%	294
Sexual violence (composite)	31.2%	752	4.4%	106
Alcohol or drug involved sexual assault	22.0%	530	3.7%	89
Forcible sexual assault	22.4%	540	2.0%	48
Any Violence (composite)	**51.7%**	**1,246**	**14.4%**	**347**

Intimate Partner Violence Estimates:

The intimate partner violence composite includes both threats of physical violence and physical violence.

- 44.2% of adult women (or 1,066) experienced intimate partner violence in their lifetime, with:
  - 23.7% (or 571) experiencing threats of physical violence, and
  - 43.7% (or 1,054) experiencing physical violence.
- 12.3% of adult women (or 297) experienced intimate partner violence in the past year, with:
  - 3.2% (or 77) experiencing threats of physical violence, and
  - 12.2% (or 294) experiencing physical violence.

Sexual Violence Estimates:

The sexual violence composite includes both alcohol or drug involved sexual assault and forcible sexual assault.

- 31.2% of adult women (or 752) experienced sexual violence in their lifetime, with:
  - 22.0% (or 530) experiencing at least one alcohol or drug involved sexual assault, and
  - 22.4% (or 540) experiencing at least one forcible sexual assault.
- 4.4% of adult women (or 106) experienced sexual violence in the past year, with:
  - 3.7% (or 89) experiencing at least one alcohol or drug involved sexual assault, and
  - 2.0% (or 48) experiencing at least one forcible sexual assault.

Important Limitations

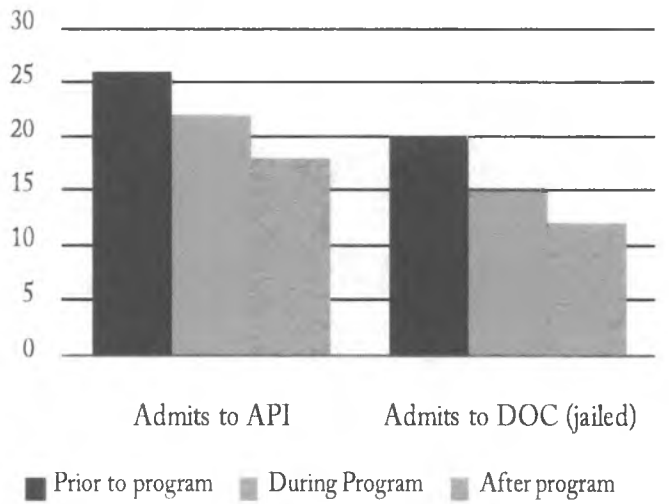
The survey excluded non-English speaking women, women without phone access, and women not living in a residence. Estimates may be higher among women excluded from the survey. Estimates may also be conservative because of the continuing stigma of reporting victimization. This survey measured the number of *victims*, not the number of *victimizations*. In addition, not all forms of intimate partner violence or sexual violence were measured. All of these limitations may vary across regions. As a result, the validity of regional comparisons remains unknown.

For additional information on the Alaska Victimization Survey, please visit http://justice.uaa.alaska.edu/avs, or contact André Rosay with the UAA Justice Center (907-786-1821) or Lauree Morton with the Council on Domestic Violence and Sexual Assault (907-465-5503). SAFE provides shelter, advocacy, and safety for victims and their families of violence in Bristol Bay. To contact SAFE, call the office at 907-842-2320 or the Crisis line at 1-800-478-2316 (http://www.besafeandfree.org).

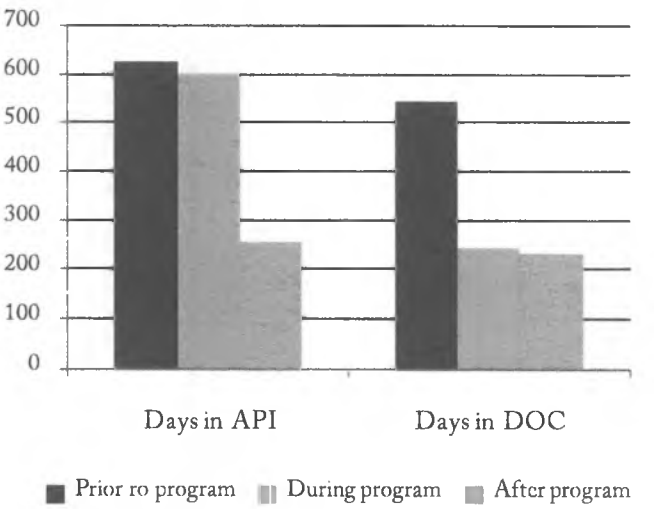
Results for Beneficiaries

Bridge Home program outcomes

API* & DOC** Admits



Days in API* & DOC**



*API = Alaska Psychiatric Institute **DOC = Department of Corrections
Number of Participants = 55 Data from 10/15/10 Grant Report

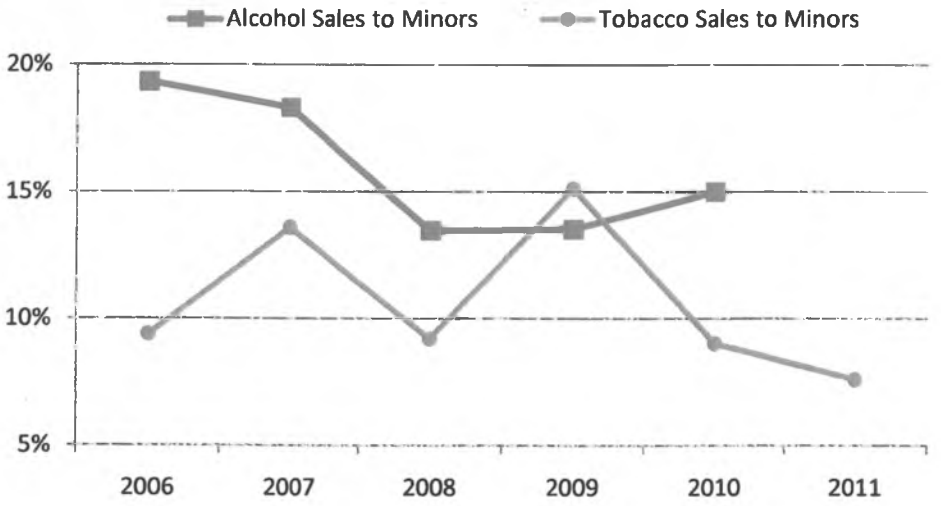
- **Outcomes 1 year prior, 1 year during and 1 year after participation for participants in Bridge Home program at Anchorage Community Mental Health Services**

The TRUST
The Alaska Mental Health Trust Authority

Alaska Alcohol vs. Tobacco Sales to Minors

SFY2006 - 2011

SFY	Alcohol Sales to Minors			Tobacco Sales to Minors *
	A	B	C	
	# Vendor Checks	# Sales	Violation Rate (B / A)	
2006	874	169	19.3%	9.4%
2007	1,037	190	18.3%	13.6%
2008	609	82	13.5%	9.2%
2009	614	83	13.5%	15.1%
2010	700	105	15.0%	9.0%
2011	n/a	n/a		7.6%



* Alaska tobacco sales to minors are represented by the Synar Retailer Violation Rate (RVR). (The federal Synar Amendment requires states to conduct investigations related to the sale of tobacco to minors.)

Synar investigations cross state fiscal years. For instance, the 2011 RVR reflects investigations conducted between June 1 and September 30, 2010. The 2011 RVR is provisional, pending federal approval.

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Remarks at Crime Summit
Senate Judiciary Committee – January 25, 2012
Janet McCabe, Chair, Partners for Progress

Thanks for Focusing on Cost-Effective Justice!

Thank you for recognizing the value Cost-Effective Justice at this summit. I feel very optimistic that under the effective leadership of Carmen Gutierrez in her role as Chair of the Reentry Task Force, the Legislature, Administration, Court System, and the Private Sector have all been actively involved in achieving Smart Justice. Collaboration is the key to "turning the curve" by reducing criminal recidivism and increasing public safety.

This month Senator French sent his constituents a message asking what we thought should be done about crime in Alaska. My answer is: Keep up the pressure to achieve Cost-Effective Justice. Reducing recidivism will take a lot of ongoing attention by the Legislature. It will mean looking at the unintended consequences of some existing laws. Cost-Effective or Smart Justice is more difficult than putting people in jail, but it is the only way to reduce recidivism and cut prison costs in a lasting way. The ripple effects of success are huge, in terms of the wellbeing of families, children, employers and the safety of the community at large.

Commuity Role – How 24/7 Sobriety Monitoring Fits In

There is a growing appreciation of the role and responsibility of the community in achieving Smart Justice goals. Community non-profits and the business sector need to provide reasonable opportunities for housing and employment for returning citizens, and the general public needs to support these efforts.

To build community support, people need to see effective systems in place that protect them against alcohol-induced crime during the period of transition from prison to community, particularly protection against DUI. 24/7 Sobriety Monitoring is a powerful tool for meeting this goal. Partners for Progress opened Anchorage's 24/7 Sobriety Monitoring site last July. The project was designed by a stakeholders' committee led by Anchorage Police Chief Mark Mew, that included AWAIC , DMV and DOC, as well as Municipal and State representatives. The Municipal Prosecutor and I met with Jeff Jessee and he expressed his support. Anchorage Mayor, Dan Sullivan also supports the program, and has included 24/7 as a proposed operating fund item in Anchorage's FY 13 "blue book".

24/7 Participants: The Anchorage Police Department and Municipal Prosecutor proposed that the new program start with a test group of misdemeanants charged with domestic violence, child abuse and neglect having a nexus in alcoholism. The goal was to find offenders who are not abusive or neglectful except when they are drinking. The committee endorsed this proposal as an excellent choice, appropriate for Anchorage, but also because

they thought 24/7 sobriety monitoring of this population would have statewide applicability.

24/7 Program: The municipal prosecutor and public defender select prospective participants for the program. They are offered dismissal of charges at program completion as an inducement to join 24/7. A strong additional motivator is often their desire not to lose custody of their children. If prospective participants accept the offer, they are court-ordered into the program during a session for municipal cases. New participants are enrolled in 24/7 by the Program Manager while still at the courthouse. They start testing that same night.

The 24/7 site is located in a mid-town Anchorage in a commercial building with plenty of parking and bus access. Since July 23rd the site has been open and testing participants every day, morning and evening, regardless of weather. Our site manager is a retired DOC Sergeant.

The program follows the model that was developed in South Dakota and uses the same software and equipment. Under court order, participants must appear at the site between 7 and 9 in the morning and evening. It takes about 45 seconds to give them a breath test. Results are shown to them and recorded in a remote data base. The cost is $2 per test. Spacing of the tests is sufficient to assure absolute sobriety. Incidents of noncompliance are reported from the site to the Municipality and the Court, and sanctions are prompt.

24/7 Results: Data show that the program is effective in keeping people sober. As of Sunday night (1/22/12), 1450 tests had been conducted and 1448 (99.9 %) of those showed no indication of drinking. The program's first participant who entered at the start on July 23 has completed her six-month program with no failed tests. Her charge of child neglect was dismissed. Thus far, one participant tested positive and has failed the program.

24/7 monitoring is not intended as a form of treatment, but, rather, as a tool to assure sobriety. However, the experience of being in 24/7 does appear to have a long-term positive effect on behavior. A study by the South Dakota Attorney General found this to be the case. We will know more definitively at the end of this month when the RAND Corporation will release an impartial evaluation of the program outside. From what they are able to tell us now, the results are very positive.

After observing a session at the Anchorage site, it is not hard to see why the program may have lasting beneficial effects. Participants come in, are greeted warmly, blow a .000, see their test results and leave. Every day, twice a day they are rewarded by the knowledge of one more success. Doing this 180 or 360 times is bound to have an impact. The program requires participants to actively engage in their monitoring and to make contact with

supportive people twice each day. They develop a personal sense of responsibility and create their own success.

Program Size – Expansion Possibilities: The current program is small. We have 10 participants and expect to have a total of 30 this fiscal year from the test group. The site is functioning well, and has an estimated capacity of up to 100. Partners for Progress has been working with the Parole Board, and the Anchorage Probation Office to gain participants from an additional source. They have told us to expect referrals next month.

A highly useful and effective way to make fuller use of the existing Anchorage 24/7 site would require legislation for an Anchorage pilot project. South Dakota makes major use of 24/7 as a tool to assure the sobriety of DUI offenders who would otherwise lose their licenses. Trends in South Dakota since 2005 show a direct correlation between the expansion of 24/7 and a decrease in fatal accidents involving alcohol. The program has worked so well that Primero Insurance reduces SR 22 insurance costs for people on 24/7 by 10 percent.

In Alaska a license to drive is often essential for employment. License revocation creates a Hobson's choice between supporting a family and being lawful. This seems particularly counter-productive for therapeutic court graduates who have developed sobriety and self-sufficiency under a rigorous 18-month program. As one therapeutic court judge has said, "Work, which is critical to rehabilitation and thus public safety, is extremely difficult for people who cannot drive. By denying a license, we limit rehabilitation and increase the risk of ultimate failure."

The Criminal Justice Working Group has recognized this situation, and created a study group to analyze unintended effects of license suspension and revocation. A pilot project allowing Anchorage Wellness Court graduates to drive with a license conditioned on twice-daily 24/7 sobriety monitoring could assist the CJWG study group by demonstrating a new approach to people who would otherwise lose their licenses for life.

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Anchorage 24/7 Sobriety Monitoring

What is 24/7

24/7 Sobriety Monitoring requires twice daily breath tests enforced by swift, certain and proportionate consequences for any indication of alcohol consumption. The program is an excellent system for assuring the absolute all-day, each-day sobriety of offenders who would otherwise have to be incarcerated because of their potential danger to the public as indicated by previous violent or irresponsible behavior while drunk. In Anchorage, where Alaska's first 24/7 site was opened on July 23, the program is currently being used by the Municipality for individuals with misdemeanant Domestic Violence, Assault, Child Abuse and Neglect charges resulting from actions that occurred during episodes of drunkenness.

Provided by

- Partners for Progress funds and manages the test site and keeps it open for two-hour testing sessions in every morning and evening throughout the year.
- The Municipality of Anchorage and the Court System provide swift and certain response to failed tests or no-shows.

Location and Access

- **207 East Northern Lights, Suite 113 in midtown Anchorage**, a large pinkish building at the corner of Northern Lights and Cordova. The building is next to The Greek Corner and directly across from Blockbuster and Chuck E Cheese.
- Enter from the main door at the rear of the building and walk about 20 feet down the hall to the test site in Suite 113 on the right.
- Ample free parking surrounds the building.
- There is a bus stop on Northern Lights directly in front of the building.
- In the evening after 7:00 PM the building is locked and participants must use the intercom or the doorbell at the back entrance to be let in by staff, or call them in the site at 272-1199.

Hours

- Morning testing – 7:00 to 9:00 AM
- Evening testing – 7:00 to 9:00 PM

Costs

- Participants must pay $2.00 a test ($4.00 a day or $28.00 a week) at the site.

Contact

Melanie Edwards, Program Manager
Tel: 907-441-4480
Email: maddhouse@gci.net

24/7 Committee

Chief Mark Mew, APD

Janet McCabe, Chair, Partners for Progress

Doug Wooliver, Alaska Court Administration

Cindy Franklin, Prosecutor, MOA

Captain Ross Plummer, APD

Judge Jim Wanamaker (retired), Partners for Progress

Carmen Gutierrez, DOC

Kevin Waring, Partners for Progress

Claire Waddoup, ED, Partners for Progress

Max Holmquist, Gorton and Logue

Carrie Longoria, MOA, DHHS

Melissa Emmal, AWAIC

Judge Cathy Easter, Anchorage Wellness Court

Judge Dave Wallace, Anchorage Wellness Court

Melanie Edwards, 24/7 Program Manager, Partners for Progress

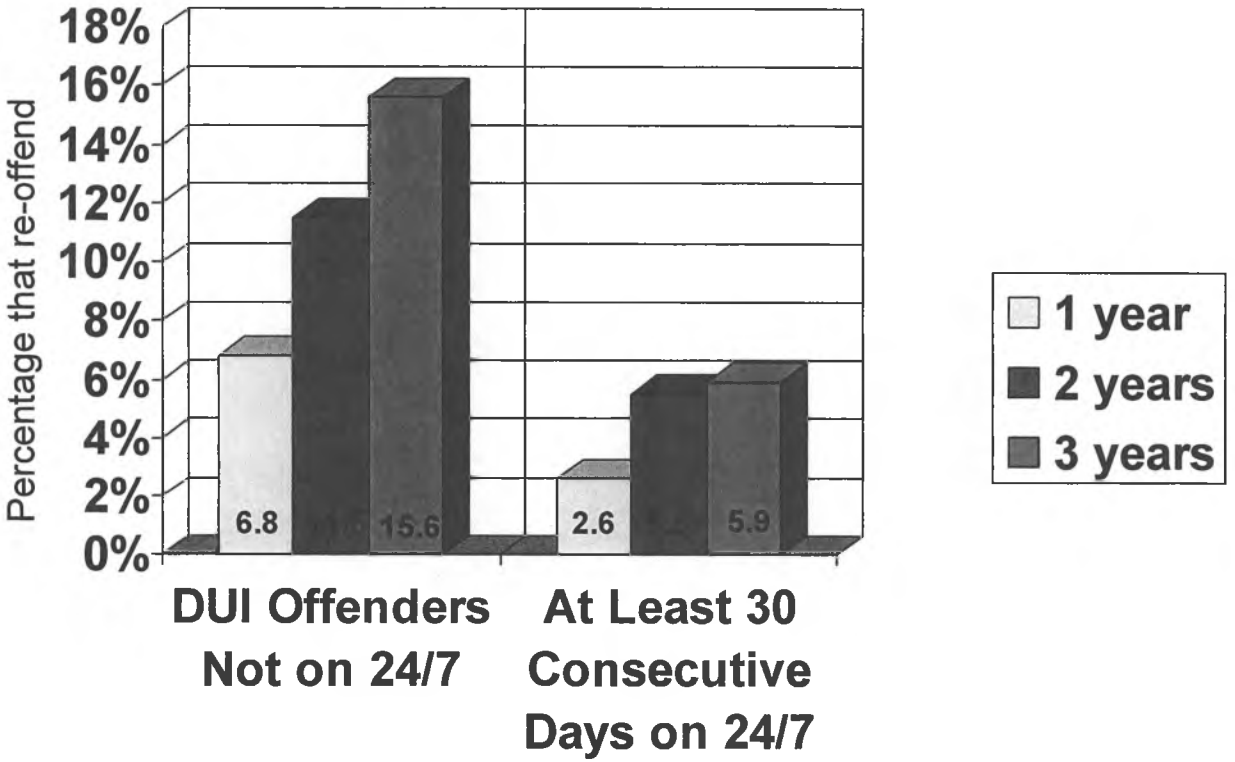
Tiffany Thomas, DMV

Carrie Belden, Executive Director, Alaska Parole Board

Keith Thayer, Anchorage Area Manager

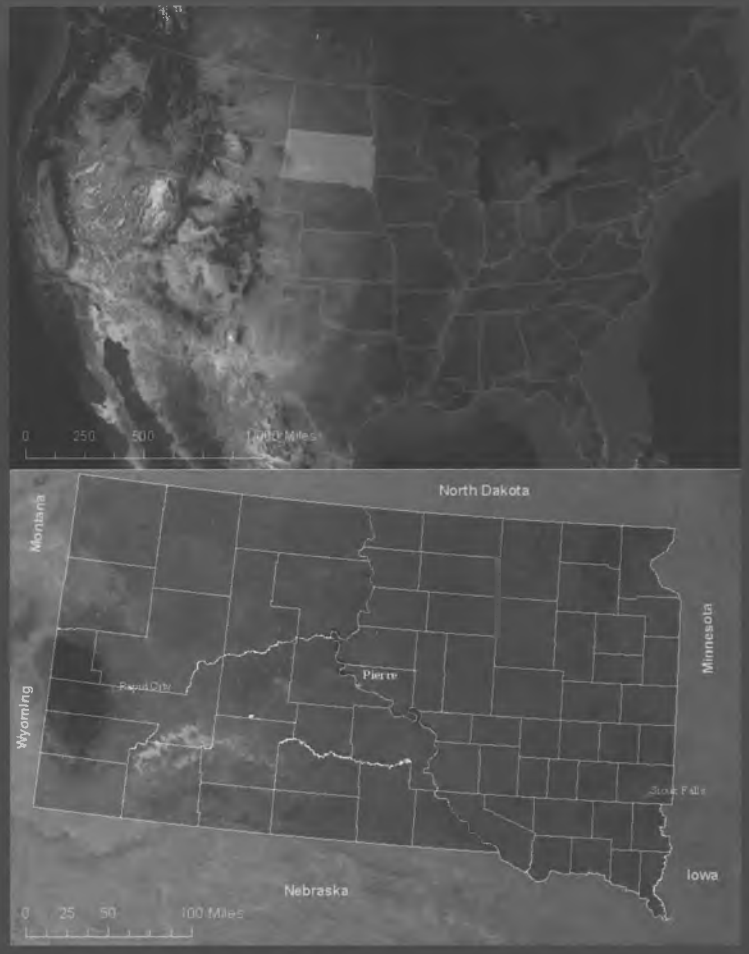
Post-24/7 Recidivism
South Dakota

Analyses by the South Dakota Attorney General's Office found that offenders placed at least 30 consecutive days on 24/7 are subsequently less likely to commit another DUI offense.



SOURCE: South Dakota Attorney General's Office, www.state.sd.us/attorney

South Dakota



- 814,000 people
- 48% live in rural SD
- In 2005, SD ranked 5th worst in alcohol related fatal crashes
- 36% of all felonies were DUIs
- 10% of all males under 50 have been on 24/7

TARGET GROUP and GOAL

- Defendant sobriety- 24/7 (NO ALCOHOL NO DRUGS NO BARS)
- (5 county pilot) Anyone arrested for DUI 2nd or more imposed as a condition of bond
- (And now) – used as a bond condition, DUI 2 or more, vehicular homicide, vehicular battery, bond or post sentence probation any offense, prison parole any offense, family court , domestic violence, DUI court/drug court, and DUI conditional permits

Alco-Sensor FST

The Alco-Sensor FST is the newest instrument in the Alco Sensor product line. Offering rapid and accurate testing. No court challenges and extremely durable instrument. Designed to do 150 test per hour.

BREATH TESTING RESULTS

(LATEST PUBLISHED STATS OCT 2011)
(twice per day is the backbone of 24/7 testing)

- 20,000 PARTICIPANT 2 x day SINCE FEB. 05
- 1,600 ACTIVE PARTICIPANTS STATEWIDE AVE.
- ADMINISTERED 4.22 MILLION TWICE PER DAY TESTS
- PASS RATE OF 99.4%
- .3% FAILED THE BREATH TEST
- .3% DID NOT SHOW FOR TESTING
- 4.22 MILLION TESTS / 2 = 2.1M DAYS x $68 PER DAY COSTS = MILLIONS IN SAVINGS?

(*estimated SAVINGS ON JAIL FEES FOR LOCAL GOVERNMENT)

Agency work load data

- 60 % always show on time and have clean testing (no failures) during participation
- 40 % have at least 1 type of failure during participation
  - 19 % have 1 failure
  - 12 % have two failures
  - 5 % have three failures
  - 9 % have four or more failure

(source Mt. Plains Evaluation)

Alcohol-Impaired MV Fatalities and 24/7 Participation

BENEFITS OF 24/7

- Reduced alcohol related fatal crashes
- Family is safer – reduced incidents of other crimes where alcohol and drugs were a factor
- Helps with the efficiencies of probation, parole, and DUI courts (case management)
- Defendant will spend less time in jail – alternative to incarceration
- Treatment prospects improve
- Participant's employer happy
- NO COST TO THE TAXPAYER

CONTACT INFORMATION

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24/7 Changing Behavior

PEOPLE DO NOT CHANGE BEHAVIOR UNTIL ALL THE OTHER ALTERNATIVES ARE WORSE

24/7 Sobriety Objectives

The Goals:

- "Keep them Sober" requiring defendant sobriety- 24/7
- Reduce incarceration rates (local and state)
- Reduce alcohol related injury and fatal crashes
- Save taxpayers money
- Prison cells freed up
- Defender pay model
- Participants working providing for families
- Reduction in crime and recidivism
- Reduction or elimination of work release programs
- Set the stage for long term sobriety and behavior changes with treatment protocols and return of cognitive skills .

What is 24/7 ?

- The 24/7 Sobriety Project is a court or corrections - based management program originally designed to deal with growing jail and prison populations;
- The 24/7 Sobriety Project is a testing and monitoring program for alcohol and illegal drugs that serves as an alternative to incarceration, allows people to work and remain in the community, continuing to drive if eligible, care for their families, and stay out of the criminal justice system;
- Violation of program rules leads to immediate, measured, sure and swift sanction (usually brief incarceration of the offender);

24/7 Project Background

Facts:

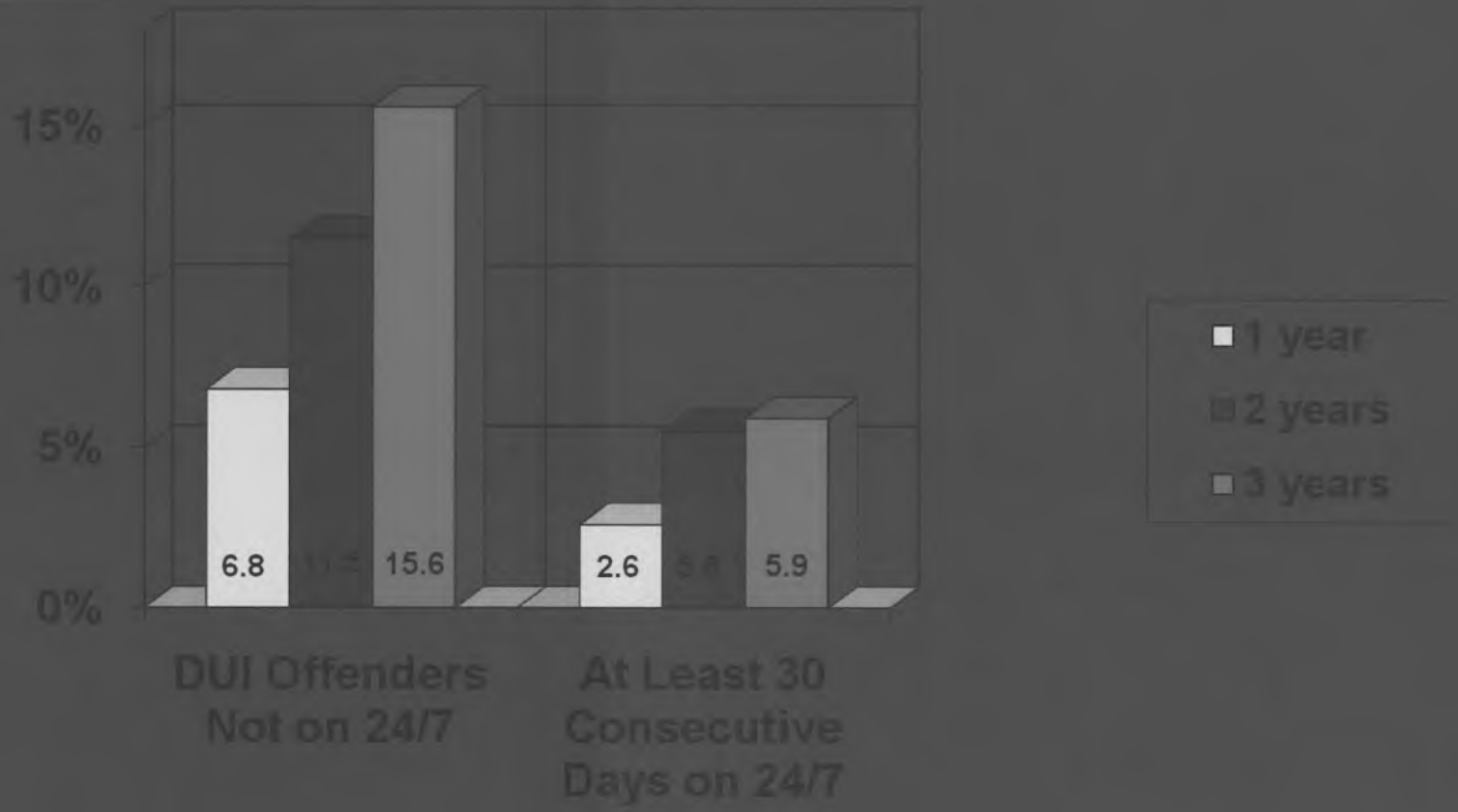
- For decades alcohol and drugs have driven the criminal justice system
- 45% of traffic fatalities are alcohol related
- 85% of prison populations in SD have an admitted alcohol or drug problem
- 15% of prison population is Felony DUI
- 35% of all felonies are DUI Felony / Vehicular Battery / Vehicular Homicide
- 57% of all felonies are DUI and controlled substances
- 18% of persons convicted for DUI 1 get a second conviction for DUI 2
- 41% of all misdemeanor filings are DUI 1 and DUI 2

TESTING METHODOLOGIES

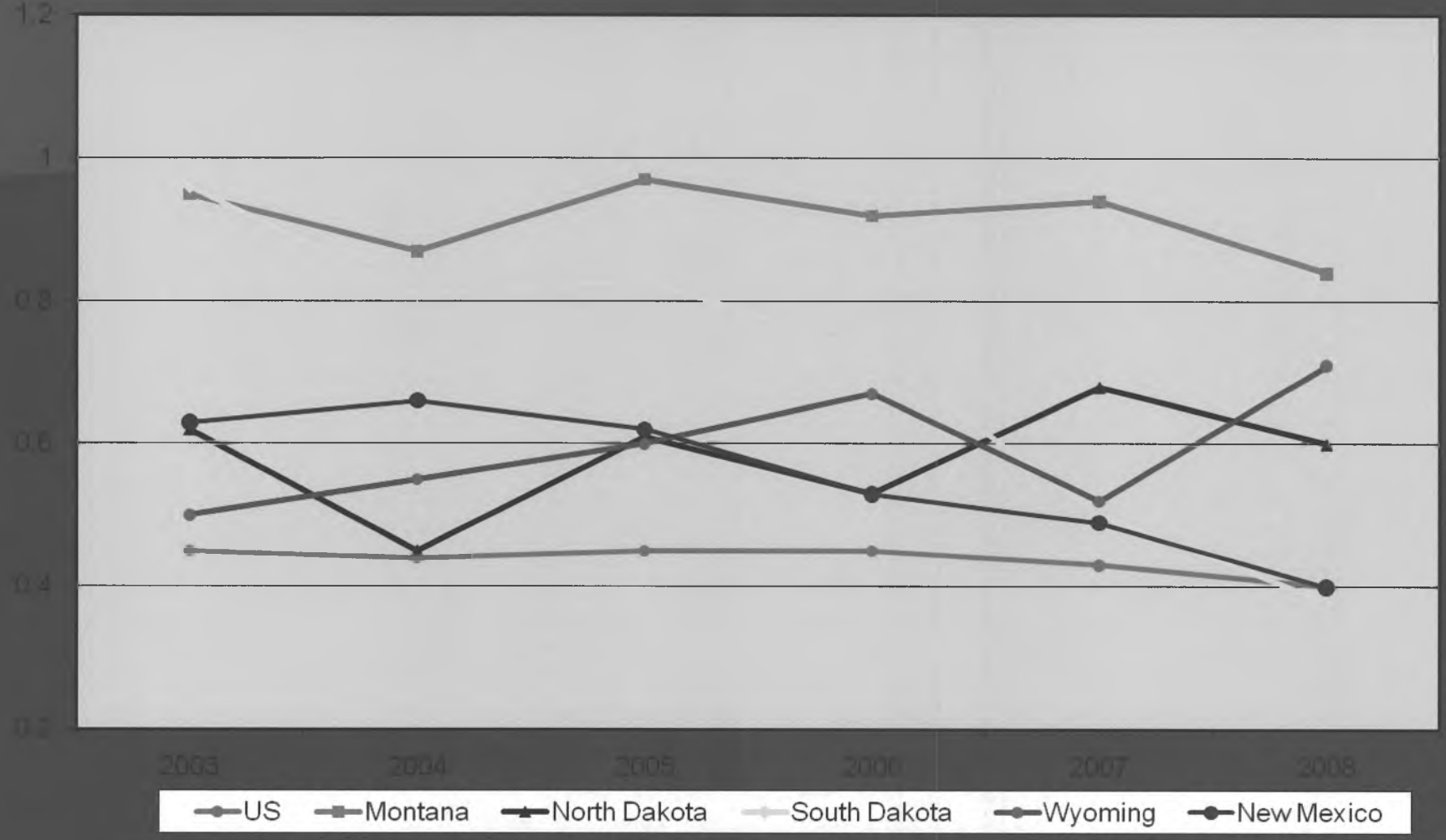
- TWICE PER DAY BREATH TESTING
- TRANSDERMAL MONITORING
- RANDOM OR SCHUDULED UA
- DRUG PATCH

Recidivism Rates under 24/7

Mountain Plains Evaluation and Study February 2011



Alcohol-Impaired Motor Vehicle Fatalities/Vehicle Miles Traveled



STATE OF ALASKA

SEAN PARNELL, GOVERNOR

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF JUVENILE JUSTICE

McLaughlin Youth Center
2600 Providence Drive
Anchorage, AK 99508
Phone: (907) 261-4399
Fax: (907) 261-4308

STEP UP – A PROGRAM FOR EXPELLED/SUSPENDED YOUTH

The genesis of the Step Up program began in 2007 with the recognition that expelled/long term suspended youth from the Anchorage School District (ASD)represent a risk to the community. The data was clear; many of these youth become dropouts, some become involved in the juvenile system, they are at a higher risk of becoming gang involved, many become a drain on social welfare networks, and it is well established that a failure to obtain a high school diploma will cause them to earn substantially less income in their lifetime. ASD, Division of Juvenile Justice (DJJ), the City of Anchorage, Nine Star, United Way, and other concerned individuals started to meet on what should be done. The Anti-Gang and Youth Violence Policy Team, which was formed under the Mayor of Anchorage's Office helped provide the oversight and political will to move forward. Slowly and deliberately, the Step Up program was thus conceived, designed, developed, and implemented after much hard work.

Step Up is a proactive education program now operated cooperatively by DJJ and ASD. DJJ provides Juvenile Justice Officer Staff, rent for the space, food supplies and ASD provides the teaching staff, a counselor, equipment and other support services. The focus is to transition students back to school, assist in credit recovery with a sense of purpose and philosophy. We are inclusive, build on the strengths of families and competency driven, requiring accountability of youth and parents. We are focused on our goal of student's succeeding in academics, improving in social and emotional growth areas to make Anchorage a safer community. Service learning is also a huge component of the program, with youth participating in service learning at least twice a week. Many of these service learning events translate into employment for youth. Additionally, Step Up also provides ART (Aggression Replacement Therapy) and other support services to these youth.

The program opened its doors in the fall of September, 2009 with a grand opening in a very small space with many dignitaries present including Governor Parnell. It was recognized by many that this was a new and important effort in dealing with troubled youth who were not succeeding in a traditional comprehensive school. The program started purposely small, with only 12 slots available for high school expelled/suspended youth. In the fall of 2011, Step Up expanded to 25 slots for both high school and middle school youth who have been expelled or long-term suspended. We anticipate being full or close to full once all the referrals have been dealt with.

Step Up has steadily grown in success. The first year we experienced some bumps in the road with referrals and other transition efforts. This has greatly improved and the program is operating extremely smooth, with virtually no incidents of misbehavior at the program. The success of the program is due to a great number of factors, including the structure, curriculum, service learning, engagement of the youth, and having hand selected top notch staff.

The following statistics are very new of course since Step Up is a little over two years old and the initial size only allowed for 12 youth in the program. No less, we believe the initial statistics are extremely encouraging and very informative of what should happen in the future.

Total two year enrollment	**53 students**	
Graduated from Step Up with Diploma	5	9%
Returned to ASD schools	25	47%
Moved out of District	6	12%
Step Up return (to the next year)	5	9%
Transferred to Ninestar GED program	2	4%
Enrolled at Treatment Facility	1	2%
Detained at McLaughlin Youth Center	4	8%
Unknown	5	9%

- 100% of students that returned to ASD schools had zero long-term suspensions
- 75% of students that returned to ASD had zero discipline infractions
- 88% successfully transitioned out of Step Up

* We recognize of course that the longer that we follow these former Step Up residents the more time exists for them to run in to trouble.

Ethnicity of the 53 students

Hawaiian/Pacific Islander	36%
African American	23%
Caucasian	21%
Mixed	7%
Alaska Native	6%
Asian	2%

*** Student Success Stories from Step Up (fictitious names, histories are accurate)**

Steve Seward 16, male, White

Student was a sophomore at a comprehensive high school when he was expelled for a presumptive one year for weapon/firearms, assault, criminal acts, and prohibited organizations. Around the same time, his best friend was shot and killed in a warehouse party. He stated that at this time his life of drugs and violence came crashing down and he knew he needed to turn things around. After time at the McLaughlin Youth Facility, he decided that Step Up was his last option for a high school diploma. A search through his school district discipline records show that his expulsion was the 1st infraction he had at school. Student came to Step Up as junior with 10.75 credits. While with us, he gained 8 credits, completed all his requirements to be reinstated with the school district, and then transitioned to an alternative school where he finished up his last remaining credits and graduated with his diploma. He was also offered and completed an internship with USKH an engineering firm in Anchorage. This came about after the Step Up students took a field trip to USKH and this student impressed the USKH staff to the point of them offering him this opportunity. He then went on to work for UPS. He has come back to Step Up since he left to talk with the other students about choosing different paths.

George Fairbanks 19, male, Black

Student was a senior at a comprehensive high school when he was placed on a 45 day suspension with a recommendation for expulsion for fighting. This was his 3rd high school fight. His discipline records show that he had 8 out-of- school- suspensions, ranging from 1 to 45 days, in a 4 year period. These incidents ranged from reckless and unsafe behavior, sexual harassment, fighting, and theft/robbery. Student had also previously been expelled from the district but was able to complete his reinstatement criteria and return to school. However, within 5 months of returning, he was put up for expulsion again after getting into another fight. The decision was made to have him attend Step Up to finish up his remaining 1.5 credits. He came to Step Up, completed his credits, and was granted his diploma. This student had attended the Continuation Program, a school for students who were expelled for drugs and alcohol. This was a special deal for him as he was expelled for violent incidents and never substance use issues. He was in and out of Continuation 3 times in 2 years. All in all, this student switched school placements 11 times in 4 years before he was finally able to get his high school diploma through Step Up. We have had all 3 brothers from this family at Step Up, with 2 of them receiving high school diplomas from the program.

Dillingham Xander 17, male, Hmong

Student was a junior at a comprehensive high school when he was expelled for assault. Between the dates of 2/18/2009 and 1/6/2011, he had been in 6 different incidents ranging from assaults, fighting, and threats. He was out of school on 5 different suspensions ranging from 5 to 45 days. He came to Step Up in the 11th grade with only 4.5 credits. He should have had 15 credits. While at Step Up, this student worked extremely hard and was able to increase his credits to 11.75. He also completed all his reinstatement criteria and was reinstated with the school district. He also passed the writing HSGQE while at Step Up. We were able to transition him back into the district and he is currently attending an alternative school with a graduation date of December 2012.

Cindy Alison Stebbins 17, female, Native Hawaiian/Pacific Islander

Student was a senior at a comprehensive high school when she was placed on a long term suspension for fighting/physical violence. This was her 2nd fight and 3rd act of physical violence at school in 2 years; however, student had a much longer discipline history going back to her 6th grade year. The decision was made to place her at Step Up to complete the rest of her credits. Student had spent time at the Continuation Program, another school set up for student on long term suspensions and expulsions prior to attending Step Up. Student was successful at Step Up and was able to complete her last 5.5 credits and received her High School Diploma.

LEGISLATIVE RESEARCH REPORT

OCTOBER 21, 2011

REPORT NUMBER 12.044

STATISTICS ON CRIME IN URBAN ALASKA, 2001-2010

PREPARED FOR SENATOR HOLLIS FRENCH

BY TIM SPENGLER, LEGISLATIVE ANALYST

You asked for crime statistics in urban Alaska over the last decade.[1] Specifically, you wished to view crime data from Anchorage, Fairbanks, Kenai and Soldotna, and Palmer and Wasilla, as well as statewide figures, regarding the following:

- Murders
- Rapes and sexual assaults
- Felony assaults
- Robberies
- Violent crime totals
- Population of the above-mentioned cities
- Cost per year spent on incarcerated Alaskans with annual percentage increase
- The number of felony and misdemeanor filings and convictions in the Alaska Court System and the number of those convicted that were repeat offenders

We present data on violent crimes in Alaska for calendar years 2000 through 2009 in Table 1 on the following pages.[2] You will notice that violent crime totals have risen in most communities—particularly in Anchorage and statewide. In Table 1, we highlight (in light blue) the total violent crime highs and lows for each jurisdiction over this ten-year time period.

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[1] This report is an update of legislative research report 08.073 from December 24, 2007.

[2] Statistics for 2010 are not currently available but, according to Kathryn Monfreda, chief of the Criminal Records and Identifications Bureau for the Department of Public Safety, (907-269-5581) these figures should be accessible in the near future.

TABLE 1: VIOLENT CRIMES IN SELECTED ALASKA COMMUNITIES, 2000-2009

Year	Crimes				
	Murder	Rape/Attempted Rape	Felony Assault	Robberies	Total Violent Crimes
Anchorage					
2000	11	195	974	346	1,526
2001	10	211	1,146	385	1,752
2002	18	254	1,068	382	1,722
2003	17	247	1,152	340	1,756
2004	14	264	1,497	319	2,094
2005	16	224	1,411	386	2,037
2006	17	250	1,868	470	2,605
2007	22	258	1,676	455	2,411
2008	12	263	1,834	544	2,653
2009	15	282	1,668	534	2,499
Fairbanks					
2000	2	59	109	39	209
2001	4	58	129	31	222
2002	2	38	214	33	287
2003	4	42	212	42	300
2004	2	46	134	47	229
2005	2	44	196	62	304
2006	1	67	155	47	270
2007	5	43	175	42	265
2008	3	41	208	28	280
2009	0	60	167	46	273
Kenai/Soldotna					
2000	0	3	75	3	81
2001	0	10	64	5	79
2002	1	8	57	6	72
2003	0	15	63	5	83
2004	0	12	40	2	54
2005	1	7	42	1	51
2006	0	5	35	1	41
2007	1	4	42	4	51
2008	0	3	57	2	62
2009	0	4	45	3	52
Palmer/Wasilla					
2000	0	1	91	9	101
2001	0	3	81	8	92
2002	0	4	106	8	118
2003	1	2	157	7	167
2004	0	2	128	7	137
2005	0	4	138	11	153
2006	0	3	60	7	70
2007	0	8	103	3	114
2008	0	1	115	7	123
2009	0	6	88	8	102

TABLE 1: VIOLENT CRIMES IN SELECTED ALASKA COMMUNITIES, 2000-2009 (CONTINUED)

Year	Crimes				
	Murder	Rape/Attempted Rape	Felony Assault	Robberies	Total Violent Crimes
Statewide Totals					
2000	29	468	2,294	468	3,259
2001	39	479	2,548	496	3,562
2002	34	502	2,518	484	3,538
2003	43	575	2,638	442	3,698
2004	36	547	2,963	431	3,977
2005	32	524	3,040	531	4,127
2006	34	495	3,355	589	4,473
2007	42	514	3,294	577	4,427
2008	30	446	3,334	642	4,452
2009	21	503	3,357	643	4,524

Notes: Sexual assaults where the victim is a non-consenting female are included in the Rape/Attempted Rape category. Sexual assaults where the victim is a male, or where no carnal knowledge occurs, are not reflected in this table. The Uniform Crime Report lists such crimes in a separate "sex offense" category. Violent crimes in this table fall under AS 11.41.

Sources: Uniform Crime Reports, *Crime Reported in Alaska*, 2000-2009, Alaska Department of Public Safety *http://www.dps.state.ak.us/statewide/UCR.asox*

INCARCERATION COSTS

The cost of care for incarcerated Alaskan's has risen over the last decade. For example, in FY 2001, institutional care in the state cost around $112 a day, while in FY 2011 the cost was about $136 a day. Similar cost increases occurred for community residential centers, community jails, and for out of state incarceration. We include, as Attachment A, a detailed look at the Department of Corrections' (DOC) cost of care for the last eleven fiscal years, provided by the department's Division of Administrative Services.[3] This attachment also chronicles the state's rising overall expenditures on prisoner care; in FY 2001, for example, the overall cost of care was around $148 million, while in FY 2010, costs were nearly $236 million—an increase of more than $87 million.

POPULATION OF SELECTED ALASKA CITIES

Table 2, below, enumerates the estimated population of the cities in Alaska that you are interested in, for each year from 2001 through 2010. The population figures for Kenai and Soldotna are combined as are those for Palmer and Wasilla. These figures do not reflect the entire population of the Kenai Peninsula Borough, the Matanuska-Susitna Borough, or the Fairbanks North Star Borough, but only the specific cities requested. You will see that the population increased by the greatest percentage over the decade in Palmer and Wasilla at nearly 20 percent, while Anchorage and statewide growth was around six and a half percent.

[3] Leslie Houston, director of the Division of Administrative Services for the DOC, and our contact for this report, can be reached at (907) 465-3339.

TABLE 2: POPULATIONS OF SELECTED CITIES IN ALASKA 2001-2010					
Year	Anchorage	Fairbanks	Kenai/Soldotna	Palmer/Wasilla	Statewide Totals
2001	264,600	29,611	10,715	10,354	632,716
2002	267,339	29,941	10,957	11,085	641,729
2003	272,304	29,156	11,254	11,987	649,466
2004	276,865	30,402	10,756	11,757	659,653
2005	277,157	31,478	10,742	12,120	667,146
2006	281,831	30,580	10,737	12,414	674,583
2007	281,151	32,266	11,003	12,876	680,169
2008	282,871	31,694	11,166	12,890	686,818
2009	289,230	32,346	11,401	13,432	697,828
2010	291,826	31,535	11,263	13,768	710,231
Change 2001-2010	6.5%	3.3%	0.2%	19.9%	6.6%

Notes: Population estimates from 2001 through 2009 are as of July 1 of each year. Data from 2010 are from the US Census Bureau.
Sources: Alaska Department of Labor and Workforce Development, Research and Analysis Section, Population Estimates, and the US Census Bureau *http://labor.alaska.gov/research/pop/popest.htm.*

CONVICTIONS AND CRIMINAL CASE FILINGS

We provide data regarding criminal cases with convictions from 2003 through 2010, along with whether the perpetrator was a repeat offender, in Attachment B. The Alaska Court System (ACS) compiled this information from its CourtView Case Management System, which has been implemented in Alaska over the last several years. Cases reflected in these tables are from the courts in Anchorage, Palmer (which includes the entire Mat-Su Valley), Fairbanks, Kotzebue, Nome, Barrow, and Unalakleet. For each fiscal year, the tables display the total number of felony and misdemeanor convictions, as well as the number of those committed by repeat offenders. The total number of convictions during this time period ranged from a low of 14,752 in 2004 to a high of 18,423 in 2008. Generally, around 63 percent of individuals who had criminal convictions between 2003 and 2010 had prior convictions.

Table 3 enumerates the total number of criminal case filings, both felony and misdemeanor, from FY 2003 through FY 2010, in selected Alaska locations.[4] We obtained these data from Alaska Court System personnel as well as the ACS's Annual Statistical report on misdemeanors and felonies in Alaska. Please note that Wasilla and the entire Mat-Su Valley are included in the Palmer figures. As you will notice, felony criminal case fillings have risen from 2,612 in FY 2003 to nearly 4,700 in fiscal year 2010. Misdemeanor filings have been more or less flat over this time period.

[4] Table 3 provides data on the same court locations reviewed in Legislative Research Report 08.073; these courts represent about 75 percent of total cases statewide.

TABLE 3: ALASKA COURT SYSTEM CRIMINAL CASE FILINGS, FY 2003-FY 2010

Felony									
Court District	Location	FY03	FY04	FY05	FY06	FY07	FY08	FY09	FY10
2	Barrow	58	58	64	65	66	62	56	95
	Kotzebue	180	199	236	198	176	141	144	124
	Nome	168	147	121	141	137	159	124	131
	Unalakleet	Felonies are reflected in Nome's figures							
3	Anchorage	1,249	1,838	2,203	2,440	2,884	3,072	2,781	3,026
	Palmer	435	600	563	537	542	624	557	541
4	Fairbanks	522	481	650	749	675	598	650	780
Total		**2,612**	**3,323**	**3,837**	**4,130**	**4,480**	**4,656**	**4,312**	**4,697**
Misdemeanor									
Court District	**Location**	**FY03**	**FY04**	**FY05**	**FY06**	**FY07**	**FY08**	**FY09**	**FY10**
2	Barrow	654	526	442	495	531	576	528	539
	Kotzebue	891	668	756	667	792	815	700	589
	Nome	908	799	700	730	871	840	768	708
	Unalakleet	172	130	106	97	35	83	64	104
3	Anchorage	11,944	11,388	10,119	11,107	11,115	11,751	12,324	11,728
	Palmer	2,170	2,873	3,006	2,967	2,836	3,159	2,747	3,024
4	Fairbanks	4,302	4,011	3,801	4,191	3,737	3,892	3,686	4,857
Total		**21,041**	**20,395**	**18,930**	**20,254**	**19,917**	**21,116**	**20,817**	**21,549**

Sources: Alaska Court System (ACS), Annual Statistical Reports. ACS contact, Doug Wooliver, Deputy Administrative Director (907) 264-8265.

We hope you find this information to be useful. Please let us know if you have questions or need additional information.

Attachment A

Cost of Prisoner Care, 2001-2011, Alaska Department of Corrections

Department of Corrections
Summary Data 2001 - 2011
Legislative Research Request

EXPENDITURES	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009	FY2010	FY2011
Institutions	$106,660,274	$111,337,736	$117,931,786	$128,558,560	$128,195,521	$127,560,709	$152,962,995	$164,557,791	$171,002,857	$173,131,242	$186,912,045
Comm. Residential Cntrs	$15,353,842	$16,058,820	$16,963,077	$16,073,156	$16,154,514	$16,131,486	$16,292,227	$14,867,609	$17,811,039	$19,878,966	$20,863,677
Community Jails	$4,895,604	$4,898,285	$5,124,121	$5,125,927	$4,841,163	$4,685,003	$5,766,749	$6,314,795	$6,328,912	$6,320,796	$6,312,550
Out of State Contractual	$19,048,255	$19,376,705	$18,199,021	$14,215,978	$15,415,332	$17,329,472	$19,098,756	$22,768,802	$20,911,708	$21,805,654	$21,904,919
Pt. MacKenzie Rehab/Farm	$2,199,545	$2,236,441	$2,408,312	See Note	See Note	See Note	See Note	See Note	See Note	See Note	See Note
TOTAL	**$148,157,520**	**$153,907,987**	**$160,626,317**	**$163,973,621**	**$164,606,530**	**$165,706,670**	**$194,120,727**	**$208,508,997**	**$216,054,516**	**$221,136,658**	**$235,993,191**

% Increase in EXPENDITURES	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009	FY2010	FY2011
Institutions		4.20%	5.59%	8.27%	-0.28%	-0.50%	16.61%	7.05%	3.77%	1.23%	7.37%
Comm. Residential Cntrs		4.39%	5.33%	-5.54%	0.50%	-0.14%	0.99%	-9.58%	16.53%	10.40%	4.72%
Community Jails		0.05%	4.41%	0.04%	-5.88%	-3.33%	18.76%	8.68%	0.22%	-0.13%	-0.13%
Out of State Contractual		1.70%	-6.47%	-28.02%	7.78%	11.05%	9.26%	16.12%	-8.88%	4.10%	0.45%
Pt. MacKenzie Rehab/Farm		1.65%	7.14%	See Note	See Note	See Note	See Note	See Note	See Note	See Note	See Note

Daily Cost of Care	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009	FY2010	FY2011
Institutions	$111.89	$114.37	$113.31	$113.69	$110.08	$107.42	$121.60	$129.11	$126.04	$134.21	$136.44
Comm. Residential Cntrs	$64.07	$66.49	$67.37	$64.02	$64.88	$68.76	$72.44	$78.97	$79.58	$80.28	$78.34
Community Jails	$194.39	$169.87	$182.32	$200.62	$240.49	$203.74	$232.34	$254.42	$254.99	$254.67	$241.58
Out of State Contractual	$64.83	$65.54	$65.18	$60.20	$60.15	$62.93	$66.02	$63.74	$65.53	$67.47	$71.84
Pt. MacKenzie Rehab/Farm	$58.27	$58.22	$62.84	See Note	See Note	See Note	See Note	See Note	See Note	See Note	See Note

Mandays Served (Average)	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009	FY2010	FY2011
Institutions (Actual)	953,287	973,453	1,040,831	1,130,770	1,164,612	1,187,553	1,257,893	1,274,555	171,002,857	173,131,242	186,912,045
Comm. Residential Cntrs (Avg)	239,805	241,630	251,850	251,120	248,880	234,695	224,840	188,340	224,358	247,470	266,450
Community Jails (Avg)	25,185	28,835	28,105	25,550	20,130	22,995	24,820	24,820	24,888	24,820	26,280
Out of State Contractual (Avg)	293,825	295,650	279,225	236,155	256,200	275,210	289,445	357,335	319,884	323,390	304,775
Pt. Mac Rehab/Farm (Avg)	37,595	38,325	38,325	See Note	See Note	See Note	See Note	See Note	See Note	See Note	See Note

Average Mandays Served Increase/Decrease	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009	FY2010	FY2011
Institutions (Actual)		20,166	67,378	89,939	33,842	22,941	70,340	16,662	169,728,302	2,128,385	13,780,803
Comm. Residential Cntrs (Avg)		1,825	10,220	(730)	(2,240)	(14,185)	(9,855)	(36,500)	36,018	23,112	18,980
Community Jails (Avg)		3,650	(730)	(2,555)	(5,420)	2,865	1,825	0	68	(68)	1,460
Out of State Contractual (Avg)		1,825	(16,425)	(43,070)	20,045	19,010	14,235	67,890	(37,451)	3,506	(18,615)
Pt. Mac Rehab/Farm (Avg)		730	0	See Note	See Note	See Note	See Note	See Note	See Note	See Note	See Note

NOTE: Pt. MacKenzie was moved from the Division of Probation and Parole to the Division of Institutions in FY2004. Expense and Mandays are included in Institutions beginning in FY2004.

Attachment B

Conviction Disposition Tables, 2003-2007 and 2008-2010, Alaska Court System, October 2011

		Total	Felony	Misdemeanor
Total		100%	100%	100%
2003	**Total**	100%	100%	100%
	No Prior Conviction	41%	32%	42%
	Prior Conviction	58%	66%	57%
	Prior Conviction Unknown	0%	0%	0%
2004	**Total**	100%	100%	100%
	No Prior Conviction	38%	31%	40%
	Prior Conviction	60%	68%	59%
	Prior Conviction Unknown	0%	0%	0%
2005	**Total**	100%	100%	100%
	No Prior Conviction	37%	30%	38%
	Prior Conviction	62%	69%	61%
	Prior Conviction Unknown	0%	0%	0%
2006	**Total**	100%	100%	100%
	No Prior Conviction	36%	27%	38%
	Prior Conviction	63%	71%	61%
	Prior Conviction Unknown	0%	0%	0%
2007	**Total**	100%	100%	100%
	No Prior Conviction	35%	28%	36%
	Prior Conviction	64%	71%	62%
	Prior Conviction Unknown	0%	0%	0%

		Total	Felony	Misdemeanor
Total		80,112	12,950	67,162
2003	**Total**	16,584	1,907	14,677
	No Prior Conviction	6,877	619	6,258
	Prior Conviction	9,660	1,275	8,385
	Prior Conviction Unknown	47	13	34
2004	**Total**	14,752	2,288	12,464
	No Prior Conviction	5,718	723	4,995
	Prior Conviction	8,983	1,556	7,427
	Prior Conviction Unknown	51	9	42
2005	**Total**	14,977	2,624	12,353
	No Prior Conviction	5,551	801	4,750
	Prior Conviction	9,362	1,813	7,549
	Prior Conviction Unknown	64	10	54
2006	**Total**	17,044	3,070	13,974
	No Prior Conviction	6,177	854	5,323
	Prior Conviction	10,758	2,193	8,565
	Prior Conviction Unknown	109	23	86
2007	**Total**	16,755	3,061	13,694
	No Prior Conviction	5,868	870	4,998
	Prior Conviction	10,796	2,179	8,617
	Prior Conviction Unknown	91	12	79

Report: Criminal Cases with Conviction and Percentage of Convicted Cases with a Prior Conviction.

Notes in compiling cases:

1. Cases are compiled using records from the new CourtView courts: Anchorage, Palmer, Fairbanks, Kotzebue, Nome, Barrow, and Unalakleet.
2. Defendant's Identity matching is done using last name and date of birth. When either record is missing, the case is marked as "Prior Conviction Unknown".
3. A person's prior conviction in location other than in the CourtView courts is not accounted against that person in the report.
4. Guilty found, pleaded, or not contested, is not necessarily the last status of the case. The conviction may get set aside later.
5. A case can be disposed with a conviction more than once. The latest conviction for a case supersedes all earlier ones.

Cause of the discrepancy in the same report provided in 2005:

1. Criminal case is reopened when a Petition to Revoke Probation is filed. Case can then be disposed for the PTRP charge. Duplicate conviction dispositions were reported in the 2005 statistics.

Criminal Cases		Total	Felony	Misdemeanor
Total		100%	100%	100%
2008	Total	100%	100%	100%
	No Prior Conviction	36%	24%	37%
	Prior Conviction	63%	74%	62%
	Prior Conviction Unknown	0%	0%	0%
2009	Total	100%	100%	100%
	No Prior Conviction	36%	22%	37%
	Prior Conviction	63%	77%	61%
	Prior Conviction Unknown	0%	0%	0%
2010	Total	100%	100%	100%
	No Prior Conviction	34%	25%	36%
	Prior Conviction	64%	74%	63%
	Prior Conviction Unknown	0%	0%	0%

Criminal Cases		Total	Felony	Misdemeanor
Total		54,152	5,678	48,474
2008	Total	18,423	1,851	16,572
	No Prior Conviction	6,686	459	6,227
	Prior Conviction	11,663	1,388	10,275
	Prior Conviction Unknown	74	4	70
2009	Total	17,991	1,896	16,095
	No Prior Conviction	6,528	418	6,110
	Prior Conviction	11,418	1,473	9,945
	Prior Conviction Unknown	45	5	40
2010	Total	17,738	1,931	15,807
	No Prior Conviction	6,195	486	5,709
	Prior Conviction	11,521	1,443	10,078
	Prior Conviction Unknown	22	2	20

Report: Criminal Cases with Conviction and Percentage of Convicted Cases with a Prior Conviction.

Notes in compiling cases:

1. Cases are compiled using records from the new CourtView courts: Anchorage, Palmer, Fairbanks, Kotzebue, Nome, Barrow, and Unalakleet.
2. Defendant's Identity matching is done using last name and date of birth.
3. A person's prior conviction in location other than in the CourtView database is not accounted against that person in the report.
4. Guilty found, pleaded, or not contested, is not necessarily the last status of the case. The conviction may get set aside later.
5. A case can be disposed with a conviction more than once. This report uses the first conviction.
6. Cases filed with felony charges can be reduced to misdemeanor upon conviction. Severity of a case in this report, unlike previously provided in 2007, is based on severity of convicted charges.

Date of Data Compiled: 10/13/2011

1/24-1/25/12 CRIME SUMMIT (FILE 2)

<TARGET><BILL></BILL><SUBJECT>1-24-1-25-12 CRIME SUMMIT (FILE 2)</SUBJECT><COMM>SJUD27</COMM></TARGET>

STATE OF ALASKA

DEPARTMENT. OF HEALTH AND SOCIAL SERVICES

DIVISION OF JUVENILE JUSTICE

*Sean Parnell, **GOVERNOR***

P.O. BOX 110635
JUNEAU, ALASKA 99811-0635
PHONE: (907) 465-2212
FAX (907) 465-2333

February 1, 2012

Senator Hollis French
Chair, Senate Judiciary Committee
Alaska State Capitol, Room 417
Juneau, AK 99801

Dear Senator French:

Thank you for the opportunity to participate in the Crime Summit hearing on Wednesday, January 25th. During my presentation you asked about the number of youth involved with the Division of Juvenile Justice, and how the number of youth placed in the Division's secure facilities compares with the number of youth who remain in the community under probation supervision. The attached data sheet summarizes this information for you.

A few points bear emphasizing:

- Only 4.8% of Alaska's youth were referred to the Division of Juvenile Justice in FY 2011. The vast majority of our state's kids are not getting into trouble with the law.

- The Division manages a significant number of referrals (reports from law enforcement) through informal (non-court-ordered) services and programs, such as community justice panels (youth court) or informal probation. The Division also may "adjust" referrals from less serious, lower-risk offenders, having them complete letters of apology, pay restitution, or perform community work service in order to hold them accountable and helping ensure that court processes are reserved for more serious, higher-risk offenders.

- The majority (58%) of juveniles who are placed under Division probation or custody remain in the community, typically in their own homes. The pie chart in the attachment shows the various other places juveniles may reside. As you can see, only a small proportion are placed in the state's secure juvenile facilities (9% in detention facilities, 10% in institutional treatment facilities).

Thank you, again, for hosting the Crime Summit and inviting the Division of Juvenile Justice to be there as guests and presenters.

Sincerely,

Barbara Henjum
Director

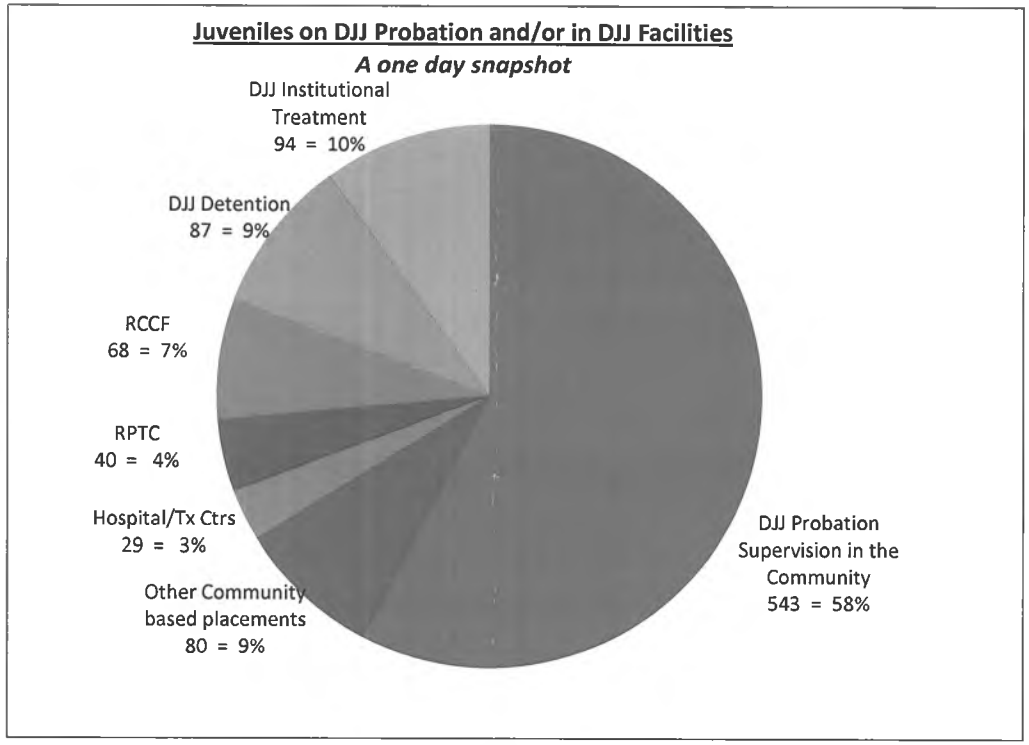
Attachment: "Some General Data Points Regarding Youth in the Juvenile Justice System"

Some General Data Points Regarding Youth in the Juvenile Justice System

FY2011 Referral Information		
	Count	% of total
Census 2010 population age 12 through 17	61885	
FY2011 Referrals to DJJ	4261	
FY2011 Juveniles referred to DJJ	2945	4.8%

What happened to the FY2011 Referrals ?		
	Count	% of total
Screen & Refer	6	0.1%
Community Justice Panel(s)	585	13.7%
Adjusted	1219	28.6%
Informal Probation	171	4.0%
In Process (outcome still TBD)	251	5.9%
Petitioned to court (outcome still TBD)	425	10.0%
Petitioned to court - Adjudicated	787	18.5%
Dismissed	817	19.2%
TOTAL REFERRALS	**4261**	

A one day snapshot (10/26/2011) Juveniles on DJJ Probation and/or in DJJ Facilities		
	Count	% of total
DJJ Probation Supervision in the community	543	57.7%
Community based placements	80	8.5%
Hospital/Treatment Centers	29	3.1%
Residential Psych Treatment Centers (RPTC)	40	4.3%
Residential Child Care Facility (RCCF)	68	7.2%
DJJ Detention	87	9.2%
DJJ Institutional Treatment	94	10.0%
Total Juveniles on Probation	**941**	



News Release 1/26/2012

In January, the State Senate held a "Crime Summit." The Committee goal: identify issues and offer solutions.

Conspicuously absent from the Senate Committee's review was a serious, in-depth review of individuals with a severe mental illness who commit crimes or have crimes committed against them.

Ninety percent of females with a mental illness who live on the street (shelters, tents, etc.) will at some point become a victim of sexual assault which will in itself damage the individual and will also hinder or prevent recovery from the underlying mental illness.

Men and women with a severe mental illness commit crimes or become victims in higher numbers than the average public. The costs of transportation and one day in the Psych ER can be upwards of a thousand dollars.

Approximately 10,000 individuals in Alaska because of a mental illness will come in contact with law enforcement in the next 12 months. Many will be forcibly transported to Psych ER's in handcuffs for forced evaluations or civil commitments, etc.

When a state improves psychiatric patient rights it translates to better care and better recovery. Alaska has some of the worst patient rights and government oversight of psychiatric patient rights and care in the nation.

Psychiatric patient rights in Alaska need to be improved.

Faith Myers
Dorrance Collins

Mental Health Advocates,
Faith Myers / Dorrance Collins
3240 Penland Pkwy, Sp. 35
Anchorage, AK. 99508
(907) 929-0532

faith.myers@gci.net

To: Alaska State legislature
Capitol City of Juneau,AK. 1/25,/2012

Issue: Crime.

No matter where a crime is committed in our State, the most important question is: "Is this Alcohol or Drug related?"

Substance Abuse is the most important issue in the State of Alaska. Addressing this issue has been most inadequate. As an example, Domestic Violence. When Domestic Violence is addressed, the most important question is: "Was this Alcohol or Drug related?" Calling for an end to Domestic Violence, without addressing the primary cause of it, comes to nothing.

When it comes to "The Revolving Door" problem of the Criminal Justice System the answers come to nothing, zero, without addressing Substance Abuse Counselling or Treatment. "How many former inmates can say that their Treatment and/or Counselling for Substance Abuse was adequate?"

These are a couple of questions as to why things are the way they are in the State of Alaska concerning crime.

Signed, Albert Judson
(Albert Judson)
Registered Voter & Resident
of the State of Alaska

PASSAGES MALIBU

Dear valued client,

Congratulations on taking the necessary steps in your road to recovery by investing in your life and in *The Alcoholism and Addiction Cure.*

Since we founded Passages in 2001, we have treated many individuals from around the world in their quest to be cured of their addictions to drugs and alcohol. Unfortunately, there are others who want to come to Passages but for various reasons are unable to do so, which is why we wrote this paradigm changing book. Now, they too can attain this powerful healing experience and remain substance free by using the methods that Passages has become known for the world over.

The Alcoholism and Addiction Cure will outline the four causes of all addictions and provide insight on how to structure your own holistic program for healing. We don't believe in the "disease model," nor do we place degrading labels on you like "addict" or "alcoholic." The Passages model empowers you to permanently rid yourself of addiction and chart your own destiny.

If you or someone you love would like more information about Passages and it's centers, please feel free to call 866.777.9319. Our experienced admissions counselors are available 24 hours a day, 7 days a week. You may also visit our website at www.passagesmalibu.com, follow us on Twitter at twitter.com/passagesrehab, or 'Like' us on Facebook at facebook.com/passagesmaliburehab.

Remember, at Passages, "We believe in a cure, and we believe in you."

Sincerely yours,

Pax Prentiss

Chris Prentiss

Co-founders
Passages Malibu - The Addiction Cure Center

Call for a Complementary copy of the book "The Alcoholism & Addiction Cure."

CITY OF PETERSBURG
P.O. BOX 329 • PETERSBURG, ALASKA 99833
TELEPHONE (907) 772-4519
FAX (907) 772-3759

Honorable Sean Parnell
Alaska State Capitol Building
P.O. Box 110001
Juneau, AK 99811-0001

January 3, 2012

Re: Safety and Security

Honorable Governor Sean Parnell;

The City of Petersburg would like to thank you for your support of our community and of Southeast Alaska as a whole. We understand that ours is a large state with many needs and your support makes all the difference. Unfortunately, not all problems can be solved at a local level so we must again rely upon your help to solve a worsening issue in our community.

In 2005, the City of Petersburg working with the District Attorney's Office noted an 18% dismissal rate on crimes sent to their office for prosecution. In 2010, this dismissal rate was 30%. As a result, several members of the City of Petersburg City Council went to Juneau to meet with the District Attorney's office. Petersburg was promised improved service and we took them at their word. In 2011, the Year-to-date dismissal rate is over 38%, not including numerous questionable plea bargains that have caused judges to question the State's logic. In December of 2011, our city contacted the Juneau office to seek both guidance and a mutually acceptable solution to these issues. We offered to host a meeting here in Petersburg to discuss the issues and how we as a community could help resolve the problem. In a series of emails (attached) with their office, Petersburg was informed that while "ideal", the Juneau office was just too busy to actively communicate with the Petersburg Police Department and explain the dismissals, plea bargains and less than adequate service. We argue that it is not a question of "ideal", but a question of properly doing an incredibly important job.

We are asking for your help. The City of Petersburg has offered some solutions and attempted to engage the District Attorney's Office to make sure there is not something we can do to make their job in Juneau easier. However, our first priority is the safety and security of the citizens of Petersburg. While Petersburg can commiserate over the issues of crime in Juneau, our city needs a District Attorney that will take our issues as seriously as they do those in their own backyard.

We look forward to your response and your support.

Sincerely,

Al Dwyer
Mayor

National Organization on Fetal Alcohol Syndrome

Helping Children & Families Through Education and Advocacy
to Prevent Fetal Alcohol Spectrum Disorders

FASD: What the Justice System Should Know

Alcohol abuse and pregnancy are common among women in the criminal justice system.

- An estimated 70 to 85 percent of inmates need substance abuse treatment.
- Approximately one in four women is either pregnant or postpartum when she enters prison.

The Justice System can help to prevent Fetal Alcohol Spectrum Disorders (FASD) among the incarcerated population by offering educational workshops on FASD and addiction counseling for women inmates.

Many individuals with FASD will never socially mature beyond the level of 6 year-old child.

People with FASD end up in the justice system as victims of crimes.

Other factors that may place persons with FASD at risk for involvement with the criminal justice system include:

- Difficulties in impulse control
- Intellectual deficits
- Poor judgment skills
- A history of abuse and/or neglect

Problems individuals with FASD may encounter when dealing with police include:

- Being persuaded by the police (even inadvertently) to admit to crimes which they did not commit.

Victimization of FASD within the legal system

- Taking responsibility for crimes committed by others in order to win the favor of more sophisticated companions or to please the police.
- Consenting to searches of themselves or their possessions in circumstances in which non-disabled sophisticated individuals would not.
- Panicking during encounters with the police, running away or resisting arrest.
- Saying that they understand their legal rights when in fact they do not.
- Making potentially incriminating statements about how serious any misconduct may have been.

The Justice System can help FASD-affected individuals by:

- Educating judges, police officers, lawyers and parole officers about the characteristics and behaviors of persons with FASD.
- Establishing screening, analysis, and treatment procedures for those with FASD who enter the juvenile justice or adult criminal justice system.
- Establishing/utilizing alternative sentencing programs for persons with FASD who have committed non-violent offenses.
- Screening referral information for the children of incarcerated women who may have been prenatally exposed to alcohol.
- Providing appropriate support to reduce the incidence of victimization of people with FASD.

1200 Eton Court, NW, Third Floor ▪ Washington, DC 20007 ▪ (202) 785-4585 ▪ info@nofas.org ▪ www.nofas.org

DRAFT: DO NOT CITE

FETAL ALCOHOL SPECTRUM DISORDERS (FASD) AND OFFENDER CRIMINAL HISTORY

A 1996 study conducted by the Fetal Alcohol and Drug Unit at the University of Washington[1] for the Centers for Disease Control and Prevention concluded that a majority of individuals with FASD have been in trouble with the law. Both that study and anecdotal experience have indicated that there are some distinctive patterns in the types of conduct involved, and in the manner in which individuals with FASD respond to the criminal justice system. It is possible that those very patterns could be useful in identifying criminal defendants who may have FASD. Such a screening method would not be conclusive (it would certainly be both under and over-inclusive), but it could nonetheless serve to prompt lawyers, judges or others to seek further investigation or diagnosis.

This memorandum identifies the patterns of behavior which the literature or anecdotal experience suggest may correlate with FASD. Some relate to the circumstances of the offense itself, while others concern additional circumstances that would likely be known to the lawyers, government officials or judges.

Offender Patterns

(1) Many of the underlying offenses fall into one or more of five categories:

(a) impulsive behavior, such as shoplifting, particularly for some item (possibly of no great value) for immediate consumption (e.g. a pack of cigarettes),

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[1]Understanding The Occurrence of Secondary Disabilties in Clients With Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE), Ann P. Streissguth, Helen M. Barr, Julia Kogan and Fred Bookstein, Final Report to the Centers for Disease control and Prevention, Grant No. R04/CCR08515, August 1996.

(b) stealing from a friend or neighbor some item (or a few) for personal use,

(c) getting into a fight because the offender overreacted with a very short fuse to some mild provocation or teasing,

(d) behavior precipitated by panic or excessive fright, such as running in fear or lashing out when cornered or overwhelmed by noise and contact, and

(e) participating as a secondary figure at the behest of more sophisticated criminals who were exploiting the offender, e.g. delivering a package as a favor for a "friend" who turns out to be a drug dealer. Involvement with others in a crime clearly beyond the skill level of the offender.

(2) Committing inexplicably stupid crimes involving an obvious risk of apprehension that most offenders would avoid. Engaging after the crime in activity with an irrationally high risk of apprehension (e.g. wearing, when visiting a friend, a piece of jewelry stolen from the friend).

(3) Where the offender took part as a secondary participant with other more sophisticated offenders, the individual with FASD is often the only one apprehended.

(4) Repeatedly engaging in relatively minor offenses without escalating (absent encouragement by more sophisticated offenders) into more serious offenses, e.g. repeated shoplifting that does not lead to armed robbery. A pattern of what would usually be regarded as first offenses, where the offender seems not to learn anything from the experience of apprehension and punishment.

(5) An absence of offenses that involve significant planning or premeditation.

(6) A history of minor offenses before the offender reached the age of 18.

(7)Behaving in a manner which reflects a failure to grasp the boundaries of permissible behavior, such as standing too close or inappropriate touching.

Other Patterns

(1) Naive cooperation with and confession to friendly law enforcement officials; fulsome and guileless confessions that most offenders would never make.

(2) Equally guileless confessions to offenses of which the too-eager-to-please individual is actually innocent, or which may never have occurred at all.

(3) A past failure on probation or parole, stemming from an inability to understand or adhere to supervision conditions or to keep appointments.

(4) An apparent lack of remorse, deriving from a failure to understand that the underlying conduct was wrong.

(5) A failure to grasp the causal connection between unlawful conduct and the resulting incarceration or other punishment.

(6) Viewing incarceration as undesirable only insofar as it results in removing the offender from the company of his friends (or the people he naively thinks are his friends).

(7) Attempts to explain away the offending conduct with implausible stories that are outlandish or simple-minded.

(8) An inability to grasp the seriousness of the distinction between different periods of possible incarceration, e.g. 3 days versus 3 months.

(9) Associating with individuals who are significantly younger than the offender, in part because they may be closer to his or her level of maturity. The younger "friends" may be more sophisticated offenders who are exploiting the relative unsophistication of the individual with FASD.

FAS/FAE Legal Issues Resource Center (Kathryn Kelly, Project Director), Fetal Alcohol and Drug Unit (Ann P. Streissguth, Director), University of Washington School of Medicine.
(206) 543-7144

faslaw@u.washington.edu

http://depts.washington.edu/fadu/legaliyssues/

Lila Hobbs

From: Peat Galaktionoff <peatatone@yahoo.com>
Sent: Thursday, January 26, 2012 7:01 PM
To: Sen. Hollis French

One of the main problems with crime in Alaska is that to many politicians and state workers get away with crime which sets a bad example and embarrasses the state.

News Release 1/26/2012

In January, the State Senate held a "Crime Summit." The Committee goal: identify issues and offer solutions.

Conspicuously absent from the Senate Committee's review was a serious, in-depth review of individuals with a severe mental illness who commit crimes or have crimes committed against them.

Ninety percent of females with a mental illness who live on the street (shelters, tents, etc.) will at some point become a victim of sexual assault which will in itself damage the individual and will also hinder or prevent recovery from the underlying mental illness.

Men and women with a severe mental illness commit crimes or become victims in higher numbers than the average public. The costs of transportation and one day in the Psych ER can be upwards of a thousand dollars.

Approximately 10,000 individuals in Alaska because of a mental illness will come in contact with law enforcement in the next 12 months. Many will be forcibly transported to Psych ER's in handcuffs for forced evaluations or civil commitments, etc.

When a state improves psychiatric patient rights it translates to better care and better recovery. Alaska has some of the worst patient rights and government oversight of psychiatric patient rights and care in the nation.

Psychiatric patient rights in Alaska need to be improved.

Mental Health Advocates,
Faith Myers / Dorrance Collins
3240 Penland Pkwy, Sp. 35
Anchorage, AK. 99508
(907) 929-0532

faith.myers@gci.net

Lila Hobbs

From: Lauren Moss <lolly@gci.net>
Sent: Friday, January 13, 2012 10:45 PM
To: Sen. Hollis French
Subject: # one crime in Alaska

Hi Senator French;

Thank you for your editorial request from the general constituency for input regarding the number one crime across Alaska and it's possible systemic solutions.

I regard the number one non-prosecuted crime against all Alaskans to be the closed door behavior of our Governor concerning AGIA negotiations with big industry and big oil. The Governor has traveled far and wide several times expressly to meet with big oil cronies, using Alaska public funds, out of sight of the prying eyes of the press, and more importantly, without the participation of the Alaskan public. How can this be lawful under our state Constitution? I believe one of our own Constitutional Authors, the great Vic Fisher, has himself spoken to the questionable legality of these actions. Our governor even met in the last few weeks in Juneau with a batch of the same oil execs behind closed doors without the legislature even being in session. It was so clear that when Governor Parnell slid in as Lt. Gov., that eventually the revolving door of industry would become a huge tool in removing badly needed and fairly entitled income from Alaska State coffers.

It is time to ask our new AG to prove his worth by providing legal justification for industrial tax gerrymandering by our Governor. (why
is mining given an almost free ticket for resource extraction?)
Please use your bully pulpit to expand the debate regarding the blatant and legally questionable actions of our Governor.

You are one of our last Senators brave enough to draw these inequities that sneak around in Juneau unchallenged into the public debate. I want you to know that there is at least part of the constituency out here is madder than heck and we won't take it forever. These are the State's resources, not the Governor's, and we did not elect him to give them away to his Cronies for little or nothing.

Don't dispute!!! Prosecute!!!

Lauren E. "Lolly" Moss; Alaskan voter for 31 Years

Senator Hollis French, **January 13, 2012**

We read your letter 1/13/2012 in the Anchorage Daily News. The questions you raise have a large scope—We would like to add a small piece to the puzzle. Writing new laws is important, but just as important "society must change how it deals with individuals who need help."

One Society needs to change how money, support and spare time is given to any individual with a drug or alcohol problem, i.e.—payee, oversight, work or school program, etc.

Two A large number of individuals in prison have a severe mental illness. The assessment is they cannot receive proper treatment that promotes recovery in a prison setting. Detained individuals should be given at least a small amount of time in a forensic unit in a psychiatric hospital so they have a better chance for recovery. Forty years ago, state-run Alaska Psychiatric Institute (API) had a 10 bed forensic unit. API still has a 10 bed forensic unit in 2012.

Three Thousands of individuals who have not broken any laws are transported to locked psychiatric units each year for forced evaluation or commitment, many in handcuffs. Too often, individuals who may not have broken any laws are treated like criminals, both when they are transported to a psychiatric unit, or when they are in a psychiatric unit. When society treats an honest person like a criminal, sometimes they become a criminal.

Four Too often individuals with psychiatric disorders who may not have broken any laws are held in jails and hospital ER's while waiting for space at state-run API. Disability Law Center filed a law suit against DHSS concerning that issue.

Five Almost without exception, when society improves the quality of psychiatric patient rights, the quality of patient care improves and the opportunity for recovery. Sen. Bill 55 when passed will improve the psychiatric patient grievance procedures and needs to be supported and passed by the Senators.

We would be willing to testify telephonically to your committee on these issues.

Mental Health Advocates,
Faith Myers / Dorrance Collins
3240 Penland Pkwy, Sp. 35
Anchorage, AK. 99508

(907) 929-0532
faith.myers@gci.net

Cc: Open Letter

Faith Myers
Dorrance Collins

Psychiatric Patients need your help!

Call Your Legislator—Support Sen. Bill 55

Approximately 10,000 Alaska citizens, who may not have broken any laws, are placed in locked psychiatric facilities and units each year, sometimes by force, anywhere from one hour to months. Detained citizens need to have a better grievance procedure law, rules and oversight for protection and with your help they can get it.

The Joint Commission for the Accreditation of Hospital Organizations (JCAHO)—Medicaid/Medicare fully expect each state to write laws and rules that lay out a blueprint for a fair grievance procedure and one that will protect all psychiatric patients and their family members in the grievance/ appeals process. (Alaska has not)

AS47.30.847 and the associated rules do not in a reasonable way protect psychiatric patients in the grievance/appeal process and needs to be revised.

One AS47.30.847 does not apply to all locked psychiatric units that do civil commitments / forced evaluations according to DHSS.

Two Who is the Impartial Body to hear a patients complaint? AS47.30.847 does not say.

Three No requirement that patients receive a written response to their grievance at all levels of resolution.

Four No due process requirements for a patient's grievance or appeals.

Five No appeal process requirements to the state or anyone else.

Six No requirements that patients can receive a written copy of the hospital grievance procedure and associated rules. (Psychiatric patients in Alaska are told they can file a grievance but are rarely informed of the entire contents of the grievance procedure, due process rights and appeal process rights; How can a detained citizen protect themselves if they don't even have access to all the grievance procedure rules.)

Seven No requirement for an urgent grievance procedure in AS47.30.847. (Resolution in 24 hours) Psychiatric patients in locked facilities and units are in danger without access to an urgent grievance procedure.

Eight AS47.30.847, which has no due process requirements, allows psychiatric institution and unit employees to put patients through an informal complaint process with no time frame for completion and it puts patients in danger.

For this document due process means: "a course of formal proceedings carried out regularly and in accordance with established rules and principles."

Faith Myers
Dorrance Collins

Mental Health Advocates,
Faith Myers / Dorrances Collins
3240 Penland Pkwy Sp. 35
Anchorage, AK. 99508

(907) 929-0532

Turn Page

Current Psychiatric Patient Grievance Procedure laws and rules needs to be improved

One Federal and JCAHO grievance procedure rules that cover psychiatric hospitals and psychiatric units in hospitals. (Does not cover all psychiatric patients) Psychiatric patients must receive a written response to their grievance. (Medicaid and Medicare see a grievance and a complaint as interchangeable) There is no corresponding requirement in Alaska state law or regulations. (Patients are in danger when they are not given a written response to their grievance) Federal and JCAHO rules do not require an appeal process and psychiatric hospitals and units are given 14 days to resolve a psychiatric patient's grievance. (which is too long for a detained individual)

It would be relatively easy for a psychiatric institution or unit to give patients a form which could contain the patient's complaint and the institution's written response to the grievance and patient appeal options. It would protect patients to receive a written response and it is a Federal/ JCAHO requirement.

Two Behavioral Health (DHSS) Requirements for Grantee Grievance Procedures (4 pages) only covers approximately 80 Grantee facilities and units some of which treats psychiatric patients.
--Facilities can inform patients that they need more time to resolve their complaint but the amount of time can be open-ended.
--No due process for appeals (time for completion is open-ended)
--No written response required when responding to patient complaint/ grievance/ or appeals

Three Sec. 47.30.847. Psychiatric patients' grievance procedures. (Does not cover all "detained" psychiatric patients according to DHSS)

(a) A patient has the right to bring grievances about the patient's treatment, care, or rights to an impartial body within an evaluation facility or designated treatment facility.
(b) An evaluation facility and a designated treatment facility shall have a formal grievance procedure for patient grievances brought under (a) of this section. The facility shall inform each patient of the existence and contents of the grievance procedure.
(c) An evaluation facility and a designated treatment facility shall have a designated staff member who is trained in mental health consumer advocacy who will serve as an advocate, upon a patient's request, to assist the patient in bringing grievances or pursuing other redress for complaints concerning care, treatment, and rights.
(10 ch 109 SLA 1992)

AS47.30.847 was written and passed with good intentions, but there are too many loopholes and the loopholes are now being used by psychiatric facilities and units to deny patients their right to file a grievance in a fair way. (There is no appeal process, due process, urgent grievance procedure or written response requirements)

Detailed grievance procedure rules for appeals are only written in hospital policy by providers and they can be changed in fifteen minutes to suit the provider. Psychiatric patient grievance procedure rights including appeals need to be in law and state regulations, including the details.

Psychiatric patients need your help!

Turn Page

Lila Hobbs

----- Original Message -----
From: chndlr15@alaska.net
To: Senator Hollis French@legis.state.ak.us
Sent: Friday, January 13, 2012 7:25 PM
Subject: Number one crime issue in Alaska

Dear Sir, The cases mentioned break my heart. If more police and harder punishments lessened their frequency, I'm for it. But sadly, to some degree we'll always be subject to isolated catastrophic accidents. The crime I present is no accident and it occurs daily in the courtrooms and on the courthouse steps. The fraudulant foreclosure process. Used to steal peoples homes, and in my case erase 30 years of hard work, is prevalent because most people walk away. The entities below are well known for their crimes, but Alaska is behind in the fight for justice. Attorney Generals, Senators, and Judges across the country are freezing evictions and foreclosures, and demanding due process, but phone calls and e-mails are not returned in AK. Below is just a snippet of my case, sent to Cynthia Drinkwater (269-5200) (Cynthia.drinkwater@alaska.gov). She received a well written criminal complaint a year ago and phone calls and e-mails since, but is still contemplating action. Parnell, Treadwell, Begich, Young and Murkowski all claim their powerless, and no word back from the Juneau AGs office. My case # is 3AN-09-10994CI. If you choose to read Judge Aarseths final order, you'll see how he bent over backwards to pardon their crimes and discredit our "theories" and expert witnesses. I was current on my loan and sported a 750 FICO when my refi was denied, and then lured into default with modification promises. I am furious for the stress and heartache Onewest has caused my wife and son, and the unknown future now as we live in her parents basement while Onewest heaps on damages and attorney fees. We've appealed, but since the Alaska Court System is part of Team Fraud, we can only hope that the Supreme Court will see the constructive fraud, strong deceptive tendency, breach of duty, and unconscionability. It was a lovely Christmas as our kickout date was the 28th. Thanks Judge Aarseth. Really enjoyed moving despite the snow, ice, wind, and power outages.

Hi Cynthia. As you know, Onewest Bank, Indymac Bank, Deutsche Bank, Alaska Trustee LLC, MERS, and Lender Processing Services (LPS), have contaminated my loan, foreclosure, and courtroom defense. The Assignments of DOT and Substitution of Trustee utilize three infamous robo-signers, and here, the correspondence between Onewest, Richard Ullstrom of AK Trustee LLC and the document fabricator LPS contains quotes acknowledging the fabrications and forgeries, such as:

"THE NOTE THAT HAS BEEN UPLOADED IS TO E-LOAN, I NEED ONE THAT HAS BEEN ENDORSED TO INDYMAC (AND IDEALLY, FURTHER ENDORSED TO TO ONEWEST)."

"REMEMBER THAT WHAT IS NEEDED IS A COPY SHOWING ENDORSEMENT TO INDYMAC. THE COPY UPLOADED DOES NOT HAVE THAT."

"USER HAS COMPLETED THE ASSIGNMENT INFO DATA FORM WITH THE FOLLOWING ENTRIES: ASSIGNMENT FROM: E-LOAN, ASSIGNMENT TO: DEUTSCHE BANK ."

"HAVE NOT YET RECEIVED COPY OF ENDORSED NOTE. WHAT WAS UPLOADED DOES NOT SHOW ENDORSEMENT TO INDYMAC AND I AM CONCERNED THAT BORROWER'S ATTORNEY WILL RAISE STANDING ISSUE IF THE NOTE DOES NOT SHOW THAT IT IS HELD BY INDYMAC."

"OTHER 2 ENDORSEMENTS ARE NEEDED, PLEASE OPEN A COPY OF ALLONGE PROCESS FOR EACH ENDORSEMENT NEEDED MAKING SURE TO FILL IN THE FORM AND TO ENTITIES. THANKS. USER HAS COMPLETED THE REVISED DOCUMENT DATA FORM WITH THE FOLLOWING ENTRIES: DOCUMENT TYPE: ALLONGE REVISION CATEGORY: ARE MULTIPLE REVISIONS NEEDED FOR THIS DOCUMENT? RECEIVED AUTHORIZATION TO DRAFT AND UPLOAD THE ALLONGE FROM E-LOAN TO INDYMAC. PLEASE HAVE THIS ALLONGE UPLOADED INTO STEP 2 OF THE REVISION PROCESS. PLEASE ALSO INCLUDE LOAN SPECIFIC INFORMATION ON THE ALLONGE."

"THE COPY CURRENTLY UPLOADED INTO DOCUMENTS HAS NO ENDORSEMENTS AT ALL, AND THEY HAVE SPECIFICALLY REQUESTED THE NOTE."

"A QWR WAS MADE TO INDYMAC ON 1/30/09 AND ACKNOWLEDGED BY INDYMAC ON 2/5/09, BUT NO SUBSTANTIVE RESPONSE FROM INDYMAC WAS EVER RECEIVED."

And this is from material that hasn't been redacted! Would you be willing to take a closer look at more of my case yet? Please comment. Thanks, Max Espeland

Lila Hobbs

From: Patti Higgins <patti@keytoalaska.com>
Sent: Friday, January 13, 2012 5:27 PM
To: Sen. Hollis French
Subject: RE: Legislative Update from Senator Hollis French

I think the number 1 crime problem in the state is due to drug and alcohol abuse. Many abusers also have some mental health issues.
Mental Health should be covered by insurance companies without limits. We should have several 'state of the art' drug & alcohol treatment centers that are subsidized and that take insurance. Anyone wanting treatment should get it and they should be treated the same day they make the request.
There is a huge shortage of psychologists and psychiatrists and counselors. We should offer programs at the University and reimburse student loans for those who stay in Alaska and work in the field.
Decimalize possession of marijuana; I believe it should be treated like alcohol. If you drive drunk you go to jail.

www.KeyToAlaska.net
Patti Higgins Realtor®, GRI, eCertified®
907-360-2561 – Mobile
Rachael Higgins-Lalki Realtor®, eCertified®
(907) 830-7293 - Mobile
Prudential Jack White/Vista Real Estate
(907) 562-5485 – Fax

Lila Hobbs

From: Sean O'Hare <SeanO@AlaskaTraffic.com>
Sent: Friday, January 13, 2012 5:19 PM
To: Sen. Hollis French
Subject: RE: Legislative Update from Senator Hollis French

I think the main or at least most dangerous crime problem is youth delinquency. It seems there are kids being arrested for serious felonies that have long criminal records. I would like to see these kids identified and institutionalized in such a way that they would be apart from criminals and would have a chance at rehabilitation—perhaps put in a strict half way house that includes work, study, exercise, etc. I would hope that the cost of less crime and incarceration might offset the cost of this institutionalization but even if it doesn't, I would still be for it.
Keep up the good work,
Sean O'Hare

From: Sen. Hollis French [mailto:Senator_Hollis_French@legis.state.ak.us]
Sent: Friday, January 13, 2012 4:22 PM
Subject: Legislative Update from Senator Hollis French

Visit my website
Write me an email

Voice your opinions!
Here are some ways to let your voice be heard regarding issues important to you.

Write a Letter to the Editor
Submit your 175 word letter to the Anchorage Daily News via e-mail letters@adn.com, or fax them to 258-2157, Attn: letters to the editor.

Contact the Governor

January 13, 2012

Dear Neighbor,

The second session of the 27th Alaska State Legislature will convene on Tuesday. My Juneau office is up and running and I'll be there this weekend. I look forward to working on a host of interesting issues this session.

Crime Summit

As Chair of the Senate Judiciary Committee, I am sponsoring a Crime Summit on **January 24th** and **25th**. We will explore the leading criminal justice issues facing Alaska's urban areas. Our goal is to identify some cost-effective methods to combat crime, as well as concrete actions we can

Lila Hobbs

From: suter <suter@gci.net>
Sent: Friday, January 13, 2012 2:14 PM
To: Sen. Hollis French

Dear Senator Hollis French

September 13, 2012

On the issue of crimes, solutions, something that needs to be changed is Sec. 18.80.115 Confidential Information. The Alaska State Commission for Human Rights failed their audit, Audit Control Number: 01-30056-11, September 23, 2011. However, the auditors were not able to look deep enough into the workings of ASCHR to see if in fact they are investigating impartially and working to eradicate discrimination so that minorities who work for the state are getting their civil rights. There are no checks and balances, no transparency for the legislative auditors to do a complete and thorough investigation. The law needs to be changed so that the legislative auditors can look at everything the ASCHR and the state ombudsman has on anything they do. Otherwise the state government has no idea if they are ever doing their job. They can go on for decades and never be detected when they are not doing their job and get away with malfeasants. As of now, there is no way to tell. When a minority who works for the state files a human right grievance against the state, ASCHR does not allow these minorities to win their cases because of conflict of interest. They allow minorities who work for the federal government, local government and private contractors to win their cases, but not state workers. What essentially is being asked, is for the state to investigate itself and find itself guilty which is something the state is not going to do. There lies the conflict of interest. One can always say a minority who works for the state can sue to get their human rights back, but checking with 15 attorneys around town on this, they all want 50-60 thousand dollars up front before they start to sue. The vast majority of minorities who work for the state are at the bottom of the pay scale, living pay check to pay check. They don't have the resources to get into court. This is why the state put in ASCHR. There are 4 cases on state workers that ASCHR and now the ombudsman are working on since 1996, 15 years later and still on going. The audit report shows that they are not following the law and processing cases in a timely manner.

Thank you for your prompt and courteous attention.

Sincerely,

John Suter P.O.B. 670144, Chugiak, AK 99567

suter@gci.net 688-3103 301-0129

Lila Hobbs

From: clark yerrington <clarkyerrington@gmail.com>
Sent: Friday, January 13, 2012 1:41 PM
To: Sen. Hollis French
Subject: crime survey

1. What's the number one crime issue in Alaska?

concentrating on anchorage [which i'm more familiar with] it appears that theft is the worst problem, followed by burglary and assault.
http://www.muni.org/Departments/police/stats/Pages/CrimeStatistics.aspx
it depends on how you determine what is 'number one'? murder or rape might be more worth addressing, since the consequences are greater.
sorry to waste time by stating the obvious.
isn't the murder rate low to average here, and domestic violence and rape a lot higher than average?
anyway... let's just say for argument that theft is still number one. then...

2. What should be done about it?

- since much of it is drug-related, increase the availability of treatment programs.
- increase police presence in neighborhoods. when i first moved into mt view in 1999 there was a program in place that put extra officers on patrol, some of them on bicycles. think this was paid for by a federal grant -- but state resources could be similarly directed. federal emphasis lately seems to be on the militarization of local police forces through federal DHS -- not what's needed in my opinion.
- other preventive measures such as youth programs [arts immersion; sports; civic improvements, etc.]; and seed money for neighborhood organizing and event programming would help direct people toward leading productive lives.
- increase availability of low income housing. the problem with recent efforts in this area is the housing is still too expensive and the residency requirements too restrictive. often it seems like the real benefit from the funding and construction of low income housing projects goes to the developers. the financial structure of projects receiving public funds needs to be examined and clarified; and developer profit controlled for the benefit of the tenants [reduced rent, more favorable terms]. there needs to be a city-wide and statewide strategy for low- and middle-income housing, not a piecemeal approach that tends to segregate residents of a city or region by income -- having people of limited means living near wealthier individuals will tend to increase opportunity to those on the lower end. concentrating low-income housing in mt view, fairview [and to a lesser extent, muldoon and spenard] is unfair to those neighborhoods and does not promote a healthy mixture of tax brackets on the same streets.
- the last few summers a student group has been going around parts of town doing a 'peep hole project' -- installing a good quality peep hole in the entrance door of anyone who wants one, free of charge. maybe this could be a state program? having a good peep hole and a working porch light would cut down on assault and burglary.

clark yerrington
340 no. flower st.
anch AK

Lila Hobbs

From: Jed Grabman <3.14jed@gmail.com>
Sent: Friday, January 13, 2012 6:09 PM
To: Sen. Hollis French
Subject: Crime

Senator French,
In your letter to the editor you mention the 14 year old girl who overdosed on heroin and died. I am sure that you will get many letters telling you that we need stricter drug laws in Alaska in response to this. I am not going to agree with these other letters. I think that it is important when creating public policy not to be reactionary and not to simply make laws in response to one or two cases. As prohibition taught the U.S, when drugs and alcohol are illegal even when there is demand for them it simply creates an unregulated underground market.

I would urge you to support the decriminalization and regulation of drugs, with treatment provided for addicts. This is what Portugal did, and it resulted in markedly lower levels of drug use then when drugs were illegal. http://www.time.com/time/health/article/0,8599,1893946,00.html

It is simply a waste of resources to incarcerate non-violent drug offenders. If we instead treated drug addicts, instead of locking them up, we could save millions of dollars, while freeing up our police force and legal system to focus on those who are actually a danger to society. http://www.adn.com/2011/10/03/2102312/lawmakers-seek-to-cut-prison-costs.html

I write this to you as an Alaskan who neither drinks, nor does any drugs. I simply read articles about the Anchorage Police Department arresting people for being drunk at bars and think about what a terrible waste of money and man power this is. Why isn't this money being spent on education, or health care. You are in a position to do a lot of good, and I would urge you not to give in to the politically expedient stance of being "tough on crime".

-Jed Grabman,
Anchorage, Alaska

Lila Hobbs

From: John Zarnetske <jzarnetske@hotmail.com>
Sent: Friday, January 13, 2012 2:37 PM
To: Sen. Hollis French
Subject: FW: Crime

From: jzarnetske@hotmail.com
To: french@legis.state.ak.us
Subject: Crime
Date: Fri, 13 Jan 2012 09:07:58 -0500

Dear Senator French,

It seems to me as though the biggest issue regarding crime in Alaska is the recent actions taken by federal, state and local governments toward law enforcement. While Alaska has wielded a smaller hatchet to public order and safety than most states in the lower 48, we Alaskans are guilty of cutting programs, forcing departments to cut officers on the beat, threatening pensions and the ability of police unions to negotiate for reasonable working conditions. In short, we have more or less told law enforcement agencies from cops, to prosecutors, to prison guards, to parole officers, that they are less important than they used to be with regard upholding the law in society. As a result, good law enforcers retire early and fewer energetic and enthusiastic recruits commit to the rigors of law enforcement training, resulting in fewer career cops. We have asked Alaska's law enforcement agencies to do more with less and it won't work. The criminal and general societal attitudes toward the law are only as good as our ability to be proactive in preventing crime, catching criminals when they have committed crime, dispensing justice to suspects according to the laws we have in place, and rehabilitation of convicted criminals.

The solution is simple. Be creative with crime prevention and enforcement programs, hire more law enforcement officers, spend the money to train them well, pay them well so that they feel well compensated for their indispensable service to society, and reward them with benefits that will attract and keep Alaska's finest in the law enforcement occupation. As with education, we cannot sell ourselves short as Alaskans regarding crime.

I, for one, would feel much safer in Alaska if revered all for the law enforcement agencies in the state with the respect that they deserve.

Sincerely,

John Zarnetske
836 E. 78th Ave.
Anchorage, AK 99518

Lila Hobbs

From: A. lejune Davis <a.lejune@yahoo.com>
Sent: Saturday, January 14, 2012 7:50 PM
To: Sen. Hollis French
Subject: Re: Crime Summit

Senator Hollis French,

I am happy to reply to your request for answers to 2 questions from the public for your Crime Summit meeting.

Long have I told others (Outside) that nothing will ever get accomplished in Alaska's D/V and S/A problems until the people themselves rise up appalled.

What surprises me is that it is those two events which have (finally) offended Alaska's public.

I am a 57 year old, single mother (widowed) of a teen age daughter, who was 4 years old, when we landed in Alaska.

For 10 years I have been appalled at what Alaskans think is normal here.

In answer to question

1. The Number 1 crime issue in Alaska is corruption of it's law enforcement. By corruption I mean things like Troopers, Police, and (even) FBI refusing to let reports of known abuse be made. I can't remember (I am ordained Christian clergy and so, required by law to report...) ever trying to report suspected only abuse or neglect here. It takes too long to recover each time I am abused (and I do mean literally abused) for trying to report known abuse here to police, or Troopers. Finally, this year, as instructed by Governor Parnell's Office, I reported the (known) corruption (experiences) with the Wasilla PD to the FBI in Anchorage. Again, as is usual in Alaska, anyone trying to comply or be a responsible citizen is treated as (at least) a nut (or worse). Finally, I had to turn it into the Office of Professional Responsibility of the FBI and that took asking Yahoo UK Answers just to get the Office name and contact info because that too is obstructed info.

This is normal in Alaska. Calling the Troopers from Wasilla only gets re-routed automatically to Wasilla PD instead.

STAR does NOT automatically report all S/A's reported to them. More than that, they do NOT (in 10 years of experience with them) respect the religious views of rape victims. Instead, they sit and wait until the victims will convert to their world view and belief system THEN they MIGHT send in a rescue team. Usually,not. Usually, they persecute and enable whomever is abusing or has abused victims as much or MORE than what was already done.

That Sir, is just a few examples of why it is the "solution" that is actually the problem here. Because it is corrupted.

Go to the Alaska Women's Network, look up the contact info to report D/V or S/A in your area and then try to call or email from public facilities. Most of those "resources" are what D/V and S/A advocates (anywhere else in the USA but Alaska) call Stranded. 800 #'s that do not work. Email's that can not be made from public computers, such a libraries, etc.

For 8 years straight I sought to discover even 1 female physician (or endonurse) to do colonoscopies on survivors of S/A in this state. The Alaska Native Medical community solve that lack within a year of being informed they were not providing that service. The rest of the population didn't have it. Dr. June George does NOT accept Medicaid or Medicare and I found no evidence she ever actually treats any patients at Providence Family Med. The Alaska AMA would not disclose one existed anywhere in Alaska. Until I discovered, myself, just this year, a female Pediatric Gastroenterologist in Mat-Su (only) by myself, it has been a 100% males only physicians club.

Yet, you Legislators mandated at least the API patients get choice of gender for "intimate care." Really, no one ever admitted they were actually doing that (obeying State law) for the inpatients there age 55 and older. Because ALL persons age 55 and older are recommended to have at least a screening colonoscopy. Senate Bill 8 was passed exactly because 90 something percent of the people who end up spending some time at API have been sexual assault victims.

SART and STAR had NO referrals to make, so I could get people who needed sensitive care. SART does not deal with past victims, only new ones. STAR to this day does not respond to any requests for referrals (for old victims). I watched a women who they supposedly "helped" after a rape be taken to the ER in an Ambulance 3 times AFTER the rape. Finally, she stroked out (at only about 32 years old) from their "professional help."

STAR has it's priorities all messed up. I noticed it within the first 3 months of arriving in Alaska back in Dec 2000. Prior to that, I had worked in D/V and S/A issues in 3 states.

The best law enforcement I've ever seen was actually BIA out of Lapwai Idaho. THEY know how to be respectful of persons views, traditions, customs, and the law. And I'm not Native anything!

Corruption of normal and/or anything resembling function responses (i.e. sabotage of what agencies/programs do exist here) is so rampant here and so all pervasive that the only reasonable conclusion can be gross corruption. You can expect nothing but loud denials if you ask or look into this. The louder and more knee jerk that denial, the more you should have it independently checked out. Nothing but dealing with it, removing it from our judicial system (and that means groups like STAR all over the state too) will result in progress (finally). The rest is news spin and propaganda, moral boosting, etc. Without dealing with what is wrong, it's just trying to put the trash can lid on an ever piling pile inside the can.

What you are seeing is the "stuff" that can no longer be hidden. Nothing more, nothing less.

Nothing will ever be solved until and unless law enforcement is uncorrupted in Alaska.

On Question

2. Create an Internal Affairs for this State because the FBI can only do so much and they pretty much burned out their efforts back in their 2006-08 sting.

Alaska does not care. That a woman was raped and "tortured" to death in Anchorage (can't find it in ADN archives anymore) and the perp convicted but 2 men (who testified at his trial) walked through, saw it happening, spoke with the victim (before he tortured her some more, to death) and left not reporting it, could not be convicted of any crime is about the best picture of just how horrific Alaska really is. No rape in concert, no statutory rape, rampant police brutality but whole shows glorifying Troopers (who have NO Internal Affairs) and the gross neglect of the State of deal with any of it, along with the complicity of silence by the FBI now give me absolutely no hope for this State. And Alaska was my last hope for the USA!

Sincerely,

Rev. Angela L. Davis

http://www.thenazareneschool.com

Lila Hobbs

From: Brian Lax <brian9lax@gmail.com>
Sent: Saturday, January 14, 2012 6:59 PM
To: Sen. Hollis French
Subject: Input for Crime Summit

Senator French--

Thank you for organizing this very important effort! I am a long time educator in the state, so I have some experience with children, but I am by no means an expert in the area of crime. My personal opinion is that high crime rates in Alaska in areas of domestic violence are particularly disturbing. These crimes seem to be chronic and to exact a particularly heavy toll on children. Tied into this is crimes in general in which substance abuse or mental illness is involved. I really don't understand how we, as a relatively wealthy state, can tolerate the extreme lack of funding for programs treating substance abuse and mental illness. An employee at North Star told me that that is the ONLY resident facility in the state for the treatment of mental illness in children and adolescents. Really? One for profit facility in Anchorage for the entire state?! I hope she is badly mistaken! I frequently work as a substitute teacher in ASD special education classes, so I know, somewhat, about the large amount of education resources spent on children that cycle through this facility. For every one of these children whose issues can be successfully addressed and who can then successfully complete their course of study, the benefits to our society are enormous. Why do these children not have a diversity of options available to them?

I also seem to remember that, under Governor Murkowski's administration, funding for substance abuse treatment programs was cut considerably.Possibly mental health treatment as well? Has any study been done tracking crime rates with state funding for treatment facilities? Given the rampant problems associated with addiction statewide, every hub community in the state should have a treatment facility with no waiting list.

Thank you so much for allowing me to provide my input on this critical issue. Again, I am not an expert in these areas, however, I am most definitely interested.

--Brian Lax

Lila Hobbs

From: Per Jensen <akseadust@aol.com>
Sent: Saturday, January 14, 2012 6:46 PM
To: Sen. Hollis French
Subject: Re: Legislative Update from Senator Hollis French

1. Two many republicans.
2. More bumper stickers that say "wolves against Sarah Palin."

Sent from my iPhone

On Jan 13, 2012, at 5:22 PM, "Sen. Hollis French" <Senator_Hollis_French@legis.state.ak.us> wrote:

<image001.jpg>

Visit my website
Write me an email

Voice your opinions!
Here are some ways to let your voice be heard regarding issues important to you.

Write a Letter to the Editor
Submit your 175 word letter to the Anchorage Daily News via e-mail letters@adn.com, or fax them to 258-2157, Attn: letters to the editor.

Contact the Governor
Governor Parnell's Anchorage office may be reached at 269-7450, or e-mail him at sean.parnell@alaska.gov
You can also visit the state website at www.alaska.gov

Contact your Congressional Delegation
Senator Mark Begich,
Anchorage Office:
907-271-5915
EMAIL: Sen. Mark Begich

Senator Lisa Murkowski,
Anchorage Office:
907-271-3735,
EMAIL: Sen. Lisa Murkowski

January 13, 2012

Dear Neighbor,

The second session of the 27th Alaska State Legislature will convene on Tuesday. My Juneau office is up and running and I'll be there this weekend. I look forward to working on a host of interesting issues this session.

Crime Summit

As Chair of the Senate Judiciary Committee, I am sponsoring a Crime Summit on **January 24th** and **25th**. We will explore the leading criminal justice issues facing Alaska's urban areas. Our goal is to identify some cost-effective methods to combat crime, as well as concrete actions we can take to improve public safety. We held a similar Crime Summit in 2008, and are re-visiting the issues to get an update on progress, new challenges, and to brainstorm what the Legislature can do to help.

Presenting at the Crime Summit will be the U.S. Attorney for Alaska, representatives from the Criminal Division of the Department of Law, municipal prosecutors, commissioners, Alaska State Troopers, police chiefs, victim's services organizations, Public Defender Agency, Office of Public Advocacy, representatives from the Alaska Court System, Alaska Native Justice Center, Public Safety Employees Association, UAA Justice Center, Alaska Mental Health Trust Authority, representatives from Juvenile Justice, and more.

The featured speaker will be Annie Pennucci from the Washington State Institute for Public Policy. She will be focusing on how education, particularly early childhood education and adult GED and similar programs,

Lila Hobbs

From: Jonathan Galin <galin@gci.net>
Sent: Saturday, January 14, 2012 12:56 PM
To: Sen. Hollis French
Subject: RE: Legislative Update from Senator Hollis French
Attachments: image001.jpg; image004.jpg; image002.jpg

1) **What do you think is the number one crime problem in Alaska?**
answer:VIOLENT RAPE

2) **What do you think should be done about it?**
answer: STRONGER,more SEVERE penalties & BETTER METHODS OF FINANCIAL RESTITUTION. ATTACH ALL ASSETS (inc future) THEY HAVE ANY.

Jonathan Galin

Jonathan Galin
4120 Woronzof Drive
Anchorage, Alaska 99517-1495
248-9097
242-0505 cell
galin@gci.net

From: Sen. Hollis French [mailto:Senator_Hollis_French@legis.state.ak.us]
Sent: Friday, January 13, 2012 4:22 PM
Subject: Legislative Update from Senator Hollis French

Visit my website
Write me an email

Voice your opinions!
Here are some ways to let your voice be heard

January 13, 2012

Dear Neighbor,

The second session of the 27th Alaska State Legislature will convene on Tuesday. My Juneau office is up and running and I'll be there this

January 14, 2011

Senator Hollis French
State Capitol Bldg. Room 417
Juneau, Alaska 99801

SUBJECT: Crime Summit Recommendation

Recently, I had the unfortunate experience of being the mother of a son who committed a Domestic Violence crime. It sure brought the criminal justice (or no justice system) system in great prominence.

I can without question tell you that I am extremely disappointed in the justice presumptive sentence and the years that these presumptive sentences have been increased to, while still claiming to have a rehabilitating justice system for Domestic Violence and yet murders can be out in one third of their sentences and don't have to register for anything.

The other eye opener was how there is no accountability for the veracity of the statements made to the court by the victim. In this case there is perjury under oath and many other instances of lying and the victim is given a pass that whatever they do or say is okay even if it impacts the sentencing and is untrue.

We don't need any more draconian laws. There is either a person that is rehabilitable or you have a person with a criminal mindset that is going to reoffend. How about some common sense instead of a political platform "I am tough on crime". Great running slogan. Too bad that is all it is.

Women can get any male thrown out of their residence with the claim of being threatened and they are believed. They don't seem to have to substantiate the claim. Before any domestic violence occurred my son's ex had him removed from HIS house by gun point and the victim later said, there was no violence, I just wanted him out of the house.

What I want is accountability for everyone. In my mind lying should be just as punishable as the crime. You don't need more gasoline thrown on the fire and you sure shouldn't have to be fighting made up ghosts.

TV cameras in the court room should not be allowed. It is a distraction, and intimidating for all, including the judge. Anyone would be mistaken if they said it did not have an impact or influence the sentencing. The news media also doesn't provide unbiased coverage for both sides and their presence in the court rooms needs to be stopped.

Laws that could be made:

1. PROSECUTORS NEED TO BE HELD TO A HIGHER STANDARD AND FACE

PROSECUTION IF THEY LIE OR HIDE EVIDENCE i.e. Ted Stevens case.

2. NO TV CAMERA'S IN THE COURT ROOM. IT IS DISTRACTING, INTIMADING AND HAS A NEGETIVE EFFECT ON JUDGES SENTENCING AND WITNESSES TESTIFYING.
3. VICTIMS NEED TO BE HELD ACCOUNTABLE IF THEY ARE USING THE LAW FOR MANIPULATION OF THE COURT AND THE DESTRUCTION OF OTHERS BY FALSE STATEMENTS.

My son's case is probably an anomaly; however, I have attached a copy of a Readers Digest Article that is very similar "victim" as his ex and an article about Michael Douglas's son who got extra years when his defense attorney smuggled in drugs to the jail – Douglas's son gets more time – nothing is done to this attorney who hauled in the drugs. These are just a few cases where a female uses the law to accomplish something harmful to others. This abuse of the law is spreading and the women involved are given a free ride that destroys others.

You can't take all the risk out of living, DUI drivers or just incompetent drivers are a fact. The more laws you make the less freedom everyone else has. It is also inexcusable to have sentences that remove common sense and are so long you might as well lock the prisoners up and throw away the key. The young girl who died of the overdose, again where were the parents and where is the young girls responsibility for putting herself into an environment that was dangerous. I am sure there are enough laws on the books to prosecute this man.

I hope you will read the attached articles and will consider that sometimes less is more. Right now there are more male victims being created by making laws and then not vetting the stories of the supposed victims. The draconian sentences are enlarging the prison population and not doing anything to change society. If as a society we don't start reinforcing families and quit the one parent situations this problem will only increase.

The people that I talked to in the court system said they just didn't have time to check the stories of the victims out. Maybe it would be a good thing to provide funding for fact checkers to verify the victims' stories.

Sincerely,

Aileen Herring
8821 Emerald St
Anchorage, Alaska 95502

Caught in a Trap

The crime looked horrific: kidnapping, torture, and sexual assault. But nothing was as it seemed.

By Christopher Goffard
FROM *The Los Angeles Times*

He kept thinking there had been a mistake.

That was before the detective informed him of the charges and before the article in the *Ventura County Star*. "Man Held After Woman Found Raped and Tortured," read the headline, and there was his name, Louis Gonzalez III, along with a quote from a police officer: "In 19 years of police work, this has to go down as one of the most brutal attacks I have ever seen."

He had been standing on the sidewalk outside the Simi Valley Montessori School, having just flown in from Las Vegas, hoping to get a look at his five-year-old son's new

ILLUSTRATED BY JOHN RITTER

kindergarten—standing there, waiting to scoop the boy up in his arms and fly him to Nevada for the weekend. The sky was beautiful that afternoon. Gonzalez remembered it felt like spring.

The officer arrived on a motorcycle and headed straight for him. As he snapped on the handcuffs, Gonzalez noticed little faces pressed against the schoolhouse glass and asked if he could be moved just a bit so his son didn't have to see.

Soon, he'd surrendered all the items that tethered him reassuringly to the rational, workaday world. The BlackBerry he used a hundred times a day. His credit cards and photos of his son. His shoes and socks, his shirt and jacket, his belt and slacks and underwear. He stepped into a set of black-and-white-striped jail scrubs, the kind his son might wear on Halloween.

Minutes before Gonzalez's arrest around 2 p.m. on February 1, 2008, Tim Geiges placed a frantic 911 call. By the account he would give consistently in years to come, he'd just returned from work and found his wife, Tracy West, naked and bound in an upstairs bedroom of their Simi Valley home.

The dispatcher tried to calm him. "Sir, somebody beat your wife up?"

"Somebody tied her up, and I just got home—oh, my God ..." He was whimpering. "I just untied her head just now. She's crying. I need somebody, please!"

He managed to say that his wife's attacker would be at the Montessori School, a mile away.

"Who is this person?"

"Louis. Louis Gonzalez the Third."

Detective David Del Marto found West, 33, in the emergency room of Simi Valley Hospital. Her face was swollen, her lip gashed, her hair torn out in chunks. A cord, found tied around her neck with a slipknot, had left an angry red line, and there were burns on her stomach and ring finger.

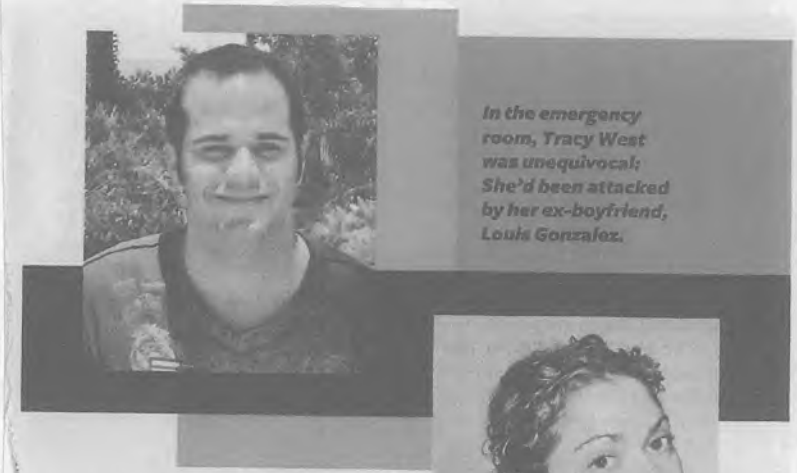
West was unequivocal about who had attacked her. It was Gonzalez, she said. He was her ex-boyfriend, the father of her son.

Del Marto made his voice gentle. "I need to find out what happened, OK? You know he's in custody, right? You don't have to worry anymore about him for now."

In a small, fragile voice, West explained that she and Gonzalez, 30, had been fighting over custody since their son's birth. She and Geiges were raising the boy, along with their younger daughter.

She said Gonzalez had ambushed her in the garage, dragged her to an upstairs bedroom, hog-tied her with her clothes, singed her with matches, and assaulted her sexually with a wooden coat hanger. Then, she said, he forced a plastic bag over her head and held it tight, and she feigned unconsciousness until he left.

"He told me he was gonna kill me," she said. "He told me that. Seven or eight different times."



In the emergency room, Tracy West was unequivocal: She'd been attacked by her ex-boyfriend, Louis Gonzalez.

HANDOUT/LOS ANGELES TIMES (2)

"Did he have anything with him in his hands?"

"He had a bag. Like a little mini-duffel bag."

During the attack, she said, she awoke from a blackout to find Gonzalez had placed mittens on her hands while he wore plastic gloves.

Del Marto thought this pointed to an uncommon level of sophistication—to a man who took extraordinary pains to avoid leaving fingerprints or traces of his DNA. In his report, the detective noted another detail she gave: Her attacker had worn overalls, as if to shield his clothes from evidence.

Del Marto thought West was lucky to be alive.

A few hours after the arrest, Del Marto pulled the accused out of his cell.

He studied Gonzalez. He saw no scratches on his face or hands and thought, The mittens.

"What is the accusation?" Gonzalez asked.

"That you assaulted Tracy at her house."

"That I assaulted? At what time did this take place?"

Del Marto stopped him. He had to read him his Miranda rights, a delicate business he knew could end the interview fast. Gonzalez agreed to talk anyway.

Maybe he thinks he's smarter than me, Del Marto thought. The guy came off as a little arrogant. Gonzalez had

an impressive title: senior vice president for business banking at the Bank of Las Vegas.

This is about a custody fight, Gonzalez said. He insisted he'd never been to West's house. Didn't even know the address.

"You work for a financial institution," Del Marto replied. "It's not hard to get a property profile on somebody."

The attack could have taken as little as 15 or 20 minutes, he said, and it was just two or three minutes from West's house to the school where he was arrested.

What about evidence at the house? Gonzalez asked.

Del Marto thought of the gloves. "Somebody probably watches *CSI* quite a lot."

"I didn't do this," Gonzalez said. "I know you think I did it, but I didn't do it."

"Yeah, I think you did it. I do," the detective replied.

Gonzalez and West had met in a study group at the University of Nevada in summer 2001. He was a high school dropout from the Bronx who had become a career-minded student; he wore pin-striped suits to class. She was smart, with brown hair and pretty hazel eyes, a vegetarian in flowered dresses who spoke softly.

Their relationship was brief. They had been apart for months when she called during a sonogram appointment. Suddenly he was listening to the heartbeat of their son.

In her fourth month of pregnancy, West met Gonzalez at a Denny's in Vegas. According to a police report, she said he became upset because she wouldn't go back to him. She said he slapped her and punched her stomach.

Gonzalez's version: They had gotten back together and argued because she was seeing another man and lying about it. He admitted to breaking her windshield, but only after she "went nuts hitting him," the police report said. He was arrested on suspicion of misdemeanor domestic violence. The charge was dropped.

The family-court battle began before the boy's first birthday.

Gonzalez's custody attorney, Denise Placencio, said West had tried relentlessly to curtail his time with his son, accusing Gonzalez of domestic abuse. The campaign continued, Placencio said, after West married Geiges and moved to California with the boy.

The courts allowed Gonzalez two weekends a month with his son. He would pick him up from the Vegas airport on Friday and take him back on Sunday, a knife twisting in his stomach as he watched his five-year-old loping down the Jetway, a gangly little guy with reddish hair, glancing back uncertainly.

In January 2008, Gonzalez sent an e-mail to West explaining that he wanted to see the boy's new Montessori school in Simi Valley. He would pick him up there on February 1 and

fly him to Nevada for the weekend.

West pressed for specifics. "What time are you planning on being here? Are you going to drive or fly?"

He would arrive by plane around noon, he wrote, and expected to get to the school around 2 p.m.

The e-mail exchange soon descended into acrimony. All these trips to Vegas were taking a toll on their son, West wrote. "Having to tell him that he has to go despite his obvious distress is not what I want."

miliate her as much as humanly possible before killing her" and fleeing with their son, Deputy District Attorney Andrea Tischler wrote in court papers.

The judge ruled: no bail.

When she met Gonzalez, lead defense attorney Debra S. White was struck by his eyes. He looked distraught and tired and angry.

This is about the boy, Gonzalez insisted. She wants me out of his life.

"This is about the boy," Gonzalez insisted. "Nail down my alibi and get me out."

Gonzalez answered that he hadn't seen these signs of distress—his son seemed happy to see him. "My focus right now is to make the best of what little time I have with him," he wrote.

West replied by writing that he had "proven time and time again" that he did not put their son's needs above his own whims.

It was hardly the nastiest exchange Gonzalez could remember. But he found himself thinking about it as he awaited arraignment. His hope of a quick release now seemed remote, considering the charges. If convicted of all counts, he faced five back-to-back life sentences.

"His goal was to degrade and humiliate her as much as humanly possible before killing her" and fleeing with their son, Deputy District Attorney Andrea Tischler wrote in court papers.

The judge ruled: no bail.

When she met Gonzalez, lead defense attorney Debra S. White was struck by his eyes. He looked distraught and tired and angry.

This is about the boy, Gonzalez insisted. She wants me out of his life. Nail down my alibi and get me out. He recited a detailed list, compiled over hours in his cell, of everybody who might have seen him around the time West said the attack occurred.

White called her sister, Leigh-Anne Salinas, her investigator on big cases. Salinas related to Gonzalez's businesslike, hard-edged manner but didn't think a jury would like him much. She was pessimistic about human nature and suspected Gonzalez might be guilty. She thought, Wow, this guy really thought this out.

Her task: verify Gonzalez's whereabouts in the hours preceding his arrest. West had accused Gonzalez of attacking her between 12:30 and

ANNE CUSACK/LOS ANGELES TIMES

Detective David Del Marto drove the route Gonzalez had taken that day. The timing didn't add up.

12:45 p.m. She knew the time, she told police, because she was about to leave to pick up her younger daughter early from school.

Salinas began retracing Gonzalez's movements, starting with his arrival at the airport in Burbank around noon. She walked into Enterprise Rent-a-Car on Hollywood Way, where employees remembered Gonzalez. He was the guy who needed a child's car seat. His receipt said 12:09 p.m.

Next, Gonzalez would have driven northwest to Simi Valley, a 28-mile trip. Salinas verified that Gonzalez was on his cell phone with another Nevada banker during the drive. Phone records confirmed this call lasted from 12:43 to 12:48 p.m.

At the Montessori School, Salinas's job proved tougher. School employees knew West, and Salinas sensed their reluctance to help the man accused of brutalizing her.

Salinas was polite and persistent. School workers remembered Gonzalez arriving between 12:45 and 12:50 p.m. He greeted his son and briefly toured the school. One lady joked that she felt underdressed alongside his suit and tie. They told him to return in about an hour to pick up his boy.

Gonzalez said he walked to a bagel shop at a nearby strip mall. The manager, Jung Soon Shin, recalled Gonzalez coming in around 1 p.m. to order a tuna sandwich on a sesame bagel.

When Shin explained that she didn't take credit cards, Gonzalez had patted his pockets—no cash—and promised to be back.

At the Wells Fargo a few blocks away, Salinas discovered, an assistant manager named Mercedes Saunders remembered Gonzalez coming in to make a withdrawal. They'd chatted, and she found him calm and pleasant. Surveillance cameras confirmed

he was there from 1:14 to 1:38 p.m., a bored-looking man in a dark suit.

Back at the bagel shop, Shin saw him return sometime before 2 p.m. with cash to buy his sandwich. She remembered him because he wasn't a regular and because after he left, she had to fish his reusable red sandwich basket out of the trash.

Salinas called her sister. West's story didn't hold up, she said.

"Wow," White said. "He actually may be innocent."

Del Marto wanted to find the duffel bag that West said Gonzalez had been carrying. Had all the items Del Marto couldn't find—the mittens, the gloves, the overalls—been stuffed in there and discarded?

He'd looked in storm drains and sewers. He'd searched roofs and freeway shoulders. He'd even inquired at Simi Valley mailbox companies, in case Gonzalez had been calculating enough to mail it to himself. No sign of the bag.

With doubts beginning to gnaw at him, he climbed into his car to time the route between the airport and West's house. He picked a Friday just after noon for his experiment, to replicate the conditions Gonzalez would have faced. He pushed his car to 80 mph. His partner held a stopwatch.

Even if Gonzalez had raced up the freeway, the detective discovered, he could not have arrived at West's house earlier than 12:42 p.m. And witnesses confirmed he was at the Montessori School right around then.

Did Gonzalez commit the attack after he left the school and before he was seen at a nearby bank? Or perhaps after he left the bank and before he was seen buying a bagel?

The detective concluded that each scenario would have given Gonzalez a narrow window of opportunity at West's house: six minutes.

Was that enough time?

Enough time for Gonzalez to find her in her garage, knock her out, drag her up the stairs, put gloves on his hands and mittens on hers, and slip on protective overalls so that his suit would remain immaculate?

Enough time to strip her, tie her up, burn her with matches, sexually assault her with a coat hanger, and try to suffocate her with a plastic bag?

Enough time to dispose of all this evidence, along with a duffel bag?

Why did no one, before or after, notice that Gonzalez was nervous or out of breath?

He remembered how West looked that day, bruised and traumatized. But the medical records seemed at odds with the sexual assault she described: They showed no internal tears or bleeding.

Maybe, Del Marto thought, the gloves, mittens, and overalls didn't exist. Maybe they were props in a story.

He withheld judgment until he could see the footage captured by the security cameras at McCarran Airport in Las Vegas.

Getting it required weeks of calls to the Transportation Security Administration. Finally, Del Marto and his partner were led to a private room in the bowels of Los Angeles International Airport and handed a disc.

Del Marto slid it into his laptop. He watched bodies shuffle through the security line in Vegas, taking off shoes, placing luggage on the conveyor belt. The detective trained his eyes on the screen for one thing in particular: the duffel bag. The airline said he hadn't checked bags. Had he carried it on board?

The detective froze the video and leaned forward. "I don't know how he could have done it," he said.

Three cameras captured Gonzalez walking through the metal detector. Del Marto froze the frame and leaned forward. Gonzalez's hands were empty.

Del Marto turned to his partner. "I don't know how he could have done this," he said.

The preliminary hearing in *State v. Gonzalez*, to determine whether he should face trial, was weeks away, and Del Marto was expected to testify on West's behalf. The detective did something rare in his 23-year career. He called the prosecutor to say that he was uncomfortable testifying in his own case.

Ventura County prosecutors were not deterred. They intended to put West on the stand to tell her story. There she would face a defense team that had lined up ten alibi witnesses and was preparing to portray her as a pathological liar.

On April 21, 2008, the day before the hearing was to begin, prosecutors learned that West was in the hospital. They had obtained a note in what appeared to be West's handwriting.

"The DA asking me to relive my horror of Louis Gonzalez attack is more than I can bear. For them it is a case. For me it is my life shattered," read the note. "I died of Rx overdose—suicide."

Later, in family court, West would say she didn't remember writing the note and blamed the hospitalization on drugs her psychiatrist had prescribed.

At 5:26 p.m. on April 22, prosecutor Andrea Tischler sent defense attorneys a brief e-mail: With West unavailable to testify, they were dropping the case. For now.

Jay Leiderman, one of Gonzalez's defense attorneys, hurried to the jail. Gonzalez was accustomed to odd-hours visits from the lawyer, but this

HANDOUT/LOS ANGELES TIMES

A bank security tape proved to be powerful evidence for Gonzalez's innocence.

time, Leiderman was smiling. "You're going home tomorrow," he said.

Gonzalez's father was there to greet him. So were Gonzalez's mother, brother, sister, and aunts, sweeping him up in a crush of family. After 83 days in a solitary cell, things felt wrong. All these people in one place, all this open air, made him dizzy.

He had his freedom. Now he wanted a sandwich. Then he wanted to get as far away from Ventura County as possible and start figuring out how to reclaim everything else he'd lost: his son, his job, his name.

The job turned out to be the easiest—the Bank of Las Vegas valued his abilities.

Lou, hey, welcome back ... So ...

He got used to telling the story. It was all about the custody case, he said. She wanted me gone.

No one came out and said anything directly, but he sensed people were wary. As if people figured that he hired a crack legal team and bought his way out of trouble. He knew certain things reinforced this perception: His accuser was walking free, after all, and retained custody of his son.

How come your ex isn't in jail? People kept asking.

He didn't have a good answer.

Getting to see his son proved tougher. He missed his sixth birthday. A custody judge withheld visitation, concerned Gonzalez might still face criminal charges.

He was finally allowed to see his son—eight months after his arrest. It was a brief visit at the office of a family reunification specialist.

Soon after, on his day off, Del Marto gave a deposition to the family law

attorney whom Gonzalez had enlisted to fight for full custody. All the physical evidence had been processed, the detective said, and none of it implicated Gonzalez.

"Based on my investigation, I see no reason why he should not be able to see his son."

Winning back his name was hardest of all. Stories persist on the Internet. Once, a date told him she had Googled him, and he had to explain.

What if he'd grabbed breakfast before his flight? His alibi gone, he could be in prison for life.

Leiderman thought it was not enough that the government dropped charges. There is such a thing as a declaration of factual innocence, he explained to Gonzalez. A judge can grant it. It is exceedingly rare—so rare that many lawyers go a career without seeing one. It means not just that prosecutors couldn't make a case against you but that you didn't do the crime.

The case remained on the docket of Ventura County Superior Court judge Patricia Murphy, who had earlier ordered Gonzalez held without bail. Leiderman petitioned the judge, trying not to get his client's hopes up. He laid out the case, pointing out the holes in West's story and the numerous alibi witnesses.

Prosecutors did not want Gonzalez declared innocent. They knew a jury wouldn't convict him but said they couldn't be positive of his innocence.

In January 2009, nearly a year after Gonzalez's arrest, Leiderman called him excitedly: The judge had sided with them. Gonzalez was soon holding a certified copy of the judge's order declaring him factually innocent.

He drove to the bank and put it in a safe-deposit box. He figured he would need it if he wanted to continue in banking, where the blot on his record would otherwise scare off future employers. It would help in his fight to win custody of his son. But it hardly made him whole.

Asked why West hadn't been charged with filing a false police report, James Ellison, Ventura County's chief assistant district attorney, gave this explanation: "We could not say with 100 percent certainty that Tracy West was lying."

Leiderman said he thinks the district attorney's office is embarrassed and wants the case to disappear. "No

one wanted to believe a woman would make something like this up," he said.

Del Marto can't say for sure what happened in that upstairs bedroom. He ruled out the possibility that West's husband, Tim Geiges, inflicted the wounds on her; his cell phone records proved he was elsewhere as she lay tied up.

Now and then, he found himself thinking of something he discovered on West's computer. It was a link to a sexual-bondage website that West had recently visited, Del Marto said. When he asked about it, she replied that a friend had sent it as a joke.

The site featured men and women in elaborate restraints and a depiction of a double-loop slipknot with a little eyelet on one end. To Del Marto, it resembled the knotted cord a nurse had removed from West's bruised neck on February 1, 2008.

The detective tried to imagine West hating her son's father enough to injure herself in such a methodical way. Tying the cord around her own neck, cutting off clumps of her hair, battering her own face ... and the other things. He'd seen people give themselves a scratch or bruise to impersonate victims, but nothing like this. "My God," he said, "to this extent?"

Del Marto said prosecutors asked him whether a case could be made against her. His reply: not without her confession. His supervisor praised his detective work, but Del Marto found the outcome unsatisfying. No one punished was a bad way to leave it.

As the custody battle staggered on, hearing by hearing, Las Vegas family court judge Bill Henderson wrestled aloud with the implications of the criminal case. He didn't believe Gonzalez had attacked West. Must he conclude, he asked, that she made it up? Perhaps someone else attacked her?

No, testified John Paglini, the court-appointed psychologist who had interviewed West four times: Either Gonzalez attacked her, or she lied.

West's voice was soft, at times barely above a whisper, when she took the stand last June. Her dark hair fell to her shoulders. She held her hands demurely in her lap, a still presence with an air of vulnerability.

She deserved her son, she said. She talked about how close he was to his little sister, how they belonged together in California; her voice broke.

Her lawyer asked her about February 1, 2008. She steadfastly insisted Gonzalez attacked her.

"Did you do it to yourself?"

"Absolutely not."

In her closing argument, Gonzalez's custody attorney, Denise Placencio, said West had been trying to divide father and son for years.

"The last resort was to frame Mr. Gonzalez and put him in jail for life," she said.

The judge concluded that West's insistence on Gonzalez's guilt "with no rational basis" was an attempt to remove the boy from his father's life.

"She continues to maintain that he's guilty of this heinous crime, and he's not," the judge said. She appeared to be a good mother otherwise, he said, and it was with "a heavy heart" that he awarded custody to the father.

The judge was not, however, prepared to accept the psychologist's either-or view of the case—that if Gonzalez didn't do it, West had made it up. What West believed about February 1, 2008, "remains unclear," and the possibility that she suffered a "delusion" had not been ruled out, the judge said.

West would stay in her son's life. She moved back to Nevada.

Statement required by the Act of August 12, 1970, Section 3685, Title 39, United States Code, showing the ownership, management and circulation of READER'S DIGEST, published ten times a year at 44 South Broadway Floor 17, White Plains, NY 10601, as filed on September 30, 2011.

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I certify that the statements made by me above are correct and complete.

Jim Woods
VP Planning, Consumer Marketing

View the original article at: http://www.nationalenquirer.com/celebrity/michael-douglas-outraged

NATIONAL ENQUIRER

MICHAEL DOUGLAS OUTRAGED!

[1] [1]

by Jeff Samuels, NATIONAL ENQUIRER
Photography by: splash news online

MICHAEL DOUGLAS is heartbroken over his son Cameron's extended prison sentence is incensed with the pretty female defense attorney who allegedly smuggled drugs into jail for the troubled young man, say insiders.

Jennifer Ridha, who was hired to defend the "Wall Street" star's 33-year-old son, reportedly became smitten with Cameron and hid powerful anti-anxiety Xanax pills in her bra during an attorney-client meeting with him.

Michael – along with his gorgeous actress wife **Catherine Zeta-Jones** – now blames Jennifer after a no-nonsense judge recently extended Cameron's sentence by 4 1/2 years for possessing drugs in prison, say sources.

Cameron had already begun serving a five-year term for peddling meth and cocaine at a New York City hotel, along with heroin possession.

"Michael is furious, and Catherine feels the same, that the woman lawyer who was hired to help Cam ended up causing him new trouble behind bars," revealed a close source. "And she wasn't severely punished for sneaking him drugs."

Confirmed an insider:"They're angry that Jennifer was not charged with anything while Cam is going to be behind bars for nearly a decade!"

Judge Richard Berman cited the pills-in-bra smuggling incident and said Cameron had proven himself "reckless, disruptive and noncompliant."

Incredibly, the judge's sentence was twice as long as what the prosecutors wanted, and Berman told Cameron he had "blown the biggest opportunity of his life."

Lila Hobbs

From: fwcoco@gci.net
Sent: Saturday, January 14, 2012 12:10 PM
To: Sen. Hollis French
Subject: RE: Legislative Update from Senator Hollis French

Hi,

In answer to question #1 I believe violent gang activity is our gratest danger at least in the urban areas.

Keeping law enforecment funded and focused with special task forces directed at these groups are one direct answer to the problem.

Thank You,
Fred

On Fri, Jan 13, 2012 at 4:22 PM , Sen. Hollis French wrote:

Description: Description: Description: Legislative Update from Sen. Hollis French
Visit my website
Write me an email

Voice your opinions!

Here are some ways to let your voice be heard regarding issues important to you.

Write a Letter to the Editor

Submit your 175 word letter to the Anchorage Daily News via e-mail letters@adn.com, or fax them to 258-2157, Attn: letters to the editor.

Contact the Governor

Governor Parnell's Anchorage office may be reached at 269-7450, or e-mail him at sean.parnell@alaska.gov
You can also visit the state website at www.alaska.gov

Contact your
Congressional Delegation

Senator Mark Begich,
Anchorage Office:
907-271-5915
EMAIL: Sen. Mark Begich
Senator Lisa Murkowski,
Anchorage Office:
907-271-3735,
EMAIL: Sen. Lisa Murkowski
Congressman Don Young,
Anchorage Office:
907-271-5978
EMAIL: Rep. Don Young

January 13, 2012

Dear Neighbor,

Lila Hobbs

From: Knudsen.Latta@gmail.com
Sent: Saturday, January 14, 2012 11:47 AM
To: Sen. Hollis French
Subject: Reply to questions in legislative update

Dear Senator French:
I think the number one crime problem in Alaska is violent crimes against women and children - especially in rural areas, but in urban areas too.
Unfortunately there is no easy solution to this problem. It is not to criminalize more behavior or increase penalties - our laws are already pretty stiff. But, laws without community enforcement or a community that offers no refuge from violence are problems that could be addressed. I think the Governor's "Choose Respect" is a step in the right direction, but it is going to take time. I do think public education efforts CAN make a difference - look at seat belts, washing hands, covering a sneeze. If presented as a public HEALTH issue, as well as a public safety issue, then I think building on increased community policing is going to work over the long term. But, it has to be a long term effort.
I see that the current redistricting plan has our House district (north of the airport paired with the House district south of the airport - does that make yours the "Fly-By District"? Or, because you have all those lakes (Lake Hood, Lake Spenard, Conner Lake, Sand Lake, Jewell Lake, and Jones Lake), maybe you can call it the "Lake District"....
Best of luck with session,
Kristin Knudsen

Lila Hobbs

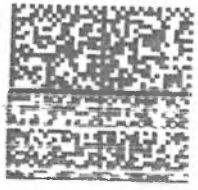
From: Scott Christy <scott512@gci.net>
Sent: Saturday, January 14, 2012 9:13 AM
To: Sen. Hollis French
Subject: Education

Since there is a strong link between education and crime, my suggestion is that the all or a portion of children's permanent fund dividends be invested in accounts that the child is allowed to draw on for either college or trade school education upon turning 18 years old. If they are not inclined to seek education, then cash them out at age 21. At present many of the children who most need better education or trade school training have their dividends spent by their parents for new snow machines, ATVs, and other short term frills. Unfortunately, such a change would not be popular with the parents (or most voters) who most need to consider the long term future of their children.

Keep up the good the work; I am proud you are my representative in Juneau.

Michael 'Scott' Christy

Joshua A. Sanchez 332727
Anchorage Correctional Complex west
1300 E 4th Ave
Anchorage Ak 99501



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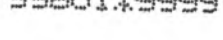
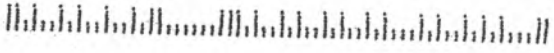
Mailed From 99501
US POSTAGE

Senator French
State Captiol Room 417
Juneau, Ak
99801





1-14-12

What's the number one crime issues in Alaska? I would have to say among all the issues is, the courage to approach any one issue with flexibility and compassion. We should have come along ways in the recognition of all our communities in Alaska and each need there of.

Not to take away the strength of those communities, on the contrary to empower and unite the principals of a healthy environment. This may be subjected to others thoughts of what that might be. However it should not. I repeat should not be infringed upon any one community.

The belonging of everyone to co exist respectfully with one another.

I have given much thought to this and I am trying to find the most benefical way to illuminate my points. Alaska has many forces at work or in motion. First the expansion of civiliation (Dominating) So now we have many human beings that are being run over by the expansion. This is where

the social sciences come in to play. To recognize and correctly translate the needs of the communities being exposed to the expansion. With out a doubt there are people that will need help Education can provide and facillitate the society with markers if paid attentioned to the path of cohesion. This is the key to flexibility with in the departments and Legislature and the statues enacted. Not for political power or to look good or be cool. Our very existance, Now right now. If its something that needs to be changed change it Now. Don't continue to eliminate the freedoms of the citizens. Jail isn't the solution to everyone issue.

P.S I could expound on this upon your request.

Most Respectfully

Joshua Alexander Sandage

Lila Hobbs

From: Bruce Neilson <brucedneilson@yahoo.com>
Sent: Saturday, January 14, 2012 11:49 AM
To: Sen. Hollis French
Subject: Re: Legislative Update from Senator Hollis French

The number one crime problem in Alaska is alcohol fueled violence. I do not know what should be done about it. Wish I had some suggestions but after a lifetime in Alaska, over 56 years, I am jaded. Just see more of the same.

From: Sen. Hollis French <Senator_Hollis_French@legis.state.ak.us>
To:
Sent: Friday, January 13, 2012 4:22 PM
Subject: Legislative Update from Senator Hollis French

Visit my website
Write me an email

Voice your opinions!
Here are some ways to let your voice be heard regarding issues important to you.
Write a Letter to the Editor
Submit your 175 word letter to the Anchorage Daily News via e-mail [illegible], or fax them to 258-2157, Attn: letters to the editor.
Contact the Governor
Governor Parnell's Anchorage office may be reached at 269-7450, or e-mail him at sean.parnell@alaska.gov
You can also visit the state website at www.alaska.gov
Contact your Congressional Delegation
Senator Mark Begich,

January 13, 2012

Dear Neighbor,
The second session of the 27th Alaska State Legislature will convene on Tuesday. My Juneau office is up and running and I'll be there this weekend. I look forward to working on a host of interesting issues this session.

Crime Summit

As Chair of the Senate Judiciary Committee, I am sponsoring a Crime Summit on **January 24th** and **25th**. We will explore the leading criminal justice issues facing Alaska's urban areas. Our goal is to identify some cost-effective methods to combat crime, as well as concrete actions we can take to improve public safety. We held a similar Crime Summit in 2008, and are re-visiting the issues to get an update on progress, new challenges, and to brainstorm what the Legislature can do to help.
Presenting at the Crime Summit will be the U.S. Attorney for Alaska, representatives from the Criminal Division of the Department of Law, municipal prosecutors, commissioners, Alaska State Troopers, police chiefs, victim's services organizations, Public Defender Agency, Office of Public Advocacy, representatives from the Alaska Court System, Alaska Native

Daniel Shoi 578530
Alaska Correctional Complex - E
1400 E 4th ave
Anchorage, AK 99501

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01/17/2012
Mailed From 99501
US POSTAGE

Sen Hollis French
State Capitol room 417
Juneau, AK 99801

99801X1193

Thank you San French

I would say the #1 criminal issue in Alaska is the epidemic level of child sexual abuse.

Such acts are arguably worse than murder [redacted] especially when one considers murder victims Never become the perpetrator; and seem to cope with death better.

No punishment could be too harsh in my politically incorrect opinion; How many of those children do you suppose would have preferred to have been beaten? Yet sentences often leave teenagers with the knowledge that we just released the man who raped you.

#2 Solutions

1. No statute of limitations or a very long one 50-100 years
2. Lengthy prison terms (or just kill em)
   Where's that great molester gone you'd story?
3. Though the ACLU & Supreme Court would never tolerate a drug free society why don't you, just as a publicity stunt, sponsor a bill making polygraphs court admissable i.e.
   "There claims were made on a polygraph"

Daniel Short

On the back I have expressed my [redacted] opinion in Hillbilly Rap. Please enjoy

AS wrong as is me beat you is more
wrongER you're Not beat
-Gotcha No respect for childrens
Now we're confiscating feet
cain't has you walking round
where the Kiddies might be found
& their place is over ground
so you're going under it.
Aint No bitch Billy bottom
Aint No why waste time with it
If a chicken got a throat
then that's where you put a slit
Where's this Molester gone good story
when does this (shit) over work
How you gonna tell them kids that
we just released the Jerk?

More (& less offensive) poetry on
Spaceranger on myspace.com

(sorry about the penmanship, I'm in the hole :-)

FROM DESK OF:
DON THRAPP
2203 ROOSEVELT DR.
ANCHORAGE, AK 99517

DEAR SENATOR HOLLIS;

I'd SAY #1 CRIME ISSUE IS MURDER!

AND #2 ISSUE IS RAPE!

IN ORDER TO SOLVE OR PREVENT CRIMES AND housing THOUSANDS of PEOPLE, PUNISHMENT NEED BE SWIFT & PROMPT!

FOR CAPITOL CRIMES, YOU TAKE THE CRIMINAL OUT BEHIND THE BARN & STAND him up AGAINST A DEAD STUMP & SHOOT THEM full of holes with A DULL FAN!

FOR RAPE CASES the "SENTENCE" is very simple & theres <u>NEVER</u> any REPEAT OFFENDERS!!! This METHOD was used on the NAVAHO INDIAN RESERVATIONS FOR OVER 100 YEARS & there NEVER were any 2nd

Page

Dear Senator;

offenders! Neither were these Any Rapist spend time in JAIL!

One must STOP, "mollycoddling" CRIMinals! If they committe A CRime then, they need to Be Required to PAY the PRICE!

When A Sex offender was PROVE guilty on Reservation, His Testicles were NAILed to Floor & a sharp Knife PLACed in FRONT of him! Then his HOGAN was Set Afire! END of STORY!! What Part Does Not This modern generation UNDERSTAND?

Please Change LAWS to Reflect ABOVE THINKING!!! Truly,

907-394-9105 Dan Chapp

Lila Hobbs

From: Robert Auth <authrm@gci.net>
Sent: Sunday, January 15, 2012 11:19 AM
To: Sen. Hollis French
Subject: Re: Legislative Update from Senator Hollis French

Dear Hollis,

I think the number one crime in Alaska is corruption. You see it everywhere, from the collusion of the two oil refineries which causes us to have some of the highest gas prices in the country to the legislators who refuse to even consider a law against price gouging to a governor who seems more interested in keeping oil companies happy than abiding by the constitution. It didn't end with Bill Allen and Frank Murkowski and the Corrupt Bastards. I find it dismaying we had to have the federal government prosecute our homegrown criminals. Where was our law enforcement and the attorneys general who were in charge while this was happening?

I think we have become one of the most corrupt states in the country. It influences everyone here because it says when things can be done to whom, where, how and why. You're not safe in your home because they might put a coal mine operation down the road from you or they might decide that your basic rights to clean air and water is superseded by an open pit mine. We deserve better.

Thank you.

Peggy Auth
On Jan 13, 2012, at 4:22 PM, Sen. Hollis French wrote:

Visit my website
Write me an email

Voice your opinions!
Here are some ways to let your voice be heard

January 13, 2012

Dear Neighbor,

The second session of the 27th Alaska State Legislature will convene on Tuesday. My Juneau office is up and running and I'll be there this

Lila Hobbs

From: Robert Auth <authrm@gci.net>
Sent: Sunday, January 15, 2012 11:58 AM
To: Sen. Hollis French
Subject: Re: Legislative Update from Senator Hollis French

Hi Hollis,

After seeing the front page of the Daily News for today, I want to add corruption going on between the state and Anchorage Baptist Temple. How about doing away with the tax loopholes?

Peggy Auth
On Jan 13, 2012, at 4:22 PM, Sen. Hollis French wrote:

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Marguerite Swartz
PO Box 451
Sutton, AK 99674

T 907 746-0151

mhstz2005@yahoo.com

January 16, 2012

Hollis French
Senator

716 West 4TH Avenue, Suite 420
Anchorage, Alaska 99501

Dear Senator Hollis,

I was writing in answer to your request for public input as to what the #1 crime issue in Alaska is and what should be done about it. It seems to me it is the same problem the entire country has, which is the abuse of drugs and alcohol. I suspect that the vast majority of violent crimes, child abuse, theft, car accidents and on and on are committed by people who are under the influence of drugs and/or alcohol or whose lifestyle encourages them to habitually use them. I think by now it should be clear that stiffer penalties and longer prison terms are not an effective way to rehabilitate drug/alcohol users. In fact for many prison terms will only exacerbate their problems. That is not to say that penalties should not be imposed on law breakers, they should be. But they should be reasonable and they should not be unending if the addict is going to have any incentive to quit. Most professionals agree drug and alcohol addiction is a mental health issue. I believe that if more money was spent treating it as a health issue as opposed to a criminal issue countless dollars could be saved in the long term. Not to mention the lives that could be saved and the suffering that could be prevented.

Most people don't believe the current method of fighting the 'war on drugs' with undercover agents, SWAT teams, prison cells and probation officers is working. In fact over the last 30 years the problem seems to have gotten much worse. It is time for a different tactic. I think de-glamorizing drug and alcohol abuse would be a good step. This could be done by expanding and modifying the present school programs and also with a television/radio/newspaper campaign. It would be most effective if only the facts were presented. For example I recall being told far fetched horror stories about drug use when I was in school and after that all drug warnings seemed to loose credibility. The facts alone are horrifying enough. People who have grown up in a family of addicts and perhaps surrounded by other addicts may not even realize how different life could be with out drugs and alcohol. A public education campaign stressing the possible and inevitable financial, legal, physical and mental consequences of drug/alcohol abuse versus the benefits of not using could inspire some to quit and more to never start. If affordable treatment was made available at the same time it could be very effective for those who wanted it.

If one considers all the costs associated with addictions, the damage it does to the children of the addicts and the almost certainty that they too will grow up to be addicts, the costs of juvenile crime, foster care, the costs of all the crimes addicts commit, the additional time police departments spend investigating those crimes, the costs of trials, the costs of imprisoning addicts and then the costs of supervision during the following years of probation it seems to be astronomical. Spreading like the disease it is from generation to generation, from person to person, it also seems unending. Offering free treatment to those who decide

they want to stop but need help doing so might be expensive but would be a bargain in comparison to dealing with another addict. For every person who is successful in quitting the odds that others might not ever start or will also be able to quit are increased. I believe the state needs to offer treatment on both an inpatient/outpatient basis at a reduced or free rate to all who want it but might otherwise not be able to afford it. The availability of these programs should be widely advertised so the addicts are constantly reminded that there is a better way and it is available. If the people who volunteered for these programs were kept separate from the court ordered patients, who might not be sincere in their wish to change, the success rate could be very high. I say that because without exposure to court ordered patients, the ones who are sincerely trying to quit would not be exposed to the temptation to use that those who are only there to satisfy a court order might offer them when they are at a cross roads. There are many voluntary programs already in place and the state could join forces with them to offer services to willing participants. Perhaps vouchers could be made available to provide treatment in existing treatment centers for both outpatient and inpatient treatment. After treatment they should also have access to long term support. Just as after imprisonment a probation officer is assigned, perhaps a counsellor could be assigned to assist the newly sober person in learning to adjust to and deal with all the problems of day to day life. If the addict has underlaying issues with depression or some other type of mental or physical health issue they could advise and help them to treat it also. Many addicts are self medicating undiagnosed problems. Correcting those pre-existing problems would go along way towards ending their addictions and the resulting bad behavior.

Maybe the state already offers these programs, but it is not widely known. If so it needs to be advertised. Every drug and/or alcohol abuser in the state needs to know there is a better way to live and that help learning to live a better life is available.

I also want to thank you for giving me the opportunity to express my opinion on this tragic and serious issue.

Sincerely yours,

Marguerite Swartz

Lila Hobbs

From: Joe <joco49@mtaonline.net>
Sent: Wednesday, January 18, 2012 5:26 PM
To: Sen. Hollis French
Subject: Requested info '#1 crime issue in the state of AK.'

Most will state sexual abuse of minors or rape which are not to be marginalized & are extremely important issues but we also have a real issue most of us can relate to and that is 'traffic issues, specifically arrogant drivers who drive above the law on our roads and byways (of which we have few) either in a drunken state or in a 'non-caring state knowing that the odds of getting caught are few due to the low population of officers on the roads at any given time. This issue gets worse every year.
Make it possible to fund additional Troopers for our highways. This is vital. Our state is not a teenager anymore. We've grown exponentially. We actually should have an intermediate police force similar to a Sheriff Office, just another step in the law enforcement agencies. We need these assets to curb the many accidents that take so many of our community members lives.
Just the 'sight of a Trooper vehicle ' can keep the nut behind the wheel from spinning off.
Good luck to you in this year's legislative endeavor...

James J Corbett
Wasilla AK.
44 yr. res of AK.

1-16-17

Senator French
716 west 4th Ave Suite 420
Anchorage AK 99501

Dear Sir,

In regards to your article on the Nome Nugget, I have some issues affecting Rural Alaska.

I live in Bresig Mission Alaska, a growing community with 340 residents. In the last 4 yrs our community has major development with the installation of water and sewer, tank farms, roads, and new housing, in which I live in currently with these developments came jobs and jobs mean money. Along with these developments also came [redacted] sites in human form who wanted this money, [redacted] bootlegging, drugs became rampant, which corrupted our people, our economy and goverment.

All Alcohol and marijuana came in BULK through Barges that resupply our stores, schools and public facilites.

Non Natives who came to do a service for our community got rich. Teachers, health workers and even our pastor who we have been trying to get rid of but having a hard time because he's paying the church council, city workers and local goverment.

Recently we got a new Mayor, PA, and principal who are honest and hard working.

Drugs are our number one problem here and our local law enforcement and troopers in Nome are no help at all.

We need help here and booting out our pastor would change our future and village life our people are →

struggling. So are our children.

Any help here or anywhere with drugs and alcohol problems would be greatly appreciated.

Cathy Barr
P.O. Box 85057
Brevig Mission AK 99785
907-642-6566

Lila Hobbs

From: Fred Torrisi <ftorrisi@courts.state.ak.us>
Sent: Tuesday, January 17, 2012 12:38 PM
To: Sen. Hollis French
Subject: crime in rural Alaska

Sen. French, I write in response to your letter in Friday's ADN. I am not writing in any official capacity, but rather as a long time resident of Bristol Bay.

The number one crime issue in this part of rural Alaska is that it is generational. The children of criminals and victims are much more likely than others to offend in the future.

The good news is that in small villages it is relatively easy to identify these families; the bad news is that a significant number have fetal alcohol syndrome disorder and are not easy to help. But the State should double funding for the Office of Children's Services and offer a variety of programs for those with alcohol and mental health issues, intervening much earlier than is now occurring. Facilities offering structure and guidance should be created throughout the state, and correctional facilities should be located in regional hubs, so that offenders could have contact with their families and take advantage of local programs.

I know that this does not directly address the two crimes you mentioned, but they do support my belief that deterrence is an illusion after an alcoholic takes his first drink. While raising sentences and turning misdemeanors into felonies works to isolate the hopeless defendants, real prevention must begin years earlier. Spectacular children will emerge from dysfunctional families, but they face long odds. Taking them from their families after 5 or 10 years of abuse and neglect is, too often, too late. Early intervention and locally administered programs are needed. While the results may be difficult to measure, it seems plain to me that such efforts will pay dividends for years to come.

Thank you for your work on this.

Fred Torrisi

Lila Hobbs

From: Michael Scott <mikeinanc@gmail.com>
Sent: Wednesday, January 18, 2012 7:19 AM
To: Sen. Hollis French
Subject: Re: Legislative Update from Senator Hollis French

1) What do you think is the number one crime problem in Alaska?
DWI

2) What do you think should be done about it?
Increase minimum mandatory sentence significantly

On 1/14/12, Sen. Hollis French <Senator_Hollis_French@legis.state.ak.us> wrote:
>
> [Description: Description: Description: Legislative Update from Sen.
> Hollis French]<http://french.aksenate.org/>
>
> Visit my website<http://www.aksenate.org/index.php?id=16>
> Write me an email<mailto:sen.hollis.french@legis.state.ak.us>
>
> Voice your opinions!
> Here are some ways to let your voice be heard regarding issues
> important to you.
>
> Write a Letter to the Editor
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> letters@adn.com<mailto:letters@adn.com>, or fax them to 258-2157, Attn:
> letters to the editor.
>
> Contact the Governor
> Governor Parnell's Anchorage office may be reached at 269-7450, or
> e-mail him at sean.parnell@alaska.gov<mailto:sean.parnell@alaska.gov>
> You can also visit the state website at
> www.alaska.gov<http://www.alaska.gov/>
>
> Contact your
> Congressional Delegation
> Senator Mark Begich,
> Anchorage Office:
> 907-271-5915
> EMAIL: Sen. Mark Begich<mailto:senator@begich.senate.gov>
>
> Senator Lisa Murkowski,
> Anchorage Office:
> 907-271-3735,
> EMAIL: Sen. Lisa Murkowski<http://murkowski.senate.gov/contact.cfm>
>
> Congressman Don Young,
> Anchorage Office:
> 907-271-5978
> EMAIL: Rep. Don Young<mailto:don.young@mail.house.gov>

Lila Hobbs

From: bigfishon@gci.net
Sent: Friday, January 20, 2012 11:45 AM
To: Sen. Hollis French
Subject: Crime in Alaska

Dear Senator French, Thank you for asking for our opinion regarding crime in Alaska. I have been sharing this question with several professionals that I work with and others and we all agree on the same solution so I hope you have received responses that follow this same path.

The number one crime in Alaska includes violence against children, women and others. As you may conclude, this leads to side effects that cause enormous strains on those of us that provide services such as housing, domestic violence support, children's services and shelters.

The solution is substance abuse treatment and affordable housing.

We know that over 80% of those in our prisons and the crimes they committed in some way involve alcohol or drugs. At an unfathomable cost to our children, the cost to the state and to our families, and communities, we do not have any affordable comprehensive alcohol drug or mental health treatment programs. The largest provider of mental health treatment programs in Anchorage has to fight each year for funding. If I have a client who comes to me and says, "I'm drinking and I need help"...there will be no help available. There are literally 9 beds in Anchorage. These are folks who have little to no income and certainly no opportunities for getting better without at least some support.

If you ask me, the new prison fiasco could have been turned in to a self sustaining alcohol and mental health treatment center. It makes no sense to put more money into prisons when crime can be prevented by providing effective treatment. Especially crimes against children.
Once someone gets out of prison, they have few housing options. Affordable and stable housing is an an answer to crime as much as treatment.

I apologize for the long e-mail and as I'm sure you have guessed can continue for pages. I hope you will consider my response and thank you for the opportunity.

I work in affordable housing with folks who are previously homeless, disabled and elderly and have been an Alaskan for over 40 years....the problem has never changed. Vickie Dodge-Pamplin

Lila Hobbs

From: Jana Barlow <jbarlow907@yahoo.com>
Sent: Monday, January 23, 2012 10:15 PM
To: Sen. Hollis French
Subject: Crime Summit Issues

Hi Sen. French. I'm one of your biggest fans and the mother of Amanda Metivier, who I believe you know. I'm responding to your call for letters from the ADN asking for input. I am sorry this is last minute but I hope it reaches you in time. The #1 crime issue in AK is the horrific proliferation of drug crimes and the crimes committed by addicts who are stealing, pawning stolen goods, dealing drugs, trading for stolen goods or trading for them. One of my daughters and her boyfriend (and the boyfriend before) are prime examples. I used to see a parade of unsavory characters come to visit-obviously high on something, I've seen a long list of drug related texts, and have had to do my own detective work to track down some of my stolen items. I had to pay Ambrose Richardson to get back a pair of my earrings he had been holding in lieu of payment for drugs-he doesn't work except to sell drugs. His girlfriend died last year from an infected injection site-she left behind some children. A friend of my daughter, Alex K. Robinson used to work at Bingo South where she was asked to sell drugs for some of the bingo patrons, pawned several pieces of my jewelry-taken from my home-she's mostly a user but she's never been caught. I had to negotiate with the pawn companies and spend about $500.00 to get my items back. Lyle Newby Sr. sold drugs for years, attacked a man and beat him from behind but never caught. He got lots of pain meds from his Dr. and sold those too. He also "cleaned out a vacant house down the street from his mom's house and kept bringing anything that wasn't nailed down to her house on Aspen-never caught.A lot of these miscreants have been traffic stopped but APD is missing a lot of their hiding places. #2 What should be done about it? APD is too inconsistant.They help a select few but withhold help for so many of us. I filed a police report as well as my friend, Betty Whorton-we both paid for our reports but they were heavily redacted with key info blacked out. We were both ripped off $800.00 by Erik A. Thomson of Chugiak-who was supposed to cut down trees on our properties then changed his cell phone no. and never came back to do the job. Without his home address, we had to hire a PI to track down his address so he could be served for court-another $130.00 because APD refused to keep his address on our report. They wouldn't even send an officer out to talk to him. YET CHECK ADN 12-21-11, "POLICE HUNT MAN WANTED ON FRAUD ALLEGATIONS", PAGE 3 AND ADN 12-24-11, "FUGITIVE WANTED IN FRAUD SCHEMES ARRESTED"-SAME MO, DIFFERENT VICTIMS-APD HELPED THEM IN A BIG WAY, BUT NOT MY FRIEND AND I--INCONSISTANT AGAIN. ALSO-ADN, 1-7-12-"POLICE HOPE PHOTOS HELP NAB SNOWBLOWER THIEVES"-WITH A PUBLISHED PHOTO OF THE TWO SUSPECTS, ASKING FOR CRIMESTOPPER TIPS. A friend of mine, middle aged, was stopped for no lisc., no ins., and expired tags-SHE WENT TO JAIL AND IT COST HER $700.00 PLUS. last Wed., a young 21 yr. old attractive young lady who worked for Brown Jug at Minnesota and Spenard named Bianca was stopped by APD with no lisc. or ins. and got NO TICKET AND WAS ALLOWED TO DRIVE HOME. Today, while delivering mail and going over to water my 93 yr. old friends' greenhouse, I got out of my car and was verbally assaulted by her neighbor-a male who yelled at me "TO NEVER COME NEAR HIS PROPERTY AGAIN AND THAT I WAS A F----ING B---H, ETC AD NAUSEUM-I HAD SAID, NOR DONE ANYTHING. WHEN I CALLED APD OUT THEY THOUGHT THAT I WAS THE ONE LYING EVEN AFTER I TOLD THEM I WOULD TAKE A POLYGRAPH. I WAS SO UPSET I THOUGHT I WAS GOING TO HAVE TO CALL A PARAMEDIC.I ASKED IF I COULD GET A RESTRAINING ORDER-'yeah if you do a property search and find his name you can", I was told. I am that old lady's caregiver, now I'll have to take a tape recorder with me to get evidence and spend hours trying to locate the name for 3399 Willow st.Again APD DID NOTHING.This was his second attack on me. APD IS PROTECTING AND SERVING ONLY A FEW SELECT CITIZENS-NOT ALL WHO NEED HELP. At the courthouse I had to redo my court papers FOUR TIMES TO THE CLERK'S SATISFACTION, SPENDING DOUBLE ON FILING TO SEPERATE THE CASES AND PAY THE INCOMPETENT ACIS PROCESS SERVER, TODD DOUBLE TO SERVE AT THE SAME ADDRESS. THERE WAS NO CLIENT

CONTRACT FROM ACIS AND I HAD TO DEMAND RECEIPTS-THEY WEREN'T GOING TO GIVE ME ONE. I WAS SENT A LETTER SAYING THAT THEY WEREN'T ABLE TO SERVE ERIK A. THOMSON-NO EXPLAINATION, NO REFUND CHECK. ALL BECAUSE APD REFUSED TO DO ANYTHING OR LEAVE HIS ADDRESS ON THE REPORTS THAT I PAID FOR. WHETHER THEY KNOW IT OR NOT, APD HAS A TERRIBLE REPUTATION IN ANCHORAGE-THESE ARE SOME OF THE REASONS WHY.THEY ARE SO INCONSISTANT AND SELECTIVE ABOUT WHO GETS HELP AND WHO DOESN'T. MY FRIEND AND I WILL NEVER GET JUSTICE. Thank you for your service, Hollis-keep up the good work. Sincerely, Jana Barlow (243-4581, 230-5515, jbarlow907@yahoo.com)

Lila Hobbs

From: johnpalmes@gci.net on behalf of John Palmes <johnpalmes@gci.net>
Sent: Tuesday, January 24, 2012 11:09 PM
To: Sen. Hollis French
Subject: Rape and Child Rape ... FASD (Fetal Alcohol Spectrum Disorder)
Attachments: Denali Poster.jpg

Categories: HF responded

Senator French and Senate Judiciary Members:

Today I attended the first day of this year's Alaska Crime Summit because I am a 40 year resident of Alaska and I am appalled by our highest in the nation rates of rape and child rape.

It was almost 10 years ago that I heard on the radio "Alaska has the highest rate of sexual assault in the United States." Then I heard it again the following year. I also started hearing "Alaska has the highest child sexual assault rate in the United States." I heard these statistics year after year until I decided I should spend some time trying to understand what's going on.

I am a retired biologist and animal behavior is something I've spent some time studying. I also could not rape either an adult or a child… it would be impossible. I had to ask myself "what is it about Alaskan society that causes there to be so many men that are capable of such a thing?" I think the answer lies to a great extent in our highest in the nation rates of alcohol consumption, and Fetal Alcohol Spectrum Disorder, fetal brain damage by alcohol.

Since my awakening almost a decade ago, I've been studying the issue.

I found that no matter if Democrats or Republicans were in the majority, or if our income was soaring or sinking, Alaska has had the highest rates in the nation of these particularly nasty crimes for as long as statistics have been collected…. 40 years? 50? It's part of life in Alaska and most of us don't even know it. We are in denial. The next step is anger, and you may be there, but the public isn't. One women's advocate told me "Rape is an accepted norm. I once met a 10 year old girl in rural Alaska who told me it wasn't a question of if she would be raped but when."

Alaska's sexual assault is at least twice the national average. I had to ask myself "what does that mean?" We hear that the rates are high, but we don't do the math. One in four women in the United States are raped before their 25th birthday. If we are twice that then that's half the girls in your local grade school and half the young women in the senior class. Why are we not screaming about this? Why are we so complacent?

We are in denial, and we aren't looking for causes. If we're looking for anything we're looking for punishment.

It seems our first response is to help victims… and that's appropriate. Then those of us that do get angry want vengeance and punishment. Problem is that helping victims doesn't reduce the rate of sexual assault… rape for a simpler word… and punishing the perpetrators doesn't reduce the rate either. The problem is that something about life in Alaska fosters individuals who commit these crimes… another thing we don't want to know about ourselves.

In the last few years I think I've found a large component of the problem. All males are not liable to commit these crimes, but people with brains damaged by fetal alcohol exposure are. It may be possible to turn them to more productive and acceptable behavior if you get to them early enough, but people with FASD have life-long incurable brain damage which leads them to be both victims and perpetrators of sexual assault and other violent crimes, particularly if they grow up in an atmosphere of violence and abuse.

People with Fetal Alcohol Spectrum Disorder, FASD, may have good language skills and near normal IQ, but can't remember and can't learn from mistakes. They don't understand consequences of the things they do, have little empathy for other people, and act impulsively. They are not deterred by punishment. They are also not likely to be able to figure out what "Choose Respect" means.

People with FASD need guidance, structure and support for their whole lives. They can be trained to be productive rather than destructive, but over half get in trouble with the law (60% in a Washington State study). Their first brush with the law is usually in the child custody system .... 65%of children with FAS (a form of FASD) are in state custody and only 23% live with one or both biological parents. These folks are Alaskan citizens and they need help. It has been estimated that they cost the state anywhere from $1.4 million to $5 million apiece during the course of their lives, depending on how you figure cost... for the individual, to society, to others.

I apologize for the lack of citations, but one study I read said that in the prisons studied 30-70% of inmates were afflicted with FASD. An article in "The Province," a British Columbia newspaper, said up to 80 percent of those in jail had an FASD, and at an FASD conference in Juneau, a panel of Alaska judges, lawyers and a former Alaska Attorney General suggested that the rate was at least 50%. I will note here that our recidivism rate is about 66% and that 40% of those returning to jail are reoffenders. FASD may not be the magic bullet explanation for all our problems, but it is the bullet that nobody is talking about at the Crime Summit so far.

What should we do?

What we should not do is go out and spend a bunch of money without a truly comprehensive plan that includes Education, Law, Health and Social Services, and Corrections. Alaska, H&SS, FASD Program got a $19 million federal grant for FASD in 2000 and we spent money at the rate of 5 million a year for 5 years. Then the federal money went away. Now we're spending $1.7 million a year and darned if I can get anyone to tell me what's different about the program at those two very different spending levels. What is it that we aren't doing now that we used to be doing? And does it make any difference? Big chunks of money are hard to spend wisely...you need a plan first.

Best I can come up with is we have to recognize FASD, the most common birth defect, as a problem that is going to be around as long as pregnant women continue to drink... and that will happen as long as our per capita drinking rates are high. We can't demonize the women that make the mistake and it appears that the rates of this preventable problem are in fact declining... but not disappearing. We have to own the problem.

We can diagnose children, we can look for FASD in the child welfare system and the juvenile justice system and we can work to turn the affected individuals to more productive outcomes than jail, homelessness and victimization. When these people go to jail, we have to have a system to track and guide them for the rest of their days when they get out.

Alaska is not the only society with these problems, and if we got really good at training workers and designing systems to deal with FASD, we could export our knowledge and expertise while enriching our communities with the workers, specialists and their families that would be required to do the job.

Thanks for listening and I look forward to the second day of the summit....

John Palmes
Box 20454, Juneau, Alaska 99802
907 586 2252

Lila Hobbs

From: Jan Flora <grewingk@gmail.com>
Sent: Tuesday, January 24, 2012 3:44 PM
To: Sen. Hollis French
Subject: crime summit

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Hollis:

I'm watching, but only paying half my attention to the proceedings.
(I'm trying to work & listen, too.)

Wade Hampton & sexual assault rates -> go look at the income levels in areas with highest rates and see if there's a correlation. The NYT or WaPo did a thing on food stamps last year. Wade Hampton has the highest food stamp usage per capita in the United States. Does grinding poverty exacerbate DV & sexual assault rates?

I know the answer. I'll bet you do, too.

Throw loss of culture on top of grinding poverty and you've got two parts of a trifecta.

Thank you for being such a kick-ass Senator. Strength to your sword arm, sir.

Jan in Homer

Lila Hobbs

From: Sheila Lankford <slankford@alaska.com>
Sent: Thursday, January 26, 2012 12:50 PM
To: Sen. Hollis French
Subject: Crime issues and solutions

Follow Up Flag: Follow up
Flag Status: Flagged

Senator, thank you for asking for the public's input on this matter. I offer no quick fixes, but ones that will work. I believe that education is always the answer, but in this case targeted to fill two voids in our national education system. We can start to rectify it in Alaska and be the example for the rest of the nation.

First, we must teach ethics in our schools. It must be taught at several grade increments, say first, fourth, seventh, tenth or more. Each grade level will require a different approach, but this education, this learning to think and consider appropriate responses to various situations and to be compassionate about others, will serve students well throughout their lifetimes. Long-term, it will change our neighborhoods, our communities, our nation.

Second, we must teach logic in our schools. This was a subject I didn't experience until college, but it was life-changing. I no longer get caught up in either the political or the advertising nonsense. A background in logic eliminates much of the drama in interpersonal relationships and communications, would aid our citizens in making their own nutritional selections, would reduce the desire to purchase the latest thing, would dial way down the political rhetoric that truly has no basis in logic or facts. I believe that a course in logic should be required. Our citizens would make decisions bases on facts, not on manipulation, innuendo, etc. A course in logic is not at all difficult; it is easy and fun. It is simply a new way of looking at the familiar. I guarantee that students would enjoy it. It should be definitely taught in high school, but would be helpful in middle school or earlier as well.

Thank you again for your interest.

Sheila Lankford

Lila Hobbs

From: George R. Boatright <boats@palmerpolice.com>
Sent: Thursday, January 26, 2012 12:32 PM
To: Sen. Hollis French
Subject: Crime Summit

Follow Up Flag: Follow up
Flag Status: Flagged

Senator French,

Two points that appeared to be overlooked or glossed over due to time constraints:

> The reduction in traffic fatalities in Anchorage is remarkable. With nearly three decades of my career at APD, I attended or investigated more than my share them and they account for many of my worst memories. Much of what made the reductions possible was funding provided via National Highway Traffic Safety Administration (NHTSA) funding for overtime enforcement for both DUI and seat belt enforcement. These funding streams are drying up and with that I fear a diminishment in related enforcement activities. Anchorage may be better able to supplement the required funding to perpetuate extracurricular enforcement; however, this will have a significant impact on the resources that smaller agencies will be able to dedicate to traffic safety.
>
> Sgt. Ketterling clearly addressed the growing population issues encountered in both the cities of Wasilla, Palmer, and the core area of the Mat-Su Valley. One item he appeared to have no time to address is the staffing levels of the Alaska State Troopers upon whom both the Palmer PD and Wasilla PD are integrally interdependent. Troopers often assist both agencies within our jurisdictions, then, we are increasingly providing services outside of our jurisdictions simply because the Troopers are so dramatically understaffed in the core area of the Matanuska – Susitna Valley. I do not expect the state to fund officers to staff our agencies, as nice as that would be, while funding additional troopers is more politically acceptable. This will directly improve our ability to serve our communities while allowing the Troopers to be more responsive to those who live outside of either Palmer or Wasilla.

I also take this opportunity to express my gratitude for allowing the Palmer Police Department, via Sgt. Ketterling, to speak on behalf of the smaller agencies strung throughout the state. Our issues differ dramatically from community to community; yet, there are common threads.

Respectfully,

George R. Boatright
Chief of Police
Palmer Police Department
423 South Valley Way
Palmer, Alaska 99645
907-745-4811

Lila Hobbs

From: John Palmes <johnpalmes@gci.net>
Sent: Thursday, January 26, 2012 1:10 PM
To: jeff.jessee@alaska.gov
Cc: Sen. Hollis French
Subject: FW: Prison Survey for FASD (Fetal Alcohol Spectrum Disorder)

Mr. Jessee,

Good Afternoon from Juneau… snowy Juneau.

For the past two days I've been attending the Senate Judiciary Committee's Crime Summit.

I was disappointed that your testimony yesterday seemed to focus on who regulates the sale of alcohol and had so little to say about mental illness and crime. Yes there are a lot of mentally ill people in jail but why is that? And what can we do to keep them out of jail and out of homelessness and victimization?

As you will see from the following emails to Senator French, my focus is on understanding why Alaska has such high rates of sexual assault and child sexual assault. FASD seems to be a key to understanding the problem, but you mentioned it only in passing.

Please read the emails and suggest how we might get estimates of the prevalence of FASD in our prison populations.

Thanks for your help…. john

From: John Palmes [mailto:johnpalmes@gci.net]
Sent: Thursday, January 26, 2012 11:58 AM
To: 'Sen. Hollis French'
Subject: Prison Survey for FASD (Fetal Alcohol Spectrum Disorder)

Senator French,

Thank you for your quick response to my email and for introducing FASD into the discussion during the Corrections Department testimony. I was disappointed that during two days of talking about crime, with an emphasis on sexual assault, yours was the only direct reference to the topic.

I was very surprised that Walt Monegan made no mention of alcohol related illness in his testimony and that Jeff Jessee only mentioned FASD in passing.

At 2:00 I left the second day's session to meet with Genevieve Casey, FASD Program Manager and Diane Casto, Director of Health and Social Services Division of Behavioral Health… now I just want to send a quick note because I think there is something we can do right away to shed some light on things.

It's time to survey Alaska prisons to see what part of the population is likely affected by mental illness, particularly FASD. From Jeff Jessee's testimony, we already know the prison system is the largest

mental health facility in the state.... but he said very little or nothing about what that means and why that is.

A formal study might not be required for a quick glimpse, since I imagine the prison psychologists, rehabilitation program specialists and others that have regular contact with inmates could give us an estimate based on their personal experience and professional opinion. This could then lead to a more formal an scientific study funded and coordinated by Corrections, Health and Social Services, and Mental Health Trust.

I think part of the problem with recognizing FASD is first that we don't want to admit there is something wrong with our drinking habits. Second, we want to punish perpetrators and feel like FASD is a way for them to argue for more lenient sentences. Finally, we don't want to have to think or deal with our domestic violence and sexual assault problem. The public needs to know how bad things are before the legislature can do anything about it. Please issue a press release on highlights of the testimony during the Crime Summit, particularly the study on intimate partner violence by the University of Alaska Justice Center.

You said yesterday that we need to do something to keep from being number 1.

I think we need to figure out how to be number 50.

Alaska has the means to do the job. With our small population, incredible resources, and all that money in the bank we can afford to try and be the happiest and healthiest bunch of people on earth. If not us then who?

We're saving money for future generations... people that don't yet exist.... While people that do exist, common property owners of the wealth and resources are denied the services that will keep them from homelessness, victimization, and criminal activity. We should be angry about our situation, but we should also be ashamed.

Please circulate this email to the rest of the Committee as well as to Corrections, Health and Social Services, Education, and Mental Health.

Thanks to you and the Judiciary Committee for listening and for your service on behalf of Alaska..... john

---

From: Sen. Hollis French [mailto:Senator_Hollis_French@legis.state.ak.us]
Sent: Wednesday, January 25, 2012 3:51 AM
To: John Palmes
Subject: Re: Rape and Child Rape ... FASD (Fetal Alcohol Spectrum Disorder)

Thank you for the very very thoughtful analysis. I will ask our corrections people about this today when they are presenting.
Nice chatting with you at the reception as well.
Hollis French

Sent from my iPhone

On Jan 24, 2012, at 11:09 PM, "John Palmes" <johnpalmes@gci.net> wrote:

Senator French and Senate Judiciary Members:

Lila Hobbs

From: Taber Rehbaum <taber.rehbaum@bbbsak.org>
Sent: Thursday, January 26, 2012 2:59 PM
To: Sen. Hollis French
Subject: Crime Summit
Attachments: SD2c_2011YouthOutcomeRpt_ExecSum_012312.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Hello Senator French-
Bernard Gatewood, a Board member of Big Brothers Big Sisters of Alaska and Superintendent of the Fairbanks Youth Facility, suggested I check in with you and make sure you are aware of the partnership between Big Brothers Big Sisters and the Division of Juvenile Justice, as well as to let you know about the outcomes BBBS produces for youth, both in terms of risk avoidance and educational outcomes.
I'm attaching a National report that was just released demonstrating the statistically significant outcomes that our programs have produced for the children and youth we serve. You can also refer to the "My Turn" piece that was in today's Juneau Empire. I would love to talk with you about the role Big Brothers Big Sisters can play in improving both educational and justice outcomes in Alaska. Is there a time you might be available for a call? I will be coming to Juneau during the session, but don't have dates nailed down yet.
Thanks for convening the Summit, and thanks for your time and consideration.
Taber Rehbaum

--
Taber Rehbaum
CEO
Big Brothers Big Sisters of Alaska
Taber.Rehbaum@bbbsak.org
907-433-4622 Anchorage
907-452-8110 Fairbanks
907-460-0911 Cell
www.bigbrothersbigsistersalaska.org

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Please note: my e-mail address has changed to Taber.Rehbaum@bbbsak.org. Please begin using the new e-mail address by October 15, 2010.

Lila Hobbs

From: Peat Galaktionoff <peatatone@yahoo.com>
Sent: Thursday, January 26, 2012 7:01 PM
To: Sen. Hollis French

One of the main problems with crime in Alaska is that to many politicians and state workers get away with crime which sets a bad example and embarrasses the state.

Lila Hobbs

From: Nancy Meade <NMeade@courts.state.ak.us>
Sent: Friday, January 27, 2012 11:11 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. John Coghill; Sen. Lesil McGuire; Sen. Joe Paskvan
Cc: Cindy Smith
Subject: response to crime summit question

Dear Senators:

During the Alaska Court System's presentation at the Crime Summit this past Wednesday, Senator Paskvan asked about the percentage of all felony cases that are dismissed (as opposed to going to trial or being disposed of with a guilty plea) that are dismissed because of the running of the Criminal Rule 45 deadline of 120 days. I responded that the number was very low and that it is a rare occurrence for a felony to be dismissed because Rule 45 has run.

I have now verified that the actual percentage of **felony cases dismissed for a Rule 45 violation in FY11 was zero.** That is, **no felony case** was dismissed in any court because Rule 45 had run. The court and parties watch that timeframe very carefully, and are committed to preventing a Rule 45 dismissal.

For comparison, although you did not specifically ask this question, in FY11, **five misdemeanor** cases were dismissed statewide for a Rule 45 violation. That compares with 32,000 misdemeanor filings; that number is also extremely low, but we are working to bring that misdemeanor number to zero also.

Senator French also asked me about the time that felony cases take to be disposed (finished and closed). I intend to verify some of the court's statistics and will be able to respond to that soon.

I hope this is helpful and please let me know if you have any other questions. Thank you.

Nancy Meade
General Counsel
Alaska Court System
Anch: 907-264-8264
Juneau: 907-463-4736

Lila Hobbs

From: johnpalmes@gci.net on behalf of John Palmes <johnpalmes@gci.net>
Sent: Friday, January 27, 2012 3:09 PM
To: Sen. Hollis French
Subject: FASD incidence in Prison Population ... Study
Attachments: FASD DEFENDANTS UW.pdf; fasd_what_the_justice_system_should_know.authcheckdam.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Senator French,

Thanks again for listening to my concerns and getting them into the record during the Corrections Department testimony.

Now I'm not sure if my email were distributed to anyone other than yourself and the copies I sent to Jeff Jesse.

I can go ahead and write another email to each member of the committee, and I understand that you may not want to associate my emails with your own opinion on the subject.... Just want to know what distribution my emails got, and is there a staff person that I might consult with when you are not available?

I am attaching two PFD documents from The University of Washington Fetal Alcohol and Drug Unit http://depts.washington.edu/fadu/resources/fas-and-the-law ... for your information and for the committee. You will see that FASD may account for a high number of minor offenders as well.

Have a good weekend (though I know you may be working just as hard)..... john

Lila Hobbs

From: Brian Balega <blbalega@gmail.com>
Sent: Saturday, January 28, 2012 6:44 PM
To: Sen. Hollis French
Subject: Alaska Association of Fire Arson Investigators
Attachments: 2012 AAFAI Juneau Letter.doc

Senator French,

I will be visiting Juneau the week of January 31st for a short stay. I would welcome the opportunity to meet with you or someone from your office to discuss the attached letter. While in Juneau I can be reached at 907-227-1553.

Thanks for your time

Brian L. Balega

President

Lila Hobbs

From: Dennis Johnson <dennis.johnson@alaskapretrial.org>
Sent: Monday, January 30, 2012 10:02 AM
To: Sen. Hollis French
Cc: Kristen Peterson; Cindy Smith; brenda.beland@alaskapretrial.org
Subject: Personal Thank You

Senator French,

I want to personally thank you so much for the opportunity you gave me last week in testifying before you and the committee at the Crime Summit. Thank you as well for taking the time to personally meet with me and let me explain my cause, I know you were busy. You have an incredible staff, Cindy and Kristen were most accommodating and took wonderful care of me in making sure I had all the information and support in preparing for the summit.

I look forward to working with you and your office in the future in making this program more accessible to those in our pre-trial criminal justice system. Take Care and God Bless Sir ...

Dennis Johnson, Pregram Director
ALASKA PRETRIAL SERVICES, Inc.
6410 DeBarr Road
Anchorage, Alaska 99504
(907) 332-3330 office
(907) 332-1283 fax
(907) 351-6046 cell
dennis.johnson@alaskapretrial.org
www.alaskapretrial.com

Please consider the environment before printing this e-mail

Lila Hobbs

From: Dennis Johnson <dennis.johnson@alaskapretrial.org>
Sent: Monday, January 30, 2012 9:26 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Lesil McGuire; Sen. Johnny Ellis; Sen. John Coghill; Kristen Peterson; Cindy Smith; Kendra Kloster; Samuel Gottstein; Michael Pawlowski; Genevieve Wojtusik
Cc: brenda.beland@alaskapretrial.org; eugene.wainwright@alaskapretrial.org; mark.allen@alaskapretrial.org; 'valerie.anderson@alaskapretrial.org'
Subject: 2012 Alaska Crime Summit

Good Morning Everyone,

I wanted to take a minute to thank everyone for the opportunity and honor of being invited to the crime summit last week. The support and personal attention given to me and my Alaska Pretrial Services Program by all of the Senators on the Committee and their staff was overwhelming. I look forward to a long and continued relationship with all of your offices in the future. As small of an offer it may be, please do not hesitate to contact me should anyone need assistance or I can return the pleasure of helping you in any way.

Again, thank you for everything that all of you did for myself and Alaska Pretrial Services and getting my message out. Take care and God Bless .....

Dennis Johnson, Program Director
ALASKA PRE-TRIAL SERVICES
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Please consider the environment before printing this e-mail

Lila Hobbs

From: Williams, Dean R (HSS) <dean.williams@alaska.gov>
Sent: Monday, January 30, 2012 7:44 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Subject: Thank you

Just a quick thank you to the committee for holding the Crime Summit last week. The value of this effort has ripple effects for quite some time that are often not seen during the actual summit time. Several discussions were held on the plane ride home that helped reinvigorate certain collaborations that had dwindled.

In my own world you know that my passions for certain interventions, like the expulsion/suspension school I briefly spoke of, run close to my heart not just because of the tremendous cost vs. benefit factor, but also because it fundamentally is the right thing to do with kids. Meaningful and smart intervention is vastly cheaper and more sensible than incarceration in most situations. (Recognizing of course, that certain individuals absolutely must be locked up for community safety.) I say that even as I have the tremendous privilege of leading the largest juvenile facility in the State.

Regards and best wishes this legislative session,

Dean Williams
Juvenile Justice Superintendent
McLaughlin Youth Center
(907) 261-4324

Let It Be Known,

We the undersigned residents of Tok, Alaska are very concerned with the escalation of crime in our community. We are also concerned that the persons committing these crimes are not being prosecuted and punished sufficiently. When criminals get their cases dismissed pursuant to rule 43A, or are allowed to plea down to a level involving a hand slap it sends the wrong message to other would be criminals. As a result we are seeing more and more malicious behavior at great cost and concern to our community.

We therefore petition and respectfully request that the District Attorney and the Alaska Court System take more aggressive action concerning the crimes in the Tok area.

Copies of this Petition will be sent to the Governor, Attorney General, State Representative, State Senator, and Chairs of the House and Senate Judiciary Committees.

NAME (Print)	Name (Signed)	Mailing Address
John Bristol	John Bristol	Po 702 Tok 99780
Billy Lance	Billy Lance	Po Box 172 Tok 9978
Thomas Cliver	Thomas Cliver	Po Box 18 Tok 99780
Kathryn Davis	Kathryn Davis	P.O. Box 663 Tok, AK 99780
Kristina Porter	[illegible]	P.O. Box 337 Tok, AK 9978
Peggy L. Clevenger	Peggy Clevenger	P.O. Box 75 Tok, AK 99780
Jim Cliver	[illegible]	P.O. Box 18 Tok, AK 9978
Todd Austin	for TODD AUSTIN SR.	BOX 305 - Tok 9978
[illegible]	Greg Johnson	Box 232 Tok 99780
Richard Kemper	Richard Kemper	Box 927 Tok 99780
Richard C Davis	Richard C Davis	P.O. Box 663 Tok Ak. 9978
Bonnie Emery	Bonnie Emery	P.O. Box 305 Tok, AK 99780
Donna Lance	Donna Lance	PO BOX 172 99780

NAME (Print)	NAME (signed)	Mailing Address
Janice Houser	Janice Houser	HC63 Box 1313B, Tok
Sharon Thomas	Sharon Thomas	Box 884 TOK
Merissa Maynard	Merissa Maynard	P.O Box 923
EUGENE BERG	Eugene V Berg	PO BOX 488
Samuel Jack	Samuel Jack	P.O Box 993 Tok AK
Kevin VanWinkle	Kevin VanWinkle	PO Box 573 Tok AK
CINDY Koestler	Cindy Koestler	PO Box 3160 Tok AK
BILL ARPINO	Bill Arpino	POB 111 TOK
George Pine	George Pine	Box 4 Tok
LORI Nelson	Lori Nelson	Box 882 Tok
[redacted]		
Thomas Tennant		Box 427 Northway
Sophie Denny		Tanacross Alaska 99776
Pamela Lehman	Pamela Lehman	PO Box 341 Tok AK 99780.
David Helmer	David Helmer	Box 33 Eagle AK 99738
Vanessa Thompson	Vanessa Thompson	Box 715 Tok AK 99780
DANA GRIMM	Dana Grimm	Box 703, Tok
Kenneth & Sue Campbell	Mtn. City Inc.	8/27/11
Erica Burnham	Erica Burnham	Po Box 427 Tok AK 99780
Tod Lewis	TROY ROBINSON	P.O Box 208 Tok 99780
Elizabeth Zabielski	Elizabeth Zabielski	PO Box 453 Tok, AK 99780
Shauna Lee	Shauna Lee	PO Box 714 TOK AK 99780

Let It Be Known,

We the undersigned residents of Tok, Alaska are very concerned with the escalation of crime in our community. We are also concerned that the persons committing these crimes are not being prosecuted and punished sufficiently. When criminals get their cases dismissed pursuant to rule 43A, or are allowed to plea down to a level involving a hand slap it sends the wrong message to other would be criminals. As a result we are seeing more and more malicious behavior at great cost and concern to our community.

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Copies of this Petition will be sent to the Governor, Attorney General, State Representative, State Senator, and Chairs of the House and Senate Judiciary Committees.

NAME (Print)	Name (Signed)	Mailing Address
KATHY MORGAN	Kathy D Morgan	Box 342, Tok, Ak
Geneva L. Smith	Geneva L. Smith	Box 559 Tok, Ak.
ELSIE AITES	Elsie L. Aites	Box 373 Tok Ak.
Katherin E. Sharp	Katherin Sharp	Box 373 Tok AK
JESSICA FRASIEUR	Jessica Frasieur	BOX 573 tok AK
Alvin J. Bates		P.O. Box 321 Tok AK
Connie Bates	Connie J Bates	P.O. Box 321 Tok, AK
Dianne Achman	DIANNE ACHMAN	P.O. Box 149 Tok AK
Candy Trouge	Candy Trouge	P.O. Box 559, TOK, AK
Judd Rutledge		P.O. Box 462 Tok, AK
Dinnie Rutledge	Dinnie Rutledge	P.O. Box 462 Tok, Ak
Terry E Hughes	Terry E Hughes	P.O. Box 573 tok AK
Tim Marsh	Tim Marsh	P.O. Box 965 TOK.

NAME (Print)	NAME (signed)	Mailing Address
Lucia Zaczkowski		PO Box 407 Tok, AK
Theresa Woody	Theresa Woody	Box 1028 - Tok, AK 99780
Josie Ainsworth	Josie Ainsworth	Box 541 Tok, AK 99780
Abby Page		PO Box 1032 Tok AK 99780
Colleen S. Hayden	Colleen S Hayden	PO Box 442 Tok
Sage Tixier		PO Box 726 Tok
Barry Jacobs		Box 214 Tok
Greg Lumber		HC63 Box 1221 Tok
TERESA SAPPARD	Teresa Sheppard	PO BOX 141 TOK.
Jane Teague		P.O box 39 Tokak 99780
Ray Thomas		PO 76016 Thompson, AK
Karen I Ogden-Holt		Box 493 Tok, AK
DENISE TUELER		PO BOX 779 TOK, AK

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NAME (Print)	Name (Signed)	Mailing Address
Glenn E. Burnham	Glenn E. Burnham	P.O. Box 872 Tok, AK 99780
Michael W. Garber	M Garber	P.O. Box 761 Tok, AK 99780
Don Lachmet	Don Lachmet	PO Box 377 TOK AK 99780
Chip Peterson	chip Peterson	PO 96 Tok, AK 99780
Earl Kain	Earl Kain	PO Box 572 TOK AK 99780
Rodney Omta	Rodney Omta	P.O Box 496 Tok AK 99780
Christy Bristol	Christy Bristol	P.O. Box 174 Tok, AK 99780
Erich Kemp	Erich Kemp	HCR 62 Box 5003 Delta Jct. AK 99737
David McDermott	David McDermott	P.O. BOX 691 Tok AK 99780
SUSAN CARRUTHERS	Susan Carruthers	PO Box 394 Tok, AK 99780
Paul A. Cranor	Paul A Cranor	PO Box 1006 Tok AK 99780
Scott N Cronk	Scott N Cronk	P.O. Box 696 Tok, AK 99780
Pepi Brown	PEPI Brown	Box 417 Tok, AK 99780

NAME (Print)	NAME (signed)	Mailing Address
Stefanie Collins	Stefanie Collins	PO Box 183
Paula Bays	Paula Bays	PO Box 986
Parker Williams	[illegible]	Box 713
Douglas Lee	Douglas Lee II	Box 863
Andrea Sitton	Andrea Sitton	Box 751
Larry Markis	Larry Markis	Box 660
Roni J. Norman-Agre	Roni J. Norman-Agre	Box 1015 Tok
Theodore D Agre	Theodore D Agre	Box 1015 Tok
Jason Wreggelsworth		
Rick Ralls	Rick Ralls	Box 56 Tok AK
Karla J Ralls	Karla J Ralls	PO Box 56 Tok AK
	Gary Antrim	Box 14 Tok AK
Brandon Wagner	Brandon Wagner	Box 883
[illegible]	[illegible]	Box 6106
A Doyle	[illegible]	Box 866 Tok
[illegible]	[illegible]	Box 866 Tok.
[illegible]	Barbara Arnold	Box 71 (NEED GBA)
Ron Gries	Ron Gries	PoB 439
Rebecca Wade	Rebecca Wade	PO Box 772 Tok AK
Mike Kane		P.O. Box 401 Tok AK.
Dave Doggett		P.O. Box 963 Tok AK
Melody R. Foley	Melody R. Foley	P.O. Box 436 Tok, AK 99780

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NAME (Print)	Name (Signed)	Mailing Address
Randy Warren		P.O. Box 975 Tok
Charles Camphear		Po Box 563 Tok
Maurice Shultz		Po Box 571
Wayne Mac Murray		PO. Box 952 Slana 99586
LeAnn Young		POBOX351 Tok
Leilla Shultz		Box 487 Tok
Ron Robinson		Box 589 Tok
Patrick Maurio		Box 1082 Tok
Christopher		Box 683, Tok
Merissa Maynard	Merissa Maynard	P.O Box 923, Tok
Wesley		Po Box 484 Tok AK
Lisa Shultz		PO Box 511 Tok, AK.

NAME (Print)	NAME (signed)	Mailing Address
Betty A Kuebler	Betty C. Kuebler	Box 543 Tok, AK 99780
LeeRoy Kuebler	LeeRoy Kuebler	Box 543 Tok, AK 99780
Ronald A Brinkman	Ronald A Brinkman	Box 342 Tok AK 99780
Jeff Wonsitler	Jeff Wonsitler	Po 754 Tok, AK
Jack Rutledge	Jack Rutledge	Box 418 Tok 99780
Sheryl Heldarsn	Sheryl Heldarsn	P.O. Box 673 Tok AK 99780
~~Jeff Gavaza~~	~~Jeff Gavaza~~	PO Box 501 Tok, AK 99780
Annette Coulman	Annette Coulman	Box 646 Tok AK 99780
Belinda Watkins	Belinda Watkins	Box 451 Tok, AK 99780
Delores R. Burnham	DELORES R. BURNHAM	Bx. 363 Tok, AK 99780
JOHN W BURNHAM	John W Burnham	P.O. Bx 363 Tok, AK 99780
SHARON A Hoot	Sharon A Hoot	PO Bx 786 Tok AK

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NAME (Print)	Name (Signed)	Mailing Address
Damon Brooks		Box 936 Tok
Billy Lamee		BOX990 TOK
Jesse Stienbarger	Jesse Steinenger	Box 428 Tok
Jahal Graff		Box 694 Tok
Tom Dean	Tom Dean	Box 742 Tok
Wayne Hoffman	Wayne Hoffman	Box 114 Tok

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NAME (Print)	Name (Signed)	Mailing Address
Jeremy Torre,		P.O. Box 718 Tok AK 99780
		Box 574, Tok 99780
		P.O. Box 574 Tok 99780
		Po Box 475 Xtha, 99764
Rachel McQuillin		Po Box 656 99780
		P.O. Box 443 99780
Ray Thomas		PO Box 76016 Tanacross AK
Cynthia LaTour		PO Box 935 Tok 99780
Adrian Dale		Po 1685 Tok.
Joyce Dunning		
Tobar BARKER		Bx 553 Tok
		Bx 38 Tok

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NAME (Print)	Name (Signed)	Mailing Address
Francine Lee	Francine Lee	PO Box 661 Tok AK 99780
Ashley May	Ashley May	Po. Box 809 Tok AK 99780
Pam Kron	Pam Kron	PO Box 627, TOK, AK 99780
Don Lee	Don Lee	PO Box 661 TOK AK 99780
Lisa Rutherford	Lisa Rutherford	P.O. Box 483 Tok, AK 99780
DAVID FREDERICK	David Frederick	Box 93 TOK, AK 99780
MICHAEL BRADY	Michael Brady	Box 444 Tok 99780
Merissa Maynard	Merissa Maynard	P.O Box 923
Helen Windus Olson		Box 106 TOK
Stephen Olson		Box 106 Tok
David May	David May	Box 809 TOK 99780
James F. Morgan Sr.		Box 561 Tok
Sam Crafft		Tetlin NWR

JI

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NAME (Print)	Name (Signed)	Mailing Address
DAVID Young	David Young	PO Box 351 TOK
James Harbison	James Harbison	PO Box 54 Tok
SANDRA KITH	Sandra P. Keith	PO Box 143 Tok
B Britton	[illegible]	[redacted]
Mel Ranger	[illegible]	Box 77 TOK
JEFFA. Summan	[illegible]	Box 639 Tok
MARY BROWNELL	Mary Brownell	Box 50 Tok
Dollie Jonathan	Dollie Jonathan	Box 76054 Tanacross
Jennifer Isaac	Jennifer Isaac	Tanacross AK
Aaron Page	Aaron Page	PO Box 383 Tok
Alex Page	Alex Page	PO Box 383 Tok
Margit Brooks	Margit Brooks	P.O. Box 936 Tok
David Young	[illegible]	PO Box 910 Tok
H. Dale Young	H. Dale Young	P.O. Box 367 TOK

NAME (Print)	NAME (signed)	Mailing Address
Lisa Garriott	Lisa Garriott	PO Box 732
Sandra Elsner	Sandra Elsner	Po Box 712 TOK
Tom Denny	Tom Denny	Box 243
Pat Case		Pob 835 Tok
Lois Marston		PO Box 1866 Tok
Don Wimberly	Don Wimberly	PO BOX 272, TOK
Jacqueline Allison	Jacqueline Allison	Box 181 Tok
Margaret Koslowsky	Margaret Koslowski	Box 302 Tok
Wanda McPhee	Wanda McPhee	Box 1056
Amber Champagne	Amber Champagne	Box 89 TOK
Rocky J. Haynes Sr	Rocky J. Haynes Sr	Box 705 Tok
LEE Roy Knebled	LeRoy Knebled	Box 543 Tok
David Parfait	David Parfait	Box 985 TOK
Susie A Sam	Susie A Sam	Ort 99764
Alice Nutting	Alice Nutting	ort 99764
PAUL F. NAWROT	Paul F. Nawrot	P.O. BOX 585 TOK
Chris Rauch		PO Box 413 Tok
Brooke R Baker	Brooke Baker	PO Box 888 TOK
Ron Denny	Ron Denny	Po. Box 284 TOK
James Wotthke	James Watthke	P.O. Box 228 Tok
Debra James		PO Box 1571 TOK
Ted Morris	Ted Morris	PO Box 664 Tok

Jeanne Morris	Jeanne Morris	POBX654 TOK
Ted Hampierre	Ted Hampierre	P.O. Box 124
Scott Kruenberg		P.O. Box 970
Zane Paul	Zane S. Paul	Box 391
Doug Hoth	Doug Hoth	Box 513
Heather Herman	Heather Herman	Box 107
Sheila Thomas	Sheila Thomas	Box 324
Sheila Wontorski	Sheila Wontorski	Box 208
~~Andrew David~~	Andrew David - Andrew David	Box 535
Peter U Erickson		Box 16
~~Glenn G Wilkinson~~		Box 671
Craig Roach		Box 542
~~Ray Champagne~~	Ray Champagne	POB 22 TOK AK
~~Jerry Lancaster~~	Jerry Lancaster	PO Box 414 TOK AK 99780
Mike Warner	Mike Warner	PO Box 193 Tok AK 99780
Pamela Johnson	Pamela Johnson	Box 135 TOK
Dan Teague	Dan Teague	Box 391
Suzette Tixier	Suzette Tixier	TOK Box 726
~~David Smith~~	Richard Smith	P.O. Box 833 Tok, AK
Adam Hartzler		P.O. 964 Tok
Olaf Allison Jr.	Olaf Allison Jr.	P.O. Box 181 Tok
Treasa Range	Treasa Range	Box 77, TOK
Robbie MacManus	Robbie MacManus	P.O. Box 906 Tok AK.
Rick Edwards		Box 514. TOK, AK

Julie Thompson	Julie Thompson	HC 63 Box 1221 Tok 9977
Martha Summar	Martha Summar	Tok Ak
JOHN SNYDER	John Snyder	PO Box 152 TOK AK
LAND H.11		BOX 484
Faye Tanner	Faye Tanner	Box 76067 Tanacross 99776
ED HANGL	Ed Hangl	PO Box 591 TOK AK 9978
Karen Page		P.O. Box 383 Tok, Ak
T.J. Wertz	T.J. Wertz	P.O. Box 91 TOK, AK
Tasha Tolliver	Tasha Tolliver	P.O. Box 466 Tok Ak
		Box 76061 Tanacross
Dennis		Tetlin AK
Daryl Brinkman	Daryl Brinkman	TOK
William Wertz	William Wertz	TOK
Amy Crozier	Amy CROZIER	Box 337 TOK, AK
Sean Burke		PO Box 823 TOK, AK
Susan Sutherson		Box 17, Tok
Eric Marston		Box 562 TOK
Marianne Young		Box 121 TOK
Karyn Summar	Karyn Summar	Box 829 Tok AK

2/01/12 UPDATE ON CASE DISMISSALS

<TARGET><BILL></BILL><SUBJECT>2-01-12 UPDATE ON CASE DISMISSALS</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska Court System

Criminal Case - Time to Disposition (Final Judgment)

Cases Closed 07/01/2010 to 06/30/2011

Breakdown by Disposition and Case Type

Felony

Disposition	Number of Cases	Days - Number of Cases and Percent of Total Cases										Mean	Median
		1 - 120 Days		121-180 Days		181 - 365 Days		366 - 730 Days (1-2 yrs)		Over 730 Days (2 yrs)			
		Cases	Percent	Cases	Percent	Cases	Percent	Cases	Percent	Cases	Percent		
Acquittal													
District Court Felony	4	2	50.0 %	0	0.0 %	1	25.0 %	1	25.0 %	0	0.0 %	**200**	**139**
Superior Court Felony	28	4	14.3 %	5	17.9 %	14	50.0 %	2	7.1 %	3	10.7 %	**289**	**204**
Total Case Count:	**32**												
Convictions													
District Court Felony	1442	1146	79.5 %	152	10.5 %	115	8.0 %	24	1.7 %	5	0.3 %	**89**	**64**
Superior Court Felony	3261	1218	37.4 %	636	19.5 %	913	28.0 %	387	11.9 %	107	3.3 %	**230**	**155**
Total Case Count:	**4703**												
Dismissals													
District Court Felony	926	745	80.5 %	88	9.5 %	66	7.1 %	21	2.3 %	6	0.6 %	**81**	**38**
Superior Court Felony	526	218	41.4 %	84	16.0 %	149	28.3 %	60	11.4 %	15	2.9 %	**265**	**154**
Total Case Count:	**1452**												
Other													
District Court Felony	15	14	93.3 %	1	6.7 %	0	0.0 %	0	0.0 %	0	0.0 %	**29**	**14**
Superior Court Felony	16	14	87.5 %	0	0.0 %	1	6.3 %	0	0.0 %	1	6.3 %	**105**	**13**
Total Case Count:	**31**												
	6218												

End of Felony report

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End of Report

Alaska Court System

Felony Time to Disposition (Final Judgment)
Cases Closed 07/01/2010 to 06/30/2011
Statewide

Days to Disposition	*Degree of Offense at Filing*							Totals	Percent	Cumulative Percent
	Felony Conver-sion	Murder Unclass Felony	Unclass Felony	Class A Felony	Class B Felony	Class C Felony	Misde-meanor			
1-120	33	5	32	113	743	2,151	65	3,142	52.4%	52.4%
121-180	25	0	17	68	231	601	22	964	16.1%	68.5%
181-365	50	4	56	136	291	673	48	1,258	21.0%	89.4%
366-730	31	15	53	45	111	226	14	495	8.3%	97.7%
Over 730	16	12	22	15	21	41	10	137	2.3%	100.0%
Others	0	0	0	0	1	1	0	2	0.0%	100.0%
	155	**36**	**180**	**377**	**1,398**	**3,693**	**159**	**5,998**		

Degree of Offense at Filing	Mean	Median
Felony Conversion	552	334
Murder Unclassified Felony	550	429
Unclassified Felony	429	327
Class A Felony	277	235
Class B Felony	214	136
Class C Felony	165	111
Misdemeanor	291	175
All Felonies	**216**	**133**

Note: Cases listed as a misdemeanor were originally charged as a misdemeanor but subsequent felony charges were filed in the case. Cases where a charging document was never filed are not included in this report.

Report Selection Parameters:
The report lists felony cases where the date of judgement is in the period listed in the report header. The report excludes from the calculation, any time period the case was in warrant status and any period the case was closed prior to indictment. The cases are categorized based on the degree of offense of the most serious charge at the time of filing.

End of Report

Cindy Smith

From: Nancy Meade <NMeade@courts.state.ak.us>
Sent: Friday, January 27, 2012 11:11 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. John Coghill; Sen. Lesil McGuire; Sen. Joe Paskvan
Cc: Cindy Smith
Subject: response to crime summit question

Dear Senators:

During the Alaska Court System's presentation at the Crime Summit this past Wednesday, Senator Paskvan asked about the percentage of all felony cases that are dismissed (as opposed to going to trial or being disposed of with a guilty plea) that are dismissed because of the running of the Criminal Rule 45 deadline of 120 days. I responded that the number was very low and that it is a rare occurrence for a felony to be dismissed because Rule 45 has run.

I have now verified that the actual percentage of **felony cases dismissed for a Rule 45 violation in FY11 was zero.** That is, **no felony case** was dismissed in any court because Rule 45 had run. The court and parties watch that timeframe very carefully, and are committed to preventing a Rule 45 dismissal.

For comparison, although you did not specifically ask this question, in FY11, **five misdemeanor** cases were dismissed statewide for a Rule 45 violation. That compares with 32,000 misdemeanor filings; that number is also extremely low, but we are working to bring that misdemeanor number to zero also.

Senator French also asked me about the time that felony cases take to be disposed (finished and closed). I intend to verify some of the court's statistics and will be able to respond to that soon.

I hope this is helpful and please let me know if you have any other questions. Thank you.

Nancy Meade
General Counsel
Alaska Court System
Anch: 907-264-8264
Juneau: 907-463-4736

Alaska Court System

Felony Case Dispositions

Fiscal Year 2009

Case Disposition		
Acquittal	25	0.4%
Convictions	4500	75.3%
Dismissals	1390	23.3%
Other	61	1.0%
Total Dispositions:	**5976**	

Dismissal Breakdown:

Dismissal Type	# Cases	% of Total Dimissals
*Dismissed Prior to Conversion	185	13.3%
Complaint or Citation Not Filed. Case Closed.	213	15.3%
Dismissed - Furtherance of Justice CrR 43(c)	22	1.6%
Dismissed by Prosecution (CrR43(a))	844	60.7%
Dismissed on Motion of Defendant	16	1.2%
Dismissed Under CrR 45 (Speedy Trial)	1	0.1%
Dismissed-Delay in Sup Ct Transfer CrR 5(e), 43(b)	101	7.3%
Probable Cause Not Found. Case Dismissed.	8	0.6%
	1390	

End of Report

Alaska Court System

Felony Case Dispositions

Fiscal Year 2010

Case Disposition		
Acquittal	32	0.5%
Convictions	4602	74.8%
Dismissals	1478	24.0%
Other	41	0.7%
Total Dispositions:	**6153**	

Dismissal Breakdown:

Dismissal Type	# Cases	% of Total Dimissals
*Dismissed Prior to Conversion	92	6.2%
Case Dismissed. Defendant Found Incompetent	3	0.2%
Complaint or Citation Not Filed. Case Closed.	198	13.4%
Dismissed - Furtherance of Justice CrR 43(c)	19	1.3%
Dismissed by Prosecution (CrR43(a))	1048	70.9%
Dismissed on Motion of Defendant	11	0.7%
Dismissed-Delay in Sup Ct Transfer CrR 5(e), 43(b)	89	6.0%
Dismissed. Wrongly Filed in Adult Court	4	0.3%
Probable Cause Not Found. Case Dismissed.	14	0.9%
	1478	

End of Report

Alaska Court System

Felony Case Dispositions

Calendar Year 2011

Case Disposition		
Acquittal	38	0.6%
Convictions	4662	76.1%
Dismissals	1391	22.7%
Other	37	0.6%
Total Dispositions:	**6128**	

Dismissal Breakdown:

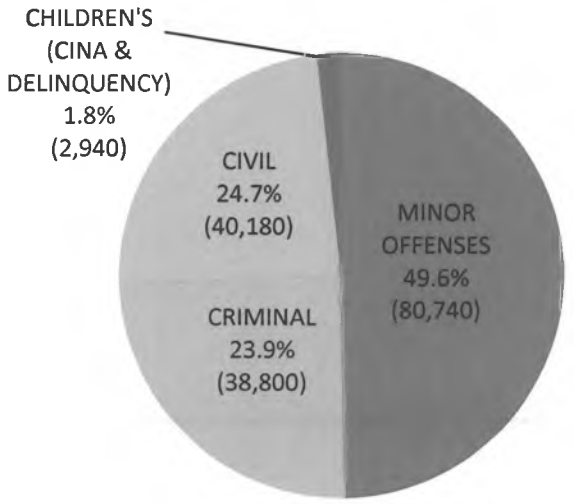
Dismissal Type	# Cases	% of Total Dimissals
Case Dismissed. Defendant Found Incompetent	2	0.1%
Complaint or Citation Not Filed. Case Closed.	204	14.7%
Dismissed - Furtherance of Justice CrR 43(c)	16	1.2%
Dismissed by Prosecution (CrR43(a))	1020	73.3%
Dismissed on Motion of Defendant	42	3.0%
Dismissed-Delay in Sup Ct Transfer CrR 5(e), 43(b)	99	7.1%
Dismissed. Wrongly Filed in Adult Court	1	0.1%
Jury Trial: Dismissed by Court After Trial Start	1	0.1%
Probable Cause Not Found. Case Dismissed.	6	0.4%
	1391	

End of Report

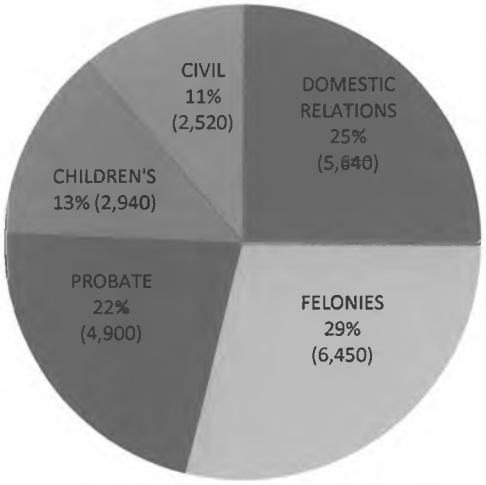
FY11 FILINGS STATEWIDE

SUPERIOR AND DISTRICT COURTS COMBINED

(162,647 total trial court cases filed in FY11)

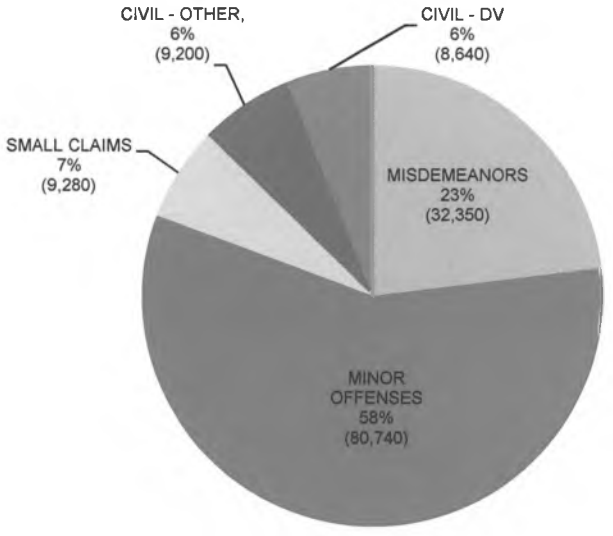


SUPERIOR COURT FILINGS (42 judges)
(22,440 superior court cases filed in FY11)



[In addition to 6450 new felony case filings, superior courts handled 4500 felony PTRPs in FY11]

DISTRICT COURT FILINGS (23 judges & 43 magistrates and masters; 140,207 district court cases filed in FY11)



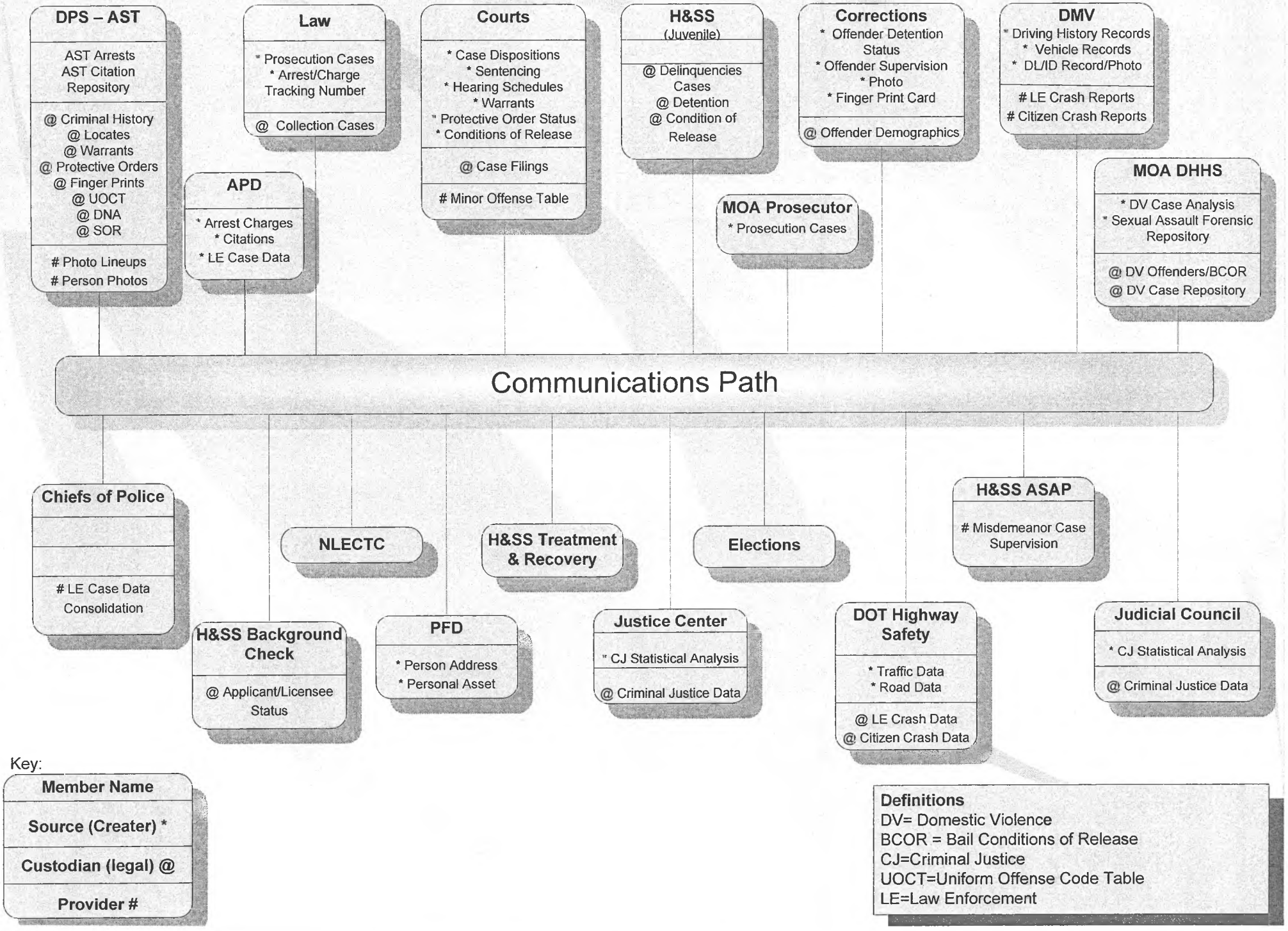
[31% of MO citations statewide were filed electronically]

Numbers of case filings rounded to nearest ten; percentages rounded to the nearest whole percent in superior and district court pie charts.

Prepared for Crime Summit, January 25, 2012

Nancy Meade, General Counsel
Alaska Court System

MAJIC Enterprise



Multi-Agency Justice Integration Consortium (MAJIC)

http://www.ajsac.state.ak.us/majic/

Membership

- Alaska Association of Chiefs of Police
- Alaska Court System
- Alaska Department of Administration, Public Defender Agency
- Alaska Judicial Council
- Alaska Department of Law, Criminal Division
- Alaska Department of Transportation, Program Development
- Alaska Department of Public Safety, Alaska State Troopers
- Alaska Department of Administration, Division of Motor Vehicles
- Alaska DHSS, Division of Behavioral Health/ASAP (Alcohol Safety Action Program)
- Alaska DHSS, Division of Juvenile Justice
- Alaska Department of Corrections
- Alaska DHSS, Division of Health Care Services, Alaska Background Check Program
- Alaska Department of Revenue, Criminal Investigations Unit
- Alaska Department of Transportation, Alaska Highway Safety Office
- Alaska Division of Elections
- Anchorage Police Department
- Municipality of Anchorage, Prosecutor's Office
- Municipality of Anchorage, Department of Health & Human Services
- National Law Enforcement & Corrections Technology Center - Alaska (NLECTC-AK)
- University of Alaska Justice Center, Statistical Analysis Center

Bail Conditions Repository – Phase 2 (Fairbanks Pilot)

September 2010 - June 2012
Responsible Agency: Alaska Court System

Problem

No one can readily determine if a person is subject to bail conditions of release because there is no statewide, electronic repository of bail orders.

Purpose

Demonstrate the feasibility of making bail orders electronically accessible to law enforcement and the public.

Expected Outcomes/Performance Measures

1. Electronic bail orders are created in the courtroom without unreasonably delaying proceedings.
2. All active Fairbanks bail orders (date forward) are in the electronically accessible repository.
3. Expired/inactive bail orders are never erroneously shown in the repository as "active".
4. The bail repository is developed, managed and supported with existing court system resources.

Scope

Phase 1: Bail order "smart" form developed as a proof of concept; in use in Fairbanks since 8/10.
Phase 2: Refine form, create repository (for Fairbanks orders) with on line access
Phase 3+: Expand to all courts.

Accomplished To Date

- ✔ Issued RFP, awarded contract to 4Point (Dec 2010)
- ✔ Gathered requirements from judges, clerks, administrative staff and other agencies (Feb 2011)
- ✔ Set up court IT infrastructure (software, hardware, training) (Mar 2011)
- ✔ Wrote business requirements and system specifications (May 2011)
- ✔ Delivered new bail form and repository for testing (Nov 2011)

Expected within the next 3 months:

- _ Complete testing – outside of courtroom
- _ Train trial court staff
- _ Go live - in courtrooms
- _ Build/test interface with APSIN
- _ Build/test web page for public

Expected within the next 6 months:

- _ Complete live-court acceptance testing
- _ Implement APSIN interface to make repository available to law enforcement
- _ Make repository available to public on court system's web page

What is Needed from Other Agencies?

1. DPS: Implement interface between the bail repository and APSIN.

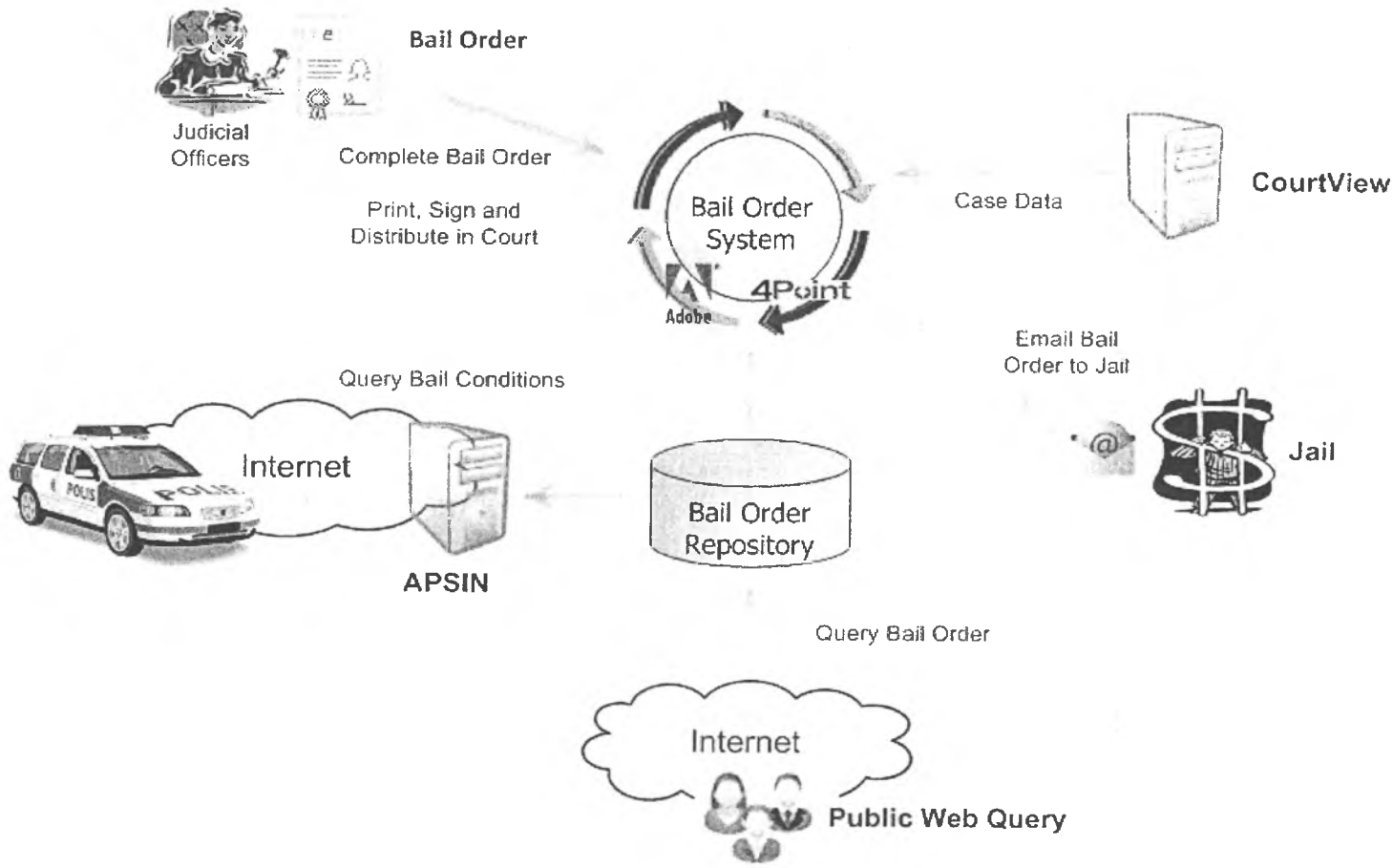
Related Projects (💣 = critical to the success of this project)

1. APSIN ID (MAJIC): APSIN ID for all defendants in court criminal case records (in progress) 💣
2. APSIN Redesign (DPS): Migrate from legacy/mainframe to modern platform (in progress) 💣
3. DV Bail Conditions Database (Muni of Anchorage): Manually flag bail conditions in APSIN

MAJIC Data Standards Relevant to the Project

1. APSIN ID Number - for law enforcement queries of the repository
2. Uniform Offense Citation Table (UOCT) - for offense codes/descriptions on the form
3. Arrest Tracking and Charge Tracking Numbers - for charge information on the form
4. U.S. Dept. of Justice National Information Exchange Model (NIEM) for systems interface

For More Info: Diane Schenker, Alaska Court System, dschenker@courts.state.ak.us, 264-8211


Bail Order
Judicial Officers
Complete Bail Order
Print, Sign and Distribute in Court
Bail Order System
4Point
Adobe
Case Data
CourtView
Email Bail Order to Jail
Jail
Query Bail Conditions
Internet
APSIN
Bail Order Repository
Query Bail Order
Internet
Public Web Query

2/06/12
OVERVIEW: BALLOT INIATIVE 11ACMP - ESTABLISHING THE ALASKA COASTAL MANAGEMENT PROGRAM

<TARGET><BILL></BILL><SUBJECT>2-06-12 OVERVIEW BALLOT INIATIVE 11ACMP - ESTABLISHING THE ALASKA COASTAL MANAGEMENT PROGRAM</SUBJECT><COMM>SJUD27</COMM></TARGET>

Cindy Smith

From: Koeneman, Crystal A (CED) <crystal.koeneman@alaska.gov>
Sent: Thursday, February 23, 2012 10:30 AM
To: Rep. Carl Gatto; Sen. Hollis French
Cc: Melanie Lesh; Cindy Smith; Thayer, Curtis W (CED); Boucher, John L (GOV); Hanrahan, Jo Ellen (CED); Bell, Susan K (CED)
Subject: RE: ACMP Hearing Follow-up
Attachments: DCCED Response to questions from ACMP Joint Judiciary Committee meeting 02 06 12.pdf; OMB Response Sen Judiciary 02.23.2012.pdf; Attachment 1 Sen Finance ACMP Fiscal Note 05.13.2011.pdf; Attachment 2 CZMA Allocation memo FFY2008.pdf; Attachment 3 CZMA Allocation memo FFY2009.pdf; Attachment 4 CZMA Allocation memo FFY2010.pdf; Attachment 5 DNR ACMP Fiscal Note 04.15.2011.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Good morning,

Please find the updated responses from DCCED and OMB from the recent hearing on the ACMP initiative. Please let me know if you have any questions or concerns. Sorry for any confusion this may have caused. Thanks and have a great day!

Crystal Koeneman, Special Assistant
Commerce, Community & Economic Development
9th Floor | State Office Building, Juneau, AK 99811
☎: 907.465.2503(w)/907.321.8517(c) | 🖷: 907.465.5442
✉: crystal.koeneman@alaska.gov

STATE OF ALASKA
DEPARTMENT OF
COMMERCE
COMMUNITY AND
ECONOMIC DEVELOPMENT

Sean Parnell, Governor
Susan K. Bell, Commissioner

MEMORANDUM

TO: Representative Gatto, Chair
Senator French, Chair
House/Senate Judiciary Committee

DATE: February 22, 2012

FROM: Susan K. Bell, Commissioner
Department of Commerce, Community,
and Economic Development

RE: ACMP

Representative Gatto and Senator French,

We have provided responses to questions raised during the recent hearing on the ACMP initiative. Please contact me if you have any further questions.

1. How long will it take for previously reviewed plans to be adopted at the onset of the new program?
   - The initiative language includes AS 46.41.040(b) which states; "*...approved coastal management plans that were in effect as of June 30, 2011 are in effect and are incorporated into the Alaska Coastal Management Program.*" Upon creation of the program, all existing approved plans would be in effect. Of the existing 28 coastal districts, there were two districts that did not have approved plans: the Northwest Arctic Borough and the North Slope Borough. It appears from the language of the initiative that those two boroughs would not have an approved plan until a new plan was submitted to the board for review and approval.

2. Will previously reviewed plans, or newly adopted plans expire?
   - Under previous versions of the ACMP program, district plans were required to be reviewed and reapproved every 10 years. Additionally, the statutory amendments to the program passed in 2003 and 2005 required all coastal districts to revise and submit their coastal plans for review and approval. The deadline for this submittal was March 1, 2006. The wording in the initiative does not include a mandatory review period where the plan would expire if not reviewed and approved. The initiative language includes AS 46.41.070 which requires coastal districts to review their plans within one year of adoption of regulations to see if they meet the requirement of the regulations and to make any changes and submit revised plans, but it does not state that the plans would expire if not revised or submitted.

3. Will plans need to have a NEPA review?
   - Under the previous program, there was a "State Coastal Management Plan" that was reviewed and approved under NEPA. The individual coastal plans were a part of the State Plan, and thus were not required to undergo individual review. We expect that this same hierarchy would be put in place under a new program.

4. How would formation of Coastal Resource Districts in the Unincorporated Borough take place?
   - The initiative language states in AS 46.41.060(b) that "*Coastal Districts, Coastal District Boundaries ...that were in effect as of June 30, 2011 are in effect and incorporated into the Alaska Coastal Management Program.*" Those municipalities in the unorganized borough that were their own coastal districts (Bethel, Cordova, Craig, Hoonah, Nome, Pelican, Thorne Bay, Valdez, and Whittier) will continue to be coastal districts. In addition, the four Coastal Resource Service Areas (Aleutians West, Bering Straits, Bristol Bay, and Ceñaliulriit) will also be coastal districts. The initiative also provides a method for areas in the unorganized borough (Regional Education Attendance Areas – REAA) that contain part of the coastal area, and that are not already formed into a coastal district, to form a district. This process is outlined starting at AS 46.41.110. Areas that would be affected by this are limited to Prince William Sound REAA (excluding Cordova, Valdez, and Whittier), Chatham REAA (excluding Hoonah and Pelican), and Southeast Island REAA (excluding Craig and Thorne Bay).

STATE OF ALASKA

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET

SEAN PARNELL, GOVERNOR

P.O. BOX 110020
JUNEAU, ALASKA 99811-0020
TELEPHONE: (907) 465-4660
FAX: (907) 465-3640

February 22, 2012

The Honorable Hollis French
Chairman, Senate Judiciary
Alaska State Legislature
State Capitol, Room 417
Juneau, AK 99801-1182

The Honorable Carl Gatto
Chairman, House Judiciary
Alaska State Legislature
State Capitol, Room 118
Juneau, AK 99801-1182

Dear Senator French/Representative Gatto,

Thank you for the opportunity to present the cost statement for the ACMP initiative before the Joint Judiciary Committee on February 6, 2012. The following is in response to questions posed by the Committee during the presentation for distribution to the members.

Questions from the Joint Judiciary Committee meeting Feb. 6

1. *Senator Wielechowski asked why a fiscal note for HB106 showed that the former ACMP federal program had shown $4.0 million in federal funding, while the statement of cost indicated available federal funding was $2.0 million.*

A fiscal note prepared on 05/13/2011 by the Senate Finance Committee for HB106 shows $4.0 million in federal funding for ACMP. (See Attachment 1) However, this level of federal funding appears well in excess of any recently available federal funding for coastal management programs.

Federal funding for Coastal Management Program administrative grants are governed by 16 U.S.C. § 1455. Since federal fiscal year 2008 (FFY2008) federal funding has come in three funding streams referred to as Sections 306/306A (tiered federal match up to 1:1); Section 309 (no match required); and the Coastal Non Point (CNP) or Section 310 (requires 1:1 match and not funded in FFY 2010).

Federal funding streams in the three programs are subject to maximum awards based upon the availability of federal funds. Alaska has typically received the maximum allowed for these programs. Below is a table showing federal funding from FFY2008-FFY2010. In these years, no more than $2.6 million was available for federal funding of state coastal management programs. Copies of the US

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Department of Commerce's program allocation letter are provided for your review. (Attachments 2-4.)

Federal Fiscal Year 2008	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$55,542,000	$10,000,000	$1,428,000	$66,970,000
Maximum State Funding	$1,967,000	$536,000	$42,000	$2,545,000
Alaska Allocation	**$1,967,000**	**$536,000**	**$42,000**	**$2,545,000**

Federal Fiscal Year 2009	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$56,079,000	$10,000,000	$2,345,000	$68,424,000
Maximum State Funding	$1,995,000	$536,000	$75,000	$2,606,000
Alaska Allocation	**$1,995,000**	**$536,000**	**$75,000**	**$2,606,000**

Federal Fiscal Year 2010	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$57,085,000	$10,000,000	$0	$67,085,000
Maximum State Funding	$2,030,000	$536,000	$0	$2,566,000
Alaska Allocation	**$2,030,000**	**$536,000**	**$0**	**$2,566,000**

As indicated during testimony, the total cost estimate of $5.4 million annually could be shared by the federal government provided that the state becomes eligible for federal funding. Uncertainty remains about the timing and availability of the federal funding stream, and all of the funds that would be requested for the budget are subject to legislative appropriation.

2. *Senator French and Representative Holmes asked for more specifics about the costs included in the overall cost estimate. They were specifically interested in information about ongoing versus one-time costs.*

Please see the summary below that itemizes costs by category. Comments about ongoing versus one-time costs are included in the narrative section. The estimates currently allow flexibility for the state to address one-time costs, however should the initiative pass, program implementation costs are likely to be different than those presented. All proposed costs will be subject to appropriation by the legislature.

CATEGORY	Description	
Personal Services	This expenditure would be an ongoing cost to support salaries and benefits for 34 full time positions ranging from a Division Director to an Office Assistant. The majority of the positions are Natural Resource Specialists supporting the envisioned Alaska Coastal Management Program In the first two years, it is likely that personal services costs will be lower than this estimate due to the program beginning from scratch. However, there will be many other activities associated with the initial gear up of the program though, so there is significant uncertainty about what percentage of these resources will be needed in the first two years.	$3,260,000
Travel	The projected travel expenditure would support employee and board related in-state and out of state travel to coastal districts and includes hotel, per diem, airfare and reimbursement for Alaska Coastal Management Program district assistance, staff training, mediation, public education, conferences and other travel supporting the program. This estimate anticipates increased travel costs in the first two years following the establishment of the board in order to assist coastal districts with their plans and advocate for the federal approval of the plan in Washington DC. Some portion of these travel resources would likely be redeployed to other program activities after the program is approved.	$267,900
Services	This expenditure is an ongoing cost to support contracts in the form of Reimbursable Services Agreements (RSA) to agencies participating in the Alaska Coastal Management Program. These contracts would support the implementation of the Alaska Coastal Management Program by the participating state agencies, coastal management areas and other contractors. This estimate also supports purchased services from other state agencies including centralized telecommunication, mail and human resource services, legal services, professional services to support monitoring & compliance activities and development and implementation activities for the Alaska Coastal Management Program. In the initial years, additional contractual services will be needed to draft and review implementing program regulations, and other start up activities.	$1,815,300
Commodities	This is an ongoing expenditure estimate that supports purchases related to office supplies, office furnishings and equipment, software as well as minor repairs to office equipment. In the first two years, actual costs in this category are likely to be significantly	$56,800

	higher as the office acquires all of the office furnishings, office equipment and other commodities necessary to build an office from scratch.	

3. *Senator French asked for more specificity about the costs included in the estimate of costs to support implementation of the 13-member Coastal Policy Board governance structure.*

The estimate of additional costs was based largely on cost estimates provided by the Department of Natural Resources (DNR) in their fiscal note for HB106 dated 04/15/2011. (Attachment 5) This fiscal note was chosen as a basis due to its somewhat similar nature to the initiative envisioned program. Comments on whether these are expected to be ongoing or one-time costs are also included.

As indicated during the testimony, these estimates assume a program that is substantially similar to the previous program with a 13-member board meeting in person 4 times annually. Significant uncertainty remains about the program that the board would ultimately implement and the associated costs. It should be noted that not all of the increased costs are directly attributable to the board members.

The costs in the table below are presented as subsets of the estimates presented in the prior table.

CATEGORY	Description	
Personal Services	One additional position was added to the previously configured program to cover the additional work associated with the administration of the Alaska Coastal Policy Board and coordinating district planning functions and information sharing. This is an ongoing cost and would be directly attributable to the Coastal Policy Board.	$109,800
Travel	This estimate anticipates increased travel costs in the first two years following the establishment of the board in order to assist coastal districts with their plans and advocate for the federal approval of the plan in Washington DC. These travel resources would likely be redeployed to other program related travel or review activities after the program is approved. These costs are not directly attributable to the addition of a board. This expenditure estimate also includes $60,000 in ongoing travel costs associated with four annual in-person meetings of the 13-member Alaska Coastal Policy Board and two staff members at approximately $1,000 per trip. This is an ongoing cost directly attributable to addition of a Coastal Policy Board.	$164,000

Services	This expenditure supports an additional $300,000 in ongoing services agreements with other state agencies services that DNR indicated would be needed to successfully implement the ACMP program. This would be an ongoing cost. These costs are not directly attributable to the addition of a board. The estimates include $60.000 estimate for regulations review by the Department of Law that would be of limited duration. Length of need is uncertain and dependent upon the complexity of the regulations and the time it takes to promulgate and implement them, this could be a cost for 2-4 years, however these resources would likely be redeployed to reviews and other program support after that time. Other ongoing services costs included $20,000 in postage, teleconference services, and other miscellaneous board and coastal district support such as conducting elections in coastal districts. This would be an ongoing cost directly attributable to the addition of the board.	$380,000
Commodities	This estimate includes some $5,600 in one-time costs such as the purchase of a recorder and sound equipment for the board. Ongoing costs include $10,000 in supplies needed to support the presentation of materials at the board meetings. These costs are directly attributable to the addition of a board.	$15,600

Attachments:
Attachment 1 Sen Finance ACMP Fiscal Note 05.13.2011.pdf
Attachment 2 CZMA Allocation memo FY2008.pdf
Attachment 3 CZMA Allocation memo FY2009.pdf
Attachment 4 CZMA Allocation memo FY2010.pdf
Attachment 5 DNR ACMP Fiscal Note 04.15.2011.pdf

Fiscal Note

State of Alaska
2011 Legislative Session

Fiscal Note Number: 10
Bill Version: SCS CSHB 106(FIN)
(S) Publish Date: 5/13/11

Identifier: CSHB106(FIN)-DNR-DCOM-4-15-11
Title: COASTAL MANAGEMENT PROGRAM
Sponsor: RLS BY REQUEST OF THE GOVERNOR
Requester: CONF COMM
Submitted: SENATE FINANCE for SCS CSHB 106(FIN)

Department: Department of Natural Resources
Appropriation: Land & Water Resources
Allocation: Alaska Coastal and Ocean Management
OMB Component Number: 2680

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	3,260.0		3,260.0	3,260.0	3,260.0	3,260.0	3,260.0
Travel	251.6		251.6	141.8	141.8	121.8	121.8
Services	3,144.4		3,144.4	3,084.4	3,084.4	3,084.4	3,084.4
Commodities	59.8		54.2	54.2	54.2	54.2	54.2
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**6,715.8**	**0.0**	**6,710.2**	**6,540.4**	**6,540.4**	**6,520.4**	**6,520.4**
Capital Expenditures							
Change in Revenues ( )							
Fund Source (Operating Only							
1002 Fed Rcpts	4,039.0		4,039.0	4,039.0	4,039.0	4,039.0	4,039.0
1003 G/F Match	1,672.6		1,672.6	1,672.6	1,672.6	1,672.6	1,672.6
1004 Gen Fund	664.1		658.5	488.7	488.7	468.7	468.7
1007 I/A Rcpts	95.5		95.5	95.5	95.5	95.5	95.5
1061 CIP Rcpts	244.6		244.6	244.6	244.6	244.6	244.6
Total	**6,715.8**	**0.0**	**6,710.2**	**6,540.4**	**6,540.4**	**6,520.4**	**6,520.4**

Estimate of any current year (FY2011) cost: 0.0

Positions

Full-time	34.0		34.0	34.0	34.0	34.0	34.0
Part-time							
Temporary							

Reason For Change:

CC: This fiscal note combines the additional funding requested with FY12 program funding removed by the Senate. Additionally, this fiscal note is updated to reflect changes made in the House Finance committee substitute.

This revised fiscal note includes $1.36 million capital authorization (federal) for operating grants to communities so they have the funding necessary for local participation.

Analysis:

NOTE: The base budget ($4,691.7 and 33 positions) was removed from the Senate version of the FY12 operating budget, making it subject to conference committee. The annual capital project request for the federal grant funds that are shared with DCCED for grants to communities and for DCCED's administration of the grants was removed from the Senate version of the FY12 Capital Budget making it subject to conference committee.

The Alaska Coastal Management Program (ACMP) will automatically terminate on July 1, 2011 (SLA2005, CH31, Sec 22). CSHB106(FIN) would extend the termination date to July 1, 2017.

Submitted By: Senate Finance for SCS CSHB 106(FIN)

Prepared By: Conference Committee

Date: 05/04/2011

This fiscal note reflects the increased fiscal impacts due to the additional Division of Coastal and Ocean Management (DCOM) duties, including the administration and implementation of the Alaska Coastal Policy Board (CPB). Those increased fiscal impacts are detailed below:

Personal Services
One additional position, a Project Coordinator (range 20), will be required to cover the additional work associated with the CPB and the coordination of district planning functions and information sharing.

Travel
The CPB will meet four times in-person in the first two years following establishment of the board, and will meet in-person twice annually after that. The CPB will need to meet more frequently in-person for the first two years in order to establish board protocols, review coastal district plans, and address issues of interest to ACMP participants. CPB travel includes nine members and two DCOM support staff.

In addition, recognizing coastal districts will be amending their district plans based on CSHB106(FIN), two DCOM staff will travel 5-6 different districts per year for four years to assist the districts with their plan amendments.

Five DCOM staff will travel to regional locations for two years to provide ACMP training and education on program changes and the revised ACMP implementing regulations.

The DCOM Director will travel to Washington, DC three times annually for two years to work with NOAA on program change approvals and NEPA requirements.

Contractual
The CPB will meet two times annually by teleconference, with each 2-day teleconference lasting 8 hours each day (including 20 phone lines). CSHB106(FIN) will require a substantial revision to all three chapters of the implementing ACMP regulations (11 AAC 110, 112, and 114). Contractual services will be required to develop and complete those revisions, including the Department of Law final review. The coordination and distribution of district planning and consistency review data and information requires postage and other fees. DCOM will also reimburse state agencies for their participation and implementation of the ACMP program.

Supplies
Supplies will be required for supporting the CPB (dictation/recorder equipment, packet materials and binders) and support staff (office

LEGAL SERVICES

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

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

MEMORANDUM February 3, 2012

SUBJECT: Sectional Summary of Coastal Management Program Initiative 11 ACMP (Work Order No. 27-LS1307)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee

FROM: Alpheus Bullard
Legislative Counsel

You have requested a sectional summary of the above-described initiative.

As a preliminary matter, note that a sectional summary of an initiative should not be considered an authoritative interpretation of the initiative and the initiative itself is the best statement of its contents.

Sec. 46.41.010. Coastal Policy Board. Establishes an Alaska Coastal Policy Board ("board") in the Department of Commerce, Community, and Economic Development ("department"). The board consists of nine public members, and their alternates, appointed by the governor from the coastal regions of the state, as well as the commissioners of the Department of Environmental Conservation, the Department of Fish and Game, the Department of Natural Resources, and the Department of Commerce, Community and Economic Development. It specifies membership terms, quorum and meeting requirements, board structure and governance details, and that the department will provide administrative support for the board.

Sec. 46.41.020. Powers and duties of the board. Establishes the duties and powers of the board.

Sec. 46.41.030. Division of Coastal Management. Establishes a division of ocean and coastal management within the department. Provides the duties of the division.

Sec. 46.41.040. Development of Alaska Coastal Management Program. Provides what regulations must be adopted under the Alaska Coastal Management Program ("program"). Directs that regulations relating to (1) program standards, (2) criteria for the preparation and approval of district coastal management plans, and (3) consistency review procedures for coastal activities and projects, be adopted. Further provides that the coastal management districts ("districts"), coastal district boundaries, and approved

coastal management plans ("plans") that were in effect on June 30, 2011, are restored and incorporated into the program.

Sec. 46.41.050. Objectives. Requires that the program be consistent with certain objectives.

Sec. 46.41.060. Development of district coastal management plans. Requires districts to develop and adopt plans. Provides plan requirements. Provides criteria for board approval of plans.

Sec. 46.41.070. Submission of district plans by coastal districts. Requires restored districts to review their plans within one year after the adoption of program regulations by the board. Provides that if plan changes are necessary, a revised plan must be submitted to the department for review by the board.

Sec. 46.41.080. Implementation of district coastal management plans. Requires districts to implement plans. Provides how a plan must be implemented. Provides that a plan for a district that does not exercise zoning or other controls "on the use of resources" within its coastal area will be implemented by "appropriate state agencies."

Sec. 46.41.090. Compliance and enforcement. Requires municipalities and state resource agencies to regulate land and water controls in conformity with district plans. Provides that the superior court has jurisdiction to enforce orders of the board and the department.

Sec. 46.41.100. Coastal management plans in the unorganized borough. States that coastal resource service areas ("service areas") established in the unorganized borough may exercise all authority and perform those duties required by the program.

Sec. 46.41.110. Coastal resource service areas. Provides for how service area boundaries will be determined.

Sec. 46.41.120. Organization of a coastal resource service area. Permits a service area (created under sec. 46.41.110) to be established by a vote at an election after either the submission to the board of (1) a petition from a certain percentage of the voters within the proposed service area or (2) a resolution from a certain percentage of the city and village councils in the proposed service area.

Sec. 46.41.130. Coastal resource service area boards. Requires each service area to have an elected service area board. Provides for board duties and powers, board composition and membership, election of board members, terms of office, vacancies, and the recall of board members.

Sec. 46.41.140. Elections in coastal resource service areas. Directs the lieutenant governor to administer the elections for service area board members under sec. 46.41.130 and the organization of service areas under sec. 46.41.120.

Sec. 46.41.150. Preparation of district coastal management program (sic.) by the Department of Commerce, Community and Economic Development. Permits the board to submit a district plan to the legislature for consideration if (1) the residents of a service area reject the organization of that service area at an election under sec. 46.41.120 and (2) the board finds that major economic activity has occurred, or will occur, in the proposed service area. Such plans are prepared by the department upon request of the board. Further permits the department, in consultation with the service area, to prepare a plan for a service area that has been organized under sec. 46.41.120, but that has not been able to make substantial progress in the preparation of an approvable plan.

Sec. 46.41.160. Approval of plans in coastal resource service areas. Establishes a process for a plan to be reviewed by cities and villages within a service area, prior to (1) adoption by the service area board and (2) approval by the (Coastal Policy) board. Establishes parameters for plan review by cities and villages.

Sec. 46.41.170. Cooperative administration. Provides that a city that is within the coastal area, but that is not part of a coastal service area, will be included within an adjacent service area, unless the city's governing body opts out. Provides that a municipality and a service area are not restricted from engaging in cooperative or joint administration of functions.

Sec. 46.41.180. Construction with other laws. States that the initiative's provisions (secs. 46.41.010 - 46.41.900) may not be construed to diminish various state and municipal powers and duties.

Sec. 46.41.900. Definitions. Provides definitions for the initiative's provisions (secs. 46.41.010 - 46.41.900).

TLAB:ljw
12-091.ljw

LEGAL SERVICES

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

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Mail Stop 3101

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

MEMORANDUM February 14, 2012

SUBJECT: Article XI, section 4's "substantially the same" and the initiative establishing an Alaska Coastal Management Program (Work Order No. 27-LS1345)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee

FROM: Doug Gardner
Director
and
Alpheus Bullard
Legislative Counsel

You asked whether a bill modeled on the provisions of the former Alaska Coastal Management Program, as those provisions would have been amended by the substantive portions of CSSB 45(CRA) am (fld H) ("SB 45"),[1] would be interpreted as "substantially the same" as the initiative entitled "An Act establishing the Alaska Coastal Management Program". You also asked that this analysis account for the initiative's "Coastal Policy Board," the prior program's AS 46.40.040(b), which prevented coastal resource districts from adopting certain enforceable policies ("DEC carve-out"), and the use and definition of the term "local knowledge" in the initiative.

Discussion

While both SB 45 and the initiative have the same general purpose -- establishing a state coastal management program -- the means by which that purpose is effectuated would be different. Given the relative scarcity of prior court cases interpreting the state constitution's art. XI, sec. 4 "substantially the same" language, it's not entirely clear to what degree this difference might result in SB 45 and the initiative being interpreted as not substantially the same.[2]

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[1] For the purposes of this memorandum, "SB 45" means the prior program as it would have been modified by that bill.

[2] When there is little case law, often it is helpful to turn to the minutes of Alaska's constitutional convention. While the article on direct legislation was the subject of extensive debate and discussion at the convention, in this case the minutes do not, as our court has observed, contain any "helpful discussion of what was the intended scope of the words 'substantially the same measure.'" *Warren v. Boucher*, 543 P.2d 731, 735 (Alaska 1975).

Under art. XI, sec. 4 of the Constitution of the State of Alaska[3] a proposed initiative is void if a law is enacted that is "substantially the same measure" as the proposed initiative.[4] Under AS 15.45.210, the lieutenant governor, with the concurrence of the attorney general, is responsible for determining whether an Act of the legislature is substantially the same as a proposed initiative.[5]

The question of whether an initiative and a legislatively enacted bill are "substantially the same" has been taken up only twice by our courts. In *Warren v. Boucher*, 543 P.2d 731 (Alaska 1975), the court was tasked with examining an initiative and a legislative bill relating to campaign finance reform. In *Warren,* the legislation "was broad and complicated, touching upon a great range of topics, including campaign spending limits, reporting of contributions and expenses, restrictions on anonymous contributions, penalties for non-compliance, the creation of an elections oversight committee to monitor elections, and several other topics." *State of Alaska v. Trust the People Initiative Committee*, 113 P.3d 613, 621 (Alaska 2005). In the second case, *Trust the People*, the court examined legislation that was "simple and straightforward, essentially dealing with only one substantive topic: filling of a U.S. Senate vacancy." *Id.* at 621. In both cases,

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[3] Article XI, sec. 4, Constitution of the State of Alaska states:

> **INITIATIVE ELECTION.** An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

[4] This constitutional provision is unusual. Of the 21 state constitutions that permit citizens to propose laws through a petition process, we are aware of only one other state with a constitutional provision that permits its legislature to void an initiative through the passage of a measure that is "substantially the same." Article III, section 52(d) of the Wyoming constitution provides, in part, "If before the election, substantially the same measure has been enacted, the [initiative] petition is void." This clause in the Wyoming constitution has not yet been interpreted by a court.

[5] AS 15.45.210 states:

> **Determination of void petition.** If the lieutenant governor, with the formal concurrence of the attorney general, determines that an act of the legislature that is substantially the same as the proposed law was enacted after the petition had been filed, and before the date of the election, the petition is void and the lieutenant governor shall so notify the committee.

the court employed the same test in deciding whether a bill and an initiative were substantially the same.

A. "Substantially the same" test in *Warren v. Boucher*

The test of how similar a bill and an initiative must be for the bill to invalidate the initiative was first articulated in *Warren v. Boucher*:

> It is clear that the legislative act need not conform to the initiative in all respects, and that the framers intended that the legislature should have some discretion in deciding how far the legislative act should differ from the provisions of the initiative. The question, of course, is how great is the permitted variance before the legislative act becomes no longer substantially the same.
>
> Upon reflection we have concluded that the legislature's discretion in this matter is reasonably broad. If in the main the legislative act achieves the same general purpose as the initiative, if the legislative act accomplishes that purpose by means or systems which are fairly comparable, then substantial similarity exists. It is not necessary that the two measures correspond in minor particulars, or even as to all major features, if the subject matter is necessarily complex or requires comprehensive treatment. The broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative.

543 P.2d at 736.

B. "Substantially the same" test revisited in *Trust the People*

In *Trust the People*, the court cited the *Warren v. Boucher* test:

> A court must first determine the scope of the subject matter, and afford the legislature greater or lesser latitude depending on whether the subject matter is broad or narrow; next, it must consider whether the general purpose of the legislation is the same as the general purpose of the initiative; and finally it must consider whether the means by which that purpose is effectuated are the same in both the legislation and the initiative.

Trust the People, 113 P.3d at 621.

1. Scope of subject matter

Turning to the first part of the test, as articulated by the court in *Trust the People*, it should be noted that the subject matter of this initiative, the establishment of an Alaska Coastal Management Program, is relatively complex and its reach is broad. Correspondingly, the legislature's discretion to vary from particular features of the initiative is broader in this instance than it might be in the context of a different initiative

(i.e. the filling of a U.S. Senate vacancy in *Trust the People*). As the court described its treatment of the legislatively enacted campaign finance bill in the *Warren v. Boucher* case:

> The legislature had made numerous changes to the initiative that implicated the scope of the law, its enforcement mechanisms, and other structural issues concerning the regulation of campaign finance reform. But because these changes were seen as promoting the shared goals of both the bill and the initiative, we were willing to accept the legislature's bill as "substantially the same" as its initiative counterpart, even though there were in fact differences in the texts.

Trust the People at 621 (footnote omitted).

SB 45 would most likely be interpreted to satisfy this element of the test. While direct comparison between the campaign finance legislation at issue in *Warren v. Boucher* and the legislation here is difficult, arguably a program that seeks to coordinate and unify permitting activities for all projects and activities in the state's coastal area between federal, state, and local governments, their respective agencies, and local inhabitants is more complex than legislation governing election contributions and expenditures in state election campaigns. So, in this instance, the court is likely to permit the legislature at least as much latitude to vary from the specific terms of the initiative as it allowed in *Warren v. Boucher*.[6]

2. Purpose of legislation and initiative

The next part of the test consists of examining whether the purposes of the legislation and the initiative are the same. The *Warren v. Boucher* test asks whether "the legislative act achieves the same general purpose as the initiative." *Id.* The establishment of a state coastal management program under both SB 45 and the initiative would, if approved by the National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management under the Coastal Management Act of 1972 (16 U.S.C. §§ 1451 - 1465), enable the state to formally review and influence federal activities affecting Alaska, allow the state to receive Coastal Zone Management Act grant funds, reestablish a coordinated permitting process for projects requiring state and federal authorizations, and result in greater local participation in state and federal permitting processes. Additionally, the Secretary of Commerce must find, for a state coastal management program to be approved, that the program includes certain program elements that are consistent with Congressional declaration of policy (purpose) found at 16 U.S.C. § 1452.[7] Both SB 45 and the initiative are likely to be found to meet these

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[6] The dissent in *Warren v. Boucher* pointed out: "of the 19 separate sections of the initiative, only six are the same as the statute," and "seven sections have been eliminated entirely by the statute." *Id.* at 741 (Erwin, J., dissenting). *Trust the People* at 621 n.30.

[7] See 16 U.S.C. § 1455(d)(2) for a list of the program elements.

federal requirements. Similarly, the program's scope and organization are much the same in SB 45 and the initiative, the prior program's sec. 45.40.020 (objectives) and the initiative's sec. 45.41.050 (objectives) are in large part the same, and the initiative even goes so far as to provide that coastal districts, district boundaries, and coastal district management plans approved under the prior program are incorporated into the initiative's program (see initiative sec. 46.41.040(b)). Consequently, the general purpose of SB 45 and the initiative would likely be interpreted as the same satisfying the second element of the *Trust the People* test.[8]

3. "Means" and the issue of local control

The third prong of the test involves considering whether the means by which this general purpose is effectuated is the same in the bill and the initiative. It is here that SB 45 and the initiative could be found to differ, because the initiative provides for greater local participation and control than the state's former coastal management program as it would have been modified by SB 45.

The former program, at the time of its repeal, was housed within the Department of Natural Resources, and that department was responsible for coordinating consistency reviews, reviewing and approving coastal management plans, offering technical assistance to coastal resource districts, and offering statutory and regulatory changes to improve coastal management.[9] Instead of direct state agency control of the program, the

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[8] In *Warren v. Boucher*, the court examined the difference between two sets of campaign finance rules and the respective difference in their probable operation. In the present case, the most salient differences between the initiative and SB 45 cannot be characterized as those differences that might exist between two disparate sets of rules, but in how decision making power is allocated between the executive branch of state government and the coastal regions of the state. While this balance of power is an important component of the initiative, a court is not likely to find that the initiative's allocation of greater power to the local governments and the residents of the coastal regions of the state and their representatives on the initiative's Coastal Policy Board is a "purpose" of the initiative, but a means of effectuating "a balanced approach to development and protection of coastal resources." (This language is from the initiative sponsor's "Short-form Description of Initiative," which provides "This initiative would establish a coastal management program for Alaska. Alaska is the only state without an approved coastal management program. The initiative seeks a balanced approach to development and protection of coastal resources." Available on February 11, 2012, at http://www.elections.alaska.gov/petitions/11ACMP/11ACMP_Proposed_Language.pdf.)

[9] The consistency review process, in which private and public land and water uses and natural resources in the coastal zone are managed in a manner consistent with the policies of a state's coastal management program, is the heart of the 1972 Coastal Management Act (16 U.S.C. §§ 1450 - 1464).

initiative vests control of the program in an Alaska Coastal Policy Board (Board),[10] the majority of whose members are residents of the coastal regions of the state.[11] Similarly, the former program prevented coastal resource districts or areas from adopting enforceable policies relating to air, land, and water quality issues that are under the Department of Environmental Conservation's authority ("DEC carve-out"),[12] whereas the initiative does not.

An argument could be made that the initiative's (1) establishment of a Board with regulatory authority over the program, made up of residents from the coastal regions of the state, (2) elimination of the "DEC carve-out," and (3) greater emphasis on program elements relating to local control and participation,[13] are not "fairly comparable means."[14]

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[10] While CSSB 45(CRA) am (fld H) established a board, the board was advisory in nature. See secs. 3 and 13 of 27-GS1965/B.A.A.

[11] The initiative's Board would be located in the Department of Commerce, Community, and Economic Development.

[12] See former AS 46.40.040(b), AS 46.40.040(c), and AS 46.40.096(i). For a discussion of the "DEC carve-out," see the Alaska Coastal Management Program Audit Part I, pages 25 - 27, available February 11, 2012 at: http://www.legaudit.state.ak.us/pages/digests/2011/30060adig.htm.

[13] Examples of a greater emphasis on local participation and local control, and the values of local participation and control, are found in the initiative's sec. 46.41.050(1) and (9) - (11), which amend the prior program's objectives to add new language and new paragraphs relating to local participation and control, and the definition of "local knowledge" as an element of how a district's coastal management plan will be evaluated. It's difficult to state what substantive effects these facets of the initiative might be interpreted to have. The initiative's additional objectives can be summarized as (1) "coordination of planning and decision-making . . . among levels of government," (2) "participation of the public, local governments, and agencies of the state and federal governments," and (3) requiring state resource agencies to carry out their duties, powers and responsibilities in the manner provided by the initiative. What it might mean in practice for the program to "be consistent with [these] objectives" (see initiative's sec. 46.41.050) is impossible to predict. Similarly, the effects of replacing one definition of "local knowledge" with another in related provisions addressing the approval of district coastal management plans, while a seemingly small detail, is not clear.

While the use of different language or the addition of these objectives might not affect the subject matter, scope, or purpose of the program, because policy considerations relating to "coordination and participation" between "levels of government" (namely the balance of power between state agencies and local governments) animated the debate that surrounded the former program during the First Session of the 27th Legislature and the two subsequent special sessions, it may be important to note that in the context of a "substantially the same" evaluation of an initiative and a competing legislatively enacted

The central questions that you want answered are whether the differences of: (1) the Alaska Coastal Policy Board; (2) the elimination of the "DEC carve-out"; and (3) the greater emphasis on local control and participation, i.e. "local knowledge," in the initiative collectively, or when viewed individually, are substantially the same.

Alaska Coastal Policy Board

The greatest single factor which a court may consider as not substantially the same comparing the initiative and SB 45, is the role and responsibilities of the initiative's Alaska Coastal Policy Board. Note that in the *Warren v. Boucher* case, the court indicated, in the context of legislation governing election contributions and expenditures, that moving a compliance mechanism from the lieutenant governor to an "election campaign commission" did not vitiate the "aims of the initiative." *Boucher* at 739. If the legislature did the same here, and restored the program to one supervised by the executive branch, would a court be so likely to find that such a change renders the program not "substantially the same"? It may be, in contrast to *Warren v. Boucher*---where the location of the enforcement mechanism was seen as complimentary to the purposes of the initiative---that here a court could interpret the legislature's action as "vitiating" the local control and local participation aspects contained in the initiative. In eliminating the Board, with its power to adopt regulations and otherwise make law by interpreting them, SB 45 could be interpreted by a court as not substantially the same as the initiative, despite the broader discretion afforded the legislature based on the complexity of the coastal zone program.

"DEC Carve- Out"

The "DEC carve-out," on its own, is not likely to be interpreted as creating enough of a variance between the initiative and SB 45, given the latitude accorded the legislature in a complex matter that requires comprehensive treatment, for a court to find SB 45 not

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bill by a court, these policy considerations, taken in isolation, are unlikely to exercise the same gravity. In *Trust the People*, the court noted that

> [w]hile the state raises serious policy arguments in favor of [the legislatively enacted bill], they relate to the wisdom of the legislation -- and thus are more properly directed to the voters considering the proposed initiative -- and not to the question whether the proposed initiative and the [legislatively enacted bill] are substantially the same.

Id. at 624.

[14] In *Warren v. Boucher*, the court found that the means for accomplishing the purpose were "fairly comparable," even thought they did not "correspond . . . as to all major features." 543 P.2d at 736.

substantially the same. While incorporating the "DEC carve out" would limit the scope of regulations the Board could adopt and the Board's jurisdiction, it could be that a court would view this variance as one that would promote the shared goal of both SB 45 and the initiative---providing a component of a coastal management program that has already been determined compliant with federal law. Of course, if a court were to find, as discussed above, that the Board was central to the initiative and that the "DEC carve-out" would diminish local power and control allotted under the program (in restricting what enforceable policies a coastal district would adopt), the court might find that the "DEC carve-out" in SB 45 renders it as not substantially the same. However, given the existing range of limitations placed on what sort of enforceable policies could be adopted under the initiative's sec. 46.41.060(b)(2), this is a less likely outcome.

Local Knowledge

Definitions of "local knowledge," albeit different, exist in both SB 45 and the initiative. Given the broad discretion a court would likely allow the legislature on this matter, it is unlikely that standing alone, these differing definitions would exceed the legislature's authority to vary from the particular features of the initiative. While the political struggles of 2011 underscore the importance of these issues to respective groups, a court is likely to consider whether the definitions in SB 45 vitiate the initiative, or are within permissible variances.[15] Given the complexity of the program and that the definitions -- albeit with differences -- exist in some form in both SB 45 and the initiative, it is likely that the different definitions would not prevent a finding of substantial similarity.

C. Conclusion

It is hard to predict how the lieutenant governor, or a court, would interpret the significance of this different balance of power between state agencies and local governments in determining whether the bill would be "substantially the same" as the initiative. While it may be useful for discussion to consider each component of SB 45 and the initiative separately and apply the substantially similar test from *Warren v. Boucher*, consideration of the entire program utilizing this test is difficult. Perhaps the best conclusion to a macro application of the test in *Warren v. Boucher* to SB 45 and the initiative is to observe that if each of the features discussed above individually raised "substantially the same concerns," then it would be likely that when all key differences were combined, that a court would find it a very close question as to whether SB 45 is substantially the same as the initiative. However, if you want to draft legislation that will increase the odds of being considered "substantially the same" and thereby voiding the initiative, a bill that provides greater local control and participation than the former program did (and SB 45 would have) could only help the effort.

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[15] Note that the definition related only to what enforceable policies of a coastal district management plan will be interpreted to "address a coastal use or resource of concern to the residents" of the district before the plan may be approved by the Board.

Additional notes

1. In *Trust the People* the court reiterated that "in determining the meaning that voters might attach to an initiative, we will look to published arguments made in connection with [an] initiative." *Id.* citing *Falcon v. Alaska Public Offices Commission*, 570 P.2d 469, 472 n.6 (Alaska 1977).[16] Consequently, if the election pamphlet is published before the legislature enacts legislation that the lieutenant governor determines is substantially the same as the initiative, and the initiative sponsors emphasize that the purpose of the initiative has everything to do with local control, it could affect the above analysis.

2. If the initiative is approved by the voters, under art. XI, sec. 6 of the state constitution the legislature can subsequently amend the initiative to a greater degree than is permissible before the initiative is placed on the ballot. The Alaska Supreme Court has noted that

> [T]he power to avoid an initiative by enacting legislation should not be equated with the power to amend an initiative enacted by the voters . . . This is because the Alaska Constitution contains no explicit limitation on the legislature's power to amend an initiative enacted by the voters, but it does contain such a limitation on the legislature's power to avoid a proposed initiative: Legislation designed to avoid a vote on a proposed initiative must be "substantially the same" as the initiative.

Trust the People, 113 P.3d at 623 (internal citations omitted).

3. In testimony on Monday, February 6, 2012, there was some discussion of how long it would take the coastal management program established by the initiative to be approved by the federal government. It is our recollection that the Alaska Sea Party chairman Bruce Botelho stated that it would take several years. This raises two points of possible interest.

- It's possible that under art. XI, sec. 6, the legislature could repeal the program before it is up and running.
- While we don't know the answer, it would be interesting to know whether there would be an expedited process for federal approval of an Alaska Coastal Management

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[16] *Falcon*, 570 P.2d at 472 n.6 provided, in pertinent part;

> "In determining the meaning of legislation enacted through initiative, or referendum, the courts will look to the published arguments made in connection with the vote upon such measures." *2 Sutherland, Statutory Construction* § 5016 at 507 (3d ed. 1943). *See State v. Lewis*, 559 P.2d 630, 637-38 (Alaska 1977), where we relied on the published Report to the People of Alaska from the Alaskan Constitutional Convention to ascertain the intent of the drafters and those who voted for ratification of the Constitution.

Program if the legislature were to enact a program that was identical to the prior program at the time of its repeal.

4. If the initiative is approved, the legislature is not required to appropriate funds for the program.

We hope the above information is helpful to your deliberations. If you have questions, please do not hesitate to contact us.

TLAB:ljw:plm
12-121.ljw

Lieutenant Governor Mead Treadwell
STATE OF ALASKA

January 17, 2012

The Honorable Gary Stevens
Senate President
State Capitol, Room 111
Juneau, AK 99801

The Honorable Mike Chenault
Speaker of the House
State Capitol, Room 208
Juneau, AK 99801

Gary + Mike —

Dear President Stevens and Speaker Chenault:

In light of the Alaska Coastal Management Program Initiative (11ACMP) recently filed with the Division of Elections, I am writing the presiding officers of each body of the legislature regarding the legislative hearing requirement of AS 24.05.186.

On January 17, 2012, the sponsors of this initiative timely filed their petition with the Division of Elections (Division) under AS 15.45.140. The Division has determined that the petition, on its face, contains a sufficient number of presumptively valid signatures – over 25,875— to be accepted for filing. The Division is now in the process of verifying those signatures as required under AS 15.45.150 -- 15.45.160. The Division has 60 days to complete the signature verification process and to notify the initiative committee of the results of that process.

✓ Under AS 24.05.186, a standing committee of the legislature, selected jointly by the presiding officers of the House and Senate, must hold at least one hearing on an initiative that my office has determined was properly filed. The legislative hearing must occur within 30 days after the convening of the legislative session at which the proposition would appear on the ballot. In this case, if the review finds that the statutory signature requirement is met, the proposition may appear on the August 2012 primary election ballot.

Based on the 60-day signature verification requirement of AS 15.45.150 and the 30-day legislative hearing requirement of AS 24.05.186(b), the required legislative hearing will need presumably to occur before the time for signature verification has elapsed.

Please let me know of any questions or issues regarding this process.

Sincerely,

Mead Treadwell
Lieutenant Governor

Juneau Office: Post Office Box 110015 • Juneau, Alaska 99811 • 907.465-3520 voice • 907-465-5400 fax
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Cc: The Honorable Sean Parnell, Governor
Mike Nizich, Chief of Staff, Office of Governor Sean Parnell
Cindy Sims, Deputy Chief of Staff, Office of Governor Sean Parnell
The Honorable Susan Bell, Commissioner, Department of Commerce Community and Economic Development
The Honorable Cora Campbell, Commissioner, Department of Fish and Game
The Honorable Larry Hartig, Commissioner, Department of Environmental Conservation
The Honorable Dan Sullivan, Commissioner, Department of Natural Resources
The Honorable Rick Svobodny, Acting Attorney General, State of Alaska
Heather Brakes, Legislative Director, Office of Governor Sean Parnell

Alaska Coastal Management Program Initiative
Comparison of Initiative Provisions with Past Programs and Legislation

Topic	Initiative	June 2011 Program	Pre-2003 Program	CS SB 45 (CRA) am (failed House 6/11)
Location	DCCED	DNR	Governor's Office	DNR
Board	13-member board of 9 public members and 4 commissioners (DNR, DFG, DEC and DCCED).	No board - DNR commissioner responsible for all ACMP decisions with no checks and balances.	15-member board of 9 public members (local elected officials), the director of the Office of Management and Budget, and the commissioners of DCED, DEC, DFG, DNR, and DOTPF.	9-member board with 5 public members (one representing industry or a Native corporation), a deputy commissioner of DNR, and the commissioners of DEC, DFG, and DOTPF.
	Quorum: 5 public members and 2 agency members.	n/a	Quorum: 4 public members & 3 agency members.	Quorum: 3 public members and 3 agency members.
	Decisions made by a majority of members present and voting.	n/a	Decisions made by majority vote of those present.	Decisions require 2/3 vote of entire board.
	Governor appoints 9 public members from list of nominations from coastal districts.	n/a	Governor appoints 9 public members from a list of nominees from municipalities.	Governor appoints 5 public members; 4 members nominated by districts (may request subsequent lists of nominees).
	Board may recommend the Governor remove a public member for cause.	n/a	Public members removed only if they cease to meet qualifications.	Governor may remove public members for cause.
	Authority to approve regulations, direct DCCED to seek federal approval of program, approve district programs, establish interagency coordination, and evaluate effectiveness of district programs.	n/a	Authority for grants, adopting regulations (guidelines, standards and consistency reviews), interagency coordination, reviewing district plans, and developing procedures for coordination and consultation with federal agencies.	Advisory board makes recommendations, provides a forum for discussion, comments on regulations and directs districts to resubmit its coastal plan if policies duplicate new laws. Board annually solicits changes to state and federal laws.
Boundaries	Incorporates coastal zone boundaries approved by	Coastal zone boundaries were approved by former Coastal	Coastal Policy Council responsible for approving	Coastal zone boundaries were approved by former Coastal

Topic	Initiative	June 2011 Program	Pre-2003 Program	CS SB 45 (CRA) am (failed House 6/11)
	former Coastal Policy Council.	Policy Council.	coastal zone boundaries.	Policy Council.
Regional Planning	Board to initiate a program of strategic regional coastal and ocean planning.	DNR to initiate an interagency program of comprehensive coastal resource planning for each geographic region of state.	Coastal Policy Board to initiate an interagency program of comprehensive coastal resource planning for each geographic region of state.	DNR to initiate an interagency program of comprehensive coastal resource planning for each geographic region of state.
Enforceable policies	Policies cannot unreasonably or arbitrarily restrict a use of state concern.			
	Policies cannot duplicate, restate, or incorporate by reference state or federal statutes or regulations.			Policies cannot duplicate, restate, incorporate by reference, rephrase, or adopt state or federal statutes or regulations.
	Policies must be clear and concise, cannot address matters preempted by state or federal law, may be prescriptive or performance based, and may address a matter of local concern.	Policies must be clear and concise, address a matter of local concern, be prescriptive, and address a matter of local concern (not adequately addressed by state or federal law).	District programs must be consistent with the standards and guidelines adopted by the Coastal Policy Council.	Policies may not address matters preempted or in conflict with federal law and employ the least restrictive means to achieve objective. State agencies have broad authority to object to a policy.
	Designated areas not required.	Designated areas are optional but required by regulation for many subjects of enforceable policies (e.g., subsistence and habitat). DNR denied many of the designated areas proposed by districts.	Designated areas are not required.	Not specifically addressed in statute but DNR testified to the Legislature that it will not require designations in order to establish enforceable policies.
	Districts may establish Areas Meriting Special Attention and establish enforceable policies that are applicable only in those areas.			
Regulations	Board will approve new regulations for project reviews, statewide standards and district plan criteria.	According to DNR testimony to the Legislature, regulations were more stringent than intended by the Legislature.	Regulations were not more stringent than intended by the Legislature.	Amendments to the regulations would be required to implement amendments to the ACMP.
Citizen Appeals	Citizen appeals not addressed in bill.	Citizen appeals prohibited.	Citizen lawsuits allowed and pre-decision project petitions allowed pre-2002.	Citizen appeals prohibited.

Topic	Initiative	June 2011 Program	Pre-2003 Program	CS SB 45 (CRA) am (failed House 6/11)
ACMP Sunset	No sunset provision.	July 1, 2011 sunset date. No sunset prior to 2005.	No sunset provision.	ACMP sunsets July 2017 unless extended.
District Plan Amendments	Plans approved as of June 2011 incorporated into new program. No requirement to resubmit plans.	Districts must resubmit plans every 10 years.	No requirement to resubmit plan every 10 years.	This bill did not change the existing statutory requirement that requires districts to resubmit plans every 10 years. A new provision in the bill requires the board to review all new state and federal laws each year. If a district policy duplicates the new law, the board must direct the district to submit a new plan.
DEC Participation	DEC participates in the program the same as DNR and DFG.	DEC Carveout removed DEC permits from ACMP consistency reviews. Legislative intent was for DEC to participate in reviews, it but seldom did. DNR testimony to Legislature indicated districts could establish policies to fill gaps in DEC laws, but none were approved.	DEC participated in the program the same as DNR and DFG.	DEC permits excluded from ACMP project consistency reviews. Board to prepare a report about the DEC Carveout by 2/1/14 and include recommendations for changes to AS 46.40.
Review Timelines	Not addressed in bill.	Most reviews must be completed within 90-days even if there is not adequate information for decision	No 90-day limit.	Most reviews must be completed within 90-days even if there is not adequate information for decision.
	For reviews with federal permits, federal regulations require notification why there is a delay at 3 months, and review must be completed in 6 months.			
Elevations (pre-decision appeals)	No details about consistency review process. Regulations would be developed for reviews.	DNR commissioner has sole authority to make decision on elevations.	DEC, DFG & DNR made decision by consensus.	DEC, DFG & DNR decide elevations by written order signed by two resource agencies within 60 days.

Topic	Initiative	June 2011 Program	Pre-2003 Program	CS SB 45 (CRA) am (failed House 6/11)
Inland Projects	Review of inland projects not addressed.	Projects inland of the coastal zone cannot be reviewed for consistency with the ACMP.	Projects inland of the coastal zone reviewed only if there are impacts to coastal resources or uses.	Projects inland of the coastal zone cannot be reviewed for consistency with the ACMP.
	Federally-initiated activities inland of coastal zone reviewed only if there are coastal effects.			
Outer Continental Shelf (OCS)	Activities in the OCS may be reviewed for consistency with the ACMP.	Activities in the OCS may be reviewed for consistency with the ACMP, but impacts to coastal resources/uses in OCS cannot be considered because of the designated area requirement in the ACMP regulations.	Activities in the OCS may be reviewed for consistency with the ACMP.	Activities in the OCS may be reviewed for consistency with the ACMP. DNR testified to the Legislature that it would remove the designated area requirements.
Activities on federal lands & waters	In addition to activities onshore and in state waters, the federal Coastal Zone Management Act (CZMA) allows states to review activities occurring in federal waters or on federal land (i.e., activities initiated or permitted by a federal agency). As described below, the ACMP regulations limited this ability.			
	The bill does not limit provisions in the CZMA for reviewing activities on federal lands and water.	Due to the designated area requirements in regulation, impacts to coastal resources and lands could only be considered within the designated area. Since the designated areas could not include federal land, the regulation limited powers given to the state in the CZMA.	No limits in bill on provisions in the CZMA for reviewing activities on federal lands and water.	No limits in bill on review of activities on federal lands or waters. Assuming the designated area requirement would be removed from the regulations, this bill would allow consideration of impacts to coastal resources and uses on federal lands and waters.

Paid for and approved by the Alaska Sea Party: Restoring Coastal Management
217 Second Street, Suite 200, Juneau, Alaska 99801
Bruce Botelho, Chair
Top Contributors: North Slope Borough-Alaska Conference of Mayors-Alaska Municipal League
www.alaskacoastalmanagement.org

Joint Judiciary Committee Hearing on 11ACMP:
Coastal Management Program Initiative
– February 2012 –
Relevant Laws

The Alaska Constitution (Article XI)

§ 1. Initiative and Referendum
The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.

§ 2. Application
An initiative or referendum is proposed by an application containing the bill to be initiated or the act to be referred. The application shall be signed by not less than one hundred qualified voters as sponsors, and shall be filed with the lieutenant governor. If he finds it in proper form he shall so certify. Denial of certification shall be subject to judicial review.

§ 3. Petition
After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. If signed by qualified voters who are equal in number to at least ten per cent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district, it may be filed with the lieutenant governor.

§ 4. Initiative Election
An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

§ 6. Enactment
If a majority of the votes cast on the proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on the proposition favor the rejection of an act referred, it is rejected. The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty days after certification. Additional procedures for the initiative and referendum may be prescribed by law.

§ 7. Restrictions
The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety.

Alaska Statutes on Initiatives

Article 01. INITIATIVE

Sec. 15.45.010. Provision and scope for use of the initiative.

The law-making powers assigned to the legislature may be exercised by the people through the initiative. However, an initiative may not be proposed to dedicate revenue, to make or repeal appropriations, to create courts, to define the jurisdiction of courts or prescribe their rules, or to enact local or special legislation.

Sec. 15.45.020. Filing application.

An initiative is proposed by filing an application with the lieutenant governor. A deposit of $100 must accompany the application. This deposit shall be retained if a petition is not properly filed. If a petition is properly filed, the deposit shall be refunded.

Sec. 15.45.030. Form of application.

The application must include the

(1) proposed bill;

(2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and

(3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

Sec. 15.45.040. Form of proposed bill.

The proposed bill shall be in the following form:

(1) the bill shall be confined to one subject;

(2) the subject of the bill shall be expressed in the title;

(3) the enacting clause of the bill shall be: "Be it enacted by the People of the State of Alaska;"

(4) the bill may not include subjects restricted by AS 15.45.010.

Sec. 15.45.050. Manner of notice.

Notice to the initiative committee on any matter pertaining to the application and petition may be served on any member of the committee in person or by mail addressed to a committee member as indicated on the application.

Sec. 15.45.060. Designation of sponsors.

The qualified voters who subscribe to the application in support of the proposed bill are designated as sponsors. The initiative committee may designate additional sponsors by giving written notice to the lieutenant governor of the names, addresses, and numerical identifiers of those so designated.

Sec. 15.45.070. Review of application for certification.

Within 60 calendar days after the date the application is received, the lieutenant governor shall review the application and shall either certify it or notify the initiative committee of the grounds for denial.

Sec. 15.45.080. Bases of denial of certification.

The lieutenant governor shall deny certification upon determining in writing that

(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form;

(2) the application is not substantially in the required form; or

(3) there is an insufficient number of qualified sponsors.

Sec. 15.45.090. Preparation of petition.

(a) If the application is certified, the lieutenant governor shall prepare a sufficient number of sequentially numbered petitions to allow full circulation throughout the state. Each petition must contain

(1) a copy of the proposed bill;

(2) an impartial summary of the subject matter of the bill;

(3) a statement of minimum costs to the state associated with certification of the initiative application and review of the initiative petition, excluding legal costs to the state and the costs to the state of any challenge to the validity of the petition;

(4) an estimate of the cost to the state of implementing the proposed law;

(5) the statement of warning prescribed in AS 15.45.100;

(6) sufficient space for the printed name, a numerical identifier, the signature, the date of signature, and the address of each person signing the petition; and

(7) other specifications prescribed by the lieutenant governor to ensure proper handling and control.

(b) Upon request of the initiative committee, the lieutenant governor shall report to the committee the number of persons who voted in the preceding general election.

Sec. 15.45.100. Statement of warning.

Each petition shall include a statement of warning that a person who signs a name other than the person's own on the petition, or who knowingly signs more than once for the same proposition at one election, or who signs the petition when knowingly not a qualified voter, is guilty of a class B misdemeanor.

Sec. 15.45.105. Qualifications of circulator.

To circulate a petition booklet, a person shall be

(1) a citizen of the United States;

(2) 18 years of age or older; and

(3) a resident of the state as determined under AS 15.05.020.

Sec. 15.45.110. Circulation of petition; prohibitions and penalty.

(a) The petitions may be circulated throughout the state only in person.

(b) *[Repealed, Sec. 92 ch 82 SLA 2000].*

(c) A circulator may not receive payment or agree to receive payment that is greater than $1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than $1 a signature, for the collection of signatures on a petition.

(d) A person or organization may not knowingly pay, offer to pay, or cause to be paid money or other valuable thing to a person to sign or refrain from signing a petition.

(e) A person or organization that violates (c) or (d) of this section is guilty of a class B misdemeanor.

(f) In this section,

(1) "organization" has the meaning given in AS 11.81.900;

(2) "other valuable thing" has the meaning given in AS 15.56.030(d);

(3) "person" has the meaning given in AS 11.81.900.

Sec. 15.45.120. Manner of signing and withdrawing name from petition.

Any qualified voter may subscribe to the petition by printing the voter's name, a numerical identifier, and an address, by signing the voter's name, and by dating the signature. A person who has signed the initiative petition may withdraw the person's name only by giving written notice to the lieutenant governor before the date the petition is filed.

Sec. 15.45.130. Certification of circulator.

Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on

petitions not properly certified at the time of filing or corrected before the subscriptions are counted. The affidavit must state in substance

(1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105;

(2) that the person is the only circulator of that petition;

(3) that the signatures were made in the circulator's actual presence;

(4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be;

(5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature;

(6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c);

(7) that the circulator has not violated AS 15.45.110(d) with respect to that petition; and

(8) whether the circulator has received payment or agreed to receive payment for the collection of signatures on the petition, and, if so, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition.

Sec. 15.45.140. Filing of petition.

(a) The sponsors must file the initiative petition within one year from the time the sponsors received notice from the lieutenant governor that the petitions were ready for delivery to them. The petition may be filed with the lieutenant governor only if it meets all of the following requirements: it is signed by qualified voters

(1) equal in number to 10 percent of those who voted in the preceding general election;

(2) resident in at least three-fourths of the house districts of the state; and

(3) who, in each of the house districts described in (2) of this subsection, are equal in number to at least seven percent of those who voted in the preceding general election in the house district.

(b) If the petition is not filed within the one-year period provided for in (a) of this section, the petition has no force or effect.

Sec. 15.45.150. Review of petition.

Within not more than 60 days of the date the petition was filed, the lieutenant governor shall review the petition and shall notify the initiative committee whether the petition was properly or improperly filed, and at which election the proposition shall be placed on the ballot.

Sec. 15.45.160. Bases for determining the petition was improperly filed.

The lieutenant governor shall notify the committee that the petition was improperly filed upon determining that

(1) there is an insufficient number of qualified subscribers;

(2) the subscribers were not resident in at least three-fourths of the house districts of the state; or

(3) there is an insufficient number of qualified subscribers from each of the house districts described in (2) of this section.

Sec. 15.45.170.Submission of supplementary petition. [Repealed, Sec. 7 ch 80 SLA 1998].

Repealed or Renumbered

Sec. 15.45.180. Preparation of ballot title and proposition.

(a) If the petition is properly filed, the lieutenant governor, with the assistance of the attorney general, shall prepare a ballot title and proposition. The ballot title shall, in not more than 25 words, indicate the general subject of the proposition. The proposition shall give a true and impartial summary of the proposed law. The total number of words used in the summary may not exceed the product of the number of sections in the proposed law multiplied by 50. In this subsection, "section" means a provision of the proposed law that is distinct from other provisions in purpose or subject matter.

(b) The proposition prepared under (a) of this section shall comply with AS 15.80.005 and shall be worded so that a "Yes" vote on the proposition is a vote to enact the proposed law.

Sec. 15.45.190. Placing proposition on ballot.

The lieutenant governor shall direct the director to place the ballot title and proposition on the election ballot of the first statewide general, special, or primary election that is held after

(1) the petition has been filed;

(2) a legislative session has convened and adjourned; and

(3) a period of 120 days has expired since the adjournment of the legislative session.

Sec. 15.45.195. Public hearings.

(a) At least 30 days before the election at which an initiative is to appear on the ballot, the lieutenant governor or a designee of the lieutenant governor shall hold two or more public hearings concerning the initiative in each judicial district of the state. Each public hearing under this section shall include the written or oral testimony of one supporter and one opponent of the initiative.

(b) The lieutenant governor shall provide reasonable notice of each public hearing required under this section. The notice must include the date, time, and place of the hearing. The notice may be given using print or broadcast media. The lieutenant governor shall provide notice in a consistent fashion for all hearings required under this section.

(c) Penalties for a violation of this section may not include removal of an initiative from the ballot.

(d) If the lieutenant governor determines that it is technologically and economically feasible, the division shall provide a live audio and video broadcast of each hearing held under (a) of this section on the division's Internet website.

Sec. 15.45.200. Display of proposed law.

The director shall provide each election board with at least five copies of the proposed law being initiated, and the election board shall display at least one copy of the proposed law in a conspicuous place in the room where the election is held.

Sec. 15.45.210. Determination of void petition.

If the lieutenant governor, with the formal concurrence of the attorney general, determines that an act of the legislature that is substantially the same as the proposed law was enacted after the petition had been filed, and before the date of the election, the petition is void and the lieutenant governor shall so notify the committee.

Sec. 15.45.220. Adoption and effective date of proposed law.

If a majority of the votes cast on the initiative proposition favor its adoption, the proposed law is enacted, and the lieutenant governor shall so certify. The act becomes effective 90 days after certification.

Sec. 15.45.230.Insufficiency of application or petition. [Repealed, Sec. 7, ch 80 SLA 1998].

Repealed or Renumbered

Sec. 15.45.240. Judicial review.

Any person aggrieved by a determination made by the lieutenant governor under AS 15.45.010 - 15.45.220 may bring an action in the superior court to have the determination reviewed within 30 days of the date on which notice of the determination was given.

Sec. 15.45.245. Delegation by lieutenant governor.

The lieutenant governor may delegate the duties imposed on the lieutenant governor by AS 15.45.010 - 15.45.240 to the director.

....

Legislative Powers

Sec. 24.05.186. Legislative hearings on initiatives certified by the lieutenant governor.

(a) A standing committee of the legislature, selected jointly by the presiding officers of the house of representatives and senate, shall hold at least one hearing on an initiative that the lieutenant governor has determined was properly filed under AS 15.45.160.

(b) The standing committee selected jointly by the presiding officers of the house of representatives and senate under (a) of this section shall hold at least one hearing under this section within 30 days after the convening of the legislative session preceding the statewide election at which the initiative proposition must appear on the election ballot under AS 15.45.190.

OFFICE OF THE
OCT 07 2011
LIEUTENANT GOVERNOR

"An Act establishing the Alaska Coastal Management Program"

Short-form Description of Initiative

This initiative would establish a coastal management program for Alaska. Alaska is the only coastal state without an approved coastal management program. The initiative seeks a balanced approach to development and protection of coastal resources.

Coastal Policy Board: This initiative would create a thirteen-person coastal policy board that would be responsible for overseeing the coastal management program. The board would approve local coastal district plans and coastal management regulations and coordinate the implementation of the coastal management program.

Coastal Districts: The program would allow municipalities and regions of the unorganized borough to organize as local coastal districts. Approved coastal district plans may include local enforceable policies so long as those policies do not unreasonably or arbitrarily restrict a use of state concern. Districts in effect on 6/30/11 are re-established.

Project Reviews: The program includes a coordinated process for review of development projects in the coastal zone to ensure they are consistent with statewide standards and local coastal district enforceable policies, but would exclude individual reviews of routine activities that do not have a significant impact on coastal resources or uses.

Federal Consistency: Once the program receives federal approval, the State of Alaska will once again be able to participate in the federal Coastal Zone Management Act.

AN ACT ENTITLED

"An Act establishing the Alaska Coastal Management Program."

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

*** Section 1.** AS 46 is amended by adding a new chapter to read:

Chapter 41. Alaska Coastal Management Program

Sec. 46.41.010 Coastal Policy Board

(a) There is created in the Department of Commerce, Community and Economic Development the Alaska Coastal Policy Board. The board consists of the following:

(1) nine public members and alternates appointed by the governor from a list composed of at least three names from each region, nominated and submitted by the coastal districts of each region; one public member shall be appointed from each of the following regions:

(A) northwest Alaska, including, generally, the area of the North Slope Borough and the Northwest Arctic Borough;

(B) Bering Straits, including, generally, the area of the Bering Straits regional educational attendance area and the City of Nome;

(C) southwest Alaska, including, generally, the area within the Lower Yukon, Lower Kuskokwim, and Southwest regional educational attendance areas, the City of Bethel, and the Lake and Peninsula and Bristol Bay Boroughs;

(D) Kodiak-Aleutians, including the area of the Kodiak Island and Aleutian East Boroughs and the Aleutian, Adak and Pribilof regional educational attendance areas;

(E) Upper Cook Inlet, including the Municipality of Anchorage and the Matanuska-Susitna Borough;

(F) Lower Cook Inlet, including, generally, the area within the Kenai Peninsula Borough;

(G) Prince William Sound, including, generally, the area east of the Kenai Peninsula Borough to 141 W. longitude;

(H) northern Southeast Alaska, including the area southeast of 141 W. longitude and north of 57 N. latitude, including the entirety of the City and Borough

of Sitka; and

(I) southern Southeast Alaska, including that portion of southeastern Alaska not contained within the area described in (H) of this paragraph;

(2) each of the following:

(A) the commissioner of environmental conservation;

(B) the commissioner of fish and game;

(C) the commissioner of natural resources; and

(D) the commissioner of commerce, community, and economic development.

(b) Public members serve staggered terms of three years. Except as provided by (c) of this section, each member serves until a successor is appointed. A public member may be reappointed.

(c) The alternate for a commissioner serving under (a)(2) of this section shall be a deputy commissioner or the director of a division in the commissioner's department. The names of alternates shall be filed with the board.

(d) The board shall designate co-chairs, one of whom shall be selected from among the public members appointed under (a)(1) of this section and one from among the members designated in (a)(2) of this section.

(e) The board may recommend that the governor remove a public member for cause.

(f) Five public members and two designated members of the board constitute a quorum, but the board may delegate to one or more of its members the power to hold hearings. All decisions of the board shall be by a majority vote of the members present and voting.

(g) The board shall meet at least four times a year and as often as necessary to fulfill its duties under this chapter. Meetings may be held and members may vote telephonically, except one board meeting a year shall be held in person.

(h) Public members of the board or their alternates are entitled to per diem and travel expenses authorized by law for members of boards and commissions.

(i) Administrative support for the board shall be provided by staff of the department. The department, under the direction of the board shall contract with or employ personnel or consultants the department considers necessary to assist the board in carrying out the board's duties and responsibilities.

Sec. 46.41.020. Powers and duties of the board.

(a) The board shall

(1) review and approve regulations necessary to implement the coastal management program in conformity with this chapter and 16 U.S.C. 1451 - 1464 (Coastal Zone Management Act of 1972);

(2) direct the department to seek approval of the Alaska coastal management program by the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management in conformity with 16 U.S.C. 1451 – 1464 (Coastal Zone Management Act of 1972);

(3) initiate an interagency program of strategic coastal and ocean planning for each geographic region of the state;

(4) review and approve coastal district management plans after receiving the department's recommendations, including local enforceable policies, that meet the provisions of this chapter and the district plan criteria.

(5) establish continuing coordination among state agencies to facilitate the development and implementation of the Alaska coastal management program;

(6) evaluate the effectiveness of district coastal management plans; and

(7) direct the department to apply for and accept grants, contributions, and appropriations, including application for and acceptance of federal funds that may become available for coastal planning and management.

(b) The board may

(1) contract for necessary services;

(2) take any reasonable action necessary to carry out the provisions of this chapter.

Sec. 46.41.030. Division of Coastal Management.

(a) There is created in the department the division of ocean and coastal management.

(b) The division shall

(1) render, on behalf of the state, all federal consistency determinations and certifications authorized by 16 U.S.C. 1456 (Sec. 307, Coastal Zone Management Act of 1972), and each conclusive state consistency determination when a project requires a permit, lease, or authorization from the department or from two or more state resource agencies.

(2) adopt regulations approved by the board necessary to implement this chapter under the provisions of AS 44.62 (Administrative Procedure Act).

(3) assure continued provision of data and information to coastal districts to carry

out their planning and management functions under the program.

(4) develop and maintain a program of financial assistance to aid coastal districts in the development and implementation of district coastal management plan.

Sec. 46.41.040. Development of Alaska coastal management program.

(a) The regulations developed under this chapter shall include

(1) statewide coastal program standards;

(2) the criteria and process for the preparation and approval of district coastal management plans; and

(3) consistency review procedures in accordance with this chapter, including provisions for

(A) review of activities proposed or permitted by a state or federal agency;

(B) the types of activities that will trigger a consistency review;

(C) review of phased activities and uses;

(D) public notice and opportunities for public comment;

(E) elevation of proposed consistency determinations to the resource agency commissioners;

(F) establishment of review timelines;

(G) exclusion from an individual project review aspects of activities that are covered by a general permit previously found consistent with the Alaska coastal management program;

(H) exclusion of routine activities with insignificant effects to coastal uses or resources from an individual consistency review.

b) The coastal districts, coastal district boundaries and approved coastal management plans that were in effect as of June 30, 2011 are in effect and are incorporated into the Alaska coastal management program.

Sec. 46.41.050. Objectives.

The Alaska coastal management program shall be consistent with the following objectives:

(1) the use, management, restoration, and enhancement of the overall quality of the coastal environment for this and succeeding generations;

(2) the development of industrial or commercial enterprises that are consistent with the social, cultural, historic, economic, and environmental interests of the people of the state;

(3) the orderly, balanced utilization and protection of the resources of the coastal

area consistent with sound conservation and sustained yield principles;

(4) the management of coastal land and water uses in such a manner that, generally, those uses that are economically or physically dependent on a coastal location are given higher priority when compared to uses that do not economically or physically require a coastal location;

(5) the protection and management of significant historic, cultural, natural, and aesthetic values and natural systems or processes within the coastal area;

(6) the prevention of damage to or degradation of land and water reserved for their natural values as a result of inconsistent land or water usages adjacent to that land;

(7) the recognition of the need for a continuing supply of energy to meet the requirements of the state and the contribution of a share of the state's resources to meet national energy needs; and

(8) the full and fair evaluation of all demands on and uses of the land and water in the coastal area.

(9) the coordination of planning and decision-making in the coastal area among levels of government and citizens engaging in or affected by activities involving the coastal resources of the state;

(10) the participation of the public, local governments, and agencies of the state and federal governments in the development and implementation of a coastal management program; and

(11) the requirement that state resource agencies carry out their duties, powers and responsibilities that affect the use of coastal area resources in accordance with the coastal program adopted pursuant to this Act.

Sec. 46.41.060. Development of district coastal management plans.

(a) Coastal districts shall

(1) develop and adopt district coastal management plans in accordance with the provisions of this chapter. The plan adopted by a coastal district shall be based upon a municipality's existing comprehensive plan or a new comprehensive resource use plan or comprehensive statement of needs, policies, objectives, and standards governing the use and conservation of resources within the coastal area of the district. The plan must meet the district plan criteria adopted under AS 46.41.040 and must include

(A) a delineation within the district of the boundaries of the coastal area subject

to the district coastal management plan;

(B) a statement, list, or definition of the land and water uses and activities subject to the district coastal management plan;

(C) a designation of any special management areas;

(D) enforceable policies to be applied to all the land and water uses subject to the district coastal management plan as well as policies that apply to special management areas.

(b) The board shall approve an initial or amended district coastal management plan if the

(1) district coastal management plan meets the requirements of this chapter and the district plan criteria in regulation adopted by the department; and

(2) enforceable policies of the district coastal management plan

(A) do not duplicate, restate, or incorporate by reference state or federal statutes or regulations;

(B) are not preempted by federal or state law;

(C) do not arbitrarily or unreasonably restrict a use of state concern;

(D) are clear and concise as to the activities and persons affected by the policies and the requirements of the policies;

(E) use prescriptive or performance-based standards that are written in precise and enforceable language; and

(F) address a coastal use or resource of concern to the residents of the coastal resource district as demonstrated by local knowledge or supported by scientific evidence

(c) In (b)(2)(B) of this section, an enforceable policy of the district coastal management plan is preempted

(1) by federal statutes or regulations if the United States Congress expressly declares that local law or regulation is preempted, if the United States Congress demonstrates the intent to occupy the field exclusively, or if there is an actual conflict between federal and local law or regulation;

(2) by state law if it is prohibited, either by express legislative direction or direct conflict with a state statute or regulation, or where a local law or regulation substantially interferes with the effective functioning of a state statute or regulation or the underlying

purposes of a state statute or regulation.

Sec. 46.41.070. Submission of district plans by coastal districts.

(a) Within one year after the effective date of regulations implementing this chapter, coastal districts shall review their coastal management plans and if changes are necessary to meet the requirements of this chapter and implementing regulations, submit to the department a revised district coastal management plan.

Sec. 46.41.080. Implementation of district coastal management plans.

(a) A district coastal management plan approved under this chapter for a coastal district that does not have and exercise zoning or other controls on the use of resources within the coastal area shall be implemented by appropriate state agencies. Implementation shall be in accordance with the comprehensive use plan or the statement of needs, policies, objectives, and standards adopted by the district.

(b) A coastal district that has and exercises zoning or other controls on the use of resources within the coastal area shall implement its district coastal management plan. Implementation shall be in accordance with the comprehensive use plan or the statement of needs, policies, objectives, and standards adopted by the district.

Sec. 46.41.090. Compliance and enforcement.

(a) Municipalities and state resource agencies shall administer land and water use regulations or controls in conformity with district coastal management plans approved under this chapter and in effect.

(b) The superior courts of the state have jurisdiction to enforce lawful orders of the board and the department under this chapter.

Sec. 46.41.100. Coastal management plans in the unorganized borough.

(a) A coastal resource service area incorporated into the coastal management program under this chapter shall exercise those authorities and perform those duties required under this chapter.

Sec. 46.41.110. Coastal resource service areas.

(a) Except as otherwise provided in this section, each regional educational attendance area established under AS 14.08.031 containing a part of the coastal area may be organized as a coastal resource service area.

(b) The commissioner of the department may, after public hearings held in the affected area, consolidate two or more regional educational attendance areas as a single

coastal resource service area

(1) if a substantial portion of the coastal area contains land and water area owned by the federal government over which it exercises exclusive jurisdiction or land held in trust by the federal government for Alaska Natives over which the state would not exercise control as to use; or

(2) if, after giving due consideration to the standards applicable to incorporation of borough governments and the likelihood that a borough will be incorporated within the area, the commissioner determines that the functions to be performed under this chapter could be undertaken more efficiently through the combination of two or more regional education attendance area as a single coastal resource service area.

(c) A determination under (b) of this section shall be made before the organization of the coastal resource service area.

(d) or purposes of coastal management only, the commissioner of the department may, after public hearings held in the regional education attendance area affected, divide an existing regional education attendance area into no more than three coastal resource service areas according to geographic, cultural, economic, environmental, or other features relevant to coastal management planning. However,

(1) each coastal resource service area formed by dividing an existing regional education attendance must contain at least one first class city or home rule city; and

(2) a city within a coastal resource service area formed by dividing an existing regional education attendance area may not elect to exclude itself from the coastal resource service area.

Sec. 46.41.120. Organization of a Coastal Resource Service Area.

(a) Organization of a coastal resource service area may be initiated by

(1) submission to the coastal policy board of a petition signed by a number of registered voters equal to 15 percent of the number of votes cast within the coastal resource service area at the last state general election; or

(2) by submission to the board of a resolution approved by the city council or traditional village council of not less than 25 percent of the number of cities and villages within the coastal resource service area.

(b) Acting at the request of the council, the lieutenant governor, not less than 60 nor more than 90 days after receipt of a proper petition under (a)(1) of this section, a proper

resolution under (a)(2) of this section, or at the direction of the council under (a)(3) of this section, shall conduct an election on the question of organization of a coastal resource service area.

Sec. 46.41.130. Coastal resource service area boards

(a) Each coastal resource service area shall have an elected board representing the population of the service area. The board shall have the powers and duties and perform the functions prescribed for or required of coastal districts.

(b) A coastal resource service area board shall contain seven members. Board members shall be elected at large by the qualified voters of the coastal resource service area.

(c) The term of office of a member of a coastal resource service area board is three years. Members serve until their successors are elected and have qualified. This section does not prohibit the reelection of a board member.

(d) The lieutenant governor shall provide for the election of the members of coastal resource service area boards.

(e) Election of members of coastal resource service area boards shall be held annually on the date of election of members of regional educational attendance area boards under AS 14.08.071(b). If no candidate files for election to a seat on the coastal resource service area board, the seat is considered vacant at the time a newly elected member would have taken office.

(f) A seat on a coastal resource service area board shall be declared vacant by the board if the criteria under AS 14.08.045 (a) apply to the person elected. A vacancy on a coastal resource service area board shall be filled by appointment as provided in AS 14.12.070 for vacancies in the membership of regional educational attendance area boards.

(g) Members of coastal resource service area boards are subject to recall on the same grounds and in the same manner as provided for recall of municipal officials in AS 29.26.240 - 29.26.350. The lieutenant governor functions in place of the assembly or council and municipal clerk for receipt and review of recall petitions and the conduct of recall elections.

(h) Members of a coastal resource service area board are entitled to per diem and travel expenses authorized by law for members of boards and commissions and for honorariums for meetings attended in person.

Sec. 46.41.140. Elections in coastal resource service areas.

Elections under AS 46.41.100 - 46.41.160 shall be administered by the lieutenant

governor in the general manner provided in AS 15 (Election Code). In addition, the lieutenant governor may adopt regulations necessary to the conduct of coastal resource service area board elections. The state shall pay all election costs.

Sec. 46.41.150. Preparation of district coastal management program by the Department of Commerce, Community and Economic Development

(a) If residents of a coastal resource service area reject organization of the service area at an election called for the purpose and the coastal policy board finds, after public hearing, that major economic development activity has occurred or will occur within the service area, the board may direct the department to prepare and recommend for consideration by the council and for submission to the legislature a district coastal management plan for the service area.

(b) At the request of the coastal policy board, the department shall complete the district coastal management plan in accordance with this chapter and the guidelines and standards adopted by the board for a coastal resource service area that has been organized but that has failed to make substantial progress in the preparation of an approvable district costal management program within 18 months of certification of the results of an organization election or that has not submitted for approval to the board a program within 30 months of certification of the results of its organization election. Preparation of the program shall be conducted in consultation with the coastal resource service area and shall, to the maximum extent consistent with this chapter, reflect the expressed concerns of the residents of the service area.

(c) Before requesting the department to complete the district coastal management plan under (b) of this section, the board shall meet with members of the coastal resource service area board to determine whether the board is able to complete a district coastal management program within the time limitations established in this section.

Sec. 46.41.160. Approval of plans in coastal resource service areas.

(a) Before adoption by a coastal resource service area board, a district coastal management plan shall be submitted for review to each city or village within the coastal resource service area. The council of a city or traditional village council shall consider the plan submitted for review. Within 60 days of submission, the council of a city or traditional village council shall either approve the plan or enter objections to all or any portion of the plan.

(b) If a city or village within a coastal resource service area fails to approve a portion of the district coastal management plan prepared and submitted for approval under (a) of this section, the governing body shall advise the coastal resource service area board of its objections to the proposed plan and suggest alternative elements or components for inclusion in the district coastal management plan. New matter submitted by a city or village that meets the district plan criteria adopted under this chapter may be accepted by the district and the district coastal management plan modified accordingly. If a city or village fails to provide objections and suggested alternatives within the time limits established in this section, the coastal resource service area board may adopt the district coastal management plan as initially offered.

(c) Objection by a city council under (b) of this section is limited to objection to elements of the plan affecting resources or the use of resources within the corporate limits of the city. Objection by a traditional village council under (b) of this section is limited to objection to elements of the plan affecting resources or the use of resources within the village or within two miles of the village.

(d) For purposes of this section, "village" means an unincorporated community where at least 25 persons reside as a social unit as determined by the Department of Commerce, Community, and Economic Development.

Sec. 46.41.170. Cooperative administration.

(a) A city within the coastal area that is not part of a coastal resource service area shall be included for purposes of this chapter within an adjacent coastal resource service area unless its governing body, by resolution adopted by a majority of its membership, chooses to exclude the city from an adjacent coastal resource service area and a copy of the resolution is filed with the commissioner of commerce, community, and economic development.

(b) This chapter does not restrict or prohibit cooperative or joint administration of functions between a municipality and a coastal resource service area organized under the provisions of this chapter upon initiation of a mutual agreement for the purpose.

Sec. 46.41.180. Construction with other laws.

Nothing in this chapter shall be construed to

(1) diminish state jurisdiction, responsibility, or rights in the field of planning, development, or control of land or water resources, submerged land, or navigable water;

(2) affect in any way any state requirement imposed under a federal authorization or

federal waiver of sovereign immunity; or

(3) diminish the zoning or planning authority of municipalities under AS 29.

Sec. 46.41.900. Definitions.

In this chapter, unless the context otherwise requires,

(1) "affected coastal district" means a coastal district with a publically reviewed draft or approved plan in which a project is proposed to be located or that may experience a direct and significant impact from a proposed project;

(2) "board" means the Alaska Coastal Policy Board established in AS 46.41.010;

(3) "coastal district" means each of the following that contains a portion of the coastal area of the state:

(A) unified municipalities;

(B) organized boroughs of any class that exercise planning and zoning authority;

(C) home rule and first class cities of the unorganized borough or within boroughs that do not exercise planning and zoning authority;

(D) second class cities of the unorganized borough, or within boroughs that do not exercise planning and zoning authority, that have established a planning commission, and that, in the opinion of the commissioner of commerce, community, and economic development, have the capability of preparing and implementing a comprehensive district coastal management plan under AS 46.41.030;

(E) coastal resource service areas established and organized under AS 29.03.020 an AS 46.41.100 - 46.41.160;

(4) "coastal use or resource" means any land or water use or natural resource of the coastal zone. Land and water uses include, but are not limited to, public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas and floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects. Natural resources include biological or physical resources that are found within a State's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to, air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, reptiles, and coastal resources of national significance;

(5) "coastal zone" means the coastal water including land within and under that water,

and adjacent shoreland, including the water within and under that shoreland, within the boundaries approved by the former Alaska Coastal Policy Council and by the United States Secretary of Commerce under 16 U.S.C. 1451 - 1465 (Coastal Zone Management Act of 1972, as amended); "coastal zone" includes areas added as a result of any boundary changes approved by the board and by the United States Secretary of Commerce under 16 U.S.C. 1451 - 1465; "coastal zone" does not include

(A) those lands excluded under 16 U.S.C. 1453(1); or

(B) areas deleted as a result of any boundary changes by the board in conformance with 16 U.S.C. 1451 - 1465;

(6) "consistency review" means the evaluation of a proposed project against the statewide standards and the approved enforceable policies of an affected coastal district under the process developed by the board;

(7) "department" means the Department of Commerce, Community and Economic Development;

(8) "direct and significant impact" means an activity which proximately contributes to a material change or alteration in the natural or social characteristics of a part of the state's coastal area and in which

(A) would have a net adverse effect on the quality of the resources of the coastal area;

(B) would limit the range of alternative uses of the resources of the coastal area; or

(C) would, of itself, constitute a tolerable change or alteration of the resources within the coastal area but which, cumulatively, would have an adverse effect;

(9) "district coastal management plan" means a plan developed by a coastal district, including enforceable policies of that plan, setting out policies and standards to guide public and private uses of land and water within that district and approved by the board as meeting the requirements of this chapter and the regulations adopted under this chapter;

(10) "enforceable policy" means a policy established by this chapter or approved by the board as a legally binding policy of the Alaska coastal management program applicable to public and private activities;

(11) "local knowledge" means a body of knowledge or information about the coastal environment or the human use of that environment, including information passed down

through generations, if that information is

(A) derived from experience and observations; and

(B) generally accepted by the local community;

(12) "project" means all activities that will be part of a proposed development and includes all federal agency activities as defined in 15 C.F.R. 930.31, including lease sales and development projects affecting a coastal use or resource;

(13) "resource agency" means

(A) the Department of Environmental Conservation;

(B) the Department of Fish and Game; or

(C) the Department of Natural Resources.;

(14) "scientific evidence" means facts or data that are

(A) premised upon established chemical, physical, biological, or ecosystem management principles as obtained through scientific method and submitted to the department to furnish proof of a matter required under this chapter;

(B) in a form that would allow resource agency review for scientific merit; and

(C) supported by one or more of the following:

(i) written analysis based on field observation and professional judgment along with photographic documentation;

(ii) written analysis from a professional scientist with expertise in the specific discipline; or

(iii) site-specific scientific research that may include peer-review level research or literature.

(15) "special management area" includes areas meriting special attention and means a delineated geographic area within the coastal area which is sensitive to change or alteration and which, because of plans or commitments or because a claim on the resources within the area delineated would preclude subsequent use of the resources to a conflicting or incompatible use, warrants special management attention, or which, because of its value to the general public, should be identified for current or future planning, protection, or acquisition;

(16) "use of state concern" means a land and water use that would significantly affect the long-term public interest; a "use of state concern" includes

(A) uses of national interest, including the use of resources for the siting of ports

and major facilities that contribute to meeting national energy needs, construction and maintenance of navigational facilities and systems, resource development of federal land, and national defense and related security facilities that are dependent upon coastal locations;

(B) uses of more than local concern, including those land and water uses that confer significant environmental, social, cultural, or economic benefits or burdens beyond a single coastal district;

(C) the siting of major energy facilities, activities pursuant to a state oil and gas lease, a state gas only lease, or a federal oil and gas lease, or large-scale industrial or commercial development activities that are dependent on a coastal location and that, because of their magnitude or the magnitude of their effect on the economy of the state or the surrounding area, are reasonably likely to present issues of more than local significance;

(D) facilities serving statewide or interregional transportation and communication needs; and

(E) uses in areas established as state parks or recreational areas under AS 41.21 or as state game refuges, game sanctuaries, or critical habitat areas under AS 16.20.

11ACMP STATEMENT OF COSTS

Summary:

The estimated total cost of this program during the next five years is $27.0 million. Of that estimated cost, the minimum expenditure by the State of Alaska under this initiative during the next five years, if it becomes law, is $22.3 million. The program has no expiration date, and the estimate – developed by the Governor's Office of Management and Budget -- does not provide for inflation.

Expenses of the proposed program may be shared with the federal government in year three or later if the U.S. Department of Commerce approves the program and provides partial funding, and Congress makes the required appropriation. **Of the annual estimated program cost of $5.4 million, federal support is estimated to be up to a maximum of $2.0 million per year after year five.** The program is not required by federal law.

Expenditures for this program are subject to legislative appropriation. The estimate excludes potential litigation expenses and revenue impacts to the State of Alaska.

The overall cost estimate may be high or low, depending on decisions made by the new Board proposed in the initiative. The number of days that Board and Coastal District Boards decide to meet, the number and kind of consistency reviews, elevations and appeals over natural resource permits that the program may authorize, and the potential duplication of permitting reviews at the Department of Environmental Conservation and at the Coastal District level are among the major cost uncertainties.

Costs or savings the program would provide in the management or protection of public trust resources or permit coordination cannot be estimated at this time, nor can the estimate include the costs or savings the program would provide in the process of allowing the State and local districts to comment on or condition federal permits issued in Alaska's coastal regions.

The complete budget estimate prepared by the Office of Management and Budget is below:

Statement of Costs for Initiative:
Establishment of Alaska Coastal Management Program
Prepared by the Office of Management and Budget

As required by AS 15.45.090(a)(4), the Office of Management and Budget has prepared the following estimate of costs to the State of implementing the law proposed by this ballot initiative.

This ballot initiative would establish a coastal management program for Alaska. To govern the envisioned program, the initiative creates a new thirteen-member Coastal Policy Board, referred to as the Alaska Coastal Policy Board, which would be responsible for overseeing the proposed coastal management program. Among its principal duties are reviewing and approving regulations for the program and the management plans and enforceable policies prepared by local coastal district boards. The Coastal Policy Board is also to "initiate an interagency program of strategic coastal and ocean planning for each geographic region of the state."

Administrative support for the program and board would be provided by the Alaska Department of Commerce, Community & Economic Development. The department, under the direction of the board, would contract with or employ personnel or consultants the department considers necessary to assist the board in carrying out its duties and responsibilities. To provide the structure for the administrative support, the initiative creates within the department a Division of Ocean and Coastal Management. Among its other duties, the division would be responsible for rendering determinations whether projects subject to the program would be "consistent" with applicable statewide standards and enforceable policies of an affected coastal district.

The initiative would create a coastal management program with a number of substantive differences from the most recent federally approved Alaska Coastal Management Program that existed up until July 1, 2011. If the initiative is approved by the voters, a new administrative structure for the program would be built from scratch. This would include recruiting and hiring personnel, acquiring office space, equipment and supplies. It would also include tasks such as developing implementing regulations and guidance to administer the program. There is insufficient detail in the initiative to identify all of the costs to implement the program – this represents an estimate of the costs and the actual costs are likely to be different.

As a basis for providing cost estimates, it was assumed that the operation and procedural requirements of the Coastal Management Program envisioned by the initiative would include most if not all of the costs that existed before July 1, 2011. The initiative provides the board with broad power to create a program or procedures that could vary widely from the previous program. Substantive differences in the management or procedural requirements of the program could result in the costs varying substantially from the costs presented. Areas of program implementation difference that increase costs to the state include but are not limited to: Costs of additional board meetings should the board be required to meet more than the estimated four times annually; the level and timing of federal funding for the program; potential costs to state agencies in implementing the coastal management program and administering other state programs due to an increase in the number and/or complexity of local enforceable policies and other plan requirements; an increase in the amount and complexity of coordination and enforcement

of actions taken by the board; and an increase in the level of financial and other support for local coastal districts.

Expenditures for the program would be subject to legislative appropriation. The estimate excludes litigation expenses and potential revenue impacts to the State of Alaska.

In 2011, the budget estimate for renewing the State's previous federally approved coastal management program was approximately $4,700,000 annually, a portion of the program was funded with federal funds and a portion was funded with state funds.

The cost associated with the administration and implementation of the new Coastal Policy Board was not anticipated in the estimate above. The estimate to provide administrative support to the Coastal Policy Board is approximately $700,000 annually, and the additional cost is assumed to be state funded.

Until the new coastal management program is federally approved and becomes eligible to receive federal funds, the State would expect to initially absorb the entire cost. This would be followed by a period of gradually increasing federal participation in sharing of the costs until the program met eligibility requirements for full federal funding. Typically, it takes a coastal management program approximately two years from initial application to federal approval and an additional three years before qualifying for a full program cost share. During the initial two years, the State could expect to support the program at its anticipated annual funding level of $5,400,000. The amount of federal funds available in the out years is unknown, however given the current federal program; the state would anticipate federal participation to top out at $2,000,000 in year five.

A year by year estimate of federal and state funding is presented below:

	General Funds	Federal Funds	Total Funds
Year 1	$ 5,400,000	$ 0	$ 5,400,000
Year 2	$ 5,400,000	$ 0	$ 5,400,000
Year 3	$ 4,320,000	$ 1,080,000	$ 5,400,000
Year 4	$ 3,763,633	$ 1,636,634	$ 5,400,000
Year 5	$ 3,400,000	$ 2,000,000	$ 5,400,000
Year 6	$ 3,400,000	$ 2,000,000	$ 5,400,000

Administrative support for the new agency would be provided by a new division in the Alaska Department of Commerce and Community Development. It is assumed that the new agency would be similarly structured to the previous Alaska Coastal and Ocean Management component in the Alaska Department of Natural Resources.
Alaska Coastal Management Program estimate by category

TOTAL	$5,400,000
Personal Services	$3,260,000

This expenditure would support salaries and benefits for 34 full time positions ranging from a Division Director to an Office Assistant. The majority of the positions are Natural Resource Specialists supporting the envisioned Alaska Coastal Management Program. One additional position was added to the previously configured program to cover the additional work associated with the administration of the Alaska Coastal Policy Board and coordinating district planning functions and information sharing.

Travel $267,900

The projected travel expenditure would support employee and board related in-state and out of state travel to coastal districts and includes hotel, per diem, airfare and reimbursement for Alaska Coastal Management Program district assistance, staff training, mediation, public education, conferences and other travel supporting the program. This estimate anticipates increased travel costs in the first two years following the establishment of the board in order to assist coastal districts with their plans and advocate for the federal approval of the plan in Washington DC.

This estimate assumes travel costs associated with four annual in-person meetings of the 13-member Alaska Coastal Policy Board and two support staff members.

Services $1,815,300

This expenditure supports contracts in the form of Reimbursable Services Agreements (RSA) to agencies participating in the Alaska Coastal Management Program. These contracts would support the implementation of the Alaska Coastal Management Program by the participating state agencies, coastal management areas and other contractors.

It also supports purchased services from other state agencies including centralized telecommunication, mail and human resource services, legal services, professional services to support monitoring & compliance activities and development and implementation activities for the Alaska Coastal Management Program. In the initial years, additional contractual services will be needed to draft and review implementing program regulations, conduct district elections, and other start up activities.

Commodities $56,800

This expenditure estimate supports purchases related to office supplies, office furnishings and equipment, software as well as minor repairs to office equipment.

Additional one-time costs associated with the initiative

Statement of Costs for Initiative
"An Act establishing the Alaska Coastal Management Program"
Costs to certify the initiative application and review the initiative petition
Prepared by the Office of Lieutenant Governor and the
Division of Elections

Elections cost statement
The minimum cost to the Division of Elections associated with certification of the initiative application and review of the initiative petition, excluding legal costs to the state and the costs to the state of any challenge to the validity of the petition, is estimated to be $66,821. This statement is required under AS 15.45.090(a) (3).

Total $66,821

Elections estimate by category

Personal Services $65,521
Expenses associated with certification of the initiative application and review of the initiative petition:
Three full-time employees at 522 hours is $26,067
8 temporary employees at 2520 hours is $39,454

Services $ 1,300
Printing of booklets is $1,300

Lt. Governor's Office Cost statement
The minimum cost to conduct public hearings concerning the initiative in two communities in each of four judicial districts is estimated to be $4,470. This statement is required under 15.45.195.

Total $4,470

Lt. Governor's Office Estimate by category

Travel $ 4,270
Average round trip airfare for the Lieutenant Governor and one staff member to travel to seven communities in Alaska: Average airfare: $310 * 7 locations * 2 staff = $4,270. It is assumed one of the hearings would be in Anchorage which would not involve travel costs.

Services $ 200
Cost breakdowns for teleconferencing services:
$25.00 X 8 meetings = $200.00 as a minimum cost estimate

11ACMP STATEMENT OF COSTS

Summary:

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Expenses of the proposed program may be shared with the federal government in year three or later if the U.S. Department of Commerce approves the program and provides partial funding, and Congress makes the required appropriation. **Of the annual estimated program cost of $5.4 million, federal support is estimated to be up to a maximum of $2.0 million per year after year five.** The program is not required by federal law.

Expenditures for this program are subject to legislative appropriation. The estimate excludes potential litigation expenses and revenue impacts to the State of Alaska.

The overall cost estimate may be high or low, depending on decisions made by the new Board proposed in the initiative. The number of days that Board and Coastal District Boards decide to meet, the number and kind of consistency reviews, elevations and appeals over natural resource permits that the program may authorize, and the potential duplication of permitting reviews at the Department of Environmental Conservation and at the Coastal District level are among the major cost uncertainties.

Costs or savings the program would provide in the management or protection of public trust resources or permit coordination cannot be estimated at this time, nor can the estimate include the costs or savings the program would provide in the process of allowing the State and local districts to comment on or condition federal permits issued in Alaska's coastal regions.

The complete budget estimate prepared by the Office of Management and Budget is below:

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This ballot initiative would establish a coastal management program for Alaska. To govern the envisioned program, the initiative creates a new thirteen-member Coastal Policy Board, referred to as the Alaska Coastal Policy Board, which would be responsible for overseeing the proposed coastal management program. Among its principal duties are reviewing and approving regulations for the program and the management plans and enforceable policies prepared by local coastal district boards. The Coastal Policy Board is also to "initiate an interagency program of strategic coastal and ocean planning for each geographic region of the state."

Administrative support for the program and board would be provided by the Alaska Department of Commerce, Community & Economic Development. The department, under the direction of the board, would contract with or employ personnel or consultants the department considers necessary to assist the board in carrying out its duties and responsibilities. To provide the structure for the administrative support, the initiative creates within the department a Division of Ocean and Coastal Management. Among its other duties, the division would be responsible for rendering determinations whether projects subject to the program would be "consistent" with applicable statewide standards and enforceable policies of an affected coastal district.

The initiative would create a coastal management program with a number of substantive differences from the most recent federally approved Alaska Coastal Management Program that existed up until July 1, 2011. If the initiative is approved by the voters, a new administrative structure for the program would be built from scratch. This would include recruiting and hiring personnel, acquiring office space, equipment and supplies. It would also include tasks such as developing implementing regulations and guidance to administer the program. There is insufficient detail in the initiative to identify all of the costs to implement the program – this represents an estimate of the costs and the actual costs are likely to be different.

As a basis for providing cost estimates, it was assumed that the operation and procedural requirements of the Coastal Management Program envisioned by the initiative would include most if not all of the costs that existed before July 1, 2011. The initiative provides the board with broad power to create a program or procedures that could vary widely from the previous program. Substantive differences in the management or procedural requirements of the program could result in the costs varying substantially from the costs presented. Areas of program implementation difference that increase costs to the state include but are not limited to: Costs of additional board meetings should the board be required to meet more than the estimated four times annually; the level and timing of federal funding for the program; potential costs to state agencies in implementing the

coastal management program and administering other state programs due to an increase in the number and/or complexity of local enforceable policies and other plan requirements; an increase in the amount and complexity of coordination and enforcement of actions taken by the board; and an increase in the level of financial and other support for local coastal districts.

Expenditures for the program would be subject to legislative appropriation. The estimate excludes litigation expenses and potential revenue impacts to the State of Alaska.

In 2011, the budget estimate for renewing the State's previous federally approved coastal management program was approximately $4,700,000 annually, a portion of the program was funded with federal funds and a portion was funded with state funds.

The cost associated with the administration and implementation of the new Coastal Policy Board was not anticipated in the estimate above. The estimate to provide administrative support to the Coastal Policy Board is approximately $700,000 annually, and the additional cost is assumed to be state funded.

Until the new coastal management program is federally approved and becomes eligible to receive federal funds, the State would expect to initially absorb the entire cost. This would be followed by a period of gradually increasing federal participation in sharing of the costs until the program met eligibility requirements for full federal funding. Typically, it takes a coastal management program approximately two years from initial application to federal approval and an additional three years before qualifying for a full program cost share. During the initial two years, the State could expect to support the program at its anticipated annual funding level of $5,400,000. The amount of federal funds available in the out years is unknown, however given the current federal program; the state would anticipate federal participation to top out at $2,000,000 in year five.

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Year 5	$ 3,400,000	$ 2,000,000	$ 5,400,000
Year 6	$ 3,400,000	$ 2,000,000	$ 5,400,000

Administrative support for the new agency would be provided by a new division in the Alaska Department of Commerce and Community Development. It is assumed that the new agency would be similarly structured to the previous Alaska Coastal and Ocean Management component in the Alaska Department of Natural Resources.
Alaska Coastal Management Program estimate by category

TOTAL	$5,400,000
Personal Services	$3,260,000

This expenditure would support salaries and benefits for 34 full time positions ranging from a Division Director to an Office Assistant. The majority of the positions are Natural Resource Specialists supporting the envisioned Alaska Coastal Management Program. One additional position was added to the previously configured program to cover the additional work associated with the administration of the Alaska Coastal Policy Board and coordinating district planning functions and information sharing.

Travel	$267,900

The projected travel expenditure would support employee and board related in-state and out of state travel to coastal districts and includes hotel, per diem, airfare and reimbursement for Alaska Coastal Management Program district assistance, staff training, mediation, public education, conferences and other travel supporting the program. This estimate anticipates increased travel costs in the first two years following the establishment of the board in order to assist coastal districts with their plans and advocate for the federal approval of the plan in Washington DC.

This estimate assumes travel costs associated with four annual in-person meetings of the 13-member Alaska Coastal Policy Board and two support staff members.

Services	$1,815,300

This expenditure supports contracts in the form of Reimbursable Services Agreements (RSA) to agencies participating in the Alaska Coastal Management Program. These contracts would support the implementation of the Alaska Coastal Management Program by the participating state agencies, coastal management areas and other contractors.

It also supports purchased services from other state agencies including centralized telecommunication, mail and human resource services, legal services, professional services to support monitoring & compliance activities and development and implementation activities for the Alaska Coastal Management Program. In the initial years, additional contractual services will be needed to draft and review implementing program regulations, conduct district elections, and other start up activities.

Commodities	$56,800

This expenditure estimate supports purchases related to office supplies, office furnishings and equipment, software as well as minor repairs to office equipment.

Additional one-time costs associated with the initiative

Statement of Costs for Initiative

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Elections cost statement
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Total $66,821

Elections estimate by category

Personal Services $65,521
Expenses associated with certification of the initiative application and review of the initiative petition:
Three full-time employees at 522 hours is $26,067
8 temporary employees at 2520 hours is $39,454

Services $ 1,300
Printing of booklets is $1,300

Lt. Governor's Office Cost statement
The minimum cost to conduct public hearings concerning the initiative in two communities in each of four judicial districts is estimated to be $4,470. This statement is required under 15.45.195.

Total $4,470

Lt. Governor's Office Estimate by category

Travel $ 4,270
Average round trip airfare for the Lieutenant Governor and one staff member to travel to seven communities in Alaska: Average airfare: $310 * 7 locations * 2 staff = $4,270. It is assumed one of the hearings would be in Anchorage which would not involve travel costs.

Services $ 200
Cost breakdowns for teleconferencing services:
$25.00 X 8 meetings = $200.00 as a minimum cost estimate

Alaska Coastal Management Program Initiative
Sectional Analysis

"An Act Establishing the Alaska Coastal Management Program"

Section 1. Adds a new chapter 41 to Title 46 in Alaska Statutes.

Sec. 46.41.010(a). Creates the Alaska Coastal Policy Board in the Department of Commerce, Community and Economic Development (DCCED). The board is comprised of the three resource agency commissioners and the DCCED commissioner and nine public members. The public members are chosen by the governor from a list of at least three names submitted by the coastal district of each of the nine regions represented on the board.

Secs. 46.41.010(b)-(i). Administrative provisions for the Board.

Sec. 46.41.020. The Board's powers and duties include reviewing and approving the regulations necessary to implement the coastal management program; initiating interagency coastal and ocean regional planning; reviewing and approving coastal district management plans; and establishing coordination among state agencies to facilitate development and implementation of the coastal program.

Sec. 46.41.030. Creates the division of ocean and coastal management in DCCED. Among other things, the division is tasked with adopting the regulations approved by the Board for implementation of the coastal program and is responsible for performing state and federal consistency determinations.

Sec. 46.41.040. Establishes the criteria for development of the coastal management program regulations. Specifies that the coastal districts, district boundaries, and approved coastal management plans in effect as of June 30, 2011 are in effect and incorporated into the coastal management program.

Sec. 46.41.050. Establishes objectives for the coastal management program that address the use, management, restoration, enhancement, development, and protection of the coastal environment; coordination among government agencies and citizens; and public and government participation in development and implementation of the coastal management program. The objectives also include the requirement that state resource agencies act in accordance with the coastal program.

Secs. 46.41.060-080. Establishes the criteria, requirements and process for development of district coastal management plans and implementation of the plans.

Sec. 46.41.090. Requires that municipalities and state resource agencies act in conformity with the approved district coastal management plans; and establishes superior court jurisdiction for enforcement of lawful orders of the Board and DCCED.

Secs. 46.41.100-170. Establishes the process for creation and functioning of coastal resource service areas in the unorganized borough.

Sec. 46.41.180. Nothing in the Act shall be construed to diminish state jurisdiction over land or water resources, submerged land, or navigable water; affect any state requirement imposed under a federal authorization or federal waiver of sovereign immunity; or diminish municipal zoning or planning authority.

Sect. 46.41.900. Definitions.

Alaska State Legislature

January 24, 2012

Senator Hollis French, Chair Senate Judiciary
Representative Carl Gatto, Chair House Judiciary

Chairmen:

As we understand, your committees have been chosen by the presiding officers to review the initiative regarding Coastal Zone Management.

We write this letter clarifying the intent in adding this provision to the legislation as co-prime sponsors two years ago.

The intent of the Legislative hearing language was to gauge the impact on the agencies charged with duties by an initiative. It has been our experience that, while well intended, language forwarded by initiative sponsors may not fully anticipate implementation challenges faced by regulators.

Therefore, we ask that you consider limiting testimony for this required meeting to the agencies affected by this measure.

While we understand the possible desire for public testimony on the issue, nothing precludes either of you (or other committees) from holding additional hearings.

Our offices can provide you with a copy of the relevant minutes from committee testimony on House Bill 36 regarding the intent of this section of the bill, if necessary.

Respectfully,

Representative Kyle Johansen

Representative Charisse Millett

STATE OF ALASKA

SEAN PARNELL, GOVERNOR

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET

P.O. BOX 110020
JUNEAU, ALASKA 99811-0020
TELEPHONE: (907) 465-4660
FAX: (907) 465-3640

File

February 22, 2012

The Honorable Hollis French
Chairman, Senate Judiciary
Alaska State Legislature
State Capitol, Room 417
Juneau, AK 99801-1182

The Honorable Carl Gatto
Chairman, House Judiciary
Alaska State Legislature
State Capitol, Room 118
Juneau, AK 99801-1182

Dear Senator French/Representative Gatto,

Thank you for the opportunity to present the cost statement for the ACMP initiative before the Joint Judiciary Committee on February 6, 2012. The following is in response to questions posed by the Committee during the presentation for distribution to the members.

Questions from the Joint Judiciary Committee meeting Feb. 6

1. *Senator Wielechowski asked why a fiscal note for HB106 showed that the former ACMP federal program had shown $4.0 million in federal funding, while the statement of cost indicated available federal funding was $2.0 million.*

A fiscal note prepared on 05/13/2011 by the Senate Finance Committee for HB106 shows $4.0 million in federal funding for ACMP. (See Attachment 1) However, this level of federal funding appears well in excess of any recently available federal funding for coastal management programs.

Federal funding for Coastal Management Program administrative grants are governed by 16 U.S.C. § 1455. Since federal fiscal year 2008 (FFY2008) federal funding has come in three funding streams referred to as Sections 306/306A (tiered federal match up to 1:1); Section 309 (no match required); and the Coastal Non Point (CNP) or Section 310 (requires 1:1 match and not funded in FFY 2010).

Federal funding streams in the three programs are subject to maximum awards based upon the availability of federal funds. Alaska has typically received the maximum allowed for these programs. Below is a table showing federal funding from FFY2008-FFY2010. In these years, no more than $2.6 million was available for federal funding of state coastal management programs. Copies of the US

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Department of Commerce's program allocation letter are provided for your review. (Attachments 2-4.)

Federal Fiscal Year 2008	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$55,542,000	$10,000,000	$1,428,000	$66,970,000
Maximum State Funding	$1,967,000	$536,000	$42,000	$2,545,000
Alaska Allocation	**$1,967,000**	**$536,000**	**$42,000**	**$2,545,000**

Federal Fiscal Year 2009	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$56,079,000	$10,000,000	$2,345,000	$68,424,000
Maximum State Funding	$1,995,000	$536,000	$75,000	$2,606,000
Alaska Allocation	**$1,995,000**	**$536,000**	**$75,000**	**$2,606,000**

Federal Fiscal Year 2010	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$57,085,000	$10,000,000	$0	$67,085,000
Maximum State Funding	$2,030,000	$536,000	$0	$2,566,000
Alaska Allocation	**$2,030,000**	**$536,000**	**$0**	**$2,566,000**

As indicated during testimony, the total cost estimate of $5.4 million annually could be shared by the federal government provided that the state becomes eligible for federal funding. Uncertainty remains about the timing and availability of the federal funding stream, and all of the funds that would be requested for the budget are subject to legislative appropriation.

2. *Senator French and Representative Holmes asked for more specifics about the costs included in the overall cost estimate. They were specifically interested in information about ongoing versus one-time costs.*

Please see the summary below that itemizes costs by category. Comments about ongoing versus one-time costs are included in the narrative section. The estimates currently allow flexibility for the state to address one-time costs, however should the initiative pass, program implementation costs are likely to be different than those presented. All proposed costs will be subject to appropriation by the legislature.

CATEGORY	Description	
Personal Services	This expenditure would be an ongoing cost to support salaries and benefits for 34 full time positions ranging from a Division Director to an Office Assistant. The majority of the positions are Natural Resource Specialists supporting the envisioned Alaska Coastal Management Program In the first two years, it is likely that personal services costs will be lower than this estimate due to the program beginning from scratch. However, there will be many other activities associated with the initial gear up of the program though, so there is significant uncertainty about what percentage of these resources will be needed in the first two years.	$3,260,000
Travel	The projected travel expenditure would support employee and board related in-state and out of state travel to coastal districts and includes hotel, per diem, airfare and reimbursement for Alaska Coastal Management Program district assistance, staff training, mediation, public education, conferences and other travel supporting the program. This estimate anticipates increased travel costs in the first two years following the establishment of the board in order to assist coastal districts with their plans and advocate for the federal approval of the plan in Washington DC. Some portion of these travel resources would likely be redeployed to other program activities after the program is approved.	$267,900
Services	This expenditure is an ongoing cost to support contracts in the form of Reimbursable Services Agreements (RSA) to agencies participating in the Alaska Coastal Management Program. These contracts would support the implementation of the Alaska Coastal Management Program by the participating state agencies, coastal management areas and other contractors. This estimate also supports purchased services from other state agencies including centralized telecommunication, mail and human resource services, legal services, professional services to support monitoring & compliance activities and development and implementation activities for the Alaska Coastal Management Program. In the initial years, additional contractual services will be needed to draft and review implementing program regulations, and other start up activities.	$1,815,300
Commodities	This is an ongoing expenditure estimate that supports purchases related to office supplies, office furnishings and equipment, software as well as minor repairs to office equipment. In the first two years, actual costs in this category are likely to be significantly	$56,800

	higher as the office acquires all of the office furnishings, office equipment and other commodities necessary to build an office from scratch.	

3. *Senator French asked for more specificity about the costs included in the estimate of costs to support implementation of the 13-member Coastal Policy Board governance structure.*

The estimate of additional costs was based largely on cost estimates provided by the Department of Natural Resources (DNR) in their fiscal note for HB106 dated 04/15/2011. (Attachment 5) This fiscal note was chosen as a basis due to its somewhat similar nature to the initiative envisioned program. Comments on whether these are expected to be ongoing or one-time costs are also included.

As indicated during the testimony, these estimates assume a program that is substantially similar to the previous program with a 13-member board meeting in person 4 times annually. Significant uncertainty remains about the program that the board would ultimately implement and the associated costs. It should be noted that not all of the increased costs are directly attributable to the board members.

The costs in the table below are presented as subsets of the estimates presented in the prior table.

CATEGORY	Description	
Personal Services	One additional position was added to the previously configured program to cover the additional work associated with the administration of the Alaska Coastal Policy Board and coordinating district planning functions and information sharing. This is an ongoing cost and would be directly attributable to the Coastal Policy Board.	$109,800
Travel	This estimate anticipates increased travel costs in the first two years following the establishment of the board in order to assist coastal districts with their plans and advocate for the federal approval of the plan in Washington DC. These travel resources would likely be redeployed to other program related travel or review activities after the program is approved. These costs are not directly attributable to the addition of a board. This expenditure estimate also includes $60,000 in ongoing travel costs associated with four annual in-person meetings of the 13-member Alaska Coastal Policy Board and two staff members at approximately $1,000 per trip. This is an ongoing cost directly attributable to addition of a Coastal Policy Board.	$164,000

Services	This expenditure supports an additional $300,000 in ongoing services agreements with other state agencies services that DNR indicated would be needed to successfully implement the ACMP program. This would be an ongoing cost. These costs are not directly attributable to the addition of a board. The estimates include $60.000 estimate for regulations review by the Department of Law that would be of limited duration. Length of need is uncertain and dependent upon the complexity of the regulations and the time it takes to promulgate and implement them, this could be a cost for 2-4 years, however these resources would likely be redeployed to reviews and other program support after that time. Other ongoing services costs included $20,000 in postage, teleconference services, and other miscellaneous board and coastal district support such as conducting elections in coastal districts. This would be an ongoing cost directly attributable to the addition of the board.	$380,000
Commodities	This estimate includes some $5,600 in one-time costs such as the purchase of a recorder and sound equipment for the board. Ongoing costs include $10,000 in supplies needed to support the presentation of materials at the board meetings. These costs are directly attributable to the addition of a board.	$15,600

Attachments:
Attachment 1 Sen Finance ACMP Fiscal Note 05.13.2011.pdf
Attachment 2 CZMA Allocation memo FY2008.pdf
Attachment 3 CZMA Allocation memo FY2009.pdf
Attachment 4 CZMA Allocation memo FY2010.pdf
Attachment 5 DNR ACMP Fiscal Note 04.15.2011.pdf

Fiscal Note

State of Alaska
2011 Legislative Session

Fiscal Note Number: 10
Bill Version: SCS CSHB 106(FIN)
(S) Publish Date: 5/13/11

Identifier: CSHB106(FIN)-DNR-DCOM-4-15-11
Title: COASTAL MANAGEMENT PROGRAM
Sponsor: RLS BY REQUEST OF THE GOVERNOR
Requester: CONF COMM
Submitted: SENATE FINANCE for SCS CSHB 106(FIN)

Department: Department of Natural Resources
Appropriation: Land & Water Resources
Allocation: Alaska Coastal and Ocean Management
OMB Component Number: 2680

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	3,260.0		3,260.0	3,260.0	3,260.0	3,260.0	3,260.0
Travel	251.6		251.6	141.8	141.8	121.8	121.8
Services	3,144.4		3,144.4	3,084.4	3,084.4	3,084.4	3,084.4
Commodities	59.8		54.2	54.2	54.2	54.2	54.2
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**6,715.8**	**0.0**	**6,710.2**	**6,540.4**	**6,540.4**	**6,520.4**	**6,520.4**
Capital Expenditures							
Change in Revenues ( )							
Fund Source (Operating Only)							
1002 Fed Rcpts	4,039.0		4,039.0	4,039.0	4,039.0	4,039.0	4,039.0
1003 G/F Match	1,672.6		1,672.6	1,672.6	1,672.6	1,672.6	1,672.6
1004 Gen Fund	664.1		658.5	488.7	488.7	468.7	468.7
1007 I/A Rcpts	95.5		95.5	95.5	95.5	95.5	95.5
1061 CIP Rcpts	244.6		244.6	244.6	244.6	244.6	244.6
Total	**6,715.8**	**0.0**	**6,710.2**	**6,540.4**	**6,540.4**	**6,520.4**	**6,520.4**

Estimate of any current year (FY2011) cost: 0.0

Positions

Full-time	34.0		34.0	34.0	34.0	34.0	34.0
Part-time							
Temporary							

Reason For Change:

CC: This fiscal note combines the additional funding requested with FY12 program funding removed by the Senate. Additionally, this fiscal note is updated to reflect changes made in the House Finance committee substitute.

This revised fiscal note includes $1.36 million capital authorization (federal) for operating grants to communities so they have the funding necessary for local participation.

Analysis:

NOTE: The base budget ($4,691.7 and 33 positions) was removed from the Senate version of the FY12 operating budget, making it subject to conference committee. The annual capital project request for the federal grant funds that are shared with DCCED for grants to communities and for DCCED's administration of the grants was removed from the Senate version of the FY12 Capital Budget making it subject to conference committee.

The Alaska Coastal Management Program (ACMP) will automatically terminate on July 1, 2011 (SLA2005, CH31, Sec 22). CSHB106(FIN) would extend the termination date to July 1, 2017.

Submitted By: Senate Finance for SCS CSHB 106(FIN)

Prepared By: Conference Committee

Date: 05/04/2011

This fiscal note reflects the increased fiscal impacts due to the additional Division of Coastal and Ocean Management (DCOM) duties, including the administration and implementation of the Alaska Coastal Policy Board (CPB). Those increased fiscal impacts are detailed below:

Personal Services
One additional position, a Project Coordinator (range 20), will be required to cover the additional work associated with the CPB and the coordination of district planning functions and information sharing.

Travel
The CPB will meet four times in-person in the first two years following establishment of the board, and will meet in-person twice annually after that. The CPB will need to meet more frequently in-person for the first two years in order to establish board protocols, review coastal district plans, and address issues of interest to ACMP participants. CPB travel includes nine members and two DCOM support staff.

In addition, recognizing coastal districts will be amending their district plans based on CSHB106(FIN), two DCOM staff will travel 5-6 different districts per year for four years to assist the districts with their plan amendments.

Five DCOM staff will travel to regional locations for two years to provide ACMP training and education on program changes and the revised ACMP implementing regulations.

The DCOM Director will travel to Washington, DC three times annually for two years to work with NOAA on program change approvals and NEPA requirements.

Contractual
The CPB will meet two times annually by teleconference, with each 2-day teleconference lasting 8 hours each day (including 20 phone lines). CSHB106(FIN) will require a substantial revision to all three chapters of the implementing ACMP regulations (11 AAC 110, 112, and 114). Contractual services will be required to develop and complete those revisions, including the Department of Law final review. The coordination and distribution of district planning and consistency review data and information requires postage and other fees. DCOM will also reimburse state agencies for their participation and implementation of the ACMP program.

Supplies
Supplies will be required for supporting the CPB (dictation/recorder equipment, packet materials and binders) and support staff (office

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

(2)

MAR 10 2008

NA08N05419042B

MEMORANDUM FOR: Commonwealth, State, and Territorial Coastal Program Managers

THROUGH: Eric Wolfe
Acting Chief Financial Officer
National Ocean Service

FROM: John R. King
Chief, Coastal Programs Division

SUBJECT: FY 2008 Final Funding Guidance and Allocations
Coastal Zone Management Act Sections 306/306A, 309 and 310

This final funding guidance is based on the funding levels contained in the Consolidated Appropriations Act, 2008 (P.L. 110-161). This Act contains funding for sections 306/306A; 309; and 310. This memorandum provides guidance on the allocation and uses of these funds. Questions or comments should be directed to me, and I can be reached at (301) 713-3155 extension 188 or via e-mail at john.king@noaa.gov.

Funding Facts

	2007	2008
Section 306/306A/309*	$ 65,780,000	$ 64,358,577
CNPCP Implementation**	0	1,974,000
Deobligated Funds***	0	1,183,423
Totals	$ 65,780,000	$ 67,516,000

* - Figures reflect the FY08 Appropriation less assessments for the Hollings Scholarship program
**- Figures reflect the FY08 Appropriation less assessments for the Hollings Scholarship program and administrative costs.
*** - Total deobligated funds added to section 306 funding.

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As you can see from the above table, appropriations for sections 306/309 are down by approximately $1.4M. This is partially offset by the availability of $1.2M in prior year deobligations. There is also almost $2M available for the Coastal Nonpoint Pollution Control Program.

Section 306/306A and Section 309 Allotments

For FY 2007, there is $65,542,000 in appropriated and deobligated funds available for sections 306/306A and 309. The CZMA requires that between ten and twenty percent of the section 306/309 appropriation be directed toward section 309, up to a maximum of $10,000,000. We will direct the statutory maximum of $10,000,000 (15.1%) of the appropriation toward section 309, leaving $55,542,000 for section 306/306A. The section 306/306A funds require a 1 to 1 match and are available to states with federally-approved coastal zone management programs. State allocations are provided in the attached table (attachment 1).

The states that have successfully completed section 309 assessments and strategies are eligible for section 309 funding. These funds require no match. All of the section 309 funds will be awarded through the weighted formula. The primary focus of this year's section 309 effort will be to implement the third year of the new enhancement strategies.

Implementation of Section 6217 Programs

There is a total of $1,974,000 available for the Coastal Nonpoint Program. The funds are being allocated as follows: 1. $42,000 for each state with a conditionally or fully approved 6217 program; 2. an additional $26,000 for each state with a fully approved program.

As in past years, Congress has provided these funds to support program implementation activities. Any remaining program development activities (i.e., addressing remaining conditions of approval) should be supported with the $100,000 in section 319 Clean Water Act funding identified initially in EPA's supplemental FY 2001 grants guidance for this purpose. Section 309 funds may also be used to support program development activities and states can utilize section 306 funding to support a variety of CNPCP development and implementation activities.

The CNPCP implementation funds require a 1 to1 match. The state coastal zone management lead agency is the only entity eligible to receive these awards, and may in turn make sub-awards. For states with conditional approval, these funds must be used to implement the approved portions of the CNPCP.

Application Procedures

The current application schedule is attached. July 1 start date awards are due in OCRM by April 10, 2008; and October 1 start date awards are due in OCRM by May 20, 2008 (attachment 2). This schedule may be revised pending discussions with the Grants Management Division. As with FY 2007, use of the electronic grants application system is required.

Notice Information

According to the Coastal Zone Management Act of 1972, as amended (CZMA), the Secretary of Commerce may make grants to eligible coastal states. Coastal states are defined as states that are in, or bordering on, the Atlantic, Pacific, or Arctic Oceans, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of the CZMA, the term also includes Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. This notice is being distributed to all eligible parties, and substitutes for the Federal Register notice required for Federal grant programs.

cc: EScheffler, NOS
BBlum, GCOS
RLiogys, NFA
JPiercy, NOS
LZuckerberg,OCRM
TMorris, OCRM
KBarba, OCRM
DFlynn, DOC/FALD
OCRM/CPD Staff
DKennedy, OCRM
DWieting, OCRM
ASimpson Porter, GMD
KFletcher, CSO

Parameter	Section 306/306A	Section 309	CNP Standard	CNP Full Approval
Total Funding	55,542,000	10,000,000	1,428,000	546,000
Base Funding	672,000	70,000	42,000	26,000
Maximum Funding	1,967,000	536,000	42,000	26,000

STATE	Section 306	Section 309	CNP Standard	CNP Full Approval	Total
Alabama	1,278,000	104,000	42,000	0	1,424,000
Alaska	1,967,000	536,000	42,000	0	2,545,000
American Samoa	779,000	76,000	42,000	26,000	923,000
California	1,967,000	536,000	42,000	26,000	2,571,000
Connecticut	1,848,000	177,000	42,000	26,000	2,093,000
Delaware	1,211,000	101,000	42,000	26,000	1,380,000
Florida	1,967,000	536,000	42,000	26,000	2,571,000
Georgia	1,967,000	270,000	42,000	0	2,279,000
Guam	803,000	77,000	42,000	26,000	948,000
Hawaii	1,821,000	174,000	42,000	0	2,037,000
Indiana	966,000	86,000	42,000	0	1,094,000
Louisiana	1,967,000	536,000	42,000	0	2,545,000
Maine	1,967,000	409,000	42,000	26,000	2,444,000
Maryland	1,967,000	521,000	42,000	26,000	2,556,000
Massachusetts	1,967,000	413,000	42,000	26,000	2,448,000
Michigan	1,967,000	536,000	42,000	0	2,545,000
Minnesota	885,000	82,000	42,000	26,000	1,035,000
Mississippi	1,046,000	91,000	42,000	0	1,179,000
New Hampshire	900,000	83,000	42,000	26,000	1,051,000
New Jersey	1,967,000	536,000	42,000	0	2,545,000
New York	1,967,000	536,000	42,000	26,000	2,571,000
North Carolina	1,967,000	392,000	42,000	26,000	2,427,000
Northern Mariana Islands	837,000	80,000	42,000	26,000	985,000
Ohio	1,869,000	180,000	42,000	0	2,091,000
Oregon	1,967,000	216,000	42,000	0	2,225,000
Pennsylvania	1,815,000	172,000	42,000	26,000	2,055,000
Puerto Rico	1,967,000	215,000	42,000	26,000	2,250,000
Rhode Island	1,307,000	106,000	42,000	26,000	1,481,000
South Carolina	1,967,000	349,000	42,000	26,000	2,384,000
Texas	1,967,000	536,000	42,000	0	2,545,000
U.S. Virgin Islands	831,000	79,000	42,000	26,000	978,000
Virginia	1,967,000	536,000	42,000	26,000	2,571,000
Washington	1,967,000	532,000	42,000	0	2,541,000
Wisconsin	1,940,000	191,000	42,000	26,000	2,199,000
TOTALS	55,542,000	10,000,000	1,428,000	546,000	67,516,000

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

MAR 31 2009

MEMORANDUM FOR: Commonwealth, State, and Territorial Coastal Program Managers

THROUGH: Chris Cartwright, Chief Financial Officer
National Ocean Service

FROM: John R. King
Chief, Coastal Programs Division

SUBJECT: FY 2009 Final Funding Guidance and Allocations
Coastal Zone Management Act Sections 306/306A, 309 and 310

Given the lateness of the appropriation and the need to get the funds out to the recipients, we are forgoing the normal process of issuing draft funding guidance. This final funding guidance is based on the funding levels contained in the Consolidated Appropriations Act, 2008 (P.L. 110-161). This Act contains funding for sections 306/306A; 309; and 310. This memorandum provides guidance on the allocation and uses of these funds. Questions or comments should be directed to me, and I can be reached at (301) 713-3155 extension 188 or via e-mail at john.king@noaa.gov.

In spite of the late appropriation, our goal is to get you your funds in a timely manner. To meet this goal, we must keep an application schedule similar to last year (Attachment 2). We recognize that this is a difficult schedule, however, it is critical that we get applications in as quickly as possible, so that we can get funds out the door in time to meet your start dates. We will work with you to get this done as efficiently as possible.

Funding Facts

	2008	2009
Section 306/306A/309*	$ 64, 358,577	$ 66,079,000
CNPCP Implementation**	1,974,000	3,362,000
Deobligated Funds***	1,183, 423	0
Totals	$ 67,516,000	$ 69,441,000

* - Figures reflect the Appropriation less assessments for the Hollings Scholarship program
**- Figures reflect the Appropriation less assessments for the Hollings Scholarship program and administrative costs.
*** - Total deobligated funds added to section 306 funding in 2008

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As you can see from the above table, appropriations for sections 306/309 are up by approximately $1.4M, however, deobligated funds are down by almost $1.2M. There is also almost $3.4M available for the Coastal Nonpoint Pollution Control Program.

Section 306/306A and Section 309 Allotments

For FY 2009, there is $66,079,000 in appropriated funds available for sections 306/306A and 309. The CZMA requires that between ten and twenty percent of the section 306/309 appropriation be directed toward section 309, up to a maximum of $10,000,000. We will direct the statutory maximum of $10,000,000 (15.1%) of the appropriation toward section 309, leaving $56,079,000 for section 306/306A. The section 306/306A funds require a 1 to 1 match and are available to states with federally-approved coastal zone management programs. State allocations are provided in the attached table (attachment 1).

The states that have successfully completed section 309 assessments and strategies are eligible for section 309 funding. These funds require no match. All of the section 309 funds will be awarded through the weighted formula. The primary focus of this year's section 309 effort will be to continue developing program changes outlined in the current strategies and to begin developing revised assessments and strategies.

Implementation of Section 6217 Programs

There is a total of $3,362,000 available for the Coastal Nonpoint Program. The funds are being allocated as follows: 1. $2,345,000 allocated by formula to each state with a conditionally or fully approved 6217 program. Each state will see an increase of at least $19,000 over FY08 in these funds. 2. an additional $46,200 for each state with a fully approved program.

As in past years, Congress has provided these funds to support program implementation activities. Please consult the CNP Funding Guidance for additional information. (http://coastalmanagement.noaa.gov/nonpoint/docs/6217grantsguidance_FY06Final.pdf)

Any remaining program development activities (i.e., addressing remaining conditions of approval) should be supported with the $100,000 in section 319 Clean Water Act funding identified initially in EPA's supplemental FY 2001 grants guidance for this purpose. Section 309 funds may also be used to support program development activities and states can utilize section 306 funding to support a variety of CNPCP development and implementation activities.

The CNPCP implementation funds require a 1 to1 match. The state coastal zone management lead agency is the only entity eligible to receive these awards, and may in turn make sub-awards. For states with conditional approval, these funds must be used to implement the approved portions of the CNPCP.

Application Procedures

The current application schedule is attached. July 1 start date awards are due in OCRM by April 3, 2009; and October 1 start date awards are due in OCRM by May 20, 2009 (attachment 2). As with FY 2008, use of the electronic grants application system is required.

Notice Information

According to the Coastal Zone Management Act of 1972, as amended (CZMA), the Secretary of Commerce may make grants to eligible coastal states. Coastal states are defined as states that are in, or bordering on, the Atlantic, Pacific, or Arctic Oceans, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of the CZMA, the term also includes Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. This notice is being distributed to all eligible parties, and substitutes for the Federal Register notice required for Federal grant programs.

cc: CCartwright, NOS
BBlum, GCOS
RLiogys, NFA
JPiercy, NOS
LZuckerberg,OCRM
TMorris, OCRM
KBarba, OCRM
DFlynn, DOC/FALD
OCRM/CPD Staff
DKennedy, OCRM
DWieting, OCRM
ASimpson Porter, GMD
KFletcher, CSO

Attachment 1

FINAL FY 2009 Allocations
Sections 306/306A and 309 and
Coastal Nonpoint Implementation

3/31/20094:04 PM
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Parameter	Section 306/306A	Section 309	CNP Standard	CNP Full Approval
Total Funding	56,079,000	10,000,000	2,345,000	1,016,400
Base Funding	675,000	70,000	60,000	46,200
Maximum Funding	1,995,000	536,000	75,000	NA

STATE	Section 306	Section 309	CNP Standard	CNP Full Approval	Total
Alabama	1,280,000	104,000	63,000	0	1,447,000
Alaska	1,995,000	536,000	75,000	0	2,606,000
American Samoa	781,000	76,000	61,000	46,200	964,200
California	1,995,000	536,000	75,000	46,200	2,652,200
Connecticut	1,849,000	177,000	67,000	46,200	2,139,200
Delaware	1,213,000	101,000	63,000	46,200	1,423,200
Florida	1,995,000	536,000	75,000	46,200	2,652,200
Georgia	1,995,000	270,000	70,000	0	2,335,000
Guam	804,000	77,000	61,000	46,200	988,200
Hawaii	1,824,000	174,000	67,000	0	2,065,000
Indiana	969,000	86,000	62,000	0	1,117,000
Louisiana	1,995,000	536,000	75,000	0	2,606,000
Maine	1,995,000	409,000	75,000	46,200	2,525,200
Maryland	1,995,000	521,000	75,000	46,200	2,637,200
Massachusetts	1,995,000	413,000	75,000	46,200	2,529,200
Michigan	1,995,000	536,000	75,000	0	2,606,000
Minnesota	889,000	82,000	61,000	46,200	1,078,200
Mississippi	1,050,000	91,000	62,000	0	1,203,000
New Hampshire	903,000	83,000	61,000	46,200	1,093,200
New Jersey	1,995,000	536,000	75,000	46,200	2,652,200
New York	1,995,000	536,000	75,000	46,200	2,652,200
North Carolina	1,995,000	392,000	75,000	46,200	2,508,200
Northern Mariana Islands	840,000	80,000	61,000	46,200	1,027,200
Ohio	1,869,000	180,000	67,000	0	2,116,000
Oregon	1,995,000	216,000	68,000	0	2,279,000
Pennsylvania	1,816,000	172,000	67,000	46,200	2,101,200
Puerto Rico	1,995,000	215,000	68,000	46,200	2,324,200
Rhode Island	1,309,000	106,000	64,000	46,200	1,525,200
South Carolina	1,995,000	349,000	74,000	46,200	2,464,200
Texas	1,995,000	536,000	75,000	0	2,606,000
U.S. Virgin Islands	833,000	79,000	61,000	46,200	1,019,200
Virginia	1,995,000	536,000	75,000	46,200	2,652,200
Washington	1,995,000	532,000	75,000	0	2,602,000
Wisconsin	1,940,000	191,000	67,000	46,200	2,244,200
TOTALS	56,079,000	10,000,000	2,345,000	1,016,400	69,440,400

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

MAR - 3 2010

MEMORANDUM FOR: Commonwealth, State, and Territorial Coastal Program Managers

THROUGH: Chris Cartwright, Chief Financial Officer
National Ocean Service

FROM: John R. King
Chief, Coastal Programs Division

SUBJECT: FY 2010 Draft Funding Guidance and Allocations
Coastal Zone Management Act Sections 306/306A and 309

This draft funding guidance is based on the funding levels contained in the Consolidated Appropriations Act, 2010 (P.L. 111-117). This Act contains funding for sections 306/306A and 309. This memorandum provides guidance on the allocation and uses of these funds. Questions or comments should be directed to me, and I can be reached at (301) 713-3155 extension 188 or via e-mail at john.king@noaa.gov. Comments are due by March 8, 2010.

Our goal is to get you your funds in a timely manner, and to meet this goal, we must keep an application schedule similar to last year (Attachment 2). We recognize that this is a difficult schedule, however, it is critical that we get applications in as quickly as possible, so that we can get funds out the door in time to meet your start dates. We will work with you to get this done as efficiently as possible.

Funding Facts

	2009	2010***
Section 306/306A/309*	$ 66,079,000	$ 68,077,854
CNPCP Implementation**	3,362,000	0
Deobligated Funds	0	7,146
Totals	$ 69,441,000	$ 68,085,000

* - Figures reflect the Appropriation less assessments for the Hollings Scholarship program
**- Figures reflect the Appropriation less assessments for the Hollings Scholarship program and administrative costs.
*** - Includes report language addressing the increase in 306/309 funding

Printed on Recycled Paper

As you can see from the above table, appropriations for sections 306/309 are up by approximately $2.0M, however, there is no funding available for the Coastal Nonpoint Pollution Control Program. There is also a small amount of deobligated funds available for re-allocation.

Report Language

Report language accompanying the FY10 Appropriations Act requires that a portion of the increase in the Coastal Zone Management Grants funding be used for a competitive grants program. Specifically, the report states:

> *The conference agreement provides $2,000,000 above the request, and NOAA is directed to use a portion of the increase provided for a competitive program for efforts to modernize and improve State information systems to assess, track and manage permitting and land-use tracking procedures. (* FY2010 Appropriations Conference Report (p27))

In addition, the Appropriations Act continues to include the following language regarding allocations:

> *Provided further, That in allocating grants under sections 306 and 306A of the Coastal Zone Management Act of 1972, as amended, no coastal State shall receive more than 5 percent or less than 1 percent of increased funds appropriated over the previous fiscal year.* (FY2010 Appropriations Act (p17))

Proposed Approach

Our challenge is to meet both existing statutory and regulatory requirements, and Congressional direction contained in the Conference Report. To do this, we are proposing to allocate $1,000,000 of the funding increase towards section 306 allocations, and $1,000,000 of the funding increase towards a competitive process for the purposes described in the Conference Report. There will be a separate call for proposals for the competitive funds, as well as separate cooperative agreements. This approach meets the requirements described above, and allows the standard annual CZM cooperative agreement process to move forward in a timely manner.

Section 306/306A and Section 309 Allotments

For FY 2010, there is $67,085,000 in appropriated and deobligated funds available for sections 306/306A and 309. The CZMA requires that between ten and twenty percent of the section 306/309 appropriation be directed toward section 309, up to a maximum of $10,000,000. We will direct the statutory maximum of $10,000,000 (14.9%) of the appropriation toward section 309, leaving $57,085,000 for section 306/306A. The section 306/306A funds require a 1 to 1 match and are available to states with federally-approved coastal zone management programs. State allocations are provided in the attached table (attachment 1).

The states that have successfully completed section 309 assessments and strategies are eligible for section 309 funding. These funds require no match. All of the section 309 funds will be awarded through the weighted formula. The primary focus of this year's section 309 effort will

be to develop revised assessments and strategies.

Implementation of Section 6217 Programs

No funding was appropriated for this program for FY 2010. We understand that this presents difficulties for some states, and we will provide flexibility in funding CNP implementation projects with 306 or 309 funds.

Application Procedures

The current application schedule is attached. July 1 start date awards are due in OCRM by April 5, 2010; and October 1 start date awards are due in OCRM by May 20, 2010 (attachment 2). As with FY 2009, use of the electronic grants application system is required.

NOAA Strategic Priorities

NOAA is currently in the process of finalizing its "Next Generation Strategic Plan" intended to guide Agency actions through 2017. The draft goals articulated in this plan align nicely with CZMA goals, OCRM office priorities, and the priorities of many of your programs. This provides a good opportunity to demonstrate the connection between the CZM program and funding and NOAA priorities. Towards this end, we thought it worthwhile to provide a brief description of the NOAA strategic priorities, as they will likely provide greater visibility for the CZM program and new opportunities for states to access a broader array of NOAA resources.

NOAA intends to focus its efforts on the following four (4) overarching goals:

1. Climate Adaptation & Mitigation: An informed society anticipating and responding to a changing climate and its impacts.
2. Weather Resilience: Society prepares for and responds to high-impact events that jeopardize individuals, government, and businesses.
3. Sustainable Coastal Communities and Economies: Environmentally and economically sustainable oceans, coasts, and Great Lakes communities and ecosystem services.
4. Sustainable and Resilient Fisheries, Species, and Habitats: Biodiversity protected and restored and fisheries sustained within healthy and productive ecosystems

By using the following means, familiar to coastal programs, to improve management of our coasts and oceans:

- Promoting partnerships and collaboration at all levels
- Engaging regional ocean governance bodies
- Enabling data integration and delivery
- Improving tools and technology for decision support
- Using local expertise and ecological knowledge

We anticipate that OCRM's support of coastal program engagement in regional ocean governance, climate change adaptation, and the development and use of coastal and marine spatial planning will support the NOAA strategic priorities. We encourage you to consider these priorities in the development of your annual work programs; 309 Assessments and Strategies; and in reporting your program's success stories (Section C of the Performance Reporting Guidelines). Additional information related to NOAA's Strategic Plan can be found here: http://www.ppi.noaa.gov/ngsp.html; and the current OCRM strategic plan can be found here: http://coastalmanagement.noaa.gov/resources/docs/ocrm_strategicplan.pdf.

Notice Information

According to the Coastal Zone Management Act of 1972, as amended (CZMA), the Secretary of Commerce may make grants to eligible coastal states. Coastal states are defined as states that are in, or bordering on, the Atlantic, Pacific, or Arctic Oceans, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of the CZMA, the term also includes Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. This notice is being distributed to all eligible parties, and substitutes for the Federal Register notice required for Federal grant programs.

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OCRM/CPD Staff
DWieting, OCRM
ASimpson Porter, GMD
KFletcher, CSO

Parameter	Section 306/306A	Section 309
Total Funding	57,085,000	10,000,000
Base Funding	700,000	70,000
Maximum Funding	2,030,000	536,000

STATE	Section 306	Section 309	Total
Alabama	1,305,000	104,000	**1,409,000**
Alaska	2,030,000	536,000	**2,566,000**
American Samoa	807,000	76,000	**883,000**
California	2,030,000	536,000	**2,566,000**
Connecticut	1,871,000	177,000	**2,048,000**
Delaware	1,237,000	101,000	**1,338,000**
Florida	2,030,000	536,000	**2,566,000**
Georgia	2,030,000	270,000	**2,300,000**
Guam	830,000	77,000	**907,000**
Hawaii	1,844,000	174,000	**2,018,000**
Indiana	993,000	86,000	**1,079,000**
Louisiana	2,030,000	536,000	**2,566,000**
Maine	2,030,000	409,000	**2,439,000**
Maryland	2,030,000	521,000	**2,551,000**
Massachusetts	2,030,000	413,000	**2,443,000**
Michigan	2,030,000	536,000	**2,566,000**
Minnesota	913,000	82,000	**995,000**
Mississippi	1,073,000	91,000	**1,164,000**
New Hampshire	927,000	83,000	**1,010,000**
New Jersey	2,030,000	536,000	**2,566,000**
New York	2,030,000	536,000	**2,566,000**
North Carolina	2,030,000	392,000	**2,422,000**
Northern Mariana Islands	865,000	80,000	**945,000**
Ohio	1,891,000	180,000	**2,071,000**
Oregon	2,030,000	216,000	**2,246,000**
Pennsylvania	1,837,000	172,000	**2,009,000**
Puerto Rico	2,030,000	215,000	**2,245,000**
Rhode Island	1,331,000	106,000	**1,437,000**
South Carolina	2,030,000	349,000	**2,379,000**
Texas	2,030,000	536,000	**2,566,000**
U.S. Virgin Islands	858,000	79,000	**937,000**
Virginia	2,030,000	536,000	**2,566,000**
Washington	2,030,000	532,000	**2,562,000**
Wisconsin	1,963,000	191,000	**2,154,000**
TOTALS	**57,085,000**	**10,000,000**	**67,085,000**

ACTIVITY	States with July 1 Start Dates	States with October 1 Start Dates
1. Initial discussions between state and OCRM - submission of preliminary work plan (optional)	January - February	February
2. State submits draft application package for CZMA cooperative agreement. OCRM provides comments to State as appropriate	March 12, 2010	April 15, 2010
3. State submits final application, budget and narrative to OCRM for review and approval.	April 5, 2010	May 18, 2010
4. OCRM completes review and circulates Cooperative Agreement package within OCRM.	April 9, 2010	May 25, 2010
5. OCRM submits Cooperative agreement package to NOAA Grants office.	April 16, 2010	June 1, 2010

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number 9
Bill Version CSHB 106(FIN)
(H) Publish Date 4/15/11

Identifier (file name)CSHB106(FIN)-DNR-DCOM-4-15-11
Title Act extending termination of the Alaska Coastal Mgmt Pgm
Sponsor Rules Committee by Request of Governor
Requester House Finance

Dept. Affected Natural Resources
Appropriation Resource Development
Allocation Coastal and Ocean Management
OMB Component Number 2680

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	109.8	3,150.2	3,260.0	3,260.0	3,260.0	3,260.0	3,260.0
Travel	155.7	95.9	251.6	141.8	141.8	121.8	121.8
Contractual	380.0	1,404.4	1,784.4	1,724.4	1,724.4	1,724.4	1,724.4
Supplies	18.6	41.2	54.2	54.2	54.2	54.2	54.2
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**664.1**	**4,691.7**	**5,350.2**	**5,180.4**	**5,180.4**	**5,160.4**	**5,160.4**
CAPITAL EXPENDITURES		**1,360.0**	**1,360.0**	**1,360.0**	**1,360.0**	**1,360.0**	**1,360.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts		2,679.0	2,679.0	2,679.0	2,679.0	2,679.0	2,679.0
1003 GF Match		1,672.6	1,672.6	1,672.6	1,672.6	1,672.6	1,672.6
1004 GF	664.1		658.5	488.7	488.7	468.7	468.7
1005 GF/Program Receipts							
1061 CIP receipts		244.6	244.6	244.6	244.6	244.6	244.6
1007 Interagency Receipts		95.5	95.5	95.5	95.5	95.5	95.5
TOTAL	**664.1**	**4,691.7**	**5,350.2**	**5,180.4**	**5,180.4**	**5,160.4**	**5,160.4**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	1	33	34	34	34	34	34
Part-time							
Temporary							

Why this fiscal note differs from previous version

The fiscal note is updated to reflect changes made in the House Finance committee substitute.
(1) Based on language in the CSHB106 (FIN), this fiscal note reflects the removal of one full time Natural Resource Specialist II position and only an additional $10.0 in supplies for dissemination of projects in review by hard copy.

NOTE: The base budget ($4,691.7 and 33 positions) was removed from the Senate version of the FY12 operating budget, making it subject to conference committee. This fiscal note also includes the annual capital project request for the federal grant funds that are shared with DCCED for grants to communities and for DCCED's adminstration of the grants which was removed from the budget making it subject to conference committee.

Prepared by Randy Bates, Director — Phone 465-8797
Division Coastal and Ocean Management — Date/Time 4/15/11 12:00 AM
Approved by Dan Sullivan, Commissioner — Date 4/15/2011
Natural Resources

(Revised 12/29/2010 OMB)

FISCAL NOTE #9

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 106(FIN)

Analysis

NOTE: The base budget ($4,691.7 and 33 positions) was removed from the Senate version of the FY12 operating budget, making it subject to conference committee. The annual capital project request for the federal grant funds that are shared with DCCED for grants to communities and for DCCED's administration of the grants was removed from the Senate version of the FY12 Capital Budget making it subject to conference committee.

The Alaska Coastal Management Program (ACMP) will automatically terminate on July 1, 2011 (SLA2005, CH31, Sec 22). CSHB106(FIN) would extend the termination date to July 1, 2017.

This fiscal note reflects the increased fiscal impacts due to the additional Division of Coastal and Ocean Management (DCOM) duties, including the administration and implementation of the Alaska Coastal Policy Board (CPB). Those increased fiscal impacts are detailed below:

Personal Services
One additional position, a Project Coordinator (range 20), will be required to cover the additional work associated with the CPB and the coordination of district planning functions and information sharing.

Travel
The CPB will meet four times in-person in the first two years following establishment of the board, and will meet in-person twice annually after that. The CPB will need to meet more frequently in-person for the first two years in order to establish board protocols, review coastal district plans, and address issues of interest to ACMP participants. CPB travel includes nine members and two DCOM support staff.

In addition, recognizing coastal districts will be amending their district plans based on CSHB106(FIN), two DCOM staff will travel 5-6 different districts per year for four years to assist the districts with their plan amendments.

Five DCOM staff will travel to regional locations for two years to provide ACMP training and education on program changes and the revised ACMP implementing regulations.

The DCOM Director will travel to Washington, DC three times annually for two years to work with NOAA on program change approvals and NEPA requirements.

Contractual
The CPB will meet two times annually by teleconference, with each 2-day teleconference lasting 8 hours each day (including 20 phone lines). CSHB106(FIN) will require a substantial revision to all three chapters of the implementing ACMP regulations (11 AAC 110, 112, and 114). Contractual services will be required to develop and complete those revisions, including the Department of Law final review. The coordination and distribution of district planning and consistency review data and information requires postage and other fees. DCOM will also reimburse state agencies for their participation and implementation of the ACMP program.

Supplies
Supplies will be required for supporting the CPB (dictation/recorder equipment, packet materials and binders) and support staff (office equipment).

2/08/12
PRESENTATION
ALASKA CHILDREN'S JUSTICE ACT TASK FORCE

<TARGET><BILL></BILL><SUBJECT>2-08-12 PRESENTATION ALASKA CHILDREN'S JUSTICE ACT TASK FORCE</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska Children's Justice Act Task Force

Presentation to Joint Senate Judiciary and HSS Committees, Alaska Legislature

February 8, 2012

hss.state.ak.us/ocs/ChildrensJustice/default.htm

OVERVIEW OF 2012 PRESENTATION

- Background on CJA: Who we are and what we do
- Child maltreatment in Alaska
- Proposed legislative changes

OVERVIEW OF CJA TASK FORCE

- Background: Founded 2002
  - Federal mandate: Child Abuse Prevention and Treatment Act (CAPTA) 42 U.S.C. 5101 and Victims of Crime Act 42 U.S.C. 10601
  - Multidisciplinary/statewide representation
  - Federally funded based on population

Mission

- Identify areas where improvement is needed in the statewide response to child maltreatment, particularly child sexual abuse, make recommendations and take actions to improve the system

Task Force Projects

- Develop and distribute better data
  - Collaboration with DHSS, Maternal Child Health Epidemiology Unit - Surveillance of Child Abuse and Neglect (SCAN) program
- Improve system response
  - Support the development of Child Advocacy Centers (CACs) and Multidisciplinary Teams (MDTs)
  - Support innovative programs
  - Support education and training
- Make recommendations for law changes

IMPROVE THE SYSTEM RESPONSE

Support the development of CACs and MDTs

- Alaska now has 10 regional CACs and 2 satellite centers
- Publications:
  - Guidelines for the Multidisciplinary Response to Child Abuse in Alaska
  - Standardized medical documentation forms

Support Innovative Programs

- Pathway to Hope
  - Tribal facilitator curriculum to assist community healing from intergenerational trauma due to sexual abuse
- Sexual exploitation of children protection
  - Internet Crimes Against Children
  - NetSmartz
  - In-school education programs

Education and training

- Educate mandatory reporters
  - Developed Mandatory Reporter Training CD
- Encourage professional development
  - Scholarships for trainings
  - Sponsor biennial Alaska Child Maltreatment Conference (collaboration with the Alaska Children's Alliance)
- Yearly legislative presentations

Yearly legislative presentations

- Children's Caucus
- Legislative committee presentations
- 2012 presentation to Senate Judiciary & HSS
  - Child maltreatment in Alaska
  - Proposed legislation

Child maltreatment in Alaska

- Data
- Fiscal impact

Maltreatment-Related Child Deaths

Deaths occurring between 2000-2008,
children ages 0 – 9 years

- Approximately **1 out of everv 5** (20%) Alaskan child deaths is maltreatment-related
  - ~ **1 out of everv 4** (25%) for Alaska Native children
- Nearly **3 out of everv 4** (~75%) maltreatment-related deaths occur in infants

Maltreatment - All Types

- In 2008 ~ **12,400 Alaskan children** were likely victims of at least one incident of maltreatment
  - **24%** had at least one incident confirmed
    - Substantiated or conviction
    - "Tip of the iceberg"
  - As many as **34 children a day** are likely maltreated, or **3,000** during this 90 day legislative session

Maltreatment - Neglect

- In 2008 ~ **8,900 Alaskan children** were the likely victims of at least one incident of neglect
  - **25%** had at least one incident confirmed
  - As many as **25 children a day** ,or **2,200** during this 90 day legislative session

Maltreatment – Physical Abuse

- In 2008 ~ **2,700 Alaskan children** were likely victims of at least one incident of physical abuse
  - **22%** had at least one incident confirmed
  - As many as **7 children a day**, or **630** during this 90 day legislative session

Maltreatment – Sexual Abuse

- In 2008 ~ **1,900 Alaskan children** were likely victims of at least one incident of sexual abuse
  - Among the children experiencing sexual abuse, **16%** had at least one incident confirmed
  - ~ **As many as 5 children a day**, or **450** during this 90 day legislative session

What does this cost?

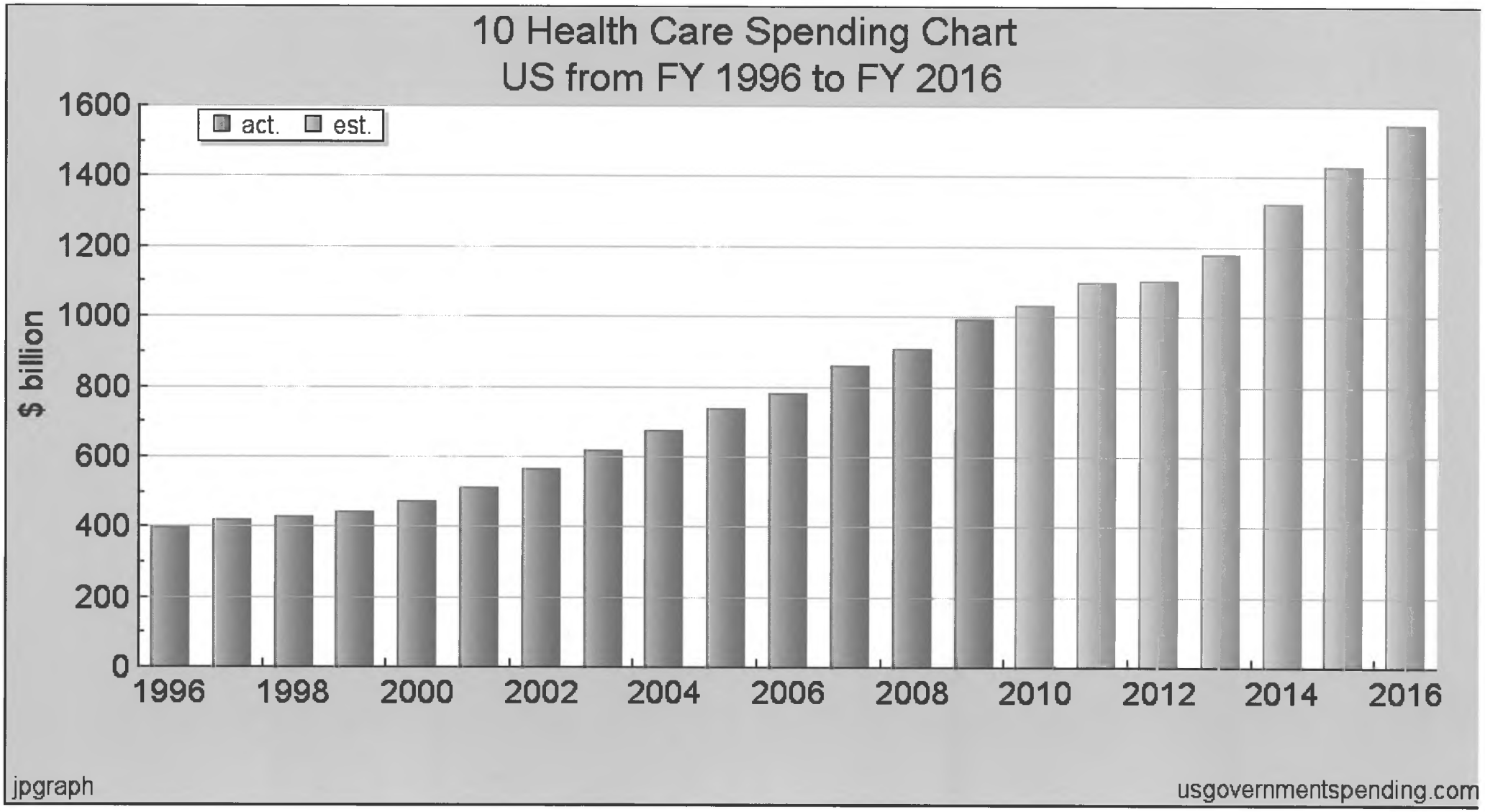
- Medical & mental health care
  - Short and long term
- Child protection system
- Criminal justice system
- Future earnings
- Quality of life

Health Care Costs

- Adverse Childhood Experiences Studies: "Turning Gold Into Lead"
- "…much of what is recognized as common in adult medicine is the result of what is not recognized in childhood."
- Link to ALL most common causes of adult disease and death in US today

www.cdc.gov

Health Care Costs



Average lifetime cost per case of fatal child maltreatment

• Medical costs	• $ 14,000
• Productivity losses	• $1,258,800
• Total	• $1,272,900

2012 The economic burden of child maltreatment in the United States Child Abuse and Neglect

Annual economic burden to Alaskans: fatal child maltreatment (infants only)

• Medical costs	• $ 140,000
• Productivity losses	• $12,588,000
• Total	• $12,729,000

Average lifetime cost per case of nonfatal child maltreatment

• Short-term health care costs	• $ 32,648
• Long-term health care costs	• $ 10,530
• Productivity losses	• $144,360
• Child welfare costs	• $ 7,728
• Criminal justice costs	• $ 6,747
• Special education costs	• $ 7,999
• Total	• $210,012

Estimated annual economic burden for Alaskans

• Short-term health care costs	• $97 – 405 million
• Long-term health care costs	• $31 - 130 million
• Productivity losses	• $430 million -1.8 billion
• Child welfare costs	• $23 – 96 million
• Criminal justice costs	• $20 -84 million
• Special education costs	• $24 – 99 million
• Total	• $625 million - 2.6 billion

based on ~3000 - 12,400 children annually

SYSTEM IMPROVEMENT THROUGH CHANGES TO OUR CRIMINAL STATUTES

RECOMMENDATION #1

Modify assault statutes to create broader criminal liability for assaults to children

Problem: Required for felony prosecution

- Serious physical injury OR
- Multiple events OR
- Reasonable caregiver would seek medical diagnosis and treatment

Problem: Definition of "serious physical injury"

- "**(A)** physical injury caused by an act performed under circumstances that create a substantial risk of death; or
- **(B)** physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy."

Solutions: New definition "serious bodily injury to a child"

- "Serious bodily injury to the child" includes, but is not limited to, second- or third-degree burns, a fracture of any bone, a concussion, subdural or subarachnoid bleeding, retinal hemorrhage, cerebral edema, brain contusion, strangulation, injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement, including those sustained by striking children with objects, or other physical injury that results in significant physical injury to the child

Solutions

- Apply the proposed "serious bodily injury" definition to
  - children under 12
  - children under age 16 who are mentally or physically impaired
- Add new theories to all three felony assault statutes that incorporate the definition of serious bodily injury to a child

Post-conviction recommendation:

- To recognize mental harm resulting from physical injury:
- Create a sentencing aggravator if the serious bodily injury caused to a child resulted in significant mental injury to the child

RECOMMENDATION #2

STRENGTHEN STATUTES REGARDING EXPOSURE OF CHILDREN TO DRUGS

Problem:

- Difficult to prosecute person who has exposed a child to drugs to extent that child tests positive for drug
- Examples: meth lab, leaving drugs laying around, using drugs around child

Solution:

- Amend endangering the welfare of a minor statute by creating 2 new subsections to:
  - Penalize reckless exposure of child to controlled substance and, because of exposure, the child tests positive for the controlled substance
  - Penalties vary depending on dangerousness of drug

Section 5, subsections (b)(2) and (g)

Problem:

- Inability to prosecute for indirect exposure to dangerous chemicals used in drug labs

Solution

- Penalize reckless exposure of child to chemicals used in meth labs

Section 5, subsections (b)(4)

RECOMMENDATION #3

INCREASE PENALITES WHEN A PARENT INTENTIONALLY WITHHOLDS ADEQUATE FOOD OR LIQUIDS

Problem:

- Current punishment for criminal nonsupport is a misdemeanor
- Intentional failure to provide adequate food or liquids to a child should be a felony

Solutions:

- Modify criminal nonsupport to create a class C felony for parent or guardian who intentionally fails to provide adequate food and liquids to the child
- Standard for determination: “a reasonable person would conclude the child was not receiving adequate food or liquids”

RECOMMENDATION #4

CREATE A CRIMINAL LAW THAT PROHIBITS AN INCARCERATED PERSON FROM CONTACTING A VICTIM OR WITNESS

Problem:

- Current statutes do not fully protect a child victim from influences and pressure prior to trial and sentencing
  - Only after sentencing
- Examples:
  - Incarcerated accused sex offender can contact under age victim
  - 3rd party can forward phone calls, letters from defendant to victim

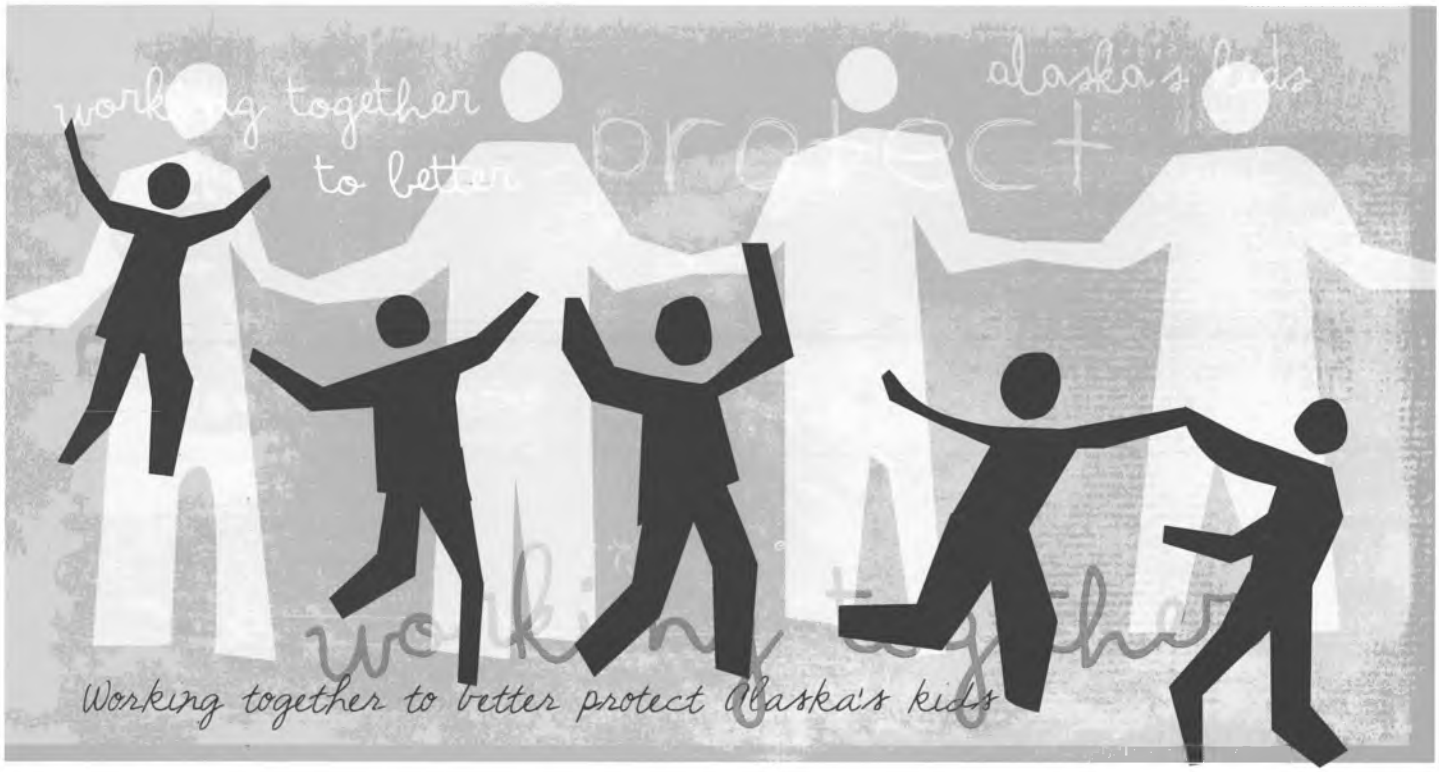
Solutions:

- Add two new theories to unlawful contact statute to:
  - Penalize a person incarcerated before trial or sentencing for contacting a victim or witness of the offense in violation of no-contact order
  - Penalize person who assists the defendant in engaging in such contact

Alaska Children's Justice Act Task Force

- Problem: need legislative changes to enhance safety of Alaskan children
- Solution: introduce and pass proposed legislation

We need champions for children!



GUIDELINES FOR THE MULTIDISCIPLINARY RESPONSE TO CHILD ABUSE IN ALASKA

A Project of the
Alaska Children's Justice Act Task Force

Alaska Children's
Justice Act Task Force

This document is intended to assist the dedicated people who participate in the evaluation of children for whom there is a concern for maltreatment: child protection, law enforcement, medical and mental health, Child Advocacy Centers (CACs), tribes/tribal organizations, victim advocates, prosecutors and others. The work is hard and often under-appreciated, but there is little we do that is more important than making a difference in the life of a child.

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SECTION ONE: OVERVIEW

Guiding Principles

- These guidelines are intended to be used in the best interests of children. Every effort should be made to avoid re-traumatizing a child who has possibly suffered abuse.

- Child abuse occurs in families from every race, culture, religion, economic status and educational level. Children from infants to teens, both boys and girls, are victims of child abuse.

- Child maltreatment has life-long ramifications that include adverse outcomes in future physical and mental health, substance abuse, suicide, criminal behavior, productivity, and a host of other societal ills with enormous direct and indirect costs.[1], [2]

- A multidisciplinary approach affords the best opportunity for breaking the cycle of child abuse and neglect through effective investigations, holding offenders accountable, access to medical and mental health evaluation and treatment, and assistance to support families in providing safe and nurturing environments for their children to heal from abuse.

- Response to child abuse in small rural communities presents unique obstacles that can complicate the investigation, victim support and family services, prosecution and the healing process. Interagency cooperation is essential to minimize the trauma experienced by children in rural Alaska.

- Bringing children from rural communities into hub or urban areas for forensic evaluation and investigation requires management of logistical and emotional support including lodging, transportation, meals and additional advocacy and support. Lack of adequate and culturally-informed support while the child is away from their home community may result in recantation or difficulty in cooperating with the investigation and prosecution.

- Critical attention must be given to the reactions of the child's supporters and extended family, particularly in small rural communities because unsupportive or negative reactions to an abuse disclosure/investigation may cause further trauma to the child, compromise safety and inhibit the child's healing.

- All evaluations of possible child maltreatment must take into account aspects of individual and family diversity including regional/geographic practices and lifestyles, primary language, and physical, emotional and cognitive ability.

- Multidisciplinary team members should have, at a minimum, training on normal child development, dynamics and impacts of child abuse on children at different developmental stages, profiles of those who abuse children, and how children tell about abuse. Each member of the team should become informed regarding the diversity of their specific service area in order to remain objective and avoid bias based on demographic, educational, economic, ethnic or cultural factors.

- It is expressly understood that each agency will work within its departmental mandates and policies.

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1 *Wang and Holton; Economic Impact Study 2007 from Prevent Child Abuse America;* http://www.preventchilda-buse.org/about_us/media_releases/pcaa_pew_economic_impact_study_final.pdf

2 *Adverse Childhood Experiences Study conducted through the Centers for Disease Control* http://www.cdc.gov/nccdphp/ace/

INTRODUCTION

Child abuse and neglect is a widespread problem in the United States, especially in Alaska. It is critical that we effectively respond. During the years 2007 -2008 approximately six in every 100 Alaskan children were potential victims of at least one form of child maltreatment, nearly 24 per week had concerns for sexual abuse, and over 2920 children required the services of our Child Advocacy Centers. These cases are complex and require the cooperation and sharing of information by those involved. No single agency or organization can effectively deal with the issues of child abuse and neglect, and a multidisciplinary approach that is cooperative and mutually respectful will result in a professional assessment with the least amount of trauma to the children and families involved.

"Child abuse and neglect is a widespread problem in the United States, especially in Alaska. It is critical that we effectively respond."

Statement of Purpose

The purpose of this multidisciplinary guideline document is to provide those involved in the initial evaluation of suspected child abuse and neglect with guidance based on existing best practice recommendations. We believe that consistency in the approach to these complex cases will greatly increase the effectiveness of Alaska's response to child abuse and neglect cases.

In this document **initial response** refers to any investigation and/or assessment conducted in order to make a decision on whether or not to move forward with a criminal or civil case. The initial response generally involves investigative steps, a forensic interview, a medical exam, if indicated, and an assessment of child and family needs for services.

This document represents the best knowledge about multidisciplinary practices in response to child abuse and neglect available at the time of publication. Furthermore, these are standards toward which professionals should strive to reach in these cases. This document is not intended to create substantive rights for any individual. Finally, the authors assume that any individual agency's ability to follow these guidelines will depend to some degree on the availability of resources and the necessity to balance priorities among several cases.

Intended Audience

These guidelines are for those who work in child protection, law enforcement, medical and mental health, Child Advocacy Centers (CACs), tribes/tribal organizations, prosecutors and others who participate in the evaluation of children for whom there is a concern for maltreatment. Multidisciplinary teams (MDTs) typically have two over-lapping and inter-related purposes, with participating agency membership varying depending on location and purpose. The MDT that initially responds to an allegation of abuse generally includes investigators from the Office of Children's Services and/or law enforcement, CAC staff, a medical provider, an ICWA worker (if concerning a Native child), a victim advocate, and sometimes a mental health provider. In addition, there may also be a larger MDT that meets to review cases, which may include all of the above as well as supervisors and representatives from other agencies as defined in AS 47.14.300. This document may be helpful to those wishing to understand the framework for multidisciplinary teams and to those who are involved with later stages of child abuse investigations. However, the primary intended audiences are those involved in the initial evaluation/assessment/investigation, whether the case falls within criminal and/or civil jurisdictions.

BACKGROUND

History of the Alaska Children's Justice Act Task Force

The Alaska Children's Justice Act Task Force is a statewide multidisciplinary group established in 1999 in order to comply with the Federal Child Abuse Prevention and Treatment Act requirement to undertake a comprehensive review and evaluation of law, policy and the investigative, administrative and judicial handling of cases of child abuse and neglect. The purpose of the Task Force is to promote State system enhancements or changes, including training, policies, procedures and laws that will improve how Alaska responds to children and families involved in these cases. The CJA Task Force members represent multiple disciplines and are employed in state, private and Tribal agencies.

History of Child Advocacy Centers in Alaska

CACs are community-based facilities that bring together law enforcement, child protection workers, prosecutors, child and family advocates, tribal representatives, medical and mental health professionals to utilize a collaborative team approach to the investigation of child sexual abuse and other forms of maltreatment as well as providing necessary follow-up services. CACs provide a safe neutral environment for the evaluation of child abuse and exploitation, as well as coordination of services for victims and families.

CACs were developed in Alaska as a result of community MDTs and others working in the field who recognized that child sexual abuse cases needed to be approached differently than adult sexual assault cases. The first CAC in Alaska, Alaska CARES in Anchorage, opened in 1996, followed by The Children's Place in Wasilla in 1999. Now CACs are present in 10 different hub communities, allowing a majority of children in Alaska to have access to CAC services. CACs in Alaska are based on a national model first developed in Huntsville Alabama in the 1980's with each reflecting the unique needs and resources of their community/region.

The benefits of a CAC include:

- Allegations of sexual abuse are more thoroughly investigated
- The trauma experienced by children and families is reduced
- Non-offending parents are empowered to protect and support their children
- Children and families receive services tailored to their family's needs
- More offenders are held accountable
- The community is more aware of the problem of child abuse in general and sexual abuse specifically
- The CAC becomes a resource to MDT professionals, providing specialized training and consultation

Alaska is fortunate to now have a Child Advocacy Center in each of the following communities:

- Anchorage, Alaska CARES -- 1-877-561-8301 http://www.providence.org/alaska/tchap/cares/default.htm
- Wasilla – The Children's Place – 1-907-357-5157 http://www.thechildrens-place.org/
- Juneau – S.A.F.E. Child Advocacy Center -- 1-907-463-6157 -- http://www.ccsjuneau.org/51
- Fairbanks – Stevie's Place -- 1-907-374-2850 -- http://www.rcpcfairbanks.org/Stevie's%20Place.htm
- Nome – Kawerak Child Advocacy Center--1-907-443-4379 -- http://www.kawerak.org/servicedivisions/cfs/cac/index.html
- Bethel – The Children's Center -- 1-907-543-3144
- Dillingham – Nitaput Child Advocacy/Family Support Center -- 1-907-842-1230 -- www.bbahc.org/child_advocacy
- Copper River – Copper River Basin Child Advocacy Center -- 1-907-822-3733 -- http://crbcac.com/purpose.html
- Kenai – Central Peninsula Child Advocacy Center -- (907)690-2113
- Homer – Haven House Child Advocacy Center --(907)235-7712 -- http://www.havenhousealaska.org/

Additional CACs are under development at the time of publication. Contact the Alaska Children's Alliance for an up to date list with contact information.

The Alaska Children's Alliance (ACA) is a coalition of established and developing CACs, MDTs, and child protection teams (CPTs) dedicated to improving Alaskan community responses to child maltreatment. The ACA is a state chapter of the National Children's Alliance (NCA). The NCA is a non-profit membership organization whose mission is to assist communities seeking to improve their responses to child abuse by establishing and maintaining CACs.

DEFINITIONS

These are definitions of commonly used terms and terms used throughout this document, and are not necessarily legal definitions (which may be found under pertinent statutes).

Child Advocacy Center: A child-focused, community-based program that provides coordination between the various agencies and professionals responsible for responding to child maltreatment with the primary goal to prevent re-traumatization by the system response.[3]

Child maltreatment: Any act or series of acts of commission or omission by a parent, caregiver, or person in position of authority over a child that result in harm, potential for harm, or threat of harm to a child.[4]

Child neglect: The failure to provide for a child's basic physical, emotional, or educational needs or to protect a child from harm or potential harm. Harm to a child may or may not be the intended consequence. The following types of maltreatment involve acts of omission:[5]

- Failure to provide
  - Physical needs
  - Emotional needs
  - Medical/dental needs
  - Educational needs
- Failure to supervise
  - Inadequate supervision
  - Exposure to violent environments

Child physical abuse: The intentional use of force against a child that results in, or has the potential to result in, physical injury. Physical abuse includes physical acts ranging from those which do not leave a physical mark on the child to physical acts which cause permanent disability, disfigurement, or death. Physical abuse can result from discipline or physical punishment.[6]

Child sexual abuse: Child sexual abuse occurs when a child is engaged in sexual activities that he or she cannot comprehend, for which he or she is developmentally unprepared and cannot give consent, and/or that violate the law or social taboos of society. The sexual activities may include all forms of oral-genital, genital, or anal contact by or to the child or abuse that does not involve contact, such as exhibitionism, voyeurism, or using the child in the production of pornography.[7]

Forensic Interview: A forensic interview is a process of asking, when feasible, non-leading and age appropriate questions to determine whether a crime against a child has been committed or if a child is in need of protection. A forensic interview should be performed by someone who is specially trained in child development and the many dynamics of child abuse.

Guardian Ad Litem: A GAL is a person appointed by a judge to conduct an independent investigation and advocate for the best interest of a child in the child's court case, which can include Child in Need of Aid cases where abuse or neglect is alleged, domestic violence cases where a restraining order

3 *National Children's Alliance*

4 http://www.cdc.gov/ViolencePrevention/childmaltreatment/definitions.html

5 http://www.cdc.gov/ViolencePrevention/childmaltreatment/definitions.html

6 http://www.cdc.gov/violenceprevention/pdf/CM_Surveillance-a.pdf

7 *Kempe CH. Sexual abuse, another hidden pediatric problem: the 1977 C. Anderson Aldrich lecture. Pediatrics. 1978;62 :382 –389*

is filed on behalf of the child, in juvenile delinquency cases, in private child custody cases between divorcing parents, or in adult criminal cases where there is a child victim. A GAL may or may not be an attorney, and must meet specific qualifications.

ICWA worker: A person who represents the tribe in an Indian Child Welfare Act case.

Multidisciplinary team: A group of professionals and agency representatives brought together because of a report of concern that a child has been maltreated and/or that a crime has been committed against a child (the initial response). The MDT also continues to meet to provide ongoing consultation, follow up on services and case review. These meetings may include other people as listed in AS 47.14.300b.

Protective Services Report (PSR):
A report to OCS of suspected child abuse or neglect.

Victim Advocate: A trained individual who works with children and non-offending family members to provide support and referrals for services; may be a CAC staff member.

SECTION TWO: GUIDELINES FOR THE INITIAL RESPONSE

MDT Roles and Responsibilities in the Initial Response
General Guidelines

- To the best of their ability, each agency will work with and assist other members of the multidisciplinary team to ensure that the best interest and protection of children will be served.
- All reasonable efforts will be made by each agency to coordinate each step of the investigation/assessment process in order to minimize the number of interviews and interviewers involved with the child, as well as the number of medical exams.
- All agencies participating in this process will share pertinent case information with other appropriate agencies except as prohibited by law or policy.
- To the best of their ability, agencies should provide specially trained professionals with skills in forensic interviewing, assessment, and investigation to handle appropriate cases of child abuse and neglect.
- It is expressly understood that each agency will work within its departmental mandates and policies.

Role of the Office of Children's Services (OCS)

In the context of the initial response, it is the role of OCS to assess whether a parent or guardian has abused or neglected their child, or created conditions that caused such abuse or neglect. The steps involved in this process include:

- Receiving, documenting, screening, and prioritizing Protective Services Reports;
- Assessing "screened in"[8] allegations of in-home abuse or neglect of children;
- Notifying the appropriate law enforcement agency when a crime against a child may have been committed;
- Making a referral to CAC serving the area, in accordance with MDT team protocol, when a screened-in PSR involves sexual abuse or severe physical abuse, or when a child discloses sexual abuse during an assessment of less severe physical abuse or neglect. At a minimum, OCS staff should adhere to the following protocol when their safety assessment work involves a CAC:
    - Submit information from the protective services report to the CAC and coordinate with law enforcement and the CAC to schedule an interview of the child. Any information about the reporter's identity will be redacted prior to submission
    - If a non-offending caregiver (of physical or sexual abuse) is identified, request that caregiver bring the child to the CAC or to give their consent for the child to be transported to the CAC for an interview
    - If the non-offending caregiver refuses to allow the child to be transported, or there is no non-offending caretaker available, determine if there is probable cause to assume emergency custody of the child
    - Help coordinate the interview, making every effort to coordinate the interview with the necessary members of the investigation team to minimize trauma to the child. At a minimum, the OCS worker and a law enforcement officer should be present at the interview
    - Help coordinate any necessary follow-up medical examination(s) or services
    - Limit the number of interviews with a child.
    - Filing a civil child-in-need-of-aid petition, if warranted

Note: If the MDT initial response is not initiated by OCS, OCS is available as a professional resource to the MDT.

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8 If, after a preliminary evaluation of a PSR involving in-home abuse or neglect of children, OCS may either determine that a more complete assessment is needed ("Screened In") or determine that no further assessment is needed ("Screened Out")

Role of Law Enforcement

It is the role of the law enforcement detective/investigator/officer to investigate and determine whether a crime has been committed. The investigation includes but is not limited to:

- Ensuring that all interviews are completed, including victims, witnesses, suspects and other collateral people involved
- Conducting a thorough crime scene investigation
- Collecting evidence, including any corroborating evidence
- Preserving the chain of possession of any collected evidence

Law enforcement presents the case to the prosecutor's office or agency if enough evidence of the crime exists for a criminal prosecution. As a mandated reporter, law enforcement will notify OCS of any possible cases of child maltreatment, even if out of home.

Role of Federal Bureau of Investigation (FBI)

It is the role of the Federal Bureau of Investigation (FBI) to investigate certain federal criminal cases in Alaska and certain interstate crimes. When a serious child physical or sexual abuse case falls within federal jurisdiction, the FBI role includes:

- Working with OCS on child safety issues
- Working with Alaska State Troopers (AST), and/or other local law enforcement agencies on investigation
- Serving on the MDT when there is a current investigation involving the FBI

Role of the Child Advocacy Center (CAC)

It is the role of the CAC to provide a child-focused, neutral, community-oriented program in which representatives from many disciplines meet to provide a comprehensive approach to the investigation, assessment, treatment, and prosecution of child abuse cases. The CAC provides a facility for:

- Legally sound forensic interviews of children who may have been sexually abused, physically abused, severely neglected, drug endangered, or who may be a witness to violence, plus others depending on the resources of the CAC and MDT
- Medical services for children by specially-trained medical providers, including medical treatment, follow-up exams, and medical referrals, either on site or through collaboration with community medical providers
- Referrals for families and children to an appropriate mental health provider and other indicated services

Child Advocacy Centers in Alaska strive to meet the Accreditation Standards set forth by the National Children's Alliance (see Appendix 2).

Role of the Medical Provider

It is the role of the medical providers to be responsible for medical and forensic child abuse evaluation and treatment within their licensing scope of practice. This includes the following:

- Interpretation of exam findings (or lack of findings)
- Identification of unmet health care needs
- Careful and complete written and photographic documentation
- Work with other team members to promote future health and safety of the child
- Reassurance for child and family

Role of Mental Health

The role of the mental health provider includes:

- Notifying OCS, as a mandated reporter, of any suspected child maltreatment
- Assessing and treating the emotional and psychological needs of the child and non-offending family member, with a special emphasis on working with those who have experienced complex trauma
- Providing crisis intervention as needed.

Role of Victim Advocate

It is the role of the victim advocate to assist the child victim and/or witness during the initial response, which includes:

- Providing a crisis response and preparing the child for the forensic interview and medical evaluation, if any
- Supporting the non-offending caregiver during investigation, forensic interview, medical evaluation
- Explaining legal process to caregiver and child
- Providing logistical support for child and non-offending family, including arranging transportation, assistance with appointments for services, etc.
- Conveying child's and non-offending caregiver's concerns and abilities to prosecutor and MDT members
- Serving as a resource on the dynamics of abuse, responses of children, child development and psycho-social needs of child victims

Roles of Tribes/Tribal Organizations

Under federal law, Tribes and Tribal organizations have a specific additional mandate regarding initial response to suspected or known child abuse. Mandatory reporters of child abuse who are employed by a Tribe or Tribal organization that receives federal funds are obligated to report suspected child abuse to both local child protection and local law enforcement agencies.[9] Except for Chevak, Metlakatla and Native Village of Barrow, the local child protection agency is OCS; local law enforcement may be Alaska State Troopers, City Police or Borough Police.

In addition to these mandatory reporting duties, Tribes and Tribal organizations may have a consultative role to address cultural and family dynamics in specific cases, and develop and/or assist in developing community education efforts. Tribes and Tribal organizations may have programs and services that can provide direct support and assistance to the child and family as well.

9 *Public Law 101-630, Indian Child Protection and Family Violence Prevention Act*

Forensic Interviewing of Children[10]

The forensic interview can empower a child to disclose maltreatment in a legally defensible manner.[11] Forensic interviews are typically the cornerstone of a child abuse investigation, effective child protection and subsequent prosecution. Actions taken at the initial forensic interview may significantly impact the child's understanding of and ability to respond to the intervention process and/or criminal justice system, and may also mark the beginning of the journey to healing for the child and family. The best forensic interviewing practice includes:

- An age-appropriate, neutral interview setting
- Effective communication among MDT members
- Utilization of legally sound and culturally informed interviewing techniques
- Appropriately trained and supervised interviewers

"Actions taken at the initial forensic interview may significantly impact the child's understanding of and ability to respond to the intervention process and/or criminal justice system, and may also mark the beginning of the journey to healing for the child and family."

At a minimum, forensic interviews should be child-centered and coordinated to avoid multiple interviewers and duplication in questions asked of the child.

The purpose of a forensic interview is to obtain a statement from a child, in a developmentally and culturally sensitive, unbiased and fact-finding manner that will support accurate and fair decision making by the involved multidisciplinary team in the criminal justice and child protection systems. The status of the individual conducting the forensic interview may vary, depending on the case circumstances and location, but in all situations, it is recommended that the forensic interviewer have initial and ongoing formal forensic interviewer training. The interviewer may be a CAC employee, law enforcement officer, OCS worker, medical provider, federal law enforcement officer or other MDT members, depending on the situation and who is available.

Key elements of a child forensic interview include the following:

- Introductions and rapport building
- Assessment of developmental and cultural factors influencing communication
- Age appropriate language and formulation of questions
- Explanation of rules of the interview
- Exploring the potential for abuse in as non-leading a manner as possible
- Gathering details surrounding any disclosure
- Screening for other types of abuse, neglect or mental injury
- Use of aids such as free hand drawing and body diagrams as needed to help child communicate

The CAC/MDT protocol should set out the required qualifications of the forensic interviewer, including minimum specialized training, the method for sharing among MDT members information collected in the forensic interview, and the mechanisms for collaboration and peer review.

Ongoing education in the field of child maltreatment and/or forensic interviewing is essential for those conducting forensic interviews of children. Additionally, the importance of peer review cannot be overstated. As noted by Michael Lamb, "interviewers continue to maintain or improve their skills only when they regularly review their own and others' interviews closely, discussing their strategies, successes and mistakes with other interviewers"[12] .

In response to concerns about defense attorney attacks on peer review, Victor Vieth states: "Simply put, whatever the MDT does or does not do as part of the forensic interviewing process, including peer review, will be attacked by defense counsel." "The MDT should not focus on avoiding a defense attack

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10 Based on the Accreditation Standards of the National Children's Alliance, which all CACs in Alaska are required to strive to meet

11 Victor Vieth, Director, National Child Protection Training Center, Winona State University

12 Lamb, et al, A structured forensic interview protocol improves the quality and informativeness (sic) of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol, 31 CHILD ABUSE & NEGLECT 1201, 1210 (2007).

of the peer review process, any more than the MDT should focus on conducting a forensic interview in a manner to avoid a defense attack. [13]

Cultural Considerations in Forensic Interviewing of Children

"It should never be assumed that English is a universal language understood by all children."

Research indicates that members of different cultural groups may respond differently to children's disclosure of sexual abuse.[14] A child's cultural background may also impact upon the child's appraisal of the abusive experiences (e.g., level of self-blame) and the level of social support that the child may receive. In addition, the way emotions may or may not be expressed is also related to culture and ethnicity. In the investigative process, the interviewer should explore as appropriate:

- family structure (e.g. extended, nuclear, single), gender role expectations,
- child care practices,
- financial management of the household,
- community/country of origin and reasons for immigration or transfer to urban areas (if Alaska Native),
- any contact with family in the village/country of origin, religious belief systems, social networks, and
- attitudes about sexual violence.

Interviewers should integrate these cultural concerns into the interview process. Furthermore, the factors that make it more difficult for some children to disclose sexual abuse are culturally related (e.g., gender role expectations), and cultural issues may also contribute to the possibility of recantation.

Language proficiency is another important consideration for the interviewer. It should never be assumed that English is a universal language understood by all children. Ideally, children should be asked what language they speak at home, as well as what language they would prefer to use in talking to investigators. Children may use language terms for body parts, for certain actions, for relationships and for certain individuals, and they may not know the English word for these things or people. There may be a taboo about saying words for private parts or sex acts, especially with people outside of the family. Nicknames are widely used in some cultures, and children may not know a person's formal name, only their nickname such as "Junior" or "Chubby".

Non-verbal expression, body language and posture are interpreted differently in different cultures with great variation as to the meaning. The interviewer should not presume that a bent-over posture or a lack of eye contact, for instance, means a person is not truthful, or that alert posture and direct eye-contact means the person is truthful. Understanding the child's specific cultural norms for non-verbal expression is an important aspect of the forensic interview.

Translation/interpretation, whether of spoken language or of non-verbal communication, in and of itself, raises additional considerations, and it is important that the MDT include individuals with knowledge and understanding of the unique cultural aspects of the child and family/caregivers or who are willing and able to access such expertise when needed.

13 *Victor Vieth, In the Shadow of Defense Council: Conducting Peer Reviews of Forensic Interviews in an Age of Discovery*

14 *Feiring, C., Coates, D.L., & Taska, L.S. (2001). Ethnic status, stigmatization, support and symptom development following sexual abuse. J. of Interpersonal Violence.16: 1307-1329*

Medical Evaluation for Child Maltreatment

All CACs in Alaska evaluate children for sexual abuse; many also offer the ability to evaluate children for physical abuse, neglect and drug endangerment.

Purpose of the Medical Evaluation
The majority of children for whom sexual abuse is a concern will have normal or non-specific anal-genital exams. There are a number of reasons for this, including:

- Late disclosure
- Delays in seeking care
- Types of sexual abuse that do not cause significant physical trauma: fondling, oral-genital contact, rubbing, touching over clothes
- Elasticity of vaginal and anal openings
- Rapid healing in children
- Medical conditions that can be confused with sexual abuse

Also, research shows that that it is unusual to find any forensic evidence in pre-pubertal children, especially if they are seen more than 24 hours after the abuse has occurred.[15], [16]

Even in physical abuse cases, exams can be non-diagnostic because of delays in evaluation, medical conditions that can be confused with abuse and the overlap in findings that can occur in inflicted and accidental injuries.

Therefore the purposes of the medical evaluation include the following:

- Help ensure the health, safety and well being of the child
- Diagnose, document, and address medical conditions resulting from abuse and neglect
- Differentiate medical findings that are indicative of abuse from those which may be explained by other medical conditions
- Diagnose, document, and address medical conditions unrelated to abuse (within the scope of practice of the individual provider)
- Assess the child for any developmental, emotional, or behavioral problems needing further evaluation and treatment including referrals as necessary
- Collection, preservation and documentation of forensic material if indicated by history and timing
- Reassure and educate the child and family to assist in emotional healing

Indications for a Medical Evaluation
All children who are suspected victims of child sexual and/or physical abuse should be offered a medical evaluation.[17] Health care providers working with the CAC and MDT should determine those situations (indicators) in which medical evaluations should be "required" (with the provision that children are never forced to have any portion of an exam unless medical/surgical intervention is necessary). These indicators should be part of the CAC's written protocols.

Indicators to consider include:

- Any child who discloses direct oral, anal or genital contact (skin to skin) by a suspect's body part or an object
- Any child with anal or genital pain, bleeding, or abnormal discharge
- Any child with a non-neonatal transmission of a sexually-transmitted infection
- Any child disclosing physical abuse or observed to have possible signs of non-accidental injury, including
    - Unexplained or unwitnessed injuries to a young child
    - Injuries inconsistent with history or age and development
    - Patterned injuries
- Any child with significant signs of neglect

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15 Christian et al; Pediatrics July 2007
16 Young et al; Archives Pediatric & Adolescent Medicine June 2006
17 Medical Standard from the National Children's Alliance

- Any child where there is a concern of endangerment due to drug exposure
- Any child who is highly suspected of being recently abused, or who may be reluctant to disclose abuse, or who is preverbal
- Other considerations for medical exams include:
    - Young children exhibiting significant sexualized behavior
    - History or exam findings of concern for abuse noted by another health care provider
    - Adolescents disclosing "consensual sex" if the teen is under 16 years of age

Access for Medical Evaluations

The National Children's Alliance Medical Standard states that: **"Specialized medical evaluation and treatment services are routinely made available to all CAC clients and coordinated with the multidisciplinary team response."**

In Alaska, some CACs offer on-site medical evaluations through employed or contract medical providers. Others arrange for medical exams to be conducted at the local hospital, clinic, or at another CAC with medical providers on staff.

CACs need to make arrangements for those situations where children require evaluation after regular business hours or at Emergency Department or in-patient hospital care – for example, a child with serious injuries requiring diagnostic testing and treatment beyond the scope of the CAC. Policies should be in place for transport to the nearest hospital if the child first presents to the CAC, as well as for examination of the child, documentation of injuries, and forensic evidence gathering as appropriate.

Medical evaluations arranged through the CAC should always be available regardless of the child's and family's ability to pay. In Alaska it is possible to bill third party payers including private insurance and Medicaid for exams conducted on children under the age of 16. In some situations and areas, such as sexual abuse exams conducted as part of a criminal investigation (or on children 16 and older), law enforcement may pay for the exam. The Alaska Violent Crimes Compensation Board is another potential resource for assisting with the costs of exams, diagnostic testing, and transportation to and from the CAC when other resources are not available.

Process for the Medical Evaluation

General Principles

Duplicative exams should be avoided whenever possible. If feasible, the child's exam should be conducted by someone with specialized training and experience in conducting medical evaluations for abuse and neglect. In addition, photo-documentation of exam findings allows for peer review and expert consultation, which also helps obviate the need for another exam.

All abuse exams should generally consist of a complete head-to-toe physical. Diagnostic testing (i.e., radiological and laboratory testing) is obtained and/or ordered by the medical provider as clinically indicated.

Every effort should be made to avoid duplicative interviewing. If the medical provider is unable to observe the child's forensic interview, then a summary of pertinent information should be provided prior to the exam. The medical provider will need to obtain a medical history, including chronic health conditions, prior injuries, surgeries or procedures (especially those that may affect interpretation of findings), medications, allergies, and relevant family medical history (such as bleeding disorders in a child with bruises, or warts in a child with possible HPV). Clarification questions about the abuse may also be necessary, such as asking the cause of a particular injury found on the child's body. Every effort should be made to ask non-leading questions, and any questions asked along with the child's responses should be noted in the medical report. Whenever possible, the child's exact words should be used and identified with quotation marks.

Consent

Ideally, there will be a non-offending legal guardian available to give consent for the child's medical exam. Alaska law does allow for the medical evaluation, x-rays and photographs to be taken of children for whom there is a concern for abuse without parental consent;[18] however parents should be notified as soon as reasonably possible, and the team should discuss how and when this will happen. In addition, Alaska law also allows adolescents to seek medical care related to sexually transmitted infections, pregnancy, and contraception without parental consent. In those instances where the medical evaluation is part of a criminal investigation, the health care provider should encourage the adolescent to talk to their parents and should coordinate with law enforcement concerning parental notification.

Exam Steps

The exam for child maltreatment is a comprehensive head-to-toe evaluation, including height, weight, and head circumference for children less than two years of age, and vital signs. The child's head, eyes, ears (including external ears, canals and ear drums), nose, mouth, neck, heart, lungs, abdomen, back, extremities, and buttocks should all be evaluated. All skin surfaces should be visualized, with careful attention to those areas which can easily be missed such as behind the ears. Oral frenula should be examined for evidence of trauma as well. A colposcope is ideal for examination of the anal-genital region; however, it may not always be available. Any source of magnification can be used if necessary, including an otoscope. Speculum exams are reserved for post-pubescent children. There are rare situations in which a medical need exists for internal visualization of the anal or vaginal canal beyond what can normally be seen with positioning and gentle external traction. Examples include the need for surgical repair or unexplained vaginal or anal bleeding. In this case, the medical provider will work with the local hospital to arrange an exam under sedation.

Diagnostic Testing

A complete description of diagnostic testing for child sexual and physical abuse is beyond the scope of this document. It is vitally important for health care providers to stay up to date with the literature on this topic, and to consult with more experienced providers as needed. Of note, however, is that Alaska has high rates of Chlamydia trachomatis and rising rates of gonorrhea. In addition, nucleic acid amplification testing (commonly called "PCR") for both of these infections can be obtained easily through a non-invasive, non-clean catch urine sample for pre-pubertal children and on the same sample as liquid cytology pap smear samples from adolescents – thus providers should have a low threshold to screen for at least these two infections on child sexual abuse cases where indicated by history or exam.

Exam Documentation

Photographic documentation of examination findings is the standard of care. Photo-documentation enables peer review, continuous quality improvement, and consultation. It may also prevent the need for a repeat examination. Photo-colposcopy is normally used for documentation of the anal-genital area; however, in the event a colposcope with camera is not available, a digital camera maybe used to document exam findings. Digital photo-documentation should be used for visible physical abuse or neglect findings.

Written documentation may involve dictated notes, forms or an electronic medical record if required by the hospital or clinic providing medical exam services for the CAC. The Children's Justice Act Task Force, in collaboration with the Alaska Children's Alliance, has developed standardized forms which may be used electronically and are currently used in a number of the CACs in the state.

Treatment

The medical provider works with other team members to develop an appropriate treatment plan for the child and family, which may include but is not limited to any of the following:

- Further diagnostic testing
- Follow-up exams and photos

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18 AS 25.20.025

- Prescriptions and medical treatment either ordered or administered at the CAC
- Follow-up care and referrals, including:
    - Counseling
    - Primary and/or specialty medical care

Provisions must also be made for evaluation, treatment and/or referral for medical conditions found at the time of the exam.

Sharing of Exam Findings with the Team

The CAC's written protocols should describe how medical exam findings will be shared with MDT members in a timely manner, and in what format. Remember that the duty to report suspected child abuse is a clear exception to HIPPA privacy requirements.[19]

Training Criteria for Medical Providers

Medical evaluations should be conducted by health care providers with specialized training and experience in child abuse. This can include physicians, nurse practitioners, physician assistants, and sexual assault nurse examiners with pediatric training and expertise. All medical providers should operate within the scope of their practice as outlined by their state license.

Acquisition of adequate training can be through any of the following:

- Board certification in Child Abuse Pediatrics
- Child Abuse Fellowship training or child abuse Certificate of Added Qualification
- Documentation of satisfactory completion of competency-based training in the performance of child abuse evaluations
- Documentation of completion of at least 16 hours of formal medical training in child sexual abuse evaluation (the absolute minimum as recommended by the National Children's Alliance)

Continuous Quality Improvement

The National Children's Alliance Medical Standard states that the CAC must provide opportunities for ongoing training and peer review. In Alaska, most medical providers will not be conducting hundreds of child abuse exams each year. Therefore, ongoing training and peer review as well as the ability to access expert opinions are critical to develop and maintain competency.

The National Children's Alliance Medical Standard recommends that ongoing education in the field of child sexual abuse should consist of a minimum of 3 hours of CEU/CME credits every 2 years. A number of viable options are open for Alaskan medical providers for training, including:

- The biennial Alaska Child Maltreatment Conference, organized by the Alaska Children's Alliance with sponsorship from the Alaska Children's Justice Act Task Force and Western Regional Child Advocacy Center
- The National Children's Alliance Medical Training Academy (basic and advanced), held at least twice yearly through a partnership with Midwest Regional Child Advocacy Center
- The San Diego International Conference on Child and Family Maltreatment, sponsored by the Chadwick Center for Children and Families, usually held in January each year (a nice break for we Alaskans!)
- The National Symposium on Child Abuse, sponsored by The National Children's Advocacy Center (the very first CAC) and held in Huntsville, Alabama, in March each year (also a nice break for Alaskans!)
- The American Professional Society on the Abuse of Children Annual Colloquium, held each summer in various locations

Membership in the American Professional Society on the Abuse of Children (APSAC) and the International Society for the Prevention of Child Abuse and Neglect (ISPCAN) both include the benefit of their respective journals as well as access to their websites and resources.

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19 http://aappolicy.aappublications.org/cgi/reprint/pediatrics;125/1/197.pdf

All medical providers affiliated with Alaskan CACs have the opportunity to become members of the Alaska Children's Alliance (ACA) Medical Peer Review Group and participate in monthly peer review as well as access expert consultation. Further information may be obtained through the local CAC or from the chapter coordinator for the ACA.

Cultural Considerations Regarding Medical Evaluations for Child Abuse

Many of the same concerns arise here as were discussed in the Forensic Interview section regarding cultural considerations. In addition to those areas discussed, the child's cultural beliefs may require that the medical evaluation be conducted by a person from the same gender as the child. Children may have been taught not to speak to a person of the opposite gender regarding private parts or sexual issues.

The child's cultural practices and teachings about the privacy or lack of privacy about their own body can impact how the child tolerates and cooperates with the medical evaluation. The medical evaluator needs to ensure that this step does not cause further trauma to the child because of cultural beliefs and practices.

Victim Advocacy

Victim Support and Advocacy within a CAC[20]

Child victims and their non-offending family members have a constitutional right to be treated with dignity, respect and fairness throughout the criminal justice process.[21] Victim support and advocacy should reduce trauma for the child and non-offending family members and thus strengthen the victim's involvement in the investigation and prosecution, improving overall outcomes for child victims. Victim and non-offending caregiver support from the time of disclosure throughout the case and beyond sentencing is a necessary component in the MDT's response. By keeping the child and family informed and focusing on their needs during the investigation and justice process, the victim advocate empowers the child and family to focus on well-being and healing. Victim advocacy has also been proven to increase guilty verdicts in sexual abuse cases, suggesting that better prepared and relaxed child victims and witnesses are more credible.[22]

> "By keeping the child and family informed and focusing on their needs during the investigation and justice process, the victim advocate empowers the child and family to focus on well-being and healing."

At the CAC, more than one person may serve as victim advocate, and it is important that this role/function is defined clearly within the CAC/MDT's written documents as to how the needs will be met. Some CACs have staff (e.g. family advocates, care coordinators, victim advocates, and child life specialists) that handle advocacy functions, and some CACs have a cooperative arrangement with a local victim advocacy agency (e.g., domestic violence advocates, rape crisis counselors, Court Appointed Special Advocates), and/or system-based advocates (e.g., victim witness coordinators, law enforcement victim's advocates). Some CACs use more than one of these resources.

Procedures should be in place to provide initial and on-going support and advocacy for the child and non-offending caregiver. At a minimum, victim support and advocacy should include the following services:

- Providing crisis response and preparing child for interview, medical evaluation
- Supporting non-offending caregiver during investigation, forensic interview, medical evaluation
- Explaining legal process to caregiver and child
- Providing education to caregiver and extended family members regarding the impact of abuse, dynamics of child sexual abuse and ways to support child, promote healing
- Providing logistical support for child and non-offending family, including arranging transportation, assistance with appointments for services, etc.
- One-on-one preparation of child for testimony in court at age-level
- Conveying non-offending caregiver and child concerns and abilities to prosecutor and MDT members
- Explaining victim rights and helping child and/or caregiver to complete Victim Impact Statements
- Supporting child and non-offending caregiver during trial
- Serving as a resource and possible expert witness on dynamics of abuse, responses of children, child development and psycho-social needs of child victims
- Making referrals for services to child and/or non-offending family members

Cultural Considerations Regarding Victim Advocacy

The victim advocate will likely have the most contact with the child and caregiver following the initial investigation and thus is in the strongest position to identify cultural issues and needs that impact the child's and family's cooperation with the system. It is essential that the victim advocate diligently learn about the child's lifestyle and culture (in the broadest sense)

20 *Based on the Accreditation Standards of the National Children's Alliance, which all CACs in Alaska are required to strive to meet (see Appendix 2)*

21 *State of Alaska Constitution, Article I, Section 24*

22 *Child Victims and Witnesses: A Handbook for Criminal Justice Professionals, USDOJ 1998*

to identify values and practices that may offer support and healing strategies throughout the case. The victim advocate also advises other MDT members regarding these issues to promote continuity of response for the victim.

The victim advocate needs to be aware of the role that extended family and the child's "community" (whether a whole village or a neighborhood in the city) has in the child's life and educate/inform those in the child's environment about abuse dynamics as well as ways to support this child in her/his healing journey. This may involve working with cultural authority figures such as elders, spiritual leaders, shaman, priests, etc.

Communication and Information Sharing

State law requires OCS, as a general rule, to keep confidential information that it has obtained from a report of harm (Protective Services Report) and any investigation or services arising out of that report.[23] However, an exception to this general rule requires OCS to provide appropriate confidential information to members of the investigation MDT as necessary for the MDT member to perform the member's duties.[24] OCS may not share the reporter's name but may share the contents of the report with the MDT members.[25]

Other members of the MDT may also have confidentiality restrictions applicable to them; for example, physicians must follow the federal Health Insurance Portability and Accountability Act (HIPAA)[26]. However, HIPAA's general rule (that protected health information may not be released by a covered entity without the patient's consent or court order) does not apply during these parts of the initial response: (1) when child abuse or neglect is suspected, the medical provider is a mandatory reporter and may disclose a child's protected health information to OCS in the course of reporting the suspected child abuse or neglect and (2) during an investigation of the report, the medical provider may disclose protected health information about the child to OCS without parental notification or authorization.

HIPAA also allows disclosure of protected health information (1) to other health care professionals if necessary for treatment of the patient and (2) to law enforcement if (a) the information is necessary for immediate law enforcement or for a criminal investigation in which the investigation would be compromised if the information was not immediately provided and (b) the health care provider determines, using his/her best professional judgment, that the disclosure is in the best interest of the victim.[27]

Records and information collected by the MDT are not subject to discovery or subpoena in connection with a civil or criminal proceeding and not subject to public disclosure.[28]

Cultural Considerations Regarding Information Sharing

Confidentiality can be a challenge in small communities. It is common in rural Alaska communities for health care providers, public safety officers, service providers and ICWA workers to be related to many individuals in the village. Thus it is extremely important that procedures are in place for releasing and sharing information that will assure those closely related to the child or the suspect cannot access any information on the child's disclosure or other investigative information. Medical, social services and school records that might normally be released to the parent/caregiver should be kept in a separate, secure location in the village as well as the hub when child maltreatment is suspected.

23 *AS 47.10.093(a) and (f); 7 AAC 54.040(a)*
24 *AS 47.10.093(b)(7).*
25 *7 AAC 54.040(c)*
26 *45 CFR 160, 162, and 164*
27 *45 CFR 164.512*
28 *AS 47.14.300(d) & (f)*

SECTION THREE: CULTURE AND DIVERSITY CONSIDERATIONS IN CHILD ABUSE EVALUATIONS

Culture is one of the filters that people use to interpret life experiences. Culture is different from race or ethnicity. It is not based on the color of our skin but on our accumulative life experiences. Culture encompasses many different factors: language, family structure, socioeconomic status, gender and gender roles, moral and religious values, traditions, history, parenting practices, sexual attitudes, tolerance level for emotionalism, and individual vs. group orientation.[29] MDTs need to maintain vigilance on matters of culture in every case; it is not acceptable to apply one's own cultural values standards and beliefs in these cases, nor is it appropriate to presume that only people of color have "culture."

Diversity influences nearly every aspect of child maltreatment response in Alaska. The concept of diversity encompasses acceptance and respect, and includes an understanding that each individual is unique and recognition of our individual differences. These differences can be along the dimensions of culture, race, ethnicity, gender, sexual orientation, socio-economic status, age, physical abilities, religious beliefs, political beliefs, or other ideologies. Practicing diversity is the exploration of these differences in a safe, positive, and nurturing environment. In the MDTs setting this means understanding each other and moving beyond simple tolerance to embracing and celebrating the rich dimensions of diversity contained within each individual.

"MDTs must be willing to become educated and competent in adjusting to the diverse world views in order to successfully investigate and prosecute in a respectful manner."

These considerations, along with developmental considerations, bring a variety of unique circumstances to most investigations. MDTs must be willing to become educated and competent in adjusting to the diverse world views in order to successfully investigate and prosecute in a respectful manner.

Addressing cultural differences and respecting diversity in the CAC and MDTs means that members should seek guidance from appropriate and knowledgeable sources when responding to child victims from an experience or context that is not familiar to the MDT member. The MDT must be deliberate and introspective during the initial investigation, including determining who will conduct the forensic interview and what questioning techniques will be used, and when drawing conclusions regarding the occurrence of abuse. Furthermore, whether the child is from a remote rural community or from a cultural context within an urban setting, the MDT must not make assumptions as to the history and comfort of the child with the response system, but rather must diligently assess the child's context and history.

Language – both verbal and non-verbal – has many interpretations. A child may live in dominant society, attend school and speak English fluently yet still be more comfortable within their own cultural context and communication norms. Research indicates that members of different cultural groups may respond differently to children's disclosure of sexual abuse.[30] A child's cultural background may also impact the child's appraisal of the abusive experiences (e.g., level of self-blame) and the level of social support that the child may receive. In addition, the way emotions may or may not be expressed is also related to culture and ethnicity. In the investigative process, the interviewer should explore:

- family structure (e.g., extended, nuclear, single),
- gender role expectations, child care practices,
- financial management of the household,
- community/country of origin and reasons for immigration or transfer to urban areas (if Alaska Native),
- any contact with family in the village/country of origin,
- religious belief systems, social networks, and
- attitudes about sexual violence.

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29 *New York State Children's Justice Task Force "Forensic Interviewing Best Practices", 2003*

30 *Feiring, C., Coates, D.L., & Taska, L.S. (2001). Ethnic status, stigmatization, support and symptom development following sexual abuse. J. of Interpersonal Violence 16:1307-1329.*

Advocacy for children must naturally begin where the child is physically, emotionally and developmentally, and thus be accountable for creating comfort and safety for the child while they are dealing with the system, drawing on the strengths and familiarity of the child's own cultural environment. It is incumbent on the victim advocate to adapt their advocacy skills and exercise creativity in addressing the child/family needs, providing support that will enable the child to cooperate with the investigation and prosecution.

SECTION FOUR: FOLLOW-UP ROLES AND RESPONSIBILITIES

MDT Follow-Up Roles and Responsibilities

After the initial response outlined in Section Two, representatives from the following disciplines are typically part of the ongoing MDT that meet for the purpose of case review and follow up.

Role of the Office of Children's Services (OCS)

If the initial assessment of alleged child maltreatment determines that further OCS action is warranted, such action may include:

- Case management of on-going family cases
- Facilitation of services for prevention of removal
- Facilitation of reunification services to families with children in out-of-home placement
- Permanency planning services up to and including adoption and guardianship

Regardless of OCS involvement in a case, an OCS representative continues to be a member of the MDT and provides expertise and input when cases are brought before the MDT.

Role of Law Enforcement

The law enforcement agency may be involved with additional investigation tasks at the direction of the prosecutor and/or if a child makes additional disclosures or provides more detailed information after the case has been accepted for prosecution. The investigating officer will also be called upon to testify at Grand Jury and at the trial.

Role of the Child Advocacy Center

As part of their follow up role, the CAC staff provides:

- Follow-up support and case management services
- Referrals for other services within the child's community
- Maintenance of statistical case information including case disposition tracking
- Assist with scheduling and creating and providing an agenda for MDT case review meetings

Role of State of Alaska Department of Law – District Attorney's Office (DAO)

The DAO may become involved in the investigation of any possible criminal case. After an investigation is complete, the DAO determines whether or not the case can be proven beyond a reasonable doubt. If the determination is to proceed with prosecution, the DAO is responsible for filing criminal charges and moving the case through the formal legal system. The goal is to prosecute all provable cases. The final authority concerning prosecution rests with the DAO.

In addition, a DAO representative is usually a member of the MDT and provides expertise and input when cases are brought before the MDT.

Role of State of Alaska Department of Law – Attorney General's Office (AGO)

The AGO may become involved in the assessment of possible child abuse or neglect. If the decision is made to file a child-in-need-of-aid petition, the AGO responsibilities include:

- Providing legal advice and representation to the Office of Children's Services in civil child protection proceedings
- Working with OCS and other team members to hold offenders accountable in the civil justice system and provide protection for the child

In addition, an AGO representative is usually a member of the MDT and provides expertise and input when cases are brought before the MDT.

Role of Medical Provider

As part of their follow-up role, the medical provider:

- Ensures medical test results are communicated to the patient/family/caregiver and (as appropriate) MDT members
- Provides treatment as indicated
- Provides expert testimony as needed
- Provides education and training for other MDT members
- Participates in the Multidisciplinary Team
- Networks with child abuse groups and organizations

For further information, see specific section on Medical Evaluation.

Role of Victim Advocate

As part of their follow-up role, the victim advocate may assist with some or all of the following tasks:

- One-on-one preparation of child for testimony in court at age-level
- Helping child and/or caregiver to complete Victim Impact Statements
- Support for child and non-offending caregiver during trial
- Serving as a resource and possible expert witness on dynamics of abuse, responses of children, child development and psycho-social needs of child victims

For further information, see specific section on Victim Advocacy.

Role of Mental Health Provider

As part of their follow-up role, the mental health provider:

- Provides treatment planning that identifies and incorporates patient clinical problems
- Facilitates groups and individual treatment sessions
- Continuously monitors patient progress in treatment and outcomes as a result of interventions
- Makes ongoing assessment of patient mental health status and assist in crisis management
- Documents a thorough assessment, including mental status exam, interventions and activities related to the patient's plan of care
- Provides expert witness testimony as needed
- Participates in the MDT

Role of Tribes and Tribal Organizations

When a child is eligible for Tribal programs and services from a Tribal organization, the Tribe or Tribal organization may assist with some or all of the following tasks:

- Provide supplemental face-to-face support/liaison function when the victim advocate, prosecutor and law enforcement agencies are located elsewhere
- Assist agencies in making contact with the child and family residing in the village
- Provide follow-up medical monitoring and treatment
- Assist victim advocate with obtaining pertinent Victim Impact Statements
- Provide cultural and language interpreter
- Provide community and family dynamics updates for prosecutor in preparation for trial
- Support for child and non-offending caregiver during trial
- Serving as a resource and possible expert witness on cultural issues including cultural norms and consequences, cultural needs of child victims

Role of Guardian Ad Litem (GAL)

The GAL represents the best interest of the child in a CINA proceeding in those cases where OCS has taken legal custody of a child. The GAL determines and advocates for the best interest of the child given the child's situation, taking into account the child's age, maturity, culture, and ethnicity, and public laws and policies regarding family preservation and timely permanency planning. The GAL's responsibilities are to:

- Conduct ongoing independent investigations, including as reasonable and appropriate in person visits with the child, review of records, interviews with parents, social workers, teachers, and other persons as necessary to assess the child's situation and observations of the child's interactions with parents or other potential caregivers
- Consult professionals as necessary to determine the best interest of the child
- Monitor the provision and utilization of family support services
- Monitor services to the child provided by educational, medical, mental health, and other community systems and ensure these services are promoting the best interest of the child
- Explain the court proceedings, the role of a GAL, and the child's rights to the child when appropriate, in language and terms the child can understand; encourage older children to attend and participate in court hearings as appropriate and determine whether and under what conditions younger children should attend court hearings
- Determine whether to seek appointment of a GAL or attorney in related legal proceedings
- Determine whether to call the child as a witness or determine appropriate action if others seek the child's testimony, and familiarize the child with the process of testifying

Other individuals with specific expertise or knowledge may participate in the ongoing MDT according to local protocols or the needs of the specific case.

Role of State of Alaska Division of Juvenile Justice (DJJ)

DJJ is responsible for both reporting child abuse and neglect of its clients and for prosecution of juveniles who have allegedly committed offenses that would be crimes if committed by an adult, including sexual abuse offenses. DJJ will review sexual abuse offenses committed by juveniles to determine whether there is sufficient admissible evidence to support a formal adjudication. DJJ will also consider the minor's age, maturity level, emotional and intellectual capacity, family circumstances, and prior personal victimization, among other factors, to determine whether formal or informal action should be taken. The goals of DJJ are to hold these juveniles accountable for their behavior, provide for their victims, and assist the juveniles and their family to gain skills to prevent further offenses.

DJJ will also provide information to the MDT to assist in the investigation of child abuse and neglect cases.

Unique Challenges for Mental Health Service Provision in Alaska

Mental health services may be provided on site at CACs or through collaboration with community mental health providers; however, many challenges face Alaska in delivering these services. With a lack of resources along with the difficulties in recruiting, retraining and retaining qualified mental health personnel, many rural areas have no local mental health services other than the occasional itinerant provider. And of those rural areas that do have mental health services, many personnel are serving on a part-time basis, making it difficult to provide consistent and recommended follow-up services. A qualified workforce is needed to meet the needs of these children and families. Greater travel distance to outpatient services is common in rural settings and is associated with fewer mental health follow-up visits by patients as well as a lesser likelihood of receiving care in accordance with mental health services prescribed through an initial assessment.

Cultural Considerations Regarding Mental Health Evaluation and Treatment

Any mental health evaluation should include consideration of the child's cultural context and diversity factors within the family and community. Standard Western evaluation methods may not be comprehensive enough to encompass the strengths of the child's culture or the depth of impacts from historical trauma on the family and community. During the early contacts with the child and caregiver, mental health providers should identify culture and diversity dynamics and tailor treatment recommendations and plans to assure effective and appropriate services are offered. It is essential that mental health service providers diligently learn about the child's lifestyle and culture (in the broadest sense) to identify values and practices that may offer support and healing strategies throughout the case. The mental health provider also advises other MDT members regarding these issues to promote continuity of response for the child.

The mental health provider may not have a service role if the child and family are not willing. However, the mental health provider should also assist in educating and informing those in the child's environment about abuse dynamics as well as ways to support this child in her/his healing journey. This may involve working with cultural authority figures such as elders, spiritual leaders, shaman, priests, etc.

Records Handling and Storage

Protection & maintenance of records

Each CAC should develop policies and procedures for what records will be kept on site and how to maintain the confidentiality of those records. Confidentiality policies and procedures for the multidisciplinary team should be in place to insure client privacy while allowing for the sharing of relevant information consistent with legal, ethical, and professional standards of practice as determined by AS 47.14.300.

MDT protocols should also establish guidelines for how and when records may be released. Medical records are subject to HIPAA guidelines; however, federal and state law do allow for information sharing as part of the investigation for suspected child abuse. The child's parent or legal guardian normally has the right to a copy of the child's medical record; an exception is made if sharing that information may pose risk to the child.[31] Examples include cases where a parent is the alleged offender, or a non-offending parent is non-protective and likely to share the information with the offender. When medical exams are performed at the local hospital facility, requests for such records should be referred to the hospital. If concerns are present about releasing such records to the parent, this information should be shared with the hospital.

Requests for a copy of the forensic interview tape (or viewing of the tape) should be referred to the agency with primary responsibility for the investigation (OCS or law enforcement).

Mental health records, even if the mental health services are provided at the CAC, should be kept in a separate confidential file which is not released except with court order.

It is essential that each MDT discuss and develop protocols to address issues such as:

- Ownership of information stored at the CAC
- Control and release of records stored at the CAC
- Data custody

The following statutes should be considered:
AS 40.25.120(a)(2) (Public records exception for juveniles)
AS 47.10.093 (OCS records)
AS 47.12.310 (Division of Juvenile Justice records)
AS 47.14.300(d) & (f) (MDT records)
AS 47.17.040(b) (OCS investigation records)
7 AAC 54.020 – 7 AAC 54.150 (OCS records)
45 CFR 160 and 164 (HIPAA regulations)
AS 18.66.200 (protection of disclosure of communications in certain situations)

Protection of evidence

Evidence collected at a CAC as part of a child abuse investigation may include the recording of the child's forensic interview; a copy of exam photos; a copy of the forensic medical report; and forensic evidence collected from the child's body. Such documentation and collection/preservation of evidence should be conducted according to CAC and MDT policies and procedures, as well as current Alaska Sexual Assault Evidence Collection Kit guidelines. A Chain of Custody[32] should be followed for all evidence gathered as part of a Sexual Assault Evidence Collection kit. In addition, it is recommended that a Chain of Custody be used for copies of exam photographs and forensic medical reports. The CAC should have a secure locked location for forensic evidence to be stored if law enforcement is not immediately available to take possession of the evidence.

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31 *45 CFR 164.502(G)(5)*

32 *Chronological documentation that ensures the physical security of samples, data and records in a criminal investigation from identification and collection through presentation to the court*

SECTION FIVE: RESOURCES FOR MDTS

This is a list of helpful resources for MDTs; some were also used in the development of this document.

General MDT

- *The APSAC Handbook on Child Maltreatment, Third Edition* -- Edited by John E. B. Myers, available at http://www.apsac.org/mc/page.do?sitePageId=54511
- *Child Abuse and Neglect User Manuals* – available at http://www.childwelfare.gov/pubs/umnew.cfm
- *Child Abuse Protocol Development Guide* – available at http://www.tribal-institute.org/download/Completed%20Protocol%20Guide%202003.pdf
- *Resource Guide For Parents, Caregivers and Service Providers Working With Alaska Native Children* – available at http://www.providence.org/resources/alaska/tchap/ak_cares.pdf
- *State of New Hampshire Attorney General's Task Force on Child Abuse and Neglect Protocols 3rd Edition 2008* – available at http://doj.nh.gov/victim/documents/lawenforcement.pdf

Forensic Interviewing of Children

- *Basic Guidelines for Forensic Interviewers in Child Sexual Abuse Cases in Indian Country and Alaska Native Communities* – available at http://www.tribal-institute.org/download/Guidelines%20for%20the%20Forensic%20Interview.pdf
- *The Forensic Interviewer at Trial: Guidelines for the Admission and Scope of Expert Witness Testimony Concerning an Investigative Interview in a Case of Child Abuse* – – available at http://www.wmitchell.edu/lawreview/documents/8.Veith.pdf
- *In The Shadow of Defense Counsel: Conducting Peer Reviews of Forensic Interviews in an Age of Discovery* – available at http://www.ncptc.org/vertical/Sites/{8634A6E1-FAD2-4381-9C0D-5DC7E93C9410}/uploads/{5C3E2603-E1FB-4EB1-8369-E5549FE62EFA}.PDF
- *New York State Children's Justice Task Force FORENSIC INTERVIEWING BEST PRACTICES*—available on request at http://www.nyscarcc.org/index.php

Investigation

- Crime Scene Investigations http://www.crime-scene-investigator.net
- *Portable Guides to Investigating Child Abuse* – available at http://ojjdp.ncjrs.gov/publications/PubResults.asp
- *Severe Child Injury Investigation and Review* – available at http://ican-ncfr.org/hmSevereInjuryReview.asp

Medical Evaluation for Child Abuse

- American Academy of Pediatrics policy statements and clinical guidelines – search by topic at http://aappolicy.aappublications.org/
- Child Abuse and Children with Disabilities http://childabuse.tc.columbia.edu/
- Child Abuse Evaluation and Treatment for Medical Providers – http://childabusemd.com/
- *Tips for Non-Native Medical Providers Working in Alaska Native Communities* – available at http://www.tribal-institute.org/download/Working_Native_Communities_03.pdf

Victim Advocacy

- Alaska Violent Crimes Compensation Board http://www.state.ak.us/admin/vccb/
- National Court Appointed Special Advocates (CASA) http://www.nationalcasa.org
- Office of Victims of Crime http://www.ojp.usdoj.gov/ovc

Mental Health

- *Child Physical and Sexual Abuse: Guidelines for Treatment* – available at http://academicdepartments.musc.edu/ncvc/resources_prof/ovc_guidelines04-26-04.pdf
- Indian Country Child Trauma Center Native -- specific treatment models for trauma, children with sexual behavior problems, and parent-child interaction therapy www.icctc.org
- National Child Traumatic Stress Network http://www.nctsn.org
- Sidran Traumatic Stress Foundation -- Provides education, training, research and information about abuse and healing www.sidran.org

- Trauma Information Page -- Treatment resources (free) and research www.trauma-pages.com

Legal

- The American Bar Association (ABA) Center on Children and the Law http://www.abanet.org/child/home.html
- National Association of Counsel for Children http://naccchildlaw.org
- National District Attorney Association http://www.ndaa.org/
- *THE IMPACT OF HIPAA ON CHILD ABUSE AND NEGLECT CASES* – available at http://www.pcsao.org/HIPAA/HIPAAChildAbuse.pdf

Other Website Resources

- Adverse Childhood Experiences studies http://www.cdc.gov/nccdphp/ace/
- American Humane Association http://www.americanhumane.org
- American Professional Society on the Abuse of Children www.apsac.org
- Bureau of Indian Affairs Alaska http://www.bia.gov/WhoWeAre/RegionalOffices/Alaska/index.htm
- Childabuse.com -- This site's mission is to provide information and raise awareness about child abuse http://www.childabuse.com
- ChildHelp USA www.childhelpusa.org
- Child Welfare Information Gateway -- A national resource for information on child abuse, neglect and welfare http://www.childwelfare.gov
- Child Welfare League of America http://cwla.org/
- International Society for Prevention of Child Abuse and Neglect http://ispcan.org/
- National Children's Alliance (NCA) http://www.nca-online.org/pages/page.asp?page_id=4028
- National Center for Missing and Exploited Children http://www.missingkids.com
- National Center on Shaken Baby Syndrome http://www.dontshake.org
- National Data Archive on Child Abuse and Neglect http://www.ndacan.cornell.edu
- Office for Victims of Crime
- Office of Justice Programs U.S. Department of Justice http://www.ojp.usdoj.gov/ovc/welcome.html
- Office of Children's Services Program statements & Practice model links -- http://www.hss.state.ak.us/ocs/
- Shaken Baby Alliance http://www.shakenbaby.com
- Tribal Law & Policy Institute www.tlpi.org

FOR ADDITIONAL RESOURCES AND UPDATES, PLEASE VISIT OUR WEBSITE AT

http://hss.state.ak.us/ocs/ChildrensJustice/

APPENDIX 1

Pertinent Statutes

Note: The following statutes are current at the time of publication. To verify the most recent version of statutes relevant to child abuse, please visit the following website: http://www.legis.state.ak.us/basis/folio.asp

Alaska Criminal Laws Relating to Child Sexual and Physical Abuse

Sexual offenses:

Sexual Abuse of a Minor: (AS 11.41.434, 11.41.436, 11.41.438, and 11.41.440) Sexual contact or penetration (putting something into the vagina, rectum or any genital-mouth contact) between a minor and an adult, a person in a position of authority, someone who is at least 4 years older than the child or by another child if that child was forced or coerced into the sexual activity by someone 16 or older. Depending upon the actions, this can be an unclassified felony, a class B felony, a class C felony, or a class A misdemeanor.

Incest: (AS 11.41.450) When a biological relative of full or half blood, puts something into the vagina or rectum of a child. Incest is a class C felony.

Online enticement of a minor: (AS. 11.41.452) using a computer to communicate with a person who is (or who is believed to be) under 16 to entice, solicit, or encourage the person to engage in an act described in AS 11.41.455(a)(1) - (7) This is a class B or class C felony, depending on whether the defendant was required to register as a sex offender or child kidnapper.

Unlawful Exploitation of a Minor: (AS 11.41.455) using a person under the age of 18 in books, stories, videos, or pictures about sex. This is a class B felony or a class A felony for repeat offenders.

Indecent Exposure: (AS 11.41.458, AS 11.41.460) showing one's penis or vagina to another person on purpose. This is a class B misdemeanor if the victim is over 16, a class A misdemeanor if the victim is under 16 and a class C felony if the victim is under 16 and the person is a repeat offender or masturbates during the exposure.

Disorderly Conduct: (AS 11.61.110(7)) showing one's buttock or anus to another person.

Sexual Harassment: (AS 11.61.120) making rude or sexual gestures, pulling another person's clothing down, up, or off to expose their private parts, making sexual jokes that are offensive, making obscene phone calls.

Endangering the Welfare of a Child: (AS 11.51.100(a)(2)) a parent, guardian, or lawful custodian leaving a child under the age of 16 with another person, who is *not a parent, guardian, or lawful custodian*, knowing that the person is either (1) a registered sex offender or required to be registered in this state or another jurisdiction; (2) has been charged with a sex offense; or (3) has been charged with an attempt, solicitation, or conspiracy to commit a sex offence." This is a class C felony.

Indecent viewing or photography: (11.61.123) knowingly viewing, or producing a picture of the private exposure of the genitals, anus, or female breast of a child under 16 and the view or production is without the knowledge or consent of the parent or guardian of the child viewed or shown in the picture and without the knowledge or consent of the child, if that child is at least 13 years of age.

Distribution of child pornography: (AS 11.61.125) bringing or causing to be brought into the state for distribution, or in the state distributing, or in the state possessing, preparing, publishing, or printing with intent to distribute, any material that visually or aurally depicts conduct described in AS 11.41.455(a), knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct. This is a class B felony or a class A felony for repeat offenders.

Electronic distribution of indecent material to minors: (AS 11.61.128) an adult knowingly distributing to a child under 16 by computer any material that depicts certain sexual conduct, whether actual or simulated. This is a class B or class C felony, depending on whether the defendant was required to register as a sex offender or child kidnapper.

Promoting prostitution in the first degree: (AS 11.66.110(a)(2) inducing or causing a person under 18 years of age to engage in prostitution. This is an unclassified felony.

Physical offenses:

Assault: (AS 11.41.200, 11.41.210, 11.41.220 11.41.230) causing physical injury to another. Depending upon the actions or harm caused, this can be a class A felony, a class B felony, a class C felony, or a class A misdemeanor. Also, it is a class C felony If the offender (a) recklessly causes physical injury to a child under 10 and the injury would (1) cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment or (2) if the offender has done this repeatedly or (b) knowingly causes physical injury to a child under 16 years of age but at least 10 years of age and the injury reasonably requires medical treatment;

Endangering the Welfare of a Child: (AS 11.51.100(a)(3)) for a parent, guardian, or lawful custodian of a child under the age of 16 to leave the child with another person knowing the other person has *previously* physically mistreated or had sexual contact with *any* child *and* the other person causes physical injury or has sexual contact with the present child. "Physically mistreated" includes unreasonably excessive discipline. This is a class C felony or a class A misdemeanor, depending on the injuries to the child.

Alaska Civil Law Regarding MDT Roles and Responsibilities

AS 47.14.300. Multidisciplinary child protection teams.

(a) The department shall create multidisciplinary child protection teams to assist in the evaluation and investigation of reports made under AS 47.17 and to provide consultation and coordination for agencies involved in child protection cases under AS 47.10.

(b) A team created under (a) of this section may invite other persons to serve on the team who have knowledge of and experience in child abuse and neglect matters. These persons may include

(1) mental and physical health practitioners licensed under AS 08;

(2) child development specialists;

(3) educators;

(4) peace officers as defined in AS 11.81.900;

(5) victim counselors as defined in AS 18.66.250;

(6) experts in the assessment and treatment of substance abuse;

(7) representatives of the district attorney's office and the attorney general's office;

(8) persons familiar with 25 U.S.C. 1901 - 1963 (Indian Child Welfare Act);

(9) guardians ad litem; and

(10) staff members of a child advocacy center if a center is located in the relevant area.

(c) A team created under (a) and (b) of this section shall review records on a case referred to the team by the department. The department shall make available to the team its records on the case and other records compiled for planning on the case by other agencies at the request of the department. The team may make recommendations to the department on appropriate planning for the case.

(d) Except for a public report issued by a team that does not contain confidential information, records or other information collected by the team or a member of the team related to duties under this section are confidential and not subject to public disclosure under AS 40.25.100 and 40.25.110.

(e) Meetings of a team are closed to the public and are not subject to the provisions of AS 44.62.310 and 44.62.312.

(f) The determinations, conclusions, and recommendations of a team or its members are not admissible in a civil or criminal proceeding. A member may not be compelled to disclose a determination, conclusion, recommendation, discussion, or thought process through discovery or testimony in a civil or criminal proceeding. Records and information collected by the team are not subject to discovery or subpoena in connection with a civil or criminal proceeding.

(g) Notwithstanding (f) of this section, an employee of the department may testify in a civil or criminal proceeding concerning cases reviewed by a team even though the department's records were reviewed by a team and formed the basis of that employee's testimony and the team's report.

(h) A person who serves on a multidisciplinary child protection team is not liable for damage or other relief in an action brought by the reason of the performance of a duty, a function, or an activity of the team.

(i) In this section, "team" means a multidisciplinary child protection team created under (a) and (b) of this section.

Alaska Civil Law Regarding Child Advocacy Centers and Forensic Interviewing of Children
AS 47.17.033 Investigations and interviews.
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(c) An investigation by the department of child abuse or neglect reported under this chapter shall be conducted by a person trained to conduct a child abuse and neglect investigation and without subjecting a child to more than one interview about the abuse or neglect except when new information is obtained that requires further information from the child.

(d) An interview of a child conducted as a result of a report of harm may be audiotaped or videotaped. If an interview of a child concerns a report of sexual abuse of the child by a parent or caretaker of the child, the interview shall be videotaped, unless videotaping the interview is not feasible or will, in the opinion of the investigating agency, result in trauma to the child.

(e) An interview of a child that is audiotaped or videotaped under (d) of this section shall be conducted

(1) by a person trained and competent to conduct the interview;

(2) if available, at a child advocacy center; and

(3) by a person who is a party to a memorandum of understanding with the department to conduct the interview or who is employed by an agency that is authorized to conduct investigations.

(f) An interview of a child may not be videotaped more than one time unless the interviewer or the investigating agency determines that one or more additional interviews are necessary to complete an investigation. If additional interviews are necessary, the additional interviews shall be conducted, to the extent possible, by the same interviewer who conducted the initial interview of the child.

(g) A recorded interview of a child shall be preserved in the manner and for a period provided by law for maintaining evidence and records of a public agency.

(h) A recorded interview of a child is subject to disclosure under the applicable court rules for discovery in a civil or criminal case.

(i) The training required under (c) of this section must address the constitutional and statutory rights of children and families that apply throughout the investigation and department intervention. The training must inform department representatives of the applicable legal duties to protect the rights and safety of a child and the child's family.

(j) During a joint investigation by the department and a law enforcement agency, the department shall coordinate an investigation of child abuse or neglect with the law enforcement agency to ensure that the possibility of a criminal charge is not compromised.

(k) Unless a law enforcement official prohibits or restricts notification under (j) of this section, at the time of initial contact with a person alleged to have committed child abuse or neglect, the department shall notify the person of the specific complaint or allegation made against the person, except that the identity of the complainant may not be revealed.

(l) In this section, "child advocacy center" means a facility operated with a child-focused, community partnership committed to a multidisciplinary team approach that includes representatives from law enforcement, child protection, criminal prosecution, victim advocacy, and the medical and mental health fields who collaborate and assist in investigating allegations of sexual or other abuse and neglect of children.

Alaska Civil Laws regarding disclosure of public records
AS 40.25.120. Public records; exceptions; certified copies.
(a) Every person has a right to inspect a public record in the state, including public records in recorders' offices, except

(1) records of vital statistics and adoption proceedings, which shall be treated in the manner required by AS 18.50;

(2) records pertaining to juveniles unless disclosure is authorized by law;

(3) medical and related public health records;

(4) records required to be kept confidential by a federal law or regulation or by state law;

(5) to the extent the records are required to be kept confidential under 20 U.S.C. 1232g and the regulations adopted under 20 U.S.C. 1232g in order to secure or retain federal assistance;

(6) records or information compiled for law enforcement purposes, but only to the extent that the production of the law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings;

(B) would deprive a person of a right to a fair trial or an impartial adjudication;

(C) could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness;

(D) could reasonably be expected to disclose the identity of a confidential source;

(E) would disclose confidential techniques and procedures for law enforcement investigations or prosecutions;

(F) would disclose guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law; or

(G) could reasonably be expected to endanger the life or physical safety of an individual;

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AS 47.10.093. Disclosure of [OCS] records.

(b) A state or municipal agency or employee shall disclose appropriate confidential information regarding a case to ***

(7) a member of a multidisciplinary child protection team created under AS 47.14.300 as necessary for the performance of the member's duties;

(f) The department may release to a person with a legitimate interest confidential information relating to children not subject to the jurisdiction of the court under AS 47.10.010 .

AS 47.17.040. Central registry; confidentiality.

(a) The department shall maintain a central registry of all investigation reports but not of the reports of harm.

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 40.25.110 and 40.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside the state, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who with criminal negligence makes public information contained in confidential reports is guilty of a class B misdemeanor.

7 AAC 54.040. Release of child protection information to persons with legitimate interests

(a) The department has exclusive control and custody of the child protection information collected by the department. Any request for disclosure of child protection information not covered by this chapter, or requiring a special determination, must be sent to the central office of the unit of the department that handles child protection services programs.

(b) Protected health information contained in child protection files may only be released under this section to a public health authority.

(c) The department may release child protection information, on a form provided by the department, concerning a minor child that is not subject to the jurisdiction of a court under AS 47.10.010 , to a person with legitimate interest if the department has reason to believe that the release of the information will prevent physical harm to the child. The information that may be released under this subsection includes reports of harm under AS 47.17 without the name of the person making the report, the results of investigations on those reports of harm, information on protective services reports, and additional child protection information.

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(f) A person with sufficient legitimate interest who receives child protection information from the department shall safeguard the information.

Alaska Statutes Regarding Mandatory Reporting

AS 47.17.020. Persons required to report.

(a) The following persons who, in the performance of their occupational duties, or with respect to (8) of this subsection, in the performance of their appointed duties, have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members of public and private schools;

(3) peace officers and officers of the Department of Corrections;

(4) administrative officers of institutions;

(5) child care providers;

(6) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.990;

(7) paid employees of an organization that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol;

(8) members of a child fatality review team established under AS 12.65.015(e) or 12.65.120 or the multidisciplinary child protection team created under AS 47.14.300 .

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has reasonable cause to suspect is a result of child abuse or neglect. These reports shall be made to the nearest office of the department.

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the person shall make the report to a peace officer. The peace officer shall immediately take action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department.

(d) This section does not require a religious healing practitioner to report as neglect of a child the failure to provide medical attention to the child if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination.

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(g) A person required to report child abuse or neglect under (a) of this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(h) This section does not require a person required to report child abuse or neglect under (a)(6) of this section to report mental injury to a child as a result of exposure to domestic violence so long as the person has reasonable cause to believe that the child is in safe and appropriate care and not presently in danger of mental injury as a result of exposure to domestic violence.

(i) This section does not require a person required to report child abuse or neglect under (a)(7) of this section to report the resumption of use of an intoxicant as described in AS 47.10.011(10) so long as the person does not have reasonable cause to suspect that a child has suffered harm as a result of the resumption.

Alaska Statutes Regarding Medical and Mental Health Evaluations for Child Abuse

AS 25.20.025. Examination and treatment of minors.

(a) Except as prohibited under AS 18.16.010(a)(3),

(1) a minor who is living apart from the minor's parents or legal guardian and who is managing the minor's own financial affairs, regardless of the source or extent of income, may give consent for medical and dental services for the minor;

(2) a minor may give consent for medical and dental services if the parent or legal guardian of the minor cannot be contacted or, if contacted, is unwilling either to grant or withhold consent; however, where the parent or legal guardian cannot be contacted or, if contacted, is unwilling either to grant or to withhold consent, the provider of medical or dental services shall counsel the minor keeping in mind not only the valid interests of the minor but also the valid interests of the parent or guardian and the family unit as best the provider presumes them;

(3) a minor who is the parent of a child may give consent to medical and dental services for the minor or the child;

(4) a minor may give consent for diagnosis, prevention or treatment of pregnancy, and for diagnosis and treatment of venereal disease;

(5) the parent or guardian of the minor is relieved of all financial obligation to the provider of the service under this section.

(b) The consent of a minor who represents that the minor may give consent under this section is considered valid if the person rendering the medical or dental service relied in good faith upon the representations of the minor.

c) Nothing in this section may be construed to remove liability of the person performing the examination or treatment for failure to meet the standards of care common throughout the health professions in the state or for intentional misconduct.

HIPAA Guidelines Regarding Child Abuse and Neglect Reports

Code of Federal Regulations, Title 45, Parts 160 & 164

§ 160.203 General rule and exceptions.

A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, except if one or more of the following conditions is met:

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(c) The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention.

§ 164.502 Uses and disclosures of protected health information: general rules.

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(g)

(5) ***Implementation specification:*** Abuse, neglect, endangerment situations. Notwithstanding a State law or any requirement of this paragraph to the contrary, a covered entity may elect not to treat a person as the personal representative of an individual if:

(i) The covered entity has a reasonable belief that:

(A) The individual has been or may be subjected to domestic violence, abuse, or neglect by such person; or

(B) Treating such person as the personal representative could endanger the individual; and

(ii) The covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative.

§ 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in Sec. 164.508, or the opportunity for the individual to agree or object as described in Sec. 164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(a) ***Standard: Uses and disclosures required by law.***

(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.

(b) ***Standard: uses and disclosures for public health activities***

(1) Permitted disclosures. A covered entity may disclose protected health information for the public health activities and purposes described in this paragraph to:

(i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority;

(ii) A public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect;

(c) ***Standard: Disclosures about victims of abuse, neglect or domestic violence***

(1) ***Permitted disclosures.*** Except for reports of child abuse or neglect permitted by paragraph (b)(1)(ii) of this section, a covered entity may disclose protected health information about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority, including a

social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence:

(i) To the extent the disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law;

(ii) If the individual agrees to the disclosure; or

(iii) To the extent the disclosure is expressly authorized by statute or regulation and:

(A) The covered entity, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims; or

(B) If the individual is unable to agree because of incapacity, a law enforcement or other public official authorized to receive the report represents that the protected health information for which disclosure is sought is not intended to be used against the individual and that an immediate enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure.

(2) ***Informing the individual.*** A covered entity that makes a disclosure permitted by paragraph (c)(1) of this section must promptly inform the individual that such a report has been or will be made, except if:

(i) The covered entity, in the exercise of professional judgment, believes informing the individual would place the individual at risk of serious harm; or

(ii) The covered entity would be informing a personal representative, and the covered entity reasonably believes the personal representative is responsible for the abuse, neglect, or other injury, and that informing such person would not be in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(d) ***Standard: Uses and disclosures for health oversight activities***

(1) ***Permitted disclosures.*** A covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:

(i) The health care system;

(ii) Government benefit programs for which health information is relevant to beneficiary eligibility;

(iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or

(iv) Entities subject to civil rights laws for which health information is necessary for determining compliance.

(2) ***Exception to health oversight activities.*** For the purpose of the disclosures permitted by paragraph (d)(1) of this section, a health oversight activity does not include an investigation or other activity in which the individual is the subject of the investigation or activity and such investigation or other activity does not arise out of and is not directly related to:

(i) The receipt of health care;

(ii) A claim for public benefits related to health; or

(iii) Qualification for, or receipt of, public benefits or services when a patient's health is integral to the claim for public benefits or services.

(3) ***Joint activities or investigations.*** Notwithstanding paragraph (d)(2) of this section, if a health oversight activity or investigation is conducted in conjunction with an oversight activity or investigation relating to a claim for public benefits not related to health, the joint activity or investigation is considered a health oversight activity for purposes of paragraph (d) of this section.

(4) Permitted uses. If a covered entity also is a health oversight agency, the covered entity may use protected health information for health oversight activities as permitted by paragraph (d) of this section.

(e) ***Standard: Disclosures for judicial and administrative proceedings***

(1) ***Permitted disclosures.*** A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements

of paragraph (e)(1)(iv) of this section.

(2) Other uses and disclosures under this section. The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

(f) ***Standard: Disclosures for law enforcement purposes.*** A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) ***Permitted disclosures:*** Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

(i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(i) of this section; or

(ii) In compliance with and as limited by the relevant requirements of:

(A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

(B) A grand jury subpoena; or

(C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

(1) The information sought is relevant and material to a legitimate law enforcement inquiry;

(2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used.

(2) ***Permitted disclosures: Limited information for identification and location purposes.*** Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, provided that:

(i) The covered entity may disclose only the following information:

(A) Name and address;

(B) Date and place of birth;

(C) Social security number;

(D) ABO blood type and Rh factor;

(E) Type of injury;

(F) Date and time of treatment;

(G) Date and time of death, if applicable; and

(H) A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.

(ii) Except as permitted by paragraph (f)(2)(i) of this section, the covered entity may not disclose for the purposes of identification or location under paragraph (f)(2) of this section any protected health information related to the individual's DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue.

(3) ***Permitted disclosure: Victims of a crime.*** Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime, other than disclosures that are subject to paragraph (b) or (c) of this section, if:

(i) The individual agrees to the disclosure; or

(ii) The covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided that:

(A) The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the

victim;

(B) The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and

(C) The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(4) ***Permitted disclosure: Decedents.*** A covered entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.

(5) ***Permitted disclosure: Crime on premises.*** A covered entity may disclose to a law enforcement official protected health information that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity.

(6) ***Permitted disclosure: Reporting crime in emergencies.***

(i) A covered health care provider providing emergency health care in response to a medical emergency, other than such emergency on the premises of the covered health care provider, may disclose protected health information to a law enforcement official if such disclosure appears necessary to alert law enforcement to:

(A) The commission and nature of a crime;

(B) The location of such crime or of the victim(s) of such crime; and

(C) The identity, description, and location of the perpetrator of such crime.

(ii) If a covered health care provider believes that the medical emergency described in paragraph (f)(6)(i) of this section is the result of abuse, neglect, or domestic violence of the individual in need of emergency health care, paragraph (f)(6)(i) of this section does not apply and any disclosure to a law enforcement official for law enforcement purposes is subject to paragraph (c) of this section.

***

(j) ***Standard: Uses and disclosures to avert a serious threat to health or safety***

(1) ***Permitted disclosures.*** A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:

(i) (A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and

(B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat; or

(ii) Is necessary for law enforcement authorities to identify or apprehend an individual:

(A) Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim; or

(B) Where it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody, as those terms are defined in Sec. 164.501.

(2) ***Use or disclosure not permitted.*** A use or disclosure pursuant to paragraph (j)(1)(ii)(A) of this section may not be made if the information described in paragraph (j)(1)(ii)(A) of this section is learned by the covered entity:

(i) In the course of treatment to affect the propensity to commit the criminal conduct that is the basis for the disclosure under paragraph (j)(1)(ii)(A) of this section, or counseling or therapy; or

(ii) Through a request by the individual to initiate or to be referred for the treatment, counseling, or therapy described in paragraph (j)(2)(i) of this section.

(3) ***Limit on information that may be disclosed.*** A disclosure made pursuant to paragraph (j)(1)(ii)(A) of this section shall contain only the statement described in paragraph (j)(1)(ii)(A) of this section and the protected health information described in paragraph (f)(2)(i) of this section.

(4) ***Presumption of good faith belief.*** A covered entity that uses or discloses protected health information pursuant to paragraph (j)(1) of this section is presumed to have acted in good faith with regard to a belief described in paragraph (j)(1)(i) or (ii) of this section, if the belief is based

upon the covered entity's actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.

(k) ***Standard: Uses and disclosures for specialized government functions***

***

(5) ***Correctional institutions and other law enforcement custodial situations.***

(i) ***Permitted disclosures.*** A covered entity may disclose to a correctional institution or a law enforcement official having lawful

custody of an inmate or other individual protected health information about such inmate or individual, if the correctional institution or such law enforcement official represents that such protected health information is necessary for:

(A) The provision of health care to such individuals;

(B) The health and safety of such individual or other inmates;

(C) The health and safety of the officers or employees of or others at the correctional institution;

(D) The health and safety of such individuals and officers or other persons responsible for the transporting of inmates or their transfer from one institution, facility, or setting to another;

(E) Law enforcement on the premises of the correctional institution; and

(F) The administration and maintenance of the safety, security, and good order of the correctional institution.

(ii) ***Permitted uses.*** A covered entity that is a correctional institution may use protected health information of individuals who are inmates for any purpose for which such protected health information may be disclosed.

(iii) No application after release. For the purposes of this provision, an individual is no longer an inmate when released on parole, probation, supervised release, or otherwise is no longer in lawful custody.

(6) ***Covered entities that are government programs providing public benefits.***

(i) A health plan that is a government program providing public benefits may disclose protected health information relating to

eligibility for or enrollment in the health plan to another agency administering a government program providing public benefits if the sharing of eligibility or enrollment information among such government agencies or the maintenance of such information in a single or combined data system accessible to all such government agencies is required or expressly authorized by statute or regulation.

(ii) A covered entity that is a government agency administering a government program providing public benefits may disclose protected health information relating to the program to another covered entity that is a government agency administering a government program providing public benefits if the programs serve the same or similar populations and the disclosure of protected health information is necessary to coordinate the covered functions of such programs or to improve administration and management relating to the covered functions of such programs.

APPENDIX 2

National Standards for Child Advocacy Centers

Multidisciplinary Team
A multidisciplinary team for response to child abuse allegations includes representation from the following: law enforcement, child protective services, prosecution, medical, mental health, victim advocacy and Children's Advocacy Center.

Cultural Competency and Diversity
Culturally competent services are routinely made available to all CAC clients and coordinated with the multidisciplinary team response.

Forensic Interviews
Forensic interviews are conducted in a manner that is legally sound, of a neutral, fact finding nature, and are coordinated to avoid duplicative interviewing.

Victim Support and Advocacy
Victim support and advocacy services are routinely made available to all CAC clients and their non-offending family members as part of the multidisciplinary team response.

Medical Evaluation
Specialized medical evaluation and treatment services are routinely made available to all CAC clients and coordinated with the multidisciplinary team response.

Mental Health
Specialized trauma-focused mental health services, designed to meet the unique needs of the child and non-offending family members, are routinely made available as part of the multidisciplinary team response.

Case Review
A formal process in which multidisciplinary discussion and information sharing regarding the investigation, case status and services needed by the child and family is to occur on a routine basis.

Case Tracking
Children's Advocacy Centers must develop and implement a system for monitoring case progress and tracking case outcomes for all MDT components.

Organizational Capacity
A designated legal entity responsible for program and fiscal operations has been established and implements basic sound administrative policies and procedures.

Child Focused Setting
The child-focused setting is comfortable, private, and both physically and psychologically safe for diverse populations of children and their non-offending family members.

MULTIDISCIPLINARY TEAM (MDT)
Essential components:

A. The CAC/MDT has a written interagency agreement signed by authorized representatives of all MDT components that clearly commits the signed parties to the CAC model for its multidisciplinary child abuse intervention response.
B. All members of the MDT including appropriate CAC staff, as defined by the needs of the case, are routinely involved in investigations and/or MDT interventions.
C. The CAC/MDT's written documents address information sharing that ensures the timely exchange of relevant information among MDT members, staff and volunteers and is consistent with legal, ethical and professional standards of practice.

Rated criteria:

D. The CAC provides routine opportunities for MDT members to provide feedback and suggestions regarding procedures/operations of the CAC/MDT.
E. The CAC/MDT participates in ongoing and relevant training and educational opportunities, including cross-discipline, team and skills-based learning.

CULTURAL COMPETENCY AND DIVERSITY

Essential components:

A. The CAC has a cultural competency plan that includes community assessment, goals, and strategies.
B. The CAC must ensure that provisions are made for non-English speaking and deaf or hard of hearing children and their non-offending family members throughout the investigation process.
C. The CAC and MDT members ensure that all services are provided in a manner that addresses culture and development throughout the investigation, intervention, and case management process.

Rated criteria:

D. The CAC engages in community outreach with underserved populations.
E. The CAC actively recruits staff, volunteers, and board members that reflect the demographics of the community
F. The CAC's cultural competency plan has been implemented and evaluated.

FORENSIC INTERVIEWS

Essential components:

A. Forensic interviews are provided by MDT/CAC staff that have specialized training in conducting forensic interviews of children.
B. The CAC/MDT's written documents describe the general forensic interview process including pre- and post-interview information sharing and decision making, and interview procedures.
C. Forensic interviews are conducted in a manner that is legally sound, non-duplicative, non-leading and neutral.
D. MDT members with investigative responsibilities are present for the forensic interview(s).
E. Forensic interviews are routinely conducted at the CAC.

Rated criteria:

F. The CAC/MDT's written documents include:
    - selection of an appropriate, trained interviewer;
    - sharing of information among team members; and
    - a mechanism for collaborative case planning.
G. The CAC and/or MDT provide opportunities for professionals who conduct forensic interviews to participate in ongoing training and peer review.
H. The CAC/MDT coordinate information gathering whether through history taking, assessment of forensic interview(s) to avoid duplication.

VICTIM SUPPORT AND ADVOCACY

Essential components:

A. Crisis intervention and ongoing support services are routinely made available for children and their non-offending family members on-site or through linkage agreements with other appropriate agencies or providers.
B. Education regarding the dynamics of abuse, the coordinated multidisciplinary response, treatment, and access to services is routinely available for children and their non-offending family members.
C. Information regarding the rights of a crime victim is routinely available to children and their non-offending family members and is consistent with legal, ethical and professional standards of practice.
D. The CAC/MDT's written documents include availability of victim support and advocacy services for all CAC clients.

Rated criteria:

E. A designated, trained individual(s) provides comprehensive, coordinated victim support and advocacy services including, but not limited to:
    - Information regarding the dynamics of abuse and the coordinated multidisciplinary response;
    - updates on case status;
    - assistance in accessing/obtaining victims' rights as outlined by law;
    - court education, support and accompaniment; and
    - assistance with access to treatment and other services such as protective orders, housing, public assistance, domestic violence intervention and transportation.

F. Procedures are in place to provide initial and on-going support and advocacy with the child and/or non-offending family members.

MEDICAL EVALUATION

Essential components:

A. Medical evaluations are provided by health care providers with pediatric experience and child abuse expertise.

B. Specialized medical evaluations for the child client are routinely made available on-site or through linkage agreements with other appropriate agencies or providers.

C. Specialized medical evaluations are available and accessible to all CAC clients regardless of ability to pay.

D. The CAC/MDT's written documents include access to appropriate medical evaluation and treatment for all CAC clients.

Rated criteria:

E. The CAC/MDT's written documents include:
    - the circumstances under which a medical evaluation is recommended;
    - the purpose of the medical evaluation;
    - how the medical evaluation is made available;
    - how medical emergency situations are addressed;
    - how multiple medical evaluations are avoided;
    - how medical care is documented;
    - how the medical evaluation is coordinated with the MDT in order to avoid duplication of interviewing and history taking; and
    - procedures are in place for medical intervention in cases of suspected physical abuse and maltreatment, if applicable.

A. The CAC and/or MDT provide opportunities for those who conduct medical evaluations to participate in ongoing training and peer review.

B. MDT members and CAC staff are trained regarding the purpose and nature of the evaluation and can educate clients and/or non-offending caregivers regarding the medical evaluation.

C. Findings of the medical evaluation are shared with the MDT in a routine and timely manner.

MENTAL HEALTH

Essential components:

A. Mental health services are provided by professionals with pediatric experience and child abuse expertise.

B. Specialized trauma-focused mental health services for the child client are routinely made available on-site or through linkage agreements with other appropriate agencies or providers.

C. Mental health services are available and accessible to all CAC clients regardless of ability to pay.

D. The CAC/MDT's written documents include access to appropriate mental health evaluation and treatment for all CAC clients.

Rated criteria:

E. The CAC/MDT's written documents include:
    - the role of the mental health professional on the MDT including provisions for attendance at case review;
    - provisions regarding sharing relevant information with the team while protecting

the clients' right to confidentiality; and
    - how the forensic process is separate from mental health treatment.

F. The CAC and/or MDT provide opportunities for those who provide mental health services to participate in ongoing training and peer review.
G. Mental health services for non-offending family members and/or caregivers are routinely made available on-site or through linkage agreements with other appropriate agencies or providers

CASE REVIEW

Essential components:

A. The CAC/MDT's written documents include criteria for case review and case review procedures.
B. A forum for the purpose of reviewing cases is conducted on a regularly scheduled basis.
C. Case review is an informed decision making process with input from all necessary MDT members based on the needs of the case.
D. A designated individual coordinates and facilitates the case review process, including notification of cases that will be reviewed.

Rated criteria:

E. Representatives routinely participating in case review include, at a minimum:
    - Law Enforcement
    - Child Protective Services
    - Prosecution
    - Medical
    - Mental Health
    - Victim Advocacy and
    - Children's Advocacy Center.

F. Recommendations from case review are communicated to appropriate parties for implementation.
G. Case review meetings are utilized as an opportunity for MDT members to increase understanding of the complexity of child abuse cases.

CASE TRACKING

Essential components:

A. The CAC/MDT's written documents include tracking case information until final disposition.
B. The CAC tracks and minimally is able to retrieve NCA Statistical Information.

Rated criteria:

C. An individual is identified to implement the case tracking process.
D. All MDT partner agencies provide their specific case information and disposition.
E. MDT partner agencies have access to information as defined by the CAC/MDT's written documents.

ORGANIZATIONAL CAPACITY

Essential components:

A. The CAC is an incorporated, private non-profit organization or government-based agency or a component of such an organization or agency.
B. The CAC maintains, at a minimum, current general commercial liability*, professional liability, and Directors and Officers liability as appropriate to its organizational structure.
C. The CAC has written administrative policies and procedures that apply to staff, MDT members, board members, volunteers and clients.
D. The CAC has an annual independent financial audit.
E. The CAC has personnel responsible for its operations and program services.
F. The CAC has, and demonstrates compliance with, written screening policies for staff that includes criminal background and child abuse registry checks and provides training and supervision.
G. The CAC has, and demonstrates compliance with, written screening policies for on-site volunteers that include criminal background and child abuse registry checks and provides training and supervision.

Rated criteria:

H. The CAC provides education and community awareness on child abuse issues.
I. The CAC has addressed its sustainability through the development of a strategic plan that includes a funding component.

CHILD FOCUSED SETTING

Essential components:

A. The CAC setting is a designated, well-defined, task appropriate facility or contiguous space within an existing structure.
B. The CAC has written policies and procedures that ensure separation of victims and alleged offenders.
C. The CAC makes reasonable accommodations to make the facility physically accessible.
D. The facility allows for live observation of interviews by MDT members.

Rated criteria:

E. The CAC is maintained in a manner that is physically safe and "child proof".
F. Children and families are observed or supervised by staff, volunteer, and/or MDT members.
G. Separate and private area(s) are available for those awaiting services, for case consultation and discussion, and for meetings or interviews.
H. The location of the CAC is convenient and accessible to clients and MDT members.

ACKNOWLEDGEMENTS

The Alaska Children's Justice Act Task Force members at the time of publication are gratefully acknowledged for their time and expertise:

- *Shannon Baergen* - Guardian ad litem, Office of Public Advocacy, Anchorage
- *Cathy Baldwin-Johnson MD** – CJATF Chair - Medical Director, Alaska CARES, Anchorage; Medical Director, The Children's Place, Wasilla; Family Physician, Providence Matanuska Health Care, Wasilla
- *John Bioff* * - General Counsel, Norton Sound Health Corporation, Nome
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- *Cyndy Curran* - Division Director, Teaching Learning Support, Department of Education
- *Derek DeGraaf* - Alaska Bureau of Investigations, Internet Crimes Against Children Task Force, Alaska State Troopers, Anchorage
- *Bradley Grigg* - Children's Behavioral Health Specialist/Child State Planner, Division of Behavioral Health, Juneau
- *Judge Charles Huguelet* - Kenai Trial Court, Alaska Court System, Kenai
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- *Jan Rutherdale** - CJATF Co-Chair - Assistant Attorney General, Child Protection Section, Civil Division, Department of Law, Juneau
- *Sergeant Cindi Stanton* - Anchorage Police Department Crimes Against Children Unit
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- (*Mike Lesmann* * - Former Task Force Member, now Special Assistant to the Governor, Juneau)

* MDT Guidelines Subcommittee members who developed this document

Many thanks to the leadership and staff of Alaska CARES and The Children's Place who worked diligently with their state and community partners to craft mutually beneficial protocols and agreements, and then generously shared those documents with the Task Force.

This document was sent to the following organizations and agencies for their response and input:

- The Alaska Children's Alliance
- Alaska Department of Public Safety
- Alaska Office of Children's Services
- Alaska Division of Behavioral Health
- Alaska Division of Juvenile Justice
- Alaska Department of Law
- Crimes Against Children Unit of the Anchorage Police Department
- Alaska Office of Public Advocacy
- Bureau of Indian Affairs Human Services Alaska Region

State of Alaska
Sean Parnell, Governor

Department of Health & Social Services
Bill Hogan, Commissioner

Office of Children's Services
Christy Lawton, Acting Director

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October 2010

Alaska Children's
Justice Act Task Force

CHILDREN'S JUSTICE ACT TASK FORCE MEMBERS
(Updated November 2011)

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Alaska Children's Justice Act Task Force

The Honorable Kevin Meyer

716 West 4th Avenue Suite 410

Anchorage, AK 99501

December 9, 2011

Dear Representative Meyer:

The Alaska Children's Justice Act Task Force (CJA) respectfully requests that you sponsor and introduce the attached bill to improve and remedy some deficiencies within the criminal statutes.

The CJA, funded in FY 1999, is a federally-mandated, state-wide multi-disciplinary group charged with evaluating the state system response to child abuse, making recommendations for system improvement, and implementing projects that improve the system's response.

Last year the CJA made a presentation to the House HSS Committee concerning a problem that the task force had identified. After the presentation, the task force was asked to present our recommendations.

At our scheduled meeting on December 20, 2011 at 12:30 p.m., we will present a proposal for a bill that our committee members have developed over the past several months. We are asking that you sponsor this bill. We will be prepared to answer any questions that you or your staff may have at that time.

I am including with this letter our statement regarding the proposed legislation, a copy of our member list, and a copy of the proposed legislative changes.

We look forward to our meeting with you and to your support for this important change to the statutes which we believe will further our goal of protecting Alaska's children.

Thank you for your consideration.

Respectfully yours,

Thom F. Janidlo

Vice-Chair

Alaska Children's Justice Act Task Force

Alaska Children's Justice Act Task Force (CJA)
Statement Regarding Proposed Legislation

About the CJA

The current CJA was founded in FY1999. We are a federally-mandated, state-wide multidisciplinary group, with representatives from law enforcement, medicine, child protection, law (both prosecution and defense), child advocacy centers, judiciary, mental health, CASA, schools, and parents. The CJA is charged with evaluating the state system response to child abuse, especially child sexual abuse and serious physical abuse; making recommendations for system improvement; and implementing projects that improve the system response. For a current list of CJA members, see attachment "CJA member list 11-11."

Recommendations for system improvement through criminal legislation

As we pointed out in last year's presentation to the House HESS Committee, we have become aware of some shortcomings in the current criminal laws regarding the prosecution of harm to children. After researching laws in other states, analyzing the Alaska criminal statutes, and running our ideas past prosecutors and law enforcement, we have drafted the attached "CJA proposed legislation 11-18-11."

What follows is a description of the problem and how this legislation proposes to fix the problem, with section numbers provided to locate the fix in the proposed legislation.

This legislation would seek to:

- **Modify the assault statutes to create broader criminal liability for assaults to children**

Problem: Young children or mentally/physically impaired older children sometimes experience harm that deserves greater penalties to the offender than are currently available. One reason is because the harm may not fit into the "serious

physical injury" definition[1], a required element in many of the felony assault statutes, and yet the harm caused to the child is serious enough to deserve a penalty greater than a misdemeanor. For example, a person who intentionally burns a child but not to the point of the child needing medical treatment could be charged only with a misdemeanor. Another example is that a person who spanks a child so hard that it results in severe bruising but not protracted disfigurement could be charged only with a misdemeanor.

Solutions:

A. Create a new definition of harm for child assaults, "serious bodily injury to the child" (See section 10.) This definition was modeled after a Tennessee criminal statute, 39-15-402(d).[2]

B. Apply the "serious bodily injury" definition to children under 12 or children under age 16 who are mentally or physically impaired. (See section 4 for definition of mental and physical impairment.)

C. Add new causes of action in all three felony assault statutes so that the penalty for an assault to a child corresponds with the person's mental state and the harm caused. For example, this legislation would add two new causes of action to 11.41.200, assault in the first degree (a class A felony), to punish the intentional, one-time serious bodily injury (to a young or impaired older child) and the reckless, repeated serious bodily injury to such children. (See section 1.) This legislation also would add causes of action to assault in the second degree (a class B felony) to cover less serious mental states and/or less serious injuries to such children. (See section 2.)

D. Modify assault in the third degree (a class C felony) to increase the age of the injured child from under 10 to under 12 and to also apply to a child under 16 who is mentally or physically impaired, in order to make the ages in the assault statutes the same.[3] (See section 3.)

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[1] 11.81.900(56) defines "serious physical injury" as "**(A)** physical injury caused by an act performed under circumstances that create a substantial risk of death; or **(B)** physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy."

[2] 39-15-402(d) defines "Serious bodily injury to the child" as including, "but is not limited to, second- or third-degree burns, a fracture of any bone, a concussion, subdural or subarachnoid bleeding, retinal hemorrhage, cerebral edema, brain contusion, injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement, including those sustained by striking children with objects, or other physical injury that results in significant physical or emotional injury to the child."

E. Create a sentencing aggravator if the serious bodily injury caused to a child resulted in significant mental injury to the child. (See section 11.) The definition of "mental injury" is taken from AS 47.17.290(9).[4]

- **Create new criminal theories regarding exposure of children to drugs**

Problem: It is difficult to prosecute a person who has exposed a child to drugs and, because of that exposure, the child tests positive for that drug. For example, the District Attorney's Office currently can prosecute someone under Misconduct Involving Controlled Substance I for purposefully giving a child under 16 drugs such as methamphetamine but can't prosecute someone who is indirectly exposing a child to such drugs, such as by having a meth lab in the home. Nor can a person be prosecuted for exposing a child to serious chemicals used in meth labs, which can be highly dangerous to a child. Also, 11.51.130(a)(2) (contributing to the delinquency of a minor) -- which makes it a misdemeanor to recklessly allow a child to be in presence of the unlawful manufacture, use, display, or delivery of a controlled substance – seemed to fit better in the endangering the welfare of a minor statute.

Solution: Modify AS 11.51.100 (endangering the welfare of a minor in the first degree) by creating 3 new subsections to:

A. Penalize the reckless exposure of a child to a controlled substance and, because of that exposure, the child tests positive for the controlled substance. Exposure could include having a meth lab in the home or doing drugs in the child's presence, or leaving drugs around the house, in harms way. The penalties range from a misdemeanor to a Class B felony, depending on the dangerousness of the drug. (See section 5, subsection (b)(2).) The level of penalty, from a class B felony to a class A misdemeanor, depends on the seriousness of the class of drugs. For example, exposure to meth would be a class A felony, whereas exposure to marijuana would be a misdemeanor. (See section 5, subsection (g).)

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[3] The CJA felt that under 12 was a better age cut-off than 10; children under 12 are usually still in elementary school, so the under 10 category seemed too restrictive.

[4] AS 47.17.290(9) states: "mental injury" means a serious injury to the child as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness."

B. Move the provision in 11.51.130(a)(2) (recklessly allowing a child to be in presence of the unlawful manufacture, use, display, or delivery of a controlled substance) to AS 11.51.100. (See section 5, subsection (b)(3).)

C. Penalize the reckless exposure of a child to serious chemicals used in meth labs. (See section 5, subsection (b)(4).)

- **Increase penalties when a parent intentionally withholds adequate food or liquids**

Problem: The current punishment for criminal neglect is a misdemeanor. The CJA believes that a felony is a more apt punishment for a parent or guardian who intentionally withholds adequate food or liquids to a child, perhaps as a form of punishment or deliberate cruelty.

Solution: Modify AS 11.51.120 so that it is a class C felony for a parent to intentionally fail, without lawful excuse, to provide adequate food and liquids to the child. (See sections 6 and 7.) The standard for determining what is an inadequate amount of food is that "a reasonable person would conclude the child was not receiving adequate food or liquids."

- **Create a criminal law when an incarcerated person contacts a victim or witness in violation of a court order**

Problem: Current law prevents a defendant out on bail or on parole or probation from having contact with a victim or witness if so ordered by the court, but if that defendant is incarcerated on a no bail order, it is not a crime for him to be contacting the victim or a witness (unless he threatens her or encourages her to change her story, which is a violation of the witness tampering or interference with the judicial process law). So, for example, if an incarcerated sex offender contacts his under-age victim to tell her that he loves her and wants to marry her, no crime has been committed. Also, there is nothing law enforcement can do to the person who forwards the phone call or letters to the incarcerated offender.

Solution: Add two new theories to the unlawful contact statute to: (1) penalize an incarcerated person for contacting a victim or witness after being ordered not to and (2) penalize a person who assists the defendant who's been ordered to have no contact to have such contact. (See section 9.)

CJA Task Force Proposed Legislative changes 12/6/11

"An Act relating to the crimes of assault, endangering the welfare of a child, and criminal nonsupport contributing to the delinquency of a minor, unlawful contact; relating to criminal definitions; relating to sentencing; and providing for an effective date."

* **Sec. 1.** AS 11.41.200(a) is amended to read:

(a) A person commits the crime of assault in the first degree if

(1) that person recklessly causes serious physical injury to another by means of a dangerous instrument;

(2) with intent to cause serious physical injury to another, **that** [THE] person causes serious physical injury to any person;

(3) **that** [THE] person knowingly engages in conduct that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life; or

(4) that person recklessly causes serious physical injury to another by repeated assaults using a dangerous instrument, even if each assault individually does not cause serious physical injury.

(5) while being 18 years of age or older, that person

(i) intentionally causes serious bodily injury to a child under 12 years of age or to a child under the age of 16 who is mentally or physically impaired.

(ii) recklessly causes serious bodily injury to a child under 12 years of age or to a child under the age of 16 who is mentally or physically impaired on more than one occasion.

* **Sec. 2.** AS 11.41.210(a) is amended to read:

(a) A person commits the crime of assault in the second degree if

(1) with intent to cause physical injury to another person, that person causes physical injury to another person by means of a dangerous instrument;

(2) that person recklessly causes serious physical injury to another person; or

(3) that person recklessly causes serious physical injury to another by repeated assaults, even if each assault individually does not cause serious physical injury.

(4) while being 18 years of age or older, that person

(i) recklessly causes serious bodily injury to a child under 12 years of age or to a child under the age of 16 who is mentally or physically impaired;

(ii) intentionally causes physical injury to a child under 12 years of age or to a child under the age of 16 who is mentally or physically impaired and the injury would cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment;

(iii) intentionally causes physical injury to a child under 12 years of age or a child under the age of 16 who is mentally or physically impaired on more than on occasion.

* **Sec. 3.** AS 11.41.220(a) is amended to read:

(a) A person commits the crime of assault in the third degree if that person

(1) recklessly

(A) places another person in fear of imminent serious physical injury by means of a dangerous instrument;

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older

(i) causes physical injury to a child under **12** [10] years of age **or to a child under the age of 16 who is mentally or physically impaired** and the injury would cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment;

(ii) causes physical injury to a child under **12** [10] years of age **or to a child under the age of 16 who is mentally or physically impaired** on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member makes repeated threats to cause death or serious physical injury to another person;

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least **12** [10] years of age and the injury reasonably requires medical treatment;

(4) with criminal negligence causes serious physical injury under AS 11.81.900(b)(56)(B) to another person by means of a dangerous instrument; or

(5) commits a crime that is a violation of AS 11.41.230(a)(1) or (2) and, within the preceding 10 years, the person was convicted on two or more separate occasions of crimes under

(A) AS 11.41.100 - 11.41.170;

(B) AS 11.41.200 - 11.41.220, 11.41.230(a)(1) or (2), 11.41.280, or 11.41.282;

(C) AS 11.41.260 or 11.41.270;

(D) AS 11.41.410, 11.41.420, or 11.41.425(a)(1); or

(E) a law or ordinance of this or another jurisdiction with elements similar to those of an offense described in (A) - (D) of this paragraph.

* **Sec. 4.** AS 11.41 is amended by adding a new section to read:

Sec. 11.41.225. Definitions

In AS 11.41.200-220:

a) mentally impaired means a person who suffers from diminished cognitive function or capacity or a mental disorder that temporarily or permanently renders the person substantially incapable of appraising the nature of his or her conduct or the conduct of others.

b) Physically impaired includes, but is not limited to, all of the following: having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(1) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, including speech organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(2) Limits an individual's ability to participate in major life activities.

* **Sec. 5.** AS 11.51.100 is amended to read:

Sec. 11.51.100. Endangering the welfare of a child in the first degree.

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person

(A) is registered or required to register as a sex offender under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) has been charged by complaint, information, or indictment with a violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) has been charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; or

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child.

(b) A person commits the crime of endangering the welfare of a minor in the first degree if

(1) the person transports a child in a motor vehicle, aircraft, or watercraft while in violation of AS 28.35.030**;**

(2) the person recklessly exposes a child to an IA, IIA, IIIA, IVA, VA, or VIA controlled substance, and as a result of that exposure the child tests positive for a IA, IIA, IIIA, IVA, VA, or VIA controlled substance. In this section, exposure includes but is not limited to the manufacture of a controlled substance or the consumption of a controlled substance by smoking or inhalation while in the presence of a child.

(3) recklessly allows the child to enter or remain in the immediate physical presence of the unlawful manufacture, use, display, or delivery of a controlled substance knowing that the manufacture, use, display, or deliveryis occurring, unless the child's disabilities of minority have been removed for general purposes under AS 09.55.590; or

(4) recklessly causes or allows a child to enter or remain in a dwelling or vehicle in which on occupant of the dwelling or vehicle possesses an immediate precursor of methamphetamine, or the salts, isomers, or salts of isomers of the immediate precursor of methamphetamine, or possesses a listed chemical with the intent to manufacture any material, compound, mixture, or preparation that contains methamphetamine, or its salts, isomers, or salts of isomers or an immediate precursor of methamphetamine, or its salts, isomers, or salts of isomer; in this section, "listed chemical" means a chemical described under AS 11.71.200.

(c) In this section, "physically mistreated" means

(1) having committed an act punishable under AS 11.41.100 - 11.41.250; or

(2) having applied force to a child that, under the circumstances in which it was applied, or considering the age or physical condition of the child, constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation because of the substantial and unjustifiable risk of

(A) death;

(B) serious or protracted disfigurement;

(C) protracted impairment of health;

(D) loss or impairment of the function of a body member or organ;

(E) substantial skin bruising, burning, or other skin injury;

(F) internal bleeding or subdural hematoma;

(G) bone fracture; or

(H) prolonged or extreme pain, swelling, or injury to soft tissue.

(d) Endangering the welfare of a child in the first degree under (a)(3) of this section is a

(1) class B felony if the child dies;

(2) class C felony if the child suffers sexual contact, sexual penetration, or serious physical injury; or

(3) class A misdemeanor if the child suffers physical injury.

(e) Endangering the welfare of a child under (b)**(1), (3) or (4)** of this subsection is a class A misdemeanor.

(f) Endangering the welfare of a child in the first degree under (a)(1) or (2) of this section is a class C felony.

(g) Endangering the welfare of a child under (b)(2) of this subsection is a

(1) class B felony if the controlled substance was a schedule IA, or IIA controlled substance;

(2) class C felony if the controlled substance was a schedule IIIA, or IVA controlled substance;

(3) class A misdemeanor of the controlled substance was a schedule VA, VIA controlled substance.

* **Sec. 6.** AS 11.51 is amended by adding a new section to read:

Sec. 11.51.115. Criminal nonsupport in the First Degree.

(a) A person commits the crime of criminal nonsupport if, being a person legally charged with the support of a child the person intentionally fails, without lawful excuse, to provide adequate food and or liquids for the child and a reasonable person would conclude the child was not receiving adequate food or liquids.

(b) Criminal nonsupport in the first degree is a class C felony.

(c) In this section, "child" is defined in AS 11.51.120(f)(1).

* **Sec. 7.** AS 11.51.120 is amended to read:

Sec. 11.51.120. Criminal nonsupport in the Second Degree.

(a) A person commits the crime of criminal nonsupport if, being a person legally charged with the support of a child the person knowingly fails, without lawful excuse, to provide support for the child.

(b) As used in this section "support" includes necessary food, care, clothing, shelter, medical attention, and education. There is no failure to provide medical attention to a child if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination.

(c) Except as provided in (d) of this section, criminal nonsupport is a class A misdemeanor.

(d) Criminal nonsupport is a class C felony if the support the person failed to provide is monetary support required by a court or administrative order from this or another jurisdiction and, at the time the person knowingly failed, without lawful excuse, to provide the support,

(1) the aggregate amount of accrued monetary child support arrearage is $20,000 or more;

(2) no child support payment has been made for a period of 24 consecutive months or more; or

(3) the person had been previously convicted under this section or a similar provision in another jurisdiction and

(A) the aggregate amount of accrued monetary child support arrearage is $5,000 or more; or

(B) no child support payment has been made for a period of six months or more.

(e) In addition to the provisions of (c) and (d) of this section, criminal nonsupport is punishable by loss or restriction of a recreational license as provided in AS 12.55.139_.

(f) In this section,

(1) "child" means a person

(A) under 18 years of age; or

(B) 18 years of age or older for whom a person is ordered to pay support under a valid court or administrative order;

(2) "child support" means support for a child;

(3) "without lawful excuse" means having the financial ability to provide support or having the capacity to acquire that ability through the exercise of reasonable efforts.

* **Sec. 8.** AS 11.51.130(a) is amended to read:

(a) A person commits the crime of contributing to the delinquency of a minor if, being 19 years of age or older or being under 19 years of age and having the disabilities of minority removed for general purposes under AS 09.55.590, the person aids, induces, causes, or encourages a child

(1) under 18 years of age to do any act prohibited by state law unless the child's disabilities of minority have been removed for general purposes under AS 09.55.590;

[(2) UNDER 18 YEARS OF AGE OR ALLOWS A CHILD UNDER 18 YEARS OF AGE TO ENTER OR REMAIN IN THE IMMEDIATE PHYSICALL PRESENCE OF THE UNLAWFUL MANUFACTURE, USE, DISPAY, OR DELIVERY OF A CONTROLLED SUBSTANCE KNOWING THAT THE MANUFACTURE, USE, DISPAY, OR DELIVERY IS OCCURING, UNLESS THE CHILD'S DISABILITIES OF MINORITY HAVE BEEN REMOVED FOR GENERAL PURPOSES UNDER AS 09.55.590 ;]

(2)[3] under 16 years of age to be repeatedly absent from school, without just cause; or

(3)[4] under 18 years of age to be absent from the custody of a parent, guardian, or custodian without the permission of the parent, guardian, or custodian or without the knowledge of the parent, guardian, or custodian, unless the child's disabilities of minority have been removed for general purposes under AS 09.55.590 or the person has immunity under AS 47.10.350 or 47.10.398(a); it is an affirmative defense to a prosecution under this paragraph that, at the time of the alleged offense, the defendant

(A) reasonably believed that the child was in danger of physical injury or in need of temporary shelter; and

(B) within 12 hours after taking the actions comprising the alleged offense, notified a peace officer, a law enforcement agency, or the Department of Health and Social Services of the name of the child and the child's location.

* **Sec. 9.** AS 11.56.750(a) is amended by adding a new section to read:

(a) A person commits the crime of unlawful contact in the first degree if the person

(1) has been ordered not to contact a victim or witness of the offense [AS]

(A) **as** part of a sentence imposed under AS 12.55.015 ; or

(B) **as** a condition of

(i) release under AS 12.30;

(ii) probation under AS 12.55.101; or

(iii) parole under AS 33.16.150; **or**

(C) while incarcerated; and

(2) either directly or indirectly, knowingly contacts or attempts to contact the victim or witness in violation of the order**; or**

(3) knowingly assists a person in violating section (a)(1 & 2) of this statute.

* **Sec. 10.** AS 11.81.900(a) is amended by adding a new subsection to read:

"Serious bodily injury to the child" includes, but is not limited to, second- or third-degree burns, a fracture of any bone, a concussion, subdural or subarachnoid bleeding, retinal hemorrhage, cerebral edema, brain contusion, strangulation, injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement, including those sustained by striking children with objects, or other physical injury that results in significant physical injury to the child.

* **Sec. 11.** AS 12.55.155(18) is amended to read:

Sec. 12.55.155. Factors in aggravation and mitigation.

(18) the offense was a felony

(A) specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit made up of those living together in the same dwelling as the defendant;

(B) specified in AS 11.41.410 - 11.41.458 and the defendant has engaged in the same or other conduct prohibited by a provision of AS 11.41.410 - 11.41.460 involving the same or another victim;

(C) specified in AS 11.41 that is a crime involving domestic violence and was committed in the physical presence or hearing of a child under 16 years of age who was, at the time of the offense, living within the residence of the victim, the residence of the perpetrator, or the residence where the crime involving domestic violence occurred;

(D) specified in AS 11.41 and was committed against a person with whom the defendant has a dating relationship or with whom the defendant has engaged in a sexual relationship; [OR]

(E) specified in AS 11.41.434 - 11.41.458 or AS 11.61.128 and the defendant was 10 or more years older than the victim; **or**

(F) specified in AS 11.41.200 – 11.41.220 and the serious bodily injury caused to a child resulted in significant mental injury to the child. In this section, "mental injury" is defined as a serious injury to the child as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness.

* **Sec. 12.** This Act takes effect *, 2012.

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The economic burden of child maltreatment in the United States and implications for prevention☆,☆☆

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ABSTRACT

Objectives: To present new estimates of the average lifetime costs per child maltreatment victim and aggregate lifetime costs for all new child maltreatment cases incurred in 2008 using an incidence-based approach.
Methods: This study used the best available secondary data to develop cost per case estimates. For each cost category, the paper used attributable costs whenever possible. For those categories that attributable cost data were not available, costs were estimated as the product of incremental effect of child maltreatment on a specific outcome multiplied by the estimated cost associated with that outcome. The estimate of the aggregate lifetime cost of child maltreatment in 2008 was obtained by multiplying per-victim lifetime cost estimates by the estimated cases of new child maltreatment in 2008.
Results: The estimated average lifetime cost per victim of nonfatal child maltreatment is $210,012 in 2010 dollars, including $32,648 in childhood health care costs; $10,530 in adult medical costs; $144,360 in productivity losses; $7,728 in child welfare costs; $6,747 in criminal justice costs; and $7,999 in special education costs. The estimated average lifetime cost per death is $1,272,900, including $14,100 in medical costs and $1,258,800 in productivity losses. The total lifetime economic burden resulting from new cases of fatal and nonfatal child maltreatment in the United States in 2008 is approximately $124 billion. In sensitivity analysis, the total burden is estimated to be as large as $585 billion.
Conclusions: Compared with other health problems, the burden of child maltreatment is substantial, indicating the importance of prevention efforts to address the high prevalence of child maltreatment.

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Introduction

Child maltreatment (CM) is a serious and prevalent public health problem in the United States, responsible for substantial morbidity and mortality. The 4 major types of CM are physical abuse, sexual abuse, psychological abuse, and neglect (Leeb et al., 2007). In fiscal year 2008, US state and local child protective services (CPS) received 3.3 million

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reports of children being abused or neglected and an estimated 772,000 children were classified by CPS authorities as being maltreated (USDHHS, 2010). The number of confirmed cases has decreased over the past several years (USDHHS, 2010), but researchers argue that CPS data grossly underestimate the total incidence of CM (Haugaard & Emery, 1989; Hussey, Chang, & Kotch, 2006; Swahn et al., 2006; Waldfogel, 1998). A nationally representative study of children aged 0–17 reported that 10.2% of US children experienced some form of maltreatment in 2008 (Finkelhor, Turner, Ormrod, & Hamby, 2009).

CM has been shown to have lifelong adverse health, social, and economic consequences for survivors, including behavioral problems (Felitti et al., 1998; Repetti, Taylor, & Seeman, 2002); mental health conditions such as posttraumatic stress disorder (Browne & Finkelhor, 1986; Holmes & Sammel, 2005; Moeller, Bachmann, & Moeller, 1993); increased risk for delinquency, adult criminality, and violent behavior (Fang & Corso, 2007; Widom & Maxfield, 2001); increased risk of chronic diseases (Browne & Finkelhor, 1986; Felitti et al., 1998); lasting impacts or disability from physical injury (Dominguez, Chalom, & Costarino, 2001); reduced health-related quality of life (Corso, Edwards, Fang, & Mercy, 2008); and lower levels of adult economic well-being (Currie & Widom, 2010). Given the high prevalence of CM and the many negative short- and long-term consequences of CM, the economic costs of CM may be substantial. Estimating the economic burden of CM is important for several reasons. Economic estimates can help to increase awareness of the current severity of CM, place the problem in the context of other public health concerns, and may be used in economic evaluation of interventions to reduce or prevent CM.

Several studies have drawn attention to the problem of CM by producing estimates of the national economic burden of CM (Conrad, 2006; Daro, 1988; Fromm, 2001; Miller, Cohen, & Wiersema, 1996; Wang & Holton, 2007). These studies made important contributions and advanced awareness, but shortcomings have been identified (Corso & Fertig, 2010), which should be addressed if burden estimates are to be used for health policy analysis. Problems include the "(1) lack of transparency in inputs used in the estimation procedure, (2) calculation mistakes, and (3) methodological errors" (p. 297) (Corso & Fertig, 2010). Correcting for these flaws is crucial to producing higher quality future estimates of the economic burden of CM. Furthermore, since the last estimate of the economic burden of CM conducted in 2007 (Wang & Holton, 2007), researchers have found additional quantified evidence regarding the health care costs associated with CM during childhood and adulthood (Bonomi et al., 2008; Florence et al., 2012) and the long-term consequence of CM on adult earnings (Currie & Widom, 2010). Including these latest study results should improve understanding of the economic burden of CM.

Economic burden estimates generally take 1 of 2 perspectives to quantifying a health problem: a prevalence-based approach or an incidence-based approach. Both are relevant to CM. Prevalence-based economic burden provides an estimate of the direct and indirect costs incurred in a period (most often 1 year) as a result of the prevalence of CM during this same period (or this given year), regardless of the onset of CM. Thus, in a prevalence-based study of the economic burden of CM with a time frame of, say, 1 year, costs associated with all cases of CM (including cases with the onset in or at any time before the base year) would be included; however, only costs incurred during the 1-year period would be counted (Haddix, Teutsch, & Corso, 2003).

In contrast, incidence-based economic burden represents the total lifetime costs resulting from new cases of CM that occur within a set time period (most often 1 year) (Haddix, Teutsch, & Corso, 2003). Incidence-based costs are more difficult to estimate because they require data on short- and long-term costs and consequences of CM, such as its chronic sequelae on health, employment, and earnings over the lifetime of an individual. However, incidence-based costs are more useful for the economic evaluation of CM prevention/intervention activities (Haddix, Teutsch, & Corso, 2003). For example, the lifetime costs avoided could be compared with the costs of preventing 1 case of CM in a benefit-cost analysis of prevention. Both direct and indirect costs are included in an incidence-based costing perspective.

All of the previous estimates of the economic burden of CM that we are aware of are not estimated on a cost-per-case basis, except for the Conrad (2006) study. Similar to other studies, Conrad's study has a number of methodological shortcomings. For example, for the effect of CM on juvenile delinquency, Conrad uses the raw number of how many abused children become juvenile offenders as reported in a study by Widom and Maxfield (2001). This number does not take into account how many of these children would have been offenders if they had not been abused and therefore overestimates the effect of CM on juvenile delinquency. Widom and Maxfield (2001) report that about 27% of abused and neglected children have had a juvenile arrest, compared with 17% of non-abused children. This 10% marginal (or incremental) effect would have provided a more accurate estimate of the effect of CM on delinquency. There are similar problems with the estimates of effect of CM on adult criminality and lifetime productivity. In addition, for some of the cost estimates (such as the use of health care and mental health services), annual costs (prevalence-based estimates) of CM were calculated. Because the study was designed to estimate the incidence-based lifetime health care costs, the stream of incremental health care costs associated with CM over the lifetime should be used, discounted, and summed to net present value in the base year of analysis (Haddix, Teutsch, & Corso, 2003).

In this paper, we present new estimates of the average lifetime cost per CM victim and aggregate lifetime costs for all new cases of CM incurred in 2008 using an incidence-based approach. This study extends previous research in this area by correcting methodological flaws of previous studies; incorporating more recent and comprehensive studies of the epidemiology, consequences, and costs of CM; and providing a framework for using the findings in the literature to estimate the incidence-based economic burden of CM.

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Methods

General overview

This study measured costs from the societal perspective. All costs were estimated in US dollars and adjusted to the reference year 2010 using the gross domestic product (GDP) deflator (available from http://www.gpoaccess.gov/usbudget/fy12/pdf/BUDGET-2012-TAB.pdf, Table 10.1). Future costs associated with CM accumulating over time were discounted at 3% to reflect their present value, as recommended by the US Panel on Cost-Effectiveness in Health and Medicine (Gold et al., 1996). Although 3% is often recommended as the base rate for cost-effectiveness analysis of health and medical interventions, a more conservative discount rate of 7% was used as a further sensitivity analysis as recommended by the Committee to Evaluate Measures of Health Benefits for Environmental, Health, and Safety Regulations (Miller, Robinson, & Lawrence, 2006).

Based on previous research (Corso & Fertig, 2010), this study focuses on the following major types of costs that are associated with CM: health care costs (short- and long-term, including physical and mental health), productivity losses, child welfare costs, criminal justice costs, and special education costs. For each category, we used the best available secondary data to develop cost per case estimates. First, a general literature review was performed to identify published, peer-reviewed studies on all outcomes related to CM with a potential economic cost or consequence. Articles were identified by keyword searching in a variety of databases, including PubMed, PsycInfo, EconLit, and Google Scholar. In addition to keyword searches, the bibliographies of all relevant articles were scanned to identify additional relevant studies. Whenever possible, published peer-reviewed studies were used to estimate the costs. However, in cases where the data on costs or effects were particularly sparse, we included non-peer-reviewed reports or white papers containing relevant economic outcomes of CM. Reports and white papers were identified by examining the citations of peer-reviewed studies identified in the general literature review and through searches of EconLit, the Social Science Research Network, and Google and Google Scholar.

The median age for CM victims in 2008 was 6 years old (USDHHS, 2010). We used the median age to calculate the average lifetime cost per victim, which was defined as the sum of short-term health care costs, long-term health care costs, productivity losses, child welfare costs, criminal justice costs, and special education costs. In other words, the present value of all future costs is estimated starting at age 6. For each category, we used attributable costs whenever possible (e.g., health care costs); these estimates reflect econometric procedures to statistically identify the difference between the costs of CM victims and non-maltreated controls, adjusting for observed differences between the 2 groups. Attributable cost data were not available for some categories; in these, costs were estimated as the product of incremental effect of CM on a specific outcome multiplied by the estimated cost associated with that outcome. For example, the cost of adult criminality due to CM is estimated as the product of the incremental probability of being an adult criminal by the average cost per adult criminal career. The estimate of the aggregate lifetime cost of CM in 2008 was obtained by multiplying per-victim lifetime cost estimates by the estimated cases of new CM in 2008.

Incidence rate

To generate incidence-based estimates, we begin with an estimate of CM cases and deaths during 2008. For cases, an estimated 772,000 children were determined by CPS agencies to be victims of abuse or neglect during 2008 (USDHHS, 2010). Three-quarters of victims (75%) had no history of prior victimization (USDHHS, 2010), yielding an estimated 579,000 new cases in 2008. Although researchers have argued that CPS data underestimate the total incidence of CM (Haugaard & Emery, 1989; Hussey, Chang, & Kotch, 2006; Swahn et al., 2006; Waldfogel, 1998), to be conservative, this study uses the CPS estimate of 579,000 new cases as the baseline for our estimation of the aggregate lifetime cost of CM in 2008.

Given that definitions of CM and criteria for substantiation vary between states and that previous research has shown that children in unsubstantiated cases have similar maltreatment experiences and developmental outcomes to children in substantiated cases (Drake, 1996; Hussey, Marshall, & English, 2005; Kohl, Jonson-Reid, & Drake, 2009; Leiter, Myers, & Zingraff, 1994), a sensitivity analysis on the aggregate lifetime cost of CM was conducted using the investigated incidents of CM. In 2008, nearly 3.7 million children received an investigation or assessment (USDHHS, 2010); assuming that 75% of these investigated children were also new reports, this suggests about 2,775,000 new victims of CM as an alternative estimate of CM incidence for sensitivity analysis.

The other major source of national estimates of the incidence of nonfatal CM is the periodic National Incidence Study (NIS), which combines information about reported cases with data on maltreated children identified by community professionals who are likely to come into contact with maltreated children such as child care providers, teachers, and hospital staff. There have been 4 cycles of NIS conducted in the United States: NIS-1 (1979–1980); NIS-2 (1986); NIS-3 (1993) and NIS-4 (2005–2006). According to NIS-4, the most recent NIS data available, an estimated 1,256,600 children experienced maltreatment using the "Harm Standard," and an estimated 2,905,800 children experienced maltreatment using the broader "Endangerment Standard" during the 2005–2006 study year (Sedlak et al., 2010). Assuming that 75% of these cases were new reports, this suggests an estimated 942,450 new cases using the "Harm Standard" and 2,179,350 new cases using the "Endangerment Standard." Both numbers were included as alternative estimates of CM incidence in 2008 in the sensitivity analysis.

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An incidence-based accounting of the costs of CM must also include the value of mortality for fatal cases of maltreatment. An estimated 1,740 children nationally died from abuse or neglect in 2008 (USDHHS, 2010). About 80% of all fatalities were children younger than 4 years old. Valuation is described in detail below.

Average lifetime cost per victim of nonfatal child maltreatment

Short-term health care costs. Short-term health care costs of CM in this study refer to the health care costs resulting from a new case of CM that occurred in childhood. Because the median CM case is a child aged 6 years, short-term health care costs include the incremental health care costs attributable to CM from age 6 to age 17.

A literature review identified a set of 8 articles on pediatric, short-term medical costs of CM. However, all of the studies are based on inpatient hospital data and limit their per-case reporting time period to a single inpatient episode (Brown, Fang, & Florence, 2011). Estimating the average annual medical costs of CM requires capturing increased expenditures outside of hospital settings. For example, CM may lead to increased costs for mental health services, prescription drugs, or chronic disease care, which are not captured in the inpatient studies. Furthermore, only the most severe instances of CM require inpatient care, and therefore these studies capture a non-representative sample of abused children.

In the absence of appropriate estimates in the literature, we have, in separate analyses, estimated the medical costs of maltreatment during childhood using linked survey and Medicaid claims (Florence et al., 2012). Specifically, we linked a sample of 1,151 children with cases investigated by CPS, drawn from the National Survey of Child and Adolescent Well-Being, to individual 2000–2003 Medicaid claims. We formed a comparison group of Medicaid children based on propensity score matching. The attributable difference in annual medical costs between the case and control groups is $2,703 (2003 dollars) per victim. Full details of methods and results for this analysis can be found elsewhere (Florence et al., 2012). Adjusted by GDP deflator, the cost difference measured in 2010 dollars is $3,184, or $32,648 per victim of nonfatal CM for the present value of medical costs from ages 6 through 17.

Long-term medical costs. A few sources of data exist for adult estimates of the long-term medical costs of CM (Bonomi et al., 2008; Hulme, 2000; Walker et al., 1999). Based on a review (Brown et al., 2011), we determined that Bonomi et al.'s (2008) estimates were most suitable for this study. They examined long-term health care costs associated with physical, sexual, or both physical and sexual childhood abuse using data from 3,333 women (ages 18–64) enrolled in a large health care delivery system. Total annual health care costs were 21% higher (about $507) in 2004 for women with a history of physical or sexual childhood abuse compared to women without these abuse histories. Based on Bonomi et al.'s (2008) findings and acknowledging that the study only included women (as did the 2 other adult estimates), we assume that the average annual incremental health care costs for a CM victim from age 18 through age 64 are $507 (2004 dollars), or $582 in 2010 dollars. The present value of a stream of these incremental health care costs over the period from age 18 through age 64 is $10,530 per case.

We did not locate any studies that report incremental health care costs associated with CM for adults older than age 65. As a result, the long-term medical costs of CM included in this study only account for the incremental health care costs from age 18 to 64.

Productivity losses. Lifetime productivity losses associated with CM were estimated using the human capital approach, which measures the potential loss of earnings due to being maltreated during childhood. Currie and Widom (2010) assessed the economic consequences in individuals with documented histories of childhood neglect and physical and sexual abuse and a matched comparison group who were followed up into adulthood (mean age = 41). They found that individuals with documented histories of neglect and/or abuse earned about $5,000 less per year on average than controls, controlling for background characteristics. Based on their findings, we assume that experience of CM reduces victim earnings by $5,000 (2003 dollars) per year from ages 18 to 64, assuming that productivity losses are negligible beyond 65 when most retire. Adjusted to 2010 dollars, the earning gap is $5,890, and assuming a long-term growth in labor productivity of 1% per year (Grosse, 2003), the present discounted value of these earnings losses from age 6 would be $144,360. We do not include the value of lost tax receipts from reduced earnings. Although these are a cost to the government, from a social perspective, this is a transfer from individuals to the public sector, and there is no net loss.

Child welfare costs. Given that some of the child welfare services provided to CM victims last more than 1 year (e.g., long-term foster care), the ideal way to estimate lifetime child welfare costs associated with CM would be to track the CM victims and their child welfare costs over their entire childhood. To date, there have been no such longitudinal studies. However, according to the Administration for Children and Families, the number of children investigated for CM and the cross-section of the investigated sample with respect to age and services provided to the children (e.g., substantiated vs. unsubstantiated; in-home services vs. out-of-home placement) remained relatively constant between 2004 and 2008 (USDHHS, 2010), which satisfies the assumptions for the steady-state methodology used by other researchers to estimate the lifetime costs of disease when direct or longitudinal data on lifetime costs are not available (Barnett, Birnbaum, Cremieux, Fendrick, & Slavin, 2000; Birnbaum, Leong, & Kabra, 2003). Following their methodology, by making steady-state assumptions, the total annual child welfare costs in 1 year serve as a proxy for the lifetime welfare costs of victims investigated in that year.

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The most recent national estimate of child welfare costs available is from 2006. Overall, states spent $25.7 billion in federal, state, and local funds on child welfare activities in fiscal year 2006, and an estimated 3,578,000 children received a CPS investigation in 2006 (DeVooght, Allen, & Geen, 2008). This yields an estimated $7,183 in child welfare costs per investigated child, or $7,728 per child in 2010 dollars.

Criminal justice costs. Criminal justice costs associated with CM were determined based on the effects of CM on juvenile and adult arrests. Widom and Maxfield (2001) analyzed data from a longitudinal study that followed a group of 908 substantiated cases of CM and a comparison group of 667 children through adulthood; they reported that 27.4% of maltreated children had a juvenile arrest, compared with 17.2% of non-abused children. We used the simple difference in these, 10.2%, as our estimate for the incremental effect of CM on the likelihood of arrest. Regarding the associated costs, Reynolds, Temple, Robertson, and Mann (2002) estimated that expenditures to the criminal justice system for juveniles with court petitions were $18,950 per participant in 1998 dollars, including the administrative expenditures associated with the juvenile arrest and the weighted national average of the proportion of cases that led to residential treatment, community treatment or probation services, and release. Updated to 2010 dollars, the criminal justice costs per juvenile arrest are $24,513. Based on the mean age of juvenile arrest of 14 (Reynolds et al., 2002) and the incremental increase of 10.2%, the present value of future expenditures to the criminal justice system associated with juvenile arrest evaluated at age 6 is $1,974 (2010 dollars) per CM victim.

For adult criminal justice costs, we used additional data from Widom and Maxfield (2001), who reported that CM increases the likelihood of having an adult criminal record by 9.1 percentage points (41.6% for the maltreated group vs. 32.5% for the comparison group). Reynolds et al. (2002) estimated that the average social cost of an adult crime — including the costs of arrest, judicial processing, and treatment — is $69,038 in 1998 dollars or $89,304 in 2010 dollars. Based on the assumed mean age of first adult arrest at 23 and an incremental increase of 9.1%, the present value of future expenditures to the criminal justice system associated with adult arrest is $4,773 (2010 dollars) per CM victim. Given the incidence-based costing framework we are using, this estimate reflects the average costs of all criminals, including chronic re-offenders.

Special education costs. Maltreated children are more likely to receive special education. Jonson-Reid, Drake, Kim, Porterfield, and Han (2004) found that 24.2% of maltreated children received special education at a mean age of 8 years, compared with 13.7% of children with no maltreatment record. Again, based on a simple difference, we assumed that the incremental effect due to CM is 10.5%. Reynolds et al. (2002) estimated that the average annual cost per child for special education services was $7,791 (1998 dollars) above and beyond regular instruction. Assuming that the average number of years receiving special education services is 9 years (from age 8 to 17) and the incremental increase is 10.5%, the present value of future special education costs associated with CM is estimated to be $7,999 (2010 dollars) per victim.

Average lifetime cost per victim of fatal child maltreatment

According to Corso, Mercy, Simon, Finkelstein, and Miller's (2007) work, for children aged 0–4, the average cost per case for a fatal assault was $11,300 (in 2000 dollars) in medical costs and $1,005,650 (in 2000 dollars) for lost productivity. Adjusted to 2010 dollars, the medical costs and productivity losses are $14,100 and $1,258,812, respectively.

Results

Table 1 presents the average lifetime cost of nonfatal CM per victim. Discounted at 3%, we estimated the average lifetime cost per victim of nonfatal CM to be $210,012 in 2010 dollars. The cost includes discounted present values of $32,648 in childhood health care costs, $10,530 in adulthood medical costs, $144,360 in productivity losses, $7,728 in child welfare costs, $6,747 in criminal justice costs, and $7,999 in special education costs. Because cost estimates vary as a function of the discount rate, we also estimated the average lifetime cost per case of nonfatal CM using the discount rate of 7% (Miller et al., 2006). Based on a 7% annual discount rate, the average lifetime cost per nonfatal victim was estimated to be $97,952 (see Table 1). For fatal CM, the average lifetime cost per death was estimated to be $1,272,900 in 2010 dollars, including $14,100

Table 1
The average lifetime cost per victim of nonfatal child maltreatment.

Source of cost	Reference	Average lifetime cost per victim (in 2010 dollars)	
		Discounted at 3%	Discounted at 7%
Short-term health care costs	Florence et al. (2012)	$32,648	$27,063
Long-term health care costs	Bonomi et al. (2008)	$10,530	$3,789
Productivity losses	Currie and Widom (2010)	$144,360	$49,068
Child welfare costs	DeVooght et al. (2008)	$7,728	$7,728
Criminal justice costs	Widom and Maxfield (2001) Reynolds et al. (2002)	$6,747	$3,860
Special education costs	Jonson-Reid et al. (2004) Reynolds et al. (2002)	$7,999	$6,443
Total		$210,012	$97,952

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Table 2
The average lifetime cost per case of fatal child maltreatment.

Source of cost	Average lifetime cost per victim (in 2010 dollars)	Average lifetime cost per victim (in 2010 dollars)
	Discounted at 3%	Discounted at 7%
Medical costs	$14,100	$14,100
Productivity losses	$1,258,800	$325,267
Total	$1,272,900	$339,367

Table 3
Total lifetime costs of child maltreatment, 2008, United States (based on substantiated cases of child maltreatment).

Source of cost	Total lifetime costs (in 2010 dollars)	
	Discounted at 3%	Discounted at 7%
Nonfatal		
Incidence (cases)	579,000	579,000
Short-term health care costs	$18,903,192,000	$15,669,477,000
Long-term health care costs	$6,096,870,000	$2,193,831,000
Productivity losses	$83,584,440,000	$28,410,372,000
Child welfare costs	$4,474,512,000	$4,474,512,000
Criminal justice costs	$3,906,513,000	$2,234,940,000
Special education costs	$4,631,421,000	$3,730,497,000
Total	$121,596,948,000	$56,714,208,000
Fatal		
Incidence (cases)	1,740	1,740
Medical costs	$24,534,000	$24,534,000
Productivity losses	$2,190,312,000	$565,964,580
Total	$2,214,846,000	$590,498,580
Total costs (including both fatal and nonfatal cases)	$123,811,794,000	$57,304,706,580

in medical costs and $1,258,800 in productivity losses (Table 2). The average lifetime cost per death would be $339,367 if using the discount rate of 7%.

Table 3 presents the total lifetime economic burden of CM in 2008 based on the baseline estimate of 579,000 new cases of nonfatal CM. For these cases, the aggregate lifetime costs were estimated to be $121.6 billion. Of the total costs, childhood health care costs accounted for $18.9 billion, adulthood medical costs accounted for $6.1 billion, productivity losses accounted for $83.6 billion, child welfare costs accounted for $4.5 billion, criminal justice costs accounted for $3.9 billion, and special education costs accounted for $4.6 billion. The aggregate lifetime costs associated with the 1,740 deaths resulting from CM were estimated to be $2.21 billion, with medical costs accounting for $25 million and lost productivity accounting for $2.19 billion. Adding together the fatal and nonfatal costs gave us the total lifetime costs associated with new cases of fatal and nonfatal CM in 2008, approximately $124 billion. When using the more conservative discount rate of 7%, the total lifetime costs of CM in 2008 still exceed $57 billion (Table 3).

In sensitivity analysis (Table 4), when we assumed that all investigated children were victims of CM (i.e., 2,775,000 new victims in 2008), the total lifetime costs associated with new cases of fatal and nonfatal CM in 2008 would increase to $585 billion using the discount rate of 3% and to $272 billion using the discount rate of 7%. When incidence estimates using the NIS "Harm Standard" (i.e., 942,450 new victims per year) and "Endangerment Standard" (i.e., 2,179,350 new victims per year) were applied to the sensitivity analysis, the total lifetime costs of CM in 2008 were approximately $200 billion and $460 billion, respectively, using the discount rate of 3%. When using the discount rate of 7%, the total lifetime costs of CM were $93 billion and $214 billion respectively.

Table 4
Sensitivity analysis of total lifetime costs of child maltreatment, 2008, United States.

Source of incidence data	Incidence (cases)	Total lifetime costs (in 2010 dollars) discounted at 3%	Total lifetime costs (in 2010 dollars) discounted at 7%
Nonfatal			
NIS harm standard	942,450	$197,925,809,400	$92,314,862,400
NIS endangerment standard	2,179,350	$457,689,652,200	$213,471,691,200
CPS investigated cases	2,775,000	$582,783,300,000	$271,816,800,000
Fatal			
CPS data	1,740	$2,214,846,000	$590,498,580
Total costs (including both fatal and nonfatal cases)			
NIS harm standard		$200,140,655,400	$92,905,360,980
NIS endangerment standard		$459,904,498,200	$214,062,189,780
CPS investigated cases		$584,998,146,000	$272,407,298,580

Abbreviations: NIS, National Incidence Study; CPS, child protective services.

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Discussion

Using an incidence-based approach, the lifetime economic burden of CM resulting from an estimated 579,000 new cases of nonfatal CM and 1,740 cases of fatal CM that occurred in the United States in 2008 is approximately $124 billion. On average, the lifetime cost is estimated to be $210,012 per victim of nonfatal CM and $1,272,900 per victim of fatal CM. These estimates are significant new contributions that use a consistent, robust approach in incidence-based costing methods, which improve significantly upon the limitations of past estimates of the burden of CM. Our estimates also represent the most recent and up-to-date figures for accurate, contemporary policy analysis. Furthermore, our use of a consistent, incidence-based approach directly facilitates comparisons with other health conditions and enables economic analyses of CM-specific policies. Such evaluation was impossible in the past based on previous work. We also provide sensitivity analyses on our estimates to reflect the facts that the measure of burden is dependent on assumptions about discounting for present value and CPS data underestimate the total incidence of CM.

Our new estimates cannot be compared directly to previous estimates of the economic impact of CM because of significant differences in our methods, as discussed earlier. However, for context, we cautiously make comparisons to the most widely cited report and to estimated costs of some other public health problems, which are measured using incidence-based costing approaches. Using a mix of methods, but primarily a prevalence-based approach, Wang and Holton (2007) report an estimate of $103.8 billion (2007 dollars) in annual costs; because it is primarily prevalence-based, their estimate is approximately the burden in a single year. In contrast, our estimate of $124 billion (2010 dollars)—while seemingly similar—represents the lifetime cost of new CM cases that occur in a single year.

We also estimated the lifetime burden of a new case of nonfatal CM to be $210,012 per victim. This estimate is comparable to that of many other high profile public health problems, indicating the impact and seriousness of the issue of CM. For example, the discounted lifetime costs (discounted at a 5% rate) of stroke per person were estimated at $159,846 (2010 dollars) (Taylor et al., 1996), whereas the total lifetime costs (discounted at a 3% rate) associated with type 2 diabetes were estimated between $181,000 and $253,000 (2010 dollars) per case (Zhuo, Zhang, & Hoerger, 2010). Although stroke and diabetes are clearly different from CM, we reference them to indicate that CM costs and prevalence are high enough for policy makers to justify allocating resources to effective prevention and mitigation strategies for CM.

Like any estimates of economic burden, our study has several limitations. First, we used an estimate of 579,000 new substantiated cases per year as the baseline to calculate the total lifetime economic burden of CM. This number underestimates the total incidence of CM because some of the maltreated cases may not have been reported to CPS or were reported but not substantiated for various reasons, implying that our baseline results are probably conservative, lower-bound estimates of the total lifetime economic burden of CM. Since many states are now facing fiscal crises and significantly trimming social service budgets, it is possible that budget cuts may have artificially reduced the number of substantiated cases. If so, our estimates based on substantiated cases may not represent a "steady state" burden of CM as much as estimates based on investigated cases, which may be less affected by budget cuts than substantiation. A number of papers (e.g., Drake, 1996; Fallon et al., 2011; Hussey et al., 2005; Kohl, Jonson-Reid, & Drake, 2009; Leiter, Myers, & Zingraff, 1994) have shown that risk of maltreatment, which we capture more broadly through investigations, is strongly associated with adverse CM-related outcomes, including risk of CM fatalities (Putnam-Hornstein, 2011). Second, the costs of several adverse outcomes associated with CM were not measured. Research has suggested that CM may be associated with reduced life expectancy, decreased quality of life, and negative parenting behaviors, which can lead to negative intergenerational outcomes, including conduct, peer, and emotional problems (Brown et al., 2011; Corso & Fertig, 2010; Corso et al., 2007; Roberts, O'Connor, Dunn, & Golding, 2004). We were unable to locate sufficient data on the magnitude of these effects or their costs and were therefore unable to include them in this study. As a result, our findings undercount the full costs of CM. Third, the assessment and definitions of CM differed somewhat among the studies we used to estimate different categories of costs. Some used CPS substantiated cases to identify CM (e.g., Currie & Widom, 2010; Widom & Maxfield, 2001), whereas others used CPS investigations (e.g., Florence et al., 2012) to measure CM or used self-reported surveys and questionnaires (e.g., Bonomi et al., 2008) to measure the retrospective abuse history. Fourth, most of the studies we used for component costs did not estimate the impact of psychological abuse because of the lack of data on psychological abuse. The long-term medical cost estimates in Bonomi et al. (2008) do not include psychological abuse or neglect. Excluding psychological abuse or neglect from some cost areas associated with CM may lead to an underestimation of the economic burden of CM.

Fifth, we did not estimate the economic burden of CM by type and severity of maltreatment because several of the cost studies we used (e.g., Currie & Widom, 2010; Widom & Maxfield, 2001) did not provide the effects of CM by type of maltreatment and none of the studies have estimated the effects by severity of CM. However, for the studies which *did* investigate the effects by type, results indicate that different types of maltreatment may be associated with different magnitude of these effects. For example, Jonson-Reid et al. (2004) found that children reported for physical abuse had nearly a 50% higher risk of later special education entry than those reported for sexual abuse. Bonomi et al. (2008) estimated that long-term annual health care costs were 22% higher for women with a history of physical abuse and 16% higher for women with a history of sexual abuse compared to women without physical or sexual childhood abuse. In contrast, sexual abuse can be more significantly associated with some other health consequences such as reproductive and sexual health problems. A literature review indicates that childhood sexual abuse can be associated with a myriad of serious reproductive and sexual health problems including unplanned or adolescent pregnancies, infertility, menstrual problems, and painful intercourse (Bohn & Holz, 1996). Severity of maltreatment is another important factor that may affect economic costs. Some

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previous studies have shown a relationship between severity of CM and psychological and/or functional outcomes (e.g., Manly, Cicchetti, & Barnett, 1994; Romans, Martin, Anderson, O'Shea, & Mullen, 1995), but little has been done to examine the associations of CM severity with the outcomes included in this study for the estimation of CM costs. Furthermore, the field has not achieved consensus on how to best measure the severity of CM. The lack of the studies and consensus on the operational definitions of severity did not allow us to conduct finer calculations by severity.

Sixth, we were unable to include any long-term medical costs for adults aged 65 or older. Because other research has shown that health consequences of CM may continue beyond age 65 (Felitti et al., 1998), any associated costs in this age group further imply that we underestimate total costs of CM. Seventh, productivity losses for CM morbidity were not adjusted to include household productivity, although for mortality, household productivity losses were included in the Corso et al. (2007) estimates. Short-term productivity losses such as missed school days due to CM were excluded as well. Excluding these losses implies that our estimates underestimate the actual burden of CM. Eighth, we used the median age (6 years) in CPS reports (USDHHS, 2010) to calculate the average lifetime cost per victim. More severe cases of CM tend to occur in early childhood, so the unbalanced age distribution in terms of the severity of CM could bias our estimates. (For example, in most cases of abusive head trauma, victims are infants younger than 1-year old (Brown et al., 2011).) Ninth, most of our component costs estimates were based on data from single studies. In most cases there were few alternatives from which to choose. Given the sensitive nature of CM, we did not find any relevant studies of CM costs that were based on an experimental design. Instead, as a second best approach with the available data, we relied on studies which applied quasi-experimental longitudinal, prospective designs whenever possible. For almost all the cost categories for which existing data are available, only one study with prospective quasi-experimental design has been found for each category. Given the lack of additional valid studies in these areas, we were not able to use methods like meta-analysis or a sensitivity analysis of high and low estimates to arrive at more valid estimates for each cost category. Finally, although we include a range of estimates based on discount rate and incidence rate sensitivity analysis, we are unable to provide statistical confidence intervals in this study because of the large number of input sources used and the fact that several estimates included in our study did not report standard errors.

Although our study provides several important innovations over past estimates, a few areas should be highlighted for future research. First, as discussed above, we were unable to include economic estimates of a few impacts, which may have monetary costs. Future studies that quantify the costs of reduced life expectancy, decreased quality of life, or negative parenting behaviors and negative intergenerational outcomes could be included as updates to our estimates as they are available using the same framework. Second, if additional data on unsubstantiated cases were to be made available by CPS agencies or other sources, we could expand our sensitivity analysis and the potential range of estimates in this study. Developing more consistent definitions of CM and adding confidence intervals to inputs would strengthen our findings. Third, we were unable to estimate the economic burden of CM by type and severity of maltreatment due to the lack of sufficient data. This gap inhibits the evaluation of interventions which may be specific to certain types of maltreatment and our understanding of cost impacts of maltreatment. Where possible, we recommend that future researchers make efforts to investigate the costs of maltreatment by type and severity, as this will facilitate improved economic evaluations.

In summary, we estimate that the approximately 579,000 new substantiated cases of nonfatal CM and 1,740 cases of fatal CM per year in the United States result in a total economic burden of $124 billion. This estimate is based on discounted lifetime costs of $210,012 per victim of nonfatal CM and $1,272,900 per victim of fatal CM. These estimates are based on an incidence-based approach, which facilitates economic analysis for public health interventions. Compared with other health problems, the burden of CM is substantial, even after conservative assumptions are used, indicating the importance of preventing and treating CM. Although the evidence base for effective strategies to address CM is limited, a promising array of prevention and response programs have great potential to reduce the economic burden of CM. Included among effective programs are Nurse-Family Partnership, Early Start, and Triple P System (Macmillan et al., 2009; Prinz, Sanders, Shapiro, Whitaker, & Lutzker, 2009). For such programs to be successful, an ongoing commitment to implementation science will be needed to ensure that the full programs—upon which the positive results rest—are imparted with fidelity and include ongoing monitoring and supervision, and sustained resourcing (Cohen, Mannarino, & Murray, 2011; Toth & Manly, 2011). Given the substantial economic burden of CM, the benefits of prevention will likely outweigh the costs for effective programs.

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Cindy Smith

From: Rutherdale, Jan A (LAW) <jan.rutherdale@alaska.gov>
Sent: Wednesday, February 08, 2012 10:20 AM
To: Cindy Smith; Lyons, Michelle G (HSS)
Cc: Celeste Hodge
Subject: Re: Materials are coming

Will do, Cindy, and thanks again for your patience with yesterday's glitches.
Jan

----- Original Message -----
From: Cindy Smith <Cindy_Smith@legis.state.ak.us>
To: Rutherdale, Jan A (LAW); Lyons, Michelle G (HSS)
Cc: Hodge, Celeste (LAA)
Sent: Wed Feb 08 08:03:21 2012
Subject: RE: Materials are coming

For today, we will have a laptop and screen set up so all you need to bring is a jump drive with your presentation and we can plug you right in! If you can be there about 10 minutes before start time -- so around 1:20 -- that would helpful so we can make sure the presentation is up, loaded and ready to go when the committee begins.

All the printed material has been distributed, and we look forward to seeing you!

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

-----Original Message-----
From: Rutherdale, Jan A (LAW) [mailto:jan.rutherdale@alaska.gov]
Sent: Tuesday, February 07, 2012 2:58 PM
To: Cindy Smith; Lyons, Michelle G (HSS)
Subject: RE: Materials are coming

Cindy,
Sorry about the delay; Michelle ran into OCS firewall problems so we're sending this from my computer.

-----Original Message-----
From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Tuesday, February 07, 2012 12:21 PM
To: Rutherdale, Jan A (LAW); Lyons, Michelle G (HSS)
Subject: RE: Materials are coming

OK, thanks!

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

-----Original Message-----
From: Rutherdale, Jan A (LAW) [mailto:jan.rutherdale@alaska.gov]
Sent: Tuesday, February 07, 2012 12:20 PM
To: Cindy Smith; Lyons, Michelle G (HSS)
Subject: Materials are coming

Hi Cindy,
Michelle Lyons-Brown will be sending you within the hour the following for the presentation:
-Power point (3 slides to a page, B&W, w/o photos -hand-out of a national study (I can't remember the same) -a slightly corrected version of the CJA member list (if you've already distributed this, don't worry about redistributing)
- the statement regarding the proposed legislation -the proposed legislation

(Note: you already have a copy of the last two items -- we haven't changed them.)

We'll bring with us the 3 other reference handoutsthat are in hard copy form and not needed for the presentation (mandatory reporter training CD, MDT Guideline publication, and ACA brochure).
Jan

Cindy Smith

From: Lyons, Michelle G (HSS) <michelle.lyons@alaska.gov>
Sent: Tuesday, February 07, 2012 1:03 PM
To: Cindy Smith
Subject: Materials may come in two batches
Attachments: CJA statement regarding proposed legislation 11-18-11.doc; CJA member list 11-11.docx; CJA proposed legisation jan's FINAL 12-6-11.doc

Importance: High

As we are having technological issues with the presentation and cannot get it forwarded at this time....

Michelle Lyons-Brown
Child Advocacy Center/
Child Justice Act Task Force Coordinator
State of Alaska
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What is the Alaska Children's Alliance?

The Alaska Children's Alliance (ACA) is a non-profit coalition of established and developing children's advocacy centers (CAC's), multi-disciplinary teams (MDT's), and child protection teams (CPT's) dedicated to improving community responses to child maltreatment.

ACA is a state chapter of the National Children's Alliance (NCA). NCA is a non-profit accrediting organization that was developed to support and sustain the continued evolution of the CAC model. NCA provided Chapter Grant funding for the development of ACA and its publications, such as this brochure.

The Mission of the Alaska Children's Alliance

The mission of the Alaska Children's Alliance is to promote a culturally appropriate multidisciplinary response to child maltreatment throughout Alaska.

What is a Children's Advocacy Center?

A Children's Advocacy Center (CAC) provides a child-friendly environment that allows law enforcement, child protection workers, prosecutors, medical providers, victim/family advocacy, tribal representatives, and mental health providers to work together when there are allegations of child abuse. Referrals are accepted from the Office of Children's Services, law enforcement agencies (Alaska State Troopers, local police departments) and medical providers.

Why does Alaska need Children's Advocacy Centers?

- Alaska continues to have very high rates of child abuse and neglect, particularly child sexual abuse
- Child maltreatment is strongly linked to juvenile and adult crime, teen pregnancy, alcohol & drug abuse, suicide, and future family violence
- Child maltreatment has also been shown to be major contributors to poor adult medical and mental health
- Studies show that the annual economic impact of child abuse is $182,000 per maltreated child.
- Children are less fearful when investigations are conducted using CACs
- Parents & caregivers are more satisfied with the investigations when CACs are used

What happens at a Children's Advocacy Center?

- Comprehensive, multidisciplinary evaluation for child abuse concerns
- Specialized forensic interview in a child-oriented interview room which is video-taped and monitored by other members of the team
- Thorough, non-invasive medical exam by specially trained medical professionals
- Support, referrals, and follow up for children and families

Goals of CAC's, MDT's, & CPT's

- Assure that children are not further victimized by the systems designed to protect them
- Assure the child is safe
- Reduce the long term affects associated with trauma for the child and family
- Enhance and coordinate the investigation so that the accuracy of the concern is quickly and reliably determined
- Promote successful prosecution of criminal child abuse
- Encourage support and treatment for abused children and their families

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Brochure designed by Diane Karalunas

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The Alaska Children's Alliance

"Let us pray and work diligently,
and not take our ease,
until every Alaskan child
is safe, loved, and nurtured
every day of his or her life."

~ Senator Fred Dyson

A Chapter of the National Children's Alliance

3/02/12

OVERVIEW: BONDING REQUIREMENTS FOR MAJOR MINE PROJECTS

<TARGET><BILL></BILL><SUBJECT>3-02-12 OVERVIEW BONDING REQUIREMENTS FOR MAJOR MINE PROJECTS</SUBJECT><COMM>SJUD27</COMM></TARGET>

2012 March 2nd Judiciary Committee Hearing Witnesses

Dr. Margaret Palmer is a Professor of Entomology and Biology at the University of Maryland where she oversees a scientific research laboratory with approximately 120 staff, 20 buildings, and a research fleet. She has over 25 years of experience in research and teaching on coastal ecosystems, watershed science, and stream ecology and restoration. Her past work includes leading a large team of scientists in developing the first national database on river restoration in the U.S., coauthoring a book on The Foundations of Restoration Ecology and serving as an expert advisor on the design of multiple stream and river restoration projects.

Lance Trasky is the owner of Lance Trasky and Associates an environmental consulting company. Mr. Trasky received a Bachelor of Science degree from Michigan State University and did his graduate studies in fisheries at Central Michigan University. Mr. Trasky is a fisheries and habitat biologist with over 32 years of experience in fisheries research and analyzing potential adverse affects of many types of activities on fish and fish habitat. From 1971 to 1974 he served as the Alaska Department of Fish and Games Commercial Fisheries Division salmon area research biologist for the Arctic and Yukon River. Since 1974 he worked for the ADF&G Habitat and Restoration Division in a series of research, planning, and management positions with increasing responsibilities. In 1977 he was promoted to supervisor of the Marine and Coastal Habitat Management section, and in 1980 was made Regional Supervisor for the South Western, and Western Regions of Alaska. In 1983 his responsibilities were expanded to include ADF&G's South Central Region. This included Cook Inlet, Bristol Bay, Prince William Sound, Kodiak Island, and the lower Yukon Kuskokwim River which are the major salmon producing areas of Alaska.

Dr. David Chambers is the president of the CENTER for SCIENCE in PUBLIC PARTICIPATION, a non-profit corporation formed to provide technical assistance on mining and water quality to public interest groups and tribal governments. Dr. Chambers has 35 years of experience in mineral exploration and development – 15 years of technical and management experience in the mineral exploration industry, and for the past 20 years he has served as an advisor on the environmental effects of mining projects both nationally and internationally. He has Professional Engineering Degree in Physics from the Colorado School of Mines, a Master of Science Degree in Engineering from the University of California at Berkeley, and is a registered professional geophysicist in California (# GP 972). Dr. Chambers received his Ph.D. in Environmental Planning from Berkeley where his doctoral dissertation analyzed the U.S. Forest Service's efforts to plan for and manage minerals on the National Forests.

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TRUSTEES FOR ALASKA, ALASKA CENTER FOR THE ENVIRONMENT, TAMARA SMID and EDWIN TAYLOR, Appellants, v. LENNIE B. GORSUCH, COMMISSIONER, and ALASKA DEPARTMENT OF NATURAL RESOURCES, Appellees.

No. 3879, Supreme Court File. No. S-4047

SUPREME COURT OF ALASKA

835 P.2d 1239*; *1992 Alas. LEXIS 102*; *23 ELR 20276

August 21, 1992, Decided

SUBSEQUENT HISTORY: Petition for Partial Rehearing Denied January 11, 1994.

PRIOR HISTORY: [**1] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karen L. Hunt, Judge. Superior Court No. 3AN-88-7646 Civil

DISPOSITION: AFFIRMED in part, REVERSED in part, REMANDED

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, Trustees for Alaska, Alaska Center for the Environment, and citizens (trustees), challenged an order of the Superior Court of the State of Alaska, Third Judicial District, Anchorage, which affirmed an order of appellee Commissioner of Natural Resources (commissioner), approving appellee Alaska Department of Natural Resources' (DNR) issuance of a surface coal mining and reclamation operations permit.

OVERVIEW: The trustees challenged the commissioner's issuance of a surface coal-mining permit and a bond, alleging that the commissioner acted in excess of its jurisdiction and contrary to the Alaska Surface Control Mining Reclamation Act. The lower court approved the commissioner's decision, which affirmed the DNR's issuance of a permit and bond for certain mining activity. The trustees appealed. The court partially reversed the lower court's judgment, concluding that the DNR improperly issued a permit because it refrained from exercising jurisdiction over disputed facilities without a reasonable basis. Likewise, the bond was improperly issued because its amount was erroneously calculated not to cover the total cost of reclamation and its release was not contingent on the completion of wetlands restoration. Nevertheless, the court affirmed the commissioner's approval of the wetlands restoration plan because that decision was not arbitrary, capricious, or without reasonable basis.

OUTCOME: The court reversed the lower court's judgment to the extent that it affirmed the commissioner's approval of the DNR's issuance of a coal-mining permit and a bond. The matter was remanded for reconsideration of proper criteria as to the permit and for recalculation of the bond amount and reconsideration of the bond release criterion. The court affirmed the lower court's judgment to the extent it approved the wetlands restoration plan.

COUNSEL: Michael M. Wenig, Anchorage, for Appellants.

Ellen Toll, Assistant Attorney General, Anchorage, and Charles E. Cole, Attorney General, Juneau, for Appellees.

Richard M. Johannsen, Perkins Coie, Anchorage, Amicus Curiae of Diamond Shamrock-Chuitna Coal Joint Venture.

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

OPINION BY: COMPTON

OPINION

[*1241] *OPINION*

COMPTON, Justice.

RABINOWITZ, Chief Justice, with whom MATTHEWS, Justice, joins, dissenting in part.

This appeal challenges several aspects of a decision by the Commissioner of Natural Resources (commissioner) to issue a surface coal mining and reclamation operations permit under the Alaska Surface Coal Mining Control and Reclamation Act (ASCMCRA), *AS 27.21.010*-.999. We affirm the commissioner's decision in part, reverse in part and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Any person who conducts a surface coal mining and reclamation operation in Alaska [**2] must obtain a permit issued under ASCMCRA. *AS 27.21.060(a)*. In January 1985 Diamond Shamrock-Chuitna Coal Joint Venture (Diamond) applied for a permit to conduct surface coal mining on the western side of Cook Inlet. The Alaska Department of Natural Resources (DNR), Division of Mining (Division), approved Diamond's application on March 5 and August 21, 1987, after extensive review, public comment and revisions.

Trustees for Alaska, Alaska Center for the Environment, and several individuals who had participated in the comment and review process (collectively Trustees), appealed the decision to the commissioner under *AS 27.21.150*. After a hearing, the hearing officer issued a proposed decision rejecting Trustees' challenges relevant to this appeal. The commissioner adopted the hearing officer's proposed decision.

Trustees appealed the commissioner's decision to the superior court. *AS 22.10.020(d)*; Alaska Appellate Rule 602(a)(2). The superior court upheld the commissioner's decision, except to the extent that the permit coverage excluded an eleven mile access/haul road from the mine site to Cook Inlet. On rehearing, the superior [*1242] court concluded that the road could be permitted [**3] under a separate ASCMCRA permit. Trustees appeals the superior court's decision raising the following contentions:

1. DNR exceeded its discretion by "refusing to require that the following off-site facilities be covered under Diamond's permit: port stockpiling and loading facilities; coal conveyor to the port; gravel pits; employee housing; access/haul roads; and airstrip."

2. DNR violated ASCMCRA by approving a bond amount which "does not reflect the cost of all reclamation which will need to be performed during the life of the permit."

3. DNR violated ASCMCRA by issuing a permit when Diamond failed to prove "that its wetlands 'revegetation' plan will restore prior 'uses' of the land that were supported by wetlands and . . . will satisfy the applicable performance standards for hydrology, water quality, and wildlife habitat."

4. DNR's bond release criteria violate ASCMCRA because they "do not appear to make bond release contingent on Diamond's successful completion of its wetlands plan."

II. APPLICABLE LAW

The parties disagree as to whether the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), *30 U.S.C. §§ 1201-1328 (1986)*, [**4] and the regulations promulgated thereunder, are controlling in this case.

SMCRA provides a process whereby a state may assume control of a program to regulate surface mining and reclamation operations. *30 U.S.C. § 1253 (1986)*. The state program must demonstrate, among other things:

that such State has the capability of carrying out the provisions of this chapter and meeting its purposes through --

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter

(7) rules and regulations consistent with regulations issued by the Secretary pursuant to this chapter.

30 U.S.C. § 1253(a) (1986). Ultimately, the Secretary of Interior must approve the program. 30 U.S.C. § 1353(b) (1986). States which do not have approved programs are subject to federally implemented programs. *30 U.S.C. § 1254 (1986)*.

In 1982 the state of Alaska passed ASCMCRA as part of its effort to assume exclusive jurisdiction of surface coal mining and reclamation within the [**5] state. Ch. 29, § 1, SLA 1982; *AS 27.21.010(a)(5)*. The legislature specifically expressed the state's intent "to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations in the state under [SMCRA]." *AS 27.21.010(a)(5)*. In enacting ASCMCRA, the legislature also found that:

Section 503 [*30 U.S.C. § 1253*] of [SMCRA] provides that a state wishing to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations in the state must have a state law

that provides for the regulation of surface coal mining and reclamation operations *in accordance with the requirements of* [SMCRA].

AS 27.21.010(4) (emphasis added).

In light of this finding and the legislature's express intent to assume exclusive jurisdiction, we do not believe the legislature intended the state act to be inconsistent with the federal act. Moreover, section 505(a) of SMCRA provides that state laws or regulations which are inconsistent with its provisions are superseded by the SMCRA provisions. *30 U.S.C. § 1255(a) (1986). Accord Russell v. Island Creek Coal Co., 182 W.Va. 506, 389 S.E.2d 194, 199 (W. Va. 1989).* [**6]

It is clear that both the Congress and the Alaska Legislature intended that the state program comply with SMCRA. Therefore, ASCMCRA should be construed to be consistent with SMCRA. [1]

1 However, while federal *regulations* promulgated under SMCRA may provide helpful guidance, they do not set a standard against which state law must be measured. In this context, Alaska law is superseded only where it is inconsistent with the federal *statute. 30 U.S.C. § 1255.*

[*1243] III. FAILURE TO REQUIRE INCLUSION OF CERTAIN OFFSITE FACILITIES IN DIAMOND'S PERMIT.

Trustees argues that Diamond's permit should have covered the eleven mile access/haul road and adjacent conveyor from the mine site to a port, port facilities, a solid waste disposal facility, gravel pits, and a housing facility with an air strip and access road. Trustees asserts that these facilities fall within the broad statutory definition of "surface coal mining and reclamation operation" and therefore require an [**7] ASCMCRA permit. Trustees also argues that DNR's regulations implementing ASCMCRA plainly require a permit for these facilities. DNR argues that the determination of which facilities are "resulting from or incident to" the mine operation, which must be included in the permit, is within the special expertise of the commissioner and that the commissioner's decision was reasonable and based on policy considerations.

We defer to an agency decision which involves complex subject matter or fundamental policy considerations unless the decision is arbitrary, capricious or without a reasonable basis. *Trustees for Alaska v. State, Dep't of Natural Resources, 795 P.2d 805, 809 (Alaska 1990).* "The reasonable basis standard is appropriate for determining whether the agency decision has been undertaken 'in the manner required by law.' One indication whether an agency has proceeded in the manner required by law is compliance with its own regulations." *Jager v. State, 537 P.2d 1100, 1107-08 (Alaska 1975).*

Any person who conducts a "surface coal mining and reclamation operation" must first obtain an ASCMCRA permit. *AS 27.21.060.* "'Surface [**8] coal mining and reclamation operation' means a surface coal mining operation and the activities necessary and incidental to the reclamation of that operation after August 3, 1977. . . ." *AS 27.21.998(16).* [2] The definition of "surface coal mining operations" in ASCMCRA is broad, and includes more than the actual mining activities. *AS 27.21.998(17)* provides:

"Surface coal mining operations" means:

(A) an activity

(i) conducted on the surface of land in connection with a surface coal mine or, to the extent that the activity affects the surface of land, conducted in connection with an underground coal mine;

(ii) the products of which enter commerce or the operation of which directly or indirectly affects interstate commerce;

(iii) which may include contour, strip, auger, mountain top removal, boxcut, open pit, and area mining; the use of explosives and blasting; on-site distillation or retorting, leaching, or other chemical or physical processing of coal; and loading of coal for interstate commerce at or near the mine site;

(iv) other than an activity related to the extraction of coal incidental to the extraction of other minerals under which the coal extracted does not exceed [**9] 16 2/3 percent of the total tonnage of coal and other minerals removed annually for purposes of commercial use or sale and other than a coal exploration activity subject to this chapter; and

(B) the areas on which an activity described in (A) of this paragraph occurs or where the activity disturbs the natural land surface, including adjacent land, the use of which is incidental to the activity; and affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the activity and for haulage; and excavation, workings, impoundments, dams, ventilation shafts, entry ways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and [*1244] other areas upon which are situated structures, facilities, or other property or materials on the surface resulting from or incidental to the activity. . . .

AS 27.21.998(17). [3]

2 This is essentially identical to the federal definition of "surface coal mining and reclamation operations" found in SMCRA § 701, *30 U.S.C. § 1291(27) (1986)*.

[**10]

3 This definition closely parallels the federal definition of "surface coal mining operations" found in section 701 of SMCRA. *30 U.S.C. § 1291(28) (1986)*. The United States Court of Appeals for the District of Columbia Circuit has construed SMCRA as conferring considerable discretion on the regulatory authority in defining the scope of its own jurisdiction. *See National Wildlife Federation v. Lujan, 928 F.2d 453, 461-63 (D.C. Cir. 1991)*; *National Wildlife Federation v. Hodel, 839 F.2d 694, 743-45 (D.C. Cir. 1988)*.

In this case, the Division refused to exercise ASCMCRA jurisdiction over the disputed facilities, citing several reasons. [4] The Division made no mention in its decision of state regulations relating to the range of facilities which require permitting under ASCMCRA. Instead, it relied on the state statutory language and federal case law. On review, the commissioner's hearing officer accepted the Division's decision as a "reasonable one" in light of the "good policy reasons which have [**11] been articulated by the Division for terminating its jurisdiction at [the secondary crusher]." However, in the same decision, the hearing officer noted that "11 [Alaska Administrative Code (AAC)] 90.155 provides that a permit is required for roads and support facilities outside of a mine's permit area."

4 These reasons included:

(1) DNR has discretion in determining the extent of its jurisdiction with respect to offsite facilities which do not include coal processing;

(2) since coal processing is finished at the secondary crusher, the coal should be considered loaded for interstate commerce at that point and therefore DNR's jurisdiction under ASCMCRA ends;

(3) the hauling from the secondary crusher to the port will be operated by a separate entity;

(4) ASCMCRA "describes how a mining operation should be conducted, but provides little guidance to describe how facilities such as the port and employee housing should be operated."

(5) DNR does not have the expertise to regulate the construction of these offsite facilities;

(6) the facilities will require other permits which will address environmental concerns; and

(7) the location of the road, conveyor, and port have not yet been determined, therefore they could not have been included in the present permit.

[**12] We conclude that DNR's decision to refrain from exercising jurisdiction over the disputed facilities lacked a reasonable basis. Further, we conclude that the statutory definition of "surface coal mining operations" in *AS 27.21.998(17)* encompasses the facilities which are disputed in this case. Our conclusions are supported by the language of the statute and by regulations promulgated by DNR which clearly require permitting of many of the disputed facilities.

The state legislature defined "surface coal mining operations" to mean, inter alia, "other areas upon which are situated structures, facilities, or other property or materials on the surface *resulting from or incidental to* the activity." *AS 27.21.998(17)(B)* (emphasis added). The disputed facilities, including the conveyor, airstrip, access roads, gravel pit, solid waste disposal facility, employee housing facilities, port and the coal storage facilities, would not be necessary in the absence of the coal mining operation. They will be built to support the mining activity, will be proximate to the mine and will be located in an otherwise generally undeveloped area. The disputed facilities can only be characterized as facilities [**13] which result from or are incidental to the mining operation. The seven reasons DNR gave for declining jurisdiction simply do not provide a reasonable basis for a different conclusion.

The lack of a reasonable basis for DNR's determination is highlighted by DNR's failure to comply with its own regulations. An agency is bound by the regulations it promulgates. *See* 2 Kenneth C. Davis, *Administrative Law Treatise* § 7:21 at 98 (2d Ed. 1979). An agency has not acted in the manner required by law if its actions are not in compliance with its own regulations. *Jager, 537 P.2d at 1107-08*.

[*1245] In deciding that the disputed facilities were outside its jurisdiction, DNR apparently overlooked its own regulation which provides as follows:

A permit is required for all roads, transportation, support facilities and utility installations included in 11 AAC 90.491, whether or not these facilities are outside the permit area of any particular mine. These facilities must comply with all performance standards of this chapter determined to be applicable by the commissioner and must comply with the appropriate bonding provisions of 11 AAC 90.201 -- 11 AAC [**14] 90.207. In determining which requirements of this chapter are applicable, the commissioner will consider whether any given facility may be subject to the requirements of some other governmental permitting authority.

11 AAC 90.155.

The first sentence of this regulation is clear and unambiguous: a permit is required for all the offsite facilities listed in 11 AAC 90.491.

The facilities listed in 11 AAC 90.491 which must be designed, constructed, used and maintained in a manner which prevents or minimizes environmental damage include:

roads, railroad loops, spurs, sidings, *surface conveyor systems,* chutes, aerial tramways, *airfields, ports, docks,* or other transportation facilities, mine buildings, *coal loading facilities at or near the minesite, coal storage facilities, storage facilities,* fan buildings, hoist buildings, preparation plants, sheds, shops, *and other support facilities* . . . .

11 AAC 90.491(a) (emphasis added). Clearly many of the disputed facilities in this case are explicitly identified in this list. The facilities not explicitly identified are fairly encompassed by the phrase "other support facilities."

As defined by *AS 27.21.998(17)(B)*, [**15] "surface coal mining and reclamation operation" encompasses all of the disputed facilities, including the conveyor, airstrip, access roads, gravel pit, solid waste disposal facility, employee housing facilities, port and the coal storage facilities. Therefore, these facilities must be permitted in accordance with ASCMCRA.

IV. INCLUSION OF OFFSITE FACILITIES IN THE SAME ASCMCRA PERMIT AS THE MINE ITSELF.

Trustees argues that the superior court erred in its decision on rehearing in concluding that the access/haul road could be permitted under a separate ASCMCRA permit. Trustees asserts that the plain language and logic of ASCMCRA contemplate a single permit for an entire surface coal mining operation. It also asserts that allowing separate permits is inconsistent with the statute's remedial goals because it will allow DNR to ignore the cumulative or synergistic impacts of the combined activities.

DNR argues that neither ASCMCRA nor the regulations directly address whether a separate permit is required. It contends that 11 AAC 90.155 implies that a separate permit may be appropriate. DNR claims its interpretation of the regulation is reasonable and entitled to deference. DNR also [**16] asserts that cumulative impacts must be considered whether or not the offsite facilities are separately permitted.

"A permit is required for all roads, transportation, support facilities and utility installations included in 11 AAC 90.491, whether or not these facilities are outside the permit area of any particular mine." 11 AAC 90.155. The implication of this language is that support facilities may have separate permits from the individual mines they support. DNR's interpretation of its own regulations is neither plainly erroneous nor inconsistent with the regulations. Therefore it should be given effect unless it is contrary to ASCMCRA. *AS 44.62.030.*

The portions of ASCMCRA cited by Trustees do not on their face require that a single permit cover the entire mine operation and related facilities. Trustees urges that ASCMCRA precludes DNR's interpretation because it prohibits a person from conducting a "surface coal mining and reclamation operation in the state without a [*1246] permit for that operation." *AS 27.21.060.* We find nothing in this statutory language which requires us to interfere with DNR's interpretation that ASCMCRA allows separate permits to be issued for individual [**17] mines or for support facilities within a larger mining area.

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

One of ASCMCRA's purposes is "to prevent the adverse effects to society and the environment resulting from unregulated surface coal mining operations." *AS 27.21.010(b)(1).* Other express purposes are "to assure that surface coal mining operations are conducted in a manner that will prevent unreasonable degradation of land and water resources," *AS 27.21.010(b)(3)*, and "to strike a balance between protection of the environment and other uses of the land and the need for coal as an essential source of energy." *AS 27.21.010(b)(7).* These purposes cannot be accomplished by ignoring cumulative impacts. [5] Based on the policies inherent in these purposes, we conclude that DNR may not ignore cumulative effects of mining and related support facilities by unreasonably restricting its jurisdiction or by permitting facilities separately. These purposes require that at the [**18] time DNR reviews any ASCMCRA permit application it consider the probable cumulative impact of all anticipated activities which will be a part of a "surface coal mining operation," whether or not the activities are part of the permit under review. If DNR determines that the cumulative impact is problematic, the problems must be resolved before the initial permit is approved. [6]

5 DNR is specifically required to consider cumulative hydrologic impacts. *AS 27.21.180(c)(3).*

6 This type of "concept approval" is necessary in order to avoid a situation where, because of industry investment and reliance upon a past

mining permit approval, DNR might feel compelled to approve a subsequent permit for a related but environmentally unsound support facility. In some cases, this may require concurrent, as opposed to serial, review of separate, related permit applications. In other cases, anticipated problems resulting from cumulative impacts may require that approval of an initial permit be conditioned upon satisfactory resolution of the problems anticipated in subsequent permits.

[**19] After reviewing the record, we are unable to conclude that in approving Diamond's permit application, DNR substantially complied with its obligation to consider the cumulative environmental effects of the entire mining operation. DNR had the benefit of the United States Environmental Protection Agency's (EPA) analysis of the cumulative impacts of the mine operation, including the effects of facilities which must be permitted but were excluded by DNR from the Diamond permit at issue. [7] However, DNR has not directed this court to portions of its decision in which it meaningfully considered the effects of the facilities it erroneously determined were not within its jurisdiction. [8] Because of this [*1247] lapse, this case must be remanded to DNR for consideration of the cumulative environmental effects of the entire "surface coal mining operation" including the conveyor, airstrip, access roads, gravel pit, solid waste disposal facility, employee housing facilities, port and the coal storage facilities.

7 The EPA specifically considered the effects of these offsite facilities on wildlife, groundwater hydrology, surface water hydrology, and biology. Further, the EPA considered the cumulative impacts resulting from the development of other coal or natural resource projects in addition to the Diamond project.

[**20]

8 In an appendix to its March 1987 findings, DNR made a "cumulative hydrologic impact assessment." However, it is not clear that the conveyor system or the port were considered in this assessment. Further, it appears that DNR was aware of but consciously chose not to consider the cumulative effects of the port and conveyor on moose in the area. DNR found as follows:

> Through the development of all facilities associated with the mine operation (port, conveyor system, and mine site) a portion of the winter range will be disrupted, movement corridors may be changed due to the conveyor, and a section of one rutting area will be lost. The overall effect of these habitat disruptions may be quite different from the impacts associated with only the loss of part of a rutting area. . . . Although it is necessary to be aware of the potential for these types of cumulative impacts to occur, the authority to require monitoring and mitigation under the Surface Mining Program extends only to impacts directly resulting from operations under this permit.

V. APPROVAL OF BOND AMOUNTS INADEQUATE TO COVER THE [**21] TOTAL COST OF RECLAMATION.

Trustees argues that DNR erred in calculating the bond amounts by assuming that Diamond will have complied with all the reclamation requirements on schedule up until the time of any default. Trustees contends that this assumption violates the plain meaning and spirit of the bonding requirements of *AS 27.21.160* and DNR's regulations on bonding amounts. Trustees asserts that there is no reasonable basis for assuming that all ongoing reclamation requirements will be fully complied with up until forfeiture. Trustees also argues that it is unreasonable to assume that DNR's enforcement power will promptly remedy violations.

DNR asserts that bond amounts are left to the discretion of the commissioner and that they cover the full cost of reclamation which may be required if the operation were to shut down at any given point. DNR points out that Diamond must submit annual status reports and that DNR can require additional bonding.

Trustees argues that the issue of the adequacy of the bond required is a legal one. In its view, the substitution of judgment standard applies. DNR urges review on the reasonable basis standard because bond calculations require administrative [**22] expertise.

Alaska Statute 27.21.160(a) provides:

> The amount of the bond required for an area within the permit area shall be determined by the commissioner and shall reflect the probable difficulty of the reclamation considering the topography, geology, hydrology, revegetation potential, and similar factors relating to the area. The amount of the bond must be sufficient to assure the completion of the reclamation plan by the commissioner in the event of forfeiture . . .

AS 27.21.160(a).

Under the statute, the bond calculation involves technical analysis and the exercise of agency expertise and is clearly left to the discretion of the commissioner. We apply a "rational basis" review where an issue "requires resolution of policy questions which lie within the agency's area of expertise and are inseparable from the facts underlying the agency's decision." *Earth Resources Co. of Alaska v. State, Dep't of Revenue, 665 P.2d 960, 964 (Alaska 1983).*

However, Trustees does not challenge DNR's technical analysis or the factual sufficiency of the bond calculations. Rather, it asserts that DNR's assumption that a permittee will have no permit violations [**23] at the time of default is unreasonable and contrary to the statute.

This challenge does not implicate agency expertise. "Where the knowledge and experience of the agency is of little guidance to the court or where the case concerns 'statutory interpretation or other analysis of legal relationships about which the courts have specialized knowledge and experience,'" we may substitute our own judgment for that of the agency's. *Id. at 965, quoting Kelly v. Zamarello, 486 P.2d 906, 916 (Alaska 1971).*

In its decision, the Division rejected Trustees' criticism of its assumption that the regrading and reclamation schedules in the application will be followed:

To do as the commenter suggests, which is to determine the bond amount as though no reclamation at all has taken place during the permit term, is unreasonable and would result in the state holding a considerable [sic] larger bond than would ever be necessary to reclaim the site. If, as suggested . . . the applicant were to disregard regrading and revegetation schedules in the application, this would constitute a violation of the permit. [DNR] is required to inspect the [**24] site on a monthly basis, and has the [*1248] power to enforce the permit provisions should a violation occur. *Basing the bond amount on the assumption that the applicant will violate permit terms is unfair and unnecessary.*

(Emphasis added). DNR adopted the Division's reasoning.

We believe the Division's reasoning and its assumption are fundamentally flawed. We conclude that ASCMCRA *requires* DNR to "base[] the bond amount on the assumption that the applicant will violate permit terms."

The purpose of the bond is to insure "faithful performance of the requirements" of ASCMCRA and "to assure the completion of the reclamation plan . . . in the event of forfeiture." *AS 21.27.160(a).* A performance bond is drawn upon only where there has been a failure of performance. The bond would be unnecessary absent the assumption that a permittee may not fully perform its obligations. The amount of the bond is academic absent a failure.

In light of these elementary facts, we believe it unreasonable and indeed illogical to conclude that DNR's enforcement efforts will assure a permittee's full compliance with reclamation obligations until a forfeiture. DNR's enforcement powers cannot [**25] prevent permit violations. If they could, performance bonds would not be necessary.

The Division intimated that if reclamation does not progress as scheduled, adjustments could be made in the bond amount. But if the operation folds at the point where DNR discovers reclamation violations, a bond calculated under the assumption of compliance up to that point will necessarily be inadequate. The bonds required by DNR will only be adequate to assure full reclamation in the event that forfeiture occurs at a point when no violations exist. We conclude that the Division's assumption that no violations will exist at the time of forfeiture is unreasonable. [9]

9 One of the grounds for forfeiture of a bond is a willful or unwarranted pattern of violations. 11 AAC 90.617(a).

DNR should recalculate the bonds so that they are "sufficient to assure the completion of the reclamation plan by [DNR] in the event of forfeiture." *AS 27.21.160(a).* This does not necessarily mean that DNR must require Diamond to post a bond equal to the [**26] total reclamation cost. DNR should calculate the bond assuming forfeiture at a time when unabated permit violations exist, though it need not assume that *no* reclamation will have taken place.

VI. APPROVAL OF DIAMOND'S WETLANDS RESTORATION PLAN.

A. *Restoration of Ecological Functions and Revegetation.*

Trustees argues that ASCMCRA and SMCRA require restoration of ecological functions provided by wetlands and that the revegetation plan approved by DNR does not satisfy those requirements. Trustees asserts that: (1) the plan is too vague; (2) restoration sites will not be chosen to maximize their effectiveness, but rather they will be based on the regrading; (3) the plan does not discuss how it will replace ecological functions or why that may be infeasible or unnecessary; (4) DNR could not have reasonably determined that the plan was adequate from a hydrologic standpoint because DNR did not have a hydrologist review it; (5) DNR did not consider the adequacy of the plan from a water quality standpoint; and (6) DNR did not consider whether the plan is sufficient from the standpoint of wildlife habitat.

ASCMCRA directs the commissioner to propose regulations consistent with [**27] the environmental performance standards of SMCRA and directs that all permits issued require compliance with those environmental performance standards. *AS 27.21.210.* Trustees has not pointed to any evidence that Diamond's application violates the performance standards, but claim that

DNR approved Diamond's application without [*1249] sufficient evidence that it will restore wetlands functions. [10]

10 The Division required by stipulation that Diamond submit a wetlands plan within six months of permit approval. The Division removed the stipulation when Diamond submitted the plan.

The pre-mining and post-mining use of the area to be disturbed is fish and wildlife habitat. The Division accepted the wetlands plan despite concerns that some of the peat-filled depressions Diamond proposed to create might be too small to function effectively. The Division did not require modification because the restoration plan was a trial program and it would be reevaluated at the permit midterm review. DNR found that the reclamation [**28] plan with the wetlands restoration plan was sufficient to restore the disturbed area to a condition capable of supporting fish and wildlife.

DNR's assessment of the adequacy of the wetlands restoration plan is necessarily speculative and it involves complex subject matter which is within the expertise of the agency. Therefore, we will defer to DNR's decision unless it is arbitrary, capricious, or without a reasonable basis. *Trustees for Alaska, 795 P.2d at 809.*

In our view, DNR's acceptance of the plan meets the reasonable basis standard. The plan describes how wildlife habitat will be recreated by constructing peat-filled depressions which will be replanted with various plant species. In addition, three sediment ponds will be inoculated with plant and insect life forms, and seedlings will be planted to provide a vegetation canopy layer for the benefit of wildlife. In light of the complexity of the subject matter, we will defer to DNR's conclusion that these measures will be adequate to restore wildlife habitat. [11]

11 We are not persuaded by Trustees' other objections to the restoration plan.

[**29] B. *DNR's Bond Release Criteria.*

Trustees asserts that DNR must require Diamond to successfully reestablish wetlands as a criterion for bond release. Trustees argues that "completion of the reclamation plan" includes wetlands restoration.

In its decision, the Division made the following comments in response to Trustees' concern that DNR would not evaluate the success of the wetlands restoration before releasing the bond:

[DNR] intends to evaluate any bond release application in terms of the revegetation success criteria of plant cover, species diversity and woody plant density (11 AAC 90.451 - 11 AAC 90.457). Largely because the wetlands areas are small, separate sampling of the restored wetlands has not been required. Rather, these would be considered as an inclusion within the surrounding vegetation type. Furthermore, there is no specific authority in [ASCMCRA] to support establishing additional bond release criteria to determine whether wetlands have been reestablished successfully (i.e., retention of water, utilization by wildlife, growth of *Sphagnum,* etc.). For this reason, and because of the trial nature of the program, no such demonstration has been required.

[**30] In our view, no reasonable basis exists for the Division's conclusions. Under ASCMCRA, bond release is "conditioned on faithful performance of the requirements of this chapter and the permit. . . . The amount of the bond must be sufficient to assure the *completion of the reclamation plan* by the commissioner in the event of forfeiture . . . ." *AS 27.21.160(a).* This makes it clear that a performance bond must be conditioned on completion of the reclamation plan contained in the permit, irrespective of other specific bond release criteria. The record demonstrates that wetlands restoration is part of the reclamation plan. The commissioner may not release all or part of a bond if part of the permit area covered by the bond is in violation of the performance standards established by regulation. *AS 27.21.170(d).*

AFFIRMED in part, REVERSED in part and REMANDED. The superior court is directed to remand the permit application to DNR for consideration of the cumulative [*1250] effects of all activities which are part of the "surface coal mining operation," for reconsideration of the amount of the bond and for further proceedings in accordance with this opinion.

DISSENT BY: RABINOWITZ (In Part)

DISSENT

[**31] RABINOWITZ, Chief Justice, with whom MATTHEWS, Justice, joins dissenting in part.

I disagree with part IV of the court's opinion, holding that DNR's interpretation of its regulations as allowing separate ASCMCRA permits for different components of a surface coal mining operation is neither "plainly erroneous nor inconsistent with the regulations" or with ASCMCRA.

Alaska Statute 27.21.060 provides in part: "a person may not conduct a surface coal mining and reclamation operation in the state *without a permit* for that operation." (Emphasis added.) *See also* SMCRA § 506(a), *30 U.S.C.A. § 1256(a)*; 11 AAC 90.002(c). The language of *AS 27.21.060* contemplates that a single permit will control all components of a "surface coal mining operation."

The applicable definition of a "surface coal mining operation" includes the actual mine site and all facilities and structures, either off-site or on-site, that are "resulting from or incidental to" the mining. *AS 27.21.998(17)*. Subsection (A) defines "surface coal mining operation" in terms of "an activity" conducted at the actual mine site. *AS 27.21.998(17)(A)*. The definition of a surface coal mining [**32] operation is further broadened in subsection (B):

(B) the areas on which an activity described in (A) of this paragraph occurs or where the activity disturbs the natural land surface, including adjacent land, the use of which is incidental to the activity; and affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the activity and for haulage; and excavation, workings, impoundments, dams, ventilation shafts, entry ways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are situated structures, facilities, or other property or materials on the surface resulting from or incidental to the activity.

AS 27.21.998(17).

While DNR's assertion that "11 AAC 90.155 . . . infers that a separate permit is appropriate" for the access/haul road is a plausible interpretation of that regulation, I disagree with the court's conclusion that DNR's interpretation is not "inconsistent with the regulations." (Majority Op. 12) In my view, DNR's separate permit interpretation is in direct contravention [**33] with the text of another DNR regulation, 11 AAC 90.002, which is substantially similar to *AS 27.21.060(a)*. 11 AAC 90.002(a) provides in part "no person may conduct exploration activities or surface coal mining and reclamation operations without *a permit.*" (Emphasis added.)

The DNR regulations and DNR's interpretation of those regulations and ASCMCRA, allowing the issuance of separate permits for the access/haul road and the remainder of the mining operation, are contrary to the express purposes of ASCMCRA. Among the enumerated purposes of the statute are "to prevent the adverse effects to society and the environment resulting from unregulated surface coal mining operations" and "to assure that surface coal mining operations are conducted in a manner that will prevent unreasonable degradation of land and water resources." *AS 27.21.010(b)(1)* and *(3)*. The court reasons that to accomplish the purposes of the Act,

at the time DNR reviews any ASCMCRA permit application it [must] consider the probable cumulative impact of all anticipated activities which will be a part of a 'surface coal mining operation,' whether or not the activities are part of the permit under review.

(Majority [**34] Op. 14) I do not believe that the court's mandated "concept approval," in the context of an operation whose anticipated components will be covered by separate permits, is an adequate substitute for the safeguards of the single permit requirement of *AS 27.21.060* in light of the goal of assuring that the agency consider [*1251] the cumulative or synergistic effects of a coal mining operation. In contrast to the anticipated "concept approval" approach adopted by the court, I believe that the requirement, found in *AS 27.21.060*, of a single permit will compel the permit applicant to plan and design the operation and its various components in more concrete and greater detail. This should lead to consideration by the permit applicant and DNR of the operation's cumulative effect in a more careful and comprehensive manner.

Courts have disallowed segmentation of a proposed project for the purpose of preparing environmental impact statements (EISs) to assure that the cumulative effects of the project are adequately considered under the National Environmental Policy Act (NEPA). *Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985)*; *see also Kleppe v. Sierra Club, 427 U.S. 390, 410-411, 49 L. Ed. 2d 576, 96 S. Ct. 2718 (1976)*; [**35] *Save the Yaak Committee v. Block, 840 F.2d 714 (9th Cir. 1988)*. In discussing a Forest Service plan to prepare an EIS for the logging access road and a separate EIS for each individual timber sale area afterward, *Thomas* cautioned that allowing consideration of cumulative impacts after a portion of the project is already approved "swings the balance decidedly in favor of timber sales even if such sales would have been disfavored had road and sales been considered together before the road was built." *753 F.2d at 760*. While I recognize that in some instances phased implementation of a mining operation may require a reopening and modification of the ASCMCRA permit, the same danger that *Thomas* counselled against inheres in the instant case. Thus, I conclude that *AS 27.21.060* assures that the cumulative and synergistic effects are adequately addressed by its requirement of a single ASCMCRA permit for all components of a surface coal mining operation.

ALASKA STATE LEGISLATURE

SENATOR HOLLIS FRENCH

January 20, 2011

Commissioner Dan Sullivan
Department of Natural Resources
550 W. 7th. Avenue, Suite 1400
Anchorage, AK 99501

Commissioner Sullivan,

PacRim Coal has applied to the Department of Natural Resources for a permit to mine coal in the Chuitna watershed. I am writing to you out of concern regarding one aspect of the permitting process and that is the setting of a reclamation bond under AS 27.21.160 of the Alaska Surface Coal Mining Control and Reclamation Act (ASCMCRA).

PacRim's plan for the mine's development would remove 11 miles of Middle Creek, a major tributary of the Chuitna River and a stream identified by the Department of Fish and Game as "significant to salmon." By 'remove' I mean just that: the plan calls for diverting all of the water out of the streambed, the removal of more than 300 feet of overburden and then mining the exposed coal seams.

While there is currently no law on the books that prohibits mining through a stream – in contrast to the logging rules which require buffers around salmon streams – the reclamation bond statute stands as a significant hurdle for this project to clear. The bond is in place to make certain that PacRim fulfills its obligation to complete its reclamation plan. The difficult issue you face is setting the amount of the reclamation bond given the absence of any precedent in Alaska for permitting mining in active salmon streams.

There is some legal precedent, however, on this particular question. *Trustees of Alaska v. Gorsuch*, 835 P.2d 1239 (1992) involved several disputes surrounding a proposal to mine coal in the Chuitna area by the Diamond Shamrock-Chuitna Coal Joint Venture, a

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June-December: 716 West 4th Avenue • Anchorage, Alaska 99501 • (907) 269-0234 • Fax: (907) 269-0238
Senator_Hollis_French@legis.state.ak.us

company related to PacRim through the common ownership interests of Richard Bass and William Herbert Hunt and the Hunt family of Texas in both companies. I have attached a Legislative Research Report outlining this connection in detail. The *Trustees* case in part took up the question of whether DNR, in setting the amount of the reclamation bond, may assume compliance with the requirements of the reclamation plan. Drawing from earlier cases, the court concluded that ASCMCRA requires DNR to base the bond amount on the assumption that the applicant will violate its permit terms. 835 P. 2d at 1248. This assumption takes on a greater significance given the difficulty of PacRim's restoration obligations.

Indeed, many scientists are skeptical of PacRim's plans. For example, Professor Palmer of the University of Maryland in her "Report on Chuitna Coal Project of PacRim Coal" points out that the company will be attempting to "create a stream after all the natural flow paths and landscape topography have been destroyed. This is not even in the realm of anything that has been scientifically tested and is certainly not within the realm of what is considered ecological restoration." The report also notes that "Even with far less damage to a site, stream restoration projects that involve channel modification have an extremely high failure rate."

I hope it is clear from the foregoing that in my view the project as proposed should not be permitted. Should you come to a different conclusion, please keep these considerations in mind as you weigh the amount of the reclamation bond.

Sincerely yours,

Senator Hollis French

LEGISLATIVE RESEARCH SERVICES

Alaska State Legislature
Division of Legal and Research Services
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Memorandum

TO: Senator Hollis French
FROM: Susan Haymes, Legislative Analyst
DATE: October 25, 2010
RE: Chuitna Coal Project Developers
LRS Report 11.062

You asked if there is any business connection between Diamond Shamrock Chuitna Coal Joint Venture and PacRim Coal, LP.

The short answer is yes, there is a business connection between Diamond Shamrock Chuitna Coal Joint Venture (DSCCJV) and PacRim Coal, LP. The two companies have been involved in efforts to develop the Chuitna Coal Project located 45 miles west of Anchorage.[1] The companies are connected through the ownership interest of Richard Bass and William Herbert Hunt and the Hunt family of Texas, in both companies. Mr. Bass and the Hunt family have been involved in the Chuitna coal property since 1968, first as the Bass-Hunt-Wilson (BHW) group, then as a partner in the DSCCJV, and more recently as controlling owners of PacRim.[2]

The Alaska Department of Natural Resources (DNR) granted coal leases to the Bass-Hunt-Wilson (BHW) group for the Chuitna area in the early 1970s. In 1981, the BHW group formed the Diamond Shamrock Chuitna Coal Joint Venture with the Diamond Shamrock Corporation, and began drilling and exploratory work.[3] In October, 1983, Diamond Shamrock Joint Venture filed a Coal Exploration application with DNR to develop the coal leases held by BHW.[4] Robert Stiles signed the application as the representative of the joint venture. The operating partner for the project was the Diamond Alaska Coal Company, a subsidiary of Diamond Shamrock Corporation. In 1990, the DRven Corporation became the managing partner in the project.[5] Robert Stiles, now president of DRven, continued as the project manager.

In a presentation to the Resource Development Council in Anchorage, Alaska on December 1, 2005, Robert Stiles described the evolution of the companies involved in the Chuitna coal project. According to Mr. Stiles, the Diamond Shamrock Joint Venture was an owner and leaseholder in the Diamond Chuitna Coal

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[1] The Chultna Coal Project is a surface coal mining and export development proposal for an ultra low sulfur, sub bituminous coal resource located in the Beluga Coal Field of South-central Alaska, approximately 45 miles west of Anchorage.

[2] The BHW group included Richard D. Bass, William "Herbert" Hunt, and Starkey Wilson. William Herbert Hunt is the son of H.L. Hunt, the founder of Hunt Oil. Herbert Hunt founded Petro-Hunt, LLC, an independent energy corporation. The Hunt Family or "Hunt Group," through Petro-Hunt LLC and Petro-Hunt International LLC (Petro-Hunt Group) has business interests primarily in oil and gas exploration, development and production, gas processing, pipeline transportation and refining. More information on Petro-Hunt and the Hunt Group can be accessed at *http://www.petro-hunt.com/About.htm.*

[3] In 1981, the Diamond Shamrock Corporation formed the Diamond Shamrock Coal Company with headquarters in Lexington, Kentucky. In 1987, the Arch Mineral Corporation, owned in equal parts by the Hunt family and Ashand Oil Company purchased Diamond Shamrock Coal. "Shamrock to Sell Coal Subsidiary," *New York Times*, April 17, 1987.

[4] The 1983 Coal Exploration application can be accessed at *http://dnr.alaska.gov/miw/mining/largemine/chuitna/pdf/exploration_permit_0283795.pdf.*

[5] The DRven Corporation, a Texas company, registered in Alaska in April 1990. According to the Department of Commerce, Community and Economic Development, DRven filed its last Biennel Report in 2006, *https://myalaska.state.ak.us/business/soskb/Corp.asp?249391*. Russ Kirkham, coal regulatory program manager, Department of Natural Resources, notes that the Hunt family remained involved in the project throughout, but DRven held the permits for the project during this time. Mr. Kirkham can be reached at 907.269.8650.

Project until about 1994. However, Richard Bass and the Hunt family have had an ownership interest in the Chuitna Coal Project since its inception.[6]

In 2005, control of the project transferred to PacRim Coal, LP, a Delaware corporation, controlled by Richard D. Bass, William Herbert Hunt, and the William Herbert Hunt Trust Estate.[7] PacRim is the current owner and developer of the Chuitna Coal Project.[8] The current manager of the project is Dan Graham.

We hope this information is helpful. If you have questions or need additional information, please let us know.

[6] The presentation can be accessed at *http://www.akrdc.org/membership/events/breakfast/0506/stiles.pdf*.

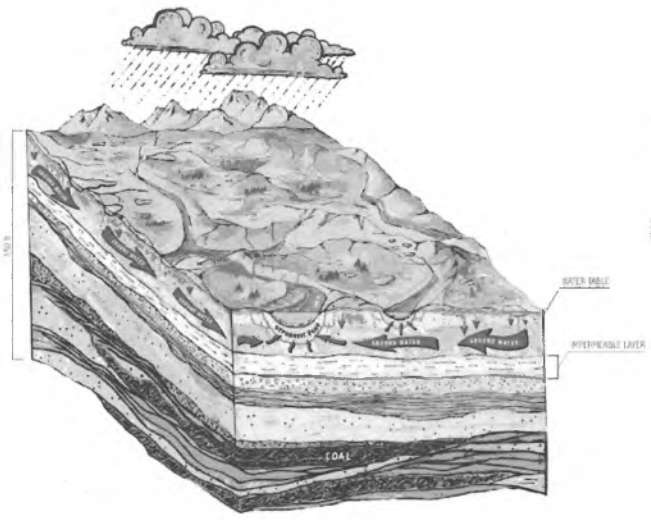
[7] PacRim is part of the Hunt Group, more information can be accessed at *http://www.petro-hunt.com/Coal.htm*. Alaska corporate registration information for PacRim can be accessed at *https://myalaska.state.ak.us/business/soskb/Corp.asp?338563*. Paula Dobbyn, "Beluga Coal Deal Edges Within Reach: High Prices and Cutbacks in Exports from China Could Make the Long-Envisioned Project a Reality, *Anchorage Daily News*, November 3, 2005.

[8] The current project proposed by PacRim consist of a surface coal mine and associated support facilities, mine access road, coal transport conveyor, housing and air strip facility, a logistics center, and coal export terminal. PacRim applied to renew its Coal Exploration Permit with the Alaska Department of Natural Resources on June 24, 2010. The public comment period on the application ended October 13, 2010. More information on the current project can be accessed at *http://dnr.alaska.gov/mlw/mining/largemine/chuitna/index.htm*.

STRIP MINES & SALMON STREAMS

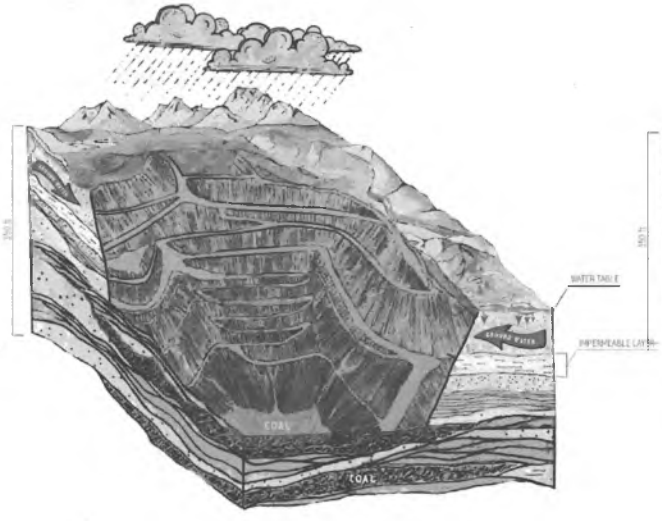
A salmon stream is more than a ditch that drains water: Salmon streams are crucial threads in the intricate fabric that comprises a watershed ecosystem. Once we start to pull out these threads, the very fabric of the watershed starts to unravel.

BEFORE



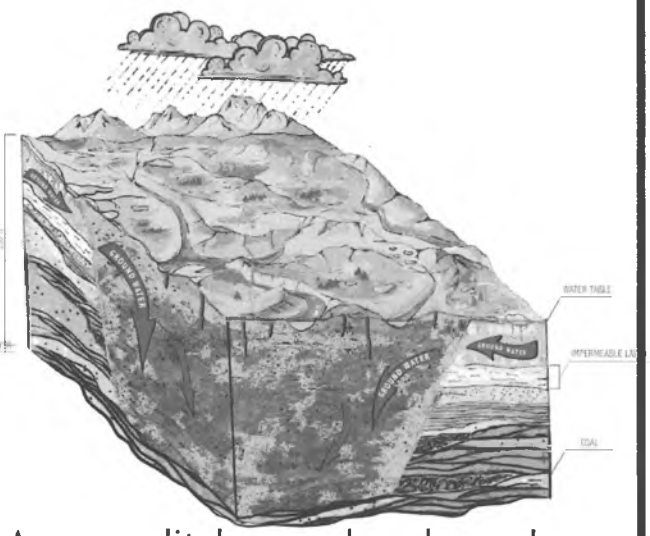
The ecosystem is a woven fabric of wetlands, tundra, forests and tiny headwater streams that pour into the Chuitna River, then Cook Inlet. Surface and groundwaters interact in a complex dynamic that provides the nutrients and conditions needed to support wild Alaskan salmon.

DURING



Impacts to the watershed and the headwater streams from mining activities will fundamentally alter the chemical, hydrologic and sediment regimes that are primary variables controlling the water quality and productivity downstream, which are all key factors for wild Alaskan salmon.

AFTER



A new ditch can be dug where the old stream used to be, but a ditch atop a filled-in pit can never replace the complex physical and chemical conditions needed to support wild salmon and the loss of habitat guarantees the native wild Alaskan salmon population will be lost forever.

JUST LIKE HUMPTY DUMPTY, ONCE IT'S BROKEN, PACRIM CAN'T PUT IT BACK TOGETHER AGAIN - NO ONE CAN

FACTS

- PacRim Coal, a Delaware corporation, is actively seeking state and federal permits to build and operate the Chuitna coal strip mine 45 miles west of Anchorage, near the communities of Tyonek and Beluga.
- PacRim clearly states: "approximately 17.4 km [11 miles] of total stream-channel [salmon] habitat will be removed during the mining operations;"
- Scientific experts concur, it is not possible to construct a new wild salmon spawning stream to the same level of productivity after mining ends.
- PacRim has not provided a single example of strip-mined wild salmon spawning and rearing habitat that has been restored to premining productivity.
- Extensive searches of scientific literature have not produced any examples of successful restoration of a strip mined-wild salmon stream.
- Strip mining will interrupt groundwater flow and destroy the shallow aquifers that currently provide groundwater to streams.
- The uninterrupted flow of shallow groundwater to wild salmon spawning streams is essential for over-winter survival of eggs and fry.
- Recreating the structural complexity and interconnectivity of the below-ground sediment layers responsible for the transport of ground water into salmon streams is impossible.
- The long-term loss of marine-derived nutrients and wetlands (primary sources of nutrients for wild salmon streams) from 25+ years of proposed mining makes the restoration of biological productivity impossible.
- The complex system of surface and groundwater exchange at the streambed is responsible for the year-round upwelling of water, critical for over-winter survival for wild salmon eggs and cannot be recreated.
- Mining through the tributaries and uplands of the Chuit River will permanently change the ecosystem and decrease the productivity of the river.
- Mining through the Chuit River headwaters will remove stored carbon and nutrients that are vital for the health of all downstream reaches; once removed they can not be replaced.
- There is no evidence that the proposed restoration and mitigation plans will compensate for the natural resource losses.
- The complex, genetically diverse wild Alaskan salmon stocks found in the Chuit River, a key to long term viability—cannot be recreated.
- Strip mining would destroy the watershed's hydrologic and geomorphic functions, including the balance of stream flow and sediment supply that supports stream function and habitats over the long term.

WHY SHOULD ALASKANS TRADE RENEWABLE SALMON STREAMS FOR DIRTY COAL BOUND FOR CHINA?

REBUILDING A SALMON STREAM IS LIKE MOVING A $100,000 WEDDING CAKE FROM ONE END OF TOWN TO THE OTHER WITH A TEASPOON.

Testimony Before the
Alaska Senate Judiciary Committee
March 2, 2012

Submitted by:

Lance Trasky
Lance Trasky and Associates
3941 Truro Drive
Anchorage, Alaska 99507

Introduction: Chairman French and members of the Judiciary Committee, my name is Lance Trasky. I have 42 years of experience as a fisheries research biologist, a habitat biologist, and a Regional Supervisor with the Alaska Department of Fish and Game.

Establishing a restoration bond for the proposed Chuitna Coal Strip Mine will be very difficult because there is nothing in the scientific literature or the projects cited by Pacrim and the Alaska Department of Natural Resources which supports the claim that re-creation of a wild Pacific salmon stream and its associated drainage has ever been successfully accomplished or is even feasible. It is also unlikely that the spawning channel and rearing ponds that Pacrim has offered as interim mitigation for the loss of salmon production from Chuitna River tributaries for 25 to 50 years would be successful in maintaining these runs.

The Problem

The Chuitna River supports substantial runs of all five species of Pacific salmon. It is an important contributor to the Cook Inlet commercial and subsistence fisheries. It is believed to be the major source of Chinook salmon to the Tyonek subsistence fishery. The Chuitna is the major Chinook salmon producing system on the west side of Cook Inlet and supports a Chinook sport fishery second only to the Deshka River. The Board of Fish has recently declared the Chuitna River a stock of concern because of shortfalls in escapement.

In the first phase of mining, Pacrim has proposed to strip mine 8,000 acres of the three major Chuitna River salmon producing tributaries. Mining would remove 11 miles of

one tributary and all surface and subsurface features to a depth of 300 feet. To create a new 11 mine long salmon spawning and rearing stream, Pacrim would have to re-construct the entire upper stream drainage from bedrock on up. Re-creation of both surface features such as wetlands and subsurface features such as the shallow and deep aquifers which provide critical ground water flow to these three major tributaries would be necessary. Because sockeye, Chinook, and coho salmon select areas of upwelling ground water for spawning and the input of ground water is essential to the overwinter survival of salmon eggs and larvae in cold climates, the creation of shallow aquifers would be one of the most critical elements in creation of a new salmon stream. Finally an 11mile long stable stream channel and riparian area incorporating all the complex and interconnecting structures and processes that allow salmon to successfully spawn and rear would have to be constructed on top of 300 feet of mine tailings. This has never been done and it is likely not feasible.

ADNR and Pacrim Examples Are Not Relevant:

Both Pacrim and ADNR have provided examples of projects which they claim support their contention that creation of a productive salmon stream after strip mining is feasible. I have reviewed these projects and have personal experience with most of the Alaska projects cited. These projects do not support the contention that re-creation of a new salmon spawning and rearing stream is feasible. None of the examples provided by ADNR or Pacrim involved complete removal of an entire drainage with its associated salmon spawning stream, aquifers, wetlands, vegetation, and the subsequent creation of a new functioning salmon stream with all of these essential attributes on top of the mine overburden. The objective of most of these projects was to improve habitat in damaged fish streams, with no expectations that salmon or other fish species would be restored to pre-development levels of productivity. Only three of the projects cited by ADNR and Pacrim even involved salmon streams, and none of these streams were strip mined. Projects cited involving grayling or catfish have no relevance to the Chutina because these species have very different life histories. The available information for the projects cited did not mention restoring aquifers or ground water. All of the Alaskan projects cited by Commissioner Sullivan and Pacrim as examples of the feasibility of restoring the Chuitna River drainage after strip mining are small-scale compared with the proposed Chuitna Coal Project, which includes 21,000 acres of leases and over 8,000 acres in the first phase of mining. In contrast the Valdez Creek mine which was cited by ADNR and was the largest placer mine in Alaska was only 640 acres and only a mile of grayling stream was constructed.

A letter I wrote to Commissioner Sullivan describing in some detail why the projects that ADNR is using to support their decisions on this project are not relevant to the proposed Chuitna coal strip mine is included in the handouts.

Federal and state biologists question the feasibility of salmon stream restoration

In a 2007 letter to the Environmental Protection Agency, the National Marine Fisheries Service (NMFS) concluded the Chuitna Coal Strip Mine would cause permanent impacts to the Chuitna watershed and associated salmon habitat. NMFS stated, "We are aware of no example of successful salmon stream restoration at this scale". In the Diamond Chuitna Coal Project Final Environmental Impact Statement, EPA also concluded "that it is questionable whether mined through streams could be returned to pre-mining productivity: therefore, fish productivity loss could be a long term loss". The Alaska Department of Fish and Game provided the following response to a letter from ADNR asking whether reclamation of the Chuitna Coal Strip Mine was feasible: "while we are aware of small scale successes in reclaiming certain stream functions we are not aware of any evidence documenting whether large-scale reclamation of ecosystem function can or cannot be accomplished."

In the process of reviewing the Alaskan projects cited as examples of post-mining stream restoration by Commissioner Sullivan and PacRim, I asked a number of fisheries biologists and hydrologists who were involved in these projects if they believed that these projects demonstrate that restoring thousands of acres of strip mined salmon streams, aquifers and drainages was feasible. They all said no. They were also unaware of any example of where a salmon producing drainage has been removed by strip mining to depths of several hundred feet, and a new stream created on top of mine overburden.

Compensation for permanent loss of salmon production:

PacRim has proposed to construct a spawning channel and rearing ponds to replace salmon production from Chuitna tributaries lost due to mining during the 25 to 50 years before a new stream would be created. ADNR has cited salmon usage of USFS gravel pits adjacent to Granite Creek on the Kenai Peninsula and two Canadian spawning channels as confirmation that these methods could replace lost salmon production. However, we know that other Canadian spawning channels and all of the spawning channels that have been constructed in South Central Alaska in the last 30 years have failed over time. Similarly, other gravel pits such as the ADF&G's and ADOT's attempt to convert the Quartz Creek gravel pit on the Sterling Highway to salmon spawning and rearing habitat have failed. Most importantly, because of the

presence of invasive northern pike in the Chuitna drainage, any attempt to sustain salmon production by spawning channels and rearing ponds is unlikely to succeed. Pike thrive in these low gradient environments and have extirpated salmon and trout from all of the lakes, gravel pits (Cheney Lake in Anchorage) and slow moving streams pike have invaded in South Central Alaska.

Conclusion

I have not found any independent restoration experts, scientific studies or projects cited by ADNR and Pacrim that support the contention that reconstruction of a salmon stream with its associated drainage, confined and unconfined aquifers, wetlands, and other essential elements on top of 300 feet of mine overburden is feasible. Restoration of a strip mined salmon producing drainage would be exponentially more difficult than small scale projects to reroute a stream around a man made barrier, revegetate stream banks, or attempts to confine a unstable placer mined grayling stream to a single channel.

In considering standards for bonding mines such as Chuitna, legislators should keep in mind that all of the techniques cited by ADNR and Pacrim as examples of the feasibility of recreating salmon stream drainages were developed in the Pacific Northwest and British Colombia in an attempt to halt or reverse the continuing decline of anadromous salmon populations due to habitat loss. Billions of dollars have been spent in the U.S. and Canada with little success. If the projects cited by PacRim and ADNR as proof of the feasibility of re-creating a salmon stream worked, these methods would be used everywhere and salmon populations would not continue to decline. The problem is that from a salmon habitat perspective, the effect of permanent landscape changes such as the deep strip mining proposed for the Chuitna River drainage cannot be reversed.

Currently, ADNR has considerable discretion in setting bond amounts. It is important to recognize, if the state allows strip mining through a wild salmon stream at Chuitna, it will set state policy that will endure. So, in light of the fact that there is nothing to indicate that restoration of strip mined salmon drainages to pre-mining functions and values or that artificial maintenance of genetically unique runs is feasible, the Legislature should take a hard look at whether mining through salmon streams is a precedent the state should pursue. If so, there will need to be some very difficult discussions about how to put a value on the loss of a renewable resource – wild Alaska salmon – in perpetuity.

Thank you for the opportunity to comment.

Lance Trasky
Lance Trasky and Associates
3941 Truro Drive
Anchorage, Alaska 99507

Mr. Daniel S. Sullivan, Commissioner
Alaska Department of Natural Resources
550 W. 5th Avenue, Ste. 1400
Anchorage, Alaska 99501

Subject: Petition to Designate the Streambeds of Anadromous Water Bodies and Riparian Areas within the Chuitna River Watershed, Alaska as Unsuitable for Surface Coal Mining Pursuant to AS. 27.21.260

Dear Commissioner Sullivan:

I am a fisheries habitat consultant with 37 years of experience as a fisheries and habitat biologist and as a Habitat and Restoration Division Regional Supervisor with the Alaska Department of Fish and Game. I am writing in support of the petition to designate the streambeds of anadromous water bodies and riparian areas within the Chuitna River watershed, Alaska, as unsuitable for surface coal mining pursuant to As. 27.21.260. I support the petition for the following reasons:

1. **The Chuitna River is an important salmon producing system**: Unlike current coal producing areas of Alaska the Chuitna River is located in a productive coastal ecosystem which supports a diversity of fish and wildlife species. Chuitna River supports all five species of pacific salmon as well as Dolly Varden, rainbow trout and whitefish. Chuitna River salmon are harvested by an in river sport fishery, the Northern district commercial fishery, and the Tyonek subsistence fishery. On the west side of Cook Inlet the Chuitna River sport fishery for Chinook salmon is the second only in importance to the Deshka River. Because of its importance the Chuitna River Chinook stock was listed as a stock of management concern by the Alaska Board of Fisheries in 2010 (Helsinger 2010).

2. **Strip mining for coal will destroy the shallow aquifers and interrupt the flow of ground water to anadromous streams in and adjacent to the mined area:** Over the past several years I have conducted an extensive search of the scientific literature but have not found any examples of strip mine reclamation projects where phreatic ground water flow in streams has been restored to premine conditions by replacing mining tailings. However there is a large body of information documenting long term disruption of both surface and ground water flow as the result of recently permitted strip mining and reclamation (Bonta, 2007, Wilson 1978 and Schwartz and Crowe 1985). Bonta et al 2007 studied the effect of surface mining and reclamation on physical watershed conditions and ground water hydrology in three watersheds. This study found that mining disturbances in watersheds

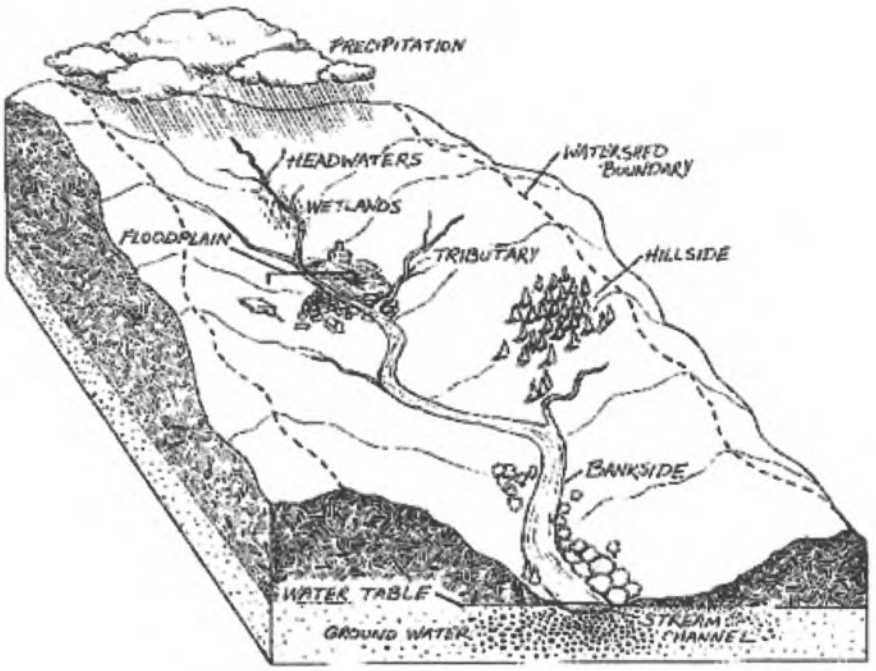


Figure 1: Cross Section of a Watershed (Source: USEPA)

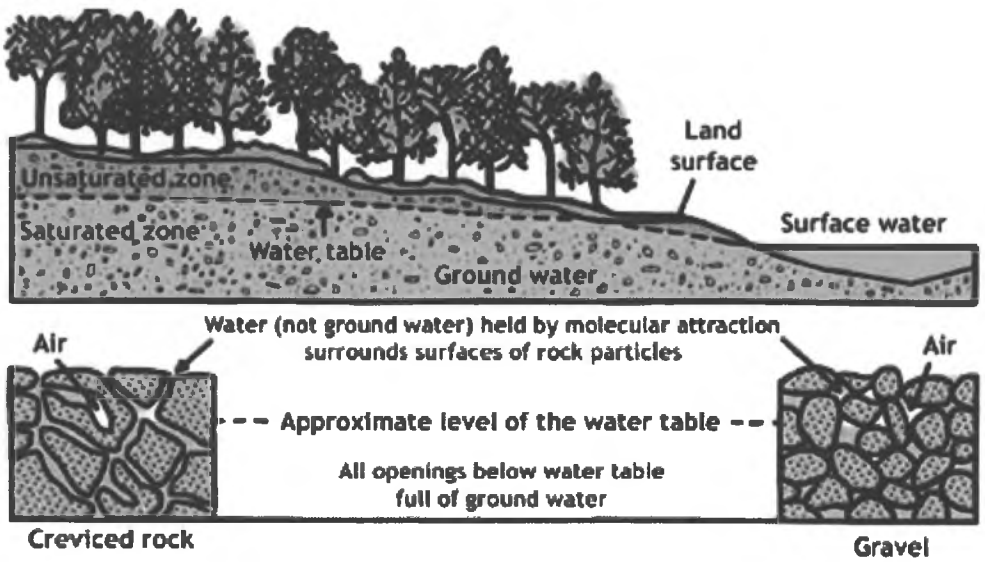


Figure 2: Cross Section of an Aquifer (Source: USGS)

Ground water is critical because it maintains stream base flow and moderates water level fluctuations, particularly in the winter when there is no precipitation. It provides stable temperatures and thermal refugia for fish. It provides water for riparian vegetation which controls bank strength and the rate of erosion (Douglas 2006). It also creates the hyporheic zone (Figure 3).

processes in the hyporheic zone play a central role in the functioning of stream ecosystems (Malcolm et al 2003).

To restore fish habitat in these streams after mining it, it would be necessary to restore the same quality and quantity of ground water. To successfully reconstruct a new stream that is as productive as mined streams, it would be necessary to reconstruct a new shallow aquifer to provide the same amount of phreatic and hyporheic flow, the same seasonal flow patterns and same quality (temperature, pH, dissolved elements, dissolved solids etc.) of ground water present prior to mining. I conducted an extensive search of the scientific literature to find examples of restoration of salmon streams after the type of strip mining proposed for the Chuitna River drainage. I also consulted with experts who have been involved in salmon habitat and strip mine restoration in Alaska and the continental United States. The search found many examples of how strip mining has dramatically altered local and regional ground water flow during and after mining, but no references to any scientific studies of mines where the aquifer's supplying phreatic ground water to the hyporheic zone of a salmon spawning and rearing stream has been successfully restored to premining productivity after strip mining. Most experts do not believe that it is possible to reconstruct a functioning shallow aquifer for an anadromous streams system in a deep mined system with any degree of confidence that it would work. Attempts to restore ground water flow to mined stream would be further hampered by the fact that the very complex geology of the Chuitna River drainage and how these shallow aquifers function is poorly understood except that ground water from these aquifers up well's at certain points in these streams and currently supports salmon spawning, rearing and overwintering.

3. **Strip mining will result in the long loss of marine derived nutrients and organic carbon essential to stream productivity:** Even if mined anadromous stream channel's in the Chuitna River drainage could be successfully reconstructed to full physical function, it is unlikely these streams could be restored to their former level of biological productivity because of the loss of marine derived nutrients (MDN) from salmon carcasses in the mined areas and the loss of organic carbon from the removal of all of the wetlands in the mine area. Significant loss of stream productivity from premining conditions has been documented in studies of streams in reclaimed stripmines. Matter and Ney (1981) found that "benthic invertebrate and fish populations were significantly lower in abundance in the reclaimed mine streams than in the reference stream and showed less taxonomic richness and stability: they were similar in these respects to the biota of unreclaimed mine streams."

Wetlands and MDN from salmon carcasses are the primary sources of stream nutrients and productivity in salmon streams. There is a large body of scientific literature showing that Pacific salmon are the major vehicle transporting marine nutrients across ecosystem boundaries from marine to freshwater and terrestrial ecosystems. Nutrients from salmon eggs and carcasses play a major role in the productivity of both freshwater and riparian ecosystems and in perpetuating future salmon runs. Most fisheries scientists and progressive fisheries managers have concluded that stream ecosystem health benefits from having the largest number of spawners possible which in turn produces a large number of carcasses (WDFW 1997). The eggs and carcasses from these spawning salmon provide an essential

wetlands can be replaced, stream productivity and fisheries production can not be restored to premining levels of productivity. The National Academy of Science recommends not destroying filling fens and bogs, both found in the Chuitna claims area, because they are "difficult or impossible to restore" (National Academy of Science 2001). For certain types of wetlands such as peat bogs which grow at a rate of less than 1mm annually, replacement is not feasible within geological time. Wetlands whether natural or constructed exist because of the presence of surface or near surface water. The extensive wetlands in the Chuitna River drainage exist in part because weathered volcanic ash a few feet below the surface forms clay like impermeable layer which holds water. Deeper layers of compacted ash act as an aquaitard confining the water table below it and forcing seeps and springs out of the hillsides and into adjacent drainages. Once the existing wetlands and the impermeable soils that currently maintain these wetlands are removed by mining there is nothing to provide a base for construction of new wetlands. There are no studies in the scientific literature which indicates that wetlands have been restored on coal mine spoils on the scale which would be required in the Chuitna River drainage. The risk of failure for many wetlands restoration projects is high, particularly in Alaska where no projects of this type have been documented (Kusler, 2004 and National Academy of Sciences, 2001).

4. **Mining will adversely affect water quality for fish and aquatic life:** Information provided by Pac rim contractors indicates that water quality will change as a result of mining in the Chuitna River drainage. Potential water quality changes include lower Ph, higher turbidity, and releases of heavy metals such as copper. Fish and their food organisms in the Chuitna River drainage have adapted to the unique water quality conditions present in the Chuitna River and its tributaries over thousands of years. Water quality is defined by dissolved elements, marine derived and terrestrial nutrients, and physical factors such as temperature, pH, conductivity, and turbidity. Anadromous species such as salmon, trout, and whitefish also depend on subtle chemical clues present in surface waters in to locate both their natal streams, and spawning locations within tributaries.

Surface water chemistry will be altered by pumping water out of the pit to allow mining and rerouting surface water away from the pit area and into streams. Data collected by Pac Rim contractors indicates that one or more of the aquifers in the mine areas contains elevated levels of copper, zinc, iron, aluminum, manganese and lead. Zinc and manganese levels in ground water within the proposed Chuitna mine area are approximately 4 times and aluminum 20 times greater than average surface water levels in stream within the proposed Chuitna mine area . All of these metals are toxic to fish and aquatic life at levels in the part per billion to part per million ranges. Aluminum interferes with phosphorus metabolism in plants which form the basis of the aquatic food chain in streams. It also precipitates on fish gill membranes inhibiting exchange of oxygen and carbon dioxide which results in asphyxiation. Copper is toxic to rainbow trout at 1.4 parts per billion, and elevated levels (5-20 ppb.) destroys the olfactory organs which anadromous fish use to locate prey and spawning streams. Zinc is toxic in the part per billion range and accumulates in and damages gills, liver, and kidneys. Copper, zinc and lead bioconcentrate (build up to high levels over time) in aquatic organisms. Copper and zinc also act synergistically in the aquatic environment so that the toxicity of the combination is greater than the individual elements.

Moose Creek in the Matanuska River drainage. The damage to salmon streams from alluvial placer mining and is very different from strip mining, which may encompass entire drainages and alter both the surface topography, subsurface geology and the aquifers down to several hundred feet. The objective of most of these stream projects has been to stabilize a short section of an existing stream channel and not reconstruct an entire drainage, stream channel and aquifer.

Although there may have been some benefits to fish, I have not been able to find any reports or scientific studies documenting that these stream relocation or stabilization projects have benefitted fish. Most of these projects such as the USFS projects on Resurrection Creek have attempted to restore both sinuosity and rearing habitat to a stream impacted by placer mining in the early 1900's by moving and grading spoil piles and providing instream cover. Placer miners channelized the stream and left spoil piles in the flood plain but did not destroy the shallow aquifer that provides ground water flow to the stream. It appears that the USFS projects have increased rearing habitat for Chinook and Coho salmon by connecting formerly isolated channels in mine spoils, but no data has been made available to document this. Similarly, it is likely that the rerouting of Moose Creek back into its original channel has provided access to additional upstream spawning and rearing habitat for salmon in previously inaccessible upstream waters but no scientific data is provided to support this. However, this project like the others does not provide any indication of the likelihood of success in completely reconstructing a salmon stream, recreating the existing water chemistry, recontouring and revegetating its drainage, reconstructing all of its wetlands and rebuilding its aquifers from basement sediments on up in the Chuitna River drainage.

7. **A great deal of new information that raises questions about the feasibility of restoring anadromous within the Chuitna River drainage to their premining level of productivity has become available since the 1990 Diamond Chuitna Coal Project Final Environmental Impact Statement.** When the Diamond Chuitna Coal Project Final Environmental Impact Statement was completed in 1990 very little was known about the physical, chemical and biological components of salmon habitat, and the function of in stream flow and ground water, marine derived nutrients, and wetlands in the productivity of salmon streams. Studies of salmon salmon genetics, the effects of mining on salmon streams, and the restoration of salmon streams were in their infancy. The impetus for much of this research was the continued decline of salmon stocks due to human activities. Since 1990 a great deal of scientific research on these subjects has been completed and information has become available. This information support the conclusion that strip mining for coal will severely impact current anadromous waters in the Chuitna River drainage and that it is very unlikely that these waters could be restored to their premining level of productivity

Thank you for your consideration of my request that you grant the Petition to Designate the Streambeds of Anadromous Water Bodies and Riparian Areas within the Chuitna River Watershed, Alaska. as Unsuitable for Surface Coal Mining Pursuant to AS. 27.21.260. If you have any questions you can contact me at the address shown above.

Sincerely,

Literature Cited:

Helsinger, 2010. Upper Cook Inlet Stock of Concern. Letter to Alaska Board of Fisheries October 1, 2010.

Hood, E, R Edwards, D. D'Amore, and B. Lange. 2003. Organic Carbon Sources in Coastal Southeast Alaskan Streams. American Geophysical Union. Fall meeting 2003. Abstract #B31C-0317.

Kusler, 2004. Multi-Objective Wetland Restoration In Watershed Contexts. Association of State Wetlands Managers. 108 p.

National Academy of Sciences, 2001. Compensating for Wetlands Losses Under the Clean Water Act. National Academies Press. 322 p.

For citations not listed here please refer to my 2009 report, Report on Chuitna Coal Project Aquatic Studies and Fish and Wildlife Protection Plan which has been previously provided to ADNR

CENTER for SCIENCE in PUBLIC PARTICIPATION

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"Technical Support for Grassroots Public Interest Groups"

March 2, 2012

Re: Testimony on the feasibility of reclamation for the proposed Chuitna coal mine, before the Alaska Senate Judiciary Committee on March 2, 2012

Fm: David M. Chambers, Ph.D., P. Geop.

Reclamation of a minesite is not restoration to its former function, but involves returning a minesite to a functional use after mining has been completed. The functional uses are typically things like wildlife habitat, grazing, and/or industrial use. The goals for reclamation functional use are, or have, always been aimed primarily at a surface use.

Recreating the subsurface hydrological regime that existed before mining would be extremely difficult, likely impossible, very expensive, and to my knowledge has never been the primary goal of any reclamation effort. Recreating the pre-mining hydrologic regime would be technically challenging at best, but more likely is not a viable option. At a minimum it would require a very detailed pre-mining data collection effort in order to understand the physical layout and function of the existing hydrologic (groundwater) regime. Where water moves and how fast it moves are functions that would have to be well understood before the groundwater strata are disturbed by mining. Some of the reclamation at Chuitna would involve attempting to restore up to 200 feet in thickness of potentially water-bearing strata.

Complicating the restoration would be the Chuit and South Pit faults, and several anticlines (structural features) that have warped the underlying strata since its deposition. Faults can either be zones of high permeability that promote preferential flow of groundwater, or zones of low permeability that act as barriers to the transmission of groundwater. Mining through fault zones means that the groundwater hydrology must be thoroughly understood in order to have any chance of restoring groundwater flow patterns during reclamation. Similarly, anticlines and similar geomorphic structures will influence groundwater flow, and must be carefully mapped in order that restoration of pre-mining hydrologic effects might be attempted. It is not evident from the information presented in the pre-mining work[1] that these important hydrologic factors have been adequately examined.

If the original hydrology were to be adequately mapped in three dimensions, the flow patterns, temperature and water quality variations documented, getting similar materials back into these configurations would be very difficult. When waste material is mined, stockpiled, and then moved back into the mined out pit, there is a tendency for homogenization of the backfill material. From a hydrologic perspective the original strata will consist of zones that conduct water (aquifers), and zones that do not conduct water (aquitards). The aquitards are as important as the aquifers because they control the flow of groundwater. A normal pit backfill would tend to create a relatively uniform aquifer, with hydraulic conductivity that could be greater than or less than that of the original strata. Backfill could also negatively impact groundwater, and potentially surface water, quality.

In order to recreate the original hydrologic regime, backfill material would need to be sorted, stored separately, and selectively replaced into the mined out areas. This sorting, with perhaps screening, and separate storage would be more expensive than traditional pit backfill methodology. Quality control of the backfill segregation and placement would also be a significant management issue. If backfilled material is not sorted, stored, and replaced to meet locational and hydrologic parameters, then the restored hydrologic system would function differently than the original.

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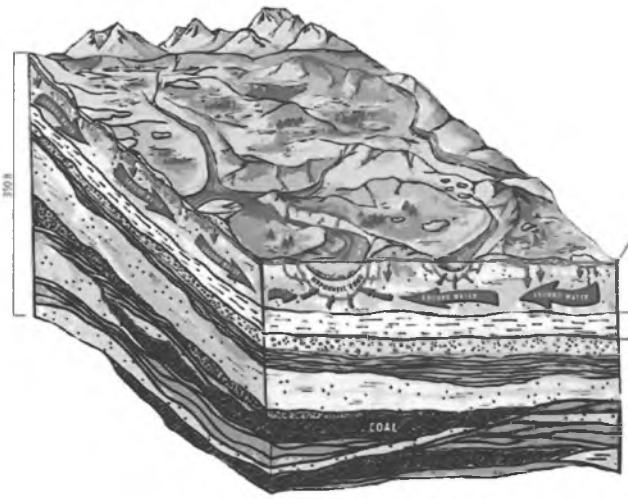
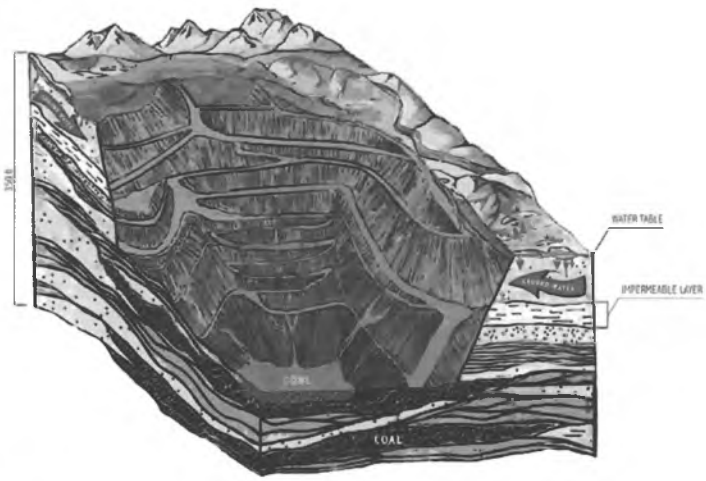
[1] Chuitna Coal Project Geology Baseline Information, PacRim Coal, L.P., August, 2006

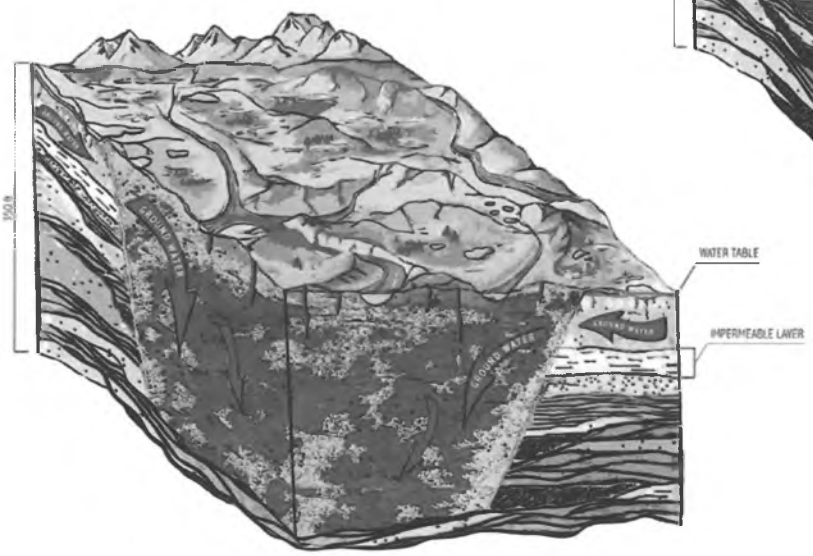
It is highly unlikely that the original hydrologic system could be restored. This is due to the disruption of the original strata due to mining that would cause a change in the physical character of the rock. There would be changes in rock size (therefore hydraulic conductivity), and changes in rock volume. The volume would increase on a unit basis due to breaking up the rock, but there might be a decrease in total volume due to the removal of the coal – coal layers that cannot be replaced physically or hydrologically.



Strip Mining - Before



Strip Mining - During



Strip Mining - After

Because of all of these complications – of adequately defining the existing hydrology; of sorting and storing the mined waste; and, of putting it back in the same hydrologic configuration as the original material – it is likely that the restored hydrologic regime would only be a rough approximation of the original. The significant increase in cost to provide only a rough approximation of what was there before explains why restoration of the original hydrologic regime at a minesite is not typically attempted.

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Alaskans Must Stand Firm to Protect Salmon Habitat

By

Dr. Jim Rearden

February 25, 2012

Some folks from Texas want to strip-mine the Chuitna River watershed on the west side of Cook Inlet so they can send coal to China. To get to the coal, they want to destroy 11 miles of Middle Creek, a beautiful stream that is home to several species of wild Alaskan salmon. This would be the first time in our great State's history we would allow mining directly through a wild salmon stream. If our Governor and the state agencies allow this project to proceed, it will set a horrendous precedent that will jeopardize wild Alaska salmon forever.

Alaska's Department of Natural Resources is moving ahead with a permitting process for this monstrous misuse of the land. That an Alaska agency would consider such a proposal is an insult to Alaskans and to the land. In my 61 years being involved with Alaska's fish and game resources, the only other comparable, seriously-proposed rape of Alaska's land I can remember was when Gov. Gruening wanted to dam the Yukon River.

The federal government almost destroyed Alaska's salmon fishery. Since statehood in 1959, Alaska's Department of Fish and Game has rebuilt our salmon runs to equal to or even better than the greatest runs of the earliest years. But now, politics and money have crept in, and sound science is no longer driving our agency decision making.

The future of our salmon depends upon the health of our salmon streams. Since territorial days we have prohibited dams that could keep salmon from spawning grounds. To protect spawning grounds and prevent silting, one cannot legally drive a tractor or all-terrain vehicle across an Alaska salmon stream. We require logging projects to protect riparian habitat for fish. We say no to fish stream pollution of any kind.

At statehood, Alaska's salmon managers -- I was one -- had mostly pristine rivers to manage. The Texans presume they can replace the 11 miles of Middle Creek they plan to destroy. That is impossible; any Alaskan knows that. If they could build new salmon streams, they could make a heck of a lot more money doing that then exporting coal. Only God could create a wild Alaska salmon stream and all its fixings, and it might even take Him a few centuries.

Equally important, it's impossible to set a dollar value on the loss of salmon from Middle Creek. The reason is simple: salmon are an eternally renewable resource. What would be the value of salmon from Middle Creek over the next 10,000 years? Compare that with 25 years of income from coal shipped to China, most of which would fill the pockets of Outside investors.

Governor Parnell has promised on numerous occasions he would "never trade one resource for another." Yet he rejected a petition from local hunters and fishermen asking the state to remove salmon streams from the proposed mining area. I'm all for mining, it's vitally important to our state – just not through our salmon streams. The Governor wants us to believe the permitting system can somehow magically mitigate away the devastating effects of coal strip mining on wild salmon streams. But anyone who's lived with salmon knows that's untrue.

Alaska is the last stronghold for wild salmon. The once-magnificent runs in Oregon and Washington and Maine have fallen to the very same shortsighted decisions we're faced today with the Chuitna coal strip mine. If we set state policy by allowing mining through salmon streams at Chuitna, it won't be long before our kids and grandkids are asking: why didn't you learn from the mistakes they made in the Lower 48?

In 1950, Dr. Jim Rearden organized the wildlife department at the University of Alaska Fairbanks and taught as head of that department for four years. He has been an area biologist for commercial fisheries for the Alaska Department of Fish and Game in Cook Inlet, served on the old Board of Fish and Game and later on the Board of Game and was a member of the National Advisory Committee on Oceans and Atmosphere. He was outdoors editor of Alaska magazine for 20 years and has written more than 500 magazine stories and 27 books on Alaska subjects.

Panelist Bios

Dr. Margaret Palmer is a Professor of Entomology and Biology at the University of Maryland where she oversees a scientific research laboratory with approximately 120 staff, 20 buildings, and a research fleet. She has over 25 years of experience in research and teaching on coastal ecosystems, watershed science, and stream ecology and restoration. Her past work includes leading a large team of scientists in developing the first national database on river restoration in the U.S., coauthoring a book on The Foundations of Restoration Ecology and serving as an expert advisor on the design of multiple stream and river restoration projects.

Lance Trasky is the owner of Lance Trasky and Associates an environmental consulting company. Mr. Trasky received a Bachelor of Science degree from Michigan State University and did his graduate studies in fisheries at Central Michigan University. Mr. Trasky is a fisheries and habitat biologist with over 32 years of experience in fisheries research and analyzing potential adverse affects of many types of activities on fish and fish habitat. From 1971 to 1974 he served as the Alaska Department of Fish and Games Commercial Fisheries Division salmon area research biologist for the Arctic and Yukon River. Since 1974 he worked for the ADF&G Habitat and Restoration Division in a series of research, planning, and management positions with increasing responsibilities. In 1977 he was promoted to supervisor of the Marine and Coastal Habitat Management section, and in 1980 was made Regional Supervisor for the South Western, and Western Regions of Alaska. In 1983 his responsibilities were expanded to include ADF&G's South Central Region. This included Cook Inlet, Bristol Bay, Prince William Sound, Kodiak Island, and the lower Yukon Kuskokwim River which are the major salmon producing areas of Alaska.

Dr. David Chambers is the president of the Center for Science in Public Participation, a non-profit corporation formed to provide technical assistance on mining and water quality to public interest groups and tribal governments. Dr. Chambers has 35 years of experience in mineral exploration and development – 15 years of technical and management experience in the mineral exploration industry, and for the past 20 years he has served as an advisor on the environmental effects of mining projects both nationally and internationally. He has Professional Engineering Degree in Physics from the Colorado School of Mines, a Master of Science Degree in Engineering from the University of California at Berkeley, and is a registered professional geophysicist in California (# GP 972). Dr. Chambers received his Ph.D. in Environmental Planning from Berkeley where his doctoral dissertation analyzed the U.S. Forest Service's efforts to plan for and manage minerals on the National Forests.

Testimony of

Margaret A. Palmer, Ph.D.
Professor and Director
Socio-Environmental Synthesis Center
University of Maryland

to the

Alaska Senate Judiciary Committee

March 2, 2012

Good afternoon Chairman French and members of the Senate Judiciary Committee. My name is Margaret Palmer and I thank you for allowing me to speak to you today.

I am a Professor at the University of Maryland and Director of the National Science Foundation's National Socio-environmental Synthesis Center. I've been researching streams and watersheds for over 25 years and am an expert on stream restoration and the impacts of surface mining on streams.

As you know, PacRim Coal has proposed a large mining project in the Chuitna River watershed. This is a 25 year project that will impact a very large track of land not only due to the footprint of the mine itself but due to all the infrastructure and access needs for mining. Impacts to the Chuitna watershed will include destruction of fragile wetlands and 11 miles of salmon spawning streams.

I am here to describe irrefutable scientific evidence that the impacts of the proposed Chuitna mining project will be irreversible and that reclamation to support future salmon populations is not technologically feasible.

I wish to make three major points today:

- First, the examples of reclamation and restoration projects that have been provided by PacRim and others do not demonstrate that restoration at Chuitna is achievable.
- Second, reclamation at the Chuitna site to support salmon would require *creation* of streams and rivers, not restoration or reclamation, yet *creation* of streams is outside the realm of credible science.

- Third, there is extensive scientific documentation of widespread failures of restoration projects in watersheds far less impacted than what is proposed for the Chuitna watershed; and, thus the likelihood of reclamation success to support salmon populations is at or near zero.

Point 1: Irrelevance of PacRim reclamation examples

PacRim has put forward a number of examples of projects that they suggest are evidence that reclamation of wetlands and salmon streams lost due to the Chuitna project is technologically feasible. In fact, they are not evidence because the projects they describe are on sites only minimally impacted – this is nothing like what will happen to the Chuitna watershed if the proposed mining occurs.

The PacRim referenced projects have no bearing on what will be needed at Chuitna:

First, the referenced examples are in watersheds that still have intact headwaters and the streams are still connected longitudinally, which is not the case for Chuitna.

Second, groundwater flow paths in the examples they cite are still intact yet in the Chuitna case, with mining to depths of 300 feet or more, the existing groundwater flow paths will be destroyed. Keep in mind that groundwater is what feeds streams.

Third, many of the examples PacRim cites deal with restoration of stream *sections* that had been previously diverted or degraded ...not streams whose watersheds have been destroyed. The restoration actions required for their examples typically are just adding more bends in the existing stream, widening channels, or removing the diversion channels.

Fourth, the PacRim examples were not of mined-through streams in which the entire channel including its headwaters was exposed to major earth-moving activities. Such activities (which are to occur at the Chuitna sites) not only result in mining waste rock and soil being placed where streams once were but that material is seriously compacted.

Fifth, they provide examples from Illinois and Indiana for streams that are warm-water and do not support sensitive species like salmon.

Point 2: Stream creation is outside the realm of modern science

What PacRim is proposing is nothing like stream reclamation that is commonly practiced today. Instead it is an attempt to create a stream *de novo*. In other words,

streams and wetlands, including headwaters are to be completed destroyed, fill added and packed then after mining is complete, PacRim will dig ditches and route water to them.

In practice, ecological stream restoration varies along a continuum from: removing on-going impacts to a stream (e.g., preventing toxic inputs) and letting the system recover on its own; to enhancing in-stream habitat or the surrounding riparian zone (e.g., adding coarse woody debris to streams and planting vegetation) in an otherwise healthy stream; to full scale restoration that involves manipulations of an *existing* stream channel (e.g., re-grading banks and planting trees along a stream with eroding banks).

Yet under the plan proposed for Chuitna, there will be no existing channels remaining to 'restore'. They will be gone. Unfortunately, simply ditches and routing water to them does not create a living, breathing stream that will support insects, fish, wildlife and certainly not salmon.

Streams that are healthy enough to support salmon and other valuable species, must have the organically rich soils, wetlands, and mature native vegetation common to the region. Rainwater and snowmelt percolate into the ground, reaching the water table and then move laterally into streams and/or wetlands. Thus groundwater inputs to streams have moved through rich soils where nutrients and essential elements that are necessary for healthy streams and wetlands.

Claiming that a structure like a ditch dug on mined land is similar to a functional ecosystem because it has the same width and depth is analogous to claiming that all people of the same height are equally healthy. It's easy to understand the important difference between physical features and biological functioning when you think about people's health. For instance, my husband looks great, he is 6'2" and weighs 185. But guess what? He has really high blood pressure. Can you imagine a doctor saying he is healthy without ensuring his essential systems are working, like heart rate, blood pressure, glucose metabolism?

From a scientific point of view, it is equally unacceptable to say a stream will be healthy ecologically just because it happens to have rocks and water. It is particularly

remarkable to make such a claim in this case given the extensive watershed destruction.

Point 3: Widespread failures in much simpler reclamation projects mean large scale failure at Chuitna

The status of research evaluating the effectiveness of stream and wetland reclamation has advanced significantly in the last decade and there is now clear evidence of widespread ecological failures of projects attempted on sites far less damaged than what will occur at the Chuitna sites.

Recently, I led a national project that developed the first comprehensive database on stream and river restoration for the U.S. (38,000 projects in the database) and there is not a single case in which building streams in the manner they outline has been shown to work, much less fully compensate for what is lost when a stream is destroyed.

Additionally, there is a long list of peer-reviewed studies documenting failures from stream restoration projects. For example:

A study published in 2010 evaluated 78 independent stream restoration projects to determine if aquatic biodiversity recovered. Only 2 of those 78 showed improvement.

A special issue of the leading ecological journal, *Ecological Applications* was devoted to stream restoration in 2011 and there was not a single example provided of ecological recovery.

There are two recent publications demonstrating failure of recovery when reclamation of streams was attempted on previously minded land in ecoregions similar to the Chuitna site. The locations of those sites were in the North West Territories of Canada and in the Arctic.

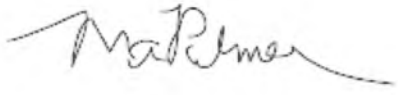
The fact is, the current status of technology for stream reclamation is limited to small scales (usually single reaches), is only useful in intact water networks, and is certainly not designed nor tested for situations in which the underlying soils, geology, and associated groundwater flow paths are destroyed.

Summary

I would like to leave you with the understanding that there is no evidence that reclamation of streams and wetlands at the Chuitna site is feasible. And that in fact

there is strong evidence that it is not feasible based on strong science and extensive research. The current technology for reclamation has not yet been successful in watersheds or in streams with far less impact that what Chuitna will experience. You should recognize that if the watershed is mined as proposed, you will not regain the salmon populations that frequent the streams now.

Thank you Mr. Chairman and Members of the Committee.



Margaret A. Palmer
February 19, 2012

Testimony Before the
Alaska Senate Judiciary Committee
March 2, 2012

Submitted by:

Lance Trasky
Lance Trasky and Associates
3941 Truro Drive
Anchorage, Alaska 99507

Introduction: Chairman French and members of the Judiciary Committee, my name is Lance Trasky. I have 42 years of experience as a fisheries research biologist, a habitat biologist, and a Regional Supervisor with the Alaska Department of Fish and Game.

Establishing a restoration bond for the proposed Chuitna Coal Strip Mine will be very difficult because there is nothing in the scientific literature or the projects cited by Pacrim and the Alaska Department of Natural Resources which supports the claim that re-creation of a wild Pacific salmon stream and its associated drainage has ever been successfully accomplished or is even feasible. It is also unlikely that the spawning channel and rearing ponds that Pacrim has offered as interim mitigation for the loss of salmon production from Chuitna River tributaries for 25 to 50 years would be successful in maintaining these runs.

The Problem

The Chuitna River supports substantial runs of all five species of Pacific salmon. It is an important contributor to the Cook Inlet commercial and subsistence fisheries. It is believed to be the major source of Chinook salmon to the Tyonek subsistence fishery. The Chuitna is the major Chinook salmon producing system on the west side of Cook Inlet and supports a Chinook sport fishery second only to the Deshka River. The Board of Fish has recently declared the Chuitna River a stock of concern because of shortfalls in escapement.

In the first phase of mining, Pacrim has proposed to strip mine 8,000 acres of the three major Chuitna River salmon producing tributaries. Mining would remove 11 miles of

one tributary and all surface and subsurface features to a depth of 300 feet. To create a new 11 mine long salmon spawning and rearing stream, Pacrim would have to re-construct the entire upper stream drainage from bedrock on up. Re-creation of both surface features such as wetlands and subsurface features such as the shallow and deep aquifers which provide critical ground water flow to these three major tributaries would be necessary. Because sockeye, Chinook, and coho salmon select areas of upwelling ground water for spawning and the input of ground water is essential to the overwinter survival of salmon eggs and larvae in cold climates, the creation of shallow aquifers would be one of the most critical elements in creation of a new salmon stream. Finally an 11mile long stable stream channel and riparian area incorporating all the complex and interconnecting structures and processes that allow salmon to successfully spawn and rear would have to be constructed on top of 300 feet of mine tailings. This has never been done and it is likely not feasible.

ADNR and Pacrim Examples Are Not Relevant:

Both Pacrim and ADNR have provided examples of projects which they claim support their contention that creation of a productive salmon stream after strip mining is feasible. I have reviewed these projects and have personal experience with most of the Alaska projects cited. These projects do not support the contention that re-creation of a new salmon spawning and rearing stream is feasible. None of the examples provided by ADNR or Pacrim involved complete removal of an entire drainage with its associated salmon spawning stream, aquifers, wetlands, vegetation, and the subsequent creation of a new functioning salmon stream with all of these essential attributes on top of the mine overburden. The objective of most of these projects was to improve habitat in damaged fish streams, with no expectations that salmon or other fish species would be restored to pre-development levels of productivity. Only three of the projects cited by ADNR and Pacrim even involved salmon streams, and none of these streams were strip mined. Projects cited involving grayling or catfish have no relevance to the Chutina because these species have very different life histories. The available information for the projects cited did not mention restoring aquifers or ground water. All of the Alaskan projects cited by Commissioner Sullivan and Pacrim as examples of the feasibility of restoring the Chuitna River drainage after strip mining are small-scale compared with the proposed Chuitna Coal Project, which includes 21,000 acres of leases and over 8,000 acres in the first phase of mining. In contrast the Valdez Creek mine which was cited by ADNR and was the largest placer mine in Alaska was only 640 acres and only a mile of grayling stream was constructed.

A letter I wrote to Commissioner Sullivan describing in some detail why the projects that ADNR is using to support their decisions on this project are not relevant to the proposed Chuitna coal strip mine is included in the handouts.

Federal and state biologists question the feasibility of salmon stream restoration

In a 2007 letter to the Environmental Protection Agency, the National Marine Fisheries Service (NMFS) concluded the Chuitna Coal Strip Mine would cause permanent impacts to the Chuitna watershed and associated salmon habitat. NMFS stated, "We are aware of no example of successful salmon stream restoration at this scale". In the Diamond Chuitna Coal Project Final Environmental Impact Statement, EPA also concluded "that it is questionable whether mined through streams could be returned to pre-mining productivity: therefore, fish productivity loss could be a long term loss". The Alaska Department of Fish and Game provided the following response to a letter from ADNR asking whether reclamation of the Chuitna Coal Strip Mine was feasible: "while we are aware of small scale successes in reclaiming certain stream functions we are not aware of any evidence documenting whether large-scale reclamation of ecosystem function can or cannot be accomplished."

In the process of reviewing the Alaskan projects cited as examples of post-mining stream restoration by Commissioner Sullivan and PacRim, I asked a number of fisheries biologists and hydrologists who were involved in these projects if they believed that these projects demonstrate that restoring thousands of acres of strip mined salmon streams, aquifers and drainages was feasible. They all said no. They were also unaware of any example of where a salmon producing drainage has been removed by strip mining to depths of several hundred feet, and a new stream created on top of mine overburden.

Compensation for permanent loss of salmon production:

PacRim has proposed to construct a spawning channel and rearing ponds to replace salmon production from Chuitna tributaries lost due to mining during the 25 to 50 years before a new stream would be created. ADNR has cited salmon usage of USFS gravel pits adjacent to Granite Creek on the Kenai Peninsula and two Canadian spawning channels as confirmation that these methods could replace lost salmon production. However, we know that other Canadian spawning channels and all of the spawning channels that have been constructed in South Central Alaska in the last 30 years have failed over time. Similarly, other gravel pits such as the ADF&G's and ADOT's attempt to convert the Quartz Creek gravel pit on the Sterling Highway to salmon spawning and rearing habitat have failed. Most importantly, because of the

presence of invasive northern pike in the Chuitna drainage, any attempt to sustain salmon production by spawning channels and rearing ponds is unlikely to succeed. Pike thrive in these low gradient environments and have extirpated salmon and trout from all of the lakes, gravel pits (Cheney Lake in Anchorage) and slow moving streams pike have invaded in South Central Alaska.

Conclusion

I have not found any independent restoration experts, scientific studies or projects cited by ADNR and Pacrim that support the contention that reconstruction of a salmon stream with its associated drainage, confined and unconfined aquifers, wetlands, and other essential elements on top of 300 feet of mine overburden is feasible. Restoration of a strip mined salmon producing drainage would be exponentially more difficult than small scale projects to reroute a stream around a man made barrier, revegetate stream banks, or attempts to confine a unstable placer mined grayling stream to a single channel.

In considering standards for bonding mines such as Chuitna, legislators should keep in mind that all of the techniques cited by ADNR and Pacrim as examples of the feasibility of recreating salmon stream drainages were developed in the Pacific Northwest and British Colombia in an attempt to halt or reverse the continuing decline of anadromous salmon populations due to habitat loss. Billions of dollars have been spent in the U.S. and Canada with little success. If the projects cited by PacRim and ADNR as proof of the feasibility of re-creating a salmon stream worked, these methods would be used everywhere and salmon populations would not continue to decline. The problem is that from a salmon habitat perspective, the effect of permanent landscape changes such as the deep strip mining proposed for the Chuitna River drainage cannot be reversed.

Currently, ADNR has considerable discretion in setting bond amounts. It is important to recognize, if the state allows strip mining through a wild salmon stream at Chuitna, it will set state policy that will endure. So, in light of the fact that there is nothing to indicate that restoration of strip mined salmon drainages to pre-mining functions and values or that artificial maintenance of genetically unique runs is feasible, the Legislature should take a hard look at whether mining through salmon streams is a precedent the state should pursue. If so, there will need to be some very difficult discussions about how to put a value on the loss of a renewable resource – wild Alaska salmon – in perpetuity.

Thank you for the opportunity to comment.

CENTER for SCIENCE in PUBLIC PARTICIPATION

224 North Church Avenue, Bozeman, MT 59715
Phone (406) 585-9854 / Fax (406) 585-2260 / web: www.csp2.org / e-mail: csp2@csp2.org
"Technical Support for Grassroots Public Interest Groups"

March 2, 2012

Re: Testimony on the feasibility of reclamation for the proposed Chuitna coal mine, before the Alaska Senate Judiciary Committee on March 2, 2012

Fm: David M. Chambers, Ph.D., P. Geop.

Reclamation of a minesite is not restoration to its former function, but involves returning a minesite to a functional use after mining has been completed. The functional uses are typically things like wildlife habitat, grazing, and/or industrial use. The goals for reclamation functional use are, or have, always been aimed primarily at a surface use.

Recreating the subsurface hydrological regime that existed before mining would be extremely difficult, likely impossible, very expensive, and to my knowledge has never been the primary goal of any reclamation effort. Recreating the pre-mining hydrologic regime would be technically challenging at best, but more likely is not a viable option. At a minimum it would require a very detailed pre-mining data collection effort in order to understand the physical layout and function of the existing hydrologic (groundwater) regime. Where water moves and how fast it moves are functions that would have to be well understood before the groundwater strata are disturbed by mining. Some of the reclamation at Chuitna would involve attempting to restore up to 200 feet in thickness of potentially water-bearing strata.

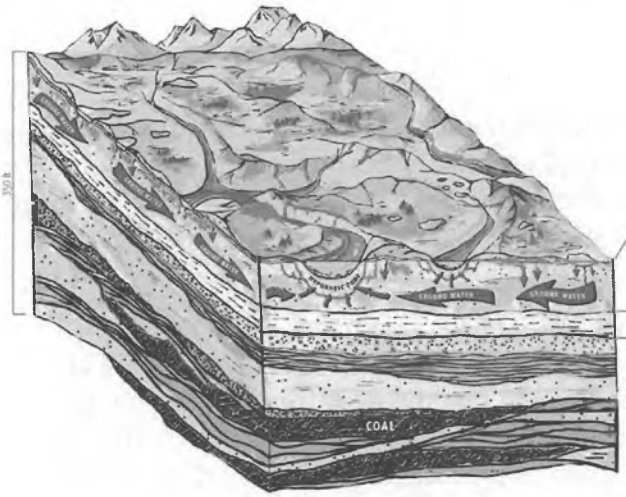
Complicating the restoration would be the Chuit and South Pit faults, and several anticlines (structural features) that have warped the underlying strata since its deposition. Faults can either be zones of high permeability that promote preferential flow of groundwater, or zones of low permeability that act as barriers to the transmission of groundwater. Mining through fault zones means that the groundwater hydrology must be thoroughly understood in order to have any chance of restoring groundwater flow patterns during reclamation. Similarly, anticlines and similar geomorphic structures will influence groundwater flow, and must be carefully mapped in order that restoration of pre-mining hydrologic effects might be attempted. It is not evident from the information presented in the pre-mining work[1] that these important hydrologic factors have been adequately examined.

If the original hydrology were to be adequately mapped in three dimensions, the flow patterns, temperature and water quality variations documented, getting similar materials back into these configurations would be very difficult. When waste material is mined, stockpiled, and then moved back into the mined out pit, there is a tendency for homogenization of the backfill material. From a hydrologic perspective the original strata will consist of zones that conduct water (aquifers), and zones that do not conduct water (aquitards). The aquitards are as important as the aquifers because they control the flow of groundwater. A normal pit backfill would tend to create a relatively uniform aquifer, with hydraulic conductivity that could be greater than or less than that of the original strata. Backfill could also negatively impact groundwater, and potentially surface water, quality.

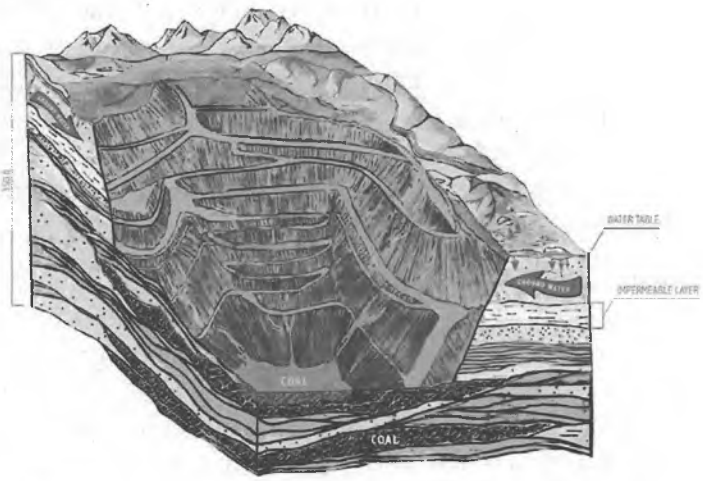
In order to recreate the original hydrologic regime, backfill material would need to be sorted, stored separately, and selectively replaced into the mined out areas. This sorting, with perhaps screening, and separate storage would be more expensive than traditional pit backfill methodology. Quality control of the backfill segregation and placement would also be a significant management issue. If backfilled material is not sorted, stored, and replaced to meet locational and hydrologic parameters, then the restored hydrologic system would function differently than the original.

[1] Chuitna Coal Project Geology Baseline Information, PacRim Coal, L.P., August, 2006

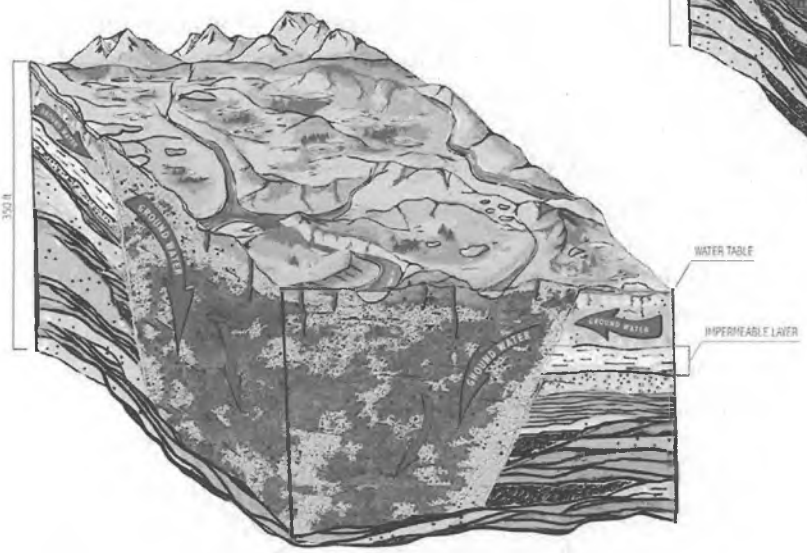
It is highly unlikely that the original hydrologic system could be restored. This is due to the disruption of the original strata due to mining that would cause a change in the physical character of the rock. There would be changes in rock size (therefore hydraulic conductivity), and changes in rock volume. The volume would increase on a unit basis due to breaking up the rock, but there might be a decrease in total volume due to the removal of the coal – coal layers that cannot be replaced physically or hydrologically.



Strip Mining - Before



Strip Mining - During



Strip Mining - After

Because of all of these complications – of adequately defining the existing hydrology; of sorting and storing the mined waste; and, of putting it back in the same hydrologic configuration as the original material – it is likely that the restored hydrologic regime would only be a rough approximation of the original. The significant increase in cost to provide only a rough approximation of what was there before explains why restoration of the original hydrologic regime at a minesite is not typically attempted.

#####

Dr. Tom Myers, researcher and consultant in hydrogeology and water resource specializing in groundwater modeling, hydrogeology, environmental forensics, regulatory compliance, water rights, NEPA analysis, and environmental and water policy.

- The current unique combination of groundwater storage, artesian pressure, horizontal and vertical conductivity, compaction and recharge cause the baseflow hydrograph that sustains streamflows during the low-flow periods of the year. The best available technology would dig up and remove the current layering and completely change the properties that control the flow through the backfill. Consequently, based on best available reclamation technology, it is not technologically feasible to restore water balances to pre-mining conditions.

  Download the full report: http://bit.ly/Juneau2012-Myers

Lance Trasky, fisheries habitat consultant with 37 years of experience as a fisheries and habitat biologist and as a Habitat and Restoration Division Regional Supervisor with the Alaska Department of Fish and Game.

- None of the examples provided by the Alaska Department of Natural Resources (ADNR) or PacRim demonstrate that reclamation is technologically feasible for streams and riparian corridors in the Chuitna watershed. The proposed project would remove 300 feet of overburden, mine the coal, then replace the overburden, in an attempt to build an entirely new stream and create a functioning stream ecosystem that supports anadromous salmon productivity similar to that which existed pre-mining. As none of the examples provided by ADNR or PacRim involved complete removal of an entire drainage with its associated salmon spawning stream, aquifers, wetlands, vegetation, and the subsequent creation of a new functioning stream on top of the mine overburden, no support is provided for the feasibility of reclamation of a coal strip mine in streams of the Chuitna watershed.

  Download the full report: http://bit.ly/Juneau2012-Trasky

John Talberth, Ph.D and Evan Branosky, Net Public Benefits of the Chuitna Coal Project

- Chuitna coal strip mine development could cost Alaska $2 billion in economic losses over the 25 year life of the mine based on the loss of intact freshwater and marine habitats including fish, flood control, water purification, subsistence resources, recreation and scenery.

- The social costs passed on to individuals could range between 193 and 604% of market price of the extracted coal, meaning the cost to Alaskans from the mining of the coal greatly exceeds the coals low value. A finding that corroborates the range published in existing literature.

  Download the full report: http://bit.ly/Juneau2012-Talberth

Expert Comments and Report Summary
RE: The Proposed Chuitna Coal Strip Mine and the Petition to Designate Lands Unsuitable for Surface Coal Strip Mining

Dr. Margaret A. Palmer, Professor of Entomology and Biology at the University of Maryland

- Stream 2003" also called Middle Creek, will be completely destroyed. It will not be "impacted", but rather mining will go down hundreds of feet beneath it, completely removing the stream bed and any remnant of the stream for 11 miles. While stream reconstruction has been done successfully by re-grading and re-vegetating banks, or adding or removing debris to create habitat, no one has simply created a new stream where none exists. A new ditch can be dug where the old stream used to be, and can have the same curves and shape. But it will not have the exchange of surface and groundwater at the streambed, upwelling areas for fish to lay their eggs in, biodiversity of insects that headwater streams provide as food for fish, the purity of water and nutrients wetlands provided.

  Download the full report: http://bit.ly/Juneau2012-Palmer1

- [C]urrent and highly relevant science shows that the scientific technology and knowledge is not sufficient to reclaim salmon streams and riparian habitats post-mining in the Chuitna Watershed. Therefore if the mining proceeds, the damage done to streams and wetlands will be permanent – the damage is irreversible.

  Dr. Palmer's comments can be found at: http://bit.ly/Juneau2012-Palmer2

Mitchell Swanson, Geomorphologist and River Restoration Scientist

- "Constructing stream channels on reclaimed overburden alone is not the primary factor upon which to demonstrate success – one must somehow create specific watershed conditions for the stream channel to receive and move sediment, [and] recreate and retain habitat features and a stable morphology after construction."

- "...successful stream restoration examples from other locations [are] inappropriate for conditions in the Chuitna Watershed primarily because the cited examples all retained pre-project watershed conditions above the mined sites, which left the pre-project hydrology and sediment supply regimes intact...."

  Download the full report: http://bit.ly/Juneau2012-Swanson.

Other Resources

COMMENTS: Expert Comments on DNR denial of petition to designate the stream beds and riparian areas of the Chuitna Watershed as unsuitable for coal strip mining (ULP)

by The Center for Sustainable Economy, Mitchell Swanson, Lance Trasky, Dr. Tom Myers and Dr. Margaret Palmer

November 2011

Abstract: On October 24, 2011, the Alaska Department of Natural Resources denied the petition by the Chuitna Citizens Coalition and Cook Inletkeeper seeking to designate stream beds and riparian areas of the Chuitna watershed as unsuitable for coal strip mining (ULP). Relying on the word of PacRim Coal, DNR claims the re-creation of a vibrant, wild Alaskan salmon stream is "technically feasible." Independent, scientific experts disagree. A survey of existing literature failed to provide a single example of the successful re-creation of a wild salmon stream after it total removal. Below are the comments submitted to DNR regarding the denial of the petition.

REPORT: Net Public Benefits of the Chuitna Coal Project

by The Center for Sustainable Economy

September 2011

Abstract: Report confirming that the Chuitna Coal Project (CCP) could result in net losses to Alaskan's of over $2 billion over the life of the mine. The $2B figure includes all profits from lease fees, royalty fees, taxes, salaries and the expenditures for the project. In the end the CCP could cost up to 6 times more in economic losses than it creates in economic output.

REPORT: Economic Analysis of the Chuitna Watershed & Cook Inlet

by ECONorthwest

March 23, 2010

Abstract: The information provided in this report is intended to assist citizens and decision makers understand the magnitude of the economic value Alaskans currently enjoy and would place at risk from short- and long-term negative impacts associated with large-scale extractive development–such as the proposed Chuitna Coal Strip Mine.

Other Resources

REPORT: Report on Chuitna Coal Project Aquatic Studies and Fish and Wildlife Protection Plan
by Lance Trasky and Associates
Released August 17, 2009

Abstract: This report summarizes a review of seven environmental reports and documents developed for the proposed Chuitna Coal Project with a full analysis determining the quantity and quality of aquatic resource studies. Additionally, whether those studies provide for an adequate foundation for a successful fish and wildlife protection plan that will successfully protect aquatic resources and provide adequate information for the U. S. Army Corps to make the required determinations under the 404(b) (1) Guidelines.

REPORT: Chuitna Coal Mine Baseline Monitoring and Restoration Plan Review
by Dr. Mark S. Wipfli, Institute of Arctic Biology, University of Alaska Fairbanks
Released July 22, 2009

Abstract: This scientific review of the Chuitna Coal Mine baseline monitoring and restoration plan found critical elements missing from the Chuitna system baseline aquatic reports. The failure to address food webs, trophic linkages, interactions among upstream-downstream, stream-riparian, stream-marine, and basin-wide linkages (below and above ground) severely undermined the ability of the mining plans to protect ecosystem function during mining and to restore it post-mining. Additionally, the lack of consistent, long-term sampling fails to provide the needed estimate of annual biological variability or range of variability, and therefore does not provide a reference to which post-mining rehabilitation effects can be compared.

REPORT: Report on Chuitna Coal Project of PacRim Coal
by Margaret A. Palmer, Professor and Director, Chesapeake Biological Laboratory, University of Maryland
Released March 16, 2009

Abstract: This report, reviewing documents prepared for PacRim Coal's Chuitna Coal Project, focuses primarily on concerns with the mitigation plan for streams. Primary areas of concern include: 1) PacRim has not directly measured ecosystem functions, without these functional assessments they do not know what natural resource values are being lost, and thus how to develop a mitigation plan. 2) The approach proposed for replacing Stream 2003 (Middle Creek) is outside the realm of stream restoration practices. 3) Impacts to the watershed and the headwater streams from the mining activities will fundamentally alter

the chemical, hydrologic and sediment regimes which are master variables controlling the water quality and productivity downstream.

Letter from the CCC to Sean Parnell, Governor of Alaska
September 29, 2010

Abstract: Letter from the Chuitna Citizens Coalition asking the Governor to explain why the State of Alaska is referring to a proposed, but un-permitted, coal strip mine project with a clear and obvious implication that the project has a predetermined outcome, and that production – regardless of public input, the rule of law or scientific data – will invariably commence.

Parnell Administration Response to Citizen Letter and response from the Chuitna Citizens Coalition
December 2011

The Parnell Administration responded to comments from hundreds of Alaskans asking for common sense protection for the Chuitna River with a form letter full of misstatements and half-truths regarding the State's refusal to protect salmon from large scale coal strip mining.

View and download any of these documents at:
www.chuitna.org/documents/

Opposition Resolutions

Native Village of Tyonek
Chickaloon Village Traditional Council
Nanwalek IRA Council
Kenaitze Indian Tribe
Old Harbor Tribal Council
United Fishermen of Alaska (UFA)
United Cook Inlet Drift Association (UCIDA)
Kenai Peninsula Fishermen's Association
Tyonek Fish & Game Advisory Committee
Anchorage Fish & Game Advisory Committee
Homer Fish & Game Advisory Committee
Central Peninsula Fish & Game Advisory Committee
Nunamta Aulukestai
Renewable Resources Coalition

98% of the people of Tyonek oppose the proposed Chuitna coal strip mine.

Download Resolutions at: http://bit.ly/Juneau2012-Resolutions

THE PROPOSED CHUITNA COAL STRIP MINE:

A PRECEDENT-SETTING THREAT TO ALL WILD ALASKAN SLAMON STREAMS

PREPARED FOR

THE ALASKA STATE LEGISATURE
SENATE JUDICIARY COMMITTEE

SENATOR FRENCH, CHAIR
SENATOR WIELECHOWSKI, VICE-CHAIR
SENATOR PASKVAN
SENATOR MCGUIRE
SENATOR COGHILL

BY

THE CHUITNA CITIZENS COALITION
&
COOK INLETKEEPER

Summary: PacRim Coal, a Delaware corporation funded by Texas millionaires is working to develop Alaska's largest coal strip mine on the western shores of Cook Inlet near the communities of Tyonek and Beluga.

The Chuitna coal strip mine:

- Sets a statewide precedent of mining through and completely removing salmon spawning and rearing habitat.
- **Dispite a complete lack of viable examples, PacRim Coal claims they can recreate a salmon stream from scratch.**
- Destroys a renewable resource, salmon, for short-term gain by extracting coal, a finite resource.

Chuitna Coal Mine

PacRim Coal Leases (Chuitna Coal)

Barrick Gold Coal Leases

Strip-Mine Area

Anadromous River (Important for salmon, trout, etc.)

Sources: Alaska Department of Natural Resources (2006); PacRim Coal (August 16, 2006)

INTRODUCTION

The Chuitna coal project would be the first strip mine in state history allowed to mine directly through 11 miles of salmon spawning and rearing habitat, completely removing the streambed, from bank to bank, to a depth of 350 feet. According to fisheries biologists and restoration experts, the level of impact PacRim proposes will make reclamation functionally impossible. Middle Creek, a tributary to the Chuit River (recognized as important to salmon by the Alaska Department of Fish and Game) will be destroyed and adjacent streams will have their water flows significantly altered.

There is **NO** law in Alaska that bans the wholesale removal of a salmon steam; the decision is left to the discretion of state agency personnel. If the Chuitna coal strip mine is permitted, a precedent will be set that has far reaching implications to all anadromous streams across the state – **if they can mine through the Chuitna Watershed tributaries they can mine through any salmon stream.**

CURRENT STATUS

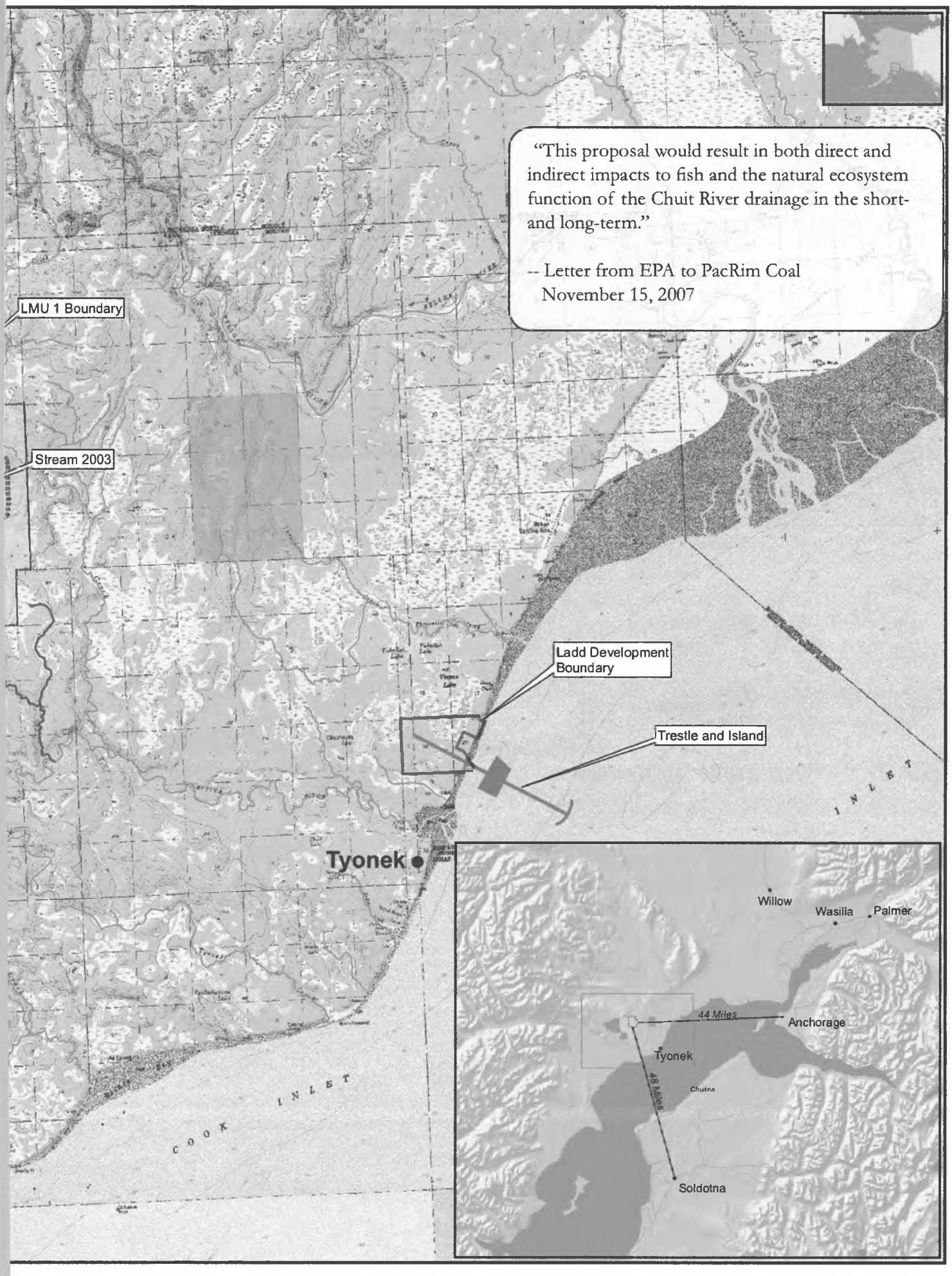
October 24, 2011: Alaska Governor Sean Parnell and the Alaska Department of Natural Resources rejected the petition to protect the Chuit River and its triburaries from coal strip mining. **This decision puts all wild salmon in the Chuit River watershed in danger.**

WHO OPPOSES THE PROPOSED CHUITNA COAL STRIP MINE?

United Fishermen of Alaska (UFA)
Native Village of Tyonek
Native Village of Nanwalek
United Cook Inlet Drift Association (UCIDA)
Kodiak Old Harbor
Chickaloon Village Traditional Council
Kenaitze Indian Tribe
Nunamta Aulukestai
Renewable Resources Coalition
Tyonek Fish & Game Advisory Committee
Anchorage Fish & Game Advisory Committee
Homer Fish & Game Advisory Committee
Central Pen. Fish & Game Advisory Committee
Kenai Peninsula Fishermen's Association

See the complete and current list at:
http://chuitna.org/resolutions/

98% of the people of Tyonek oppose the proposed Chuitna coal strip mine.


"This proposal would result in both direct and indirect impacts to fish and the natural ecosystem function of the Chuit River drainage in the short- and long-term."
-- Letter from EPA to PacRim Coal
November 15, 2007
LMU 1 Boundary
Stream 2003
Ladd Development Boundary
Trestle and Island
Tyonek
INLET
COOK INLET
Willow
Wasilla
Palmer
44 Miles
Anchorage
Tyonek
48 Miles
Chuitna
Soldotna

What Experts Say About Chuitna

"Re-creating the complex three-dimensional diversity of interconnected underground sediments in salmon habitat, such as Middle Creek, would be impossible."

Dr. Mark Wipfli, avssociate professor with the University of Alaska in Fairbanks conducting research in aquatic-riparian interactions, freshwater foodwebs, and understanding how riparian forests affect aquatic productivity.

"An extensive search of scientific literature, and discussions with stream restoration and in-stream flow experts did not yield a single documented example of strip-mined salmon habitat being successfully restored."

Lance Trasky, Former ADF&G Fisheries and Habitat Biologist with over 30 years experience in fisheries research.

"PacRim's reclamation plan is based on digging a "new stream" to replicate the physical appearance of the original. There is no evidence that simply restoring the shape of a channel will bring back salmon runs, riparian corridors or other essential biological functions. Past stream restoration projects involving channel modifications with much less damage have been unsuccessful, making PacRim's plans a grand experiment with a stream that produces a significant portion of Chuitna's salmon."

Dr. Margaret Palmer, Professor of Entomology and Biology at the University of Maryland with over 25 years experience in stream ecology and restoration.

"Only God would be capable of reproducing a viable 11 miles of salmon stream and all its fixings, and it might even take Him some time."

Dr. Jim Rearden organized the wildlife department at the University of Alaska Fairbanks in 1950 and taught as head of that department for four years. He has been an area biologist for commercial fisheries for the Alaska Department of Fish and Game in Cook Inlet, served on the old Board of Fish and Game and later on the Board of Game and was a member of the National Advisory Committee on Oceans and Atmosphere. He was outdoors editor of Alaska magazine for 20 years and has written more than 500 magazine stories and 27 books on Alaska subjects.

"Strip mining the streams and their contributing watersheds significantly changes how the watershed converts rainfall into surface runoff, and how, when and if sediment is dislodged by erosion and transported to and within the stream. It is simply not feasible to re-create these characteristics after destroying soil and vegetation cover that were formed and evolved over thousands of years."

Mitchell Swanson, Geomorphologist and River Restoration Scientist

For more information:

http://www.chutina.org/
http://inletkeeper.org
http://www.chuitnaseis.com/

http://dnr.alaska.gov/mlw/mining/largemine/chuitna/index.htm

info@chuitna.org
keeper@inletkeeper.org

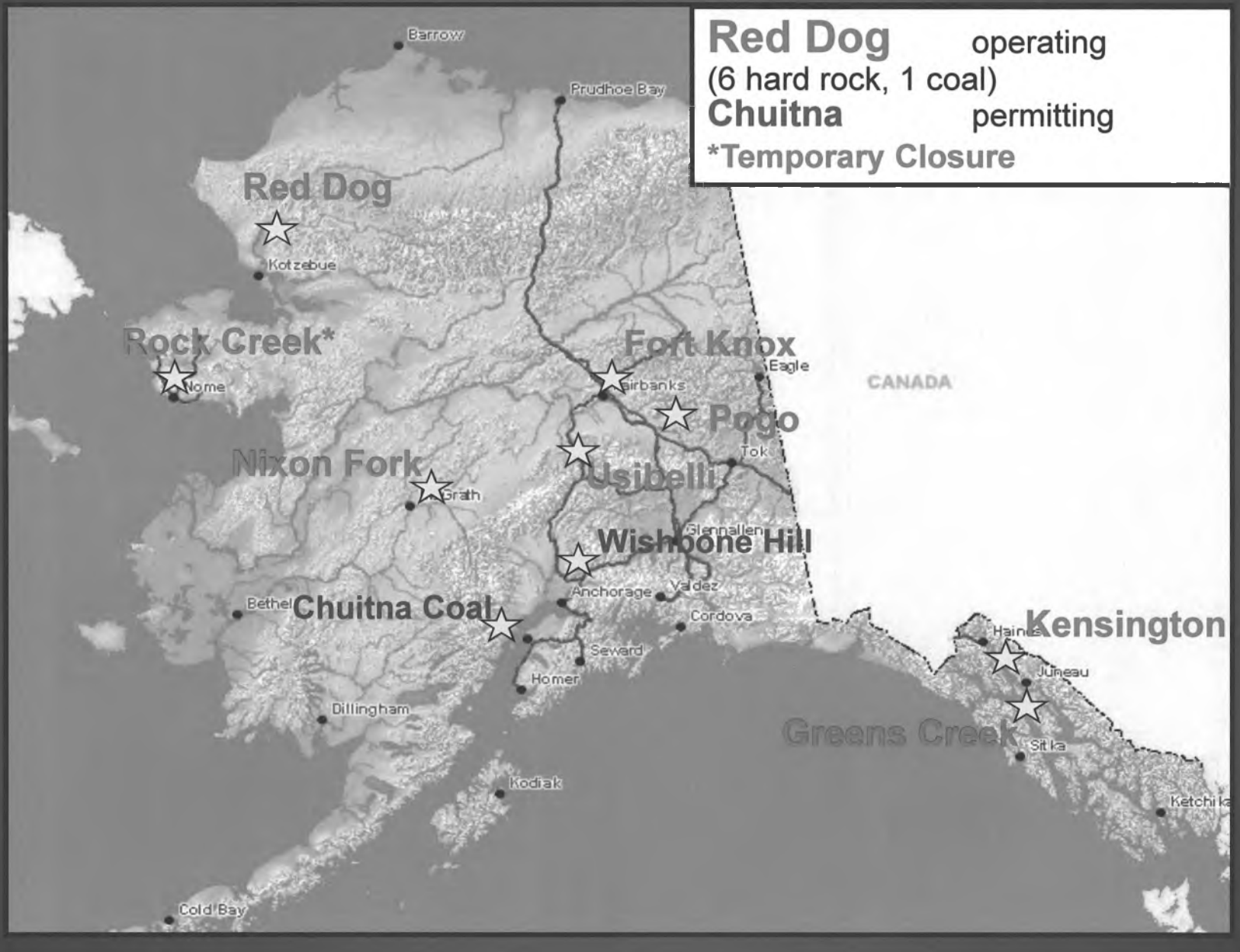
Overview: Bonding Requirements for Major Mine Projects

Senate Judiciary Committee Hearing

March 2, 2012

Tom Crafford, Director
Alaska Department of Natural Resources
Office of Project Management and Permitting

Large mining projects in Alaska



A Brief(!) Mine Permitting Primer

No Single Permit to Mine: there are many permits & authorizations

STATE

- Plan of Operations (DNR)
- Reclamation and Bonding (DNR)
- Waste Management Permits and Bonding (ADEC)
- CWA Section 402 APDES Water Discharge Permit
- Certification of ACOE Permits (ADEC)
- Sewage Treatment System Approval (ADEC)
- Air Quality Permits (ADEC)
- Fish Habitat and Fishway Permits (ADF&G)
- Water Rights (DNR)
- Right of Way/Access (DNR/DOT)
- Tidelands Leases (DNR)
- Dam Safety Certification (DNR)
- Cultural Resource Protection (DNR)
- Monitoring Plan (Surface/Groundwater/Wildlife) (DNR/DEC)

FEDERAL

- US EPA Air Quality Permit review
- US EPA Safe Drinking Water Act (UIC Permit)
- US ACOE Section 404 Dredge and Fill Permit
- US ACOE Section 10 Rivers and Harbors Act
- US ACOE Section 106 Historical and Cultural Resources Protection
- NMFS Threatened and Endangered Species Act Consultation
- NMFS Marine Mammal Protection Act
- NMFS Essential Fish Habitat
- NMFS Fish and Wildlife Coordination Act
- USFWS Threatened and Endangered Species Act Consultation
- USFWS Bald Eagle Protection Act Clearance
- USFWS Migratory Bird Protection
- USFWS Fish and Wildlife Coordination Act

(These are only some of the authorizations required)

State Agencies

(LARGE MINE PERMITTING TEAM)

- Dept of Natural Resources
  --Lead State agency for coordination: AS 27.05.010(b)
- Dept of Environmental Conservation
- Dept of Fish and Game
- Dept of Health & Social Services
- Dept of Law
- Dept of Transportation & Public Facilities
- Dept of Commerce, Community and Economic Development

Federal Agencies

- US Environmental Protection Agency
- US Army Corps of Engineers
- US Fish and Wildlife Service
- National Marine Fisheries Service

Federal Land Managers

- Bureau of Land Management
- US Forest Service
- National Park Service
- US Fish and Wildlife Service

State Large Mine Permitting Team

- Coordinates review of applications and numerous State permit requirements
- Reviews, analyzes, and evaluates complex technical documents for adequacy and soundness
- Benefits from multi-disciplinary expertise of team of experienced professionals (geologists, hydrologists, mining/civil/environmental engineers, biologists, environmental scientists)
- If the Team does not have the expertise, it can hire additional experts.
- Team members conduct mine inspections and evaluate permit updates during operations.
- The Team is involved from pre-permitting to post-closure.

National Environmental Policy Act (NEPA) Process for an Environmental Impact Statement

A means for considering and evaluating alternatives

Not a permit

- Triggered by major federal action (Notice of Intent)
- Contents:
  - proposed project, purpose & need, and project alternatives (must include No Action alternative)
  - description of the affected environment
  - analysis of environmental consequences of proposed project and alternatives
- Designation of Lead Federal Agency & selection of 3rd party contractor to mange the EIS
- Multiple Public Notice and Comment Requirements
- State participates as a Cooperating Agency and works to dovetail its permitting processes with the EIS timetable and public notice requirements

Baseline Studies

- Surface Water Quality & Quantity
- Groundwater Quality & Quantity
- Aquatic Life (Includes Marine & Freshwater Fish, Invertebrates, etc.)
- Wildlife
- Wetlands
- Socioeconomics
- Subsistence
- Traditional Ecological Knowledge
- Cultural Resources
- Air Quality
- Meteorology
- Health Impact Assessment
- Visual Resources
- Noise

State and federal agencies consult in advance with project applicants to help ensure the right information is collected

Monitoring Plans & Environmental Audits

- Air Qual, Water Qual, Fish & Wildlife are monitored according to approved plan
- Environmental Audits on 5 year schedule tied to re-crafting & reissuance of permits
- All environmental systems audited
- Audits evaluate Agencies as well as operations
- Audits by 3rd party experts
- Financial Assurances revisited and recalculated based on Audit results

Summary

- Many permits required, many state/federal agencies involved
- Experienced agency professionals involved in permitting and regulation
- Third-party experts utilized if agencies don't have the expertise
- Comprehensive analysis of potential environmental, socioeconomic, and health impacts for each project
- Air, Water, Fish & Wildlife Monitoring required
- Financial assurances are required and regularly updated

Financial Assurances
i.e., Bonding

Underlying Philosophy

- At no time is the financial assurance to be less than the amount required by the State to complete reclamation
- The bond amount can be increased any time the mine is shown to have inadequate financial assurance.

Authorities

- Reclamation Bonding is required in Alaska (AS 27.19) for mining projects
  - State reclamation standards apply to state, federal, municipal, and private lands and waters subject to mining
  - The bond is based on a Reclamation Plan that must be approved by the DNR prior to mining (AS 27.19.030)
  - DEC has separate bonding requirements that can be included with the DNR into a single bond.

Reclamation Standard (AS 29.19.020)

"A mining operation shall be conducted in a manner that prevents unnecessary and undue degradation of land and water resources, and the mining operation shall be reclaimed as contemporaneously as practicable with the mining operation to leave the site in a **stable condition**."

Reclamation Performance Standards (11 AAC 97.200-240)

- Return waterborne soil erosion to pre-mining levels in one year.
- Achieve revegetation, where feasible, in five years without reseeding or fertilizer
- Topsoil is to be salvaged, stockpiled and protected for later use in reclamation
- Surface contours are to be made conducive to natural revegetation
- Site shall be reclaimed such that it retains sufficient moisture for natural revegetation
- **Stream channels disturbed need to be reestablished in a stable condition or location**
- Pit and quarry walls and subsidence features need to be made stable.
- Buildings and structures are to be removed unless authorized to stay.
- Scrap iron, equipment, tools, piping, hardware, chemicals, fuels, waste, and general construction debris are to be removed or properly disposed.
- Facilities associated with heap leach facilities are to be reclaimed.
- Underground openings are to be sealed after closure.
- "A miner shall reclaim a mined area that has potential to generate acid rock drainage (acid mine drainage) in a manner that prevents the generation of acid rock drainage or prevents the offsite discharge of acid rock drainage."

Reclamation Plan General Elements

11 AAC 97.310

- Property descriptions and maps
- Description of mining plan and schedule
- Reclamation measures for treatment of:
  - Topsoil and revegetation
  - Tailings ponds, reservoirs, dumps, pits, etc.
  - Stream replacement
  - Roads, airstrips, and access
  - Buildings

Bonding Statute (AS 27.19.040)

- Bond amount not to exceed an amount reasonably necessary to ensure performance of the reclamation plan
- DNR Commissioner shall establish the bond amount
- A cooperative management agreement with the Federal agencies (land manager) or another State agency is allowed

DEC Statute AS46.03.100(f) for Waste Management and Disposal

- Financial assurance required for closure and monitoring:
  - Of a solid waste facility with chemical treatment of ores (tailings and rock dumps)
  - Of a facility with potential to generate or generates Acid Rock Drainage

Bond Calculation Elements

- Calculation needs to agree with Reclamation and Closure Plan and include inflation.
- Rental Equipment to be used at current rates – quotes required
- Labor with burden at little Davis-Bacon rates
- Mob-Demob estimated for the site (not % of directs)
- Salvage value of buildings and equipment cannot be utilized
- Includes water treatment and post closure monitoring
- Indirect costs include: engineering redesign, contingency, contractor profit, agency administration costs, etc.

Updates to the Financial Assurance Package

- At least every 5 years when permits are renewed
- After an environmental audit
- Upon significant mine design changes that would affect the bond calculation
- Major changes in prices of fuel or consumables
- Anytime it is believed that the project is under-bonded

Bonding Instruments – Large Mines
(11 AAC 97.4)

- Performance Bond to be placed with DNR
  - Corporate Surety Bond
  - Personal Bond accompanied by:
    - Letter of Credit
    - Certificate of Deposit
    - Deposit of cash
    - Deposit of gold bullion (25% greater than bond am't)
  - General Performance Bond
  - Payments to the Mine Reclamation Trust Fund (AS 37.14.800)
- Interest earned may stay with the bond

Financial assurances are based on a detailed engineering analysis

Teck - Pogo Inc.
teckcominco

Reclamation & Closure Plan Update

Table F.1: Demolition Hourly Labor Wage Rates

Description		General Demolition Crew	Mechanical Crew	Heavy Equipment Operator	Electrical Crew	Foreman	Laborer
Base Hourly Rate - straight time		$26.55	$26.04	$27.77	$30.83	$30.55	$23.43
Overtime for 50 hour week	10.0%	$2.66	$2.60	$2.78	$3.08	$3.06	$2.34
Adjusted Hourly Base Rate		$29.21	$28.64	$30.55	$33.91	$33.61	$25.77
Social Security, Medicaid, Unemployment, Liability, and Workers Comp Insurance	21.7%	$6.34	$6.22	$6.63	$7.36	$7.29	$5.59
Total Direct						40.90	$31.37
Labor Indirec						$4.87	$3.74
Benefits - per						$8.24	$6.32
Field Overhe						$3.00	$3.00
Small Tools A						$8.00	$8.00
Camp and/or						24.11	$21.06
Total Indirec							
Total Hourly						65.01	$52.42

Teck - Pogo Inc.
teckcominco

Reclamation & Closure Plan Update

Table F.2: Hourly Equipment Rates ($)

Equipment	Equipment Lease Rate	Maintenance & Fuel	Support & Transport	Total
Excavator 330	31.00	52.00	16.60	100.00
Excavator 375L	48.00	89.00	27.40	164.00
Excavator 235	31.00	52.00	16.60	100.00
Dozer D10R	73.00			
Dozer D8R	42.00			
D6R Dozer	30.00			
Grader 16G	34.00			
Water Truck	20.00			
Tamrock Drill	48.00			
Shotcrete Machine	20.00			
Picker Truck	30.00			
Re-seeding	15.00			
Shear on 375L	65.00			
FE Loader 950	30.00			
FE Loader 980G	45.00			
FE Loader 992C	62.00			
Dump Truck 14Cy	25.00			
Self Load Flat Bed	50.00			
Low Bed Truck	35.00			
Dump Truck 17cy	31.00			
Crane Truck 20T	45.00			
Crane Truck 50T	70.00			
Track Stugger 528	50.00			

amec

POGO: RECLAMATION COST ESTIMATE
(SEPTEMBER 2003)

Project Number: U419F
Currency: USD 4Q2002

Description	Qty	Unit	Unit Direct Hr	Total Direct Hr	Total Direct Lab Cost	Unit Mat	Total Mat Cost	Unit Sub	Total Sub Cost	Unit Equip	Total Equip Cost	Total Cost
Phase I: Post-Construction				4,988	287,345		13,213		26,400		156,977	483,935
Phase II: Reclamation Concurrent with Mining												
A-07 WELLS			115	6,294		1,200		0		0		7,494
A-09 GRAVEL PADS			393	21,312		900		0		25,013		47,224
A-12 ROCK PILES			2,928	165,891		0		0		197,786		363,677
A-13 LINERS UNDER ROCK PILES			629	35,340		0		0		41,040		76,381
A-14 PADS UNDER ROCK PILES			340	19,996		870		0		23,860		44,726
A-15 EXPLOSIVES STORAGE			406	23,515		0		0		10,904		34,418
R-01 SURFACE BOREHOLES			2,000	114,060		50,000		0		31,260		195,320
S-00 WATER QUALITY ASSURANCE			0	0		0		10,000		0		10,000
Phase II: Reclamation Concurrent with Mining				6,781	386,408		52,970		10,000		329,862	779,241

Financial Assurances for Alaska Mines

Audited & recalculated every 5 years
or when significant changes occur

Operation	***Total Bond ($ Millions)*** *29Feb2012*
Greens Creek Mine	$30.5
Red Dog Mine	$304.5
Fort Knox (& True North) Mine	$37.6
Usibelli Coal Mine & Exploration	$11.6
Kensington Project	$7.4
Rock Creek Mine	$6.8
Pogo Mine	$49.2
Nixon Fork Mine	$3.5
TOTAL	$451.1

Alaska Dept. of Fish & Game specific roles/authorities

Title 16 Permits

Fishway & Fish Habitat

Issued by ADFG

Div. of Habitat

- AS 16.05.841: Fishway Act

For activities within or across a stream used by fish that could represent an impediment to the efficient passage of fish. e.g., culverts; water withdrawals; stream realignments or diversion; dams; low-water crossings; and construction, placement, deposition, or removal of any material or structure below ordinary high water

- AS 16.05.871: Anadromous Fish Act

All activities within or across a specified anadromous waterbody and all instream activities affecting a specified anadromous waterbody require approval from the OHMP, including construction; road crossings; gravel removal; mining; water withdrawals; the use of vehicles or equipment in the waterway; stream realignment or diversion; bank stabilization; blasting; and the placement, excavation, deposition, or removal of any material.

ADF&G Project Permitting

- Activities associated with large project development that would typically require permits from the ADF&G include:
  - Fish Habitat Permits for:
    - Construction of fish barriers (i.e., dams);
    - Flow reduction;
    - Bridges, culverts, buried pipelines, etc.;
    - Water withdrawal and intake structures;
    - Stream re-alignment; and
    - Instream mitigation projects.
  - Fish Resource Permits from the Sport Fish and Commercial Fish Divisions associated with project monitoring.

Avoid - Minimize - Mitigate

- Examples of mitigation projects that may be appropriate for large projects include:
  - Construction of wetland complexes;
  - Fish habitat improvement projects
  - Riparian planting of native species;
  - Clean-up of old abandoned sites in the area; and
  - Bank stabilization.

Coal Specific Requirements

per Alaska Surface Coal Mining Control and Reclamation Act (ASCMCRA)
AS 27.21 & 11 AAC 90

Fish and Wildlife Protection Plan

11 AAC 90.081

- (a) Each application must include a plan to prevent or minimize disturbance and adverse impacts on fish, wildlife, and related environmental values in accordance with 11 AAC 90.423, including impact control measures, management techniques, and monitoring methods to protect, enhance, or mitigate the following, if they can reasonably be expected to be affected by the proposed activities:
  - (2) important species, as determined by the commissioner, including fish and game of economic, recreational, or subsistence importance; eagles, migratory birds, other animals protected by state or federal law, and their habitats; and
  - (3) habitats of unusually high value for fish or wildlife.

- (b) Except as provided in (c) of this section, the plan must include protective measures to be used during the active mining phase of the operation, and enhancement measures to be used during the reclamation and postmining phases of the operation to develop aquatic and terrestrial habitats.

Coal Regulatory Program consults with ADF&G Habitat to accomplish the above

Reclamation Bonding

- The ASCMCRA requires under 11 AAC 90.201 - 213 that, as a prerequisite for obtaining a coal mining permit, a person must post a reclamation bond to ensure that the regulatory authority will have funds to reclaim the site if the permittee fails to complete the reclamation plan approved in the permit.
- Reclamation performance bonds are posted to cover all operations during the term of the permit. Prior to permit issuance, the permittee must post a bond to cover one of the following areas:
    - The entire permit area;
    - The initial area of land to be affected under a cumulative bond schedule; or
    - The initial area of land to be affected under an incremental bond schedule.

Bond Amount

- Minimum bond amount based on regulatory authority's independent analysis of the amount that would be necessary for a third party to complete the reclamation plan in the event of bond forfeiture.
- The bond amount generally reflects reclamation costs at the projected point of maximum reclamation liability (usually the point of maximum disturbance) within the permit area or an initial increment of that area.
- Bond updated prior to additional disturbance or when cost of reclamation increases

Bond Release

- When all reclamation requirements of the approved permit and regulatory program have been met, the regulatory authority may release the reclamation bond.
- Permittee may apply for release of the bond on all or part of the permit or increment as reclamation is completed. (Encourages concurrent reclamation)
- Regulations recognize three discrete phases of reclamation for purposes of bond release.
  - Phase I – Backfilling, grading, and drainage control (60% of total bond)
  - Phase II – Replacement of topsoil and the establishment of vegetation (~30% of total bond)
  - Phase III – Completion of all surface coal mining and reclamation activities

End of Presentation

Questions?

Coal Regulatory Program
Additional Informational Slides

Additional Coal Regulatory Info

- One of the purposes of the Alaska Surface Coal Mining and Control Act (AS 27.21) is to assure that reclamation of land on which surface coal mining takes place is accomplished as contemporaneously as practicable with the surface coal mining activity, and to assure that the rights of surface landowners and other persons with an interest in the land are protected.
- Alaska Statute 27.21.160 requires that, prior to permit issuance, the applicant file a performance bond, sufficient to cover the cost of reclamation in accordance with the approved reclamation plan.

Additional Coal Regulatory Info (Cont.)

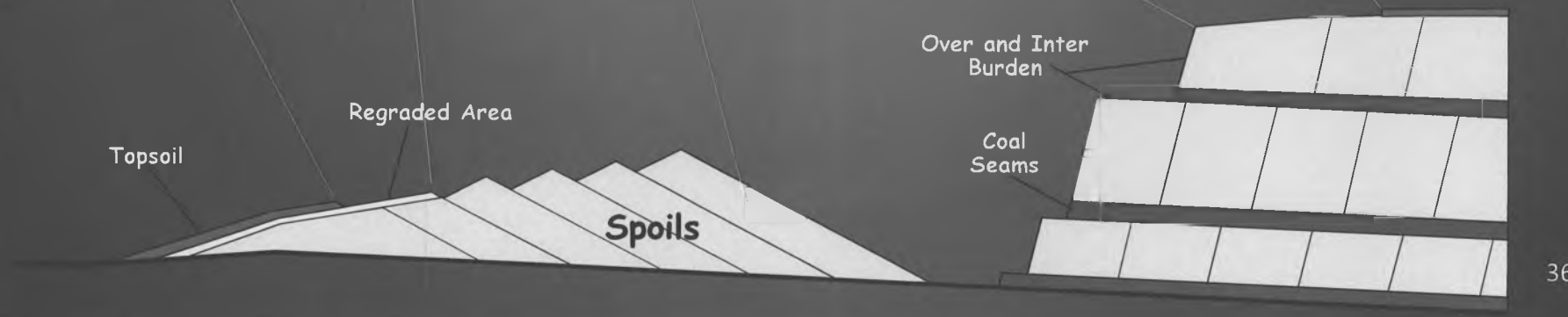
- 11 AAC 90.083. RECLAMATION PLAN GENERAL REQUIREMENTS. (a) Each application must contain a plan for reclamation of the proposed permit area showing how the applicant will comply with 11 AAC 90.301 - 11 AAC 90.501. The plan must include, at a minimum, all information required under 11 AAC 90.083 - 11 AAC 90.101.

Additional Coal Regulatory Info (Cont.)

- The reclamation plan must contain a detailed description of the intended post mining land use, including how the proposed post mining land use will be achieved.
- The description must be accompanied by comments concerning the proposed use by the legal or equitable owner of record of the surface of the proposed permit area and state and local government agencies which would have to initiate, implement, approve, or authorize the proposed land use following reclamation.

Reclamation Practices

Topsoil Replaced/ Revegitation	Regrade	Backfilling	Active Pit	Prestripping/ Topsoil removal	Direction of Mining →



First steps: Environmental resource Information (baseline Studies)

- Hydrology and geology
  - (11 AAC 90.043-045)
- Ground water information
  - (11 AAC 90.047)
- Surface water information
  - (11 AAC 90.049)
- Alternative water supply information
  - (11 AAC 90.051)

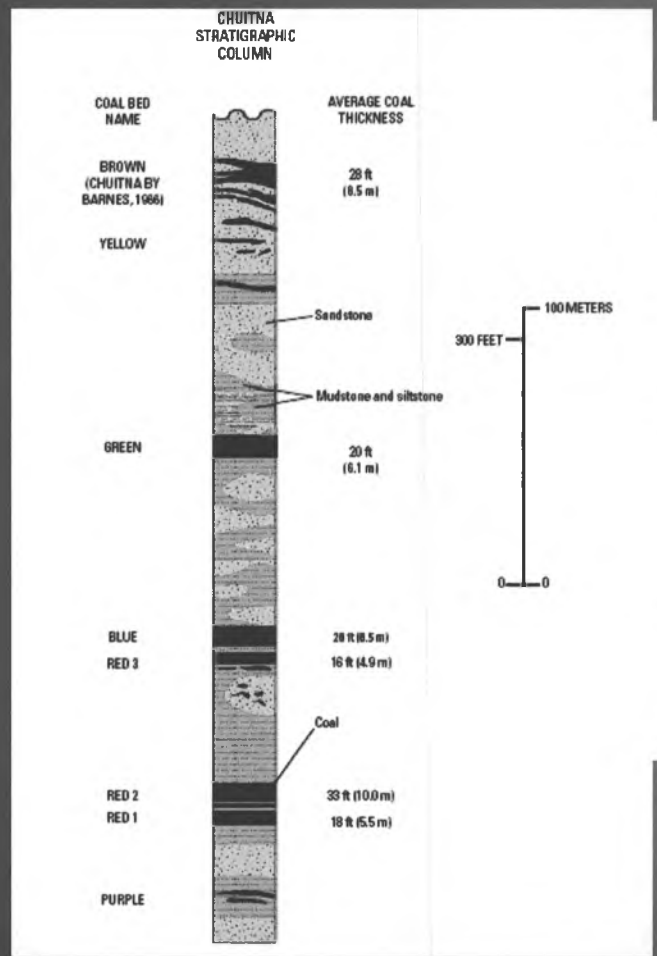
11 AAC 90.043. HYDROLOGY AND GEOLOGY

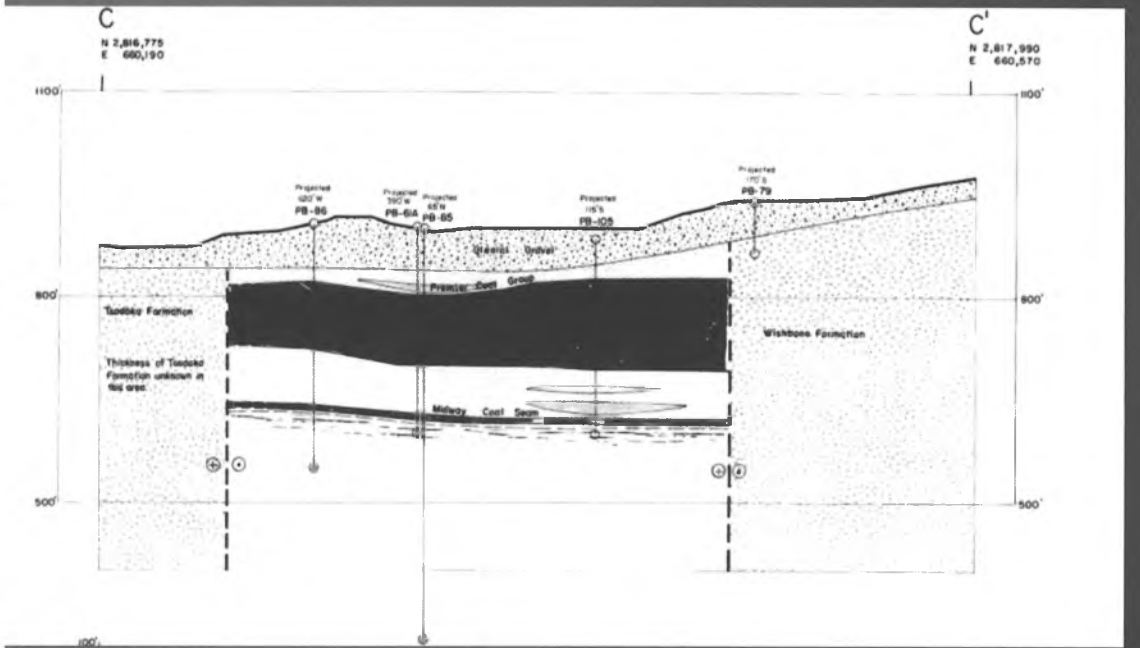
(a) Each application must describe the geology, hydrology, and water quality and quantity of all land within the permit area, adjacent area, and the general area. The description must include information on the characteristics of all surface and ground water within the general area and any other water that will flow into or receive discharge of water from the general area.

(b) All water quality analyses performed to meet the requirements of this section, 11 AAC 90.047, or 11 AAC 90.049 [,] must be conducted according to the methodology in *Standard Methods for the Examination of Water and Wastewater, 21st edition,* adopted by reference in 11 AAC 90.001(c), or the methodology in 40 C.F.R. Part 136 and 40 C.F.R. Part 434, adopted by reference in 11 AAC 90.001(b).

(c) Information on hydrology, water quality and quantity, and geology related to hydrology of the area outside the proposed permit area and within the general area will be provided by the commissioner to the extent that the data are available from an appropriate federal or state agency. The permit will not be approved without this information unless the commissioner determines that the information is not necessary to determine the impact the proposed operation will have on environmental and other resources within the permit area and general area.

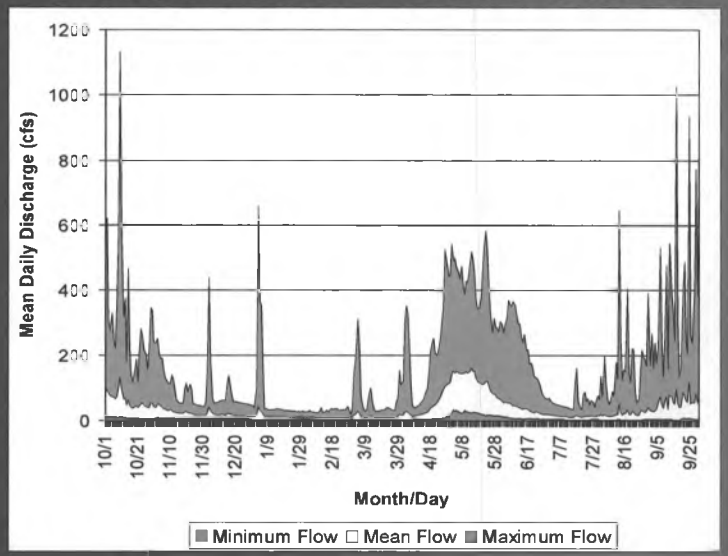
Geology

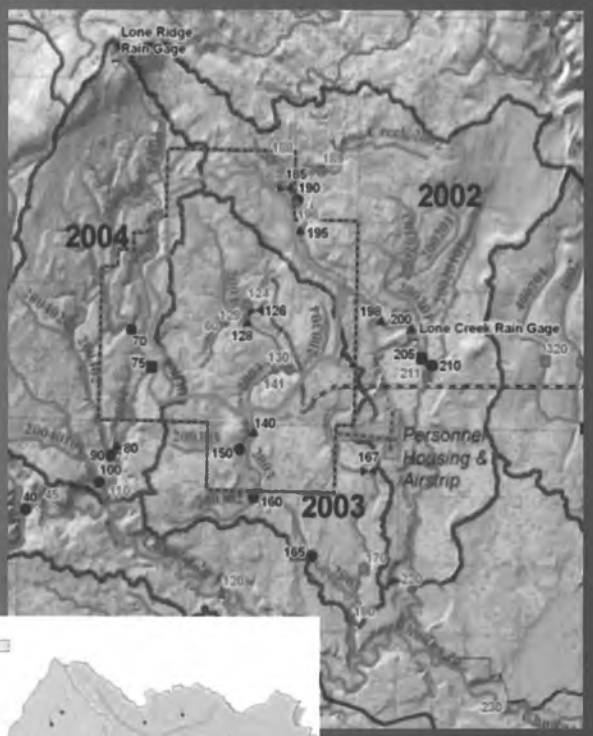

CHUITNA
STRATIGRAPHIC
COLUMN
COAL BED
NAME
AVERAGE COAL
THICKNESS
BROWN
(CHUITNA BY
BARNES, 1966)
28 ft
(8.5 m)
YELLOW
Sandstone
Mudstone and siltstone
100 METERS
300 FEET
0
0
GREEN
20 ft
(6.1 m)
BLUE
28 ft (8.5 m)
RED 3
16 ft (4.9 m)
Coal
RED 2
33 ft (10.0 m)
RED 1
18 ft (5.5 m)
PURPLE

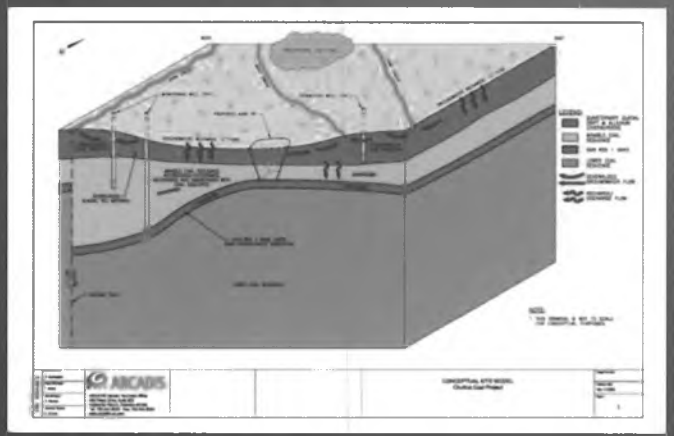

C
N 2,816,775
E 660,190
C'
N 2,817,990
E 660,570
1100'
800'
500'
PB-86
PB-85
PB-105
PB-79
Tsadaka Formation
Wishbone Formation
Thickness of Tsadaka Formation unknown in this area

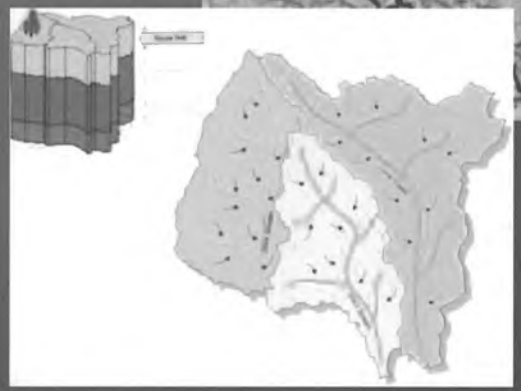
Surface & Groundwater Hydrology and Hydrogeology

Daily Flow Variation at Station 180 – 2003 Creek









Water Quality

		Station 141 on 2003 Creek									
Date	TSS mg/L	Hardness mg/L	Al - T µg/L	Cu - T µg/L	Cu - D µg/L	Fe - T µg/L	Fe - D µg/L	Mn - T µg/L	Mn - D µg/L	Zn - T µg/L	Zn - D µg/L
Aug-06	10	20	180	1	< 1	1,420	860	90	100	6	6
Feb-07	< 5	40	50	< 1	< 1	3,170	1,520	270	210	< 5	< 5
May-07	23	20	530	< 1	< 1	3,590	1,670	170	100	8	< 5
Jul-07	< 5	30	50	< 1	< 1	3,350	1,740	230	210	< 5	< 5
Oct-07	< 5	10	100	< 1	< 1	1,280	870	70	< 10	< 5	< 5
Feb-08	< 5	30	60	< 1	< 1	2,910	1,450	220	220	< 5	< 5
May-08	11	< 10	130	< 1	< 1	480	250	80	70	< 5	< 5
Aug-08	< 5	20	60	< 1	< 1	3,090	970	350	340	< 5	< 5
Sep-08	8	< 10	140	1	< 1	930	610	40	< 10	< 5	< 5

First steps: Environmental resource Information (Cont.)

- Climatological information
  - (11 AAC 90.053)
- Vegetation information
  - (11 AAC 90.055)
- Fish and wildlife information
  - (11 AAC 90.057)
- Soil resources information
  - (11 AAC 90.059)
- Land use information
  - (11 AAC 90.061)

Climatological

(Local and Regional Weather Data)

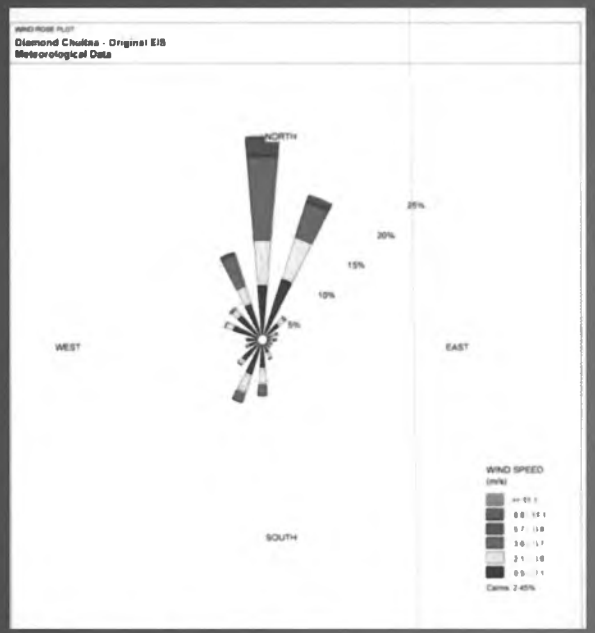
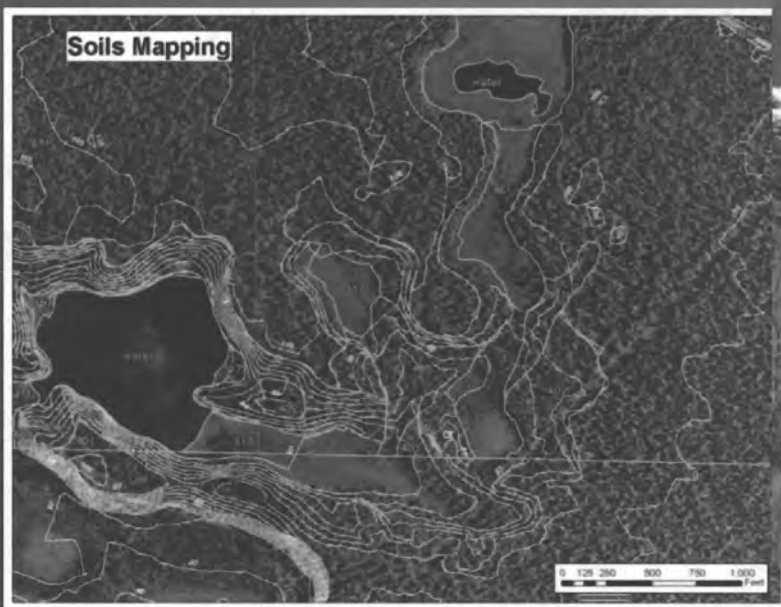


Table 5.2c **AVERAGE SNOW DEPTH AND SNOW WATER EQUIVALENT FIRST OF MONTH MEASUREMENTS (INCHES)**

Station	POR	February		March		April		May	
		depth	swe	depth	Swe	depth	swe	depth	swe
Chuitna Plateau	1982-2005	62.0	21.2	69.0	24.7	71.0	28.2	70.0	29.4
	# years in avg	11	11	23	23	23	23	9	9
Congahbuna Lake	1982- 2005	30.0	7.7	34.0	9.3	37.0	11.2	25.0	8.5
	# years in avg	14	14	23	23	24	24	11	11
Lone Ridge	1983-2005	68.0	23.3	80.0	28.9	84.0	31.6	64.0	34.9
	# years in avg	6	6	21	21	20	20	6	6
Granite Point	1982-2004	20.0	5.4	20.0	5.2	17.0	5.3	4.0	1.4
	# years in avg	11	11	22	22	23	23	6	7
Heartbreak Hill	1983-1987	45.0	11.5	53.0	14.7	50.0	16.1	37.0	14.1
	# years in avg	4	4	4	4	4	4	4	4
Hunt Creek	1983-1987	49.0	13.5	56.0	16.4	54.0	17.7	46.0	17.6
	# years in avg	4	4	4	4	4	4	3	3
Lone Creek	1983-1987	34.0	8.2	42.0	10.6	39.0	11.6	33.0	12.8
	# years in avg	4	4	4	4	4	4	3	3
Capps Plateau	1982-1987	68.0	33.3	93.0	39.7	46.0	38.4	57.0	48.6
	# years in avg	6	6	6	6	7	7	6	6

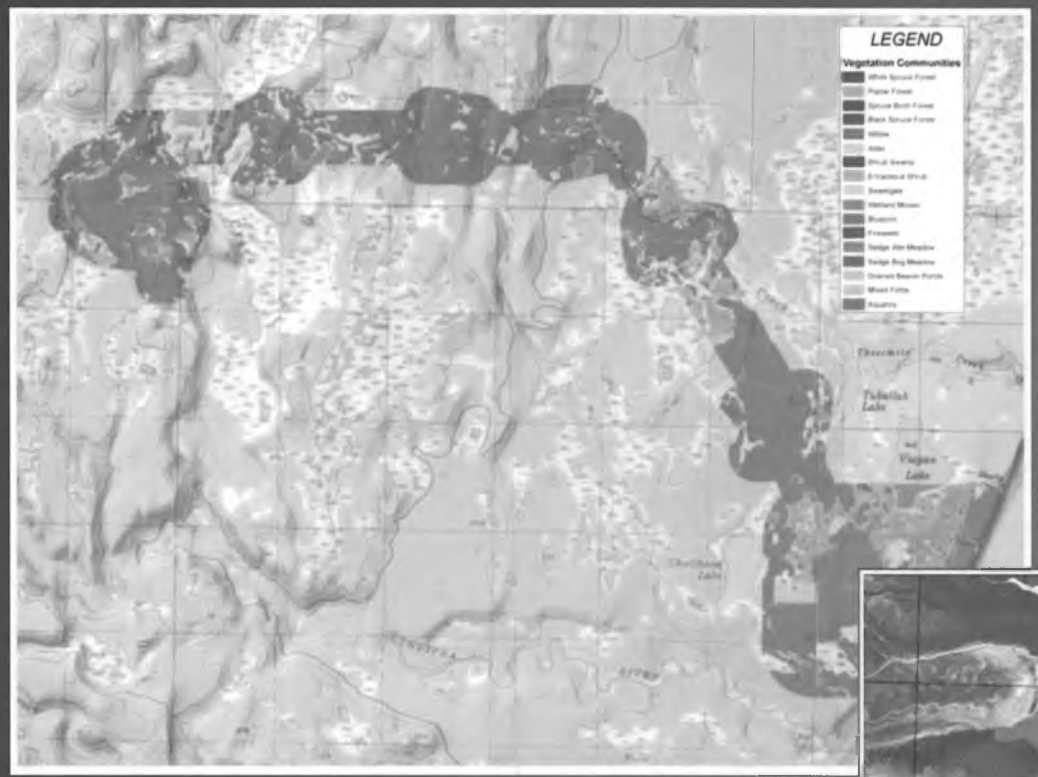
Soils

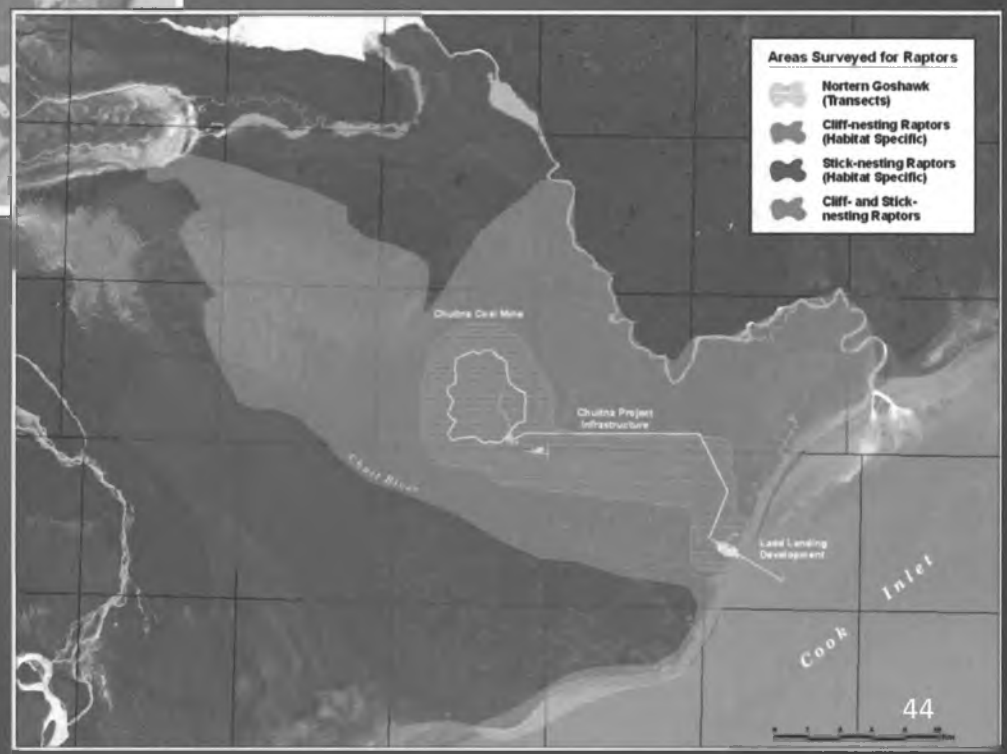


Wetland Organic Soils, MU 310

Chichantna Muck

Vegetation& Wetlands



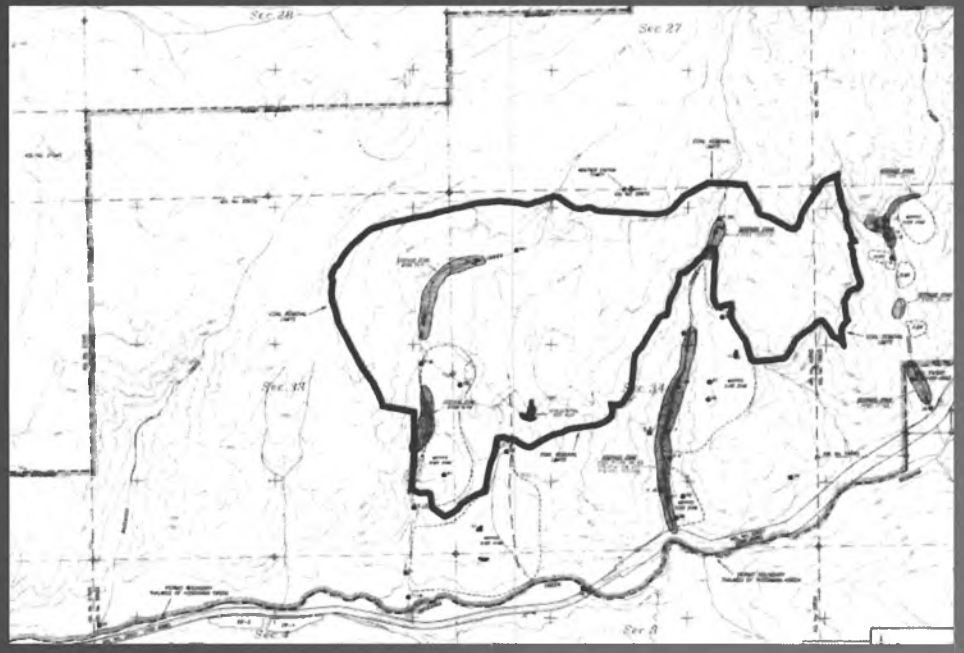


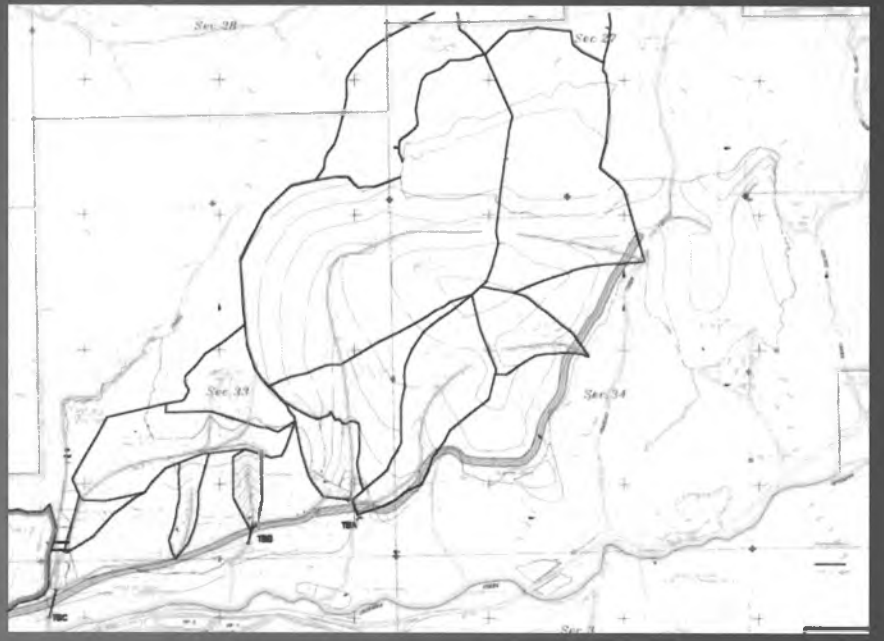
Fish & Wildlife

Pre- & Post- Mining Topography Approximate Original Contour (AOC)

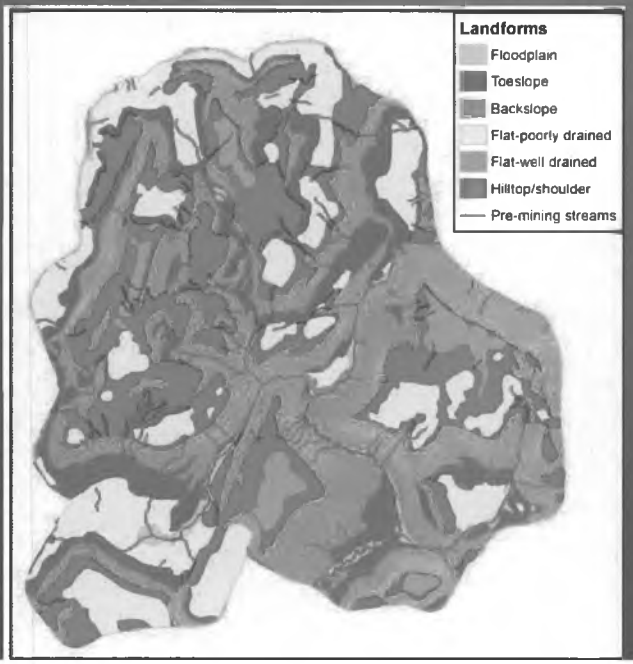
- Means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land before mining and blends into and complements the drainage pattern of the surrounding terrain in accordance with the performance standards of this chapter.

Pre- & Post- Mining Topography





Post-mining vegetation



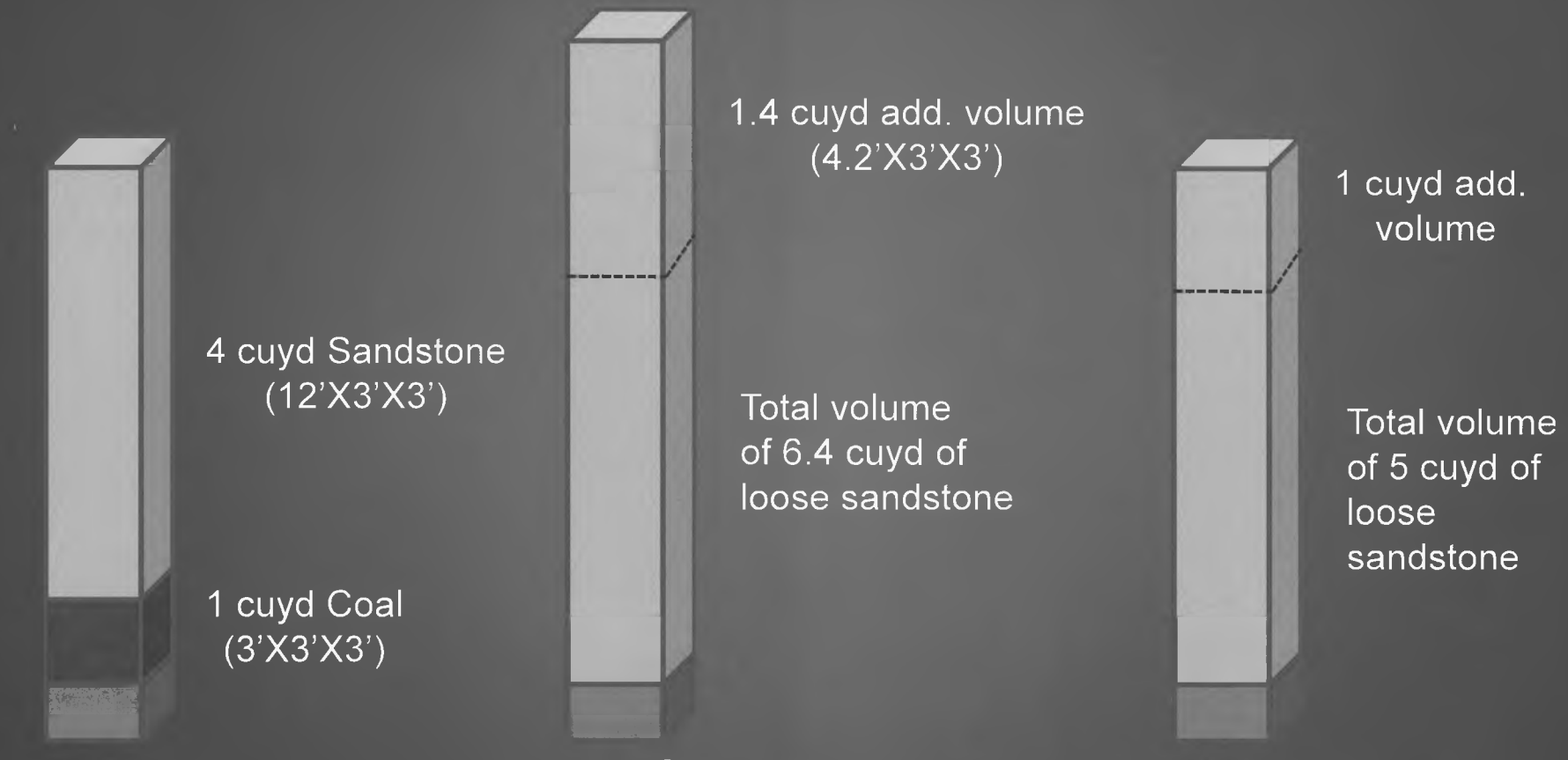
Landform	Slope Range (%)	Actively Reclaimed Communities	Communities That Will Establish Naturally	Postmine Topo (%)
Hilltop and shoulder	0-25	Mixed forest	Alder scrub Bluejoint meadow Fireweed meadow	23
Backslope	7-25	Mixed forest	Alder scrub Bluejoint meadow Fireweed meadow	37
Drainage	0-25	Shrub swamp in shallower, less sloping drainages. Forest in more incised, steeper drain ages.	Bluejoint meadow Alder	**
Toeslope	0-7	Shrub swamp Low scrub	Bluejoint meadow Wet mixed forests may develop	15
Flat, well - drained	0-3	Mixed forest	Alder scrub Bluejoint meadow Fireweed meadow	3
Flat, poorly drained	0-3	Low scrub Sedge meadow Vegetated pond	Shrub swamp Bluejoint meadow	20
Depression	0-3	Sedge meadow Vegetated pond	Shrub swamp Bluejoint mead ow	**
Floodplain	0-3	Shrub swamp Sedge meadow	Bluejoint meadow	2

** Drainages a nd depressions are part of meso scale topography created during backfilling and grading; they are not mapped on the post -mining topography.

Swell Factor

60% initial swell volume

25% final swell Volume



Backfilling and Regrading

Topsoil Placement

Seeding

Sec. 38.05.005. Division of lands.

The commissioner shall control and supervise the division of lands created and established under the Department of Natural Resources. The director has administrative powers and other delegated duties, as prescribed by law or regulation.

Sec. 38.05.010. Appointment of director.

The commissioner shall appoint a director. The director is the executive officer of the division of lands.

Sec. 38.05.015. Director serves at pleasure of commissioner.

The director serves at the pleasure of the commissioner.

Sec. 38.05.020. Authority and duties of the commissioner.

(a) The commissioner shall supervise the administration of the division of lands.

(b) The commissioner may

(1) establish reasonable procedures and adopt reasonable regulations necessary to carry out this chapter and, whenever necessary, issue directives or orders to the director to carry out specific functions and duties; regulations adopted by the commissioner shall be adopted under AS 44.62 (Administrative Procedure Act); orders by the commissioner classifying land, issued after January 3, 1959, are not required to be adopted under AS 44.62 (Administrative Procedure Act);

(2) enter into agreements considered necessary to carry out the purposes of this chapter, including agreements with federal and state agencies;

(3) review any order or action of the director;

(4) exercise the powers and do the acts necessary to carry out the provisions and objectives of this chapter;

(5) notwithstanding the provisions of any other section of this chapter, grant an extension of the time within which payments due on any exploration license, lease, or sale of state land, minerals, or materials may be made, including payment of rental and royalties, on a finding that compliance with the requirements is or was prevented by reason of war, riots, or acts of God;

(6) classify tracts for agricultural uses;

(7) after consulting with the Board of Agriculture and Conservation (AS 03.09.010), waive, postpone, or otherwise modify the development requirements of a contract for the sale of agricultural land if

(A) the land is inaccessible by road; or

(B) transportation, marketing, and development costs render the required development uneconomic;

(8) reconvey or relinquish land or an interest in land to the federal government if

(A) the land is described in an amended application for an allotment under 43 U.S.C. 1617; and

(B) the reconveyance or relinquishment is

(i) for the purposes provided in 43 U.S.C. 1617; and

(ii) in the best interests of the state;

(9) lead and coordinate all matters relating to the state's review and authorization of resource development projects;

(10) exercise the powers and do the acts necessary to carry out the provisions and objectives of AS 43.90 that relate to this chapter.

Sec. 38.05.025. Continuing regulations, agreements, etc.

All rules, regulations, procedures, funds, contracts, and agreements established or entered into by the Department of Lands before May 2, 1959, under the authority of ch. 126, SLA 1953, as amended, and ch. 184, SLA 1957, are continued, and are subject to amendment by the commissioner except where inconsistent with this chapter.

Sec. 38.05.027. Cooperative resource management or development agreements.

(a) Consistent with the authority of the commissioner under law, the commissioner, after determining that the agreement is in the best interests of the public and the state, may enter into cooperative resource management or development agreements with the federal government, a state agency, a village or municipality, or a person. Specific guidelines to protect the state and public interest shall be established, if necessary, by the commissioner before entering into an agreement under this section.

(b) A summary of agreements entered into under this section shall be submitted to the legislature within five days of the beginning of each regular session.

Sec. 38.05.030. Exceptions.

(a) *[Repealed, Sec. 88 ch 152 SLA 1984].*

11 AAC 82.600. Bonding

(a) Every mineral lease and permit may contain a provision requiring that an acceptable bond in the minimum amount required by the section of this title dealing with the specific mineral involved be filed before beginning any permit or lease operation.

(b) The amount of the bond is the amount determined by the commissioner to be justified by the nature of the surface, its uses and improvements in the vicinity of the lands, and the degree of the risks involved in the types of operations to be carried on under the lease or permit.

(c) Every bond must be either

(1) a corporate surety bond with a corporate surety qualified to do business as such in Alaska; or

(2) a personal bond accompanied by a deposit of cash in the amount of the bond, or negotiable federal or Alaska securities in a sum equal at par value to the amount of the bond together with a sufficient conveyance to the commissioner of full authority to sell the securities in the event of default in the performance of the conditions of the bond.

(d) Every bond must be conditioned upon faithful compliance with all the provisions of the lease or permit.

(e) The principal on any bond must be the lessee of record unless the lease is subject to an operating agreement which has been approved by the commissioner, in which case the operator may be the principal in place of the lessee of record.

(f) Bonds must be furnished on forms provided by the department.

History: Eff. 9/5/74, Register 51; am 7/22/79, Register 71

Authority: AS 38.05.020

AS 38.05.145(a)

11 AAC 82.605. Assignments

(a) Leases, oil and gas exploration licenses, permits, or interests in leases, oil and gas exploration licenses, or permits, may, with the approval of the commissioner, be assigned or subleased as provided in this section to a person or persons qualified to hold a lease.

(b) No transfer of an interest in a lease, oil and gas exploration license, or permit, including assignments of working or royalty interest, operating agreements, and subleases, is binding upon the state unless approved by the commissioner. The transferor is liable for all obligations under the lease or oil and gas exploration license accruing before the approval of the transfer. When transfers of overriding royalty are made after the initial separation from the working interest of the lease, executed or image copies of these transfers must be transmitted to the department without charge for filing in the appropriate case file. However, the commissioner will take no action and official

status records will not be posted to reflect these transfers.

(c) The commissioner will approve a transfer of an undivided interest in a lease, oil and gas exploration license, or permit unless the commissioner makes a written finding that the transfer would adversely affect the interests of the state or the application does not comply with applicable regulations. The commissioner will state the reasons for denial of an application in the finding.

(d) The commissioner will disapprove a transfer of a divided interest in a lease, oil and gas exploration license, or permit if the transfer covers only a portion of the lease, oil and gas exploration license, or permit or a separate and distinct zone or geological horizon, unless the transfer would not adversely affect the interests of the state, the transfer complies with applicable regulations, and the

(1) applicant demonstrates to the commissioner's satisfaction that the proposed transfer of a divided interest is reasonably necessary to accomplish exploration of the area subject to an oil and gas exploration license and exploration or development of the lease or permit;

(2) lease is committed to a unit agreement approved by the commissioner;

(3) lease is allocated production within a participating area approved by the commissioner; or

(4) lease or area subject to an oil and gas exploration license has an oil, gas, or geothermal well certified as capable of production in paying quantities.

(e) The commissioner will make a written finding stating the reasons for disapproval of a transfer of a divided interest under (d) of this section.

(f) When a corporate merger or consolidation occurs, transferring all of the interests of one corporation to another, the surviving or new corporation shall submit to the department

(1) a signed, notarized statement by an officer of the surviving or new corporation describing the transfer of interests;

(2) a certificate of merger or certificate of consolidation issued by the State of Alaska, Department of Commerce;

(3) applications for approval of assignments transferring all interests to the surviving or new corporation, in compliance with 11 AAC 82.615;

(4) if not filed on a form provided by the department, the request for approval must contain the same information for each interest transferred as is required on the assignment application form;

(5) a filing fee is required for each affected lease or oil and gas exploration license; and

(6) the surviving or new corporation must comply with the statement of qualifications required by 11 AAC 82.205.

History: Eff. 9/5/74, Register 51; am 7/22/79, Register 71; am 3/30/84, Register 89; am 7/1/89, Register 110; am 9/22/95, Register 135

Authority: AS 38.05.020

AS 38.05.131

AS 38.05.132

AS 38.05.133

AS 38.05.920

11 AAC 82.610. Permits or leases segregated by partial assignment

If a transfer is made of all or a part of the lessee's or permittee's working interest in a portion of the acreage in a lease or permit, the acreage as to which the transfer is made will, at the option of the commissioner, and may, upon the request of the transferee and with the approval of the commissioner, be segregated into a separate and distinct lease having the same effective date as the original lease or permit.

History: Eff. 9/5/74, Register 51; am 7/22/79, Register 71

Authority: AS 38.05.020

11 AAC 82.615. Application for approval of assignment

(a) An application for approval of assignment or transfer must

(1) be filed in triplicate and comply with 11 AAC 88.105;

(2) be filed within 90 days after the date of final signing of the transfer by the assignor; however, an assignment not filed within 90 days may be approved, at the discretion of the commissioner, where no intervening interest is filed;

(3) unless filed on forms provided by the department, be accompanied by a request for approval of assignment essentially like that used in the appropriate department form; and

(4) be accompanied by a bond, if required by the commissioner, which clearly binds the assignee and the assignee's surety to any unperformed obligations of the assignor.

(b) If the transfer is solely an assignment by the lessee or licensee of a state-issued oil and gas exploration license of record of all or a divided or undivided portion of the record title to a lease or oil and gas exploration license, forms provided by the department or facsimile must be used.

(c) Each application for approval of assignment must provide for the transfer of interest from a single assignor to a single assignee. The department form may not be altered to provide for any type of multiple party assignments.

(d) If a single instrument affects two or more leases, oil and gas exploration licenses, or permits, the applicant shall file three signed counterparts of the instrument and sufficient exact image copies of it to provide one copy of each lease, oil and gas exploration license, or permit covered by the application. A separate filing fee is required for each lease, oil and gas exploration license, or

permit affected.

(e) The assignee shall also file or refer to the current statement of qualifications required by 11 AAC 82.205.

(f) Ownership interests must be expressed in percentages with any fraction of a percent expressed in decimals with five or fewer digits to the right of the decimal point. All ownership percentages in the lease, when added, must total 100 percent.

(g) Filing fees will be assessed in accordance with 11 AAC 05.010 for each application for approval of assignments.

History: Eff. 9/5/74, Register 51; am 7/22/79, Register 71; am 7/1/89, Register 110; am 9/22/95, Register 135

Authority: AS 38.05.020

AS 38.05.131

AS 38.05.132

AS 38.05.133

AS 38.05.920

11 AAC 82.620. Transfer by death

If the applicant claims to be the heir or devisee of a deceased holder of a lease or permit or interest in it, he must furnish evidence satisfactory to the commissioner of his status and identity as an heir or devisee.

History: Eff. 9/5/74, Register 51; am 7/22/79, Register 71

Authority: AS 38.05.020

AS 38.05.920

Kensington Gold Mine Project

Reclamation Plan Approval

DEPARTMENT OF NATURAL RESOURCES
Division of Mining, Land and Water

June 3, 2005

The Alaska Department of Natural Resources, Division of Mining, Land and Water (DNR), in accordance with and subject to Alaska Statutes 27.19 (Reclamation) and 38.05 (Alaska Land Act) and the Alaska Administrative Code, Title 11 and Chapter 97 (Mining Reclamation), approves the Reclamation Plan for the Kensington Gold Mine Project submitted by:

Coeur Alaska, Inc
3031 Clinton Dr. Suite 202
Juneau, AK 99801

The Reclamation Plan is considered to consist of Appendix 1 of the Kensington Gold Project Final Plan of Operations, dated May 2005. The Reclamation Plan applies to both private lands and lands managed by the United States Forest Service (USFS).

Effective dates of this plan approval are **June 3, 2005 through June 3, 2011**, unless sooner revoked for cause; however, Coeur Alaska's obligations under the terms and conditions of this plan approval shall continue, unless sooner terminated in accordance with the provisions of this plan approval, until completion of all requirements under and pursuant to the Plan of Operations.

This plan approval does not constitute certification of any property right or land status claimed by the applicant.

The Reclamation Plan was found to be complete and is approved by DNR with the following conditions:

Financial Assurance. This Reclamation Plan Approval does not take effect until Coeur Alaska submits a financial assurance in a form and substance approved by DNR and the USFS. The financial assurance shall not be released until all affected areas have been reclaimed and are approved by the Authorized Officer and the USFS, and all other terms of this plan of operations are met. Modifications to this Reclamation Plan may, at DNR's discretion, require bond review and update. The total financial assurance of **$7,354,015.00** has been accepted for the Kensington Gold Project, with the conditions that the financial assurance amount be reviewed prior to construction of the Tailings Storage Facility dam to determine if premature closure of the dam at Stage I or Stage II would change the closure cost estimate, and also that the financial assurance be reviewed as part of the Reclamation Plan update scheduled for 2008.

Terms of this Plan Approval. The Terms and Conditions contained within the Reclamation Plan (May 2005) are hereby included as stipulations of this Plan Approval. If there is a difference between the Reclamation Plan as submitted and the terms contained within this Plan Approval, the terms contained within this Plan Approval take precedence.

The Authorized Officer for DNR is the Director of the Division of Mining, Land and Water or his designee. The Authorized Officer may be contacted at 550 West 7th Avenue, Suite 900D, Anchorage, AK 99501-3577, telephone (907) 269-8621, and fax (907) 269-8930 or at tom_crafford@dnr.state.ak.us. Coeur Alaska will be notified of changes to the authorized officer as needed.

Monitoring Plan. Monitoring results obtained during a reporting period shall be summarized and reported to the Authorized Officer quarterly, on or before the 15th day of the month following the quarter, in an electronic format acceptable to DNR. Electronic copies should also be sent to ADNR (Carl Schrader at Carl_Schrader@dnr.state.ak.us). Amendments to this distribution list will be provided to Coeur Alaska as needed.

As-Built Maps. Coeur Alaska shall submit to ADNR an annual "as built" map illustrating the current development of all project facilities. The plan maps shall show cleared and grubbed areas; growth medium stockpiles; roads; waste rock dump development; material site development; and facility construction. Maps shall be both in a digital format and hard copy at 1"=500' or other appropriate scale necessary to review the development of individual facilities.

Inspection and Entry. Coeur Alaska shall permit authorized representatives of DNR and DEC to enter into and upon the area and facilities covered under this plan approval at all reasonable times without notice for the purpose of inspecting the area and activities covered under this plan approval. Said inspections shall be subject to such safety and security procedures as Coeur Alaska may from time to time adopt.

At any time upon DNR's written request, Coeur Alaska shall promptly make any and all records, documents, or other information required to be kept or maintained by law, regulation, ordinance or this plan approval available to DNR for inspection and copying as reasonably required by DNR to determine if Coeur Alaska is in compliance with local, state and federal laws applicable to the operations authorized under this plan approval.

Environmental Audit. A third-party environmental audit shall be conducted every six years (and prior to final closure, unless otherwise approved by DNR and the USFS). This audit will include all aspects of the project, including access roads, material sites, waste rock storage facilities, and the tailings storage facility. The third-party contractor should be mutually agreed on by the State, USFS, and Coeur Alaska, but in the event that agreement cannot be reached, the State and USFS retains the final selection decision. Costs for the third-party environmental audit shall be borne by

Coeur Alaska. The environmental audit shall include an evaluation of the adequacy of the reclamation financial sureties.

Violations. This authorization is revocable immediately upon violation of any of its terms, conditions, stipulations, or upon failure to comply with any other applicable laws, statutes and regulations (federal and State).

Assignment. This plan approval may be transferred or assigned with prior written approval from DNR. DNR will only disapprove a transfer with good cause and will evaluate whether the proposed assignee (1) is qualified to acquire all other permits and authorizations necessary to conduct operations under the plan; (2) is on notice of default or subject to an enforcement action by any state agency on any lease, reclamation bond, or other permit within the state. Any assignee must commit in writing to be bound by this plan approval to the same extent as Coeur Alaska, and must provide to DNR all proofs of bonds, or undertakings required by this plan approval. Transfer of this plan approval may, at DNR's discretion, require bond review and update.

Other Authorizations. The issuance of this authorization does not alleviate the necessity of Coeur Alaska to obtain authorizations required by other agencies for this activity.

Valid Existing Rights. This authorization is subject to all valid existing rights in and to the land under this authorization. The State of Alaska makes no representations or warranties whatsoever, either expressed or implied, as to the existence, number, or nature of such valid existing rights.

Change of Address. Any change of address must be submitted in writing to the Authorized Officer.

Modifications. Any request for modification of the plan of operations and any other affected permits or authorizations must be made by written application to DNR. Amendments to the Reclamation Plan may, at the discretion of DNR, require bond review and update.

Statutes and Regulations. This plan approval is subject to all applicable state and federal statutes, including state, federal, and any local statutes and ordinances in effect on the effective date of this plan approval, new statutes, regulations, and

ordinances enacted or promulgated after said effective date, and changes to existing statutes and regulations made after the effective date, to the extent constitutionally permissible.

Severability. If any clause or provision herein contained shall be adjudicated to be invalid, it shall not affect the validity or effect of any other clause or provision of this plan approval, nor constitute any cause of action in favor of either Coeur Alaska or DNR as against the other.

Commencement of permitted activities will be considered an acceptance by Coeur Alaska of these special stipulations.

Approved: _____ June 3, 2005
Date

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER

MINING RECLAMATION BOND (PERSONAL BOND)

The Miner, Abacus Alaska, Inc., a corporation existing under the laws of the State of Alaska, whose address is c/o CBR Gold Corp, Suite 220, 9797 45 Avenue NW, Edmonton, Alberta T6E 5V8, Canada, as Obligor, is firmly bound unto the State of Alaska Department of Natural Resources and the State of Alaska Department of Environmental Conservation ("the State") in the sum of One Million, Two Hundred Twenty One Thousand, Four Hundred and Eight U.S. Dollars ($1,221,408), lawful money of the United States, for the payment of which the Obligor hereby binds itself, its successors, and assigns.

Contemporaneously with the execution and delivery of this Personal Bond, the Obligor delivers to the State as collateral to secure the obligation described herein a Letter of Credit numbered BMTO184657OS pursuant to 11 AAC 97.410 and 18 AAC 60.265.

Whereas, the Obligor has submitted reclamation plans for mining exploration operations under an approved reclamation plan, and obtained waste disposal or management permits at the Niblack Mine exploration property, which approved reclamation plans (hereinafter "the reclamation plans") and waste disposal or management permits (hereinafter "the Permits") are listed in Table 1 below, and are incorporated fully herein in all its terms and made a part of this bond; and

Table 1

Plan/Permit/Lease #	USD Amount	Description
ADNR Reclamation Plan Approval J092711 and ADEC Waste Management Permit 2006-DB0037	$ 1,221,408	Permits issued for the Underground Exploration Program
TOTAL	$ 1,221,408	

Whereas, the Obligor is required to post a performance bond with the State to ensure complete compliance with AS 27.19, 11 AAC Chapter 97, 18 AAC Chapter 60, the reclamation plans and the Permits; and

Whereas, the Obligor is required to post this Personal Bond with the State to ensure the Obligor's complete compliance with the requirements of the reclamation plans, AS 27.19 and attendant regulations at 11 AAC Chapter 97, and the Permits and attendant regulations at 18 AAC Chapter 60; and

Whereas, in accordance with 11 AAC 97.430, Obligor is liable for the full costs of reclamation to the standards of AS 27.19, the requirements of 11 AAC Chapter 97, and the approved reclamation plans, regardless of the amount of the bond; and

Whereas, the Obligor agrees that unless the Obligor has replaced this bond with another personal bond or with another form of financial assurance authorized under 11 AAC 97.400 and 18 AAC 60.265 providing security for compliance with all terms of the reclamation plans and Permits, coverage under this bond shall extend to and include the approved reclamation plans, Permits, and any amendments to the plan approved by the State.

Now, therefore, the terms of this Personal Bond are as follows:

Upon a determination by the State that the Obligor has satisfactorily complied with the reclamation plans (in accordance with the standards of AS 27.19.020 and of 11 AAC 97.200-250) and the Permits, the obligations of this personal bond and accompanying instrument shall terminate and the commissioner shall release this bond and the accompanying instrument.

This personal bond and accompanying instrument shall remain in full force and effect until their release is approved in writing by the State (1) in accordance with 11 AAC 97.410(b) and 18 AAC 60; or (2) upon delivery of substitute financial assurance acceptable to the State.

The State may approve replacement of this personal bond or the collateral securing it in accordance with 11 AAC 97.400 and 18 AAC 60. In the event of replacement, the substitute bond must assume all remaining reclamation obligations and liabilities.

If the State determines that the Obligor has violated or permitted a violation of the reclamation plans or Permits and failed to comply with a lawful order of the State, the Obligor forfeits this personal bond or the relevant portion thereof in accordance with AS 27.19.040(c) and AS 27.19.070(a) or and 18 AAC 60. Upon the Obligor's receipt of a notice of the Obligor's default from the State, the Obligor shall promptly pay the face value of this personal bond to the State or forfeit the funds secured by the Letter of Credit # __BMTO184657OS__ referenced above.

All correspondence pertaining to the Personal Bond shall be sent to:

State of Alaska, Department of Natural Resources
Division of Mining Land and Water
550 West 7th Avenue, Suite 900D
Anchorage, AK 99501-3577

OBLIGOR

Date Feb 12/10

(Affix seal)

Obligor Abacus Alaska, Inc.

By: _____

DIRECTOR
(Title)

ACKNOWLEDGMENT OF OBLIGOR

The foregoing instrument was acknowledged before me by Sean Hagel,

this 12 day of February 2009/10.

Witness my hand and official seal. _____
(Notary Public or other authorized officer)

My Commission Expires: non-expires

PRATHAVAN P VENKATRAMAN
BARRISTER & SOLICITOR
A NOTARY PUBLIC AND COMMISSIONER
FOR OATHS IN AND FOR THE PROVINCE
OF ALBERTA

APPROVAL AND ACCEPTANCE BY STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES

By: _____ Date 9-10-2010
Dick Mylius, Director, Division of Mining, Land and Water

APPROVAL AND ACCEPTANCE BY STATE OF ALASKA
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

By: _____ Date 10/20/2010
Lynn Kent, Director, Division of Water
FLV

CONSENT RESOLUTION OF ALL THE DIRECTORS

OF

ABACUS ALASKA, INC.

(the "Company")

We, the undersigned, being all the Directors of the Company, hereby consent to and adopt in writing the following resolutions as of the ____day of_____, 2009.

GENERAL SIGNING AUTHORITY

BE IT RESOLVED THAT:

1. Sean Mager, or such other person or persons as the Directors may from time to time by resolution appoint, be and is hereby authorized and directed to do all such acts and things and to execute or cause to be executed, whether under corporate seal or otherwise, all such agreements, deeds, transfers, assignments, reclamation bonds or other instruments which may be necessary or desirable and in the best interest of the Company.

2. These resolutions may be executed in counterparts and delivered by hand or facsimile, each of which shall be deemed an original but which together shall constitute one and the same instrument.

Sean Mager

Peter Kleespies

John Williamson

Sean Mager hereby confirms that he is a director of the Company and acknowledges his interest in the transaction referred to above and to the extent necessary abstains from voting on the transaction, his signature above being necessary to comply with the requirement that a consent resolution be signed by all the Directors of the Company.

Sean Mager

STATE OF ALASKA

SEAN PARNELL, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

P.O. BOX 111000
JUNEAU, ALASKA 99811-1000
PHONE: (907) 465-2400
FAX: (907) 465-3886

550 WEST 7TH AVENUE, SUITE 1400
ANCHORAGE, ALASKA 99501-3650
PHONE: (907) 269-8431
FAX: (907) 269-8918

Detailed Statement of Findings and Decision on Petition Requesting that the Streambeds of Anadromous Waterbodies and Associated Riparian Areas in the Chuitna River Watershed be Designated as Lands Unsuitable for All Types of Surface Coal Mining Operations

SUMMARY AND BACKGROUND OF THE PETITION

On January 21, 2010, Trustees for Alaska (Trustees), on behalf of two organizations, submitted a petition (referenced herein as the "petition," or where context is required, the "2010 Petition") to the Commissioner of the Department of Natural Resources (DNR), requesting that certain lands within the Chuitna River[1] watershed (Chuitna watershed) be designated unsuitable for all types of surface coal mining operations. Trustees submitted the petition on behalf of the Chuitna Citizens Coalition and Cook InletKeeper. Both groups are collectively referenced herein as petitioners.

The present action is one in a continuing series of attempts dating back to the 1980s to prohibit surface coal mining operations in the Chuitna watershed. More recently, this is the second time in three years that petitioners have filed a petition requesting that DNR find the Chuitna watershed unsuitable for surface coal mining operations. In the 2007 Petition, these petitioners alleged that reclamation was not technologically feasible; the petition was litigated, and the appeal was eventually dismissed with prejudice. This procedural history and the state and federal decisions denying earlier attempts to prohibit surface coal mining are integral to the present decision.

The 2010 Petition raises many of the same arguments and reads much like the 2007 Petition. More specifically, the 2010 Petition requests that streambeds underlying anadromous water bodies and their associated riparian areas within the Chuitna watershed be designated unsuitable for surface coal mining.

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[1] The river is also commonly referred to, including by petitioners, as the Chuit River.

This petition is based on the Alaska Surface Coal Mining Control and Reclamation Act, which authorizes the DNR Commissioner to designate state lands as off-limits for all surface coal mining operations if scientifically sound data and information justifies a finding that state lands are unsuitable for surface coal mining operations. The State of Alaska has never granted a "lands unsuitable" petition. The result of granting such a petition for the Chuitna watershed would be that the petition area would be preemptively closed for all surface coal mining operations. Thus, entities with a property interest in the land would be precluded from even applying for a permit to mine coal from the Chuitna watershed.

For that reason, three different entities -- Alaska Mental Health Trust Land Office, Tyonek Native Corporation, and PacRim Coal, LP (intervenors) -- have sought to intervene to protect their property interests and requested that DNR deny the 2010 Petition, which, if granted, would have substantial negative impacts on their property interests and on potential economic developments in the region. Tyonek Native Corporation (TNC) explained that it opposes the 2010 Petition because the petition "seeks to end most development of the coal reserves in the region where TNC's lands are located and mostly TNC shareholders reside. Such a determination would frustrate TNC's efforts to increase local employment opportunities for its shareholders, who are the Native people and the majority of the population of the region. Developing the region's substantial coal resources is critical to economic growth."

Similarly, Alaska Mental Health Trust Land Office, which is a state corporation that administers the Alaska Mental Health Trust for the benefit of individuals with mental illness, developmental disabilities, chronic alcoholism and Alzheimer's disease and related dementia,[2] stated: "The Trust is the predominant landowner within the Chuitna River Watershed, and lessor of the coal resources located within the areas subject to the petition. As the owner of the coal resources proposed for development pursuant to the existing coal leases held by PacRim Coal, LP (PRC) in the subject area, The Trust has a significant stake in the outcome of the petition proceeding. . . . To allow [the petition] to go forward would significantly affect the ability of The Trust and its lesee to develop this resource and would result in a major negative economic

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2 http://www.mhtrust.org/layouts/mhtrust/files/documents/about_aboutdocs/Trust_Overview_update2011.pdf.

impact to The Trust and its beneficiaries." The Alaska Mental Health Trust Land Office has taken this position because it is obliged to manage the Trust's assets for the "maximization of long-term revenue from trust land," "protection and enhancement of the long-term productivity of trust land," and "encouragement of a diversity of revenue-producing uses of trust land."[3]

SUMMARY OF THE DECISION

Alaska Surface Coal Mining Control and Reclamation Act[4] (ASCMCRA), which is modeled after the federal Surface Mining Control and Reclamation Act[5] (SMCRA), authorizes DNR to preemptively disallow any surface coal mining operations and project development in a particular area by granting a "lands unsuitable" petition. State law authorizes the DNR Commissioner to grant such a petition if the Commissioner finds that: reclamation is not technologically feasible; surface coal mining operations would have long-lasting damage to the ecosystem or harm important cultural or aesthetic values; or mining operations would take place in an area prone to natural hazards that could substantially endanger life and property.[6]

To support a lands unsuitable petition, a petitioner must assume "that contemporary mining practices required under AS 27.21 and this chapter would be followed if the area were mined."[7] Thus, a petitioner may not base a petition on the

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[3] 11 AAC 90.020(c).

[4] AS 27.21.010, *et seq.*

[5] 30 U.S.C. § 1202, *et seq.*

[6] Specifically, AS 27.21.260(c) provides the "commissioner (1) shall designate an area as unsuitable for all or certain types of surface coal mining operations if the commissioner determines that reclamation in accordance with this chapter and regulations adopted under it is not technologically feasible in the area; (2) may designate an area as unsuitable for all or certain types of surface coal mining operations if the commissioner determines that the operations in the area will may designate an area as unsuitable for all or certain types of surface coal mining operations if the commissioner determines that the operations in the area will (A) be incompatible with existing state or local land use programs; (B) affect fragile or historic land in which the operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems; (C) affect aquifer recharge areas or other renewable resource land in which the operations could result in a substantial loss or reduction of long-range productivity of water supply or food or fiber products; or (D) affect areas subject to frequent flooding and areas of unstable geology, or other natural hazard land in which the operations could substantially endanger life and property."

[7] 11 AAC 90.701(a)(5). *See also* AS 27.21.210 (stating that all permits issued under the Act shall require that surface coal mining and reclamation must comply with environmental performance standards). The federal Office of Surface Mining (OSM) has also stated that a

assumption that adverse mining impacts will occur that otherwise would be prevented by the environmental protection requirements mandated by ASCMCRA or other state regulations.[8] Indeed, the federal Office of Surface Mining (OSM) has stated that a petition that simply assumes non-compliance with state law is a meritless petition that should be rejected.[9]

Also embedded in ~~SMCRA and~~ ASCMCRA is the recognition that coal mining *will* significantly impact an area.[10] Indeed, state and federal law authorize surface coal mining despite its effects on the environment. Both Congress and the Alaska Legislature, in respectively enacting SMCRA and ASCMCRA, anticipated that impacts will necessarily occur during construction and coal mining. The provisions contained in SMCRA and ASCMCRA also recognize that coal mining will have adverse impacts to surface and groundwater within the disturbed mining area and that a balancing of responsible resource development and environmental protection is necessary.[11]

The extensive permitting and litigation history that preceded the 2010 Petition provides a critical backdrop to this decision. Trustees, along with other entities, opposed a coal mining project in the Chuitna watershed in the 1980s that underwent extensive regulatory review and received permit approvals from several state and federal agencies (including DNR, the Alaska Department of Fish and Game (ADF&G), and the U.S. Environmental Protection Agency (EPA)).

After this coal project received state permitting approvals, Trustees sued the state and appealed the Cowper Administration's permitting decision to the Alaska Superior Court. One of the major issues in that appeal, which is also one of the key issues in the present petition, centered on former DNR Commissioner Judith Brady's determination that reclamation was, in fact, feasible. The Superior Court rejected Trustees' claim that DNR erred in making this finding. Trustees then appealed to the

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petitioner "must assume that contemporary mining practices required under the applicable regulatory program will be followed." 48 Fed. Reg. 41312, 41328-29 (Sept. 14, 1983). *Accord In re Permanent Surface Mining Regulation Litigation*, 620 F. Supp. 1519 (D.D.C. 1985).

[8] 48 Fed. Reg. at 41328-29.

[9] *Id.*

[10] 30 U.S.C. § 1202; AS 27.21.010.

[11] 30 U.S.C. § 1202; AS 27.21.010.

Alaska Supreme Court. In *Trustees for Alaska v. Gorsuch,*[12] the Supreme Court upheld DNR's decision concerning the feasibility of reclamation in the Chuitna watershed area. Specifically, in addressing the contention that DNR erred in approving the proposed plan for restoration, the *Gorsuch* Court held that DNR had properly found that the proposed reclamation and wetlands restoration plans for the leased lands were "sufficient to restore the disturbed area to a condition capable of supporting fish and wildlife."[13] On this point, the Court was unanimous.

The EPA also conducted an environmental review of the same proposed coal mine in the Chuitna watershed through its 1990 Final Environmental Impact Statement (FEIS) and issued a 1990 Record of Decision (ROD) approving the project proposal. Thereafter, the EPA issued a National Pollutant Discharge Elimination System (NPDES) permit for the mine's wastewater discharges.

This proposed coal mining project eventually stalled in the 1990s due to market conditions. Since the mid-2000s, however, the Chuitna area has seen renewed development efforts.

In response to this renewed interest, Trustees, on behalf of petitioners, filed a lands unsuitable petition in 2007 (2007 Petition). The 2007 Petition sought to have the entire Chuitna watershed deemed unsuitable for surface coal mining activities. Petitioners raised concerns regarding the feasibility of reclamation in the Chuitna watershed disturbed by coal mining, as well as allegations that essentially unjustifiable significant harm would occur. Former DNR Commissioner Tom Irwin rejected the 2007 Petition, finding that the petition was incomplete and without merit.[14] Trustees appealed Commissioner Irwin's decision to the Superior Court.[15] The Commissioner and petitioners later settled the litigation, and with the exception of one issue (discussed below) no other aspect of Commissioner Irwin's decision on the 2007 Petition was withdrawn or changed, and Trustees' appeal to the Superior Court was dismissed with prejudice.

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[12] 835 P.2d 1239 (Alaska 1992).

[13] *Id.* at 1249.

[14] July 16, 2007 Petition Decision, at 1.

[15] *Chuitna Citizens NO-COALition, Inc., v. Irwin, et al.*, Case No. 3AN-08-6009CI.

On January 21, 2010, Trustees, on behalf of petitioners, once again submitted a new petition (2010 Petition) under ASCMCRA. To support the 2010 Petition, petitioners essentially recycle the two central claims raised in the 2007 Petition: first, that reclamation of the petition area in accordance with the ASCMCRA[16] is not technologically feasible; and second, that surface coal mining operations will destroy habitat and adversely impact fragile lands resulting in significant damage to important cultural, scientific, and aesthetic values and natural systems within the watershed.

The evidence contained in the administrative record does not support the designation of any of the petition area as lands unsuitable for surface coal mining operations. The evidence in the administrative record provided by the petitioners and intervenors, and compiled by DNR, demonstrates that reclamation throughout the Chuitna watershed is, in fact, technologically feasible. Moreover, there is not sufficient evidence to support a finding that surface coal mining operations -- that comply with the applicable statutes and regulations -- will adversely affect the environment in such a manner that would justify granting this petition.

In particular, there is insufficient evidence to suggest that prior permitting decisions issued by the state and federal government wrongly concluded that reclamation was feasible. For example, in DNR's 1987 Permitting Decision determining that the restoration and reclamation plans were sufficient (including to restore disturbed fish and wildlife habitats), DNR found "that reclamation as required by AS 27.21 and 11 AAC 90 can be accomplished under the reclamation plan," subject to DNR-required modifications.[17] As mentioned above, this finding was upheld by the Alaska Supreme Court in *Trustees for Alaska v. Gorsuch*, and is also consistent with EPA's 1990 findings that reclamation was feasible.

While the petitioners provide a few new studies to support the 2010 Petition, this information does not contradict DNR's earlier findings with respect to reclamation and restoration of wetlands and fish and wildlife habitat. Nor does it overcome the significant evidence in the record -- discussed in detail below -- which demonstrates that reclamation is technologically feasible. Nevertheless, as this lengthy statement of

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[16] AS 27.21.010, *et seq.*

[17] August 21, 1987 Decision (1987 Permitting Decision) on the Diamond Shamrock Chuitna Coal Project, issued by J.M. Brady, at 125 and at 326-361.

findings and decision shows, DNR has again undertaken a comprehensive review of these issues and will continue to do so as the permitting process continues.

More broadly, petitioners' arguments also suffer from thematic flaws repeated throughout the petition. *First*, petitioners do not give appropriate weight to previous federal and state decisions, including the Alaska Supreme Court *Gorsuch* decision, which found that reclamation in the Chuitna watershed is feasible. When petitioners do cite some of these decisions, they often do so by selectively quoting portions of the decision to leave a misleading impression that the decisions support their allegations.

Second, petitioners make many of the same allegations, often verbatim, that were raised in the 2007 Petition, which was dismissed with prejudice by the Alaska Superior Court. A dismissal with prejudice "is treated as a dismissal on the merits and is, therefore, a final judgment on the merits ... operating as res judicata." *Smith v. CSK Auto, Inc.*, 132 P.3d 818, 820 (Alaska 2006). Res judicata (claim preclusion) and collateral estoppel (issue preclusion) "bind the parties and their privies to factual findings, as well as legal conclusions, that have been the subject of prior litigation," and "administrative agency decisions can have preclusive effect on later court proceedings, so that if a party participates in an administrative adjudication, ... the adjudication may foreclose the possibility of a later lawsuit on the same factual issues." *Alaska Public Interest Group v. State*, 167 P.3d 27, 44 (Alaska 2007).

Third, petitioners assume that DNR will permit a surface coal mine that cannot comply with ASCMRCA and other state laws, and they assume that if a mine is permitted, a mining operator will not be able to comply with such laws and regulations. As discussed above, these assumptions conflict with the requirements of an ASCMCRA lands unsuitable petition.[18] And, as the OSM has stated, a petition that simply assumes non-compliance with state law is meritless.[19]

The 2010 Petition also fails to consider other important policy objectives of ASCMCRA including:

- assuring "that the coal supply essential to the nation's energy requirements and to its economic and social well-being is provided and to strike a balance

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[18] 11 AAC 90.701(a)(5).

[19] 48 Fed. Reg. at 41328-29.

between protection of the environment and other uses of the land and the need for coal as an essential source of energy;"[20] and

- assuring "that reclamation of land on which surface coal mining takes place is accomplished as contemporaneously as practicable with the surface coal mining, recognizing that the responsible extraction of coal by responsible mining operators is an essential and beneficial economic activity."[21]

Notably, as discussed by the intervenors and set out in detail below, this decision recognizes that the majority of landowners in the Chuitna watershed selected their lands because of the presence of significant coal resources and the financial prosperity, employment opportunities, and enhanced social well-being that development of those lands would bring, not just to private industry, but to Native corporation shareholders and Mental Health Trust beneficiaries, as well as local residents and the public at large. Thus, to the extent that any landowner or lessee in the area may propose a surface coal mining project capable of demonstrating compliance with applicable state, federal, and local requirements, and that such operations can be responsibly conducted, then such operations would further these important statutory directives.

Although this decision addresses the merits of all of petitioners' allegations, this decision expressly preserves, and in no way holds contrary to, the final findings of former DNR Commissioner Irwin on the evidence and allegations that Trustees asserted in the 2007 Petition and which petitioners now reassert, in many places verbatim, in the 2010 Petition. Today's decision also expressly preserves the defenses of res judicata and collateral estoppel for Commissioner Irwin's final findings for purposes of any future litigation that may be brought on the 2010 Petition because many of the allegations and arguments raised in the 2007 Petition, and repeated here, were dismissed with prejudice by the Alaska Superior Court.

Finally, it is worth noting that petitioners raise some reasonable concerns regarding the impact of surface coal mining operations on water quality, wetlands, the hydrologic balance of the larger Chuitna watershed, and fish and wildlife habitat.

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[20] AS 27.21.010(b)(7).

[21] AS 27.21.010(b)(5).

These concerns are, however, more effectively and appropriately addressed during the permitting phase of any proposed project. Accordingly, it is important to note that this decision to not designate the petition area as unsuitable for all or certain types of coal mining activities does not mean that surface coal mining will automatically be approved in this area for a specific project. The lands unsuitable designation process is independent of the permitting and mine planning processes that are subject to multi-agency regulatory reviews by several state, federal and local agencies, and these processes may prohibit, curtail, or modify coal mining activities depending on the project proposal. Moreover, DNR will not issue a permit for a specific project unless a specific coal mining proposal demonstrates the capacity to comply with all applicable legal requirements.

THE PETITION PROCESS, STANDARDS FOR REVIEWING PETITIONS, AND OTHER APPLICABLE AUTHORITIES

The Alaska Surface Coal Mining Control and Reclamation Act (ASCMCRA)[22] authorizes the DNR Commissioner to determine if certain lands are unsuitable for surface coal mining operations.[23] Under ASCMCRA, a person or a municipality adversely affected by potential surface coal mining operations may file a petition asking the Commissioner to designate lands unsuitable for mining.[24] A petition "must contain allegations of facts with supporting evidence that would tend to establish the allegations."[25]

Because ASCMCRA is modeled after the federal Surface Mining Control and Reclamation Act (SMCRA),[26] both congressional and federal regulatory commentary on the federal act informs the petition review process. In discussing Section 522(a) of SMCRA,[27] the House Committee on Interior and Insular Affairs stated that the petition process "is structured to be applied on an area basis, rather than a site-by-site

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[22] AS 27.21.010, *et seq.*

[23] AS 27.21.260(a).

[24] AS 27.21.260(b).

[25] *Id.*

[26] ASCMCRA, the state counterpart to SMCRA, was enacted in 1982. Ch. 29, § 1, SLA 1982. The State of Alaska subsequently obtained federal approval in 1983 to exercise exclusive jurisdiction over surface coal mining and reclamation under ASCMCRA, which act is based on its federal counterpart, SMCRA, 30 U.S.C. §§ 1201-1328.

[27] 30 U.S.C. § 1272.

determination, which presents issues more appropriately addressed in the permit application process."[28] The committee also stated that the petition process, whether administered by a federal or state regulatory authority, "does not require the designation of areas as unsuitable for surface mining" unless "it is demonstrated that reclamation of an area is not physically or economically feasible under the standards of the act. The other criteria for designation ... are discretionary."[29]

In considering a lands unsuitable petition under state law, the Commissioner "shall use competent and scientifically sound data and information in order to make objective decisions as to which areas of land are unsuitable for all or certain types of surface coal operations."[30] Such decisions shall also include consideration of "the planning activities of federal, state, and municipal governments."[31] The petition decision shall "use a data base and inventory system that will permit the evaluation of areas of the state to support and permit reclamation for surface coal mining operations."[32] In reaching a decision on a petition, the Commissioner will use (1) relevant information from the data base and inventory system, (2) relevant information and analysis submitted during the comment period, and (3) relevant information provided by other governmental entities.[33] The Commissioner shall include a statement of reasons for the Commissioner's decision.[34]

Before designating an area as unsuitable, the Commissioner shall prepare "a detailed statement of potential coal resources in the area, the demand for coal resources, and the impact of the designation on the environment, the economy, and the supply of coal."[35] Any potential designation must consider "present and future land use planning and regulation processes at the federal, state, and local levels."[36] In response to a petition, the Commissioner may determine to designate the entire

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[28] House Committee Report No. 95-218 (1977), at 630.

[29] *Id.*

[30] AS 27.21.260(a).

[31] AS 27.21.260(a)(1).

[32] AS 27.21.260(a)(2).

[33] 11 AAC 90.711(a).

[34] 11 AAC 90.711(b).

[35] AS 27.21.260(e).

[36] AS 27.21.260(f).

petition area unsuitable for all or certain types of surface coal mining operations, designate only certain portions of the petition area as unsuitable for all or certain types of surface coal mining operations, deny the petition in its entirety, or direct that future permits issued in the petition area "contain specific requirements for mitigating the impact of operations on the feature that was the subject of the petition."[37]

Federal and state coal mining laws provide a plan for assuring that surface coal mining will be conducted in such a manner as to minimize the adverse impact of coal mining, while assuring the nation an adequate supply of coal.[38] These laws and their attendant regulations contain requirements regarding contemporary coal mining practices, including "performance standards" for mine operations and reclamation.[39]

What is critical to underscore is that a petition requesting that lands be designated as unsuitable for surface coal mining operations must assume "that contemporary mining practices required under AS 27.21 and this chapter would be followed if the area were mined."[40] These practices include the performance standards provided at 11 AAC 90.301 – 90.501. Thus, any mine would have to meet the requirements of the state and federal law and a petitioner may not assume mining impacts will occur that would be prevented by the environmental protection requirements mandated by the such laws and other state regulations.[41] Indeed, the federal Office of Surface Mining (OSM) has stated that a petition that simply assumes non-compliance with state law is meritless.[42]

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[37] AS 27.21.260(c); 11 AAC 90.711(c).

[38] *See, e.g., Prager v. Hodel*, 793 F.2d 730 (5th Cir. 1986), *cert. den.* 479 U.S. 988 (1986).

[39] Performance standards provide a basic level of compliance during coal mining and reclamation. *See generally* 11 AAC 90.301 – 90.501. These standards ensure that the environment and the public are protected during mining by requiring avoidance and mitigation of impacts, and the requirement that all land disturbed by mining is restored to a productive postmining land use. *Alaska Coal Mining and the Law* (DNR, March 2007).

[40] 11 AAC 90.701(a)(5). *See also* AS 27.21.210 (stating that all permits issued under the Act shall require that surface coal mining and reclamation must comply with environmental performance standards). The federal Office of Surface Mining (OSM) has also stated that a petitioner "must assume that contemporary mining practices required under the applicable regulatory program will be followed." 48 Fed. Reg. 41312, 41328-29 (Sept. 14, 1983). *Accord In re Permanent Surface Mining Regulation Litigation*, 620 F. Supp. 1519 (D.D.C. 1985).

[41] 48 Fed. Reg. at 41328-29.

[42] *Id.*

Beyond the statutes and regulations specifically dealing with the petition process, the review of a petition includes consideration of ASCMCRA's primary purposes. These include, but are not limited to, the following:

- assuring "that surface coal mining operations are conducted in a manner that will prevent unreasonable degradation of land and water resources;"[43]
- assuring "that surface coal mining operations are not conducted where reclamation required by this chapter and the regulations adopted under it is not feasible;"[44]
- assuring "that reclamation of land on which surface coal mining takes place is accomplished as contemporaneously as practicable with the surface coal mining, recognizing that the responsible extraction of coal by responsible mining operators is an essential and beneficial economic activity;"[45]
- assuring "that the coal supply essential to the nation's energy requirements and to its economic and social well-being is provided and to strike a balance between protection of the environment and other uses of the land and the need for coal as an essential source of energy."[46]

Additionally, a critical component of DNR's mandate, which has been promulgated by the Alaska Legislature and is derived from the Alaska Constitution, is to allow responsible resource development. This duty flows from article VIII of the Alaska Constitution. Section 1 states that "[i]t is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for the maximum use consistent with the public interest." Section 2 provides that the legislature shall provide for the

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[43] AS 27.21.010(b)(3).

[44] AS 27.21.010(b)(4).

[45] AS 27.21.010(b)(5).

[46] AS 27.21.010(b)(7).

utilization, development and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."

The Legislature has, in turn, charged DNR with administering state lands for the "conservation and development of natural resources, including forests, parks, and recreational areas, land, water, agriculture, soil conservation, and minerals including petroleum and natural gas."[47] As former Commissioner Tom Irwin stated in a July 16, 2007 decision on the previous lands unsuitable petition filed by Trustees for the entire Chuitna watershed, both the federal and state statutory regimes "reflect the goal of allowing, where possible, multiple uses of coal bearing lands, and that balanced consideration would be given to regulated coal mining operations and other uses/resources."[48]

The ASCMCRA goals complement the state's economic development, energy, and mineral policies, as declared by the legislature, including the proper conservation and development of mineral resources such as coal for the "further economic development of the state, to maintain a sound economy and stable employment, and to encourage responsible economic development within the state for the benefit of present and future generations."[49]

DETAILED STATEMENT OF FINDINGS AND CONCLUSIONS

Having considered the administrative record in this matter, including the petition and supporting materials, public comments, as well as intervenors' submittals, the following is a detailed statement of findings relative to the petition, along with conclusions on the petition, including reasons for those conclusions, pursuant to AS 27.21.260 and 11 AAC 90.711, and other applicable authorities.

Background on the 2010 Petition and Prior Related Decisions

1. The petition area is 45 miles west of Anchorage, on the west side of Cook Inlet. The petition area is 3,560 acres (5.5 square miles): streams in the petition area total approximately 118 miles in length in the larger Chuitna watershed. The Chuitna

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[47] AS 44.37.025(a).

[48] Commissioner Tom Irwin's July 16, 2007 Decision on Petition Requesting that the Chuitna River Watershed be Determined Lands Unsuitable for Surface Coal Mining, at 13 (citing 30 U.S.C. §§ 1201-1202; AS 27.21.010(b)).

[49] AS 44.99.110 (mineral policy); *accord* AS 44.99.100 (economic policy) and AS 44.99.115 (energy policy).

watershed is subject to multiple uses, including residential, subsistence, recreational, and industrial uses. The communities of Tyonek Native Village and Beluga are adjacent to the watershed and the petition area. A variety of mammals, fish (including salmon), and bird species occur in the petition area.

2. The petition area, and the Chuitna watershed throughout which the petition area pervades, falls within the Susitna/Beluga Coal Field, which is one of the most significant coal fields in Alaska.[50] Since at least statehood in 1959,[51] as well as after enactment of the Alaska Native Claims Settlement Act (ANCSA) in 1971,[52] lands within the area were selected for their mineral, coal, and oil and gas resource potential. Many of the landowners and state and local land use plans identify these areas for coal resource development.

3. Exploration on at least two separate projects in the area has been conducted for decades. One proposed project, the Diamond Shamrock Chuitna Coal Project, underwent extensive regulatory review by several state and federal agencies (including DNR, the Alaska Department of Fish and Game (ADF&G), and the U.S. Environmental Protection Agency (EPA)), from the mid-1980s until the early 1990s.

4. Based on the ASCMCRA permit application submitted on the Diamond Shamrock Chuitna Coal Project, DNR, under the Cowper Administration, issued a permitting decision in 1987 approving the construction and operation of the proposed coal mine. The findings supporting DNR's approval are recorded in (i) a March 5, 1987, "Conditions of Decision and Findings of Compliance for the Diamond Chuitna Mine" and (ii) an August 21, 1987, "Decision to Issue a Surface Mining Permit Diamond Shamrock Chuitna Coal Joint Venture Diamond Chuitna Mine." These documents were later combined into a single document referenced herein as the "1987 Permitting Decision." DNR made a number of key findings in these documents regarding reclamation and hydrologic impacts:

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[50] The Beluga Coal Field has the largest identified resource of any coal field in Alaska, south of the Brooks Range. Merritt, R.D. and Hawley, C.C., 1986, Map of Alaska coal resources, 1:2,500,000: Alaska DGGS Special Report No. 37, Table 2.

[51] 72 Stat. 339 Public Law 85-508 (1958).

[52] 43 U.S.C. § 1601, *et seq.*

- Diamond Shamrock's Wetland Revegetation Plan satisfactorily addressed DNR's initial concerns about whether wetland habitat could be restored. The agency noted, however, that the plan would be subject to continuing DNR review and that, if appropriate, changes could be made to the plan during actual mine operation.[53]

- The project was subject to several DNR stipulations relative to reclamation measures and activities that would be required contemporaneous with mining. These included measures for sediment and drainage control (including sediment control ponds),[54] and measures for protecting surface and groundwater hydrology (including additional hydrologic monitoring).[55]

- In accordance with AS 27.21.180(c)(2), Diamond Shamrock had "demonstrated that reclamation as required by AS 27.21 and 11 AAC 90 can be accomplished under the reclamation plan," subject to DNR-required modifications.[56]

- In accordance with AS 27.21.180(c)(3), "an assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance has been made and the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area."[57]

- Regarding stream restoration, DNR -- while acknowledging that "post-mining baseflows will take ten to fifteen years to reach pre-mining levels and that it was important that enhancement techniques be maintained until the pre-mining flows are reached" -- found that the application

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[53] August 21, 1987 Decision (1987 Permitting Decision) on the Diamond Shamrock Chuitna Coal Project, issued by J.M. Brady, at 33-34.

[54] *Id.* at 40-42, and at 53-92 (consisting of an August 16, 1987 report prepared for DNR by Arctic Hydrologic Consultants that provides a technical review on the proposed Sediment and Drainage Control Plan).

[55] *Id.* at 44-48.

[56] *Id.* at 125, and at 326-361 (containing Section IV findings).

[57] *Id.* at 125, and at 362-404 (containing Section V findings).

complied with 11 AAC 90.327 (Stream Channel Diversion) for the initial permit term.[58]

5. On June 28, 1988, then DNR Commissioner Judith Brady adopted, with minor modifications, the Hearing Officer's May 21, 1988, proposed decision (1988 Administrative Appeal Decision) on the consolidated administrative appeals brought on the 1987 Permitting Decision by Trustees for Alaska, the project proponent Diamond Shamrock, and others. The Hearing Officer's proposed decision recommended certain modifications to the permitting decision, including lengthening the permit term from five to ten years.[59] Based on the administrative record, the Hearing Officer also found that "Diamond's reclamation plan, including its wetlands restoration plan, is sufficient to restore the disturbed area to a condition that is capable of supporting fish and wildlife."[60] With this 1988 Administrative Appeal Decision, Commissioner Brady affirmed the 1987 Permitting Decision.

6. EPA also conducted an environmental review of the proposed coal mine through its 1990 FEIS and issued a 1990 ROD approving the proposal. Thereafter, EPA issued an NPDES permit for the mine's wastewater discharges. In the two-volume 1990 FEIS and the 1990 ROD, EPA considered several factors and made a number of key findings:

- EPA considered numerous impacts the project potentially could have on the environment, including possible impacts to wetlands, subsistence, fish and wildlife, and associated habitat impacts.[61]
- EPA concluded that the area in which the project was to be located was not pristine. For example, it had been previously entered for logging and oil and gas purposes.[62]
- EPA stated the following regarding potential impacts to wetlands:

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[58] *Id.* at 202.

[59] 1988 Administrative Appeal Decision at 5-7.

[60] *Id.* at 33-35.

[61] 1990 FEIS at 5-11, 5-16, and 5-75.

[62] *Id.* at 5-136.

> The acidic, muskeg-type wetlands which are widely dispersed throughout the area are not highly productive and the net primary productivity of replacement communities could be as high or higher than the communities that now exist. Therefore, adverse impacts to primary wetland productivity would not be significant on a regional scale. Food webs would be interrupted in the immediate vicinity of pre-mining wetland areas, but such interruption would probably not be significant on a regional basis because of the isolated nature of most area wetlands and the large extent of similar wetlands outside the project area.[63]

- EPA noted that the wetlands within the Diamond Shamrock Chuitna Coal Project area were similar to wetlands found outside the project area (i.e., the Chuitna watershed/drainage).[64]

- In the ROD, EPA stated that the authorizing agencies, including EPA and DNR, anticipated that reclamation within the project area would be undertaken in accordance with specific requirements, and therefore feasible.[65]

7. After the commissioner upheld DNR's permitting decision upon appeal, multiple plaintiffs, including Trustees for Alaska, appealed the commissioner's decision in the *Gorsuch* litigation.[66] With the exception of one modification, which required a separate ASCMCRA permit for an eleven mile access/haul road from the mine site, the Alaska Superior Court upheld the permitting decision. Upon Trustees' appeal of the Superior Court's decision, the Alaska Supreme Court -- while remanding the decision to DNR for further consideration of cumulative effects of activities associated with the permit, and reconsideration of the reclamation bond amount -- addressed Trustees' contention that DNR erred in approving the proposed plan for restoration of ecological functions and revegetation. Among other things, the Court held:

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[63] *Id.* at Appendix F, at 2-3.

[64] *Id.* at 3.

[65] 1990 ROD at 6, and at 9-12. *See also* 1990 FEIS, at 2-31 to 2-34.

[66] 835 P.2d at 1239.

- that DNR had found that the proposed reclamation and wetlands restoration plans for the leased lands were "sufficient to restore the disturbed area to a condition capable of supporting fish and wildlife."[67]
- that DNR acted reasonably in accepting the restoration plan, because the plan

> describes how wildlife habitat will be recreated by constructing peat-filled depressions which will be planted with various plant species. In addition, three sediment ponds will be inoculated with plant and insect life forms, and seedlings will be planted to provide a vegetation canopy layer for the benefit of wildlife.[68]

8. Diamond Shamrock Chuitna Coal Project project, however, ultimately stalled due to market conditions.

9. Since the mid-2000s, the area has seen renewed development efforts, and the former Diamond Shamrock Chuitna Coal Project is now simply referred to as the Chuitna Coal Project. The current proponent of the project, PacRim Coal, is developing baseline information and coordinating with state and federal agencies, with the expectation that permit applications for the project will be submitted in the next year.

10. The petitioners submitted a petition in 2007 (2007 Petition) seeking to have the entire Chuitna watershed be deemed lands unsuitable for surface coal mining activities. In this petition, petitioners' counsel, Trustees for Alaska, raised concerns regarding the feasibility of reclaiming areas disturbed by coal mining, as well as allegations that essentially unjustifiable significant harm would occur.

11. In a decision issued on July 16, 2007, then-Commissioner Tom Irwin returned the 2007 Petition to petitioners, finding that the petition was incomplete and without merit.[69] In that decision, which contained multiple findings of fact and law, Commissioner Irwin informed petitioners that they could submit a new petition, and described the types of evidence which would be needed to support the petition, so that

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[67] *Id.* at 1249.

[68] *Id.*

[69] July 16, 2007 Petition Decision, at 1.

it could be reviewed on the merits.[70] Commissioner Irwin also informed petitioners, in accordance with 11 AAC 90.701(a)(5), that the petition needed to assume that contemporary mining practices, required under AS 27.21 and this chapter, would be followed if the area were mined, and that the 2007 Petition failed to do that.[71]

12. In a letter dated February 14, 2008, Commissioner Irwin upheld his decision upon petitioners' request for reconsideration. Petitioners appealed Commissioner Irwin's decision on the 2007 Petition to the Superior Court.[72] The Commissioner and petitioners later settled the litigation, and with the exception of one issue (*see* discussion of Allegation V, below), no other aspect of Commissioner Irwin's decision on the 2007 Petition was withdrawn or changed, and the petitioners' appeal to the Superior Court was dismissed with prejudice.[73]

13. On January 21, 2010, Trustees submitted a new petition (2010 Petition) under AS 27.21.260 on behalf of Chuitna Citizens Coalition and Cook Inlet Keeper.

14. Petitioner Chuitna Citizens Coalition is an organization whose members are "full-time and part-time residents of Beluga," a small community located near the petition area. The petitioner describes three of its members' interest in the recreational, fish and wildlife, and subsistence values of the petition area. Two of its members, Judy and Larry Heilman, are residents of Beluga, and state they use the watershed for hunting and fishing opportunities, but do not describe where in the petition area they specifically conduct their activities. Another member, Terry Jorgenson, engages in commercial fishing in the marine waters/Ladd Landing area in Cook Inlet. Ladd Landing is adjacent, rather than within, the petition area. Ladd Landing has been proposed as a potential transfer site for the Chuitna Coal Project for loading coal to freighters for marine shipping.[74]

15. Petitioner Cook Inlet Keeper "is a community-based nonprofit organization that combines advocacy, education and science towards its mission to

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[70] *Id.* at 5-15.

[71] *Id.*

[72] *Chuitna Citizens NO-COALition, Inc., v. Irwin, et al.*, Case No. 3AN-08-6009CI.

[73] For this reason, arguments in the 2010 Petition consistent with the arguments made in the 2007 Petition are likely barred by res judicata and collateral estoppel.

[74] Petition at 12-13.

protect Alaska's Cook Inlet Watershed and the life it sustains."[75] Cook Inlet Keeper asserts that it has members living in the petition area "that would be adversely affected by surface coal mining operations in the Chuitna River watershed," including with respect to members' subsistence activities.[76]

16. The 2010 Petition was more refined than the 2007 Petition because it requests that streambeds underlying anadromous water bodies and their associated riparian areas within the Chuitna watershed be designated unsuitable for surface coal mining as opposed to the broader request in 2007 to have the entire watershed deemed lands unsuitable for surface coal mining. Nonetheless, Petitioners submitted essentially the same evidentiary information that was provided with the 2007 Petition, and only included a handful of additional new documents as evidence to support the petition's allegations. Thus, many of the allegations and supportive materials cited by the petitioners in their 2010 Petition are the same as those that petitioners cited in their 2007 Petition and are also similar to the issues litigated in the *Gorsuch* case.[77]

17. While this more focused specification of the petition area might initially be viewed as a reduction in the area that was sought for designation under the 2007 Petition, the practical effect of the designation would not be so limited, given the geographical reach of the petition area. The specified streambeds and riparian areas have a wide-ranging, meandering trace throughout the Chuitna watershed,[78] repeatedly crossing over the coal resources that likewise pervade throughout the watershed. The designation of the petition area would therefore have a fragmenting effect on the coal resources, jeopardizing the feasibility and extraction of any of the coal resources present in the watershed, even if those resources are not within the petitioners' identified petition area.

18. On February 22, 2010, former Commissioner Tom Irwin found the 2010 Petition to be administratively complete under 11 AAC 90.703(a), and that it contained

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[75] *Id.* at 13.

[76] *Id.* at 13-14.

[77] Petitioners in this 2010 petition, Chuitna Citizens Coalition (formerly Chuitna Citizens NO-COALition) and Cook Inlet Keeper, were among the petitioners listed in the 2007 Petition.

[78] *See* Figure 1 and "Description of the Petition Area."

the information required under 11 AAC 90.701(a). At the time, the commissioner made no other determinations as to the adequacy of the petition.

19. The petition alleges in Allegation I that reclamation of impacts from any type of surface coal mining operations in the petition area (*i.e.*, the streambeds of anadromous streams and their riparian areas), as well as the streams that overlie the delineated area, is not technologically feasible in accordance with ASCMCRA.[79] The petition specifically states that:

- surface coal mining would irreparably harm the area's hydrologic balance, including scrub/sweetgale fen and peat soils ecosystems for which few examples of successful reclamation exist;[80]
- reclamation would not restore the groundwater recharge capacity in the area, violating the performance standards requiring such restoration;[81]
- reclamation would not restore aquatic productivity to premining levels, altering highly productive spawning, migratory, and rearing habitat;[82] and
- surface coal mining on the identified lands cannot be designed and operated to minimize changes in water quality and hydrology enough to ensure no adverse effects to fish and wildlife habitat.[83]

20. The petition alleges in Allegation II that all types of surface coal mining operations will affect fragile land within the meaning of the ASCMCRA regulations and would result in significant damage to important cultural, scientific, and aesthetic values and natural systems.[84]

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[79] *Id.* at 14-16.

[80] *Id.* at 16-24.

[81] *Id.* at 24-25.

[82] *Id.* at 25-29.

[83] *Id.* at 29-33.

[84] *Id.* at 33-45.

21. The petition alleges in Allegation III that all types of surface coal mining operations will affect renewable resource land which could result in a substantial loss or reduction of long-range productivity of water supply or food or fiber products.[85]

22. The petition alleges in Allegation IV that all types of surface coal mining operations could substantially endanger life and property because these operations will occur in areas of unstable geology and where other natural hazards are present. This would include local faults which experience frequent seismic activity, the possibility of volcanic eruptions, strong currents and severe winter ice conditions that would make transport dangerous and spills more likely, and strong winds that would contribute to coal dust being blown offsite.[86]

23. The petition alleges in Allegation V that all of the delineated petition area, including streambeds underlying anadromous water bodies and associated riparian areas that occur within Logical Mining Unit-1 (LMU-1),[87] must be considered in a decision on the petition, and that none of the delineated petition area is exempt from petition review, asserting that there were no substantial legal or financial commitments for an operation in this area before January 4, 1977.

24. In support of the 2010 Petition, the petitioners cite earlier reviews and decisions that were issued in the late 1980s and early 1990s by DNR, the EPA, and other agencies when the project was identified as the Diamond Shamrock Chuitna Coal Project. The petitioners cite DNR's August 21, 1987, permitting decision (1987 Permitting Decision) approving the project; the 1988 administrative appeal decision (1988 Administrative Appeal Decision) affirming that decision; EPA's 1990 final environmental impact statement (1990 FEIS) and 1990 Record of Decision (ROD) on the project;[88] and *Trustees for Alaska v. Gorsuch*,[89] a 1992 Alaska Supreme Court

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[85] *Id.* at 45-46.

[86] *Id.* at 46-48.

[87] LMU-1 is the area which was proposed for permitting in the Diamond Shamrock Chuitna Coal Project. This area is now held by PacRim, and is promoted as the "Chuitna Coal Project."

[88] The FEIS was actually issued in late 1989, but because EPA's ROD was issued in 1990, and because the petitioners, intervenors, and commenters identify it as the 1990 FEIS, this decision does so as well, for ease of reference.

[89] 835 P.2d 1239 (Alaska 1992).

decision involving Trustees for Alaska's challenge on DNR's 1987 Permitting Decision that authorized the Diamond Shamrock Chuitna Coal Project.

25. Petitioners also submitted a few more recent reports that had not been submitted with the petitioners' 2007 Petition. They submitted reports by Palmer M.A., Trasky L., and Wipfli M.S., which are reports based on a review of draft aquatic baseline studies and PacRim's draft Fish and Wildlife Protection plan associated with the Chuitna Coal Project. Petitioners also submitted a report on Valley Fills in Appalachia, *Mountaintop Mining Consequences*,[90] in which the report discusses the burial of headwater streams by overburden during coal mining, along with the reports cited by Palmer, *et al.*, and quoted in the 2010 Petition. And petitioners submitted a report that discusses the development of Circumarctic peatlands, *Rapid Early Development of Circumarctic Peatlands and Atmosphere CH4 and CO2 Variations*.[91]

26. Thus, other than the refinements to the petition area, portions of the narrative that reclamation would not be technologically feasible, and the submittal of the above-referenced reports, the allegations and referenced materials in the 2010 Petition are largely the same, even verbatim, to that set forth in the 2007 Petition.

27. Under AS 27.21.260(b) and 11 AAC 90.709(a), the Commissioner may, in his or her discretion, extend the time for holding a hearing for "up to five additional months if the delay is necessary to provide a field season and a reasonable period of time to review the results of field season surveys." This option was exercised, and during the summer and fall of 2010, DNR conducted field work within the Chuitna River watershed in order to adequately review the petition. Field work consisted of multiple full day trips, conducted throughout the summer and fall of 2010, to different portions of the watershed. Field work included aerial and ground investigation of stream and riparian areas, as well as a review of the condition of reclaimed bulk coal sample sites within the 2003 and Lone Creek watersheds that are within the PacRim Chuitna Coal Project area. The additional time also allowed for the collection of additional surface and ground water information and fish population estimates by third party contractors working on the proposed Chuitna Coal Project. This information was used to more fully understand and address the potential impacts to

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[90] Palmer, Margaret A., *et al.*, 327 Science 148 (2010).

[91] MacDonald, Glen M., *et al.*, 312 Science 385 (2006).

resources within the watershed from surface coal mining activities as they related to petitioners' allegations.

28. The following entities sought and were granted intervenor status under 11 AAC 90.705(e) in opposition to the petition:

(a) Alaska Mental Health Trust Land Office ("the Trust")
by Gregory Jones, Executive Director
718 L Street Suite 202
Anchorage, Alaska 99501

(b) PacRim Coal, LP ("PacRim")
by Joe Lucas
1007 W 3rd Ave, Suite 304
Anchorage, AK 99501

(c) Tyonek Native Cooperation ("TNC")
by Michaelene Stephan, President
1689 C Street, Suite 219
Anchorage, Alaska 99501

29. No person or entity sought intervenor status under 11 AAC 90.705(e) in support of the petition.

30. Intervenors PacRim, TNC and the Trust all strongly oppose an unsuitability designation based on the petition, and request that it be denied.

31. Both TNC and the Trust are substantial landowners in the petition area. They both submitted letters regarding their land interests and expressing their significant economic interests associated with the coal resources located within the petition area.[92] TNC specifically stated that the petition "seeks to end most development of the coal reserves in the region where TNC's lands are located and mostly TNC shareholders reside. Such a determination would frustrate TNC's efforts to increase local employment opportunities for its shareholders, who are the Native people and the majority of the population of the region. Developing the region's substantial coal resources is critical to economic growth."

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[92] *See,* e.g., TNC comment letter on the petition, dated January 5, 2011, at 4; Trust comment letter on the petition, dated January 5, 2011, at 2.

32. The Trust wrote: "The Trust is the predominant landowner within the Chuitna River Watershed, and lessor of the coal resources located within the areas subject to the petition. As the owner of the coal resources proposed for development pursuant to the existing coal leases held by PacRim Coal, LP (PRC) in the subject area, The Trust has a significant stake in the outcome of the petition proceeding. . . . To allow it [the petition] to go forward would significantly affect the ability of The Trust and its lesee to develop this resource and would result in a major negative economic impact to The Trust and its beneficiaries."

33. PacRim, a leaseholder, also submitted similar letters.[93]

34. On January 19, 2011, DNR held a public hearing in Kenai, Alaska. One hundred and fifty individuals signed in attendance, representing many Southcentral Alaska communities. Fifty-seven individuals provided oral comments, with some individuals getting up a second time during the course of the proceedings to provide additional comments. Nearly all of the comments were in support of the petition, with one individual speaking against the petition.

35. On February 19, 2011, DNR held another public hearing in the Village of Tyonek. This second hearing was primarily scheduled to allow oral comments from those people who were unable to attend the January 19th hearing in Kenai due to adverse weather in Tyonek. Approximately 60 individuals attended the hearing, including individuals from Anchorage. Approximately eighteen people provided comments at the hearing. Nearly all of the comments were in support of the petition.

36. Public Comments: DNR received a total of approximately 550 comment submittals (letters, comment forms, e-mails and other oral comments documented in the hearing transcripts) during the petition review. Comments addressed both the petition and permitting issues directly relating to PacRim's proposed Chuitna Coal Project. Of the approximately 550 comments submitted, approximately 525 came from private individuals. Fifteen resolutions were submitted by trade organizations (fishery councils). Seven comment letters were from non-Governmental organizations; one comment letter came from a community council, and three comment letters were from Native Corporations. Eight papers supporting the petition were submitted.

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[93] *See, e.g.*, PacRim's January 5 and 19, 2011, comment letters on the petition.

Approximately 30 comments favored dismissing the petition, while approximately 500 comments supported the petition. Comments received on the petition that were within the scope of and relevant to the petition process were considered in reviewing the petition and the formulation of this decision, and these comments and DNR's summary of comments and responses thereto are part of the agency's administrative record relative to the petition, and those written responses are expressly incorporated into this decision by reference.[94] Many of the comments focused on the Chuitna Coal Project -- both the project's location and PacRim's more recent efforts in seeking permits, environmental reviews and project development.

37. In accordance with AS 27.21.260(a), 11 AAC 90.701(a)(6), and 11 AAC 90.711, DNR has compiled information and data relating to the petition area and the petition's allegations (including detailed site-specific data required from companies as part of their permit applications) in order to develop this detailed statement and to render this decision. Detailed and relevant information regarding any petition area, including detailed soils and hydrologic data for the petition area is, as a practical matter, iterative and acquired over a period of several years. Among the key documents containing relevant, competent and scientifically sound data and information regarding the condition and environment of the Chuitna watershed are the 1990 FEIS, 1990 ROD, the 1987 Permitting Decision, and the Alaska Supreme Court *Gorsuch* decision.

Description of the Petition Area

38. The petition area is located in Southcentral Alaska, approximately 45 miles west of Anchorage (*see* Figure 1). The lands for which petitioners seek an unsuitability determination involve 3,560 acres (5.5 square miles), and cover stream reaches totaling approximately 118 miles (Chuitna watershed) (*see* Figures 2 and 3). As such, the streambeds and riparian areas do not occur in one or two confined areas on the west side of Cook Inlet, but rather meander and spread throughout the larger Chuitna watershed area. The Chuitna watershed is very large, encompassing approximately 95,600 acres (~150 square miles) and containing approximately 200 miles of streams. The main stem of the Chuitna River is approximately 25 miles in length, and courses from its headwaters at the base of the Alaska Range to the point

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[94] 11 AAC 90.711(a).

where it empties into Cook Inlet between the communities of Tyonek (population 171[95]) and Beluga (population 20[96]). The Chuitna watershed is situated within the Beluga Plateau and consists of streams cutting through the underlying Tertiary sedimentary strata creating moderate relief, with elevations ranging up to 1400 feet.

39. The Beluga Plateau is characterized as having typical glacial moraine-controlled topography of irregular ridges and depressions. To the northwest of the watershed are higher plateaus and foothills leading to the Alaska Range. Approximately 30 miles west is Mt. Spurr, a volcano active since at least the Tertiary period, and to the southwest, the estuarine and alluvial lowlands of the Chakachatna embayment, and Cook Inlet borders the area to the south. The plateau is described as a "sedimentary plateau mantled by Quaternary glacial deposits."[97]

40. The general geology of the watershed consists of semi-consolidated, coal-bearing sedimentary rocks of the Tyonek Formation, overlain by a mantle of younger, unconsolidated sediments that include glacial deposits and alluvium located along stream reaches.[98] The Tyonek Formation is a sequence of fluvial and deltaic silts, clays, and sands with occasional gravel beds and coal seams."[99] The formation has been fairly compacted after burial and is poorly cemented.[100]

41. The hydrostratigraphic units within the watershed[101] consist of recent alluvium, glacial deposits, coals of the Tyonek Formation and the Sub-Red 1 Sands

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[95] Dept. of Commerce Community Database, http://www.commerce.state.ak.us/dca/commdb/CF_BLOCK.cfm?Comm_Boro_Name=Tyonek&Data_Type=2010Census&submit2=Get+Data

[96] Dept. of Commerce Community Database Online at http://www.commerce.state.ak.us/dca/commdb/CF_BLOCK.cfm?Comm_Boro_Name=Beluga&Data_Type=2010Census&submit2=Get+Data

[97] PacRim Coal, L.P., *Chuitna Coal Project Geology Baseline Information* (August 2006), at 3; 27 p.

[98] Wahrhaftig, *et al.*, *Coal in Alaska*, in The Geology of Alaska, Plafker and Berg editor (1994), pp 937-78, at 953.

[99] 1987 Permitting Decision at 366.

[100] *Id.*

[101] The detailed studies and information of the hydrogeology and the hydrology for the watershed are limited, and much of the information used to process the 2010 petition is specifically focused upon the area within and around the proposed Chuitna Coal Project. Because similar lithologies are observed present throughout the watershed, this information has been used to provide a general description of the hydrology of the larger Chuitna

within the Tyonek Formation.[102] Alluvium consists of the sands and gravels within the course of present day stream channels. Glacial deposits consist of unconsolidated sediments characterized as unsorted mixtures of clay to boulder-sized material with lenticular bodies of well-sorted sands and gravels.[103] Coals consist of the Blue Coal, Red 3, Red 2, and Red 1 seams.[104] The interburden between the coal seams consists of interbedded and interfingering sequences of poorly consolidated and weakly cemented sandstones, siltstones, and mudstones.[105] This interburden material between coal seams and the overlying glacial deposit generally acts as an aquitard.[106] The Sub Red 1 aquifer is a fine to medium grained sandstone that underlies portions of the Chuitna watershed.[107] Coal seams within the Tyonek formation also occur below the Sub Red 1 sands.[108]

42. The near surface groundwater table generally mimics the surface topography, with flow towards streams and tributaries. This topography provides for surface-water collection and for ground-water recharge into the alluvium, coal seams, and overburden.[109] With these units, groundwater generally flows from higher elevations to lower elevations where it discharges as seeps or to the stream channels where the channel is below the local groundwater's piexometric surfaces.[110]

43. Recharge to the glacial deposits is by direct infiltration of precipitation (rain or snowmelt), infiltration from muskeg bogs in depressions, and from stream

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watershed, but it is important to note that certain areas within the watershed may be markedly different from the available information due to erosion of the Tyonek Formation and/or displacement of lithologies due to faulting.

[102] Chuitna Coal Project Hydrology Component Baseline Report Historical Data Summary, Riverside Technology Inc. 2007, at 5-5.

[103] *Id.*

[104] 1990 FEIS at 4-24.

[105] Chuitna Coal Project Hydrology Component Baseline Report Historical Data Summary, Riverside Technology Inc. 2007 at 5-5.

[106] *Id.* at 5-6.

[107] *Id.*

[108] Wahrhaftig, *et al.*, *Coal in Alaska, in The Geology of Alaska*, Plaker and Berg editor (1994), pp 937-78, at 953.

[109] 1987 Permitting Decision at 366-67.

[110] 1990 FEIS at 4-25 to 4-26.

channels that are above the water table.[111] Overall, the storage capacity of the glacial deposits is relatively large compared to the other units, and the glacial material is the main source of recharge to the underlying coal and sand aquifers of the Tyonek Formation.

44. The groundwater direction in the upper portions of the Tyonek Formation is predominantly from west to east.[112] Groundwater flow direction is controlled locally by the presence of faulting and folding within the formation.[113] Within the watershed, the coal seams and the Sub Red 1 sands may interact with streams where these units outcrop or subcrop in the streams or alluvium.[114] This interaction with the streams may be in the form of upwelling to the stream or local recharge from the stream, depending on local structures influencing groundwater flow.[115]

45. Recharge to the coal seams occurs by direct infiltration on outcrops, downward flow from saturated glacial deposits, and by diffuse leakage through confining interburden layers.[116] Within the glacial deposits there is a small amount of vertical leakage which contributes to the recharge of the interburden, coal seams, and the Sub Red 1 sands.[117] Recharge for the Sub Red 1 sands can be inferred from well data to occur predominately at higher elevations in the western most part of the watershed and beyond.[118]

46. Discharge of groundwater into streams as baseflow contributes up to 30 percent of the total stream flow in streams in the Chuitna watershed.[119] Contributions to baseflow from the glacial deposits and aquifers in the Tyonek

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[111] 1987 Permitting Decision at 367.

[112] 1990 FEIS at 4-26.

[113] *Id.* at 4-25.

[114] Chuitna Coal Project Hydrology Component Baseline Report Historical Data Summary, Riverside Technology Inc., 2007, at 5-4.

[115] *Id.*

[116] 1987 Permitting Decision at 367.

[117] Addendum D12-B Groundwater Model, Chuitna Coal Project, August 2007, at 6-7.

[118] Chuitna Coal Project Hydrology Component Baseline Report Historical Data Summary, Riverside Technology Inc. 2007, at 5-16.

[119] *Id.* at 3-27.

Formation are estimated to be approximately 89 percent and 11 percent, respectively.[120]

47. Poorly drained organic soils dominate much of the Chuitna Coal Project area, and materials underlying the surface consist primarily of alluvium, peat, glacial deposits and minor amounts of loess and volcanic ash.[121] The vegetation in the area is generally characterized as a combination of the following: closed spruce-hardwood forest, bottomland spruce-poplar forest, high brush communities and wet tundra.[122] Alder thickets and willow stands form a large portion of the Chuitna watershed.[123] No threatened or endangered plant species are known to exist in the area.[124] Of the wetland communities, open low shrub grass fen is the most common.[125]

48. A number of mammals exist in the region, most notably moose, beaver, and brown and black bear. Avian surveys have noted waterfowl, shorebirds, and raptors, though the habitat for birds is considered relatively poor in comparison to the Trading Bay and Susitna Flats State Game Refuges blanketing the area to the south and east, respectively.[126]

49. The waterbodies in the area support an array of primary, secondary, and tertiary producers (algae, invertebrates, and vertebrates).[127] These streams can be characterized as clear-water streams with moderate to high organic staining, stable channels and flows, good benthic productivity, and good to excellent fish habitat.[128]

50. Freshwater habitats in the project area support abundant resident and anadromous fish populations that have significant subsistence, commercial, and sport value. The entire main stem of the Chuitna River is accessible to adult anadromous

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120 1987 Permitting Decision at 386.

121 1990 FEIS at 4-7.

122 *Id.*

123 HDR, 2007 Baseline Report for Vegetation and Wetlands, at 7.

124 *Id.*

125 1990 FEIS at 4-7.

126 1990 FEIS at 4-14.

127 *Id.* at 4-10.

128 *Id.* at 4-41.

fish and is also utilized by juveniles for rearing and by resident fish populations.[129] By far the greatest fishery value of the Chuitna River system is represented by the production of Pacific salmon, especially Chinook, and coho.[130] Pink, chum, and red (sockeye) salmon are also present.[131] Important resident species include rainbow trout, arctic lamprey, slimy sculpin, coastrange sculpin, and threespine stickleback.[132] Pacific lamprey and Dolly Varden are also present within the Chuitna watershed.[133] Spawning activity was noted as far upstream as 11.4 km (7.2 mi) above the mouth of Stream 2003. In Lone Creek, pinks were seen as far up as 14.6 km (9.1 mi) above the mouth (at the confluence of Stream 2002).[134] Below Stream 2003, the Chuitna River was rated as very high in habitat values for Chinook and high for all other species.[135]

51. No threatened or endangered fish or wildlife species are known to be present within the petition area. The federal National Marine Fisheries Service (NMFS), with the National Oceanic and Atmospheric Administration (NOAA), has designated Cook Inlet beluga whales as depleted under the Marine Mammal Protection Act (MMPA), and as endangered under the Endangered Species Act (ESA). NMFS has also designated critical habitat for the Cook Inlet beluga whale within the waters of Cook Inlet.[136] The federally designated critical habitat is directly adjacent to the far east end of the petition area.

52. Recreational uses of the area include sport hunting, trapping, and fishing. The primary target for hunters in the area is moose. A limited number of brown and black bear are also taken.[137] In the fall and winter, waterfowl, spruce grouse, and ptarmigan are hunted. Trapping is limited to the fall and winter months,

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[129] *Id.* at 4-40.

[130] OASIS Environmental Inc., 2007 Freshwater Aquatic Biology Study Program, at xiv.

[131] *Id.*

[132] 1990 FEIS at 4-41.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 50.

[136] More information is provided at the following link:
http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/belugawhale.htm

[137] OASIS Environmental Inc., *Land Use Baseline Summary Report for the Chuitna Coal Project*, (October 2006).

and targets fur bearers such as beaver, river otter, lynx, marten, and wolverine.[138] Sport fishing in the Chuitna River is primarily for Chinook and coho salmon.[139]

53. The region was initially settled by the Dena'ina (Tanaina) people who lived along the coast near the present day settlement of Tyonek.[140] The Moquawkie Indian Reservation was established in 1915, and in 1970, the members elected to participate as a village corporation under the Alaska Native Claims Settlement Act (ANCSA).[141] Oil, gas, and coal exploration began in the area in the early 1960s, and the Chugach Electric Association's natural gas power plant at Beluga began operations in 1968.[142] In the mid-1970s, the state sold salvage rights to the beetle-killed spruce in the area and the resultant logging operations created a network of roads throughout the area.[143] A lumber mill was built at Tyonek in 1973, where lumber was chipped and exported. Logging occurred both south and north of the Chuitna River.[144]

54. Subsistence use of the petition area and the larger Chuitna watershed area through which the petition area meanders is similar to the recreational uses.[145] A report by the Alaska Department of Fish and Game on subsistence harvest in the Chuitna watershed area stated that "[s]almon made up the largest portion of harvests for home use in the study communities, but harvests of large land mammals, other fish, small game such as birds and furbearers, marine invertebrates, and wild plants

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138 *Id.*

139 *Id.*

140 *Id.* at 4-1.

141 *Id.*

142 *Id.*

143 *Id.* at 4-3.

144 1990 FEIS at 4-3 and 4-10. Environmental Research and Technology, Inc., *Diamond Chuitna Project, Mine Component Vegetation Baseline Report*, prepared for Diamond Shamrock-Chuitna Coal Joint Venture, Anchorage, AK, at 23 (February 1985).

145 Stanek, Ronald T., and Holen, Davin L., *Update of Wild Resource Harvest And Use Information For Tyonek and Beluga, Alaska*, Technical Paper 321, 2005/2006, 2006.

were also important. Marine mammal harvests were important in Tyonek."[146] Subsistence uses also include a collection of edible plants and berries.[147]

Potential Coal Resources in the Petition Area and the Effect on the Demand for and Supply of Alaska Coal

55. The petition area meanders throughout the Chuitna watershed. The watershed is within the Susitna/Beluga Coal Field. This coal field is one of the most significant coal fields in Alaska,[148] containing a resource estimated at 2.2 billion metric tonnes (MT) of low-sulfur coal.[149] The occurrence of coal seams in the west Cook Inlet area has been known for decades and large exposures of coal occur in the Chuitna River valley. These coal seams or coal measures are readily observed outcroppings in the Chuitna River itself and on banks and bluffs at many locations in the watershed. Evaluation of the coal resources in the area show that it has a low-sulfur content, and this resource would provide a cleaner burning fuel than many other coal resources currently in production in the United States.[150]

56. The lands in the Susitna/Beluga Coal Field are owned by various private and public entities, including the State of Alaska, the Mental Health Trust, Tyonek Native Corporation, Cook Inlet Region, Inc. (CIRI), and the Kenai Peninsula Borough.[151] Since statehood in 1959,[152] as well as following enactment of ANCSA in 1971,[153] many of the lands within the area were selected by the state and third parties

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[146] Stanek, Ronald T., and Holen, Davin L., *Update of Wild Resource Harvest And Use Information For Tyonek and Beluga, Alaska*, Technical Paper 321, 2005/2006, 2006.

[147] *Id.*

[148] In terms of identified resources, the Beluga coal field is slightly larger than the total of the coal fields of the Nenana Province near Healy, Alaska. Merritt, R.D. and Hawley, C.C., 1986, Map of Alaska coal resources, 1:2,500,000: Alaska DGGS Special Report No. 37, Table 2.

[149] DDS-77, Alaska Coal Geology, Resources, and Coalbed Methane Potential by Romeo M. Flores, Gary D. Stricker, and Scott A. Kinney, 2004.

[150] Acid Rain Program Benefits Exceeds Expectation, USEPA Clean Ai Market Programs: http://www.epa.gov/capandtrade/documents/benefits.pdf , and Considerations For Low Sulfur Coal Blending At B. L. England Station, Russell, *et al.*

[151] *See* Figure 1.

[152] 72 Stat. 339 Public Law 85-508 (1958).

[153] 43 U.S.C. § 1601, *et seq.*

based upon the coal resources present in the area.[154] For example, the core townships in the Chuitna watershed are original Mental Health Land Trust selections, filed in 1960 with patent received in 1966.[155] The Trust selections were made on known resource lands containing large deposits of coal, sand and gravel, heavily timbered areas, and areas with significant oil and gas potential. It was anticipated that resource development leases on the lands would provide rental and royalty income for the Trust over the long term.[156] DNR estimates that an aggregate of at least $127 million has been expended on coal exploration and potential development within the Chuitna watershed.

57. In the 1970s, exploration drilling was conducted by the Diamond Alaska Coal Company[157] and the Beluga Coal Company.[158] This exploration continued into the late 1980s, with over 200 holes being drilled and four test pits being mined in the watershed. The exploration permits associated with these activities (Beluga-Center Ridge Exploration Permit No. 01-84-795 and Chuitna Exploration Permit Nos. 01-85-795 and 02-83-795) have been maintained and renewed continuously since first being issued.

58. The coal leases currently issued to PacRim (ADLs 36911, 36913, 36914, 37002, and 59502) were originally issued as Coal Prospecting Permits (CPPs) in early 1968. These CPPs were converted to Coal Leases in May of 1972 and 1978. The coal leases issued to the Barrick/Beluga Coal Company (ADLs 33795, 36282, 37471, 56982, 79816, 56982, and 79816) were issued as CPPs in 1967 and 1968, and converted to Coal Leases over a period between 1971 and 1976.

59. The State of Alaska and the Kenai Peninsula Borough have long recognized the potential importance of this resource to the people of Alaska. Land use plans, specifically the 2000 Kenai Area Plan,[159] and -- although no longer controlling --

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[154] Alaska Department of Natural Resources, 1996, 1990s land selection project, final State of Alaska land selection from federal public domain lands, final report draft: ADNR Division of Land, Resource Assessment Section (May 29, 1996), 164p.

[155] DNR case file abstracts.

[156] Mental Health Annotated Chronology (updated July, 1991), at 1.

[157] PacRim comment letter January 19, 2010, at 3.

[158] Beluga (Center Ridge) Exploration Permit # 01-84-795.

[159] 2000 Kenai Area Plan at 3-296 to 3-298, 3-308, and 3-313.

the area's predecessor plan, the 1985 Susitna Area Plan for Management Unit 3,[160] identified and designated state land in the petition area for coal mineral development and activities. The planning processes for these two area plans were subject to extensive public review and comment. The Kenai Peninsula Borough's 2005 Comprehensive Plan and the 1988 Chuitna Area Resource Development Plan recognize coal as an economic resource within the Chuitna watershed.[161] The 2000 Kenai Area Plan states that these resources should "[c]ontribute to Alaska's economy by making subsurface resources available for development, which will provide job opportunities, stimulate economic growth, and establish a source of state revenues."[162]

60. Within the watershed there are currently two active coal exploration projects, PacRim's Chuitna Coal Project and Beluga Coal Company/Barrick's Beluga Coal Project. Coal reserves in the Chuitna River basin are estimated at 2.2 billion MT.[163] Estimated reserves within the Pac Rim Coal Leases are reported to be 771 million MT.[164] Areas leased as part of Beluga Coal Project are estimated to hold 600 million MT.[165] These project estimates do not include significant reserves located on CIRI lands and Trust lands not currently under lease within the watershed.

61. Work on the Diamond Shamrock Chuitna Coal Project (predecessor to PacRim's Chuitna Coal Project) intensified in the early to mid-1980s, with compilation of environmental baseline studies, preparation of mine engineering plans, market studies, and measurement of coal reserves, as well as applications for permits. In 1985, the Diamond Shamrock Chuitna Coal Project applied to the state for a permit to mine and DNR issued a permitting decision in 1987 approving the project, which then DNR Commissioner Judith Brady affirmed, with minor modifications, upon

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[160] 1985 Susitna Area Plan at 295-97.

[161] 2000 Kenai Area Plan at 3-296 to 3-298, 3-308, and 3-313.

[162] 2000 Kenai Area Plan at 2-34.

[163] DDS-77, Alaska Coal Geology, Resources, and Coalbed Methane Potential by Romeo M. Flores, Gary D. Stricker, and Scott A. Kinney, 2004.

[164] ALASKA'S MINERAL INDUSTRY 2007: A SUMMARY, D.J. Szumigala and R.A. Hughes, at 11.

[165] DDS-77, Alaska Coal Geology, Resources, and Coalbed Methane Potential by Romeo M. Flores, Gary D. Stricker, and Scott A. Kinney, 2004.

reconsideration in 1988.[166] The EPA prepared the 1990 FEIS and issued its 1990 ROD in accordance with the National Environmental Policy Act (NEPA),[167] along with a national pollutant discharge elimination system permit (NPDES or wastewater discharge permit)[168] for the project. ADF&G issued Fish Habitat Permits for in-stream mining in one of the area streams (Stream 2003) and approved the sedimentation pond construction in the same vicinity. Subsequently, Diamond Shamrock did not proceed with the project due to economic conditions.

62. More recently, during the early to mid-2000s, coal prices began to rise and PacRim has renewed efforts to develop the project as the Chuitna Coal Project. PacRim applied for an NPDES permit triggering the need for a Supplemental EIS (SEIS) in 2006 that is in ongoing preparation. PacRim is also preparing new mine applications for an updated and reconfigured operation.

63. DNR has determined that, from a logistical and operational standpoint, because of the area that petitioners have delineated for a lands unsuitable determination, designation of those lands as unsuitable for surface coal mining operations would significantly fragment the coal resource within the watershed. This conclusion is based on simple geometry; the mosaic that would be created by the petition and overlay the footprint of the proposed Chuitna coal mine would leave almost no place for such a mine to fit and produce at an economic level.[169] Thus, it is DNR's opinion that this designation and the resulting fragmentation of the coal resource would negatively impact the economics of coal development on undesignated lands within the watershed.

64. The demand for coal in the United States and foreign markets has steadily increased over the last 50 years and coal is expected to remain an important

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[166] Environmental groups administratively appealed DNR's 1987 Permitting Decision, which was ultimately litigated in state court, with Alaska Supreme Court issuing a decision in 1992. *Trustees for Alaska v. Gorsuch*, 835 P.2d 1239.

[167] 42 U.S.C. § 4321, *et seq.*

[168] 33 U.S.C. § 1342.

[169] *See, e.g.,* Figure 4 attached to this decision.

energy source into the future.[170] The U.S. Department of Energy has projected national coal consumption through 2035.[171] Even so, coal energy faces competition from other energy sources, such as natural gas and oil, as well as the evolving solar and wind energy sectors.[172] This competition will affect market demand for coal in domestic and foreign markets, but it will not eliminate coal as one of the world's principal energy resources.[173] The U.S. Energy Information Administration predicts that coal use will continue to grow, with most of it destined to generate electricity and the production of synthetic liquids.[174] The report predicts that coal will remain the largest source of electrical generation through 2035.[175]

65. In 2010, the United States produced approximately 984 million MT of coal.[176] Of that amount, approximately 74 million MT were exported to foreign markets.[177] In 2010, the primary destination for U.S. coal exports was the European market, with approximately 38 million MT delivered to various European countries.[178] The European market was followed by markets in Asia, North America, South America, and Africa, in order of decreasing imports of US coal.[179] Within the United States, the primary destination in 2010 of all coal produced is for electrical generation (885 MT); the other use is for steel production.[180]

66. Regarding the demand for, and supply of, Alaska coal, there is currently one active producer in Alaska, Usibelli Coal Mine in Healy, Alaska. In 2010, Usibelli

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[170] J. Fallows, *Dirty Coal, Clean Future*, The Atlantic Magazine (noting that coal produces approximately 46% of U.S. electricity), http://www.theatlantic.com/magazine/archive/2010/12/dirty-coal-clean-future/8307/ .

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] Annual Energy Outlook 2011, U.S. Energy Information Administration, April 2011, at 85.

[175] *Id.* at 49.

[176] U.S. Coal Summary Statistics; U.S. Energy Information Administration January 2011, http://www.eia.gov/cneaf/coal/quarterly/html/tes1p01p1.html .

[177] *Id.*

[178] U.S. Coal Supply and Demand: 2010 Year in Review by Watson, *et al.*

[179] *Id.*

[180] *Id.*

produced approximately two million MT of coal.[181] Approximately half of this was shipped to overseas markets including Chile, South Korea, and Japan. The rest of the coal produced by Usibelli is used at power plants located in Interior Alaska. The amount of coal used at six interior power plants is approximately a million tonnes a year and is not expected to increase in the near future.[182] The demand from overseas markets for Usibelli coal has been steadily increasing. Usibelli reported a 24% increase in exports over the same period in 2009.[183] Statewide, DNR has observed an increased interest by companies looking at Alaska coal for overseas markets as seen by an increase in requests to DNR for information on coal resources, particularly those in Southcentral Alaska. Also, "Alaskan coals have a lower sulfur content (averaging 0.3 percent) than most coals in the conterminous United States and are within or below minimum sulfur value mandated by the Clean Air Act amendments"[184], thus making Alaska coal an environmentally attractive fuel source.

67. There are two other projects approaching development and actively developing information to acquire permits. The first is the proposed Chuitna Coal Mine, through which some of the petition area crosses. At full production, this project is estimated to produce 12 million MT of coal per year, with an estimated mine life of 25 years.[185] Any coal produced from this project is expected to be exported to overseas markets. The other coal project in Southcentral Alaska that may start production in the relatively near future is Usibelli's Wishbone Hill Project. The potential minable reserves at this project are estimated at 14 million MT.[186] This

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[181] *Usibelli 2010 Coal Sales Set New Record* (North of 60 Mining News Dec 2010).

[182] This statement does not include the Healy Clean Coal Plant becoming operational in the next several years. Golden Valley Electric Association is currently exploring the possibility to bring this power plant online. If so, it would require approximately 200,000 tons of coal a year to produce 50 megawatts of power.

[183] *Usibelli 2010 Coal Sales Set New Record* (North of 60 Mining News Dec 2010).

[184] Flores, *et al.*, Alaska Coal Geology, Resources, and Coalbed Methane Potential (Nov. 2005), at USGS website: http://pubs.usgs.gov/dds/dds-077/ .

[185] Applicant's Proposed Project (as of April 2011), at 2, EPA's website for Proposed Chuitna Supplemental Environmental Impact Statement (SEIS), http://www.chuitnaseis.com/seis-process.html .

[186] Usibelli Coal Mine website: http://www.usibelli.com/Coal_leases.asp .

project is proposed to produce less than a million MT a year of coal for the export market.[187]

68. Regarding the economy of Alaska and its coal mining regions, the estimated value of Alaska coal in 2009 was approximately $65 million.[188] Based on the 2007-2009 values, the estimated value of coal produced in 2010 will be over $75 million.[189] The currently active Usibelli Coal Mine provides 130 full time jobs.[190] This number does not include additional jobs provided by support services and vendors. Using the most recently available information for the value of coal produced at Usibelli Coal Mine, the value of the coal produced at the proposed Chuitna coal project at full production would be approximately $430 million a year. According to the project description for the proposed Chuitna Coal mine, the project would employ up to 250 workers.[191]

Petitioners' Interests and Standing

69. Based on the petition, it appears that the Chuitna Citizens Coalition has provided sufficient information to support that at least three of its members -- Judy Heilman, Larry Heilman, and Terry Jorgensen -- have interests that could be adversely affected if surface coal mining operations occurred on some portion of the petition area, and that Chuitna Citizens Coalition, by virtue of these members' interests, therefore has standing to seek this merits review of the petition under AS 27.21.260. The Heilmans are residents of Beluga, one of two communities adjacent to the lowest reaches of the petition area,[192] and they use the petition area for various fish and game opportunities, though it is unclear where within the petition area they conduct these uses. Mr. Jorgenson routinely conducts commercial fishing activities near Ladd Landing in Cook Inlet, in a location approximately one mile from the mouth of the

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[187] Usibelli Coal Mine, Inc., 2011 Wishbone Hill Mine, information and frequently asked questions, website: http://www.usibelli.com/wishbone-brochure-web.pdf .

[188] Szumigala, D.J., Harbo, L.A., and Hughes, R., *Alaska's Mineral Industry 2009*, Alaska Division of Geological and Geophysical Surveys Special Report 64, at 28, 82p.

[189] *Id.*

[190] The Economic Benefits of Alaska Mining Industry January 2010, Alaska Miners Association.

[191] Applicant's Proposed Project (as of April 2011), at 6, http://www.chuitnaseis.com/seis-process.html .

[192] *See* Figures 1 and 2.

Chuitna River at its confluence with Cook Inlet. All three express general environmental concerns about potential impacts from coal mining operations in the watershed and how those operations might affect their interests, but they provide little other detail in describing their interests.[193]

70. It is not clear that these members' interests would be affected by mining activities that might occur throughout the entire petition area. Former Commissioner Irwin had urged petitioners in his decision on the 2007 Petition to provide "evidence that supports the scope of the lands requested for designation bears some reasonable correlation to the asserted allegations [and] petitioners' interests."[194] In his decision, Commissioner Irwin also cited and quoted a 2006 OSM decision involving a large petition area that echoed his concern:

> Even though there is no specific size limit for a petition area, a basic regulatory criterion is that the petitioner must present "allegations of fact and supporting evidence, *covering all lands in the petition area*, which tend to establish that the area is unsuitable for all or certain types of surface coal mining operations" [30 CFR 764.13(b)(1)(v)]. Therefore, the large size of the petition area means that it is unlikely that the evidence presented can relate to the criteria for designation throughout the entire petition area. This is consistent with OSM's comments in the 1983 preamble that "OSM has found that under the previous regulation, very large areas for which no evidence was presented were included in petitions (Alton petition, Tongue River petition), thus requiring significant efforts by OSM and other interested parties on issues of questionable merit," 48 FR 41329 (September 14, 1983).[195]

71. While there are concerns that petitioners still have not provided, with this new petition, the evidence to sustain a review of the entire area for which they seek designation, and that these specific members' interests are actually more

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[193] Petition at 12-13.

[194] July 16, 2007 decision on 2007 petition. *See also, id.*, at 6, 9, 10, 11, and 12 (stating, *e.g.*, that "petitioners have failed to sufficiently describe how any of the allegations and any particular type of coal mining activities that might occur on the petitioned lands would adversely affect petitioners' various interests"). And, as the Trust points out, a good deal of the land which the petition area traverses, such as Stream 2003 across the LMU-1 land leased by PacRim Coal, is 10 miles away from the Beluga community, and is "remote and inaccessible without written authority from TLO," and not located within any residential viewshed. Trust's January 5, 2011 comment letter on the petition, at 5.

[195] July 16, 2007 Decision, at 13-14, n. 11 (emphasis added), quoting OSM's January 13, 2006 Statement of Reasons for Determination of Completeness for the New River Lands for Mining Petition, at 12, in which OSM returned the petition to petitioners as incomplete and without merit. The OSM statement on the New River petition is available on OSM's website, http://www.osmre.gov/resources/newsroom/News/Archive/2006/011306.pdf .

narrowly concerned with the site-specific Chuitna Coal Project, this decision nonetheless reflects consideration of the entire petition area, and not just areas where coal mining might affect the community of Beluga and nearby lands, or the proposed Ladd Landing location (which proposed site is also actually outside the delineated petition area).

72. Cook Inlet Keeper, the second organizational petitioner, stated that it "combines advocacy, education, and science toward its mission to protect Alaska's Cook Inlet watershed and the life it sustains."[196] It cites the goals of preserving clean water, abundant fish and wildlife, and other policies "that are necessary to sustain healthy communities and strong local economies."[197] Cook Inlet Keeper asserts that it has members who live and undertake activities and work throughout Cook Inlet, and that it has members in the area that would be directly and adversely affected by mining activities in the Chuitna watershed.[198]

73. The statutory standing requirements require a sufficient description of how a petitioner's interests would be adversely affected with respect to both the potential coal mining activities, as well as to the lands for which designation of unsuitability is sought.[199] General assertions regarding an organization's goals or mission do not, alone, establish that a person (in the organization's case, a member) is adversely affected," nor does the general assertion that members are "directly affected," without more evidence demonstrating direct affects, necessarily support standing.[200]

74. While it is questionable whether Cook Inlet Keeper has provided adequate information to show its members' interests could be adversely affected by coal mining activities anywhere within the petition area, Chuitna Citizens Coalition has substantiated that at least three of its members' hold such interests, at least for portions of the petition area, and therefore the petition is subject to this merit review.

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196 Petition at 13.

197 *Id.*

198 *Id.*

199 AS 27.21.260(b).

200 *Sisters of Providence in Washington, Inc. v. Department of Health and Social Services*, 648 P.2d 970 (Alaska 1982).

Intervenors' Interests

75. The three intervenors on the petition hold unique interests, including significant property interests, which could be adversely affected if the petition area is designated unsuitable for surface coal mining.

76. In accordance with the land conveyance system established under ANCSA,[201] the surface estate of 47,000 acres in the Chuitna watershed have been conveyed to the local Village Corporation, TNC, and the subsurface estate for that acreage was conveyed to a Regional Corporation, in this instance CIRI. TNC asserts that responsible coal mining in the Chuitna watershed, throughout which the delineated petition area meanders, would bring economic development, infrastructure projects, and job opportunities for the benefit of its shareholders, approximately 200 of whom live in the Village of Tyonek. TNC describes that at present this is especially true with respect to PacRim's Chuitna Coal Project, and TNC has entered into contracts with PacRim which relate to development of the project. The same benefits for TNC shareholders could also be realized through contractual relationships if CIRI were to pursue coal mining in the future. In addition, were CIRI to develop coal resources in the Chuitna watershed, all shareholders of Alaska Native Corporations, including TNC shareholders, will receive dividends and other potential benefits through revenue-sharing required under ANCSA.[202] TNC also cites other non-coal economic development plans that it wishes to undertake, but those plans are predicated on development of coal mining activities in the petition area. If the petition area is designated unsuitable for surface coal mining, TNC expects the designation will frustrate or deprive TNC's ability to secure economic benefits for its shareholders.[203]

77. The Trust owns a large portion of the lands in the petition area, and efforts to obtain that ownership go back to 1960.[204] The Trust Land Office (TLO) manages Trust lands, and its "primary responsibility is to maximize revenue from Trust land over time and to protect and enhance the value of Trust land ... on behalf

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201 43 U.S.C. § 1613.

202 43 U.S.C. § 1606(i) and (j).

203 TNC's January 5, 2011 comment letter on the petition.

204 DNR Land Administration System case file abstracts.

of Trust beneficiaries."[205] The Trust is a state corporation that administers the Alaska Mental Health Trust, whose beneficiaries include individuals with mental illness, developmental disabilities, chronic alcoholism and Alzheimer's disease and related dementia.[206] The TLO is obliged to consider a number of trust management principals in managing the Trust's assets, including "maximization of long-term revenue from trust land," "protection and enhancement of the long-term productivity of trust land," and "encouragement of a diversity of revenue-producing uses of trust land."[207] Many of these lands are coal-bearing, and a significant subset of these lands is leased to PacRim Coal, including the Chuitna Coal Project area (*e.g.*, LMU-1). If coal production at the Chuitna Coal Project occurs, TLO estimates that it will provide significant revenue to the Trust over time, generating a 5% royalty that would equate to $300 million dollars over the 25-year projected life of the mine. If the petition area is designated unsuitable for surface coal mining and the effect of that designation deters coal mining at the Chuitna Coal Project, TLO will not be able to attain these royalties for mental health programs that support Trust beneficiaries.[208]

78. PacRim holds the leases for coal deposits in the petition area. These leases originated more than 30 years ago.[209] As noted earlier, many of the petition's allegations, supporting evidence, as well as public comment, focus on PacRim's efforts to develop the Chuitna Coal Project. PacRim has made a significant financial investment in its efforts to develop the project.[210] As PacRim notes, the predecessor Diamond Shamrock Chuitna Coal Project was designed and permitted in the late 1980s and early 1990s, but due to market conditions, the project did not go forward. PacRim has restarted efforts to obtain new permits for the Chuitna Coal Project, and is working with the federal agencies on preparation of a SEIS. PacRim's more recent

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[205] Trust's January 5, 2011 comment letter on the petition, at 2.

[206] Trust website, http://www.mhtrust.org/layouts/mhtrust/files/documents/about_aboutdocs/Trust_Overview_update2011.pdf .

[207] 11 AAC 90.020(c).

[208] *Id.*

[209] PacRim's January 19, 2011 comment letter on the petition, at 2.

[210] PacRim's January 5, 2011 comment letter on the petition, at 1.

efforts have been underway since 2005.[211] Thus, if the petition were granted, PacRim's property interests would be adversely impacted.

79. Attached Figure 2 delineates surface estate ownership within the Chuitna watershed. With the exception of TNC, all of the entities listed also own the subsurface estates, including the right to any coal resources and the financial returns from the extraction and sale of that coal. As noted earlier, CIRI owns the subsurface estate to TNC's lands. And, as Figure 2 shows, the petition area meanders throughout the larger Chuitna watershed area.

Consequences Associated with Granting, Granting in Part, or Denying the Requested Unsuitability Designation

80. In rendering a decision on a petition, a number of alternative outcomes can be reached, and with each come certain consequences. These outcomes include: designating the petition area in its entirety as unsuitable for surface coal mining operations; designating only a portion of the petition area as unsuitable; denying any of the petition area as unsuitable; or denying to designate any of the petition area as unsuitable but setting forth conditions to apply to future coal mine permitting. Each option is discussed below.

A. Consequences of Designating the Petition Area in its Entirety as Unsuitable for All Types of Surface Coal Mining Operations

81. In order to designate the petition area in its entirety, the Commissioner would have to find from a review and evaluation of the petition's allegations that the mandatory or discretionary criteria applicable to the allegations are supported by competent and scientifically sound data and information, and consider planning activities of federal, state, and local governments.[212] From an on-the-ground disturbance perspective, designation of the entire delineated petition area as unsuitable for all types of surface coal mining operations (including activities to extract the coal and to transport the coal from the deposit site to Cook Inlet shore facilities), as the petition requests, would essentially eliminate the potential future impacts of those operations to the petition area's current environmental condition.

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[211] PacRim's January 19, 2011 comment letter on the petition, at 2.

[212] AS 27.21.260(a) and AS 27.21.260(c).

82. However, the actual consequences of granting the requested designation would likely have farther-reaching geographical ramifications beyond the identified streambed and riparian land features delineated by petitioners in the petition. While coal exploration could still occur in the designated area,[213] and coal mining could theoretically occur outside the petition area within the Chuitna watershed, it is DNR's judgment that the designation would likely render most, if not all, coal mining in the watershed economically unfeasible to efficiently extract and transfer coal out of the watershed, given the fragmenting effect that the designation would have on the watershed's coal resources. This conclusion is based on simple geometry; the mosaic that would be created by the petition and (at the same scale) overlay the footprint of the proposed Chuitna coal mine, existing Usibelli coal mine, or the proposed Wishbone Hill mine, there is almost no place where such a mine could fit and produce at an economic level.

83. Thus, if the petition area were designated in its entirety for all types of surface coal mining operations, it is likely that the larger Chuitna watershed, *i.e.*, the petition area's streambeds and associated riparian areas, as well as other lands, vegetation, soils, hydrological regime, and the areas used by fish and wildlife surrounding the petition area, would not be impacted by coal mining development and operations. In the absence of feasible mining projects, and absent any changes to land management plans or uses, an area more expansive than the petition area -- quite likely the 96,000 acres of the Chuitna watershed -- would essentially remain as it is today. The area would only reflect impacts from those activities that variably have occurred in the area over the past several decades, activities which include coal exploration, recreational and subsistence uses, fishing and hunting, fulltime and seasonal residential use, episodic road building, natural gas exploration and production projects, and logging activities.[214]

84. The requested designation, if granted, and the ramifications perceived from that designation for surface coal mining in the greater Chuitna watershed, would mean that up to 2.2 billion MT of low sulfur, cleaner burning coal present in the

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[213] AS 27.21.260(h).

[214] OASIS Environmental Inc., *Land Use Baseline Summary Report for the Chuitna Coal Project*, (October 2006).

Chuitna watershed, could not be extracted and used for power generation. Land owners in the area would not be able to realize -- for themselves or for those members on whose behalf they manage the coal resource in trust -- financial gains and program benefits from the extraction and sale of that resource. No local employment (such as the potential 250 direct jobs relating to the Chuitna Coal Project) would be realized from surface coal mining activities. Future surface coal mining in the area could only be conducted if the unsuitability designation were terminated through a petition.[215] The possibility of terminating a designation means that the coal resource is not irreversibly lost.

85. Based on Department of Energy data, while national coal consumption should not, at least in the foreseeable future, be limited by supply constraints caused by a designation of the petition area, the low-sulfur content of the watershed's coal resources and its resultant cleaner-burning fuel emissions provide incentive for seeking to develop this coal resource.

B. Consequences of Designating Parts of the Petition Area as Unsuitable for All or Certain Types of Surface Coal Mining Operations

86. The petitioners have not requested, as an alternative, that only certain portions of the petition area be designated as unsuitable, nor have they specified a narrower range of types of surface coal mining operations that could be prohibited, while other operations could be permitted. Nonetheless, the Commissioner has the authority, based on a review of a petition, to designate a more discrete portion or portions of the petition area as unsuitable for surface coal mining operations, or to prohibit some rather than all types of surface coal mining activities if he or she finds such action is warranted, and in accordance with applicable statutory and regulatory criteria. In order to designate any portion of the petition area as unsuitable for surface coal mining operations, the Commissioner would have to find from a review and evaluation of the petition's allegations that the mandatory or discretionary criteria applicable to the allegations are supported by competent and scientifically sound data and information, and take into consideration planning activities of federal, state, and local governments.[216]

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[215] AS 27.21.260(b).

[216] AS 27.21.260(a) and AS 27.21.260(c).

87. For more discrete portions of the petition area that may, as a consequence of the evaluation, be designated by the Commissioner as unsuitable for all or certain types of surface coal mining, the on-the-ground consequences would generally be similar to those if the entire petition area were designated, except not on a watershed-wide scale. For example, if only streambeds and riparian areas within the LMU-1 lands were designated as unsuitable, while that, due to feasibility factors, would likely preclude any mining at all for the LMU-1 lands as part of the Chuitna Coal Project, it probably would not preclude surface coal mining operations elsewhere in the larger Chuitna watershed -- although those other operations may have fewer infrastructure options (*e.g.*, potential shared port facility) in the absence of the Chuitna Coal Project. It is likely that the partial designations would mean that streambeds, associated riparian areas, wetlands, vegetation, soils, hydrological regime, and the areas used by fish and wildlife through which the petition area crosses would not be impacted by coal mine development and operations.

88. Partial designation also would likely mean that coal resources for those designated areas would not be extracted or sold, due to feasibility factors. For example, if streambeds and riparian areas within the LMU-1 lands were designated, it is unlikely that it would be feasible to mine the LMU-1 area, and that would mean that at least 300 million MT of low sulfur, cleaner burning coal present in the area would not be extracted and used for power generation. The Trust land owner would not realize -- for the benefit of those beneficiaries on whose behalf the TLO manages the coal resource -- financial gains and mental health program improvement from the extraction and sale of that resource, and that unrealized gain, based on a 5% royalty, could equate to as much as $300 million dollars. Local employment anticipated from the potential 250 jobs relating to the Chuitna Coal Project would not be realized. Future surface coal mining in the designated portion could only be conducted if the unsuitability designation were terminated through a petition.[217] The possibility of terminating a designation means that the coal resource is not irreversibly lost.

89. Based on Department of Energy data, while national coal consumption should not, at least in the foreseeable future, be limited by supply constraints caused by a designation of a portion or portions of the petition area, the low-sulfur content of

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[217] AS 27.21.260(b).

the watershed's coal resources and its resultant cleaner-burning fuel emissions provide incentive for seeking to develop this coal resource.

C. Consequences of Denying Designation of the Petition Area in its Entirety

90. The Commissioner may find that there is insufficient evidence to support the allegations and deny the designation of the petition area in its entirety. Nevertheless, and this point must be emphasized, such denial would *not* constitute approval of surface coal mining operations in the petition area, and those approvals would still need to be gained through project-specific permitting processes conducted by multiple state and federal agencies.

91. Because denial to designate any portion of the petition area would mean that the area is not closed to potential future coal mining, this decision would leave open the possibility of coal development, including the realization of potential financial and employment associated with coal mining activities, as well as the opportunity to develop low sulfur coal as a fuel burning resource on national and international markets.

92. At the same time, however, potential impacts to fish and wildlife, subsistence or recreational uses, water resources, air quality, soils, cultural resources, and esthetics (visual and noise), associated with surface coal mining activities may occur or be observed. The significant scale of those impacts would depend on a variety of factors, including the following: permit conditions placed on any specific coal mining operation; the scale of the coal mining operations (its footprint/size) and the anticipated mine life; the postmining land use; the viewshed(s) involved; and whether subsistence or recreational users have access or authority to access lands in a given project area.

D. Consequences of Denying Designation of the Petition Area, But Setting Forth Certain Requirements to Apply to Future Permits

93. As a consequence of evaluating the petition and a determination not to designate a petitioned area as unsuitable, the Commissioner may determine that certain requirements should routinely apply to coal mining permits issued in the future in order to mitigate potential impacts of any project-specific operations to the

land and resources in the petition area.[218] However, the administrative record, including petitioner's allegations and evidence, would need to provide a basis for determining the need for any requirements that might be delineated in advance of project-specific permitting. Having evaluated the 2010 Petition and the administrative record, I do not find any evidence that would cause me to impose any mitigation requirements for coal mining operations in advance of project-specific permitting that may be proposed for the petition area.

The Petition's Allegations

Petitioners' Allegation I: For surface coal mining operations in the petition area, reclamation in accordance with ASCMCRA is not technologically feasible.

94. Under AS 27.21.260(c)(1), the Commissioner "shall designate an area as unsuitable for all or certain" coal mining activities "if the commissioner determines that reclamation in accordance with this chapter and regulations adopted under it is not technologically feasible." This provision is considered mandatory, that is, the Commissioner must designate lands as unsuitable if the Commissioner determines that reclamation in accordance with the applicable authorities is not technologically feasible.

95. At the outset of Allegation I, petitioners argue that reclamation is not technologically feasible under ASCMCRA. To support this argument, petitioners assert: (i) reclamation means that the disturbed areas are restored in a timely manner to conditions that support pre-mining land uses or "higher and better uses"; (ii) there is no "higher and better" use of this area than its pre-mining use as high quality fish and wildlife habitat; (iii) surface coal mining will "cause irreversible damage to fish and wildlife habitat;" (iv) reclamation cannot return the disturbed areas to pre-mining condition; and (v) therefore reclamation is not technologically feasible.[219] In essence, this is a syllogism. Coupled with this syllogism, petitioners argue that reclamation is not technologically feasible because mining operations cannot meet the state's "performance standards."[220] These arguments, which for reasons that are discussed in

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[218] 11 AAC 90.711(c).

[219] *Id.* at 14-16.

[220] *Id.* at 15-16.

detail below, misstate and misapply the applicable law, and are constant themes threaded throughout Allegation I.

96. From this mistaken premise, petitioners' Allegation I makes four specific arguments to support their contention that reclamation of impacts from surface coal mining activities in the petition area would not be technologically feasible. [221] These arguments are:

- construction and operation of a surface coal mine on the identified lands would irreparably harm the area's hydrologic balance;
- reclamation would not restore groundwater recharge capacity in the area;
- reclamation would not restore aquatic productivity to pre-mining levels; and
- surface coal mining in the identified lands cannot be designed and operated to minimize changes in water quality and quantity and hydrology enough to ensure no adverse effects to fish and wildlife habitat.

97. In reviewing petitioners' allegation that reclamation of impacts from surface coal mining activities in the petition area would not be technologically feasible, consideration was given to DNR's 1987 Permitting Decision on the Diamond Shamrock Chuitna Coal Project, the 1988 Administrative Appeal Decision affirming the 1987 Permitting Decision, EPA's 1990 FEIS and ROD on the same project, and the Alaska Supreme Court's *Gorsuch* decision on DNR's 1987 Permitting Decision. Additional background relative to these documents is required to understand why they are relevant to an analysis of petitioners' allegations that reclamation in the petition area in accordance with ASCMCRA is not technologically feasible. Significantly, these documents all contained findings, or affirmed findings, that reclamation in the petition area *would be* technologically feasible.

98. Based on the ASCMCRA permit application submitted on the Diamond Shamrock Chuitna Coal Project, DNR issued a permitting decision in 1987, approving the construction and operation of the proposed coal mine. The findings supporting DNR's approval are recorded in (1) a March 5, 1987, "Conditions of Decision and

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[221] Petition, Allegation I, subparts A-D, at 14-33.

Findings of Compliance for the Diamond Chuitna Mine" and (2) an August 21, 1987, "Decision to Issue a Surface Mining Permit Diamond Shamrock Chuitna Coal Joint Venture Diamond Chuitna Mine." These documents were later combined into a single document referenced herein as the "1987 Permitting Decision." While the petitioners and intervenors cite the permitting approval in general ways, DNR made a number of key findings in these documents regarding reclamation and hydrologic impacts:

- Diamond Shamrock's Wetland Revegetation Plan satisfactorily addressed DNR's initial concerns about whether wetland habitat could be restored. The agency noted, however, that the plan would be subject to continuing DNR review and that, if appropriate, changes could be made to the plan during actual mine operation.[222]
- The project was subject to several DNR stipulations relative to reclamation measures and activities that would be required contemporaneous with mining. These included measures for sediment and drainage control (including sediment control ponds),[223] and measures for protecting surface and groundwater hydrology (including additional hydrologic monitoring).[224]
- In accordance with AS 27.21.180(c)(2), Diamond Shamrock had "demonstrated that reclamation as required by AS 27.21 and 11 AAC 90 can be accomplished under the reclamation plan," subject to DNR-required modifications.[225]
- In accordance with AS 27.21.180(c)(3), "an assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance has been made and the proposed operation has been designed to

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[222] August 21, 1987 Decision (1987 Permitting Decision) on the Diamond Shamrock Chuitna Coal Project, issued by J.M. Brady, at 33-34.

[223] *Id.* at 40-42, and at 53-92 (consisting of an August 16, 1987 report prepared for DNR by Arctic Hydrologic Consultants that provides a technical review on the proposed Sediment and Drainage Control Plan).

[224] *Id.* at 44-48.

[225] *Id.* at 125, and at 326-361 (containing Section IV findings).

prevent material damage to the hydrologic balance outside the permit area."[226]

- Regarding stream restoration, DNR -- while acknowledging that "post-mining baseflows will take ten to fifteen years to reach pre-mining levels and that it was important that enhancement techniques be maintained until the pre-mining flows are reached" -- found that the application complied with 11 AAC 90.327 (Stream Channel Diversion) for the initial permit term.[227]

99. On June 28, 1988, then DNR Commissioner Judith Brady adopted, with minor modifications, the Hearing Officer's May 21, 1988, proposed decision (1988 Administrative Appeal Decision) on the consolidated administrative appeals brought on the 1987 Permitting Decision by Trustees for Alaska, the project proponent Diamond Shamrock, and others. The Hearing Officer's proposed decision recommended certain modifications to the permitting decision, including lengthening the permit term from five to ten years.[228] Based on the administrative record, the Hearing Officer also found that "Diamond's reclamation plan, including its wetlands restoration plan, is sufficient to restore the disturbed area to a condition that is capable of supporting fish and wildlife."[229] With this 1988 Administrative Appeal Decision, Commissioner Brady affirmed the 1987 Permitting Decision.

100. EPA also conducted an environmental review of the proposed coal mine through its 1990 FEIS and issued a 1990 ROD approving the proposal. Thereafter, EPA issued an NPDES permit for the mine's wastewater discharges. In the two-volume 1990 FEIS and the 1990 ROD, EPA considered several factors and made a number of key findings:

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[226] *Id.* at 125, and at 362-404 (containing Section V findings).

[227] *Id.* at 202.

[228] 1988 Administrative Appeal Decision at 5-7.

[229] *Id.* at 33-35.

- EPA considered numerous impacts the project potentially could have on the environment, including possible impacts to wetlands, subsistence, fish and wildlife, and associated habitat impacts.[230]
- EPA concluded that the area in which the project was to be located was not pristine. For example, it had been previously entered for logging and oil and gas purposes.[231]
- EPA stated the following regarding potential impacts to wetlands:

> The acidic, muskeg-type wetlands which are widely dispersed throughout the area are not highly productive and the net primary productivity of replacement communities could be as high or higher than the communities that now exist. Therefore, adverse impacts to primary wetland productivity would not be significant on a regional scale. Food webs would be interrupted in the immediate vicinity of pre-mining wetland areas, but such interruption would probably not be significant on a regional basis because of the isolated nature of most area wetlands and the large extent of similar wetlands outside the project area.[232]

- EPA noted that the wetlands within the Diamond Shamrock Chuitna Coal Project area were similar to wetlands found outside the project area (i.e., the Chuitna watershed/drainage).[233]
- In the ROD, EPA stated that the authorizing agencies, including EPA and DNR, anticipated that reclamation within the project area would be undertaken in accordance with specific requirements, and therefore feasible.[234]

101. After the Commissioner upheld DNR's permitting decision upon appeal, multiple plaintiffs, including Trustees for Alaska, appealed the Commissioner's

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[230] 1990 FEIS at 5-11, 5-16, and 5-75.

[231] *Id.* at 5-136.

[232] *Id.* at Appendix F, at 2-3.

[233] *Id.* at 3.

[234] 1990 ROD at 6, and at 9-12. *See also* 1990 FEIS, at 2-31 to 2-34.

decision.[235] With the exception of one modification, which required a separate ASCMCRA permit for an eleven mile access/haul road from the mine site, the superior court upheld the permitting decision. Upon Trustees' appeal of the superior court's decision, the Alaska Supreme Court -- while remanding the decision to DNR for further consideration of cumulative effects of activities associated with the permit, and reconsideration of the reclamation bond amount -- addressed Trustees' contention that DNR erred in approving the proposed plan for restoration of ecological functions and revegetation. Among other things, the Court held:

- that DNR had found that the proposed reclamation and wetlands restoration plans for the leased lands were "sufficient to restore the disturbed area to a condition capable of supporting fish and wildlife."[236]
- that DNR acted reasonably in accepting the restoration plan, because the plan

> describes how wildlife habitat will be recreated by constructing peat-filled depressions which will be planted with various plant species. In addition, three sediment ponds will be inoculated with plant and insect life forms, and seedlings will be planted to provide a vegetation canopy layer for the benefit of wildlife.[237]

102. The petitioners fail to provide convincing evidence with their petition to suggest that anything has changed since DNR's 1987 Permitting Decision determining that the restoration and reclamation plans were sufficient (including to restore disturbed fish and wildlife habitats), EPA's 1990 findings that reclamation was feasible, and the *Gorsuch* decision, in which the Alaska Supreme Court upheld DNR's decision concerning the feasibility of reclamation. Nor is there any evidence in the administrative record, or in the petition, that justifies issuing a finding that contradicts these earlier decisions.

103. The findings and other information contained in the foregoing documents provide an important backdrop for the following discussion. Allegation I relies on a number of faulty premises, speculative information, misinterpretation of regulatory

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[235] *Gorsuch*, 835 P.2d at 1239.

[236] *Id.* at 1249.

[237] *Id.*

requirements and performance standards, a failure to assume that contemporary coal mining practices will be followed, as well as selective citation to information that, as a whole, does not support the contention that reclamation in accordance with ASCMCRA is not technologically feasible. Indeed, with respect to each of the petitioners' allegations (I, II, III, and IV), rather than assuming that contemporary mining practices will be followed and that any approved site-specific project must show it will comply with performance standards or the project will not be approved, the petitioners essentially assume that these practices and standards will *not* be met. That is not the basis upon which an unsuitability petition is reviewed and decided.[238]

A. Petitioner's overarching assertion that reclamation requires restoration of the petition area to the premining condition and that there is no higher and better use of the area than for fish and wildlife habitat.

104. Petitioners' overarching assumption in Allegation I is that the petition area must be returned to its premining condition and that "there is no higher and better use" of anadromous water bodies and the riparian areas than to support fish and wildlife habitat.[239] This allegation calls into play the state's postmining land use regulation at 11 AAC 90.481, which states, in relevant part, the following:

> (a) All disturbed areas must be restored in a timely manner to conditions that are capable of supporting
>
> (1) the uses which they were capable of supporting before any mining; or
>
> (2) higher or better uses achievable under the provisions of this section.

105. Petitioners are mistaken that the petition area must be returned to its pre-mining condition for at least five primary reasons. First, as an initial matter, embedded in SMCRA and ASCMCRA is the recognition that coal mining will

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[238] 11 AAC 90.701(a)(5)(a petition must assume "that contemporary mining practices required under AS 27.21 and this chapter would be followed if the area were mined"). *See also* AS 27.21.210 (stating that all permits issued under the Act shall require that surface coal mining and reclamation must comply with environmental performance standards). OSM has also stated that a petitioner "must assume that contemporary mining practices required under the applicable regulatory program will be followed." 48 Fed. Reg. 41312, 41328-29 (Sept. 14, 1983). *Accord In re Permanent Surface Mining Regulation Litigation*, 620 F. Supp. 1519 (D.D.C. 1985).

[239] Petition at 15.

significantly impact an area.[240] Thus, state and federal law authorize surface coal mining despite its effects on the environment.

106. Second, petitioners' argument related to the appropriate postmining land use is premature. Under state law, determining the "higher or better" postmining use will be addressed during the permitting phase when the operator must present a postmining reclamation plan, which "must contain a detailed description of the proposed use, following reclamation, of the land to be affected by surface operations or facilities."[241]

107. Third, a petition must assume that "that contemporary mining practices required under AS 27.21 and this chapter would be followed if the area were mined."[242] DNR's regulation is consistent with federal law, where the OSM has also stated that a petitioner "must assume that contemporary mining practices required under the applicable regulatory program will be followed."[243] Yet petitioners turn this standards on its head -- i.e., Trustees argues that "in order for reclamation in accordance with SMCRA and ASCMCRA to be considered feasible, it must meet the performance standards that the DNR has established to . . . . Surface coal mining and reclamation on lands within the Chuit River watershed . . . would be incapable of meeting a number of these performance standards[.]"[244] Consequently, petitioners, by assuming that any mine in the Chuitna watershed will not be able to comply with DNR's performance standards, have misconstrued the petition process.

108. Fourth, petitioners fail to acknowledge that a mine operator will not receive the requisite permits if it cannot satisfy the performance standards set out in 11 AAC 90.481. Thus, to the extent that an operator cannot meet the performance standard cited by petitioners (11 AAC 90.481), it will not receive the requisite permits.

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240 30 U.S.C. § 1202; AS 27.21.010. This issue is discussed in more detail below.

241 11 AAC 90.087.

242 11 AAC 90.701(a)(5).

243 48 Fed. Reg. 41312, 41328-29 (Sept. 14, 1983).

244 Petition at 16.

109. And fifth, petitioners assume inaccurately that an area's premining uses must dictate the appropriate postmining uses.[245] But one cannot simply assume that the premining land use is the "higher and better use" for an area. Instead, as discussed below, the landowner and the regulatory authorities determine the appropriate postmining land use.

110. More specifically, petitioners' arguments related to the "higher and better use" of these lands must be considered in connection with several other applicable provisions, including 11 AAC 90.481(c) and 11 AAC 90.087, area management plans,[246] as well as in consultation with the affected landowner.

111. State regulation defines "higher and better uses" as those "postmining land uses that have a higher value or other benefit to the landowner or community than the premining land use."[247] Determination of the postmining land use may be generally identified by the land owner prior to any coal mining activity, and then with more specificity in the permitting phase. Thus, there is no presumption, as petitioners assert, that the "higher and better" postmining land use for the petition area is the support of fish and wildlife habitat, although those uses would certainly be considered at the appropriate time. And under 11 AAC 90.481(c), when considering higher and better use, the Commissioner would consider measures to prevent or mitigate adverse effects on fish, wildlife, and related environmental values and threatened or endangered plants as identified and incorporated into the postmining land use plan, if appropriate.

112. As noted previously, ownership of land within the petition area and the larger Chuitna watershed is mixed, and consists of the following: State lands, private lands (with the surface estate belonging to Tyonek Native Corporation), CIRI lands, Kenai Peninsula Borough lands, Trust lands (managed by the Trust Land Office (TLO)), and parcels owned by private individuals. For those lands lying in the petition area, as well as for any areas in the larger Chuitna watershed, "higher and better uses" of these lands would be determined after consultation with the relevant land holders during the permitting phase of a specific coal mining project.

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[245] Petition at 15.

[246] AS 27.21.260(a)(1).

[247] 11 AAC 90.911(50).

113. In its January 5, 2011, letter commenting on the petition, the TLO correctly points out some of the regulatory requirements applied in considering postmining uses:

> While fish and wildlife habitat may be an ancillary use of this land, the TLO is obligated to consider any viable use of this land in the future that could be (sic) produce benefits to The Trust and its beneficiaries. The TLO fully anticipates having input into the reclamation plan to enhance the value of this land for future uses. The provisions of 11 AAC 90.087 and 11 AAC 90.481 address post mining land use and provide that consideration be given to making the proposed operation consistent with surface owner plans and creating conditions that are capable of supporting higher and better land uses.[248]

Thus, for the Chuitna Coal Project, TLO is the landowner that has a major stake in determining, in consultation with regulatory authorities, the postmining land use for this specific project's affected area.

114. Moreover, as required by AS 27.21.260(a)(1), reviews of available land planning documents for the Chuitna watershed, through which the petition area meanders, have been conducted. Area plans provide a useful tool to guide permitting decisions both before and after mining.

115. The primary guide for state decisions on state land in the petition area is the 2000 Kenai Area Plan. This plan specifically excludes federal, borough, private, Native Corporation, and Trust Lands.[249] Prior to the transfer of landownership of the PacRim Chuitna coal leases to the Trust, those leased lands were owned by the State. Coal development was one of the primary uses designated for the area under both the 2000 Kenai Area Plan (specifically indentifying the "Chuitna Area Coal Leases")[250] and the previously applicable 1985 Susitna Area Plan.[251] The Kenai Area Plan anticipates mining of fish streams and fish habitat by noting that when DNR issues a permit for mining in or adjacent to a fish stream, the activity will be conditioned by the permit to be protective of fish, and noting that mining in fish streams requires permits from DEC and ADF&G.[252] The 2000 Kenai Area Plan also states that the postmining land

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[248] January 5, 2011 Trust letter at 4.

[249] 2000 Kenai Area Plan at 1-9.

[250] *Id.* at 3-308.

[251] 1985 Susitna Area Plan at 295-96.

[252] 2000 Kenai Area Plan at 2-34.

use is to "provide high value habitat for moose and provide water quality for downstream fisheries."[253] With the transfer of ownership of the lands, identification of postmining land uses are subject to the Trust's discretion.[254]

116. Review of the Kenai Peninsula Borough's 2005 Comprehensive Plan shows that it recognizes coal as an economic resource within the borough, but does not specifically discuss land use plans within the watershed. The 1988 Chuitna Area Resource Development Plan discusses the borough's "keen interest in potential large scale development of coal"[255] in the Chuitna watershed, including roads, conveyors, and ports, but does not discuss postmining land use. Instead, it relies on the State's planning documents to guide land use. The remainder of the land is either Native Corporation or Mental Health Trust lands which are guided by their own planning and development strategies, and these landowners support responsible coal mining operations.

117. For the foregoing reasons, the petitioners' allegation rests on a misinterpretation of the regulatory requirements and the misapplication of these requirements. The above discussion shows that the determination of the postmining land use is at the discretion of the landowner, with some input and approval necessary by the regulatory authority, and that, as a practical matter, postmining land uses are more formally fashioned during the permitting phase of a specific proposed coal mining operation. Therefore, declaring that there can only be one higher and better use at this stage is premature.

B. Petitioners' allegation that construction and operation of a surface coal mine in the petition area would irreparably harm the area's hydrological balance.

118. Petitioners' contend that surface coal mining would irreparably harm the area's hydrological balance, destroying streams, riparian areas and wetlands in the

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[253] *Id.* at 3-307.

[254] Transfer of ownership of lands within the petition area, including the PacRim leased lands, to the Trust, had actually been contemplated since 1956, but delayed due to litigation. Transfer of the lands was finalized in 2010. Case abstracts for ADLs 36911, 36913, 36914, 37002, and 59502.

[255] Kenai Peninsula Borough's 2005 Comprehensive Plan at I-1.

Chuitna watershed, and dramatically affecting the local hydrology.[256] To support this argument, petitioners cite one performance standards (11 AAC 90.321) that protects the area's hydrologic balance and claim that a coal mine in the petition area cannot meet this standard.

119. The petitioners' argument is unavailing because they (i) take the apparent position that coal mining operations can have no adverse impacts on areas where mining activities occur; (ii) improperly assume that performance standards will not be followed; and (iii) ignore several other performance standards that would apply to any coal mining operations in the area to protect the Chuitna watershed's hydrological balance.[257]

120. Both Congress and the Alaska Legislature, in respectively enacting SMCRA and ASCMCRA, anticipated that adverse impacts will necessarily occur during construction and coal mining. Indeed, the provisions contained in SMCRA and ASCMCRA recognize that coal mining will have impacts to surface and groundwater within the disturbed mining area and that a balancing of resource development and environmental protection is necessary.[258] The legislative history and discussion related to hydrologic balance assumes that there will be significant impacts within the mine area itself: "The total prevention of adverse hydrologic effects from mining is impossible and thus the bill sets attainable standards to protect the hydrologic balance of impacted areas within the limits of feasibility."[259] Put simply, the standard for a lands unsuitable petition and a mandatory designation is not whether operations will have substantial impacts as petitioners allege at times, but rather whether there will be irreparable harm that makes reclamation in accordance with ASCMCRA technologically infeasible.

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[256] Petition at 16-29.

[257] These include the following regulations set out in Article 11, Chapter 90, of the Alaska Administrative Code: .311, .313, and .315, regarding removal, conservation and storage, and reapplication of top soil; .343, .085, regarding preventative practices that must be taken to prevent long-term adverse changes to area hydrology; .451, .453, .455, and .457 regarding measures for revegetation during reclamation.

[258] 30 U.S.C. § 1202; AS 27.21.010.

[259] H.R. REP. No. 218, 95th Cong. 1st Sess. 109 (H.R. 2 April 22, 1977). *Elements of mine regulation program; Mining impacts on hydrologic balance*, OSMRE COALEX Report at 235.

121. To reduce, reclaim, and avoid coal mining's adverse impacts, state law imposes performance standards and reclamation requirements. For purposes of the petition, we must assume the performance standards will be followed.[260] 11 AAC 90.321 (Hydrologic Balance) provides performance standards that, among other things, require that "[o]perations must be planned and conducted to prevent long-term adverse changes in the hydrologic balance *in both the permit area and adjacent areas.*"[261] The regulation also provides that "[c]hanges in water quality and quantity, in the depth and flow patterns of ground water, and in the location of surface and subsurface drainage channels must be minimized so that the approved postmining land use of the permit area is not adversely affected."[262] Further, an "operator shall comply with all applicable federal and state water quality statutes and regulations."[263] A recurring flaw in the petitioners' argument is the assumption that a permitted project would not be held to these performance standards.[264] This position directly conflicts with what the law requires, which is the presumption "that contemporary mining practices required under AS 27.21 and this chapter would be followed if the area were mined."[265]

122. The petition correctly states that reclamation consists of those actions taken to restore mined land as required by AS 27.21 and 11 AAC 90. But petitioners presume that restoration must be to the premining use. As discussed above, such a standard is not supported by statute or regulation.

123. The petitioners state that some of the wetland types within the Chuitna watershed (not just the petition area), specifically fen and bog wetlands, are difficult, if not impossible, to restore.[266] The argument that there should be no impacts to wetlands or that the same type of wetland needs to be reclaimed is not supported by

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[260] AS 27.21.210; 11 AAC 90.701(a)(5).

[261] 11 AAC 90.321(a) (emphasis added).

[262] 11 AAC 90.321(b).

[263] 11 AAC 90.321(c).

[264] *See, e.g.*, Petition at 16.

[265] 11 AAC 90.701(a)(5). *See also* AS 27.21.210 (stating that all permits issued under the Act shall require that surface coal mining and reclamation must comply with environmental performance standards).

[266] Petition at 20-25.

the applicable law. Instead, the reestablishment of wetlands is based on the approved postmining land use and any proposed project meeting the requirements of 11 AAC 90.337 – 317 dealing with topsoil, 11 AAC 90.321 dealing with the protection of hydrologic balance, 11 AAC 90.451 dealing with revegetation, and 11 AAC 90.451 dealing with standards for assessing revegetation success.

124. Petitioners' argument also overlooks the fact that state and federal agencies have made findings that reclamation in this area is technologically feasible. In the 1990 FEIS on the Diamond Shamrock Chuitna Coal Project, EPA stated that "[r]eclamation of the mine area would at least partly reverse the ground-water impacts from mining. After removal of the surface-water diversion systems, surface water together with incident precipitation would recharge the underlying spoil materials and with time result in the reestablishment of a ground-water regime similar but not identical to the premining condition."[267] DNR also found in its 1987 Permitting Decision that reclamation of the activities proposed for the Diamond-Shamrock Chuitna Coal Project was technologically feasible and that the Reclamation Plan met the requirements of 11 AAC 90.[268] Thus, the findings in both the 1990 FEIS and DNR's 1987 Permitting Decision contradict the petitioners' allegation that reclamation, including of wetlands, is not feasible.

125. Nonetheless, the petitioners selectively cite portions of the 1990 FEIS to assert that reclamation of wetlands and riparian areas is not technologically feasible. The petitioners cite statements that, at first blush, appear to support their allegations, but omit other statements that discuss potential impacts and proposed reclamation that ultimately negate the contention that reclamation of coal mining activities is not technologically feasible. For example, petitioners quote the following from the 1990 FEIS regarding impacts to groundwater: "Impacts to groundwater regime as a result of mining operations would be substantial and would affect recharge and discharge relationships; quantity, quality, and direction of groundwater flows; and quantity and quality of surface water."[269] However, petitioners fail to mention two other key

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[267] 1990 FEIS at 5-20.

[268] 1987 Permitting Decision at 125.

[269] 2010 Petition at 25 (quoting 1990 FEIS at 5-16).

observations EPA reached: "These impacts are unavoidable; however, with proper planning, the impacts can be minimized."[270]

126. Petitioners also selectively cite the 1990 FEIS to support their contention that reclamation is not technologically feasible:

> Because of the long period required for soil formation, soils in the Diamond Chuitna mine area are highly susceptible to irreversible, disruptive impacts from surface mining. A major long-term disturbance would result from the removal of soils and overburden to reach the coal seams.[271]

127. Perhaps more importantly, petitioners omit what EPA concluded regarding feasibility of reclamation: "The initial construction impact to soils would be eventually mitigated by implementation of the reclamation plan and successful revegetation."[272]

128. In addition, EPA concluded in the 1990 FEIS that the reclamation plan was consistent with legal requirements:

> The project reclamation plan, as required by the State Surface Coal Mining Permit, includes a plan for the restoration of wetlands in the mining area. This plan provides for the enhancement of wetlands development throughout the reclaimed mine area, and the rehabilitation of certain sediment control ponds. The permit also requires construction of a minimum of four 1/2 acre coho salmon rearing ponds. These requirements are subject to review and possible revisions as necessary with the goal of achieving the desired restoration of wetland functions. The wetland restoration measures would reduce net wetland losses expected as a result of the project. Post reclamation wildlife habitat value could be less than premining conditions due to reductions in habitat diversity now contributed by the interspersed wetland/upland areas; however, this diversity is expected to re-establish over the long-term. An extensive sediment pond system is planned, which is expected to reduce the hydrologic and water quality impacts associated with the direct loss of wetlands during the period of mining, as reclamation proceeds.[273]

129. Significantly, in 1987, DNR, in its review of the Diamond Shamrock surface coal mining permit application for the Chuitna Coal project, found that the mining and reclamation plans met the requirements of 11 AAC 90.083, 11 AAC

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[270] 1990 FEIS at 5-16.

[271] 1990 FEIS at 5-4.

[272] *Id.*

[273] 1990 FEIS, App. F, at 2-3.

90.085, 11 AAC 90.321, 11 AAC 90.323, and 11 AAC 90.335 - 90.353, and were protective of the hydrologic balance within the proposed mining area.[274]

130. In 1990, while remanding the permitting decision on other grounds, the Alaska Supreme Court upheld DNR's decision concerning reclamation.[275] The Supreme Court stated:

> In our view, DNR's acceptance of the plan meets the reasonable basis standard. The plan describes how wildlife habitat will be recreated by constructing peat-filled depressions which will be replanted with various plant species. In addition, three sediment ponds will be inoculated with plant and insect life forms, and seedlings will be planted to provide a vegetation canopy layer for the benefit of wildlife. In light of the complexity of the subject matter, we will defer to DNR's conclusion that these measures will be adequate to restore wildlife habitat.[276]

131. The petitioners fail to provide compelling evidence with their petition to suggest that there has been significant changes since DNR's 1987 Permitting Decision determining that the restoration and reclamation plans were sufficient (including to restore disturbed fish and wildlife habitats), EPA's 1990 findings that reclamation was feasible, and the proceedings in *Trustees for Alaska v. Gorsuch,* in which the Alaska Supreme Court upheld DNR's decision concerning the feasibility of reclamation. Wetlands of a similar type occur throughout the petition area. While the petitioners cite several passages from the 1990 EIS that discuss wetlands in the area and their functions, this information does not contradict DNR's earlier findings with respect to reclamation and restoration of wetlands and fish and wildlife habitat. Moreover, even though EPA found that there would be significant wetland impacts during operations in the Chuitna Coal project area, EPA made no finding that reclamation was not technologically feasible.

132. Not only have petitioners' argument been addressed in previous decisions, but the petitioners continue to rely on information that they submitted with their 2007 petition and which Commissioner Irwin found either did not provide competent evidence to support their allegations, or which, when inspected more

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[274] 1987 Permitting Decision at 125, 283, and 383.

[275] *Gorsuch*, 835 P.2d 1239.

[276] *Id.* at 1249.

closely, contradicted petitioners' allegations.[277] The petitioners did not seek further review of these final findings, and dismissed with prejudice their lawsuit on Commissioner Irwin's July 16, 2007 decision and corresponding February 14, 2008 decision on reconsideration.[278]

133. Additionally, the petitioners continue to rely on a 1998 report by Cooper, *et al.*, *Hydrologic Restoration of a Fen in Rocky Mountain National Park, Colorado, USA*[279] -- regarding 1990 wetland restoration efforts for fen wetlands systems in the Rocky Mountains, which does not support their allegations. The efforts documented in that paper were devoted to restoring fen systems for lands disturbed by agricultural activities that took place roughly one hundred years ago and relating to activities not likely subject to the regulations and practices used in contemporary agricultural activities, much less contemporary surface coal mining activities.[280] These lands are also located in a much more arid environment than the petition lands in the Chuitna watershed. Additionally, at least one conclusion in the report appears to contradict the petitioners' claim that fen systems cannot be restored:

> The ditch was blocked in an attempt to restore the hydrologic regime in the central and southern portions of the fen. Water-level data from three years prior to the restoration and four years after restoration show that blocking the ditch successfully restored surface sheet flow, high later summer water levels, and anaerobic soil conditions.[281]

134. The other reports that the petitioners continue to rely on that were included with the 2007 Petition deal with studies of restoration efforts for sphagnum moss in Quebec,[282] a wetlands restoration project in Hungary in a primarily agricultural and urban development area,[283] as well as a report of modeling approaches for the "prediction of effective water and lands use management aimed at

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[277] July 16, 2007 Decision on 2007 Petition at 8-9.

[278] For this reason, these arguments are likely barred by res judicata and collateral estoppel.

[279] 18 Wetlands 3 (1998), and Exhibit 6 to the current petition, and Exhibit 4 to the 2007 petition.

[280] Petition, Exhibit 6 at 336-37.

[281] 2010 Petition, Exhibit 6 at 335.

[282] 2010 Petition, Exhibit 15, Shantz, *et al.*, *Hydrological changes following restoration of the Bois-des-Bel Peatland, Quebec, 1991-2002*, 331 Journal of Hydrology 543 (2006).

[283] 2010 Petition, Exhibit 9, Middleton, *et al.*, *Fen Management and Research Perspectives: An Overview, in Wetlands: Functioning, Biodiversity Conservation, and Restoration* 191 (2006).

mire conservation and restoration in primarily Western Siberia.[284] These studies discuss the difficulties of restoring wetlands but do not provide relevant data and information to support petitioners' argument in Allegation I that restoring wetlands, particularly fens, is not technologically feasible.

135. Petitioners also continue to rely on another report they assert shows that fens and bogs cannot be restored, *Compensating for Wetland Losses Under the Clean Water Act,*[285] but the excerpts from the report do not discuss any restoration measures that might be applicable to further aid analysis of the validity of this assertion, including contemporary coal mining practices and performance standards. The primary purpose of the report is to provide guidance to the U.S. Army Corps of Engineers and EPA in making permitting decisions and to develop mitigation strategies that the agencies can use in their decisions under section 404 of the Clean Water Act.[286] While the report is cited in the petition to support the claim that any proposed fen/bog restoration is not technologically feasible, petitioners' claims are contradicted by other competent and scientifically sound information discussed in detail below, which demonstrates that, while it may be difficult, it is possible to restore fens.

136. In short, as Commissioner Irwin previously found, none of these reports deal with disturbances caused by surface coal mines or mining in general, nor do they assess the effectiveness of contemporary coal mining practices and performance standards applicable to both operational and reclamation phases of surface coal mining activities, thus rendering the reports not competent for purposes of review to determine lands unsuitable for surface coal mining operations. Moreover, these reports do not show that reclamation in accordance with ASCMCRA of lands in the petition area disturbed by construction and operation of surface coal mining operations would not be technologically feasible.

137. In addition to the foregoing decisions that have found the hydrological balance and wetlands can be restored, there is evidence of contemporary techniques

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[284] 2010 Petition, Exhibit 5, Bleuten, *et al.*, *Hydrological Processes, Nutrient Flows and Patterns of Fens and Bogs,* Wetlands and Resource Management 190 (2006).

[285] 2010 Petition at 23-24, discussing Exhibit 10, a National Research Council report entitled *Compensating For Wetland Losses Under The Clean Water Act,* at 2 (2001).

[286] 33 U.S.C. § 1344.

that can be used to restore wetlands after mining. For example, in its intervention on the petition, PacRim notes other contemporary coal mining practices that are considered to promote reclamation success, including:

- Modern mining operations are conducted and reclaimed in a manner addressing sequential changes in the hydrologic control infrastructure, which minimizes impacts during mining and shortens the period of hydrologic restoration;
- Modern mine operations also incorporate material handling plans, which often include segregation of materials according to specific properties and reclamation or hydrologic benefits (i.e., topsoil, alluvium, surface gravels, aquiclude or aquitard materials) and dictate how these materials will be placed into the reclamation areas; and
- Modern groundwater models, such as MODFLOW developed by the USGS, are able to predict mining impacts to groundwater and in-stream flows, allowing a mine operator to formulate plans to mitigate potential water table declines and associated stream flow losses during mining, as well as proving a means to mitigate impacts after mining while groundwater elevations naturally recover.[287]

138. In fact, many examples of where high value wetlands have been reclaimed after disturbance by mining do exist. Within the Chuitna watershed, Exhibit 2 to PacRim's January 19, 2011, letter on the petition, shows compelling evidence of wetlands reestablishing after disturbance by mining activities. PacRim also provided recent reports concerning revegetation of disturbed areas in Alaska, including Barclay's willow and Diamond-leaf willow,[288] as well as sedges in wetland areas.[289] DNR reviewed these reports, and found them to be competent and scientifically sound data and information documenting successful revegetation efforts that are viable techniques that should be considered for reclamation planning in the coal-mine permitting context.

139. Examples of the ability to reclaim areas in the Chuitna watershed -- while small scale -- also exist. At the headwaters of Stream 2003, a test pit was dug to a depth of approximately seventeen feet to the top of a coal seam. The area was backfilled and graded with little additional work conducted to encourage vegetation or wetlands regrowth. During recent environmental

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[287] PacRim's January 19, 2011 letter commenting on the 2010 Petition, at 13.

[288] Walter, *et al.* (2005).

[289] Nolan and Wright (2007).

baseline work, including wetlands and vegetation mapping, this area was delineated as undisturbed natural ground. The report on this site stated that "[t]he lake and surrounding area are characterized as a vegetated pond with high value wetlands which contribute to carbon export and food chain support to adjacent streams."[290]

140. Although small in scale, this site is important because it shows that a functional wetland was established without additional mitigation or maintenance that would be required as part of a reclamation plan under 11 AAC 90.083. This site, along with several other sites disturbed by exploration activities within the Chuitna watershed, were inspected as part of the department's field work on the petition.

141. With its 2010 Petition, the petitioners included three recent reports that they commissioned which they assert support their allegation that reclamation is not technologically feasible. These reports are the "Chuitna Coal Mine baseline monitoring and restoration plan review" by Mark Wipfli (2009 Wipfli Report),[291] "Report on Chuitna Coal Project of PacRim Coal" (2009 Palmer Report),[292] and a "Report on Chuitna Coal Project Aquatic Studies and Fish and Wildlife Protection Plan" by Lance Trasky (2009 Trasky Report).[293] These reports include analyses of the potential impacts from surface coal mining based on a review of draft project and baseline documents that PacRim Coal is developing for its proposed Chuitna Coal Project. As the permitting process for the proposed Chuitna Coal Project has progressed, these draft project and baseline documents have changed considerably in response to comments and concerns raised by state and federal agencies. Consequently, the three reports commissioned by the petitioners have limited applicability in relation to the evolving proposed project.

142. In any event, petitioners' reports discuss the importance of the existing food web and hydrologic linkages in understanding the premining ecosystem and they

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[290] HDR Alaska (2008).

[291] Exhibit 19 to the petition. Exhibit 20 is an executive summary of the conclusions presented in Exhibit 19.

[292] Exhibit 12 to the petition. Exhibit 13 is a summary of the conclusions presented in Exhibit 12.

[293] Exhibit 17 to the petition. Exhibit 18 is a summary of the conclusions presented in Exhibit 17.

assert that the data is not adequate to support a permitting decision, *e.g.*, "stream restoration presented in the Fish and Wildlife Protection Plan is conceptual and few specifics are provided."[294] The ADF&G agreed with the author that there was not enough information in these reports to address their concerns about reclamation,[295] but goes on to state ADF&G could not "conduct a thorough analysis until finalized plans are submitted."[296] The 2009 Wipfli Report states that the reports reviewed contain important biological information but are missing important baseline studies and potential impacts to the Chuitna watershed. From these reports, the petitioners argue that the understanding of streams and riparian areas has changed since the original Diamond Shamrock surface coal mining permit application was reviewed and use this as their basis for requesting designation of the petition area as lands unsuitable for mining.

143. The 2009 Palmer Report[297] is a review of draft baseline documents for the proposed Chuitna Coal Mine. The report focuses on the potential impacts the proposed Chuitna Coal Mine would have on streams and the environment both in the project area and downstream, and raises concerns with the baseline studies associated with the Chuitna Coal Project.[298] The petitioners cite the 2009 Palmer Report to support their allegation that the reclamation of streams is not technologically feasible.[299] However, in light of stream restoration projects associated with mining projects that are discussed in this decision, the 2009 Palmer Report fails to demonstrate that reclamation, or stream restoration, is not technologically feasible.[300] Examples discussed in this decision dealing with stream restoration after both large and small scale mining, including surface coal mining, show where streams

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294 2009 Trasky Report at 53.

295 Informal Comments on Three Reports Associated with the Proposed PacRim Chuitna Coal Project, ADF&G (December 2010).

296 *Id.* at 2.

297 Exhibit 12 and 13 to the petition.

298 These concerns have also been expressed by state and federal agencies reviewing the project, and staff with the agencies has asked PacRim for additional information and baseline studies, which are currently ongoing.

299 Petition at 28.

300 *See* Section F, below, relating to Allegation I.

have been successfully reclaimed, along with the ecological functions of the restored portions of those streams.

144. The 2009 Trasky Report, which is another report cited by petitioners, stresses the importance of nutrients that support fish populations, *e.g.*, "Nutrients from salmon eggs and carcasses play a major role in the productivity of both freshwater and riparian ecosystems and in perpetuating future salmon runs." However, the report fails to take into account proposed or mandated mitigation that would require the addition of nutrients such as pollock bone meal, transported salmon carcasses, and salmon carcass analogs. Selected examples of nutrient addition to salmon bearing waters include those from Revillagigedo Island, Southeast Alaska[301] Grilse Creek[302], and Cluxewe River in British Columbia[303], and these examples confirmed an increase in salmonids size and weight, as well as an increase in abundance of other food chain organisms. These examples support the proposition that nutrient addition can be used to mitigate the loss of any marine derived nutrient caused by mining operations and can be continued as mitigation throughout the reclamation period until natural sources can be re-established.

145. The ADF&G also reviewed the petition, including the 2009 reports prepared by Wipfli, Palmer, and Trasky. ADF&G concluded that "information submitted with, or in response to the petition, is insufficient at this time to determine whether reclamation of anadromous water bodies or riparian areas anywhere within the entire Chuitna River watershed is not technologically feasible."[304] The letter goes on to state that many of the concerns raised by the petitioners with regard to reclaiming anadromous water bodies and their associated riparian areas need to be addressed on a project-specific basis, when performance standards and other requirements are considered.[305] This is a sound conclusion.

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[301] Restoring Productivity of Salmon-Based Food Webs: Contrasting Effects of Salmon Carcass and Salmon Carcass Analog Additions on Stream-Resident Salmonids, Wipfli and others (2004).

[302] Salmon River Nutrient Enrichment for Fish Habitat Restoration (2006).

[303] Nutrient Enrichment of Vancouver Island's Cluxewe River (2007).

[304] Alaska Department of Fish and Game Letter dated May 26, 2011, at 2.

[305] *Id.*

146. Where the petitioners' commissioned reports do discuss reclamation, the reports either do not apply the appropriate reclamation standards based on the postmining land use authorities, or the conclusions reached in these reports are speculative and not supported by competent and scientifically sound data. It is also important to note that contemporary mining practices have also changed with the advance of new technology and increased understanding of reclamation processes.[306] Contemporary mining practices require continuous monitoring and mitigation of reclaimed areas. The petitioners and the authors of the commissioned reports base their arguments on the erroneous assumption that no adverse impacts at all are allowed to fish and wildlife habitat, wetlands, and site hydrology as a result of surface coal mining operations.

147. The petitioners also cite a 2010 report (Mountaintop Mining Consequences, Palmer, *et al.*) documenting the impacts of valley fills[307] on headwater streams in the Appalachian region. Mine operators create valley fills when they dispose of excess spoil/overburden material on valley floors. This material consists of spoil and overburden that is not used in reclaiming the postmining topography after mining has been completed. This activity is typically associated with "mountain top removal"[308] operations in the Appalachian region. In Alaska, there is only one permitted valley fill, located at the Two Bull Ridge Mine near Healy, Alaska. The petitioners cite the valley fill report[309] to raise concerns that it would be impossible to reclaim premining vegetation, especially woody vegetation.

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306 Examples of contemporary mining practices include mining and reclamation plans that consider the roles landforms have on the function of reclaimed areas, the use of GPS controlled mining equipment, and extensive monitoring and mitigation plans that allow the mining and reclamation operation to adapt to real world conditions.

307 "Valley fill" is defined as a "fill structure consisting of any material other than organic material that is placed in a valley where side slopes of the existing valley measured at the steepest point are greater than 20 degrees or the average slope of the profile of the valley from the toe of the fill to the top of the fill is greater than 10 degrees." 11 AAC 90.911(120).

308 "Mountaintop removal" is defined as "surface mining which removes an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill, by removing substantially all of the overburden off the bench and creating a level plateau or a gently rolling contour, with no highwalls remaining, and capable of supporting postmining land uses approved in accordance with 11 AAC 90.141." 11 AAC 90.911(64).

309 Petition at 22.

148. However, the potential circumstance petitioners cite has not been an issue in Alaska, even in areas where the reclamation effort did not involve a valley fill. For example, based on documentation in both an evaluation report and a recent final bond release for the Gold Run Pass permit, revegetation of wood species was well above the standard required by 11 AAC 90.457.[310]

149. At present, there are no planned or anticipated valley fills in the petition area. Notwithstanding, there is documentation noting successful reclamation of woody vegetation at the Lone Creek Bulk Sample sites in the Chuitna watershed.[311]

150. The petitioners assert that the valley fill report provides evidence that surface coal mining causes permanent damage to streambeds and riparian areas and that there are no examples of large scale reclamation associated with mining.[312] However, the valley fill report is narrowly focused on impacts of mountaintop removal and the disposal of valley fill in West Virginia. This information is countered by the information discussed elsewhere in this document, including competent information relevant to the Alaska environment and stream reclamation efforts in Alaska. Moreover, it is noteworthy that the Palmer, *et al.*, valley fill report does not discuss or consider successful stream restoration efforts at surface coal mining operations in other parts of the United States, some of which are documented in this decision.

151. During review of the petition, DNR found reports that recommended management practices to successfully restore fen/bogs. A 2003 study by the University of Minnesota on fen restoration, *Fen Restoration Final Project Report*,[313] recommended a number of measures to promote successful fen restoration, including direct haul of soil material to its final location, timing targets for soil removal and placement, methods for transplanting desired vegetation and controlling water levels. Another paper, *Covering Bare Ground Suppresses Unwanted Willows and Aids a Fen*

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[310] Revegetation Evaluation of Gold Run Pass July 2006-August 2008 Report for Bond Release (Dot Helm, November 2008); Gold Run Pass Phase III Bond Release (March 3, 2011).

[311] Inspection Report Diamond Chuitna Mine Phase 0 (October 1, 2011). This site is also discussed in Exhibit 2 to PacRim's January 19, 2011 comment letter on the petition, at 9 (blue and red test pits).

[312] Petition at 21.

[313] Johnson, K. W. and Valppu, S. H. (2003).

Meadow Restoration in Switzerland,[314] provides recommendations for controlling unwanted vegetation within a restored fen to limit competition and enhance the regrowth of desired vegetative species associated with fens. A study on the restoration of fens, *Restoration of Degraded Boreal Peatlands,*[315] cited the 1998 study by Cooper, *et al., Hydrologic Restoration of a Fen in Rocky Mountain National Park, Colorado,* USA,[316] as an example of a successful fen restoration project. The Cooper study is the same study cited by petitioners at pages 22-23 of the petition, and was also submitted with the 2007 petition. While the Cooper study addressed the difficulties the project encountered during and after competition of the project, it described mitigation measures that can be taken to minimize these difficulties and the study describes success at restoring fens.[317] The management practices suggested by these reports is already required by 11 AAC 90.313 (Topsoil Storage) and is consistent with contemporary mining practices to direct haul soils to maintain their ecologic viability. Reclamation of wetlands, including type and location, is driven by the approved postmining land use. For any new projects within the Chuitna watershed, any disturbance to or loss of wetlands would have to be approved by DNR under AS 27.21 and by the Army Corps of Engineers under the Clean Water Act section 404 provisions. Ultimately, the decision to restore fens as part of reclamation is significantly tied to the landowner's proposed postmining land use and consultation with DNR regarding that proposed use.

152. In accordance with AS 27.21.260(c)(1), the evidence in the administrative record-- particularly in light of the contrary evidence discussed in this decision -- is insufficient to require my determination that, for the petition area's hydrologic balance, reclamation in accordance with ASCMCRA is not technologically feasible. Moreover, the petitioners' evidence is insufficient to support the conclusion that surface coal mining operations would irreparably harm the area's hydrologic balance. Finally, many of the arguments and concerns raised by petitioners will also be addressed again at the permitting stage, based on project specific proposals.

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[314] Matthias Suter, Christine Prohaska and Dieter Ramseier (2006)

[315] Rochefort, Line and Lode, Elve, Ecological Studies, Vol. 188 (2006)

[316] 18 Wetlands 3 (1998).

[317] 2010 Petition, Exhibit 6 at 344.

C. Petitioners' allegation that reclamation would not restore groundwater recharge capacity in the petition area.

153. Petitioners claim that any surface mining within the Chuitna watershed would not restore the recharge capacity, as required by the performance standard in 11 AAC 90.343 (Protection of Groundwater Recharge Capacity).[318] The petitioners assert that this allegation is reviewed under the mandatory designation standard set forth in AS 27.21.260(c)(1). This assertion is mistaken. Allegations regarding aquifer recharge are subject to the discretionary designation standard. Under AS 27.21.260(c)(2)(C), the Commissioner "*may* designate an area as unsuitable...if the commissioner determines that the operations in the area will affect aquifer recharge areas...."[319] In any event, whether the petitioners' allegation that surface coal mining operations would not restore recharge capacity is reviewed under the nondiscretionary or discretionary designation standards, the evidence is insufficient to support their allegation.

154. In making this allegation, the petitioners quote selective portions of the 1990 FEIS.[320] A full examination of the 1990 FEIS, however, contradicts petitioners' allegation:

> Reclamation of the mine area would at least partly reverse the ground-water impacts from mining. After removal of the surface-water diversion systems, surface water together with incident precipitation would recharge the underlying spoil materials and with time result in the reestablishment of a ground-water regime similar but not identical to the premining condition.[321]

155. As stated earlier, one of ASCMCA's purposes is to *minimize* adverse impacts to the hydrologic balance, including the recharge capacity within the mine area, and this is reflected in 11 AAC 90.343. As expressed in the 1990 FEIS, the EPA concluded that the proposed reclamation was essential to minimizing adverse impacts and would facilitate recharge of the "groundwater regime similar but not identical to the premining condition."[322] This finding is again supported by DNR's 1987 Permitting Decision to issue the permit for the Diamond Shamrock Chuitna Coal

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318 Petition at 24-25.

319 Emphasis added.

320 Petition at 25.

321 1990 FEIS at 5-20.

322 *Id.*

Mine.[323] As required by AS 27.21.180(c)(3), the permitting decision found that there would be no material damage to the project or surrounding areas.[324]

156. The petitioners assert that because "groundwater recharge capacity cannot be achieved within a reasonable timeframe,"[325] the performance standard at 11 AAC 90.343 could not be met. Specification of a reasonable time frame is not set forth in the regulations. Moreover, the absence of a given time frame does not alone warrant an unsuitability determination, when there are a myriad of performance standards and other countervailing competent and scientifically sound data and information identified in this decision that support the conclusion that reclamation is technologically feasible.[326]

157. Petitioners also question the ability to preserve water quality during coal mining operations and cite a few studies relating to those concerns.[327] These concerns, however, can be addressed, and potential impacts prevented, by applying the performance standards and requiring adherence to Alaska Water Quality standards.

158. In sum, in accordance with AS 27.21.260(c)(1), for groundwater recharge, the evidence in the administrative record is insufficient to require my determination that reclamation is not technologically feasible. In accordance with AS 27.21.260(c)(2)(C), the evidence is insufficient to sway me to designate, in my discretion, any part of the petition area as unsuitable for surface coal mining operations due to groundwater recharge issues, because the evidence does not support a conclusion that operations anywhere in the petition area would "affect aquifer recharge areas or other renewable resource land in which the operations could

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[323] DNR's 1987 Permitting Decision, at 386.

[324] *Id.* at 39.

[325] Petition at 25.

[326] For example, under 11 AAC 90.085(a) and (c)(3), an application for a proposed mining operation would have to describe anticipated impacts to the recharge capacity and include plans for restoring the "approximate recharge capacity in the area" after mining is complete in accordance with 11 AAC 90.343.11 AAC 90.085(c)(3). Under 11 AAC 90.083(a) and (b)(1) and 11 AAC 90.085(c)(3), DNR requires that a reclamation plan include "a detailed timetable for the completion of each major step in the reclamation plan," and that would include a timetable for restoration of the approximate recharge capacity.

[327] Petition at 25.

result in a substantial loss or reduction to the long-range productivity of water supply," in this instance, groundwater recharge.

D. Petitioners' allegation that reclamation would not restore aquatic productivity to premining levels.

159. The petitioners allege that reclamation would not restore aquatic productivity for fish habitat to premining levels. This allegation cites the importance of the petition area as highly productive fish habitat, and that invertebrates within the petition area are an important food source for fish.[328] This argument is based on an interpretation of 11 AAC 90.327(d)(3).[329] 11 AAC 90.327(d)(3) provides:

> (d)When permanent diversions are constructed or stream channels restored after temporary diversions, the operator shall ...
>
> ...
>
> (3) establish or restore the stream to a longitudinal profile and cross section, including aquatic habitats that approximate refining stream channel characteristics and *which may, using the best technology currently available,* be expected to restore aquatic productivity to premining levels.[330]

This regulation means that any coal mining operation that plans to construct permanent diversions (*i.e.*, rebuild stream channels) is directed to use the "best technology available" as part of the reclamation and mitigation plan that may be expected to restore aquatic productivity to premining level. As with other requirements of ASCMCRA, there is the understanding that mining will have adverse impacts to the environment,[331] including aquatic productivity, and that any adverse impact must be minimized or mitigated. Accordingly, there is no

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[328] The petitioners assert that this allegation is reviewed under the mandatory designation standard set forth in AS 27.21.260(c)(1). Petitioners are again mistaken. Allegations regarding restoration of aquatic productivity -- or, in other words, to reclaim losses or reduction to productivity that may be sustained as a consequence of surface coal mining -- are subject to the discretionary designation standard. Under AS 27.21.260(c)(2)(C), the commissioner "may designate an area as unsuitable...if the commissioner determines that the operations in the area will affect aquifer recharge areas in which the operations could result in a substantial loss or reduction of long-range productivity of water supply or food or fiber products." But even if this allegation is reviewed under the nondiscretionary designation standard, the evidence is insufficient to support their allegation.

[329] Petition at 25-29.

[330] Emphasis added.

[331] *See* discussion at Allegation I, subsection B, above.

requirement, as petitioners argue, that a petition must be granted if there is a showing that mining activity will have an adverse impact on the environment.

160. Petitioners' interpretation of 11 AAC 90.327(d)(3) also ignores the emphasized portion of this performance standard -- i.e., petitioners do not consider the application of "best available technology" and how this technology can be used to restore habitat.

161. The petitioners' argument is misplaced for an additional reason: other applicable performance standards will operate to protect water quality and hydrology, and seek to minimize adverse impacts on fish and wildlife.[332]

162. Petitioners next cite examples of impacts to fish productivity that were considered in the 1990 FEIS[333] as evidence demonstrating that aquatic productivity could not be restored. The cited examples are comments set forth in Chapter 5 of the 1990 FEIS, dealing with "Environmental Consequences." A closer reading of Chapter 5 and the cited comments regarding potential impacts to aquatic productivity show the comments themselves were speculation, and not conclusions.[334]

163. Petitioners also fail to account for the mitigation required by DNR's 1987 Permitting Decision,[335] or how mitigation might be required by other state and federal permits,[336] and how that mitigation was addressed in the 1990 FEIS:

> To mitigate for the unavoidable loss of approximately two miles of anadromous fish habitat in tributaries 200305, 200304, and 20030502 (ADF&G Nos. 247-20-10010-2030 - 3018 and 3012) the applicant shall construct replacement fish habitat. Replacement fish habitat shall consist of the construction and maintenance of at least four one-half acre coho salmon rearing ponds to be located adjacent to coho salmon spawning habitat in tributary 2003.
>
> The requirement also insists upon a monitoring plan to address the effectiveness of the mitigation:

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[332] 11 AAC 90.323 (water quality); 11 AAC 90.343, 11 AAC 90.085,11 AAC 90.321 (hydrology); and 11 AAC 90.423 (fish and wildlife).

[333] Petition at 27.

[334] 1990 FEIS at 5-139.

[335] 1987 Permitting Decision at 11.

[336] 1990 FEIS at 5-1.

> Should the monitoring show that the ponds are not providing satisfactory coho salmon rearing habitat, as determined by ADNR in consultation with ADF&G, alternative mitigation may be prescribed as necessary to compensate for the lost fish habitat.[337]

164. Moreover, information regarding anadromous fish streams has advanced since the 1990 FEIS, as has the understanding of the technology used to restore fish productivity in disturbed areas. In Alaska, several mitigation measures have been used successfully to restore productivity to impacted streams. Examples include the construction of off-channel rearing pond at the Granite Creek Material Site,[338] which is used for coho and Dolly Varden rearing, and the restoration of Resurrection Creek for pink, coho, Chinook, chum and sockeye salmon.[339] Another mitigation measure used successfully was the Alaska Resource & Economic Development Inc.[340] (ARED) system on the Moose Creek Restoration project.[341] The ARED system is designed to use existing wild salmon in an impacted stream to enhance fish population. This enhancement is accomplished by improving the survival rate of the salmon in their early life stages. In the Moose Creek project this technique has been used to help reestablish the Chinook and coho salmon populations. Other mitigation that has been used successfully in restoration projects, and discussed elsewhere in this decision, includes the addition of nutrients such as pollock bone meal, transported salmon carcasses, and salmon carcass analogs.

165. In addition, for reasons discussed above, the application of 11 AAC 90.327(d)(3) needs to be on a project-specific basis, using site specific information, including a detailed mining and reclamation plan, not area-wide information using the petition process.

166. In accordance with AS 27.21.260(c)(1), the evidence in the administrative record is insufficient to require my determination that, for aquatic productivity (specifically fish habitat), reclamation in accordance with statutory and regulatory authorities is not technologically feasible. In accordance with AS 27.21.260(c)(2)(C),

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[337] *Id.* at 6-9 (quoting DNR's 1987 Permitting Decision at 12).

[338] PacRim Coal Intervention Letter Exhibit 2.

[339] Wildfish Habitat Initiative, http://wildfish.montana.edu/Cases/browse_details.asp?ProjectID=61 .

[340] http://www.ared.net/index.htm .

[341] Wildfish Habitat Initiative, http://wildfish.montana.edu/Cases/browse_details.asp?ProjectID=73 .

the evidence is insufficient to cause me to designate, in my discretion, any part of the petition area as unsuitable for surface coal mining operations because of aquatic productivity, because the evidence does not support a conclusion that operations anywhere in the petition area would "affect aquifer recharge areas or other renewable resource land in which the operations could result in a substantial loss or reduction to the long-range productivity of water supply or food or fiber products." Stated another way, there is insufficient evidence to support the allegation that there will be a substantial loss or reduction to the long-range productivity of aquatic productivity -- including fish habitat, fish, or other food supply -- based on the petition, even assuming that fish habitat is the confirmed postmining land use for the delineated petition area. And, as a practical matter, it must be recognized that concerns regarding a proposed project's ability to achieve the applicable performance standards with regard to water quality, minimization of damage to fish and wildlife, and design of precise reclamation measures for proposed postmining land uses is dealt with on a site-specific basis during the permitting phase. Such concerns cannot be appropriately addressed in the context of a lands unsuitable petition if petitioners fail to assume -- as they do here -- that contemporary coal mining practices will be followed.

E. Petitioners' allegation that surface coal mining in the petition area cannot be designed and operated to minimize changes in water quality and quantity and hydrology enough to ensure no adverse effects to fish and wildlife habitat.

167. Petitioners appear to assert that the Act mandates that a petition be granted if there are adverse impacts to fish and wildlife.[342] The proposition that no adverse impacts from surface coal mining operations is allowed is not consistent with the legislative expectation under either SMCRA or ASCMCRA. As noted in section B, above, adverse impacts during construction and operation are anticipated. The objective, though, is to minimize and avoid impacts, and to reclaim areas which are impacted.[343]

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[342] Petition at 29-33.

[343] For example, regarding fish and wildlife, a coal mining operation "shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practical." 11 AAC 90.423(a).

168. In making this allegation, the petitioners misconstrue 11 AAC 90.321(b) to be a performance standard requiring "avoidance of adverse effects to *pre-existing* land uses."[344] This is not a correct statement of the regulation, because, as discussed in detail above, the focus is on "postmining land use," whatever that land use may be determined to be in accordance with applicable authorities and consultation with the landowner.

169. The petitioners and a number of commenters, including the Center for Science and Public Participation (CSP2),[345] raised concerns that water discharges from coal mining operations -- specifically discharges from the proposed Chuitna Coal Project -- will not meet Alaska Water Quality Standards, even after reclamation. These comments parallel concerns that have been expressed by state and federal agencies in their initial evaluation of preliminary plans submitted by PacRim for the Chuitna Coal project, but these comments were made based on preliminary information relating to a specific project and are too speculative for determining reclamation is not technologically feasible. Moreover, if PacRim's final proposal cannot comply with performance standards (including compliance with Alaska water quality standards) it will not be permitted. Thus, petitioners -- once again -- fail to assume (as they must) that performance standards will be followed. And, the type of issue that CSP2 raised and addressed in the previous paragraph must be addressed as part of a project-specific review.[346]

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[344] Petition at 33 (emphasis added).

[345] CSP2's January 18, 2011 letter in support of the petition.

[346] The Alaska Department of Environmental Conservation echoed this view in reviewing CSP2's comments in support of the petition:

> ....The agencies have not yet been provided all the data and plan information to determine the potential and degree of risk and suitable mitigation methods to address the multitude of issues concerning water quality and subsequent effects on habitat and fisheries. Once these issues have been identified on the basis of complete data and development plans, they will need to be reviewed and deliberated amongst the state and federal agencies for compatibility across the several permits that PacRim will need to obtain. Until such time as the agencies have been provided with complete permit applications with all the supporting data and documentation, it is pre-mature to determine if [CSP2's] concerns directly apply to the Chuitna Coal Project.

170. Petitioners also cite EPA's statements in the 1990 FEIS that streamflow reduction from the Chuitna Coal Project could be as much as 17% in the Chuitna River near Lone Creek during low flow periods, and that there might be a reduction of streamflow of 25% for Lone Creek during low flow periods.[347] However, neither citation presents EPA's complete statement regarding its analyses and conclusions on these potential reductions. For example, regarding the Chuitna River, EPA stated:

> As indicated in Table 5-7, minimum flow in the Chuitna River immediately below the mouth of Lone Creek could be reduced by up to 17% during low flow periods in later years of mining. This reduction would represent an extreme worst case situation and would be unlikely during mining because of the addition of return water to the Chuitna drainage from the various mine area drainage systems.[348]

Regarding Lone Creek, EPA stated:

> As indicated in Table 5-7, minimum flows could be reduced during low flow periods (late summer and later winter) by up to 25 percent within the portion of Lone Creek east of the mine. As flows increase downstream, impact would be proportionally less. The above calculations of flow reduction assume no transfer of pit drainage to Lone Creek. During the first 10 years of mining, Diamond Alaska plans to release much of its pit drainage into Lone Creek; therefore net flow would actually increase at least temporarily. The up to 25 percent reduction would still occur in the event of pump failure or in the event that pit water freezes and cannot be pumped.[349]

171. As stated throughout this decision, a petitioner must assume that any mine that might be permitted in the petition area will follow contemporary mining practices and that the applicable regulatory standards established by ASCMCRA, including compliance with Alaska Water Quality Standards, will be imposed and adhered to. Neither DEC, which regulates wastewater, nor DNR, which issues coal operating permits, will issue authorizations that would allow discharges to exceed Alaska's applicable statutory and regulatory requirements for water quality and quantity. The same is true for ADF&G, which will only issue Title 16 Habitat Permits if a mining proposal can show that statutory and regulatory requirements will be met.

DEC's May 26, 2011 analysis and response to CSP2's January 18, 2011 comment letter.

[347] 2010 Petition at 31.

[348] 1990 FEIS at 5-30.

[349] *Id.*

172. In accordance with AS 27.21.260(c)(1), the evidence in the record is insufficient to require my determination that -- for water quality, quantity, and hydrology that may provide fish and wildlife habitat within the petition area -- reclamation in accordance with ASCMCRA is not technologically feasible. Moreover, the evidence is insufficient to support the petitioners' allegation that surface coal mining operations would irrevocably alter the hydrology and aquatic productivity of the petition area, or the Chuitna watershed.

F. Examples of Successful Stream and Wetlands Reclamation Projects

173. In addition to the information submitted by the petitioners, I am required to review relevant, competent and scientifically sound data and information in making a determination on a petition alleging that reclamation is not technologically feasible.[350] I have reviewed stream and wetland restoration and reclamation projects in Alaska and other parts of North America. Many of the examples reviewed include areas disturbed by mining, including surface coal mining.

174. The Valdez Creek Mine, located south of the Alaska Range, is an example of mining-related successful stream reclamation. The mine operated as one of the largest gold producers in Alaska from 1984 to 1996 by the Valdez Creek Mining Company -- a consortium of Camindex Mines Ltd., Cambior Inc., and Barrick Resources Ltd.[351] The stream hosts populations of grayling and trout,[352] and during some period of the operations, fish were transported around the mine site during the spawning period. The work was done under contract from Cambior to Potterville Specialty Services and North Alaska Fisheries Services for several days each week for a period of about a month and a half in the spring.[353] While there are no anadromous fish that are supported in the river, it is an important example of stream reclamation

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[350] AS 27.21.260(a)(2).

[351] Reger, R.D. and Bundtzen, 1990, Multiple glaciations and gold-placer formation, Valdez Creek valley, western Clearwater Mountains, Alaska: DGGS Prof. Paper 107, at 1-2; 30p.

[352] EPA, 1992, Site visit report: Valdez Creek mine Cambior Alaska Incorporated, at 3-8; 46p.; website, http://www.epa.gov/osw/nonhaz/industrial/special/mining/techdocs/placer/placer3.pdf .

[353] EPA, 1992, Site visit report: Valdez Creek mine Cambior Alaska Incorporated, at 3-37; 46p.; website, http://www.epa.gov/osw/nonhaz/industrial/special/mining/techdocs/placer/placer3.pdf .

after substantial disturbance to the hydrologic balance by a relatively deep surface mining operation. The postmining stream on this site was constructed on reclaimed mine spoils that were replaced after mining in the same general configuration as the premining stratigraphy, including substantial thicknesses of glacialfluvial material overlying Tertiary fluvial deposits and deeply incised paleochannels.[354] This work resulted in the 1995 Governor's Award for Reclamation, presented to Cambior Alaska, Inc.[355] The selective handling of the spoil material is very similar to spoil handling plan for the Diamond Shamrock permit application.[356]

175. Nome Creek, located in the White Mountains in Interior Alaska, is another example of successful postmining stream reclamation. The creek was mined from 1900[357] up to the 1980s[358] by sluicing, and a gold dredge operated on a large scale in the 1920s and 1930s; an area is still set aside for recreational gold mining.[359] Approximately seven to eight miles of the stream and riparian areas were destroyed as part of the historic mining operations. In the late 1980s, the Department of Interior's Bureau of Land Management (BLM) initiated a water resource monitoring and inventory on Nome Creek and reclamation efforts were started in earnest by 1991. As of 2006, six miles of stream, riparian areas, and 300 acres of floodplain restoration had been completed.[360] This stream historically had a resident Arctic grayling population. Monitoring has shown grayling present in lower and upper Nome

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[354] Reger, R.D. and Bundtzen, 1990, Multiple glaciations and gold-placer formation, Valdez Creek valley, western Clearwater Mountains, Alaska: DGGS Prof. Paper 107, at 6; 30p.

[355] DNR, 1997, Mining reclamation in Alaska: State of Alaska, Department of Natural Resources, Division of Mining and Water Management, November 1997, 37p.

[356] DNR 1987 Permitting Decision at 402; 404p.

[357] McGown, Sarah, 2011, History of gold mining on Nome Creek: BLM Alaska website http://www.blm.gov/ak/st/en/prog/nlcs/white_mtns/summer_recreation/nome_creek_mining.html (updated 1-15-11).

[358] Fleming, D,F., and McSweeny, Ingrid, 2001, Stock assessment of arctic grayling in Beaver and Nome Creeks: Alaska Department of Fish and Game, Division of Sport Fish, Fisher Data Serier 01-28, at 1; 38 p.

[359] BLM, 2001, Gold Panning at Nome Creek: BLM Alaska website, http://www.blm.gov/ak/st/en/prog/nlcs/white_mtns/summer_recreation/gold_panning.html

[360] Kostohrys, Jon, 2007, Water resources and riparian reclamation of Nome Creek, White Mountains National Recreation Area, Alaska: Bureau of Land Management, Alaska Open File Report 113, 47p.

Creek.[361] This restoration effort has been a national showcase for riparian reclamation projects,[362] and BLM hopes that techniques developed at Nome Creek will be useful in other placer mine reclamation efforts.[363]

176. Another pertinent example of stream reclamation related to coal mining is that of Moose Creek, in the Wishbone Hill area near Palmer and Sutton, Alaska. Prior to disturbance, the creek supported sockeye, coho, Chinook, pink, and chum salmon.[364] From 1916 through 1983, sporadic coal mining occurred along Moose Creek. Early underground mining, followed by adjoining strip mining operations, severely altered more than seven miles of Moose Creek.[365] In 1923, a railroad spur was constructed up Moose Creek, from the railroad junction at the creek's mouth to the foothills.[366] When the rail line was upgraded to a standard-gauge rail, Moose Creek was re-routed, straightened and channelized, separating it from its floodplain, creating artificial waterfalls, and impacting more than seven miles of creek.[367] Such stream alterations resulted in degraded fish rearing and spawning habitat on the creek, as well as degraded adjacent wildlife riparian habitat for species such as bears and eagles. The stream alterations resulted in three distinct waterfalls, which prevented salmon from accessing over five miles of stream and wetland complex.

The goal of the Moose Creek Fish Passage Restoration Project was to restore wild salmon spawning habitat and runs to the upper Moose Creek watershed and improve the quality and quantity of aquatic and riparian habitat available to fish and

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[361] Flemming and McSweeny (2001).

[362] Kostohrys, Jon and Koss, Lee, 2006, Nome Creek restoration of place[r] mined gravels [abs]: Alaska Section of the American Water Resources Association 2006 Annual Meeting, Proceedings Abstracts.

[363] Kostohrys, 2007.

[364] Matanuska-Susitna Borough, 2011, Moose Creek Soapstone Community Council comprehensive draft plan May 16, 2011: Matanuska-Susitna Borough, at 13; 80p.

[365] Moose Creek Fish Passage Restoration Project, 2007, Wildfish Habitat Initiative (USFWS and Montana Watershed Council): website updated 2/16/2007, http://wildfish.montana.edu/Cases/browse_details.asp?ProjectID=73 .

[366] Moose Creek Restoration Project, 2011, Chickaloon Village Traditional Council website: website, http://www.chickaloon.org/index.php?option=com_content&view=article&id=145&Itemid=160.

[367] U.S. Fish and Wildlife Service, 2005, Environmental assessment, Moose Creek fish passage project: Anchorage USFWS Office, Anchorage, AK, prepared for the Chickaloon Village Traditional Tribal Council.

wildlife species.[368] The work was a cooperative effort by the Chickaloon Village Environmental Protection Program, the U.S. Fish and Wildlife Service, NOAA, the University of Alaska at Anchorage's Environment and Natural Resources Institute, the EPA, and others, receiving a Five-Star Restoration Grant in 2004.[369]

Work was done in two phases -- Phase I in 2005, and Phase II in 2006. In late July 2005, after Phase I restoration construction was complete, over 200 adult Chinook salmon were observed above the previously impassable waterfall barrier. Chinook salmon were spawning in the newly created restoration channel. In late September and early October 2005, several adult coho salmon were seen migrating through the restoration project toward upstream spawning habitats. In early September, after Phase II restoration was complete, coho salmon were observed above the previously impassable barrier.[370] It is reported that "within days of project completion, Chinook salmon were observed spawning within the new channel, and were also seen as far as four miles upstream of the old waterfall site."[371] Phase II was completed in July 2006, relocating portions of the stream to its original location and bypassing three partial-barriers to fish passage. The stream restoration work largely survived a major flood later in the late summer of 2006, and the stream allows continuous fish passage.[372]

177. Resurrection Creek, home to Alaska's first gold rush in 1896, is another relevant stream restoration project. Hydraulic and power shovel mining within the watershed reduced the quality and quantity of fish and wildlife habitat within the watershed. The most severe impacts from mining were located in the lower 6.2 miles

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[368] Roach, Chris, 2004, Summary – Moose Creek conceptual reclamation plan [abs.]: Alaska Section of the American Water Resources Association 2004 Annual Meeting, Proceedings Abstracts; Moose Creek Fish Passage Restoration Project, 2007, Wildfish Habitat Initiative (USFWS and Montana Watershed Council): website updated 2/16/2007, http://wildfish.montana.edu/Cases/browse_details.asp?ProjectID=73 .

[369] EPA, 2010, Five-Star Restoration Program: EPA website updated 3-5-2010, http://www.epa.gov/owow/wetlands/restore/5star/ .

[370] Moose Creek Fish Passage Restoration Project, 2007, Wildfish Habitat Initiative (USFWS and Montana Watershed Council): website updated 2/16/2007, http://wildfish.montana.edu/Cases/browse_details.asp?ProjectID=73 .

[371] Cooperative Conservation, 2011, Moose Creek fish passage restoration project: website, http://www.cooperativeconservationamerica.org/viewproject.asp?pid=712 .

[372] Moose Creek Restoration Project, 2011, Chickaloon Village Traditional Council website: http://www.chickaloon.org/index.php?option=com_content&view=article&id=145&Itemid=160.

of river. The lower reaches within this area were identified as critical spawning and rearing habitat for coho, chum, pink and Chinook salmon. Placer tailings piles up to 25 feet high confined and straightened the stream[373] and covered 54% of the floodplain.[374]

Investigations began in 2002 by the U.S. Forest Service Wind River Restoration Team from Carson, Washington, that assisted the Chugach National Forest by surveying and analyzing stream channel conditions and developing a stream channel restoration strategy, rehabilitation alternatives, and recommendations.[375] Restoration design and implementation templates for Resurrection Creek included channel geometry equations, stream flow patterns, and relic and disturbed analog reaches for reference reaches of stream. Restoration actions included mechanically manipulating mine tailings to recover floodplain width and elevations; reconstructing meander pattern, channel profile, pools and spawning habitat; developing multiple relief channels and off-channel ponds within the floodplain; extracting beetle killed spruce trees in high risk fire hazard areas to utilize as a source of in-stream and terrestrial woody material; augmenting soils in reclaimed riparian areas to provide soil/landform and drainage conditions which can support native plant communities; thinning existing overstocked riparian sapling spruce and cottonwood stands; allowing natural revegetation where seed source and site conditions were favorable; and using native plant species in revegetation projects when natural revegetation conditions were not favorable.[376]

The U.S. Forest Service produced a draft of the EIS in April 2004, completed the FEIS in November 2004, and in 2005 had finished channel, side channel, logjam, and floodplain reconstruction for most of the lower 0.7 miles of the project. These newly created channel segments were quickly utilized by spawning salmon almost

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[373] Wild Fish Initiative, 2007, Resurrection Creek: (USFWS and Montana Watershed Council) website, http://wildfish.montana.edu/Cases/browse_details.asp?ProjectID=61.

[374] Bair, Brian, Blanchet, Dave, and Olegario, Anthony, 2003, Planning a resurrection: Resurrection Creek, Alaska: Streamline -- Watershed Management Bulletin a publication of FORREX, the Forest Research Extension Partnership, vol.7, no. 2, at 1; 4p.

[375] Bair, Brian, Powers, Paul, and Olegario, Anthony, 2002, Resurrection Creek stream channel and riparian restoration analysis, river kilometer 8.0-9.3: U.S. Forest Service Wind River Watershed Restoration Team, October 1, 2002, at 4; 61p.

[376] Wild Fish Initiative, 2007, Resurrection Creek: (USFWS and Montana Watershed Council) website, http://wildfish.montana.edu/Cases/browse_details.asp?ProjectID=61 .

immediately following construction.[377] With channel restoration nearly complete for about 75 percent of the length of the one-mile project reach, many of the morphologic objectives of the project have been accomplished or nearly accomplished in the reach restored in 2005. Spawning gravel at the pool tails was increased substantially from pre-project conditions. Although the majority of the fish were pink salmon, all five species of Pacific salmon have been observed in the restored reach (pink, coho, Chinook, chum and sockeye).[378] The U.S. Forest Service is now nearly complete with planning for Phase II of the project that would reclaim an additional two miles of the creek below the Phase I work.[379]

178. Outside of Alaska, there have been many examples of reclaiming fish-bearing streams, including salmon streams, after mining activity. Clear Creek near Shasta, California is an example where historic hydraulic and dredge mining, as well as recent gravel mining, significantly disturbed the flood plain and stream including the complete removal of all of the riparian and upland vegetation. Mining left a complex of large pits and ponds along the lower reaches that became isolated when water levels dropped stranding adult and juvenile salmon and steelhead.[380] Gravel mining in the 1950s through the 1980s completely disrupted channel form and confinement, interrupting fish migration.[381] Historically, Clear Creek supported populations of Chinook salmon that were adversely affected by these activities. The U.S. Fish and Wildlife Service has monitored the occurrence of juvenile salmonids

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[377] U.S. Forest Service, 2006, Resurrection Creek stream channel and riparian restoration project: USFS Alaska Region Briefing Paper, April 2006, at 2, 4p.; U.S. Forest Service, 2004, DEIS, Resurrection Creek stream and riparian restoration project, Seward ranger district, Chugach National Forest: USDA Forest Service, April 2004, R10-MB-505, 201p.

[378] Wild Fish Initiative, 2007, Resurrection Creek: (USFWS and Montana Watershed Council) website, http://wildfish.montana.edu/Cases/browse_details.asp?ProjectID=61 .

[379] USFS DEIS Resurrection Creek Phase II Stream Riparian Restoration (8-04-10).

[380] Wild Fish Habitat Initiative, 2006, Clear Creek Photo Gallery: website updated 6-20-2006, http://wildfish.montana.edu/cases/gallery1.asp?ProjectID=74 .

[381] Tompkins MR, Kondolf GM (2003) Integrating geomorphic process approach in riparian and stream restoration: past experience and future opportunities. In: Faber PM (ed) California riparian systems: processes and floodplain management, ecology and restoration. Proceedings of the Riparian Habitat and Floodplains Conference (Sacramento, 2001), Sacramento, California, at 234; 230–238.

since 1998 when restoration began.[382] Recent restoration activities of the stream and riparian areas have led to a fivefold increase in Chinook spawning escapements over the disturbed configuration.[383] Restoration activities are ongoing.[384]

179. Near Butte Montana, stream restoration efforts of portions of Silver Bow Creek, as part of a Superfund cleanup of mining tailings that began in 1999, have returned trout to portions of reclaimed streams that have been barren of trout for generations.[385] By 2005, slimy sculpin and long-nosed suckers returned to the creek,[386] and by 2007, trout were found in Silver Bow Creek. In 2010, an 18.5 inch cutthroat trout was caught by a young sports fisherman and mink, which prey on fish, were observed along the creek.[387] This project included the removal of nearly a century's worth of mine tailings and the complete reconstruction of 10 miles of trout streams and their associated riparian areas. As part of the project's achievements for this restoration project, the Montana Department of Environmental Quality cites improved ground and surface water quality, and reconstructed stream channels that are functioning and providing increased habitat diversity and an increase in biological diversity especially in aquatic species susceptible to metals leaching from spoils.[388]

180. Several stream restoration projects associated with large coal mines have been completed in Illinois. Consol Energy's Burning Star 4 mine reclaimed eight miles

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[382] Earley, J.T., Colby, D.J., and Brown, M.R., 2010, Juvenile salmonid monitoring in Clear Creek, California, from October 2008 through September 2009: USFWS, Red Bluff Fish and Wildlife Office, California (September 2010), at 1; 53p.

[383] WildFish Habitat Initiative, http://wildfish.montana.edu/Cases/browse_details.asp?ProjectID=74 .

[384] Destaso, J. and Brown, M.R., 2011, Clear Creek Restoration Program Annual Work Plan for Fiscal Year 2011: CVPIA program document, website: http://www.usbr.gov/mp/cvpia/docs_reports/awp/2011/3406(b)(12)%20Clear%20Creek_AWP_FY2011.pdf

[385] Montana Department of Environmental Quality, 2009, Silver Bow Creek update, winter 2009: Montana DEQ website, http://www.cfwep.org/cfinfo/agency_updates/SBC-030209.pdf .

[386] Tracy, Jim, 2005, *Greenway district wins environmental award, poisoned Silver Bow Creek showing signs of life: Anaconda Leader*, April 18, 2005.

[387] Montana Department of Environmental Quality, 2008, *Trout make splash in Silver Bow Creek for second straight year,* Montana DEQ press release (Oct. 7, 2008).

[388] Montana Department of Environmental Quality, 2009, Silver Bow Creek update, winter 2009: Montana DEQ website, http://www.cfwep.org/cfinfo/agency_updates/SBC-030209.pdf .

of stream, including associated riparian areas, that had been impacted by dragline placed mine spoil. This project has been recognized by OSM for its outstanding reclamation efforts and has received a national award for its innovative reclamation practices.[389] The Pipestone Creek Restoration Project is another project in Illinois that restored 4.6 miles of Pipestone Creek on reclaimed mine spoils. This project noted that aquatic species returned to the restored portions on the creek in a short period after work was complete. The restored creek along with the conservation easement has been added to Pyramid State Park.[390]

181. While some of the above examples involved reclamation projects that commenced long after an area was subject to some form of mining and had been abandoned, the projects nonetheless reflect that reclamation is technologically feasible. Successful reclamation for surface coal mining operations, not only within the petition area but other areas of the state, will be even more likely for present-day reclamation where statutory and regulatory authorities require detailed planning, multi-agency State and federal regulatory review, and reclamation efforts to be actively pursued before, during, and after coal mining ceases.

182. Since the 1987 Permitting Decision on the Diamond Shamrock Chuitna Coal Project, regulatory authorities nationwide have recognized that reclamation of coal mine sites could be even better. Both state and federal regulatory authorities and the mining industry have combined resources to institute geomorphic reclamation techniques such as those pioneered by Horst Schor and documented in his book "Landforming: An Environmental Approach to Hillside Development, Mine Reclamation and Watershed Restoration" (Schor and Gray, 2007), as well as the works of Dave Rosgen[391] on stream restoration. These techniques are currently being applied to large surface coal mining operations throughout the United States.

183. This use of advanced reclamation strategies recognizes the need for both pre-development baseline studies of the streams and riparian areas proposed to be disturbed, and a detailed life of project monitoring and reclamation plan that are

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[389] 2011 OSM National Stream Design Workshop, Field Tour Descriptions.

[390] PacRim Coal Intervention Letter Exhibit 3.

[391] Rosgen, Dave, & Silvey, Hilton Lee; Watershed Assessment of River Stability and Sediment Supply, at 589, 2006 and Rosgen, Dave, & Silvey, Hilton Lee; Applied River Morphology, Second Edition© 1996 184 pages.

designed to achieve reclamation in real world conditions. The EPA, in its recognition of river corridor and wetlands restoration, stresses the importance of planning and proper management: "When properly planned, executed and managed, restoration works; its success can be attributed to the hard work and dedication of practitioners, scientists and others...."[392] This progression to more advanced reclamation techniques in Alaska can be seen in the submittal by PacRim Coal of their "Draft Chuitna Coal Project Preliminary Design Report." This report outlines the proposed designs for streams to be reclaimed at the proposed Chuitna Coal Project.

184. Unless a specific finding is made, the existing performance standard found at 11 AAC 90.353 imposes a 100-foot, "no-mining" buffer on all perennial or intermittent streams, including streams located within the Chuitna watershed. The buffer may only be waived if the Commissioner specifically finds that any surface coal mining operation, including all support facilities, will have no adverse impacts on water quality and quantity and that any adverse effect on fish and wildlife will be minimized. To make this finding, the Commissioner must have detailed baseline data and a complete operation and reclamation plan for any proposed project within the Chuitna watershed.

185. As discussed several times above, it must be recognized that concerns regarding a proposed project's ability to achieve the applicable performance standards with regard to water quality, minimization of damage to fish and wildlife, and design precise reclamation measures for proposed postmining land uses is dealt with on a site-specific basis during the permitting phase. Such concerns cannot be appropriately addressed in the context of a lands unsuitable petition if petitioners fail to assume -- as they do here – that contemporary coal mining practices will be followed.

186. While Congress intended the petition process "to be applied on an area basis, rather than a site-by-site determination, which presents issues more

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[392] http://www.epa.gov/owow/wetlands/restore/benefits.html

appropriately addressed in the permit application process,"[393] the petition process nonetheless contemplates that sufficient evidence to establish their allegations throughout the petition area. In this regard, there is insufficient evidence to support the claim that reclamation throughout the delineated petition area is not technologically feasible.

187. Congress emphasized that the petition process "does not require the designation of areas as unsuitable for surface mining other than where it is demonstrated that reclamation of an area is not physically or economically feasible under the standards of the act."[394] Based on all of the above -- in particular the prior state and federal permitting decisions and the many examples of successful reclamation -- and pursuant to the requirements of ASCMCRA, there is insufficient evidence in the administrative record for me to determine that reclamation of streambeds and riparian areas in the petition area is not technologically feasible.[395]

Petitioners' Allegation II: Surface coal mining operations will affect fragile land and could result in significant damage to important cultural, scientific, and aesthetic values and natural systems

188. Petitioners also allege that, pursuant to AS 27.21.260(c)(2)(B), the petition area should be deemed unsuitable for surface coal mining operations on the basis that "such operations will affect fragile land and could result in significant damage to important cultural, scientific, and aesthetic values and natural systems." In connection with this allegation, petitioners assert the following:

- The watershed contains fragile land within the meaning of the ASCMCRA regulations;
- Surface coal mining within the watershed would result in significant damage to important cultural, scientific, and aesthetic values and natural systems;

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[393] House Committee Report No. 95-218 (1977), at 630.

[394] U.S. Code Cong. & Admin. News 1977, p.630, and quoted by the Fifth Circuit in *Prager*, 793 F.2d at 732-34 (holding that the Secretary of the Interior had thoroughly considered the petitioner's allegation that reclamation would not be technologically or economically feasible, and the record supported the secretary's decision that there was insufficient evidence to support the allegation).

[395] AS 27.21.260(c)(1).

- Significant harm will result to subsistence, commercial and sport fishing, complex and poorly understood hydrologic systems, the Cook Inlet beluga whale population, and aesthetic values.[396]

189. Under AS 27.21.260(c)(2)(B), the Commissioner "may designate an area as unsuitable for all or certain" coal mining activities "if the commissioner determines that operations in the area will...affect fragile or historic land in which the operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems." This provision is considered discretionary, that is, the Commissioner may designate lands unsuitable at his or her discretion, but is not required to do so.

190. At the outset, the petitioners' Allegation II is verbatim to the Allegation II that they raised in the 2007 petition.[397] As with the 2007 Petition, the current petition contains only general assertions. With the exception of one new document,[398] the petitioners do not submit any new evidence to support this allegation since it was originally made in the 2007 Petition.[399]

191. Former Commissioner Irwin rejected this same allegation in the 2007 Petition, stating the following:

> It has been recognized that many of the lands within the petitioned area may hold some of the values that petitioners list. The petition also describes how many of those listed on the petition use the area and benefit from its resources. However, petitioners have provided no evidence to support allegations that surface coal mining operations -- if carried out in accordance with applicable, contemporary standards and regulations -- would result in significant damage to these values and natural systems, rendering the assertions speculative. Petitioners also fail to describe how the allegations are specific to petitioners' interests, that is, it does not describe the specific coal mining activities that would occur and on which lands within the petitioned area that would adversely affect the petitioners' interest. This correlation must be described in the petition to support the allegations. In addition, specific existing federal statutes address many of these issues, such as laws

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396 Petition at 33-45.

397 *See* Allegation II of 2007 Petition, at 25-36.

398 MacDonald, Glen M., *et al.*, *Rapid Early Development of Circumarctic Peatlands and Atmosphere CH4 and CO2 Variations*, 312 Science 285 (2006).

399 For this reason, petitioners' arguments are likely barred by res judicata and collateral estoppel.

> governing protection of cultural resources and protection of marine mammals, and any authorized coal development must comply with these laws.[400]

Commissioner Irwin also noted that the petitioners alleged "harms from potential coal storage and transport activities at Ladd Landing, but the petitioned area does not include Ladd Landing, and the petition likewise fails to assume that contemporary mining standards and regulations would apply to activities at the site."[401] Commissioner Irwin informed petitioners that they could submit a new petition providing evidence supporting their allegation, and that it would be considered.[402]

192. I concur with Commissioner Irwin's earlier findings, and also find, as discussed below, that the petition fails to provide any new information to support an unsuitability designation.

A. Fragile Lands

193. The petitioners' list of fragile lands for purposes of Allegation II includes streams and riparian areas, wetlands, and lands which support subsistence and commercial uses, as well as aesthetic values, and they consider these to meet the definition of "fragile lands."[403] Fragile lands are particular areas that could be damaged or destroyed by coal mining and reclamation.[404] Under 11 AAC 90.911(40), "fragile lands" means:

> ...geographic areas containing natural, ecologic, scientific, or aesthetic resources that could be damaged or destroyed by surface coal mining and reclamation operations. Examples of fragile land includes, but is not limited to, uncommon geologic features, National Natural Landmark sites, groundwater recharge areas, valuable habitats for fish and wildlife, critical habitats for endangered species of animals and plants, critical wetlands, environmental corridors containing concentrations of ecologic and aesthetic features, areas of recreational value due to high environmental quality, buffer zones around areas where surface coal mining is prohibited; and important, unique, or highly productive soils or mineral resources.

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400 July 16, 2007 Decision on 2007 Petition at 10.

401 *Id.*

402 *Id.*

403 Petition at 34.

404 *See* 11 AAC 90.911(40) and 30 C.F.R. 762.5.

194. In reviewing this allegation, DNR has also relied on OSM's clarification in the COALEX Report of the term "fragile land." OSM stated that the definition "is meant to provide guidance on what general types of resources can be considered fragile lands, not a list of areas which can or should *automatically* be designated suitable."[405]

195. OSM has stated in the COALEX Report that "[a]n interruption of certain activities or a diminution of particular values *during* mining is not sufficient to classify the land as fragile if the activities or values can be restored."[406] Thus, even though there is a potential for surface coal mining to affect the lands and values that petitioners reference, those factors alone do not justify an automatic finding that lands are "fragile" because petitioners need to show with specificity that *after* mining and reclamation the geographic area has been destroyed or damaged by the mining operations.

196. Moreover, even if the evidence demonstrates that fragile lands would be destroyed or damaged such a finding would not dictate that lands should be designated unsuitable for surface coal mining operations because when reviewing the petition, I must consider competent and scientifically sound data and information, as well as an array of statutory and regulatory factors. For example, I must strike a balance between protection of the environment and the need for coal as an essential source of energy, recognize that responsible extraction of coal is an essential and beneficial economic activity, take into account how contemporary coal mining practices (including performance standards) will minimize or avoid damage to an area, and consider the positions expressed about coal mining in this area in area plans and by the landowners.

197. Based on the area plans cited and described earlier in this decision, coal development in the Chuitna watershed has long been recognized as an important goal for and appropriate use of the area's lands. As described earlier under Allegation I, there is substantial evidence supporting that reclamation of the petition lands is technologically feasible. With the goals of these area plans in mind, and in light of OSM's guidance above regarding fragile lands, I find that -- assuming contemporary

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[405] COALEX State Inquiry Report – 156 (emphasis added).

[406] *Id.* (emphasis added). The OSM COALEX Report – 156 provides additional guidance for making a decision under AS 27.21.260(c)(2)(B).

coal mining practices are followed -- the petition and the administrative record do not present any evidence that lands within the petition area are fragile or that impacts in the petition area and associated values that petitioners claim for the area, would be significantly damaged.

B. Aesthetic Values

198. The petitioners raise concerns about potential impacts to aesthetic values from surface coal mining operations in the petition area. Activities that already affect the aesthetic values in the petition area and the greater Chuitna watershed include oil and gas exploration and development, exploration activities for coal, and commercial flight-seeing and guide services. Moreover, for much of the watershed, the land is privately owned, and petitioners' ability to gain access without authorization is questionable. Also, the visibility or noise associated with any specific project that might be permitted would depend on the viewshed in which the project is located (*e.g.*, the project operation may be inaccessible or the landscape situation may obstruct visibility of the activity), as well as the conditions placed on operations to minimize and avoid audio and visual impacts.

199. Because of the nature of surface coal mining operations, impacts to aesthetic values are anticipated. The 2000 Kenai Area Plan, Kenai Borough Plan, and various owners of large parcels of land in the watershed have all expressed their intent to propose coal development projects. While some impacts may be visible in localized areas where actual mining activities occur, because reclamation is conducted concurrent with mining on a rolling basis, and because reclamation must be completed before site closure is approved, impacts to aesthetic values will be substantially minimized. Impacts from noise, light pollution, or vehicle traffic associated with mining operations can also be mitigated as part of the mine plan or by stipulations during the permitting process. For instance, DNR previously dealt with noise and light issues with respect to development of the True North/Fort Knox mine near Fairbanks. Under ASCMCRA, the same or similar mitigation measures, as appropriate, can be accomplished through technical amendments pursuant to 11 AAC 90.127(2) and during the mine permitting process itself. Thus, potential impacts from surface coal mining operations in the petition area, if they occur, can likely be

minimized and avoided, or are unlikely to cause significant impacts to aesthetic values to warrant an unsuitability designation.[407]

C. Beluga Whales

200. The petitioners raise concerns that Cook Inlet beluga whales may be adversely impacted by surface coal mining in the petition area. On October 22, 2008, NMFS listed the Cook Inlet stock of beluga whales as endangered under the ESA.[408] This stock of beluga whale had also previously been listed by NMFS as depleted under the MMPA. Following the ESA listing,[409] NMFS delineated critical habitat within Cook Inlet for the beluga whale, and this habitat is adjacent to the petition area.[410]

201. There is no evidence in the administrative record that coal mining activities within the petition area, properly regulated in accordance with applicable performance standards (including those relating to protection of water quality), would have any down-stream significant, much less measureable, impact on beluga whales and their designated critical habitat. Outside the petition area and in the marine waters of Cook Inlet, impacts to belugas associated with surface coal mining operations involving shore-side bulk freighting activities would also likely be minimal, but would, in any event, be pointedly addressed on a project-specific basis in a multi-agency State and federal review, including consideration of potential impacts pursuant to NEPA, as well as federal review under the MMPA[411] and ESA[412]. For example, 11 AAC 90.423, dealing with protection of fish and wildlife, requires that any proposed project within the watershed that might pose a threat to threatened or endangered species and their critical habit would require consultation with State and federal fish and wildlife agencies to determine whether a specifically proposed project may proceed.

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[407] AS 27.260(c)(2)(B).

[408] More information is provided at the following link:
http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/belugawhale.htm

[409] The State of Alaska has filed a court action challenging this listing. *State of Alaska v. Lubchenco*, Case No. 10-0927 (D.C. D. 2010).

[410] *Id.*

[411] 16 U.S.C. § 1361, *et seq.*

[412] 16 U.S.C. § 1531, *et seq.*

202. Regarding the significant adverse impacts that petitioners allege for both fish and beluga whales, petitioners fail to assume that contemporary coal mining practices, including performance standards, will apply. Within a project area, impacts would have to be minimized using the best available technology,[413] in addition to acquiring Title 16 Habitat Permits from ADF&G that require mitigation of lost fish productivity due to mining in streams and riparian areas.[414] These permitting requirements would also address the petitioners' concerns raised about potential impacts to subsistence, commercial and sport fisheries. If a proposed project could not comply with these performance standards and others that will be required by state and federal regulatory authorities, then the project would not be permitted.

D. Natural Systems -- Global Warming/Greenhouse Gases

203. Petitioners contend that coal extracted from the Chuitna watershed, not just from within the confines of the requested petition area, would result in adverse effects to "another natural system -- the climate."[415] Petitioners claim that extraction activities in peatland in the watershed will release trapped methane gas. The petitioners also assert that the burning of coal by customers of coal extracted from the greater Chuitna watershed would also add CO_2 into the atmosphere, furthering global warming.

204. Petitioners appear to expect that because coal extraction and burning relating to coal extracted from the petition area may contribute to greenhouse gases, this potential contribution warrants designation of the area as unsuitable for coal mining activities. Followed to its logical conclusion this argument would dictate that all coal fields in the United States would need to be designated as unsuitable. Clearly, this was not what the U.S. Congress or Alaska Legislature had in mind. Indeed, the U.S. Congress and the Alaska Legislature expressed that there needs to be a balancing between coal use and environmental protection, especially when coal is recognized by both legislative bodies as an essential source of energy.[416]

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[413] *See* Section D of this decision on Allegation I.

[414] ADF&G's May 26, 2011 letter at 2.

[415] Petition at 44.

[416] 30 U.S.C. § 1202(f); AS 27.21.010(b)(7).

205. Consideration of these issues are subject to my discretionary review.[417] I do not find that petitioners' arguments justify a lands unsuitable designation. Methane and CO_2 that might be released during mining and the burning of coal (wherever that might occur) are just a few of many contributors to greenhouse gasses generated by human activity. Naturally occurring conditions also contribute to greenhouse gases. The contribution to greenhouse gases of coal extracted from the petition area would be minimal -- even when aggregated with greenhouse gases on a global basis -- and do not lead me to the conclusion that these would result in significant harm to natural systems.

206. For example, compared to the total production of coal in the United States, the one currently proposed project in the watershed (PacRim's proposed Chuitna Coal project) would, at maximum production, produce roughly one percent of the U.S. coal supply per year, and less than 0.2 percent of the world's annual production.[418] A rough calculation shows that this would correspond to approximately 0.04 percent of the world's greenhouse gas emissions. Moreover, the coal found in the Chuitna watershed is low sulfur, one of the cleaner burning fuels that could be burned to support basic power needs, in particular electricity.

207. While greenhouse gasses and their link to climate change is an important issue to both the State and the nation, addressing broad policy concerns regarding coal as a fuel source and global warming are outside the scope of the lands unsuitable petition process, and are handled at the national government level and through international agreements.[419]

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[417] AS 27.21.260(c)(2)(B).

[418] Coal Statistics – World Coal Association website, http://www.worldcoal.org/resources/coal-statistics .

[419] The impact of climate change to arctic and subarctic regions is an important issue to the State of Alaska. Former Governor Sarah Palin, by Administrative order number 238, established the Alaska Climate Change Sub-Cabinet to advise the Office of the Governor on the implementation of Alaska's climate change strategy. Members of the sub-cabinet include the commissioners of the Departments of Environmental Conservation, Natural Resources, Fish and Game, Transportation, and Community and Economic Development, as well as the Vice Chancellor of Research for the University of Alaska Fairbanks. The purpose of this group is to develop strategies to mitigate the impacts of climate change while protecting Alaska's economic growth. This Sub-cabinet is developing recommendations for Alaska communities that will be impacted as a result of climate change.

208. Based on the above and the administrative record, I decline to use my discretionary authority under AS 27.21.260(c)(2)(B) to designate any of the petition area as unsuitable for surface coal mining operations.

Petitioners' Allegation III: Surface coal mining operations will affect renewable resource lands in which the operations could result in a substantial loss or reduction of long-range productivity of water supply or food or fiber products

209. Petitioners further assert that, under AS 27.21.260(c)(2)(C), the petition area should be deemed unsuitable for mining because surface coal mining operations "will affect renewable resource lands in which the operations could result in a substantial loss or reduction of long-range productivity of water supply or food or fiber products."[420] Petitioners allege that mining could impact productivity in the Chuitna watershed. Petitioners cite the potential for impacts to aquifer recharge and for increased sedimentation, which they say would harm salmon productivity, which they say in turn will harm subsistence, commercial, and sports fishing. They also claim that activities in the petition area will result in a substantial loss or reduction to moose populations in the area.[421] Finally, while citing no information to support the allegation, petitioners refer back to information they discuss in Allegations I and II of the petition.

210. Under AS 27.21.260(c)(2)(D), the Commissioner "may designate an area as unsuitable for all or certain" coal mining activities "if the commissioner determines that operations in the area will . . . affect aquifer recharge areas or other renewable resource land in which the operations could result in a substantial loss or reduction of long-range productivity of water supply or food or fiber products."[422] This provision is considered discretionary, that is, the Commissioner may designate lands unsuitable in his or her discretion, but is not required to do so.

211. The petitioners' Allegation III is verbatim to the Allegation III that they raised in the 2007 Petition.[423] As with the 2007 Petition, the current petition contains only general assertions, and petitioners fail to provide evidence to support this

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[420] Petition at 45-46.

[421] *Id.*

[422] Emphasis added.

[423] *See* Allegation III of 2007 Petition, at 36-37.

allegation. Nor do petitioners submit any new evidence to support this allegation since the 2007 Petition.

212. Former Commissioner Irwin rejected this same allegation in the 2007 petition, stating the following:

> Petitioners fail to allege how lands throughout the petitioned area, in connection with any type of surface coal mining activity would suffer substantial loss or reduction of long-range productivity of aquifers and their recharge areas, or for food or timber products, including salmon and moose that petitioners specifically name. While they mention pumping operations and potential deposition of sedimentation relating to coal operations, these statements, of themselves, do not constitute significant facts to frame the allegation. Nor do the petitioners present any evidence to suggest that current surface coal mining practices, properly regulated, will not guard against the alleged harms.[424]

213. As with the first two allegations in the petition, petitioners fail with respect to Allegation III to assume that contemporary coal mining practices will be followed, including performance standards. While it would be reasonable to expect that surface coal mining operations would have some adverse impact on the aquifer within the actual mining area, there is insufficient evidence to demonstrate a substantial loss or reduction of productivity to the water supply, or food or fiber products. To the extent there might be an effect, there are performance standards created to minimize any effect. Under 11 AAC 90.329, an operator must (among other things) use the best technology currently available to minimize and avoid, for example, additional contributions of sediment to stream flow or to runoff outside the permit area. Likewise, under 11 AAC 90.423, an operator must (among other things) use best technology currently available to minimize disturbances and adverse impacts to, for example, fish and moose. Estimation of more specific impacts to aquatic productivity would also be addressed on a project-specific basis. Within a project area, impacts would also be addressed through a Title 16 habitat permit issued by ADF&G, which likewise would contain requirements to mitigate impacts to fish productivity due to mining in streams and riparian areas.[425]

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[424] July 16, 2007 Decision on 2007 Petition, at 10-11. Because this issue has been adjudicated and the matter was dismissed with prejudice by the Superior Court, this claim is likely barred by res judicata and collateral estoppel.

[425] ADF&G May 26, 2011 letter at 2.

214. Based on the above and the administrative record, I decline to use my discretionary authority under AS 27.21.260(c)(2)(C) to designate any of the petition area as lands unsuitable for surface coal mining operations.

Petitioners' Allegation IV: Surface coal mining operations will affect areas of unstable geology and other natural hazards in which the operations could substantially endanger life and property

215. Petitioners allege that, pursuant to AS 27.21.260(c)(2)(D), the petition area should be deemed unsuitable for surface coal mining operations on the basis that those operations will affect areas of unstable geology and other natural hazards which could substantially endanger life and property.[426]

216. Under AS 27.21.260(c)(2)(D), the Commissioner "may designate an area as unsuitable for all or certain" coal mining activities "if the commissioner determines that operations in the area will...affect areas subject to frequent flooding and areas of unstable geology, or other natural hazard land in which the operations could substantially endanger life and property." This provision is considered discretionary, that is, the Commissioner may designate lands unsuitable in his or her discretion, but is not required to do so.

217. Petitioners' Allegation IV is verbatim to the Allegation IV that they raised in the 2007 Petition.[427] As with the 2007 Petition, the current petition contains only general assertions, and petitioners fail to provide evidence to support this allegation. Nor do petitioners submit any new evidence to support this allegation since the 2007 Petition.

A. Earthquakes

218. Like Commissioner Irwin, I find that many of the conditions petitioners describe, *e.g.*, earthquakes, high winds, landslides, and severe winter ice conditions[428] occur in areas where surface coal mining activities have long been carried out under regulation without substantially endangering life and property. For example, the Usibelli Coal Mine near Healy, Alaska is located within the area impacted by the magnitude 7.9 earthquake on the Denali Fault in November 2002. Little or no damage

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[426] 2010 Petition at 46-48.

[427] *See* Allegation IV of 2007 Petition, at 37-39.

[428] 2010 Petition at 46-48.

was sustained within active or reclaimed surface coal mining areas. Only minor slump features, occurring within both disturbed and undisturbed areas, were noted. Petitioners fail to provide supporting evidence that the situation would be any different for any of the streambeds or riparian areas they delineate in the current petition.

219. The petitioners maintain that seismic hazards in the Chuitna watershed are extreme and would cause an increased ground failure hazard if the ground were disturbed by mining activities.[429] There are two strike slip faults that occur in the petition area -- the Bruin Bay Fault and the Castle Mountain Fault. According to the Division of Geological and Geophysical Surveys, these two faults have not shown signs of movement within the Holocene period (approximately the last 11,000 years) and therefore would not be characterized as "active."[430] In addition to their lack of recent movement, and due to the geology and character of the faults, they would be unlikely to generate a seismic event on the scale of the 9.2 magnitude Good Friday earthquake in 1964. Seismic Risk Zone 4 includes virtually all of the Southcentral Alaska region, including the Chuitna watershed. The region contains roads, pipelines, railroads, oil and gas platforms, power plants, oil and gas refineries, and buildings up to 20 stories in height, all designed to withstand seismic events in this risk zone.

220. There is no evidence in the administrative record to support the allegation that surface coal mining operations, if properly regulated, would nonetheless adversely affect renewable resource lands in an earthquake event.

B. Volcanic Hazards

221. With respect to any volcanic hazards, the petitioners claim there are four volcanoes on the west side of Cook Inlet that create a volcanic risk.[431] These volcanoes include: Augustine, Iliamna, Redoubt, and Mount Spurr. Direct impacts from volcanic hazards with the Chuitna watershed would most likely be associated with Mount Spurr, the closest volcano.

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[429] Petition at 47.

[430] DGGS, DNR Large Mine Coordinator Tom Crafford and DGGS Deputy Director Rob Cornbellick, July 12, 2007.

[431] Petition at 47.

222. A Preliminary Volcano-Hazard Assessment for Mount Spurr Volcano[432] indicates that within the Chuitna watershed there exist minimal volcanic hazards associated with an eruption. Only a small area of the southwestern edge of the watershed is within the zone of debris avalanche hazards. Volcanic ash hazards depend on the prevailing wind at the time of an eruption. They are predominantly a threat to aircraft operations and only apply to a much lesser extent to ground-based operations. Within the Chuitna watershed, a volcanic ash fall from Mount Spurr might necessitate a suspension of ground-based mining operations, but would be unlikely to constitute a significant danger to health or property, at least no more so than falling ash in the nearby communities of Tyonek or Beluga. Assuming that contemporary coal mining practices will be adhered to, the presence of mining activities in the petition area would not exacerbate an air quality situation that might result in combination with a volcanic eruption and there is no evidence in the record to support such a conclusion.

C. Winter Ice & High Wind Conditions

223. The petitioners raise concerns that winter ice conditions along with strong currents in Cook Inlet could substantially endanger life or property, either directly, or as a result of spills of fuel or coal, connected with a coal shore-side marine freight facility that may be permitted and built for transferring coal to transport ships.[433] This allegation describes potential circumstances that would occur outside the petition area.

224. This allegation does not address why surface coal mining operations within the petition area itself is a hazard. The currently proposed Chuitna Coal Project proposes a freight transport facility located outside the delineated petition area.[434] Thus, the allegation contains matters outside the scope of this decision.

225. Even if the petitioners had delineated a coal-bearing area that would encompass shore facilities, I would not find support for the allegation. Marine

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[432] Preliminary Volcano-Hazard Assessment for Mount Spurr Volcano, Alaska, Open –File report 01-482, 2002.

[433] Petition at 47.

[434] Applicant's Proposed Project; April 2011, http://www.chuitnaseis.com/documents/Current-Project-Description.pdf , at 8.

shipping activities in Cook Inlet occur year-round for several ports in the Inlet, involving the transport of a variety of products (both raw resources and finished consumer products). Ice conditions/floes are issues that are commonly encountered and are successfully addressed by marine traffic in Cook Inlet during winter months. To assist with navigation and docking during ice conditions, the U.S. Coast Guard has developed operating procedures for different portions of Cook Inlet.[435] These operating procedures are designed to set minimum transit and docking requirements to lessen the chance of shipping accidents. In addition, a port operator and the U.S. Coast Guard have the option of shutting down operations if they feel conditions warrant, as noted in the February 1999 closure of the Port of Nikiski due to heavy ice conditions.[436] I find that reasonable and appropriate conditions could be imposed on any coal mining operations to minimize and avoid this particular concern, and that the allegation does not warrant designating an area that is, in the first instance, outside the petitioners' delineated petition area.

226. In the effort to support their allegation regarding high wind conditions, petitioners state that "[r]ecent events in Seward, Alaska" that involved high wind conditions, dry weather and fugitive coal dust emissions from coal stockpiled and handled at a vessel transport facility resulted in issuance of a citation by the Alaska Department of Environmental Conservation against the Alaska Railroad "for failing to control the fugitive emissions and for allowing pollution that is harmful to health and property."[437] This allegation is verbatim to that raised in the 2007 Petition. I concur with former Commissioner Irwin's 2007 finding and conclusion[438] that the referenced event simply does not support petitioners' allegation, inasmuch as the violation occurred as a consequence of the Alaska Railroad's failure to follow/comply with existing air quality standards and requirements.

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[435] 2008 Operating Procedures for Ice Conditions in Cook Inlet, U.S. Coast Guard (December 2008).

[436] *Heavy ice in Cook Inlet halts marine traffic*, posted by the Associated Press, Tuesday, February 09, 1999.

[437] Petition at 48.

[438] July 16, 2007 Decision on 2007 Petition, at 12.

227. Based on the above and the administrative record, I decline to use my discretionary authority under AS 27.21.260(c)(2)(D) to designate any of the petition area as lands unsuitable for surface coal mining operations.

Petitioners' Allegation V: Lands Exempt from Designation under AS 27.21.260; Streambeds and Associated Riparian Areas Within Logical Mining Unit 1

228. Petitioners requested that streambeds and associated riparian areas that exist in the Chuitna watershed, including those that may traverse LMU-1, be included in my deliberations on the January 21, 2010, petition. PacRim asserts that lands delineated by the petition that may lie with LMU-1 are exempt from petition review.

229. As part of the settlement relating to a judicial proceeding involving an Alaska Civil Rule 601 administrative appeal of former Commissioner Irwin's decision on the 2007 petition, DNR agreed that lands within LMU-1 would not be held exempt -- based on the 1980s Diamond Shamrock coal permitting process -- from a future petition proceeding.[439] Thus, the petition lands contained within LMU-1, along with the greater petition area that meanders throughout the Chuitna watershed, have been considered in rendering this decision.

Statutory and Constitutional Obligations to Facilitate Responsible Development of Coal Resources

230. Other statutory and constitutional factors play a part in my determinations on this petition. As previously explained with the 2010 Petition, the petitioners have refined the area for which they seek an unsuitability designation, compared to what they sought under the 2007 Petition. Given the meandering nature and length of the petition area throughout the larger Chuitna watershed designation of the petition area, or any portion thereof, would have a significant fragmenting impact on the coal resources throughout the watershed and would affect a potential operator's ability to economically and efficiently access and extract the coal resource. In short, a designation would affect the feasibility of project-specific coal mining and deter coal resource development. Because of this, granting the requested designation would likely result in a de facto designation of the entire watershed as unsuitable for

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[439] No other aspect of Commissioner Irwin's decision on the 2007 petition was changed or withdrawn, and the associated Rule 601 administrative appeal was dismissed with prejudice.

coal mining. Such a result would undercut my ability to carry out other important ASCMCRA objectives, including:

- assuring "that the coal supply essential to the nation's energy requirements and to its economic and social well-being is provided and to strike a balance between protection of the environment and other uses of the land and the need for coal as an essential source of energy;"[440] and
- assuring "that reclamation of land on which surface coal mining takes place is accomplished as contemporaneously as practicable with the surface coal mining, recognizing that the responsible extraction of coal by responsible mining operators is an essential and beneficial economic activity."[441]

231. As DNR Commissioner, I also have responsibilities under the Alaska Constitution and AS 44.37.025(a) to encourage and allow responsible resource development.

232. While these obligations and the manner in which they are carried out greatly depend on the context and facts in which resource development questions -- such as this petition -- are raised, these obligations are nonetheless important factors in my decision. Notably, as set out in detail at the outset of this document, I recognize that the majority of landowners in the Chuitna watershed were motivated in great part to select their lands because of the presence of significant coal resources and the financial prosperity, employment opportunities, and enhanced social well-being that development of those lands would bring, not just to private industry, but to Native corporation shareholders and Mental Health Trust beneficiaries, as well as local residents and the public at large. Thus, to the extent that any landowner or lessee in the area may propose a surface coal mining project capable of demonstrating compliance with applicable state, federal, and local requirements, and that such operations therefore can be responsibly conducted, then such operations would further these important statutory and constitutional directives.

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[440] AS 27.21.010(b)(7).

[441] AS 27.21.010(b)(5).

DECISION

233. The information contained in the administrative record, including that provided with the petition, is insufficient to support Allegation I.

234. Regarding Allegation II there is insufficient evidence to support this allegation or that the petition area constitutes "fragile lands." I therefore decline to use my discretionary authority under AS 27.21.260(c)(2)(B) to designate any of the petition area as fragile lands or as lands unsuitable for surface coal mining operations.

235. Regarding Allegation III there is insufficient evidence to support this allegation. I therefore decline to use my discretionary authority under AS 27.21.260(c)(2)(C) to designate any of the petition area as lands unsuitable for surface coal mining operations.

236. Regarding Allegation IV, there is insufficient evidence to support this allegations. I therefore decline to use my discretionary authority under AS 27.21.260(c)(2)(D) to designate any of the petition area as lands unsuitable for surface coal mining operations.

237. Regarding Allegation V, all of the streambeds and riparian areas delineated by the petition were included in my review of the petition, including those which meander through the Chuitna Coal Project LMU-1 area.

238. Commissioner Irwin agreed that lands within LMU-1 would not be held exempt under AS 27.21.260(g) from petition review based on the Diamond Shamrock coal permitting process. Commissioner Irwin did not, however, otherwise withdraw or change any aspect of his decision on the 2007 Petition, and the petitioners' associated Rule 601 administrative appeal on the 2007 Petition decision was dismissed with prejudice by the Superior Court. A dismissal with prejudice, including a stipulation to dismiss with prejudice, "is treated as a dismissal on the merits and is, therefore, a final judgment on the merits ... operating as res judicata." *Smith v. CSK Auto, Inc.*, 132 P.3d 818, 820 (Alaska 2006). Res judicata (claim preclusion) and collateral estoppel (issue preclusion) "bind the parties and their privies to factual findings, as well as legal conclusions, that have been the subject of prior litigation," and "administrative agency decisions can have preclusive effect on later court proceedings, so that if a party participates in an administrative adjudication, ... the adjudication

may foreclose the possibility of a later lawsuit on the same factual issues." *Alaska Public Interest Group v. State*, 167 P.3d 27, 44 (Alaska 2007). The Alaska Supreme Court has also stated that (1) "'principles of finality may be applied to the decisions of administrative agencies if, after case-specific review, a court finds that the administrative decision resulted from a procedure that seems an adequate substitute for judicial procedure and that it would be fair to accord preclusive effect to the administrative decision'" and that (2) the collateral estoppel doctrine "may be applied to an administrative decision if the decision is one 'rendered pursuant to an exercise of primary jurisdiction.'" *Harrod v. State, Dep't of Revenue*, 255 P.3d 991, 1000 (Alaska 2011) (citations omitted). In rendering my decision on the 2010 petition, I expressly preserve, and in no way hold contrary to, the final findings of Commissioner Irwin on the evidence and allegations that petitioners asserted in the 2007 petition and which petitioners now reassert nearly verbatim in the 2010 Petition. I also expressly preserve the defenses of res judicata and collateral estoppel for Commissioner's Irwin's final findings for purposes of any future litigation that may be brought on the 2010 Petition.

239. Any remaining allegations raised by petitioners that have not been specifically addressed by this decision are rejected.

240. While there is insufficient evidence to support any of the allegations, some of the petitioners' allegations raise reasonable concerns regarding whether water quality, wetlands, the hydrologic balance of the larger Chuitna watershed, fish and wildlife habitat, and other resources can be adequately protected if surface coal mining occurs within the petition area. These concerns are, however, more effectively and appropriately addressed in the application of regulatory requirements, including the performance standards that are incorporated in ASCMCRA mine permits, if a proposed mine is ultimately approved anywhere within the Chuitna watershed. Moreover, the potential impacts from any proposed coal mining project will be addressed through multi-agency State and federal review, including under NEPA.

241. It is important to note that this decision to not designate the petition area as unsuitable for all or certain types of coal mining activities does not mean that surface coal mining will automatically be approved in this area. This decision simply denies petitioners' request to preemptively shutdown the Chuitna watershed from the

possibility of surface coal mining operations. The designation process is independent of the permitting and mine planning processes that are subject to multi-agency regulatory reviews by several state, federal and local agencies, and these processes may prohibit or otherwise curtail coal mining activities on a project specific basis. A permit by DNR will not, however, be issued unless a coal mining proposal demonstrated the capacity to comply with all applicable requirements, including ASCMCRA performance standards.

242. A person affected by this decision may request reconsideration, in accordance with AS 44.37.011 and 11 AAC 02. Any reconsideration request must be received in writing within 20 calendar days after the "date of issuance" of this decision as defined by 11 AAC 02.040(c) and (d) and may be mailed or delivered to Daniel S. Sullivan, Commissioner, Department of Natural Resources, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501; faxed to 1-907-269-8918, or sent by electronic mail to dnr.appeals@alaska.gov.

243. If reconsideration is not requested within the time allowed, this decision goes into effect as a final order and decision on the 31st day after issuance. Failure of the Commissioner to act on the request for reconsideration within 30 days after issuance of this decision is an automatic denial of reconsideration (AS 44.62.540(a)) and is a final administrative order and decision for purposes of an appeal to Superior Court (AS 44.37.011; 11 AAC 02.020(c)). The decision may then be appealed to Superior Court within a further 30 days in accordance with the rules of the court, and to the extent permitted by applicable law. An eligible person must first request reconsideration of this decision in accordance with 11 AAC 02 before appealing this decision to Superior Court (11 AAC 02.020). A copy of AS 44.37.011 and 11 AAC 02 may be obtained from any regional DNR information office.

DATED this 24th day, of October, 2011.

By: Daniel S. Sullivan

Commissioner Daniel S. Sullivan
Department of Natural Resources

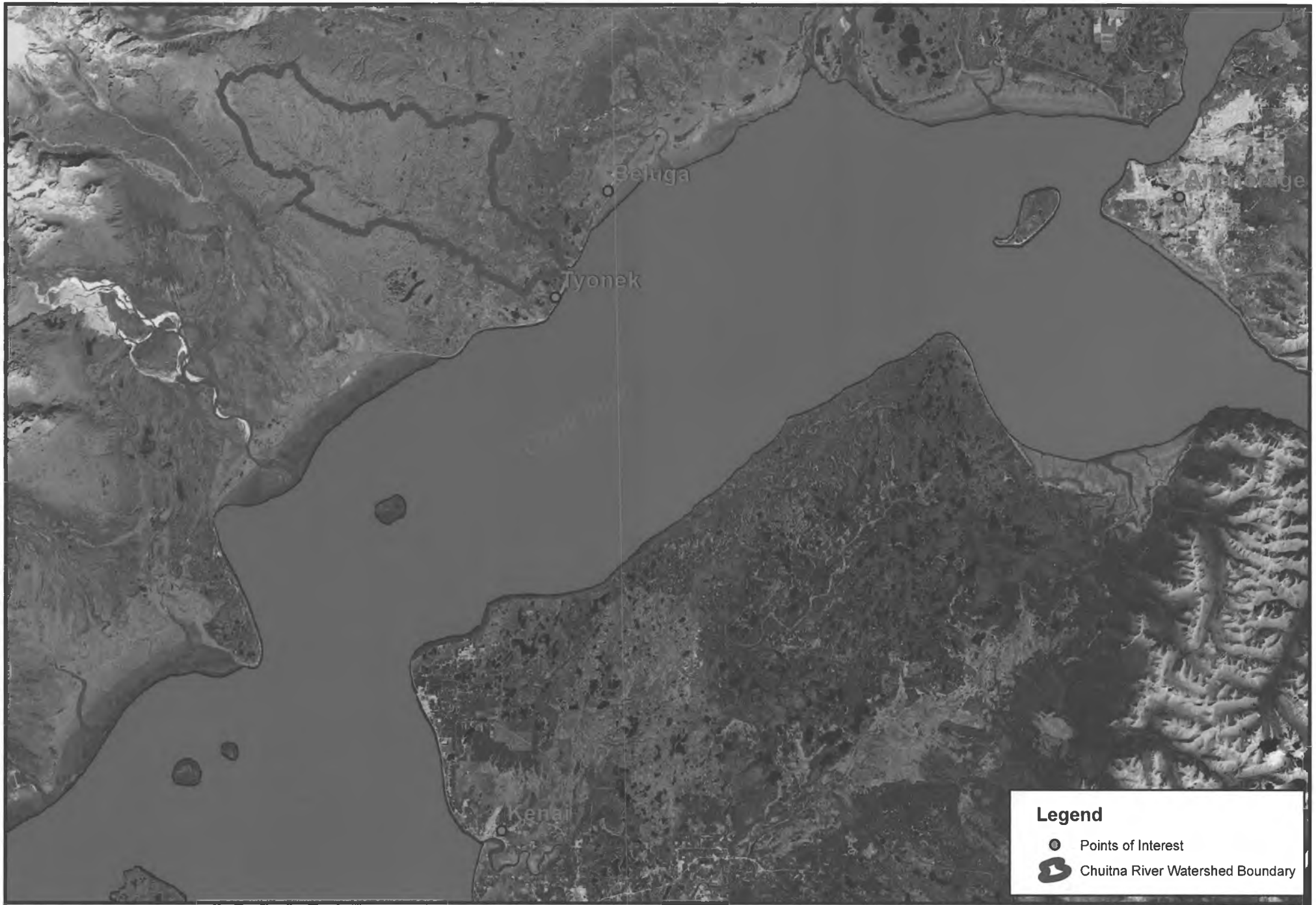

Figure 1: Location map showing locations of Anchorage, Kenai, Tyonek and Beluga in relation to the Chuitna River Watershed.

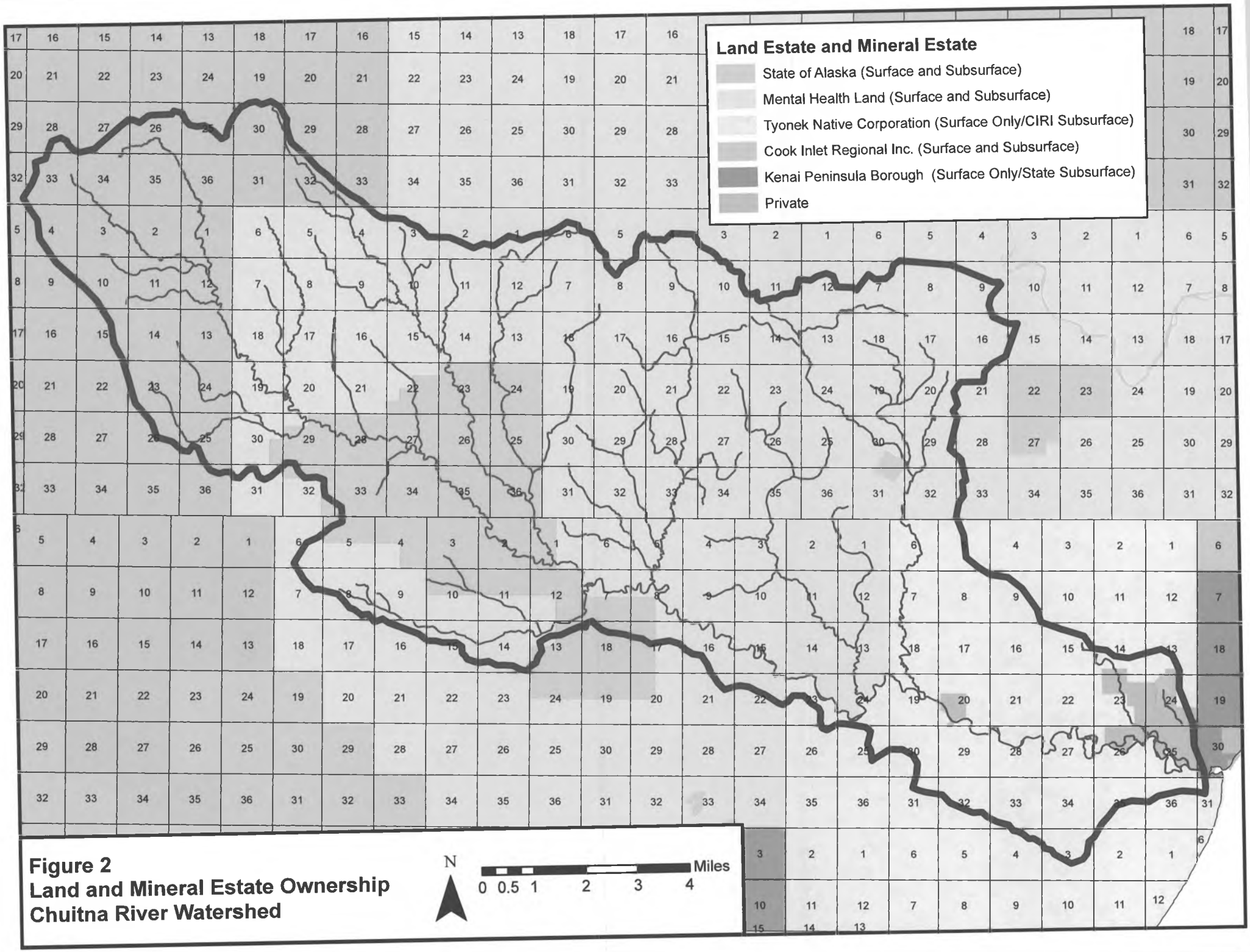

Figure 2
Land and Mineral Estate Ownership
Chuitna River Watershed

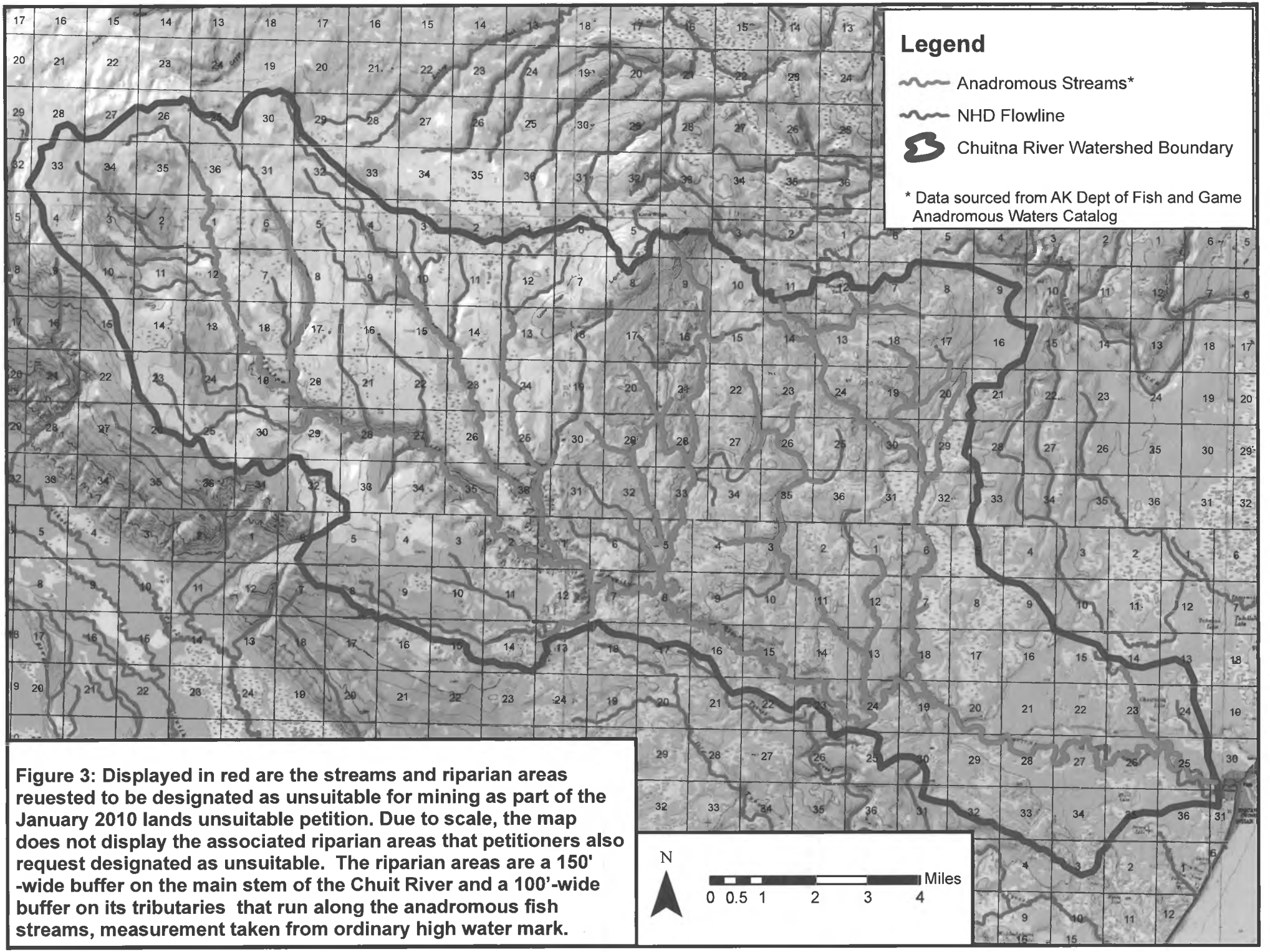

Figure 3: Displayed in red are the streams and riparian areas reuested to be designated as unsuitable for mining as part of the January 2010 lands unsuitable petition. Due to scale, the map does not display the associated riparian areas that petitioners also request designated as unsuitable. The riparian areas are a 150' -wide buffer on the main stem of the Chuit River and a 100'-wide buffer on its tributaries that run along the anadromous fish streams, measurement taken from ordinary high water mark.

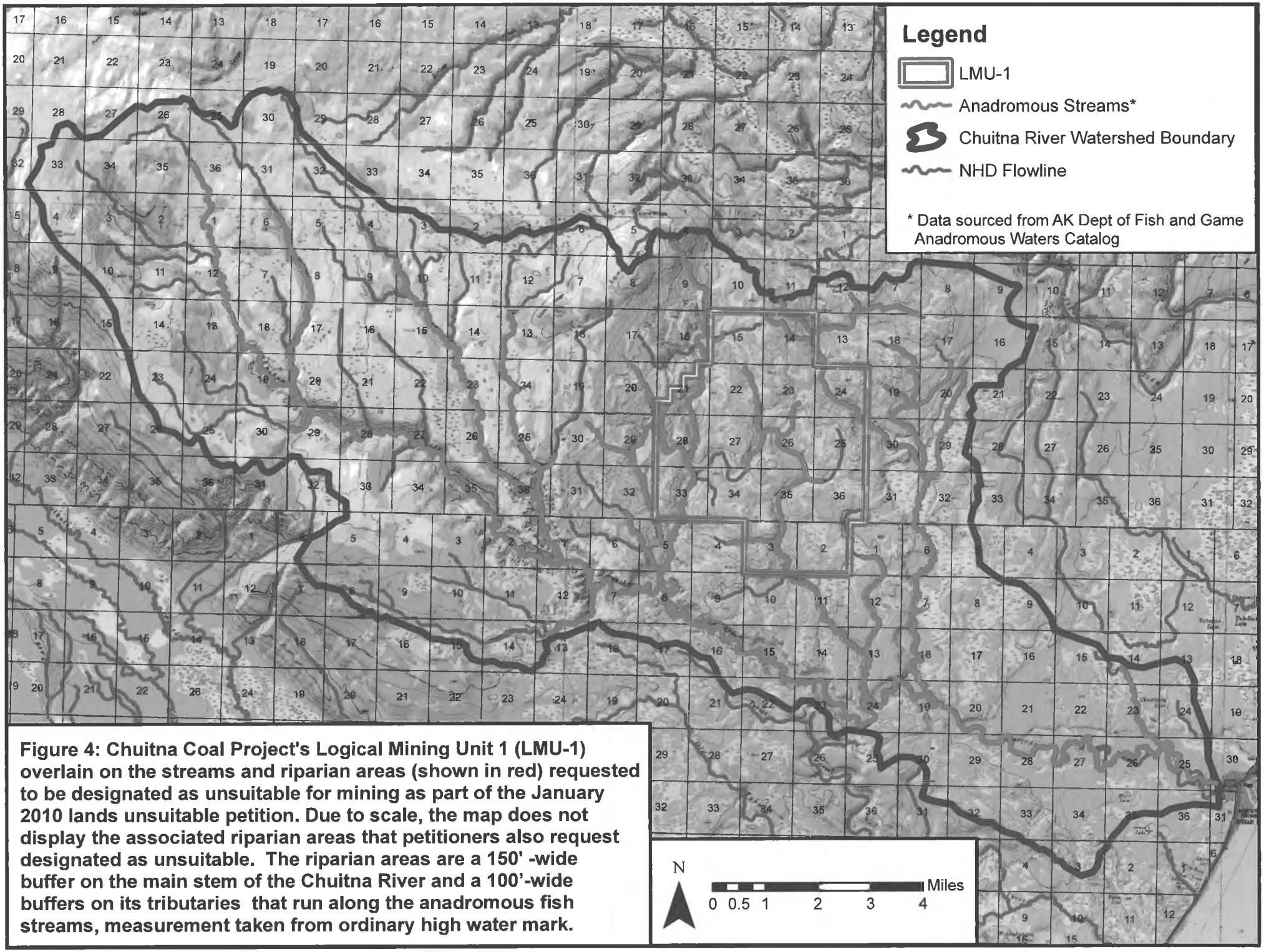

Figure 4: Chuitna Coal Project's Logical Mining Unit 1 (LMU-1) overlain on the streams and riparian areas (shown in red) requested to be designated as unsuitable for mining as part of the January 2010 lands unsuitable petition. Due to scale, the map does not display the associated riparian areas that petitioners also request designated as unsuitable. The riparian areas are a 150' -wide buffer on the main stem of the Chuitna River and a 100'-wide buffers on its tributaries that run along the anadromous fish streams, measurement taken from ordinary high water mark.

3/14/12 CONFIRMATION HEARING: ATTORNEY GENERAL MICHAEL GERAGHTY

<TARGET><BILL></BILL><SUBJECT>3-14-12 CONFIRMATION HEARING ATTORNEY GENERAL MICHAEL GERAGHTY</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE
CONFIRMATION COMMITTEE REPORT

Date: 3·14·12

In accordance with AS 39.05.080, the Judiciary Committee reviewed the following and recommends the appointment be forwarded to a joint session for consideration:

Attorney General – Department of Law
Michael C. Geraghty

This does not reflect an intent by any of the members to vote for or against the confirmation of the individual during any further sessions.

Signature:	**Printed Last Name**
	Wielechowski
	Coghill
	Paskvan
	McGuire
Chair:	French

Please return to the Senate Secretary's Office (Room 213).

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

1. Describe your law school experience. Where and when did you attend law school? Did you receive any honors? Did you participate in your school's law review? Moot court? Legal aid clinic? Any other details about that time in your life?

2. Describe your legal employment after law school. What subject areas have you practiced in? How many other lawyers did you practice with? How many jury trials have you completed? How many appearances have you made before the Alaska Supreme Court? Before the Ninth Circuit Court of Appeals? Have you published in any legal journals?

3. What do you see as the primary mission of the Attorney General?

4. What is the biggest challenge facing the civil division? What actions do you plan to take in reaction to that challenge?

5. What is the biggest challenge facing the criminal division? What actions do you plan to take in reaction to that challenge?

6. Are you satisfied with the turnover rates in the criminal division? If not, what actions do you plan to take to lower the turnover rates?

7. Alaska suffers from some of the highest sex assault and sex abuse rates in the nation. Are prosecutions of this crime increasing? Are trials on these charges increasing? Please provide some statistics on this subject. What actions do you plan to take in this area?

8. What will be your Department's approach to the issues of tribes and tribal sovereignty in Alaska? For instance, at the 2012 Crime Summit, Walt Monegan, CEO of the Alaska Native Justice Center suggested the creation of a pilot project creating tribal or community courts in villages that are currently not served by the state court systems. What is your view on cooperative ventures such as this?

9. The State challenged the listing of polar bears and beluga whales, as well as recent protections for stellar sea lions as threatened species under the Endangered Species Act. These challenges have failed. Do you foresee continued challenges of this sort, given the state's record?

10. Recent news articles discussed a Department of Fish and Game initiative that would give special hunting privileges to some private landowners. The story noted the involvement of an assistant Attorney General in developing this proposal. The Alaska constitution provides that all state resources, including wildlife, are "reserved to the people for common use". Tell us your thoughts regarding the constitution's provision of common use versus the provision of special hunting permits for landowners.

11. State leases for oil and gas development require the operator of the lease to drill wells when "a reasonable profit" can be made. How does law and case law define "a reasonable profit" under these leases?

Geraghty, Michael
State of Alaska Attorney General

MICHAEL C. GERAGHTY

mgeraghty@dmgz.com

PROFILE

Since he joined the firm in 1979, Mr. Geraghty's work has been devoted exclusively to litigation and trial practice before state and federal courts. He has assumed lead counsel responsibilities in all of his trials, which have included both civil and criminal law, as well as proceedings before the OSHA Review Board, the Alaska State Commission on Human Rights and the U.S. Land Commission. He has tried cases before juries in Fairbanks, Anchorage, Barrow, Kenai and Dillingham. Mr. Geraghty has been selected in The Best Lawyers in America in the specialties of Construction Law and Personal Injury Litigation since 2007 and he has also been recognized as a "Superlawyer" by Washington Law & Politics magazine since 2008. In 2005 he was appointed by the Governor to serve Alaska as a Uniform Law Commissioner to the National Conference of Commissioners on Uniform State Laws. In 2007 he was honored by his peers when he received the Board of Governors Professionalism Award "in recognition of exemplary conduct in his association with the public, his colleagues and the legal community." In 2011, he was elected to the Fellows of the American Bar Foundation "in recognition of outstanding dedication to the welfare of the community, the traditions of the profession and the advancement of the objectives of the American Bar Association."

PRACTICE DESCRIPTION

Born and raised in Alaska, Mr. Geraghty's practice has focused on industries and areas that reflect this state's growth and history, including natural resources, oil and gas and construction. He has been involved in numerous complex litigations, including class actions and anti-trust. Many, if not most, of these cases pose

unique challenges in terms of developing orderly plans for discovery, document production, depositions of witnesses and experts, and other related matters.

He has handled approximately 20 appeals to the Alaska Supreme Court in the areas of sovereign immunity, administrative law, insurance and bad faith, attorney-client privilege, OSHA regulations, personal injury, products liability and premises-landowner liability. His reported cases include:

- Harris v. Ahtna Government Services Corp., 193 P.3d 300 (Alaska 2008)
- Kirk v. Demientieff, 145 P.3d 512 (Alaska 2006)
- Halliburton Energy Services v. State of Alaska, Department of Labor Division of Labor Standards and Safety, Occupational Safety and Health Section, 2 P.3d 41 (Alaska 2000)
- McCubbins v. State of Alaska, Department of Natural Resources, Division of Parks and Recreation, 973 P.2d 588 (Alaska 1999)
- State of Alaska v. State Farm, 939 P.2d 788 (Alaska 1997)
- State of Alaska v. Sanders, 944 P.2d 453 (Alaska 1997)
- City of Dillingham v. CH2M Hill Northwest, Inc., 873 P.2d 1271 (Alaska 1994)
- Central Constr. Co. v. The Home Indem. Co., 794 P.2d 595 (Alaska 1990)
- Lake v. Constr. Mach., Inc., 787 P.2d 1027 (Alaska 1990)
- Myers v. Snow White Cleaners, 770 P.2d 750 (Alaska 1989)
- Ogle v. Craig Taylor Equip. Co., 761 P.2d 722 (Alaska 1988)
- Wade Oilfield Serv. Co. v. Providence Washington Ins. Co., 759 P.2d 1302 (Alaska 1988)
- Cheeks v. Wismer & Becker, 742 P.2d 239 (Alaska 1987)
- Exxon Corp. v. Alvey, 690 P.2d 733 (Alaska 1984)
- Miller v. Northside Danzi Constr. Co., 629 P.2d 1389 (Alaska 1981)
- Black v. Universal Services, Inc., 627 P.2d 1073 (Alaska 1981)
- Ribar v. H & S Earthmovers, 618 P.2d 582 (Alaska 1980)
- Board of Educ. v. Ewig, 609 P.2d 10 (Alaska 1980)

Michael's approach is client-focused, solution-driven and premised on providing timely and superior service.

PROFESSIONAL AND COMMUNITY ACTIVITIES

- Uniform Law Commissioner, National Conference of Commissioners on Uniform State Laws
- American Bar Association Litigation Section and Construction Industry Forum
- Federation of Defense and Corporate Counsel (FDCC)
- Fellow, American Bar Foundation

EDUCATION

- University of Santa Clara, J.D., *Cum Laude*, 1978
- University of Hawaii, B.A., Political Science, 1974

BAR AND COURT ADMISSIONS

- Alaska Bar Association
- United States District Court for the District of Alaska
- United States Court of Appeals for the Ninth Circuit

Attorneys At Law
DMGZ
DeLisio Moran Geraghty & Zobel, P.C.

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Phone: 907.279.9574 • Fax: 907.276.4231 | Site Map

POFD Form

Completed

Submission Date: **02/26/2012**

Filer Information

First Name: **Michael**
Last Name: **Geraghty**
Address: **6761 Reklas Cir.**
City, State Zip: **Anchorage, Alaska 99502**
Contact Phone: **907. 248.4057**
Alternate Phone: **907.269.3787**
Fax (Optional): **none**
Email: **mcgeraghty@gci.net**
Partner Type: **Spouse**
Spouse/Domestic Partner Name: **Ruth Mishel geraghty**
Dependent Children: **4**
Non-Dependent Children: **0**

Purpose of Filing

Report Dates: From **01/01/2011** Through **12/31/2011**
Filing As: **Office Holder**
Branch: **Executive**
Position: **Commissioner**
Department: **Department of Law**
Report Type: **Initial**

Income

Owner	Type	Detail	Description	Amount
Filer	Salaried	DeLisio Moran geraghty & Zobel, P.C. 943 W. 6th Ave. Anchorage, Alaska 99501 Full-time From: 01/01/2011 Through 01/31/2012 Time Worked: typically Mon-Friday, 8:30 to 5 pm or thereabouts	Partner in law firm bearing my name	**$200,000 - $500,000**
Others	Rental	Tenant: Golat Inc.d/b/a North Star Auto Sales		**$5,000 - $10,000**
Filer	Dividend or Interest	PFD and family investment entities		**$5,000 - $10,000**
		Delisio, Moran, Geraghty & Zobel PC Hourly From: 01/01/2011 Through 12/31/2011 Time Worked: 12 months	Legal Services	**$200,000 - $500,000**

Client Names	Client Addresses	Client Amount
Ahtna Government Services Corporation	c/o 943 W. 6th Avenue, Anchorage, AK 99502	$200,000 - $500,000
Alaska Pacific Environmental Services	c/o 943 W. 6th Avenue, Anchorage, AK 99502	$20,000 - $50,000
Alaska Airlines	c/0 943 W. 6th Avenue, Anchorage, Ak 99502	$2,000 - $5,000
Alaska Public Entity Insurance	Pending	$10,000 - $20,000
Alaska National Insurance	Pending	$5,000 - $10,000
Alaska Timber Insurance Exchange	Pending	$50,000 - $100,000
Alaska USA Federal Credit Union	Pending	$2,000 - $5,000
American Interstate Insurance	Pending	$20,000 - $50,000

Anchorage School District	Pending	$20,000 - $50,000
ANPI, LLC	Pending	$2,000 - $5,000
Aramark	Pending	$20,000 - $50,000
ESIS Portland Claims	Pending	$5,000 - $10,000
Arctic Slope Regional Corporation	Pending	$100,000 - $200,000
ASTAC	Pending	$50,000 - $100,000
WH Pacific	Pending	$20,000 - $50,000
ASEA Legal Services Trust	Pending	$1,000 - $2,000
ASRC Energy Services	Pending	$100,000 - $200,000
Atigun, Inc	Pending	$20,000 - $50,000
Auto Owners Insurance Company	Pending	$2,000 - $5,000
Barrett & Associates Insurance	Pending	$1,000 - $2,000
Bombardier Aerospace	Pending	$1,000 - $2,000
Bristol Bay Borough	Pending	$5,000 - $10,000
Broadspire	Pending	$20,000 - $50,000
Mr. and Mrs. C.R. Foss	Pending	$5,000 - $10,000
The Center for Community	Pending	$2,000 - $5,000
CH2M Hill Constructors, Inc	Pending	$100,000 - $200,000
Chuck Slagle	Pending	$2,000 - $5,000
Church Mutual Insurance Co.	Pending	$5,000 - $10,000
Claim Professional Liability	Pending	$1,000 - $2,000
CNA Ins.	Pending	$2,000 - $5,000
Common Point, LLC	Pending	$2,000 - $5,000

Filer	Self Employment	~~Conam Construction Co.~~	~~Pending~~	~~$1,000 - $2,000~~
		Constitution State Services	Pending	$10,000 - $20,000
		Crawford Integrated Services	Pending	$10,000 - $20,000
		Crawford & Company	Pending	$10,000 - $20,000
		Dock Street Building Corporation	Pending	$1,000 - $2,000
		Electric Power Systems, Inc.	Pending	$5,000 - $10,000
		Enstar Group	Pending	$1,000 - $2,000
		Era Helicopters	Pending	$1,000 - $2,000
		First Bank	Pending	$50,000 - $100,000
		First Citizens Bank and Trust	Pending	$2,000 - $5,000
		First National Bank of Alaska	Pending	$200,000 - $500,000
		GCI Inc.	Pending	$10,000 - $20,000
		Haines Sanitation, Inc.	Pending	$2,000 - $5,000
		Harland Financial Solutions	Pending	$5,000 - $10,000
		Hudson Cook - Omni Financial	Pending	$5,000 - $10,000
		JL Properties Inc.	Pending	$5,000 - $10,000
		Kinross Gold U.S.A. Inc.	Pending	$2,000 - $5,000
		Lloyd Kompkoff	Pending	$1,000 - $2,000
		Firstgroup America	Pending	$2,000 - $5,000
		Laker Electric, Inc.	Pending	$1,000 - $2,000
		Liberty Mutual Insurance	Pending	$20,000 - $50,000
		Liberty Northwest	Pending	$100,000 - $200,000
		Little Red Services	Pending	$5,000 - $10,000
		Livingreen	Pending	$1,000 - $2,000
		Lowe's Inc.	Pending	$5,000 - $10,000

Marsha L. Marke	Pending	$2,000 - $5,000
Matanuska Valley Federal Credit Union	Pending	$1,000 - $2,000
McKinley Fence Company of Alaska	Pending	$10,000 - $20,000
Theodore Meiners	Pending	$2,000 - $5,000
Midland Loan Services Inc.	Pending	$1,000 - $2,000
Juris Mindenbergs	Pending	$1,000 - $2,000
Morris Engineering Group	Pending	$5,000 - $10,000
NANA Management Services	Pending	$10,000 - $20,000
Northern Adjusters	Pending	$2,000 - $5,000
Northrim Bank	Pending	$20,000 - $50,000
Novapro Risk Solutions	Pending	$10,000 - $20,000
Ocwen Loan Services, Inc.	Pending	$2,000 - $5,000
OTZ Telephone Cooperative	Pending	$2,000 - $5,000
Petro Star	Pending	$20,000 - $50,000
Platinum Jaxx, Inc.	Pending	$1,000 - $2,000
Providence Washington Insurance	Pending	$1,000 - $2,000
PTP Management, Inc.	pending	$5,000 - $10,000
Q-1 Corporation	Pending	$20,000 - $50,000
Resort Associates	Pending	$1,000 - $2,000
Dean Rickerson	Pending	$2,000 - $5,000
Kenneth V. Schaefer	Pending	$2,000 - $5,000
Ballard Smith	Pending	$10,000 - $20,000
Sedgwick	Pending	$20,000 - $50,000
Specialty Risk Services	Pending	$50,000 - $100,000

		Stokes, Roberts & Wagner	Pending	$5,000 - $10,000
		Tanacross, Inc.	Pending	$5,000 - $10,000
		Trans-Pac Alaska, Limited	Pending	$2,000 - $5,000
		Tyonek Contractors, LLC	Pending	$10,000 - $20,000
		Ukpeagvik Inupiat Corporation	Pending	$5,000 - $10,000
		Unique Machine, LLC	Pending	$1,000 - $2,000
		University of Alaska	Pending	$20,000 - $50,000
		Hal K. Ward	Pending	$2,000 - $5,000
		Washington Capital	Pending	$20,000 - $50,000
		Waterfall Group	Pending	$20,000 - $50,000
		Wausau Insurance Companies	Pending	$20,000 - $50,000
		Wells Fargo Bank N.A.	Pending	$10,000 - $20,000
		Wilton Adjustment Services	Pending	$20,000 - $50,000
		Zurich International	Pending	$5,000 - $10,000
		Marvin and Hue McConnell	pending	$10,000 - $20,000
		ARECA Ins. Exchange	pending	$2,000 - $5,000

INTERESTS

Owner	Type	Detail	Description	Interest
Filer	Business	Business Name: Geraghty Bros. LLC 6761 Reklas Cir. Fairbanks, Alaska 99707	Business owned w/ my brother; owns real estate in Fairbanks.	Position / Type: member/owner
		Business Name: Angela Geraghty Family Ltd. Partnership	Family-owned business that holds various real estate and	Position / Type:

Filer	Business	6761 Reklas Cir. Anchorage, Alaska 99502	securities.	General and limited partner
Filer	Real Property	Metro Industrial Park and other property in Fairbanks,Alaska Fairbanks, Alaska 99701	Ownership Interest: Geraghty Bros., LLC owns 4-6 parcels of ground in Fairbanks, including a recreational cabin at Harding Lake.	
Filer	Beneficial	Managed By: Fidelity	Delisio Moran Geraghty & Zobel Profit-Sharing Trust	Ownership: 100%

Loans and Debts

Owner	Type	Name
Filer	Lender	Wells Fargo home mortgage
Filer	Lender	Wells Fargo pers. line of credit secured by primary residence
Filer	Lender	Toyota Financial Services auto loan

Leases

Owner	Type of Lease	Lease/Contract ID	Interest	Status	Description
No Leases / Nothing to Report					

Close Economic Associations

Person Disclosing Association	Associated Person	Description
No Associations / Nothing to Report		

Lobbyist Partner Employers

Name	Address	Compensation
No Lobbyist Partner Employers / Nothing to Report		

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Dubious relocation of Anchorage, Mat-Su moose makes no sense

Begich: Exempt Native hunters from duck-stamp fee, charge others more

Brace for impact: Solar flare could mean brilliant northern lights, electrical disruption

Arctic

Judge delivers 'bittersweet' polar bear ruling

Amanda Coyne | Oct 17, 2011

In a ruling that both environmentalists and Alaska Rep. Don Young can applaud, U.S. District Judge Emmet Sullivan threw out a key section of an Interior Department rule that declared global warming is threatening the survival of the polar bear, making regulations of greenhouse gases mandatory.

Sullivan said that Fish and Wildlife Service failed to conduct a proper environmental review when creating the protections for the polar bear. The agency must now go back and conduct an environmental assessment of the outcome of the rule, and consider other options.

In other words, according to **Politico,** "the Obama administration can't be forced to use endangered species law to regulate greenhouse gases . . . but it can't ignore the idea either."

Politico quotes the judge as writing the following:

> The question at the heart of this litigation — whether the ESA is an effective or appropriate tool to address the threat of climate change — is not a question that this court can decide based upon its own independent assessment, particularly in the abstract. The answer to that question will ultimately be grounded in science and policy determinations that are beyond the purview of this court.

In keeping with his optimistic disposition, Young all but declared victory:

> Today's decision by a federal judge that the Fish and Wildlife Service cannot use the Endangered Species Act to regulate greenhouse gas emissions is the right one. The lawsuits to list the polar bear as endangered were never about protecting polar bears. Instead they were nothing more than a back door approach to regulate CO2 and stop responsible development from moving forward. This is a good decision, not only for Alaska but for this nation as we look to become more energy independent.

A press release sent by the groups who brought the case to court -- Center for Biological Diversity, Natural Resources Defense Council, Greenpeace and Defenders of Wildlife -- said that today's ruling "does not limit the applicability of the ESA to greenhouse gas emissions affecting species listed as endangered under the Act or to other threatened species for which Interior has not issued a specific exemption."

It called the ruling, "bittersweet."

Sullivan is the same judge who presided over the corruption trail of the late **Sen. Ted Stevens**, and who subsequently threw out his conviction.

*Contact Amanda Coyne at **amanda(at)alaskadispatch.com***

Dubious relocation of Anchorage, Mat-Su moose makes no sense

Begich: Exempt Native hunters from duck-stamp fee, charge others more

Brace for impact: Solar flare could mean brilliant northern lights, electrical disruption

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EARTHJUSTICE
Because the earth needs a good lawyer

Steller Sea Lion Protections in Aleutian Islands Upheld

Alaska, industry groups' challenge to fishery restrictions rebuffed
January 20, 2012
Juneau, AK —
Alaska, industry groups' challenge to fishery restrictions rebuffed
Juneau, AK
Contact:
Colin O'Brien, Earthjustice, (907) 500-7134
Michael LeVine, Oceana, (907) 723-0136
January 20, 2012

Today, the United States District Court for the District of Alaska upheld protections for the Western Population of Steller sea lions. The new measures were put in place by the National Marine Fisheries Service (NMFS) to reduce competition between large-scale commercial fisheries and endangered Steller sea lions in the Aleutian Islands.

The ruling came after the State of Alaska and industry groups sued to have the sea lion protections thrown out.

Steller sea lions are powerful, playful creatures that are gracefully adept at moving through icy waters. (NOAA)

"It's a good day for our oceans," said Susan Murray, Oceana's Senior Director, Pacific. "This decision shows that responsible management requires steps to

protect healthy ocean ecosystems including sustainable fisheries and vibrant communities. We are moving away from managing single species money fish and toward ecosystem-based management that takes into account the needs of apex predators in our oceans."

The court found that the agency based its decision on good science and, with one exception, followed appropriate process. According to the court, the agency did not comply with the law in failing to prepare a full environmental impact statement.

"Today's decision validates the agency's use of the best science to protect our oceans," said Colin O'Brien, staff attorney at Earthjustice, "The next step is a full evaluation of the impacts of fisheries on ocean ecosystems, including Steller sea lions."

Oceana and Greenpeace, represented by Earthjustice, intervened in the lawsuit to defend the new measures.

The parties will submit briefing on the scope of the new environmental impact statement by February 8.

Contact:
Colin O'Brien, Earthjustice, (907) 500-7134
Michael LeVine, Oceana, (907) 723-0136

URL: http://earthjustice.org/news/press/2012/steller-sea-lion-protections-in-aleutian-islands-upheld

adn.com
Anchorage Daily News

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Federal judge backs listing of Inlet belugas as endangered

ENDANGERED: State failed on all points, federal judge rules.

By RICHARD MAUER

(11/22/11 16:54:57)

For the second time in less than six months, a federal judge on Monday threw out a lawsuit by the Parnell administration challenging an endangered species listing, this time involving Cook Inlet's beluga whales.

In the latest ruling, the chief judge of the Washington, D.C., District Court, Royce Lamberth, said the state failed on all its points to show that the National Marine Fisheries Service improperly designated belugas as endangered in the Cook Inlet region.

That follows a similar decision in June by another federal judge in Washington, Emmet Sullivan, who said the U.S. Fish and Wildlife Service properly designated polar bears as endangered. The state is appealing that decision.

Bob Shavelson of Cook Inletkeeper, one of the organizations that intervened in the beluga case in support of the federal fisheries service, said the ruling demonstrated that the state's lawsuit was "a waste of taxpayer money."

"The state would be better served paying scientists instead of lawyers and letting the scientists do science and not be handcuffed by politics," said Shavelson. He was referring in part to a Parnell administration order, issued in connection with beluga recovery efforts, that barred state scientists from publicly disagreeing with administration policy.

In a prepared statement, Alaska Attorney General John Burns expressed disappointment with the ruling.

State officials say they are concerned that recovery efforts for belugas,

if too strict, could threaten oil and gas development and shipping in the Inlet. Escopeta Oil Co., which recently announced a major gas discovery in Cook Inlet, had intervened in the lawsuit on the side of the state.

"We maintain that the listing process was defective because it did not sufficiently involve the state or consider the conservation measures already in place to protect Cook Inlet belugas," Burns said. "We are reviewing the decision and considering further options."

But in his ruling, Lamberth, a Reagan appointee, took note of the state's conservation measures and rejected them as inadequate.

"Ultimately, whatever conservation efforts were already being made by the state ... clearly had not demonstrated a degree of effectiveness sufficient to alleviate concern over the small population size in Cook Inlet, since the population had shown no signs of recovery and was indeed continuing to decline," Lamberth wrote in his decision.

The failure of the state to renew its coastal management program -- bills to do so died this year in the Alaska Legislature -- "certainly does not help (Alaska's) argument that the (National Marine Fisheries) Service somehow overlooked an important state-sponsored conservation effort," the judge wrote in his 25-page decision.

Lamberth also rejected the state's contention that its objections weren't adequately heard by the federal government.

"But the record reflects that the Service held four public hearings -- three in Alaska and one in Maryland -- and received approximately 180,000 public comments on the Proposed Rule," Lamberth wrote. "In any event, plaintiffs' argument that the opportunity for public comment was somehow not 'full' borders on the absurd."

Instead, he said, the National Marine Fisheries Service "considered -- and thoroughly responded to -- each of Alaska's objections to the Proposed Rule."

While beluga populations around the Northern Hemisphere are generally healthy, the subspecies in Cook Inlet begin sliding in the 1980s, then declined dramatically from 1994 to 1998 in a

"catastrophic spree of subsistence whaling," Lamberth wrote.

"Aided by modern technology, Alaska Natives decimated the beluga population in Cook Inlet, harvesting nearly half of the remaining 650 whales in only four years," Lamberth said.

New rules put a moratorium on the hunt. The federal government declined to list belugas as endangered in 2000, predicting the population would bounce back. Instead, Lamberth said, whale numbers continued to decline an average of more than 1 percent a year.

The 1973 Endangered Species Act has five criteria for determining whether a species should be listed. While any one would have been adequate, Lamberth said, Cook Inlet belugas met all five. On April 20, 2007, the fisheries service proposed listing belugas and scheduled a public comment period. It issued its final ruling Oct. 28, 2008, in the waning days of the Bush administration.

In February, the fisheries service designated more than 3,000 square miles of Cook Inlet shoreline and marine area as critical habitat for belugas, leading some state officials and development advocates to complain that the local economy could be stifled. Federal officials urged more cautious reactions, saying they had no plans to turn the Inlet into an exclusive zone for whales, which in any event had coexisted with offshore oil drilling and shipping for decades.

Among a dozen parties to the lawsuit, initially brought by Alaska on June 4, 2010, were the whales themselves, represented by four attorneys from environmental organizations. Lamberth took over the case after another judge allowed the famed white whales to join the lawsuit as an intervenor defendant. He described that status as a "noble gesture" with "no legal significance."

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Anchorage Daily News

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Alaska joins appeal of ruling on polar bear 'threatened' status

By RICHARD MAUER
rmauer@adn.com
(08/27/11 13:21:10)

The Parnell administration on Friday joined a parade of parties appealing the June decision by a federal judge in Washington, D.C., that the government correctly listed polar bears as a threatened species.

On Thursday, 35 plaintiffs and intervenors, some working together, filed three separate notices that they were appealing U.S. District Judge Emmet Sullivan's decision in favor of the U.S. Fish and Wildlife Service's listing of polar bears under the Endangered Species Act. Most of the parties support or engage in trophy hunting, though they also include an organization of California cattlemen.

The fourth notice of appeal, to the District of Columbia Circuit Court of Appeals, belongs to the State of Alaska. It was filed this morning by one of four non-state lawyers who have represented the state in the case -- Boise, Idaho-based Murray Feldman of the western states law firm Holland & Hart.

The state had been one of many plaintiffs to sue against the 2008 listing. The Parnell Administration said the listing was inappropriate because polar bear populations were healthy.

Environmental organizations also sued or intervened in District Court, saying the listing wasn't strong enough -- it should have been "endangered," they said, which would provide more protections than "threatened." None of the environmental groups have appealed yet.

The Fish and Wildlife Service agrees that the polar bear numbers are

strong today in most of their locations, but listed them because of threats to their habitat caused by global warming.

Polar bears spend much of their lives hunting seals from sea ice. Biologists say that as the sea ice melts away, bears will have to swim tremendous distances between rest stops. At the same time, their food supply will become harder to find. The stress is likely to cause deaths from drowning and reduce their ability to reproduce, the biologists say.

Over the last three decades, Arctic sea ice has melted at rates unprecedented in recorded history. A recent study by climate scientists with the National Center for Atmospheric Research concluded that half the melting was due to greenhouse gases produced by human activity, such as the burning of fossil fuel for energy production.

Parnell administration officials say that polar bears survived prehistoric periods of global warming and there's no reason to believe they wouldn't again. The state lawsuit doesn't deny the world is undergoing climate change, but it says the Endangered Species Act shouldn't be used in a "speculative" situation before an animal population actually shows signs of serious decline. State officials say they fear the listing could impede oil and gas development in the Arctic Ocean, though that is also speculative -- no development has been blocked yet by the listing.

The Fish and Wildlife Service argued successfully that the listing was well within the law, since it allows for special management of polar bears and their habitat to keep them from facing extinction.

When he ruled in June, Sullivan said the agency followed proper procedures and met the standards of "rationality" in making the listing.

Reach Richard Mauer at rmauer@adn.com or 257-4345.

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U.S. Fish & Wildlife Service

Marine Mammals Management

Alaska Region

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ABOUT POLAR BEARS
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Range Map
Photo Gallery

CONSERVATION
What We Do
Conservation Issues
1994 Conservation Plan (pdf)
Work With US

CURRENT TOPICS
Endangered Species Act
Marine Mammal Protection Act
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Listing

Final Rule Listing the Polar Bear as a Threatened Species Under the Endangered Species Act (May 15, 2008)

On May 15, 2008, the Service published a *Final Rule* in the Federal Register listing the polar bear as a threatened species under the Endangered Species Act (ESA). This listing is based on the best available science, which shows that loss of sea ice threatens and will likely continue to threaten polar bear habitat. Any significant changes in the abundance, distribution, or existence of sea ice will have effects on the number and behavior of these animals and their prey. This loss of habitat puts polar bears at risk of becoming endangered in the foreseeable future, the standard established by the ESA for designating a threatened species. A species can be listed under the ESA under one of two categories, endangered or threatened. An endangered species is likely to go extinct within all or a significant portion of its range in the foreseeable future. The polar bear was petitioned to be listed as a threatened species, defined as a species likely to become endangered in the

foreseeable future. The Service also published on May 15, 2008, an *Interim Final Rule* for the polar bear under Section 4(d) of the ESA.

Secretary Kempthorne Announces Decision to Protect Polar Bears under Endangered Species Act Press Release
Frequently Asked Questions About the Listing of the Polar Bear as a Threatened Species (pdf)
Final Rule May 15, 2008
Literature Citation (pdf) for the Final Rule.

Reissuance of Interim Special Rule for the Polar Bear. 1/30/12

The U.S. Fish and Wildlife Service (Service) announces a notice that codifies the November 18, 2011, court-ordered reinstatement of an interim final special rule governing management of polar bears under the Endangered Species Act (ESA). In its ruling, the court stated that the Service was required to review potential environmental impacts of its December 16, 2008, final special rule for the polar bear under the National Environmental Policy Act (NEPA), and that the May 15, 2008 (73 FR 28306), interim final special rule will be in effect until this is done.

Interim Special Rule
Bulletin
Talking Points

Official announcement of the Polar Bear 4(d) from the Department of the Interior. 12/12/08

News Release
Special Rule
Questions and Answers

Previous Actions

- **April 28, 2008 -** The United States District Court for the Northern District of California orders the Department of Interior and US Fish and Wildlife Service to make a final decision on whether or not add the polar bear to the list of threatened and endangered species by May 15, 2008.
- **January 7, 2008 -** To allow additional time for Service biologists to adequately evaluate and

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Hawker opposes giving special hunt rights to landowners

He calls giving rights to private landowners a terrible policy.

By LISA DEMER

(03/06/12 00:14:50)

JUNEAU -- State Rep. Mike Hawker said Monday that the idea of creating special hunting rights for private landowners is terrible policy, and he would oppose anything like that if it materialized in the Legislature.

Hawker, along with House Speaker Mike Chenault and Rules Chairman Craig Johnson, appeared before news reporters Monday morning for a weekly House Republican-led majority press conference.

They were asked about a proposal being circulated within the Parnell administration to give special hunting privileges to private landowners in exchange for improving habitat for species such as moose, killing predators, or allowing others to hunt on their land. A Sunday Daily News story detailed the project, which Wildlife Division Director Corey Rossi was quietly pursuing before he was charged with misdemeanor game violations and lost his job in January. Other picked up the project, though no legislation has been filed.

While Chenault said he wasn't familiar with the project, Hawker didn't mince words. Hawker, R-Anchorage, is an avid gun collector who enjoys target shooting but says he doesn't hunt much anymore.

"It just doesn't make any sense to be essentially exempting private landowners from any and all state fish and game regulation," Hawker said.

"I don't know where that idea came from but it's certainly not one I would have supported in the legislative process," Hawker said.

Told it came from Rossi, Hawker said he didn't know him and had

never talked to him. Had Rossi asked, "I would have told him it was pretty foolish," Hawker said.

"Alaska's wildlife ought to be managed as a public resource, not a private individual's chattel," Hawker said later.

Reach Lisa Demer at ldemer@adn.com or (907) 500-7388.

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Our View: Drop it with one shot

Kill notion to let landowners play by different hunting rules

(03/07/12 00:27:27)

Rep. Mike Hawker is right about this one.

The Anchorage Republican said this week he has no use for an idea in the works at the state Department of Fish and Game that would allow private landownwers special permits to take big game on their lands -- or sell those permits -- possibly outside the usual hunting seasons.

In return, landownwers would be expected to improve habitat for certain big game animals on their land, allow access to other hunters and/or kill predators like bears and wolves.

Hawker's response?

"Alaska's wildlife ought to be managed as a public resource, not a private individual's chattel."

The Alaska Constitution defines Alaska's resources as public, reserved for the common use of the people of Alaska. And while one senior assistant attorney general says such a program could be made constitutional, it's practical effect would be to privatize some game management in Alaska for the sake of the few. Hunting is already expensive. Given the likely cost of auctioned permits, any open-access argument would crumble in the face of the reality that state policy would be improving access only for the few who could afford such permits.

The idea also appears to be a way to incentivize private landowners to kill bears and wolves to increase populations of moose and caribou. Such a notion takes Alaska closer to the game farm ideal of some hunters. At its extreme, that ideal says ecosystems be damned -- we need to be sure there's a moose for everyone who wants to shoot one.

Not just needs, but wants.

This is wildlife management with all the knowledge, expertise and awareness of the 19th century.

The private hunting rights project was driven by Corey Rossi, the former Division of Wildlife Conservation director for the Parnell administration. Rossi has been described by dozens of Alaska professional fish and game biologists as highly unqualified. He resigned in January after being charged with a dozen misdemeanor offenses in the taking of black bears on a hunt he guided in 2008. He has pleaded not guilty. His case has not yet been tried.

Rossi's pet project should have gone out the door with him, but apparently it's still a work in progress at Fish and Game.

So it's time for a clean, one-shot kill from Gov. Sean Parnell. One phone call to the commissioner of Fish and Game and this un-Alaskan notion goes away.

What say you, governor?

BOTTOM LINE: Private hunting rights? Let them do it Outside if they like. Not in Alaska.

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Gmail by Google

Cindy Smith <2cindysmith@gmail.com>

Richard Mauer: Hunting rights for landowners weighed; KFSK: Seine permit buyback meetings planned for Southeast; Russell Stigall/Empire: Meeting of the SE purse seiners; Alan Austerman: Ruling on Charter Halibut Limited Entry; Cordova Times: Salmon bycatch is topic for federal-state fisheries meeting; Ed Schoenfeld: Fish board rejects Taku River fishery changes; Compromise helps troilers, protects anglers; Journal of Commerce: State paid travel bills for board chairman in hometown; ADFG granted waivers allowing travel expenses for board chairman; Cordova Times: IPHC seeks nominations for two commissioners

Christopher Clark <cgcalaska@yahoo.com> **Mon, Mar 5, 2012 at 8:04 AM**

Reply-To: Christopher Clark <cgcalaska@yahoo.com>

Hunting rights for landowners weighed
Large landowners would get special permits to big game.
By RICHARD MAUER
Anchorage Daily News
Published: March 3rd, 2012 10:50 PM
Last Modified: March 3rd, 2012 10:51 PM

Six weeks before he learned he was under criminal investigation for violating his department's hunting rules, state Wildlife Division Director Corey Rossi told his staff about a pet project -- **unprecedented in Alaska -- to give private landowners special rights to hunt big game, even out of season, and to be able to sell**

those rights to whomever they want.
Rossi lost his job in January with the filing of a criminal complaint that cited him for 12 misdemeanor violations during a 2008 bear hunt. He has pleaded not guilty and his case is moving through District Court in Anchorage.
But his project to privatize some of Alaska's game lives on in the Parnell administration. At least one deputy commissioner is still working on the landowner permit project. Rossi's replacement, Doug Vincent-Lang, says it remains under active consideration, though he needs time to review it.
"We don't waste time on ideas that have absolutely no merit," Vincent-Lang said.
The idea that wild game is a public resource and not the property of a landowner is a long-held doctrine in Alaska and most of North America. But that idea is being challenged, at least on a limited basis, by advocates of intensive game management, who argue that granting special game rights to property owners will encourage them to make life easier for big game on their land. One of the leading advocates of that position is the organization Sportsmen for Fish and Wildlife, in which Rossi was an active member before taking over the Wildlife Division.
According to Rossi's minutes of the Nov. 1-2 meeting of Wildlife Division leaders and others in Fish and Game, **the attorney general's office was already drafting a new law that would implement the project**.
A budget was under development to manage the project with new staff positions, Rossi wrote.
"There is initial draft language, and the governor's office has asked for a full legal review," Rossi wrote.
Rossi's minutes were distributed this month by Vincent-Lang. A copy was leaked to the Daily News.

Owning hunting rights
The proposal would encourage owners of large private tracts to increase "public-interest benefits" on their land. They could do that by allowing access to hunters, improving habitat for species such as moose, or killing predators, Rossi wrote.
In return, landowners would get special hunting permits "that the landowner would be allowed to use or sell, perhaps with special authorizations such as the ability to hunt outside normal hunting seasons on their lands."
The proposal is modeled on similar programs in western states like Utah and Colorado, where it has been promoted by chapters of the advocacy group Sportsmen for Fish and Wildlife and its sister organization Sportsmen for Habitat. The organization has a big expo in Salt Lake City every year where it auctions special permits.
In the West, large landowners are mainly ranchers. In Alaska, Rossi noted in his minutes, they are Alaska Native corporations.
Mark Richards, co-chairman of the grassroots organization Alaska Backcountry Hunters and Anglers, said Alaska hunters wouldn't be the beneficiaries of Rossi's proposal.
"It doesn't take a rocket scientist to figure out who would win by privatizing more hunts in Alaska," Richards said in an email from his remote Interior cabin some 60 miles north of Eagle. "It would be the orgs that get the permits to auction off, and the wealthy hunters who could afford to buy them."
Sportsmen for Fish and Wildlife and similar organizations would also get "more power and influence to further game the system," Richards asserted.
Rossi has a strong connection to Sportsmen for Fish and Wildlife. In 2007, he was one of three founders of its Alaska chapter.
He was also a big-game guide. He was working as a guide for three out-of-state bear hunters in 2008 when he lied on his post-hunt reports to the state and failed to properly seal bear hides, according to the charges.
The June bear hunt took place about six months before he was brought into the Fish and Game department by then-Gov. Sarah Palin. She created a new position for him, assistant commissioner for "abundance management" -- the idea of managing moose and caribou to provide the greatest possible number of animals for hunters.
In 2010, Gov. Sean Parnell elevated Rossi to wildlife director, the official in charge of managing hunting and big-game habitat in Alaska. It was a controversial appointment because Rossi lacked a college degree and scientific training. But he was an expert at killing predators and vermin and had the backing of hunters who wanted fewer bears and wolves and more moose.
"With Director Rossi at the wheel, we at SFW look forward to some real positive changes within the Department that are long overdue!" executive director Dane Crowley of Sportsmen for Fish and Wildlife Alaska wrote at the time.

Constitution an obstacle?
In the minutes from the meeting in November, Rossi said the private-hunting project **would require the Legislature to create a new kind of "landowner permit."** He wanted the authority to dole out such permits

at the department's discretion.
"Some discussions have occurred with various Native groups who have expressed strong interest in the concept, though at least one has firmly said it is not interested in providing hunter access," he wrote. "It is expected that **for the program to move forward, the legislature would need to provide specific funding for the program, and new staff positions would be needed. There are many details still to be worked out, but the idea is moving forward**."
One obstacle could be the Alaska Constitution. The Constitution provides that all resources, including wildlife, are "reserved to the people for common use." In the landmark 1989 McDowell decision, the Alaska Supreme Court threw out a law that violated the equal access provision by giving rural residents priority over urban dwellers to fish and game.
Given that history, would it be possible for landowners to get more rights to game than others?
"Could a constitutional law be written? Yeah, sure it could," said Kevin Saxby, a senior assistant attorney general who advises the department on hunting issues. "The goal of the law would be to open up more access for more Alaskans, I presume, so that would serve the common use and the equal access provisions in Article 8 of the Constitution."
Saxby said he has only done "a tiny bit of work" on the initiative and wouldn't say whether that included writing a draft version of a bill. "Anything more is confidential until the governor makes a decision" to take the issue to the Legislature, he said.
Byron Bateman, president of Sportsmen for Fish and Wildlife in South Weber, Utah, said in a telephone interview that landowner permits in his state have "increased the opportunity for the ordinary citizen to be able to hunt some of these private lands that they would not have been able to afford."
He described Utah's hunting and landowner programs as an example for other states to follow.
"Utah has been a model as to we how we manage all of our wildlife in the West. We've increased a lot of different populations," he said.
Sportsmen for Fish and Wildlife, along with the like-minded Mule Deer Foundation, hosts the Western Hunting and Conservation Expo in Salt Lake City, where special permits from around the West are auctioned. Among the hundreds auctioned over the weekend of Feb. 9-12 were about a dozen private landowner permits from Utah.
Bateman said those permits sold in the range of $9,000 to $18,500 each. Another indication of the value of permits appeared on Sportsmen for Fish and Wildlife's 2010 nonprofit tax returns, the most recent available. The returns show the organization raised $2.4 million from selling permits, though it didn't break down how much of those were landowner permits. It did report how much it spent buying landowner permits: $563,000. The returns show Sportsmen for Fish and Wildlife spent $1.1 million on conventions and conferences -- nearly as much as the $1.4 million it spent on big-game habitat improvements, conservation, moving wildlife and studies.

To end hunting 'socialism'
Rossi's move to give landowners special rights to the wildlife on their property coincides with the ideology of Don Peay, a Utah guide and founder of Sportsmen for Fish and Wildlife.
Peay, who stressed that the Utah chapter isn't trying to push its view in Alaska or even with the Alaska chapter, said it's time to revisit the widely accepted principle in the United States and Canada that game is a public resource. Peay described that egalitarian doctrine, found in Alaska's state constitution and laws throughout the West, as "socialism." It offers no economic incentive for landowners to kill predators, improve big game habitat and even provide food and water for target species.
"We understand the North American model where wildlife belongs to the people, but we're also seeing dramatic reductions in game populations in the western United States under that model," he said. Population pressure, habitat loss from development and the rise of environmental organizations opposed to predator control have put pressure on game herds that weren't envisioned when the laws were written a century or more ago, he said.
"When wildlife is a very highly valued asset, people want more of it and they'll invest additional funds to make sure it's abundant," Peay said.
The same is true of professional guides and outfitters, he added. "They tend to be more involved to make sure there's abundant game herds than a lot of guys who just buy their license the day before the hunt starts and then, when game disappears, the masses tend to complain -- but what did they do to allow that situation to happen and why weren't they more involved to fix it?"
Valerie Conner, conservation director for the Alaska Center for the Environment, said she doubted most Alaskans were ready to abandon or modify the concept of wildlife as a public resource. And managing wildlife to promote just moose and caribou for the benefit of guides and some sportsmen "is draconian," she said.
"It's an ecosystem out there, and the bears and wolves and other predators play a really vital role. They're just

leading us down this path to eliminate as many predators as they can and create a game farm," she said. "If you're really concerned about managing on an ecosystem-wide basis, you wouldn't be taking out all the bears and wolves and incentivizing landowners to kill all the predators on their land. It's insane."
With the Alaska Board of Game and, increasingly, the Department of Fish and Game, representing primarily trappers, guides and abundance hunters, Conner said, there's almost no one speaking out for tourism and wildlife viewing in an official capacity.
"Diversity is equally as important as abundance," she said. "There's nobody on that board who represents the thousands of Alaskans who simply appreciate wildlife for its intrinsic value or to go look at it."

Reach Richard Mauer at rmauer@adn.com or 257-4345.

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Seine permit buyback meetings planned for Southeast
by **Joe Viechnicki**, KFSK
March 1, 2012 2:01 pm

The National Marine Fisheries Service will be holding informational meetings in three Southeast Alaska communities this month on a purse seine buyback program.
The agency is holding the meetings in preparation for a vote by permit holders on whether to go ahead with the fleet reduction. **Owners of the 379 Southeast seine permits will be deciding this spring on a loan to buy 64 of those permits and remove them from the fishery. The loan would be repaid by the remaining fleet members with a fee imposed on future landings**.
Supporters of the buyback say it will reduce the capacity of a fleet that's grown much more efficient at catching salmon since the limited-entry fishery started. Opponents don't see a point in reducing fleet numbers and say it will mean fewer deckhand jobs and a reduced political voice for the fleet.
NMFS has published a notice in the Federal Register with a list of all eligible permit holders and is taking public comment on that list until March 16th.
NFMS plans to hold four meetings March 5th-7th and will field comments and questions about the buyback program. The first will be at Fishermens Terminal in Seattle Monday March 5th.
A meeting is planned in Petersburg at the city council chambers Tuesday, March 6th from noon to 2 p.m. Another session will be Wednesday, March 7th from 10 to noon at the Ted Ferry Civic Center in Ketchikan and a meeting will be held later that day from 7-9 p.m. at the Northern Southeast Regional Aquaculture Association in Sitka.
Here's the notice from the Federal Register:
Eligible Voters and Meeting FR Notice 03 01 12 11
To hear an earlier story on the buyback proposal, click here.

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Meeting of the SE purse seiners
NMFS holds public meetings to discuss capacity reduction
Posted: March 4, 2012 - 12:07am
By By RUSSELL STIGALL
JUNEAU EMPIRE

The National Oceanographic and Atmospheric Association National Marine Fisheries Service has scheduled a series of public informational meetings in Seattle and southeast Alaska to discuss capacity reduction and other topics on the southeast Alaska purse seine salmon fishery.
The Southeast Revitalization Association submitted a capacity reduction plan to determine the industry's willingness to repay a fishing capacity reduction loan to purchase the permits identified in the reduction plan. Marine Fisheries approved that plan.
As of late Feb., 379 permits in the fishery designated as S01A. Marine Fisheries continues to update this number. These permanent permit holders are eligible to vote in the referendum, according to NMFS.

Meetings
• Seattle - Nordby Conference Center at Fishermen's Terminal, 3919 18th Avenue West on March 5, 10 am to noon.
• Petersburg - City Council Chambers, Municipal Building, No. 12 South Nordic Drive on March 6, noon to 2

STATE OF ALASKA
DEPARTMENT OF
COMMERCE
COMMUNITY AND
ECONOMIC DEVELOPMENT
Office of the Commissioner

Sean Parnell, Governor
Emil Notti, Commissioner

April 29, 2010

The Honorable Daniel S. Sullivan
Attorney General
State of Alaska
Department of Law
P. O. Box 110300
Juneau, Alaska 99811-0300

Re: Arctic Marine Pilotage

Dear Mr. Sullivan:

As you know, there is tremendous national and international interest in the Arctic region. Continued reduction of the Arctic ice cover is expected to allow increased access to the region. The Arctic region is rich in natural resources, including fish, marine mammals, seabirds, oil, gas, and other minerals.

Over the last couple of years the Alaska Board of Marine Pilots (Board) has been discussing the extension of mandatory marine pilotage waters from those set out in 12 AAC 56.090 and 12 AAC 56.100 to encompass large areas of the Chukchi and Beaufort Seas. The boundaries of the proposed new mandatory marine pilotage waters include the outer continental shelf oil and gas lease areas where exploratory drilling is expected to occur this summer.

The Board is seeking advice from your office regarding the extent of the Board's authority under existing state and federal laws to adopt regulations that extend the state's mandatory marine pilotage waters to include large areas of the Chukchi and Beaufort Seas. Some background follows.

Like other U.S. maritime states,[1] Alaska requires foreign vessels and U.S. "registered vessels" heading for its ports, or transiting inland waters, to employ a state-

[1] *See generally*, A. Parks, The Law of Tug, Tow, and Pilotage 991-1003 (3rd ed. 1994).

P.O. Box 110800, Juneau, Alaska 99811-0800
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licensed marine pilot.[2] The marine pilot boards the foreign vessel and guides it into and out of port, or through navigational hazards in inland waters.

The seven-person Board of Marine Pilots regulates marine pilotage in Alaska.[3] Under AS 08.62.040(a)(1) - (3), the Board must "provide for the maintenance of efficient and competent pilotage service", regulate the training, examination, and licensure of marine pilots, and "keep a register of licensed pilots, licensed deputy pilots, and agents". AS 08.62.040(a)(1) requires the Board to adopt regulations to "assure the protection of shipping, the safety of human life and property, and the protection of the marine environment" on the "inland and coastal water of and adjacent to the state".
AS 08.62.160 requires the Board to "define the mandatory pilotage water of the state", and requires a vessel subject to AS 08.62 to employ a state-licensed marine pilot while "navigating the inland or coastal water of or adjacent to the state".[4] Violation of this requirement is a misdemeanor crime.[5]

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[2] AS 08.62.160. The federal government has authority over commerce and shipping, but federal statutes grant authority for marine pilotage laws to the states.
46 U.S.C.A. sec. 8501(a) states: "[e]xcept as otherwise provided in this subtitle, pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States." Under 46 U.S.C.A. sec. 8502(a) vessels licensed under U.S. laws engaged in domestic or coastwise trade fall under the jurisdiction of the U.S. Coast Guard, and are not subject to state pilotage laws. These are commonly referred to as "enrolled vessels". *Hochstetler v. Board of Pilot Commissioners*, 8 Cal. Rptr. 2d 403, 407 (Cal. App. 1 Dist. 1992). Foreign vessels and U.S. licensed vessels "sailing on registry" must comply with state pilotage laws. *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 159-160 (1978), T. Schoenbaum, 2 Admiralty and Maritime Law, sec. 13-1 (4th ed. 2004). These are commonly referred to as "registered vessels". *Hochstetler v. Board of Pilot Commissioners*, 8 Cal. Rptr. 2d 403, 407 (Cal. App. 1 Dist. 1992).

[3] AS 08.62.040. The Board consists of two licensed marine pilots, two registered vessel agents, two members of the public, and the commissioner of DCCED or the commissioner's designee; AS 08.62.010.

[4] State waters are not defined in AS 08.62, but under AS 44.03.010 the state asserts jurisdiction over "water offshore from the coast of the state", including (1) the "marginal sea", (2) the high seas claimed by the United States, and (3) the submerged lands under that water.

[5] AS 08.62.190.

The boundaries of those areas where use of a state-licensed marine pilot is mandatory are set out in 12 AAC 56.090 and 12 AAC 56.100. 12 AAC 56.090 is a general provision. In 2008[6] 12 AAC 56.090 provided, in part: "[p]ilotage is compulsory at all entrances from seaward to Alaska bays, sounds, rivers, straits where the passage is within three nautical miles of this state, or other estuaries for which specific boundaries are not otherwise described in this chapter."

The boundaries of mandatory pilotage waters in specific locations are set out in 12 AAC 56.100. 12 AAC 56.100(14) describes the mandatory pilotage waters along the coast of the Chukchi Sea and in Kotzebue Sound.

During a public comment period at a Board meeting held on January 22-23, 2008, a licensed marine pilot asked the Board to consider the adoption of a Board regulation to extend the compulsory (mandatory) pilotage waters from those set out in 12 AAC 56.090 and 12 AAC 56.100. The marine pilot suggested that the compulsory pilotage waters be extended out into the Chukchi and Beaufort Seas to an area roughly concurrent to outer continental shelf oil and gas lease areas.[7]

As originally proposed, pilotage would be compulsory for all vessels subject to AS 08.62 "engaged in commercial activities" within the designated waters of the Chukchi and Beaufort Seas. As proposed, the pilotage requirements would not have been restricted to vessels entering state ports, rivers, sounds, etc., but would have applied to all commercial vessels moving through the specified waters (including oil exploration and drilling vessels).

By a vote of four to three, the Board members voted to accept the marine pilot's suggestion for a proposed regulation to extend compulsory pilotage waters into the Chukchi and Beaufort Seas. A public notice of the proposed amendment to 12 AAC 56.100(14), requesting public comment on the proposed language, was issued on March 13, 2008.[8]

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[6] As explained later in this memorandum, 12 AAC 56.090 has been amended slightly, effective November 4, 2009, Register 192.

[7] These leases are under the authority of the U.S. Department of the Interior, Minerals Management Service.

[8] This is a necessary first step in the adoption of an administrative regulation under AS 44.62.020--300 (Administrative Procedure Act); AS 44.62.190, 44.62.200.

Significant public comment on the proposed amendment was received, both in support of and in opposition to the proposal. The Board held a public hearing on the proposal at a meeting on April 18, 2008. Many of those who commented supported the proposed expansion of compulsory pilotage waters, citing the need to protect the fragile Arctic ecosystem, fish and wildlife, and indigenous peoples. Other commentators expressed concern that such a significant expansion of compulsory pilotage waters might be interpreted to apply to vessels not bound for Alaska ports, but merely passing through the lease areas, and would exceed the Board's authority. Oil companies interested in resource development in the Arctic, including ConocoPhilips, Shell Oil, and BP, were generally opposed to the proposed expansion of compulsory pilotage waters.

The Board voted to revise the proposed language in response to some of the comments received, including clarification of the right to "innocent passage".[9] The Board requested public comment on the revised version in a supplemental notice issued on June 23, 2008. The revised version also contained some technical clarifications to other existing regulations. The revised version included a new cross-reference in 12 AAC 56.090, the revised boundaries in 12 AAC 56.100(14), some technical amendments in 12 AAC 56.990(a)(5) and (8), and added a definition of the state's coastline in 12 AAC 56.990(a)(39).

A second public hearing was held at a Board meeting on October 1, 2008. The Board again considered testimony and several written comments received. The proposed amendments were further revised, and a second supplemental public notice requesting comments was issued on February 18, 2009.

A third public hearing was held at a Board meeting on April 15, 2009. At that hearing the Board decided to adopt the remaining proposed language changes dealing with the general boundaries of compulsory marine pilotage waters and definitions, but not to adopt the proposed new compulsory marine pilotage areas in the Chukchi and Beaufort Seas. These adopted regulations contain changes only to 12 AAC 56.090 and 12 AAC 56.990(a)(5) and (8), and the new definition in 12 AAC 56.990(a)(39). By the addition of the words "inlets, harbors, ports" and "adjacent to Alaska" the revised regulations are intended to make the scope of the regulations identical to the legislature's

[9] The right of innocent passage refers to the right to navigation through the territorial sea by ships of all nations, to traverse the area without entering internal waters or proceeding to or from internal waters or a port. *See* U.N. Convention on the Law of the Sea, Arts. 17 & 18 (1982).

grant of jurisdictional authority to the Board in AS 08.62.040(a)(1). These regulation changes took effect on November 4, 2009.

The Board concluded that further consideration was needed on some aspects of the Arctic pilotage proposal. A Board subcommittee was appointed to study the issue in more detail. At a Board meeting on January 28, 2010, the chair of the Board subcommittee reported his conclusion that the subcommittee likely would be unable to resolve the concerns expressed about the proposed expansion of compulsory marine pilotage into Arctic waters. Some subcommittee members questioned whether the Board possessed the legal authority to adopt the proposed regulation changes.

At a meeting held on April 28, 2010, the Board decided to ask your office for assistance in determining the scope of the Board's authority in this area.
AS 08.62.040(a)(1) requires the Board to regulate marine pilotage "on the inland and coastal water of *and adjacent to* the state" (emphasis added). By its own terms, this legislative grant of authority to the Board appears to contemplate marine pilotage requirements extending beyond state waters.[10]

But how far outside of state waters may the Board extend state marine pilotage requirements? Are special navigational factors (such as shallow waters, or extreme ice conditions) necessary to justify this extension? May the Board impose pilotage requirements on vessels subject to AS 08.62 that do not intend to enter state ports, rivers, or sounds, or even to enter state waters at all? May the Board impose pilotage requirements upon vessels subject to AS 08.62 intending to moor along stationary structures such as a drilling platform? What about drilling platforms that are located outside of state waters? Are amendments in state law needed to authorize the Board to adopt the measures it has discussed? What limits do federal laws place on the Board's authority in this area?

The Board requests advice from your office addressing the above questions, and the extent of the Board's legal authority to adopt the proposed mandatory pilotage

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[10] Maritime zones recognized under international law include: internal waters (3 nautical miles), territorial sea (12 nautical miles), contiguous zone (24 nautical miles), exclusive economic zone (200 nautical miles), and the high seas. Courts have approved mandatory marine pilotage requirements imposed by state law on vessels located many miles outside of state waters. *See, e.g., Gillis v. Louisiana*; 294 F.3d 755 (5th Cir. 2002).

STATE OF ALASKA
DEPARTMENT OF
COMMERCE
COMMUNITY AND
ECONOMIC DEVELOPMENT
Office of the Commissioner

Sean Parnell, Governor
Emil Notti, Commissioner

requirements described above. Thank you for your assistance to the Board on this important legal issue.

Sincerely,

EMIL NOTTI
Commissioner

By:
Curtis Thayer, Chair
AK Board of Marine Pilots

CT/eeh

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA, on its own behalf and as *parens patriae* on behalf of its members, Plaintiffs, v. STATE OF ALASKA, PATRICK S. GALVIN, in his official capacity of Commission of the Alaska Department of Revenue and JOHN MALLONEE, in his official capacity of Director of the Alaska Child Support Services Division, Defendants.	FILED IN CHAMBERS STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY: KJK ON: Oct 25, 2011 Case No. 1JU-10-376 CI

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff, the Central Council of Tlingit and Haida Indian Tribes of Alaska ("Tribe") is a federally recognized Indian Tribe. This case presents important questions concerning the Tribe's jurisdiction to adjudicate child support in its tribal court. The Tribe seeks injunctive and declaratory relief finding that its tribal court has subject matter jurisdiction over child support cases concerning tribal member children, and requiring the State of Alaska to give recognition to tribal child support orders in such cases.

Both parties move for summary judgment. The facts are generally not in dispute; the motions present questions of law. Having considered the parties' memoranda and exhibits, and the arguments of counsel presented at oral argument, the Tribe's motion for summary

judgment is granted, and the State's motion for summary judgment is denied, for the reasons set forth below.[1]

II. DISCUSSION

A. Standard for Summary Judgment

Summary judgment is appropriate where there are no genuine issues of material fact and a party is entitled to a judgment as a matter of law.[2] The party moving for summary judgment "has the initial burden of offering admissible evidence showing both the absence of any genuine dispute of fact and the legal right to a judgment."[3] Once that burden is satisfied, the non-moving party, in order to prevent the entry of summary judgment, must produce admissible evidence reasonably tending to dispute or contradict the moving party's evidence.[4]

B. Child Support

As society changed during the nineteenth and early twentieth century, American courts created, for the first time in Anglo-American common law, a legally enforceable duty on the part of parents to financially support their children.[5] This development stemmed from a

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[1] Plaintiff's request for the court to take judicial notice of the briefing in *State v. Native Village of Tanana*, 249 P.3d 734 (Alaska 2011) is denied. The briefing in *Tanana* does not establish any fact which would bring it within Evidence Rule 201, nor is it legal authority within the scope of Rule 202. Judicial notice is, therefore, inappropriate. However, these materials are the sort of persuasive matter which parties routinely – and quite appropriately – submit in support of legal arguments. These materials are entirely appropriate to submit for the court's consideration, and they will be made a part of the record without any need to resort to judicial notice. Defendant's motion to strike is denied for the same reasons.

[2] Alaska Rule of Civil Procedure 56.

[3] *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

[4] *Id.*

[5] *See generally*, 108 Yale L.J. 1123, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law* (1999).

recognition of the correlation between divorce, poverty, and dependency on the part of children of divorcing families (or, more generally, families involving a parent absent from the home).[6]

With the advent of modern welfare programs later in the twentieth century came a realization that the failure of noncustodial parents (often fathers) to provide financial support to their children drove those children into poverty and inflated the welfare rolls. By 1974 it could be said that:

> The problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents. Of the 11 million recipients who are now receiving [Aid to Families with Dependent Children], 4 out of every 5 are on the rolls because they have been deprived of the support of a parent who has absented himself from the home.[7]

Until then, child support establishment, collection, and enforcement had largely been left to the States.[8]

In 1974, Congress adopted Title IV-D of the Social Security Act, which required each state, as a condition of receiving federal funds for its welfare program, to create a child support enforcement system available both to welfare recipients and non-recipients.[9] The federal government, through its IV-D reimbursement plan, pays most of the cost of this system.

As part of this federal program, participating child support enforcement agencies are overseen by the federal Office of Child Support Enforcement ("OSCE"). Federal law establishes a variety of requirements that states are required to comply with in order to receive federal IV-D funding.

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[6] *Id.*
[7] *Wehunt v. Ledbetter*, 875 F.2d 1558, 1565 (11th Cir. 1989), *quoting* Social Services Amendments of 1974, S. Rep. 93-1356, 93rd Congress, 2d Session 42 (1974).
[8] *See, e.g.*, 73 Mich. Bar Journal 660, *Federalization of Child Support: Twenty Years and Counting* (July 1994).
[9] P.L. 93-647; 42 USC §§661-665.

In 1996, as part of the federal welfare reform legislation known as the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), states were required to adopt the Uniform Interstate Family Support Act ("UIFSA"), which sets out procedures for recognition of child support orders from other states.

UIFSA was initially promulgated by the National Conference of Commissioners on Uniform State Laws in 1992, and was adopted in Alaska in 1995.[10] The purpose of UIFSA is to unify state laws relating to the establishment, enforcement, and modification of child support orders, and to eliminate the problem of multiple child support orders from different jurisdictions.[11]

The UIFSA requires states to recognize child support orders from other "states." Although the uniform act included Indian tribes within the definition of "states," the language including Indian tribes was omitted by the Alaska legislature when it adopted UIFSA in 1997.[12]

When Congress enacted PRWORA in 1996, it required states to enact the official version of UIFSA, which includes Indian tribes within the definition of "states."[13] The State of Alaska twice requested an exemption from this requirement in 2008, but each request was rejected by the federal Department of Health & Human Services.[14] After the second denial, the State was warned that continued failure to enact a conforming statute risked loss of over $60

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[10] AS 25.25.101 *et seq.*; SLA 1995, ch. 57.
[11] Am Jur 2d Desertion, §73 (2011); *Hamilton v. Foster*, 620 N.W.2d 103 (Neb. 2000); *Linn v. Delaware Child Support Enforcement*, 736 A.2d 954 (Del. 1999). *See also*, *Bartlett v. State, Dept. of Revenue*, 125 P.3d 328, 331 (Alaska 2005) (UIFSA requires states to enforce other state's judgments "in order to create uniformity in interstate judgments.").
[12] SLA 1995, ch. 57 §4.
[13] 42 USC §666(f).
[14] Exhibit 4 to Plaintiff's Motion for Summary Judgment.

million in federal funds for IV-D and Temporary Assistance to Needy Families ("TANF") programs (the successor program to Aid to Families with Dependent Children).[15]

Faced with this threat, the Alaska Legislature amended UIFSA in 2009 to conform to the definition of "states" in the official text.[16] In doing so, the Legislature adopted intent language clarifying that it was not the Legislature's intention to confer additional jurisdiction on tribal courts:

> (a) It is the intent of the legislature that, in order to bring Alaska into conformity with the nationwide Uniform Interstate Family Support Act (UIFSA), as approved by the American Bar Association on February 9, 1993, and as in effect on August 22, 1996, including any amendments officially adopted as of that date by the National Conference of Commissioners on Uniform State Laws, it is necessary to amend AS 25.25.101 to include "an Indian tribe" and "the United States Virgin Islands" in the definition of "state."
>
> (b) The proposed changes made in AS 25.25.101(19) under sec. 3 of this Act are conforming amendments that will result in procedural changes in Alaska for enforcement and modification of child support orders from other jurisdictions. UIFSA does not determine the authority of an Indian tribe to enter, modify, or enforce a child support order. In adopting UIFSA conforming amendments, the legislative intent is
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> > (1) to remain neutral on the issue of the underlying child support jurisdiction, if any, for the entities listed in the amended definition of "state";
> >
> > (2) not to expand or restrict the child support jurisdiction, if any, of the listed "state" entities in the amended definition; and
> >
> > (3) not to assume or express any opinion about whether those entities have child support jurisdiction in fact or in law.[17]

UIFSA requires a tribunal of this state to recognize the "continuing, exclusive jurisdiction" of a tribunal of another state that has issued a child support order under a law

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[15] *Id.*
[16] AS 25.25.101(19), amended by SLA 2009, ch. 45 §3.
[17] 2009 SLA ch. 45 §1.

substantially similar to UIFSA.[18] Article 5 of UIFSA requires Alaska's Child Support Services Division ("CSSD") to take steps to administratively enforce child support orders from other states without the need to file an independent court action in an Alaska court.[19] If an order from another state is contested in Alaska, UIFSA provides that CSSD "shall" register the order in an Alaska court under the procedures set forth in article 6 of UIFSA.[20] Resort to the registration procedure avoids the need to file an independent court action in Alaska to seek recognition of a foreign judgment as a matter of comity.[21]

The State correctly points out that the ability to use these UIFSA procedures for a tribal court support order depends upon whether the tribal court has jurisdiction to issue child support orders. UIFSA does not confer jurisdiction on tribal courts; it merely requires recognition of tribal court support orders if the tribal court has jurisdiction.

Thus the outcome of this case hinges on the basic question of jurisdiction: does the Tlingit Haida tribal court have jurisdiction to enter child support orders concerning children who are tribal members?

C. Tribal Court Jurisdiction – *John v. Baker*

Indian tribes possess inherent powers of self-government which predate the arrival of European settlers and the founding of the United States.[22] Tribes "retain those fundamental

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[18] AS 25.25.205(d).
[19] AS 25.25.501-507.
[20] AS 25.25.507(b); AS 25.25.601-614.
[21] *See generally,* Exhibit 3 to Plaintiff's Motion for Summary Judgment, SOA pp. 0115-0116 (Steinberg letter).
[22] *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe's dependent status."[23]

While tribal sovereignty is not absolute, "until Congress acts, . . . Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[24] The United States Supreme Court has articulated a "core set of sovereign powers that remain intact even though Indian nations are dependent under federal law; in particular, internal functions involving tribal membership and domestic affairs lie within a tribe's retained inherent sovereign powers."[25]

These principles are well established in the context of an Indian tribe occupying a reservation in the lower 48 states. Indian tribes possess broad sovereignty in Indian country. In Alaska, however, the Alaska Native Claims Settlement Act ("ANCSA") largely extinguished Indian country.[26]

In *John v. Baker*, the Alaska Supreme Court held that Alaska tribes retain the power to adjudicate custody disputes concerning tribal member children "by virtue of their inherent powers as sovereign nations."[27] The court in *John v. Baker* found that this power does not depend upon the existence of Indian country, but rather stems from the tribe's interest in "preserving and protecting the Indian family as the wellspring of its own future."[28] As such,

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[23] *Merrion v. Jicarilla Apace Tribe*, 455 U.S. 130, 146 (1982).
[24] *Merrion*, 435 U.S. at 323.
[25] *John v. Baker*, 982 P.2d 738, 751 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000).
[26] *Alaska v. Native Village of Venetie Tribal Government (Venetie II)*, 522 U.S. 520 (1998).
[27] 982 P.2d at 748-49.
[28] *Id.* at 752.

the power to adjudicate custody disputes over Alaska Native children is necessary "to protect tribal self-government or to control internal relations."[29]

It was unclear from the Supreme Court's first *John v. Baker* opinion (*John v. Baker I*) whether the holding extended to the question of whether Alaska Native tribes have authority to decide child support as well as child custody. In its third opinion in *John v. Baker* (*John III*), the Supreme Court clarified that it did not intend to decide this question in *John v. Baker I*. The court in *John III* declined, for procedural reasons, to reach the question presented in this case – whether tribal courts have jurisdiction over child support issues.[30] This is, therefore, a question of first impression.

D. Child Custody and Child Support

It is clear under Alaska law and procedure that the issues of child custody and child support are closely intertwined. The Supreme Court emphasized this point in *McCaffery v. Green*,[31] a case dealing with interstate child support jurisdiction.

Ms. McCaffery and Mr. Green were divorced in Texas. The Texas court awarded McCaffery custody of the children and ordered Green to pay child support. Four years later, McCaffery moved to Alaska with the children. Green moved to Oregon. Neither parent retained connections to Texas.

Three years after moving to Alaska, McCaffery moved in an Alaska court to modify the visitation and child support provisions of the Texas decree. Green objected on the basis of jurisdiction.

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[29] *Id.*
[30] *John v. Baker*, 125 P.3d 323 (Alaska 2005).
[31] 931 P.2d 407 (Alaska 1997).

The trial court found that it had jurisdiction to modify the Texas decree as to custody and visitation under the statute then in effect, the Uniform Child Custody Jurisdiction Act ("UCCJA"), but found that the court was without jurisdiction as to child support.

The Supreme Court reversed, holding that the court had jurisdiction to consider both custody or visitation, and child support. In doing so, the court noted that it "simply makes sense" for a court that has jurisdiction to consider custody and visitation to also have jurisdiction to consider child support:

> An Alaska court is already deciding issues of custody and visitation. A visitation determination inherently affects the amount of child support owed by the obligor parent. Alaska Civil Rule 90.3(a)(3) specifically links the two issues: a court may allow an obligor parent to reduce child support payments up to fifty percent for any period in which that parent has extended visitation of over twenty-seven consecutive days. This rule recognizes that a parent's own expenses are greater (and the other parent's expenses less) when that parent exercises visitation rights. To decide custody and visitation issues without being able to make the logically concomitant support modification could result in an imbalance between visitation allowed and support owed.[32]

The court went on to note that issues of support and custody are intertwined, quoting the view of one commentator on this point:

> Dissolution of marriage determines status and does not carry with it any inevitable consequences. The parties are not presumed to have any ongoing obligation to one another. Therefore, in a divorce action it is conceptually justifiable to sever the economic issues from the status issues and require personal jurisdiction to resolve the former. In contrast, divorce does not extinguish a parent's obligation to his or her children. While the amount of monthly payments is certainly a subject of frequent dispute, the fact remains that the noncustodial parent can reasonably anticipate being liable for some amount of child support. The parent's obligation to support the child is not merely related to the status determination; it is an inevitable concomitant of custody decisions.[33]

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[32] 931 P.2d at 413-14 (emphasis added).
[33] *Id.* at 414, *quoting* Monica J. Allen, Child-State Jurisdiction: A Due Process Invitation to Reconsider Some Basic Family Law Assumptions, 26 Fam. L. Q. 293, 307 (1992).

Additionally, Alaska's court rules require the court to consider child support any time it makes a custody decision. Civil Rule 90.3(e) requires all parents seeking to litigate custody issues to file information regarding their income for child support purposes. Child support depends not upon the amount of time the child actually spends with each parent, but rather upon what is in the custody order.[34]

The court in *John v. Baker* clearly established that the tribal court has jurisdiction to decide issues of custody and visitation as to children who are members of the tribe. It would be an odd result if a state court which was called upon to decide custody were required to decide child support, but a tribal court deciding custody were barred from deciding support for lack of jurisdiction. But that would be the result of the State's position. This result would provide a substantial deterrent for parents to bring custody disputes to tribal courts, since tribal courts could not decide all of the issues in the case. It would also open the door to procedural manipulation, since a parent wanting to adjudicate custody without risking an adverse child support order could file in tribal court.

Parents have a broad range of rights and responsibilities with respect to their children. The duty to provide financial support for one's children is just one of a parent's responsibilities. Parents have a duty to keep their children safe, to provide them with food, clothing, shelter, and medical care, and to ensure that they go to school.

A court deciding child custody may make decisions that affect the full range of each parent's rights and duties. A court may enter orders in a custody case having to do with all of the parents' duties, including but not limited to child support. A court may order a parent to

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[34] *Turinsky v. Long*, 910 P.2d 590, 595 (Alaska 1996).

take the child to school, or to the doctor, or to see a counselor, or to church. A parent may be prohibited from exercising some of the duties of a parent, or may be required in a custody order to exercise those duties.

According to the State's position, a tribal court has the jurisdiction to adjudicate each and every one of the rights and responsibilities of the parents of a tribal member child, except for the parents' duty to provide monetary support for the child. Under this argument, child support is merely a debt between the parents, which has no relation to any tribal interest. This position fails to recognize the "paramount duty" of parents to support their children.[35] This duty is not simply a debt to the other parent, but is integral to the statutory and common-law duty parents have to their children.[36]

In arguing that child support is merely a social welfare program, the State views this question only through the lens of administrative child support enforcement. This argument views child support as only a way for governments to recoup welfare payments from noncustodial parents.[37] But the duty to pay child support long predates enactment of social welfare legislation. This duty is integral to the parent child relationship. The ability to ensure that noncustodial parents support their children may be the only thing keeping those children out of grinding poverty. This duty cannot be characterized as merely a debt between parents. Nor can it be characterized only as an after-effect of the enactment of social welfare legislation in the twentieth century.

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[35] *See, e.g., Kestner v. Clark*, 182 P.3d 1117, 1122-23 (Alaska 2008).
[36] *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987).
[37] State's memorandum in opposition to summary judgment and in support of cross-motion for summary judgment at 6-8, 12 (". . . child support developed as a broad, national social welfare program.").

The determination and enforcement of the duty of parents to support a child who happens to be a tribal member is no less a part of the tribe's internal domestic relations than the decision as to which parent the child will live with, which school the child will attend, or any of the other important decisions that custody courts make every day. Ensuring that tribal children are supported by their noncustodial parents may be the same thing as ensuring that those children are fed, clothed, and sheltered. The future of a tribe – like that of any society – requires no less.

In my view, the determination of child support is an integral part of a custody determination. To the extent that the Supreme Court found in *John v. Baker* that tribes have jurisdiction over custody determinations, I conclude that this jurisdiction, to be meaningful, must extend to adjudication of child support.

To the extent that the State argues that the holding of *John v. Baker* is in question as a result of subsequent federal decisions, that argument was undercut by the Alaska Supreme Court's decision in *State v. Native Village of Tanana*,[38] in which the court reaffirmed *John v. Baker*'s "foundational holding" that a sovereign tribe's inherent powers of self-government include "inherent authority to regulate internal domestic relations among its members," and that this authority was not divested by ANCSA's elimination of Indian country in Alaska.[39] It is not for this court to reject the Supreme Court's holding in *John v. Baker*.[40]

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[38] 249 P.3d 734 (Alaska 2011).
[39] *Id.* at 750.
[40] I am not persuaded that *Montana v. United States*, 450 U.S. 544 (1981), a case having to do with a tribe's authority to regulate the activities of non-members on private land, calls the Alaska Supreme Court's later holding in *John v. Baker* into question. *Montana* has to do with a tribe's authority to regulate the conduct of non-members, and does not delineate a tribe's authority to adjudicate domestic relations cases involving children who are members of the tribe. I find *Montana* to be distinguishable.

Here, of course, the tribal court seeks to decide only child support and not custody. The fact that a court has chosen not to exercise the full extent of its jurisdiction, however, does not divest the court of jurisdiction. In my view, *John v. Baker* confers jurisdiction on the tribal court to decide both custody and support. The tribal court does not forfeit its jurisdiction merely because it chooses not to decide issues of custody.

E. Personal Jurisdiction

I have concluded that the tribal court has subject matter jurisdiction over issues of child support as to children who are members of the tribe (or eligible for membership). This case does not require the court to decide the issue of personal jurisdiction, which must be decided on a case by case basis.

The United States Supreme Court held in *Kulko v. Superior Court*[41] that the Due Process clause of the Fourteenth Amendment was violated when a California court heard a custody modification and child support claim against a father who lived in New York, when that father did not have the "minimum contacts" with the State of California which are required under *International Shoe Co. v. Washington.*[42]

Statutes such as the UCCJEA or UIFSA impose geographical limitations on the jurisdiction of state courts. Reservation boundaries impose geographical limitations on the jurisdiction of tribal courts in the lower 48 states. Because of the extinguishment of Indian country in Alaska, the Tlingit Haida Tribal court has no such geographical limitation on its jurisdiction. The tribe claims jurisdiction based solely on the child's membership. Under this framework, the tribal court could claim jurisdiction to enter a support order for a tribal member

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[41] 436 U.S. 84 (1978).
[42] 326 U.S. 310, 316 (1945).

child, against a nonmember parent, even in a case in which neither the parents nor the child have ever been to Alaska or set foot on the Tribe's traditional lands.

One could imagine a hypothetical case in which both parents live in a far away state, and all the necessary witnesses as to the issue of child support would be located in the parents' state of residence. The obligor parent would have to defend himself or herself in a far away court with which he or she has no connections. In such a hypothetical case, the exercise of jurisdiction by the tribal court may well violate due process, based on the holding in *Kulko*.

It is not necessary to decide the precise outer limits of the court's jurisdiction to decide this case. There is no suggestion that any of the particular cases at issue here involve a claim of jurisdiction that would run afoul of *Kulko*.

F. Other Practical Difficulties

The State has identified a number of practical problems with concurrent state and tribal jurisdiction. I recognize the validity of many of these concerns. These practical complications are inevitable with a system of dual sovereignty. I further recognize that many of these problems will be difficult to solve. Because I believe the conclusions reached in this decision are a necessary consequence of the Supreme Court's holding in *John v. Baker*, however, I believe the solution to these problems lies somewhere other than in this court.

G. Remedies

Based on the foregoing conclusions, I find that the Tribe is entitled to summary judgment on its first, second, and third causes of action, and I will enter a declaratory judgment declaring that the Tribe possesses inherent rights of self-governance that include subject matter jurisdiction to adjudicate child support for children who are members of the Tribe or eligible

for membership in the Tribe, and an injunction requiring the State of Alaska, Child Support Services Department to comply with UIFSA and applicable federal and state regulations.

There are several issues that require additional briefing. The first is whether these conclusions require summary judgment on the constitutional and §1983 claims set out in plaintiff's fourth and fifth causes of action. And the second is the precise language of the injunctive relief that should be granted. In particular, how broadly should the injunction be phrased as to future cases.

In addressing this second question, I would ask the parties to specifically address the question of how (or whether) to address possible questions about personal jurisdiction, under *Kulko* or other authority, in crafting an injunction.

Finally, the parties should address the question of whether, based on the conclusions set out in this order, the court should enter final judgment in this case. If so, the parties should state their positions on what that judgment should be (consistent with the conclusions reached in this order).

The plaintiff should submit a memorandum on these points, along with a proposed form of order, in thirty (30) days. The defendant should submit its memorandum thirty (30) days form the date of service of the plaintiff's memorandum. The plaintiff may submit a reply memorandum fifteen (15) days from the date of service of the defendant's memorandum.

III. CONCLUSION

As discussed above, I find that the Tlingit Haida Tribal court has subject matter jurisdiction to enter child support orders concerning tribal member children. The plaintiff's

motion for summary judgment is, therefore, GRANTED. The State's cross motion for summary judgment is DENIED.

Entered at Juneau, Alaska this 25 day of October, 2011.

Philip M. Pallenberg
Superior Court Judge

CERTIFICATION OF SERVICE

I certify that I served the following parties on the 25th day of October, 2011.

Holly Handler	Mary Ann Lundquist
☒ Court box	☒ Court box

Keitha J. Kolvig
Judicial Assistant to Judge Pallenberg

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New Attorney General Plans to 'Fight the Good Fight'

By Dave Donaldson, APRN - Juneau | February 16, 2012 - 3:29 pm

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Newly appointed Attorney General Michael Geraghty made his first appearance before legislators today to talk about the budget, pending litigation – and what he calls the state's "proactive" role in state's rights litigation.

The lawmakers will determine the level of funding for the Department of Law in the budget they are now writing.

Along with Deputy Attorney General James Cantor, Geraghty gave the House Finance Subcommittee an update on thirteen major non-oil lawsuits the state has been involved in this year. He presented cases ranging from corporate income taxes to the Kasuylie and Moore education suits that were settled recently.

Geraghty also addressed what he called the states' rights cases – from Beluga Whales to Polar Bears to the roadless rule in the Tongass National Forest, to the question of jurisdiction over navigable waters within federal conservation areas.

> From my perspective, this is an insidious encroachment on states' rights. It doesn't seem like much in a particular case, a particular example – you are going to be talking about endangered species, that's another example of where we're losing control over our wildlife. And it's just an insidious process and we have to fight the good fight.

He also said the state should take care to be proactive — to pick cases it can win throughout the judicial process. He said Alaska will have "tough sledding" by being a part of the "Liberal" Ninth Circuit Court of Appeals, But he said with the right cases, Alaska can get before a "somewhat sympathetic U-S Supreme Court."

Geraghty agreed with Anchorage Democrat Lindsey Holmes –a member of the subcommittee – who said she struggles with the good intentions versus the misuse of the Endangered Species Act and the National Environmental Policy Act.

> In the Polar Bear for example, they're modeling in Global Warming – which in itself tends to be a controversial subject with many people, but that's .... The modeling is going out well into the future and they're trying to take into account Global Warming as well. It just seems like it's gotten away from good science and species that are threatened into these projections. I mean, who can tell the future a hundred years out. It just boggles the mind.

Geraghty was appointed January 12th to head the Department of Law – and he will go through the legislative confirmation process before the end of the session.

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House panel advances Parnell's AG pick to vote

Geraghty still faces a hearing before Senate Judiciary Committee.

By BECKY BOHRER

(02/29/12 18:12:29)

JUNEAU -- The House Judiciary Committee on Wednesday advanced Gov. Sean Parnell's pick for attorney general to a confirmation vote.

Michael Geraghty faced friendly questioning during his confirmation hearing before the committee. He was asked, among other things, how he views his role both as a political appointee of the governor and as someone chosen to represent the public interest.

Geraghty said it's a hypothetical situation, the idea that agencies or the governor wouldn't follow his legal advice. He said he serves the office of governor, not an individual, and as long as the governor's views support the law -- and he said he has confidence they will -- then this won't be an issue.

He said attorneys general and governors come and go, but the integrity of institutions and the independence of his office are critical to the proper function of government.

He noted that he has no qualms about Parnell's ethics or commitment to Alaska.

Geraghty was a partner at an Anchorage law firm when he was appointed, and he has been practicing law for more than 30 years. His experience includes trial work in state and federal courts.

Geraghty also has served as an independent counsel to the State Personnel Board. His work as such has raised some concerns, though none was voiced at Wednesday's hearing.

Lynn Willis, of Eagle River, in a letter to the Senate and House

Judiciary chairs included in the hearing packet, said Geraghty's performance in an ethics complaint he filed against the governor raised doubts about whether Geraghty could effectively serve "all Alaskans" as attorney general.

"I am not contesting Mr. Geraghty's decision," he wrote. "What concerns me is the manner in which he executed his duties."

Willis declined to go into much more detail when contacted by The Associated Press on Wednesday, citing confidentiality surrounding ethics complaints and uncertainty about what he could discuss.

Geraghty still faces a confirmation hearing before the Senate Judiciary Committee. He must be confirmed by the full Legislature.

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JuneauEmpire.com

AG nominee urges challenges to 'federal encroachments'

Michael Geraghty talks state's rights in confirmation hearing

Posted: March 1, 2012 - 12:10am

By Pat Forgey

JUNEAU EMPIRE

Gov. Sean Parnell's nominee for the position of attorney general got a warm reception from legislators Wednesday during a confirmation hearing, suggesting the long-time Fairbanks attorney will have little difficulty winning confirmation from the full Legislature.

Michael Geraghty, 59, said he's looking forward to working on cases important to Alaska, including fighting what he called "federal encroachment" on Alaska's rights.

That's a key part of the Parnell administration's stance, including fighting Endangered Species Act listings in Alaska and other actions.

Before the House Judiciary Committee on Wednesday and in other legislative testimony, Geraghty talked of his interest in fighting those battles on behalf of the state, and hopefully getting past the "somewhat liberal" 9th Circuit Court of Appeals, and into a "somewhat sympathetic" U.S. Supreme Court.

Geraghty said the polar bear endangered species listing action is based on modeling of the future effects of global warming, and questioned the validity of the science behind it.

"I mean, who can tell 100 years out," he said. "It just boggles the mind."

He called global warming itself a controversial subject, and said the listing process had "gotten away from good science."

Geraghty on Wednesday defended a decision not to continue state involvement in the case of Jim Wild, who was arrested following a Yukon River confrontation with federal authorities.

The Fairbanks News-Miner described Wild as a "crusty 71-year old who cursed out National Park Service Rangers."

Geraghty said he was still interested in establishing the state's control of navigable waters in conservation areas under the Alaska National Interest Land Conservation Act, but that the Wild case was not a "clean" case on which to mount an appeal as Wild had some "behavior issues."

"There were some disputed issues that clouded to some extent the ANILCA issues, the issues that were of concern to the state," Geraghty said.

The state will pursue its interests in asserting control of navigable waters in conservation areas with other cases, he said.

Geraghty has described his philosophy as "looking for vehicles to attack and resist this encroachment."

Almost no gubernatorial appointments are rejected by the Legislature, and the confirmation process had become almost routine until a few years ago when then-Gov. Sarah Palin drew controversy with her choice for the AG's slot, Wayne Anthony Ross.

Ross made history in what turned out to be the closing days of the Palin administration when a Legislature dominated by Republicans rejected the Republican governor's appointment to the state's top law enforcement position. Ross was the first nominee to Alaska's attorney general post to be refused confirmation.

Geraghty has so far received mostly praise from legislators, especially those advocating for an aggressive state role in challenging federal actions.

Prior to being named attorney general in January, Geraghty's law firm worked for the state Personnel Board investigating ethics complaints.

One of those that has been made public was his recommendation to dismiss a claim of an ethics violation stemming from a state press release announcing Palin's selection as running mate for John McCain.

Confirmations are generally taken up in the last days of the legislative sessions by the full House and Senate.

• Contact reporter Pat Forgey at 523-2250 or at patrick.forgey@juneauempire.com.

Follow This Article

Cindy Smith

From: Soukup, Michael D (GOV) <michael.soukup@alaska.gov>
Sent: Friday, February 17, 2012 3:35 PM
To: sharon.leighow@alaska.gov
Cc: michael.soukup@alaska.gov
Subject: DoL PR State Requesting to Intervene in Ninth Circuit NEPA Case 021712
Attachments: DoL PR State Requesting to Intervene in Ninth Circuit NEPA Case 021712.pdf

Press Release ATTORNEY GENERAL'S OFFICE

FOR IMMEDIATE RELEASE **February 17, 2012**

State Requesting to Intervene in Ninth Circuit NEPA Case

February 17, 2012, Anchorage, Alaska - Attorney General Michael Geraghty today filed a motion to intervene in a case challenging the adequacy of the environmental review of the Port MacKenzie rail line extension. The rail line will improve the state's transportation system by allowing freight to be transported to and from the Interior and Port MacKenzie.

On November 11, 2011, the U.S. Department of Transportation's Surface Transportation Board authorized the construction and operation of a 35-mile railroad connecting Port MacKenzie and the Alaska Railroad Corporation's (ARRC) main line north of Willow.

The rail line will allow more efficient shipments of bulk commodities (logs, sand/gravel, coal, and cement), vehicles and heavy equipment, and mobile and modular buildings. The state previously appropriated $75 million for the project. The board concluded that the environmental analysis completed under the National Environmental Policy Act (NEPA) was sufficient and that ARRC may construct the preferred alternative outlined in the environmental document. On January 20, 2012, various project opponents, including the Sierra Club, filed suit in the Ninth Circuit on the grounds that the board violated NEPA and the federal Administrative Procedure Act.

Alaska is seeking to intervene in order to protect the state's interests. General Geraghty maintains the board followed the law, and a reversal of the board's decision would result in unnecessary delays and increased costs, which is not in the best interest of Alaska or its citizens.

"Not only does the State of Alaska have a direct financial stake in the project, but we need to protect our ability to responsibly develop Alaska's infrastructure and natural resources," Attorney General Michael Geraghty said.

For more information about the case, please contact Assistant Attorney General Sean Lynch at (907) 465-3600.

###

Cindy Smith

From: Badgley, Cori M (LAW) <cori.badgley@alaska.gov>
Sent: Monday, February 13, 2012 3:30 PM
To: Cindy Smith
Subject: RE: AG Confirmation Hearing

That's great! I was starting to get worried about how to fit it all in.

The 14th would be best for us, but the 16th is also available.

Thanks Cindy.

Cori Badgley
Assistant Attorney General
Legislation and Regulations Section
Department of Law
P.O. Box 110300
Juneau, Alaska 99811
cori.badgley@alaska.gov
(907) 465-2132

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Monday, February 13, 2012 3:16 PM
To: Badgley, Cori M (LAW)
Subject: RE: AG Confirmation Hearing

Corey,

We've always held this hearing separately. These tend to be substantive hearings and it's just too hard to do with 12 legislators.

But really, there's lots of time. How about the middle of March? We can do the 12th, the 14th, the 16th, or the 19th. Let me know what will work for the Attorney General.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Badgley, Cori M (LAW) [mailto:cori.badgley@alaska.gov]
Sent: Monday, February 13, 2012 2:58 PM
To: Cindy Smith
Subject: AG Confirmation Hearing

Cindy,

Senator French said we should talk with you about getting the confirmation hearing scheduled. In talking with Senator French about confirmation, it sounded like he was looking at doing the confirmation hearing before things got too busy. I am currently in discussions with the House Judiciary Committee about doing the confirmation hearing on Wednesday, February 29, the week before energy week.

I was wondering if there was any possibility to hold a joint confirmation hearing? The reason being that the attorney general will be leaving for a conference at the end of that week, and we are trying to adhere to Senator French's desire to not hold off too long on the confirmation, while still allowing Mr. Geraghty time to meet the legislators and become comfortable with the Department of Law and the various issues it has to address.

If that is not a possibility, we can discuss a better time and date.

Thanks in advance for your help! Its greatly appreciated.

Cori Badgley
Assistant Attorney General
Legislation and Regulations Section
Department of Law
P.O. Box 110300
Juneau, Alaska 99811
cori.badgley@alaska.gov
(907) 465-2132

Cindy Smith

From: LynnWillis <akwillis@gci.net>
Sent: Wednesday, March 14, 2012 8:36 PM
To: Cindy Smith
Cc: Sen. Joe Paskvan; Sen. Bill Wielechowski; Sen. Hollis French; Sen. Lesil McGuire; Sen. John Coghill
Subject: Re: your letter and testimony

Ms.Smith,

I am sorry that I didn't read your email until this evening when I got home. You sent it this morning and the hearing was held this afternoon. So my testimony was not included in the hearing documents.

I suppose you could have called me as my phone number was on the original letter I sent your office on February 17th. However you chose not to do so. I know my question was complicated or else I wouldn't have asked it. But what does a citizen know?

I was able to listen to the hearing today. Now I understand why Mr. Geraghty was not challenged about his performance as an independent counsel and why he never admitted that he had worked as a contract attorney for the State Personnel Board.

I truly am disgusted with the Alaska governmental process reserved for use by only the privileged few. This whole episode has been characterized by delays and abuses that have only seemed to serve the agenda of those of you who control this system. Now you can do what you want with my testimony. It was not included with the hearing documents and so it has been lost. You and your ilk win again.

Lynn Willis
Eagle River, Alaska

----- Original Message -----
From: Cindy Smith
To: akwillis@gci.net
Cc: Melanie Lesh
Sent: Wednesday, March 14, 2012 9:37 AM
Subject: your letter and testimony

I have looked into your question regarding whether you can discuss your ethics complaint publicly, and whether if you did you would be subject to sanction. I apologize for taking as long as I did but your question was more complicated than it appeared!

Here is what I have found: as you said in your letter, the law says that unless a complaint reached the reaches the public phase with an accusation, the complaint has to be kept confidential.

However, in an opinion issued by the Attorney General in August, 2009, the specific issue was addressed and he concluded " Because public dialogue about government action is speech at the core of the First Amendment, **we do not recommend imposing sanctions on a citizen for disclosing information about an ethics complaint he or she has filed. Speech by a citizen charging government officials with breach of a code of official conduct is political speech accorded First Amendment protection."**

You can read the opinion here:

http://law.alaska.gov/pdf/opinions/opinions_2009/09-008_AN2009102807.pdf

The language I am citing starts on page 8.

Given this, would you like to have your testimony distributed to the committee?

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

SEAN PARNELL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)276-3697

August 5, 2009

Mike Nizich
Chief of Staff, Office of the Governor
550 West 7th Avenue, Suite 1700
Anchorage, AK 99501

Re: Analysis and Recommendations Concerning the Alaska Executive Branch Ethics Act

Dear Mr. Nizich,

We provide this legal analysis in response to questions about how to best implement the Alaska Executive Branch Ethics Act's goals to encourage high moral and ethical conduct and to improve public service, with a particular focus on (1) effective ways in which to minimize the disruptive effects of breaches of confidentiality, and (2) whether and how the state may defend public officers charged with ethics violations.

I. Summary

These are important issues for the state. They require consideration of laws that promote ethical conduct for public officials, the balance between First Amendment rights and a fair process for those accused of ethics violations, and holding public officials accountable while also encouraging qualified citizens to serve in state government. Because these issues have broader implications for public policy, I am issuing this analysis and advice as an attorney general's opinion.

Our analysis, conclusions, and recommendations fall into two categories. First, the confidentiality of the Ethics Act investigative process can be better protected in the future. As drafted, the Act provides an unnecessary opportunity

for a complainant to publicize a confidential report at a sensitive stage of the process. In addition, it imposes no consequences for citizens who abuse the Act by filing frequent, frivolous complaints, or filing complaints in bad faith. With statutory amendments, the ethics procedures can be changed in a manner that protects both the public interest in holding public officials accountable and the integrity of the process. We do not, however, recommend amendments that would impose sanctions for a citizen's disclosure of an ethics complaint that he or she has filed.

Second, the state has a well-established general policy of either defending or reimbursing executive and judicial branch officials for their legal defense when they are accused of inappropriate conduct or wrongdoing. Underlying this general policy is the legal presumption that state officers carry out their duties ethically and responsibly and therefore should be defended by the state against allegations to the contrary. Reimbursing the reasonable expenses that exonerated public officers incur in successfully defending against ethics complaints is consistent with this policy and balances the state's interests in discouraging misconduct by public officers and encouraging public service.

Drawing on previous legal advice we have provided, we conclude that executive branch agencies have authority to pay or reimburse the legal expenses public officers incur in defending against ethics complaints, if four conditions are met: (1) the public officers are exonerated of violations of the Ethics Act or other wrongdoing; (2) the officers acted within the course and scope of their offices or employment; (3) the expenses incurred are reasonable; and (4) appropriate sources of funds are available to the agencies to pay the expenses. Where those four conditions exist, reimbursing officers for those expenses clearly serves a public purpose and the public interest.

II. Background – the Ethics Act Process

Under the Ethics Act, anyone—including the attorney general or a member of the public—may file a complaint against a public officer.[1] For most ethics complaints, the attorney general is responsible for investigating the allegations and,

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[1] AS 39.52.310. "Public officers" include executive branch employees and officers, members of state boards and commissions, and state trustees. AS 39.52.960(20) and (21).

if appropriate, prosecuting the accused.[2] However, for ethics complaints against the governor, lieutenant governor, or attorney general, the attorney general is recused from involvement in the proceedings and the personnel board appoints independent counsel to act in place of the attorney general.[3] The attorney general is also charged with adopting regulations "necessary to interpret and implement" the Ethics Act.[4]

An Ethics Act investigation often results in the dismissal or settlement of the complaint. When it does not, the attorney general or independent counsel issues a public accusation against the subject officer, followed by an evidentiary hearing before the personnel board to determine whether a violation occurred and what remedies are appropriate.[5] In that hearing, the attorney general or independent counsel prosecutes the ethics charges against the public officer.[6]

A public officer accused of ethics violations is not required to have a lawyer represent him in ethics proceedings. But even a public officer who is confident he acted properly may decide that he does not want to handle the ethics complaint procedures on his own – especially given that the potential penalties include substantial fines, removal from office, or discharge from state employment.[7] A wrongly accused public officer might worry that, without a lawyer representing him in the process, the attorney general or independent counsel might misconstrue the officer's actions or misinterpret the Ethics Act. An accused public officer might also want a lawyer's advice on how to respond to media inquiries about an ethics complaint if the complaint prematurely becomes public knowledge.

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2 AS 39.52.310 – 39.52.390.

3 AS 39.52.310(c).

4 AS 39.52.950.

5 AS 39.52.350 – 39.52.370.

6 AS 39.52.360(c).

7 *See* AS 39.52.410 – 39.52.460.

The Ethics Act designates as confidential an ethics complaint and all other documents and information regarding an ethics investigation unless (1) the accused waives confidentiality in writing or (2) the attorney general or independent counsel initiates formal proceedings by issuing a public accusation.[8] The Act also provides other ways in which confidential information from the proceedings can be made public.[9]

III. Preventing Breaches of Confidentiality

Despite the Ethics Act's confidentiality provisions, over the past several months complaints against public officers regularly have been provided to the news media. In addition, a confidential recommendation by the personnel board's independent counsel recently was disclosed to the press, undermining the process by which ethics complaints are resolved. The Ethics Act does not grant the state authority to punish citizens who violate the confidentiality requirement, however, nor would that be advisable in many circumstances.[10] We conclude that the appropriate manner to prevent disclosure of information that may be harmful to the process of ethics investigations and the subject of the complaint is to improve protections to the process and to implement safeguards to prevent abuse of the Ethics Act.

A. The State Can Take Steps to Protect the Integrity of the Process of Resolving an Ethics Act Complaint

Confidentiality is important to the process of investigating and resolving an ethics complaint. The investigation may involve sensitive information about personnel matters that should be protected from the public eye. Further,

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8 AS 39.52.340(a), (c).

9 *See, e.g.*, AS 39.52.335(c), (f)-(h).

10 The confidentiality provision is enforceable against state officers who are part of the process of evaluating, investigating, and deciding Ethics Act complaints. *See, e.g., Dixon v. Kirkpatrick*, 553 F.3d 1294, 1306 (10th Cir. 2009) (holding that disclosure by a clerical employee of information about an ongoing investigation by state veterinary board was a constitutionally sufficient basis for dismissal).

publicizing information may interfere with the investigator's ability to find witnesses willing to cooperate, invite retaliation, threaten the independence of the investigation, and prejudice the right of the subject to a fair process. The public does not have a right to access information about the evidence or course of an investigation as it proceeds.[11]

The state can protect its interest in the integrity of Ethics Act investigations by creating "careful internal procedures to protect the confidentiality of [the] proceedings."[12] Thus we recommend improving Ethics Act procedures to prevent a breach of confidentiality that could prejudice the subject of a complaint and interfere with the state's ability to judiciously resolve ethics matters.

For example, the Ethics Act provides that when the attorney general finds probable cause to believe that a past action has violated, or an anticipated action would violate the Ethics Act, but determines that a hearing is unwarranted, he recommends corrective or preventive action in a confidential report. The Ethics Act currently requires the attorney general to provide copies of this confidential report to both the complainant and the accused officer. The accused officer who receives a report of recommended action from the attorney general may want to negotiate an alternative corrective action or settlement with the state. In this situation, giving the recommendations to the complainant is unnecessary. The complainant has no role in negotiations and should not be permitted to interfere

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[11] The right of access to information is far narrower than the free speech right to publish information once it is received. *See First Amendment Coal. v. Judicial Inquiry and Review Bd.*, 784 F.2d 467, 472 (3rd Cir. 1986) ("[T]he right of publication is the broader of the two, and in most instances, publication may not be constitutionally prohibited even though access to the particular information may properly be denied.") (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

[12] *Providence Journal Co. v. Newton,* 723 F. Supp. 846, 857 (D.R.I. 1989) (citing *Landmark Comm'ns, Inc. v. Virginia*, 435 U.S. 829 (1978); *see also R.M. v. Supreme Court of N.J.*, 883 A.2d 369, 380 (N.J. 2005) (holding that state's interest in enabling disciplinary authorities to make a full and fair investigation can be more narrowly met by the use of subpoenas and the imposition of criminal sanctions for witness tampering, destruction of evidence, and attempts to unduly pressure officials).

with or undermine discussions by publishing the report. This would compromise the proceedings at a critical stage. The complainant can be informed of the disposition of the case when the matter is resolved, corrective action is taken under AS 39.52.330, or an accusation is filed under AS 39.52.350. Thus, we recommend the Ethics Act be amended to eliminate the requirement that the attorney general serve the complainant with his predispositional recommendations, and to delay notification to the complainant until the matter is concluded.

B. The State Can Take Steps to Prevent Abuse of the Ethics Act

The Ethics Act process also could be changed to prevent another potential harm—abuse of the process. Some Alaskans have argued that the Ethics Act has been used inappropriately in some circumstances to politically damage the subject of the complaint.[13] This opinion does not examine or decide whether or to what extent citizens may have abused the Ethics Act process in the past. We focus instead on statutory changes that could provide a disincentive to abuse the Act in the future.

Our first suggested addition to the Ethics Act is a provision that is simple and commonly used in other jurisdictions. We recommend giving the personnel board authority to order reimbursement of fees and costs from a person who has filed a complaint in bad faith. The reimbursement could extend both to the subject of the complaint, for attorney's fees and costs of defending against the accusation, and to the state, for its actual costs associated with processing and investigating the complaint. The precise standard for ordering reimbursement is a policy decision beyond the scope of this opinion, but as a general matter the standard should not discourage speech protected by the First Amendment. A brief analysis of different standards used by other states follows.

Some state codes make knowingly false complaints subject to both reimbursement orders and criminal prosecution.[14] Others have similar provisions

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[13] *See, e.g.,* "Our View: Abuse of Ethics Complaints Turns Good Law Into Bad Politics," Anchorage Daily News, May 3, 2009.

[14] *See, e.g.*, Ala. Code § 36-25-27(a)(4) ("Any person who knowingly makes or transmits a false report or complaint pursuant to this chapter shall, upon conviction, be guilty of a Class A misdemeanor and shall be liable for the actual legal expenses incurred by the respondent against whom the false report or

but without criminal penalties, whereby reimbursement is warranted when the complainant knew that he or she was falsely alleging misconduct or providing false information.[15] In still other states, a less rigorous standard applies. Missouri law provides, for example, that "[a]ny person who submits a frivolous complaint shall be liable for actual and compensatory damages to the alleged violator for holding the alleged violator before the public in a false light."[16] The same statute defines "frivolous" to mean "a complaint clearly lacking any basis in fact or law." An even looser standard would be to assess the subject's attorney's fees against the complainant whenever a subject is found not to have violated the Ethics Act, regardless of the complainant's knowledge or intent. We have found no state that applies such a standard, however, most likely because it would discourage most ethics complaints and undermine an important element of ethics laws.

We also recommend consideration of another safeguard to discourage habitual complaint filers who use the Ethics Act process to harass executive branch employees. Statutory amendments could provide authority to the personnel board to decline to process further complaints filed by a person who has abused the Act in this way. Again, the precise parameters of this authority would be a policy

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complaint was filed."); *see also* 5 Ill. Comp. Stat. 430/50-5(d) ("Any person who intentionally makes a false report alleging a violation of any provision of this Act to an ethics commission, an inspector general, the State Police, a State's Attorney, the Attorney General, or any other law enforcement official is guilty of a Class A misdemeanor.").

15 In West Virginia, for example, a person who files an ethics complaint in good faith "is immune from any civil liability that otherwise might result," but a person who is found, by clear and convincing evidence, to have filed a complaint knowing that material statements are untrue can be ordered to reimburse both the subject and the ethics commission for costs and fees. W. Va. Code § 6B-2-4(u)(1)-(2); *see also* Fla. Stat. § 112.317(7) (giving ethics commission authority to require reimbursement of costs and fees "[i]n any case in which the commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee … with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part.").

16 Mo. Ann. Stat. § 105.957 (4).

matter. One model is the provision for "Multiple complaints by a single complainant" in the Rules for Judicial Council and Judicial Disability, which govern the United States Court of Appeals for the Ninth Circuit. These rules provide that a complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints.[17] The rule allows the complainant an opportunity to demonstrate why the judicial council should not limit the complainant's right to file further complaints, and gives the council authority to prohibit, restrict, or impose conditions on the complainant's future use of the procedure.[18]

We believe that these recommendations for changes to the Ethics Act maintain an appropriate balance between protecting the integrity of the process and encouraging responsible use of the Act to expose and correct unethical conduct. As discussed further below, we do not suggest any changes that might inhibit public discussion, debate, or criticism of the government.

C. The State Should Not Discourage Public Discourse on Government Actions

Creating safeguards to keep Ethics Act investigations confidential is categorically different than restricting citizens from speaking out about government conduct. Because public dialogue about government actions is speech at the core of the First Amendment, we do not recommend imposing sanctions on a citizen for disclosing information about an ethics complaint he or she has filed. Speech by a citizen charging government officials with breach of a code of official conduct is political speech accorded First Amendment protection. The United States Supreme Court has adhered to the bedrock principle that expression on public issues rests "on the highest rung of the hierarchy of First Amendment values,"[19] and thus that "debate on public issues should be uninhibited, robust, and

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17 U. S. Ct. of App. 9th Cir. Jud Miscon, Rule 10(a) (2008).

18 *Id.* West Virginia's ethics act contains a similar provision, *see* W. Va. Code § 6B-2-4(u)(2)(C) ("[T]he commission may decline to process any further complaints by the complainant, the initiator of the investigation, or the informant.").

19 *Carey v. Brown*, 447 U.S. 455, 467 (1979).

wide-open."[20] The Supreme Court has also made clear that protected political speech goes far beyond intellectual argument about political theory; it includes vigorous debate about the qualifications and official conduct of public officials.[21] Open discussion of official conduct is accorded the broadest protection available in our political system despite the fact "that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[22]

Alaska's Ethics Act does not inhibit this type of debate, because it does not impose penalties on individuals who are not engaged in the investigative or decision-making process. As we have considered ways to protect the confidentiality of the ethics investigations, we have been mindful that penalizing public discourse about the actions of government officials might threaten First Amendment rights. Courts have consistently found that confidentiality provisions applicable to ethics complaints restrict the content of speech.[23] Because they

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20 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

21 *See, e.g., New York Times Co. v. Sullivan,* 376 U.S. at 268 (citing with approval *Beauhamais v. Illinois*, 343 U.S. 250 (1952) ("public men, are, as it were, public property" and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled")).

22 *Id.* at 270.

23 "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad., Inc. v. FCC*, 512 U.S. 622, 643 (1994). Cases finding the confidentiality provisions of ethics laws to impose content-based restrictions include *Lind v. Grimmer,* 30 F.3d 1115, 1118 (9th Cir. 1994) (holding unconstitutional the confidentiality provision applicable to investigations conducted by Hawaii's campaign spending commission); *Baugh v. Judicial Inquiry and Review Comm'n*, 907 F.2d 440, 444 (4th Cir. 1990) (finding that confidentiality requirement of Hawaii's Judicial Inquiry and Review Commission was not content-neutral and remanding for further analysis under strict scrutiny); *Doe v. State of Florida Judicial Qualifications Comm'n*, 748 F. Supp. 1520, 1525 (S.D.

govern the content of speech, these restrictions will survive scrutiny only if narrowly drawn and necessary to serve a compelling state interest.[24] Courts generally have rejected states' interests in ethics code confidentiality provisions as insufficient to justify restrictions on citizens' speech.[25]

IV. As a General Policy, the State Either Defends or Reimburses Public Officers for Their Legal Expenses When They are Accused of Inappropriate Conduct or Wrongdoing

The state routinely defends public officers against claims of inappropriate conduct or wrongdoing. For example, unless engaged in willful misconduct or gross negligence, the state defends public officers against claims that they violated others' constitutional rights while acting within the course and scope of their official duties.[26] Similarly, the Department of Law offers in-house legal

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Fla. 1990) (invalidating confidentiality provision of Florida Constitution, applicable to complaints against judges); *Providence Journal Co. v. Newton,* 723 F. Supp. at 853 (invalidating confidentiality provision of Rhode Island Ethics Commission); *Doe v. Gonzalez*, 723 F. Supp. 690 (S.D. Fla. 1988) (finding confidentiality provision of Florida State Ethics Commission unconstitutional); *In re Warner*, ___ So.3d ___, 2009 WL 1025823 at *9 (La. 2009) (invalidating confidentiality requirement in attorney disciplinary proceedings).

[24] *Boos v. Barry,* 485 U.S. 312, 321 (1988).

[25] *See Lind v. Grimmer*, 30 F.3d at 1119-20; *Stilp v. Contino*, __F. Supp.2d __, 2009 WL 1842087 at *6-11 (M.D. Pa. 2009); *Providence Journal Co. v. Newton*, 723 F. Supp. at 856-57; *S.D. v. Supreme Court of Florida*, 723 F. Supp. 690, 693-94 (S.D. Fla. 1988); *In re Warner*, 2009 WL 1025823 at *22-27; *R.M. v. Supreme Court of New Jersey*, 883 A.2d 369, 377-78 (N.J. 2005); *Doe v. Doe*, 127 S.W.3d 728, 736 (Tenn. 2004); *Petition of Brooks*, 678 A.2d 140, 144-45 (N.H. 1996).

[26] *See, e.g., Prentzel v. State, Dep't of Pub. Safety*, 169 P.3d 573, 577 (Alaska 2007). The Department of Law recently—and successfully—defended three Alaska State Troopers against claims under 42 U.S.C. § 1983, which provides, in part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

representation to its attorneys when complaints of professional misconduct are filed against them with the Alaska Bar Association.[27] The Department of Law represents its attorneys so long as the allegations of misconduct arise in the course and scope of their official duties and the attorneys did not engage in willful misconduct or gross negligence.[28]

In some cases, when the Department of Law does not defend public officers against claims of inappropriate conduct, the state will instead reimburse them for the legal expenses they incur in successfully defending themselves. For example, if a Department of Law attorney hires private counsel to defend against professional misconduct claims before the Alaska Bar Association, the department may reimburse the attorney for costs and fees incurred if the attorney successfully defends against the claims and the claims arise out of the course and scope of the attorney's work with the department.[29] The state also reimburses Alaska judges and judicial officers for legal expenses they incur in disciplinary proceedings before the Alaska Commission on Judicial Conduct.[30] This commission serves a function for the judicial branch that is analogous to the personnel board's function for the executive branch under the Ethics Act.

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be liable to the party injured in an action at law." This statute therefore authorizes a person to bring a civil action for a public official's putative violation of the person's constitutional rights. The department also is defending former Governor Palin in a § 1983 action involving a clerical error in the Governor's Office that resulted in the failure to issue a proclamation.

27 Memorandum from Attorney General Bruce Botelho at 2 (Nov. 8, 2002) (announcing the department's policy on reimbursement and defense of employees).

28 *Id.*

29 *Id.*

30 Letter of Agreement between the State of Alaska, Dep't of Admin., Div. of Risk Mgmt. and the Alaska Ct. Sys. at 2 (undated). The state also has agreed to reimburse state employees for legal defense of allegations of wrongdoing in occupational licensing investigations before the Board of Psychologists and the State Medical Board, if the employees are exonerated.

More generally, the Department of Law was recently asked whether a state agency may reimburse a public officer for legal expenses incurred in defending against a complaint that the officer violated the professional code of conduct covering his duties and responsibilities. We concluded that the agency could reimburse such legal expenses if: (1) a decision exonerates the officer of any violations of the law or any wrongdoing; (2) the officer acted within the course and scope of his office or employment; (3) the attorney's fees are reasonable; and (4) an appropriate source of funds is available for that purpose.[31]

As these examples show, the state adheres to a general policy of either defending or reimbursing public officers for their legal expenses when they are accused of inappropriate conduct or wrongdoing, particularly when such accusations are unfounded. Underlying this general policy is the legal presumption that state officers carry out their duties ethically and responsibly,[32] and therefore should be defended by the state against allegations to the contrary.

V. May the State May Defend or Cover the Legal Expenses of Public Officers in Ethics Proceedings

Despite this widespread practice of defending or reimbursing public officials when accused of wrongdoing, the state apparently has never defended or covered the legal expenses of an accused officer in an Ethics Act proceeding. Alaska

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[31] Confidential Letter from Acting Attorney General Richard Svobodny (May 4, 2009).

[32] *See, e.g., AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007) ("[a]dministrative agency personnel are presumed to be honest"); *Earth Resources Co. v. State, Dep't of Revenue*, 665 P.2d 960, 962 n.1 (Alaska 1983) ("agency personnel and procedures are presumed to be honest and impartial").

statutes are silent on this issue with regard to ethics proceedings.[33] But existing law provides ample authority and guidance for covering these legal expenses without the need for statutory changes.

A. A Public Purpose is Critical

The state may not spend public money for public officers' defense in ethics matters unless doing so serves a public purpose and appropriations exist for the expenditures.[34] Defending officers accused of ethics violations or covering their legal expenses when they are exonerated clearly has a public purpose: citizens may be reluctant to serve in state government—or be inhibited in performing their

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[33] We concluded in an informal 1994 opinion that defense or indemnification of public officers for expenses or penalties incurred in ethics proceedings was unavailable in part because a complaint under the Ethics Act is not a suit for money damages. 1994 Inf. Op. Att'y Gen. at 2 (June 3; 663-94-0289). To the extent that the informal 1994 opinion emphasizes that public officers are not legally entitled to defense and indemnification of fines levied against them in ethics proceedings, the reasoning of this informal opinion is sound, particularly for public officers found guilty of wrongdoing. To the extent that the opinion suggests that the state may not pay the legal expenses of exonerated public officers, it is inconsistent with the state's practice in other contexts and with the public interest. While ethics proceedings are not suits for money damages, ethics allegations usually arise out of public officers' performance of their official duties, and penalties for violating the Ethics Act may include monetary fines. *See* AS 39.52.440 – 39.52.450. Moreover, the potential damage to a public officer's reputation is a cost to the individual, and recent experience demonstrates that public officers may incur substantial legal expenses even with regard to meritless ethics complaints.

[34] *See* Alaska Const. art. IX, § 6 ("No . . . appropriation of public money [shall be] made, or public property transferred, . . . except for a public purpose."); Alaska Const. art. IX, § 13 ("No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law."); *see also* AS 37.07.080(d) ("A state agency may not increase the salaries of its employees . . . or expend money or incur obligations except in accordance with law and [a] properly approved operations plan.").

official duties—if they must bear the cost of defending themselves against unfounded ethics charges related to their state duties.[35] Indeed, the Ethics Act itself underscores the importance of ensuring that the Act not only encourages "high moral and ethical standards among public officers in the executive branch," but also "improve[s] standards of public service."[36] Public service should not subject public officers, who are assumed by law to be acting ethically, to personal financial liabilities when ethics proceedings confirm that they acted appropriately. Therefore, in examining whether the state may defend or pay the legal expenses for public officers in ethics proceedings, the critical question is whether there is an approach that ensures that a public purpose is advanced while at the same time encouraging compliance with the Ethics Act by public officers. This question is examined in more detail below.

B. A Policy of Payment or Reimbursement After Exoneration Would Best Balance the Public Interest in Encouraging Public Service and Compliance with the Ethics Act

A policy allowing payment of legal expenses of exonerated public officers who hire private lawyers to defend them against ethics complaints would promote and "improve standards of public service"[37] while encouraging compliance with the Ethics Act. The public purpose for paying legal expenses is clearest for those

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35 *See, e.g., Snowden v. Anne Arundel County*, 456 A.2d 380, 385 (Md. 1983) (upholding an ordinance allowing reimbursement of fees and recognizing that reimbursement serves the public interest in encouraging the recruitment and retention of high-risk officers, maintaining morale, and providing necessary protection to those whose line of work exposes them to the financial burdens of defending baseless criminal charges); *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 916-17 (Fla. 1990) (holding that Florida common law requires publicly paid legal representation for public officials defending against litigation arising from their performance of official duties while serving a public purpose; the requirement's purpose "is to avoid the chilling effect that a denial of representation might have on public officials in performing their duties properly and diligently") (citing *Nuzum v. Valdes*, 407 So. 2d 277 (Fla. Dist. Ct. App. 1981)).

36 AS 39.52.010 (a)(1) and (a)(2)(B).

37 AS 39.52.010(a)(2)(B).

who are exonerated.[38] As noted above, the reimbursement of legal fees for those who are exonerated in ethics matters also is consistent with the state's general practice in other contexts. Those situations, all of which concern professional ethics codes, involve issues very similar to Ethics Act matters. Such an approach also appears to be the common practice among the majority of state governments in the country.[39]

The recent advice we provided to an executive branch agency on reimbursement of legal expenses in code-of-conduct proceedings offers an appropriate model for payment of legal expenses in Ethics Act matters. Based on that model, public officers may have expenses they incur in defending against ethics complaints covered if
(1) the officers are exonerated of any violation of the Ethics Act or other wrongdoing; (2) the officers acted within the course and scope of their offices or employment; (3) the expenses incurred were reasonable; and (4) there are appropriate sources of funds to pay the expenses.[40] As we stated in that opinion, "these conditions ensure that the spending will serve a public purpose."[41]

Although agencies could wait and reimburse public officers for their legal expenses once the ethics complaints against them are resolved, allowing state

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38 *See Snowden*, 456 A.2d at 385.

39 *See* Letter from James McPherson, Executive Director of the National Association of Attorneys General 2 (July 31, 2009) ("In conclusion, the reimbursement for reasonable attorney's fees and costs incurred by state officials during the course of an investigation or adjudication of alleged ethics violations where those allegations were found unsubstantiated or unfounded appears to be a common practice among a majority of the states. Such common practice, while not specifically provided by any state statutory or regulatory scheme, is premised upon a broad interpretation of risk management programs, formal ethics programs, or sound public policy protecting state officials from frivolous lawsuits which could discourage citizens from engaging in public service or seeking elected office.").

40 Confidential Letter from Acting Attorney General Richard Svobodny, *supra* n.31.

41 *Id.*

officers the option of having their legal expenses paid as they are incurred helps serve the public interest of not discouraging public service. Logistically, reimbursement may be simpler. But if public officers must shoulder the financial burden of legal expenses while they await resolution of unfounded complaints against them, qualified individuals may be reluctant to accept positions in state service and public officers may be inhibited in carrying out their duties. Public officers must agree, however, to repay any amounts they receive if they are not exonerated. [42]

The Alaska Supreme Court has not addressed the issue of reimbursement, but other court decisions suggest that this approach strikes an appropriate balance between the public's interest in encouraging individuals to accept positions in state

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[42] Pursuant to AS 39.52.950, the Department of Law will soon promulgate regulations addressing procedures for payment of expenses incurred in Ethics Act proceedings.

service and its interest in holding public officials accountable and discouraging misconduct under the Ethics Act.[43]

C. Conflict of Interest Issues Prevent the Department of Law from Directly Representing State Officials in Ethics Act Proceedings

Another possible approach would be to have the Department of Law defend public officers against ethics complaints. As noted above, the Department of Law regularly defends public officials when they are accused of wrongdoing under federal civil rights statutes. However, having the Department of Law directly defend public officers against ethics complaints could present conflict-of-interest

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[43] *See, e.g., Guenzel-Handlos v. County of Lancaster*, 655 N.W.2d 384, 389-90 (Neb. 2003) (concluding that, absent specific legislative authorization, public bodies are not obligated to pay attorney's fees their officials incur in successfully defending against criminal charges arising out of performance of their official duties); *Triplett v. Town of Oxford*, 791 N.E.2d 310, 315-16 (Mass. 2003) (same); *Hart v. County of Sagadahoc*, 609 A.2d 282, 283-84 (Me. 1992) (concluding that the common law permits, but does not require, a public body to pay fees its officials incur in those circumstances); *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 916-17 (Fla. 1990) (recognizing a common law duty of a governmental body to pay attorney's fees that its officials incur in defending against litigation arising out of performance of their official duties while serving a public purpose); *Chavez v. City of Tampa*, 560 So.2d 1214, 1214-19 (Fla. Dist. Ct. App. 1990) (holding that, where a city council member received advice from the city attorney that voting on a matter involving her personal interest would be a conflict of interest but nonetheless voted on that matter to break a tie vote, she was not entitled by statute or common law to reimbursement of the legal expenses she incurred in successfully defending against related charges before the state ethics commission); *Ellison v. Reid*, 397 So. 2d 352, 354 (Fla. Dist. Ct. App. 1981) (upholding the use of public funds to pay attorney's fees that a county appraiser incurred in successfully defending against charges of official misconduct before the state ethics commission); *Bd. of Chosen Freeholders of Burlington v. Conda*, 396 A.2d 613, 615, 620 (N.J. Super. Ct. Law Div. 1978) (holding that a county had neither the duty nor the authority to reimburse a county surrogate for legal fees incurred in defending against disciplinary proceedings before an advisory committee on judicial conduct, where the proceedings led to censure of the surrogate as a judicial officer).

challenges because of the attorney general's role in interpreting, enforcing, and prosecuting violations of the Ethics Act. If the Department of Law directly defended public officers in Ethics Act proceedings, the result would be that—for ethics complaints against most public officers—the defense counsel and the lawyer investigating and prosecuting the complaint would be in the same department and be supervised by the same attorney general and, perhaps the same deputy attorney general. In essence, the attorney general, through attorneys in the Department of Law, would be both prosecuting and defending against the ethics complaints. That could not only create an appearance of impropriety, but could also prejudice the interests of the accused officers and diminish the officers' confidence in the representation they receive. It could also create difficulties under the Alaska Rules of Professional Conduct because of the conflicting obligations of the state attorneys and their supervisors.[44]

Those conflict difficulties would not exist if the Department of Law represented only the governor, lieutenant governor, and attorney general against ethics complaints, because the attorney general is recused from investigating and prosecuting complaints against those three officers.[45] But Department of Law representation of even those three officers would still raise significant concerns.[46]

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[44] *See* Alaska R. Prof'l Conduct 1.7, 1.10 (providing that a lawyer should generally not represent a client if the representation of that client will be directly adverse to another client of that lawyer or the lawyer's firm). *But see* Alaska R. Prof'l Conduct 1.7 cmt. ("government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party.").

[45] AS 39.52.310(c).

[46] As a general rule, the Ethics Act makes clear that the attorney general has no role in the investigation and prosecution of an ethics complaint against the governor, lieutenant governor, or attorney general. In all other situations involving the Ethics Act, the role of the attorney general and Department of Law is to interpret, implement, and enforce the Act, with the goal of promoting the Act's purposes. But if the Department of Law were defending an individual officer against an ethics complaint, the goal would be different: to defend that officer zealously, regardless of the implications for the long-term implementation of the Ethics Act. For example, zealous representation of an accused officer might involve asserting that a provision of the Ethics Act is unconstitutional—an

Please contact me if we can be of further assistance with this matter.

Sincerely,

Daniel S. Sullivan
Attorney General

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assertion that the Department of Law would likely resist in carrying out its general responsibility to implement and enforce the Ethics Act. Defending individual officers against ethics complaints would therefore create an unacceptable conflict between the Department of Law's duty to provide them zealous representation and its general duty to promote the purposes of the Ethics Act in interpreting, implementing, and enforcing the Act.

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March 2, 2012

Senator Hollis French
State Capitol Building – Room 417
Juneau, Alaska 99801

Re: Testimony concerning appointment of Attorney General.

Senator French,

Approaching the Alaska Legislature is a difficult task. I asked for guidance relating to submitting testimony that relates to a confidential matter in a letter dated February 17, 2012 addressed to both you and Representative Gatto as chairs of the Judiciary Committees. I have not been provided with that information yet my letter of inquiry was included in public testimony for the House hearing. That is not what I requested.

Because I feel this is important, I will now submit detailed testimony for the Senate Judiciary hearing on the confirmation of Mr. Michael Geraghty for Attorney General with this caveat. If my statement violates the law regarding disclosure of information relating to a complaint under the Executive Ethics Act and would subject me to sanctions then I do not want my testimony submitted.

I was sent a letter from the Department of Law dated June 14, 2010 acknowledging receipt of my ethics complaint. The letter contained the following statement: "Please also be advised that ethics complaints and any related investigations are confidential under AS 39.52.340, unless the subject of the investigation fully waives confidentiality or the proceedings reach the public phase with the issuance of a public accusation." I assumed that I would be accountable for maintaining the confidential nature of my efforts and could, in fact, face punishment or my complaint would be dismissed if I violated that restriction by discussing my complaint with anyone. I am still not sure I can legally discuss this issue including this testimony.

Re: Testimony concerning appointment of Attorney General, March 2, 2012

I have pursued this question of my being able to talk about this complaint. In October 2010 I requested and received an opinion through my State Representative from the Legislative Legal Office regarding this confidentially restriction that states;" Note, however, that the remedies for violating the provisions of AS 39.52.340 **seem** (emphasis added) to apply only to a public employee. Also; "While a person who files a compliant is required to treat the existence of and information about the complaint as confidential, **there may be** (emphasis added) no statutory remedy if the person fails to abide by this requirement.

As stated, I deem my testimony important. However since the legislature has created such ambiguity in the law, while retaining the power of the State to pursue a perceived breach of this law, I am not willing to expose myself to the costs of a legal defense. Senator French if, in your opinion, my statement is not legal I demand that it not be submitted. Thank you.

Mr. Lynn Willis

March 1, 2012

To: Senate Judiciary Committee

Subject: Testimony concerning appointment of Michael Geraghty as Attorney General.

I do not support the appointment of Mr. Geraghty as the next Alaska Attorney General. My opinion is based on my experience with Mr. Geraghty when he acted as an independent counsel for the state personnel board following my submitting an ethics complaint against the Governor. This testimony is not intended to argue the merits of my complaint or contest the outcome. I am concerned about how Mr. Geraghty conducted his review of my complaint. My specific concern is if Mr. Geraghty posseses the ability to function independently from the Governor who appointed him.

My complaint concerned the ethics of violating the State Constitution to create a position for a sitting legislator. I was and am very much concerned about the actions of the Governor and the appearance of unethical behavior especially in light of the recent scandals involving Alaska Legislators.

I filed my complaint on June 12, 2010. I had never filed an ethics complaint. My complaint was then "forgotten" for over 90 days. I now assume my complaint would have remained "forgotten" had I not called the Department of Law in September asking for the status of my complaint.

I received a letter on September 29, 2010 from the Alaska State Personnel Board Chair, Debra English. In that letter Ms. English apologized for the delay. The letter included the following statement, "I received your filing on June 14th via email at my work address. I forgot about you filing and failed to assign it to independent counsel. I did not recall your case until I was contacted by Nicki Neal for a status update on September 21st." Also Ms English wrote; "When Nicki contacted me I reached out to the Board's independent counsel and Mr. Geraghty agreed to take the case and review it immediately."

Did my case not receive an adequate review because of Mr. Geraghty's agreement to have the review done immediately? Mr. Geraghty concluded his review and published his report on September 28, 2010. He never contacted me.

Subject: Testimony concerning appointment of Michael Geraghty as Attorney General.
March 1, 2012

Mr. Geraghty's review included his charge; "A complaint filed under the Executive Branch Ethics Act requires independent counsel retained by the personnel board to determine whether the conduct alleged, if true, would constitute a violation of the Act. If counsel determines that the allegations in the complaint do not warrant an investigation, counsel shall dismiss the complaint with notice to the complainant and the subject of the complaint."

I believe Mr. Geraghty didn't search for a probable violation of the act. He instead searched for justification to exonerate the Governor - which he did. Mr. Geraghty obviously didn't believe that this issue warranted further investigating despite the fact that this particular issue had generated editorials and much public discourse regarding the appearance of the Governor's actions and the fate of those he appointed. However, Mr. Geraghty chose not to mention any of those facts. Mr. Geraghty shared the opinion of the then Attorney General that the Governor's action had not been found to be irrefutably illegal and therefore was not unethical either. I personally believe that behavior can be legal yet also unethical. Mr. Geraghty apparently does not. He refused to deal with the appearance of suspect behavior which, to me, is the difference between a breach of law and a breach of ethics.

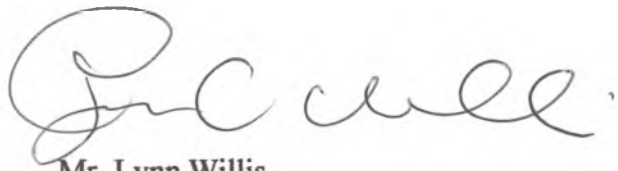
Mr. Geraghty apparently did not understand that he was to render the final and irreversible decision on this matter of pursuing a further investigation. In his September 28th report, he concludes, "It is my opinion that the allegations contained in Mr. Willis' (sic) complaint do not constitute conduct in violation of the Ethics Act and the complaint **should be** (emphasis added) dismissed." Didn't Mr. Geraghty understand that he wasn't supposed to be recommending anything? He was supposed to decide the issue. I believe his argument was written as if he would be advocating for a dismissal to another authority.

I asked the Department of Law if the statute had changed so that Mr. Geraghty was not going to make the final decision concerning a further investigation and who would be acting on Mr. Geraghty's recommendation.

Subject: Testimony concerning appointment of Michael Geraghty as Attorney General.
March 1, 2012

The Department of Law must have also asked Mr. Geraghty for clarification because I was then sent another letter on October 21, 2010 from Mr. Geraghty informing me that he had, in fact, dismissed my complaint.

Between the negligence of those who "forgot" my complaint, the self imposed necessity to complete the review quickly, and the narrow scope of the review, I feel that I was subjected to a process, including the contribution of Mr. Geraghty, more designed to quash ethics complaints from individual citizens than to determine the validity of those complaints. Therefore, based on my experience with Mr. Geraghty, I very much question his ability to maintain an independent, objective approach to situations involving conflicting issues which demand impartiality. Thank you.



Mr. Lynn Willis

10140 Hillcrest Lane
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akwillis@gci.net

February 17, 2012

Senator Hollis French, Chair, Senate Judiciary Committee
Representative Carl Gatto, Chair, House Judiciary Committee

Sirs,

I would like to submit testimony regarding the appointment of Mr. Michael G. Geraghty as Attorney General. After contacting the Anchorage LIO who referred me to the offices of the President of the Senate and the Speaker of the House of Representatives I understand that the hearings on Mr. Geraghty's appointment have not been held. I also understand that both Legislative Judiciary Committees will be involved in this process.

This concerns Mr. Geraghty's performance as an independent counsel in regard to an ethics complaint I filed against the Governor. I am not contesting Mr. Geraghty's decision. What concerns me is the manner in which he executed his duties. Based on my experience, I very much doubt if Mr. Geraghty could effectively serve all Alaskans as Attorney General.

I understand that the facts concerning my complaint might want to be treated as confidential. Therefore I am asking for guidance regarding how to submit my testimony. Thank you.

Lynn C. Willis

4/27/12 POINT THOMSON SETTLEMENT: EVALUATION, LITIGATION, DNR RESPONSE

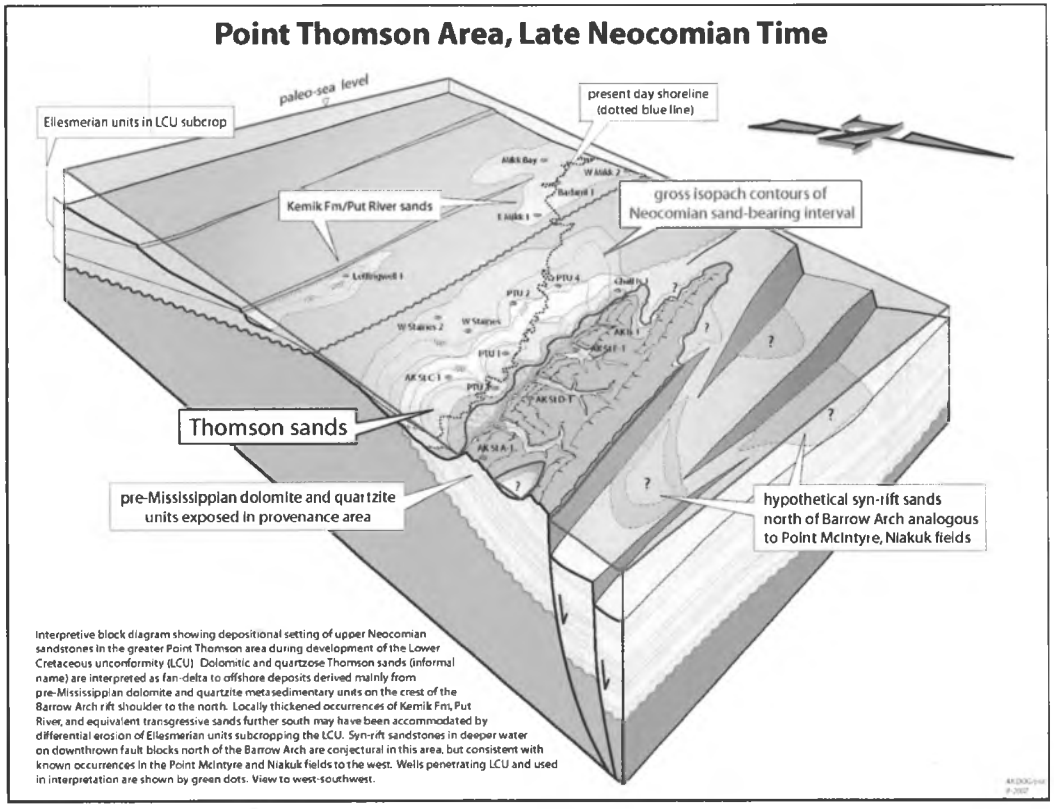
<TARGET><BILL></BILL><SUBJECT>4-27-12 POINT THOMSON SETTLEMENT EVALUATION, LITIGATION, DNR RESPONSE</SUBJECT><COMM>SJUD27</COMM></TARGET>

The Pt Thomson Settlement

Presented upon request of the Senate Judiciary Committee

Mark Myers Ph.D., CPG

April 27, 2012



Presentation of Information Useful for Understanding the Settlement

I. Technical Details of the Point Thomson field

II. Description of a few previous development commitments

III. Current Settlement

IV. Summary

I. Point Thomson Technical Details

- Largest known remaining undeveloped, onshore Alaska, conventional field (petroleum liquids - oil and condensate)

- Combined reservoirs could contain more than 1,000,000,000 barrels of technically recoverable oil and condensate and 7 TCF gas

- 2 major hydrocarbon bearing zones
  - Flaxman sands D. 1975 - conventional oil
  - Thomson sands D. 1977)-retrograde condensate, oil and natural gas

- AOGCC classifies Pt Thomson is classified by as an **oil** not a gas field – liquids production should drive development

- **Because Point Thomson is a high-pressure retrograde condensate field the method of production, well and facility design is critical to maximizing recovery**

Unless the Point Thomson Sands are Developed Using Full Field Gas Cycling the Majority of the Recoverable Condensate and Oil **Will Be Wasted**

Blow Down	Full Field Cycling (20 yrs followed by blow down)	Difference
26% of the condensate	76% of the condensate	- 50%
127-156 MMSTB	370-450 MMSTB	- 243-323 MMSTB
3-16% of the oil	43% of the oil	- 27%-40%
30-150 MMSTB	250-400 MMSTB	- 220-230 MMSTB
70% of the gas	56% of the gas	+14% of the gas
6-7 TCF	4.8-5.9 TCF	+1.1 to 1.2 TCF gas

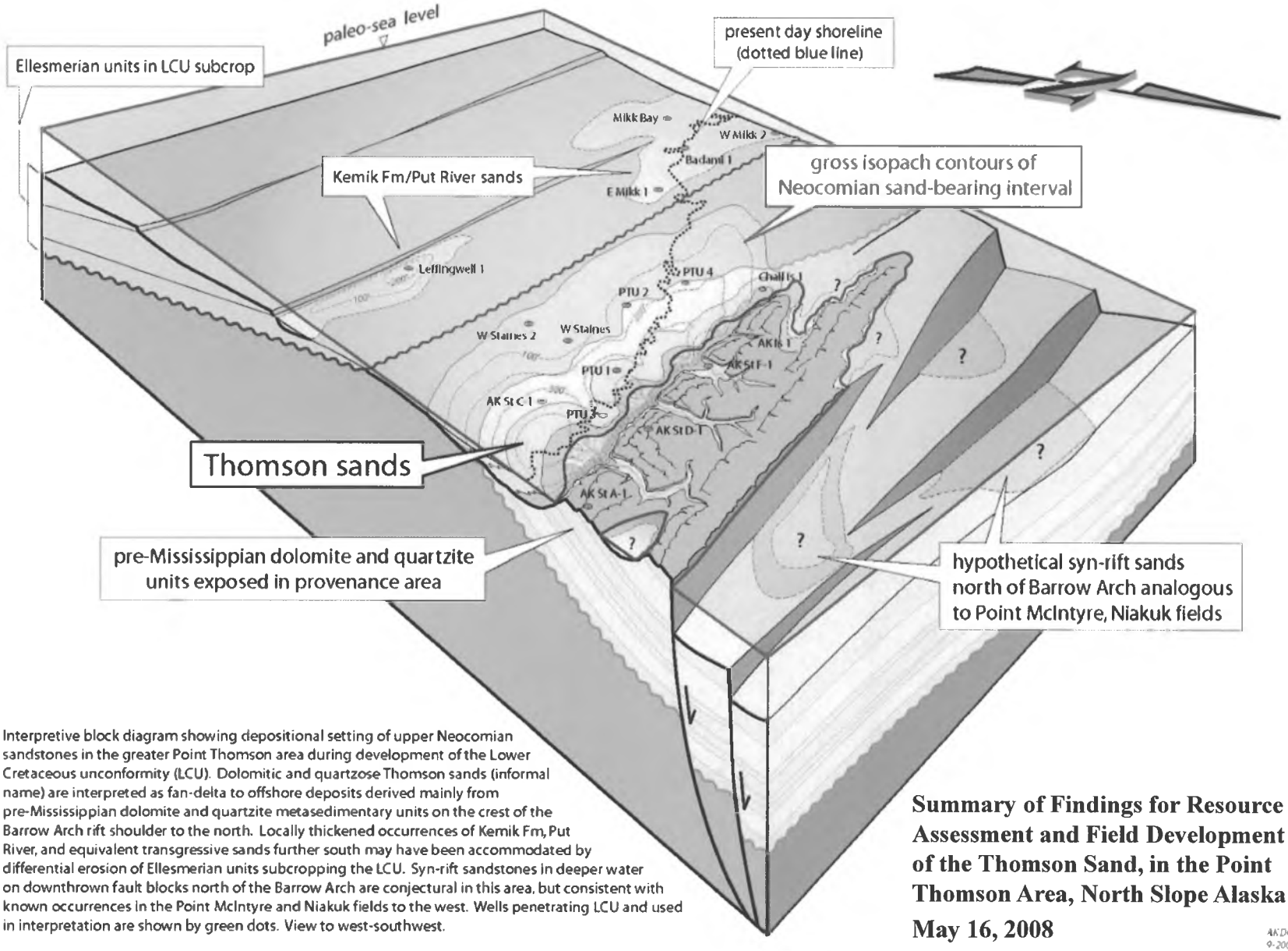
Key Findings from the only publically available study (commissioned by DNR DOG and completed by PetroTel Inc. in May 2008)

Resource owner (State DNR) and lessee/producer (WIOs) may not agree on method of production even if they agree on the geology, engineering, technology and costs

Why?

- Cycling costs more than blowdown and might have a lower – but still highly economic – rate of return
- Lessee/producer, not the state, bares the development and production costs as a requirement of the lease (somewhat offset by tax credits and potentially royalty relief)
- Lessee/producer has other options outside of Alaska where they can invest saved capitol
- State (DNR) has a mission and a legal requirement as the resource steward and regulator to protect the public interest, promote conservation and promote the prevention of physical and economic waste –done primarily through the Unitization and Plan of Development (11AAC83.303(a).

Point Thomson Area, Late Neocomian Time



Interpretive block diagram showing depositional setting of upper Neocomian sandstones in the greater Point Thomson area during development of the Lower Cretaceous unconformity (LCU). Dolomitic and quartzose Thomson sands (informal name) are interpreted as fan-delta to offshore deposits derived mainly from pre-Mississippian dolomite and quartzite metasedimentary units on the crest of the Barrow Arch rift shoulder to the north. Locally thickened occurrences of Kemik Fm, Put River, and equivalent transgressive sands further south may have been accommodated by differential erosion of Ellesmerian units subcropping the LCU. Syn-rift sandstones in deeper water on downthrown fault blocks north of the Barrow Arch are conjectural in this area, but consistent with known occurrences in the Point McIntyre and Niakuk fields to the west. Wells penetrating LCU and used in interpretation are shown by green dots. View to west-southwest.

Summary of Findings for Resource Assessment and Field Development Study of the Thomson Sand, in the Point Thomson Area, North Slope Alaska

May 16, 2008

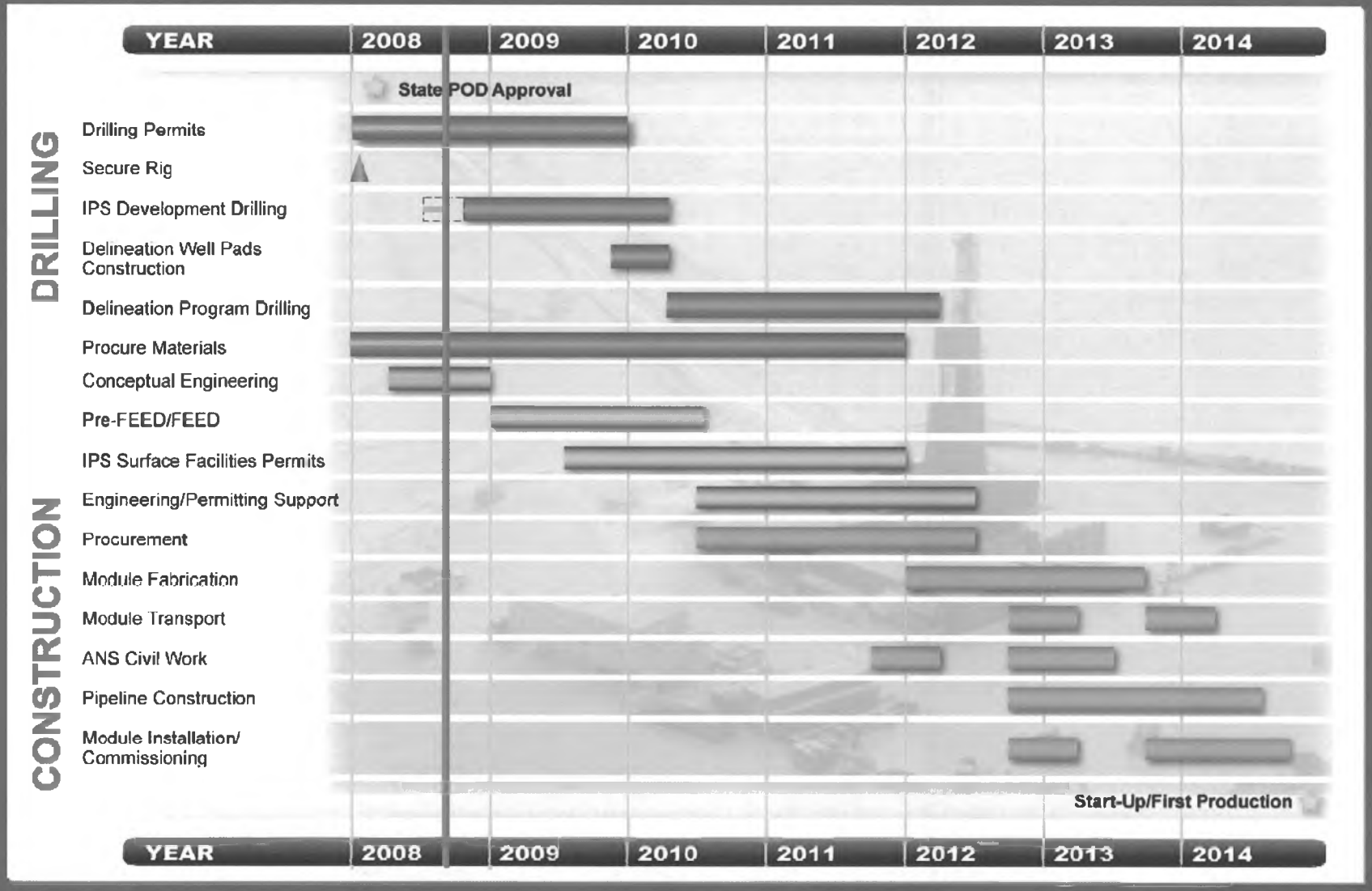
AKDOG/pld 9-2007

II. Description of a Few Previous Development Commitments

- Pt Thomson Unit formed in 1977, 1 1 Wells Drilled 1979-1983
- 2001 Expansion agreement:
  - Exxon agreed to drill well to test western end of field by June 2003
  - Commence development drilling by June 2006 or contract unit and pay $20 Million
  - Complete 7 development wells by June 2008 or contract unit and pay $27 million and increase royalty rates
  - Target project was a 75,000 Barrels of Condensate/Day full field cycling project
  - Wells were never drilled and Unit was ultimately defaulted in 2005
- 2009 Irwin Agreement that reinstated 2 of 31 leases
  - Exxon agrees to drill the PTU 15 and PTU 16
    - "Irwin said Tuesday he decided to reverse Banks and reinstate two leases because Exxon representatives said during the hearing that the company is 'unconditionally committed' to drilling two wells by 2010 and producing from those wells by 2014 "(ADN 27 Jan 2009)
  - Exxon builds wells, drills and tests wells and began permitting the pipeline

Point Thomson Project - Clear & Committed Timeline

POINT THOMSON PROJECT



http://www.akrdc.org/membership/events/breakfast/0809/haymes.pdf

ExxonMobil

PTU POD - Addressing DNR's Requests

POINT THOMSON PROJECT

- Engineering & Drilling Starts 2008
  - > 200 jobs by next winter
- Production begins 2014
- 10,000 Barrels per Day
- Future Expansion Capability

- Drilling Program – Gas, Oil, Condensate
  - 2 gas cycling wells
  - 3 oil / gas delineation wells
  - Additional Wells

- Term of POD through to Production
- Owners support $1.3 Billion Project
- Already Secured Rig; Long Lead Materials
- Scheduled Milestones for State to Monitor Progress
- Owners Support Assured by Corporate Executives
- Agreed to Unit Termination if Milestones Not Met

ExxonMobil

http://www.akrdc.org/membership/events/breakfast/0809/haymes.pdf

Point Thomson Project – Initial Development Phase

POINT THOMSON PROJECT

- Production by YE 2014: 10,000 BPD, inject remaining gas
- Includes process facilities, liquids pipeline, airstrip, camp
- Delineates oil reservoirs, ability to produce
- Future expansion capability; ultimate gas sales development

Project Illustration

http://www.akrdc.org/membership/events/breakfast/0809/haymes.pdf

ExxonMobil

III. The Current Settlement

- This settlement is extraordinarily significant in the impact and the breadth of issues that are settled.
- These issues are normally reserved for and resolved through statute and regulations using established public processes.

Some Major Issues

- Relinquishment of DNR's authority to manage the unit
- All development options are at the sole discretion of the WIO – none optimal for state
- Requirement for the State to take its gas in-kind prior to a major gas sale
- Deferral of Taxes on PTU gas injected into Prudhoe Bay

Major Issues Continued

- Contraction of unit is not automatic and through at least one of the pathways no drilling is required to keep acreage
- Most PA and tract allocations (which affects the state royalty share) are determined by the settlement and automatic – where is the technical review?

Major Issues Continued

- Validity: The Commissioner has determined that the terms of this agreement are necessary or advisable to protect the public interest – including RIK and blowing the reservoir down in spite of the huge oil and condensate loss
- Further Assurances: - DNR will not oppose an application to AOGCC to blow the reservoir down if consistent with the agreement and applicable state law

Unusual and Problematic Definitions

"Major Gas Sale (MGS)"

- Means a large-scale pipeline project having a design throughput of more than 500 MMCFD of gas that results in delivery of gas off the North Slope of Alaska"
- This is 9X less volume than the proposed AGIA line and 6X smaller than the proposed LNG project under AGIA or the Port Authority.
- Given the gas reserves at Prudhoe Bay, a MGS for an LNG project wouldn't need Point Thomson gas until the year 2040 for a 3 BCF line and the year 2146 MMCFD for a 500 MMCFD pipeline
- Why would state use this definition?

Unusual and Problematic Definitions Continued

"Without appeal"

- Any Party may dispute in court whether a specified event has occurred that would result in termination or release of acreage "Without Appeal" (Section 5.1.4)

Available Development Options

All Alternatives are at the Discretion of the WIO

ALTERNATIVE A

- "Sanction" a Major Gas Sale: defined as any pipeline > volume than bullet line – doesn't require building it or connecting it to Point Thomson

ALTERNATIVE B

- Expanded Liquids Production into TAPS Only requires 20,000 to 30000 BOPD

ALTERNATIVE C

- Expanded Liquids Production into TAPS, Enhanced Prudhoe Bay Recovery, and Gas for In-State Use

ALTERNATIVE D

- Spend $2 Billion dollars between year end 2007 and year end 2015 on "work activities set forth in this agreement" Abandon and keep most of the acreage. Keep it all with planning No production required.

Summary

- **None of the three development scenarios maximize economic oil and gas recovery from the field. In fact they all could/will lead to very significant physical and economic waste**
- **The settlement provides several pathways which require little to no actual production**
- **Settlement removes DNR's authority to manage the field through normal development procedures**
- **Some settlement terms step back from previous commitments of WIOs**

Summary Continued

- **None of the contemplated gas pipelines will require Pt Thomson gas for decades**
  - **Linkages are made to a gas line that is so small that it could be kept full with Prudhoe Bay gas for 20-120 years. Pt Thomson gas won't be needed until 2040 and beyond: long after full field cycling for liquids would have been completed.**
- **RIK – Why? and why no finding process?**
- **Major oil and gas decision of the decade made without public process**
- **Abandonment with no damages and minimal consequences**

Unless the Point Thomson Sands are Developed Using Full Field Gas Cycling the Majority of the Recoverable Condensate and Oil **Will Be Wasted**

Blow Down	**Full Field Cycling** (20 yrs followed by blow down)	**Difference**
26% of the condensate	**76% of the condensate**	**- 50%**
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30-150 MMSTB	**250-400 MMSTB**	**- 220-230 MMSTB**
70% of the gas	**56% of the gas**	**+14% of the gas**
6-7 TCF	**4.8-5.9 TCF**	**+1.1 to 1.2 TCF gas**

Key Findings from the only publically available study (commissioned by DNR DOG and completed by PetroTel Inc. in May 2008)

Excerpts from a Statement of the Alaska Oil and Gas Conservation Commission

To date, the Commission has received no application for pool rules from the PTU owners. Accordingly, the Thomson Sand Reservoir (TSR) is presumed to be an oil pool and will remain so unless and until the Commission establishes Pool Rules that provide otherwise.

As cited above, the Commission's responsibility is to prevent the physical **waste of hydrocarbon resources. Maximizing *value to the owners and the State at the*** **possible expense of additional reserves is not a valid reason for committing waste. The owners have yet to demonstrate to the satisfaction of the Commission that developing the PIU as a gas field will be the only viable alternative for a prudent operator to pursue. Until they do, the Commission will continue to regard the PTU as un oil field and steps taken towards developing it as a gas field risk being viewed as steps taken towards wasting hydrocarbon resources. Point Thomson could be part of a gas line project and still cycle condensate first; if the operator makes prudent use of the time available.**

In conclusion the Commission does not believe that the uncertainty that still exists about the potential development of the PTU can be used as justification for a decision that may promote waste of tens to hundreds of millions of barrels of oil and condensate. This is especially true in light of the fact that much of this uncertainty could have been eliminated already had the PTU owners adhered to the work commitments specified in previous POD's and agreements.

Submitted this 3rd day of November 2006.

http://www.courts.alaska.gov/outreach/scl2012-anc-appellant-excerpts479-535.pdf

AOGCC Explanation

- Retrograde condensate reservoirs do not behave in the same ways that conventional oil and gas reservoirs do. Dropping the pressure in the reservoir does not cause gas to form from oil, as is the case in a conventional oil reservoir. Nor does vaporized condensate remain a vapor, as is the case in a conventional gas reservoir. Rather, for a retrograde condensate reservoir, as the pressure decreases, liquids drop out of the gas in the reservoir.
- When a retrograde condensate field is produced like a conventional gas field, the gas is produced and sold at high rates. Initially a large amount of condensate is produced with the gas. However the reservoir pressure drops quickly and condensate production drops dramatically because condensate is dropping out in the reservoir instead of at the surface. To further the problem, condensate that drops out in the reservoir is much more difficult to produce than that which remains entrained as a vapor in the gas. The liquid tends to build up and clog the pore spaces in the reservoir rock. Also, since this reservoir has never been exposed to liquid before, the rock acts as a sponge and some of the condensate will be immobilized and never come out. **To make things worse, once the condensate comes out of the gas, very little of it will return to a gaseous state even if the reservoir pressure is later increased. In other words this is a problem that you can't fix after you cause it; it's like unringing a bell.**
- **In addition to lost condensate recovery, if the reservoir pressure is reduced too quickly, the gas recovery will also decrease.** The condensate that clogs up the reservoir and won't come out also blocks the gas from coming out. This is similar to an air filter on a car. When the filter is new, air will flow through it freely, but as it gets older the pores in the filter begin to clog with dirt (as the pores in the reservoir would clog with condensate) and the air will not flow through as well. Eventually no air at all will flow.
- **So to maximize condensate production from a retrograde condensate reservoir, it is necessary to keep the reservoir pressure high until the condensate has been recovered. Often this is accomplished through a process known as "gas cycling." In this process hydrocarbon gas is produced, the condensate is removed and sold, and the now-lean gas is injected back into the reservoir to maintain pressure and to sweep more condensate to the surface. As this process continues, the gas produced slowly becomes leaner and the yield of condensate decreases. Eventually the gas is stripped of most of the liquids and it is safe to sell the gas. This method delays gas sales, but it results in greater ultimate recovery of both liquid and gaseous hydrocarbons. the answer?**

- http://doa.alaska.gov/ogc/Gas/PtThompson_Pool_Rules.pdf

POINT THOMSON

SETTLEMENT OVERVIEW

Senate Judiciary Committee

Joe Balash
Deputy Commissioner
Alaska Department of Natural Resources

April 27, 2012

Outline

PT

I. Background

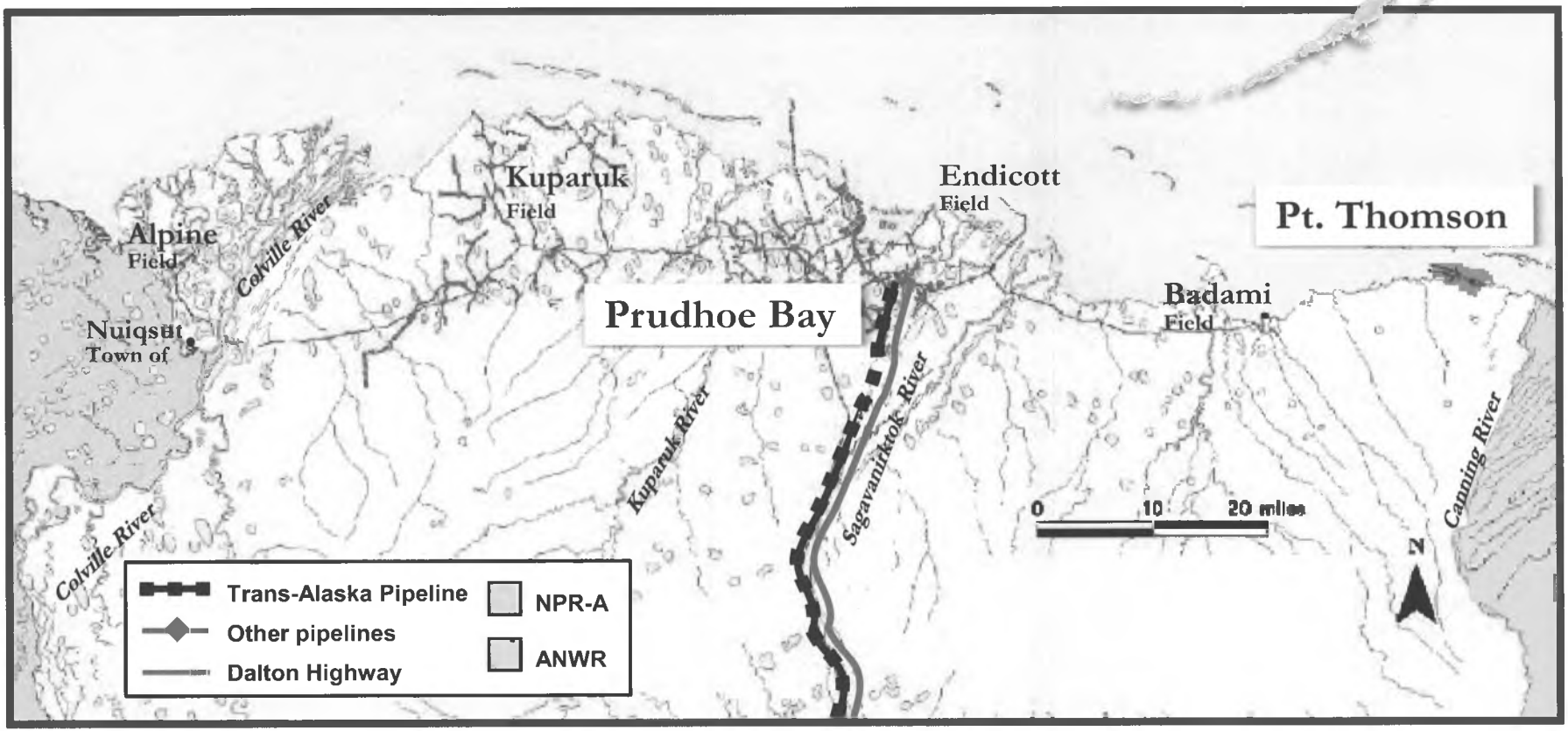
II. Long-Standing Goals Related to Point Thomson

III. How *the* Settlement Advances Alaska's Interests

IV. Components *of the* Agreement

PT

BACKGROUND



BACKGROUND

About Point Thomson

- Point Thomson (PT) is located approximately 60 miles east of Prudhoe Bay and is adjacent to the Arctic National Wildlife Refuge (ANWR)
- The first leases were acquired in 1965; oil discovered in 1975; gas discovered in 1977
- The PT unit formed in 1977
- The PT unit contains 38 state leases on approximately 93,000 acres of state land
- PT contains about 8TCF of gas and hundreds of millions of barrels of oil
- PT has ~ 25% of known North Slope gas reserves
- PT unit has a massive Thomson Sands reservoir, a thin oil rim, and smaller Brookian oil accumulations
- The PT reservoir is a high-pressure retrograde condensate and natural gas reservoir that presents development challenges

About the Litigation

- In 2005, DNR defaulted the PT unit for lack of development
- In November 2006, DNR terminated the unit when the Producers failed to cure the default
- The Producers appealed to superior court; in December 2007, the court remanded the unit termination decision to DNR
- In April 2008, DNR rejected a new plan of development and again terminated the unit
- The Producers appealed to superior court, which ruled that DNR erred in terminating the unit
- The Alaska Supreme Court granted the State's Petition for Review, which halted the current superior court litigation – final court resolution is years away

LONG-STANDING GOALS RELATED *to* POINT THOMSON

State of Alaska's Goal for Point Thomson:

Advance the State of Alaska's Strategic Interests

<u>For years the State of Alaska has focused on these common goals related to PT:</u>

- Begin producing PT hydrocarbons into TAPS—*no more warehousing*
- Keep development and production moving forward
- Incentivize and lay out clear path for full-field development
- Ensure significant consequences if the Producers fail to meet commitments
- Encourage commercialization of North Slope gas
- Create increased employment and economic opportunities for Alaskans

How *the* Settlement Advances Alaska's Interests

PT

- Creates momentum on production and development
- Creates a near-term commitment of production into TAPS and increasing TAPS throughput
- Ends the warehousing of state resources
- Provides the quickest way to move PT into production by a certain date
- Opens the Eastern North Slope to new development opportunities by adding infrastructure and a 70,000 bpd common carrier pipeline connecting to TAPS ✓
- Incentivizes and lays out a clear path and alternatives for full-field development, each of which will require billions of dollars in investment if pursued
- Generates significant investment in Alaska, which will create increased employment and economic activity for Alaskans: strong Alaska hire provision
- Establishes significant consequences if near-term or longer-term development is not pursued
- Increases competition on the North Slope
- Provides potential for significant gas volumes for in-state use no later than 2019
- Positions North Slope gas for a large-scale gas pipeline project
  - Near term work on liquids production undertaken simultaneously with gas commercialization efforts
  - Liquids production work commitments are a pre-investment for North Slope gas commercialization
  - Ends the cloud of litigation over PT
  - Catalyst for alignment among the Producers and TransCanada
- Requires a commitment to develop a separate oil reservoir within PT
- Improves technical and geologic understanding of the complicated PT reservoir to help determine the best way to maximize state resources
- Animating principle: "earn your acreage" – the more work, more commitment, more investment, and more production that occur, the more PT acreage companies will retain

PT COMPONENTS *of the* SETTLEMENT

I. Initial Production System (IPS)

II. Overview of Expanded Development Alternatives

A. ALTERNATIVE A:

Major Gas Sale

B. ALTERNATIVE B:

Expanded Liquids Production into TAPS

C. ALTERNATIVE C:

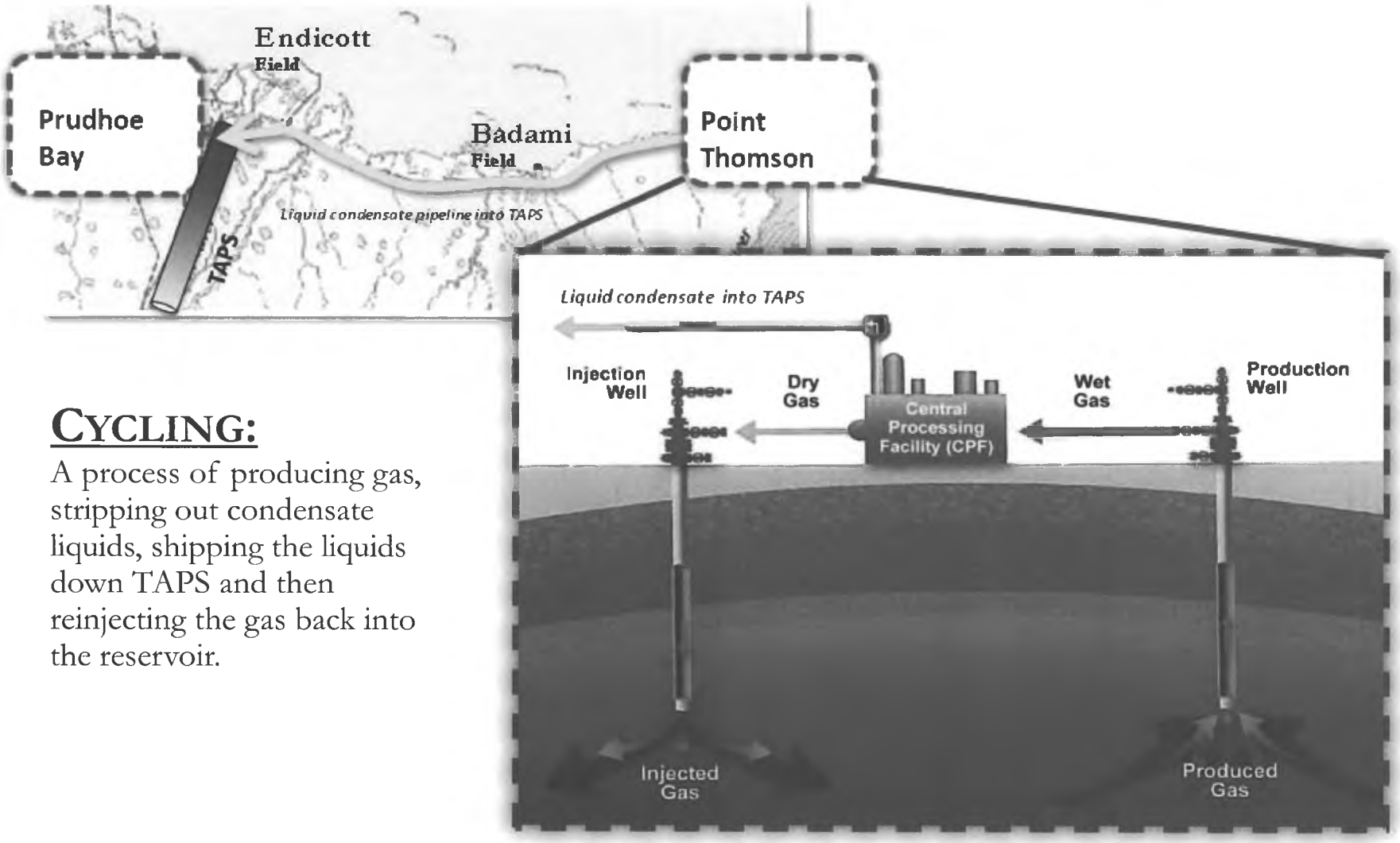
Expanded Liquids Production into TAPS, Enhanced Prudhoe Bay Recovery, and Gas for In-State Use

III. Consequences and Incentives Related to Development Path Taken

INITIAL PRODUCTION SYSTEM
- COMMITMENTS *and* TIMELINES -

- Producers will work together to complete the Initial Production System (IPS), will produce ~10kBPD of liquid gas condensates and cycle ~200 mm CFD
- To install the IPS, the Producers will complete the following work commitments:
  - Drill PT 15 & 16 wells from the central pad (completed); world-class wells in a remote location
  - Construct facilities and install 70k BPD liquids, common carrier pipeline to TAPS
  - Put PT 15 & 16 on production by end of 2015-16 winter season utilizing IPS
    - Original, agreed-upon timeline was pushed back one year because of federal permitting delays
  - Drill west pad well by end of 2016-17 winter season
  - Permit two additional wells and the east pad
- IPS installs infrastructure necessary for full-field development and will provide critical information for the next phase of development
- Detailed work schedule incorporated into the agreement (see slide 11)
- DNR technical review confirmed reservoir complexity
- If the IPS is abandoned, acreage automatically contracts from the unit and is returned to the state
- Unfavorable economics/ROI of IPS cannot serve as an excuse for non-performance
- Once production starts, limited acreage is secured consistent with state law
- IPS development proceeds in parallel with gas commercialization work

PT INITIAL PRODUCTION SYSTEM
- OVERVIEW *of* CYCLING -

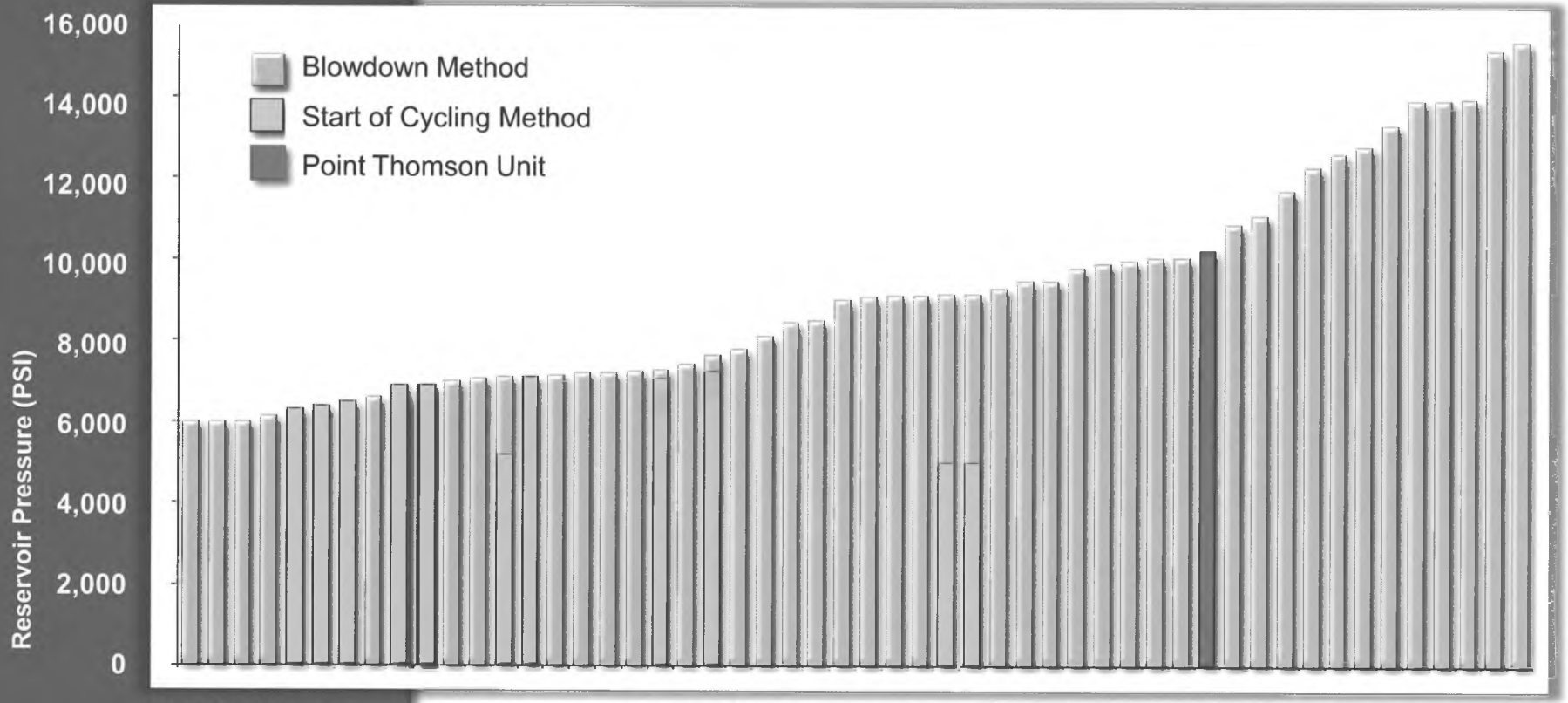


CYCLING:

A process of producing gas, stripping out condensate liquids, shipping the liquids down TAPS and then reinjecting the gas back into the reservoir.

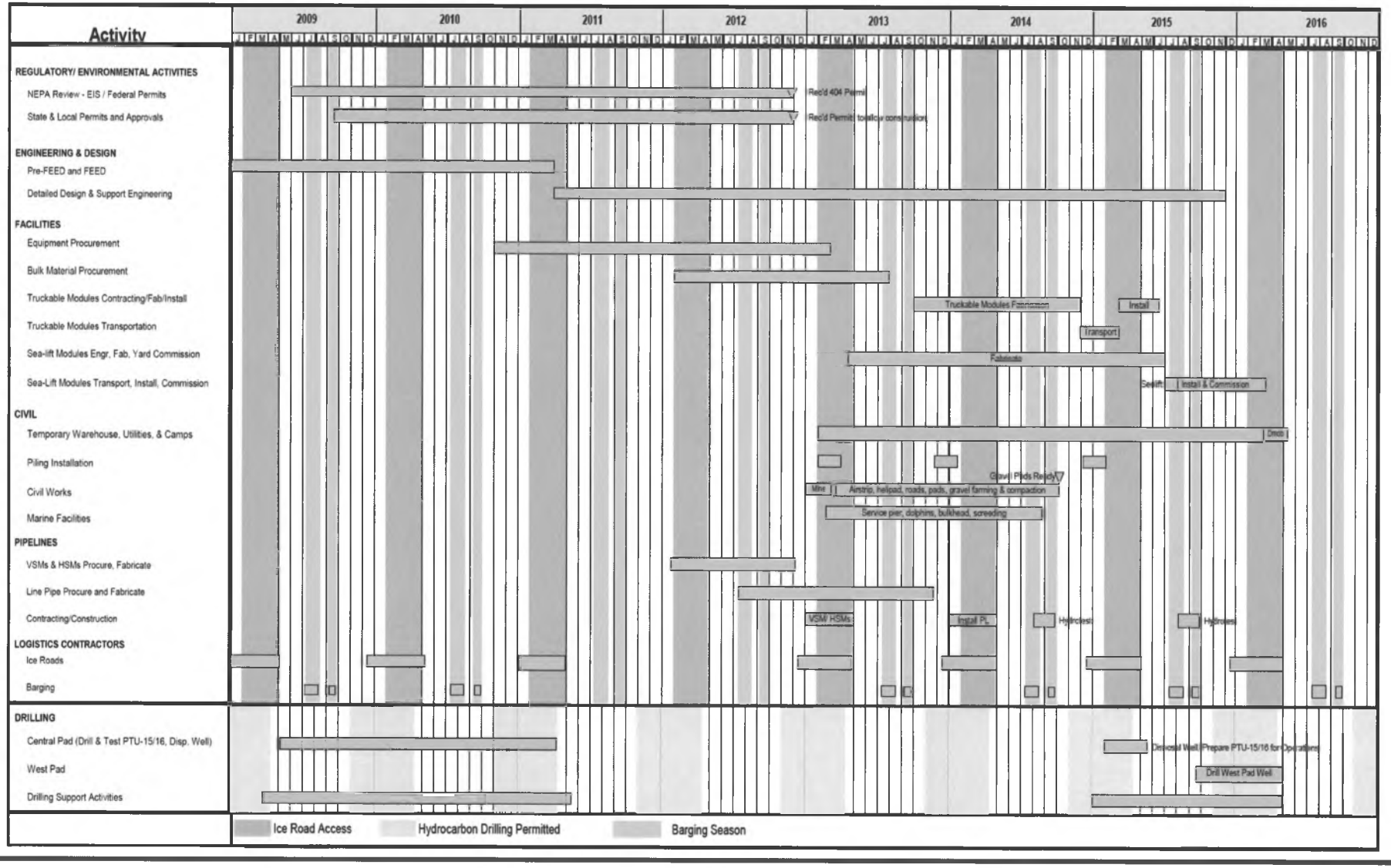
INITIAL PRODUCTION SYSTEM
- CYCLING *at* HIGH-PRESSURE -

Comparison *of* World-Wide Gas–Condensate Reservoirs



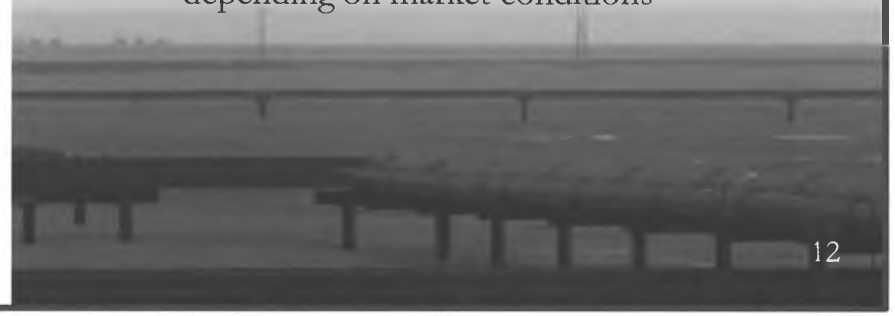
- There are no retrograde gas condensate reservoir cycling projects similar to Point Thomson (~10,200 psi), although there are a few oil and gas reservoirs in the world that are in production at a higher pressure
- For comparison, Prudhoe Bay gas is at ~3500 PSI, although this is not a condensate reservoir

IPS Work Schedule



PT Overview of Expanded Development Alternatives

- In addition to the IPS production commitments and timeline, the settlement creates pathways, incentives, and benchmarks for full-field development of the PT reservoir – *critical component of the settlement*
- Once the IPS is on production, there are three alternatives to full-field development:
  A. Major Gas Sale
  B. Expanded Liquid Production into TAPS
  C. Expanded Liquid Production into TAPS, Enhanced Prudhoe Bay Recovery, and Gas for In-State Use
- All three alternatives:
  - Can be pursued individually or simultaneously
  - Will require billions of dollars of additional investment to complete
  - Can only fully secure additional PT acreage once expanded production of hydrocarbons begins
- If none of the three expanded development alternatives are sanctioned or committed to, then the Producers automatically lose significant PT acreage
- Producers must also commit to Brookian oil formation production by 2018 or lose Brookian acreage
- A primary goal of the expanded development alternatives is commercializing North Slope gas
- But other full-field development scenarios—Alternatives B and C—are also available
  - Provides flexibility for the future: markets are hard to predict
  - State's resources can be maximized depending on market conditions



PT

ALTERNATIVE A:
- MAJOR GAS SALE -

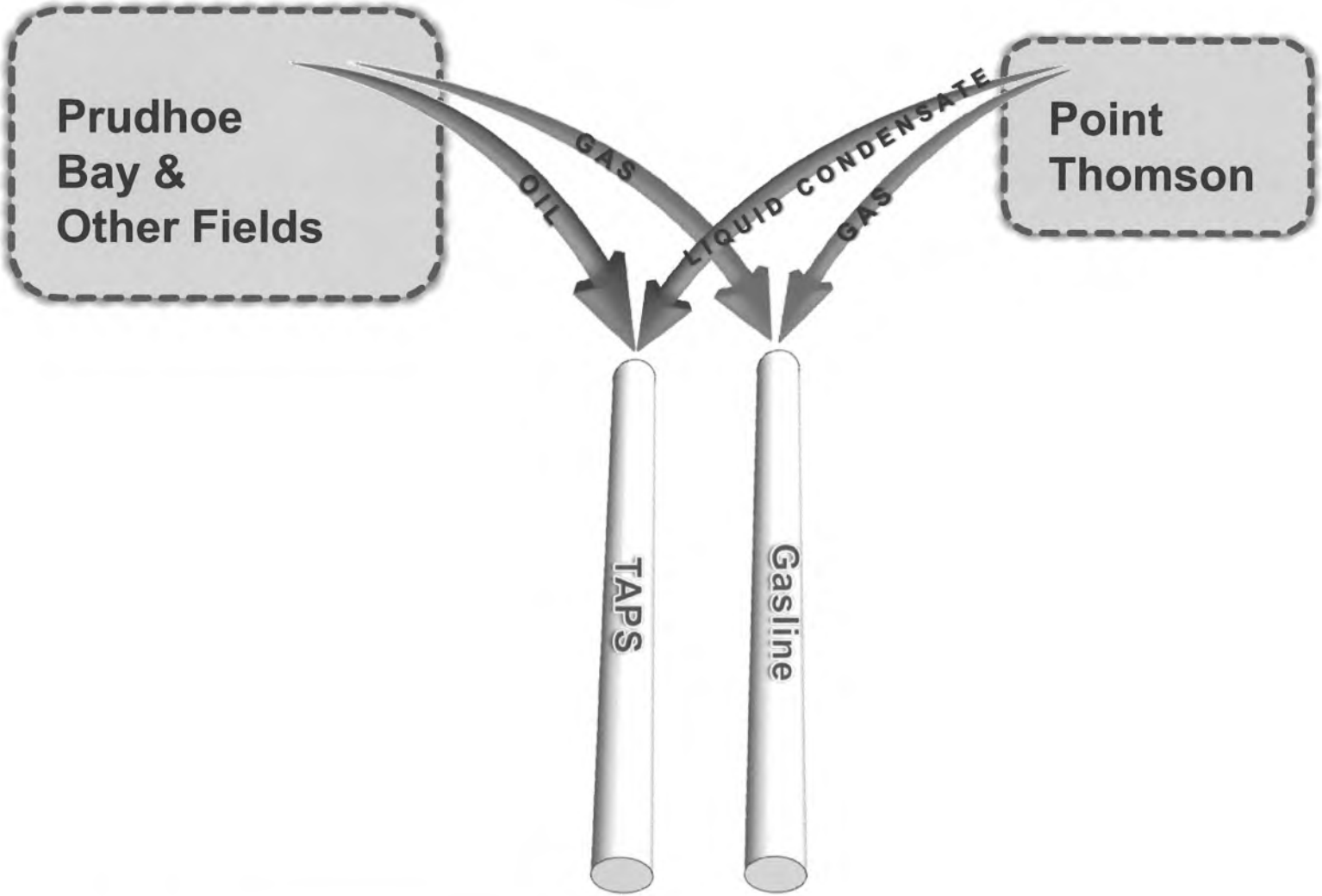
A. ALTERNATIVE A:
Major Gas Sale

B. ALTERNATIVE B:
Expanded Liquids Production into TAPS

C. ALTERNATIVE C:
Expanded Liquids Production into TAPS, Enhanced Prudhoe Bay Recovery, and Gas for In-State Use

- A primary goal of this settlement is to incentivize commercialization of North Slope gas/Major Gas Sale (MGS)
  - MGS must exceed 500 million cubic feet/d on the North Slope
  - Provides flexibility to allow different MGS scenarios
- Work begins immediately on dual spending for IPS and MGS/LNG
- There are two windows to "sanction" a MGS: (1) from present to 2016 and (2) from 2016 to 2019
  - "Sanction" means that all required state and federal gas line permits have been issued and the pipeline sponsors have secured all necessary financing and received full corporate approval to proceed with pipeline construction
  - Getting to a sanctioned decision will likely require investing hundreds of millions/billions of dollars
- MGS production makes gas available for in-state use
- If a MGS is not sanctioned by June 2016, the Producers must begin engineering & permitting to expand PT production either through Alternative B or C
- Once MGS is sanctioned, the Producers will temporarily retain most of the PT unit; but the PT unit will only be fully secured once gas is flowing into a gas pipeline
- If a MGS is not sanctioned by 2019, the Producers will have had to commit to Alternative B or Alternative C or lose significant acreage

ALTERNATIVE A:
- GENERAL DEPICTION -



ALTERNATIVE B:
- EXPANDED LIQUID PRODUCTION INTO TAPS -

A. **ALTERNATIVE A:**
Major Gas Sale

B. **ALTERNATIVE B:**
Expanded Liquids Production into TAPS

C. **ALTERNATIVE C:**
Expanded Liquids Production into TAPS, ~~Enhanced~~ Prudhoe Bay Recovery, and Gas for In-State Use

- Producers can expand the IPS cycling capacity and increase production to a minimum of approximately 30,000 bpd of liquids into TAPS
- Producers must commit to expanded cycling by 2019
- Production will likely exceed 30,000 bpd of liquids into TAPS—*lip of the funnel*
- Any expansion less than 30,000 bpd of liquids will result in certain acreage automatically contracting from the unit
- This alternative will likely result in the greatest long-term recovery of liquids from PT into TAPS, but PT gas will remain in the reservoir
- The enhanced understanding of the PT reservoir, gained from the IPS, will help determine the feasibility of this option
  - Will be influenced by factors such as condensate yield, reservoir connectivity and oil price forecasts
- Will require additional wells and larger gas processing and production facilities
- Once the Producers begin producing under this option, they will retain most of the unit acreage
- Producers can also pursue other alternatives simultaneously

PT

ALTERNATIVE C:

- EXPANDED LIQUID PRODUCTION INTO TAPS, ENHANCED PRUDHOE BAY RECOVERY, AND GAS FOR IN-STATE USE -

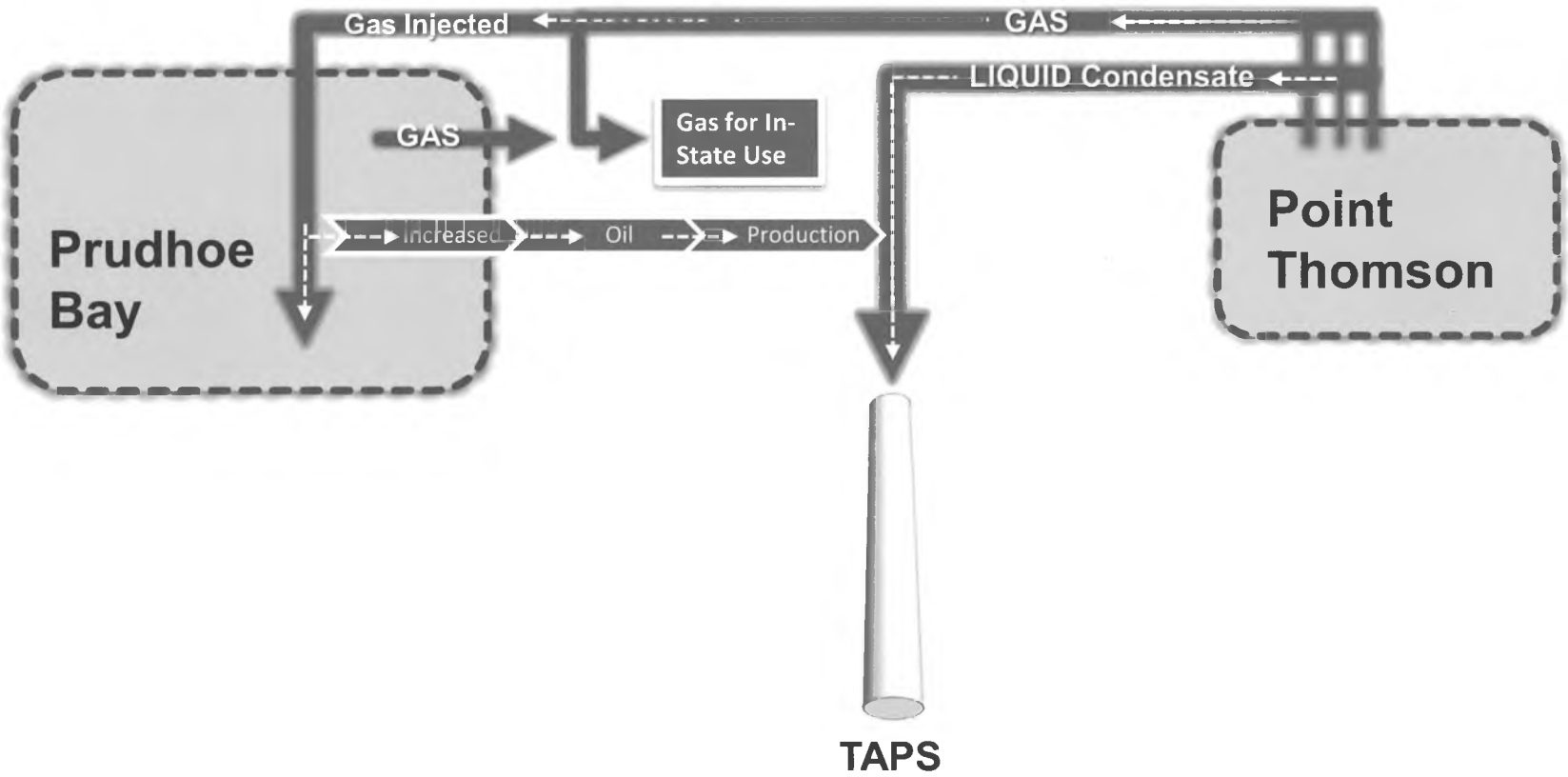
A. **ALTERNATIVE A:**
Major Gas Sale

B. **ALTERNATIVE B:**
Expanded Liquids Production into TAPS

C. **ALTERNATIVE C:**
Expanded Liquids Production into TAPS, Enhanced Prudhoe Bay Recovery, and Gas for In-State Use

- Requires complex reservoir integration between Prudhoe Bay and PT
  - PT dry gas produced, transported and injected into Prudhoe Bay
  - This will significantly increase oil production and enhanced oil recovery at Prudhoe Bay into TAPS
  - Includes significant liquids production from PT into TAPS
- Essentially a hybrid between Alternative A: MGS and Alternative B: Expanded Liquid Production
- Significantly increases TAPS throughput
- Major investment, infrastructure and hydrocarbon pre-positioning required for this alternative will facilitate North Slope gas commercialization
  - Completes installation of infrastructure, including PT gas pipeline to Prudhoe Bay and additional wells and production facilities
  - Prudhoe Bay becomes a central collection point for critical North Slope gas
- Alternative C also requires that significant volumes of gas be available for in-state use from Prudhoe Bay no later than 2019
- Once PT gas is transmitted to Prudhoe Bay, state Royalty-in-Kind (RIK) gas is made available for in-state use
- This provides the state with an opportunity to plan for large-scale, in-state gas-use projects, e.g. GTL, methanol, gas sales, etc.
- This alternative could take place prior to or in conjunction with Alternative A or B

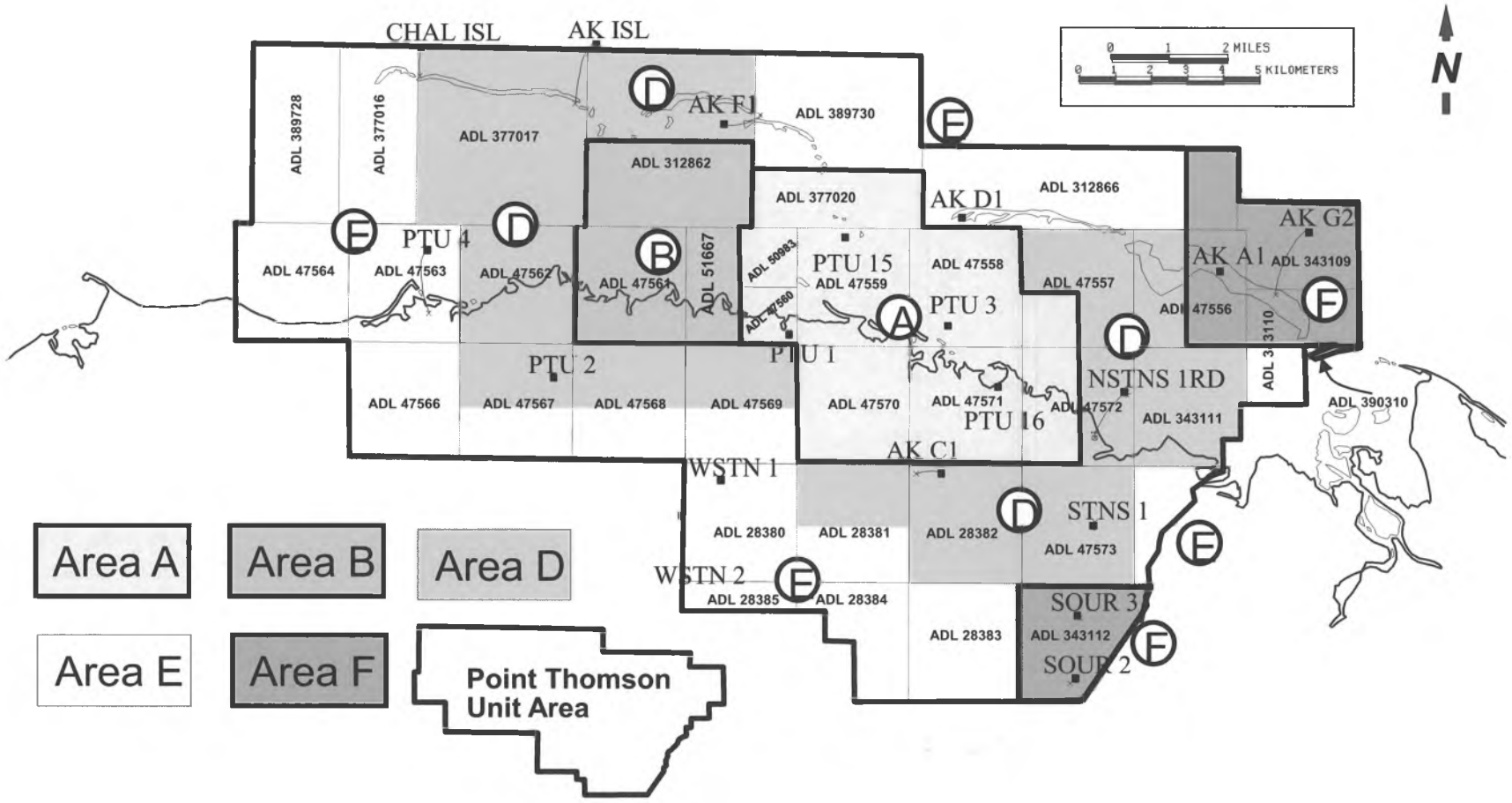
PT OVERVIEW *of* ALTERNATIVE C



PT Consequences & Incentives Related *to* Development Path

- The settlement centers on one animating principle: Producers must *earn* acreage – more work, more commitments, more production secures more state acreage
- Key Goal: Keep parties focused on near-term production (IPS) and longer-term hydrocarbon production expansion (full-field development)
  - Settlement seeks to anticipate contingencies
  - Provides incentives for work completed
  - Provides for fair and expeditious dispute resolution
- The settlement also has severe consequences if the Producers fail to develop or expand development
- If Producers abandon the IPS/fail to keep the provisional work schedule, there will be a significant contraction of PT acreage by 2015
- If there is no IPS production and a MGS is not sanctioned by 2019, then the unit terminates and all acreage automatically returns to the state *without appeal*
  - This includes leases with capable wells
- If the Producers do not commit to expand production beyond the IPS, or do not sanction a MGS, then significant acreage contracts from the unit and automatically returns to the state *without appeal*
- If the Producers commit to expanded development, or sanction a MGS by 2019, but do not follow through, the unit will contract to the area in production
- If there is no commitment to Brookian oil formation production, then Brookian acreage automatically contracts in 2018 and returns to the state *without appeal*
- *"Without appeal"* is used throughout the agreement—it means that the Producers waive their right to appeal automatic termination of their leases to any tribunal in Alaska or the United States

POINT THOMSON UNIT



STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

SEAN PARNELL, GOVERNOR

550 WEST 7TH AVENUE, SUITE 1400
ANCHORAGE, ALASKA 99501-3650
PHONE: (907) 269-8431
FAX: (907) 269-8918

Senator Hollis French
State Capitol, Rm. 417
Juneau, AK 99801

April 27, 2012

RE: Senate Judiciary Point Thomson Settlement Hearing

Dear Senator French:

I regret that I am unable to attend today's Point Thomson hearing. I am currently in Washington, D.C. meeting with senior executives and legislative branch officials to provide updates on Alaska gas opportunities and recent positive developments regarding commercializing North Slope gas. Another key focus of my meetings in Washington has been the Point Thomson EIS process. We are here to underscore the importance of ensuring that the federal government does not continue to delay the permitting process.

My discussions in Washington complement the conversations, meetings and outreach that my office has engaged in over the past several months, including my active engagement with private sector and government officials from Asia to educate them on the benefits and comparative advantages of Alaska natural gas.

We are entering a new era in the United States, with our nation now on the path to becoming the leading hydrocarbon resource producer. A window of opportunity has also opened for significantly increasing LNG exports to Asia. Demand for gas along the Pacific Rim is strong and there is a keen interest in Alaska gas. And, for the first time, the state's three producers on the North Slope are aligned with a state backed effort to move forward to commercialize North Slope gas and one of Alaska's largest gas fields is now moving forward with development after four decades of sitting idle.

We must be part of this new era. We have a massive hydrocarbon resource basin and are poised to advance a large-scale gas line that would benefit all Alaskans. But this window of opportunity will not be open for long and Point Thomson—which holds 25% of known gas reserves on the North Slope— plays a critical role. Just as the settlement agreement places the Point Thomson Working Interest Owners on a clock to move forward with timely development, the State of Alaska is also on a clock—we cannot afford another decade of this important hydrocarbon basin sitting idle.

Since we announced the Point Thomson settlement on March 30, 2012, we have sought to explain the details of the settlement to a variety of audiences and have been transparent in answering questions and clearing up misunderstandings about its provisions. I have been all over the state

doing this with community groups, Chambers of Commerce, editorial boards, and others. The Point Thomson settlement is complex and as I have stated numerous times, it is not perfect.

Like all settlements, it entails compromise and risk. It is important to note that in this case, there was significant risk to the state in staying the course on litigation that literally had no end in sight.

My Department is eager to answer all questions about this settlement agreement.

Sincerely,

Daniel S. Sullivan
Commissioner
Alaska Department of Natural Resources

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sean Parnell, Governor

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)269-5110

April 26, 2012

VIA FAX TO (907) 278-7001 & 1ST CLASS MAIL

William M. Walker
Craig Richards
Walker & Levesque, LLC
731 N Street
Anchorage, AK 99501

Re: Point Thomson Unit Settlement Agreement

Dear Mr. Walker and Mr. Richards:

I am in receipt of your letter to Department of Natural Resources Commissioner Dan Sullivan dated April 17, 2012 requesting reconsideration of the State of Alaska's entry into the March 29, 2012 settlement agreement with the Point Thomson working interest owners (the "Point Thomson Settlement"). Settlements entered into by the State of Alaska are not subject to administrative challenge, by reconsideration or otherwise. As the Attorney General for the State of Alaska, I have broad authority to enter into any settlement of litigation on behalf of the State of Alaska that I believe in the exercise of my discretion is in the best interests of the State. *See, e.g., Public Defender Agency v. Superior Court*, 534 P.2d 947, 950-51 (Alaska 1975). The exercise of this authority is not subject to administrative review.

Commissioner Sullivan's signature to the Point Thomson Settlement and his findings in paragraph 5.8, recognize, among other things, that the Agreement addresses matters within the Department of Natural Resources' legislatively delegated authority and administrative expertise, and resolves disputed matters that arose as part of the agency's oversight of the Point Thomson Unit Agreement and the leases that encompass the unit. These findings do not give rise to a right to challenge or seek reconsideration of a settlement agreement entered into by the State of Alaska. The Point Thomson Settlement has been executed and all related litigation has been dismissed.

Thank you for your attention.

Sincerely,

Michael C. Geraghty
Attorney General

cc: Daniel Sullivan, Commissioner, Department of Natural Resources

CIRRICULUM VITA

MARK D. MYERS
9700 Tundra Loop Drive
Anchorage AK 99507
mdarmyers@gci.net
907 337-4863

QUALIFICATIONS

- Proven leadership skills and consensus building management style.
- Internationally recognized leader in energy and science policy.
- Senior executive and geologist with 23 years of Alaskan experience.
- Wide-ranging industry, state and federal government experience.
- Experienced at effectively communicating complex concepts to audiences ranging from grade school students to Governors, Congress, Cabinet Members and the President.

EDUCATION

Ph.D. Geology, University of Alaska Fairbanks, 1994.
Fields of Specialization: sedimentology, clastic depositional environments, surface and subsurface sequence analysis and sandstone petrography.
Dissertation: *Evolution of Late Cretaceous - Early Tertiary Depositional Sequences in the Beaufort-Mackenzie Basin, Canada.*
GPA 4.0

M.S. Geology, University of Wisconsin-Madison, 1981.
Fields of Specialization: stratigraphy, paleoecology, sedimentology.
Thesis: *The Stratigraphy and Sedimentology of the Upper Wonewoc Formation.*
Honors: Vilas Fellowship, Twenhofel Scholarship.

B.S. Geology and Geophysics, University of Wisconsin-Madison, 1977.
Honors: Sophomore Honors, Senior Honors Thesis, Graduation with Honors.

Military: Squadron Officers School
Air Command and Staff
Air War College
Air Force Pilot Training
Air Force Air Intelligence School

PROFESSIONAL LICENSES

Certified Professional Geologist – American Institute of Professional Geologists
Certified Petroleum Geologist – American Association of Petroleum Geologists
Licensed Geologist – State of Alaska
Commercial Pilot, land and sea, single and multiengine instrument airplane

WORK HISTORY

2011 Vice Chancellor for Research – University of Alaska Fairbanks

Oversee administration of the university's $123-million-per-year research enterprise and supervises the university's standalone research institutes.

2009-2010 Alaska Natural Gas Inducement Act (AGIA) Coordinator

Served as the first Alaska Natural Gas Inducement Act Coordinator, a new position created under state statute and appointed by the governor. Responsible for building a new organization for overseeing and coordinating state agencies engaged in efforts to build a large diameter natural gas pipeline from the North Slope of Alaska to North American markets.

2006-2009 Director of the United States Geologic Survey

Appointed by President and confirmed by the Senate as the 14th Director of the United States Geological Survey (USGS). Managed the nation's largest water, earth, and biological science and civilian mapping agency. Responsible for nearly 9000 employees in 400 locations worldwide, with a total annual budget of more than $1.4 billion. Some key accomplishments include revitalizing the USGS climate change and the national civilian mapping programs, implementing a new ten year interdisciplinary science strategy throughout the agency, advancing the development of the Landsat 8 (LDCM)) satellite and releasing the entire 35 year Landsat data library at no charge to the public, implementing a new regional structure for the USGS, building strong partnerships with state and national organizations and agencies, and significantly increasing the USGS budget in a very challenged budget environment. Testified before Congress on many issues including water quality, geothermal energy, climate change, satellite operations, and the Department of the Interior budget. Served on many national and international science and environmental committees.

2001-2005 State of Alaska Division of Oil and Gas Director/State Geologist/ Director of the State Division of Geological and Geophysical Surveys

Appointed by Governors Knowles and Murkowski as the Director of the Division of Oil and Gas. Managed the State of Alaska's oil and gas resources. The division's responsibilities include resource evaluation, leasing, unitization, permitting, royalty accounting, auditing, sale of royalty oil and gas, permitting and inspecting. Managed a professional staff of approximately 90 professionals including geoscientists, engineers, land managers, accountants, commercial analysts and auditors. For FY 2005 petroleum revenue from assets managed by the division produced $1.9 billion in royalties and lease sale bonuses and rents. Restructured the organization and nearly doubled the division's budget and staffing. This resulted in Alaska receiving significantly more income from its oil and gas resources, and a record amount of acreage under lease. Worked closely with the Alaska Legislature to develop and pass numerous oil and gas leasing, incentive and royalty modification statutes. Effectively managed relations with the public, industry, environmental organizations, native regional and village corporations, federal and local governments. Presented the concept of a North Slope natural gas hydrate evaluation program to the U.S. Senate. The proposal was strongly supported by the Alaska delegation and the Senate Energy and Natural Resources Committee and was incorporated into law with an authorization for $70 million.

In addition to being the director of the Division of Oil and Gas, in 2005 I also served as state geologist and director of the Division of Geological and Geophysical Survey (the state survey). In that role I managed the state's geological and geophysical research organization of 38 scientists and support staff. The state survey generates, analyzes and interprets data on geologic resources and natural conditions; maps and inventories mineral and energy resources on state land for use by government, private industry, scientists, educators and the public.

1998-2001 ARCO Alaska, Inc./Phillips Alaska Inc.
Sr. Staff Geologist - Exploration

Developed Alaskan oil and gas exploration prospects for ARCO/Phillips, resulting in many lease purchases, wells drilled and three oil discoveries, two of which are producing today. Led and participated in North Slope geologic field programs.

1990-1998 **State of Alaska Division of Oil and Gas**
Petroleum Geologist II

Recognized expert on state oil and gas statutes, regulations and incentive programs. Hearing officer for the division. Authored numerous DNR commissioner and director decisions for discovery royalty, economic incentive credit, extended confidentiality and royalty reduction applications. Wrote regulations for and provided significant input on many key oil and gas bills before the legislature. Led and participated in geologic field programs. Performed pre-sale evaluation for oil and gas lease sales for the State of Alaska. Evaluated the oil and gas potential of federal onshore and offshore acreage for State of Alaska and provided expert testimony to U.S. Senate on ANWR. Managed statewide oil and gas evaluation of federal lands available for final state selection. My recommendations resulted in the state selecting over 3 million acres of additional land. Completed geological evaluations for State of Alaska in support of unitization, plan of development approval, and/or tract allocation factors for most North Slope oil fields.

1987-1990 **University of Alaska Fairbanks**
Ph.D. Student and Intern with SOA Division of Oil and Gas

1985-1987 **ARCO Alaska, Inc.**
Development Geologist

Development geologist responsible for two of the three production segments of the Kuparuk River oil field during the early stages of production. Created subsurface maps, developed drilling targets and extension exploration oil prospects, evaluated well results and seismic information.

1983-1985 **ARCO Alaska, Inc.**
Exploration Geologist

Developed exploration prospects in the Beaufort Sea. Well site geologist for wells on the North Slope, Beaufort Sea, Navarin Basin and Norton Sound. Led and participated in geologic field programs.

1981-1983 **ARCO Oil and Gas, Lafayette, LA**
Extension Exploration Geologist

Developed and evaluated extension exploration prospects and infield development wells in offshore and onshore Louisiana. Evaluated oil field properties for acquisition.

1978 **Chevron USA, New Orleans, LA**
Exploration Geologist

Performed regional subsurface geologic assessment of a large portion of the Louisiana Gulf of Mexico shelf.

1977-2003 **Lt. - Lt. Colonel, USAFR**

Pilot and Senior Intelligence Officer in the Air National Guard and Air Force Reserve

SELECTED INVITED TALKS IN PAST THREE YEARS

"Geoscience, Ideology and the Politics of Energy: What is the Role of Geoscience in the Development and Implementation of a Rational and Sustainable Energy Policy?" Alaska Geological Society, Anchorage, AK. February 18, 2010.

"Alaska's Natural Gas Pipeline-Moving Forward-Securing North America's Energy Future." Canadian Institute's Alaska Oil and Gas Conference. Anchorage, AK. September 15, 2009.

"Ecosystem Change: Managing Resources in an Uncertain Future." Interstate Oil and Gas Compact Commission 2009 Midyear Issues Summit. Anchorage, AK. May 12, 2009.

"Domestic Natural Gas and Its Role Building the Nation's Energy Future." Pipeline Opportunities Conference. Houston, TX. March 11, 2009.

"Science for a Crowded Planet." Clarke Forum for Contemporary Issues, Dickinson College. Carlisle, PA. February 26, 2009.

"USGS Involvement in National LiDAR." Federal Geographic Data Committee, Steering Committee. Washington, DC. December 16, 2008.

"Why Are Ecosystems Services Important and What are the Challenges in Including Them in Decisions?" Plenary Panel, Aces: A Conference on Ecosystem Services. Naples, FL. December 9, 2008.

"Opening Remarks for the United Nations Special Event." Launch of Africa: Atlas of Our Changing Environment. New York, NY. September 22, 2008.

"An Integrated Strategy for Government-Sponsored Science." 33rd International Geological Congress. Oslo, Norway. August 11, 2008.

"Facing Tomorrow's Challenges: Integrated Science for the Everglades." Keynote for Plenary Session, Greater Everglades Ecosytem Restoration, 2008. Naples, FL. July 29, 2008.

"USGS in the 21st Century: Climate Science and New Directions." Cirmount Mtnclim 2008. Silverton, CO. June 9, 2008.

"A Strategy for Integrating Science to Inform Public Policy." American Meteorological Society Summer Policy Colloquium. Washington, DC. June 6, 2008.

"Facing Tomorrow's Challenges - in Minerals." Arizona Geological Society. Tucson, AZ. June 3, 2008.

"Elevating USGS Science with LiDAR." Remarks at the Second National LiDAR Conference. Reston, VA. May 21, 2008.

"Science, Society, and the Importance of Earth Observations." Maryland Space Business Roundtable. Greenbelt, MD. May 20, 2008.

"Integrating Data to Accelerate Integrated Science." USGS GIS 2008, 7th Biennial GIS Workshop. Denver, CO. May 13, 2008.

"Building a More Resilient Nation." National Earthquake Conference. Seattle, WA. April 23, 2008.

"Facing Tomorrow's Challenges." Association of American Geographers 104th Annual Meeting. Boston, MA. April 16, 2008.

"Climate Change Perspectives and Advances in Mapping." Eastern Lands and Resources Council & Western States Land Commissioners Association, Joint Spring Conference on Emerging Challenges for Public Land Managers. Washington, DC. April 7, 2008.

"USGS Integrated Science - In and Beyond Maine." Maine Water Conference. Augusta, ME. March 19, 2008.

"Moving the National Map." Alaska Surveying and Mapping Conference. Anchorage, AK. February 25, 2008.

"Science, Society, and the Future of Earth's Resources." Launch Event for the International Year of Planet Earth, UNESCO. Paris, France. February 12, 2008.

"An Enlightened Energy Future: Understanding the Challenge." Plenary Roundtable, Tackling Global Change: Key Energy and Technology Issues for Stabilization, 8th National Conference on Science, Policy and the Environment. Washington, DC. January 16, 2008.

"USGS Scientific Contributions to Understanding Global Energy Resources." International Symposium on Circum-Pacific Petroleum and Alternative Energy Resources. Beijing, China. October 17, 2009.

"Facing Tomorrow's Challenges, Science in the Coming Decade." Keynote presentation, American Institute of Professional Geologists 44th Annual Meeting. Travis City, MI. Oct 7, 2007.

"USGS Role in Framing the Climate Change Challenge." Tribal College Forum. Bismarck, ND. September 4, 2007.

"Restoration in the Spirit of Cooperation." National Conference on Ecosystem Restoration (NCER-07). Kansas City, KS. April 23, 2007.

"USGS Natural Hazards Science in the Coming Decade." Association of American Geographers Annual Meeting. San Francisco, CA. April 19, 2007.

"USGS Science: Facing Tomorrow's Challenges." Georgia Water Resources Conference. University of Georgia. Athens GA. March 28, 2007.

"Renewable and Non-renewable Energy Resources on the U.S. Landscape." North American Wildlife and Natural Resources Conference. Portland, OR. March 21, 2007.

"Opening Remarks for the International Polar Year National Launch Event." National Academy of Sciences. Washington, DC. February 22, 2007.

"Science to Support the Nation's Choices for its Natural Resources." Alaska Miners Association. Anchorage, AK. November 8, 2006.

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PAST ORGANIZATIONAL LEADERSHIP POSITIONS

Co-Chair of the Plenary Session and Head of United States Delegation for Group on Earth Observation (GEO-V), Bucharest, Romania, November 19-20, 2008.
Member of the Interagency Coordinating Committee of the National Earthquake Hazard Reduction Program (NEHRP).
Ex-officio Member of the Roundtable on Environmental Health Sciences, Research, and Medicine, Institute of Medicine of the National Academies.
Member of the National Science and Technology Council (NSTC).
Member of the International Polar Year, U.S. Government Leadership Panel.
Principal of the United States Climate Change Science Program.
Member of the Interagency Arctic Research Policy Committee (IARPC).
Chairman of the Civil Applications Committee (CAC).
Past President/Board Member – Alaska Geological Society.
Member of the House of Delegates of the American Association of Petroleum Geologists.

AWARDS AND HONORS

The Meritorious Service Medal, United States Air Force
Medallion for Excellence, National Geospatial Intelligence Agency
Student Conservation Association Founders Medal
Outstanding Service and Exceptional Service Awards, Alaska Geological Society
Resolution of Congratulations and Commendation, Association of American State Geologists
Distinguished Alumni Award, University of Wisc-Madison, Dept of Geology and Geophysics
Wall of Excellence, LaCrosse Central High School

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April 27, 2012

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1&2

BILL WALKER

2234 Kissee Court Anchorage, AK 99517

(907) 223-8530

E-mail: bill-wwa@ak.net

April 18, 2012

To Whom it May Concern:

On April 17, 2012, I moved for Commissioner Sullivan to reconsider his decision to enter into the Point Thomson settlement. The attached letter articulates the grounds for my appeal, which includes:

- No public notice or opportunity for public comment was provided in advance of the settlement being signed and announced.

- The agreement allows the working interest owners to retain development rights over the unit with no further work commitments.

    - One option allows the owners to maintain at least twenty-two of the leases indefinitely if they complete the 10,000 bbl/d gas cycling project that they had already made a firm commitment to construct in 2009 for the right to develop two leases.

    - A second option allows the owners to maintain the unit at least until the next decade, if they do no work at Point Thomson but permit without committing to construct a bullet line out of Prudhoe Bay. Since Prudhoe Bay has enough gas to fuel a bullet line for over a century, it does not make sense that such a project would excuse development at Point Thomson.

- Under the settlement, if the owners decide to develop the field, they have the discretion to blow down the reservoir without first undertaking a gas cycling project. The Department has previously concluded that depletion of the reservoir in that manner would result in the waste of approximately half a billion barrels of oil and condensates.

- The settlement purports to abrogate many of Commissioner Sullivan's statutory and regulatory obligations relating to field oversight, which the Alaska Supreme Court has held the Department may not do by contractual agreement.

- The Commissioner cannot agree to Exxon's acquisition of Chevron's interest in Point Thomson without further public process and findings.

- The agreement must be approved by the Legislature to be valid under Alaska law.

Consequently I have asked that the settlement be submitted to the Legislature for approval, with all the public process that necessarily follows, and that our Supreme Court has indicated is necessary. In the meantime, I requested that Commissioner Sullivan stay deciding

reconsideration until such time as correspondence relating to the deal is made public and the Department publishes an explanation of the agreement sufficient for the public to understand its terms. Being well acquainted with the Point Thomson Unit Agreement, it appears that the State has given up far more than it would have, had it lost the lawsuit.

I encourage all Alaskans concerned about the manner in which the settlement was entered into, its terms or its legality, to submit written comments to the Commissioner by Monday, May 7th (at which time public comment will close if the Commissioner does not extend the deadline).

Bill Walker

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DEPARTMENT OF
NATURAL RESOURCES

APR 17 2012

COMMISSIONER'S OFFICE
ANCHORAGE

April 17, 2012

VIA PERSONAL SERVICE AND E-MAIL

Commissioner Dan Sullivan
Department of Natural Resources
State of Alaska
550 W. 7th Ave., Suite 1400
Anchorage, Alaska 99501
dnr.appeals@alaska.gov

Re: Reconsideration of the Point Thomson Settlement Agreement;
Former Superior Court Case No.: 3 AN-06-13751 CI (consolidated);
Former Supreme Court Case No.: S-13730 (consolidated);
Our File No.: 449-1.

Dear Commissioner Sullivan:

On March 29, 2012, the attorney general ("Attorney General") and commissioner ("Commissioner") of the Department of Natural Resources ("Department"), on behalf of the State of Alaska ("State") and acting through the Department, and the Point Thomson Unit ("PTU") working interest owners (each an "Owner" or "WIO" and collectively "Owner Group" or "WIOs"), finalized a settlement agreement ("Settlement" or "Agreement") relating to the Point Thomson Unit ("PTU").

The Settlement was the basis to dismiss ongoing litigation related to the Department's efforts to terminate the PTU. The parties before the Alaska Supreme Court, in Case No. S-13730 (consolidated), signed the Joint Stipulation for Dismissal of Petition for Review on March 27, 28 and 29, 2012.[1] That stipulation by stamp of the Court was filed at 3:20 p.m. on March 29, 2012 and by The Order Dismissing Petition for Review was granted on the same date. Similarly, the parties before the Alaska Superior Court, in Case No. 3AN-06-13751 CI (consolidated), filed a Joint Stipulation for Dismissal of Administrative Appeal on March 29, 2012, also granted by [Proposed] Order Dismissing Administrative Appeal on the same date by the Honorable Brian

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[1] Susan Orlansky of Feldman Orlansky & Sanders signed on behalf of BP Exploration (Alaska), Inc. ("BP"), and Stephen M. Ellis of Delaney Wiles, Inc. on behalf of Chevron U.S.A. Inc. ("Chevron") signed on March 27, 2012; Spencer C. Sneed of Dorsey & Whitney LLP on behalf of ConocoPhillips Alaska, Inc. ("ConocoPhillips"), Barat M. LaPorte of Patton Boggs LLP on behalf of Exxon Mobil Corporation ("Exxon" or "Unit Operator"), David B. Rusk of David B. Ruskin, P.C. of Leede Operating Company, LLC ("Leede"), and Mathew T. Findley of Ashburn & Mason, P.C. on behalf of the State signed on March 29, 2012.

Clark, Superior Court Judge *pro tem*. That joint stipulation was signed by counsel for the parties on the same dates as the Joint Stipulation for Dismissal of Petition for Review before the Alaska Supreme Court. Also on March 29, 2012 the parties filed and were granted, by Judge Clark, a Joint Motion to Vacate February 11, 2010 Partial Stay; Request for Expedited Consideration, which had attached a copy of the Settlement signed by the parties on March 28 and 29, 2012.[2] The rushed nature of these dismissals is particularly concerning given Settlement ¶¶ 4.10.1 and 4.10.3.2 provided for vacating the cases in an orderly manner, within 10 days or so after execution of the Agreement. Yet it occurred in secret, by expedited motion, a day before the deal became public. Those pleading are attached as Exhibit 1.

On March 30, 2012 the Settlement was announced to the public via a press conference held by State Governor Sean Parnell and the Commissioner (audio file of the press conference attached as Exhibit 2), in which a letter dated March 30, 2012, signed by the respective Presidents of BP, Exxon and ConocoPhillips (Exhibit 3), announced a plan to mutually assess, in conjunction with the State and Alaska Gasline Inducement Act, AS 43.90 *et seq*. ("AGIA") licensee, a liquefied natural gas ("LNG") export project from South Central Alaska.

The Settlement broadly encompasses terms relevant to the future development of the PTU, Prudhoe Bay Unit ("PBU"), and an Alaska North Slope ("ANS") gas commercialization project. It purports to bring definitive resolution to such subjects as *inter alia*: (i) disputes as to the termination of the PTU and underlying leases; (ii) creation of participating areas within the PTU; (iii) the expansion and contraction of acreage into and out of the PTU; (iv) the plan of development ("POD") for the PTU; (v) certain terms in the event of a major gas sale; (vii) reinjection of PTU gas into the Prudhoe Bay Unit; (viii) the use of and accounting for the State's royalty gas out of the PTU and into the PBU after reinjection; (ix) the taxation of PTU gas; (x) advanced approval of reassignment of the WIOs interests in the PTU, presumably including Exxon's acquisition of Chevron's interests in the PTU; and (xi) the procedure for handling future disputes of these subjects.

As will be discussed further, upon initial review it does not appear to William M. Walker, a citizen taxpayer of the State ("Walker"),[3] that the substantive terms of the settlement are advantageous to the future development of the PTU or ANS gas commercialization efforts. Additionally, the Department and Owner Group have attempted to settle a host of issues associated with ANS development, but have done so without any of the public process, regulatory action, and legislative approvals contemplated by Alaska law. Settlement ¶ 5.8 provides that the Agreement constitutes a finding of the Commissioner. So although the authority of the State to enter into the Settlement, and the correct procedures the State must follow to do so, are disputed, it appears the proper vehicle for Walker to challenge the Settlement is as a request for reconsideration under 11 AAC 2.010(f). Consequently Walker asks the

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[2] Attorney General Michael C. Geraghty signed on March 28, 2012; Commissioner Daniel S. Sullivan, Randy L. Broiler of Exxon, John C. Minge of BP, Trond-Erik Johansen of ConocoPhillips, and John G. Leede of Leede signed on March 29, 2012.

[3] Walker claims standing to bring this appeal, not only as a citizen taxpayer, but as a result of interest-injury, third-party, and any other form of standing recognized by the Alaska Supreme Court.

Commissioner to reconsider his decision to enter into the PTU Settlement as: (i) not in the best interests of the State; (ii) in contravention to State law and regulation; (iii) unconstitutional; and (iv) *ultra vires* without legislative approval. The specifics of Walker's points of appeal are detailed below.

Please serve any notice, decision or other correspondence to the following address:

Craig Richards
Walker & Levesque, LLC
731 N Street
Anchorage, Alaska 99501

I. The Settlement is Not in the Best Interests of the State of Alaska.

A. The State Has Not Previously and Should Not Now Enter into Bargains of This Magnitude With the Three Primary ANS Producers With No Public Process.

It is irrefutable that ANS oil production is dominated and will continue to be dominated in the coming decades by affiliates of ConocoPhillips, Exxon and BP.[4] Perhaps the most telling evidence of this phenomenon is that, even though TAPS has been in operation for three decades, there is only one independent shipper. It is equally clear that the same integrated producers expect to dominate ANS natural gas production when and if they concede to commercialization of that resource.[5] This dynamic has resulted in an unflattering history where the companies have used their market dominance to negotiate, or attempt to negotiate, large scale concessions from the State outside of a traditional competitive process that should otherwise be expected in dealings with a sovereign government. Some of the more notorious of those deals are: (i) the TAPS Settlement Methodology; (ii) renegotiation of the North Star leases; (iii) BP's attempted acquisition of Atlantic Richfield Company's Alaska's assets, resulting after Federal Trade Commission intervention in the Charter for Development of the ANS;[6] and (iv) the proposed Stranded Gas Development Act Contract negotiated by the Murkowski Administration.

But even these company specific deals pale in comparison to the Settlement in one material aspect. Never before has a deal of the magnitude of the Settlement been entered into by the State and ANS producers without public notice and the opportunity for public comment. It is simply unprecedented in the annals of Alaska history for the executive branch to attempt to bind

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[4] Amended Decision Upon Reconsideration Following Trial De Novo, 2006 Assessed Valuation of the Trans Alaska Pipeline System ("TAPS") at ¶ 104 (October 26, 2010) (Exhibit 4); Decision Following Trial De Novo, 2007, 2008, 2009 Assessed valuations of the TAPS at ¶ 70 (December 30, 2011) (Exhibit 5).

[5] *See, e.g.*, Exhibits 7.1, 7.2 and 7.3.

[6] *See* State Department of Environmental Conservation website for documents related to the Charter, which are incorporated into the record by reference herein <available at http://dec.alaska.gov/spar/ipp/nscharter.htm>.

the citizenry to such a sweeping set of concessions, with no public involvement and without legislative approval.

B. Form of the Administrative Record.

Walker has had less than twenty days to review the Settlement, and has not had the opportunity to compare his understanding of its terms against that of the parties or review any of the correspondence between the State and Owner Group. Consequently Walker bases his understanding of it and the surrounding deal relating to gas pipeline development primarily on a reading of the document and the attached exhibits. Walker acknowledges that the reading of one or more of the portions of the Settlement, and intent behind them, may be incorrect. However, a thorough public vetting of the Agreement is the proper way to ensure the public has an understanding of its terms, it is in the best interests of the State, and it is legally entered into by the current administration.

Walker also incorporates herein, and requests the Department make part of the record of this motion to reconsider, the administrative record and court pleadings in the Point Thomson Cases (as that term is defined in Settlement ¶ 1.8) and 3AN-05-12486. Additionally, Walker requests that all correspondence between any member of the Parnell Administration and any WIO relating to the Settlement or a potential settlement of the Court Cases, dated on or after January 1, 2010, be included in the administrative record. As provided by 11 AAC 02.030(d), because public notice was not provided by the Department 30 days in advance of the Settlement, Walker intends to file additional written materials within the longer of 20 days or the term of the stay requested in Part III below. Walker also undertakes this action as a public interest litigant, and consequently requests that the administrative record be prepared at the State's expense. If the Commissioner will not agree to that request, please provide Walker with advance notice before any costs chargeable to him are incurred.

C. A Summary of Certain Terms of the Settlement That Demonstrate it is Not in the Best Interests of Alaska.

In this Subpart C Walker describes his understanding of the Settlement at a high level. Capitalized terms not otherwise defined are meant to have the meaning given them in the Settlement.

1. The Owner Group Will Maintain Most if Not All of the PTU Acreage With Little or No Additional Work Commitments.

The Settlement contemplates a myriad of confusing potential options and outcomes for development of the PTU. Time and time again, however, Exxon has shown it will pursue the smallest work commitment the Department allows. In the Settlement, that appears to be one of two options. The first option is to go forward with the IPS Project, which is the 10,000 barrel per day ("bbl/d") cycling project *already committed to in 2009 to keep two leases.* If that route is taken most, if not all, of Point Thomson will be held in perpetuity by the Owner Group. Walker does not believe that the Department surrendering those additional leases for no work commitments is in the State's best interests.

But of course the Settlement no longer even requires the WIOs to undertake the previously committed to IPS Project. The second option is to Sanction a Major Gas Sale for, but not necessarily build, a bullet line project out of Prudhoe Bay. That will obviate the need for the Owner Group to do any work at Point Thomson, or even connect it by pipeline to other ANS infrastructure, yet will preserve the Owner Group's right to the acreage well into the next decade. Walker does not believe it is in the State's best interests to allow a bullet line from Prudhoe Bay, which itself has sufficient gas for such a project for approximately 125 years, to result in the Owner Group being able to continue to warehouse Point Thomson resources. And when the field is developed, Walker does not believe it is in the State's best interests, given the current available evidence, to allow the Owner Group to blowdown the reservoir without cycling, which under the Department's previous analysis will result in the physical and economic waste of condensates and oil of a value greater than the Alaska Permanent Fund.

A discussion about specific portions of the Settlement related to development options follows:

a. Under Settlement ¶ 4.1.1 the Owner Group agreed as part of the IPS Project to drill the PTU 15 and PTU 16 wells, already completed by 2010, and has the option to put those wells into production at 10,000 bbl/d no later than May 1, 2016 and to construct the liquid hydrocarbon pipeline from the PTU to Badami. This option is the same development project that was previously a firm commitment, delayed from 2014, that the Owner Group made in January 2009 to secure two leases (ADL47559 and 47571).[7] Thus the Owner Group has already been working on this project including the expected 10,000 bbl/d condensate production and 70,000 bbl/d hydrocarbons liquid line that will connect to Badami,[8] only the formerly firm commitment is now an optional one under the Settlement.

b. Also part of the IPS Project, in Settlement ¶¶ 4.1.2 and 4.1.3, the WIOs have the option to drill a Thomson Sand well from the West Pad by May 1, 2017, and to continue permitting an East Pad well.

c. Under Settlement ¶ 4.2.2 the IPS Project commitments are not mandatory. If the Owner Group Abandons these projects by 2015 the Owners still maintain core unit acreage in the 9 leases listed in Area A of Exhibit C through year-end 2019 (and if they have spuded the West Pad well by year-end 2016 they will keep the acreage in the 3 leases listed in Area B of Exhibit C). Further, if between 2007 and year-end 2015 the Owners spend more than $2.0 billion on Point Thomson Development, they will automatically keep the acreage in the 13 leases listed in Area D of Exhibit C also through year-end 2019.

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[7] Commissioner Irwin stated in his approval of the project that the WIOs "have unconditionally committed to bring those two wells on the two leases into production by 2014." Conditional Interim Decision (January 27, 2009) (Exhibit 8). *See also* Transcript of Hearings, Before Commissioner Thomas Irwin (January 12 to 16, 2009) (Exhibit 9).

[8] *See, e.g.,* Testimony of Paul Carson, 3 AN-06-8446CI, Tr. 3149 – 50, 3190 – 93, 3212 – 14 (September 11, 2011) and Testimony of Charles Cicchetti, 3 AN-06-8446CI, Tr. 8444 – 8446 (October 13, 2011) (Exhibit 10).

d. By spending $2.0 billion on Point Thomson Development, the Owner Group, with no firm development commitments, has the right to unitize and maintain some or all of 22 of the 38 leases, that overly the core acreage, through year-end 2019. Since no accounting of the amount spent from 2007 to date was provided in the Settlement, it is unclear if the Owners had met that spending threshold as of the date of the Agreement. However, based upon the fact that the spending amount is back dated, there are no rules for how to do the accounting, the State only gets the information on spending if the IPS Project is Abandoned, and the definition of what goes towards the $2 billion is worded broadly enough to encompass work done since 2007 on various ANS projects outside the PTU or on a gas pipeline project,[9] it can only be assumed the $2 billion threshold will be met as a matter of course.[10]

e. If the WIOs keep their prior commitment made in 2009 to maintain ADL 47559 and 47571, and put the two wells drilled in 2010 into production by year-end 2019, then under Settlement ¶ 4.5.3 the Owners automatically get to keep all or part of the 23 leases now part of the PTU (9 or 12 leases if the $2 billion was not spent depending on if the West Pad well is spuded).[11] Further, because the PTU would now be under production all of this acreage will be held in perpetuity by the WIOs under the habendum clause in Section 21(c) of the PTU Agreement.

f. The WIOs also get to wrap into the PTU and maintain indefinitely additional acreage if by year-end 2019 they expand liquid production by 10,000 bbl/d (and even more acreage if 20,000 bbl/d) or Sanction a Major Gas Sale, or if by year-end 2018 they have a POD for the Brookian formation underlying Area F of Exhibit C. Since all that maintaining the Brookian requires is an approved POD by 2019 under Settlement 4.7, the agreement effectively pushes off any decision on the development of the 5 leases in Area F of Exhibit C for half a decade, at which time the POD process starts over for that acreage.

g. Pursuant to Settlement ¶ 4.5.2 if by year-end 2019 IPS Project Start-UP has not occurred, or a Major Gas Sale Sanctioned, then the Department may theoretically terminate the PTU Without Appeal.

1) However, Settlement ¶¶ 4.4.2, 4.5.1 and 4.5.7 appear to provide if a Major Gas Sale is Sanctioned by year-end 2019 then the PTU is fully reconstituted to include all the acreage except the Brookian in Area F of Exhibit C (which will be separately maintained by simply filing for a POD by year-end 2018). When the definitions of Major Gas Sale and Sanction are reviewed in Settlement ¶¶ 2.16 and 2.28, all that is required for this outcome are

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[9] It is unclear from the Settlement what qualifies as "other work activities" under ¶ 2.19 that count toward the $2 billion threshold, such as funds spent by the Owner Group on projects relating to Prudhoe Bay gas reinjection, the Badami oil system, or in furtherance of a Major Gas Sale (e.g., on the Denali Pipeline Project, Alaska Pipeline Project under the Alaska Gasline Inducement Act, a large diameter or bullet line liquefied natural gas project to tidewater).

[10] Regardless, if the Owners spend less than $2.0 billion they similarly lock up all or part either 9 or 12 of the most productive leases (depending on whether a the West Pad well is drilled).

[11] The exception is that under Settlement ¶ 4.5.3.1 the northern half of ADL 377017 will be released from the PTU.

receipt by the State of corporate approvals and firm transportation service agreements "sufficient to proceed to construction," and necessary regulatory approvals issued, for a "pipeline project having a design through put of more than 500 million cubic feet of gas per day that results in delivery of gas off the North Slope of Alaska." No construction commitments, or even a final investment decision, are mandatory. It is also worth noting that this option does not require development of the PTU given Major Gas Sale Sanction of a project relying solely on Prudhoe Bay gas satisfies these conditions. Yet once a Major Gas Sale is Sanctioned under Settlement ¶ 4.5.1 then the reconstituted PTU is in effect, and the POD process starts over again. It would consequently appear the WIOs, at the end of 2019, having done no work on the field, have maintained the entirety of the unit by getting the paperwork in order to undertake a bullet line or large diameter pipeline project (without any actual commitment to go forward) from Prudhoe Bay. This is notwithstanding a 500 million cubic feet per day off-slope pipeline would not need gas from a source, such as the PTU, other than the PBU for approximately 125 years.

2) It also seems, although the provisions are incredibly difficult to understand and vague, that a Major Gas Sale Sanction or an IPS Project is not necessary to keep the PTU alive past year-end 2019 if before that date an Expansion Project POD is submitted. It appears nothing requires the Expansion Project POD to result in any actual work under the definition of Commit at Settlement ¶ 2.4, so long as if before the Expansion POD is submitted some internal sanctioning has occurred which document an obligation to proceed diligently (sanctioning that can presumably be revoked at a later date). Walker has not yet been able to figure out which acreage survives under an Expansion Project POD past 2019, but the consequence seems to be to start the POD process anew in the post-2020 era.

Thus for little or no consideration beyond the work commitment to produce 10,000 bbl/d of condensates made in 2009 to maintain ADL 47559 and 47571, the State has agreed to allow the PTU to remain in effect indefinitely (with the potential for some acreage contracting out). Alternatively the WIOs can avoid the 2009 production commitment of 10,000 bbl/d but get the paperwork completed to undertake, but not actually commit to, a small or large diameter off-slope pipeline, or submit an Expansion Project POD, and at the end of 2019 restart the POD process on the entire PTU. And of course if the WIOs put the unit into production and Sanction a Major Gas Sale then, as confirmed by Settlement ¶ 4.5.6, the PTU now consists of all the leases, which are held in perpetuity by the 10,000 bbl/d of condensate production committed to in 2009 pursuant to the habendum clause in Section 21(c) of the PTU Agreement.

But the terms of the Settlement go even further.

2. The Settlement Attempts to Contract Around the Department's Regulatory Authority. Settlement ¶ 5.1.3 provides:

> The Parties agree that this Agreement is a contract between the Parties. . . Application of standard administrative processes does not provide any right or basis for the State to alter the terms of this Agreement. DNR discretion and the authority to take action or make a decision regarding Point Thomson may only be exercised by DNR in a manner that . . . does not conflict with the terms of this Agreement.

It appears to be the intent of this provision to make the contractual terms of the Agreement control over the Department's regulations and other state law.

3. **The Settlement Alters the Regulatory POD Process.** Settlement ¶ 4.1.5 provides the IPS Project work plan laid out in the Settlement also acts as a substitute for plans of development otherwise mandatory under 11 AAC 83.343 and PTU Agreement Section 10. Thus rather than annual POD's, there will be no Departmental approvals of development plans until May 1, 2017 at the earliest. Then if a Major Gas Sale is Sanctioned, the process in 11 AAC 83.343 is again replaced with Settlement ¶¶ 4.6.1 and 4.6.4, such that the initial POD after Sanctioning "shall remain in effect for two years following that date and until a subsequent MGS POD is approved." Thus it appears the Department has lost the ability to terminate an otherwise non-producing unit by failing to approve a POD, and contractually altered the regulatory POD process for decades into the future. The Expansion Planning POD under Settlement ¶ 4.6.3 also substitutes an alternative process for that provided in 11 AAC 83.343 with apparently similar consequences if the WIOs go that route to maintain the PTU past year 2019. And not only has the Department forgone POD's through 2017, and contractually altered the regulatory process for later POD's, it has agreed that for most POD disputes, with several carve outs that the Department retains administrative decisional authority over, that the Department no longer has jurisdiction to hear them and instead under Settlement ¶ 5.1 disputes must be resolved by either the Superior Court or arbitration.

4. **The Settlement Results in the Abrogation of the Commissioner's Obligation to Make Findings Under 11 AAC 83.303, Including Leaving the Method of Field Development to the WIOs.** The net effect of the Settlement is that the Commissioner has used a contract to forgo his regulatory obligations to approve issues associated with the PTU. 11 AAC 83.303 provides that before the Commissioner can approve actions related to units he must evaluate and consider the proposed action in light of various factors, and then make particular findings.[12] Under .303(c) these findings must be explicitly made as to all unit approvals, including: "(1) an approval of a unit agreement; (2) an extension or amendment of a unit agreement; (3) a plan or amendment of a plan of exploration, development or operations; (4) a participating area; or (5) a proposed or revised production or cost allocation formula." Yet the sweeping Settlement contains numerous express and implied approvals without these findings, including one or more approvals as to each of items (2) to (5) in the prior sentence. Instead Settlement ¶ 5.8 contains a generic statement, "The Commissioner has determined that entry into

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[12] The Commissioner must evaluate and consider that the proposed action will: "(1) promote conservation of all natural resources, including all or part of an oil or gas pool, field, or like area; (2) promote the prevention of economic and physical waste; and (3) provide for the protection of all parties of interest, including the state." 11 AAC 83.303(a). In evaluating those criteria the Commissioner must consider: "(1) the environmental costs and benefits of unitized exploration or development; (2) the geological and engineering characteristics of the potential hydrocarbon accumulation or reservoir proposed for unitization; (3) prior exploration activities in the proposed unit area; (4) the applicant's plans for exploration or development of the unit area; (5) the economic costs and benefits to the state; and (6) any other relevant factors, including measures to mitigate impacts identified above, the commissioner determines necessary or advisable to protect the public interest." *Id.* at 83.303(b).

this Agreement and individual terms and conditions set forth here are necessary or advisable to protect the public interest . . ."

For instance, the Commissioner's obligation to approve development so as to promote conservation, and to prevent economic and physical waste, is a fundamental mandate of the Department.[13] Yet the Settlement leaves the decision as to gas cycling (in terms of whether it occurs, in what volume, and for how long) to the discretion of the WIOs. The Department has not only abrogated it regulatory obligation to ensure the field is developed to promote conservation and prevent waste, but has agreed in Settlement ¶ 5.7 not to oppose the development approach ultimately selected by the WIOs before the Alaska Oil and Gas Conservation Commission ("AOGCC").

It is incongruous that lengthy gas cycling or a gas blowdown can both be in the public interest, particularly in light of the long standing dispute between the Unit Operator and Department as the extent gas cycling is appropriate. Consider that in 2008 the report commissioned by the Department and adopted by Commissioner Irwin into the Alaska Gasline Inducement Act findings found: "Gas cycling delays gas sales, but results in greater ultimate recovery of both liquid and gas hydrocarbons. In contrast, primary depletion as a gas reservoir results in the lowest hydrocarbon recovery of a retrograde condensate reservoir. Gas blowdown for sale can be done at any time after gas cycling and recovery of the hydrocarbon liquids."[14] As to condensates, it was concluded cycling gas for 30 years will result in 86% recovery (420-415 million stock tank barrels ("MMSTB")), 20 years of cycling 76% recovery (370-370 MMSTB), and 10 years of cycling 62% recovery (300-370 MMSTB).[15] It further found that a gas blowdown will result in recovery of only 26% (127 to 156 MMSTB) of the in-place volume of condensates.[16] The same study concluded recovery from the oil rim will also be substantially reduced by blowing down the reservoir early.[17] In fact, under the Department's analysis, a gas blowdown would result in the physical and economic waste of condensates and oil with a value that exceeds the Alaska Permanent Fund.

History, via innumerable past POD's and testimony before the Department, demonstrates that the Unit Operator's preferred method to develop the field is through a less capitally intense gas blowdown, yet the Department has previously concluded such a development approach will result in waste.[18] There is nothing in the Agreement to support a finding that a gas blowdown could now be in the public's interests, particularly if – as the Agreement allows – it does not occur for many years and no cycling project is commenced in the interim. The Settlement does not even provide for what has previously been viewed by the

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[13] 11 AAC 83.303(a).

[14] Summary of Findings for Resource Assessment and Field Development Study of Thomson Sand, in the Point Thomson Area, North Slope Alaska at 3 (May 16, 2008) (Exhibit 11).

[15] *Id.* at 14.

[16] *Id.*

[17] *Id.*

[18] Denial of the Proposed Plans for Development of the Point Thomson Unit, Findings and Decision of the Director, Division Oil and Gas, Under Delegation of Authority from the Commissioner (September 30, 2005) (Exhibit 12).

Department as the only reasonable development scenario: long-term full field cycling followed by a gas blowdown. There is also no support or findings related to why PTU gas is necessary for a Major Gas Sale or why that development alternative obviates the need for cycling given, the way the term is defined in the Settlement, gas from PTU might not be necessary for a small diameter off-slope pipeline for over a century.

5. **The Settlement Contemplates Future Royalty Relief Not Available Under Alaska Law.** Settlement ¶ 4.8 allows the Owners to submit an application for royalty to relief through to the Department not "pursuant to Alaska statutory provisions . . ." It is unclear what this means.

6. **The Settlement Pre-Approves Lease Assignments Such as Exxon's Acquisition of Chevron's Interest.** In Settlement ¶ 4.9 the Department agreed to approve any lease assignment requested by ExxonMobil, BP Exploration (Alaska), Inc., Chevron U.S.A. Inc., and ConocoPhillips Alaska, Inc. submitted within 90 days of execution of this Agreement. This clause is presumably to provide advance approval of Exxon's acquisition of the Chevron interests in the PTU, notwithstanding Governor Parnell acknowledged at the press conference on March 30, 2012[19] the State had not been privy to the agreements.

7. **Terms of Taxation on Injected Gas Are Established by Contract.** In Settlement ¶ 4.16 the Department agreed "that any gas produced from a reservoir within the Point Thomson Unit and injected into a reservoir within the Prudhoe Bay Unit . . . is only subject to tax and royalty one time." This provision attempts to establish terms of future taxation by contract. The Commissioner and Attorney General have also apparently usurped the authority of the Department of Revenue, and given a legal interpretation of 15 AAC 55.151(e) that reinjection of PTU gas into Prudhoe is a non-taxable event under current Alaska law, and made such a commitment without demanding continuing compliance with the affidavit requirements of 15 AAC 55.151(e)(5).

8. **The State Waives its Right to Take Royalty In-Value and Substantially Encumbers its Rights Relating to the Taking of Royalty In-Kind.** Settlement ¶ 4.16.1 states the State will elect to only take its gas in-kind if there is a completed Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, meaning it waives its right to take the royalty in-value. In addition to committing the State to such items as taking delivery at the PBU unit and bearing the cost of transportation (if the PTU to PBU pipeline is regulated), the Agreement adopts an accounting mechanism for handling the gas once it is injected into the PBU reservoir. Agreeing to the accrual of transportation costs, without detailed treatment of the rate mechanisms, is particularly concerning in light of the history of rate manipulation by ANS producers on oil transportation.

9. **Dispute Resolution Is by Methods Different Than Those Provided by Alaska Law.** As previously discussed, the Department in Settlement ¶ 5.1 has largely abrogated its regulatory mandate, and contractual rights under the PTU Agreement, to make agency determinations about issues relevant to future disputes involving the Agreement, including for instance relating to PODs. Additionally, arbitration, rather than resolution through the

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[19] Exhibit 2.

Department administrative process or Alaska's court system, is to be the forum under Settlement ¶ 4.2.3 to resolve whether the WIOs failure to perform was excused by circumstances outside their control. The terms of that arbitration are to "be decided following execution of this Agreement." It is also worth noting that factors outside of the WIOs control under Settlement ¶ 4.2.3, which result in their not being deemed to have Abandoned the IPS Project, includes design modifications, litigation by third parties, and permitting and regulatory delays, virtually guaranteeing an excuse to argue work has not been Abandoned and arbitration is required.

II. The Settlement Violates Alaska Law.

In addition to any reasons raised in other Subparts of this letter, Walker asserts the Settlement violates Alaska law in the following manner.

- Insufficient public notice and opportunity for public comment was provided in advance of execution of the Agreement. The Public Notice Clause of the Alaska Constitution provides, "No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." Alaska Const. art. VIII, § 10. "The Alaska Constitution does not express a requirement of pre-negotiation notice, and instead can be read to require notice before the State commits to an agreement requiring it to dispose of or lease state lands or interests in state lands." *Baxley*, 958 P.2d at 432. In *Baxley*, the Supreme Court held that the State could confidentially renegotiate oil and gas lease terms, in compliance with the Public Notice Clause, if "the public had ample opportunity to comment on the proposed lease amendments before the legislature authorized any binding changes. . ." *Id.* Since the Agreement purports to be binding upon execution, and without legislative approval, and the Settlement was announced without public notice and the opportunity for public input, it violates not only the Public Notice Clause but the very framework of AS 38.05 and 11.383 (among other regulatory, statutory and constitutional requirements).

- The Settlement, including Settlement ¶ 5.8, does not comply with the Commissioner's obligations to evaluate and make the findings necessary to approve this Settlement, including without limitation its terms that approve: (i) the extension and amendment of the PTU Agreement; (ii) the contained plans of development and operations; (iii) the formation, expansion and contraction of participating areas; and (iv) revised cost allocation formulas. 11 AAC 83.303. Those findings should have been sufficiently detailed in writing, orally at hearing, or in another manner that provided sufficient support to allow meaningful judicial review. *Button v. Haines Borough*, 208 P.3d 194, 2000 (Alaska 2009) (an agency's findings must be supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

- Compliance with the procedures provided by the legislature and by regulation to handle matters involving Alaska's public lands are mandatory and not at the discretion of the Department. The Settlement thus cannot contract around the Department's regulatory authority, either as to its current or future regulatory obligations. *Exxon Corp. v. State*, 40 P.3d 786, 796-97 (Alaska 2001) ("We disagree

with Exxon's first contention that the department can agree to contract terms that violate its regulations... To allow such activity would be arbitrary; parties contracting with the department would not be held to the same regulations that non-contracting parties were required to comply with. And the department should never need to contract in violation of its own regulations, because it has the authority to change its regulations so long as the new regulation has a reasonable basis and is within the scope of the legislature's delegation of power to the department."). Without limitation the following portions of the Settlement are improper.

- The Settlement cannot contract away the Commissioner's regulatory responsibilities to, in the future, approve unit actions that must be in the public's interests under 11 AAC 83.303. Among other items, this includes abrogating the Commissioner's obligation to ensure the ultimate method of field development promotes conservation and prevents waste (e.g., the Department cannot allow decisions as to gas cycling to be made at the discretion of the WIOs). Relying on the AOGCC to resolve conservation, waste, and reservoir management issues independent of the Department's administrate process, and without the Department's independent voice before the AOGCC, is not legally permissible and not in the State's best interests.

- The Settlement cannot contract around the POD process under 11 AAC 83.343, either by waiving the obligation to get POD's approved or by altering the POD approval process provided by statute and regulation.

- The Settlement cannot pre-commit to the continuation, expansion or term of the PTU without compliance with the public notice and other requirements of 11 AAC 83.311-.336 and .356.

- The Settlement cannot pre-commit, under 11 AAC 83.351, to the formation of participating areas, including expansion and contraction of the same, before various development commitments are final and contemporaneous data about field and reservoir characteristics are analyzed by the Department. This includes agreeing to the formation of participating areas substantially in advance of the 90 day period (before sustained production) contemplated by regulation.

- The Settlement cannot be used as a mechanism to pre-commit to any current or future amendments to the PTU operating agreement, such as any alternations associated with Chevron's withdrawal, under 11 AAC 83.366.

- The Settlement cannot by contract waive the Department's statutory and regulatory obligations to make agency determinations about issues relevant to future disputes involving the Agreement. That includes having disputes relating to the Agreement decided in the first instance by the Alaska Superior Court. Nor does the Commissioner have the power to waive the Departmental administrative process in favor of arbitration. Similarly, the Settlement cannot provide in its terms or by future agreement to allow arbitration to supplant

judicial review or otherwise alter the standard of judicial review exercised by Alaska's courts.

- The State must approve assignment of Chevron's leases after the sale. *See Baxley v. State of Alaska*, 958 P.2d at 426 n. 6 ("Oil and gas lessees often sell interests in leases without the State's involvement; the State may, however, be required to approve assignment resulting from the sale."). The Commissioner cannot issue a blanket approval, in advance of seeing the parties or terms, of any lease assignment brought to him in 90 days. Practically that means this Agreement is not sufficient to approve Exxon's acquisition and continued retention of Chevron's interest in the PTU.

- The Settlement is too vague and unclear to be enforceable against the State. *George v. Custer*, 862 P.2d 176, 179 (Alaska 1993); *Stenehjem v. Kyn Jin Cho*, 631 P.2d 482, 485 (Alaska 1981) ("A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract; they must have expressed their intentions in a manner that is capable of understanding. It is not even enough that they have actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract.") (Quoting 1 Arthur L. Corbin, Corbin on Contracts § 95, at 394 (1963 & Supp.1992) (footnote omitted)). The Settlement is also unenforceable on grounds of public policy. *State v. Public Safety Employees Ass'n*, 257 P.3d 151, 159 (Alaska 2011) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.") (quoting Restatement (Second) of Contracts § 178(1) (1981)).

- The executive branch does not have the authority to consider royalty relief pursuant to a mechanism other than that provided by statute. *Baxley*, 958 P.2d at 427 (the Department cannot modify lease terms like royalty without either statutory authority or specific legislative approval).

- The executive branch cannot contract away the State's power of taxation. Alaska Const. art. IX, § 1. The Commissioner and Attorney General also cannot commit the Department of Revenue to an interpretation of State tax law or regulation, nor waive requirements contained therein.

- The Commissioner cannot, employing a non-competitive process, waive the State's right to take royalty in-value, and substantially encumber its rights relating to the taking of royalty-in kind, without the advanced findings and notices contemplated in AS 38.05.183 and 11 AAC 03.010-.070, without approval of the Royalty Board under AS 38.06.050, and without legislative approval as contemplated by AS 38.06.055. It is improper under Alaska law for the Commissioner, in a non-competitive process with no advanced findings or opportunity for public comment, to unilaterally and

potentially indefinitely waive the State's right to take royalty in-value and to so encumber the terms in which the State will take its royalty in-kind.

- This Agreement, which fundamentally alters the regulatory and contractual relationship currently existing between the State and WIOs, must be approved by the legislature under Alaska law. The Commissioner also does not have the power to affect by settlement what he does not have the authority to do by direct action. For example:

    - The Settlement violates the material amendments doctrine by creating a new contract without a new round of public bidding, and without the legislative hearing process the Supreme Court has previously held satisfies the policy considerations behind the rule when amending State oil and gas leases. *Baxley*, 958 P.2d at 434.

    - Alternatively, the State and WIOs could seek approval of the terms of the Settlement by contract through the process established by the Stranded Gas Development Act, AS 43.82 *et seq.* ("SGDA"). As recognized in prior PTU POD's, the WIOs worked with the State to enact the SGDA, which is the current statutory scheme in place to affect such a dramatic overhaul of the State's relationship with the WIOs.[20] But built into the SGDA are a series of procedural safeguards such as the requirement for preliminary findings, notice and comment regarding the contract, final findings, and legislative authorization, as well as a clear mechanism for judicial review. AS 43.82.400 – .440. However, the WIOs, having failed to achieve the goals of the Agreement through the SGDA during the Murkowski Administration,[21] now seek to achieve many of the same goals via a litigation settlement agreement, but without the multi-faceted public process.[22]

- The Settlement is not in any part or in whole in the best interests of the State or its citizens. By signing the Settlement the executive branch abused its discretion and failed to meet its fiduciary obligation to manage Alaska's natural resources for the common good of the public, thus violating the public trust doctrine. Alaska Const. art

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[20] 15th PTU Plan of Development (June 5, 1998) (["T]hree of the PTU Owners (Exxon, BP and Phillips) have worked with the State of Alaska's North Slope Gas Commercialization Team which has recommended that changes be made to the State's tax and royalty structure to improve the economic feasibility of a North Slope gas project. This work culminated in the Governor's introduction of Stranded Gas legislation (HB 393) earlier this year.").

[21] SGDA Interim Fiscal Interest Findings (November 16, 2006) <available at http://www.revenue.state.ak.us/gasline/IFIF%2011-16-06.pdf>; Proposed SGDA Contract (May 24, 2006) <available at http://www.revenue.state.ak.us/gasline/ContractDocuments/ Main%20Documents/ Fiscal%20Contract/ SGDA_Contract_5%2024%2006%20final.pdf> (both documents are incorporated into the record by reference herein).

[22] *Id.* (as a reference, Exhibit 13 contains certain excerpts from the SGDA Interim Fiscal Findings and Proposed SGDA Contract related to the PTU).

VIII, § 2; *Baxley*, 958 at 422 (citing *McDowell v. State*, 785 P.2d 1, 16 n.9 (Alaska 1989)).

III. Walker Seeks the Following Remedies.

For the above stated reasons, Walker seeks the following relief.

A. A stay of this request for reconsideration until 30 days after the Department: (i) assembles, makes public, and incorporates into this record all correspondence between any member of the Parnell Administration and any WIO relating to a potential settlement of the Point Thomson Cases, dated on or after January 1, 2010; and (ii) publishes summaries of the Settlement, including flow charts or other materials, to aid Walker and the public in understanding the terms of the Agreement.[23] The additional 30 days will allow Walker and public time to review the materials and submit public comment and additional materials before the Commissioner decides this request for reconsideration.

B. That the Settlement be approved by the legislature, either under the SGDA or by special legislation similar to the process followed to amend the terms of the leases in the North Star unit (which would include among other items authorization for the Commissioner to contract around his statutory and regulatory duties).

C. That the Commissioner undertake an inquiry, with an opportunity for public comment and best interests findings, regarding whether Exxon should be allowed to acquire and retain Chevron's interest in the PTU. At a minimum the Department should review all the agreements between the WIOs relating to the Settlement and agreements between Exxon and Chevron relating to the purchase, and issue detailed best interest findings. Such a review is not only advisable and even necessary under Alaska law, but it is consistent with past actions of the Department where agreements and realignments between working interest owners impacted the State's interests.[24]

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[23] Specifically, Walker requests an explanation of the various options the WIOs have to keep acreage past year-end 2019, including any associated work and study commitments, which are so complex and vague as to not be understandable even after detailed review.

[24] *See, e.g.*, Findings of the Decision of the Commissioner, Application for Change of Unit Operator, Prudhoe Bay Unit, As Amended, with Errata Changes (June 27, 2000) and related documents (Exhibit 14).

Sincerely,

William M. Walker
Citizen Taxpayer of the State of Alaska

WALKER & LEVESQUE, LLC

Craig Richards
Counsel for William M. Walker

Enclosures as listed on the attached List of Enclosures

INDEX OF EXHIBITS

Exhibits provided on CD or DVD only.

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Exhibit 2	Governor and Commissioner Press Conference (March 30, 2012) Provided on DVD
Exhibit 3	BP, ConocoPhillips and Exxon CEO letter (March 30, 2012)
Exhibit 4	Amended Decision re Reconsider Trial De Novo (Oct. 26, 2010)
Exhibit 5	Decision Following Trial Do Novo (Dec. 30, 2012)
Exhibit 6	[Reserved]
Exhibit 7.1	Testimony of Charles Cicchetti (August 18, 2009)
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Exhibit 20	Commissioner Presentation to the Legislature, Point Thomson Settlement Overview (March 31, 2012)
Exhibit 21	Video of the Presentation of the Point Thomson Settlement to the Alaska Legislature (March 31, 2012) Provided on DVD

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March 29, 2012

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is made by and between the State of Alaska (the "State"), acting through the Department of Natural Resources ("DNR"), on the one hand, and Exxon Mobil Corporation, as Point Thomson Unit Operator and pursuant to Section 22 of the Point Thomson Unit Agreement and as working interest owner and as successor in interest to Chevron U.S.A., Inc., ExxonMobil Oil Corporation, BP Exploration (Alaska) Inc., ConocoPhillips Alaska, Inc., and Leede Operating Company, L.L.C. (collectively the "Owner Group"), on the other hand. DNR and the Owner Group are at times hereinafter referred to collectively as the "Parties" and each individually as a "Party."

1. RECITALS

1.1 The Point Thomson leases were acquired beginning in 1965. Oil was discovered in 1975, and the Point Thomson Unit was formed in 1977. Following formation of the unit, the Point Thomson owners drilled additional wells and discovered additional oil and natural gas in paying quantities. The field is located 60 miles east of Prudhoe Bay in a remote arctic area. The Point Thomson reservoir is a high-pressure retrograde condensate and natural gas reservoir with abnormally-pressured formations, and presents unique engineering challenges with respect to development and production. Since the discovery of the field, the Point Thomson owners have drilled 19 exploration / delineation wells in the Point Thomson area, and recently completed the drilling of two additional wells, the PTU 15 and PTU 16, to initiate production from the Point Thomson Unit consistent with this Agreement.

1.2 On September 30, 2005 and October 27, 2005, the Director of the Division of Oil and Gas of DNR ("Director") denied approval of the 22nd Plan of Development (a "POD") submitted by the Working Interest Owners ("WIOs") with respect to the Point Thomson Unit, and placed the Point Thomson Unit into default. The WIOs appealed this decision to the Commissioner of DNR ("Commissioner"), who affirmed the default decision, rejected the WIOs' proposed POD, and terminated the Point Thomson Unit on November 27, 2006, which was affirmed upon reconsideration by the Commissioner on December 27, 2006. These decisions were affirmed in part, reversed in part, termination of the Point Thomson Unit was vacated, and the matter was remanded to DNR by the Superior Court of the State of Alaska on December 26, 2007.

1.3 On April 22, 2008, the Commissioner issued another decision terminating the Point Thomson Unit, affirmed upon reconsideration on June 11, 2008. On August 4, 2008, DNR issued lease expiration decisions related to leases within the Point Thomson Unit.

1.4 The Owner Group filed several appeals challenging these decisions. On January 11, 2010, the Superior Court of the State of Alaska reversed DNR's April 22, 2008 decision terminating the Point Thomson Unit. On February 5, 2010, DNR filed in the Supreme Court of the State of Alaska a petition for review of the Superior Court's January 11, 2010 decision, which was granted by the Supreme Court on May 28, 2010.

1.5 The Parties wish to resolve all pending litigation and administrative proceedings between them related to the Point Thomson Unit on the terms and conditions set forth in this Agreement.

1.6 This Agreement sets forth the WIOs' commitment to produce natural gas condensate liquids ("condensate") from the Point Thomson Reservoir for delivery into the TransAlaska Pipeline System ("TAPS"). The WIOs have committed to construct an Initial Production System ("IPS") which is to be completed by the end of the 2015-2016 winter season. The IPS facility is being designed to produce and re-inject (cycle) 200 million cubic feet per day of gas and to produce approximately 10,000 barrels per day of condensate. In addition, a liquid hydrocarbon pipeline is being designed that can transport approximately 70,000 barrels per day from Point Thomson to an existing pipeline interconnection at the Badami field, which will provide for final delivery of Point Thomson liquid hydrocarbons into TAPS. Operation and production from the IPS will provide data and information to assist in evaluation of additional development plans, including potential increased gas and condensate production from Point Thomson, and plans for the delivery of Point Thomson gas into a Major Gas Sale pipeline project.

1.7 In parallel with the work on the IPS, Parties and/or their affiliates to this Agreement will, upon execution of this Agreement, undertake work for commercialization of North Slope gas. This work will build on ongoing gas commercialization efforts. If a Major Gas Sale is Sanctioned prior to year-end 2016, the WIOs will begin work on a Point Thomson project associated with that Major Gas Sale. However, if a Major Gas Sale has not been Sanctioned by June of 2016, the WIOs have committed to begin engineering of a Point Thomson Expansion Project. An expanded cycling project would result in additional condensate production, totaling approximately 20,000 to 30,000 barrels per day into TAPS, depending on the level of expansion. Alternatively,

a project to deliver Point Thomson gas to Prudhoe Bay for injection would significantly increase the rate of condensate production at Point Thomson, serve as a pre-investment for a Major Gas Sale project, and essentially complete installation of the Point Thomson wells and facilities required for a Major Gas Sale. In addition, this option would materially increase production at Prudhoe Bay, and result in enhanced recovery at Prudhoe Bay.

1.8 The Agreement further establishes terms and conditions to facilitate development and provide benefits to the State of Alaska. Certain acreage within the Point Thomson Unit is secured when specified work activities are completed (e.g., the IPS is completed and producing) and key commitments or decisions are made (e.g., a Major Gas Sale is Sanctioned or WIOs Commit to a Point Thomson gas development / Prudhoe Bay enhanced oil recovery project or an IPS gas cycling expansion project). Likewise, the Agreement provides for the automatic release of certain acreage to the State if the IPS is not completed or if certain key commitments or decisions are not made (e.g., a Major Gas Sale is not Sanctioned or WIOs do not Commit to a Point Thomson gas development / Prudhoe Bay enhanced oil recovery project or an IPS gas cycling expansion project). Depending upon the work activities that occur, the Point Thomson Unit will remain in effect or may terminate.

1.9 Since 2009, work activities at Point Thomson have resulted in contracts with over 150 companies and the employment of hundreds of Alaskans.

1.10 In implementing the terms of this Agreement, the WIOs and the State anticipate there will be significant continued investment and employment opportunities for Point Thomson Unit development.

1.11 A Major Gas Sale off the North Slope of Alaska is a primary goal of the Parties. The Parties believe settlement of the Point Thomson litigation will assist in progressing a Major Gas Sale. It also allows for other development options that may be pursued independent of or in conjunction with a Major Gas Sale, and would allow for continued progress on permitting, regulatory, and engineering activities toward a Major Gas Sale. Progress toward a potential Major Gas Sale off the North Slope of Alaska and development of Point Thomson consistent with this Agreement should aid exploration and development opportunities of North Slope resources.

2. DEFINITIONS

Whenever the following terms are used in this Agreement, they shall have the meanings set forth in this Section 2:

2.1 "Abandon," "Abandoned," or "Abandonment" has the meaning provided in Paragraph 4.2.1.

2.2 "Authorization for Expenditure" means a formal approval or authorization of expenditures for a project or a phase of a project by the authorized corporate representative.

2.3 "Brookian" means the stratigraphic interval correlating with the sands and silts penetrated by the Sourdough 3 well (API No. 50-089-200260) between the interval 10,305 feet measured depth and 12,200 feet measured depth as measured by Dual

Induction Focused Log Run No. 3, dated March 6, 1996, or the sands and silts penetrated by the Flaxman Island A-1 well (API No. 50-089-200030) between the interval 11,848 feet measured depth and 12,643 feet measured depth as measured by Dual Induction Laterolog Run No. 4, dated August 7, 1975.

2.4 "Commit," "Committed," or "Commitment" in the context of a Point Thomson Expansion Project means documentation that the WIOs have conducted project evaluation and scoping and have obligated themselves to proceed diligently with the project through completion in accordance with the terms of this Agreement. The documentation to be provided shall include corporate authorization letters by the authorized corporate representative from the WIOs and any existing project Authorizations for Expenditure.

In addition, in the context of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, the documentation to be provided also includes documentation demonstrating the completion of Front End Engineering and Design (FEED) and filing of formal applications for major federal and state permits, authorizations, certificates, or rights of way associated with construction of the project, from the U.S. Army Corp of Engineers, DNR and the Alaska Oil and Gas Conservation Commission, including any related NEPA review ("Authorizations").

After the WIOs "Commit," as defined above, to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, upon receipt of Authorizations consistent with FEED design work and the applications filed by the WIOs, the WIOs will proceed

in a timely manner to enter into contracts necessary to proceed with construction of the project consistent with the POD requirements.

2.5 "Continuous Operations" in the context of the IPS Project means continuing operation of wells and facilities to produce oil or gas from the Thomson Reservoir into a pipeline or other means of transportation to market. "Continuous Operations" does not include testing, evaluation, or temporary production. "Continuous Operations" exist even when production temporarily ceases or temporarily declines due to and for the period of: (1) planned or unplanned maintenance or repairs; (2) operational upsets; or (3) circumstances beyond the control of the WIOs that impact ongoing operations.

2.6 "DNR Point Thomson Orders" means the following DNR orders: (1) the Director's September 30, 2005 Denial of Proposed Plans of Development for the Point Thomson Unit and the Director's October 27, 2005 Amended Decision - Denial of Proposed Plans of Development of the Point Thomson Unit; (2) the Commissioner's November 27, 2006 Final Decision and the Commissioner's December 27, 2006 Decision on Reconsideration; (3) the Commissioner's April 22, 2008 Findings and Decision on Remand and the Commissioner's June 11, 2008 Decision on Reconsideration; (4) the Director's February 2007 and August 4, 2008 Decisions regarding thirty-one leases entitled Lease Expiration Due To Elimination From Unit; (5) the Commissioner's August 4, 2008 Decision on Consolidated Appeals From the Director's 2007 Decisions Terminating Thirteen State Oil and Gas Leases That Were Subject to the 2001 Point Thomson Unit Expansion Agreement; and (6) the Commissioner's January 27, 2009 Conditional Interim Decision.

2.7 "East Pad" means the proposed drilling pad located east of the IPS in Area D and from which one or more wells could be drilled.

2.8 "Effective Date" has the meaning provided in Paragraph 4.10.2.

2.9 "Expansion Planning POD" has the meaning provided in Paragraph 4.6.2.

2.10 "Expansion Project POD" has the meaning provided in Paragraph 4.6.3.

2.11 "Future POD" has the meaning provided in Paragraph 4.6.

2.12 "Initial Participating Area" or "Initial PA" means the participating area ("PA") formed for the Thomson Reservoir containing all or part of the leases listed in Area A on attached Exhibit C and contained in Area A of attached Exhibit D.

2.13 "Initial Production System" or "IPS" means the gas cycling facilities designed with capacity to produce and re-inject (cycle) 200 million cubic feet of gas per day utilizing reciprocal compression and with the objective of a minimum of 10,000 barrels per day of condensate for delivery into the TransAlaska Pipeline System ("TAPS").

2.14 "IPS Project" means the project to construct and install the IPS, and includes a 12-inch liquid hydrocarbon pipeline from Point Thomson to an interconnection with the Badami Field liquid hydrocarbon pipeline.

2.15 "IPS Gas Cycling Expansion Project" means an expansion of the IPS that must be: (i) a minimum of an additional 10,000 barrels per day if reciprocal compression is used; or (ii) a minimum of an additional 20,000 barrels per day if centrifugal compression is

used for delivery into TAPS. The WIOs have the discretion to decide on (i) or (ii) above and whether they will Commit to any IPS Gas Cycling Expansion Project.

2.16 "Major Gas Sale" or "MGS" means a large-scale pipeline project having a design throughput of more than 500 million cubic feet of gas per day that results in delivery of gas off the North Slope of Alaska.

2.17 "MGS POD" has the meaning provided in Paragraph 4.6.1.

2.18 "Point Thomson Cases" means (1) the following cases consolidated with Case No. 3AN-06-13751 CI: Case Nos. 3AN-06-13760 CI, 3AN-06-13773 CI, 3AN-06-13799 CI, 3AN-07-04634 CI, 3AN-07-04620 CI, 3AN-07-04621 CI, and 3AN-08-09369 CI; (2) the expansion leases termination appeal, Case No. 3AN-08-10156 CI; (3) the appeal from the AOGCC's decision dismissing involuntary unit petition, Case No. 3AN-09-07768 CI; (4) the Supreme Court appeal from denial of breach of contract damages claim, Case No. S-12743; (5) the appeal before the Department of Administration from DNR's denial of damages claim, Case No. OAH No. 08-0409; (6) the appeal from Commissioner Irwin's August 29, 2008 letter denying certain permit applications, Case No. 3AN-08-10825 CI; and (7) Chevron's Public Records Act case, Case No. 3AN-08-11804 CI.

2.19 "Point Thomson Development" means the IPS Project, drill wells, and work plans described in Paragraph 4.1 and other work activities set forth in this Agreement.

2.20 "Point Thomson Expansion Project" means an IPS Gas Cycling Expansion Project or a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project. The WIOs have discretion on whether to Commit to any Point Thomson Expansion Project.

2.21 "Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project" means a project to deliver Point Thomson gas to Prudhoe Bay for injection that would significantly increase the rate of condensate production at Point Thomson into TAPS, serve as a pre-investment for a Major Gas Sale, essentially complete installation of the Point Thomson wells and facilities required for a Major Gas Sale, and allow for continued efforts towards, and positions Point Thomson gas for, a Major Gas Sale. In addition, this project would materially increase oil production at Prudhoe Bay into TAPS and result in substantial enhanced recovery at Prudhoe Bay. A Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project would result in production and recovery of liquids from Point Thomson and Prudhoe Bay that would be greater than production and recovery of liquids from Point Thomson from an IPS Gas Cycling Expansion Project of a minimum of an additional 20,000 barrels per day. Before Project Start-up required approvals from the Alaska Oil and Gas Conservation Commission must be obtained.

The project would consist of:

(i) a newly constructed gas pipeline from Point Thomson to Prudhoe Bay with the capacity to transport significant volumes of Point Thomson gas in an amount that would position Point Thomson gas for a Major Gas Sale, for injection for: (a) use in repressuring, stimulation of production, and increasing ultimate

recovery of Prudhoe Bay oil; and (b) for ultimate availability for a Major Gas Sale; and

(ii) additional wells and facilities at Point Thomson to produce and process significant condensate production for delivery into TAPS through existing liquid hydrocarbon pipelines and pipelines constructed as part of the IPS Project. These facilities would also be used for a Major Gas Sale.

To ensure DNR receives necessary information regarding a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, in addition to information required under an Expansion Planning POD or an Expansion Project POD, the WIOs will meet and confer with DNR technical staff and schedule periodic reviews and workshops regarding reservoir and facility modeling results related to the project, and provide data and information to DNR for it to understand and track progress and evaluation of the project consistent with Section 16 of the PTUA. If the WIOs Commit to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, then at the State's request, the State and each individual WIO with a working interest in each Point Thomson Unit lease will negotiate a separate gas sales agreement that includes the terms set forth in Exhibit G. The Parties recognize that a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project will also be subject to Prudhoe Bay Unit agreements, including the Prudhoe Bay Unit plan of development approval process, which are not part of and would not be modified by this Agreement.

2.22 "Point Thomson Superior Court Case" means the case pending in the Superior Court of the State of Alaska, Case No. 3AN-06-13751 CI (Consolidated).

2.23 "Point Thomson Supreme Court Case" means the case pending in the Supreme Court of the State of Alaska, Case No. S-13730.

2.24 "Point Thomson Unit" has the meaning set forth in Section 3.

2.25 "Point Thomson Unit Agreement" or "PTUA" means the Unit Agreement for the Development and Operation of the Point Thomson Unit effective August 1, 1977, including all amendments thereto.

2.26 "Pre-Mississippian Section" means the interval of rock correlating with the Alaska State F-1 well (API No. 50-089-200190) below the depth of 13,846 feet measured depth as measured by the Dual Induction Laterolog Run No. 4, dated March 16, 1982, consisting of low grade metamorphic rocks containing argillite, phyllite, and quartzite along with intercalated beds of dolomite and limestone.

2.27 "Project Start-up" means the date of first production through facilities constructed as a result of the project in question but does not include testing, evaluation, or temporary production.

2.28 "Sanction" in the context of a Major Gas Sale means formal and explicit approval of a Major Gas Sale. A Major Gas Sale shall be considered "Sanctioned" under this Agreement upon receipt by the State of documentary evidence of: (1) corporate approvals by parties sufficient to proceed with construction of the project to completion; (2) firm transportation service agreements that have been entered into

sufficient to proceed with construction of the project to completion; and (3) necessary United States (and, if applicable, Canadian) federal regulatory certificates that have been issued and accepted.

2.29 "Thomson Reservoir" means the accumulation of hydrocarbon substances in the Thomson Sand and the Pre-Mississippian Section within the Point Thomson Unit.

2.30 "Thomson Sand" means the interval of rock correlating with the Point Thomson Unit No. 3 well (API No. 50-089-200070) between the depths of 13,657 and 13,932 feet measured depth as measured by the Dual Induction Laterolog Run No. 3, dated May 17, 1979, consisting of conglomerates, sandstones and siltstones.

2.31 "Unit Operator" means the Point Thomson Unit Operator designated in the PTUA and Point Thomson Unit Operating Agreement.

2.32 "West Pad" means the proposed drilling pad located west of the IPS in Area B and from which one or more wells could be drilled.

2.33 "West Pad Area" means the acreage containing all or part of the leases listed in Area B on Exhibit C and contained in Area B on Exhibit D.

2.34 "Without Appeal" means that the WIOs have waived any rights under the PTUA, individual lease terms, Alaska law and/or the laws of the United States of America, to file an application, petition, administrative appeal, or any cause of action before any administrative tribunal or state or federal court of law, and that the WIOs shall not file any such application, petition, administrative appeal, or cause of action. With regard to acreage that is released to the State Without Appeal under this Agreement, upon the

occurrence of the specified event resulting in the release of acreage, that release will occur immediately and automatically.

2.35 "Working Interest Owners" or "WIOs" means the working interest owners who are entitled to vote as to the applicable operation pursuant to, or who undertake a non-consent operation under, the Point Thomson Unit Operating Agreement.

3. UNIT CONFIGURATION

The Point Thomson Unit consists of the area and leases within the boundary set forth on the map attached as Exhibit A and the schedule of leases listed and identified on Exhibit B for a total acreage of 93,291.12 acres. The WIOs confirm that any leases not set forth on Exhibits A and B that formerly may have been included in the Point Thomson Unit have expired and the acreage has been released and returned to the State.

The map of the unit area reflecting the boundary of the Point Thomson Unit as set forth on Exhibit A and the schedule listing leases within the Point Thomson Unit area as set forth on Exhibit B are approved as Exhibit A and Exhibit B to the PTUA. The Unit Operator will file revised versions of Exhibits A and B when changes occur to the configuration or boundaries of the Point Thomson Unit area as set forth in this Agreement, with the revisions effective on the date the changes occur. Exhibit C is a listing of all or part of the leases listed on Exhibit A by area as referenced in this Agreement. Exhibit D is a map depicting the leases and areas set forth in Exhibit C. A reference to Exhibit C in this Agreement includes a reference to the corresponding area depicted in Exhibit D.

4. TERMS OF AGREEMENT

The Parties agree and understand as follows:

4.1 By signing this Agreement, the WIOs shall undertake and DNR approves the following work plan:

4.1.1 IPS Project.

4.1.1.1 The WIOs shall drill the PTU 15 and PTU 16 wells by the end of 2010, which work has been completed.

4.1.1.2 The WIOs shall put the PTU 15 and PTU 16 wells on production utilizing the IPS by the end of the 2015-2016 winter season and in any event no later than May 1, 2016. The work plan and activities associated with the IPS Project are set forth in Exhibit E. The PTU 15 and PTU 16 wells shall be placed on Continuous Operations either under production or gas injection. During the first year of production following IPS Project Start-up, the WIOs shall collect data and information regarding production, well and reservoir performance, IPS facility performance, and transportation system operations to aid in further development planning and decisions.

4.1.1.3 Additional wells shall be drilled and placed on production as needed to keep the IPS fully loaded with gas as set forth in Paragraph 2.13, to sustain the objective of a minimum of 10,000 barrels of condensate per day until the Thomson Reservoir is no longer able to sustain this objective.

4.1.1.4 After IPS Project Start-up, the WIOs shall identify and pursue debottlenecking work to increase the capacity of the installed facilities.

4.1.2 West Pad Well. The WIOs shall drill a Thomson Sand well from the West Pad by the end of the 2016-2017 winter season and in any event no later than May 1, 2017.

4.1.3 East Pad, East Pad Well, and Fifth Well. In addition to the wells and pads provided for in Paragraphs 4.1.1 and 4.1.2, the WIOs shall continue permitting for the East Pad, an East Pad well, and a fifth well, with the permitted location of the fifth well determined by the WIOs based on prior well results.

4.1.4 Wells to Target Thomson Sand Gas. All wells addressed in Paragraph 4.1 shall target Thomson Sand gas.

4.1.5 IPS POD. The work plans for the development and operation for the unitized land set forth in Paragraphs 4.1.1 through 4.1.4 shall constitute the drilling and operating obligations under Section 10 of the PTUA until May 1, 2017, unless IPS Project Start-up has not occurred due to factors outside the control of the WIOs under Paragraph 4.2.3 or force majeure under Paragraph 4.14, then until one year following IPS Project Start-up. The Unit Operator shall submit an annual report by March 1 of each year describing the operations conducted during the preceding year, but otherwise shall not be required to update the plan under 11 AAC 83.343.

4.1.6 Facility Expansion.

4.1.6.1 If a Major Gas Sale is Sanctioned by year-end 2019, then the WIOs are not obligated to pursue or continue to pursue the work plans for a Point Thomson Expansion Project set forth in Paragraphs 4.1.6.2, 4.6.2, or 4.6.3.

4.1.6.2 If a Major Gas Sale is not Sanctioned by June 1, 2016, the WIOs shall begin engineering and permitting of a Point Thomson Expansion Project. The WIOs shall incorporate these work plans into the Expansion Planning POD set forth in Paragraph 4.6.2 of this Agreement.

4.2 Completion of the IPS Project; Abandonment

4.2.1 Definition of Abandonment. For purposes of Paragraph 4.2, "Abandon," "Abandoned," or "Abandonment" means the WIOs are no longer diligently pursuing the IPS Project in good faith. Diligence is understood to mean the type of effort and activity demonstrated by the WIOs in drilling the PTU 15 and PTU 16 wells. The WIOs will have diligently pursued the IPS Project if the project work plans, activities, and pace are undertaken in a manner exemplified by the Point Thomson Provisional Schedule Level 1 work sheet attached as Exhibit E. Moreover, a lack of progress on project work plans, activities, and pace commensurate with the size and scale of the IPS Project over a one-year period is indicia of the WIOs' decision to Abandon the IPS Project. The economics or costs of the IPS Project cannot be used as a rationale or justification for not completing the IPS Project and do not constitute a factor outside the WIOs' control under Paragraph 4.2.3. To demonstrate diligence, the WIOs shall continue to provide to DNR documentation (e.g., spend reports, permit

applications, etc.) of their work activities and more detailed annual work plans to supplement the information in Exhibit E.

4.2.2 Consequences of Abandonment.

4.2.2.1 If the WIOs Abandon the IPS Project and have incurred costs for Point Thomson Development during the period between year-end 2007 and year-end 2015 of less than $2.0 billion dollars, then all Point Thomson Unit area acreage except for acreage included in Area A and Area B on Exhibit C shall be released to the State Without Appeal at year-end 2015.

4.2.2.2 If the WIOs Abandon the IPS Project and: (a) have incurred costs for Point Thomson Development during the period between year-end 2007 and year-end 2015 of less than $2.0 billion dollars; and (b) a West Pad well has not been spud by year-end 2016, then the Point Thomson Unit area acreage in Area B on Exhibit C shall be released to the State Without Appeal at year-end 2016.

4.2.2.3 If the WIOs Abandon the IPS Project and have incurred costs for Point Thomson Development during the period between year-end 2007 and year-end 2015 of $2.0 billion dollars or more, then only acreage listed in Area E and Area F on Exhibit C shall be released to the State Without Appeal at year-end 2015.

4.2.2.4 If the WIOs Abandon the IPS Project, the WIOs shall provide the State with accounting information provided by the Unit Operator in joint interest

billings to the WIOs to verify the costs incurred for Point Thomson Development between year-end 2007 and year-end 2015.

4.2.3 Factors Outside the Control of the WIOs. The WIOs shall not be considered to have Abandoned the IPS Project if the WIOs are unable to continue moving forward because of factors outside the control of the WIOs due to:

(a) circumstances addressed by Section 25 of the PTUA;

(b) design modifications due to significant technological or environmental obstacles that cause substantial additional work;

(c) litigation by third parties; or

(d) permitting and regulatory delays.

At the time the WIOs assert that one or more of the factors outside of their control has prevented them from moving forward with the IPS Project, the WIOs shall provide written notice to DNR with a description of the circumstances that have occurred and information to support the basis for their position. The WIOs shall exercise due care and diligence to address a factor outside of their control and shall keep DNR updated on the steps they are taking and their progress to move forward with the IPS Project under the circumstances. The WIOs shall provide written notice when they are able to continue moving forward with the IPS Project. If DNR disagrees with the position taken in the written notice from the WIOs, or if DNR otherwise believes the WIOs have Abandoned the IPS Project, DNR shall provide the WIOs written notice of DNR's position. DNR and the WIOs shall meet and review their respective positions in an effort to resolve any

differences. If the parties are not able to resolve their different assessments, then any dispute on whether the WIOs have Abandoned the IPS Project and whether failure to spud a West Pad well by the date set forth in Paragraph 4.2.2.2 is due to circumstances addressed by Section 25 of the PTUA, shall be subject to expedited arbitration. The parties shall agree upon expedited arbitration with the principles to be decided following execution of this Agreement.

4.2.4 Term of Abandonment Provision. This Paragraph 4.2 expires upon IPS Project Start-up, but in no event extends beyond year-end 2019, which date is fixed and not subject to Paragraph 4.14.

4.2.5 Year-end 2019. The provisions in this Paragraph 4.2 do not modify the provisions regarding Point Thomson Unit contraction/termination at year-end 2019 in Paragraphs 4.5.2 and 4.5.7 of this Agreement.

4.3 Formation of Initial Participating Area (Initial PA). This Paragraph 4.3 describes how the Initial PA will be formed for the Point Thomson Unit.

4.3.1 Initial Participating Area for Thomson Reservoir. The Initial PA shall be the first participating area for the Point Thomson Unit. The Initial PA shall contain the leases listed as the Initial Participating Area on Exhibit C. At least ninety (90) days before the date of first production through the IPS Project, the Unit Operator shall submit documentation regarding the Initial PA as provided in Paragraph 4.4.5, including PA tract allocations for each lease in the PA which shall be set forth in a revision to Exhibit C. The Initial PA for the Thomson Reservoir shall be formed and is approved upon IPS Project Start-up effective the date of first

production through the IPS Project with delivery into TAPS. Within twenty (20) days following the month of first production through the IPS Project with delivery into TAPS, the Unit Operator shall provide notice to DNR of the date of first production through the IPS Project with delivery into TAPS.

4.4 Expansion of IPA and Formation of New PAs. This Paragraph 4.4 describes how the Point Thomson Unit Initial PA may be: (1) conditionally expanded to include acreage in Area B upon completion of certain work activities; (2) expanded to include acreage in Area B and Area D upon approval of a PA application pursuant to the PTUA including applicable State law based on technical information from drilling and IPS production; and (3) expanded to include up to the entire Point Thomson Unit area (except Area F) upon Project Start-up of a Point Thomson project resulting from Sanction of a Major Gas Sale, an IPS Gas Cycling Expansion Project of a minimum of an additional 20,000 barrels per day, or a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project. The leases in the Initial PA, and the leases included in Area B, have been identified for inclusion in the Thomson Reservoir PA by the Parties for the purposes of this Agreement. The inclusion of leases in the PA does not constitute a determination under Section 11 of the PTUA of the land that otherwise would be included in the PA. Development of Point Thomson Unit acreage in Area F (Brookian reservoirs) is subject to the provisions set forth in Paragraph 4.7.

4.4.1 Area B Expansion. If: (i) a West Pad well is drilled as provided in Paragraph 4.1.2 and casing set across the Thomson Sand; and (ii) an Authorization for Expenditure for a gathering line to the West Pad is approved, then the Initial PA formed as provided in Paragraph 4.3 shall automatically expand to include the

West Pad Area (Area B) acreage listed on Exhibit C. Within twenty (20) days following the month in which the last of the above conditions is accomplished, the Unit Operator shall submit documentation regarding the expanded PA as provided in Paragraph 4.4.5, including the PA tract allocations for each lease in the PA which shall be set forth in a revision to Exhibit C, and notice confirming that the conditions set forth in this Paragraph 4.4.1 have been met including a copy of the Authorization for Expenditure. Upon receipt of proper notification, expansion of the Initial PA is automatically approved effective the first day of the month in which the last of conditions (i) and (ii) was met.

4.4.2 PA Expansion to Entire Unit. If by year-end 2019, (i) a Major Gas Sale is Sanctioned or (ii) the WIOs Commit to an IPS Gas Cycling Expansion Project of a minimum of an additional 20,000 barrels per day or to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, then, upon Project Start-up of the project to develop the Point Thomson Reservoir for a Major Gas Sale, the IPS Gas Cycling Expansion Project of a minimum of an additional 20,000 barrels per day, or the Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, as applicable, the PA for the Thomson Reservoir shall expand to include the entire Point Thomson Unit area contained on Exhibit A and the leases listed and identified on Exhibit B, except acreage listed in Area F on Exhibit C or acreage that has contracted from the Point Thomson Unit if IPS Project Start-up has not occurred as provided under Paragraph 4.5.7. At least ninety (90) days before Project Start-up, the Unit Operator shall submit documentation regarding the expanded PA as provided in Paragraph 4.4.5,

including the PA tract allocations for each lease in the PA which shall be set forth in a revision to Exhibit C. Within twenty (20) days following the month of Project Start-up, the Unit Operator shall submit documentation confirming Project Start-up. Prior to the effective date of expansion of the PA, any acreage subject to this Paragraph 4.4.2 and not within the PA for the Thomson Reservoir shall be subject to the provisions of Paragraph 4.5.1.

4.4.3 PA Expansion Based on Technical Information. In addition to expansion of the PA for the Thomson Reservoir provided in Paragraph 4.4.1, prior to year-end 2019 the Unit Operator may submit an application for expansion of the PA pursuant to the PTUA including applicable State law based on drilling and IPS production results (i.e., technical information). This request could include acreage in Area B and Area D on Exhibit C. Any acreage included in the PA for the Thomson Reservoir as a result of this application shall be listed as a new Area C on Exhibit C and depicted as Area C on Exhibit D. The WIOs' rights to such an expansion of the PA and DNR's decisions regarding same shall be governed by the PTUA including applicable State law. The Parties acknowledge that any DNR decision on a technical PA submitted consistent with this Paragraph 4.4.3, including any appeal of a DNR decision to the Superior Court of the State of Alaska, may extend beyond year-end 2019.

4.4.4 Acreage Not Subject to Contraction. The following acreage shall not be subject to removal from a PA or contraction from the Point Thomson Unit:

(a) acreage that has been included in the Initial PA pursuant to an IPS Project Start-up under Paragraph 4.3;

(b) except as specifically provided in Paragraph 4.5.8, acreage that has been included in a PA pursuant to a PA expansion to include Area B under Paragraph 4.4.1;

(c) acreage that has been included in a PA pursuant to a PA expansion to include the entire Point Thomson Unit (except Area F) under Paragraph 4.4.2; or

(d) subject to 11 AAC 83.351(c), as applicable, and except as specifically provided in Paragraph 4.5.3, acreage that has been included in a PA pursuant to an approved PA expansion based on technical information under Paragraph 4.4.3.

Notwithstanding the above, this Paragraph 4.4.4 does not modify Section 20(c) of the PTUA should production cease from the PA.

4.4.5 PA Documentation. Information to be submitted to DNR under Paragraphs 4.3.1, 4.4.1 and 4.4.2 is provided in Exhibit F.

4.4.6 PA Dispute. Any dispute related to a PA under this Agreement shall be subject to Paragraph 5.1. A dispute regarding PA documentation or the tract allocation factors set forth in Exhibit C shall not impact formation or expansion of a PA under this Agreement, except as provided in Paragraph 4.4.3. Submittal of PA documentation under Paragraphs 4.3 and 4.4 shall be subject to the terms of the

PTUA including applicable State law. Approval of the tract allocation factors contained in Exhibit C shall be subject the terms of the PTUA including applicable State law. If the tract allocation factors submitted by the Unit Operator under Paragraphs 4.3 and 4.4 are disputed, the factors submitted by the Unit Operator shall take effect and apply until the dispute is finally resolved. Once resolved, the tract allocation factors will be retroactively adjusted.

4.5 Unit Contraction and Participating Area Reductions / Unit Status at Year-End 2019. This Paragraph 4.5 describes various development scenarios that could be present at year-end 2019, and the implications for acreage in the Point Thomson Unit. Particularly, this paragraph sets forth the terms and conditions under which some or all of the acreage could contract out of the Point Thomson Unit and be released to the State Without Appeal, and some or all of the acreage could remain in the Point Thomson Unit and be included in a PA. Paragraph 4.5 does not address Area F; Paragraph 4.7 describes what will happen with Area F acreage.

4.5.1 Acreage Subject to Inclusion in PA. If by year-end 2019 a Major Gas Sale has been Sanctioned or the WIOs have Committed to a Point Thomson Expansion Project, acreage to be included in the PA for the Thomson Reservoir under Paragraphs 4.4.2, 4.5.4, or 4.5.7 shall be entitled to be included in the PA. Such acreage shall remain in the Point Thomson Unit following formation of the Initial PA, and thereafter shall be subject to elimination from the Point Thomson Unit in accordance with the terms of the PTUA including applicable State law, including Section 2(e). If IPS Project Start-up has not occurred and the Initial PA has not been formed, but a Major Gas Sale is Sanctioned, such acreage shall remain in the

Point Thomson Unit and shall be subject to elimination from the Point Thomson Unit in accordance with the terms of the PTUA including applicable State law, including Section 2(e), as if the Initial PA had been formed effective May 1, 2016.

4.5.2 No IPS or MGS.

4.5.2.1 If IPS Project Start-up has not occurred and a Major Gas Sale has not been Sanctioned by year-end 2019, the following shall occur: (1) subject to Paragraph 4.5.2.2, the Point Thomson Unit and the PTUA shall terminate Without Appeal; (2) except for leases subject to Paragraph 4.5.2.3, each WIO will immediately surrender its leases and all such acreage shall be automatically released Without Appeal to the State; (3) each WIO agrees that it will not apply to form a compulsory unit with the Alaska Oil and Gas Conservation Commission with respect to any lease formerly within the Point Thomson Unit; and (4) this Agreement shall terminate.

4.5.2.2 If IPS Project Start-up has not occurred and a Major Gas Sale has not been Sanctioned by year-end 2019, then the WIOs may submit an alternative POD for the Point Thomson Unit no later than sixty (60) days prior to year-end 2019. Submittal and approval of the alternative POD shall be subject to the terms of the PTUA including applicable State law. Nonetheless, DNR shall have sole discretion to accept or reject an alternative POD, and a final Commissioner decision on the alternative POD is Without Appeal. For purposes of this paragraph the WIOs agree not to assert that Section 21 of

the PTUA applies in any respect to review of or a decision on the proposed alternative POD.

4.5.2.3 If the Point Thomson Unit is terminated under Paragraph 4.5.2.1, the lessees of leases containing the PTU 15, PTU 16 and wells drilled after execution of this Agreement, and lessees of leases containing any other wells capable of producing in paying quantities, may submit a Plan of Operations ("POO") for each lease to the Director within sixty (60) days of the date of Point Thomson Unit termination. The POO shall provide for placing the well on producing status within two (2) years of the date of approval of the POO. Approval or rejection of the POO shall be within the sole discretion of the DNR. If the Director denies approval of the POO, that decision may be appealed to the Commissioner. The Commissioner's decision on the POO shall be Without Appeal. If the lessees fail to submit a POO for the leases within sixty (60) days following Point Thomson Unit termination, or the Commissioner denies approval of the POO, the leases shall terminate with acreage returning to the State Without Appeal. If the Director or the Commissioner approve the POO and the lessees fail to place the well on producing status within two years, the lease shall terminate with acreage returning to the State Without Appeal.

4.5.3 IPS Project - No Expansion and No MGS. If IPS Project Startup has occurred and the WIOs do not Commit to a Point Thomson Expansion Project and a Major Gas Sale has not been Sanctioned by year-end 2019, then:

4.5.3.1 The acreage in Area E and the northern half of ADL 377017 (ADL 377017(N) on Exhibit C), without regard to whether this acreage was included in a technical PA application or is included in the PA as the result of a technical PA expansion under Paragraph 4.4.3, shall be released to the State Without Appeal. The remaining acreage in Area D shall be subject to the PTUA including applicable State law.

4.5.3.2 If a technical PA application has been filed pursuant to Paragraph 4.4.3, then, subject to Paragraph 4.5.3.1, the acreage included in the application shall not be subject to contraction until a final decision on the technical PA application. Once a final decision has been made on the PA application, any acreage not included in a PA shall be eliminated from the Point Thomson Unit.

4.5.4 IPS Project Expansion by 10,000 Barrels per Day and No MGS. If the WIOs Commit to an IPS Gas Cycling Expansion Project of minimum of an additional 10,000 barrels per day by year-end 2019, but that expansion is less than minimum of an additional 20,000 barrels per day, then the acreage in the northern half of ADL 377017 (ADL 377017(N) on Exhibit C), without regard to whether this acreage was included in a technical PA application or is included in the PA as the result of a technical PA expansion under Paragraph 4.4.3, and the acreage listed as within ADLs 377016, 389728 and 389730 in Area E on Exhibit C, shall be released to the State Without Appeal. The remaining acreage listed within Area E on Exhibit C shall be included in the acreage listed in Area D on Exhibit C and subject to the terms of the PTUA including applicable State law.

4.5.5 IPS Project Expansion by 20,000 Barrels per Day or a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project and No MGS. If IPS Project Start-up has occurred and the WIOs have Committed to either: (1) an IPS Gas Cycling Expansion Project of a minimum of an additional 20,000 barrels per day; or (2) a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project by year-end 2019, then all acreage, except as set forth in Paragraph 4.7, shall remain in the Point Thomson Unit at year-end 2019 and shall be entitled to be included in a PA as set forth in Paragraphs 4.4.2 and 4.5.1.

4.5.6 IPS with MGS. If IPS Project Start-up has occurred and a Major Gas Sale has been Sanctioned by year-end 2019, then all acreage, except as set forth in Paragraph 4.7, shall remain in the Point Thomson Unit at year-end 2019 and shall be entitled to be included in a PA as set forth in Paragraphs 4.4.2 and 4.5.1.

4.5.7 MGS Sanctioned – No IPS Project. If IPS Project Start-up has not occurred and a Major Gas Sale is Sanctioned prior to year-end 2019, any acreage that contracts from the Point Thomson Unit under Paragraph 4.2 of this Agreement shall not be recommitted to the Point Thomson Unit. Acreage remaining in the Point Thomson Unit shall be subject to Paragraphs 4.4.2 and 4.5.1.

4.5.8 Area B. If (i) an expanded PA based on technical information has not been approved as provided in Paragraph 4.4.3 that includes all of Area B or (ii) if a gathering line is not constructed and the well on the West Pad is not placed on Continuous Operations into the IPS by year-end 2019, then any of the West Pad Area (Area B) acreage listed on Exhibit C that was originally included in the PA

for the Thomson Reservoir pursuant to Paragraph 4.4.1, but subsequently has not been included in the PA expansion as provided for in Paragraph 4.4.3, shall be removed from the PA and included within Area D on Exhibit C, and thereafter shall be subject to the terms of the PTUA including applicable State law.

4.5.9 Segregation of Leases Released to State or Contracted from the Unit. Any lease, a portion of which is released to the State under Paragraphs 4.2 or 4.5, shall be segregated into a separate and distinct lease as to the portion remaining within the Point Thomson Unit, which does not include the portion that contracts out of the Point Thomson Unit and is released to the State, and the provisions of the original lease shall apply to the segregated portion that remains in the Point Thomson Unit.

4.6 Plans of Development/Future Work Plans. The WIOs shall prepare plans of further development and operation for the Point Thomson Unit under Section 10 of the PTUA ("Future POD") as provided in this Paragraph 4.6 for the periods set forth. Work plans for Point Thomson Unit acreage in Area F of Exhibit C shall be subject to the terms of Paragraph 4.7, not this Paragraph 4.6.

4.6.1 Major Gas Sale Sanction. If a Major Gas Sale is Sanctioned prior to year-end 2019, then within ninety (90) days following the Sanction date, the WIOs shall submit a Future POD that includes work plans and project activities to develop the Point Thomson Reservoir for a Major Gas Sale (the initial and each Future POD under this Paragraph 4.6.1 is hereinafter referred to as an "MGS POD"). Upon Project Start-up associated with an MGS POD, the obligations set forth in

Paragraph 4.1.1 shall terminate. The initial MGS POD shall be effective as of the date a Major Gas Sale is Sanctioned and shall remain in effect for two years following that date and until a subsequent MGS POD is approved. Subsequent MGS PODs shall be submitted to DNR within ninety (90) days before expiration of the prior MGS POD. Each MGS POD shall cover a period of two years and shall address the information contained in Paragraph 4.6.4. Following submittal of each MGS POD, DNR shall have sixty (60) days to review the MGS POD. Unless DNR provides the WIOs written notice that the MGS POD is inconsistent with the terms of this Agreement, the MGS POD is approved effective the date set forth above, even if DNR approval of the MGS POD occurs after that date.

4.6.2 Expansion Project Planning. Consistent with Paragraph 4.1.6.2, if a Major Gas Sale has not been Sanctioned by June 1, 2016, the WIOs must begin engineering and permitting of a Point Thomson Expansion Project. The WIOs shall submit a Future POD that includes work plans for evaluation and selection of an option for development of the Point Thomson Reservoir through a Point Thomson Expansion Project ("Expansion Planning POD"). The Expansion Planning POD shall be effective one year following IPS Project Start-up but no later than May 1, 2017, and shall remain in effect until the earlier of: (1) the effective date of an Expansion Project POD under Paragraph 4.6.3; (2) the effective date of an MGS POD under Paragraph 4.6.1; or (3) December 31, 2019 if a Major Gas Sale has not been Sanctioned and the WIOs do not Commit to a Point Thomson Expansion Project prior to that date. The Expansion Planning POD may supplement the work plans set forth in Paragraphs 4.1.1 through 4.1.4. The Expansion Planning

POD shall be submitted no later than ninety (90) days following the Expansion Planning POD effective date provided above and shall address the information contained in Paragraph 4.6.4. Following submittal of the Expansion Planning POD, DNR shall have sixty (60) days to review the Expansion Planning POD. Unless DNR provides the WIOs written notice that the Expansion Planning POD is inconsistent with the terms of this Agreement, the Expansion Planning POD is approved effective the date set forth above, even if DNR approval of the Expansion Planning POD occurs after that date.

4.6.3 Expansion Project Commitment. If a Major Gas Sale has not been Sanctioned by year-end 2019, and the WIOs Commit to a Point Thomson Expansion Project on or before year-end 2019, then the WIOs shall submit a Future POD based on the Expansion Planning POD work product that describes work plans and project activities to develop the Point Thomson Reservoir through a Point Thomson Expansion Project (the initial and each subsequent Future POD under this Paragraph 4.6.3 is hereinafter referred to as an "Expansion Project POD"). Upon Project Start-up of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, the obligations set forth in Paragraph 4.1.1 shall terminate. Upon DNR approval, the initial Expansion Project POD shall be deemed effective on January 1, 2020 unless the WIOs Commit to a Point Thomson Expansion Project and an Expansion Project POD is approved prior to year-end 2019, and shall remain in effect for two years following that approval and until a subsequent Expansion Project POD is approved. The initial Expansion Project POD shall be submitted no later than ninety (90) days following the date the WIOs Commit to a

Point Thomson Expansion Project. Subsequent Expansion Project PODs shall be submitted to DNR within ninety (90) days before expiration of the prior Expansion Project POD. Each Expansion Project POD shall cover a period of two years and shall address the information contained in Paragraph 4.6.4. Following submittal of each Expansion Project POD, DNR shall have sixty (60) days to review the Expansion Project POD. Unless DNR provides the WIOs written notice that the Expansion Project POD is inconsistent with the terms of this Agreement, the Expansion Project POD is approved effective the date set forth above, even if DNR approval of the Expansion Project POD occurs after that date.

4.6.4 POD Information. Consistent with this Paragraph 4.6, Future PODs shall include plans to address the following:

(a) data acquisition and technical evaluations and qualifications to support the development plan;

(b) well planning including identification of the number of drill wells, well locations, and completion plans;

(c) project design basis and engineering plans for infrastructure, well pads, and process facilities;

(d) acquisition of permits and other approvals to accommodate drilling, construction, production transportation, and operations;

(e) operation and maintenance considerations;

(f) construction and start-up including estimated timing to complete the work activities;

(g) logistics; and

(h) safety, security, health, and environmental considerations.

4.6.5 POD Implementation. Any dispute regarding a Future POD, including whether a Future POD is consistent with this Agreement, whether WIOs are diligently progressing a project to develop the Point Thomson Reservoir for a Major Gas Sale, or whether WIOs are diligently progressing a Point Thomson Expansion Project consistent with this Agreement shall be subject to Paragraph 5.1. Any dispute related to a Future POD shall not be used as the basis to seek Point Thomson Unit contraction or release of acreage, unless DNR asserts the WIOs are not diligently progressing a project to develop the Point Thomson Reservoir for a Major Gas Sale or a Point Thomson Expansion Project consistent with this Agreement.

4.7 Area F. If the WIOs submit a POD for the Brookian by year-end 2018 that is approved by DNR, the acreage listed in Area F on Exhibit C shall remain in the Point Thomson Unit after any Unit contraction at year-end 2019 and shall be maintained through approved PODs or formation of expanded or new PA(s) in accordance with the PTUA including applicable State law. If the WIOs do not submit a Brookian POD by year-end 2018 or if DNR does not approve the Brookian POD, the acreage listed in Area F on Exhibit C shall be released to the State Without Appeal.

4.8 Royalty. Following IPS Project Start-up, the WIOs may submit a royalty modification application requesting a royalty reduction. DNR denial of the application does not relieve the WIOs or the State of their commitments to abide by the terms of this Agreement.

4.8.1 If applicable, the application shall be submitted pursuant to Alaska statutory provisions and shall be submitted and evaluated pursuant to Alaska law.

4.8.2 If the application is not submitted pursuant to Alaska statutory provisions, the WIOs may apply for royalty modification under this Paragraph 4.8.2. The State shall evaluate this application in good faith and the WIOs shall provide DNR with sufficient information to process the application. A decision by DNR denying an application submitted under this Paragraph 4.8.2 for any reason, including a determination that DNR may not legally approve that application because it does not have the authority to do so, shall be Without Appeal.

4.9 Lease Assignments. Within ninety (90) days of the Effective Date, the State agrees to approve lease assignments for each of the leases identified on Exhibit B as PTU Tract No. 1 through Tract No. 38, in the manner requested in writing by ExxonMobil, BP Exploration (Alaska) Inc., Chevron U.S.A. Inc., and ConocoPhillips Alaska, Inc., who, as represented by those requesting parties, are the only lessees to those assignments.

4.10 Litigation.

4.10.1 Joint Motions. Within ten (10) days of the date this Agreement is executed, the Parties shall jointly and simultaneously file: (a) a motion to vacate the February 11, 2010 Order Granting Stay of Proceedings in the Point Thomson Superior Court Case; and (b) a motion to vacate the December 26, 2007 and January 11, 2010 decisions in the Point Thomson Superior Court Case ("Joint Motion"). A copy of this Agreement shall be included with the filings. The Joint Motion described in Paragraph 4.10.1(b) shall expressly affirm that the DNR Point Thomson Orders will be automatically withdrawn as set forth in Paragraph 4.10.3 if the Joint Motion described in Paragraph 4.10.1(b) is granted.

4.10.2 Effective Date of Agreement. The effective date of this Agreement ("Effective Date") shall be the later of: (i) the date the Superior Court grants the Joint Motion described in Paragraph 4.10.1(b); (ii) the date of dismissal of the Point Thomson Supreme Court Case; and (iii) the date of dismissal of the Point Thomson Superior Court Case. If the Superior Court denies the Joint Motion described in Paragraph 4.10.1(b), or the Point Thomson Supreme Court Case and the Point Thomson Superior Court Case are not dismissed, this Agreement shall not become effective.

4.10.3 Other DNR Requirements.

4.10.3.1 Immediately upon the granting of the Joint Motion described in Paragraph 4.10.1(b), the DNR Point Thomson Orders shall be automatically withdrawn. Any authorization or approval issued by DNR as a result of any

of the DNR Point Thomson Orders allowing the WIOs to conduct activity within the Point Thomson Unit area shall not be affected by such action and shall remain valid and effective by its terms.

4.10.3.2 Within ten (10) days of the date the Superior Court grants the Joint Motion described in Paragraph 4.10.1(b), the Parties shall file a joint dismissal of the Point Thomson Supreme Court Case and the Point Thomson Superior Court Case pursuant to Alaska Appellate Rule 511.

4.10.4 Other Owner Requirements. Within ten (10) days of the Effective Date, the Owner Group shall file a release of Amended Notice of Lis Pendens in the Point Thomson Superior Court Case.

4.10.5 Other Joint Motions. Within ten (10) days of the Effective Date, the Parties shall jointly move to dismiss with prejudice the remaining Point Thomson Cases. A copy of this Agreement shall be included with each filing.

4.10.6 Costs and Fees. For purposes of this Paragraph 4.10, the State and the Owner Group shall each bear their own costs and attorney's fees.

4.11 Point Thomson Unit Status. By signing this Agreement, the Parties confirm that the Point Thomson Unit, the PTUA, and the Point Thomson Unit Operating Agreement have remained in effect since originally approved, and remain in effect as of the date of this Agreement as modified by this Agreement.

4.12 Interpretation. In the event of any conflict or inconsistency between this Agreement and the PTUA, this Agreement controls. Subject to and as modified by the terms of

this Agreement, the relationship between DNR and the WIOs shall continue to be governed by the PTUA including applicable State law.

4.13 Alaska Hire. Within the constraints of law, when the Unit Operator hires, it agrees to employ Alaska residents and contract with Alaska businesses to provide goods and services to support and work on construction, fabrication, or operation at Point Thomson to the extent Alaska residents or Alaska businesses are available, ready, willing, cost competitive, in compliance with all safety and environmental standards, qualified and able to accept employment at the time required, and are located in Alaska. The Unit Operator shall use, as far as is practicable, job centers and associated services operated by the Department of Labor and Workforce Development. The Unit Operator shall advertise for available positions locally and use, as far as practicable, Alaska job service organizations to notify the Alaskan public.

4.14 Force Majeure. The terms of this Agreement are subject to the unavoidable delay provisions of Section 25 of the PTUA. For the purposes of this Agreement, failure to timely receive permit approvals or other authorizations, despite the exercise of due care and diligence of the WIOs, is considered an unavoidable delay under Section 25 of the PTUA. Notwithstanding the foregoing, failure to obtain AOGCC approval related to the Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project is not force majeure and will not be considered an unavoidable delay under Section 25 of the PTUA.

4.15 Dates Subject to Adjustment. Decisions, work activities, and dates associated with Thomson Reservoir development are interrelated. Except as specifically provided in

Paragraph 4.15.1, if one or more force majeure events result in an extension of the date for IPS Project Start-up by at least one full year from the date provided in Paragraph 4.1.1.2 as may be adjusted herein, regardless of the actual term of any single force majeure event, then for each full one-year period that IPS Project Start-up is delayed, the dates for future Thomson Reservoir decisions and work activities, including dates associated with a Point Thomson Expansion Project or Thomson Reservoir development for a Major Gas Sale, shall be extended by a corresponding period of time. This provision is applicable each and every time IPS Project Start-up is delayed by at least one additional full year. This Paragraph 4.15 shall apply in addition to any extension or adjustment to a date in this Agreement resulting from a force majeure event under Paragraph 4.14.

4.15.1 Dates Not Subject to Adjustment. The following dates are not subject to adjustment under Paragraphs 4.14 and 4.15:

(a) the expiration date (year-end 2019) for the Abandonment provision under Paragraph 4.2.4;

(b) the year-end 2007 to year-end 2015 time period for determination of project costs if the WIOs Abandon the IPS Project as provided under Paragraph 4.2;

(c) the date (year-end 2018) for WIO submittal of a Brookian POD under Paragraph 4.7; and

(d) the date for application of DNR standard administrative processes under Paragraph 5.1.3.1.

The number of days for submitting information or providing notice under this Agreement (e.g., "within ninety (90) days") are not subject to adjustment under Paragraph 4.14, including the number of days for submitting and approving Future PODs under Paragraph 4.6.

4.16 Taxes and Royalty for Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project. The Parties agree that any gas produced from a reservoir within the Point Thomson Unit and injected into a reservoir within the Prudhoe Bay Unit pursuant to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project is only subject to tax and royalty one time.

4.16.1 Tax on Injected Gas. The Parties recognize that Alaska law regarding oil and gas production tax provides that gas produced from the Point Thomson Unit that would be used according to 15 AAC 55.151(e) in effect as of the Effective Date, and that would be injected into a reservoir within the Prudhoe Bay Unit in the course of operations of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project for purposes of repressuring, including enhanced recovery, would be exempt from taxation at the time of its production from the Point Thomson Unit and would be subject to tax only at the time the gas would be ultimately produced for sale from the Prudhoe Bay Unit.

4.16.2 Royalty on Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project Gas. If the WIOs Commit to and complete construction of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, then, upon Project Start-up, the State, as authorized by the Point Thomson leases and

applicable State law, will elect, for the period prior to Project Start-up of a Major Gas Sale, to take in-kind the State's royalty share of gas produced from the Point Thomson Unit when produced into the gas pipeline from Point Thomson to Prudhoe Bay referenced in Paragraph 2.21(i). Terms implementing this royalty in kind election are as follows.

4.16.2.1 Definitions. Whenever the following terms are used in this Paragraph 4.16.2, they shall have the meanings set forth in this Paragraph 4.16.2.1. Other capitalized terms shall have the meaning set forth in Paragraph 2 of this Agreement.

(a) "Delivery Point" means: (1) the terminus of the PTU / PBU Gas Pipeline in the Prudhoe Bay Unit ("PBU Delivery Point") if the PTU / PBU Gas Pipeline has been exempted from the requirement of a right-of-way lease under AS 38.35 ("Unregulated PTU / PBU Gas Pipeline"); or (2) the point where Point Thomson gas is produced and first delivered into the PTU / PBU Gas Pipeline ("PTU Delivery Point") if the PTU / PBU Gas Pipeline has not been exempted from the requirement of a right-of-way lease under AS 38.35 ("Regulated PTU / PBU Gas Pipeline").

(b) "Field Costs" means costs incurred by lessee that may be reimbursed or deducted from royalty gas under the Point Thomson leases and other applicable agreements.

(c) "Fuel / Losses" means any fuel consumption or losses associated with transporting gas through the PTU / PBU Gas Pipeline.

(d) "PBU" means the Prudhoe Bay Unit.

(e) "PTU / PBU Gas Pipeline" means the gas pipeline to be constructed for a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project that will begin in the Point Thomson Unit and terminate in the Prudhoe Bay Unit.

(f) "State RIK Gas" means the State's royalty share of gas produced from the Point Thomson Unit into the PTU / PBU Gas Pipeline that is taken by the State in kind, as described in this Paragraph 4.16.2.

(g) "Transportation Costs" means costs for transporting gas through the PTU / PBU Gas Pipeline.

4.16.2.2 General Terms.

(a) If the WIOs Commit to and complete construction of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, the State, as authorized by the Point Thomson leases and applicable State law, will elect to take in kind State royalty due when Point Thomson gas is produced into the PTU / PBU Gas Pipeline, with State RIK Gas delivered to the State at the Delivery Point.

(b) The State may take all or any portion of State RIK Gas for sale or other use at the time it is delivered to the Delivery Point.

(c) State RIK Gas not taken for sale or other use by the State at the time it is delivered to the Delivery Point will be injected into the PBU reservoir, where the gas will be used for enhanced liquids recovery.

(d) The State will retain title and risk of material loss on State RIK Gas in the PBU reservoir, but will not be responsible for any costs, payments, or fees, or charged for fuel or other operational losses, associated with use of State RIK Gas in the PBU reservoir.

(e) The State will not charge any costs, payments, or fees, nor require receipt of any other benefit for use of State RIK Gas that is delivered to the Delivery Point and injected into the PBU reservoir, beyond any royalty provided for under applicable PBU leases and other applicable agreements on liquids recovered from the PBU reservoir.

4.16.2.3 Transportation Costs, Field Costs, and Fuel / Losses. Except as interpreted or modified by the terms set forth in this Paragraph 4.16.2, any Transportation Costs, Fuel / Losses and Field Costs associated with State RIK Gas shall be addressed as set forth in the Point Thomson leases and other applicable agreements. The manner in which Transportation Costs, Fuel / Losses and Field Costs are addressed depends on whether the PTU /

PBU Gas Pipeline is a Regulated PTU / PBU Gas Pipeline or an Unregulated PTU / PBU Gas Pipeline at the time the State RIK Gas is produced and delivered into the PTU / PBU Gas Pipeline, recognizing that the status of the PTU / PBU Gas Pipeline may change. In addition, upon Project Start-Up of a Major Gas Sale, the treatment of these costs may change. No interest will be charged on any of the State's accrued Transportation Costs and Fuel / Losses prior to the due date under this Paragraph 4.16.2.

(a) Regulated PTU / PBU Gas Pipeline.

i. The State will pay Transportation Costs and be responsible for Fuel / Losses for State RIK Gas that is delivered to the State at the PTU Delivery Point pursuant to the terms of the approved transportation tariff for the PTU / PBU Gas Pipeline.

1. For State RIK Gas that is delivered to the State at the PTU Delivery Point and not injected into the PBU reservoir, the Transportation Costs will be paid by the State and deductions made for Fuel / Losses at the time of delivery to the State at the PTU Delivery Point.

2. For State RIK Gas that is delivered to the State at the PTU Delivery Point and is then injected into the PBU reservoir for enhanced liquids recovery, the Transportation Costs will accrue and deductions made for Fuel / Losses, but will not be

paid by the State until State RIK Gas is delivered from the PBU reservoir to the State for sale or other use.

ii. For State RIK Gas produced prior to Project Start-up of a Major Gas Sale, the State will not be responsible for Field Costs for State RIK Gas that is delivered to the State at the PTU Delivery Point, regardless of whether the State RIK Gas is injected into the PBU reservoir. For Point Thomson gas produced after Project Start-up of a Major Gas Sale, the State will be responsible for Field Costs to the extent provided under the Point Thomson leases and other applicable agreements.

(b) Unregulated PTU / PBU Gas Pipeline.

i. If costs for the Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, including the PTU / PBU Gas Pipeline, were entitled to and received deductions and credits under AS 43.55, with substantially the same credits / benefits as exists under AS 43.55 on the Effective Date, then the State will not be responsible for Transportation Costs or Fuel / Losses associated with delivery of State RIK Gas to the State at the PBU Delivery Point prior to Project Start-up of a Major Gas Sale.

ii. If costs for the Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, including the PTU / PBU Gas Pipeline, were not entitled to or did not receive deductions and

credits under AS 43.55, with substantially the same credits/benefits as exists under AS 43.55 on the Effective Date, then the State will be responsible for Transportation Costs and Fuel / Losses associated with the delivery of State RIK Gas to the State at the PBU Delivery Point.

1. If State RIK Gas is not injected into the PBU reservoir, payment of Transportation Costs and deductions for Fuel / Losses will be due at the time of delivery of State RIK Gas to the State at the PBU Delivery Point.

2. If State RIK Gas is injected into the PBU reservoir, payment of Transportation Costs and deductions for Fuel / Losses will be due from the State when State RIK Gas is delivered from the PBU reservoir to the State for sale or other use.

iii. For State RIK Gas produced prior to Project Start-up of a Major Gas Sale, the State will not be responsible for Field Costs for State RIK Gas that is delivered to the State at the PTU Delivery Point, regardless of whether the State RIK Gas is injected into the PBU reservoir. For Point Thomson gas produced after Project Start-Up of a Major Gas Sale, the State will be responsible for Field Costs to the extent provided under the Point Thomson leases and other applicable agreements.

4.16.2.4 State RIK Gas Allocation Principles.

(a) For State RIK Gas Injected into the PBU reservoir:

i. Each WIO is responsible for delivery to the State and the State will take deliveries of State RIK Gas proportionately from each WIO.

ii. State RIK Gas will be subject to gas balancing agreement procedures that will be developed between the affected parties, including the State.

iii. State RIK Gas injected into the PBU reservoir will be available for delivery to the State from the PBU reservoir at any then-existing PBU facilities, including any facilities installed for a Major Gas Sale, at a location designated by PBU owners.

iv. Delivery of State RIK Gas to the State will not be unreasonably withheld.

v. Deliveries of State RIK Gas from the PBU reservoir may not unreasonably interfere with ongoing PBU operations.

vi. If delivery from the PBU reservoir is constrained at PBU delivery point(s), gas availability will be allocated 75% to PBU gas and 25% to Point Thomson gas. The allocation to Point Thomson gas will remain fixed even if other gas is injected into the PBU reservoir from another reservoir.

(b) Specific Principles Before Project Start-up a Major Gas Sale. If the State is taking delivery of State RIK Gas for sale or other use for delivery into a facility or pipeline connected to the PTU / PBU Gas Pipeline, the State will preferentially take delivery of State RIK Gas that has not been injected into the PBU Reservoir; otherwise, subject to constraints listed above, the State may take delivery of State RIK Gas that has been injected into the PBU reservoir.

(c) Specific Principles After Project Start-up of a Major Gas Sale.

i. For gas produced from Point Thomson after Project Start-up of a Major Gas Sale, the State from time to time may elect to take its royalty share in value or in kind pursuant to the Point Thomson leases, other applicable agreements and applicable State law.

ii. For State RIK Gas that was injected into the PBU reservoir prior to Project Start-up of a Major Gas Sale, the State may take delivery of its State RIK Gas from the PBU reservoir, or may from time to time, by notice consistent with the notice requirements of the Point Thomson leases and other applicable agreements, elect to take payment in-value as follows:

1. Whether the State receives gas or a payment for its share of State RIK Gas produced from the PBU reservoir, the share will be measured in proportion to gas offtake allocated to Point Thomson gas injected into the PBU reservoir, adjusted

for any withdrawal of State RIK Gas and WIO Point Thomson gas prior to Project Start-up of a Major Gas Sale.

2. Whether the State receives gas or a payment for its share of State RIK Gas produced from the PBU reservoir, there will be no deduction for Field Costs, but the deductions for Transportation Costs and Fuel / Losses, as set forth in Paragraph 4.16.2.3, will apply.

3. If the State elects to receive a payment for its share of State RIK Gas that was injected into the PBU reservoir prior to Project Start-up of a Major Gas Sale, payment will be calculated based on the royalty in value basis for Point Thomson gas under the applicable leases, at the time the gas is withdrawn from the PBU reservoir.

5. MISCELLANEOUS PROVISIONS

5.1 Dispute Resolution. The following provisions shall apply to this Agreement:

5.1.1 Until the date set forth in Paragraph 5.1.3.1, with respect to any dispute regarding the Parties' rights and obligations under this Agreement, including any matter that otherwise would be subject to DNR standard administrative processes as set forth in 11 AAC 02.010-02.900, a Party may file an action in the Superior Court of the State of Alaska as set forth in Paragraph 5.5, except for matters set forth in Paragraph 5.1.2 or an Abandonment dispute via arbitration under Paragraph 4.2.3.

Thereafter, DNR standard administrative processes as set forth in 11 AAC 02.010-02.900 shall apply to any dispute regarding the Parties' rights and obligations under this Agreement as provided under the PTUA and applicable State law. Within the application of DNR's administrative processes the Parties do not waive any rights under applicable State law.

5.1.2 Decisions Subject to DNR Standard Administrative Processes.

(a) The following matters shall be subject to DNR standard administrative processes as set forth in 11 AAC 02.010-02.900, including the right of appeal to the Commissioner, the right of appeal to the Superior Court of the State of Alaska, and the right of appeal to the Supreme Court of the State of Alaska.

i. Decisions regarding a technical PA application under Paragraph 4.4.3.

ii. Decisions regarding inclusion of acreage in Area B and Area D in a PA and retention of that acreage in the Point Thomson Unit that are specifically governed by or subject to the PTUA including applicable State law as provided in Paragraphs 4.5.3, 4.5.4, and 4.5.8.

iii. Decisions related to providing PA documentation and tract allocations as provided in Paragraph 4.4.6.

(b) The following matters shall be subject to DNR standard administrative processes as set forth in 11 AAC 02.010-02.900, including the right of

appeal to the Commissioner, but otherwise are Without Appeal, with no right of appeal to the Superior Court of the State of Alaska or to the Supreme Court of the State of Alaska. Any DNR decision that is Without Appeal shall not have any precedential effect in any other matter, case, or dispute.

i. Decisions regarding the Brookian POD as provided in Paragraph 4.7.

ii. Decisions associated with an alternative POD as provided in Paragraph 4.5.2.2.

iii. Decisions associated with a royalty application as provided in Paragraph 4.8.2.

iv. Decisions associated with a Plan of Operations for leases as provided in Paragraph 4.5.2.3.

5.1.3 The Parties agree that this Agreement is a contract between the Parties. Subject to Paragraph 5.1.3.2, DNR standard administrative processes as set forth in 11 AAC 02.010-02.900 shall include the right of any WIO to appeal a DNR decision or other action to the Superior Court of the State of Alaska, and the right to appeal any judgment of the Superior Court to the Supreme Court of the State of Alaska. Application of DNR standard administrative processes does not provide any right or basis for the State to alter the terms of this Agreement. DNR discretion and the authority to take action or make a decision regarding Point Thomson may only be

exercised by DNR in a manner that, consistent with Paragraph 5.7, does not conflict with the terms of this Agreement.

5.1.3.1 The date for application of DNR standard administrative processes as set forth in 11 AAC 02.010-02.900 and as provided in Paragraph 5.1.1 shall be the later of the following:

(1) year-end 2019, if IPS Project Start-up occurs or a Major Gas Sale is Sanctioned before year-end 2019;

(2) the date of IPS Project Start-up, if the date of IPS Project Start-up occurs after year-end 2019 due to force majeure under Paragraph 4.14; however, not later than year-end 2024, which date is fixed and not subject to adjustment even if IPS Project Start-up has not occurred by year-end 2024.

5.1.3.2 Paragraph 5.1.1 does not apply to DNR decisions referenced in Paragraph 5.1.2(b).

5.1.4 Any Party may dispute whether a specified event has occurred that pursuant to the terms of this Agreement would result in termination of the Point Thomson Unit Without Appeal or release of acreage Without Appeal under Paragraphs 4.2.2, 4.5.2.1, 4.5.3, or 4.5.4, with the dispute handled in accordance with Paragraph 5.1. In the event of such dispute, termination of the Point Thomson Unit Without Appeal or the release of acreage Without Appeal shall not be required until there has been a final judicial determination as to the occurrence of the specified event, or upon an Abandonment determination via arbitration under Paragraph 4.2.3.

This Paragraph 5.1.4 does not apply to DNR decisions referenced in Paragraph 5.1.2(b).

5.1.5 Any dispute that would be subject to the terms of the PTUA shall be determined in accordance with the PTUA including applicable State law.

5.2 No Admission. This Agreement does not constitute and shall not be deemed to be an admission by any Party about the merits, validity, or accuracy of any of the allegations, claims, or defenses of any Party.

5.3 Entire Agreement. This Agreement, including all exhibits attached hereto or referenced herein (all of which are hereby incorporated herein by this reference), represents the complete agreement of the Parties. This Agreement may not be modified, amended, or changed except by written instrument signed by each Party.

5.4 Term of Agreement. Unless earlier terminated in accordance with the provisions hereof, this Agreement shall remain in full force and effect until all obligations have been performed and all rights satisfied.

5.5 Enforcement. No Party shall contest: (a) the validity of this Agreement; (b) subject to Paragraph 5.1, the jurisdiction of the Superior Court of the State of Alaska to enforce this Agreement and its terms or the right of any Party to file an action in the Superior Court of the State of Alaska for enforcement of any of the terms of this Agreement or to enforce an arbitration decision; or (c) the authority of DNR to issue decisions as provided for in Paragraphs 5.1.1, 5.1.2, and 5.1.3.

5.6 Waiver. The failure by any Party at any time to require performance by any other Party or to claim a breach of any provision of this Agreement shall not be construed as affecting any subsequent breach or the right to require performance or to claim a breach with respect thereto.

5.7 Further Assurances. In proceedings before the Alaska Oil and Gas Conservation Commission regarding approvals related to the IPS Project, a Point Thomson Expansion Project, or a Point Thomson project related to a Major Gas Sale, the DNR agrees it will not oppose any such application submitted that is consistent with the terms of this Agreement and applicable State law.

5.8 Validity. The Commissioner has determined that entry into this Agreement and the individual terms and conditions set forth herein are necessary or advisable to protect the public interest, including a determination that the taking in kind of royalty as provided in Paragraph 4.16.2 will be in the best interests of the State. If any provision of this Agreement shall be held to be invalid or unenforceable, such provisions shall not affect in any respect the validity or enforceability of the remainder of this Agreement unless the invalidity materially affects the ability of any Party to perform as contemplated hereunder.

5.9 Order of Precedence. While the exhibits are an integral part of this Agreement, in the event any exhibit conflicts with a provision in the body of this Agreement, the provision in the body of this Agreement shall control, unless that provision of the exhibit expressly states that it supersedes a specifically identified section in the body of

this Agreement, in which case the specifically identified section shall be superseded only with respect to the specific provision of the exhibit.

5.10 Effect of Headings. The headings and subheadings of the sections and paragraphs of this Agreement are inserted for convenience of reference only and shall not control or affect the meaning or construction of any of the terms, covenants, and conditions of this Agreement in any manner.

5.11 Construction. The Parties agree that this Agreement was fully negotiated by the Parties and, therefore, no provision of this Agreement shall be interpreted against any Party because that Party or its legal representative drafted the provision.

5.12 Counterparts and Facsimile Signature. This Agreement may be executed in counterparts and each shall be deemed an original. This Agreement may also be executed by facsimile signature.

5.13 Governing Law. This Agreement shall be governed in all respects by the laws of the State of Alaska without regard to its choice of law or conflict of law provisions.

5.14 Venue. The Parties agree that any action arising out of or relating to this Agreement shall be brought only in a court of competent jurisdiction in the State of Alaska, with the understanding that the State of Alaska does not waive any right to object to federal court jurisdiction, including its rights under the 11th Amendment of the United States Constitution, nor does the State of Alaska agree to waive sovereign immunity.

5.15 Authority to Sign. Each undersigned representative of a Party to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind such Party to this Agreement.

AGREED, UNDERSTOOD, AND CONSENTED TO:

STATE OF ALASKA

ATTORNEY GENERAL
STATE OF ALASKA

Date _____ _____
Michael C. Geraghty

COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES
STATE OF ALASKA

Date _____ _____
Daniel S. Sullivan

AGREED, UNDERSTOOD, AND CONSENTED TO:

STATE OF ALASKA

ATTORNEY GENERAL
STATE OF ALASKA

Date 3.28.12

Michael C. Geraghty

COMMISSIONER OF DEPARTMENT OF NATURAL RESOURCES
STATE OF ALASKA

Date 3/29/12

Daniel S. Sullivan

OWNER GROUP

EXXON MOBIL CORPORATION,
Unit Operator and Working Interest Owner

Date _____ _____
Randy L. Broiles

EXXONMOBIL OIL CORPORATION

Date _____ _____
Randy L. Broiles

BP EXPLORATION (ALASKA) INC.

Date _____ _____
John C. Minge

EXXON MOBIL CORPORATION,
as successor in interest to
CHEVRON U.S.A., INC.

Date _____ _____
Randy L. Broiles

CONOCOPHILLIPS ALASKA, INC.

Date _____ _____
Trond-Erik Johansen

LEEDE OPERATING COMPANY, L.L.C.

Date _____ _____
John G. Leede, Manager

OWNER GROUP

EXXON MOBIL CORPORATION,
Unit Operator and Working Interest Owner

Date 29 MAR 12

Randy L. Broiles

EXXONMOBIL OIL CORPORATION

Date 29 MAR 12

Randy L. Broiles

BP EXPLORATION (ALASKA) INC.

Date _____

John C. Minge

EXXON MOBIL CORPORATION,
as successor in interest to
CHEVRON U.S.A., INC.

Date 29 MAR 12

Randy L. Broiles

CONOCOPHILLIPS ALASKA, INC.

Date _____

Trond-Erik Johansen

LEEDE OPERATING COMPANY, L.L.C.

Date _____

John G. Leede, Manager

OWNER GROUP

EXXON MOBIL CORPORATION,
Unit Operator and Working Interest Owner

Date _____

_____
Randy L. Broiles

EXXONMOBIL OIL CORPORATION

Date _____

_____
Randy L. Broiles

BP EXPLORATION (ALASKA) INC.

Date March 29, 2012

_____
John C. Minge

EXXON MOBIL CORPORATION,
as successor in interest to
CHEVRON U.S.A., INC.

Date _____

_____
Randy L. Broiles

CONOCOPHILLIPS ALASKA, INC.

Date _____

_____
Trond-Erik Johansen

LEEDE OPERATING COMPANY, L.L.C.

Date _____

_____
John G. Leede, Manager

OWNER GROUP

EXXON MOBIL CORPORATION,
Unit Operator and Working Interest Owner

Date _____ _____
Randy L. Broiles

EXXONMOBIL OIL CORPORATION

Date _____ _____
Randy L. Broiles

BP EXPLORATION (ALASKA) INC.

Date _____ _____
John C. Minge

EXXON MOBIL CORPORATION,
as successor in interest to
CHEVRON U.S.A., INC.

Date _____ _____
Randy L. Broiles

CONOCOPHILLIPS ALASKA, INC.

Date 29 March 2012 _____
Trond-Erik Johansen

LEEDE OPERATING COMPANY, L.L.C.

Date _____ _____
John G. Leede, Manager

OWNER GROUP

EXXON MOBIL CORPORATION,
Unit Operator and Working Interest Owner

Date _____ _____
Randy L. Broiles

EXXONMOBIL OIL CORPORATION

Date _____ _____
Randy L. Broiles

BP EXPLORATION (ALASKA) INC.

Date _____ _____
John C. Minge

EXXON MOBIL CORPORATION,
as successor in interest to
CHEVRON U.S.A., INC.

Date _____ _____
Randy L. Broiles

CONOCOPHILLIPS ALASKA, INC.

Date _____ _____
Trond-Erik Johansen

LEEDE OPERATING COMPANY, L.L.C.

Date March 29, 2012 John G. Leede
John G. Leede, Manager

EXHIBIT A
Point Thomson Unit

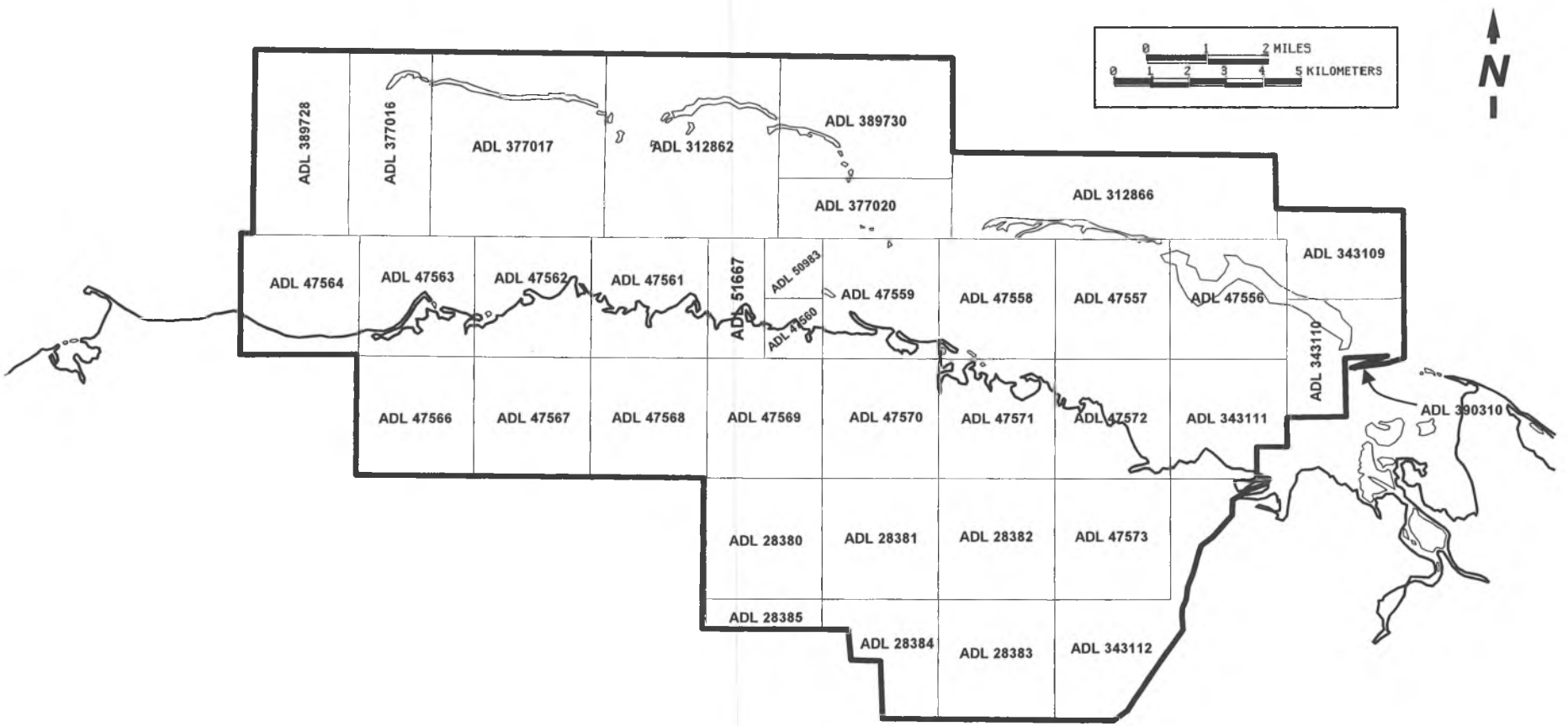


Exhibit B
Point Thomson Unit

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description
1	1	T10N-R24E, UM Secs. 29, 30, 31, and 32	2,523.00	47557	12½/None	Mobil BP	None		Mobil BP	50.0000000% 50.0000000%	All All
2	2	T10N-R23E, UM Secs. 25, 26, 35, and 36	2,560.00	47558	12½/None	Mobil BP ExxonMobil	None		Mobil BP ExxonMobil	50.0000000% 25.0000000% 50.0000000% 25.0000000% 50.0000000%	Secs. 25 and 36 Secs. 26 and 35 Secs. 25 and 36 Secs. 26 and 35 Secs. 26 and 35
3	3	T10N-R23E, UM Secs. 27, 28, 33, and 34	2,560.00	47559	12½/None	ExxonMobil	None		ExxonMobil	100.0000000%	All
4	4	T10N-R23E, UM Sec. 32	640.00	47560	12½/None	ExxonMobil COP Leede Pacific Donnelly, G. Hughes Chap-KDL, Ltd. Leede and Pine McConnell Searls, Jr. Donnelly, R. Holbrook O'Neill Donnelly, R.R. Peery, J.W.	Subject to Simasko Farm Out provisions and subsequent Assignment of interest to ExxonMobil		ExxonMobil COP Leede Pacific Donnelly, G. Hughes Chap-KDL, Ltd. Leede and Pine McConnell Searls, Jr. Donnelly, R. Holbrook O'Neill Donnelly, R.R. Peery, J.W.	50.0000000% 20.1951200% 10.0975600% 5.0000000% 0.5048780% 3.6000000% 2.2719500% 2.0195150% 1.5146350% 1.1359750% 0.7573180% 0.7573180% 0.5048780% 0.5048780% 1.1359750%	All All All All All All All All All All All All All All All
5	5	T10N-R22E, UM Secs. 25, 26, 35, and 36	2,560.00	47561	12½/None	ExxonMobil Chevron BP	None		ExxonMobil Chevron BP	75.0000000% 11.0000000% 14.0000000%	All All All
6	6	T10N-R22E, UM Secs. 27, 28, 33, and 34	2,560.00	47562	12½/None	ExxonMobil Devon Mobil Forest Trans World Two Four Six SNG Sunlite	Robert Meek Sabine Royalty Marvin D. Mangus Janet D. Fackler Nadene Pettijohn Donnell O. Wells Hilltop Community Church Peter J. Farrelly Little Sisters of the Poor	0.50000% 0.08313% 0.02771% 0.02771% 0.02771% 0.00354% 0.00236% 0.00236% 0.00236%	ExxonMobil Devon Mobil Forest Trans World Two Four Six SNG Sunlite	71.5315773% 10.0000000% 9.5000000% 5.2473820% 1.3289431% 1.3289431% 0.5315773% 0.5315773%	All All All All All All All All
7	7	T10N-R22E, UM Secs. 29, 30, 31, and 32	2,523.00	47563	12½/None	ExxonMobil Mobil BP	None		ExxonMobil Mobil BP	50.0000000% 25.0000000% 25.0000000%	All All All

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description
8	8	T10N-R21E, UM Secs. 25, 26, 35, and 36	2,560.00	47564	12½/None	ExxonMobil Mobil BP	None		ExxonMobil Mobil BP	50.0000000% 25.0000000% 25.0000000%	All All All
9	9	Contracted out of PTU									
10	10	T9N-R22E, UM Secs. 5, 6, 7, and 8	2,533.00	47566	12½/None	ExxonMobil Mobil BP	None		ExxonMobil Mobil BP	50.0000000% 25.0000000% 25.0000000%	All All All
11	11	T9N-R22E, UM Secs. 3, 4, 9, and 10	2,560.00	47567	12½/None	ExxonMobil Devon Mobil Forest Trans World Two Four Six SNG Sunlite	Robert Meek Sabine Royalty Marvin D. Mangus Janet D. Fackler Nadene Pettijohn Donnell O. Wells Hilltop Community Church Peter J. Farrelly Little Sisters of the Poor Subject to Simasko Farm Out Agreement providing for assignment to ExxonMobil	0.50000% 0.08313% 0.02771% 0.02771% 0.02771% 0.00354% 0.00236% 0.00236% 0.00236%	ExxonMobil Devon Mobil Forest Trans World Two Four Six SNG Sunlite	71.5315773% 10.0000000% 9.5000000% 5.2473820% 1.3289431% 1.3289431% 0.5315773% 0.5315773%	All All All All All All All All
12	12	T9N-R22E, UM Secs. 1, 2, 11, and 12	2,560.00	47568	12½/None	Chevron BP ExxonMobil	ASRC - Secs 1 and 2 ASRC - Secs 11 and 12	0.50000% 0.25000%	Chevron BP ExxonMobil	44.0000000% 22.0000000% 56.0000000% 28.0000000% 50.0000000%	Secs. 1 and 2 Secs. 11 and 12 Secs. 1 and 2 Secs. 11 and 12 Secs, 11 and 12
13	13	T9N-R23E, UM Secs. 5, 6, 7, and 8	2,533.00	47569	12½/None	Chevron BP Mobil ExxonMobil	ASRC - Secs 5, 6 and 8 ASRC - Sec. 7	0.25000% 0.08333%	Chevron BP Mobil ExxonMobil	22.0000000% 7.3333300% 28.0000000% 26.0000000% 16.6666700% 50.0000000%	Secs. 5, 6, and 8 Sec. 7 Secs. 5, 6, and 8 Sec. 7 Sec. 7 Secs. 5, 6, 7, and 8
14	14	T9N-R23E, UM Secs. 3, 4, 9, and 10	2,560.00	47570	12½/None	Chevron BP ExxonMobil	ASRC	0.25000%	Chevron BP ExxonMobil	22.0000000% 28.0000000% 50.0000000%	All All All
15	15	T9N-R23E, UM Secs. 1, 2, 11, and 12	2,560.00	47571	12½/None	Chevron BP	ASRC	0.50000%	Chevron BP	44.0000000% 56.0000000%	All All
16	16	T9N-R24E, UM Secs. 5, 6, 7, and 8	2,533.00	47572	12½/None	Chevron BP Mobil	ASRC - Secs 5, and 8 ASRC - Secs. 6 and 7	0.20000% 0.50000%	Chevron BP Mobil	17.6000000% 44.0000000% 52.4000000% 56.0000000% 30.0000000%	Sec. 5 and 8 Sec. 6 and 7 Sec. 5 and 8 Sec. 6 and 7 Sec. 5 and 8

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description
17	17	T10N-R23E, UM Sec. 29	640.00	50983	12½/None	ExxonMobil BP	Subject to a 1/3 net profits interest to: Leede; Leede and Pine; Phillips; BP; ExxonMobil; Chevron; Donnelly; Chaparral; Searls, Jr.; Hughes; Pacific; Searls, Jeanne; Searls, J.P.; Neidert, L.L.S.; Collier, S.J.S.		ExxonMobil BP	66.6700000% 33.3300000%	All All
18	18	T10N-R23E, UM Secs. 30 and 31	1,243.00	51667	12½/None	ExxonMobil Mobil BP Chevron	Conoco Phillips; Leede; Leede and Pine; Donnelly; Hughes; Chaparral; Searls, Jr.; Peery; Pacific; Searls, Jeanne; Searls, J.P.; Neidert, L.L.S.; Collier, S.J.S. ASRC	6.25000% 0.083328%	ExxonMobil Mobil BP Chevron	50.0000000% 16.6670000% 25.9997400% 7.3332600%	All All All All
19	19	T9N-R23E, UM Secs. 17, 18, 19, and 20	2,544.00	28380	12½/None	Mobil Chevron ExxonMobil BP Woodbine	None		Mobil Chevron ExxonMobil BP Woodbine	54.0464100% 50.0000000% 33.3333350% 14.6666700% 3.2703880% 12.6742800% 51.9999950% 29.9997220% 50.0000000% 0.0092000%	Sec. 19 Sec. 20 Sec. 17 and 18 Sec. 17 and 18 Sec. 19 Sec. 19 Sec. 17 and 18 Sec. 19 Sec. 20 Sec. 19
20	20	T9N-R23E, UM Secs. 15, 16, 21, and 22	2,560.00	28381	12½/None	Chevron BP ExxonMobil	None		Chevron BP ExxonMobil	22.0000000% 28.0000000% 50.0000000%	All All All
21	21	T9N-R23E, UM Secs. 13, 14, 23, and 24	2,560.00	28382	12½/None	ExxonMobil Chevron BP	None		ExxonMobil Chevron BP	50.0000000% 22.0000000% 28.0000000%	All All All
22	22	T9N-R23E, UM Secs. 25, 26, 35, and 36	2,560.00	28383	12½/None	ExxonMobil Chevron BP	None		ExxonMobil Chevron BP	50.0000000% 22.0000000% 28.0000000%	All All All
23	23	T9N-R23E, UM Sec. 27, Sec. 28: N/2 and SE/4, Sec. 34	1,760.00	28384	12½/None	Mobil ExxonMobil Chevron BP Woodbine	None		Mobil ExxonMobil Chevron BP Woodbine	54.0464100% 12.6742800% 3.2703880% 29.9997220% 0.0092000%	All All All All All
24	24	T9N-R23E, UM Sec. 29: N/2 Sec. 30: N/2	637.00	28385	12½/None	Mobil ExxonMobil Chevron BP Woodbine	None		Mobil ExxonMobil Chevron BP Woodbine	54.0464100% 12.6742800% 3.2703880% 29.9997220% 0.0092000%	All All All All All

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description
25	25	T10N-R24E, UM Secs. 27, 28, 33, and 34	2,560.00	47556	12½/None	ExxonMobil	None		ExxonMobil	100.0000000%	All
26	26	T9N-R24E, UM Secs. 17, 18, 19, and 20	2,544.00	47573	12½/None	Mobil BP	None		Mobil BP	50.0000000% 50.0000000%	All All
27	27	T10N-R22&23E, UM TRACT C30-110 (BF-110): A PORTION OF BLOCKS 753 AND 797 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LOCATED IN THE S1/2 OF BLOCK 753, BEING A PORTION OF BLOCK 753 ON THE AFORESAID LEASING AND NOMINATION MAP, CONTAINING 1152.00HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R22E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R23E; U.M., AK., IN BLOCK 797 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1133.95 HECTARES.	5,648.68	312862	Sliding Scale 20-65/None	ExxonMobil	None		ExxonMobil	100.0000000%	All
28	28	T10N-R23&24E, UM TRACT C30-114 (BF-114): A PORTION OF BLOCKS 799 AND 800 AS SHOWN ONTHE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R23E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R24E; U.M., AK., IN BLOCK 799 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1081.11 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, AND 22, T10N, R24E; U.M., AK., AND LYING WESTERLY OF 146 DEGREES 00'00" WEST LONGITUDE IN BLOCK 800 LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79,CONTAINING 916.21 HECTARES.	4,935.47	312866	20/52.352	ExxonMobil	None		ExxonMobil	100.0000000%	All
29	29	T10N-R24E, UM Sec 22: S/2 All lying easterly of 146°00'00" west Sec. 23: S/2; Sec. 24: S/2; Secs. 25 and 26	1,970.16	343109	12½/40	ExxonMobil BP Chevron	None		ExxonMobil BP Chevron	50.0000000% 28.0000000% 22.0000000%	All All All
30	30	T10N-R24E, UM Secs. 35 and 36 T9N-R24E, UM Sec. 2	1,920.00	343110	12½/40	Mobil BP	None		Mobil BP	50.0000000% 50.0000000%	All All
31	31	T9N-R24E, UM Secs. 3, 4, and 9 Sec. 10: N/2 and SW/4	2,400.00	343111	12½/40	BP Chevron	ASRC	0.50000%	BP Chevron	56.0000000% 44.0000000%	All All

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description
32	32	T9N-R24E, UM Secs. 30 and 31 All, excluding ANWR, of Secs. 15,16,21,28,29,and 32	3,446.00	343112	12½/40	Chevron BP	None		Chevron BP	44.0000000% 56.0000000%	
34	34	T10N-R21E. UM T10N-R22E. UM That portion of Tract 65-016, "TRACT 65-016 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 751, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T. 10N., R. 21E., UMIAT MERIDIAN, ALASKA AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 795 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1167.58 HECTARES." lying within T. 10 N., R. 22 E., U.M., Alaska, and the E1/2E1/2 of Sections 1, 12, 13 and 24, T. 10 N., R. 21 E., U.M., Alaska.	2,779.16	377016	20.0 / None	BP COP	None		BP COP	50.0000000% 50.0000000%	All
35	35	T10N-R22E. UM T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA TRACT 65-017 IS A PORTION OF OCS BLOCKS 752 AND 796 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS: TRACT 65-017 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 752, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 796 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1153.17 HECTARES. THIS TRACT CONTAINS 5696.18 ACRES MORE OR LESS (2305.17 HECTARES MORE OR LESS).	5,696.18	377017	20.0 / None	ExxonMobil BP Chevron	None		ExxonMobil BP Chevron	66.6667000% 18.6666480% 14.6666520%	All
33	37	T10N-R23E. UM That portion of Tract 65-020, "TRACT 65-020 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 754 OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/79, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 23E., UMIAT MERIDIAN, ALASKA IN BLOCK 798 (BEING IN THE NORTHERLY PORTION), LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1109.94 HECTARES." lying southerly of Sections 14, 15, 16 and 17, T. 10 N., R. 23 E., U.M., Alaska in OCS Block 798.	1,909.74	377020	20.0 / None	ExxonMobil BP Chevron	None		ExxonMobil BP Chevron	66.6667000% 18.6666480% 14.6666520%	All

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description
36	46	T10N-R21E. UM That portion of Tract 65-016, "TRACT 65-016 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 751, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T. 10N., R. 21E., UMIAT MERIDIAN, ALASKA AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 795 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1167.58 HECTARES." lying within T. 10 N., R. 21 E., U.M., Alaska, excluding the E1/2E1/2 of Sections 1, 12, 13 and 24.	2,952.62	389728	16.6667 / None	BP COP	None		BP COP	50.0000000% 50.0000000%	All
37	47	T10N-R23E. UM That portion of Tract 65-020, "TRACT 65-020 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 754 OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/79, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 23E., UMIAT MERIDIAN, ALASKA IN BLOCK 798 (BEING IN THE NORTHERLY PORTION), LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1109.94 HECTARES." lying in the S1/2 of OCS Block 754, and lying northerly of Sections 20, 21, 22 and 23, T. 10 N., R. 23 E., U.M., Alaska in OCS Block 798.	3,684.31	389730	20.0 / None	ExxonMobil BP Chevron	None		ExxonMobil BP Chevron	66.6667000% 18.6666480% 14.6666520%	All
38	48	T9N-R24E. UM Sec. 1, ALL TIDE AND SUBMERGED LAND, EXCLUDING STATE OF ALASKA OIL AND GAS LEASE ADL 372256 AND THE ARCTIC NATIONAL WILDLIFE REFUGE, 15.80 ACRES	15.80	390310	20.0 / None	ExxonMobil BP Chevron COP	None		ExxonMobil BP Chevron COP	37.2750000% 32.3260000% 25.3990000% 5.0000000%	All
		Total	**93,291.12**								

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description

Notes

BP	means	BP Exploration (Alaska) Inc.
Chap-KDL, Ltd.	"	Chap-KDL, Ltd.
Chevron	"	Chevron USA Inc.
COP	"	ConocoPhillips Alaska Inc.
Devon	"	Devon Energy Corporation
Donnelly, R.	"	Richard Donnelly
Donnelly, R.R.	"	The Robert R. Donnelly 1991 Irrevocable Trust
Donnelly, G.	"	The George A. Donnelly III 1991 Irrevocable Trust
ExxonMobil	"	Exxon Mobil Corporation
Forest	"	Forest Oil Corporation
Holbrook		Mary Lou Holbrook (The Eastland Oil Company)
Hughes	"	Kingdon R. Hughes Family Partnership
Leede	"	Edward H. Leede
Leede and Pine	"	Leede and Pine, a Partnership
McConnell		Peggy D. McConnell (Eastland Property and Minerals)
Mobil	"	ExxonMobil Oil Corporation
O'Neill	"	Jan Donnelly O'Neill, Irrevocable
Pacific	"	Pacific Lighting Gas Development Company
Peery, J. W.	"	Estate of John W. Peery (Susan Jean Searls Collier, Linda Lou Searls Neidert, Jean Alice Searls and John Peery Searls)
SNG	"	Samson Resources Company (SNG Prod. Co.)
Searls, Jr.	"	Robert Searls, Jr. Testamentary Trust (Collier / Searls)
Sunlite	"	Sunlite International Inc.
Trans World	"	Trans World Oil and Gas Ltd.
Two Four Six	"	Two Four Six Exploration, Inc. (United Oil & Minerals Limited Parnership)
Woodbine	"	Woodbine Petroleum, Inc. (a subsidiary of Sunlite International Inc.)

Exhibit C
Point Thomson Unit

Area A - Initial Participating Area

Tract No.	ADL No.	Description	Acres	Initial PA Tract Allocation	Area A + B Tract Allocation	Unit Tract Allocation
1	47557	T10N-R24E, UM Sec. 31, All, 623 acres	623.00			
2	47558	T10N-R23E, UM Sec. 25, All, 640 acres Sec. 26, All, 640 acres Sec. 35, All, 640 acres Sec. 36, All, 640 acres	2,560.00			
3	47559	T10N-R23E, UM Ses. 27, All, 640 acres Sec. 28, All, 640 acres Sec. 33, All, 640 acres Sec. 34, All, 640 acres	2,560.00			
4	47560	T10N-R23E, UM Sec. 32, All, 640 acres	640.00			
14	47570	T9N-R23E, UM Ses. 3, All, 640 acres Sec. 4, All, 640 acres Sec. 9, All, 640 acres Sec. 10, All, 640 acres	2,560.00			
15	47571	T9N-R23E, UM Sec. 1, All, 640 acres Sec. 2, All, 640 acres Sec. 11, All, 640 acres Sec. 12, All, 640 acres	2,560.00			
16	47572	T9N-R24E, UM Sec. 6, All, 625 acres Sec. 7, All, 628 acres	1,253.00			
17	50983	T10N-R23E, UM Sec. 29, All, 640 acres	640.00			
33 (37)	377020	T10N-R23E. UM That portion of Tract 65-020, "TRACT 65-020 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 754 OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/79, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 23E., UMIAT MERIDIAN, ALASKA IN BLOCK 798 (BEING IN THE NORTHERLY PORTION), LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1109.94 HECTARES." lying southerly of Sections 14, 15, 16 and 17, T. 10 N., R. 23 E., U.M., Alaska in OCS Block 798.	1,909.74			
		Area A Acreage	**15,305.74**			

Exhibit C

Area B - West Pad Area

Tract No.	ADL No.	Description	Acres	Area A + B Tract Allocation	Unit Tract Allocation
5	47561	T10N-R22E, UM Sec. 25, All, 640 acres Sec. 26, All, 640 acres Sec. 35, All, 640 acres Sec. 36, All, 640 acres	2,560.00		
18	51667	T10N-R23E, UM Sec. 30, All, 620 acres Sec. 31, All, 623 acres	1,243.00		
27	312862	T10N-R22&23E. UM TRACT C30-110 (BF-110): A PORTION OF BLOCKS 753 AND 797 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LOCATED IN THE S1/2 OF BLOCK 753, BEING A PORTION OF BLOCK 753 ON THE AFORESAID LEASING AND NOMINATION MAP, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R22E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R23E; U.M., AK., IN BLOCK 797 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1133.95 HECTARES, LESS AND EXCEPT THE NORTH HALF OF THE AFOREMENTIONED TRACT.	2,824.34		
		Area B Acreage	**6,627.34**		
		Area A + B Acreage	**21,933.08**		

Exhibit C

Area D

Tract No.	ADL No.	Description	Acres	Unit Tract Allocation
1	47557	T10N-R24E, UM Sec. 29, All, 640 acres Sec. 30, All, 620 acres Sec. 32, All, 640 acres	1,900.00	
6	47562	T10N-R22E, UM Sec. 27, All, 640 acres Sec. 28, All, 640 acres Sec. 33, All, 640 acres Sec. 34, All, 640 acres	2,560.00	
11	47567	T9N-R22E, UM Ses. 3, All, 640 acres Sec. 4, All, 640 acres	1,280.00	
12	47568	T9N-R22E, UM Sec. 1, All, 640 acres Sec. 2, All, 640 acres	1,280.00	
13	47569	T9N-R23E, UM Sec. 5, All, 640 acres Sec. 6, All, 625 acres	1,265.00	
16	47572	T9N-R24E, UM Sec. 5, All, 640 acres Sec. 8, All, 640 acres	1,280.00	
20	28381	T9N-R23E, UM Secs. 15 and 16	1,280.00	
21	28382	T9N-R23E, UM Sec. 13, All, 640 acres Sec. 14, All, 640 acres Sec. 23, All, 640 acres Sec. 24, All, 640 acres	2,560.00	
25	47556	T10N-R24E, UM Sec. 28, All, 640 acres Sec. 33, All, 640 acres	1,280.00	
26	47573	T9N-R24E, UM Sec. 17, All, 640 acres Sec. 18, All, 631 acres Sec. 19, All, 633 acres Sec. 20, All, 640 acres	2,544.00	
27	312862	T10N-R22&23E, UM TRACT C30-110 (BF-110): A PORTION OF BLOCKS 753 AND 797 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LOCATED IN THE S1/2 OF BLOCK 753, BEING A PORTION OF BLOCK 753 ON THE AFORESAID LEASING AND NOMINATION MAP, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R22E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R23E; U.M., AK., IN BLOCK 797 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1133.95 HECTARES, LESS AND EXCEPT THE SOUTH HALF OF THE AFOREMENTIONED TRACT.	2,824.34	

Exhibit C

Area D (cont.)

Tract No.	ADL No.	Description	Acres	Unit Tract Allocation
31	343111	T9N-R24E, UM Sec. 3, Protracted, All, 640 acres Sec. 4, Protracted, All, 640 acres Sec. 9, Protracted, All, 640 acres Sec. 10, Protracted, N/2, SW/4, 480 acres	2,400.00	
	ADL 377017(S)			
35	377017	T10N-R22E, UM T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA TRACT 65-017 IS A PORTION OF OCS BLOCKS 752 AND 796 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS: TRACT 65-017 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 752, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 796 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1153.17 HECTARES. THIS TRACT CONTAINS 5696.18 ACRES MORE OR LESS (2305.17 HECTARES MORE OR LESS), LESS AND EXCEPT THE NORTH HALF OF THE AFOREMENTIONED TRACT.	2,848.09	
	ADL 377017(N)			
35	377017	T10N-R22E, UM T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA TRACT 65-017 IS A PORTION OF OCS BLOCKS 752 AND 796 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS: TRACT 65-017 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 752, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 796 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1153.17 HECTARES. THIS TRACT CONTAINS 5696.18 ACRES MORE OR LESS (2305.17 HECTARES MORE OR LESS), LESS AND EXCEPT THE SOUTH HALF OF THE AFOREMENTIONED TRACT.	2,848.09	
		Area D Acreage	**28,149.52**	

Exhibit C

Area E

Tract No.	ADL No.	Description	Acres	Unit Tract Allocation
7	47563	T10N-R22E, UM Sec. 29, All, 640 acres Sec. 30, All, 620 acres Sec. 31, All, 623 acres Sec. 32, All, 640 acres	2,523.00	
8	47564	T10N-R21E, UM Sec. 25, All, 640 acres Sec. 26, All, 640 acres Sec. 35, All, 640 acres Sec. 36, All, 640 acres	2,560.00	
10	47566	T9N-R22E, UM Sec. 5, All, 640 acres Sec. 6, All, 625 acres Sec. 7, All, 628 acres Sec. 8, All, 640 acres	2,533.00	
11	47567	T9N-R22E, UM Sec. 9, All, 640 acres Sec. 10, All, 640 acres	1,280.00	
12	47568	T9N-R22E, UM Sec. 11, All, 640 acres Sec. 12, All, 640 acres	1,280.00	
13	47569	T9N-R23E, UM Sec. 7, All, 628 acres Sec. 8, All, 640 acres	1,268.00	
19	28380	T9N-R23E, UM Sec. 17, All, 640 acres Sec. 18, All, 631 acres Sec. 19, All, 633 acres Sec. 20, All, 640 acres	2,544.00	
20	28381	T9N-R23E, UM Secs. 21 and 22	1,280.00	
22	28383	T9N-R23E, UM Secs. 25, 26, 35, and 36	2,560.00	
23	28384	T9N-R23E, UM Sec. 27, All, 640 acres Sec. 28, N/2 and SE/4, 480 acres Sec. 34, All, 640 acres	1,760.00	
24	28385	T9N-R23E, UM Sec. 29: N/2, 320 acres Sec. 30: N/2, 317 acres	637.00	
28	312866	T10N-R23&24E, UM TRACT C30-114 (BF-114): A PORTION OF BLOCKS 799 AND 800 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R23E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R24E; U.M., AK., IN BLOCK 799 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1081.11 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, AND 22, T10N, R24E; U.M., AK., AND LYING WESTERLY OF 146 DEGREES 00'00" WEST LONGITUDE IN BLOCK 800 LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79,CONTAINING 916.21 HECTARES. LESS AND EXCEPT THOSE LANDS IN SECTIONS 15 AND 22 OF T10N, R24E.	4,215.47	

Exhibit C

Area E (cont.)

Tract No.	ADL No.	Description	Acres	Unit Tract Allocation
30	343110	T9N-R24E, UM Sec. 2, Protracted, All, 640 acres	640.00	
32	343112	T9N-R24E, UM Sec. 15, Protracted, All excluding the Arctic National Wildlife Refuge, 139 acres Sec. 16, Protracted, All excluding the Arctic National Wildlife Refuge, 606 acres Sec. 21, Protracted, All excluding the Arctic National Wildlife Refuge, 304 acres	1,049.00	
34	377016	T10N-R21E, UM T10N-R22E, UM That portion of Tract 65-016, "TRACT 65-016 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 751, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T. 10N., R. 21E., UMIAT MERIDIAN, ALASKA AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 795 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1167.58 HECTARES." lying within T. 10 N., R. 22 E., U.M., Alaska, and the E1/2E1/2 of Sections 1, 12, 13 and 24, T. 10 N., R. 21 E., U.M., Alaska.	2,779.16	
36 (46)	389728	T10N-R21E, UM That portion of Tract 65-016, "TRACT 65-016 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 751, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T. 10N., R. 21E., UMIAT MERIDIAN, ALASKA AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 795 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1167.58 HECTARES." lying within T. 10 N., R. 21 E., U.M., Alaska, excluding the E1/2E1/2 of Sections 1, 12, 13 and 24.	2,952.62	
37 (47)	389730	T10N-R23E, UM That portion of Tract 65-020, "TRACT 65-020 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 754 OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/79, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 23E., UMIAT MERIDIAN, ALASKA IN BLOCK 798 (BEING IN THE NORTHERLY PORTION), LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1109.94 HECTARES." lying in the S1/2 of OCS Block 754, and lying northerly of Sections 20, 21, 22 and 23, T. 10 N., R. 23 E., U.M., Alaska in OCS Block 798.	3,684.31	
38 (48)	390310	T9N-R24E, UM Sec. 1, UNSURVEYED, ALL TIDE AND SUBMERGED LAND, EXCLUDING STATE OF ALASKA OIL AND GAS LEASE ADL 372256 AND THE ARCTIC NATIONAL WILDLIFE REFUGE, 15.80 ACRES	15.80	
		Area E Acreage	**35,561.36**	
		Area A + B + D + E Acreage	**85,643.96**	

Exhibit C

Area F

Tract No.	ADL No.	Description	Acres
25	47556	T10N-R24E, UM Sec. 27, All, 640 acres Sec. 34, All, 640 acres	1,280.00
28	312866	T10N-R23&24E. UM TRACT C30-114 (BF-114): A PORTION OF BLOCKS 799 AND 800 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R23E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R24E; U.M., AK., IN BLOCK 799 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1081.11 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, AND 22, T10N, R24E; U.M., AK., AND LYING WESTERLY OF 146 DEGREES 00'00" WEST LONGITUDE IN BLOCK 800 LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79,CONTAINING 916.21 HECTARES, LIMITED TO those lands in Sections 15 and 22 of T10N, R24E.	720.00
29	343109	T10N-R24E, UM Sec 22: Protracted, S/2 lying easterly of 146°00'00" west longitude, 50.16 acres Sec. 23: Protracted, S/2, 320 acres Sec. 24: Protracted, S/2, 320 acres Sec. 25, Protracted, All, 640 acres Sec. 26, Protracted, All, 640 acres	1,970.16
30	343110	T10N-R24E, UM Sec. 35, Protracted, All, 640 acres Sec. 36, Protracted, All, 640 acres	1,280.00
32	343112	T9N-R24E, UM Sec. 28, Protracted, All excluding the Arctic National Wildlife Refuge, 123 acres Sec. 29, Protracted, All excluding the Arctic National Wildlife Refuge, 636 acres Sec. 30, Protracted, All, 636 acres Sec. 31, Protracted, All, 639 acres Sec. 32, Protracted, All excluding the Arctic National Wildlife Refuge, 363 acres	2,397.00
		Area F Acreage	**7,647.16**

EXHIBIT D
Point Thomson Unit

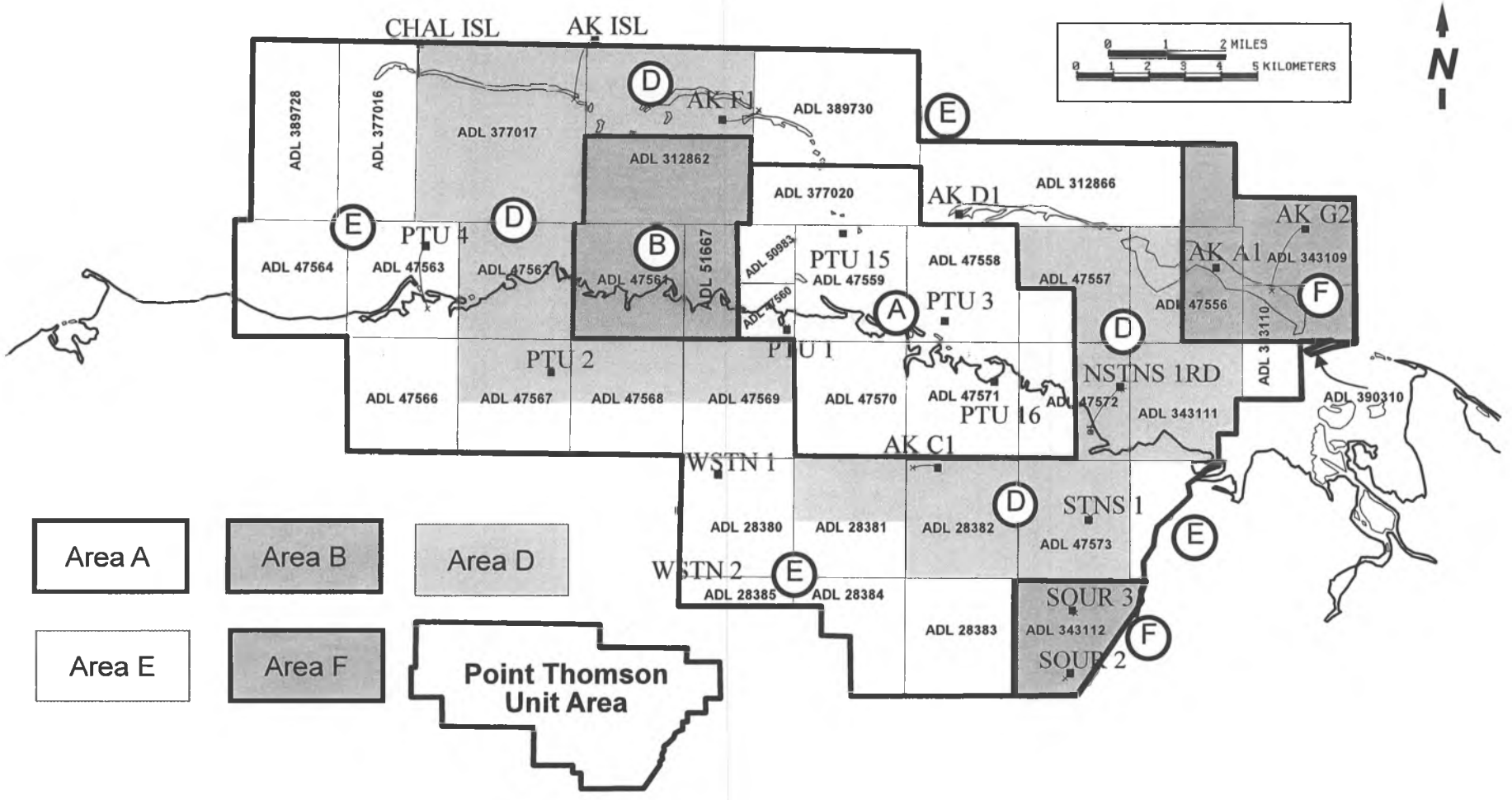
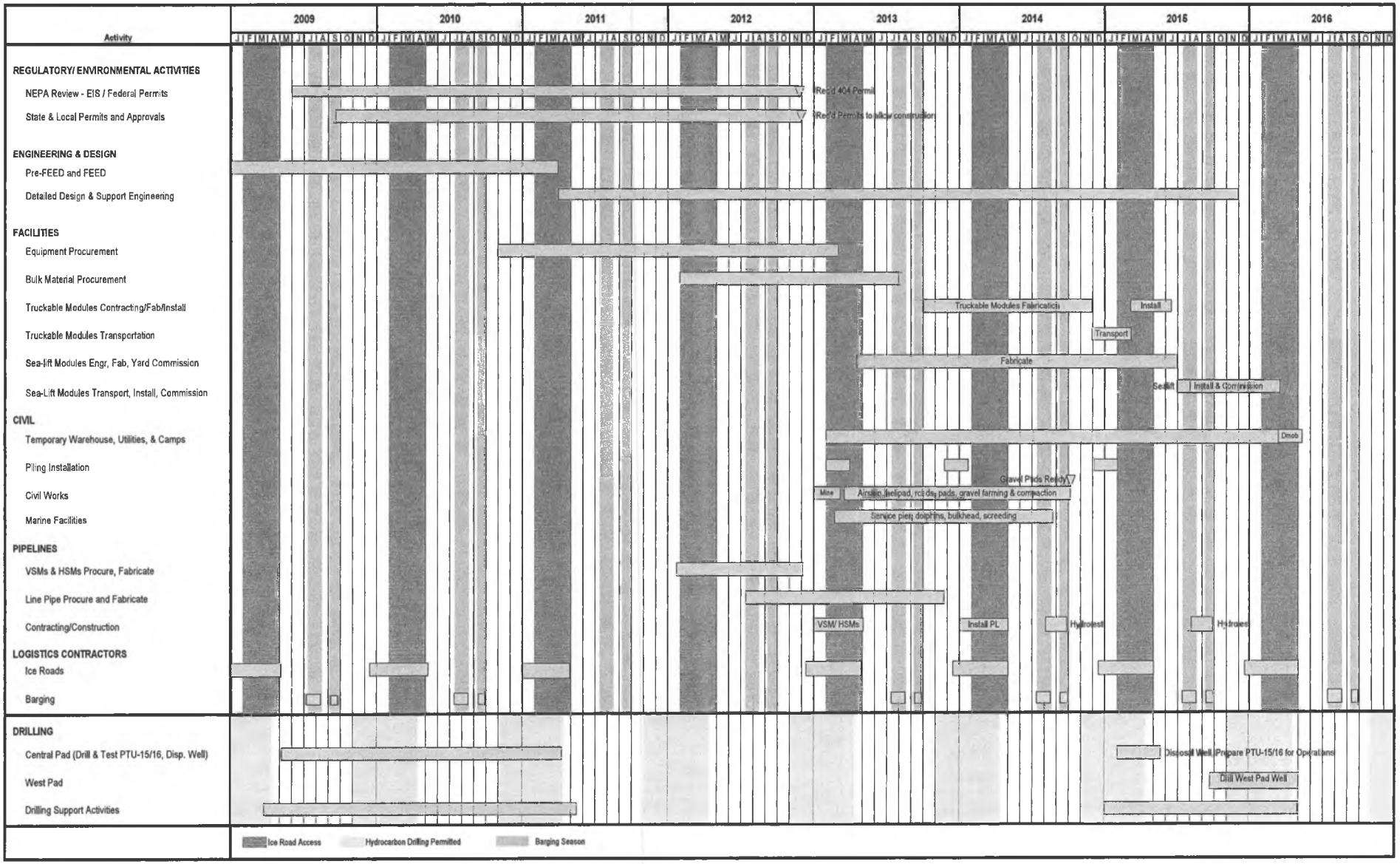


EXHIBIT E

Point Thomson Provisional Schedule Level 1 Work Sheet



NOTE: This schedule is indicative and subject to change.

Exhibit F

PA DOCUMENTATION

DNR will keep information submitted in a PA application confidential as provided in AS 38.05.035(a)(8) and its applicable regulations. In accordance with AS 38.05.035(a)(8)(C), in order for geological, geophysical and engineering data to be held confidential, the Unit Operator must request confidentiality at the time the data is submitted by indicating "CONFIDENTIAL" on all confidential data items.

1. Depth Structure Maps and digital grids (including faults) for each producing horizon.

2. Gross Isochore Maps and digital grids for each producing horizon

3. Hydrocarbon Net Pay Maps and digital grids for each producing horizon. Also include any fluid contact maps and digital grids used in creation of the hydrocarbon net pay maps.

4. Average Porosity and Hydrocarbon Saturation Maps and digital grids for each producing horizon.

5. Hydrocarbon Pore Feet Maps and digital grids for each producing horizon.

6. Paper and digital copies of representative seismic lines to support the applied for action. Data submitted should include both strike and dip oriented lines, include picked horizons for all mapped surfaces, mapped faults, and wells demonstrating time-depth ties to well log formation picks. Lines should be clearly annotated with seismic survey

ID, seismic volume, line number, picked horizon and well names. Map clearly showing location of all seismic and well sections provided.

7. Paper and digital copies of representative stratigraphic and structural well-log cross-sections. Cross-sections should include, log correlations for all mapped horizons, mapped faults, identified fluid contacts and deepest "oil down to" (ODT) and shallowest "water up to" (WUT) picks. Cross-sections should be of an appropriate scale that all annotations, picks, log curves and scales are clearly legible.

8. Hydrocarbon formation volume factors (B_o, B_g) applied to each reservoir.

9. Oil Gravity and/or Viscosity Maps and digital grids for each producing horizon.

10. Digital file (ascii or Excel spreadsheet) of formation picks in measured depth (MD) and sub-sea true vertical depth (sstvd) for each well, including all plug backs and pilot holes. Picks should include top and base of each producing interval, all known fluid contacts and deepest "oil down to" (ODT) and shallowest "water up to" (WUT) picks.

11. Digital files of calculated curve data from log analysis used in determining reservoir properties and in-place hydrocarbon volumes. Curve data should include total and/or effective porosity, water saturation, permeability, clay volume, and bulk volume water.

12. Criteria /cutoffs (i.e. porosity, saturation, volume shale, permeability) used to determine net pay in each producing horizon.

13. Digital file (ascii or Excel spreadsheet) of calculated rock properties of each producing interval for every well. Data to include, top and base depth of interval in measured

depth and sstvd, gross interval thickness (tvt), net sand thickness, net hydrocarbon pay thickness, net to gross ratio, average reservoir porosity, average reservoir water saturation (Sw), average permeability, permeability height (kh), and hydrocarbon pore feet

14. Location Map clearly showing all existing production, injection and planned wells. Horizontal wells should be shown as a line highlighting the existing and planned productive interval length. In addition, a digital file (ascii or Excel spreadsheet) provided with target x y coordinates for planned wells. For horizontal wells, x y coordinates for heel and toe locations should be provided for both existing and planned wells.

15. Summary of all oil and gas (including non-hydrocarbon constituents) compositional analyses, including gravity and viscosity data.

16. Paper and digital copies of all pressure build-up PTA and fluid PVT analyses.

17. Relative permeability curves for oil/water, gas/oil, and gas/water.

18. Paper and digital copies of all capillary pressure analyses, where available.

19. Calculated original oil and/or gas in place (OOIP and/or OGIP) volumes

20. Estimated ultimate recovery (EUR).

21. Proposed reservoir depletion plan set forth in the current POD.

22. Production forecast.

Exhibit G

GAS SALES AGREEMENT PROVISION

In the event of any conflict, the language of this Exhibit G shall control and supersede the language of Paragraph 2.21 with respect to the gas sales agreement provision. If the WIOs intend to Commit to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, then at the State's request prior to the Commitment date, the State and each individual WIO with a working interest in each Point Thomson Unit lease will enter into negotiations for separate gas sales agreements, with sufficient lead time to ensure the terms below can be met, that include the following terms which the State has requested be common to all such agreements, with additional terms to be negotiated:

(a) The daily volume of gas to be sold by each WIO will be equal to that WIO's proportionate share of the State's total expected daily volume of Point Thomson royalty gas to be delivered into the PTU / PBU Gas Pipeline.

(b) The gas sales agreement would become effective if the WIOs Commit to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project with gas to be available for delivery on the Commitment date.

(c) The term of each sales agreement will continue until the earlier of: (1) Project Start-up of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, (2) Project Start-up of a Major Gas Sale as defined under the Settlement Agreement, or (3) 10 years following the Commitment date.

(d) The delivery point for the gas will be at a mutually agreed location from Prudhoe Bay facilities.

(e) The State and each WIO will establish the price of gas in their contract based on a price mutually agreed between the State and that WIO considering most recent, relevant Alaska North Slope gas sales agreements, including consideration for volume commitments and terms. The gas sales agreement will allow for periodic price re-openers to be negotiated. The initial re-opener may not be triggered sooner than one year after the start of gas sales.

(f) Any royalty due on gas sold under this provision will be paid in value based on the contract price for that WIO.

4

ExxonMobil ConocoPhillips bp

March 30, 2012

Governor Sean Parnell
550 West 7th Avenue, Suite 1700
Anchorage, Alaska 99501

Dear Governor Parnell,

Our three corporations, collectively and individually, value our relationship with Alaska and believe that its citizens across the state, as well as our shareholders around the world, share a common interest in responsible resource development. We write today to inform you of our progress in working together on the next generation of North Slope resource development.

Alaska's vast North Slope holds over 35 trillion cubic feet of discovered natural gas. To date, this gas has been used to enhance North Slope oil production, adding several billion barrels to Prudhoe and Kuparuk recoveries. However, under the right business climate, the full commercial potential of this world-class resource can be unlocked. North Slope gas commercialization will bring new job opportunities, increased state revenues, reliable in-state energy supplies and new exploration opportunities, which will further the development of North Slope oil and gas. This will be key toward reaching your goal of one million barrels of oil per day through the Trans-Alaska Pipeline System.

Serious discussions between our companies have taken place over the past several months, along with the Alaska Pipeline Project (APP) parties who are supporting the AGIA License. We have aligned on a structured, stewardable and transparent approach with the aim to commercialize North Slope natural gas resources within an AGIA framework. As a result of the rapidly evolving global market, large-scale liquefied natural gas (LNG) exports from south-central Alaska will be assessed as an alternative to gas line exports through Alberta. In addition to broadening market access, a south-central Alaska LNG approach could more closely align with in-state energy demand and needs. We are now working together on the gas commercialization project concept selection, which would include an associated timeline and an assessment of major project components including in-state pipeline routes and capacities, global LNG trends, and LNG tidewater site locations, among others.

Commercializing Alaska natural gas resources will not be easy. There are many challenges and issues that must be resolved, and we cannot do it alone. Unprecedented commitments of capital for gas development will require competitive and stable fiscal terms with the State of Alaska first be established. Appropriately structured, stable fiscal arrangements have opened new opportunities around the world, and will play a pivotal role in making Alaska competitive in the global market and unlocking the economic potential of North Slope resources.

Point Thomson is an excellent example of a challenged, world-class resource. With approximately 25% of known North Slope natural gas, Point Thomson development is an important element in consideration of North Slope gas commercialization. However, economic models must span decades into an uncertain future to estimate economic returns. Your Administration has taken the lead in forging a Point Thomson settlement that will bring long-term resources, revenues and jobs to help Alaska's economy. With settlement now finalized, our companies are moving forward, as participating co-venturers, with the initial development phase at Point Thomson with confidence that North Slope gas development will ultimately bring the Point Thomson resource to market.

We agree the next generation of North Slope resource development is achievable, working together with the APP parties, as well as with the State of Alaska. Thank you for your leadership and your confidence in us to take on these challenges. We join you in a vision of prosperity and promise. There is much work to do and opportunities yet to discover.

Sincerely,

Rex Tillerson Jim Mulva Bob Dudley

5

UNIT OPERATING AGREEMENT

PRUDHOE BAY UNIT

STATE OF ALASKA

VOLUME I

ARTICLES

April 1, 1977

37A even if the revised fault location should diverge by a greater lateral distance than 500 feet, and in no event will the plane be shifted along that segment connecting the faults which is drawn along the Range 12 East, Range 13 East boundary.

Major Gas Pipeline is any pipeline and appurtenant equipment used to transport Separator Off-Gas off the North Slope of Alaska for purposes other than use or consumption as fuel for a Major Oil Pipeline.

Major Gas Sale. If the Forecasted Initial Gas Sales Rate, as defined in Section 40.002, equals or exceeds 2,000 MMScf/D, Major Gas Sale is 12.01 A.M. on the first day of the calendar month following the point in time when the first deliveries of Separator Off-Gas are made by any Working Interest Owner to a Major Gas Pipeline for transportation off the North Slope of Alaska for purposes other than use or consumption as fuel for a Major Oil Pipeline. If the Forecasted Initial Gas Sales Rate is less than 2,000 MMScf/D, Major Gas Sale is 12.01 A.M. on the first day of the calendar month following the first complete calendar month during which the average daily volume of Separator Off-Gas delivered to a Major Gas Pipeline for transportation off the North Slope of Alaska, for purposes other than use or consumption as fuel for a Major Oil Pipeline, has equaled or exceeded 1,750 MMScf/D.

Major Loss shall have the meaning given to it in § 32.002.

Major Oil Pipeline is any common carrier pipeline, together with suitable pump stations, tankage, terminals, docks, communication facilities and other facilities necessary and incident to the transportation of Separator Liquid Production off the North Slope of Alaska, including the pipeline from Prudhoe Bay to Valdez, Alaska.

Midperiod Allocated Solution GOR is the number calculated in accordance with Section 28.709 at each Modification Date.

Midperiod Bottomhole Pressure is the number calculated in accordance with Subsection 28.704.03 at each Modification Date.

6

ALASKA

ALASKA OIL AND GAS CONSERVATION COMMISSION

333 West 7th Avenue, Suite 100

Anchorage Alaska 99501

Re: **THE APPLICATION OF BP**	)	**Conservation Order 341D**
EXPLORATION (ALASKA) INC.	)	
Prudhoe Oil Pool - Modification to	)	Prudhoe Oil Pool
pool rules - Conservation Order	)	Prudhoe Bay Field
341C, for injection of water into the	)	
Prudhoe Bay Gas Cap	)	
	)	November 30, 2001

IT APPEARING THAT:

1. By letter dated September 21, 2001, BP Exploration (Alaska), Inc. ("BPXA") on behalf of the Working Interest Owners ("WIOs") of the Initial Participating Areas of the Prudhoe Bay Unit ("PBU") has applied for a modification of certain rules of Conservation Order 341C ("CO 341C") in conjunction with a proposed project named the Gas Cap Water Injection Project ("GCWI").

2. The Commission published notice of opportunity for public hearing in the Anchorage Daily News on September 29, 2001.

3. The Commission held a public hearing October 30, 2001 at 9:00 am at the Alaska Oil and Gas Conservation Commission at 333 West 7th Avenue, Suite 100, Anchorage, Alaska 99501.

4. The Commission received no protests to BPXA's application or to the public testimony.

5. Pre-filed testimony of representatives of BP Exploration (Alaska), Inc., Phillips Alaska, Inc. and ExxonMobil Production Company is included in the record (revised October 30, 2001). All additional information requested by the Commission at the hearing was received November 1, 2001 and November 6, 2001.

FINDINGS:

1. Authority 20 AAC 25.520, 20 AAC 25.540

Commission regulation 20 AAC 25.420 provides authority to issue orders prescribing rules to govern the proposed development and operation of a pool. The commission will, in its discretion, amend pool orders in accordance with procedures set forth in 20 AC 25.540.

2. Gas Cap Water Injection Project - Overview

Currently, reservoir pressure is declining at 25 to 35 psi/year. The WIOs have studied options to mitigate pressure decline and have annually reported the progress of these studies to the Commission, based upon rulings in CO 290 (2/21/92), which were incorporated into CO 341C, Rule 12(d). As a result of these studies, the WIOs sanctioned the Gas Cap Water Injection project in June 2001. This project represents a new element in the depletion strategy of the Prudhoe Bay Oil Pool with the dual goals to mitigate reservoir pressure decline and improve recovery.

3. Proposed Modifications to Conservation Order 341C

The most current rules governing Prudhoe Bay Field, Prudhoe Oil Pool are contained in CO 341C, dated June 12, 1997. CO 341C is a consolidation of all conservation orders in effect for the Prudhoe Bay Field, Prudhoe Oil Pool at that point in time. Specific to CO 341C, BPXA is requesting the following modifications:

a) Revoke paragraph (d) of Rule 12 that requires the Operator to continue to investigate options to mitigate pressure decline and to provide an annual report to the Commission. With the implementation of GCWI, BPXA claims pressure decline will be mitigated.

b) Modification of Paragraph (c) in Rule 12 which currently provides that the Operator maintain a pressure differential of at least 250 psi between the minimum miscibility pressure of the miscible injectant and the prevailing reservoir pressure. BPXA claims that as GCWI will mitigate pressure decline, a more appropriate pressure differential of 100 psi is appropriate and will allow BPXA to better optimize both the composition and volume of the miscible injectant.

c) Modification of Rule 11, which describes the Prudhoe Oil Pool surveillance report, to include the results of GCWI surveillance.

4. GCWI Project Overview

The project scope calls for ramping up to 650,000 barrels per day of seawater injection into the eastern portion of the gas cap from a new injection site located at the East Dock Staging Pad. Initial projected rates are 500,000 barrels per day. Water injection will increase over time with increased availability of seawater and decreased seawater demand in other projects, such as the Flow Station 2 and Point McIntyre waterfloods and Grind and Inject. Water injection is anticipated to continue for twenty years, with a final injected water volume of near four billion barrels. Increased hydrocarbon recovery of 150-200 million barrels is projected by BPXA.

a) Facilities Requirements

Facility construction is planned for this winter, followed by start-up of injection in mid 2002. To implement the Gas Cap Water Injection project, a new seawater pipeline from Flow Station 2 to the East Dock Staging Pad will be constructed. The new line will have a 32" diameter and a

total length of approximately 18,000 feet. It will tie-in to the existing 32"seawater line running from the Eastern Seawater Injection Plant to Flow Station 2. A heated pig receiver/manifold module and well houses will be installed at the East Dock Staging Pad to accommodate five to seven new injection wells.

b) GCWI Well Locations

Current plans for the GCWI include drilling of up to seven water injection wells into the eastern portion of the PBU, Ivishak formation gas cap. BPXA indicates the well locations were strategically chosen to allow for sufficient Ivishak pay at the bottom hole locations of the injectors, while maintaining sufficient distance from the gas injection and oil producing areas.

c) GCWI Well Completion

Each gas cap water injector will be completed with 13 3/8" surface casing cemented to surface, 9 5/8" intermediate casing with cement brought to 1000' above the shoe, and a fully cemented 7" injection liner. The tubing will be 7 5/8" and will include a 7" subsurface safety valve and two 7" profiles. The tubing is large to accommodate the high volume of water to be injected. The tubing will also be plastic coated to help minimize the friction losses. Average surface pressure for these new injection wells will be approximately 2700 psi. Maximum injection pressure is expected to be approximately 3100 psi.

5. Project Benefits

a) Reservoir Pressure

Average reservoir pressure in the Prudhoe Bay field is declining at a rate of 25-35 psi/year. The declining pressure reduces efficiency of every recovery mechanism operating in the field. The GCWI project is designed to arrest pressure decline and maintain the reservoir pressure until water injection ends in 2022. Current average reservoir pressure is approximately 3450 psi (@ 8800' ss datum).

b) Reservoir Simulation of Recovery

The GCWI incremental oil recovery was predicted using BPXA's Full Field Compositional Reservoir Model, comprised of a sixty (60) acre areal grid of the Prudhoe Bay field. It includes the oil that initially was in the gas cap and is immobile. The recovery calculated by the full field model was validated using mechanistic studies of GCWI using fully compositional 1D, 2D, strip, and pattern models. The increased pressure resulting from GCWI improves every recovery mechanism operating in the field. The benefits are characterized for three regions of the field; Gas Cap, Gravity Drainage, and Waterflood/EOR.

The incremental net additional recovery from GCWI is approximately 200 MMB in the full field model. The total reflects a reduction of 20 MMB in the Gas Cap region with increases of 200 MMB in the Gravity Drainage region, and 20 MMB in the waterflood/EOR region.

(1) Gas Cap Area

In total, there is a net reserves reduction of about 20 MMB in the Gas Cap region. In the original gas cap, not invaded by water, BPXA projects 30 MMB additional reserves from

vaporization of residual oil and retrograde condensate. In the water invaded area, some hydrocarbon liquids will be trapped and remain immobile to injected water, preventing vaporization by injected gas, which reduces liquid recovery by approximately 50 MMB.

(2) Gravity Drainage Area

BPXA projects improved vaporization and gravity drainage processes will yield about 200 MMB of incremental recovery from the Gravity Drainage region. Vaporization of residual oil and retrograde condensate by the injected gas is more efficient at higher pressure. Higher reservoir pressure reduces oil shrinkage and oil viscosity. Both of these effects increase oil mobility and result in more efficient gravity drainage.

(3) Waterflood and EOR Area

The waterflood/EOR benefits are approximately 20 MMB. The projected benefits result from: 1) higher reservoir pressure increasing well production capacity; 2) lowered oil shrinkage; and 3) the higher reservoir pressure allowing leaner miscible injectant, thus greater supply, leading to more EOR recovery.

6. Water Movement

The potential for water to interfere with the various recovery mechanisms has been extensively studied by the WIOs. In particular, the potential for water to finger through the gas cap, and interfere with the gravity drainage area was a prime concern. WIO studies showed that because gas is 100 times more mobile than the water that displaces it, a piston-like displacement is anticipated. Water saturations in simulation of water displacing oil were compared to simulation of water displacing gas in a reservoir containing a high permeability (5 Darcy) thief zone. In the case of water displacing oil, water fingered through the high perm streak to the producer. In the case of water displacing gas, a piston-like displacement occurred.

Areal water saturation maps from BPXA's full field model were presented, showing the movement of water over time. The water is projected to move in a relatively radial to oblong shaped front. At the end of GCWI injection in 2022, water is projected to reach the waterflood area in the eastern part of the field, and the northern oil producers in the gravity drainage area. However, the western portion of the gas cap, and the major portion of the gravity drainage area are not expected to be invaded with water. Shut-down of GCWI is expected in 2022. Review of model projections through 2031 indicates little lateral movement of the water, again due to the low mobility of the water to the gas in the area.

7. GCWI - Major Gas sale Relationship

The WIOs addressed the interaction of the GCWI project with potential major gas sales and how gas sales would impact the estimated benefits of the GCWI project and how gas cap water injection is expected to impact ultimate gas recovery.

a) Major Gas Sale Effect on GCWI Recovery

A gas sale will reduce the incremental oil recovery from gas cap water injection. While the rate and timing have not been determined for major gas sales, a case to demonstrate the effect

was shown. Assuming a 4 BCF/D gas sales rate beginning in 2008, the incremental production derived from GCWI is reduced from about 200 MMB to about 135 MMB. The reduction in the recovery results from three mechanisms:

* With a major gas sale the volume of gas available for injection is reduced in order to meet the gas sale demand. This reduces vaporization recovery for gas cap water injection;

* The ability of the injected gas to vaporize the oil it contacts diminishes as reservoir pressure decreases.

* Gas sale will lower reservoir pressure, making the oil more viscous, which decreases efficiency of oil production and reduces oil produced by gravity drainage.

b) Effect of GCWI on Gas Recovery of Major Gas Sales

The WIOs state that ultimate gas recovery should not be reduced by GCWI. Major Gas Sales off-take will require a large water free area from which to produce the gas. The simulation projections presented for the GCWI project suggest that the water will be localized and a significant portion of the gas cap will be free from water to allow blow-down of the gas reserves.

Without GCWI, gas recovery is expected to exceed 80% of the original gas cap gas in place when the pressure is reduced from the original 4400 psi to about 850 psi. With GCWI, gas is expected to be trapped at a saturation of 25% within the area of water injection. When reservoir pressure is subsequently reduced during "blow down", the trapped gas expands and once again becomes mobile. In the example shown by the WIOs, at a reservoir pressure of 1500 psi the gas recovery was projected at 90% with GCWI, while by pressure depletion alone the pressure has to be blown down to 500 psi to achieve the same recovery.

8. Surveillance BPXA presented plans to monitor injection well conformance, water movement and reservoir pressure. The major components of the GCWI surveillance plan are:

* Injection wells will be monitored in a manner similar to other water injection wells within the Prudhoe Bay pool.

* Pulsed Neutron Logs (PNLs) in existing wells will provide downhole and regional data on the water movement.

* 4-D gravity will provide a general view of water movement.

* Reservoir pressure monitoring will be done according to current Prudhoe Bay pool rules.

a) Injection Well Monitoring

Injection well monitoring will be conducted to ensure that the water injection is contained in the desired reservoir interval. The injection wells will be monitored with surface measured temperature, pressure and injection rate. These measurements will be similar to other injection wells within the Prudhoe Bay pool. With these measurements it is possible to monitor injection characteristics, particularly changes in the injectivity indices. The injectivity indices provide direct evidence of changes in well performance. Downhole measurements will provide

confirmation of the surface measurements and will also help describe reservoir properties and hydraulic performance. Downhole temperature logs will provide verification of injection conformance and confirm that fracture height growth is confined within the Ivishak. Downhole pressure measurements will be used to determine tubular pressure drops and hydraulic performance. Pressure falloff tests will be undertaken to determine reservoir properties and wellbore skin.

b) Water Movement Surveillance with Pulsed Neutron Logs:

The leading edge of the waterflood will be detected primarily with pulsed neutron logs. BPXA identified more than nine wells surrounding the injection areas in which pulsed neutron logs can be run to monitor the movement of water. These wells are primarily Lisburne producing wells. BPXA indicated that there are no known cement problems that would prevent confinement of injection to the Ivishak. Pulsed neutron logs, specifically the RST logs, were chosen because they can be run in Lisburne wells completed with 2 7/8 inch tubing. Also, they can be run in two modes to collect data for discerning a major change in fluids (sigma & Carbon/Oxygen). The RSTs will help locate the leading edge of the waterflood, by detecting the change in saturation as water invades the Ivishak gas cap interval at the wellbore. It will also provide data in determining the regional waterflood coverage. BPXA indicated that the statistical variations seen in the RST log measurements should not substantially affect the ability to detect movement of water into the gas zones.

c) 4D Gravity Technique

The 4D Gravity technique utilizes very sensitive surface gravity measurements taken periodically. The method measures small changes in gravity as the low-density gas is replaced with the higher density water. Baseline measurements will be taken prior to water injection. Subsequent measurements will be made at discrete time intervals and compared to the baseline measurements. An increase in the density of the fluids in the gas cap indicates the presence of water. BPXA anticipates the 4D Gravity technique will allow them to map general water movement, determine an average waterflood front, and provide a means to perform a mass balance of the injected water. The major limitations of the 4D gravity technique are that it cannot detect small horizontal or vertical flood fronts and it cannot provide any downhole zonal information. Gravity measurements coupled with material balance and PNL measurements can aid validation of simulation predictions and fine tune history match calculations.

9. Proposed change to Rule 12(c)

BPXA requested in the rules for GCWI that the requirements for minimum miscibility pressure stipulated in Rule 12(c) should be modified. Currently this rule stipulated that the Operator maintain a pressure differential of at least 250 psi between the minimum miscibility pressure of the miscible injectant and the prevailing reservoir pressure. The 250 psi differential had been initially proposed by the WIOs in testimony provided 10/9/91, and approved in CO 290 dated February 21, 1992. This differential was based upon the assumption that the reservoir pressure will decline 100-150 psi during the time in which a cycle of MI is in the reservoir. A safety factor of 100 psi in addition was added to this. With GCWI pressure will be maintained in the injection patterns. As such 100 psi differential is sufficient until such time that the reservoir pressure is stabilized. This change will allow some additional flexibility of the Operator to increase overall MI volumes, and disperse MI to other areas of the field, leading to better optimization of MI throughout the field. This will not have a negative impact upon overall

recovery.

10. Mitigation of Risks

Studies indicate that not implementing or further delaying GCWI will result in less recovery over the remaining life of the field. The studies and analysis appear thorough and technically sound. Though outweighed by the expected benefits to overall hydrocarbon recovery, there remain some risks that must be managed through ongoing surveillance. Oil reserves are potentially at risk if the injected water moves too far, too fast and enters the sensitive Gravity Drainage area of the field. Numerous reservoir simulation and studies show a likely tendency for the injected water to be concentrated in the eastern portion of the gas cap where it is more likely to improve oil recovery from up dip oil zone waterfloods already in progress or planned. In addition, model studies have consistently shown that water will move in a piston-like way through the gas cap, regardless of heterogeneities. Therefore, sweep efficiency of the process will be high and the water should move downdip slowly. GCWI is a recovery technique, which, though well studied, is untried at Prudhoe Bay. Despite the lack of precedents, risks to hydrocarbon reserves can be controlled. The WIOs have designed a process and outlined overall surveillance plans that should minimize losses and ensure greater ultimate hydrocarbon recovery.

11. Blowout Prevention Equipment and Practice

The provisions of Rule 4 of CO 341C are obsolete and inconsistent with current Commission regulations as stated in 20AAC 25 and current North Slope operator practice.

CONCLUSIONS:

1. The application requirements of 20 AAC 25.520 have been met.

2. The GCWI project is expected to significantly increase overall hydrocarbon recovery from the Prudhoe Bay Oil Pool.

3. The GCWI project will mitigate pressure decline within the Prudhoe Bay Oil Pool.

4. With the planned implementation of GCWI, further investigation of options to mitigate pressure decline and annual report of these investigations is no longer necessary.

5. Further implementation of paragraph (d) of Rule 12, is unnecessary so long as the GCWI project is in operation.

6. Decreasing the minimum pressure differential requirement of Paragraph (c) of Rule 12 from 250 psi between the minimum miscibility pressure and the average reservoir pressure in the EOR injection areas will allow the Operator flexibility to provide more MI volume, and will not negatively impact recovery. Potential for increased rate and recovery exists through optimization of the MI injectant.

7. Adequate surveillance of the GCWI project is required to determine that water movement within the reservoir is confined as intended and does not negatively impact overall hydrocarbon recovery, and to determine if the project is successful in stabilizing reservoir pressure.

8. The Commission needs to be apprised of surveillance plans and results on a yearly basis.

9. The conclusions in CO 341C and the amendments thereto are incorporated herein to the extent not inconsistent with this order.

10. Rule 4 of CO 341C is no longer current and has been superseded by 20 AAC 25.035, 25.036, 25.037, 25.285, 25.286, 25.287, and 25.288.

NOW, THEREFORE, IT IS ORDERED THAT

(1) Conservation Order 341D supersedes Conservation Order 341C dated June 12, 1997;
(2) Rule 4 of Conservation Order No. 341C is revoked, Rules 11,12, and 16 are amended, and new Rule 17 is added; and
(3) In addition to statewide requirements under 20AAC 25 (to the extent not superseding these rules), the following rules now apply to the Prudhoe Oil Pool within the following described area (referred to in this order as the affected area):

UMIAT MERIDIAN

Township	Range	Section
T. 10N.,	R. 12E.,	1, 2, 3, 4, 10, 11, 12
T. 10N.,	R. 13E.,	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 24
T. 10N.,	R. 14E.,	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17,
		18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 36
T. 10N.,	R. 15E.,	all
T. 10N.,	R. 16E.,	5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31
T. 11N.,	R. 11E.,	1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 24, 25
T. 11N.,	R. 12E.,	all
T. 11N.,	R. 13E.,	all
T. 11N.,	R. 14E.,	all
T. 11N.,	R. 15E.,	all
T. 11N.,	R.	17, 18, 19, 30, 31, 32

	16E.,	
T. 12N.,	R. 10E.,	13, 24,
T. 12N.,	R. 11E.,	15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30,
		32, 33, 34, 35, 36
T. 12N.,	R. 12E.,	23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36
T. 12N.,	R. 13E.,	19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34,
		35, 36
T. 12N.,	R. 14E.,	25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36
T. 12N.,	R. 15E.,	25, 26, 27, 28, 29, 30 ,31 ,32, 33, 34, 35, 36

(Source: C. O. 145, page 7, expansions/contractions of initial participating area based on November 20, 1987 letter, Wade and Nelson to Eason, Re: Prudhoe Bay Unit Exhibits, Exhibit C, Part I Oil Rim Participating Area and Part II Gas Cap Participating Area.)

Rule 1 Pool Definition and Changing the Affected Area (ref. C.O. 145)

(a) The Prudhoe Oil Pool is defined as the accumulations of oil that are common to and which correlate with the accumulations found in the Atlantic Richfield - Humble Prudhoe Bay State No. 1 well between the depths of 8,110 feet and 8,680 feet. (Source: C.O. 145, Rule 1)

(b) The Commission may adjust the description of the affected area to conform to future changes in the initial participating area by administrative approval. (Source: C. O. 145, Rule 12)

Rule 2 Well Spacing (ref. C.O. 145, 174)

There shall be no restrictions as to well spacing except that no pay shall be opened in a well closer than 500 feet to the boundary of the affected area. (Source: C.O. 174, Rule 2)

Rule 3 Casing and Cementing Requirements (ref. C.O. 145, 238)

(a) Conductor casing shall be set at least 75 feet below the surface and sufficient cement shall be used to fill the annulus behind the pipe to the surface. Rigid high-density polyurethane foam may be used as an alternate to cement, upon approval by the Commission. The Commission may also administratively approve other sealing materials upon application and presentation of data which show the alternate is appropriate based on accepted engineering principles. (Source: C.O. 238, Rule 3a)

(b) Surface casing to provide proper anchorage for equipment, to prevent uncontrolled flow, to

withstand anticipated internal pressure, and to protect the well from the effects of permafrost thaw-subsidence or freeze-back loading shall be set at least 500 feet, measured depth, below the base of the permafrost but not below 5000 feet true vertical depth. Sufficient cement shall be used to fill the annulus behind the casing to the surface. The surface casing shall have minimum axial strain properties of 0.5% in tension and 0.7% in compression. (Source: C.O. 238, Rule 3b)

(c) Alternate casing programs may be administratively approved by the Commission upon application and presentation of data, which show the alternatives, are appropriate, based upon accepted engineering principles. (Source: C.O. 238, Rule 3c)

Rule 4 Blowout Prevention Equipment and Practice (revoked C.O. 341D).

Rule 5 Automatic Shut-in Equipment (ref. C.O. 145, 333, 363)

(a) Each well shall be equipped with a Commission approved fail-safe automatic surface safety valve system (SVS) capable of preventing uncontrolled flow by shutting off flow at the wellhead and shutting down any artificial lift system where an over pressure of equipment may occur.

(b) The safety valve system (SVS) shall not be deactivated except during repairs, while engaged in active well work, or if the pad is manned. If the SVS cannot be returned to service within 24 hours, the well must be shut in at the well head and at the manifold building.

1. Wells with a deactivated SVS shall be identified by a sign on the wellhead stating that the SVS has been deactivated and the date it was deactivated.

2. A list of wells with the SVS deactivated, the dates and reasons for deactivating, and the estimated re-activation dates must be maintained current and available for Commission inspection on request.

(c) A representative of the Commission will witness operation and performance tests at intervals and times as prescribed by the Commission to confirm that the SVS is in proper working condition.

(d) The SVS must be maintained in working condition at all times unless the well is shut in and secured, or the well is being operated in conformance with other sections of this rule.

(e) Upon proper application or its own motion, the Commission may administratively waive or amend the requirements of this rule as long as the change does not promote waste, jeopardize correlative rights or compromise ultimate recovery, and is based on sound engineering principles.

(f) Nothing in this rule precludes the installation of a SSSV in wells designated by the operator. If a SSSV is installed, it must be maintained in working order and is subject to performance testing as part of the SVS.

Rule 6 Pressure Surveys (ref. C.O. 145, 165, 192, 208, 213, 220, AA 220.1, 341B)

(a) Prior to regular production, a static bottom hole or transient pressure survey shall be taken on at least one in three wells drilled from a common drilling site. (Source: C.O. 220, Rule 1,

C.O. 341B)

(b) An annual pressure surveillance plan shall be submitted to the Commission in conjunction with the Annual Prudhoe Pool Reservoir Surveillance Report by April 1, each year. The plan will contain the number of pressure surveys anticipated for the next calendar year and be subject to approval by the Commission by May 1. These surveys are needed to effectively monitor reservoir pressure in the Prudhoe Oil Pool. The surveys required in (a) of this rule may be used to fulfill the minimum requirements. (Source: C.O. 220, Rule 6, C.O. 341B)

(c) Data from the surveys required in (a) and (b) of this rule shall be submitted with the Annual Prudhoe Oil Pool Reservoir Surveillance Report by April 1 each year. Data submitted shall include rate, pressure, time depths, temperature, and any well condition necessary for the complete analysis of each survey. The datum for the pressure surveys is 8800 feet subsea. Transient pressure surveys obtained by a shut in buildup test, an injection well pressure fall-off test, a multi rate test or an interference test are acceptable. Other quantitative methods may be administratively approved by the Commission. (Source: C.O. 220, Rule 7, C. O. 341C.001)

(d) Results and data from any special reservoir pressure monitoring techniques, tests, or surveys shall also be submitted as prescribed in (c) of this rule. (Source: C.O. 220, Rule 8)

(e) By administrative approval the Commission may grant time extensions and waive requirements of this rule, and by administrative order the Commission may require additional pressure surveys in (b) of this rule. (Source: C.O. 220, Rule 5)

Rule 7 Gas-Oil Contact Monitoring (ref. C.O. 145, 165, 192, 208, 213, AA 213.39)

(a) Prior to initial sustained production, a cased or open hole neutron log shall be run in each well. (Source: C.O. 165, Rule 9a) This requirement is waived for waterflood/EOR areas encompassed by the expanded Prudhoe Bay Miscible Gas Project outlined in C.O. 290, and for those areas not expected to have significant GOC movement or gas encroachment from the gravity drainage area defined by the Commission through Administrative Approval. (Source: AA 213.39, excerpts from paragraph 1)

(b) A minimum of 40 repeat cased hole neutron log surveys shall be run annually. (Source: C.O. 208, Rule 4)

(c) The neutron logs run on any well and those required in (a) and (b) of this rule shall be filed with the Commission by the last day of the month following the month in which the logs were run. (Source: C.O. 165, Rule 9d)

(d) By administrative approval, the Commission may delay, modify or waive the logging requirements of this rule or may require additional wells to be logged. (Source: C.O. 213, Rule 3)

Rule 8 Productivity Profiles (ref. C.O. 145, 165, 192, 208, 213, AA 213.40)

(a) A spinner flow meter or tracer survey shall be run in each well during the first six months the well is on production. (Source: C.O. 165, Rule 11a) This requirement is waived for wells completed with a single perforated interval, or with perforations in a single reservoir zone including highly deviated (greater than 65 degrees) and horizontal wells. (Source: AA 213.40

paragraph 3)

(b) Follow-up surveys shall be performed on a rotating basis so that a new production profile is obtained on each well periodically. Nonscheduled surveys shall be run in wells which experience an abrupt change in water cut, gas-oil ratio, or productivity. (Source: C.O. 165, Rule 11b)

(c) The complete spinner flow meter or tracer data and results shall be recorded and filed with the Commission by the last day of the month following the month in which each survey is taken. (Source: C.O. 165, Rule 11c)

(d) The Commission may administratively approve alternate methods and time periods in the enforcement of this rule provided that the data obtained is appropriate for monitoring the Prudhoe Oil Pool or may waive the requirements of (a), (b) and (c). By administrative order the Commission may specify additional surveys other than the surveys submitted under (a), (b) and (c) of this rule. (Sources: C.O. 208, Rule 8 and C.O. 213, Rule 2)

Rule 9 Pool Off-Take Rates (ref. C.O. 145, 214)

The maximum annual average oil offtake rate is 1.5 million barrels per day plus condensate production. The maximum annual average gas offtake rate is 2.7 billion standard cubic feet per day, which contemplates an annual average gas pipeline delivery sales rate of 2.0 billion standard cubic feet per day of pipeline quality gas when treating and transportation facilities are available. Daily offtake rates in excess of these amounts are permitted only as required to sustain these annual average rates. The annual average offtake rates as specified shall not be exceeded without the prior written approval of the Commission.

Annual average offtake rates mean the daily average rate calculated by dividing the total volume produced in a calendar year by the number of days in the year. However, in the first calendar year that large gas offtake rates are initiated, following the completion of a large gas sales pipeline, the annual average offtake rate for gas shall be determined by dividing the total volume of gas produced in the calendar year by the number of days remaining in the year following initial delivery to the large gas sales pipeline.

Rule 10 Facility Gas Flaring revoked (ref. C. O. 341C)

Rule 11 Annual Surveillance Reporting (ref. C.O. 165, 186, 195, 208, 223, 224, 279, AA 279.1)

(a) An annual Prudhoe Oil Pool surveillance report will be required by April 1 of each year. The report shall include but is not limited to the following:

1. Progress of enhanced recovery project(s) implementation and reservoir management summary including engineering and geotechnical parameters.

2. Voidage balance by month of produced fluids, oil, water and gas, and injected fluids, gas, water, low molecular weight hydrocarbons, and any other injected substances (which can be filed in lieu of monthly Forms 10-413 for each EOR project). (Source C.O. 279, Rule 7 and AA 279.1 excerpt from paragraph 3)

3. Analysis of reservoir pressure surveys within the field.

4. Results and where appropriate, analysis of production logging surveys, tracer surveys and observation well surveys.

5. Results of gas movement and gas-oil contact surveillance efforts including a summary of wells surveyed and analysis of gas movement within the reservoir. The analysis shall include map(s) and/or tables showing the locations of various documented gas movement mechanisms as appropriate. (Source: C.O. 279, Rule 7)

6. Progress of the Gas Cap Water Injection project with surveillance observations including;

(a) volume of water injected,
(b) reservoir pressure results, maps, and analysis (in conjunction with (a) 3 of this rule),
(c) water movement and zonal conformance maps derived from surveillance (such as Pulsed Neutron Logs and 4-D gravity surveys)
(d) results of reservoir evaluations of performance (such as material balance and reservoir simulation studies),
(e) surveillance plans for the upcoming year, and
(f) any plans for change in project operation.

(b) Upon its own motion or upon written request, the Commission may administratively amend this rule so long as the change does not promote waste nor jeopardize correlative rights and is based on sound engineering principles. (Source: C.O. 279, Rule 8)

Rule 12 Prudhoe Bay Miscible Gas Project (PBMGP) (ref. C.O. 195, 290)

(a) Expansion of the PBMGP and infill expansion of miscible gas injection in the NWFB is approved for the 59,740 acre portion of the Prudhoe Oil Pool defined in the record. (Source: C.O. 290, Rule 1, AA 290.1)

(b) An annual report must be submitted to the Commission detailing performance of the PBMGP and outlining compositional information for the current miscible injectant (MI) necessary to maintain miscibility under anticipated reservoir conditions. (Source: C.O. 290, Rule 2)

(c) The minimum miscibility pressure (MMP) of the Miscible Injectant must be maintained at least 100 psi below the average reservoir pressure in the Prudhoe Bay Miscible Project area. When the Operator demonstrates that the reservoir pressure is no longer declining within the Prudhoe Bay Miscible Project Area (as evidenced by reservoir pressure measurements), the MMP may be maintained at or below the average reservoir pressure in the Prudhoe Bay Miscible Project area. (Source: C.O. 290, Rule 4; amended C.O. 341D)

(d) Revoked (C.O. 341D).

(e) Upon its own motion or upon written request, the Commission may amend this rule by administrative action if the change does not promote waste, violate correlative rights, nor jeopardize ultimate recovery, and is based on sound engineering principles. (Source: C.O. 290, Rule 6)

Rule 13 Waiver of GOR Limitation (ref. 8/22/86 letter)

The Commission waives the requirements of 20 AAC 25.240(b) for all oil wells in the Prudhoe Oil Pool of the Prudhoe Bay Field so long as the gas from the wells is being returned to the pool, or so long as the additional recovery project is in operation. (Source: Letter 8/22/86, L. Smith to Heinze/Nelson, paragraph 3)

Rule 14 Waiver of "Application for Sundry Approval" Requirement for Workover Operations (ref. C.O. 258)

The requirements of 20 AAC 25.280(a) are waived for development wells in the Prudhoe Oil Pool of the Prudhoe Bay Field. (Source: C.O. 258)

Rule 15 Waterflooding (ref. 3/20/81 letter Hamilton to Nelson/Norgaard)

The commission approves the December 1980 additional recovery application for water-flooding in the Prudhoe Oil Pool subject to the requirements listed in Rule 11 above.

Any proposed changes must be submitted to the Commission for approval. (Source: Letter 3/20/81, Hamilton to Nelson/Norgaard)

Rule 16 Orders Revoked

The following Conservation Orders and associated Administrative Approvals and letter approvals are hereby revoked. Conservation orders 78, 83B, 85, 87, 88, 96, 97, 98B, 117, 117A, 118, 130, 137, 138, 139, 140, 141, 143, 145, 145A, 148, 155, 160, 164, 165, 166, 167, 169, 174, 178, 180, 181, 183, 184, 185, 186, 188, 189, 192, 194, 195, 195.1, 195.2, 195.4, 197, 199, 200, 204, 208, 213, 214, 219, 220, 223, 224, 238, 258, 259, 279, 290 and 333, 341, 341A, 341B, 341C, and March 20, 1981 and August 22, 1986 letter approvals.

The hearing records of these orders are made part of the record for this order.

Rule 17 Gas Cap Water Injections

The Gas Cap Water Injection Project as described in the operator's application and testimony is approved. Ongoing reservoir surveillance is required to determine that water movement within the reservoir is confined as intended and does not negatively impact overall hydrocarbon recovery, and to determine that the project has resulted in stabilization of reservoir pressure.

DONE at Anchorage, Alaska and dated November 30, 2001.

Cammy Oechsli Taylor, Chair
Alaska Oil and Gas Conservation Commission

Daniel T. Seamount, Jr., Commissioner
Alaska Oil and Gas Conservation Commission

Julie M. Heusser, Commissioner
Alaska Oil and Gas Conservation Commission

7

AMENDED DECISION

DENIAL OF THE PROPOSED PLANS FOR DEVELOPMENT OF THE POINT THOMSON UNIT

October 27, 2005

Findings and Decision of the Director, Division of Oil and Gas
Under Delegation of Authority from the
Commissioner, Department of Natural Resources, State Of Alaska

The Division of Oil and Gas (the Division) hereby amends the decision entitled *Denial of the Proposed Plans for Development of the Point Thomson Unit* dated September 30, 2005 (the Decision). The Decision included notice that the Division would hold a hearing under Article 21 of the Point Thomson Unit Agreement. The Decision is amended to remove certain items of work and all references to Article 21 because they do not apply to the Division's evaluation of the Unit Operator's proposed plans for development of the Point Thomson Unit.

I. SUMMARY OF DECISION

This is the final Decision of the Alaska Department of Natural Resources, Division of Oil and Gas (the Division) on the Twenty-second Plan of Development (22nd POD) for the Point Thomson Unit (PTU) submitted by the PTU Operator, Exxon Mobil Corporation (Exxon), on August 31, 2005. The Division finds that the PTU Agreement is in default for Exxon's failure to submit an acceptable unit plan of development.

The PTU is underlain by a massive undeveloped gas and gas condensate reservoir that was discovered nearly 30 years ago, but the PTU oil and gas lessees have determined that production of the unitized substances is, in their view, not commercially viable. The 22nd POD proposes additional studies to determine if the PTU lessees can design a commercially viable production project.

The 22nd POD states that PTU development is not possible without modifying the current laws regarding the State's right to taxes and royalties on oil and gas production and on construction of a North Slope gas pipeline. The PTU Operator proposed integrating the lessees' PTU development obligations into negotiations for a fiscal contract with the State and proposed a two year delay of the development commitments made by the lessees in connection with an expansion of the PTU in 2001, both of which would make PTU development uncertain. The current fiscal contract negotiations may or may not lead to construction of a North Slope gas pipeline.

The premise that the PTU can only be developed if a North Slope gas pipeline is built is inappropriate. In addition to dry gas, the unit contains 100s of millions of barrels of hydrocarbon liquids. These hydrocarbon liquids could be produced using mostly existing oil pipelines without construction of a North Slope gas pipeline. Therefore, potential PTU development is not, in fact, limited to dry gas production. In addition, the PTU Agreement, which requires timely exploration, delineation, development, and production of unitized substances, does not guarantee the lessees' commercial success or provide for indefinite extension of the leases.

1. The 22nd POD is disapproved because it does not set out a plan to bring the PTU into commercial production within a reasonable time frame.

2. Failure to obtain approval of the unit plan is grounds for default under the PTU Agreement and the State oil and gas regulations. Effective October 1, 2005, the PTU Agreement is in default. Exxon has 90 days, until December 29, 2005 to cure the default by submitting a unit plan that commits to timely development and production of unitized substances.

3. In addition, the Division denies Exxon's request for a one-year deferral of the Expansion Agreement commitments. If Exxon does not commence drilling within the PTU by June 15, 2006, the PTU boundary will contract and the contracted leases will no longer be held by unitization.

II. BACKGROUND

The details of the PTU history set out below can be summarized as follows. Some of the PTU leases were issued over 40 years ago and the unit has been in existence for 28 years. The Division certified 7 exploration wells within and around the unit area as capable of producing hydrocarbons in paying quantities, but it has been 20 years since the last well was drilled. The Thomson Sand Reservoir is known to contain at least 8 trillion cubic feet of gas and 200 million barrels of gas condensate and oil. The PTU also contains 100s of millions of barrels of oil in the shallower Brookian reservoirs. The PTU lessees have not yet determined whether they can commercially produce PTU resources, and they have not committed to timely explore, delineate, or develop PTU oil, gas, or gas condensate. The unit operator has consistently proposed that more studies or workshops are needed before putting the PTU into production and, since 1983, has periodically asserted that production cannot begin until a North Slope gas pipeline is built.

The PTU is located on the North Slope of Alaska. The western unit boundary is approximately 3 miles east of the Badami Unit and 30 miles east of the Prudhoe Bay Unit (PBU), and the eastern unit boundary lies west of the western boundary of the Arctic National Wildlife Refuge (ANWR). The southern PTU boundary is onshore, and the northern boundary is offshore in the Beaufort Sea, adjacent to or near the three-mile territorial sea boundary that separates state from federal Outer Continental Shelf (OCS) lands. The PTU consists of 45 state oil and gas leases encompassing approximately 106,200.55 acres. The state owns the entire subsurface estate within the unit area.

Twenty-five lessees hold working interest ownership in the PTU (PTU Owners), and Exxon is the designated Unit Operator. Ownership is calculated based on a lessee's percent of working interest ownership in each lease multiplied by the lease acreage, as a percentage of the total unit acreage. On a surface acreage basis, the Major PTU Owners hold 98.9056% of the PTU: Exxon 52.5779%[1], BP Exploration (Alaska) Inc. (BPXA) 29.1943%, Chevron U.S.A. Inc. (Chevron) 14.3125%, and ConocoPhillips Alaska, Inc. (CPAI) 2.821%. The Minor PTU Owners include twenty entities that hold the remaining 1.0944% interest in the PTU.

The Division approved the PTU Agreement effective August 1, 1977, with a five-year Initial Plan of Exploration. The original unit area included 18 state oil and gas leases comprising approximately 40,768 acres. The PTU Owners drilled 11 wells in and around the unit area between 1978 and 1983, and the Division certified six of those wells as capable of producing hydrocarbons in paying quantities under the regulations[2] and the PTU Agreement.[3]

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[1] Exxon Mobil Corporation holds 43.2361% working interest ownership in the PTU and ExxonMobil Oil Corporation holds 9.3418%, jointly referred to as Exxon.

[2] 11 AAC 83.361. Certification of Well Test Results. "For the purposes of 11 AAC 83.301 – 11 AAC 83.395, a well will be considered capable of producing hydrocarbons in paying quantities, as defined in 11 AAC 83.395, when so certified by the commissioner following application by the lessee or unit operator. The commissioner will require the submission of data necessary to make the certification, including all results of the flow test or tests, supporting geological data, and cost data reasonably necessary to show that the production capability of the well

On March 26, 1984, the Division approved an application to expand the unit area on condition that the PTU Owners drill a well on one of the two southern expansion leases by March 31, 1985, and a well on one of the ten northern expansion leases by February 1, 1990. The expansion added approximately 94,152 acres within 25 leases to the PTU. The PTU Owners failed to meet both drilling commitments; therefore, the two southern expansion leases and nine northern expansion leases contracted out of the PTU.[4]

In 1998, the Division denied a unit expansion application, which was submitted by Exxon as the owner of the proposed expansion lease, rather than as the PTU Operator; because it was not supported by the other PTU Owners. The Division found that adding a lease to a unit where the owners have demonstrated a lack of cooperation may discourage, rather than encourage, unit development. The Division's denial of Exxon's 1998 PTU expansion application instigated negotiations between the Division and the PTU Owners to redefine the unit boundary. Supporting technical data indicated that the Thomson Sand Reservoir extended beyond the existing unit boundary and that other portions of the unit were not underlain by known hydrocarbons.

On February 2, 2001, Exxon applied to simultaneously expand and contract the PTU boundary. On July 31, 2001, the Division and the PTU Owners entered into an agreement in which the Division approved an expansion of the unit area in return for the PTU Owners' commitment to do certain items of work. This agreement also provided that the expansion leases would contract out of the unit and the PTU Owners would pay the State certain sums of money if the work was not done. This "*Agreement Resolving All Pending Point Thomson Unit Expansion/Contraction Matters and Proceedings*" (Expansion Agreement) identified seven Expansion Areas and one Work Commitment Area (WCA) outside of the preexisting PTU (All together referred to as "Expansion Acreage"). The Expansion Agreement included the following work commitments by the PTU Owners:

1. WCA Drilling Commitment: Drill a well through the Thomson Sand interval within the Work Commitment Area by June 15, 2003, or the WCA acreage would automatically contract out the PTU on that date. Drilling a new well or deepening the Red Dog #1 Well would have fulfilled the WCA Drilling Commitment

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satisfies the economic requirements of the paying quantities definition." 11 AAC 83.395. Definitions. "Unless the context clearly requires a different meaning, in 11 AAC 83.301 – 11 AAC 83.395 and in the applicable unit agreements, … (4) 'paying quantities' means quantities sufficient to yield a return in excess of operating costs, even if drilling and equipment costs may never be repaid and the undertaking considered as a whole may ultimately result in a loss; quantities are insufficient to yield a return in excess of operating costs unless those quantities, not considering the costs of transportation and marketing, will produce sufficient revenue to induce a prudent operator to produce those quantities;"

[3] PTU Agreement, Article 9, Drilling to Discovery. "Within 6 months after the effective date hereof, the Unit Operator shall begin to drill an adequate test well at a location approved by the Director, … and thereafter continue such drilling diligently until the top 100 feet of the Pre-Mississippian formation has been tested or until at a lesser depth unitized substances shall be discovered which can be produced in paying quantities (to wit: quantities sufficient to repay the costs of drilling, and producing operations, with a reasonable profit) …"

[4] One of the northern expansion leases remained committed to the PTU because a well drilled on that lease in 1982 was certified as capable of producing in paying quantities.

2. 2006 Development Drilling Commitment: Commence development drilling in the PTU by June 15, 2006, or all of the Expansion Acreage would automatically contract out of the unit effective that date, and the PTU Owners would pay the State $20,000,000 by July 1, 2006, to compensate for the unrealized bonus payments during the period that the Expansion Acreage was withheld from leasing.

3. 2008 Development Drilling Commitment: Complete drilling seven development wells in the PTU by June 15, 2008, or all of the Expansion Acreage would automatically contract out of the unit effective that date, and the PTU Owners would pay the State $27,500,000 by July 1, 2008, to compensate for the unrealized bonus payments during the period that the Expansion Acreage was withheld from leasing.

4. Participating Area Commitment: Allocate production to the Expansion Acreage within a participating area approved by the Division by certain deadlines. The participating area commitment date is June 15, 2008, for Expansion Acreage primarily underlain by the Thomson Sand Reservoir; and June 15, 2010, for Expansion Acreage primarily underlain by a Brookian prospect.

In addition, the Expansion Agreement imposed contraction provisions and charges of up to $27,500,000 if the PTU Owners failed to meet the drilling commitments. The Agreement also increased royalty rates on eight of the twelve expansion leases; from 12.5% to 16.66667% on one lease, and from 16.66667% to 20% on the other seven leases.

The May 24, 2002 Findings and Decision contains the Division's evaluation of the Expansion Agreement, which resulted in the Second Expansion and Third Contraction of the PTU. The Expansion Agreement added approximately 40,353 acres within 12 leases to the PTU, and excluded all or portions of 4 leases, containing approximately 7,572 acres; an overall increase in the unit area of 39 percent. The revised unit area encompassed approximately 116,607 acres within 46 leases.

The PTU Owners based the Expansion Agreement on their assumption that they could engineer and develop a commercially viable gas cycling project. In a gas cycling project natural gas is produced, gas condensates are removed, and the dry gas is re-inject back into the reservoir for later production. The PTU Owners would need to build a pipeline from the PTU to connect with the Badami Unit pipeline to ship the gas condensates through the existing Trans-Alaska oil pipeline for sale. The Expansion Agreement provided that if PTU Owners found, in their view, the project to be uneconomic by June 15, 2003 (the Contraction Election Deadline), the PTU Owners could elect to contract all of the Expansion Acreage out of the PTU, pay the State $8,000,000 to compensate for the unrealized bonus payments during the period that the acreage was withheld from leasing, and be released from the remaining obligations in the Expansion Agreement.

The Division approved subsequent unit plans that described the PTU Owner's proposed plans for development of a gas cycling project including: facility design, preliminary engineering, updating the PTU geologic model, and initiating the permitting process. However, in the Nineteenth POD, approved effective October 1, 2002, Exxon stated that the PTU Owners could

not justify drilling an exploration well in the WCA, the first drilling commitment in the Expansion Agreement, due to their findings that the costs would be higher and the potential accumulation smaller than they had previously anticipated.

On January 29, 2003, the Division found that the geological and geophysical data supported Exxon's proposal to transfer ADL 389728 from the WCA to Expansion Area #1. This amendment of the Expansion Agreement increased the applicable royalty rate for ADL 389728 from 16.66667% to 20% and the PA Extension Charge for Expansion Area #1 from $17,031,000 to $21,289,000.

Under the terms of the Expansion Agreement, the two remaining leases in the WCA contracted out of the PTU and the PTU Owners relinquished their interest in the leases effective January 21, 2003 and the PTU Owners paid the State $940,000 because they failed to fulfill the first drilling commitment.

On April 24, 2003, Exxon requested a two–year extension of the next three deadlines in the Expansion Agreement: the Contraction Election Deadline, the 2006 Development Drilling Commitment, and the 2008 Development Drilling Commitment.

On May 15, 2003, the Division approved a one-month extension of the Contraction Election Deadline, but the Development Drilling Commitments were unchanged. On June 20, 2003, the PTU Owners requested an additional six-month extension of the Contraction Election Deadline. On July 14, 2003, the Division approved the Twentieth POD for the period October 1, 2003 through September 30, 2004, during which time, Exxon planned to acquire the necessary permits and approvals for the gas cycling project while evaluating the Thomson reservoir structure and reserve estimates to move the gas cycling project toward the next phase of funding approval. This decision also extended the Contraction Election Deadline until January 15, 2004 as follows:

a) On or before July 15, 2003, the Working Interest Owners may elect to contract all of the Expansion Acreage out of the PTU, pay the State of Alaska $8,000,000 to compensate for the unrealized bonus payments during the period that the acreage was withheld from leasing (Extension Charge), and be released from the remaining obligations imposed in the Decision. The Extension Charge will be due on August 1, 2003.

b) Notwithstanding the foregoing, the above described deadline for election is hereby extended for a period of six months, until January 15, 2004, in exchange for an increase of the Extension Charge by the sum of $2,000,000, provided that, at any time during such six-month extended period, the PTU Owners may provide notification of their election hereunder, in which event the total Extension Charge of $10,000,000 shall be reduced by an amount equal to 1/12 of $4,000,000 for each full month of such six-month period remaining.

The Division agreed to extend the Contraction Election Deadline on May 15 and again on July 14, 2003, to allow additional time for the PTU Owners to further evaluate their proposed gas cycling project. The PTU Owners presented their current interpretation of the PTU geologic model and updated in-place and recoverable hydrocarbons estimates to the Division on October

16, 2003. Unfortunately, the PTU Owners' assessment of their proposed gas cycling project indicated higher costs and lower liquid recovery than they had previously estimated.

In a letter dated December 18, 2003, Exxon stated that engineering and resource evaluation work confirmed that, in their view, development of the resource at PTU is challenged. The resource evaluation work resulted in a significant reduction in condensate recovery under the PTU Owners' conceptual design for a gas cycling project. In addition, they found that their engineering design, along with permitting and environmental requirements added significant cost to the gas cycling project. After evaluating potential cost reduction measures and alternate development plans, Exxon concluded "that a standalone project prior to gas sales is not economically viable under the current fiscal system." Exxon's letter went on to request a further extension of the Contraction Election Deadline, until June 15, 2006. The Division's denial of Exxon's requested extensions provides in part:

> "Over the past year, the Owners reviewed the geologic model, recalculated the recoverable liquid hydrocarbons, refined the engineering design to better estimate the cost of development, began evaluating the environmental impacts through the federal permitting process, and considered alternate development scenarios. Through these activities, the Owners determined that the gas cycling project is currently uneconomic and suspended the permitting process indefinitely. Representatives from ExxonMobil met with division staff on December 2, 2003, to discuss possible revisions to the State's current fiscal system that might make the gas cycling project commercially viable. However, the Owners have not made any specific proposals that would warrant a further extension of the Contraction Election Deadline.
>
> Without a commercially viable project, the Owners may surrender the expansion acreage, pay the $10 million Extension charge, and be released from the remaining obligations in the Decision. If the Owners do not exercise this option, they must begin development drilling in the PTU by June 15, 2006, or all of the Expansion Acreage will automatically contract out of the PTU and the Owners will pay $20 million to the State of Alaska. We trust that the Owners will continue to evaluate options to economically produce the known hydrocarbon resources underlying the PTU, and look forward to reviewing the proposed PTU Twenty-First Plan of Development in July 2004."

Although the PTU Owners found the gas cycling project to be uneconomic, they did not exercise their option to contract the Expansion Acreage out of the PTU prior to the January 15, 2004 Contraction Election Deadline.

The Twenty-first POD, dated August 31, 2004, stated that the PTU Owners were unable to identify a viable gas cycling project under the current fiscal terms and they planned to focus on gas sales rather than gas cycling. The Twenty-first POD included a proposal to share with the Division the results of the PTU studies including reserve estimates, distributions, and mapping for the Thomson Sand Reservoir as well as the Brookian and Pre-Mississippian reservoirs within the unit area and provide financial and technical information so the Division could conduct an independent economic evaluation of the PTU Owners' gas cycling project. But the WIOs would

only provide this information if the Division executed an extraordinary confidentiality agreement.

North Slope producers Exxon, BPXA, and CPAI (Sponsor Group), three of the Major PTU Owners, submitted an application to the State under the Stranded Gas Development Act (SGDA), which proposed a fiscal contract that may or may not lead to construction of a major North Slope gas pipeline. The Sponsor Group does not officially represent the PTU, the PBU or any other unitized area on the North Slope. During the Twenty-first POD, the PTU Owners planned to evaluate the technical and commercial issues necessary for the PTU Owners to participate in a future open season for major gas sales from the North Slope.

On September 23, 2004, the Division approved the Twenty-first POD, on condition that Exxon provide the Division with existing technical information, costs, and other fiscal assumptions necessary for the Division to conduct an economic analysis of the PTU Owners' gas cycling project. The Division reminded Exxon of the statutory and regulatory confidentiality protections accorded sensitive information, and notified Exxon that the Division would not execute the proposed confidentiality agreement. The Division requested that Exxon provide copies of all of the requested data no later than November 15, 2004. In addition, the Division's approval of the Twenty-first POD required that the 22nd POD contain specific plans to fulfill the 2006 drilling commitment set forth in the Expansion Agreement.

Exxon appealed the Division's decision on the Twenty-first POD to the Commissioner of the Department of Natural Resources (the Commissioner). But on November 15, 2004, Exxon hand delivered a set of technical data to the Division. The Commissioner affirmed the Division's Twenty-first POD decision on November 24, 2004.

On June 21, 2005, Exxon proposed amending the Expansion Agreement such that the Expansion Acreage leases would remain within the PTU while the State and Sponsor Group continue negotiations over a fiscal contract and for the duration of any resulting fiscal contract. On July 1, 2005, the Division received Exxon's proposed 22nd POD, which included an update on activities during the term of the Twenty-first POD and planned activities during the one-year term of the 22nd POD. Exxon reported that the PTU Owners had incorporated the results of the prior geologic model, updated reservoir simulation, facility design, and cost estimates into a conceptual depletion plan for the PTU gas sales project. Under that plan, the PTU Owners would produce PTU gas and send it to the PBU for further processing before shipping it via a North Slope gas pipeline for sale, but did not specify a time-frame for development.

The 22nd POD did not commit to timely development or production of unitized substances. Instead, it proposed further development of the gas sales conceptual depletion plan so the PTU Owners would be prepared to participate in some future open season for nominations to a North Slope gas pipeline. The 22nd POD provides that the exact timing of the open season will be dependent, in part, upon the successful completion of a fiscal contract under the SGDA. During the term of the 22nd POD, the PTU Owners planned to monitor the progress of the negotiations under the SGDA and adjust the PTU work schedule as necessary to participate in an open season. The 22nd POD included the items of work summarized as follows:

1. Incorporate geologic modeling of the Thomson Sand aquifer uncertainty and the Pre-Mississippian bedded facies in the reservoir simulation model to form the basis of a major gas sales depletion plan.

2. Initiate more detailed facility design or Conceptual Engineering.

3. Determine optimum drillsite and well locations and update drilling and completion plan costs to estimate total project costs and timing.

4. Share the results of the above tasks with the Division.

5. Begin planning the permitting process for the PTU gas sales project.

6. Continue working to obtain all PTU Owners' approval of a new PTU Operating Agreement.

7. Assist the Division with its independent assessment of the commercial viability of the gas cycling project.

The Division's July 27, 2005 response indicated that it would not accept Exxon's proposal to amend the Expansion Agreement by tying it to the SGDA negotiations or relieve the PTU Owners of the work commitments they made in return for including the Expansion Acreage in the PTU. However, the Division indicated that it would be willing to extend the 2006 and 2008 Development Drilling Commitments, if the PTU Owners agreed to drill an exploration/delineation well, in lieu of a development well, by June 15, 2006 that could provide pertinent information pertaining to appropriate development of the western portion of the Thomson Sand Reservoir. The Division gave Exxon ten days to submit an acceptable plan, which should include the following items:

1. ExxonMobil shall drill an exploration/delineation well within the PTU by June 15, 2006.

2. The well must be drilled to the Mississippian basement and located to
   a. delineate the Thomson Reservoir west of the PTU #1 well,
   b. evaluate connectivity and continuity within the Thomson Reservoir, and
   c. evaluate the extent of and the hydrocarbon properties within the oil rim.

3. ExxonMobil shall apply to the Alaska Oil and Gas Conservation Commission for Pool Rules and a depletion plan for the Thomson Reservoir.

4. ExxonMobil shall prepare a schedule of activities to obtain the necessary permits for construction of the PTU facilities and pipelines.

5. ExxonMobil shall compare core samples from the Badami wells with the appropriate PTU wells to evaluate the Brookian reservoirs within the PTU.

Division staff discussed the requested modifications to the 22nd POD with the PTU Owners on July 27, 2005, and on August 1, Exxon indicated that they would respond to the Division by the end of the month.

On August 31, 2005, Exxon submitted a revised 22nd POD and a letter requesting a one-year deferral of both the 2006 and 2008 Development Drilling Commitments, rather than an indefinite extension under the SGDA. The 22nd POD stated that the PTU Owners could not justify drilling an exploration well, but Exxon offered to hold a workshop with Division staff to evaluate whether drilling exploration/delineation wells could provide valuable information that would reduce the uncertainty associated with the western portion of the Thomson Sand Reservoir. Other than a commitment to drill an exploration/delineation well by June 15, 2006, the revised 22nd POD included the other modifications that the Division had requested. However, without a commitment to drill an exploration/delineation well within the PTU while requesting deferral of the Development Drilling Commitments and tying development activities in the 22nd POD to the SGDA, the PTU Owners' plans for development of the PTU are unacceptable.

III. STATE STATUTES, REGULATIONS, AND PTU AGREEMENT PROVISIONS RELEVANT TO EVALUATION OF THE PTU OWNERS' PLANS FOR DEVELOPMENT OF THE PTU

The standards and criteria for approval of unit plans are primarily set out in the State statute, regulations, and the applicable unit agreement.

A. State Statute and Regulations

The Commissioner, or his designee, may approve a unit plan if he determines it is necessary or advisable in the public interest.[5] The following statutes and regulations govern approval of unit plans:

AS 38.05.180(p) provides, in part:

> To conserve the natural resources of all or part of an oil or gas pool, field, or like area, the lessees and their representatives may unite with each other, or jointly or separately with others, in collectively adopting or operating under a cooperative or unit plan of development or operation of the pool, field, or like area, or part of it, when determined and certified by the commissioner to be necessary or advisable in the public interest. . . . The commissioner may require oil and gas leases issued under this section to contain a provision requiring the lessee to operate under a reasonable cooperative or unit plan, and may prescribe a plan under which the lessee must operate. The plan must adequately protect all parties in interest, including the state. "

Under State regulation 11 AAC 83.303(a), the Director will approve a unit plan of development upon finding that it will: 1) promote the conservation of all natural resources; 2) promote the prevention of economic and physical waste; and 3) provide for the protection of all parties of

[5] By memorandum dated September 30, 1999, the Commissioner approved a revision of Department Order 003 that delegated this authority to the Director of the Division of Oil and Gas.

interest, including the State. Subsection .303(b) sets out six factors that the Director will consider in evaluating a proposed unit plan.

11 AAC 83.343, Unit Plan of Development, provides as follows:

> (a) A unit plan of development must be filed for approval as an exhibit to the unit agreement if a participating area is proposed for the unit area under 11 AAC 83.351, or when a reservoir has become sufficiently delineated so that a prudent operator would initiate development activities in that reservoir. All development operations must be conducted under an approved plan of development. A unit plan of development must contain sufficient information for the commissioner to determine whether the plan is consistent with the provisions of 11 AAC 83.303. The plan must include a description of the proposed development activities based on data reasonably available at the time the plan is submitted for approval as well as plans for the exploration or delineation of any land in the unit not included in a participating area. The plan must include, to the extent available information exists:
>
> > (1) long-range proposed development activities for the unit, including plans to delineate all underlying oil or gas reservoirs, bring the reservoirs into production, and maintain and enhance production once established;
> >
> > (2) plans for the exploration or delineation of any land in the unit not included in a participating area;
> >
> > (3) details of the proposed operations for at least one year following submission of the plan; and
> >
> > (4) the surface location of proposed facilities, drill pads, roads, docks, causeways, material sites, base camps, waste disposal sites, water supplies, airstrips, and any other operation or facility necessary for unit operations.
>
> (b) The commissioner will approve the unit plan of development if it complies with the provision of 11 AAC 833.303. If the proposed unit plan of development is disapproved, the commissioner will, in his discretion, propose modifications which, if accepted by the unit operator, would qualify the plan for approval.
>
> (c) The unit plan of development must be updated and submitted to the commissioner for approval at least 90 days before the expiration date of the previously approved plan, as set out in that plan. The update must describe the extent to which the requirements of the previously approved pan were achieved; if actual operations deviated from or did not comply with the previously approved pan, an explanation of the deviation or noncompliance must be included in the update. … After the commissioner has determined that an updated unit plan of development is complete as submitted, or as modified by the unit operator following the commissioner's suggestions, the commissioner will have an

additional 60 days in which to approve or disapprove the plan; if no action is taken by the commissioner, the update of the unit plan of development is approved.

(d) The unit operator shall submit an annual report to the commissioner describing the operations conducted under the unit plan of development during the preceding year.

(e) The unit operator may, with the approval of the commissioner, amend an approved pan of development.

B. The PTU Agreement Provisions

The following PTU Agreement provisions are relevant to the Division's evaluation of the PTU Owners' plans for development of the PTU.

Article 10, Plan of Further Development and Operation, provides as follows:

> Within six months after completion of a well capable of producing unitized substances in paying quantities, the Unit Operator shall submit for the approval of the Director an acceptable plan of development and operation for the unitized land which, when approved by the Director, shall constitute the further drilling and operating obligations of the Unit Operator under this agreement for the period specified therein. Thereafter, from time to time before the expiration of any existing plan, the Unit Operator shall submit for the approval of the Director a plan for an additional specified period for the development and operation of the unitized land. The Unit Operator expressly covenants to develop the unit area as a reasonably prudent operator in a reasonably prudent manner.
>
> Any plan submitted pursuant to this section shall provide for the exploration of the unitized area and for the diligent drilling necessary for determination of the area or areas thereof capable of producing unitized substances in paying quantities in each and every productive formation and shall be as complete and adequate as the Director may determine to be necessary for timely development and proper conservation of oil and gas resources of the unitized area, and shall:
>
> (a) specify the number and location of any wells to be drilled and the proposed order and time for such drilling; and,
>
> (b) to the extent practicable, specify the operating practices regarded as necessary and advisable for the proper conservation of natural resources.
>
> Separate plans may be submitted for separate productive zones, subject to the approval of the Director.
>
> Said plan or plans shall be modified or supplemented when necessary to meet changed conditions, or to protect the interests of all parties to this agreement.

> Reasonable diligence shall be exercised in complying with the obligations of the approved plan of development. ...

Article 16, Conservation, states:

> Operations hereunder and production of unitized substances shall be conducted to provide for the most economical and efficient recovery of said substances without waste, as defined by or pursuant to state law or regulation.

Article 20, Effective Date and Term, provides in part:

> This agreement shall become effective upon approval by the Commissioner or his duly authorized representative as of the date of approval by the Commissioner and shall terminate five (5) years from said effective date unless:
>
> (a) such date of expiration is extended by the Commissioner, or
>
> (b) it is reasonably determined ... that the unitized land is incapable of production of unitized substances in paying quantities ... or
>
> (c) a valuable discovery of unitized substances has been made or accepted on unitized land during the said initial term or any extension thereof, in which event the agreement shall remain in effect for such term and so long as unitized substances can be produced in quantities sufficient to pay for the cost of producing same from wells on unitized land and, should production cease, so long thereafter as diligent operations are in progress for the restoration of production or discovery of new production and so long thereafter as the unitized substances so discovered can be produces as aforesaid, or
>
> (d) it is terminated as heretofore provided in this agreement. ...

IV. ANALYSIS OF THE PTU OWNERS' PLANS FOR DEVELOPMENT OF THE PTU

A discussion of the subsection 11 AAC 83.303(b) criteria, as they apply to the PTU Owners' plans for development of the PTU, is set out directly below, followed by the Director's findings relevant to the subsection .303(a) criteria, and the Director's decision.

1. Prior Exploration Activities and Geological and Engineering Characteristics of the PTU

The Thomson Sand Reservoir is the primary reservoir in the PTU, consisting of the Lower Cretaceous Thomson Sand interval trending generally west-northwest across the unit, and between approximately –12,780' and –13,128' tvdss[6] in the Point Thomson Unit #1 discovery well (PTU1) drilled by Exxon in 1977. Exxon estimates that the Thomson Sand Reservoir

[6] Total vertical depth subsurface (below sea level).

contains approximately 8 trillion cubic feet (TCF) of gas and over 200 million barrels (MMB) of recoverable gas condensate with a discontinuous heavy-oil rim. The reservoir pressure is extremely high, around 13,000 pounds per square inch (psi). Other potentially productive reservoirs present in the PTU include Brookian Lower Tertiary turbidite sands and what are informally referred to as the "Pre-Mississippian" carbonates. Although the Sourdough well data remain confidential, in 2001 BPXA disclosed that the wells encountered recoverable reserves of approximately 200 MMB in the Brookian section. All three reservoirs are, or may be, over-pressured throughout much of the PTU.

A subsurface ridge-like structural feature constrains the northern edge of the Thomson Sand accumulation. While Thomson Sand presence, hydrocarbon charge, and thickness are uncertain on the north flank of the feature, it is possible that the Thomson Sand Reservoir is present north of the feature within Expansion Area #6.

Eighteen exploration wells have been drilled within and around the PTU. At the request of the Unit Operator, the Division certified seven PTU wells as capable of producing hydrocarbons in paying quantities and granted five wells extended confidentiality[7]. The public PTU well data is summarized in Attachment 1 to this decision.

The available well data allows the Thomson Sand Reservoir to be described as very fine-grained sand along the southern margin of the unit coarsening northward to a conglomeratic facies and exhibiting an average porosity of about 16%. Permeability within the reservoir varies from 10 millidarcies (md) to more than 1,000 md.

The PTU Owners also acquired extensive seismic data over the unit. They merged and began prestack depth migration processing of four 3D seismic surveys, which cover essentially the entire unit area: the Point Thomson Unit, Flaxman Lagoon, Island Corridor West, and Challenge Island surveys. Merging the seismic data sets produced a more unified interpretation of the extent of the Thomson Sand Reservoir over the greater unit area. The well and geophysical data indicate that much of the PTU is underlain or is potentially underlain by oil, natural gas and gas condensate deposits in the Thomson Sand Reservoir, and by Brookian oil deposits. There also appears to be a thin and potentially discontinuous oil leg at the bottom of the Thomson Sand Reservoir. The PTU owners incorporated the well and seismic data into a common database, which is the basis for the PTU Owners' Thomson Sand Geologic and Reservoir Simulation Models.

The Sixteenth POD, submitted by Exxon on July 30, 1999, included a commitment to conform the unit boundary to consensus maps of the potential reservoirs. During the term of the Sixteenth POD, the PTU Owners developed consensus structure and isochore maps of the

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7 20 AAC 25.537. Public and Confidential Well Information. "(d) Except as provided by (a) of this section, the reports and information required by this chapter to be filed by the operator will be kept confidential by the commission for 24 months following the 30-day filing period after well completion, suspension, or abandonment unless the operator gives written and unrestricted permission to release all of the reports and information at an earlier date. Upon notification that the commissioner of the Department of Natural Resources has made a finding that the required reports and information from a well contain significant information relating to the valuation of unleased land in the same vicinity, the commission will hold the reports and information confidential beyond the 24-month peiior and until notified by the commissioner of the Department of Natural Resources to release the reports and information."

Thomson Sand Reservoir and five potential Brookian accumulations; and initiated unit expansion discussions with adjacent leaseholders. On July 31, 2001, the Division and the PTU Owners executed the Expansion Agreement, which restructured the unit boundary in exchange for the PTU Owners' exploration and development commitments.

The Eighteenth POD, approved effective October 1, 2001, included activities toward fulfilling the Expansion Agreement, including selecting a location and contracting for a rig to drill an exploration/delineation well in the WCA. During the term of the Eighteenth POD, the PTU Owners completed prestack depth migration of the combined PTU 3D data set (Point Thomson Unit, Challenge Island, Island Corridor West and Flaxman Lagoon) over the redefined unit area. Exxon continued to pursue facility design, engineering and geological studies, and environmental analysis toward development of the Thomson Sand Reservoir, and initiated the federal permitting process for a gas cycling project, which moved from conceptual engineering to front-end engineering and facility design during the Eighteenth POD.

In the Nineteenth POD, dated August 8, 2002, Exxon notified the Division that the PTU Owners would not drill an exploration well prior to the WCA Drilling Commitment deadline of June 15, 2003. The State and Exxon executed a Memorandum of Understanding to facilitate the State permitting process for the gas cycling project and Exxon proceeded with engineering design of the surface facilities during the term of the Nineteenth POD. On June 24, 2003, the PTU Owners presented their updated stratigraphic and structural interpretation of the Thomson Sand Reservoir, based on the merged PTU seismic data, to Division staff.

During the term of Twentieth POD, October 1, 2003 through September 30, 2004, the PTU Owners completed a number of technical studies to evaluate Thomson Reservoir quality, fault seal, and structural framework; which, to the PTU Owners, indicated a chance of greater compartmentalization and a higher risk of sand production. The PTU Owners also studied alternative facility designs and identified cost reduction measures for their proposed gas cycling project. The PTU Owners stated that, in their view, their proposed gas cycling project is not commercially viable. Exxon suspended all permitting activities for their proposed gas cycling project and deferred evaluation of the Pre-Mississippian formation that underlies the Thomson Sand Reservoir. The PTU Owners incorporated the results of the prior geologic model, updated reservoir simulation, facility design, and cost estimates into a depletion plan for a conceptual PTU gas sales project.

Despite rigorous analyses of seismic data, the depth of the subsurface geological structure of the Thomson Sand Reservoir west of the PTU1 well remains suspect and introduces substantial uncertainty about reservoir connectivity and continuity, fluid contacts, and the character of the underlying oil rim between the eastern and western areas of the PTU. An exploration/delineation well in this area would provide geologic and reservoir data that could confirm or reduce the structural uncertainty and aid the subsequent determination of recoverable reserves and development options for the PTU.

The PTU Owners' prior exploration activities identified several hydrocarbon accumulations within the unit area that are capable of production in paying quantities. The geological and engineering data indicate that the PTU is underlain by the Thomson Sand Reservoir, which contains significant oil, gas, and gas condensate reserves, and several Brookian oil reservoirs. However, there has been no further delineation of the known accumulations or exploration

within the PTU since BPXA drilled the Sourdough #3 well in 1996. The PTU Owners have not yet begun development or production of the known hydrocarbon resources within the unit, and the 22nd POD does not contain any commitments to do so. Therefore, the criteria in 11 AAC 83.303(b)(2) and .303(b)(3), do not support approval of the 22nd POD.

2. The PTU Owners' Plans for Development of the PTU

Although the Thomson Sand Reservoir was discovered in 1977 and the PTU contains several known hydrocarbon accumulations that are capable of producing in paying quantities, the PTU Owners have not committed to put the unit into commercial production. Instead, the PTU Owners propose that more studies are needed and a fiscal contract changing the State's royalty and tax share is required before they can begin development of the PTU.

According to Exxon, the focus of the 22nd POD is on preparing for a potential open season for major gas sales from the North Slope. The 22nd POD states

> The timing of the open season process will be dependent upon successful completion of a fiscal contract between the Sponsor Group and the SoA under the Stranded Gas Development Act (SGDA). During the next year, the Owners will monitor progress of the contract negotiations under the SGDA and be prepared to adjust the work schedule to ensure the necessary work is conducted in sufficient time to allow the Owners to prepare for an open season for an Alaska gas pipeline while maximizing the efficiency of the work processes and sequence.

The Sponsor Group consists of only three of the Major PTU Owners: Exxon, BPXA, and CPAI, and does not officially represent the PTU lessees. The State is also negotiating with two other applicants that submitted proposals to build a North Slope gas pipeline. Depending on the progress of the negotiations, it is unlikely that a North Slope gas pipeline will be in operation before 2012, and the Sponsor Group has not yet made a public commitment to ever build a North Slope gas pipeline. However, regardless of the status of those negotiations, the PTU Owners have an obligation to diligently explore, delineate, and develop the hydrocarbon resources underlying the unit area.

The 22nd POD states that field activities associated with development drilling should begin three to three and one-half years before field startup, but it does not indicate when, if ever, an open season might occur or when, if ever, Exxon anticipates the commencement of development or production. At this point in time, the PTU Owners do not control if or when a North Slope gas pipeline will ever be operational. Reliance on third parties, beyond the control of the PTU Owners, is not grounds for the delay of PTU development and production.

While previous plans focused on developing unitized substances through a gas cycling project, the PTU Owners stated that project was not commercially viable and redirected their efforts to evaluate PTU development through gas sales. The 22nd POD describes several activities that the PTU Owners plan to execute during the next year to evaluate a conceptual PTU gas sales project, but those activities are all contingent on the Sponsor Group successfully negotiating a fiscal contract with the State under the SGDA.

The 22nd POD outlines the unit operator's plans for one year beginning October 1, 2005. Exxon plans to update the PTU geologic model and incorporate the results in the reservoir simulation to identify potential upside gas production from the Pre-Mississippian section. The technical studies will be the basis for a gas sales depletion plan followed by conceptual engineering for detailed facility design. The 22nd POD anticipates completing the depletion plan in April 2006 and initiating conceptual engineering, a 9 to 12 month process that must be completed in time for the PTU Owners to be prepared to nominate gas in an open season, should one occur. During the conceptual engineering process, the PTU Owners plan to determine optimum drillsites and well locations, and update drilling and completion costs to estimate total project costs and timing. PTU conceptual engineering will also include provisions for Brookian development, which Exxon anticipates will occur after it develops the Thomson Sand Reservoir. However, the 22nd POD did not identify a firm date for the start of production.

During the 22nd POD, the PTU Owners plan to assess the permitting requirements for PTU gas sales. They will review the previous permitting activities undertaken for the gas injection project, evaluate the need for additional data and studies, and assess the interrelationship between permitting for PTU development and for the Alaska gas pipeline project. The PTU Operator will also apply to the AOGCC for a conservation order that addresses gas offtake and depletion plans for the Thomson Sand Reservoir and discuss other conservation orders needed for PTU development. Based on the permitting assessment, Exxon will update the project timeline and prepare a schedule of activities to obtain the permits and conservation orders needed to drill the PTU wells and to construct and operate the facilities and pipelines.

To address the Division's concern about reservoir uncertainty in the western unit area, the 22nd POD includes Exxon's offer to hold a workshop to evaluate whether drilling delineation wells could provide valuable information that would reduce the uncertainty associated with the western Thomson Sand Reservoir. The 22nd POD also includes plans to compare core samples from PTU and Badami wells to evaluate potential development of Brookian prospects within the PTU.

While there is some benefit to the proposals in the 22nd POD, it does not contain sufficient plans or commitments to timely develop and produce unitized substances. The PTU Owners are not entitled to condition development of the PTU on the construction of a pipeline by a third party or on modification of the state's royalty and tax rights. PTU Owners' plans for delineation and development of the unit area do not justify approval of the 22nd POD or the PTU Owners' request for extension of the 2006 and 2008 Development Drilling Commitments. The 22nd POD does not meet the criteria in section 11 AAC 83.303(b)(4).

3. Economic Costs and Benefits of the PTU Owners' Plans for Development of the PTU.

The cost to the state and the public of approving the 22nd POD is that the known underlying hydrocarbons will not be timely delineated and produced and the remainder of the unit area will not be timely explored. Moreover, the 22nd POD conditions PTU development on amending the State's existing tax and royalty structure in the Sponsor Group's fiscal contract and construction of a North Slope gas pipeline, which are an inappropriate basis upon which to condition PTU development.

In the short-term, development of the PTU could create additional jobs and in the long-term, development would create additional employment and income to State residents. The State and the public are primarily interested in timely oil and gas production from State leases. Every year that production is delayed costs the State millions of dollars in unrealized interest on production revenue and delays the secondary benefits associated with PTU development. If the PTU Owners developed and began production from the PTU, the State would earn royalty and tax revenues over the long-term life of the field. Royalties, corporate income taxes, property taxes, and severance taxes would benefit the local and state economy, and provide revenue to the State's general, school, and permanent funds. The PTU Owners may reinvest revenues from PTU production in new exploration and development in the State.

Development of the PTU would also increase demand for goods and services supplied by local businesses, retailers, and service providers. An increased property tax base would benefit the residents and communities within the North Slope Borough and along the Trans-Alaska Pipeline corridor. Timely development and production from the PTU will lead to additional development and production from other reservoirs in the unit area and could provide an infrastructure base for exploration, development, and production outside of the unit area.

The Division's May 24, 2002 evaluation of the Expansion Agreement, found that the economic benefits of including the Expansion Acreage in the PTU outweighed the costs because the PTU owners made meaningful commitments to explore and develop the Thomson Sand Reservoir by drilling adequate exploration and development wells by dates certain, and agreed to increased royalty rates for some of the leases to compensate the state for lost opportunities to re-lease the acreage. If the Applicants fail to follow through with those commitments as scheduled, the Expansion Acreage will automatically contract out of the unit, and the PTU Owners must compensate the State for the lost opportunity to receive bonus payments in past lease sales. However, the PTU Owners have requested a one-year deferral of the Development Drilling Commitments. The 22nd POD, unlike the Eighteenth POD and subsequent plans, does not contain activities toward fulfilling the commitments in the Expansion Agreement.

In addition to the Development Drilling Commitments, the Expansion Agreement also contains the PTU Owners commitments to allocate production under an approved participating area by June 15, 2008, for Expansion Areas primarily underlain by the Thomson Sand Reservoir; and by June 15, 2010, for Expansion Areas underlain by Brookian prospects. If the PTU Owners ultimately fail to drill the required development wells, approval of a one-year deferral of the Development Drilling Commitments would delay receipt of any payments to compensate for withholding the Expansion Acreage from leasing, and if they do ultimately develop the PTU, deferral would delay receipt of facility and production related payments,.

There are currently 45 state oil and gas leases committed to the PTU Agreement.[8] Most of the PTU leases had a 10-year primary term, except the four most recent leases, which were issued with 7-year primary terms. All but two of the PTU leases are beyond their primary term, but under Article 18 (d) of the PTU Agreement they are all extended for the duration of the unit term.[9]

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[8] Six of the PTU leases were effective in 1965, nineteen in 1969, three in 1970, two in 1979, four in 1982, one in 1988, eight in 1991, one in 1993, two in 1997, and one each in 2000 and 2002.

[9] PTU Agreement, Article 18 (d) states "Each lease, sublease or contract relating to the exploration, drilling, development or operation for oil or gas of lands, committed to this agreement, which, by its terms might expire prior

In addition, the primary terms of seven PTU leases are extended because the Division certified wells located on those leases as capable of production in paying quantities. The PTU leases with certified wells are: ADL 28382, ADL 47556, ADL 47560, ADL 47567, and ADL 47573, which were issued on lease form DL-1 revised October 1963; ADL 312862 issued on DMEM-1-79B (Sliding Scale Royalty) revised November 5, 1979; and ADL 343112, issued on DMEM 1-82 (Net Profit Share) revised April 7, 1982. The primary term of these leases are extended under the individual lease agreements and State regulation 11 AAC 83.135, Shut-in Production.

The lessees have had twenty to thirty years to delineate, develop, and commence production from the hydrocarbon accumulations underlying these leases, which contain wells that are certified as capable of production in paying quantities. If the Division notifies the lessees that they must commence production, and they fail to do so within the time allowed, the leases will no longer be held by shut-in production, although the primary terms may continue to be extended by unitization or other extension provisions in the lease agreements.

If the PTU Agreement terminates and the leases expire, the Division could re-offer the acreage for lease in future lease sales and impose work commitments in the new leases.[10] Re-offering the PTU acreage would also replace older lease forms with a more modern updated lease form. The Division received bonus bids totaling nearly $146 million when the State originally issued the current PTU leases, and could attract significantly higher bid bonuses today.

Another benefit the state could realize by re-offering the unit acreage is the potential for increased royalty rates. Most of the leases in the core unit area have royalty rates of 12.5%. If the Division were to re-offer the acreage, it could impose higher royalty rates. The PTU Owners agreed to increased royalty rates for some leases in the Expansion Areas, ensuring that the State would receive the benefit of higher royalties on production from those leases without releasing the acreage. The royalty rate increased from 16.66667% to 20% for seven of the leases and from 12.5% to 16.66667% for one lease.

If the PTU is terminated and the Division re-offered the PTU acreage for bid, it might attract new lessees who may bring new ideas and energy as well as new geologic interpretations, engineering, development timelines, and marketing perspectives to develop the area. At this point, the current PTU Owners have had the leases for far beyond their primary term, and their conclusion today is simply that they cannot make enough money to justify development. It is time for the PTU Owners to develop and produce or give new lessees had a chance to develop the known hydrocarbon resources within the PTU.

In summary, the economic costs outweigh the benefits that might be gained by approving the 22nd POD. Therefore, the Division's evaluation of the section .303(b)(5) economic criteria does not support approval of the 22nd POD.

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to the termination of this agreement, is hereby extended beyond any such term so provided therein so that it shall be continued in full force and effect for and during the term o this agreement."

[10] "The Commissioner may include terms in any oil and gas lease imposing minimum work commitment on the lessee. These terms shall be made public before the sale, and may include appropriate penalty provisions to take effect in the event the lessee does not fulfill the minimum work commitment." AS 38.05.180 (h).

4. Environmental Costs and Benefits of the PTU Owners' Plans for Development of the PTU.

The PTU Owners do not propose any exploration, delineation, or development operations within the PTU. Therefore, the section 11 AAC 83.303(b)(1) environmental criteria neither supports nor condemns approval of the PTU Owners' plans for development of the PTU.

5. Other Relevant Factors to Protect the Public Interest

The PTU contains wells certified as capable of production in paying quantities. Considering the facts, it is now time to develop and produce the underlying hydrocarbons. If the PTU Owners have been unable to identify a commercial project in nearly 30 years, it is time to terminate the unit and re-offer the acreage to new lessees who will have the opportunity to develop the State's resources in a timely manner.

The Division has given the PTU Owners many opportunities over many years to develop the PTU. It is not in the public interest to grant a state lessee an indefinite extension on development merely because development in their view is not currently profitable enough or is too risky.

The intent of oil and gas leases is to give producers an opportunity to explore, develop, and produce within the primary term of the lease. That intent has been met and exceeded in this case. It is not in the public interest to change leasehold intent by allowing a lessee's parochial interests to supersede the State interest for orderly and reasonably prompt development.

The state's primary interest in oil and gas leases is development of hydrocarbons which yield oil and gas revenue. The state's interest is not met by allowing the producers to delay production until such time as the lessee determines that it is the lessee's optimum time to develop a known resource or the State agrees to compromise its tax and royalty system.

It is not fair to the public or other potential lessees to allow the current PTU Owners to continue to hold the leases, thereby precluding others from the opportunity to develop the resource.

V. FINDINGS

The PTU Owners' Plans for Development of the PTU fail to meet the criteria in 11 AAC 83.303(a) as follows.

A. Promote the Conservation of All Natural Resources.

If the Unit Operator proposed any operations under the 22nd POD, there would be environmental impacts associated with reservoir development. However, unitized development of the unit area would reduce the disruption of land and fish and wildlife habitat that would occur under individual lease development. This reduction in environmental impacts and preservation of subsistence access would, when taken in isolation, be in the public interest. While unitized operations conserve natural resources when compared to lease-by-lease development, development on a lease basis maybe preferable to no development at all. However, development of the Thomson Sand Reservoir is possible under a new unit agreement.

Additionally, before undertaking any specific operations, the unit operator must submit a unit plan of operations to the Division and other appropriate state and local agencies for review and approval, and the lessees may not commence exploration or development operations until all agencies have granted the required permits. The Division may condition its approval of a unit plan of operations and other permits on performance of mitigation measures in addition to those in the leases, if necessary or appropriate. Compliance with the mitigation measures would minimize, reduce or completely avoid adverse environmental impacts. Lease-by-lease operations would also require agency approvals, including mitigation measures.

B. Promote the Prevention of Economic and Physical Waste.

Exxon submitted geological, geophysical, and engineering data to support its interpretation of the hydrocarbon accumulations underlying the unit area. The available data indicates the PTU encompasses all or part of one or more hydrocarbon accumulations, but the PTU Owners' plans do not provide for delineation and timely development of those resources.

The PTU Owners stated that a gas cycling project was not commercially viable and the 22nd POD focuses on evaluating gas sales, but does not commit to produce and sell PTU gas. There is uncertainty regarding continuity of the reservoir in the western unit area, which could be addressed by drilling additional delineation wells. The Unit Operator has not adequately considered alternate development scenarios that incorporate both gas sales and gas cycling. Nor has Exxon evaluated the cumulative benefits of simultaneously developing the multiple hydrocarbon accumulations within the unit area. Timely development and production from the PTU does not preclude PTU gas sales at a later date. Focusing on gas sales at the exclusion of all other development options may result in waste of natural resources.

Gas cycling theoretically allows the recovery of significantly more liquids than would be recovered in a pure gas blow down project. In a gas blow down scenario, oil and gas condensates that remain in the field following gas sales may be largely unrecoverable. In addition, delaying timely production also constitutes waste. The Division and AOGCC must determine whether the proposed development will promote the conservation of oil and gas, but the Unit Operator has yet to apply to AOGCC for conservation orders and to the Division for approval of a depletion plan. The Director has the authority to modify the rate of development to achieve the conservation objectives under the PTU Agreement, and I find that increasing the rate of development in the PTU is necessary and advisable.

C. Provide for the Protection of All Parties of Interest, Including the State

A majority of the State's general fund revenue is derived from North Slope oil and gas operations in the form of royalty, net profit shares, production tax, property tax, and corporate income tax. Failure to develop and produce known hydrocarbon accumulations deprives the State of incremental revenue, economic activity and jobs. Should the PTU terminate, the area could be re-leased and unitized again under an acceptable unit plan of development that includes commitments to develop and produce the underlying hydrocarbon accumulations.

Continuing this 30-year record of non-development and delay of an oil and gas lessee's obligations to develop and produce its oil and gas leases makes a mockery of the statutory,

regulatory and contractual protections for the State as owner of the oil and gas estate. Therefore, the 22nd POD is unacceptable.

VI. DECISION

The 22nd POD fails to meet the requirements of 11 AAC 83.303 and .343 because it does not provide for the reasonable delineation and timely development of the hydrocarbon accumulations in the unit area. Nearly 30 years ago, lessees discovered the Thomson Sand Reservoir underlying the PTU, which to date has not been developed or put into commercial production. The PTU contains significant gas condensate and oil resources. Eighteen wells have been drilled within and around the PTU, but the most recent PTU well was drilled by BPXA nearly 10 years ago. Although some of the leases are more than 40 years old, and several hydrocarbon accumulations within the unit area contain wells that are certified as capable of producing in paying quantities, the Unit Operator has not stated that production from the PTU is economic and has not committed to development and commercial production. To the contrary, the Unit Operator has stated the production from the unit is not economic.

1. The 22nd POD makes no commitment to timely develop and produce PTU oil, gas, or gas condensate. The 22nd POD is hereby denied.

2. Failure to obtain approval of the unit plan is grounds for default under the PTU Agreement and the State oil and gas regulations. The PTU Owners are hereby notified that effective October 1, 2005, the PTU Agreement is in default.

3. To cure the default, the Unit Operator shall submit an acceptable POD within 90 days, by Thursday, December 29, 2005.

    a) An acceptable unit plan must contain specific commitments to timely delineate the hydrocarbon accumulations underlying the PTU and develop the unitized substances. The following commitments represent an example of an acceptable PTU plan of development:

        - Development activities for the unit, including plans and deadlines to delineate the Thomson Sand Reservoir, bring the reservoir into commercial production, maximize oil, condensate, and gas recovery, and maintain and enhance production once established; and plans for the exploration or delineation and production of other hydrocarbon accumulations and lands that lie stratigraphically above or below the Thomson Sand Reservoir;

        - The PTU Owners shall sanction a commercial PTU development project by October 1, 2006, and provide the Division with evidence of corporate approval and commitment of project funding.

        - The PTU Operator shall begin commercial production of unitized substances from the PTU by October 1, 2009.

- Details of the proposed operations to fulfill the 2006 Development Drilling Commitment, including the proposed surface location of the drill pad, bottom-hole location for the well, testing plan, and schedule of activities. The consequences of failure to fulfill the 2006 drilling commitment are specified in the Expansion Agreement.

4. Failure to submit an acceptable plan of development is grounds for termination of the PTU.

A person affected by this decision may appeal it, in accordance with 11 AAC 02. Any appeal must be received within 20 calendar days after the date of "issuance" of this amended decision, as defined in 11 AAC 02.040 (c) and (d), and may be mailed or delivered to Thomas E. Irwin, Commissioner, Department of Natural Resources, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501; faxed to 1-907-269-8918; or sent by electronic mail to dnr_appeals@dnr.state.ak.us. This decision takes effect immediately. If no appeal is filed by the appeal deadline, this decision becomes a final administrative order and decision of the department on the 31st day after issuance. An eligible person must first appeal this decision in accordance with 11 AAC 02 before appealing this decision to Superior Court. A copy of 11 AAC 02 may be obtained from any regional information office of the Department of Natural Resources.

Original signed by Mark D. Myers, Director *October 27, 2005*

Mark D. Myers, Director
Division of Oil and Gas

Date

cc: Thomas E. Irwin, Commissioner DNR
John Norman, Chair AOGCC
Richard Todd, Senior Assistant Attorney General

Attachment 1

Point Thomson Unit Leases

Lease Number	PTU Tract #	PTU Area	Acres	Effective Date	Well Completion Date	Certified Well	BROOKIAN TEST DATA	THOMSON SAND TEST DATA
28380	019	Core	2,544.00	9/1/1965	West Staines St. No.1 1970		GCM with trace OIL	DST#3,4&5: negligable GCM
28384	023	Core	1,760.00	9/1/1965				
28385	024	Core	637.00	9/1/1965				
28381	020	Core	2,560.00	10/1/1965				
28382	021	Core	2,560.00	10/1/1965	Alaska State C-1 1981	Y	DST#4: 50 bbls O&GCM	DST#2: 1.75 MMCFGD, 455 BCPD (37.3 API)
28383	022	Core	2,560.00	10/1/1965				
47568	012	Core	2,560.00	10/1/1969				
47569	013	Core	2,533.00	10/1/1969				
47570	014	Core	2,560.00	10/1/1969				
47571	015	Core	2,560.00	10/1/1969				
47572	016	Core	2,533.00	10/1/1969	N Staines River 1 1982		CONFIDENTIAL	CONFIDENTIAL
47562	006	Core	2,560.00	10/1/1969				
47567	011	Core	2,560.00	10/1/1969	PTU Well No.2 1978	Y	DST#5&6: 248 BOPD and 124 MCFGD	NONE
47556	025	Core	2,560.00	10/1/1969	Alaska State A-1 1975	Y	DST#2&3: 2,507 BOPD (23.1 API) and 2.17 MMCFGD	NONE
47559	003	Core	2,560.00	10/1/1969				
47561	005	Core	2,560.00	10/1/1969				
47557	001	Core	2,523.00	10/1/1969				
47558	002	Core	2,560.00	10/1/1969	PTU Well No.3 1979		NONE	DST#2: 6.348 MMCFGD and 476 BCPD (38 API)
47563	007	Core	2,523.00	10/1/1969	PTU Well No.4 1980		DST#3: 20 bbls O&GCM	DST#1: 306 BWPD
47564	008	Core	2,560.00	10/1/1969				
47566	010	Core	2,533.00	10/1/1969				
47573	026	Core	2,544.00	10/1/1969	Staines R. St. No.1 1979	Y	CONFIDENTIAL	CONFIDENTIAL
47560	004	Core	640.00	4/1/1970	PTU Well No.1 1977	Y	DST#3: 2.25 MMCFGD and 132 bbls (44.4 API)	DST#1: 2,283 BOPD (18.4 API) and 13.307 MMCFGD DST#2: 3.86 MMCFGD and 170 bbls (45.4 API)
50983	017	Core	640.00	4/1/1970				
51667	018	Core	1,243.00	4/1/1970				
312862	027	Core	5,648.68	2/1/1980	Alaska State F-1 1982	Y	DST#3: 73 MCFGD and 41 BCPD (35-50 API) DST#5C: 141 MCFGD and 145 BOPD (22.1 API)	DST#1: 3.02 MMCFGD and 152 BCPD (35.3 API) DST#2: 4.6 MMCFGD and 286 BCPD
312866	028	Core	4,935.47	2/1/1980	Alaska State D-1 2/16/1982		NONE	NONE
343110	030	Core	1,920.00	8/1/1982				
343111	031	Core	2,400.00	8/1/1982				
343112	032	Core	3,446.00	8/1/1982	Sourdough No. 2 1994 Sourdough No.3 1996	Y	CONFIDENTIAL	CONFIDENTIAL
343109	029	Core	1,970.16	8/1/1982	Alaska State G-2 1983		CONFIDENTIAL	CONFIDENTIAL
372256	038	3	1,412.00	12/1/1988				
375064	043	4	1,062.00	4/1/1991				
377015	033	1	3,554.30	8/1/1991	Challenge Is. No.1 1981		NONE	BLOWOUT ... OIL below 12,963'
389727	045	6	2,143.39	8/1/1991				
377016	034	1	2,779.16	8/1/1991				
389728	046	1	2,952.62	8/1/1991				
377017	035	1	5,696.18	8/1/1991				
377020	037	2	1,909.74	8/1/1991				
389730	047	6	3,684.31	8/1/1991				
382101	042	5	1,280.00	7/1/1993				
388425	039	6	1,162.08	1/1/1998	Alaska Island No.1 1982		NONE	2.9 MMCFGD and 185 BCPD (36 API)
388426	040	6	821.74	1/1/1998				
389716	036	7	1,473.92	6/1/2001				
390310	048	Core	15.80	4/1/2003				
45			106,200.55					

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STATE OF ALASKA

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DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

January 27, 2009

Appeal by Exxon Mobil Corporation, BP Exploration (Alaska) Inc., Chevron USA, Inc., ConocoPhillips Alaska, Inc. and Exxon Mobil Oil Corporation, Working Interest Owners, of the Notice of the Director, Division of Oil and Gas, dated August 4, 2008, entitled Lease Expiration Due To Elimination From Unit for Oil and Gas Leases ADL 28380 et al.

CONDITIONAL INTERIM DECISION

This is a conditional interim decision in appeals from the August 4, 2008, decision of the DNR Director of Oil and Gas that 31 of the leases included in the former Point Thomson Unit had expired. BP Exploration (Alaska) Inc., Chevron USA, Inc., ConocoPhillips Alaska, Inc., and ExxonMobil Corporation appealed from that decision. The initial phase of the evidentiary hearing was held on January 12 through 16, 2009, and the hearing is continued to February 12, 2009.

I am issuing this conditional interim decision because, in part, Appellants offered testimony that their development plans to drill a well during this winter season could still go forward if DNR provided them with an ice road permit before the end of this month and authorized drilling activities on the leases. For this reason, I have decided to issue this decision.

At the initial phase of the hearing, Appellants offered testimony and evidence regarding their plans for development of certain leases in the former Point Thomson Unit, referred to by Appellants as the "Point Thomson Project." Appellants have testified that this project provided for the drilling and producing from wells by 2014. Appellants have specifically testified that they are unconditionally committed to the initiation and continuation of drilling during this 2008 and 2009 winter season, including drilling a well out of the conductors with a rig capable of drilling through the Thomson Sands on that lease, and completing the drilling of two wells, both penetrating the Thomson Sands reservoir, by 2010. Appellants testified that in furtherance of this commitment, they have: (1) mobilized equipment and materials to the North Slope to support the operations; (2) retained subcontractors to support this operation; (3) modified a drill rig to make it suitable for the high pressure Thomson Sands reservoir; and (4) applied for and pursued all necessary permits. Given this testimony, I find that it is in the public interest to authorize Appellants to drill these two wells. If Appellants provide the documents listed below, the record will be adequate to support reinstatement of the two leases and issuance of permits to authorize drilling of these two wells.

I am not, however, ruling on whether any of the remaining 29 leases are engaged in drilling operations, or are extended by another lease provision, because the record is incomplete and there are many outstanding questions that Appellants need to address.

Nonetheless, assuming Appellants can provide the documentation listed below, I find that Appellants have demonstrated that ADL 47559 and ADL 47571 have been extended by the drilling operations savings clause because they have: (1) testified that they are unconditionally committed to the initiation of drilling during this winter season, including drilling a well out of the conductors with a rig capable of drilling through the Thomson Sands on that lease, and completing the drilling of two wells on these two leases, both penetrating the Thomson Sands reservoir, by 2010; (2) mobilized equipment and materials to the North Slope to support these operations and awarded subcontracts; and (3) unconditionally committed to bring those two wells on the two leases into production by 2014.

Based on the testimony and evidence presented at the hearing, I have decided to:

(1) direct my staff to issue the ice road permit as soon as possible so that the rig can be mobilized to the drill pad this winter;

(2) direct my staff to process all permits necessary for drilling these two wells that are pending before DNR;

(3) inform local, state, and federal agencies that Appellants are authorized to drill these two wells on the two leases; and

(4) reinstate ADL 47559 and ADL 47571 on the following conditions:

a. Appellants must abide by their unconditional commitments they made on the record including: (1) initiate drilling during this winter season, including drilling a well out of the conductors with a rig capable of drilling through the Thomson Sands on that lease; (2) completing these two wells on these two leases, both penetrating the Thomson Sands reservoir, by 2010; (3) continue to diligently move towards production by constructing the necessary facilities for processing and transporting hydrocarbons from these leases to market; and (4) commence sustained commercial production and transportation of hydrocarbons from these two wells on these two leases to market by 2014;

b. Appellants must obtain AOGCC and DNR approval for the precise location and bottom hole of each well;

c. Appellants must obtain DNR's approval for its Plan of Operations for the drilling of these two wells;

d. Appellants must diligently pursue all necessary permits, including working in good faith with all permitting agencies; and

e. Appellants must provide, within two weeks, all of the answers and documentation I requested during the initial phase of the hearing regarding Appellants' drilling plans for these two wells, including the precise well locations, drilling dates and production dates for each well. Appellants must also include a drill rig contract for each well, unconditional AFEs for each well signed by all parties, an AFE for the production infrastructure, and affidavits from each Appellant stating its willingness to pay its share of the costs for each well and for the production infrastructure.[1]

Additionally, unitization of these leases will likely be appropriate in order to properly conserve natural resources. I will address unitization issues in a final decision once the record is complete.

This conditional interim decision is intended to effect more expeditious production of state oil and gas resources. However, I remind Appellants that, under the terms of these two leases, the failure to diligently pursue drilling operations in good faith for the purpose of production will result in the automatic termination of these leases.

This interim decision will be followed by a final agency decision in the lease appeals once the record is complete, setting out my findings, rationale, and decision in detail. The time for appeal to the superior court will run from the date of issuance of the final agency decision.

In summary, I am issuing this conditional interim decision because Appellants have offered testimony and evidence that they are engaged in "drilling operations" for the purpose of diligently working in good faith to bring ADL 47559 and ADL 47571 into production, and that they will proceed with the project this winter season. The decision is conditional upon Appellants abiding by the conditions set forth above. I still need to review contracts and other documents that I have requested in order to make a final agency decision.

Jan. 27, 2009

Thomas E. Irwin
Commissioner

Date

[1] Compliance with this condition does not relieve Appellants from providing all of the other answers and documentation requested during the initial phase of the hearing.

9

Summary of Findings for Resource Assessment and Field Development Study of the Thomson Sand, in the Point Thomson Area, North Slope Alaska

May 16, 2008

Commissioned by

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

For the purpose of evaluating the hydrocarbon resource of the Thomson sand and potential depletion scenarios to maximize oil and gas recovery.

Study completed by

PetroTel Inc.
5240 Tennyson Pkwy, #207
Plano, TX 75025
Investigators
Anil Chopra - Distinguished Reservoir Engineering Advisor
Fred Stalkup - Distinguished Reservoir Engineering Advisor
Qichong Li – Senior Reservoir Engineer
Ravi Sharma – Project Director
Thomas Phillips – Distinguished Geological Advisor
Thomas O'Brien – Distinguished Geological Advisor

Summary of findings prepared by

Division of Oil and Gas, Resource Evaluation Staff
Jack Hartz
Julie Houle
Steve Moothart

Introduction

In 2007, the Resource Evaluation section of the Alaska Department of Natural Resources (DNR) Division of Oil and Gas (DO&G) initiated an independent technical assessment of the Thomson sand reservoir. The Division o f Oil & Gas contracted with PetroTel, Inc. to perform geologic and engineering evaluation of the Pt Thomson sands reservoir. PetroTel is recognized worldwide as industry leaders in enhanced oil recovery, reservoir characterization and simulation, coalbed methane, production, and exploration technologies. PetroTel provides professional consulting and advisory services utilizing a staff of 80 professionals with combined 1100 years of industry experience along with integrated project management support to domestic and international petroleum companies. Activities span the entire spectrum of technical, project, and commercial functions along with all facets of the hydrocarbon exploitation cycle.

With state-of-the-art software and sophisticated geostatistical and object modeling techniques, PetroTel reservoir engineers and geologists have successfully tackled a broad spectrum of difficult reservoir engineering problems by the intelligent application of reservoir simulation. Through the integration of reservoir geology, rock/fluid interactions, the dynamic pressure-volume-temperature relationships of oil gas and water (PVT properties), and process mechanisms, PetroTel engineers deliver reliable predictions of reservoir performance. Company expertise includes determination of in place hydrocarbons and reserves as well as providing a plan of development for discoveries that includes integrated economics.

PetroTel also has significant expertise in the development of gas condensate reservoirs with thin oil rims. They specialize in solutions and diagnostic tools that can advance the development of potential or undeveloped reserves. PetroTel has extensive experience that deals with pressure maintenance and improving recovery from gas condensate reservoirs.

The Pt Thomson sand accumulation is recognized as a high pressure retrograde condensate reservoir, which also contains a relatively thin oil column. The Petroleum Engineering Handbook[1] states "Development and operation of these (gas condensate) reservoirs for maximum recovery require engineering and operating methods significantly different from crude-oil or dry-gas reservoirs. The single most striking factor about gas-condensate systems (fluids) is that they exist either wholly or preponderantly as vapor phase in the reservoir at the time of discovery. This key fact nearly always governs the development and operating programs for recovery of hydrocarbons from such reservoirs; the properties of the fluids in place determine the best program in each case. A thorough understanding of fluid properties together with a good understanding of the special economics involved is therefore required for optimum engineering of gas condensate reservoirs. Other important aspects include geologic conditions, rock properties, well deliverability, well costs and spacing, well-pattern geometry, and plant costs."

The Resource Evaluation Group, DO&G undertook the evaluation of the Pt Thomson reservoir to better understand the resources contained in the reservoir and get an independent analysis of the development issues associated with gas condensate. The study had two main objectives: 1) to construct three-dimensional (3D) geologic models to evaluate the proven and potential hydrocarbon

[1] Bradley, H.B., 1987, Petroleum Engineers Handbook, 1987 Society of Petroleum Engineers, Chapter 39 Gas Condensate Reservoirs.

resource and 2) to import the geologic model into a dynamic reservoir simulator to test potential development and off-take scenarios to determine the impact on ultimate recovery of both gas and hydrocarbon liquids in the form of condensate and oil from an oil-rim in the reservoir. It should be noted that this study focuses on only the resource contained in the Thomson sand and does not Include the resource tested from the underlying Pre-Mississippian strata or the overlying Brookian accumulations

Results of PetroTel's work are summarized below.

1) The geologic and engineering analysis confirmed that gas cycling recovers more hydrocarbon than simple primary depletion based on known oil properties, gas properties, and reservoir characteristics.
2) Technical issues remain to be resolved; however, economic evaluation still needs to be done to validate conceptual conclusions and refine potential development scenarios.
3) Rigorous technical evaluation will be required as delineation of the reservoirs proceeds and additional physical information is acquired; more thorough and longer well tests are done; and as high quality reservoir oil, gas and condensate samples are acquired and analyzed.
4) Maximum recovery with gas cycling may require the import of gas in the form of waste CO2, captured inert gases, methane or natural gas from reservoirs outside of the Pt Thomson reservoir to replace voidage caused by fuel usage and shrinkage. Technical literature also suggests water can be injected into gas condensate reservoirs to maintain pressure, however, that process has not been addressed with this study.[1]
5) **Gas cycling delays gas sales, but results in greater ultimate recovery of both liquid and gas hydrocarbons. In contrast, primary depletion as a gas reservoir results in the lowest hydrocarbon recovery of a retrograde condensate reservoir. Gas blowdown[2] for sale can be done at any time after gas cycling and recovery of the hydrocarbon liquids.**
6) From the eleven static geologic models created, the volume of original gas in place (OGIP) ranged from 8.5-10.4 trillion standard cubic feet (TSCF). The volume of associated condensate ranged from 490-600 million stock tank barrels (MMSTB)[3] of condensate in place.
7) The range of original oil in place in the oil-rim varied greatly depending on the depth used for the oil-water contact. Publicly available data indicate that the interval between lowest possible gas and highest known water could vary from 60 feet to 145 feet in true vertical thickness, representing a wide range of potential oil column thickness in the oil-rim. The various geologic models produced a range of volumes of original oil in place (OOIP) in the oil-rim from 580-950 MMSTB.
8) Recoverable hydrocarbon resources for the Thomson sand were determined from dynamic reservoir simulation and are primarily a function of the development method employed. Over 70 scenarios were run to model a variety of development methods and well configurations within the reservoir simulator.

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[2] Blow-down (also Blowdown) "A term applied to the commencement of production of gas for sale after the completion o a Cycling or Recycling operation. The term refers to the reduction of pressure in the formation as a result of the production of gas. … ". Martin, Patrick H. and Kramer, Bruce M., 2000, Manual of Oil and Gas Terms, Eleventh Edition, Lexis Publishing, page 101.

[3] Million stock barrels - MMSTB, Million standard cubic feet – MMSCF or MMSCFG/D – Roman numeral designation for million. Stock tank barrel is equivalent of 42 US Gallons liquid at 60°F and 14.65 pounds per square inch absolute, psia (1 atmosphere). Standard cubic foot is measured at 14.65 psia and 60°F

9) Development of the Thomson reservoir by primary depletion (blowdown) has the potential to recover 210-305 MMSTB of liquid hydrocarbons in addition to 6-7 TSCF of gas.
10) Gas cycling for 20 years prior to gas sales has the potential to result in the ultimate recovery of 620-850 MMSTB of liquid hydrocarbons and still recover 4.8-5.9 TSCF of gas.
11) Gas cycling, has the potential to significantly increase recoverable oil and condensate as much as 500 MMSTB of condensate and oil beyond recovery from primary depletion blowdown. This incremental recovery of oil is larger than the expected ultimate recovery from the Alpine Oil Field.

The length of time required for gas cycling prior to gas sales will be determined by the resource available in the oil rim and how fast the gas volume can be cycled. The major determining factor in this decision is the number of wells that can be economically drilled and operated. More injection and production wells could accelerate cycling and recovery of the condensate liquids and oil. There are an optimal number of wells that will economically recover the maximum amount of oil and gas within a reasonable drilling budget; however, the scope of this study did not include optimization of development but rather was designed to estimate resource volumes and quantify the range of recoverable resource using conceptual development scenarios. Hydrocarbon liquids could be produced and sold using mostly existing oil pipelines prior to the construction of a North Slope gas pipeline. Once production of liquid hydrocarbons is established from the Thomson reservoir, the production facilities could be utilized to produce oil from the Brookian Flaxman and Sourdough accumulations.

Petroleum Potential and Exploration History of the Point Thomson Area

Well log and production or drill stem test data indicate that much of the Point Thomson area is underlain by the Cretaceous (Neocomian) Thomson sand that contains abundant natural gas and hydrocarbon liquids in the form of gas condensate, ranging from 35° to 45° API gravity[4],[5]. In addition to gas and condensate, the Thomson sand also contains a thin and potentially discontinuous oil-rim at the bottom of the reservoir interval that has tested oil as high as 18° API gravity. The Point Thomson area contains the potential of hundreds of millions of barrels of oil in the shallower Tertiary Brookian reservoirs. Another potential productive reservoir is composed of carbonates and bedded metasedimentary strata in the "Pre-Mississippian" basement below the Thomson sand reservoir. The DO&G reported in their 2007 annual report that the Pt Thomson Area contained estimated undeveloped recoverable resources of 295 million stock tank barrels (MMSTB) of liquid hydrocarbons and 8 trillion standard cubic feet (TSCF) of gas.

Hydrocarbons were first discovered in the Point Thomson area in 1975 in the Alaska State A-1 well. This well tested a zone of the lower Tertiary Flaxman sand of the Canning Formation from 12,565 to 12,635 feet MD(measured depth) that flowed 23° API gravity oil at a rate of 2,507 BOPD (barrels of oil per day),

[4] API Gravity – "Specific gravity measured in degrees on the American Petroleum Institute scale. The specific gravity of oil is normally specified … in terms of API degrees. On the API scale, oil with the least specific gravity has the highest API gravity. … the higher the API gravity the greater the value of the oil." ". Martin, Patrick H. and Kramer, Bruce M., 2000, Manual of Oil and Gas Terms, Eleventh Edition, Lexis Publishing, page 52.

[5] Condensate API gravity typically ranges from 40-60 degrees and are light color compared to oil. Black oils typically have API gravity that ranges from 25-35 degrees. Lake, Larry W., 2007, Petroleum Engineering Handbook, Volume V, Society of Petroleum Engineers, Chapter 10,

2.2 MMSCFG/D,GOR 864 SCF/STB (gas/oil ratio, standard cubic feet per stock tank barrel) (USGS, 1987).

In 1977, a second discovery well, the Point Thomson Unit No. 1 well was drilled and conducted two flow tests in the Lower Cretaceous (Neocomian) Thomson sand. From a zone between the depths of 12,963 to 13,050 feet MD, the well flowed 18° API gravity oil at a rate of 2,283 BOPD, 13.3 MMSCFG/D, GOR 5,830. Between the depths of 12,834 to 12,874 feet MD, the well tested at a rate of 3.86 MMSCFG/D, 170 BPD condensate, 45° API gravity (USGS, 1987).

Over the next seven years, six additional wells were drilled to delineate the two Pt Thomson discoveries. As a result of the additional delineation drilling, two other hydrocarbon reservoirs were encountered. In 1978, the Point Thomson Unit No. 2 well tested the "Staines River sand," a local sand in the Tertiary Canning formation at a depth of 11,580 to 11,678 feet MD that produced 21° API gravity oil at a rate of 248 BOPD, 124 MSCFG/D, GOR 500, after acid treatment (USGS, 1987).

In 1982, the Alaska State F-1 well tested the Thomson sand at a depth of 13,940 to 14,316 feet MD at a rate of 4.2 MMSCFG/D and 284 BOPD condensate of 35.3° API gravity. The well also tested the under lying "Pre-Mississippian" metasedimentary basement from 13,940 to 14,316 feet MD that flowed at a rate of 2.9 MMSCFG/D with 152 BPOD condensate of 34.8° API gravity. This test identified a third potentially productive zone in the Point Thomson area (USDOE, 1993).

State lands east of Prudhoe Bay saw renewed exploration activity during the 1990s after the discovery of the Badami oil field within turbidite sandstones of the Tertiary Canning Formation. First estimated to contain 100-150 MMSTB of recoverable oil, production began at Badami in August 1998. Since that time, production has been sporadic with the field periodically shut in due to connectivity issues within the reservoir. To date, over 5 MMSTB of cumulative oil production from Badami has been reported to the Alaska Oil and Gas Conservation Commission (AOGCC).

In 1994, BP Exploration Alaska (BPXA) and Chevron drilled the Sourdough #2 well targeting Brookian sands of the Canning formation in the southern portion of the former Point Thomson Unit; the Sourdough #3 well was drilled as a follow-up in 1996. Although the data from these wells are still held confidential, BP announced the discovery of hydrocarbons within turbidite sandstones of the Tertiary Canning Formation that could potentially contain 100 million barrels of recoverable oil in a 1997 press release. The Sourdough project would require up to 35 miles of pipeline to link up with the Badami field (Peninsula Clarion, 1997).

Additional discoveries have been announced in the offshore federal waters of the eastern Beaufort Sea within the Mississippian Kekiktuk Formation (Liberty) and Tertiary sandstones of the Sagavanirktok Formation (Hammerhead and Kuvlum). Once developed, production from Liberty is expected to peak at 40,000 BOPD, with a recovery target of 100 MMSTB (Petroleum News, 2007). While data from the U.S. Minerals Management Service (MMS) indicates that while neither Hammerhead nor Kuvlum have been fully delineated, the agency estimates 100-200 MMSTB of recoverable oil at Hammerhead, and 160-300 MMSTB at Kuvlum (MMS, 2006).

The timing of development of these and other Brookian oil accumulations in the area will likely follow the commercialization of the gas and liquids reserves within the Point Thomson sand.

Geologic Setting of the Thomson Sand

The Thomson sand is an informal name that describes a sequence that is stratigraphically correlated with the Kemik Sandstone of Early Cretaceous (Neocomian) age (Figure 1). Both intervals commonly consist of preserved isolated accumulations of locally derived sediment overlying the regional Lower Cretaceous unconformity (LCU), whose composition is controlled by the local provenance eroded by the unconformity.

The Thomson sands contain significant detrital dolomite and quartz sand that are interpreted as Neocomian age fan-delta complexes that were sourced from a northern provenance composed of northerly-dipping pre-Mississippian metasedimentary units. The Thomson interval includes a broad range of rock types ranging from conglomeratic dolomite breccia to fine-grained sandstone and siltstone. In general, the coarser conglomerate facies of the Thomson sand are present to the north, proximal to the interpreted source area, while the finer-grained distal facies are more prevalent to the south. A block diagram (Figure 2) depicts a highly interpretive, schematic representation of the depositional setting of the Thomson sand during an advanced stage of transgression of the Neocomian Barrow Arch rift margin uplift and development of the Lower Cretaceous Unconformity (LCU).

Other sand occurrences are irregularly distributed along the LCU surface to the south of the Point Thomson area, depending on local thickening into accommodation space attributed to paleotopography created by the differential erosion of Ellesmerian and pre-Mississippian units below the LCU. North of the rift shoulder uplift, syn-rift sands may have been deposited as sediment gravity flows down fault relay ramps to accumulate in relatively deep water. Similar sands form major reservoirs in the Point McIntyre and Niakuk fields north of Prudhoe Bay, but the concept has not yet been tested with a drill bit north of the Point Thomson area.

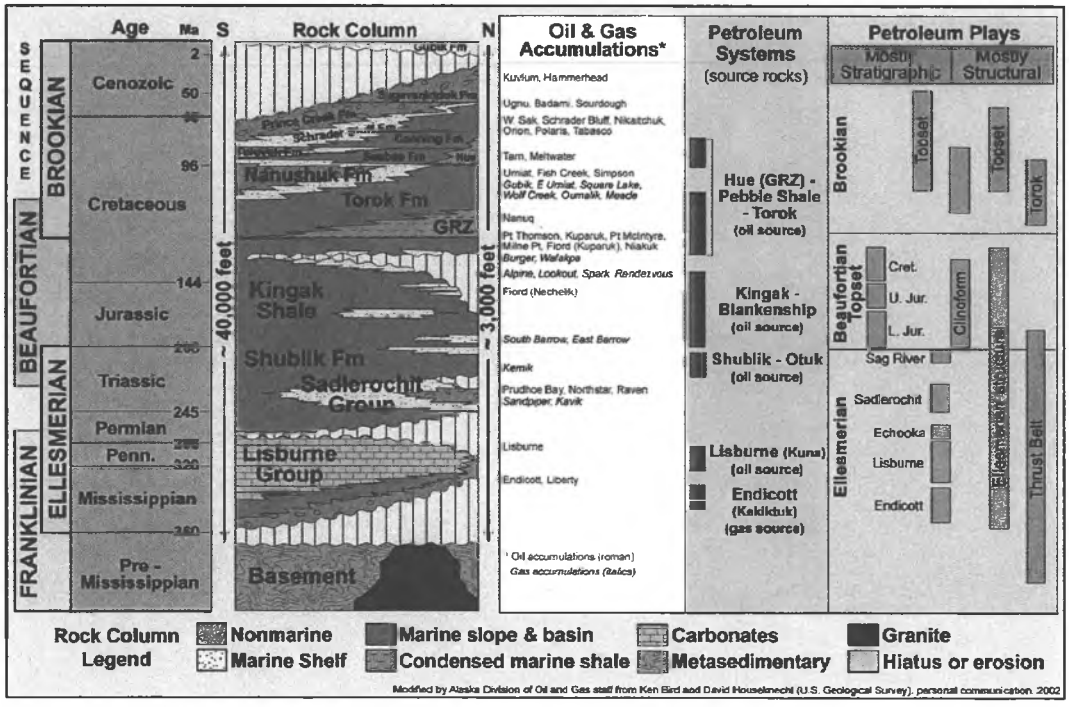

Figure 1, Alaska North Slope Stratigraphic Column

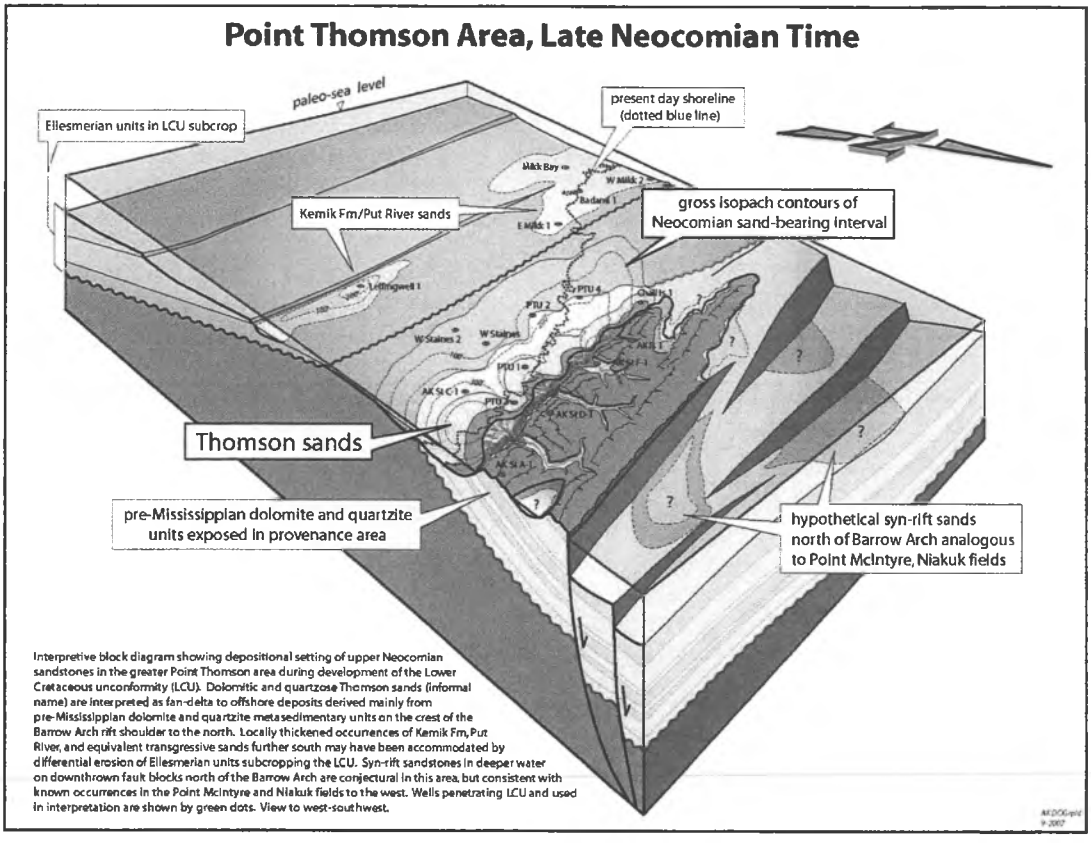

Figure 2, Block diagram of Point Thomson area in Late Neocomian time

First discovered in 1977, the oil, gas, and gas condensate contained within the Thomson sand is the largest proven, yet still undeveloped, field in Alaska. Between 1975 and 1996, a total of 17 wells have been drilled within the boundaries of the former Point Thomson unit. 1982 was the last time that a well was drilled into the Point Thomson reservoir. Although attempts were made to test most of the wells, tests were of short duration and were hampered by the high mud weights that were required to contain high reservoir pressure. Some of the tests were further complicated because they straddled both the gas and oil legs of the reservoir. No definitive, isolated test exists in the oil-rim of the Thomson reservoir. Additional wells are still needed to specifically delineate and test the productivity of Thomson oil-rim. Delineation wells in the oil-rim should include vertical pilot holes with horizontal laterals for production tests and include rigorous sampling for oil quality and PVT studies.

A number of the Point Thomson wells were drilled on the flanks of the accumulation and delineate the aerial extent of the core area of the Thomson reservoir. Along the western margin of the area though, no well has been drilled to demonstrate the western limit or trap of the reservoir or define the structural or stratigraphic continuity of the core reservoir from southeast to northwest. Additional wells are still required to adequately delineate the western limits of the hydrocarbon accumulation.

Thomson Sand Retrograde Condensate

The majority of the proven hydrocarbon resource in the Thomson sand is contained in the form of gas with entrained liquids known as a retrograde condensate. The Alaska Oil and Gas Conservation Commission (AOGCC) has released a paper entitled "Role of the Alaska Oil and Gas Commission in approving Pool Rules for the Point Thomson Field"[6] which gives an informative overview of the differences between a retrograde condensate reservoir and conventional gas and oil reservoirs. Retrograde condensate reservoirs tend to be deeper and have higher pressures and temperatures than conventional reservoirs. Due to the abnormally high pressures and temperatures, the fluid in a retrograde condensate reservoir does not behave like those in conventional oil and gas reservoirs. Pressure reduction in a conventional oil reservoir, causes the gas to expand and evolve out of solution from the oil. As gas evolves the oil becomes thicker (more viscous) and flows more slowly.

Technical literature (Society of Petroleum Engineers) has abundant examples of how condensate reservoirs perform under primary depletion and gas cycling. As pressure drops in a retrograde condensate reservoir, vaporized hydrocarbon liquids will condense when the reservoir pressure decreases below a certain point (dew point). If this happens in the reservoir, the condensate will remain trapped in place and clog the pore space, causing reduction of relative permeability; reducing well productivity and ultimate recovery. During primary depletion, the reservoir pressure will steadily decrease below dew point and hundreds of millions of barrels of condensate will become trapped in the reservoir and never be produced. Once the condensate comes out of the gas in the reservoir, very little of it will return to a gaseous state even if the reservoir pressure is later increased. Ideally, reservoir pressure should be maintained above dew point to keep vaporized liquid entrained to condense in surface facilities, thereby maximizing recovery. Results of the Pt Thomson sand reservoir modeling confirm the losses of condensate recovery during blow down. The blow down cases at best recovered about one-half the condensate that cycling cases recovered. The difference is directly attributable to trapped condensate.

Prudent development practices require keeping the reservoir pressure high (near or above dew point) until all of the economically recoverable liquid hydrocarbons have been produced in order to maximize the recovery of both oil and gas in a retrograde condensate field. "Gas cycling" is considered the best method of producing a retrograde condensate reservoir. This process involves producing hydrocarbon gas; removing the condensate for commercial sales; and then re-injecting the "lean gas" back into the reservoir to maintain pressure and sweep more condensate to the production wells. Once most of the condensate has been recovered, all the wells can be converted to gas production wells and the gas sold to market.

In addition to the dry gas and entrained condensate, the Thomson sand contains hundreds of millions of barrels of oil in the oil-rim. The gas cycling process can be applied simultaneously to the Thomson oil-rim after delineation and development. These hydrocarbon liquids could be produced and sold using mostly existing oil pipelines before a North Slope gas pipeline is operational. Once production of condensate and oil begins from the Thomson reservoir, it is anticipated that this would facilitate the delineation, development and production of some of the outlying Brookian oil discoveries in the Thomson area.

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6 URL: http://www.state.ak.us/local/akpages/ADMIN/ogc/Gas/PtThompson_Pool_Rules.pdf, Retrieved April, 2008,

Studies of gas cycling in both the gas cap and oil rim were conducted using static geologic models and dynamic reservoir simulations to estimate recoveries under different development schemes. Results of those studies are documented later in the Reservoir Simulation section of this report.

DNR Evaluation of the Thomson Sand

Geologic Model Results

A total of eleven 3D geologic models were constructed of the Thomson sand. The distribution of facies and reservoir properties were varied in the different cases to account for the uncertainty between the well control points. A range of depths for the fluid contacts was also used to capture the uncertainty in identifying those contacts in the well logs or from available test data. The volume of original gas in place (OGIP) from the eleven static geologic models ranged from 8.5 – 10.4 trillion standard cubic feet (TSCF).

The volume of associated condensate ranged from 490 – 600 million stock tank barrels (MMSTB) condensate in place. Publically available well test data from the Thomson sand indicate condensate yields of 44-75 barrels condensate/MMSCF gas produced. The average yield was 64 STB/MMSCF.

The potential for a significant volume of oil in place below the gas cap in the oil-rim was also identified. The range of original oil in place in the oil-rim varied greatly depending on the depth used for the oil-water contact. Publicly available data indicate that the interval between lowest known gas and highest known water could range from 60 feet to 145 feet in true vertical thickness. This is the range of thickness available to be occupied by oil in the oil-rim. The range of volumes of original oil in place (OOIP) in the oil-rim varied in the models from 580 – 950 MMSTB.

All the volumes reported out of the geologic model are original hydrocarbons in place for the Thomson sand reservoir and do not include the hydrocarbons tested from the bedded carbonates of the Pre-Mississippian basement or those hydrocarbons tested from the overlying Brookian intervals. Reservoir properties within the Pre-Mississippian strata are not as well constrained by the available data as in the Thomson sand.

Because the Thomson sand directly overlies bedded carbonate strata of the Pre-Mississippian, it is likely in communication with the Pre-Mississippian. Recoverable volumes for the Thomson sand were determined from the dynamic reservoir simulation and were demonstrated to be a function of the development method employed. Neither the Pre-Mississippian nor Brookian reservoirs were included in the reservoir simulation. Both should be considered as considerable upside since they have been successfully tested in multiple wells. Further delineation drilling is required to fully access the resources in-place and production impacts of these reservoirs on future development.

Reservoir Simulation Results

Upon initialization of the reservoir simulation model, over 70 scenarios were run to model a variety of development methods and well configurations. The development methods included primary depletion (gas blowdown), gas cycling followed by gas blowdown, and development of the oil-rim. Numerous cases were run for each type of development to test different well configurations such as horizontal wells, well constraints such as rate limits and operating pressures, and the number of development wells. In this

way, we were able to judge the relative impact the different variables had on the ultimate recovery of the resource within each type of development. All model cases were run out to thirty years of production. It should be noted that no physical constraints to the development wells such as location of surface drill sites and facilities or drilling departure from surface location have been applied during the modeling. At this stage of the analysis scenarios were designed and run to discover and evaluate the key sensitivities to recovery, rather than to derive optimal production economics.

Primary Depletion (Gas Blowdown)

Gas blowdown can be done at any time after cycling and recovery of the hydrocarbon liquids. In the following cases, gas blow down is done first without pressure maintenance or gas injection. Six primary depletion cases were run in the reservoir model. Three cases contained a fixed number of wells at startup and three cases included additional wells that were added later. Gas producers were constrained to a maximum rate of 150 MMSCF/D and a minimum bottom-hole pressure (BHP) of 3000 psi. Cases were run with 8, 16 and 22 wells. Initial gas production rates for these three cases varied from 0.4 – 1.2 BSCF/D[7]. Additional cases included: 12 initial producers with 4 new producers drilled after 4 years, 16 initial producers with 3 additional wells drilled after 8 years, and 16 producers with 6 additional wells drilled after 4 years. Initial gas production rates for these three cases ranged from 0.8 to 1.2 BSCF/D. Three more primary depletion cases were run in both gas cap and oil rim. Cases were run with 22, 13 and 13 gas producers in the gas cap and 4, 30 and 20 oil producers in the oil rim. Oil producers were constrained to a maximum rate of 7000 STB/D and a minimum bottom-hole pressure (BHP) of 3000 psi. Initial gas production rates for these three cases ranged from 1.0 to 1.2 BSCF/D

With a BHP limit of 3000 psi, gas recovery can approach 60% for the 16- producer and 22-producer cases. The recovery can reach 70% at lower BHP of 2000 psi. The 8-producer case can recover 45% of the gas in 30 years. The number of wells and timing of drilling could be optimized to meet gas demand or gas sales contracts. Twenty-two wells could drain the gas in the reservoir in 12-15 years.

Condensate recovery during primary depletion of the gas cap is only about 25% of the in place volume after 30 years. The majority of the condensate is lost in the reservoir because the reservoir pressure drops below dew point. Pressure maintenance and gas recycling is needed to recover more condensate. Primary depletion is also detrimental to any future recovery from the oil-rim due to loss of energy within the oil by the reduction of reservoir pressure. Oil rim recovery ranged from 3-16% in the cases of primary depletion in both gas cap and oil rim if primary depletion is the only recovery method.

Gas Cycling Followed by Gas Blowdown

The model cases run demonstrate that full scale gas cycling should be initiated early in order to achieve maximum recovery of the condensate and any other potential hydrocarbon liquids in the gas cap. Cycling also maintains reservoir pressure for development of the oil-rim. In a gas cycling project, the ultimate recovery of condensate and timing of subsequent gas blowdown is a function of the rate at which the in place volume of gas can be produced and recycled. This can be optimized by the number of development wells in place.

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[7] BSCF/D – Billion standard cubic feet per day.

Four base cases of cycling the produced gas for 30 years with a different numbers of wells were run to test the impact of well count on the potential ultimate recovery of condensate. Additional cases with gas blowdown commencing after 10 and 20 years of cycling were run to test how much condensate could be produced prior to blowdown for gas sales.

The four base cases consisted of: a minimum development case of 4 producers and 2 injectors; a case with 8 producers and 4 injectors; a 16-producer with 5-injector case; and a case with 22-producers and 8 injectors which resulted in the highest hydrocarbon recovery of the four cases. Producers were constrained to a maximum rate of 150 MMSCF/D and a minimum BHP of 3000 psi. The injectors were limited to a maximum rate of 300 MMSCF/D and a maximum injection pressure of 15000 psi. In all cases 90% of the produced gas was cycled back into the reservoir.

Condensate recovery after 30 years for the four cases ranged from only 24% of the in place volume for the 4-producer case, to 86% recovery for the 22-producer case. At the end of cycling the injectors can be converted to gas producers. Gas blowdown with the 30 wells producing subsequent to gas cycling can recover up to 70% of the remaining recycled gas within 12 years.

Additional cases were then run with gas cycling for both 10 years and 20 years before blowdown. For the 22-producer and 8-injector development, after 10 years of cycling 62% of the condensate is recovered and then 57% of the original gas in place (OGIP) is recovered during the ensuing blowdown. Cycling for 20 years recovers 76% of the condensate and then 56% of the gas (OGIP).

Oil-rim Development

One of the key results of the study was that it became obvious that oil rim development had to be done during a gas cycling phase. Because there is uncertainty about the quality of the oil and reservoir rock in the oil-rim, to preserve reservoir energy and sustain maximum oil producibility oil rim reservoir pressure must be maintained. The oil-rim is a relatively thin zone of the reservoir that lies between the gas cap and underlying aquifer. For this reason the use of dedicated horizontal wells will be required to avoid coning of the adjacent gas or water. Injection of the recycled gas into the oil-rim will help reduce the viscosity, improve swelling, mobilize and displace the oil.

Model cases were run that included production wells in the oil-rim as part of both a primary depletion and gas cycling developments. Individual cases in both development strategies varied the number of oil-rim producers from 4 to 20 and ultimately 30 oil wells. Sensitivities were also run on gas- oil ratio (GOR) cutoffs for the producers, minimum BHP, and the use of offsite gas for supplemental gas injection.

In a primary depletion scenario, adding four wells into the oil-rim recovered 3% of the original oil in place. Increasing the number of oil-rim wells to twenty or thirty upped the recovery to almost 16% of OOIP. In a gas cycling scenario, the addition of four wells in the oil-rim achieved 11% recovery after 30 years of cycling, going to gas blowdown after 10 or 20 years of cycling recovered 7% and 9 % of the oil-rim OOIP respectively.

Increasing the number of oil-rim wells during gas cycling development in the model increased the recovery of oil significantly. In a case with 13 gas producers, 18 gas injectors and 20 oil-rim producers, recovery of oil from the oil-rim approaches 50% of the in-place volume after 30 years of cycling. This is 3-15 times better recovery than during primary blowdown. By varying the length of time of cycling

before gas blowdown from 5 to 10 and then 20 years in the same development scenario the recoveries from the oil-rim drop to 31%, 39% and 43% respectively.

Modeling of development scenarios for the oil-rim demonstrates that to achieve maximum recovery of the oil resources located below the gas cap in the oil-rim reservoir pressure maintenance by gas cycling is crucial. The difference in recovery from the oil-rim between primary depletion and a cycling project that maintains reservoir pressure can be as much as **35% more** of the total in-place volume.

Use of Offsite Gas

Production from the oil rim increases the voidage within the reservoir. The results from model cases involving large scale development of the oil-rim (30 horizontal producers) indicated that due to the increased off-take, reinjection of 90% of the produced gas will not be sufficient to maintain reservoir pressure. A decrease in reservoir pressure below dew point results in lower condensate recoveries and the reduction also decreases oil-rim recovery.

Gas from outside sources (offsite) could be imported and injected into the Thomson reservoir to help maintain reservoir pressure. Offsite gas can be in the form of carbon dioxide (CO2), inert gas such as nitrogen, methane or natural gas.

The use of CO2 for pressure maintenance may have multiple benefits depending on the source and availability.

- CO2 is commonly removed as a byproduct from produced gas in a gas treatment plant prior to sale.
- If enough CO2 is available for pressure maintenance, it could allow sale of some Point Thomson gas before gas blowdown.
- CO2 should be fully miscible with the Thomson oil and thus reduce the viscosity and further increase recovery.

CO2 is considered a "green house gas" and re-injection into a reservoir is a method of sequestering carbon and as such government tax incentives may be available in the form of carbon credits to offset and/or mitigate CO2 re-injection costs,
Although the importation of offsite gas would require the construction of a gas line to Point Thomson, once gas cycling is completed, the line would be available for gas sales.

The large scale oil-rim development cases that needed supplemental pressure support indicated a volume of 200-500 MMSCF/D would be required in addition to the Thomson gas during the cycling process. A comparison of cases with and without offsite gas showed an increase in condensate recoveries from 33% to 60% of the original condensate in place. This is a potential increase of 130-160 MMSTB.

Conclusions from Geologic and Reservoir Modeling

1. In addition to gas, the area contains hundreds of millions of barrels of hydrocarbon liquids. These hydrocarbon liquids exist in the form of condensate liquids; a thin and potentially discontinuous oil leg at the bottom of the Thomson sand reservoir; and oil in the overlying Brookian sediments. Exploration wells drilled prior to 1982 have tested oil from each of these reservoirs. Adequate infrastructure to transport these liquids to market exists within thirty miles of this reservoir.

Therefore, the potential development of the Point Thomson area should not be limited to production of the dry gas.

2. Evaluation of the potential hydrocarbons in place in the Thomson sand reservoir by DNR and PetroTel's 3D geologic models results indicate the following volumetrics:
    - Original gas in place of 8.5-10.4 TSCF.
    - retrograde condensate - 490-600 MMSTB in place
    - Oil rim - 580 to 950 MMSTB original oil-in-places.

3. Reservoir simulation of the Thomson sand reservoir evaluated various development scenarios for the reservoir. These scenarios included primary depletion of the reservoir (gas blowdown), production and re-injection of the gas after recovering the condensate (gas cycling), and the addition of dedicated horizontal production wells into the oil-rim in both gas blowdown and cycling cases. Over 70 individual cases where run in the reservoir simulator varying the number of development wells and operating constraints in an attempt to determine the optimum recovery for each development scenario.

4. The producible liquids contained in the Thomson reservoir could technically be developed before a gas pipeline is built.

5. In order to maximize the recovery of the hydrocarbon liquids in the reservoir it is necessary to keep the reservoir pressure high until all of the economically recoverable liquid hydrocarbons are produced. This is most often accomplished through gas cycling. In the reservoir simulator cases run, gas cycling was applied in the gas cap for 30 years in conjunction with development and gas cycling of the oil-rim.

    - Gas cycling recovered 86% or 420-516 MMSTB of condensate.
    - Recovery from the oil-rim was close to 50%, 290-475 MMSTB.

6. Shorter duration Gas Cycling:
    - Cycling gas for 10 years prior to blowdown results in recoveries of:
        - Condensate - 62% or 300-370 MMSTB
        - Oil Rim - 39% or 225-370 MMSTB of the oil-rim

    - Cycling the gas for 20 years increases the recoveries:
        - Condensate - 76% or 370-450 MMSTB
        - Oil Rim - 43% or 250-400 MMSTB.

    - Subsequent blowdown of the gas cap after 10 and 20 years cycling recovers 57% and 56% or 4.8-5.9 TSCF of gas reserves.

7. Primary depletion is the fastest method to produce the gas from the reservoir but recovers the least hydrocarbons. Simulation results showed: 70% of gas recovered or 6-7 TSCF with 22 wells in 12-15 years.
    - Condensate recovery is approximately 26% of the in place volume, or 127-156 MMSTB
    - Oil-rim recovery during primary depletion is only 3-16% 30-150 MMSTB of oil.
    - The majority of the condensate is left in the reservoir by condensation below dew point.
    - Pressure maintenance and gas recycling is needed to maximize condensate recovery.

- Primary depletion reduces recovery from the oil-rim due to loss of energy by the depletion of reservoir pressure.
- Gas blowdown and sale of the gas can be done at any time after cycling and recovery of the hydrocarbon liquids.

8. A gas blowdown scenario could recover over 500 million barrels less than a gas cycling scenario. This difference is larger than the expected ultimate recovery from the Alpine Oil Field.

9. There is uncertainty in the original oil-rim volume in place and the ultimate recovery of that oil, even though it has flowed during testing of the PTU-1 exploration well.
   - Even if the oil rim was discounted entirely, the difference in condensate recovery between primary depletion (blowdown) and gas cycling for 20 years is potentially over 300 million barrels.
   - This represents three times the targeted recovery from the proposed off shore development of the Liberty Field.
   - During the period of gas cycling, further delineation of the oil-rim will determine the scale of development needed to maximize recovery from that portion of the resource.

In summary, gas cycling delays gas sales, but it is through this process that the maximum recovery of the condensate in the gas cap and any other liquid hydrocarbons can be achieved. Cycling also maintains reservoir pressure for development of the oil-rim and is a viable recovery mechanism. The length of time required for gas cycling prior to gas sales will be a combination of the resource available from the oil rim and the rate at which the in place volume of gas can be produced and recycled. A large factor in this will be the number of development wells that can be economically drilled and operated. More wells equals faster cycling and faster recovery of the condensate liquids. These liquids could be produced and sold before the construction of a North Slope gas pipeline. Production of liquid hydrocarbons from the Thomson reservoir could facilitate oil production from the other discovered reservoirs such as the Brookian Flaxman and Sourdough accumulations.

10

11 AAC 83.303. Criteria

(a) The commissioner will approve a proposed unit agreement for state oil and gas leases if he makes a written finding that the agreement is necessary or advisable to protect the public interest considering the provisions of AS 38.05.180 (p) and this section. The commissioner will approve a proposed unit agreement upon a written finding that it will

(1) promote conservation of all natural resources, including all or part of an oil or gas pool, field, or like area;

(2) promote the prevention of economic and physical waste; and

(3) provide for the protection of all parties of interest, including the state.

(b) In evaluating the above criteria, the commissioner will consider

(1) the environmental costs and benefits of unitized exploration or development;

(2) the geological and engineering characteristics of the potential hydrocarbon accumulation or reservoir proposed for unitization;

(3) prior exploration activities in the proposed unit area;

(4) the applicant's plans for exploration or development of the unit area;

(5) the economic costs and benefits to the state; and

(6) any other relevant factors, including measures to mitigate impacts identified above, the commissioner determines necessary or advisable to protect the public interest.

(c) The commissioner will consider the criteria in (a) and (b) of this section when evaluating each requested authorization or approval under 11 AAC 83.301 - 11 AAC 83.395, including

(1) an approval of a unit agreement;

(2) an extension or amendment of a unit agreement;

(3) a plan or amendment of a plan of exploration, development or operations;

(4) a participating area; or

(5) a proposed or revised production or cost allocation formula.

History: Eff. 9/5/74, Register 51; am 7/22/79, Register 71; am 6/28/81, Register 78; am 3/18/83, Register 85

11

958 P.2d 422, 139 Oil & Gas Rep. 461
(Cite as: 958 P.2d 422)

Supreme Court of Alaska.
Clyde BAXLEY, individually, and on behalf of the citizens of the State of Alaska, and The Republican Moderate Party, a political group, on behalf of the citizens of the State of Alaska, Appellants,
v.
STATE of Alaska, and John Shively, Commissioner, Department of Natural Resources, and BP Exploration (Alaska), Inc., Appellees.

No. S-8155.
May 15, 1998.

Citizen-taxpayers brought action challenging constitutionality of statute authorizing amendment of "net profit share" (NPS) provisions of state oil and gas leases. The Superior Court, Third Judicial District, Anchorage, Michael J. Wolverton, J., entered summary judgment in favor of defendants, and plaintiffs appealed. The Supreme Court, Eastaugh, J., held that: (1) plaintiffs had standing to bring action; (2) Uniform Application Clause did not apply to statute; (3) statute was not unconstitutional special legislation; (4) Commissioner of the Alaska Department of Natural Resources (DNR) did not exceed his authority under the Alaska Land Act when he negotiated amendment; (5) statute was not enacted in violation of the Public Notice Clause; and (6) statute did not violate rule against material amendments to state contracts awarded through a public bidding process.

Affirmed.

West Headnotes

[1] Mines and Minerals 260 ⚿79.1(2)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of Oil and Gas Leases
260k79 Rent or Royalties
260k79.1 In General
260k79.1(2) k. Nature and Distinctions; Bonus. Most Cited Cases

"Royalty" is a share of the product or profit reserved by the owner of land for permitting another to develop his land for oil or gas.

[2] Mines and Minerals 260 ⚿79.1(2)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of Oil and Gas Leases
260k79 Rent or Royalties
260k79.1 In General
260k79.1(2) k. Nature and Distinctions; Bonus. Most Cited Cases

Royalties are usually expressed as fractions, and they usually continue throughout the life of oil and gas lease, whether the lessee reaps a net profit or not.

[3] Mines and Minerals 260 ⚿79.1(2)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of Oil and Gas Leases
260k79 Rent or Royalties
260k79.1 In General
260k79.1(2) k. Nature and Distinctions; Bonus. Most Cited Cases

A "bonus" is a definite sum, not a fraction of production, to be paid in cash or out of production, for the execution of oil and gas lease.

[4] Mines and Minerals 260 ⚿79.1(2)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of Oil and Gas Leases
260k79 Rent or Royalties

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260k79.1 In General
260k79.1(2) k. Nature and Distinctions; Bonus. Most Cited Cases

A "net profit share" (NPS), like a royalty, is a percentage of the oil and gas lessee's production; the lessor, however, only collects on the NPS interest when the lessee's operations yield a profit, after the lessee has recouped its expenditures for exploration and development. Alaska Admin. Code title 11, §§ 83.207-83.219.

[5] Constitutional Law 92 ⚿990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases
(Formerly 92k48(1))

Constitutional Law 92 ⚿1002

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1001 Doubt
92k1002 k. In General. Most Cited Cases
(Formerly 92k48(3))

Constitutional Law 92 ⚿1030

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In General. Most Cited Cases
(Formerly 92k48(1))

A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation; a presumption of constitutionality applies, and doubts are resolved in favor of constitutionality.

[6] Constitutional Law 92 ⚿695

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)3 Particular Questions or Grounds of Attack in General
92k695 k. In General. Most Cited Cases
(Formerly 92k42.3(2))

Individual had standing as a citizen-taxpayer to challenge constitutionality of statute authorizing amendment of "net profit share" (NPS) provisions of state oil and gas leases; individual raised issues of public significance, had interests adverse to those of State and lessee, was adequately represented, and could advocate his position competently. AS 38.05.180(i).

[7] Municipal Corporations 268 ⚿987

268 Municipal Corporations
268XIV Taxpayers' Suits and Other Remedies
268k987 k. Nature and Scope in General. Most Cited Cases

A plaintiff must meet two requirements in order to establish citizen-taxpayer standing: first, the case must be one of public significance; second, the plaintiff must be an appropriate party to bring the case.

[8] Municipal Corporations 268 ⚿987

268 Municipal Corporations
268XIV Taxpayers' Suits and Other Remedies
268k987 k. Nature and Scope in General. Most Cited Cases

Appropriateness requirement for citizen-taxpayer standing has three main facets: the plaintiff must not be a "sham plaintiff" with no true adversity of interest; he or she must be capable of competently advocating his or her position; and he or she may still be denied standing if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit.

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958 P.2d 422, 139 Oil & Gas Rep. 461
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[9] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Supreme Court reviews de novo a finding of standing.

[10] Action 13 ⚿13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons Entitled to Sue. Most Cited Cases

The mere possibility that another party might sue does not necessarily justify a denial of standing.

[11] Constitutional Law 92 ⚿3697

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)12 Trade or Business
92k3681 Licenses and Regulation
92k3697 k. Mining and Excavation; Oil and Gas. Most Cited Cases
(Formerly 92k240(8))

Mines and Minerals 260 ⚿5.2(1)

260 Mines and Minerals
260I Public Mineral Lands
260I(A) Reservation and Disposal in General
260k4.5 Leases by Government
260k5.2 State Leases
260k5.2(1) k. In General. Most Cited Cases

Uniform Application Clause of State Constitution did not apply to statute authorizing amendment of "net profit share" (NPS) provisions of state oil and gas leases; sole lessee of the leases was uniquely situated with respect to the statute. Const. Art. 8, § 17.

[12] Constitutional Law 92 ⚿3060

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3059 Heightened Levels of Scrutiny
92k3060 k. In General. Most Cited Cases
(Formerly 92k213.1(1))

In recognition of the importance of citizens' equal access to natural resources the Uniform Application Clause of State Constitution is interpreted to require legislation dealing with natural resources to satisfy a heightened level of equal protection scrutiny. Const. Art. 8, § 17.

[13] Constitutional Law 92 ⚿3043

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3043 k. Statutes and Other Written Regulations and Rules. Most Cited Cases
(Formerly 92k211(1))

The protections of the Uniform Application Clause of State Constitution extend only to persons similarly situated with respect to the subject matter and purpose of the legislation. Const. Art. 8, § 17.

[14] Appeal and Error 30 ⚿170(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k170 Nature or Subject-Matter of Issues or Questions
30k170(2) k. Constitutional Questions. Most Cited Cases

Whether statute authorizing amendment of "net

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profit share" (NPS) provisions of state oil and gas leases was unconstitutional special legislation could be addressed for first time on appeal in action brought by citizen taxpayer challenging statute as violation of Uniform Application Clause; issue did not depend on new facts and was closely related to Uniform Application Clause argument. Const. Art. 2, § 19; Art. 8, § 17.

[15] Statutes 361 ⚿77(1)

361 Statutes
361II General and Special or Local Laws
361k77 Laws of Special, Local, or Private Nature in General
361k77(1) k. In General. Most Cited Cases

Supreme Court evaluates challenges under constitutional provision prohibiting special legislation according to the test applied to nonsuspect classifications in equal protection cases. Const. Art. 2, § 19.

[16] Mines and Minerals 260 ⚿5.2(1)

260 Mines and Minerals
260I Public Mineral Lands
260I(A) Reservation and Disposal in General
260k4.5 Leases by Government
260k5.2 State Leases
260k5.2(1) k. In General. Most Cited Cases

Statutes 361 ⚿77(1)

361 Statutes
361II General and Special or Local Laws
361k77 Laws of Special, Local, or Private Nature in General
361k77(1) k. In General. Most Cited Cases

Statute authorizing amendment of "net profit share" (NPS) provisions of state oil and gas leases reflected unique nature of the leases and substantially related to legitimate state purposes, and thus was not unconstitutional special legislation; leases were State's only oil and gas leases auctioned with NPS as the bid variable and were only State leases with NPS terms greater than 85%, giving lessee incentive to abandon field before extracting all the oil, and development of field required new technology, including the first undersea pipeline in the Artic Ocean. Const. Art. 2, § 19

[17] Mines and Minerals 260 ⚿5.2(1)

260 Mines and Minerals
260I Public Mineral Lands
260I(A) Reservation and Disposal in General
260k4.5 Leases by Government
260k5.2 State Leases
260k5.2(1) k. In General. Most Cited Cases

Commissioner of the Alaska Department of Natural Resources (DNR) did not exceed his authority under the Alaska Land Act when he negotiated a proposed reduction in "net profit share" (NPS) provisions of state oil and gas leases, then sought legislative approval. AS 38.05.180(i).

[18] Mines and Minerals 260 ⚿5.2(1)

260 Mines and Minerals
260I Public Mineral Lands
260I(A) Reservation and Disposal in General
260k4.5 Leases by Government
260k5.2 State Leases
260k5.2(1) k. In General. Most Cited Cases

Statute authorizing amendment of "net profit share" (NPS) provisions of state oil and gas leases was not enacted in violation of the Public Notice Clause of the Alaska Constitution; Commissioner of the Alaska Department of Natural Resources (DNR) presented the proposed amendments to the legislature, and nearly five weeks of spirited debate followed. Const. Art. 8, § 10.

[19] Appeal and Error 30 ⚿170(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k170 Nature or Subject-Matter of Issues or Questions
30k170(2) k. Constitutional Questions. Most Cited Cases

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Whether Commissioner of the Alaska Department of Natural Resources (DNR) violated constitutional provisions governing state mineral leases by not requiring lessee to forfeit state oil and gas leases after lessee announced its intention not to proceed with development would not be addressed for first time on appeal in citizen-taxpayer's action challenging constitutionality of statute authorizing amendment of "net profit share" (NPS) provisions of the leases; issues presented new constitutional theory that could not be gleaned from pleadings. Const. Art. 8, §§ 8, 11.

[20] Appeal and Error 30 ⚿172(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k172 Grounds of Action or Relief
30k172(1) k. In General; Asserting New or Inconsistent Grounds. Most Cited Cases

Whether lessee anticipatorily breached state oil and gas lease agreements and State should have responded by rescinding the leases would not be addressed for first time on appeal in citizen-taxpayer's action challenging constitutionality of statute authorizing amendment of "net profit share" (NPS) provisions of the leases; resolution of issue depended on the outcome of potential fact disputes and a different body of case law.

[21] Appeal and Error 30 ⚿170(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k170 Nature or Subject-Matter of Issues or Questions
30k170(2) k. Constitutional Questions. Most Cited Cases

Whether statute authorizing amendment of "net profit share" (NPS) provisions of state oil and gas leases unlawfully infringed on the domain of the courts and violated separation of powers principles would not be addressed for first time on appeal in citizen-taxpayer's action challenging constitutionality of statute; plaintiff's argument was not closely related to his argument at trial that Commissioner of the Alaska Department of Natural Resources (DNR) lacked authority to negotiate lease amendments, and could not have been gleaned from the pleadings.

[22] Mines and Minerals 260 ⚿5.2(1)

260 Mines and Minerals
260I Public Mineral Lands
260I(A) Reservation and Disposal in General
260k4.5 Leases by Government
260k5.2 State Leases
260k5.2(1) k. In General. Most Cited Cases

Statute authorizing amendment of "net profit share" (NPS) provisions of state oil and gas leases did not violate rule against material amendments to state contracts awarded through a public bidding process; rule did not apply to contracts amended by legislature.

[23] Public Contracts 316A ⚿18

316A Public Contracts
316AI In General
316Ak18 k. Modification or Rescission. Most Cited Cases

In general, competitively bid contracts involving state resources cannot be materially amended.

[24] Public Contracts 316A ⚿18

316A Public Contracts
316AI In General
316Ak18 k. Modification or Rescission. Most Cited Cases

Material amendments doctrine, prohibiting amendments to competitively bid contracts involving state resources, does not apply to amendments approved by the legislature.

[25] Appeal and Error 30 ⚿172(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court

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30k172 Grounds of Action or Relief
30k172(1) k. In General; Asserting New or Inconsistent Grounds. Most Cited Cases

Whether statute authorizing amendment of "net profit share" (NPS) provisions of state oil and gas leases violated the public trust doctrine would not be addressed for first time on appeal in citizen-taxpayer's action challenging constitutionality of statute; plaintiff's argument turned on a new body of case law, concerning fiduciary duty, and on new fact questions, concerning possible abuse of the fiduciary's discretion, and could not have been gleaned from the pleadings.

***424** Jody Patrick Brion, Leutwyler, Brion & Associates, Anchorage, for Appellants.

Lawrence Z. Ostrovsky, Jeffrey D. Landry, Camille Oechsli, Assistant Attorneys General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellees, State of Alaska and John Shively.

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John E. Havelock, Ely & Havelock, Anchorage, for Amicus Curiae Oilwatch, Alaska, Inc.

Before MATTHEWS, C.J., and COMPTON, EASTAUGH, FABE, and BRYNER, JJ.

OPINION

EASTAUGH, Justice.

I. *INTRODUCTION*

Citizen-taxpayers filed suit challenging a legislative enactment approving and giving effect to modifications of four State oil and gas leases in the Northstar Oil Field. Reasoning that the modifications were a narrowly tailored response to a unique situation, and that the legislature had not given the lessee preferential treatment, the superior court granted summary judgment for the defendants.***425** Because we agree with that analysis, we affirm.

II. *FACTS AND PROCEEDINGS*

A. *Facts*

The Northstar Unit is an oil field in the Beaufort Sea, approximately six miles from Prudhoe Bay. It contains tracts of land now subject to five State and two federal oil and gas leases. In 1979 Amerada Hess submitted the winning bid in a sale of four of the State's leases. They are the subject of this litigation.

The four leases were unusual, partially because the "net profit share" was the bid variable for the 1979 auction. When the State sells oil and gas leases, the Commissioner of the Alaska Department of Natural Resources (DNR) analyzes the tracts of state land to be leased and determines, in advance of the sale, which lease terms to establish as fixed or variable. AS 38.05.180(f)(1), (3); *Hammond v. North Slope Borough*, 645 P.2d 750, 763-64 (Alaska1982). The Commissioner determines which bidding method (the combination of fixed and variable lease terms) is in the state's best interest. AS 38.05.180(f)(1); *see also Hammond*, 645 P.2d at 763-64 (discussing some of the factors the Commissioner considers when selecting bidding methods); *Kelly v. Zamarello*, 486 P.2d 906, 912-13 (Alaska 1971). Typically, the bid variable is the bonus, the royalty share, the net profit share, or some combination of those terms. AS 38.05.180(f)(3)(A)-(G).

[1][2][3] A royalty is "a share of the product or profit reserved by the owner of land for permitting another to develop his land for oil or gas." Earl A. Brown, *The Law of Oil and Gas Leases* § 6.00 (1967). Royalties are usually expressed as fractions (such as a royalty of one-eighth of production), and they usually continue throughout the life of the lease, whether the lessee reaps a net profit or not. *Kelly*, 486 P.2d at 913 (citing *Griffith v. Taylor*, 156 Tex. 1, 291 S.W.2d 673, 676 (1956)); *see also* Richard W. Hemingway, *The Law of Oil and Gas* § 2.5, at 57-58 (3d ed.1991). A bonus is a definite sum (not a fraction of production), to be paid in cash or out of production, for the execution of the lease. *Kelly*, 486 P.2d at 913; Hemingway, *The Law of Oil and Gas* § 2.4, at 56.

[4] A net profit share (NPS), like a royalty, is a percentage of the lessee's production. 5 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 63.5, at 254 (1991) [hereinafter Kuntz]. The lessor, however, only collects on the NPS interest when the lessee's operations yield a profit, after the lessee has recouped its expenditures for exploration and development. 11

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Alaska Administrative Code (AAC) 83.207-219; *see also* Kuntz § 63.5, at 254. The Alaska Administrative Code allows lessees to establish special development accounts to recover all of their development costs before any NPS payments become due to the State. 11 AAC 83.207-214.

The State and BP Exploration (Alaska), Inc. argue that NPS terms allow the lessor to reap the benefits of rising oil prices in the future, especially if the lessee finds cost-effective ways of developing the field and extracting the oil. According to the State and BP (collectively, the State), leases with high NPS terms are the most risky for the lessor, because the lessor will receive little or nothing if the field is unprofitable, or if the lessee develops the field in an inefficient manner. *See, e.g.,* Kuntz § 63.5, at 258 ("[T]he owner of the [net profit] interest is dependent upon the activity of the lessee to generate net profits.").

During a brief period in the late 1970s, some lessors experimented with NPS terms, which were, and still are, controversial.[FN1] The State notes that some observers theorize that leases with high NPS terms have a fundamental problem: under these leases, the lessors' and lessees' interests are misaligned because "the oil company [has] no incentive to develop the leases promptly or to economize costs during the development." Furthermore, lessees receive very little income after the NPS payments begin; for instance, ***426** according to the State, the Northstar lessee was predicted to receive a profit of less than fifty cents per barrel once the NPS payments began. When the lessee begins paying a large percentage of its profits to the State, along with taxes and royalties, it has very little incentive to operate efficiently. The lessee also may be tempted to discontinue its operations and abandon the field prematurely, because it retains only a small portion of the profits after it has recouped its development costs.

> FN1. Philip E. Sorenson, then-visiting Professor of Economics at the University of California, Santa Barbara, addressed the Alaska House of Representatives in 1979, prior to the Beaufort Sea lease sale. He analyzed NPS interests in detail and urged the legislature not to use NPS as the bid variable in the Northstar auction.

In the late 1970s, however, oil prices had been rising, and experts predicted that they would climb to $60 to $100 per barrel. In addition, research indicated that the Northstar Unit contained massive reserves of oil-perhaps up to one billion barrels.[FN2] Thus, in 1979 the State chose to auction four of its Northstar lease tracts using NPS as the bid variable.

> FN2. In 1996 the Commissioner stated that the Northstar Unit's reserves were estimated to contain 130 million barrels. The State's Brief of Appellee, filed in 1997, asserts that oil prices had settled around $18 per barrel.

The four leases auctioned in 1979 had a fixed cash bonus and a fixed royalty of 20%.[FN3] Amerada Hess submitted the winning bids, with NPS terms ranging from 85.26% to 93.2%.[FN4] The winning NPS figure averaged about 89%, meaning that after the leaseholder recovered its expenses, the State would receive 89% of the profits.

> FN3. The State auctioned its fifth Northstar lease in 1983, using a bonus as the variable term, a fixed royalty of 12.5%, and a fixed NPS of 40%.

> FN4. Amerada Hess had the largest, but not the only, share of the four Northstar leases. The other original lessees were Shell Oil Co., Enterprise Oil Co., and Murphy Oil Co. Amerada Hess bought Enterprise's interest for $2 million in 1990.

According to the State, from 1979 to 1994 Amerada Hess invested approximately $260 million in attempting to develop the Northstar Unit. Because of the NPS terms (which allowed the lessee to recoup all of its development costs before beginning to make net profit share payments to the State), the State's chances of receiving the NPS payments seemed increasingly slim, as Amerada Hess invested in development with little prospect of producing. A 1993 study by the federal Department of Energy concluded that "Northstar was uneconomic largely due to the net profit provision." Amerada Hess estimated that its development costs would approach $1.4 billion. The combination of the development costs, the 89% NPS, and the fact that optimistic projections of Northstar's reserves and world oil prices had not materialized convinced Amerada Hess to abandon its plans to develop its Northstar holdings. Amerada Hess did not submit a

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required development plan to the State, and DNR issued a notice of default to Amerada Hess in November 1994.

Instead of curing the default, Amerada Hess sold its interest in the leases to BP in 1995.[FN5] The State was not involved in the sale negotiations, nor were the terms or prices disclosed to the public.[FN6] BP submitted a brief plan of development to DNR, which extended the time for submitting a more detailed plan. In March 1995 BP submitted, and DNR approved, a revised and more comprehensive three-year development plan. [FN7] The revised plan increased the development time from two years to three years. Under this plan, production would probably not begin until 2002.

FN5. Shell also sold its interests to BP.

FN6. Oil and gas lessees often sell interests in leases without the State's involvement; the State may, however, be required to approve assignments resulting from the sale.

FN7. The plan called for data gathering, 3-D seismic acquisition, and construction permit acquisition. The projected three-year cost of these steps was $12 million.

Both DNR and BP asserted that BP's development of the Northstar leases would be profitable under the original lease terms. BP, however, has estimated that its rate of return later in the life of the field would be 21% without the NPS lease terms, and only 10% with the NPS terms. According to an Arthur D. Little Co. report cited in findings of fact issued by the Senate Resources Committee, oil companies tend to look for rates of return around 15%. In early 1995 BP intimated*427 to DNR that it hoped to revise the NPS terms. BP and DNR, however, decided not to pursue that issue at that time.

Later that year, BP's president testified that

> with the net profit arrangement in place, at the level that it exists, BP would not be prepared to go ahead with the development of a Northstar project, even though, if you run the economics, you can show that the return on investment for the project is a sound sort of return on investment.

BP made this announcement after DNR had approved the plan of development (which included a three-year period in which very little development would occur).[FN8]

FN8. All of the State's oil and gas leases contain an implied covenant for lessees "to diligently explore and develop their leases." BP, however, could probably fulfill that obligation by meeting the requirements of its DNR-approved three-year plan.

DNR's Petroleum Investment Manager stated that, to his knowledge, this was the first time that a lessee had ever informed the State "that it would be economical to produce a field, but that it is unwilling to do so unless the State renegotiates its competitively bid terms." [FN9]

FN9. The lease between Amerada Hess and the State allowed assignment and conveyance, but required the new lessee to be bound by all of the terms of the original lease. The lease provides, in part:

> This lease, or any undivided interest herein, may, with the approval of the State, be assigned, subleased or otherwise transferred.... No assignment, sublease or other transfer of an interest in this lease, including assignments of working or royalty interests and operating agreements and subleases, shall be binding upon the State unless approved by the State.... All covenants, conditions and agreements contained in this lease shall extend to and be binding upon the heirs, administrators, successors, and assigns of the State and/or Lessee.

In the fall of 1995, after BP's announcement, DNR and BP conducted confidential negotiations regarding possible amendments to the leases. The negotiations yielded the following proposed amendments: the State's NPS (which had averaged 89%) would be eliminated; the State's royalties would be at least 20% for all of the leases, and a variable "supplemental royalty" of 7.5% could be added to that; a "use it or lose it" provision would be added, allowing the State to terminate the leases (without litigation) if

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BP did not begin development within a certain period; and BP committed to employing Alaskans in the construction and operation of its facilities.

The Commissioner has the statutory authority to make changes to royalty provisions of oil and gas leases without obtaining the legislature's approval. AS 38.05.180(j).[FN10] But the statute is silent on whether the Commissioner may amend NPS provisions. The Commissioner therefore negotiated proposed terms with BP and presented the negotiated proposed lease amendments to the Alaska legislature for consideration. The lease amendments were to take effect only upon approval by the legislature. After investigation by committees in the House and Senate, and testimony from DNR, BP, and the public, a bill for an act authorizing amendment of the Northstar Unit leases (the Act) passed both houses in May 1996. Governor Knowles signed the bill into law in July 1996. Since then, BP has approved development of the tracts covered by the leases.

FN10. AS 38.05.180(j) provides, in part:

> The commissioner
>
> (1) may provide for an increase or decrease or otherwise modify royalty, to allow for production that would not otherwise be economically feasible, on individual leases....
>
> (2) may not grant a royalty modification unless the lessee or lessees requesting the modification make a clear and convincing showing that a modification of royalty meets the requirements of this subsection and is in the best interests of the state....

B. *Proceedings*

This case began in January 1997 when Clyde Baxley and the Republican Moderate Party brought a declaratory judgment action against the State and John Shively, Commissioner of the Department of Natural Resources.[FN11] Baxley and the Party (collectively ***428** Baxley) asserted that they had citizen-taxpayer standing to challenge the Act. Baxley argued that the Act violates the Uniform Application Clause and the Public Notice Clause of the Alaska Constitution, and that it violates competitive bidding statutes and laws proscribing material amendments to competitively bid contracts.[FN12] Baxley also contended that the Commissioner lacked the authority to modify the leases. BP intervened as a party defendant under Alaska Rule of Civil Procedure 24.

> FN11. The Republican Moderate Party claims to be a nonprofit political group. The Republican Party of Alaska asserted below that the Republican Moderate Party admits it is not a political party, and that it has no relation to the Republican Party of Alaska. The Republican Party of Alaska has disclaimed interest in this case.
>
> FN12. Baxley also asserted, but later withdrew, a claim that the Act violated the Privileges and Immunities Clauses of the Alaska and United States Constitutions, and the Commerce Clause of the United States Constitution.

The State moved to dismiss for lack of standing. Both sides then filed motions for summary judgment. The superior court found that all plaintiffs had standing as citizen-taxpayers. It denied Baxley's motion for summary judgment and granted the State's motion for summary judgment. The court concluded that the rule against material amendments did not apply to amendments by the legislature. The court also reasoned that the legislature had conducted adequate public hearings, had not given BP privileged status, and, in passing the Act, had created a narrowly tailored response to a unique problem. Baxley appeals.

III. *DISCUSSION*

A. *Standard of Review*

We review a grant of summary judgment with our independent judgment. *Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130, 1134 (Alaska 1996). We will affirm a grant of summary judgment if the evidence in the record, viewed in the light most favorable to the non-moving party, fails to disclose a genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Metcalfe Inv., Inc. v. Garrison*, 919 P.2d 1356, 1360 (Alaska 1996).

[5] A party raising a constitutional challenge to a statute bears the burden of demonstrating the consti-

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tutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality. *A. Fred Miller, Attorneys at Law, P.C. v. Purvis*, 921 P.2d 610, 618 (Alaska 1996); *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979).

B. *Standing*

[6] Following vigorous debate on the issue, the superior court held that Baxley had standing as a citizen-taxpayer to present the issues raised in his complaint. The State suggests on appeal that we may resolve Baxley's Uniform Application Clause claim "on standing grounds, without reaching the merits."

[7][8][9] We decline to disturb the superior court's finding that Baxley has standing as a citizen-taxpayer.[FN13] A plaintiff must meet two requirements in order to establish citizen-taxpayer standing. First, the case "must be one of public significance." *Trustees for Alaska v. State*, 736 P.2d 324, 329-30 (Alaska 1987). A plaintiff who raises constitutional issues is likely to meet this requirement. *Id.* Second, the plaintiff must be an "appropriate" party to bring the case. *Id.* Appropriateness has three main facets: the plaintiff must not be a "sham plaintiff" with no true adversity of interest; he or she must be capable of competently advocating his or her position; and he or she may still be denied standing if "there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit." *Id.* The citizen-taxpayer standing requirements ensure that the plaintiff will serve as a true and strong adversary, even if the conduct in question did not directly affect the plaintiff.

> FN13. We review de novo a finding of standing. *Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough*, 865 P.2d 741, 742 n. 5 (Alaska 1993) (citing *Langdon v. Champion*, 745 P.2d 1371, 1372 n. 2 (Alaska 1987)).

[10] Baxley argues that the Act violates constitutional provisions, may reduce the State's income, undermines public confidence in the integrity of the bidding system, and ***429** violates the public trust. Those issues have public significance.[FN14] The State asserted below that Baxley is not an appropriate plaintiff; it suggested that a competing oil company, for instance, would have been a more appropriate challenger. The mere possibility that another party might sue, however, does not necessarily justify a denial of standing. *See Trustees*, 736 P.2d at 330. Baxley's interests are sufficiently adverse to those of the State and BP. He is adequately represented and can advocate his position competently. We conclude that the superior court did not err in determining that Baxley has citizen-taxpayer standing.

> FN14. *See, e.g., Trustees for Alaska v. State*, 736 P.2d 324, 330 (Alaska 1987) (granting citizen-taxpayer standing to a coalition of environmental, Native, and fishing groups challenging the States's mineral leasing system); *State v. Lewis*, 559 P.2d 630, 634-36 (Alaska 1977) (granting citizen-taxpayer standing for challenge of a three-way land trade involving the State, the federal government, and a Native corporation).

C. *The Uniform Application Clause*

[11] Baxley contends that the Act violates the Uniform Application Clause of the Alaska Constitution. That clause provides, "Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." Alaska Const. art. VIII, § 17.

[12] In recognition of the importance of citizens' equal access to natural resources, we interpret the Uniform Application Clause to require legislation dealing with natural resources to satisfy a heightened level of equal protection scrutiny. *Gilbert v. State*, 803 P.2d 391, 398 (Alaska 1990); *Baker v. State*, 878 P.2d 642, 644 (Alaska App.1994).

[13] The protections of the Uniform Application Clause, however, extend only to persons similarly situated with respect to the subject matter and purpose of the legislation. Alaska Const. art. VIII, § 17; *Reichmann v. State*, 917 P.2d 1197, 1200 (Alaska 1996). "Concluding that two classes are not similarly situated necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes." *Shepherd v. State*, 897 P.2d 33, 44 n. 12 (Alaska 1995).[FN15]

> FN15. The State argues that no other entity is similarly situated with respect to the Act.

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> Baxley argues that similarly situated persons disadvantaged by the Act include: "1) all original bidders on Northstar; 2) all possible bidders at a potential rebidding of Northstar; 3) all potential bidders who might wish to bid for the rights given to BP ... and 4) all citizen-taxpayers of the State of Alaska, who have a personal and individual stake in the fair allocation of Alaska resources."

The superior court held that the Uniform Application Clause does not apply because it found that BP's status as sole lessee of the Northstar leases rendered it uniquely situated with respect to the Act.[FN16] The superior court also held that, even if the Uniform Application Clause did apply, the Act would satisfy the clause's equal protection requirements.

> FN16. We apply our independent judgment to the question whether BP is uniquely situated with respect to the Act. *See* Luedtke v. Nabors Alaska Drilling, Inc., 834 P.2d 1220, 1223 (Alaska 1992) (noting that we review a trial court's application of law to facts with our independent judgment).

We agree that the Uniform Application Clause does not apply. Land use statutes, for instance, sometimes favor existing land users over others. *See, e.g.,* AS 38.05.035(b)(5), .035(f). We also allow some changes to existing lessees' competitively bid contracts without requiring new public auctions. *See* KILA, Inc. v. State, 876 P.2d 1102, 1108-09 (Alaska 1994) (upholding State's decision to negotiate with successful bidder and accept a substitute site for government building); Kenai Lumber Co. v. LeResche, 646 P.2d 215, 218-22 (Alaska 1982) (allowing nonmaterial modifications to a long-term timber contract).

Not all persons in the state with an interest in a resource are similarly situated for purposes of the Uniform Application Clause.[FN17] BP, as sole lessee of the Northstar ***430** leases, is uniquely situated with respect to the Act. Because no other entity is similarly situated, we hold that the Act does not violate the Uniform Application Clause.

> FN17. *See, e.g.,* Reichmann v. State, 917 P.2d 1197, 1200 (Alaska 1996) (upholding differential treatment of residential and recreational users of lakeshore land); Shepherd v. State, 897 P.2d 33, 43-44 (Alaska 1995) (upholding Alaska Board of Game regulations giving hunting preference to residents over nonresidents); Tongass Sport Fishing Ass'n v. State, 866 P.2d 1314, 1318 (Alaska 1994) (upholding salmon harvesting regulation giving preference to commercial fishers because sport and commercial fishers are not similarly situated); Gilbert v. State, 803 P.2d 391, 399 (Alaska 1990) (upholding distinction in harvest quotas for two fisheries based on "biological spawning patterns").

D. *Special Legislation*

[14] Baxley next argues that the Act was special legislation prohibited by article II, section 19 of the Alaska Constitution. Although we ordinarily do not consider on appeal issues not presented to the lower court,[FN18] we choose to address Baxley's special legislation argument. It does not depend on new facts, and it could have been gleaned from the pleadings because it is closely related to Baxley's Uniform Application Clause argument that the State gave BP privileged status. The issue therefore satisfies the requirements of Zeman v. Lufthansa German Airlines, 699 P.2d 1274, 1280 (Alaska 1985) (discussing bases for reaching appellate issues not preserved in lower court). Moreover, the State has not suggested that it has been prejudiced by introduction of this argument on appeal; on the contrary, it has conceded that the court may properly consider this issue.

> FN18. *See* Brooks v. Brooks, 733 P.2d 1044, 1053 (Alaska 1987).

[15] The Alaska Constitution states: "The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination." Alaska Const. art. II, § 19. We evaluate challenges under this provision according to the test applied to nonsuspect classifications in equal protection cases.[FN19] State v. Lewis, 559 P.2d 630, 643 (Alaska 1977) (upholding a threeway exchange of land, and the minerals it contained, among the State of Alaska, the United States, and a regional Native corporation); Boucher v. Engstrom, 528 P.2d 456, 463 (Alaska 1974) ("The classification must bear a reasonable and proper relationship to the purposes of the act and the problem sought to be remedied."). Thus,

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when the legislature has singled out an area or group, we examine the

> FN19. Baxley is correct in pointing out that this court has adopted a sliding scale analysis to determine the level of scrutiny to apply to equal protection claims. *See State v. Enserch Alaska Constr.*, 787 P.2d 624, 631 (Alaska 1989). He asserts that the court should use the sliding scale when analyzing his special legislation challenge. Baxley argues that, to determine where on the sliding scale the state and individual interests fall, the court should apply the Uniform Application Clause, which, he reasons, requires a showing of an important state interest and no less restrictive alternative to further it.
>
> Our decisions interpreting article II, section 19 of the Alaska Constitution, however, have applied the less rigorous test used for nonsuspect classifications in equal protection cases. *See Lewis*, 559 P.2d at 643; *Abrams v. State*, 534 P.2d 91, 94-95 (Alaska 1975). We will analyze this claim under the standard applied in *Abrams* and *Lewis* because they deal specifically with article II, section 19 challenges instead of equal protection challenges.

> legislative goals and the means used to advance them [to] determine whether the legislation bears a "fair and substantial relationship" to legitimate purposes. If this standard is satisfied, the bill will not be invalid because of incidental local or private advantages. Legislation need not operate evenly in all parts of the state to avoid being classified as local or special.
>
> *Lewis*, 559 P.2d at 643 (footnotes omitted). This is the "minimum level of equal protection scrutiny in Alaska"; it is more demanding than its federal counterpart. *Principal Mut. Life Ins. v. State*, 780 P.2d 1023, 1026 (Alaska 1989).

[16] The State argues that the Act is not local or special legislation because it "addresses a matter of statewide concern," and that, even though the Act focuses on one locality, it is constitutional because the high NPS terms made these leases unique and made general legislation inappropriate.

We conclude that the Act is not special legislation. Several features of the Northstar leases distinguish them from the State's other oil and gas leases. The Northstar ***431** leases were the State's only oil and gas leases auctioned with NPS as the bid variable. They are also the only State leases with NPS terms greater than 85%. (NPS terms in most State leases average about 30% to 40%.) The high NPS terms present the State with a unique problem: in the later years of the lease, the lessee would reap only a slight profit from continuing to extract oil, giving the lessee a strong incentive to abandon the field before extracting all the oil.[FN20]

> FN20. BP's president stated, "Once the net profit interest cuts in, ... some 90% or so of the revenue stream to the [Northstar lessee] would effectively dry up, and that would lead to the premature shut-down of the field." He asserted that "it would not be acceptable for BP, or I believe any other reputable oil company to continue to operate the field."

Other features of the Northstar Unit distinguish these leases. The development account the Northstar lessees amassed over seventeen years is evidence of the difficulty of developing the fields. Development of the Northstar Unit will require new technology, including the first undersea pipeline in the Arctic Ocean-a technological advance that the legislature predicts will increase the value of other North Slope leases and increase State revenues. No State lessee had previously been obliged to develop such holdings under such lease terms.

The legislature conducted numerous public hearings and debates on the propriety of the proposed Act. It concluded that, if the leases were not amended, production in the Northstar Unit would probably not begin before 2002. It found that amending the leases "will maximize the economic benefits of oil and gas production to the people of the state by encouraging timely production from the unit." It also concluded that BP's timely development of the Northstar unit "may result in technological breakthroughs and other cost savings that may make other development opportunities in Alaska economically feasible." These legislative findings express the legitimate purposes of encouraging and providing for development of state resources for the benefit of the people. *See* Alaska Const. art. VIII, §§ 1-2.[FN21]

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> FN21. Article VIII, section 1 of the Alaska Constitution provides: "It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest."
>
> Article VIII, section 2 of the Alaska Constitution states: "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."

Because the Act's exclusive focus on the Northstar leases reflects their unique nature, and because the Act fairly and substantially relates to legitimate state purposes, we hold that it is not special legislation. *See Lewis,* 559 P.2d at 643.

E. *The Commissioner's Authority*

[17] Baxley asserts that the Commissioner did not "have statutory authority under AS 38.05.180(j) to unilaterally reduce the net profit share in any Alaska oil lease." [FN22] Baxley argues that, although the Commissioner has statutory authority to change royalty payments, the Commissioner has no statutory authority to change NPS payments.

> FN22. AS 38.05.180(j) is set out, in part, at note 10, *supra.*

Baxley's argument, however, depends on our acceptance of his characterization of the Commissioner's actions. The Commissioner did not unilaterally reduce the NPS terms. The Commissioner merely negotiated a proposed reduction, which the legislature then approved. The negotiations would have had no binding effect unless the legislature approved the proposed amendments.

Baxley correctly notes that the Alaska Land Act (AS 38.05) does not grant or deny the Commissioner authority to negotiate proposed changes in the NPS terms. But particular provisions of the Alaska Land Act suggest that the Commissioner at least had the authority to negotiate the amendments, whether or not the Commissioner could have approved the lease amendments absent the 1996 Act here at issue. The Commissioner has broad supervisory power over the "administration of the division of lands." AS 38.05.020(a). The Commissioner may "enter into agreements considered necessary to carry out the purposes of this chapter, including ***432** agreements with federal and state agencies." AS 38.05.020(b)(2). The Commissioner may also "exercise the powers and do the acts necessary to carry out the provisions and objectives of this chapter." AS 38.05.020(b)(4). The Commissioner's broad powers appear to us to include the authority to negotiate with a lessee wishing to change the terms of its lease; such negotiations with respect to a given lease and the pertinent circumstances may be acts necessary to further the objectives of the Alaska Land Act. We do not interpret AS 38.05.180(j) to prevent, expressly or impliedly, the Commissioner from negotiating proposed NPS amendments subject to legislative approval.[FN23]

> FN23. We do not decide here whether the Commissioner would have had the authority to modify the NPS terms without legislative approval.

The Commissioner's broad statutory powers authorized these negotiations; subsection .180(j) did not preclude them. We hold that the Commissioner did not exceed his authority.

F. *Public Notice Clause*

[18] Baxley argues that the Act violates the Public Notice Clause of the Alaska Constitution, which provides, "No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." Alaska Const. art. VIII, § 10. Baxley concedes that the public received notice of the legislature's approval of the proposed amendments.[FN24] He argues that the public should have received notice before the negotiations, and that, at the public hearings, other options (besides the proposed amendments negotiated by DNR and BP) should have been presented.

> FN24. Baxley argues, "The only aspect of Northstar for which the public received notice was the subsequent legislative ratification of a deal already struck, an agreement already made."

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The Alaska Constitution does not express a requirement of pre-negotiation notice, and instead can be read to require notice before the State commits to an agreement requiring it to dispose of or lease state lands or interests in state lands. We assume for sake of discussion that amendment of the lease terms was a disposal or lease of an interest in state land. Regardless of the exact extent and timing of the notice required by the Public Notice Clause, we think that the process followed here satisfied that clause. The Commissioner presented the proposed amendments to the legislature, and nearly five weeks of spirited debate followed. We disagree with Baxley's contention that the "ink on the agreement was dry before it was submitted to the legislature": the public was still free to comment on the bill, and the legislature was still free to reject it. Because the public had ample opportunity to comment on the proposed lease amendments before the legislature authorized any binding changes, *see* Part III.D., *supra,* at 18, we conclude that the State did not violate the Public Notice Clause.

G. *Remaining Issues*

1. *Constitutional requirement of forfeiture provisions*

[19] Baxley argues that the Commissioner violated article VIII, sections 8 and 11 of the Alaska Constitution by not requiring BP to forfeit the leases after BP announced its intention not to proceed with development. [FN25] ***433** We decline to consider this issue because Baxley did not preserve it below. *See Brooks v. Brooks,* 733 P.2d 1044, 1053 (Alaska 1987). This issue presents a new constitutional theory and raises new fact questions about whether the leases' forfeiture provisions satisfied sections 8 and 11 and whether BP and the State complied with them. Because we believe that the State could not have gleaned this new constitutional argument from the pleadings, we decline to address it. *See Zeman,* 699 P.2d at 1280 (discussing bases for reaching on appeal issues not preserved below).

FN25. Article VIII, section 8 of the Alaska Constitution provides:

> The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.

Article VIII, section 11 of the Alaska Constitution provides, in part:

> Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to these minerals and also a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law.

2. *Anticipatory breach*

[20] Baxley contends that BP anticipatorily breached the lease agreements, and that the State should have responded by rescinding the leases. This contract law argument turns on new facts and could not have been gleaned from the pleadings. *See Zeman,* 699 P.2d at 1280. Whether BP committed an anticipatory breach would depend on the outcome of potential fact disputes and a different body of case law. For example, it would raise the question of whether BP's communication to the State was a definite and unconditional repudiation of the contract, or merely an expression of concern with certain provisions in the lease. *See, e.g., Holiday Inns of Am., Inc. v. Peck,* 520 P.2d 87 (Alaska 1974). We therefore decline to address this argument.

3. *Separation of powers*

[21] Baxley argues that the legislature unlawfully infringed on the domain of the courts and violated separation of powers principles. This argument is not closely related to Baxley's superior court argument that the Commissioner lacked the authority to negotiate lease amendments; instead, it attacks the legislature's authority to consider the proposed amendments.

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This argument could not have been gleaned from the pleadings. We therefore decline to address it. *See Zeman*, 699 P.2d at 1280.

Moreover, Baxley seems to assume that the legislature made a legal determination that the Commissioner's negotiations with BP were constitutional. It appears, however, that the Commissioner presented the legislature with proposed legislation, and that the legislature conducted its own investigation and debates on the propriety of the proposed Act and amendments. It does not appear that the legislature impermissibly intruded on judicial domain.

4. *Rule against material amendments*

[22] Baxley asserts that the Act violates the rule against material amendments to state contracts awarded through a public bidding process. He reasons that the Act may undermine public confidence in the integrity of the bidding process because it changes the leases' terms instead of rescinding them and offering them in a new auction.

[23] In general, competitively bid contracts involving state resources cannot be materially amended. *Kenai Lumber Co. v. LeResche*, 646 P.2d 215, 221 (Alaska 1982). The rationale behind this judicially created rule is that the amendment effectively produces a new contract, which the State should award only after a new round of public bidding. *McKinnon v. Alpetco Co.*, 633 P.2d 281, 287 (Alaska 1981).[FN26]

FN26. We have explained:

> This rule has been judicially imposed in order to guard against circumvention of competitive bidding requirements. Competitive bidding itself is designed to ensure that government obtains the most favorable terms possible in its contracts, and to protect the public from the possibility of favoritism, fraud, and corruption on the part of public officials.
>
> *Kenai Lumber Co. v. LeResche*, 646 P.2d 215, 220 (Alaska 1982).

[24] We have never applied the rule to bar contract amendments approved by the legislature.[FN27] The superior court held that, "where the legislature itself amends a competitively bid contract, employing the committee and public hearing process, the need for the judiciary to protect legislative policy is essentially obviated." The superior court ***434** also reasoned that, because the legislature has the authority to create DNR and pass the leasing statutes, it would be illogical to conclude that the legislature lacks the authority to amend the leases. We agree. We believe the legislature's hearing process satisfies the policy considerations behind this rule. Therefore, we conclude that the material amendments doctrine does not apply to amendments approved by the legislature. We reject Baxley's challenge.

FN27. *See, e.g., KILA, Inc. v. State*, 876 P.2d 1102 (Alaska 1994); *Kenai Lumber*, 646 P.2d at 217-23; *McKinnon v. Alpetco Co.*, 633 P.2d 281, 285 (Alaska 1981)

5. *Public trust*

[25] Finally, Baxley argues that the amendments violate the public trust doctrine. Baxley argues that the executive branch violated the public trust by not determining whether similarly situated parties existed before allocating resources to BP, by not "telling BP to develop the field or lose it," and by not offering the Northstar leases in another sale in January 1995.[FN28] He asserts that he raised this claim in the superior court, but he fails to cite where in the record he did so. Baxley did not raise this argument in his points on appeal and made only passing references to it in the superior court in connection with his Uniform Application Clause argument. The State contends that Baxley has raised this issue for the first time on appeal.

FN28. Baxley also seems to suggest that the legislature breached the public trust. Because he does not develop this argument, we decline to address it. *See State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528 (Alaska 1980) (declining to consider an inadequately briefed argument).

The public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use, "and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary." *McDowell v. State*, 785 P.2d 1, 16 n. 9 (Alaska 1989). We apply basic principles of trust law to public

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land trusts. *State v. Weiss*, 706 P.2d 681, 683 n. 3 (Alaska 1985). One basic principle is that, when a trustee has discretion, a court will only review the trustee's acts for abuse of discretion. *See* William F. Fratcher, 3 *Scott on Trusts* § 187, at 14-19 (4th ed.1988); *see also Restatement (Second) of Trusts* § 187 (1959).

Baxley's argument consequently turns on a new body of case law, concerning fiduciary duty, and on new fact questions, concerning possible abuse of the fiduciary's discretion. Because this argument is not closely related to Baxley's trial court arguments and could not have been gleaned from the pleadings, we decline to address it. *See Zeman*, 699 P.2d at 1280.

IV. *CONCLUSION*

Because we reject Baxley's challenges to the Act, we AFFIRM the superior court's grant of summary judgment to BP and the State.

Alaska,1998.
Baxley v. State
958 P.2d 422, 139 Oil & Gas Rep. 461

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40 P.3d 786, 151 Oil & Gas Rep. 317
(Cite as: 40 P.3d 786)

H

Supreme Court of Alaska.
EXXON CORPORATION, Appellant,
v.
STATE of Alaska, Appellee.

No. S-9164.
Oct. 12, 2001.
Rehearing Denied Feb. 21, 2002.

Oil company appealed decision of Department of Natural Resources denying expansion of area covered by oil and gas lease unit agreement, which agreement allowed oil company to deduct field costs before paying state royalties, to include additional oil reservoir. The Superior Court, Third Judicial District, Anchorage, John E. Reese, J., affirmed Department's decision, and oil company appealed. The Supreme Court, Carpeneti, J., held that: (1) agreement provided Department with discretion to deny expansion of unit area, and (2) Department's decision did not violate settlement agreement on royalty payments due from unit area.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A 683

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak681 Further Review
15Ak683 k. Scope. Most Cited Cases

When the superior court reviews an agency decision and acts as an intermediate court, Supreme Court directly reviews the administrative agency decision under consideration.

[2] Administrative Law and Procedure 15A 796

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 k. Law Questions in General. Most Cited Cases

Supreme Court applies a substitution of judgment standard of review for agency decisions on questions of law where no expertise is involved.

[3] Administrative Law and Procedure 15A 796

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 k. Law Questions in General. Most Cited Cases

Interpretation of a contract is a question of law that is not within an administration agency's special expertise or skill.

[4] Contracts 95 176(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(1) k. In General. Most Cited Cases

Where there is no conflict in extrinsic evidence, the interpretation of contract is a question of law.

[5] Appeal and Error 30 1010.1(10)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in

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Support
30k1010.1 In General
30k1010.1(8) Particular Cases and Questions
30k1010.1(10) k. Contracts in General; Sales; Landlord and Tenant. Most Cited Cases

When the finder of fact must determine the meaning of a contract based on extrinsic evidence that raises conflicting inferences, Supreme Court's inquiry on appeal is limited to determining whether the finder of fact's choice of inferences is supported by substantial evidence.

[6] Mines and Minerals 260 92.79

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.78 Unitization
260k92.79 k. In General; Procedure. Most Cited Cases

Supreme Court reviewed Department of Natural Resources' interpretation of oil and gas lease unit agreement between state and oil company for substantial evidentiary support, as determination of meaning of contract was based on extrinsic evidence, and such evidence raised conflicting inferences.

[7] Mines and Minerals 260 92.79

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.78 Unitization
260k92.79 k. In General; Procedure. Most Cited Cases

Oil company did not waive right to argue on appeal that geological condition necessary to allow expansion of area covered by oil and gas lease unit agreement was met, when it signed agreement that allowed oil production to begin on additional reservoir pending resolution of legal dispute; express intent of agreement was to preserve oil company's right to appeal and so interpreting agreement would eviscerate such right.

[8] Contracts 95 147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) k. In General. Most Cited Cases

Goal when interpreting contracts is to give effect to the reasonable expectations of the parties.

[9] Mines and Minerals 260 92.79

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.78 Unitization
260k92.79 k. In General; Procedure. Most Cited Cases

Unit agreement unitizing oil leases provided Department of Natural Resources discretion on whether to allow expansion of area covered by agreement; though text of agreement alone did not unambiguously indicate if oil company or Department had authority to expand area, agreement stated that Director "shall" render a decision on expansion, when agreement created a right that oil company could exercise word "shall" was used, agreement expressly provided that it was subject to valid state laws, rules, regulations and orders, and past conduct of oil company in requesting changes in areas of oil and gas lease units indicated Department had discretion to deny expansion.

[10] Contracts 95 143.5

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 k. Construction as a Whole. Most Cited Cases

In interpreting a contract, courts should interpret the contract in a manner that makes the contract internally consistent.

[11] Contracts 95 170(1)

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(Cite as: 40 P.3d 786)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k170 Construction by Parties
95k170(1) k. In General. Most Cited Cases

The conduct of the parties to a contract is properly considered as evidence of the parties' intent.

[12] Mines and Minerals 260 92.79

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.78 Unitization
260k92.79 k. In General; Procedure. Most Cited Cases

Regulation did not provide Department of Natural Resources with authority to contract away its discretion to consider state's best interest in approving expansion of areas covered by unit agreements unitizing oil and gas leases; regulation regarding conflicts between new regulations and existing leases did not make existing Department regulations inapplicable to new unit agreements, and allowing Department to contract outside of its regulations would allow Department to be arbitrary. Alaska Admin.Code title 11, §§ 83.301(b), 83.303.

[13] Mines and Minerals 260 92.79

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.78 Unitization
260k92.79 k. In General; Procedure. Most Cited Cases

Refusal of Department of Natural Resources to expand area covered by unit agreement to include additional oil reservoir did not violate express terms of settlement agreement with oil company on royalties to be paid from original area, nor violate Department's implied covenant of good faith and fair dealing with regards to such settlement; though refusal to allow expansion prevented oil company from deducting field costs from royalty payments due state from new reservoir, Department had the discretion not to allow expansion, actual field costs incurred by oil company were much lower than those allowed by settlement agreement, and oil company had enjoyed a substantial benefit from settlement agreement.

[14] Constitutional Law 92 2701

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)2 Particular Issues and Applications
92k2701 k. Leases. Most Cited Cases
(Formerly 92k121(1))

Mines and Minerals 260 92.79

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.78 Unitization
260k92.79 k. In General; Procedure. Most Cited Cases

Refusal of Department of Natural Resources to expand area covered by unit agreement, under which oil company made smaller royalty payments to state, to include additional oil reservoir did not unconstitutionally impair oil company's contractual rights, where Department had the discretion under unit agreement with oil company to approve changes to the unit. U.S.C.A. Const.Amend. 5.

[15] Estoppel 156 62.2(2)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Government, or Public Officers
156k62.2 States and United States
156k62.2(2) k. Particular State Officers, Agencies or Proceedings. Most Cited Cases

Department of Natural Resources was not estopped from ordering contraction and denying expansion of area covered by oil and gas lease unit agreement, under which oil company was entitled to make smaller royalty payments to state; though agreement

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provided that area could be expanded based on geologic factors, agreement provided Department with discretion to deny expansion.

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Before FABE, Chief Justice, MATTHEWS, EASTAUGH, BRYNER, and CARPENETI, Justices.

OPINION

CARPENETI, Justice.

I. *INTRODUCTION*

In 1988 Exxon discovered the Point McIntyre oil reservoir, a bonanza with an estimated value of $4,783,800,000. Now, Exxon and the State of Alaska dispute who will absorb $24 million in field costs associated with the reservoir based on their opposing interpretations of a contract, the Prudhoe Bay Unit Agreement. We conclude that the state has the discretion under the terms of the agreement to consider the public interest according to state law and to deny the expansion of the Prudhoe Bay Unit to include the Pt. McIntyre reservoir. This conclusion is dispositive of the numerous arguments raised on appeal. We therefore affirm the commissioner's decision.

*788 II. *FACTS AND PROCEEDINGS*

In the late 1960's the predecessors of Exxon and Arco acquired several oil and gas leases on the Alaska North Slope.[FN1] Each lease had a ten-year term and provided a royalty to the state-twelve and one-half percent of all oil and gas production. These leases provided that the state could take its royalty in oil or gas products (in kind) or in equivalent dollar value (in value). If the state took its royalty in kind, the lease provided that the lessees could deduct only their cleaning and dehydration field costs.[FN2] The leases did not mention field cost deductions when the state took its royalty in value.

FN1. Appendix A contains a map that marks the various lease parcels, the Pt. McIntyre reservoir, and the Prudhoe Bay Unit. Exxon and Arco obtained the rights to Alaska Division of Lands leases 34626, 34627, 34624, 28297, 28298, and 34622. We adopt the parties' shorthand reference of "ADL" followed by the lease number. Tracts 5, 6, 7, and 8 correspond to those portions of ADLs 34626, 34627, 34624, and 28297, respectively, that were within the original PBU boundary. Tracts 115 and 116 correspond to ADLs 28298 and 34622. BP later acquired ADL 365548 (tract 117).

FN2. Field costs are all of the costs of production incurred from the wellhead to the custody transfer meters into the Trans Alaska Pipeline. Field costs generally include gathering, separation, cleaning, dehydration, compression, and other handling costs.

In 1977 Exxon, Arco, and the state, through the Department of Natural Resources, entered into the Prudhoe Bay Unit Agreement (PBUA). A unit agreement is a contract between the department and lessees that allows for the efficient development of a reservoir that underlies multiple leases owned by different lessees. The various lessees join together in exploration and drilling, and allocate costs and production. The PBUA was not based on the state's model unit agreement; the lessees drafted the PBUA. The state approved the PBUA effective April 1, 1977.

The PBUA unitized 111 leases, including portions of the five previously mentioned [FN3] Exxon and Arco leases. The Prudhoe Bay Unit (PBU) includes most of the land described by these leases. The PBUA also had expansion and contraction provisions; these provisions allowed the selective increase and decrease of the lands and natural resources controlled by the agreement.

FN3. *See supra* n. 1.

Expansion of the unit would extend the terms of the PBUA to additional lands. Expansion was generally thought to be desirable by both the state and the lessees because it allowed efficient administration under the existing agreement and efficient shared production with existing facilities. Expansion under the PBUA required that the "geologic condition" was met-that the additional lands contained a reservoir any portion of which was within the PBU.

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Contraction excluded nonproductive lands from the unit agreement. The threat of contraction was a stimulus for the lessee to discover oil and develop production into paying quantities or to lose the lease and the opportunity to discover and produce oil. The PBUA required that all lands not included in a participating area,[FN4] or entitled to be included in a participating area, would be contracted out of the PBUA after ten years.

> FN4. "Participating areas" are portions of the unit "reasonably known to be underlain by hydrocarbons and known or reasonably estimated ... to be capable of producing or contributing to production of hydrocarbons in paying quantities." 11 Alaska Administrative Code (AAC) 83.351(a) (1996).

The PBUA extended the original leases until April 1, 1987. Once production began, the terms of the PBUA would continue in force for so long as oil or gas was being produced in paying quantities.

Shortly after the PBU lessees began paying royalties based on their interpretation of the lease terms, the state sued the lessees. In *State v. Amerada Hess,*[FN5] one issue was whether the lessees could deduct field costs when the state took its royalty in value. On motions for partial summary judgment, the superior court ruled that the lessees could not. [FN6] It held further that the state could ***789** take its royalty in kind only if the market value of the oil or gas exceeded the royalty in value because only then would taking the royalty in kind be "in the best interests of the state and for the maximum benefit of its people."

> FN5. No. 77-847 Ci. (Alaska Super., 1st Dist., Juneau, complaint filed September 2, 1977).

> FN6. No. 77-847 Ci. (Alaska Super., 1st Dist., Juneau, April 6, 1979).

This ruling apparently pleased neither the lessees nor the state, because soon after the ruling, the parties settled the dispute on terms that differed significantly from the court's partial summary judgment ruling. Under the 1980 Royalty Settlement Agreement, the state agreed to pay a field cost allowance for its PBU royalty whether in value or in kind. The field cost allowance was initially set at forty-two cents per barrel but was to be adjusted annually based on the Producer Price Index. (By 1993 the cost had increased to seventy-nine cents per barrel.) The superior court approved the settlement and allowed it to supersede the court's previous ruling on the merits.

During the *Amerada Hess* litigation, the legislature amended AS 38.05.180(f) to make it clear that the lessees could not deduct field costs from the state's royalty share under the existing, standard-form state oil and gas leases. [FN7] Subsequent leases expressly disallowed all field costs deductions. In addition, all but one of all unit agreements approved after 1978 disallowed field cost deductions.

> FN7. *See* ch. 155, § 1, SLA 1978 (currently codified at AS 38.05.180(f)(2)); ch. 160, § 16, SLA 1978 (currently codified at AS 38.05.180(z)).

In early 1984 the director of the Division of Oil and Gas, acting for the commissioner of the Department of Natural Resources, allowed an expansion of the PBU. The director's decision was based on geological, royalty and rental, and public interest considerations. The director also conditioned the expansion on two changes to one of the affected leases.

In early 1985 the director approved an expansion of the Duck Island Unit and a corresponding contraction of the PBU. The director's decision again noted several factors: environmental costs and benefits of unitized development; geological characteristics of the reservoir; prior exploration activities; applicant's development plans; and the economic costs and benefits to the state.

In late 1985 BP acquired the oil and gas lease to the remaining portion of the yet-to-be-discovered Pt. McIntyre reservoir. Following the amended AS 38.05.180(f), the BP lease expressly disallowed all field costs deductions.

In late 1986 Exxon and Arco applied to defer contraction of the PBU for five years. They invoked a department regulation, 11 AAC 83.356(b),[FN8] as authority to defer contraction, because the PBUA had no provisions for deferral of contraction. The lessees argued that a delay was justified by both the public interest criteria of 11 AAC 83.303 [FN9] ***790** and geological considerations. In early 1987 the director

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granted a conditional deferral [FN10] of the PBU contraction. The parties now dispute the terms of this deferral and whether the lessees met the conditions.

FN8. 11 AAC 83.356(b) (1996) gives the department authority to delay contraction of unit under certain circumstances:

> (b) 10 years after sustained unit production begins, the unit area must be contracted to include only those lands then included in an approved participating area and lands that facilitate production including the immediately adjacent lands necessary for secondary or tertiary recovery, pressure maintenance, reinjection, or cycling operations. The commissioner will, in the commissioner's discretion, after considering the provisions of 11 AAC 83.303, delay contraction of the unit area if the circumstances of a particular unit warrant. If any portion of a lease is included in the participating area, the portion of the lease outside the participating area will neither be severed nor will it continue to be subject to the terms and conditions of the unit. The portion of the lease outside the participating area will continue in full force and effect so long as production is allocated to the unitized portion of the lease and the lessee satisfies the remaining terms and conditions of the lease.

FN9. 11 AAC 83.303 (1996) states the criteria to consider in determining the public interest:

> (a) The commissioner will approve a proposed unit agreement for state oil and gas leases if he makes a written finding that the agreement is necessary or advisable to protect the public interest considering the provisions of AS 38.05.180(p) and this section. The commissioner will approve a proposed unit agreement upon a written finding that it will
>
> (1) promote conservation of all natural resources, including all or part of an oil or gas pool, field, or like area;
>
> (2) promote the prevention of economic and physical waste; and
>
> (3) provide for the protection of all parties of interest, including the state.
>
> (b) In evaluating the above criteria, the commissioner will consider
>
> (1) the environmental costs and benefits of unitized exploration or development;
>
> (2) the geological and engineering characteristics of the potential hydrocarbon accumulation or reservoir proposed for unitization;
>
> (3) prior exploration activities in the proposed unit area;
>
> (4) the applicant's plans for exploration or development of the unit area;
>
> (5) the economic costs and benefits to the state; and
>
> (6) any other relevant factors, including measures to mitigate impacts identified above, the commissioner determines necessary or advisable to protect the public interest.
>
> (c) The commissioner will consider the criteria in (a) and (b) of this section when evaluating each requested authorization or approval under 11 AAC 83.301-11 AAC 83.395, including
>
> (1) an approval of a unit agreement;
>
> (2) an extension or amendment of a unit agreement;
>
> (3) a plan or amendment of a plan of exploration, development or operations;
>
> (4) a participating area; or
>
> (5) a proposed or revised production or

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cost allocation formula.

FN10. The director's decision stated in relevant part:

> This approval is conditioned on the following terms:
>
> (A) A well to delineate the hydrocarbon reserves underlying [ADL] 34626 and ADL 34627 must be drilled and completed prior to April 1, 1992; and
>
> (B) A commitment by the lessees to drill a second well to delineate the hydrocarbon reserves underlying ADL ... 28297 and ADL 34624 must be made by April 1, 1992.
>
> Should these leases not be included within an approved participating area on April 1, 1992, or should the required well not be completed or the commitment for the second well not secured by that date, ADLs 28297, 34624, 34626, and 34627 will be contracted out of the Prudhoe Bay Unit as of that date.

In January 1992 the lessees presented the department with their plans to seek deferral of contraction until September 1, 1993; they also sought expansion of the PBU to include the Pt. McIntyre reservoir. On February 28, 1992, the lessees asked the department for a second deferral pursuant to 11 AAC 83.356(b).

On March 25, 1992, the director stated that the department would "delay a decision on the contraction request" until it had the opportunity to review the additional well data. The lessees informed the department that, due to technical problems, they were unable to provide the department with the requested well data until September 1992. The department indicated that it would "further delay a decision to defer contraction of the Prudhoe Bay Unit ... until September 30, 1992." Continuing technical problems caused Arco to ask for a further postponement of its deadline to provide the well data. The department responded that it was "unwilling to delay a decision regarding the original deferral of contraction request beyond the first quarter of 1993."

On March 1, 1993, the lessees requested that the department establish the Pt. McIntyre participating area. On March 18, 1993, the lessees petitioned the department to expand the PBU to include the Pt. McIntyre reservoir. The first sentence of that letter suggested that the authority to expand the PBU was based on the PBUA and the department's regulations: "Pursuant to the provisions of Section 5.3 and Section 9.1 of the Prudhoe Bay Unit Agreement and 11 AAC 83.351 and 11 AAC 83.356, ARCO Alaska, Inc., for itself and on behalf of Exxon Corporation and BP Exploration, Inc., hereby petitions the Department of Natural Resources to expand the boundaries of the Prudhoe Bay Unit ...." (Parentheticals omitted.)

On March 31, 1993, the lessees petitioned for further deferral of contraction of the PBU. By 1993, the lessees claimed to have spent more than $287 million to develop the Pt. McIntyre and West Beach reservoirs for production.

In two separate decisions the director denied the lessees' requests to defer contraction and to expand the PBU.[FN11] On April 14, 1993, the director denied the lessees' request ***791** to defer contraction of the PBU. Because of the delays and based on the criteria of 11 AAC 83.303, the director contracted tracts 5, 6, 7, and 8 from the PBU effective April 1, 1993.

FN11. Exxon had asked that the department consider the expansion and contraction issues together. At one point, Exxon raised the issue of whether the director's refusal to consider the issues together was arbitrary and capricious. Because no further argument of this issue appears in Exxon's brief, we conclude that Exxon has waived the issue. *See Martinson v. Arco Alaska, Inc.*, 989 P.2d 733, 737 (Alaska 1999).

On August 18, 1993, the director denied the expansion of the PBU. He applied 11 AAC 83.303 and considered factors including the environmental costs and benefits, the geological characteristics and previous exploration, the lessees' plans for development, and the economic costs and benefits to the state. A large portion of the decision focused on field costs.

The lessees appealed both decisions to the com-

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missioner.

The lessees negotiated with the director and developed an amended application to expand the PBU to include the Pt. McIntyre reservoir, which the director granted. In the amended application, BP and Arco withdrew their appeals of the director's contraction and expansion decisions and waived any right to a field cost deduction except for production attributable to the small portion of the Pt. McIntyre reservoir that underlay the original boundary of the PBU. Exxon did not agree to waive its rights to a field cost deduction on Pt. McIntyre production. However, Exxon did agree to forego the deduction pending the final resolution of the issue, subject to later recoupment from the department. The amended application expressly noted Exxon's right to appeal or commence litigation in the superior court and specifically limited Exxon's arguments on appeal. The parties dispute exactly what arguments Exxon waived by this agreement.

On November 12, 1993, the commissioner upheld the director's decision to contract the PBU. He initially focused on the lessees' substantial delays in developing tracts 5, 6, 7, and 8. The commissioner interpreted the director's actions prior to the director's decision to contract the PBU as delaying the decision to contract rather than granting a deferral of contraction. He found the authority to delay contraction under 11 AAC 83.356(b), which, he concluded, required him to consider the criteria specified in 11 AAC 83.303. The commissioner noted that unitization of the Pt. McIntyre leases was generally in the public interest, but the public interest in conservation of natural resources could be equally served by deferring contraction of the PBU or by contracting the PBU and forming a new unit that used the PBU's excess processing capacity. The commissioner then concluded that deferring contraction of the PBU was not in the public interest based on environmental costs and benefits, geological and engineering considerations, prior exploration activities, and economic costs and benefits to the state. Because the commissioner found that any deferral of the contraction was not in the public interest, he decided that the original request for deferral should have been denied and denied the deferral retroactive to April 2, 1992.

On December 2, 1994, the commissioner affirmed the director's denial of PBU expansion. He expressly did not adopt two points: that the state would never allow a field cost deduction, and that PBU expansion should be denied in part because the state has paid more under the 1980 settlement than it ever intended to pay. He noted that, while under some circumstances a field cost deduction might be allowed, it depended on the public interest analysis. The commissioner also stated that using the state's discretionary powers to recoup perceived losses under prior agreements was not good public policy and expressly disclaimed reliance on this rationale for denying expansion of the PBU.

The commissioner specifically concluded that Exxon did not have an absolute right to expansion for two reasons. First, the geologic requirements of the PBUA were not met. The PBUA requires that any additional lands to be incorporated into the PBU contain a reservoir, any portion of which is within the PBU. No part of the Pt. McIntyre reservoir was within the PBU on March 18, 1993, because the contraction decision previously removed tracts 6, 7, and 8 from the PBU effective April 1, 1992. Second, the department had discretion to deny expansion of the PBU in the public interest according to state statute and the PBUA. In considering the public interest, the commissioner first generally stated "that the public interest with respect to non-economic and even some economic matters would be served at least as *792 well if not better by the creation of a new unit as it would by expansion of the PBU to include the [Pt. McIntyre reservoir]." He then specifically noted that the field cost allowance under the 1980 settlement exceeded Exxon's likely actual field costs and concluded that allowing Exxon to make a profit at the state's expense was not in the public interest. The commissioner also noted that the public interest favored treating Exxon like the other lessees of the Pt. McIntyre area, who were not permitted a field costs deduction.

Exxon appealed both of the commissioner's decisions. The appeals were consolidated before Superior Court Judge John E. Reese. On May 19, 1999, Judge Reese affirmed the commissioner's decision. Exxon appeals the following issues: (1) whether the department retained discretion under the PBUA to deny expansion of the PBU; (2) whether the department breached the PBUA by contracting the PBU; (3) whether the decision to deny expansion violated the 1980 settlement; (4) whether the department violated Exxon's constitutional rights; and (5) whether the department was equitably estopped from denying

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expansion or ordering contraction of the PBU.

III. *STANDARD OF REVIEW*

[1] When the superior court acts as an intermediate court, we directly review the administrative agency decision under consideration.[FN12]

FN12. *See Handley v. State, Dep't of Revenue,* 838 P.2d 1231, 1233 (Alaska 1992).

[2][3][4] We apply a substitution of judgment standard of review for agency decisions on questions of law where no expertise is involved.[FN13] Interpretation of a contract is a question of law that is not within the department's special expertise or skill. "Where ... there is no conflict in extrinsic evidence, the interpretation of contract is a question of law." [FN14]

FN13. *See id.*

FN14. *Leisnoi, Inc. v. Stratman,* 956 P.2d 452, 454 (Alaska 1998).

[5][6] But when the finder of fact must determine the meaning of a contract based on extrinsic evidence that raises conflicting inferences, "our inquiry is limited to determining whether the trier of fact's choice of inferences is supported by substantial evidence." [FN15] In this case, almost all of the extrinsic evidence raises conflicting inferences. Thus, we review the commissioner's choice of inferences for substantial evidentiary support.

FN15. *Zito v. Zito,* 969 P.2d 1144, 1147 n. 4 (Alaska 1998) (quoting *Wahl v. Wahl,* 945 P.2d 1229, 1232 n. 3 (Alaska 1997)).

IV. *DISCUSSION*

Exxon's arguments on appeal are based on one critical contention: that the PBUA abrogated the department's discretion to deny expansion and to order contraction of the PBU. Exxon's additional claims that the department breached the 1980 settlement, unconstitutionally impaired the PBUA contract, unconstitutionally worked a taking, and should be equitably estopped all derive from the department's exercise of discretion in making the contraction and expansion decisions. The state disputes Exxon's view that the PBUA destroyed its power over expansion and contraction. As discussed in greater detail below, our conclusion that the department had the discretion to deny expansion of the PBU in the public interest and in accord with state law is dispositive of this matter.

A. *Exxon Did Not Waive the Argument that the Pt. McIntyre Reservoir Was Partially within the Boundaries of the PBU.*

As a preliminary matter, we address the state's contention that Exxon waived its right to make certain arguments on appeal. The state argues that in the amended application for PBU expansion Exxon agreed to present its position as if the geologic condition-that the Pt. McIntyre reservoir was at least partially within the boundaries of the PBU-was not met. Exxon argues that the state's interpretation***793** of the amended application is incorrect because it would render Exxon's express right to appeal meaningless, because Exxon can prevail on appeal only if it can prove that the geologic condition was met. Neither side disputes that a small portion of the Pt. McIntyre reservoir actually underlies the original PBU and thus meets the geologic condition.

The amended application for PBU expansion summarizes the parties' positions and agreement as follows:

> Exxon disagrees with the State regarding their respective rights. To allow production of the Pt. McIntyre Participating Area to begin while preserving Exxon's rights and the State's rights, the Applicants propose the following procedure:
>
> ....
>
> iii. Exxon may appeal to or commence litigation in (or both) the Alaska Superior Court, and/or may appeal to the Commissioner, to contend among other things that the Commissioner's Contraction Decision (assuming he affirms the Contraction Decision) and other DNR decisions concerning the Pt. McIntyre Participating Area and the Contracted Acreage [FN16] were incorrect. Any such appeal or litigation is collectively referred to as the "Contest."
>
> FN16. "Contracted Acreage" referred to tracts 5, 6,7, and 8.
>
> In the Contest, ... Exxon shall not challenge the legality of DNR's established procedures or

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> DNR's power and authority to act and make decisions concerning the contraction or expansion of the PBU, the Pt. McIntyre Participating Area, or the Contracted Acreage, but may claim, for example, that the established procedures were not followed or that the DNR decisions or actions are not consistent with applicable law. Also, Exxon shall not claim that the DNR is disqualified from acting because the State could realize a gain as a result of the DNR's actions.
>
> ....
>
> iv. Exxon must present its position in the Contest as if the Contracted Acreage were not in the PBU ... until Exxon obtains a final, non-appealable ruling that the Contracted Acreage should not have been contracted out of the PBU. If Exxon obtains such a ruling, it may use the ruling in presenting its position in the Contest. Exxon, however, shall not at any time ... argue or claim that it is entitled to field costs or any other costs or relief because ... the Pt. McIntyre Participating Area [is] in the PBU as a result of granting this Amended Application or the Production Application. Exxon recognizes and agrees that such an argument would be "bootstrapping."
>
> ....
>
> vi. By filing this Amended Application and pursuing any relief permitted by it, Exxon does not waive any rights which it may have to field and other costs under the terms of the Pt. McIntyre Participating Area leases....
>
> vii. All appellate rights of the State and Exxon, if any, are preserved.
>
> The commissioner interpreted the "no bootstrapping" paragraph as a waiver of Exxon's argument that the geologic condition was met, because Exxon had to present its position as if tracts 5, 6, 7, and 8 were not in the PBU. If tracts 6, 7, and 8 are not in the PBU, the geologic condition cannot be met.

[7][8] We think the commissioner read the waiver too broadly for two reasons: first, the parties intended to preserve the status quo on the field costs issue while simultaneously allowing development of the Pt. McIntyre reservoir; second, the state's interpretation eviscerates Exxon's right to appeal the field costs issue. Our goal when interpreting contracts is to "give effect to the reasonable expectations of the parties." [FN17] The relevant section of the agreement begins with a statement of intent: "To allow production of the Pt. McIntyre Participating Area to begin while preserving Exxon's rights and ***794** the State's rights." The express intent of the amended agreement was to avert an impasse by isolating the field costs issue for separate resolution on appeal.

> FN17. *Stepanov v. Homer Elec. Ass'n*, 814 P.2d 731, 734 (Alaska 1991) (quoting *Mitford v. de Lasala*, 666 P.2d 1000, 1005 (Alaska 1983)).

Moreover, we have repeatedly noted that "[a] court should not interpret an agreement in a manner which would give meaning to one part of an agreement at the cost of annulling another part." [FN18] Exxon expressly retained a right to "appeal to or commence litigation in (or both) the Alaska Superior Court." Interpreting the "no bootstrapping" paragraph as a general waiver of an argument required for Exxon to prevail on appeal effectively eliminates Exxon's right to appeal. Instead, we read the agreement to give Exxon a meaningful right of appeal while preserving the "no bootstrapping" provision. Accordingly, Exxon may argue in this appeal that the geologic condition was met because the facts so indicate but not because the state approved the amended application for expansion.

> FN18. *Betz v. Chena Hot Springs Group*, 657 P.2d 831, 835 (Alaska 1982); *see also Earth Movers, Inc. v. State, Dep't of Transp. & Pub. Facilities*, 824 P.2d 715, 717-18 (Alaska 1992) (interpreting contract based on document as a whole).

B. *The Department of Natural Resources Has the Authority to Deny Expansion of the PBU Under the PBUA.*

While the parties dispute numerous aspects of the expansion and contraction decisions,[FN19] we find one issue dispositive-whether the department had the authority to consider the state's best interests in making a decision on expansion of the PBU.

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> FN19. Concerning the contraction decision, for example, the parties dispute: the meaning of the PBUA text; whether the director's amended 1987 deferral superceded the PBUA contraction provisions; whether the lessees met the conditions of the 1987 deferral; and whether the director granted a second deferral.

Exxon argues that the department has no discretion to determine unit expansion; rather, Article 9 of the PBUA controls. Exxon interprets the PBUA to give itself a unilateral right to expand the PBU so long as the lands to be added contained a reservoir that was partially within the PBU. If this "geologic condition" was met, Exxon argues, the department had no discretion to deny expansion.

The state argues that the department has discretion to consider the public interest when deciding to expand the PBU under the PBUA and department regulations.

We first consider the text of the PBUA. We then look at extrinsic evidence.

1. *The text of the PBUA*

Article 9.1 of the PBUA discusses possible expansion of the PBU:

> The Unit Area may be enlarged from time to time so as to include any additional lands reasonably determined to be within any Reservoir any portion of which is within the Unit Area. The lands to be included shall be based on such subdivisions of the public land surveys as may be approved by the Director, but not less than the area approved by the well-spacing order affecting such lands for such Reservoir....

Exxon argues that the first sentence indicates that Exxon may enlarge the unit area, so long as the additional lands meet the condition. The state argues that the first sentence is ambiguous, but the rest of the PBUA indicates that the department has the power to expand the PBU.

The state is correct that the language is ambiguous. The passive voice can be ambiguous.[FN20] The text alone does not indicate whether Exxon or the department has the authority to expand the PBU. However, the subsections following the contested statement help to clarify it. Subsections (a) through (d) indicate the process for expansion of the PBU. The final step indicates that "after due consideration of all pertinent information, the Director shall render his decision." This text, and the absence of text ***795** indicating that Exxon was meant to have the right to expand, strongly favors the state's interpretation that the director has the authority to decide expansion of the PBU.

> FN20. *See Plate v. State,* 925 P.2d 1057, 1065 (Alaska App.1996) (finding evidence rule in passive voice ambiguous and resolving ambiguity by resort to commentary to rules); *see also E.I. du Pont de Nemours and Co. v. Train,* 430 U.S. 112, 128, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977) (resorting to other portions of federal statute to resolve ambiguous passive language).

Both sides argue that the use of the permissive "may" supports their interpretation. Exxon argues that the permissive had to be used to preserve Exxon's option of expansion. If the mandatory "shall" was used, Exxon would have been required to expand the PBU if the condition was met.

The state contends that use of the permissive indicates the department's discretion. The state notes that in four other articles of the PBUA, Articles 4.4, 5.4, 16.4, and 18.1, when the agreement intended to create a right that could be exercised by the lessees, it used the language "shall have the right" or "shall be entitled to."

[9][10] The state's interpretation is the most logical. In interpreting a contract, courts should "interpret the contract in a manner that makes the contract internally consistent." [FN21] Exxon's interpretation that Article 9.1 creates a right to expansion with the language "may" conflicts with other portions of the PBUA that use "shall have the right" or "shall be entitled to" to create a lessees' right.

> FN21. *Brobeck, Phleger, & Harrison v. Telex Corp.,* 602 F.2d 866, 872 (9th Cir.1979).

Finally, the state notes that Article 12.1 of the

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PBUA expressly indicates that the PBUA "shall be subject to all valid applicable federal and state laws, rules, regulations and orders." Former 11 AAC 83.340 and former 11 AAC 83.345, state regulations in effect at the time the parties entered the PBUA, required the director's approval, based on a determination of necessity or advisability in the public interest, for a modification of an approved unit agreement.[FN22] Accordingly, the state argues that the PBUA required the director's approval for any modification of the agreement. Exxon has no response to this. This express statement also favors the state's interpretation that the department has discretion to deny expansion of the PBU. In sum, the text of the PBUA strongly indicates that the department had discretion to deny expansion as specified by its own regulations.

FN22. Former 11 AAC 83.345 (eff. 9/20/74) provided:

> Any modification of an approved unit agreement is subject to the director's approval in the same manner and upon the same determination as the original unit agreement.

Former 11 AAC 83.340 (eff. 9/20/74) provided in relevant part:

> A unit agreement will be approved by the director if he determines that the agreement is necessary or advisable in the public interest, is for the purpose of more properly conserving natural resources, and adequately protects all parties in interest including Alaska.

2. *Extrinsic evidence*

Extrinsic evidence provides substantial support for the commissioner's decision. The parties' course of performance of the PBUA and the existence of departmental regulations that are inconsistent with Exxon's view of the PBUA strongly support the conclusion that the department had discretion to deny expansion of the PBU.

a. *Exxon's and the department's course of performance*

The state argues that Exxon's and the department's course of performance of the PBUA shows that Exxon understood that the department retained discretion. Exxon offers no argument in response.

[11] The conduct of the parties is properly considered as evidence of the parties' intent.[FN23] In the course of performance of the PBUA, Exxon has previously requested contraction of the PBU and corresponding expansion of another unit. Exxon's application for the change in the PBU requested the director's approval under provisions including 11 AAC 83.301-.395 and argued that the change was in "the public interest in accordance with AS 38.05.180(p) and 11 AAC 83.303." Exxon has also requested expansion of the PBU and contraction of another unit. In both cases, the director's decisions to grant the change included an analysis of the best interests factors listed in 11 AAC 83.303.

FN23. *See, e.g., Peterson v. Wirum,* 625 P.2d 866, 872-74 (Alaska 1981).

***796** Furthermore, Exxon's application for the Pt. McIntyre expansion-the denial of which forms the main issue here-requested the director to expand the PBU "pursuant to the provisions of Section 5.3 and Section 9.1 of the [PBUA] and 11 AAC 83.351 and 11 AAC 83.356." The application expressly noted that the expansion "meets the criteria of 11 AAC 83.303" and listed three reasons. Exxon's and the department's prior course of performance of the PBUA contradicts Exxon's current position and strongly indicates that the department had discretion to deny expansion.

b. *The department's inability to contract around its regulations*

[12] Exxon argues that the department's own regulations allow the department to enter contracts that differ from existing regulations and provide that later-enacted regulations will not apply to preexisting contracts.[FN24] It also notes that the department has no statutory authority to alter a unit agreement without consent by the contracting parties.[FN25] Exxon claims that it drafted the PBUA to eliminate the department's discretion. Why, Exxon asks, would it draft an agreement that simply restates the department's regulations?

FN24. *See* 11 AAC 83.301(b) (1996) ("[The unitization regulations] apply to an existing oil and gas lease or approved unit agreement where not inconsistent with the lease or unit agreement or regulations in effect on the ef-

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fective date of the lease or unit agreement.").

FN25. *See* AS 38.05.180(p) ("The commissioner may, with the consent of the holders of leases involved, establish, change or revoke drilling, producing, and royalty requirements of the leases and adopt regulations with reference to the leases, with like consent on the part of the lessees, in connection with the institution and operation of a cooperative or unit plan as the commissioner determines necessary or proper to secure the proper protection of the public interest.").

We disagree with Exxon's first contention-that the department can agree to contract terms that violate its regulations. The only authority cited for this proposition is 11 AAC 83.301(b), which states that the department's regulations "apply to an existing oil and gas lease or approved unit agreement where not inconsistent with the lease or unit agreement or regulations in effect on the effective date of the lease or unit agreement." This merely applies the department's later-enacted regulations as default rules to existing leases or unit agreements when there is no conflict.

Subsection .301(b) does not make existing department regulations inapplicable to new unit agreements. Former 11 AAC 83.340 and .345 existed before the approval of the PBUA. Former section .345 stated that "[a]ny modification of an approved unit agreement is subject to the director's approval in the same manner and upon the same determination as the original unit agreement." [FN26] Former section.340 required that "[a] unit agreement will be approved by the director if he determines that the agreement is necessary or advisable in the public interest, is for the purpose of more properly conserving natural resources, and adequately protects all parties in interest including Alaska." [FN27] Thus, 11 AAC 83.301(b) does not affect the applicability of the best interests analysis for expansions of the PBU according to former 11 AAC 83.340 and .345.[FN28]

FN26. Former 11 AAC 83.345 (eff. 9/20/74).

FN27. Former 11 AAC 83.340 (eff. 9/20/74).

FN28. When the department repealed 11 AAC 83.340 and .345 on June 28, 1981, the department adopted 11 AAC 83.303, which contained a similar (but more detailed) consideration of "the public interest" in approving changes to unit agreements. 11 AAC 83.303 (1996).

Moreover, 11 AAC 83.301(b) does not confer authority for the converse: to contract outside of the department's regulations. To allow such activity would be arbitrary; parties contracting with the department would not be held to the same regulations that non-contracting parties were required to comply with. And the department should never need to contract in violation of its own regulations, because it has the authority to change its regulations so long as the new regulation has a reasonable basis and is within the scope of the legislature's delegation of power to the department.[FN29] Because we conclude*797 that 11 AAC 83.301(b) does not allow the department to contract outside of its regulations, Exxon's argument that the department contracted away its regulatory discretion fails.

FN29. *See United Steelworkers of America Local Union 14534 v. NLRB*, 983 F.2d 240, 244-45 (D.C.Cir.1993) ("An agency may alter its interpretation of substantive law so long as its new interpretation does not conflict with the statute, and so long as the agency supplies a 'reasoned analysis' for 'changing its course.' " (citation omitted)).

In sum, the text of the PBUA and the extrinsic evidence support the conclusion that the department had discretion to deny expansion. The department did not, and could not, contract away its discretion to consider the state's best interests in approving expansions of the PBU. Exxon did not have a unilateral right to expansion under the PBUA.

C. *The Commissioner's Decision To Deny Expansion Because of the Excessive Field Cost Allowance Did Not Violate the 1980 Royalty Settlement Agreement.*

Exxon argues that the department's failure to expand the PBU violated the 1980 settlement because the 1980 settlement's resolution of field costs expressly applied to all lands covered by the PBUA "and, in addition, all other land to which the [PBUA] may hereafter be extended as therein provided."

Exxon's argument is premised on its interpretation of the PBUA that Exxon had a unilateral right to

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expand the PBU if the geologic condition was met. If the department had the discretionary authority to deny expansion, Exxon had no right to force application of the 1980 settlement to lands outside the PBU, and the argument fails. Consistent with our previous conclusion that Exxon had no unilateral right to expansion of the PBU, we conclude that the commissioner did not breach the 1980 settlement.

Exxon argues further that the department breached the implied covenant of good faith and fair dealing of the 1980 settlement because the department's failure to allow expansion deprived Exxon of the benefit of its bargain and rendered the settlement a nullity. Exxon argues that for the commissioner to decide as he did "*solely because these [field cost] deductions will apply* " deprives it of the benefit it bargained for in the 1980 settlement. (Emphasis in original.) But the commissioner's decision does not support Exxon's argument that was denied solely because field cost deductions applied. The commissioner first stated "that the public interest with respect to non-economic and even some economic matters would be served at least as well if not better by the creation of a new unit as it would by expansion of the PBU to include the [Pt. McIntyre reservoir]." The commissioner expressly disclaimed both that field costs would never be allowed and that the amount paid under the 1980 settlement was a permissible consideration. Rather, the commissioner appeared to be concerned that Exxon would unfairly profit by overcharging field costs. According to his calculations, Exxon's actual field cost expenses were in the range of six to seventeen cents per barrel, far less than the seventy-nine cents per barrel allowed by the 1980 Royalty Settlement Agreement. The commissioner requested that Exxon justify the magnitude of the field cost, but Exxon did not respond. Presumably, if Exxon could show special production costs that warranted the substantial field costs, a deduction may have been allowed. The commissioner also noted the unfairness of allowing Exxon, but not other similarly situated lessees, a field cost deduction. The commissioner did not deny PBU expansion solely because the field costs would apply.

[13] Exxon also argues that the department's consideration of field costs in the denial of expansion rendered the 1980 settlement a nullity. If the 1980 settlement only concerned field costs deductions for production from expansions of the PBU, the problems of illusory contracts and lack of consideration might arise as Exxon argues. But the 1980 settlement applies primarily to existing PBU production, and Exxon has enjoyed a substantial and continuing benefit from the 1980 settlement-a field cost deduction of seventy-nine cents per barrel of oil produced from the PBU. Exxon's claim that "no rational settling party would agree" to the 1980 settlement if its field cost allowance ***798** were limited to the existing PBU is quite unpersuasive given the facts that the legislature expressly declared that paying field costs was not in the best interests of the state,[FN30] that most unit agreements did not allow for field costs deductions,[FN31] and that Exxon's co-lessees for the disputed tracts waived their rights to any field cost deductions. Accordingly, we conclude that the department breached neither the express terms of the 1980 settlement nor its implied covenant of good faith and fair dealing by exercising discretion to consider the public interest in denying expansion of the PBU.

FN30. *See* AS 38.05.180(f)(2) (enacted 1978).

FN31. The department allowed field cost deductions for the Duck Island Unit ("Endicott"), signed before the 1980 Settlement, and the Kuparuk River Unit. All other unit agreements did not allow field cost deductions. *See, e.g.,* the Milne Point Unit; the North Star Unit; and the Thetis Island Unit.

D. *The State Did Not Violate Exxon's Constitutional Rights.*

Exxon argues that the department's regulations unconstitutionally impair the obligations of contracts. This argument is premised on its interpretation of the PBUA. Because the department bargained away its discretion to change the PBU in the PBUA, Exxon argues, applying regulations that reinstate that discretion impairs the PBUA.

In addition, Exxon argues that the department's requirement that Exxon waive its right to field cost deductions under the PBUA for Pt. McIntyre production is an unconstitutional taking. Again, this argument is premised on Exxon's interpretation of the PBUA. For there to be a taking, Exxon must have a property interest in the field cost deduction for production from lands that may be added to the PBU.[FN32] In turn, this requires that Exxon have a right to ex-

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pansion of the PBU to include these lands.

FN32. *See Bowen v. Public Agencies Opposed to Soc. Security Entrapment*, 477 U.S. 41, 55-56, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986).

The state argues simply that the department did not violate any of Exxon's contractual rights because the department has discretion to deny expansion and order contraction under the PBUA. First, because the department did not bargain away its discretion to change the PBU, it has not impaired the contract by using its discretion to deny the changes to the PBU. Second, Exxon has no right to expansion under the PBUA; thus, it has no property right in a field cost deduction from lands that only might be added to the PBU.

[14] As we determined previously, the state has the discretionary authority under the PBUA to approve changes to the PBU. Exxon's constitutional arguments therefore fail.

E. *The Department Is Not Equitably Estopped from Denying Expansion or Ordering Contraction of the PBU.*

Exxon argues that the state should be estopped from ordering contraction and denying expansion of the PBU because Exxon detrimentally relied upon the department's alleged agreement in the PBUA to expand and contract the PBU based solely on geologic factors and without exercise of its discretion. The state argues that the commissioner found the evidence insufficient to establish estoppel and that his finding is supported by substantial evidence.

We have stated that estoppel may apply against the government and in favor of a private party if four elements are present: "(1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury." [FN33] Whether estoppel applies in any given situation is a legal conclusion.[FN34]

FN33. *Crum v. Stalnaker*, 936 P.2d 1254, 1256 (Alaska 1997).

FN34. *See id.* at 1258 ("We determine that the Board erred in its legal conclusion that equitable estoppel is unavailable under the facts of this case.").

[15] Like Exxon's constitutional arguments, its estoppel argument hinges on its interpretation of the PBUA. Because we conclude that the department has discretion ***799** under the PBUA, Exxon has not been prejudiced by the department's use of its discretion to deny the expansion to the PBU. Thus, estoppel does not apply here.

V. *CONCLUSION*

The commissioner had discretionary authority to deny expansion of the PBU. For that reason, and because the decision to deny expansion did not violate the 1980 Royalty Settlement Agreement, the decision did not violate Exxon's constitutional rights, and the department was not equitably estopped from making that decision, we AFFIRM in all respects.

APPENDIX "A"
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Exxon Corp. v. State
40 P.3d 786, 151 Oil & Gas Rep. 317

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

EXXON MOBIL CORPORATION, Operator of the Point Thomson Unit; BP Exploration (Alaska) Inc.; Chevron U.S.A., Inc.; and ConocoPhillips Alaska, Inc.,	))))Case No. 3AN-06-13751 CI) (Consolidated))Case No. 3AN-06-13760 CI)Case No. 3AN-06-13773 CI
Appellants,	)Case No. 3AN-06-13799 CI)Case No. 3AN-07-04634 CI
v.	)Case No. 3AN-07-04620 CI)Case No. 3AN-07-04621 CI
STATE OF ALASKA, Department of Natural Resources,	)))
Appellee.	)

DECISION ON APPEAL

This case is before the superior court in its capacity as an appellate court on appeal from administrative determinations by the Department of Natural Resources (DNR) with respect to the Point Thomson Unit Agreement. *See* AS 22.10.020(d).

Factual and Procedural Background

In 1977, the Point Thomson Unit Agreement (PTUA) was entered into between Exxon (now ExxonMobil) and the Commissioner of the Department of Natural Resources for the State of Alaska for the purpose of facilitating the production of oil and gas at Point Thomson. [R. 1253-1271] ExxonMobil, which holds the largest percentage of leasehold interests at Point Thomson, is

identified in the PTUA as the Unit Operator. The other appellants in this action all have leasehold interests within the unit.

The following paragraphs of the unit agreement are particularly relevant to this appeal:

> 1. ENABLING ACT AND REGULATIONS. The Alaska Land Act (AS 38.05.005--370) and all valid and pertinent oil and gas statutes and regulations including the oil and gas operating statutes and regulations in effect as of the effective date hereof or hereafter issued thereunder governing drilling and producing operations, not inconsistent with the terms hereof or the laws of the State of Alaska, are hereby accepted and made a part of this agreement.
>
> ...
>
> 10. PLAN OF FURTHER DEVELOPMENT AND OPERATION. Within six months after completion of a well capable of producing unitized substances in paying quantities, the Unit Operator shall submit for the approval of the Director an acceptable plan of development and operation for the unitized land which, when approved by the Director, shall constitute the further drilling and operating obligations of the Unit Operator under this agreement for the period specified therein. Thereafter, from time to time before the expiration of any existing plan, the Unit Operator shall submit for the approval of the Director a plan for an additional specified period for the development and operation of the unitized land. The Unit Operator expressly covenants to develop the unit area as a reasonably prudent operator in a reasonably prudent manner.
>
> Any plan submitted pursuant to this section shall provide for the exploration of the unitized area and for the diligent drilling necessary for determination of the area or areas thereof capable of producing unitized substances in paying quantities in each and every productive formation and shall be as complete and adequate as the Director may determine to be necessary for timely development and proper conservation of the oil and gas resources of the unitized areas, and shall:
>
> (a) specify the number and location of any wells to be drilled and the proposed order and time for such drilling; and,
>
> (b) to the extent practicable, specify the operating practices regarded as necessary and advisable for the proper conservation of natural resources. ...

Said plan or plans shall be modified or supplemented when necessary to meet changed conditions, or to protect the interests of all parties to this agreement. Reasonable diligence shall be exercised in complying with the obligations of the approved plan of development. ...

16. CONSERVATION. Operations hereunder and production of unitized substances shall be conducted to provide for the most economical and efficient recovery of said substances without waste, as defined by or pursuant to state law or regulation.

...

20. EFFECTIVE DATE AND TERM. This agreement shall become effective upon approval by the Commissioner or his duly authorized representative as of the date of approval by the Commissioner and shall terminate five (5) years from said effective date unless:
    (a) such date of expiration is extended by the Commissioner, or
    (b) it is reasonably determined prior to the expiration of the fixed term or any extension thereof that the unitized land is incapable of production of unitized substances in paying quantities in the formations tested hereunder ... or
    (c) a valuable discovery of unitized substances has been made or accepted on unitized land during said initial term or any extension thereof, in which event the agreement shall remain in effect for such term and so long as unitized substances can be produced in quantities sufficient to pay for the cost of producing same from wells on unitized land ~~within any participating area established hereunder~~ and, should production cease, so long thereafter as diligent operations are in progress for the restoration of production or discovery of new production and so long thereafter as the unitized substances so discovered can be produced as aforesaid ...

21. RATE OF PROSPECTING, DEVELOPMENT AND PRODUCTION. The Director is hereby vested with authority to alter or modify from time to time in his discretion the quantity and rate of production under this agreement when such quantity and rate is not fixed pursuant to state law or does not conform to any statewide voluntary conservation or allocation program which is established, recognized and generally adhered to by the majority of operators in such state, such authority being hereby limited to alternation [sic] or modification in the public interest, the purpose thereof and the public interest to be served thereby to be stated in the order of alternation or modification. Without regard to the foregoing, the Director is also hereby vested with

> authority to alter or modify from time to time at his discretion the rate of prospecting and development and the quantity and rate of production under this agreement when such alternation or modification is in the interest of attaining the conservation objectives stated in this agreement and is not in violation of any applicable state law.
>
> Powers in this section vested in the Director shall only be exercised after notice to Unit Operator and opportunity for hearing to be held not less than ~~fifteen (15)~~ *thirty (30)* days from notice, *and shall not be exercised in a manner that would (i) require any increase in the rate of prospecting, development or production in excess of that required under good faith and diligent oil and gas engineering and production practices; or (ii) alter or modify the rates of production from the rates provided in the approved plan of development and operations then in effect or, in any case, curtail rates of production to an unreasonable extent, considering unit productive capacity, transportation facilities available, and conservation objectives; or (iii) prevent this agreement from serving its purpose of adequately protecting all parties in interest hereunder, subject to applicable conservation laws and regulations.*

The language that is struck out in Sections 20 and 21 above was deleted, and the italicized language in Section 21 was added in 1985 amendments to the PTUA. [R. 794, 1253-1268, 9448]

As set forth in Section 1 of the unit agreement, the regulations in effect at the time of the agreement's inception were "accepted and made a part of [the unit] agreement." *See also Exxon Corp. v. State*, 40 P.3d 786 (Alaska 2001).

Three of those regulations have particular bearing on this case.

Former 11 AAC.83.315 provided as follows:

> RATES OF PROSPECTING AND PRODUCTION. The director [of the former State Division of Lands] may require that any unit agreement contain a provision vesting authority in the director or other person, committee, or agency as may be designated in the agreement and satisfactory to the director, to alter or modify from time to time the rate of prospecting and development and the quantity and rate of production under the agreement.

Former 11 AAC 83.340 provided in relevant part as follows:

> APPROVAL OF UNIT AGREEMENT. A unit agreement will be approved by the director if he determines that the agreement is necessary or advisable in the public interest, is for the purpose of more properly conserving natural resources, and adequately protects all parties in interest including Alaska ...

Former 11 AAC 83.345 provided as follows:

> MODIFICATION OF UNIT AGREEMENTS. Any modification of an approved unit agreement is subject to the director's approval in the same manner and upon the same determination as the original agreement.

In addition to the above-quoted regulations, there was also a chapter of procedural regulations that were in effect in 1977 that applied to unit agreements. This chapter, entitled "Practice and Procedure," applied to several other chapters of the natural resources regulations, including the unitization chapter. It contained several provisions regarding administrative adjudications, including a provision for judicial appeals to the superior court of administrative decisions and actions.[1] But these former regulations did not contain any provision that required or authorized a unit termination or default action to be initiated by judicial proceedings. Former 11 AAC 88.100 – .185 (Eff. 9/20/74)

There are two subsections of the Alaska Land Act as it was in effect in 1977 that relate to unit agreements:

Former AS 38.05.180(m) provided as follows:

> To conserve the natural resources of all or a part of an oil or gas pool, field, or like area, (whether or not the part is then subject to a cooperative or unit plan of development or operation), lessees and their representatives may unite with each other, or jointly or separately with others, in collectively adopting or operating under a

[1] Former 11 AAC 88.160 (Eff. 9/20/74).

> cooperative or a unit plan of development or operation of the pool, field, or like area, or a part of it, whenever determined and certified by the commissioner to be necessary or advisable in the public interest. The commissioner may, with the consent of the holders of the leases involved, establish, alter, change, or revoke drilling, producing, rental minimum royalty, and royalty requirements of the leases and make regulations with reference to the leases, with like consent on the part of the lessees, in connection with the institution and operation of a cooperative or unit plan as he determines necessary or proper to secure the proper protection of the public interest. The commissioner may provide that oil and gas leases issued under this section shall contain a provision requiring the lessee to operate under a reasonable cooperative or unit plan, and he may prescribe a plan under which the lessee shall operate. The plan shall adequately protect all parties in interest, including the state.
>
> Former AS 38.05.180(n) provided in relevant part as follows:
>
> A plan authorized by (m) of this section, which includes lands owned by the state, may contain a provision vesting the commissioner, or a person, committee, or state agency with authority to alter or modify from time to time the rate of prospecting and development and the quantity and rate of production under the plan ...

The Alaska Land Act also accords broad authority to the Commissioner of the Department of Natural Resources. Specifically, AS 38.05.020 provides that "[t]he commissioner may establish reasonable procedures and adopt reasonable regulations necessary to carry out this chapter," and the commissioner may "exercise the powers and do the acts necessary to carry out the provisions and objectives of this chapter." These statutory provisions were in effect in 1977 and remain in effect today.

Overlying the entire statutory and regulatory construct is Article VIII, Section 2 of the Alaska Constitution, which provides, "[t]he legislature shall

provide for the utilization, development and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."

Several current regulations have been discussed by the parties extensively in this appeal, including 11 AAC 83.303; 11 AAC 83.336; 11 AAC 83.361; and 11 AAC 83.374. None of these regulations was in effect when the PTUA became effective in 1977. They were all originally adopted in 1981.

The history of the Point Thomson Unit has been thoroughly set out in the record before this court, including in the decisions issued at the administrative level. [*See, e.g.*, R. 629-635] Since the unit's formation in 1977, eighteen exploration wells have been drilled within and around the PTU. At the request of the Unit Operator, the Division of Oil and Gas of the Department of Natural Resources (Division) certified seven wells within the PTU as capable of producing hydrocarbons in paying quantities. [R. 640] With one exception, all of those certifications were issued, and the wells all then abandoned, prior to 1987. [R. 5681] The last well was certified in 1994 and abandoned the following day. [Id.][2]

The PTU Lessees are required to submit Plans of Development (PODs) at specified intervals to the Division that set out their development plans for the unit. The current controversy arises from the Department of Natural Resources'

[2] However, the certification letter for the last well dated April 26, 1994 indicated, "It should be noted, however, that the well is not capable of producing in paying quantities as that phrase is defined in section 9 of the Point Thomson Unit Agreement." [R. 5681]

refusal to approve the Lessees' proposed 22nd Plan of Development for the Point Thomson Unit. [R. 1966-1976] The Division rejected the Lessees' first proposed 22nd Plan of Development in a decision dated September 30, 2005. [R. 12282] That proposed 22nd Plan, as described by the Division, conditioned PTU development on amending the State's existing tax and royalty structure and construction of a North Slope gas pipeline. [R. 12297] The Division found "the current PTU Owners have had the leases for far beyond their primary term, and their conclusion today is simply that they cannot make enough money to justify development. It is time for the PTU Owners to develop and produce or give new lessees ... a chance to develop the known hydrocarbon resources within the PTU." [R. 12303] That initial decision held that "[f]ailure to submit an acceptable plan of development is grounds for termination of the PTU." [R. 12305] The initial decision then referenced Section 21 of the PTUA, and held that "the PTU Operator shall commence development operations within the PTU by October 1, 2007. The PTU Owners shall have an opportunity for hearing regarding this notice to modify the rate of PTU development." [*Id.*] The initial decision also required that "the PTU Operator shall begin commercial production of unitized substances from the PTU by October 1, 2009." [R. 12304]

Shortly after the issuance of the September 2005 decision, the Division issued an Amended Decision on October 27, 2005. [R. 12282] The Amended Decision removed all references to Section 21 of the PTUA, because, according to the Amended Decision, that section does "not apply to the Division's

evaluation of the Unit Operator's proposed plans for development of the Point Thomson Unit." [*Id.*][3] The Amended Decision of October 2005 accorded the Unit Operator 90 days within which to submit an acceptable POD. The Amended Decision also modified the initial decision to provide that the development and production deadlines previously specified in the initial decision were "*an example* of an acceptable PTU plan of development." [R. 12304; emphasis added] The Amended Decision eliminated the reference to the opportunity for a hearing regarding the proposed modification of the rate of PTU development. [R. 12305] But the Amended Decision retained the language from the initial decision that "[f]ailure to submit an acceptable plan of development is grounds for termination of the PTU." [R.12305]

The initial decision and the Division's Amended Decision of October 2005 both noted that the Division had certified seven wells on the unit as capable of producing hydrocarbons in paying quantities. [R. 12295] Nothing in either the initial decision or the Amended Decision of the Division purported to decertify those wells. To the contrary, the Division's Amended Decision stated, "the PTU contains wells certified as capable of production in paying quantities." [R. 12302]

The Division's October 2005 Amended Decision recognized that negotiations between State representatives and some of the PTU Lessees for

[3] *See also* State's Br. at 49, n. 56. There, the State asserts that Section 21 "relates to the Director's authority to change the rate of prospecting and development once Lessees are operating under an approved POD," and is not applicable with respect to the approval of the POD itself, which the State asserts is governed solely by Section 10 of the PTUA. *But see* Section 21 as amended, paragraph 2, and the reference there excluding applicability of portions of that section to approved plans of development. [R. 794]

the construction of a gas pipeline were ongoing at that time, but clearly indicated that such negotiations would not serve as a basis to delay PTU development: "At this point in time, the PTU Owners do not control if or when a North Slope gas pipeline will ever be operational. Reliance on third parties, beyond the control of the PTU Owners, is not grounds for the delay of PTU development and production." [R. 642]

The ninety-day deadline for submission of an acceptable modified 22nd POD was extended by the Division until October 20, 2006, during which time negotiations continued with respect to the development of a gas pipeline. The resultant proposed Fiscal Contract for a gas pipeline included certain provisions dealing with the PTU. Specifically, the proposed Fiscal Contract provided that if certain PTU Lessees undertook designated actions with respect to the development of a gas pipeline, the State agreed not to terminate the PTU. [App. 125]

In May 2006, the proposed Fiscal Contract was submitted to the Alaska Legislature for its consideration as required by the Stranded Gas Development Act. [App. 125] On October 18, 2006, while the Fiscal Contract was still under legislative consideration, ExxonMobil submitted a modified 22nd POD to the Commissioner. [R. 3089-3105] The modified 22nd POD did not propose to put the unit into production by 2009, a commitment that had been delineated by the Division as a component of an acceptable plan of development in the Division's Amended Decision of October 2005. [R. 667] The Lessees have asserted that

the modified 22nd POD was consistent with the terms of the proposed Fiscal Contract. [App. 126] However, the Fiscal Contract had not been approved by the Legislature at that time, and indeed, has not ever been approved by the Legislature.

Oral argument before the Commissioner on the modified proposed 22nd POD was held on November 20, 2006. No participant requested an evidentiary hearing. However, approximately 5,000 pages of documents regarding the modified proposed POD were submitted to the Commissioner prior to the November 2006 hearing. [R. 5672]

The Commissioner issued a Decision on Appeal on November 27, 2006. [R. 5670-5689] As summarized in the decision itself, the Decision on Appeal:

> (1) denies the request for modification of the 2001 Expansion Agreement, as amended, which affects only the expansion leases; (2) affirms the Director's Decision in all respects to the extent it is consistent with this Commissioner's Decision, but the Director's Decision is disapproved to the extent that it can be read to mean the PTU contains certified wells; (3) adopts and incorporates into the Commissioner's Decision the findings and rationale of the Director's Decision as modified by this Decision; (4) rejects the cure or revised 22nd PTU POD submitted by the Lessees on October 18, 2006; and (5) terminates the PTU.

[R. 5671]

The Commissioner rejected the Lessees' contention that the modified proposed 22nd POD should be evaluated pursuant to the Reasonably Prudent Operator Standard. He characterized the "lessees' appeal [as] based on the premise that they do not have to produce because a Reasonably Prudent Operator would not produce." [R. 5684] The Commissioner acknowledged that

Section 10 of the PTUA included a covenant by the Lessees to "develop the unit area as a reasonably prudent operator in a reasonably prudent manner." But he added, "Section 10 says much more." [*Id.*] He noted the PTU was not in production even though "massive PTU reserves were found in the early 1980s." [R. 5686] Then he added,

> I specifically find that the Reasonably Prudent Operator standard does not apply to this Commissioner's Decision involving a long standing unit with leases far beyond their primary term and Lessees which unambiguously refuse to adequately explore, delineate, or produce massive known hydrocarbon reserves. The Reasonably Prudent Operator language of section 10 of the unit agreement does not supersede the other provisions of that section, or the applicable statutes, regulations or leases. Section 10 contains significant detail on what an acceptable POD must contain and the Director's Decision asked the Lessees to comply. Instead, they ask for the protection of the RPO standard, but on these facts, it matters not what a Reasonably Prudent Operator would do, the state is entitled to terminate the PTU.

[R. 5686-87]

In his decision, the Commissioner noted that seven wells in the PTU had been previously certified by DNR as "capable of producing in paying quantities." But he then held as follows:

> Whatever the merits of the certifications when they were originally issued, the suggestions in the Director's Decision that certified wells exist today or that the prior certifications of now non-existent exploration wells indefinitely extend the term of the leases upon which they were drilled or that the PTU should be treated as a unit with certified wells is disapproved and reversed in this Commissioner's Decision. Those suggestions are not supported by the facts. There are no certified wells in the unit capable of producing in paying quantities. All wells which were certified have been plugged and abandoned. Inconsistent findings and statements in the Director's Decision on certified wells are hereby disapproved.

[R. 5682]

The Commissioner affirmed the Director's Amended Decision "in all respects to the extent it is consistent with this Commissioner's Decision, but it is disapproved to the extent it can be read to mean the PTU contains certified wells." [R. 5688] The Commissioner rejected the revised 22nd POD because it did "not commit to put the unit into production." He concluded that "[t]he PTU is terminated." [R. 5688, 5689]

Some of the PTU Lessees sought reconsideration of the Commissioner's Decision. The primary issue on reconsideration addressed the propriety of the Commissioner's determination that the PTU contains no wells certified as capable of producing in paying quantities. From there, the Lessees asserted that since the wells remained certified, the unit could only be terminated through judicial proceedings, citing 11 AAC 83.374(d). The Lessees also asserted that they did not receive fair notice that the certified well status of the PTU wells was at issue, and requested that DNR reopen the administrative proceedings for that reason. [R. 9287]

On December 27, 2006, Acting Commissioner Marty Rutherford issued an 11-page Decision on Reconsideration, which affirmed the Commissioner's Decision of November 27, 2006 in all respects. [R. 9286-9298] The Reconsideration Decision expressly distinguished between the well decertification component of the November 2006 decision and the termination component of that same decision. The Reconsideration Decision characterized

the certified well status as a "collateral finding" to the termination decision. [R. 9288] Specifically, the Reconsideration Decision found:

> The certified well finding is not the basis of the November 27, 2006 unit termination decision. The unit termination decision is based primarily on two independent grounds neither one of which regards certified wells.
>
> One ground for unit termination is that DNR is entitled to terminate a unit which has been known to contain massive hydrocarbon reserves for more than 30 years, but which has never been put into production, when the lessees of the state oil and gas leases making up the unit unequivocally state that they still cannot find a way to put the unit into production. DNR is entitled to terminate a unit because the purpose of forming a unit is to effect production. Units are not formed for the purpose of simply holding properties until such time as the Lessees think production will be profitable enough to commence. On these facts, when the Lessees say they cannot put the unit into production, DNR can terminate the unit as a matter of law.
>
> The second primary ground for unit termination is the failure to submit an acceptable Plan of Development. . . .

[R. 9289-90]

The Reconsideration Decision also addressed, but did not directly resolve, the Lessees' argument that 11 AAC 83.374(d) requires the agency to pursue unit termination through court proceedings, and not by administrative determination. In this regard, the decision notes, "[e]ven if the PTU contains certified wells, the November 27, 2006 Decision is an appropriate DNR action which facilitates court review." [R. 9292] The Reconsideration Decision acknowledges that it is undisputed that the decertification approach "reverses longstanding DNR Oil and Gas Director's Decisions that certify non-existent or non-production wells." [R.

9295] But the Acting Commissioner indicates that the longstanding policy was "poor policy" which it was incumbent on the Commissioner to correct. [R. 9296]

The Reconsideration Decision also held that the Lessees' own submissions to the Commissioner demonstrated that the Lessees had adequate notice that decertification was an issue before the Commissioner. [R. 9294-95] The Acting Commissioner also found that the State was not estopped from decertifying the wells and that it had not breached the covenant of good faith and fair dealing under the Unit Agreement. [R. 9296-97]

Four of the PTU Lessees appealed the Commissioner's Decision and the Reconsideration Decision. The appeals were all consolidated to this court, sitting in its appellate capacity pursuant to AS 22.10.020(d).

In March 2007, the Appellants filed a motion with this court seeking to stay the administrative determinations pending appeal. They asserted that because the Division had certified wells in the unit as capable of producing hydrocarbons in paying quantities, subsection (d) of 11 AAC 83.374 applied such that the Division was required to "seek to terminate the unit agreement by judicial proceedings," and was precluded from administratively terminating the unit. By order dated May 1, 2007, this court denied the stay. While this court found that the Appellants had made a "clear showing of probable success on the merits" that the administrative termination of the unit did not comply with 11 AAC 83.374(d), this court also found that granting the stay would be contrary to the public interest, and particularly the benefit of according to DNR the opportunity to

appropriately address the related lease termination proceedings in the first instance. However, this court did query the parties at the end of those proceedings whether there was any significance to the fact that 11 AAC 83.374 was adopted in 1981 – after the PTUA was entered into in 1977 – an issue that was not the focus of the parties' briefing on the stay motion.

In a separate order issued on May 7, 2007, this court held that Alaska Gasline Port Authority and Jim Whitaker would not be considered parties to this appeal. However, they were permitted to, and did submit amicus curiae briefing to this court.

Oral argument on the appeal was held on October 5, 2007. At oral argument, the Appellants each indicated they were not pursuing an appeal with respect to the Commissioner's decision on the expansion leases. Thereafter, ExxonMobil and Chevron USA filed a motion to dismiss those claims on appeal. The State filed a limited objection, focused primarily on the language of the proposed order of dismissal of that portion of the appeal. That motion is addressed below.

Standard of Review

Four different standards apply to a court's review of the merits of an agency's rulings: "(1) the 'substantial evidence test' for questions of fact; (2) the 'reasonable basis test' for questions of law involving agency expertise; (3) the 'substitution of judgment test' for questions of law involving no agency expertise,

and (4) the 'reasonable and not arbitrary test' for review of administrative regulations." *ConocoPhillips v. DNR*, 109 P.3d 914, 919 (Alaska 2005)(footnote omitted).

While the issue of contract interpretation "generally presents a question of law,"[4] where a contract specifies that certain determinations are to be made through an administrative process, then the court's review of those determinations "would need to be appropriately deferential"[5] such that the reasonable basis test would apply. *See also Usibelli Coal Mine, Inc., v. State, Dept. of Natural Res.*, 921 P.2d 1134, 1146 (Alaska 1996). Under the reasonable basis standard of review for administrative decisions involving complex issues involving agency expertise, the court is to give deference to the agency's determination so long as it is reasonable, supported by evidence in the record as a whole, and there is no abuse of discretion. *Ellis v. State, Dept. of Natural Resources*, 944 P.2d 491, 493 (Alaska 1977).

In this case, the parties generally agree that the regulations that DNR adopted in 1981 are applicable to the PTUA to the extent those regulations are "not inconsistent with the ... unit agreement or regulations in effect on the effective date of the lease or unit agreement." 11 AAC 83.301(b). Section 1 of the PTUA expressly provides:

> The Alaska Land Act (AS 38.05.005--370) and all valid and pertinent oil and gas statutes and regulations including the oil and gas operating statutes and regulations in effect as of the effective

[4] *ConocoPhillips, 109 P.3d.* at 920.
[5] *Id.*

> date hereof or hereafter issued thereunder governing drilling and producing operations, not inconsistent with the terms hereof or the laws of the State of Alaska, are hereby accepted and made a part of this agreement.

See also Exxon Corp. v. State, 40 P. 3d 786, 796-797. Where the parties to this appeal disagree is as to which of the 1981 regulations are consistent with the PTUA and which are inconsistent.

In *Exxon Corp. v. State*, 40 P.3d 786 (Alaska 2001), the Alaska Supreme Court addressed the Prudhoe Bay Unit Agreement (PBUA), which, like the PTUA, became effective in 1977. Although the issue the court confronted in that case – whether the lessees had an absolute right to expansion of that unit – is dissimilar to that here, many of the legal principles discussed there by the Supreme Court are applicable when analyzing the legal issues presented in this case.

In the Prudhoe Bay case, Exxon asserted that the PBUA eliminated DNR's discretion to refuse to expand the Prudhoe Bay Unit (PBU). The Department argued that it had the authority to consider the State's best interests in making a decision on whether to expand the PBU. DNR relied not only on the contract language, but also on the regulations in effect at that time, and specifically former 11 AAC 83.340 and former 11 AAC 83.345 – regulations which the court held "required the director's approval, based on a determination of necessity or advisability in the public interest, for a modification of an approved unit agreement." 40 P.3d at 795 (footnote omitted). Exxon then asserted that DNR had agreed to contract terms that were binding upon the agency even if

those terms violated DNR's regulations. But the Supreme Court held that an agency does not have the authority to contract outside of its own regulations. "To allow such activity would be arbitrary; parties not contracting with the department would not be held to the same regulations that non-contracting parties were required to comply with." 40 P. 3d at 796.

The Prudhoe Bay *Exxon* case teaches that the interpretation of the PTUA contract in this case must be governed by the language of the contract itself, as well as the regulations and statutes that were in place when the contract was adopted. Thus, to the extent that Section 1 of the PTUA could be read to limit the applicability of regulations that were in effect at the time of the PTUA's adoption, that reading is contrary to Alaska law and must be rejected. All of the applicable regulations in effect at the time of the PTUA's adoption apply to the PTUA agreement. Secondarily, the current regulations and statutes apply to the PTUA "where not inconsistent with the ... unit agreement or regulations in effect on the effective date of the ... unit agreement." 11 AAC 83.301(b).

Discussion

There are two primary administrative determinations that are before the court in this appeal – (1) the Department's rejection of the Lessees' proposed modified 22nd Plan of Development for the Point Thomson Unit, and (2) the Department's termination of the Point Thomson Unit.

I. DNR's rejection of the proposed 22nd Plan of Development

A. DNR has the authority to administratively determine whether a proposed plan of development should be accepted or rejected.

The PTUA, when read in conjunction with the regulations in effect in 1977, clearly accorded to DNR the ability to administratively determine whether the Unit Operator is in compliance with Section 10 of the Unit Agreement. That section provides, among other statements, that any development plan submitted by the Unit Operator "shall be as complete and adequate *as the Director may determine* to be necessary for timely development and proper conservation of the oil and gas resources of the unitized areas." [R. 1260, emphasis added] Moreover, former 11 AAC 88.160 accords to the Unit Operator the right to appeal to the superior court a "decision or other action" by DNR. To the extent that the Appellants are asserting that the more recently adopted regulation 11 AAC 83.374 requires that rejection or acceptance of a proposed POD must be made in the first instance in judicial proceedings, as opposed to by DNR, that regulation would be inconsistent with the PTUA and former regulation and is accordingly inapplicable to this agreement.

B. What is the appropriate standard for the Department to apply when determining the adequacy of a plan of development?

The Appellants' primary assertion with respect to DNR's rejection of the proposed modified 22nd Plan of Development is that the agency applied the wrong legal standard when reviewing the proposed POD. The Appellants assert that as a matter of law, DNR is required to apply a reasonably prudent operator

(RPO) standard. They assert this standard is mandated based on the following sentence in Section 10 of the PTUA: "The Unit Operator expressly covenants to develop the unit area as a reasonably prudent operator in a reasonably prudent manner." [R. 1260] The Appellants assert that this contractual language, in conjunction with applicable statutes, "makes clear that DNR may not require the Operator to carry out a plan that is not reasonable from the perspective of the Operator, because it does not adequately protect the lessees' interests."[6]

The State asserts that the PTUA's reference to the reasonably prudent operator "acts primarily as a covenant *by the lessee* to act as a RPO and does not alter how DNR is to administer the PTUA. It defines the Lessees' commitment rather than limiting DNR's authority." [State's Br. at 46, emphasis in original] Accordingly, the State asserts that this court should affirm DNR's determination which rejected the 22nd Plan of Development because, as found by the Commissioner, both the original plan and the revised plan "suffered from the same defects" as each proposal did not commit to put the unit into production but instead contained the "unequivocal statement that the lessees cannot find a way to put the unit into production." [R. 9290, 9291]

Generally, issues of contract interpretation are legal issues as to which a court is to apply its independent judgment. But here, the disputed section of the PTUA – Section 10 – expressly confers upon the Division the authority to require a plan from the Lessees that "shall be as complete and adequate as the Director

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[6] Jt. Br. at 54, *citing* AS 38.05.180.

may determine to be necessary for timely development and proper conservation of the oil and gas resources of the unitized area . . ." [R. 1260] Accordingly, this court's review of those determinations "would need to be appropriately deferential" such that the reasonable basis test should apply. *ConocoPhillips v. DNR,* 109 P.3d 914, 919 (Alaska 2005)(footnote omitted); *see also Usibelli Coal Mine, Inc., v. State, Dept. of Natural Res.*, 921 P.2d 1134, 1146 (Alaska 1996); *Pan American Petroleum Corp. v. Shell Oil Co.*, 455 P.2d 12, 22-23 (Alaska 1969).

Adoption of the Appellants' interpretation of the contract to mandate the RPO standard would run counter to the regulatory and statutory provisions that were in effect at the time of the contract's creation. The applicable effective regulation at the time of contracting in 1977 required a determination by the State "that the agreement is necessary or advisable in the public interest... and adequately protects all parties in interest including Alaska." Former 11 AAC 83.340. Likewise, former 11 AAC 83.345 provides that this same standard applied to modifications of approved unit agreements. To interpret Section 10 of the PTUA to focus on the Lessee's perspective, so as to preclude rejection of any plan of development that the Lessees asserted was unreasonable for them, irrespective of the public interest, would be inconsistent with this regulatory directive. *See also* former AS 38.05.180(m).

In this regard, the current regulation, 11 AAC 83.303, is not inconsistent with Section 10 of the PTUA or the former regulations. That regulation requires

the DNR Commissioner to approve a proposed plan of development upon a written finding that it will "(1) promote conservation of all natural resources ... (2) promote the prevention of economic and physical waste; and (3) provide for the protection of all parties of interest, including the state." 11 AAC 83.303(a), (c)(3). In evaluating these criteria, the regulation specifies that the Commissioner is to consider several factors, including "the geological and engineering characteristics of the potential hydrocarbon accumulation," "prior exploration activities in the proposed unit area," and "the applicant's plans for exploration or development of the unit area." 11 AAC 83.303(b). DNR thoroughly addressed these criteria when it rejected both of the Lessees' proposed 22nd Plans of Development. [*See, e.g.*, R. 12297-12303] DNR consistently rejected the fundamental tenet of both of the 22nd PODs that the Lessees proposed – that unit development should be conditioned upon the construction of a North Slope gas pipeline. [R. 12299]

Accordingly, this court finds that DNR did not err when it declined to review the modified POD under a reasonably prudent operator standard. In evaluating the POD, DNR also considered whether the proposed POD provided adequate protection of the public interest in light of the history of limited development in the unit area over its 30-year history. DNR's approach was consistent with Section 10's grant of authority to the Director to require a plan of development "as complete and adequate as the Director may determine to be necessary for timely development and proper conservation of the oil and gas

resources of the unitized areas," and complies with the applicable statutes and regulations.[7]

C. Substantial Evidence Supports DNR's Determination to Reject the 22nd POD

The Appellants also assert that even if judged by a different standard that the RPO, the modified 22nd POD should have been approved. They note that their modified plan called for an appraisal well to be drilled for the winter of 2008-2009. [Jt. Br. at 61] But with regard to this proposed well, DNR responded that under the Appellants' modified POD, they would pay the State $40 million if they did not drill the well as planned. [R. 3096] The Commissioner found "the value of the well to the state greatly exceeds $40,000,000 because a well or wells are needed to adequately appraise the PTU." [R. 5678] DNR, looking at the history of the unit, determined that "[t]he proposed payment is no substitute for adequate delineation of the PTU hydrocarbon accumulations, now long overdue and repeatedly requested by DNR." [R. 5683]

Further, the 22nd modified plan indicated that production would require a gas pipeline. [R. 3093] In rejecting that plan, DNR concluded that "neither the oil nor the gas condensate [within Point Thomson] require a gas pipeline to produce" -- a finding that is not directly refuted by the Appellants. [R. 9296]

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[7] *But see* Section 21, second paragraph, of the PTUA as modified in 1985. [R. 794] That revision specifies that the Department may not require any increase in the rate of production or development "in excess of that required under good and diligent oil and gas engineering and production practices." This section may well have applicability when determining the appropriate remedy when DNR rejects a proposed plan of development. *See* discussion, *infra*.

In sum, there is substantial evidence in the record as a whole to support DNR's determination to reject the modified 22nd Plan of Development based on DNR's finding that the plan contained "no commitment to develop the unit and no firm commitment to adequately delineate the reservoirs." [R. 5677-78]

D. The Impact of the Fiscal Contract Negotiations

The Appellants that participated in the gas pipeline negotiations[8] have asserted that the DNR Commissioner acted in bad faith in rejecting the modified POD in light of the State's course of conduct during the negotiations for the Fiscal Contract for a gas pipeline. The Appellants also assert that the DNR Commissioner "breached the obligation of subjective good faith" based on the Commissioner's statements at a press conference that occurred the day he issued his November 2006 decision in this case. [App. 130-31] And these Appellants assert these same facts support a claim of estoppel against the State. Specifically, they assert that they relied on those provisions of the proposed Fiscal Contract that relieved the Lessees of submitting PODs for so long as the fiscal contract was in place. [R. 2247]

The State asserts that any reliance by the Appellants that is based on the proposed Fiscal Contract is unreasonable because that contract was never finalized when legislative approval was not forthcoming. The Appellants point to no assertion outside the context of the Fiscal Contract negotiations in which the State indicated that it would accept a modified POD that did not commit the unit

[8] Chevron was not a participant in these negotiations. [Exxon Br. at 62, n. 122]

into production. For example, the Commissioner's letter to Exxon of August 31, 2006, which accorded to Exxon the final extension of the appeal period, made no reference at all to the Fiscal Contract. [R. 3081]

The parties agree that this court should consider these claims de novo, since technically these is no administrative determination on these issues for this court to review. *See generally Danco Exploration v. State*, 924 P.2d 432, 434 (Alaska 1996).

To the extent the Appellants relied upon the proposed Fiscal Contract when they presented the modified POD, such reliance was unreasonable. Although the Fiscal Contract, had it been accepted by the Legislature, would have permitted the PTU to be developed in conjunction with the construction of a gas pipeline, the Fiscal Contract was never approved. DNR made no definitive statements that the Appellants would be relieved of their obligations under the PTUA even if the Fiscal Contract was not approved. To the contrary, DNR advised the Appellants that the agency would not delay a drilling commitment for so long as the Fiscal Contract negotiations were occurring. [R. 1958] In these circumstances, DNR is not estopped from rejecting the 22nd POD based on its determination that the POD did not propose an adequate development plan for the unit. *See, e.g., Mortvedt v. State, Dept. of Natural Res.*, 941 P.2d 126, 130 (Alaska 1997).

Nor can the Appellants maintain their claim for breach of the covenant of good fair and fair dealing. This covenant is intended to effectuate the reasonable

expectations of the parties under an existing contract. It "cannot be interpreted to prohibit what is expressly permitted" in the contract. *Casey v. Semco Energy, Inc.*, 92 P.3d 379, 384-385 (Alaska 2004), *quoting Ramsey v. City of Sand Point*, 936 P.2d 126, 133 (Alaska 1997). Here, the covenant cannot be applied to preclude DNR's rejection of the modified 22nd Plan of Development, because the authority to insist on a plan of development that is "as complete and adequate as the Director may determine to be necessary" is expressly accorded to DNR under the PTUA. [R. 1260]

Based on the foregoing analysis, DNR's rejection of the modified proposed 22nd Plan of Development is affirmed.

II. Did DNR have the authority to administratively terminate the PTUA?

The Director's Amended Decision of October 27, 2005 rejected the 22nd POD, but it did not purport to terminate the unit agreement. Rather, it stated that "the PTU Agreement is in default," and listed certain commitments that represented "an example of an acceptable PTU plan of development" to cure the default. [R. 12304] The Director's Amended Decision also indicated that "[f]ailure to submit an acceptable plan of development is grounds for termination of the PTU." [R. 12305]

The Commissioner's Decision and Decision on Reconsideration, issued one year later and after a modified POD proposal had been submitted to DNR by the Lessees, not only rejected the modified 22nd POD proposal – it terminated

the unit. The Appellees have asserted that DNR does not have the authority to administratively terminate the unit, but must instead seek to terminate the agreement through judicial proceedings.

The State has asserted several bases to support its authority to administratively terminate the PTUA when it has rejected a proposed Plan of Development for the unit. Each of these bases is discussed below.

A. Section 20(c) of the PTUA is not applicable.

One potential basis for the PTUA's administrative termination is pursuant to Section 20 of the agreement itself. This section of the PTUA, termed a "habendum clause," specifies certain bases upon which the unit agreement automatically terminates. There is no reference to this specific clause of the PTUA in any of the agency determinations in this matter. Moreover, at oral argument before this court in October 2007, counsel for the State made clear that the State was not seeking to invoke this clause to support the agency's termination decision. [*See* Transcript of Oral Argument of 10/5/07 at 34] Accordingly, any authority to administratively terminate or cancel the unit agreement must derive either from other provisions within the PTU Agreement itself or the regulations and statutes that are applicable to this particular agreement.

B. Other sections of the PTUA regarding termination

Section 9 of the PTUA delineates the parties' obligations prior to the discovery of hydrocarbons at the unit. Since hydrocarbons were discovered at

the unit decades ago, it is inapplicable to the current controversy. But Section 9 of the agreement is noteworthy in that it expressly provides that if the Unit Operator fails to diligently drill until hydrocarbons are discovered, "the Commissioner may, after 15 days notice to the Unit Operator, declare this unit agreement terminated." [R. 1259] In contrast, Section 10 of the PTUA, which applies after a well capable of producing unitized substances in paying quantities has been completed, is silent on the rights of either party to terminate or cancel the contract. It does not expressly accord to the DNR a right to administratively terminate the unit – nor does it eliminate any such right.

Section 20, discussed above, specifies when the PTUA shall *automatically* terminate. This court does not interpret that habendum clause and Section 9 of the PTUA to preclude the cancellation or termination of the contract under any other circumstance apart from those listed there. *See generally Law of Federal Oil and Gas Leases*, Vol. 1 at §14.19[1](1992)(distinguishing cancellation through affirmative agency action from automatic termination by operation of law). Indeed, the parties in this action recognize that the State could seek to cancel the contract based on an alleged breach of Section 10 by the Lessees. [*See, e.g.*, Jt. Reply at 9] At issue is whether that cancellation proceeding would need to be initiated in state court or if the agency could seek to cancel the contract in an administrative proceeding. This court does not read the PTUA to preclude an administrative cancellation proceeding when the Director has determined that a

proposed plan of development is incomplete or inadequate under Section 10 of the PTUA.

C. The Statutes and Regulations in Effect in 1977

A fundamental question thus arises – did DNR have the implied authority to administratively terminate the PTUA under the statutes and regulations in effect when the PTUA was entered into in 1977? The Appellants assert that no such authority existed, such that the State "like parties to contracts generally, [must] seek relief by way of a claim of default in court." [CPA at 21] The State and the Port Authority assert that when the PTUA is silent, the agency has the inherent authority to administratively terminate the unit unless judicial action is specifically required by statute or applicable regulation. [Port Auth. Supp. at 1]

"Administrative agencies rest their power on affirmative legislative acts. They are creatures of statute and therefore must find within the statute the authority for the exercise of any power they claim." *McDaniel v. Cory*, 631 P.2d 82, 88 (Alaska 1981). The Alaska Land Act, as cited above, accorded broad authority to DNR's Commissioner to "establish reasonable procedures" and "exercise the powers and do the acts necessary to carry out the provisions and objectives" of the Act. AS 38.05.020(b). Those powers included the ability to authorize and certify unit agreements "whenever determined and certified by the

Commissioner to be necessary or advisable in the public interest." Former AS 38.05.180(m).[9]

The State and the Port Authority both cite to the United States Supreme Court case of *Boesche v. Udall*, 373 U.S. 472, 478 (1963), which held that the Department of Interior had a "traditional administrative authority" to cancel a federal lease unless such authority had been specifically withdrawn by federal law. Similarly, in *White v. State, Dept. of Natural Resources*, 14 P.3d 956 (Alaska 2000)(*White II*), the Alaska Supreme Court held that a lessee's breach of contract claim against the State "fit[s] comfortably within the scope of an ordinary administrative claim" and should be pursued before the administrative agency. 14 P.3d at 960. *See also Danco Exploration v. State*, 924 P.2d 432, 434 (Alaska 1996)("Oil and gas lessees and lease bidders which have grievances with the State must pursue the administrative procedures provided by [regulation]." Although there was no express statutory grant to DNR to terminate unit agreements in 1977, this court finds that this specified procedure falls "within the scope of an ordinary administrative claim" that is within the agency's broad statutory powers. *White v. State*, 14 P.3d at 960.

As discussed above, there were two chapters of regulations that were in effect in 1977 that applied to unitization agreements on state lands. One of these

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[9] When the unit agreement included lands owned by the state, the Alaska Land Act provided that the unit agreement "may contain a provision vesting the commissioner ... with authority to alter or modify from time to time the rate of prospecting and development and the quantity and rate of production under the plan." Former AS 38.05.180(n). Section 21 of the PTUA corresponds to this statutory grant of authority.

chapters addressed only unitization agreements. Former 11 AAC 83.300 *et seq.* (Eff. 9/20/74). The other chapter, entitled "Practice and Procedure," applied to several chapters of the natural resources regulations, including the unitization chapter. It contained several provisions regarding administrative adjudications, including a provision for judicial appeals to the superior court of administrative decisions and actions.[10] These former regulations neither required nor authorized that a unit termination be initiated by judicial proceedings. Former 11 AAC 88.100 – 145 (Eff. 9/20/74).

Under the regulatory scheme as it was in existence in 1977, the administrative authority to terminate the unit agreement had not been restricted or withdrawn. And the statutory regimen accorded broad powers to the commissioner to manage state land. As correctly noted by the Port Authority, "[a]t the time the PTUA was adopted, no statute or regulation abrogated the Department's authority to administratively cancel a unit ..." [Port Auth. Supp. at 2] Instead, the procedural regulations in effect at that time expressly contemplated agency determination and judicial review of all issues. This court finds that DNR possessed the authority to administratively terminate the Point Thomson Unit Agreement when that agreement was adopted in 1977 under the statutory and regulatory structure as it existed at that time.

[10] Former 11 AAC 88.160 (Eff. 9/20/74).

D. To what extent are the current regulations applicable to the Point Thomson Unit Agreement?

In 1981, the State adopted several regulations that more comprehensively address unitization. With some modifications, most of these regulations remain in effect today. The parties in this action dispute both the interpretation of the current regulations and the extent to which those later-adopted regulations apply to the PTUA. Under Alaska law, the later-enacted regulations do not apply to the PTUA to the extent they conflict with either the terms of the PTU Agreement or with regulations that were in effect in 1977, when the PTUA was adopted. *Exxon v. State,* 40 P.3d 786 (Alaska 2001). While the parties to this appeal all generally agree with this principle, they have considerable disagreement as to which of the current regulations are consistent, and which are inconsistent, with the PTUA and former regulations.

1. 11 AAC 83.374 is not applicable when the basis for termination is the rejection of a plan of development, as opposed to failure to comply with an approved unit agreement.

One regulation at issue that was adopted after the PTUA, 11 AAC 83.374(d), specifies that if the Division determines that a default has occurred with respect to a unit in which there is a certified well, "the commissioner will, in his discretion, seek to terminate the unit agreement by judicial proceedings." This regulation was the focus of the stay proceedings in this case earlier this year, although at that time the parties had not addressed the fact that this regulation was adopted in 1981, after the PTUA's effective date of 1977.

This regulation is cited in the agency's decisions in this case only in the Decision on Reconsideration. There, the Acting Commissioner referenced the regulation, but indicated that the unit termination "is an appropriate DNR action which facilitates court review" and could be undertaken "[r]egardless of whether the unit contains certified wells." [R. 9292] Although the parties have provided extensive analysis of this statute in their briefing to this court, it does not appear that DNR relied upon this regulation as the basis for its termination decision.

11 AAC 83.374(a) provides that the "failure to comply with ... any plans of exploration, development or operation which are a part of the unit agreement, is a default under the unit agreement," thereby making the balance of that regulation applicable. As Exxon noted in its briefing to the agency on appeal of the Director's Amended Decision in November 2006, "failure to receive DNR approval of a plan of development does not constitute default under DNR regulations. . . " Instead, as noted by Exxon, "11 AAC 83.374(a) provides that failure to comply with the terms of an *approved* plan of development is a default under the unit agreement, not the failure to obtain approval." [R. 705, emphasis added]

Similarly, the Alaska Gasline Port Authority, in its amicus brief, has asserted that Section 374 should not apply in this case, where the issue is the agency's rejection of a proposed plan of development, as opposed to a lessee's failure to comply with an approved plan of development. [Amicus Br. at 29] In this court's view, upon close reading of the regulation, that position, espoused

both by Exxon in 2006 and by the Port Authority before this court, has merit. 11 AAC 83.374(a) does not apply to cases such as this in which DNR has rejected a proposed plan of development.

Moreover, even if the rejection of a modified plan of development were to constitute a "default" under Section 374, then that regulation would be inconsistent with the unit agreement, to the extent that this more recent regulation imposes a requirement of judicial termination proceedings that was not administratively or statutorily required in 1977.

The Appellants assert, however, that even if inconsistent with the PTUA, the 1981 regulation should nonetheless apply to the PTUA, because this later-enacted regulation impairs only DNR's rights, not the private parties to the PTUA, and is thus binding on the State so as to require judicial termination proceedings. In response to this court's request for supplemental briefing, the Appellants have asserted that under Alaska law, "[r]egulations that benefit those who are regulated are applied retroactively even if inconsistent with previous regulations." [CPA Supp. at 4] In support of this proposition, the Appellants cite to Atlantic Richfield Company v. State, 705 P. 2d 418, 424, n. 17 (1985). But in this court's view, the Appellants are reading the cited footnote in the *Arco* decision too broadly. In that case, the retroactive interpretation of a regulation was the only way in which that newly enacted regulation could be "meaningfully applied," such that the Supreme Court found an intent by the Department for that regulation to have retroactive effect. *Id.* Absent such unique circumstances, which are not

present here given the expected continuing creation of unit agreements throughout Alaska, neither the State nor the Appellants should be bound by subsequent regulations that are inconsistent with the State's prior contractual agreement or regulations in effect at the time of contracting.

Because this court finds that 11 AAC 83.374 is inapplicable to this case, this court will not issue a final determination with respect to DNR's purported "decertification" of the wells. As noted in the Commissioner's Decision on Reconsideration, [t]he certified well finding [was] not the basis of the November 27, 2006 unit termination decision." [R. 9289] In light of this court's rulings as set forth above, a decision on the decertification question is no longer essential to resolving the issues presented in this particular appeal. The Supreme Court instructs that an appellate court should generally not resolve legal issues when they are rendered moot. *Clark v. State, Dept. of Corrections*, 156 P.3d 384, 347 (Alaska 2007). Accordingly, apart from this court's statements on the decertification issue as set forth in the Order re Motion for Stay dated May 1, 2007, no further opinion on the propriety of the purported decertification of the seven wells is expressed by this court.

2. Does 11 AAC 83.336(a)(1) apply?

The State and Port Authority have advanced a different current regulation to support DNR's termination decision -- 11 AAC 83.336(a)(1). This regulation, adopted in 1981, provides as follows:

> A unit agreement becomes effective upon approval by the commissioner and automatically terminates five years from the

> effective date unless (1) a unit well in the unit area has been certified as capable of producing hydrocarbons in paying quantities, in which case the unit agreement will remain in effect for so long as hydrocarbons are produced in paying quantities from the unit area, or for so long as hydrocarbons can be produced in paying quantities and unit operations are being conducted in accordance with an approved unit plan of exploration or development, or, should production cease, for so long after that as diligent operations are in progress to restore production and then so long after as unitized substances are produced in paying quantities...

This regulation is not referenced anywhere in the Commissioner's termination decision or in the Decision on Reconsideration. But the State asserts on appeal that although the specific reference to the regulation to support the unit termination was not made at the agency level, the requisite elements of the regulation to support termination are all "contained within the findings made by the Commissioner." [10/5/07 Oral Arg. Transcript at 36]

On appeal, the State and the Port Authority assert that Section 336 is "essentially a habendum clause," such that if a plan of development is not approved, "the failure means [the] Unit Agreement simply terminated." [State's Br. at 95] In response, the Appellants assert that Section 336(a) "is inconsistent with the PTU Agreement and the effective date regulations and thus cannot apply in this case." The inconsistency, in their view, is that Section 336 would "graft onto the PTU Agreement a new event of termination: DNR approval of a plan of development." [CPA Reply at 28; *see also* Jt. Reply at 25] The Appellants correctly note that Section 20(c) of the PTUA contains no reference to an agency-approved plan of development as a condition for the unit agreement to remain in effect.

DNR notes that Section 20(c) of the Agreement was modified in 1985, and asserts that "because the PTUA modification occurred after the promulgation of section 336, Article 20(c) [of the PTUA] must conform to the [1981] regulation" [State's Br. at 98, n. 172; *see* R. 787-795] But the Appellants note that Section 1 of the PTUA was not amended in 1985. That section precludes the application of inconsistent regulations enacted after the effective date of the PTUA. This court finds the Appellants' assertion on this point persuasive. [Jt. Reply at 26] The 1985 amendments did not graft onto the PTUA the provisions of 11 AAC 83.336(a).

Section 336, as interpreted by the parties in this case, would result in the *automatic* termination of the PTUA whenever a proposed unit plan was rejected by the DNR. As such, it is inconsistent with the PTUA and the regulations that were in effect when the PTUA was executed in 1977. For although, as discussed by this court in the preceding portion of this opinion, DNR may seek to administratively terminate the PTU, neither the PTUA nor the applicable regulations and statutes in effect in 1977 permitted an automatic termination whenever a POD was unacceptable to the State. At oral argument, counsel for the State asserted that Section 336 was not inconsistent with the PTUA, because "[a]n acceptable plan of development is an express condition contained with the Point Thomson Unit Agreement." [10/5/07 Oral Arg. at 48] The State noted that Section 10 of the PTUA accords to the Director the authority to specify a plan of development that "shall be as complete and adequate as the Director may

determine to be necessary for timely development and proper conservation of the oil and gas resources of the unitized area." [R. 1260] As discussed above, this court has found that this provision of the contract accords to DNR the administrative authority to reject proposed plans of development. But rejection of a proposed plan of development does not result in automatic termination under the PTUA. Rather, a separate administrative determination as to the appropriate remedy is required in such instance. To the extent Section 336 would permit the automatic termination of the PTUA whenever a POD was rejected by the State, it is inconsistent with the PTUA and inapplicable to this unit.

E. The Appellants' Right to Due Process

The right to due process, under both the state and federal constitutions, prohibits the State from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Alaska Const. Art. I, §7. The State acknowledges that the Appellants are entitled to due process with respect to their interests at Point Thomson. [State's Br. at 99]

The Appellants assert that their due process rights were violated when the Commissioner terminated the PTU on appeal from the Director's Decision. They assert that the only issues over which the Commissioner had jurisdiction were whether the Director had properly rejected the 22nd POD and whether the modified POD should be approved. [Exxon Br. at 47] The Appellants maintain that the Director's Decision, which stated simply that "[f]ailure to submit an acceptable plan of development is grounds for termination of the PTU," was

Instead, the reconsideration motion and decision were primarily focused on the decertification issue, not the termination decision. [*See* R. 9288, 9291]

The Alaska Supreme Court's decision in *White v. State, Dept. of Natural Resources*, 984 P.2d 1122 (Alaska 1999)(*White I*) is instructive on these issues. In that case, White had requested a hearing before DNR on a disputed factual issue with respect to an oil and gas lease. DNR refused to grant him a hearing on the issue. The Supreme Court reversed and remanded, and held that the due process clause accorded to White the opportunity for a hearing on that issue before an agency determination was made that precluded the automatic extension of the lease. 984 P.2d at 1128.

Likewise, albeit in a quite different context, the Supreme Court found that a trial court had violated a parent's right to due process when the trial court entered a *permanent* child custody order after conducting a hearing that had been scheduled to determine *interim* custody. *Cushing v. Painter*, 666 P. 2d 1044, 1046 (Alaska 1983). Due process requires that parties are accorded "sufficient written notice, specifying the nature of the dispute and the relief requested." *Hickel v. Halford*, 872 P.2d 171,180 (Alaska 1994).

Here, the State did not seek termination under Section 20(c) of the PTUA. Rather, it sought to terminate the unit after it rejected the Appellants' proposed Plan of Development. Nothing in the PTUA nor the regulatory framework in place in 1977 mandated or authorized automatic termination of the unit when DNR rejected the proposed POD. And while this court has concluded that the

PTUA and then-existing regulations did not preclude DNR from pursuing termination at the administrative level, the Appellants were constitutionally entitled to a clear written notice that DNR was considering this remedy when it rejected the POD, and should have been accorded the opportunity to be heard with respect to the appropriate remedy when the modified 22nd POD was rejected. *See generally* former 11 AAC 88.155. The Director's statement that "[f]ailure to submit an acceptable plan of development is grounds for termination of the PTU" is not constitutionally adequate notice that a termination would be administratively declared by the Commissioner on appeal of the Director's Decision rejecting the 22nd POD.

Accordingly, this matter is remanded to the DNR for the purpose of according to the Appellants a hearing on the appropriate remedy to the State upon DNR's rejection of the proposed 22nd Plan of Development. On remand, the agency should also consider the import of Section 21 of the PTUA, as amended in 1985, in determining the appropriate remedy.

III. The Expansion Leases

A separate component of the administrative determinations focused on the Expansion Agreement entered into in 2001 between the Appellants and the State. That agreement expanded the PTU on the condition that the PTU Lessees performed certain work at the PTU and put the unit into production with at least seven development wells by 2008. [R. 5678] The agreement also provided that

if the Lessees failed to perform the work in a timely manner, the expansion leases would automatically contract out of the unit and the Lessees would owe DNR certain sums of money. [*Id.*]

The Appellants did not complete the work contemplated under the Expansion Agreement. Instead, in October 2006, ExxonMobil proposed a modification of the Expansion Agreement. DNR characterized the proposed modification as allowing it "to retain the most valuable portions of the Expansion Acreage without putting the unit into production." [R. 5680]

In the Commissioner's November 2006 decision, the Lessees' request to modify the Expansion Agreement was denied. The Commissioner's decision also stated that "the state is entitled to have the Expansion Leases back and to receive payment." [R. 5688-89]

The Appellants originally appealed this aspect of the Commissioner's decision, but later abandoned this particular claim and in June 2007 paid the State the $20,000,000 payment plus interest then due as specified in the Expansion Agreement. On October 19, 2007, the Appellants filed a motion to dismiss the claims on appeal with respect to the Expansion Agreement. The State filed a partial opposition to the motion, disputing the language in the proposed order on these claims. Specifically, the Appellants' proposed order simply provided that all claims regarding the Expansion Agreement "are hereby dismissed as expressly abandoned by all Appellants and, in the alternative, as moot." The State's proposed order was broader, and sought to affirm a final

agency decision, effectively returning the expansion leases to the State. In reply, the Appellants asserted that the language from the Commissioner's decision that "the state is entitled to have the Expansion Leases back" should be considered dicta, and not a final agency determination with respect to the underlying leases in the expansion acreage. [R. 5689]

This court agrees with the Appellants that the validity of the leases encompassed within the expansion acreage was not directly before the Commissioner in this administrative proceeding, and thus is not properly before this court on appeal. With respect to mootness, this court agrees with the State's position that the claims related to the Expansion Agreement are more properly characterized as dismissed rather than moot.

Accordingly, with respect to the Expansion Agreement claims, all of the Appellants' claims concerning the Expansion Agreement are hereby dismissed as they have been expressly abandoned by all Appellants.

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Conclusion

DNR's rejection of the Lessees' proposed modified 22nd Plan of Development, including DNR's interpretation of Section 10 of the Point Thomson Unit Agreement, is affirmed.

DNR's determination as set forth in the Commissioner's Decision and the Decision on Reconsideration that terminated the Point Thomson Unit is reversed and remanded, so as to accord to the Appellants notice and an opportunity to be heard before the agency as to the appropriate remedy when the Department has rejected the proposed modified 22nd Plan of Development for the Point Thomson Unit.

All of the Appellants' claims concerning the Expansion Agreement are dismissed as they have been expressly abandoned by all Appellants.

Dated this 26th day of December, 2007.

Sharon Gleason
Judge of the Superior Court

I certify that on 12-26-07 a copy of the above was mailed/faxed to each of the following at their addresses of record

Judicial Assistant

Ala- Todd
Ashburn / crosby
orcutt
Keithley
Serdahely
Rozell

Dawn
Ellis
Ballew / Ashley / Haynes / Phillips
Sneed

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

EXXON MOBIL CORPORATION, Operator of the Point Thomson Unit; BP Exploration (Alaska) Inc.; Chevron U.S.A., Inc.; and ConocoPhillips Alaska, Inc.,	)	Case No. 3AN-06-13751 CI (Consolidated)
Appellants,	)	Case No. 3AN-06-13760 CI Case No. 3AN-06-13773 CI Case No. 3AN-06-13799 CI Case No. 3AN-07-04634 CI
v.	)	Case No. 3AN-07-04620 CI Case No. 3AN-07-04621 CI
STATE OF ALASKA, Department of Natural Resources,	)	
Appellee.	)	

DECISION AFTER REMAND

This case is before this Court on appeal for the second time following an administrative determination on remand by the Commissioner of the Department of Natural Resources (DNR) terminating the Point Thomson Unit. Because the contractual agreement between DNR and the Appellants precludes the termination of the Point Thomson Unit in these circumstances without consideration of "good and diligent oil and gas engineering and production practices,"[1] and because DNR failed to accord the Appellants their constitutional right to procedural due process in the remand proceeding, DNR's decision is reversed.

[1] PTU REC at 794 (Section 21, paragraph 2 of the Point Thomson Unit Agreement). Given the procedural history of this matter, portions of the record are paginated multiple times. In this decision, citations to particular pages of the record are to the page numbers provided by the "PTU REC" pagination.

FACTS AND PROCEDURAL HISTORY

In March 1977, Exxon Corporation (now ExxonMobil) and the Commissioner of DNR entered into the Point Thomson Unit Agreement (PTUA).[2] The agreement was intended to facilitate the production of oil and gas at Point Thomson, an area on the North Slope of Alaska.[3] ExxonMobil holds the largest percentage of leasehold interests at Point Thomson and is identified in the PTUA as the Unit Operator. The other Appellants -- BP Exploration (Alaska) Inc., Chevron U.S.A., Inc. and ConocoPhillips Alaska, Inc. -- each have leasehold interests within the Point Thomson Unit (PTU).

In 1977, when the parties entered into the PTUA, Section 21 of the agreement provided:

> 21. RATE OF PROSPECTING, DEVELOPMENT AND PRODUCTION.
> The Director is hereby vested with authority to alter or modify from time to time in his discretion the quantity and rate of production under this agreement when such quantity and rate is not fixed pursuant to state law or does not conform to any statewide voluntary conservation or allocation program which is established, recognized and generally adhered to by the majority of operators in such state, such authority being hereby limited to alternation [sic] or modification in the public interest, the purpose thereof and the public interest to be served thereby to be stated in the order of alteration or modification. Without regard to the foregoing, the Director is also hereby vested with authority to alter or modify from time to time at his discretion the rate of prospecting and development and the quantity and rate of production under this agreement when such alteration or modification is in the interest of attaining the conservation objectives stated in this agreement and is not in violation of any applicable state law.
>
> Powers in this section vested in the Director shall only be exercised after notice to Unit Operator and opportunity for hearing to be held not less than fifteen (15) days from notice.

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[2] "Unit agreements . . . are organizational schemes approved by the [DNR] to efficiently extract oil from a common reservoir that is the subject of multiple leases." *ConocoPhillips Alaska, Inc. et al. v. State, Dep't of Natural Res.*, 109 P.3d 914, 917 n.16 (Alaska 2005), *reh'g denied.*

[3] *See* PTU REC at 1253-1271.

PTU REC at 1268.

During the first several years of the PTU's existence, DNR concluded that the Appellants had been "diligent in exploring the unit area." *Id.* at 9464.[4] By January 1982, a discovery well had indicated that the PTU was capable of producing in paying quantities, seven wells had been drilled within or near the PTU, and four more wells were then being drilled. *Id.*

But in October 1983, Exxon submitted its seventh proposed Plan of Development (POD) to DNR. This plan proposed that there be "no further drilling activities" in the PTU for the next five years, unless "contracts for actual construction of a feasible transportation system for the gas are let" before that time. *Id.* at 11252. On November 29, 1983, DNR approved this seventh POD but noted that "[a]pproval of the seventh plan does not relieve any lessee of a drilling commitment or other work commitment that may be attached to the lease as a condition for approval of an expansion of the Point Thomson Unit to include the lease in the unit area." *Id.* at 11250. Several months later, in March 1984, DNR conditionally granted an application to add more leases to the PTU. DNR's decision to grant the expansion application included several express conditions, one of which was that a well be drilled on lands covered by certain expansion leases by March 31, 1985. *Id.* at 10040. Another condition was that the Appellants submit to DNR acceptable proposed amendments to the PTUA aimed

[4] Kay Brown, then the Acting Director of DNR's former Division of Minerals and Energy Management, wrote this in a January 1982 memorandum to John Katz, DNR Commissioner at that time. *Id.* at 9463-64.

primarily at addressing the inclusion of additional leases within the PTU with royalty rates other than the standard 12.5%. *Id.* at 10039.

Against this backdrop, in late 1984 Exxon submitted proposed amendments to the PTUA to DNR. *Id.* at 790-95. In January 1985, DNR approved a number of these amendments. *Id.* at 787-88. Included among these amendments was a rewording of the second paragraph of Section 21 of the PTUA as follows:

> Powers in this section vested in the Director shall only be exercised after notice to Unit Operator and opportunity for hearing to be held not less than . . . thirty (30) days from notice, and shall not be exercised in a manner that would (i) require any increase in the rate of prospecting, development or production in excess of that required under good and diligent oil and gas engineering and production practices; or (ii) alter or modify the rates of production from the rates provided in the approved plan of development and operations then in effect or, in any case, curtail rates of production to an unreasonable extent, considering unit productive capacity, transportation facilities available, and conservation objectives; or (iii) prevent this agreement from serving its purpose of adequately protecting all parties in interest hereunder, subject to applicable conservation laws and regulations.

Id. at 794 (amended language underlined).[5]

On March 12, 1985, the lessees of certain of the expansion leases notified DNR that "efforts to promote the drilling of a well on the subject lessees have been unsuccessful and the required well [due by March 31, 1985] will not be drilled." *Id.* at 10026.

The instant dispute began over twenty years later, in August 2005, when the Appellants submitted their proposed 22nd POD to DNR. The Director of DNR's Division of Oil and Gas initially rejected the proposed 22nd POD on September 30, 2005. In this

[5] Before the Appellants submitted their proposed amendments, DNR had notified them that "the State would find acceptable" this amendment to Section 21. *Id.* at 10039, 10051.

initial decision, the Director concluded that "[f]ailure to submit an acceptable plan of development is grounds for termination of the PTU." *Id.* at 8948. Referring expressly to Section 21 of the PTU, the Director's initial decision provided:

> This decision provides notice under Article 21 of the PTU Agreement that Exxon must initiate development operations within the PTU by October 1, 2007. The Division will contact Exxon to schedule a hearing on this issue, which will be held not less than 30 days from the date of this decision. . . . The PTU Owners shall have an opportunity for hearing regarding this notice to modify the rate of PTU development.

Id. at 8927, 8948.

One month after issuing the September 2005 initial decision referencing Section 21, the Director issued an amended decision on October 27, 2005. The amended decision concluded that the Appellants had defaulted under the PTUA and applicable oil and gas regulations and accorded the Appellants an opportunity to cure the default by submitting an acceptable POD. *Id.* at 12304. But the amended decision also held that Section 21 does "not apply to the Division's evaluation of the Unit Operator's proposed plans for development of the Point Thomson Unit." *Id.* at 12282. Accordingly, the amended decision deleted the requirement contained in the initial decision that the Appellants commence development operations at the PTU by October 1, 2007 and deleted the provision that the Appellants would have an opportunity for a hearing under Section 21 of the PTUA regarding modification of the rate of PTU development. *Id.* at 12305. Instead, the amended decision shifted the burden to the Appellants to propose an acceptable POD, stating that "[a]n acceptable unit plan must contain specific commitments to timely delineate the hydrocarbon accumulations underlying the PTU and develop the unitized substances." *Id.* at 12304-05.

The Appellants were granted extensions of time to appeal from the Director's decision during negotiations with the State under the Stranded Gas Development Act. On October 18, 2006, the Appellants submitted a modified 22nd POD, *id.* at 3089-3105, and oral argument on the proposed modified 22nd POD was held before the Commissioner of DNR on November 20, 2006. Although the Appellants did not request an evidentiary hearing at that time, over 5,000 pages of documents regarding the modified proposed 22nd POD were submitted to the Commissioner prior to the hearing.

The Commissioner issued a Decision on Appeal on November 27, 2006. As summarized by the Commissioner at that time, that decision:

> (1) denies the request for modification of the 2001 Expansion Agreement, as amended, which affects only the expansion leases; (2) affirms the Director's Decision in all respects to the extent it is consistent with this Commissioner's Decision, but the Director's Decision is disapproved to the extent that it can be read to mean the PTU contains certified wells; (3) adopts and incorporates into the Commissioner's Decision the findings and rationale of the Director's Decision as modified by this Decision; (4) rejects the cure or revised 22nd PTU POD submitted by the Lessees on October 18, 2006; and (5) terminates the PTU.

Id. at 5671.

After the Commissioner denied their request for reconsideration, the Appellants appealed the Commissioner's decision to this Court. In a decision issued on December 26, 2007, this Court affirmed in part and reversed in part. *Exxon Mobil Corp. et al. v. State, Dep't of Natural Res.*, 3AN-06-13751 CI (Consolidated) (Dec. 26, 2007) (hereinafter, "2007 Decision").

This Court affirmed DNR's rejection of the proposed modified 22nd POD under Section 10 of the PTUA. Section 10 of the PTUA provides:

> 10. PLAN OF FURTHER DEVELOPMENT AND OPERATION. Within six months after completion of a well capable of producing unitized substances in paying quantities, the Unit Operator shall submit for the approval of the Director an acceptable plan of development and operation for the unitized land which, when approved by the Director, shall constitute the further drilling and operating obligations of the Unit Operator under this agreement for the period specified therein. Thereafter, from time to time before the expiration of any existing plan, the Unit Operator shall submit for the approval of the Director a plan for an additional specified period for the development and operation of the unitized land. The Unit Operator expressly covenants to develop the unit area as a reasonably prudent operator in a reasonably prudent manner.
>
> Any plan submitted pursuant to this section shall provide for the exploration of the unitized area and for the diligent drilling necessary for determination of the area or areas thereof capable of producing unitized substances in paying quantities in each and every productive formation and shall be as complete and adequate as the Director may determine to be necessary for timely development and proper conservation of the oil and gas resources of the unitized areas, and shall:
>
> (a) specify the number and location of any wells to be drilled and the proposed order and time for such drilling; and,
>
> (b) to the extent practicable, specify the operating practices regarded as necessary and advisable for the proper conservation of natural resources. . . .
>
> Said plan or plans shall be modified or supplemented when necessary to meet changed conditions, or to protect the interests of all parties to this agreement. Reasonable diligence shall be exercised in complying with the obligations of the approved plan of development.

PTU REC at 600-01. The Appellants had asserted that the "reasonably prudent operator" language contained in the first paragraph of Section 10, in conjunction with applicable statutes, "ma[d]e clear that DNR may not require the Operator to carry out a plan that is not reasonable from the perspective of the Operator, because it does not adequately protect the lessees' interests." 2007 Decision at 21 (quoting Jt. Br. at 54). This Court rejected that argument and concluded instead that Section 10 grants to DNR the authority to reject a proposed POD without regard to the reasonably prudent operator standard: "To interpret Section 10 of the PTUA to focus on the Lessee's perspective, so as to preclude rejection of any plan of development that the Lessees

asserted was unreasonable for them, irrespective of the public interest, would be inconsistent with" the applicable regulations and statutes. *Id.* at 22. But this Court strived to make clear that the contractual rights of the parties were not fully resolved under Section 10 of the PTUA, concluding that "rejection of a proposed plan of development does not result in automatic termination under the PTUA . . . [and] a separate administrative determination as to the appropriate remedy is required in such instance." *Id.* at 39. Accordingly, this Court reversed the termination of the PTU and remanded the matter to DNR as follows:

> DNR's rejection of the Lessees' proposed modified 22nd Plan of Development . . . is affirmed. DNR's determination as set forth in the Commissioner's Decision and the Decision on Reconsideration that terminated the Point Thomson Unit is reversed and remanded, so as to accord to the Appellants notice and an opportunity to be heard before the agency as to the appropriate remedy when the Department has rejected the proposed modified 22nd Plan of Development for the Point Thomson Unit.

Id. While the Court left open what standard to apply in the remand proceeding, the 2007 Decision did provide that: "on remand, the agency should also consider the import of Section 21 of the PTUA, as amended in 1985 . . . ." *Id.* at 42.

Promptly after this Court issued its December 2007 decision, the Commissioner sent a letter to the Appellants notifying them that DNR "is specifically considering the remedy of termination of the Point Thomson Unit." PTU REC at 30505. The Commissioner invited the Appellants to submit briefing on the following issues: "(1) whether the remedy of unit termination is the appropriate remedy for the Appellants' failure to submit an acceptable 22nd POD; and (2) if termination is not appropriate, what remedy would be an appropriate response to the Appellants' failure to submit an acceptable 22nd POD." *Id.* The Commissioner also alerted the Appellants that DNR's

planned remand proceedings would consist of oral argument and the submission of written briefs unless the Appellants requested and were accorded additional proceedings. *Id.* at 30505-06.

The Appellants responded with a number of procedural requests. *Id.* at 30507-11. The Appellants contended, among other things, that due process required that an independent hearing officer conduct the remand hearing, that the Commissioner institute procedures to prevent *ex parte* contacts with DNR staff on the subject of the remand hearing, and that DNR participate as an adversary during the proceeding. The Appellants also asserted that the hearing should be conducted in accordance with Section 21 of the PTUA. *Id.* at 30507-10, 30519. In that regard, they requested notice under Section 21 "of the specific nature and timing of the development activity DNR now finds necessary and proper . . . and the reasons for that belief." *Id.* at 30517. While the Commissioner denied most of the Appellants' requests, he did grant their request to present witnesses during the remand proceeding. *Id.* at 30513.

On February 19, 2008, the Appellants submitted a 23rd POD as a proposed remedy for DNR's rejection of the 22nd POD. *Id.* at 30000-19. An administrative hearing was then held from March 3 through 7, 2008, during which the Appellants called multiple witnesses to testify and submitted additional written materials. The Commissioner presided at the hearing and also designated Nanette Thompson, an employee of DNR's Division of Oil and Gas, to participate as the hearing officer. *See id.* at 30514. Ms. Thomson had previously appeared as DNR's representative before this Court during the 2007 administrative appeal. During the remand hearing, the

Commissioner was also advised by the same attorneys who had defended the agency in the original appeal.[6]

On April 22, 2008, the Commissioner issued a 75 page decision and concluded: "The 23rd POD proposed by Appellants as the remedy for rejection of the 22nd POD does not meet the standards in 11 AAC 83.303 and does not serve the public interest. It is not adequate to insure timely development as required by Section 10 of the PTUA. The Point Thomson Unit is terminated." *Id.* at 31465. In his decision, the Commissioner explained that the 23rd POD "does not adequately develop all of the known hydrocarbon resources in the unit area." *Id.* at 31464. The Commissioner also concluded, "most importantly, the public's interest would not be protected if I approve the 23rd POD because I do not believe, based on this record, that the Appellants will perform as promised this time." *Id.* at 31465.

The Commissioner's decision on remand expressly considered the import of Section 21, as instructed by this Court, and found that section of the PTUA inapplicable:

> Section 21 does not apply to my evaluation of Appellants' proposed remedy. Section 21 only applies where there is ongoing prospecting, development, or production operations. In this case, there are no ongoing operations. . . . The most recent drilling activity by the unit operator was in 1982, twenty-six years ago. The last seismic data was gathered almost a decade ago, in 1999. Thus, Section 21 is not implicated because there is currently no prospecting, development or production. This construction is most consistent with the PTUA as a whole . . . .
>
> Moreover, Section 21 does not supersede the applicable statutes and regulations which authorize unitization only when it is in the public interest. It does not trump Section 10 and the regulations, which give DNR the discretion to determine the adequacy of a proposed POD. Thus, Appellants' argument that if DNR rejects the 23rd POD, Section 21 shifts

[6] See Order Denying Motion for Partial Trial de Novo dated January 13, 2009 at 8-9.

> the responsibility to DNR to design an acceptable POD is inappropriate as a matter of public policy and inconsistent with DNR's authority.

Id. at 31455-56.

The Appellants sought reconsideration, and in a decision on reconsideration issued on June 11, 2008, the Commissioner affirmed. *Id.* at 31520-44. The Commissioner again rejected the Appellants' proposition that Section 21 applied to these proceedings: "Appellants' efforts to make the decision on remand turn on a DNR presentation of an acceptable POD under section 21 of the unit agreement and the reasonably prudent operator standard is inappropriate because the issue at hand is whether, given Judge Gleason's decision that DNR properly rejected the 22nd POD, it is in the public interest for the unit to continue." *Id.* at 31523.

The Appellants appealed the Commissioner's decision on remand to this Court. *See* AS 22.10.020(d). The parties' briefing on this second appeal was completed on May 26, 2009, and oral argument was held on July 20, 2009.

In their briefing to this Court, the Appellants summarized their primary issues on appeal as follows:

> · The procedures followed by the Commissioner on remand were constitutionally inadequate.
>
> · Before proceeding to termination, DNR needed to comply with its obligations under Section 21 and its duty of cooperation.
>
> · The Commissioner's decision must be reversed since no adjudication of the fundamental issue of material breach has yet occurred.
>
> · DNR's change of development policy did not give rise to a material breach of the unit agreement by the Appellants and could not have provided a basis to terminate.
>
> · Termination was unavailable as a remedy since there was no uncured material breach.

· The Commissioner committed legal error in evaluating the 23rd plan of development.

Br. of Appellants at i-iii.

DISCUSSION

A. Standard of Review

Four different standards apply to a court's review of the merits of an agency's rulings: "(1) the 'substantial evidence test' for questions of fact; (2) the 'reasonable basis test' for questions of law involving agency expertise; (3) the 'substitution of judgment test' for questions of law involving no agency expertise; and (4) the 'reasonable and not arbitrary test' for review of administrative regulations." *ConocoPhillips*, 109 P.3d at 919 (footnote omitted).

For the reasons explained below, this Court finds that the interpretation of Section 21 of the PTUA is dispositive of this appeal. The Appellants contend that DNR was required to comply with the provisions of Section 21 on remand, while DNR argues that Section 21 was inapplicable to the remand proceedings. The interpretation of this contract provision does not require DNR's administrative expertise. Accordingly, on remand this Court should substitute its own judgment to determine this legal issue.[7] *Quality Asphalt Paving, Inc. v. State, Dep't of Transp. & Pub. Facilities*, 71 P.3d 865, 872 n.10 (Alaska 2003) ("[W]e will substitute our own judgment for questions of law not

[7] In contrast, this Court applied the reasonable basis standard of review in its December 2007 decision as to DNR's determination to accept or reject a POD under Section 10 of the PTUA because that determination involved the exercise of agency expertise. 2007 Decision at 17.

involving agency expertise, such as contract interpretation."); *Alaska Hous. Fin. Corp. v. Salvucci*, 950 P.2d 1116, 1119 (Alaska 1997) ("Interpretation of a contract is a question of law on which this court substitutes its own judgment.").[8]

When interpreting a contract, this Court is "to give effect to the reasonable expectations of the parties." *Exxon Corp. v. State*, 40 P.3d 786, 793 (Alaska 2001) (citation omitted), *reh'g denied.* Those expectations should be determined "by looking to the words of the contract and any extrinsic evidence regarding intentions when they entered into a contract, including evidence of the parties' subsequent conduct." *Kay v. Danbar, Inc.*, 132 P.3d 262, 269 (Alaska 2006). The language of the contract is the "most important evidence of [the parties'] intention." *Id.* Unless words are defined otherwise within the contract, they are to be given their "ordinary, contemporary, common meaning." *Norville v. Carr-Gottstein Foods Co.*, 84 P.3d 996, 1001 n.3 (Alaska 2004).

B. Are the Appellants Entitled to a Section 21 Hearing?

Section 21 of the PTUA accords to DNR's Director of the Division of Oil and Gas[9] the authority to "alter or modify from time to time in his discretion the quantity and rate of

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[8] It bears noting that this Court's 2007 Decision remanded the legal issue of the applicability of Section 21 to the agency to address in the first instance, consistent with the principle of primary agency jurisdiction. *See Eidelson v. Archer*, 645 P.2d 171, 176 (Alaska 1982) ("If [a complaining party] is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.") (*quoting McKart v. United States*, 395 U.S. 185, 194-195 (1969)).

[9] The PTUA references the Director of DNR's Division of Lands, a division which has been eliminated since the parties entered into the contract. PTU REC at 595; *see* Revisor's Notes to AS 38.05 (LexisNexis 2008) ("Through administrative reorganization, the Department of Natural

production when such alteration or modification is in the interest of attaining the conservation objectives stated in [the PTUA]" and not in violation of state law. PTU REC at 1268. However, under the amendments to Section 21 agreed to by DNR and the Appellants in 1985, the Director may not exercise this power

> in a manner that would (i) require any increase in the rate of prospecting, development or production in excess of that required under good and diligent oil and gas engineering and production practices; or (ii) alter or modify the rates of production from the rates provided in the approved plan of development and operations then in effect or, in any case, curtail rates of production to an unreasonable extent, considering unit productive capacity, transportation facilities available, and conservation objectives; or (iii) prevent this agreement from serving its purpose of adequately protecting all parties in interest hereunder, subject to applicable conservation laws and regulations.

Id. at 794 (underlining in original). Section 21 also expressly provides that the Appellants are entitled to notice and a hearing whenever the Director seeks to exercise the powers vested in him by that section. *Id.*

The Appellants argue that they were entitled to a hearing under Section 21 on remand because "the entire thrust of DNR's position, from its initial consideration of POD 22 through its most recent brief, has been that the rate of development at Point Thomson has not been fast enough, so that the rate of development needs to be increased and production needs to be obtained." Reply Br. of Appellants at 30-31 (*citing* Br. of Appellee at 2-7).

DNR argues Section 21 is not applicable for several reasons. Its position can be parsed into five arguments: (1) "Section 21 is only triggered when DNR takes unilateral action and seeks to order a change in the rate of prospecting, development or

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Resources has eliminated the division of lands. Duties and responsibilities given to the division of lands under this chapter have been assigned to other divisions of the department.").

production" and does not apply when DNR simply rejects a POD;[10] (2) Section 21 does not apply when "there are no ongoing operations, and thus no existing functioning infrastructure;"[11] (3) a Section 21 hearing is precluded by this Court's December 2007 decision;[12] (4) to accord a Section 21 hearing to the Appellants in these circumstances would undermine the authority conferred upon DNR by certain statutes and regulations;[13] and (5) according the Appellants a Section 21 hearing in these circumstances would inappropriately shift the burden of establishing a development plan to DNR, or, as stated by DNR in its brief: "the Appellants are trying to manipulate Section 21 in a manner requiring that DNR devise a remedy measurable against Section 21's standards."[14] Each argument is addressed in turn.

1. Is Section 21 Triggered by the Rejection of a Proposed POD?

DNR argues that Section 21 is inapplicable to the remand proceedings because Section 21 does not apply when DNR has rejected a proposed POD. For the following reasons, the Court disagrees.

First, the language of Section 21 itself indicates that its application is not limited to only those situations where DNR seeks to modify an existing POD. When interpreting a contract, a court should strive to give effect and reasonable meaning to all provisions of the instrument. *Alaska Constr. & Eng'g, Inc. v. Balzer Pac. Equip. Co.*,

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[10] Br. of Appellee at 48.

[11] *Id.* at 47.

[12] *Id.* at 49.

[13] *Id.* at 51-53.

[14] *Id.* at 50.

130 P.3d 932, 937 (Alaska 2006), *reh'g denied*. Here, subsection (ii) of the second paragraph of Section 21 provides that DNR's powers under Section 21 "shall not be exercised in a manner that would . . . alter or modify the rates of production from the rates provided *in the approved plan of development* and operations then in effect *or, in any case*, curtail rates of production to an unreasonable extent . . . ." PTU REC at 794 (emphasis added). Thus, subsection (ii) applies not only to situations in which DNR seeks to change the terms of approved POD but also to "any case" – which would include cases in which there is no approved POD. Additionally, subsection (i) of that same paragraph provides that DNR's powers under Section 21 "shall not be exercised in a manner that would . . . require any increase in the rate of prospecting, development or production in excess of that required under good and diligent oil and gas engineering and production practices" and makes no mention of applying only to approved POD's. *Id.* To interpret Section 21 of the PTUA as applicable only when DNR seeks to alter the terms of an approved POD would be inconsistent with the language of both subsections (i) and (ii) of the second paragraph of Section 21.

Second, as the Appellants noted in their reply brief, throughout the proceedings before both the DNR and this Court, DNR has repeatedly expressed its dissatisfaction with the rate of development of the PTU as a basis for its determinations.[15] In both the initial and amended decisions rejecting the 22nd POD, the Direcctor wrote, "The Director has the authority to modify the rate of development to achieve the conservation objectives under the PTU Agreement, and *I find that increasing the rate of development in the PTU is necessary and advisable.*" PTU REC at 8947, 12328 (emphasis added).

[15] Reply Br. of Appellants at 30-31 (*citing* Br. of Appellee at 2-7).

On appeal from the Director's amended decision, the Appellants submitted a revised 22nd POD. In rejecting this revised POD and ultimately terminating the PTU, the Commissioner largely adopted and incorporated the findings and rationale of the Director's amended decision, *see id.* at 5671, and characterized the Appellants' conduct as "unambiguously refus[ing] to *adequately* explore, delineate, or produce massive known hydrocarbon reserves." *Id.* at 5686 (emphasis added). And after this Court affirmed the Commissioner's decision to reject the revised 22nd POD under Section 10 and remanded the matter to the Commissioner, the Appellants submitted a proposed 23rd POD as an alternative to termination of the PTU. In rejecting this proposed POD, the Commissioner found that the 23rd POD was "*not adequate* to insure timely development" of the PTU. *Id.* at 31465 (emphasis added).

Third, a Section 21 hearing is the natural progression from the rejection of a POD under Section 10 when the proposed 23rd POD was rejected because DNR seeks to increase production in the Point Thomson Unit. This Court's December 2007 Decision addressed the standard under which DNR may reject proposed PODs pursuant to Section 10 of the PTUA and held DNR is accorded the authority under Section 10 to reject a proposed POD based solely upon consideration of the factors set forth in 11 AAC 83.303(a).[16] This Court rejected the Appellants' position that the reasonably prudent operator (RPO) standard should apply to DNR's assessment of a POD, reasoning that Section 10's reference to the RPO standard only obligated the Appellants to act as reasonably prudent operators – it did not obligate DNR to apply that standard when evaluating a proposed Plan of Development. 2007 Decision at 22-24.

[16] 2007 Decision at 22-23.

But when Section 10 is interpreted in that manner, it cannot be the basis for establishing a material breach of the PTUA by the Appellants. Stated differently, in December 2007 this Court recognized that the rejection of a proposed POD under Section 10 of the PTUA does not of itself constitute an act of default or a material breach of the PTUA by the Appellants. *Id.* at 34-35.

2. Does Section 21 Apply if the Current Rate of Prospecting, Development, or Production is Zero?

DNR next argues that Section 21 does not apply because there is no ongoing production in the PTU. By its terms, Section 21's applicability is limited to where DNR seeks to "alter or modify . . . the quantity and rate of [the PTU's] production[.]" PTU REC at 1268. DNR asserts that, "[w]here, as here, there are no ongoing operations, and thus no existing functioning infrastructure (such as active wells, production facilities and pipelines) Section 21 is not the proper provision of the PTUA" to apply to this proceeding. Br. of Appellee at 47.

The question presented is whether "rate of production" as used in Section 21 includes the rate of zero production. Nowhere in Section 21 is there an express limitation of its applicability to DNR proceedings undertaken only when the PTU is actively producing oil or gas. Further, the term "rate" is not defined in the PTUA. Therefore, this Court will look to the "ordinary, contemporary, common meaning" of the word "rate" to discern whether Section 21 of the PTUA should be interpreted to apply where there is no ongoing production in the unit and DNR seeks to increase that rate from zero so as to require production. *Kay*, 132 P.3d at 269.

"Rate" is a word with a variety of meanings. For example, it may refer to the price paid for a particular good or service, Black's Law Dictionary 1375 (9th ed. 2009)

(definition 2 of "rate *n*") (i.e., a hotel room rate), or it may be used as a verb, meaning "to set an estimate on" or "to determine or assign the relative rank or class of." Webster's Ninth New Collegiate Dictionary 976 (1990) (definitions 3a and 3b of "rate *vb*") (i.e., to rate an athlete's abilities). But in Section 21 of the PTUA, it is apparent from the context in which the term is used that "rate" refers to the amount or speed of production in the PTU. Black's Law Dictionary defines "rate" as a "[p]roportional or relative value; the proportion by which quantity or value is adjusted." Black's Law Dictionary 1375 (9th ed. 2009). Other dictionaries provide the following relevant definitions: "a fixed ratio between two things," Webster's Ninth New Collegiate Dictionary 976 (1990) (definition 3a of "rate *n*"), "a quantity, amount, or degree of something measured per unit of something else," *id.* (definition 4a of "rate *n*"), "[a] stated numerical amount of one thing corresponding proportionally to a certain amount of some other thing," The New Shorter Oxford English Dictionary on Historical Principles Vol. 2 2481 (1993) (definition 4 of "rate n^1"), and "[s]peed of movement, change, etc., the rapidity with which something takes place; frequency of a rhythmic action." *Id.* (definition 5 of "rate n^1").

Each of these ordinary, contemporary, and common definitions of "rate" lead this Court to conclude that "rate of production," as used in Section 21 of the PTUA encompasses not only situations in which there is active production, but also the situation in which the rate of production is zero. The referenced dictionary definitions of "rate" provide that the term refers to a proportional value or ratio. In the context of oil production, the common proportional measure of the rate of production is barrels per day, *see, e.g., Amber Res. Co. v. U.S.*, 87 Fed. Cl. 16, 20 (Fed. Cl. 2009); *Trees Oil Co. v. State Corp. Comm'n*, 105 P.3d 1269, 1274 (Kan. 2005); *Harken Sw. Corp. v. Bd. of*

Oil, Gas & Mining, 920 P.2d 1176, 1180 (Utah 1996), and, in the context of gas production, the common proportional measure of the rate of production is cubic feet per day. *See, e.g., Exxon Mobil Corp. v. State, Dep't of Revenue*, 219 P.3d 128, 132 (Wyo. 2009); *Cimarron Oil Corp. v. Howard Energy Corp.*, 909 N.E.2d 1115, 1120 (Ind. Ct. App. 2009). These definitions of "rate" encompass the possibility that oil may be produced at a "rate" of zero barrels per day and gas may be produced at a "rate" of zero cubic feet per day. This reading of "rate" is in line with the usage of the term "rate" in decisions from other courts.[17] *See Amara v. Cigna Corp.*, 534 F.Supp.2d 288, 324 n.18 (D. Conn. 2008) (emphasis added) (referencing an Internal Revenue Service ruling mentioning "a period of *zero* annual rate of accrual"); *State Bd. of Health v. Godfrey*, 290 S.E.2d 875, 877 (Va. 1982) (emphasis added) (referencing an expert witness's testimony regarding "slow or *nil* rates of absorption"); *Nw. Pipeline Corp. v. Adams County*, 131 P.3d 958, 960 (Wash. Ct. App. 2006) (emphasis added) (referencing the possibility that a company would have a "*zero* growth rate"). This Court concludes that the fact that the PTU currently has a zero rate of production does not preclude the applicability of Section 21.

3. Does This Court's December 2007 Decision Preclude a Section 21 Hearing?

DNR also contends that the Appellants were not entitled to a Section 21 hearing on remand because this Court's December 2007 decision precludes such a hearing. DNR argues that this Court's prior decision remanded to the agency for a "remedy"

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[17] The Court's research has not located any Alaska appellate cases construing the word "rate." However, as noted above, DNR's Director of the Oil and Gas Division initially applied Section 21 in this case to a production rate of zero. *See* p. 5, *supra.*

proceeding. DNR maintains that this Court has already found the Appellants in default of the PTUA and limited the scope of the remand proceedings to giving the Appellants an opportunity to cure a material breach. DNR contends:

> [T]he court has already determined 'what happens' after DNR properly rejects a proposed POD under Section 10 of the PTUA: 'this matter is remanded to the DNR for the purpose of according to the Appellants a hearing on the appropriate remedy to the State upon DNR's rejection of the proposed 22nd Plan of Development.' . . . The court did *not* remand to give Appellants another chance to cure their material breach. Rather, because this court affirmed DNR's rejection of the revised 22nd POD and confirmed that the agency applied the proper legal standards in doing so, the sole issue on remand was 'the appropriate *remedy* to the State upon DNR's rejection of the proposed 22nd Plan of Development.

Br. of Appellee at 49, 78.

DNR accords too broad of an interpretation to the use of the term "remedy" in this Court's December 2007 decision. As explained above, this Court's 2007 Decision did not find that DNR's rejection of a POD under Section 10 constituted a material breach of the PTUA by the Appellants.[18] Rather, in that decision, this Court interpreted Section 10 to accord to DNR the right to reject a POD based primarily on a consideration of the public's interest and remanded the case to address the appropriate remedy in that circumstance. "Remedy," as used in the December 2007 decision, meant the following dictionary definition of the term: "[t]he means of enforcing a right." Black's Law Dictionary 1407 (9th ed. 2009). A Section 21 hearing is the contractual means by which DNR may enforce its right to seek increased production in the PTU. Stated differently, DNR has the right to seek increased production in the PTU, but it can only enforce that right in accordance with the provisions of the PTUA, including Section 21.

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[18] *Supra* at 17.

4. Does the application of Section 21 after DNR rejects a proposed POD undermine DNR's authority conferred by statutes and regulations?

DNR also asserts that if Section 21 is applicable when DNR rejects a proposed POD, it would undermine the agency's authority to reject a POD under the applicable statutes and regulations. In this regard, DNR asserts:

> Section 21's "good and diligent" practices standards, which Appellants assert should have been applied on remand, are very different in kind from the criteria set out in Section 10 and 11 AAC 83.343. The phrase "good faith and diligent oil and gas engineering and production practices" was added as part of the 1985 amendments to the PTUA, and thus must be read consistently with 11 AAC 83.343 which was in existence in 1985 ... Injecting Section 21 standards into this analysis would have taken away the Commissioner's ability to consider the unit agreement, statutory, and regulatory POD criteria.[19]

DNR adds, "If section 21 [were] applied in the manner advocated by Appellants, its 'good and diligent' practices standard would be impermissibly elevated over the 'public interest.'"[20]

This Court finds DNR's argument in this regard to be unavailing. Rather, this Court agrees with the Appellants' analysis of the applicable statutory and regulatory provisions that apply when DNR rejects a proposed POD on the basis that it does not increase the rate of prospecting, development, or production to a level satisfactory to DNR.[21] And while this Court's 2007 Decision held that Section 10 of the PTUA accords DNR considerable discretion to reject a proposed POD, Section 21 accords specific contractual rights that the Appellants may then exercise to protect their interest in the

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[19] Br. of Appellee at 53 (footnotes omitted).

[20] *Id.* at 54.

[21] *See generally* Reply Br. of Appellants at 29-31, including footnotes therein.

PTU. This contractual interpretation is consistent with the underlying statutes that were in place when the PTU was created in 1977 and incorporated into Section 1 of the PTUA. *See former* AS 38.05.180(m) and (n).[22]

5. Does a Section 21 Hearing Impermissibly Shift the Burden to DNR to Determine the Appropriate Rate of Production?

DNR's final argument with respect to the applicability of Section 21 asserts that the agency would be inappropriately "saddled with the burden of designing an adequate POD" at Point Thomson if the PTUA is interpreted to require a Section 21 hearing whenever a POD is rejected. Br. of Appellee at 52. But this Court finds that the provisions of Section 21 are reasonable contractual burdens that DNR knowingly assumed both in both 1977 and again when the PTUA was amended in 1985.[23]

For the foregoing reasons, upon DNR's rejection of the 22nd POD under Section 10, the Appellants are entitled to a hearing in accordance with Section 21 of the PTUA.

C. Further Proceedings and the Appellants' Right to Due Process

This Court having determined that the Appellants did not receive the Section 21 hearing that they should have been accorded under the PTUA, it is clear that further proceedings are necessary. The Appellants have taken the position that "it is now

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[22] *See also* 11 AAC 83.343, adopted in 1981, which indicates that if the POD is disapproved, the Commissioner of DNR may propose modifications that would qualify the POD for approval, but is otherwise silent on how such modifications are to be proposed. *Cf.* 11 AAC 83.336, adopted in 1981, discussed in this Court's 2007 Decision at 36-39.

[23] Moreover, it would appear that the burden on DNR may well be considerably less onerous in a case such as this in which no production has been occurring, given the language contained in Section 20(c) of the contract, which provides that after a valuable discovery of unitized substances has been made, the PTUA shall remain in effect only for "so long as unitized substances can be produced in quantities sufficient to pay for the cost of producing same from wells on unitized lands within any participating area established hereunder . . . ." PTU REC at 608-09, 9448.

necessary that the dispute be referred to an independent hearing officer." Reply Br. of Appellants at 15 (citing AS 44.64.030(b)). Alternatively, the Appellants asserted in their opening brief that this Court should grant a trial *de novo*. Br. of Appellants at 94. For its part, DNR asserted that briefing of any remedy issues should be deferred until this Court has determined whether further proceedings are necessary. It maintains that if this Court finds a due process violation, "it makes the most sense to wait until the court identifies how DNR violated due process and exactly what process is due Appellants before the parties argue whether trial de novo or remand is the best way to address any deficiencies." Br. of Appellee at 43.

Accordingly, analysis of the due process issues raised by the Appellants is clearly necessitated.[24] The Appellants have identified several procedures that the Commissioner employed on remand that they assert were constitutionally inadequate. They maintain that DNR failed to separate the advocacy of its proprietary interests from its quasi-judicial adjudicatory functions by permitting the same staff and counsel who had defended the first appeal to assist the Commissioner in the remand proceeding. Br. of Appellants at 24-27. They also assert that DNR failed to accord the Appellants an adversarial hearing with the minimum procedural protections consistent with a fair proceeding. Specifically, they maintain that they were not accorded a neutral decision maker, adequate notice and adequate discovery, an appropriate burden of proof, an adversarial hearing in which DNR staff participated as a party, and a preclusion on *ex parte* contacts between the decision maker and any party. *Id.* at 27-33.

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[24] The Court should address constitutional issues on appeal "only when a case cannot be fairly decided on other grounds." *Frost v. Spencer*, 218 P.3d 678, 682 (Alaska 2009).

This Court previously found in its 2007 Decision that DNR does have the authority to administratively adjudicate disputes related to the PTUA.[25] But it must do so consistent with the constitutional protections that are to be accorded to all litigants. "An impartial tribunal is basic to a guarantee of due process."[26] While an administrative agency may perform adjudicatory functions, it must do so in a way that adequately separates the adjudicatory function from the agency's administrative and investigatory functions so as to insure that all parties appearing before the agency are accorded their constitutional right to due process.[27]

In this case, it is undisputed that during the remand proceedings before the agency, the Commissioner, acting in an adjudicative role, was advised by the same attorneys who had represented the agency in the first appeal to this Court. Those attorneys are also representing the agency in this second appeal. In addition, the Commissioner appointed Ms. Thompson to serve as the hearing officer at the remand proceedings. She had previously been DNR's representative when the agency was defending its first decision in the 2007 appeal before this Court.

The Appellants assert that when the same attorneys who had defended the agency in the first appeal, together with Ms. Thompson, provided legal guidance to the Commissioner in private during the remand proceedings, it constituted a deprivation of their constitutional right to due process, citing *In re Robson*, 575 P.2d 771. In *Robson*, an attorney faced disciplinary proceedings before the Disciplinary Board of the Alaska

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[25] 2007 Decision at 20.

[26] *In re Robson*, 575 P.2d 771, 774 (Alaska 1978) (citations omitted).

[27] *Id.* at 774.

Bar Association. A member of the Bar Association's Executive Director's staff had investigated Mr. Robson's alleged attorney misconduct and prosecuted the case before the Board. The Executive Director was then present during the Disciplinary Board's private deliberations, although there was no indication that she actually took any active part in the deliberations. The Bar asserted that she was present during deliberations "to advise [the Board] on procedural matters, should the need arise."[28]

Mr. Robson then appealed the Board's decision to suspend his license to practice law, contending that he was deprived of procedural due process because the Executive Director had been present during the Board's deliberations. The Alaska Supreme Court agreed and held:

> When an administrative official has participated in the past in any advocacy capacity against the party in question, fundamental fairness is normally held to require that the former advocate take no part in rendering the decision. The purpose of this due process requirement is to prevent a person with probable partiality from influencing the other decision-makers.[29]

The Appellants assert that just as the Executive Director in *Robson* had participated in an advocacy capacity against Mr. Robson, so had the attorneys and Ms. Thompson previously participated in an advocacy capacity against the Appellants in this case, such that their assistance to the Commissioner during the remand proceedings constituted a violation of the Appellants' constitutional right to due process.[30]

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[28] *Id.* at 775.

[29] *Id.* at 774. *See also In re Brion*, 212 P.3d 748, 754-55 (Alaska 2009); *Amerada Hess Pipeline Corp. v. Regulatory Comm'n of Alaska,* 176 P.3d 667, 677 (Alaska 2008) (per curiam); *In re Walton*, 676 P.2d 1078, 1082 (Alaska 1983). *Cf. Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2262 (2009).

[30] Br. of Appellants at 26-27.

DNR asserts that *Robson* is distinguishable. It asserts that DNR's lawyers at the Attorney General's Office and private outside counsel "only provided legal guidance to the agency and were not 'advocates' or participants at the hearing"[31] and that Ms. Thompson's role on remand was not problematic because "Ms. Thomson was *not* the decision maker in the remand proceedings."[32]

This Court finds DNR's arguments on this issue to be unavailing. The advocates for DNR in the first appeal before this Court were advising the Commissioner during the subsequent remand proceedings before the agency. As DNR's attorneys before this Court in the first appeal, they "participated in the past in an advocacy capacity against the [Appellants]."[33] Furthermore, the hearing officer appointed by the Commissioner to assist him at the remand proceedings defended DNR's position in the original appeal before this Court, participating on behalf of the agency as the agency's unit manager for the PTU.[34] Under *Robson* and the due process requirement articulated by the Alaska Supreme Court in that decision, these advocates were precluded from providing legal guidance or, as was the case in *Robson*, simply being present whenever the Commissioner deliberated on remand. As such, the private interaction of these advocates with the Commissioner in the course of the remand proceeding resulted in a denial of due process to the Appellants, as it failed to "assure both the fact and

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[31] Br. of Appellee at 30.

[32] *Id.* at 44 (emphasis in original).

[33] *Robson*, 575 P. 2d at 774.

[34] *See* audio recording of April 17, 2007 hearing. Media Number 3AN-6307-62.

appearance of impartiality in the [agency's] decisional function." *Robson,* 575 P.2d at 775.

DNR argues that any procedural infirmity was rectified by the Commissioner's issuance of a written decision on remand.[35] In this regard, it asserts that "the case that is more applicable to these facts is *Alyeska Pipeline Service Company v. State, Department of Environmental Conservation*."[36] But the *Alyeska* decision involved the propriety of an administrator making a written fee determination on an $8,073 fee invoice for costs incurred by the administrator related to a permit challenge -- a circumstance quite distinct from the termination of the PTU that is at issue in this litigation. *See Alyeska,* 145. P.3d at 563-64; *see also Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (one factor in determining the extent of process that is due is the nature of the private interest at stake).

Just as the Alaska Supreme Court found in *Robson*, there is no indication that the advocates in this case took any active part in the substantive deliberations of the Commissioner, and this Court has no doubt that the purpose of their private meetings with the Commissioner during the remand proceeding was entirely ethical.[37] Nonetheless, in order to assure both the fact and appearance of impartiality when the Commissioner was exercising his decisional function, DNR's litigation counsel should not have been providing legal guidance to the Commissioner at the remand hearing, nor

---

[35] Br. of Appellee at 31.

[36] *Id.* (citing 145 P. 3d 561, 572 (Alaska 2006)).

[37] *See Robson*, 575 P. 2d at 775.

should DNR's agency representative in the first appeal have served in the position of hearing officer at the remand proceeding.

The remainder of the alleged due process violations would appear to be substantially mooted by this Court's rulings as set forth above concerning the applicability of Section 21 and the constitutional entitlement of each party to a proceeding in conformance with the dictates of procedural due process.

In light of the foregoing, the parties are invited to provide the Court with further briefing regarding whether this Court should again remand this matter for an administrative proceeding[38] or retain jurisdiction and conduct a *de novo* proceeding. With respect to a *de novo* proceeding, the parties' briefing may address whether the appointment of a special master pursuant to Civil Rule 53 is appropriate. The parties shall each have thirty days from the date of this decision to submit additional briefing on these issues. No responsive briefing shall be filed thereafter unless otherwise ordered.

CONCLUSION

For the foregoing reasons, the DNR Commissioner's Findings and Decision on Remand is REVERSED. The parties shall have thirty days from the date of this decision to submit additional briefing as set forth above. This Court shall retain jurisdiction over this matter pending further order of the Court.

ENTERED at Anchorage, Alaska this 11th day of January 2010.

I certify that on 1-11-10 a copy of the above was mailed to each of the following at their address of record (list name if not an agency)
☐ CSED ☐ AG ☐ PD ☐ DA AG Sevdalecky Ashburn/Crosby Keithley
Deputy Clerk / Secretary

Sharon Gleason
SHARON L. GLEASON
Superior Court Judge

[38] As the Appellants note in their brief, Alaska Statute 44.64.030(b) permits DNR to request that the Office of Administrative Hearings conduct the hearing. Br. of Appellants at 35.

Sneed Crosby Lyle D'Amm Ballew/Ashley Rushin Nizich

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ExxonMobil Corporation, Operator of the Point Thomson Unit; BP Exploration (Alaska) Inc.; Chevron U.S.A. Inc; ConocoPhillips Alaska, Inc.,	)	**Case No.: 3AN-06-13751 CI** (Consolidated Appeals)
Appellants,	)	Case No. 3AN-06-13760 CI Case No. 3AN-06-13773 CI Case No. 3AN-06-13799 CI Case No. 3AN-07-04634 CI Case No. 3AN-07-04620 CI Case No. 3AN-07-04621 CI
vs.	)	
State of Alaska, Department of Natural Resources,	)	
Appellee.	)	

ORDER DENYING APPELLANTS' MOTION TO SUPPLEMENT OR AUGMENT RECORD ON APPEAL

This Court, having considered Appellants' Motion to Supplement or Augment the Record and Appellees' Opposition, ~~and any reply thereto~~, hereby DENIES the motion. It is moot in light of this court's issuance of the Decision on Remand on this date.

DATED: 1-11-10

Sharon Gleason
The Honorable Sharon L. Gleason
SUPERIOR COURT JUDGE

I certify that on 1-11-10 a copy of the above was mailed to each of the following at their address of record (list name if not an agency)
☐ CSED ☐ AG ☐ PD ☐ DA
Deputy Clerk / Secretary

ashburn/crosby
AG Todd
Serdahely
Keithley
Arnold
Wrzosky

Kyle
Dawson
Ballard/Ashley
Luskin
Reyes

JAN - 5 2010

ASHBURN MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 FAX 907.277.8235

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was ☐ hand delivered ☐ faxed ☒ mailed on the 5th day of January, 2010 to:

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Los Angeles, CA 90071

ASHBURN & MASON
By: Jennifer E. Witaschek
Jennifer E. Witaschek

P: Clients 10578 Remand Appeal December 2009 Motion to Supplement ORDER-Opposition to Supplement.doc

ASHBURN MASON PC
LAWYERS
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Anchorage, Alaska 99501
Tel 907.276.4331 Fax 907.277.8235

Cindy Smith

From: Tempel, Esther (DNR) <esther.tempel@alaska.gov>
Sent: Thursday, April 26, 2012 5:09 PM
To: Cindy Smith
Subject: Pt Thomson hearing

Hi Cindy,

Just wanted to let you know that Matt Findley, Attorney with Ashburn & Mason, will be calling in for tomorrow's hearing.

Also, Joe Balash (Dep. Comm) and Jon Katchen (Inter-governmental Coordinator, Commissioner's Office) of DNR will be available. As will the Attorney General, Michael Geraghty.

Please let me know if I can be of further assistance.

Esther Cha Tempel
Legislative Liaison
Office of the Commissioner
Department of Natural Resources
(907) 465-4730
esther.tempel@alaska.gov

6/12/12 POINT THOMSON SETTLEMENT: ANALYSIS AND LEGAL ISSUES; POINT THOMSON PLAN OF OPERATION: EXXONMOBIL

<TARGET><BILL></BILL><SUBJECT>6-12-12 POINT THOMSON SETTLEMENT ANALYSIS AND LEGAL ISSUES; POINT THOMSON PLAN OF OPERATION
EXXONMOBIL</SUBJECT><COMM>SJUD27</COMM></TARGET>

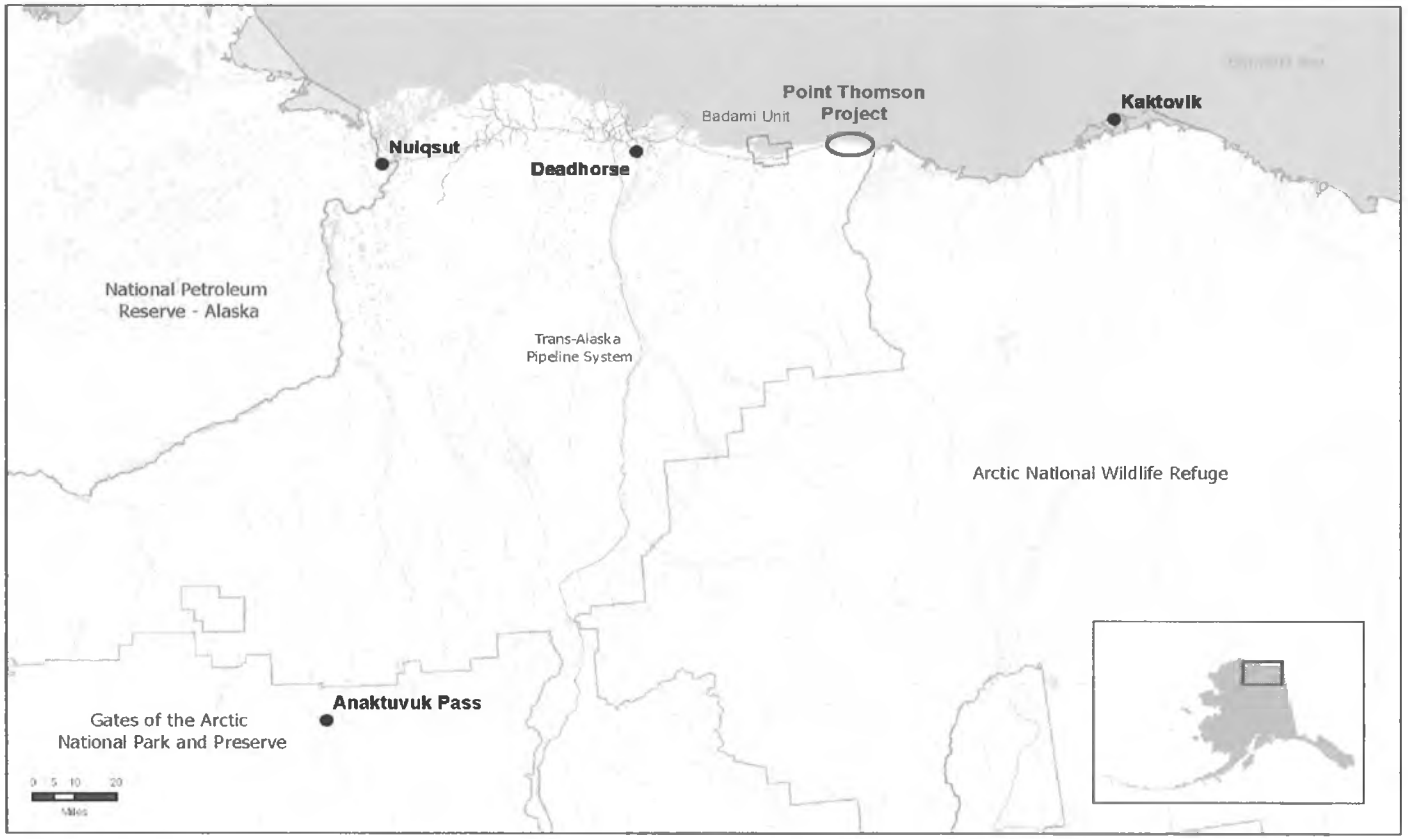
Point Thomson Plan of Operations

POINT THOMSON PROJECT

ExxonMobil's Commitment to Alaska

POINT THOMSON PROJECT

- Point Thomson is a strategic investment, critical for North Slope gas commercialization
  - Represents ~ 25% of discovered North Slope natural gas resources
- Producing Alaska's resources is a positive part of the development cycle
  - Generates significant direct value and new opportunities for the State and its citizens
- ExxonMobil expects to continue to work in Alaska for many years to come
  - We are committed to long-term, responsible resource development



Central Pad Evolution

POINT THOMSON PROJECT

Central Pad- April 2011

POINT THOMSON PROJECT

PTU-3

PTU-16

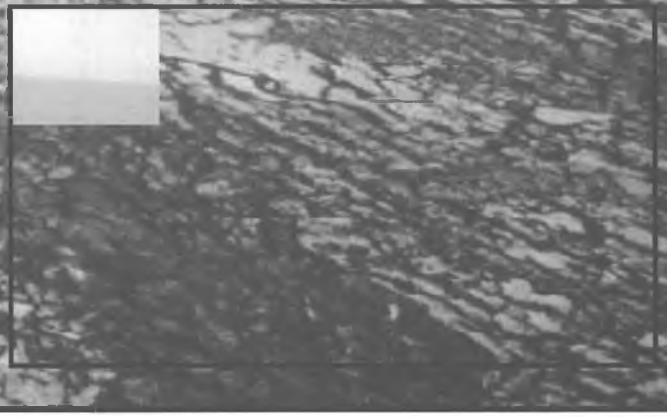
PTU-15

Spare Conductor

PTU-15 and PTU-16 Drilling Accomplishments

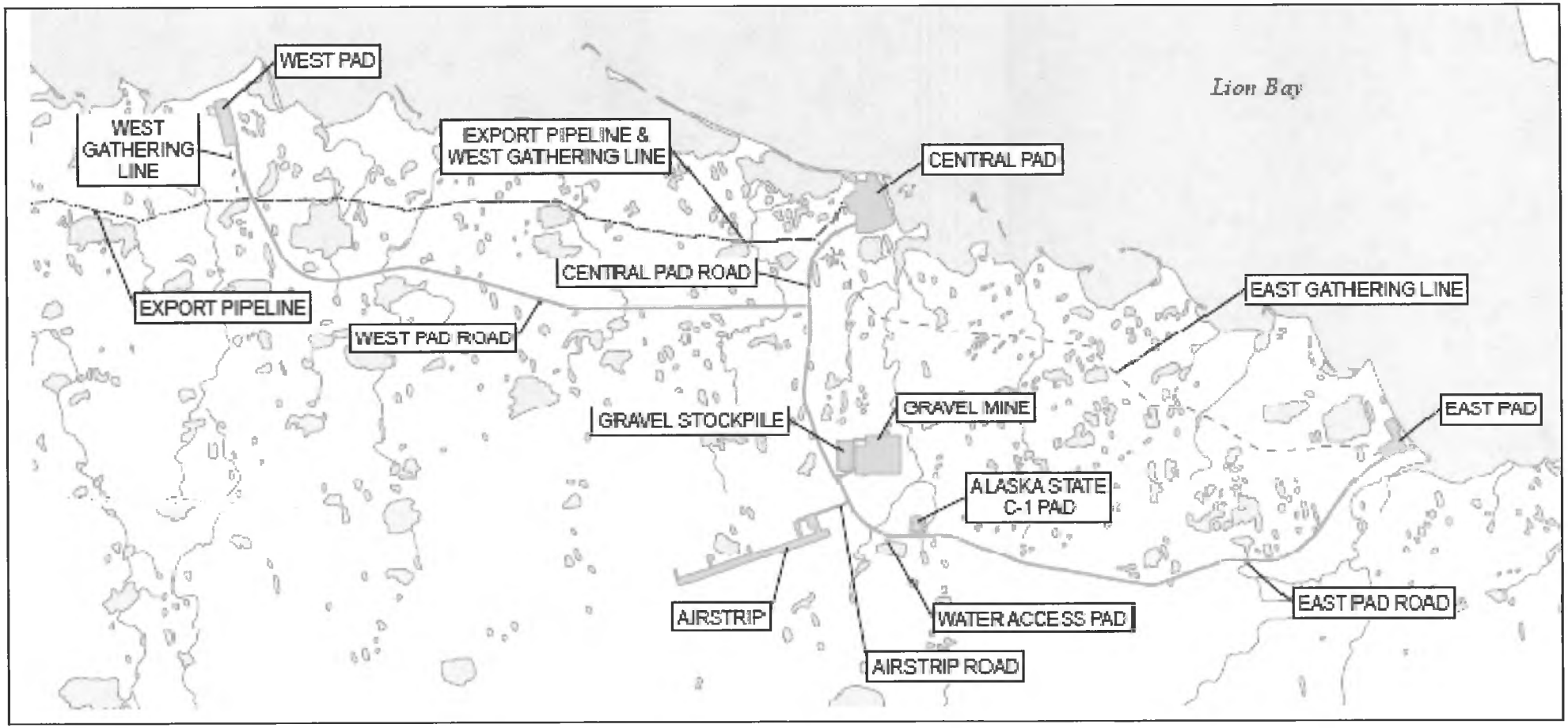
POINT THOMSON PROJECT

- Zero safety incidents (>3.5M hours w/o LTIs)
- Exemplary environmental performance
- Robust marine mammal protection plan
  - ➢ Recognized by USFWS for handling of a denning polar bear along ice road in April 2010
- Employment/economic benefits to community
  - ➢ 1,500 people from over 150 companies worked on project in 2010
  - ➢ Community outreach programs



Field Layout

POINT THOMSON PROJECT

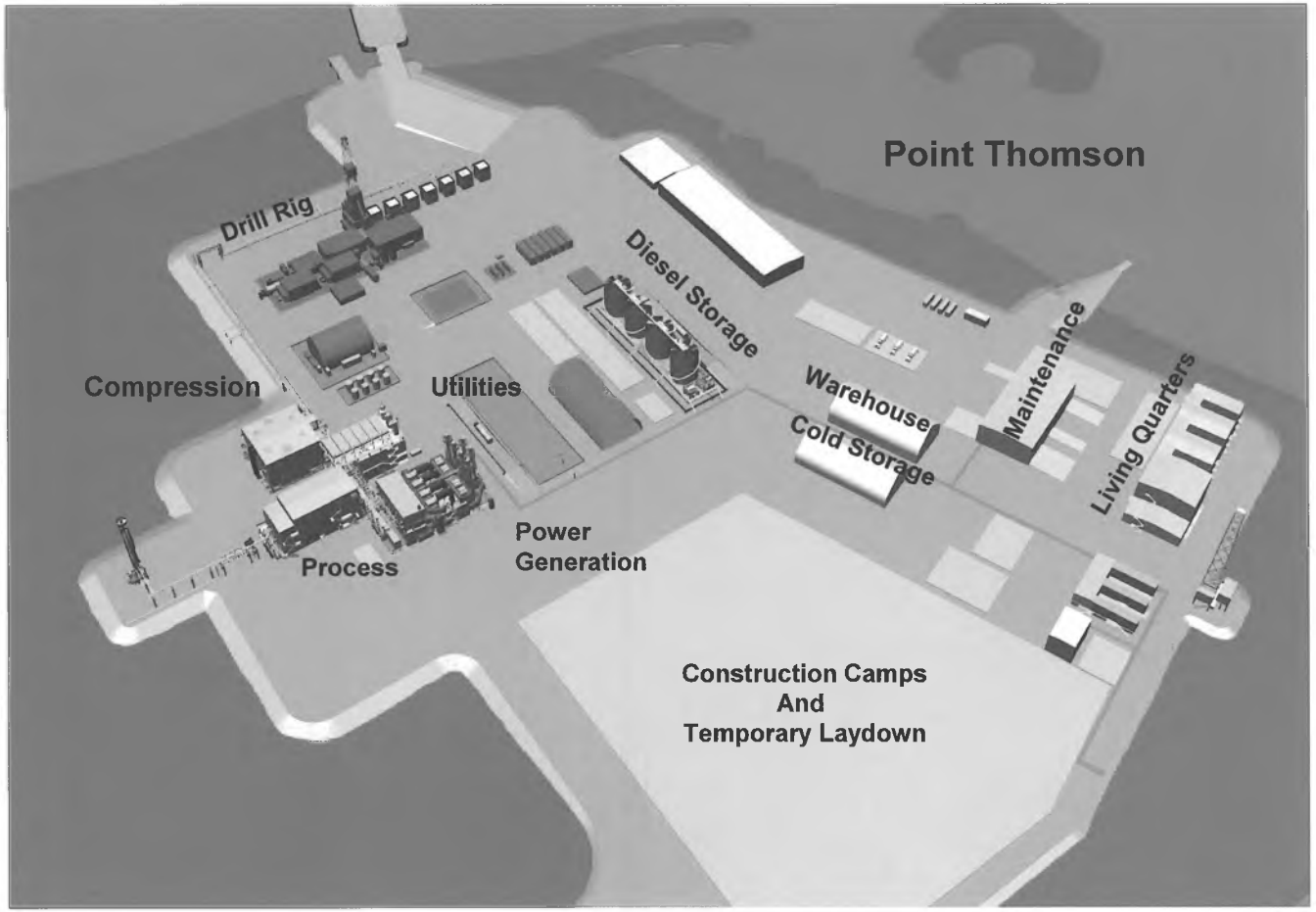


Initial Production Facility (IPS)

POINT THOMSON PROJECT

Scope

- Produce 10,000 barrels per day of condensate into TAPS
  - Cycle 200 million cubic feet per day of natural gas
- Major facility components:
  - Gas processing plant
  - 22 mile pipeline to Badami
  - Camp
  - Airstrip
- Small environmental footprint
  - Directional drilling from shore
  - Ice road construction (no off-lease permanent roads)
  - Utilize existing pads
- Nearly all facilities are re-useable

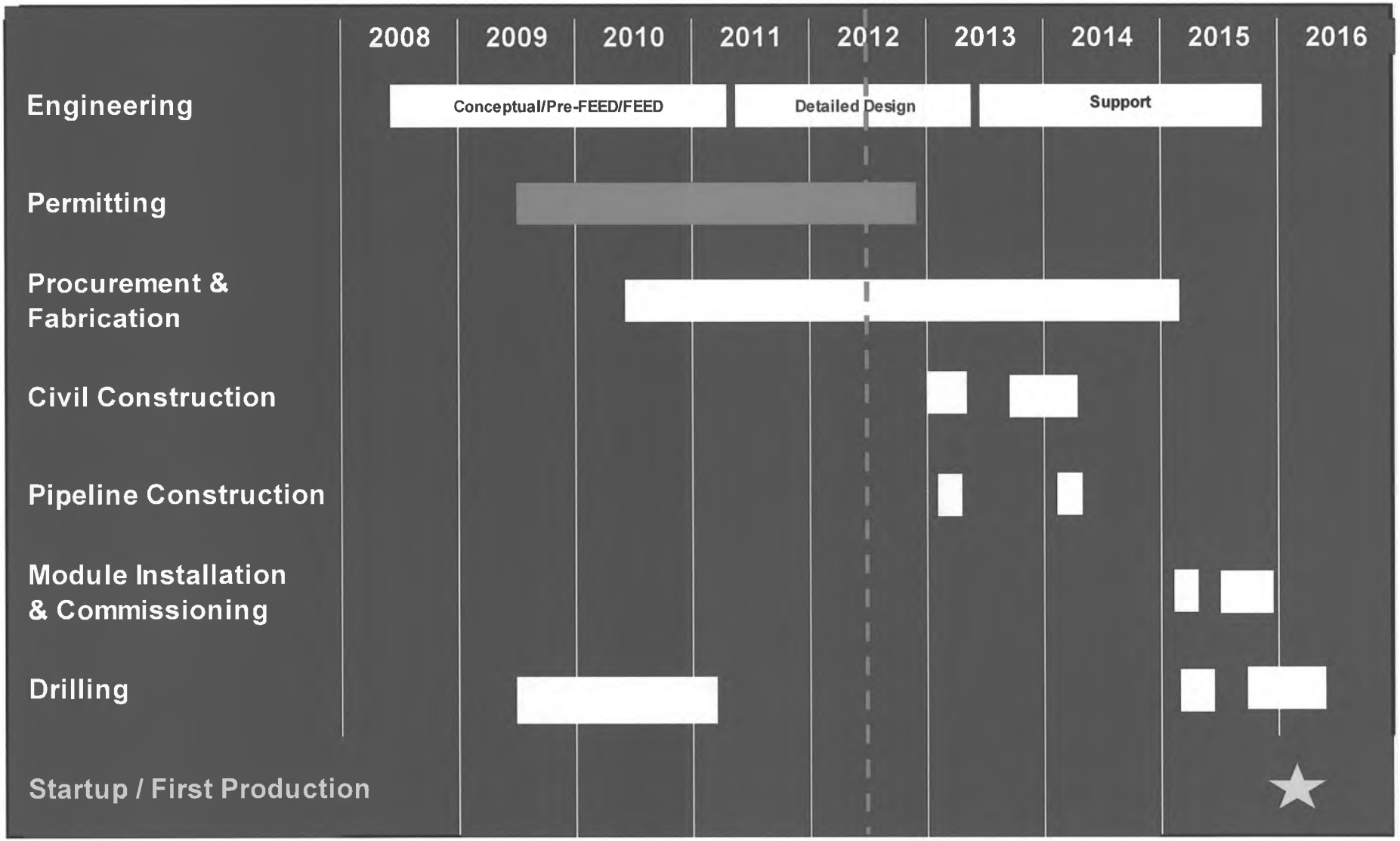


Key Challenges

- High reservoir pressures require 10,000 pounds per square inch gas compression to re-inject
- High carbon dioxide (CO_2) content at high pressure requires corrosive resistant design
- Minimal in-field infrastructure; materials and equipment supplied via coastal barge and sea ice roads
- Limited windows to perform drilling, logistics (ice road / barging) and construction activities

Clear and Committed Timeline

POINT THOMSON PROJECT



Today's Status

POINT THOMSON PROJECT

Engineering:

- Infrastructure and Pipeline engineering nearing completion by PND and Michael Baker, Jr., respectively
- Telecommunications engineering underway with GCI
- Facilities engineering ~ 40% complete

Procurement and Contracting:

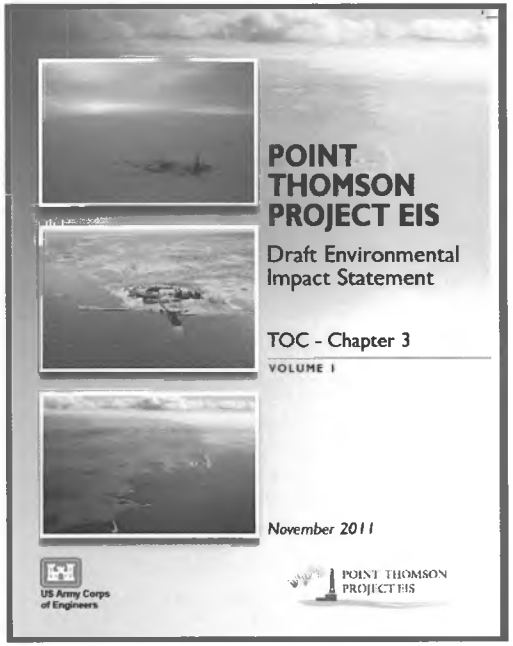
- Multiple purchase orders placed, all major equipment on order
- Major contracts awarded including: Infrastructure/Civil Construction, Export Pipeline, and Logistics

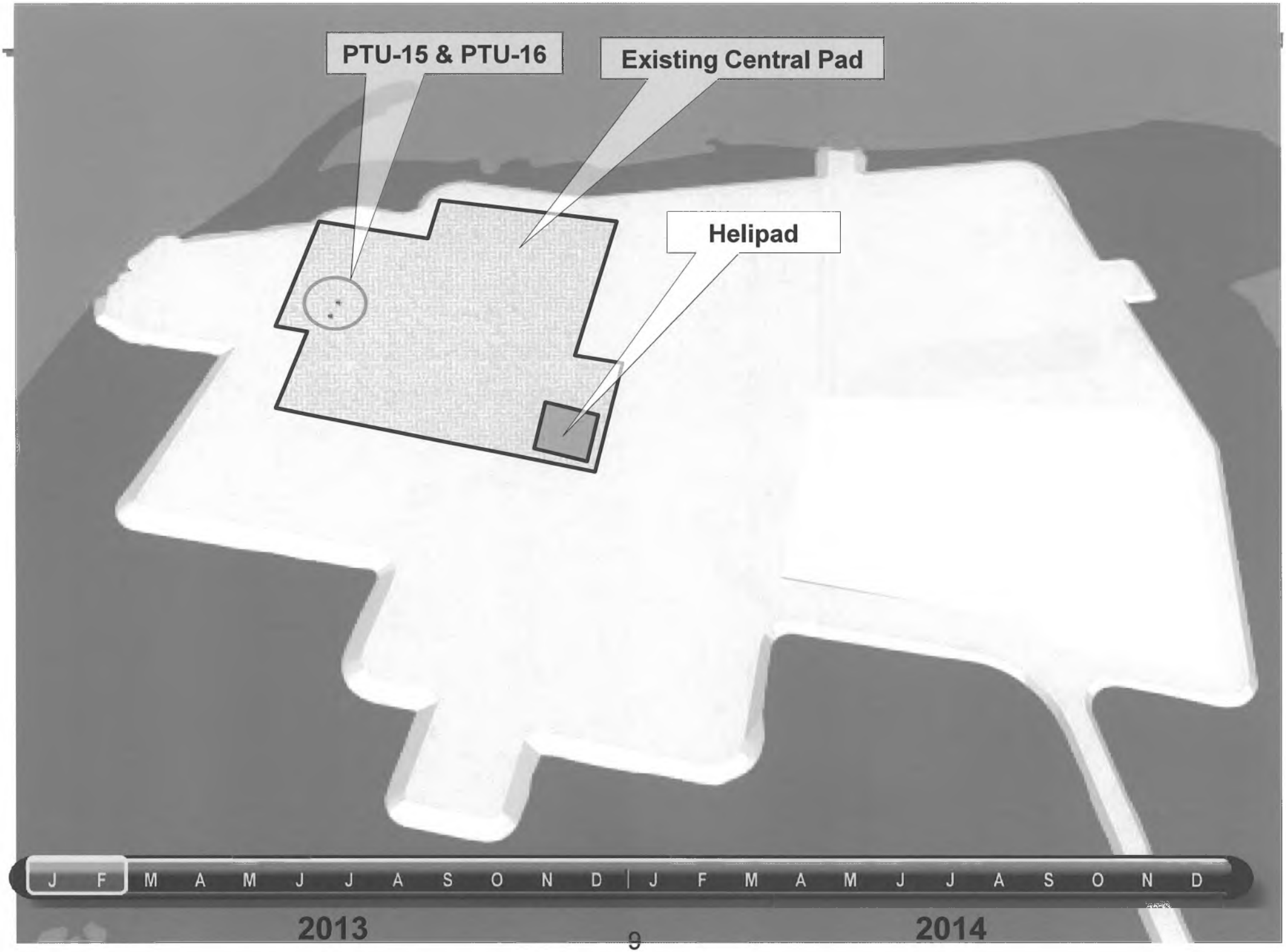
Fabrication and Construction:

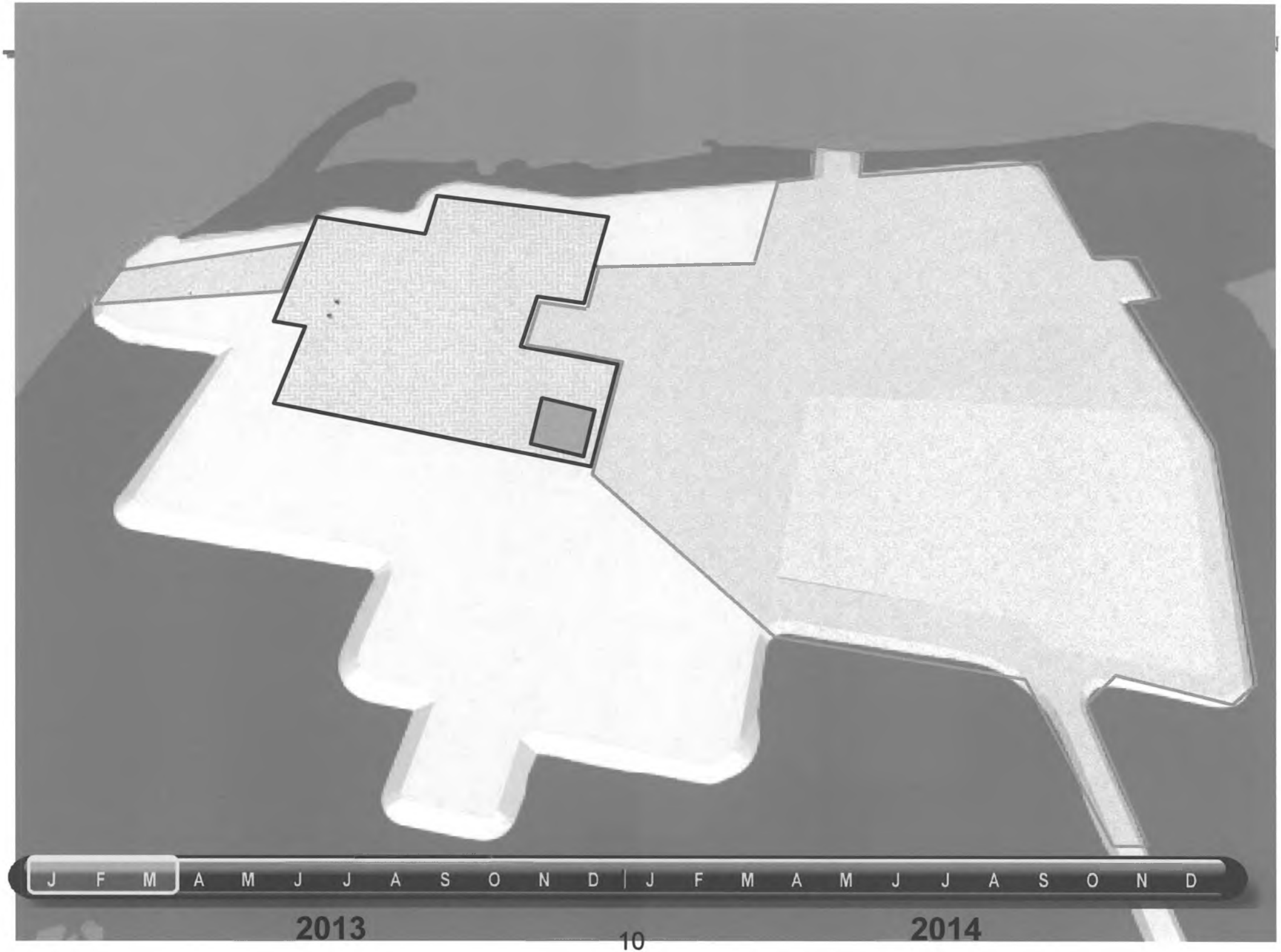
- Fuel Tank Construction commenced
- Execution Plans under development for Winter 2012-2013 construction season

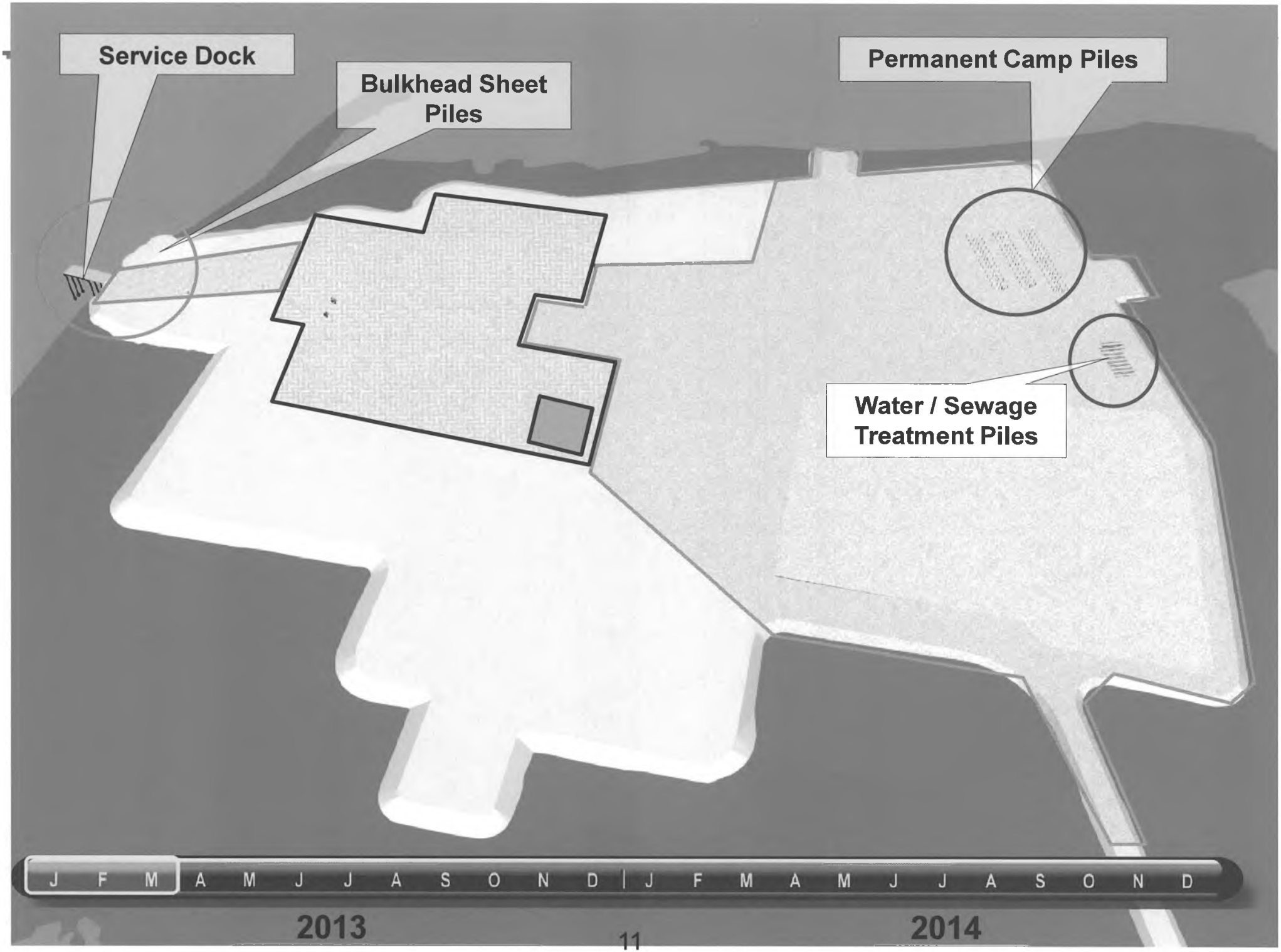
Permitting:

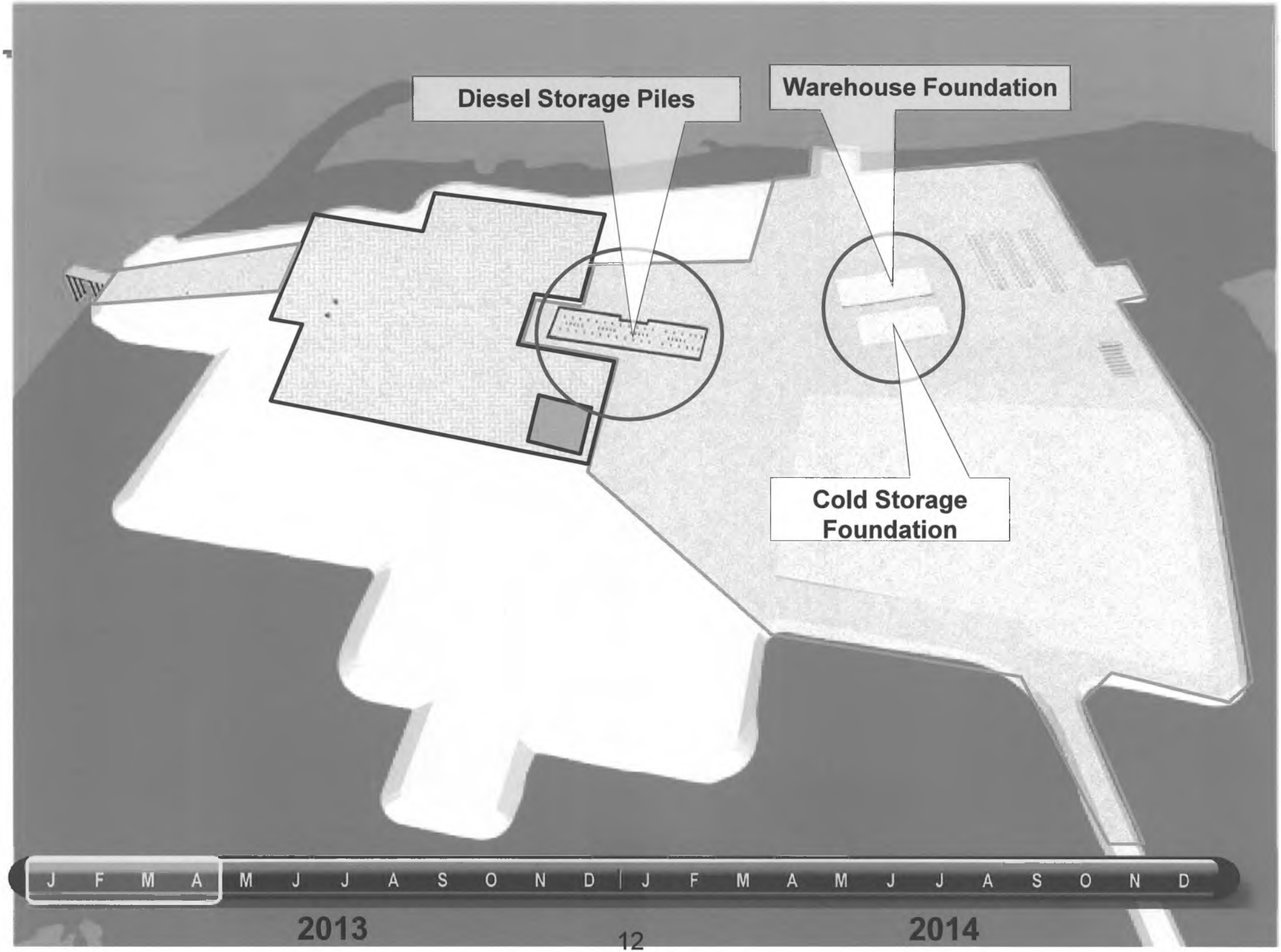
- Draft Environmental Impact Statement
- All major State and North Slope Borough permit applications have been submitted

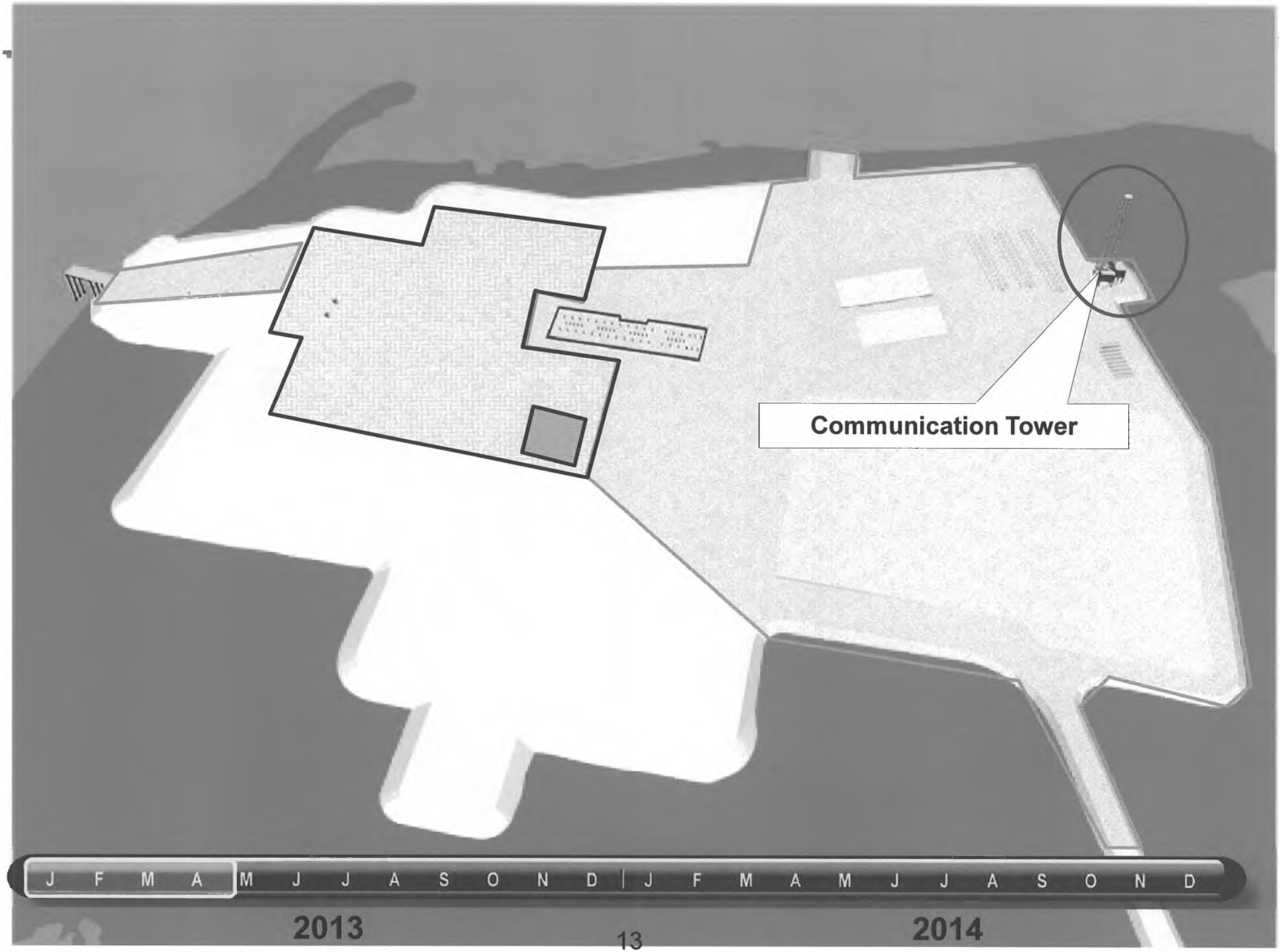



PTU-15 & PTU-16
Existing Central Pad
Helipad
J F M A M J J A S O N D J F M A M J J A S O N D
2013
2014


J F M A M J J A S O N D J F M A M J J A S O N D
2013
2014


Service Dock
Bulkhead Sheet Piles
Permanent Camp Piles
Water / Sewage Treatment Piles
J F M A M J J A S O N D J F M A M J J A S O N D
2013
2014


Diesel Storage Piles
Warehouse Foundation
Cold Storage Foundation
J F M A M J J A S O N D J F M A M J J A S O N D
2013
2014


Communication Tower
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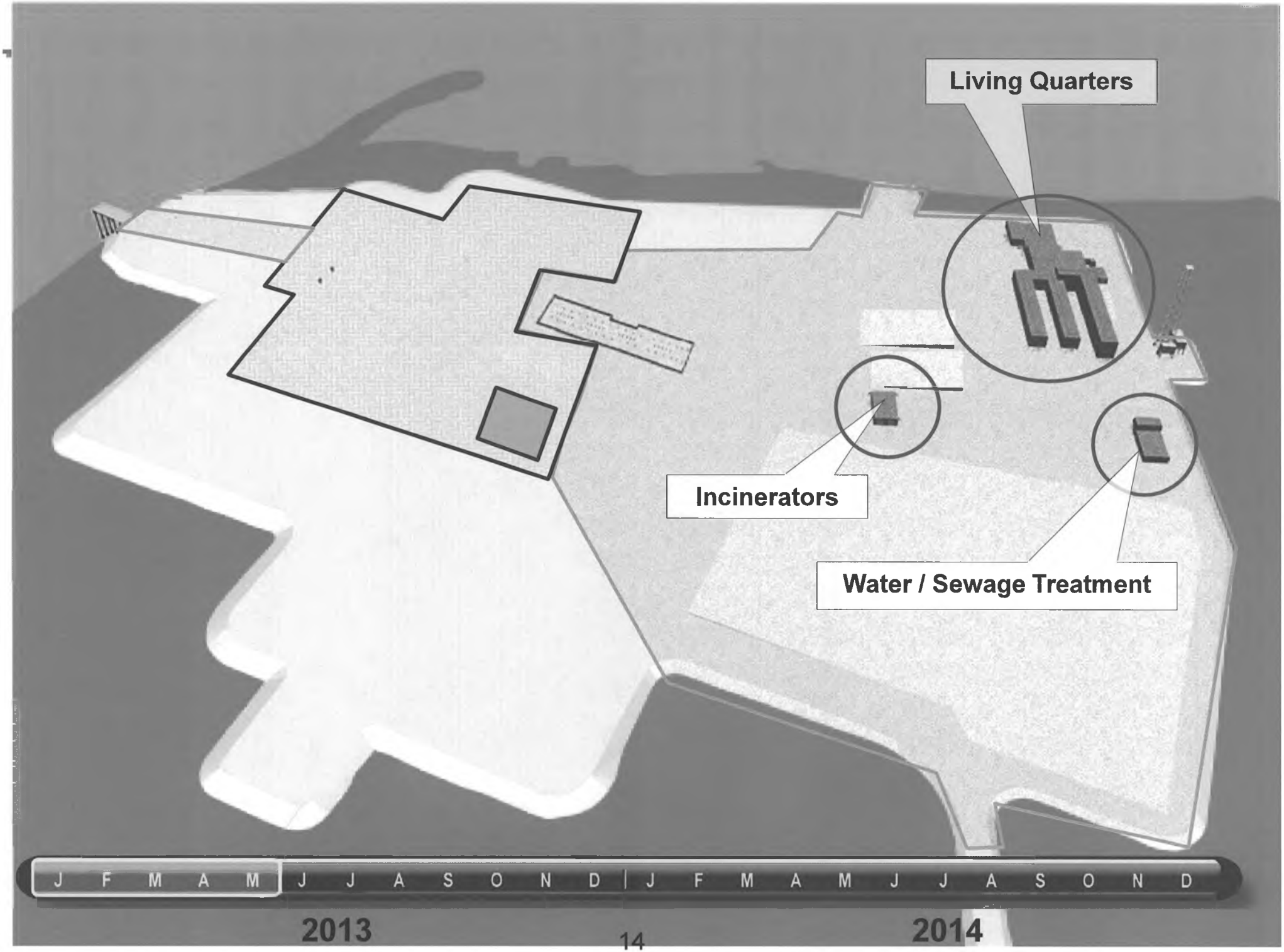
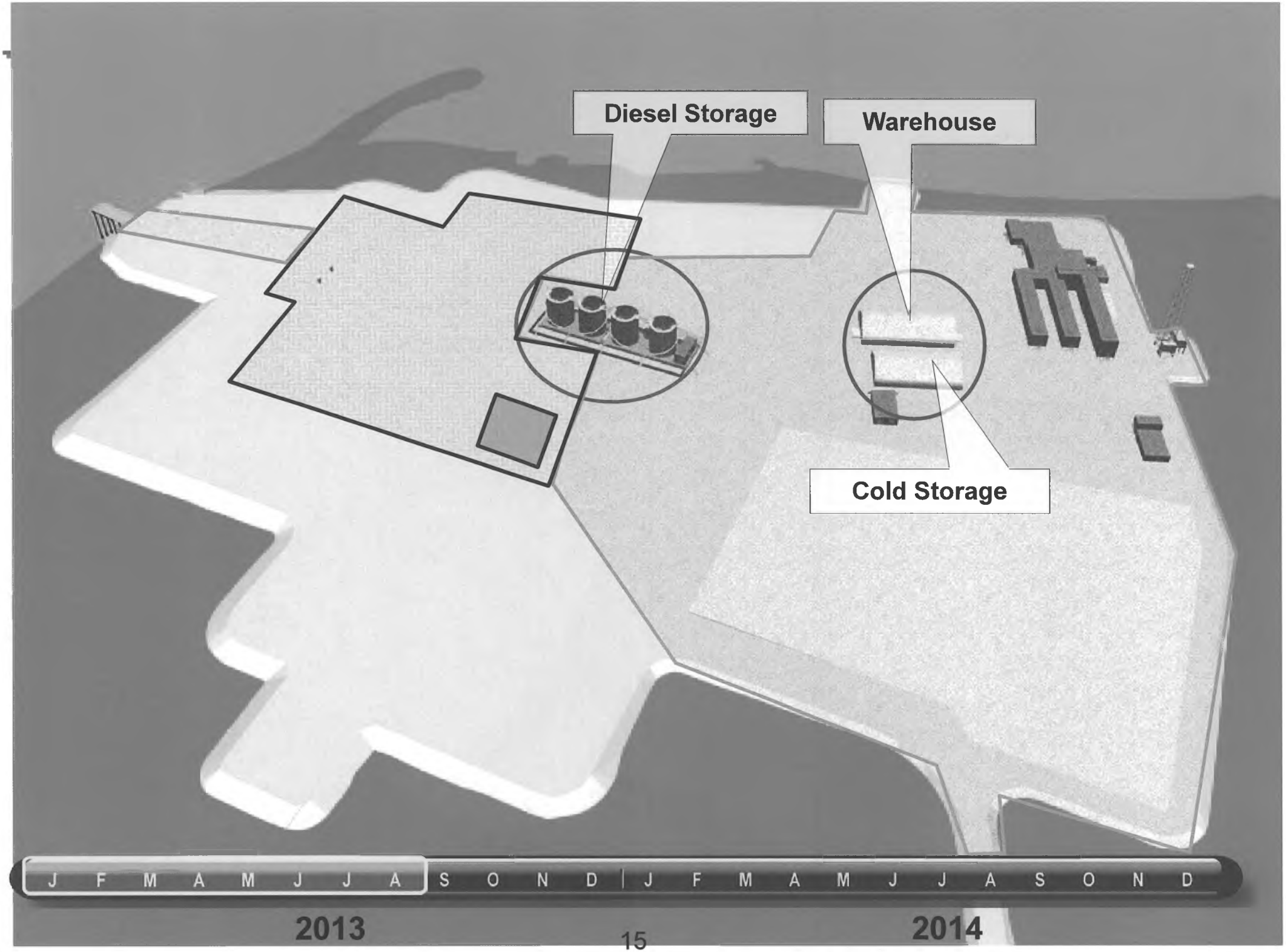
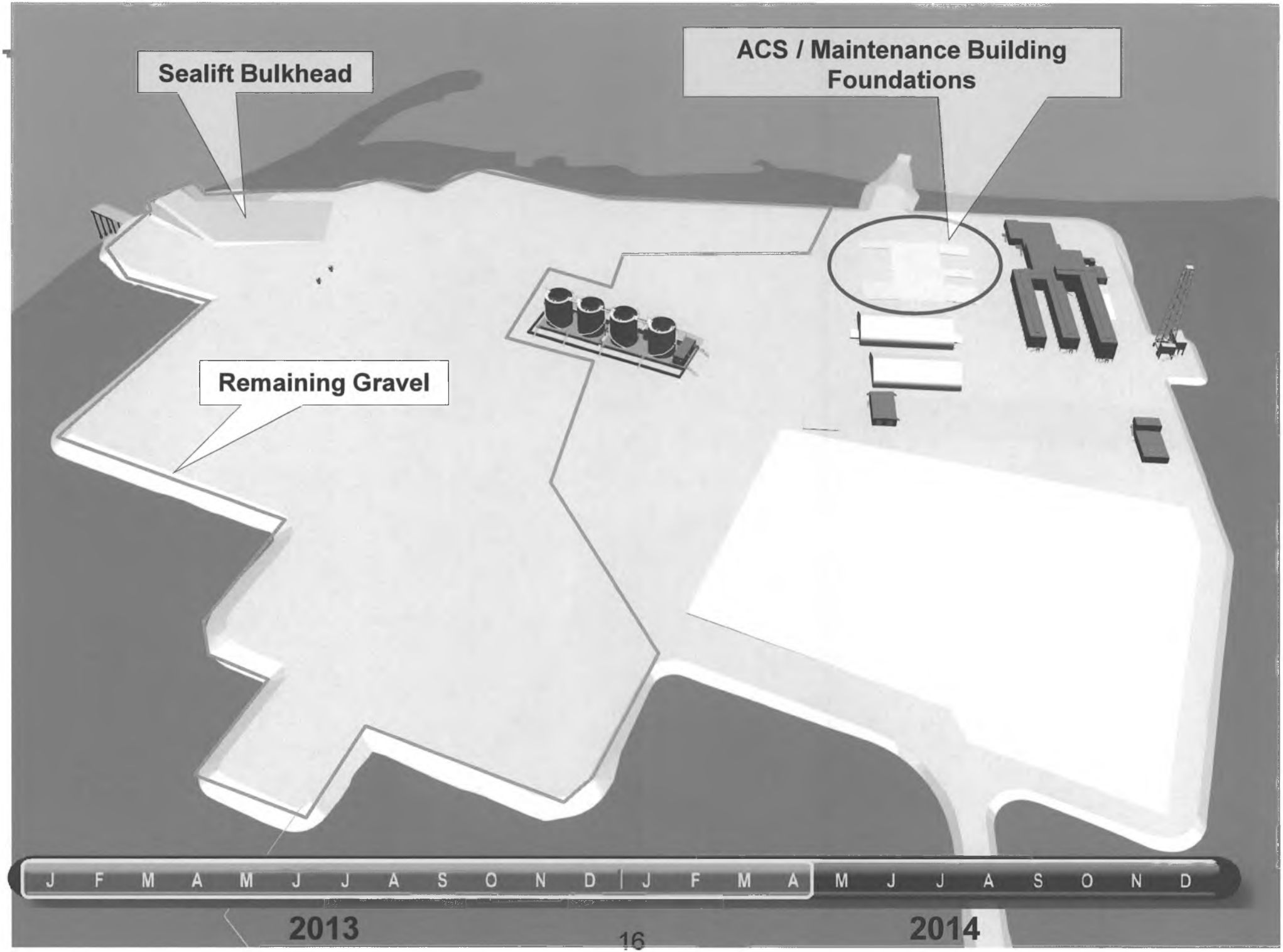
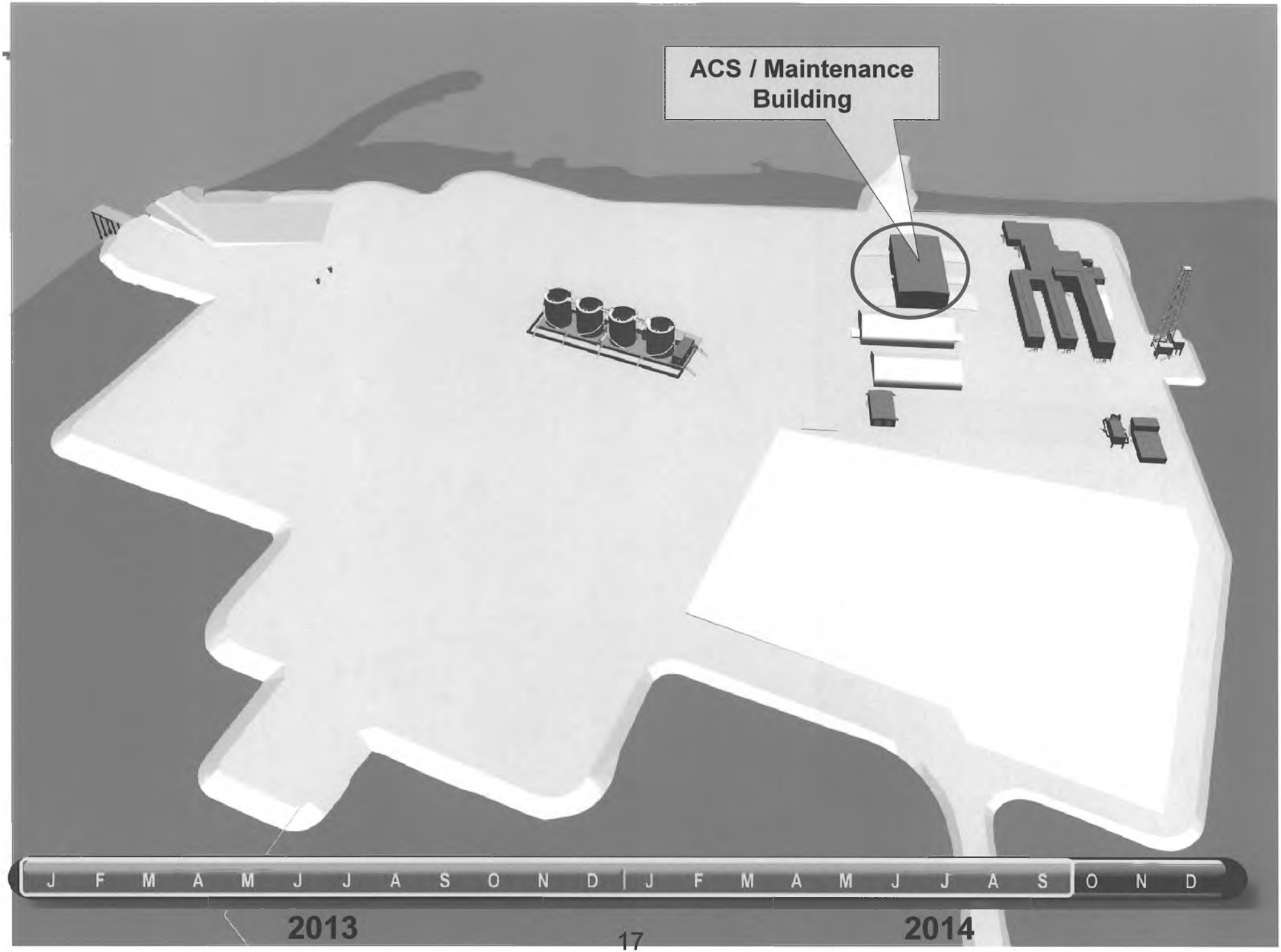
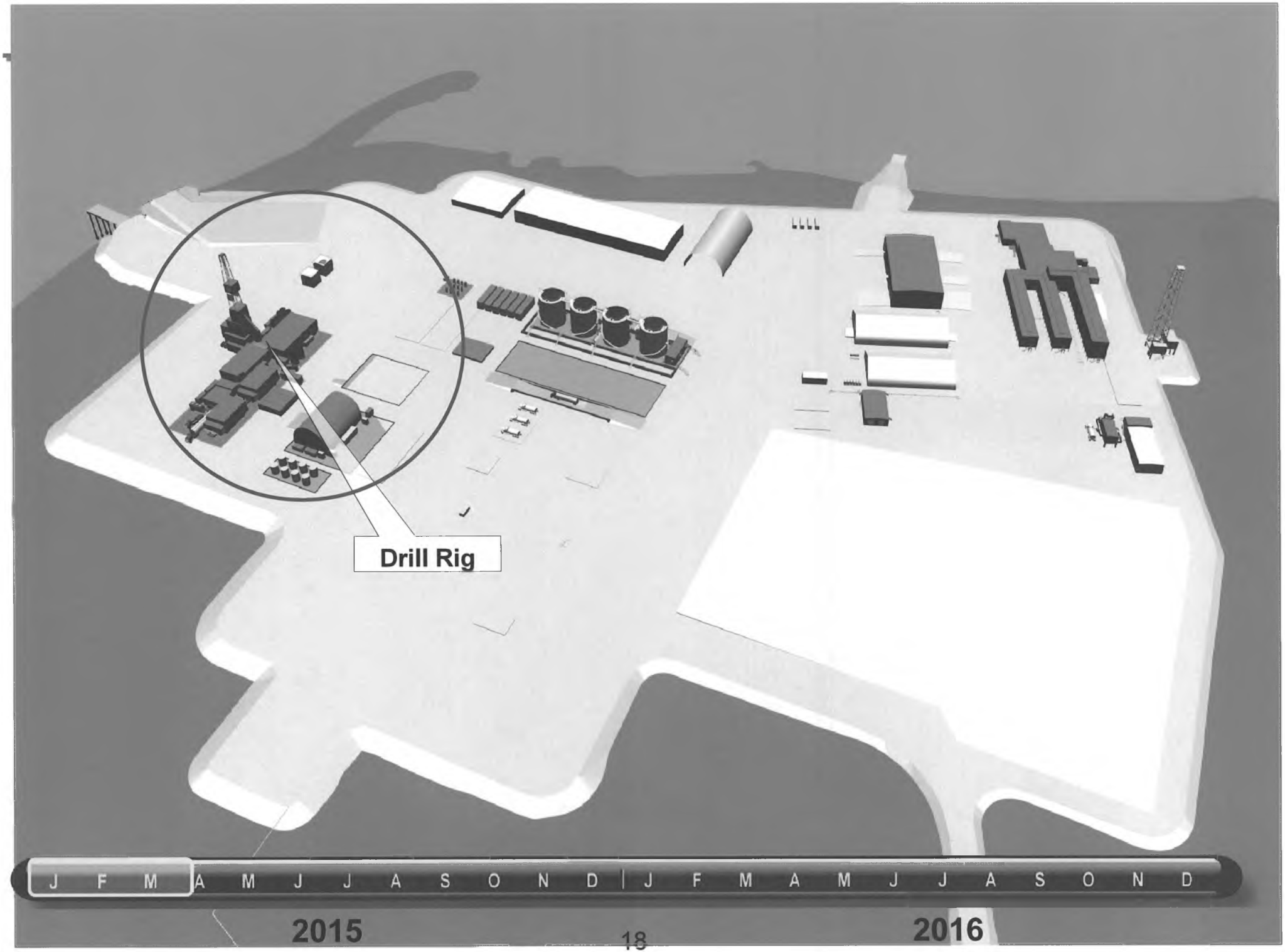
2013
2014

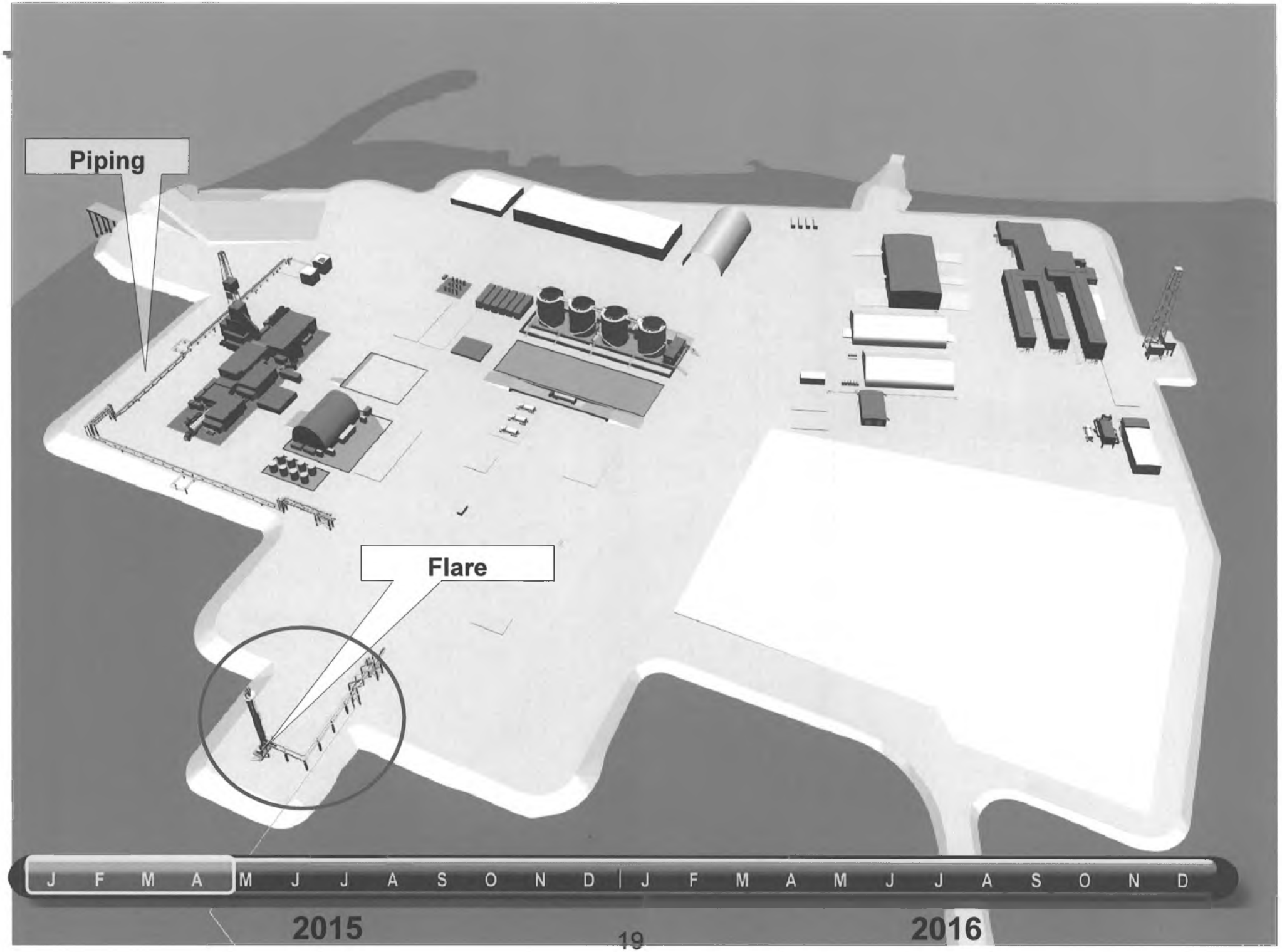

Living Quarters
Incinerators
Water / Sewage Treatment
J F M A M J J A S O N D J F M A M J J A S O N D
2013
2014

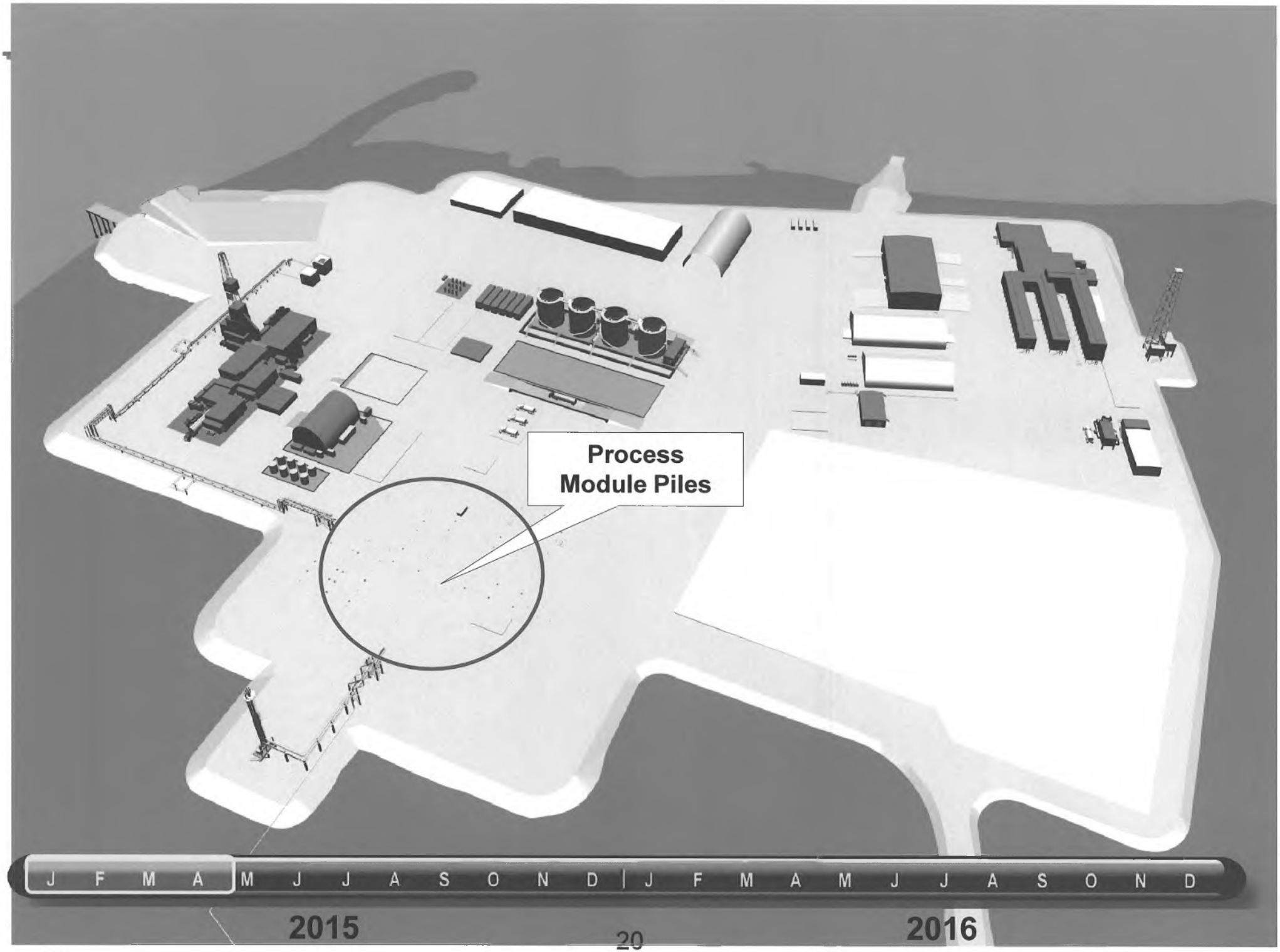

Diesel Storage
Warehouse
Cold Storage
J F M A M J J A S O N D J F M A M J J A S O N D
2013
2014

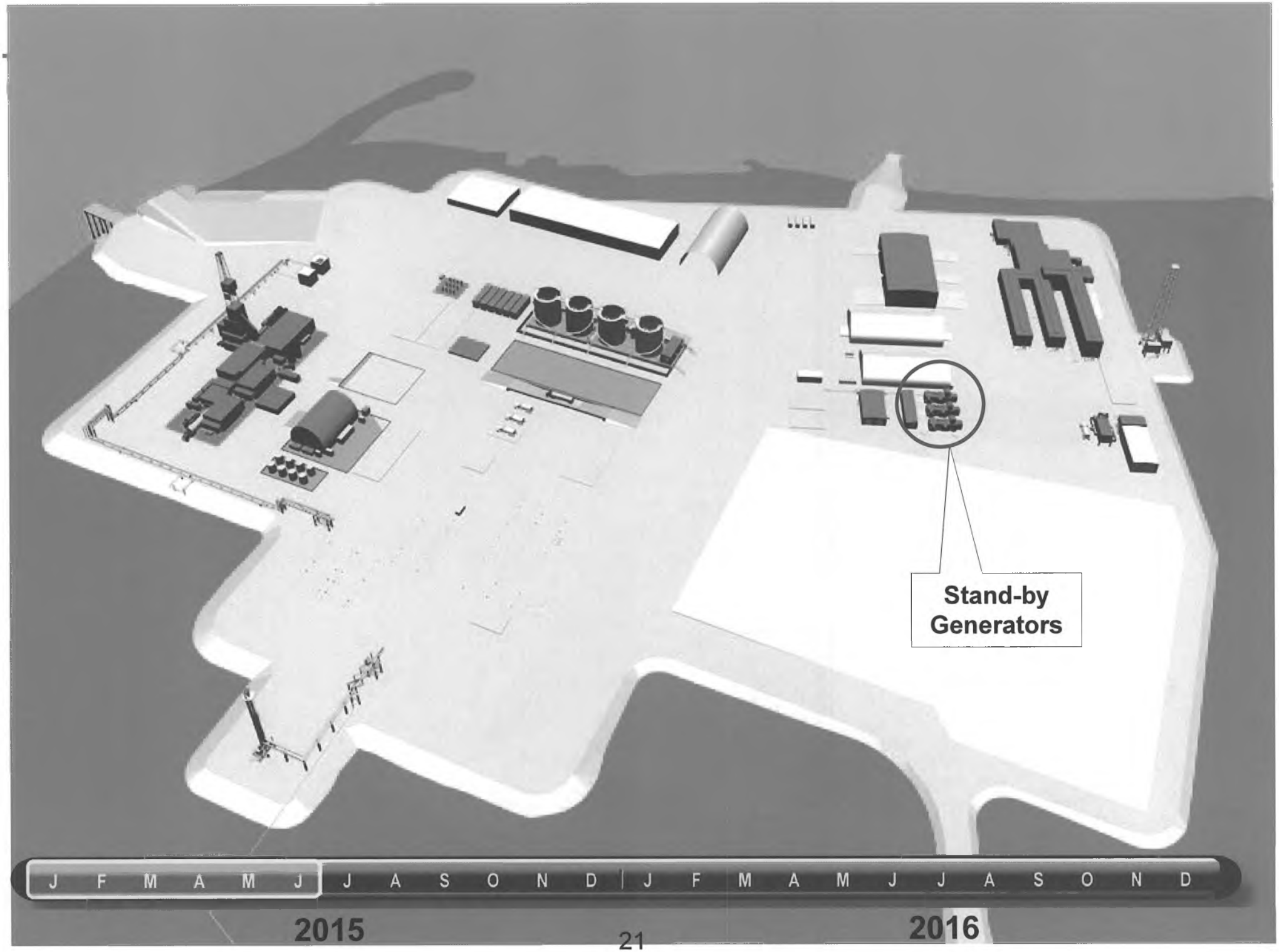

Sealift Bulkhead
ACS / Maintenance Building Foundations
Remaining Gravel
J F M A M J J A S O N D J F M A M J J A S O N D
2013
2014


ACS / Maintenance Building
J F M A M J J A S O N D J F M A M J J A S O N D
2013
2014


Drill Rig
J F M A M J J A S O N D J F M A M J J A S O N D
2015
2016


Piping
Flare
J F M A M J J A S O N D J F M A M J J A S O N D
2015
2016


Process
Module Piles
J F M A M J J A S O N D J F M A M J J A S O N D
2015
2016


Stand-by Generators
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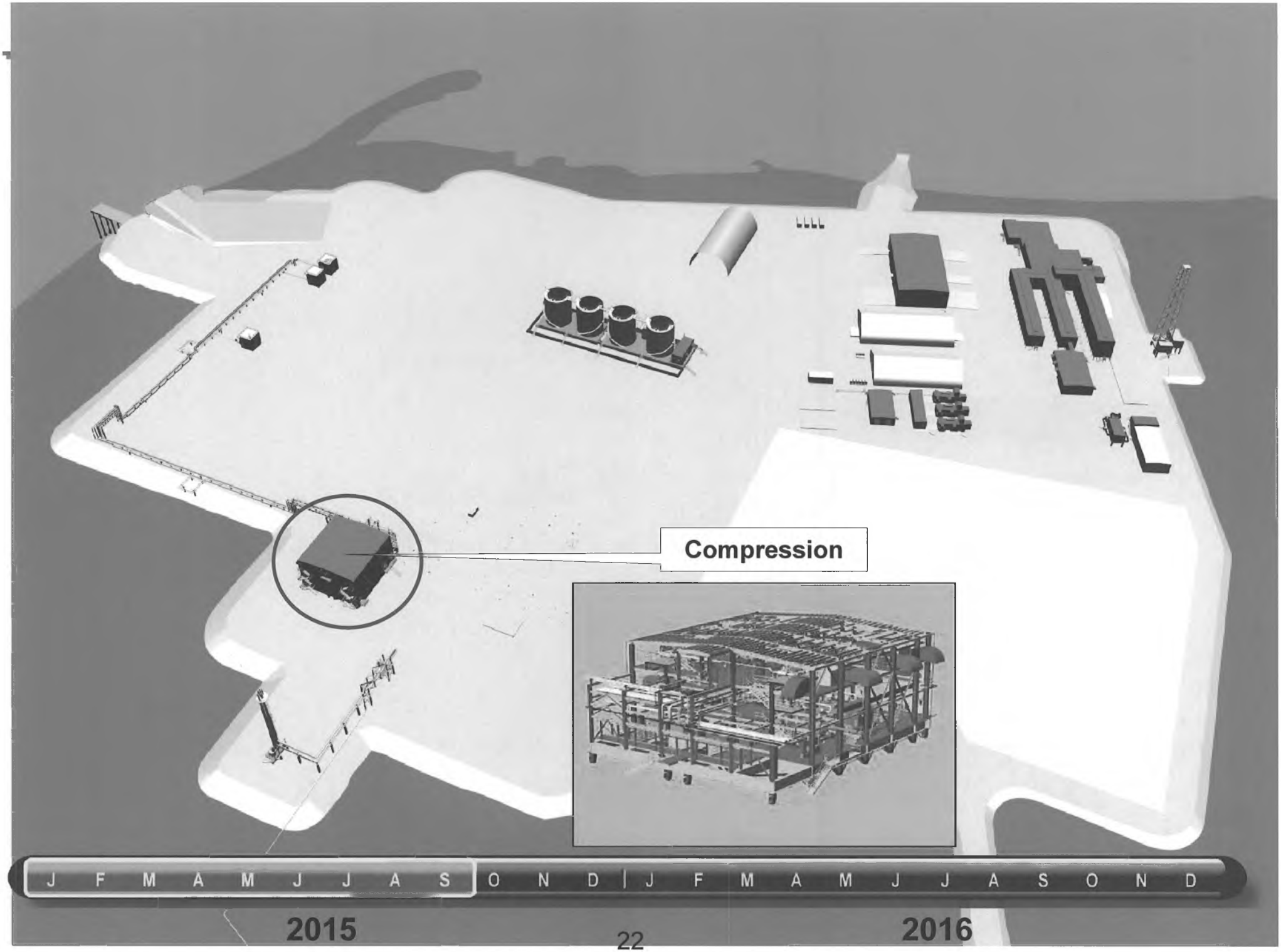
2015
2016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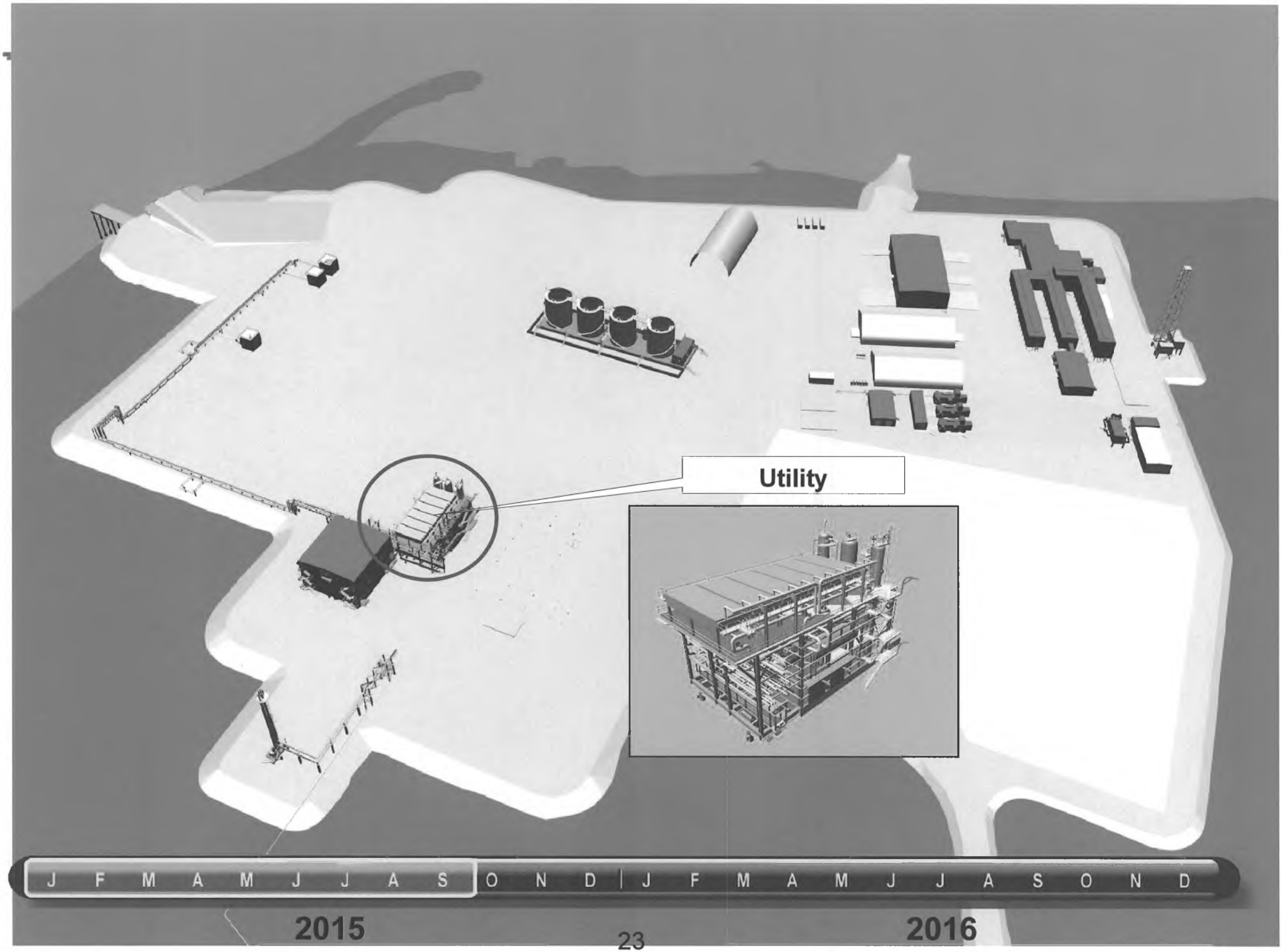
2015
2016


Utility
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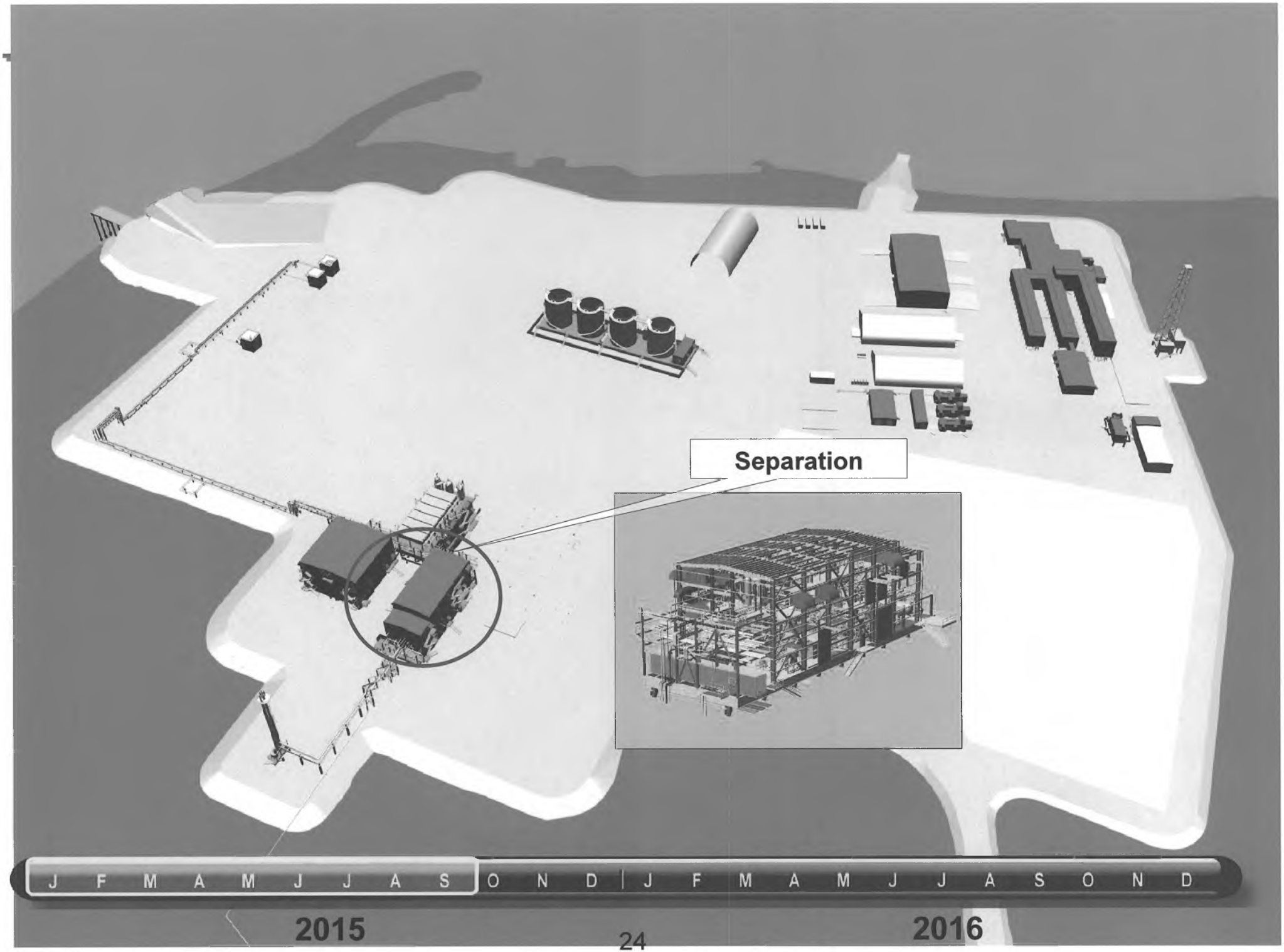
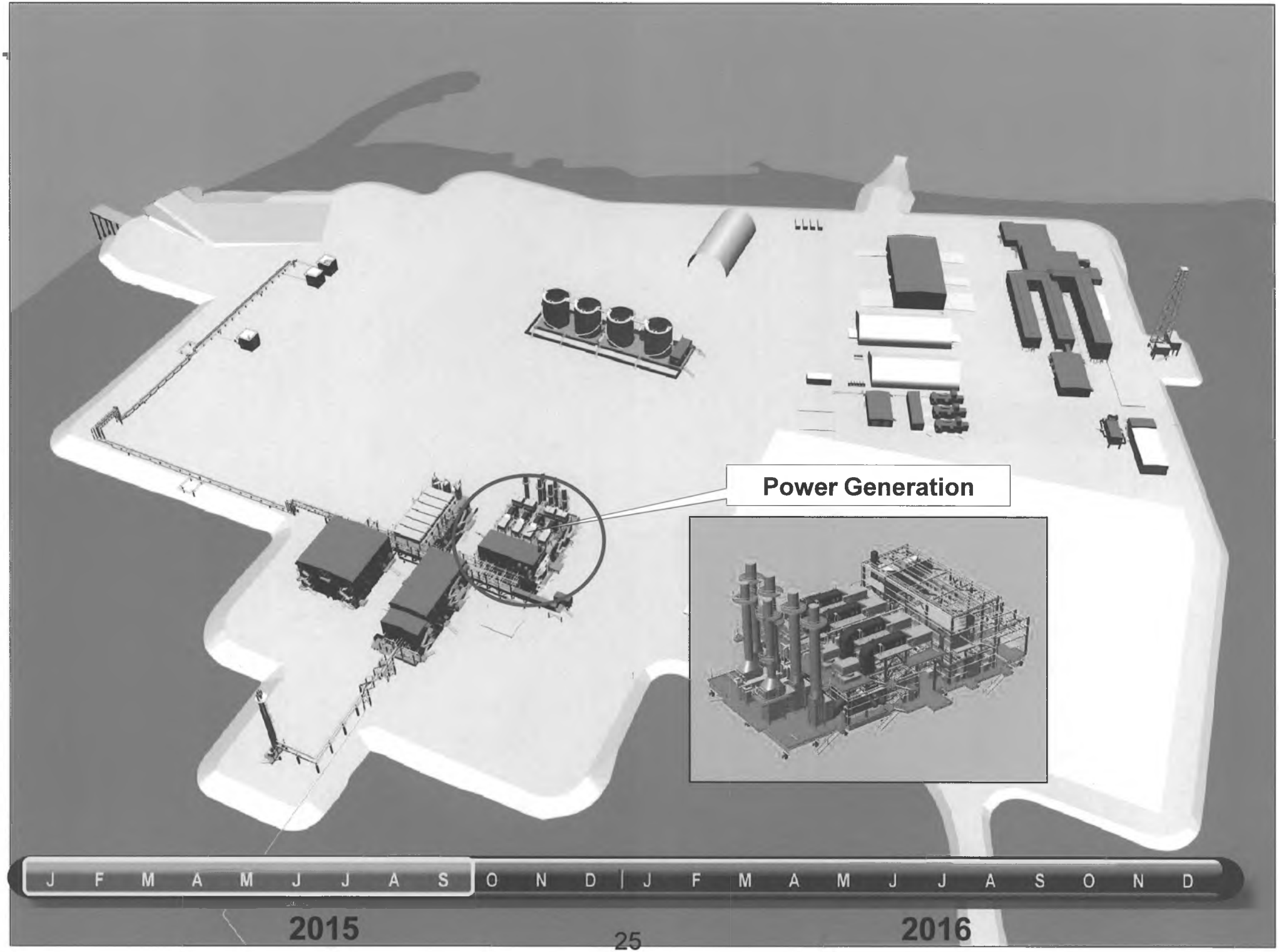
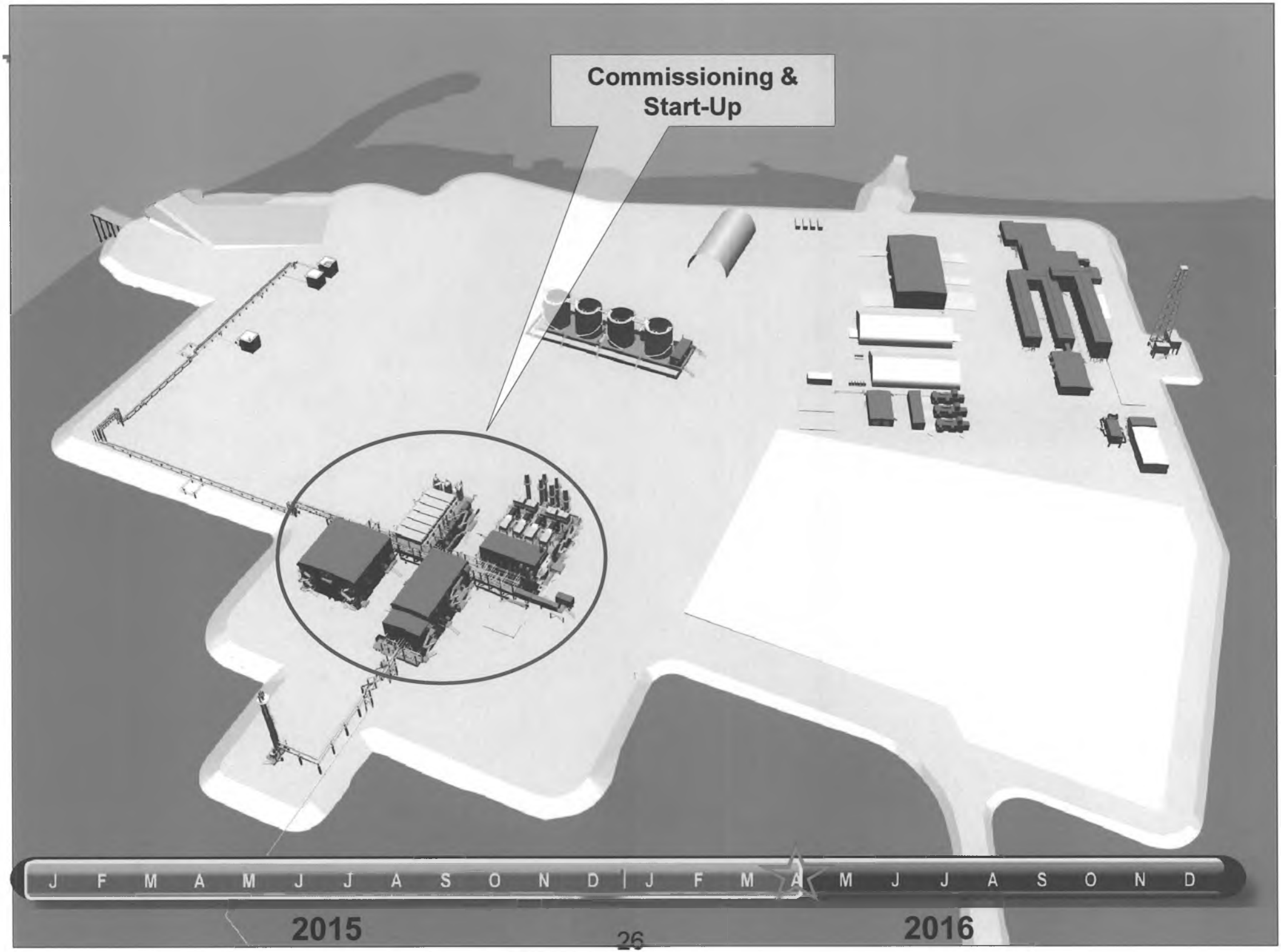
2015
2016

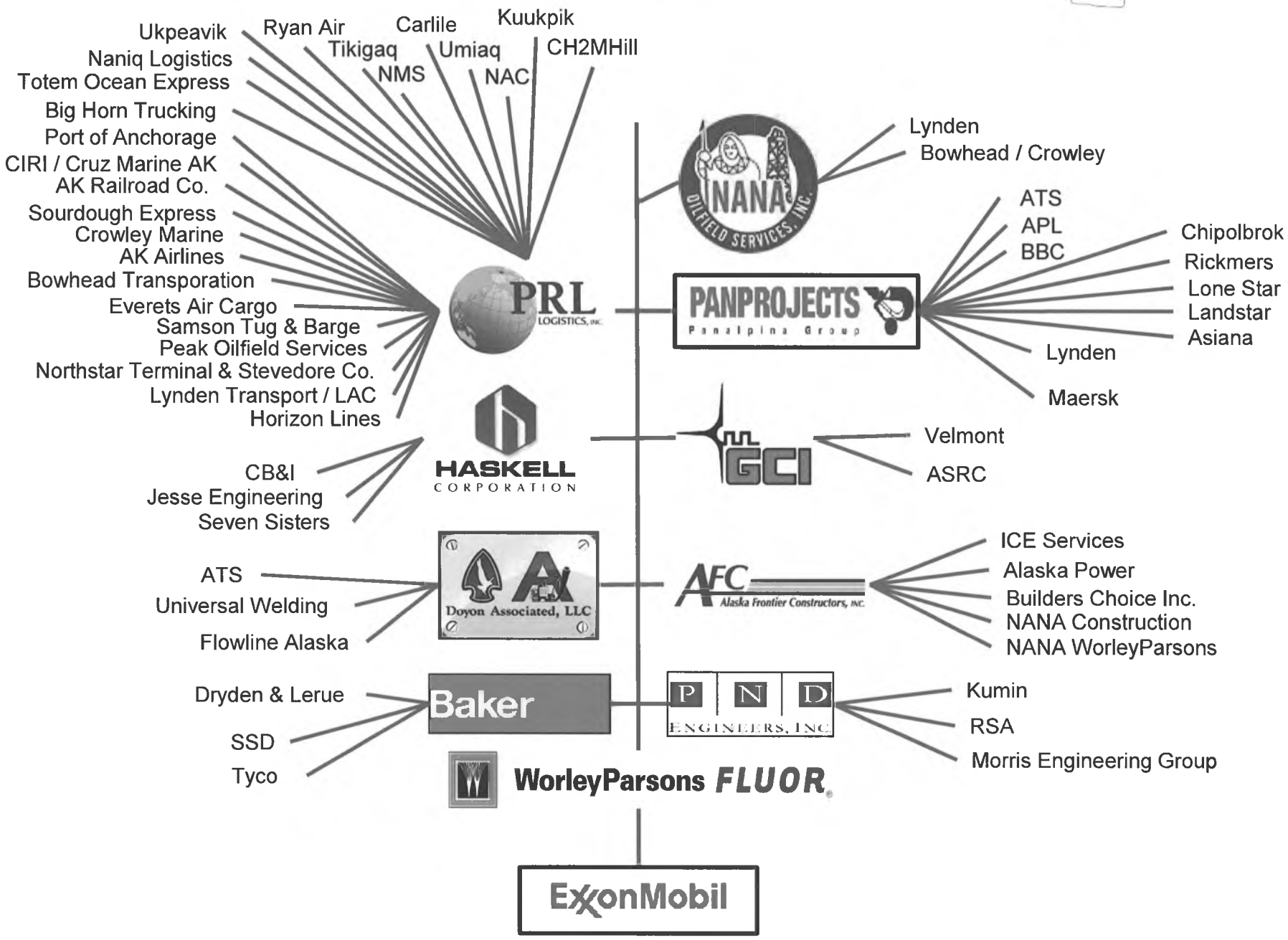

Separation
J F M A M J J A S O N D J F M A M J J A S O N D
2015
2016


Power Generation
J F M A M J J A S O N D J F M A M J J A S O N D
2015
2016


Commissioning &
Start-Up
J F M A M J J A S O N D J F M A M J J A S O N D
2015
2016

Contractors

POINT THOMSON PROJECT



Community Engagement and Consultation

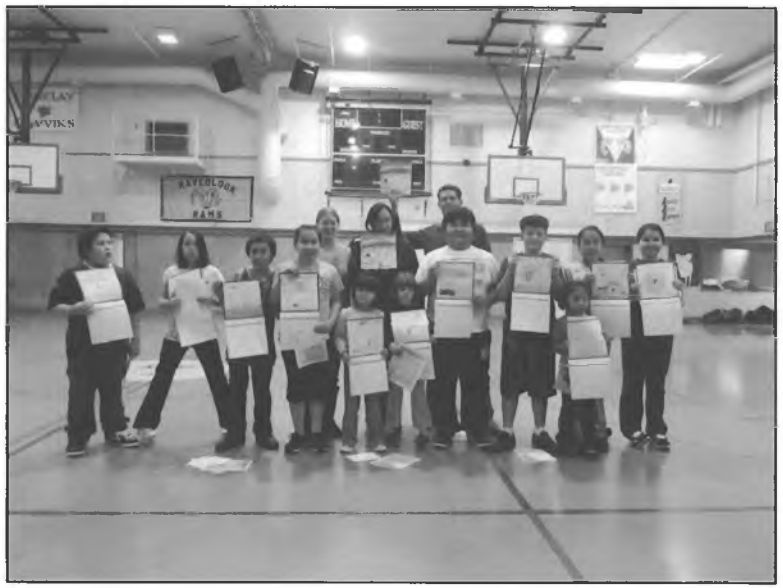
POINT THOMSON PROJECT

- Kaktovik Point Thomson Working Group established
  - Consultation with Village and Corporation leadership
- Community Meetings held in Kaktovik
  - Inform local residents and solicit feedback
- Specific design measures adopted as a result of local input
  - External paint colors and textures selected to reduce offsite visual effect
  - Export pipeline sections and gathering lines designed to withstand accidental bullet strikes
  - Pipelines elevated minimum 7-foot height above tundra for caribou migration
- Employment and Economic Benefits
  - Contracts with Regional and Village Corporations
  - Annual Career Fairs in Kaktovik
  - Subsistence Representatives, Marine Mammal Observers and Bear Monitors hired and trained
- Coordination with Traditional Whaling
  - Consultation with Kaktovik whaling captains and AEWC
  - Conflict Avoidance Agreement
- Protection of Native Allotments
  - Letters to owners/heirs
  - Ice road private property signage
- Education and Cultural Support

Direct benefits to the State of Alaska

POINT THOMSON PROJECT

- Commercializing North Slope natural gas resources is an important step forward for Alaska's economy and future, providing:
  - Business and job opportunities for Alaskans
  - New, long-term revenues for the state
  - Reliable sources of in-state energy supplies
  - Opportunity for further North Slope oil and gas exploration and resource development
- The Point Thomson Project provides direct benefits to the State of Alaska
  - Training and jobs for Alaskans
  - Revenues for Alaska
    - Native Corporations
    - North Slope Borough
    - State of Alaska
  - Increased throughput for Trans Alaska Pipeline
  - Continued community investment



Point Thomson Project

POINT THOMSON PROJECT

- Laying the foundation for future gas monetization on the North Slope

- Our vision includes:
  - Distinguishing our project with superior performance in safety, security, health, environment, quality, cost and schedule
  - Being good neighbors and partners with the communities in which we work
  - Building trust with the State of Alaska

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sean Parnell, Governor

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)269-5110

June 8, 2012

VIA EMAIL TO SENATOR_JOE_PASKVAN@LEGIS.STATE.AK.US
& 1ST CLASS MAIL

The Honorable Joe Paskvan
Alaska State Legislature
1292 Sadler Way, Suite 308
Fairbanks, AK 99701

Re: Point Thomson Settlement

Dear Senator ~~Paskvan~~ Joe:

Thank you for your letter of April 30, 2012. You have asked a number of questions about the State's settlement of *Exxon Mobil Corporation v. State, Department of Natural Resources*, 3AN-06-13751 (consolidated), the litigation about the Point Thomson Unit. I welcome the opportunity to respond, with the assistance of the Department of Natural Resources.

Initially, I would like to clarify some aspects of the terms of the Point Thomson Settlement agreement ("the agreement"), in particular, the reference to a gas pipeline. While the agreement refers to two pipelines, it offers only *one* development path—that is, a Major Gas Sale as defined in Section 2.16—that contemplates a gas pipeline leaving the North Slope. Similarly, the State has agreed to take its royalty-in-kind under only *one* development path, *i.e.*, where the WIOs (the Point Thomson working interest owners) produce Point Thomson gas and inject it into Prudhoe Bay to aid in enhanced oil recovery. The State has not made any agreements affecting its royalty rights should the WIOs sanction a Major Gas Sale and construct a large-scale pipeline off the North Slope.

A brief summary of the development paths in the agreement may be helpful. As described below, in order to maintain their Point Thomson acreage, the Point Thomson WIOs must complete the IPS Project:

- **IPS Project:** The agreement requires the WIOs to complete the IPS Project, which is a gas cycling project that will result in approximately 10,000 barrels per day (bpd) production of liquid condensate into TAPS. The WIOs have completed the two wells necessary for this project (PTU 15 and PTU 16) and must complete construction of the production infrastructure by 2015, including construction of a common-carrier pipeline with the capacity to transport 70,000 bpd of liquids to existing infrastructure

at Badami.[1] The agreement provides strict forfeiture penalties should the WIOs not complete the IPS Project.

The agreement also addresses what happens after the IPS Project. Specifically, the agreement contemplates three post-IPS Project development scenarios, one of which the WIOs must choose by year-end 2019 or they will lose Point Thomson acreage. DNR thoroughly evaluated these development alternatives and concluded that, as set forth and specifically defined in the agreement, they are all in the public interest. The agreement provides for three different development paths because it is not clear today what the optimal Point Thomson development will be more than five years from now.

The three post-IPS Project development scenarios are:

- **Major Gas Sale:** (referred to in your letter as Alternative A.) This development path is the large-scale gas pipeline project as defined in Section 2.16, now likely to be an LNG project. The pipeline capacity must be greater than 500 million cubic feet per day (mmcf/d) and it must transport gas "off the North Slope." In the agreement, the State has made no royalty commitments with respect to a Major Gas Sale. Rather, the State retains its full royalty rights under the leases and Alaska law, including the discretion to take royalty in-value or in-kind. The agreement is also clear that in proceedings before the AOGCC, DNR retains the right to oppose a Major Gas Sale development proposal at Point Thomson if the proposed project is inconsistent with the agreement's terms (including Section 2.21) and applicable state law. Under this development path, gas would be available for in-state use and export.

- **Expanded Gas Cycling:** (Alternative B.) Under this option, the WIOs would increase IPS Project production by at least 10,000 to 20,000 bpd of gas condensates (DNR expects that if the WIOs choose this option, they likely will produce well beyond 30,000 bpd of gas condensates due to project economics). Under this development path, Point Thomson gas would not be available for in-state use or for export.

- **Prudhoe Bay Injection Project:** (Alternative C.) Under this development path, the WIOs would "blow down" Point Thomson, delivering the resulting liquids production into TAPS and transporting the gas to Prudhoe Bay for injection in order to enhance oil recovery at Prudhoe Bay. This development scenario does not address construction of a gas pipeline off the North Slope. It would require only a pipeline running between Point Thomson and Prudhoe Bay. This project was added to the agreement to provide for a development path at year-end 2019 if no Major Gas Sale has occurred. Both the State and the WIOs are optimistic that this project, if chosen, will be an intermediate step toward a later Major Gas Sale. Indeed, the construction of the gas pipeline between Point Thomson and Prudhoe Bay would serve as a pre-investment to a future Major Gas Sale and positions Point Thomson gas for a future

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[1] The completion date of this project has been set back one year due to the Corps of Engineers' repeated delays in approving the WIOs' EIS application.

> Major Gas Sale. To select this development path, the WIOs must demonstrate that the enhanced oil recovery from Prudhoe Bay would offset any liquids loss from Point Thomson. *See* Section 2.21. In addition, the WIOs must persuade the AOGCC that this development option will satisfy state law requirements for conservation and maximum recovery. And the agreement is clear that DNR is free to oppose any development proposed to the AOGCC unless the proposal is consistent with the agreement's terms (including Section 2.21) and applicable state law.

Two elements of the Prudhoe Bay Injection Project seem to be causing confusion: (1) the State's agreement to take its royalty in-kind, and (2) the WIOs' commitment to make gas volumes available for sale to the State when it commits to this project. As explained in more detail below, taking royalty in-kind will ultimately maximize its value, and the immediate availability of gas will ensure a supply for the State while waiting for a large-scale gas pipeline project.

(1) State's agreement to take its royalty in-kind under the Prudhoe Bay Injection Project.

Under Alaska law and the terms of the Point Thomson leases and the unit agreement, royalty obligations attach when the gas leaves the unit boundary. In the event the WIOs choose and complete the Prudhoe Bay Injection Project, the State has agreed to take its royalty in-kind for gas that leaves the Point Thomson Unit boundary destined for injection at Prudhoe Bay. The State agreed to do this because the value of gas produced from Point Thomson and injected into Prudhoe Bay initially would be minimal. The State will therefore derive greater value from the gas by taking it in-kind and either: (a) having it injected into Prudhoe Bay along with the WIOs' gas to aid in enhanced oil recovery—which increases the State's royalty revenue from the resulting increased oil production; or (b) instead of re-injecting the gas, utilizing it for some other purpose, such as to fill an in-state gas pipeline. The agreement also provides that should the State choose to inject its in-kind gas into Prudhoe Bay, it can later withdraw this gas for in-state use. The State will not be responsible for any costs or fees associated with keeping its royalty-in-kind gas in the Prudhoe Bay reservoir.

The agreement also provides another choice for the State's royalty-in-kind gas —to leave it in Prudhoe Bay in anticipation of an eventual Major Gas Sale and construction of a large-scale pipeline off the North Slope. Under this scenario, once the big pipeline is complete, the WIOs would produce into this pipeline: (1) Prudhoe Bay gas; (2) Point Thomson gas that has been injected into Prudhoe Bay; and (3) previously unproduced gas from the Point Thomson field. For its part, the State could sell its in-kind gas that had been injected into Prudhoe Bay and put it in the big pipeline. The agreement also entitles the State to take payment in value from the Point Thomson lessees after project start-up of a Major Gas Sale for the State's Point Thomson in-kind gas that had been injected into Prudhoe Bay. By negotiating these royalty options, the State will derive greater royalty value than it would have by taking its royalty in-value when the gas is first produced from Point Thomson for injection into Prudhoe Bay.

(2) The WIOs' commitment to make gas volumes available for sale to the State if they choose the Prudhoe Bay Injection development path.

The Prudhoe Bay Injection Project also includes a commitment by the Prudhoe Bay WIOs to make significant gas from Prudhoe Bay immediately available to the State when they commit to the Prudhoe Bay Injection Project. This provision is intended to assure a sufficient supply of gas for the State if the WIOs choose this development option, because any "big pipeline" Major Gas Sale project would, at best, be several years away and potentially more. For example, if the WIOs committed to the Prudhoe Bay Injection Project in 2019, the State might need to take immediate action to secure an in-state gas supply. This is partly why the State has agreed to take royalty-in-kind—to have its own gas available for in-state needs as may be appropriate. To utilize its royalty-in-kind gas, however, the State would have to wait until the WIOs complete the Prudhoe Bay Injection Project. To ensure a supply of gas for State projects in the interim, the agreement provides that the State may purchase gas *immediately* upon the WIOs' commitment to a Prudhoe Bay Injection Project.

It is important to note that under this "make gas available immediately" provision, the State would purchase Prudhoe Bay gas owned by the Prudhoe Bay WIOs as a simple commercial sale. It would not be a purchase of, or an advance on, any eventual royalty-in-kind gas from Point Thomson. The price would be based on comparable, contemporaneous North Slope sales. The only relation these sales would have to the royalty-in-kind provisions discussed above is that the precise volumes of Prudhoe Bay gas made available to the State for immediate purchase will be tied to the anticipated volume of royalty-in-kind Point Thomson gas the State will receive upon completion of the Prudhoe Bay Injection Project.

And the State does not have to exercise its right to purchase gas. The provision was intended to provide flexibility to future policy makers, recognizing that if the WIOs choose the Prudhoe Bay Injection Project, a big pipeline Major Gas Sale project may not yet be on the immediate horizon, a fact that may have consequences for in-state gas use and energy planning.

Responses to Specific Questions

With this background, we now respond to your specific questions. Because several of the concerns you express seem to arise from a misunderstanding of some terms of the agreement, we have attempted to clarify such terms.

- **Under the Point Thomson settlement agreement, is the decision to build or not build a major gas sale pipeline under the sole control of the Point Thomson Working Interest Owners (WIOs)?**

No. The agreement provides that if a Major Gas Sale pipeline is constructed, the WIOs will retain Point Thomson acreage. The agreement does not inhibit or otherwise restrict the ability of any individual or entity to build a large-scale gas pipeline off the North Slope of Alaska.

- **As I currently understand the settlement agreement, there are only 2 alternatives which involve a gas pipeline: Alternative A, which would be a "major gas sale" pipeline built by the Producers with gas delivery off the North Slope and Alternative C, which would be an "in-state" pipeline built, if built, by someone other than the Producers. Is my understanding accurate?**

No. As the above discussion indicates, only one development path, a Major Gas Sale as defined in Section 2.16 (Alternative A), involves construction of a gas pipeline off the North Slope. Under the Prudhoe Bay Injection Project discussed above (Alternative C), the agreement provides for the WIOs to construct a gas pipeline running between Point Thomson and Prudhoe Bay, and for the gas to be injected into the Prudhoe Bay reservoir. The gas would be available to the State for in-state use in the event that a gas pipeline is built to transport gas off the North Slope, but such a pipeline is not an element of this development path. The Point Thomson Settlement does not prohibit the State, or anyone else, from building a gas pipeline to transport gas off the North Slope at any time.

- **Under the Point Thomson settlement, gas volumes greater than .5 bcf/d are defined as a "major gas sale." However, the AGIA process, requiring in-state volumes of less than .5 bcf/d, continues to obligate Alaska to $500 million in contributions to gas pipeline development with a risk of treble damages. The Point Thomson settlement seems to allow ultimate decision making with respect to construction or not of a gas pipeline of greater than .5 bcf to the producers [WIO's] until 2019 and then links Alaska's receipt of natural gas for in-state use to delivery of Point Thomson natural gas into a gas pipeline to Prudhoe Bay. The election by Alaska is mandatory under the settlement agreement in that Alaska is contractually obligated to take royalty-in-kind as compared to in-value once the Point Thomson gas is produced into the gas pipeline and goes to a Prudhoe Bay delivery point. Please let me know if this description as to Alaska's ability to receive natural gas for in-state use is not accurate. In part, I am concerned that Alaska's legal ability to receive natural gas is limited to the royalty share of natural gas out of Point Thomson.**

This description is not accurate. A "Major Gas Sale" is defined as a project transporting gas off the North Slope with throughput of more than 500 mmcf/d, but it does not limit Alaska's legal ability to receive its royalty share of natural gas from Point Thomson under any scenario. Nor is Alaska's legal ability to receive natural gas linked to delivery of Point Thomson gas into a pipeline to Prudhoe Bay. Rather, the agreement provides that should the WIOs choose to send Point Thomson gas to Prudhoe Bay for injection into that reservoir, the Prudhoe Bay WIOs *must* make gas available for sale to the State. This is not the only scenario, however, under which the State may procure natural gas from the North Slope.

Moreover, the AGIA project assurances provision (referred to in your question as "a risk of treble damages") does not require in-state volumes of less than 500 million cubic feet of gas per day. It would apply only if the State were to grant certain preferential tax, royalty, or monetary treatment "for the purpose of facilitating the construction of a competing natural gas pipeline project in this state … designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market." (*See* AS 43.90.440(a) and (c)(1)).

Senator Joe Paskvan

Alaska State Senate • District E • Fairbanks • Ft Wainwright

The Honorable Michael Geraghty
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811

April 30, 2012

Dear Mr. ~~Attorney General~~ Mike,

Thank you for participating in the Senate Judiciary Committee's Point Thomson settlement hearing on Friday, April 27th. I believe that it was important for the committee to seek a better understanding of the current position of the State with respect to a natural gas pipeline.

As I work my way through this complex legal issue, I would appreciate your continued assistance. Please reply to the following questions at your earliest convenience.

Under the Point Thomson settlement agreement, is the decision to build or not build a major gas sale pipeline under the sole control of the Point Thomson Working Interest Owners (WIOs)?

As I currently understand the settlement agreement, there are only 2 alternatives which involve a gas pipeline: Alternative A, which would be a "major gas sale" pipeline built by the Producers with gas delivery off the North Slope and Alternative C, which would be an "in-state" pipeline built, if built, by someone other than the Producers. Is my understanding accurate?

I am interested in receiving the Department of Law's broad description of the State's legal right to obtain natural gas from the North Slope.

I respectfully request any Attorney General opinions on the topic of the trigger of Alaska's royalty with respect to Prudhoe Bay and with respect to the Point Thomson settlement agreement. In particular, I generally understand that the trigger is at the point that gas leaves a unit. Under this scenario, unless gas leaves a unit, no royalty may be claimed by the state. Is my understanding accurate?

I also have concerns as to the concept of an "overlift." I request any Attorney General opinion as to this concept.

I am concerned that there are multiple and potentially competing forces involving natural gas pipeline development from the North Slope region. I assume that the AGIA constraint as to maximum volumes for an in-state gas pipeline (i.e., .5 bcf/d or less by volume) remains the law of the land. Is this accurate?

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Under the Point Thomson settlement, gas volumes greater than .5 bcf/d are defined as a "major gas sale." However, the AGIA process, requiring in-state volumes of less than .5 bcf/d, continues to obligate Alaska to $500 million in contributions to gas pipeline development with a risk of treble damages. The Point Thomson settlement seems to allow ultimate decision making with respect to construction or not of a gas pipeline of greater than .5 bcf to the producers [WIO's] until 2019 and then links Alaska's receipt of natural gas for in-state use to delivery of Point Thomson natural gas into a gas pipeline to Prudhoe Bay. The election by Alaska is mandatory under the settlement agreement in that Alaska is contractually obligated to take royalty-in-kind as compared to in-value once the Point Thomson gas is produced into the gas pipeline and goes to a Prudhoe Bay delivery point.

Please let me know if this description as to Alaska's ability to receive natural gas for in-state use is not accurate. In part, I am concerned that Alaska's legal ability to receive natural gas is limited to the royalty share of natural gas out of Point Thomson.

If the Point Thomson WIOs control the gas volumes out of Point Thomson, does that also mean that the gas volumes of natural gas available for in-state use by Alaskans is controlled by the Point Thomson WIOs? Further, does the Point Thomson settlement in any way put Alaskans at risk of having to potentially accept a blow down of Point Thomson in order to have natural gas sufficient to fill an in-state gas pipeline? If the in-state line were built at .5 bcf/d in volume from Prudhoe Bay, does this mean that Alaska's $1/8^{th}$ royalty share requires 4 bcf/d in natural gas from Point Thomson to Prudhoe Bay for Alaskans to have rights of access to gas? I ask this question as page 16 of DNR's Settlement Overview states in part: "Once Point Thomson gas is transmitted to Prudhoe Bay, state royalty-in-kind (RIK) is made available for in-state use." Further, I ask this question as page 6 of DNR's Settlement Overview states in part that the settlement: "Provides potential for significant gas volumes for in-state use no later than 2019."

As to a major gas sale pipeline [Alternative A] built by the Producers, what is the most optimistic date for completion of such a line such that there were actual gas volumes for in-state use? As to a decision by the Producers not to build a major gas sale pipeline, what is the earliest and latest date under the settlement agreement for the public announcement of that decision? If and when the WIO decision is made that the Alternative A pipeline will not be built, does that become the date when it is first known that the Alternative C gas pipeline may be necessary to build a gas pipeline from the North Slope solely for in-state use?

Is 4 bcf/d in natural gas out of Point Thomson consistent with a blow down of Point Thomson? Under the settlement agreement, is Alaska forced to accept the blow down of Point Thomson gas, which may be wasteful of the oil resource, in order to receive its royalty share of .5 bcf/d for an in-state gas pipeline?

What volumes of gas, if it is something other than 4 bcf/d out of Point Thomson, are consistent with a blow down of Point Thomson?

Can Alaska require the Producers to produce .5 bcf/d from Prudhoe Bay alone for in-state use, even if Point Thomson is not developed? By agreeing to accept RIK from Point Thomson, does this mean that only after Point Thomson gas is delivered to Prudhoe Bay will Alaska have the legal right to significant volumes of gas for in-state use?

Why is Alaska waiving its right to royalty-in-value even if no in-state gas pipeline exists?

Assuming the Alternative A pipeline is built by Point Thomson WIOs, is the only requirement under the settlement agreement, for access to Prudhoe Bay natural gas for in-state use, triggered when a major gas sale decision is made by Point Thomson WIOs? If the Point Thomson WIOs decide not to build a major gas sale pipeline, is the only access to natural gas by way of a gas pipeline built by someone other than the WIOs? In other words, is it true that gas under the Alternative C approach for in-state use only will not be built by the Producers?

Can Alaska "compete" with the Point Thomson WIO's and develop an Alternative C pipeline with volumes for export? In other words, can the state at this time participate in developing a gas line with volumes greater than .5 bcf/d without violating the Point Thomson settlement agreement [or the AGIA statutes]? If the state were to do this, will, at the minimum, the WIO's contractual obligation under the settlement agreement be voided or nullified as to an Alternative A pipeline? Under Alternative A of the settlement agreement, can it be assumed that no gas pipeline will be built with state participation which may have an export component?

Is the only line which "economics or costs…cannot be used as a rationale or justification for not completing…," the 12-inch line for Point Thomson liquids from Point Thomson to Badami? Is the same 12-inch liquids pipeline eligible for royalty modification under section 4.8 of the settlement agreement?

Can an in-state line be built with volumes greater than .5 bcf/d without violating either or both AGIA statutes and the Point Thomson settlement agreement? Does the settlement agreement set the maximum gas volumes for an in-state line at .5 bcf/d or less? Does the settlement agreement assume Alaska's good faith in not developing an in-state pipeline until the WIO's have made their decision whether to construct the large diameter Alternative A pipeline? If any gas pipeline were built in excess of .5 bcf/d by someone other than the WIO's under the settlement agreement, would that relieve the WIO's from having to perform under Alternative A or other portions of the settlement agreement? If any gas pipeline were built in excess of .5 bcf/d by someone other than TransCanada, would that someone currently be in violation of the AGIA statutes?

Comments have been made that AGIA's statutes may be applied to an in-state gas pipeline. Why? Isn't any discussion of an in-state gas pipeline premature until the WIOs have determined that a major gas sale pipeline will be built? Has TransCanada agreed to the WIOs' construction of a gas pipeline as defined as a major gas sale pipeline? I believe that AGIA's limitation prohibits an in-state gas line with a design capacity greater than .5 bcf/d. Is this correct? Does

the Point Thomson settlement agreement provide for the potential construction under Alternative A approach of a gas pipeline with design capacity greater than .5 bcf/d? Is the Point Thomson settlement agreement in current conflict under the language of the AGIA statutes as to the construction of an LNG export line under Alternative A concept of the Point Thomson settlement? Has TransCananda been contacted for its approval of the Point Thomson settlement agreement as relates to a pipeline other than that as set forth in the AGIA statutes? If so, please provide all documents as to the contacts and agreements reached. Did the Commissioner under the AGIA regulatory process or otherwise specifically reject the LNG approach?

Will a large diameter gas pipeline – for example, a 4.5 bcf/d pipeline – produce the lowest tariff as compared to an in-state pipeline of 1 bcf/d or smaller? Stated otherwise, will a .5 bcf/d pipeline or less produce a higher tariff than a large diameter pipeline?

Will injecting another gas pipeline concept, whether in the format of HB 9 or otherwise, produce more potential for Alaska to be in breach of either AGIA or the Point Thomson settlement agreement with respect to gas from the North Slope? Is it true that a gas line from Cook Inlet to Interior Alaska does not and cannot in any way violate either the AGIA statutes or the Point Thomson settlement agreement?

Does the construction of an in-state gas line, in compliance with AGIA limitations, impede or potentially remove any obligation upon Point Thomson WIOs to construct an Alternative A gas pipeline?

Does Alaska shoot itself in the foot with respect to a higher tariff if the State advances a small-diameter pipeline for in-state use and, shortly after, the WIOs, under the terms of the Point Thomson settlement, decide to build a lower tariff large-diameter pipeline?

If you have any comments or questions, please don't hesitate to contact me any time.

Sincerely,

Joe Paskvan

Joe Paskvan

Cc Senator Gary Stevens, President, Alaska State Senate
Senator Hollis French, Chair, Judiciary Committee
Senator Bert Stedman, Co-Chair, Finance Committee
Commissioner Dan Sullivan, Department of Natural Resources

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June 7, 2012

VIA EMAIL TO SENATOR_HOLLIS_FRENCH@LEGIS.STATE.AK.US
& U.S. MAIL

The Honorable Hollis French
Alaska State Legislature
716 W. 4th Avenue, Suite 420
Anchorage, AK 99501-2133

Re: Point Thomson Settlement Agreement

Dear Senator French:

Thank you for this opportunity to explain certain aspects of the settlement of *Exxon Mobil Corporation v. State, Department of Natural Resources*, 3AN-06-13751 (consolidated), the litigation that arose after DNR terminated the Point Thomson Unit. During the Senate Judiciary Committee hearing on April 27, 2012, Mr. William Walker, Mr. Craig Richards, and Dr. Mark Myers raised questions and concerns about the settlement agreement. Many of these points relate to technical issues that are best addressed by DNR, and I defer to that agency on these matters. I would like to discuss the legal allegations that Mr. Richards has made on behalf of Mr. Walker, however.

Mr. Richards and Mr. Walker argue that the settlement agreement violates Alaska law, citing several reasons for their allegations. They are incorrect on the law—as I explain below—but even more fundamentally, they misunderstand the authority of the Attorney General to settle the cases. Alaska's Attorney General has broad authority to enter into any agreement to settle litigation that he or she believes is in the best interest of the State.[1] The exercise of this authority is not subject to legislative approval or administrative review, and requires no prior public notice or comment. Settling litigation is an executive branch function, and a legislative role would violate separation of powers principles.[2]

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1 *See, e.g., Public Defender Agency v. Superior Court*, 534 P.2d 947, 950-51 (Alaska 1975).

2 *See, e.g., Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976) (separation of powers doctrine prohibits "encroachments upon the executive by the legislative branch" in

Aside from the question of the Attorney General's authority, Mr. Walker and Mr. Richards make five allegations about the legality of the settlement agreement. They argue that the settlement should have been subject to public notice and comment because (1) it is a disposal of an interest in state land; (2) it is subject to the material amendments doctrine; and (3) it impermissibly disposes of state royalty gas. They also allege that the agreement (4) unlawfully attempts to restrict the State's future ability to tax Point Thomson gas, and (5) contracts around DNR's regulations, running afoul of the Alaska Supreme Court's 2001 decision in *Exxon v. State*.[3]

I will address each point in turn.

1. *The Agreement is not a "Disposal" of State Land.*

The Alaska Constitution provides that "[n]o disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be required by law."[4] A "disposal" is the transfer of an "interest" in state land, which includes the sale or leasing of land, mineral leasing, and right of way permits and licenses.[5]

The Point Thomson settlement agreement does not dispose of an interest in state property. The disposal occurred many years ago when the leases were issued. The settlement agreement addresses DNR's administration of these leases and the Point Thomson Unit Agreement. The State did not transfer any additional interests by entering into the unit agreement, approving Plans of Development ("PODs"), or forming participating areas under the unit agreement.

2. *The Agreement Does Not Amend Any Leases and Thus Does Not Implicate the Material Amendments Doctrine.*

The "material amendments" doctrine applies to competitively bid contracts, *e.g.*, leases. Unit agreements, in contrast, are not competitively bid. In general, "competitively

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confirmation of executive appointments); *Public Defender Agency*, 534 P.2d at 950 ("When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of the separation of powers.").

3 40 P.3d 786 (Alaska 2001).

4 Alaska Const. art. VIII, sec. 10. This requirement is codified in the Alaska Lands Act at AS 38.05.035.

5 *See Northern Alaska Environmental Center v. State, Dep't of Natural Resources*, 2 P.3d 629, 636 (Alaska 2000).

bid contracts involving state resources cannot be materially amended."[6] The rationale behind this judicially created rule is that an amendment effectively produces a new contract, which the State should award only after a new round of public bidding.[7]

Here, DNR has not amended the lease terms. Mr. Walker and Mr. Richards point to no provisions in any of the Point Thomson oil and gas leases that have been amended, nor could they. Because the settlement agreement addresses only the terms of the unit agreement, the sole case cited by Mr. Walker and Mr. Richards, *Baxley v. State*, is inapplicable.[8]

3. *The Agreement Does Not Dispose of State Royalty Gas.*

In the settlement agreement, the State has committed to take its royalty in-kind only if the working interest owners complete a project injecting Point Thomson Gas into Prudhoe Bay in order to enhance oil recovery at Prudhoe Bay, while awaiting a potential subsequent Major Gas Sale project.[9] The agreement provides that the State's in-kind Point Thomson gas will be injected into Prudhoe Bay alongside the working interest owners' produced Point Thomson gas where it will both aid in enhanced oil recovery and be available for later withdrawal at the State's discretion for in-state use.[10] In the event there is a later Major Gas Sale project, the State may elect to have the working interest owners sell the gas that was previously taken in-kind and injected into Prudhoe Bay and instead take its royalty in-value based on the Major Gas Sale price.[11]

Agreeing to take royalty in-kind in this manner is consistent with the applicable leases that grant DNR discretion to take its royalty in-kind or in-value. In these circumstances, DNR regulations provide that royalty must be taken in-kind according to the lease terms.[12]

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6 *Kenai Lumber Co. v. LeResche,* 646 P.2d 215, 221 (Alaska 1982).

7 *McKinnon v. Alpetco Co.,* 633 P.2d 281, 287 (Alaska 1981); *Baxley v. State*, 958 P.2d 422, 433 (Alaska 1998).

8 958 P.2d at 433.

9 *See* Section 4.16.2.

10 *See* Section 4.16.2.2; 4.16.2.4.

11 *See* Section 4.16.2.4(c)(i) ("For gas produced from Point Thomson after Project Start-up of a Major Gas Sale, the State from time to time may elect to take its royalty share in-value or in-kind pursuant to the Point Thomson leases, other applicable agreements and applicable State law.").

12 11 AAC 03.015.

The legal provisions that Mr. Walker and Mr. Richards cite on the topics of addressing public notice, royalty board submittal, and legislative approval all address state *disposals* of its royalty in-kind oil or gas, by sale or otherwise.[13] Here, there is no disposal because DNR has not agreed to sell or otherwise transfer its interest in any gas taken in-kind under the agreement. Rather, DNR will retain full title and control to all royalty in-kind gas injected into Prudhoe Bay. The State would potentially trigger the procedural requirements referenced by Mr. Walker and Mr. Richards only if it subsequently withdrew its gas to sell.

The terms of the agreement require only that the Commissioner determine in writing that taking in-kind is in the best interests of the State.[14] Section 5.8 of the Agreement makes this express finding.[15]

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[13] *See, e.g.*, AS 38.05.183 ("Sale of Royalty); AS 38.06.050 (providing for Royalty Board Review for "proposed sale, exchange, encumbrance, or other disposition . . ."); AS 38.06.055 (providing for legislative approval of a "sale, exchange, or other disposition of oil or gas . . ."); 11 AAC 03.020 ("Procedures to be followed for dispositions").

[14] AS 38.05.182 ("any royalty . . . may be taken in kind rather than in value if the Commissioner determines that the taking in-kind would be in the best interests of the state."); 11 AAC.03.010(b) ("Before taking royalty oil, gas, or associated substances in-kind, the commissioner will determine in writing that taking in-kind will be in the best interests of the state.").

[15] DNR agreed to take its royalty in-kind under these circumstances in order to maximize royalty value to the State. Under this development scenario, Point Thomson gas is transported to Prudhoe Bay and injected into that reservoir to enhance oil recovery. Any gas that leaves the Point Thomson Unit boundary triggers the working interest owners' royalty obligations. But if the State were to take its royalty in-value at that time, the value would be minimal because the gas is not being sold by the working interest owners, but is instead being injected into Prudhoe Bay to aid enhanced oil recovery, and potentially for later withdrawal and sale as part of a Major Gas Sale project. If the gas injected into Prudhoe Bay is later sold as part of a Major Gas Sale project, its value will be higher than when it was initially produced from Point Thomson and injected into Prudhoe Bay. The agreement entitles the State to take payment in-value from the Point Thomson lessees after project start-up of a Major Gas Sale for the State's Point Thomson in-kind gas that had been injected into Prudhoe Bay. If there is not a pending Major Gas Sale, however, the State's injected gas in Prudhoe Bay is available for withdrawal at the State's discretion for in-State use. By negotiating these options with respect to royalty, the State ensured that it would derive greater royalty value than if the State had taken its royalty in-value when the gas was first produced from Point Thomson for injection into Prudhoe Bay.

4. *The Agreement Contains No Future Tax Commitments.*

The settlement agreement does not impermissibly bind future legislatures on tax issues. The tax provision in Section 4.16.1 makes no commitments at all about the future state of the law; it only articulates the current state of the law that permits deferral of taxation in certain circumstances, citing 15 AAC 55.151(c) .[16] To the extent Mr. Walker and Mr. Richards are arguing that the agreement's statement in Section 4.16 (Point Thomsen gas injected in to Prudhoe Bay is only subject to tax and royalty once) wrongfully limits the legislature's taxing authority, this argument is meritless.

5. *The Agreement Is Consistent with DNR's Regulatory Authority.*

Finally, Mr. Walker and Mr. Richards argue that DNR has contracted around its regulations providing for unit management, including POD review and the formation of participating areas.[17] To the contrary, the agreement represents an appropriate exercise of DNR's regulatory authority. The recognition in Section 5.1.3 that the agreement is a contract simply makes clear that parties have negotiated a binding agreement (just as oil and gas leases and unit agreements are binding contracts).

Under DNR's regulations,[18] a unit operator must submit a POD that commits to diligent development of the unit resources and sets out a long-term plan for future work activities. After reviewing the POD and considering the criteria set out in 11 AAC 83.303, DNR may approve or deny the POD. If DNR approves the POD, it must monitor activities to ensure that the unit operator complies with the plan.

Mr. Walker and Mr. Richards misunderstand how the POD process will work in conjunction with the agreement. First, the agreement does not eliminate the requirement to have a POD for the Initial Production System; the agreement itself serves as the Initial Production System POD. It sets forth the key work activities and timelines required for the Initial Production System, and it has other requirements that complement the POD.

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16 Section 4.16.1 provides: "The Parties recognize that Alaska law regarding oil and gas production tax provides that gas produced from the Point Thomson Unit that would be used according to 15 AAC 55.151(e) in effect as of the Effective Date, and that would be injected into a reservoir within the Prudhoe Bay Unit in the course of operations of a Point Thomson Gas Development/Prudhoe Bay Enhanced Recovery Project for purposes of repressuring, including enhanced recovery, would be exempt from taxation at the time of its production from the Point Thomson Unit and would be subject to tax only at the time the gas would be ultimately produced for sale from the Prudhoe Bay Unit."

17 Walker Letter at 7-12.

18 11 AAC 83.343.

In addition, before moving forward with the Initial Production System POD and future PODs, the working interest owners must secure DNR's approval for their plan of operations under 11 AAC 83.158. Second, for development beyond the Initial Production System, the agreement expressly requires the submittal of PODs for both development planning and the development itself.[19]

Likewise, the agreement is consistent with DNR's participating area regulations. DNR's regulations require the creation of a participating area for acreage "reasonably estimated through use of geological, geophysical, or engineering data to be capable of producing or contributing to production of hydrocarbons in paying quantities."[20]

The agreement does not abrogate this important management authority. With participating areas, as with PODs, the agreement looks to the future in providing that participating areas will be formed if production actually commences at levels required by the agreement. Addressing participating areas in advance of production is consistent with DNR's regulations and, if the participating area is to be formed, the agreement[21] requires submission of the same supporting technical data that is currently required by DNR regulations.[22]

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19 *See* Section 4.6. The agreement provides that these PODs will be approved only if they are consistent with the specific development requirements set forth in the agreement *Id.* DNR agreed to place its imprimatur on the post-Initial Production System development scenarios set forth in the agreement after engaging in an extensive diligence and review process. Determining that these development paths are in the public interest, and that any POD that conforms to these development requirements will be approved, is a reasonable and authorized exercise of DNR's POD review discretion.

20 11 AAC 83.351(a). Further, the regulations provide that the unit operator must apply for the creation of a participating area "at least ninety days before sustained production."

21 *See* Sections 4.3.1; 4.4.1; 4.4.2; 4.4.5 and Ex. F.

22 Because the agreement works within DNR's regulations, the discussion in *Exxon v. State,* 40 P.3d 786 (Alaska 2001) cited by Mr. Walker regarding DNR's authority to enter into contracts that violate its regulations is inapplicable. Walker Letter at 10-12. Further, the facts of that case have no application to the agreement. There, ExxonMobil argued that a provision in the Prudhoe Bay Unit agreement expressly abrogated DNR's regulatory discretion to evaluate whether expanding the unit was in the public interest and instead made expansion mandatory should certain geologic criteria be satisfied. *Id.* at 794-95. The Court rejected ExxonMobil's reading of the Prudhoe Bay Unit agreement. *Id.* at 795. The Court concluded that its interpretation of the Unit agreement was bolstered by the general principle that DNR could not agree to contract terms that violate its regulations. *Id.* at 796-97. Here, DNR is not contracting away the requirement

Mr. Walker and Mr. Richards also argue that the agreement impermissibly alters DNR's dispute resolution procedures by agreeing to arbitration and to superior court jurisdiction.[23] But the Commissioner and the Attorney General have flexibility when settling litigation to negotiate terms, including dispute resolution mechanisms. DNR's appeal regulations do not prohibit it from agreeing to arbitration or other dispute resolution procedures.[24] And agreeing to superior court jurisdiction for certain disputes is not a novel concept; DNR's regulations currently provide for judicial proceedings in certain circumstances.[25]

Finally, Mr. Walker and Mr. Richards misread DNR's regulations in asserting that DNR was required to provide public notice and issue written findings prior to entering into the agreement.[26] They are incorrect on both counts. DNR is required to issue written findings only when disposing of interests in state lands.[27] As discussed above, the agreement does not effect a disposal. In contexts other than disposals, DNR does not have to issue public interest findings in writing, or in any other particular form.

Nor was DNR required to provide for public notice and comment for the agreement. DNR regulations require notice and comment for approvals of a unit agreement, expansions of an approved unit, and extensions of the unit term.[28] But the agreement did none of these things and therefore did not trigger any of the conditions in 11 AAC 83.311 that require public notice and comment.

In conclusion, we fully stand behind the decision to settle the Point Thomson litigation. The settlement agreement secures the State's goal of settling this protracted

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that PODs be submitted with certain information and approved by DNR, or the requirement that acreage must be in a participating area if it is contributing to production. Rather, DNR has agreed that it will approve future PODs *if* they are consistent with all of the conditions set out in the agreement. And DNR has agreed to what participating areas will form *if* production commences and the appropriate information is submitted to DNR.

23 Walker Letter at 10.

24 The State demanded that the agreement include an expedited arbitration provision to deal with an abandonment dispute because the State did not want to waste years in court litigating over whether the working interest owners had abandoned the Initial Production System. Arbitration does not apply to any other dispute.

25 11 AAC 83.374.

26 Walker Letter at 11.

27 *See* AS 38.05.035(e).

28 11 AAC 83.311.

and uncertain litigation, and advances the State's interest in the commercialization of Alaska's natural gas It is not a perfect settlement—no settlement achieves that standard—but the agreement unquestionably is in the public interest. I appreciate this opportunity to supplement the record and would be happy to answer any additional questions by the committee.

Sincerely,

Michael C. Geraghty
Attorney General

cc: Commissioner Dan Sullivan, Department of Natural Resources

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DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

June 7, 2012

Senator Hollis French
716 W 4th Ave, Ste 470
Anchorage, Alaska 99501-2133

Dear Senator French,

During the Senate Judiciary Committee hearing on April 27, 2012, Mr. William Walker, Mr. Craig Richards, and Dr. Mark Myers raised questions and concerns about the Point Thomson Settlement Agreement ("Agreement"). The concerns raised by Mr. Walker and Mr. Richards echoed the claims asserted in Mr. Walker's April 17, 2012 letter to Department of Natural Resources Commissioner Dan Sullivan, which has been included in the record. The issues raised by Mr. Walker, Mr. Richards, and Dr. Myers are based on a misunderstanding of the Agreement and its background.

The following response explains the context for the Agreement, describes the terms of the Agreement in detail, explains why it is in the public interest, and addresses the issues raised by Dr. Myers and by Mr. Richards on behalf of Mr. Walker. My analysis is focused primarily on the policy concerns raised at the hearing. The Attorney General will address the legal issues raised by Mr. Walker and Mr. Richards in a separate response.

I thank you for this opportunity to provide a response on this important public issue. A table of headings is set forth below for ease of reference.

I. STRATEGIC CONTEXT OF THE POINT THOMSON SETTLEMENT
A. Point Thomson History.
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C. World Oil & Gas Markets: Extreme Price Variability, Declining TAPS Throughput and LNG Opportunities.

II. STRATEGIC BENEFITS OF THE POINT THOMSON AGREEMENT
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E. The Agreement Provides Long-Term Benefits and the Ability to Optimize Full Field Development.

1. DNR Retains the Authority to Review Development Plans, and if the WIOs Do Not Commit to or Sanction at Least One Expanded Development Alternative, Significant Acreage Will Contract Out of the Unit.

2. Given the Importance of a Large Scale Gasline to the State's Interests, the Agreement Focuses on a Major Gas Sale.

3. The Agreement Provides for Other Full Field Development Alternatives Aimed at Enabling the Optimization of State Resources.

III. DR. MYERS'S, MR. WALKER'S AND MR. RICHARD'S CRITICISMS OF THE AGREEMENT ARE BASED ON MISUNDERSTANDINGS OF ITS TERMS
A. Full Field Cycling is One of Several Viable Development Alternatives that Provide Significant Benefits to the State.

1. The Difference Between "Gas Cycling" and "Gas Blowdown."

2. The Agreement does not Unconditionally Authorize Gas Blowdown and the AOGCC Must Approve Any Proposed Development.

3. The 2008 PetroTel Study Taken Out of Context Does Not Provide a Realistic Portrait Regarding Full Field Development.

4. The 2008 PetroTel Study Does Not Fully Reflect DNR's Current Understanding of the Point Thomson Reservoir.

B. The Major Gas Sale Development Set Forth in the Agreement Contemplates a Large- Scale Gas Pipeline Project Off the North Slope.

C. The Agreement Contains a Firm Development Commitment in the Form of the IPS, and the Penalty of Losing the Unit *and* the Underlying Leases if the IPS is not Completed.

1. Per the Agreement, the IPS is a Firm Commitment Offering Benefits to the State Far in Excess of the 2009 Conditional Interim Decision.

2. Even if a Major Gas Sale is Sanctioned after Abandonment of the IPS, Previously Contracted Acreage is Forever Lost to the WIOs.

3. If the WIOs Do Not Develop Beyond the IPS, They Will Lose Significant Acreage.

D. The Agreement Addresses the Next Phase of Development after the IPS by Providing for Additional Development Alternatives that, if Completed, Allow the WIOs to Retain Additional Acreage.

1. Construction Commitments and Final Investment Decisions Will be Part and Parcel of Sanctioning a Major Gas Sale.

2. Point Thomson Gas Would Be Used for a Major Gas Sale under the Agreement.

3. If the WIOs Abandon the IPS and a Major Gas Sale is Not Sanctioned, DNR May Terminate the Unit and all Point Thomson Leases.

E. The Agreement Permits DNR to Closely Monitor the WIOs' Development Decisions and Activities and Impose Penalties for Failure to Abide by the Commitments in the Agreement.

1. Under the Agreement, DNR Retains its POD Powers.

2. The Agreement is Consistent with DNR's Participating Area Regulations.

3. DNR Considered 11 AAC 83.303 Prior to Entering into the Agreement.

4. If a Development path that is Selected by the WIOs is Inconsistent with the Agreement or Law, DNR Has the Right to Oppose the Option.

I. STRATEGIC CONTEXT OF THE POINT THOMSON SETTLEMENT

A. Point Thomson History.

Point Thomson is located 60 miles east of Prudhoe Bay in a remote arctic area.[1] The Point Thomson leases were acquired beginning in 1965.[2] Oil was discovered in 1975, and the Point Thomson Unit ("the Unit") was formed in 1977.[3] Following formation of the Unit, the Point Thomson owners drilled additional wells and discovered large quantities of oil and gas.[4]

The Point Thomson reservoir is a high-pressure retrograde condensate and natural gas reservoir with abnormally-pressured formations.[5] It presents unique engineering challenges with respect to development and production.[6] Since discovery of the field, the Point Thomson owners have drilled 19 exploration / delineation wells in the Point Thomson area.[7]

These wells have demonstrated that Point Thomson is a world class resource.[8] It is the largest undeveloped field in Alaska with one reservoir, the Thomson Sands, holding approximately eight trillion cubic feet of conventional natural gas, which is about 25% of the known North Slope gas reserves, and hundreds of millions of barrels of gas condensate and oil. The field also holds an estimated hundreds of millions of barrels of oil in the Brookian formations, which are geographically separate from the Thomson Sands reservoir.

Under the terms of the Point Thomson Unit Agreement, the Unit was set to expire in 1983 because it was not placed into production. The Department of Natural Resources ("DNR"), however, agreed to remove the automatic termination provision to give the Working Interest Owners ("WIOs") more time to delineate the field's resources and then move into timely production.[9] An unintended consequence of this modification to the Unit Agreement was that the

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1 *See* March 29, 2012 Point Thomson Settlement Agreement, Section 1.1 ("Section").

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*; *see also* http://www.arcticgas.gov/point-thomson-key-gas-field ("But as rich with potential as Point Thomson is, the undeveloped field is also rich with unanswered questions about how to technically produce the gas. . . . Point Thomson is a 'retrograde gas condensate reservoir,' a kind of field that's far more challenging and expensive to engineer into production.").

7 Section 1.1.

8 *See, e.g.,*
http://dog.dnr.alaska.gov/Publications/Documents/AnnualReports/Section1_2009.pdf

9 *See* Commissioner Irwin's April 22, 2008 Point Thomson Unit Findings and Decision on Remand From Superior Court at 12.

Unit continued for decades without production.[10] Despite its massive resource base, the State has not seen any hydrocarbon production from this important field.

For years, DNR tried to get the WIOs to submit a development plan that would place the Unit into commercial production.[11] All attempts to move the field into production were stymied – the primary reasons offered by the WIOs for refusing to place the Unit into production centered on high costs, engineering challenges, and the fact that no gas pipeline existed to transport the Unit's massive gas reserves.[12]

B. DNR's Default and Termination Decisions and the Ongoing Litigation.

DNR's frustration with the lack of development reached a breaking point in October 2005 when the Director of the Division of Oil and Gas of DNR ("Director") denied approval of the 22nd Plan of Development (a "POD") submitted by the WIOs because they refused to drill wells and put the Unit into production.[13] In this decision, Director Mark Myers placed the Unit into default and informed the WIOs that DNR would terminate the Unit if the WIOs refused to submit a development plan that would put the Unit into timely production.[14]

The WIOs appealed the Director's default decision to DNR Commissioner Menge.[15] This began the lengthy litigation between the State and the WIOs, which lasted for nearly seven years and had the potential to continue for a significant period of time.[16] Because the WIOs insisted on warehousing the Unit's massive reserves, Commissioner Menge affirmed Director Myers's default decision, rejected the WIOs' proposed POD, and terminated the Unit on November 27, 2006.[17] This decision was affirmed upon reconsideration by Acting Commissioner Marty Rutherford on December 27, 2006.[18]

The WIOs appealed the default and termination decisions to the Alaska Superior Court. Judge Gleason affirmed most aspects of DNR's decisions, but vacated the Unit termination decision. Judge Gleason ruled that the WIOs received insufficient notice and were therefore denied

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10 *Id.*

11 *Id.* at 9-29, 41-43.

12 *See id.; see also* Brief of Appellant State of Alaska, Department of Natural Resources at 18-20 (May 10, 2011, Supreme Court Case No. S-13730).

13 *See* Commissioner Irwin's April 22, 2008 Point Thomson Unit Findings and Decision on Remand From Superior Court at 27-29.

14 *Id.*

15 *Id.*

16 Section 1.2 – 1.5.

17 *See* Commissioner Irwin's April 22, 2008 Point Thomson Unit Findings and Decision on Remand From Superior Court at 29.

18 *See id.*

an opportunity to be heard on the appropriate remedy for their refusal to place the Unit into production after thirty years. Judge Gleason remanded the matter to DNR.[19]

During the remand proceedings, the WIOs submitted a new POD, the 23rd POD. This POD committed to drilling wells and placing the Unit onto production with an initial program that would produce 10,000 barrels per day of gas condensates.[20]

On April 22, 2008, DNR Commissioner Irwin rejected this POD and issued a decision terminating the Unit. Commissioner Irwin rejected the 23rd POD for two main reasons: (i) after years of broken promises to develop the Unit, he did not trust the WIOs to follow through with this development plan; and (ii) even if they did put the Unit into production, the WIOs did not provide a path to full field development or consequences for the failure to move beyond the initial production phase.[21]

After terminating the Unit, Commissioner Irwin issued a three-page "Conditional Interim Decision" in January 2009 that allowed ExxonMobil to drill two wells on two state leases conditioned upon the WIOs' commitment to bring these leases into production.[22] ExxonMobil, the Unit Operator, drilled these two wells and has continued to work on permitting and engineering to move the Unit into production.[23] The Agreement builds on this progress and these work commitments.

Despite the 2009 Conditional Interim Decision, the broader litigation involving the Unit termination continued. The WIOs filed several appeals challenging Commissioner Irwin's 2008 Unit termination decision. On January 11, 2010, after extensive briefing, Judge Gleason reversed DNR's 2008 decision terminating the Unit.[24]

Her ruling was a significant setback for the State. She ruled that the failure to develop known reserves for thirty years and the WIOs' refusal to submit a POD committing to development did not constitute material breach of the Unit Agreement or a violation of state law.[25] The decision also reconstituted the Point Thomson Unit and upended DNR's oversight of Unit development by requiring DNR to conduct a "Section 21" hearing before it could default the Unit.[26] It was a ruling that potentially had far-reaching implications for DNR because it unraveled the "produce or lose" bargain that underlies State oil and gas leases, and it effectively shifted the obligation to develop State leases from lessees to DNR.[27] If this decision was upheld, it conceivably would allow the

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19 *See* Brief of Appellant State of Alaska, Department of Natural Resources at 21 (May 10, 2011, Supreme Court Case No. S-13730).

20 *See* Commissioner Irwin's April 22, 2008 Point Thomson Unit Findings and Decision on Remand From Superior Court at 29-31.

21 *See id.* at 29-55.

22 January 27, 2009 Commissioner Irwin's Conditional Interim Decision.

23 Section 1.1, 4.1.1.1; http://www.pointthomsonprojecteis.com/.

24 Section 1.4.

25 Decision after Remand (Superior Court Case No. 3AN-06-13751 CI (Consolidated)) January 11, 2010.

26 *Id.* at 23.

27 State of Alaska Petition for Review (Supreme Court Case No. S-13730) at 7-8.

WIOs to simply sit on the massive Point Thomson resources with no requirement to commercially produce hydrocarbons until a gas pipeline was built.[28]

Given the significant negative ramifications, the State filed a petition for review of Judge Gleason's decision with the Alaska Supreme Court.[29] The Supreme Court decided to hear the appeal, thereby halting the ongoing Superior Court proceeding. The main issue before the Alaska Supreme Court centered on whether Judge Gleason properly interpreted the applicable law to require a Section 21 hearing.[30] The Court was not asked to address whether DNR properly terminated the Unit.

A ruling from the Alaska Supreme Court on the State's petition for review was still pending as of the Agreement. It is important to understand the procedural context of the case at that time. Any ruling by the Supreme Court – favorable to the State or not – would not have resolved the entire case, it would have merely remanded to the Superior Court to continue with the litigation. Any final decision from the Superior Court would invariably have been appealed back to the Supreme Court. Thus, the litigation surrounding unit termination still had many years before final resolution. Even assuming the State ultimately prevailed in the unit termination litigation, it would have required individual proceedings to terminate the underlying Point Thomson leases. The litigation, in other words, was still far from final resolution.

B. World Oil & Gas Markets: Extreme Price Variability, Declining TAPS Throughput and LNG Opportunities.

The past decade has seen extreme price volatility in global energy markets. Nominal oil prices have bounced from $22 a barrel to $135 to $40 back to nearly $130 and now hover around $100. Natural gas prices have also been volatile – prices in the Lower-48 were as high as $14 per MMBtu in 2008 but dropped below $2 in April 2012. Meanwhile, the price and demand for liquefied natural gas ("LNG") in the Pacific Rim currently remains robust and is increasing due to a number of global factors – although LNG prices are also volatile. With the extreme volatility in energy markets, this much is certain: nobody can say for sure what the future holds in terms of oil and gas prices and profitable hydrocarbon development scenarios.

Another certainty is that the State of Alaska faces an urgent situation that threatens our economic future – the steady decline in oil production through the Trans-Alaska Pipeline System (TAPS). Despite remaining a world-class hydrocarbon basin, Alaska North Slope (ANS) oil production continues to fall. In April 2011, ANS production averaged almost 635,000 barrels per day. One year later, April 2012 production dropped by nearly 50,000 barrels and now averaged 577,000 barrels per day. In the meantime, North Dakota oil production, which sells at approximately a $20 discount compared to Alaska oil, has surged and it has overtaken Alaska as the

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28 *See Id.*

29 As a general matter, parties cannot appeal a lower court's decision to the Alaska Supreme Court until the lower court has issued a final order. However, in limited circumstances, the Alaska Supreme Court will take an interlocutory petition for review of an ongoing superior court action if the lower court has issued an interim ruling that needs to be addressed before the lower court's proceedings can continue.

30 *See* State of Alaska Petition for Review at 4.

nation's number two oil producer.[31] Having Point Thomson – one of the State's largest oil and gas fields – remain undeveloped, with no infrastructure connecting it to TAPS, has not helped the State address the TAPS throughput decline challenge.

Having Point Thomson remain undeveloped and under a cloud of prolonged litigation also presented an impediment to the State's ability to advance another critically important, long-sought goal: commercializing our massive North Slope gas resources for both in-state use and for export.

Now a window of opportunity has opened for significantly increasing Alaska LNG exports to the Pacific Rim.[32] Demand for natural gas in the Pacific Rim is strong, and there is significant interest in Alaska gas. For the first time, the State's three producers on the North Slope are aligned with a state-backed effort to move forward to commercialize Alaska North Slope (ANS) gas. Before signing the Agreement, BP and ConocoPhillips wanted to increase the probability of transporting Point Thomson gas into a large diameter gas pipeline. It was this desire that launched discussions, for the first time in years, between the three Producers and the State, related to commercializing North Slope gas. Thus, the Agreement catalyzed the alignment among the Producers.

And recently, several reputable studies have shown that Alaska is economically competitive with other LNG projects. For example, in *"Alaskan LNG Exports Competitiveness Study, AGPA, Final Report, July 27, 2011,"* Wood Mackenzie concluded that Alaska is more competitive than Lower 48 and Canadian gas supplies and is on par with Australian LNG projects.[33] Similarly, the Brookings Institution recently released findings from its year-long study on U.S. LNG exports, noting that a large-scale Alaska LNG project to Asia would be in a strong competitive position with respect to other global LNG projects.[34]

This window of opportunity for commercializing North Slope gas will not be open indefinitely. Fortunately, the Agreement puts the WIOs on a clock to develop the Point Thomson resources. But, the State of Alaska is also on a clock. We face fierce competition from many countries and companies vying to meet the growing demand in LNG. Norway, Canada, Australia, Qatar, Russia, and countries in East Africa, in addition to producers in the Lower 48, are all seeking to supply the increased demand for LNG in the Pacific Rim. Indeed, over the past two years, *nine* Australia LNG projects have reached the Final Investment Decision stage.

To capitalize on this opportunity and to make sure Alaska is not left on the sidelines, the Parnell Administration has diligently worked to advance the prospects of a large scale LNG project. We have worked with our AGIA licensee through the Alaska Pipeline Project to move forward on the necessary permitting and engineering work for an LNG project; we have driven the alignment among the three North Slope producers and TransCanada; we are engaged in far reaching discussions with high-ranking federal officials in Washington, D.C. to seek support of a large-scale

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31 http://www.adn.com/2012/05/15/2465480/n-dakota-passes-alaska-to-become.html

32 For over forty years Alaska has exported LNG from Cook Inlet to Asia. Alaska has never, however, exported North Slope gas.

33 http://www.arcticgas.gov/sites/default/files/documents/11-07-alaska-lng-competitiveness-study.pdf

34 http://www.brookings.edu/~/media/Files/rc/reports/2012/0502_lng_exports_ebinger/0502_lng_exports_ebinger.pdf.

LNG export project; and we have engaged private sector and government officials from Asia to educate them on the benefits and comparative advantages of Alaska natural gas.

Based on this outreach, we can say that the momentum is building and considerable interest exists in getting ANS gas to Alaskans and world markets.

II. STRATEGIC BENEFITS OF THE POINT THOMSON AGREEMENT

This Agreement significantly advances critical interests for the State of Alaska and its citizens across a number of areas. This section highlights and discusses many of these important areas.

A. Overview: The Point Thomson Settlement Agreement Advances the State's Longstanding Interests Related to This Field.

Before entering into settlement negotiations, the State had four longstanding objectives: (i) secure a commitment to timely production of the Unit's resources[35]; (ii) set out a path to full field development[36]; (iii) leverage Point Thomson development to advance a large scale gas pipeline[37]; and (iv) impose swift consequences if the WIOs failed to follow through on development commitments.

The Agreement achieves all of these goals. First, it provides an unequivocal, binding commitment to drill wells that will delineate resources and place the Unit into production, which will in turn increase TAPS throughput and foster exploration and development in the highly prospective Eastern North Slope.[38] Second, the Agreement lays out a path to full field development. Third, the Agreement advances ANS gas commercialization efforts by:

- Installing infrastructure that can be utilized for gas commercialization;

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35 *See* Director Myers's October 27, 2005 Denial of the Proposed Plans for Development of the Point Thomson Unit. In this Decision, Director Myers placed the Unit into default because ExxonMobil refused to provide the State with a development plan. He told the WIOs that they could cure this default by submitting a POD containing "specific commitments to delineate the hydrocarbon accumulations underlying the PTU and develop the unitized substances." Decision at 22.

36 *See* Commissioner Irwin's April 22, 2008 Point Thomson Unit Findings and Decision on Remand From Superior Court. In this Decision, Commissioner Irwin rejected the WIOs' stated commitment to develop the field under a gas cycling pilot program, in part, because while the plan presented a reasonable first step for development, the plan failed to explain how ExxonMobil would continue to expand production as promised and what would happen if they did not expand production. Decision at 31-32. As detailed below, the Agreement addresses all of these issues.

37 Advancing a large scale gas pipeline has been a longstanding goal for the State. *See, e.g.,* the Stranded Gas Development Act (AS 43.82 *et seq.*) and by the Alaska Gasline Inducement Act (AS 43.90 *et seq.*).

38 Sections 1.6 - 1.7, 1.11, 4.1 (noting the benefits under the Agreement and explaining that the IPS work commitments are mandatory). Section 4.1 specifically provides: "The WIOs *shall* put the PTU 15 and PTU 16 wells on production utilizing the IPS by the end of the 2015-2016 winter season and in any event no later than May 1, 2016." (emphasis added).

- Imposing work commitments that will foster gas commercialization;
- Facilitating alignment between the three largest North Slope WIOs and the Alaska Pipeline Project parties;
- Incentivizing a Major Gas Sale "sanction" decision prior to May 2016.

Finally, the Agreement provides for Unit termination and the return of all Point Thomson leases if the Unit is not placed into production.[39] Similarly, if production only results in the development of some of the Unit's resources, acreage not placed into production will also terminate.[40]

In sum, the Agreement is structured around one key principle that the WIOs must earn their acreage: the more work, investment, and commitments they make, the more acreage they retain. In the 1980s, DNR agreed to revise the Unit Agreement in a manner that while unintentional, effectively took the WIOs off the clock and resulted in warehousing for decades. This Agreement puts the WIOs back on the clock.

B. Continuing with the Status Quo Entailed Inherent Risk for the State.

In evaluating any settlement, it is imperative to judge the settlement against realistic alternatives. The alternative to this settlement was the status quo of continued litigation. Continuing with the ongoing litigation entailed inherent risk to the State. While the State believed it had a strong case, there was no guarantee the State would have ultimately prevailed on every issue. Had the State lost, it might have been stuck with a legal precedent that could have potentially allowed the WIOs to sit on the field without having to move forward with production. And, even had the State ultimately prevailed on all issues in the litigation, it would have taken years to terminate the Unit and litigate the underlying leases to get them back under state control. This potential for additional delay also created risks for the State.

Despite this uncertainty, some have suggested that the State should not have settled the overall litigation, but instead allowed the WIOs to continue with the development plan authorized by Commissioner Irwin in 2009 while continuing to litigate the broader issue of the Unit termination. This view assumes that the WIOs would have proceeded with the development plan through completion. But that was certainly not guaranteed. Judge Gleason's decision re-instated the Point Thomson Unit after the 2009 Conditional Interim Decision, meaning the individual leases were no longer at immediate risk of termination for lack of production. With the Unit reinstated, the WIOs could have chosen to ignore Commissioner Irwin's 2009 decision, and they could have halted all development while the litigation was pending. Given the history of this Unit, such a risk was not insubstantial.

Further, the Agreement has spurred significant progress toward a large scale gas pipeline to move the North Slope gas resources. Indeed, the State agreed to the Agreement, in part, because the Producers committed to work together on a project to Commercialize North Slope gas. Gaining momentum on gas commercialization efforts is critically important given the window of opportunity

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39 *See, e.g.,* Sections 1.8; 4.5.2.

40 Sections 1.8, 4.5.3, 4.5.7.

that currently exists for such a project. These opportunities and benefits would likely not be available if the State had continued to litigate.

Given the fierce competition that the State faces to commercialize ANS gas and the limited opportunity to get ANS gas to the world markets, the progress to commercialize ANS gas could easily be jeopardized by continuing with uncertain litigation. Without this Agreement, there is a heightened risk that ANS gas commercialization efforts would stall – that companies would be less likely to invest billions of dollars in a large scale gas pipeline project without greater certainty over the Point Thomson leases and the 25% of ANS gas reserves underlying them.

Finally, continued litigation would have frustrated advancing efforts to increase oil exploration and production from the Eastern North Slope of Alaska. Continuing with litigation would have delayed the activity and investments required by the Settlement, which in turn could have discouraged exploration and development because companies may be less likely to invest in this area without certainty related to Point Thomson development.

C. The Agreement Achieves Significant Near-Term Benefits for the State.

The WIOs must complete the Initial Production System (IPS), which entails drilling two wells (now completed), installing production facilities, and constructing a common carrier liquids pipeline capable of transporting 70,000 barrels of liquids condensate per day.[41] IPS production must begin by the 2015-2016 winter season.[42] The IPS is required to produce 200 million cubic feet a day of natural gas: approximately 10,000 barrels per day of condensate from the gas will be stripped from the gas and sent down TAPS, and the dry gas will be re-injected into the reservoir.[43] Further, the IPS commitments require an additional well to be drilled by 2016-2017 and permitting for two additional wells and another well pad.[44] The WIOs are also obligated to drill additional wells to keep the facilities fully loaded with gas at 200 million cubic feet per day.[45]

A primary function of the IPS Project is to test the viability of gas cycling from both a reservoir and operational perspective by generating reservoir quality and performance information.[46]

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41 *See* Sections 1.6, 4.1.

42 Section 4.1.1.2. The original, agreed-upon start-up date of 2014-2015 was pushed back one year because the federal government failed to timely issue the Environmental Impact Statement.

43 Sections 1.6, 4.1.

44 Sections 4.1.2, 4.1.3.

45 Section 4.1.1.3.

46 It appears that there is misunderstanding or minimization of the complexities and uncertainties associated with Point Thomson development – including the scale of the project and challenges associated with the resources, economics, permitting processes, and facility constraints. Certain testimony offered at the Senate Judiciary Committee minimized the IPS and the challenges associated with developing an abnormally high pressured retrograde gas condensate reservoir like Point Thomson. There are very few, if any, retrograde condensate fields that have been cycled at over 10,000 PSI anywhere in the world. By industry standards, the IPS is a "mega-project" – to complete the IPS, the WIOs will have to spend *billions* of dollars. The IPS project requires the WIOs to drill wells, install production facilities, and to build pipelines and roads in a remote arctic

This will generate critical information to determine the optimum full field development option and facility expansion.[47] The Agreement is structured around an initial cycling development plan that will provide essential data to inform how the field should ultimately be developed.[48]

The contractually binding work commitments set out in the Agreement should finally bring the field into production *in the near future*. Indeed, the Agreement provides the quickest way to bring the Unit into production because it builds on Commissioner Irwin's 2009 decision authorizing Point Thomson development. Once they received DNR's 2009 authorization, the WIOs drilled two production wells. They have also completed most of the necessary engineering and permitting work. If DNR were now to require a different development approach, the WIOs would have to re-start the engineering and permitting process, which would add additional years before the State received the benefits of production from Point Thomson.

A key goal of the Agreement was to bring the Point Thomson field on line as soon as possible and avoid further delays. The requirements of Section 4.1, requiring the WIOs to bring wells into production utilizing the IPS by the end of the 2015-2016 winter season, meet this goal. The IPS gas cycling project will result in approximately 10,000 barrel per day (bpd) production of liquid condensate into TAPS, thus production will create employment opportunities for Alaskans and it will increase TAPS throughput and revenue for state and local governments.

Additionally, to get the field into production, the WIOs will have to invest billions of dollars, which will provide hundreds of jobs for Alaskans.[49] Alaskans can expect more employment in the future because the Agreement also contains a strong Alaska-hire provision.[50]

For decades, much of the highly prospective area between Prudhoe Bay and the Arctic National Wildlife Refuge (ANWR) – the Eastern North Slope – has been dormant, in large part because of its remoteness and the lack of infrastructure. The infrastructure installed under the Agreement, e.g., a 70,000 barrel per day common carrier liquids pipeline, roads, airstrip, and gravel pits, will help open the Eastern North Slope to additional development for other companies both large and small by creating economies of scale that will likely make marginal development more economic.[51] This is an important added benefit for the State.

The Agreement incentivizes full field development by allowing the WIOs to retain acreage that they place into production.[52] It also incentivizes additional development because the WIOs will presumably want to get the best return on their investment in billions of dollars of infrastructure by moving beyond the initial 10,000 barrel per day production.

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environment. In the context of an abnormally high-pressure reservoir, this is an undertaking that requires world-class drilling, production, and execution skills.

47 Sections 1.6, 4.1.1.2.

48 Section 1.6.

49 Section 1.9.

50 Sections 1.9-1.11, 4.13.

51 Sections 1.10-1.11.

52 Sections 4.3 - 4.4, 4.5.1.

Despite these advantages, some have argued that even with the Agreement, the WIOs have no intention of following through with its terms and commitments to production – but that they will use the Agreement to further delay development. We do not agree, but even if this is the case, the State is now in a much stronger position legally because the Agreement provides definitive remedies for forfeiture of acreage for the failure to develop within the agreed-upon timelines. The Agreement therefore strengthens the State's litigation position because it provides clear deadlines that the WIOs must meet to move development forward or lose acreage. The Agreement also puts the State on firmer footing to get acreage back if the WIOs delay development because as detailed below, it removes many of the arguments that the WIOs have used in the past to delay development.

Finally, in a significant concession by the WIOS, the Agreement vacated Judge Gleason's decisions, thus permanently eliminating any argument that these decisions restricted DNR's management authority for Point Thomson, or any other unit in the state.[53]

D. If the WIOs Breach Their Near-Term IPS Commitments, Then the State is Well-Protected Under the Agreement.

As noted above, the Agreement contains both incentives for the WIOs to undertake work and production commitments, as well as significant consequences if they do not.

The WIOs appear to be intent on meeting their IPS commitments under the Agreement. Their Chief Executive Officers have announced to Alaska and to the world that they are moving forward with the IPS.[54] They have also spent considerable sums drilling wells and securing the necessary permits for this development plan. Further, the WIOs have contracted with over 150 Alaskan companies to fulfill their work commitments.[55]

But even if the WIOs fail to follow through on their commitments, the State is well-protected. In particular, if the WIOs breach the Agreement and abandon the IPS, they will lose significant acreage as early as 2015 under Section 4.2.2.[56] The Unit will automatically terminate by 2019, and unless the WIOs Sanction a Major Gas Sale or submit an acceptable "alternative" Plan of Development (POD) that places the remaining acreage into production they will subsequently lose all remaining Point Thomson leases.[57] DNR's decision to reject this "alternative" POD is at DNR's

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53 Section 4.10.

54 *See, e.g.,* http://dnr.alaska.gov/commis/priorities/point_thomson_files/ceo_letter.pdf

55 Section 1.9.

56 Under this provision the amount of acreage returned to the State depends on whether: (1) the WIOs have drilled the West Pad well; and (2) how much money they have spent on Point Thomson development between year end 2007 and the abandonment date. *See* Section 4.2.2. If their total spending on Point Thomson development from 2007 to 2015 does not exceed $2 billion, they will lose the vast majority of the Point Thomson leases automatically in 2015.

57 Sections 4.1.6, 4.6.

"sole discretion."[58] This decision cannot be appealed to court, and the WIOs cannot argue that Section 21 of the Unit Agreement applies to the agency's rejection.[59]

After the Unit is terminated, the Agreement takes the extra step of ensuring the underlying leases return to the State in a timely manner. Even leases containing wells capable of producing in paying quantities are subject to swift termination. The WIOs with leases containing such wells (currently there are only two PTU 15 and 16) may only try and avoid lease termination by submitting a Plan of Operations to the Director that commits to placing the capable well on producing status within two years.[60] Moreover, DNR retains the sole discretion to accept the Plan: "Approval or rejection of the Plan of Operation *shall be within the sole discretion of the DNR*. . . . The Commissioner's decision on the Plan of Operation shall be Without Appeal." [61] If the WIOs fail to submit a Plan within sixty days following Unit termination, or the Commissioner denies approval of the Plan, "the leases shall terminate with acreage returning to the State Without Appeal."[62]

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[58] Section 4.5.2.2.

[59] Section 4.5.2.2 provides, in part: "Submittal and approval of the alternative POD shall be subject to the terms of the PTUA including applicable State law. Nonetheless, DNR shall have sole discretion to accept or reject an alternative POD, and a final Commissioner decision on the alternative POD is Without Appeal. For purposes of this paragraph the WIOs agree not to assert that Section 21 of the PTUA applies in any respect to review of or a decision on the proposed alternative POD."

[60] Section 4.5.2.3. Under Alaska law, a lessee may retain any non-producing lease after the primary term if that lease contains a well capable of producing in paying quantities. AS 38.05.180(m).

[61] Throughout the Agreement, DNR has insisted that the failure to perform certain activities would result in automatic consequences that are "Without Appeal" – *i.e.,* that cannot be appealed to court. This is a strong provision that protects the State from potential future drawn-out litigation. "Without Appeal" is defined in Section 2.34 to mean:

> the WIOs have waived any rights under the PTUA, individual lease terms, Alaska law and/or the laws of the United States of America, to file an application, petition, administrative appeal, or any cause of action before any administrative tribunal or state or federal court of law, and that the WIOs shall not file any such application, petition, administrative appeal, or cause of action. With regard to acreage that is released to the State Without Appeal under this Agreement, upon the occurrence of the specified event resulting in the release of acreage, that release will occur immediately and automatically.

Section 4.5.2.3 (emphasis added). The WIOs, however, can contest whether the specified event has occurred that triggers the automatic termination – e.g., a WIO can contest whether it did in fact drill a well or whether *force majeure* has prevented them from performing. Section 5.1.4.

[62] Section 4.5.2.3. "If the Director or the Commissioner approve the Plan of Operation and the lessees fail to place the well on producing status within two years, the lease shall terminate with acreage returning to the State Without Appeal." *Id.*

Accordingly, pursuant to Section 4.5.2, if there is no IPS and a Major Gas Sale (MGS) is not sanctioned, then the Unit automatically terminates and DNR has the sole discretion to get *all* Point Thomson acreage automatically returned to the State.[63] The WIOs can no longer argue, for example, that Section 21 applies if they refuse to install the IPS or if they refuse to develop the field beyond the IPS.[64] They are now foreclosed from filing a compulsory unitization request with the AOGCC under AS 31.05.110.[65] And they cannot argue that they should retain leases because they are engaged in drilling operations or because the leases contain wells capable of producing in paying quantities.[66] The only justification that remains to forestall returning all acreage to the state in 2019 is if the WIOs show that a *force majeure* event prevented timely performance – which is a right that is secured to them under state law.

In sum, the Agreement strips the WIOs of their previously used arguments for refusing to put the Unit into production. The WIOs can no longer argue that Section 21 applies if they refuse to install the IPS or if they refuse to develop the field beyond the IPS.[67] Nor can they argue that they do not need to put the IPS onto production because a reasonably prudent operator would not cycle this field because doing so would be "uneconomic."[68] And the WIOs cannot argue that they get to indefinitely retain all leases with wells capable of producing in paying quantities.[69] Accordingly, the WIOs have relinquished most of the arguments that have been used in the past to prevent the State from terminating the Unit and getting acreage back. If they breach their IPS commitments or Abandon the IPS project, the State will vigorously enforce these provisions of the Agreement, which will limit the WIOs' ability to engage in long, drawn out litigation.

E. The Agreement Provides Long-Term Benefits and the Ability to Optimize Full Field Development.

One reason why Commissioner Irwin rejected POD 23 was because the WIOs failed to address what would happen *after* the IPS was placed on-line.[70] Would the WIOs timely move

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63 Section 4.5.2.1 provides: "If IPS Project Start-up has not occurred and a Major Gas Sale has not been Sanctioned by year-end 2019, the following shall occur: (1) subject to Paragraph 4.5.2.2, the Point Thomson Unit and the PTUA shall terminate Without Appeal; (2) except for leases subject to Paragraph 4.5.2.3, each WIO will immediately surrender its leases and all such acreage shall be automatically released Without Appeal to the State; (3) each WIO agrees that it will not apply to form a compulsory unit with the Alaska Oil and Gas Conservation Commission with respect to any lease formerly within the Point Thomson Unit; and (4) this Agreement shall terminate."

64 Sections 2.3.4, 4.5.2.2.

65 *See* Sections 2.3.4, 4.5.2.2, 4.5.2.3.

66 *Id.*

67 Section 2.3.4.

68 *See, e.g.,* Section 4.2.1 ("The economics or costs of the IPS Project cannot be used as a rationale or justification for not completing the IPS Project and do not constitute a factor outside the WIOs' control under Paragraph 4.2.3.").

69 Section 4.5.2.3.

70 *See* Commissioner Irwin's April 22, 2008 Point Thomson Unit Findings and Decision on Remand From Superior Court at 31.

forward with a full field development plan, or would they force DNR to litigate with them to get more development? Importantly, the Agreement answers the "what next" question because it sets out three full field development alternatives and imposes significant consequences if the WIOs fail to develop beyond the IPS.

1. DNR Retains the Authority to Review Development Plans, and if the WIOs Do Not Commit to or Sanction at Least One Expanded Development Alternative, Significant Acreage Will Contract Out of the Unit.

The Agreement mandates the IPS be put into production. Once the IPS is on-line, the WIOs are presented with the following specifically defined and delineated development paths for the Thomson Sands reservoir which the WIOs must pursue by year-end 2019 or they will lose significant Point Thomson acreage.[71]

- Sanction a Major Gas Sale and begin the process of developing the massive Point Thomson gas reserves to ship down a gas pipeline.[72]

- Expand the IPS to cycle more gas and increase condensate production into TAPS; this alternative will result in additional liquids condensate production but leaves the dry gas in the reservoir.[73]

- Produce the Point Thomson gas and condensate, and then transport and inject the dry gas into Prudhoe Bay and send the liquid condensate down TAPS; this alternative will materially increase oil production at Prudhoe Bay, allow for Point Thomson gas to be available for in-state use, and increase condensate production at Point Thomson.[74]

DNR retains the discretion to review these development plans and can reject them if they are inconsistent with the Agreement.[75]

In addition to these post-IPS development alternatives for the Thomson Sands reservoir, the WIOs must develop the Brookian oil accumulations. This is an important component of the Agreement given the estimates of oil in the Brookian accumulations. The WIOs must submit an acceptable development plan that moves the Brookian accumulations into timely production.[76] If they do not submit an acceptable development plan by 2018, they will lose the Brookian acreage.[77]

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71 *See, e.g.,* Section 4.4.2.

72 *See, e.g.,* Section 4.4.2.

71 *See, e.g.,* Section 4.4.2.

72 *See, e.g.,* Section 4.4.2.

73 *See, e.g.,* Sections 4.4.2, 4.5.4, 4.5.5.

74 *See, e.g.,* Section 4.5.5.

75 *See* Section 4.6 (providing that future PODs must be submitted for DNR's approval and must be consistent with Section 10 of the Point Thomson Unit Agreement and the Settlement).

76 Section 4.7.

77 *Id.*

DNR has complete discretion to accept or reject the Brookian POD and its decision to reject the POD will result in the loss of the Brookian acreage, and this decision cannot be appealed to court.[78]

All three development paths can be pursued individually or simultaneously. They will each require billions of dollars of additional investment to complete, thereby providing significant employment opportunities for Alaskans, increasing revenue for the State and local governments, and two of the three will enable Alaskans to finally access large volumes of North Slope gas for in-state use. Each of these alternatives also provide that the WIOs can only fully secure additional Point Thomson acreage once expanded production of hydrocarbons begins.[79]

2. Given the Importance of a Large Scale Gasline to the State's Interests, the Agreement Focuses on a Major Gas Sale.

Advancing a Major Gas Sale has been a longstanding goal of the State and is therefore a primary goal of the Agreement.[80] The Agreement moves the State closer to a Major Gas Sale in a number of ways.

First, a Major Gas Sale unlocks the potential and resources of the Point Thomson field, which contains approximately 25% of ANS proven gas reserves.

Second, the Agreement provides that in addition to the IPS work, the parties undertake work together to commercialize ANS gas in conjunction with the IPS.[81] The letter to Governor Parnell from the CEOs of BP, ConocoPhillips, and ExxonMobil announced this forward alignment and made public the work that had already begun.[82] The producer alignment is important for a Major Gas Sale – it is also unprecedented when considering their alignment with TransCanada. The Point Thomson Agreement drove the alignment to work together on a single, large-scale, in-state LNG project.

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78 Section 4.7 provides: "If the WIOs submit a POD for the Brookian by year-end 2018 that is approved by DNR, the acreage listed in Area F on Exhibit C shall remain in the Point Thomson Unit after any Unit contraction at year-end 2019 and shall be maintained through approved PODs or formation of expanded or new PA(s) in accordance with the PTUA including applicable State law. If the WIOs do not submit a Brookian POD by year-end 2018 or if DNR does not approve the Brookian POD, the acreage listed in Area F on Exhibit C shall be released to the State Without Appeal."

79 Section 4.4.2 (noting that the initial participating area will expand once the WIOs begin expanded production for a Major Gas Sale, IPS Gas Cycling Expansion Project, or the Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project).

80 Section 1.11 ("A Major Gas Sale off the North Slope of Alaska is a primary goal of the Parties.").

81 Section 1.7 states: "In parallel with the work on the IPS, Parties and/or their affiliates to this Agreement will, upon execution of this Agreement, undertake work for commercialization of North Slope gas. This work will build on ongoing gas commercialization efforts."

82 http://dnr.alaska.gov/commis/priorities/point_thomson_files/ceo_letter.pdf

Third, and more specifically, the Agreement incentivizes progress on a Major Gas Sale project. It provides two windows for the producers to Sanction a Major Gas Sale commercial project: (1) from now until 2016, which if chosen, will enable the WIOs to temporarily secure additional Point Thomson acreage; and (2) if a Sanction decision is not made by 2016, then the WIOs will have to do engineering and permitting work on the other full field development alternatives laid out in the Agreement.[83]

And finally, the IPS and full field development alternatives will result in infrastructure and permits required for a Major Gas Sale.[84]

3. The Agreement Provides for Other Full Field Development Alternatives Aimed at Enabling the Optimization of State Resources.

One of the strengths of this Agreement is it provides the State and the WIOs flexibility regarding full field development. The past decade has seen considerable volatility in the global and domestic energy markets. Because nobody can predict the future, it is difficult to know the optimal development path for Point Thomson at present. Although the Agreement places an emphasis on a large scale gas commercialization pipeline project, there is significant value in retaining other paths for how the Point Thomson field should be developed in addition to a Major Gas Sale, which is why the Agreement also has full field cycling as an alternative.

Nevertheless, it has been suggested that full field cycling should be the *only* full field development alternative authorized by the State. We disagree.

First, before committing to full field cycling, the WIOs, and the State, need to better understand, among other things: (i) the operational capability to cycle gas at 10,000 psi; (ii) the efficiency of high pressure separation of condensate from the gas; (iii) the connectivity of the reservoir; (iv) the condensate yield (how much condensate drops out of the gas); and (v) the economic viability of long term gas cycling. There will be much more information on these important aspects once the IPS is online and producing condensates and reinjecting dry gas back into the reservoir.

Second, Point Thomson gas may be needed for a large-scale pipeline. The State therefore does not want to condemn the prospects of a large scale gas pipeline by insisting that Point Thomson gas cannot be made available for North Slope gas commercialization until Point Thomson is fully cycled, which could take 20 to 30 years. Indeed, insisting only on full field cycling could significantly restrict the State's flexibility on advancing a large-scale gas pipeline because full field cycling would deprive the State of the ability to use Point Thomson gas for such a pipeline.

Third, to help advance a large scale gas pipeline, the Agreement encourages the WIOs to sanction a Major Gas Sale by allowing the WIOs to retain the Unit (with the exception of the

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83 Section 4.1.6.

84 Section 1.6 – 1.7 (noting that the infrastructure will serve as a "pre-investment" for a Major Gas Sale).

Brookian, which is subject to a separate process) if a Major Gas Sale goes forward and Point Thomson gas is transported down the gas pipeline.[85]

All three full field development alternatives as set forth and defined in the Agreement are in the public interest because they will provide significant benefits to the State, including increased oil production, billions of dollars in investment, additional revenue to State and local governments, and employment for Alaskans.

Overall, the flexibility related to full field development provided by the Agreement is one of its important strengths. Nobody knows what the future holds. It is in the State's interest to retain all alternatives that would optimize the overall benefit to the State for the development of the Point Thomson resources.

4. Mr. Walker's and Mr. Richard's Views on the Uses of the Point Thomson Reservoir Illustrate Why Full Field Development Alternatives are in the State's Interest.

Given the uncertainty of the future, today's views on the best way to fully-develop Point Thomson may not be tomorrow's. Mr. Walker's and Mr. Richard's changing views on the best uses of the Point Thomson Reservoir illustrate the reasonableness of providing full field development alternatives for the Point Thomson field to promote the State's interests. Mr. Walker asserted in his testimony before the Senate Judiciary Committee on April 27, 2012, and his recent letter to the DNR Commissioner Sullivan, that the only responsible way to develop Point Thomson is through full field cycling of liquids. This position is at odds with the positions he argued for in the written filings and oral testimony he submitted earlier during the pendency of the Point Thomson litigation.[86] There he urged DNR to require a blow down sort of development on the basis that Point Thomson provides the "best source of gas" for an LNG project and utilizing Point Thomson gas for a gas pipeline will provide significant benefits for the state. He advocated that DNR needed to get the WIOs to commit their Point Thomson gas reserves into a gas pipeline or, alternatively, terminate the Unit so that it could get another company to develop Point Thomson's gas reserves and put this gas into a gas pipeline.[87]

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85 *See* Sections 4.4.2.

86 The Point Thomson record, which serves as the basis for this Agreement, contains over 35,000 pages of documents. Between the 2005 default decision and the 2009 lease termination proceedings held before Commissioner Irwin, DNR held three public hearings related to the issues covered in the Agreement. Mr. Walker participated in two of these hearings and submitted hundreds of pages of documents that were considered by DNR before settling this dispute.

87 For example, in 2005 Mr. Walker stated in a court filing that Point Thomson provides the "best source of gas" for an LNG project. [Ex. A at 6] He told DNR that utilizing Point Thomson gas for a gas pipeline will provide significant benefits for the state. [Ex. A at 8-9] Mr. Walker, citing a filing that he submitted to DNR, explained:

- "Natural gas from the PTU is necessary to make a natural gas line project from the North Slope possible. PTU proven gas reserves are sufficient to supply a large diameter gas pipeline at startup."
- "The Authority requires an assured supply of natural gas, such as that found in the PTU, to obtain financing for a gasline project"

Similarly, Mr. Richards testified to the Senate Judiciary Committee that the State should only allow for full field cycling of the Point Thomson field. But, in a 2008 brief to DNR, Mr. Richards argued to Commissioner Irwin that he should *reject* the WIOs' plans for field cycling because "Point Thomson is predominately a gas field."[88] A main focus of his brief was to encourage DNR to *forego* gas cycling development, which would keep the gas in the ground at Point Thomson, and terminate the unit so another party could come in and develop the gas reserves for a large scale gas pipeline.[89]

In sum, Mr. Walker's previous statements are diametrically opposed to his current position, articulated before the Senate Judiciary Committee on April 27, 2012. Indeed, previous statements that it is DNR's constitutional duty to develop Point Thomson's gas reserves as soon as possible significantly raises questions regarding Mr. Walker's most recent position on Point Thomson development. At a minimum, this demonstrates that even those that follow oil and gas issues closely, such as Mr. Walker, cannot be sure of what the most optimum full field development path is for the state regarding Point Thomson. It also demonstrates the importance of having more than one full field development alternative in the Agreement.

II. DR. MYERS'S, MR. WALKER'S AND MR. RICHARD'S CRITICISMS OF THE AGREEMENT ARE BASED ON MISUNDERSTANDINGS OF ITS TERMS

Dr. Myers, Mr. Walker, and Mr. Richards lay out similar criticisms of the Agreement. As shown below, their reading of the Agreement either misunderstands or misinterprets numerous provisions of the Agreement. Below is a brief summary and response to their claims.

A. Full Field Cycling is One of Several Viable Development Alternatives that Provide Significant Benefits to the State.

- "The Leaseholders are attempting to mothball valuable gas reserves that belong to the State and its citizens. These resources are now more valuable than ever, as a result of increases in the price of natural gas in the past few years. Clearly, it is in the State's best interest, and the best interest of its citizens, to develop these resources sooner rather than later."
- "DNR has a constitutional duty to the State and its citizens to ensure that the Point Thomson gas reserves are developed in a timely manner, and not mothballed as the Leaseholders seek to do."
- "It is in the interest of every citizen that a natural gas Project be built because such a Project will provide needed revenue for many government programs, both at the State and local levels. It is also in the public's interest because a natural gas Project will create jobs and economic activity." [*Id.* at 11]

88 *See* Ex. B at 23.

89 *See* Ex. B at 22-35. Mr. Richards also added: "the Port Authority respectfully submits that the Commissioner would be woefully ignoring his obligations as trustee of our people's resources if he did not focus these termination proceedings on the working interest owners' refusal to market gas from the unit." [Ex. B at 22]

The central criticism offered by Dr. Myers, and echoed by Mr. Walker and Mr. Richards, is that the only reasonable development path for Point Thomson is full field cycling, and that the State should not have agreed to any other development option in the Agreement.

As discussed in much more detail below, Dr. Myers, Mr. Walker, and Mr. Richards rely on a misguided application of the 2008 PetroTel study to support their view that full field cycling is the *only* development option that DNR should consider. This study, however, is not a complete guide to determine the feasibility or commercial viability of a full field scale cycling development. The 2008 study was only designed to evaluate the range of proven and potential hydrocarbon resources within the Thomson Sand reservoir and to get a preliminary understanding of the relative impact on potential rate of production and ultimate recovery of hydrocarbons.

It is critical to underscore that these *preliminary* 2008 estimates of technically recoverable resources were made without applying the real-world constraints that would apply to an actual development, such as limitations on the number of wells, restrictions on the placement of drilling pads and other facilities, gas handling limits, or economic metrics. Additionally, since issuance of the report in 2008, new data has been made available to DNR, which allowed the agency to conduct detailed studies and understand more fully the full range of challenges associated with development of the Point Thomson reservoir.

Nonetheless, DNR agrees that full field cycling may be a viable alternative for developing Point Thomson, and that is why the development path is included in the Agreement.[90] Indeed, it should be noted, that the IPS *is* a gas cycling project, and depending on the results of that development, full field cycling might be how the Point Thomson field is optimally developed.[91]

Generally speaking, the primary benefit of full field cycling is that it potentially allows the operator to recover the largest quantity of condensates and oil. But, when evaluating this development option, there are other considerations that cannot be overlooked. For example, the WIOs would not agree to a settlement that demanded only full field cycling; in part because they claim it is not yet known whether full field cycling at Point Thomson is technically feasible. Further, it is far from clear that full field cycling, even if technically feasible, would make economic sense to either the State or the WIOs, given that the costs could be much greater than for other development scenarios and the price of oil in the future is not known.[92] And, critically, full field cycling could delay production of natural gas from the reservoir, which in turn has the potential to significantly postpone a large-scale gas pipeline, a critical piece of Alaska's energy future. On the other hand, a market for North Slope natural gas does not currently exist and cannot be assured by the availability of Point Thomson gas. Thus, the public interest is best protected by retaining flexibility to determine the best path for full field development. Indeed, insisting on only one development option overlooks the benefits, discussed above, that accrue to the State by retaining flexibility with full field development.

In sum, the Agreement requires an initial cycling project and then provides for both full field cycling and other alternatives for possible full field development alternatives for Point Thomson.

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90 Sections 1.7, 2.15, 4.6.2.

91 Sections 1.6 – 1.7.

92 For a detailed overview of the challenges associated with producing this field see http://www.arcticgas.gov/point-thomson-key-gas-field.

Any of these alternatives will provide considerable value to the State. The Agreement further protects the State because DNR retains the right to reject any development that is inconsistent with the Agreement or state law.[93] And, finally, prior to choosing one of these alternatives, the WIOs will still need to secure AOGCC approval, using data acquired through the IPS, that the development alternative ultimately selected is consistent with the Agreement and with State law.[94]

1. The Difference Between "Gas Cycling" and "Gas Blowdown."

To understand the Agreement, and some of the criticisms, it is worth pausing to discuss the two primary methods to develop a retrograde gas condensate field like Point Thomson.[95]

One development method, gas cycling, produces the natural gas, separates out the gas condensates, ships the condensates to market through a liquids pipeline, and re-injects the gas into the reservoir to maintain reservoir pressure. This is exactly what the IPS will do. In a retrograde condensate field, the reservoir pressure must be maintained above its "dew-point, which at Point Thomson is at a very high pressure," in order to prevent the reservoir's condensates and oil from "dropping out" of the gas phase in the reservoir and being lost to production. The primary benefit of this development method is that it allows the operator to recover the largest quantity of liquid condensates and oil by maintaining reservoir pressure. After recovery of the condensate the re-injected gas (minus the volume used for fuel) can then be produced and sold.

The second development method is gas "blowdown", where natural gas is produced from the reservoir and sold rather than re-injected. The liquid condensates are separated from the gas and sent to market through a liquids pipeline and the "dry" gas is transported through a gas pipeline. This type of development would allow the WIOs to simultaneously produce gas and liquids, and it would result in a huge rush of production because the Thomson Sands reservoir is highly pressurized. However, it will also result in the potential loss of considerable liquids in the reservoir because reservoir pressure is not maintained.

It should be emphasized that blowing down the Thomson Sands reservoir (the primary resource in the Unit) will have no impact on the ability to recover the significant volumes of oil contained in the shallower Brookian accumulations.

2. The Agreement does not Unconditionally Authorize Gas Blowdown and the AOGCC Must Approve Any Proposed Development.

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93 Sections 5.7, 4.6 (DNR can reject PODs inconsistent with the Settlement Agreement or Section 10 of the Point Thomson Unit Agreement).

94 Section 5.7 provides: "In proceedings before the Alaska Oil and Gas Conservation Commission regarding approvals related to the IPS Project, a Point Thomson Expansion Project, or a Point Thomson project related to a Major Gas Sale, the DNR agrees it will not oppose any such application submitted that is consistent with the terms of this Agreement and applicable State law." Thus, if DNR believes that a development alternative is not consistent with the Settlement or with state law – i.e., the development will result in waste – then DNR can oppose such an alternative before the AOGCC.

95 For a more detailed overview of these issues see http://www.arcticgas.gov/point-thomson-key-gas-field and http://doa.alaska.gov/ogc/Gas/PtThompson_Pool_Rules.pdf

The main thrust of Dr. Myers' criticism is that the Agreement unconditionally authorizes the waste of significant volumes of oil and gas condensates. This criticism is misplaced because DNR retains the right to reject any development that is inconsistent with the Agreement. Moreover, nothing in the Agreement gives the WIOs an unconditional right to forgo full field cycling and blowdown the field.

Beyond DNR's tools to guide full field development, the Alaska Oil and Gas Conservation Commission ("AOGCC") will adjudicate any development and off-take plan proposed by the operator. The AOGCC is statutorily prohibited from allowing any development plan that will result in waste.[96] And State law provides that it is the AOGCC that must determine whether a particular development plan is wasteful.[97] The Agreement does not alter this relationship or responsibility, and it does not prevent DNR from opposing a development plan that conflicts with the Agreement or with state law.[98]

3. The 2008 PetroTel Study Taken Out of Context Does Not Provide a Realistic Portrait Regarding Full Field Development.

During their testimony before the Senate Judicial Committee on April 27, 2012, the only evidence that Dr. Myers and Mr. Walker cited to support their assertion that blowing down Point Thomson for a large scale pipeline would lead to considerable waste of oil and gas condensates was a 2008 PetroTel study. Based on this study, Dr. Myers and Mr. Walker also claim that the only reasonable development plan for Point Thomson is full field cycling.

The 2008 PetroTel study should not be used to judge the merits of the IPS and the expanded development alternatives set out in Agreement because the 2008 study was a preliminary analysis and was not designed to evaluate optimal developments scenarios.

In 2007, the Resource Evaluation section of the Division of Oil and Gas contracted with PetroTel, Inc. to perform geologic and engineering evaluation of the Point Thomson Sand reservoir. The study was initiated to provide a technical assessment of the Thomson Sand reservoir. The purpose of the evaluation was to get an independent analysis of the proven and potential hydrocarbon resources contained in the reservoir and gain a better understanding of unique issues associated with development and production of a retrograde gas condensate reservoir.

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96 AS 31.05.095 provides: "The waste of oil and gas in this state is prohibited." Under AS 31.05.100, an operator must secure AOGCC approval by proving that the development will not result in waste before developing a pool. AS 31.05.170(15) defines waste to mean its "ordinary meaning" and includes "the inefficient, excessive, or improper use of . . . reservoir energy and . . . producing any oil or gas well in a manner which results or tends to result in reducing the quantity of oil or gas to be recovered from a pool[.]"

97 As the AOGCC has stated, "the operator of an oil or gas field applies to the AOGCC for 'Pool Rules.' These are specific rules that stipulate how to develop the reservoir in a way that maximizes oil and gas recovery." http://doa.alaska.gov/ogc/Gas/NS_Gas_Sales.pdf

98 Section 5.7 (DNR can oppose any development application pending before the AOGCC that is inconsistent with state law or the Settlement); Section 4.6 (DNR can reject PODs inconsistent with the Settlement Agreement or Section 10 of the Point Thomson Unit Agreement).

The scope of the 2008 study did not include optimization of any particular development scenario and it was not designed with the intent of describing a realistic development plan. It is vitally important to note, therefore, that these preliminary 2008 estimates of technically recoverable resource were made without applying the real-world constraints that would apply to an actual development project, such as limitations on the number of wells, regulatory restrictions on the placement of drilling pads and facilities, gas handling limits, or economic metrics.

Here, the 2008 PetroTel study cannot serve as a realistic basis to review a specific development plan precisely because *no consideration was given to these potential restrictions*, i.e., to the location or size of surface infrastructure or facilities, development costs, performance of high pressure facilities, gas handling constraints, or market conditions. Indeed, the 2008 PetroTel study did not consider *any* economic or operational constraints on the number of wells drilled, the amount of gas cycled per day, the volume of gas the facilities could handle, or the associated challenges imposed when permitting a full field development.

In addition, the 2008 study reported that up to 400 million barrels of oil could potentially be recovered from the Thomson Sands oil-rim, which is different from the Brookian resources. This thin oil rim lies between an overlying, highly mobile Thomson Sands gas cap and an underlying water leg. Subsequent modeling runs by DNR and PetroTel, however, indicate that a project to drain the thin oil column of the main Thomson reservoir could face serious challenges because, in part, the wells intended to produce the oil would produce gas instead of oil within a matter of weeks, effectively ending production from the oil rim. Even Dr. Myers conceded during his testimony that the oil rim estimates in the 2008 PetroTel study that he cited in his PowerPoint were likely too optimistic. Thus, the assumption of the 400 million barrels of recoverable oil from the oil rim, in retrospect, appears unrealistic given these challenges, the current state of technology, and development costs.[99]

Put simply, it is not appropriate to use the potentially recoverable reserves reported in the 2008 PetroTel study as the true measure of what will or won't be recovered at Point Thomson. Ultimately any development at Point Thomson will be a balance (optimization) of not only the potential resource and reservoir characteristics but also the real world development constraints that allow the operator to economically recover the maximum amount of oil and gas over an expected time frame.

4. The 2008 PetroTel Study Does Not Fully Reflect DNR's Current Understanding of the Point Thomson Reservoir.

The 2008 PetroTel study was a preliminary study and does not comport with the Division's current understanding of the challenges in developing the Thomson Sands reservoir. Since this

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[99] Indeed, discounting the recoverability of the oil rim is consistent with the United States Department of Energy's analysis of the Point Thomson reservoir. After reviewing the 2008 PetroTel study, the Department of Energy stated the PetroTel findings "appear to be optimistic and open to question, especially with respect to the recovery predicted for oil from the oil rim." http://www.netl.doe.gov/technologies/oil-gas/publications/AEO/ANS_Potential.pdf at 2-30 Contrary to the 2008 PetroTel study, the DOE concluded that very little of the oil rim oil was recoverable and that "it is conservatively assumed that the gas reserves are 8.0 TCF and the liquids are estimated to be at least 300 MMBC." This number is in stark contrast to the earlier 2008 PetroTel estimates of 620-850 million barrels of petroleum liquids.

study was issued the Division has learned much more about the reservoir and the challenges associated with development of the resource within. After PetroTel completed the 2008 study, the Division acquired access to ExxonMobil's data room. The Division took the information it learned from the data room and, along with PetroTel, concluded that when comparing similar likely scaled full field developments, the potential liquids lost would be far less than the estimates contained in the 2008 PetroTel study.

More specifically, in September 2008 PetroTel was put under contract to the Alaska Department of Law to provide consulting services and expert testimony to the State of Alaska in connection with the litigation arising from DNR decisions to terminate the Point Thomson Unit. PetroTel performed additional studies and refinements to their earlier modeling efforts in order to advise the State and be in a position to testify in the Point Thomson Unit litigation if the litigation team deemed it appropriate. The work performed by PetroTel on behalf of the Point Thomson Unit litigation team is set forth in detail in Appendix A.

After completing this extensive review, the Division of Oil and Gas concluded that the potential amount of liquid condensate and oil that could be lost if Point Thomson were "blowndown" early for a Major Gas Sale would be significantly less that the estimates found in the 2008 PetroTel study that Dr. Myers and Mr. Walker rely upon. DNR cannot disclose the revised estimate because this information is protected under Alaska law.

This work culminated in a two day briefing by PetroTel and the Division of Oil and Gas for DNR Deputy Commissioner Rutherford and the Point Thomson litigation team in August of 2009. Commissioner Sullivan subsequently received similar briefings from Division staff in 2011. This work was integral to the Agreement and to DNR's decision to support the full field development alternatives authorized by the Agreement.

B. <u>The Major Gas Sale Development Set Forth in the Agreement Contemplates a Large- Scale Gas Pipeline Project Off the North Slope</u>.

Mr. Walker and Mr. Richards have raised questions regarding why the Agreement's definition of Major Gas Sale is a pipeline with capacity greater than 500 million cubic feet per day (mmcfd), as opposed to a larger number, such as the definition of Major Gas Sale in the Prudhoe Bay Unit Operating Agreement. Contrary to Mr. Walker and Mr. Richard's speculation, this definition does not contemplate a small-scale gas pipeline.

The 500 mmcfd threshold was included in the Agreement to reference the exception in AGIA that provides the State may be involved in the finance and construction of a gas pipeline of 500 mmcfd or less without incurring penalties. Requiring the Major Gas Sale to be in excess of 500 mmcfd made clear that any in-state "bullet line" would not qualify as a Major Gas Sale.

It would not be economic to construct a small line as speculated by Mr. Walker and Mr. Richards. In order for a gas pipeline project to make economic sense, the project size would likely need to eventually be well in excess of 500 mmcf per day.

An LNG project will need to be large scale to be economic. Given this, there was no reason to try and specify any minimum pipeline size in the Agreement beyond ensuring the line will be in excess of the 500 mmcfd AGIA limitation because it is not clear today exactly what the initial scope of any LNG project may be. An LNG project may "scale up" over its first few years and the

Agreement was designed to provide flexibility to ensure that an arbitrary limitation did not prevent the construction of an economic large-scale gas pipeline project.

C. The Agreement Contains a Firm Development Commitment in the Form of the IPS, and the Penalty of Losing the Unit *and* the Underlying Leases if the IPS is not Completed.

1. Per the Agreement, the IPS is a Firm Commitment Offering Benefits to the State Far in Excess of the 2009 Conditional Interim Decision.

Mr. Walker and Mr. Richards argue that the IPS was formerly a firm commitment under DNR's 2009 Conditional Interim Decision and that, under the Agreement, the IPS is now optional and that even if the WIOs Abandon the IPS, they still keep significant acreage.[100] Mr. Walker and Mr. Richards misunderstand the IPS and how it differs from the 2009 decision.

The IPS is not an "option." The Agreement employs binding mandatory language that *requires* the WIOS to complete the IPS. It provides: "The WIOs *shall* put the PTU 15 and PTU 16 wells on production utilizing the IPS by the end of the 2015-2016 winter season and in no event later than May 1, 2016."[101]

In the past when the WIOs have committed to cycling projects at Point Thomson, they have returned to the State and said that cycling is uneconomic. The Agreement takes away this excuse. Under Section 4.2.1, the "economics or costs of the IPS Project cannot be used as a rationale or justification for not completing the IPS Project and do not constitute a factor outside the WIOs' control under Paragraph 4.2.3."

The Agreement also requires the WIOs to "diligently pursue" the completion of the IPS and it provides that the failure to do so constitutes a breach of the Agreement that triggers significant consequences.[102] In particular, if the WIOs breach the Agreement by abandoning the IPS, [103] the WIOs lose significant acreage as soon as 2015,[104] and if there is no Major Gas Sale Sanctioned by 2019, then *all acreage* comes back to the State and the Unit terminates Without Appeal.[105]

The purpose of the Abandonment provision is not, as Mr. Walker suggests, to give the WIOs an "option." Instead, *the State* insisted on including this provision in order to establish predetermined consequences for the WIOs' failure to meet contractual obligations. The alternative,

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100 Walker Letter at 5.

101 *See* Section 4.1.1.2 (emphasis added).

102 Section 4.2.1 provides: "The WIOs will have diligently pursued the IPS Project if the project work plans, activities, and pace are undertaken in a manner exemplified by the Point Thomson Provisional Schedule Level 1 work sheet attached as Exhibit E. Moreover, a lack of progress on project work plans, activities, and pace commensurate with the size and scale of the IPS Project over a one-year period is indicia of the WIOs' decision to Abandon the IPS Project."

103 Abandonment is defined in Section 4.2.1, which is quoted above.

104 *See* Section 4.2.2.

105 *See* Section 4.5.2.1.

to remain silent on consequences, would likely result in protracted litigation related to the appropriate remedy for the WIOs' failure to meet their binding contractual obligations.

The WIOs' agreement to these consequences for abandonment was a significant concession by the WIOs because, in the past, they have argued that unit and lease termination was not an appropriate remedy for failure to develop the Unit. Now the prospect of losing significant acreage in the near future looms large if the WIOs stop working on the IPS.

Indeed, under the Conditional Interim Decision, there was nothing to prevent the WIOs from stopping work and forcing the State to litigate *for years* on whether they needed to complete the project. This prospect became more likely once Judge Gleason reinstated the Unit, which gave the WIOs the ability to halt their work and wait for the litigation to reach a final resolution.

And contrary to Mr. Walker's contention, the IPS Project described in the Agreement is not in the same as the Conditional Interim Decision.[106] The Agreement goes far beyond the sparse terms of the Conditional Interim Decision. For example, the Agreement sets out a detailed work schedule that the WIOs must abide by; if they do not, then the State has grounds to declare that the IPS Project has been abandoned.[107] The Agreement also obligates the WIOs to keep the IPS fully loaded with gas by drilling additional wells if production falls off and to conduct debottlenecking work to increase liquids recovery.[108] It requires the WIOs to drill the West Pad well by the end of the 2016-2017 winter season[109] and requires the WIOs to pursue permitting of an East Pad, East Pad Well, and a Fifth Well.[110] The Agreement also requires the WIOs to begin working on the next phase of development by submitting a POD for DNR's approval.[111] And as noted above it dispatches with the WIOs' previous excuses for not developing the field.[112]

Accordingly, the IPS Project required by the Agreement differs significantly from the 2009 Conditional Interim Decision because it contains additional mandatory work commitments and provides contractually agreed upon remedies if the WIOs fail to meet their binding obligations.

2. Even if a Major Gas Sale is Sanctioned after Abandonment of the IPS, Previously Contracted Acreage is Forever Lost to the WIOs.

Mr. Walker and Mr. Richards seem to believe that, if the IPS is Abandoned and acreage is lost as a result, the Sanctioning of a Major Gas Sale will cause previously contracted acreage to come back into the Unit.[113] This is incorrect.

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106 Walker Letter at 4, 5.

107 *See* Section 4.1.1.2; 4.2.1; Ex. E.

108 *See* Section 4.1.1.3; 4.1.1.4.

109 *See* Section 4.1.2.

110 *See* Section 4.1.3.

111 *See* Section 4.1.6, 4.6.

112 *See, e.g.*, Section 4.1.1.2 (the WIOs must complete the IPS – this commitment is not contingent on the outcome of engineering studies), 4.2.1 (the WIOs cannot use economics or costs as an excuse for not completing the project).

113 Walker Letter at 7.

The Agreement is clear that should the WIOs Abandon the IPS but later Sanction a Major Gas Sale, certain acreage that contracts as a result of Abandonment remains contracted.[114] More specifically, if the IPS is Abandoned, Areas E and F contract regardless of the amount of money spent between year-end 2007 and 2015, and if the WIOs spend less than $2 billion and do not drill the West Pad Well, the only acreage that remains in the Unit is Area A.[115]

This acreage will not, as Mr. Walker and Mr. Richards suggest, be reconstituted or recommitted to the Unit if the WIOs later Sanction a Major Gas Sale. The Agreement is explicit on this point: "If IPS Project Start-up has not occurred and a Major Gas Sale is Sanctioned prior to year-end 2019, any acreage that contracts from the Point Thomson Unit under Paragraph 4.2 (the Abandonment provision) of this Agreement *shall not be recommitted to the Point Thomson Unit.*"[116]

3. If the WIOs Do Not Develop Beyond the IPS, They Will Lose Significant Acreage.

Mr. Walker and Mr. Richards assert that the WIOs will retain "most, if not all, of Point Thomson in perpetuity" by producing 10,000 barrels per day through the IPS.[117] They are incorrect.

If the WIOs do not move beyond the IPS, then under Sections 4.5.3 and 4.7, Area E and F, and some leases in Area D, will automatically contract out of the PTU. This acreage automatically returns to the State in 2019. The WIOs cannot appeal this decision.[118]

Additionally, assuming that the WIOs fail to meet their binding commitment to drill the West Pad Well, then any acreage in Areas B and D that is not contributing to production, i.e., that is not included in the initial participating area, will contract from the unit under Section 4.5.3.2. And

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114 The State did not insist on getting all of the acreage back in 2015 because the WIOs have, by drilling two wells capable of producing in paying quantities, earned the right to retain some acreage for an additional period of time to place those wells onto production or to Sanction a Major Gas Sale. This provision is also consistent with the central principle of the Settlement: the more work and money the WIOs spend, the more acreage they retain.

115 Under Section 4.2.2.4, only costs that are directly related to Point Thomson Development and that are paid for by the other Point Thomson WIOs can count towards the $2.0 billion number. Point Thomson Development is defined as "work activities" for the IPS and other work activities set out in the Settlement. This means that the WIOs cannot "get credit" for work they have completed on gas pipeline projects or for work completed at other fields (because the Point Thomson WIOs are not going to be billed for this work), nor will legal fees or overhead count because these are not work activities mandated by the Settlement. *See* Section 4.2.2.

116 *See* Section 4.5.7 (emphasis added).

117 Walker Letter at 4.

118 Section 4.5.3.1 provides: "The acreage in Area E and the northern half of ADL 377017 (ADL377017(N) on Exhibit C), without regard to whether this acreage was included in a technical PA application or is included in the PA as the result of a technical PA expansion under Paragraph 4.4.3, shall be released to the State Without Appeal. The remaining acreage in Area D shall be subject to the PTUA including applicable State law."

even if the WIOs have drilled the West Pad Well, then any acreage in Area D that is not contributing to production will contract from the Unit.

Consequently, by 2019, nearly half of the Point Thomson acreage will automatically return to the State Without Appeal if the WIOs do not expand beyond the IPS. If the WIOs do not move beyond the IPS, the only acreage the WIOs are entitled to hold is Area A. And depending on what else the WIOs have done and the extent of the IPS production, they may keep more leases beyond Area A. The Agreement therefore dramatically restricts the WIOs' ability to keep the State in court for years over their failure to develop the Unit's resources and will result in the automatic return of significant acreage to the State Without Appeal.

This outcome is entirely consistent with State law and the Unit Agreement, both of which provide for retention of acreage as a result of production.[119] The Agreement provides additional protection for the State that does not otherwise exist under the Unit Agreement by specifically tying the retention of additional acreage to undertaking and completing future development projects.[120]

D. The Agreement Addresses the Next Phase of Development after the IPS by Providing for Additional Development Alternatives that, if Completed, Allow the WIOs to Retain Additional Acreage.

1. Construction Commitments and Final Investment Decisions Will be Part and Parcel of Sanctioning a Major Gas Sale.

Mr. Walker and Mr. Richards believe that Sanctioning of a Major Gas Sale could occur in the absence of construction commitments and without final investment decisions,[121] but they misunderstand the definition of Sanction.

The definition of Sanction was carefully crafted to ensure that acreage would not be secured unless a Major Gas Sale project would actually be completed, with a pipeline constructed and gas flowing through the pipeline. The definition of Major Gas Sale mandates a pipeline that delivers gas "off the North Slope of Alaska."[122] The definition of Sanction expressly requires corporate approvals to "proceed with construction of the project to completion."[123] *This is a contractually-binding construction commitment to complete a gas pipeline, not a promise to conduct further "studies."*

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119 *See* Section 11 of the Point Thomson Unit Agreement; AS 38.05.180(m); 11 AAC 83.336.

120 Sections 4.4, 4.5, and 4.7 explicitly discuss when and how acreage is retained and under what circumstances the Point Thomson Unit terminates and acreage returns to the state.

121 Walker Letter at 6-7.

122 *See* Section 2.16.

123 Section 2.28 defines Sanction to mean "formal and explicit approval of a Major Gas Sale. A Major Gas Sale shall be considered "Sanctioned" under this Agreement upon receipt by the State of documentary evidence of: (1) corporate approvals by parties sufficient to proceed with construction of the project to completion; (2) firm transportation service agreements that have been entered into sufficient to proceed with construction of the project to completion; and (3) necessary United States (and, if applicable, Canadian) federal regulatory certificates that have been issued and accepted."

Moreover, a Sanction requires Firm Transportation Service Agreements from customers who will ship gas on the pipeline, and to acquire necessary regulatory approvals, including a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission.[124] These agreements and regulatory approvals represent significant undertakings that will likely cost over a billion dollars and would not occur unless there was a real project.

2. Point Thomson Gas Would Be Used for a Major Gas Sale under the Agreement.

Mr. Walker and Mr. Richards claim if a Major Gas Sale is Sanctioned, the WIOs would retain the Point Thomson Unit without the need to develop Point Thomson gas reserves.[125] This contention is wrong.

If a Major Gas Sale is Sanctioned but the WIOs never produce Point Thomson gas, then they are in breach of the Agreement – assuming they have not pursued one of the other full field development alternatives. Under Section 4.6, the WIOs must submit a POD that complies with Section 10 of the Unit Agreement, which in turn requires the submission of PODs for DNR's approval that timely develop the Unit's resources.[126] Likewise, Section 4.6.1 provides that if a Major Gas Sale is sanctioned, the WIOs "*shall* submit a Future POD that includes works plans and project activities to *develop the Point Thomson Reservoir* for a Major Gas Sale."[127] The Agreement adds that DNR retains the right to reject the proposed POD if it fails to comply with these requirements.[128]

Thus, the Agreement makes very clear that once a Major Gas Sale has been Sanctioned, the WIOs are not relieved from developing the Point Thomson gas reserves – instead they must timely develop the PTU gas unless they decide to pursue another full field development alternative, *e.g.*, full field cycling under Section 4.6.3.

In addition, it provides that the only way to secure Point Thomson acreage after Sanctioning a Major Gas Sale, assuming no other full field development alternative is pursued, is by *producing the gas at Point Thomson.*[129] Section 4.4.2 states that the participating area will *only* expand to include additional Point Thomson acreage "upon Project Start-up of the project *to develop the Point Thomson Reservoir* for a Major Gas Sale[.]" Accordingly, Point Thomson gas molecules must be flowing through a gas pipeline off of the North Slope to secure acreage.

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124 Section 2.28.

125 Walker Letter at 7.

126 Section 10 of the PTUA provides, in part, that "Any plan submitted pursuant to this section . . . shall be as complete and adequate as the Director may determine to be necessary for timely development and proper conservation of the oil and gas resources of the unitized area."

127 *See* Section 4.6.1 (emphasis added).

128 *Id.*

129 This critical principle applies to all of the development projects – *e.g.*, acreage is only secured when the IPS is on production (Section 4.3) when additional development

The Agreement is also clear that should natural gas production into a gas pipeline never commence from the Unit, then DNR retains the right under Section 2(e) of the Unit Agreement, and applicable state law, to contract non-producing acreage out of the Unit, assuming the Unit has been placed into production.[130] And if a Major Gas Sale has been Sanctioned, but the Unit has never been placed onto production by the IPS, then the State can terminate the Unit under the Unit Agreement and applicable law.[131]

Thus, even if a Major Gas Sale project commences and only uses gas from Prudhoe Bay, the Agreement does not allow the WIOs to permit Point Thomson to lay fallow indefinitely. Moreover, as discussed in detail above, this is one example of how the Agreement has put the WIOs back "on the clock" to get the Unit developed. Accordingly, the contention that the Agreement allows the WIOs "to continue to warehouse Point Thomson resources" is meritless.

3. If the WIOs Abandon the IPS and a Major Gas Sale is Not Sanctioned, DNR May Terminate the Unit and all Point Thomson Leases.

Mr. Walker and Mr. Richards are under the impression that if the IPS is Abandoned and a Major Gas Sale is not Sanctioned, the WIOs have the right to retain the entire Unit by submitting an "Expansion Project POD" by year-end 2019.[132] They misunderstand the Agreement's provisions.[133]

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130 *See* Section 4.5.1 ("If by year-end 2019 a Major Gas Sale has been Sanctioned or the WIOs have Committed to a Point Thomson Expansion Project, acreage to be included in the PA . . . shall remain in the Point Thomson Unit following formation of the Initial PA, and thereafter shall be subject to elimination from the Point Thomson Unit in accordance with the terms of the PTUA including applicable State law, including Section 2(e). If IPS Project Start-up has not occurred and the Initial PA has not been formed, but a Major Gas Sale is Sanctioned, such acreage shall remain in the Point Thomson Unit and shall be subject to elimination from the Point Thomson Unit in accordance with the terms of the PTUA including applicable State law, including Section 2(e), as if the Initial PA had been formed effective May 1, 2016."). Section 2(e) of the Point Thomson Unit Agreement and the applicable State law (11 AAC 83.356) provide that acreage not contributing to production eventually contracts from the Unit. 11 AAC 83.356(b) provides: "ten years after sustained unit production begins, the unit area must be contracted to include only those lands then included in an approved participating area and lands that facilitate production[.]"

131 *See* Section 20(c) of the PTUA and 11 AAC 83.336.

132 Walker Letter at 7.

133 The "Expansion Project POD" does not apply to this situation. Instead, the Expansion Project POD will be submitted *after* the WIOs have begun producing from the IPS and *after* they have completed the necessary work under the "Expansion Planning POD" which the WIOs *must* submit if a Major Gas Sales has not been Sanctioned. Section 4.1.6. The "Expansion Planning POD" requires the WIOs to conduct engineering work and permitting for a Point Thomson Expansion Project: full field cycling or injecting PTU gas into Prudhoe Bay. Section 4.6.2. Once this work is completed, which must occur before year-end 2019, the WIOs must submit an "Expansion Project POD" (or Sanction a Major Gas Sale), or they will lose acreage. *See* Section 4.6.3, 4.5.3. The Agreement further provides that no additional acreage is secured until the expansion project the WIOs have committed to is complete and in production. *See* Section 4.4.2.

The Agreement only permits the WIOs to submit an Expansion Project POD *if the IPS project has been completed.* In the absence of completing the IPS, the WIOs must Sanction a Major Gas Sale or the Unit automatically terminates in 2019 and the WIOs lose all of their leases.[134]

The Agreement is clear: DNR has the complete discretion to terminate the Unit in 2019 *and* get all of the leases back Without Appeal if the IPS is not in production or a Major Gas Sale has not been sanctioned. Section 4.5.2.1 provides: "If IPS Project Start-up has not occurred and a Major Gas Sale has not been Sanctioned by year-end 2019, the following shall occur . . . the Point Thomson Unit and the PTUA *shall terminate* Without Appeal . . . *each WIO will immediately surrender its leases and all such acreage shall be automatically released Without Appeal to the State*[.]" (emphasis added).

The Agreement does allow the WIOs to submit one last "alternative" POD[135] or ask DNR for the right to put any wells capable of producing into production in two years.[136] Even so, with both exceptions, DNR has unfettered discretion to deny the request, and the WIOs cannot appeal this determination.[137]

In short, DNR has the full authority, discretion, and contractual right to automatically terminate the Unit in 2019 *and* soon thereafter get all of the leases back Without Appeal if the Unit is not placed into production and a Major Gas Sale has not been Sanctioned. The foregoing provisions provide significant protection for the State because they make clear that if the WIOs fail to follow through on their development commitments, then all acreage comes back to the State. Such clarity is in sharp contrast to the lay of the land that existed under the Unit Agreement following Judge Gleason's decision because, under her decision, there was no assurance that DNR would be able to terminate the Point Thomson Unit or terminate the leases, and get the acreage back.

E. The Agreement Permits DNR to Closely Monitor the WIOs' Development Decisions and Activities and Impose Penalties for Failure to Abide by the Commitments in the Agreement.

1. Under the Agreement, DNR Retains its POD Powers.

With respect to PODs, Mr. Walker and Mr. Richards appear to believe that DNR has abrogated its POD review powers and obligations to ensure that future development advances the public interest.[138] They are wrong.

Although such acreage temporarily remains in the Unit after year-end 2019, DNR retains its authority to move to contract the unit if the WIOs are in violation of state law. Section 4.5.1.

134 *See* Section 4.5.2.

135 *See* Section 4.5.2.2. This provision is included because, under State law, a Unit operator *must* submit a Plan of Development. 11 AAC 83.343.

136 *See* Section 4.5.2.3.

137 *See* Section 4.5.2.1.

138 Walker Letter at 6-8; 12-13.

As an initial matter, the Agreement ensures the integrity of the POD review process by vacating Judge Gleason's 2010 decision, thereby permanently foreclosing the WIOs from arguing that this decision limited DNR's POD review remedies to a Section 21 hearing where DNR had the burden of proof to prove, among other things, that the specific increase in development demanded by DNR satisfies a "good and diligent practices" standard and would not harm the WIOs' interests.[139] Vacating this decision was a significant concession by the WIOs.

The Agreement further expressly preserves DNR's management of State lands under the POD review process. Under DNR's regulations,[140] a unit operator must submit a POD that: (i) commits to diligently developing the unit resources; and (ii) sets out a long-term plan for future work activities. After reviewing the POD and considering the criteria set out in 11 AAC 83.303, DNR has the discretion to approve or deny the POD. If the POD is approved, DNR must monitor activities to ensure that the unit operator is acting in compliance with the POD.

Mr. Walker and Mr. Richards misconstrue how the POD process will work in conjunction with the Agreement.[141] First, the Agreement does not do away with the requirement to have a POD for the IPS; the Agreement *is* the IPS POD.[142] It sets forth the key work activities and timelines that the WIOs must undertake with respect to the IPS, and it has other requirements (such as annual reporting regarding work activities and spend activity) that complement the POD.[143] In addition, before moving forward with the IPS POD and future PODs, the WIOs must secure DNR's approval for their Plan of Operations under 11 AAC 83.158.[144]

For the post-IPS PODs, the WIOs are obligated to submit PODs that comply with Section 10 of the Unit Agreement, and these PODs must contain all information required by 11 AAC 83.343.[145] DNR has the discretion to deny these PODs if they fail to comply with the requirements set out in

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139 Brief of Appellant State of Alaska, Department of Natural Resources at 27-56 (May 10, 2011, Supreme Court Case No. S-13730).

140 11 AAC 83.343.

141 Walker Letter at 8.

142 *See* Section 4.1.

143 The IPS POD complies with the remaining requirements set out in 11 AAC 83.343 because it contains: (i) long-range plans for proposed development (set out in the recitals, 4.1, and 4.6); (ii) and plans for future delineation and exploration (set out in the recitals, 4.1, and 4.6); (iii) details of the proposed operations for one year (set out in Exhibit E); (iv) the surface location of proposed facilities, drill pads, etc, which are set out in submitted and proposed Plan of Operations; (v) under 4.1.5 and 4.2.1 the WIOs must submit annual reports detailing the work completed during the previous year; and (vi) DNR considered criteria consistent with 11 AAC 83.303 before approving this plan. *See* Section 1, 4.1, 4.2.1, 5.8; Ex. E.

144 The Plan of Operations will discuss in more detail the specific environmental impacts of the development plan and the mitigation measures that DNR will require to mitigate these impacts. They will also be subject to public review and comment, and DNR's approval.

145 *See* Section 4.6 ("The WIOs shall prepare plans of further development and operation for the Point Thomson Unit under Section 10 of the PTUA") and Section 4.6.4 1 (listing all of the technical data and information required by DNR's regulations).

the Agreement or are inconsistent with Section 10 of the Unit Agreement.[146] Moreover, if the WIOs fail to submit a POD that complies with the requirements set out in Section 4.6, this would constitute a breach of the Agreement.[147]

Finally, as discussed above and below, DNR has determined, after considering criteria consistent with 11 AAC 83.303, that the full field development paths set forth and defined in the Agreement are in the public interest.[148] DNR relied on the entire Point Thomson record, spanning over thirty years, to determine that the development paths set forth in the Agreement are acceptable and in the public interest. The WIOs' proposed POD was approved after DNR reviewed voluminous information, including confidential proprietary data in ExxonMobil's data room; engaged in extended discussions with the WIOs related to different development alternatives; and engaged Petrotel to help evaluate various proposed development plans and the economics of these plans.

The Commissioner considered and incorporated regulatory criteria in approving the IPS POD as part of the Agreement and in agreeing to what would constitute acceptable PODs for future development after the IPS. DNR has not relieved the WIOs of the requirement to submit a POD, and DNR has retained the ability to manage state lands under the POD process. Overall, with respect to PODs, Mr. Walker and Mr. Richards fail to recognize that, while the POD process is delineated in the Agreement, the Agreement does not cede the role of PODs in the unit management process, nor does it eliminate DNR's oversight authority.

2. The Agreement is Consistent with DNR's Participating Area Regulations.

Mr. Walker and Mr. Richards mistakenly argue that the Agreement abrogates DNR's unit management authority by eliminating participating area requirements.[149] But the Agreement does not abrogate this important management authority.

Rather, the Agreement works *within* DNR's regulatory framework for the creation of participating areas. DNR's regulations require the creation of a participating area for acreage "reasonably estimated through use of geological, geophysical, or engineering data to be capable of producing or contributing to production of hydrocarbons in paying quantities."[150] Further, the

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146 *See* Section 4.6 (providing the DNR retains the right to reject any POD that is inconsistent with the terms of the agreement).

147 While Mr. Walker and Mr. Richards note that the WIOs will not be submitting an annual POD, Walker Letter at 8, they overlook the fact that there is not legal requirement for yearly PODS – the Point Thomson Unit Agreement merely requires PODs be submitted from "time to time." They also disregard that PODs are often in multi-year form (Point Thomson has previously operated under multi-year PODs, as has Prudhoe Bay), and they also fail to recognize that the Agreement obviates the need for year-by-year PODs because it clearly specifies work activities for both the IPS Project and delineates the path for future development.

148 *See* Section 5.8.

149 Walker Letter at 12.

150 11 AAC 83.351(a).

regulations provide that the unit operator must apply for the creation of participating areas "at least 90 days before sustained production."[151]

With participating areas, as with PODs, the Agreement looks to the future and provides that they will be formed if production actually commences at production levels required by the development alternatives. Further, the Agreement requires submission of the same supporting technical data currently required by DNR regulations. Addressing participating areas in advance of production is consistent with the regulation, which provides that the unit operator must apply for the creation of participating areas "at least 90 days before sustained production."[152] As discussed in detail above, prior to entering into this Agreement, DNR reviewed and analyzed a great deal of technical data, including confidential proprietary data related to reservoir performance. Thus, the participating areas provided for in the Agreement are based on sound technical review and are procedurally consistent with DNR's participating are regulations.

3. DNR Considered 11 AAC 83.303 Prior to Entering into the Agreement.

Mr. Walker and Mr. Richards claim that DNR failed to consider 11 AAC 83.303 and issue a written finding before agreeing to the Agreement.[153] They are wrong.

As an initial matter, there is no requirement that DNR must issue "written" findings under 11 AAC 83.303 before approving the Agreement and the activities authorized by it.[154] Rather, the applicable regulation requires that DNR "consider" the factors set out in 11 AAC 83.303(a) before approving such activities. [155]

Second, consistent with 11 AAC 83.303, DNR did consider the factors set out in 11 AAC 83.303(b) before approving the Agreement and, even though one is not required, it has issued written finding (the Agreement itself) to support its decisions.

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151 *Id.*

152 If a participating area is to be formed, the Agreement requires submission of the same supporting technical data that is currently required by DNR regulations. The data enumerated in Exhibit F is taken from DNR's current form for applying for the creation of participating areas, and was expressly approved by DNR's technical staff. *See* Sections 4.4.5 & Ex. F.

153 Walker Letter at 8-9.

154 The only time DNR must issue a written finding is before approving a new unit agreement. 11 AAC 83.303(a). Here, DNR did not approve a new unit agreement – it settled litigation and approved a development plan.

155 11 AAC 83.303(a) provides that when reviewing a POD or a Participating Area application, DNR must consider proposed activity: (1) promotes conservation of all natural resources, including all or part of an oil or gas pool, field, or like area; (2) promotes the prevention of economic and physical waste; and (3) provides for the protection of all parties of interest, including the state. In evaluating the above criteria, "the commissioner will consider (1) the environmental costs and benefits; (2) the geological and engineering characteristics of the potential hydrocarbon accumulation or reservoir; (3) prior exploration activities in the proposed unit area; (4) the applicant's plans for exploration or development of the unit area; (5) the economic costs and benefits to the state; and (6) any other relevant factors . . . the commissioner determines necessary or advisable to protect the public interest." 11 AAC 83.303(b).

More specifically, consistent with 11 AAC 83.303, DNR evaluated due diligence dating back over nearly *a seven year period* and undertook unprecedented action in evaluating all aspects of the Agreement before agreeing to the terms. The Point Thomson litigation began in 2005. DNR conducted three formal public hearings related to the dispute and various proposed development plans. Collectively, these hearings lasted for weeks and involved dozens of witnesses and included the submission of tens of thousands of pages of documentation from the WIOs and the public. After the hearings concluded, the Parties began settlement negotiations in 2008. Throughout this process, DNR spent considerable time and effort to understand all matters covered in the Agreement, including the IPS POD, future development plans, and the formation of participating areas. DNR received and analyzed confidential and proprietary data relating to various development options; it spent countless hours with the WIOs, including in ExxonMobil and BP's data rooms, discussing these plans; it assembled a team of over 20 state employees from DNR and the Department of Law, and hired PetroTel and two highly respected law firms to help the State evaluate and analyze matters throughout the settlement negotiations; and it created a record exceeding at least 35,000 pages that support its decision to approve the Agreement

The record supporting the Agreement demonstrates that DNR fully and exhaustively considered all of the criteria set out in 11 AAC 83.303 before concluding that this Agreement is in the public interest.

4. <u>If a Development Path that is Selected by the WIOs is Inconsistent with the Agreement or Law, DNR Has the Right to Oppose It</u>.

Mr. Walker and Mr. Richards assert that the Agreement leaves DNR powerless to oppose the development approach ultimately selected by the WIOs.[156] They are wrong.

Section 5.7 provides that DNR will not oppose any project application submitted to the AOGCC by the WIOs "*that is consistent with the terms of this Agreement and applicable state law.*" This is significant because any development plan submitted to DNR and the AOGCC under the Agreement must comply with AOGCC regulations and DNR regulations (which are applicable state law) and must be consistent with the project definitions in the Agreement (such as the numerous benchmarks regarding a Prudhoe Bay Injection Project).[157] In this way, DNR retains its ability to make a final evaluation of whether any development option chosen and proposed by the WIOs under the Agreement is consistent with the public interest. And, if such a development approach is not consistent with State law or with the terms of the Agreement, then DNR can file an opposition before the AOGCC.

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156 Walker Letter at 7.

157 *See* Section 2.21.

In conclusion, I appreciate this opportunity to supplement the record. DNR fully stands behind the decision to settle the Point Thomson litigation. The Agreement secures the State's goal of settling this protracted and uncertain litigation and moving the field into production, and advances the State's interest in the commercialization of Alaska's natural gas. It is not a perfect settlement – no settlement achieves that standard – but there should be no question that the Agreement is in the public interest. I would be happy to answer any additional questions by the committee.

Sincerely,

Joe Balash
Deputy DNR Commissioner

APPENDIX A

The scope of the first phase of the additional PetroTel work addressed in Section III.A.4 was fourfold and dealt primarily with gaining a better understanding of the range of uncertainties in the geologic description of the Point Thomson reservoir.

The first purpose was to generate additional realizations of the static geologic model in order to provide a statistical distribution of the in-place resource within the Point Thomson reservoir from which representative P90 (low-side), P50, and P10 (upside) cases could be extracted. Special consideration was given to creating a "stressed case" geologic description (P99) to capture a possible "worst case" outcome moving forward based upon the existing data from previously drilled wells.

The second purpose was to identify and quantify the uncertainty and potential impact of key variables in the reservoir description, such as reservoir structure, fluid contacts and facies distribution. The third goal was to quantify the expected connectivity of the reservoir within the geo-cellular model for the various descriptions. The final objective was to evaluate different delineation plans which, if executed, would test those key variables and reduce the reservoir uncertainty.

The next phase of work involved reviewing key reservoir data, fluid compositional data and well test data acquired through DNR access to ExxonMobil's confidential Point Thomson data room. The existing dynamic reservoir simulation model was updated based upon this additional information. Special effort was applied to better understand the PVT (pressure/volume/temperature) properties of the gas and refine the equation of state within the model to better match the results of production tests of existing wells and quantify the potential uncertainty in the expected condensate yield from the gas.

Once the dynamic simulator was updated, conceptual development/delineation drilling programs were evaluated and modeled to determine both the optimum and minimum sizing of a pilot project required to determine the validity, within a reasonable time frame, of gas cycling as a recovery mechanism in the Point Thomson reservoir. Variations were run to test the number and location of the wells within the expected physical surface constraints and drilling departure limits imposed by the high pressure reservoir. Each case employed appropriate and realistic facility technology and capacities. The impacts of varying certain aspects of facility design, such as the first stage pressure at which condensate is separated from the produced gas, were explored and quantified. Each cycling pilot case modeled was also run against a primary depletion case (gas blowdown) with the same well configuration to demonstrate the difference in recovery methods.

A methodology for estimating capital and operating costs was then developed beginning with confidential estimates generated by ExxonMobil and their contractors for previous project plans and using industry standards and economic indexes to adjust those estimates to current dollars. Project schedules were also developed based upon ExxonMobil's estimates as well as common practices employed for other large projects located on the North Slope of Alaska.

Ultimately, development scenarios were generated and modeled to evaluate what could be considered a most likely full-field scale development based upon the quantified reservoir risks and uncertainties, as well as the likely facility and surface constraints.

At this point it was decided that the development scenarios would focus primarily on production of the gas and condensate within the gas cap without any dedicated development of the underlying thin oil rim. As mentioned above, previous fine-scale mechanistic modeling of various configurations of dedicated wells targeting production from the oil rim had indicated that production of that resource would likely be very challenging and uncertain due to (i) the close proximity of the large, highly mobile, overlying gas cap, (ii) rapid coning of gas into dedicated oil rim wells that may hamper oil production, (iii) difficulties associated with abnormally pressured directional drilling, and (iv) limitations in the gas handling capacities of facilities. For this reason, oil rim production was not pursued further as part of a likely initial development.[158]

Various development scenarios were then run based on different geologic descriptions to provide production profiles representing a statistical range of outcomes; a P99 stressed case, a P90 low-side, a P50 case, and a P10 upside case. Production and cost profiles were generated for the various cases and provided to the Commercial Section of the Division of Oil and Gas to conduct economic analyses of the different scenarios through the expected life of the project. The analyses incorporated the current ACES tax structure and were run across a range of different assumptions such as commodity price and investment discount rates. This allowed a comparison of the relative economic strength of various development scenarios and outcomes using economic parameters such as Net Present Value (NPV) and Internal Rate of Return (IRR) for both the State and project working interest owners.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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BY DEPUTY CLERK KS

THE ALASKA GASLINE PORT AUTHORITY and JIM WHITAKER, Plaintiffs, v. THE STATE OF ALASKA, Department of Natural Resources, THOMAS IRWIN, Commissioner, Department of Natural Resources, and MARK MYERS, Director, Division of Oil and Gas, Defendants.	CASE NO.: 3AN-05-7486CIV

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Plaintiffs the Alaska Gasline Port Authority (the "Authority") and Jim Whitaker, on his own behalf and on behalf of every citizen-taxpayer in Alaska ("Whitaker"), seek to enjoin Defendants the State, Department of Natural Resources ("DNR" or the "Department"), the Commissioner of DNR, Thomas Irwin (the "Commissioner") and the Director of DNR's Division of Oil and Gas, Mark Myers (the "Director") from approving, extending or acting upon the Point Thomson Unit ("PTU" or the "Unit") 21st or proposed 22nd Plan of Development, the Unit Agreement or any Unit leases. ExxonMobil Corporation ("ExxonMobil"), the Point Thomson ("PT") Unit Operator, and other holders of state leases in the PTU ("Leaseholders"), have concluded that it is uneconomic to develop the PTU gas reserves until there is a committed date for availability or construction of a pipeline to market. ExxonMobil and the other Leaseholders have requested indefinite postponement of any future drilling or production requirements in the PTU. Plaintiffs seek the right to be heard and to participate in the process to determine whether the resources of the State should

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be locked up indefinitely upon the Leaseholders' request, and whether it is constitutionally permissible for DNR to allow ExxonMobil and the other Leaseholders to "mothball" State oil and gas resources in this manner, that is, to delay their development indefinitely.

Accordingly, the Court should enjoin DNR, the Commissioner and the Director from extending, approving or acting upon the Leaseholders' development postponement request, their proposed 22nd Plan of Development or extension of their 21st Plan of Development, and should direct DNR to conduct a public hearing on the issues raised by the Authority, Whitaker, and the public at large.

RELEVANT FACTS

The Authority was formed in 1999 pursuant to AS 29.35.600-29.35.730 by the North Slope Borough, Fairbanks North Star Borough and the City of Valdez. The Authority was formed for the purpose of building or causing to be built a gas line from Alaska's North Slope to tidewater at Valdez, to include a spur line from Glennallen to the Palmer area to provide gas to the South Central gas grid.

Since its formation, the Authority has engaged the services of Bechtel Corporation who provided a Project cost estimate and received a Private Letter Ruling from the IRS declaring that income to the Authority would be tax exempt. In January 2005 the Authority entered into an exclusive purchase agreement for Yukon Pacific Corporation ("YPC"). YPC was started in the early 1980's by former Governors William Egan and Walter Hickel to develop a gas line/LNG Project from the North Slope to tidewater at Valdez. Since its creation, YPC, among other things, obtained 12 senior permits from the Federal and State governments for the gasline Project which include a federal Environmental Impact Statement, Conditional Right of Way Permit, LNG Liquefaction Site Permit and a Federal Export License.

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The Authority is one of three applicants under the Alaska Stranded Gas Development Act, AS 43.82 et seq., and is currently in negotiations with the Governor. In the past year Congress amended the Alaska Natural Gas Pipeline Act of 2004, 15 U.S.C. § 720n, to make the Authority's LNG Project qualify for the $18 billion federal loan guarantee gas line incentive package.

The Authority has received a Memorandum of Understanding ("MOU") from 5 West Coast LNG receiving terminals interested in receiving LNG from Alaska. It has also received an MOU from Totem Ocean Trailer Express for the shipment of LNG from Alaska to the West Coast on Jones Act compliant vessels. Given the current status of the Authority's Project, and by using existing West Coast gas grids, the Authority can market Alaska gas to both the Midwest and West Coast markets in 2011-2012.

The only remaining piece for the Authority's Project is the acquisition of the gas.

The substantial gas reserves in the PTU are not being utilized: the PTU is not presently producing either oil or gas for market. The U.S. Department of Energy estimates that there are eight trillion cubic feet ("TCF") of proven, recoverable natural gas reserves in the Unit. Exhibit 1.

These reserves are a valuable resource belonging to the State and its citizens. The State, Department of Natural Resources ("DNR" or the "Department") leased the lands in what is now the PTU beginning in 1965. The working interest ownership in the PTU leases, based solely on acreage, since there has been no production of oil or gas in the PTU, is shown on a DNR map as follows:

ExxonMobil	48.22%
BP	28.40%
ChevronTexaco	15.40%
ConocoPhillips	4.06%
Others	3.92%

ExxonMobil became the Unit Operator when the Unit was formed on March 1, 1977, and continues as the Unit Operator today. Ex. 2.

All Unit leases are beyond their primary term, and are listed by DNR as "expired," except for ADL 389716, which expires on May 31, 2008. Accordingly, the PTU leases remain in effect today solely because they are incorporated into a State oil and gas unit. *See* AS 38.05.180(m); 11 AAC 83.190; Unit Agreement § 18, Ex. 3.

No gas or oil has been produced from the Unit. In fact, neither ExxonMobil nor any of the other Leaseholders has even drilled a well in the Unit since 1999, and only 3 have been drilled since 1983. Moreover, despite several requests by DNR over the years for the Leaseholders to conduct additional drilling in the Unit, ExxonMobil has previously submitted, and continues to submit, annual plans for the Unit that include no drilling, and no development of the Unit's gas or oil resources. ExxonMobil, on behalf of the Leaseholders, recently requested an extension of all obligations to drill in the PTU, for an indefinite time period.

Several Leaseholders drilled wells in the Unit in the 1970s and 1980s. Seven wells were certified as capable of producing in paying quantities. Ex. 4. All seven are currently listed as plugged and abandoned by the Alaska Oil and Gas Conservation Commission (the "Commission" or "AOGCC"). This means that they cannot physically produce any gas or oil. Ex. 5. In fact, all wells that were drilled in the Unit are currently listed as plugged and abandoned, except one, the status of which is "suspended/confidential." Ex. 5.

When the Unit was formed, ExxonMobil agreed to exercise "[r]easonable diligence...in complying with the obligations of the approved plan of development." Unit Agreement § 10, Ex. 3. The Director of the Division of Oil and Gas (the "Director") may only approve a Plan of Development if it meets certain criteria, including that the Plan will "promote conservation of all

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natural resources." "promote the prevention of economic and physical waste," and "provide for the protection of all parties of interest, including the State." 11 AAC 83.303(a); *see* 11 AAC 83.343(b).

Beginning in 1983, ExxonMobil proposed an indefinite suspension of drilling. Ex. 6. ExxonMobil felt that the Leaseholders had accomplished "sufficient drilling...to establish within reason the area and potential commerciality of the field." Ex. 6. ExxonMobil claimed that "[f]urther development prior to commencement of construction of a pipeline to market would constitute economic waste...." Ex. 6. Accordingly, ExxonMobil proposed a five-year Plan of Development with no further drilling. Ex. 6.

In the mid-1990's, the Leaseholders proposed a Plan of Development that included no drilling or development. Ex. 7. The Leaseholders asserted that "all development options are currently uneconomic." Ex. 7. Although the Director ultimately approved the Plan, he expressed concern "about the lack of exploration and development work...." Ex. 8. The Division wanted "a fair and honest attempt to get this acreage explored...." Ex. 8.

In 1998, the Leaseholders submitted another Plan that again contained no drilling. Ex. 9. The Leaseholders claimed, among other things, a "lack of a gas market and transportation system...." Ex. 9. According to the Leaseholders, the "development of the Thomson Sand gas [was] not economically justified at the present time." Ex. 9.

On April 1, 2005, the Authority made a detailed offer to purchase Alaska North Slope gas and transport it to market. Ex. 10. The offer was distributed to ExxonMobil, ConocoPhillips, British Petroleum, ChevronTexaco and others. During the several months that followed, the major producers, including the Leaseholders, declined to sell the Authority North Slope gas, or even to discuss prices or terms. Ex. 11.

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In relation to its revised Project, the Port Authority has intensified its correspondence and meetings with ExxonMobil as the PTU Operator. Ex. 12. In a letter dated August 18, 2005, ExxonMobil was asked to present "general terms/price information of a gas sales agreement that your company would find acceptable." Authority team members met with ExxonMobil executives in Houston on August 30, 2005. In a letter on August 31, 2005, ExxonMobil said it needs to pursue "an analysis includ(ing) all aspects of the value chain from the wellhead to the market to assess Project viability." Authority representatives expressed disappointment (in letters dated September 2 and September 12, 2005) that ExxonMobil had not provided information concerning "price and terms by which you would be willing to sell us gas." As of today, the Authority's offer to purchase Point Thomson (and other North Slope) gas is still open, but ExxonMobil has responded only with a description of its "analysis" needs.

The Authority cannot obtain financing to implement its pipeline LNG Project without a committed supply of natural gas. Since the PTU reserves are not being utilized, they represent the best source of gas for the Authority's pipeline startup needs. However, the Leaseholders have declined to sell any North Slope gas to the Authority.

On September 23, 2005, the Authority submitted a First Supplemental Agency Demand requesting a public hearing on the PT Unit to Defendant Myers, Director of DNR Division of Oil and Gas. Ex. 13. No substantive response has been received.

On September 30, 2005, the Authority appealed the Director's constructive denial of its request for public hearing to Defendant Irwin, Commissioner of DNR. Ex. 14. No response has been received.

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ARGUMENT

A. PLAINTIFFS ARE ENTITLED TO A TRO/PRELIMINARY INJUNCTION.

To determine whether a party is entitled to injunctive relief, courts apply a "balance of hardships" approach that focuses on three factors:

1. The harm to the plaintiff;
2. The harm to, or protection of, the defendant; and
3. The strength of plaintiff's case.

North Kenai Peninsula Road Maintenance Service Area v. Kenai Peninsula Borough, 850 P.2d 636, 639 (Alaska 1993). *See Keystone Services, Inc. v. Alaska Transportation Comm'n*, 568 P.2d 952 (Alaska 1977) and *Alaska Public Utilities Comm'n v. Greater Anchorage Area Borough*, 534 P.2d 549 (Alaska 1975). Once plaintiff has met the preliminary threshold of showing irreparable harm, and that defendants will not be harmed by the injunction (or that they can be adequately protected from harm), plaintiff need only raise serious and substantial questions going to the merits of the case. *North Kenai Maintenance Area*, 850 P.2d at 639; *Keystone Services*, 568 P.2d at 954; *A.J. Industries, Inc. v. Alaska Public Service Comm'n*, 470 P.2d 537 (Alaska 1970).

The "serious and substantial question" standard means that the "issues raised cannot be 'frivolous or obviously without merit.'" *North Kenai Maintenance Area*, 850 P.2d at 639, *quoting State v. Kluti Kaah Native Village*, 831 P.2d 1270, 1273 (Alaska 1992). On the other hand, where the preliminary injunction will harm the defendant, and the defendant cannot be adequately protected, "'a showing of probable success on the merits is required before a temporary restraining order or preliminary injunction can be issued.'" *North Kenai Maintenance Area*, 850 P.2d at 639, *quoting State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991).

In this case, it is apparent that Plaintiffs will be irreparably harmed if the Defendants continue to extend the PTU agreement and leases, without requiring development, indefinitely, as

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the Leaseholders seek. There is no relief, other than the injunctive relief requested, which can protect Plaintiffs. It is equally apparent that a TRO or injunction will cause no harm to the State or the Division of Oil and Gas.

Accordingly, Plaintiffs need only raise serious and substantial questions going to the merits of the case. In this case, Plaintiffs clearly meet this minimal threshold showing and are thus entitled to a preliminary injunction. In fact, as the following discussion demonstrates, Plaintiffs satisfy even the more stringent standard of a "probable success on the merits." *See A.J. Industries*, 470 P.2d at 540 and *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 nn. 2 and 11 (Alaska 1973).

B. PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.

Plaintiffs, and every citizen of the State, will be irreparably harmed unless the court issues the requested injunctive relief. No relief, other than a TRO or an injunction, can protect Plaintiffs from harm.

Plaintiff the Authority will be harmed because, without commitments from the Leaseholders to sell the PTU gas, the Authority cannot obtain financing to implement its pipeline-LNG Project. As a result of the Leaseholders' refusal to develop the PTU reserves and/or commit to sell them, the Authority's ability to obtain the necessary gas for startup may be delayed indefinitely. Currently, the Authority is denied the right to participate and to be heard in the DNR process leading to the extension or termination of the PT Unit Agreement, even though this process will likely determine whether the Authority can obtain commitments for gas reserves necessary to qualify for construction financing. The Authority may only appeal a decision, already made, to the Commissioner of DNR.

Plaintiff Whitaker and every other citizen of Alaska will likewise be irreparably harmed. It is the public policy of the State to develop a Project to take Alaska North Slope natural gas to

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market. Further, the Alaska Constitution requires DNR to manage and develop the State's resources for the benefit of its people. *See, e.g.*, Alaska Constitution, art. VIII §§ 1, 2, 8 and 11, discussed below. It is in the interest of every citizen that a natural gas Project be built because such a Project will provide needed revenue for many government programs, both at the State and local levels. It is also in the public's interest because a natural gas Project will create jobs and economic activity. Currently, Whitaker and other citizens are denied the right to participate and to be heard in the DNR process leading to the extension or termination of the PT Unit Agreement, even though this process will affect every citizen of the State.

Further, Defendants' continued extension of the PT Unit Agreement, without benefit to the citizens of Alaska, causes harm to the State and the development of its resources, in which Plaintiffs have an interest. The Defendants continue to extend the PT Unit Agreement and leases without requiring ExxonMobil and the other Leaseholders to develop or produce from the PTU. Accordingly, irreparable harm is certain absent injunctive relief.

C. **THERE WILL BE NO HARM TO THE STATE.**

Just as clearly, there will be absolutely no harm to the state if injunctive relief is granted. To the contrary, the State has a duty, mandated by the Constitution, to develop its resources and to ensure that it receives value for the use of its land and resources. *See* discussion below. Thus, the State may in fact benefit, rather than suffer harm, from the relief requested by Plaintiffs. Further, the relief that Plaintiffs seek is merely the right to participate in a public hearing before DNR relating to the issues of PTU gas and getting it to market. A public hearing concerning disposition of the PTU will provide useful information from oil and gas related companies, gas distribution companies, major gas-consuming industries, oil and gas scientists, elected officials, and other members of the public.

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Since Plaintiffs will be irreparably harmed, and the State will suffer no harm, Plaintiffs need only raise serious and substantial questions going to the merits. *Keystone Services*, 568 P.2d at 954; *A.P.U.C. v. Greater Anchorage*, 534 P.2d at 554; and *A.J. Industries*, 470 P.2d 537.

D. PLAINTIFFS HAVE RAISED SERIOUS AND SUBSTANTIAL QUESTIONS GOING TO THE MERITS.

There can be no doubt that Plaintiffs have raised serious and substantial, that is, "non-frivolous" questions going to the merits. Indeed, Plaintiffs have satisfied the more stringent standard of probable success on the merits.

1. Plaintiffs Have the Right to Participate and to be Heard in the DNR Proceeding.

In this proceeding, the Authority and Whitaker seek to participate and to be heard in the DNR proceeding, and to compel DNR to conduct a public hearing on this matter of vital importance to the citizens of Alaska and their natural resources, and to include Plaintiffs and other interested members of the public in the hearing.

The regulations afford a unit operator, such as ExxonMobil, the right to "reasonable notice and [an] opportunity to be heard," before DNR may terminate the unit agreement as a result of an uncured default. *See* 11 AAC 83. 374(c). Indeed, this is the minimum process afforded to a unit operator, and only applies to a unit "in which there is no well capable of producing oil or gas in paying quantities." *Id.* Where the unit contains a well "capable of producing oil or gas in paying quantities," DNR must initiate "judicial proceedings" to terminate the unit agreement. 11 AAC 83.374(d). Clearly, a unit operator's rights are protected, even where the unit operator is in default of its agreement. *See id.*

Another interested party affected by the Department's decision, such as the Authority here, must be afforded the same rights as the unit operator. *See, e.g., White v. State, Dep't of Natural*

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Resources, 984 P.2d 1112 (Alaska 1999). In this instance, the Authority seeks nothing more than a public hearing, in accordance with its rights to participate and to be heard. The Authority believes that such a hearing will be sufficient to expose the Leaseholders' request for an indefinite delay for what it really is—an ill-disguised attempt to mothball, rather than develop, valuable resources belonging to the citizens and the State of Alaska.

In addition, an "eligible person affected by a decision of the [D]epartment" has the right to appeal to or to request reconsideration from the Commissioner of DNR, and to request a hearing on its appeal or request for reconsideration. *See* 11 AAC 02.020 and 02.030. That is precisely what the Authority, an eligible person affected by DNR's decision, did in this instance. Further, where material facts are disputed and need to be resolved, sound legal principles require an agency to exercise its discretion to hold a hearing. *See White*, 984 P.2d at 1126. In this instance, the Authority described numerous factual issues to be considered at the hearing. *See* the Authority's Appeal to Commissioner Irwin, dated September 30, 2005. Ex. 14. These include:

1. Natural gas from the PTU is necessary to make a natural gasline Project from the North Slope possible.
2. PTU proven gas reserves are sufficient to supply a large diameter gas pipeline at startup.
3. The Authority requires an assured supply of natural gas, such as that found in the PTU, to obtain financing for a gasline Project.
4. ExxonMobil and the other Leaseholders have not developed or produced any gas or oil from the PTU, despite having held their leases for 30 years or more.
5. ExxonMobil and the other Leaseholders have proposed postponing all drilling—and hence and development or production—indefinitely in the PTU.
6. ExxonMobil and the other Leaseholders have refused repeated requests from the Authority, and from Yukon Pacific in the 1990s, for terms or prices for the purchase of natural gas.

See id. The Commissioner has denied the Authority its right to a hearing.

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The Authority seeks nothing more than a full, public hearing in accordance with its rights. Because of the importance of the resources involved, and the expected benefit to the State and its citizens, a public hearing is necessary in this instance.

Another provision of the Alaska Constitution also supports the Authority's request for a public hearing. Article VIII, § 10 requires "public notice" prior to "disposals or leases of state lands: "No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." Alaska Const., art. VIII, § 10. *See also Baxley v. State.* 958 P.2d 422, 432 (Alaska 1998) (legislative enactment modifying oil and gas leases did not violate section because the public had ample opportunity to comment on the proposed lease amendments). Although the State may argue that this provision does not apply here because the PTU leases are not new disposals or leases of state lands, the Leaseholders have held their leases for between 30 and 40 years without developing the resources. Accordingly, any further delay in the development and production of these resources, as requested by the Leaseholders, should be subject to this public notice requirement.

2. <u>The Leaseholders Cannot be Permitted to "Mothball" Alaska's Natural Gas Resources.</u>

The Leaseholders are attempting to mothball valuable gas reserves that belong to the State and its citizens. These resources are now more valuable than ever, as a result of increases in the price of natural gas in the past few years. Clearly, it is in the State's best interest, and the best interest of its citizens, to develop these resources sooner rather than later.

The Leaseholders, however, do not agree. Since they are unwilling to develop the resources for sale to a party which would take them to market, and in fact want to mothball them indefinitely, their interests are directly adverse to those of the State. The Authority seeks a public hearing to

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argue that the Unit Agreement and PTU leases should therefore be terminated, and the leases made available to third parties who are willing to develop the PTU gas reserves in a timely manner.

The Leaseholders' request for continued postponement of developing the PTU resources violates several provisions of the Alaska Constitution, notably Article VIII, §§ 1 and 2. Section 1 provides: "It is the policy of the State to encourage...the development of its resources by making them available for maximum use consistent with the public interest." Alaska Const., art. VIII, § 1. Section 2 provides: "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State...for the maximum benefit of its people." *Id.*, art. VIII, § 2. The request for indefinite postponement of all drilling—and hence any development or production—plainly violates the intent of these provisions, which is to utilize the State's resources, such as the PTU gas reserves, for the maximum benefit of its citizens.

3. DNR's Constitutional Duty to Promote Development of Alaska's Natural Resources Requires it to Terminate the PTU Leases.

DNR has a constitutional duty to the State and its citizens to ensure that the PTU gas reserves are developed in a timely manner, and not mothballed as the Leaseholders seek to do. *See* Alaska Const., art VIII, §§ 8 and 11. *See Baxley v. State*, 958 P.2d 422, 432-33 (Alaska 1998). These provisions provide for the leasing of State lands, and require forfeiture in "the event of breach of conditions." *Id.*, art. VIII, § 8. Furthermore, continuation of lease rights depend upon the performance of annual labor, or the payment of rents or royalties, or upon other requests as may be prescribed by law." *Id.*, art. VIII, § 11.

Here, the State has leased the lands to the Leaseholders, but the Leaseholders refuse to develop the resources or even to negotiate for the sale of the resources to other parties, such as the Authority. To the contrary, as noted above, the Leaseholders seek to mothball the reserves, which, while it may be in their interests, is not in the best interest of the State or its citizens.

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DNR has the constitutional duty to require the Leaseholders to adhere to the terms of the Unit Agreement and leases, and to develop the resources in a timely manner. Since the Leaseholders refuse to comply with the Agreement and their leases, and seek to mothball the PTU gas reserves indefinitely, they are in breach of the Agreement and their leases. The leases and the Unit should therefore be terminated, and the Authority here seeks the opportunity to be heard on this issue.

4. The Public Trust Doctrine Requires DNR to Terminate the PTU Leases or to Require the Leaseholders to Market the Gas Reserves.

DNR's failure to require the Leaseholders to comply with the terms of the Unit Agreement and their leases also constitutes a violation of the public trust doctrine. The public trust doctrine provides that the State holds its mineral resources (and other natural resources) in trust for public use, "and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary." *McDowell v. State*, 785 P.2d 1, 16 n.9 (Alaska 1989). Under the doctrine, where a trustee has discretion, courts "will only review the trustee's acts for abuse of discretion." *Baxley*, 958 P.2d at 434.

In addition, the Director may only approve a Plan of Development if it meets certain criteria, including that the Plan will "promote conservation of all natural resources," "promote the prevention of economic and physical waste," and "provide for the protection of all parties of interest, including the State." 11 AAC 83.303(a); *see* 11 AAC 83.343(b). A Plan that indefinitely postpones all development and production clearly does not satisfy these regulatory requirements.

In this instance, Plaintiff believes DNR has abused its discretion by failing to terminate the Unit Agreement and leases in the face of clear evidence that the Leaseholders have breached the terms of, and their obligations under, these documents. In fact, the abuse of discretion is evident because the Leaseholders' mothballing tactics are clearly adverse to the best interests of the State

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and its citizens, and again Plaintiff seeks a public hearing at the administrative level on these allegations.

CONCLUSION

Plainly, Plaintiffs have raised serious and substantial, non-frivolous issues going to the merits. In fact, Plaintiffs have even met the higher threshold of probable success on the merits. Accordingly, the Court should enjoin the Department, the Commissioner and the Director from taking any action to extend the 21st PTU Plan of Development, to approve a 22nd Plan of Development, or to extend the PT Unit Agreement or leases, and should direct DNR to conduct a public hearing on the issues raised by Plaintiffs.

DATED this ___ day of October 2005.

WALKER & LEVESQUE, LLC
Attorneys for Plaintiffs Alaska Gasline Port Authority and Jim Whitaker

By: _____
William M. Walker
Alaska Bar No. 8310155

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2005, I caused a true and correct copy of the foregoing to be served upon the following:

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Thomas Irwin, Commissioner
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STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES
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In re Remand Proceedings Pursuant to
December 26, 2007 Order of Superior Court
Regarding Point Thomson Unit Agreement

BRIEF OF ALASKA GASLINE PORT AUTHORITY ON REMAND BY SUPERIOR COURT ORDER DATED DECEMBER 26, 2007

The Alaska Gasline Port Authority ("Port Authority") hereby submits argument, pursuant to the Commissioners' determination to allow the Port Authority to file an end of hearing brief, in support of the decision of the Department of Natural Resources ("Department") to terminate the Point Thomson unit ("PTU").

INTRODUCTION

Bob Bartlett, Alaska's delegate in Congress, warned in his keynote address on the opening day of the constitutional convention of two different dangers that faced our fledgling State in relation to natural resource development.

> Two very real dangers are present. The first, and most obvious, danger is that of exploitation under the thin disguise of development. The taking of Alaska's mineral resources without leaving some reasonable return for the support of Alaska governmental services and the use of all the people in Alaska will mean a betrayal in the administration of the people's wealth. ***The second danger is that outside interests, determined to stifle any development in Alaska which might compete with their activities elsewhere, will attempt to acquire great areas of Alaska's public lands in order NOT to develop them until such time as, in the omnipotence and pursuance of their own interests, they see fit. If large areas of Alaska's patrimony are turned over to such corporations, the people of Alaska may be even more the losers than if the lands had been exploited.***[1]

[1] Vic Fischer, *Alaska's Constitutional Convention* 131 (1975) (quoting E.L. ("Bob") Bartlett, November 8, 1955) (emphasis added).

It does not take a student of Alaska history or of oil and gas law to recognize the working interest owners' lack diligence in pursuing a market and production for Point Thomson resources specifically, and off-slope gas sales in general, is a realization of our framers' fears. Oil and gas leases contemplate diligent development and marketing, a proposition that remains foreign even to the working interest owners' most recent proposed plan of development ("POD").

Put simply, forty years of speculation, broken promises, and refusal to aggressively market Point Thomson gas is long enough. The PTU working interest owners should not be allowed to continue to subjugate the State of Alaska's ("State") royalty interest to their own corporate purposes – or hold the State's own gas hostage as an inducement to gain royalty and tax concessions on a gas pipeline they may or may not one day build. The Commissioner should reject ExxonMobil Corporation's ("Exxon" or the "Unit Operator") newest proposed POD and affirm termination of the Point Thomson Unit Agreement ("PTUA").

I. MISCELLANEOUS OBSERVATIONS.

Before addressing why the unit is subject to termination under the habendum clause, and why past and the current Commissioners retain the power to cancel the unit under PTUA § 10 and for the lessees breach of the implied covenant to market product, the Port Authority would briefly like to address a few miscellaneous issues. These include (i) why the multi-year nature of the proposed November 2006 and February 2008 22nd PODs should result in their rejection; (ii) why, in oil and gas leasing, equity does not abhor a forfeiture; and (iii) the PTUA is structured such as to generally make the Unit Operator, not the other working interest owners, responsible to the State for in-unit decisions and obligations.

A. It Would be Improper for Past and the Current Commissioner to Accept a Multi-Year POD.

To the Port Authority's knowledge no seven to ten year POD has ever been approved by the Department for the North Slope, and in light of the Unit Operator's historic lack of willingness to delineate, develop, produce or market Point Thomson resources, the unit does not seem a fitting candidate. PTUA § 10 specifically contemplates a one-year POD,[2] and it is unreasonable for the Unit Operator to submit a long-term POD that would hamper the Commissioner's ability to maintain oversight, and if necessary, termination authority.

Additionally, acceptance of a multi-year POD would run afoul of the findings and stated policy rationale in the Commissioner's June 27, 2000 *Finding and Decisions* on Lessees' *Application for Change of [Prudhoe Bay] Unit Operator* (failure to have regular, periodic PODs – as opposed to annual reports – results in plans not being disclosed to or approved by the Commissioner). There is no part of the various proposed multi-year 22nd POD's that could not have been accomplished through a series of single-year PODs, and the newest POD should be rejected for the Unit Operator's fairly hollow attempt to use a long-term commitment to lock the unit up into yet another decade.

B. Equity Abhors a Forfeiture (Except in Oil and Gas Leasing).

Hornbook law tells us that "equity abhors a forfeiture," a proposition the Alaska Supreme Court has from time-to-time parotid.[3] But this principle does not hold in the unique body of oil and gas law where, although cases can be assembled to the contrary as done in the owners' pre-

[2] The exact provision as PTUA § 10 under FMUA § 10 has historically been interpreted as requiring annual POD's. BLM Handbook (Unitization (Exploratory)) H-3180-1 at II.H. ("BLM Handbook") ("Prior to the expiration of the initial or nay subsequent plan of development and operation, a new plan covering the next period (the following calendar year) should be submitted on a calendar year basis not later than March 1 of each year, for the authorized officer's approval.").

[3] *See e.g., Strack v. Miller,* 645 P.2d 184, 187 (Alaska 1982).

hearing brief,[4] forfeitures are typically favored with a view towards protecting the lessor. "Although there is division of authority as to whether the equitable remedy of cancellation is favored, it is generally accepted with regard to oil and gas leases that forfeitures are favored."[5]

However, this area of case law and policy rationale behind it need not be explored in depth, because in Alaska this issue was squarely addressed – and decided – by the framers of our Constitution. Section 8 of the Natural Resources Article of the Alaska Constitution expressly mandates that State mineral leases and permits be subject to forfeiture. "Leases and permits shall provide . . . for forfeiture in the event of breach of conditions."[6] It would work an absurdity for the framers to mandate forfeiture for breach of conditions for leases, but to adopt a different policy for leases held by a unit (which is most producing State oil and gas leases except maybe a few in Cook Inlet[7]).

C. The PTUA Generally Creates Obligations of Performance By the Unit Operator to the State, Not By the Other Working Interest Owners to the State.

Under PTUA § 4, Exxon is the Point Thomson Unit Operator. Section 8 provides:

> [T]he exclusive right, privilege, and duty of exercising any and all rights of the parties hereto which are necessary or convenient for prospecting for, producing storing, allocating, and distributing the united substances are hereby delegated to and shall be exercising by the Unit Operator as herein provided. Acceptable evidence of title to said rights shall be depositing with said Unit Operator and, together with this agreement, shall constitute and define the rights, privileges, and obligations of the Unit Operator.

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[4] Owners Pre-Hearing Brief at 28-31.

[5] *Davis v. Cramer*, 837 P.2d 218, 225 (Colo. 1992). *See also Hiko Bell Mining & Oil Co.*, 100 IBLA 371 (1998) ("The courts have held that in connection with oil and gas leases, forfeitures are favored by the law so that such leases are to be construed liberally in favor of the lessor and provisions for forfeiture strictly enforced.").

[6] Alaska Const., art. XIII, § 8 ("Section 8. Leases. The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. *Leases and permits shall provide*, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and *for forfeiture in the event of breach of conditions*.") (emphasis added).

[7] *See* Alaska Department of Natural Resources, *2007 Annual Report* §§ 1 and 2 <available at http://www.dog.dnr.state.ak.us/oil/products/publications/annual/report.htm (visited March 19, 2008)>.

The effect of this provision is that the working interest owners have delegated their rights to the Unit Operator to make just the Unit Owner, as opposed to all the working interest owners, answerable to the Department for performance of certain in-unit obligations established in the PTUA (but not out of unit obligations like marketing). As the Commissioner is no doubt aware, the PTUA is simply the federal model exploratory unit agreement ("FMUA") edited by the Department and working interest owners in the 1977 to account for the State, rather than the federal government, being the lessor.

"Under the Model Form Unit Agreement, the Unit Operator is delegated the exclusive authority to exercise all rights relating to prospecting for, producing, storing allocating, and distributing the unitized substances."[8] Thus the Unit Operator and government have final say on in-unit decisions such as prospecting, production rates and the size of participating areas under the PTUA § 8.

That is not to say that the working interest owners are without recourse if the Unit Operator makes poor decisions. Under the FMUA and PTUA it is pretty easy to remove the Unit Operator.[9] The Department of Interior has also allowed the working interest owners, but not royalty interest owners, to appeal certain Unit Operator decisions in limited circumstances.[10] However, the primary remedy that working interest owners have and are expected to exercise

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[8] 2 Kramer & Martin at § 16.02[2][d].

[9] Section 6 provides that Exxon may resign at any time, and "the owners of the working interests according to their respective acreage interests in all unitized land, shall by majority vote select a successor Unit Operator . . ." Additionally, under PTUA § 5, "The Unit Operator may, upon default or failure in the performance of its duties or obligations hereunder, be subject to removal by the same percentage vote of the owners of working interest determined in like manner as herein provided for the selection of a new Unit Operator." That is, because the PTU is in default, the working interest owners may – per PTUA §§ 5 and 6 – by simple majority vote on an acreage basis replace Exxon as Unit Operator (and if Exxon either resigns or is removed as Unit Operator by a majority vote, and a new Unit Operator is not selected and qualified, "the Commissioner at his election may declare this Unit Agreement terminated.").

[10] *See Stanley Mollerstuen*, 146 IBLA 1 (1998); *Chevron U.S.A. Production Co. Rio de Viento, Inc.*, 149 IBLA 374 (1999).

under the PTUA against poor unit operations and decision making are private suits against the Unit Operator for breach[11] of the Unit Operating Agreement.[12]

II. THE UNIT IS SUBJECT TO TERMINATION UNDER THE HABENDUM CLAUSE.

A. Commissioner Should Clarify for the Record that the Unit Terminated Automatically under PTUA § 20(c) and 11 AAC 83.336(a)(1) (if Applicable).

The Point Thomson unit has terminated automatically under the habendum clause provisions in PTUA § 20(c) and 11 AAC 83.336(a)(1). The termination of a determinable estate upon the occurrence of the special limitation (e.g., failure to have a well capable of producing in paying quantities or an approved POD) is not a forfeiture but merely the expiration of the estate in accordance with its terms.

> A habendum clause in an oil and gas lease (or other mineral lease) providing a short primary term and a secondary term for 'so long as' production in paying quantities or operations therefore continue, or similar language, conveys a 'determinable' interest, that is, an interest subject to a special limitation. Such an interest automatically terminates by its own terms upon the occurrence of the stated event, namely, expiration of the primary term without production or operations at such time, or the cessation of production or operations during the secondary term. Such a habendum clause does *not* convey an interest subject to a condition subsequent, with the lessor having the optionally exercisable power of declaring a forfeiture upon nonproduction or cessation of production. Instead, the lessor has a possibility of reverter and does not need to take any affirmative action for the lease to terminate.[13]

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[11] *See e.g., BHP Petroleum Co. V. Okie,* 836 P.2d 873 (Wyo. 1992).

[12] Under Section 7 the working interest owners must enter into a "Unit Operating Agreement." The Unit Operating Agreement ("PTUOA") must provide for allocation of benefits "and such other rights and obligations as between Unit Operator and the working interest owners as may be agreed upon by Unit Operator and the working interest owners . . ." The PTUOA had to be filed with the Director within 90 days of execution of the Unit Agreement (i.e., November of 1977) or the unit would terminate. Thereafter, "Any revision of the unit operating agreement must be submitted to the Director before it takes effect." The PTUOA cannot modify the Unit Agreement, and the Unit Agreement controls between any conflicts occurring between the State of Alaska and any working interest owner (including the Unit Operator).

[13] *McCullough Oil, Inc. v. Rezek, et al,* 176 W. Va. 638, 644-5 (W. Va. 1986) (internal citations omitted).

Common law makes clear that in agreements between private parties automatic termination happens without any notice being required, or action of any kind on the part of the lessor. Again, the West Virginia Supreme Court observed:

> A notice and demand clause in an oil and gas lease (or other mineral lease) has no effect upon the habendum clause or cessation of production clause of the lease. Ordinarily a notice and demand clause relates to express and implied contractual obligations (covenants) of the lessee under the lease and relates to forfeiture of the lease for a default, that is, for a breach of these obligations; the notice and demand clause does not relate to termination or expiration of the lease upon the occurrence of the estate limiting event stated in the habendum clause or cessation of production clause.[14]

However, in the administrative context, when the Department or Bureau of Land Management (the "BLM") are acting as both regulator and lessor, it is common practice for the agency to give notice of expiration after it makes appropriate administrative findings.[15] For instance, before the FMUA is held to have automatically terminated, BLM makes legal and factual findings and then gives notice of the expiration.[16] BLM can even backdate the date it determines automatic termination occurred from the date of its findings, thus reducing the amount of time leases formerly committed to a unit will have before themselves expiring.[17] It should be recognized that this administrative action does not turn automatic termination into administrative cancellation that requires a finding of default or breach and subsequent forfeiture.

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[14] *Id. See also Renner v. Huntington-Hawthorne Oil and Gas Company, et al,* 39 Cal. 2d 93, 96-8 (Cal. 1952)("A determinable fee terminates upon the happening of the event named in the terms of the instrument which created the estate; no notice is required for, and no forfeiture results from, such termination.").

[15] *Kirkpatrick Oil & Gas Company, v. United States of America, et al,* 675 F.2d 1122, 1123 (10th Cir. 1982)("The initial terms had all expired by December 31, 1975. On November 26, 1976, the United States informed Kirkpatrick that its oil and gas leases were terminated for lack of paying production.").

[16] *Oronegro, Inc.*, 156 IBLA 170 (2002) ("By decision dated October 21, 1999, the . . . BLM, notified appellant that the North Kern Front Field Unit Agreement had terminated effective February 28, 1998, because of the cessation of unit production during that month and because diligent operations to restore production or discover new production had not been undertaken in the ensuring 20 months."); *D.L. Cook*, 144 IBLA 63 (1998) (because the three wells in the unit were not able to produce in paying quantities, and the unit operator had not commenced sufficient reworking or drilling operations within 60 days, the unit agreement is invalid under Section 9).

[17] 2 Kramer & Martin at § 16.02[6] ("Terminations can be retroactively determined as in the case of *Oronegro, Inc.*, where BLM sent out a notice of termination in October 1999, declaring that a particular unit had terminated February 28, 1998.") (citing *Oronegro, Inc.*, 156 IBLA 170 (2002)).

As an analogy, think of it like a one year lease expiring at the end of 12 months. At the end of the year when the landlord asks the tenant to move out, no forfeiture has occurred. The lease has simply ended as agreed by the parties when they entered into it. The fact that the lessor may be the government, and for whatever reason an administrative agency reviewing the lease makes a finding that 12 months has passed, does not turn the agency's action in forfeiture proceedings.

This distinction between automatic termination (also called expiration or termination by operation of law) and forfeiture or cancellation for breach has been long recognized in oil and gas law and is briefed in detail in the Port Authority's amicus brief before Judge Gleason. Although Judge Gleason ruled automatic termination did not occur (because the State did not assert the 20(c) argument and in the Court's view 11 AAC 83.336(a)(1) was inconsistent with the PTUA), it is extremely important that the Commissioner rule for the record that: (i) the unit terminated automatically under PTUA § 20(c); and (ii) under 11 AAC 83.336(a)(1) – if applicable – the unit would have terminated automatically upon the Unit Operator's failure to have an approved POD. As to the latter, the Port Authority is very confident that the Alaska Supreme Court can be convinced 11 AAC 83.336(a)(1) applied, and consequently all the hullabaloo about whether the Department should or is required to accept the newest 22nd POD is irrelevant because the estate has already expired.[18]

[18] And we even know from federal precedent such as *Oronegro, Inc.*, 156 IBLA 170 (2002), that regardless of when the Supreme Court makes that finding, termination of the Unit will be back dated to the fall of 2005. That will mean all the leases will have long since terminated as well because that will be when the 90 day period in 11 AAC 83.140 and Clause 5 of the DL-1 lease form began to run.

B. The Unit is Subject to Termination under Discovery Jurisdiction Habendum Clause Case Law Regardless of Whether there is a Capable Well or a POD was Rejected.

Even if the courts ultimately hold that the unit cannot be terminated under the habendum clause for not having a well capable of producing in paying quantities, or for the Unit Operator's failure to submit an acceptable POD, the unit is still subject to termination under the habendum clause (not PTUA § 10) because an unreasonable amount of time has passed without the owners having marketed product.

The majority of jurisdictions, under typical habendum clause language (e.g., "the lease shall continue so long thereafter as oil and gas or either or any of them are produced in paying quantities"), have adopted the rule that if actual production stops, or does not commence, then the lease terminates automatically at the end of the primary term.

> In a few states there is authority for another theory, namely that habendum clause requires merely discovery rather than production in paying quantities. . . In 'discovery' jurisdictions, the habendum clause is read to require the lessee to attempt to market the natural gas within a reasonable time. Failure to do so will lead to lease termination.[19]

Essentially this distinction comes down to whether marketing is a necessary incident of production. In most jurisdictions it is held there cannot be production without disposition so if product is not being marketed at the end of primary term the estate terminates under the habendum clause. Marketing in most states is consequently considered a special limitation to the determinable estate.

> In a jurisdiction where marketing is an essential part of production, an habendum clause which provides for a fixed term and so long thereafter as oil or gas is 'produced' will not be satisfied unless the oil or gas is actually removed from the earth which necessarily involves marking in the case of gas. In this context, marketing the product is a special limitation and a failure to market gas will result

[19] 3 Williams & Meyers at § 604.1.

> in an automatic termination of the lease unless termination is prevented by some other provision. On the other hand, in a jurisdiction where marketing is not an essential part of production, an habendum clause such as the one just described will be satisfied by commercial discovery without marketing the product.[20]

Thus discovery jurisdictions are more lessee friendly because a lessee's rights do not automatically terminate if product is not being marketed when the primary term ends. Rather in discovery jurisdictions if there is a lack of market the court will allow a lease to be held under the habendum clause into the secondary term so long as at the conclusion of the primary term there has been a valuable discovery and the acreage contains a "well capable of producing in paying quantities."

> In these states the discovery of gas (and perhaps oil) in commercial quantities during the primary term or an extension thereof satisfies the thereafter provision of the habendum clause, at least for a period of time, and thereby extends the lease into the secondary term.
>
> After the mineral is discovered the lessee has a duty to use due diligence to market the product, and the failure to do so will result in termination of the lease, under the habendum clause, after the primary term has expired.[21]

However, unlike in a case claiming a breach of the implied covenant to market, in a discovery jurisdiction habendum clause case the courts will terminate the unit after a reasonable amount of time *even if the lessee has continued to market with diligence.* [22]

> Here we find the breakdown of the conceptual distinction between the implied marketing covenant and the [discovery jurisdiction] habendum clause. However, the marketing covenant and the habendum clause are not completely assimilated: Satisfaction of the implied marketing obligation through continuing efforts to market the product will not satisfy the habendum clause indefinitely. At some point, even though there has been no breach of the covenant, the lease will expire if there is no production.[23]

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[20] 5 Kuntz at § 60.1.
[21] 5 Williams & Meyers at § 855.
[22] *See e.g., Somont Oil Co., Inc. v. A & G Drilling, Inc.*, 49 P.3d 598 (Mont. 2002); *Fisher v. Grace Petroleum Corp.*, 830 P.2d 1380 (Ok. Civ. App. 1991).
[23] 5 Williams & Meyers at § 855.

If the Alaska courts refuse to apply the special limitations in the PTUA § 20(c) and 11 AAC 83.336(a)(1) then for purposes of interpreting the PTUA (and maybe all units) Alaska is a discovery jurisdiction and the unit is subject to termination if: (i) the operator did not exercise diligence at any time in finding a market, even if a market is not readily available; or (ii) after a reasonable amount of time no market is available even if the lessee exercised diligence in attempting to find one. Thus under discovery jurisdiction law either a lack of diligence or market can ultimately terminate the unit. This is because failure to acquire a market results in termination under the habendum clause, not the implied covenant to market. Under such a standard the PTU owners' interests are unquestionably subject to termination given 30 years has passed since unitization and no market has been secured.

III. THE UNIT IS SUBJECT TO TERMINATION UNDER PTUA § 10; THE REASONABLY PRUDENT OPERATOR STANDARD IN PTUA § 10 REQUIRES THE UNIT OPERATOR AND WORKING INTEREST OWNERS TO MARKET WITH DILIGENCE.

A. The Department has "Broad Authority" to Approve, Modify and Terminate Units, which Includes the Inherent Authority to Terminate the Unit for the Unit Operator's Failure to Submit an Acceptable POD under PTUA § 10.

Substantial energy has been expended arguing that the unit agreement is a private contract between the working interest owners and the State, and that the Department does not have the authority to unilaterally terminate it. However, federal case law demonstrates a government/lessor can do just that. In addition to the now well briefed holding in *Boesche v. Udal*, 373 U.S. 472 (1962), that the government has the inherent power to administratively terminate an oil and gas property interest when such power is not specifically withheld, IBLA decisions relating to the FMUA support that conclusion as applied to units.

In *Chevron U.S.A., Inc.,* 111 IBLA 96 (1989), after reviewing applicable provisions of the Mineral Leasing Act,[24] the leases, and the FMUA § 2 (almost identical to the PTUA § 2), it was determined that – so long as he considers the "reasonableness" of a plan – the Secretary of the Interior has broad authority to approve unit plans, including ratifying and expanding units, over the objection of the working and royalty interest owners.

> As can be seen, 30 U.S.C. § 226(j), the lease terms, and the MDUA all give the Secretary broad authority to approve any unit plan 'he may deem necessary or proper to secure the proper protection of the public interest,' to mandate unitization, and to prescribe a plan 'which shall adequately protect the rights of all parties in interest, including the United States.'[25]

Relying on this decision, the most learned of commentators, Professors Bruce Kramer and Patrick Martin, noted in their treatise on unitization that a government's sweeping authority under these provisions to approve and dictate unit plans extends to forced termination of units. "The broad authority to approve any unit plan that the Secretary deems reasonable or proper is sufficient to cover the forced termination and/or expansion of existing federal exploratory units."[26]

In short the Department – like the Department of the Interior – is not just any other lessor. Broad, inherent authority to approve, modify and terminate units is typically reserved to the overseeing agency on leased government land under statute, regulation and the leasing documents (i.e., leases and unit agreements).

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[24] 30 U.S.C. § 226(j) (1988).
[25] *Chevron U.S.A., Inc.*. 111 IBLA at 104 (quoting *Celsius Energy Co.*, 99 IBLA 53, 68 (1987)).
[26] 2 Bruce M. Kramer & Partrick H. Martin, *The Law of Pooling and Unitization* § 16.02[2][d] (2005 ed.).

B. The Implied Covenant to Market as a Reasonably Prudent Operator under PTUA § 10.

Lessees do not have a legal choice about whether to explore for, develop, produce and market hydrocarbon resources from Point Thomson. American courts since early in the 20th century have read into oil and gas leases a series of implied covenants in order to assure that a lessor's rights are protected, covenants which are extended to units upon unitization.[27] Courts use implied covenants to ensure a lessee does not act opportunistically towards a lessor whose interests might otherwise be held hostage by a lessee holding the land for speculation,[28] and in fact they are so important in protecting a lessor against a lessee's speculative behavior that many jurisdictions hold they are integral parts of the written contract and implied in fact rather than implied in law.[29]

In oil and gas leases and unit agreements, such as PTUA § 10, the duty to develop and/or produce as a reasonably prudent operator is often express. When not expressly provided for by the parties, as noted by the Alaska Supreme Court, courts imply such obligations.[30] Similarly,

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[27] *See Parkin v. State Corp. Comm'n of Kansas*, 677 P.2d 991 (1984) (implied covenants extended to units).

[28] *Amoco Production Co. v. Douglas Energy Co.*, 613 F.Supp. 730, 733 (D. Kan. 1985) ("[H]olding leases for speculative purposes is condemned. Leases of this kind contemplate exploration and development, and not the bottling up of land for speculative or other purposes or the postponement of reasonable development. . ."); *Carter v. United States Smelting, Refining and Mining Co.*, 485 P.2d 748, 752 (Okla. 1971) (condemning holding a lease for "sheer speculation and without any purpose for further development"); *Garcia v. King*, 164 S.W.2d 509 (Tex. 1942) ("The lessors should not be required to suffer a continuation of the lease after the expiration of the primary period merely for speculation purposes on the part of the lessees.").

[29] *Smith v. Amoco Production Co.*, 31 P.3d 255 (Kan. 2001) (implied covenants in an oil and gas lease are implied in fact, rather than in law, in *inter alia* Kansas, Oklahoma, Texas and Montana).

[30] *Baxley v. State of Alaska,* 958 P.2d 422, 427 (1998) (Noting in passing that the State's oil and gas leases contain an implied covenant for lessees to "diligently explore and develop their leases."). *See also* Richard W. Hemingway, *The Law of Oil and Gas* § 8.3 (3d ed. 1991) ("All jurisdictions impose a prudent operator rule to determine whether lease development satisfies the implied covenant of further development. . . Within such relationship the lessee has an implied duty, after production is acquired, to develop the lease to its fullest extent."); *Meaher v. Getty Oil Co.,* 450 So.2d 443, 446 (Ala. 1984) ("[I]mplied covenants to reasonably develop the leased lands, recognized to exist in every oil and gas lease, continue to obligate the lessee to develop all the leased lands. . ."); *Byrd v. Bradham,* 280 Ark. 11, 14, 655 S.W. 2d 366, 367 (1983) ("In oil and gas leases where royalties constitute the chief consideration, an implied covenant exists that the lessee will explore and develop the property with reasonable diligence."); *Olson v. Schwartz,* 345 N.W.2d 33, 38 (N.Dak. 1984) ("It is well settled that the lessee of an oil and gas lease has an implied obligation to the lessor to do everything that a reasonably prudent operator would do in operating,

regardless of whether the duty to develop and produce as a reasonably prudent operator is express or implied, courts will additionally imply a duty to market oil and gas from the lease as a reasonably prudent operator.

> In the absence of such a duty, the courts, on the same theory that they imply covenants to test and develop, imply a covenant on part of the lessee to market the oil and gas produced. It would be of little benefit to the lessor to have express or implied covenants on part of the lessee to test, develop, and protect the land by drilling wells, if the lessee might cap them and refuse to market the product.[31]

The duty to market lies at the heart of the parties' purpose since without it the lessor does not receive royalty. The Texas Supreme Court long ago explained:

> Under the ordinary oil and gas lease, the lessee is not required to market the yield of the leased land at any certain time for any certain price. When the lease is silent on the subject, the lessee's duty is to exercise ordinary or reasonable care. . . Without the exercise of reasonable care to market the gas, there could be no compliance with the assignee's obligations to proceed with the development reasonable and necessary to bring the lease to a normal stage of production.[32]

The New Mexico Supreme Court put it a bit more succinctly:

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developing, and protecting the property, with due consideration being given to the interests of both the lessor and the lessee, if there is no express clause in the lease relieving the lessee of this implied duty.").

[31] 2 W.L. Summers, *The Law of Oil and Gas* § 400 (1959 ed. and 2004 Supp.). The case law supporting the implied duty to market is legion. *See e.g., Wolfe v. Texas Co.,* 83 F.2d 425, 432 (10th Cir.), *cert. denied,* 299 U.S. 553 (1936) ("In the absence of an express provision in an oil and gas lease with respect to marketing the production there is an implied duty on the part of the lessee to make diligent efforts to market the production in order that the lessor may realize on his royalty interest."); *Davis v. Cramer,* 808 P.2d 358, 361 (Col. 1991) (*en banc*) ("Embodied in the covenant to operate diligently and prudently is the implied covenant to market."); *Tana Oil & Gas Corp. v. Bates,* 978 S.W.2d 735, 739 (Tex. App. 1998) ("Oil and gas law in Texas recognizes an implied covenant in gas leases such that a lessee must use due diligence to market the oil or gas produced within a reasonable time and at a reasonable price…[t]he behavior of a lessee in this regard must conform to the standard of a reasonably prudent operator."); *Gilmore v. Superior Oil Co.,* 192 Kan. 388, 392, 388 P.2d 602, 606 (Kansas 1964) ("Kansas has always recognized the duty of the lessee under an oil and gas lease not only to find if there is oil and gas, but to use reasonable diligence in finding a market for the product, or run the risk of causing the lease to lapse…"); *Townsend v. Creekmore-Rooney Co.,* 358 P.2d 1103, 1104 (Okla. 1960)("Where the oil and gas lease does not, in express terms, provide for the marketing of production discovered under the lease, the lessee is under an implied covenant only to market production within a reasonable time. In complying with said covenant the lessee must exercise due diligence in securing a market or a new market, if the one secured proves unsatisfactory. The matter of whether the lessee exercised due diligence in obtaining a satisfactory market within a reasonable time depends upon the facts of each case."); *Severson v. Barstow,* 103 Mont. 526, 63 P.2d 1022, 1024 (Mont. 1936) ("Where, as here, the principal consideration for a lease is the payment of royalty, the lease carries an implied covenant to use reasonable diligence to market the product when produced, although the lease is silent on the subject, and whatever is implied in a contract is as effectual as what is expressed…").

[32] *Cole Petroleum Co. v. United States Gas & Oil Co.*, 41 S.W.2d 414 (Tex. 1931).

> Obviously production without disposition of the product is futile. Thus the courts have developed the implied covenant 'to make diligent efforts to market the production in order that the lessor may realize on his royalty interest.'[33]

The Port Authority does not believe termination of the PTUA must be contingent on a finding that the November 2006 or February 2008 proposed 22nd PODs do or do not comply with the reasonably prudent operator standard. However, if such a proposition were correct it is not sufficient to inquire whether the Unit Operator's prior and promised development conduct alone complies with the reasonably prudent operator standard as expressly stated in PTUA § 10. The owners and Unit Operator's production and marketing efforts must likewise be measured against a hypothetical reasonable third party producer in order for the proposed PODs to comply with such a standard. Additionally, the Unit Operator and owners' breach of the implied marketing covenant provides independent grounds for forfeiting the unit outside of the Unit Operator's obligation to submit an acceptable POD under PTUA § 10 (with is also grounds for termination under PTUA § 10).

C. The Prudent Operator Standard as Applied to Oil and Gas Marketing.

The prudent operator standard has the same function in oil and gas law as the reasonable man standard has in negligence law. Thus to comply with this standard, Exxon (and the other owners) must act with regards to duties owed under implied covenants, including the duty to market oil and gas, as a prudent third party operator would under similar circumstances.

The standard against which a producer's marketing efforts must be measured has been summarized by Professor Kramer as follows:

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[33] *Darr v. Eldridge*, 346 P.2d 1041 (N.M. 1959).

> [T]he lessee in any given case is compared to a hypothetical reasonable person engaged in oil and gas operations. Under such an objective standard, the lessee cannot justify his wrongful act or omission on the grounds that his course of action was reasonable based on circumstances peculiar to himself. Rather, the lessee's marketing activities are compared to those that would have been carried on by a reasonably prudent operator under similar circumstances. Where it is found that the lessee failed to meet this standard of conduct he will be liable for breach of the implied marketing covenant.[34]

Additionally, in relation to marketing Point Thomson product, there are at least four relevant corollaries to the duty of care owed by Exxon and the other working interest owners to the State as lessor.

First, a reasonably prudent operator will act if and when there is a "reasonable expectation of profit."[35] Second, the reasonableness of the acts of the lessees in marketing oil and gas cannot be measured in light of a lessee's individual circumstances, such as available financial resources, corporate objectives or self interests, a desire to favor development of another property, or an overall North Slope development strategy.[36]

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[34] Bruce M. Kramer and Chris Pearson, *The Implied Marketing Covenant in Oil and Gas Leases: Some Needed Changes for the 80's*, 46 La. L. Rev. 787, 810-11 (1986) (notes omitted).

[35] *See e.g., Whitman Farms, v. City of Longmont*, 97 P.3d 135, 137-8 (Colo. Ct. App. 2003) ("When, as here, there is a proven field of oil or gas, courts have held that a lessee is required to further develop the lease when there is a reasonable expectation that one or more new wells would generate enough revenue to cover the cost of development and return a reasonable profit. Thus, when a prudent operator would have a reasonable expectation of such economic viability and a lessee is not developing the field, it is proper to conclude that the lessee has breached the covenant of reasonable development and to grant an equitable termination to the lessor.").

[36] *Shelton v. Exxon Corp.*, 719 F.Supp. 537, 549 (S.D. Texas) (Exxon's failure to market gas from leasehold to meet certain corporate warranties without having to purchase gas on the open market "completely subordinated the rights of the mineral interest owners to Exxon's financial gain. Exxon's acts and omission in so doing were not those of a reasonable, prudent operator having its own and the plaintiff's interest in mind."), *rev'd on this point*, 921 F.2d 595 (concluding that the imprudent marketing claim had been released by a 1980 settlement). *See also Newell v. Phillips Petroleum Co.,* 144 F.2d 338, 339 (10th Cir. 1944) ("It was the duty of Phillips to operate this well prudently and with reasonable diligence... It's duty in that respect was not affected in any manner by its ownership of other wells in the vicinity. And its failure to discharge that duty, whether motivated by its interest in wells located lower on the structure, or otherwise, would render it liable in damages for any injury suffered by the owner of the royalty interest."); *Smith v. Amoco Production Co.,* 272 Kan. 58, 31 P.3d 255, 272 (Kan. 2001) ("Amoco admits that its obligations as lessee apply independently to each lease. The independent duty principle is applied to prevent Amoco from making the management of a given lease dependent upon the management of another lease."); *Amoco Production Co. v. Alexander,* 622 S.W.2d 563, 569 (Tex. 1981) ("The reasonably prudent operator standard is not to be reduced to the Alexanders because Amoco has other lessors in the same field. Amoco's status as a common lessee does not affect its liability to the Alexanders."); Pearson and Dancy, "Negotiating and Renegotiating the Gas

> The prudent operator . . . is a hypothetical oil operator who does what he ought to do not what he ought not to do with respect to operations on the leasehold. Since the standard of conduct is objective, a defendant cannot justify his act or omission on personal grounds or by reference to his peculiar circumstances. . . In short, the question is not what was meet [sic] and proper for *this* defendant to do, given his peculiar circumstances, but what a hypothetical operator acting reasonably would have done, given circumstances generally obtained in the locality.[37]

Third, diligence in marketing is a prerequisite to the working interest owners' standard of care given it is they – not the lessor – that are in the position to secure a market for the product.

> The covenant to market requires that the lessees exercise reasonable diligence to market the products. Reasonable diligence is whatever, in the circumstances, would be reasonably expected of all operators of ordinary prudence, having regard to the interests of both lessor and lessee. . .[38]

Fourth, a reasonably prudent operator's interaction with a nearby or prospective pipeline will recognize the economic realities of the industry are such that pipelines must secure long-term shipment commitments from either the gas producer or purchaser.

> [G]as normally is marketable only when the reserves in the field where the lease is situated justify the sizeable capital expenditure necessary to construct and lay a pipeline capable of transporting the gas to its market destination. Pipeline systems, of course, are complex creatures and are quite expensive to construct. Investors traditionally have not been willing to build pipelines unless gas is available in a sufficient quantity and has been committed to the pipeline for an adequately long period, thereby providing the investors with reasonable assurance that they will make a profit on their investment. Thus, the justification for the capital expenditure necessary to construct the pipeline usually comes in the form of long-term gas sale contracts which effectively commit the volume of gas to be sold to the purchaser who will transport the gas through its pipeline to the point of consumption.[39]

Contract: Producer Duties to Third Parties," 56 Okla. B.J. 2181 at 2182 (1985) ("lessee cannot justify his actions merely on the grounds that his course of action was reasonably based on circumstances peculiar to himself.").

[37] 5 Williams & Meyers at § 806.3 (emphasis in original).

[38] *Davis v. Cramer*, 808 P.2d 358, 363 (Colo. 1991).

[39] Holliman, *Exxon Corp. v. Middleton: Some Answers but Additional Confusion in the Volatile Area of Market Value Gas Royalty Litigation,* 13 St. Mary's L.J. 1, 6 (1981). *See also Panhandle Eastern Pipe Line Co. v. The United States,* 187 Ct. Cl. 129, 170 408 F.2d 690 (Ct. Cl. 1969) ("Since pipelines are expensive to construct, pipeline companies have been required to insure for themselves long-term supplies of natural gas in order to amortize their investments..."); *The Superior Oil Co. v. Western Slope Gas Co.,* 549 F.Supp. 463, 469 (D. Colo. 1982) ("Because gas purchasers must make substantial capital outlays in order to move the gas product to the retail consumer, they require same assurance that sufficient long-term supplies of gas will be available to them.").

Consequently, a reasonably prudent operator must act to diligently secure a pipeline connection,[40] include making necessary long-term gas sale or pipeline shipment commitments.[41] Even in the cases where the courts have found the implied covenant to market was not breached, they have nevertheless emphasized the diligence that operators showed with respect to trying to secure, and in some cases actually securing, pipeline connections.[42] In each of these cases the courts recognized that the producers' attempts to and actually contracting with a pipeline were central to the issue of whether reasonable diligence in marketing had been shown.

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[40] *See Crain v. Hill Resources, Inc.*, 972 P.2d 1179, 1181 (Okla. Ct. App. 1998) (The "wells were never hooked up to a pipeline," and the court found that therefore the "lessees failed to comply with the implied covenant to market the gas and cancelled the lease."); *Davis v. Cramer,* 837 P.2d 218 (Colo. Ct. App. 1992) (When the well was completed in 1972 and the pipeline was completed near the well in 1975, but product was not marketed until 1978, the implied covenant to market had been breached.); *Barby v. Cabot Corp.*, 550 F.Supp. 188, 190 (W.D. Okla. 1981) ("Defendant's breach of its duty to diligently market the gas produced . . ." resulted from fact that "[d]efendant was dilatory in renegotiating" expired gas contracts.); *Cole Petroleum Co. v. United States Gas & Oil Co.*, 41 S.W.2d 414 (Tex. 1931) ("The jury found that reasonable care was not used by the assignee to connect the gas wells with a pipe line nor to sell the gas to the advantage of the parties. Without the exercise of reasonable care to market the gas, there could be no compliance with the assignee's obligation to proceed with the development reasonably necessary to bring the lease to a normal stage of production.").

[41] *See Hillard v. Stephens,* 276 Ark. 545, 550, 637 S.W.2d 581, 583-4 (Ark. 1982) ("Once the lessee-producer drills a well resulting in the commercial production of natural gas on the leased premises, the lessee-producer has the immediate duty to market the gas. In order to market such gas effectively, it is the custom in the industry and is usually necessary for the lessee-producer to sell the gas under a long-term gas purchase contract."); *Tara Petroleum Corp. v. Hughey,* 630 P.2d 1269, 1273 (Okla. 1981) (footnotes omitted) ("Once a producing well is drilled, a producer has a duty to market the gas. In order to market gas it is usually necessary to enter into a gas purchase contract – frequently a long term one. . . We have recognized this necessity of the market, and we believe that lessors and lessees know and consider it when they negotiate oil and gas leases.").

[42] *See e.g., Christianson v. Champlin Refining Co.,* 169 F.2d 207, 210 (10th Cir. 1948)(In determining whether an operator had "exercise[d] due diligence" the court emphasized the defendants "secure[d] within a year the construction of an expensive pipe line and made it possible to market the gas which was an inferior quality, which in itself, entailed additional difficulty, and were actually marketing the gas from the well within fifteen months from the date of completion."); *Tate v. Stanolind Oil Co.,* 172 Kan. 351, 358 240 P.2d 465, 470-71 (Kan. 1952)(In deciding whether marketing had occurred "within a reasonable time," the court considered that the pipeline "refused to take the gas," and the producer "proceeded before the commission to compel" the pipeline to take it and the pipeline "then agreed to do so."); *Fey v. A.A. Oil Corp.,* 129 Mont. 300, 320 285 P.2d 578, 588 (Mon. 1955) (In determining "[w]hether due diligence [in marketing] has been exercised," the court emphasized that "[t]he record is replete with the efforts of defendants to procure a pipe line company that would take the gas at the profit to lessors and lessees."); *Commissioners of the Land Office v. Carter Oil Co. of W. Va.,* 336 P.2d 1086, 1096 (Okla. 1958) (In determining whether "due diligence was exercised in the seeking and obtaining of a market" the court considered the fact that "[c]ontinued negotiations were carried on with other [potential buyers] and the operator found a buyer "taking the gas from the well head.").

Thus a general statement of the relevant marketing duty of a working interest owner as a party to the PTUA is as follows: upon discovery of oil or gas, an owner is under an implied duty to use diligence to market product and secure pipeline connections as a reasonably prudent operator, which includes marketing the product if there is a reasonable expectation of profit and a willingness to enter into necessary long-term gas sale or shipping commitments.

IV. THE UNIT OPERATOR HAS BREACHED THE IMPLIED COVENANT TO MARKET GAS, FOR WHICH TERMINATION IS A PROPER REMEDY.

A. Elements of Breach of the Implied Covenant to Market as a Reasonably Prudent Operator.

The easiest way to show the Point Thomson owners have not behaved as reasonably prudent operators in relation to marketing as required under PTUA § 10 – and to separately make the case that violation of the marketing covenant justifies forfeiture in its own right outside of the obligations in PTUA § 10 to submit an acceptable POD – is to demonstrate breach of the covenant. The elements of the cause of action for breach of the implied covenant to market are: (i) discovery of oil or gas on the leasehold; (ii) failure to sell the product so discovered; (iii) ability of a prudent operator to sell the product through the exercise of reasonable diligence; (iv) and damage to the lessor as a result of the failure to obtain a market.[43]

Of the four elements necessary for the State to prove a prima facia case of breach, only element (iii) is not facially met for the Point Thomson unit. Consequently the Port Authority will explore it further, explaining that: (a) in these circumstances it need not be shown that a prudent operator could have sold product (or at least the owners bear the burden to demonstrate a prudent operator could not have sold product); and (b) the owners have not acted with diligence in attempting to market product.

[43] 5 Williams & Meyers at § 855.

B. The Unit Operator and Other Owners Bear the Burden of Proof to Demonstrate Their Diligence in Marketing Product form the Unit.

In a case claiming a breach of the implied covenant to market, the lessor normally bears the burden to prove the ability of a prudent operator to sell the product through the exercise of reasonable diligence. But what happens if the lessor cannot meet this burden and substantial time passes? Should the lessee continue to maintain the right to produce and market the leasehold indefinitely notwithstanding his continuing inability to so?

The Port Authority has already explained this problem is resolved in discovery jurisdictions, not through a claim of the breach of the implied covenant to market, but in the rule that a failure to market product after a reasonable period of time results in forfeiture of the lease under the habendum clause regardless of diligence.

However, what happens in non-discovery jurisdictions when substantial time passes without marketing, yet the habendum clause is satisfied into the secondary term because there is either: (i) a habendum clause that requires the "capability of production" (such as PTUA § 20(c)) rather than "actual production;" or (ii) a habendum clause that requires "actual production" but the lease contains a shut-in royalty clause that allows payment of shut-in royalties to act as constructive production after the primary term?

> That the lessor must prove that diligence would have secured a market in a covenant case but need not make such proof in a habendum clause case suggests the possibility that the lessor may be favored with the lighter burden in pure covenant cases when the lease is being held under a shut-in royalty clause. Suppose the lessee drills a commercial gas well but no market is immediately available. He shuts the well in, commences shut-in royalty, and forgets the well. Some years later the lessor sues to cancel the lease for failure to market the gas. Should he bear the burden in such a case of showing that a market was available and could have been secured through due diligence?
>
> The [discovery jurisdiction] habendum clause cases are not controlling on this point, because the issue arises under the implied marketing covenant, not the

> habendum clause. Payment of the royalty is production for habendum clauses purposes. Nevertheless, if no efforts to market the gas are made by the lessee, or if his efforts fall below the standard of prudent operation, a court could properly grant cancellation for breach of covenant without proof that a market for gas existed. The ground for cancellation would be to prevent the lessee from holding the land for speculative purposes.
>
> A court reluctant to forfeit the lease where the lessee is paying shut-in royalty (although these sums are usually nominal) should at least shift the burden of proof to the operator to show that a market could not be obtained, even if the exercise of reasonable effort. A shut-in gas clause should not hold a nonproducing lease indefinitely in the absence of the exercise of due diligence to market the product. It is difficult to know whether a market could have been obtained unless efforts have been made to do so; the absence of effort implies a desire by the lessee to hold the land for speculation contrary to the base purposes of the lease.[44]

First, the Port Authority has already suggested that if the courts or Department refuse to give effect to the special limitations in PTUA § 20(c) and 11 AAA 83.336(a)(1), then Alaska is a discovery jurisdiction in this context and the unit is subject to termination under the habendum clause for a reasonable amount of time passing and marketing not having occurred. Second, if the unit is not subject to discovery jurisdiction rules, then for units held indefinitely by shut-in savings provisions, or a "can be produced" habendum clause where there is maintained a well capable of producing in paying quantities (the rationale is identical), it is proper if product has not been marketed with sufficient diligence for the Department under the implied marketing covenant to: (i) rule the unit cancelled for breach of the covenant without proof that a market existed, or (ii) at least shift the burden of proof to the Unit Operator and owners to show that a market could not be obtained, even if the exercise of reasonable effort.

[44] 5 Williams & Meyers at § 856.3.

C. The Unit Operator and Other Working Interest Owners Have Not Marketed Point Thomson Gas with Diligence.

The duty of care the lessees owe the State to find a market for gas is one of diligence. To even suggest the owners, in 43 years since the first lease sale or 31 years since unitization, have acted diligently to bring product to market is farcical. That is because not only have the Point Thomson working interest owners not diligently sought a market, they have used Point Thomson as a chess piece in their ongoing corporate strategies relating to the construction of a gas pipeline. The Port Authority respectfully submits that the Commissioner would be woefully ignoring his obligations as trustee of our people's resources if he did not focus these termination proceedings on the working interest owners' refusal to market gas from the Unit.

Exxon, BP and ConocoPhillips have not even been coy about their respective positions on North Slope gas development. Time and time again these owners have beat the refrain that they will not sell gas from Point Thomson until an off-slope pipeline gets build, they will not commit gas to a pipeline until the State makes royalty and tax concessions, they will not enter into gas purchasing agreements to allow a downstream gas purchaser to make shipping commitments on an independent pipeline, and they will not enter into firm transportation commitments to ship their own gas down a third party pipeline. Each one of these positions is a direct breach of the marketing covenant and will be addressed individually below.[45]

[45] In its September 16, 2006 Agency Demand letter to Director Myers ("Agency Demand"), PTUR 000001, and in the pleadings leading up to and argument at the November 20, 2006 hearing before Commissioner Menge, the Port Authority detailed and incorporated into the record many of the violations of the producers' obligations to market Point Thomson gas diligently. However, a brief recap of some of those arguments and producer statements is useful.

1. *The Unit Operator and Working Interest Owners Have Not Been Willing to Develop Point Thomson Resources Until There is an Off-Slope Gas Pipeline.*

The State should not be distracted by the most recent POD proposal to undertake a relatively small gas cycling project. As the Unit Operator testified before the Commissioner, Point Thomson is predominately a gas field.[46] That is why, starting in 1983, the Unit Operator repeatedly took the position in PODs for almost twenty-five years that only a major off-slope gas sale would economically justify development of the unit, with the crux of its justification for non-development and for not marketing unitized substances being a lack off-slope gas transportation facilities.[47] The newest version of the 22nd POD, a minimal development commitment to get around negotiating gas sales with a third party pipeline operator, is hardly a meaningful departure from this strategy.[48]

2. *The Unit Operator and Working Interest Owners Will Not Commit Gas to a Pipeline Until the State Makes Royalty and Tax Concessions.*

As has been addressed, lessees must undertake development and marketing if they have a reasonable expectation of profit. Yet irrespective of the level of profitability the various working

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[46] "Gas is our predominant resource. It's over 90 percent of the hydrocarbons at Point Thomson . . . And we will be pursuing . . . the ultimate development of Point Thomson . . . to commercialize that gas, but as we're – as we know we're currently await a pipeline." Testimony of Craig Haymes, Hearing Transcript at 98-99 (February 27, 2008).

[47] 7th POD (1983) ("Sufficient drilling has been accomplished to establish within reason the area and potential commerciality of the field. Further development prior to commencement of construction of a pipeline to market would constitute economic waste through premature expenditure of funds which otherwise could be utilized for exploratory or development activity on other Alaska areas and leases."). *See also* 11th POD (1994) ("Exxon believes that the most likely way to commercialize ANS gas, other than the relatively small volume of gas for local sales, will be through a large scale delivery system, to an off-slope market."); 15th POD (1998) ("[H]urdles to economic development remain; particularly, high well and facilities costs, lack of a gas market and transportation system, and the unique technical challenges associated with high pressure gas cycling. Consequently, development of the Thomson Sand gas is not economically justified at the present time.").

[48] Cycling out 10,000 bbl/d, or about 3 to 4 mmbbl/y, of condensates in a field with know resources of several hundred million barrels can hardly be considered preparing for a major gas sale. Such a small amount of condensates will be cycled out in the next few years that if a major gas sale were to occur in the near future it would still be a gas blowdown.

interest owners and independent consultants are actually projecting from gas sales,[49] it has been repeatedly stated that major off-slope gas sales will not occur without fiscal concessions from the State.

Consider the 15th POD where the Unit Operator stated unit development was not commercially viable, and instead hinted that development might be appropriate upon a change in the State's royalty and tax structure.[50] The alluded to Stranded Gas Development Act ("SGDA"), AS 43.82, ultimately culminated in the SGDA negotiations fiasco where the producers used their stranglehold on Alaska's gas resources to extract sickening tax and royalty concessions in the Murkowski Administration contract. The very point of the implied covenant to market is to force lessees to live up to the spirit of the lease by requiring that they exercise diligence to try and produce and market product. For a lessee to demand renegotiation of fiscal terms (e.g., waiver of lessor's right to take gas in value) in order to take known resources to a profitable market is a gross violation of the implied marketing covenant and the State should not continue to tolerate it for Point Thomson.

And of course the Unit Operator and working interest owners continue to maintain this position. ConocoPhillips's AGIA filing, as well a litany of radio advertisements and legislative testimony, makes clear that that company expects the State to change its tax and royalty structure before it will consider marketing gas.[51]

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[49] Consider, for instance, the Econ One findings and Green Gate LLC calculations included in the record with the Port Authority's "Appeal Letter" before the November 20, 2006 hearing.

[50] 15th POD (1998) ("Additionally, three of the PTU Owners (Exxon, BP and Phillips) have worked with the State of Alaska's North Slope Gas Commercialization Team which has recommended that changes be made to the State's tax and royalty structure to improve the economic feasibility of a North Slope gas project. This work culminated in the Governor's introduction of Stranded Gas legislation (HB 393) earlier this year. . . Future fiscal legislation will continue to be monitored for applicability to PTU resource commercialization.").

[51] *See* Attachment B.

Unbelievable, just a few weeks ago, Exxon filed comments on TransCanada's application under the Alaska Gasline Inducement Act ("AGIA"), AS 43.90, taking just that position. "An appropriate fiscal regime must be negotiated between the State and the ANS producers."[52]

> ExxonMobil considers the foregoing to be a fundamental condition to achieving commercially viable Alaska gas pipeline project under any legislative regime. Consistent with EM's testimony during the AGIA hearings, EM reiterates its offer to engage in substantive fiscal discussions with the State with a goal of developing a fiscal regime which can lead to a viable pipeline project.[53]

But even more telling are Exxon's multiple comments before the legislature on April 12, 2007 that Exxon will not be involved with a North Slope gas project if the State does not lock in fiscal terms.

> [I]ncreases in taxes and oil and gas related activities during the life of the project could significantly impact the commercial viability of the project and offset the benefits of taking on a project of this magnitude. Because fiscal terms could be modified under the proposed AGIA legislation, it dos not provide the fiscal stability necessary to ensure a commercially viable project.[54]

Exxon even hinted it may insist on fiscal certainty before marketing product even if such fiscal certainty is potentially unconstitutional under the Alaska Constitution.[55]

3. The Owners Are Not Diligently Seeking Pipeline Connections for Off-Slope Gas Sales, Either by Selling Gas on the North Slope or by Agreeing to Make Shipping Commitments on an Independent Pipeline.

Above numerous cases were cited to demonstrate that a reasonably prudent operator must act to diligently secure a pipeline connection, include making necessary long-term gas sale or pipeline shipment commitments. But the difference between the PTU working interest owners' behavior, and their legal obligations under the PTUA to market with diligence, is remarkable. It

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[52] Attachment B at 1.
[53] *Id.* at 14 (referring to Attachment C, Exxon's testimony to Alaska House Resources Committee, April 12, 2007).
[54] Attachment C at 16.
[55] *Id.* at 19.

is worth focusing on two specific aspects of that behavior, the owners' lack of diligence in finding a party that will purchase gas on the North Slope, and their lack of diligence in encouraging the construction of or making gas commitments on an independently owned pipeline.

a. The Owners Will Not Enter into Gas Purchasing Agreements to Allow a Downstream Gas Purchaser to Make Shipping Commitments on an Independent Pipeline.

A fundamental disconnect between the North Slope producers' actions with Point Thomson, and their legal obligations, is their unquestioned supposition that they will under all circumstances retain title to unitized substances past the point of production. That is, the owners are behaving as if they do not have to diligently seek and ultimately sell to a party that would purchase the gas on the North Slope.

It is customary that a lessee will sell its gas to a third party and the gas purchase contract will determine the price the working and royalty interest owners receive for their gas. Because of this disputes dealing with a producer's obligation to market product tend to deal with gas sale contracts as opposed to a producer's direct participation in a pipeline open season and requisite firm transportation commitments. In fact marketing covenant cases have held that when a lessee sells gas to an affiliated company, the potential of a lessee acting opportunistically towards the lessor (on pricing for instance) make such arrangements "inherently suspect."[56]

Thus producers have a duty of care to diligently seek to sell gas through a gas sales contract.[57] Although the largest North Slope gas reserves holders (BP, Exxon and

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[56] "Although the sale of gas by the lessee to a subsidiary is 'inherently suspect,' it does not [necessarily] constitute a breach of the covenant to market . . ." 5 Kuntz § 60.3 (quoting *Parker v. TXO Production Corp.*, 716 S.W.2d 644 (Tex. App. 1986)).

[57] "[E]ntering into a long term gas purchase contract will discharge the obligation to market the gas where the sale is for the best price obtainable at the time." 5 Kuntz § 60.3.

ConocoPhillips) no doubt find the idea anathema, other producers that do not have an interest in Trans Alaska Pipeline System currently undertake on-slope oil sales,[58] and the major North Slope producers could do so for gas.

However, in Alaska the major producers have made it clear there preference for integrated ownership of the value chain means they will not ship down someone else's pipeline, much less transfer title to the gas via a gas purchase contract that would, for instance, allow a downstream distributor, consumer, or even pipeline company to take title and make shipping arrangements from the unit boundary or the gas conditioning facilities. This is true even though such an arrangement could significantly reduce, and even eliminate, the risk the Point Thomson working interest owners would have if they themselves made firm transportation commitments and took their own gas to market.

As with their demand for fiscal concessions, Exxon is frank in its comments on the TransCanada AGIA application that they demand integrated ownership.

> [A]s explained in ExxonMobil testimony to the Alaska Legislature during April, 2007, because AGIA disconnects the upstream and the midstream aspects of the business, ExxonMobil's participation in an AGIA-related project would be difficult. Notwithstanding this situation, ExxonMobil believes it is important to offer the following comments on TransCanada's Application from the perspective of a possible 'owner-shipper' that expects to have both those roles in the project that is ultimately constructed.[59]

And the producers' behavior evidences their refusal to consider major on-slope gas sales. For instance, shortly after formation the Port Authority in 1999 made its first formal offer to purchase North Slope gas.[60] On April 1, 2005, the Port Authority in conjunction with Sempra

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[58] Anadarko sells to a third-party upstream of Pump Station No. 1, and Pioneer has recently agreed to do so. Prior to merger with Unocal, Chevron sold to a third-party upstream of Pump Station No. 1 and has continued that practice on a limited basis after the merger.
[59] Attachment B at 5.
[60] Attachment D at ¶ 2.

LNG made a much more formal and detailed offer to purchase gas on the North Slope and transport it to market.[61] The offer was distributed to Exxon, ConocoPhillips, BP, ChevronTexaco and others. On May 27, 2005 Sempra LNG and the Port Authority had their first substantive discussion with Exxon about that offer, and the tone of the Unit Operator and its obvious unwillingness to commit gas to a project led to Sempra LNG pulling out of the project four hours later, even though in the months prior Sempra LNG had spent millions of dollars on project development.[62]

During the several months that followed, the major Point Thomson working interest owners declined to sell the Port Authority North Slope gas, or even to discuss prices or terms.[63] As of today, the Port Authority still labors to develop its project, but is prevented from moving the project forward by the unwillingness of the working interest owners to provide terms for the sale or shipment of North Slope gas.[64] This is notwithstanding the record established before Commissioner Menge at the November 20, 2006 hearing unquestionably demonstrated the working interest owners would have a reasonable expectation of profit if they pursued a Port Authority project.

Finally, although counsel for the Port Authority has not reviewed its AGIA application, it has heard that Sinopec has expressed interest in making gas purchase commitments that would have characteristics similar to an on-slope gas sale (e.g., Sinopec would absorb shipping commitment risk). If true, it is likely the PTU working interest owners have refused to take such an idea seriously, much less diligently pursue it.

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[61] *See* Agency Demand at Exhibit 65.
[62] Attachment D ¶ 4.
[63] *Id.* at ¶ 4-7.
[64] *Id.* at ¶¶ 8-9.

b. The Unit Operator and Working Interest Owners Will Not Enter Into Firm Transportation Commitments to Ship Gas Down an Independent Pipeline

A lessee is not typically viewed by the courts as obligated to construct expensive pipeline facilities to comply with the duty to market.[65] Rather courts expect a lessee to work diligently towards finding a gas purchaser and to secure pipeline connections from existing or proposed third party pipelines. But in Alaska the Point Thomson working interest owners have turned this expectation on its head, instead demanding they own the pipeline facilities before gas will be marketed form the unit.

In all of the various PODs over the years Exxon consistently speaks in terms of the producers eventually building a gas pipeline to bring Point Thomson gas to market. Nowhere in the record can the Port Authority find evidence that the Unit Operator or other working interest owners seriously discussed or considered a third party building a line in which Point Thomson gas could be transported. Yet there is a long history of capable, qualified parties seeking to build an off-slope gasline, and numerous parties have sought Point Thomson gas from the owners. The owners have demonstrated a long history of refusing to diligently attempt to commit Point Thomson gas to qualified parties seeking to build an Alaska gas pipeline, regardless of such projects' economics.

For instance, in the 1980s and 1990s Yukon Pacific Corporation ("YPC"), a subsidiary of CSX Corporation, which because of its acquisition of Texas Gas Resources Corp. in 1983 was at the time one of the largest natural gas pipeline operators in America, sought to build a gasline from the North Slope to Valdez to allow delivery of liquefied natural gas to market in Asia. By

[65] *See e.g.*, Richard W. Hemingway, *The Law of Oil and Gas* § 8.9 (3d ed. 1991) ("Although the lessee has an obligation to market the products from the wells, it has been repeatedly held that he does not have to stand the expense of a long and costly gathering system to transport the products to the nearest market.").

at least 1989 YPC had attempted to purchase the necessary natural gas,[66] efforts that obviously did not come to fruition.

As discussed above since its inception the Port Authority has tried everything in its powers to engage the working interest owners in the hope of either purchasing or shipping Point Thomson gas. The Port Authority is right now able and willing to enter into long-term gas sale contracts or shipping commitments that would allow it to construct pipeline facilities to bring Point Thomson gas to market, but Exxon and the other owners have refused to provide terms of sale or shipment. No doubt such other third party project sponsors as the Alaska Natural Gas Development Authority and TransCanada have experienced a similar frustration.

That is because the Point Thomson working interest owners are not only not acting diligently in pursuing pipeline connections they are, to the detriment of the State's royalty interest, unequivocally warehousing Point Thomson gas until such time as they decide to undertake their own project.

Consider the comments on May 30, 2005, while Exxon was engaged in negotiations with the State under the SGDA, the Chairman and Chief Executive of Exxon, Lee Raymond, stated this fact with chilling clarity in an interview with National Gas Weekly.

> NGW: Will political problems seem to be popping up in Alaska and Canada affect the proposed gas pipelines?
>
> Raymond: There is not a mechanism in Canada to deal with all of the local, provincial and federal issues all in a consistent, timely manner. . . My friends at the International Energy Agency talk about developing more upstream resources, but they don't have a clue as to what it takes to do that. They think it just takes money. There isn't going to be an Alaska gas pipeline before there is a Canadian gas pipeline. I know some people in Alaska don't like to hear it, but Canada is a sovereign country, and the pipeline does have to go through Canada. Then you have these competing pipeline proposals, which is fine if that's what you want to

[66] *See* Agency Demand at Exhibit 71.

> do. But the reality is, nobody is going to build a pipeline without the producers. You and I know how pipelines get built. The pipeline goes to the bank. The guy at the bank says, what are you going to put in your pipeline? Gas. Do you own the gas? No. I don't own the gas. Well, who does own the gas, and do you have a commitment from them that they are going to put it through the pipeline? Well, no, we don't have that. Then I don't think I'm going to give you much money to build a pipeline.

Just consider the number of ways this statement violates the implied duty to market as a reasonably prudent operator. By its Chief Executive's own admission Exxon has followed a policy that an Alaskan North Slope gas pipeline will be built when and if Exxon chooses to do so, and until such a time it plans to sit on Point Thomson and other North Slope gas reserves.

On the night of Governor Palin's election, ConocoPhillips made a similar assertion:

> Jack Griffin, ConocoPhillips Alaska Inc.'s vice president for external affairs, predicted that no matter how many new proposals Palin solicits, she will end up negotiating with the three major oil produces, just as Murkowski did.
>
> 'There's only one proposal from the resource owners, and no project can move forward without the resource owners,' said Griffin.[67]

Even Exxon's recent comments on TransCanada's AGIA application are unequivocal in this regard, stating that Exxon's lack of desire to participate in the AGIA process that disconnects the upstream and midstream aspects of the business, and that Exxon expects to hold an equity interest in any project equivalent to its portion of gas being treated and shipped.[68] And if there were any doubt, Exxon's April 12th testimony before the legislature again made it clear that not only is its participation necessary, but so is BP and Exxon's. "[I]t will take ExxonMobil, BP, ConocoPhillips, and the State of Alaska. 'Until we are all aligned on this project it just is not going to happen,' he said."[69]

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[67] Reuters, "Incoming Alaska Gov to Consider New Pipeline Deals," Wed. Nov. 8, 2006 (8:49 p.m. ET).
[68] Attachment B at 5.
[69] Attachment C at 11.

Although this position may be reasonable when measured against the working interest owners' corporate profit motives, it is not reasonable when measured against their legal obligations under the implied marketing covenants in the State's leases and units.

D. The Working Interest Owners' Marketing Commitments in the Newest Proposed POD do not Satisfy Their Legal Obligations Under the Unit Agreement.

The final issue the Port Authority would like to highlight in light of the Point Thomson working interest owners' refusal to market Point Thomson gas as a reasonable prudent operator is the following statement in Exxon's February 10, 2008 transmittal letter sending the most recent proposed POD to the Commissioner. The below is actually quite remarkable, because it is the first time the Port Authority is aware of that ANY Point Thomson working interest owner has ever shared terms under which it would consider marketing Point Thomson gas.

> In addition, necessary engineering work will be completed to allow individual PTU working interest owners to participate in an open season for a gas pipeline. Each owner must individually decide whether to participate in a specific gas sales opportunity. ExxonMobil, as an individual owner, will fully participate in and make commitments for its Point Thomson gas in an open season for a gas pipeline (producer owned, third-party owned, or some other combination) in that pipeline's open season on terms and conditions no less favorable to ExxonMobil than those upon which other shipping commitments are made.

Essentially Exxon is suggesting it will sell Point Thomson gas if it can do so on parity with the best deal any other shipper gets (although it is unclear how this statement meshes with various other recent Exxon statements about gas development in Attachments A and B). But even taken on its face, this position is woefully below what the law expects.

First, this commitment is expressly limited to Exxon. **The Commissioner should demand to know under what terms the other working interest owners are willing to market Point Thomson gas.**

Second, Exxon's obligation is to seek a market with diligence. It should be beating the pavement trying to find a market for its gas, not begrudgingly offering conditional terms of sale because it fears losing the property interest.

Third, Exxon conditions its willingness to sell gas only if it can do so "on terms and conditions no less favorable to ExxonMobil than . . . other shipping commitments." The gamesmanship is just palatable. A reasonable prudent operator does not play games, it diligently seeks a market, and courts recognize that what a lessee covenants is to "obtain the best price and terms available."[70] "[E]ntering into a long term gas purchase contract will discharge the obligation to market the gas where the sale is for the best price obtainable at the time."[71] Why would Exxon believe it has the legal right to warehouse gas if it has a reasonable expectation of profit, just because some other shipper was able to negotiate a slightly better deal?

V. CONCLUSION

In conclusion, the Port Authority respectfully requests the Commissioner affirm or make the following findings of law and fact (many of which have already been made in Director Myers's Amended Decision, Commissioner Menge's Decision, and/or the Acting Commissioner Rutherford's Decision on Reconsideration). As a general rule cites are only provided if the point of law was not addressed elsewhere in the brief, although a few cites were included to clarify which portion of the brief the suggested finding relates.

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[70] *Texaco Inc. v. Duhe*, 274 F.3d 911 (5th Cir. 2001) (the obligation of the implied covenant is to use "reasonable diligence" to get the "best price reasonably possible," but "while royalty owners legitimately cannot expect the highest rates of return from their mineral or natural gas interests, they can expect returns consistent with the bargains-for exchange: reasonable rent for the intended use of land.").

[71] 5 Kuntz at § 60.3. These cases normally arise when a lessor accuses a lessee of selling for too low a price, but the principle is still the same. The lessee's duty under the marketing covenant is to sell gas at the best price currently available, or the prevailing market rate. *See e.g., Cabot Corp. v. Brown*, 754 S.W.2d 104 (Tex. 1987); *Yzaguirre v. KCS Resources, Inc.*, 53 S.W.3d 368 (Tex. 2001).

A. Habendum Clause.

1. The lessee's failure to have a well capable of producing in paying quantities meant the special limitation in the "can be produced" habendum clause in PTUA § 20(c) was triggered, and the unit is subject to automatic termination. For a well to be capable and to meet this requirement, it must be able to be turned on and product flow without additional equipment and repairs, [72] and plugged and suspended wells cannot meet this definition because: (i) 11 AAC 83.361 did not adopt a fiction that a certified well would be treated as capable even though not equipped; (ii) if 11 AAC 83.361 did create a fiction that a certified well would be treated as capable even though not equipped, then 11 AAC 83.361 is inconsistent with the known meaning of the PTUA § 20(c);[73] and/or (iii) when the Department revoked well certification the owners no longer met the special limitation in PTUA § 20(c).

2. Although Judge Gleason determined 11 AAC 83.336(a)(1) does not apply to the unit because it is inconsistent with the PTUA, it should be clarified for record that if 11 AAC 83.336(a)(1) does apply, then the unit would be subject to automatic termination upon the occurrence of the special limitation of not having an approved POD for a unit not in production.

3. If the courts or Department refuse to terminate the unit for the triggering of the special limitations in either PTUA § 20(c) (e.g., effect is not given to the "can be produced" requirement because of, for instance, 11 AAC 83.361) or 11 AAC 83.336(a)(1) (e.g., it is inconsistent with PTUA § 20(c)) then Alaska is a *de facto* discovery jurisdiction because, upon valuable discovery, a unit survives into its secondary term without marketing product. In such jurisdictions the habendum clause will be satisfied after the primary term without marketing product unless: (i) the operator did not exercise diligence at any time in finding a market, even if a market is not readily available; or (ii) after a reasonable amount of time no market is available even if the lessee exercised diligence in attempting to find one.

4. A reasonable amount of time to obtain a market had passed when Director Myers and Commissioner Menge rejected the original proposed 22nd PODs, and thus under law applicable to discovery jurisdictions the Unit was properly terminated under the habendum clause.

B. PTUA § 10.

5. The rejection of the all the proposed 22nd PODs under PTUA § 10 and 11 AAC 83.343 was consistent with the provisions of 11 AAC 83.303.

6. The Commissioner has inherent authority under PTUA § 10 to cancel the unit administratively for the Unit Operator's refusal to submit an acceptable POD since such authority was not withheld by applicable statute, regulation, or the PTUA.[74]

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[72] *See e.g., Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550 (Tex. 2002).
[73] *Merrion Oil & Gas Corp.*, 169 IBLA 47 (2006).
[74] *Boesche v. Udal*, 373 U.S. 472 (1962).

7. In addition to the power of the Commissioner to administratively cancel an oil and gas lease or unit agreement when that power is not specifically withheld, the Commissioner's broad express authority under applicable statute, regulation, and PTUA to approve any unit plan that the Commissioner deems reasonable or proper is sufficient to cover the forced termination of the former Point Thomson unit.[75]

8. PTUA § 10 conditioned the existence of the Unit on the Unit Operator's submitting an acceptable plan of development; the Unit Operator's refusal to do so is a breach of a condition that subjects the unit to forfeiture.

9. The Unit Operator not only expressly covenanted in PTUA § 10 to develop the unit as a reasonably prudent operator, the Unit Operator and other working interest owners impliedly covenanted in PTUA § 10 to produce and market product from the unit as a reasonably prudent operator.

10. The Unit Operator and other working interest owners' past marketing activities and proposed terms of marketing (e.g., Exxon's terms of marketing) do not meet the reasonably prudent operator standard requirement of PTUA § 10.

C. <u>Breach of the Implied Covenant to Market.</u>

11. As to the first element of a cause of action for breach of the implied covenant to market, there has been discovery of oil and gas on the leasehold.

12. As to the second element of a cause of action for breach of the implied covenant to market, there has been a failure to sell the product so discovered.

13. As to the fourth element of a cause of action for breach of the implied covenant to market, there has been damage to the State of Alaska as lessor as a result of the failure to obtain market, including *inter alia* the failure to receive royalties from the sale of unitized substances.

14. As to the third element of a cause of action for the breach of the implied covenant to market, if an operator has not acted diligently in marketing product, it need not be shown that a market existed. Alternatively, the burden of proof should be shifted to the operator to show that a market could not be obtained.

15. As to the third element of a cause of action for the breach of the implied covenant to market, the Unit Operator and other working interest owners have not acted diligently in marketing product from the Unit.

16. The Unit Operator and other working interest owners breach of the implied covenant to market product is independent grounds for terminating the Unit.

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[75] *See e.g.*, 2 Kramer & Martin at § 16.02[2][d]; *Chevron U.S.A., Inc.*, 111 IBLA 96 (1989) ("The broad authority to approve any unit plan that the Secretary deems reasonable or proper is sufficient to cover the forced termination and/or expansion of existing federal exploratory units.") (discussing *Chevron U.S.A., Inc.*, 111 IBLA 96 (1989)).

DATED this 21st day of March, 2008.

WALKER & LEVESQUE, LLC
Attorneys for Alaska Gasline Port Authority

By _____
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Certificate of Service:

I hereby certify that on the 21st day of March, 2008, I caused a true and correct copy of the foregoing document to be served upon each of the following:

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MEMORANDUM June 8, 2012

SUBJECT: Point Thomson settlement (Work Order No. 27-LS1577)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Donald M. Bullock Jr.
Legislative Counsel

You asked for an opinion on a number legal issues related to the settlement of disputes concerning the leases and development of the Point Thomson Unit (PTU). At the time of the settlement, an appeal relating to the issues addressed in the settlement agreement before the Alaska Supreme Court had been argued and was under advisement by the court.[1]

There are two overriding questions relating to the PTU settlement agreement. First, is agreeing to the settlement agreement within the discretion and authority of the attorney general? Second, is the settlement agreement the best possible approach for the development of the PTU? The first question is a matter of law -- the law appears clear that the attorney general has the authority to settle litigation in which the state is a party. The second is a matter of opinion -- whether the settlement agreement is the best of all alternatives, or more subjectively, whether it is the agreement that any one legislator or other current or former officer of the state would make.

At this time, the settlement is final and the supreme court has closed the case on appeal.[2] Dismissal of the administrative appeal is pending in superior court.[3]

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[1] The various cases involving the Point Thomson Unit are listed in paragraph 2.18 of the Settlement Agreement (March 29, 2012). The Settlement Agreement is document no. 3 in the record for the April 27, 2012 meeting of the Senate Judiciary Committee. The list of documents in the committee record is published on the Internet at *http://www.legis.state.ak.us/basis/get_documents.asp?chamber=SJUD&session=27&bill=&date1=20120427&time2=1330* (accessed June 5, 2012).

[2] Oral argument in Case No. S13730 was held on Feb. 8, 2012, the motion to dismiss the petition for review was filed on March 27, 2012, and the court granted the motion to dismiss on March 30, 2012. The appeal information is in the court system's appellate

Authority of the attorney general to enter into settlement agreements.

The forum in which the settlement agreement was presented is significant for determining the relative powers and authority of the attorney general in litigation and the Department of Natural Resources in the administration of oil and gas leases. The Department of Natural Resources and the commissioner of natural resources administer oil and gas leases under the Alaska Land Act (AS 38.05), and in particular, AS 38.05.180, which relates to oil and gas leasing. The duties and responsibilities of the attorney general with respect to litigation are listed in AS 44.23.020(b) and (d).[4] When representing the state in

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database and published on the Internet at *http://www.appellate.courts.state.ak.us/frames1.asp?Bookmark=S13730* (accessed June 5, 2012).

[3] The order dismissing the administrative appeal may have been issued, but the case status is reported as "reopened." The docket published on Courtview lists "Order Upon Dismissal of Appeal" for Case No. 3AN-06-13751CI, dated April 18, 2012. A joint Stipulation for Dismissal of Administrative Appeal was filed on March 29, 2012. The docket is published on the Internet at *http://www.courtrecords.alaska.gov/eservices/casedetail.page.9?x=x3rZcQJPNwZRYwflnD4ouP9W4fw8-kbWZnVk*2aNAnc* (accessed June 5, 2012).

[4] **Sec. 44.23.020. Duties; and powers; waiver of immunity.**

. . .

(b) The attorney general shall

(1) defend the Constitution of the State of Alaska and the Constitution of the United States of America;

(2) bring, prosecute, and defend all necessary and proper actions in the name of the state for the collection of revenue;

(3) represent the state in all civil actions in which the state is a party;

(4) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

(5) administer state legal services, including the furnishing of written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs; and give legal advice on a law, proposed law, or proposed legislative measure upon request by the legislature or a member of the legislature;

(6) draft legal instruments for the state;

(7) make available a report to the legislature, through the governor, at each regular legislative session

(A) of the work and expenditures of the office; and

(B) on needed legislation or amendments to existing law;

litigation, the authority of the attorney general to settle a case may result in an outcome that may not be possible at the agency level because of the duties and responsibilities granted to an agency by law.

The authority to settle and the authority of the executive branch to control litigation was described by the Alaska Supreme Court in *Public Defender Agency v. Superior Court*:[5]

> Generally, an attorney general has those powers which existed at common law except where they are limited by statute or conferred upon some other state official. AS 44.23.020 indicates that the office of the Attorney General is to function with those powers and duties normally ascribed to it at common law:
>
> '(b) The attorney general shall . . .
>
> (7) perform all other duties required by law or which usually pertain to the office of the attorney general in a state.'[6]
>
> Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best. This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases.
>
> When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation

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> (8) prepare, publish, and revise as it becomes useful or necessary to do so an information pamphlet on landlord and tenant rights and the means of making complaints to appropriate public agencies concerning landlord and tenant rights; the contents of the pamphlet and any revision shall be approved by the Department of Law before publication; and
>
> (9) perform all other duties required by law or which usually pertain to the office of attorney general in a state.
>
> . . .
>
> (d) The attorney general may, subject to the power of the legislature to enact laws and make appropriations, settle actions, cases, and offenses under (b) of this section.
>
> . . . .

[5] 534 P.2d 947, 950 (Alaska 1975) (citations omitted).

[6] This paragraph is currently codified as AS 44.23.020(b)(9).

> of the doctrine of separation of powers. Although the Alaska Constitution does not expressly address itself to the doctrine of separation of powers, we have noted that often what is implied is as much a part of the constitution as what is expressed. The state constitution is divided into a number of separate articles. Since Article III concerns the executive branch, it can fairly be implied that this state does recognize the separation of powers doctrine.
>
> Both federal and state courts have consistently and carefully observed the line which divides their branch of government from that of the executive. They have held that the Attorney General cannot be controlled in either his decision of whether to proceed, or in his disposition of the proceeding.

Although *Public Defender Agency* specifically addressed the separation of powers between the judicial and executive branches, similar separation exists between the legislative and executive branches.

The attorney general discussed the relative responsibilities of the attorney general in the litigation situation and the responsibilities of the Department of Natural Resources for land exchanges outside of litigation in a 1981 opinion to Reed Stoops, Director, Division of Research & Development, Dept. of Natural Resources.[7] The opinion states, in part:

> By your memorandum of May 26, 1981, you requested our opinion regarding the relationship between the authority of the Attorney General to settle legal disputes and the statutory authority of the Department of Natural Resources to exchange state land for private land pursuant to AS 38.50. Your request speaks of both 'out-of-court settlements' (which are usually agreements, not filed in court, to settle a legal dispute without litigation) and 'settlements of litigation' (generally stipulations filed in court and approved by the judge to terminate litigation already initiated).
>
> In brief, it is our opinion that the Attorney General has authority unilaterally to settle litigation over title to a given parcel of land. *However, if that settlement involves an exchange of that land for land which is not at issue in the litigation, the provisions of AS 38.50 must be followed.* In addition, any unilateral settlement of litigation by the Attorney General is subject to constitutional constraints and must be in good faith and free of fraud. *Finally, because of legal considerations unique to land, we believe the Attorney General does not have authority unilaterally to settle legal disputes over land in the absence of litigation.*

(Emphasis added.)

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[7] File No. A66-446-81, 1981 WL 38510 (Alaska A.G.) (Oct. 7, 1981).

The settlement of the Point Thomson litigation by the attorney general seems consistent with the authority of the attorney general. In its litigation phase, as opposed to the initial determinations by the Department of Natural Resources, the attorney general has the power to end the litigation by settlement. Regardless of whether one agrees with the form of settlement or not, the settlement seems to be within the discretion of the attorney general.

The settlement agreement describes the way in which the laws applicable to the PTU are to be interpreted in the administration of the unit. For example, although the state generally is to receive royalty oil and gas in kind under AS 38.05.182(a), the commissioner may elect to take the royalty in value; under section 4.16.2 of the settlement agreement, the royalty is to be taken under the described circumstances in kind and the commissioner may not elect to take the royalty in value.

With this background, the following are the questions you presented and my opinions relating to the settlement of the PTU issues.

Has there, in the history of the State of Alaska, ever been a large deal done with the ANS producers, to end litigation or otherwise, without any public process?[8]

A significant example of a settlement with Alaska North Slope oil and gas producers (ANS producers) is the settlement of the royalty litigation in *State v. Amerada Hess*.[9] That case involved the determination of the value of the state's royalty share of oil production, and the settlement ended a dispute that had been ongoing for approximately 18 years.[10]

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[8] I am not sure what you mean by public process. There is public process in the enactment of legislation and the adoption of regulations. For example, the legislature enacted AS 38.05.180, which sets forth the duties and responsibilities of the Department of Natural Resources and the commissioner relating to oil and gas leases, and the department adopted regulations and drafted lease documents under the authority of that section and the general authority of the department to adopt regulations. However, when disputes advance to litigation in court, any public process is subject to court rules, and input from parties other than those directly involved in the controversy may be limited to amicus briefs. Also, because of various statutes relating to the confidentiality of information, such as AS 38.05.035(a) and AS 43.05.230, information critical to issues under consideration may not be available to the public. If public process means oversight of executive action by the legislature, the power of the legislature may be limited by the doctrine of separation of powers under which the legislative power is granted under art. II, sec. 1, and the executive power is granted under art. III, sec. 1, Constitution of the State of Alaska.

[9] Case No. 1JU-77-847 Civ.

[10] The Office of Management and Budget summarized the history of the Amerada Hess royalty litigation in the context of using the Amerada Hess settlement proceeds to pay the

Other settlements relating to oil and gas pipeline and marine transport of ANS crude are the 1985 settlement of tariff methodology for the Trans Alaska Pipeline (TAPS tariff settlement) and the Exxon Valdez spill claims settlement agreement.

With regard to the Exxon Valdez oil spill claims settlement, the attorney general described the authority of the attorney general and the governor to negotiate and agree to the settlement agreement on behalf of the state in a letter to Senator Richard Eliason and Representative Max Gruenberg. After discussing the authority of the executive under the separation of powers doctrine and quoting from *Public Defender Agency v. Superior Court, supra*, the attorney general concluded, "It is thus entirely clear that, as an incident of both common law and statutory powers, the Attorney General has the discretionary authority to settle the State's litigation."[11]

The opinion expressed in the letter to the legislators seems consistent with *Public Defender Agency v. Superior Court* and the statutory authority to settle cases in AS 44.23.020.

Can the commissioner abrogate his mandate to ensure the development option (e.g., cycling[12] versus gas blow-down[13]) chosen by the working interest owners is in the

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debt service on bonds for capital projects financing for FY 2006. *Amerada Hess Royalty Oil Dispute and Settlement*, Office of Management and Budget (Dec. 15, 2004). The summary is published on the Internet at *http://omb.alaska.gov/ombfiles/06_budget/AmeradaHess.pdf* (accessed June 5, 2012).

[11] Letter from Charles E. Cole, Attorney General, to Sen. Richard Eliason, Chair of the Senate Special Committee on the Exxon Valdez Oil Spill Claims Settlement, and Rep. Max Gruenberg, Chair of the House Special Committee on the Exxon Valdez Oil Spill Claims Settlement, 1991 WL 916843 (April 2, 1991).

[12] "Cycling" is described in Patrick H. Martin and Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law*, Manual of Terms (LexisNexis Matthew Bender 2011) as

> A primary recovery method by which condensate is recovered gas produced from a condensate gas reservoir and the residue gas is compressed and returned to the reservoir from which it was originally produced.

[13] "Blow-down" is described in *Williams & Meyers* as

> A term applied to the commencement of production of gas for sale after the completion of a cycling or recycling operation. The term refers to the reduction of pressure in the formation as a result of the production of gas. Gas royalty becomes payable to royalty owners upon the commencement of the blow-down.

public interest under 11 AAC 83.303? That is, can the commissioner contract around his statutory and regulatory obligations?

Although the commissioner of natural resources (commissioner) may not contract "around his statutory and regulatory obligations," the attorney general may enter into a settlement agreement in litigation that may resolve an issue in a different manner than what the commissioner may have chosen or had the power to accomplish administratively. Once the issues are being litigated, settlement is in the discretion of the attorney general and no longer in the discretion of the commissioner, though the attorney general may consult with the commissioner in the course of negotiating and reaching a settlement. Although the settlement authority rests with the attorney general, the commissioner also signed the settlement agreement, impliedly to express agreement in the terms of the settlement.

Your question includes two options for dealing with gas extracted from the PTU. Under cycling, condensate is removed from the gas and the residual gas is injected into the reservoir from which it was extracted. Blow-down refers to the decline in formation pressure when gas is produced for sale. In other words, the two options are to reinject residual gas with the possibility of extracting the gas for sale in the future or to produce the gas for sale.

The critical time for determining whether gas will be cycled or produced for sale is the end of 2016. Section 1.7 of the settlement agreement addresses the alternatives based on whether or not a major gas sale is sanctioned before the end of 2016:

> If a Major Gas Sale is Sanctioned prior to year-end 2016, the WIOs will begin work on a Point Thomson project associated with that Major Gas Sale. However, if a Major Gas Sale has not been Sanctioned by June of 2016, the WIOs have committed to begin engineering of a Point Thomson Expansion Project. An expanded cycling project would result in additional condensate production, totaling approximately 20,000 to 30,000 barrels per day into TAPS, depending on the level of expansion. Alternatively, a project to deliver Point Thomson gas to Prudhoe Bay for injection would significantly increase the rate of condensate production at Point Thomson, serve as a pre-investment for a Major Gas Sale project, and essentially complete installation of the Point Thomson wells and facilities required for a Major Gas Sale. In addition, this option would materially increase production at Prudhoe Bay, and result in enhanced recovery at Prudhoe Bay.

"Major Gas Sale" is defined in sec. 2.16 of the settlement agreement to mean "a large-scale pipeline project having a design throughput of more than 500 million cubic feet of gas per day that results in delivery of gas off the North Slope of Alaska."

The attorney general entered into the settlement agreement to end the PTU litigation. Part of the settlement agreement addresses the cycling and blow-down options and the situation in which each option could be exercised. Since the options are part of the settlement agreement, the option is subject to the agreement and is no longer under the purview of the commissioner. This situation is similar to the situation addressed in the opinion by the attorney general to Reed Stoops discussed above in that the settlement agreement was made in the litigation context and within the discretion of the attorney general as the state's lawyer.

Can the commissioner agree to have future disputes as to field development or related to interpretation of the settlement decided in a manner other than the DNR administrative process provided by law (i.e., by original determination by the superior court or by arbitration)?

The attorney general agreed to the terms of the agreement on behalf of the state; the state and the commissioner of natural resources are bound by the terms of the settlement agreement. The settlement agreement is complete and does not require further approval or agreement by the commissioner of natural resources.

The settlement agreement addresses the resolution of future disputes in section 5.1 of the settlement agreement. The introductory sentence in section 5.1 states:

> 5.1 Dispute Resolution. The following provisions *shall apply to this agreement*:

(Emphasis added.)

By its own provisions, disputes relating to the implementation of the settlement agreement are subject to the procedure within the settlement agreement. The resolution of disputes outside of the settlement agreement would continue to be subject to the dispute resolution provisions applicable to a dispute between a working interest owner and the commissioner of natural resources.

Can the commissioner of natural resources, in section 4.9 of the settlement agreement, pre-approve any lease assignment requested by any working interest owner within 90 days? In practical terms, can Chevron be bought out by another working interest owner and the state agree before it sees who bought its interest, the terms, and what impact that has on the PTU operating agreement?

Section 4.9 states the agreement by the state to approve lease assignments within 90 days after the effective date for tracts identified in Exhibit B to the settlement agreement. Because the state already agreed to approve the lease assignments in the settlement agreement, the assignments are not subject to review or other action by the commissioner outside of the terms of the settlement agreement.

Not being privy to conversations between the attorney general and the commissioner of natural resources, one may not know what work has already been done on the lease assignments and the extent to which the settlement agreement can be reasonably implemented on this point. One would hope that the attorney general negotiated a time-frame that was adequate for the commissioner to take the actions necessary to approve the lease assignments.

Can the state, through a non-competitive process, waive its right to take royalty in value and so encumber its rights relating to the taking in royalty in kind (under the option related to reinjection of PTU gas into the Prudhoe Bay Unit without royalty board and legislative approval?

Actually, the default is for the state to take oil and gas royalty in kind and not to take it in value. AS 38.05.182 addresses royalty on the state's natural resources:

> **Sec. 38.05.182. Royalty on natural resources.** (a) Any royalty provided for in AS 38.05.135 - 38.05.181 may be taken in kind rather than in money if the commissioner determines that the taking in kind would be in the best interest of the state. *However, royalties on oil and gas shall be taken in kind unless the commissioner determines that the taking in money would be in the best interest of the state.*
>
> (b) The commissioner shall submit a determination to take royalty in money to the legislature at the first opportunity during a current session or, if the legislature is not in session, at the next regular session. The legislature, within 60 days or by the adjournment of the session, whichever comes sooner, may revoke the determination by concurrent resolution.

(Emphasis added.)

Section 4.16.2 of the settlement agreement addresses taking royalty in kind:

> Royalty on Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project Gas. If the WIOs Commit to and complete construction of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, then, upon Project Start-up, the State, as authorized by the Point Thomson leases and applicable State law, *will elect, for the period prior to Project Start-up of a Major Gas Sale, to take in-kind the State's royalty share of gas* produced from the Point Thomson Unit when produced into the gas pipeline from Point Thomson to Prudhoe Bay referenced in Paragraph 2.21(i).

(Emphasis added.)

Section 4.16.2 has the effect of excluding the royalty-in-value election and makes the election that is the general rule under AS 38.05.182(a). When the royalty gas is taken in

kind, the disposal of the gas is subject to AS 38.05.183, relating to the sale of royalty, and the advisory duties of the Alaska royalty oil and gas development advisory board under AS 38.06.

Note that, under section 4.16.2.2 General Terms, the state may take its royalty gas for sale or other use, or the royalty gas may be injected into the Prudhoe Bay unit reservoir to enhance the production of liquids. If injected into the Prudhoe Bay unit reservoir, the state maintains ownership of the royalty gas received from the PTU.[14]

Does the settlement require legislative approval under the Stranded Gas Development Act or under the logic of *Baxley v. State*?[15]

The settlement agreement is not a contract developed under the Stranded Gas Development Act (AS 43.82). Therefore there is no contract to submit to the legislature for approval under AS 43.82.435. The settlement agreement settles litigation and is subject to court acceptance and approval, which apparently has already been received.

Baxley involved a citizen-taxpayer challenge to an amendment to the royalty provisions for leases in the Northstar Oil Field that was negotiated by the commissioner of natural resources and approved by law. The Department of Natural Resources and BP Exploration (Alaska), Inc. (BP) negotiated a change in royalty terms that eliminated the net profit share provision, established new royalty rates, allowed the state to terminate (without litigation) the leases if BP did not begin development within a certain time period, and committed BP to employ Alaskans in the construction and operation of the field.[16] The legislature authorized the amendment of the leases as negotiated by the commissioner in 1996.[17]

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[14] I am not sure how the state's PTU royalty gas will be taken from the Prudhoe Bay unit reservoir when gas in the reservoir is produced. An agreement with the working interest owners in the Prudhoe Bay unit may be needed to allocate gas between the state's royalty interest in Prudhoe Bay gas, PTU royalty gas effectively stored in the Prudhoe Bay unit reservoir, the gas of PTU working interest owners, and the share of gas owned by the Prudhoe Bay unit working interest owners.

[15] *Baxley v. State*, 958 P.2d 422 (Alaska 1998).

[16] *Baxley*, at 427.

[17] Ch. 139, SLA 1996.

The court summarized the plaintiffs allegations in *Baxley* as follows:[18]

> This case began in January 1997 when Clyde Baxley and the Republican Moderate Party brought a declaratory judgment action against the State and John Shively, Commissioner of the Department of Natural Resources. Baxley and the Party (collectively Baxley) asserted that they had citizen-taxpayer standing to challenge the Act. Baxley argued that the Act violates the Uniform Application Clause and the Public Notice Clause of the Alaska Constitution, and that it violates competitive bidding statutes and laws proscribing material amendments to competitively bid contracts. Baxley also contended that the Commissioner lacked the authority to modify the leases.

The court did not disturb the superior court's findings that the plaintiffs had standing,[19] agreed with the superior court that the Uniform Application Clause[20] did not apply,[21] agreed with the lower court that the legislation approving the lease amendments was not special legislation,[22] and found that the commissioner did not exceed the commissioner's broad statutory powers to negotiate amendments to the leases.[23] The court also found that the public notice requirement in art. VIII, sec. 10, was not violated "because the public had ample opportunity to comment on the proposed lease amendments before the legislature authorized any binding changes[.]"[24] Finally, the court found that the rule against material amendments to state contracts through a public bidding process did not apply to amendments approved by the legislature.[25]

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[18] *Baxley*, at 427 - 28.

[19] *Baxley*, at 428.

[20] The Uniform Application Clause is in art. VIII, sec. 17, Constitution of the State of Alaska:

> **Section 17. Uniform Application.** Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

[21] *Baxley*, at 429.

[22] *Baxley*, at 430 - 31.

[23] *Baxley*, at 432.

[24] *Id.*

[25] *Baxley*, at 433 - 34. Consideration of several issues were not considered by the court because they were not raised in the lower court. Those issues included whether the commissioner violated art. VIII, secs. 8 and 11 of the state constitution by not requiring

Baxley was a court challenge to actions taken by the legislature and the commissioner. Had the PTU settlement agreement been an agreement negotiated by the commissioner of natural resources and approved by the legislature, *Baxley* may have been relevant. However, the settlement agreement is an agreement between adversaries in the context of an appeal of an administrative decision, and the attorney general is authorized by AS 44.23.020(d) to settle cases such as this, subject to the power of the legislature to enact laws and make appropriations.[26]

Although different persons may have negotiated a settlement agreement with different terms, the PTU settlement agreement was negotiated by the attorney general as attorney for the state and presented to the court in the context of the appeal. The plaintiffs in *Baxley* unsuccessfully challenged the authority of the commissioner of natural resources to renegotiate lease terms; with regard to the PTU settlement agreement, negotiating and agreeing to the PTU settlement appears to be well within the authority of the attorney general.

Is the attorney general's authority to enter into a settlement so broad as to include terms that otherwise violate state law? That is, can the attorney general do by settlement what the commissioner of natural resources could not do by direct action outside of the settlement context?

The attorney general has broad authority to settle cases under the authority discussed above. Whether terms of a settlement are in violation in state laws may or not be clear. For example, in section 4.16.2, the settlement agreement provides that the state will take its royalty in kind. Does the provision of the settlement that removes the commissioner's option to take royalty in value violate state law by removing that option?

As in any litigation settlement, a party may give up something the party feels it is entitled to in exchange for something else it wants. A settlement agreement often involves compromises. Whether a provision of the settlement agreement under consideration violates state law may be difficult to determine, based on the broad discretion the commissioner has to manage leases and the broad authority of the attorney general to settle cases. Broad discretion provides flexibility, which may encompass a broad range of settlement alternatives.

BP to forfeit the leases that BP said it would not develop (*Baxley*, at 432 - 33), whether BP anticipatorily breached the lease agreements (*id.* at 433), and that the lease amendments violated the public trust doctrine (*id.* at 434)

[26] I am unaware of a statute that limits the authority of the attorney general to enter into a settlement agreement such as the one discussed in this memorandum. Also, the settlement agreement does not seem to require an appropriation to fund its implementation. If an appropriation had been or will be required, the legislature would have the power to appropriate as it sees fit, subject to veto.

The attorney general appears to have the authority to do by settlement what the commissioner of natural resources may not do under the commissioner's authority. For example, the commissioner of natural resources revoked the leases based on his interpretation of the law and leases, an action that resulted in the appeal and the settlement agreement; the attorney general had the option to negotiate with the working interest owners and reached a settlement to allow the leases to continue, subject to the terms of the settlement. Thus, there was a different outcome from the commissioner's initial action, but both were within the discretion of each state officer.

Where there is broad discretion to act, it is sometimes difficult to define the breadth of the discretion. If there are particular parts of the settlement agreement that you believe were outside of the attorney general's discretion, the options for correction are limited as the settlement agreement is under the jurisdiction of the court. The best outcome from the review of the PTU settlement agreement may be to find a better approach to be exercised in future settlements.

What is the absolute minimum amount of gas that must be moved under the settlement agreement? How does the amount of gas that must be moved under the settlement agreement compare to a major gas sale as defined under the Prudhoe Bay unit operating agreement?

Assuming that the question refers to the amount of gas that must be produced before the state is required to take its royalty share, there is no minimum amount that is specified. Under section 4.16.2, the trigger for the state to take its royalty gas is an event, not a volume of gas. The event is the project startup for the Point Thomson Gas Development/Prudhoe Bay Enhanced Recover Project, when gas is produced into the gas pipeline from Point Thomson to Prudhoe Bay. Under section 2.21(i), the gas pipeline from Point Thomson to Prudhoe Bay is expected to have the capacity "to transport significant volumes of Point Thomson gas in an amount that would position Point Thomson gas for a Major Gas Sale, for injection for: . . . use in repressuring, stimulation of production, and increasing ultimate recovery of Prudhoe Bay oil and for ultimate availability for a Major Gas Sale. . . ." "Major Gas Sale" is defined in section 2.16 of the settlement agreement as "a large-scale pipeline project having a design throughput of more than 500 million cubic feet of gas per day that results in delivery of gas off the North Slope of Alaska."

According to the excerpt of the Prudhoe Bay unit operating agreement presented to the Senate Judiciary Committee on April 27, 2012, and exhibit 5, a major gas sale is an average daily volume of separator off-gas of at least "1,750 MMScf/D,"[27] about three and one-half times the 500 million cubic feet of gas per day volume.

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[27] "MMScf/D" means 1,000,000 standard cubic feet a day. 1,750 MMScf/D means 1,750,000,000 standard cubic feet a day or 1.75 billion standard cubic feet, if my math is correct.

Summary

The attorney general has broad authority to settle cases being litigated by the attorney general on behalf of the state. While there may be different views as to whether each of the issues addressed in the PTU settlement agreement was resolved in the way someone else may have resolved an issue, the attorney general has the discretion to settle all issues of the case within the settlement. The settlement agreement apparently has been adopted by the court and may now be implemented. While the legislature may review the settlement, the settlement agreement may not be amended without the consent of the parties or the approval of the court.

DMB:ljw
12-342.ljw

March 29, 2012

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is made by and between the State of Alaska (the "State"), acting through the Department of Natural Resources ("DNR"), on the one hand, and Exxon Mobil Corporation, as Point Thomson Unit Operator and pursuant to Section 22 of the Point Thomson Unit Agreement and as working interest owner and as successor in interest to Chevron U.S.A., Inc., ExxonMobil Oil Corporation, BP Exploration (Alaska) Inc., ConocoPhillips Alaska, Inc., and Leede Operating Company, L.L.C. (collectively the "Owner Group"), on the other hand. DNR and the Owner Group are at times hereinafter referred to collectively as the "Parties" and each individually as a "Party."

1. RECITALS

1.1 The Point Thomson leases were acquired beginning in 1965. Oil was discovered in 1975, and the Point Thomson Unit was formed in 1977. Following formation of the unit, the Point Thomson owners drilled additional wells and discovered additional oil and natural gas in paying quantities. The field is located 60 miles east of Prudhoe Bay in a remote arctic area. The Point Thomson reservoir is a high-pressure retrograde condensate and natural gas reservoir with abnormally-pressured formations, and presents unique engineering challenges with respect to development and production. Since the discovery of the field, the Point Thomson owners have drilled 19 exploration / delineation wells in the Point Thomson area, and recently completed the drilling of two additional wells, the PTU 15 and PTU 16, to initiate production from the Point Thomson Unit consistent with this Agreement.

1.2 On September 30, 2005 and October 27, 2005, the Director of the Division of Oil and Gas of DNR ("Director") denied approval of the 22nd Plan of Development (a "POD") submitted by the Working Interest Owners ("WIOs") with respect to the Point Thomson Unit, and placed the Point Thomson Unit into default. The WIOs appealed this decision to the Commissioner of DNR ("Commissioner"), who affirmed the default decision, rejected the WIOs' proposed POD, and terminated the Point Thomson Unit on November 27, 2006, which was affirmed upon reconsideration by the Commissioner on December 27, 2006. These decisions were affirmed in part, reversed in part, termination of the Point Thomson Unit was vacated, and the matter was remanded to DNR by the Superior Court of the State of Alaska on December 26, 2007.

1.3 On April 22, 2008, the Commissioner issued another decision terminating the Point Thomson Unit, affirmed upon reconsideration on June 11, 2008. On August 4, 2008, DNR issued lease expiration decisions related to leases within the Point Thomson Unit.

1.4 The Owner Group filed several appeals challenging these decisions. On January 11, 2010, the Superior Court of the State of Alaska reversed DNR's April 22, 2008 decision terminating the Point Thomson Unit. On February 5, 2010, DNR filed in the Supreme Court of the State of Alaska a petition for review of the Superior Court's January 11, 2010 decision, which was granted by the Supreme Court on May 28, 2010.

1.5 The Parties wish to resolve all pending litigation and administrative proceedings between them related to the Point Thomson Unit on the terms and conditions set forth in this Agreement.

1.6 This Agreement sets forth the WIOs' commitment to produce natural gas condensate liquids ("condensate") from the Point Thomson Reservoir for delivery into the TransAlaska Pipeline System ("TAPS"). The WIOs have committed to construct an Initial Production System ("IPS") which is to be completed by the end of the 2015-2016 winter season. The IPS facility is being designed to produce and re-inject (cycle) 200 million cubic feet per day of gas and to produce approximately 10,000 barrels per day of condensate. In addition, a liquid hydrocarbon pipeline is being designed that can transport approximately 70,000 barrels per day from Point Thomson to an existing pipeline interconnection at the Badami field, which will provide for final delivery of Point Thomson liquid hydrocarbons into TAPS. Operation and production from the IPS will provide data and information to assist in evaluation of additional development plans, including potential increased gas and condensate production from Point Thomson, and plans for the delivery of Point Thomson gas into a Major Gas Sale pipeline project.

1.7 In parallel with the work on the IPS, Parties and/or their affiliates to this Agreement will, upon execution of this Agreement, undertake work for commercialization of North Slope gas. This work will build on ongoing gas commercialization efforts. If a Major Gas Sale is Sanctioned prior to year-end 2016, the WIOs will begin work on a Point Thomson project associated with that Major Gas Sale. However, if a Major Gas Sale has not been Sanctioned by June of 2016, the WIOs have committed to begin engineering of a Point Thomson Expansion Project. An expanded cycling project would result in additional condensate production, totaling approximately 20,000 to 30,000 barrels per day into TAPS, depending on the level of expansion. Alternatively,

a project to deliver Point Thomson gas to Prudhoe Bay for injection would significantly increase the rate of condensate production at Point Thomson, serve as a pre-investment for a Major Gas Sale project, and essentially complete installation of the Point Thomson wells and facilities required for a Major Gas Sale. In addition, this option would materially increase production at Prudhoe Bay, and result in enhanced recovery at Prudhoe Bay.

1.8 The Agreement further establishes terms and conditions to facilitate development and provide benefits to the State of Alaska. Certain acreage within the Point Thomson Unit is secured when specified work activities are completed (e.g., the IPS is completed and producing) and key commitments or decisions are made (e.g., a Major Gas Sale is Sanctioned or WIOs Commit to a Point Thomson gas development / Prudhoe Bay enhanced oil recovery project or an IPS gas cycling expansion project). Likewise, the Agreement provides for the automatic release of certain acreage to the State if the IPS is not completed or if certain key commitments or decisions are not made (e.g., a Major Gas Sale is not Sanctioned or WIOs do not Commit to a Point Thomson gas development / Prudhoe Bay enhanced oil recovery project or an IPS gas cycling expansion project). Depending upon the work activities that occur, the Point Thomson Unit will remain in effect or may terminate.

1.9 Since 2009, work activities at Point Thomson have resulted in contracts with over 150 companies and the employment of hundreds of Alaskans.

1.10 In implementing the terms of this Agreement, the WIOs and the State anticipate there will be significant continued investment and employment opportunities for Point Thomson Unit development.

1.11 A Major Gas Sale off the North Slope of Alaska is a primary goal of the Parties. The Parties believe settlement of the Point Thomson litigation will assist in progressing a Major Gas Sale. It also allows for other development options that may be pursued independent of or in conjunction with a Major Gas Sale, and would allow for continued progress on permitting, regulatory, and engineering activities toward a Major Gas Sale. Progress toward a potential Major Gas Sale off the North Slope of Alaska and development of Point Thomson consistent with this Agreement should aid exploration and development opportunities of North Slope resources.

2. DEFINITIONS

Whenever the following terms are used in this Agreement, they shall have the meanings set forth in this Section 2:

2.1 "Abandon," "Abandoned," or "Abandonment" has the meaning provided in Paragraph 4.2.1.

2.2 "Authorization for Expenditure" means a formal approval or authorization of expenditures for a project or a phase of a project by the authorized corporate representative.

2.3 "Brookian" means the stratigraphic interval correlating with the sands and silts penetrated by the Sourdough 3 well (API No. 50-089-200260) between the interval 10,305 feet measured depth and 12,200 feet measured depth as measured by Dual

Induction Focused Log Run No. 3, dated March 6, 1996, or the sands and silts penetrated by the Flaxman Island A-1 well (API No. 50-089-200030) between the interval 11,848 feet measured depth and 12,643 feet measured depth as measured by Dual Induction Laterolog Run No. 4, dated August 7, 1975.

2.4 "Commit," "Committed," or "Commitment" in the context of a Point Thomson Expansion Project means documentation that the WIOs have conducted project evaluation and scoping and have obligated themselves to proceed diligently with the project through completion in accordance with the terms of this Agreement. The documentation to be provided shall include corporate authorization letters by the authorized corporate representative from the WIOs and any existing project Authorizations for Expenditure.

In addition, in the context of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, the documentation to be provided also includes documentation demonstrating the completion of Front End Engineering and Design (FEED) and filing of formal applications for major federal and state permits, authorizations, certificates, or rights of way associated with construction of the project, from the U.S. Army Corp of Engineers, DNR and the Alaska Oil and Gas Conservation Commission, including any related NEPA review ("Authorizations").

After the WIOs "Commit," as defined above, to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, upon receipt of Authorizations consistent with FEED design work and the applications filed by the WIOs, the WIOs will proceed

in a timely manner to enter into contracts necessary to proceed with construction of the project consistent with the POD requirements.

2.5 "Continuous Operations" in the context of the IPS Project means continuing operation of wells and facilities to produce oil or gas from the Thomson Reservoir into a pipeline or other means of transportation to market. "Continuous Operations" does not include testing, evaluation, or temporary production. "Continuous Operations" exist even when production temporarily ceases or temporarily declines due to and for the period of: (1) planned or unplanned maintenance or repairs; (2) operational upsets; or (3) circumstances beyond the control of the WIOs that impact ongoing operations.

2.6 "DNR Point Thomson Orders" means the following DNR orders: (1) the Director's September 30, 2005 Denial of Proposed Plans of Development for the Point Thomson Unit and the Director's October 27, 2005 Amended Decision - Denial of Proposed Plans of Development of the Point Thomson Unit; (2) the Commissioner's November 27, 2006 Final Decision and the Commissioner's December 27, 2006 Decision on Reconsideration; (3) the Commissioner's April 22, 2008 Findings and Decision on Remand and the Commissioner's June 11, 2008 Decision on Reconsideration; (4) the Director's February 2007 and August 4, 2008 Decisions regarding thirty-one leases entitled Lease Expiration Due To Elimination From Unit; (5) the Commissioner's August 4, 2008 Decision on Consolidated Appeals From the Director's 2007 Decisions Terminating Thirteen State Oil and Gas Leases That Were Subject to the 2001 Point Thomson Unit Expansion Agreement; and (6) the Commissioner's January 27, 2009 Conditional Interim Decision.

2.7 "East Pad" means the proposed drilling pad located east of the IPS in Area D and from which one or more wells could be drilled.

2.8 "Effective Date" has the meaning provided in Paragraph 4.10.2.

2.9 "Expansion Planning POD" has the meaning provided in Paragraph 4.6.2.

2.10 "Expansion Project POD" has the meaning provided in Paragraph 4.6.3.

2.11 "Future POD" has the meaning provided in Paragraph 4.6.

2.12 "Initial Participating Area" or "Initial PA" means the participating area ("PA") formed for the Thomson Reservoir containing all or part of the leases listed in Area A on attached Exhibit C and contained in Area A of attached Exhibit D.

2.13 "Initial Production System" or "IPS" means the gas cycling facilities designed with capacity to produce and re-inject (cycle) 200 million cubic feet of gas per day utilizing reciprocal compression and with the objective of a minimum of 10,000 barrels per day of condensate for delivery into the TransAlaska Pipeline System ("TAPS").

2.14 "IPS Project" means the project to construct and install the IPS, and includes a 12-inch liquid hydrocarbon pipeline from Point Thomson to an interconnection with the Badami Field liquid hydrocarbon pipeline.

2.15 "IPS Gas Cycling Expansion Project" means an expansion of the IPS that must be: (i) a minimum of an additional 10,000 barrels per day if reciprocal compression is used; or (ii) a minimum of an additional 20,000 barrels per day if centrifugal compression is

used for delivery into TAPS. The WIOs have the discretion to decide on (i) or (ii) above and whether they will Commit to any IPS Gas Cycling Expansion Project.

2.16 "Major Gas Sale" or "MGS" means a large-scale pipeline project having a design throughput of more than 500 million cubic feet of gas per day that results in delivery of gas off the North Slope of Alaska.

2.17 "MGS POD" has the meaning provided in Paragraph 4.6.1.

2.18 "Point Thomson Cases" means (1) the following cases consolidated with Case No. 3AN-06-13751 CI: Case Nos. 3AN-06-13760 CI, 3AN-06-13773 CI, 3AN-06-13799 CI, 3AN-07-04634 CI, 3AN-07-04620 CI, 3AN-07-04621 CI, and 3AN-08-09369 CI; (2) the expansion leases termination appeal, Case No. 3AN-08-10156 CI; (3) the appeal from the AOGCC's decision dismissing involuntary unit petition, Case No. 3AN-09-07768 CI; (4) the Supreme Court appeal from denial of breach of contract damages claim, Case No. S-12743; (5) the appeal before the Department of Administration from DNR's denial of damages claim, Case No. OAH No. 08-0409; (6) the appeal from Commissioner Irwin's August 29, 2008 letter denying certain permit applications, Case No. 3AN-08-10825 CI; and (7) Chevron's Public Records Act case, Case No. 3AN-08-11804 CI.

2.19 "Point Thomson Development" means the IPS Project, drill wells, and work plans described in Paragraph 4.1 and other work activities set forth in this Agreement.

2.20 "Point Thomson Expansion Project" means an IPS Gas Cycling Expansion Project or a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project. The WIOs have discretion on whether to Commit to any Point Thomson Expansion Project.

2.21 "Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project" means a project to deliver Point Thomson gas to Prudhoe Bay for injection that would significantly increase the rate of condensate production at Point Thomson into TAPS, serve as a pre-investment for a Major Gas Sale, essentially complete installation of the Point Thomson wells and facilities required for a Major Gas Sale, and allow for continued efforts towards, and positions Point Thomson gas for, a Major Gas Sale. In addition, this project would materially increase oil production at Prudhoe Bay into TAPS and result in substantial enhanced recovery at Prudhoe Bay. A Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project would result in production and recovery of liquids from Point Thomson and Prudhoe Bay that would be greater than production and recovery of liquids from Point Thomson from an IPS Gas Cycling Expansion Project of a minimum of an additional 20,000 barrels per day. Before Project Start-up required approvals from the Alaska Oil and Gas Conservation Commission must be obtained.

The project would consist of:

(i) a newly constructed gas pipeline from Point Thomson to Prudhoe Bay with the capacity to transport significant volumes of Point Thomson gas in an amount that would position Point Thomson gas for a Major Gas Sale, for injection for: (a) use in repressuring, stimulation of production, and increasing ultimate

recovery of Prudhoe Bay oil; and (b) for ultimate availability for a Major Gas Sale; and

(ii) additional wells and facilities at Point Thomson to produce and process significant condensate production for delivery into TAPS through existing liquid hydrocarbon pipelines and pipelines constructed as part of the IPS Project. These facilities would also be used for a Major Gas Sale.

To ensure DNR receives necessary information regarding a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, in addition to information required under an Expansion Planning POD or an Expansion Project POD, the WIOs will meet and confer with DNR technical staff and schedule periodic reviews and workshops regarding reservoir and facility modeling results related to the project, and provide data and information to DNR for it to understand and track progress and evaluation of the project consistent with Section 16 of the PTUA. If the WIOs Commit to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, then at the State's request, the State and each individual WIO with a working interest in each Point Thomson Unit lease will negotiate a separate gas sales agreement that includes the terms set forth in Exhibit G. The Parties recognize that a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project will also be subject to Prudhoe Bay Unit agreements, including the Prudhoe Bay Unit plan of development approval process, which are not part of and would not be modified by this Agreement.

2.22 "Point Thomson Superior Court Case" means the case pending in the Superior Court of the State of Alaska, Case No. 3AN-06-13751 CI (Consolidated).

2.23 "Point Thomson Supreme Court Case" means the case pending in the Supreme Court of the State of Alaska, Case No. S-13730.

2.24 "Point Thomson Unit" has the meaning set forth in Section 3.

2.25 "Point Thomson Unit Agreement" or "PTUA" means the Unit Agreement for the Development and Operation of the Point Thomson Unit effective August 1, 1977, including all amendments thereto.

2.26 "Pre-Mississippian Section" means the interval of rock correlating with the Alaska State F-1 well (API No. 50-089-200190) below the depth of 13,846 feet measured depth as measured by the Dual Induction Laterolog Run No. 4, dated March 16, 1982, consisting of low grade metamorphic rocks containing argillite, phyllite, and quartzite along with intercalated beds of dolomite and limestone.

2.27 "Project Start-up" means the date of first production through facilities constructed as a result of the project in question but does not include testing, evaluation, or temporary production.

2.28 "Sanction" in the context of a Major Gas Sale means formal and explicit approval of a Major Gas Sale. A Major Gas Sale shall be considered "Sanctioned" under this Agreement upon receipt by the State of documentary evidence of: (1) corporate approvals by parties sufficient to proceed with construction of the project to completion; (2) firm transportation service agreements that have been entered into

sufficient to proceed with construction of the project to completion; and (3) necessary United States (and, if applicable, Canadian) federal regulatory certificates that have been issued and accepted.

2.29 "Thomson Reservoir" means the accumulation of hydrocarbon substances in the Thomson Sand and the Pre-Mississippian Section within the Point Thomson Unit.

2.30 "Thomson Sand" means the interval of rock correlating with the Point Thomson Unit No. 3 well (API No. 50-089-200070) between the depths of 13,657 and 13,932 feet measured depth as measured by the Dual Induction Laterolog Run No. 3, dated May 17, 1979, consisting of conglomerates, sandstones and siltstones.

2.31 "Unit Operator" means the Point Thomson Unit Operator designated in the PTUA and Point Thomson Unit Operating Agreement.

2.32 "West Pad" means the proposed drilling pad located west of the IPS in Area B and from which one or more wells could be drilled.

2.33 "West Pad Area" means the acreage containing all or part of the leases listed in Area B on Exhibit C and contained in Area B on Exhibit D.

2.34 "Without Appeal" means that the WIOs have waived any rights under the PTUA, individual lease terms, Alaska law and/or the laws of the United States of America, to file an application, petition, administrative appeal, or any cause of action before any administrative tribunal or state or federal court of law, and that the WIOs shall not file any such application, petition, administrative appeal, or cause of action. With regard to acreage that is released to the State Without Appeal under this Agreement, upon the

occurrence of the specified event resulting in the release of acreage, that release will occur immediately and automatically.

2.35 "Working Interest Owners" or "WIOs" means the working interest owners who are entitled to vote as to the applicable operation pursuant to, or who undertake a non-consent operation under, the Point Thomson Unit Operating Agreement.

3. UNIT CONFIGURATION

The Point Thomson Unit consists of the area and leases within the boundary set forth on the map attached as Exhibit A and the schedule of leases listed and identified on Exhibit B for a total acreage of 93,291.12 acres. The WIOs confirm that any leases not set forth on Exhibits A and B that formerly may have been included in the Point Thomson Unit have expired and the acreage has been released and returned to the State.

The map of the unit area reflecting the boundary of the Point Thomson Unit as set forth on Exhibit A and the schedule listing leases within the Point Thomson Unit area as set forth on Exhibit B are approved as Exhibit A and Exhibit B to the PTUA. The Unit Operator will file revised versions of Exhibits A and B when changes occur to the configuration or boundaries of the Point Thomson Unit area as set forth in this Agreement, with the revisions effective on the date the changes occur. Exhibit C is a listing of all or part of the leases listed on Exhibit A by area as referenced in this Agreement. Exhibit D is a map depicting the leases and areas set forth in Exhibit C. A reference to Exhibit C in this Agreement includes a reference to the corresponding area depicted in Exhibit D.

4. TERMS OF AGREEMENT

The Parties agree and understand as follows:

4.1 By signing this Agreement, the WIOs shall undertake and DNR approves the following work plan:

4.1.1 IPS Project.

4.1.1.1 The WIOs shall drill the PTU 15 and PTU 16 wells by the end of 2010, which work has been completed.

4.1.1.2 The WIOs shall put the PTU 15 and PTU 16 wells on production utilizing the IPS by the end of the 2015-2016 winter season and in any event no later than May 1, 2016. The work plan and activities associated with the IPS Project are set forth in Exhibit E. The PTU 15 and PTU 16 wells shall be placed on Continuous Operations either under production or gas injection. During the first year of production following IPS Project Start-up, the WIOs shall collect data and information regarding production, well and reservoir performance, IPS facility performance, and transportation system operations to aid in further development planning and decisions.

4.1.1.3 Additional wells shall be drilled and placed on production as needed to keep the IPS fully loaded with gas as set forth in Paragraph 2.13, to sustain the objective of a minimum of 10,000 barrels of condensate per day until the Thomson Reservoir is no longer able to sustain this objective.

4.1.1.4 After IPS Project Start-up, the WIOs shall identify and pursue debottlenecking work to increase the capacity of the installed facilities.

4.1.2 West Pad Well. The WIOs shall drill a Thomson Sand well from the West Pad by the end of the 2016-2017 winter season and in any event no later than May 1, 2017.

4.1.3 East Pad, East Pad Well, and Fifth Well. In addition to the wells and pads provided for in Paragraphs 4.1.1 and 4.1.2, the WIOs shall continue permitting for the East Pad, an East Pad well, and a fifth well, with the permitted location of the fifth well determined by the WIOs based on prior well results.

4.1.4 Wells to Target Thomson Sand Gas. All wells addressed in Paragraph 4.1 shall target Thomson Sand gas.

4.1.5 IPS POD. The work plans for the development and operation for the unitized land set forth in Paragraphs 4.1.1 through 4.1.4 shall constitute the drilling and operating obligations under Section 10 of the PTUA until May 1, 2017, unless IPS Project Start-up has not occurred due to factors outside the control of the WIOs under Paragraph 4.2.3 or force majeure under Paragraph 4.14, then until one year following IPS Project Start-up. The Unit Operator shall submit an annual report by March 1 of each year describing the operations conducted during the preceding year, but otherwise shall not be required to update the plan under 11 AAC 83.343.

4.1.6 Facility Expansion.

4.1.6.1 If a Major Gas Sale is Sanctioned by year-end 2019, then the WIOs are not obligated to pursue or continue to pursue the work plans for a Point Thomson Expansion Project set forth in Paragraphs 4.1.6.2, 4.6.2, or 4.6.3.

4.1.6.2 If a Major Gas Sale is not Sanctioned by June 1, 2016, the WIOs shall begin engineering and permitting of a Point Thomson Expansion Project. The WIOs shall incorporate these work plans into the Expansion Planning POD set forth in Paragraph 4.6.2 of this Agreement.

4.2 Completion of the IPS Project; Abandonment

4.2.1 Definition of Abandonment. For purposes of Paragraph 4.2, "Abandon," "Abandoned," or "Abandonment" means the WIOs are no longer diligently pursuing the IPS Project in good faith. Diligence is understood to mean the type of effort and activity demonstrated by the WIOs in drilling the PTU 15 and PTU 16 wells. The WIOs will have diligently pursued the IPS Project if the project work plans, activities, and pace are undertaken in a manner exemplified by the Point Thomson Provisional Schedule Level 1 work sheet attached as Exhibit E. Moreover, a lack of progress on project work plans, activities, and pace commensurate with the size and scale of the IPS Project over a one-year period is indicia of the WIOs' decision to Abandon the IPS Project. The economics or costs of the IPS Project cannot be used as a rationale or justification for not completing the IPS Project and do not constitute a factor outside the WIOs' control under Paragraph 4.2.3. To demonstrate diligence, the WIOs shall continue to provide to DNR documentation (e.g., spend reports, permit

applications, etc.) of their work activities and more detailed annual work plans to supplement the information in Exhibit E.

4.2.2 Consequences of Abandonment.

4.2.2.1 If the WIOs Abandon the IPS Project and have incurred costs for Point Thomson Development during the period between year-end 2007 and year-end 2015 of less than $2.0 billion dollars, then all Point Thomson Unit area acreage except for acreage included in Area A and Area B on Exhibit C shall be released to the State Without Appeal at year-end 2015.

4.2.2.2 If the WIOs Abandon the IPS Project and: (a) have incurred costs for Point Thomson Development during the period between year-end 2007 and year-end 2015 of less than $2.0 billion dollars; and (b) a West Pad well has not been spud by year-end 2016, then the Point Thomson Unit area acreage in Area B on Exhibit C shall be released to the State Without Appeal at year-end 2016.

4.2.2.3 If the WIOs Abandon the IPS Project and have incurred costs for Point Thomson Development during the period between year-end 2007 and year-end 2015 of $2.0 billion dollars or more, then only acreage listed in Area E and Area F on Exhibit C shall be released to the State Without Appeal at year-end 2015.

4.2.2.4 If the WIOs Abandon the IPS Project, the WIOs shall provide the State with accounting information provided by the Unit Operator in joint interest

billings to the WIOs to verify the costs incurred for Point Thomson Development between year-end 2007 and year-end 2015.

4.2.3 Factors Outside the Control of the WIOs. The WIOs shall not be considered to have Abandoned the IPS Project if the WIOs are unable to continue moving forward because of factors outside the control of the WIOs due to:

(a) circumstances addressed by Section 25 of the PTUA;

(b) design modifications due to significant technological or environmental obstacles that cause substantial additional work;

(c) litigation by third parties; or

(d) permitting and regulatory delays.

At the time the WIOs assert that one or more of the factors outside of their control has prevented them from moving forward with the IPS Project, the WIOs shall provide written notice to DNR with a description of the circumstances that have occurred and information to support the basis for their position. The WIOs shall exercise due care and diligence to address a factor outside of their control and shall keep DNR updated on the steps they are taking and their progress to move forward with the IPS Project under the circumstances. The WIOs shall provide written notice when they are able to continue moving forward with the IPS Project. If DNR disagrees with the position taken in the written notice from the WIOs, or if DNR otherwise believes the WIOs have Abandoned the IPS Project, DNR shall provide the WIOs written notice of DNR's position. DNR and the WIOs shall meet and review their respective positions in an effort to resolve any

differences. If the parties are not able to resolve their different assessments, then any dispute on whether the WIOs have Abandoned the IPS Project and whether failure to spud a West Pad well by the date set forth in Paragraph 4.2.2.2 is due to circumstances addressed by Section 25 of the PTUA, shall be subject to expedited arbitration. The parties shall agree upon expedited arbitration with the principles to be decided following execution of this Agreement.

4.2.4 Term of Abandonment Provision. This Paragraph 4.2 expires upon IPS Project Start-up, but in no event extends beyond year-end 2019, which date is fixed and not subject to Paragraph 4.14.

4.2.5 Year-end 2019. The provisions in this Paragraph 4.2 do not modify the provisions regarding Point Thomson Unit contraction/termination at year-end 2019 in Paragraphs 4.5.2 and 4.5.7 of this Agreement.

4.3 Formation of Initial Participating Area (Initial PA). This Paragraph 4.3 describes how the Initial PA will be formed for the Point Thomson Unit.

4.3.1 Initial Participating Area for Thomson Reservoir. The Initial PA shall be the first participating area for the Point Thomson Unit. The Initial PA shall contain the leases listed as the Initial Participating Area on Exhibit C. At least ninety (90) days before the date of first production through the IPS Project, the Unit Operator shall submit documentation regarding the Initial PA as provided in Paragraph 4.4.5, including PA tract allocations for each lease in the PA which shall be set forth in a revision to Exhibit C. The Initial PA for the Thomson Reservoir shall be formed and is approved upon IPS Project Start-up effective the date of first

production through the IPS Project with delivery into TAPS. Within twenty (20) days following the month of first production through the IPS Project with delivery into TAPS, the Unit Operator shall provide notice to DNR of the date of first production through the IPS Project with delivery into TAPS.

4.4 Expansion of IPA and Formation of New PAs. This Paragraph 4.4 describes how the Point Thomson Unit Initial PA may be: (1) conditionally expanded to include acreage in Area B upon completion of certain work activities; (2) expanded to include acreage in Area B and Area D upon approval of a PA application pursuant to the PTUA including applicable State law based on technical information from drilling and IPS production; and (3) expanded to include up to the entire Point Thomson Unit area (except Area F) upon Project Start-up of a Point Thomson project resulting from Sanction of a Major Gas Sale, an IPS Gas Cycling Expansion Project of a minimum of an additional 20,000 barrels per day, or a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project. The leases in the Initial PA, and the leases included in Area B, have been identified for inclusion in the Thomson Reservoir PA by the Parties for the purposes of this Agreement. The inclusion of leases in the PA does not constitute a determination under Section 11 of the PTUA of the land that otherwise would be included in the PA. Development of Point Thomson Unit acreage in Area F (Brookian reservoirs) is subject to the provisions set forth in Paragraph 4.7.

4.4.1 Area B Expansion. If: (i) a West Pad well is drilled as provided in Paragraph 4.1.2 and casing set across the Thomson Sand; and (ii) an Authorization for Expenditure for a gathering line to the West Pad is approved, then the Initial PA formed as provided in Paragraph 4.3 shall automatically expand to include the

West Pad Area (Area B) acreage listed on Exhibit C. Within twenty (20) days following the month in which the last of the above conditions is accomplished, the Unit Operator shall submit documentation regarding the expanded PA as provided in Paragraph 4.4.5, including the PA tract allocations for each lease in the PA which shall be set forth in a revision to Exhibit C, and notice confirming that the conditions set forth in this Paragraph 4.4.1 have been met including a copy of the Authorization for Expenditure. Upon receipt of proper notification, expansion of the Initial PA is automatically approved effective the first day of the month in which the last of conditions (i) and (ii) was met.

4.4.2 PA Expansion to Entire Unit. If by year-end 2019, (i) a Major Gas Sale is Sanctioned or (ii) the WIOs Commit to an IPS Gas Cycling Expansion Project of a minimum of an additional 20,000 barrels per day or to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, then, upon Project Start-up of the project to develop the Point Thomson Reservoir for a Major Gas Sale, the IPS Gas Cycling Expansion Project of a minimum of an additional 20,000 barrels per day, or the Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, as applicable, the PA for the Thomson Reservoir shall expand to include the entire Point Thomson Unit area contained on Exhibit A and the leases listed and identified on Exhibit B, except acreage listed in Area F on Exhibit C or acreage that has contracted from the Point Thomson Unit if IPS Project Start-up has not occurred as provided under Paragraph 4.5.7. At least ninety (90) days before Project Start-up, the Unit Operator shall submit documentation regarding the expanded PA as provided in Paragraph 4.4.5,

including the PA tract allocations for each lease in the PA which shall be set forth in a revision to Exhibit C. Within twenty (20) days following the month of Project Start-up, the Unit Operator shall submit documentation confirming Project Start-up. Prior to the effective date of expansion of the PA, any acreage subject to this Paragraph 4.4.2 and not within the PA for the Thomson Reservoir shall be subject to the provisions of Paragraph 4.5.1.

4.4.3 PA Expansion Based on Technical Information. In addition to expansion of the PA for the Thomson Reservoir provided in Paragraph 4.4.1, prior to year-end 2019 the Unit Operator may submit an application for expansion of the PA pursuant to the PTUA including applicable State law based on drilling and IPS production results (i.e., technical information). This request could include acreage in Area B and Area D on Exhibit C. Any acreage included in the PA for the Thomson Reservoir as a result of this application shall be listed as a new Area C on Exhibit C and depicted as Area C on Exhibit D. The WIOs' rights to such an expansion of the PA and DNR's decisions regarding same shall be governed by the PTUA including applicable State law. The Parties acknowledge that any DNR decision on a technical PA submitted consistent with this Paragraph 4.4.3, including any appeal of a DNR decision to the Superior Court of the State of Alaska, may extend beyond year-end 2019.

4.4.4 Acreage Not Subject to Contraction. The following acreage shall not be subject to removal from a PA or contraction from the Point Thomson Unit:

(a) acreage that has been included in the Initial PA pursuant to an IPS Project Start-up under Paragraph 4.3;

(b) except as specifically provided in Paragraph 4.5.8, acreage that has been included in a PA pursuant to a PA expansion to include Area B under Paragraph 4.4.1;

(c) acreage that has been included in a PA pursuant to a PA expansion to include the entire Point Thomson Unit (except Area F) under Paragraph 4.4.2; or

(d) subject to 11 AAC 83.351(c), as applicable, and except as specifically provided in Paragraph 4.5.3, acreage that has been included in a PA pursuant to an approved PA expansion based on technical information under Paragraph 4.4.3.

Notwithstanding the above, this Paragraph 4.4.4 does not modify Section 20(c) of the PTUA should production cease from the PA.

4.4.5 PA Documentation. Information to be submitted to DNR under Paragraphs 4.3.1, 4.4.1 and 4.4.2 is provided in Exhibit F.

4.4.6 PA Dispute. Any dispute related to a PA under this Agreement shall be subject to Paragraph 5.1. A dispute regarding PA documentation or the tract allocation factors set forth in Exhibit C shall not impact formation or expansion of a PA under this Agreement, except as provided in Paragraph 4.4.3. Submittal of PA documentation under Paragraphs 4.3 and 4.4 shall be subject to the terms of the

PTUA including applicable State law. Approval of the tract allocation factors contained in Exhibit C shall be subject the terms of the PTUA including applicable State law. If the tract allocation factors submitted by the Unit Operator under Paragraphs 4.3 and 4.4 are disputed, the factors submitted by the Unit Operator shall take effect and apply until the dispute is finally resolved. Once resolved, the tract allocation factors will be retroactively adjusted.

4.5 Unit Contraction and Participating Area Reductions / Unit Status at Year-End 2019. This Paragraph 4.5 describes various development scenarios that could be present at year-end 2019, and the implications for acreage in the Point Thomson Unit. Particularly, this paragraph sets forth the terms and conditions under which some or all of the acreage could contract out of the Point Thomson Unit and be released to the State Without Appeal, and some or all of the acreage could remain in the Point Thomson Unit and be included in a PA. Paragraph 4.5 does not address Area F; Paragraph 4.7 describes what will happen with Area F acreage.

4.5.1 Acreage Subject to Inclusion in PA. If by year-end 2019 a Major Gas Sale has been Sanctioned or the WIOs have Committed to a Point Thomson Expansion Project, acreage to be included in the PA for the Thomson Reservoir under Paragraphs 4.4.2, 4.5.4, or 4.5.7 shall be entitled to be included in the PA. Such acreage shall remain in the Point Thomson Unit following formation of the Initial PA, and thereafter shall be subject to elimination from the Point Thomson Unit in accordance with the terms of the PTUA including applicable State law, including Section 2(e). If IPS Project Start-up has not occurred and the Initial PA has not been formed, but a Major Gas Sale is Sanctioned, such acreage shall remain in the

Point Thomson Unit and shall be subject to elimination from the Point Thomson Unit in accordance with the terms of the PTUA including applicable State law, including Section 2(e), as if the Initial PA had been formed effective May 1, 2016.

4.5.2 No IPS or MGS.

4.5.2.1 If IPS Project Start-up has not occurred and a Major Gas Sale has not been Sanctioned by year-end 2019, the following shall occur: (1) subject to Paragraph 4.5.2.2, the Point Thomson Unit and the PTUA shall terminate Without Appeal; (2) except for leases subject to Paragraph 4.5.2.3, each WIO will immediately surrender its leases and all such acreage shall be automatically released Without Appeal to the State; (3) each WIO agrees that it will not apply to form a compulsory unit with the Alaska Oil and Gas Conservation Commission with respect to any lease formerly within the Point Thomson Unit; and (4) this Agreement shall terminate.

4.5.2.2 If IPS Project Start-up has not occurred and a Major Gas Sale has not been Sanctioned by year-end 2019, then the WIOs may submit an alternative POD for the Point Thomson Unit no later than sixty (60) days prior to year-end 2019. Submittal and approval of the alternative POD shall be subject to the terms of the PTUA including applicable State law. Nonetheless, DNR shall have sole discretion to accept or reject an alternative POD, and a final Commissioner decision on the alternative POD is Without Appeal. For purposes of this paragraph the WIOs agree not to assert that Section 21 of

the PTUA applies in any respect to review of or a decision on the proposed alternative POD.

4.5.2.3 If the Point Thomson Unit is terminated under Paragraph 4.5.2.1, the lessees of leases containing the PTU 15, PTU 16 and wells drilled after execution of this Agreement, and lessees of leases containing any other wells capable of producing in paying quantities, may submit a Plan of Operations ("POO") for each lease to the Director within sixty (60) days of the date of Point Thomson Unit termination. The POO shall provide for placing the well on producing status within two (2) years of the date of approval of the POO. Approval or rejection of the POO shall be within the sole discretion of the DNR. If the Director denies approval of the POO, that decision may be appealed to the Commissioner. The Commissioner's decision on the POO shall be Without Appeal. If the lessees fail to submit a POO for the leases within sixty (60) days following Point Thomson Unit termination, or the Commissioner denies approval of the POO, the leases shall terminate with acreage returning to the State Without Appeal. If the Director or the Commissioner approve the POO and the lessees fail to place the well on producing status within two years, the lease shall terminate with acreage returning to the State Without Appeal.

4.5.3 IPS Project - No Expansion and No MGS. If IPS Project Startup has occurred and the WIOs do not Commit to a Point Thomson Expansion Project and a Major Gas Sale has not been Sanctioned by year-end 2019, then:

4.5.3.1 The acreage in Area E and the northern half of ADL 377017 (ADL 377017(N) on Exhibit C), without regard to whether this acreage was included in a technical PA application or is included in the PA as the result of a technical PA expansion under Paragraph 4.4.3, shall be released to the State Without Appeal. The remaining acreage in Area D shall be subject to the PTUA including applicable State law.

4.5.3.2 If a technical PA application has been filed pursuant to Paragraph 4.4.3, then, subject to Paragraph 4.5.3.1, the acreage included in the application shall not be subject to contraction until a final decision on the technical PA application. Once a final decision has been made on the PA application, any acreage not included in a PA shall be eliminated from the Point Thomson Unit.

4.5.4 IPS Project Expansion by 10,000 Barrels per Day and No MGS. If the WIOs Commit to an IPS Gas Cycling Expansion Project of minimum of an additional 10,000 barrels per day by year-end 2019, but that expansion is less than minimum of an additional 20,000 barrels per day, then the acreage in the northern half of ADL 377017 (ADL 377017(N) on Exhibit C), without regard to whether this acreage was included in a technical PA application or is included in the PA as the result of a technical PA expansion under Paragraph 4.4.3, and the acreage listed as within ADLs 377016, 389728 and 389730 in Area E on Exhibit C, shall be released to the State Without Appeal. The remaining acreage listed within Area E on Exhibit C shall be included in the acreage listed in Area D on Exhibit C and subject to the terms of the PTUA including applicable State law.

4.5.5 IPS Project Expansion by 20,000 Barrels per Day or a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project and No MGS. If IPS Project Start-up has occurred and the WIOs have Committed to either: (1) an IPS Gas Cycling Expansion Project of a minimum of an additional 20,000 barrels per day; or (2) a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project by year-end 2019, then all acreage, except as set forth in Paragraph 4.7, shall remain in the Point Thomson Unit at year-end 2019 and shall be entitled to be included in a PA as set forth in Paragraphs 4.4.2 and 4.5.1.

4.5.6 IPS with MGS. If IPS Project Start-up has occurred and a Major Gas Sale has been Sanctioned by year-end 2019, then all acreage, except as set forth in Paragraph 4.7, shall remain in the Point Thomson Unit at year-end 2019 and shall be entitled to be included in a PA as set forth in Paragraphs 4.4.2 and 4.5.1.

4.5.7 MGS Sanctioned – No IPS Project. If IPS Project Start-up has not occurred and a Major Gas Sale is Sanctioned prior to year-end 2019, any acreage that contracts from the Point Thomson Unit under Paragraph 4.2 of this Agreement shall not be recommitted to the Point Thomson Unit. Acreage remaining in the Point Thomson Unit shall be subject to Paragraphs 4.4.2 and 4.5.1.

4.5.8 Area B. If (i) an expanded PA based on technical information has not been approved as provided in Paragraph 4.4.3 that includes all of Area B or (ii) if a gathering line is not constructed and the well on the West Pad is not placed on Continuous Operations into the IPS by year-end 2019, then any of the West Pad Area (Area B) acreage listed on Exhibit C that was originally included in the PA

for the Thomson Reservoir pursuant to Paragraph 4.4.1, but subsequently has not been included in the PA expansion as provided for in Paragraph 4.4.3, shall be removed from the PA and included within Area D on Exhibit C, and thereafter shall be subject to the terms of the PTUA including applicable State law.

4.5.9 Segregation of Leases Released to State or Contracted from the Unit. Any lease, a portion of which is released to the State under Paragraphs 4.2 or 4.5, shall be segregated into a separate and distinct lease as to the portion remaining within the Point Thomson Unit, which does not include the portion that contracts out of the Point Thomson Unit and is released to the State, and the provisions of the original lease shall apply to the segregated portion that remains in the Point Thomson Unit.

4.6 Plans of Development/Future Work Plans. The WIOs shall prepare plans of further development and operation for the Point Thomson Unit under Section 10 of the PTUA ("Future POD") as provided in this Paragraph 4.6 for the periods set forth. Work plans for Point Thomson Unit acreage in Area F of Exhibit C shall be subject to the terms of Paragraph 4.7, not this Paragraph 4.6.

4.6.1 Major Gas Sale Sanction. If a Major Gas Sale is Sanctioned prior to year-end 2019, then within ninety (90) days following the Sanction date, the WIOs shall submit a Future POD that includes work plans and project activities to develop the Point Thomson Reservoir for a Major Gas Sale (the initial and each Future POD under this Paragraph 4.6.1 is hereinafter referred to as an "MGS POD"). Upon Project Start-up associated with an MGS POD, the obligations set forth in

Paragraph 4.1.1 shall terminate. The initial MGS POD shall be effective as of the date a Major Gas Sale is Sanctioned and shall remain in effect for two years following that date and until a subsequent MGS POD is approved. Subsequent MGS PODs shall be submitted to DNR within ninety (90) days before expiration of the prior MGS POD. Each MGS POD shall cover a period of two years and shall address the information contained in Paragraph 4.6.4. Following submittal of each MGS POD, DNR shall have sixty (60) days to review the MGS POD. Unless DNR provides the WIOs written notice that the MGS POD is inconsistent with the terms of this Agreement, the MGS POD is approved effective the date set forth above, even if DNR approval of the MGS POD occurs after that date.

4.6.2 Expansion Project Planning. Consistent with Paragraph 4.1.6.2, if a Major Gas Sale has not been Sanctioned by June 1, 2016, the WIOs must begin engineering and permitting of a Point Thomson Expansion Project. The WIOs shall submit a Future POD that includes work plans for evaluation and selection of an option for development of the Point Thomson Reservoir through a Point Thomson Expansion Project ("Expansion Planning POD"). The Expansion Planning POD shall be effective one year following IPS Project Start-up but no later than May 1, 2017, and shall remain in effect until the earlier of: (1) the effective date of an Expansion Project POD under Paragraph 4.6.3; (2) the effective date of an MGS POD under Paragraph 4.6.1; or (3) December 31, 2019 if a Major Gas Sale has not been Sanctioned and the WIOs do not Commit to a Point Thomson Expansion Project prior to that date. The Expansion Planning POD may supplement the work plans set forth in Paragraphs 4.1.1 through 4.1.4. The Expansion Planning

POD shall be submitted no later than ninety (90) days following the Expansion Planning POD effective date provided above and shall address the information contained in Paragraph 4.6.4. Following submittal of the Expansion Planning POD, DNR shall have sixty (60) days to review the Expansion Planning POD. Unless DNR provides the WIOs written notice that the Expansion Planning POD is inconsistent with the terms of this Agreement, the Expansion Planning POD is approved effective the date set forth above, even if DNR approval of the Expansion Planning POD occurs after that date.

4.6.3 Expansion Project Commitment. If a Major Gas Sale has not been Sanctioned by year-end 2019, and the WIOs Commit to a Point Thomson Expansion Project on or before year-end 2019, then the WIOs shall submit a Future POD based on the Expansion Planning POD work product that describes work plans and project activities to develop the Point Thomson Reservoir through a Point Thomson Expansion Project (the initial and each subsequent Future POD under this Paragraph 4.6.3 is hereinafter referred to as an "Expansion Project POD"). Upon Project Start-up of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, the obligations set forth in Paragraph 4.1.1 shall terminate. Upon DNR approval, the initial Expansion Project POD shall be deemed effective on January 1, 2020 unless the WIOs Commit to a Point Thomson Expansion Project and an Expansion Project POD is approved prior to year-end 2019, and shall remain in effect for two years following that approval and until a subsequent Expansion Project POD is approved. The initial Expansion Project POD shall be submitted no later than ninety (90) days following the date the WIOs Commit to a

Point Thomson Expansion Project. Subsequent Expansion Project PODs shall be submitted to DNR within ninety (90) days before expiration of the prior Expansion Project POD. Each Expansion Project POD shall cover a period of two years and shall address the information contained in Paragraph 4.6.4. Following submittal of each Expansion Project POD, DNR shall have sixty (60) days to review the Expansion Project POD. Unless DNR provides the WIOs written notice that the Expansion Project POD is inconsistent with the terms of this Agreement, the Expansion Project POD is approved effective the date set forth above, even if DNR approval of the Expansion Project POD occurs after that date.

4.6.4 POD Information. Consistent with this Paragraph 4.6, Future PODs shall include plans to address the following:

(a) data acquisition and technical evaluations and qualifications to support the development plan;

(b) well planning including identification of the number of drill wells, well locations, and completion plans;

(c) project design basis and engineering plans for infrastructure, well pads, and process facilities;

(d) acquisition of permits and other approvals to accommodate drilling, construction, production transportation, and operations;

(e) operation and maintenance considerations;

(f) construction and start-up including estimated timing to complete the work activities;

(g) logistics; and

(h) safety, security, health, and environmental considerations.

4.6.5 POD Implementation. Any dispute regarding a Future POD, including whether a Future POD is consistent with this Agreement, whether WIOs are diligently progressing a project to develop the Point Thomson Reservoir for a Major Gas Sale, or whether WIOs are diligently progressing a Point Thomson Expansion Project consistent with this Agreement shall be subject to Paragraph 5.1. Any dispute related to a Future POD shall not be used as the basis to seek Point Thomson Unit contraction or release of acreage, unless DNR asserts the WIOs are not diligently progressing a project to develop the Point Thomson Reservoir for a Major Gas Sale or a Point Thomson Expansion Project consistent with this Agreement.

4.7 Area F. If the WIOs submit a POD for the Brookian by year-end 2018 that is approved by DNR, the acreage listed in Area F on Exhibit C shall remain in the Point Thomson Unit after any Unit contraction at year-end 2019 and shall be maintained through approved PODs or formation of expanded or new PA(s) in accordance with the PTUA including applicable State law. If the WIOs do not submit a Brookian POD by year-end 2018 or if DNR does not approve the Brookian POD, the acreage listed in Area F on Exhibit C shall be released to the State Without Appeal.

4.8 Royalty. Following IPS Project Start-up, the WIOs may submit a royalty modification application requesting a royalty reduction. DNR denial of the application does not relieve the WIOs or the State of their commitments to abide by the terms of this Agreement.

4.8.1 If applicable, the application shall be submitted pursuant to Alaska statutory provisions and shall be submitted and evaluated pursuant to Alaska law.

4.8.2 If the application is not submitted pursuant to Alaska statutory provisions, the WIOs may apply for royalty modification under this Paragraph 4.8.2. The State shall evaluate this application in good faith and the WIOs shall provide DNR with sufficient information to process the application. A decision by DNR denying an application submitted under this Paragraph 4.8.2 for any reason, including a determination that DNR may not legally approve that application because it does not have the authority to do so, shall be Without Appeal.

4.9 Lease Assignments. Within ninety (90) days of the Effective Date, the State agrees to approve lease assignments for each of the leases identified on Exhibit B as PTU Tract No. 1 through Tract No. 38, in the manner requested in writing by ExxonMobil, BP Exploration (Alaska) Inc., Chevron U.S.A. Inc., and ConocoPhillips Alaska, Inc., who, as represented by those requesting parties, are the only lessees to those assignments.

4.10 Litigation.

4.10.1 Joint Motions. Within ten (10) days of the date this Agreement is executed, the Parties shall jointly and simultaneously file: (a) a motion to vacate the February 11, 2010 Order Granting Stay of Proceedings in the Point Thomson Superior Court Case; and (b) a motion to vacate the December 26, 2007 and January 11, 2010 decisions in the Point Thomson Superior Court Case ("Joint Motion"). A copy of this Agreement shall be included with the filings. The Joint Motion described in Paragraph 4.10.1(b) shall expressly affirm that the DNR Point Thomson Orders will be automatically withdrawn as set forth in Paragraph 4.10.3 if the Joint Motion described in Paragraph 4.10.1(b) is granted.

4.10.2 Effective Date of Agreement. The effective date of this Agreement ("Effective Date") shall be the later of: (i) the date the Superior Court grants the Joint Motion described in Paragraph 4.10.1(b); (ii) the date of dismissal of the Point Thomson Supreme Court Case; and (iii) the date of dismissal of the Point Thomson Superior Court Case. If the Superior Court denies the Joint Motion described in Paragraph 4.10.1(b), or the Point Thomson Supreme Court Case and the Point Thomson Superior Court Case are not dismissed, this Agreement shall not become effective.

4.10.3 Other DNR Requirements.

4.10.3.1 Immediately upon the granting of the Joint Motion described in Paragraph 4.10.1(b), the DNR Point Thomson Orders shall be automatically withdrawn. Any authorization or approval issued by DNR as a result of any

of the DNR Point Thomson Orders allowing the WIOs to conduct activity within the Point Thomson Unit area shall not be affected by such action and shall remain valid and effective by its terms.

4.10.3.2 Within ten (10) days of the date the Superior Court grants the Joint Motion described in Paragraph 4.10.1(b), the Parties shall file a joint dismissal of the Point Thomson Supreme Court Case and the Point Thomson Superior Court Case pursuant to Alaska Appellate Rule 511.

4.10.4 Other Owner Requirements. Within ten (10) days of the Effective Date, the Owner Group shall file a release of Amended Notice of Lis Pendens in the Point Thomson Superior Court Case.

4.10.5 Other Joint Motions. Within ten (10) days of the Effective Date, the Parties shall jointly move to dismiss with prejudice the remaining Point Thomson Cases. A copy of this Agreement shall be included with each filing.

4.10.6 Costs and Fees. For purposes of this Paragraph 4.10, the State and the Owner Group shall each bear their own costs and attorney's fees.

4.11 Point Thomson Unit Status. By signing this Agreement, the Parties confirm that the Point Thomson Unit, the PTUA, and the Point Thomson Unit Operating Agreement have remained in effect since originally approved, and remain in effect as of the date of this Agreement as modified by this Agreement.

4.12 Interpretation. In the event of any conflict or inconsistency between this Agreement and the PTUA, this Agreement controls. Subject to and as modified by the terms of

this Agreement, the relationship between DNR and the WIOs shall continue to be governed by the PTUA including applicable State law.

4.13 Alaska Hire. Within the constraints of law, when the Unit Operator hires, it agrees to employ Alaska residents and contract with Alaska businesses to provide goods and services to support and work on construction, fabrication, or operation at Point Thomson to the extent Alaska residents or Alaska businesses are available, ready, willing, cost competitive, in compliance with all safety and environmental standards, qualified and able to accept employment at the time required, and are located in Alaska. The Unit Operator shall use, as far as is practicable, job centers and associated services operated by the Department of Labor and Workforce Development. The Unit Operator shall advertise for available positions locally and use, as far as practicable, Alaska job service organizations to notify the Alaskan public.

4.14 Force Majeure. The terms of this Agreement are subject to the unavoidable delay provisions of Section 25 of the PTUA. For the purposes of this Agreement, failure to timely receive permit approvals or other authorizations, despite the exercise of due care and diligence of the WIOs, is considered an unavoidable delay under Section 25 of the PTUA. Notwithstanding the foregoing, failure to obtain AOGCC approval related to the Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project is not force majeure and will not be considered an unavoidable delay under Section 25 of the PTUA.

4.15 Dates Subject to Adjustment. Decisions, work activities, and dates associated with Thomson Reservoir development are interrelated. Except as specifically provided in

Paragraph 4.15.1, if one or more force majeure events result in an extension of the date for IPS Project Start-up by at least one full year from the date provided in Paragraph 4.1.1.2 as may be adjusted herein, regardless of the actual term of any single force majeure event, then for each full one-year period that IPS Project Start-up is delayed, the dates for future Thomson Reservoir decisions and work activities, including dates associated with a Point Thomson Expansion Project or Thomson Reservoir development for a Major Gas Sale, shall be extended by a corresponding period of time. This provision is applicable each and every time IPS Project Start-up is delayed by at least one additional full year. This Paragraph 4.15 shall apply in addition to any extension or adjustment to a date in this Agreement resulting from a force majeure event under Paragraph 4.14.

4.15.1 Dates Not Subject to Adjustment. The following dates are not subject to adjustment under Paragraphs 4.14 and 4.15:

(a) the expiration date (year-end 2019) for the Abandonment provision under Paragraph 4.2.4;

(b) the year-end 2007 to year-end 2015 time period for determination of project costs if the WIOs Abandon the IPS Project as provided under Paragraph 4.2;

(c) the date (year-end 2018) for WIO submittal of a Brookian POD under Paragraph 4.7; and

(d) the date for application of DNR standard administrative processes under Paragraph 5.1.3.1.

The number of days for submitting information or providing notice under this Agreement (e.g., "within ninety (90) days") are not subject to adjustment under Paragraph 4.14, including the number of days for submitting and approving Future PODs under Paragraph 4.6.

4.16 Taxes and Royalty for Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project. The Parties agree that any gas produced from a reservoir within the Point Thomson Unit and injected into a reservoir within the Prudhoe Bay Unit pursuant to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project is only subject to tax and royalty one time.

4.16.1 Tax on Injected Gas. The Parties recognize that Alaska law regarding oil and gas production tax provides that gas produced from the Point Thomson Unit that would be used according to 15 AAC 55.151(e) in effect as of the Effective Date, and that would be injected into a reservoir within the Prudhoe Bay Unit in the course of operations of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project for purposes of repressuring, including enhanced recovery, would be exempt from taxation at the time of its production from the Point Thomson Unit and would be subject to tax only at the time the gas would be ultimately produced for sale from the Prudhoe Bay Unit.

4.16.2 Royalty on Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project Gas. If the WIOs Commit to and complete construction of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, then, upon Project Start-up, the State, as authorized by the Point Thomson leases and

applicable State law, will elect, for the period prior to Project Start-up of a Major Gas Sale, to take in-kind the State's royalty share of gas produced from the Point Thomson Unit when produced into the gas pipeline from Point Thomson to Prudhoe Bay referenced in Paragraph 2.21(i). Terms implementing this royalty in kind election are as follows.

4.16.2.1 Definitions. Whenever the following terms are used in this Paragraph 4.16.2, they shall have the meanings set forth in this Paragraph 4.16.2.1. Other capitalized terms shall have the meaning set forth in Paragraph 2 of this Agreement.

(a) "Delivery Point" means: (1) the terminus of the PTU / PBU Gas Pipeline in the Prudhoe Bay Unit ("PBU Delivery Point") if the PTU / PBU Gas Pipeline has been exempted from the requirement of a right-of-way lease under AS 38.35 ("Unregulated PTU / PBU Gas Pipeline"); or (2) the point where Point Thomson gas is produced and first delivered into the PTU / PBU Gas Pipeline ("PTU Delivery Point") if the PTU / PBU Gas Pipeline has not been exempted from the requirement of a right-of-way lease under AS 38.35 ("Regulated PTU / PBU Gas Pipeline").

(b) "Field Costs" means costs incurred by lessee that may be reimbursed or deducted from royalty gas under the Point Thomson leases and other applicable agreements.

(c) "Fuel / Losses" means any fuel consumption or losses associated with transporting gas through the PTU / PBU Gas Pipeline.

(d) "PBU" means the Prudhoe Bay Unit.

(e) "PTU / PBU Gas Pipeline" means the gas pipeline to be constructed for a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project that will begin in the Point Thomson Unit and terminate in the Prudhoe Bay Unit.

(f) "State RIK Gas" means the State's royalty share of gas produced from the Point Thomson Unit into the PTU / PBU Gas Pipeline that is taken by the State in kind, as described in this Paragraph 4.16.2.

(g) "Transportation Costs" means costs for transporting gas through the PTU / PBU Gas Pipeline.

4.16.2.2 General Terms.

(a) If the WIOs Commit to and complete construction of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, the State, as authorized by the Point Thomson leases and applicable State law, will elect to take in kind State royalty due when Point Thomson gas is produced into the PTU / PBU Gas Pipeline, with State RIK Gas delivered to the State at the Delivery Point.

(b) The State may take all or any portion of State RIK Gas for sale or other use at the time it is delivered to the Delivery Point.

(c) State RIK Gas not taken for sale or other use by the State at the time it is delivered to the Delivery Point will be injected into the PBU reservoir, where the gas will be used for enhanced liquids recovery.

(d) The State will retain title and risk of material loss on State RIK Gas in the PBU reservoir, but will not be responsible for any costs, payments, or fees, or charged for fuel or other operational losses, associated with use of State RIK Gas in the PBU reservoir.

(e) The State will not charge any costs, payments, or fees, nor require receipt of any other benefit for use of State RIK Gas that is delivered to the Delivery Point and injected into the PBU reservoir, beyond any royalty provided for under applicable PBU leases and other applicable agreements on liquids recovered from the PBU reservoir.

4.16.2.3 Transportation Costs, Field Costs, and Fuel / Losses. Except as interpreted or modified by the terms set forth in this Paragraph 4.16.2, any Transportation Costs, Fuel / Losses and Field Costs associated with State RIK Gas shall be addressed as set forth in the Point Thomson leases and other applicable agreements. The manner in which Transportation Costs, Fuel / Losses and Field Costs are addressed depends on whether the PTU /

PBU Gas Pipeline is a Regulated PTU / PBU Gas Pipeline or an Unregulated PTU / PBU Gas Pipeline at the time the State RIK Gas is produced and delivered into the PTU / PBU Gas Pipeline, recognizing that the status of the PTU / PBU Gas Pipeline may change. In addition, upon Project Start-Up of a Major Gas Sale, the treatment of these costs may change. No interest will be charged on any of the State's accrued Transportation Costs and Fuel / Losses prior to the due date under this Paragraph 4.16.2.

(a) Regulated PTU / PBU Gas Pipeline.

i. The State will pay Transportation Costs and be responsible for Fuel / Losses for State RIK Gas that is delivered to the State at the PTU Delivery Point pursuant to the terms of the approved transportation tariff for the PTU / PBU Gas Pipeline.

1. For State RIK Gas that is delivered to the State at the PTU Delivery Point and not injected into the PBU reservoir, the Transportation Costs will be paid by the State and deductions made for Fuel / Losses at the time of delivery to the State at the PTU Delivery Point.

2. For State RIK Gas that is delivered to the State at the PTU Delivery Point and is then injected into the PBU reservoir for enhanced liquids recovery, the Transportation Costs will accrue and deductions made for Fuel / Losses, but will not be

paid by the State until State RIK Gas is delivered from the PBU reservoir to the State for sale or other use.

ii. For State RIK Gas produced prior to Project Start-up of a Major Gas Sale, the State will not be responsible for Field Costs for State RIK Gas that is delivered to the State at the PTU Delivery Point, regardless of whether the State RIK Gas is injected into the PBU reservoir. For Point Thomson gas produced after Project Start-up of a Major Gas Sale, the State will be responsible for Field Costs to the extent provided under the Point Thomson leases and other applicable agreements.

(b) Unregulated PTU / PBU Gas Pipeline.

i. If costs for the Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, including the PTU / PBU Gas Pipeline, were entitled to and received deductions and credits under AS 43.55, with substantially the same credits / benefits as exists under AS 43.55 on the Effective Date, then the State will not be responsible for Transportation Costs or Fuel / Losses associated with delivery of State RIK Gas to the State at the PBU Delivery Point prior to Project Start-up of a Major Gas Sale.

ii. If costs for the Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, including the PTU / PBU Gas Pipeline, were not entitled to or did not receive deductions and

credits under AS 43.55, with substantially the same credits/benefits as exists under AS 43.55 on the Effective Date, then the State will be responsible for Transportation Costs and Fuel / Losses associated with the delivery of State RIK Gas to the State at the PBU Delivery Point.

1. If State RIK Gas is not injected into the PBU reservoir, payment of Transportation Costs and deductions for Fuel / Losses will be due at the time of delivery of State RIK Gas to the State at the PBU Delivery Point.

2. If State RIK Gas is injected into the PBU reservoir, payment of Transportation Costs and deductions for Fuel / Losses will be due from the State when State RIK Gas is delivered from the PBU reservoir to the State for sale or other use.

iii. For State RIK Gas produced prior to Project Start-up of a Major Gas Sale, the State will not be responsible for Field Costs for State RIK Gas that is delivered to the State at the PTU Delivery Point, regardless of whether the State RIK Gas is injected into the PBU reservoir. For Point Thomson gas produced after Project Start-Up of a Major Gas Sale, the State will be responsible for Field Costs to the extent provided under the Point Thomson leases and other applicable agreements.

4.16.2.4 State RIK Gas Allocation Principles.

(a) For State RIK Gas Injected into the PBU reservoir:

i. Each WIO is responsible for delivery to the State and the State will take deliveries of State RIK Gas proportionately from each WIO.

ii. State RIK Gas will be subject to gas balancing agreement procedures that will be developed between the affected parties, including the State.

iii. State RIK Gas injected into the PBU reservoir will be available for delivery to the State from the PBU reservoir at any then-existing PBU facilities, including any facilities installed for a Major Gas Sale, at a location designated by PBU owners.

iv. Delivery of State RIK Gas to the State will not be unreasonably withheld.

v. Deliveries of State RIK Gas from the PBU reservoir may not unreasonably interfere with ongoing PBU operations.

vi. If delivery from the PBU reservoir is constrained at PBU delivery point(s), gas availability will be allocated 75% to PBU gas and 25% to Point Thomson gas. The allocation to Point Thomson gas will remain fixed even if other gas is injected into the PBU reservoir from another reservoir.

(b) Specific Principles Before Project Start-up a Major Gas Sale. If the State is taking delivery of State RIK Gas for sale or other use for delivery into a facility or pipeline connected to the PTU / PBU Gas Pipeline, the State will preferentially take delivery of State RIK Gas that has not been injected into the PBU Reservoir; otherwise, subject to constraints listed above, the State may take delivery of State RIK Gas that has been injected into the PBU reservoir.

(c) Specific Principles After Project Start-up of a Major Gas Sale.

i. For gas produced from Point Thomson after Project Start-up of a Major Gas Sale, the State from time to time may elect to take its royalty share in value or in kind pursuant to the Point Thomson leases, other applicable agreements and applicable State law.

ii. For State RIK Gas that was injected into the PBU reservoir prior to Project Start-up of a Major Gas Sale, the State may take delivery of its State RIK Gas from the PBU reservoir, or may from time to time, by notice consistent with the notice requirements of the Point Thomson leases and other applicable agreements, elect to take payment in-value as follows:

1. Whether the State receives gas or a payment for its share of State RIK Gas produced from the PBU reservoir, the share will be measured in proportion to gas offtake allocated to Point Thomson gas injected into the PBU reservoir, adjusted

for any withdrawal of State RIK Gas and WIO Point Thomson gas prior to Project Start-up of a Major Gas Sale.

2. Whether the State receives gas or a payment for its share of State RIK Gas produced from the PBU reservoir, there will be no deduction for Field Costs, but the deductions for Transportation Costs and Fuel / Losses, as set forth in Paragraph 4.16.2.3, will apply.

3. If the State elects to receive a payment for its share of State RIK Gas that was injected into the PBU reservoir prior to Project Start-up of a Major Gas Sale, payment will be calculated based on the royalty in value basis for Point Thomson gas under the applicable leases, at the time the gas is withdrawn from the PBU reservoir.

5. MISCELLANEOUS PROVISIONS

5.1 Dispute Resolution. The following provisions shall apply to this Agreement:

5.1.1 Until the date set forth in Paragraph 5.1.3.1, with respect to any dispute regarding the Parties' rights and obligations under this Agreement, including any matter that otherwise would be subject to DNR standard administrative processes as set forth in 11 AAC 02.010-02.900, a Party may file an action in the Superior Court of the State of Alaska as set forth in Paragraph 5.5, except for matters set forth in Paragraph 5.1.2 or an Abandonment dispute via arbitration under Paragraph 4.2.3.

Thereafter, DNR standard administrative processes as set forth in 11 AAC 02.010-02.900 shall apply to any dispute regarding the Parties' rights and obligations under this Agreement as provided under the PTUA and applicable State law. Within the application of DNR's administrative processes the Parties do not waive any rights under applicable State law.

5.1.2 Decisions Subject to DNR Standard Administrative Processes.

(a) The following matters shall be subject to DNR standard administrative processes as set forth in 11 AAC 02.010-02.900, including the right of appeal to the Commissioner, the right of appeal to the Superior Court of the State of Alaska, and the right of appeal to the Supreme Court of the State of Alaska.

i. Decisions regarding a technical PA application under Paragraph 4.4.3.

ii. Decisions regarding inclusion of acreage in Area B and Area D in a PA and retention of that acreage in the Point Thomson Unit that are specifically governed by or subject to the PTUA including applicable State law as provided in Paragraphs 4.5.3, 4.5.4, and 4.5.8.

iii. Decisions related to providing PA documentation and tract allocations as provided in Paragraph 4.4.6.

(b) The following matters shall be subject to DNR standard administrative processes as set forth in 11 AAC 02.010-02.900, including the right of

appeal to the Commissioner, but otherwise are Without Appeal, with no right of appeal to the Superior Court of the State of Alaska or to the Supreme Court of the State of Alaska. Any DNR decision that is Without Appeal shall not have any precedential effect in any other matter, case, or dispute.

i. Decisions regarding the Brookian POD as provided in Paragraph 4.7.

ii. Decisions associated with an alternative POD as provided in Paragraph 4.5.2.2.

iii. Decisions associated with a royalty application as provided in Paragraph 4.8.2.

iv. Decisions associated with a Plan of Operations for leases as provided in Paragraph 4.5.2.3.

5.1.3 The Parties agree that this Agreement is a contract between the Parties. Subject to Paragraph 5.1.3.2, DNR standard administrative processes as set forth in 11 AAC 02.010-02.900 shall include the right of any WIO to appeal a DNR decision or other action to the Superior Court of the State of Alaska, and the right to appeal any judgment of the Superior Court to the Supreme Court of the State of Alaska. Application of DNR standard administrative processes does not provide any right or basis for the State to alter the terms of this Agreement. DNR discretion and the authority to take action or make a decision regarding Point Thomson may only be

exercised by DNR in a manner that, consistent with Paragraph 5.7, does not conflict with the terms of this Agreement.

5.1.3.1 The date for application of DNR standard administrative processes as set forth in 11 AAC 02.010-02.900 and as provided in Paragraph 5.1.1 shall be the later of the following:

(1) year-end 2019, if IPS Project Start-up occurs or a Major Gas Sale is Sanctioned before year-end 2019;

(2) the date of IPS Project Start-up, if the date of IPS Project Start-up occurs after year-end 2019 due to force majeure under Paragraph 4.14; however, not later than year-end 2024, which date is fixed and not subject to adjustment even if IPS Project Start-up has not occurred by year-end 2024.

5.1.3.2 Paragraph 5.1.1 does not apply to DNR decisions referenced in Paragraph 5.1.2(b).

5.1.4 Any Party may dispute whether a specified event has occurred that pursuant to the terms of this Agreement would result in termination of the Point Thomson Unit Without Appeal or release of acreage Without Appeal under Paragraphs 4.2.2, 4.5.2.1, 4.5.3, or 4.5.4, with the dispute handled in accordance with Paragraph 5.1. In the event of such dispute, termination of the Point Thomson Unit Without Appeal or the release of acreage Without Appeal shall not be required until there has been a final judicial determination as to the occurrence of the specified event, or upon an Abandonment determination via arbitration under Paragraph 4.2.3.

This Paragraph 5.1.4 does not apply to DNR decisions referenced in Paragraph 5.1.2(b).

5.1.5 Any dispute that would be subject to the terms of the PTUA shall be determined in accordance with the PTUA including applicable State law.

5.2 No Admission. This Agreement does not constitute and shall not be deemed to be an admission by any Party about the merits, validity, or accuracy of any of the allegations, claims, or defenses of any Party.

5.3 Entire Agreement. This Agreement, including all exhibits attached hereto or referenced herein (all of which are hereby incorporated herein by this reference), represents the complete agreement of the Parties. This Agreement may not be modified, amended, or changed except by written instrument signed by each Party.

5.4 Term of Agreement. Unless earlier terminated in accordance with the provisions hereof, this Agreement shall remain in full force and effect until all obligations have been performed and all rights satisfied.

5.5 Enforcement. No Party shall contest: (a) the validity of this Agreement; (b) subject to Paragraph 5.1, the jurisdiction of the Superior Court of the State of Alaska to enforce this Agreement and its terms or the right of any Party to file an action in the Superior Court of the State of Alaska for enforcement of any of the terms of this Agreement or to enforce an arbitration decision; or (c) the authority of DNR to issue decisions as provided for in Paragraphs 5.1.1, 5.1.2, and 5.1.3.

5.6 Waiver. The failure by any Party at any time to require performance by any other Party or to claim a breach of any provision of this Agreement shall not be construed as affecting any subsequent breach or the right to require performance or to claim a breach with respect thereto.

5.7 Further Assurances. In proceedings before the Alaska Oil and Gas Conservation Commission regarding approvals related to the IPS Project, a Point Thomson Expansion Project, or a Point Thomson project related to a Major Gas Sale, the DNR agrees it will not oppose any such application submitted that is consistent with the terms of this Agreement and applicable State law.

5.8 Validity. The Commissioner has determined that entry into this Agreement and the individual terms and conditions set forth herein are necessary or advisable to protect the public interest, including a determination that the taking in kind of royalty as provided in Paragraph 4.16.2 will be in the best interests of the State. If any provision of this Agreement shall be held to be invalid or unenforceable, such provisions shall not affect in any respect the validity or enforceability of the remainder of this Agreement unless the invalidity materially affects the ability of any Party to perform as contemplated hereunder.

5.9 Order of Precedence. While the exhibits are an integral part of this Agreement, in the event any exhibit conflicts with a provision in the body of this Agreement, the provision in the body of this Agreement shall control, unless that provision of the exhibit expressly states that it supersedes a specifically identified section in the body of

this Agreement, in which case the specifically identified section shall be superseded only with respect to the specific provision of the exhibit.

5.10 Effect of Headings. The headings and subheadings of the sections and paragraphs of this Agreement are inserted for convenience of reference only and shall not control or affect the meaning or construction of any of the terms, covenants, and conditions of this Agreement in any manner.

5.11 Construction. The Parties agree that this Agreement was fully negotiated by the Parties and, therefore, no provision of this Agreement shall be interpreted against any Party because that Party or its legal representative drafted the provision.

5.12 Counterparts and Facsimile Signature. This Agreement may be executed in counterparts and each shall be deemed an original. This Agreement may also be executed by facsimile signature.

5.13 Governing Law. This Agreement shall be governed in all respects by the laws of the State of Alaska without regard to its choice of law or conflict of law provisions.

5.14 Venue. The Parties agree that any action arising out of or relating to this Agreement shall be brought only in a court of competent jurisdiction in the State of Alaska, with the understanding that the State of Alaska does not waive any right to object to federal court jurisdiction, including its rights under the 11th Amendment of the United States Constitution, nor does the State of Alaska agree to waive sovereign immunity.

5.15 Authority to Sign. Each undersigned representative of a Party to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind such Party to this Agreement.

AGREED, UNDERSTOOD, AND CONSENTED TO:

STATE OF ALASKA

ATTORNEY GENERAL
STATE OF ALASKA

Date _____

_____
Michael C. Geraghty

COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES
STATE OF ALASKA

Date _____

_____
Daniel S. Sullivan

AGREED, UNDERSTOOD, AND CONSENTED TO:

STATE OF ALASKA

ATTORNEY GENERAL
STATE OF ALASKA

Date 3.28.12

Michael C. Geraghty

COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES
STATE OF ALASKA

Date 3/29/12

Daniel S. Sullivan

OWNER GROUP

EXXON MOBIL CORPORATION,
Unit Operator and Working Interest Owner

Date _____ _____
Randy L. Broiles

EXXONMOBIL OIL CORPORATION

Date _____ _____
Randy L. Broiles

BP EXPLORATION (ALASKA) INC.

Date _____ _____
John C. Minge

EXXON MOBIL CORPORATION,
as successor in interest to
CHEVRON U.S.A., INC.

Date _____ _____
Randy L. Broiles

CONOCOPHILLIPS ALASKA, INC.

Date _____ _____
Trond-Erik Johansen

LEEDE OPERATING COMPANY, L.L.C.

Date _____ _____
John G. Leede, Manager

OWNER GROUP

EXXON MOBIL CORPORATION,
Unit Operator and Working Interest Owner

Date 29 MAR 12

Randy L. Broiles

EXXONMOBIL OIL CORPORATION

Date 29 MAR 12

Randy L. Broiles

BP EXPLORATION (ALASKA) INC.

Date _____

John C. Minge

EXXON MOBIL CORPORATION,
as successor in interest to
CHEVRON U.S.A., INC.

Date 29 MAR 12

Randy L. Broiles

CONOCOPHILLIPS ALASKA, INC.

Date _____

Trond-Erik Johansen

LEEDE OPERATING COMPANY, L.L.C.

Date _____

John G. Leede, Manager

OWNER GROUP

EXXON MOBIL CORPORATION,
Unit Operator and Working Interest Owner

Date _____

_____
Randy L. Broiles

EXXONMOBIL OIL CORPORATION

Date _____

_____
Randy L. Broiles

BP EXPLORATION (ALASKA) INC.

Date March 29, 2012

_____
John C. Minge

EXXON MOBIL CORPORATION,
as successor in interest to
CHEVRON U.S.A., INC.

Date _____

_____
Randy L. Broiles

CONOCOPHILLIPS ALASKA, INC.

Date _____

_____
Trond-Erik Johansen

LEEDE OPERATING COMPANY, L.L.C.

Date _____

_____
John G. Leede, Manager

OWNER GROUP

EXXON MOBIL CORPORATION,
Unit Operator and Working Interest Owner

Date _____ _____
Randy L. Broiles

EXXONMOBIL OIL CORPORATION

Date _____ _____
Randy L. Broiles

BP EXPLORATION (ALASKA) INC.

Date _____ _____
John C. Minge

EXXON MOBIL CORPORATION,
as successor in interest to
CHEVRON U.S.A., INC.

Date _____ _____
Randy L. Broiles

CONOCOPHILLIPS ALASKA, INC.

Date 29 March 2012 _____
Trond-Erik Johansen

LEEDE OPERATING COMPANY, L.L.C.

Date _____ _____
John G. Leede, Manager

OWNER GROUP

EXXON MOBIL CORPORATION,
Unit Operator and Working Interest Owner

Date _____ _____
Randy L. Broiles

EXXONMOBIL OIL CORPORATION

Date _____ _____
Randy L. Broiles

BP EXPLORATION (ALASKA) INC.

Date _____ _____
John C. Minge

EXXON MOBIL CORPORATION,
as successor in interest to
CHEVRON U.S.A., INC.

Date _____ _____
Randy L. Broiles

CONOCOPHILLIPS ALASKA, INC.

Date _____ _____
Trond-Erik Johansen

LEEDE OPERATING COMPANY, L.L.C.

Date March 29, 2012 John G. Leede
John G. Leede, Manager

EXHIBIT A
Point Thomson Unit

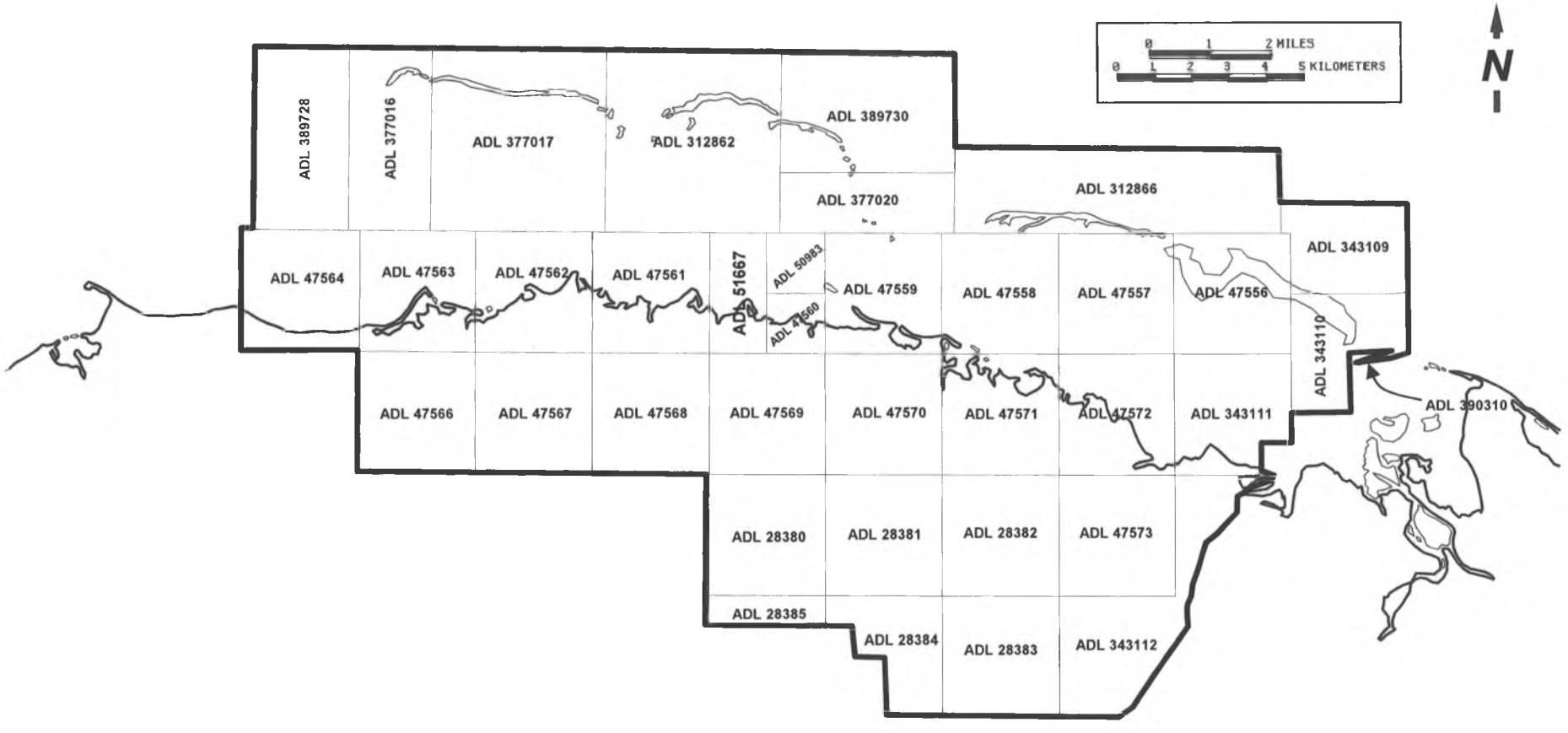


Exhibit B
Point Thomson Unit

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership Owner	Overriding Royalty Ownership Percent	Working Interest Ownership Owner	Working Interest Ownership Percent	Working Interest Ownership Description
1	1	T10N-R24E, UM Secs. 29, 30, 31, and 32	2,523.00	47557	12½/None	Mobil BP	None		Mobil BP	50.0000000% 50.0000000%	All All
2	2	T10N-R23E, UM Secs. 25, 26, 35, and 36	2,560.00	47558	12½/None	Mobil BP ExxonMobil	None		Mobil BP ExxonMobil	50.0000000% 25.0000000% 50.0000000% 25.0000000% 50.0000000%	Secs. 25 and 36 Secs. 26 and 35 Secs. 25 and 36 Secs. 26 and 35 Secs. 26 and 35
3	3	T10N-R23E, UM Secs. 27, 28, 33, and 34	2,560.00	47559	12½/None	ExxonMobil	None		ExxonMobil	100.0000000%	All
4	4	T10N-R23E, UM Sec. 32	640.00	47560	12½/None	ExxonMobil COP Leede Pacific Donnelly, G. Hughes Chap-KDL, Ltd. Leede and Pine McConnell Searls, Jr. Donnelly, R. Holbrook O'Neill Donnelly, R.R. Peery, J.W.	Subject to Simasko Farm Out provisions and subsequent Assignment of interest to ExxonMobil		ExxonMobil COP Leede Pacific Donnelly, G. Hughes Chap-KDL, Ltd. Leede and Pine McConnell Searls, Jr. Donnelly, R. Holbrook O'Neill Donnelly, R.R. Peery, J.W.	50.0000000% 20.1951200% 10.0975600% 5.0000000% 0.5048780% 3.6000000% 2.2719500% 2.0195150% 1.5146350% 1.1359750% 0.7573180% 0.7573180% 0.5048780% 0.5048780% 1.1359750%	All All All All All All All All All All All All All All All
5	5	T10N-R22E, UM Secs. 25, 26, 35, and 36	2,560.00	47561	12½/None	ExxonMobil Chevron BP	None		ExxonMobil Chevron BP	75.0000000% 11.0000000% 14.0000000%	All All All
6	6	T10N-R22E, UM Secs. 27, 28, 33, and 34	2,560.00	47562	12½/None	ExxonMobil Devon Mobil Forest Trans World Two Four Six SNG Sunlite	Robert Meek Sabine Royalty Marvin D. Mangus Janet D. Fackler Nadene Pettijohn Donnell O. Wells Hilltop Community Church Peter J. Farrelly Little Sisters of the Poor	0.50000% 0.08313% 0.02771% 0.02771% 0.02771% 0.00354% 0.00236% 0.00236% 0.00236%	ExxonMobil Devon Mobil Forest Trans World Two Four Six SNG Sunlite	71.5315773% 10.0000000% 9.5000000% 5.2473820% 1.3289431% 1.3289431% 0.5315773% 0.5315773%	All All All All All All All All
7	7	T10N-R22E, UM Secs. 29, 30, 31, and 32	2,523.00	47563	12½/None	ExxonMobil Mobil BP	None		ExxonMobil Mobil BP	50.0000000% 25.0000000% 25.0000000%	All All All

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description
8	8	T10N-R21E, UM Secs. 25, 26, 35, and 36	2,560.00	47564	12½/None	ExxonMobil Mobil BP	None		ExxonMobil Mobil BP	50.0000000% 25.0000000% 25.0000000%	All All All
9	9	Contracted out of PTU									
10	10	T9N-R22E, UM Secs. 5, 6, 7, and 8	2,533.00	47566	12½/None	ExxonMobil Mobil BP	None		ExxonMobil Mobil BP	50.0000000% 25.0000000% 25.0000000%	All All All
11	11	T9N-R22E, UM Secs. 3, 4, 9, and 10	2,560.00	47567	12½/None	ExxonMobil Devon Mobil Forest Trans World Two Four Six SNG Sunlite	Robert Meek Sabine Royalty Marvin D. Mangus Janet D. Fackler Nadene Pettijohn Donnell O. Wells Hilltop Community Church Peter J. Farrelly Little Sisters of the Poor Subject to Simasko Farm Out Agreement providing for assignment to ExxonMobil	0.50000% 0.08313% 0.02771% 0.02771% 0.02771% 0.00354% 0.00236% 0.00236% 0.00236%	ExxonMobil Devon Mobil Forest Trans World Two Four Six SNG Sunlite	71.5315773% 10.0000000% 9.5000000% 5.2473820% 1.3289431% 1.3289431% 0.5315773% 0.5315773%	All All All All All All All All
12	12	T9N-R22E, UM Secs. 1, 2, 11, and 12	2,560.00	47568	12½/None	Chevron BP ExxonMobil	ASRC - Secs 1 and 2 ASRC - Secs 11 and 12	0.50000% 0.25000%	Chevron BP ExxonMobil	44.0000000% 22.0000000% 56.0000000% 28.0000000% 50.0000000%	Secs. 1 and 2 Secs. 11 and 12 Secs. 1 and 2 Secs. 11 and 12 Secs, 11 and 12
13	13	T9N-R23E, UM Secs. 5, 6, 7, and 8	2,533.00	47569	12½/None	Chevron BP Mobil ExxonMobil	ASRC - Secs 5, 6 and 8 ASRC - Sec. 7	0.25000% 0.08333%	Chevron BP Mobil ExxonMobil	22.0000000% 7.3333300% 28.0000000% 26.0000000% 16.6666700% 50.0000000%	Secs. 5, 6, and 8 Sec. 7 Secs. 5, 6, and 8 Sec. 7 Sec. 7 Secs. 5, 6, 7, and 8
14	14	T9N-R23E, UM Secs. 3, 4, 9, and 10	2,560.00	47570	12½/None	Chevron BP ExxonMobil	ASRC	0.25000%	Chevron BP ExxonMobil	22.0000000% 28.0000000% 50.0000000%	All All All
15	15	T9N-R23E, UM Secs. 1, 2, 11, and 12	2,560.00	47571	12½/None	Chevron BP	ASRC	0.50000%	Chevron BP	44.0000000% 56.0000000%	All All
16	16	T9N-R24E, UM Secs. 5, 6, 7, and 8	2,533.00	47572	12½/None	Chevron BP Mobil	ASRC - Secs 5, and 8 ASRC - Secs. 6 and 7	0.20000% 0.50000%	Chevron BP Mobil	17.6000000% 44.0000000% 52.4000000% 56.0000000% 30.0000000%	Sec. 5 and 8 Sec. 6 and 7 Sec. 5 and 8 Sec. 6 and 7 Sec. 5 and 8

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description
17	17	T10N-R23E, UM Sec. 29	640.00	50983	12½/None	ExxonMobil BP	Subject to a 1/3 net profits interest to: Leede; Leede and Pine; Phillips; BP; ExxonMobil; Chevron; Donnelly; Chaparral; Searls, Jr.; Hughes; Pacific; Searls, Jeanne; Searls, J.P.; Neidert, L.L.S.; Collier, S.J.S.		ExxonMobil BP	66.6700000% 33.3300000%	All All
18	18	T10N-R23E, UM Secs. 30 and 31	1,243.00	51667	12½/None	ExxonMobil Mobil BP Chevron	Conoco Phillips; Leede; Leede and Pine; Donnelly; Hughes; Chaparral; Searls, Jr.; Peery; Pacific; Searls, Jeanne; Searls, J.P.; Neidert, L.L.S.; Collier, S.J.S. ASRC	6.25000% 0.083328%	ExxonMobil Mobil BP Chevron	50.0000000% 16.6670000% 25.9997400% 7.3332600%	All All All All
19	19	T9N-R23E, UM Secs. 17, 18, 19, and 20	2,544.00	28380	12½/None	Mobil Chevron ExxonMobil BP Woodbine	None		Mobil Chevron ExxonMobil BP Woodbine	54.0464100% 50.0000000% 33.3333350% 14.6666700% 3.2703880% 12.6742800% 51.9999950% 29.9997220% 50.0000000% 0.0092000%	Sec. 19 Sec. 20 Sec. 17 and 18 Sec. 17 and 18 Sec. 19 Sec. 19 Sec. 17 and 18 Sec. 19 Sec. 20 Sec. 19
20	20	T9N-R23E, UM Secs. 15, 16, 21, and 22	2,560.00	28381	12½/None	Chevron BP ExxonMobil	None		Chevron BP ExxonMobil	22.0000000% 28.0000000% 50.0000000%	All All All
21	21	T9N-R23E, UM Secs. 13, 14, 23, and 24	2,560.00	28382	12½/None	ExxonMobil Chevron BP	None		ExxonMobil Chevron BP	50.0000000% 22.0000000% 28.0000000%	All All All
22	22	T9N-R23E, UM Secs. 25, 26, 35, and 36	2,560.00	28383	12½/None	ExxonMobil Chevron BP	None		ExxonMobil Chevron BP	50.0000000% 22.0000000% 28.0000000%	All All All
23	23	T9N-R23E, UM Sec. 27, Sec. 28: N/2 and SE/4, Sec. 34	1,760.00	28384	12½/None	Mobil ExxonMobil Chevron BP Woodbine	None		Mobil ExxonMobil Chevron BP Woodbine	54.0464100% 12.6742800% 3.2703880% 29.9997220% 0.0092000%	All All All All All
24	24	T9N-R23E, UM Sec. 29: N/2 Sec. 30: N/2	637.00	28385	12½/None	Mobil ExxonMobil Chevron BP Woodbine	None		Mobil ExxonMobil Chevron BP Woodbine	54.0464100% 12.6742800% 3.2703880% 29.9997220% 0.0092000%	All All All All All

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description
25	25	T10N-R24E, UM Secs. 27, 28, 33, and 34	2,560.00	47556	12½/None	ExxonMobil	None		ExxonMobil	100.0000000%	All
26	26	T9N-R24E, UM Secs. 17, 18, 19, and 20	2,544.00	47573	12½/None	Mobil BP	None		Mobil BP	50.0000000% 50.0000000%	All All
27	27	T10N-R22&23E, UM TRACT C30-110 (BF-110): A PORTION OF BLOCKS 753 AND 797 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LOCATED IN THE S1/2 OF BLOCK 753, BEING A PORTION OF BLOCK 753 ON THE AFORESAID LEASING AND NOMINATION MAP, CONTAINING 1152.00HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R22E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R23E; U.M., AK., IN BLOCK 797 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1133.95 HECTARES.	5,648.68	312862	Sliding Scale 20-65/None	ExxonMobil	None		ExxonMobil	100.0000000%	All
28	28	T10N-R23&24E, UM TRACT C30-114 (BF-114): A PORTION OF BLOCKS 799 AND 800 AS SHOWN ONTHE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R23E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R24E; U.M., AK., IN BLOCK 799 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1081.11 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, AND 22, T10N, R24E; U.M., AK., AND LYING WESTERLY OF 146 DEGREES 00'00" WEST LONGITUDE IN BLOCK 800 LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79,CONTAINING 916.21 HECTARES.	4,935.47	312866	20/52.352	ExxonMobil	None		ExxonMobil	100.0000000%	All
29	29	T10N-R24E, UM Sec 22: S/2 All lying easterly of 146°00'00" west Sec. 23: S/2; Sec. 24: S/2; Secs. 25 and 26	1,970.16	343109	12½/40	ExxonMobil BP Chevron	None		ExxonMobil BP Chevron	50.0000000% 28.0000000% 22.0000000%	All All All
30	30	T10N-R24E, UM Secs. 35 and 36 T9N-R24E, UM Sec. 2	1,920.00	343110	12½/40	Mobil BP	None		Mobil BP	50.0000000% 50.0000000%	All All
31	31	T9N-R24E, UM Secs. 3, 4, and 9 Sec. 10: N/2 and SW/4	2,400.00	343111	12½/40	BP Chevron	ASRC	0.50000%	BP Chevron	56.0000000% 44.0000000%	All All

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description
32	32	T9N-R24E, UM Secs. 30 and 31 All, excluding ANWR, of Secs. 15,16,21,28,29,and 32	3,446.00	343112	12½/40	Chevron BP	None		Chevron BP	44.0000000% 56.0000000%	
34	34	T10N-R21E, UM T10N-R22E, UM That portion of Tract 65-016, "TRACT 65-016 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 751, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T. 10N., R. 21E., UMIAT MERIDIAN, ALASKA AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 795 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1167.58 HECTARES." lying within T. 10 N., R. 22 E., U.M., Alaska, and the E1/2E1/2 of Sections 1, 12, 13 and 24, T. 10 N., R. 21 E., U.M., Alaska.	2,779.16	377016	20.0 / None	BP COP	None		BP COP	50.0000000% 50.0000000%	All
35	35	T10N-R22E, UM T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA TRACT 65-017 IS A PORTION OF OCS BLOCKS 752 AND 796 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS: TRACT 65-017 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 752, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 796 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1153.17 HECTARES. THIS TRACT CONTAINS 5696.18 ACRES MORE OR LESS (2305.17 HECTARES MORE OR LESS).	5,696.18	377017	20.0 / None	ExxonMobil BP Chevron	None		ExxonMobil BP Chevron	66.6667000% 18.6666480% 14.6666520%	All
33	37	T10N-R23E, UM That portion of Tract 65-020, "TRACT 65-020 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 754 OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/79, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 23E., UMIAT MERIDIAN, ALASKA IN BLOCK 798 (BEING IN THE NORTHERLY PORTION), LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1109.94 HECTARES." lying southerly of Sections 14, 15, 16 and 17, T. 10 N., R. 23 E., U.M., Alaska in OCS Block 798.	1,909.74	377020	20.0 / None	ExxonMobil BP Chevron	None		ExxonMobil BP Chevron	66.6667000% 18.6666480% 14.6666520%	All

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description
36	46	T10N-R21E. UM That portion of Tract 65-016, "TRACT 65-016 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 751, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T. 10N., R. 21E., UMIAT MERIDIAN, ALASKA AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 795 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1167.58 HECTARES." lying within T. 10 N., R. 21 E., U.M., Alaska, excluding the E1/2E1/2 of Sections 1, 12, 13 and 24.	2,952.62	389728	16.6667 / None	BP COP	None		BP COP	50.0000000% 50.0000000%	All
37	47	T10N-R23E. UM That portion of Tract 65-020, "TRACT 65-020 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 754 OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/79, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 23E., UMIAT MERIDIAN, ALASKA IN BLOCK 798 (BEING IN THE NORTHERLY PORTION), LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1109.94 HECTARES." lying in the S1/2 of OCS Block 754, and lying northerly of Sections 20, 21, 22 and 23, T. 10 N., R. 23 E., U.M., Alaska in OCS Block 798.	3,684.31	389730	20.0 / None	ExxonMobil BP Chevron	None		ExxonMobil BP Chevron	66.6667000% 18.6666480% 14.6666520%	All
38	48	T9N-R24E. UM Sec. 1, ALL TIDE AND SUBMERGED LAND, EXCLUDING STATE OF ALASKA OIL AND GAS LEASE ADL 372256 AND THE ARCTIC NATIONAL WILDLIFE REFUGE, 15.80 ACRES	15.80	390310	20.0 / None	ExxonMobil BP Chevron COP	None		ExxonMobil BP Chevron COP	37.2750000% 32.3260000% 25.3990000% 5.0000000%	All
		Total	**93,291.12**								

New Tract No.	Original Tract No.	Description	Acres	ADL No.	Base Royalty % / NPS %	Lessee(s) of Record	Overriding Royalty Ownership		Working Interest Ownership		
							Owner	Percent	Owner	Percent	Description

Notes

BP	means	BP Exploration (Alaska) Inc.
Chap-KDL, Ltd.	"	Chap-KDL, Ltd.
Chevron	"	Chevron USA Inc.
COP	"	ConocoPhillips Alaska Inc.
Devon	"	Devon Energy Corporation
Donnelly, R.	"	Richard Donnelly
Donnelly, R.R.	"	The Robert R. Donnelly 1991 Irrevocable Trust
Donnelly, G.	"	The George A. Donnelly III 1991 Irrevocable Trust
ExxonMobil	"	Exxon Mobil Corporation
Forest	"	Forest Oil Corporation
Holbrook		Mary Lou Holbrook (The Eastland Oil Company)
Hughes	"	Kingdon R. Hughes Family Partnership
Leede	"	Edward H. Leede
Leede and Pine	"	Leede and Pine, a Partnership
McConnell		Peggy D. McConnell (Eastland Property and Minerals)
Mobil	"	ExxonMobil Oil Corporation
O'Neill	"	Jan Donnelly O'Neill, Irrevocable
Pacific	"	Pacific Lighting Gas Development Company
Peery, J. W.	"	Estate of John W. Peery (Susan Jean Searls Collier, Linda Lou Searls Neidert, Jean Alice Searls and John Peery Searls)
SNG	"	Samson Resources Company (SNG Prod. Co.)
Searls, Jr.	"	Robert Searls, Jr. Testamentary Trust (Collier / Searls)
Sunlite	"	Sunlite International Inc.
Trans World	"	Trans World Oil and Gas Ltd.
Two Four Six	"	Two Four Six Exploration, Inc. (United Oil & Minerals Limited Parnership)
Woodbine	"	Woodbine Petroleum, Inc. (a subsidiary of Sunlite International Inc.)

Exhibit C
Point Thomson Unit

Area A - initial Participating Area

Tract No.	ADL No.	Description	Acres	Initial PA Tract Allocation	Area A + B Tract Allocation	Unit Tract Allocation
1	47557	T10N-R24E, UM Sec. 31, All, 623 acres	623.00			
2	47558	T10N-R23E, UM Sec. 25, All, 640 acres Sec. 26, All, 640 acres Sec. 35, All, 640 acres Sec. 36, All, 640 acres	2,560.00			
3	47559	T10N-R23E, UM Ses. 27, All, 640 acres Sec. 28, All, 640 acres Sec. 33, All, 640 acres Sec. 34, All, 640 acres	2,560.00			
4	47560	T10N-R23E, UM Sec. 32, All, 640 acres	640.00			
14	47570	T9N-R23E, UM Ses. 3, All, 640 acres Sec. 4, All, 640 acres Sec. 9, All, 640 acres Sec. 10, All, 640 acres	2,560.00			
15	47571	T9N-R23E, UM Sec. 1, All, 640 acres Sec. 2, All, 640 acres Sec. 11, All, 640 acres Sec. 12, All, 640 acres	2,560.00			
16	47572	T9N-R24E, UM Sec. 6, All, 625 acres Sec. 7, All, 628 acres	1,253.00			
17	50983	T10N-R23E, UM Sec. 29, All, 640 acres	640.00			
33 (37)	377020	T10N-R23E. UM That portion of Tract 65-020, "TRACT 65-020 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 754 OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/79, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 23E., UMIAT MERIDIAN, ALASKA IN BLOCK 798 (BEING IN THE NORTHERLY PORTION), LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1109.94 HECTARES." lying southerly of Sections 14, 15, 16 and 17, T. 10 N., R. 23 E., U.M., Alaska in OCS Block 798.	1,909.74			
		Area A Acreage	**15,305.74**			

Exhibit C

Area B - West Pad Area

Tract No.	ADL No.	Description	Acres	Area A + B Tract Allocation	Unit Tract Allocation
5	47561	T10N-R22E, UM Sec. 25, All, 640 acres Sec. 26, All, 640 acres Sec. 35, All, 640 acres Sec. 36, All, 640 acres	2,560.00		
18	51667	T10N-R23E, UM Sec. 30, All, 620 acres Sec. 31, All, 623 acres	1,243.00		
27	312862	T10N-R22&23E. UM TRACT C30-110 (BF-110): A PORTION OF BLOCKS 753 AND 797 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LOCATED IN THE S1/2 OF BLOCK 753, BEING A PORTION OF BLOCK 753 ON THE AFORESAID LEASING AND NOMINATION MAP, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R22E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R23E; U.M., AK., IN BLOCK 797 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1133.95 HECTARES. LESS AND EXCEPT THE NORTH HALF OF THE AFOREMENTIONED TRACT.	2,824.34		
		Area B Acreage	**6,627.34**		
		Area A + B Acreage	**21,933.08**		

Exhibit C

Area D

Tract No.	ADL No.	Description	Acres	Unit Tract Allocation
1	47557	T10N-R24E, UM Sec. 29, All, 640 acres Sec. 30, All, 620 acres Sec. 32, All, 640 acres	1,900.00	
6	47562	T10N-R22E, UM Sec. 27, All, 640 acres Sec. 28, All, 640 acres Sec. 33, All, 640 acres Sec. 34, All, 640 acres	2,560.00	
11	47567	T9N-R22E, UM Ses. 3, All, 640 acres Sec. 4, All, 640 acres	1,280.00	
12	47568	T9N-R22E, UM Sec. 1, All, 640 acres Sec. 2, All, 640 acres	1,280.00	
13	47569	T9N-R23E, UM Sec. 5, All, 640 acres Sec. 6, All, 625 acres	1,265.00	
16	47572	T9N-R24E, UM Sec. 5, All, 640 acres Sec. 8, All, 640 acres	1,280.00	
20	28381	T9N-R23E, UM Secs. 15 and 16	1,280.00	
21	28382	T9N-R23E, UM Sec. 13, All, 640 acres Sec. 14, All, 640 acres Sec. 23, All, 640 acres Sec. 24, All, 640 acres	2,560.00	
25	47556	T10N-R24E, UM Sec. 28, All, 640 acres Sec. 33, All, 640 acres	1,280.00	
26	47573	T9N-R24E, UM Sec. 17, All, 640 acres Sec. 18, All, 631 acres Sec. 19, All, 633 acres Sec. 20, All, 640 acres	2,544.00	
27	312862	T10N-R22&23E, UM TRACT C30-110 (BF-110): A PORTION OF BLOCKS 753 AND 797 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LOCATED IN THE S1/2 OF BLOCK 753, BEING A PORTION OF BLOCK 753 ON THE AFORESAID LEASING AND NOMINATION MAP, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R22E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R23E; U.M., AK., IN BLOCK 797 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1133.95 HECTARES, LESS AND EXCEPT THE SOUTH HALF OF THE AFOREMENTIONED TRACT.	2,824.34	

Exhibit C

Area D (cont.)

Tract No.	ADL No.	Description	Acres	Unit Tract Allocation
31	343111	T9N-R24E, UM Sec. 3, Protracted, All, 640 acres Sec. 4, Protracted, All, 640 acres Sec. 9, Protracted, All, 640 acres Sec. 10, Protracted, N/2, SW/4, 480 acres	2,400.00	
	ADL 377017(S)			
35	377017	T10N-R22E, UM T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA TRACT 65-017 IS A PORTION OF OCS BLOCKS 752 AND 796 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS: TRACT 65-017 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 752, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 796 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1153.17 HECTARES. THIS TRACT CONTAINS 5696.18 ACRES MORE OR LESS (2305.17 HECTARES MORE OR LESS), LESS AND EXCEPT THE NORTH HALF OF THE AFOREMENTIONED TRACT.	2,848.09	
	ADL 377017(N)			
35	377017	T10N-R22E, UM T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA TRACT 65-017 IS A PORTION OF OCS BLOCKS 752 AND 796 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS: TRACT 65-017 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 752, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 796 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1153.17 HECTARES. THIS TRACT CONTAINS 5696.18 ACRES MORE OR LESS (2305.17 HECTARES MORE OR LESS), LESS AND EXCEPT THE SOUTH HALF OF THE AFOREMENTIONED TRACT.	2,848.09	
		Area D Acreage	**28,149.52**	

Exhibit C

Area E

Tract No.	ADL No.	Description	Acres	Unit Tract Allocation
7	47563	T10N-R22E, UM Sec. 29, All, 640 acres Sec. 30, All, 620 acres Sec. 31, All, 623 acres Sec. 32, All, 640 acres	2,523.00	
8	47564	T10N-R21E, UM Sec. 25, All, 640 acres Sec. 26, All, 640 acres Sec. 35, All, 640 acres Sec. 36, All, 640 acres	2,560.00	
10	47566	T9N-R22E, UM Sec. 5, All, 640 acres Sec. 6, All, 625 acres Sec. 7, All, 628 acres Sec. 8, All, 640 acres	2,533.00	
11	47567	T9N-R22E, UM Sec. 9, All, 640 acres Sec. 10, All, 640 acres	1,280.00	
12	47568	T9N-R22E, UM Sec. 11, All, 640 acres Sec. 12, All, 640 acres	1,280.00	
13	47569	T9N-R23E, UM Sec. 7, All, 628 acres Sec. 8, All, 640 acres	1,268.00	
19	28380	T9N-R23E, UM Sec. 17, All, 640 acres Sec. 18, All, 631 acres Sec. 19, All, 633 acres Sec. 20, All, 640 acres	2,544.00	
20	28381	T9N-R23E, UM Secs. 21 and 22	1,280.00	
22	28383	T9N-R23E, UM Secs. 25, 26, 35, and 36	2,560.00	
23	28384	T9N-R23E, UM Sec. 27, All, 640 acres Sec. 28, N/2 and SE/4, 480 acres Sec. 34, All, 640 acres	1,760.00	
24	28385	T9N-R23E, UM Sec. 29: N/2, 320 acres Sec. 30: N/2, 317 acres	637.00	
28	312866	T10N-R23&24E, UM TRACT C30-114 (BF-114): A PORTION OF BLOCKS 799 AND 800 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R23E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R24E; U.M., AK., IN BLOCK 799 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1081.11 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, AND 22, T10N, R24E; U.M., AK., AND LYING WESTERLY OF 146 DEGREES 00'00" WEST LONGITUDE IN BLOCK 800 LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79,CONTAINING 916.21 HECTARES. LESS AND EXCEPT THOSE LANDS IN SECTIONS 15 AND 22 OF T10N, R24E.	4,215.47	

Exhibit C

Area E (cont.)

Tract No.	ADL No.	Description	Acres	Unit Tract Allocation
30	343110	T9N-R24E, UM Sec. 2, Protracted, All, 640 acres	640.00	
32	343112	T9N-R24E, UM Sec. 15, Protracted, All excluding the Arctic National Wildlife Refuge, 139 acres Sec. 16, Protracted, All excluding the Arctic National Wildlife Refuge, 606 acres Sec. 21, Protracted, All excluding the Arctic National Wildlife Refuge, 304 acres	1,049.00	
34	377016	T10N-R21E. UM T10N-R22E. UM That portion of Tract 65-016, "TRACT 65-016 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 751, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T. 10N., R. 21E., UMIAT MERIDIAN, ALASKA AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 795 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1167.58 HECTARES." lying within T. 10 N., R. 22 E., U.M., Alaska, and the E1/2E1/2 of Sections 1, 12, 13 and 24, T. 10 N., R. 21 E., U.M., Alaska.	2,779.16	
36 (46)	389728	T10N-R21E. UM That portion of Tract 65-016, "TRACT 65-016 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 751, OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/75, CONTAINING 1152.00 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T. 10N., R. 21E., UMIAT MERIDIAN, ALASKA AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T. 10N., R. 22E., UMIAT MERIDIAN, ALASKA IN BLOCK 795 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1167.58 HECTARES." lying within T. 10 N., R. 21 E., U.M., Alaska, excluding the E1/2E1/2 of Sections 1, 12, 13 and 24.	2,952.62	
37 (47)	389730	T10N-R23E. UM That portion of Tract 65-020, "TRACT 65-020 ENCOMPASSES ALL THOSE LANDS IN THE S1/2 OF BLOCK 754 OCS OFFICIAL PROTRACTION DIAGRAM NR 6-4 APPROVED 4/29/79, CONTAINING 1152 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, 22 AND 23, T. 10N., R. 23E., UMIAT MERIDIAN, ALASKA IN BLOCK 798 (BEING IN THE NORTHERLY PORTION), LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL OCS BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1109.94 HECTARES." lying in the S1/2 of OCS Block 754, and lying northerly of Sections 20, 21, 22 and 23, T. 10 N., R. 23 E., U.M., Alaska in OCS Block 798.	3,684.31	
38 (48)	390310	T9N-R24E. UM Sec. 1, UNSURVEYED, ALL TIDE AND SUBMERGED LAND, EXCLUDING STATE OF ALASKA OIL AND GAS LEASE ADL 372256 AND THE ARCTIC NATIONAL WILDLIFE REFUGE, 15.80 ACRES	15.80	
		Area E Acreage	**35,561.36**	
		Area A + B + D + E Acreage	**85,643.96**	

Exhibit C

Area F

Tract No.	ADL No.	Description	Acres
25	47556	T10N-R24E, UM Sec. 27, All, 640 acres Sec. 34, All, 640 acres	1,280.00
28	312866	T10N-R23&24E. UM TRACT C30-114 (BF-114): A PORTION OF BLOCKS 799 AND 800 AS SHOWN ON THE "LEASING AND NOMINATION MAP" FOR THE FEDERAL/STATE BEAUFORT SEA OIL AND GAS LEASE SALE, DATED 1/30/79, MORE PARTICULARLY DESCRIBED AS FOLLOWS: THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 23 AND 24, T10N, R23E; U.M., AK., AND LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 19 AND 20, T10N, R24E; U.M., AK., IN BLOCK 799 (BEING THE NORTHERLY PORTION) LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79, CONTAINING 1081.11 HECTARES, AND THOSE LANDS LYING NORTHERLY OF THE SOUTH BOUNDARY OF SECTIONS 20, 21, AND 22, T10N, R24E; U.M., AK., AND LYING WESTERLY OF 146 DEGREES 00'00" WEST LONGITUDE IN BLOCK 800 LISTED AS STATE AREA ON THE "SUPPLEMENTAL OFFICIAL O.C.S. BLOCK DIAGRAM" APPROVED 10/4/79,CONTAINING 916.21 HECTARES. LIMITED TO those lands in Sections 15 and 22 of T10N, R24E.	720.00
29	343109	T10N-R24E, UM Sec 22: Protracted, S/2 lying easterly of 146°00'00" west longitude, 50.16 acres Sec. 23: Protracted, S/2, 320 acres Sec. 24: Protracted, S/2, 320 acres Sec. 25, Protracted, All, 640 acres Sec. 26, Protracted, All, 640 acres	1,970.16
30	343110	T10N-R24E, UM Sec. 35, Protracted, All, 640 acres Sec. 36, Protracted, All, 640 acres	1,280.00
32	343112	T9N-R24E, UM Sec. 28, Protracted, All excluding the Arctic National Wildlife Refuge, 123 acres Sec. 29, Protracted, All excluding the Arctic National Wildlife Refuge, 636 acres Sec. 30, Protracted, All, 636 acres Sec. 31, Protracted, All, 639 acres Sec. 32, Protracted, All excluding the Arctic National Wildlife Refuge, 363 acres	2,397.00
		Area F Acreage	**7,647.16**

EXHIBIT D
Point Thomson Unit

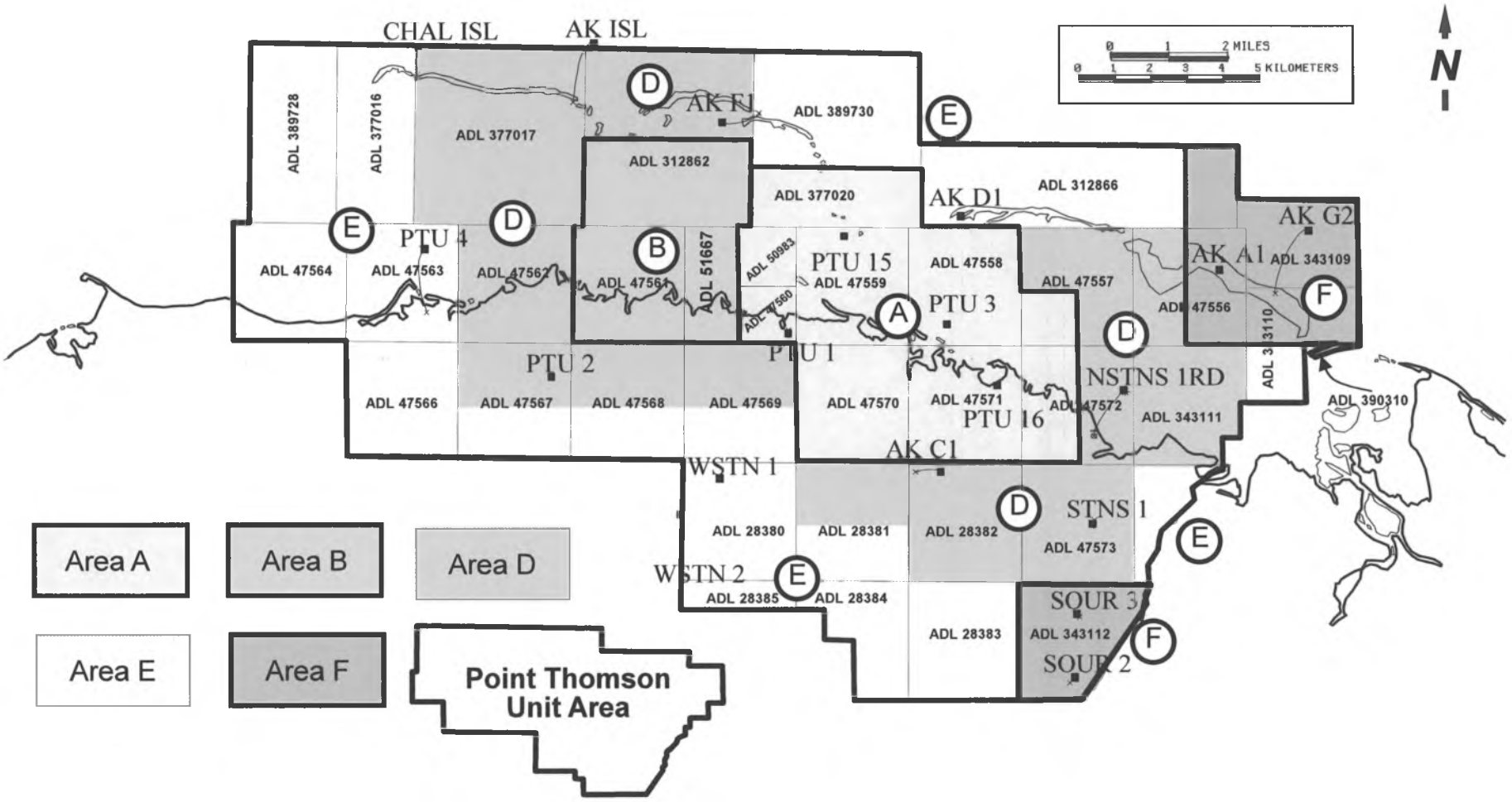
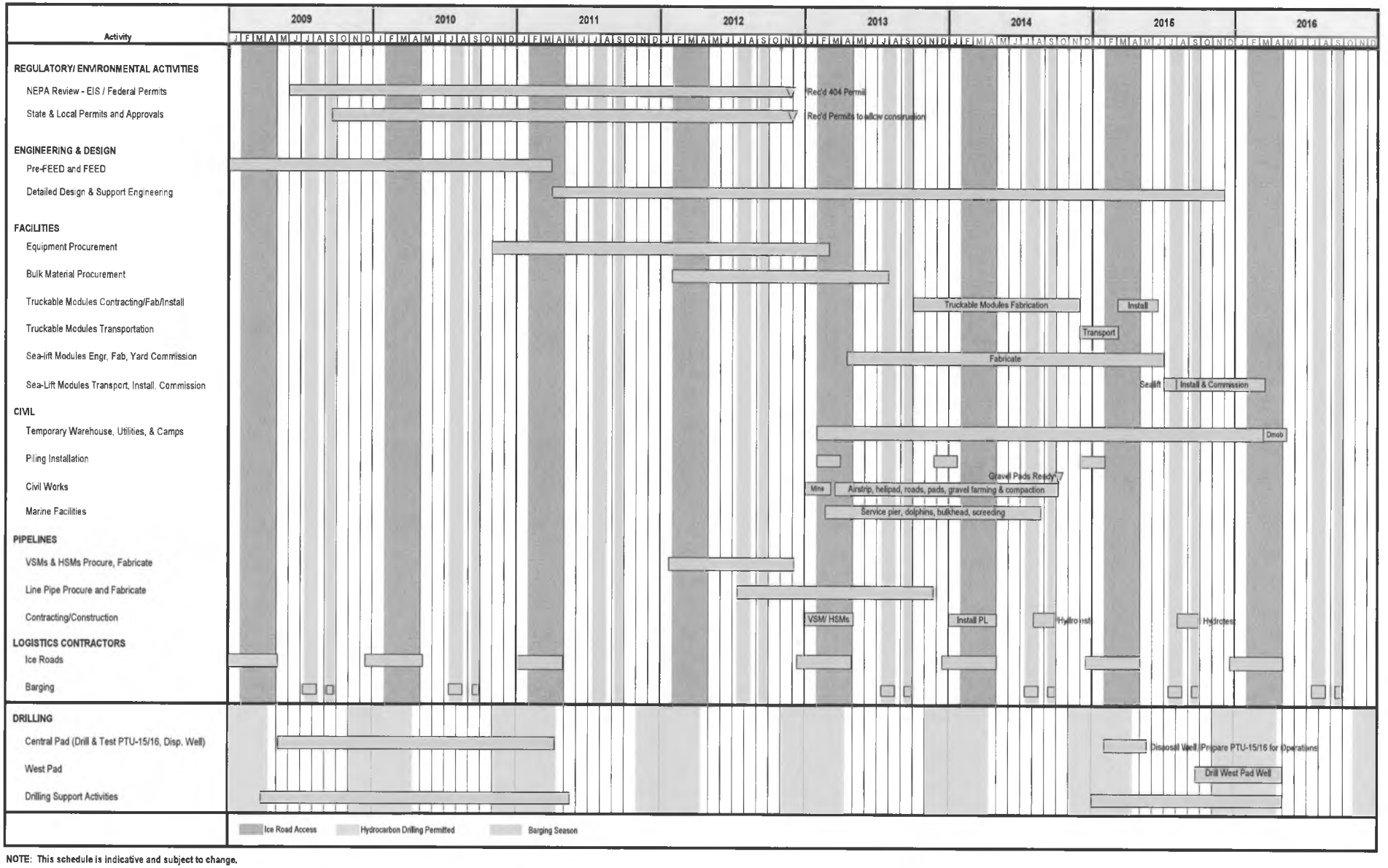


EXHIBIT E

Point Thomson Provisional Schedule Level 1 Work Sheet



NOTE: This schedule is indicative and subject to change.

Exhibit F

PA DOCUMENTATION

DNR will keep information submitted in a PA application confidential as provided in AS 38.05.035(a)(8) and its applicable regulations. In accordance with AS 38.05.035(a)(8)(C), in order for geological, geophysical and engineering data to be held confidential, the Unit Operator must request confidentiality at the time the data is submitted by indicating "CONFIDENTIAL" on all confidential data items.

1. Depth Structure Maps and digital grids (including faults) for each producing horizon.

2. Gross Isochore Maps and digital grids for each producing horizon

3. Hydrocarbon Net Pay Maps and digital grids for each producing horizon. Also include any fluid contact maps and digital grids used in creation of the hydrocarbon net pay maps.

4. Average Porosity and Hydrocarbon Saturation Maps and digital grids for each producing horizon.

5. Hydrocarbon Pore Feet Maps and digital grids for each producing horizon.

6. Paper and digital copies of representative seismic lines to support the applied for action. Data submitted should include both strike and dip oriented lines, include picked horizons for all mapped surfaces, mapped faults, and wells demonstrating time-depth ties to well log formation picks. Lines should be clearly annotated with seismic survey

ID, seismic volume, line number, picked horizon and well names. Map clearly showing location of all seismic and well sections provided.

7. Paper and digital copies of representative stratigraphic and structural well-log cross-sections. Cross-sections should include, log correlations for all mapped horizons, mapped faults, identified fluid contacts and deepest "oil down to" (ODT) and shallowest "water up to" (WUT) picks. Cross-sections should be of an appropriate scale that all annotations, picks, log curves and scales are clearly legible.

8. Hydrocarbon formation volume factors (B_o, B_g) applied to each reservoir.

9. Oil Gravity and/or Viscosity Maps and digital grids for each producing horizon.

10. Digital file (ascii or Excel spreadsheet) of formation picks in measured depth (MD) and sub-sea true vertical depth (sstvd) for each well, including all plug backs and pilot holes. Picks should include top and base of each producing interval, all known fluid contacts and deepest "oil down to" (ODT) and shallowest "water up to" (WUT) picks.

11. Digital files of calculated curve data from log analysis used in determining reservoir properties and in-place hydrocarbon volumes. Curve data should include total and/or effective porosity, water saturation, permeability, clay volume, and bulk volume water.

12. Criteria /cutoffs (i.e. porosity, saturation, volume shale, permeability) used to determine net pay in each producing horizon.

13. Digital file (ascii or Excel spreadsheet) of calculated rock properties of each producing interval for every well. Data to include, top and base depth of interval in measured

depth and sstvd, gross interval thickness (tvt), net sand thickness, net hydrocarbon pay thickness, net to gross ratio, average reservoir porosity, average reservoir water saturation (Sw), average permeability, permeability height (kh), and hydrocarbon pore feet

14. Location Map clearly showing all existing production, injection and planned wells. Horizontal wells should be shown as a line highlighting the existing and planned productive interval length. In addition, a digital file (ascii or Excel spreadsheet) provided with target x y coordinates for planned wells. For horizontal wells, x y coordinates for heel and toe locations should be provided for both existing and planned wells.

15. Summary of all oil and gas (including non-hydrocarbon constituents) compositional analyses, including gravity and viscosity data.

16. Paper and digital copies of all pressure build-up PTA and fluid PVT analyses.

17. Relative permeability curves for oil/water, gas/oil, and gas/water.

18. Paper and digital copies of all capillary pressure analyses, where available.

19. Calculated original oil and/or gas in place (OOIP and/or OGIP) volumes

20. Estimated ultimate recovery (EUR).

21. Proposed reservoir depletion plan set forth in the current POD.

22. Production forecast.

Exhibit G

GAS SALES AGREEMENT PROVISION

In the event of any conflict, the language of this Exhibit G shall control and supersede the language of Paragraph 2.21 with respect to the gas sales agreement provision. If the WIOs intend to Commit to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, then at the State's request prior to the Commitment date, the State and each individual WIO with a working interest in each Point Thomson Unit lease will enter into negotiations for separate gas sales agreements, with sufficient lead time to ensure the terms below can be met, that include the following terms which the State has requested be common to all such agreements, with additional terms to be negotiated:

(a) The daily volume of gas to be sold by each WIO will be equal to that WIO's proportionate share of the State's total expected daily volume of Point Thomson royalty gas to be delivered into the PTU / PBU Gas Pipeline.

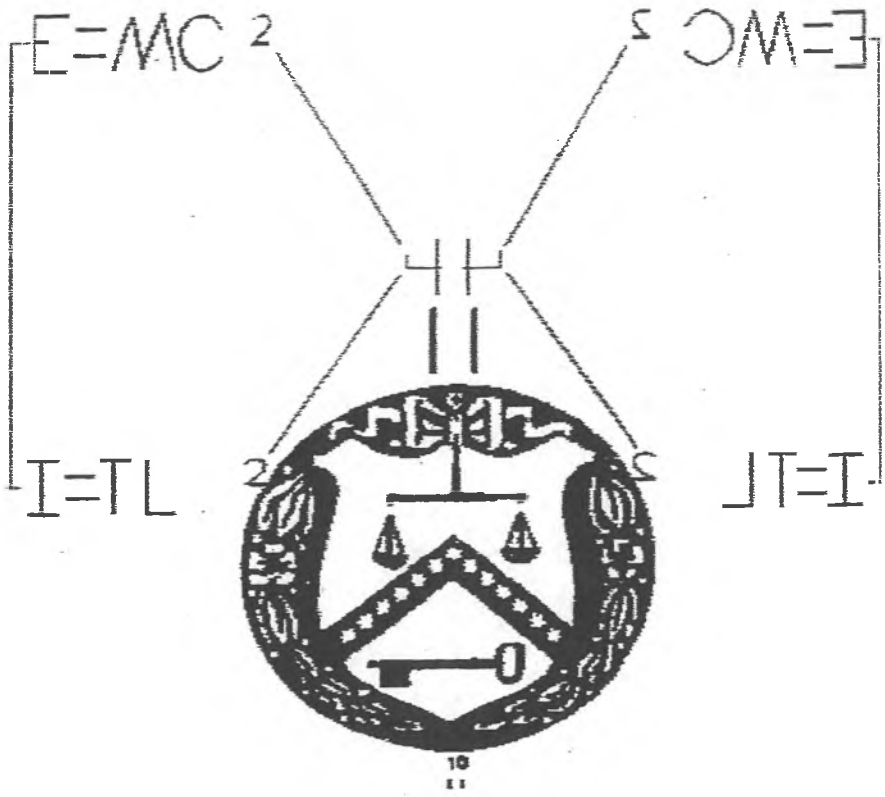
(b) The gas sales agreement would become effective if the WIOs Commit to a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project with gas to be available for delivery on the Commitment date.

(c) The term of each sales agreement will continue until the earlier of: (1) Project Start-up of a Point Thomson Gas Development / Prudhoe Bay Enhanced Recovery Project, (2) Project Start-up of a Major Gas Sale as defined under the Settlement Agreement, or (3) 10 years following the Commitment date.

(d) The delivery point for the gas will be at a mutually agreed location from Prudhoe Bay facilities.

(e) The State and each WIO will establish the price of gas in their contract based on a price mutually agreed between the State and that WIO considering most recent, relevant Alaska North Slope gas sales agreements, including consideration for volume commitments and terms. The gas sales agreement will allow for periodic price re-openers to be negotiated. The initial re-opener may not be triggered sooner than one year after the start of gas sales.

(f) Any royalty due on gas sold under this provision will be paid in value based on the contract price for that WIO.



I=Inspired

T=Thought

L=Light

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"Every effort has been made by the Fed (Federal Reserve System) to conceal its powers but the truth is – the Fed has usurped the Government. It controls everything here (in Congress) and it controls all our foreign relations. It makes and breaks governments at will."

1 of (~~7~~ 8)

Hon. Louis T. McFadden.
Chairman. Banking & Currency
Committee. "Congressman
McFadden on the Federal
Reserve Corporation".
CONGRESSIONAL RECORD.
1934. page 3

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99 Ind.App. 1; Browning v. Browning, 226 Mo. App. 322, 41 S.W.2d 860, 868.

A combination, or an agreement between two or more persons, for accomplishing an unlawful end or a lawful end by unlawful means. 4 B. & Ad. 345; Cumberland Telephone & Telegraph Co. v. Stevens, D.C.Miss., 274 F. 745, 746; Lauf v. E. G. Shinner & Co., C.C.A.Wis., 82 F.2d 68, 72; Morrison v. Goodspeed, 100 Colo. 470, 68 P.2d 458, 464.

A partnership in criminal purposes. Marino v. United States, C.C.A.Cal., 91 F.2d 691, 113 A.L.R. 975.

The essence of "conspiracy" is an agreement, together with an overt act, to do an unlawful act, or do a lawful act in an unlawful manner. Cooper v. O'Connor, 99 F.2d 135, 142, 69 App.D.C. 100, 118 A.L.R. 1440. Mere knowledge, acquiescence, approval, or attempt on part of one to perpetrate illegal act is insufficient. People v. Link, 365 Ill. 266, 6 N.E.2d 201.

A conspiracy may be a continuing one; actors may drop out, and others drop in; the details of operation may change from time to time; the members need not know each other or the part played by others; a member need not know all the details of the plan or the operations: he must, however, know the purpose of the conspiracy and agree to become a party to a plan to effectuate that purpose. Craig v. U. S., C.C.A.Cal., 81 F.2d 816, 822.

A consultation or agreement between two or more persons, either falsely to accuse another of a crime punishable by law; or wrongfully to injure or prejudice a third person, or any body of men, in any manner; or to commit any offense punishable by law; or to do any act with intent to prevent the course of justice; or to effect a legal purpose with a corrupt intent, or by improper means. Hawk. P.C. c. 72, § 2; Archb.Crim.Pl. 390, adding also combinations by journeymen to raise wages. State v. Murphy, 6 Ala. 765, 41 Am.Dec. 79.

Civil and Criminal Conspiracies

The term "civil" is used to designate a conspiracy which will furnish ground for a civil action, as where, in carrying out the design of the conspirators, overt acts are done causing legal damage, the person injured has a right of action. It is said that the gist of civil conspiracy is the injury or damage. While criminal conspiracy does not require such overt acts, yet, so far as the rights and remedies are concerned, all criminal conspiracies are embraced within the civil conspiracies. Martha Mills v. Moseley, 50 Ga.App. 536, 179 S.E. 159.

Accurately speaking, there is no such thing as a civil action for conspiracy. The better view is that the damage sustained, and not the conspiracy is the gist of the action. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable. Dahlquist v. Mattson, 40 Idaho, 378, 233 P. 883, 885.

The essence of a "civil conspiracy" is a concert or combination to defraud or cause other injury to person or property, which results in damage to the person or property of plaintiff. Conner v. Bryce, Sup., 170 N.Y.S. 94, 95.

CONSPIRATIONE. An ancient writ that lay against conspirators. Reg.Orig. 134; Fitzh.Nat. Brev. 114.

CONSPIRATORS. Persons guilty of a conspiracy. State v. Collins, 88 Mont. 514, 294 P. 957, 961, 73 A.L.R. 861.

Where two or more persons enter on a common enterprise or adventure and criminal offense is contemplated each is a "conspirator". Kelly v. State, 31 Ala.App. 194, 13 So.2d 691, 692.

Those who bind themselves by oath, covenant, or other alliance that each of them shall aid the other falsely and maliciously to indict persons; or falsely to move and maintain pleas, etc. 33 Edw. I. St. 2. Besides these, there are conspirators in treasonable purposes; as for plotting against the government. Wharton.

CONSPIRE. To engage in conspiracy. Wright v. United States, C.C.A.La., 48 C.C.A. 37, 108 F. 805, 809.

It carries with it the idea of agreement, concurrence and combination, and hence is inapplicable to a single person or thing, and one cannot agree or conspire with another who does not agree or conspire with him. Horton v. Johnson, 192 Ga. 338, 15 S.E.2d 605, 615.

CONSTABLE. In American law. An officer of a municipal corporation (usually elected) whose duties are similar to those of the sheriff, though his powers are less and his jurisdiction smaller. He is to preserve the public peace, execute the process of magistrates' courts, and of some other tribunals, serve writs, attend the sessions of the criminal courts, have the custody of juries, and discharge other functions sometimes assigned to him by the local law or by statute. Allor v. Wayne County, 43 Mich. 76, 4 N.W. 492.

In English law. A public civil officer, whose proper and general duty is to keep the peace within his district, though he is frequently charged with additional duties. 1 Bl.Comm. 356. There are "high," "petty," and "special" constables. See the definitions, *infra*.

In Medieval law. A high functionary under the French and English kings, the dignity and importance of whose office was second only to that of the monarch. He was in general the leader of the royal armies, and had cognizance of all matters pertaining to war and arms, exercising both civil and military jurisdiction. He was also charged with the conservation of the peace of the nation. Thus there was a "Constable of France" and a "Lord High Constable of England." Rich v. Industrial Commission, 80 Utah 511, 15 P.2d 641, 644.

Constable of a castle. In English law. An officer having charge of a castle; a warden, or keeper; otherwise called a "castellain." Stat. Westm. 1, c. 7 (3 Edw. I.); Spelman, Gloss.

Constable of England. (Called, also, "Marshal.") His office consisted in the care of the common peace of the realm in deeds of arms and matters of war. Lamb. Const. 4; 3 Steph. Comm. 47; 4 Bla. Comm. 92.

Constable of Scotland. An officer who was formerly entitled to command all the king's armies in the absence of the king, and to take cognizance of all crimes committed within four miles of the king's person or of parliament, the privy council, or any general convention of the states of the kingdom. The office was hereditary in the family of Errol, and was abolished by the 20 Geo. III, c. 43. Bell; Ersk. Inst. 1, 3, 37.

Constable of the exchequer. An officer mentioned in Fleta, lib. 2, c. 31, and in 51 Hen. III, stat. 5, cited by Cowell.

High constables. In England, officers appointed in every hundred or franchise, whose proper duty

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common enemy; *defensive* when the parties agree to act in concert in defending each other against an enemy. Wharton.

The marine league, marking the limit of national jurisdiction on the high seas, is equal to three geographical (or marine) miles of 6,075 feet each.

In Spanish and Mexican law, the league, as a legal measure of length, consisted of 5,000 varas, and a vara was equivalent to 33⅓ English inches, making the league equal to a little more than 2.63 miles, and the square league equal to 4,428 acres. This is its meaning as used in Texas land grants. United States v. Perot, 98 U.S. 428, 25 L.Ed. 251; Hunter v. Morse, 49 Tex. 219. "League and labor," an area of land equivalent to 4,605 acres. Ammons v. Dwyer, 78 Tex. 639, 15 S.W. 1049. See Labor.

LEAKAGE. The waste or diminution of a liquid caused by its leaking from the cask, barrel, or other vessel in which it was placed.

Also an allowance made to an importer of liquids, at the custom-house, in the collection of duties, for his loss sustained by the leaking of the liquid from its cask or vessel.

LEAL. L. Fr. Loyal; that which belongs to the law.

LEALTE. L. Fr. Legality; the condition of a *legalis homo*, or lawful man.

LEAN. To incline in opinion or preference.

A court is sometimes said to "lean against" a doctrine, construction, or view contended for, whereby it is meant that the court regards it with disfavor or repugnance, because of its inexpedience, injustice, or inconsistency.

LEAP-YEAR. See Bissextile.

LEARN. To gain knowledge or information of; to ascertain by inquiry, study, or investigation. Fletcher Savings & Trust Co. v. American Surety Co. of New York, 92 Ind.App. 651, 175 N.E. 247, 251; Rambo v. Rambo, 245 Ala. 98, 16 So.2d 4, 5.

LEARNED. Possessing learning; erudite; versed in the law; informed.

In statutes prescribing the qualifications of judges, "learned in the law" designates one who has received a regular legal education, the almost invariable evidence of which is the fact of his admission to the bar. See Jamieson v. Wiggin, 12 S.D. 16, 80 N.W. 137, 46 L.R.A. 317, 76 Am.St.Rep. 585; O'Neal v. McKinna, 116 Ala. 620, 22 So. 905; Potter v. Robbins, 155 Tenn. 1, 290 S.W. 396, 399; Meard v. Moore, 154 Tenn. 566, 290 S.W. 15, 16, 50 A.L.R. 1152.

LEARNING. Legal doctrine. 1 Leon. 77.

LEASE. Any agreement which gives rise to relationship of landlord and tenant. Smith v. Royal Ins. Co., C.C.A.Cal., 111 F.2d 667, 671. Any grant of permissive use. People v. City of Chicago, 349 Ill. 304, 182 N.E. 419, 434.

Contract for exclusive possession of lands or tenements for determinate period. Barnett v. Lincoln, 162 Wash. 613, 299 P. 392, 394. Contract for possession and profits of lands and tenements either for life, or for certain period of time, or during the pleasure of the parties, Femmer v. City of Juneau, C.C.A.Alaska, 97 F.2d 649, 657; Smith v. Royal Ins. Co., D.C.Cal., 5 F.Supp. 435, 437; Intermountain Realty Co. v. Allen, 60 Idaho 228, 90 P.2d 704, 706, 122 A.L.R. 647. Contract for possession and profits of property for a recompense. White v. City of Grand Rapids, 244 N.W. 469, 260 Mich. 267; Stone v. City of Los Angeles, 114 Cal.App. 192, 299 P. 838, 840; Clark v. Harry, 182 Va. 410, 29 S.E.2d 231, 233. Conveyance, grant or devise of realty for designated period with reversion to grantor. Becker v. Manufacturers Trust Co., 262 App.Div. 525, 30 N.Y.S. 2d 542, 544; Moore v. Brandenberg, 234 Ky. 400, 28 S.W.2d 477, 478; Lewes Sand Co. v. Graves, Del., 1 Terry 189, 8 A.2d 21, 24. Conveyance of interest in real property for specified period or at will, Minneker v. Gardiner, 47 Ohio App. 203, 191 N.E. 793. Conveyance or grant of estate in real property for limited term with conditions attached, State ex rel. St. Louis County v. Evans, 246 Mo. 209, 139 S.W.2d 967, 969; Holcombe v. Lorino, 124 Tex. 446, 79 S.W.2d 307, 310; Dean v. Brower, 119 Cal.App. 412, 6 P.2d 580, 581. Conveyance, usually in consideration of rent or other recompense, for life, years, or at will. Smith v. Royal Ins. Co., C.C.A.Cal., 111 F.2d 667, 671; Clark v. Harry, 182 Va. 410, 29 S.E.2d 231, 233; but always for a less time than lessor has in the premises, Leonard v. Autocar Sales & Service Co., 325 Ill.App. 375, 60 N.E.2d 457, 462; Union Central Life Ins. Co. of Cincinnati, Ohio, v. Goode, 222 Iowa 716, 269 N.W. 762, 764. Grant of use and possession, in consideration of something to be rendered, Ottman v. Albert Co., 327 Pa. 49, 192 A. 897, 899.

A contract in writing, under seal, whereby a person having a legal estate in hereditaments, corporeal or incorporeal, conveys a portion of his interest to another, in consideration of a certain annual rent or render, or other recompense. Archb.Landl. & Ten. 2.

Instrument granting exclusive possession or control of premises, or portion, though use be restricted by reservations, will be considered lease, Barnett v. Lincoln, 162 Wash. 613, 299 P. 392, 394.

"Lease" or "hire" is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price. Civil Code La. art. 2669.

Oral agreement whereby property owner for fixed consideration gave another trapping privileges on his lands for trapping season held contract of "lease." Defelice v. Autin, La.App., 159 So. 648, 649.

The person who conveys is termed the "lessor," and the person to whom they are conveyed, the "lessee;" and when the lessor conveys lands or tenements to a lessee, he is said to lease, demise, or let them. 4 Cruise, Dig. 58; U. S. Nat. Bank of La Grande v. Miller, 122 Or. 285, 258 P. 205, 207, 58 A.L.R. 339; Howard v. Manning, 79 Okl. 165, 192 P. 358, 360, 79 A.L.R. 819. The word when used as verb, means to transfer for term specified therein from lessor to lessee property therein demised, also to let, to farm out, to rent; and there is authority for view that word "lease" may properly be used in two senses, first, in describing act of lessor in giving lease, and again in describing act of lessee in taking lease. Stone v. City of Los Angeles, 114 Cal.App. 192, 299 P. 838, 841.

The term embraces what are described as the covenants of the lease. Goldberg v. Grossman, 105 Pa.Super. 50, 160 A. 138, 139.

Whatever is sufficient to show that one party shall divest himself of possession and the other party shall come into it for a determinate time and for a fixed rental amounts to a lease. General American Life Ins. Co. v. North American Mfg. Co., 320 Ill.App. 488, 51 N.E.2d 619.

When the contract is bipartite the one part is called the "lease", the other the "counterclaim."

Concurrent Lease

One granted for a term which is to commence before the expiration or other determination of a previous lease of the same premises made to another person; or, in other words, an assignment of a part of the reversion, entitling the lessee to all the rents accruing on the previous lease after the date of his lease and to appropriate remedies against the holding tenant. Cargill v. Thompson, 57 Minn. 534, 59 N.W. 638.

Farm Lease

See Farm Lease.

Lease and Release

A species of conveyance much used in England, said to have been invented by Serjeant Moore, soon after the enactment of the statute of uses. It is thus contrived: A lease, or rather bargain and sale upon some pecuniary consideration for one year, is made by the tenant of the freehold to the lessee or bargainee. This, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for one year, and then the statute immediately annexes the possession. Being thus in possession, he is capable of receiving a release of the freehold and reversion, which must be made to the tenant in possession, and accordingly the next day a release is granted to him. The lease and release, when used as a conveyance of the fee, have the joint operation of a single conveyance. 2 Bl. Comm. 339; 4 Kent, Comm. 482; Co.Litt. 207; Cruise, Dig. tit. 32, c. 11.

Mining Lease

See Mining.

Parol Lease

A lease of real estate not evidenced by writing, but resting in an oral agreement.

Perpetual Lease

A lease of lands which may last without limitation as to time; a grant of lands in fee with the reservation of a rent in fee; a fee-farm. Edwards v. Noel, 88 Mo.App. 434.

Sublease, or Underlease

One executed by the lessee of an estate to a third person, conveying the same estate for a shorter term than that for which the lessee holds it. The distinction between an assignment of a term for years and a sublease or subletting is that if the lessee parts with his entire interest in the term, it constitutes an assignment and not a subletting, although the transfer is in form a sublease; but if the lessee reserves to himself a reversionary interest in the term, it constitutes a sublease, whatever the form of the transfer. Johnson v. Thompson, 185 Ala. 666, 64 So. 554, 555; Weigle v. Rogers, 202 Mo.App. 520, 213 S.W. 501, 502; Holden v. Tidwell, 37 Okl. 553, 133 P. 54, 55, 49 L.R.A., N.S., 369, Ann.Cas.1915C, 394; Davis v. First Nat. Bank, Tex.Civ.App., 258 S.W. 241, 242.

For "Extension of lease," see Extension.

LEASEHOLD. An estate in realty held under a lease; an estate for a fixed term of years. See Stubbings v. Evanston, 136 Ill. 37, 26 N.E. 577, 11 L.R.A. 839, 29 Am.St.Rep. 300; Washington F. Ins. Co. v. Kelly, 32 Md. 421, 3 Am.Rep. 149; Greene Line Terminal Co. v. Martin, 122 W.Va. 483, 10 S.E. 2d 901, 903. Right of tenant at will is "leasehold." Public Service Co. of New Hampshire v. Voudoumas, 84 N.H. 387, 151 A. 81, 83, 70 A.L.R. 480.

LEASING, or LESING. Gleaning.

LEASING-MAKING. In old Scotch criminal law. An offense consisting in slanderous and untrue speeches, to the disdain, reproach, and contempt of the king, his council and proceedings, etc. Bell.

LEAUTE. L. Fr. Legality; sufficiency in law. Britt. c. 109.

LEAVE. Give. Grimes v. Crouch, 175 Va. 1 S.E.2d 115, 117.

To allow or cause to remain; to let remai moved or undone; to refrain from or neglec ing, doing, or changing; to let stay or cont to let be without interference; to suffer to re subject to another's action, control, or the to suffer to be undisturbed in action. Colli Hartford Accident & Indemnity Co., 178 Va 17 S.E.2d 413, 418.

To give or dispose of by will; to bequea devise. Townsend v. Gordon, 308 Mich. 4 N.W.2d 57, 60; Williams v. McPherson, 216 565, 5 S.E.2d 830, 831. "The word 'leave,' a plied to the subject-matter, *prima facie* me disposition by will." Thorley v. Thorley, 10 438; Carr v. Effinger, 78 Va. 203.

To put, place, deposit, deliver, or the Jaggers v. Southeastern Greyhound Lines, Tenn., 34 F.Supp. 667, 668; Stafford v. Conso ed Bus Lines, 179 Tenn. 185, 164 S.W.2d 1 Collins v. Hartford Accident & Indemnity Co Va. 501, 17 S.E.2d 413, 418, 137 A.L.R. 1046.

Willful departure with intent to remain a and not temporary absence with intention turning. Landreth v. Casey, 340 Ill. 519, 173 84, 85.

LEAVE AND LICENSE. A defense to an a in trespass setting up the consent of the pla to the trespass complained of.

LEAVE NO ISSUE. Not survived by a chi children or their descendants. A spouse of ceased child is not "issue" (*q. v.*). In re V Estate, 38 N.M. 383, 34 P.2d 667, 668, 93 A 1506.

LEAVE OF ABSENCE. Temporary absence duty with intention to return during which remuneration is suspended, State ex rel. Gaughey v. Grayston, 349 Mo. 700, 163 S 335, 341.

LEAVE OF COURT. Permission obtained fi court to take some action which, without such mission, would not be allowable; as, to sue ceiver, to file an amended pleading, to plea eral pleas. See Copperthwait v. Dummer, 1 L. 258.

LEAVE TO DEFEND. The bills of exchang 1855 (18 & 19 Vict. c. 67) allowed actions or and notes commenced within six months aft ing due to be by writ of summons in a form vided by the act, and unless the defendant s within twelve days obtain leave to appear a fend the action, allowed the plaintiff to sign ment on proof of service. This procedure w tained by the judicature act, but abolished in Whart. Lex.

LECCATOR. A debauched person. Cowell.

LECHERWITE, LAIRWITE, or LEGERWIT fine for adultery or fornication, anciently p the lords of certain manors. 4 Inst. 206.

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PALMARIUM. In civil law. A conditional fee for professional services in addition to the lawful charge.

PALMER ACT. A name given to the English statute 19 & 20 Vict. c. 16, enabling a person accused of a crime committed out of the jurisdiction of the central criminal court, to be tried in that court.

PALMING OFF DOCTRINE. Rule of law itself by which it is determined whether a given state of facts constitutes "unfair competition." Soft-Lite Lens Co. v. Ritholz, 301 Ill.App. 100, 21 N.E. 2d 835, 838.

PALMISTRY. The practice of telling fortunes by a feigned interpretation of the lines and marks on the hand. Also, a trick with the hand. 2 Exch. Div. 268.

PALPABLE. Easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest. State v. Department of Public Works, 143 Wash. 67, 254 P. 839, 844; Alabama Fuel & Iron Co. v. Minyard, 210 Ala. 299, 97 So. 918, 921. People v. Hughey, 382 Ill. 136, 47 N.E.2d 77, 80.

PAMPHLET. A small book, bound in paper covers, usually printed in octavo form, and stitched. U. S. v. Chase, 10 S.Ct. 756, 135 U.S. 255, 34 L.Ed. 117.

PAMPHLET LAWS. The name given in some states, such as Pennsylvania, to the publication, in pamphlet or book form, containing the acts passed by the state legislature at each of its biennial sessions.

PANDECTS. A compilation of Roman law, consisting of selected passages from the writings of the most authoritative of the older jurists, methodically arranged, prepared by Tribonian with the assistance of sixteen associates, under a commission from the emperor Justinian. This work, which is otherwise called the "Digest," because in his compilation the writings of the jurists were reduced to order and condensed *quasi digestiæ*, comprises fifty books, and is one of the four great works composing the *Corpus Juris Civilis*. It was first published in A. D. 533, when Justinian gave to it the force of law.

PANDER, *n.* One who caters to the lust of others; a male bawd, a pimp, or procurer. Hewitt v. State, 71 Tex.Cr.R. 243, 158 S.W. 1120, 1125.

PANDER, *v.* To pimp; to cater to the gratification of the lust of another. State v. Thibodeaux, 136 La. 935, 67 So. 973, 974. To entice or procure a female, by promises, threats, fraud, or artifice, to enter any place in which prostitution is practiced, for the purpose of prostitution. Boyle v. State, 110 Ark. 318, 161 S.W. 1049, 1051; Crawford & Moses' Dig. § 2707; Humphries v. State, 79 Tex.Cr.R. 637, 186 S.W. 332, 334; To take and detain a female for the purpose of sexual intercourse, on pretense of marriage. Crawford & Moses' Dig. (Ark.) § 2703.

PANDERER. One who solicits for prostitute or lewd woman. Lutes v. Commonwealth, 236 Ky. 549, 33 S.W.2d 620, 622, 74 A.L.R. 304.

PANDOXATOR. In old records. A brewer.

PANDOXATRIX. An ale-wife; a woman that both brewed and sold ale and beer.

PANEL. The roll or slip of parchment returned by the sheriff in obedience to a *venire facias*, containing the names of the persons whom he has summoned to attend the court as jurymen. Beasley v. People, 89 Ill. 571; People v. Coyodo, 40 Cal. 592; Co. Litt. 158*b*.

A list of jurors returned by a sheriff, to serve at a particular court or for the trial of a particular action. Pen.Code Cal. § 1057. The word may be used to denote either the whole body of persons summoned as jurors for a particular term of court, or those selected by the clerk by lot. State v. Gurlagh, 76 Iowa, 141, 40 N.W. 141.

In Scotch law. The prisoner at the bar, or person who takes his trial before the court of justiciary for any crime. This name is given to him after his appearance. Bell.

PANIER, in the parlance of the English bar societies, is an attendant or domestic who waits at table and gives bread, (*panis,*) wine, and other necessary things to those who are dining. The phrase was in familiar use among the knights templar, and from them has been handed down to the learned societies of the inner and middle temples, who at the present day occupy the halls and buildings once belonging to that distinguished order, and who have retained a few of their customs and phrases. Brown.

PANIS. Lat. In old English law. Bread; loaf; a loaf. Fleta, lib. 2, c. 9. See Mandato, Panes De.

PANNAGE. A common of pannage is the right of feeding swine on mast and acorns at certain seasons in a commonable wood or forest. Elton, Commons, 25; Williams, Common, 168.

PANNAGIUM EST PASTUS PORCORUM, IN NEMORIBUS ET IN SILVIS, UT PUTA, DE GLANDIBUS, ETC. 1 Bulst. 7. A pannagium is a pasture of hogs, in woods and forests, upon acorns, and so forth.

PANNELLATION. The act of impaneling a jury.

PANTOMIME. A dramatic performance in which gestures take the place of words. See 3 C. B. 871.

PAPAL SUPREMACY. The supremacy which the Pope claimed not only over the Emperor of the Holy Roman Empire, but over all other Christian princes. The theory was that they stood to the Pope as feudal vassals to a supreme lord; as such, the Pope claimed the right to enforce the duties due to him from his feudal subordinates through an ascending scale of penalties culminating in the absolution of the prince's subjects from the bonds of allegiance, and in the disposition of the sovereign himself. The papal supremacy was overthrown in England by acts of the Parliament which met in 1529 and was dissolved in 1536, ending in the Act of Supremacy. Hannis Taylor, Science of

CONFIR-
MATIONS
2011

<TARGET><BILL></BILL><SUBJECT>CONFIRMATIONS
2011</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE
CONFIRMATION COMMITTEE REPORT

Date: _____

In accordance with AS 39.05.080, the Judiciary Committee reviewed the following and recommends the appointments be forwarded to a joint session for consideration:

Alaska Judicial Council
Donald J. Haase

and recommends a "no" vote on confirmation.

Signature:	Printed Last Name
	Coghill
	Paskvan
	McGuire
	Wielechowski
Chair:	French

Please return to the Senate Secretary's Office (Room 211).

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Anchorage Daily News

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Judicial Council nominee withdraws

By BECKY BOHRER
Associated Press
(04/08/11 12:09:50)

JUNEAU -- Gov. Sean Parnell's pick for the Alaska Judicial Council has withdrawn his name from consideration, saying he was wrongfully painted as an "extremist" and did not want to bring disrespect to the board.

Don Haase submitted his withdrawal letter to Parnell on Thursday, the day before the Legislature was set to vote on his confirmation. Last week, the Senate Judiciary Committee recommended a "no" vote amid concerns about statements that Haase had made under questioning about criminalizing adultery and possibly premarital sex.

There were concerns, too, with Parnell nominating a Valdez resident when the state constitution calls for the council -- which comprises seven members and is tasked with forwarding nominations for judgeship openings to the governor -- to be a geographically diverse group. Haase would have replaced a member from Ketchikan, leaving one council member representing southeast Alaska.

Parnell spokeswoman Sharon Leighow said the administration would submit another nominee for consideration but she did not immediately know whom or whether the submission would come before the Legislature convenes in joint session later Friday.

Haase told The Associated Press he has a "deep respect for an impartial judiciary." While he said he had no doubt that he could be impartial in assessing judicial nominees, he worried that others may think otherwise given the way he said he's been portrayed in the media.

"I don't consider myself an extremist, and anyone who knows me knows I'm not an extremist," he said.

During his confirmation hearings before the Senate Judiciary Committee, Haase was questioned about his affiliation with a conservative blog that appeared to advocate punishing extra-marital affairs as felonies. Haase said he only posted others' writings and wasn't involved with the blog anymore.

He also was asked by Sen. Joe Paskvan, D-Fairbanks, for his thoughts on a blog post mentioning a move in another state to criminalize adultery. Paskvan asked Haase if he believed it should be a crime; Haase said yes, adding that he believes affairs are harmful to kids and spouses.

Paskvan then asked if Haase believed premarital sex should be a crime; Haase said he could see legitimate reasons for trying to criminalize it.

Haase said in his withdrawal letter that he has "deep respect for our constitutional right to privacy. The unguarded comment made concerning extra-marital affairs was a spur-of-the-moment opinion, given after at most 10 seconds of thought on the issue."

"Immediately after the hearing, I realized the unworkable nature of such a law, both in constitutional terms and the practical matter of enforcement," he wrote, adding that he never suggested he would withhold support for a judicial nominee based on his or her opinion on the issue and that he was never given a chance to clarify his remarks before the committee.

Haase said in an interview that he wasn't pressured to withdraw and appreciated Parnell's support.

He said he had never been under such intense pressure and had grown more in the last two weeks than he had in the past 10 years. "Certainly," he said, "I'm learning to guard my tongue."

Haase's withdrawal was first reported by KCHU radio.

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Chambers of
Walter L. Carpeneti
Chief Justice

Supreme Court
State of Alaska

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Juneau, Alaska
99811-4100

(907) 463-4771
Fax (907) 463-3475

April 1, 2011

Via E-Mail and, in Juneau, Hand Delivery

Kevin G. Clarkson
Brena, Bell & Clarkson, P.C.
810 N Street, Suite 100
Anchorage, AK 99501

Dear Mr. Clarkson:

Thank you for your letter expressing concern about Larry Cohn's statements in front of the Senate Judiciary Committee last week. Following receipt of that letter, I listened to the hearing. I do not believe that Mr. Cohn's statement was inaccurate or false.

The question by Sen. Coghill and Mr. Cohn's full response were as follows:

> Q: Help me understand, do the non-public members get the same type of scrutiny from a judicial council selectee that a public member like this does?
>
> . . . .

A: Thank you, Mr. Chairman. For the record, my name is Larry Cohn, I am the Executive Director of the Alaska Judicial Council, and I was requested to be available to answer questions today, which is why I called in. As to the appointment of attorney members of the Council, that is done by the Board of Governors. Under our Constitution, that task has been delegated to the Board of Governors of the Alaska Bar Association. I have never been privy to that appointment process. I do know that they, to assist them in their decision, well, my understanding of how the process works is they solicit applicants among the bar and they solicit them by district because of the Constitution's requirement for geographical diversity. So, for example, if there is an opening in the Third Judicial District, they will send a notice around to all of the attorneys in the Third Judicial District and request, solicit applicants. When they have the applicants, I do know that they send out a poll to attorneys within that judicial district for feedback as to the qualifications of those attorneys. And then they meet with the benefit of that poll and make an appointment. But as to what criteria they apply, I have never been privy to that actual kind of discussion.

There is nothing exceptionable in this statement. Mr. Cohn, while acknowledging that he does not know what criteria the Board of Governors ultimately applies in making its appointment, accurately noted that the Board of Governors polls all of the attorneys in the judicial district where a vacancy has occurred. Obviously, the reason to poll all attorneys is to discover the sentiment of bar members as to the applicants for the position. Mr. Cohn used the term "feedback" to describe this process to discover the collective sentiment of the bar members in the district. It is an accurate

term. Moreover, his complete statement makes clear that he is discussing a poll of all attorneys as to their views as to which applicant is the most qualified.

That usage is neither false nor misleading. If one assumes — as did the framers of our Constitution — that attorneys will know well the strengths and weaknesses of the attorneys who practice in their area, and will have every incentive to support those with excellent habits who will represent them well in the nomination of attorneys for judicial office, then it is perfectly accurate to describe a poll of all the attorneys in the affected region as "a poll to attorneys for feedback as to the qualifications of those attorneys."

Perhaps, because you are a lawyer, you mistook Mr. Cohn's use of the word "poll" to signify the more detailed "bar poll," which is sent to all attorneys concerning candidates for judicial office. But there is nothing in his remarks that suggests that interpretation. And I doubt that legislators generally would attach that meaning.

Finally, to get to the nub of Sen. Coghill's question, I would echo Mr. Cohn's statement: The Constitution assigns the task of appointing attorney members of the Judicial Council to the Board of Governors. That would be the entity to definitively answer Sen. Coghill's question.

Your letter requested clarification of the record before the hearings resume. I am informed they resume today. For that reason, I am sending this letter even before the Council has had the opportunity to meet on this matter. Thus, I want to emphasize that I write for myself alone, and not on behalf of the Council. However, I have no reason to believe that the Council would not support these views.

Thank you for your letter and for your interest in the Alaska Judicial Council and its work.

Sincerely,

/s/

Walter L. Carpeneti

cc: Sen. Hollis French
Sen. John Coghill
James H. Cannon, Council Member
Kevin Fitzgerald, Council Member
Julie Willoughby, Council Member
William F. Clarke, Council Member
Kathleen Tompkins-Miller, Council Member
Christena Williams, Former Council Member
Larry Cohn, Executive Director

BRENA, BELL & CLARKSON, P.C.

ROBIN O. BRENA, MANAGING ATTORNEY
JESSE C. BELL, ATTORNEY
KEVIN G. CLARKSON, ATTORNEY
DAVID W. WENSEL, ATTORNEY
ANTHONY S. GUERRIERO, ATTORNEY
LAURA S. GOULD, ATTORNEY

ATTORNEYS AT LAW

810 N STREET, SUITE 100
ANCHORAGE, ALASKA 99501
TELEPHONE: (907) 258-2000
FACSIMILE: (907) 258-2001
WEB SITE: BRENALAW.COM
EMAIL: KCLARKSON@BRENALAW.COM

March 30, 2011

VIA E-MAIL AND HAND-DELIVERY

Alaska Judicial Council
1029 West Third Ave., Suite 201
Anchorage, Alaska 99501-1969

Attention: The Honorable Chief Justice Walter Carpeneti
James H. Cannon, Esq., Council Member
Kevin Fitzgerald, Esq., Council Member
Julie Willoughby, Esq., Council Member
Mr. William F. Clarke, Council Member
Ms. Kathleen Tompkins-Miller, Council Member
Ms. Christena Williams, Council Member

Re: Testimony of Larry Cohn to Senate Judiciary Committee, March 23, 2011/Legislative Confirmation of Public Member to the Judicial Council

Dear Chief Justice Carpeneti and Council Members:

Senator John Coghill forwarded to me a recording of Larry Cohn's testimony before the Senate Judiciary Committee of the Alaska Legislature on March 23, 2011, regarding the confirmation of Don Haase as a public member of the Alaska Judicial Council. Senator Coghill asked that I listen to Mr. Cohn's testimony, wherein he appeared before the Committee and testified under oath in his official capacity as Executive Director of the Judicial Council, in order to evaluate the accuracy and/or truthfulness of his testimony. Having now listened to Mr. Cohn's testimony, I must say that I have serious concerns.

After listening to Mr. Haase being questioned by Senators about his various personal and/or political, religious, and moral views, including his views about what the law should or should not be, Senator Coghill inquired as to just exactly what questions attorney members of the Judicial Council are asked prior to their appointment to the Council. In response to Senator Coghill's

inquiry, Senator French called on Mr. Cohn to provide testimony. Mr. Cohn then proceeded to represent to the Committee that attorney members of the Council are appointed by the Board of Governors after they are subjected to "a poll" of "attorneys within [the] Judicial District **for feedback** as to **the qualifications** of these attorneys. . . ." Contrary to Mr. Cohn's testimony, when an attorney member of the Judicial Council is appointed, the Bar Association does nothing more than (1) receive applications (with no information on the applicant); (2) mail a voting card to the attorneys within the Judicial District; and then (3) count the votes for the various applicants – the Board of Governors then appoints the winner of the vote. Contrary to Mr. Cohn's testimony, no poll-seeking "feedback" regarding "qualifications" of attorney applicants to the Judicial Council is conducted, whether within the Bar Association or otherwise.

Mr. Cohn's testimony, whether misinformed or misleading, was plainly inaccurate and false and the record needs to be corrected prior to the continuation of Mr. Haase's confirmation hearings before the Judiciary Committee. At this point in time, Mr. Cohn, through his testimony in his official capacity as Executive Director of the Judicial Council, has left the Senate Judiciary Committee and the public with the false impression that attorney members of the Council are subjected to some form of "polling" for "feedback" regarding their "qualifications" – when in truth they are subjected to nothing more than a "vote" of attorneys. We ask that you direct Mr. Cohn to correct his inaccurate testimony with the Committee.

Thank you for your consideration.

Very truly yours,

BRENA, BELL & CLARKSON, P.C.

Kevin G. Clarkson

KGC:alm
cc: The Honorable John Coghill

Dr. William Whitehead	Juneau	5/18/59 – 12/06/62
Charles Kidd	Juneau	4/63 – 1/64
H. Douglas Gray	Juneau	4/64 – 5/18/65
HO Smith	Ketchikan	5/18/65 - 06/65
Pete Meland	Sitka	1/66 - 5/18/71
Oral Freeman	Ketchikan	11/22/71 – 01/73
Lew Williams	Ketchikan	4/73 - 5/18/77
John Longworth,	Petersburg	5/18/77 - 5/18/83
Hilbert Henrickson	Ketchikan	8/13/85 - 5/18/91
David Dapcevich	Sitka	5/19/91 - 5/18/97
Vicki Otte,	Juneau	5/31/95 - 11/21/00
Gigi Pilcher	Ketchikan	3/21/00 - 5/18/05
Christena Williams	Ketchikan	05/19/05 - 03/01/11

Lila Hobbs

From: Larry Cohn [lcohn@ajc.state.ak.us]
Sent: Wednesday, March 23, 2011 10:08 AM
To: Sen. Hollis French
Subject: AJC historical log

Hi Hollis,

Here is the link to a historical roster of AJC members. This table is in our 25th biennial report that was very recently distributed to legislators and others: http://www.ajc.state.ak.us/about/roster.pdf. If you or staff have any other questions, I'll be around until noon at which time I've got a meeting. Thanks.

Larry

Historical Roster of Alaska Judicial Council Members			
	Residence	**Appointment Effective**	**Expiration of Term**
Chairperson[1]			
Chief Justice Buell A. Nesbett		11/29/59	06/18/70
Chief Justice George F. Boney		06/18/70	11/16/72
Chief Justice Jay A. Rabinowitz		11/16/72	11/16/75
Chief Justice Robert Boochever		11/16/75	11/16/78
Chief Justice Jay A. Rabinowitz		11/16/78	11/16/81
Chief Justice Edmond W. Burke		11/16/81	09/30/84
Chief Justice Jay A. Rabinowitz		10/01/84	09/30/87
Chief Justice Warren W. Matthews		10/01/87	09/30/90
Chief Justice Jay A. Rabinowitz[3]		10/01/90	09/30/92
Chief Justice Daniel A. Moore, Jr.		10/01/92	09/30/95
Chief Justice Allen T. Compton[3]		10/01/95	07/01/97
Chief Justice Warren W. Matthews		07/02/97	06/30/00
Chief Justice Dana Fabe		07/01/00	06/30/03
Chief Justice Alexander O. Bryner		07/01/03	06/30/06
Chief Justice Dana Fabe		07/01/06	06/30/09
Chief Justice Walter L. Carpeneti		**07/01/09**	**06/30/12**
Attorney Members			
E.E. Bailey[2]	Ketchikan	02/24/59	02/24/62
E.E. Bailey	Ketchikan	02/24/62	02/24/68
Frank M. Doogan[3]	Juneau	10/15/68	04/73
Michael L. Holmes[4]	Juneau	05/73	02/24/74
Michael L. Holmes	Juneau	02/24/74	02/24/80
Walter L. Carpeneti[5]	Juneau	02/24/80	02/81
James B. Bradley[4]	Juneau	04/81	02/24/86
William T. Council	Juneau	02/24/86	02/24/92
Thomas G. Nave	Juneau	02/24/92	02/23/98
Geoffrey G. Currall	Ketchikan	02/24/98	02/23/04
Douglas Baily	Juneau	04/27/04	07/18/07
Louis James Menendez[4]	Juneau	07/19/07	02/23/10
Julie Willoughby	**Juneau**	**04/27/10**	**02/23/16**
Robert A. Parrish[2]	Fairbanks	02/24/59	02/24/64
William V. Boggess[5]	Fairbanks	02/24/64	04/64
Michael Stepovich[4]	Fairbanks	05/64	02/24/70
Michael Stepovich	Fairbanks	02/24/70	02/24/76
Michael Stepovich[3]	Fairbanks	02/24/76	08/78
Marcus R. Clapp[4]	Fairbanks	08/78	02/24/82
Mary E. Greene[3]	Fairbanks	02/24/82	04/82
Barbara L. Schuhmann[4]	Fairbanks	07/82	02/24/88
Daniel L. Callahan	Fairbanks	02/24/88	02/24/94
Christopher E. Zimmerman[5]	Fairbanks	04/14/94	07/17/97
Paul J. Ewers	Fairbanks	07/18/97	02/23/00
Robert B. Groseclose	Fairbanks	04/05/00	02/23/06
James H. Cannon	**Fairbanks**	**02/24/06**	**02/23/12**

Historical Roster of Alaska Judicial Council Members			
	Residence	**Appointment Effective**	**Expiration of Term**
Attorney Members *(Continued)*			
Raymond E. Plummer[2, 3]	Anchorage	02/24/59	09/26/61
Harold Butcher[4]	Anchorage	11/61	02/24/66
George F. Boney[5]	Anchorage	02/24/66	09/68
Lester W. Miller, Jr.[4]	Anchorage	10/15/68	02/24/72
Eugene F. Wiles[3]	Anchorage	02/24/72	03/75
Joseph L. Young[4]	Anchorage	04/75	02/24/78
Joseph L. Young	Anchorage	02/24/78	02/24/84
James D. Gilmore	Anchorage	02/24/84	02/24/90
Mark E. Ashburn	Anchorage	03/23/90	02/23/96
Robert H. Wagstaff	Anchorage	03/22/96	02/23/02
Susan Orlansky	Anchorage	03/14/02	02/27/08
Kevin Fitzgerald	**Anchorage**	**04/28/08**	**02/23/14**
Non-Attorney Members			
Elmo LeRoy "Roy" J. Walker[2]	Fairbanks	05/18/59	05/18/61
John Cross	Kotzebue	05/18/61	05/18/67
Thomas K. Downes[3]	Fairbanks	05/18/67	Mid-1968
V. Paul Gavora[4]	Fairbanks	10/15/68	05/18/73
Thomas J. Miklautsch[3]	Fairbanks	05/28/73	12/10/74
Robert H. Moss[4]	Homer	12/10/74	05/18/79
Robert H. Moss	Homer	05/18/79	05/18/85
Dr. Hilbert J. Henrickson	Ketchikan	08/13/85	05/18/91
David A. Dapcevich	Sitka	05/19/91	05/18/97
Mary Matthews[3]	Fairbanks	05/19/97	08/23/98
Sandra Stringer[4]	Fairbanks	08/24/98	07/12/99
Katie Hurley	Wasilla	07/13/99	05/18/03
Bill Gordon	Fairbanks	05/19/03	03/01/09
Kathleen Tompkins-Miller	**Fairbanks**	**03/01/09**	**03/01/15**
Jack E. Werner[2]	Seward	05/18/59	05/18/63
Jack E. Werner	Seward	05/18/63	05/18/69
Ken Brady	Anchorage	06/28/69	05/18/75
Ken Brady	Anchorage	05/18/75	05/18/81
Mary Jane Fate	Fairbanks	05/18/81	05/18/87
Leona Okakok	Barrow	07/31/87	05/18/93
Janice Lienhart	Anchorage	05/19/93	05/18/99
Gigi Pilcher	Ketchikan	03/21/00	05/18/05
Christena Williams	**Ketchikan**	**05/19/05**	**03/01/11**

Historical Roster of Alaska Judicial Council Members			
	Residence	**Appointment Effective**	**Expiration of Term**
Non-Attorney Members *(continued)*			
Dr. William M. Whitehead[2, 3]	Juneau	05/18/59	12/06/62
Charles W. Kidd[4, 3]	Juneau	04/63	01/64
H. Douglas Gray[4]	Juneau	04/64	05/18/65
H.O. Smith[6]	Ketchikan	05/18/65	06/65
Pete Meland[4]	Sitka	01/66	05/18/71
Oral Freeman[3]	Ketchikan	11/22/71	01/73
Lew M. Williams, Jr.[4]	Ketchikan	04/73	05/18/77
John Longworth	Petersburg	05/18/77	05/18/83
Renee Murray	Anchorage	08/08/83	05/18/89
Janis Roller[3]	Anchorage	09/01/89	02/14/91
Dr. Paul Dittrich, M.D.[4, 3]	Anchorage	04/06/91	10/03/91
Jim A. Arnesen[4]	Anchorage	10/04/91	05/18/95
Vicki A. Otte[3]	Juneau	05/31/95	11/21/00
Eleanor Andrews[4]	Anchorage	11/15/00	05/18/01
Eleanor Andrews	Anchorage	05/18/01	03/01/07
Charles M. Kopp[3]	Kenai	03/02/07	07/13/08
William F. Clarke[4]	**Anchorage**	**10/16/08**	**03/01/13**

1 *The Judicial Council initially submitted nominations for the position of Chief Justice; the Constitution did not limit the Chief Justice's term. Chief Justice Nesbett and Chief Justice Boney were nominated and appointed in this manner. Voters amended the Constitution on August 25, 1970 to provide for the election of the Chief Justice by the justices of the Supreme Court for a three-year term; the amendment further provided that a Chief Justice may not be re-elected to consecutive terms.*

2 *Appointed to initial staggered term.*

3 *Resigned during term.*

4 *Appointed to complete unexpired term.*

5 *Resigned during term to apply for judicial office.*

6 *Denied legislative confirmation.*

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Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 24, 2011

SUBJECT: Senate Judiciary Committee Action Regarding Governor's Judicial Council Proposed Appointment

TO: Senator Hollis French
Attn: Kristen Peterson

FROM: Doug Gardner
Director

The question you asked is whether the Senate Judiciary Committee may "hold" and thereby defeat a governor's proposed appointment to the Alaska Judicial Council by failing to report the name out of committee. The brief answer is no.

Article IV, § 8, establishes the Alaska Judicial Council, and, in relevant part to this discussion, provides that "[t]hree non-attorney members shall be appointed for six year terms by the governor, subject to confirmation by a majority of the members of the legislature in joint session." Uniform Rule 46 refers to the process in AS 39.05.080, and Article III, §§ 25 and 26, for the process the legislature follows when considering appointments by the governor.[1] AS 39.05.080 directs that the presiding officer of each

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[1] Rule 46. Confirmation of Appointments.
Appointments by the governor are made pursuant to AS 39.05.080. Such appointments are subject to confirmation by a majority vote of the full membership of the legislature in joint session. (Secs. 25 and 26, Art. III, State Constitution.)

Section 3.25 - Department Heads.
The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

Section 3.26 - Boards and Commissions.
When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or

house, in this case the President of the Senate, to assign the name of each of the governor's proposed appointments to a standing committee of each house for "a hearing, report, and recommendations. . ." AS 39.05.080(2)(B) goes on to direct that "the legislature shall, before the end of the regular session in which the appointment is presented, in joint session assembled, act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented." If the legislature fails to act to confirm or decline to confirm an appointment during the regular session in which the appointment is presented, the legislature's failure to act constitutes a "declination to confirm." AS 39.05.080(3).

If a standing committee assigned to conduct a hearing regarding a prospective appointment fails to write a report or make a recommendation to the body, the result will be that the legislature will take up the name on the floor for confirmation despite the lack of committee action, as provided in AS 39.05.080(2)(B) and Article III, § 8 of the Alaska Constitution, and either confirm or decline to confirm the appointment. While it is less likely, it is possible under AS 39.05.080 as previously noted, that the legislature could take no action, thereby declining the appointment.

So, a committee that writes no report or makes no recommendation will have no effect on the procedural process of a governor's appointment being considered by a joint session of the legislature. It is unclear whether other members in a joint session would give more weight to a decision by the committee not to write a report with a recommendation, or to a committee report that articulates the reasons for either supporting confirmation or urging declination of confirmation.

DDG:ljw
11-191.ljw

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commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

Haase, Donald
Alaska Judicial Council

Donald J. Haase

Objective: Highly motivated, personable individual is seeking an opportunity to serve the State of Alaska and learn new skills.

Experience:

January 2000-present
CH2M-Hill / VECO ALASKA
Box 300MS777, Valdez AK 99686, (907)834-7359
Redline electrical, instrumentation, and mechanical drawings
Transfer redlines to AutoCAD drawings
Instrument/Electrical design team since July, 2001

September 1995 – January 2000
CHUGACH NORTH TECHNICAL SERVICES
Box 300MS792, Valdez AK 99686, (907)835-5847
Increasingly responsible positions in Corporate Affairs, Documentation, Drawing Update Program, the Maintenance Library, and As-builts

May 1997 - October 1999
LAUGH OUT LOUD PRODUCTIONS
Box 2903, Valdez AK 99686, (907)835-3505
Acted in and promoted play during tourist season

October 1994 - October 1996
C & D PRODUCTIONS
Box 3423, Valdez AK 99686, (907)835-3608
Wrote, produced and acted in a 4-part play for tourists
Hired, trained, and supervised 9 employee-actors and stage hands

May 1993 - September 1995
S & G ENTERPRISES
Box 2744, Valdez AK 99686, (907)835-3030
Carpentry, concrete work, and lawn maintenance

May 1991 - April 1993
J & F BUILDERS
8670 Eldora, Byron Center MI 49315, (616)878-9741
Carpentry, drywall, and apartment maintenance

SERVICE:
City of Valdez Planning and Zoning Commission, 2004 - present (Chair 2009-2011)
Copper Valley Electrical Association Board of Adjustments, 2005-2007
Copper Valley Electrical Association Scholarship Committee, 2006
Member of Valdez Trails Association, 1996-1997
Member of Valdez Snowmachine Club, 1996-1997
City of Valdez Mental Health Advisory Board Member, 1994-1997, Chair 1997

EDUCATION:
BS in Political Science at Grand Valley State University, 1992
Allendale MI 49401, (616)895-3327
3.59 GPA out of 4.0

Cindy Smith

From: Kristen Peterson
Sent: Thursday, March 24, 2011 1:12 PM
To: Haase, Donald J.
Subject: RE: Alaska Judicial Council, Don Haase

Yes, please. Thanks!

From: Haase, Donald J. [mailto:Donald.Haase@alyeska-pipeline.com]
Sent: Thursday, March 24, 2011 12:10 PM
To: Kristen Peterson
Subject: RE: Alaska Judicial Council, Don Haase

Thank you Kristen. That will be fine. May I call in to the same number (855-463-5009)?

From: Kristen Peterson [mailto:Kristen_Peterson@legis.state.ak.us]
Sent: Thursday, March 24, 2011 11:47 AM
To: Don Haase
Subject: RE: Alaska Judicial Council, Don Haase

Hi Don,

Senator French has scheduled another hearing for your board confirmation next Friday, March 1st at 1:30 PM. Does that work for you? Please let me know if you have any questions.

Kristen

Kristen Peterson
Office of Senator Hollis French
State Capitol, Room 417
Juneau, AK 99801
(907) 465-5265
Fax (907) 465-6595

From: Don Haase [mailto:haasedj@gmail.com]
Sent: Wednesday, March 23, 2011 3:24 PM
To: Sen. Hollis French
Cc: Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. John Coghill
Subject: Alaska Judicial Council, Don Haase

Honorable Chair and Members of the Judiciary Committee,

Thank you for giving so much of your time to veting those of us volunteering to work within boards and commissions. Your questions were thoughtful and appreciated. I am confident that you have the well being of Alaska foremost in your mind.

I am new to this process, so I am writing to ask what being held over means to me. Will there be a second hearing for me to attend? If there are discussions about my candidacy, will I be invited to listen in or respond?

Thank you.

Don Haase

PS: Since the stated reason for holding my name over was geographic representation, you may be interested in seeing the roster, listing all members since statehood with their hometown. http://www.ajc.state.ak.us/about/roster.pdf. By my count, the First Judicial district has had 24 members, 2nd 2, 3rd 23, and 4th 20. The constitutional requirement is "Appointments shall be made with due consideration to area representation and without regard to political affiliation." Article IV, Section 8.

Cindy Smith

From: Haase, Donald J. [Donald.Haase@alyeska-pipeline.com]
Sent: Wednesday, March 09, 2011 11:07 AM
To: Cindy Smith
Subject: SJUD hearing 03/23

Follow Up Flag: Follow up
Flag Status: Flagged

Ms. Smith,

Thank you for calling to schedule my confirmation hearing. I am following up with an email to provide you with my contact information in case you need to reach me prior to the hearing. You are free to share with the committee members as you wish. It was a pleasure to speak with you and I look forward to meeting you in person next time I get to Juneau.

Sincerely,

Don Haase
Box 3423
Valdez AK 99686
(907)835-3608 hm
(907)831-3608 cell
(907)834-7359 wk
haasedj@gmail.com

Cindy Smith

From: Roger Withington
Sent: Friday, April 01, 2011 10:35 AM
To: Cindy Smith
Subject: Standing Committee Reports and gubernatorial nominees

Good morning Cindy,

Using Infobases, I have searched the House and Senate Journals from 1989 (16th Legislature) forward and found no instances where Standing Committee Reports, that report that the particular committee has considered gubernatorial nominees for commissioners, and members of boards and commissions, etc., have indicated that the committee, or specific members of the committee, do not believe a particular nominee should be confirmed by the entire Legislative body.

It appears, however, that the way these reports are recorded in the Journal has changed over the years. For example, during the 16th and 17th Legislatures, the committee vote for each nominee was included in the Committee Report. Two examples, one from the 16th Legislature and one from the 17th Legislature are as follows.

16th Legislature
House Journal March 3, 1989
REPORTS OF STANDING COMMITTEES
The State Affairs Committee has considered the following appointments:

Athletic Commission
Joe B. "BJ" Hall
Recommending confirmation (2): Boucher (Chairman), Zawacki
No recommendation (2): Spohnholz, Hanley

Athletic Commission
James A. Reid
Recommending confirmation (3): Boucher (Chairman), Hanley, Zawacki
No recommendation (1): Spohnholz

Personnel Board
Michael C. Andrews
Recommending confirmation (2): Boucher (Chairman), Spohnholz
No recommendation (2): Hanley, Zawacki

The Judiciary Committee has considered the following appointment and recommends confirmation:

Attorney General
Douglas B. Baily
The report was signed by Gruenberg and Goll (Co-chairmen), Martin, Davidson, Ellis, Miller and M. Davis.

17th Legislature
House Journal, March 18, 1991
REPORTS OF STANDING COMMITTEES
The Resources Committee has considered the following appointments:

Big Game Commercial Services Board
Glen R. Alsworth
Recommending confirmation: Davidson, Carney, Ivan, Hudson, Moyer, Leman, Finkelstein, Lincoln

Board of Game
Richard Burley
Recommending confirmation: Hudson, Moyer, Leman
Recommending against confirmation: Lincoln
No recommendation: Davidson, Carney, Ivan, Finkelstein

The reports were signed by Representative Davidson, Chairman.

It appears that during the 18th Legislature, Journal entries started transitioning from including committee member votes to including only a generic statement such as:

> The report stated that though there were no stated objections in the report regarding confirmation of the named individual, this does not necessarily indicate an intention of a committee member to vote for or against the individual named at the time of the joint session on confirmation.

or, more simply:

> This does not reflect an intent by any of the members to vote for or against the confirmation of the individual during any further sessions.

In addition, it appears that for the more recent Legislatures, either one of the two statements noted above are included in the Standing Committee Reports, or a list of the committee members who signed the Committee Report, with no accompanying statement, is included.

I have asked Ms. Lowell and Ms. Waid if there are any policies or procedures that describe or dictate how Standing Committee Reports, that report that gubernatorial nominees have been considered, are entered into the Journal, but as yet, neither have responded. I will forward any response I receive from them.

Please keep in mind that although I believe my search of the Journals to be thorough, due to the disparate nature in which committee reports are recorded, I may have inadvertently missed some entries.

Please let me know if you need anything else.

Roger Withington, Legislative Analyst
Legislative Research Services
State Capitol
Juneau, AK 99801
907-465-6614
907-465-3908 (fax)
Roger_Withington@legis.state.ak.us

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Cindy Smith

From: Roger Withington
Sent: Tuesday, April 05, 2011 10:15 AM
To: Cindy Smith
Subject: RE: Standing Committee Reports and gubernatorial nominees

Good morning Cindy,

Below is Ms. Waid's response to my questions about policies or procedures that describe or dictate how Standing Committee Reports are entered into the Journal.

> Roger,
>
> On the Senate side we provide the Committees with a template of a form they can use when they report the nominees out of committee. In the far past, they came up with their own reports. When I first started working in the Senate Secretary's Office (that was in 1996) the Committee Aides would ask us for examples of report forms. We used to provide them with several options, but the report you noticed was what usually came back. I think we just started providing them with that template when they asked. They are free to come up with their own report, but lately they seem to be using our generic report.
>
> Let me know if this is what you were asking me.
>
> Kirsten

Thanks again.

Roger Withington, Legislative Analyst
Legislative Research Services
State Capitol
Juneau, AK 99801
907-465-6614
907-465-3908 (fax)
Roger_Withington@legis.state.ak.us

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From: Cindy Smith
Sent: Friday, April 01, 2011 11:43 AM
To: Roger Withington
Subject: RE: Standing Committee Reports and gubernatorial nominees

Oh, thanks! I really appreciate the help!

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Roger Withington
Sent: Friday, April 01, 2011 10:35 AM

To: Cindy Smith
Subject: Standing Committee Reports and gubernatorial nominees

Good morning Cindy,

Using Infobases, I have searched the House and Senate Journals from 1989 (16th Legislature) forward and found no instances where Standing Committee Reports, that report that the particular committee has considered gubernatorial nominees for commissioners, and members of boards and commissions, etc., have indicated that the committee, or specific members of the committee, do not believe a particular nominee should be confirmed by the entire Legislative body.

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House Journal March 3, 1989
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Joe B. "BJ" Hall
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No recommendation (2): Spohnholz, Hanley

Athletic Commission
James A. Reid
Recommending confirmation (3): Boucher (Chairman), Hanley, Zawacki
No recommendation (1): Spohnholz

Personnel Board
Michael C. Andrews
Recommending confirmation (2): Boucher (Chairman), Spohnholz
No recommendation (2): Hanley, Zawacki

The Judiciary Committee has considered the following appointment and recommends confirmation:

Attorney General
Douglas B. Baily
The report was signed by Gruenberg and Goll (Co-chairmen), Martin, Davidson, Ellis, Miller and M. Davis.

17th Legislature
House Journal, March 18, 1991
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The Resources Committee has considered the following appointments:

Big Game Commercial Services Board
Glen R. Alsworth
Recommending confirmation: Davidson, Carney, Ivan, Hudson, Moyer, Leman, Finkelstein, Lincoln

Board of Game
Richard Burley
Recommending confirmation: Hudson, Moyer, Leman
Recommending against confirmation: Lincoln
No recommendation: Davidson, Carney, Ivan, Finkelstein

The reports were signed by Representative Davidson, Chairman.

It appears that during the 18th Legislature, Journal entries started transitioning from including committee member votes to including only a generic statement such as:

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Please let me know if you need anything else.

Roger Withington, Legislative Analyst
Legislative Research Services
State Capitol
Juneau, AK 99801
907-465-6614
907-465-3908 (fax)
Roger_Withington@legis.state.ak.us

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Cindy Smith

From: Henriksen, Kelly E (LAW) [kelly.henriksen@alaska.gov]
Sent: Wednesday, April 06, 2011 3:52 PM
To: Cindy Smith
Cc: Gibbens, Joanne C (HSS)
Subject: CSSB 86

Cindy, as re changing sec. 52 in the CS, it should read "Sections 16 and 20 of this Act...." Those are the two sections that address mandatory reporters and the obligation of peace officers to report to the dept. within 24 hours. (AS 47.24.010(a) and (e)).

Kelly E. Henriksen
Assistant Attorney General
Human Services Section

State of Alaska Department of Law
P.O. Box 110300
Juneau, AK 99811-0300

(907) 465-6726 (direct)
(907) 465-2539 (fax)

kelly.henriksen@alaska.gov

Cindy Smith

From: Roger Withington
Sent: Friday, April 01, 2011 10:35 AM
To: Cindy Smith
Subject: Standing Committee Reports and gubernatorial nominees

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Richard Burley
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Roger Withington, Legislative Analyst
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SENATE
CONFIRMATION COMMITTEE REPORT

Date: 3/9/11

In accordance with AS 39.05.080, the Judiciary Committee reviewed the following and recommends the appointments be forwarded to a joint session for consideration:

Board of Governors of the Alaska Bar
William Granger – Anchorage

State Board of Parole
Daniel Morris – Soldotna

Alaska Police Standards Council
Kelly Alzaharna – Barrow
~~Richard Burton – Ketchikan~~ dcs –
Rebecca Hamon – King Salmon
Bernice Troglio – Anchorage

This does not reflect an intent by any of the members to vote for or against the confirmation of the individuals during any further sessions.

Signature:	Printed Last Name
John Coghill	Coghill
	Wielechowski
Joe Paskvan	Paskvan
Kevin McGuire	McGuire
Chair:	French

Please return to the Senate Secretary's Office (Room 211).

SENATE
CONFIRMATION COMMITTEE REPORT

Date: 3/23/11

In accordance with AS 39.05.080, the Judiciary Committee reviewed the following and recommends the appointments be forwarded to a joint session for consideration:

Alaska Police Standards Council
Mark Mew - Anchorage
Richard Burton – Ketchikan

Violent Crimes Compensation Board
Nora Barlow - Anchorage

Commission on Judicial Conduct
Amy Demboski - Chugiak

This does not reflect an intent by any of the members to vote for or against the confirmation of the individuals during any further sessions.

Signature:	Printed Last Name
	Coghill
	Paskvan
	Wielechowski
Chair:	French

Please return to the Senate Secretary's Office (Room 211).

SENATE
CONFIRMATION COMMITTEE REPORT

Date: _____

In accordance with AS 39.05.080, the Judiciary Committee reviewed the following and recommends the appointments be forwarded to a joint session for consideration:

State Board of Parole
~~Susan~~ Possenti, Fairbanks
Sarah

This does not reflect an intent by any of the members to vote for or against the confirmation of the individuals during any further sessions.

Signature:	**Printed Last Name**
Chair:	

Please return to the Senate Secretary's Office (Room 211).

Possenti, Sarah J.
State Board of Parole

Sarah J. Possenti

Employment History

- State of Alaska, Department of Corrections Probation/Parole Officer II – Field Probation Officer in Fairbanks Alaska between October 1999 through September 30, 2007.
- State of Alaska, Department of Corrections Probation/Parole Officer II – Institutional Probation Officer in Fairbanks, Alaska from October 1, 2007 until present.
- North Star Youth Court, Program Coordinator, September 1998 through October 1999
- University of Alaska Fairbanks Residence Life, Student Assistant IV, September 1994 through November 1997.
- University of Alaska Fairbank, Residence Life, Student Assistant III, May 1994 through September 1994.

Education, Experience, Training, and Qualifications

Bachelor's Degree of Criminal Justice, University of Alaska Fairbanks - 1999
Bachelor's Degree of Social Work, University of Alaska Fairbanks - 1999

I successfully completed a training academy designed for probation/parole officers through the Department of Corrections
I was asked to serve in the Acting Probation Officer III many times throughout my PO career
Probation Officer Supervisor Training
Parole Review and Training
Managing Sexual Offender Computer Usage
Firearms, Semi-Auto Familiarization Course
VPSO Field Training
Team Building/Interoffice Communication
Sex Offender Supervision/Polygraph
Sex Offender – ATSA Conference
Sex Offender – Containment Basics
Static 99/Stable Risk Management
Sex Offender - Spirit of Change Conference
APPA Annual Training (New York)
Courtroom Testimony
Legal Issues
Mental Health Offender Supervision/Principles of Mental Health
Ethics, Organizational Change and Leadership
Control Tactics
Victim Issues
FASD Fetal Alcohol Spectrum Disorders
Interstate Compact Familiarization
FTO (Field Training Officer) Training

Respect in the Workplace
Addiction Assessments: Substance Abuse Profession
Clandestine Lab Safety and Awareness
Critical Incident Stress Management (CISM)
Static 99 (sex offender risk assessment)
Bloodborne Pathogens
FAS A Practical Native Am Guide
Sex Offender PSR's
Suicide Prevention/Ellington's
FATS DOC (Firearm training)
Female Offenders in the Community
SONAR (sex offender risk assessment)
Firearms, Semi-Auto Transition Course
COG Skills
Risk Management and Critical Incident Stress Debriefing
VINE
Cultural Diversity - Brainwaves
Wellness Courts
Rural Issues
Legal Issues for Probation Officers
Meth Lab Training
ACA Accreditation
VPSO Training
OTIS Training
Victim Impact Panels/Classes
PO Academy - 3 Weeks
LSI-R Training
Community Justice Conference

I have various computer skills including, but not limited to Microsoft Office Suite, Microsoft Works, Microsoft Excel, Microsoft Access, various internet service providers, various e-mail programs, Windows 95 through XP and Windows 3.11. I also have experience with many types of other office equipment such as copy machines, FAX machines, computer printers and scanners, netbooks, and laptops.

Alaska Police Standards Council Certification for Probation/Parole Officer obtained in 2000
APSIN certification maintained since 2007
Medic First Aid Course (CPR inclusive)
I passed an extensive background investigation in order to obtain employment as a Probation Officer and to become certified by the Alaska Police Standards.

Boards & Commissions Factsheets

PAROLE BOARD

Board: State Board of Parole
Board identification number: 075

Department: Department of Corrections

Authority: AS 33.16.020

Status: Active

Sunset date: 6/30/2016

Requirements: Legislative Confirmation and Financial Disclosure

Prohibitions: Members may not be an officer or employee of the state.

Term: 5 years

Description: 5 members appointed by the Governor: appointments are made with due regard for representation of the ethnic, racial, gender and cultural populations of the state: 1 member who resides in the first judicial district, 1 in the third judicial district, and 1 member who resides in either the second or fourth judicial districts; at least 1 appointee must have experience in the field of criminal justice. Governor appoints chair.

Function: Through hearings authorizes discretionary parole releases, establishes conditions of parole, issues arrest warrants, and revokes parole for cause; conducts clemency investigations.

Chair: Governor appoints.

Special facts: Adjudicatory.Quorum - 3 members. Legislative Confirmation is required by statute, but not permissible under the Constitution.

Compensation: Standard Travel and Per Diem. Receive honorarium of $250 per day.

Meetings: Approximately 150 days per year.

For further information contact:
Mr. Ron Taylor
Executive Director
State Board of Parole
550 West Seventh Avenue, Suite 601
Anchorage, AK 99501
Phone: (907) 770-6309, FAX: (907) 770-6308

Parole Board Roster

Go to the Parole Board Home page

We appreciate your interest in Boards and Commissions. For further information contact the Boards and Commissions staff at (907) 465-3500 or at **boards@alaska.gov**.

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Boards & Commissions Roster

PAROLE BOARD (075)

Member	Date Appointed	Reappointed	Term Expires
VACANT Public/Restricted			3/1/2013
Lonzo Henderson Public/Restricted c/o Parole Board 550 West Avenue, Suite 601 Anchorage, AK 99501	12/29/2008		3/1/2014
Richard O. Larson Public/Restricted/Criminal Justice c/o Alaska Board of Parole 550 West Seventh Ave., Suite 601 Anchorage, AK 99501	3/1/2010		3/1/2015
Charles G. Moses Public/Restricted -- Chair c/o Alaska Board of Parole 550 West Seventh Ave., Suite 601 Anchorage, AK 99501	4/21/1997	1/1/2006	3/1/2011
Michael J. Stark Public/Restricted c/o Alaska Board of Parole 550 West Seventh Ave., Suite 601 Anchorage, AK 99501	3/18/2002	3/1/2007	3/1/2012

Return to the fact sheet

We appreciate your interest in Boards and Commissions. For further information contact the Boards and Commissions staff at (907) 465-3500 or at **boards@alaska.gov**.

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Alaska State Legislature

Senate

Office of the Secretary

Official Business

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:Julianna.Singh@legis.state.ak.us

Memorandum

TO: Cindy Smith
Judiciary Committee

FROM: Julianna Singh JCS
Assistant Secretary of the Senate

DATE: March 29, 2011

SUBJECT: Contact Info for Governor's Appointee
State Board of Parole - Sarah Possenti

The Office of the Governor, Boards and Commissions Office, has provided the following contact information (this info was redacted from the appointee's resume):

Sarah Possenti
1033 Pedro Street
Fairbanks, AK 99701
H 479-8087
C 460-6427

all @ gmail.com

This information is for the purpose of contacting the appointee to schedule hearings. **The information is not for public distribution. DO NOT post appointee contact information on BASIS or on the web.**

If there is a problem with the contact information, or if more information is needed, please contact Selina Kokotovich in the Boards and Commissions Office at:

PHONE: 907.465.3934
FAX: 907.465.8110
selina.kokotovich@alaska.gov

jcs

Alaska State Legislature

Senate

Office of the Secretary

Official Business

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:senate_secretary@legis.state.ak.us

Memorandum

TO: Senator French, Chair
Judiciary Committee

FROM: Kirsten Waid
Secretary of the Senate

DATE: March 28, 2011

SUBJECT: Confirmation of Governor's Appointment

Pursuant to AS 39.05.080, the President has referred the following name for legislative confirmation to your committee for a hearing, recommendation and report:

State Board of Parole
Sarah J. Possenti – Fairbanks
Appointed: 3/26/2011 Term Expires: 3/1/2013

Resume(s) will be transmitted electronically.

KW:jcs
gl #5

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary
committee name

Committee on Confirmation: Demboski, AK Comm on Judicial Conduct, dated 3-23-11
bill # / subject public hearing date

My name is David Haeg and I represent myself and my family.

I thank the Senate Judiciary Committee for the opportunity to speak today.

Ms. Demboski has stated that she applied to be a member of the Commission on Judicial Conduct because she is a public-minded individual with an interest in the law and, as such, wants to ensure fair and equitable treatment for all parties involved in court cases.
Given this assurance on her part, I would hope that if evidence of malfeasance on the part of a judge, the commission and/or its sole investigator came to light that she would follow-up on this evidence and see that the matter is fully vetted and not swept under the carpet, especially if the information was forwarded to the Commission by a Superior Court Judge and also provided to the Ombudsman.

I look forward to hearing her thoughts on this issue and trust that if confirmed she will indeed do the right thing and not fall prey to the "good ol' boy mentality" of cronyism in the face of judicial corruption and investigatory negligence.

Again, thank you to the Chair and the Committee members for taking my comments.

Signed:

David Haeg
Testifier

self
Representing (optional)

PO Box 123 Soldotna, AK 99669
Address

907-262-9249
Phone number

Cindy Smith

From: Hooley, Jason M (GOV) [jason.hooley@alaska.gov]
Sent: Tuesday, March 01, 2011 11:08 AM
To: Cindy Smith
Subject: RE: board application information

Cindy,

I double-checked, and we did not receive anything other than resumes (and in 2 of the cases, benign applications) from the applicants. We did not receive any letters of interest or endorsements for the Governor to consider.

Jason M Hooley
Director of Boards and Commissions
Office of Governor Sean Parnell

PO Box 110001
Juneau, AK 99811
PHONE: 907.465.3934
FAX: 907.465.8110

jason.hooley@alaska.gov
www.gov.alaska.gov/boards/
Follow the Governor on Facebook

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Tuesday, March 01, 2011 10:47 AM
To: Hooley, Jason M (GOV)
Subject: board application information

Hi Jason!

We have board confirmations for a number of folks this year. For three boards, I would like to get copies of letters of interest, letters of support, or other additional application materials for the nominees forwarded to the committee for consideration. They are:

Bill Granger, Alaska Bar Association
Amy Demboski, Alaska Judicial Conduct Commission
Don Haase, Alaska Judicial Council

Thanks,

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

Cindy Smith

From: Hooley, Jason M (GOV) [jason.hooley@alaska.gov]
Sent: Tuesday, March 01, 2011 11:42 AM
To: Cindy Smith
Subject: RE: board application information
Attachments: Demboski.pdf; Granger.pdf

Jason M Hooley
Director of Boards and Commissions
Office of Governor Sean Parnell

PO Box 110001
Juneau, AK 99811
PHONE: 907.465.3934
FAX: 907.465.8110

jason.hooley@alaska.gov
www.gov.alaska.gov/boards/
Follow the Governor on Facebook

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Tuesday, March 01, 2011 11:39 AM
To: Hooley, Jason M (GOV)
Subject: RE: board application information

Well, if I can get the applications, I guess that'll do it! Thanks --

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Hooley, Jason M (GOV) [mailto:jason.hooley@alaska.gov]
Sent: Tuesday, March 01, 2011 11:08 AM
To: Cindy Smith
Subject: RE: board application information

Cindy,

I double-checked, and we did not receive anything other than resumes (and in 2 of the cases, benign applications) from the applicants. We did not receive any letters of interest or endorsements for the Governor to consider.

Jason M Hooley
Director of Boards and Commissions
Office of Governor Sean Parnell

PO Box 110001
Juneau, AK 99811
PHONE: 907.465.3934
FAX: 907.465.8110

jason.hooley@alaska.gov

www.gov.alaska.gov/boards/
Follow the Governor on Facebook

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Tuesday, March 01, 2011 10:47 AM
To: Hooley, Jason M (GOV)
Subject: board application information

Hi Jason!

We have board confirmations for a number of folks this year. For three boards, I would like to get copies of letters of interest, letters of support, or other additional application materials for the nominees forwarded to the committee for consideration. They are:

Bill Granger, Alaska Bar Association
Amy Demboski, Alaska Judicial Conduct Commission
Don Haase, Alaska Judicial Council

Thanks,

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

Cindy Smith

From: Rebecca Hamon [rhamonbiz@yahoo.com]
Sent: Tuesday, March 01, 2011 11:40 AM
To: Cindy Smith
Subject: Re: Confirmation hearing March 9

I will be available to attend. Thanks.

Rebecca Hamon
907-246-7106
cell: 907-469-0344
SAFE cell: 907-439-2320
rhamonbiz@yahoo.com

From: Cindy Smith <Cindy_Smith@legis.state.ak.us>
To: "rhamonbiz@yahoo.com" <rhamonbiz@yahoo.com>
Sent: Mon, February 28, 2011 9:16:06 AM
Subject: Confirmation hearing March 9

The Senate Judiciary Committee is scheduling a confirmation hearing for Wednesday, March 9th at 1:30 p.m. I wanted to check with you to see if you are available on that date.

Let me know, and I will forward the toll-free call in number for you to use, and can answer any other questions you may have.

Thanks for volunteering to serve the State! I look forward to hearing from you.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

Cindy Smith

From: Dan and Peggy Morris [morris.dp@gmail.com]
Sent: Monday, February 28, 2011 9:38 AM
To: Cindy Smith
Subject: Re: Confirmation hearing March 9

Follow Up Flag: Follow up
Flag Status: Flagged

Cindy Smith: I am scheduled to be in attendance at a parole hearing at that time but I'm sure I could be excused by the chair to attend the confirmation . The parole hearings are scheduled for that full week. I will assume at this time that I can be available for the Committee hearing. Respecfully, Daniel Morris

----- Original Message -----
From: Cindy Smith
To: morrisdp@gmail.com
Sent: Monday, February 28, 2011 9:03 AM
Subject: Confirmation hearing March 9

The Senate Judiciary Committee is scheduling a confirmation hearing for Wednesday, March 9th at 1:30 p.m. I wanted to check with you to see if you are available on that date.

Let me know, and I will forward the toll-free call in number for you to use, and can answer any other questions you may have.

Thanks for volunteering to serve the State! I look forward to hearing from you.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

Cindy Smith

From: Kelly Alzaharna [kalz@barrow.com]
Sent: Monday, February 28, 2011 1:13 PM
To: Cindy Smith
Subject: RE: Confirmation Hearing March 9

Follow Up Flag: Follow up
Flag Status: Flagged

Yes Cindy, I am available at 1:30 pm on March 9, 2011. Thank you.

Kelly

-Kelly Alzaharna

On Mon, Feb 28, 2011 at 9:17 AM , Cindy Smith wrote:

The Senate Judiciary Committee is scheduling a confirmation hearing for Wednesday, March 9 th at 1:30 p.m. I wanted to check with you to see if you are available on that date.

Let me know, and I will forward the toll-free call in number for you to use, and can answer any other questions you may have.

Thanks for volunteering to serve the State! I look forward to hearing from you.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

Official Business

Alaska State Legislature

Senate

Office of the Secretary

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:senate_secretary@legis.state.ak.us

Memorandum

TO: Senator French, Chair
Judiciary Committee

FROM: Kirsten Waid
Secretary of the Senate

DATE: February 2, 2011

SUBJECT: Confirmation of Governor's Appointments

Pursuant to AS 39.05.080, the President has referred the following names for legislative confirmation to your committee for a hearing, recommendation and report:

Board of Governors of the Alaska Bar
William Granger – Anchorage
Appointed: 3/1/2011 Term Expires: 3/1/2014

Commission on Judicial Conduct
Amy Demboski – Chugiak
Appointed: 3/1/2011 Term Expires: 3/1/2015

Alaska Judicial Council
Donald Haase – Valdez
Appointed: 3/1/2011 Term Expires: 3/1/2017

State Board of Parole
Daniel Morris – Soldotna
Appointed: 3/1/2011 Term Expires: 3/1/2016

Alaska Police Standards Council
Kelly Alzaharna – Barrow
Appointed: 5/29/2009
Reappointed: 3/1/2011 Term Expires: 12/18/2014

Richard Burton – Ketchikan
Appointed: 12/18/2005
Reappointed: 4/2/2010 Term Expires: 12/18/2013

Rebecca Hamon – King Salmon
Appointed: 3/1/2011 Term Expires: 12/18/2014

Mark Mew – Eagle River
Appointed: 4/2/2010 Term Expires: 12/18/2013

Bernice Troglio – Anchorage
Appointed: 11/19/2008
Reappointed: 4/2/2010 Term Expires: 12/18/2014

Violent Crimes Compensation Board
Nora Barlow – Anchorage
Appointed: 3/1/2010
Reappointed: 3/1/2011 Term Expires: 3/1/2014

Resume(s) will be transmitted electronically.

KW:jcs
gl #2

Alaska State Legislature

Senate

Office of the Secretary

Official Business

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:senate_secretary@legis.state.ak.us

Memorandum

TO: Cindy Smith
Judiciary Committee

FROM: BR Ben Robinson
Deputy Secretary of the Senate

DATE: February 7, 2011

SUBJECT: Contact List for Governor's Appointee(s)

The Office of the Governor, Boards and Commissions Office, has provided the attached information for appointees requiring legislative confirmation. This contact information was redacted from the resumes and is strictly for the purpose of contacting appointees to schedule hearings.

The information is not for public distribution. DO NOT post appointee contact information in BASIS or on the web.

If there is a problem with the contact information, or if more information is needed, please contact Selina Kokotovich in the Boards and Commissions Office at:

PHONE: 907.465.3934
FAX: 907.465.8110
selina.kokotovich@alaska.gov

KW:bbr

Board	F Name	L Name	Address	City	State	Zip	Phone	Email
JUD								
Bar Association Board of Governors	Bill	Granger	13810 Jarvi Drive	Anchorage	AK	99515	907-345-1350	William.A.Granger@wellsfargo.com
Judicial Conduct	Amy	Demboski	P.O. Box 672114	Chugiak	AK	99567	907-301-9179	amydemb@hotmail.com
Judicial Council	Don	Haase	P.O. Box 3423	Valdez	AK	99686	907-835-3608	n/a
Parole Board	Daniel	Morris	30625 Stubblefield Drive	Soldotna	AK	99669	907-262-8374	morris.dp@gmail.com
Police Standards Council	Rebecca	Hamon	P.O. Box 71	King Salmon	AK	99613	907-246-7106	rhamonbiz@yahoo.com
Police Standards Council	Mark	Mew	3929 Birdsong Drive	Eagle River	AK	99577	907-694-0577	themews@mtaonline.net
Police Standards Council	Kelly	Alzaharna	P.O. Box 384	Barrow	AK	99723	907-852-7007	kalz@barrow.com
Police Standards Council	Richard	Burton	443 Forest Park Drive	Ketchikan	AK	99901	907-247-3334	n/a
Police Standards Council	Bernice	Troglio	4900 Cambridge Way	Anchorage	AK	99503	907-632-2633	n/a
Violent Crimes Compensation Board	Nora	Barlow	934 W 6th Avenue	Anchorage	AK	99501	907-279-9574	n/a

mews -
barlow
granger
demboski
haase

called haase 3/9/11 at 1045am

cell - Burton
617-3162

- Demboski
- Mew
- Barlow
- Haas

Hamon, Rebecca
Alaska Police Standards Council

Rebecca Hamon

Professional Experience

2008 – Present Safe and Fear Free Environment, Inc., Dillingham AK
Village/Legal Advocate: direct advocacy to victims of domestic violence and sexual assault within the Naknek court district, legal advocacy to victim witnesses and assistance to Assistant District Attorney during criminal trial proceedings, partnership with Bristol Bay Borough Police Department, Alaska State Troopers, Office of Children's Services and other agencies and organizations to provide assistance to victims, management of local shelter in King Salmon, and facilitation of support groups and activities to promote wellness in the communities of King Salmon, Naknek and South Naknek.

2004 – 2008 Lake & Peninsula Business Development Center dba Biz Solutions, King Salmon AK
Contract work: website design, graphic design, technical writing, document production assistance.

1993 – 1998 Hart Crowser, Seattle, WA
Environment engineering project management, database creation and maintenance.

1991 – 1993 Northwest Eye Center, Seattle WA
Records manager.

1990 – 1991 Mutual of Enumclaw, Enumclaw WA
Word processing, filing.

1989 – 1990 House of Fabrics, Burien WA
Store Manager.

1985 – 1989 House of Fabrics, Camarillo CA
Craft Department Manager, Assistant Manager.

Community Efforts

2008 - Present Bristol Bay Borough Chamber of Commerce, Secretary

2008 – Present Sockeye Swim League, Naknek AK, Treasurer

2006 – Present Volunteer teacher of art in the Bristol Bay Borough School, Naknek, Alaska.

2005 – Present Naknek River Community Choir, Naknek, AK, Secretary

Education

2006 Scottsdale Artists School, Scottsdale AZ

2004 Seattle Academy of Fine Art, Seattle WA

1992 Seattle Art Institute, Seattle WA

1989 Ventura County Community College, Ventura CA

1988 Graduate of Rio Mesa High School, Oxnard CA

Creative Interests

Fine arts, graphic design, fiber arts and traditional handwork, music.

Goals

I intend to grasp every opportunity for learning, growth and creativity, while continuing to fulfill my commitments to my family, friends and community.

Bernice "Berni" Troglio

Objective: Position with the Alaska Police Standard Council

SUMMARY OF QUALIFICATIONS

- Over 15 years of experience with substance abuse in program coordination and case management (6 years working with the sex offender criminal population and 3 years as a Mental Health Probation Supervisor)
- Strong organizational and case management skills with an attention to detail and the ability to master and apply new knowledge.
- Skilled in providing a confidential, safe, supportive, and non-judgmental environment while ensuring adherence to Local, State, and Federal policy guidelines.

TECHNICAL SKILLS & ABILITIES

Working knowledge of program coordination/case management procedures to include:

•Interviewing techniques •Individual/Group Counseling

•Understanding & Analyzing Individual/Group Human Behaviors

•Developing, implementing, and maintaining objectives for short and long-range plans with measurable indicators for improving statewide sex offender supervision.

Ability to:

•Meet and interview individuals.

•Interpret patterns among clientele in order to evaluate and analyze data in developing a therapeutic course in treatment or identification of social services if appropriate.

•Communicate effectively with clients and families in a manner that promotes respect and confidence.

•Analyze diverse situations and take prompt, effective action.

•Communicate verbally and in writing to a culturally diverse population.

•Analyze problem areas with regard to sex offender supervision, submit recommendations to the Director of Probation & Parole, and implement corrective action planning.

EMPLOYMENT HISTORY

Probation/Parole Officer II-III 1/99 – current

STATE OF ALASKA, DEPT OF CORRECTIONS Anchorage, AK

- Responsible for monitoring, instructing and demonstrating appropriate policy and procedures for Probation Officer II's and Community Counselors in the Mental Health and Sex Offender Units.
- Oversee case management of sex offenders by auditing probation officer's caseloads throughout the state for compliance with standard operating procedures and participating in weekly case reviews of sex offender probation cases.
- Supervise Adult Probation Officer II's with specialized caseloads of convicted sex offenders from various regions. Support and manage line officers as a trainer and mentor providing the latest information and best practices in the field of supervising sex offenders.
- Provide technical assistance to sex offender team members, Interstate Compact staff, victims of sexual assault, community groups, and others throughout the State.

- Continued -

STATE OF ALASKA, DEPT OF CORRECTIONS Cont'd

- Maintain training records for employees, monitor performance of staff, and observe work product to insure compliance with Department of Corrections Policy and Procedure.
- Develop, plan, coordinate, and schedule regular meetings to provide for consistent and accurate dissemination of information for the division and the department.
- Enforce policies and procedures, recommend disciplinary action, counsel staff on violation of Policy and Procedure, and write procedural memos to assure understanding of duties.
- Assist in the development of a model forensic polygraph program in Alaska to incorporate into the current supervision and treatment of sex offenders the development of the Containment Model.
- Research, organize, maintain, and disseminate a directory of approved polygraph examiners with specialized sex offender specific polygraph designations.
- Provide recommendations on contract awards, program development, practices and procedural development, and staff development.
- Respond to police inquiries and assist police officers and other probation officers with arrests, remands, and coordination of inquiry.
- Address grievances and questions from individuals or organizations following guidelines established by standard operating procedures and current contractual agreements.
- Develop and implement practices to improve statewide sex offender supervision, mental health services, and volunteer programming in Community Corrections.
- Monitor national literature and ensure that the Division is apprised of the most current trends in risk-management strategies for sex offenders.

Primary Counselor II 4/96 – 1/99
SALVATION ARMY CLITHEROE CENTER Anchorage, AK

- Managed cases at the 6th Avenue and Highland Mountain Correctional Centers.
- Provided educational and intervention services to incarcerated substance abusers.
- Prepared written case documentation and reports on a daily, monthly, quarterly, and annual basis.
- Performed therapeutic counseling, social work, and case management to residents in the chemical dependency unit.
- Coordinated individual client treatment plans to achieve individual and department rehabilitation goals.
- Participated in individual and group counseling sessions, educational classes, family counseling, didactic presentation, recreational therapy, and unit meetings.
- Determined, suggested, and participated in departmental in-service training.
- Compiled daily client data for funding requirements and maintained accurate treatment record.

- Continued -

EDUCATION

B.A., Psychology; Cum Laude – Alaska Pacific University (Anchorage, AK), 1994
A.A.S., Chemical Dependency Counseling; Deans List, Magna Cum Laude – Rio Salado Community College (Phoenix, AZ), 1992

PROFESSIONAL TRAINING

2006
•Sex Offender Containment Programming (Div. Probation & Parole)
•Serving Adult Offenders with Cognitively Impairments (Mental Health TrustJustice Initiative)
2005
•Effective Management of Sex Offenders (United States Department of Justice)
•Annual Training Institute-New York (America Probation Parole Association)
•Change Management, Team Building, Leadership Challenge Facilitation (Department of Administration (DOA)/Division of Personnel (DOP))
•CITRIX Computer, Courtroom Testimony 1, Interstate Compact Review, Legal Issues Clarification, Mental Health-Offender Supervision, Policy and Procedures/Case Management, Victim Issues, P and Procedures/ Search & Seizure, Searches/Home Visits, Sex Offender Supervision, Sex Offender Risk Assessment, (Department of Corrections (DOC))
•Director's Report, Supervisor Committee Reports, Public Safety Grants Development, Statewide Issues Discussion for Supervisors, Weekly Observation Report Planning (DOC-DPP)
•Legal Issues for POs (Dept of Law)
•Meth Lab Drug Training (Alaska State Troopers)
•FASD Southcentral Alaska Summit (State of Alaska Office of FAS)
2004
•DPP Supervisors Training (DOC/DPP)
•Interview Techniques-Organizational Learning, Valuing Diversity, Academy for New Supervisors, Organization Learning-Problem Solving Model, Performance Coaching, Discipline Process (DOA/DOP)
2003
•Crisis Intervention Team Training (Anchorage Police Department)
•22 Keys to Creating a Meaningful (State of Alaska (SOA) Labor Management Committee)
•Sex Offender Risk Assessment (DOC/DPP)
•Spirit of Change: Bringing Sexual Offender Assessment, Treatment, and Management Into the New Millennium (Dr. Roger Graves)
•Probation/Parole Officer Scenario Training, NIE Advanced Field Training Officer School, Weapons Retention (DOC)
•Joining Forces: Forming A Coordinated Community Approach to Domestic Violence (Dept Of Health and Human Services)

PROFESSIONAL MEMBERSHIP

- A member of the Internet Crimes Against Children (ICAC) Task Force since January 2008
- A member of the Child Safety Team – Formerly Multi-Disciplinary Team since March 2007

CERTIFICATIONS

Probation/Parole Officer Certification #1583-P

Issued through the AK Police Standards Council on Police Standards and Training

REFERENCES

Available upon request

Kelly Alzaharna

QUALIFICATIONS SUMMARY

Seasoned leadership executive with over 19-years experience in creating, developing, and executing strategic plans for assessment, consolidation, cost reduction, human resource allocation, team-building, training, and improving the value of organizations. Innovative leader and mentor, who displays solid convictions, morals, integrity, and business ethics.

PROFESSIONAL EXPERIENCE AND ACCOMPLISHMENTS

LEADERSHIP

- Leads subordinates by example, actively responding to calls for service and participating in high-risk situations. Possesses and demonstrates the ability to remain calm, prioritize information, provide accountability and make decisions in stressful situations.

- Actively solicits citizen input and participation through face-to-face interactions. Seeks cooperation and collaboration between agencies in continued efforts to improve community and organizational quality of life.

- Nominated and selected to attend the 198th Session of the FBI National Academy including participation and successful completion of the Bureau's inaugural Leadership Challenge program.

COMMUNICATIONS

- Highly skilled in verbal and hands-on presentations; effectively addresses and engages a wide variety of audiences, from students and elders to employees and administrators, promoting overall community and organizational goals.

- Consistently called upon to write policy and operational procedures for an organization whose daily mission is the safety and protection of the communities it serves.

- Facilitates problem-solving meetings and employee performance discussions, generating employee input and involvement regarding organizational concerns.

TRAINING AND INSTRUCTION

- Dedicated to the safety of police officers and community members through the development and implementation of organized, engaging, and innovative training. Has conducted over 1500 hours of instruction in topics ranging from community/police partnerships, leadership, use of force, firearms, control tactics, report writing, and field training officer programs.

- Created and implemented the North Slope Borough Police Department's Field Officer Training Program. This program is used as the current standard for "department specific " training programs for the Alaska Police Standards Council, the certifying agency for police officers in the State of Alaska.

Kelly Alzaharna

TRAINING AND INSTRUCTION (cont.)

- Develops and delivers presentations at international seminars for the American Society of Law Enforcement Trainers, addressing participants from the U.S. and international communities. Provided "Focus on Leadership" interviews for the FBI National Academy in Quantico, Virginia.

EDUCATION

MASTER OF ARTS – ORGANIZATIONAL LEADERSHIP
Azusa Pacific University **May 2005**
GPA 4.0

FBI NATIONAL ACADEMY – 198TH SESSION
Federal Bureau of Investigation **July-September 1999**

BACHELOR OF BUSINESS ADMINISTRATION – HUMAN RESOURCE MANAGEMENT
New Mexico State University **June 1985**

PROFESSIONAL WORK HISTORY

NORTH SLOPE BOROUGH POLICE DEPARTMENT

Chief of Police **March 20, 2008-Present**

Field Operations Division Commander **September 2007-March 2008**

Training Coordinator (Lieutenant) **January 2006-September 2007**

Organized, scheduled and assigned training for all Department employees. Taught law enforcement topics at the Department and Academy level. Carried out recruiting and hiring responsibilities.

Patrol Unit Lieutenant (Barrow and Villages) **December 2003–January 2006**

Orchestrated the successful transition of two separate operating units in to one cohesive corps of officers responsible for providing basic police services to all North Slope Borough communities.

Acting Field Operations Commander (as assigned) **1997-Present**

Tactical Team Leader **1997-2004**

Commanded the specialized team responsible for peaceful resolutions of high-risk incidents involving barricaded suspects, hostage situations, and drug interdictions without injury or death to citizens or officers.

Kelly Alzaharna

PROFESSIONAL WORK HISTORY (cont.)

Department Armorer **1992–Present**

Barrow Unit Lieutenant **February 2000–December 2003**

Worked in conjunction with shift supervisors and line officers to set realistic, consistent, and attainable goals for community interaction and case investigations.

Assistant Tactical Team Leader **1996-1997**

Investigations Unit Lieutenant/Sergeant **April 1997–February 2000**

Worked collaboratively with police officers, investigators, tactical team members and citizens by encouraging direct contact between units resulting in the safe seizure of illegal substances and the successful prosecution and conviction of multiple known drug and alcohol traffickers.

Barrow Unit Corporal **April 1995–April 1997**

Mentored shift personnel through supervisory support and setting an example.

Training Unit Corporal **February 1991-April 1995**

Established the department's training unit, forming a pool of employee instructors and composing and teaching eleven lesson plans designed to provide Alaska Police Standards Council certified training utilizing available department resources.

Barrow Unit Police Officer **July 1990–February 1991**

NEW MEXICO STATE UNIVERSITY POLICE DEPARTMENT
Police Officer **April 1989–June 1990**

LAS CRUCES POLICE DEPARTMENT
Police Officer **July 1987–March 1989**

Kelly Alzaharna

COMMUNITY INVOLVEMENT

Arctic Women In Crisis
Vice-Chairperson, Advisory Board — **January 2009–Present**

ASSETS Steering Committee
Member — **July 2005-July 2006**

North Slope Borough Breakthrough Committees
Facilitator and Team Member — **2000-2004**

Alaska Special Olympics
Law Enforcement Torch Run Regional Coordinator — **1995-Present**

Barrow High School Lady Whalers
Assistant Varsity Basketball Coach — **December 2002–April 2004**

Child Abuse Task Force
Panel Member — **December 1990-July 1991**

Suicide Prevention Task Force
Panel Member — **November 1990-April 1991**

PROFESSIONAL AFFILIATIONS

International Association of Chiefs of Police (IACP) — **2005-Present**
Member

National Association of Women Law Enforcement Executives
Member — **2005-Present**

National Law Enforcement and Corrections Technology Center — **2001-2004**
Board Member

National Commission on Law Enforcement Integrity — **2002-2004**
Committee Chairperson, Hiring and Retention Committee

FBI National Academy Associates
Vice President, Alaska Chapter and Member — **2000-Present**

Alaska Association of Chiefs of Police
Member — **1999-Present**

Women Police of Alaska
Past Vice President and Board Member — **1996-Present**

Alaska Peace Officers Association
Member — **1991-Present**

Kelly Alzaharna

PROFESSIONAL REFERENCES

Harold Curran
Chief Administrative Officer, North Slope Borough
907-852-0358
harold.curran@north-slope.org

Edward S. Itta
Mayor, North Slope Borough
907-852-0300
edward.itta@north-slope.org

Kelly Alzaharna

TRAINING AND CERTIFICATIONS

STATE CERTIFICATIONS

Advanced Police Certification
Alaska Police Standards Council — **September 1993**

Police Instructor Certification
Alaska Police Standards Council — **September 1991**

Intermediate Police Certification
Alaska Police Standards Council — **September 1991**

Basic Police Certification
Alaska Police Standards Council — **July 1991**

Alaska Police Standards Council Recertification
Alaska Police Standards Council — **October 1-12, 1990**

Police Officer Certification
New Mexico Law Enforcement Training Academy — **September 1987**

Kelly Alzaharna

LEADERSHIP/SUPERVISORY TRAINING

Leadership — **February 2009**
Val Van Brocklin

Executive Development Training — **December 5-9, 2006-Present**
FBINAA and Alaska Association of Chiefs of Police

Developing Police Policies and Procedures
Public Agency Training Council — **February 8-9, 2005**

Intermediate Incident Command
Homeland Security & Emergency Management — **February 26-27, 2004**

Risk Management/Critical Policy Development for Law Enforcement
Penn State — **December 4-5, 2003**

Incident Command System
Alaska Chadux Corporation — **November 19, 2003**

Executive Development Training
FBINAA and Alaska Association of Chiefs of Police — **December 5-9, 2000-2003**

Contract Procedures
NSB Law Department — **December 5-6, 2000**

Leadership Challenge
Federal Bureau of Investigations National Academy — **July 3 – September 24, 1999**

Budgeting for Law Enforcement Executives
FBINA/University of Virginia — **July 3 – September 24, 1999**

Grant Writing
FBINA/University of Virginia — **July 3 – September 24, 1999**

Police Executive Legal Issues
FBINA/University of Virginia — **July 3 – September 24, 1999**

Futuristics in Law Enforcement
FBINA/University of Virginia — **July 3 – September 24, 1999**

Advanced Field Training Officer Programs
Kaminsky & Associates, Inc. — **January 30 – February 3, 1995**

School of Police Supervision
The Southwestern Law Enforcement Institute — **October 3-28, 1994**

Police Use of Force Liability
Institute of Liability Management — **May 27, 1992**

Kelly Alzaharna

LEADERSHIP/SUPERVISORY TRAINING (cont.)

Understanding Personnel Law
Council on Education in Management — **April 2-3, 1992**

EEO in the Changing Alaskan Workplace
Alaska EEO — ***January 16, 1992***

How to Train and Orient Employees
KEYE Productivity Center — **November 4, 1991**

Tom Peters' Excellence
CareerPath — **November 1, 1991**

Achieving Excellence
NMDPS Training and Recruiting — **April 11-12, 1990**

First Line Supervision of Police Personnel
Northwestern University — ***November 7-11, 1988***

Kelly Alzaharna

INSTRUCTOR CERTIFICATIONS

American Society of Law Enforcement Trainers International Seminars
ASLET **1992-Present**

Field Training Officer Train-the-Trainer
Kaminsky & Associates **1997-Present**

OC Aerosol Projectors, Chemical Munitions, Specialty Impact Munitions and Distraction Devices Instructor
Defense Technology Corporation of America **1997-Present**

Control/Defensive Tactics Instructor
National Law Enforcement Training Center **1997-Present**

Firearms Training Systems Instructor (FATS)
FATS, Inc. **1998-Present**

Handgun/Long Gun Retention and Disarming Instructor
National Law Enforcement Training Center **1997-Present**

Power Handcuffing Instructor
National Law Enforcement Training Center **1997-Present**

Ground Defensive/Control Tactics Instructor
National Law Enforcement Training Center **1997-Present**

Shotgun Instructor
Federal Bureau of Investigations **1995-Present**

Tactical Baton Instructor
Armament Systems and Procedures, Inc. (ASP) **1995-Present**

Mandt System for Managing People – Intermediate Instructor
David Mandt & Associates **1994-1997**

Community/Problem Oriented Policing Instructor
Police Executive Research Forum **1994-1997**

Hazardous Materials Operations for First Responders Instructor
State of Alaska DPS Fire Service **1993-Present**

Hazardous Materials Awareness for First Responders Instructor
State of Alaska DPS Fire Service **1993-Present**

Defensive Tactics Instructor
NM/DPS Training & Recruiting **1992-Present**

Kelly Alzaharna

INSTRUCTOR CERTIFICATIONS (cont.)

Glock Firearm Instructor
Glock, Inc. **1992-Present**

Oleoresin Capsicum (OC) Instructor
REB Security, Inc. **1992-Present**

Field Training Officer Program Instructor
NSB/DPS **1991-Present**

Village Police/School Liaison Instructor
NSB/DPS **1990-Present**

Police Physical Fitness Instructor
The Cooper Institute **1990-Present**

Instructor Development
Webber & Associates ***1988-Present***

Kelly Alzaharna

INVESTIGATIONS TRAINING

Law Enforcement Background Investigations *Ken Betterton, Betterton Inc.*	**April 20-22, 2009**
Computer Voice Stress Analysis Examiner (CVSA) *National Institute for Truth Verification*	**June 8-12, 2004**
Search and Seizure/Miranda Issues *Alaska Police Standards Council*	**March 26, 2001**
Rave Clubs – Designer Drugs *Alaska Counterdrug Task Force*	**December 12, 2000**
Forensic Science *FBINA/University of Virginia*	**July 3 – September 24, 1999**
Basic Drug Enforcement School *U.S. Drug Enforcement Administration (DEA)*	**May 18-22, 1998**
Narcotics Identification *ODV, Inc.*	**May 18, 1998**
Asset Forfeiture for Officers and Investigators *U.S. Department of Justice*	**November 13-14, 1997**
Death Investigation *Alaska Police Standards Council*	**March 27, 1997**
Search Warrants *NSB/DPS*	**February 15, 1995**
Crime Scene and Physical Evidence *State of Alaska Crime Lab*	**February 1-4, 1993**
Advanced Interviewing and Interrogations *John E. Reid and Associates*	**April 9-10, 1992**
Interviewing and Interrogations *John E. Reid and Associates*	**April 6-8, 1992**
Child Sexual Abuse Investigative Techniques *Rollie Port Investigations*	**November 2-6, 1990**
Interviews and Interrogations *Institute of Police Technology and Management (IPTM)*	**September 25-29, 1989**

Kelly Alzaharna

TACTICAL TRAINING

Applications & Development Program in Tactical Command
Operational Tactics — **November 10-12, 2003**

Active Shooter in Schools
Anchorage Police Department — **April 2, 2002**

Bomb Identification and Searches
U.S. Army — **February 18, 1998**

MP5-Rifle-BenelII-USP Armorer
Heckler & Koch, Inc. — **January 13-17, 1997**

Advanced Special Weapons and Tactics (SWAT)
Alaska State Troopers — **August 7-11, 1995**

Special Weapons and Tactics (SWAT)
Alaska State Troopers — **May 22-24, 1995**

Hostage Negotiations
Federal Bureau of Investigations — **December 9-13, 1991**

Kelly Alzaharna

GENERAL LAW ENFORCEMENT TRAINING

Emergency Crime Scene Responder
Powerphone — **January 25-26, 1999**

Remington Armorer
Remington Arms, Co., Inc. — **September 26-30, 1996**

Domestic Violence Injury Documentation
Polaroid School of Law Enforcement Imaging — **January 18-19, 1996**

Commercial Drivers License Traffic Enforcement
State of Alaska DPS — **May 15, 1995**

Open Communication
Dr. Dave Smith — **November 10, 1994**

Community/Problem-Oriented Policing – Line Staff
Police Executive Research Forum — **March 16, 1994**

Glock Armorer
Glock, Inc. — **June 28, 1992**

Community Response Teams in Village Settings
North Slope Borough — **February 19-20, 1992**

Problem Oriented Policing
Police Executive Research Forum — **November 5-8, 1991**

Youth Gang Violence
Anchorage Police Department — **October 29-30, 1991**

How to Manage Projects
SkillPath — **October 21, 1991**

Managing Multiple Projects, Objectives and Deadlines
SkillPath — ***September 30, 1991***

Field Training Officer Program
NSB/DPS — **August-November 1990**

Standardized Field Sobriety Testing
City of Las Cruces PD — **December 14-15, 1989**

Traffic Radar Operations
Kustom Dopier Electronics — **April 19, 1989**

Morris, Daniel

State Board of Parole

Daniel Morris

Objective: **State of Alaska Parole Board**

Summary Of Qualifications: Nine years experience as Kenai Police Chief managing Police, Communications and Animal Control Departments.

Twenty three years law enforcement experience, civilian and military.

Nine years serving as a board member Kenai/Soldotna Women's Resource Crisis Center.

Four years serving on the Alaska Police Standards Council, several years as vice chair and chair.

Nine years as a member of the Kenai Peninsula Borough E911 Board.

Professional Experience: **1993-2002 (ret.) Police Chief, City of Kenai Alaska**

Administered and managed Police, Communications and Animal Control Departments employing 25 personal.

Established department goals and policies, managed personnel and material resources, directed training and recruitment.

Served on boards and advisory groups addressing local issues pertaining to domestic violence, drug abuse and juvenile delinquency.

1988-1993 Investigations Supervisor, Kenai Police

Managed investigations personnel.
Coordinated criminal investigations.

Worked with multi-agency task forces addressing drug enforcement and major crimes.

Helped establish Drug Abuse Resistance Education (DARE) with local school district.

Worked as Crime Stoppers coordinator.

1985-1988 Patrol Sergeant, Kenai Police
Supervised patrol officers responsible for law enforcement duties.

Coordinated schedules and training.

Established Field Training Officers program.

1982-1985 Patrol Officer, Kenai Police
Performed law enforcement duties. Served as field training officer for recruits.

1973-1976 US ARMY Military Police
Performed law enforcement duties.

Education:

1990 FBI National Academy
Police management studies, University of Virginia

1979-1981 Southern Oregon University, Ashland, OR
BA Criminology

1977-1979 Chemeketa Community College, Salem, OR
AS Criminal Justice Administration

Professional Memberships:

Alaska Association Chiefs of Police
National Association Chiefs of Police

FBI National Academy Associates, Alaska Chapter
Alaska Peace Officers Association

Community Activities:

Kenai/Soldotna Women's Resource Crisis Center
Board of Directors, nine years

Worked with other board members and executive director to provide budget and program over-site.

Helped establish goals and policies to provide assistance and services to victims of domestic violence and sexual assault.

Board responsible for hiring executive director and approval of operations budget.

Kenai Peninsula E911 Board
Board member, nine years

Worked with other police, fire, borough managers to provide enhanced E911 services to entire borough.

Addressed issues pertaining to establishment and expansion of E911 system coordinating with state, borough, city agencies and local phone service providers.

Alaska Police Standards Council
Chair, Vice Chair, member four years

Council was responsible to oversee police and correctional officers hiring qualifications, certifications, and training requirements.

Issued and revoked certifications.

Made recommendations for Alaska Administrative Code revisions pertaining to APSC responsibilities.

Conducted public meetings coordinated with police chiefs, department of corrections managers, and APSC executive director in carrying out APSC duties.

Post Retirement: **2002-Present**

Majority of time has been spent building personal homes and developing property.

Volunteering on other building projects.

Working part-time November 2002 to present as a security officer at the Conoco/Phillips LNG plant in Kenai.

Boards & Commissions Factsheets

AK BAR ASSOCIATION - GOVERNORS

Board: Board of Governors of the Alaska Bar Association
Board identification number: 010

Department: OFFICE OF THE GOVERNOR

Authority: AS 08.08.040; Chapter 196, SLA 1955

Status: Active

Sunset date: 6/30/2013

Requirements: Legislative Confirmation

Prohibitions: None

Term: 3 years

Description: 12 members: 3 non-attorneys appointed by Governor: (subject to legislative confirmation); plus 9 active members (Alaska Bar) elected by active members of Alaska Bar (2 from 1st judicial district, 4 from 3rd judicial district, 2 from 2nd/4th judicial districts and 1 at-large); triennial rotation regarding judicial districts used for appointments (see statute).

Function: Governs Alaska Bar; administers Bar exam; approves/recommends rules concerning practice of law to State Supreme Court; provides disciplinary actions; provides continuing legal education and membership services.

Chair: Members select.

Special facts: Annual report to Legislature. Legislative confirmation required for public members only.

Compensation: Standard Travel and Per Diem.

Meetings: 4 times per year; 2 day meetings; 8 days total.

For further information contact:
Ms. Deborah O'Regan
Executive Director
P.O. Box 100279
550 W. 7th Ave. Ste. 1900 (physical address only)
Anchorage, AK 99510-0279
Phone: (907) 272-7469, FAX: (907) 272-2932

Ak Bar Association - Governors Roster

Go to the Ak Bar Association - Governors Home page

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Boards & Commissions Roster

AK BAR ASSOCIATION - GOVERNORS (010)

Member	Date Appointed	Reappointed	Term Expires
Mark Andrews Active Member/AK Bar/2nd/4th JD 1648 Cushman, Suite 300 Fairbanks, AK 99701-6228	5/15/2009		5/15/2012
Alexander O. Bryner, Esq. At Large Feldman Orlansky & Sanders 500 L Street, Fourth Floor Anchorage, AK 99501	5/15/2010		5/15/2013
David L. Eichler, DMD Public 3375 Badger Road, Suite 1 North Pole, AK 99705	3/1/2009		3/1/2012
Carl L. Ekstrom Public Anchorage Sportsplex, Inc. 6689 ChangePoint Drive Anchorage, AK 99518	1/29/2008		3/1/2011
Loren P. Hildebrandt New Lawyer Liaison Palmer & Erwin, LLC 121 W. Fireweed Lane, Suite 208 Anchorage, AK 99503	5/15/2010		5/15/2013
Peter J. Maassen, Esq. Active Member/AK Bar/3rd JD 813 West Third Avenue Anchorage, AK 99504-2001	5/15/2009		5/15/2012
Donald W. McClintock, III, Esq. Active Member/AK Bar/3rd JD	5/15/2008		5/15/2011

1227 West Ninth Avenue, Suite 200 Anchorage, AK 99501			
Donald McLean Public 3719 East Meridian Loop, Suite B Wasilla, AK 99654	3/1/2007	3/1/2010	3/1/2013
Michael A. Moberly Active Member/AK Bar/3rd JD 310 K Street, Suite 405 Anchorage, AK 99501	5/15/2010		5/15/2013
Mitchell A. Seaver Active Member/AK Bar/1st JD Ziegler Law Firm 307 Bawden Street Ketchikan, AK 99901	5/30/2006		5/15/2009
Hanna Sebold Active Member/AK Bar/1st JD P.O. Box 110300 Juneau, AK 99811	5/15/2008		5/15/2011
Krista S. Stearns Active Member/AK Bar/3rd JD City Attorney's Office-Kenai 210 Fidalgo Avenue Kenai, AK 99661-7794	5/15/2010		5/15/2013
Jason A. Weiner Active Member/AK Bar/2nd/4th JD P.O. Box 71671 Fairbanks, AK 99707-1671	6/30/2005	5/15/2008	5/15/2011

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Granger, William
Board of Governors of the Alaska Bar

RESUME

WILLIAM. A. GRANGER

Anchorage Resident from 1964

Employment History:

Matanuska Valley Bank 1970 – 1972, 1974 - 1978
Various paying and receiving duties. Branch Manager, SBA Lender, Manager of Consumer Loan Department

Washington Trust Bank, Spokane Washington 1972 – 1974 Vault Teller

National Bank of Alaska 1978 – 1984
Vice President, Manager Commercial Special Credits (loan workout)

Alaska National Bank of The North (purchased by NBA) 1984 – 1987
Senior Vice President, Manager Special Credits (loan workout)

National Bank of Alaska (NBA)
1987 – 1992
Vice President, Manager Commercial Special Credits (loan workout)
Instructor American Institute of Banking, Anchorage Community College

1993 – 1999
Senior Vice President, Senior Credit Administration. Senior lending officer.
Lending Limit 45MM

Wells Fargo Bank Alaska (formally NBA)
1999 – 2001
Senior Vice President, Senior Regional Credit Officer

Wells Fargo Bank N.A.
2002 to present
Senior Vice President, Deputy Senior Regional Credit Officer
Manager, Credit Management Group, Supervising the following states with 28 officers in ten offices:
Alaska, Iowa, Nebraska, North and South Dakota, Indiana, Ohio, Illinois, Washington and Oregon.

Education:

Diamond High School, Anchorage Alaska 1972
Anchorage Community College, various banking Classes 1970 – 1982
Gonzaga University, Spokane Washington 1972 – 1974
Graduate of Pacific Coast Banking School, University of Washington 2000 – 2003
Graduate of Mendoza College of Business, University of Notre Dame, Catholic Charities Management 2008

Licenses:

Private Pilot License SEL/SES, Complex and HP
Alaska Real Estate Salesman (expired)
PADA Scuba Diver

Public Service

Alaska Bar Association Board of Governors, Vice President 2000-2009
Recipient of the Lay persons award for service to the Bar 2009
Anchorage Center for Families Board Member 1993-1999
Make-A-Wish Alaska President of Board 1998-2001
Catholic Social Services, Chairman of the Board of Trustees 2006-2009

Bar, Board of Governors of the Alaska — **william Arnold Granger**

General Information

Board/Commission and seat you are seeking:
Bar, Board of Governors of the Alaska, Board member

Additional Boards/Commissions of interest:

State Boards/Commissions on which you have served
Bar, Board of Governors

First	*Middlename*	*Last Name*
william	**Arnold**	**Granger**

Mailing Address	*City*	*State & ZIP*
13810 Jarvi Drive	**Anchorage**	**AK 99515**

Home/Message Phone	*Business Phone*	*Cell Phone*
907-345-1350	**907-265-2114**	**907-244-0416**

Email Address	*Are you a registered voter?*
William.a.granger@wellsfargo.com	**Yes**

Date of Birth	*Ethnicity*
1953-06-10	**White**
Gender	
Male	
Military Service	

Conflict of Interest

Certain boards and commissions require full disclosure of personal financial data under AS 39.50.010. If required for the board or commission for which you are applying, are you willing to do so?
Yes

Could you or any member of your family be affected financially by decisions to be made by the board or commission for which you are applying?
No

Please explain the potential financial benefit

Employment History

Employment work history including paid, unpaid or voluntary.
see resume

Education, Training, Experience & Qualifications

List both formal and informal education and training experiences:
see resume

List any professional licenses, certifications, or registrations and dates obtained that may be used as qualifying criteria:
see resume

List any community service, municipal government, and state positions held, and any awards received.
see resume

Have you ever been convicted of a misdemeanor within the past five years or a felony within the past ten years?
No

Conviction Circumstances

Certification of Accuracy & Completeness

By submitting this online application, I swear the information I have entered on this form is true to the best of my knowledge. I understand that if I deliberately conceal or enter false information on the form my application may be rejected, I may be removed from the list of eligible candidates, or I may be removed from the position. I agree that the Office of the Governor may contact present or former employees or other persons who know me to obtain an additional information about my skills and abilities. I understand that the information on this application is public information and may be released through a legal request for such information.

Type "I certify"
"I certify"

Resumé Addendum
RESUME

WILLIAM. A. GRANGER

Anchorage Resident from 1964

Employment History:

Matanuska Valley Bank 1970 – 1972, 1974 - 1978
Various paying and receiving duties. Branch Manager, SBA Lender, Manager of Consumer Loan Department

Washington Trust Bank, Spokane Washington 1972 – 1974 Vault Teller

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Vice President, Manager Commercial Special Credits (loan workout)

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Senior Vice President, Manager Special Credits (loan workout)

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1993 – 1999
Senior Vice President, Senior Credit Administration. Senior lending officer.

Wells Fargo Bank Alaska (formally NBA)
1999 – 2001
Senior Vice President, Senior Regional Credit Officer

Wells Fargo Bank N.A.
2002 to present
Senior Vice President, Deputy Senior Regional Credit Officer
Manager, Credit Management Group, Supervising the following states with 28 officers in ten offices:

Alaska, Iowa, Nebraska, North and South Dakota, Indiana, Ohio, Illinois, Washington and Oregon.

Education:

Diamond High School, Anchorage Alaska 1972
Anchorage Community College, various banking Classes 1970 – 1982
Gonzaga University, Spokane Washington 1972 – 1974
Graduate of Pacific Coast Banking School, University of Washington 2000 – 2003
Graduate of Mendoza College of Business, University of Notre Dame, Catholic Charities Management 2008

Licenses:

Private Pilot License SEL/SES, Complex and HP
Alaska Real Estate Salesman (expired)
PADA Scuba Diver

Public Service

Alaska Bar Association Board of Governors, Vice President 2000-2009
Recipient of the Lay persons award for service to the Bar 2009
Anchorage Center for Families Board Member 1993-1999
Make-A-Wish Alaska President of Board 1998-2001
Catholic Social Services, Chairman of the Board of Trustees 2006-present

William (Bill) Granger
13810 Jarvi Drive
Anchorage, Akaska
99515
907-345-1350 Home
907-265-2114 Work

Press Release Wording

{Your Name}, {age} of {hometown}, is {job title/place of employment} holds {education level, school, or relevant experiences}.

Submitted: 11/29/10 at 1:27 pm from 151.151.7.53

Cindy Smith

From: Theresa Nangle Obermeyer [tobermeyer@gci.net]
Sent: Monday, February 07, 2011 8:54 AM
To: Sen. Hollis French
Cc: Lila Hobbs; Andy Moderow; Kristen Peterson; Cindy Smith; Thomas S. Obermeyer, Attorney
Subject: Nomination of Mr. William Granger, Wells Fargo, to Alaska Bar Association Board of Governors 3/1/11

Senator French and Staff:

This is to oppose the appointment of Mr. William Granger, Wells Fargo, as a "Public Member" again to Alaska Bar Association Board of Governors for a term of three years from 3/1/2011 to 3/1/2014. To my memory, Mr. Granger was appointed as a "Public Member" to Board of Governors originally by Governor Tony Knowles for the three year term and again appointed by Governor Frank Murkowski for another three year term. He has already served on Board of Governors for two consecutive terms. He was replaced for one three year term and now is supposed to serve again for anther three year term. Mr. Granger has not and will not be on Alaska Bar Association Board of Governors to serve the public. He has been and will be on Board of Governors only to serve Wells Fargo Bank.

Please let me know if I should call in to testify against Mr. Granger's appointment.

I will call you office.

Sincerely yours,

Theresa Nangle Obermeyer
3000 Dartmouth Drive
Anchorage, Alaska 99508-4413
(907)278-9455 Phone/Fax/Msg.

Boards & Commissions Factsheets

POLICE STANDARDS COUNCIL

Board: Alaska Police Standards Council
Board identification number: 081

Department: DEPARTMENT OF PUBLIC SAFETY

Authority: AS 18.65.140

Status: Active

Sunset date:

Requirements: Legislative Confirmation

Prohibitions: None

Term: 4 years

Description: 13 members: 11 appointed by the governor. The council consists of the following persons: 4 chief administrative officers or chiefs of police of local governments; the commissioner of public safety or a designee; the commissioner of corrections or a designee; 2 persons, each of who has been certified for 5 years or more by the council under this chapter, one of whom serves as a police officer and one of whom serves as a probation officer, parole officer, municipal correctional officer, or correctional officer; 1 correctional administrative officer who is employed at the level of deputy director or higher; and, 4 members of the public at large with at least 2 from the communities of 2,500 population or less.

Function: Establishes and enforces minimum standards for employment, certification, training and retention of police, correctional, probation, parole and municipal correctional officers; adopts regulations; investigates potential misconduct issues related to potential decertification of officers.

Chair: Board selects.

Special facts: Notwithstanding AS 18.65.160, the governor shall specify the terms of the person appointed under AS 18.65.150(4), added by sec. I of this Act, to the Alaska Police Standards Council, as follows: (1) one person shall be appointed for a two-year term; and (2) one person shall be appointed for a four-year term

Compensation: Standard Travel and Per Diem. No additional compensation.

Meetings: Normally 2 times per year – additional special meetings as required; 8 days maximum per year

For further information contact:
Terry Vrabec
Director
Alaska Police Standards Council
DPS, P.O. Box 111200 M/S 1200
Juneau, AK 99811-1200
Phone: (907) 465-5523, FAX: (907) 465-3263

Police Standards Council Roster

Go to the Police Standards Council Home page

Boards & Commissions Roster

POLICE STANDARDS COUNCIL (081)

Member	Date Appointed	Reappointed	Term Expires
VACANT Public/Restricted			12/18/2009
Kelly C Alzaharna Chief/Admin. North Slope Borough Police Department P.O. Box 384 Barrow, AK 99723	5/29/2009		12/18/2010
Richard Burton Public 443 Forest Park Drive Ketchikan, AK 99901	12/18/2005	4/2/2010	12/18/2013
William "Middy" Johnson Public/Restricted P.O. Box 222 Unalakleet, AK 99684	2/19/2008		12/18/2011
Charles T.C. Kamai Chief/Admin. Kodiak Police Department 217 Lower Mill Bay Road Kodiak, AK 99615	4/30/2004	2/19/2008	12/18/2011
Thomas (Bob) R. Kean Public Doyon Universal Services 701 West Eigth Avenue, Suite 500 Anchorage, AK 99501	11/22/2005	11/19/2008	12/18/2012
Joseph A Masters Commissioner/Public Safety/Designee Department of Public Safety 5700 E. Tudor Road	9/12/2008		

Anchorage, AK 99507			
Mark T Mew Chief/Admin. Anchorage Police Department 4501 Elmore Road Anchorage, AK 99507	4/2/2010		12/18/2013
Joseph D Schmidt Commissioner/Corrections/Designee Department of Corrections P.O. Box 112000 Juneau, AK 99811	12/4/2006		
Sheldon Schmitt Chief/Admin. Sitka Police Department 304 Lake Street, Room 102 Sitka, AK 99835	2/19/2008		12/18/2011
Bernice A. Troglio Certified Officer/Probation Department of Corrections Anchorage, AK 99503	11/19/2008	4/2/2010	12/18/2014
Freddie L Wells Jr. Certified Officer/Police Alaska State Troopers P.O. Box 251 .3 Mile Sundog Trail Tok, AK 99780	11/19/2008		12/18/2012
Donna E. White Correctional Administrative Officer Department of Corrections Division of Probation & Parole 4500 Diplomacy Drive, Suite 109 Anchorage, AK 99508	3/23/2007	7/11/2008	12/18/2012

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Burton, Richard
Alaska Police Standards Council

Richard L. Burton

Public Safety Consultant: 1995 - Present

Owner and principal consultant of business of management audits, background investigations, internal affairs, administrative investigations, locating and providing temporary personnel, recruit selection and all services relative to operating and managing police or public safety agencies.

Commissioner of Public Safety: 1991 - 1995 State of Alaska, Department of Public Safety

Chief administrator of all state public safety functions. Responsible for budget in excess of $100 million and over 900 employees. Functions included the Divisions of State Troopers, Fish and Wildlife Protection, Motor Vehicles, Fire Prevention, and Administrative Services. Related functions included State Training Academy, State Crime Lab, Highway Safety Planning, and Police Standards Council.

Burton & Associates 1988 - 1990

Started Public Safety Management consulting business. Stopped in 1991 to accept appointment by Governor as Commissioner of Public Safety.

Alaska Security, Inc. 1985 - 1988

President and co-owner of a full service security and armored car company. Started the company with 1 employee and built it to over 100 employees and 3 armored vehicles.

Private Consultant 1983 - 1985

Consultant to various law firms on issues related to lawsuits involving police practices and procedures.

Justice Services Administrator 1981 - 1982 Warm Springs Indian Reservation. Warm Springs, Oregon Chief Administrator for all law enforcement including criminal laws and natural resource protection. Administered the operation of the tribal prosecutor, legal aides, and the tribal jail.

Police Specialist/planner 1979 - 1980 U.S. Dept. of Justice, Criminal Justice Planning Agency

Under contract worked with the Commonwealth of the Northern Marianna Islands at Saipan. Provided technical assistance in Public Safety management and operations. This included manpower allocation, training, job description and reporting development and instituting basic police practices. Restructured employee compensation benefits, management training and policies and procedures.

Commissioner of Public Safety 1975 – 1979 State of Alaska, Department of Public Safety

First appointment as Commissioner and Chief Administrator of State Public Safety functions including the State Troopers, Fish & Wildlife Protection, DMV, State Fire Marshal, Training Academy and enforcement of all state criminal laws.

Chief of Police 1973 - 1974 City and Borough of Juneau, Alaska

Administrator over all municipal police functions, provided law enforcement within the cities of Juneau and Douglas, Alaska.

Public Safety Advisor 1971 – 1973 U.S. State Department, AID, Republic of South Vietnam

Consulted and trained Provincial Police Command in implementation of modern management principles. Command consisted of 1 Province and 7 District police stations and corrections centers with 1,800 police personnel. Corrections centers exceeded 1,000 inmates. Coordinated emergency procedures to react to terrorist activities against the civilian population.

Sergeant, Lieutenant, Captain 1959 – 1971 Alaska Department of Public Safety, Alaska State Troopers

Joined the Alaska State Troopers following 4 years as a city police officer in Ketchikan and Fairbanks. Served in all ranks and was assigned to remote outposts, as detachment patrol supervisor, detachment commander and regional commander as lieutenant and captain. In 1967 was assigned as Chief of Security for the Office of the Governor and created first Governor's security.

Professional Affiliations

DELEGATION LEADER, to Khabarovsk, Russia in September 1991. Professional visit to establish relationship with the Far East Russian Militia for information exchange on criminal activity between Russia and Alaska. In 1993 was a member of an international delegation of law enforcement officials to visit with Russian Militia Officials in Moscow and St. Petersburg. In 1994 lead third delegation to Magadan in the Russian Far East and established intelligence network capability between the Militia and the Alaska State Troopers.

In April 1994 was selected as a member to be the guest of the Turkish Government at an international meeting of 3l countries in a first of its kind meeting to discuss international extradition's, drug trafficking and related mutual criminal activity.

GENERAL CHAIRMAN, of the Division of State and Provincial Police of the International Association of Chiefs of Police, 1977 - 1978. Traveled extensively throughout the U.S. and Canada, meeting with Chief Administrators of major law enforcement agencies, members of Congress and heads of federal and state departments and agencies. Member National Highway Committee1991-1995.

PAST PRESIDENT AND VICE-PRESIDENT, of the Alaska Chiefs of Police Association. Served on legislative committees related to statewide criminal justice issues.

LIFE MEMBER, of the International Chiefs of Police, Alaska Chiefs of Police and the Alaska Peace Officers Association.

MEMBER, Alumni of the University of Louisville, Southern Police Institute.

Mew, Mark
Alaska Police Standards Council

Mark T. Mew

Mark Mew is the appointed chief of the Anchorage Police Department. He comes to the APD from the Anchorage School District, where he served as Director of Security and Emergency Preparedness for six years.

Mew had a full career in police service prior to his tour with the school district. He retired from the Anchorage Police Department in 2003, as Deputy Chief, after twenty years of service. While at the APD, Mew worked in patrol, detectives, SWAT, and at various administrative posts. Through much of his career he was responsible for implementing new police communications and technology systems.

Prior to coming to Alaska Mew worked at the Lane County (Oregon) Sheriff's Office, in the Corrections Division.

Mew was an appointee to the municipality's Public Safety Advisory Commission for several years. He has also been active in the National Emergency Number Association, the Alaska Association of Chiefs of Police, the McLaughlin Youth Center Community Advisory Board, the Boy Scouts of America, and many other associations, committees, and task forces.

Mew holds a bachelor's degree in Anthropology from the University of Oregon, and is a graduate of the FBI National Academy in Quantico, VA.

Mew makes his home in Eagle River, where he and his wife have raised a son and daughter.

Boards & Commissions Factsheets

VIOLENT CRIMES COMPENSATION

Board: Violent Crimes Compensation Board
Board identification number: 103

Department: Department of Administration

Authority: AS 18.67.020

Status: Active

Sunset date:

Requirements: Legislative Confirmation

Prohibitions: None

Term: 3 years

Description: 3 members appointed by Governor: at least 1 member must be a medical or osteopathic physician licensed to practice in Alaska, or holding a retired status license in Alaska; 1 member must be an attorney licensed to practice in Alaska, or retired from practice in Alaska; Governor designates chair; serve at pleasure of Governor.

Function: Facilitates and permits payment of compensation to innocent victims of violent crimes.

Chair: Governor selects.

Special facts: Quasi-judicial; may be removed for cause; annual report to Governor/Legislature.

Compensation: Standard Travel and Per Diem. No additional compensation.

Meetings: 4-6 times per year.

For further information contact:
Ms. Kate Hudson
Administrator
Violent Crimes Compensation Board
ADM, P.O. Box 110230 M/S 0230
Juneau, AK 99811-0230
Phone: (907) 465-5525, FAX: (907) 465-2379

Violent Crimes Compensation Roster

Go to the Violent Crimes Compensation Home page

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Boards & Commissions Roster

VIOLENT CRIMES COMPENSATION (103)

Member	Date Appointed	Reappointed	Term Expires
Nora G. Barlow, P.C. Attorney 943 West Sixth Avenue Anchorage, AK 99501	3/1/2010		3/1/2011
Regina C. Chennault, M.D. Physician P.O. Box 1129 Soldotna, AK 99669	10/18/2005	3/1/2009	3/1/2012
Gerad G. Godfrey Public -- Chair P.O. Box 770892 Eagle River, AK 99577	2/19/2003	3/1/2010	3/1/2013

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Barlow, Nora
Violent Crimes Compensation Board

NORA G. BARLOW

EDUCATION:

1991	University of the Pacific, McGeorge School of Law with Distinction, Order of the Coif
1989	London Institute of International Business and Commercial Law "Fundamental Rights in Europe and the United States." Hon. Anthony Kennedy, Associate Justice, United States Supreme Court
1986	University of California, Berkeley, Bachelor of Arts, Environmental Science, Emphasis Biology

EMPLOYMENT:

2006-present	DeLisio Moran Geraghty & Zobel, P.C. Associate Attorney; General civil litigation practice with an emphasis in defense of employment law cases and workers' compensation claims.
2004-2006	Russell Wagg Cooper & Gabbert, P.C., Anchorage, AK Associate Attorney; Emphasis in workers' compensation defense.
2003-2004	Attorney General's Office, Anchorage, AK Assistant Attorney General, Office of Special Prosecutions and Appeals; Environmental Prosecutor.
2002-2003	District Attorney's Office, Anchorage, AK Assistant District Attorney; Felony Prosecution of Property Crimes and Sexual Assaults.
1999-2002	Office of the County Counsel, Contra Costa County, Martinez, CA Deputy County Counsel; Assigned to Juvenile Dependency and Conservatorship Unit.
1995-1999	Heller Ehrman White & McAuliffe, San Francisco, CA and Anchorage, AK Associate Attorney; Complex civil litigation practice.
1992-1995	Burr Pease & Kurtz, Anchorage, AK Associate Attorney; General civil litigation practice.
1991-1992	Law Clerk:"Hon. H. Russell Holland, Judge, United States District Court for the District of Alaska and Hon. James M. Fitzgerald, Senior Judge, United States District Court for the District of Alaska
Summer 1990	Pillsbury Madison & Sutro, San Francisco, CA Summer Associate

BAR ADMITTANCE:

Admitted in California 1992
Admitted in Alaska 1993

COMMUNITY ACTIVITIES:

Committee Member, Annual Jewish Cultural Gala
Volunteer, Bean's Café
Volunteer, Aquarian Charter School
Volunteer, Camp Gan Israel

Boards & Commissions Factsheets

JUDICIAL CONDUCT

Board: Commission on Judicial Conduct
Board identification number: 052

Department: JUDICIAL BRANCH

Authority: AS 22.30.010

Status: Active

Sunset date:

Requirements: Legislative Confirmation and Financial Disclosure

Prohibitions: Members may not serve on the Judicial Council and the Commission on Judicial Conduct simultaneously.

Term: 4 years

Description: 9 members: 6 appointed by Governor - 3 public members who are not judges, retired judges, or members of the state Bar; 3 attorneys who have practiced law in Alaska for 10 years, from nominations provided by Bar Association. The 3 justices/judges are elected by the justices/judges of the state courts. Membership terminates if member ceases to hold position that qualified appointment.

Function: Reviews allegations against judges/justices and promotes compliance with codes of conduct for judges.

Chair: Commission selects.

Special facts: Quorum - majority (but must include 1 public member, 1 member of the Alaska Bar, and 1 judge member); Court presents annual budget to Legislature. Commission elects chairman.

Compensation: Standard Travel and Per Diem.

Meetings: At least quarterly; 1-3 days each depending on caseload.

For further information contact:
Ms. Marla Greenstein
Executive Director
1029 West Third Avenue, Suite 550
Anchorage, AK 99501
Phone: (907) 272-1033, FAX: (907) 272-9309

Judicial Conduct Roster

Go to the Judicial Conduct Home page

We appreciate your interest in Boards and Commissions. For further information contact the Boards and Commissions staff at (907) 465-3500 or at **boards@alaska.gov**.

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Boards & Commissions Roster

JUDICIAL CONDUCT (052)

Member	Date Appointed	Reappointed	Term Expires
VACANT Attorney/Governor's Appointment			3/1/2012
Peter J. Aschenbrenner Attorney/Governor's Appointment Aschenbrenner Law Offices 1830 Second Avenue Fairbanks, AK 99707	3/24/2004	1/28/2008	3/1/2012
Chris Brown Public/Governor's Appointment AT&T Alaska Business Unit 5273 Cape Seville Drive Anchorage, AK 99516	3/1/2009		3/1/2013
Amy L. Demboski Public/Governor's Appointment P.O. Box 672114 Chugiak, AK 99567	3/1/2011		3/1/2015
Ben Esch, Esq. Judge/Court Appointment Second Judicial District, Nome P.O. Box 1100 Nome, AK 99762-1100	2/4/2003	1/28/2008	2/1/2012
Keith B. Levy Judge/Court Appointment Alaska Court System P.O. Box 114100 Juneau, AK 99811-0300	2/1/2011		2/1/2014
Jan S Ostrovsky Attorney/Governor's Appointment Bankruptcy Court, District of Alaska	3/1/2009		3/1/2013

605 W. Fourth Ave. #138
2540 Susitna Drive
Anchorage, AK 99517

Robert D. Sheldon Public/Governor's Appointment 1029 West 3rd Avenue, Suite 550 Anchorage, AK 99501	1/29/2008	3/1/2012
Philip R. Volland Judge/Court Appointment Anchorage Superior Court 825 W. Fourth Avenue Anchorage, AK 99501	2/1/2011	2/1/2014

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Demboski, Amy
Commission on Judicial Conduct

Amy L. Demboski

INTRODUCTION

Initially, I acquired my dental skills in the military. After military service, I entered the private sector and have worked in almost every aspect of a dental practice. During the past 15 years I have grown as a person, an employee, and a leader. Through mutual respect, building those up around me, working hard, and leading by example; I have found we are truly limited by our own ambition. While working full time, I went to school full time, and in 5 years, achieved two college degrees. The secret to success: put one foot in front of the other, focus on the strengths of your co-workers, and be open to the wisdom and experience of others.

SUMMARY OF QUALIFICATIONS

- Marketing, Advertising, Human Resources, Payroll, Accounting, Collections
- Project Management: Development of new practices & expansion of existing practices
- Coordination of legal affairs: LLC incorporation, contract law, leasing
- Direct Patient Care: Certified Dental Assistant
- OSHA Compliance Director, Emergency Preparedness Facilitator, Training Coordinator

EMPLOYMENT

AUG 2005 to OCT 2010 - ADVANCED FAMILY DENTAL CARE

Project Management, Office Management, Human Resources, Payroll, Direct Patient Care

- Marketing, Advertising, Human Resources, Payroll, Accounting & Collections
- Project Management, Coordination of Legal Affairs, Contract Law & Leasing
- Managed & Coordinated all aspect of business
- Direct Patient Care: Expanded Duties Assistant
- OSHA Compliance Director, Emergency Preparedness Facilitator, Training Coordinator

JAN 2007 to MAY 2009 - ADVANCED FAMILY DENTISTRY

Project Manager, Human Resource Coordinator, Payroll, Direct Patient Care

- Facilitated Development & Management of all aspects of new business
- Marketing, Advertising, Human Resources, Payroll
- Training & Support of all new staff members

DEC 2000 TO AUG 2005 - LEE ELLENBURG, DDS
Dental Assistant
• Direct Patient Care: radiology, crown & bridge impressions, temporaries, impressions for all dental appliances, assist during all surgeries, ordering dental supplies

Education
BA Justice UAA 2006
BA History UAA 2007

Natural Gas Development Authority, Alaska **Amy Lynn Demboski**

General Information

Board/Commission and seat you are seeking:
Natural Gas Development Authority, Alaska, Public Seat

Additional Boards/Commissions of interest:
1) Big Game Commercial Services Board
2) Judicial Conduct, Commission on
3) Federal Areas in Alaska, Citizens' Advisory Commission on

State Boards/Commissions on which you have served
None

First	*Middlename*	*Last Name*
Amy	**Lynn**	**Demboski**
Mailing Address **PO BOX 672114**	*City* **Chugiak**	*State & ZIP* **AK 99567**
Home/Message Phone **9076882671**	*Business Phone*	*Cell Phone* **9073019179**
Email Address **amydemb@hotmail.com**	*Are you a registered voter?* **Yes**	

Date of Birth	*Ethnicity*
1976-09-06	**White**
Gender **Female**	
Military Service	

Conflict of Interest

Certain boards and commissions require full disclosure of personal financial data under AS 39.50.010. If required for the board or commission for which you are applying, are you willing to do so?
Yes

Could you or any member of your family be affected financially by decisions to be made by the board or commission for which you are applying?
No

Please explain the potential financial benefit

Employment History

Employment work history including paid, unpaid or voluntary.
AUG 2005 to OCT 2010 - ADVANCED FAMILY DENTAL CARE
Project Management, Office Management, Human Resources, Payroll, Direct Patient Care
- **Marketing, Advertising, Human Resources, Payroll, Accounting & Collections**
- **Project Management, Coordination of Legal Affairs, Contract Law & Leasing**
- **Managed & Coordinated all aspect of business**
- **Direct Patient Care: Expanded Duties Assistant**
- **OSHA Compliance Director, Emergency Preparedness Facilitator, Training Coordinator**

JAN 2007 to MAY 2009 - ADVANCED FAMILY DENTISTRY
Project Manager, Human Resource Coordinator, Payroll, Direct Patient Care

• Facilitated Development & Management of all aspects of new business
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DEC 2000 TO AUG 2005 - LEE ELLENBURG, DDS
Dental Assistant
• Direct Patient Care: radiology, crown & bridge impressions, temporaries, impressions for all dental appliances, assist during all surgeries, ordering dental supplies

Education, Training, Experience & Qualifications

List both formal and informal education and training experiences:
BA Justice, BA History, trained as a dental assistant in the military.

List any professional licenses, certifications, or registrations and dates obtained that may be used as qualifying criteria:
n/a

List any community service, municipal government, and state positions held, and any awards received.
I have volunteered with the special olympics, and been a member of the Sleeping Lady Mountain Lions club- which provides service to members of the Chugiak-Eagle River area.

Conviction Record

Have you ever been convicted of a misdemeanor within the past five years or a felony within the past ten years?
No

Conviction Circumstances

Certification of Accuracy & Completeness

By submitting this online application, I swear the information I have entered on this form is true to the best of my knowledge. I understand that if I deliberately conceal or enter false information on the form my application may be rejected, I may be removed from the list of eligible candidates, or I may be removed from the position. I agree that the Office of the Governor may contact present or former employees or other persons who know me to obtain an additional information about my skills and abilities. I understand that the information on this application is public information and may be released through a legal request for such information.

Type "I certify"
"I certify"

Resumé Addendum
AMY DEMBOSKI
PO BOX 672114 CHUGIAK, AK 99567
301-9179 cell • 688-2671 home amydemb@hotmail.com
INTRODUCTION
initially, I acquired my dental skills in the military. After military service, I entered the private sector and have worked in almost every aspect of a dental practice. During the past 15 years I have grown as a person, an employee, and a leader. Through mutual respect, building those up around me, working hard, and leading by example; I have found we are truly limited by our own ambition. While working full time, I went to school full time, and in 5 years, achieved two college degrees. The secret to success: put one foot in front of the other, focus on the strengths of your co-workers, and be open to the wisdom and experience of others.

SUMMARY OF QUALIFICATIONS
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DEC 2000 TO AUG 2005 - LEE ELLENBURG, DDS
Dental Assistant
• Direct Patient Care: radiology, crown & bridge impressions, temporaries, impressions for all dental appliances, assist during all surgeries, ordering dental supplies

Education
BA Justice UAA 2006
BA History UAA 2007

References
Available Upon Request

Press Release Wording

Amy Demboski, 34, of Chugiak, holds a bachelor's degree in Justice and a bachelor's degree in Histroy from the University of Alaska Anchorage.

Submitted: 01/08/11 at 12:18 am from 66.58.227.221

Boards & Commissions Factsheets

JUDICIAL COUNCIL

Board: Alaska Judicial Council
Board identification number: 053

Department: JUDICIAL BRANCH

Authority: AK Const. Art. IV Sec. 8

Status: Active

Sunset date:

Requirements: Legislative Confirmation and Financial Disclosure

Prohibitions: Members may not serve on the Commission on Judicial Conduct simultaneously; no member, except the Chief Justice, may hold any other office or position of profit under the U.S. or State of Alaska.

Term: 6 years

Description: 7 members - 3 non-attorney members appointed by Governor: with regard to area representation and without regard to political affiliation; (only non-attorney members require legislative confirmation); 3 attorneys appointed by the Bar Association; and Chief Justice (ex-officio and chair).

Function: Nominates persons to Governor for any vacancy in an office of supreme court justice, court of appeals judge, superior court judge, district court judge, the public defender, or administrative tax law judges (Governor appoints one of two or more persons nominated by Council); conducts studies for improvement of the administration of justice; evaluates judges standing for retention election and publicizes findings and recommendations.

Chair: Chief Justice

Special facts: Quorum - 4 members; reports to Supreme Court/Legislature at least every 2 years.Chief Justice serves a three-year term

Compensation: Standard Travel and Per Diem.

Meetings: About 4 times per year for full Council; 1-2 days each.

For further information contact:
Mr. Larry Cohn
Executive Director
AJC; 1029 West Third Avenue, Ste. 201
Anchorage, AK 99501-1969
Phone: (907) 279-2526, FAX: (907) 276-5046

Judicial Council Roster

Go to the Judicial Council Home page

Boards & Commissions Roster

JUDICIAL COUNCIL (053)

Member	Date Appointed	Reappointed	Term Expires
James H. Cannon Attorney/Alaska Bar Appointment P.O. Box 70891 Fairbanks, AK 99707	2/23/2006		2/23/2012
Walter L. Carpeneti Chief Justice/Designated Alaska Judicial Council 1029 West Third Avenue, Suite 201 Anchorage, AK 99501	7/1/2009		6/30/2012
William F. Clarke Public/Governor's Appointment Alaska Judicial Council 1029 West Third Avenue, Suite 201 Anchorage, AK 99501-1969	10/16/2008		3/1/2013
Kevin T. Fitzgerald Attorney/Alaska Bar Appointment Ingaldson, Maassen & Fitzgerald 813 West Third Avenue Anchorage, AK 99501	4/28/2008		2/23/2014
Kathleen R. Tompkins-Miller Public/Governor's Appointment Law Offices of Joseph Miller, LLC P.O. Box 83440 Fairbanks, AK 99708	3/1/2009		3/1/2015
Christena E. Williams Public/Governor's Appointment 761 Grant Street Ketchikan, AK 99901	4/13/2005		3/1/2011
Julie Willoughby	4/27/2010		2/23/2016

Attorney/Alaska Bar Appointment
Alaska Judicial Council
1029 West Third Avenue, Suite 201
Anchorage, AK 99501

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Haase, Donald
Alaska Judicial Council

Donald J. Haase

Objective: Highly motivated, personable individual is seeking an opportunity to serve the State of Alaska and learn new skills.

Experience:

January 2000-present
CH2M-Hill / VECO ALASKA
Box 300MS777, Valdez AK 99686, (907)834-7359
Redline electrical, instrumentation, and mechanical drawings
Transfer redlines to AutoCAD drawings
Instrument/Electrical design team since July, 2001

September 1995 – January 2000
CHUGACH NORTH TECHNICAL SERVICES
Box 300MS792, Valdez AK 99686, (907)835-5847
Increasingly responsible positions in Corporate Affairs, Documentation, Drawing Update Program, the Maintenance Library, and As-builts

May 1997 - October 1999
LAUGH OUT LOUD PRODUCTIONS
Box 2903, Valdez AK 99686, (907)835-3505
Acted in and promoted play during tourist season

October 1994 - October 1996
C & D PRODUCTIONS
Box 3423, Valdez AK 99686, (907)835-3608
Wrote, produced and acted in a 4-part play for tourists
Hired, trained, and supervised 9 employee-actors and stage hands

May 1993 - September 1995
S & G ENTERPRISES
Box 2744, Valdez AK 99686, (907)835-3030
Carpentry, concrete work, and lawn maintenance

May 1991 - April 1993
J & F BUILDERS
8670 Eldora, Byron Center MI 49315, (616)878-9741
Carpentry, drywall, and apartment maintenance

SERVICE:
City of Valdez Planning and Zoning Commission, 2004 - present (Chair 2009-2011)
Copper Valley Electrical Association Board of Adjustments, 2005-2007
Copper Valley Electrical Association Scholarship Committee, 2006
Member of Valdez Trails Association, 1996-1997
Member of Valdez Snowmachine Club, 1996-1997
City of Valdez Mental Health Advisory Board Member, 1994-1997, Chair 1997

EDUCATION:
BS in Political Science at Grand Valley State University, 1992
Allendale MI 49401, (616)895-3327
3.59 GPA out of 4.0

From: Theresa Nangle Obermeyer <tobermeyer@gci.net>
Subject: **Renomination of Mr. William Granger to Board of Governors, Alaska Bar Association**
Date: March 9, 2011 5:47:06 PM AKST
To: "Honorable Hollis French II, Attorney" <Senator_Hollis_French@legis.state.ak.us>, "Honorable Bill Wielechowski, Attorney" <senator_bill_wielechowski@legis.state.ak.us>, "Honorable Joe Paskvan, Attorney" <senator_joe_paskvan@legis.state.ak.us>, Honorable Lesil McGuire <Senator_Lesil_McGuire@legis.state.ak.us>, Honorable John Coghill <senator_john_coghill@legis.state.ak.us>
Cc: Lila Hobbs <lila_hobbs@legis.state.ak.us>, Andy Moderow <andy_moderow@legis.state.ak.us>, Kristen Peterson <kristen_peterson@legis.state.ak.us>, Cindy Smith <cindy_smith@legis.state.ak.us>, Karla Hart <karla_hart@legis.state.ak.us>, Christy Harvey <christy_harvey@legis.state.ak.us>, Michelle Sydeman <michelle_sydeman@legis.state.ak.us>, Jake Hamburg <jake_hamburg@legis.state.ak.us>, Anna Sorensen <anna_sorensen@legis.state.ak.us>, Jeff Stepp <jeff_stepp@legis.state.ak.us>, Mike Pawlowski <michael_pawlowski@legis.state.ak.us>, Esther Tempel <esther_tempel@legis.state.ak.us>, Genevieve Wojtusik <genevieve_wojtusik@legis.state.ak.us>, Karen Lidster <karen_lidster@legis.state.ak.us>, Rynnieva Moss <rynnieva_moss@legis.state.ak.us>

Senator French and Alaska Judiciary Committee:

My testimony against the Renomination of Mr. William Granger to Board of Governors Alaska Bar Association can be heard online. It was today at about 1:42 P.M. http://www.legis.state.ak.us/basis/get_audio.asp?session=27&chamber=H&comm=JUD&date1=3/9/2011&start=1337. If you have any questions technically, please call (907)465-2870.

Below is a brief summary of what I said:

1. I began by asking for clarification as to whether Mr. Granger was on the line as I understood that he had just testified but I had been unable to hear what he said. My testimony was taken individually without the opportunity to hear what Mr. Granger said. He was allowed to respond after I had been disconnected.

2. I mentioned that I have mailed and/or emailed 60 copies of everything that has gone to the currently serving 60 member Alaska Legislature since 1992 without response. I stated that I refuse to be a partisan as I join hands with any ethical person without regard to partisan politics.

3. I stated that I never got involved at all in my husband's career as an attorney until one decade after Tom had perseveringly dedicated himself to becoming licensed to practice law in Alaska beginning in 1984. In 1994 I spoke for the first time to Board of Governors Alaska Bar Association . I was then routinely mailed the notices of the Meetings until January 15, 1999 when Ms. Deborah O'Regan, Executive Director, and Mr. Stephen Van Goor, Alaska Bar Counsel, "set me up" at the Bar office while the Board of Governors was at court. Three Anchorage Police officers arrived and I was jailed over night.

4. I brought up the fact that former Chief Justice Alex Bryner "descended" Alaska Bar Association Board of Governors in May, 2010. I am certain that in no other state in the U.S. is a former Chief Justice a member of a Board of Governors. We live in the only state that does not have a law school. Chief Justice Bryner's descension to Board of Governors is an example of control. Where is any level of creative thinking?

5. I talked about the grave security breach during the July, 2010 Alaska Bar Exam. For the first time in 26 1/2 years when the Exam began, there were four missing tests so the entire room of Alaska Bar Exam applicants in Anchorage had to wait about 35 minutes until Ms. Deborah O'Regan went back to the Bar office and xeroxed four more tests. As you know, the applicants had to have signed up by June 15 in order to take Alaska Bar Exam. Af first, I thought someone must have stolen four Exams but upon reflection I realized that four different applicants must have stolen the Exam. Everyone in the room except Tom Obermeyer might have had to test. You know Tom and how professional he is. Tom wrote to Board of Governors about this outrageous security breach. To my knowledge, no investigation was undertaken and Tom was again failed when Alaska Bar Exam results came out in November, 2010. Please ask Tom if you would like to read "Irregularities during the July, 2010 Alaska Bar Exam in Anchorage and Background" dated 8/30/10.

6. I discussed that the three "Public Members," Alaska Bar Association Board of Governors, are two Alaska dentists, Dr.

David Eichler and Dr. Don McLean, and now again Mr. Granger, who represents Wells Fargo, the fifth largest bank in the U.S, who had already served for 2000-2009. I wish I could say that I think these three "Public Members" represent the public's interest on Board of Governors but I observe just the opposite. I see control and going along with whatever the nine lawyer members do.

7. I spoke about the 27 years that Alaska Bench and Bar have been allowed to treat a family of six the way our family has been treated. I mentioned that ethical people do not take a person's money once without a thought of helping the individual. Alaska Bar Association continues to take our money seemingly without any thought of helping one of their own, Tom Obermeyer, Attorney. Paying for, studying for, and taking another three day test of minimal competency, Alaska Bar Exam, is the only option Tom, licensed since 1990 by similar Missouri Bar Exam, a state that has reciprocity with Alaska, has been given in 27 years.

8. I mentioned 27th Alaska Legislature 1st Session "Draft Bill Authorizing Admission of Reciprocal Applicants to Alaska Bar Association who have passed a written bar exam in a reciprocal state to the active practice of law; and providing for an effective date" http://www.tobermeyer.info/pdfs/reciprocity2011.pdf and the precedent "Laws of Alaska 1966 HB 520 Chapter No. 144 Authorizing the Department of Labor to enter into reciprocal agreements with other states regarding wage claims; and providing for an effective date" http://www.tobermeyer.info/pdfs/LawsofAK.pdf . This "Laws of Alaska 1966 HB 520" resulted in Mr. Gil Johnson, Attorney, (deceased) and possibly others being licensed to practice law in Alaska. Does "Draft Bill Authorizing Admission of Reciprocal Applicants to Alaska Bar Association" harm the public? I spoke of Governor Hickel's question:"Why don't they license you. They can discipline you if you do something unethical."

I asked if any of you had a question but was disconnected. Please let me know if you do.

I appreciated the opportunity to be heard by Alaska Senate Judiciary Committee today but it had no effect at all as you endorsed Mr. Granger's Renomination unanimously.

Sincerely yours,

Theresa Nangle Obermeyer, Ph.D.
3000 Dartmouth Drive
Anchorage, Alaska 99508-4413
(907)278-9455 Phone/Fax/Msg.

From: Theresa Nangle Obermeyer <tobermeyer@gci.net>
Subject: **Alaska State House Judiciary Committee Meeting Yesterday**
Date: March 15, 2011 9:59:00 AM AKDT
To: Honorable Steve Thompson <representative_steve_thompson@legis.state.ak.us>, Honorable Carl Gatto <Representative_Carl_Gatto@legis.state.ak.us>, Honorable Bob Lynn <Representative_Bob_Lynn@legis.state.ak.us>, Honorable Wes Keller <Representative_Wes_Keller@legis.state.ak.us>, Honorable Lance Pruitt <representative_lance_pruitt@legis.state.ak.us>, "Honorable Max Gruenberg, Jr., Attorney" <Representative_Max_Gruenberg@legis.state.ak.us>, "Honorable Lindsey Holmes, Attorney" <Representative_Lindsey_Holmes@legis.state.ak.us>, "Honorable Mike Chenault, Speaker" <Representative_Mike_Chenault@legis.state.ak.us>
Cc: Lynette Bergh <lynette_bergh@legis.state.ak.us>, Jane Pierson <jane_pierson@legis.state.ak.us>, Jomo Stewart <jomo_stewart@legis.state.ak.us>, Judy McDonnell <judy_mcdonnell@legis.state.ak.us>, Sarah Munson <sarah_munson@legis.state.ak.us>, Karen Sawyer <karen_sawyer@legis.state.ak.us>, Michael Coumbe <mike_coumbe@legis.state.ak.us>, James Waldo <james_waldo@legis.state.ak.us>, Janet Ogan <janet_ogan@legis.state.ak.us>, Jim Pound <jim_pound@legis.state.ak.us>, Ernest Prax <ernest_prax@legis.state.ak.us>, Ted Madsen <ted_madsen@legis.state.ak.us>, "Gretchen Staft, Attorney" <gretchen_staft@legis.state.ak.us>, Patty Krueger <patty_krueger@legis.state.ak.us>, Nancy Manly <nancy_manly@legis.state.ak.us>, Thomas Reiker <thomas_reiker@legis.state.ak.us>, Jeremiah Campbell <jeremiah_campbell@legis.state.ak.us>, Dirk Craft <dirk_craft@legis.state.ak.us>, Jenna Crouse <jenna_crouse@legis.state.ak.us>

Representative Thompson and Alaska House Judiciary Committee:

I called in yesterday and listened to the interviews of the various nominees for Alaska Commission on Judicial Conduct, Alaska Judicial Council, and Violent Crimes Compensation Board, and Alaska Bar Association Board of Governors.

I was called on at about 1:40 P.M. I was badgered and cut off by you, Representative Thompson, after about a minute. Why?

I began by talking about the appointment of Nora Barlow, Partner, Delision Moran (brother of Bill Moran, current Chair, Alaska Permanent Fund Board per http://www.apfboardconfirmation.org/moran.html) to Violent Crimes Compensation Board (VCCB). I have had three Claims and three Hearings per http://www.tobermeyer.info/aquittal.html through VCCB after having been assaulted three times. After each Hearing, the lawyers who were the Hearing Officers were highly paid and they did not even attest to my veracity in their "Findings." Per the third Claim, I had been acquitted in a jury trial 3AN-98S-2211 CR State of Alaska/Hilton Anchorage vs. Theresa Nangle Obermeyer, Ph.D., on the same issue and still Mr. Paul Stockier, Hearing Officer, did not agree to my veracity. Mr. Stockier was and is an "Officer of the Court." In any other state in the U.S. he would have been disciplined if not disbarred for not agreeing to my acquittal in the seven day jury trial.

I was not given time to speak against the Reappointment of Mr. Bill Granger, "Public Member," Alaska Bar Association Board of Governors who was already on Board of Governors 2000-2009. I heard a little of Mr. Granger's comments. He actually stated how proud he is of Alaska Bar Association. On what basis is Mr. Granger proud of Alaska Bar Association? He should be ashamed. The two primary functions of Alaska Bar Association are Alaska law licensure and discipline. Regarding Alaska law licensure, my husband, Thomas S. Obermeyer, Attorney, licensed by similar Missouri Bar Exam, since 1990 and denied reciprocity, is still not licensed to practice law in Alaska after 27 years of effort. Regarding discipline, I spent a decade between 1993 and 2003 per http://www.tobermeyer.info/akbar.html , http://www.tobermeyer.info/pdfs/30complaints.pdf , http://www.tobermeyer.info/pdfs/complaintdetails.pdf , http://www.tobermeyer.info/pdfs/akbartotno061804.pdf , and http://www.tobermeyer.info/pdfs/tnotoakbar061804.pdf trying to be assisted by Alaska Bar Association while I was being treated unethically by Alaska Bar members. I know today that my treatment was worse because I gave Mr. Stephen Van Goor, Alaska Bar Counsel since 1980, transcripts and lengthy timely stamped documents as part of each complaint. In August, 2004, Mr. Van Goor filed a complaint against my husband's Missouri law license to Missouri Supreme Court over the names of the Alaska attorneys I had filed complaints against being posted on my website. Missouri Supreme Court dismissed Mr. Van Goor's complaint in silence. Since Mr. Van Goor did not want the names of the Alaska Bar members posted on my website, I took them off http://www.tobermeyer.info/pdfs/30complaints.pdf. That was in 2004. My husband and I have complied with whatever has been requested of us by Board of Governors and Mr. Van Goor to no avail. My husband has continued to be failed on Alaska Bar Exam, the only option he has been given in 27 years.

Why should citizens such as myself call to speak about important issues being presented to Alaska State House Judiciary Committee if we are going to be badgered and cut off as I was yesterday? I am owed an apology.

Sincerely yours,

Theresa Nangle Obermeyer, Ph.D.
3000 Dartmouth Drive
Anchorage, Alaska 99508-4413
(907)278-9455 Phone/Fax/Msg.
http://www.apfboardconfirmation.org
http://www.tobermeyer.info

BEFORE THE ALASKA PUBLIC OFFICES COMMISSION
ANCHORAGE

Theresa Obermeyer **vs.** **Alaska Judicial Council**	**Case No. 11-01-CD**

NOTICE of HEARING

A hearing in this case will take place before the Alaska Public Offices Commission on Wednesday, March 23, 2011 at 12:30 pm at the Atwood Building, 550 West 7th Avenue, 19th Floor, Anchorage, AK 99503.

The commissioners will be present in person or by telephone and will receive evidence regarding this matter. You may be present at the hearing, either in person or by telephone. You may be represented by an attorney or agent, but this is not required.

If you wish to participate by telephone, please advise the commission office at least three days before the hearing. If you require special accommodation to participate, you must advise the commission office at least three days before the date of the hearing so that accommodations can be made.

Date: 3-11-11

Jerry D Anderson, Asst. Director

Jerry Anderson
Assistant Director

BEFORE THE ALASKA PUBLIC OFFICES COMMISSION
ANCHORAGE

Theresa Obermeyer	)	
	)	
v.	)	**Case No. 11-01-CD**
	)	
Alaska Judicial Council	)	
	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2011, I mailed, postage prepaid, and e-mailed a true and correct copy of the Notice of Hearing to the following:

Theresa Nangle Obermeyer (tobermeyer@gci.net)
Complainant
3000 Dartmouth Drive
Anchorage, AK 99508-4413

Andrew R. Harrington, AAG (andrew.harrington@alaska.gov)
Respondent's Attorney
Attorney General's Office
100 Cushman Street, #400
Fairbanks, AK 99701

john.ptacin

John Ptacin (~~joh~~.ptacin@alaska.gov)
Assistant Attorney General, Alaska Dept. of Law
1031 W. Fourth Ave., Suite 200
Anchorage, AK 99501-1994

Vullnet Greva
Paralegal II
Alaska Public Offices Commission

MEMORANDUM State of Alaska

ALASKA PUBLIC OFFICES COMMISSION

DEPARTMENT OF ADMINISTRATION

TO: **APOC Commissioners** **DATE:** **February 4, 2011**

FROM: **Barbara J. Dreyer** BD
Associate Attorney II

SUBJECT: **APOC Staff Report: 11-01-CD**
Obermeyer v. Alaska Judicial Council

I. SUMMARY

Theresa Obermeyer ("Complainant") alleges in her Complaint[1] that Respondent Alaska Judicial Council ("AJC") violated APOC laws during the 2010 election season. The Complaint alleges that AJC (1) untimely disclosed six independent expenditures and (2) illegally spent State money without appropriation to influence an election.

Staff reviewed the complaint, materials provided by Complainant, the Answer, materials provided by AJC, the Alaska Judicial Council website (http://www.ajc.state.ak.us) and conducted an informal interview with AJC's representative Executive Director Larry Cohn on January 26, 2011.

II. ISSUES

1. Did AJC violate AS 15.13.110(h) when AJC failed to timely report six expenditures made or incurred October 26 and 27, 2010?
2. Did AJC violate AS 15.13.145 when AJC spent State money to influence the outcome of an election in excess of its appropriation?

III. SHORT ANSWERS

1. No, AJC did not violate its duty to report by failing to timely report six expenditures made or incurred October 26 and 27, 2010.
2. Yes, AJC violated AS 15.13.145 when AJC spent money to influence the outcome of an election in excess of its appropriations.

[1] **Exhibit 1**, Complaint.

IV. FACTS

AJC is a commission created by the Alaska Constitution. One of its duties is to evaluate the performance of justices and judges and recommend whether voters should retain those justices and judges for another term.[2] AJC publishes its findings as a recommendation to the voters through various media and, in turn, reports those independent expenditures to APOC. The Alaska legislature annually appropriates funds to AJC for these retention-related independent expenditures.

During the 2010 legislative session, the legislature appropriated $21,400 to AJC for publishing costs. A general election was held November 2, 2010 where Alaskan voters made retention votes on one justice and 27 judges. AJC reported independent expenditures totaling $41,878.73 to APOC. AJC submitted three 15-6 Forms reporting its estimated independent expenditures and then amended the 15-6 Forms on January 26, 2011 by filing an amended 15-6 Form.[3]

There are two questions presented in this Complaint. First, the Complaint alleges that AJC failed to timely report six independent expenditures (the "Six Independent Expenditures"). The Six Independent Expenditures at issue in this case are as follows:

1. 10/26/2010 Juneau Empire newspaper ads $274.68
2. 10/27/2010 Anchorage Daily News newspaper ads $1,656.21
3. 10/27/2010 Fairbanks Daily News-Miner newspaper ads $378.00
4. 10/27/2010 Kodiak Daily Mirror newspaper ads $274.10
5. 10/27/2010 Mat-Su Valley Frontiersman newspaper ads $256.35
6. 10/27/2010 Peninsula Clarion newspaper ads $294.01

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[2] The Alaska Constitution and statutes require judges to stand for retention by appearing on the ballot to allow voters to decide whether the judges should be retained in office. Judges' terms between retention elections vary between four and 10 years.

[3] **Exhibits 2, 3, 4 and 5.** AJC's 15-6 Forms reporting independent expenditures filed with APOC September 27, October 7 and November 5, 2010 and amended on January 26, 2011.

AJC published its recommendations for retention in anticipation of the November 2, 2010 election through Spirit of Alaska Broadcasting (radio ads), Clear Channel Communications, Inc. (radio ads), Anchorage Media Group (radio ads), Alaska Newspapers, Inc. (newspaper ads), Anchorage Daily News (newspaper ads), Chilkat Valley News (newspaper ads), Daily Sitka Sentinel (newspaper ads), Delta Discovery (newspaper ads), Fairbanks Daily News Miner (newspaper ads), Ketchikan Daily News (newspaper ads), Kodiak Daily Mirror (newspaper ads), Mat-Su Valley Frontiersman (newspaper ads), Peninsula Clarion (Kenai) (newspaper ads), Petersburg Pilot (newspaper ads), Anchorage Publishing (newspaper ads), Valdez Star (newspaper ads), Wrangell Sentinel (newspaper ads), Mukiuk News (newspaper ads), Homer News (newspaper ads), Juneau Empire (newspaper ads), Alaska Star (newspaper ads). AJCs' total expenditures on these items (which constitute the entirety of its expenditures in the November 2, 2010 election) and reported to APOC were $41,887.55.

The second question is whether AJC violated APOC laws when it made expenditures in excess of its 2010 legislative appropriation.

V. ANALYSIS

1. *AJC did not violate AS 15.13.110(h) when AJC failed to timely report the Six Independent Expenditures.*

An independent expenditure must be reported to APOC in accordance with AS 15.13. An independent expenditure in excess of $250 made within nine days of an election must technically be reported to APOC within 24 hours if made within nine days of an election. AS 15.13.110(h). Here, the Six Independent Expenditures were each made within nine days of the election on November 2, 2010 and each was in excess of $250.[4] The question presented is whether late reporting is permissible in this instance. It is.

The facts show that the Commission should find no violation. AJC's Executive Director Larry Cohn stated during his informal interview that it is difficult for a filer such as AJC to accurately value media buys (and swaps) when they are ordered close to an election. This is a common valuation problem in Alaska media markets. In order to promote a robust and flexible marketplace for political speech, APOC Staff permits speech makers like AJC to make initial estimates of their proposed speech and then correct those estimates once the speech maker can truly value the cost of its activity. That is what happened here.

When AJC filed its 15-6 Forms on September 27, 2010 and October 7, 2010, AJC was making a good faith disclosure that AJC would be spending $38,741.02 on independent expenditures in 2010. AJC's Executive Director Larry Cohn described in his informal interview that, in the weeks leading up to the election, unforeseen developments required AJC to withdraw some of its proposed newspaper advertisements and place new advertisements. The newspapers were unable to give AJC a concrete value for these changes.[5] Without certainty from the newspapers, AJC was placed in an unstable reporting position. Thus, AJC waited until after the election and amended its disclosure filings on November 5, 2010. The changes made by AJC results in an increase of independent expenditures of only

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[4]The 15-6 Forms signed and filed by AJCs on September 27, 2010, October 7, 2010 and November 5, 2010, in addition to 15-6 Form (Amended) filed by AJC January 26, 2011, each state that "an independent expenditure that exceeds $250 and is made within nine days of an election must be reported within 24 hours after the expenditures is made (emphasis in original)." This is a reiteration of AS 15.13.110(h).

[5]During his informal interview, AJC's Executive Director Larry Cohn informed APOC that one newspaper did not produce a final bill to AJC until January 2011 for the ads run concerning the November election.

a few thousand dollars, from $38,741.02 to $41,887.55. Because AJC's initial estimate was reasonable and the corrections were made when values became known, the Commission should find no violation.

2. *AJC violated AS 15.13.145 when AJC spent money to influence the outcome of an election in excess of its appropriation.*

Under AS 15.13.145, AJC may use money held by the State to influence the outcome of an election, but only if the funds have been specifically appropriated by the State legislature. The State had specifically approved monies to be used for the retention recommendation advertising. AJC has admitted to exceeding its appropriations in past years, including 2010. *See* AO 10-28-CD, University of Alaska (discussing the limitations of the University in engaging in election activities absent a State appropriation) and AO 10-12-CD, Alaska Mental Health Board and Advisory Board on Alcohol and Drug Abuse (money held by the State cannot be used for advocacy inconsistent with AS 15.13.145).

VI. STAFF CONCLUSION

AJC did not violate AS 15.13.110(h) when it filed estimates of the amounts and timing of the Six Independent Expenditures incurred within nine days of the November 2, 2010 election. AJC violated AS 15.13.145 when it used State money in excess of its appropriations in FY 98, 01, 05 and 11.

VII. RECOMMENDATION

Staff recommends a finding of no violation of AS 15.13.110(h).

AJC made a good faith effort to disclose the timing and amount of the Six Independent Expenditures. Given the uncertainty of the timing and amount of its media buys, AJC should not be penalized for providing information to the best of its ability in light of the fact that the timing and amount was unascertainable at the time of the disclosure of the Six Independent Expenditures.

Staff recommends a finding of violation of AS 15.13.145.

In Moore v. University of Alaska-Fairbanks Tanana Valley Campus ("UAF-TVC"), 02-21-CD, the Commission found that UAF-TVC used public money to influence the outcome of an election absent an appropriation in violation of AS 15.13.145, in combination with other violations of campaign finance laws. There, the Commission directed Staff to issue a letter of admonition which informed UAF-TVC concerning the requirements of public entities who intend to use money held by the State to influence an election. To deter future violations, Staff recommends a similar letter to AJC, but no fines for violation of AS 15.13.145. AJC Executive Director Larry Cohn agreed that, to avoid violations in the future, he could seek greater appropriations from the State in his annual budget.

APPENDIX A: APPLICABLE LAW

§ 15.13.110. Filing of reports

(a) Each candidate, group, and nongroup entity shall make a full report in accordance with AS 15.13.040 for the period ending three days before the due date of the report and beginning on the last day covered by the most recent previous report. If the report is a first report, it must cover the period from the beginning of the campaign to the date three days before the due date of the report. If the report is a report due February 15, it must cover the period beginning on the last day covered by the most recent previous report or on the day that the campaign started, whichever is later, and ending on February 1 of that year. The report shall be filed

(1) 30 days before the election; however, this report is not required if the deadline for filing a nominating petition or declaration of candidacy is within 30 days of the election;

(2) one week before the election;

(3) 105 days after a special election; and

(4) February 15 for expenditures made and contributions received that were not reported previously, including, if applicable, all amounts expended from a public office expense term account established under AS 15.13.116(a)(8) and all amounts expended from a municipal office account under AS 15.13.116(a)(9), or when expenditures were not made or contributions were not received during the previous year.

(b) Each contribution that exceeds $250 and that is made within nine days of the election shall be reported to the commission by date, amount, and contributor within 24 hours of receipt by the candidate, group, campaign treasurer, or deputy campaign treasurer. Each contribution to a nongroup entity for the purpose of influencing the outcome of an election that exceeds $250 and that is made within nine days of the election shall be reported to the commission by date, amount, and contributor within 24 hours of receipt by the nongroup entity.

(c) All reports required by this chapter shall be filed with the commission's central office and shall be kept open to public inspection. Within 30 days after each election, the commission shall prepare a summary of each report which shall be made available to the public at cost upon request. Each summary shall use uniform categories of reporting.

(d) Repealed by SLA 1994, ch. 126, § 35, eff. July 1, 1994.

(e) A group formed to sponsor an initiative, a referendum or a recall shall report 30 days after its first filing with the lieutenant governor. Thereafter each group shall report within 10 days after the end of each calendar quarter on the contributions received and expenditures made during the preceding calendar quarter until reports are due under (a) of this section.

(f) During the year in which the election is scheduled, each of the following shall file the campaign disclosure reports in the manner and at the times required by this section:

(1) a person who, under the regulations adopted by the commission to implement AS 15.13.100, indicates an intention to become a candidate for elective state executive or legislative office;

(2) a person who has filed a nominating petition under AS 15.25.140--15.25.200 to become a candidate at the general election for elective state executive or legislative office;

(3) a person who campaigns as a write-in candidate for elective state executive or legislative office at the general election; and

(4) a group or nongroup entity that receives contributions or makes expenditures on behalf of or in opposition to a person described in (1)--(3) of this subsection, except as provided for certain independent expenditures by nongroup entities in AS 15.13.135(a).

(g) An initiative committee, person, group, or nongroup entity receiving contributions exceeding $500 or making expenditures exceeding $500 in a calendar year in support of or in opposition to an initiative on the ballot in a statewide election or an initiative proposal application filed with the lieutenant governor under AS 15.45.020 shall file a report within 10 days after the end of each calendar quarter on the contributions received and expenditures made during the preceding calendar quarter until reports are due under (a) and (b) of this section. If the report is a first report, it must cover the period beginning on the day an initiative proposal application is filed under AS 15.45.020 and ending three days before the due date of the report.

(h) An independent expenditure report required under AS 15.13.040(e) shall be filed with the commission not later than 10 days after an independent expenditure has been made. However, an independent expenditure that exceeds $250 and that is made within nine days of an election shall be reported to the commission not later than 24 hours after the expenditure is made.

CREDIT(S)

SLA 1974, ch. 76, § 1; SLA 1975, ch. 189, § 24; SLA 1977, ch. 133, § 2; SLA 1993, ch. 49, §§ 1, 2; SLA 1994, ch. 126, § 35; SLA 1995, ch. 59, § 2; SLA 1996, ch. 30, § 13; SLA 1996, ch. 48, §§ 16--18; SLA 1998, ch. 74, § 6; SLA 2001, ch. 103, § 2; SLA 2002, ch. 1, §§ 20--22; SLA 2003, ch. 108, § 14; SLA 2004, ch. 99, § 10. Amended by SLA 2010, ch. 36, § 15, eff. June 2, 2010.

Current through legislation effective June 3, 2010 passed during the Second Regular Session the 26th Legislature.(2010)

(c) 2010 Thomson Reuters

§ 15.13.145. Money of the state and its political subdivisions

(a) Except as provided in (b) and (c) of this section, each of the following may not use money held by the entity to influence the outcome of the election of a candidate to a state or municipal office:

(1) the state, its agencies, and its corporations;

(2) the University of Alaska and its Board of Regents;

(3) municipalities, school districts, and regional educational attendance areas, or another political subdivision of the state; and

(4) an officer or employee of an entity identified in (1)-(3) of this subsection.

(b) Money held by an entity identified in (a)(1)-(3) of this section may be used to influence the outcome of an election concerning a ballot proposition or question, but only if the funds have been specifically appropriated for that purpose by a state law or a municipal ordinance.

(c) Money held by an entity identified in (a)(1)-(3) of this section may be used

(1) to disseminate information about the time and place of an election and to hold an election;

(2) to provide the public with nonpartisan information about a ballot proposition or question or about all the candidates seeking election to a particular public office.

(d) When expenditure of money is authorized by (b) or (c) of this section and is used to influence the outcome of an election, the expenditures shall be reported to the commission in the same manner as an individual is required to report under AS 15.13.040.

CREDIT(S)

SLA 1996, ch. 48, § 24.

AS § 15.13.145, AK ST § 15.13.145

Current through legislation effective June 3, 2010 passed during the Second Regular Session the 26th Legislature.(2010)

(c) 2010 Thomson Reuters

Alaska Public Offices Commission

COMPLAINT

1 of 7

1. COMPLAINT – APOC LAW ALLEGEDLY VIOLATED

Specify section of law or regulation

1. Complainant's name + contact info
2. Respondent's name + contact info
3. Laws, regulations allegedly violated
4. Description of allegations
5. Basis of knowledge of alleged facts
6. Documentation to support allegations
7. Notarized signature of the complainant
8. Proof that complaint *and* all supporting documents were served on respondent

If complaint meets requirements for acceptance, APOC will investigate the allegations and notify the respondent of the right to respond. APOC will notify Complainant and Respondent when APOC accepts or rejects a complaint.

Campaign Disclosure Law	☑ AS 15.13 ☑ 2 AAC 50.250–405
Public Official Financial Disclosure	☐ AS 39.50 ☐ 2 AAC 50.010–200
Legislative Financial Disclosure	☐ AS 24.60 ☐ 2 AAC 50.705–890
Lobbying Regulation	☐ AS 24.45 ☐ 2 AAC 50.505–545

PRIOR to requesting expedited review, ensure your filing meets the factors the Commission considers for expedited approval in AS 15.30.380(c). Expedited review requires the **complainant** to prove the violation by a preponderance of the evidence.

2. COMPLAINANT

THERESA NANGLE OBERMEYER
3000 DARTMOUTH DRIVE
ANCHORAGE AK 99508-4415
(907) 278-9455 PHONE | FAX | MSG
tobermeyer @ gci . net

RESPONDENT

AK JUDICIAL COUNCIL
C/O LARRY COHN, EX. DIR.
1029 W. 3RD AVE. # 201
ANCHORAGE, AK 99501-1969
(907) 279-2526 PHONE (907) 276-5046 FAX
lcohn @ ajc.state.ak.us

COMPLAINANT'S REPRESENTATIVE

Name
Address
Phone
Email

RESPONDENT'S REPRESENTATIVE

Name
Address
Phone
Email

DESCRIPTION OF SUMMARY OF FACTS ALLEGED (Use additional pages if necessary)

ATTACHED LETTER OF 12/30/10 TO APOC

SUPPORTING DOCUMENTS

ATTACHED FIVE PAGE LETTER TO JUDGE POSTMA 12/13/10

Provide copies of documents, affidavits, recordings, and other materials supporting the complaint. Explain why each is relevant. Indicate if there are additional documents you intend to submit later. Provide a list of witnesses you believe have information relevant to the complaint.

Attached: ☐ Documentation ☐ Affidavit ☐ Recording ☐ Witness list ☐ Other

3. COMPLAINANT'S STATEMENT – To the best of my knowledge and belief, the facts stated in this complaint are true.

Signature Theresa Nangle Obermeyer Title Ph.D. Date 12/30/10

Subscribed and sworn to before me at Anchorage, Alaska on Dec 30th, 2010.

Signature J. Brody Notary Public Title

J. BRODY Commission Expires NOTARY PUBLIC

APOC DOCUMENTS, RESPONSES, INVESTIGATION REPORTS, COMMISSION ACTIONS

ANCHORAGE	JUNEAU	APOC COMPLAINT PROCESS
2221 E. NORTHERN LIGHTS #128	240 MAIN STREET #500	FILING COMPLAINTS: 2AAC 50.450 ANSWERING COMPLAINTS: 2AAC 50.458
ANCHORAGE, AK 99508	P.O. BOX 110222	APOC CRITERIA for ACCEPTING COMPLAINTS: AAC 50.452
907-276-4176 / FAX 907-276-7018	JUNEAU, AK 99811	INVESTIGATIONS & HEARINGS: 2 AAC 50.460 – 470
TOLL-FREE 800-478-4176	465-4864 / FAX 465-4832	RULES for REQUESTING EXPEDITED CONSIDERATION: AS15.13.380(c)
WEB: http://doa.alaska.gov/apoc/	APOC FORMS: http://doa.alaska.gov/apoc/forms_all.html	APOC LAWS: http://doa.alaska.gov/apoc/laws.html

EXHIBIT 1

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THERESA NANGLE OBERMEYER

3000 Dartmouth Drive
Anchorage, Alaska 99508-4413
(907)278-9455 Phone/Fax/Msg.
tobermever@gci.net
December 30, 2010

Ms. Elizabeth Hickerson, Attorney Chair
and APOC
2221 E. Northern Lights Blvd., Rm. 128
Anchorage, Alaska 99508-4149
FAX(907)276-7018

RE: Statement of Independent Expenditures Complaint against Alaska Judicial Council Filing Stamped "Arrived" November 8, 2010

Dear Ms. Hickerson and APOC:

This is to file a complaint against Alaska Judicial Council regarding "An independent expenditure that exceeds $250 and is made within nine days of an election must be report within 24 hours after the expenditure is made" which is clearly stated on Form 15-6. Based on the stamped November 8 "Arrived" APOC form which was mailed 11/5/10, it looks like there were six expenditures over $250 between October 24 and November 2.

Additionally, I believe there should be a great deal of discussion as to whether Alaska Judicial Council should be allowed to spend State of Alaska money on Retention Elections. The role of the Council should be to review and recommend or reject Retentions of judges. I believe a separate committee or group should be formed for advocacy to raise and spend money. In the November 2, 2010 General Election Alaska Judicial Council spent $41,887.55 on advertising the Retention Election. Only one judge was not recommended so it was as though all the money was spent against one judge, i.e., Richard Postma. The Council to my knowledge spent a total of $11,086.00 including $7,336.00 "Arrived" September 27, 2010 and $3,750.00 "Arrived" October 7, 2010 on very malicious radio ads in which former Senator Vic Fischer defamed Judge Postma a few days before the Election so that Judge Postma was unable to respond. I believe Judge Postma was treated very unfairly. Attached is my writing of December 13 about Judge Postma's mistreatment.

These issues become very relevant because three Alaska Supreme Court Justices including Carpeneti, Winfree, and Christen or the majority of Alaska Supreme Court are up for Retention in November, 2012.

Sincerely yours,

Theresa Nangle Obermeyer

Theresa Nangle Obermeyer
cc: Judge Postma
Ms. Lopez
Ms. Tompkins-Miller
Judge Johnstone
Judge Landry
Judge Clark
Judge Hanley

JAN 0 3 2011

EXHIBIT 1
Page 2 of 8

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THERESA NANGLE OBERMEYER
3000 Dartmouth Drive
Anchorage, Alaska 99508-4413
(907)278-9455 Phone/Fax/Msg.
tobermeyer@gci.net
December 13, 2010

REVISION

Judge Richard Postma
22235 Woodcliff Court
Chugiak, Alaska 99567

RE: ACJC File No. 2010-005

Dear Judge Postma:

This is to give you information prior to the "Hearing" scheduled for 8:30 A.M. 12/15/10-12/17/10 in Courtroom 4 Anchorage U.S. District Court. I have been going to and giving lengthy documents to both Alaska Commission of Judicial Conduct (ACJC) and Alaska Judicial Council since 1994 as a public office holder, an interested citizen, and spouse of Thomas S. Obermeyer, Attorney, licensed since 1990 by similar Missouri Bar Exam, a state that has reciprocity with Alaska, but still not licensed to practice law in Alaska after 26 ½ years of effort. I feel great affinity to you as I have been treated in much the same way after I was elected to Anchorage School Board 1990-1994. I know "the dark side" of Alaska Bench and Bar.

ALASKA JUDICIAL COUNCIL

I question any document that comes out of the Alaska Judicial Council after the way I was treated by Ms. Teri Carns on 9/26/94 who in CY 2009 was paid $126,390.50 per ~~http://www.tobermeyer.info/transcript.html~~ which is "Fabe Retention Binder" Tab 10 and http://www.tobermeyer.info/transcript.html

http://doa.alaska.gov/dop/soce/pdf/JudicialEarned GreaterTha 100000 (40% pdf

Please review at Alaska Judicial Council website about Alaska Bar Poll per http://www.ajc.state.ak.us/onlinesurvey.html that Information Insights http://www.infoinsights.com/site/staff/brian/brian-rogers/ was founded and continues to be owned by Mr. Brian Rogers, current Chancellor, University of Alaska Fairbanks. Alaska Bar Poll used to be administered by UAA Justice Center. Please review "Fabe Retention Binder" Tab 5 about per http://www.tobermeyer.info scroll down to Theresa Nangle Obermeyer, Ph.D., vs. University of Alaska No.85-3826 DC CIVIL #A81-448 for which I got a "Not for Publication" ruling and was required to pay $17,161.75 5/13/86 or 24 years ago. I more recently posted http://www.tobermeyer.info scroll down to "University of Alaska Hearing 9/24/79 & Ruling by Robert Flint 10/29/79" Mr. Rogers, University of Alaska, and his Information Insights have zero credibility after the way I have been treated.

JAN 0 3 2011

EXHIBIT 1
Page 3 of 8

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I got Alaska Public Offices Commission (APOC) Alaska Judicial Council "Statement of Independent Expenditures." Between 9/15/10 and 10/27/10 $41,887.55 was spent on the Retention Election. Obviously, you were the single focus of the advertising because all other judges were endorsed. I question if an Alaska government agency has a right to spend government funds in this manner. Three Alaska Supreme Court Justices will be on the ballot 11/12 including Chief Justice Carpeneti who continues to be ex officio Chair, Alaska Judicial Council, until 6/30/12.

BACKGROUND

I testified on 5/18/10 on the phone and 6/28/10 in person requesting that Alaska Judicial Council not endorse the Retention of Ms. Dana Fabe and Ms. Sharon Gleason in the 11/2/10 Election. I submitted as enclosed two one inch binders as background about my request that the Council reject endorsement of especially Ms. Fabe and secondarily Ms. Gleason. Both Ms. Fabe and Ms. Gleason were endorsed. Ms. Kathleen Tompkins-Miller abstained in the vote for the endorsement of Ms. Fabe.

I testified again at the "Public Hearing" on 11/15/10 for the Superior Court judgeship that is available because Ms. Stephanie Joannides is retiring. Please review that Ms. Joannides is so unethical that she held my only jury trial 11/2/98-11/10/98 per http://www.tobermeyer.info/aquittal.html . How much did my seven day jury trial cost Alaska Court System? I was not able to file a civil lawsuit for "Vindictive Prosecution" having gone to many local law firms to ask for legal representation because Tom continues not to be licensed here. At the "Public Hearing" 11/15/10, I told the Council that they knew full well how unfairly Ms. Fabe and the law firm of her husband, Randall Simpson, Partner, Jermain Dunnagan & Owens, have treated me because I gave them the documents in June. I wanted a full accounting of how much was spent in the 11/2/10 General Election to retain Ms. Fabe and non-retain you.

I called your Chambers 12/6/10 to find out when you leave your employment with Alaska Court System and spoke to Ms. Darbe Lopez. I was told you are scheduled to leave your employment 90 days from when the General Election was certified November 30. I understood for the first time that there is a "Hearing" 12/15/10-12/17/10. Even though I testified about this exact issue on November 15, I was not informed by Alaska Judicial Council that there is a "Hearing" December 15-17.

FYI, my husband and I both have been held up to public ridicule by Anchorage Daily News (ADN) for many years. I was defamed for at least 14 years as I held public office on Anchorage School Board 1990-1994 and when I have run for public office since. Neither my husband nor I have been able to so much as get a "Letter to the Editor" published for many years in ADN. I believe that Mr. John McKay, Attorney, ADN, does the bidding of Jermain Dunnagan & Owens, the law firm of Dana Fabe's husband, Randy Simpson.

According to APOC Report of the $41,887.55 spent by Alaska Judicial Council on the Retention Election, $11,086.00 was spent on radio ads. Was all of that amount spent on

the very disparaging radio ads against you by former Senator Vic Fischer several days before the Retention Election? I believe so. Senator Fischer's radio ads were "the bottom of the barrel" and could have been the single reason why you were not retained. Why did Senator Fischer stoop so low? Do you even know Vic Fischer?

RELEVANT RETENTION ELECTIONS

Judge Karl Johnstone was not recommended by Alaska Judicial Council in the mid1980s but I do not believe any money was spent against Judge Johnstone in the Retention Election. Judge Johnstone was retained.

Judge David Landry was not retained in 2006. I was appalled to read In re Landry 157 Pacific Reporter 3d 1049 (Alaska May 18, 2007). How was it possible that Judge Landry was allowed to pre-sign bail orders from December 1, 2004 until April, 2006 without be stopped by the Presiding Judge or one of his peers at the Kenai Courthouse? I believe Alaska Court System was at least as culpable as Judge Landry in the matter.

Judge Patrick McKay was recommended and retained in the 2010 Retention Election even though he had had two past criminal Driving While Intoxicated (DWI) conviction in 1988 when he served three days in jail and in November 12, 2009 when he got special treatment serving his 5 day sentence at Cordova Half Way House. Please compare Judge McKay's criminal offenses to what seems to be differences of approach with court personnel that has resulted in the ruination of your career. You have never had a criminal charge during this entire ordeal.

COMPLAINT 5/4/10

I received Complaint and your Answer 12/10/10 from Ms. Marla Greenstein. I am not acquainted with you although I met your wife when we waited to find out the Endorsements of Alaska Judicial Council on 6/28/10, I spoke on the phone with you on 10/1/10, and my husband and I introduced ourselves to ~~him~~ you on 11/12/10 at the Swearing In of the new licensees from the July 27-29, 2010 Alaska Bar Exam at which time ~~he~~ you spoke as President, Anchorage Bar Association.

Below are specific responses to ACJC Complaint.

Complaint (1) and (2), the issues should have been dealt with more effectively by the Presiding Judge of the District Court. Therefore, Alaska Court System bears tremendous responsibility for the situation in which you currently find yourself. The entire matter sounds like negative personnel issues with out of control subordinates and two Alaska Court System judges. It sounds like you have been "fed to the wolves."

Complaint (3) The names of the two judges should have been in (3) since it is apparent that those two judges are going to testify against you. Please provide me with their names. Were they District Court or Superior Court? If I have their names, I will be in a better position to understand what transpired. Those two judges must be very vindictive.

The matter sounds like petty jealousy that had nothing to do with your judicial duties. I believe those two judges should be roundly criticized for their inability to get along with you. Were they working together? It was "two against one." Your effort to reach out to other colleagues for help by filing complaints to ACJC "backfired." I have filed numerous complaint with ACJC which I believe today only made my treatment worse similar to the 30 lengthy complaints I filed against Alaska attorneys 1993-2003 to Alaska Bar Association per http://www.tobermeyer.info/akbar.html which resulted in Stephen Van Goor, Bar Counsel, filing a complaint against my husband's Missouri law license in 2004. The complaint was dismissed in silence by Missouri Supreme Court.

Complaint (4) You made an error in judgment by allowing yourself to undergo psychiatric examinations by D. M. Milner of April 6 and April 21, 2010. Who is the person? Why were you not offered a psychiatrist? I do not recommend that your avail yourself to any more mental exams because I assume the "mental health professional" will find something wrong with your mental health. I am impressed with your willingness to post on your website http://www.judgepostma.com/ACJC_Findings.php issues that were transpiring. I noticed that it was Ms. Gleason, Superior Court Presiding Judge, who relieved you of your duties on 9/30/09. Why was Ms. Gleason allowed to interfere with the current District Court Presiding Judge? I see tremendous culpability on the part of Alaska Court System as regards your treatment.

You should have known ACJC would get "an independent mental health expert" who would make you look mentally unbalanced. During my prosecution 1994-2003, I weathered at least 17 fabricated court charges and was represented only by public attorneys. I refused to spend the money that we needed for our four children's higher education on private Alaska lawyers. Was that a mistake on my part? I do not believe I would have been helped by private counsel but. of course, when an attorney is being highly paid, he/she is motivated. I was constantly asked to undergo a psychiatric examinations which I refused to do.

ANSWER 6/1/10

The Answer attachments prove unequivocally that you performed excellently on the bench as a District Court Judge. How was in possible that you who obviously received glowing endorsements from many diverse groups before your appointment to the bench on 6/14/07 could have changed so much by 2010 when Alaska Judicial Council did not endorse you for Retention on 6/28/10? I observe your treatment as a travesty of justice. You should have been given assistance internally if there was something amiss 2007-2010. Were you intentionally made to work with staff members who were going to undermine you?

Mr. Matt Jamin according to your Answer.is holding your "Hearing" 12/15/10-12/17/10. He will be acting as the lawyer for ACJC to my knowledge, not a part-time U.S. Magistrate. If he is acting as a U.S. Magistrate, he should not be paid by ACJC. This must be clarified. Mr. Jamin is often the lawyer for ACJC. He actually held one of my phony "Hearings" to my memory 10/94 after my first non-jury federal criminal trial.

7 of 7 14 of 32

Finally, under the guise of revoking my orchestrated probation I was jailed for 29 days 6/11/96-7/9/96 by Judge William B. Enright, San Diego U.S. District Court, because I filed for U.S. Senate.

I question Exhibit 3 Page 1 of 1. Why did Judge Patrick McKay and Judge Michael Spaan have such enormous totals of respondents compared to all the other judges?

CONCLUSION

FYI, Ms. Gleason came in third in U.S. District Judge Alaska Bar Poll presumably done in-house by Alaska Bar Association not Brian Rogers's Information Insights to replace Judge Jack Sedwick who will move to Senior status on 3/9/11. I believe Ms. Gleason and Ms. Fabe are working in concert to advance themselves to higher judgeships along with Ms. Fabe's husband's law firm, Jermain, Dunnagan & Owens. Ms. Fabe knows she has to hurry because she is already 59 years old so it might be too late for her to ascend to a higher judgeship. Ms. Gleason is 53. Currently, there is no minority/female U.S. District Court judge in Alaska. As I testified on 6/28/10, Mark Begich recommended Ms. Fabe for the U.S. Supreme Court judgeship which became available when Associate Justice Sotomayor, U.S. Supreme Court, was appointed per "Fabe Retention Binder" loose pages. I believe Ms. Fabe is currently focused on being appointed to replace Judge Andrew Kleinfeld on U.S. Court of Appeals for the Ninth Circuit unless she is too old.

I conclude that you are a scapegoat for these two very unethical women to advance their careers. It amazes me how power hungry Dana and Sharon really are. I speculate that Ms. Gleason as Presiding Judge, Third Judicial District, had a lot to do with your very unfair treatment behind the scenes. Judge Brian Clark was Presiding Judge and Judge Patrick Hanley is currently Presiding Judge, Anchorage District Court, during the period of your grievous mistreatment. I know both of them to some extent and believe they hope that Mr. Jamin will dismiss Complaint No. 2010-005 in its entirety. I doubt that he will but I hope so.

I will attend your "kangaroo court" December15-17.

Sincerely yours,

Theresa Nangle Obermeyer

Theresa Nangle Obermeyer

cc: Ms. Lopez
Ms. Tompkins-Miller
Judge Johnstone
Judge Landry
Judge Clark
Judge Hanley

JAN 0 3 2011

EXHIBIT 1
Page 7 of 8

FROM :0bermeyer FAX NO. :9072789455 Dec. 30 2010 03:43PM P1

[redacted] To: APOC Eight Page Fax 15 of 32

Dec. 30 2010 03:40PM

YOUR LOGO : 0bermeyer
YOUR FAX NO. : 9072789455

NO.	OTHER FACSIMILE	START TIME	USAGE TIME	MODE	PAGES	RESULT
01	2765046	Dec. 30 03:35PM	05'04	SND	07	OK

TO TURN OFF REPORT, PRESS 'MENU' #04.
THEN SELECT OFF BY USING '+' OR '-'.

JAN 0 3 2011

EXHIBIT 1
Page 8 of 8

ALASKA PUBLIC OFFICES COMMISSION

ANCHORAGE
2221 E. Northern Lights, Rm. 128
Anchorage, AK 99508-4149
Phone: (907) 276-4176
Toll Free: (800) 478-4176
Fax: (907) 276-7018

http://doa.alaska.gov/apoc

JUNEAU
240 Main St. #500
PO Box 110222
Juneau, AK 99811
Phone: (907) 465-4864
Fax: (907) 465-4832

Form 15-6

Statement of Independent Expenditures

Instructions on Page 3

Select what type of person is submitting this report: (check one)

☐ **INDIVIDUALS (Natural Persons) – fill out sections 1, 2, 3, 4, and 8, then certify on page 2.**

☒ **ALL OTHER PERSONS** (including corporations, companies, partnerships, firms, associations, organizations, business trusts, societies, labor unions, and groups). **Fill out sections 1-3, 5-12, and certify on page 2.**

1. Select whether the expenditure(s):

☒ Were made in the last ten days.

☐ Were made in the last 24 hours.

File independent expenditure reports no later than 10 days after an independent expenditure is made or incurred.

An independent expenditure that exceeds $250 and is made within nine days of an election must be reported within 24 hours after the expenditure is made.

2. Indicate which type of election the expenditure intends to influence:

☒ State Primary/ General ☐ October Municipal ☐ April Anchorage Municipal ☐ Other: _____

3. FULL NAME and complete MAILING ADDRESS of individual or other person:

Alaska Judicial Council
1029 W. 3rd Ave., Ste. 201
Anchorage, AK 99501

E-mail
lcohn@ajc.state.ak.us
Contact Telephone
279-2526

4. Individual's PRINCIPAL OCCUPATION and EMPLOYER:

5. For persons other than individuals, list the TYPE OF BUSINESS or ORGANIZATION (e.g. *Corporation or Labor Union*): Agency of State of Alaska

6. Provide full name of CONTACT PERSON for person listed in question 3:

Larry Cohn

E-mail
lcohn@ajc.state.ak.us
Contact Telephone
279-2526

7. Name and address of each OFFICER and DIRECTOR (*required of all persons other than individuals*):

Larry Cohn, Executive Director
Alaska Judicial Council
1029 W. 3rd Ave., Ste. 201
Anchorage, AK 99501

RECEIVED
SEP 27 2010
APOC - ANCH
BY HAND/FAX/ELE

8. Itemize expenditure(s) made, incurred, or authorized by the person listed in question 3:

Date Made or Incurred	Check Number	Name and Address of Vendor or Recipient	Description of Expenditure (e.g. direct mail, TV, radio, or newspaper ad)	Name of Candidate/ Proposition	Support? Oppose?	Amount

See Form 15-6A

Continued on Form 15-6A, Continuation Page ☒	Sub-Total	$
	Amount from Form 15-6A Continuation Page	$7,336.00
	Total Expenditures Reported with this Report	$7,336.00

NOTE: All filings submitted to APOC are public records and available to the public as submitted. Do NOT include any of the following personal information: social security numbers, account numbers, credit card numbers, copies of checks, financial records with account numbers or access codes, or any document with personal identification numbers.

EXHIBIT 2
Page 1 of 3

This page concerns **CONTRIBUTIONS**, which are the funds *received by* the person making the expenditure.

9. List cumulative amount of contributions from all previous reports.

(a) Check box if not applicable:	(b) Date last form 15-6 was filed:	(c) Amount reported in response to Question 12 on last Form 15-6:
☒		

10. ☐ Check this box if no contributions have been received since the person submitting this form last filed a Form 15-6 with APOC. If this box is selected, skip to number 12.

11. In the table below:
   (a) List all contributions received by the person filing this report that were received for the purpose of influencing the outcome of an election.
   (b) If necessary, add the Sub-total from the table below with the total amount from any attached Form 15-6B Continuation Pages and place in box 11(c).

Date Received	Contributor's Name, Address, City, State, Zip	For individuals: Employer's name/address and individual's principal occupation*	For persons other than individuals: Name and address of each officer/director**	Amount
Below text provided for example only. Please omit example amount from your totals.				
6/6/2010	*Jane Citizen 1315 Home Street Anchorage, AK 99502*	Name: *Sample Employer* Occupation/Title: *Laboratory Technician*	Address: *100 City St., Anch., AK 99501* *Janet Director* *12 City Ave., Anch., AK 99501*	*$50.01*
		Occupation/Title: *President (continue to fill out for each officer as necessary)*		
		Name	Address	$
		Occupation/Title		
		Name	Address	$
		Occupation/Title		
		Name	Address	$
		Occupation/Title		
Continued on Form 15-6B Continuation Page ☐			Sub-Total	$
*Only required of contributors who are individuals that contribute a total in excess of $50 during a calendar year.			Amount from Form 15-6B Continuation Page	$
**Contributors who are persons other than individuals must always include the full name and address of each officer and director of the contributor.			TOTAL REPORTED WITH THIS REPORT – 11(c)	$

12. TOTAL CONTRIBUTIONS. Add the amounts listed in 9(c) and 11(c) and place the resulting figure in the box to the right. $

CERTIFICATION

I certify (or declare) under penalty of perjury:
1. That the above information is true, complete, and correct to the best of my knowledge;
2. That I have properly identified all contributors and have listed the true source of the funds for each contribution; and
3. That the expenditures reported herein were made without coordination with any candidate, campaign, or group.

Signature	Date
	9/23/10
Printed name	Title (if representing a business entity)
Larry Cohn	Executive Director

SEP 27 2010

EXHIBIT 2

Form 15-6A Continuation Page **Question 8 - Expenditures**

Continue entering responses to Question 8 in the table below. Attach as many pages as necessary.

Date Made or Incurred	Check Number	Name and Address of Vendor or Recipient	Description of Expenditure *(e.g. direct mail, TV, radio, or newspaper ad)*	Name of Candidate/ Proposition	Support? Oppose?	Amount
Below text provided for example only. Please omit example amount from your totals.						
6/5/2010	*1883*	*Anchorage Herald*	*Full page ad*	*Sen. John Doe*	*Support*	*$2,346*
9/15/2010	n/a	Spirit of Alaska Broadcasting 2200 E Parks Highway Wasilla, AK 99654	Radio ads	Judicial retention recommendations	Recommend 27 of 28 judges be retained.	704.00
9/16/2010	n/a	Clear Channel Communications, Inc. PO BOX 847454 Dallas, TX 75284	Radio ads	Judicial retention recommendations	Recommend 27 of 28 judges be retained.	2,332.00
9/16/2010	n/a	Anchorage Media Group 301 Arctic Slope Ave. Anchorage, AK 99518	Radio ads	Judicial retention recommendations	Recommend 27 of 28 judges be retained.	4,300.00
				TOTAL THIS PAGE		**$7,336.00**

Copy the total amount written in the box "TOTAL THIS PAGE" and place it in the box on page 1 of your Form 15-6 marked "Amount from Form 15-6A Continuation Page."

Approved by Commission June 18, 2010.

SEP 27 2010
EXHIBIT 2

ALASKA PUBLIC OFFICES COMMISSION

Form 15-6

ANCHORAGE
2221 E. Northern Lights, Rm. 128
Anchorage, AK 99508-4149
Phone: (907) 276-4176
Toll Free: (800) 478-4176
Fax: (907) 276-7018

http://doa.alaska.gov/apoc

JUNEAU
240 Main St. #500
PO Box 110222
Juneau, AK 99811
Phone: (907) 465-4864
Fax: (907) 465-4832

Statement of Independent Expenditures

Instructions on Page 3

Select what type of person is submitting this report: (check one)

☐ **INDIVIDUALS (Natural Persons) – fill out sections 1, 2, 3, 4, and 8, then certify on page 2.**

X **ALL OTHER PERSONS** (including corporations, companies, partnerships, firms, associations, organizations, business trusts, societies, labor unions, and groups). **Fill out sections 1-3, 5-12, and certify on page 2.**

1. Select whether the expenditure(s):
   - X Were made in the last ten days.
   - ☐ Were made in the last 24 hours.

File independent expenditure reports no later than 10 days after an independent expenditure is made or incurred.

An independent expenditure that exceeds $250 and is made within nine days of an election must be reported within 24 hours after the expenditure is made.

2. Indicate which type of election the expenditure intends to influence:
   X State Primary/ General ☐ October Municipal ☐ April Anchorage Municipal ☐ Other: _____

3. FULL NAME and complete MAILING ADDRESS of individual or other person:
Alaska Judicial Council
1029 W. 3rd Ave., Ste. 201
Anchorage, AK 99501

E-mail
lcohn@aic.state.ak.us
Contact Telephone
279-2526

4. Individual's PRINCIPAL OCCUPATION and EMPLOYER:

5. For persons other than individuals, list the TYPE OF BUSINESS or ORGANIZATION (e.g. *Corporation or Labor Union*): Agency of State of Alaska

ARRIVED
OCT 07 2010
APOC - ANCH
PM HC FAX ELE

6. Provide full name of CONTACT PERSON for person listed in question 3:
Larry Cohn

E-mail
lcohn@aic.state.ak.us
Contact Telephone
279-2526

7. Name and address of each OFFICER and DIRECTOR (*required of all persons other than individuals*):
Larry Cohn, Executive Director
Alaska Judicial Council
1029 W. 3rd Ave., Ste. 201
Anchorage, AK 99501

8. Itemize expenditure(s) made, incurred, or authorized by the person listed in question 3.

Date Made or Incurred	Check Number	Name and Address of Vendor or Recipient	Description of Expenditure *(e.g. direct mail, TV, radio, or newspaper ad)*	Name of Candidate/ Proposition	Support? Oppose?	Amount

See Form 15-6A

Continued on Form 15-6A, Continuation Page X	Sub-Total	$
	Amount from Form 15-6A Continuation Pages	$31,405.02
	Total Expenditures Reported with this Report	**$31,405.02**

NOTE: All filings submitted to APOC are public records and available to the public as submitted. Do NOT include any of the following personal information: social security numbers, account numbers, credit card numbers, copies of checks,

EXHIBT 3
Page1 of 4

financial records with account numbers or access codes, or any document with personal identification numbers.

This page concerns CONTRIBUTIONS, which are the funds *received by* the person making the expenditure.

9. List cumulative amount of contributions from all previous reports.

(a) Check box if not applicable:	(b) Date last form 15-6 was filed:	(c) Amount reported in response to Question 12 on last Form 15-6:
X	9-27-2010	$0

10. X Check this box if no contributions have been received since the person submitting this form last filed a Form 15-6 with APOC. If this box is selected, skip to number 12.

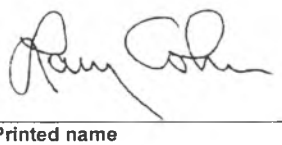
11. In the table below:
   (a) List all contributions received by the person filing this report that were received for the purpose of influencing the outcome of an election.
   (b) If necessary, add the Sub-total from the table below with the total amount from any attached Form 15-6B Continuation Pages and place in box 11(c).

Date Received	Contributor's Name, Address, City, State, Zip	For individuals: Employer's name/address and individual's principal occupation*	For persons other than individuals: Name and address of each officer/director**	Amount
Below text provided for example only. Please omit example amount from your totals.				
6/6/2010	*Jane Citizen 1315 Home Street Anchorage, AK 99502*	Name: *Sample Employer* Occupation/Title: *Laboratory Technician*	Address: *100 City St., Anch., AK 99501* *Janet Director* *12 City Ave., Anch., AK 99501*	*$50.01*
		Occupation/Title: *President (continue to fill out for each officer as necessary)*		
		Name Occupation/Title	Address	$
		Name Occupation/Title	Address	$
Continued on Form 15-6B Continuation Page ☐			Sub-Total	$
*Only required of contributors who are individuals that contribute a total in excess of $50 during a calendar year.			Amount from Form 15-6B Continuation Page	$
**Contributors who are persons other than individuals must always include the full name and address of each officer and director of the contributor.			TOTAL REPORTED WITH THIS REPORT – 11(c)	$

12. TOTAL CONTRIBUTIONS. Add the amounts listed in 9(c) and 11(c) and place the resulting figure in the box to the right. **$0**

CERTIFICATION

I certify (or declare) under penalty of perjury:
1. That the above information is true, complete, and correct to the best of my knowledge;
2. That I have properly identified all contributors and have listed the true source of the funds for each contribution; and
3. That the expenditures reported herein were made without coordination with any candidate, campaign, or group.

Signature	Date
	10-6-10
Printed name	**Title (if representing a business entity)**
Larry Cohn	Executive Director

EXHIBT 3

Form 15-6A Continuation Page – Page 1 of 2 **Question 8 - Expenditures**

Continue entering responses to Question 8 in the table below. Attach as many pages as necessary.

Date Made or Incurred	Check Number	Name and Address of Vendor or Recipient	Description of Expenditure *(e.g. direct mail, TV, radio, or newspaper ad)*	Name of Candidate/ Proposition	Support? Oppose?	Amount
Below text provided for example only. Please omit example amount from your totals.						
6/5/2010	*1883*	*Anchorage Herald*	*Full page ad*	*Sen. John Doe*	*Support*	*$2,346*
9/29/2010	n/a	Spirit of Alaska Broadcasting 2200 E Parks Highway Wasilla, AK 99654	Radio ads	Judicial retention recommendations	Recommend 27 of 28 judges be retained.	384.00
9/29/2010	n/a	Clear Channel Communications, Inc. PO BOX 847454 Dallas, TX 75284	Radio ads	Judicial retention recommendations	Recommend 27 of 28 judges be retained.	1,356.00
9/28/2010	n/a	Anchorage Media Group 301 Arctic Slope Ave. Anchorage, AK 99518	Radio ads	Judicial retention recommendations	Recommend 27 of 28 judges be retained.	2,010.00
9/30/2010	n/a	Alaska Newspapers, Inc. 301 Calista Ct. #B Anchorage, AK 99518	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	2,521.80
9/30/2010	n/a	Alaska Newspapers, Inc. 301 Calista Ct. #B Anchorage, AK 99518	Newspaper ads	Judicial retention recommendations	Recommend 2 of 2 judges be retained.	441.75
9/30/2010	n/a	Alaska Newspapers, Inc. 301 Calista Ct. #B Anchorage, AK 99518	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	306.45
9/28/2010	n/a	Anchorage Daily News PO Box 140147 Anchorage, AK 99514	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	12,216.53
9/27/2010	n/a	Chilkat Valley News PO Box 630 Haines, AK 99827	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	156.00
9/30/2010	n/a	Daily Sitka Sentinel 112 Barracks St. Sitka, AK 99835	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	296.40
9/30/2010	n/a	Delta Discovery PO Box 1028 Bethel, AK 99559	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	275.40
9/29/2010	n/a	Fairbanks Daily News-Miner PO Box 70710 Fairbanks, AK 99707	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	1,350.00
9/29/2010	n/a	Ketchikan Daily News PO Box 7900 Ketchikan, AK 99901	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	474.48
				TOTAL THIS PAGE		*$21,788.81*

Copy the total amount written in the box "TOTAL THIS PAGE" and place it in the box on page 1 of your Form 15-6 marked "Amount from Form 15-6A Continuation Page."

Form 15-6A Continuation Page – Page 2 of 2 Question 8 - Expenditures

Date Made or Incurred	Check Number	Name and Address of Vendor or Recipient	Description of Expenditure *(e.g. direct mail, TV, radio, or newspaper ad)*	Name of Candidate/ Proposition	Support? Oppose?	Amount
Below text provided for example only. Please omit example amount from your totals.						
6/5/2010	*1883*	*Anchorage Herald*	*Full page ad*	*Sen. John Doe*	*Support*	*$2,346*
9/29/2010	n/a	Kodiak Daily Mirror 1419 Selig St. Kodiak, AK 99615	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	802.74
9/29/2010	n/a	Mat-Su Valley Frontiersman PO Box 873509 Wasilla, AK 99687	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	3,916.80
9/29/2010	n/a	Peninsula Clarion PO Box 3009 Kenai, AK 99611	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	1,249.50
10/6/2010	n/a	Petersburg Pilot PO Box 3009 Petersburg, AK 99833	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	130.00
9/30/2010	n/a	Anchorage Publishing PO Box 873509 Wasilla, AK 99687	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	912.00
9/29/2010	n/a	Valdez Star PO Box 2949 Valdez, AK 99686	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	490.00
9/27/2010	n/a	Wrangell Sentinel PO Box 798 Wrangell, AK 99929	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	142.31
10/6/2010	n/a	Mukluk News PO Box 90 Tok, AK 99780	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	35.00
9/30/2010	n/a	Homer News 3482 Landings St. Homer, AK 99603	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	644.10
10/6/2010	n/a	Juneau Empire 3100 Channel Dr. Juneau, AK 99801	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	924.00
10/6/2010	n/a	Alaska Star 301 Arctic Slope Ave Anchorage, AK 99518	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	369.76

TOTAL THIS PAGE | *$9,616.21*

ALASKA PUBLIC OFFICES COMMISSION

Form 15-6

ANCHORAGE
2221 E. Northern Lights, Rm. 128
Anchorage, AK 99508-4149
Phone: (907) 276-4176
Toll Free: (800) 478-4176
Fax: (907) 276-7018

http://doa.alaska.gov/apoc

JUNEAU
240 Main St. #500
PO Box 110222
Juneau, AK 99811
Phone: (907) 465-4864
Fax: (907) 465-4832

Statement of Independent Expenditures

Instructions on Page 3

Select what type of person is submitting this report: (check one)

☐ **INDIVIDUALS (Natural Persons) – fill out sections 1, 2, 3, 4, and 8, then certify on page 2.**

X **ALL OTHER PERSONS** (including corporations, companies, partnerships, firms, associations, organizations, business trusts, societies, labor unions, and groups). **Fill out sections 1-3, 5-12, and certify on page 2.**

1. Select whether the expenditure(s):

X **Were made in the last ten days.**

☐ **Were made in the last 24 hours.**

File independent expenditure reports no later than 10 days after an independent expenditure is made or incurred.

An independent expenditure that exceeds $250 and is made within nine days of an election must be reported within 24 hours after the expenditure is made.

2. Indicate which type of election the expenditure intends to influence:

X **State Primary/ General** ☐ **October Municipal** ☐ **April Municipal** ☐ **Other:** _____

ARRIVED NOV 08 2010 APOC ANCHORAGE PUBLIC RECORDS FILE 11/05/10

3. FULL NAME and complete MAILING ADDRESS of individual or other person:

Alaska Judicial Council
1029 W. 3rd Ave., Ste. 201
Anchorage, AK 99501

E-mail
lcohn@ajc.state.ak.us
Contact Telephone
279-2526

4. Individual's PRINCIPAL OCCUPATION and EMPLOYER:

5. For persons other than individuals, list the TYPE OF BUSINESS or ORGANIZATION (e.g. *Corporation or Labor Union*): Agency of State of Alaska

6. Provide full name of CONTACT PERSON for person listed in question 3:

Larry Cohn

E-mail
lcohn@ajc.state.ak.us
Contact Telephone
279-2526

7. Name and address of each OFFICER and DIRECTOR (*required of all persons other than individuals*):

Larry Cohn, Executive Director
Alaska Judicial Council
1029 W. 3rd Ave., Ste. 201
Anchorage, AK 99501

8. Itemize expenditure(s) made, incurred, or authorized by the person listed in question 3.

Date Made or Incurred	Check Number	Name and Address of Vendor or Recipient	Description of Expenditure *(e.g. direct mail, TV, radio, or newspaper ad)*	Name of Candidate/ Proposition	Support? Oppose?	Amount

See Form 15-6A

Continued on Form 15-6A, Continuation Page X	**Sub-Total**	$
	Amount from Form 15-6A Continuation Pages	$3,146.53
	Total Expenditures Reported with this Report	$3,146.53

NOTE: All filings submitted to APOC are public records and available to the public as submitted. Do NOT include any of the following personal information: social security numbers, account numbers, credit card numbers, copies of checks,

EXHIBT 4
Page 1 of 3

financial records with account numbers or access codes, or any document with personal identification numbers.

This page concerns CONTRIBUTIONS, which are the funds *received by* the person making the expenditure.

9. List cumulative amount of contributions from all previous reports.

(a) Check box if not applicable:	(b) Date last form 15-6 was filed:	(c) Amount reported in response to Question 12 on last Form 15-6:
X	10-7-2010	$0

10. X Check this box if no contributions have been received since the person submitting this form last filed a Form 15-6 with APOC. If this box is selected, skip to number 12.

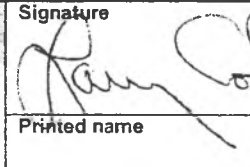
11. In the table below:
   (a) List all contributions received by the person filing this report that were received for the purpose of influencing the outcome of an election.
   (b) If necessary, add the Sub-total from the table below with the total amount from any attached Form 15-6B Continuation Pages and place in box 11(c).

Date Received	Contributor's Name, Address, City, State, Zip	For individuals: Employer's name/address and individual's principal occupation*	For persons other than individuals: Name and address of each officer/director**	Amount
Below text provided for example only. Please omit example amount from your totals.				
6/6/2010	*Jane Citizen 1315 Home Street Anchorage, AK 99502*	Name: *Sample Employer* Occupation/Title: *Laboratory Technician*	Address: *100 City St., Anch., AK 99501*	*$50.01*
		Janet Director Occupation/Title: *President (continue to fill out for each officer as necessary)*	*12 City Ave., Anch., AK 99501*	
		Name Occupation/Title	Address	$
		Name Occupation/Title	Address	$

Continued on Form 15-6B Continuation Page ☐	Sub-Total	$
*Only required of contributors who are individuals that contribute a total in excess of $50 during a calendar year.	Amount from Form 15-6B Continuation Page	$
**Contributors who are persons other than individuals must always include the full name and address of each officer and director of the contributor.	TOTAL REPORTED WITH THIS REPORT – 11(c)	$
12. TOTAL CONTRIBUTIONS. Add the amounts listed in 9(c) and 11(c) and place the resulting figure in the box to the right.		$0

CERTIFICATION

I certify (or declare) under penalty of perjury:
1. That the above information is true, complete, and correct to the best of my knowledge;
2. That I have properly identified all contributors and have listed the true source of the funds for each contribution; and
3. That the expenditures reported herein were made without coordination with any candidate, campaign, or group.

Signature	Date
	11/5/10
Printed name	**Title (if representing a business entity)**
Larry Cohn	Executive Director

NOV 0 8 2010

Form 15-6A Continuation Page **Question 8 - Expenditures**

Continue entering responses to Question 8 in the table below. Attach as many pages as necessary.

Date Made or Incurred	Check Number	Name and Address of Vendor or Recipient	Description of Expenditure *(e.g. direct mail, TV, radio, or newspaper ad)*	Name of Candidate/ Proposition	Support? Oppose?	Amount
Below text provided for example only. Please omit example amount from your totals.						
6/5/2010	*1883*	*Anchorage Herald*	*Full page ad*	*Sen. John Doe*	*Support*	*$2,346*
10/27/2010	n/a	Anchorage Daily News PO Box 140147 Anchorage, AK 99514	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	1,656.21
10/27/2010	n/a	Ketchikan Daily News PO Box 7900 Ketchikan, AK 99901	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	13.18
10/27/2010	n/a	Fairbanks Daily News-Miner PO Box 70710 Fairbanks, AK 99707	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	378.00
10/27/2010	n/a	Kodiak Daily Mirror 1419 Selig St. Kodiak, AK 99615	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	274.10
10/27/2010	n/a	Mat-Su Valley Frontiersman PO Box 873509 Wasilla, AK 99687	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	256.35
10/27/2010	n/a	Peninsula Clarion PO Box 3009 Kenai, AK 99611	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	294.01
10/26/2010	n/a	Juneau Empire 3100 Channel Dr. Juneau, AK 99801	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	274.68
					TOTAL THIS PAGE	**$3,146.53**

Copy the total amount written in the box "TOTAL THIS PAGE" and place it in the box on page 1 of your Form 15-6 marked "Amount from Form 15-6A Continuation Page."

ALASKA PUBLIC OFFICES COMMISSION

Form 15-6

ANCHORAGE
2221 E. Northern Lights, Rm. 128
Anchorage, AK 99508-4149
Phone: (907) 276-4176
Toll Free: (800) 478-4176
Fax: (907) 276-7018

http://doa.alaska.gov/apoc

JUNEAU
240 Main St. #500
PO Box 110222
Juneau, AK 99811
Phone: (907) 465-4864
Fax: (907) 465-4832

Statement of Independent Expenditures

Instructions on Page 3

Select what type of person is submitting this report: (check one)

☐ **INDIVIDUALS (Natural Persons) – fill out sections 1, 2, 3, 4, and 8, then certify on page 2.**

X **ALL OTHER PERSONS** (including corporations, companies, partnerships, firms, associations, organizations, business trusts, societies, labor unions, and groups). **Fill out sections 1-3, 5-12, and certify on page 2.**

1. Select whether the expenditure(s):
   - X Were made in the last ten days.
   - ☐ Were made in the last 24 hours.

File independent expenditure reports no later than 10 days after an independent expenditure is made or incurred.

An independent expenditure that exceeds $250 and is made within nine days of an election must be reported within 24 hours after the expenditure is made.

2. Indicate which type of election the expenditure intends to influence:
   X State Primary/ General ☐ October Municipal ☐ April Anchorage Municipal ☐ Other: _____

3. FULL NAME and complete MAILING ADDRESS of individual or other person:
Alaska Judicial Council
1029 W. 3rd Ave., Ste. 201
Anchorage, AK 99501

E-mail
lcohn@ajc.state.ak.us
Contact Telephone
279-2526

11/05/10

4. Individual's PRINCIPAL OCCUPATION and EMPLOYER:

5. For persons other than individuals, list the TYPE OF BUSINESS or ORGANIZATION (e.g. *Corporation or Labor Union*): Agency of State of Alaska

6. Provide full name of CONTACT PERSON for person listed in question 3:
Larry Cohn

E-mail
lcohn@ajc.state.ak.us
Contact Telephone
279-2526

7. Name and address of each OFFICER and DIRECTOR (***required of all persons other than individuals***):
Larry Cohn, Executive Director
Alaska Judicial Council
1029 W. 3rd Ave., Ste. 201
Anchorage, AK 99501

8. Itemize expenditure(s) made, incurred, or authorized by the person listed in question 3.

Date Made or Incurred	Check Number	Name and Address of Vendor or Recipient	Description of Expenditure *(e.g. direct mail, TV, radio, or newspaper ad)*	Name of Candidate/ Proposition	Support? Oppose?	Amount

See Form 15-6A

Continued on Form 15-6A, Continuation Page X	**Sub-Total**	$
	Amount from Form 15-6A Continuation Pages	$3,146.53
	Total Expenditures Reported with this Report	**$3,146.53**

NOTE: All filings submitted to APOC are public records and available to the public as submitted. Do NOT include any of the following personal information: social security numbers, account numbers, credit card numbers, copies of checks,

EXHIBT 4
Page 1 of 3

financial records with account numbers or access codes, or any document with personal identification numbers.

This page concerns CONTRIBUTIONS, which are the funds *received by* the person making the expenditure.

9. List cumulative amount of contributions from all previous reports.

(a) Check box if not applicable:	(b) Date last form 15-6 was filed:	(c) Amount reported in response to Question 12 on last Form 15-6:
X	10-7-2010	$0

10. X Check this box if no contributions have been received since the person submitting this form last filed a Form 15-6 with APOC. If this box is selected, skip to number 12.

11. In the table below:
   (a) List all contributions received by the person filing this report that were received for the purpose of influencing the outcome of an election.
   (b) If necessary, add the Sub-total from the table below with the total amount from any attached Form 15-6B Continuation Pages and place in box 11(c).

Date Received	Contributor's Name, Address, City, State, Zip	For individuals: Employer's name/address and individual's principal occupation*	For persons other than individuals: Name and address of each officer/director**	Amount
Below text provided for example only. Please omit example amount from your totals.				
6/6/2010	*Jane Citizen 1315 Home Street Anchorage, AK 99502*	Name: *Sample Employer* Occupation/Title: *Laboratory Technician*	Address: *100 City St., Anch., AK 99501* *Janet Director* *12 City Ave., Anch., AK 99501*	*$50.01*
		Occupation/Title: *President (continue to fill out for each officer as necessary)*		
		Name	Address	$
		Occupation/Title		
		Name	Address	$
		Occupation/Title		
Continued on Form 15-6B Continuation Page ☐			Sub-Total	$
*Only required of contributors who are individuals that contribute a total in excess of $50 during a calendar year.			Amount from Form 15-6B Continuation Page	$
**Contributors who are persons other than individuals must always include the full name and address of each officer and director of the contributor.			TOTAL REPORTED WITH THIS REPORT – 11(c)	$

12. **TOTAL CONTRIBUTIONS. Add the amounts listed in 9(c) and 11(c) and place the resulting figure in the box to the right.** $0

CERTIFICATION

I certify (or declare) under penalty of perjury:
1. That the above information is true, complete, and correct to the best of my knowledge;
2. That I have properly identified all contributors and have listed the true source of the funds for each contribution; and
3. That the expenditures reported herein were made without coordination with any candidate, campaign, or group.

Signature	Date
Larry Cohn	11/5/10
Printed name	**Title (if representing a business entity)**
Larry Cohn	Executive Director

EXHIBT 4

Form 15-6A Continuation Page **Question 8 - Expenditures**

Continue entering responses to Question 8 in the table below. Attach as many pages as necessary.

Date Made or Incurred	Check Number	Name and Address of Vendor or Recipient	Description of Expenditure *(e.g. direct mail, TV, radio, or newspaper ad)*	Name of Candidate/ Proposition	Support? Oppose?	Amount
Below text provided for example only. Please omit example amount from your totals.						
6/5/2010	*1883*	*Anchorage Herald*	*Full page ad*	*Sen. John Doe*	*Support*	*$2,346*
10/27/2010	n/a	Anchorage Daily News PO Box 140147 Anchorage, AK 99514	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	1,656.21
10/27/2010	n/a	Ketchikan Daily News PO Box 7900 Ketchikan, AK 99901	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	13.18
10/27/2010	n/a	Fairbanks Daily News-Miner PO Box 70710 Fairbanks, AK 99707	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	378.00
10/27/2010	n/a	Kodiak Daily Mirror 1419 Selig St. Kodiak, AK 99615	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	274.10
10/27/2010	n/a	Mat-Su Valley Frontiersman PO Box 873509 Wasilla, AK 99687	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	256.35
10/27/2010	n/a	Peninsula Clarion PO Box 3009 Kenai, AK 99611	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	294.01
10/26/2010	n/a	Juneau Empire 3100 Channel Dr. Juneau, AK 99801	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	274.68
					TOTAL THIS PAGE	**$3,146.53**

Copy the total amount written in the box "TOTAL THIS PAGE" and place it in the box on page 1 of your Form 15-6 marked "Amount from Form 15-6A Continuation Page."

ALASKA PUBLIC OFFICES COMMISSION

ANCHORAGE
2221 E. Northern Lights, Rm. 128
Anchorage, AK 99508-4149
Phone: (907) 276-4176
Toll Free: (800) 478-4176
Fax: (907) 276-7018

http://doa.alaska.gov/apoc

JUNEAU
240 Main St. #500
PO Box 110222
Juneau, AK 99811
Phone: (907) 465-4864
Fax: (907) 465-4832

Form 15-6

AMENDED Statement of Independent Expenditures

Instructions on Page 3

Select what type of person is submitting this report: (check one)

☐ **INDIVIDUALS (Natural Persons) – fill out sections 1, 2, 3, 4, and 8, then certify on page 2.**

X **ALL OTHER PERSONS** (including corporations, companies, partnerships, firms, associations, organizations, business trusts, societies, labor unions, and groups). **Fill out sections 1-3, 5-12, and certify on page 2.**

1. Select whether the expenditure(s):
   - ☐ Were made in the last ten days.
   - ☐ Were made in the last 24 hours.

File independent expenditure reports no later than 10 days after an independent expenditure is made or incurred.

An independent expenditure that exceeds $250 and is made within nine days of an election must be reported within 24 hours after the expenditure is made.

2. Indicate which type of election the expenditure intends to influence:

X State Primary/ General ☐ October Municipal ☐ April Anchorage Municipal ☐ Other: _____

3. FULL NAME and complete MAILING ADDRESS of individual or other person:

Alaska Judicial Council
1029 W. 3rd Ave., Ste. 201
Anchorage, AK 99501

E-mail
lcohn@aic.state.ak.us

Contact Telephone
279-2526

4. Individual's PRINCIPAL OCCUPATION and EMPLOYER:

5. For persons other than individuals, list the TYPE OF BUSINESS or ORGANIZATION (e.g. *Corporation or Labor Union*): Agency of State of Alaska

6. Provide full name of CONTACT PERSON for person listed in question 3:

Larry Cohn

E-mail
lcohn@aic.state.ak.us

Contact Telephone
279-2526

7. Name and address of each OFFICER and DIRECTOR (*required of all persons other than individuals*):

Larry Cohn, Executive Director
Alaska Judicial Council
1029 W. 3rd Ave., Ste. 201
Anchorage, AK 99501

8. Itemize expenditure(s) made, incurred, or authorized by the person listed in question 3.

Date Made or Incurred	Check Number	Name and Address of Vendor or Recipient	Description of Expenditure *(e.g. direct mail, TV, radio, or newspaper ad)*	Name of Candidate/ Proposition	Support? Oppose?	Amount

See Form 15-6A

Continued on Form 15-6A, Continuation Page X	Sub-Total	$
	Amount from Form 15-6A Continuation Pages	$1,822.67
	AMENDED Total Expenditures Reported with this Report	$1,822.67

NOTE: All filings submitted to APOC are public records and available to the public as submitted. Do NOT include any of the following personal information: social security numbers, account numbers, credit card numbers, copies of checks,

Exhibit 5
Page 1 of 3

financial records with account numbers or access codes, or any document with personal identification numbers.

This page concerns CONTRIBUTIONS, which are the funds *received by* the person making the expenditure.

9. List cumulative amount of contributions from all previous reports.

(a) Check box if not applicable:	(b) Date last form 15-6 was filed:	(c) Amount reported in response to Question 12 on last Form 15-6:
X	10-7-2010	$0

10. X Check this box if no contributions have been received since the person submitting this form last filed a Form 15-6 with APOC. If this box is selected, skip to number 12.

11. In the table below:
   (a) List all contributions received by the person filing this report that were received for the purpose of influencing the outcome of an election.
   (b) If necessary, add the Sub-total from the table below with the total amount from any attached Form 15-6B Continuation Pages and place in box 11(c).

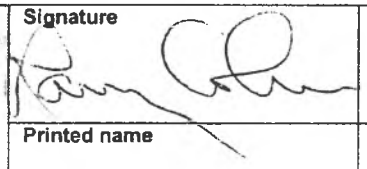
Date Received	Contributor's Name, Address, City, State, Zip	For individuals: Employer's name/address and individual's principal occupation*	For persons other than individuals: Name and address of each officer/director**	Amount
Below text provided for example only. Please omit example amount from your totals.				
6/6/2010	*Jane Citizen 1315 Home Street Anchorage, AK 99502*	Name: *Sample Employer* Occupation/Title: *Laboratory Technician*	Address: *100 City St., Anch., AK 99501*	*$50.01*
		Janet Director Occupation/Title: *President (continue to fill out for each officer as necessary)*	*12 City Ave., Anch., AK 99501*	
		Name Occupation/Title	Address	$
		Name Occupation/Title	Address	$

Continued on Form 15-6B Continuation Page ☐	Sub-Total	$
*Only required of contributors who are individuals that contribute a total in excess of $50 during a calendar year.	Amount from Form 15-6B Continuation Page	$
**Contributors who are persons other than individuals must always include the full name and address of each officer and director of the contributor.	TOTAL REPORTED WITH THIS REPORT – 11(c)	$

12. **TOTAL CONTRIBUTIONS. Add the amounts listed in 9(c) and 11(c) and place the resulting figure in the box to the right.** $0

CERTIFICATION

I certify (or declare) under penalty of perjury:
1. **That the above information is true, complete, and correct to the best of my knowledge;**
2. **That I have properly identified all contributors and have listed the true source of the funds for each contribution; and**
3. **That the expenditures reported herein were made without coordination with any candidate, campaign, or group.**

Signature	Date
	1/26/11
Printed name Larry Cohn	**Title (if representing a business entity)** Executive Director

Form 15-6A Continuation Page **Question 8 - Expenditures**

Continue entering responses to Question 8 in the table below. Attach as many pages as necessary.

Date Made or Incurred	Check Number	Name and Address of Vendor or Recipient	Description of Expenditure *(e.g. direct mail, TV, radio, or newspaper ad)*	Name of Candidate/ Proposition	Support? Oppose?	AMENDED Total Amount
Below text provided for example only. Please omit example amount from your totals.						
6/5/2010	*1883*	*Anchorage Herald*	*Full page ad*	*Sen. John Doe*	*Support*	*$2,346*
9/27/10	n/a	Wrangell Sentinel PO Box 798 Wrangell, AK 99929	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	123.50
9/29/2010	n/a	Valdez Star PO Box 2949 Valdez, AK 99686	Newspaper ads	Judicial retention recommendations	Recommend 19 of 20 judges be retained.	500.00
10/6/2010 & 10/26/2010	n/a	Juneau Empire 3100 Channel Dr. Juneau, AK 99801	Newspaper ads	Judicial retention recommendations	Recommend 6 of 6 judges be retained.	1,198.67
				AMENDED TOTAL THIS PAGE		**$1,822.17**

Copy the total amount written in the box "TOTAL THIS PAGE" and place it in the box on page 1 of your Form 15-6 marked "Amount from Form 15-6A Continuation Page."

Approved by Commission June 18, 2010.

BEFORE THE ALASKA PUBLIC OFFICES COMMISSION
ANCHORAGE

Theresa Nangle Obermeyer,	)	
	)	
Complainant,	)	
v.	)	Case No. 11-01-CD
	)	
Alaska Judicial Council,	)	
	)	
Respondent.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2011, I mailed, postage prepaid, and e-mailed a true and correct copy of the February 4, 2011 Staff Report to the following:

Theresa Nangle Obermeyer (tobermeyer@gci.net)
Complainant
3000 Dartmouth Drive
Anchorage, AK 99508-4413

Andrew R. Harrington, AAG (andrew.harrington@alaska.gov)
Respondent's Attorney
Attorney General's Office
100 Cushman Street, #400
Fairbanks, AK 99701

Vullnet Greva
Paralegal II
Alaska Public Offices Commission

CONFIR-
MATIONS
2012

<TARGET><BILL></BILL><SUBJECT>CONFIRMATIONS
2012</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE
CONFIRMATION COMMITTEE REPORT

Date: 3/5/12

In accordance with AS 24.60.130, the Judiciary Committee reviewed the following and recommends the appointments be forwarded to the Senate for consideration:

Select Committee on Legislative Ethics
Herman G. Walker, Jr.
Dennis "Skip" Cook

This does not reflect an intent by any of the members to vote for or against the confirmation of the individuals during any further sessions.

Signature:	Printed Last Name
	Wielechowski
	Coghill
	PASKVAN
Chair:	French

Please return to the Senate Secretary's Office (Room 211).

Alaska State Legislature

Senate

Office of the Secretary

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:senate_secretary@legis.state.ak.us

Official Business

Memorandum

TO: Senator French, Chair
Judiciary Committee

FROM: Kirsten Waid
Secretary of the Senate

DATE: January 25, 2012

SUBJECT: Confirmation of Chief Justice's Nomination of
Public Members to the
Select Committee on Legislative Ethics

Pursuant to AS 24.60.130, the President has referred the following name for legislative confirmation to your committee for a hearing, recommendation and report:

Select Committee on Legislative Ethics
Dennis Cook

KW:lc

Alaska State Legislature

Senate

Office of the Secretary

Official Business

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:senate_secretary@legis.state.ak.us

Memorandum

TO: Senator French, Chair
Judiciary Committee

FROM: Kirsten Waid
Secretary of the Senate

DATE: January 25, 2012

SUBJECT: Confirmation of Chief Justice's Nomination of
Public Members to the
Select Committee on Legislative Ethics

Pursuant to AS 24.60.130, the President has referred the following name for legislative confirmation to your committee for a hearing, recommendation and report:

Select Committee on Legislative Ethics
Herman Walker, Jr.

KW:lc

Alaska State Legislature

Select Committee on
Legislative Ethics

716 W. 4th, Suite 230
Anchorage AK 99501-2133
(907) 269-0150
FAX: 269-0152
Email: ethics_committee@legis.state.ak.us

Mailing Address:
P.O. Box 101468
Anchorage, AK.
99510 – 1468

TO: Senator Hollis French, Chair Senate Judiciary
Representative Carl Gatto, Chair House Judiciary

FROM: Joyce Anderson, Administrator

DATE: February 21, 2012

RE: Public Member Appointees to the Ethics Committee

Enclosed are the appointment letters, resumes, and financial disclosure statements for the two public member nominees for the Select Committee on Legislative Ethics:

Herman G. Walker, Jr
Dennis "Skip" Cook

Let me know if you need anything else or have questions.

Chambers of
Walter L. Carpeneti
Chief Justice

Supreme Court
State of Alaska

P.O. Box 114100
Juneau, Alaska
99811-4100

(907) 463-4771
Fax (907) 463-3475

January 19, 2012

The Honorable Gary Stevens
Senate President
State Capitol, Room 111
Juneau, Alaska 99801-1182

The Honorable Mike Chenault
Speaker of the House
State Capitol, Room 208
Juneau, Alaska 99801-1182

Dear President Stevens
and Speaker Chenault:

In my capacity as Chief Justice, and pursuant to AS 24.60.130(b)(3), I am re-appointing Herman Walker, Jr. to serve another term as a public member of the Select Committee on Legislative Ethics.

Mr. Walker is partner in a law firm in Anchorage, Limon & Walker, LLC. For purposes of determining compliance with AS 24.60.130(c), Mr. Walker is non-partisan.

Mr. Walker can be reached at (907) 279-2889. His mailing address is 606 E Street, Suite 203, Anchorage, Alaska 99501, and his e-mail address is hermanjr@limonwalker.com. Please let me know if I can provide you with any other information on this matter.

Sincerely,

Walter L. Carpeneti

Walter L. Carpeneti

cc: Herman Walker
Joyce Anderson

HERMAN GENE WALKER, JR.

606 E Street, Suite 203
Anchorage Alaska 99501
(907) 279-2889
email: hermanjr@limonwalker.com

EDUCATION

- University of Wyoming Laramie, Wyoming. May 1992
  J.D. Degree

- Arizona State University Tempe, Arizona. May 1988
  B.S. Political Science Degree

LAW EXPERIENCE

- Limon & Walker, LLC. Anchorage AK 2006 to Present
  Attorney

- Lynda Limon Law Offices Anchorage AK 2000 to 2005
  Attorney
- Koval & Featherly Law Offices Anchorage AK 1998 to 2000
  Attorney
- Public Defender Agency Anchorage AK 1995 to1996
  Attorney
- Rex Lamont Butler & Associates Anchorage AK 1993 to 1995
  Associate Attorney
- Law Office of Rex Lamont Butler Anchorage AK 1993 to 1993
  Law Clerk
- Office of Public Advocacy Anchorage AK 1992 to 1993
  Legal Intern
- Defender Association of Philadelphia PA 1991
  Legal Intern
- Maricopa County Superior Court Phoenix AZ 1989
  Pre-Trial Services Officer

MEMBERSHIPS AND AFFILIATIONS

Alaska Bar Association, United States District Court of Alaska, Anchorage Bar Association, American Bar Association, National Association of Criminal Defense Lawyers, Alaskan Association for Justice , National Board of American Association for Justice, Urban League, Sigma Pi Phi Fraternity,

POFD Registration

Completed

Submission Date: **01/19/2012**

Filer Information

First Name: **Herman**
Last Name: **Walker, Jr.**
Address: **606 E St. suite 203**
City, State Zip: **Anchorage, Alaska 99501**
Contact Phone: **907-279-2889**
Alternate Phone: **907-279-2890**
Fax (Optional): **907-258-4428**
Email: **hermanjr@limonwalker.com**
Partner Type: **Spouse**
Spouse/Domestic Partner Name: **Lynda Limon**
Dependent Children: **2**
Non-Dependent Children: **0**
Names of Non-Dependent Children living with filer: **n/a**

ARRIVED
JAN 19 2012
APOC - ANCH
PM HC FAX ELE

Purpose of Filing

Report Dates: From **01/01/2011** Through **12/31/2011**
Filing As: **Office Holder**
Branch: **Legislative**
Position: **Member of Select Committee on Legislative Ethics**
Report Type: **Annual**

Income

Owner	Type	Detail	Description	Amount
Filer	Salaried	Limon & Walker 606 E St. suite 203 Anchorage, Alaska 99501 Full-time From: 01/01/2011 Through 12/31/2011 Time Worked: 12	Law Firm	$50,000 - $100,000
Spouse	Salaried	Limon & Walker 606 E St. Suite 203, Anchorage, Alaska 99501 Full-time From: 01/01/2011 Through 12/31/2011 Time Worked: 12 months	Law firm	$50,000 - $100,000
Spouse	Rental	Tenant: Della Martinez	Lisa Tellef	$5,000 - $10,000
Filer	Dividend or Interest	pfd		$1,000 - $2,000
Spouse	Dividend or Interest	pfd		$1,000 - $2,000
Child	Dividend or Interest	pfd		$1,000 - $2,000

Child	Dividend or Interest	pfd		$1,000 - $2,000

Interests

Owner	Type	Detail	Description	Interest
Filer, Spouse	Real Property	2351 Lusardi Pt. Circle, Anchorage, Alaska 99515	Ownership Interest: Home owner	
Spouse	Real Property	2440 E 5th Place Tempe, Arizona 85281	Ownership Interest: ownership	
Filer	Beneficial	Managed By: Herman G. Walker, Sr.	Various properties around the country. No properties in Alaska	Ownership: 20%
Filer	Beneficial	Managed By: State of Alaska	Pers	Ownership: 100%
Filer, Spouse	Beneficial	Managed By: A.T. Lloyd's Inc.	Fidelity Wealth central	Ownership: 100%

Loans and Debts

Owner	Type	Name
Filer, Spouse Address: n/a n/a, Alaska n/a	Lender Original Loan Amount: $0.00 . Balance Amount: $0.00 Interest Rate: 0.0%	Wells Fargo
Filer, Spouse Address: n/a n/a, Alaska n/a	Lender Original Loan Amount: $0.00 Balance Amount: $0.00 Interest Rate: 0.0%	Bank of America

Leases

Owner	Type of Lease	Lease/Contract ID	Interest	Status	Description
No Leases / Nothing to Report					

Close Economic Associations

Person Disclosing Association	Associated Person	Description
No Associations / Nothing to Report		

Lobbyist Partner Employers

Name	Address	Compensation
No Lobbyist Partner Employers / Nothing to Report		

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JAN 19 2012

Chambers of
Walter L. Carpeneti
Chief Justice

Supreme Court
State of Alaska

P.O. Box 114100
Juneau, Alaska
99811-4100

(907) 463-4771
Fax (907) 463-3475

January 19, 2012

The Honorable Gary Stevens
Senate President
State Capitol, Room 111
Juneau, Alaska 99801-1182

The Honorable Mike Chenault
Speaker of the House
State Capitol, Room 208
Juneau, Alaska 99801-1182

Dear President Stevens
and Speaker Chenault:

In my capacity as Chief Justice, and pursuant to AS 24.60.130(b)(3), I am re-appointing Dennis Cook to serve another term as a public member of the Select Committee on Legislative Ethics.

Mr. Cook is partner in a law firm in Fairbanks, Cook, Schuhmann & Groseclose, Inc. For purposes of determining compliance with AS 24.60.130(c), Mr. Cook is non-partisan.

Mr. Cook can be reached at (907) 457-6994. His mailing address is P.O. Box 70810, Fairbanks, Alaska, 99707-0810, and his e-mail address is skip@alaskalaw.com. Please let me know if I can provide you with any other information on this matter.

Sincerely,

Walter L. Carpeneti

Walter L. Carpeneti

cc: Dennis Cook
Joyce Anderson

Chambers of
Walter L. Carpeneti
Chief Justice

Supreme Court
State of Alaska

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99811-4100

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Sincerely,

Walter L. Carpeneti

cc: Dennis Cook
Joyce Anderson

Dennis E. "Skip" Cook

P. O. Box 70810
Fairbanks, AK 99707-0810
(907) 452-1855
skip@alaskalaw.com

EDUCATION

- Admitted to practice law in the State of Alaska; 1970
- J.D., Willamette University College of law, Salem, OR; 1967-70
- M.A., Political Science, Northwestern University, Evanston, IL; 1962
- B.S., Economics, Politics & Engineering, Massachusetts Institute of Technology, Cambridge, MA; 1958-62

EMPLOYMENT

Partner/Shareholder, Cook Schuhmann & Groseclose, Inc., Fairbanks, AK; 1972-present
- Expertise in workers' compensation, commercial law and domestic law. Started as associate in 1970

Distribution Representative, Alaskan Adventures, Inc., Fairbanks, AK; 1969-70

Registered Representative, Horton, Geib & O'Rourk, Inc., Salem, OR; 1968-69

Clerk, Oregon State Police, Salem, OR; 1967-68

General Manager, Alaska 67 Centennial Exposition, Fairbanks, AK; 1965-67

Acting Director, Alaska Local Affairs Agency, State of Alaska, Juneau, AK- 1963-65

Election Supervisor, Alaska Division of Elections, Fairbanks, AK; 1963

PROFESSIONAL ASSOCIATIONS

- Tanana Valley Bar Association
- Alaska Bar Association
- American Bar Association

AWARDS & ACHIEVEMENTS

- Fairbanks Distinguished Citizen Award; December, 2003
- Vigil Honor, Order of the Arrow, Boy Scouts of America; 2003
- Outstanding Service Award, Alaska Bar Association Pro Bono Program; 1998
- Silver Beaver Award, Midnight Sun Council, Boy Scouts of America; 1997
- Blue Ribbon Volunteer Service Award – Tanana Valley State Fair Association; 1989
- Rotarian of the Year, Fairbanks Rotary Club; 1985
- Distinguished Service Award, Jaycees of Fairbanks; 1967
- Valedictorian, Fairbanks High School; 1958

CIVIC & COMMUNITY ACTIVITIES

- Member, Select Committee on Legislative Ethics, State of Alaska; *1998-present*
- Fairbanks Representative, MIT Educational Council; *1971-present*
- The Church of Jesus Christ of Latter-day Saints; V*arious positions held*
- Boy Scouts of America-Scoutmaster, *Council Board and Executive Committee Member; (President 1998-2000), Merit Badge Counselor*
- Rotary Club of Fairbanks; *1977-present*
- Rotary International District 5010; *District Governor; 2005-2006*
- Tanana Valley State Fair Association; *1970-1984*
- Interior Alaska Adoptive Parents, Western Association of Concerned Adoptive Parents; *Founding Member*

POFD Form

Completed

Submission Date: **01/10/2012**

Filer Information

First Name: **DENNIS**
Last Name: **COOK**
Address: **431 Birch Hill Road**
City, State Zip: **Fairbanks, Alaska 99712**
Contact Phone: **907-452-1855**
Alternate Phone: **907-457-6994**
Fax (Optional): **907-452-8154**
Email: **skipcook@mac.com**
Partner Type: **Spouse**
Spouse/Domestic Partner Name: **Olga B. Cook**
Dependent Children: **0**
Non-Dependent Children: **0**
Names of Non-Dependent Children living with filer: **0**

ARRIVED
JAN 10 2012
APOC - ANCH
PM HC FAX ELE

Purpose of Filing

Report Dates: From **01/01/2011** Through **12/31/2011**
Filing As: **Office Holder**
Branch: **Legislative**
Position: **Member of Select Committee on Legislative Ethics**
Report Type: **Annual**

Income

Owner	Type	Detail	Description	Amount
Filer	Salaried	Cook Schuhmann & Groseclose, Inc. P.O.Box 70810 Fairbanks, Alaska 99707-0810 Part-time From: 01/01/2011 Through 12/31/2011 Time Worked: approximately 1/2 time	Staff Attorney	$100,000 - $200,000
Filer, Spouse	Dividend or Interest	Permanent Fund Dividends		$1,000 - $2,000
Filer	Other	Source: Cook Schuhmann & Groseclose Retirement Plan		$50,000 - $100,000
Filer	Other	Source: Social Security		$20,000 - $50,000
Spouse	Other	Source: Social Security		$5,000 - $10,000

Interests

Owner	Type	Detail	Description	Interest
Filer	Business	Business Name: Cook Schuhmann & Groseclose, Inc. P.O. Box 70810 Fairbanks, Alaska 99707-0810	Law Firm	Position / Type: Shareholder in C Corporation
Filer	Business	Business Name: Midnight Sun Council, Boy Scouts of America 1400 Gillam Way	Non-Profit Youth Organization	Position / Type: Board of Directors & Executive Committee

		Fairbanks, Alaska 99701		
Filer, Spouse	Real Property	431 Birch Hill Road Fairbanks, Alaska 99712	Ownership Interest: JRWROS – Home	
Filer, Spouse	Real Property	9770 Salchaket Drive Harding Lake, Alaska 99705	Ownership Interest: JTWROS – Recrdational Cabin	
Filer, Spouse	Real Property	1935 RJ Loop Fairbanks, Alaska 99709	Ownership Interest: Tenants in Common	
Filer	Beneficial	Managed By: Cook Schuhmann & Groseclose Pension & Profit Sharing	Americal Bar Association, P.O. Box 5142, Boston MA 02206-5142	Ownership: 100%
Filer	Beneficial	Managed By: Ridgeway & Conger, Inc.	Investment & IRA Accounts	Ownership: 100%
Spouse	Beneficial	Managed By: Wells Fargo Investment	IRA	Ownership: 100%
Filer, Spouse	Beneficial	Managed By: Wedbush Morgan Securities	Investment Account	Ownership: 100%
Filer	Beneficial	Managed By: First Midwest Securities, Inc.	Investment Account	Ownership: 100%

Loans and Debts

Owner	Type	Name
Filer, Spouse Address: Mt. McKinley Bank, 500 4th Avenue Fairbanks, Alaska 99701	Creditor Original Loan Amount: $407,000.00 Balance Amount: $393,975.59 Interest Rate: 5.0%	Dennis E. & Olga B. Cook
Filer, Spouse Address: Mt. McKinley Bank, 500 4th Avenue Fairbanks, Alaska 99701	Creditor Original Loan Amount: $228,510.00 Balance Amount: $213,531.57 Interest Rate: 6.125%	Dennis E. & Olga B. Cook

Leases

Owner	Type of Lease	Lease/Contract ID	Interest	Status	Description
No Leases / Nothing to Report					

Close Economic Associations

Person Disclosing Association	Associated Person	Description
No Associations / Nothing to Report		

Lobbyist Partner Employers

Name	Address	Compensation
No Lobbyist Partner Employers / Nothing to Report		

JAN 10 2012

– COPY –

SENATE
CONFIRMATION COMMITTEE REPORT

Date: 3/21/12

In accordance with AS 39.05.080, the Judiciary Committee reviewed the following and recommends the appointments be forwarded to a joint session for consideration:

Alaska Police Standards Council

Gustaf Sandahl - Kenai
Sheldon Schmitt - Sitka
Ronald Taylor - Anchorage

Violent Crimes Compensation Board
Regina Chennault - Anchorage

Commission on Judicial Conduct
Robert Sheldon – Anchorage

Parole Board
Michael Stark - Juneau

This does not reflect an intent by any of the members to vote for or against the confirmation of the individuals during any further sessions.

Signature:	**Printed Last Name**
	Wielechowski
	Coghill
	PASKVAN
Chair:	French

Please return to the Senate Secretary's Office (Room 211).

SENATE
CONFIRMATION COMMITTEE REPORT

Date: _____

In accordance with AS 39.05.080, the Judiciary Committee reviewed the following and recommends the appointments be forwarded to a joint session for consideration:

Alaska Police Standards Council

Brad Reich - Kiana
Jamie Sunderland – Unalaska

Judicial Council

Kenneth Kreitzer – Juneau

This does not reflect an intent by any of the members to vote for or against the confirmation of the individuals during any further sessions.

Signature:	**Printed Last Name**
	Coghill
	PASKVAN
	Wielechowski
Chair:	French

Please return to the Senate Secretary's Office (Room 211).

Boards & Commissions Factsheets

POLICE STANDARDS COUNCIL

Board: Alaska Police Standards Council
Board identification number: 081

Department: DEPARTMENT OF PUBLIC SAFETY

Authority: AS 18.65.140

Status: Active

Sunset date:

Requirements: Legislative Confirmation

Prohibitions: None

Term: 4 years

Description: The council consists of 13 members: 11 appointed by the governor as follows: 4 chief administrative officers or chiefs of police of local governments; the commissioner of public safety or a designee; the commissioner of corrections or a designee; 2 persons, each of who has been certified for 5 years or more by the council under this chapter, one of whom serves as a police officer and one of whom serves as a probation officer, parole officer, municipal correctional officer, or correctional officer; 1 correctional administrative officer who is employed at the level of deputy director or higher; and, 4 members of the public at large with at least 2 from the communities of 2,500 population or less.

Function: The council establishes and enforces minimum standards for employment, certification, training and retention of police, correctional, probation, parole and municipal correctional officers; adopts regulations; investigates potential misconduct issues related to potential decertification of officers.

Chair: Board selects.

Special facts: Notwithstanding AS 18.65.160, the governor shall specify the terms of the person appointed under AS 18.65.150(4), added by sec. I of this Act, to the Alaska Police Standards Council, as follows:(1) one person shall be appointed for a two-year term; and (2) one person shall be appointed for a four-year term

Compensation: Standard Travel and Per Diem. No additional compensation.

Meetings: Normally 2 times per year for one day each – December and May or June, additional special meetings as required.

For further information and to reach individual members, contact:
Dave Sexton
Director
Alaska Police Standards Council
DPS, P.O. Box 111200 M/S 1200
Juneau, AK 99811-1200
Phone: (907) 465-5523, FAX: (907) 465-3263

Police Standards Council Roster

Go to the Police Standards Council Home page

We appreciate your interest in Boards and Commissions. For further information contact the Boards and Commissions staff at (907) 465-3500 or at **boards@alaska.gov**.

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Boards & Commissions Roster

POLICE STANDARDS COUNCIL (081)

Member	Date Appointed	Reappointed	Term Expires
Richard Burton Public	12/18/2005	4/2/2010	3/1/2014
Rebecca Hamon Public/Under 2500 Population	3/1/2011		3/1/2015
Thomas (Bob) R. Kean Public	11/22/2005	11/19/2008	3/1/2013
Joseph A Masters Commissioner/Public Safety/Designee	9/12/2008		
Mark T Mew Chief	4/2/2010		3/1/2013
Brad M Reich Public/Under 2500 Population	2/1/2012		3/1/2016
Gustaf A. Sandahl Chief	6/20/2011		3/1/2015
Joseph D Schmidt Commissioner/Corrections/Designee	12/4/2006		
Sheldon Schmitt Chief	2/19/2008	3/1/2012	3/1/2016
Jamie L. Sunderland Chief	3/1/2012		3/1/2016
Ronald F Taylor Correctional Administrative Officer	2/1/2012		3/1/2016
Bernice A. Troglio Probation/Parole/Correctional Officer	11/19/2008	4/2/2010	3/1/2014
Freddie L Wells Jr. Police Officer	11/19/2008		3/1/2013

Return to the fact sheet

We appreciate your interest in Boards and Commissions. For further information contact the Boards and Commissions staff at (907) 465-3500 or at **boards@alaska.gov**.

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Reich, Brad
Alaska Police Standards Council

Police Standards Council, Alaska **Brad Martin Reich**

General Information

Board/Commission and seat you are seeking:
Police Standards Council, Alaska, First

Additional Boards/Commissions of interest:
1) Big Game Commercial Services Board
2) Police Standards Council, Alaska

State Boards/Commissions on which you have served
None

First	*Middlename*	*Last Name*
Brad	**Martin**	**Reich**
Mailing Address	*City*	*State & ZIP*
	Kiana	
Home/Message Phone	*Business Phone*	*Cell Phone*
Email Address	*Are you a registered voter?*	
	Yes	

Date of Birth	*Ethnicity*
Gender	
Military Service	

Conflict of Interest

Certain boards and commissions require full disclosure of personal financial data under AS 39.50.010. If required for the board or commission for which you are applying, are you willing to do so?
Yes

Could you or any member of your family be affected financially by decisions to be made by the board or commission for which you are applying?
No

Please explain the potential financial benefit

Employment History

Employment work history including paid, unpaid or voluntary.
Maniilaq Association I am the Inutek Manager for 10 years now.

Education, Training, Experience & Qualifications

List both formal and informal education and training experiences:
I have my GED and have taken a lot of classes Boiler maintenance certificate, Microwave Technology certificate.

List any professional licenses, certifications, or registrations and dates obtained that may be used as qualifying criteria:

Well been to AASB Regional boards trainings 8/14/2009

List any community service, municipal government, and state positions held, and any awards received.
I am Mayor City of Kiana,I am on the Reginal School Board,local Advisor school Committee Chair,I am on the Public Safety commission with the Northwest Arctic Borough.

Conviction Record

Have you ever been convicted of a misdemeanor within the past five years or a felony within the past ten years?
No

Conviction Circumstances

Certification of Accuracy & Completeness

By submitting this online application, I swear the information I have entered on this form is true to the best of my knowledge. I understand that if I deliberately conceal or enter false information on the form my application may be rejected, I may be removed from the list of eligible candidates, or I may be removed from the position. I agree that the Office of the Governor may contact present or former employees or other persons who know me to obtain an additional information about my skills and abilities. I understand that the information on this application is public information and may be released through a legal request for such information.

Type "I certify"
"I Certify"

Resumé Addendum

Press Release Wording

{Your Name}, {age} of {hometown}, is {job title/place of employment} holds {education level, school, or relevant experiences}.Brad M Reich : I am the Inutek Manager for Maniilaq Association for Ten years, I am the Mayor ot , Regional School Board Member NWABSD,Also on Public Safety Commission for the Northwest Arctic Borough,Along with Local Advisory School Committee.Long lived in Northwest and look forward to working with the State to better our communities Merry Christmas all.

Submitted: 12/20/11 at 3:59 pm from 209.165.162.138

Sunderland, Jamie
Alaska Police Standards Council

ENTERED
09.13.07

OFFICE OF THE GOVERNOR
MAILROOM
SEP 13 2007

September 5, 2007

State of Alaska
Attn: Frank Bailey, Director of Boards and Commissions
P.O. Box 110001
Juneau, AK 99811-0001

Dear Mr. Bailey:

I am seeking consideration for appointment to the **State Emergency Response Commission (SERC)**. I am interested in the vacant rural LEPC seat.

I have served the last 2 years as the Aleutian Pribilof Islands LEPC chair. I have been an LEPC member for approximately 4 years. I have attended the LEPC/SERC tri-annual meetings for the past 3 years and am familiar with the format and issues facing this commission. I am willing to devote the time necessary to carry out any duties associated with this Commission.

I am a registered voter in Alaska, and have resided in the City of Unalaska for the past 12 years. I currently work for the city as the Acting Director of Public Safety. I have a strong interest in Emergency Preparedness and have completed over 30 courses in this field.

In closing, I ask for your consideration in this appointment. I have attached a resume and commission application for your review.

Respectfully,

Jamie Sunderland

STATE OF ALASKA
OFFICE OF THE GOVERNOR
P.O. Box 110001, Juneau, AK 99811-0001
Phone: (907) 465-3500 Fax: (907) 465-3532

BOARDS AND COMMISSIONS APPLICATION FORM

INSTRUCTIONS

A separate application is required for each position for which you apply. Complete and specific answers will aid in rapid and accurate processing of your resume. Please type or print legibly in ink. Forward to the above address. Be sure your answers are true. A willfully false answer may result in your disqualification or removal from office if you are appointed.

Board or Commission and seat for which I am applying: State Emergency Response Commission (SERC) LEPC/Rura
(For example, Board of Agriculture, public seat)

Please list any other State Boards or Commissions on which you currently or previously have served:
None

Name: Jamie Sunderland

Mailing Address: _____

Residence Address: _____

City, State and Zip Code: Unalaska, AK 99685

Home or Message Telephone: _____ Business Telephone: _____

Fax Number: _____ Cell Phone: _____

Email address: _____

AS 39-05-100 requires that a person appointed to a state board or commission be a registered voter prior to the last general election.

Are you a registered voter: YES XX NO _____ Voter Registration Number (Optional): _____

Social Security Number (Optional, required if appointed for travel, reimbursement etc.) _____

Have you ever been convicted of a misdemeanor within the past five years or a felony within the past ten years?

YES _____ NO XX if "YES", explain the circumstances on a separate sheet of paper and attach it to this application. A conviction is not necessarily grounds for disqualification. The number of convictions, nature, recentness, and relationship to the board position applied for, will be evaluated and a determination will be made after a review of all relevant facts.

CONFLICTS OF INTEREST: Certain boards and commissions require full disclosure of personal financial data under AS 39.50.010. If required for the board or commission for which you are applying, are you willing to do so?
YES XX NO _____

Could you or any member of your family be affected financially by decisions to be made by the board or commission for which you have applied? YES _____ NO XX

If "YES", explain:

TRAINING AND EXPERIENCE: (If resume attached, it is not necessary to complete items A-D)

A. List any professional licenses, certifications, or registrations and dates obtained that may be used as qualifying criteria:

see attached resume

B. List both formal and informal education and training experiences: (Use additional paper if necessary).

C. List any community service, municipal government, and state positions held, and any awards received. Include both compensated and uncompensated positions (such as president of a service organization or a mayor). Include length of time serviced.

D. Employment work history – paid, unpaid or voluntary: (Use additional paper of necessary).

The Office of the Governor and the State of Alaska have an Affirmative Action Equal Employment Opportunity Program. To assist in the program, you are asked to voluntarily answer the following questions to provide the information necessary for reporting purposes. Under State and Federal law, the information you provide will not be used to illegally discriminate against you

CERTIFICATION: I swear the information I have entered on this form is true to the best of my knowledge. I understand that if I deliberately conceal or enter false information on the form my application may be rejected, I may be removed from the list of eligible candidates, or I may be removed from the position. I agree that the Office of the Governor may contact present or former employees or other persons who know me to obtain an additional information about my skills and abilities. I understand that the information on this application is public information and may be released through a legal request for such information.

Signature (in ink): _____ Date: 9/5/07

Please attach a current resume with your application.

STATE OF ALASKA
OFFICE OF THE GOVERNOR

BOARDS AND COMMISSIONS

Name: Jamie Sunderland Date: 9/5/07

(Indicate top three boards/commissions of interest by number with #1 as your preference)

	Accounting Board
	Aerospace Development Corporation
	Aging Commission
	Agriculture & Conservation
	Alaska Juvenile Justice Advisory Committee
	Alaska Retirement Management Board
	Alaska Statehood Celebration Commission
	Alaska-Alberta Bilateral Council
	Alcohol/Drug Abuse
	Alcoholic Beverage Control
	Architects/Engineers/ Land Surveyors
	Arts Council
	Assessment Review Board
	Aviation Advisory Board
	Bald Eagle Preserve
	Bar Association
	Barbers & Hairdressers
	Bering Sea Fishery Advisory Board
	Big Game Commercial Services
	Boating Safety Council
	Broadcasting Commission
	Children's Trust Board
	Chiropractic Examiners
	Clemency Advisory Committee
	Commemorative Coin Commission
	Commercial Fisheries Entry
	Commercial Fishing/Agriculture Bank
	Community Service Commission
	Denali Access System Advisory Committee
	Dental Examiners
	Disabilities/Special Education
	Domestic Violence/Sexual Assault
	Education & Early Development
	Education Commission/States
	Emergency Medical Services
1	Emergency Response Commission
	Employment of People with Disabilities
	Exxon Valdez Oil Spill Trustee
	Faith-Based & Community Initiatives Council
	Fire Standards Council
	Fisheries

	Fisherman's Fund Advisory & Appeals
	Forestry
	Game
	Health Council
	Historical Commission
	Historical Records Advisory
	Homeless Council
	Housing Finance Corporation
	Human Rights
	Humanities Forum
	Independent Living Council
	Industrial Development/Export Authority
	Interstate Oil & Gas Compact
	Judicial Conduct
	Judicial Council
	Knik Arm Bridge
	Labor Relations Agency
	Libraries Advisory
	Local Boundary Commission
	Marine Pilots
	Marine Transportation Advisory Board
	Marital & Family Therapy
	Medical Board
	Mental Health Board
	Mental Health Trust Authority
	Midwives
	Minerals Commission
	Municipal Bond Bank
	Natural Gas Authority
	Natural Gas Pipeline Corporation
	Natural Resources Conservation Dev
	North Pacific Anadromous Fish
	North Pacific Fisheries Management Council
	North Pacific Research Board
	Nursing
	Occupational Safety
	Oil & Gas Conservation Commission
	Optometry
	Pacific Marine Fisheries Commission
	Pacific Salmon Commission-Commissioners
	Pacific Salmon Commission- Northern Panel

	Pacific Salmon Commission-Transboundary Panel
	Parole Board
	Permanent Fund
	Pharmacy Board
	Physical/Occupational Therapy
	Pioneer's Home Advisory
2	Police Standards Council
	Postsecondary Education
	Professional Counselors
	Professional Teaching Practices
	Psychologist/ Psychological assoc
	Public Offices Commission
	PWS Oil Spill Recovery Institute
	Railroad Corporation
	Real Estate Appraisers
	Real Estate Commission
	Regents
	Regulatory Commission (RCA)
	Royalty Oil & Gas Development
	Safety Advisory Council
	Seafood Marketing Institute
	Seismic Hazards Safety Commission
	Social Work Examiners
	Student Loan Corporation
	Subsistence Resource Commissions
	Suicide Prevention Council
	Telecommunications
	Uniform State Laws
	Veterans Advisory Council
	Veterinary Examiners
	Violent Crimes Compensation
	Water and Wastewater Works
	Western Interstate Comm/Higher Educ
	Wood-Tikchik State Park
	Worker's compensation
	Worker's Compensation Appeals Commission
	Workforce Investment Board
	Yukon River Panel

If appointed, a press release will be issued announcing your appointment pending the completion of the appointment process with the Governor's office. Please supply our office with the following information that will be included in the press release.

(Name):** see below, (Age):____of (Hometown):_____
is (Job title/Place of employment):_____.
(Name) holds (Listing of earned degrees like bachelor's, master's, ect.):_____.

(Or list relevant experience to the position you are being appointed to)

Examples:

John A. Doe, 38 of Soldotna, is Director of T-Shirts & Co. Doe holds a bachelor's degree in business administration from X University and a master's degree in communications from X University.

John A. Doe, 38 of Palmer, is the owner and operator of Doe and Associates, Inc. Doe previously served as division manager at X, Inc. Doe is a certified personnel consultant.

** Jamie Sunderland, [illegible]en appointed to the State Emergency Response Commission (SERC), in the Rural LEPC slot. Mr. Sunderland is the Police Lieutentant for the City of Unalaska, and also serves as the Chair of the Aleutian Pribilof Islands LEPC.

Jamie Sunderland

Objective

Seeking appointment to the **State Emergency Response Commission (SERC) rural LEPC seat**

Education

University of Alaska Anchorage/Mat-Su College	Associate of Arts, General Studies, Cum Laude 08/95
University of Alaska Southeast	Senior status in BA Business Management program
FBI National Academy	Graduate, 223rd session, 12/05

Work Experience

01/03 to Present	Police Lieutenant Unalaska Dept. of Public Safety, Unalaska, AK Manage Public Safety budgets, capital projects, grants and personnel
11/95 to 12/02	Police Officer Unalaska Dept. of Public Safety, Unalaska, AK Police patrol duties and police instruction
03/94 to 11/95	Security Officer Ahtna American Guard and Alert (formerly Wackenhut), Anchorage, AK Provide security and courier services to ARCO Alaska
08/84 to 01/94	US Army Military Intelligence Anchorage, AK, Augsburg, FRG, Ft. Polk, LA Intelligence collection, specialized in Russian language

Volunteer Work

Currently I am the Chair of the Local Emergency Planning Committee. I volunteer every week during the school year cooking for an after school church program. I currently serve as the Vice-President of our local police non-profit association. I am the past President and Treasurer of the Aleutian Rod and Gun Club. I assist with the City fireworks display.

Licenses and Certificates

Advanced Police Certificate, State of Alaska
Certified Police Instructor, State of Alaska
Certified Concealed Carry/Armed Security Guard Instructor, State of Alaska
Emergency Medical Technician I, State of Alaska

Languages

Russian

References

Available on request

Boards & Commissions Factsheets

JUDICIAL COUNCIL

Board: Alaska Judicial Council
Board identification number: 053

Department: JUDICIAL BRANCH

Authority: AK Const. Art. IV Sec. 8

Status: Active

Sunset date:

Requirements: Legislative Confirmation and Financial Disclosure

Prohibitions: Members may not serve on the Commission on Judicial Conduct simultaneously; no member, except the Chief Justice, may hold any other office or position of profit under the U.S. or State of Alaska.

Term: 6 years

Description: The council consists of 7 members: 3 non-attorney members appointed by Governor: with regard to area representation and without regard to political affiliation; (only non-attorney members require legislative confirmation); 3 attorneys appointed by the Bar Association; and Chief Justice (ex-officio and chair).

Function: The council nominates persons to Governor for any vacancy in an office of supreme court justice, court of appeals judge, superior court judge, district court judge, the public defender, or administrative tax law judges (Governor appoints one of two or more persons nominated by Council); conducts studies for improvement of the administration of justice; evaluates judges standing for retention election and publicizes findings and recommendations.

Chair: Chief Justice

Special facts: A quorum consists of 4 members. The council reports to Supreme Court/Legislature at least every 2 years. The Chief Justice serves a three-year term.

Compensation: Standard Travel and Per Diem.

Meetings: About 5 times per year as required by new vacancies; 1-2 days each.

For further information and to reach individual members, contact:
Mr. Larry Cohn
Executive Director
1029 West Third Avenue, Ste. 201
Anchorage, AK 99501-1969
Phone: (907) 279-2526, FAX: (907) 276-5046

Judicial Council Roster

Go to the Judicial Council Home page

We appreciate your interest in Boards and Commissions. For further information contact the Boards and Commissions staff at (907) 465-3500 or at **boards@alaska.gov**.

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Boards & Commissions Roster

JUDICIAL COUNCIL (053)

Member	Date Appointed	Reappointed	Term Expires
James H. Cannon Attorney/Alaska Bar Appointment	2/23/2006		2/23/2012
Walter L. Carpeneti Chief Justice/Designated	7/1/2009		6/30/2012
William F. Clarke Public/Governor's Appointment	10/16/2008		3/1/2013
Kevin T. Fitzgerald Attorney/Alaska Bar Appointment	4/28/2008		2/23/2014
Ken Kreitzer Public/Governor's Appointment	7/28/2011		3/1/2017
Kathleen R. Tompkins-Miller Public/Governor's Appointment	3/1/2009		3/1/2015
Julie Willoughby Attorney/Alaska Bar Appointment	4/27/2010		2/23/2016

Return to the fact sheet

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Ken Kreitzer

Kreitzer, Ken
Alaska Judicial Council

PERSPECTIVE:

My sincere desire is to help the Parnell/Treadwell Administration fulfill their vision for the state of Alaska. I have over 25 years of experience in resource conservation issues. I have been able to effectively work on both sides of management and labor. I would be honored to use my talent and experience hearing and adjudicating fisheries resources for the Commercial Fisheries (Limited) Entry Commission.

WORK EXPERIENCE:

*City Councilman *Citizens Advisory Commission on Federal Areas Member *Promoting conservation through volunteer service *Experience deck handing Southeast fisheries *Correctional Officer *Airport Safety Officer *Police Officer *Drilling Fluids Engineer *Professional Firefighter *Legislative Aide *City Treasurer *Emergency Medical Technician *PSEA Board Member, Corrections Chapter *PSEA Legislative Liaison *ACOA Legislative liaison

ISSUE EXPERIENCE:

Cold Bay City Councilman/Treasurer - helped write grants for community development plan with Southwest Alaska Municipal Conference (SWAMC) and for development of Cold Bay dock project, Work on City Recreation Committee to set policy for all city recreation programs, CACFA – Evaluate resource-related issues and provide a voice for Alaskans on federal/state resource issues, Fund raising for resource related groups like Ducks Unlimited, Educating, legislators on Corrections issues, Helped rewrite union bylaws, resolve grievances, and participated in negotiations of corrections contract

SUPERVISORY EXPERIENCE:

Acting airport manager, Supervise and train volunteer firefighters, Supervise inmates, Supervise Community Service offender, Supervise and implement FAA required security system, As EMT II, supervise lower level medics, Supervise drilling crews treating drilling fluids, DU Chairman, Salmon Derby Chairman Cold Bay, Supervised fiscal responsibilities of city clerk and clinic personnel

STRENGTHS:

BA Communications 1980 Wright State University, Numerous certifications and continuing ed documentation

REFERENCES ON REQUEST

Sandahl, Gustaf
Alaska Police Standards Council

Police Standards Council, Alaska **Gustaf Arnold Sandahl**

General Information

Board/Commission and seat you are seeking:
Police Standards Council, Alaska, Member

Additional Boards/Commissions of interest:

State Boards/Commissions on which you have served
None

First	*Middlename*	*Last Name*
Gustaf	**Arnold**	**Sandahl**
Mailing Address	*City* **Kenai**	*State & ZIP*
Home/Message Phone	*Business Phone*	*Cell Phone*
Email Address	*Are you a registered voter?* **Yes**	

Date of Birth	*Ethnicity*
Gender	
Military Service	

Conflict of Interest

Certain boards and commissions require full disclosure of personal financial data under AS 39.50.010. If required for the board or commission for which you are applying, are you willing to do so?
Yes

Could you or any member of your family be affected financially by decisions to be made by the board or commission for which you are applying?
No

Please explain the potential financial benefit

Employment History

Employment work history including paid, unpaid or voluntary.
1995 - present, Police Officer with the City of Kenai
1995 (February - April) State of Alaska - construction laborer
1988 - 1994, Commercial Fisherman - Cook Inlet (skipper Jim Evenson)
1993 - 1994, Boise State University Recreation Department (intramural referee).
1990 - 1994, Kenai Golf Course, range keeper, laborer
2008 - 2010, Little League volunteer coach

Education, Training, Experience & Qualifications

List both formal and informal education and training experiences:
Bachelor of Science - Criminal Justice Administration - Boise State Univ. 12/94
Graduate of the FBI National Academy (10 week Police Leadership Program) 3/06

Certified Polygraph Examiner (Harrisburg Area Community College) 3/03
Certified Police Handgun Instructor
Certified Oleoresin Capsicum (Pepper Spray) Instructor
Completed all necessary Homeland Security Incident Command Courses (ICS 100, 200, 300, 400, 700, 800)
Advanced Criminal Investigations - (one week course in Anchorage 1998)
Methods of instruction - 1999
Field Training Officer - 1999
Northwestern University - Supervision of Police Personnel (Independent Study Course) 2001
DARE Officer (2 week training program - 2000); Taught DARE for 2 years in schools.
School Resource Officer Leadership Program (one week in Anchoraage - 2001)
Sexual Assault Response Team training - 2002
Advanced Intensive Sexual Abuse Interviewing Skills training - 2000
Managing the Lost Person Incident (Search and Rescue) - 2004
Clan Lab Investigations (one day) - 2001
Crime Stoppers International Training - 2004
Law Enforcement Management Institute (one week of supervisory training - 2003)
Various other law enforcement trainings (interview/interrogation, crime lab, death investigations, etc.).

List any professional licenses, certifications, or registrations and dates obtained that may be used as qualifying criteria.
Advanced Certificate - Police Officer State of Alaska - July 2001.
Certified Police Instructor - State of Alaska - February 2000.

List any community service, municipal government, and state positions held, and any awards received.
2008 - 2010 Kenai Little League board member
2008 - 2010 Kenai Care Center board member (no longer on board)
2009 - 2010 LeeShore Center board member (Women's shelter)
2008 - 2010 FBI National Academy Associates Board Member
2009 - 2010 Member of the Local Emergency Planning Committee (LEPC)
2004 - 2007 Vice-President Alaska Peace Officers Association (Kenai Chapter)
2003 - 2006 Law Enforcement Coordinator to Kenai Peninsula Crime Stoppers
2007 - 2008 Law Enforcement Liaison to the Alaska Highway Safety Office
2007 - 2009 Co-facilitator of youth activities for Police Athletic League
2008 - Officer of the Year - Kenai Police Department
1995 - 2000 Patrolman Kenai Police Department
2000 - 2002 Investigator/Youth Services Kenai Police Department
2002 - 2003 Patrol Sergeant Kenai Police Department
2003 - 2008 Investigations Sergeant Kenai Police Department
2008 - Present, Police Chief Kenai Police Department

Conviction Record

Have you ever been convicted of a misdemeanor within the past five years or a felony within the past ten years?
No

Conviction Circumstances

Certification of Accuracy & Completeness

By submitting this online application, I swear the information I have entered on this form is true to the best of my knowledge. I understand that if I deliberately conceal or enter false information on the form my application may be rejected, I may be removed from the list of eligible candidates, or I may be removed from the position. I agree that the Office of the Governor may contact present or former employees or other persons who know me

to obtain an additional information about my skills and abilities. I understand that the information on this application is public information and may be released through a legal request for such information.

Type "I certify"
"I certify"

Resumé Addendum

Press Release Wording

Gustaf Sandahl, , Police Chief - Kenai Police Department, holds a Bachelor's Degree in Criminal Justice Administration from Boise State University, and has been a Police Officer for 15 years with the City of Kenai.

Submitted: 09/17/10 at 12:23 pm from 69.162.209.70

City and Borough of Sitka

POLICE DEPARTMENT

304 Lake Street, Room 102 • Sitka, Alaska 99835

Sheldon Schmitt
Chief of Police

Business 747-3245
Fax 747-1075

October 19, 2007

Office of Governor Sarah Palin
Attn: Frank Bailey
Director of Boards and Commissions
P. O. Box 110001
Juneau, AK 99811-0001

Re: Alaska Police Standards Council Seat

Dear Mr. Bailey:

I am writing to advise you of my interest in serving as a member of the Alaska Police Standards Council. I am a twelve-year veteran of law enforcement service in Alaska, currently serving as the Chief of Police in Sitka, Alaska. I desire to see Alaska's public safety community continue to improve in both quality and recruit training, as well as the continued education of our experienced officers. I believe in a quality selection process and will strive to uphold and refine standards for entry into the police and corrections workforce.

I would consider it an honor to serve on the Alaska Police Standards Council. My resume and application are attached for your consideration.

Respectfully,

Sheldon Schmitt
Chief of Police
Sitka Police Department

cc: Terry Vrabec, Executive Director, APSC
Walt Monegan, Commissioner, Dept. of Public Safety

Enc: Resume

Sheldon Schmitt **Sitka Alaska**

With over twelve years of law enforcement with a variety of responsibilities, most recently as Police Chief in Sitka, Alaska, this applicant has qualities, experience, education, and abilities that qualify him to be selected for a seat on the Alaska Police Standards Council.

Education

BS Degree:	Criminal Justice Major, Political Science Minor Magna Cum Laude Graduate, Phi Kappa Phi Honors (12-3-93) Minnesota State University, Mankato, Minnesota
Masters Program	University of Alaska Fairbanks Masters Program in Criminal Justice-(Second Year)

Professional Experience

The applicant has over twelve years in law enforcement including many years in bush Alaska as a Corrections Officer, Village Public Safety Officer, Police Officer, Police Sergeant and Police Chief in locations such as Togiak, Nelson Lagoon, Point Hope and Barrow, Alaska. For the past five years he served as Police Lieutenant and Police Chief in Sitka Alaska. He helped establish a Tribal and Community courts in several villages that later became the model for the state. In Sitka he also helped start TYDE, a Tribal Youth Diversion Effort, The Sitka Family Justice Center, one of only fifteen selected nationally for grant funding, and Community Oriented programs, and other community oriented programs.

Specialized Training/ Education

APSC Certification: Alaska Police Standards Council Advanced Certificate, Federal Bureau of Investigation National Academy, Community/ Tribal Courts trainer, DataMaster Supervisor, State Certified Police Instructor, DARE Certified, FTO- Field Training Officer

Community Involvement or Recognition

- Sitka Family Justice Center co-founder and Board Member. Recognition from President Bush and the Office of Violence Against Women for this program
- FBI National Academy Associates Vice President, Secretary Treasurer
- SAFV, Sitka women's shelter, Board Member for two years
- CID-COPs co-founder. Helped import this model program to Sitka from Yale University for children exposed to violence
- Alaska Municipal Awards for the development of the Sitka Family Justice Center and Barrow Community
- Advancing Our Community- Board Member
- Alaska Division of Homeland Security- state grant review committee
- Certificate of Merit- Sitka Police In recognition in the area of community relations
- Community Service Awards in 1998 and 2000 North Slope Borough
- Live Saving Award North Slope Borough Police 1999

STATE OF ALASKA
OFFICE OF THE GOVERNOR
P.O. Box 110001, Juneau, AK 99811-0001
Phone: (907) 465-3500 Fax: (907) 465-3532

BOARDS AND COMMISSIONS APPLICATION FORM

INSTRUCTIONS

A separate application is required for each position for which you apply. Complete and specific answers will aid in rapid and accurate processing of your resume. Please type or print legibly in ink. Forward to the above address. Be sure your answers are true. A willfully false answer may result in your disqualification or removal from office if you are appointed.

Board or Commission and seat for which I am applying: Alaska Police Standards Council APSC
(For example, Board of Agriculture, public seat)

Please list any other State Boards or Commissions on which you currently or previously have served:

Name: Sheldon R. Schmitt

Mailing Address: ____

Residence Address: ____

City, State and Zip Code: Sitka, AK. 99835

Home or Message Telephone: ____ Business Telephone: ____

Fax Number: ____ Cell Phone: ____

Email address: ____

AS 39-05-100 requires that a person appointed to a state board or commission be a registered voter prior to the last general election:

Are you a registered voter: YES ✓ NO ____ Voter Registration Number (Optional): ____

Social Security Number (Optional, required if appointed for travel, reimbursement etc.): ____

Have you ever been convicted of a misdemeanor within the past five years or a felony within the past ten years?

YES ____ NO ✓ if "YES", explain the circumstances on a separate sheet of paper and attach it to this application. A conviction is not necessarily grounds for disqualification. The number of convictions, nature, recentness, and relationship to the board position applied for, will be evaluated and a determination will be made after a review of all relevant facts.

CONFLICTS OF INTEREST: Certain boards and commissions require full disclosure of personal financial data under AS 39.50.010. If required for the board or commission for which you are applying, are you willing to do so?
YES ✓ NO ____

Could you or any member of your family be affected financially by decisions to be made by the board or commission for which you have applied? YES ____ NO ✓

If "YES", explain:

TRAINING AND EXPERIENCE: (If resume attached, it is not necessary to complete items A-D)

A. List any professional licenses, certifications, or registrations and dates obtained that may be used as qualifying criteria:

See Resume

B. List both formal and informal education and training experiences: (Use additional paper if necessary).

C. List any community service, municipal government, and state positions held, and any awards received. Include both compensated and uncompensated positions (such as president of a service organization or a mayor). Include length of time serviced.

D. Employment work history – paid, unpaid or voluntary: (Use additional paper of necessary).

The Office of the Governor and the State of Alaska have an Affirmative Action Equal Employment Opportunity Program. To assist in the program, you are asked to voluntarily answer the following questions to provide the information necessary for reporting purposes. Under State and Federal law, the information you provide will not be used to illegally discriminate against you.

DATE OF BIRTH: _ ___ SEX: FEMALE _____ MALE ___ ___

ETHNICITY:
Alaska Native ___ American Indian ___ Asian or Pacific Islander ___ Black ___ Hispanic ___ White

MILITARY SERVICE (if applicable, give dates): _____ _____

CERTIFICATION: I swear the information I have entered on this form is true to the best of my knowledge. I understand that if I deliberately conceal or enter false information on the form my application may be rejected, I may be removed from the list of eligible candidates, or I may be removed from the position. I agree that the Office of the Governor may contact present or former employees or other persons who know me to obtain an additional information about my skills and abilities. I understand that the information on this application is public information and may be released through a legal request for such information.

Signature (in ink): Sheldon Soloi Date: 10/22/07

Please attach a current resume with your application.

STATE OF ALASKA
OFFICE OF THE GOVERNOR

BOARDS AND COMMISSIONS

Name: SHELDON SCHMITT Date: 10-22-07

(Indicate top three boards/commissions of interest by number with #1 as your preference)

	Accounting Board
	Aerospace Development Corporation
	Aging Commission
	Agriculture & Conservation
	Alaska Juvenile Justice Advisory Committee
	Alaska Retirement Management Board
	Alaska Statehood Celebration Commission
	Alaska-Alberta Bilateral Council
	Alcohol/Drug Abuse
	Alcoholic Beverage Control
	Architects/Engineers/ Land Surveyors
	Arts Council
	Assessment Review Board
	Aviation Advisory Board
	Bald Eagle Preserve
	Bar Association
	Barbers & Hairdressers
	Bering Sea Fishery Advisory Board
	Big Game Commercial Services
	Boating Safety Council
	Broadcasting Commission
	Children's Trust Board
	Chiropractic Examiners
	Clemency Advisory Committee
	Commemorative Coin Commission
	Commercial Fisheries Entry
	Commercial Fishing/ Agriculture Bank
	Community Service Commission
	Denali Access System Advisory Committee
	Dental Examiners
	Disabilities/Special Education
	Domestic Violence/Sexual Assault
	Education & Early Development
	Education Commission/States
	Emergency Medical Services
	Emergency Response Commission
	Employment of People with Disabilities
	Exxon Valdez Oil Spill Trustee
	Faith-Based & Community Initiatives Council
	Fire Standards Council
	Fisheries

	Fisherman's Fund Advisory & Appeals
	Forestry
	Game
	Health Council
	Historical Commission
	Historical Records Advisory
	Homeless Council
	Housing Finance Corporation
	Human Rights
	Humanities Forum
	Independent Living Council
	Industrial Development/Export Authority
	Interstate Oil & Gas Compact
	Judicial Conduct
	Judicial Council
	Knik Arm Bridge
	Labor Relations Agency
	Libraries Advisory
	Local Boundary Commission
	Marine Pilots
	Marine Transportation Advisory Board
	Marital & Family Therapy
	Medical Board
	Mental Health Board
	Mental Health Trust Authority
	Midwives
	Minerals Commission
	Municipal Bond Bank
	Natural Gas Authority
	Natural Gas Pipeline Corporation
	Natural Resources Conservation Dev
	North Pacific Anadromous Fish
	North Pacific Fisheries Management Council
	North Pacific Research Board
	Nursing
	Occupational Safety
	Oil & Gas Conservation Commission
	Optometry
	Pacific Marine Fisheries Commission
	Pacific Salmon Commission-Commissioners
	Pacific Salmon Commission- Northern Panel

	Pacific Salmon Commission-Transboundary Panel
	Parole Board
	Permanent Fund
	Pharmacy Board
	Physical/Occupational Therapy
	Pioneer's Home Advisory
#1	Police Standards Council
	Postsecondary Education
	Professional Counselors
	Professional Teaching Practices
	Psychologist/ Psychological assoc.
	Public Offices Commission
	PWS Oil Spill Recovery Institute
	Railroad Corporation
	Real Estate Appraisers
	Real Estate Commission
	Regents
	Regulatory Commission (RCA)
	Royalty Oil & Gas Development
	Safety Advisory Council
	Seafood Marketing Institute
	Seismic Hazards Safety Commission
	Social Work Examiners
	Student Loan Corporation
	Subsistence Resource Commissions
	Suicide Prevention Council
	Telecommunications
	Uniform State Laws
	Veterans Advisory Council
	Veterinary Examiners
	Violent Crimes Compensation
	Water and Wastewater Works
	Western Interstate Comm/Higher Educ
	Wood-Tikchik State Park
	Worker's compensation
	Worker's Compensation Appeals Commission
	Workforce Investment Board
	Yukon River Panel

If appointed, a press release will be issued announcing your appointment pending the completion of the appointment process with the Governor's office. Please supply our office with the following information that will be included in the press release.

(Name): SHELDON SCHMITT (Age): ___ of (Hometown): SITKA, ALASKA
is (Job title/Place of employment): CHIEF OF POLICE.
(Name) holds (Listing of earned degrees like bachelor's, master's, ect.): PLEASE SEE RESUME.
(Or list relevant experience to the position you are being appointed to)

Examples:

John A. Doe, 38 of Soldotna, is Director of T-Shirts & Co. Doe holds a bachelor's degree in business administration from X University and a master's degree in communications from X University.

John A. Doe, 38 of Palmer, is the owner and operator of Doe and Associates, Inc. Doe previously served as division manager at X, Inc. Doe is a certified personnel consultant.

Ronald F. Taylor

Taylor, Ronald
Alaska Police Standards Council

Profile

- Over 16 years' experience of senior management – Executive Director of the Alaska Board of Parole and Program Director of the Alaska ASAP Misdemeanor Services.
- Ability to direct complex projects from concept to fully operational status.
- Outcome-oriented individual with strong leadership capabilities.
- Organized, highly motivated, and detail-directed problem solver.
- Proven ability to work in unison with court system staff, substance abuse/mental health program directors, criminal justice agencies, and other correctional agencies throughout the state.

Education

University of Alaska Anchorage (2000)

- Interdisciplinary M.A. Degree - Sociology & Justice
- Completed the coursework, and only the Thesis remains

University of Florida (1986)

- B.A. Degree – Criminal Justice

Experience

Alaska Division of Probation & Parole | 550 West 7th Avenue, Suite #601; Anchorage, Alaska 99501

Division Director 9/1/2011 – Present

- Serves as the final division authority, and is responsible for all of the activities and decisions of the division.
- Oversee the management of delegated areas through chief probation officers. Provide guidance and instruction on policy, goals, use of division resources, process coordination, and quality control.
- Adjudicates subordinates' grievances and approves the appropriate disciplinary action; appoints, promotes and transfers subordinates as needed to achieve program goals; assigns and reviews work, approves leave and prepares performance evaluations.
- Direct the preparation, development and implementation of revisions to legislation, rules, regulations, policies and procedures.
- Coordinate the division's activities with other divisions within the department, outside agencies and federal, state and local governments as necessary.
- Represent the division at legislative hearings and meetings, explaining and justifying the division's programs and budget; represent the division at various meetings and conferences with State and federal officials, members of the public and the media;
- Respond to inquiries concerning policy matters, program operations, legislative proposals, administrative reviews and quality control.

- Provide periodic reports required by the Commissioner, Governor, other jurisdictions and the public.

Alaska Board of Parole | 550 West 7th Avenue, Suite #601; Anchorage, Alaska 99501
Executive Director 10/16/2008 – 8/31/2011

- Served as Alaska's expert on parole, and was responsible for the implementation of Board policies, advised Board members on parole related matters and represented the Board to the Legislature, organizations and agencies.
- Provided daily management of the Board to include development of goals and objectives, policies and procedures, regulations and statutes; maintained computerized statistical data concerning Board activities; and administered the Board's budget.
- Supervised, trained and evaluated staff. Interviewed candidates for Board staff positions, appointed, promoted, transferred and initiated disciplinary actions in accordance with personnel rules and collective bargaining agreements.
- Reviewed file information to determine eligibility for parole of all adult inmates confined in both State and contractual institutions.
- Scheduled parole hearings and handled the mechanics of the hearings (location, recording and transcription of proceedings, etc.). Conducted all parole release, parole rescission and final parole revocation hearings.
- Advised Board members, parole applicants, attorneys, witnesses and victims on applicable parole guidelines, policies, regulations and laws; and determined admissibility of evidence.
- Trained new Board members, institutional and field parole officers, and other Department of Corrections employees in all aspects of parole.
- Informed Board members of current community resources available to parolees. Provided interpretation of mental health and other technical reports to Board members in lay terms.
- Represented the Board on criminal justice matters to other agencies, the public, the media and by serving on special task forces; testified before the Legislature and provided interpretation of complex policy, legal and casework matters referred by the courts, attorneys, Governor's office, Commissioner's office, and law enforcement and corrections personnel.
- Reviewed lawsuits against the Board and Department of Corrections, and provided information to the Attorney General's office for possible resolution of lawsuits.
- Presented all executive clemency cases to the Executive Clemency Advisory Committee or directly to the Governor and/or his staff.
- Prepared and submitted a variety of reports concerning Board activities required by the Department of Corrections, Legislature and Alaska statutes.

Alaska ASAP Misdemeanor Services | 303 K Street; Anchorage, Alaska 99501
Alaska ASAP Program Manager 8/1/1995 – 10/15/2008

- Supervised, planned, directed and implemented the program direction, policies and procedures for the statewide ASAP network.

- Functions as the Chief Probation Officer and Program Administrator.
- Oversaw the statewide misdemeanor probation, tobacco enforcement, substance abuse program approval, and the various drug court probation monitoring units (Wellness court, Mental Health Court, Felony DUI Court, Felony Drug Court, etc.).
- Assessed policy and procedure changes to achieve the most effective, positive impact on the program administration, and recommended any revised legislation, policies and procedures to the Division Director.
- Collaborated with Division staff in the development of the operating and capital budgets, and monitored the financial performance of the program to ensure that work was completed within the budget framework.
- Monitored staff performance, allocated manpower, established job priorities and prepared staff evaluations for supervisors and program staff.
- Provided statewide quality control and accountability of all ASAP program services by conducting and overseeing site reviews, as well as preparing and reviewing written evaluations and/or technical assistance plans.
- Developed requests for proposal for the section, as needed. Reviewed grantee applications, and provided guidance to members of the PEC (Performance Evaluation Committee) on their award recommendations.
- Oversaw the development and implementation of the client and program tracking systems designed to evaluate statewide statistical output and program outcome data.
- Represented ASAP and/or the Division in the coordination of services, meetings, presentations and legislative testimonies regarding the role and function of Alaska ASAP.
- Planned and delivered statewide workshops and training conferences regarding alcohol, drugs and the criminal justice system.
- Responded to complaints and inquiries made regarding the Division's programs.
- Served as the DUI Program Administrator for the State of Alaska. Past President of the National Organization of State Impaired-Driving Programs.

Alaska ASAP Misdemeanor Services | 303 K Street; Anchorage, Alaska 99501
Adult Probation Officer II -ASAP 9/17/1990 – 7/31/1995

- Reviewed defendant files to assess and identify the status of a court-ordered misdemeanor case.
- Exercised independent judgments and decisions regarding the type and manner of ASAP requirements that will be imposed.
- Administered the screening and drinker classification procedure for early identification of problem drinkers.
- Referred to education or treatment programs for mental health counseling, domestic violence intervention and/or substance abuse treatment.
- Prepared progress reports based on defendant's criminal and treatment history, prognosis, and recommendations for treatment.

- Conducted case reviews with education and treatment providers to assist clients in their involvement with behavioral health programs.
- Provided court testimony, correspondence, special assistance and reports on the status or progress of defendants while on misdemeanor probation.
- Developed alternative resources and sentencing treatment options for defendants who live in remote areas, as well as conducted case conferences with parents of minors to assess treatment options.
- Traveled to statewide communities to evaluate the effectiveness and efficiency of local grantee programs, and provided technical assistance with detailed recommendations on the probation and case management processes.
- Supervised the ASAP office in the absence of the Program Manager, as well as conducted statewide training and/or on the job training for new personnel.
- Recommended the hiring of new personnel, rated the work performance and assigned job duties for ASAP grantee personnel, as well as the Anchorage probation staff.
- Monitored and provided reports to federal grant reviewers regarding the status and ongoing development of the ASAP client tracking software.

Professional Membership/Community Involvement

- Disabled American Veterans Association (DAV) - *Life Member*
- University of Florida Alumni Association - *Charter Life Member*
- Alpha Kappa Delta Honor Society, *Past Member*
- National Organization of State Impaired Driving Program (NOSIP), *Past President*
- Community Based Action for a Safer Society (CBASS), *Founding Member*
- Criminal Justice Assessment Committee (CJAC), *Member*
- Supreme Court Domestic Violence Committee, *Member*
- Underage Drinking Coalition, *Past Member*
- Alaska Traffic Records Committee, *Past Member*
- Multi-Agency Justice Integration Consortium (MAJIC), *Member*
- Alaska Co-Occurring State Incentive Grant Project, *Past Member*
- Criminal Justice Work Group, *Member*
- Alaska Prisoner Re-Entry Taskforce, *Member*
- Alaska Native Justice Center, *Re-Entry Mentor*
- National Association of Probation/Parole Executives, *Member*
- American Probation & Parole Association, *Member*
- Association of Paroling Authorities International, *Member*
- Interstate Compact Administrator, *Member*
- Alaska Police Standards Council, *Member*
- National Institute of Corrections, *Technical Resource Provider*

Professional Development

- Certificate of Achievement for Exceptional Meritorious Achievement on 7/87, Department of the Army
- Field Sanitation Team Training, 7/87, Department of the Army
- Combat Lifesavers Course, 1/88, Department of the Army
- ASAP Administration Training, 3/91, Alaska Department of Health and Social Services
- Supervisory Training- Labor Relations Series, 12/96, Alaska Department of Health and Social Services
- Southeastern DUI Offender Systems Training, 10/86
- Basic Ergonomics, 1/97, Alaska Department of Health and Social Services
- Criticism and Discipline Skills for Managers, 10/97, Career Track
- Time Quest, 10/97, Franklin Quest
- Federal Confidentiality Regulations, 5/98, Legal Action Center
- How to Delegate Work, 5/98, Career Track
- How to Deal With Difficult People, 5/98, Skillpath
- National GAINS Center Regional Forum on Co-Occurring Disorders, 5/98, National Institute of Corrections
- Making Managers into Leaders, 6/98, Enlightened Leadership International
- 4-Dimensional Leadership, 6/98, Career Track
- Dealing With Employee Discipline & Performance Problems, 6/98, Fred Pryor
- Contracts and Grants Management, 2/00, Alaska Department of Health and Social Services
- Community Mobilization, 4/00, Western Community Policing Center
- Developing Problem Solving Teams, 5/00, Western Community Policing Center
- Ethics, Leadership & Organizational Change, 7/00, Western Community Policing Center
- Community Justice, 10/00, Alaska Department of Corrections
- Workforce Development, 5/01, Alaska Department of Health and Social Services
- Family Medical Leave Act, 7/01, Alaska Department of Health and Social Services
- Non-Violence Crisis Intervention, 9/01, Alaska Department of Health and Social Services
- Microsoft ACCESS, 4/02
- Addressing the Substance Abuse Barriers to Employment for TANF Families, 9/02, Alaska Division of Alcoholism & Drug Abuse
- Media Literacy, 9/02, Akeela, Inc.
- Community Readiness, 1/03, Akeela, Inc.
- A Manager's Tool for Researching Public Issues, 2/03, University of Alaska Anchorage
- Roles Supervisors Play, 1/03, University of Alaska Anchorage
- Discipline: Progressive and Constructive, 1/03, University of Alaska Anchorage
- The New Public Manager, 3/03, University of Alaska Anchorage
- Personnel & Administrative Law for Managers Training, 3/03, University of Alaska Anchorage
- Proposal Evaluation Training, 3/03, Alaska Department of Health and Social Services
- HIPAA & Federal Confidentiality, 3/03, Alaska Department of Health and Social Services
- Domestic Violence Training, 4/03, Department of Defense

- Co-Occurring Disorders Institute, 4/03, Co-Occurring Disorders Institute, Inc.
- Personnel Management, 5/03, University of Alaska Anchorage
- A Manager's Tool for Setting Program Goals & Evaluating Programs, 5/03, University of Alaska Anchorage
- Developing a Strategic Plan for Your Organization, 5/03, University of Alaska Anchorage
- Performance Appraisal Process, 10/03, University of Alaska Anchorage
- Key Issues in Employee Relations Law, 10/03, University of Alaska Anchorage
- Managing for Employee Performance, 10/03, University of Alaska Anchorage
- Persuasive Presentations, 11/03, University of Alaska Anchorage
- Choosing to Lead, 2/04, University of Alaska Anchorage
- Effective Writing, 3/04, University of Alaska Anchorage
- A Guide to Problem Analysis and Problem Solving, 4/04, University of Alaska Anchorage
- Confidentiality & Privacy: Creating Awareness in Drug Court Operations, 8/04, Center for Substance Abuse Treatment (CSAT)
- Confidentiality, Privacy & Ethics, 8/04, Center for Substance Abuse Treatment (CSAT)
- Community Supervision, 12/04, National Drug Court Institute
- National GAINS Conference on Co-Occurring Disorders, 5/05 -3/08, GAINS Center
- Annual School on Additions, 5/05, Substance Abuse Directors Association
- Annual Drug Court Training, 6/05-6/08, National Association of Drug Court Professionals
- Orientation for New Probation & Parole Chief Executive Officers, 2/09, National Institute of Corrections
- Basic Time Accounting Training, 3/09, Alaska Department of Corrections
- Correctional Leadership Development, 5/10, National Institute of Corrections
- American Probation & Parole Association – Annual Training Institute, 8/09 & 8/10
- Executive Excellence, 1/11, National Institute of Corrections
- Association of Paroling Authorities International – Annual Training Conference, 5/11
- Basic Public Information Officer, 7/11 Alaska Division of Homeland Security & Emergency Management
- Introduction to Continuity of Operations, 11/11, Alaska Division of Homeland Security & Emergency Management
- Managing the Paroling Authority – Executive Director Orientation (Training for Trainers), 1/12, National Institute of Corrections

References

1. L. Diane Casto, Former Supervisor
   Division of Behavioral Health, Prevention & Early Intervention Manager
   Phone Number: (907) 465-1188

2. Emily McKenzie, Former Supervisor
   Formerly of Division of Alcoholism & Drug Abuse
   Phone Number: (907) 345-0980

3. Charles Moses, Former Chair
   Formerly of Alaska Board of Parole
   Phone Number: (907) 274-2184

Boards & Commissions Factsheets

VIOLENT CRIMES COMPENSATION

Board: Violent Crimes Compensation Board
Board identification number: 103

Department: Department of Administration

Authority: AS 18.67.020

Status: Active

Sunset date:

Requirements: Legislative Confirmation

Prohibitions: None

Term: 3 years

Description: The board consists of 3 members appointed by Governor: at least 1 member must be a medical or osteopathic physician licensed to practice in Alaska, or holding a retired status license in Alaska; 1 member must be an attorney licensed to practice in Alaska, or retired from practice in Alaska. The Governor designates the board chair. Members serve at pleasure of Governor.

Function: Facilitates and permits payment of compensation to innocent victims of violent crimes.

Chair: Governor selects.

Special facts: the board serves in a quasi-judicial capacity. Members may be removed for cause. The board provides an annual report to Governor and Legislature.

Compensation: Standard Travel and Per Diem. No additional compensation.

Meetings: 6 times per year; at least one meeting per quarter. Jan/Feb. in Juneau; otherwise usually in Anchorage.

For further information and to reach individual members, contact:
Ms. Kate Hudson
Executive Director
Violent Crimes Compensation Board
ADM, P.O. Box 110230 M/S 0230
Juneau, AK 99811-0230
Phone: (907) 465-5525, FAX: (907) 465-2379

Violent Crimes Compensation Roster

Go to the Violent Crimes Compensation Home page

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Boards & Commissions Roster

VIOLENT CRIMES COMPENSATION (103)

Member	Date Appointed	Reappointed	Term Expires
Nora G. Barlow, P.C. Attorney	3/1/2010	3/1/2011	3/1/2014
Regina C. Chennault, M.D. Physician	10/18/2005	3/1/2012	3/1/2015
Gerad G. Godfrey Public – Chair	2/19/2003	3/1/2010	3/1/2013

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Stark, Michael
State Board of Parole

Rec'd Appt/Parole/07

ENTERED
1.2.07
dc

OFFICE OF THE GOVERNOR
DEC 28 2006

Michael J. Stark

Juneau, Alaska 99801

December 27, 2006

Honorable Sarah Palin
Office of the Governor
Boards and Commissions
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: Application for reappointment to the Alaska Board of Parole

Dear Governor Palin:

I am writing to express my strong interest in being considered by you for reappointment to the Alaska Board of Parole. I have served on the Board since March 2002, and respectfully seek appointment for another five-year term.

I served as Acting Chair of the Board from September 2004 – March 2005. For the last three years I have served as Vice Chair of the Board, elected by board members.

As evident from a review of my enclosed resume, prior to my appointment to the Board of Parole I had 27 years of state service in the Alaska Department of Law. Combined with my nearly five years of service on the board, I believe my work experience makes me uniquely qualified to continue serving on the board. During my last 21 years in the Attorney General's office, I served as lead counsel to the Alaska Department of Corrections and for my last 15 years as counsel to the parole board itself.

I have enclosed my resume and a letter of recommendation from Alaska Supreme Court Justice Walter L. Carpeneti for your review. Another letter of recommendation from United States Ambassador David Gross will be sent to your office in early January 2007 upon his return to Washington, D.C. I hope you will give favorable consideration to my request, as I believe I have much to contribute to the State of Alaska as a member of the Alaska Board of Parole.

Sincerely,

Michael J. Stark

Michael J. Stark

Enclosures

Michael J. Stark

[redacted]

PERSONAL

- Resident of Alaska 32 years. Married to Mary Jane "mj" Grande and have four children ages 31, 27, 16, and 13.

EDUCATION

- J.D., Georgetown University Law Center, Washington, D.C., 1974 Editorial Staff of American Criminal Law Review
- B.A., Political Science, Univ. of Florida, Gainesville, FL, 1970
- Certification in Trial Advocacy, National Institute of Trial Advocacy, 1981
- Specialized training: Civil Rights and 42 U.S.C. § 1983, and Law of Corrections

ADMITTED TO PRACTICE LAW

- Alaska Supreme Court, 1974
- United States District Court, District of Alaska, 1975
- United States Court of Appeals, Seventh Circuit, 1980
- United States Supreme Court, 1981
- United States Court of Appeals, Ninth Circuit, 1983

AFFILIATIONS

- Alaska Bar Association, since 1974
- American Correctional Association, since 1983

PAST COMMUNITY AFFILIATIONS

- Juneau Cooperative Preschool, Board of Directors 1998-1999
- Juneau Community Charter School, Academic Policy Committee (governing board) 2000-2003 (President 2001-2003)
- Soccer coach Juneau Parks and Recreation 1999-2002

REFERENCES

- Walter L. Carpeneti, Justice, Alaska Supreme Court
  P.O. Box 114100, Juneau, Alaska 99811 (907) 463-4770

- David Gross, Ambassador, United States State Department
  2201 "C" Street NW, Washington D.C. 20520 (202) 647-5212
  grossda@state.gov

- Additional references provided upon request

EMPLOYMENT HISTORY

March 2002-present *Member, Alaska Board of Parole*

Appointed by governor to serve as member of five person board that conducts hundreds of hearings annually to determine suitability of offenders for release on parole or return to prison for violation of conditions of parole. Hearings are held in several locations around Alaska and two times each year in Arizona where approximately 900 Alaskan prisoners are incarcerated in a privately operated correctional facility. Also responsible for setting conditions of parole for several hundred parolees released from Alaska's correctional facilities. Elected Vice Chair of the Board in November 2003, and re-elected in 2004 and 2005.

May 1980 – January 2002 *Assistant Attorney General, Criminal Division Central Office, Alaska Department of Law, Juneau*

Supervise section of four attorneys serving as counsel to Alaska Department of Corrections and Alaska Board of Parole. Trial or appellate counsel, or supervising attorney in ongoing caseload of 150-220 prisoner-initiated lawsuits pending against state officials in state and federal courts. From 1996-2002, served as counsel to the Division of Fire Prevention (State Fire Marshall) and the Alaska Police Standards Council.

Over 20 years experience in civil litigation primarily involving civil rights and post-conviction relief actions. Counsel for state in prisoner class-action, *Cleary v. Smith,* 1981-1995: participated in seven week trial in 1984 and negotiated 88 page final settlement agreement in 1990. Represented state and state officials in dozens of appeals before Alaska and federal appellate courts. Counsel for Alaska in appeal before United States Supreme Court with Delaware, Vermont and Hawaii concerning state's authority to incarcerate prisoners in federal facilities, 1981.

Responsible for complex investigation and report of misconduct by high level officials in Anchorage probation office, 1988.

Provide oral and written advice to corrections, probation and parole officials. Draft criminal justice legislation and present testimony before legislative committees. Author of major rewrite of AS 33.30, Alaska's statutes on corrections. Coordinate and review major regulations projects for the Department of

Corrections, Board of Parole, and Alaska Police Standards Council. Provide final review of Department of Corrections policy and procedures prior to submission to commissioner. Train correctional and probation/parole officers in legal liabilities and other aspects of corrections law.

July 1979-May 1980 *Assistant Attorney General, Office of Special Prosecutions and Appeals, Criminal Division Central Office, Alaska Department of Law, Juneau*

Counsel for the state in criminal appeals before Alaska Supreme Court and Alaska Court of Appeals. Investigated and prosecuted tax fraud case against attorney in Kodiak, *State v. Vogt*. Presented position of Alaska Department of Law to Alaska Supreme Court regarding proposed changes to Criminal Rule 6 relating to grand juries. Trained law enforcement officers on Alaska's newly adopted revised criminal code.

August 1975-July 1979 *Assistant District Attorney, District Attorney's Office, Alaska Department of Law, Juneau*

Prosecutor in more than 35 misdemeanor and felony jury trials in District and Superior Courts throughout Alaska, including sexual assault and homicide cases. Counsel for state in several appeals before the Alaska Supreme Court. Provided legal advice to Juneau Police Department and Alaska State Troopers. Trained social service groups in legal aspects of sexual assault and domestic violence. Presented overview of criminal justice system in public schools.

August 1974-August 1975 *Assistant Attorney General, Civil Division Alaska Department of Law, Juneau*

Specialized in criminal matters and civil rights. Authored more than 15 pieces of legislation relating to criminal justice. Assisted Juneau District Attorney's Office: argued motions and conducted several trials. Served as counsel to Alaska Human Rights Commission. Represented the Commission before the superior court in two cases relating to freedom of religion and sexual discrimination in employment.

Boards & Commissions Factsheets

JUDICIAL CONDUCT

Board: Commission on Judicial Conduct
Board identification number: 052

Department: JUDICIAL BRANCH

Authority: AS 22.30.010

Status: Active

Sunset date:

Requirements: Legislative Confirmation and Financial Disclosure

Prohibitions: Members may not serve on the Judicial Council and the Commission on Judicial Conduct simultaneously.

Term: 4 years

Description: The commission consists of 9 members: 6 appointed by Governor - 3 public members who are not judges, retired judges, or members of the state Bar; 3 attorneys who have practiced law in Alaska for 10 years, from nominations provided by Bar Association. The 3 justices/judges are elected by the justices/judges of the state courts. Membership terminates if member ceases to hold position that qualified appointment.

Function: Reviews allegations against judges/justices and promotes compliance with codes of conduct for judges.

Chair: Commission selects.

Special facts: A quorum consists of a majority which must include 1 public member, 1 member of the Alaska Bar, and 1 judge member. The Court presents an annual budget to Legislature. The commission elects its chairman.

Compensation: Standard Travel and Per Diem.

Meetings: At least quarterly; 1-3 days each depending on caseload.

For further information and to reach individual members, contact:
Ms. Marla Greenstein
Executive Director
1029 West Third Avenue, Suite 550
Anchorage, AK 99501
Phone: (907) 272-1033, FAX: (907) 272-9309

Judicial Conduct Roster

Go to the Judicial Conduct Home page

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Boards & Commissions Roster

JUDICIAL CONDUCT (052)

Member	Date Appointed	Reappointed	Term Expires
VACANT Attorney/Governor's Appointment			3/1/2012
Peter J. Aschenbrenner Attorney/Governor's Appointment	3/24/2004	1/28/2008	3/1/2012
Chris Brown Public/Governor's Appointment	3/1/2009		3/1/2013
Amy L. Demboski Public/Governor's Appointment	3/1/2011		3/1/2015
Ben Esch, Esq. Judge/Court Appointment	2/4/2003	1/28/2008	2/1/2012
Keith B. Levy Judge/Court Appointment	2/1/2011		2/1/2015
Jan S Ostrovsky Attorney/Governor's Appointment	3/1/2009		3/1/2013
Robert D. Sheldon Public/Governor's Appointment	1/29/2008	3/1/2012	3/1/2016
Philip R. Volland Judge/Court Appointment	2/1/2011		2/1/2015

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Sheldon, Robert
Commission on Judicial Conduct

STATE OF ALASKA
OFFICE OF THE GOVERNOR
P.O. Box 110001 Juneau, AK 99811-0001
Phone: (907) 465-3500 Fax: (907) 465-3532

BOARDS AND COMMISSIONS APPLICATION FORM

INSTRUCTIONS

A separate application is required for each position for which you apply. Complete and specific answers will aid in rapid and accurate processing of your resume. Please type or print legibly in ink. Forward to the above address. Be sure your answers are true. A willfully false answer may result in your disqualification or removal from office if you are appointed.

Board or Commission and seat for which I am applying: Alaska Commission on Judicial Conduct
(For example, Board of Agriculture, public seat) Public Seat

Please list any other State Boards or Commissions on which you currently or previously have served:

Name: Robert D. Sheldon

Mailing Address: _____

Residence Address: _____

City, State and Zip Code: Anchorage AK 99502

Home or Message Telephone: _____ Business Telephone: _____

Fax Number: _____ Cell Phone: _____

Email address: _____

AS 39-05-100 requires that a person appointed to a state board or commission be a registered voter prior to the last general election:

Are you a registered voter. YES X NO _____ Voter Registration Number (Optional): _____

Social Security Number (Optional, required if appointed for travel, reimbursement et[redacted] _____

Have you ever been convicted of a misdemeanor within the past five years or a felony within the past ten years?

YES _____ NO X if "YES", explain the circumstances on a separate sheet of paper and attach it to this application. A conviction is not necessarily grounds for disqualification. The number of convictions, nature, recentness, and relationship to the board position applied for, will be evaluated and a determination will be made after a review of all relevant facts.

CONFLICTS OF INTEREST: Certain boards and commissions require full disclosure of personal financial data under AS 39.50.010. If required for the board or commission for which you are applying, are you willing to do so?
YES X NO _____

Could you or any member of your family be affected financially by decisions to be made by the board or commission for which you have applied? YES _____ NO X

If "YES", explain:

TRAINING AND EXPERIENCE: (If resume attached, it is not necessary to complete items A-D)

A. List any professional licenses, certifications, or registrations and dates obtained that may be used as qualifying criteria:

Please see attached resume

B. List both formal and informal education and training experiences: (Use additional paper if necessary).

Please see attached resume

C. List any community service, municipal government, and state positions held, and any awards received. Include both compensated and uncompensated positions (such as president of a service organization or a mayor). Include length of time serviced.

C. Service: Grace Alaska operating Entity Advisory Board 2007-Now
C. Service: Bi-weekly MC, Childrens Service, Changepoint 2003-Now
State: TATICC, Investment section, 2006 & 2007

D. Employment work history - paid, unpaid or voluntary: (Use additional paper of necessary).

Please see attached resume

The Office of the Governor and the State of Alaska have an Affirmative Action Equal Employment Opportunity Program. To assist in the program, you are asked to voluntarily answer the following questions to provide the information necessary for reporting purposes. Under State and Federal law, the information you provide will not be used to illegally discriminate against you.

DATE OF BIRTH: _ , . _ SEX: FEMALE _____ MALE _____

ETHNICITY:
Alaska Native ___ American Indian ___ Asian or Pacific Islander ___ Black ___ Hispanic ___ White ___

MILITARY SERVICE (if applicable, give dates): _____

CERTIFICATION: I swear the information I have entered on this form is true to the best of my knowledge. I understand that if I deliberately conceal or enter false information on the form my application may be rejected, I may be removed from the list of eligible candidates, or I may be removed from the position. I agree that the Office of the Governor may contact present or former employees or other persons who know me to obtain an additional information about my skills and abilities. I understand that the information on this application is public information and may be released through a legal request for such information.

Signature (in ink): Robert D. Sheldon Date: 1.29.2008

Please attach a current resume with your application.

STATE OF ALASKA
OFFICE OF THE GOVERNOR

BOARDS AND COMMISSIONS

Name: Robert D. Sheldon Date: 1.29.2008

(Indicate top three boards/commissions of interest by number with #1 as your preference)

	Accounting Board
	Aerospace Development Corporation
	Aging Commission
	Agriculture & Conservation
	Alaska Juvenile Justice Advisory Committee
	Alaska Retirement Management Board
	Alaska Statehood Celebration Commission
	Alaska-Alberta Bilateral Council
	Alcohol/Drug Abuse
	Alcoholic Beverage Control
	Architects/Engineers/ Land Surveyors
	Arts Council
	Assessment Review Board
	Aviation Advisory Board
	Bald Eagle Preserve
	Bar Association
	Barbers & Hairdressers
	Bering Sea Fishery Advisory Board
	Big Game Commercial Services
	Boating Safety Council
	Broadcasting Commission
	Children's Trust Board
	Chiropractic Examiners
	Clemency Advisory Committee
	Commemorative Coin Commission
	Commercial Fisheries Entry
	Commercial Fishing/ Agriculture Bank
	Community Service Commission
	Denali Access System Advisory Committee
	Dental Examiners
	Disabilities/Special Education
	Domestic Violence/Sexual Assault
	Education & Early Development
	Education Commission/States
	Emergency Medical Services
	Emergency Response Commission
	Employment of People with Disabilities
	Exxon Valdez Oil Spill Trustee
	Faith-Based & Community Initiatives Council
	Fire Standards Council
	Fisheries

	Fisherman's Fund Advisory & Appeals
	Forestry
	Game
	Health Council
	Historical Commission
	Historical Records Advisory
	Homeless Council
	Housing Finance Corporation
	Human Rights
	Humanities Forum
	Independent Living Council
	Industrial Development/Export Authority
	Interstate Oil & Gas Compact
1	Judicial Conduct
	Judicial Council
	Knik Arm Bridge
	Labor Relations Agency
	Libraries Advisory
	Local Boundary Commission
	Marine Pilots
	Marine Transportation Advisory Board
	Marital & Family Therapy
	Medical Board
	Mental Health Board
	Mental Health Trust Authority
	Midwives
	Minerals Commission
	Municipal Bond Bank
	Natural Gas Authority
	Natural Gas Pipeline Corporation
	Natural Resources Conservation Dev
	North Pacific Anadromous Fish
	North Pacific Fisheries Management Council
	North Pacific Research Board
	Nursing
	Occupational Safety
	Oil & Gas Conservation Commission
	Optometry
	Pacific Marine Fisheries Commission
	Pacific Salmon Commission-Commissioners
	Pacific Salmon Commission- Northern Panel

	Pacific Salmon Commission-Transboundary Panel
	Parole Board
	Permanent Fund
	Pharmacy Board
	Physical/Occupational Therapy
	Pioneer's Home Advisory
	Police Standards Council
	Postsecondary Education
	Professional Counselors
	Professional Teaching Practices
	Psychologist/ Psychological assoc.
	Public Offices Commission
	PWS Oil Spill Recovery Institute
	Railroad Corporation
	Real Estate Appraisers
	Real Estate Commission
	Regents
	Regulatory Commission (RCA)
	Royalty Oil & Gas Development
	Safety Advisory Council
	Seafood Marketing Institute
	Seismic Hazards Safety Commission
	Social Work Examiners
	Student Loan Corporation
	Subsistence Resource Commissions
	Suicide Prevention Council
	Telecommunications
	Uniform State Laws
	Veterans Advisory Council
	Veterinary Examiners
	Violent Crimes Compensation
	Water and Wastewater Works
	Western Interstate Comm/Higher Educ
	Wood-Tikchik State Park
	Worker's compensation
	Worker's Compensation Appeals Commission
	Workforce Investment Board
	Yukon River Panel

If appointed, a press release will be issued announcing your appointment pending the completion of the appointment process with the Governor's office. Please supply our office with the following information that will be included in the press release.

(Name): Robert D. Sheldon (Age): ___ of (Hometown): Anchorage
is (Job title/Place of employment): Principal / Arbor Capital Management, Inc.
(Name) holds (Listing of earned degrees like bachelor's, master's,
ect.): BS Business Administration, BA Economics.
(Or list relevant experience to the position you are being appointed to)

Examples:

John A. Doe, 38 of Soldotna, is Director of T-Shirts & Co. Doe holds a bachelor's degree in business administration from X University and a master's degree in communications from X University.

John A. Doe, 38 of Palmer, is the owner and operator of Doe and Associates, Inc. Doe previously served as division manager at X, Inc. Doe is a certified personnel consultant.

Robert D. Sheldon

HIGHLIGHTS:

- Extensive business development experience.
- In-depth financial and project management experience.
- Demonstrated ability to manage and direct multiple organizations.
- Experienced with creating, developing and implementing various investment conduits.

EXPERIENCE:

2000-**Present** *MANAGING PARTNER* / Power Fund Management, LLC
Co-founded management group that created and manages a private equity fund which invests in latter stage power related companies.

1996-**Present** *CHAIRMAN & PRINCIPAL* / Arbor Capital Management, Inc., Anchorage, Alaska
Co-founded Registered Investment Advisory firm which focuses on providing personalized portfolio management for institutions and high net worth individuals.

1995-2001 *DIRECTOR* / The Reeve Corporation, Anchorage, Alaska
Investigated, reviewed and analyzed various subsidiaries and business practices at the behest of minority shareholders.

1994-1996 *PARTNER* / FirstAnco, Anchorage, Alaska.
Supervise and directed investment activities within FNBA investment conduit.

1994-1996 *TRUST OFFICER & ADMINISTRATOR* / FNBA, Anchorage, Alaska
Responsible for business development, general compliance and administration of several Trust Department units (Employee Benefit Unit, Mortgage Backed Security Safekeeping Unit, Individual Retirement Account Unit, and paying agent duties for multiple fixed income security issues).

1993 & 1992 *MANAGEMENT TRAINEE II* (Summer) / FNBA, Anchorage, Alaska.
Responsible for special projects as assigned by COO, SVP of Operations, and Director of Marketing. Training in bank operational and control areas.

1991 & 1992 *STATISTICS INSTRUCTOR* / Colorado State University, Fort Collins, Colorado
Instructed Students in Linear Regression, Chi-Squared, and ANOVA.

EDUCATION & AFFILIATIONS:

- B.S., Business Administration (Finance), Colorado State University, 1993
- Minor B.A., Economics, Colorado State University, 1993
- Core Management Training, First National Bank Anchorage, 1994, 1995
- Member of Omicron Delta Epsilon, an international economics society
- Third Generation Alaskan

Boards & Commissions Factsheets

PAROLE BOARD

Board: State Board of Parole
Board identification number: 075

Department: Department of Corrections

Authority: AS 33.16.020

Status: Active

Sunset date: 6/30/2016

Requirements: Legislative Confirmation and Financial Disclosure

Prohibitions: Members may not be an officer or employee of the state.

Term: 5 years

Description: The board consists of 5 members appointed by the Governor: appointments are made with due regard for representation of the ethnic, racial, gender and cultural populations of the state: 1 member who resides in the first judicial district, 1 in the third judicial district, and 1 member who resides in either the second or fourth judicial districts; at least 1 appointee must have experience in the field of criminal justice. The Governor appoints the chair.

Function: Through hearings, the board authorizes discretionary parole releases, establishes conditions of parole, issues arrest warrants, and revokes parole for cause. The board also conducts clemency investigations.

Chair: Governor appoints.

Special facts: The board is adjudicatory in nature. A quorum consists of 3 members. Legislative confirmation is required by statute, but not permissible under the Constitution.

Compensation: Standard Travel and Per Diem. Receive honorarium of $250 per day.

Meetings: Approximately 150 days per year.

For further information and to reach individual members, contact:

State Board of Parole
550 West Seventh Avenue, Suite 601
Anchorage, AK 99501
Phone: (907) 269-4642, FAX: (907) 269-4697

Parole Board Roster

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Boards & Commissions Roster

PAROLE BOARD (075)

Member	Date Appointed	Reappointed	Term Expires
Lonzo Henderson Third Judicial District	12/29/2008		3/1/2014
R. Ole Larson At Large	3/1/2010		3/1/2015
Daniel L. Morris At Large	3/1/2011		3/1/2016
Sarah J. Possenti Second/Fourth Judicial District	4/1/2011		3/1/2013
Michael J. Stark First Judicial District	3/18/2002	3/1/2012	3/1/2017

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Chennault, Regina
Violent Crimes Compensation Board

App/Phy/OccTh/ Therapy/C

ENTERED 9-26-05 dc

STATE OF ALASKA
OFFICE OF THE GOVERNOR
P.O. Box 110001, Juneau, AK 99811-0001
Phone: (907) 465-3500 Fax: (907) 465-3532

BOARDS AND COMMISSIONS APPLICATION FORM

INSTRUCTIONS

A separate application is required for each position for which you apply. Complete and specific answers will aid in rapid and accurate processing of your resume. Please type or print legibly in ink. Forward to the above address. Be sure your answers are true. A willfully false answer may result in your disqualification or removal from office if you are appointed.

Board or Commission and seat for which I am applying: Medical Examiner/Occupational Ther.
(For example, Board of Agriculture, public seat)

Please list any other State Boards or Commissions on which you currently or previously have served:

Name: Regina Christine Sutton Chennault, M.D.

Mailing Address: ____

Residence Address: Soldotna, Alaska 99669

City, State and Zip Code: ____

Home or Message Telephone: ____ Business Telephone: ____

Fax Number: ____ Cell Phone: ____

Email address: ____

AS 39-05-100 requires that a person appointed to a state board or commission be a registered voter prior to the last general election.

Are you a registered voter: YES ____ NO ____ Voter Registration Number (Optional): ____

Social Security Number (Optional, required if appointed for travel reimbursement etc.): ____

Have you ever been convicted of a misdemeanor within the past five years or a felony within the past ten years?

YES ____ NO ____ if "YES", explain the circumstances on a separate sheet of paper and attach it to this application. A conviction is not necessarily grounds for disqualification. The number of convictions, nature, recentness, and relationship to the board position applied for, will be evaluated and a determination will be made after a review of all relevant facts.

CONFLICTS OF INTEREST: Certain boards and commissions require full disclosure of personal financial data under AS 39.50.010. If required for the board or commission for which you are applying, are you willing to do so?
YES ____ NO ____

Could you or any member of your family be affected financially by decisions to be made by the board or commission for which you have applied? YES ____ NO ____

If "YES", explain:

TRAINING AND EXPERIENCE: (If resume attached, it is not necessary to complete items A-D)

A. List any professional licenses, certifications, or registrations and dates obtained that may be used as qualifying criteria: M.D. Degree 1993

B. List both formal and informal education and training experiences: (Use additional paper if necessary).
General Surgery residency 5 years

C. List any community service, municipal government, and state positions held, and any awards received. Include both compensated and uncompensated positions (such as president of a service organization or a mayor). Include length of time serviced.
Vice Chairman, State of Alaska, Federal Committee on Trauma

D. Employment work history - paid, unpaid or voluntary: (Use additional paper of necessary).
Private practice Surgeon Soldotna, Alaska

The Office of the Governor and the State of Alaska have an Affirmative Action Equal Employment Opportunity Program. To assist in the program, you are asked to voluntarily answer the following questions to provide the information necessary for reporting purposes. Under State and Federal law, the information you provide will no be used to illegally discriminate against you.

DATE OF BIRTH: ____ SEX: ✓ ___ MALE ____

ETHNICITY:
Alaska Native ___ American Indian ___ Asian or Pacific Islander ___ Black Hispanic

MILITARY SERVICE (if applicable, give dates): ____ ____ ____

CERTIFICATION: I swear the information I have entered on this form is true to the best of my knowledge. I understand that if I deliberately conceal or enter false information on the form my application may be rejected, I may be removed from the list of eligible candidates, or I may be removed from the position. I agree that the Office of the Governor may contact present or former employees or other persons who know me to obtain an additional information about my skills and abilities. I understand that the information on this application is public information and may be released through a legal request for such information.

Signature (in ink): [signature] Date: 9-26-05

Please attach a current resume with your application.

Chennault, Regina
Violent Crimes Compensation Board

App/Phy/OEC4p/ Therapy

ENTERED 9.26.05 dc

STATE OF ALASKA
OFFICE OF THE GOVERNOR
P.O. Box 110001, Juneau, AK 99811-0001
Phone: (907) 465-3500 Fax: (907) 465-3532

BOARDS AND COMMISSIONS APPLICATION FORM

INSTRUCTIONS

A separate application is required for each position for which you apply. Complete and specific answers will aid in rapid and accurate processing of your resume. Please type or print legibly in ink. Forward to the above address. Be sure your answers are true. A willfully false answer may result in your disqualification or removal from office if you are appointed.

Board or Commission and seat for which I am applying: Medical/Other/Occupational Ther.
(For example, Board of Agriculture, public seat)

Please list any other State Boards or Commissions on which you currently or previously have served:

Name: Regina Christine Sutton Chennault, M.D.

Mailing Address: ____

Residence Address: Soldotna, Alaska 99669

City, State and Zip Code: ____

Home or Message Telephone: ____ Business Telephone: ____

Fax Number: ____ Cell Phone: ____

Email address: ____

AS 39-05-100 requires that a person appointed to a state board or commission be a registered voter prior to the last general election.

Are you a registered voter: YES ____ NO ____ Voter Registration Number (Optional): ____

Social Security Number (Optional, required if appointed for travel, reimbursement etc.): ____

Have you ever been convicted of a misdemeanor within the past five years or a felony within the past ten years?

YES ____ NO ____ if "YES", explain the circumstances on a separate sheet of paper and attach it to this application. A conviction is not necessarily grounds for disqualification. The number of convictions, nature, recentness, and relationship to the board position applied for, will be evaluated and a determination will be made after a review of all relevant facts.

CONFLICTS OF INTEREST: Certain boards and commissions require full disclosure of personal financial data under AS 39.50.010. If required for the board or commission for which you are applying, are you willing to do so?
YES ____ NO ____

Could you or any member of your family be affected financially by decisions to be made by the board or commission for which you have applied? YES ____ NO ____

If "YES", explain:

TRAINING AND EXPERIENCE: (If resume attached, it is not necessary to complete items A-D)

A. List any professional licenses, certifications, or registrations and dates obtained that may be used as qualifying criteria: M.D. Degree 1993

B. List both formal and informal education and training experiences: (Use additional paper if necessary).

General Surgery residency 5 years

C. List any community service, municipal government, and state positions held, and any awards received. Include both compensated and uncompensated positions (such as president of a service organization or a mayor). Include length of time serviced.

Vice Chairman, State of Alaska, Federal Committee on Trauma

D. Employment work history - paid, unpaid or voluntary: (Use additional paper of necessary).

Private practice Surgeon Soldotna, Alaska

The Office of the Governor and the State of Alaska have an Affirmative Action Equal Employment Opportunity Program. To assist in the program, you are asked to voluntarily answer the following questions to provide the information necessary for reporting purposes. Under State and Federal law, the information you provide will not be used to illegally discriminate against you.

DATE OF BIRTH: ____ ____ SEX: ✓ ___ MALE ____

ETHNICITY:
Alaska Native ___ American Indian ___ Asian or Pacific Islander ___ Black Hispanic

MILITARY SERVICE (if applicable, give dates): ____ ____ ____

CERTIFICATION: I swear the information I have entered on this form is true to the best of my knowledge. I understand that if I deliberately conceal or enter false information on the form my application may be rejected, I may be removed from the list of eligible candidates, or I may be removed from the position. I agree that the Office of the Governor may contact present or former employers or other persons who know me to obtain additional information about my skills and abilities. I understand that the information on this application is public information and may be released through a legal request for such information.

Signature (in ink): [signature] Date: 9-26-05

Please attach a current resume with your application.

Note that some resumes contain personal contact information for references. Please respect the personal nature of all contact information.

State Board of Parole
Michael Stark
8270 North Douglas Highway
Juneau, Ak 99801
Mjx2@att.net
Home: 586-1653
Appointed: 3/18/2002
Reappointed: 3/1/2007
Reappointed: 3/1/2012 Term Expires: 3/1/2017

Note that some resumes contain personal contact information for references. Please respect the personal nature of all contact information.

Alaska Judicial Council
Kenneth Kreitzer
9440 Patricia Place
Juneau, AK 99801
kreitzer@alaska.com
Home: 790-3136
Appointed: 7/28/2011 Term Expires: 3/1/2017

Alaska State Legislature

Senate

Office of the Secretary

Official Business

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:senate_secretary@legis.state.ak.us

Memorandum

TO: Senator French, Chair
Judiciary Committee

FROM: Kirsten Waid
Secretary of the Senate

DATE: February 2, 2012

SUBJECT: Confirmation of Governor's Appointment(s)

Pursuant to AS 39.05.080, the President has referred the following name(s) for legislative confirmation to your committee for a hearing, recommendation and report:

State of Alaska Attorney General ✓
Michael Geraghty – Anchorage
Appointed: 2/1/2012

Commission on Judicial Conduct
Robert Sheldon – Anchorage
Appointed: 10/29/2010
Reappointed: 3/1/2012 Term Expires: 3/1/2016

Alaska Judicial Council
Kenneth Kreitzer – Juneau
Appointed: 7/28/2011 Term Expires: 3/1/2017

State Board of Parole
Michael Stark – Juneau
Appointed: 3/18/2002
Reappointed: 3/1/2007
Reappointed: 3/1/2012 Term Expires: 3/1/2017

Alaska Police Standards Council
Brad Reich – Kiana
Appointed: 2/1/2012 Term Expires: 3/1/2016

Gustaf Sandahl – Kenai
Appointed: 6/20/2011 Term Expires: 3/1/2015

Sheldon Schmitt – Sitka
Appointed: 2/19/2008
Reappointed: 3/1/2012 Term Expires: 3/1/2016

Jamie Sunderland – Unalaska
Appointed: 3/1/2012 Term Expires: 3/1/2016

Ronald Taylor – Anchorage
Appointed: 2/1/2012 Term Expires: 3/1/2016

Violent Crimes Compensation Board
Dr. Regina Chennault – Anchorage
Appointed: 10/18/2005
Reappointed: 3/1/2006
Reappointed: 3/1/2009
Reappointed: 3/1/2012 Term Expires: 3/1/2015

Resume(s) are available electronically by using the following link and your LAA user login: http://intranet/docs/confirmation_resumes/

Note that some resumes contain personal contact information for references. Please respect the personal nature of all contact information.

KW:jcs
gl #1

Note that some resumes contain personal contact information for references. Please respect the personal nature of all contact information.

Violent Crimes Compensation Board
Dr. Regina Chennault
P.O. Box 1129
Soldotna, AK 99669
rchennault@alaska.net
Home: 260-2656 Work: 260-2045 Cell: 244-1689
Appointed: 10/18/2005
Reappointed: 3/1/2006
Reappointed: 3/1/2009
Reappointed: 3/1/2012 Term Expires: 3/1/2015

Note that some resumes contain personal contact information for references. Please respect the personal nature of all contact information.

Commission on Judicial Conduct

Robert Sheldon
8350 Sky Mountain Circle
Anchorage, AK 99502
~~rsheldon@arborcapital.net~~
rsheldon@acminc.com
Home: 222-7581 Cell: 223-5361

Appointed: 10/29/2010
Reappointed: 3/1/2012 Term Expires: 3/1/2016

Note that some resumes contain personal contact information for references. Please respect the personal nature of all contact information.

Alaska Police Standards Council

Brad Reich
P.O. Box 82
Kiana, AK 99749
breich@inutek.net
Home: 475-2122 Work: 382-4560
Appointed: 2/1/2012 Term Expires: 3/1/2016

Gustaf Sandahl
107 South Willow Street
Kenai, AK 99611
gsandahl@ci.kenai.ak.us
Home: 283-3290 Work: 283-7879 Cell: 398-7857
Appointed: 6/20/2011 Term Expires: 3/1/2015

Sheldon Schmitt
304 Lake Street, Room 102
Sitka, AK 99835
Work: 747-3254 Cell: 738-3150
Appointed: 2/19/2008
Reappointed: 3/1/2012 Term Expires: 3/1/2016

Jamie Sunderland
P.O. Box 1033
Unalaska, AK 99685
jsunderland@ci.unalaska.ak.us
Home: 581-1221 Work: 581-1233 Cell: 359-4040
Appointed: 3/1/2012 Term Expires: 3/1/2016

Ronald Taylor
1840 North Salem Drive
Anchorage, AK 99508
Rft1@gci.net
Home: 301-4288
Appointed: 2/1/2012 Term Expires: 3/1/2016

SB

7

<TARGET><BILL>SB 7</BILL><SUBJECT>SB 7</SUBJECT><COMM>SJUD27</COMM></TARGET>

March 21, 2011

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

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NADINE WINTERS, Fairbanks

ZACH FICK, Anchorage
STUDENT ADVISOR

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
Juneau, AK 99801-1182
via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

Re: Senate Bill 7
ACLU Statement of Support

Chair French, Vice-Chair Wielechowski:

Thank you for the opportunity to submit a written statement of support for Senate Bill 7.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions.

The Racially Differential Impact of Disfranchisement

Felony disfranchisement is a policy that bars citizens from the ballot box upon conviction of a felony. In the United States, over 5.3 million Americans cannot vote due to a felony conviction. Felony disfranchisement laws vary from state to state, but 48 states bar incarcerated individuals from casting a ballot, with only Maine and Vermont allowing inmates to vote. Eight states permanently ban certain individuals with a felony conviction from voting and two states bar all persons with felony convictions from voting.

The vast majority of disfranchised individuals are no longer incarcerated, but are living in their communities on probation or parole; 2.1 million of the

disfranchised population have fully completed their sentence. These ***disfranchised individuals are tax-paying citizens, involved with the issues in their community, but unable to vote to affect them.***

The impact of felony disfranchisement falls disproportionately upon communities of color. Nearly one and a half million African-American men, or 13%, are disfranchised due to felony convictions, a rate that is seven times the national average of one out of forty-one adults. If incarceration rates hold steady, three in ten of the next generation of black men can expect to be disfranchised at some point in their lives.

However, ***over the last decade the national trend has moved toward lowering barriers for the disfranchised. Since 1997, 19 states have made progressive changes to their felony disfranchisement laws, enfranchising over 700,000 formerly incarcerated individuals.***

In a democracy voting is a right, not a privilege. But for over 5 million Americans, that is not the case. We hope SB 7 will change that in Alaska.

Alaska Disfranchisement Policy

Alaska bars individuals with a felony conviction from voting until full completion of sentence, including incarceration, probation and parole. Upon completion of sentence the right to vote is automatically restored but individuals must include a copy of their discharge papers when registering to vote. Individuals with misdemeanor convictions never lose the right to vote, but they must vote by absentee ballot if in jail.

An estimated 10,176 people with felony convictions are barred from voting in Alaska. Approximately 44% of disfranchised people are in prison while 56% of disfranchised people are on probation or parole. Probationers and parolees are law-abiding citizens who are living in the community, working, raising their families and paying taxes.

Alaska Natives are significantly overrepresented in the disfranchised population. Alaska Natives comprise 32% of the total disfranchised population, though they only comprise 16% of the total population of Alaska. African-Americans comprise 9.5% of the disfranchised population, yet comprise only 3.5% of the total population of Alaska.

Voting & Public Safety

Felony disfranchisement runs counter to the goal of public safety. Restricting voting rights does not prevent crime, nor does it provide compensation to victims. In fact, disfranchising persons after release from prison is antithetical to the reentry process and harmful to long-term prospects for sustainable reintegration of ex-offenders into society. Recent research finds a link between voting participation and reoffense; people who voted after release from supervision were half as

likely to be re-arrested as those who did not vote.[1] Similar effects were found among people with a prior arrest; 27% of non-voters were re-arrested, compared to 12% of people who had voted. Far from making streets safer, felony disfranchisement may be detrimental to public safety. Voting demonstrates an individual's commitment to the institutions of American democracy. The irony of felony disfranchisement is that the very behavior that society strives to encourage – the commitment to the larger social and political collective – is undermined by a policy that requires people who desire to engage in that behavior to relinquish the right to vote.

For the above reasons, the ACLU is pleased to support SB 7, and thanks Senator Davis sponsoring this important legislation to expand civil liberties.

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions that which Members of the Committee may have. Thank you again for the opportunity to share our thoughts.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us
Senator John Coghill, Senator_John_Coghill@legis.state.ak.us
Sponsor, Senator Bettye J. Davis, Senator_Bettye_Davis@legis.state.ak.us

---

[1] Christopher Uggen and Jeff Manza, ***Voting and Subsequent Crime and Arrest: Evidence from a Community Sample***, 36 Columbia Human Rights Law Review 193 (2004-05), pp. 204-05. Committee Members who wish, may request a copy of this article from the ACLU.

LEGAL SERVICES

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

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

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

MEMORANDUM February 15, 2011

SUBJECT: "Civil rights" under art. V, sec. 2 of the state constitution (Work Order No. 27-LS0499)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Alpheus Bullard
Legislative Counsel

You have asked how a court is likely to interpret "civil rights" under art. V, sec. 2[1] of the state constitution and whether a person's "restoration" of civil rights under the provision equates with a person's "unconditional discharge" under AS 12.55.185(18).[2]

Article V, sec. 2 provides that "[n]o person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored." It is not clear how an Alaska court would interpret this provision. The Alaska Supreme Court has not yet addressed what constitutes "civil rights" for the purposes of this clause. The section's reference to "civil rights" must include rights other than the right to vote, otherwise the provision would be unnecessary.

Origins of the provision

The minutes of the constitutional convention provide some insight, but no definitive answer, as to how "civil rights" in art. V, sec. 2 should be interpreted. The only discussion and debate of the provision (that would become art. V, sec. 2) occurred on December 15, 1955.[3] On that day, delegate John S. Hellenthal, chairman of the convention's committee on suffrage, elections and apportionment, described a debate the

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[1] **Disqualifications.** No person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored. No person may vote who has been judicially determined to be of unsound mind unless the disability has been removed.

[2] AS 12.55.185(18) provides:

> "unconditional discharge" means that a defendant is released from all disability arising under a sentence, including probation and parole[.]

[3] Minutes of the Constitutional Convention, Day 38 at 866 - 910.

committee had when drafting "Committee Proposal No. 1. Article on Suffrage and Elections":

> HELLENTHAL: The reason that the [term "moral turpitude"] was used was that not all felonies involve moral turpitude, not all. There are some felonies that do not and the term "moral turpitude" is a generally accepted word. Now we adopted this language on the advice of the adviser who agreed with that contention and who felt that we should not require all persons convicted of any felony to have to go before the pardon board. Now that was the reason for the language. Other language that was rejected was "a felony of serious nature". Another suggestion was "convicted of an infamous crime". ***There was one group in the Committee who felt that any person who served his time should automatically be restored to his civil rights. The majority definitely felt, and later the unanimous opinion of the Committee was that construction would not be sound.*** But they felt that not all convicted felons should have to go before the pardon board but only those of the more serious felonies. Now, Alaska has a fairly good criminal code, but throughout the United States there are many many offenses which in Alaska are misdemeanors, are considered felonies, and vice versa, and that is why the moral connotation was added and only that.

Minutes of the Constitutional Convention, at 890 - 891 (emphasis added) .

There is no record of any delegate taking issue with the judgment of the committee (as described by Hellenthal) on this point.

Note also, in the committee's original proposal, the "Disqualification" section read:

> No person judicially determined to be of unsound mind and no person convicted of a felony involving moral turpitude, ***unless pardoned and restored to his civil rights***, shall be qualified to vote in any State or local election.

Minutes of the Constitutional Convention, "Appendix V. Committee Proposals" (emphasis added).[4]

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[4] Though the record isn't clear, it seems that the committee on style and drafting removed the "*pardoned and*" language from the provision.

Interpreting "civil rights"[5]

Federal law prohibits a convicted felon from possessing a firearm unless the felon's civil rights have been restored under state law. 18 U.S.C. 921(a)(20). The federal statute does not define "civil rights." For purposes of this statute, federal circuit courts have interpreted "civil rights" to include the right to vote, the right to seek and hold public office, and the right to serve on a jury. United States v. Dahms, 938 F.2d 131, 133 (9th Cir. 1991); United States v. Leuschen, 395 F.3d 155 (3d Cir. 2005) (appellant did not qualify for the restoration of civil rights defense, because his right to sit on a jury had not been restored under Pennsylvania law).

The Alaska Court of Appeals has addressed this statute as well, concluding that under Alaska law "defendants on probation or parole can not serve as jurors" and "[t]his disqualification means that, for purposes of federal firearms laws, [the defendant's] civil rights have not been restored." Barry v. State, 925 P.2d 255, 257 (Alaska App. 1996). The prohibition on felons serving as jurors is found in AS 33.30.241(b).[6] Another case dealing with juror qualifications makes a passing reference to "civil rights -- such as the right to vote or to carry a firearm." Singleton v. Alaska, 921 P.2d 636, 638 (Alaska App. 1996).

These cases do not specifically address article V, sec. 2 of the Constitution of the State of Alaska, and they would not be binding on the Alaska Supreme Court as it interprets that provision. But, they are an indicator of how a court would interpret art. V, sec. 2 if required to do so. It is my legal opinion that an Alaska court is likely to interpret "civil rights" under art. V, sec. 2 to include the right to vote, the right to seek and hold public office, and the right to serve on a jury.

Parolees and probationers

Less clear is whether persons on parole or probation, would be considered by a court to have had their civil rights restored for the purposes of art. V, sec.2. Under current law,

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[5] The term "civil rights" has not had a fixed life in the law. Rights that were once considered as "political" (the right to vote) or "social" (right of unimpeded access to public accommodations) are now recognized as civil rights. See e.g. Voting Rights Act of 1965, 42 U.S.C. §§ 1973 - 1973aa-6 (2006) and Americans with Disabilities Act of 1990, 42 U.S.C. §§ 1201-12213 (Supp. 2008).

[6] **Sec. 33.30.241. Effect of judgment of conviction on civil rights.** (a) A person who is convicted of a felony involving moral turpitude as defined in AS 15.80.010 is disqualified from voting in a state or municipal election until the person's unconditional discharge.

(b) A person who is convicted of a felony is disqualified from serving as a juror until the person's unconditional discharge.

(c) In this section "unconditional discharge" has the meaning given in AS 12.55.185.

"'unconditional discharge' means that a defendant is released from all disability arising under a sentence, including probation and parole." AS 12.55.185(39). This definition applies to the term as it is used in AS 09.20.020 (relating to qualifications of jurors), AS 15.05.030 (loss and restoration of voting rights), and AS 33.30.241 (effect of judgment of conviction on civil rights).[7]

Perhaps telling of how an Alaska court might approach the issue is Roman v. State, 570 P.2d 1235 (Alaska 1977). In Roman, the Alaska Supreme Court held that the Alaska constitution entitles a released offender, whether a probationer or parolee,[8] to the same protections against search and seizure as an ordinary person.

> Any justification for treating parolees differently from any other person must stem from their special status. They are entitled to all rights accorded other persons except where valid purposes of parole require restrictions. Clearly, parole authorities have a special interest in the otherwise private affairs of the parolee. Most courts and commentators and some legislatures, however, have recognized that parole conditions must be reasonably related to the rehabilitation of the offender and the protection of the public and must not be unduly restrictive of liberty.

Id. at 1240 (internal citations omitted).

It remains to be seen whether an Alaska court would hold that there is a state justification for preventing persons who are no longer incarcerated, but not yet free of a condition of probation or parole, from voting due to a valid purpose of parole or probation.

If you have questions, or if I can be of further assistance, please do not hesitate to contact me.

TLAB:ljw:plm
11-099.ljw

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[7] The statutes have not always been so clear regarding the status of a person on parole or probation. See 1985 Op. Alaska Atty Gen. 103, File No. 366-333-85 (January 29), 1985 Alas. AG LEXIS 312 (under AS 33.30.310, repealed in 1986, which referred to "imprisonment" suspending a person's civil rights, some opinions of the attorney general said that "parolees and those under suspended sentences may vote, while others [said] they may not.")

[8] Roman, 570 P.2d at 1237, n.3.

Thomas Obermeyer

From: Thomas Obermeyer
Sent: Thursday, March 10, 2011 1:40 PM
To: Cindy Smith
Cc: Sen. Hollis French; Sen. Bettye Davis; Pamela Marsch
Subject: SB 7 Felons' Right to Vote - Request for hearing in (S)JUD
Attachments: SB 7 Docs-NAACP Ltr of Support 2-3-2011.pdf; SB 7 Docs-US Senate passes Natl Crim.Just.Act.pdf; SB 7 Fiscal note 21 Elections.pdf; SB 7 fiscal note 684 DOC Probation & Parole.pdf; SB 7 Request for Hearing (S)JUD 3-10-2011.pdf; SB 7 Sectional Summary 27-LS0083A.pdf; Docs -Felon processing.pdf; SB 7 27-LS0083A The Bill.pdf; SB 7 Docs - Sentencing Project - WA Decision.pdf; SB 7 Docs - ACLU letter of support.pdf; SB 7 Docs - ACLU Model Testimony 2007.pdf; SB 7 Docs - ACLU-Voting &Subeq.Crime.Arrest.pdf; SB 7 Docs - AK Justice Forum - Felon Disenfranchisement.pdf; SB 7 Docs - Ltr -AK Police Ofcr Assn.pdf; SB 7 Docs - NCSL - Felon Voting Rights.pdf; SB 7 Docs - NCSL -Legis Brief-Felon Voting Rts.pdf; SB 7 Docs - NCSL -Perm.Disenfranch.states.pdf; SB 7 -Docs - NCSL - Restor.Voting.Rts.by.State. 2011.pdf; SB 7 Docs - NCSL Voting Rts Restoration Process.pdf; SB 7 -Docs -Def.Felony.Moral.Turp. AS 15.80.010(9).pdf; SB 7 Docs -MEMO Felons Rt to Vote 9-22-2010.pdf; SB 7 Docs-DOC 2009 Offender Profile.pdf

Cindy,

Attached is the electronic transmission of the hearing documents for SB 7. The request for hearing lists all the attached documents in the order assembled in the hearing package. Only a few of the above need to be posted on BASIS. It is easier to look at the paper copies which I will hand-deliver in the next few minutes.

Tom

Cc: Senator Davis/Pamela Marsh- info only – Do not print

Thomas S. Obermeyer, MO Atty, M.B.A.
Office of Senator Bettye Davis, Chair
Alaska State Senate Health & Social Services Committee
State Capitol Rm 30
Anchorage, Alaska 99501
907-465-3762Direct
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Alaska State Legislature

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Toll free: (800) 770-3822

Senator_Bettye_Davis@legis.state.ak.us
http://www.akdemocrats.org

Senator Bettye Davis

March 10, 2011

Senator Hollis French, Chair
Senate Judiciary Committee

RE: Request for Hearing SB 7, 27-LS00083\A -"An Act relating to the Civil Rights of Felons."

Dear Senator French,

I respectfully request a hearing on SB 7 before the Senate State Affairs Committee. SB 7 allows felons to register to vote immediately upon release from incarceration and assume responsibility for their reintegration in their communities. The below documents have been transmitted electronically. Two complete paper copies are being delivered to your office.

Included in this hearing package are the following:

1. Sponsor Statement
2. Current version of SB 7, 27-LS0083\A.
3. *Sectional Summary
4. Fiscal Notes
   - OMB #21 - Elections
   - *OMB# 684 - Probation & Parole
5. *Memorandum, Legal Services September 22, 2011
6. Supportive Documents:
   - *Definition of Felony Crimes involving Moral Turpitude, AS 15.80.010(9)
   - *NCSL- Restoration of Voting Rights- listed by state, February, 2011
   - NCSL- Felon Voting Rights – Permanent Disenfranchisement States
   - NCSL - Legisbrief, "Felon Voting Rights," April-May 2009
   - NCSL –"Voting Rights Restoration Process"
   - NCSL- "Felon Voting Rights"
   - ACLU- Alaska February, 2011 Letter of Support
   - *ACLU – Alaska –Voting & Subsequent Crime and Arrest
   - ACLU Model Testimony, February, 2007
   - Processing Felons (DOC documents)

- *Alaska Department of Corrections 2009 Offender Profile - excerpted sections
- *Alaska Justice Forum, "Felon Disenfranchisement and the Voting Rights Act – *Farrakhan V. Gregoire*: 'A Crowd of One.'" Winter, 2010
- The Sentencing Project News: "Senate Committee Passes National Criminal Justice Commission Act of 2009," January 21, 2010
- The Sentencing Project News: "Washington State: 9th Circuit Court Reverses Disenfranchising Law; Landmark Decision Could Go to Supreme Court." January 8, 2010
- NAACP Testimony February 3, 2011
- *Letter – Alaska Police Officers' Association

***Note: The above underlined documents need to be added to SB 7 "Documents" on BASIS.**

The Committee may anticipate in-person and teleconference testimony.

If you require additional information, please contact Tom Obermeyer in my office at 465-3762.

Thank you for your consideration.

Sincerely,

Bettye Davis

Bettye Davis

Alaska State Legislature

Interim: (May - Dec.)
716 W. 4th Ave
Anchorage, AK 99501
Phone: (907) 269-0144
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Senator_Bettye_Davis@legis.state.ak.us
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Senator Bettye Davis

SB 7 - "An Act relating to the civil rights of felons."

SPONSOR STATEMENT

The Alaska State Constitution Article V, Sec. 2 bars a person to vote "who has been convicted of a felony of moral turpitude unless his civil rights have been restored." The right to vote remains suspended from the date of conviction through the date of release from all conviction-related disabilities, including probation and parole (AS15.05.030; AS 15.60.010(39)). According to the Alaska Department of Corrections Offender Profile, in 2009 more than 10,000 Alaskans were ineligible to vote pursuant to this provision. This bill allows felons to register to vote immediately upon release from incarceration and start assuming responsibility for their reintegration in their communities.

Harsher sentencing laws over the past 30 years have allowed the prison population to balloon while reducing the rehabilitative model to almost non-existence. Article I, Section 12 of the Alaska Constitution requires: "Criminal administration shall be based upon . . . the principle of reformation." In Alaska the prison population increased from 800 prisoners in 1984 to over 5,000 in 2008, an increase of over 600%. Of those incarcerated in Alaska 48% were Caucasian, 52% were minorities. Although Alaska Natives represent only 16% of the population, they comprised 35% of total offenders in institutions in 2009. Likewise, African American represent 4% of the population but comprised 10% of the incarcerated. Nationally, minority felons are disproportionately disenfranchised under current law and the harm of this continued disenfranchisement after release is exacerbated by stigma and other forms of discrimination as they try to reenter society.

An estimated 5.3 million American citizens cannot vote because of a criminal conviction. Of these, 4 million are out of prison and living and working in communities. Restoring a person's right to vote is a critical element to successful reentry into society after incarceration and is consistent with our democracy's modern ideal of universal suffrage. The Democracy Restoration Act of 2009 was introduced in both houses of Congress to restore the right to vote to citizens once released from prison. It would affect more than 41,000 people on parole.

Felons across the country often cannot sit on juries, serve as teachers, firefighters or even barbers or plumbers; receive food stamps or live in public housing. These ex-offenders have a vested interest in what happens in society and if they are to participate they should have a right to vote.

The National Conference of State Legislatures (NCSL) in 2009 found that disenfranchisement still varies tremendously from state to state:

- In Maine and Vermont, felons do not lose their right to vote; even felons who are serving a prison sentence can vote.
- In 13 states and the District of Columbia, felons are ineligible to vote only while serving a prison sentence. Ex-offenders and those on probation and parole can vote.
- In 25 states, prisoners and people under community supervision, probation and/or parole are ineligible to vote, but ex-offenders are eligible.
- In eight states, all felons in prison and those in community supervision, as well as certain ex-offenders, are ineligible to vote.
- In Kentucky and Virginia, all felons and ex-offenders are permanently ineligible to vote, absent a pardon.

NCSL reported that between 1996 and 2008 28 states passed new laws on felon voting rights which included:

- Seven states repealed lifetime disenfranchisement laws, at least for some ex-offenders.
- Two states gave probationers the right to vote.
- Seven states improved data-sharing procedures among state agencies.
- Nine states passed requirements that ex-offenders be given information and/or assistance in regaining their voting rights at the time they complete their sentence.
- Twelve states simplified the process for regaining voting rights, for instance, by eliminating a waiting period or streamlining the paperwork process.

While this bill falls short of a Constitutional amendment to eliminate the voting prohibition entirely, it does limit disenfranchisement to those incarcerated and restores voting rights upon release. A hallmark of participatory democracy, voting affirms our membership in the social compact. Exclusion of criminal offenders from this process and from one of the most fundamental rituals of community involvement does nothing to promote public safety and reduce recidivism. It can only serve to impede social reintegration of these citizens. Felon disenfranchisement statutes rest on outdated retributory practices antithetical to contemporary standards of equal representation in the political process, standards explicitly stated in the Voting Rights Act.

Former US Supreme Court Justice Thurgood Marshall said:

"It is doubtful whether a state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. Ex-offenders have already paid their debt to society. They are as much affected by the actions of government as any other citizen and have as much of a right to participate in governmental decision-making. Furthermore, the denial of a right to vote to such persons is hindrance to the efforts of society to rehabilitate former felons and convert them into law abiding and productive citizens."

LEGAL SERVICES

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

MEMORANDUM January 27, 2011

SUBJECT: Sectional Summary of SB 7 (Work Order No. 27-LS0083\A)

TO: Senator Bettye Davis
Attn: Thomas Obermeyer

FROM: Alpheus Bullard
Legislative Counsel

You have requested a sectional analysis of the above referenced bill. As a preliminary matter, please note that a sectional analysis should not be considered an authoritative interpretation of the bill, and the bill itself is the best statement of its contents.

Section 1. Changes AS 09.20.020 to provide that a person who has been convicted of a felony may not serve as a juror while incarcerated for that crime, instead of being disqualified from serving as a juror until the person's unconditional discharge ("unconditional discharge" means that a person, convicted of a crime, is released from all disability arising under a sentence, including probation and parole).

Section 2. Changes AS 15.05.030 to provide that a person convicted of a crime that constitutes a felony involving moral turpitude under state or federal law may not vote while incarcerated for that crime, instead of being disqualified as a voter until the person's unconditional discharge. Provides that a person who has been incarcerated will be advised of voter registration requirements and procedures upon release, and that the commissioner of corrections will notify the director of elections that the person is entitled to be registered as a voter.

Section 3. Changes AS 15.07.135 to provide that the voter registration of a person convicted of a crime that constitutes a felony involving moral turpitude will be cancelled only while that person is incarcerated, instead of until that person's unconditional discharge from custody.

Section 4. Changes AS 33.30.241(a) to provide that a person convicted of a crime that constitutes a felony involving moral turpitude under state or federal law is disqualified from voting while incarcerated for that crime, instead of being disqualified from voting until the person's unconditional discharge.

Section 5. Changes AS 33.30.241(b) to provide that a person convicted of a felony is disqualified from serving as a juror while that person is incarcerated, instead of being disqualified from serving as a juror until the person's unconditional discharge.

Section 6. Repeals AS 15.60.010(39), a definition of "unconditional discharge," and AS 33.30.241(c), a definition of "unconditional discharge" as used in AS 33.30.241. The changes made by secs. 4 and 5 have removed the term from that section.

TLAB:ljw
11-050.ljw

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **SB7**
() Publish Date

Identifier (file name): SB007-OOG-DOE-1-31-11
Title: "An Act relating to the civil rights of felons."
Sponsor: Senator Davis
Requester: Senate State Affairs Committee

Dept. Affected: OOG
Appropriation: Elections
Allocation: Elections
OMB Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Gail Fenumiai, Director — Phone: 465-2644
Division: Division of Elections — Date/Time: 1/31/2011, 3:03pm
Approved by: Linda Perez, Administrative Director — Date: 1/31/2011
Office of the Governor

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB7

Analysis

This legislation has no fiscal impact for the Division of Elections.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB 7**
() Publish Date 1/21/2011

Identifier (file name) SB7-DOC-OC-02-01-11
Title "An Act relating to the civil rights of felons"
Sponsor Senator Davis
Requester State Affairs Committee

Dept. Affected DOC
Appropriation Administration & Support
Allocation Statewide Probation & Parole
OMB Component Number 684

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost **

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the first version of the bill.

Prepared by Leslie Houston, Director — Phone 465-3339
Division Dept. of Corrections - Administrative Services — Date/Time 2/1/2011 12:30 p.m.
Approved by Joseph D. Schmidt, Commissioner — Date 2/1/2011
Dept. of Corrections

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 7

Analysis

Passage of this legislation will have potential impact on the Department of Corrections, specifically in the Division of Probation & Parole, as they would be responsible for providing written notification to the person receiving restored rights to vote as well as notification to the Division of Elections. This would create a significant increase in workload to DOC. In 2008 the Department of Corrections released 1,732 individuals on parole and 6,708 individuals on probation. In 2009 the Department of Corrections released 1,939 individuals on parole and 6,747 on probation. The number of individuals released from incarceration annually is significant.

LEGAL SERVICES

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

MEMORANDUM September 22, 2010

SUBJECT: Restoration of voting rights for certain felons
(Work Order No 27-LS0083\A)

TO: Senator Bettye Davis
Attn: Thomas Obermeyer

FROM: Alpheus Bullard TAB
Legislative Counsel

This memorandum accompanies the draft bill you requested that would restore voting rights to persons convicted of felonies involving moral turpitude once these persons are released from incarceration. This bill is based on a draft prepared by this office for introduction in the 26th Legislature. The draft raises several issues.

Restoration of civil rights

Article V, sec. 2 of the Alaska Constitution provides that "[n]o person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored." The Alaska Supreme Court has not yet addressed what constitutes "civil rights" for the purposes of this clause.

The constitutional reference to "civil rights" must include rights other than the right to vote, otherwise the provision would be unnecessary. However, there is no discussion in the minutes of the constitutional convention indicating what the framers understood as "civil rights" for purposes of this section.

Federal law prohibits a convicted felon from possessing a firearm unless the felon's civil rights have been restored under state law. 18 U.S.C. 921(a)(20). The federal statute does not define "civil rights." For purposes of this statute, federal circuit courts have interpreted "civil rights" to include the right to vote, the right to seek and hold public office, and the right to serve on a jury. United States v. Dahms, 938 F.2d 131, 133 (9th Cir. 1991); United States v. Leuschen, 395 F.3d 155 (3d Cir., Pa. 2005).

The Alaska Court of Appeals has addressed this statute as well, concluding that under Alaska statute "defendants on probation or parole can not serve as jurors" and "[t]his disqualification means that, for purposes of federal firearms laws, [the defendant's] civil rights have not been restored." Barry v. State, 925 P.2d 255 (Alaska App. 1996). Another case dealing with juror qualifications makes a passing reference to "civil rights -- such as the right to vote or to carry a firearm." Singleton v. Alaska, 921 P.2d 636 (Alaska App. 1996).

These cases do not specifically address article V, sec. 2 of the Constitution of the State of Alaska, and they would not be binding on the Alaska Supreme Court as it interprets that provision. But, they are an indicator of how a court would interpret art. V, sec. 2 if required to do so. Because art. V, sec. 2 would make little sense if "civil rights" did not refer to something more than the right to vote (which is a prerequisite for seeking public office in Alaska), the enclosed draft changes the qualifications for jury service as well. Accordingly, I've changed the title of the bill from "An Act relating to the voting rights of felons" to "An Act relating to the civil rights of felons."

"Incarceration"
This draft provides that a person convicted of a crime that constitutes a felony involving moral turpitude under state or federal law may not vote in a state, federal, or municipal election while incarcerated for that crime. "Incarcerated" is not defined in this draft or in current statute. Should a person who is sentenced to custody in a residential facility be permitted to vote? I am not aware of all sentencing options available in application to crimes constituting "a felony involving moral turpitude under state and federal law." I would recommend seeking the Department of Corrections' expertise on this point.

Felons released from the federal penitentiary system
This draft requires the commissioner of corrections to establish procedures by which a person released from incarceration is advised of voter registration requirements and procedures. The department is tasked with (1) providing a person released from incarceration with a written notification of the person's restored right to vote and (2) notifying the director of the division of elections that the person is entitled to be registered as a voter. I don't know if the Department of Corrections can fulfill these responsibilities for persons released from a federal facility. This is more a question of fact than a legal issue. Again, I would recommend that you seek the department's advice on this point.

Applicability provision
Please consider adding to the bill an applicability provision specifying the manner in which the bill's provisions are to be given effect, giving specific attention to the applicability of the bill's provisions to felons released before the Act's effective date and whether the department should be directed to notify them of their right to vote.

If you have questions, please contact me. I will be on mandatory leave from September 24th to October 22nd. If you have questions during this time, please do not hesitate to contact our office for another attorney's assistance.

TLAB:plm
10-307.plm

Enclosure

AS 15.80.010(9): DEFINITION OF FELONY CRIMES OF MORAL TURPITUDE

(See (9) next page)

Sec. 15.80.007. Sale of voter registration and election management software. The director may sell voter registration and election management system data processing software. (§ 18 ch 36 SLA 1990)

Revisor's notes. — Formerly AS 15.60.007. Renumbered in 2010.

Sec. 15.80.008. Recognized political party status. (a) A political group that the director has not recognized as a political party may obtain recognized political party status if, on or before May 31 of the election year for which the political group seeks recognition, the political group

(1) files an application with the director;

(2) submits bylaws to the director and the United States Department of Justice as required of political parties in AS 15.25.014; and

(3) meets the definition of a political party in AS 15.80.010.

(b) The director shall verify that each political group seeking recognized political party status under (a) of this section and each recognized political party meets the definition of a political party in AS 15.80.010.

(c) The director shall perform a verification described in (b) of this section at least once a month after the date of certification of the preceding general election, except that the director may suspend the monthly verifications on and after June 1 and before November 30 of a general election year. For purposes of (b) of this section, the director shall verify that the voters who have submitted registration forms to the division of elections are qualified under AS 15.05.010 and have declared affiliation with the political group or recognized political party for which the verification is performed.

(d) Within 10 days after a verification under (c) of this section, the director shall provide to a political group seeking recognized political party status under (a) of this section written notification when the political group has obtained recognized political party status.

(e) The director may not withdraw recognized political party status from a political group that no longer qualifies as a political party until after the first verification after a general election at which a governor was elected. The director shall notify the political group in writing of the withdrawal of recognition. (§ 56 ch 2 FSSLA 2005)

Revisor's notes. — Formerly AS 15.60.008. Renumbered in 2010, at which time "AS 15.80.010" was substituted for "AS 15.60.010" in (a)(3) and (b) of this section to reflect the 2010 renumbering of AS 15.60.010.

Sec. 15.80.010. Definitions. In this title, unless the context otherwise requires,

(1) "absentee voting official" means a person appointed to serve as an absentee voting official in accordance with AS 15.20.045;

(2) "ballot" means any document provided by the director on which votes may be cast for candidates, propositions, or questions;

(3) "director" means the director of elections who is the chief elections officer of the state appointed in accordance with AS 15.10.105(a);

(4) "division" means the division of elections created under AS 15.10.105;

(5) "election board" means the board appointed in accordance with AS 15.10.120;

(6) "election official" means election board members, members of counting or review boards, employees of the division of elections, and absentee voting officials;

(7) "electronically generated ballot" means any ballot other than a paper ballot that is physically marked by the voter using a writing instrument or a mechanical device;

(8) "federal election" means a general, special, or primary election held solely or in part for the purpose of selecting, nominating or electing a candidate for the office of President, Vice-President, presidential elector, United States senator, or United States representative;

(9) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, promoting prostitution, criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography;

(10) "general election" means the election held on the Tuesday after the first Monday in November of even-numbered years;

(11) "hand-counted ballot" means a ballot designated to be counted by hand in precincts where precinct tabulators are not available;

(12) "house district" means one of the districts described in art. VI, sec. 1, Constitution of the State of Alaska;

(13) "judicial district" means one of the districts defined in AS 22.10.010;

(14) "lieutenant governor" includes an appointed lieutenant governor, governor, or acting governor if a vacancy has occurred in the office of lieutenant governor or governor;

(15) "limited political party" means a political group which organizes for the purpose of selecting candidates for electors for President and Vice-President;

(16) "local election" means a regular or special election held by a borough, city, school district, or regional educational attendance area;

(17) "master register" means the list of all registered voters in the state which is maintained by the director of elections;

(18) "member of a political party" means a person who supports the political program of a party;

(19) "numerical identifier" means a voter's date of birth, the last four digits of a voter's social security number, a voter's Alaska driver's license number, or a voter's Alaska identification card number or voter identification number;

(20) "oath" includes affirmation;

(21) "official registration list" means the list of all voters qualified to vote at a particular election compiled in accordance with AS 15.07.125;

(22) "optically scanned ballot" means a paper ballot designed to be read by an optical scanning machine;

(23) "party district committee" means the political party committee that performs the executive function for a region representing an area larger than a precinct and smaller than the state;

(24) "political group" means a group of organized voters which represents a political program and which does not qualify as a political party;

(25) "political party" means an organized group of voters that represents a political program and

(A) that nominated a candidate for governor who received at least three percent of the total votes cast for governor at the preceding general election or has registered voters in the state equal in number to at least three percent of the total votes cast for governor at the preceding general election;

(B) if the office of governor was not on the ballot at the preceding general election but the office of United States senator was on that ballot, that nominated a candidate for United States senator who received at least three percent of the total votes cast for

National Conference of State Legislatures

LEGISBRIEF

BRIEFING PAPERS ON THE IMPORTANT ISSUES OF THE DAY

APRIL-MAY 2009 VOL. 17, NO. 23

Felon Voting Rights

By Jennie Drage Bowser

Some felons never lose their right to vote.

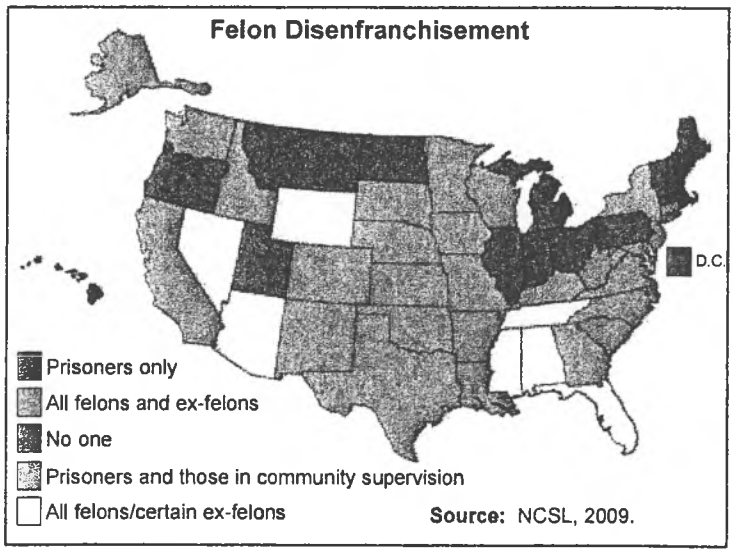
State approaches to felon disenfranchisement vary tremendously. In Maine and Vermont, felons never lose their right to vote. In Kentucky and Virginia, felons and ex-felons permanently lose their right to vote absent a pardon from the governor. The remaining 46 states have 46 different approaches to the issue.

According to the Washington, D.C.-based advocacy group, The Sentencing Project, 5.3 million Americans who were otherwise eligible to vote in 2008 were prevented from doing so due to a felony conviction. Of these, 2.1 million were ex-offenders who had served their sentences, 1.4 million were African-American men, and more than 676,000 were women.

Some states allow those serving a prison sentence to vote.

Categories of Disenfranchisement.

- In Maine and Vermont, felons do not lose their right to vote; even felons who are serving a prison sentence can vote.
- In 13 states and the District of Columbia, felons are ineligible to vote only while serving a prison sentence. Ex-offenders and people on probation and parole can vote.



All ex-offenders are eligible to vote in 40 states.

- In 25 states, prisoners and people under community supervision (probation and/or parole) are ineligible to vote, but ex-offenders are eligible.
- In eight states, all felons in prison and those in community supervision, as well as certain ex-offenders, are ineligible to vote.
- In Kentucky and Virginia, all felons and ex-offenders are permanently ineligible to vote, absent a pardon.

How Rights Are Restored. In 38 states, felons' voting rights are automatically restored upon completion of their sentence, which in some states includes probation and parole. In five states, certain ex-offenders are barred for life from voting, while the rights of others—generally first-time,

National Conference of State Legislatures

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non-violent offenders—are restored automatically upon completion of their sentence. In the three remaining states where felons lose and can regain their voting rights, certain ex-offenders are barred from voting for life, while others can apply to have their rights restored.

Re-registering to vote often is a daunting process.

Barriers to Restoration of Voting Rights. Even in states where ex-offenders automatically regain the right to vote upon completion of their sentence, the process of re-registering to vote often is difficult. One reason is the complexity of the laws and processes surrounding disenfranchisement. In some cases, it is difficult to determine whose rights can be restored. This can vary according to the date of the crime, the conviction or the release from prison, or to the nature of the crime. The complex restoration process also can be daunting. It often involves lengthy paperwork, burdensome documentation, and involvement of several state agencies.

A second barrier to restoration of voting rights for ex-offenders is the often inconsistent communication among agencies. The methods of communicating the loss and restoration of voting rights among courts, corrections and elections officials are not always reliable, timely or consistent. This inconsistency can result in uneven application of the law, even when the laws are clear.

Another barrier is lack of information. Ex-offenders sometimes are not aware that they regain their voting rights automatically upon completion of their sentence. They go through life believing they cannot vote when, in fact, they can. In other cases, they are not informed of the process for regaining their rights or offered assistance in doing so. As long as they remain ignorant of the necessary steps, ex-offenders cannot begin the process of regaining voting rights.

A final obstacle is under-funding of parole boards in some states where offenders must apply to have their rights restored. A massive backlog of applications can exist because the agencies do not have adequate staff or resources to process them in a timely manner.

Most recent legislation seeks to expand felon voting rights.

State Action Most recent state legislation seeks to expand felon voting rights and ease the process of restoration. Between 1996 and 2008, 28 states passed new laws on felon voting rights.

- Seven repealed lifetime disenfranchisement laws, at least for some ex-offenders.
- Two gave probationers the right to vote.
- Seven improved data-sharing procedures among state agencies.
- Nine passed requirements that ex-offenders be given information and/or assistance in regaining their voting rights at the time they complete their sentence.
- Twelve simplified the process for regaining voting rights, for instance, by eliminating a waiting period or streamlining the paperwork process.

To date in 2009, 79 bills addressing the voting rights of felons and ex-offenders have been introduced in 25 state legislatures. In the 2007-2008 biennium, 129 bills were introduced in 27 states.

Contacts for More Information

Jennie Drage Bowser
NCSL—Denver
(303) 364-7700, ext. 1356
jennie.bowser@ncsl.org

NCSL's Election Legislation Database
www.ncsl.org/programs/legismgt/elect/elections.cfm

The Sentencing Project
www.sentencingproject.org

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Restoration of Voting Rights

Right to vote not lost for felonies
Maine
Vermont

Right to vote not lost for *certain* felonies
Mississippi[1]

Right to vote automatically restored upon completion of sentence
Alaska
Arizona[3]
Arkansas
California
Colorado
Connecticut
District of Columbia
Florida[2]
Georgia
Hawaii
Idaho
Illinois
Indiana
Kansas
Louisiana
Maryland
Massachusetts
Michigan
Minnesota
Missouri
Montana
Nevada[3]
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
South Dakota
Texas
Utah
Washington[4]
West Virginia
Wisconsin

Automatically restored after a waiting period
Delaware (5 years)[2]
Nebraska (2 years)

Must apply for restoration of voting rights upon completion of sentence
Alabama[2]
Tennessee[2]

Must apply for restoration after a waiting period
Wyoming (5 years)[2,3]

Barred from voting for life, unless pardoned by the governor
Kentucky
Virginia

(1) In MS, the right to vote is lost permanently (absent a pardon by the governor) for the following offenses: murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, forgery, perjury, embezzlement, and bigamy. Felons convicted of any crime other than these do not lose the right to vote.
(2) For certain serious offenses, either the restoration of voting rights by a court or board, or a pardon, is necessary.
(3) Only for first-time offenders. Recidivists must petition for restoration of voting rights.

Source: National Conference of State Legislatures
February 2011
For more information, contact Jennie Drage Bowser at 303-364-7700.

(4) In Washington, certain offenders must apply with the Indeterminate Sentence Review Board for restoration of voting rights.

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Felon Voting Rights
Permanent Disenfranchisement States

State	Who is permanently disenfranchised	How right to vote may be regained	Notes
Alabama §15-22-36, 15-22-36.1 §17-3-30, 17-3-31 Const. Art. 8 §182	All people convicted of a crime involving "moral turpitude" (includes all felonies)	*Nonviolent:* apply for Certificate of Eligibility to Register to Vote from Board of Pardons & Paroles; board must issue certificate within 45 days if all requirements are satisfied *Violent:* apply for a pardon from Board of Pardons & Paroles	
Arizona §13-904 et seq. Const. Art. 7 §2	All people convicted of two or more felonies	Obtain a Certificate of Absolute Discharge from the Bureau of Prisons, or an affidavit of discharge from a judge if the most recent sentence was probation; then submit an application for restoration of civil rights to the superior court in his/her county of residence. A two-year waiting period is required before applying if the most recent sentence was a prison term.	Right to vote is automatically restored upon completion of sentence for people with a single felony conviction
Delaware §15-1701 Const. Art. V §2 and 7	People convicted of murder, manslaughter, sexual offenses, or any felony involving a violation of the public trust (includes bribery, improper influence and use of office, and election offenses)	Apply for a pardon from the governor	Voting rights are automatically restored for all other ex-offenders five years after completion of sentence
Florida Rules 6, 9, 10A and 10B, Rules of	Serious crimes, excluding murder and sex crimes	Apply to have rights restored *without a hearing* before the Board of Executive Clemency	Voting rights restoration is automatic for most people convicted of non-violent

Executive Clemency §97.041(2)(b), 944.292 and 944.293 Const. Art. VI §4	Murder, sex crimes	Apply for rights without a hearing after waiting 15 years after completion of sentence, or petition the Board for a review and hearing	offenses.
Iowa IA Code §48A.30(d) and §914.1 et seq. Const. Art. II, §5	A person convicted of any infamous crime	Apply to the board of parole for recommendation or to the governor for a reprieve, pardon, commutation of sentence, remission of fines or forfeitures, or restoration of rights of citizenship.	Under an executive order signed January 14, 2011, voting rights will no longer be restored automatically upon completion of sentence, and will only be restored by the governor for individuals who have completed their sentence and paid all financial restitution and court costs as ordered.
Kentucky §116.025, 116.113 Const. §145 and 150	All people convicted of a felony, treason or bribery in an election	Submit Application for Restoration of Civil Rights to the Division of Probation and Parole, which forwards it to the governor.	
Mississippi Const. Art. 12 §241 §23-15-11, 23-15-19	People convicted or murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy	Three options: 1) apply for a pardon from the governor 2) apply for an executive order restoring civil rights from the governor 3) ask the state legislature to pass a bill of suffrage on their behalf (requires a 2/3 majority)	People convicted of other offenses do not lose the right to vote
Nevada §176A.850, 213.090, 213.155, 213.157 Const. Art. 2, §1	Except for first-time non-violent felons, all people convicted of a felony.	1) obtain a pardon from the Board of Pardons Commissioners, or 2) petition for the restoration of civil rights in the court in which they were convicted	Rights are automatically restored upon completion of sentence for first-time non-violent felons
Tennessee §40-29-201 et seq.; 40-20-112; 2-19-143 Const. Art. 1 §5	People convicted after July 1, 1986, of voter fraud, treason, murder in the first degree, or aggravated rape.		Those convicted of any offense other than those listed to the left may request

	People convicted after July 1, 1996, but before July 1, 2006 of the above offenses or any other degree of murder or rape. People convicted on or after July 1, 2006 of all of the above offenses or felony bribery or misconduct by a public official.		a certificate of voting rights restoration from the pardoning authority, prison officials, or a parole officer
Virginia §53.1-231.2 Const. Art. II §1	All people convicted of a felony	1) after a five-year waiting period, petition the circuit court (not available to people convicted of violent or drug-related offenses); court's recommendation must be approved by the governor; or 2) after a two-year (for non-violent offenders) or five-year (for violent offenders) waiting period, apply to the governor for restoration of rights	

Washington §29A.08-520; 9.92.066; 9.94A.637; 9.94A.8859.95.260; chapter 9.96 Const. Art. VI §3	Certain sex offenders convicted after September 1, 2001	No procedure in place to obtain a certificate of discharge	All others may present a Certificate of Discharge to the voter registration official; certificate is received automatically upon completion of sentence. Ex-felons who owe court costs, fines or restitution can have voter registration revoked if they fail to make at least three payments over a 12-month period.
Wyoming §6-10-106; 7-13-105; 22-3-102 Const. Art. 6 §6	Except for people convicted of first-time non-violent felonies, all felons	Apply to the governor for a pardon or a restoration of rights after a five- to ten-year waiting period	First-time non-violent felons may, after a five-year waiting period, apply to the Wyoming Board of Parole for a certificate restoring voting rights

Sources: NCSL research and Mauer, Marc and Tushar Kansal. *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States*. Published by The Sentencing Project, February 2005.

Voting Rights Restoration Process

Source

: U.S. Department of Justice, December 2000;
Updated by the National Conference of State Legislatures, January 2002

	Restoration Process
Alabama	The right to vote may be regained only through a pardon.
Alaska	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote.
Arizona	1st offense - rights are automatically restored; 2nd and subsequent offenses - must apply to court for restoration; If felony convictions resulted in a prison sentence, felon must wait until two years after your unconditional release from incarceration or completion of parole before felon can apply. If felony convictions resulted in a sentence of probation, felon may apply for restoration of your voting rights immediately upon discharge from probation.
Arkansas	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote. Felons must provide evidence of their eligibility to vote after discharge of their sentence.*
California	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote.
Colorado	Automatically restored upon completion of sentence and/or parole; felon must register to vote.
Connecticut	Felon may regain the right to vote upon submission of written or other satisfactory proof that all fines in conjunction with conviction have been paid and that felon has been discharged from confinement or parole. Felon must submit this information to the office of the Registrar of Voters. Probationers automatically regain the right to vote.*
Delaware	-A person convicted of murder, manslaughter or any felony constituting a sexual offense or an offense against public administration involving bribery, improper influence or abuse of office, may not have their voting rights restored. -Any other person who is disqualified as a voter because of a conviction of a crime shall have such disqualification removed upon being pardoned or five years after expiration of sentence, whichever may occur first. Expiration of sentence means satisfactory completion of imprisonment, probation and parole and satisfaction of all financial obligations required by the sentence, including restitution.
D.C.	Automatically restored upon release from confinement; felon must register to vote.
Florida	Civil rights, including the right to vote, are suspended when a person is convicted of a felony. A felon may have his or her civil rights restored by obtaining a full pardon, conditional pardon, or restoration of civil rights from the Governor of Florida.
Georgia	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote.
Hawaii	Automatically restored upon release from confinement; felon must register to vote.

Idaho	Automatically restored upon completion of sentence, probation and parole; felon must register to vote.
Illinois	Automatically restored upon release from confinement; felon must register to vote.
Indiana	Automatically restored upon release from confinement; felon must register to vote.
Iowa	Must obtain a pardon or a restoration of citizenship from the Governor.
Kansas	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote.
Kentucky	Must obtain a pardon from the Governor.
Louisiana	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote.
Maine	Eligibility to vote not affected.
Maryland	-A first time offender for theft or infamous crime, other than buying or selling votes, the right to vote is automatically restored upon completion of your sentence, including any probation or parole. -If convicted of two or more such crimes, a person is not eligible to vote unless and until a pardon is obtained. -If convicted of buying or selling votes, a person is permanently prohibited from voting in Maryland.
Massachusetts	Automatically restored upon release from confinement; felon must register to vote.
Michigan	Automatically restored upon release from confinement; felon must register to vote.
Minnesota	If convicted of treason or of a felony, the right to vote is automatically restored upon discharge from sentence. Discharge occurs either by order of the sentencing court, following stay of sentence or stay of execution of sentence, or upon final expiration of sentence.
Mississippi	Right to vote may be restored by a pardon or an executive order issued by the Governor upon discharge from probation. The right to vote may also be restored by a two-thirds vote of the state legislature.
Missouri	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote; however, a person is forever disqualified from voting if convicted of a crime connected to the exercise of the right to vote.
Montana	Automatically restored upon release from confinement; felon must register to vote
Nebraska	Must obtain a "warrant of discharge" from the Nebraska Board of Pardons to regain the right to vote; however, if sentenced to confinement in an adult correctional facility, the felon can only regain the right to vote by applying to the Board of Pardons for a warrant of discharge
Nevada	-Felons who have completed probation may apply 6 months after the expiration of their term of probation to have their rights restored.* -Felons who have completed parole or who have served their full sentence may immediately petition the State Board of Parole Commissioners who may petition the district court for restoration of civil rights. *
New Hampshire	Automatically restored upon release from confinement; felon must register to vote.

New Jersey	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote.
New Mexico	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote. *
New York	-If convicted of a felony and sentenced to incarceration, felon automatically regains the right to vote upon expiration of the maximum time to which he or she was sentenced, or upon discharge from parole, whichever occurs first. -If convicted of a felony but not sentenced to incarceration, or if the sentence was suspended, felon's conviction does not affect the right to vote.
North Carolina	Automatically restored upon completion of sentence, probation and/or parole. For a North Carolina conviction, the agency having jurisdiction over a felon at the time he or she was unconditionally discharged is required to issue a certificate to the clerk of the General Court of Justice in the county where the felon was convicted, and that clerk shall then file the certificate with the original record at no fee. Once this is done, the felon can simply register and vote.
North Dakota	Automatically restored upon release from confinement; felon must register to vote.
Ohio	Automatically restored upon release from confinement; felon must register to vote.
Oklahoma	Once a conviction has become final and the maximum time set forth in the felon's sentence has expired, his or her right to vote is automatically restored.
Oregon	Automatically restored upon release from confinement or completion of parole; felon must register to vote.
Pennsylvania	Automatically restored upon release from confinement; felon must register to vote; however, if a felon was not registered to vote at the time of his or her conviction, the felon may need to wait 5 years from the date of release from incarceration in order to vote.
Rhode Island	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote.
South Carolina	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote.
South Dakota	In South Dakota, the right to vote is restored upon termination of a felon's sentence. When the sentence has been fully discharged, including parole, a felon should receive a certificate from the Secretary of Corrections stating that he or she has been restored to the full rights of a citizen. The Secretary should file a copy of the certificate with the sentencing court. After receiving this certificate the felon must register to vote.
Tennessee	-Persons convicted of murder, aggravated rape, treason, or voter fraud after July 1, 1986, or of rape after June 30, 1996, are ineligible to have their voting rights restored. -For other felony convictions after June 30, 1996, a felon may seek restoration of voting rights after the maximum sentence imposed for his or her conviction has expired, or after the felon has been pardoned, by petitioning the circuit court of the county where the felon lives or was convicted. -If a felon was convicted after July 1, 1986 but before June 30, 1996 of a felony other than murder, aggravated rape, treason, or voter fraud , a felon may request that either the board of probation and parole or the authority that supervised or incarcerated him or her during the sentence issue a Certificate of Restoration of Voting Rights. A felon is eligible to request this certificate after either being pardoned or after the maximum sentence which was imposed for the conviction has expired.
Texas	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote; if convicted persons may also regain their voting rights if they have been granted a gubernatorial pardon or release from the resulting disability to vote.

Utah	Automatically restored upon release from confinement/completion of sentence; felon must register to vote.
Vermont	Eligibility to vote not affected.
Virginia	If convicted of a felony in Virginia, then a felon must obtain a "removal of political disabilities" from the Governor in order to regain the right to vote. A felon is eligible to apply for the removal of political disabilities if he or she completed the sentence more than 5 years ago and if all court costs and restitution have been satisfied.
Washington	In order to regain the right to vote, a felon must have his or her civil rights restored. Civil rights are restored by the issuance of a certificate of discharge. When a felon has completed all of the requirements of sentence, the Department of Corrections notifies the sentencing court. The sentencing court then issues and provides the felon with a certificate of discharge, which will have the effect of restoring the right to vote. A felon must then register to vote, unless the crime was committed before 1984.
West Virginia	Automatically restored upon completion of sentence, probation and/or parole; felon must register to vote.
Wisconsin	Automatically restored upon release from confinement/completion of sentence; felon must register to vote.
Wyoming	The right to vote may be regained either by a pardon or by restoration of civil rights. The Governor has the power both to pardon and to restore rights. The Governor may issue certificates of restoration of rights upon a person's completion of probation or expiration of the term of the sentence. A felon must submit a written application to the Governor in order to request a certificate restoring the right to vote.

*Legislation passed in 2001

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For more information on felon voting rights, contact Jennie Drage Bowser at 303-364-7700.

Felon Voting Rights

In 48 of the 50 states, at least some felons -- and in some states, all felons and ex-offenders -- lose their right to vote.

Background and History

The idea of taking away a criminal's right to vote has been around since ancient Greece and Rome. A condition called "civil death" in Europe involved the forfeiture of property, the loss of the right to appear in court, and a prohibition on entering into contracts, as well as the loss of voting rights. Civil death was brought to America by English colonists, but most aspects of it were eventually abolished, leaving only felon disenfranchisement intact in some parts of modern America.

The Face of Disenfranchisement

According to The Sentencing Project, 5.3 million Americans (1 in 40 adults) were unable to vote due to a felony conviction in the 2008 elections. This included 1.4 million African-American men, more than 676,000 women, and 2.1 million ex-offenders who have completed their sentences.

Categories of Disenfranchisement

State approaches to felon disenfranchisement vary tremendously. In Maine and Vermont, felons never lose their right to vote. In Kentucky and Virginia, felons and ex-felons permanently lose their right to vote absent a pardon from the governor. The remaining 46 states have 46 different approaches to the issue.

MAP HERE

In Maine and Vermont, felons do not lose their right to vote; even felons serving a prison sentence can vote.

In 13 states and the District of Columbia, felons are ineligible to vote only while serving a prison sentence. Ex-offenders and people on probation and parole can vote.

In 25 states, prisoners and people under community supervision (probation and/or parole) are ineligible to vote, but ex-offenders are eligible.

In eight states, all felons in prison and under community supervision, as well as certain ex-offenders, are ineligible to vote.

In Kentucky and Virginia, all felons and ex-offenders are permanently ineligible to vote, absent a pardon.

How Rights Are Restored

In 38 states, felons' voting rights are automatically restored upon completion of their sentence, which in some states includes probation and parole. In five states, certain ex-offenders are barred for life from voting, while the rights of others--generally first-time, non-violent offenders--are restored automatically upon completion of their sentence. In the three remaining states where felons lose and can regain their voting rights, certain ex-offenders are barred from voting for life, while others can apply to have their rights restored.

MAP HERE

Barriers to the Restoration of Rights

Even in states where ex-offenders automatically regain the right to vote upon completion of their sentence, the process of re-registering to vote often is difficult. One reason is the complexity of the laws and processes surrounding disenfranchisement. In some cases, it is difficult to determine whose rights can be restored. This can vary in some states according to the date of the crime, the conviction, or the release from prison, or the nature of the crime. The complex restoration process also can be daunting. It often involves lengthy paperwork, burdensome documentation, and the involvement and coordination of several state agencies.

A second barrier to restoration of voting rights for ex-offenders is the often inconsistent communication among agencies. The methods of communicating the loss and restoration of voting rights among courts, corrections and elections officials are not always reliable, timely or consistent. This inconsistency can result in uneven application of the law, even when the laws are clear.

Another barrier is lack of information. Ex-offenders sometimes are not aware that they regain their voting rights automatically upon completion of their sentence. They go through life believing they cannot vote when, in fact, they can. In other cases, they are not informed of the process for regaining their rights or offered assistance in doing so. As long as they remain ignorant of the necessary steps, ex-offenders cannot begin the process of regaining voting rights.

A final obstacle is under-funding of parole boards in some states where offenders must apply to have their rights restored. A massive backlog of applications can exist because the agencies do not have adequate staff or resources to process them in a timely manner.

Recent Trends in State Action

Most recent state legislation seeks to expand felon voting rights and ease the process of restoration. Between 1996 and 2008, 28 states passed new laws on felon voting rights.

- Seven repealed lifetime disenfranchisement laws, at least for some ex-offenders.
- Two gave probationers the right to vote.
- Seven improved data-sharing procedures among state agencies.
- Nine passed requirements that ex-offenders be given information and/or assistance in regaining their voting rights at the time they complete their sentence.
- Twelve simplified the process for regaining voting rights, for instance, by eliminating a waiting period or streamlining the paperwork process.

To date in 2009, 82 bills addressing the voting rights of felons and ex-offenders have been introduced in 25 state legislatures. In the 2007-2008 biennium, 129 bills were introduced in 27 states.

For more detailed information on 2001-2009 state legislation dealing with the voting rights of convicted felons, visit NCSL's Election Legislation Database and select the subtopic "Voters-Convicted Felons."

For More Information

For more information on felon voting rights, contact Jennie Drage Bowser at 303-364-7700.

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STUDENT ADVISOR

February 2, 2011

The Honorable Bill Wielechowski, Chair
The Honorable Joe Paskvan, Vice-Chair
Senate State Affairs Committee
Alaska State Senate
Juneau, AK 99801
via email: Senator_Bill_Wielechowski@legis.state.ak.us
Senator_Joe_Paskvan@legis.state.ak.us

Re: Senate Bill 7
ACLU Statement of Support

Chair Wielechowski, Vice-Chair Paskvan:

Thank you for the opportunity to submit a written statement of support for SB 7.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions.

Felony disfranchisement is a policy that bars citizens from the ballot box upon conviction of a felony. In the United States, over 5.3 million Americans cannot vote due to a felony conviction. Felony disfranchisement laws vary from state to state, but 48 states bar incarcerated individuals from casting a ballot, with only Maine and Vermont allowing inmates to vote. Eight states permanently ban certain individuals with a felony conviction from voting and two states bar all persons with felony convictions from voting.

The vast majority of disfranchised individuals are no longer incarcerated, but are living in their communities on probation or parole; 2.1 million of the disfranchised population have fully completed their sentence. These disfranchised individuals are tax-paying citizens, involved with the issues in their community, but unable to vote to affect them.

The impact of felony disfranchisement falls disproportionately upon communities of color. Nearly one and a half million African-American men, or 13%, are disfranchised due to felony convictions, a rate that is seven times the national average of one out of forty-one adults. If incarceration rates hold steady, three in ten of the next generation of black men can expect to be disfranchised at some point in their lives.

However, over the last decade the national trend has moved toward lowering barriers for the disfranchised. Since 1997, 19 states have made progressive changes to their felony disfranchisement laws, enfranchising over 700,000 formerly incarcerated individuals. In a democracy voting is a right, not a privilege. But for over 5 million Americans, that is not the case. We hope SB 7 will change that in Alaska.

Alaska Disfranchisement Policy
Alaska bars individuals with a felony conviction from voting until full completion of sentence, including incarceration, probation and parole. Upon completion of sentence the right to vote is automatically restored but individuals must include a copy of their discharge papers when registering to vote. Individuals with misdemeanor convictions never lose the right to vote, but they must vote by absentee ballot if in jail.

Who is Disfranchised in Alaska?
An estimated 10,176 people with felony convictions are barred from voting in Alaska. Approximately 44% of disfranchised people are in prison while 56% of disfranchised people are on probation or parole. Probationers and parolees are law-abiding citizens who are living in the community, working, raising their families and paying taxes.

Racial Impact
Alaska Natives are significantly overrepresented in the disfranchised population. Alaska Natives comprise 32% of the total disfranchised population, though they only comprise 16% of the total population of Alaska. African-Americans comprise 9.5% of the disfranchised population, yet comprise only 3.5% of the total population of Alaska.

Voting & Public Safety
Felony disfranchisement runs counter to the goal of public safety. Restricting voting rights does not prevent crime, nor does it provide compensation to victims. In fact, disfranchising persons after release from prison is antithetical to the reentry process and harmful to long-term prospects for sustainable reintegration of ex-offenders into society. Recent research finds a link between voting participation and reoffense; people who voted after release from supervision were half as likely to be re-arrested as those who did not vote. Similar effects were found among people with a prior arrest; 27% of non-voters were re-arrested, compared to 12% of people who had voted.

Far from making streets safer, felony disfranchisement may be detrimental to public safety. Voting demonstrates an individual's commitment to the institutions of American democracy. The irony of felony disfranchisement is that the very behavior that society strives to encourage – the commitment to the larger social and political collective – is undermined by a policy that requires people who desire to engage in that behavior to relinquish the right to vote.

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions that may arise, or to answer informally any questions which Members of the Committee may have.

Thank you again for the opportunity to share our thoughts.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Albert Kookesh
Senator Kevin Meyer
Senator Catherine Giessel
Senator Bettye J. Davis

Thomas Obermeyer

From: Jeffrey Mittman [JMittman@akclu.org]
Sent: Tuesday, February 15, 2011 1:00 PM
To: Michelle Sydeman
Cc: Thomas Obermeyer
Subject: SB 7: Felons Right to Vote - Research regarding enfranchisement and reduction in re-offending
Attachments: Voting and Subsequent Crime and Arrest_Uggen Manza.pdf

Michelle and Tom –

Attached is a copy of ***Voting and Subsequent Crime and Arrest: Evidence from a Community Sample***, published in the Columbia Human Rights Law Review, by Christopher Uggen and Jeff Manza.

In particular, pages 204 and 205 set forth the differential data of particular interest to you.

Please do not hesitate to contact me if you require additional information, and thank you to both Senators Wielechowski and Davis for their leadership on this important issue.

Best,

Jeffrey

Direct dial: (907) 263-2002
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VOTING AND SUBSEQUENT CRIME AND ARREST: EVIDENCE FROM A COMMUNITY SAMPLE

Christopher Uggen and Jeff Manza*

I. INTRODUCTION

A number of recent studies have examined the origins and consequences of felon disenfranchisement laws in the United States. These studies have identified a large and growing group of citizens who have lost the right to vote because of felony convictions.[1] The burden has fallen particularly heavily on minority citizens, with

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* Christopher Uggen is Associate Professor of Sociology and McKnight Presidential Fellow at the University of Minnesota. With Jeff Manza, he is coauthor of the forthcoming Locked Out: Felon Disenfranchisement and American Democracy.

Jeff Manza is Associate Professor of Sociology and Political Science and Associate Director of the Institute for Policy Research at Northwestern University. He is the coauthor, with Clem Brooks, of Social Cleavages and Political Change: Voter Alignments and U.S. Party Coalitions. Our research was supported by grants from the National Science Foundation (#9819015) and the Individual Project Fellowship Program of the Open Society Institute. We are indebted to Melissa Thompson, Angie Behrens, Sara Wakefield, and Michael Vuolo for research assistance and to Eric Plutzer and Doug McAdam for suggestions and comments.

1. *See* Angela Behrens et al., *Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 Am. J. Soc. 559 (2003); Alec C. Ewald, *'Civil Death': The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 Wis. L. Rev. 1045 (2002); Jamie Fellner & Marc Mauer, Human Rights Watch and The Sentencing Project, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States 1 (1998); Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Soc. Rev. 777 (2002).

HeinOnline -- 36 Colum. Hum. Rts. L. Rev. 193 2004-2005

nearly two million African Americans currently disenfranchised.[2] American laws are uniquely restrictive on the international scene.[3] Since laws that regulate voting rights for felons and ex-felons are specific to each state—ranging from states with no restrictions to states enforcing lifetime bans on participation—there is wide variation in the size and distribution of the disenfranchised population.[4] A number of studies have suggested that disenfranchisement is likely to have impacted both electoral turnout and, in a handful of cases, even electoral outcomes.[5]

The existing research literature considering the *political* implications of disenfranchisement hardly exhausts the range of important issues to consider. One of the most important issues, the relationship between political participation and subsequent criminal activity, has yet to be systematically addressed. If voting is unrelated to later criminal behavior, then legal changes that extend the franchise to convicted felons are unlikely to affect crime or desistance rates. In that case, current policy debates over felon disenfranchisement laws should pivot primarily on questions of political rights and democracy. However, if those who vote are actually less likely to commit new crimes, legal changes easing the right to vote for felons may facilitate reintegration efforts and reduce rates of recidivism.

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2. Uggen & Manza, *supra* note 1, at 798.

3. *See* Alec C. Ewald, Of Constitutions, Politics, and Punishment: Criminal Disfranchisement Law in Comparative Context (Aug. 2002) (unpublished paper presented at the Annual Meeting of the American Political Science Association in Boston) (on file with authors) (evaluating felon disenfranchisement policies in various countries). *See also* Jeff Manza & Christopher Uggen, *Punishment and Democracy: The Disenfranchisement of Nonincarcerated Felons in the United States*, 2 Persp. on Pol. 491, 501 (2004) (stating that the United States "stands alone" in disenfranchising large numbers of non-incarcerated felons); Brandon Rottinghaus, International Foundation for Election Systems, *Incarceration and Enfranchisement: International Practices, Impact, and Recommendations for Reform* 24–25 (2003), *at* http://www.ifes.org/research_comm/08_18_03_Manatt_Brandon_Rottinghaus.pdf (comparing policies of countries that do not allow prisoners to vote and noting that, among those compared, U.S. policies were the most restrictive).

4. Fellner & Mauer, *supra* note 1, at 6.

5. *See, e.g.*, Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 Am. Pol. Sci. Rev. 963, 971 (2001); Uggen & Manza, *supra* note 1, at 789.

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The reintegrative effects of voting may have broader implications. The right to vote is one of the defining elements of citizenship in a democratic polity[6] and participation in democratic rituals such as elections affirms membership in the larger community for individuals and groups.[7] Because of all that voting represents in this society, voting can be viewed as a proxy for other kinds of civic engagement associated with the avoidance of illegal activity.

Establishing a causal relationship between voting, or civic reintegration more generally, and recidivism would require a large-scale longitudinal survey that tracked released offenders in their communities and closely monitored changes in their political and criminal behavior. At present, no such data exist.[8] Nevertheless, it is possible to bring some empirical data to bear on this question now. In this paper, we present a simple analysis of the relationship between voting and crime using data we have collected from the Youth Development Study, a prospective longitudinal investigation of a cohort of former Minnesota public school students.[9]

We will first establish a correlation between voting and crime by examining whether those who voted in the 1996 presidential election had lower rates of arrest, incarceration, and self-reported

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6. *See* Judith N. Shklar, American Citizenship: The Quest for Inclusion 25–62 (1991) (discussing the way in which the struggle for citizenship in the United States has led to a symbolic satisfaction derived from voting as affirmation of citizenship).

7. *See* Alexander A. Schuessler, A Logic of Expressive Choice (2000); Christopher Uggen et al., *Less than the Average Citizen: Stigma, Role Transition, and the Civic Reintegration of Convicted Felons*, *in* After Crime and Punishment 261, 264 (Shadd Maruna & Russ Immarigeon eds., 2004); Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. Rev. 338, 368 (1993).

8. There are longitudinal studies such as the National Longitudinal Study of Youth or the Panel Study of Income Dynamics that include some information about criminal background, but these surveys do not include information about political participation. *See* Bureau of Labor Statistics, U.S. Dept. of Labor, National Longitudinal Survey of Youth, at http://www.bls.gov/nls/home.htm (last visited Oct. 10, 2004); Inst. for Soc. Research, Panel Study of Income Dynamics, at http://psidonline.isr.umich.edu/ (last visited Oct. 10, 2004). The handful of election panel studies, such as the panels associated with the American National Election Study, do not include any information about criminal history. *See* Nat'l Election Studies, American Nat'l Election Study, at http://www.umich.edu/~nes/ (last visited Oct. 10, 2004).

9. Jeylan T. Mortimer, Working and Growing Up in America 29 (2003).

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criminal behavior in the years following this election than those who did not participate. We then conduct a logistic regression analysis to test whether this correlation is spurious due to factors that are associated with both voting and crime. By statistically controlling for prior self-reported and official criminal behavior and background factors such as race, gender, education, employment, and marital status, we can learn the extent to which the raw correlation is due to the self-selection of persons at low risk of crime into voting. While this approach cannot firmly establish political participation as a cause of desistance from crime, it allows us to rule out some of the most compelling alternative explanations for the correlation. We will estimate the net effect of voting on crime by statistically controlling for several factors closely linked to both behaviors.

II. CIVIC REINTEGRATION AND DESISTANCE FROM CRIME

A. Insights from Criminology and Prior Research

We might expect a relationship between political participation and recidivism for a number of reasons. Solid empirical evidence demonstrates that former criminal offenders who enter stable work[10] and family relationships[11] are most likely to desist from crime. In addition to securing stable employment and family situations, convicted felons are expected to return to their communities and either resume or begin their lives as active and law-abiding citizens. The primary causal mechanism hypothesized in these studies is one of informal social control, in which attachment to social institutions such as families and labor markets increase the reciprocal obligations between people and provide individuals with a stake in conforming behavior.[12] Social-psychological theories of symbolic interactionism, while differing from informal social control theories in some respects, make a similar prediction that the

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10. *See* Robert Sampson & John Laub, *Crime and Deviance over the Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609, 617–18 (1990); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 Am. Soc. Rev. 529, 542 (2000).

11. John Laub et al., *Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process*, 63 Am. Soc. Rev. 225, 237 (1998).

12. Robert Sampson & John Laub, Crime in the Making: Pathways and Turning Points through Life 18 (1993).

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assumption of work and family roles facilitates the development of an identity as a productive and responsible law-abiding citizen.[13]

Although the issue has received scant research attention in the study of desistance from crime, reintegration as a voting member of one's community would appear to be a logical analog to work and family reintegration. As Shadd Maruna notes in a recent study of desistance, the desire to "be productive and give something back to society" appears to be critical to the desistance process.[14] To date, however, much of the research on this question has been based on small-scale interview projects, or correlational studies based on highly selected samples.[15]

B. Insights from Democratic Theory

A second theory linking political participation to reduced crime derives from the literature on democracy. Conventional theories of democracy typically emphasize instruments available for citizens to control their government—through elections, public opinion, or popular revolts.[16] However, some democratic theorists focus on the benefits to the individuals who participate in democratic processes. In this latter view of democracy, individuals become citizens in part through the "educative" or "constitutive" impact of political participation.[17]

This view was first suggested by de Tocqueville and Mill, with the latter's classical statement explicitly referencing de

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13. Ross Matsueda & Karen Heimer, *A Symbolic Interactionist Theory of Role-Transitions, Role-Commitments, and Delinquency, in* Developmental Theories of Crime and Delinquency 163, 196 (Terence P. Thornberry ed., 1997); Uggen et al., *supra* note 7, at 264.

14. Shadd Maruna, Making Good: How Ex-Convicts Reform and Rebuild their Lives 88 (American Psychological Association 2001).

15. *See, e.g., id.*; Uggen et al., *supra* note 7, at 267; Christopher Uggen & Jennifer Janikula, *Volunteerism and Arrest in the Transition to Adulthood*, 78 Soc. Forces 331, 337 (1999).

16. *See, e.g.*, The Works of Jeremy Bentham, (John Bowring ed., 1843); *see also* Carole Pateman, Participation and Democratic Theory 14, 19–20 (1970).

17. John Stuart Mill, *Considerations on Representative Government* (1861), *reprinted in* Essays on Politics and Society: Collected Works 371, 467–69 (J.M. Robson ed., 1977); Pateman, *supra* note 16, at 109–10; Benjamin R. Barber, Strong Democracy 265–66 (1984).

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Tocqueville's *Democracy in America*.[18] According to Mill, when citizens participate regularly in politics, they develop an explicit identification with the polity and its norms and values.[19] In this sense, democracy fosters citizenship. In the narrowest reading of the constitutive argument, political participation produces citizens with a generalized sense of efficacy, who believe that they have a stake in the political system. This, in turn, fosters continued political participation.[20] Some classical studies provide evidence in support of this view.[21] More recently, the National Commission on Electoral Reform endorsed the idea that the greater an individual's participation in the political process, the more fair the individual is likely to consider the system.[22]

Theories of "expressive voting"[23] and communitarian and republican theories of government[24] hold that the right to vote is

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18. Mill, *supra* note 17, at 468; *see* 1 Alexis de Tocqueville, Democracy in America 243–44 (Henry Reeve trans., Phillips Bradley ed., Knopf 1990) (1840) (observing that Americans become patriots through their participation in government); *id.* at 317–18 (observing that Americans are educated though their participation in government).

19. Mill, *supra* note 17, at 469.

20. M. Margaret Conway, Political Participation in the United States 185–86 (3d ed. 2000).

21. *See* Gabriel A. Almond & Sidney Verba, The Civic Culture: Political Attitudes and Democracy in Five Nations 246–53 (1963) (discussing a study that determined a person's ability to participate within the political system often leads to an "attachment" or "loyalty" to that system); Lester W. Milbrath & M. L. Goel, Political Participation: How and Why Do People Get Involved in Politics? 57–59 (1977) (discussing findings of two studies, both of which essentially conclude that "persons who feel efficacious participate at a higher level [in the political system] than those who lack such feelings."); M. Kent Jennings & Richard G. Niemi, Generations and Politics: A Panel Study of Young Adults and Their Parents (1981) (discussing an eight-year study that analyzed change and continuity in peoples' political estimations over generations).

22. John Mark Hansen, *Sizing the Problem*, *in* To Assure Pride and Confidence in the Electoral Process: the Final Report of the Commission's Task Force 126 (Nat'l Comm. on Fed. Election Reform 2001).

23. *See* Dennis F. Thompson, Just Elections 19–64 (2001); Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. Rev. 330, 363–64 (1993); Alexander Schuessler, A Logic of Expressive Choice 11–62 (2000).

24. *See* Sanford Levinson, Constitutional Faith 62–63 (1988); Michael Sandel, Liberalism and the Limits of Justice 201–02 (1982); Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla. L. Rev. 443, 451 (1989).

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important precisely because it helps make individuals into democratic citizens. In the words of one legal theorist

> the vote should be protected not simply because it enables individuals to pursue political ends, but also because voting is a meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their identities both as individuals and as part of a greater collectivity."[25]

The expressivist theories are today the leading response to rational choice models of voter turnout,[26] suggesting that people participate in part because elections give them an opportunity to express their civic identities.[27]

More expansive views of the impact of participation have also been developed, but typically in relation to forms of participation that extend beyond the mere act of voting. In her modern reconstruction of the idea of participatory democracy, for example, Pateman argues that

> the major function of participation in the theory of *participatory democracy* is . . . an educative one . . . including both the psychological aspect and the gaining of experience in democratic skills and procedures. . . . For a democratic polity to exist it is necessary for a participatory society to exist, i.e., a society where all political systems have been democratized and socialization through participation can take place in all areas.[28]

Other advocates of "strong democracy"[29] and deliberative democracy[30] emphasize forms of participation that go beyond the

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25. Winkler, *supra* note 23, at 331.

26. Rational choice models posit that voters make the decision to participate by weighing the anticipated costs and benefits of voting. *See* John H. Aldrich, *Rational Choice and Turnout*, 37 Am. J. Pol. Sci. 246 (1993).

27. *See* Schuessler, *supra* note 23, at 46; Thompson, *supra* note 23, at 22–24.

28. Pateman, *supra* note 16, at 42–43.

29. *See* Barber, *supra* note 17, at 117–313.

30. *See* Jurgen Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society (Thomas Burger trans., M.I.T. Press 1989) (1962); *see also* Andrew Jonathan Perrin, Civil Society and the Democratic Imagination (2001) (unpublished Ph.D dissertation, University of California (Berkeley)) (on file with Digital Dissertations, File No. AAT 3025178)

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"mere" act of voting and involve citizens talking about politics.[31] McAdam's analysis of the impact of social movement activism on the lives of activists and non-activists provides powerful evidence of the constitutive and life-changing experience of high-risk activism.[32] Although the political life of felons extends to myriad activities,[33] the analysis below will focus on a single fundamental question about political participation: How is voting related to crime and recidivism?

III. DATA AND MEASURES

The criminological and political theory literature reviewed in the previous section suggest some possible links between civic participation and desistance, but the case has yet to be proven. Qualitative data from in-depth interviews we have presented elsewhere[34] are suggestive, but not ideally suited to test ideas about the possible impact of civic integration. Moreover, our interviews hardly provide unambiguous evidence in support of such an impact. To develop a more systematic assessment, we examine some longitudinal survey data containing information about both voting and criminal behavior.

The study involves a survey of the effects of voting participation in the 1996 election upon self-reported crime and arrest in the years from 1997 to 2000. We consider both the simple correlation or association between voting and crime, as well as the net impact of voting after statistically controlling the effects of race, sex, education, marital status, employment, and anti-social behavior.

(noting that political decisions are reached through a combination of consensus decision-making derived from participation and electoral outcomes).

31. *See* Nina Eliasoph, Avoiding Politics: How Americans Produce Apathy in Everyday Life 11–12, 277–78 (1998) (arguing that democratic citizenship requires a vibrant public sphere—defined as associations and institutions in which private citizens carry on conversations about issues of common concern); *see also* Perrin, *supra* note 30, at 171 (arguing that "citizens gain capacities for intelligent, strategic operation in the public sphere by gathering cues and resources from a variety of civic contexts and experiences.").

32. Doug McAdam, Freedom Summer 127–45 (1988); Doug McAdam, *The Biographical Consequences of Activism*, 54 Am. Soc. Rev. 744, 757–58 (1989).

33. *See* Christopher Uggen & Jeff Manza, *Lost Voices: The Civic and Political Views of Disfranchised Felons in* Imprisoning America: The Social Effects of Mass Incarceration 165, 180–83 (Mary Pattillo et al. eds., 2004).

34. Uggen et al., *supra* note 7, at 269–86.

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We first explore whether voting is at all related to crime and arrest and then address the more complicated issue of whether voting is an independent cause of desistance from crime. We analyze data from the Youth Development Study (YDS), a survey of 1,000 persons who began the study in 1988 as ninth-graders in St. Paul, Minnesota public schools.[35] The YDS offers a general sample, rather than a focused group of convicted felons. It is useful for our purposes, however, because it is among the very few existing data sets (if not the sole data set) that include information on both criminal behavior and voting. Self-reported crime and arrest data are drawn from data collected between 1988 and 2000. Political participation questions for the 1996 election are taken from the twelfth survey wave in 2000, when a total of 757 respondents, aged twenty-six to twenty-seven, remained in the sample. Subsequent criminal behavior is measured by self-reported indicators of property crimes and violence (reported in 1998 and 1999 for the years 1997 and 1998) and arrest and incarceration (reported in 2000 for the 1997–2000 period). Information on marital status, employment, and educational attainment were taken from the 1995 survey so that these background characteristics would precede both the 1996 voting data and the 1997-2000 information on subsequent criminal behavior. Finally, self-reported crime and arrest data prior to 1996, important statistical controls in this analysis, were taken from earlier retrospective reports of arrest, drunk driving, shoplifting, and violence.

These longitudinal data are important because a negative statistical association between voting and arrest may be an artifact of some unmeasured characteristic—such as a propensity for antisocial behavior—reflected in both processes. We exploit the longitudinal nature of the YDS to examine the effects of voting on subsequent arrest after statistically controlling for measures of self-reported deviance that would indicate antisocial propensity. In addition to race, sex, education, marital status, and employment, we control for arrest prior to 1996 and three indicators of common self-reported deviance: drunk driving, shoplifting, and hitting or threatening to hit another person. Our goal in this analysis is to determine whether the voting effect is signaling a real "prosocial

35. Mortimer, *supra* note 9, at 32–33, 36.

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orientation" linked to desistance from crime, or whether it is simply capturing stable, underlying differences across respondents in social background and criminal history.

Table 1. Variable Descriptions and Descriptive Statistics for Youth Development Study

Variable	Description	Percentage/ Mean
Voting		
1996 voting	Percentage reporting voting in the 1996 presidential election	65.2
Background		
Female	Percentage female	56.5
White	Percentage reporting white race	76.7
Years education in 1995	Number of years of education	13.6 (1.8)
Marriage in 1995	Percentage married	11.6
Employed in 1995	Percentage employed	82.3
Subsequent Crime		
Arrested 1997-2000	Percentage reporting arrest in 1997, 1998, 1999, or 2000	8.82
Incarcerated 1997-2000	Percentage reporting incarceration in jail or prison in 1997, 1998, 1999, or 2000	7.39
Violent crime 1997-1998	Percentage reporting hitting or threatening to hit someone, fighting, or robbing someone	32.3
Property crime 1997-1998	Percentage reporting shoplifting, theft, check forgery, or burglary	13.4
Any crime 1997-1998	Percentage reporting at least one property or violent offense in 1998 or 1999	38.3
Prior Deviance		
Arrest prior to 1996	Percentage arrested prior to 1996	18.7
Prior drunk driving	Percentage reporting driving after having too much to drink during high school (1988-1991)	28.4
Prior shoplifting	Percentage reporting shoplifting during high school (1988-1991)	38.0
Prior violence	Percentage reporting hitting or threatening to hit someone during high school (1988-1991)	41.4

Note: Standard deviations for continuous variables are in parentheses.

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Variable descriptions and summary statistics for each of these measures are shown in Table 1. Self-reported turnout rates were relatively high for this Minnesota cohort, with 65% of respondents reporting that they voted in 1996, one of the first federal elections in which they would have been eligible to cast ballots, as against 59.6% of people aged eighteen to twenty-four in that election in Minnesota, a high-turnout state.[36] At the time of data collection in 2000, approximately 57% of the remaining sample was female and about three-fourths of respondents were white.[37] By 1995, the cohort had achieved an average of 13.6 years of education and a good number were currently enrolled in post-secondary education. Only 12% were married by 1995 and approximately 82% were employed.

With regard to official measures of crime, about 9% reported being arrested and 7% reported being incarcerated at some point in the four years following the 1996 election. Prior to 1996, about 19% reported being arrested. With regard to self-reported criminality, we consider both property and violent offenses. About 38% of the sample indicated that they had committed at least one property crime or act of violence in the 1997-1998 period. The property crime indicator flags those who reported shoplifting, theft, forgery, and burglary. Overall, approximately 13% of the sample reported at least one of these offenses in 1997 or 1998. The violence indicator measures those

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36. U.S. Bureau of the Census, *Reported Voting and Registration, by Sex and Age, for States: November 1996* (Aug. 17, 1998), *available at* http://www.census.gov/population/socdemo/voting/96cps/tab4B.txt (last visited June 9, 2004). There are a number of methodological issues raised by reliance on self-reported turnout. Some non-voting survey respondents claim to have voted, which may be explained by Bernstein's finding that "those who are under the most pressure to vote are the ones most likely to misrepresent their behavior when they fail to do so." This includes better-educated and more privileged groups with much lower levels of criminal activity, and also minorities in politically charged areas. *See* Robert Bernstein et al., *Overreporting Voting: Why It Happens and Why It Matters*, 65 Pub. Opinion Q. 22, 41 (2001).

37. As in other longitudinal surveys, race and family income are associated with sample attrition in the YDS. In supplementary analysis, however, we found no evidence that estimates reported here are biased by sample selectivity or attrition. For example, the magnitude and direction of the voting effects appear to be consistent across income and racial groups, although the estimated standard errors are larger, and fewer of the relationships are statistically significant in the subgroup analyses. More complete information about YDS sample attrition can be found in Mortimer, *supra* note 9, at 36–37, and further details about the crime measures are reported in Uggen & Janikula, *supra* note 15, at 337.

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who reported hitting or threatening to hit someone, being involved in a physical fight, or robbing someone by force. The combined prevalence of these behaviors is about 38% overall.

In sum, the YDS sample reflects the St. Paul, Minnesota community from which it is drawn,[38] tracking a cohort of young adults as they gain eligibility to vote, transition to adult work and family roles, and desist from crime and minor deviance. As in other samples of young adults from the general population,[39] we find high rates of self-reported crime and deviance, low rates of arrest, and age-appropriate levels of marital formation, employment, and educational attainment.

IV. RESULTS

We first present simple bivariate results.[40] These are shown in figures contrasting the percentage of voters who go on to commit crime or to be arrested with the percentage of non-voters who go on to commit crime or to be arrested. We then present multivariate results in tables with regression coefficients. These figures show the relationship between voting and crime while simultaneously controlling for the effects of other variables that could alter this relationship, such as prior deviance and marital status.

A. Bivariate Relationships

1. Voting is Correlated with Arrest and Incarceration

We first examine the most basic question about the relationship between political participation and criminality. Is there any correlation between voting and crime, arrest, and incarceration? Figure 1 shows the bivariate relationship between voting in 1996 and subsequent arrest and incarceration. The figure shows clear differences in rates of arrest and incarceration by levels of political participation. Approximately 16% of the non-voters were arrested

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38. *See* Mortimer, *supra* note 9, at 241.

39. *See, e.g.*, Delbert Elliott, *National Youth Survey: Wave VII, 1987* (2002), ICPSR, File No. 6542, *available at* http://www.icpsr.umich.edu/access/index.html; Lloyd D. Johnston et al., *Monitoring The Future: A Continuing Study of American Youth (12th-Grade Survey)* (2001), ICPSR, File No. 3425, *available at* http://www.icpsr.umich.edu/access/index.html.

40. Results of study, considering two variables.

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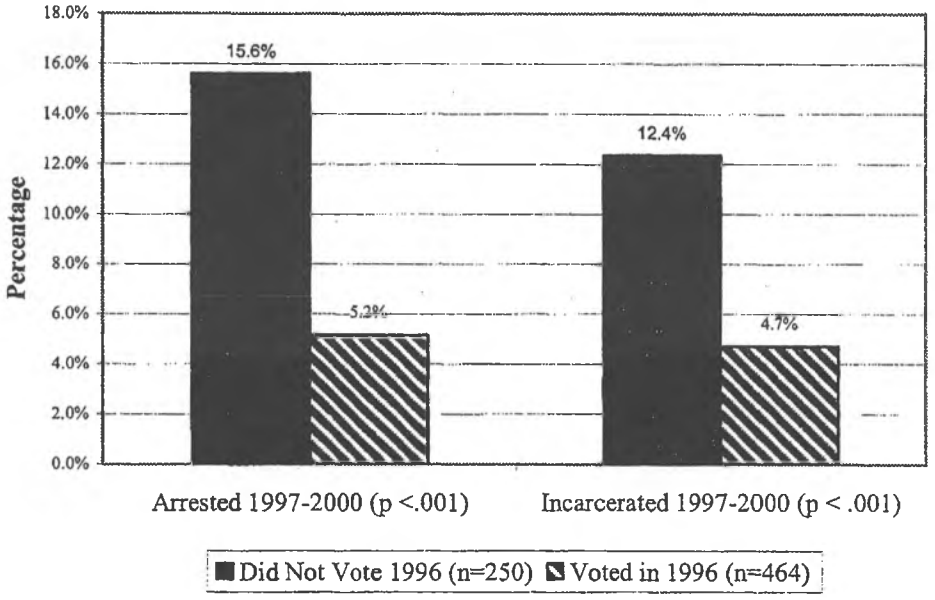
between 1997 and 2000, relative to about 5% of the voters. Similarly, approximately 12% of the non-voters were incarcerated in jail or prison between 1997 and 2000, relative to less than 5% of the voters. Both of these contrasts represent statistically significant differences ($p < .001$) between those who participated in the 1996 election and those who did not participate.

Figure 1. Percentage Arrested and Incarcerated in 1997-2000 among Voters and Non-Voters in 1996



2. Voting is Correlated with Re-arrest among those with Arrest Histories

The YDS is a heterogeneous sample with regard to criminal history, but approximately 80% of the respondents had no prior arrests at the time of the 1996 election. We therefore split the sample into two groups to distinguish those with a prior arrest history from those with no such history. This allows us to learn whether the bivariate correlation shown in Figure 1 holds across different levels of criminal history. Figure 2 suggests that this is indeed the case. Among former arrestees, about 27% of the non-voters were re-arrested, relative to 12% of the voters. These results suggest that

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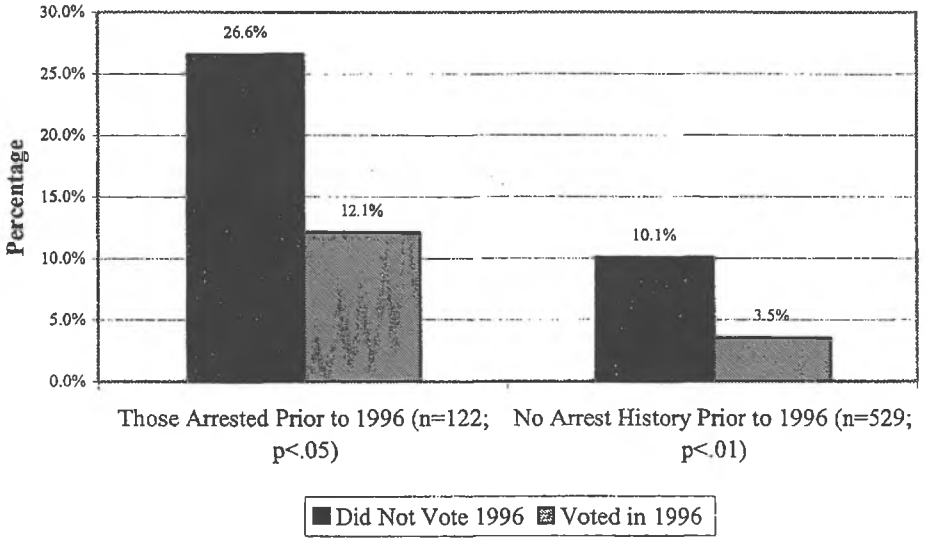
there is at least some correlation between voting in 1996 and recidivism in 1997□2000 among people who have had some official contact with the criminal justice system.

Figure 2. Percentage Arrested in 1997-2000 among Voters and Non-Voters in 1996, by Arrest History



In Minnesota, those convicted of felonies may not vote until they have completed all prison, parole, or probation supervision. Therefore, it may be the case that the differences in re-arrest by voting status are due to *legal* restrictions on the ability of arrestees to vote—some of them may have been ineligible to vote in the 1996 election. The contrast shown in the right-hand side of Figure 2, however, suggests that this is unlikely to explain the correlation between voting and subsequent arrest. Even among those with no prior arrest history, about 10% of the non-voters were arrested, compared to less than 4% of the voters. Although there is less statistical power to detect these effects in the subgroup analysis in Figure 2 than in the analysis shown in Figure 1, both of these contrasts are again statistically significant ($p < .05$). Therefore, the relationship between voting and subsequent arrest does not appear to depend on criminal history.

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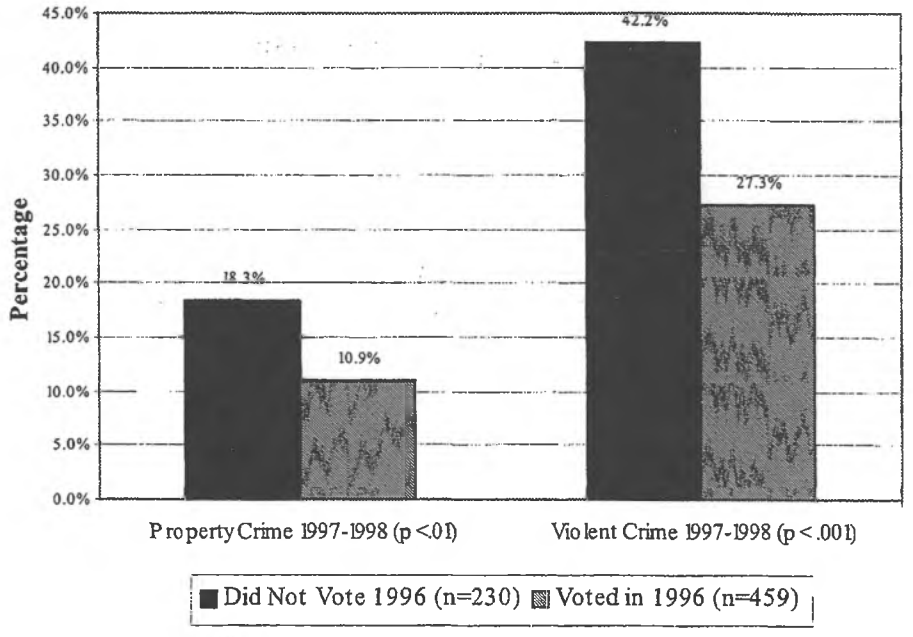
3. Voting is Correlated with Subsequent Self-Reported Crime

Arrest is an important measure of official contact with the criminal justice system, but a flawed measure of criminal behavior.[41] Many crimes go unreported and official arrest data may be subject to biases relating to class, race, and other factors. If civic participation is truly related to desistance from crime, however, voting effects should be visible on self-reported criminal behavior as well as arrest and incarceration. Figure 3 considers the relationship between voting and common property crimes and violent behavior. The figure indicates that about 11% of the voters reported a property crime, compared to about 18% of the non-voters. Similarly, about 27% of the voters reported violence or threats of violence, relative to about 42% of the non-voters. Both of these contrasts represent statistically significant differences ($p < .01$).

Figure 3. Self-Reported Property Crimes and Violence in 1997-1998 among Voters and Non-Voters in 1996



41. *See, e.g.*, David Huizinga & Delbert S. Elliott, *Reassessing the Reliability and Validity of Self-Report Delinquency Measures*, 2 J. Quantitative Criminology 293, 323 (1986).

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After examining Figures 1, 2, and 3, the answer to our first question about the basic relationship between crime and voting is clear: we find a significant bivariate association between voting and subsequent crime. Those who vote are less likely to be arrested and incarcerated, and less likely to report committing a range of property and violent offenses. Moreover, as Figure 2 shows, this relationship cannot be solely attributed to prior criminal history; voting is negatively correlated with subsequent crime among those with and those without a prior criminal history.

B. Multivariate Analysis

1. The Correlation between Voting and Arrest is Reduced when Controlling for Other Factors

Although Figures 1, 2, and 3 present an intriguing pattern of results, they show a correlation that may or may not be indicative of an underlying causal relationship. As our interviews with prisoners suggested, it seems likely that voting is correlated with other factors that are closely related to arrest. For example, race and sex are related to both processes. Women and whites had significantly higher turnout rates than men and African Americans in the 1996 election[42] as well as much lower rates of arrest.[43] Similarly, education is a very strong predictor of voter turnout in these data[44] and is also linked to crime and arrest.[45]

We begin to statistically control for the effects of these factors in Table 2. The table shows the effects of 1996 voter turnout on arrest in 1997-2000. Model 1 shows the significant bivariate association reported above in Figure 1. The exponentiated logistic regression coefficients may be interpreted as changes in the odds of arrest in these equations, such that the -1.044 voting effect in Model1 indicates a rate of arrest for voters that is a little more than one-third the corresponding rate for non-voters (e-1.044 = .35). Model 2,

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42. U.S. Bureau Census, Statistical Abstract of the United States: 2002 253 (2003).

43. U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2002 380–84 (2003).

44. Uggen & Manza, *supra* note 1, at 791.

45. U.S. Dep't of Justice, *Survey of Inmates in State and Federal Correctional Facilities, 1997* (June 1, 2000), ICPSR, File No. 2598, *available at* http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/02598.xml.

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Table 2. Logistic Regression Predicting 1997-2000 Arrest

	ARRESTED 1997-2000		
Variable	*Model 1*	*Model 2*	*Model 3*
Political Participation			
1996 voting (1=voted)	-1.044** (.321)	-.677* (.340)	-.563 (.353)
Background			
White (vs. nonwhite)		-.945** (.350)	-1.156** (.377)
Female		-.976** (.346)	-.692* (.379)
1995 years education		-.366** (.108)	-.368** (.112)
1995 married		-.076 (.529)	-.007 (.543)
1995 employed		-.208 (.424)	-.209 (.436)
Prior Deviance			
Arrest prior to 1996			.696# (.382)
Prior drunk driving			.676# (.384)
Prior shoplifting			.847* (.383)
Prior violence			-.610 (.388)
Constant	-1.928** (.218)	3.828** (1.445)	3.213* (1.544)
Number of Cases	579	579	579
-2 Log Likelihood	295.8**	263.7**	248.4**

Note: Standard errors are in parentheses. Models also include two dichotomous indicator variables for cases missing education and marital status information.
# $p < .10$ * $p < .05$ ** $p < .01$

however, shows that a good portion of this voting effect on arrest is explained by differences in race, gender, and education levels of voters and non-voters. Controlling for the effects of education, marital and employment statuses are only weak predictors at this stage of the life course (most respondents were approximately twenty-one to twenty-two years of age in 1995). Whites, females, and those with greater education are unlikely to be arrested relative to non-whites, males, and those with fewer years of education.

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Nevertheless, the effect of voting is not rendered spurious by the inclusion of these background characteristics.

Finally, in Model 3, we no longer detect a statistically significant voting effect (p = .110) once the effects of prior criminal behavior and arrest are statistically controlled. This more stringent test suggests that the voting effect is at least partially a product of antisocial propensity—insofar as we can name and measure this construct with prior arrest and deviance indicators. Although the effect of voting is no longer statistically significant in Model 3 in either the arrest or incarceration models,[46] this does not necessarily indicate that the effect of voting is irrelevant with respect to subsequent crime. In predicting a relatively rare event such as arrest in a sample of this size, a large effect would be required to reach statistical significance. The magnitude and direction of the estimated voting effect warrant further investigation into the relationship.

2. The Correlation between Voting and Self-Reported Crime is Reduced when Controlling for Other Factors

We next consider the relation between voting and self-reported crime and deviance in Table 3. Voting in 1996 is again a strong negative predictor in the equation predicting any self-reported crime in 1997–1998. For this analysis, the indicator flags any crime, whether it is a property offense (shoplifting, theft, forgery, and burglary) or an act of violence (hitting or threatening to hit, fighting, and robbery). Although the voting effect is partially mediated by background characteristics and prior criminal behavior in Models 2 and 3, respectively, political participation remains a statistically significant predictor in all models. In the final model, which adjusts estimated voting effects for the degree of prior official and self-reported criminal history, the odds of committing any self-reported crime are approximately .60 times as high for voters as for non-voters (e-.506 = .60).

As with the arrest outcome, the self-reported crime results again show a strong correlation between voting and criminal behavior. In contrast to the final arrest model, however, a statistically significant voting effect remains in all three models predicting any crime of property or violence. When the crime items

46. The incarceration model is not shown, but is available upon request.

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are examined individually, or added in a summative scale and analyzed using ordinary least squares regression, the results tend to parallel those shown in the figures and Tables 2 and 3. A large bivariate relationship is partially mediated by indicators of socioeconomic status (mainly education) and prior official and self-reported criminal behavior. Regardless of the particular crime

Table 3. Logistic Regression Predicting 1997-1998 Self-Reported Crime

	ANY PROPERTY/VIOLENCE 1997-98		
Variable	***Model 1***	***Model 2***	***Model 3***
Political Participation			
1996 voting	-.857**	-.617**	-.506**
(1=voted)	(.181)	(.194)	(.210)
Background			
White		-.921**	-1.002**
(vs. nonwhite)		(.222)	(.244)
Female		-.503**	-.110
		(.183)	(.208)
1995		-.154**	-.129*
years education		(.056)	(.060)
1995 married		.277	.479
		(.270)	(.213)
1995 employed		-.347	-.304
		(.234)	(.257)
Prior Deviance			
Arrest prior to			.770**
1996			(.265)
Prior drunk			.253
driving			(.225)
Prior shoplifting			.671**
			(.208)
Prior violence			1.095**
			(.202)
Constant	.095	3.223**	1.530#
	(.146)	(.786)	(.858)
Number of Cases	588	588	588
-2 Log Likelihood	760.8**	711.7**	633.7**

Note: Standard errors are in parentheses. Models also include two dichotomous indicator variables for cases missing education and marital status information.

#$p < .10$ *$p < .05$ **$p < .01$

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outcome we examined, the voting effect is consistently negative in direction, but does not consistently reach standard levels of statistical significance ($p < .05$) in the final models that include all of the relevant statistical controls.

V. DISCUSSION

A. Insights from Convicted Felons

We first encountered the possibility that civic reintegration may be connected to motivations for desistance in a series of in-depth interviews we conducted with convicted felons in Minnesota.[47] Those we interviewed often spoke passionately about the stigma of a felony conviction and told us that losing the right to vote, in particular, was a powerful symbol of their status as "outsiders." Steven, an older male probationer, told us that "on top of the whole messy pile, there it was. Something that was hardly mentioned, and it meant a lot."[48] Pamela, a female prisoner in her forties, felt the loss of voting rights as additional "salt in the wound" and "another [loss] to add to the pile" of problems she was encountering as a result of her criminal convictions.[49] In that study, we argued that civic reintegration and the adoption of a role identity as an active citizen may facilitate desistance from crime and reconnection with other social institutions.

Yet while many of the prisoners, probationers, and parolees we met regretted the loss of their ability to participate as citizens in their communities, they were often skeptical about drawing any direct connection between voting and subsequent criminality. Andrew, a probationer in his twenties, thought it "would be a stretch" to tie voting to recidivism:

> To me that would be a stretch. . . . I think that people who are more likely to vote are, you know, just at different points in their life, and I just think that the people [who] are more likely to commit crimes aren't gonna either commit those crimes or not commit those crimes because

47. *See* Uggen et al., *supra* note 7, at 267; *see* Uggen & Manza, *supra* note 33, at 177 for interview details.

48. Interview by Christopher Uggen with a male inmate in his fifties, Minnesota prison (Mar. 27, 2001).

49. Interview by Christopher Uggen with a female inmate in her forties, Minnesota prison (Mar. 14, 2001).

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> they have the ability to, to vote. I just don't think that voting's gonna be a priority to them.[50]

Larry, a young prisoner, echoed these sentiments in arguing that "people that are gonna get into crime are gonna do it whether they have the right to vote or not."[51] Alex, in the midst of a long prison sentence, similarly doubted the link between voting and recidivism:

> I don't think that would have anything to do with it [committing future crime], the right to vote. . . . I mean I had the right to vote before I came to prison, but I still let my crime happen. I don't go around beating up on people as a hobby or anything. But it just happened. But I don't see voting as having an effect on criminal behavior.[52]

Other felons described voting as "a small factor," or as a possible deterrent to committing future felonies. In short, our interviews showed us that while many convicted felons care deeply about disenfranchisement and other civil disabilities, they were on the whole unconvinced that voting in itself would affect subsequent criminal behavior.

B. Results of the Statistical Analysis

Taken as a whole, however, our statistical analysis suggests that a relationship between voting and subsequent crime and arrest is not only plausible, but also supported by empirical evidence. We find consistent differences between voters and non-voters in rates of subsequent arrest, incarceration, and self-reported criminal behavior. While the single behavioral act of casting a ballot is unlikely to be the sole factor that turns felons' lives around, the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society. At a minimum, our multivariate analysis suggests that the political participation effect is not entirely attributable to preexisting differences between voters and non-voters in criminal history, class, race, or gender.

---

50. Interview by Christopher Uggen with a male probationer in his twenties, Minnesota community corrections office (Mar. 21, 2001).

51. Interview by Christopher Uggen and Jeff Manza with a male inmate in his thirties, Minnesota prison (July 10, 2001).

52. Interview by Christopher Uggen with a male inmate in his thirties, Minnesota prison (Apr. 11, 2001).

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Nevertheless, a substantial portion of the association between voting and subsequent criminality appears to be a result of the greater educational attainment of voters and their less serious criminal histories. While criminal histories are not amenable to intervention, education is at the heart of ongoing correctional efforts to reintegrate felons. Moreover, a general education program working in concert with citizenship education and political participation may be especially effective in facilitating desistance from crime. For example, Larry, one of the prisoners we interviewed, strongly advocated for greater educational resources:

> I think education is underrated. There's not enough of it. They don't think about it enough. I mean there should be more education. They keep taking it away. You know, I was going to [names university] through their program in [names city], and they took the program away. About a year later they brought a smaller version of it back, but still it's not the same as it was.[53]

When asked about whether civics education might be effective in prison, Larry responded:

> I think that'd be a really good idea, though, because most of us, and, you know, me included, don't really think about my place in society as a citizen. . . . It's just about, "What's going [on] with me and my immediate surroundings?" you know? "What's going to affect me?" instead of, "Where do I stand as a citizen?" That'd be interesting.[54]

VI. CONCLUSION

While these ideas are largely speculative, we can take from this study both provisional support for the idea of civic reintegration through voting and confirmation of the skepticism expressed by some of the prison inmates and probationers we interviewed. Voting appears to be part of a package of pro-social behavior that is linked to desistance from crime. Though the unique independent contribution of voting participation is likely to be small relative to pressing socioeconomic needs, family support, and other factors, the right to vote remains the most powerful symbol of stake-holding in our

53. Interview by Uggen & Manza, *supra* note 51.

54. *Id.*

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democracy. To the extent that felons begin to vote and participate as citizens in their communities, it seems likely that many will bring their behavior into line with the expectations of the citizen role, avoiding further contact with the criminal justice system.

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MODEL TESTIMONY: ALASKA, FEBRUARY 2007

Testimony of

DANIEL LEVITAS

On behalf of

THE AMERICAN CIVIL LIBERTIES UNION

On

SB 7

AN ACT RELATING TO THE VOTING RIGHTS OF INDIVIDUALS WITH FELONY CONVICTIONS

Before the

STATE AFFAIRS COMMITTEE
IN THE TWENTY-FIFTH LEGISLATURE - FIRST SESSION
STATE OF ALASKA

February 22, 2007

Good afternoon Madam Chairman and members of the Committee. Thank you very much for the opportunity to testify today on SB 7, a measure addressing the voting rights of persons with felony convictions in Alaska. I urge your support for this important legislation.

My name is Daniel Levitas and I am a consultant to the American Civil Liberties Union on the issue of felon enfranchisement and am based in Atlanta, Georgia. Founded in 1920, the ACLU is a nonprofit, nonpartisan organization with more than 500,000 members nationwide dedicated to preserving and protecting civil liberties and civil rights.

Currently there are an estimated 5.3 million Americans who are disfranchised as a result of a prior criminal conviction, including approximately 11,132 persons in Alaska, which represents 2.42% of the state's voting age population.[1] It is especially important to note that the majority of Alaska's disfranchised population is *not* in prison or jail, but actually living in the community. In fact, slightly more than half the 11,132 disfranchised persons in Alaska, or 6,010 people, are on felony probation (5,083 and 46%) or parole (927 and 8%).

Currently Alaska is one of 19 states where the right to vote is automatically restored upon completion of sentence, including the term of incarceration, probation and parole.

However, there are a growing number of states—20 to be exact—whose disfranchisement policies are less harsh than Alaska's and whose policies are likely to promote more effective reintegration of people with felony convictions. I hope that you and your colleagues in the Alaska legislature will give strong consideration to embracing this trend with the adoption of SB 7.

For example, in 13 states and the District of Columbia (including Oregon, Montana, Utah and Indiana), individuals with felony convictions can vote automatically upon release from prison.[2] In five

other states voting rights are restored automatically after release from prison and discharge from parole, but probationers may vote.[3] And in two states—Maine and Vermont—there are no felon disfranchising provisions.

In taking up SB 7, Alaska policymakers are hardly alone in considering less restrictive disfranchising provisions. Over the past ten years there has been a broad national trend of adopting less restrictive measures with 16 states implementing positive reforms to their felon disfranchisement policies. And legislators in Colorado and Washington State are currently debating measures nearly identical to SB 7, which would fully enfranchise all persons upon release from incarceration. And just last fall, Rhode Island voters approved a statewide ballot initiative that restored voting rights to approximately 15,000 individuals on parole and probation in that state.

This trend is also one that enjoys support across the political spectrum. While testifying last summer in favor of renewing the expiring provisions of the Voting Rights Act, former Cabinet Secretary Jack Kemp declared his support for felon enfranchisement. And Florida's new Governor, Charlie Crist, who said during his campaign that he favored instituting automatic restoration of voting rights, was recently scheduled to meet personally with Kemp to discuss how to move forward on this issue. In Virginia, one of only three states that still permanently disfranchise felony offenders, the Republican controlled state senate voted overwhelmingly early this month in favor of a constitutional amendment that would allow the General Assembly to restore voting rights to formerly incarcerated individuals who committed nonviolent crimes.

In Alaska, as is the case elsewhere in the United States, the vast majority of inmates are going to return to their communities. It is therefore in our collective interest for people with felony convictions to function as responsible taxpayers and citizens, recognizing the full range of their responsibilities to society. Passage of SB 7 would help facilitate this goal by enabling more people with prior felony convictions to vote and thereby giving them a higher stake in their Alaska communities. After all, people on probation and parole are law-abiding citizens who are living in the community, working or seeking work, raising their families and paying taxes.

Restricting voting rights does not prevent crime or provide compensation to victims. Instead, disfranchising people following their release from incarceration accomplishes exactly the opposite of what we should be doing to promote re-entry. In this way, prolonged disfranchisement of citizens with criminal convictions after their release from incarceration is actually harmful to the prospects for sustainable reintegration of people with felony convictions into society. In fact, extending the right to vote to individuals who are released from incarceration is also likely to reduce the chances that they will re-offend as recent research finds a link between voting participation and re-offense: people who voted after release from supervision were half as likely to be re-arrested as those who did not vote.[4] Similar effects were found among people with a prior arrest; 27% of non-voters were re-arrested, compared to 12% of people who had voted. [5]

In contrast, maintaining Alaska's current policy of disfranchising offenders who are deemed safe enough to be living and working in local communities on probation or parole can only discourage these offenders from becoming productive members of society, enhance their likelihood of re-arrest, and weaken democratic institutions by decreasing participation in the voting process.

Overall, criminal disfranchisement also has a disproportionate impact on minority communities. While disfranchisement policies prevent 2.5% of the total population from voting nationwide, they prevent 13% of the total population of African American men from casting a ballot.[6] In Alaska, while the majority of individuals with felony convictions are Caucasian, felony disfranchisement still has a very significant racially disproportionate effect. For example, 1,469 of the 11,132 Alaskans who are disfranchised as a result of a felony conviction are African American, which represents 7.6% of the overall black voting age population in the state. This compares with the aforementioned disfranchisement rate of just 2.4% for all

voters (including minorities). Put another way, African Americans are disfranchised at a rate nearly four times that of whites in Alaska as a result of current disfranchisement policy.

Alaska Natives are similarly impacted. According to state Department of Corrections statistics, in 2000, Alaska Natives constituted 31%[7] of the total disfranchised population, though they comprised only 15.6% of the total population.[8] And of the 5,046 persons on probation and parole as of December 2003, approximately 55% (or 2,774 persons) were white, while 28% were Alaska Natives, and approximately 9% were African American, which is more than double the state's 3.7% black population.[9] The remaining 6% of parolees and probationers were divided roughly equally between Latinos and Asian Americans/Pacific Islanders.

Voting is a fundamental right and a civic duty. As the U.S. Supreme Court stated in its landmark 1964 decision, Reynolds v. Sims, *"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."*[10]

Thank you very much.

---

[1] Alaska's voting age population was 459,529 people as of December 31, 2004 – the date for which we have the most recent comprehensive data on disfranchised persons.

[2] The 13 states are: HI, IL, IN, MA, MI, MT, NH, ND, OH, OR, PA, RI, UT.

[3] The five states are: CA, CO, CT, NY, and SD.

[4] Jeff Manza & Christopher Uggen. " Voting and Subsequent Crime and Arrest: Evidence from a Community Sample." Columbia Human Rights Law Review 36, No. 1 (2004) 193-215.

[5] Ibid.

[6] Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy*, (USA: Oxford University Press, 2006), Table A3-3, p. 248 and Table A3-4, p. 251.
See, also: The Sentencing Project and Human Rights Watch, "Losing the Vote. The Impact of Felony Disenfranchisement Laws in the United States," (October 1998).

[7] Alaska Department of Corrections. "2003 Offender Profile" (2003). p. 11, 66. Accessed: January 22, 2007 <http://www.correct.state.ak.us/corrections/admin/docs/profile2003.pdf>

[8] US Census Bureau. "Profile of General Demographic Characteristics: Alaska." (April 1, 2000). Accessed: January 22, 2007 http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US02&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U&-_lang=en&-_sse=on

[9] http://www.correct.state.ak.us/corrections/admin/docs/profile2003.pdf

[10] Reynolds v. Sims. 377 U.S. 533 (1964).

PROCESSING FELONS

A person convicted of a felony involving moral turpitude cannot vote in a state or municipal election from the date of conviction through date of unconditionally discharged. The Division is notified in different ways by the Department of Corrections when a person has been convicted of a felony or has been discharged from a felony. Region III receives a statewide list of felons each month by the Department of Corrections and processes the names on the list. Each Regional Office receives notification from Department of Corrections and probation offices also of those who have been convicted or have been discharged.

FELONY CONVICTION

Prior to placing a felony conviction on a voter's record, staff must verify the conviction was for a felony involving moral turpitude. AS 15.60.010(9) provides a sample list. If the felony is not included in this list, the Division asks the AG's Office for advice on whether or not the felony involves moral turpitude.

When processing the Department of Corrections list of convicted felons, all information on the list must match the information on the voter's record before inactivating the record. Update the condition code of the voter's record to FC (felon convicted) and use the date of conviction as the suspend date. The list is the supporting document for microfilming and should be coded as SC (status change).

If the Regional Offices are notified by Corrections of a felony conviction, inactivate the voter's record in VREMS 1.10 using the FC code and suspend date of the conviction. All information on the letter must match the information on the voter's record before you change the status. Any type of condition code can be changed to a FC status including inactive voters and purged voters. The only code in VREMS that cannot be changed with an FC would be XX (deceased).

FELONY DISCHARGE

Department of Corrections sends the Regional Office a "Notification of Restoration of Rights" letter when a felon has been discharged. Update the voter's status from FC to FD in VREMS 1.10, using the date of discharge as the restored date. The information on the letter must match the information on the voter's record before you change the status. The letter is the supporting document for microfilming and should be coded as FD (felon discharge) and included with the SD documents. The voter must re-register to vote to activate the record.

If a Notification of Restoration of Rights letter is received for a voter record who has a condition code other than FC, the condition code must be updated first to FC, using the day prior to the felon's discharge date as the suspend date, and then to FD using the discharge date as the restored date. This applies even if the voter is listed as an active registered voter. This situation occurs when the Department of Corrections does not send the original notification when a felony occurs. The Notification of Restoration of

Rights letter is the supporting document for microfilming and should be coded as both FC and FD. If you change an active registered voter to FD that has a current registration date, the voter should be sent a letter indicating he or she can now re-register to vote.

If the Notification of Restoration of Rights letter does not have enough information to determine either the correct voter or the felony, contact Corrections to verify the information needed before updating the voter record. Also use the Court Records website to determine the felony or discharge dates (www.courtrecords.alaska.gov/)

Felony charges NOT involving moral turpitude, per AG's Office responses

- DUI
- Furnish alcohol to minor
- Misconduct involving weapons
- Probation violation (would apply if the violation was for a conviction of a felony involving moral turpitude)
- Stalking
- License or permit required for Alcoholic Beverages
- Failure to register as a sex offender

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

SEAN PARNELL, GOVERNOR
Division of Probation & Parole
Region 2, Fairbanks Office
455 3rd Avenue, Suite 130
Fairbanks, Alaska 99701
(907) 458-6830

January 28, 2011

[redacted]

RECEIVED
FEB 02 2011
REGION III
OFFICIAL

Re: Probation Supervision in case [redacted]

Dear [redacted]

This letter is to serve as official notification that your probation supervision expired on January 25, 2011 and contact with the Fairbanks Probation Office is no longer required.

Pursuant to AS 15.05.030, please be advised that you should re-register with the Division of Elections (P.O. Box 110017, Juneau, AK 99811-0017), now that you have been discharged from probation supervision. Also, please be advised that your right to vote (after contacting Division of Elections), your right to be a member of a jury, and your right to hold elected office are automatically restored.

Although your above rights have been restored [rights to vote, jury service, and to hold elected office], you should be aware that your right to possess firearms (all shotguns, rifles, as well as handguns) and ammunition remains restricted. Possession of any rifle, shotgun, rifle and/or ammunition could subject you to prosecution for a felony criminal offense under state or federal law. Even if you received a suspended imposition of sentence and an order has been issued setting aside the conviction, your right to possess firearms and ammunition has not been restored. You should contact your attorney if you have questions.

Thank you for your cooperation during your probation/parole supervision and best of luck to you in the future. If you have any questions concerning this subject or any other matter, please contact me.

Sincerely,

Samantha M. Zinsli
Criminal Justice Technician II

CC: Director, Division of Elections
File
Clerk of Court

20-808.08

Alaska Department of Corrections

Division of Administrative Services

2009 Offender Profile

www.correct.state.ak.us/corrections/admin

Vision Statement

The Alaska Department of Corrections enhances the safety of our communities. We provide secure confinement, reformative programs, and a process of supervised community reintegration.

Commissioner's Letter

The Mission of the Department of Corrections is to enhance the safety of our communities while providing secure confinement, reformative programs, and a process of supervised community reintegration.

I am pleased to make this profile available on line. This report is based on our best information and serves as a snapshot of a typical day. Data comes from our Offender Tracking Information System (OTIS), and is meant to give a general summary of Alaska's offender population.

The 2009 Offender Profile – which encompasses many hours of research and calculation on the part of department staff – serves as a valuable tool for our department in the successful accomplishment of our mission.

Joe Schmidt
Commissioner

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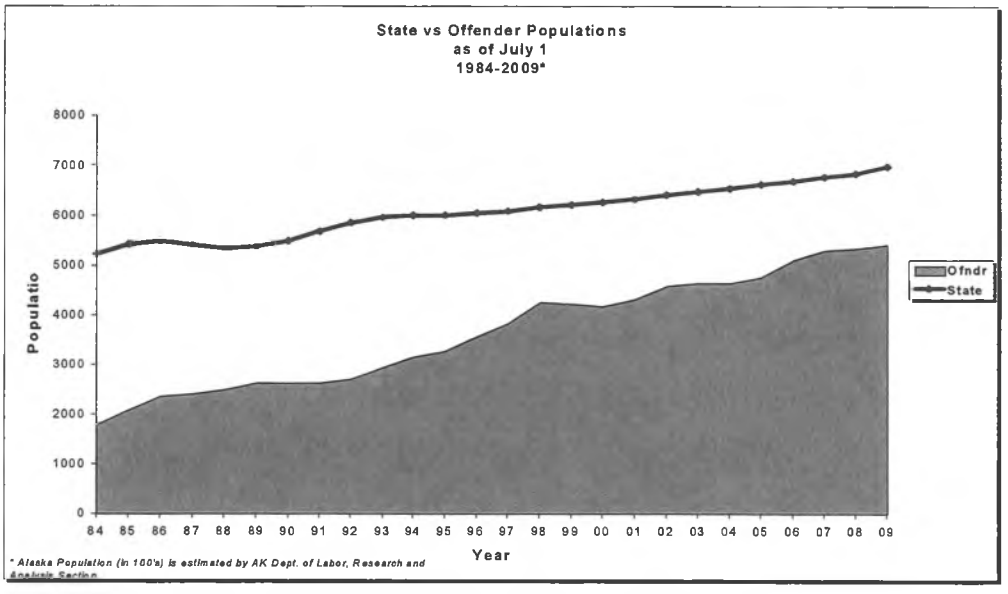
Trends

Notes:
Count and admissions data include information about all offenders under the jurisdiction of the state of Alaska who are entered into the OTIS database.
Count information consists of monthly averages of daily counts; incarcerated offenders not entered into the OTIS database when a count was tallied were not included.
Admissions data includes all criminal admits (except transfers) for all offenders.



Total Offender Population Based on Monthly Averages - January 2007 to December 2009
Includes all Offenders in all Facilities (CCs and CRCs)

YEAR	2007			2008			2009		
Month	**Female**	**Male**	**Total**	**Female**	**Male**	**Total**	**Female**	**Male**	**Total**
January	526	4682	5208	619	4802	5421	544	4699	5243
February	556	4670	5226	607	4798	5405	566	4817	5383
March	550	4657	5207	610	4791	5401	608	4856	5464
April	579	4721	5300	619	4790	5409	631	4687	5318
May	610	4822	5432	622	4777	5399	621	4641	5262
June	607	4679	5286	617	4715	5332	618	4691	5309
July	603	4678	5281	585	4716	5301	617	4754	5371
August	624	4703	5327	589	4734	5323	639	4831	5470
September	646	4754	5400	588	4754	5342	654	4889	5543
October	640	4742	5382	591	4729	5320	624	4991	5615
November	639	4835	5474	564	4718	5282	645	4978	5623
December	638	4759	5397	522	4674	5196	616	4902	5518
Daily Avg	**602**	**4725**	**5327**	**594**	**4750**	**5344**	**615**	**4811**	**5427**

Total Admissions - January 2007 to December 2009
Includes all Offenders in all Facilities (CCs and CRCs)

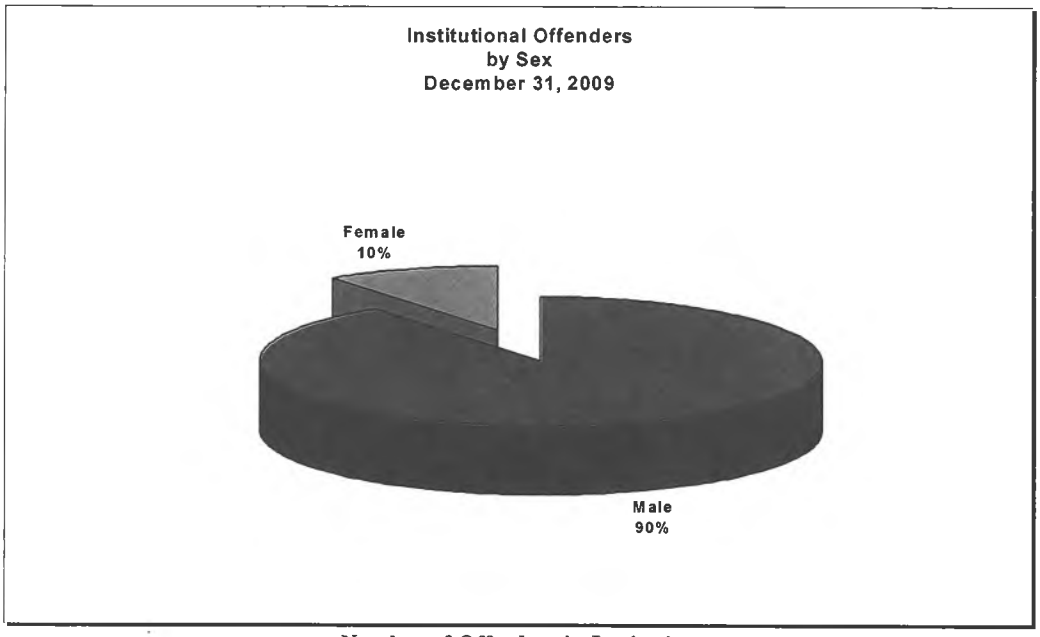
YEAR	2007			2008			2009		
Month	**Female**	**Male**	**Total**	**Female**	**Male**	**Total**	**Female**	**Male**	**Total**
January	681	2007	2688	704	2031	2735	697	2175	2872
February	611	1910	2521	617	1942	2559	681	2065	2746
March	672	2062	2734	731	2179	2910	770	2140	2910
April	710	2137	2847	671	2078	2749	729	2063	2792
May	729	2246	2975	738	2287	3025	793	2244	3037
June	729	2187	2916	741	2177	2918	789	2289	3078
July	735	2096	2831	673	2090	2763	772	2202	2974
August	713	2324	3037	746	2212	2958	786	2390	3176
September	651	2099	2750	671	2105	2776	748	2226	2974
October	720	2085	2805	749	2183	2932	782	2290	3072
November	717	2103	2820	628	2048	2676	633	1970	2603
December	672	2003	2675	624	2049	2673	679	1984	2663
Total	**8340**	**25259**	**33599**	**8293**	**25381**	**33674**	**8859**	**26038**	**34897**

Institutions

Institution Address List

Institution	Address	City	Zip	Superintendent	Phone
Anchorage Correctional Complex	1400 E 4th Avenue	Anchorage	99501	Debbie Miller	907-269-4100
Anvil Mtn Correctional Center	PO Box 730	Nome	99762	Michael Dunham	907-443-2241
Fairbanks Correctional Center	1931 Eagan Avenue	Fairbanks	99701	Charles Stevenson	907-458-6700
Hiland Mtn Correctional Center	9101 Hesterberg Road	Eagle River	99577	Dean Marshall	907-694-9511
Ketchikan Correctional Center	1201 Schoenbar Road	Ketchikan	99901	Diane Gregory	907-228-7350
Lemon Creek Correctional Center	2000 Lemon Ck. Road	Juneau	99801	Scott Wellard	907-465-6200
Matsu Pretrial Facility	339 E Dogwood Road	Palmer	99645	Steve Brunger	907-745-0943
Palmer Correctional Center	PO Box 919	Palmer	99645	Cindy Betts	907-745-5054
Pt. MacKenzie Correctional Farm	PO Box 877730	Wasilla	99687	Amy Rabeau	907-376-2976
Spring Creek Correctional Center	PO Box 2109	Seward	99664	Craig Turnbull	907-224-8200
Wildwood Correctional Complex	10 Chugach Avenue	Kenai	99611	Robert Hibpshman	907-260-7200
Yukon-Kuskowim Correctional Ctr	Box 400	Bethel	99559	Chris Liu	907-543-5245
Hudson Correctional Facility	3001 N Juniper Street	Hudson, CO	80642	Rick Veach	303-536-2600

Notes:
Includes information about all offenders incarcerated in in-state and out-of-state institutions who are entered into the OTIS database.
Consists of a snapshot of offenders incarcerated and entered into the OTIS database on or before December 31, 2009.
Alaska Native race category includes a small number of Native Americans not indigenous to Alaska.
Information about offenses is the most serious charge only.
Offense classes are semi-arbitrary.



Number of Offenders in Institutions
December 31, 2005 - 2009

	Females					Males					All Offenders				
Institutions	**2009**	**2008**	**2007**	**2006**	**2005**	**2009**	**2008**	**2007**	**2006**	**2005**	**2009**	**2008**	**2007**	**2006**	**2005**
In-State															
Anchorage CCE	1	6	1	1	34	409	390	456	473	421	410	396	457	474	455
Anchorage CCW	-	-	-	-	-	447	442	484	486	420	447	442	484	486	420
Anvil Mountain CC	9	3	12	10	8	112	80	101	97	116	121	83	113	107	124
Fairbanks CC	24	22	28	28	35	236	212	250	231	229	260	234	278	259	264
Hiland Mountain CC	379	321	362	311	240	-	-	-	-	73	379	321	362	311	313
Ketchikan CC	5	3	7	8	4	60	40	47	44	59	65	43	54	52	63
Lemon Creek CC	15	7	13	8	16	195	175	182	183	183	210	182	195	191	199
Mat-Su Pretrial	8	7	13	7	15	89	79	107	86	97	97	86	120	93	112
Palmer Medium CC	-	-	-	-	-	334	261	254	231	245	334	261	254	231	245
Palmer Minimum CC	-	-	-	-	-	176	176	176	133	175	176	176	176	133	175
Point Mackenzie CF	-	-	-	-	-	103	117	112	100	85	103	117	112	100	85
Spring Creek CC	-	-	-	-	-	554	551	537	465	495	554	551	537	465	495
Wildwood CC	-	-	-	-	-	253	258	254	227	254	253	258	254	227	254
Wildwood Pretrial	17	16	22	21	24	97	102	103	106	103	114	118	125	127	127
Yukon-Kuskokwim CC	10	2	7	5	4	110	107	105	98	112	120	109	112	103	116
Total	*468*	*387*	*465*	*399*	*380*	*3175*	*2990*	*3168*	*2960*	*3067*	*3643*	*3377*	*3633*	*3359*	*3447*
Out-of-State															
Arizona Detention Ctr	-	-	-	-	-	-	-	-	-	765	-	-	-	-	765
Red Rock CC, AZ	-	-	-	-	-	-	879	853	993	-	-	879	853	993	-
Hudson CC, CO	-	-	-	-	-	831	-	-	-	-	831	-	-	-	-
Colorado State Prison	1	1	1	1	1	2	2	2	2	1	3	3	3	3	2
Federal Bureau of Prisons	1	1	1	1	1	11	12	9	10	13	12	13	10	11	14
Minnesota State Prison	1	1	1	1	1	-	-	-	-	-	1	1	1	1	1
Oregon State Prison	-	-	-	-	-	-	1	-	-	-	-	1	-	-	-
Washington State Prison	-	-	-	-	-	-	-	2	2	2	-	-	2	2	2
Total	*3*	*3*	*3*	*3*	*3*	*844*	*894*	*866*	*1007*	*779*	*847*	*897*	*869*	*1010*	*784*
Total All	**471**	**390**	**468**	**402**	**383**	**4019**	**3884**	**4034**	**3967**	**3846**	**4490**	**4274**	**4502**	**4369**	**4231**

Demographic Information for Offenders in Institutions
December 31, 2005-2009

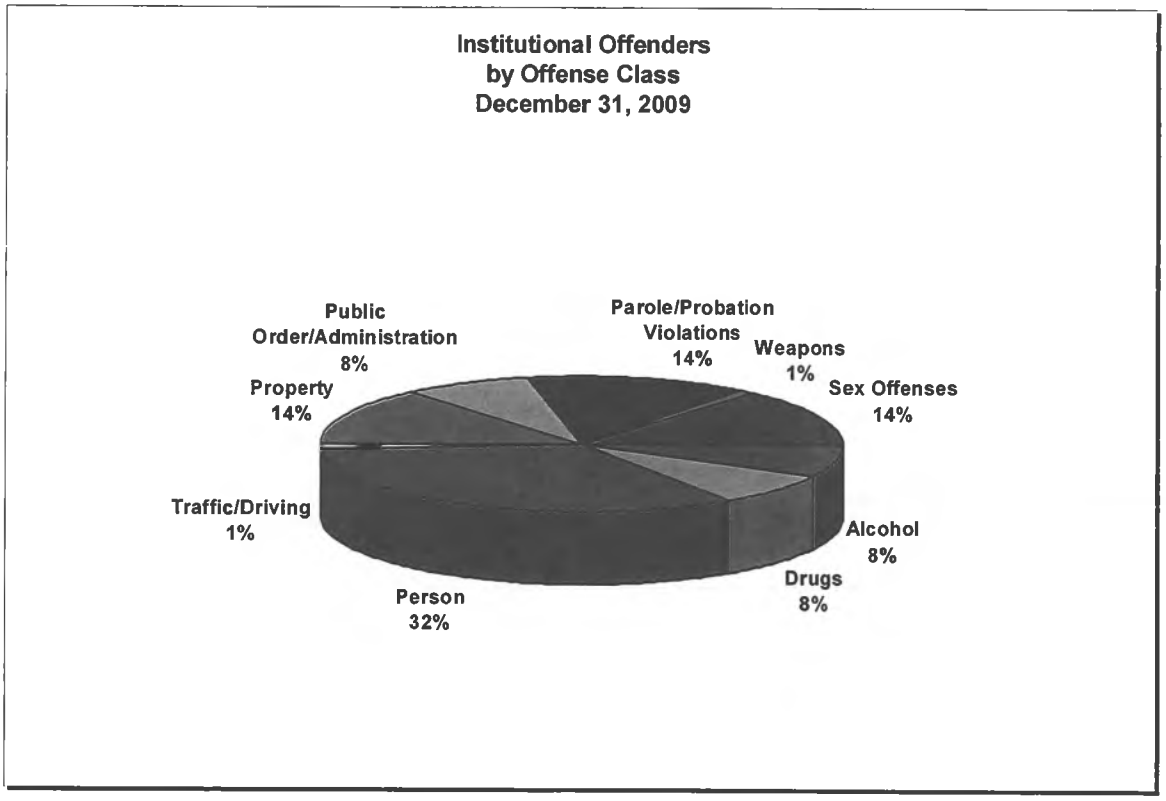
	Females					Males					All Offenders				
Ethnicity	**2009**	**2008**	**2007**	**2006**	**2005**	**2009**	**2008**	**2007**	**2006**	**2005**	**2009**	**2008**	**2007**	**2006**	**2005**
Asian/Pacific Islan	15	11	7	9	8	134	117	113	104	91	149	128	120	113	99
Black	38	30	42	26	27	453	416	443	420	415	491	446	485	446	442
Hispanic	12	9	11	6	9	100	102	94	93	89	112	111	105	99	98
Alaska Native*	145	124	159	136	132	1459	1404	1381	1413	1378	1604	1528	1540	1549	1510
Caucasian	255	213	246	223	205	1847	1832	1989	1922	1867	2102	2045	2235	2145	2072
Unknown	6	3	3	2	2	26	13	14	15	8	32	16	17	17	10
Total	**471**	**390**	**468**	**402**	**383**	**4019**	**3884**	**4034**	**3967**	**3848**	**4490**	**4274**	**4502**	**4369**	**4231**

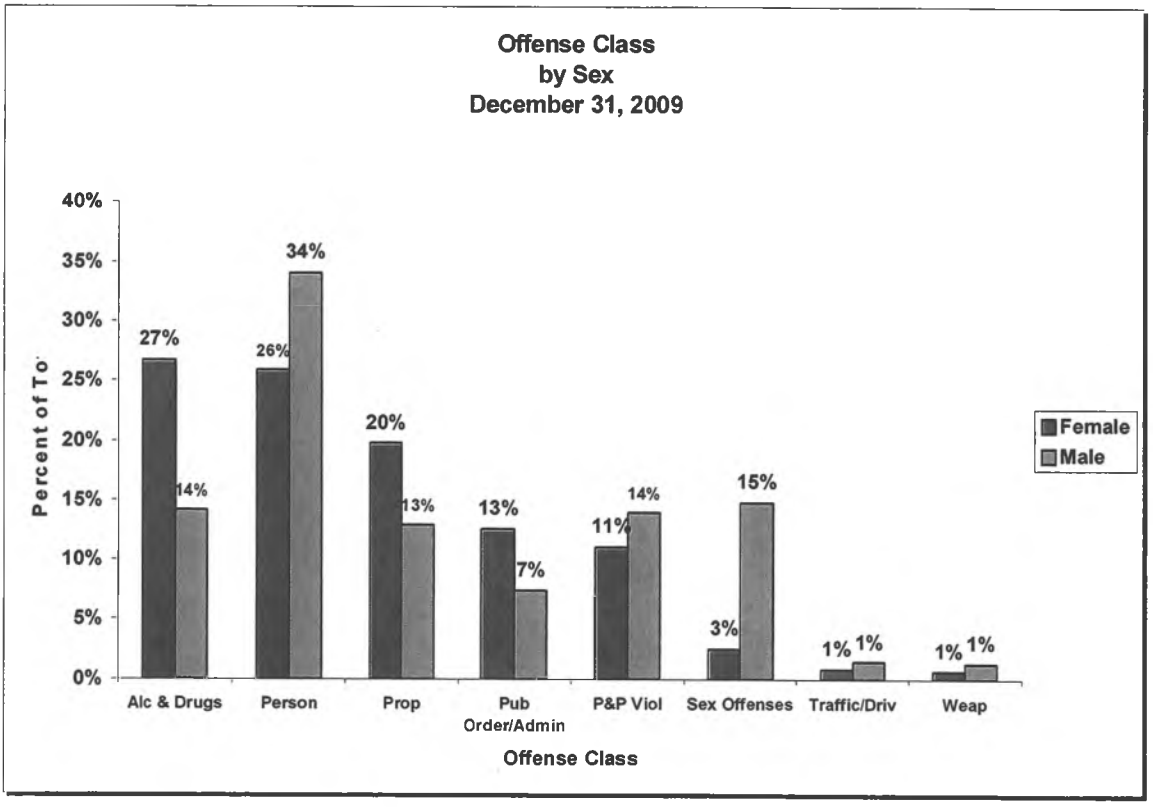
	Females					Males					All Offenders				
Age Group (Years	**2009**	**2008**	**2007**	**2006**	**2005**	**2009**	**2008**	**2007**	**2006**	**2005**	**2009**	**2008**	**2007**	**2006**	**2005**
19 and Under	8	10	15	13	12	93	109	114	98	105	101	119	129	111	117
20-24	85	67	74	62	53	639	613	637	672	672	724	680	711	734	725
25-29	92	78	65	65	57	750	754	724	660	574	842	832	789	725	631
30-34	65	58	67	62	61	512	475	495	510	503	577	533	562	572	564
35-39	84	52	74	50	48	481	481	514	513	533	565	533	588	563	581
40-44	52	47	74	58	77	486	460	552	567	566	538	507	626	625	643
45-49	49	48	54	64	46	465	423	470	454	439	514	471	524	518	485
50-54	24	15	26	17	17	305	278	262	245	229	329	293	288	262	246
55-59	9	9	13	5	8	149	155	142	136	133	158	164	155	141	141
60-64	1	4	3	3	1	73	72	74	60	61	74	76	77	63	62
65 and over	2	2	3	3	3	66	64	50	52	33	68	66	53	55	36
Total	**471**	**390**	**468**	**402**	**383**	**4019**	**3884**	**4034**	**3967**	**3848**	**4490**	**4274**	**4502**	**4369**	**4231**
Mean Age	***34.84***					***36.79***					***36.59***				
Median Age	***34.11***					***35.19***					***35.00***				

*includes a small number of Native Americans not indigenous to Alaska

Length of Time from Admissions for Offenders in Institutions
December 31, 2009

Months In	**Females**	**Males**	**Total**
6months or less	320	1896	2216
7 months - 12 months	53	513	566
13 months - 24 mon	42	510	552
25 months 36 months	21	285	306
37 months or more	35	815	850
Total	**471**	**4019**	**4490**
Mean Length (months)	***12.32***	***26.30***	***24.83***
Median Length (months)	***3.00***	***8.00***	***7.00***


Institutional Offenders
by Offense Class
December 31, 2009
Public Order/Administration 8%
Parole/Probation Violations 14%
Weapons 1%
Sex Offenses 14%
Property 14%
Traffic/Driving 1%
Alcohol 8%
Drugs 8%
Person 32%

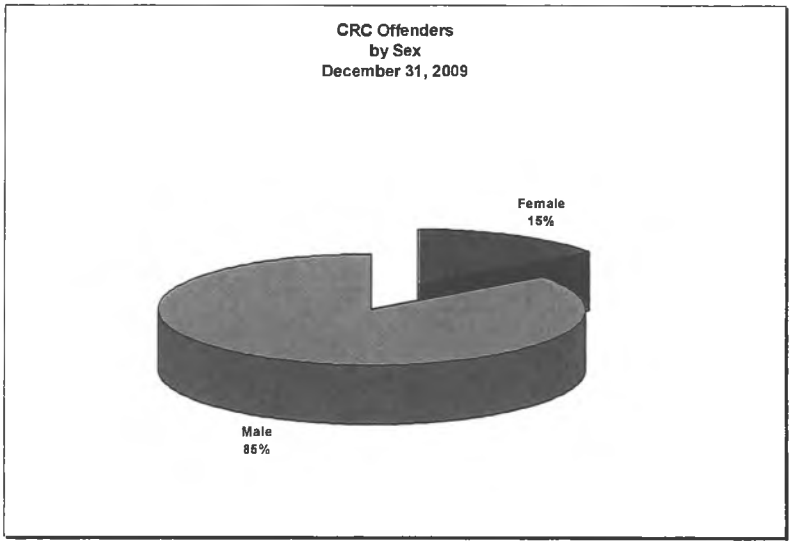

Offense Class
by Sex
December 31, 2009
Percent of To
40%
35%
30%
25%
20%
15%
10%
5%
0%
27%
14%
26%
34%
20%
13%
13%
7%
11%
14%
3%
15%
1%
1%
1%
1%
Female
Male
Alc & Drugs
Person
Prop
Pub Order/Admin
P&P Viol
Sex Offenses
Traffic/Driv
Weap
Offense Class

Community Residential Centers (CRC's)

CRC Facility Address List

CRC	Address	City	Zip	Phone
Akeela House	2804 Bering St.	Anchorage	99503	561-1200
Clitheroe Center	P.O. Box 190567	Anchorage	99519	276-2898
Cordova Center	130 Cordova St.	Anchorage	99501	274-1022
Glacier Manor	5597 Aisek	Juneau	99801	780-3020
Glennwood Center	835 D St.	Anchorage	99501	277-4501
Midtown Center	2507 Eide St.	Anchorage	99503	222-6502
Northstar Center	PO Box 80670	Fairbanks	99708	474-4955
Parkview Center	831 B St.	Anchorage	99501	272-1641
Ralph Perdue Center	3100 S Cushman St.	Faribanks	99701	456-7819
Seaside Center	PO Box 2129	Nome	99762	443-6390
Tundra Center	PO Box 485	Bethel	99559	543-3414

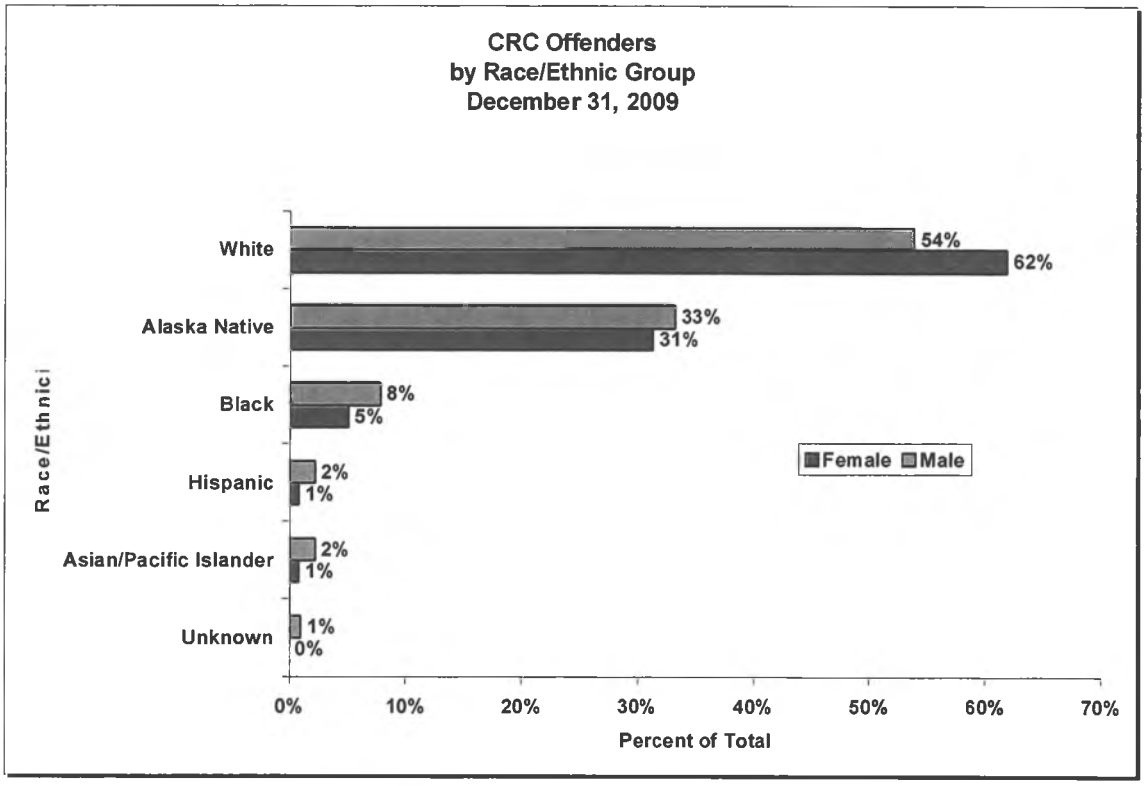
Notes:
Includes information about all offenders incarcerated in CRC's and treatment centers as well as those under electronic monitoring and those who are monitored by CRC's offsite who are entered into the OTIS database.
Consists of a snapshot of offenders incarcerated and entered into the OTIS database on or before December 31, 2009.
Alaska Native race category includes a small number of Native Americans not indigenous to Alaska.
Information about offenses is the most serious charge only.
Offense classes are semi-arbitrary.

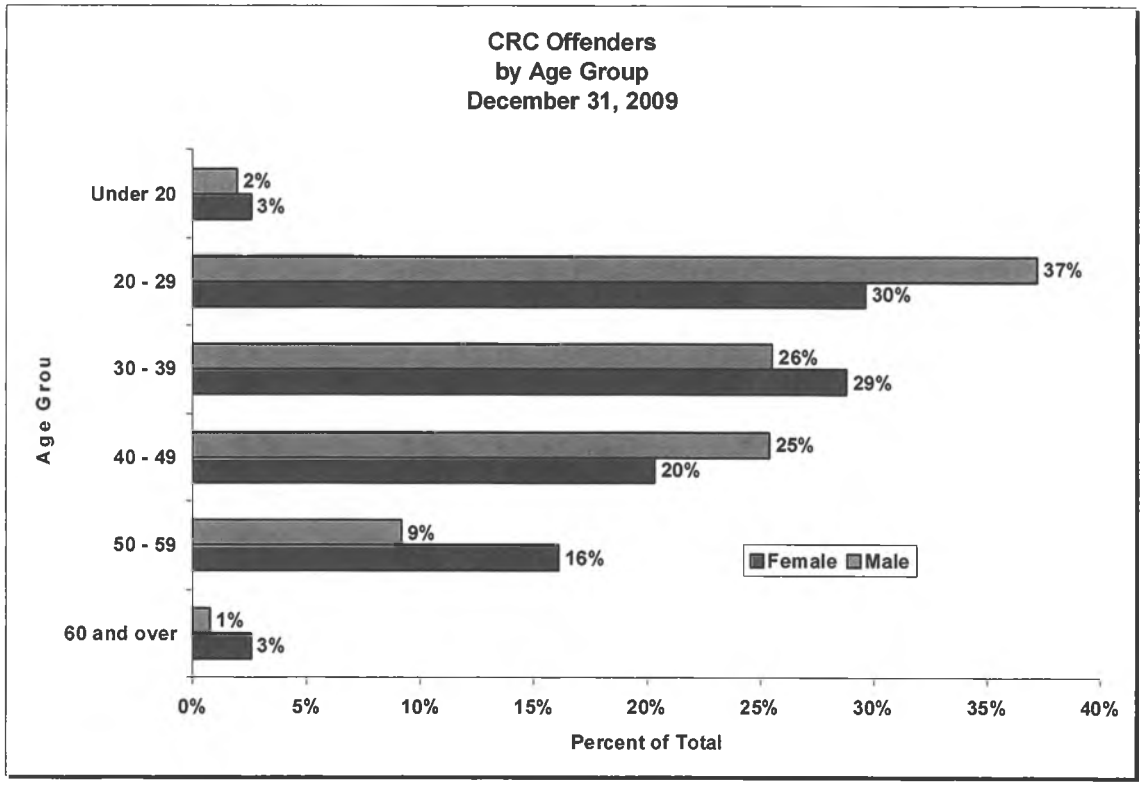


Number of Offenders in Community Residential Centers
December 31, 2005 - 2009

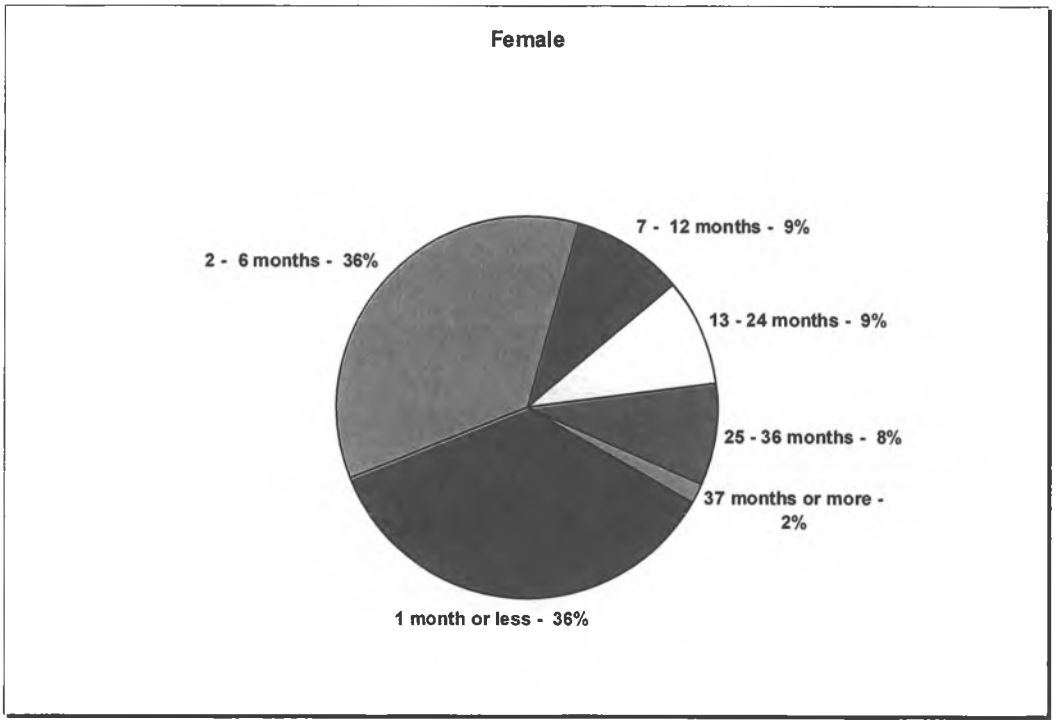
	Females					Males					All Offenders				
CRCs	**09**	**08**	**07**	**06**	**05**	**09**	**08**	**07**	**06**	**05**	**09**	**08**	**07**	**06**	**05**
Akeela House	1	1	-	1	1	-	1	1	-	3	1	2	1	1	4
Chanlyut	-	-	-	-	-	3	-	-	-	-	3	-	-	-	-
Clitheroe Center	3	3	1	2	-	-	6	2	2	10	3	9	3	4	10
Cordova Center	20	28	23	23	19	117	93	83	41	123	137	121	106	64	142
Glacier Manor	9	11	7	3	11	45	44	50	35	39	54	55	57	38	50
Glennwood Center	11	9	7	8	8	74	59	57	43	33	85	68	64	51	41
Safe Harbor/Hope House*	-	-	-	1	1	-	-	-	1	2	-	-	-	2	3
Maniilaq	-	-	-	-	-	-	-	-	-	1	-	-	-	-	1
Midtown Center	-	-	-	-	-	31	35	29	-	12	31	35	29	-	12
Northstar Center	9	6	9	9	13	80	74	67	41	64	89	80	76	50	77
Parkview Center	-	-	-	-	-	100	98	113	95	71	100	98	113	95	71
PhilipsTreatment Center	-	-	-	-	-	-	-	-	-	1	-	-	-	-	1
Ralph Perdue Center	-	-	-	-	1	-	-	-	2	3	-	-	-	2	4
Seaside Center	10	13	6	9	6	40	37	29	28	42	50	50	35	37	48
Tundra Center	3	1	3	2	5	36	52	40	36	47	39	53	43	38	52
Total	*66*	*72*	*56*	*58*	*65*	*526*	*499*	*471*	*324*	*451*	*592*	*571*	*527*	*382*	*516*
Special Offsite Programs															
Anchorage Elect Monitor	42	32	25	29	15	119	95	73	127	68	161	127	98	156	83
Anchorage CRC Monitor	-	-	1	-	-	-	1	1	1	2	-	1	2	1	2
Fairbanks Elect Monitor	8	8	9	6	5	25	26	25	12	2	33	34	34	18	7
Fairbanks CRC Monitor	-	-	-	-	-	-	-	1	-	1	-	-	1	-	1
Kenai Elect Monitor	1	1	2	-	-	5	6	2	-	-	6	7	4	-	-
Ketchikan Elect Monitor	1	-	2	-	-	2	-	2	1	-	3	-	4	1	-
Total	*52*	*41*	*39*	*35*	*20*	*151*	*128*	*104*	*141*	*73*	*203*	*169*	*143*	*176*	*93*
Total All	**118**	**113**	**95**	**93**	**85**	**677**	**627**	**575**	**465**	**524**	**795**	**740**	**670**	**558**	**609**

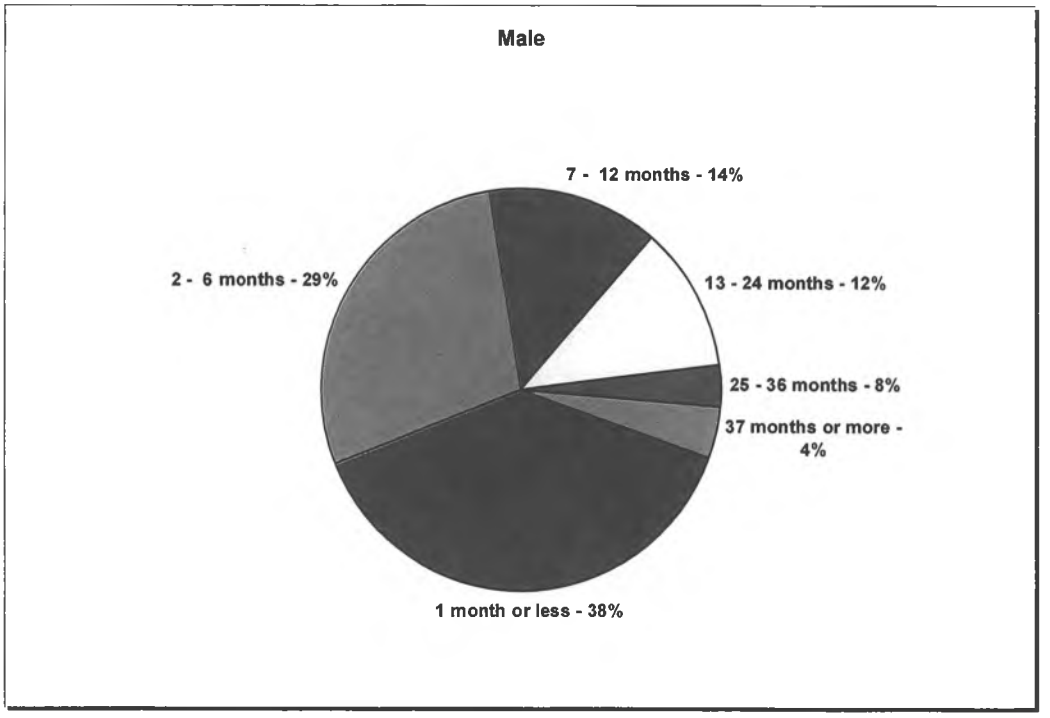
* Not currently operational


CRC Offenders
by Race/Ethnic Group
December 31, 2009
Race/Ethnici
White
Alaska Native
Black
Hispanic
Asian/Pacific Islander
Unknown
54%
62%
33%
31%
8%
5%
2%
1%
2%
1%
1%
0%
Female Male
0%
10%
20%
30%
40%
50%
60%
70%
Percent of Total


CRC Offenders
by Age Group
December 31, 2009
Age Grou
Under 20
20 - 29
30 - 39
40 - 49
50 - 59
60 and over
2%
3%
37%
30%
26%
29%
25%
20%
9%
16%
1%
3%
Female Male
0%
5%
10%
15%
20%
25%
30%
35%
40%
Percent of Total

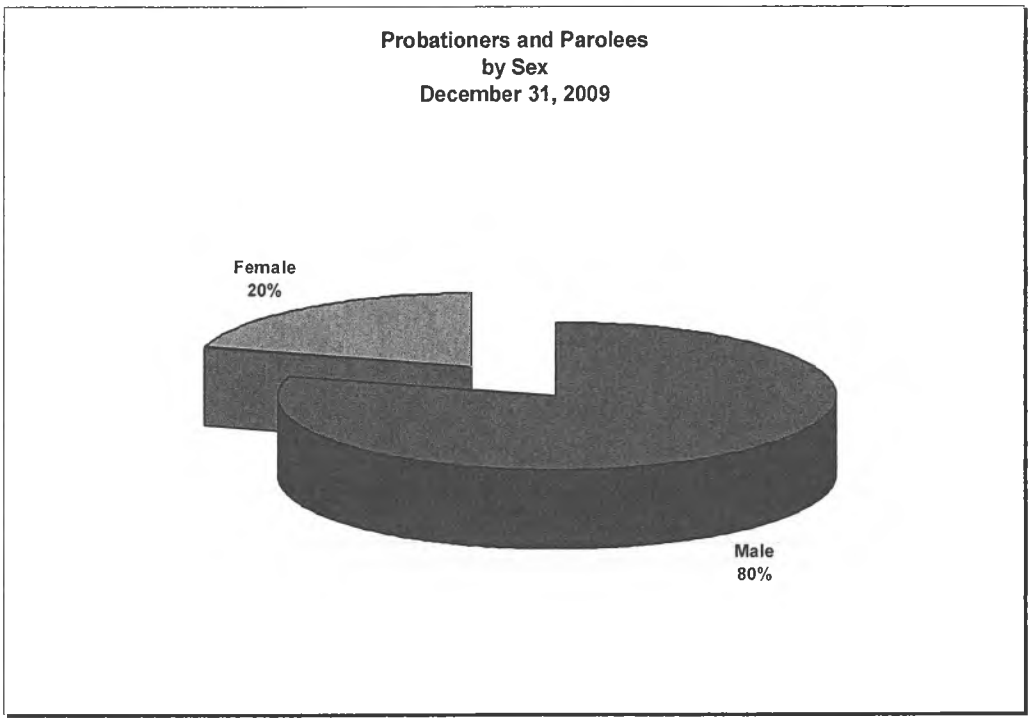
Length of Time from Admission
CRC Offenders by Sex
December 31,2009





Probation and Parole

Notes:
Includes information about all probationers and parolees under the supervision of the Division of Probation and Parole who are entered into the OTIS database.
Consists of a snapshot of probationers and parolees entered into the OTIS database on or before December 31, 2009.
Alaska Native race category includes a small number of Native Americans not indigenous to Alaska.



Supervising Authority for Probationers/Parolees
Under Supervision on December 31, 2005-2009

	Females					Males					All				
Offices	**09**	**08**	**07**	**06**	**05**	**09**	**08**	**07**	**06**	**05**	**09**	**08**	**07**	**06**	**05**
Anchorage	599	557	480	473	463	2,255	2,189	2,075	1,966	1,923	2,854	2,746	2,555	2,439	2,386
Barrow	0	10	7	4	6	-	33	34	41	45	-	43	41	45	51
Bethel	22	19	15	23	27	244	213	212	232	261	266	232	227	255	288
Dillingham	18	12	8	10	5	47	82	68	71	64	65	94	76	81	69
Fairbanks	132	127	154	145	134	596	564	538	592	557	728	691	692	737	691
Juneau	50	55	47	52	55	196	203	214	235	221	246	258	261	287	276
Kenai	118	112	127	98	75	367	404	470	384	308	485	516	597	482	383
Ketchikan	35	40	32	31	24	120	106	110	118	123	155	146	142	149	147
Kodiak	13	15	15	15	20	82	85	89	86	69	95	100	104	101	89
Kotzebue	15	13	21	26	22	78	71	78	101	99	93	84	99	127	121
Nome	8	9	12	13	8	47	48	65	66	58	55	57	77	79	66
Palmer	171	173	157	132	110	581	600	564	470	408	752	773	721	602	518
Sitka	14	13	19	21	27	40	60	63	59	68	54	73	82	80	95
Total All	**1,195**	**1,155**	**1,094**	**1043**	**976**	**4,653**	**4,658**	**4,580**	**4,421**	**4,204**	**5,848**	**5,813**	**5,674**	**5,464**	**5,180**

Demographic Information for Probationers/Parolees Under Supervision on December 31, 2005-2009

	Females					Males					All				
Ethnicity	**09**	**08**	**07**	**06**	**05**	**09**	**08**	**07**	**06**	**05**	**09**	**08**	**07**	**06**	**05**
Asian/Pac I	46	44	37	35	31	204	187	185	153	142	250	231	222	188	173
Black	81	78	64	69	70	433	440	417	408	388	514	518	481	477	458
Hispanic	28	21	19	14	12	143	138	138	138	122	171	159	157	152	134
AK Native	297	282	273	273	256	1,200	1,198	1,173	1,200	1,216	1,497	1,480	1,446	1,473	1,472
White	717	698	669	623	566	2,621	2,640	2,604	2,466	2,269	3,338	3,338	3,273	3,089	2,835
Unknown	26	32	32	29	41	52	55	63	56	67	78	87	95	85	108
Total	**1,195**	**1,155**	**1,094**	**1043**	**976**	**4,653**	**4,658**	**4,580**	**4,421**	**4,204**	**5,848**	**5,813**	**5,674**	**5,464**	**5,180**
Age Group															
19 & Unde	9	15	14	18	15	78	73	89	98	106	87	88	103	116	121
20-24	193	194	193	176	149	763	808	775	795	783	956	1,002	968	971	932
25-29	245	205	179	175	156	889	861	859	713	679	1,134	1,066	1,038	888	835
30-34	174	169	168	161	166	594	597	590	577	547	768	766	758	738	713
35-39	170	173	146	152	141	552	563	548	575	540	722	736	694	727	681
40-44	129	129	149	130	131	528	560	545	569	543	657	689	694	699	674
45-49	130	131	123	117	115	479	455	468	494	483	609	586	591	611	598
50-54	89	91	75	65	55	365	348	342	289	252	454	439	417	354	307
55-59	38	30	26	25	29	221	211	209	163	138	259	241	235	188	167
60-64	13	10	16	16	14	106	99	81	77	79	119	109	97	93	93
65 & over	5	8	5	8	5	78	83	74	71	54	83	91	79	79	59
Total	**1,195**	**1,155**	**1,094**	**1043**	**976**	**4,653**	**4,658**	**4,580**	**4,421**	**4,204**	**5,848**	**5,813**	**5,674**	**5,464**	**5,180**
Mean Age	*35.90*					*37.02*					*36.79*				
Median Ag	*34.30*					*35.02*					*34.83*				

ALASKA JUSTICE FORUM
A PUBLICATION OF THE JUSTICE CENTER

Winter 2010 Vol. 26, No. 4

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Felon Disenfranchisement and the Voting Rights Act — *Farrakhan V. Gregoire*: "A Crowd of One"

Deborah Periman

Sidebar story: Further Background on Felon Disenfranchisement

"Felon Disenfranchisement and the Voting Rights Act — *Farrakhan V. Gregoire*: 'A Crowd of One'" by Deborah Periman. *Alaska Justice Forum* 26(4): 1, 11–12 (Winter 2010). Early this year, the U.S. Court of Appeals for the Ninth Circuit issued its opinion in *Farrakhan v. Gregoire*, a challenge to Washington State's felon disenfranchisement law. The court's decision stands alone among the circuits in holding that state law denying felons the right to vote is a violation of section 2 of the Voting Rights Act, where discrimination in the state's criminal justice system results in race-based denial of the vote. Despite speculation, suggestions that the *Farrakhan* decision signals the demise of Alaska's disenfranchisement law are overstated. Nevertheless, the case is noteworthy for reopening the conversation about why we deny certain offenders the right to vote, and whether these laws reflect viable public policy or are simply relics of an era in which racial and class prejudices limited participation in the political process.

> [B]ecause the holding of *Farrakhan* I places us in a crowd of one among the circuits, I believe we should be particularly mindful before reversing the district court and invalidating felon disenfranchisement in the State of Washington.
>
> — Judge M. Margaret McKeown, dissenting, *Farrakhan v. Gregoire*, 590 F.3d 989, 1016 (9th Cir. 2010)

See also:

- Collateral consequences of criminal conviction

Early this year, the U.S. Court of Appeals for the Ninth Circuit issued its opinion in *Farrakhan v. Gregoire*, a challenge to Washington State's felon disenfranchisement law. The court's decision stands alone among the circuits in holding that state law denying felons the right to vote is a violation of section 2 of the Voting Rights Act (VRA), where discrimination in the state's criminal justice system results in race-based denial of the vote. Although there has been substantial speculation in the media over the implications of the decision, suggestions that the *Farrakhan* decision signals the demise of Alaska's disenfranchisement law are overstated. Nevertheless, the case is noteworthy for reopening the conversation about why we deny certain offenders the right to

vote, and whether these laws reflect viable public policy or are simply relics of an era in which racial and class prejudices limited participation in the political process.

Background: Felon Disenfranchisement and the Voting Rights Act

State laws throughout the country have traditionally barred those with certain types of criminal convictions from participating in the political process. Currently, 48 states and the District of Columbia have offender disenfranchisement statutes. These disenfranchisement laws are one component of the "civil death" once accorded criminal offenders. The concept of civil death dates back to ancient Athens and Rome, where those convicted of certain crimes entered a state of infamy marked by civic penalties such as the inability to vote, hold public office, and speak publicly on political issues. In medieval Europe and England, similar laws caused forfeiture of property and political rights for crimes punishable by death or life imprisonment. Laws disenfranchising felons were received into the American colonies as part of the general reception of the laws of England. Following the Revolution, in the allocation of power between the states and the federal government under the Constitution of 1787, the states retained control over access to the ballot. Almost immediately, the newly formed states adopted felon disenfranchisement laws, either constitutionally or through codification.

State control over access to the ballot was limited with ratification of the 15th Amendment, which prohibits states from abridging the right to vote "on account of race" and grants enforcement powers to Congress. Pursuant to the enforcement clause, and in conjunction with the mid-twentieth century civil rights movement, Congress enacted the Voting Rights Act of 1965. Its explicit purpose is to eliminate racial discrimination in voting throughout the United States in accordance with the mandate of the 15th Amendment. Section 2 of the Act provides that no prerequisite to voting shall be imposed in a manner that results in a denial of the right to vote on account of race or color (42 U.S.C. § 1973(a) (2010)). This standard is violated where, "based on the totality of the circumstances," it is shown that political processes in a state are not equally open to members of a class, in that such members "have less opportunity than other members of the electorate to participate in the political process..." (42 U.S.C. § 1973(b)).

Section 2 challenges to felon disenfranchisement laws are not new. Broadly speaking, these challenges assert that disproportionate numbers of minorities in the criminal justice system, and the concomitant denial of the vote to this class of citizens, result in *de facto* race-based exclusion of class members from the political process. To date the Courts of Appeals for the First, Second, Ninth, and Eleventh Circuits have analyzed the validity of such claims. Among the circuits, only the Ninth has held that challenges to felon disenfranchisement statutes raise valid Section 2 claims. The First, Second, and Eleventh Circuits are in accord (the latter two circuits sitting *en banc* as full courts rather than three judge panels) that such challenges fall outside the purview of the Voting Rights Act. These courts have concluded that Congress never intended the Act to deprive the states of their right to disenfranchise felons; such a result would impermissibly alter the balance of power between the federal government and the states, impinging on the states' traditional right to establish voter qualifications.

The Farrakhan Opinion

In a departure from this majority view, two members of the three judge panel in *Farrakhan v. Gregoire* held that the discriminatory impact of Washington state's disenfranchisement law stems

from racial discrimination in the state's criminal justice system; the resulting denial of the vote is, therefore, a violation of section 2. At the trial court level, the plaintiffs, minority citizens of Washington who lost their right to vote under the state felon disenfranchisement statute, presented reports of expert witnesses on racial disparities in all levels of Washington's criminal justice system. The reports highlighted studies showing that these disparities could not be explained by legitimate factors such as minorities' higher levels of criminal activity. Notably, one study found that "substantially more than one half of Washington State's racial disproportionality cannot be explained by higher levels of criminal involvement" (*Farrakhan*, 2010, n. 5).

These reports led the trial court to enter findings that racial discrimination exists in Washington's criminal justice system and that this discrimination "hinders the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic" (*Farrakhan*, 2010, 995). Nevertheless, the lower court held that plaintiffs failed to establish a Voting Rights Act violation because it was discrimination in the justice system, and not the disenfranchisement statute itself, that caused the loss of voting rights. Following an initial appeal, remand to the trial court, and second appeal, Ninth Circuit Judge Tashima, writing for himself and Judge Reinhardt (with Judge McKeown dissenting), held that Section 2 of the Voting Rights Act "demands that...racial discrimination not spread to the ballot box." Thus, based on the "uncontroverted record" of discrimination in the justice system, Washington's disenfranchisement law violates federal civil rights law (*Farrakhan*, 2010, 1015). (See "Further Background: Scope of Analysis," page 1.)

Felon Disenfranchisement in Alaska

Disenfranchisement of felons in Alaska is rooted in the Alaska Constitution, which provides "No person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored" (Alaska Const. art V, § 2). The right to vote remains suspended from the date of conviction through the date of release from all conviction-related disability, including probation and parole (AS 15.05.030; AS 15.60.010(39)). According to the Alaska Department of Corrections Offender Profile, in 2009 more than 10,000 Alaskans were ineligible to vote pursuant to this provision.

There is no question that in Alaska, as elsewhere, racial minorities are disproportionately represented in the criminal justice system. For example, Department of Corrections figures show that in 2009 Alaska Natives comprised over 35 percent of total offenders in institutions, yet Alaska Department of Labor 2008 population figures estimated that Alaska Natives comprised about 16 percent of the total population in Alaska. African-Americans, estimated to have comprised just over 4 percent of Alaska's population, represented over 10 percent of offenders in Alaska correctional institutions. (See "Alaska Offender Profile 2009" in this issue.) Despite this well-known disparity, Alaska lacks an extensive body of empirical data establishing conclusively that the overrepresentation of minority groups in Alaska's criminal justice system is attributable solely to systemic racial discrimination. This is the critical distinction between Alaska and Washington. As noted above, the Farrakhan opinion rests on a finding of fact by the trial judge that "there is discrimination in Washington's criminal justice system on account of race"; in reaching this finding the court relied on "extensive," unrefuted studies showing that over half of Washington's racial disproportionality could not be explained by legitimate factors (*Farrakhan*, 2010, 994–995). It is unlikely a trial judge would find the existing data in Alaska a sufficient evidentiary foundation to support a similar finding of fact here. This does not imply that racial bias is absent from Alaska's

criminal justice system, merely that widespread empirical studies have not unequivocally ruled out all other explanations for disparity in the system. (See "Further Background: Ethnic Disparity in Alaska," page 1.)

Shifting Policy

Although Alaska's disenfranchisement statute does not appear vulnerable to an immediate *Farrakhan* challenge, the essential holding of the case suggests that state policymakers may wish to consider limiting the reach of the current statute, or proposing a Constitutional amendment to eliminate the voting prohibition entirely. (Senate Bill 68, currently pending in the Alaska Legislature, would limit disenfranchisement to those incarcerated, and restore voting rights upon release.) Academic literature makes clear that for generations disenfranchisement laws throughout the country have excluded minority citizens from the vote in overwhelmingly greater percentages than Caucasian, and that the rates of minority exclusion are growing. Moreover, there is evidence that dilution of minority voting attributable to disenfranchisement statutes has affected the outcome of elections in a number of jurisdictions. In this state, the disproportionate number of Alaska Natives excluded from the political process under the disenfranchisement statute is particularly troubling given Alaska's history of discrimination in voting practices. (See "Further Background: Preclearance under the Voting Rights Act," page 1.)

At an even more basic level, however, the right to vote is the hallmark of participatory democracy. It affirms our membership in the social compact. Exclusion of criminal offenders from this process, and from one of the most fundamental rituals of community involvement, does nothing to promote public safety and can only serve to impede social reintegration of these citizens.

In his February 2010 State of the Judiciary address, Chief Justice Carpeneti observed, "Probably no problem is of greater concern to us at this time than the alarmingly high rates of recidivism in our state." The recently established Alaska Prisoner Re-Entry Task Force was created to examine how the state might better assist offenders to make a successful transition from incarceration back into their communities. Voting is an integral part of this process; studies suggest that civic reintegration facilitates successful reentry and reduces the risk of recidivism.

For all of these reasons, there is growing recognition that felon disenfranchisement statutes rest on outdated retributory practices antithetical to contemporary standards of equal representation in the political process, standards explicitly stated in the Voting Rights Act. *Farrakhan,* though out of step with the weight of authority in its statutory interpretation, gives effect to the spirit of inclusion that lies at the core of the Voting Rights Act.

Deb Periman, J.D., is a member of the Justice Center faculty.

Further Background on Felon Disenfranchisement

Scope of Analysis

This case summary of *Farrakhan* provides a basic, simplified overview. It does not address the distinction between vote denial and vote dilution claims under the Voting Rights Act, nor does it address the impact of changes in Washington's disenfranchisement law over the course of the Farrakhan litigation, the various approaches taken by the courts in addressing Section 2's "totality

of the circumstances" standard, or *Senate Report 97-417*, which lists typical factors a court might consider in evaluating a challenged voting practice.

Ethnic Disparity in Alaska

In 2004, the Alaska Judicial Council published a comprehensive summary of criminal justice processes in Alaska. *Alaska Felony Process: 1999* (February 2004) was commissioned, in part, to identify whether "disproportionate numbers of ethnic minorities at all points in Alaska's criminal justice system" were the result of discrimination or of other legitimate factors. The Council reported that justice for felony defendants in Alaska after charges were filed was "in many respects substantially equal." Presumptive sentences showed no disparities associated with ethnicity. With the exception of drug offenses, non-presumptive sentences were uniformly imposed among ethnic groups. Disparity in drug sentencing was limited to African-Americans in Anchorage and Natives outside Anchorage. The Council concluded in the Executive Summary that the "isolated nature of these disparities appeared to be inconsistent with conscious discrimination." However, phases of the felony process other than sentencing, specifically pre-disposition incarceration, charge reduction and overall time of incarceration, did show disparities by ethnicity that could not be explained by legitimate criteria. For example, statewide African-Americans and Alaska Natives could expect to spend 7 days longer in predisposition incarceration than Caucasian defendants. Although this disparity could not be attributed to any factor measured in the study other than ethnicity, the Judicial Council noted that additional socioeconomic data might have explained some of the disparate outcomes.

Preclearance under the Voting Rights Act

Alaska is one of nine states covered in its entirety by Section 5 of the Voting Rights Act, which prohibits changes in election practices without federal review and approval. This "preclearance" status is the result of a state's historic use of tests or devices to restrict the opportunity to vote, or of statutorily defined underrepresentation in the voting process. In territorial Alaska, Natives faced a number of barriers to voting, among them a 1924 law requiring voters to read and write English. With the advent of statehood, Alaska's Constitution similarly limited voter participation to those who could "read or speak the English language," a limitation not repealed until 1970. These and myriad other factors led to less than 50 percent of Alaska's voting age population participating in the voting process in 1964, a level of under-participation that brought Alaska within Section 5's preclearance requirements.

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January 21, 2010

SENATE COMMITTEE PASSES NATIONAL CRIMINAL JUSTICE COMMISSION ACT OF 2009

The bi-partisan National Criminal Justice Commission Act of 2009 (S. 714) was passed out of the Senate Committee on the Judiciary today by voice vote. The legislation, sponsored by Sen. Jim Webb (D-Va.) would create a commission to conduct a thorough evaluation of the nation's justice system and offer recommendations for reform at every stage of the criminal justice system.

The establishment of such a commission could not come at a more critical time. With 2.3 million people in prisons and jails, the United States has the highest incarceration rate in the world. Federal and state governments spend more than $50 billion each year on corrections, and the population behind bars continues to grow.

A new approach to crime prevention is necessary and the time for reform is upon us. The commission created by this legislation would establish an organized and proactive approach to studying and advancing programs and policies that promote public safety, while overhauling those practices that are found to be fundamentally flawed.

READ THE SENTENCING PROJECT'S LETTER OF ENDORSEMENT
READ ABOUT THE NCJCA

Issue Area(s): Sentencing Policy, Incarceration, Racial Disparity, Felony Disenfranchisement, Drug Policy, Collateral Consequences

<< BACK

January 8, 2010

DISENFRANCHISEMENT NEWS

Washington State: 9th Circuit Court Reverses Disenfranchising Law; Landmark Decision Could Go to Supreme Court
Virginia: Coalitions Have a Week to Urge Governor to Change Disenfranchisement Policy

Washington State: 9th Circuit Court Reverses Disenfranchising Law; Landmark Decision Could Go to Supreme Court

In a landmark case for individuals with felony records, a federal appeals court has thrown out Washington State's restrictions on felon voting on the basis that the current law violates the Voting Rights Act by creating discrimination in voting. The 2-1 decision in *Farrakhan v. Gregoire* would apply to all persons with convictions in the state, including 18,000 who are currently incarcerated, according to the Associated Press. Circuit Court Judge A. Wallace Tashima wrote that attorneys for six Washington state prisoners "have demonstrated that police practices, searches, arrests, detention practices, and plea bargaining practices lead to a greater burden on minorities that cannot be explained in race-neutral ways."

The 9th Circuit Court of Appeals found that discrimination does, in fact, exist in law enforcement, prosecutorial and judicial outcomes in Washington State and therefore, those with felony records should have the right to vote.

The lawsuit was filed in 1996 by Muhammad Shabazz Farrakhan while serving a three-year sentence at the Washington State Penitentiary for a series of felony-theft convictions. Five other minority inmates joined as plaintiffs in the lawsuit that contended that because nonwhites make up a large percentage of the prison population, a state law prohibiting inmates and parolees from voting is illegal because it dilutes the electoral clout of minorities, the *Seattle Post-Intelligencer* stated.

"In this case, we have proved that the criminal justice system in this state is biased against African-Americans, and the impact has been a violation of their voting rights," said Larry Weiser, a law professor at Gonzaga University School of Law who is the lead attorney in the lawsuit, and joined by several national civil rights organizations.

Take Action Now!

Tell your congressperson to co-sponsor the Democracy Restoration Act of 2009

Related News

Disenfranchisement News (Dec 7, 2009)

Disenfranchisement News (Nov 3, 2009)

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TESTIMONY OF HILARY O. SHELTON

DIRECTOR, NAACP WASHINGTON BUREAU &

SENIOR VICE PRESIDENT

FOR ADVOCACY AND POLICY

before the

ALASKA SENATE STATE AFFAIRS COMMITTEE

on

SB7 – FELONS' RIGHT TO VOTE OR BE JURORS

February 3, 2011

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ALASKA SENATE STATE AFFAIRS COMMITTEE

on

SB7 – FELONS' RIGHT TO VOTE OR BE JURORS

February 3, 2011

Good morning Chairman Wielechowski, Vice Chair Paskvan, and other members of this committee. I appreciate your holding this hearing and inviting me to share with you the opinion of the NAACP. The NAACP strongly supports SB7 – Felons' Right to Vote or Be Jurors as it is consistent with our national policy which supports the re-enfranchisement of ex-felony offenders once they have been released from prison or jail. We urge its immediate enactment and offer special thanks to Senator Davis for being our champion on this issue.

My name is Hilary Shelton and I am the Director of the NAACP's Washington Bureau and the Senior Vice President for Advocacy and Policy. The NAACP is our Nation's oldest, largest and most widely-recognized grassroots civil rights organization and we currently have more than 2,200 units in every state in the Nation.

At the heart of this debate, Mr. Chairman, is a question of rehabilitation, democracy and fairness. Currently, an estimated 5.3 million Americans across our nation are denied the right to vote because of laws that prohibit or restrict voting by people with felony convictions. Three fourths of these Americans are no longer in jail.

In Alaska, more than 11,000 people are currently disenfranchised. Of these men and women, over 77%, or almost 9,000 are no longer incarcerated.

The NAACP supports federal legislation, the *Democracy Restoration Act*, which would permit men and women to register and vote in federal elections once they have been released from prison, even if they are on probation or parole. SB7 is Alaska's equivalent to the *Democracy Restoration Act* on the state level.

By allowing men and women who are no longer incarcerated to register and vote, we are encouraging them to take another positive step towards creating a commitment to, a bond with, and a stake in their community. This will, in turn, can only help with the reentry process.

Furthermore, by allowing ex-felons to register once they are released from prison we are avoiding potential problems at the polls. After the 2000 election the NAACP received sworn testimony from a number of people, including a Catholic priest, who said their right to vote was questioned on election day by poll workers who accused them of being on probation or parole and thus ineligible to vote. By allowing people to register and vote as soon as they leave prison, we are eliminating this potential misunderstanding.

Ex-felon re-enfranchisement is of special concern to the NAACP due to disparate number of African Americans who come in contact with the criminal justice system and, as a result, find themselves either temporarily or permanently disenfranchised.

As a result of the racial disparities that continue to plague our criminal justice system, a vastly disparate number of the people who are incarcerated and subsequently disenfranchised are racial or ethnic minorities. Nation-wide, an estimated 13%, or one out of every 8 African American men cannot vote because of the law in the state where he resides and a prior felony conviction. This is seven times the national average.

In Alaska, 2.4% of the overall population is disenfranchised as a result of a felony conviction. However almost 8% of the state's African Americans cannot vote. Furthermore, although African Americans make up just over 4% of Alaska's population, we represent more than 13% of those Alaskans who cannot vote.

Because the right to vote is such an important element of the democratic process, it is simply wrong to predicate it upon a system rife with racial disparities. And with voting such an integral part of becoming a productive member of American society, the way forward for our Nation should be a new paradigm in which we encourage ex-felons to vote, not prohibiting them.

Thank you again Chairman Wielechowski, Vice Chair Paskvan, and other members of this committee for holding this important hearing and for inviting me here today. As I indicated earlier, the NAACP strongly supports SB7 and urges its immediate enactment.

APOA
ALASKA PEACE OFFICERS ASSOCIATION

ALASKA ASSOCIATION OF CHIEFS OF POLICE

Women Police of Alaska

February 14, 2011

Senator Bettye Davis
Alaska State Senate
State Capitol
Juneau AK 99801-1182

RECEIVED
FEB 16 2011

Dear Senator Davis:

On behalf of our respective organizations, we are writing regarding your introduction of SB 7, an act relating to voting rights of felons.

We met recently to review proposed legislation and are unanimously opposed to this bill. Current law already allows convicted felons to regain their voting rights upon unconditional discharge. That law provides a reasonable threshold and we see no need to change it.

We urge you to reconsider this legislation. Please contact the APOA office in Anchorage at 277-0515 if you have any questions.

Sincerely,

John Lucking Jr., President
Alaska Peace Officers Association
PO Box 240106
Anchorage AK 99524

Tom Clemons, President
Alaska Association of Chiefs of Police
183 Nelson Ave
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Michele Logan, President
Women Police of Alaska
PO Box 233306
Anchorage AK 99523

SB

9

<TARGET><BILL>SB 9</BILL><SUBJECT>SB 9</SUBJECT><COMM>SJUD27</COMM></TARGET>

SEAN PARNELL, GOVERNOR

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Department of Education & Early Development

Office of the Commissioner

March 22, 2011

The Honorable Hollis French
Chair, Senate Judiciary Committee
Alaska State Senate
Alaska State Capitol, Room 417
Juneau, AK 99801

Dear Chair French:

Thank you for the opportunity to provide in writing responses to questions that the Department of Education and Early Development (EED) was unable to answer during testimony at the Senate Judiciary Committee's meeting on March 11, 2011. The committee hearing was related to Senate Bill 9 – Compulsory School Attendance Age.

Outlined below are the questions along with the responses provided for the committee. Although the bill has moved from the Senate Judiciary Committee, Ms. Smith from your office requested EED's responses so that they may be passed along to the next committee of referral as well as for the committee's consideration in case of a vote on the Senate Floor.

Questions & Responses:

1. Sen. Coghill asked about the disposition of a truancy case in the Northwest Arctic School District. EED is still waiting for information from the District Attorney's office in the Northwest Arctic region. EED will forward the response to the committee once it is received in our office.

2. Sens. Wielechowski, Paskvan, French & Coghill – Where does Commissioner Hanley stand on this legislation? The administration, including the Commissioner of Education & Early Development, has not taken a position on this legislation. The administration respects the legislative process and the deliberation of statewide policy, and does not take positions on each piece of legislation that comes before the legislature.

3. Sen. Coghill - How many students under 16 drop out currently? See a one-year table below.

Dropout Counts for age 16 or less

(from dropout rate calculation)

Grade	2009-2010 Dropouts
7	83
8	81
9	324
10	384
11	283
12	6

4. Sen. French – Can the physical plant support an additional 1400+ students? When examining the number of students who drop out of school at the district level the overall numbers do not appear to be so great that it would negatively impact school buildings in a manner causing capacity problems.

5. Sen. French – It would be interesting to know whether attendance rates increase with the passage of laws like SB9.

   While we are unable to predict if attendance rates in Alaska would be impacted with the passage of SB9, there is research from other states regarding compulsory education laws and graduation rates.

   The committee was provided information from the National Conference of State Legislatures (NCSL) by the bill's sponsor. According to the web site of six states that increased the compulsory school age between 2002 and 2008, two states (Illinois and South Dakota) experienced increases in their graduation rate. Only Nevada experienced a decline.

   Another study referenced on the NCSL web site looked at state graduation states in those states that raised the compulsory attendance age to 17 or 18. This study, conducted by the Bluegrass Institute for Public Policy, found mixed results. The study found that eight states that had enacted an age 18 minimum dropout age by 2001 improved their graduation rates between 2001 and 2007. In fact, three states, Ohio, Oklahoma and Kansas, had improvements that were scarcely more than the national average improvement. Seven states actually saw a decline in their graduation rates while the rest of the nation was improving. Overall, only five of the 15 states had rates of improvement notably above the overall national average improvement from 2001-2007.

According to the Rennie Center for Education Research & Policy, in a report titled Raise the Age, Lower the Dropout Rate?, of ten states with the highest graduation rates only three states require attendance to the age of 18. Further, this study indicates that of the fourteen states with the lowest dropout rates only five require attendance to the age of 18.

The department examined information available from both the Education Commission of the States (ECS) on compulsory education laws in states, and from the National Center on Educational Statistics (NCES) on graduation rates. We found that of the states that have the highest graduation rates, those at 80% or higher, two had a compulsory age on the upper end of 18, two at 17 and eight at 16. For those states with the lowest graduation rates, 70% or less, four had a compulsory age on the upper end of 18, three at 17, and four at 16.

Thank you for the opportunity to follow up with these responses in writing. If you have any related questions or would like additional information, please contact our Legislative Liaison, Marcy Herman, at marcy.herman@alaska.gov or at 465-2803.

Sincerely,

Les Morse

Les Morse
Deputy Commissioner

Alaska State Legislature

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Senator_Bettye_Davis@legis.state.ak.us
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Office of Senator Bettye Davis

February 21, 2011
Senator French, Chair, Senate Judiciary Committee

RE: Request for Hearing for SB 9, 27-LS0085\M - "An Act relating to compulsory school attendance; and relating to the crime of contributing to the delinquency of a minor."

Dear Senator French,

Senator Davis respectfully requests a hearing on SB 9 before the Senate Judiciary Committee.
Included in this hearing package are:

1. Sponsor Statement
2. Current version of SB 9, 27-LS0085\M.
3. Sectional Summary
4. Fiscal Note
5. Additional Documents
   - DEED -"Graduation Rates in Alaska and Dropout Information" - 11/09/2010
   - NEA Alaska Letter of Support
   - NEA's 12 Point Plan to Reduce Dropout Rate 2009
   - NCSL Email comments 2/15/2011 with references:
     - Attending to Learn the Implications of Raising the Compulsory School Age to 18 (Maryland, 2007)
     - Building a Grad Nation- Civic Enterprises at Johns Hopkins University
     - A Path to Graduation for Every Child-NCSL Task Force on Dropouts
   - NCSL -"Compulsory Education" 2009
   - ECS -"Compulsory School age Requirements" June, 2010
   - US Dept Labor -"Employment Provisions-Compulsory School Attendance" Jan.2009
   - National High School Center- "High School Dropout: Stats" - 2007
   - *Boston Globe* 10/212/09 "Law urged to make teens stay in school."

Please plan on in-person and teleconference testimony. Please call if you have any questions.

Sincerely,

Thomas S. Obermeyer
Legislative Assistant, 465-3762

Alaska State Legislature

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Senator Bettye Davis

SB 9 27-LS0085 "An Act relating to compulsory school attendance; and relating to the crime of contributing to the delinquency of a minor."

SPONSOR STATEMENT

This bill changes the Alaska compulsory school attendance ages from 7-16 to 6-18. At the same time it necessarily amends the criminal statute of contributing to the delinquency of a minor from the maximum age 16 to 18. The legislative intent of this bill is to require all students to start school earlier when their brains are growing and developing at a dramatic rate from birth to age 7 and to stay in school long enough to graduate. This bill allows earlier identification of children with learning disabilities and more time to take successful corrective action. This bill will not preclude parents from homeschooling children, or using charter or alternative schools, or any other of the twelve enumerated exceptions to compulsory education under AS 14.30.010(b), including completion of grade 12 or graduation from a secondary school before age 18.

The Alaska compulsory school age statute is out of date with modern educational practice and thinking. The law has not changed since territorial days when few children attended school beyond 8th grade or bothered to graduate, because most jobs did not require much education. The majority of Alaskan students today are already in school by age six and many by the minimum age five. Head Start and prekindergarten programs are growing in popularity. The state already funds a pilot pre-kindergarten program and SB 6 this year proposes funding such a program statewide.

In 1852 Massachusetts became the first state to pass compulsory school attendance laws, and by 1918 all states required children to receive an education. Today every state and territory requires children to enroll in public or private education or to be home-schooled. Thirty-two states require students to begin their education by age 6 or 5 and to remain in school until 16 or older. Twenty-four states and American Samoa set the minimum at age 6, and eight states and the District of Columbia, Puerto Rico and the Virgin Islands set the minimum at age 5. All children are required to continue their education into their high school years, with twenty states setting the compulsory cutoff age at age 18; eleven at age 17; and nineteen states including Alaska and the Virgin Islands at age 16.

By increasing the school attendance age to 18, this bill should discourage earlier dropouts and reduce juvenile crime, teen pregnancy and other at risk behaviors. Studies have found that students without a diploma earn less than 75% of those with a diploma; they are more likely to live in poverty, go to jail, and have health problems.

The Alaska Department of Education and Early Development reported 8,245 students or 67.7% graduated in 2010 while 3,186 dropped out. The graduation rate of Alaska Native students was 55.4%, a group which experienced twice the dropout rate of all students. These rates remain well below the national average. The National Education Association's first priority two years ago in its "12-Point Action Plan for Reducing the School Dropout Rat" was to "*mandate high school graduation or equivalency as compulsory for everyone below the age of 21.*" It reported:

"Just as we established compulsory attendance to the age of 16 or 17 in the beginning of the 20th century, it is appropriate and critical to eradicate the idea of 'dropping out' before achieving a diploma. To compete in the 21st century, all of our citizens, at minimum, need a high school education."

Opponents to increasing compulsory school age who are concerned about forcing students to be in the classroom against their will argue that these students may become disruptive and require more time and expense on behavior and truancy problems. This bill, however, is directed at more than just "seat time." It is to become part of a larger plan to motivate rather than to punish or ignore students. It aims to help students stay in school long enough to graduate and go on to college or better-paying jobs. Students will want to come to school, stay in school, and graduate, if academic problems are identified early and they helped long before they dropout. For those students who want to work or are not as academically inclined, school districts are encouraged to continue accredited alternative schools and work-study programs to help students earn credits toward a diploma if they must work at the same time. Coupled with early efforts to retain, train, and graduate, this bill can bring hope and success to thousands of Alaskan students who otherwise might not stay in school long enough to graduate or develop to the best of their potential.

LEGAL SERVICES

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

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FAX (907) 465-2029
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 31, 2011

SUBJECT: Sectional Summary of SB 9 (Work Order No. 27-LS0085\M)

TO: Senator Bettye Davis
Chair of the Senate Health and Social Services Committee
Attn: Thomas Obermeyer

FROM: Jean M. Mischel
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Raises the age from 16 to 18 for the crime of contributing to the delinquency of a minor for repeated absences from school.

Section 2. Raises the compulsory school age from 16 to 18.

Section 3. Amends an exception to the compulsory school attendance age to provide for graduation for a secondary school.

JMM:ljw
11-057.ljw

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB9**
() Publish Date

Identifier (file name) SB9-EED-ESS-2-10-11
Title "An Act related to compulsory school attendance; and relating to the crime of contributing to the delinquency of a minor."
Sponsor Sen. Davis
Requester Senate Education

Dept. Affected EED
Appropriation K-12 Support
Allocation Foundation Program
OMB Component Number 141

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants	14,858.6						
Miscellaneous							
TOTAL OPERATING	**14,858.6**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	14,858.6						
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**14,858.6**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Elizabeth Nudelman, Director
Division School Finance & Facilities
Approved by Mike Hanley
Commissioner

Phone 465-8679
Date/Time 2/10/11 12:00 AM
Date 2/10/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB9

Analysis

This bill lowers the compulsory age for attendance by one year, from age 7 to 6; and extends the age of required attendance by two years, from age 16 to 18. The exception is if a student completes the 12th grade or graduates from a secondary school.

In FY2010 there were approximately 1,406 students between the ages of 16 and 18 that dropped out of public school after the October student count period. The average cost of a student run through the FY12 foundation formula is $10,568. 1,406 x $10,568 = $14,858,608.

Thomas Obermeyer

From: Corazza, Peggy (EED) [peggy.corazza@alaska.gov]
Sent: Tuesday, November 09, 2010 2:45 PM
To: Thomas Obermeyer
Subject: Graduation Rate and Dropout Rate information
Attachments: Graduation Rate Fact Sheet.doc; Dropout Rate Fact Sheet.doc

Thomas,

As promised I have attached the Fact Sheets that we discussed. I find them most helpful for both the historical view and the explanation of the calculation. I hope to have the 2010 Dropout calculation ready next week.

Peggy Corazza
Data Manager
Assessment & Accountability
(907) 465-8418

Graduation Rates in Alaska
Fact Sheet

The Graduation Rate is reported as a fraction. The numerator is the sum of the number of graduates receiving a regular diploma before June 30. The denominator is the sum of the number of graduates, plus the number of dropouts in grade nine three school years prior, plus the number of unduplicated dropouts in grade ten two school years prior, plus the number of unduplicated dropouts in grade eleven in the prior school year, plus the number of unduplicated dropouts in grade 12 during the current year, plus the number of grade 12 continuing students.

A **graduate** is defined as a student who has received a regular diploma from a state- or district-approved education program, as evidenced by receipt of a secondary school diploma from school authorities. Any student who receives a diploma under a waiver from the competency examination required under AS 14.03075 (a), as specified by the state board is considered to be a graduate. This does not include an individual who:

- receives a certificate of completion;
- receives a certificate of attendance;

The statewide Graduation Count has increased significantly over the last five years.

School Year	Graduation Rate	Graduate Count
2004	62.9%	7,290
2005	61.4%	6,905
2006	61.6%	7,361
2007	63.0%	7,666
2008	62.6%	7,855
2009	67.5%	8,008
2010	67.7%	8,245

The Alaska Native/American Indian Graduation Rate has shown improvement over the same five year time period:

School Year	Graduation Rate	Graduate Count
2004	46.1%	1,327
2005	43.2%	1,233
2006	45.1%	1,442
2007	51.2%	1,689
2008	48.1%	1,523
2009	55.4%	1,508
2010	55.4%	1,616

Please note that the new Graduation Rate required by the Final Title 1 Regulations under NCLB will use a different calculation. The new Graduation Rate, also known as the Four-Year Adjusted Cohort Rate, will follow an actual group of students across four

years of high school. Alaska will no longer be incorporating prior years' counts of dropouts to calculate the Graduation Rate.

Dropout Rates in Alaska
Fact Sheet

The Dropout Rate is computed by dividing the number of dropouts in the current school year by the number of students enrolled in grades 7-12 on October 1 of the current school year. School year is defined as the12-month period beginning with July 1 and ending June 30.

A **Dropout** is defined as a student who was enrolled in the district at some time during the school year and whose enrollment terminated. This does not include an individual who:

- graduated from high school or completed a state or district approved education program, as evidenced by receipt of formal recognition from school authorities;
- transferred to another public school, private school or state or district approved education program;
- is temporarily absent due to suspension;
- is absent due to illness or medical condition;
- died.

The statewide Dropout Rate has decreased as well as the number of dropouts for three consecutive years:

School Year	Dropout Rate	Dropout Count (Grades 7-12)
2005	6.0%	3,791
2006	5.8%	3,642
2007	5.5%	3,434
2008	5.2%	3,232
2009	5.2%	3,146

The Alaska Native/American Indian Dropout Rate has not reflected the proportionate decrease over the same time period:

School Year	Dropout Rate	Dropout Count (Grades 7-12)
2005	8.2%	1,276
2006	8.4%	1,333
2007	8.3%	1,299
2008	8.5%	1,224
2009	8.5%	1,172

In 2007-2008 Alaska showed a wide range in difference with district by district comparisons of Dropout Rates. Four districts reported 0 dropouts. Two districts reported over 25% Dropout Rates. Both districts with the highest rates, Delta/Greely School District and the Nenana City School District, had a large percentage of dropouts reported in the statewide correspondence schools.

NEA-ALASKA

Affiliated with the National Education Association

February 18, 2011

RECEIVED

FEB 21 2011

Sen. Bettye Davis
Room 30, State Capitol
Juneau, AK 99801

Dear Senator Davis:

Thank you for your introduction of Senate Bill 9, "An Act relating to compulsory school attendance; and relating to the crime of contributing to the delinquency of a minor."

On behalf of NEA-Alaska's nearly 13,000 public school employees and retired members I am privileged to offer this letter of support for the passage of Senate Bill 9.

Each January, for the past 55 years, elected NEA-Alaska delegates from Ketchikan to Barrow gather in Anchorage to set policy for the year. A few weeks ago, those 400 elected delegates affirmed their support for legislation to expand the age of compulsory school attendance and to address the problem of truancy in Alaska's public schools. As president of NEA-Alaska and as a 30 year teacher in Western Alaska I know firsthand the issue of children deciding to end their education on their 16th birthday. In this global economy, a high school diploma is a minimum for Alaska's children entering adulthood.

This legislation will help keep children in school and tracking towards their graduation. NEA-Alaska urges passage of Senate Bill 9 by the 27th Alaska Legislature.

NEA-Alaska applauds your efforts to improve K-12 education in Alaska.

Sincerely,

Barb Angaiak
President

ANCHORAGE OFFICE • 4100 Spenard Road • Anchorage, Alaska 99517 • (907) 274-0536 • FAX: (907) 274-0551
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NEA's 12-Point Action Plan for Reducing the School Dropout Rate

To address the nation's school dropout crisis, NEA has developed a 12-point action plan that includes the most promising actions supported by experience and data.

1. Mandate high school graduation or equivalency as compulsory for everyone below the age of 21. Just as we established compulsory attendance to the age of 16 or 17 in the beginning of the 20th century, it is appropriate and critical to eradicate the idea of "dropping out" before achieving a diploma. To compete in the 21st century, all of our citizens, at minimum, need a high school education.

2. Establish high school graduation centers for students 19-21 years old to provide specialized instruction and counseling to all students in this older age group who would be more effectively addressed in classes apart from younger students.

3. Make sure students receive individual attention in safe schools, in smaller learning communities within large schools, in small classes (18 or fewer students), and in programs during the summer, weekends, and before and after school that provide tutoring and build on what students learn during the school day.

4. Expand students' graduation options through creative partnerships with community colleges in career and technical fields and with alternative schools so that students have another way to earn a high school diploma. For students who are incarcerated, tie their release to high school graduation at the end of their sentences.

5. Increase career education and workforce readiness programs in schools so that students see the connection between school and careers after graduation. To ensure that students have the skills they need for these careers, integrate 21st century skills into the curriculum and provide all students with access to 21st century technology.

6. Act early so students do not drop out with high-quality, universal preschool and full-day kindergarten; strong elementary programs that ensure students are doing grade-level work when they enter middle school; and middle school programs that address causes of dropping out that appear in these grades and ensure that students have access to algebra, science, and other courses that serve as the foundation for success in high school and beyond.

7. Involve families in students' learning at school and at home in new and creative ways so that all families-single-parent families, families in poverty, and families in minority communities-can support their children's academic achievement, help their children engage in healthy behaviors, and stay actively involved in their children's education from preschool through high school

graduation.

8. Monitor students' academic progress in school through a variety of measures during the school year that provide a full picture of students' learning and help teachers make sure students do not fall behind academically.

9. Monitor, accurately report, and work to reduce dropout rates by gathering accurate data for key student groups (such as racial, ethnic, and economic), establishing benchmarks in each state for eliminating dropouts, and adopting the standardized reporting method developed by the National Governors Association.

10. Involve the entire community in dropout prevention through family-friendly policies that provide release time for employees to attend parent-teacher conferences; work schedules for high school students that enable them to attend classes on time and be ready to learn; "adopt a school" programs that encourage volunteerism and community-led projects in school; and community-based, real-world learning experiences for students.

11. Make sure educators have the training and resources they need to prevent students from dropping out including professional development focused on the needs of diverse students and students who are at risk of dropping out; up-to-date textbooks and materials, computers, and information technology; and safe modern schools.

12. Make high school graduation a federal priority by calling on Congress and the president to invest $10 billion over the next 10 years to support dropout prevention programs and states who make high school graduation compulsory.

For the Spanish version of this plan, see El Plan de la NEA para Reducir el Abandono de los Estudios.

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Thomas Obermeyer

From: Sunny Deye [sunny.deye@ncsl.org]
Sent: Tuesday, February 15, 2011 7:59 AM
To: Thomas Obermeyer
Subject: RE: Alaska State Legislature Senate Bill 9 - Increasing compulsory school age to 18
Attachments: NCSL Dropout Task Force Recommendations.pdf

Hi Tom,
Attached is the NCSL Dropout Task Force report, released just this week.
Here is the online link: http://www.ncsl.org/default.aspx?TabId=22196

As I mentioned, I will FedEx 10 copies to you now – you will have them in the morning.
Below are the relevant portions. I will be in touch soon with more information.

Best,
Sunny

Sunny Deye
Program Principal, College and Career Readiness
National Conference of State Legislatures
7700 East First Place
Denver, CO 80230
303-856-1469

One of the recommendations of the NCSL Task Force on School Dropout Prevention and Recovery – "Conduct policy audits, eliminate counterproductive policies and provide incentives for collaboration" includes a paragraph about raising the school compulsory age, as follows (see embedded references). Note that the second study actually credits, in part, raising the compulsory school age to 17 for Tennessee's 15-point improvement in grad rates from 2002 to 2008 (see p. 28 of the Balfanz report):

Evidence suggests that raising the maximum compulsory school age above 16 curtails dropout rates and produces other positive results.[i] Until recently, a majority of states permitted students to drop out of high school at the age of 16; now 32 states have set their compulsory school age to 17 or 18.[ii] States can make maximum compulsory school attendance requirements more meaningful by revoking work permits and driving privileges of students who drop out before the state-set minimum school-leaving age. States also can require that students who withdraw from school before graduation receive information not only about the economic consequences of dropping out, but also how they can complete their high school diploma after they do so.

---

[i] John M. Bridgeland, John J. Dilulio Jr., and Ryan Streeter, *Raising the School Compulsory Attendance Age: The Case for Reform* (Washington, D.C.: Civic Enterprises, 2007).

http://www.civicenterprises.net/pdfs/raisingschoolage.pdf

[ii] Robert Balfanz et al., *Building a Grad Nation: Progress and Challenge in Ending the High School Dropout Epidemic* (Washington, D.C.: Civic Enterprises, Everyone Graduates Center at Johns Hopkins University and America's Promise Alliance, November 2010).

http://www.civicenterprises.net/pdfs/gradnation.pdf

Thomas Obermeyer

From: Sunny Deye [sunny.deye@ncsl.org]
Sent: Tuesday, February 15, 2011 11:57 AM
To: Thomas Obermeyer
Subject: (ding, final answer) - grad rates for 6 states that recently raised compulsory school age
Attachments: gradnation.pdf

Tom, I think the most reliable research – to your question – was conducted recently by the Grad Nation researchers (report attached) –
p. 46:
Of the 6 states that increased the compulsory school age between 2002 and 2008, two states (Illinois and South Dakota) experienced increases in their graduation rates. Only Nevada experienced a decline.
6 states: Illinois, Indiana, Nebraska, Nevada, New Hampshire, and South Dakota
(Michigan increased in 2009 - not included here)

Perhaps bringing copies of that report to the committee will satisfactorily answer the question. These are very well respected researchers.
What else can I do to help?
Sunny

From: Sunny Deye [mailto:sunny.deye@ncsl.org]
Sent: Tuesday, February 15, 2011 11:41 AM
To: 'Thomas Obermeyer'
Subject: research - compulsory school age

Tom,
Attached are the two reports referred to in the NCSL Dropout task force report. Especially, see p. 46 of the Building a Grad Nation report:

Increasing Compulsory School Age Requirements

In our previous research, students identified "too much freedom" as a key factor that enabled them to drop out of high school, and poor attendance is a strong predictor of dropping out.[36] Most states originally enacted compulsory school attendance laws between 1870 and 1910, a time when fewer than 10 percent of 17-year-olds graduated from high school, due in large part to the fact that a high school education was not a prerequisite to participating in the mainstream workforce.[37] Over the last year, extensive research has been conducted at the state level that highlights the growing gap between the areas where states are experiencing job growth and the educational levels of their populations.[38] Students required to attend high school for an additional year experience a 12 percent increase in earnings. These students are also less likely to report being unemployed, having health problems, being depressed, and working in lower-skilled jobs. They are also more likely to report higher levels of satisfaction with their lives overall.[39] Many states have responded to these issues by raising the compulsory school age to send the message to students that graduating from high school is absolutely essential.

Since 2002, 12 states have raised the compulsory school age from 16 to 17 or 18.[40] Currently, 21 states have a compulsory school age of 18 and 32 states have a compulsory school age of 17 or 18.[41] In some states that have a compulsory school attendance age of 17, like Tennessee and West Virginia,

students must remain in school until they are 18 to keep their driver's license.

A 1991 MIT and Harvard study shows that raising the compulsory school age acts as a constraint on dropping out.[42] **Of the 6 states that increased the compulsory school age between 2002 and 2008, two states (Illinois and South Dakota) experienced increases in their graduation rates. Only Nevada experienced a decline.**

Despite broad movement on raising the compulsory school age, this movement has not been uniformly embraced within the states. Over the last year alone, 13 states have introduced legislation to raise their compulsory school age to 17 or 18 that has stalled or died in committee.[43] Among the states that were unsuccessful in raising the compulsory school age, opposition from home school educators, parents, students, local businesses, and advocacy groups; an inability to determine if an increase in graduation and attendance rates or decrease in dropout rates can be attributed to increasing the compulsory school age; and the fiscal estimate were cited as critical barriers.[44] In some states where officials cited raising the compulsory school age law as a key tool to set clear expectations at the state level and to drive anti-truancy efforts locally, they also indicated that they feared in some cases parents were home schooling their children to get around the compulsory school age and to enable them to enter the workforce full time at an earlier age.

36 Bridgeland, J. M., Dilulio, J.J., & K. B. Morison (2006). The Silent Epidemic: Perspectives of High School Dropouts. Civic Enterprises and Peter D. Hart Research Associates. For the Bill and Melinda Gates Foundation.
37 U.S. Bureau of the Census (2002). Mini-historical statistics: Education summary — enrollment. Accessed at: www.census.gov/statab/hist/HS-20.pdf.
38 Georgetown University Center on Education and the Workforce (2009). Jobs and Education Requirements Through 2018. Washington, D.C.: Georgetown University Center on Education and the Workforce.
39 Oreopoulos, P. (2003) Do Dropouts Dropout Too Soon? International Evidence From Changes in School-Leaving Laws. National Bureau of Education Research Working Paper No. 10155.
40 One state, Minnesota, has lowered its compulsory school age from 18 to 16. Data compiled by the Education Commission of the States.
41 Ibid.
42 Angrist, J.D. & A.B. Krueger (1991). Does Compulsory School Attendance Affect Schooling and Earnings? The Quarterly Journal of Economics, 106(4): 979-1014.
43 Home School Legal Defense Association statistics.
44 See: Maryland State Department of Education (2007). Attending to Learn: The Implications of Raising the Compulsory Age for School Attendance. Final report of the Task Force to Study Raising the Compulsory Public School Attendance Age to 18. Submitted to the Maryland General Assembly and Governor.

Also attached is a Spring 2009 pub I just discovered – it analyzes state data on grad rates /dropout rates for states that have set the compulsory school age to 18. It's a really useful overview of the issue – but it concludes that there's not enough evidence to focus on age 18 as a policy over other dropout prevention efforts.
But – interestingly, it does not compare grad rates from when the policy took effect through now. Also, the data they refer to is 2004-05 NCES data.

Also attached is the final report of the Maryland task on compulsory school age of 18. It recommends raising the age and has lots of useful arguments and data.

I am trying to compile information about grad rates in the 20 states that have set their age to 18; but it's a big job and I'm not sure I can complete it in time for you – the thing is, I need to figure out when each state's compulsory ed age took effect; then look at grad rates from that year to 2006-07 (latest year data is available from NCES) – and I don't know if I can do that all by tomorrow – I'll try!

unny

Attending to Learn
The Implications of Raising the Compulsory Age for School Attendance

Final Report of the Task Force to Study Raising the Compulsory Public School Attendance Age to 18
Submitted to the Maryland General Assembly and Governor
December 1, 2007

Attending to Learn: The Implications of Raising the Compulsory Age for School Attendance

Martin O'Malley
Governor

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Recommendations

The Task Force believes that Maryland must do more to engage children and keep them in school. However, the Task Force agrees that in isolation, a change in the compulsory attendance age will not reduce the dropout rate. The reality is a policy change can require students to attend school, but it can't make them learn. Whether the students benefit from being in school depends largely upon the programs and support they receive there. Accordingly, the Task Force supports the implementation of these recommendations, and the engagement of students at an earlier age, in order to address the needs of children at risk of dropping out of school. In the context of strengthened, expanded supports for the students who would be affected, students who would otherwise drop out, would, of their own volition, choose to remain in school and earn a diploma. Thereby, addressing the issue of legally mandating students to remain in school would become unnecessary.

Recommendation One

Establish a statewide initiative that will:

a) Be flexible while maintaining a consistent approach to meeting the needs of 16- to - 18 year old dropouts and potential dropouts, regardless of where they live or attended school;

b) Expand the data collection work on existing dropout-prevention and re-entry programs that has been done, and design and implement a program to analyze the effectiveness of these dropout-prevention programs;

c) Establish pilot model programs based on proven or promising approaches, and evaluate their success prior to statewide implementation. (Consideration should be given to geographic location, size, and diversity of school systems.);

d) Provide an infrastructure (people, organization, time of day, location, resources, community and family involvement), and identify reallocation of funding and new funding that guarantee effective interagency services and assure increased numbers of students will stay in school and graduate; and,

e) Examine articulation and funding agreements and formulas among agencies and institutions to determine which of these enhance students' opportunities and which serve as barriers.

efforts; provide professional development; and allocate the resources, both financial and otherwise, to ensure that all Maryland students maximize their educational potential.

Rationale

If the compulsory attendance age is raised, Maryland will immediately need to put in place a system of supports and services for students who under the previous requirement would have dropped out, and for those young adults who have already dropped out but will be required to return to school. A statewide framework must be built to accommodate these students; this multi-faceted recommendation can serve as the blueprint.

Before Maryland puts dropout prevention and intervention programs and practices in place, devoting staff, resources, and time, we must know that these programs and practices will be effective.

Task Force research on current practices and programs included collecting data from school systems on existing programs. Members analyzed the evidence shared by districts, and examined the findings of national longitudinal dropout studies. This process revealed weaknesses in data collected on programs across the state. Task Force findings in this area included the following:

- There is a significant discrepancy among districts in what is identified as an alternative education or dropout-prevention program.
- The data evaluating these programs are inconsistent.
- It is difficult, if not impossible, to compare the costs per student of these programs.

Better data collection is essential to confirming programs' success before statewide implementation. It is also essential for reasons of accountability. Although there are programs that address at-risk students, there have been limited studies done on the effectiveness of these programs. This lack of robust data has inhibited the Task Force from making more specific recommendations regarding the designs of ideal dropout-prevention and re-entry programs. Scant data has also constrained this Task Force's analysis of the need for alternative programming, the additional years to educate students, and the associated costs. Before moving forward with costly initiatives, it is imperative that evidence-based decisions be made that support both the need for change, as well as the justification for funding.

A review of promising practices in other states indicated a significant expense (around $200 million dollars per year) to simply raise the compulsory age requirement to 18 under the present school environment and current instructional delivery systems. The additional expenses associated with truly alternative programs—over and above the school systems' commitment to the typical child served—should be based on research that has taken place in Maryland, with Maryland children, ideally in multiple settings. The analysis of these pilot programs would then

inform further discussion of the fiscal support needed for an alternative program to meet the needs of Maryland's students, teachers, businesses, and families.

Recommendation Two

Support and promote the awarding of a High School Diploma by Assessment as a valid credential, and work with the federal government to remove any disincentives for recognizing a high school diploma earned by passing the national GED Tests.

Rationale

The traditional route to the diploma must remain the preferred pathway. However, Maryland must acknowledge that the traditional, four-year high school experience is an unrealistic expectation for some children. Alternatives, including the awarding of a High School Diploma by Assessment through the GED Tests, must be provided, supported, and promoted. Maryland must support and promote alternative pathways for those students for whom it is appropriate. Certainly, these pathways should not be promoted to every child at risk of dropping out.

INCREASE ACCESS TO GED INSTRUCTION AND TESTING

GED instructional programs should be more effectively publicized and more widely available. Schools should be encouraged to distribute accurate information about local GED instructional programs, including the cost of testing, both to students who have already dropped out of school and to students at risk of dropping out. Students also need to know that a High School Diploma by Assessment is a valid credential to enter Maryland community colleges. They also need to know that without a college degree their future income potential is limited compared to that of a college graduate. One opportunity for providing this information is the exit interview that COMAR requires of all students who withdraw from Maryland public schools. In order to implement this recommendation, instructional programs and testing services would need to be expanded. For example, demand for GED instruction exceeds current capacity.

IMPLEMENT THE "GED OPTION" PROGRAM

Maryland students wishing to attempt the GED Tests must first drop out of school to conform to the American Council on Education (ACE) requirement. ACE does offer an alternative for targeted students who remain in school. The GED Option program targets students who are able to complete high school requirements, but who, for a variety of circumstances, are behind in the credits needed to graduate with their class. With the GED Option, the student remains enrolled and attends high school for at least 15 hours of instruction per week. This

instruction includes not only GED preparation, but also workforce development skills and/or career and technology education. As the GED Tests are a valid method of earning a diploma, Maryland should consider implementing the GED Option program, which has been adopted in 11 states, including New York and Virginia. To implement a similar GED Option in Maryland, the State Board of Education would need to amend COMAR to recognize the GED Option program as an approved pathway leading to a Maryland high school diploma.

REMOVE DISINCENTIVES

The GED Tests are a valid route to the diploma and should be promoted as such, regardless of how the federal government categorizes GED Tests under No Child Left Behind (NCLB). Currently, NCLB requires Maryland to count its graduates with a High School Diploma by Assessment as dropouts. As a result, these students negatively affect the school, school system, and state graduation rates, which are used in the determination of Adequate Yearly Progress. There is much at stake here for schools and school systems. Those not making Adequate Yearly Progress are subject to a series of escalating consequences that include corrective actions and complete restructuring of the school or school system. It is easy to see why a school or school system might not promote the GED program as positively or as often as it should. This is a damaging disincentive to meeting students' needs, and it must be eliminated. This Task Force urges the Maryland Congressional delegation to work with the Congress and the President to amend No Child Left Behind to allow students who earn a GED to be counted as high school graduates. Implementing this recommendation would increase Maryland's high school graduates by five percent (based on FY 2006 data).

CHOOSE DIPLOMA PATHS INDIVIDUALLY

Identifying the GED Tests as the most appropriate path for a student to earn a diploma must be done with careful consideration for each student. However, the GED Tests are not appropriate or attainable for every child. Some students, including some English Language Learners and some students with special needs, would not be successful on the GED Tests. Together, parents, school personnel, and the student must review the student's skills, needs, and future goals against all of the diploma routes and choose the best one for the student.

Recommendation Three

Create multiple pathways to the Maryland High School Diploma for students with disabilities and English Language Learners. These diploma pathways should include these options: work study beginning in grade 9; a five-year high school program; and instruction at times outside of the traditional school schedule.

Rationale

Raising the compulsory attendance age alone will not produce more high school graduates. Indeed, whether the compulsory attendance age is raised or not, other actions and new alternatives to help students complete a path to graduation are needed. Particularly in need of alternatives to traditional high school programs are students with disabilities and students with little or no English language skills, referred to as English Language Learners.

Flexible, alternative routes to the Maryland High School Diploma will provide these students additional opportunities to be successful. Allowing five-year high school programs, for example, will allow more time for remediation for students having difficulty passing the High School Assessments. The additional time may also be used to meet the requirements for a Maryland High School Diploma. Another consideration in creating these diploma pathways is the age of English Language Learners at the time of enrollment. For example, an English Language Learner may enroll in high school at age 17 speaking no English. To be successful, some students may need to be enrolled for a period of time past age 18.

An alternative route to the Maryland High School Diploma that offers instruction outside of the traditional school schedule is also essential. It is not unusual for some families to place obligations (e.g., working to support the family or supervising siblings) on students that make it difficult for the students to fully participate in school. A flexible schedule with opportunities for learning in the evening, on the weekend, or during the summer would allow these students to attend school while still fulfilling their familial responsibilities.

Based on student feedback on a Maryland school district survey (Cecil County Public Schools, 2007), a five-year high school program could address the special needs of students at risk by providing:

- Additional help in academic subjects;
- Work-study opportunities that can be built into student schedules beginning at an earlier age; and,
- Additional time to meet graduation requirements, including the High School Assessments.

Alternate formats and creative solutions for instruction may enable students to complete their education. For example, school schedules may use part-time day classes; combine part-time day classes with night school; and/or include work study and technical post-secondary education.

Recommendation Four

The State Board of Education must adopt a definition of alternative education that addresses different modes of instruction and appropriate strategies for current dropouts and for children and young adults at risk of dropping out.

Rationale

Unlike several other states, Maryland has no formal definition of alternative education. This omission must be addressed promptly. Adopting a formal definition in state regulations is necessary: to ensure that alternative education programs deliver instruction that meets content standards; to offer appropriate, targeted courses that enable students to reintegrate into a comprehensive school when ready; to address individual learning styles of students; and generally to meet standards for education as set forth by the Maryland State Board of Education. The Task Force must emphasize that flexible schedules should be considered for these programs to meet the needs of students with personal obligations such as job responsibilities and other family obligations.

A review of the literature and current practices for alternative education programs across the nation revealed common types of program locations and common elements of quality practice and programming, summarized below.

Alternative Education Program Locations

- Separate room or teacher within a comprehensive high school where additional services are provided
- School within a comprehensive high school
- Separate facility

(Source: State of Wisconsin, Department of Public Instruction)

Elements of Quality Practice and Programming

- Low student/teacher ratio
- Accredited
- Authority to grant credentials (High School Diplomas or GED)

- Credit recovery (allowing students the opportunity to make up credits that were lost due to failure)
- Certified teachers
- Flexible scheduling
- Strong relationships with the district office and other high schools
- Private funding and/or public-private partnerships

(Source: State of Wisconsin, Department of Public Instruction)

To support students, alternative education models need to offer a range of services and instruction, including anger management; small group instruction; some individualized instruction; computerized, self-paced instruction; guidance services; and study skills. Strong, consistent and persistent support services are critical to students' success.

In crafting a regulatory definition for alternative programs, the State Board of Education should consider the aforementioned program locations, elements of quality practice and programming, and range of services and instruction. Also important to the process is encouraging and considering the input of stakeholders, such as local school systems, higher education, community organizations, experts in alternative programs, parents, and students.

During the process of developing the alternative program definition, the State Board of Education and/or Maryland State Department of Education should also work to change perceptions of alternative programs. Too often, alternative education programs carry a reputation in their respective communities as programs for "bad kids." This view must be changed as an alternative program infrastructure is put into place. While these programs do serve some students with behavioral problems, they also serve many other students who do not have behavior issues but do require an alternative educational setting in order to be successful. Alternative programs have great potential for helping children achieve success; communities must understand this so they can get involved with and support the school and its students.

Recommendation Five

Should the compulsory age of attendance be raised to 18, Maryland should provide the adequate financial support to raise the age of compulsory attendance to age 18.

Rationale

This Task Force has identified many, but not all, of the costs that would be associated with an increase in the compulsory attendance age. Raising the compulsory attendance age can be done responsibly and effectively only by providing the resources necessary to engage all students at a young age and keep them engaged until they successfully complete high school.

While it is not the job of this Task Force to identify specific funding sources necessary to support an increase in the compulsory attendance age, or otherwise implement these recommendations, students will not benefit from an unfunded mandate. The subcommittee recognized that much more than an infusion of money would be necessary to effect this legislated change should it come to fruition. Preparation time would need to be built into the implementation date to allow systems to hire and professionally develop additional teachers, build additional classrooms, purchase and outfit relocatable classrooms, order needed textbooks and supplies, redraw school boundaries, analyze transportation needs, account for the special needs of the physically and educationally disabled students returning or remaining, and include the appropriate amount of money in the local school boards' funding requests to the local political jurisdictions in time to meet all of the deadlines for adequate consideration in the budgetary process. Public-private partnerships may need to be explored as the State and local school systems attempt to marshal sufficient resources to implement any changes to the compulsory age of attendance.

Recommendation Six

Appoint a group to study Maryland's existing truancy courts, examine their structure, assess their effectiveness, and, if appropriate, make a recommendation for expanding truancy courts statewide.

Rationale

Currently, Maryland lacks an established system of support and consequences for frequently truant students. And while Maryland has established consequences for parents/guardians, they are rarely enforced. Without enforcement in place, the compulsory attendance law is insignificant, and raising the compulsory attendance age will have little or no influence on keeping students in school. Therefore, the State should consider a truancy court system in each county to instill hope, improve student attendance, enhance achievement, and reduce delinquent behavior through a proactive partnership of schools, courts, and families.

Truancy courts currently exist in several Maryland counties, but data on their effectiveness is not known. Truancy courts have been used with strong success in several states, including North Carolina, where a newly developed truancy court has successfully transformed truant elementary and middle school students in two counties into perfect or nearly perfect attendance students. According to Judge Richard Chaney of Durham, North Carolina, only one student failed to graduate high school out of the students who regularly came into his courtroom. In St. Louis County, Missouri, a three-year evaluation of the truancy court showed 60 percent of students significantly improved their attendance rates, reducing absences by an average of 44

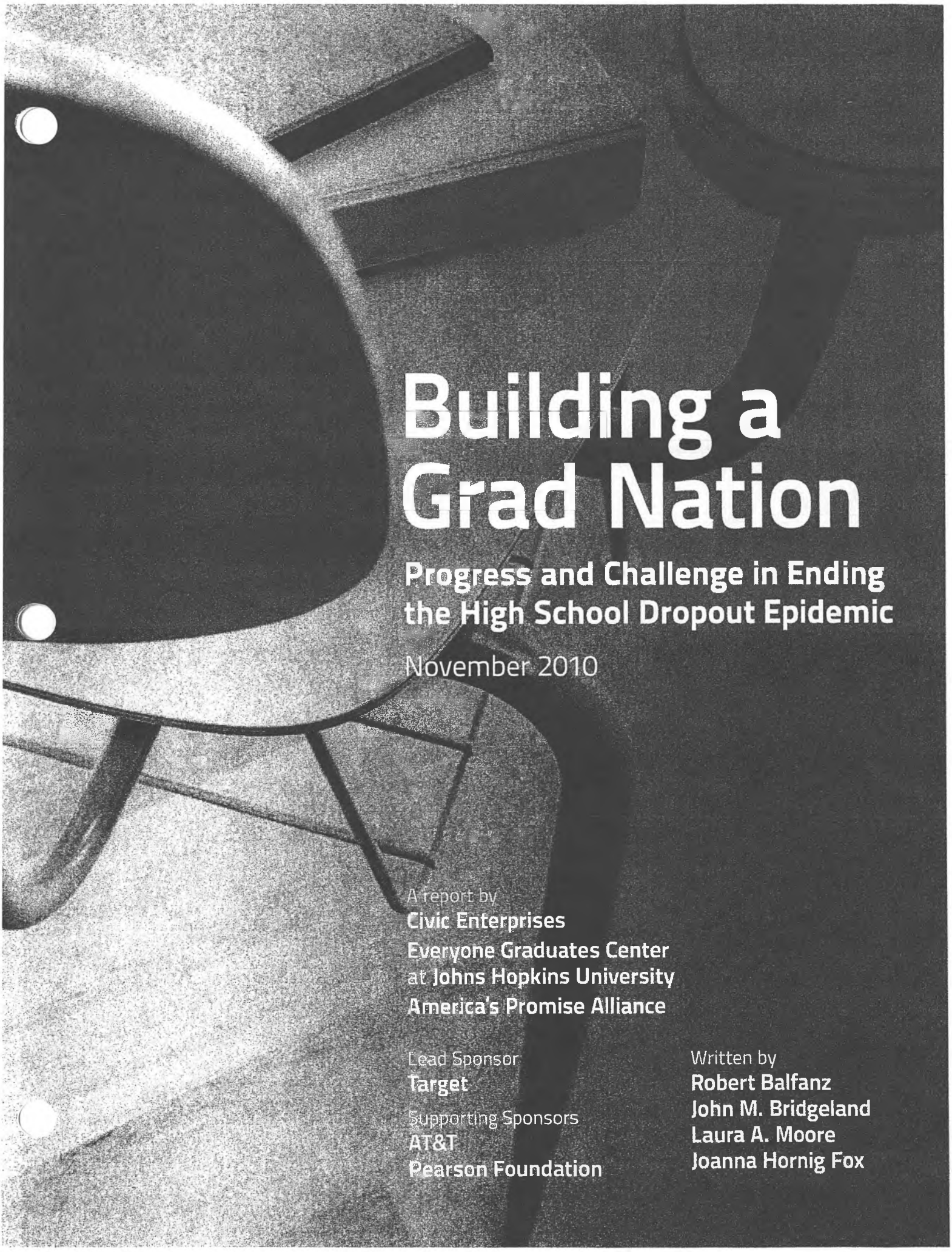
percent (St. Louis County Truancy Court, 2005). Additionally, in Ingham County, Michigan, approximately 63 percent of the 600 students referred to truancy court in the first two years have improved their attendance (Burton, 2003). Dramatic successes have also been found in Delaware. In 2003, 55 percent of the 739 students with cases closed achieved overall compliance with the truancy court; 94 percent of the students achieving full compliance remained in school at the end of the year; 70 percent of all students were still in school at the end of the year; and, 66 percent of all 2002 students involved with the truancy court continued to remain in school more than a year later (State of Delaware Justice of the Peace Court, 2003).

Should truancy courts be established, Maryland should consider a system whereby each truancy court works closely with the local State's Attorneys office, Sheriff's department, Department of Social Services, local leaders, and local boards of education to ensure compliance with compulsory attendance laws.

A statewide truancy court system should consider targeting students who were absent between 10 and 30 times. One judge, volunteer or appointed, per court could handle truancy cases once a week before or after school. The truancy judge would review a student's attendance, behavior, and academic performance. After an accumulation of multiple absences, the student would be placed on probation. If there is no improvement, the student might face community service, juvenile detention, or parental supervision in school.

The court would also intervene with issues underlying a student's truancy, including depression and drug and/or alcohol abuse, and make the appropriate referrals and placements.

Suggestions for keeping students in school through the truancy court system include transportation assistance; parent participation; counseling; parenting classes; support groups; and positive reinforcement, such as praise for small accomplishments and rewards for attendance and compliance with the truancy system.



Building a Grad Nation

Progress and Challenge in Ending the High School Dropout Epidemic

November 2010

A report by
Civic Enterprises
Everyone Graduates Center
at **Johns Hopkins University**
America's Promise Alliance

Lead Sponsor
Target

Supporting Sponsors
AT&T
Pearson Foundation

Written by
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Setting Clear and High Academic and Graduation Standards

Increasing Compulsory School Age Requirements

In our previous research, students identified "too much freedom" as a key factor that enabled them to drop out of high school, and poor attendance is a strong predictor of dropping out.[36] Most states originally enacted compulsory school attendance laws between 1870 and 1910, a time when fewer than 10 percent of 17-year-olds graduated from high school, due in large part to the fact that a high school education was not a prerequisite to participating in the mainstream workforce.[37] Over the last year, extensive research has been conducted at the state level that highlights the growing gap between the areas where states are experiencing job growth and the educational levels of their populations.[38] Students required to attend high school for an additional year experience a 12 percent increase in earnings. These students are also less likely to report being unemployed, having health problems, being depressed, and working in lower-skilled jobs. They are also more likely to report higher levels of satisfaction with their lives overall.[39] Many states have responded to these issues by raising the compulsory school age to send the message to students that graduating from high school is absolutely essential.

Since 2002, 12 states have raised the compulsory school age from 16 to 17 or 18.[40] Currently, 21 states have a compulsory school age of 18 and 32 states have a compulsory school age of 17 or 18.[41] In some states that have a compulsory school attendance age of 17, like Tennessee and West Virginia, students must remain in school until they are 18 to keep their driver's license.

A 1991 MIT and Harvard study shows that raising the compulsory school age acts as a constraint on dropping out.[42] Of the 6 states that increased the compulsory school age between 2002 and 2008, two states (Illinois and South Dakota) experienced increases in their graduation rates. Only Nevada experienced a decline.

Despite broad movement on raising the compulsory school age, this movement has not been uniformly embraced within the states. Over the last year alone, 13 states have introduced legislation to raise their compulsory school age to 17 or 18 that has stalled or died in committee.[43] Among the states that were unsuccessful in raising the compulsory school age, opposition from home school educators, parents, students, local businesses, and advocacy groups; an inability to determine if an increase in graduation and attendance rates or decrease in dropout rates can be attributed to increasing the compulsory school age; and the fiscal estimate were cited as critical barriers.[44] In some states where officials cited raising the compulsory school age law as a key tool to set clear expectations at the state level and to drive anti-truancy efforts locally, they also indicated that they feared in some cases parents were home schooling their children to get around the compulsory school age and to enable them to enter the workforce full time at an earlier age.

Combating Chronic Absenteeism

In the past few years, there has been growing awareness that communities with low graduation rates often have very high rates of chronic absenteeism from the early elementary grades forward. Recently, a number of communities have begun to organize to establish the norm that every student should be in school every day. Both Baltimore and New York City have launched joint efforts involving the school system and city agencies to create multi-pronged efforts to provide the range of supports needed to get more students to attend school on a regular basis. In addition, a new national effort called Attendance Counts has launched a website to spread best practices.[45] The federal government and most states and districts, however, do not track or report chronic absenteeism (commonly defined as missing a month or more of school) at the school or district level, instead focusing on aggregate attendance that can often mask serious chronic absenteeism challenges.

36 Bridgeland, J. M., Dilulio, J.J., & K. B. Morison (2006). The Silent Epidemic: Perspectives of High School Dropouts. Civic Enterprises and Peter D. Hart Research Associates. For the Bill and Melinda Gates Foundation.

37 U.S. Bureau of the Census (2002). Mini-historical statistics: Education summary — enrollment. Accessed at: www.census.gov/statab/hist/HS-20.pdf.

38 Georgetown University Center on Education and the Workforce (2009). Jobs and Education Requirements Through 2018. Washington, D.C.: Georgetown University Center on Education and the Workforce.

39 Oreopoulos, P. (2003) Do Dropouts Dropout Too Soon? International Evidence From Changes in School-Leaving Laws. National Bureau of Education Research Working Paper No. 10155.

40 One state, Minnesota, has lowered its compulsory school age from 18 to 16. Data compiled by the Education Commission of the States.

41 Ibid.

42 Angrist, J.D. & A.B. Krueger (1991). Does Compulsory School Attendance Affect Schooling and Earnings? The Quarterly Journal of Economics, 106(4): 979-1014.

43 Home School Legal Defense Association statistics.

44 See: Maryland State Department of Education (2007). Attending to Learn: The Implications of Raising the Compulsory Age for School Attendance. Final report of the Task Force to Study Raising the Compulsory Public School Attendance Age to 18. Submitted to the Maryland General Assembly and Governor.

45 www.attendancecounts.org

A Path to Graduation for Every Child

State Legislative Roles and Responsibilities

A Report of the NCSL Task Force on School Dropout Prevention and Recovery

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January 2011

3. Task Force Recommendations

The state legislature plays a critical role in raising public awareness about the dropout problem; setting expectations for schools and districts and holding them accountable; and providing the data infrastructure to help schools and districts identify and support struggling students. The following recommendations identify how legislators can be most effective in dropout prevention and recovery efforts.

Create and sustain urgency to improve high school graduation rates

Legislatures can make it a state priority to improve high school graduation rates. Legislatures cannot do this alone, however. We must help organize and participate in powerful partnerships among key stakeholders, including legislators, governors, superintendents, state boards of education, educators, community-based organizations, parents, and business leaders. These stakeholders each play a critical role in developing the many options and solutions necessary to help all kids navigate a path to graduation and beyond.

Creating or participating in a statewide task force, advisory board, commission, office or other entity that can take a long-term view of the state dropout problem indicates bipartisan support, brings statewide visibility to the dropout problem, and raises awareness among the media and constituents. When legislators establish or participate in such a process, we send the message that improving dropout rates is a state legislative priority and that stakeholders have allies in the legislature who can codify their efforts in statute.

States need to set ambitious goals for improving high school graduation rates, and legislatures are well-positioned to ensure that state goals are understood by the public; that progress is accounted for and recognized; and that incentives and resources are available to help schools and districts meet state goals. Publicizing the goal and state progress will help inform citizens, parents and students about the costs and consequences of dropping out, and the many options available to keep kids on the path to graduation.

Task Force Recommendations

- Create and sustain urgency to improve high school graduation rates.
- Insist on high expectations and a rigorous curriculum for all students.
- Provide options and pathways to engage all students.
- Put excellent teachers, principals, and other caring adults in schools.
- Identify and support struggling students.
- Develop dropout recovery programs to reengage out-of-school youth.
- Build capacity to transform or replace low graduation-rate high schools.
- Conduct policy audits, eliminate counterproductive policies and provide incentives for collaboration.
- Hold schools and districts accountable for improving high school graduation rates.

4. Call to Action

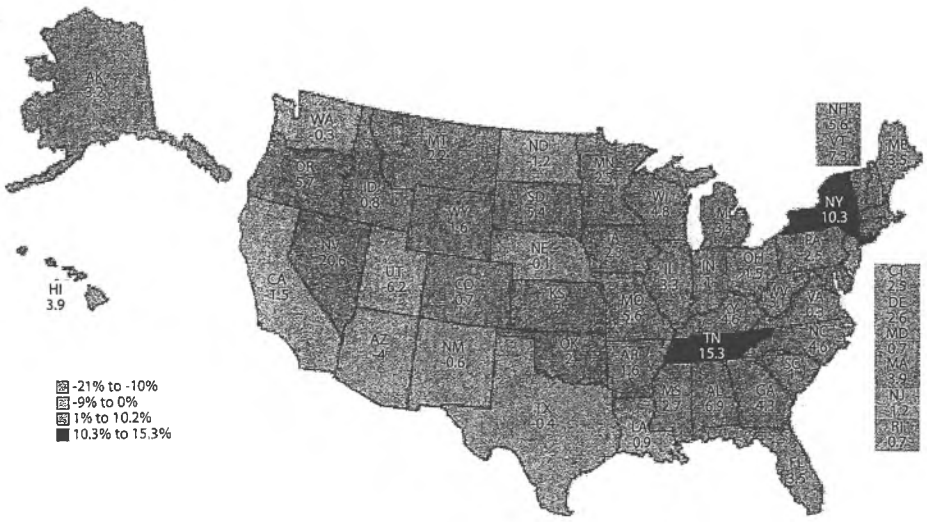
The costs of dropping out are high—to the student; to the states; and to the nation. For students who do not earn their high school diploma, the future is grim. We no longer live in a society where high school dropouts can earn a living wage. Not only do dropouts see a significant decrease in earning power and workforce opportunities, but they also are far more likely to spend their lives periodically unemployed, on government assistance, or cycling in and out of the prison system.[39] Each high school dropout is a loss to our states and communities through costs to society, diminished quality of life, and—most importantly—loss of productive, engaged citizens.

The current economic crisis offers an opportunity to act. The economic downturn has wreaked havoc on state budgets, forcing difficult choices and driving important conversations about state economic priorities, responsibilities and accountability. The current crisis in state budgets is expected to continue for several more years. It provides an opportunity to pare duplicate services; hold agencies accountable for improving results; and find new ways to collaborate, share information, and ensure that state policy environments provide incentives for improving high school graduation rates.

State legislators must be leaders in dropout prevention and recovery and set the expectation that all students will successfully graduate from high school ready for success in college, careers and life. The time is now—we cannot wait until the current economic crisis subsides. We must take advantage of this opportunity to reexamine our expectations, policies and processes to ensure that schools and districts have every incentive and opportunity to help kids navigate a path to graduation and beyond.

This is our responsibility and thus our call to action: We must ensure that graduating every child means graduating every child. The clock is ticking for our children, our states and our nation.

ɟure 7. Percentage Change in Graduation Rates, 2001-2002 to 2007-2008, by State



Note: Data for South Carolina from 2006-2007; 2007-2008 data not available.
Source: U.S. Department of Education National Center for Education Statistics, *Trends in High School Dropout and Completion Rates in the United States: 1972–2008 Compendium Report* (December 2010): Chris Chapman, National Center for Education Statistics; Jennifer Laird, MPR Associates Inc.; Angelina KewalRamani, Education Statistics Services Institute American Institutes for Research.

States Making Great Gains

The education recommendations, policy guidelines and legislation that state lawmakers have put in place during the past decade are playing a vital role in decreasing the number of students who drop out of high school in Tennessee and Alabama.

A new report shows positive signs that states are making progress in reducing the number of students who drop out of high school. The report—released in November 2010 by the America's Promise Alliance, Civic Enterprises and Johns Hopkins University's Everyone Graduates Center—highlights successful case studies in Tennessee and Alabama. It acknowledges the role of state legislators in creating policy environments that have helped increase high school graduation rates, including strong leadership with clear graduation rate goals; collaboration among many sectors that is guided by data; commitment to innovation and continuous improvement; technical assistance for evidence-based solutions; and high expectations, better policies and more support for students.

Tennessee: From 2002 to 2008, Tennessee led the nation in increasing its high school graduation rate from just under 60 percent to 75 percent. Researchers credit a statewide approach that included collaboration and coordination among stakeholders; setting clear and high statewide expectations; effectively using data to improve teaching and learning; and improving technical assistance to struggling schools.

Alabama: Between 2002 and 2008, Alabama's high school graduation rate increased from 62 percent to 69 percent. Researchers credit leadership from state policymakers that made dropout prevention and increased graduation rates a statewide priority; set clear and high statewide expectations and standards for students; built capacity for comprehensive school improvement, including state-sponsored professional development and training; and provided intensive supports to students to finish high school.

Source: Robert Balfanz, John M. Bridgeland, Laura A. Moore and Joanna Hornig Fox, *Building a Grad Nation: Progress and Challenge in Ending the High School Dropout Epidemic* (Washington, D.C.: Civic Enterprises, Everyone Graduates Center at Johns Hopkins University and America's Promise Alliance, November 2010); http://www.every1graduates.org/gradnation.html.

Education Program

Compulsory Education

Overview

Legislation & Laws

News Articles

Overview

More than 150 years have passed since Horace Mann helped Massachusetts establish a statewide system of education that eventually led to the requirement that all children attend public school. In 1852, Massachusetts became the first state to pass compulsory school attendance laws, and by 1918, all states required children to receive an education.

Compulsory Education Requirements

Today, every state and territory requires children to enroll in public or private education or to be home-schooled. More than half—32 states—require students to begin their education by age 6. Some states' set their age requirements as low as age 5 and as high as age 8. All children are required to continue their education into their high school years, with 26 states setting the cutoff age at 16. The remaining states require students to stay in school through age 17 or 18.

Compulsory education laws vary greatly from state to state. While some states use a student's date of birth to determine the beginning and ending dates for compulsory education, other states require a student to begin school if he or she will turn 6 during the school year and require a student to remain in school until completion of the school year in which he or she turns 17. Four states—Arizona, Montana, Vermont and Wyoming—require students to remain in school through a specified grade. Most states allow parents to petition their local school board or principal for a waiver of these requirements under certain circumstances, such as enrollment in a vocational education program or an institution of higher education or early completion of required coursework.

Kindergarten Enrollment

States and territories also set a minimum age for children to enroll in kindergarten, which is typically one or two years earlier than the compulsory education age. Every state or territory with a policy on this issue has established age 5 as the minimum age. However, six states—Colorado, Massachusetts, New Hampshire, New Jersey, New York and Pennsylvania—leave this decision up to local education agencies. In addition to the age requirement, each state also sets a date by which students must have attained the specified age in order to attend kindergarten. The cutoff dates range from August 1 in Indiana and Missouri to Jan. 1 in Connecticut and Vermont.

The School Age Debate

School attendance ages are often controversial. Many early childhood experts argue that if policymakers establish early cutoff dates for kindergarten, they should also establish aggressive school readiness programs to ensure students' success. Others argue that because there has been an increased emphasis on early childhood development and school readiness, we should continue to challenge children at a younger age. Some experts assert that age may be an arbitrary indicator or measure of a child's ability to succeed in school and should not be used at all. Others point out that when a state considers legislation, such as Nebraska, allowing younger children to enter kindergarten, policymakers must understand that there is likely to be a large increase in the number of children entering kindergarten during the first year of the new policy, thereby straining already tight school district budgets and increasing the need for teachers.

Featured Links

- Education Bill Tracking Database
- American Association of School Administrators
- Council of Chief State School Officers
- Education Commission of the States
- Education Week
- National Association of Elementary School Principals
- National Association of Secondary School Principals
- National Association of State Boards of Education
- National School Boards Association
- National Center for School Engagement
- Contact NCSL Staff

The age through which students must attend school can also be controversial. To encourage more students to attend institutions of higher education and to decrease dropout rates, juvenile crime and teen pregnancy, some state legislatures have increased the school attendance requirement to age 17 or 18. Opponents are concerned about forcing students to be in the classroom against their will. They say that these students may become disruptive and may require teachers and principals to spend more time and resources disciplining such students for disruptive or violent behavior and truancy. They also point out that there probably will be a greater need for funding, teachers and classrooms for alternative education.

State Action

Many state legislatures continue to debate school attendance policies. During the 2005 legislative session, Indiana changed their kindergarten enrollment date from July 1st to August 1st. During the 2004 legislative session, at least seven states enacted legislation regarding compulsory education. Alaska extended the required school age for a child who is six years of age on or before Sept. 1 following the beginning of the school year, and who is under the age of 20 and has not completed the 12th grade. Illinois increased the compulsory school age from 16 to 17 years of age, with certain exceptions. Kansas and Kentucky will both, under specific circumstances, grant exemptions from compulsory attendance. Nebraska changed the mandatory ages for compulsory education beginning in the 2005-06 school year to age of 6 by Jan. 1 of the current school year through the age of 17, with certain exceptions. In New York, local school districts will have the power to require minors from 16 to 17 years of age to attend full time day instruction. Finally, Virginia strengthened the mechanisms for enforcement of the compulsory school attendance law.

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Education Home Page

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StateNotes

Attendance

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Compulsory School Age Requirements

Updated by Melodye Bush

Last Updated June 2010

Summary

Compulsory school attendance refers to the minimum and maximum age required by each state in which a student must be enrolled in and attending public school or some equivalent education program defined by the law.

The vast majority of states include an added clause providing for pupils to be released from compulsory attendance requirements upon graduation of high school, regardless of their age.

Arizona, **Vermont** and **Wyoming** all exempt children from compulsory attendance requirements upon completion of the 10th grade.

Five states – Virginia, South Dakota, Nevada, Maryland **and** Connecticut – **allow the minimum compulsory age to be extended by at least one year if the parent(s) obtain a waiver from their assigned school.**

Nearly half of all states allow children ranging from age 14 to 18 to be exempt from the compulsory attendance requirement if they meet one or more of the following stipulations: are employed, have a physical or mental condition that makes the child's attendance infeasible, have passed the 8th-grade level, have their parents' permission, have the permission of the district court or the local school board, meet the requirements for an exit interview, or have arranged alternative education such as vocational or technical school. Endnotes are provided for Indiana, Louisiana, Massachusetts and Virginia as examples of such legislation.

Part I: Age Ranges

Minimum compulsory age and corresponding number of states:

- Age 5: 8 states and the District of Columbia, Puerto Rico and Virgin Islands
- Age 6: 24 states and American Samoa
- Age 7: 16 states
- Age 8: 2 states

Maximum compulsory age and corresponding number of states:

- Age 16: 19 states and the Virgin Islands
- Age 17: 11 states
- Age 18: 20 states and the District of Columbia, American Samoa, and Puerto Rico

State/Territory	Requirement	Citation
(Shaded line indicates change)		
Alabama	7-17	ALA. CODE § 16-28-3
Alaska	7-16	ALASKA STAT. 14.30.010
Arizona	6-16 or completion of grade 10	ARIZ. REV. STAT. § 15-802, §15-802-D-2
Arkansas[1]	5-17	ARK. STAT. ANN. § 6-18-201
California	6-18	CAL. EDUC. CODE § 48200
Colorado	6-17	COLO. REV. STAT. § 22-33-104
Connecticut[2]	5-18	CONN. GEN. STAT. § 10-184
Delaware	5-16	14 DEL. CODE ANN. §2702
District of Columbia	5-18	D.C. CODE ANN. § 38-202
Florida	6-16	FLA. STAT. § 1003.21
Georgia	6-16	GA. CODE ANN. § 20-2-690.1
Hawaii	6-18	HAW. REV. STAT. § 302A-1132
Idaho	7-16	IDAHO CODE § 33-202
Illinois	7-17	105 ILL. COMP. STAT. ANN. 5/26-1
Indiana[3]	7-18	IND. CODE ANN. § 20-33-2-6; § 22-33-2-9(B)
Iowa	6-16	IOWA CODE §299.1A
Kansas	7-18	KAN. STAT. ANN. § 72-1111
Kentucky	6-16	KY. REV. STAT. ANN. § 159.010
Louisiana[4]	7-18	LA. REV. STAT. ANN. § 17:221
Maine	7-17	ME. REV. STAT. ANN. § TIT. 20A, § 3271
Maryland	5-16	MD. CODE ANN., EDUC. § 7-301
Massachusetts[5]	6-16	MASS. REGS. CODE TIT. 603. § 8.02 MASS. GEN. LAWS ANN. CH. 76 § 1
Michigan	6-18	MICH. STAT. ANN. § 380.1561
Minnesota	7-16	MINN. STAT. § 120A.22
Mississippi	6-17	MISS. CODE ANN. § 37-13-91
Missouri	7-17	MO. REV. STAT. § 167.031
Montana[6]	7-16	MONT. CODE ANN. § 20-5-102
Nebraska	6-18	NEB. REV. STAT. ANN. § 79-201
Nevada	7-18	NEV. REV. STAT. ANN. § 392.040
New Hampshire[7]	6-18 (effective 7/01/09)	N.H. REV. STAT. ANN. § 193.1
New Jersey	6-16	N.J. REV. STAT. §18A:38-25
New Mexico	5-18	N.M. STAT. ANN. § 22-8-2; § 22-12-2; § 22-8-2 m(3)
New York[8]	6-16	N.Y. EDUC. LAW § 3205
North Carolina	7-16	N.C. GEN. STAT. § 115C-378
North Dakota	7-16	N.D. CENT. CODE § 15.1-20-01
Ohio	6-18	OHIO REV. CODE ANN. § 3321.01
Oklahoma	5-18	70 OKLA. STAT. TIT, 70, § 10-105
Oregon	7-18	OR. REV. STAT. § 339.010
Pennsylvania	8-17	PA. STAT. ANN. § 13-1326
Rhode Island	6-16	R.I. GEN. LAWS § 16-19-1
South Carolina[9]	5-17	S.C. CODE ANN. § 59-65-10
South Dakota	6-18 (effective 7/01/09)	S.D. CODIFIED LAWS § 13-27-1
Tennessee[10]	6-17	TENN. CODE ANN. § 49-6-3001 (C)(1)
Texas[11]	6-18	TEX. EDUC. CODE ANN. § 25.085
Utah	6-18	UTAH CODE ANN. § 53A-11-101
Vermont	6-16 or completion of grade 10	VT. STAT. ANN. TIT. 16 § 1121
Virginia[12]	5-18	VA. CODE ANN. § 22.1-254
Washington	8-18	WASH. REV. CODE § 28A.225.010
West Virginia	6-17	W. VA. CODE § 18-8-1
Wisconsin	6-18	WIS. STAT. § 118.15
Wyoming	7-16 or completion of grade 10	WYO. STAT. ANN. § 21-4-102

State/Territory	Requirement	Citation
(Shaded line indicates change)		
Am. Samoa	6-18	ASCA 16-3-16.0302
Puerto Rico	5-18	3 P.R. LAWS ANN. § 143B
Virgin Islands	5-16	V.I. CODE ANN. TIT. 17, § 82

Notes:

[1] Arkansas: "Any parent, guardian, or other person residing within the state and having custody or charge of any child may elect for the child not to attend kindergarten if the child will not be age six on September 15 of that particular school year."

[2] Connecticut: "The parent or person having control of a child five years of age shall have the option of not sending the child to school until the child is six years of age and the parent or person having control of a child six years of age shall have the option of not sending the child to school until the child is seven years of age.

[3] Indiana: An individual is required to stay in school until he or she: graduates; is between 16 and 18 and meets the requirements for an exit interview; or reaches at least 18 years of age. Withdrawal before 18 requires parent/guardian's and principal's written permission.

[4] Louisiana: "A child between the ages of seventeen and eighteen may withdraw from school prior to graduation if both the following circumstances exist: (a) The written consent of his parents, tutor, or legal guardian. (b) An exit interview is conducted where the student and his parent, tutor, or legal guardian provide written acknowledgment that withdrawal from school shall likely reduce the student's future earning potential and increase the student's likelihood of being unemployed in the future. During such exit interview, a student who is withdrawing from school shall be given information that has been prepared and supplied by the Louisiana Workforce Commission regarding available training and employment opportunity programs, provided such information is available."

[5] Massachusetts: "Every child between the minimum and maximum ages established for school attendance by the board of education, except a child between fourteen and sixteen who meets the requirements for the completion of the sixth grade of the public school as established by said board and who holds a permit for employment in private domestic service or service on a farm, under section eighty-six of chapter one hundred and forty-nine, and is regularly employed thereunder for at least six hours per day, or a child between fourteen and sixteen who meets said requirements and has the written permission of the superintendent of schools of the town where he resides to engage in non-wage-earning employment at home, or a child over fourteen who holds a permit for employment in a cooperating employment, as provided in said section eighty-six, shall, subject to section fifteen, attend a public day school in said town, or some other day school approved by the school committee, during the number of days required by the board of education in each school year, unless the child attends school in another town, for said number of days, under sections six to twelve, inclusive, or attends an experimental school project established under an experimental school plan, as provided in section one G of chapter fifteen, but such attendance shall not be required of a child whose physical or mental condition is such as to render attendance inexpedient or impracticable subject to the provisions of section three of chapter seventy-one B or of a child granted an employment permit by the superintendent of schools when such superintendent determines that the welfare of such child will be better served through the granting of such permit, or of a child who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee."

[6] Montana: requires that a child shall remain in school until the latter of either the child's 16th birthday or the date of completion of the work of the eighth grade.

[7] New Hampshire: The superintendent, may grant waivers upon proof that the pupil is 16 years of age or older and has an alternative learning plan for obtaining either a high school diploma or its equivalent. This law takes effect July 1st, 2009.

[8] New York: Both New York City and Buffalo require minors to attend school from the age of 6 until the age of 17. Each district in the state is authorized to require minors between 16 and 17 who are not employed to attend school. The board of education of the Syracuse city school district is authorized to require minors who are five years of age on or before December first to attend kindergarten instruction.

[9] South Carolina: In South Carolina, kindergarten is mandatory. However, state statutes permit parental waiver for kindergarten at age five.

[10] Tennessee: "A parent or guardian who believes that such parent's or guardian's child is not ready to attend school at the designated age of mandatory attendance may make application to the principal of the public school which the child would attend for a one semester or one year deferral in required attendance.

[11] Texas: School districts may require persons who voluntarily enroll in school or voluntarily attend school after their 18th birthday to attend school until the end of the school year.
[12] Virginia: "For a student who is at least 16 years of age, there shall be a meeting of the student, the student's parents, and the principal or his designee of the school in which the student is enrolled in which an individual student alternative education plan shall be developed in conformity with guidelines prescribed by the Board..."

Part II: Statutory Excerpts

Alabama – "Every child between the ages of **7** and **16** . . . ."

Alaska – "Every child between **7** and **16** years of age . . . ."

American Samoa – " . . . the age of **six** through **eighteen** . . . ."

Arizona – "Every child between the ages of **6** and **16** years . . ." or " . . . has completed the high school course of study necessary for completion of grade ten as prescribed by the State Board of Education . . ."

Arkansas – ". . . age **5** through **17** years on or before September 15th of that year...."

California – "Each person between the ages of **6** and **18** . . . ."

Colorado – "Every child who has attained the age of **6** years on or before August 1st of each year and is under the age of **17** years . . . ."

Connecticut – ". . . a child **five** years of age and over and under **eighteen** years of age . . ."

Delaware – ". . . a child between **5** years of age and **16** years of age . . . ."

District of Columbia – ". . . a minor who has reached the age of **5** years or will become **5** years of age on or before December 31st of the current school year . . . until the minor reaches the age of **18** years."

Florida – "All children who have attained the age of **6** years or who will have attained the age of **6** years by February 1 of any school year or who are older than **6** years of age but who have not attained the age of **16** years . . . ."

Georgia – ". . . between their **sixth** and **sixteenth** birthdays . . . ."

Hawaii – ". . . all children who will have arrived at the age of **6** years, and who will not have arrived at the age of **18** years, by January 1 of any school year . . . ."

Idaho – ". . . any child resident in this state who has attained the age of **7** years at the time of commencement of school in his district, but **not the age of 16** years . . . ."

Illinois - ". . . any child between the ages of **7** and **17** years . . . ."

Indiana – ". . . the individual becomes **7** years of age until . . . reaches at least **16** years of age but who is less than **18** years of age and the requirements under subsection (j) concerning an exit interview are met enabling the individual to withdraw from school before graduation; or . . . the individual reaches at least **18** years of age . . . ."

Iowa – "A child who has reached the age of **6** and is under **16** years of age by September 15 . . . ."

Kansas – ". . . any child who has reached the age of **7** years and is under the age of **18** years . . . ."

Kentucky – ". . . any child between the ages of **6** and **16** . . . A child's age is between **6** and **16** when the child has reached his **6**th birthday and has not passed his **16**th birthday. . . ."

Louisiana – ". . . from that child's **seventh** birthday until his **eighteenth** birthday . . . ."

Maine – "Persons . . . who are at **7** and under **17** years of age . . . ."

Maryland – ". . . each child who . . . is **5** years old or older and under **16** . . . ."

Massachusetts – "Each child must attend school beginning in September of the calendar year in which he or she attains the age of **six**." (Language for the maximum age found in MASS. GEN. LAWS ANN. 76 § 1.)

Michigan – ". . . a child from the age of **6** to the child's **16**th birthday . . . ."

Minnesota – ". . . every child between **7** and **16** years of age...A parent may withdraw a child under the age of 7 from enrollment at any time."

Mississippi – ". . . a child who has attained or will attain the age of **6** years on or before September 1 of the calendar year and who has not attained the age of **17** years on or before September 1 of the calendar year...and any child who has attained or will attain the age of 5 years on or before September 1st and has enrolled in a full-day public school program."

Missouri – ". . . a child between the ages of **7** and the compulsory attendance age for the district...Any parent, guardian or other person who enrolls a child between the ages of 5-7 years in a public school program of academic instruction shall cause such a child to attend the academic program on a regular basis." The school board of a metropolitan school district ". . .may adopt a resolution to establish a compulsory attendance age of **17** to take effect no later than the school year next following the school year during which the resolution is adopted." In all other cases, compulsory attendance shall mean "Seventeen years of age or having successfully completed sixteen credits towards high school graduation. The school board of a metropolitan school district for which the compulsory attendance age is 17 years may adopt a resolution to lower the compulsory attendance age to sixteen years; provided that such resolution shall take effect no earlier than the school year next following the school year during which the resolution is adopted. "

Montana – ". . . any child who is **7** years of age or older prior to the first day of school in any school fiscal year . . . until . . . the child's **16**th birthday . . . ."

Nebraska – ". . . a child is of mandatory attendance age if the child (i) will reach **six** years of age prior to January 1 of the then-current school year. . . .and (iii) **has not reached eighteen** years of age."

Nevada – ". . . any child between the ages of **7** and **18** years..."

New Hampshire – ". . . any child at least **6** years of age and under **18** years of age . . . ."

New Jersey – ". . . a child between the ages of **6** and **16** years . . . ."

New Mexico – ". . . *is at least five years of age prior to 12:01 a.m. on September 1 of the school year;* . . . until the school age-person is at least 18 years of age unless that person has graduated from high school or received a general educational development certificate."

New York – ". . . each minor from **6** to **16** years of age . . . ."

North Carolina – ". . . a child between the ages of **7** and **16** years . . . ."

North Dakota – ". . . child of an age of **7** years to **16** years. . ..and if a person enrolls a child of age 6 in a public school, the person shall ensure that the child is in attendance for the entire school year."

Ohio – "A child between **6** and **18** years of age is 'of compulsory age'..."

Oklahoma – ". . . a child who is over the age of **5** years, and under the age of **18** years . . . ."

Oregon – ". . . all children between the ages of **7** and **18** years who has not completed the 12th grade. . ."

Pennsylvania – ". . . not be later than at the age of **8** years, until the age of **17** years."

Puerto Rico – ". . . all children between the ages of five (**5**) and eighteen (**18**) . . . ."

Rhode Island – "Every child who has completed or will have completed **6** years of life on or before September 1st of any school year and has not completed **16** years of life . . . ."

South Carolina – ". . . the child or ward is **5** years of age before September first until the child or ward attains his **17**th birthday . . . ."

South Dakota – ". . . a child who is **6** years old by the first day of September and who has not exceeded the age of 18..."

Tennessee – ". . . any child or children between **six** years of age and **seventeen** years of age. . . ."

Texas – ". . . a child who is at least **6** years of age . . . and who has completed the academic year in which the child's **18**th birthday occurred . . . ."

Utah – ". . . a minor between **6** and **18** years of age . . . ."

Vermont – ". . . a child between the ages of **six** and **16** years . . ." or " . . . has completed tenth grade . . . " or " . . . is excused by the superintendent or a majority of the school directors . . . ."

Virgin Islands – "All children shall commence their school education . . . in the calendar year in which they reach their **5**th birthday . . . until the expiration of the school year nearest their **16**th birthday . . . ."

Virginia – ". . . any child who will have reached the **fifth** birthday on or before September 30 of any school year and who has not passed the **eighteenth** birthday . . . ."

Washington – ". . . any child **8** years of age and under **18** years of age . . . ."

West Virginia – "Compulsory school attendance shall begin with the school year in which the **6**th birthday is reached prior to the first day of September of such year . . . and continue to the **16**th birthday."

Wisconsin – ". . . a child who is between the ages of **6** and **18** years old . . . ."

Wyoming – " . . . a child . . . whose **7**th birthday falls on or before September 15 of any year and who has not attained his **16**th birthday . . ." or " . . . completed the tenth grade . . . . "

Recent updates to this ECS StateNote have been made by Melodye Bush, Kyle Zinth, and Michael Colasanti.

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Employment Related Provisions in State Compulsory School Attendance Laws - January 1, 2009

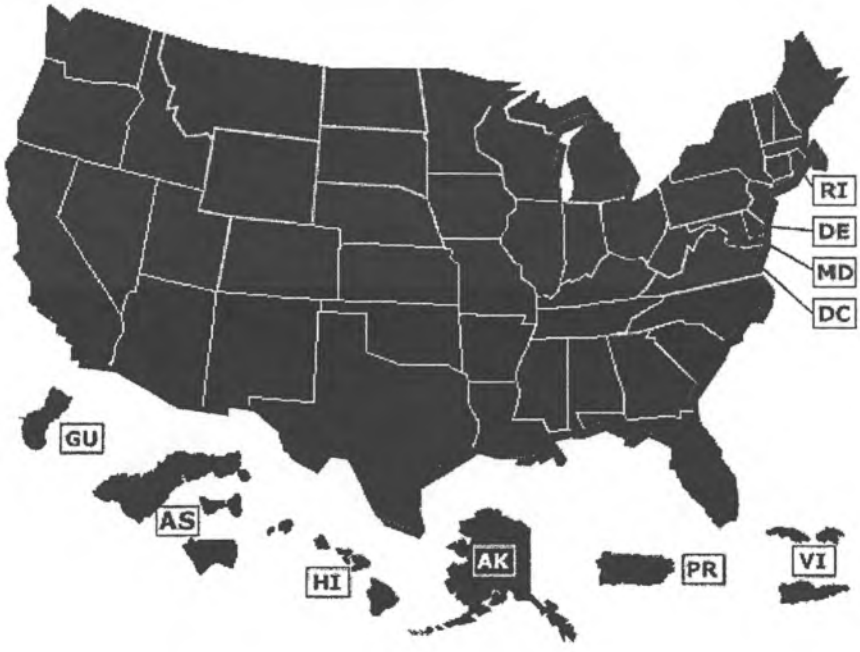

Table of Employment Related Provisions in State Compulsory School Attendance Laws By State

State	Age of Required School Attendance		Exemptions 1/ Employed		High School Graduate
	from	to	Age	Completion of Grade	
Alabama	7	16	legally and regularly employed under child labor law.	---	X
	3	21	permitted for special education students.		
Alaska	7	16	---	---	X
			14 with parental		

Arizona	6	16	consent and gainfully employed.	---	---
Arkansas	5	17 must complete school year.	---	---	X
California	6	18	---	---	X
Colorado	7	16	has current age and school certificate or work permit.	---	X
Connecticut	5	18	16 with parental consent.	---	---
Delaware	5	16	---	---	---
District of Columbia	5	18	children who are age 5 by September 30 are required to be enrolled in kindergarten.	---	---
Florida	6	17	may terminate attended at 16 with parental consent.	---	---
Georgia	6	16	---	---	X
Hawaii	6	18	15	---	X
Idaho	7	16	---	---	---
Illinois	7	17	employed and excused by school official.	---	---
Indiana	7	18	16 with consent of parent and principal. 14 if a parent agrees and State Labor bureau issues a certificate. must go back to school within 5 days of termination of employment for which certificate was issued.	---	X
Iowa	6	16	---	---	X
Kansas	7	18	17 or 16 with parental consent.	---	---
Kentucky	6	16	---	---	X
Louisiana	7	18 or 17 with parental consent.	---	---	X
Maine	7	17	15 or	9	X
Maryland	5	16	---	---	---
Massachusetts	6	16	14	---	---
Michigan	6	16	---	---	---
Minnesota	7	16	---	---	X

Mississippi	6	17	5 years of age if in public kindergarten.	---	---
Missouri	7	16	14	---	---
Montana	7	16 or completion of 8th grade, whichever is later.	---	---	---
Nebraska	7	18	14 and16 with parental consent; special legislation for home schooling.	8 ---	X
Nevada	7	upper age limit has been changed to 18 unless the child has graduated from high school.	14 and excused by board of trustees. 14 if work is necessary for own or parents' support.	8 ---	X
New Hampshire	6	16 presently; however, effective July 2009, upper age limit will change to 18 or the student must have received diploma or qualifies for exception. With passage of NH House Bill 927, all districts are making plans to offer kindergarten.	---	---	---
New Jersey	6	16	---	---	---
New Mexico	5, or 8 if parents and school board agree	effective July 1, 2007, neither school districts or state chartered school districts shall excuse a student from attending school except as provided by law or for parent-authorized medical reasons.	---	---	X
New York	6	17 in cities with 4,500 or more population and union-free school districts, otherwise 16 if approved by local school board.	---	---	X
North Carolina	7	16	---	---	---
North Dakota	7	16	necessary to support of family.	---	X

Ohio	6	18	16 with parents' and superintendents permission.	---	X
Oklahoma	5	18 or 16 if excused by written joint agreement.	---	---	X
Oregon	7	18 or excused by district school board; 16 with consent of school administration and parent; 21 for a child with a disability.	16	---	X
Pennsylvania	8	17	16 if regularly engaged in employment with a certificate. 15 in farm work or domestic service in private home with permit. Or, 14 employed as above if completed elementary school with permit recommended by district superintendent of schools or principal of private school.	---	X
Rhode Island 2	6	18	16 with written parental consent. Dropout Prevention Act of 2007.	---	---
South Carolina	5	17	16 further attendance is determined by court to be disruptive, unproductive or not in best interest of child.	8th grade completed and employment is necessary for maintenance of home.	X
South Dakota	6	16 or completion of 8th grade if member of certain religious organizations. effective July 1, 2009, the upper limit of the compulsory age law changes to	---	---	---

		18.			
Tennessee	6	18th birthday.	---	local exemptions at 17th birthday for discipline problems.	X
Texas	6	18; person 18 years of age may enroll but failure to attend can result in permanent revocation if 5 or more unexcused absences occur in a semester. Students suspected of violating school attendance laws when apprehended must be taken into custody and delivered to their school campus.	---	---	---
Utah	6	18	16 and 8th grade completed. home schooled minors has exempt from attendance.	8th for employment purposes.	X
Vermont	6	16	15 and completed 6th grade and services needed for support of family.	---	---
Virginia	5	18	exempt any pupil with parent's consent along with that of principal or superintendent or a court which believes the minor cannot benefit from education at school.	---	X
Washington	8	18 16 and parent agrees that child should not be required to attend, or child is emancipated, or child has received certificate of competence.	16	---	X and age 16
West Virginia	6	16	---	---	X
Wisconsin	6	18	---	---	X

Wyoming	7	16	---	---	---

1 Nearly all States exempt those whose physical or mental condition precludes attendance. Other exemptions not directly related to employment include those because of distance from school or school transportation; expulsion, suspension or determined to be disruptive; marriage; excused by court or judge; and receiving religious education.

2 The Dropout Prevention Act is a comprehensive program to have all the schools within the state make an attempt to keep students in school. There were no changes to the age limits for school attendance, but the establishment of a state-wide program is a major effort to prevent students from leaving school early - for any reason.

Prepared By:

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Quick Stats Fact Sheet

High School Dropout: A Quick Stats Fact Sheet

By Maggie Monrad, National High School Center at AIR

Each year almost one-third of public high school students fail to graduate from high school.[1] The high school dropout problem is a crisis for the United States, in part because it impacts not only individuals and their education, but also because the economic and social costs are so dramatic. Globally, the United States ranks seventeenth in high school graduation rates and fourteenth in college graduation rates among developed nations.[2] Domestically, the nation and its communities suffer from a lack of productive workers and higher costs associated with incarceration, health care, and other social services.[3] As the 21st century United States moves towards an increasingly global economy, more individuals are discovering that higher levels of education are critical to their own and their nation's ability to compete and thrive – in fact, about 90 percent of the fastest growing jobs will require some postsecondary education.[4] Understanding the magnitude of the dropout problem and the forces that impact dropout rates is critically important to developing dropout prevention strategies.

Who drops out?

- Secretary of Education Margaret Spellings' testimony to the U.S. House of Representatives Appropriations Subcommittee on Labor, HHS, and Education estimated that approximately one million students drop out every year.[5]
- High school dropouts are more likely to be unemployed, earn lower wages, have higher rates of public assistance, are more likely to be single parents, and have children at a younger age.[6]
- Every school day 7,000 U.S. students leave high school never to return.[7] In 2004, approximately 3.8 million 16- through 24- year olds were not enrolled in high school and had not earned a high school diploma or alternative credential, such as a GED.[8]
- Based on calculations per school day (180 days of school, seven hours each day), one high school student drops out every nine seconds.[9]
- The dropout rate for students with emotional/behavioral disabilities is approximately twice that of general education students.[10]
- Research has confirmed that the lowest-performing readers are most at risk of dropping out of high school. Those achieving in the lowest quartile are 3.5 times more likely to drop out than students in the next highest quarter of academic achievement, and 20 times more likely to drop out than top-performing students.[11]

Race/Ethnicity/Socioeconomic Status

- Male students are consistently eight percent less likely to graduate than female students, and the gap is as large as 14 percent between male and female African-American students.[12]

- Among minorities, only about 52 percent of Hispanic students and 56 percent of African-American students will graduate in four years, compared with 78 percent of white students.[13]

- High school students from low-income families (the lowest 20 percent) were six times more likely to drop out than students from higher income families. Ultimately, about one half of all dropouts never receive a high school credential.[14]

Students with Disabilities Aged 14 and Older Who Dropped Out, by Race/Ethnicity

Race/Ethnicity	Percent of Group who Dropped Out
American Indian/Alaska Native	52.2%
Black	44.5%
Hispanic	43.5%
White	33.9%
Asian/Pacific Islander	28.0%

Source: U.S. Department of Education, Office of Special Education Programs, Data Analysis System (DANS), 2003.These data are for the 50 states, DC, Puerto Rico and the four outlying areas. This is based on a cumulative 12-month count.

Impact: Crime

- Estimates indicate that approximately 30 percent of federal inmates, 40 percent of state prison inmates, and 50 percent of persons on death row are high school non-completers. Moreover, non-completers are 3.5 times more likely than high school completers to be imprisoned at some point during their lifetime.[15]

- Raising the high school completion rate one percent for all men ages 20- through 60- would save the US $1.4 billion annually in crime related costs.[16] Each class of high school dropouts costs the U.S. economy more than $8 billion in incarceration expenses and lost wages *per year*.[17] If the male graduation rate was increased by only five percent, the U.S. could save $7.7 billion a year through reducing crime related costs and increasing earnings.[18]

Impact: Economy

- A single 18-year-old dropout earns $260,000 less over a lifetime and contributes $60,000 less in federal and state income taxes. Combined income and tax losses for one cohort of 18-year-olds who drop out is $192 billion which is 1.6 percent of the GDP.[19] America loses more than $26 billion in federal and state income taxes each year from the 23 million high school dropouts aged 18 to 67.[20]

- Almost 1.3 million students didn't graduate from US high schools in 2004, costing more than $325 billion in lost wages, taxes, and productivity over their lifetimes.[21] The Alliance for Excellent Education has estimated that the more than 12 millions students who will drop out over the next decade will cost the nation $3 trillion dollars.[22]

Unemployment and Earnings for Full-time Wage and Salary Workers Age 25 and Over, by Educational Attainment

Unemployment Rate in 2005 (Percent)	Education Attained	Median Weekly Earnings in 2005 (Dollars)
1.6	Doctoral degree	$1,421
1.1	Professional degree	1,370
2.1	Master's degree	1,129
2.6	Bachelor's degree	937
3.3	Associate degree	699
4.2	Some college, no degree	653
4.7	High-school graduate	583
7.6	Some high-school, no diploma	409

Source: Bureau of Labor Statistics, U. S. Department of Labor. (2006, May). *Occupational employment and wages, May 2005.* Washington: Author. Retrieved April 20, 2007, from http://www.bls.gov/news.release/ocwage.toc.htm

Impact: Personal Income and Employment

- A male high school graduate who works until age 65 will earn, on average, nearly $333,000 more than a dropout; a worker with some college will earn $538,000 more. According to a recent report published by Teachers College at Columbia University, male high school graduates earn up to $322,000 more over the course of their lifetimes than dropouts, while college graduates earn up to $1.3 million more.[23] In total, there is more than $309 billion lost wages over the students' lifetimes.[24]

- In 1964, a high school dropout earned 64 cents for every dollar earned by an individual with at least a high school degree. In 2004, the high school dropout earned only 37 cents for each dollar earned by an individual with more education.[25]

- The median income of high school dropouts aged 18 and over was $12,184 in 2003. By comparison, the median income of those aged 18 and over who completed their education with a high school credential (including GED) was $20,431.[26]

Quick Stats Fact Sheet

Endnotes

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THIS STORY HAS BEEN FORMATTED FOR EASY PRINTING

Law urged to make teens stay in school

The Boston Globe

By James Vaznis, Globe Staff | October 21, 2009

Massachusetts students would be required to stay in school until age 18 under an ambitious proposal, part of a broader effort to halve the state's high school dropout rate, to be announced today by a special state commission.

With approximately 10,000 Massachusetts students quitting school each year, some as young as 14 years old, commission members say the state can no longer afford to ignore the dropout crisis, especially when striving to develop a more highly educated and skilled workforce.

For more than a decade, the state's dropout rate has remained stagnant. According to the most recent data available, 3.4 percent of students statewide quit school during the 2007-08 academic year, while several urban districts have rates nearly triple that. Under current state law, students can legally drop out by choice at age 16, and students as young as 14 can withdraw from school with permission from the superintendent for medical reasons, employment, or to do nonwage work at home.

If these dropouts never return to receive a diploma, they can become a huge drain on the state's economy. They are less likely to have a job and are far more likely to go to jail or depend on public assistance than residents who have graduated from high school, according to the commission's report, which is being released this afternoon.

"This whole report is a call to action," said Paul Reville, the secretary of education and chairman of the commission, which was created under a 2008 law to develop dropout prevention strategies. "It's critical work. We can ill afford the waste, loss, and tragedy these persistent rates represent."

In the coming months, the Patrick administration plans to put together legislation to raise the compulsory school age, a measure that will be tied to creation of an array of programs aimed at preventing students from dropping out and reaching out to those who have. By April this year, 19 states required students to stay in school until 18, according to the Education Commission of the States. The group includes New Hampshire, where the change took effect this year.

Some strategies recommended by the commission include hiring case managers to make the school experience more personal for these students, creating internships so students clearly see the connection between the classroom and potential careers, and using standardized test scores and other data to gauge, as early as elementary school, whether a student runs the risk of not finishing high school.

Given the state's dire budget predicament, Reville said, gaining the funding needed to push the effort forward could be a challenge. Already, sluggish state revenues have forced a sharp reduction in funding for dropout prevention this year.

But Reville emphasized that fighting for these students is worthwhile. "We are not going to hold back because of a budget crisis and say this problem doesn't exist," he said.

While the commission did not put a pricetag on its proposals, the report pointed out that overall enrollment in alternative education programs at local high schools would more than double, from 4,500 to 12,000, as more students stay in school.

Some members of the Legislature have expressed skepticism in the past about raising the age of school leaving, worried about the cost associated with creating programs for these students or further exacerbating problems that many districts already have with truancy. Those concerns led to passage of the bill that created the commission.

But others in the Legislature strongly support raising the attendance age. Representative Garrett Bradley, Democrat of Hingham, has already filed a bill to raise the maximum attendance age, which will be the subject of a hearing next month.

Reville said he has not examined that legislation yet, but anticipates that it will need to be reworked to encapsulate all the panel's recommendations.

Representative Martha M. Walz, a Boston Democrat who cochairs the Joint Committee on Education, has not yet taken a position on Bradley's bill, but said she was encouraged that the commission had given the age change a favorable recommendation and had suggested other programs and resources that could help these students succeed in school.

"My gut instinct tells me keeping students in school until age 18 is the right way to go if we can address underlying reasons that cause them to drop out and create programs that address their need," Walz said.

Students drop out of school for a wide array of reasons. Some grow frustrated because of consistently poor academic performance in school, particularly those not fluent in English and those who require special education, according to the report. Other students say they don't have time for school because they need to help their families earn income.

The commission also found that some students said they did not stick with school simply because no one seemed to care whether they did.

Compared with the national average, Massachusetts loses a smaller share of students. According to the most recent federal data available, from 2007, the national high school dropout average was 8.7 percent.

But rates in several Massachusetts urban districts often exceed or hover around the national average. In the 2007-08 school year, Lawrence lost 12.9 percent of its students; Fall River, 12.5 percent; Holyoke, 11.6 percent; Springfield, 9.7 percent; and Boston, 7.6 percent.

Reducing dropout rates is one part of the state's strategy to boost the state's high school graduation rate, which for the class of 2008 stood at about 81 percent. Dropouts accounted for about half of the students who did not earn a diploma in four years, while most of the others in that group opted for a fifth year of school.

Each dropout, over his or her lifetime, costs more than $118,000 in government expenditure and other benefits, according to research conducted a few years ago by Northeastern University's Center for Labor Market Studies.

Some districts are already working on reducing dropout rates. Boston opened a "re-engagement center" last month where high school dropouts can receive extra support as they resume their quest for a diploma.

Thomas Scott, executive of the Massachusetts Association of School Superintendents, said that decreasing the dropout rate is a good goal, but that the state needs to put money behind the policy. "You have to invest in this population for them to stay in school," said Scott. ■

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SB

11

<TARGET><BILL>SB 11</BILL><SUBJECT>SB
11</SUBJECT><COMM>SJUD27</COMM></TARGET>

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **SB 11**
() Publish Date: 1/19/2011

Identifier (file name) SB011-DOC-OC-02-12-11
Dept. Affected: DOC
Title: "An Act relating to the commission of a crime when the defendant directed the conduct constituting the crime at the victim based on..."
Appropriation: Admin & Support
Allocation: Commissioner's Office
Sponsor: Senator Davis
Requester: Judiciary Committee
OMB Component Number: 684

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost **

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the first version of the bill.

Prepared by: Leslie Houston, Director — Phone: 465-3339
Division: Dept. of Corrections - Administrative Services — Date/Time: 2/12/2011 1:00 p.m.
Approved by: Joseph D. Schmidt, Commissioner — Date: 2/12/2011
Dept. of Corrections

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB11

Analysis

This bill would create a new crime – motivation by prejudice, bias, or hatred. Because this creates a new crime, the Department of Corrections has no historical information to determine the number of offenders that will be placed under the custody of the department.

The Department of Corrections will closely monitor potential future impacts of this legislation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **SB011**
() Publish Date

Identifier (file name): SB011-LAW-CRIM-02-11-11
Dept. Affected: Law
Title: An Act relating to the commission of a crime based on the victim's race, sex, color, creed, physical or mental disability, sexual orientation...
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: SENATOR (S) DAVIS
Requester: (S) Judiciary
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/11/11 5:00 PM
Approved by: John J. Burns, Attorney General — Date: 2/11/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 011

Analysis

SB 011 would adopt a new crime – motivation by prejudice, bias, or hatred. A person commits the crime if the person commits a crime prohibited in Title 11, and knowingly directed the conduct to a victim because of the victim's race, sex, color, creed, physical or mental disability, sexual orientation, gender identity, ancestry, or national origin. The penalty for the new crime would increase the penalty for the underlying crime one level, so that a class A misdemeanor that is motivated by prejudice, bias, or hatred, would then be a class C felony.

Passage of this legislation would have no foreseeable fiscal impact on the Department of Law.

AMENDMENT

OFFERED IN THE SENATE BY SENATOR FRENCH

TO: SB 11

Page 1, line 3, following "**origin**":

Insert "**; and amending Rule 404, Alaska Rules of Evidence**"

Page 1, following line 10:

Insert a new subsection to read:

"(b) In a prosecution under this section, evidence of expression or associations of the defendant may not be admitted as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this subsection affects the rules of evidence governing the impeachment of a witness."

Reletter the following subsections accordingly.

Page 2, following line 13:

Insert a new bill section to read:

"* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. AS 11.76.150(b), added by sec. 1 of this Act, has the effect of amending Rule 404, Alaska Rules of Evidence, by forbidding the admission of certain evidence in prosecutions under AS 11.76.150, added by sec. 1 of this Act."

27-LS0087\A.2
Luckhaupt
2/22/11

AMENDMENT

OFFERED IN THE SENATE BY SENATOR COGHILL

TO: SB 11

Page 1, line 5, through page 2, line 7:

Delete all material.

Page 2, line 8:

Delete "**Sec. 2**"

Insert "**Section 1**"

moved —
obj. French

LEGAL SERVICES

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

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

MEMORANDUM February 22, 2011

SUBJECT: Amendment A.1 to SB 11 and the Alaska Rules of Evidence
(Work Order No. 27-LS0087\A.1)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Gerald P. Luckhaupt
Assistant Revisor

You have asked for my comments concerning the need for amendment A.1 to protect constitutional rights to freedom of expression and freedom of association. I fail to see a need for the amendment. I also have concerns about the language used in the amendment.

The language apparently is modeled after language included in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.

> (1) IN GENERAL. - Nothing in this division shall be construed to allow a court, in any criminal trial for an offense described under this division or an amendment made by this division, in the absence of a stipulation by the parties, to admit evidence of speech, beliefs, association, group membership, or expressive conduct unless that evidence is relevant and admissible under the Federal Rules of Evidence. Nothing in this division is intended to affect the existing rules of evidence.

This section basically says that it does nothing. Evidence remains admissible if relevant and no changes to the existing rules of evidence are intended. Normally I would not expect changes to the admissibility of evidence in a bill unless the bill states that it is amending the rules of evidence. This section appears to me to merely restate the obvious.

Amendment A.1 is similar but different. Instead of saying that evidence is admissible if relevant and admissible under the rules of evidence, the amendment states that certain evidence "may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense." It appears to me that at a minimum a change to the existing rules of evidence is intended as the amendment does not tie admissibility to relevancy but to some other sort of specific relationship to the offense. This relationship is not explained, but the fact that some change to the existing rules of evidence is

intended can be inferred from the second sentence of the amendment which states: "However, nothing in this section affects the rules of evidence governing the impeachment of a witness." This sentence clearly states that no change is intended to the rules of evidence regarding impeachment of a witness; obviously then some change to the existing rules of evidence regarding the introduction of "substantive evidence" must be intended.[1] It is not clear to me what that change might be but evidently some sort of new relationship requirement is being adopted.

Is the amendment needed to protect freedom of expression or association? In my opinion the amendment is not needed. SB 11 does not alter the rules of evidence and automatically allows the introduction of all evidence of a person's membership in associations or speech. Any evidence would still have to be relevant[2] and admissible.[3] Rule 402 specifically provides that relevant evidence is admissible except as provided by the Constitution of the United States or of this state. If the introduction of certain evidence would violate the constitution then that evidence is not admissible. Relevant evidence also may be excluded if the evidence's "probative value is outweighed by the danger of unfair prejudice . . . ."[4] And, finally, evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith

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[1] Note the differences in the last sentence of the amendment and the last sentence of the federal statute upon which it is supposedly based. The amendment states that the new section of law does not affect the rules of evidence regarding impeachment of a witness. The federal statute states that nothing is intended to affect the existing rules of evidence -- it is not limited to impeachment of a witness.

[2] Rule 401. Definition of Relevant Evidence. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[3] Rule 402. Relevant Evidence Admissible--Exceptions--Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, by these rules, or by other rules adopted by the Alaska Supreme Court. Evidence which is not relevant is not admissible.

[4] Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

except in certain situations explained by Rule 404.[5] SB 11 does not change any of these rules or automatically allow introduction of a person's speech or associations.

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[5] Rule 404. Character Evidence Not Admissible to Prove Conduct--Exceptions--Other Crimes. (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a relevant trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a relevant trait of character of a victim of crime offered by an accused, or by the prosecution to rebut the same, or evidence of a relevant character trait of an accused or of a character trait for peacefulness of the victim offered by the prosecution in a case to rebut evidence that the victim was the first aggressor, subject to the following procedure:

(i) When a party seeks to admit the evidence for any purpose, the party must apply for an order of the court at any time before or during the trial or preliminary hearing.

(ii) The court shall conduct a hearing outside the presence of the jury in order to determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim. The hearing may be conducted *in camera* where there is a danger of unwarranted invasion of the privacy of the victim.

(iii) The court shall order what evidence may be introduced and the nature of the questions which shall be permitted.

(iv) In prosecutions for the crime of sexual assault in any degree and attempt to commit sexual assault in any degree, evidence of the victim's conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this rule, in the absence of a persuasive showing to the contrary.

(3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. (1) Evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the

Admissibility of that evidence or any other evidence would still have to be relevant, admissible (and thereby constitutional), not overly prejudicial, and, if character evidence, it would have to satisfy one of the specific exceptions listed in Rule 404.

In my opinion, additional evidence that the amendment is not needed is provided by the existence of AS 12.55.155(c)(22), our "hate crime" aggravating factor. The elements of the aggravating factor are identical to the elements of proposed AS 11.76.150. If protected speech and associations could be used as evidence of a violation of AS 11.76.150 they could be used as evidence of a violation of the aggravating factor also. I have not heard of a case where constitutionally protected speech or associations were admitted as evidence under AS 12.55.155(c)(22).

GPL:ljw
11-127.ljw

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person acted in conformity therewith. It is, however, admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if admission of the evidence is not precluded by another rule of evidence and if the prior offenses

(i) occurred within the 10 years preceding the date of the offense charged;

(ii) are similar to the offense charged; and

(iii) were committed upon persons similar to the prosecuting witness.

Cindy Smith

From: Thomas Obermeyer
Sent: Wednesday, February 16, 2011 11:34 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Cc: Sen. Bettye Davis; Cindy Smith; Jeffrey Mittman
Subject: RE: Constitutional Issues regarding SB 11, 27-LS0087\A

To all above addressees by the ACLU letter of 2-16-2011:

Mr. Mittman's concerns about associational rights in his ACLU letter of 2-16-2011 are the same as he expressed last year in the previous bill. We have amended the draft to include "sexual orientation" and "gender identity" in Sec. 2, AS 12.55.155(c)(22) on page 2, lines 11-13 of SB 11.

Our legislative counsel and drafter, Jerry Luckhaupt, will not be available this afternoon unless urgent because he is testifying on a bill in House Judiciary beginning 1:00 Feb 16 in Rm 120. However, in talking to Mr. Luckhaupt this morning he does not believe SB 11 needs to include language similar to the federal bill cited which he believes repeats the obvious; that the Alaska Rules of Evidence are clear (ref. AK Rule Evidence 404) and have been correctly applied for years without additional protections. Nothing in SB 11, he says, overrides the rules of evidence.

Without offering legal advice, it is my understanding that character evidence is generally not admissible per rule 404(a), but it may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident under 404(b). That a defendant is a member of the Klu Klux Klan or dislikes black people in general is not admissible unless tied to other evidence, such as evidence of motive, intent, etc. Mr. French, former state prosecutor, should know Rule 404 and other rules of evidence well and their applicability in criminal actions in Alaska courts. Our drafter has addressed these legal issues in the past and can again if requested when he is available.

See you at the hearing.

Tom Obermeyer

Thomas S. Obermeyer, MO Atty, M.B.A.
Office of Senator Bettye Davis, Chair
Alaska State Senate Health & Social Services Committee
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From: Jeffrey Mittman [mailto:JMittman@akclu.org]
Sent: Wednesday, February 16, 2011 8:20 AM
To: Sen. Hollis French; Sen. Bill Wielechowski
Cc: Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill; Sen. Bettye Davis; Cindy Smith; Thomas Obermeyer
Subject: Constitutional Issues regarding SB 11

Chair French, Vice-Chair Wielechowski:

Thank you for the opportunity to submit written testimony regarding Senate Bill 11.

We have specific concerns with the proposed legislation, outlined in detail in the attached correspondence. We are hopeful that, through discussions with the Sponsor's office and the Committee, and minor modifications to the Bill, these issues can be addressed.

Please do not hesitate to contact the ACLU if you have any issues opening the attachment, or wish further information.

Thank you,

Jeffrey Mittman

Direct dial: (907) 263-2002
Cell: (907) 230-0665

ACLU
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Alaska State Legislature

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Session: (Jan. - May)
State Capitol, Suite 30
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Senator_Bettye_Davis@legis.state.ak.us

February 6, 2011

Senator Hollis French, Chair
Senate Judiciary Committee

RE: Request for Hearing concerning Senate Bill 11 – Hate Crimes
"An Act relating to the commission of a crime when the defendant directed the conduct constituting the crime at the victim based on the victim's race, sex, color, creed, physical or mental disability, sexual orientation, gender identity, ancestry, or national origin."

Dear Senator French:

Senator Davis respectfully requests a hearing concerning SB 11 before the Senate Judiciary Committee. – Information provided electronically and paper copy in interoffice mail.
Attached in order are the following:

1. Sponsor Statement
2. The most recent version of the bill: SB 11, 26-LS0087\A
3. Additional Documents
   - "Racially motivated attack nets prison terms for Anchorage pair; *Anchorage Daily News*, 09/09/2010
   - Letters of support for similar previous bill in 26th Legislature, SB 202
   - Hate Crime Legislation, *Congressional Research Reports* 11/29/2010
   - Obama Signs Hate Crimes Bill- *New York Times* 10/28/2009
   - Text of S.909: Matthew Shepard Hate Crimes Prevention Act – (providing legislative intent and language, similar to HR 1913 which passed).
   - HR 1913: Local Law Enforcement Hate Crimes Prevention Act of 2009- NCSL 4/29/2009

Please let me know if you need additional information. Note: Our office requests that you **not calendar** a hearing on this bill from **February 21-24, 2011** due to scheduling conflicts.

Sincerely,

Thomas S. Obermeyer
Legislative Assistant, 465-3762

Alaska State Legislature

Interim: (May - Dec.)
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Senator_Bettye_Davis@legis.state.ak.us
http://www.akdemocrats.org

Senator Bettye Davis

SB 11, 26-LS0087 – Increased sentencing for crimes motivated by prejudice, bias or hatred

"An Act relating to the commission of a crime when the defendant directed the conduct constituting the crime at the victim based on the victim's race, sex, color, creed, physical or mental disability, sexual orientation, gender identity, ancestry, or national origin."

SPONSOR STATEMENT

This bill increases the sentencing for crimes motivated prejudice, bias, or hatred based on the victim's race, sex, color, creed, physical or mental disability, sexual orientation, gender identity, ancestry, or national origin. This new crime can only be committed when a person commits some underlying crime and the person directed the conduct constituting the crime at the victim due to one of the listed characteristics of the victim. The new crime increases the classification of the underlying crime one level.

Without creating a new list of "hate crimes" under AS 11.76, new Sec. 11.76.150 simply reclassifies the level of any crime up one notch if motivated by prejudice, bias, or hatred based on the victim's race, sex, color, creed, physical or mental disability, sexual orientation, gender identity, ancestry, or national origin. For example, a class B misdemeanor becomes a class A misdemeanor; a class A misdemeanor becomes a C felony; a class C felony becomes a B felony, etc. Such reclassification, of course, increases the penalties appropriate to the classification in sentencing under AS 12.55. The bill also amends AS 55.155(c)(22), an aggravating factor as sentencing for felonies, by adding "sexual orientation" and "gender identity" to the list of protected characteristics.

The need for this bill is demonstrated by increasing reports of violence against homeless persons, minorities, religious groups, and others motivated by prejudice, bias, and hatred in Alaska and across the country in our highly diverse and multicultural society. When crimes are committed because of people's differences, the effects reverberate beyond a single victim or group into an entire community, city, state, and society as a whole. While this bill alone cannot eliminate prejudice, bias, or hatred, it will send a message that Alaskans will not tolerate hate crimes in any form, and sentencing for them will be substantially increased.

LEGAL SERVICES

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

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

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

MEMORANDUM February 7, 2011

SUBJECT: Sectional Summary -- SB 11 (Work Order No. 27-LS0087\A)

TO: Senator Bettye Davis
Attn: Thomas Obermeyer

FROM: Gerald P. Luckhaupt
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill -- the bill itself is the best statement of its contents.

Section 1. This new crime can only be committed when a person commits some underlying crime and the person directed the conduct constituting the crime at the victim due to one of the listed characteristics of the victim. The new crime increases the classification of the underlying crime one level.

Section 2. Amends AS 55.155(c)(22), an aggravating factor at sentencing for felonies, by adding "sexual orientation" and "gender identity" to the list of protected characteristics.

GPL:ljw
11-077.ljw

ALASKA WOMEN'S LOBBY

AWL Mission: To defend and advance the rights and needs of Women, Children and Families in Alaska

P.O. Box 20891
Juneau, Alaska 99802-0891
www.akwomenslobby.org

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Taber Rehbaum

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Libby Silberling

Letter of Support

SB 202: Hate Crimes
March 2010

The Alaska Women's Lobby, a statewide group with steering committees in Fairbanks, Anchorage and Juneau organized to protect and advance the rights of women, children and families supports SB 202.

According to the Anti-Defamation League 43 states and the District of Columbia have enacted hate crime laws using a "penalty-enhancement" concept similar to that proposed in SB 202. Alaska should join these states in emphasizing that people who choose to intimidate not only an individual victim but the victim's community have committed a more serious offense and should be held accountable as such.

All Alaskans have an interest in an effective response to violent bigotry. Hate crimes deserve increased penalties because the perpetrator has damaged more than one individual or institution. The offender tries to intimidate other members of the minority group by his or her actions against one person. Members of the targeted group may feel isolated, vulnerable and unprotected by the law. We need to be weaving communities together not allowing a few, bound by their ignorance, to try and keep us fragmented.

Thank you to Senator Davis for introducing this important piece of legislation. We agree with the message of her sponsor statement that while this measure alone cannot eliminate prejudice or hatred, it can send a message that Alaskans will not tolerate hate crimes in any form. Please join her in working this bill through the legislative process.

Senator Bettye Davis
Senator
Alaska State Legislature
716 W. 4th Ave, Suite 400
Anchorage, Alaska 99501
907-269-0144 T
907-269-0148 F
Senator_Bettye_Davis@legis.state.ak.us

-----Original Message-----
From: cecoffman@acsalaska.net [mailto:cecoffman@acsalaska.net]
Sent: Saturday, March 06, 2010 8:30 PM
To: Sen. Bettye Davis
Subject: Please Support Senate Bill 202, the Alaska Hate Crimes Bill

Dear Senator Davis,

I am writing to ask you to support Senate Bill 202, the Alaska Hate Crimes Bill, with an amendment to include "gender identity and expression."

I support this bill because it covers crimes motivated by prejudice, bias, or hatred based on the victim's "race, sex, color, creed, physical or mental disability, sexual orientation, ancestry, or national origin." This bill emphasizes that Alaska has no tolerance for such acts. The Alaska court system has primary jurisdiction over crimes of assault and battery, which may result in prosecution as hate crimes when occurring in Alaska. Alaska prosecutors and law enforcement officials need the support and force of an Alaska statute in order to most effectively investigate, prosecute, and track all potential hate crimes within the state.

I also support the amendment of SB 202 to add the phrase "gender identity and expression" to Sec. 11.76.150 (a) because people who are perceived as gender variant, whether heterosexual or gay, seem "different" to some people and may evoke a violent emotional response leading to harm. A substantial number of crimes have been documented that are based on the societal perception of someone as "too feminine" or "too masculine." These crimes can include bullying of both straight and gay persons in schools and throughout Alaskan communities.

I appreciate Senate Judiciary Committee for holding a hearing on SB 202, ask for its passage out of committee with a "gender identity" amendment, and support its swift movement through the legislative process so that it becomes law in the very near future.

Thank you very much for your consideration.

Sincerely,
Christine E. Coffman
Fairbanks, AK 99709

Senator Bettye Davis
Senator
Alaska State Legislature
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Anchorage, Alaska 99501
907-269-0144 T
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Senator_Bettye_Davis@legis.state.ak.us

From: bstringd@aol.com [mailto:bstringd@aol.com]
Sent: Monday, March 08, 2010 3:01 AM
To: Sen. Bettye Davis
Subject: SB 202 amendment

Thank you profusely for sponsoring the amendment of gender identity and expression to Section 11.76.150(a) of SB 202. May it pass quickly out of the Senate Judiciary committee. I strongly support your efforts to counter those whose irrational fears and prejudices incite them to hateful acts. The weekly displays seen at last summer's Assembly meetings were disgraceful and unsettling, clear proof that discrimination exists, and sadly is often promoted from the pulpit.

I, for one, would like to see tax waivers for churches modified or even eliminated. As the trend toward mega-churches continues, we can ill afford to have our local tax base further eroded, especially by those who abuse the privilege while pushing a political agenda that defies human decency. If they have sufficient funds to attempt to impose their warped views on everyone, then they should expect to be assessed the same as everyone else.

Good luck in Juneau. Your service is most appreciated!

Betty Dickenson
1312 Sunrise Dr Anchorage

Senator Bettye Davis
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From: feldenlee1@aol.com [mailto:feldenlee1@aol.com]
Sent: Friday, March 05, 2010 7:48 PM
To: Sen. Bettye Davis
Subject: SB 202

Dear Senator Davis,
Thank you for sponsoring SB 202. I strongly support the addition of an amendment that adds gender identity and expression to Section 11.76.150(a). A significant number of crimes have been documented that are based on the societal perception of someone as "too feminine" or "too masculine." These crimes can include bullying of both straight and gay persons in schools and throughout Alaskan communities. Please pass this bill with a gender identity amendment out of the Senate Judiciary Committee.
Respectfully,
Sharon Lee
3524 E. 15th Ave.
Anchorage, AK 99508

adn.com
Anchorage Daily News

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Racially motivated attack nets prison terms for Anchorage pair

VIDEO: The duo taped the attack; one posted clips on YouTube.

By ELIZABETH BLUEMINK
ebluemink@adn.com
(09/09/10 21:39:15)

The Anchorage duo who threatened and harassed a Native man while he was walking down the street two years ago have been sentenced to prison terms on felony civil rights violations.

Robert Gum, 19, was sentenced to 20 months in prison, and Deanna Scaglione, 21, also known as Deanna Powers, was sentenced to 16 months. Both were given three years of probation, according to court documents.

Federal prosecutors said that the two pursued the Native man, who was on his way to Bean's Cafe, by car and on foot and verbally and physically threatened him -- pelting him with eggs and a water bottle, saying they'd hurt him with a baseball bat and a gun and shouting racial slurs. They took turns recording their June 2008 attack on a video camera and Scaglione later posted clips of the bullying on YouTube.

The two were turned in by a woman who helped raise Scaglione after Scaglione's mother died. The woman called Crime Stoppers, a privately operated tip line.

Gum and Scaglione were arrested in 2009. They admitted to investigators that their attack was racially motivated and that it was Gum's idea. They also admitted that they egged two other Alaska Natives in downtown Anchorage that night, according to prosecutors.

In a plea for leniency, Gum's grandfather wrote that Gum recognized that he had done something very wrong and needed to make amends. But he said his grandson has many Native family members and is "not a racist."

Gum was "a very young man" who committed a stupid crime while "trying to be noticed by his friends," the grandfather wrote.

During the sentencing in federal District Court, the victim of the assault gave a powerful testimonial to the court, said Assistant U.S. Attorney Kevin Feldis, the prosecutor in the case.

The victim "spoke about the impact on him, the fear and the hurt he felt, but also how he moved forward and (his) forgiveness" of his attackers, Feldis said.

The case was investigated by the Anchorage Police Department and the Federal Bureau of Investigation.

"Conduct like the assault that occurred in this case is a crime not only against the victim but also against our entire community and must be appropriately punished," said U.S. Attorney Karen Loeffler after the sentencing.

State prosecutors have also charged the two on misdemeanor assault and harassment charges.

Sentencing in that case has been set for later this month.

Find Elizabeth Bluemink online at adn.com/contact/ebluemink or call 257-4317.

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RL33403
Hate Crime Legislation
November 29, 2010

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Summary

On October 28, 2009, President Barack Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into law, as Division E of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84; H.R. 2647). This law broadens federal jurisdiction over hate crimes by authorizing the Attorney General to provide assistance, when requested by a state, local, or tribal official, for crimes that (1) would constitute a violent crime under federal law or a felony under state or tribal law, and (2) are motivated by the victim's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. In other words, hate crimes are traditional crimes during which the offender is motivated by one or more biases considered to be particularly reprehensible and damaging to society as a whole. Prior to enactment, however, hate crimes were not separate and distinct offenses under federal law. Furthermore, federal jurisdiction over hate crime was limited to certain civil rights offenses. Although there is a consensus that hate crime is deplorable, determining the definitive federal role in addressing hate crime has proved contentious, as reflected in the legislative history and congressional debate. Legislation to widen federal jurisdiction over hate crime was passed by the Senate in the 106th and 108th Congresses, by the House in the 109th Congress, and by both chambers in the 110th Congress. Opponents of hate crime legislation view separate federal offenses for hate crime as redundant and largely symbolic, arguing that separate hate crime offenses would be in addition to the legal prohibitions for traditional crime that already exist under either federal or state law. They also contend that in most cases the federal nexus is tenuous, and that such offenses are best handled at the state and local level. Proponents for creating a separate and distinct federal offense for hate crime maintain that there is a fundamental difference between ordinary crime and hate crime. They believe that hate crimes are often perpetrated to send a message of threat and intimidation to a wider group, and that the effects of hate crime extend beyond the particular victim and reflect more pervasive patterns of discrimination on the basis of race, color, religion, national origin, and other characteristics. In the 111th Congress, the House Judiciary Committee amended and ordered reported a hate crimes bill (H.R. 1913; H.Rept. 111-86) on April 23, 2009. The House passed H.R. 1913 on April 29, 2009. Senator Reid, for Senator Kennedy, introduced the Matthew Shepard Hate Crimes Prevention Act (S. 909) on April 28, 2009. Senator Leahy successfully amended the National Defense Authorization Act (S. 1390) with language that is similar to S. 909 on July 16, 2009. The Senate passed S. 1390, amended, on July 23, 2009. The hate crime provisions were included in the conference report on the National Defense Authorization Act for Fiscal Year 2010 (H.R. 2647; H.Rept. 111-288). The House passed the conference report on H.R. 2647 on October 7, 2009; the Senate passed it on October 22, 2009. In addition, Representative Sheila Jackson-Lee has introduced three hate crime-related bills (H.R. 70, H.R. 256, and H.R. 262), and Representative Maloney has introduced a hate crime statistics act (H.R. 823). At issue for Congress is whether the prevalence and harmfulness of hate crimes warrant greater federal intervention to ensure that such crimes are systematically addressed at all levels of government. Another related issue is the completeness and comprehensiveness of national hate crime data. Representative Eddie Bernice Johnson introduced (H.R. 3419), which would amend the Hate Crime Statistics Act to require data collection on crimes committed against homeless persons. Senator Benjamin Cardin introduced an identical bill (S. 1765). On several occasions, the Senate Judiciary Committee was scheduled to mark up this bill during the 111th Congress, but consideration of this bill was postponed.

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Available Versions

- November 29, 2010
- January 15, 2010
- October 16, 2009

- July 24, 2009
- December 07, 2007

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OCTOBER 28, 2009, 7:43 PM

Obama Signs Hate Crimes Bill

By JEFF ZELENY

Doug Mills/The New York Times The hate crimes measure was included in the national defense authorization act that President Obama signed into law on Wednesday.

President Obama signed a hate crimes bill into law on Wednesday, telling an audience at the White House that the provision would "strengthen the protections against crimes based on the color of your skin, the faith in your heart, or the place of your birth."

The law expands the definition of violent federal hate crimes to those committed because of a victim's sexual orientation. Under existing federal law, hate crimes are defined as those motivated by the victim's race, color, religion or national origin.

"Prosecutors will have new tools to work with states in order to prosecute to the fullest those who would perpetrate such crimes," Mr. Obama said, speaking in the East Room of the White House at an evening reception, "Because no one in America should ever be afraid to walk down the street holding the hands of the person they love."

The hate crimes measure was included in a defense spending bill, which Democratic leaders in Congress intentionally did in an effort to keep Republicans from blocking the legislation. The legislation had been under consideration in Congress for years. It was named in memory of Matthew Shepard, the gay Wyoming college student who was murdered 11 years ago.

"You understood that we must stand against crimes that are meant not only to break bones, but to break spirits — not only to inflict harm, but to instill fear," Mr. Obama said. "You understand that the rights afforded every citizen under our Constitution mean nothing if we do not protect those rights — both from unjust laws and violent acts."

The audience at the White House included Denis and Judy Shepard, the parents of Matthew, and the family of the late Senator Edward M. Kennedy, who championed the legislation for years, but died before the bill was ultimately passed.

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Congress > Legislation

S. 909: Matthew Shepard Hate Crimes Prevention Act

111th Congress
2009-2010

Summaries

Congressional Research Service Summary

The following summary was written by the Congressional Research Service, a well-respected nonpartisan arm of the Library of Congress. GovTrack did not write and has no control over these summaries.

4/28/2009--Introduced.

Matthew Shepard Hate Crimes Prevention Act - Adopts the definition of "hate crime" as set forth in the Violent Crime Control and Law Enforcement Act of 1994 (i.e., a crime in which the defendant intentionally selects a victim or, in the case of a property crime, the property that is the object of the crime because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person). Authorizes the Attorney General to: (1) provide state, local, or tribal law enforcement agencies with technical, forensic, prosecutorial, or other assistance in the investigation or prosecution of violent crimes and hate crimes; and (2) award grants to assist such agencies with the extraordinary expenses associated with the investigation and prosecution of hate crimes. Authorizes the Office of Justice Programs to award grants to state, local, or tribal programs designed to combat hate crimes committed by juveniles. Authorizes appropriations to the Department of Justice (DOJ), including the Community Relations Service, for FY2010-FY2012 to prevent and respond to hate crime acts. Amends the federal criminal code to prohibit willfully causing bodily injury to any person because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of such person. Amends the Hate Crimes Statistics Act to expand data collection and reporting requirements under such Act to include: (1) crimes manifesting prejudice based on gender and gender identity; and (2) hate crimes committed by and against juveniles. Declares that nothing in this Act shall be construed to prohibit the exercise of constitutionally-protected free speech.

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Congress > Legislation > 2009-2010 (111th Congress) > S. 909

Text of S. 909: Matthew Shepard Hate Crimes Prevention Act

Apr 28, 2009 - Introduced in Senate. This is the original text of the bill as it was written by its sponsor and submitted to the Senate for consideration. This is the latest version of the bill currently available on GovTrack.

S 909 IS

111th CONGRESS

1st Session

S. 909

To provide Federal assistance to States, local jurisdictions, and Indian tribes to prosecute hate crimes, and for other purposes.

IN THE SENATE OF THE UNITED STATES

April 28, 2009

Mr. REID (for Mr. KENNEDY (for himself, Mr. LEAHY, Ms. SNOWE, Ms. COLLINS, Mr. SPECTER, Mr. SCHUMER, Mr. DURBIN, Mrs. FEINSTEIN, Mr. LEVIN, Ms. MIKULSKI, Mr. WHITEHOUSE, Mr. CARDIN, Ms. KLOBUCHAR, Mr. LIEBERMAN, Mrs. GILLIBRAND, Mr. MERKLEY, Mr. REED, Mr. NELSON of Florida, Mr. KERRY, Mr. BINGAMAN, Mr. DODD, Mr. BAYH, Mr. UDALL of Colorado, Mrs. SHAHEEN, Mr. HARKIN, Mr. BROWN, Mrs. MURRAY, Mr. CASEY, Mr. JOHNSON, Mr. LAUTENBERG, Mr. NELSON of Nebraska, Ms. LANDRIEU, Ms. CANTWELL, and Mr. AKAKA)) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide Federal assistance to States, local jurisdictions, and Indian tribes to prosecute hate crimes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Matthew Shepard Hate Crimes Prevention Act'.

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) The incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem.

(2) Such violence disrupts the tranquility and safety of communities and is deeply divisive.

(3) State and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes in the United States, including violent crimes motivated by bias. These authorities can carry out their responsibilities more effectively with greater Federal assistance.

(4) Existing Federal law is inadequate to address this problem.

(5) A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.

(6) Such violence substantially affects interstate commerce in many ways, including the following:

(A) The movement of members of targeted groups is impeded, and members of such groups are forced to move across State lines to escape the incidence or risk of such violence.

(B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity.

(C) Perpetrators cross State lines to commit such violence.

(D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence.

(E) Such violence is committed using articles that have traveled in interstate commerce.

(7) For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

(8) Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct 'races'. Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.

(9) Federal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes.

(10) The problem of crimes motivated by bias is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States, local jurisdictions, and Indian tribes.

SEC. 3. DEFINITION OF HATE CRIME.

In this Act--

(1) the term 'crime of violence' has the meaning given that term in section 16, title 18, United States Code;

(2) the term 'hate crime' has the meaning given such term in section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (28 U.S.C. 994 note); and

(3) the term 'local' means a county, city, town, township, parish, village, or other general purpose political subdivision of a State.

SEC. 4. SUPPORT FOR CRIMINAL INVESTIGATIONS AND PROSECUTIONS BY STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT OFFICIALS.

(a) Assistance Other Than Financial Assistance-

(1) IN GENERAL- At the request of State, local, or tribal law enforcement agency, the Attorney General may provide technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution of any crime that--

(A) constitutes a crime of violence;

(B) constitutes a felony under the State, local, or tribal laws; and

(C) is motivated by prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim, or is a violation of the State, local, or tribal hate crime laws.

(2) PRIORITY- In providing assistance under paragraph (1), the Attorney General shall give priority to crimes committed by offenders who have committed crimes in more than one State and to rural jurisdictions that have difficulty covering the extraordinary expenses relating to the investigation or prosecution of the crime.

(b) Grants-

(1) IN GENERAL- The Attorney General may award grants to State, local, and tribal law enforcement agencies for extraordinary expenses associated with the investigation and prosecution of hate crimes.

(2) OFFICE OF JUSTICE PROGRAMS- In implementing the grant program under this subsection, the Office of Justice Programs shall work closely with grantees to ensure that the concerns and needs of all affected parties, including community groups and schools, colleges, and universities, are addressed through the local infrastructure developed under the grants.

(3) APPLICATION-

(A) IN GENERAL- Each State, local, and tribal law enforcement agency that desires a grant under this subsection shall submit an application to the Attorney General at such time, in such manner, and accompanied by or containing such information as the Attorney General shall reasonably require.

(B) DATE FOR SUBMISSION - Applications submitted pursuant to subparagraph (A) shall be submitted during the 60-day period beginning on a date that the Attorney General shall prescribe.

(C) REQUIREMENTS- A State, local, and tribal law enforcement agency applying for a grant under this subsection shall--

(i) describe the extraordinary purposes for which the grant is needed;

(ii) certify that the State, local government, or Indian tribe lacks the resources necessary to investigate or prosecute the hate crime;

(iii) demonstrate that, in developing a plan to implement the grant, the State, local, and tribal law enforcement agency has consulted and coordinated with nonprofit, nongovernmental victim services programs that have experience in providing services to victims of hate crimes; and

(iv) certify that any Federal funds received under this subsection will be used to

supplement, not supplant, non-Federal funds that would otherwise be available for activities funded under this subsection.

(4) DEADLINE- An application for a grant under this subsection shall be approved or denied by the Attorney General not later than 180 business days after the date on which the Attorney General receives the application.

(5) GRANT AMOUNT- A grant under this subsection shall not exceed $100,000 for any single jurisdiction in any 1-year period.

(6) REPORT- Not later than December 31, 2010, the Attorney General shall submit to Congress a report describing the applications submitted for grants under this subsection, the award of such grants, and the purposes for which the grant amounts were expended.

(7) AUTHORIZATION OF APPROPRIATIONS- There is authorized to be appropriated to carry out this subsection $5,000,000 for each of fiscal years 2010 and 2011.

SEC. 5. GRANT PROGRAM.

(a) Authority To Award Grants- The Office of Justice Programs of the Department of Justice may award grants, in accordance with such regulations as the Attorney General may prescribe, to State, local, or tribal programs designed to combat hate crimes committed by juveniles, including programs to train local law enforcement officers in identifying, investigating, prosecuting, and preventing hate crimes.

(b) Authorization of Appropriations- There are authorized to be appropriated such sums as may be necessary to carry out this section.

SEC. 6. AUTHORIZATION FOR ADDITIONAL PERSONNEL TO ASSIST STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT.

There are authorized to be appropriated to the Department of Justice, including the Community Relations Service, for fiscal years 2010, 2011, and 2012 such sums as are necessary to increase the number of personnel to prevent and respond to alleged violations of section 249 of

title 18, United States Code, as added by section 7 of this Act.

SEC. 7. PROHIBITION OF CERTAIN HATE CRIME ACTS.

(a) In General- Chapter 13 of title 18, United States Code, is amended by adding at the end the following:

'Sec. 249. Hate crime acts

'(a) In General-

'(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN- Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person--

'(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

'(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if--

'(i) death results from the offense; or

'(ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

'(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, GENDER IDENTITY, OR DISABILITY-

'(A) IN GENERAL- Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous

weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person--

'(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

'(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if--

'(I) death results from the offense; or

'(II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

'(B) CIRCUMSTANCES DESCRIBED- For purposes of subparagraph (A), the circumstances described in this subparagraph are that--

'(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim--

'(I) across a State line or national border; or

'(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

'(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

'(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

'(iv) the conduct described in subparagraph (A)--

'(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

'(II) otherwise affects interstate or foreign commerce.

'(3) OFFENSES OCCURRING IN THE SPECIAL MARITIME OR TERRITORIAL JURISDICTION OF THE UNITED STATES- Whoever, within the special maritime or territorial jurisdiction of the United States, commits an offense described in paragraph (1) or (2) shall be subject to the same penalties as prescribed in those paragraphs.

'(b) Certification Requirement-

'(1) IN GENERAL- No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or his designee, that--

'(A) the State does not have jurisdiction;

'(B) the State has requested that the Federal Government assume jurisdiction;

'(C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or

'(D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

'(2) RULE OF CONSTRUCTION- Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

'(c) Definitions- In this section--

'(1) the term 'bodily injury' has the meaning given such term in section 1365(h)(4) of this title, but does not include solely emotional or psychological harm to the victim;

'(2) the term 'explosive or incendiary device' has the meaning given such term in section 232 of this title;

'(3) the term 'firearm' has the meaning given such term in section 921(a) of this title; and

'(4) the term 'gender identity' for the purposes of this chapter means actual or perceived gender-related characteristics.'.

(b) Technical and Conforming Amendment- The analysis for chapter 13 of title 18, United States Code, is amended by adding at the end the following:

'249. Hate crime acts.'.

SEC. 8. STATISTICS.

(a) In General- Subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note) is amended by inserting 'gender and gender identity,' after 'race,'.

(b) Data- Subsection (b)(5) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note) is amended by inserting ',

including data about crimes committed by, and crimes directed against, juveniles' after 'data acquired under this section'.

SEC. 9. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

SEC. 10. RULE OF CONSTRUCTION.

For purposes of construing this Act and the amendments made by this Act the following shall apply:

(1) RELEVANT EVIDENCE- Courts may consider relevant evidence of speech, beliefs, or expressive conduct to the extent that such evidence is offered to prove an element of a charged offense or is otherwise admissible under the Federal Rules of Evidence. Nothing in this Act is intended to affect the existing rules of evidence.

(2) VIOLENT ACTS- This Act applies to violent acts motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability of a victim.

(3) CONSTITUTIONAL PROTECTIONS- Nothing in this Act shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the First Amendment and peaceful picketing or demonstration. The Constitution does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence.

(4) FREE EXPRESSION- Nothing in this Act shall be construed to allow prosecution based solely upon an individual's expression of racial, religious, political, or other beliefs or solely upon an individual's membership in a group advocating or espousing such beliefs.

GovTrack.us is a project of **Civic Impulse, LLC**.

HR 1913: Local Law Enforcement Hate Crimes Prevention Act of 2009

April 29, 2009

Background:

Representative John Conyers of Michigan introduced the Local Law Enforcement Hate Crimes Prevention Act of 2009 on April 2, 2009 and the bill was promptly referred to the House Committee on the Judiciary. Senator Edward Kennedy of Massachusetts is sponsoring the companion bill (S. 909). The Judiciary marked up the bill on April 22, 2009 and April 23, 2009 and moved to the House floor. The committee amendments removed the "findings" portion contained in the original bill and also removed language concerning the Hate Crimes Statistics Act (28 U.S.C. 534). An amendment offered by Rep. John Conyers on the House floor was adopted on April 29, 2009. This amendment 1) clarifies the coverage of tribal lands, 2) extends the period for the Attorney General to approve applications for grants 3) clarifies that offenses committed with weapons can be considered hate crimes 4) clarifies jurisdictions of the bill and 5) limits prosecutions, trials, and punishment for offenses not resulting in death. The bill passed the house on April 29, 2009 by a vote of 249 to175. The Local Law Enforcement Hate Crimes Prevention Act of 2009 (H.R. 1913) currently carries one hundred twenty cosponsors and is under consideration in the Senate Judiciary Committee.

DEFINITION OF HATE CRIME:

"crime of violence" – defined in section 16, title 18, United States Code

"hate crime" – defined in section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (28 U.S.C. 994 note)

"local" - means a county, city, town, township, parish, village, or other general purpose political subdivision of a State.

SUPPORT FOR CRIMINAL INVESTIGATIONS AND PROSECUTIONS:
At the request of a state, local, or tribal law enforcement agency, the Attorney General (AG) may provide assistance in the criminal investigation of any crime that:

Constitutes an act of violence;
Constitutes a felony under the state, local, or tribal laws
Is motivated by prejudice based on race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim, or
Is a violation of state, local, or tribal hate crime laws.

The AG will give priority to crimes and offenders in multiple state jurisdictions and to rural jurisdictions, particularly those having difficulty covering "extraordinary expenses" relating to the investigation or prosecution of the crime. The AG may award grants to state, local, and Tribal law enforcement agencies for those expenses. The Office of Justice Programs (OJP) will implement the grant program and address the concerns and needs of all affected parties. Each state, local, and Tribal law enforcement agency that desires a grant must submit an application to the AG. Applications must be a 60-day period prescribed by the AG. A state, local, or Tribal law enforcement agency applying for a grant must:

Describe the "extraordinary purposes" for which the grant is needed
Certify that the state, local, or Indian tribe lacks the resources to investigation or prosecute the hate crime
Demonstrate that the state, local, or Tribal law enforcement agency has consulted with non-profit, nongovernmental service programs that provide services to victims of hate crimes
Certify that any federal funds granted will be used to supplement, not supplant, non-federal funds for specified activities

An application for a grant must be approved or denied by the AG not later than 180 business days after the date received. A grant must not exceed $100,000 for any single jurisdiction in any 1-year period. By December 31, 2011,

the AG must submit a report to congress describing the applications, awarded grants, and purposes for which the grants were expended.

$5 million for each FY 2010 and FY 2011 is authorized to be appropriated for this program.

GRANT PROGRAM:
OJP may award grants with the regulations prescribed by the AG to state, local, or tribal programs designed to combat hate crimes committed by juveniles. This includes programs to train local law enforcement in identifying, investigating, prosecuting, and preventing hate crimes.

There are authorized to be appropriated such sums as may be necessary to carry out this program.

AUTHORIZATION FOR ADDITIONAL PERSONNEL
There are authorized to be appropriated to the Department of Justice, including the Community Relations Service, for fiscal years 2010, 2011, and 2012, such sums as are necessary to increase the number of personnel to prevent and respond to alleged hate crimes.

PROHIBITION OF CERTAIN HATE CRIME ACTS
This language adds a section entitled "Hate crime acts" to Chapter 13 of title 18, USC.
This section establishes that any person who attempts or commits a hate crime (as defined in the statute):

Shall be imprisoned not more than 10 years, fined, or both AND
Shall be imprisoned for any term of years or for life if:

Death results from the offense
The offense includes kidnapping or an attempt to kidnap,
The offense includes aggravated sexual abuse, or an attempt to commit aggravated sexual abuse
Or an attempt to kill

For more information, please contact:

Susan Parnas Frederick	(202) 624-5400	susan.frederick@ncsl.org
Emily Taylor		emily.taylor@ncsl.org

Prepared by Emily Taylor, Policy Associate, NCSL Updated April 29, 2009

Denver Office
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February 16, 2011

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
Juneau, AK 99801-1182
via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
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Anchorage, AK 99503
(907) 258-0044
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NADINE WINTERS, Fairbanks

ZACH FICK, Anchorage
STUDENT ADVISOR

Re: Senate Bill 11
ACLU Review of Constitutional Issues

Chair French, Vice-Chair Wielechowski:

Thank you for the opportunity to submit written testimony with respect to Senate Bill 11.

As you know, the American Civil Liberties Union of Alaska represents thousands of members and activists throughout the state who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we would like to advise the Committee of several issues with respect to SB 11.

Addition of Sexual Orientation and Gender Identity to AS 12.55.155

The ACLU supports legislation designed to protect the civil rights of individuals who may be targeted for violence or harassment based on membership in a historically disfavored class. Evidence establishes that transgender persons, and lesbian, gay and bisexual individuals face discrimination and are targeted for violence.

To the extent that AS.12.55.155(c)(22) already establishes as an aggravating factor that a "defendant knowingly direct[s] . . . conduct constituting the offense at a victim because of that person's race, sex, color, creed, physical or mental disability, ancestry, or national origin," it is appropriate that both "sexual orientation" and "gender identity" be included as protected classes.

The ACLU applauds and thanks Senator Davis, the Bill's sponsor, for her continuing commitment to advance equal protections for all Alaskans.

Too, as the Committee is aware, hate crimes legislation at the federal level has included protections based on sexual orientation and gender identity, based on the evidence of discrimination encountered by these classes.

Needed Protections of Speech and Associational Rights

The ACLU is very concerned, however, that the important First Amendment rights of **all** Alaskans must be carefully protected.

Whether under the US or Alaska Constitutions, the rights of freedom of speech and of association are crucial to our democratic society. The ACLU must oppose any legislation which would lead to governmental restrictions on, or chilling of, any speech or associational rights, even if those rights represent unpopular or repugnant views.

We hope that – through working with the Sponsor's office and the Judiciary Committee – we can address the inclusion of necessary protections of speech and associational rights in SB 11.

As currently drafted, the Bill would allow prosecution of a defendant and introduction at trial of constitutionally protected speech or association as substantive evidence of the defendant's motivation, whether or not that evidence directly related to the alleged crime.

For example, if a defendant were alleged to have targeted a victim who was Jewish, the defendant's membership in the Klu Klux Klan, or internet postings he wrote attacking Zionism could be introduced at trial. Such introduction would not only be unconstitutional, but also the basis for challenging and overturning a conviction.

Contrast with the above example, a defendant who – while attacking the same Jewish victim – states: "Jews have no place in America." Introduction of such evidence would not be based on the defendant's associations or beliefs, but rather relate to the attack and specifically relevant to his motivation to commit the alleged crime.

In order to differentiate between these two situations, we recommend the inclusion in SB 11 of language such as:

> *In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense.*
>
> *However, nothing in this section affects the rules of evidence governing the impeachment of a witness.*

It is instructive to note that similar language was included in the Federal MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT, HR 2647; Public Law No. 111-084:

> **SEC. 4710. RULE OF CONSTRUCTION.**
>
> For purposes of construing this division and the amendments made by this division the following shall apply:
>
> (1) IN GENERAL.—Nothing in this division shall be construed to allow a court, in any criminal trial for an offense described under this division or an amendment made by this division, in the absence of a stipulation by the parties, to admit evidence of speech, beliefs, association, group membership, or expressive conduct unless that evidence is relevant and admissible under the Federal Rules of Evidence. Nothing in this division is intended to affect the existing rules of evidence.

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ084.111.pdf (pg. 653 of 656).

Minor Amendments

Presuming the amendments outlined above, the ACLU will support SB 11.

Thank you again permitting us to share our concerns. Please feel free to contact the undersigned should you require any additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us
Senator John Coghill, Senator_John_Coghill@legis.state.ak.us
Senator Bettye Davis, Sponsor, Senator_Bettye_Davis@legis.state.ak.us

DISABILITY LAW CENTER OF ALASKA

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www.dlcak.org

February 16, 2011

The Honorable Bettye Davis
Alaska State Senate
Alaska State Capitol, Room 30
Juneau, Alaska 99801

Re: Senate Bill 11

Dear Senator Davis:

The Disability Law Center of Alaska supports Senate Bill 11, which proposes to increase the sentencing for crimes motivated by prejudice, bias, or hatred based on the victim's status, including physical or mental disability.

Through much of our country's history and well into the twentieth century, people with disabilities -- including those with developmental delays, epilepsy, cerebral palsy and other physical and mental impairments -- were seen as useless and dependent, hidden and excluded from society, either in their own homes or in institutions. Now, this history of isolation is gradually giving way to inclusion in all aspects of society, and people with disabilities everywhere are living and working in communities alongside family and friends. But this has not been a painless process. People with disabilities often seem "different" to people without disabilities. They may look different or talk differently. They may require the assistance of a wheelchair, a cane, or other assistive technologies. They may have seizures or have difficulty understanding seemingly simple directions.

These perceived differences evoke a range of emotions, from misunderstanding and apprehension to superiority and hatred. Bias against people with disabilities takes many forms, often resulting in discriminatory actions in employment, housing, and public accommodations. Laws like the Fair Housing Amendments Act, the Americans with Disabilities Act and the Rehabilitation Act are designed to protect people with disabilities from this type of prejudice.

Perhaps most unfortunately, disability bias can also manifest itself in the form of violence, and it is imperative that a message be sent to our state that these acts of bias motivated hatred are not acceptable in our society.

In 2009, the Bureau of Justice Statistics released a National Crime Victims Survey, which report was the first estimate of crime against people with disabilities. The findings reveal the harsh realities faced by this vulnerable population.

MEMBER OF THE NATIONAL DISABILITY RIGHTS NETWORK

- Age-adjusted rate of nonfatal violent crime against persons with disabilities was 1.5 times higher than the rate for persons without disabilities.
- Youth ages 12 to 19 with a disability experienced violence at nearly twice the rate as those without a disability.
- Persons with a disability had an age-adjusted rate of rape or sexual assault that was more than twice the rate for persons without a disability.
- Females with a disability had a higher victimization rate than males with a disability; males had a higher rate than females among those without a disability.
- Persons with a cognitive functioning disability had a higher risk of violent victimization than persons with any other type of disability.
- Persons with more than one type of disability accounted for about 56% of all violent crime victimizations against those with any disability.
- Nearly 1 in 5 violent crime victims with a disability believed that they became a victim because of their disability.

Too frequently, bias-motivated crimes against those with disabilities have gone unreported and, because of the special problems associated with investigating and prosecuting hate violence against an individual with a disability, unprosecuted. These factors contribute to the victimization of individuals with disabilities.

Senate Bill 11 is vitally important for this vulnerable population and must be enacted in order to bring the full protection of the law to those targeted for violent, bias motivated crimes simply because they have a disability.

Sincerely,

DISABILITY LAW CENTER OF ALASKA

David C. Fleurant
Executive Director

SB

15

<TARGET><BILL>SB 15</BILL><SUBJECT>SB
15</SUBJECT><COMM>SJUD27</COMM></TARGET>

27-LS0119\E
Luckhaupt
3/28/11

CS FOR SENATE BILL NO. 15(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR MEYER

A BILL

FOR AN ACT ENTITLED

"An Act relating to penalties for certain alcohol offenses involving persons under 21 years of age committed by certain sex offenders or child kidnappers."

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

* **Section 1.** AS 04.16 is amended by adding a new section to read:

Sec. 04.16.059. Aggravated penalties for violations of AS 04.16.051, 04.16.055, and 04.16.057 involving a person under 21 years of age and committed by a sex offender or child kidnapper. (a) Notwithstanding AS 04.16.051, 04.16.055, 04.16.057, and 04.16.180, the penalty for a violation of AS 04.16.051, 04.16.055, or 04.16.057 that involved a person under 21 years of age and that was committed by a person who is required to register as a sex offender or child kidnapper under AS 12.63 is as follows:

(1) if the underlying offense is a violation, a sex offender or child kidnapper committing the offense is guilty of a class B misdemeanor and shall be punished as provided in AS 12.55;

(2) if the underlying offense is a class A misdemeanor, a sex offender or child kidnapper committing the offense is guilty of a class C felony and shall be punished as provided in AS 12.55;

(3) if the underlying offense is a class C felony, a sex offender or child kidnapper committing the offense is guilty of a class B felony and shall be punished as provided in AS 12.55.

(b) In this section, "sex offender or child kidnapper" has the meaning given in AS 12.63.100.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to offenses committed on or after the effective date of this Act.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

March 28, 2011

TO: Legislative Legal

FROM: Cindy Smith

RE: CS for SB15 Sex Offender/Underage Alcohol Offense

Please draft a new Senate Judiciary CS for SB15 (LS-0119\D) to make the following changes:

At line 9, after the words "was committed by" add "a person who is required to register" and at Line 10, after the word "kidnapper" add "under AS 12.63".

Call me if you have any questions at 465-6641.

CS FOR SENATE BILL NO. 15(HSS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE HEALTH AND SOCIAL SERVICES COMMITTEE

Offered: 3/18/11
Referred: Judiciary, Finance

Sponsor(s): SENATOR MEYER

A BILL

FOR AN ACT ENTITLED

"An Act relating to penalties for certain alcohol offenses involving persons under 21 years of age committed by a sex offender or child kidnapper."

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

*** Section 1.** AS 04.16 is amended by adding a new section to read:

Sec. 04.16.059. Aggravated penalties for violations of AS 04.16.051, 04.16.055, and 04.16.057 involving a person under 21 years of age and committed by a sex offender or child kidnapper. (a) Notwithstanding AS 04.16.051, 04.16.055, 04.16.057, and 04.16.180, the penalty for a violation of AS 04.16.051, 04.16.055, or 04.16.057 that involved a person under 21 years of age and that was committed by a sex offender or child kidnapper is as follows:

(1) if the underlying offense is a violation, a sex offender or child kidnapper committing the offense is guilty of a class B misdemeanor and shall be punished as provided in AS 12.55;

(2) if the underlying offense is a class A misdemeanor, a sex offender

or child kidnapper committing the offense is guilty of a class C felony and shall be punished as provided in AS 12.55;

(3) if the underlying offense is a class C felony, a sex offender or child kidnapper committing the offense is guilty of a class B felony and shall be punished as provided in AS 12.55.

who is required to register

(b) In this section, "sex offender or child kidnapper" ~~has~~ the meaning given in AS 12.63.100.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to offenses committed on or after the effective date of this Act.

ALASKA STATE LEGISLATURE

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Anchorage, Alaska 99501-2133
Phone: (907) 269-0199
Fax (907) 269-0197
Senator_Kevin_Meyer@legis.state.ak.us

Session:
Alaska State Capitol
Juneau, Alaska 99801-1182
Phone: (907) 465-4945
Fax: (907) 465-3476
Toll Free: (866) 465-4945

SENATOR KEVIN MEYER
MAJORITY LEADER

TO: Senator Hollis French, Chair
Senate Judiciary Committee

FROM: Senator Kevin Meyer

DATE: March 17, 2011

RE: CSSB 15 Request for Hearing

I respectfully request the Senate Judiciary Committee to schedule a hearing for CSSB 15, "An Act relating to penalties for certain alcohol offenses involving persons under 21 years of age committed by a sex offender or child kidnapper" pending referral. The Senate Health and Social Services Committee passed CSSB 15 out and it will be referred to Senate Judiciary on Friday, March, 18, 2011.

The following documents are attached and will be sent electronically:

- CS for SB 15 version I passed by the Senate Health and Social Services Committee
- Sponsor Statement
- Letters of support
- Memo of changes
- Back up information
- Fiscal Notes
- Witness/Testimony:
    - Kate Burkhart, Executive Director of the Advisory Board on Alcoholism and Drug Abuse
- Staff member assigned to the bill: Christine R. Marasigan, 465-6876

This bill would provide aggravated penalties for sex offenders and child kidnappers who provide alcohol to people under 21 years of age.

Please contact Christine if you have any questions regarding this legislation.

Alaska State Legislature

Interim:
716 West 4th Ave.
Anchorage, Alaska 99501
(907) 269-0199

Session:
State Capitol Building
Juneau, Alaska 99801-1182
(907) 465-4945

Senator Kevin Meyer

Senate District O

SPONSOR STATEMENT FOR SB 15

"an Act relating to penalties for certain alcohol offenses involving persons under 21 years of age committed by a sex offender or a child kidnapper."

Senate Bill 15 makes providing alcohol for those who are under 21 years of age by people with a history or background as a sex offender an aggravating offense.

If SB 15 is enacted, penalties could increase a violation to a Class B misdemeanor, a class A misdemeanor would be punishable as a class C felony and a class C felony goes to a class B felony.

Currently there are laws against those who would commit each crime separately. However, what is being discovered that those who are providing alcohol to people under 21 have the intent to commit a sexual offense. There have been instances where sex trafficking and sex offenses are preceded by providing alcohol to those under 21 years of age.

27-LS0119\I
Luckhaupt
3/16/11

CS FOR SENATE BILL NO. 15( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR MEYER

A BILL

FOR AN ACT ENTITLED

"An Act relating to penalties for certain alcohol offenses involving persons under 21 years of age committed by a sex offender or child kidnapper."

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

*** Section 1.** AS 04.16 is amended by adding a new section to read:

Sec. 04.16.059. Aggravated penalties for violations of AS 04.16.051, 04.16.055, and 04.16.057 involving a person under 21 years of age and committed by a sex offender or child kidnapper. (a) Notwithstanding AS 04.16.051, 04.16.055, 04.16.057, and 04.16.180, the penalty for a violation of AS 04.16.051, 04.16.055, or 04.16.057 that involved a person under 21 years of age and that was committed by a sex offender or child kidnapper is as follows:

(1) if the underlying offense is a violation, a sex offender or child kidnapper committing the offense is guilty of a class B misdemeanor and shall be punished as provided in AS 12.55;

(2) if the underlying offense is a class A misdemeanor, a sex offender

or child kidnapper committing the offense is guilty of a class C felony and shall be punished as provided in AS 12.55;

(3) if the underlying offense is a class C felony, a sex offender or child kidnapper committing the offense is guilty of a class B felony and shall be punished as provided in AS 12.55.

(b) In this section, "sex offender or child kidnapper" has the meaning given in AS 12.63.100.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to offenses committed on or after the effective date of this Act.

Memo

To: Senator Kevin Meyer

From: Christine R. Marasigan

Date: March 17, 2011

Re: SB 15 Changes and Fiscal Notes

CHANGES TO SB 15 FROM 27-LS0119\M to 27-LS0119\I
Two substantive changes:

Lines 5 and 6 on page 1:
Aggravated penalties applies to:

- AS 04.16.51 Furnishing or delivery of alcoholic beverages to persons under the age of 21.
- AS 04.16.055 Room rental for purposes of consuming alcoholic beverages.
- AS 04.16.057 Permitting a person under 21 years of age to possess liquor in dwelling.

Lines 6 and 7 on page 2:
The addition of AS 12.63.100 -- the definition of sex offender child kidnapper.

FISCAL NOTES
There were two fiscal notes issued thus far for SB 15.

- Department of Law issued an indeterminate fiscal note six days before hearing.
- Department of Corrections issued a substantial fiscal note the morning of the bill hearing.

In the fiscal note analysis the DOC says their data from the past 15 years would indicate that there would be 3.5 total convictions per year of persons who were both a sex offender and were caught providing alcohol to the underage. The fiscal note seems to reflect 7 convictions a year (3.5 at a class C felony and another 3.5 at a class B felony). Also, there were other issues concerning the DOC calculations.

This was discussed briefly in committee. However, the Chair felt that the fiscal note was better dealt with in either Judiciary or once the bill picked up the additional referral, the Finance Committee.

The DOC Director of Administrative Services and their Legislative Liasion met with our office, they did agree that there may be an error and that the fiscal note needs to be adjusted.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB015(HSS)**
() Publish Date 3/18/2011

Identifier (file name) SB015-DOC-OC-03-22-11
Title "An Act relating to penalties for certain alcohol offenses involving

Dept. Affected DOC
Appropriation Administration & Support
Allocation Office of the Commissioner

Sponsor Senator Kevin Meyer
Requester Senate Judiciary Committee

OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities	182.4	182.4	232.2	232.2	232.2	232.2	232.2
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**182.4**	**182.4**	**232.2**	**232.2**	**232.2**	**232.2**	**232.2**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	**182.4**	**182.4**	**232.2**	**232.2**	**232.2**	**232.2**	**232.2**
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**182.4**	**182.4**	**232.2**	**232.2**	**232.2**	**232.2**	**232.2**

Estimate of any current year (FY2011) cost **0.0**

POSITIONS

Full-time	**0**	**0**	**0**	**0**	**0**	**0**	**0**
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version; not applicable

Prepared by Leslie Houston, Director — Phone 465-3339
Division Dept. of Corrections - Administrative Services — Date/Time 3/22/11 12:00 PM
Approved by Joseph D. Schmidt, Commissioner — Date 3/22/2011
Dept. of Corrections

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB015(HSS)
2011 LEGISLATIVE SESSION

Analysis

This bill would elevate the offenses of furnishing alcohol to persons under the age of 21 (under AS 04.16.051 - AS 04.16.057) if the offense is committed by a sex offender or child kidnapper. For example, if the offense committed under AS 04.16.051 - AS 04.16.057 is a class C felony, the offense would be elevated to a class B felony.

**Based on averages over the past 10 years*

Sec 1(1): Class B misdemeanors - No increased impact to the Dept. of Corrections.

Sec 1(2): Average number of sex offender or child kidnappers coming in with a second offense of furnishing alcohol to a minor/class A misdemeanor per year = 4 offenders.
* This offense would be elevated to a class C felony, which would be an increase in sentence of 243 mandays.
* This would be an overall increase of 972 mandays per year.
* At the current daily cost of care ($136.44) this would be an increase of $132,619.7 annually.

Sec 1(3): Average number of sex offenders or child kidnappers coming in with a second offense of furnishing alcohol to a minor/class C felony per year = 1 offender.
* This offense would be elevated to a class B felony, which would be an increase in sentence of 730 mandays (2 years).
*In Year 1 (FY2012) 1 new incarceration at 365 mandays per year at the current daily cost of care ($136.44) would be an increase of $19,800.60.
* In Years 2 thru 6 averaging 1 new incarceration per year would be an overall increase of 730 mandays per year (2 year increase in sentence will result in an overlap in the out years of inmates being housed at one time).
* At the current daily cost of care ($136.44) this would be an increase of $99,601.2 annually (starting in the second year).

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB015**
() Publish Date 1/19/2011

Identifier (file name) SB015-DOC-OC-03-14-11
Title "An Act relating to penalties for certain alcohol offenses involving

Dept. Affected DOC
Appropriation Administration & Support
Allocation Office of the Commissioner

Sponsor Senator Kevin Meyer
Requester Senate Health and Social Services

OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities	469.2	469.2	821.1	1,173.0	1,173.0	1,524.9	1,876.8
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**469.2**	**469.2**	**821.1**	**1,173.0**	**1,173.0**	**1,524.9**	**1,876.8**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	469.2	469.2	821.1	1,173.0	1,173.0	1,524.9	1,876.8
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**469.2**	**469.2**	**821.1**	**1,173.0**	**1,173.0**	**1,524.9**	**1,876.8**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version; not applicable

Prepared by Leslie Houston, Director — Phone 465-3339
Division Dept. of Corrections - Administrative Services — Date/Time 3/15/11 11:00 AM
Approved by Joseph D. Schmidt, Commissioner — Date 3/15/2011
Dept. of Corrections

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB015

Analysis

This bill would elevate the offenses of furnishing alcohol to persons under the age of 21 (under AS 04.16.051 - AS 04.16.057) if the offense is committed by a sex offender or child kidnapper. For example, if the offense committed under AS 04.16.051 - AS 04.16.057 is a class C felony, the offense would be elevated to a class B felony.

Should this legislation pass, the Department of Corrections has data to support an average of 3.5 convictions per year under the following sections:

Section 1(2): if the underlying offense is a class A misemeanor, a sex offender or child kidnapper committing the offense is guilty of a class C felony and shall be punished as provided in AS 12.55;

3.5 convictions per year represents an increase of 860 mandays per year @ $136.44/da = $117.3/yr

Section 1(3) : if the underlying offense is a class C felony, a sex offender or child kidnapper committing the offense is guilty of a class B felony and shall be punished as provided in AS 12.55.

3.5 convictions per year represents an increase of 2,579 mandays per year @ $136.44/day = $351.9/yr

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **SB015 \M**
() Publish Date

Identifier (file name): SB015-LAW-CRIM-03-11-11
Dept. Affected: Law
Title: An Act relating to penalties for certain alcohol offenses involving persons under 21 years of age committed by a sex offender or child kidnapper.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: SENATOR(S) MEYER
Requester: (S) HEALTH & SOCIAL SERVICES
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost ***

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 3/11/11 4:30 PM
Approved by: John J. Burns, Attorney General — Date: 3/11/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 015 \M

Analysis

SB 15 raises one level the severity of offenses for providing alcohol to persons under 21 years of age if the offender is a sex offender or child kidnapper. For example, a nonlicensee who furnishes alcohol to a person under 21 years of age commits a class A misdemeanor for a first offense. SB 15 would make this offense a class C felony if the offender was a sex offender or child kidnapper.

This would have an indeterminate fiscal impact on the Department of Law. Any time an offense is raised from a misdemeanor to a felony there is an impact. Felony prosecutions require more time – for example, a felony requires a grand jury indictment and a jury of 12 persons.

APOA
ALASKA PEACE OFFICERS ASSOCIATION

ALASKA ASSOCIATION OF CHIEFS OF POLICE

Women Police of Alaska

February 14, 2011

Senator Kevin Meyer
Alaska State Senate
State Capitol
Juneau AK 99801-1182

Dear Senator Meyer:

On behalf of our respective organizations, we would like to thank you for introducing SB 15, an Act relating to penalties for certain alcohol offenses involving persons under 21 years of age committed by a sex offender or child kidnapper.

We met recently to review proposed legislation and decided to unanimously support this bill.

Again, thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organizations can do to assist in the passage of this bill.

Sincerely,

John Lucking Jr., President
Alaska Peace Officers Association
PO Box 240106
Anchorage AK 99524

Tom Clemons, President
Alaska Association of Chiefs of Police
183 Nelson Ave
Wasilla AK 99654

Michele Logan, President
Women Police of Alaska
PO Box 233306
Anchorage AK 99523

Advisory Board on Alcoholism
and Drug Abuse

abada
amhb

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

March 29, 2011

Senator Kevin Meyer
Alaska State Legislature
Capitol Building, Room 103
Juneau, Alaska 99801

Re: SB 15 – Alcohol Offenses Committed by Sex Offenders, Child Kidnappers

Dear Senator Meyer,

On behalf of the Advisory Board on Alcoholism and Drug Abuse, I would like to express our support for your efforts to protect children and youth from falling victim to sexual exploitation, trafficking, and kidnapping. While there is no specific data reflecting how often a young person gains access to alcohol through a convicted sex offender or child kidnapper, there is data that shows that young people gain access to alcohol at least one third of the time from adults or friends.

The Center for Behavioral Health Statistics and Quality reported in February 2011 that, between 2006 and 2009, 93.4% of the 709,000 adolescents aged 12-14 who reported drinking alcohol gained access to the alcohol — for free — from other people. Of those, 13.5% were given the alcohol by an unrelated adult. In Alaska, 34.7% of traditional high schools students participating in the 2009 Youth Risk Behavior Survey reported that they had used alcohol in the past thirty days and that they got that alcohol from someone else. While we don't know who provided that alcohol, or whether they were a convicted sex offender or child kidnapper, we do know there is connection between providing alcohol to minors and victimization.

Recent new coverage of sexual exploitation of young Alaskan women by Channel 2, KTUU news highlighted the role of drugs and alcohol in this form of victimization. Young people are often ensnared in human trafficking and sexual exploitation through the provision of drugs and alcohol, among other "grooming" efforts. By creating an aggravating factor to target individuals who use alcohol to coerce, induce, or otherwise attempt to engage a young person in sexual activity will help to address this problem.

Given the traumatic and potentially lifelong harm that can result from situations in when predators use alcohol (and other drugs) to prey upon young people, SB 15 provides a balanced approach to increasing the penalty for individuals who engage in this sort of victimization and exploitation. We appreciate your efforts on behalf our most vulnerable youth.

Sincerely,

J. Kate Burkhart
Executive Director

SB 17

<TARGET><BILL>SB 17</BILL><SUBJECT>SB 17</SUBJECT><COMM>SJUD27</COMM></TARGET>

APOA
ALASKA PEACE OFFICERS ASSOCIATION

ALASKA ASSOCIATION OF CHIEFS OF POLICE

Women Police of Alaska

February 14, 2011

Senator Kevin Meyer
Alaska State Senate
State Capitol
Juneau AK 99801-1182

Dear Senator Meyer:

On behalf of our respective organizations, we would like to thank you for introducing SB 17, an Act classifying certain synthetic cannabinoids as schedule IIA controlled substances; and providing for an effective date.

We met recently to review proposed legislation and decided to unanimously support this bill.

Again, thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organizations can do to assist in the passage of this bill.

Sincerely,

John Lucking Jr., President
Alaska Peace Officers Association
PO Box 240106
Anchorage AK 99524

Tom Clemons, President
Alaska Association of Chiefs of Police
183 Nelson Ave
Wasilla AK 99654

Michele Logan, President
Women Police of Alaska
PO Box 233306
Anchorage AK 99523

27-LS0121\D
Luckhaupt
2/22/11

CS FOR SENATE BILL NO. 17(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS MEYER, Dyson, Giessel

A BILL

FOR AN ACT ENTITLED

"An Act classifying certain substances as schedule IIIA controlled substances; and providing for an effective date."

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

*** Section 1.** AS 11.71.160(f) is amended to read:

(f) Schedule IIIA includes**, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following substances or that contains any of its salts, isomers, whether optical, position, or geometric, or salts of isomers whenever the existence of those salts, isomers, or salts of isomers is possible within the specific chemical designation:**

(1) hashish;

(2) hash oil or hashish oil;

(3) tetrahydrocannabinols;

(4) parahexyl;

(5) dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product; [AND]

(6) nabilone**;**

(7) (6aR,10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as HU-210;

(8) (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as Dexanabinol or HU-211;

(9) 1-pentyl-3-(1-naphthoyl)indole, also known as JWH-018;

(10) 1-Butyl-3-(1-naphthoyl)indole, also known as JWH-073;

(11) (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone, also known as JWH-015;

(12) 1-pentyl-3-(4-chloro-1-naphthoyl)indole, also known as JWH-398;

(13) 1-pentyl-3-(2-methoxyphenylacetyl)indole, also known as JWH-250;

(14) 1-hexyl-3-(1-naphthoyl)indole, also known as JWH-019;

(15) 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl) indole, also known as JWH-200;

(16) 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol, also known as CP 47, 497, and its dimethyloctyl (C8) homologue; in this paragraph, "homologue" means a chemical compound in a series in which each compound differs by one or more alkyl functional groups on an alkyl side chain.

*** Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

27-LS0121\I
Luckhaupt
2/8/11

CS FOR SENATE BILL NO. 17( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS MEYER, Dyson, Giessel

A BILL

FOR AN ACT ENTITLED

"An Act classifying certain substances as schedule IIIA controlled substances; and providing for an effective date."

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

*** Section 1.** AS 11.71.160(f) is amended to read:

(f) Schedule IIIA includes**, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following substances or that contains any of its salts, isomers, whether optical, position, or geometric, or salts of isomers whenever the existence of those salts, isomers, or salts of isomers is possible within the specific chemical designation:**

(1) hashish;

(2) hash oil or hashish oil;

(3) tetrahydrocannabinols;

(4) parahexyl;

(mannol)

New Text Underlined [DELETED TEXT BRACKETED]

(5) dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product; [AND]

(6) nabilone**;**

(7) (6aR,10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as HU-210;

(8) (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as Dexanabinol or HU-211;

(9) 1-pentyl-3-(1-naphthoyl)indole, also known as JWH-018;

(10) 1-Butyl-3-(1-naphthoyl)indole, also known as JWH-073;

(11) (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone, also known as JWH-015;

(12) 1-pentyl-3-(4-chloro-1-naphthoyl)indole, also known as JWH-398;

(13) 1-pentyl-3-(2-methoxyphenylacetyl)indole, also known as JWH-250;

(14) 1-hexyl-3-(1-naphthoyl)indole, also known as JWH-019;

(15) 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl) indole, also known as JWH-200;

(16) 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol, also known as CP 47, 497, and its dimethyloctyl (C8) homologue; in this paragraph, "homologue" means a chemical compound in a series in which each compound differs by one or more alkyl functional groups on an alkyl side chain.

*** Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

ALASKA STATE LEGISLATURE

Interim:
716 West 4th Avenue
Anchorage, Alaska 99501-2133
Phone: (907) 269-0199
Fax (907) 269-0197
Senator_Kevin_Meyer@legis.state.ak.us

Session:
Alaska State Capitol
Juneau, Alaska 99801-1182
Phone: (907) 465-4945
Fax: (907) 465-3476
Toll Free: (866) 465-4945

SENATOR KEVIN MEYER
MAJORITY LEADER

TO: Senator Hollis French, Chair
Senate Judiciary Committee

FROM: Senator Kevin Meyer

DATE: February 9, 2011

RE: SB 17 Request for Hearing

I respectfully request the Senate Judiciary Committee to schedule a hearing for SB 17, "An Act classifying certain synthetic cannabinoids as schedule IIA controlled substances; and providing for an effective date."

The following documents are attached and will be sent electronically:

- Current version of the bill: 27-LS0121\B
- Sponsor Statement for version B
- Sectional Analysis
- Letters of support
- Back up information
- Fiscal Notes
- Witness/Testimony:
  - Dennis Wheeler, Anchorage Municipality Attorney
  - Jennifer Messick, Assistant Municipal Prosecutor
  - Sgt. Robert Thompson, Fairbanks Police Department
- Staff member assigned to the bill: Christine R. Marasigan, 465-6876

This bill would make it unlawful to sell, use, purchase, possess, manufacture transport or deliver synthetic cannabinoids otherwise known as "Spice" or "K2."

Please contact Christine if you have any questions regarding this legislation.

Alaska State Legislature

Interim:
716 West 4th Ave.
Anchorage, Alaska 99501
(907) 269-0199

Session:
State Capitol Building
Juneau, Alaska 99801-1182
(907) 465-4945

Senator Kevin Meyer
Senate District O

SPONSOR STATEMENT FOR SB 17

"An Act classifying certain synthetic cannabinoids as schedule IIA controlled substances; and providing for an effective date."

SB 17 would classify certain synthetic cannabinoids, commonly known as K2 or Spice as a schedule IIA controlled substance.

This new drug is dangerous, cheap and legally available. Sold in smoke shops and gas stations as incense, it is marketed to people who are interested in herbal alternatives to cannabis. Synthetic cannabinoids are inexpensive, accessible and undetectable in most drug tests. Here in Alaska, the drug enjoys some popularity amongst North Slope workers, U.S. Military members and students. The U.S. Drug Enforcement Administration, Municipality of Anchorage and the U.S. Military have all taken action to control or prohibit use of this drug.

Synthetic cannabinoids are abused mainly by smoking organic material which is sprayed with the drug, or prepared in a drink. Users experience severe adverse reactions including dangerously high blood pressure, hallucinations, nausea, vomiting, agitation, delusions, loss of consciousness, and panic attacks. The chemical composition of synthetic cannabinoids is considerably more potent and intense than tetrahydrocannabinol (THC the active ingredient in marijuana).

11 states have passed legislation classifying synthetic marijuana as a controlled substance. 21 states, including Alaska, have introduced similar legislation. Should SB 17 pass, it will be unlawful to sell, use, purchase, possess, manufacture, transport or deliver synthetic cannabinoids.

LEGAL SERVICES

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

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

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

MEMORANDUM January 27, 2011

SUBJECT: Sectional Summary - SB 17 (Work Order No. 27-LS0121\B)

TO: Senator Kevin Meyer
Attn: Christine Marasigan

FROM: Gerald P. Luckhaupt
Assistant Revisor

You have requested a sectional summary of the above-described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill -- the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 11.71.150(b), by adding certain compounds to the list of Schedule IIA controlled substances contained in that section. The compounds that are being included:

(21) (6aR,10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as HU-210;

(22) (6aS,10aS)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as Dexanabinol or HU-211;

(23) 1-Pentyl-3-(1-naphthoyl)indole, also known as JWH-018;

(24) 1-Butyl-3-(1-naphthoyl)indole, also known as JWH-073;

(25) (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone, also known as JWH-015;

(26) 1-pentyl-3-(4-chloro-1-naphthoyl)indole, also known as JWH-398;

(27) 1-pentyl-3-(2-methoxyphenylacetyl)indole, also known as JWH-250;

(28) 1-hexyl-3-(1-naphthoyl)indole, also known as JWH-019;

(29) 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl)indole, also known as JWH-200;

(30) 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol, also known as CP 47, 497, and homologues

are commonly known, or have been identified by other states or the federal government, as forms of synthetic marijuana.

Section 2 of the bill provides an effective date.

GPL:ljw
11-053.ljw

MUNICIPALITY OF ANCHORAGE

Office of the Mayor

Phone: 907-343-7100
FAX: 907-343-7180

Mayor Dan Sullivan

January 28, 2011

The Honorable Kevin Meyer
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: Senate Bill 17

Dear Senator Meyer,

Thank you for introducing Senate Bill 17, *"An Act classifying certain synthetic cannabinoids as schedule IIA controlled substances; and providing for an effective date."*

The Municipality of Anchorage fully supports the passage of SB 17 and its companion bill, HB 7. In the last few years, the use of synthetic cannabinoids has quickly become a significant health and public safety issue.

Due to the huge range in potency between the various compounds and products, municipal first responders have encountered users of these drugs having severe reactions, including from bizarre and dangerous behavior to unconsciousness and death. Users who operate machinery, especially motor vehicles, have had significant accidents and present a danger to others that is on par with operating under the influence of alcohol.

In response, the Municipality has enacted its own local code, but does not have the jurisdiction to deal with the influx of the drug on a state-wide basis or impose the kinds of meaningful criminal sentences that are needed to stem the manufacture, distribution, and sale of these drugs.

Thank you again for introducing this important legislation.

Sincerely,

Dan Sullivan

Dan Sullivan
Mayor

FAIRBANKS POLICE
911 Cushman Street
Fairbanks, Alaska 99701-4616
Phone (907) 450-6500
Fax (907) 452-1588
Email: fpd@ci.fairbanks.ak.us

January 21, 2011

Senator Kevin Meyer
State Capitol Room 103
Juneau AK 99801

Dear Senator Meyer:

As the Chief of Police for the Fairbanks Police Department, I would like to extend my support of Senate Bill No. 17 "An Act classifying certain synthetic cannabinoids as schedule IIA controlled substances."

According to the U.S. Department of Justice Drug Enforcement Administration, these substances have no known therapeutic use and are known to cause a variety of effects including seizures, hallucinations, psychotic episodes, and non-responsiveness. In addition the Alaska Information Analysis Center (AKIAC) has reported in studies that subjects have reported having difficulties with balance, slurred speech, and being light headed.

These cannabinoids present a significant threat to the safety of Alaska's citizens as long as they remain unclassified. Without this new legislation a person who is under the influence of synthetic cannabinoids while operating a motor vehicle is not in violation of the law. This presents a clear danger to the citizens of Alaska, as someone could potentially be under the influence of a synthetic cannabinoid while driving and experience hallucinations, seizures, or a psychotic episode. This is not a hypothetical situation and the Fairbanks Police Department has already investigated a motor vehicle accident where the driver of the vehicle was having seizures as a result of consuming synthetic cannabinoids.

By classifying synthetic cannabinoids as a schedule II controlled substance, the act of operating a motor vehicle under the influence of a synthetic cannabinoid would become an illegal act. This bill would therefore have a direct impact on the safety of the citizens of the State of Alaska.

Sincerely

Laren Zager
Chief of Police
Fairbanks Police Department

Advisory Board on Alcoholism
and Drug Abuse

abada
amhb

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

February 3, 2011

Senator Kevin Meyer
Alaska State Legislature
Capitol Building, Room 103
Juneau, Alaska 99801

Re: SB 17 – Regulation of Synthetic Cannabinoids

Dear Senator Meyer,

On behalf of the Advisory Board on Alcoholism and Drug Abuse, I would like to express our thanks for your efforts to regulate synthetic marijuana or "cannabinoids." These products pose a grave risk to youth and adults, causing serious health consequences and impairments to users of these drugs.

The dangers posed by synthetic marijuana are serious. While the base products may be natural, the chemicals used to mimic the properties of THC are not approved for human consumption. National news reports on the effects of these products include elevated heart rate and blood pressure, extreme anxiety, poisoning, nausea and vomiting, hallucinations, overdoses, and even addiction.

The American Association of Poison Control Centers reported more than 3,000 calls related to poisoning by synthetic marijuana products in 2010 – and nearly 400 calls since January 1 of this year. The U.S. Army banned use of synthetic marijuana by service members in August 2010. The U.S. Drug Enforcement Agency (DEA) exercised its emergency scheduling authority to **temporarily** control five chemicals used in synthetic marijuana products (JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol). This federal regulation is limited in duration (12-18 months), leaving Alaskans at risk after that time without the state taking action.

The effects of synthetic marijuana are being felt right here in Alaska. News reports of crimes involving these products have come from Fairbanks and Anchorage. The U.S. Army reported courts martial and non-judicial discipline of more than thirty soldiers in Alaska by December 2010. The Anchorage School District reports situations requiring medical care due to use by students (though not to the same extent as actual marijuana).

Given the health consequences and the role synthetic marijuana can play in criminal activity, there is a more than adequate basis for the regulation of these products to protect the health and safety of Alaskans. Thank you for your work to protect Alaskans from these harmful products.

Sincerely,

J. Kate Burkhart
Executive Director

U.S. Department of Justice

NEWS RELEASE NEWS RELEASE

November 24, 2010

DEA MOVES TO EMERGENCY CONTROL SYNTHETIC MARIJUANA

Agency Will Study Whether To Permanently Control Five Substances

WASHINGTON, D.C. – The United States Drug Enforcement Administration (DEA) is using its emergency scheduling authority to temporarily control five chemicals (JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol) used to make "fake pot" products. Except as authorized by law, this action will make possessing and selling these chemicals or the products that contain them illegal in the U.S. for at least one year while the DEA and the United States Department of Health and Human Services (DHHS) further study whether these chemicals and products should be permanently controlled.

A Notice of Intent to Temporarily Control was published in the *Federal Register* today to alert the public to this action. After no fewer than 30 days, DEA will publish in the *Federal Register* a Final Rule to Temporarily Control these chemicals for at least 12 months with the possibility of a six-month extension. They will be designated as Schedule I substances, the most restrictive category, which is reserved for unsafe, highly abused substances with no medical usage.

Over the past year, smokable herbal blends marketed as being "legal" and providing a marijuana-like high, have become increasingly popular, particularly among teens and young adults. These products consist of plant material that has been coated with research chemicals that mimic THC, the active ingredient in marijuana, and are sold at a variety of retail outlets, in head shops and over the Internet. These chemicals, however, have not been approved by the FDA for human consumption and there is no oversight of the manufacturing process. Brands such as "Spice," "K2," "Blaze," and "Red X Dawn" are labeled as incense to mask their intended purpose.

Since 2009, DEA has received an increasing number of reports from poison centers, hospitals and law enforcement regarding these products. Fifteen states have already taken action to control one or more of these chemicals. The Comprehensive Crime Control Act of 1984 amends the Controlled Substances Act (CSA) to allow the DEA Administrator to emergency schedule an abused, harmful, non-medical substance in order to avoid an imminent public health crisis while the formal rule-making procedures described in the CSA are being conducted.

"The American public looks to the DEA to protect its children and communities from those who would exploit them for their own gain," said DEA Acting Administrator Michele M. Leonhart. "Makers of these harmful products mislead their customers into thinking that 'fake pot' is a harmless alternative to illegal drugs, but that is not the case. Today's action will call further attention to the risks of ingesting unknown compounds and will hopefully take away any incentive to try these products."

##

and other information in your case record, we will try to resolve it. * * * * * * * * * *

(Emphasis added). We provide similar definitions of the terms "marked" and "extreme" in the listings section for children, with criteria appropriate to childhood.

Why are we providing a limited reopening of the public comment period?

In response to the NPRM, we received many public comments that seemed to misunderstand our current policy, what changes we were proposing, and how the proposals might affect adults and children. We believe that much of the confusion was caused by our failure to provide sufficiently detailed information about our current policies and where our proposals came from. We apologize for that omission, which we have corrected in this notice.

Although we received a wide variety of comments, we are reopening the public comment period on a limited basis to specifically address the misunderstanding of our current and proposed policy regarding the use of standardized tests. We are requesting public comment only on this issue in light of the clarification we are providing in this notice.

Many commenters focused on two aspects of our proposed rule: (1) A definition of "marked" based on a standardized test score that is two standard deviations below the mean; and, (2) a separate definition of "marked" based on functioning that would be the equivalent of such a score if there were a standardized test. As discussed above, neither of these proposals represents new policy; both are based on our longstanding rules. However, some commenters said that our proposal would encourage our adjudicators to use standardized tests. Many said that we should drop all reference to standardized tests in the mental illness sections of the proposed rules and that the change would reduce the number of children and adults with serious mental disorders who qualify for disability benefits. Some who are already beneficiaries or who have family members who are beneficiaries were concerned that they would lose their benefits.

We did not intend for, and do not believe that, our proposed rules would do any of these things. The childhood mental disorders listings have contained a provision defining "marked" limitation as a score that is two standard deviations below the mean on a standardized test for 20 years. We developed those rules with information we received from a group of mental health experts. We did not propose to change that provision or the way we determine disability in children with serious mental disorders. We proposed only to extend the provision to adults since it has worked well in childhood claims.

The proposed rules for adults and children do not state that adjudicators should obtain standardized tests, encourage them to do so, or indicate that there are standardized tests for all serious mental disorders. Rather, our proposed rules state only that *if* a person has a standardized test and the scores are two standard deviations below the mean, the test will show that the person has a "marked" limitation. Consistent with our current childhood rules, the proposed rules also state that adjudicators must not rely on the results of standardized tests alone but must consider all of the evidence in the person's case record.

Since the beginning of 2001, our functional equivalence regulation has contained an alternative rule defining "marked" limitation for children based on functioning that would be consistent with a score on a standardized test that is two standard deviations below the mean, if there were such a test. As with the provision for actual scores from an actual test, the rule provides that we will find that the child has a marked limitation if the child is functioning at that level. The regulation section, like the proposed rule for the mental disorders listings, also provides other definitions for the term "marked." We began using this regulation in 1997, 13 years ago. The number of awards of children who apply for SSI has not fallen since that time.[13] Given this experience, we believe that it was appropriate to include the rule in both the adult and child mental disorders listings.

Perhaps most importantly, it appeared that many commenters did not understand that we do not deny a person's claim merely because his or her impairment(s) does not meet or medically equal the criteria of our listings. As under our current rules, adults with mental disorders who cannot perform their past work or a significant number of jobs in the national economy considering their age, education, and work experience would still be able to qualify under other rules we have for finding persons disabled.

We also want to make clear that we do not reexamine the entitlement of beneficiaries when we revise listings. When we periodically perform continuing disability reviews to determine if beneficiaries are still disabled, we continue to use the same listing section we used to make our most recent favorable decision.[14] Thus, beneficiaries who qualified under a current listing would continue to qualify as long as their impairments continued to meet or medically equal the current listing.

In light of the importance of this issue and the widespread misunderstanding of our proposed rules, we are reopening the comment period for the limited purpose of allowing interested persons to provide any additional comments they may have on our proposed policy regarding the use of standardized tests.

Michael J. Astrue,

Commissioner of Social Security.

[FR Doc. 2010–29577 Filed 11–23–10; 8:45 am]

BILLING CODE 4191–02–P

[13] You may look up our award data for children under SSI by year in the *SSI Annual Statistical Report*, available at: *http://www.socialsecurity.gov/policy/docs/statcomps/ssi_asr/2009/ssi_asr09.pdf.*

[14] *See* 404.1594(c)(3)(i), 416.994(b)(2)(iv)(A), and 416.994a(b)(2).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–345N]

Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I

AGENCY: Drug Enforcement Administration (DEA), U.S. Department of Justice.

ACTION: Notice of Intent.

SUMMARY: The Deputy Administrator of the Drug Enforcement Administration (DEA) is issuing this notice of intent to temporarily place five synthetic cannabinoids into the Controlled Substances Act (CSA) pursuant to the temporary scheduling provisions under 21 U.S.C. 811(h) of the CSA. The substances are 1-pentyl-3-(1-naphthoyl)indole (JWH–018), 1-butyl-3-(1-naphthoyl)indole (JWH–073), 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH–200), 5-(1,1-dimethylheptyl)-2-[(1*R*,3*S*)-3-hydroxycyclohexyl]-phenol (CP–47,497), and 5-(1,1-dimethyloctyl)-2-[(1*R*,3*S*)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP–47,497 C8 homologue). This intended action is based on a finding by the DEA Deputy

Administrator that the placement of these synthetic cannabinoids into Schedule I of the CSA is necessary to avoid an imminent hazard to the public safety. Finalization of this action will impose criminal sanctions and regulatory controls of Schedule I substances under the CSA on the manufacture, distribution, possession, importation, and exportation of these synthetic cannabinoids.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, Ph.D., Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, telephone (202) 307–7183, fax (202) 353–1263, or e-mail *ode@dea.usdoj.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Comprehensive Crime Control Act of 1984 (Pub. L. 98–473), which was signed into law on October 12, 1984, amended section 201 of the CSA (21 U.S.C. 811) to give the Attorney General the authority to temporarily place a substance into Schedule I of the CSA for one year without regard to the requirements of 21 U.S.C. 811(b) if he finds that such action is necessary to avoid imminent hazard to the public safety. The Attorney General may extend the temporary scheduling up to six months. A substance may be temporarily scheduled under the emergency provisions of the CSA if it is not listed in any other schedule under section 202 of the CSA (21 U.S.C. 812) or if there is no exemption or approval in effect under 21 U.S.C. 355 for the substance. The Attorney General has delegated his authority under 21 U.S.C. 811 to the Administrator of DEA (28 CFR 0.100). The Administrator has redelegated this function to the Deputy Administrator, pursuant to 28 CFR, appendix to subpart R, section 12.

Section 201(h)(4) of the CSA (21 U.S.C. 811(h)(4)) requires the Deputy Administrator to notify the Assistant Secretary for Health, delegate of the Secretary of Health and Human Services, of her intention to temporarily place a substance into Schedule I of the CSA. Comments submitted by the Assistant Secretary for Health in response to this notification, including whether there is an exemption or approval in effect for the substance in question under the Federal Food, Drug and Cosmetic Act, shall be taken into consideration before a final order is published.

In making a finding that placing a substance temporarily into Schedule I of the CSA is necessary to avoid an imminent hazard to the public safety, the Deputy Administrator is required to consider three of the eight factors set forth in section 201(c) of the CSA (21 U.S.C. 811(c)). These factors are as follows: (4) History and current pattern of abuse; (5) The scope, duration and significance of abuse; and (6) What, if any, risk there is to the public health.

Synthetic Cannabinoids

Synthetic cannabinoids have been developed over the last 30 years for research purposes to investigate the cannabinoid system. No legitimate non-research uses have been identified for these synthetic cannabinoids. They have not been approved by the U.S. Food and Drug Administration for human consumption. These THC-like synthetic cannabinoids, 1-pentyl-3-(1-naphthoyl)indole (JWH–018), 1-butyl-3-(1-naphthoyl)indole (JWH–073), 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH–200), 5-(1,1-dimethylheptyl)-2-[(1*R*,3*S*)-3-hydroxycyclohexyl]-phenol (CP–47,497), and 5-(1,1-dimethyloctyl)-2-[(1*R*,3*S*)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP–47,497 C8 homologue), are so termed for their THC-like pharmacological properties. Though they have similar properties to *delta*-9-tetrahydrocannabinol (THC) found in marijuana and have been found to be more potent than THC in animal studies. Numerous herbal products have been analyzed and JWH–073, JWH–018, JWH–200, CP–47,497, and cannabicyclohexanol have been identified in varying mixture profiles and amounts spiked on plant material.

Factor 4. History and Current Pattern of Abuse

The emergence of these synthetic cannabinoids represents a recent phenomenon in the designer drug market. Since the initial identification of JWH–018 in December 2008, many additional synthetic cannabinoids with purported psychotropic effects have been identified in related products. The popularity of these THC-like synthetic cannabinoids has greatly increased in the United States and they are being abused for their psychoactive properties. Primarily found laced on plant material, these synthetic cannabinoids are also being abused alone as self-reported on Internet discussion boards. This abuse has been characterized by both acute and long term public health and safety problems. Even though there is no accepted use for these synthetic cannabinoids, multiple shipments of JWH–018 and JWH–073 have been intercepted by U.S. Customs and Border Protection in 2010, with one being in excess of 50 kilograms. Additionally, bulk loads of JWH–018 and JWH–200 have been seized by law enforcement in 2010. In Casper, Wyoming, products seized in a raid, which were laced with synthetic cannabinoids, were found in conjunction with illicit drugs.

The products containing these THC-like synthetic cannabinoids are marketed as "legal" alternatives to marijuana and are being sold over the Internet and in tobacco and smoke shops, drug paraphernalia shops, and convenience stores. These synthetic cannabinoids alone or spiked on plant material have the potential to be extremely harmful due to their method of manufacture and high pharmacological potency. DEA has been made aware that smoking these synthetic cannabinoids for the purpose of achieving intoxication and experiencing the psychoactive effects is identified as a reason for emergency room visits and calls to poison control centers.

As of October 15, 2010, 15 states in the United States, European and Scandinavian countries have controlled one or more of the synthetic cannabinoids DEA is temporarily scheduling here.

Factor 5. Scope, Duration and Significance of Abuse

According to forensic laboratory reports, the first appearance of these synthetic cannabinoids in the United States occurred in November 2008, when U.S. Customs and Border Protection analyzed "Spice" products. From January 2010 through September 2010, the National Forensic Laboratory Information System, a national repository of drug evidence analyses from forensic laboratories across the United States, reported over 500 exhibits relating to these synthetic cannabinoids from various States including Alabama, Arkansas, California, Florida, Hawaii, Iowa, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Missouri, North Dakota, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Virginia. Additionally, the American Association of Poison Control Centers (AAPCC) has reported receiving over 1,500 calls as of September 27, 2010, relating to products spiked with these synthetic cannabinoids from 48 states and the District of Columbia.

Factor 6. What, if Any, Risk There Is to the Public Health

JWH–018, JWH–073, JWH–200, CP–47,497, and cannabicyclohexanol share pharmacological similarities with the Schedule I substance THC. Health warnings have been issued by numerous state public health departments and poison control centers describing the adverse health effects associated with these synthetic cannabinoids and their related products including agitation, anxiety, vomiting, tachycardia, elevated blood pressure, seizures, hallucinations and non-responsiveness. Case reports describe psychotic episodes, withdrawal, and dependence associated with use of these synthetic cannabinoids, similar to syndromes observed in cannabis abuse. Emergency room physicians have reported admissions connected to the abuse of these synthetic cannabinoids. Additionally, when responding to incidents involving individuals who have reportedly smoked these synthetic cannabinoids, first responders report that these individuals suffer from intense hallucinations. Detailed chemical analysis by DEA and other investigators have found these synthetic cannabinoids spiked on plant material in products marketed to the general public. The risk of adverse health effects is further increased by the fact that similar products vary in the composition and concentration of synthetic cannabinoids(s) spiked on the plant material.

Self-reported abuse of these THC-like synthetic cannabinoids alone and spiked on plant material appear on Internet discussion boards. According to self-reports, these substances are cannabis-like (or THC-like) in their psychoactive effects and are more potent than THC in this regard. The most common route of administration of these synthetic cannabinoids is by smoking, using a pipe, water pipe, or rolling the drug-spiked plant material in cigarette papers.

The marketing of products that contain one or more of these synthetic cannabinoids is geared towards teens and young adults. Despite disclaimers that the products are not intended for human consumption, retailers promote that routine urinalysis tests will not typically detect the presence of these synthetic cannabinoids.

Furthermore, a number of the products and synthetic cannabinoids appear to originate from foreign sources and are manufactured in the absence of quality controls and devoid of regulatory oversight. These products and associated synthetic cannabinoids are readily accessible via the Internet.

DEA has considered the three criteria for placing a substance into Schedule I of the CSA (21 U.S.C. 812). The data available and reviewed for JWH–073, JWH–018, JWH–200, CP–47,497, and cannabicyclohexanol indicate that these synthetic cannabinoids each have a high potential for abuse, no currently accepted medical use in treatment in the United States and are not safe for use under medical supervision.

Based on the above data, the continued uncontrolled manufacture, distribution, importation, exportation, and abuse of JWH–018, JWH–073, JWH–200, CP–47,497, and cannabicyclohexanol pose an imminent hazard to the public safety. DEA is not aware of any recognized therapeutic uses of these synthetic cannabinoids in the United States. As required by section 201(h)(4) of the CSA (21 U.S.C. 811(h)), the Deputy Administrator in a letter dated October 6, 2010, notified the Assistant Secretary of Health of the intention to temporarily place five synthetic cannabinoids in Schedule I.

In accordance with the provisions of section 201(h) of the CSA (21 U.S.C. 811(h)) and 28 CFR 0.100, the Deputy Administrator has considered the available data and the three factors required to support a determination to temporarily schedule five synthetic cannabinoids: 1-butyl-3-(1-naphthoyl)indole, 1-pentyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1*R*,3*S*)-3-hydroxycyclohexyl]-phenol, and 5-(1,1-dimethyloctyl)-2-[(1*R*,3*S*)-3-hydroxycyclohexyl]-phenol in Schedule I of the CSA and finds that placement of these synthetic cannabinoids into Schedule I of the CSA is necessary to avoid an imminent hazard to the public safety.

Because the Deputy Administrator finds that it is necessary to temporarily place these synthetic cannabinoids into Schedule I to avoid an imminent hazard to the public safety, the final order, if issued, will be effective on the date of publication of the order in the **Federal Register**. JWH–018, JWH–073, JWH–200, CP–47,497, and cannabicyclohexanol will be subject to the regulatory controls and administrative, civil and criminal sanctions applicable to the manufacture, distribution, possession, importing and exporting of a Schedule I controlled substance under the CSA. Further, it is the intention of the Deputy Administrator to issue such a final order as soon as possible after the expiration of thirty days from the date of publication of this notice and the date that notification was transmitted to the Assistant Secretary for Health.

Regulatory Certifications

Regulatory Flexibility Act

The Deputy Administrator hereby certifies that this rulemaking has been drafted in accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), has reviewed this regulation, and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. This action provides a notice of intent to temporarily place 1-butyl-3-(1-naphthoyl)indole, 1-pentyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1*R*,3*S*)-3-hydroxycyclohexyl]-phenol, and 5-(1,1-dimethyloctyl)-2-[(1*R*,3*S*)-3-hydroxycyclohexyl]-phenol into Schedule I of the CSA. DEA is not aware of any legitimate non-research uses for these synthetic cannabinoids in the United States.

Executive Order 12988

This regulation meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform.

Executive Order 13132

This rulemaking does not preempt or modify any provision of State law; nor does it impose enforcement responsibilities on any State; nor does it diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $126,400,000 or more (adjusting for inflation) in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This rule is not a major rule as defined by 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act). This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on

competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

Under the authority vested in the Attorney General by section 201(h) of the CSA (21 U.S.C. 811(h)), and delegated to the Deputy Administrator of the DEA by Department of Justice regulations (28 CFR 0.100, and section 12 of the Appendix to Subpart R), the Deputy Administrator hereby intends to order that 21 CFR part 1308 be amended as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

1. The authority citation for part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), unless otherwise noted.

2. Section 1308.11 is amended by adding new paragraphs (g)(1), (2), (3), (4), and (5) to read as follows:

§ 1308.11 Schedule I.

* * * * *

(g) * * *

(1) 5-(1,1-Dimethylheptyl)-2-[(1*R*,3*S*)-3-hydroxycyclohexyl]-phenol-7297

(Other names: CP-47,497)

(2) 5-(1,1-Dimethyloctyl)-2-[(1*R*,3*S*)-3-hydroxycyclohexyl]-phenol-7298

(Other names: cannabicyclohexanol and CP-47,497 C8 homologue)

(3) 1-Butyl-3-(1-naphthoyl)indole-7173

(Other names: JWH-073)

(4) 1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole-7200

(Other names: JWH-200)

(5) 1-Pentyl-3-(1-naphthoyl)indole-7118

(Other names: JWH-018 and AM678)

Dated: November 15, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–29600 Filed 11–23–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0062]

RIN 1625–AA00

Safety Zone; Fleet Week Maritime Festival, Pier 66, Elliot Bay, Seattle, WA

AGENCY: Coast Guard, DHS.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to amend its regulation establishing a permanent safety zone extending 100 yards from Pier 66, Elliot Bay, WA to ensure adequate safety during the parade of ships and aerial demonstration for Fleet Week. This supplemental notice of proposed rulemaking introduces revisions to enforcement dates, times and location of this safety zone. This safety zone is necessary in order to restrict vessel movement for participant and spectator safety in the proximity of Pier 66, Elliot Bay, WA to provide unencumbered access for response craft in the event of an emergency during the annual parade of ships and aerial demonstration.

DATES: Comments and related material must be received by the Coast Guard on or before December 27, 2010.

ADDRESSES: You may submit comments identified by docket number USCG–2010–0062 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand Delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail LTJG Ashley M. Wanzer, Sector Puget Sound Waterways Management Division, Coast Guard; telephone 206–217–6175, e-mail *SectorSeattleWWM@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2010–0062), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov*, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Proposed Rule" and insert "USCG–2010–0062" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½; by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

State Legislation on Synthetic Cannabinoids Pending on January 18, 2011

As of January 18, 2011, 21 states had legislation pending to modify existing laws or create new laws relating synthetic cannabinoids.

2011 PENDING LEGISLATION

Alaska H 7
Classifies certain synthetic cannabinoids as schedule IIA controlled substances.

Alaska S 17
Classifies certain synthetic cannabinoids as schedule IIA controlled substances.

Arkansas S 2
Amends the schedule VI substances regarding drugs in the criminal code; declares an emergency.

Arizona H 2167
Relates to definition of dangerous drugs; relates to synthetic.

Florida H 39
Relates to controlled substances; defines term homologue for purposes of Florida Comprehensive Drug Abuse Prevention and Control Act; includes certain hallucinogenic substances on list of controlled substances in Schedule I; reenacts provisions to incorporate amendment.

Florida S 336
Revises the list of controlled substances included in Schedules I, II, III, IV, and V.

Florida S 204
Relates to controlled substances; defines the term homologue for purposes of the Florida Comprehensive Drug Abuse Prevention and Control Act; includes certain hallucinogenic substances on the list of controlled substances in Schedule I; reenacts specified provisions relating to prohibited acts and penalties regarding controlled substances and the offense severity chart of the Criminal Punishment Code.

Iowa H 33
Adds hallucinogenic substances to the list of schedule I controlled substances; adds salvia divinorum and salvinorin A to the list of schedule I controlled substances; adds certain synthetic cannabinoids to the list of schedule I controlled substances in addition to the tetrahydrocannabinols and synthetic equivalents listed in schedule I.

Iowa S 35
Adds certain synthetic cannabinoids to the list of schedule I controlled substances; adds certain synthetic cannabinoids, also known as K2, to the list of schedule I controlled substances in addition to the tetrahydrocannabinols and synthetic equivalents listed in schedule I under Code section 124.204; A schedule I

controlled substance is considered to have a high potential for abuse and no medical purpose in treatment in the United States.

Iowa SSB 1016
Revises the lists of drugs on the controlled substances schedules, and provides penalties; removes marijuana from schedule I and reclassifies it as a schedule II controlled substance; strikes references to the authority of the board of pharmacy to adopt rules for the use of marijuana or tetrahydrocannabinols for medicinal purposes.

Iowa HSB 5
Adds hallucinogenic substances to the list of schedule I controlled substances; adds salvia divinorum and salvinorin A", also known as divinorin A to the list of schedule I controlled substances; adds certain synthetic cannabinoids, also known as "K2", to the list of schedule I controlled substances in addition to the tetrahydrocannabinols and synthetic equivalents listed in schedule I under Code section 124.204(4)(u); A schedule I controlled substance is considered to have a high potential.

Indiana S 152
Relates to synthetic cannabinoids; defines synthetic cannabinoid and makes possessing, dealing in, manufacturing, or delivering a synthetic cannabinoid equivalent to possessing, dealing in, manufacturing, or delivering marijuana, hash oil, or hashish; makes conforming amendments and corrections.

Indiana S 5
Relates to synthetic cannabinoids; defines synthetic cannabinoid and makes possessing, dealing in, manufacturing, or delivering a synthetic cannabinoid equivalent to possessing, dealing in, manufacturing, or delivering marijuana, hash oil, or hashish; makes conforming amendments.

Indiana H 1102
Relates to possession or manufacture of synthetic cannabinoid; defines synthetic cannabinoid and makes possessing, dealing in, manufacturing, or delivering a synthetic cannabinoid equivalent to possessing, dealing in, manufacturing, or delivering marijuana, hash oil, or hashish; makes conforming amendments.

Indiana H 1277
Prohibits sale of synthetic cannabinoids; defines "synthetic cannabinoid" and makes dealing in, manufacturing, or delivering a synthetic cannabinoid equivalent to possessing, dealing in, manufacturing, or delivering marijuana, hash oil, or hashish; enhances the penalty based on the same weights used to enhance the penalty for dealing in, manufacturing, or delivering hash oil or hashish; makes conforming amendments and a technical correction.

Indiana S 448
elates to spice; defines "synthetic cannabinoid" and makes possessing, dealing in, manufacturing, or delivering a synthetic cannabinoid equivalent to possessing, dealing in, manufacturing, or delivering marijuana, hash oil, or hashish; makes conforming amendments.

Indiana S 57
Relates to synthetic cannabinoids; defines synthetic cannabinoid and makes possessing, dealing in, manufacturing, or delivering a synthetic cannabinoid equivalent to possessing, dealing in, manufacturing, or delivering marijuana, hash oil, or hashish; makes conforming amendments.

Indiana H 1315

Relates to spice and salvia divinorum; defines synthetic cannabinoid and makes possessing, dealing in, manufacturing, or delivering a synthetic cannabinoid or salvia divinorum equivalent to possessing, dealing in, manufacturing, or delivering marijuana, hash oil, or hashish; makes conforming amendments and a technical correction.

Kentucky H 121
Relates to crimes and punishments and declaring an emergency; bans possession, trafficking, or manufacture of 3,4-methylenedioxypyrovalerone the primary ingredient of a drug with a street name "dove"; amend various sections of KRS Chapters 217 and 218A and KRS 530.064 relating to unlawful transaction with a minor to conform.

Minnesota H 57
Relates to public safety; establishes the crimes of sale or possession of synthetic cannabinoids; provides for a penalty.

Minnesota S 7
Relates to public safety; adds synthetic marijuana to the list of Schedule I controlled substances; prescribes criminal penalties.

Mississippi S 2163
Conforms the punishment for the illegal possession, manufacture and sale of synthetic cannabinoids to the punishment for the illegal possession, manufacture and sale of marihuana.

Mississippi S 2226
Includes cathinone derivatives in Schedule I; clarifies the punishment for offenses involving synthetic cannabinoids; clarifies the punishment for offenses involving synthetic cannabinoids.

Mississippi H 518
Includes synthetic Cannabinoids in schedule I.

Mississippi S 2369
Relates to cathinone derivatives in schedule I and to clarify the punishment for offenses involving synthetic cannabinoids; clarifies the punishment for offenses involving synthetic cannabinoids.

Mississippi H 869
Amends existing code, to include cathinone derivatives in Schedule I and to clarify the punishment for offenses involving synthetic cannabinoids; clarifies the punishment for offenses involving synthetic cannabinoids.

Montana H 185
Bans synthetic marijuana; relates to crimes; relates to alcohol and drugs.

North Dakota S 2119
Relates to the scheduling of controlled substances; modifies provisions of the controlled substance schedule relating to certain substances, including tetrahydrocannabinols and synthetic cannabinoids.

New Jersey A 2644
Adds certain cannabis-like chemical substances to list of controlled dangerous substances.

New Jersey S 2606

Adds certain cannabis-like chemical substances to list of controlled dangerous substances.

New York S 1834
Prohibits sale or distribution of any product containing a synthetic cannabinoid; defines the chemical compounds which constitute a synthetic cannabinoid; imposes a civil penalty of not more than $500 for a violation thereof; creates defenses based on over the counter drugs approved by the federal food and drug administration or lack of knowledge that the product contained a synthetic cannabinoid.

Oregon H 2462
Directs State Board of Pharmacy to classify certain synthetic cannabinoid compounds as Schedule I controlled substances; declares emergency, effective on passage.

Oregon H 2709
Directs State Board of Pharmacy to classify certain synthetic cannabinoid compounds as Schedule I controlled substances; declares emergency, effective on passage.

South Carolina H 3137
Relates to materials, compounds, mixtures, and preparations classified as schedule i drugs, add synthetic cannabis to the list of schedule I drugs.

South Carolina H 3144
Relates to materials, compounds, mixtures, and preparations classified as schedule i drugs, add synthetic cannabis to the list of schedule I drugs.

South Carolina S 78
Relates to materials, compounds, mixtures, and preparations classified as schedule I drugs; adds synthetic cannabis to the list of schedule I drugs.

Texas H 49
Relates to the addition of certain synthetic derivatives of marihuana to Penalty Group 2 of the Texas Controlled Substances Act.

Texas H 108
Relates to the addition of a synthetic derivative of marihuana to Penalty Group 2 of the Texas Controlled Substances Act.

Texas H 597
Relates to adding certain synthetic cannabinoids to Penalty Group 2 of the Texas Controlled Substances Act.

Texas S 331
Relates to adding certain synthetic cannabinoids to Penalty Group 2 of the Texas Controlled Substances Act.

Utah H 23
Modifies provisions relating to the Utah Controlled Substances Act by creating a controlled class of listed synthetic cannabinoid substances found in products often referred to as spice.

Utah H 200
Modifies the Criminal Code prohibiting the sale, distribution, and other activities relating to products containing a synthetic cannabinoid to any person under 19 years of age; provides advertising restrictions for

products containing a synthetic cannabinoid; prohibits a person from providing a product containing a synthetic cannabinoid to any person under 19 years of age.

Virginia H 1243
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 of the Drug Control Act, notwithstanding the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia H 1427
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 of the Drug Control Act, notwithstanding the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia H 1434
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 of the Drug Control Act notwithstanding the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia H 1473
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 of the Drug Control Act; relates that notwithstanding the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia H 1481
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 of the Drug Control Act; relates that the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia H 1778
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 (Section 54.1-3446) of the Drug Control Act ([Section] 54.1-3400 et seq.); provides that the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia H 1878
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 of the Drug Control Act; provides that the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia H 2049
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 (Section 54.1-3446) of the Drug Control Act ([Section] 54.1-3400 et seq.); notwithstands the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for

possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia S 745
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 of the Drug Control Act, notwithstanding the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia S 746
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 of the Drug Control Act, notwithstanding the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia S 748
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 of the Drug Control Act, notwithstanding the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia S 749
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 of the Drug Control Act, notwithstanding the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia S 926
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule I (Section 54.1-3446) of the Drug Control Act ([Section] 54.1-3400 et seq.); Notwithstands the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule I, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana.

Virginia S 1082
Adds synthetic marijuana (known as K2 and Spice and various other names) to Schedule I of the Drug Control Act.

Virginia S 1186
Creates a new category for synthetic marijuana as a series of controlled substances listed in Schedule 1 (Section 54.1-3446) of the Drug Control Act ([Section] 54.1-3400 et seq.); Notwithstands the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule 1, punishment for possession and distribution of synthetic marijuana is largely in accord with the provisions for actual marijuana; provides that has an emergency clause.

Virginia S 1373
Creates a new category for synthetic cannabinoids as a series of controlled substances listed in Schedule I (Section 54.1-3446) of the Drug Control Act ([Section] 54.1-3400 et seq.); Notwithstands the provisions regarding punishment for possession and distribution of controlled substances listed in Schedule I,

punishment for possession and distribution of synthetic cannabinoids is largely in accord with the provisions for actual marijuana.

Washington S 5101
Places certain synthetic cannabinoids into schedule I of the uniform controlled substances act.

West Virginia H 2505
Adds synthetic cannabinoids and hallucinogens and stimulants to the Schedule I list of controlled substances (K2).

West Virginia S 63
Extends number of prohibited products included in definition of salvia divinorum.

Wyoming H 62
Relates to the Wyoming Controlled Substances Act; conforms punctuation and spelling in the act to terminology in federal law; adds and deleting substances in the various schedules of the act as specified; amends registration requirements as specified; amends methamphetamine precursor sales restrictions to match federal requirements; specifies penalties; authorizes a person to sign a consent for a third party to receive prescription tracking reports; specifies applicability of new registration requirements.

Wyoming S 59
Relates to the Wyoming Controlled Substances Act; adds specified controlled substances to schedule I of the act; authorizes additional positions.

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Synthetic Cannabinoid State Laws

(Updated: January 18, 2011)

State	Related Bill Numbers	Classified as a Schedule I Controlled Substance	Crimes and Penalties	Chemical Substances*
Alabama	HB 697 (2010)	No	Subject to the same penalties as possession of marijuana in the first and second degree.	HU-210; JWH-018; and JWH-073.
Georgia	HB 1309 (2010)	Yes	Not Specified	CP 47, 497 and homologues; HU-210; and JWH-018.
Illinois	HB 6459 (2010)	Yes	Not Specified	JWH-018 and JWH-073.
Kansas	HB 2411 (2010)	Yes	Not Specified	HU-210; JWH-018; and JWH-073.
Kentucky	HB 265 (2010)	Yes	Possession of synthetic cannabinoid is a class B misdemeanor. Trafficking in synthetic cannabinoid and manufacturing synthetic cannabinoids are class A misdemeanors. Subject to the same penalties and exclusions as marijuana for certain controlled substances crimes.	Any chemical compound that contains CP 47, 497 and homologues; dexanabinol; JWH-018; or JWH-073. Excludes synthetic cannabinoids that require a prescription, are approved by the USDA and are legally dispensed.

State	Related Bill Numbers	Classified as a Schedule I Controlled Substance	Crimes and Penalties	Chemical Substances*
Louisiana	HB 121 (2010), HB 173 (2010), and SB 37 (2010)	Yes	Subject to the same penalties as possession, distribution and possession with intent to distribute of marijuana.	CP 47, 497 and homologues; HU-210; JWH-018; and JWH-073.
Michigan	HB 6038 (2010)	Yes	Not Specified	CP 47,497; HU-210; JWH-015; JWH-018; JWH-073; JWH-200; and JWH-250.
Mississippi	SB 2004 (2010)	Yes	Subject to the same penalties and exclusions as marijuana for certain controlled substances crimes.	CP-47, 497 and homologues; HU-210; JWH-018; JWH-019; JWH-073; JWH-200; JWH-250; and JWH-398.
Missouri	HB 1472 (2010)	Yes	Possession of 35 grams or less of synthetic cannabinoids is a class A misdemeanor, and possession of more than 35 grams is a class C felony.	HU-211; Indole or JWH-018; Indole or JWH-073; and Phenol CP 47, 497 and homologues.
Oklahoma	HB 3241 (2010)	Yes	Not Specified	HU-210; JWH-018; and JWH-073.
Tennessee	SB 2982 (2010)	No	Subject to the same penalties as producing, manufacturing, distributing, possessing or possessing with intent to produce, manufacture or distribute salvia divinorium.	HU-210; HU-211; JWH-018; and JWH-073. Excludes synthetic cannabinoids lawfully prescribed or substances approved by the Food and Drug Administration.

*Synthetic Cannabinoid Chemical Substances and Trade Names:

- 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl) indole [**trade name: JWH-200**]
- 1-Butyl-3-(1-naphthoyl)indole [**trade name: JWH-073**]
- 1-hexyl-3-(1-naphthoyl)indole [**trade name: JWH-019**]
- 1-pentyl-3-(1-naphthoyl)indole [**trade name: JWH-018**]
- 1-pentyl-3-(2-methoxyphenylacetyl)indole [**trade name: JWH-250**]

- 1-pentyl-3-(4-chloro-1-naphthoyl)indole [**trade name: JWH-398**]
- 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol) [**trade name: CP 47, 497 and homologues**]
- [(6a*R*,10a*R*)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c] chromen-1-ol)] [**trade name: HU-210**]
- (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone [**trade name: JWH-015**]
- Dexanabinol
- dexanabinol, (6a*S*,10a*S*)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol [**trade name: HU-211**]

CLERK'S OFFICE
AMENDED AND APPROVED
Date: 12-7-10

Submitted by: ASSEMBLY CHAIR TRAINI, MAYOR DAN SULLIVAN, AND ASSEMBLY MEMBERS HONEMAN AND GUTIERREZ
Prepared by: Dept. of Law
For reading: December 7, 2010

ANCHORAGE, ALASKA
AO No. 2010-87(S)

AN ORDINANCE AMENDING ANCHORAGE MUNICIPAL CODE CHAPTER 8.35 TO PROHIBIT THE MANUFACTURE, ASSEMBLY, DISTRIBUTION, MARKETING, SALE, USE OR POSSESSION OF SUBSTANCES CONTAINING SYNTHETIC CANNABINOIDS, TO PROHIBIT THE SALE OR POSSESSION OF PARAPHERNALIA RELATED TO THE USE OF SYNTHETIC CANNABINOIDS, TO PROVIDE PENALTIES, AND AMENDING SECTION 14.60.030 TO PROVIDE FOR CIVIL PENALTIES.

WHEREAS, the Municipality is aware that substances containing synthetic cannabinoids were and are manufactured, or assembled for, or marketed, sold or offered for sale to, residents of the Municipality, including minors; and

WHEREAS, local law enforcement personnel and "first responders" indicate there is an increased use of synthetic cannabinoids, currently marketed and sold under a variety of names, including "K2", "Spice", "Black Mamba", "Blue Pearl", "Genie", "DaScents", "Spike", "Space" and "Zohai"; and

WHEREAS, some users of the synthetic cannabinoids endanger the public by operating vehicles while under the influence and endanger the welfare of first responders; and

WHEREAS, some users experience severe reactions, resulting in unconsciousness, seizures, and hospitalization; and

WHEREAS, users of the drug report the effects are similar to marijuana and LSD usage, including blurred vision, extremely elevated blood pressure, irregular heart rates, hallucinations, delusions, vomiting, euphoria, "highs", and disturbing side effects including feelings of excruciating pain, agitation and loss of control; and

WHEREAS, representatives of businesses selling the substance indicate it is available to minors as well as adults; and

WHEREAS, products containing synthetic cannabinoids are not tested by the Food and Drug Administration (U.S. Department of Agriculture) or other governmental regulatory agency for human consumption and may contain chemicals detrimental to the health and welfare of those ingesting them; and

WHEREAS, medical studies and treatises note deleterious health risks and adverse effects associated with the use of synthetic cannabinoids and products containing the synthetic cannabinoids; and

WHEREAS, despite packaging warning purchasers the products are not for human consumption, the warnings are not being heeded; and

WHEREAS, synthetic cannabinoids are banned in many states and municipalities throughout the United States as a danger to public health and welfare; and

WHEREAS, the smoke emanating from the burning or incineration of synthetic cannabinoids may cause adverse effects on bystanders or those in the vicinity of such activity; and

WHEREAS, it is in the best interest of the Municipality to prohibit the manufacture, assembly, possession, use, sale, marketing, or offering for sale of synthetic cannabinoids within the boundaries of the Municipality to protect the health, safety and welfare of its citizens; now, therefore,

THE ANCHORAGE ASSEMBLY ORDAINS:

Section 1. Anchorage Municipal Code chapter 8.35 is amended by adding a new section to read as follows:

8.35.100 [SALE OF] [s] **Synthetic cannabinoids.**

A. It shall be unlawful for any person or **entity** [~~organization~~] to knowingly manufacture, assemble, distribute, dispense, sell, attempt to sell, give, trade, barter, transfer, or to otherwise furnish in a single transaction any product or combination of products containing synthetic cannabinoids, such as products commonly known as "K2", "Spice", "Genie", "DaScents", "Zohai" or similar products, [,] **Synthetic cannabinoids** contain[~~ing~~] one or more of the following chemical compounds:

1. HU-210: (6aR, 1OaR)-9-(hydroxymehty1)-6,6 dimethyl-3-(2methyloctan-2-yl)-6a,7,10,1Oa-tetrahydrobenzo[c]chromen- 1-o1, or 6aR-trans-3-(1,1-Dimethylheptyl)-6a,7,10,10a-tetrahydro-1-hydroxy-6,6-dimethyl-6H-dibenzo[b,d]pran-9-methanol;

2. HU-211: (6aS, 10aS)-9- (hydroxmethy1)-6,6-dimethyl-3-(2-methyloctan-2-y1)-6a,7,10,10a-tetsahydrobenzo[c]chromen-1-ol)(also known as Dexanabinol);

3. CP47,497 and homologues: 2-[(IR,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-y1)phenol;

4. JWH-018: 1-Pentyl-3-(1-naphthoyl)indole;

5. JWH-019: 1-Hexyl-1-(1-naphthoyl)indole);

6. JWH-073: 1-Butyl-3-(1 -napthoyl)indole;

7. JWH-081: 1-pentyl-3-(4-methoxy-1-napthoyl)indole, (also known as 4-methoxynapthalen-1-yl-(1-pehtylindol-3-yl)methanon);

8. JWH-200: 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole;

9. JWH-250: 1-pentyl-3-(2-methoxyphenlacetyl)indole, (also known as 2-(2-methoxypehyl)-1-(1-pentylindol-3-yl)ethonone;

10. JWH-398: 1-Pentyl-3-(4-chloro-1-napthoyl)indole)

11[12]. TEMPP: 1-(3 trifluoromethylphenyl) piperazine;
~~[Salvia Divnorum or Salvinorum A; all parts of the plant presently classified botanically as Salvia Divinorum, whether growing or not, the seeds thereof, any extract from any part of the plant, and every compound, manufacture, salts, derivative, mixture or preparation of the plant, its seeds or extracts;]~~

12 [13].BZP: N-benzylpiperazine; or

13 [14].Any other synthetic cannabinoids or derivatives, salts, isomers, or salts of isomers with similar chemical structure and pharmacological activity as the substances described above.

14. This prohibition shall also apply to any other equivalent compound, substance, or derivative, whether described as tobacco, herbs, incense, food, nutrient, spice or any blend thereof which, when smoked or ingested, mimics the effects of a controlled substance, regardless of whether the substance is marketed for the purpose of being smoked or ingested.

B. It shall be unlawful to manufacture synthetic cannabinoids described in subsection A. within the Municipality.

C. It shall be unlawful for any person or **entity** [~~organization~~] to recklessly manufacture, assemble, distribute, sell, market, display for sale, or offer for sale within the Municipality products containing synthetic cannabinoids described in subsection A.

D. Products containing synthetic cannabinoids may not be possessed, ingested, burned, incinerated or ignited in ~~any public place or on any property owned, leased or controlled by~~ the Municipality. ~~For purposes of this section, "public place" includes any public transit vehicle, any public street or other right of way, and any public school building or grounds.~~

E. A person or **entity** [~~organization~~] violating the provisions of subsections A. or B. shall be guilty of a misdemeanor and shall be punishable by:

1. A fine of not more than $5,000 or imprisonment of not more than one year, or both.

F. A person or **entity** [~~organization~~] violating the provisions of subsection C. shall be guilty of a misdemeanor and shall be punishable by:

1. A fine of not more than $5,000 or imprisonment of not more than 6 months, or both.

G. A person or **entity** [~~organization~~] violating the provisions of subsection D. shall be guilty of a misdemeanor and shall be punishable by:

1. A fine of not more than $5,000 or imprisonment of not more than 6 months, or both.

H. As an alternative to the remedies, procedures and penalties provided in this title and section 1.45.010, a violation of subsection C. **or D.** may be charged as a civil violation subject to and prosecuted in accordance with title 14, and in such case shall be punishable by a civil penalty in accordance with chapter 14.60.

I. If, after multiple violations by the same person or entity, the Municipal Attorney and the Anchorage Police Department determine the imposition of criminal penalties or civil fines will not be effective in enforcing this section, the Municipal Attorney may seek any other remedies provided by law, including injunctive relief.

J. It is not an offense under this section if the person **or entity** was acting at the direction of an authorized agent of the municipality to enforce or ensure compliance with this section.

K. Any product described in subsection A. found in the illegal possession of any person **or entity** may be confiscated and destroyed by the municipality.

L. This section does not apply to drugs or substances lawfully prescribed or drugs or substances approved by the federal Food and Drug Administration or drugs or substances specifically permitted by state law.

Section 2. Anchorage Municipal Code section 8.35.010 is hereby amended to read as follows (*the remainder of the section is not affected and therefore not set out*):

A. The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

*** *** ***

Drug paraphernalia means any items whose objective characteristics or objective manufacturer's design indicate that it is intended for use in the consumption, ingestion, inhalation, injection or other method of introduction of:

1. A [A] controlled substance into the human body or to facilitate a violation of AS 11.71; or [.]
2. A product containing illegal synthetic cannabinoids under section 8.35.100.

Section 3. Anchorage Municipal Code section 14.60.030 is hereby amended to add to the fine schedule (*the remainder of the schedule is not affected and therefore not set out*):

14.60.030 Fine schedule.

Code Section	Offense	Penalty/Fine
***	***	***
8.35.100 C. or 8.35.100 D. [~~8.36.100B~~]	Possession or use of synthetic cannabinoid	$150 for the first violation; $300 for the second violation; $600 for subsequent violations
***	***	***

(AO No. 93-167(S-1), § 1, 4-13-94; AO No. 94-108, § 1, 10-5-94; AO No. 94-134, § 2, 9-8-94; AO No. 95-42, § 2, 3-23-95; AO No. 95-67(S), § 9, 7-1-95; AO No. 95-102, § 1, 4-26-95; AO No. 95-118, § 3, 9-1-95; AO No. 95-163(S), § 21, 8-8-95; AO No. 95-195(S-1), 1-1-96; AO No. 96-51(S-1), § 2, 8-1-96; AO No. 96-96(S-1), § 2, 2-1-97; AO No. 96-126(S), § 3, 10-1-96; AO No. 96-137(S), § 9, 1-2-97; AO No. 97-88, § 3, 6-3-97; AO No. 97-107, § 3, 11-17-97; AO No. 97-133(S), § 1, 11-11-97; AO No. 98-27(S-1), § 2, 11-11-97; AO No. 98-160, § 2, 12-8-98; AO No. 99-13(S), 2-9-99; AO No. 99-91(S), § 4, 7-13-99; AO No. 2000-64, § 1, 4-18-00; AO No. 2000-116(S), § 4, 7-18-00; AO No. 2000-127(S), § 2, 10-14-00; AO No. 2000-129(S), § 26, 11-21-00; AO No. 2001-48, § 1, 3-13-01; AO No. 2001-74(S), § 2, 4-17-01; AO No. 2001-4, § 2, 2-6-01; AO No. 2001-145(S-1), § 11, 12-11-01; AO No. 2003-68, § 1, 9-30-03; AO No. 2003-97, § 4, 9-30-03; AO No. 2003-117, § 2, 1-28-03; AO No. 2003-130, § 8, 10-7-03; AO No. 2003-152S, § 10, 1-1-04; AO No. 2004-1, § 2, 1-1-03; AO No. 2004-99, § 2, 6-22-04; AO No. 2004-100(S-1), § 6, 1-1-05; AO No. 2004-171, § 1, 1-11-05; AO No. 2005-160, § 9, 11-1-05; AO No. 2005-84(S), § 3, 1-1-06; AO No. 2005-185(S), § 35, 2-28-06; AO No. 2005-124(S-1A), § 33, 4-18-06; AO No. 2006-39, § 6, 4-11-06; AO No. 2006-54, § 1, 5-2-06; AO No. 2006-80, § 1, 6-6-06; AO No. 2007-50, § 4, 4-10-07; AO No. 2007-60, § 4, 11-1-07; AO No. 2007-70, § 3, 5-15-07; AO No. 2008-84(S), § 5, 7-15-08; AO No. 2009-61, § 3, 7-7-09; AO No. 2009-82, § 5, 7-7-09; AO No. 2009-40(S), § 3, 7-21-09; AO No. 2009-112, § 4, 10-13-09; AO No. 2009-122, § 2, 12-17-09)

Section 4. The sections, paragraphs, sentences, clauses, phrases and words of this ordinance are separable, and if any word, phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional, invalid or

unenforceable by the valid judgment or decree of a Court of competent jurisdiction, such unconstitutionality, invalidity or unenforceability shall not affect any of the remaining words, phrases, clauses, sentences, paragraphs and sections of this ordinance.

Section 5. This ordinance shall be effective ~~on _____, 2010~~ **upon 30 days of passage by the Anchorage Assembly**.

PASSED AND APPROVED by the Anchorage Assembly this 7th day of December, 2010.

Chair of the Assembly

ATTEST:

Municipal Clerk

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Assembly outlaws chemical known as 'synthetic marijuana'

By ROSEMARY SHINOHARA
rshinohara@adn.com
(12/08/10 20:59:04)

A street chemical that authorities say can cause severe reactions will be illegal in Anchorage starting in early January.

The Anchorage Assembly on Tuesday voted unanimously to ban the sale, possession or use of products containing synthetic versions of cannabinoids. The products go by a variety of names such as K2, Spice and Spike, and are found in convenience stores and tobacco shops in parts of the country where they're not illegal.

Cannabinoids, natural and synthetic, are versions of the active ingredients in marijuana.

"These products pose serious and significant health risks up to and including death, and they offer nothing positive to anyone ingesting it," said Assembly member Paul Honeman, a former police officer. Assembly members Honeman, Dick Traini and Mike Gutierrez and Mayor Dan Sullivan sponsored the new city law.

State Sen. Kevin Meyer, R-Anchorage, has pre-filed a legislative bill for consideration next year that would criminalize such products on a statewide basis.

In Anchorage, it will be a misdemeanor to sell, make, have or use products containing cannabinoids starting on Jan. 6.

The Anchorage School District made public its fears about use of the synthetic chemical last April, and said some Anchorage teens have been hospitalized. In October, school district spokeswoman Heidi Embley said regular marijuana is still much more prevalent, and that the district knew of probably only a handful of synthetic cannabinoid cases.

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Lawmakers seek ban on Spice, legal synthetic marijuana

SYNTHETIC: Alarming trend sweeps nation, finally gets to Alaska.

By CASEY GROVE
casey.grove@adn.com

(10/20/10 11:41:47)

A new street drug that authorities claim is capable of causing everything from hallucinations and slurred speech to death is sweeping the nation and has made its way to Alaska, according to local police and public officials.

It goes by many names -- Spice, Spike, K2 -- but the new craze among kids, the military and others looking for a high is essentially synthetic marijuana: plant material that can hold any number of various sprayed-on psychotropic compounds.

And for now, it is legal.

State Sen. Kevin Meyer and Anchorage Assembly members Mike Gutierrez and Paul Honeman hope to change that.

The drug can be 600 to 800 times stronger than pot and can cause a physical addiction similar to methamphetamine, Gutierrez said at a press conference Tuesday.

"It's a lot more dangerous than marijuana," Guttierez said. "Your 14-year-old can walk into a convenience store and, right next to the energy drinks, they can buy it."

Meyer has pre-filed a bill for the state Legislature that would criminalize the drug, and Honeman and Gutierrez plan to introduce a resolution to the Assembly Oct. 26 that would ask local retailers to voluntarily remove it from their shelves until the Legislature has a chance to make it illegal.

Until then, the various types of synthetic pot continue to be marketed as incense and sold in convenience stores and tobacco shops across the country. Everywhere, that is, except 10 states that have already criminalized it.

Driving under the influence of synthetic marijuana can lead to an impaired driving arrest with the same penalties as drunken driving, according to local law enforcement. Hallucinations from smoking it can also compel people to commit other crimes, they say.

A 28-year-old Fairbanks man who told Alaska State Troopers he'd smoked synthetic marijuana early Tuesday morning kicked in the door of an unoccupied home on Goldhill Road, took off all of his clothes and went to sleep in a bed, according to a trooper report.

He did it because "God told him to," troopers said.

In a separate case, in March, a Fort Richardson soldier just back from Iraq was convicted of operating a vehicle while under the influence of Spike. He was arrested after driving his Chevrolet Avalanche over three raised medians, into a concrete wall, and then driving down a sidewalk on flat tires and with a broken axle, according to a police report. The 25-year-old man later admitted to

smoking some Spike, according to the police report.

The arresting officer noted some strange behavior in his report.

"I asked him who was drinking and driving and he said, 'You were,'" wrote Officer Earl Ernest in his report. "He then hollered, 'You drink, you drive, you die.' I asked if he was saying he was going to kill me and he said, 'Yes.' He then threw the cell phone he'd been holding."

The man, who later pleaded guilty to driving under the influence, had no alcohol in his system, according to a breath-alcohol test noted in the police report.

"You may not always have a bad trip, so to speak, but if you do, chances are, you're going to end up in the emergency room, you're going to be seeing the EMTs, you're going to be seeing an ER doc," Gutierrez said.

Some Anchorage teens have been hospitalized, according to the Anchorage School District, which publicized its fears about synthetic marijuana use last April. Still, use of drugs like Spice by Anchorage students does not come close to the number of cases of marijuana use, school district spokeswoman Heidi Embley said.

"You could probably count the number of cases on one hand," Embley said.

Gutierrez and Honeman had not yet compiled a list of Anchorage stores selling Spice and similar smokeable products, but they planned to do so in order to notify stores of their upcoming resolution.

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Army punishes 36 for using synthetic pot

SPICE AND K2: U.S. Army Alaska banned head shop product in August.

The Associated Press

(12/21/10 11:33:48)

The U.S. Army Alaska says it has punished 36 soldiers for the use of synthetic marijuana since it banned the substance.

Seven soldiers were tried at courts-martial, and 29 received nonjudicial punishments, the Fairbanks Daily News-Miner reported.

Synthetic marijuana is known as Spice or K2. It's a blend of spices and herbs sprayed with a compound similar to the psychoactive ingredient in marijuana. It's commonly sold in head shops.

Some users think the substance can't be detected in drugs tests. But the Army says its urine tests can now find the chemicals used in Spice.

In March, a 25-year-old Fort Richardson soldier just back from Iraq was convicted of driving under the influence of Spice. He was arrested after driving his Chevrolet Avalanche over three raised medians, into a concrete wall and down a sidewalk with flat tires and a broken axle.

The U.S. Army Alaska banned Spice in August.

It had seen an increase in users with high blood pressure and heart rates admitted to hospitals at Fort Richardson in Anchorage and Fort Wainwright in Fairbanks.

The soldiers have had life-threatening reactions in some cases, the commander of U.S. Army Alaska, Brig. Gen. Raymond Palumbo, wrote in a commentary published in the Fort Richardson and Fort Wainwright newspapers.

"We have no idea what the long-term effects are since the chemicals vary and have not been fully tested," Palumbo wrote. "But we do know that in the short term, bad things happen when people use Spice."

This month, the Anchorage Assembly voted unanimously to make the chemicals illegal in the city as of Jan. 6. It will be a misdemeanor to sell, make, have or use products containing cannabinoids, which are versions of the active ingredients in marijuana. The products are found in convenience stores and tobacco shops in parts of the country where they're not illegal.

In October, state Sen. Kevin Meyer, R-Anchorage, proposed a bill to outlaw Spice after state troopers arrested a Fairbanks man who used the substance, broke into a house, stripped naked and slept in the homeowners' bed. He told troopers God had told him to do so.

The U.S. Drug Enforcement Agency has started a process to outlaw five chemicals commonly used in synthetic marijuana.

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'Fake Marijuana' Users Showing Up in Emergency Rooms

Called 'K2' or 'Spice,' the drug is legal in many states

URL of this page: http://www.nlm.nih.gov/medlineplus/news/fullstory_105434.html (*this news item will not be available after 02/09/2011)

Thursday, November 11, 2010

HealthDay

Photo courtesy: Wikimedia/Schorle

THURSDAY, Nov. 11 --(HealthDay News) -- A form of synthetic marijuana known as "K2" is sending young people to the hospital with racing heart beats, extreme anxiety and hallucinations, toxicologists warn.

In recent months, physicians and toxicologists say more young people have been showing up in emergency rooms after smoking synthetic marijuana. Despite the side effects, K2 is legal in many states, although many state legislators are rushing to pass legislation banning it.

Since the start of 2010, the American Association of Poison Control Centers has received nearly 2,000 reports of people who became ill after smoking K2, compared to about a dozen in 2009. Poison control officials described some of the symptoms as "life-threatening."

K2 is often marketed as incense and sold in packets of herbs laced with synthetic marijuana at "head shops," gas stations, convenience stores and online for about $30 to $40 per three-gram bag. The drug also goes by other names, including Spice, Spice Gold, Spice Diamond, Yucatan Fire, Solar Flare, K2 Summit, Genie, PEP Spice, and Fire n Ice, according to the U.S. Drug Intelligence Center.

While people who smoke K2 think they're going to experience deep relaxation and euphoria, those who end up in the hospital report unpleasant experiences, said Dr. Anthony Scalzo, medical director of the Missouri Poison Center and chief of toxicology at St. Louis University.

"The classic symptoms are agitation, anxiety, racing heart beat, elevated blood pressure," Scalzo said. "And some kids are having very negative psychotropic experiences. One said, 'I felt like I went down to hell'."

In some cases, the drug also causes vomiting, tremors and seizures, according to federal drug abuse agencies.

Scalzo was the first to sound the alarm about K2 earlier this year after seeing a couple of dozen of reports of young people treated at emergency rooms who said they'd smoked K2.

The drug, also sold under the name Happy Shaman Herbs, Smoke, Skunk and Zohai, among others, was developed for study purposes in the mid-'90s in the lab of John Huffman, a Clemson University chemist, who was conducting National Institute on Drug Abuse-supported research on cannabinoids.

The chemical makeup of the drug, which he called JWH-018 and JWH-073, was similar to tetrahydrocannabinol (THC), the active ingredient in marijuana, only considerably more potent.

While THC is a cannabinoid, it's one of many, Huffman said. There are many other substances that interact with the cannabinoid receptors in the brain and other organs, Huffman said.

"These receptors don't exist so that people can smoke marijuana and get high; they play a role in regulating appetite, nausea, mood, pain and inflammation. They may be involved in the development of conditions such as osteoporosis, liver disease and some kinds of cancer," Huffman said. "Synthetic cannabinoids can help us understand these interactions and ultimately this knowledge may contribute to the development of new therapies.

Huffman and his colleagues described JWH-018 and JWH-073 in scientific literature. "Evidently some people have figured out how to make them," Huffman said.

Huffman warned that the drugs were only meant to be used in the lab and were not designed for use in people, Huffman said. "These compounds were not meant for human consumption," Huffman said. "Their effects in humans have not been studied and they could very well have toxic effects. They absolutely should not be used as recreational drugs."

And while the makers of K2 seem to have latched on to JWH-018, many other labs have developed their own synthetic cannabinoids that may also find their way into synthetic marijuana products, Scalzo said.

The K2 craze caught on several years ago Europe, prompting several countries to make synthetic cannabis products illegal.

In the United States, the Drug Enforcement Agency has listed K2 as a "drug or chemical of concern." But because it isn't officially "scheduled," it remains legal under federal law, according to published reports.

Alarmed by the rise in popularity, several states have rushed to outlaw K2. Earlier this year, Kansas became the first state to ban K2. Other states that have outlawed it include Iowa, Missouri, Arkansas, Kentucky, Alabama, Michigan and Illinois (where K2 remains legal until the end of the year). There are similar bills pending in many other states, including Nebraska, North Dakota, Ohio, New York, New Jersey and Louisiana.

Scalzo said the prohibitions don't come a moment too soon. Little is known about the health effects of the drug. But he's heard enough anecdotal reports about strange behavior -- ranging from extreme agitation to withdrawal to a suicide after smoking K2 -- to be concerned.

"This chemical was not meant to be used in any kind of pharmaceutical manner," Scalzo said.

SOURCES: Anthony Scalzo, M.D., chief of toxicology, St. Louis University, St. Louis, Mo.; John Huffman, Ph.D., research professor, organic chemistry, Clemson University, Clemson, S.C.

HealthDay

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Health

Fake Weed, Real Drug: K2 Causing Hallucinations in Teens

By Jeanna Bryner, LiveScience Managing Editor
posted: 03 March 2010 04:46 pm ET

Teens are getting high on an emerging drug called "fake weed," a concoction also known as K2 and "spice" that is also causing hallucinations, vomiting, agitation and other dangerous effects.

In the last month, Dr. Anthony Scalzo, a professor of toxicology at Saint Louis University, has seen nearly 30 cases of teenagers experiencing these adverse effects after smoking the fake weed, a legal substance that reportedly offers a marijuana-like high.

"K2 use is not limited to the Midwest; reports of its use are cropping up all over the country," Scalzo said. "I think K2 is likely a bigger problem than we're aware of at this time." For instance, Atlanta has seen about 12 cases recently.

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K2 has been sold since 2006 as incense or potpourri for about $30 to $40 per three gram bag – comparable in cost to marijuana.

"K2 may be a mixture of herbal and spice plant products, but it is sprayed with a potent psychotropic drug and likely contaminated with an unknown toxic substance that is causing many adverse effects," said Scalzo, who also directs the Missouri Regional Poison Control Center.

Origin of K2

This K2 compound was first created in the mid-1990s in the lab of organic chemist John W. Huffman of Clemson University, who studies cannabinoid receptors. He's not sure how the recipe for what is named JWH-018 (his initials) got picked up, but he did publish details on a series of compounds including JWH-018 in a book chapter. Even before that book came out, he recalls learning that in China and Korea people were selling the compound as a plant growth stimulant.

As for where it was first smoked or used as a recreational drug, Huffman thinks perhaps somewhere in Europe.

"Apparently somebody picked it up, I think in Europe, on the idea of doping this incense mixture with the compound and smoking it," Huffman told LiveScience. "You can get very high on it. It's about 10 times more active than THC," the active ingredient in marijuana.

From a chemist's perspective, that means K2 has an affinity for the cannabinoid brain receptor (CB1) that's about 10 times greater than THC. For the less chemically inclined, it means you can smoke a lot less K2 to get just as high.

The compound works on the brain in the same way as marijuana's active ingredient THC, or tetrahydrocannabinol. Both compounds bind to the CB1 receptors, which primarily affect the central nervous system. JWH-018 also binds to the peripheral brain (CB2) receptors, which are involved in the immune system, Huffman said.

Hallucinations and delusions

Since JWH-018 or K2 acts like marijuana, you'd expect to see the same effects, including sleepiness, relaxation, reduced blood pressure, and at high doses, hallucinations and delusions.

While some patients between the ages of 14 and 21 were showing up with hallucinations, other symptoms, such as increased agitation and elevated blood pressure and heart rates, didn't match up with marijuana.

Scalza speculates either another compound is responsible for the nasty side effects, or the concentration of JWH-018 is too high.

To answer this question, Scalzo is having doctors test patients' urine for JWH-018 and other compounds, but he is having trouble getting patients to agree to the test.

"This is *not* something that people are agreeing to," Scalzo said during a telephone interview. "Here's a legal substance that we don't know really that much about that people are putting into their bodies without quality control."

And even though doctors like Scalzo say they'd like to help the teens, that's not enough. "Phenomenally, people are saying no. They're afraid someone is going to find something," though Scalzo has no idea why they'd be afraid.

Dangerous drug

Both Scalzo and Huffman agree the drug is dangerous.

Further testing is needed, but Scalzo says the symptoms, such as fast heart beat, dangerously elevated blood pressure, pale skin and vomiting suggest that K2 is affecting the cardiovascular system of users. It also is believed to affect the central nervous system, causing severe, potentially life-threatening hallucinations and, in some cases, seizures.

"It's like playing Russian roulette. You don't know what it's going to do to you," Huffman said. "You're a potential winner of a Darwin award," referring to the tongue-in-cheek awards given to people who "do a service to humanity by removing themselves from the gene pool."

In addition to the compound being made without strict quality control or any regulation, as far as anyone knows, the compound itself has never been tested on humans. And when it was tested on mice, Huffman said, the animals were euthanized at the end of the experiment, so scientists don't even know how it affects mice long-term. "And mice are not humans," Huffman said.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **SB017**
() Publish Date

Identifier (file name): SB017-DPS-DET-02-07-11
Title: "An Act classifying certain synthetic cannabinoids as controlled substances."
Sponsor: Senator Meyer
Requester: Senate Health & Social Services

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Not applicable, initial version.

Prepared by: Lt. Rodney Dial
Division: Alaska State Troopers
Phone: (907) 247-4480
Date/Time: 2/7/11 3:38 PM
Approved by: Joseph Masters, Commissioner
Department of Public Safety
Date: 2/7/2011

(Revised 12/29/2010 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB017

Analysis

This legislation would amend AS 11.71.150 by adding several synthetic drugs as schedule IIA controlled substances. It is not estimated that this bill will significantly increase the workload of the division of Alaska State Troopers. There is no fiscal cost to the AST as a result of this legislation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB017**
() Publish Date

Identifier (file name): SB017-LAW-CRIM-02-04-11
Dept. Affected Law
Title An Act classifying certain synthetic cannabinoids as schedule IIA controlled substances; and providing for an effective date.
Appropriation Criminal
Allocation Criminal Justice Litigation
Sponsor Senator(s) Meyer
Requester (S) Health and Social Services
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Eileen Donahue, Division Operations Manager
Phone 465-5427
Division Administrative Services
Date/Time 2/4/11 4:30 PM
Approved by John J. Burns, Attorney General
Department of Law
Date 2/4/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB017

Analysis

This bill adds several chemical forms of Synthetic cannabinoids to Schedule IIA of Alaska's prohibited substance Schedules. Currently, marijuana, a natural form of cannabis, is a Schedule VIA prohibited substance. The anticipated fiscal impact is zero, however, if litigation ensues there will be addition costs in defending this litigation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **SB 17**
() Publish Date: 1/18/2011

Identifier (file name) SB017-DOC-OC-02-04-11
Title: "An Act classifying synthetic cannabinoids as schedule IIA
Sponsor: Senator Meyer
Requester: Health & Social Services Committee

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 684

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the first version of the bill.

Prepared by: Leslie Houston, Director — Phone: 465-3339
Division: Dept. of Corrections - Administrative Services — Date/Time: 2/4/2011 9:00 a.m.
Approved by: Joseph D. Schmidt, Commissioner — Date: 2/4/2011
Dept. of Corrections

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 17

Analysis

This legislation makes synthetic cannabinoids a schedule IIA controlled substance. Currently, possession of a schedule IIA is a Class C felony with a possible sentence of 0-2 years. Manufacturing or delivering a schedule IIA controlled substance is a Class B felony with a possible sentence of 0-4 years. The current average daily cost to house an inmate is $136.44. Therefore, housing an offender could cost the department anywhere from $0.0 (no time served) to $199.2 (for a 4-year sentence).

Department of Corrections is unable to determine the fiscal impacts of the passage of this legislation, as we cannot estimate the total number of actual violations that will occur.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB017**
() Publish Date

Identifier (file name) SB017-DPS-LAB-02-02-11
Title "An Act Relating to Synthetic Cannabinoids As Schedule IIA"
Sponsor Senator Meyer
Requester Senate Health & Social Services

Dept. Affected Public Safety
Appropriation Statewide Support
Allocation Laboratory Services
OMB Component Number 527

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	96.0		96.0	96.0	96.0	96.0	96.0
Travel	3.0		3.0	3.0	3.0	3.0	3.0
Services	8.5		5.6	5.6	5.6	5.6	5.6
Commodities	12.0		2.0	2.0	2.0	2.0	2.0
Capital Outlay	7.3						
Grants							
Miscellaneous							
TOTAL OPERATING	**126.8**		**106.6**	**106.6**	**106.6**	**106.6**	**106.6**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	126.8		106.6	106.6	106.6	106.6	106.6
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**126.8**	**0.0**	**106.6**	**106.6**	**106.6**	**106.6**	**106.6**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	**1.0**		1	1	1	1	1
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable; initial version.

Prepared by Orin Dym, Laboratory Manager
Division Scientific Crime Detection Laboratory
Approved by Joseph A Masters
Commissioner

Phone (907) 269-5743
Date/Time 2/02/2011 3:30PM
Date 2/4/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB017
2011 LEGISLATIVE SESSION

Analysis

This proposed legislation would add certain synthetic cannabinoids to the schedule IIA list of controlled substances. This bill would become effective immediately upon passage.

The Alaska Scientific Crime Detection Laboratory (Crime Laboratory) provides analysis of suspected controlled substances, issues reports, and provides expert testimony for the state of Alaska. For calendar year 2010 the laboratory received 1,267 requests for controlled substances analysis. A full time position is capable of analyzing 480 requests per year. The Controlled Substances Section of the Crime Lab currently has 2.5 full time staff assigned to it.

Once controlled, it is anticipated that the Crime Laboratory will receive significant requests for analysis related to the newly controlled substances. With the large presence of internet sales, and the ability for manufacturers to rapidly change the substances present in the materials sold, any suspected of containing these newly controlled substances will require scientific analysis at the Crime Laboratory.

This new position would come at an initial cost of $126,800. This includes a starting salary with benefits of $96,000, a work station start up cost of $7,300 for equipment , $2,000 for supplies, and there will be $3,000 in travel funds required for the ongoing training and education necessary for an analyst to maintain their expertise and certifications. There is an expected $5,000 in contractual costs as well, and this position also requires an initial $3,500 to obtain licensing required for the laboratory's LIMS database. Subsequently, there is a yearly 18% maintenance fee for that license. In addition to the above considerations involved with this new position, the Crime Laboratory would be required to obtain the standards necessary to analyze these nine new chemicals and their various isomers. This would be a one-time cost of $10,000.

In addition to the ongoing salary, benefits, and necessary travel costs relative to this position, all positions utilize an ongoing $2,000 for supply needs, and there is an ongoing licensing and maintenance cost of $5,600 per year. Therefore, the initial cost for this position would be $126,800, with a subsequent ongoing cost of $106,600.

SB

30

<TARGET><BILL>SB 30</BILL><SUBJECT>SB
30</SUBJECT><COMM>SJUD27</COMM></TARGET>

Senate Judiciary Changes to SB 30 Release of Property

- Restricted provisions for property return to apply *only* to victims of crime (original bill did not have that restriction, so applied potentially to a broad range of parties

- Delineated the proposed court hearing process and the responsibilities of the various parties, including conditions the court could set regarding retention and/or documentation of returned property.

In 2nd SJUD, the bill was brought back by the sponsor to address an amendment raised by the Department of Law that was substantive and therefore appropriately discussed by the committee (the amendment deleted reference to "law enforcement agency" and replaced it with "the party that objects to the return of the property" since that is not always the law enforcement agency.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
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Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

April 5, 2011

TO: Legislative Legal

From: Cindy Smith

RE: Amendment for SB30 Return of Seized Property 27-LS0344\E

Please paper the following amendment for SB30 \E:

On page two, at line 11, (c)(2): delete all material. Insert "a party that objects to the return of the property fails to prove by a preponderance of evidence that the property must be retained by the agency for evidentiary purposes under the provisions of this chapter or other law."

Please call me if you have any questions. Thanks!

adopted

27-LS0344\E.1
Luckhaupt
4/5/11

AMENDMENT #1

OFFERED IN THE SENATE

TO: CSSB 30( ), Draft Version "E"

Page 2, lines 11 - 13:

Delete all material and insert:

"(2) the party that objects to the return of the property fails to prove by a preponderance of the evidence that the property must be retained by the agency for evidentiary purposes under the provisions of this chapter or another law."

27-LS0344\E
Luckhaupt
3/25/11

CS FOR SENATE BILL NO. 30( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS DYSON, Kookesh, Menard, Meyer, Giessel

A BILL

FOR AN ACT ENTITLED

"An Act providing for the release of certain property in the custody of a law enforcement agency to a crime victim under certain conditions and relating to requests for that release by the office of victims' rights."

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

*** Section 1.** AS 12.36 is amended by adding a new section to read:

Sec. 12.36.070. Return of property by hearing. (a) A crime victim who is the owner of property not belonging to a law enforcement agency that is in the custody of the agency under this chapter may request that the office of victims' rights request that the agency return the property to the crime victim. The request under this subsection shall be filed by the office of victims' rights on behalf of the crime victim after the office has conducted an investigation and has concluded that the crime victim is entitled to the return of the property under the factors listed in (c) of this section.

(b) Within 10 days after receipt of a request under (a) of this section and following reasonable notice to the prosecution, defense, and other interested parties,

the agency shall request a hearing before the court to determine if the property shall be released to the crime victim. If the property is being held in connection with a criminal case, the hearing shall be before the court with jurisdiction of the criminal case. If no criminal case is pending regarding the property, the hearing shall be before a district or superior court where the property is located.

(c) At the hearing, a party that objects to the return of the property shall state the reason on the record. After a hearing, the court may order the return of the property in the custody of a law enforcement agency to the crime victim if

(1) the crime victim by a preponderance of the evidence provides satisfactory proof of ownership; and

(2) the law enforcement agency fails to prove by a preponderance of the evidence that the agency or another interested party needs to retain possession of the property for evidentiary purposes as authorized in this chapter.

(d) If the court orders the return of the property to the crime victim, the court may impose reasonable conditions on the return. Those conditions may include an order that the crime victim retain and store the property so that the property is available for future court hearings, requiring photographs of the property to be taken, or any other condition the court considers necessary to maintain the evidentiary integrity of the property.

(e) In this section, "crime victim" has the meaning given to "victim" in AS 12.55.185.

*** Sec. 2.** AS 24.65 is amended by adding a new section to read:

Sec. 24.65.115. Authority to request return of property on behalf of certain persons. Notwithstanding another provision of this chapter, the victims' advocate may file a request under AS 12.36.070 with a law enforcement agency for the return of property to a crime victim after having conducted an investigation and determining that the crime victim is entitled to the return of the property under the factors listed in AS 12.36.070(c). In fulfilling the requirements of this section, the victims' advocate may use any of the powers granted to the advocate under this chapter.

(2) a party that objects to the return of the property fails to prove by a preponderance of evidence that the property must be retained by the agency for evidentiary purposes under the provisions of this chapter or other law.

(or other interested party) ?

SENATE COMMITTEE REPORT

DATE: 2/21/11

FURTHER:

DATE TURNED IN TO OFFICE: 3/22/11

Judiciary Committee considered SENATE BILL NO. 30

SB 30-RETURN OF SEIZED PROPERTY

"An Act providing for the release of certain property in the custody of a law enforcement agency to the owner under certain conditions."

and recommends:

[X] be **replaced** with **CS** SB 30 (JUD) [ ] *Same Title* [X] *New Title*

[ ] adopt **previous CS** _____ (_____) [ ] *Same Title* [ ] *New Title*

[ ] attached amendment(s)

[ ] adopt _____ Letter of Intent

[ ] further referral to _____ Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
Law		X		

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
DPS			✓	1

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Coghill	✓			
	Wielechowski			✓	
	PASKVAN			X	
CHAIR:	French	✓			

ALASKA STATE SENATE

SENATOR FRED DYSON

Date: March 28, 2011

To: Senator Hollis French, Chair
Senate Judiciary Committee

From: Senator Fred Dyson

Re: New CS for SB 30 (JUD)

On March 23, 2011, the Office of Attorney General contacted me about the possibility of amendments to CS SB 30 (JUD) which was heard and past out of Judiciary to Finance on March 21, 2011. I agreed with the AG's proposed amendments and made inquiry with your office to request the bill be brought back to Senate Judiciary. On March 25, 2011, without objection, the Senate agreed to return SB 30 to Judiciary.

The attached CS was drafted in response to the AG request. Changes from CS SB 30 (JUD) are as follows:

Section 1

p. 2 Line 6: insert <u>At the hearing, a party that objects to the return of the property shall state the reason on the record.</u>
Line 11: delete [is authorized], insert <u>needs</u>
Line 12: delete [possession of the property.], insert <u>possession of the property for evidentiary purposes as authorized in this chapter.</u>
Lines 13 – 18: delete all language; insert <u>(d) If the court orders the return of the property to the crime victim, the court may impose reasonable conditions on the return. Those conditions may include an order that the crime victim retain and store the property so that the property is available for future court hearings, requiring photographs of the property to be taken, or any other condition the court considers necessary to maintain the evidentiary integrity of the property.</u>

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senator.fred.dyson@legis.state.ak.us • www.akrepublicans.org

Changes to SB30:

1. The bill is amended to clarify that only victims of crime who have property in custody are eligible to apply for assistance by the Office for Victims' Rights. This will continue to include secondary victims, but will comport with the statutory mission of OVR, which is to provide services to crime victims.

2. The bill has new language on Page 2, starting at line 14 that outlines processes for the court to employ when property is returned, either to ensure its availability in future proceedings or to establish a chain of custody up to its release and its admissibility in future proceedings. This was added at the request of the department of law, with the sponsor's concurrence.

27-LS0344\D
Luckhaupt
3/16/11

CS FOR SENATE BILL NO. 30(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS DYSON, Kookesh, Menard, Meyer, Giessel

A BILL

FOR AN ACT ENTITLED

"An Act providing for the release of certain property in the custody of a law enforcement agency to a crime victim under certain conditions and relating to requests for that release by the office of victims' rights."

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

* **Section 1.** AS 12.36 is amended by adding a new section to read:

Sec. 12.36.070. Return of property by hearing. (a) A crime victim who is the owner of property not belonging to a law enforcement agency that is in the custody of the agency under this chapter may request that the office of victims' rights request that the agency return the property to the crime victim. The request under this subsection shall be filed by the office of victims' rights on behalf of the crime victim after the office has conducted an investigation and has concluded that the crime victim is entitled to the return of the property under the factors listed in (c) of this section.

(b) Within 10 days after receipt of a request under (a) of this section and following reasonable notice to the prosecution, defense, and other interested parties,

the agency shall request a hearing before the court to determine if the property shall be released to the crime victim. If the property is being held in connection with a criminal case, the hearing shall be before the court with jurisdiction of the criminal case. If no criminal case is pending regarding the property, the hearing shall be before a district or superior court where the property is located.

(c) After a hearing, the court may order the return of the property in the custody of a law enforcement agency to the crime victim if

(1) the crime victim by a preponderance of the evidence provides satisfactory proof of ownership; and

(2) the law enforcement agency fails to prove by a preponderance of the evidence that the agency or another interested party is authorized to retain possession of the property.

(d) The court may impose reasonable conditions on a crime victim claiming property under this section. If the court orders the return of the property to the crime victim, the court shall impose conditions to ensure that the property is available for future court proceedings. If the court cannot assure the availability of the property, the court shall establish the chain of custody up to the date of the property return and the admissibility of the property at future court proceedings.

(e) In this section, "crime victim" has the meaning given to "victim" in AS 12.55.185.

*** Sec. 2.** AS 24.65 is amended by adding a new section to read:

Sec. 24.65.115. Authority to request return of property on behalf of certain persons. Notwithstanding another provision of this chapter, the victims' advocate may file a request under AS 12.36.070 with a law enforcement agency for the return of property to a crime victim after having conducted an investigation and determining that the crime victim is entitled to the return of the property under the factors listed in AS 12.36.070(c). In fulfilling the requirements of this section, the victims' advocate may use any of the powers granted to the advocate under this chapter.

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Cooper v. District Court
133 P.3d 692
Alaska App.,2006.
April 14, 2006

Term

133 P.3d 692

Briefs and Other Related Documents

Court of Appeals of Alaska.
Cynthia COOPER, Petitioner,
v.
DISTRICT COURT and Daniel R. Cooper Jr., Respondents.

No. A-8835.
April 14, 2006.

Katherine J. Hansen, Alaska Office of Victims' Rights, Anchorage, for the Petitioner. Allison E. Mendel, Anchorage, for Respondent Daniel R. Cooper. No appearance for Respondent District Court.

Allen M. Bailey, Anchorage, for (1) the National Crime Victim Law Institute and (2) the Victim Advocacy and Research Group; Christine McLeod Pate, Sitka, for the Alaska Network on Domestic Violence and Sexual Assault.

John E. McConnaughy III, Deputy Municipal Attorney, and Frederick H. Boness, Municipal Attorney, Anchorage, for the Municipality of Anchorage; Margi A. Mock, Assistant Public Defender, and Barbara K. Brink, Public Defender, Anchorage, for the Alaska Public Defender Agency; Daniel S. Bair, Assistant Public Advocate, and Joshua P. Fink, Public Advocate, Anchorage, for the Alaska Office of Public Advocacy; Nancy R. Simel, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and David W. Márquez, Attorney General, Juneau, for the State of Alaska.

Before: COATS, Chief Judge, MANNHEIMER, Judge, and ANDREWS, Senior Superior Court Judge.[FN*]

FN* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

OPINION

MANNHEIMER, Judge.

This is an original application for relief brought by the victim of a crime. The application has two distinct parts.

The first part of this original application presents the question of whether a crime victim or, alternatively, the Alaska Office of Victims' Rights acting on behalf of a crime victim, has an independent right to seek appellate review of an alleged error in the sentence imposed on the perpetrator of the crime. The second part of this original application presents a more case-specific question: whether Cynthia Cooper is entitled to have a portion of the sentencing hearing sealed from public access.

The Municipality of Anchorage prosecuted Daniel R. Cooper Jr. for assaulting his wife, Cynthia Cooper. Daniel Cooper ultimately pleaded no contest to misdemeanor assault, and he received a suspended imposition of sentence conditioned on his satisfactory completion of 1 year's probation. One of Daniel's conditions of probation required him to attend a counseling program, but the program Daniel was ordered to attend is not one of the "batterer's intervention" treatment programs approved by the Alaska Department of Corrections. Cynthia Cooper (who is represented by the Office of Victims' Rights) takes the position that, under Alaska law (specifically, under AS 12.55.101(a)(1)), if a defendant convicted of a crime of domestic violence is ordered to participate in rehabilitative counseling or treatment as a condition of probation, this counseling or treatment must be a batterer's intervention treatment program approved by the Department of Corrections. Cynthia therefore contends that Daniel's sentence is illegal.

The Municipality disagrees with Cynthia's interpretation of this statute. The Municipality believes that Daniel's sentence is legal, and the Municipality has therefore declined to appeal the sentence.

After it became clear that the Municipality did not intend to challenge Daniel's sentence, Cynthia filed the present original application for relief. Cynthia contends that, because she is the victim of the crime, she has standing to challenge the district court's sentencing decision. That is, Cynthia asserts that, regardless of the Municipality's position on this matter, she has an independent right to seek appellate review of the sentence (either the right to appeal the sentence or, at least, the right to seek discretionary review of the sentence by filing an original application for relief).

The Office of Victims' Rights is representing Cynthia in this litigation. However, the Office of Victims' Rights argues that they are not merely Cynthia's attorney. Rather, the Office of Victims' Rights contends that, regardless of Cynthia's personal standing to pursue this litigation, the Office of Victims' Rights is independently authorized to pursue an appeal in any criminal case where the Office has appeared on behalf of the victim.

As explained above, the second part of this original application for relief presents the question of whether Cynthia is entitled to have a portion of the sentencing hearing sealed from public access.

The sentencing hearing in this case was open to the public when it was held; in fact, the hearing was attended by representatives of the media. During her sentencing argument, Daniel's defense attorney referred to the fact that Cynthia's son (who lived with the couple) was suffering from mental health and behavioral problems. The defense attorney argued that the boy's problems were a major source of stress in Cynthia's and Daniel's relationship, and that this stress was the primary contributing factor in Daniel's assaultive conduct.

On the Monday following the sentencing hearing, Cynthia-or, more precisely, the Office of Victims' Rights on Cynthia's behalf-filed a motion asking the district court to seal many of the defense attorney's statements on this subject. Cynthia contended that the defense attorney's statements contained information that was protected by the psychotherapist-patient privilege.

The district court declined to seal the defense attorney's statements-prompting Cynthia to supplement her original application for relief with a challenge to the district court's ruling.

For the reasons explained here, we conclude that Cynthia has no standing to challenge the sentence imposed by the district court, and that the Office of Victims' Rights has no independent standing to challenge the sentence either.

We further conclude, for two separate reasons, that the district court correctly declined to seal the defense attorney's statements at the sentencing hearing. First, with one possible exception, none of the challenged statements contained information protected by the psychotherapist-patient privilege. Second, neither Cynthia nor her attorney from the Office of Victims' Rights voiced a contemporaneous objection to these statements.

Part I

Does a crime victim or, alternatively, the Office of Victims' Rights, have standing to challenge the sentence imposed on the perpetrator of a crime?

As explained above, both Cynthia Cooper and her attorney, the Office of Victims' Rights, wish to challenge the sentence imposed on Daniel Cooper because the district court failed to require Daniel to attend a Department of Corrections-approved batterer's intervention program.

Daniel takes the position that neither Cynthia nor the Office of Victims' Rights has standing to pursue an appeal or a petition challenging his sentence.

We solicited *amicus curiae* briefs from the Municipality of Anchorage, the Alaska Department of Law's Office of Special Prosecutions and Appeals, the Alaska Public Defender Agency, and the Alaska Office of Public Advocacy. All of these agencies take the position that neither a crime victim nor the Office of Victims' Rights has standing to bring an appeal or a petition challenging the judgement entered against the defendant in a criminal case.

We also granted *amicus curiae* status to the National Crime Victim Law Institute, the Victim Advocacy and Research Group (a lawyers' organization that provides *pro bono* legal services to victims of violence and their care-givers), and the Alaska Network on Domestic Violence and Sexual Assault. These organizations support Cynthia's position that a crime victim has standing to pursue an appeal in a criminal case.

As we explain in more detail later in this opinion, courts from other states are unanimous in holding that a crime victim does not have the right to participate as an independent party in a criminal case. Many of these courts acknowledge that a crime victim *does* have standing to seek appellate relief if the trial court or an executive branch agency violates one or more of the procedural rights given to victims in a victims' rights act-generally, the right to advance notice of court proceedings, the right to be present during court proceedings, and the right to be heard before the court makes certain types of decisions. But these same courts agree that a crime victim is not an independent litigant in a criminal case, and that a crime victim does not have the right to challenge the propriety or legality of the substantive decisions made by the trial court-decisions such as what sentence should be imposed on the perpetrator of the crime.

For the reasons explained here, we agree with these courts that crime victims do not have an independent right to appeal the sentence imposed on the perpetrator of the crime. We also reject the contention of the Office of Victims' Rights that they have an independent right to challenge the decisions of the trial court in any case where the Office has appeared on behalf of a crime victim.

Accordingly, we dismiss Part I of this original application for relief.

Underlying facts

The Municipality of Anchorage prosecuted Daniel Cooper for assaulting his wife, Cynthia Cooper. This prosecution was ultimately resolved by a plea bargain. Under the terms of the agreement, Daniel agreed to plead no contest to one count of "family violence" under Anchorage Municipal Code § 8.10.050 (*i.e.,* domestic assault committed in the presence of minor children), with the further agreement that he would receive a suspended imposition of sentence with 1 year's probation. Apparently, Cynthia was consulted during the negotiation of this plea agreement.

When the Municipality and Daniel's defense attorney originally described the contemplated plea bargain to the district court, the defense attorney stated that one of Daniel's conditions of probation would be to "[complete a] domestic violence intervention program" within a year. However, when the parties later returned to court for Daniel's sentencing, it became clear that there was disagreement concerning exactly what kind of counseling or therapy Daniel would be obligated to pursue.

In advance of sentencing, Daniel had been participating in counseling

with Dr. Keith Wiger. Even though Dr. Wiger's program was not approved by the Department of Corrections as a certified "domestic violence intervention program", Daniel's defense attorney told the sentencing judge-District Court Judge Gregory J. Motyka-that the plea agreement would allow Daniel to satisfy his counseling obligation by continuing in Dr. Wiger's program. The municipal prosecutor did not concede that the plea bargain (as originally negotiated) allowed this, but the prosecutor stated that the Municipality did not object to Judge Motyka's exercising discretion on the question of whether to order Daniel to continue with Dr. Wiger's program or, instead, order him to enroll in a domestic violence intervention program approved by the Department of Corrections.

This colloquy drew an objection from the attorney from the Office of Victims' Rights who was representing Cynthia Cooper. The Victims' Rights attorney declared that Cynthia had agreed to the plea bargain only because Daniel would be required to complete a DOC-approved domestic violence intervention program. The Victims' Rights attorney told Judge Motytka, "It's [Cynthia's] position that [the agreement as previously stated in court] was a contract, ... and that the parties are now bound by that agreement."

Judge Motyka pointed out that no one was bound by any facet of the plea agreement until the agreement was formally accepted by the court. The Victims' Rights attorney conceded that this was correct. However, the Victims' Rights attorney argued that, under AS 12.55.101(a)(1), if the court ordered Daniel Cooper to attend any treatment "for the purpose of rehabilitat[ing] perpetrators of domestic violence", that treatment had to take place in a program approved by the Department of Corrections.

Judge Motyka asked the prosecutor if the Municipality still took the position that the question of domestic violence counseling or treatment would be "left to [the court's] discretion". The prosecutor said yes. Judge Motyka then declared that he disagreed with the Victims' Rights attorney's interpretation of the law; that is, Judge Motyka did not believe that AS 12.55.101(a) required him to impose a DOC-approved batterer's intervention program instead of some other form of rehabilitative treatment. And, when Judge Motyka ultimately imposed the terms of Daniel's probation, he allowed Daniel to continue attending Dr. Wiger's program.

After Judge Motyka sentenced Daniel, Cynthia filed a motion asserting that the counseling portion of Daniel's sentence was illegal. Judge Motyka refused to modify this aspect of the sentence, and Cynthia thereupon sought appellate review of Judge Motyka's decision.

Alaska law defining the rights of crime victims

Our system of criminal law has its roots in England. Originally, there was no criminal law "system" as we know it today-no network of police agencies and government prosecutors. When a crime was committed, it was up to the members of the community to apprehend the perpetrator, and (except in cases where the crime was of particular interest to the crown) it was up to the victim to prosecute the case in court.

The basic premise of this system was that criminal conduct constituted an injury to the victim-either to the victim's physical self, or to the victim's property, or to the victim's dependents. Thus, it was the victim's task to bring the perpetrator to court so that the perpetrator could be punished. As explained in Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, *Criminal Procedure* (2nd ed.1999),

> [T]he English originally viewed the responsibility of the state for the administration of justice as "limited to providing means by which the injured person, or his kinsman or friends[,] might secure adequate redress without resorting to private warfare." When the Normans introduced the jury, they did not substantially alter that philosophy. They sought merely to gain the advantage of community knowledge of local events. As first established, jurors were neighbors who are likely to know something of the facts in question. They typically based their verdicts on their own knowledge and what they heard from their friends. As England moved from a rural to a more urbanized society, it was no longer possible to assume that jurors were self-informed. A method had to be developed for presenting the facts to the jury in the course of the trial. At that time, the

> English still had a strong tradition of private prosecution (although its underlying philosophy arguably had shifted the role of the private person from [seeking] personal vindication to assisting the state in redressing a wrong against the state), and the juries had already established the practice of hearing occasional witnesses. The natural progression, it is argued, was to move to an adversary trial in which both sides were allowed to present their own witnesses and to cross-examine the opposition's witnesses.

LaFave, § 1.4(c), Vol. 1, p. 177 n. 113 (citations omitted).

As *LaFave* indicates, the involvement of the state in this process was seen as a beneficial substitute for private retribution and vendetta. Although the victim personally prosecuted the case, a jury decided whether the defendant was guilty, and a judge imposed punishment on the guilty. Even so, "the early English view [was that] criminal prosecution [was] a means of providing personal redress, with the person claiming to be the victim of a crime having personally to establish his right to redress." FN1

FN1. *LaFave,* § 1.4(d), Vol. 1, p. 189.

This was the system that the early American colonists imported from England:

> Under the English common law system that the colonists brought with them to this country, satisfaction of the victim's interest in gaining the conviction of the offender lay largely in the victim's own hands. With no organized police department, if investigation was needed to determine who had committed the crime, that task fell to the victim (unless the Crown had some special interest in the offense). Whatever governmental assistance was available often came at a fee, as did much private investigative assistance. Once the identity of the offender was determined, the victim had to arrange for the arrest and the issuance of the arrest warrant. Since the English common law system also relied primarily on private prosecution, the victim then bore the responsibility of presenting the prosecution [case] at trial....

LaFave, § 1.4(k), Vol. 1, pp. 209-210 (footnotes omitted). This system obviously favored the rich and powerful-those with sufficient influence and resources to apprehend the purported wrongdoer and to pursue the case in court.

But by the late eighteenth century, society's view of criminal conduct and the proper function of the criminal law had begun to change. Criminal conduct was no longer viewed as a private injury to the victim. Rather, crime was seen as an injury to the community. Criminal investigations were conducted by public police departments, and criminal prosecutions were brought by the state on behalf of the community as a whole.FN2 It became the government's task to bring the wrongdoer to justice: government prosecutors, not crime victims, decided whether charges should be filed; likewise, if charges were filed, government prosecutors directed the litigation of those charges.

FN2. *LaFave,* § 1.4(d), Vol. 1, p. 189.

> [During] the ... half century [following American independence], public prosecutors gained a virtual monopoly over the decision to prosecute and the presentation of the prosecution [case] at trial. Most jurisdictions continued to permit private attorneys representing the victim to participate in the prosecution, but that practice ordinarily was dependent upon the permission of the prosecutor and was used primarily in misdemeanor cases. ...
>
> Another somewhat later development impacting the victim's role was the establishment of the local police department. With the police department available to conduct investigations and make arrests, the victim's role in these aspects of the process was reduced dramatically. Victims were not legally precluded from either conducting investigations

> or making arrests, but the legal, economic, and other advantages enjoyed by the police made victim[s'] use of that authority impracticable in all but exceptional cases. In large part, the victims' actions at this stage of the process came to be limited to reporting offenses to the police and then providing such additional cooperation (*e.g.,* eye-witness identification) as the police might request.

LaFave, § 1.4(k), Vol. 1, pp. 210-11 (footnotes omitted).

Crime was no longer perceived as primarily an injury to the individual victim. Rather,

> Crime [was] now conceived of entirely in terms of an offense against society. The damage to the individual victim [was] incidental[,] and its redress [was] no longer regarded as a function of the criminal justice process. Rather, it [was] separated off and ... treated as a matter of civil justice. While the victim [was] allowed to decide what [should] be done with the case as a civil matter[,] ... the criminal case belong[ed] solely to the state and public officials.

LaFave, § 1.4(k), Vol. 1, p. 211 (quoting William McDonald, "Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim", 13 Am.Crim. L.Rev. 649, 650 (1976)).

By the twentieth century, it was firmly established that "in American jurisprudence ..., a private citizen lacks a judicially cognizable interest in the [criminal] prosecution or nonprosecution of another...." *Linda R.S. v. Richard D.,* 410 U.S. 614, 619, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536 (1973).

Obviously, this meant that there would be times when government prosecutors would be at odds with crime victims. The government prosecutor might not view the facts in the same way as the victim, and thus the prosecutor might conclude that no crime had been committed. Or the prosecutor might agree that a crime had probably been committed, but nevertheless conclude that the case could not be proved in court. Or the prosecutor might disagree with the victim concerning the proper charges to file against the defendant. Or, after charges were filed and the case brought to court, the prosecutor might disagree with the victim concerning how the case should be litigated, or whether (and on what terms) the case should be settled, or what punishment should be sought in the event of the defendant's conviction.

It was not that lawmakers failed to recognize these potential conflicts. Rather, it was perceived that these problems were outweighed by the societal benefits of having an objective government official, as opposed to a person whose personal interests were at stake, decide whether a citizen should be charged with a crime, and what that charge should be, and how that charge should be litigated or settled.

And yet, in the latter part of the twentieth century, some people began to call for a re-evaluation of the victim's role-or, more precisely, non-role-in this modern system. The reformers asserted that, because crime victims had no right to actively participate in the criminal justice process, the criminal justice system had stopped paying sufficient attention to the people harmed or threatened by criminal conduct. Responding to this criticism, various states enacted statutes or constitutional amendments (or both) which were (in the words of the Massachusetts Supreme Court) "intended to change the traditional [role] of victims from virtually silent observers to active participants in the criminal justice process".[FN3]

> FN3. *Hagen v. Commonwealth,* 437 Mass. 374, 772 N.E.2d 32, 38 (2002) (internal quotations omitted).

In Alaska, these reform efforts led to the amendment of our statutes governing criminal procedure and, later, to the amendment of our state constitution.

In 1989, the Alaska Legislature enacted the Crime Victims' Rights Act.[FN4] The section of this act that enumerates victims' rights, AS 12.61.010, provides (among other things) that a crime victim has the same right as the

defendant to be present at court hearings [FN5] and the right to be notified of these court hearings,[FN6] as well as the right to make a written or oral statement for use in preparation of the pre-sentence report in felony cases,[FN7] and the right to appear personally at the defendant's sentencing hearing and to present a written statement and/or make a sworn or unsworn oral presentation at that hearing.[FN8]

FN4. SLA 1989, ch. 59.

FN5. AS 12.61.010(a)(1).

FN6. AS 12.61.010(a)(2)-(3).

FN7. AS 12.61.010(a)(8).

FN8. AS 12.61.010(a)(9).

Five years later, in 1994, a victims' rights section (Section 24) was added to Article I of the Alaska Constitution.[FN9] Article I, Section 24, states:

FN9. *See* Legislative Resolve No. 58 of the 18th Alaska Legislature, section 2.

> Crime victims, as defined by law, shall have the following rights as provided by law: the right to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court; the right to confer with the prosecution; the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process; the right to timely disposition of the case following the arrest of the accused; the right to obtain information about and be allowed to be present at all criminal or juvenile proceedings where the accused has the right to be present; the right to be allowed to be heard, upon request, at sentencing, before or after conviction or juvenile adjudication, and at any proceeding where the accused's release from custody is considered; the right to restitution from the accused; and the right to be informed, upon request, of the accused's escape or release from custody before or after conviction or juvenile adjudication.

Cynthia Cooper and the Office of Victims' Rights rely on this section of the constitution, as well as the provisions of the Alaska Victims' Rights Act quoted above, to support their contention that the victim of a crime and/or the Office of Victims' Rights are authorized to seek appellate review of a sentencing judge's decision.

Under Alaska law, does a victim of a crime have an independent right to appeal the sentence imposed on the perpetrator of the crime?

As we have just explained, a crime victim in Alaska now has the right to attend all the proceedings that the defendant has the right to attend, and a crime victim has the right to provide input before certain decisions are made-in particular, the decision as to what sentence a convicted defendant should receive. But neither Article I, Section 24 of the Alaska Constitution nor the Victims' Rights Act (AS 12.61) expressly gives crime victims the right to intervene in the litigation of a criminal case-in the sense of determining what charges should be brought, or determining how those charges should be litigated or settled, or determining whether the prosecutor should seek appellate review of particular judicial decisions.

Moreover, as we explained earlier, the case presently before us involves a situation where the prosecuting authority (the Municipality of Anchorage) does not believe that the challenged judicial decision was illegal or adverse to the government's interests. At the sentencing hearing, when it appeared

that the plea bargain might unravel over the issue of court-ordered treatment, the prosecutor took the position that Judge Motyka would be acting within his lawful authority if he declined to order Daniel Cooper to attend a DOC-approved batterer's intervention program.

Thus, by bringing this original application for relief, Cynthia Cooper is not merely pursuing a legal claim that the prosecutor has declined to pursue. Rather, she is pursuing a legal claim that is adverse to the declared interests of the Municipality of Anchorage-because a decision in her favor might lead to a motion by Daniel Cooper to withdraw from the plea agreement.

Although Alaska law does not expressly give crime victims the right to appeal a defendant's sentence, Cynthia Cooper contends that this right is implicit in one or more clauses of Article I, Section 24 or AS 12.61.010.

(a) Cynthia Cooper's argument that the district court's imposition of an allegedly illegal sentence violates her right to a timely disposition of the criminal case

Cynthia points out that Article I, Section 24 of the Alaska Constitution gives crime victims the right to "timely disposition of [a criminal] case following the arrest of the accused". As explained earlier in this opinion, Cynthia claims that, under Alaska sentencing law, once Judge Motyka made the decision to order Daniel Cooper to attend rehabilitative treatment as a condition of probation, the judge was obliged to order Daniel to attend a DOC-approved batterer's intervention program. Cynthia argues that, because Judge Motyka failed to do this, Daniel Cooper's sentence is illegal. Then, relying on appellate decisions which declare that an illegal sentence is not "meaningfully imposed", Cynthia argues that Daniel has never been "meaningfully" sentenced-and, thus, that she (Cynthia) has been denied her right (as a crime victim) to a "timely disposition" of this case.

It is true that, in prior decisions, this Court has repeatedly declared that, to the extent a sentence is illegal, it has not been "meaningfully imposed". FN10 But these decisions involved the question of whether the illegal portion of the sentence could be adjusted or corrected to the defendant's detriment, despite the fact that the double jeopardy clause normally precludes a court from adjusting a defendant's sentence upward once it has been imposed. In this context, when we declared that the illegal sentence (or the illegal portion of the sentence) had not been "meaningfully imposed", we were saying that the double jeopardy clause did not forbid adjustment of the sentence (or the challenged portion of the sentence) to the defendant's detriment.

FN10. *See, e.g.*, *Smith v. State*, 892 P.2d 202, 203-04 (Alaska App.1995); *Dunham v. Juneau*, 790 P.2d 239, 240-41 (Alaska App.1990); *State v. Laporte*, 672 P.2d 466, 468-69 & n. 6 (Alaska App.1983).

This is quite different from asserting that a defendant who receives an illegal (or partially illegal) sentence has never really been sentenced for any purpose. The fact that there may be a legal defect in the defendant's sentence does not mean that the sentencing was a complete nullity, nor does it mean that a victim's right to a timely disposition of the criminal case has been violated.

A victim's right to a timely disposition of a criminal case is satisfied if the proceedings take place in a timely manner, even if an appellate court later concludes that the proceedings were flawed and must be repeated. In the present case, even if we assume for purposes of argument that one aspect of Daniel Cooper's sentence was illegal (the portion directing him to complete his treatment with Dr. Wiger rather than engaging in treatment at a DOC-approved batterer's intervention program), and even if we assume that the double jeopardy clause would allow correction of this purported flaw, the fact remains that the sentencing did take place. Cynthia's right to a timely disposition of the case was therefore satisfied.

See Hagen v. Commonwealth, 437 Mass. 374, 772 N.E.2d 32, 36 (2002), where the Massachusetts Supreme Court said:

> We conclude that[, by guaranteeing crime victims a right to prompt disposition of criminal charges,] the Legislature sought to assure for victims a prompt disposition within the context of the trial process.... In the present case, the defendant was tried and sentenced within one year of [his] indictment.... The statutory requirement of a "prompt disposition" thus has been satisfied.

For these reasons, we reject Cynthia's contention that the entry of judgement against a criminal defendant does not constitute a "disposition" of the case if there is an attackable flaw in the sentencing judge's decision.

(b) Cynthia Cooper's argument that, because crime victims have a constitutional and statutory right to be heard at the sentencing hearing, crime victims must have the right to independently challenge the sentencing judge's decision if the victim concludes that the sentence is illegal

Cynthia's next argument is based on the fact that the Alaska Constitution and the Alaska Victims' Rights Act give crime victims the right to be heard at sentencing-that is, the right to provide input before the judge decides what sentence the defendant should receive. Cynthia argues that a crime victim must have a corresponding right to appeal the judge's sentencing decision if the victim concludes that the judge has imposed an illegal sentence.

To properly analyze this argument, it is crucial to distinguish between, on the one hand, a crime victim's acknowledged procedural rights to attend the sentencing proceedings and to provide input before the judge makes the sentencing decision and, on the other, the right asserted by Cynthia Cooper in this litigation: the asserted right to intervene in the lawsuit and independently demand or seek appellate review of the judge's sentencing decision.

In her brief to this Court, Cynthia cites several appellate decisions from other states that have enacted victims' rights laws. She claims that these courts have recognized a crime victim's standing to litigate various claims based on their states' victims' rights acts.

Cynthia's brief contains a mistaken analysis of some of these appellate decisions. For example, Cynthia claims that the New Jersey Supreme Court held in *State v. Timmendequas*, 161 N.J. 515, 737 A.2d 55, 75-76 (1999), that, because crime victims in New Jersey have a constitutional right to attend the trial, a crime victim has standing to object to a defendant's request for change of venue if the new location would pose a substantial obstacle to the victim's attending the trial. This is a misreading of the New Jersey court's decision. The *Timmendequas* decision merely holds that it is not improper for a trial judge to take account of the inconvenience that a change of venue would pose to the crime victim, " *provided* that the constitutional rights of the defendant are not denied or infringed on by [the judge's] decision".[FN11]

> FN11. *Timmendequas*, 737 A.2d at 76 (emphasis in the original).

Moreover, in the *Timmendequas* case, it was the prosecutor who addressed the trial judge and articulated the victim's concerns.[FN12] Thus, *Timmendequas* does not even reach the narrower question of whether the victim was personally entitled to be heard on this issue if, for some reason, the prosecutor did not share the victim's position.

> FN12. *Id.* at 74-75.

Similarly, in *State in the Interest of K.P.*, 311 N.J.Super. 123, 709 A.2d 315 (1997), the question was whether a juvenile court judge, when deciding whether to grant a media request to open the proceedings to the public, could lawfully consider the victim's opposition to this request-an opposition that was presented by the prosecuting attorney.

It is true that the New Jersey court worded its decision in terms of the victim's "standing", but the issue was not the victim's standing as a party to the lawsuit, but rather whether the court could lawfully consider the victim's position when ruling on a non-party newspaper's request to open the proceedings to the media. As stated by the New Jersey court, "[t]he issue [was to identify] the factors [that] the court may [properly] consider [when] exercising its discretion." FN13

FN13. *Interest of K.P.*, 709 A.2d at 316.

The New Jersey court did not reach the issue of whether the victim might have the right to seek appellate review of an adverse decision. Moreover, as was the case in *Timmendequas,* it was the prosecutor who addressed the judge and articulated the victim's concerns.FN14 Thus, like *Timmendequas,* the decision in *Interest of K.P.* does not reach the narrower question of whether the victim would have been personally entitled to be heard on this issue if the victim and the prosecutor had been at odds.

FN14. *Id.* at 316-17.

Cynthia cites *Melissa J. v. Superior Court*, 190 Cal.App.3d 476, 237 Cal.Rptr. 5 (1987), as a case in which a court recognized a crime victim's standing to sue to protect their procedural rights. This is correct: in *Melissa J.,* the California Court of Appeal held that a crime victim is entitled to notice and a right to be heard before the sentencing judge terminates or reduces the defendant's previously imposed obligation to pay restitution; the court also held that a crime victim has standing (after exhausting trial court remedies) to ask an appellate court to enforce this procedural right.FN15 However, while the California court concluded that a crime victim could seek an appellate remedy for an improper abridgement of their procedural right to be heard, the court also noted that a crime victim "is not considered a party to [the] criminal proceeding".FN16

FN15. *Melissa J.*, 237 Cal.Rptr. at 6-7.

FN16. *Id.* at 6.

Returning to the present case, we conclude that this case does not require us to decide whether Alaska law would likewise recognize a crime victim's standing to sue to enforce the procedural rights specified in Article I, Section 24 of our state constitution or in AS 12.61.010-because, in the present case, those rights were honored. Cynthia Cooper was notified of the trial court proceedings, she attended those proceedings (along with her lawyer from the Office of Victims' Rights), and she was allowed to present her views to the sentencing judge (both personally and through her lawyer).

Rather, the question before us is whether, if a crime victim's procedural rights have been honored but the victim is dissatisfied with the sentencing judge's substantive decision, the victim may independently seek appellate review of that decision. American courts are unanimous in answering "no" to this question.

For example, in *State v. Lamberton*, 183 Ariz. 47, 899 P.2d 939 (1995), the Arizona Supreme Court acknowledged that a crime victim would have standing to seek appellate review if the crime victim was denied one or more of the rights enumerated in Arizona's Victims' Rights Act. *Id.* at 942. At the same time, however, the Arizona court held that a crime victim had no standing to seek appellate review of a trial court's decision to grant the defendant's petition for post-conviction relief and to order re-sentencing. *Id.* at 942-43.

The Maryland Court of Appeals (that state's highest court) reached the same decision in *Cianos v. State*, 338 Md. 406, 659 A.2d 291 (1995). The

court held that a crime victim is not a party to the criminal litigation, and that the victim has no right to appeal the judgement entered against the defendant. Like the Arizona court, the Maryland court acknowledged that a crime victim could seek appellate enforcement of the rights granted by Maryland's Victims' Rights Act. But the Maryland court declared that any such appeal "is collateral to[,] and may not interrupt[,] a criminal case", nor can judicial review of a victims' rights violation "result in reversal of the judgment [or] a reopening of the [underlying criminal] case". *Id.* at 293-94.

In *Dix v. Superior Court*, 53 Cal.3d 442, 279 Cal.Rptr. 834, 807 P.2d 1063 (1991), the California Supreme Court held that a crime victim has no right to object to a prosecutor's decision to ask the sentencing judge to "recall" (*i.e.,* vacate) a defendant's sentence and to allow the defendant to be re-sentenced at a later time, so that the defendant could testify against other offenders and thus, potentially, earn a reduction of his sentence. The California Supreme Court declared that "[e]xcept as specifically provided by law, a private citizen has no personal legal interest in the outcome of an individual criminal prosecution against another person.... [T]he victim of the crime is not a party." FN17

FN17. *Dix*, 279 Cal.Rptr. 834, 807 P.2d at 1066 (citations omitted).

In *Dix,* the crime victim argued that the contemplated "recall" of the defendant's sentence would jeopardize the victim's personal safety, since the defendant had allegedly threatened the victim with future harm.FN18 The crime victim pointed out that the California Constitution had been amended in 1982 to guarantee crime victims the right to appropriate detention, trial, and punishment of criminal offenders. The victim argued that, because of the threat to his personal safety, any "recall" of the defendant's sentence would violate those rights.FN19 The California court answered:

FN18. *Id.*

FN19. *Id.* at 1067.

> The [California] Constitution and statutes do accord individual felony victims certain "rights" of a ... specific and personal nature. These include the "right" to restitution in appropriate circumstances, and [the right] to receive notice, appear [in court], and state [their] views in connection with disposition and sentencing. [But] whatever special considerations of standing may apply to this limited category of "victims' rights", ... [w]e hold that [the victim] has no personal "right" or "interest" which would permit his intervention in the decision [whether] to recall [the defendant's] sentence.
> *Dix*, 279 Cal.Rptr. at 838, 807 P.2d at 1067.

Having lost his argument to the California Supreme Court, the crime victim in *Dix* then took his case to the federal courts. In *Dix v. County of Shasta*, 963 F.2d 1296, 1298-1300 (9th Cir.1992),FN20 the Ninth Circuit held that crime victims have no federal due process interest in the incarceration of criminals, even when their state has enacted a victims' rights act.

FN20. *Overruled on other grounds in Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

Similarly, in *Gansz v. People*, 888 P.2d 256, 257-59 (Colo.1995), the Colorado Supreme Court held that, despite the enactment of a victims' rights amendment, the Colorado Constitution still does not give crime victims the right to appeal a court's dismissal of criminal charges. In *Johnston v. State*, 702 N.E.2d 1085, 1088 (Ind.App.1998), the Indiana Court of Appeals held that crime victims have no standing to contest a sentencing judge's decision to grant a downward modification of a defendant's sentence.FN21 In *State v. Barnett*, 980 S.W.2d 297, 308 (Mo.1998), the Missouri Supreme Court held that, despite the procedural rights guaranteed to crime victims by the

Missouri Victims' Rights Act, crime victims have no right to dictate the prosecutor's charging decision, nor do they have standing to object to the judge's sentencing decision.

FN21. *Affirmed in part, Johnston v. Dobeski,* 739 N.E.2d 121, 123 (Ind.2000).

Another decision reaching this same conclusion is *Reed v. Becka,* 333 S.C. 676, 511 S.E.2d 396 (App.Ct.1999), where the South Carolina Supreme Court held that a crime victim has no right to veto a plea agreement and force the prosecutor to renew the negotiations or take the defendant to trial. The South Carolina court acknowledged that South Carolina's Victims' Rights Act gives crime victims the right to confer with the prosecuting attorney concerning any contemplated plea agreement.[FN22] Nevertheless, the court declared, a crime victim "possesses no rights in the appellate process", nor any "right to veto a proposed plea agreement": [FN23]

FN22. *Reed v. Becka,* 511 S.E.2d at 400.

FN23. *Id.* at 399, 400.

> Nothing in our Constitution or statutes provides the "victim" standing to appeal the trial court's order [accepting the proposed plea agreement]. [While] the rights granted by the South Carolina Constitution and statutes are enforceable by a writ of mandamus, [these provisions of law do not confer a right of] direct participation at the trial level.
> *Reed v. Becka,* 511 S.E.2d at 399.
> *See also State v. Martineau,* 148 N.H. 259, 808 A.2d 51, 53-54 (2002), and *State ex rel. Wild v. Otis,* 257 N.W.2d 361, 364-65 (Minn.1977).

Amicus curiae Victim Advocacy and Research Group contends that one court-the Massachusetts Supreme Court-has held that crime victims have standing to intervene in criminal litigation and independently challenge the rulings of the trial court. The Victim Advocacy and Research Group claims that the Massachusetts court recognized a crime victim's standing in *Hagen v. Commonwealth,* 437 Mass. 374, 772 N.E.2d 32 (2002). We disagree. Here is the pertinent language from *Hagen:*

> [T]he victim of a crime does not have a judicially cognizable interest in the prosecution of another. The rights which [the victim in this case] seeks to enforce ... are not private but in fact are lodged in the Commonwealth. A [criminal] prosecution is conducted in the interests of the Commonwealth, not on behalf of the victim.... The district attorney is the elected advocate of the people for a broad spectrum of societal interests-from ensuring that criminals are punished for wrongdoing, to allocating limited resources to maximize public protection....
>
> [N]othing in [the Massachusetts Victims' Rights Act] either alters our long-standing jurisprudence that the victim of a crime does not have a judicially cognizable interest in the prosecution of another or confers on a victim the status of a party to the criminal proceeding[.]

Hagen, 772 N.E.2d at 37-38 (citations and internal quotations omitted).

Although the *Hagen* decision appears to firmly reject the idea that crime victims have standing in criminal cases, the Victim Advocacy and Research Group argues that "[t]he language of the [*Hagen*] decision ... is ... misleading"-that the Massachusetts court actually recognized a crime victim's standing, but the court "soft-pedaled its ruling" for political reasons.

The Victim Advocacy and Research Group supports this argument by pointing out that, in Justice Cowin's concurring opinion in *Hagen,* she criticized her colleagues for "creat[ing] a right of victims to participate in the proceeding as a nonparty".[FN24] But Justice Cowin was not speaking of a victim's right to independently challenge the rulings of the trial court. Rather, she was criticizing the *Hagen* majority for suggesting that crime

victims have the right to personally address the trial judge before the judge makes decisions that involve any of the rights guaranteed by the Massachusetts Victims' Rights Act.

FN24. *Hagen*, 772 N.E.2d at 38.

The majority in *Hagen* declared that "victims should be permitted an opportunity to address the [trial] court directly when their fundamental right to a prompt disposition is jeopardized." FN25 Justice Cowin believed that this was an unwarranted expansion of the Massachusetts Victims' Rights Act. She took the position that, except in situations where a victim's right to independently address the court is expressly granted (for instance, the victim's right to speak at the sentencing hearing),FN26 the Victims' Rights Act should not be interpreted as conferring on victims the right to personally address the court. Rather, Justice Cowin argued, crime victims who wish to express their position on other subjects affecting their rights must "seek assistance from the victim and witness board, the district attorney[,] or the Attorney General, none of whom is required to assist the victim in this specific regard." FN27

FN25. *Id.* at 38.

FN26. *See* Massachusetts General Law 258B, § 3(p), which declares that crime victims have the right "to be heard through an oral and written victim impact statement at sentencing[,] ... about the effects of the crime on the victim and as to a recommended sentence...."

FN27. *Id.* at 39.

To sum up: Many states have enacted victims' rights acts, either by constitutional amendment or by legislation or both. And among these states, many courts are prepared to recognize a crime victim's standing to sue for enforcement of the procedural rights granted by the victims' rights act-the rights to notice, to attend court proceedings, and to offer their views on certain decisions (especially sentencing and parole release). But no court has endorsed the position espoused by Cynthia Cooper in this appeal-the position that the enactment of a victims' rights act gives crime victims the right to participate as independent parties to a criminal prosecution or to otherwise challenge the substantive rulings of the trial court.

We agree with the reasoning of the court decisions discussed above-in particular, the distinction these courts have drawn between, on the one hand, protecting a crime victim's procedural rights and, on the other hand, allowing crime victims to participate as independent parties in criminal prosecutions.

Under Alaska law, crime victims are guaranteed the right to attend a defendant's sentencing hearing and to offer their views regarding the sentence that the defendant should receive. It may well be (although we do not decide this issue) that if a court failed to honor these rights, a crime victim would be entitled to ask an appellate court to issue a writ of mandamus-that is, an order directing the trial court to let the victim exercise these rights.

But as we explained above, the present case does not involve an infringement of Cynthia Cooper's right to attend Daniel Cooper's sentencing hearing and to offer her views regarding the proper sentence. These rights were fully honored.

Instead, Cynthia asserts that a victim's right to be heard at the sentencing hearing necessarily carries with it the right to challenge the sentencing judge's decision if the victim believes that the judge imposed an unlawful sentence. But the fact that a person or organization is legally

entitled to express their views in court does not necessarily mean that this person or organization is also entitled to appeal the court's decision if the court does not adopt their view of the facts or their view of the law.

For instance, Alaska law calls for the Department of Corrections to prepare a pre-sentence report in all felony cases.[FN28] In that pre-sentence report, the Department of Corrections offers its conclusions regarding the facts of the case and often expresses its view regarding the sentence that should be imposed. Even though the Department's view may not necessarily coincide with the positions taken by either the prosecuting attorney or the defense attorney, no one has suggested that the Department of Corrections has an independent right to appeal the court's sentencing decision if the sentencing judge does not adopt the Department's view.

FN28. Alaska Criminal Rule 32.1(b)(1).

The same thing is true with regard to the right of crime victims to appear at the sentencing hearing and express their views concerning the proper sentence. Alaska law guarantees crime victims the right to provide this input when the judge is making the sentencing decision, but the law does not guarantee crime victims a right to attack the sentencing decision if the judge fails to adhere to the crime victim's views regarding the proper sentence.

(c) Cynthia Cooper's argument that, unless crime victims have a right to appeal, prosecutors and defense attorneys will collude with sentencing judges to evade and defeat the rights of crime victims

Cynthia Cooper, and the various *amici curiae* allied with her, contend that if this Court does not allow her to independently challenge the district court's sentencing decision, we will (in effect) be authorizing prosecutors and defense attorneys to collude with trial court judges to circumvent the law-for example, by agreeing to unlawful settlements of criminal cases in which the defendant is not required to suffer the full penalty provided by law for their crime, or is not required to participate in rehabilitative programs specified by law.

We need not reach the question of what this Court would do if the record of the trial court proceedings demonstrated this type of flagrant misconduct. In the present case, there was no flagrant misconduct. In fact, there was no misconduct at all.

Cynthia Cooper and the Office of Victims' Rights assert that (1) Judge Motyka concluded that Daniel Cooper's conditions of probation should include a program of rehabilitative counseling or treatment for batterers, and that (2) once Judge Motyka reached this conclusion, the judge could not lawfully allow Daniel to pursue this rehabilitative counseling or treatment by attending Dr. Wiger's program-because Dr. Wiger's program is not approved by the Department of Corrections. Cynthia and the Office of Victims' Rights argue that, under AS 12.55.101(a), Judge Motyka was obliged to order Daniel to attend a DOC-approved batterer's intervention program.

The pertinent portion of AS 12.55.101(a) reads:

> If a person convicted of a crime involving domestic violence is placed on probation, the court ... may
>
> (1) require the defendant to participate in and complete to the satisfaction of the court one or more programs for the rehabilitation of perpetrators of domestic violence that meet the standards set by, and that are approved by, the Department of Corrections under AS 44.28.020(b), if the program is available in the community where the defendant resides; the court may not order a defendant to participate in or complete a program for the rehabilitation of perpetrators of domestic violence that does not meet the standards set [by], and that is not approved [by,] the Department of Corrections under AS 44.28.020(b).

As can be seen, the statute says that the sentencing judge "may require" the defendant to attend a batterer's intervention program. Generally, the legislature's use of the word "may" means that an action is permitted but not

required.[FN29]

FN29. *See, e.g.,* *Wongittilin v. State,* 36 P.3d 678, 682 (Alaska 2001).

Cynthia concedes that the statute gives sentencing judges discretion on this point. She argues, however, that once a sentencing judge concludes that a defendant should participate in a program for the rehabilitation of domestic violence offenders, the statute limits the judge's discretion concerning the particular program that the defendant is ordered to attend.

Cynthia asserts that, in the present case, "the prosecution, the defense, and the judge all agreed that [Daniel] Cooper needed a rehabilitation program to deal with his domestic violence and abuse". Accordingly, Cynthia argues, Judge Motyka was required to specify a batterer's intervention program approved by the Department of Corrections.

Cynthia's argument hinges on the underlying premise that any rehabilitative program designed to cure or counteract a defendant's propensity to commit acts of domestic violence must be deemed a "batterer's intervention" program of the sort that AS 12.55.101(a) addresses. We do not agree with this premise.

Initially, we note that the definition of "crime involving domestic violence" is quite broad. AS 12.55.185(4) declares that, for purposes of the sentencing statutes, "domestic violence" has the meaning given in AS 18.66.990. In prior decisions-chiefly, *Bingaman v. State,* 76 P.3d 398, 407 (Alaska App.2003), and *Carpentino v. State,* 42 P.3d 1137, 1141 (Alaska App.2002) (opinion on rehearing)-we have explained how the definition of "domestic violence" codified in AS 18.66.990 is much broader than what most people would think.

The phrase "domestic violence" is normally understood to mean an assault committed by one domestic partner against another. But under AS 18.66.990, this phrase is defined in a wide-ranging way, quite divorced from its everyday meaning:

> For example, if an elderly uncle comes to visit his favorite nephew and, while lighting his pipe, recklessly scorches a table cloth or a chair, the old man has seemingly just committed an act of "domestic violence" as defined in AS 18.66.990(3). That is, the uncle has committed the listed offense of criminally negligent burning under AS 11.46.430 (negligently damaging the property of another by fire), and the victim is related to the perpetrator within the fourth degree of consanguinity-thus qualifying them as "household members" under AS 18.66.990(5)(E).
>
> Similarly, if a group of former college roommates decide to hold a twenty-year reunion at one of their homes, and if one of the visiting former roommates gets drunk and recklessly jams his friend's CD player while trying to insert a CD into it, this roommate has seemingly just committed an act of "domestic violence". The intoxicated roommate has committed the listed offense of fourth-degree criminal mischief under AS 11.46.486(a)(1) (tampering with the property of another with reckless disregard for the risk of harm or loss), and all of the former college roommates are "household members" under AS 18.66.990(5)(B).

Carpentino, 42 P.3d at 1141.

Similarly, "a person who causes a traffic accident through criminal negligence and, by chance, happens to injure the child of a former high school sweetheart has committed a 'crime involving domestic violence' as defined in AS 18.66.990." *Bingaman,* 76 P.3d at 412.

Because the definition of "crime involving domestic violence" is so expansive-because it encompasses many situations that have nothing to do with an assault by one domestic partner against another-there will be many cases in which, even though the defendant's crime may qualify as a "crime involving domestic violence", it makes no sense to require the defendant to undergo batterer's intervention treatment.

Second, even in cases of typical "domestic violence", where one domestic partner has in fact assaulted another, there will be times when the sentencing judge may reasonably conclude that a batterer's intervention treatment program is not the answer. For instance, the judge may conclude that the defendant's assaultive conduct arose from a major mental illness (for instance, schizophrenia), or that the assaultive conduct was the one-time product of a specific emotional stress (for example, the loss of a career or the loss of a child).

In such circumstances, the sentencing judge might reasonably conclude that, rather than sending the defendant to a batterer's intervention program (that is, a program designed to address the possessive, controlling, and manipulative behaviors that typify batterers), it would be more productive to order the defendant to engage in other kinds of treatment. And because there will be such cases, it makes sense for the legislature to allow the sentencing judge to evaluate each case on its own merits, rather than requiring judges to send all defendants to complete a batterer's intervention treatment program.

In the present case, the defense attorney argued that Daniel Cooper had not committed acts of violence before, and that the present case was "an anomaly". The defense attorney also argued that it was important for Daniel to continue participating in Dr. Wiger's program because "abuse is not his only issue".

Shortly before Judge Motyka imposed Daniel's sentence, the judge declared that, given the facts of the case, he did not believe that AS 12.55.101(a) required him to send Daniel to a batterer's intervention program:

> *The Court:* [The violence committed on the victim in this case was], at best, a slap. It [was] an act done by a 57-year-old man with no priors, [no] alcohol or anger convictions. Minimal injur[y]. And if you took [away] all the bad blood, what you would have is a first-time offender pleading [no contest] to family violence.... I don't agree with [the Office of Victims' Rights' contention] that [the statute] requires a DVIP [*i.e.,* a domestic violence intervention program] in this [situation].

Based on this record, it appears that Judge Motyka concluded that a batterer's intervention program was not the best treatment for Daniel Cooper, and that Daniel should instead be ordered to complete Dr. Wiger's program.

For these reasons, we reject Cynthia Cooper's argument that the prosecutor, the defense attorney, and Judge Motyka colluded to circumvent the statute. We also reject Cynthia's argument that Judge Motyka found that Daniel needed to attend a batterer's intervention program, but then violated the statute by sending Daniel to a batterer's intervention program that was not DOC-approved. Rather, the record shows that Judge Motyka concluded that Daniel should be sent to Dr. Wiger's program *instead of* a batterer's intervention program.

(d) Cynthia Cooper's argument that a crime victim must be able to appeal a judge's decision if the judge fails to give sufficient consideration to any of the interests of crime victims enumerated in the Alaska Constitution and the Alaska Statutes

Finally, Cynthia Cooper argues that crime victims must have the right to appeal whenever a judge fails to sufficiently consider any of the interests of crime victims guaranteed by law- *i.e.,* the interests enumerated in Article I, Section 24 of the Alaska Constitution and in various provisions of the Alaska Statutes.

Cynthia points out that Article I, Section 24 guarantees the right of crime victims to be treated with "fairness during all phases of the criminal ... justice process". Cynthia argues that this right to be treated with fairness must encompass the right to insist on enforcement of all of the provisions of the Alaska Statutes that speak to the interests of crime victims.

For instance, with regard to the present case, AS 12.55.101(a) declares

that when a sentencing judge is considering whether to grant probation to a defendant convicted of a crime of domestic violence, the judge is obliged to consider "the safety and protection of the victim and any [other] member of the victim's family". Cynthia argues that, because of this statutory mandate (coupled with the constitutional guarantee of fair treatment for crime victims), a victim of domestic violence must have the right to appeal a sentencing judge's decision if the judge imposes a sentence that does not (in the victim's estimation) adequately guarantee the safety and protection of the victim and the other members of the victim's family.

In the present case, Cynthia contends that Judge Motyka failed to give adequate consideration to her safety and the safety of her children when the judge declined to order Daniel to participate in a batterer's intervention program. Cynthia argues that Judge Motyka, in making this decision, improperly disregarded her safety-and thus violated AS 12.55.101(a)-"by failing to ensure that [Daniel] receive[d] appropriate rehabilitat[ive treatment]".

Several provisions of the Alaska Statutes require judges to consider the interests of crime victims before making certain decisions. One example is AS 12.55.101(a). Another example is AS 12.30.027(a), which states that before a court orders the pre-trial or post-trial bail release of a defendant prosecuted for a crime of domestic violence, the court must "consider the safety of the alleged victim or other household member".

But we do not read these statutes to mean that crime victims are to be deemed parties to the criminal prosecution of the perpetrator. Nor do we read these statutes as demonstrating the legislature's intent to have crime victims file appeals whenever they are dissatisfied with a judge's weighing of their interests.

Our conclusion regarding the legislature's position on this issue is confirmed by actions the legislature took during its 2005 session. In that 2005 legislative session, a bill was introduced-House Bill 55-relating to the rights of crime victims. Under House Bill 55, a new statute (AS 12.61.013) would have been enacted giving crime victims the right to petition the superior court or the district court "for an order restraining [the] violation or compelling [the] implementation of [any of the] rights granted to victims by regulation, statute, or constitutional provision".[FN30] If the victim was dissatisfied with the trial court's ruling, the victim could then appeal the trial court's decision to this Court.[FN31] The proposed statute would also have required an expedited appellate process, as well as relaxation of the appellate rules governing the form and content of briefs and other documents. [FN32]

FN30. 24th Legislature, House Bill 55, § 3.

FN31. *Id.*

FN32. *Id.*

The legislature took no action on House Bill 55. Instead, the legislature enacted a more modest proposal giving crime victims the right to seek appellate review of one particular type of sentencing decision: the right to petition this Court to review any felony sentence which, because of the mitigating factors listed in AS 12.55.125(d), has been reduced below the presumptive range for that crime.[FN33] *See* AS 12.55.120(f).

FN33. SLA 2005, ch. 65, § 4.

Under this legislation, a crime victim's right to petition for review of the defendant's sentence applies only to felony cases-because only felony offenses carry a presumptive range of sentences. The case presently before this Court involves a misdemeanor sentence. Thus, the legislature's recent

enactment of AS 12.55.120(e) does not aid Cynthia Cooper's argument that she is entitled to seek appellate review of Judge Motyka's sentencing decision.

In fact, the legislature's enactment of a statute of such limited scope severely undercuts Cynthia's contention that the legislature has granted crime victims broad, independent authority to challenge any sentencing decision. The legislature's passage of House Bill 54, coupled with its failure to take action on House Bill 55, indicates that the legislature purposely declined to pass legislation that would have made a crime victim a "party" to a criminal case, or that would have given crime victims an extensive independent right to litigate whenever they believed that their rights had been abridged or that inadequate consideration had been given to their interests. Instead, the legislature gave crime victims the limited right to seek appellate review of certain felony sentences (sentences below the presumptive range).

We acknowledge that, under AS 12.55.101(a), a judge must consider the goal of protecting the victim(s) when the judge sentences a defendant to probation for a crime of domestic violence. Indeed, this duty to consider the future safety of victims is not confined to domestic violence cases. Under AS 12.55.005, the sentencing judge in any criminal case must consider "the need to confine the defendant to prevent further harm to the public", "the effect of the sentence ... as [an expression of] community condemnation of the criminal act and as a reaffirmation of societal norms", and "restoration of the victim and the community".[FN34]

FN34. AS 12.55.005(3), (6), and (7).

Thus, under Alaska law, a sentencing judge must always consider the victim's interests and the interests of the community-protection of the community, reaffirmation of community values, and restoration of the victim and the community-when choosing the defendant's sentence. But this does not mean that all members of the community have the right to challenge the judge's sentencing decision if they believe that the judge's decision fails to adequately protect the public, or fails to adequately express condemnation of the defendant's crime, or fails to adequately restore the community. Even though Alaska law requires sentencing judges to consider both the interests of the community at large and the interests of the people who have particularly suffered as a result of the defendant's conduct, a criminal prosecution is not a private lawsuit brought by the victim(s) against the defendant, nor is a sentencing hearing a community meeting in which all members of the public have a right to enter the discussion and, if dissatisfied, challenge the decision.

As we explained in the first section of this opinion, our system of criminal justice is no longer based on the idea that individual victims should bring perpetrators to court in order to obtain retribution and restitution for the harm done to their personal interests. Rather, criminal conduct is seen as an injury to the community. Criminal prosecutions are undertaken in the name of the community, and the executive branch of government (as the representative of the community) has the sole responsibility and authority to initiate and litigate criminal cases-and, if necessary, to challenge a trial court's decisions by seeking appellate review.

When the legislature enacted our state's Victims' Rights Act (AS 12.61), and when the legislature and the voters later enacted the victims' rights provision of our state constitution (Article I, Section 24), they undoubtedly wanted to enhance the participation of crime victims in the criminal justice process, and to make sure that judicial officers and prosecuting attorneys paid attention to the interests of crime victims. But the question before us now is whether the legislature and the voters wanted to change the basic rule that criminal litigation is initiated and directed by public prosecutors who act in the name of the community, rather than by crime victims who act in their own interest.

It is true, as we acknowledged earlier, that prosecuting attorneys may sometimes make decisions that run contrary to the interests or the wishes of crime victims. Likewise, there will be times when a crime victim disagrees

with the sentencing judge concerning how much jail time a defendant should serve, or how big a fine the defendant should pay, or what obligations the defendant should have to fulfill when the defendant is released on probation.

One might argue-in fact, Cynthia does argue-that, in these instances, there is a possibility that the prosecutor or the sentencing judge will be wrong, and the crime victim will be right. But most often there will be no "right" answer and no "wrong" answer. Instead, it will be a question of judgement or a question of degree.

Who is to say whether a defendant should be charged with manslaughter (that is, reckless homicide) or, instead, the lesser offense of negligent homicide? Who is to say whether the government should take the defendant to trial or, instead, negotiate a plea bargain with the defendant? If the case goes to trial and the defendant is convicted, who is to say whether the defendant should receive a sentence of five years' imprisonment or only three?

For two hundred years, the people of this country have believed that the fairest way to resolve these questions is to put the responsibility in the hands of public officials-prosecutors and judges-who have no personal interest in the case. Indeed, some courts have held that the constitutional guarantee of due process of law includes the requirement that all decisions in a criminal prosecution be made by a prosecutor who has no personal stake in the outcome.[FN35]

> FN35. See *Adkins v. Commonwealth*, 26 Va.App. 14, 492 S.E.2d 833 (1997), where the court held that the defendant's right to due process was violated when a private attorney retained by the victim's family was appointed as a special prosecutor to handle the defendant's case, after the regular prosecuting attorney withdrew. The court stated:
>
> > [When] a special prosecutor has a personal interest in the outcome of the prosecution, his objectivity and impartiality are called into question, and a defendant's right to a fair and impartial trial is violated. A special prosecutor who was formerly employed by the victim's family in connection with the same proceeding is incapable of exercising the fair-minded prosecutorial discretion to which the defendant is entitled....
>
> *Adkins*, 492 S.E.2d at 835. *Accord*, *State v. Eldridge*, 951 S.W.2d 775, 782-83 (Tenn.Crim.App.1997).

There will be times when a crime victim is dissatisfied with the way a case is handled or resolved. But we, as a society, have decided that it is fairer to let public officials make these decisions, rather than putting the victim in charge of making these decisions, or letting the victim second-guess or veto these decisions.

In the main, this a matter of principle. But it is also a matter of practicality. The case presently before this Court is not entirely representative of the problem, because here there is only one primary victim. There can easily be more than one victim in a criminal case. Assault and theft cases with three or more victims are not unusual. Indeed, in cases of securities fraud or consumer fraud, there can be dozens or even hundreds of victims. If each of these victims had a separate right to ask for appellate review of the decisions of the prosecuting attorney and the sentencing judge, the system would be unworkable, and our goal of uniform justice would recede farther from sight.

Conceivably, the people of this state (or their elected representatives) might decide to change this fundamental aspect of the criminal justice system. But the question in the present case is whether the voters and the legislature have already done so. Did the voters and the legislature, by enacting the victims' rights section of our state constitution and the statutes that comprise our Victims' Rights Act, intend to alter our system of justice so that crime victims are treated as independent parties in criminal

prosecutions (as they were two hundred years ago), with the right to go to court to challenge the substantive decisions of prosecutors and trial judges? We conclude that the answer is "no".

(e) Conclusion

For all of the reasons we have discussed here, we conclude that a crime victim does not have an independent right to appeal or petition an appellate court to review the sentence imposed on the perpetrator of the crime (except, perhaps, for the limited right of petition now granted by AS 12.55.120(f)).

As we noted earlier, some courts have recognized a crime victim's right to pursue litigation seeking relief in the nature of mandamus (*i.e.,* an appellate court order directing a lower court to follow the law) when a lower court fails to honor the procedural rights given to crime victims by state constitution or by state statute. This issue is not raised in the present case; neither Cynthia Cooper nor her attorney from the Office of Victims' Rights claims that Judge Motyka failed to allow them to attend and be heard at the sentencing hearing.

Accordingly, we leave for another day the question of whether a crime victim in Alaska has the right to seek appellate relief when a lower court fails to honor a crime victim's procedural rights specified in Article I, Section 24 of the Alaska Constitution or in the Alaska Statutes.

The authority of the Office of Victims' Rights to independently pursue this litigation

As explained above, the Office of Victims' Rights is representing Cynthia Cooper in this litigation. However, the Office claims that they have a greater role in this litigation than simply providing legal representation to Cynthia at public expense. The Office asserts that even if Cynthia has no standing to challenge the sentence imposed by the district court, the Office of Victims' Rights has independent authority to challenge this sentence.

The Office of Victims' Rights points out that the Alaska Legislature has given the Office "jurisdiction to advocate on behalf of [the] victims of felony offenses or class A misdemeanors ... involving domestic violence or a crime against a person under AS 11.41." [FN36] Further, the legislature has directed the Office of Victims' Rights to "assist crime victims in obtaining the rights [that] crime victims are guaranteed under the constitution and the laws of [Alaska] with regard to the contacts crime victims have with justice agencies." [FN37] Based on its statutory role as an advocate for crime victims, the Office of Victims' Rights argues that it has the independent authority to file lawsuits that advance the interests of crime victims, even when the crime victims themselves would have no right to sue.

FN36. AS 24.65.100(a).

FN37. AS 24.65.110(a).

But the fact that the Office of Victims' Rights is authorized to serve as an advocate for crime victims does not mean that the Office has an independent right to file lawsuits that the victims themselves could not file.

Attorneys-and this includes attorneys who are salaried officers of a public agency-are the legal representatives of the clients they serve. An attorney is empowered to appear in court for the client, and to make certain decisions on the client's behalf, but the attorney's authority to file a lawsuit is merely an extension of the client's authority to do so. The lawsuit can go forward only if the client has standing to pursue the litigation. That is, when an attorney has no personal legal rights at stake and is acting solely as the legal representative of a client, the attorney has no independent right to file a lawsuit when the client has no personal right to file the lawsuit.

The following cases all hold that a government attorney who is statutorily

authorized or obliged to serve as the legal representative of a government agency has no independent authority to pursue litigation if the client agency does not wish to pursue that litigation:

See Soliman v. Ebasco Services Inc., 822 F.2d 320, 323 (2nd Cir.1987); *Santa Rita Mining Co. v. Department of Property Valuation*, 111 Ariz. 368, 530 P.2d 360, 363 (1975); *Chun v. Board of Trustees of the Employees' Retirement System of the State of Hawaii*, 87 Hawai'i 152, 952 P.2d 1215, 1225, 1230 (1998); *Motor Club of Iowa v. Iowa Department of Transportation*, 251 N.W.2d 510, 513, 515-16 (Iowa 1977); *State v. Hagan*, 44 N.D. 306, 175 N.W. 372, 374 (1919); *Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607, 613 (1997).

Moreover, the claim made by the Office of Victims' Rights-that the Office has independent authority to file a lawsuit whenever the Office determines that the lawsuit would advance the interests of crime victims-is inconsistent with the statutes that describe the Office's powers.

As explained above, AS 24.65.100(a) gives the Office of Victims' Rights the authority to advocate on behalf of crime victims, and AS 24.65.110(a) gives the Office the authority to assist crime victims in securing their legal rights. But even in situations where the Office of Victims' Rights believes that the rights of a crime victim have been violated, the legislature has not authorized the Office to file a lawsuit. Instead, as we are about to explain, the legislature has given the Office of Victims' Rights the authority to publicly criticize a government agency if the Office believes that the agency has violated a crime victim's rights.

Under AS 24.65.120-130, the Office of Victims' Rights is given the power to investigate potential violations of crime victims' rights. If the Office preliminarily concludes that a government agency or official has violated the rights of a crime victim, the Office must consult with that agency or official. AS 24.65.140. If that consultation fails to resolve the problem, and the Office still believes that a crime victim's rights have been violated, the Office "shall [formally] report [its] opinion and recommendations to [the] agency [involved]". AS 24.65.150(a). And, after waiting a reasonable amount of time following its report to the agency in question, and with the approval of the complaining citizen, the Office "may present [its] opinion and recommendations to the governor, the legislature, a grand jury, the public, or any of these". AS 24.65.160.

These are essentially the same powers that are given to an analogous arm of the government: the Office of the Ombudsman.

Under AS 24.55.160-220, the Ombudsman is empowered to investigate and ultimately report on the workings of state government, if the Ombudsman concludes that an agency of the government has treated a citizen unfairly or unreasonably. Like the Office of Victims' Rights, the Office of the Ombudsman is authorized to investigate complaints against government agencies. If the Ombudsman preliminarily concludes that a government agency has treated a citizen unfairly or unreasonably, the Office must consult with the agency involved. AS 24.55.180. If that consultation fails to resolve the problem, and the Ombudsman still believes that the agency has mistreated the citizen, the Ombudsman "shall [formally] report [its] opinion and recommendations ... to [the] agency [involved]". AS 24.55.190. And, after waiting a reasonable amount of time following its report to the agency in question, the Ombudsman "may present the opinion and recommendations to the governor, the legislature, a grand jury, the public[,] or any of these". AS 24.65.200.

In other words, it appears that the legislature intended the Office of Victims' Rights to act as a special ombudsman in the area of victims' rights. This undercuts the Office of Victims' Rights' assertion that the Office has an independent power to intervene in a criminal prosecution and appeal the final judgement-because the Ombudsman has no such power.

As we have explained above, neither the statutes outlining the powers of the Ombudsman nor the statutes outlining the powers of the Office of Victims' Rights have any provision for filing lawsuits against an offending state agency or official. Instead, the legislature has granted the Ombudsman and the Office of Victims' Rights the powers to investigate, to advise and

mediate, and, when necessary, to publicize the failings of government agencies-by informing the public of their findings, and/or by communicating those findings to an arm of the government that is empowered to take legal action.

This is the approach taken in the American Bar Association's "Model Ombudsman Act for State Governments" first issued in 1974 and later revised in 1997. Under the terms of the Model Act, an ombudsman is authorized to investigate, to consult and to mediate, and to criticize. However, the ombudsman has no power to coerce government agencies to take action, nor the power to sue government agencies in court-except to the limited extent of suing government agencies to force them to comply with Ombudsman subpoenas, or to enjoin their willful obstruction of the Ombudsman's other investigative efforts, or to force them to honor the obligation of confidentiality that normally attaches to the Ombudsman's preliminary report. (*See,* for example, AS 24.55.190(c).)

With respect to the Office of Victims' Rights' assertion that they have the authority to challenge the substance of the district court's sentencing decision in this case, we particularly note the following Comment to Section 3(a)(1) of the Model Ombudsman Act for State Governments (1997)-a model act that was drafted by the United States Ombudsman Association, based primarily on the ABA's Model Act: FN38

> FN38. The complete text of this Model Act is available through the web site of the American Bar Association's section on Administrative Law and Regulatory Practice:
>
> http://www.abanet. org/adminlaw/ombuds/ usoamodel1.html

> [The Model Act precludes ombudsman investigations of judicial acts because of] the existence of the long-established system of appellate review of judicial decisions.... [T]he Ombudsman would have jurisdiction to investigate administrative or ministerial acts by employees of the judicial branch, when those acts are peripheral to the adjudication itself[, as well as jurisdiction to] make recommendations for improving administrative procedures that would have a prospective effect. [However, the] Ombudsman would not, of course, have the jurisdiction to question, criticize or review the substantive content of any judicial order, decision or opinion.

This same limitation on an ombudsman's authority is also reflected in the ABA's "Standards for the Establishment and Operation of Ombuds Offices" issued in 2004. Under the ABA Standards, an ombudsman should have no authority to "make, change, or set aside a law, policy, or administrative decision" (Standard D(1)), or to "directly compel [any] entity or any person to implement the [ombudsman's] recommendations" (Standard D(3)). Moreover, under Standard D(5), an ombudsman should have no authority to "accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding [judicial] officer in that action explicitly consent".

Alaska's ombudsman statutes-in particular, AS 24.55.100-200-do not depart from the substance of sections 11 through 15 of the ABA's Model Ombudsman Act. Based on the wording of our statutes, and based on the commentary to the ABA's 1974 Model Ombudsman Act and its successors, we conclude that the Alaska Legislature intended to codify the policy embodied in the model ombudsman acts-the policy that the ombudsman does not "have the jurisdiction to question, criticize[,] or review the substantive content of any judicial order, decision[,] or opinion".

As we pointed out earlier, when the Alaska Legislature created the Office of Victims' Rights, the legislature defined the powers of that Office using provisions that parallel the statutes defining the powers of the state ombudsman. We therefore conclude that the legislature intended this same policy to apply to the Office of Victims' Rights. That is, the legislature did not intend for the Office of Victims' Rights to have the authority to initiate litigation to question, criticize, or otherwise seek review of the substantive content of any judicial order, decision, or opinion.

For these reasons, we reject the assertion of the Office of Victims' Rights that the Office has independent authority to appeal or otherwise challenge a sentencing decision in circumstances where the Office's client (*i.e.,* the crime victim whom they are representing) has no personal standing to pursue the litigation.

Part II

Did the district court abuse its discretion when the court denied Cynthia Cooper's post-hearing request to seal the statements made by Daniel Cooper's defense attorney concerning the mental health and behavioral problems suffered by Cynthia's son?

As we explained at the beginning of this opinion, the second part of Cynthia Cooper's original application for relief raises the question of whether Cynthia is entitled to have a portion of the sentencing hearing sealed from public access.

The sentencing hearing in this case was open to the public, and the hearing was apparently attended by spectators and representatives of the media.

During the defense attorney's sentencing argument on behalf of Daniel Cooper, she referred to the fact that Cynthia's son (who lived with the couple) was suffering from mental health and behavioral problems. The defense attorney argued that the boy's problems were a major source of stress in Cynthia's and Daniel's relationship, and that this stress was a primary factor in causing Daniel to engage in this instance of assaultive conduct.

Neither Cynthia nor her attorney from the Office of Victims' Rights objected to the defense attorney's statements about the boy's problems. However, on the Monday following the sentencing hearing, the Office of Victims' Rights (acting on Cynthia's behalf) filed a motion asking the district court to seal the defense attorney's statements on this subject. Cynthia contended that the defense attorney's statements contained "confidential and privileged information" about her son.

Ultimately, the district court declined to seal the defense attorney's statements. The district court's ruling led to this second part of Cynthia's original application for relief.

A more detailed history of this litigation, and a description of the various legal arguments that Cynthia has asserted in favor of sealing the defense attorney's statements

Cynthia's original motion to seal portions of the sentencing record asserted that the defense attorney's statements violated her son's right of privacy and her son's right (as the family member of a crime victim) to be treated with fairness, dignity, and respect. However, in later pleadings, the Office of Victims' Rights emphasized that the legal basis of Cynthia's request was the assertion that the defense attorney's statements revealed confidential information that was protected by the son's psychotherapist-patient privilege.

In its "Reply to [the opposition to the] Motion to Temporarily Seal Court Records" (dated April 2, 2004), the Office of Victims' Rights acknowledged that any admissible information presented at the sentencing hearing-even "derogatory and misleading comments"-should properly remain part of the public record. But the Office of Victims' Rights argued that the defense attorney's challenged statements did not contain admissible information. Rather, the Office of Victims' Rights asserted, the defense attorney's statements contained "inadmissible, privileged information"-and, thus, those statements should be struck from the public record. The problem, the Office of Victims' Rights told the court, was that the defense attorney's statements violated the psychotherapist-patient privilege.

The Municipality of Anchorage opposed Cynthia's motion. One of the Municipality's arguments was that the Office of Victims' Rights had no legal authority to file motions on Cynthia's behalf on this kind of issue-since the issue did not involve any infringement of the rights contained in the Victims' Rights Act, but rather involved an assertion of evidentiary privilege by

Cynthia on behalf of her son.

As we explained in the preceding section of this opinion, there is an arguable legal basis for the Municipality's position. However, we need not resolve this legal issue-because, as we explain here, Cynthia's claim of privilege lacks merit.

On May 4, 2004, the district court denied Cynthia's motion to seal the defense attorney's statements. The court noted that the defense attorney's statements were relevant to the issues to be decided at the sentencing hearing, and the court further noted that neither Cynthia nor her attorney from the Office of Victims' Rights objected (at the time) to the defense attorney's statements.

Two weeks later, the Office of Victims' Rights filed a motion asking the district court to reconsider its decision. In its motion for reconsideration, the Office of Victims' Rights conceded that the defense attorney's statements might have been relevant to the issues at the sentencing hearing, but the Office reiterated its argument that those statements were nevertheless inadmissible. In addition, the Office of Victims' Rights raised a new argument: the contention that, before the defense attorney could make the challenged statements, Daniel Cooper was obliged to take the stand and personally testify to the assertions of fact contained in his defense attorney's statements.

The district court did not issue a decision on this motion for reconsideration. Instead, the court allowed the motion to become denied by operation of law (after the passage of 30 days). *See* Criminal Rule 42(k)(4).

Why Cynthia is entitled to pursue only the one argument based on the psychotherapist-patient privilege

As just explained, Cynthia filed several pleadings in the district court, and those pleadings mentioned various theories as to why the district court should have sealed the defense attorney's statements. Cynthia's original pleading mentioned notions of privacy and victims' rights. However, the Office of Victims' Rights (acting on Cynthia's behalf) ultimately told the district court that the issue was one of evidentiary privilege. Cynthia asserted that the defense attorney's statements should be struck from the public record because those statements contained confidential information that was protected by the psychotherapist-patient privilege codified in Alaska Evidence Rule 504.

After the district court denied Cynthia's motion to seal the defense attorney's statements, Cynthia filed a motion for reconsideration in which she raised yet another potential legal basis for sealing the challenged statements. But as our supreme court stated in *Blackburn v. Department of Transportation and Public Facilities*, 103 P.3d 900, 906 (Alaska 2004), a court "[is] under no obligation to consider an issue raised for the first time in a motion for reconsideration"-and if the trial court decides not to address the newly raised issue, that issue can not be pursued on appeal.

For these reasons, we conclude that the sole argument that Cynthia has preserved for appeal is the argument that the defense attorney's statements violated the psychotherapist-patient privilege. All of Cynthia's other arguments are waived.

Why we reject Cynthia's argument that the defense attorney's statements should be struck from the public record of the sentencing hearing

We have two reasons for rejecting Cynthia's contention that the challenged statements should be struck from the public record. First, with one possible exception, none of the challenged statements appear to be covered by the psychotherapist-patient privilege. Second, Cynthia waived whatever psychotherapist-patient privilege she might otherwise have claimed when she and her attorney from the Office of Victims' Rights failed to contemporaneously object to the challenged statements.

(a) With one possible exception, Cynthia had no valid claim of privilege with respect to the defense attorney's statements

Alaska Evidence Rule 504(b) contains the following definition of the psychotherapist-patient privilege:

> **General Rule of Privilege.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental[,] or emotional conditions ... between or among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

As can be seen from the text of this rule, the privilege applies only to "confidential communications" among the group of people named in Evidence Rule 504(b). The term "confidential communication" is defined in Evidence Rule 504(a)(4):

> A communication is confidential if [it is] not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or [to] persons reasonably necessary for the transmission of the communication, or [to] persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

During her sentencing argument on behalf of Daniel Cooper, the defense attorney referred several times to the mental health and behavioral problems suffered by Cynthia's son. But the psychotherapist-patient privilege does not cover all testimony that discloses that someone suffers from mental health or behavioral problems, or that describes those problems, or that describes other people's reactions to those problems. The privilege has a narrower scope: it applies only to testimony that reveals the substance of confidential communications made for the purpose of diagnosing or treating those problems.

Cynthia objects to statements made by the defense attorney which asserted or revealed: (1) that Cynthia's son had undergone counseling for something that had happened to him; (2) that the boy was troubled; (3) that he was not responding well to the counseling; (4) that he engaged in abusive behavior while in counseling; (5) that he had been sent to live in a residential facility for several months; (6) that Cynthia and Daniel were experiencing stress because of their uncertainty as to how to deal with the boy's problems; (7) that, a few days before Daniel's act of domestic violence, both Cynthia and Daniel had to leave work because school officials contacted them and informed them that Cynthia's son was engaging in inappropriate behavior; (8) that Cynthia believed that her son had engaged in other inappropriate behavior at home; (9) that, one day later, Daniel told Cynthia that he thought that her son needed to return to residential treatment; [FN39] (10) that two nights before the domestic assault, Cynthia and Daniel were having dinner with another couple, and the man of this couple ordered Cynthia's son to leave the table because the boy was being obnoxious; (11) that Cynthia believed that the man had acted inappropriately, so she followed her son up to his room to talk to him; (12) that, following this conversation with her son, Cynthia came back downstairs and announced (in front of everyone) that she was going to end her relationship with Daniel-that she was leaving, and that she was taking her son with her, to protect her son from Daniel's plan to send the boy back to a residential facility; (13) that Daniel and Cynthia had a house rule that Cynthia's son was not to have his bedroom door closed; and (14) that on the night of the domestic assault, Cynthia apparently assisted her son in locking his door.

> FN39. This statement was conceivably made for the purposes of furthering the boy's treatment, but it does not appear to be confidential. From the defense attorney's narrative, it seems that Daniel made this statement in front of another couple who were having dinner at Cynthia's and Daniel's home.

None of the defense attorney's statements appear to reveal the substance of "confidential communications" as that term is defined in Evidence Rule 504(a)(4). Indeed, many of the defense attorney's statements

do not reveal the substance of any communication at all.

The defense attorney did allude to one communication that is arguably covered by the psychotherapist-patient privilege: a statement attributed to a mental health professional who was treating Cynthia's son, in which the mental health professional expressed an assessment of the boy's case. This particular statement may not have been admissible over a claim of privilege. But as we explain in the next section of this opinion, no objection was made.

(b) Cynthia forfeited her claim of privilege by failing to object to the defense attorney's statements

Under the law of evidence, there are many types of evidence which should be excluded if someone objects, but which remain admissible if no one objects. For instance, the law excludes many types of hearsay evidence, but this hearsay evidence is admissible-and is properly considered by the court-if no one objects.[FN40]

FN40. *Haves v. State,* 581 P.2d 221, 222 n. 2 (Alaska 1978); *Vaska v. State,* 74 P.3d 225, 230 (Alaska App.2003); *Cassell v. State,* 645 P.2d 219, 220-21 (Alaska App.1982).

There is a similar rule for evidence that is covered by one of the privileges codified in the 500 section of the Alaska Evidence Rules. Under Evidence Rule 510, the holder of an evidentiary privilege waives their privilege if they "voluntarily ... consent[ ] to disclosure of any significant part of the matter or [the] communication".

Evidence Rule 510 speaks of "waiver", which normally entails an affirmative action-a voluntary relinquishment of a known right.[FN41] However, the Commentary to Evidence Rule 510 explains that Rule 510 is really talking about forfeiture-the loss of the privilege through failure to act. This rule of forfeiture applies even when the privilege-holder was unaware, at the time, that they could have claimed a privilege and prevented the disclosure of the information:

FN41. *See,* for instance, *Vroman v. Soldotna,* 111 P.3d 343, 347 n. 9 (Alaska 2005); *Hillman v. Nationwide Mutual Fire Ins. Co.,* 758 P.2d 1248, 1253 (Alaska 1988).

> In [these] situations, once [the] confidentiality [of the information] is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it, and [the privilege-holder's] knowledge or lack of knowledge of the existence of the privilege appears to be irrelevant. 8 *Wigmore* [*on Evidence*] § 2327.
> Commentary to Alaska Evidence Rule 510, third paragraph.

Moreover, in this context, the law deems a person to have "consented" to the disclosure of privileged information if the person, being present and able to object to the disclosure, fails to object. For instance, in John W. Strong *et al., McCormick on Evidence* (5th ed.1999), the authors explain that this rule of forfeiture- *i.e.,* loss of the privilege through inaction-governs the attorney-client privilege:

> [I]t is clear that the client may assert the privilege even though he is not a party to the cause [in which] the privileged testimony is sought to be elicited. [But] if he is present at the hearing[,] whether as [a] party, witness, or bystander[,] he must assert the privilege personally or by [his] attorney, or it will be waived.

McCormick, § 92, Vol. 1, pp. 369-370.

See also *McCormick's* discussion of the same rule applied to the marital privilege, *id.,* § 83, Vol. 1, p. 336: "A failure by the holder to assert the privilege by objection ... is a waiver."

Also see *Williams v. Utility Equipment, Inc.,* 837 P.2d 1112, 1116-17 (Alaska 1992), where the Alaska Supreme Court held that, despite the

existence of a protective order excluding the challenged testimony, "[the appellant] waived his objections ... when he did not make specific objections [at the time] the testimony was presented".

In *Clifton v. State*, 758 P.2d 1279 (Alaska App.1988), this Court applied the same rule to the psychotherapist-patient privilege. We declared that this privilege is not self-executing: "The plain language of [Evidence Rule 504] appears to require that someone act to exercise the privilege." *Id.* at 1284. Accordingly, we found no plain error in a case where neither the defendant nor his attorney objected (until appeal) to the contested disclosures. *Id.*

In the present case, Cynthia and her attorney did not object to the defense attorney's statements until after the sentencing hearing was over, and after the sentencing judge had already relied on the challenged statements. In her brief to this Court, Cynthia asserts that she was "surprised and caught off guard" by the defense attorney's statements. There is nothing in the record to support this assertion. In fact, the record appears to belie this assertion-because the statements that Cynthia challenges in this appeal were uttered over the course of several minutes. The defense attorney repeatedly referred to these matters during her sentencing argument to the court; the challenged statements are scattered throughout ten pages of the sentencing transcript.

Moreover, under the rule of forfeiture that we have described above, it does not matter if Cynthia was surprised by the fact that the defense attorney would mention these matters. When the holder of an evidentiary privilege is present and able to object to the disclosure of information covered by the privilege, but the privilege-holder fails to object, the privilege is lost and the disputed evidence is admissible.

Arguably, the present case raises a slightly different issue: whether a privilege-holder who has waived the privilege by failing to object may later retroactively assert the privilege and ask the court to erase or seal the record of the earlier challenged testimony.

According to *Wigmore on Evidence,*[FN42] the rule at common law is that once an evidentiary privilege is waived, the privilege can not be reasserted by the privilege-holder at a later stage of the same proceeding, or at any subsequent judicial proceeding:

> FN42. J. Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev.1978).

> A waiver at a former trial should bar a claim of the [physician-patient] privilege at a later trial, for the original disclosure takes away once and for all the confidentiality sought to be protected by the privilege. To enforce it thereafter is to seek to preserve a privacy which exists in legal fiction only. *Wigmore,* § 2389(4), Vol. 8, pp. 860-61.
>
> *Accord:* *Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co.*, 819 F.2d 1471, 1478 (8th Cir.1987); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, 1194 (1984); *State v. Clark*, 296 N.W.2d 372, 376 (Minn.1980); *State v. Bishop*, 187 N.J.Super. 187, 453 A.2d 1365, 1368 (App.Div.1982); *People v. Bloom*, 193 N.Y. 1, 85 N.E. 824, 825-26 (1908); *General American Life Ins. Co. v. Ettinger*, 266 A.D. 876, 42 N.Y.S.2d 836, 837 (1943); *In re Postley*, 125 Misc.2d 416, 479 N.Y.S.2d 464, 465 (1984).

For these reasons, we conclude that Cynthia's failure to raise a contemporaneous objection to the defense attorney's statements means that Cynthia forfeited her right to claim that the defense attorney's statements violated her son's psychotherapist-patient privilege.

(c) Conclusion

As we have explained here, none of the defense attorney's statements (with one possible exception) revealed confidential communications covered by the psychotherapist-patient privilege. Moreover, neither Cynthia Cooper nor her attorney from the Office of Victims' Rights objected to the defense attorney's statements until after the sentencing hearing was over. For these reasons, the psychotherapist-patient privilege provided no basis for Cynthia

Cooper to ask the district court to seal the defense attorney's statements from the public.

Overall Conclusion

This case has required us to resolve weighty issues that have not been decided before in Alaska. Our opinion is quite lengthy, and not only because the issues were new.

The question of victims' rights inspires strong feelings, and the main question posed in this appeal-whether a crime victim has a right to independently challenge the substantive decisions of the trial judge-has required us to examine some of the most fundamental principles of our criminal justice system. We have been aided in this task by a number of *amicus curiae* briefs, and we appreciate the care and effort that went into the researching and writing of those briefs.

For the reasons explained here, we conclude that neither Cynthia Cooper nor the Office of Victims' Rights has the right to challenge the district court's sentencing decision. The right to challenge the sentencing decision rests solely with the parties to this criminal prosecution-the plaintiff, Municipality of Anchorage, and the defendant, Daniel Cooper. Accordingly, this portion of the original application for relief is DISMISSED.

We further conclude that the district court correctly denied Cynthia Cooper's request to seal portions of the sentencing hearing from the public-because (with one possible exception) the challenged statements made by the defense attorney do not contain information protected by the psychotherapist-patient privilege, and also because Cynthia waived whatever privilege she would otherwise have had when she failed to contemporaneously object to the defense attorney's statements. Accordingly, with regard to this portion of the original application for relief, the decision of the district court is AFFIRMED.

STEWART, Judge, not participating.

Alaska App.,2006.
Cooper v. District Court
133 P.3d 692

Briefs and Other Related Documents (Back to top)

- 2005 WL 4902316 (Appellate Brief) Reply Brief of Petitioner (Jun. 21, 2005)
- 2005 WL 4902318 (Appellate Brief) Brief of Municipality of Anchorage (Apr. 26, 2005)
- 2005 WL 4902315 (Appellate Brief) Brief of Respondent Daniel R. Cooper (Apr. 25, 2005)
- 2005 WL 4902317 (Appellate Brief) Brief of Amicus Curiae (Apr. 25, 2005)
- 2005 WL 4902319 (Appellate Brief) Brief of Amicus Curiae Office of Public Advocacy and Alaska Public Defender Agency (Apr. 25, 2005)
- 2004 WL 5038755 (Appellate Brief) Brief of Amicus Curiae National Crime Victim Law Institute (Dec. 27, 2004)
- 2004 WL 5038756 (Appellate Brief) Brief of Amicus Curiae Victim Advocacy and Research Group (Dec. 27, 2004)
- 2004 WL 5038757 (Appellate Brief) Brief of Petitioner (Nov. 19, 2004)

END OF DOCUMENT

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ALASKA STATE SENATE

SENATOR FRED DYSON

Date: March 18, 2011

To: Senator Hollis French, Chair
Senate Judiciary Committee

From: Senator Fred Dyson

Re: CS for SB 30 (JUD)

On February 28, 2011 CS SB 30 (STA) was heard and held in Senate Judiciary. Committee member comments indicated bill language may allow for defendants to misuse the *return of property hearing* process, and detract from the intention of the bill, to promote victim rights. Further, that use of the current definition in the law of *crime victim* would assist the Office of Victims' Rights in their determinations of whether a crime victim is entitled to a return of property, and remain consistent with their current mission.

The CS before you was drafted in response to these concerns. Changes from CS SB 30 (STA) are as follows:

Title of Act
Line 2: delete [the owner]; insert a crime victim

Section 1
p. 1 Line 6: delete [the owner]; insert A crime victim who is the owner
Line 9: delete [owner]; insert crime victim
Line 10: delete [owner]; insert crime victim
Line 11: delete [owner]; insert crime victim
p. 2 Line 2: delete [owner]; insert crime victim
Line 7: delete [owner]; insert crime victim
Line 8: delete [owner]; insert crime victim
Line 13: delete [an owner]; insert a crime victim
Line 14: delete [lines 14 – 24 of CS SB 30 (STA)]; insert property under this section. If the court orders the return of the property to the crime victim, the court shall impose conditions to ensure that the property is available for future court proceedings. If the court cannot assure the availability of the property, the court shall establish the chain of custody up to the date of the property return and the admissibility of the property at future court proceedings.
Line 19: insert (e) In this section, "crime victim" has the meaning given to "victim" in AS 12.55.185.

Section 2
p. 2 Line 25: delete [an owner]; insert a crime victim
Line 25: delete [owner]; insert crime victim

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FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **CSSB030(JUD) \D**
() Publish Date

Identifier (file name): SB030CS(JUD)-LAW-CRIM-04-01-11
Dept. Affected: Law
Title: An Act providing for the release of property in the custody of a law enforcement agency to the owner under certain conditions.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: SENATOR(s) DYSON
Requester: (S) JUD
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost ***

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Change made in fiscal note analysis.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 4/1/11 12:00 PM
Approved by: John J. Burns, Attorney General — Date 4/1/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSSB030(JUD) \D

Analysis

SB 30 would adopt a procedure for the owner of property to request the Office of Victims' Rights to investigate whether property in the custody of law enforcement should be returned to them. The Victims' Advocate may, after an investigation, request that a hearing about the property be held. This note is indeterminate because the department may be required to represent law enforcement agencies at the hearings proposed in the bill. At this time we are not sure how many of these proceedings will occur. The issues raised may be complex, particularly if defense counsel opposes the return.

CS SB 30 (STA) Witness List

Victor Kester, Director, Office of Victims Rights – (907)272-2620
Les Syren, Attorney, Syren Law Offices, Anchorage – (907)903-1022
Eric Derleth, Trial Attorney, Soldotna – (907)262-9164
Dennis DeWitt, Alaska State Home Builders Association – (907)586-2565

27-LS0344\B
Luckhaupt
3/11/11

CS FOR SENATE BILL NO. 30( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS DYSON, Kookesh, Menard, Meyer, Giessel

A BILL

FOR AN ACT ENTITLED

"An Act providing for the release of certain property in the custody of a law enforcement agency to the owner under certain conditions and relating to requests for that release by the office of victims' rights."

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

* **Section 1.** AS 12.36 is amended by adding a new section to read:

Sec. 12.36.070. Return of property by hearing. (a) The owner of property not belonging to a law enforcement agency that is in the custody of the agency under this chapter may request that the office of victims' rights request that the agency return the property to the owner. The request under this subsection shall be filed by the office of victims' rights on behalf of the owner after the office has conducted an investigation and has concluded that the owner is entitled to the return of the property under the factors listed in (c) of this section.

(b) Within 10 days after receipt of a request under (a) of this section and following reasonable notice to the prosecution, defense, and other interested parties,

the agency shall request a hearing before the court to determine if the property shall be released to the owner. If the property is being held in connection with a criminal case, the hearing shall be before the court with jurisdiction of the criminal case. If no criminal case is pending regarding the property, the hearing shall be before a district or superior court where the property is located.

(c) After a hearing, the court may order the return of the property in the custody of a law enforcement agency to the owner if

(1) the owner by a preponderance of the evidence provides satisfactory proof of ownership; and

(2) the law enforcement agency fails to prove by a preponderance of the evidence that the agency or another interested party is authorized to retain possession of the property.

(d) The court may impose reasonable conditions on an owner claiming property under this section.

*** Sec. 2.** AS 24.65 is amended by adding a new section to read:

Sec. 24.65.115. Authority to request return of property on behalf of certain persons. (a) Notwithstanding another provision of this chapter, the victims' advocate may file a request under AS 12.36.070 with a law enforcement agency for the return of property to an owner after having conducted an investigation and determining that the owner is entitled to the return of the property under the factors listed in AS 12.36.070(c). In fulfilling the requirements of this section, the victims' advocate may use any of the powers granted to the advocate under this chapter.

(b) In this section, "crime victim" includes any person who is the owner of property that

(1) is in the custody of a law enforcement agency in connection with a criminal case; and

(2) is not evidence of a crime of which the person has been charged, indicted, or presented.

Cindy Smith

From: Chuck Kopp
Sent: Thursday, March 03, 2011 1:32 PM
To: Cindy Smith
Subject: CS SB30

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Cindy,

I just wanted to follow up with you on the "crime victim" definition for CS SB30. I have been pondering a different definition that would not preclude those who have been charged with an offense. As noted, sometimes property seized may not be related to the offense under investigation, and unnecessarily seized. Sometimes law enforcement takes more than they need, as the exact nature and scope of the offense is still being determined. You could have a situation where a vehicle owner, whose car was used in a DUI injury accident, is charged with Reckless Endangerment for letting a drunk driver use their car, but that same owner may have also had significant personal property (tools, paperwork, computers, etc) in the vehicle that is not connected at all to the crime. Also, in a DV crime, at times it is fairly messy determining property claims. It seems we need to allow for those situations where a person is charged (or under suspicion) to still be able to at least ask for their property back and get the process going. People lose a lot of their rights/liberties just by virtue of being charged with a crime, particularly a DV crime. This bill kind of helps balance the loss of liberty that can occur in the pre-trial phase by giving those persons an opportunity to be heard (at least by OVR).

I welcome any suggestions you or Sen. French might have to refine this definition. Thanks so much.

Chuck

Chuck Kopp
Chief of Staff
Office of Senator Fred Dyson
Alaska State Capitol, Rm 121
Juneau, AK 99801
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* **Section 1.** AS 12.36 is amended by adding a new section to read:

Sec. 12.36.070. Return of property by hearing. (a) A crime victim who is the owner of property that is in the custody of the agency under this chapter may request that the office of victims' rights request that the agency return the property to the victim. The request under this subsection shall be filed by the office of victims' rights on behalf of the victim after the office has conducted an investigation and has concluded that the victim is entitled to the return of the property after considering the factors listed in (c) of this section.

(b) If the office of victims' rights concludes, after an investigation, that the law enforecement agency must return the property to the victim, it shall file an action in court to determine if the property may be returned to the victim. Reasonable notice shall be given to the prosecution, defense, other potential owners, and other interested parties. If the property is being held in connection with a criminal case, the hearing shall be before the court with jurisdiction of the criminal case. If no criminal case is pending regarding the property, the hearing shall be before a district or superior court where the property is located.

(c) After a hearing, the court may order the return of the property in the custody of a law enforcement agency to the owner if

(1) the victim by a preponderance of the evidence provides satisfactory proof of ownership; and

(2) the law enforcement agency fails to prove by a preponderance of the evidence that the agency or another interested party is authorized to retain

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possession of the property.

(d) If the court determines that the property may be returned to the victim, the court shall impose conditions so that the property will be available for future court proceedings. If the court cannot assure the availability of the property, the court shall establish the chain of custody up to the date of the property return and the admissibility of the property at future court proceedings.

* **Sec. 2.** AS 24.65 is amended by adding a new section to read:

Sec. 24.65.115. Authority to request return of property on behalf of certain persons. (a) Notwithstanding another provision of this chapter, the victims' advocate may file a request under AS 12.36.070 with a law enforcement agency for the return of property to a victim after having conducted an investigation and determining that the victim is entitled to the return of the property under the factors listed in AS 12.36.070(c). In fulfilling the requirements of this section, the victims' advocate may use any of the powers granted to the advocate under this chapter. If the law enforcement agency does not return the property in response to this request, the victims' advocate may file an action in court under AS 12.36.070.

(b) In this section, "crime victim" includes any person who is the owner of property that is in the custody of a law enforcement agency.

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ALASKA STATE SENATE

SENATOR FRED DYSON

Date: February 21, 2011

To: Senator Hollis French, Chair
Senate Judiciary Committee

From: Senator Fred Dyson

Re: Committee Hearing Request for CS SB 30 (STA)

I respectfully request a committee hearing be scheduled for CS SB 30 (STA), "An Act providing for the release of certain property in the custody of a law enforcement agency to the owner under certain conditions and relating to requests for that release by the office of victims' rights."

Contact: Chuck Kopp, Staff to Senator Dyson, (907)465-6580

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SENATOR FRED DYSON

CS SB 30 NOTES

1. Alaska Statutes - Title 12 *Code of Criminal Procedure*, Chapter 36 *Disposition of Recovered or Seized Property*, Sec. 20 *Return of Property*, provides the legal process for return of property.
2. 12.36.020(a) identifies those circumstances when a law enforcement agency may **not** return property to an owner.
3. 12.36.020(b) provides for the return of property to owners *at the discretion of the prosecuting attorney* where photographs are used as evidence in place of the property, stating *the prosecuting attorney **may** release the property to the owner upon presentation of satisfactory proof of ownership.*
4. 12.36.020(c) states that wrongfully taken or damaged property that is *not* properly photographed and authenticated under 12.45.086 *Photographic evidence of property wrongfully taken or damaged,* and used as evidence in a criminal or children's court proceeding, is to be returned to the owner *within 60 days after the final disposition of the case.*
5. 12.36.020(c) is problematic for two reasons. First, it is the property owner who suffers unjustly if the property was not properly photographed and authenticated; and second, final disposition of the case may be protracted for a long period of time. The return of property to its rightful owner may be hindered by concerns of prosecution, defense, and/or other interested parties.
6. 12.45.086 *Photographic evidence of property wrongfully taken or damaged,* defines the process for admissibility of photographs as evidence in criminal and children's court proceedings. This section states that properly submitted photographs are to be regarded to the same extent as if the property itself was introduced as evidence. This sounds good, but in practice falls short of its intent. 12.45.086(c) seems to recognize this problem by singling out only the theft of commercial fishing gear as being property that *shall be returned to the owner as soon as possible*. Nearly all thefts of property from businesses should be returned to the rightful owners ASAP.
7. SB 30 (formerly SB 297) seeks to restore victims to a pre-offense condition by *providing directly to the property owner the right of a court hearing to recover possession of the owner's property*, and requiring that the law enforcement agency prove to the court that another parties' interest in the property overrides the owner's interest in having it returned. SB 297 was endorsed by the Alaska Peace Officers Association.
8. CS SB 30 (STA) provides that property owners must make a request for hearing through the Office of Victims' Rights (OVR) for two important purposes, 1) to vet the requests and determine if certain conditions are met in the law to allow for an owner claiming property to have a hearing, and 2) to keep the numbers of requests from becoming onerous to the Court and law enforcement agencies.
9. 12.36.090 *Definitions* of "law enforcement agency" includes the Office of District Attorney, Department of Law, as this is a public agency having one of its principal functions being the enforcement of the criminal law.
10. CS SB 30 (STA) establishes that the term *crime victim,* as used in AS 24.65 *Office of Victims' Rights*, includes any person who is the owner of property that is in the custody of a law enforcement agency.

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SENATOR FRED DYSON

SPONSOR STATEMENT

CS SB 30 (STA)

An Act providing for the release of property in the custody of a law enforcement agency to the owner under certain conditions and relating to requests for that release by the Office of Victims' Rights

CS SB 30 (STA) introduces within the Alaska Code of Criminal Procedure a process for victims of property crime to petition the court for relief in recovering their property held as evidence.

Too often victims of theft and robbery are victimized a second time by bureaucracy. This is particularly true in cases of property crimes where demonstrable loss occurs to the victim's person or business as a result of property being held for a protracted period of time by a law enforcement agency, usually at the direction of prosecution, defense counsel and/or other interested parties.

The law as currently written, provides discretionary authority to the prosecution for release of property, but does not clearly provide a right of hearing for a property owner to directly petition the court in those circumstances when property owners, prosecution and defense cannot come to agreement on return of property to the owner.

Victims of property theft often face the added burden of replacing stolen property. Small business owners who suffer property loss may face bankruptcy if the loss results in the inability to consummate a sale, continue their business operations, or the stolen property is uninsured or underinsured.

Property recovered by a law enforcement agency may be held as evidence for a protracted period of time. Property owners deserve protections in the law to ensure their property is held as evidence only as long as necessary for the prosecution and defense to physically retain the item, without jeopardizing the case.

CS SB 30 (STA) will provide property owners in the Alaska Code of Criminal Procedure, a clearly identifiable process to petition the court through the Office of Victims' Rights for the recovery of their property in those circumstances where they are otherwise not able to reach agreement with interested parties on the return of property.

Contact: Chuck Kopp, Staff to Senator Dyson (907)465-6580

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ALASKA STATE SENATE

SENATOR FRED DYSON

Date: February 21, 2011

To: Senator Hollis French, Chair
Senate Judiciary Committee

From: Senator Fred Dyson

Re: CS for SB 30 (STA)

On February 3, 2011 SB 30 was heard and held in State Affairs. Committee member comments indicated a concern that SB 30 may inadvertently open the door to a significant number of requests for hearing from property owners, and that some type of requirement or intermediary step be considered to prevent the hearings from becoming onerous to the Court system and law enforcement agencies.

A CS was drafted to address these concerns, and on February 17, 2011, CS SB 30 (STA) was submitted to Senate State Affairs and passed out the same date to Judiciary. The CS changes to SB 30 are as follows:

Section 1

1. Property owners must make a request for hearing through the Office of Victims' Rights (OVR).
2. OVR will conduct an investigation into the request to make an initial determination if the owner is entitled to return of the property being claimed under the requirements of proposed 12.36.070(c): that the owner provides satisfactory proof of ownership, and the law enforcement agency is not able to show that the agency or another interested party is authorized to retain the property.
3. Once OVR makes such a determination, they will request on behalf of the owner that the agency return the property.
4. The court of jurisdiction is identified in cases involving a pending criminal case, and in situations where no criminal case is pending
5. Establishes the burden of proof to be a *preponderance of the evidence,* for both the property owner showing ownership and the law enforcement agency showing that they or another party are authorized to retain possession of the property.

Section 2

1. Establishes within Title 24, Chapter 65 *Office of Victims' Rights,* the authority for OVR to request a law enforcement agency for return of property on behalf of certain persons claiming property using any of the powers granted to OVR under this chapter
2. Establishes that the term *crime victim,* as used in this section, includes any person who is the owner of property that is in the custody of a law enforcement agency.

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ALASKA STATE HOMEBUILDERS ASSOCIATION

February 22, 2011

Senator Fred Dyson
Alaska State Capitol
Juneau, Alaska 99801-1182

Re: SB 30 in support

Senator

We write you in support of SB-30 (An Act providing for the release of property in the custody of a law enforcement agency to the owner under certain conditions)

We agree to the supporting of SB-30 as representatives of the ASHBA (Alaska State Home Building Association), with a membership of 700 plus professionals operating and working in the construction industry. The organization views this form of legislation as beneficial to those individuals, or companies that are violated through theft, or the court systems as a means to acquire their property, and be able to utilize while the situation is resolved through the legal process.

This legislation will benefit all parties living in the state of Alaska, and will surly be well received through its passing.

If you are in need of any members being available to telephonically testify, or require any additional assistance please do not hesitate to ask.

Thank you for sponsoring SB-30

Dave Owens President ASHBA	Alan Wilson Co-Chair ASHBA Legislative Committee	Paul Michelsohn Jr. Co-Chair ASHBA Legislative Committee

8301 SCHOON ST • SUITE 200 • ANCHORAGE, ALASKA • 99518
(907) 522-3931 • FAX (907) 522-3757

CHUCK - FYI & INCLUSION IN OUR Bill

STATE OFFICE

ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355

Business Manager
Joseph Young
Anchorage

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Kenai

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Wasilla

Thecla LaLonde, President
Wrangell Chapter
Wrangell

March 17, 2010

Senator Fred Dyson
Alaska State Senate
State Capitol
Juneau AK 99801-1182

Dear Senator Dyson:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing Senate Bill 297, an act providing for the release of property in the custody of a law enforcement agency to the owner under certain conditions.

The APOA Executive Board's Legislative Committee recently reviewed this proposed legislation and decided to unanimously support this bill.

We thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515, if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

John Lucking, Jr.
State President

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSSB 297(JUD)
(S) Publish Date: 3/30/10

Identifier (file name): SB297-LAW-CRIM-03-15-10
Dept. Affected: Law
Title: An Act providing for the release of property in the custody of a law enforcement agency to the owner under certain conditions.
RDU: CRIMINAL
Component: Criminal Justice Litigation
Sponsor: Senator Dyson
Requester: Judiciary
Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2011**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2010) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

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

This bill provides for a statutory amendment to disposition of recovered or seized property for return of property by hearing. This note is indeterminate because the department may be required to represent law enforcement agencies at the hearings proposed in the bill. At this time we are not sure how many of these proceedings will occur. The issues raised may be complex, particularly if defense counsel opposes the return.

Prepared by: Eileen Donahue, Division Operations Manager
Phone 465-5427
Division: Administrative Services
Date/Time 3/15/10 1:00 PM
Approved by: Daniel S. Sullivan, Attorney General
Date 3/15/2010
Department of Law

(Revised 11/6/2009 OMB)

CS SB 30 (STA) Witness List

Victor Kester, Director, Office of Victims Rights – (907)272-2620
Les Syren, Attorney, Syren Law Offices, Anchorage – (907)903-1022
Eric Derleth, Trial Attorney, Soldotna – (907)262-9164
Dennis DeWitt, Alaska State Home Builders Association – (907)586-2565

CS Senate Bill 30 (STA)

An Act providing for the release of property in the custody of a law enforcement agency to the owner under certain conditions and relating to requests for that release by the Office of Victims' Rights

SENATE JUDICIARY COMMITTEE

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice-Chair

NFIB

The Voice of Small Business®

ALASKA

March 1, 2011

Senator Fred Dyson
Alaska State Senator
State Capitol Building
Juneau, Alaska 99801-1182

RE Senate Bill 30

Dear Senator Dyson,

On behalf of the National Federation of Independent Business/Alaska, I wish to express our support for Senate Bill 30. The National Federation of Independent Business is the largest small-business advocacy group in Alaska.

SB 30 would provide a mechanism for businesses that have had property stolen to gain assistance in recovering the items that are often critical to the continuation of a person's business.

While often there is not a problem retrieving property from authorities that are prosecuting a case, there are times when small businesses find that they are not considered as important as other issues. SB 30 provides the person assistance from the office of victims' rights to help recover stolen property being held by a law enforcement agency.

While the problem of retrieving stolen property is not always a problem, small businesses have found themselves fighting the government who has bottomless resources. The legal cost and loss of business are a very heavy burden to small businesses.

We believe that CSSB 30 is a reasonable solution to a potentially devastating problem for small businesses.

Sincerely yours,

Dennis L. DeWitt
Alaska State Director

SB

31

<TARGET><BILL>SB 31</BILL><SUBJECT>SB
31</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE COMMITTEE REPORT

DATE: 1/28/11

FURTHER: Rules

DATE TURNED IN TO OFFICE: 2/2/11

Judiciary Committee considered SENATE BILL NO. 31

SB 31-COUNTING OF WRITE-IN VOTES

"An Act relating to the counting of write-in votes."

and recommends:

[√] be **replaced** with **CS** SB31 (JUD) *[√] Same Title [ ] New Title*

[ ] adopt **previous CS** _____ (_____) *[ ] Same Title [ ] New Title*

[ ] attached amendment(s)

[ ] adopt _____Letter of Intent

[ ] further referral to _____Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
GOV			✓	1

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Wielechowski	✓			
	PASKVAN	X			
	McGuire	✓			
CHAIR:	French	✓			

CS FOR SENATE BILL NO. 31(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS THOMAS, FRENCH, MENARD, AND WIELECHOWSKI

A BILL

FOR AN ACT ENTITLED

"An Act relating to the counting of write-in votes."

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

*** Section 1.** AS 15.15.360 is amended by adding a new subsection to read:

(d) Write-in votes shall be counted according to the following rules:

(1) writing in the name of a candidate whose name is printed on the ballot does not invalidate a write-in vote unless the director determines, on the basis of other evidence, that the ballot was so marked for the purpose of identifying the ballot;

(2) in order to vote for a write-in candidate, the voter must write in the candidate's name in the space provided and fill in the oval opposite the candidate's name in accordance with (a)(1) of this section;

(3) a vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that candidate and if the name of the candidate, as it appears on the write-in declaration of candidacy, or the last name of the candidate is written in the space provided;

(4) if the write-in vote is for governor and lieutenant governor, the vote

shall be counted if the oval is filled in and the names of the candidates for governor and lieutenant governor, as they appear on the write-in declaration of candidacy, or the last names of the candidates for governor and lieutenant governor, or the name of the candidate for governor, as it appears on the write-in declaration of candidacy, or the last name of the candidate for governor is written in the space provided;

(5) in counting votes for a write-in candidate, the director shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained.

* **Sec. 2.** AS 15.15 is amended by adding a new section to read:

Sec. 15.15.365. Counting of write-in votes in general election. (a) Write-in votes on a general election ballot shall be counted by candidate only if the aggregate of all votes cast for all write-in candidates for the particular office is

(1) the highest number of votes received by any candidate for the office; or

(2) the second highest number of votes received by any candidate and the difference between the total number of votes received by the candidate having the highest number of votes and the aggregate of all votes cast for all write-in candidates for the office is less than the percentage necessary for a recount at the state's cost under AS 15.20.450.

(b) Write-in votes that do not meet the requirements of this section may not be individually counted under this section.

(c) If the director determines that the requirements of (a) of this section have been met, the director shall establish the place and date for counting those write-in votes, and the director, or a designee of the director, shall count all write-in ballots under AS 15.15.360(d).

(d) This section does not apply to the counting of federal write-in absentee ballots submitted under 42 U.S.C. 1973ff.

* **Sec. 3.** AS 15.15.360(a)(9), 15.15.360(a)(10), 15.15.360(a)(11), and 15.15.360(a)(12) are repealed.

LEGAL SERVICES

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Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 1, 2011

SUBJECT: Comments on the committee's questions
(CSSB 31(JUD) (Work Order No. 27-LS0350\E))

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Alpheus Bullard
Legislative Counsel

The committee raised a number of questions relating to CSSB 31(JUD) (27-LS0350\E) Monday afternoon. I have a few comments that may be of assistance to the committee's deliberations. I have paraphrased the committee's questions below.

Why are abbreviations included along with misspellings and other minor variations in the form of the name of a candidate under committee substitute's sec. 15.15.360(d)(5)?

In drafting the bill, I mirrored language, to the extent applicable, found in the Uniformed and Overseas Citizens Absentee Voting Act.[1] The division of elections (division) is already required to observe the standard set forth by that Act for certain voters, I used the language to ensure a consistent standard.

As employed in the committee substitute, the paragraph clarifies that, if the intention of the voter can be ascertained, the voter's write-in vote for a candidate shall be counted by the director of elections (director). One circumstance that might clearly demonstrate the voter's intent, but not constitute a misspelling or other minor variation, would be a voter's abbreviation of a write-in candidate's hyphenated last name.[2]

---

[1] "Any abbreviation, misspelling, of other minor variation in the form of a name of a candidate or political party shall be disregarded in determining the validity of the ballot if the intention of the voter can be ascertained." (42 U.S.C. § 1973ff-2(C)(3)).

[2] Cindy Smith asked if there were any cases addressing the acceptance or construction of abbreviations used by a person voting for a write-in candidate. I am not aware of any cases relating to the construction of, or practice of accepting, abbreviations used by person's voting for a write-in candidate.

The intention of the voter is paramount.[3] If the intention of a voter can be ascertained by the director when she reviews a voter's write-in vote, whether the voter employs an abbreviation, misspells the write-in candidate's name, or makes some other minor variation in the name of the candidate, the form of the variation or mistake should not be considered significant.

What is the function of the committee substitute's sec. 15.15.365(b)?

The committee substitute's sec. 15.15.365(b) provides:

> (b) Write-in votes that do not meet the requirements of this section may not be individually counted under this section.

Subsection (b) provides that write-in votes on a general election ballot will only be counted by candidate if the conditions required under the section are met. Subsection (a) provides:

> (a) Write-in votes on a general election ballot shall be counted by candidate only if the aggregate of all votes cast for all write-in candidates for the particular office is
>
> (1) the highest number of votes received by any candidate for the office; or
>
> (2) the second highest number of votes received by any candidate and the difference between the total number of votes received by the candidate having the highest number of votes and the aggregate of all votes cast for all write-in candidates for the office is less than the percentage necessary for a recount at the state's cost under AS 15.20.450.

Subsection (b) is redundant. Subsection (a) already provides that "[w]rite-in votes on a general election ballot shall be counted by candidate only if . . ." As a drafting choice, I included the language of the provision's subsection (b) because it appears in the regulation that is the basis for the committee substitute's sec. 2 (6 AAC 25.085(c)).

---

[3] See Miller v. Treadwell, Op. No. 6532, 2010 Alas. LEXIS 133 (Alaska Dec. 22, 2010), at 2, citing Edgmon v. State, Office of the Lieutenant Governor, Division of Elections, 152 P.3d 1154 (Alaska 2007), at 1157 ("the voter shall not be disenfranchised because of mere mistake, but [the voter's] intention shall prevail") (internal citations and quotations omitted); State, Division of Elections v. Alaska Democratic Party, Case No. S-14054, Order dated Oct. 29, 2010 at 3 ("[w]e have consistently emphasized the importance of voter intent because the opportunity to freely cast [one's] ballot is fundamental") (internal citations omitted).

While it is my legal opinion that the subsection is not necessary, I strongly recommend consulting with the division as to what their opinion on the matter is; given that the division has been operating pursuant to the regulation, as drafted, for over 10 years.[4]

Why is the "as appears on the write-in declaration of candidacy" language retained in the committee substitute's sec. 15.15.360(d)(3) and (4)?

Under AS 15.25.105(a), votes for a write-in candidate in the general election will not be counted unless the candidate has filed a letter of intent (write-in declaration of candidacy) with the director. Under AS 15.25.105(a)(9) that letter must include "the name of the candidate as the candidate wishes it to be written on the ballot by the voter[.]" This permits a candidate to provide an alternative name (i.e. a nickname or pseudonym)[5] or spelling of the candidate's name. This alternative name, or spelling of the candidate's name, appears on the write-in declaration of candidacy.[6]

While the appropriate interpretation of the phrase was litigated in Miller v. Treadwell, Op. No. 6532, 2010 Alas. LEXIS 133 (Alaska Dec. 22, 2010), the Court interpreted the "as it appears" language of AS 15.15.360(A)(11) to not require that a candidate's name be correctly spelled.

> Miller points to language in AS 15.15.360(a)(11) providing that "[a] vote for a write-in candidate . . . shall be counted if the oval is filled in for that candidate and if the name, as it appears on the write-in declaration of

---

[4] The regulation took effect August 13, 2000 (Register 155).

[5]
> We agree with the State that subsection [AS 15.15.360](a)(11) concerns pseudonyms. The "nickname" field on the declaration of candidacy form supports this interpretation [AS 15.15.030(4)]. If that field were not present, a candidate with a pseudonym might write only his or her legal name on the form, thus invalidating ballots with the candidate's pseudonym written in. The "nickname" field allows a candidate to ensure that his or her pseudonym "appears on the write-in declaration of candidacy" so that the write-in votes listing that pseudonym will count. Thus, the word "appears" relates to a pseudonym's possible presence on the ballot, not the particular form of the vote, and demonstrates that the statute is inclusive — it is designed to include, rather than exclude, votes.

Miller v. Treadwell, Op. No. 6532, 2010 Alas. LEXIS 133, 6 - 7 (Alaska Dec. 22, 2010) (internal footnotes omitted).

[6] By way of analogous comparison, see AS 15.25.030(a)(15), which requires a member of a political party who seeks to become a candidate of that party in the primary election, to include "the manner in which the candidate wishes the candidate's name to appear on the ballot" on the candidate's declaration of candidacy.

> candidacy, of the candidate or the last name of the candidate is written in the space provided." He argues that this subsection, read in the context of other provisions of the statute, requires that a write-in candidate's name be written and spelled perfectly, even if the voter's intent to vote for a particular candidate can be readily ascertained. But when read as a whole, AS 15.15.360's purpose is inclusive, not exclusive; it is designed to ensure that ballots are counted, not excluded. And this inclusiveness is consistent with the overarching purpose of an election: "to ascertain the public will."

Id. 2010 Alas. LEXIS 133 at 5 - 6 (internal citations omitted).

The argument, rejected by the Court, that the "as it appears" language evidences a legislative intent to require that a write-in candidate's name be spelled correctly, is addressed by the committee substitute's sec. 15.15.360(d)(5), which provides:

> (5) in counting votes for a write-in candidate, the director shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained.

The inclusion of this paragraph should provide a clear statutory answer as to whether the "as it appears" language of AS 15.15.360 should be interpreted to require that a candidate's name must be spelled correctly, while still allowing a write-in candidate to provide the division, under AS 15.25.105(a)(9), an alternative spelling or nickname that people intending to vote for that candidate might write on the ballot.

May a write-in candidate running for the office of governor run without an accompanying write-in candidate for the office of lieutenant governor?

A write-in candidate for governor must run together with a candidate for lieutenant governor. AS 15.25.105(b) provides:

> (b) If a write-in candidate is running for the office of governor, the candidate must file a joint letter of intent together with a candidate for lieutenant governor. Both candidates must be of the same political party or group.

If you have further questions, do not hesitate to contact me.

TLAB:plm:ljw
11-047.plm

Summary

27-LS0350\E
Bullard
1/31/11

CS FOR SENATE BILL NO. 31(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS THOMAS, FRENCH, MENARD, AND WIELECHOWSKI

A BILL

FOR AN ACT ENTITLED

"An Act relating to the counting of write-in votes."

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

former (99-(17) in vers B.

*** Section 1.** AS 15.15.360 is amended by adding a new subsection to read:

(d) Write-in votes shall be counted according to the following rules:

(1) writing in the name of a candidate whose name is printed on the ballot does not invalidate a write-in vote unless the director determines, on the basis of other evidence, that the ballot was so marked for the purpose of identifying the ballot;

(2) in order to vote for a write-in candidate, the voter must write in the candidate's name in the space provided and fill in the oval opposite the candidate's name in accordance with (a)(1) of this section;

(3) a vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that candidate and if the name of the candidate, as it appears on the write-in declaration of candidacy, or the last name of the candidate is written in the space provided;

(4) if the write-in vote is for governor and lieutenant governor, the vote

shall be counted if the oval is filled in and the names of the candidates for governor and lieutenant governor, as they appear on the write-in declaration of candidacy, or the last names of the candidates for governor and lieutenant governor, or the name of the candidate for governor, as it appears on the write-in declaration of candidacy, or the last name of the candidate for governor is written in the space provided;

(5) in counting votes for a write-in candidate, the director shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained.

* **Sec. 2.** AS 15.15 is amended by adding a new section to read:

Sec. 15.15.365. Counting of write-in votes in general election. (a) Write-in votes on a general election ballot shall be counted by candidate only if the aggregate of all votes cast for all write-in candidates for the particular office is

(1) the highest number of votes received by any candidate for the office; or

(2) the second highest number of votes received by any candidate and the difference between the total number of votes received by the candidate having the highest number of votes and the aggregate of all votes cast for all write-in candidates for the office is less than the percentage necessary for a recount at the state's cost under AS 15.20.450.

(b) Write-in votes that do not meet the requirements of this section may not be individually counted under this section.

(c) If the director determines that the requirements of (a) of this section have been met, the director shall establish the place and date for counting those write-in votes, and the director, or a designee of the director, shall count all write-in ballots under AS 15.15.360(d).

(d) This section does not apply to the counting of federal write-in absentee ballots submitted under 42 U.S.C. 1973ff.

* **Sec. 3.** AS 15.15.360(a)(9), 15.15.360(a)(10), 15.15.360(a)(11), and 15.15.360(a)(12) are repealed.

Cindy's -

AS 15.15.360. Rules for counting ballots

(a) The election board **[OR DIRECTOR, AS MAY BE APPROPRIATE]** shall count ballots according to the following rules:

(1) A voter may mark a ballot only by filling in, making "X" marks, diagonal, horizontal, or vertical marks, solid marks, stars, circles, asterisks, checks, or plus signs that are clearly spaced in the oval opposite the name of the candidate, proposition, or question that the voter desires to designate.

(2) A failure to properly mark a ballot as to one or more candidates does not itself invalidate the entire ballot.

(3) If a voter marks fewer names than there are persons to be elected to the office, a vote shall be counted for each candidate properly marked.

(4) If a voter marks more names than there are persons to be elected to the office, the votes for candidates for that office may not be counted.

(5) The mark specified in (1) of this subsection shall be counted only if it is substantially inside the oval provided, or touching the oval so as to indicate clearly that the voter intended the particular oval to be designated.

(6) Improper marks on the ballot may not be counted and do not invalidate marks for candidates properly made.

(7) An erasure or correction invalidates only that section of the ballot in which it appears.

(8) A vote marked for the candidate for President or Vice-President of the United States is considered and counted as a vote for the election of the presidential electors.

(b) Write-in votes shall be counted according to the following rules:

election bd. must be removed

division ?

(1) [9] Write-in votes are not invalidated by writing in the name of a candidate whose name is printed on the ballot unless **it appears [THE ELECTION BOARD OR DIRECTOR DETERMINES]**, on the basis of other evidence, that the ballot was so marked for the purpose of identifying the ballot.

(2) [10] In order to vote for a write-in candidate, the voter must write in the candidate's name in the space provided and fill in the oval opposite the candidate's name in accordance with **(a)**(1) of this section.

CONFIDENTIAL DRAFT

ok

(3) **[11]**A vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that candidate and if the name **of the candidate**, as it appears on the write-in declaration of candidacy, **[OF THE CANDIDATE]** or the last name of the candidate is written in the space provided.

(4) **[12]** If the write-in vote is for governor and lieutenant governor, the vote shall be counted if the oval is filled in and the names, as they appear on the write-in declaration of candidacy, of the candidates for governor and lieutenant governor or the last names of the candidates for governor and lieutenant governor, or the name, as it appears on the write-in declaration of candidacy, of the candidate for governor or the last name of the candidate for governor is written in the space provided.

(5) **[13]** **[IN COUNTING VOTES FOR A WRITE-IN CANDIDATE, THE ELECTION BOARD OR DIRECTOR SHALL DISREGARD ANY]** **Where there is an** abbreviation, misspelling, or other minor variation in the form of the name of **[NAME OF A]** **a write-in** candidate, the director will review the ballot and will count the vote if the intention of the voter can be ascertained.

(c) The rules set out in this section are mandatory and there are no exceptions to them. A ballot may not be counted unless marked in compliance with these rules.

Sec. 2 AS 15.15 is amended by adding.....(this section remains the same until (2) (c) (2):

(2) in an election for federal or statewide office, **[THE DIRECTOR SHALL COUNT]** all write-in ballots **shall be counted** under **the rules set out in** AS 15.15.360**(b)**.

CONFIDENTIAL DRAFT

LEGAL SERVICES

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

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

MEMORANDUM January 25, 2011

SUBJECT: Providing the Director of Elections the authority to ascertain the intention of a voter under AS 15.15.360(a)
(CSSB 31( ), Work Order No. 27-LS0350\B)

TO: Senator Joe Thomas
Attn: Grier Hopkins

FROM: Alpheus Bullard
Legislative Counsel

You requested a blank committee substitute that would revise Senate Bill 31 (27-LS0350\M) and AS 15.15.360 to provide the Director of Elections (director) the authority, in counting votes for a write-in candidate, to disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained.

AS 15.15.360 prescribes how an election board shall count ballots. The change you requested required modifications to the bill beyond the substitution of "director" for "election board" in the bill's ultimate paragraph.[1]

While a regulation, 6 AAC 25.085(d),[2] provides the director authority to establish the place and date for counting certain write-in votes, the director is not currently authorized

---

[1] Note the change to the bill's title.

[2] **6 AAC 25.085. Counting of write-in votes in general election.**

(a) Except as provided in 6 AAC 25.670, the provisions of this section apply for the counting of write-in votes in a general election in this state.

(b) Counting write-in votes in a general election by candidate will only be done under this section if the aggregate of all votes cast for all write-in candidates for the particular office is

(1) the highest number of votes received by any candidate for the office; or

(2) the second highest number of votes received by any candidate and the difference between the total number of votes received by the candidate having the highest number of votes and the aggregate of

under statute to count ballots outside of certain statutorily identified situations.[3] Nothing now in statute specifically authorizes the director to count ballots in a close election contest between a candidate on the ballot and a write-in candidate.

For this reason, your requested committee substitute includes an added section codifying the substance of 6 AAC 25.085 and further providing that the director shall count write-in ballots in certain elections for a federal or statewide office.

If I can be of further assistance please do not hesitate to contact me.

TLAB:med
11-006.med

Enclosure

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all votes cast for all write-in candidates for the office is less than the percentage necessary for a recount at the state's cost under AS 15.20.450.

(c) Write-in votes that do not meet the requirements of this section will not be individually counted under this section.

(d) If the director determines that the requirements of this section have been met, the director will establish the place and date for counting those write-in votes.

[3] While the director has general administrative supervision over the conduct of state elections and may adopt regulations necessary for the administration of state elections (AS 15.15.010) and regulations prescribing the manner in which the precinct ballot count is accomplished so as to ensure accuracy in the ballot count (AS 15.15.350), the director is authorized to review or count ballots only in certain statutorily enumerated areas. The director must (1) count or review certain absentee and vote by mail ballots under AS 15.15.430, AS 15.20.082(c), AS 15.20.201(d), AS 15.20.480, and AS 15.20.800(e); (2) review and count certain ballots under AS 15.15.430; and (3) review all ballots in a recount election (AS 15.20.480).

27-LS0350\B
Bullard
1/24/11

CS FOR SENATE BILL NO. 31( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS THOMAS, FRENCH, MENARD, AND WIELECHOWSKI

A BILL

FOR AN ACT ENTITLED

"An Act relating to the counting of ballots."

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

*** Section 1.** AS 15.15.360(a) is amended to read:

(a) The election board **or director, as may be appropriate,** shall count ballots according to the following rules:

(1) A voter may mark a ballot only by filling in, making "X" marks, diagonal, horizontal, or vertical marks, solid marks, stars, circles, asterisks, checks, or plus signs that are clearly spaced in the oval opposite the name of the candidate, proposition, or question that the voter desires to designate.

(2) A failure to properly mark a ballot as to one or more candidates does not itself invalidate the entire ballot.

(3) If a voter marks fewer names than there are persons to be elected to the office, a vote shall be counted for each candidate properly marked.

(4) If a voter marks more names than there are persons to be elected to the office, the votes for candidates for that office may not be counted.

(5) The mark specified in (1) of this subsection shall be counted only if it is substantially inside the oval provided, or touching the oval so as to indicate clearly that the voter intended the particular oval to be designated.

(6) Improper marks on the ballot may not be counted and do not invalidate marks for candidates properly made.

(7) An erasure or correction invalidates only that section of the ballot in which it appears.

(8) A vote marked for the candidate for President or Vice-President of the United States is considered and counted as a vote for the election of the presidential electors.

(9) Write-in votes are not invalidated by writing in the name of a candidate whose name is printed on the ballot unless the election board **or director** determines, on the basis of other evidence, that the ballot was so marked for the purpose of identifying the ballot.

(10) In order to vote for a write-in candidate, the voter must write in the candidate's name in the space provided and fill in the oval opposite the candidate's name in accordance with (1) of this subsection.

(11) A vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that candidate and if the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate is written in the space provided.

(12) If the write-in vote is for governor and lieutenant governor, the vote shall be counted if the oval is filled in and the names, as they appear on the write-in declaration of candidacy, of the candidates for governor and lieutenant governor or the last names of the candidates for governor and lieutenant governor, or the name, as it appears on the write-in declaration of candidacy, of the candidate for governor or the last name of the candidate for governor is written in the space provided.

(13) In counting votes for a write-in candidate, the election board or director shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained.

* **Sec. 2.** AS 15.15 is amended by adding a new section to read:

Sec. 15.15.365. Counting of write-in votes in general election. (a) Write-in votes on a general election ballot shall be counted by candidate only if the aggregate of all votes cast for all write-in candidates for the particular office is

(1) the highest number of votes received by any candidate for the office; or

(2) the second highest number of votes received by any candidate and the difference between the total number of votes received by the candidate having the highest number of votes and the aggregate of all votes cast for all write-in candidates for the office is less than the percentage necessary for a recount at the state's cost under AS 15.20.450.

(b) Write-in votes that do not meet the requirements of this section may not be individually counted under this section.

(c) If the director determines that the requirements of (a) of this section have been met,

(1) the director shall establish the place and date for counting those write-in votes; and

(2) in an election for federal or statewide office, the director shall count all write-in ballots under AS 15.15.360.

(d) This section does not apply to the counting of federal write-in absentee ballots submitted under 42 U.S.C. 1973ff.

375 S.W.2d 110
(Cite as: 375 S.W.2d 110)

C

Supreme Court of Missouri, Division No. 1.
Oscar P. KASTEN, Appellant,
v.
Ora N. GUTH, Respondent.

No. 50373.
Feb. 10, 1964.

Action to contest county school superintendent election. The Circuit Court of Perry County, J. O. Swink, J., entered a judgment adverse to the contestant who appealed. The Supreme Court, Holman, J., held that notice to contest election alleging that 67 uncounted votes were cast for person with same first and last name as contestant without insertion of any middle initial and that voters intended those ballots to be cast for contestant, a write-in candidate, thereby giving contestant more votes than declared winner was sufficient to state claim upon which relief could be granted.

Reversed and remanded.

West Headnotes

[1] Statutes 361 181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Primary rule in construction of statutes is to ascertain and give effect to intent of legislature.

[2] Elections 144 181

144 Elections
144VII Ballots
144k181 k. Erasure and Insertion of Names. Most Cited Cases

Qualified voter may vote for any candidate of his choice by writing name of such person on ballot. Sections 77.040, 79.030, 111.580(2), 122.210, 122.400, 122.960 RSMo 1959, V.A.M.S.

[3] Elections 144 181

144 Elections
144VII Ballots
144k181 k. Erasure and Insertion of Names. Most Cited Cases

Statute providing for filing of declaration by candidates for office of county school superintendent 45 days before election does not prohibit election of write-in candidate to that office. Section 167.020 RSMo 1959, V.A.M.S.

[4] Elections 144 285(3)

144 Elections
144X Contests
144k283 Pleading
144k285 Complaint, Petition, Statement, or Notice
144k285(3) k. Errors and Irregularities. Most Cited Cases

Elections 144 285(4)

144 Elections
144X Contests
144k283 Pleading
144k285 Complaint, Petition, Statement, or Notice
144k285(4) k. Result of Election and Effect of Irregularities. Most Cited Cases

Notice to contest election alleging that 67 uncounted votes were cast for person with same first and last name as contestant without insertion of any middle initial and that voters intended those ballots to be cast for contestant, a write-in candidate, thereby giving contestant more votes than declared winner was sufficient to state claim upon which relief could be granted. V.A.M.S.Const. art. 5, § 3; Section 167.020 RSMo 1959, V.A.M.S.

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375 S.W.2d 110
(Cite as: 375 S.W.2d 110)

[5] Elections 144 ⚿186(4)

144 Elections
144VII Ballots
144k185 Effect of Irregularities or Defects
144k186 In General
144k186(4) k. Indication of Choice by Voter. Most Cited Cases

If voters' intention in **writing in name** of candidate can be determined, intention will not be defeated because of an irregularity in writing of **candidate's name**.

[6] Elections 144 ⚿293(4)

144 Elections
144X Contests
144k290 Evidence
144k293 Admissibility in General
144k293(4) k. Showing for Whom Votes Were Intended. Most Cited Cases

Evidence was admissible in election contest to disclose intent of voters who **wrote in name** on ballot which bore some similarity to **name** of **write-in** candidate.

[7] Elections 144 ⚿181

144 Elections
144VII Ballots
144k181 k. Erasure and Insertion of **Names**. Most Cited Cases

Ballots on which **name** of candidate was **written in** without a line drawn through printed **name** of other candidate for same office should not be **counted** for either candidate.

***111** Stephen N. Limbaugh, Limbaugh, Limbaugh & Russell, Cape Girardeau, for appellant.

Francis Toohey, Jr., Roscoe D. Moore, Perryville, for respondent.

HOLMAN, Judge.

In this action appellant, Oscar P. Kasten, seeks to contest the election of respondent, Ora N. Guth, to the office of county superintendent of public schools at the school election held on April 2, 1963. The circuit court sustained respondent's motion to dismiss the notice of election contest filed by appellant. Contestant has duly appealed from that judgment. We have jurisdiction because the case involves the title to an 'office under this state.' Article V, § 3, Constitution of Missouri, 1945, V.A.M.S.; Armantrout v. Bohon, Mo.App., 157 S.W.2d 530.

The Notice of Election Contest reads as follows:

'Take notice that I, Oscar P. Kasten, hereby present this notice to the Circuit Court of Perry County, Missouri, for the purpose of contesting the election of Ora N. Guth to the office of County Superintendent of Schools for Perry County, Missouri, at the election held on April 2, 1963, and as grounds for such contest state as follows:

'1. On Tuesday, April 2, 1963, an election was held in Perry County, Missouri, ***112** for the purpose of electing, among other officers, a county superintendent of schools for Perry County, Missouri.

'2. The printed ballot for this office contained the name of Ora N. Guth, she being the only candidate who had announced for this office in accordance with the requirements of Section 167.020 RSMo 1959 [V.A.M.S.].

'3. About 15 days before the election held April 2, 1963, Oscar P. Kasten decided to run for the office of Perry County Superintendent of Schools and announced his candidacy as a write-in candidate through the media of newspapers, radio, posters, printed cards and word of mouth.

'4. The formal canvass of the ballots cast for this office revealed the following tabulation: For Ora N. Guth 1107 votes; for Oscar P. Kasten 1084 votes; for Oscar Kasten 67 votes; for Oscar P. Kassel 1 vote; for Oscar P. Casten 1 vote; for Roger Kasten 1 vote; for Leo Rozier 1 vote; for James Burgess 1 vote.

'In addition, there were 145 votes which were voided because the name of Oscar P. Kasten was written in but the name of the printed candidate was not crossed out. On the basis of the foregoing Ora N.

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Guth was declared the winner by a margin of 23 votes over her write-in opponent Oscar P. Kasten.

'5. Contestant Oscar P. Kasten avers that he should have been declared the winner of such election for the following reasons: (a) The sixty-seven (67) votes cast for Oscar Kasten were intended for contestant and should have been counted for him. (b) The one (1) vote cast for Oscar P. Kassel was intended for contestant and should have been counted for him. (c) The one (1) vote cast for Oscar P. Casten was intended for contestant and should have been counted for him. (d) The one (1) vote cast for Roger Kasten was intended for contestant and should have been counted for him. (e) The one hundred forty-five (145) voided votes which had contestant's name written in but which failed to have contestee's name crossed out were intended for contestant and should have been counted for him. (f) The votes cast for Oscar P. Kasten, Oscar Kasten, Oscar P. Kassel, Oscar P. Casten and Roger Kasten were all intended to be cast for one and the same person, Oscar P. Kasten, and all said votes should have been counted for him. (g) The vote cast by Jerri Carter and that cast by Joan Lorberg were invalid because they were cast in the City of Perryville District when such persons were residents of the Hunt District and such votes should have been cast in the Hunt District. (h) The vote cast by Winifred Ketchum and that cast by Mary Lewis were invalid because such persons had not resided in the State of Missouri one whole year before the election of April 2, 1963.

'Wherefore, contestant, Oscar P. Kasten, prays for a recount of all votes cast in the election of Perry County Superintendent of Schools held April 2, 1963, in Perry County, Missouri; that all votes cast for Oscar Kasten, Oscar P. Kassel, Oscar P. Casten, Roger Kasten and all void ballots be counted for contestant; that the votes of Jerri Carter, Joan Lorberg, Winifred Ketchum and Mary Lewis be voided and not counted for the reasons mentioned in this notice and for such other and further relief as may appear proper and just.'

Ora N. Guth filed the following motion to dismiss the foregoing notice: '1. Comes now the contestee and moves to dismiss the notice of election contest filed by contestant on the ground that such notice fails to state a claim upon which relief can be granted. 2. Contestee further moves that the notice of election contest filed by contestant be dismissed for the reason that he has failed to comply with the mandatory provisions of § 167.020 RSMo 1959 [V.A.M.S.] pertaining to the requirement that all candidates for the office of County Superintendent of Schools must file a declaration of candidacy at least 45 days before the date of the election and that he is therefore not entitled to file this contest nor to hold the office of ***113** County Superintendent of Schools.' As stated, the trial court sustained said motion to dismiss.

We will first consider the allegations of paragraph 2 of the motion. While it states that contestant 'is therefore not entitled to file this contest nor to hold the office of County Superintendent of Schools,' we construe that portion of the motion as alleging that contestant was disqualified from election or was not entitled to be elected to the office in question because he had not filed a written declaration of his candidacy at least 45 days before the election.

It is provided in § 167.010 (unless otherwise indicated all statutory references are to RSMo 1959, V.A.M.S.) that '[t]he qualified voters of each and every county in this state shall elect a county superintendent of public schools at the annual district school meeting held on the first Tuesday in April, 1943, and every four years thereafter. * * *' Section 167.020 provides that '[a]t least forty-five days before the annual school meeting in any year when a county superintendent of public schools is to be elected, any person desiring to be a candidate for election to the office of county superintendent of public schools must file with the county clerk a written declaration of his candidacy for the office, which declaration shall be filed by the county clerk and no filing fee shall be charged. * * *' Respondent contends that the quoted portion of § 167.020 is mandatory and that no person is eligible to be voted for at the election unless he has filed a written declaration within the time specified therein. Appellant contends that the provision in regard to filing a written declaration of candidacy relates only to the requirement for a candidate to have his name printed on the ballot, but that 'the printing of one's name on the ballot is not a mandatory requirement for election. A write-in candidate who has not filed a declaration of his candidacy and whose name is not on the printed ballot may still be elected if he receives the greatest number of votes.'

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[1][2] As indicated by the foregoing, a solution of the question presented requires a construction of the provisions of § 167.020. It is elementary that the primary rule to be followed in the construction of statutes is to ascertain and give effect to the intent of the legislature. Taney County v. Empire District Elec. Co., Mo.Sup., 309 S.W.2d 610. A strict literal construction of the quoted portion of the statute would tend to support the contention of respondent. However, in determining the legislative intent, we think the words used in the statute must be considered in connection with certain basic fundamental principles that are firmly established in this state.

We have said that 'the very taproot and reason for any election at all among a free people is that the majority may rule * * *. Election laws must be liberally construed in aid of the right of suffrage. State ex rel. [Wills] v. Hough, 193 Mo. [615], l. c. 651, 91 S.W. 905 [l. c.]; Hale v. Stimson, 198 Mo. 134, 95 S.W. 885. The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors.' Nance v. Kearbey, 251 Mo. 374, 158 S.W. 629, 631. While mandatory statutory requirements must be followed, '[e]lections should be so held as to afford a free and fair expression of the popular will * * *.' State ex Inf. McKittrick ex rel. Martin v. Stoner, 347 Mo. 242, 146 S.W.2d 891, 894. The statutes of this state indicate that it is the established public policy that a qualified voter may vote for any candidate of his choice by writing the name of such person on the ballot and the voter is not restricted to voting for the candidated whose names are printed thereon. Our general election laws contain the express provision that '[i]f the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such canceled name the name of person for whom he desires to vote, and placing a ***114** cross mark in the square at the left of such name.' Section 111.580(2). Other statutes, by reference, have made that provision applicable in elections conducted in cities of the first, second, third, and fourth classes. See §§ 122.210, 122.400, 77.040, and 79.030. Similar provisions appear in § 423 of the Charter of Kansas City. See also § 122.960 relating to elections in the City of St. Louis; Gumm v. Hubbard, 97 Mo. 311, 11 S.W. 61; Bradley v. Cox, 271 Mo. 438, 197 S.W. 88; Ousley v. Powell, Mo.App., 12 S.W.2d 102.

[3] In construing § 167.020, we think it is significant that it contains no express provision to the effect that no person should be voted for whose **name** does not appear upon the printed ballot. We also note that subsection 2 of that statute contains the following: 'The voting for county superintendent shall be by ballot and all ballots cast shall be **counted** for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is **counted** for the person receiving the same * * *.' It is, of course, implicit in every election statute that the ballot shall be **counted** for the person for whom cast. We therefore, have concluded that this provision was inserted in the statute in order to make it clear that the ballot should be **counted** for any person for whom it is cast and that the voting not be restricted to the **candidated** printed on the ballot.

We have also considered our constitutional provisions, i. e., Art. I, § 25, that 'all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage,' and Art. VIII, § 2, which provides that all qualified electors are 'entitled to vote at all elections by the people.' It is the majority rule in this nation that statutory provisions expressly stating that no person shall be voted for unless his name is printed on the ballot are unconstitutional under constitutional provisions similar to those above quoted. See Littlejohn v. People, 52 Colo. 217, 121 P. 159, Ann.Cas.1913D, 610; Annotation, Ann.Cas.1913D, 614; 18 Am.Jur., Elections, § 191, p. 307. It therefore appears that if § 167.020 should be construed in accordance with respondent's contention there is good authority for holding it unconstitutional. We need not expressly so hold. It is sufficient to say that it is presumed that the legislature did not intend to enact an unconstitutional statute.

We also note that respondent in her brief concedes that 'had no one filed for the office of county superintendent of schools and a blank ballot would be prepared, write-in candidates would be permitted, or the election would be a nullity but where you have candidates who have complied with the statute, no other persons would be entitled to be elected at such election.' We do not agree that the situation would have been any different in the event no one had filed.

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If it is mandatory that a candidate file a timely declaration in order to be qualified for election, then that requirement should be applied in every event. The situation suggested in respondent's brief tends to accentuate the fact that the construction for which she contends is unreasonable.

In view of all of the foregoing, we have concluded that the legislature, in enacting § 167.020, did not intend to restrict the electors to voting for the candidates printed on the ballot, but, on the contrary, intended that any elector could vote for a person of his own selection by drawing a line through the names printed on the ballot and writing in the name of his candidate. Any other conclusion would attribute to the legislature an intent contrary to our established public policy to the effect that a qualified voter be permitted to vote for any person of his choice and that the will of a majority of the voters should prevail. We accordingly rule the point under consideration contrary to the contention of respondent.

[4] As to the remaining point raised by respondent's motion to dismiss, we are clearly of the opinion that the appellant's ***115** notice states a claim upon which relief can be granted. It is alleged that Oscar P. Kasten received 1,084 votes and that 67 votes were cast for Oscar Kasten which were intended to be voted for Oscar P. Kasten, contestant herein. For the purposes of the motion these allegations are considered to be true. Hence it must be ruled that the 67 votes cast for Oscar Kasten should have been counted for contestant, which would have given him a total of 1,151 votes, and he should therefore have been declared the winner of said election.

In the case of Gumm v. Hubbard, 97 Mo. 311, 11 S.W. 61, Caleb Gumm contested the election of Joel D. Hubbard. The court approved a recount wherein 'one vote for 'J. D. Huba,' one for 'J. D. Hubba,' one for 'Huber,' one for 'J. D. Hub,' and one for 'D. Huber' were counted for contestee. Effect should be given to the will of the electors, and it is now generally agreed that the circumstances surrounding the election may be given in evidence, on an election contest, to explain ambiguities in the ballots. McCrary, Elec. § 396; Cooley, Const. Lim. 611; 6 Amer. & Eng.Cyclop.Law, 431. There were but two candidates for this office, and their names are so unlike that there is no danger of confusion as between them. The election, as to these candidates, was local, confined to the county where they resided, and the voting population seems to have been largely German. Under the evidence, the court might well have found that these ballots were for the contestee, and there would have been no error in **counting** them for him.' 11 S.W. 63.

'Generally, where the voter's intention is found it should not be defeated by the fact that the **name** of the candidate is misspelled, the wrong initials are employed, or some other or slightly different **name** of similar pronunciation has been written instead of that of the candidate actually intended to be voted for. If there is a misspelling of a **candidate's name** when **written in** by a voter or when printed on the ballot, evidence of the circumstances surrounding the election is admissible for the purpose of showing that the ballot was intended for a particular candidate, unless the **name** is so different that thus to apply it would be to contradict the ballot itself or unless the ballot is so defective that it fails to show any intention whatever. Although some courts deem themselves bound by a stricter rule, it has been held that a ballot which contains a **candidate's** surname only may be **counted**, even though there are other persons in the county having the same surname, where it is shown that there was no other person of such **name** who was a candidate for the same or any other office. This rule is also followed if only the middle **name** of the candidate is wrong, if the first **name** is **abbreviated**, or if the wrong initials are used. Furthermore, where there are two persons in the same district with the same **name**, one of them a candidate, and the other not, and there are ballots which do not designate which of these persons is voted for thereon, parol evidence may be received to show for whom the votes were intended.' 18 Am.Jur., Elections, § 195, p. 311.

[5] In 29 C.J.S. Elections § 180, pp. 263, 265, it is stated that 'a candidate for public office is generally entitled to have his name written upon the official ballot by voters who desire to support him as their choice, although he has not been nominated by any convention, caucus, or meeting and under most statutes, when an elector desires to vote for a person whose **name** is not on the ballot he may do so by writing his **name** on the ballot in an appropriate place, notwithstanding the person whose **name** is thus **written in** was not eligible to have his **name**

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printed on the ballot. * * * [I]f the voter's intention can be determined, that intention will not be defeated because of an irregularity in the writing of the **candidate's name**. Thus ballots have been held not invalidated because the voter misspelled the **candidate's name** or address, as where the error was so slight and of such a nature as to render the **name** as written within the scope of the doctrine of idem sonans; or because the voter wrote some other or slightly different **name** of like or similar pronunciation,***116** as where there is a clear relation between the appearance or sound of the **name written in** and that of the candidate and only one man of a particular **name** is a candidate for the office; or where the voter omitted the **candidate's** initial or employed a wrong initial, or wrote the **candidate's** initials in place of his given **name**, or wrote only the **candidate's** last **name**, there being no other candidate of the same **name** to be voted for.' See also, Annotation, 86 A.L.R.2d 1025.

[6][7] Certain questions are suggested by the allegations of the notice and the points briefed that will likely arise upon the trial of this case. Due to the nature of the case we deem it advisable to express our views upon those questions. In accord with the foregoing authorities, we are of the opinion that evidence is admissible which bears upon the intent of voters who wrote in the name of Oscar Kasten, Oscar P. Kassel, Oscar P. Casten, and Roger Kasten on their ballot. As to the votes cast for Oscar Kasten, we have the view that said name is so similar to Oscar P. Kasten that they should be counted for contestant unless it should appear from the evidence that there was a person residing in Perry County (other than contestant) who had the name of Oscar Kasten and who possessed the qualifications specified in § 167.010 for the office here involved. In the event it should appear that there were on the date of the election two residents of Perry County bearing the name of Oscar Kasten and possessing the aforesaid qualifications, then the court shall determine from all of the evidence in the case the identity of the person for whom those voters intended to cast their ballot. There were 145 ballots which were alleged to have been voided because the name of contestant was written in but no line was drawn through respondent's name. Contestant alleges that those votes should have been counted for him. We have the view that those ballots should not be counted for either appellant or respondent. Ousley v. Powell, Mo.App., 12 S.W.2d 102.

The judgment is reversed and cause remanded for further proceedings in accordance with the views herein expressed.

HYDE and DALTON, JJ., concur.
HOLLINGSWORTH, P. J., concurs in result.

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C

Court of Appeals of North Carolina.
In re PROTEST BY ROCKY MIDGETTE OF 2 NOVEMBER 1993 MANTEO TOWN ELECTION.

No. 9410SC332.
Dec. 6, 1994.

Candidate in town election appealed from order of Superior Court, Wake County, Henry V. Barnette, Jr., J., which affirmed decision of State Board of Elections, which directed that additional 41-votes for **write-in** candidate be certified by County Board of Elections. The Court of Appeals, Greene, J., held that: (1) when confronted with technical errors in following **write-in** procedure, court would generally look to face of ballot, and if **write-in candidate's name** was on ballot, but not in exact accordance with mandatory statutory requirements, to extrinsic evidence to see if voter's choice could be determined; (2) 36 ballots which had no **name** written on them should not have been **counted** for **write-in** candidate; and (3) five ballots with variations of **write-in candidate's name** written on them were properly **counted** for **write-in** candidate.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Elections 144 298(1)

144 Elections
144X Contests
144k297 Scope of Inquiry and Powers of Court or Board
144k298 In General
144k298(1) k. In General. Most Cited Cases

Candidate contended that State Board of Elections' decision to count write-in votes for another candidate was in excess of statutory authority and was error of law, and thus de novo review was required.

[2] Elections 144 158

144 Elections
144VI Nominations and Primary Elections
144k158 k. Effect of Irregularities or Defects. Most Cited Cases

Elections 144 227(8)

144 Elections
144VIII Conduct of Election
144k227 Effect of Irregularities or Defects
144k227(8) k. Voting by Ballot. Most Cited Cases

Under statutes regarding marking of ballots in primaries and elections and counting of ballots, although voter must write in name of person not on ballot in order for the vote to be counted, any technical errors in following procedure will not make ballot invalid unless it is impossible to determine voter's choice. G.S. §§ 163-151, 163-170.

[3] Elections 144 293(5)

144 Elections
144X Contests
144k290 Evidence
144k293 Admissibility in General
144k293(5) k. Admissibility of Ballots. Most Cited Cases

In determining if it is impossible to ascertain voter's choice, due to error in following **write-in** procedures, court will generally look to face of ballot, and if **write-in candidate's name** is on ballot, but not in exact accordance of mandatory statutory requirements, to extrinsic evidence to see if voter's choice can be determined. G.S. § 163-170.

[4] Elections 144 293(4)

144 Elections
144X Contests
144k290 Evidence
144k293 Admissibility in General

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144k293(4) k. Showing for Whom Votes Were Intended. Most Cited Cases

No name at all was written on 36 ballots, and thus court would not consider any extrinsic evidence in attempting to ascertain voter intent, as ballots were tantamount to technical errors in following "write-in" vote procedures which made it impossible to determine voter's choice. G.S. §§ 163-151, 163-170.

[5] **Elections 144 ⚿239**

144 Elections
144IX Count of Votes, Returns, and Canvass
144k239 k. Votes to Be Counted. Most Cited Cases

Thirty-six ballots which had no name written on them could not be counted for write-in candidate in election, since they did not express intention of voter's choice. G.S. §§ 163-151, 163-170.

[6] **Elections 144 ⚿293(4)**

144 Elections
144X Contests
144k290 Evidence
144k293 Admissibility in General
144k293(4) k. Showing for Whom Votes Were Intended. Most Cited Cases

There was some evidence of voter intent on five ballots in election, which contained variations of **write-in candidate's name**, and thus it was appropriate to look at extrinsic evidence in attempting to ascertain voter intent. G.S. §§ 163-151, 163-170.

[7] **Elections 144 ⚿239**

144 Elections
144IX **Count** of Votes, Returns, and Canvass
144k239 k. Votes to Be **Counted**. Most Cited Cases

It was not impossible to tell voter's choice from five ballots, and thus State Board of Elections correctly ordered County Board of Elections to **count** ballots for **write-in** candidate, where they were marked with variations of **write-in candidate's name**, **write-in** candidate was only person actively campaigning as **write-in** candidate, and no other person with similar **name** was running as candidate in town election or otherwise actively seeking votes for town office. G.S. §§ 163-151, 163-170.

****520 *213** Appeal by Dellerva Collins from order entered 4 February 1994 in Wake County Superior Court by Judge Henry V. Barnette, Jr. Heard in the Court of Appeals 27 October 1994.

Atty. Gen. Michael F. Easley by Sp. Deputy Atty. Gen. Charles M. Hensey, for State Bd. of Elections.

Tharrington, Smith & Hargrove by Michael Crowell and Jaye P. Meyer, Raleigh, for Rocky D. Midgette.

Thigpen, Blue, Stephens & Fellers by Cressie H. Thigpen, Jr., and Steven F. Bryant, Raleigh, for appellant Dellerva Collins.

GREENE, Judge.

Dellerva W. Collins (Ms. Collins) appeals from an order entered 4 February 1994 in Wake County Superior Court, affirming the State Board of Elections' (the State Board) 23 November 1993 decision directing that an ****521** additional forty-one votes for write-in candidate Rocky Dillon Midgette (Rocky Midgette) be certified by the Dare County Board of Elections (the County Board) for the 2 November 1993 town election for three seats on the Manteo town board.

On 2 November 1993, the town of Manteo, North Carolina, had a general election to elect three town commissioners by plurality vote. Ms. Collins, Edward C. Etheridge, and Lee Tugwell filed as candidates ***214** and were listed on the ballot while Rocky Midgette was a write-in candidate. On 3 November 1993, Rocky Midgette wrote a letter to the chairman and supervisor of the County Board, stating that although 152 votes were attributed to him, "41 ballots were set aside because the precinct could not figure out whether they should be **counted** or not." He asked the County Board to **count** the forty-one votes for him.

The County Board met on 4 November 1993 to canvass the votes and determined that thirty-six ballots which were punched in the proper place but did not have a **name** written on the ballot should not be **counted** because the directions on the ballot stated that a **name** must be **written in**. The County Board

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also determined that several ballots on which voters wrote "R. Midgette," "Rocky," "Midgette," or some other **abbreviation** of Rocky Midgette's **name** should not be **counted**. The County Board therefore dismissed Rocky Midgette's complaint for lack of probable cause and determined that the official canvass results for town commissioner were 254 votes for Edward Etheridge, 254 votes for Lee Tugwell, 185 votes for Ms. Collins, and 162 votes for Rocky Midgette.

Rocky Midgette filed a complaint with the County Board and protested the following alleged violations and misconduct:

> (1) Precinct officials and the Board of Elections refused to **count** several ballots on which voters wrote "R. Midgette", "Rocky", "Midgette" or some other, similar **abbreviations** of Rocky Midgette's **name**. Those votes should have been **counted** because the voter expressed a clear intent to vote for Rocky Midgette. Although the **name** was not written out completely and there are other citizens in town **named** Midgette, no other Midgette was actively seeking the town commissioner's office.
>
> (2) Approximately 36 ballots were rejected and not **counted** at all because the voter had punched next to place 70 on the punchcard ballot but had not **written in** Rocky Midgette's **name**.... Because 70 was the place to vote for **write-ins**, campaign material for Rocky instructed voters to punch next to 70, and there was no other **write-in** candidate in the election, it is clear that the voters' intent in punching out 70 was to vote for Rocky Midgette.

Rocky Midgette requested that all ballots with a variation of his **name** and the thirty-six ballots on which place 70 was punched be **counted** for him and added to his total.

***215** The County Board held a hearing on 13 November 1993 and by order dated 16 November 1993, made the following findings of fact based on testimony from Rocky Midgette and several voters and the affidavits of several voters:

> 5. Rocky Midgette ran an active campaign for town commissioner. He set up approximately 500 posters, distributed 1,000 flyers, mailed over 500 postcards to voters, visited homes, ran display ads in the newspaper, spoke at candidates' forum sponsored by League of Women Voters, and had workers telephone voters.
>
> 6. Rocky Midgette's campaign material directed voters to cast a write-in vote for him by punching 70 on the ballot and writing in his name.
>
> 7. No other person was actively campaigning as a write-in candidate for town commissioner, and no other person named Midgette or Midgett or Rocky was running as a candidate in the town election or otherwise actively seeking votes for town office.
>
> ....
>
> 10. ... Each [voting] booth included a plastic holder containing a booklet listing the names of candidates and the number of the space on the ballot to be punched for each candidate.
>
> ....
>
> ****522** 12. Lines 70, 71 and 72 in the booklet were identified as spaces for write-in candidates for town commissioner.
>
> 13. The instructions printed on the top of each ballot indicated that to vote for a person whose name is not on the ballot, you were to write in on the ballot in the space provided, the number for the office and the person's name you wanted to vote for.
>
> ....
>
> 18. One ballot had space 70 punched for a write-in and "Rocky" written on it. Two ballots had space 70 punched for a write-in and had "R. Midgette" written on them. Two ballots had space 70 punched for a write-in and had "Midgette" written on them. These ballots were not counted.
>
> 19. On 36 ballots, the voters punched place 70 on the ballot but wrote no name or number on the ballot. Those ballots were not counted.
>
> ....
>
> ***216** 24. At the November 13th hearing, 5 voters

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testified and 13 voters had affidavits presented which indicated they punched space 70 on their ballots but did not write anything on the ballot itself. These voters indicated that they either mistakenly wrote Rocky Midgette's name in the booklet on line 70 or did not believe it was necessary to write his name anywhere because it was already written in the booklet on line 70.

Based on these findings of fact, the County Board concluded it properly excluded one ballot with space 70 punched and "Rocky" written on it, two ballots with space 70 punched and "R. Midgette" written on them, two ballots with space 70 punched and "Midgette" written on them, and thirty-six ballots with space 70 punched but no name written on them. The County Board therefore dismissed Rocky Midgette's complaint.

Rocky Midgette then appealed to the State Board which, after considering the Board's findings of fact and conclusions of law, all submissions previously distributed to all State Board members, and verbal presentations before the County Board and the State Board, rejected the County Board's order. By decision and order entered 23 November 1993, the State Board ordered that "the 41 questioned votes for write in candidate Rocky Midgette be certified by" the County Board.

On 3 December 1993, Ms. Collins filed a petition with the State Board to reconsider its 23 November 1993 decision; however, on 9 December 1993, the State Board, by letter, informed her that it would not reconsider its decision. On 15 December 1993, Ms. Collins, pursuant to N.C.Gen.Stat. § 150B-43, appealed the 23 November 1993 and 9 December 1993 decisions of the State Board to Wake County Superior Court. On 22 December 1993, she filed an amendment to her petition to except to the failure of the State Board to include findings of fact and conclusions of law "in contravention of N.C.G.S. Section 150A-36" and requested that "the matter be remanded to the State Board ... for appropriate findings of fact and conclusions of law." On 22 December 1993, she also filed a motion to remand for findings of fact and conclusions of law. By order entered 4 February 1994, the trial court found that the State Board "adopted the findings of fact of the county board and concluded as a matter of law that the additional votes should be counted for Mr. Midgette." The trial court also concluded the State Board "acted within the scope of its authority in determining that the 41 additional votes should be counted for Rocky ***217** Midgette," its decision was "supported by substantial admissible evidence in view of the entire record as submitted," and its decision was not "in violation of constitutional provisions, in excess of authority, made upon unlawful procedure, affected by other error of law or arbitrary and capricious." The trial court therefore denied Ms. Collins' appeal and affirmed the State Board's decision.

The issue presented is whether it is impossible to determine the voter's choice from ballots containing variations of Rocky Midgette's name and ballots with no name written on them, but punched in the space for write-in candidates, where Rocky Midgette conducted an active campaign and was the only write-in candidate.

****523** [1][2] Because Ms. Collins contends the State Board's decision to count the forty-one votes in question was in excess of its statutory authority and was an error of law, *de novo* review is required. *Brooks, Comm'r of Labor v. Rebarco, Inc.*, 91 N.C.App. 459, 463, 372 S.E.2d 342, 344 (1988). N.C.Gen.Stat. § 163-151, which provides for marking ballots in primaries and elections, states that in an election, "if a voter desires to vote for a person whose name is not printed on the ballot, he shall write in the name of the person in the space immediately beneath the name of a candidate, if any, printed on the ballot for that particular office." N.C.G.S. § 163-151 (1991). N.C.Gen.Stat. § 163-170, which governs the rules for counting ballots, provides:

> Only official ballots shall be voted and counted. No official ballot shall be rejected because of technical errors in marking it unless it is impossible to determine the voter's choice. In applying the general rule, all election officials shall be governed by the following rules....
>
> (5) Write-In Votes.-If a name has been written in on an official general election ballot as provided in G.S. 163-151, it shall be counted in accordance with the following rules:
>
> a. The name written in shall not be counted un-

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less written in by the voter or a person authorized to assist the voter pursuant to G.S. 163-152.

b. The name shall be written in immediately below the name of a candidate for a particular office, if any, and shall be counted as a vote for the person whose name has been written in for that office....

***218** N.C.G.S. § 163-170 (1994). Under these statutes, while a voter must write in the name of a person not on the ballot in order for the vote to be counted, any technical errors in following this procedure will not make the ballot invalid "unless it is impossible to determine the voter's choice." *See Duke Power Co. v. Clayton*, 274 N.C. 505, 164 S.E.2d 289 (1968) (all parts of same statute dealing with same subject are to be construed together as a whole, and every part must be given effect if this can be done by fair and reasonable intendment). We must therefore determine whether it is impossible to tell the voter's choice for the thirty-six ballots where no name was written in and the five ballots marked "Rocky," "R. Midgette," or "Midgette."

[3] It is unclear under N.C.Gen.Stat. § 163-170 whether or not, in determining if it is impossible to ascertain a voter's choice, a court is to look to the circumstances surrounding an election or only to the specific ballot in question. We agree, however, with the approach taken by other courts, which have dealt with this issue by generally looking to the face of the ballot, and if the write-in candidate's name is on the ballot, but not in exact accordance with mandatory statutory requirements, looking to extrinsic evidence to see if the voter's choice can be determined. "[T]here must be an expression of intent on the ballot, but the ballot is to be read in the light of surrounding circumstances, evidence of which is admissible." *Fifteen Registered Voters on behalf of Flanagan*, 129 N.J.Super. 296, 323 A.2d 521, 523 (1974) (write-in votes for "Wright" or "Mr. Wright" should be counted for "Harry C. Wright" where evidence showed no other "Wright" sought the office and where "Harry Wright" vigorously campaigned); *see also Meyer v. Lamm*, 846 P.2d 862 (Colo.1993) (if ballot is substantially marked as law requires, and from such marking, intention of voter, when viewed in light of circumstances surrounding election, can be ascertained, ballot should be counted); *Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978) (candidate's surname sufficient to indicate vote for him where he vigorously campaigned, and it was unlikely to confuse him with others having same surname, none of whom were politically active); 26 Am.Jur.2d *Elections* §§ 268-72 (1966). Based on this general rule, courts have considered extrinsic evidence to determine a voter's intention where he or she has written in only a surname, where only the middle name of the candidate is wrong, where the first name is abbreviated, or if the wrong initials are used. 26 Am.Jur.2d *Elections* § 272.

[4][5] In this election, the thirty-six ballots which have no name written on them do not express an intention of the voter's choice ****524** because ***219** they do not contain Rocky Midgette's name, a variation of Rocky Midgette's name, or any name at all, and disregard completely the requirements of Sections 163-151 and 163-170, the instructions on the ballot, and even the instructions Rocky Midgette provided in his campaign. Accordingly, because no name at all was written on these thirty-six ballots, we do not consider any extrinsic evidence in attempting to ascertain voter intent based on the rules articulated above. These thirty-six ballots, therefore, are tantamount to technical errors which make it impossible to determine the voter's choice. The County Board's findings of fact, which the trial court found the State Board adopted, cannot support the conclusion that these thirty-six votes should be counted for Rocky Midgette.

[6][7] We now consider the one ballot marked "Rocky," the two ballots marked "R. Midgette," and the two ballots marked "Midgette." Because there is some evidence of voter intent on these five ballots, it is appropriate to look at extrinsic evidence. The evidence adduced at the hearing before the County Board, contained in the County Board's findings of fact, indicates that Rocky Midgette ran an active campaign for town commissioner by setting up approximately 500 posters, distributing 1,000 flyers, mailing over 500 postcards to voters, visiting homes, running display ads in the newspaper, speaking at a candidates' forum sponsored by the League of Women Voters, and having workers telephone voters. There was also evidence that Rocky Midgette was the only person actively campaigning as a write-in candidate for town commissioner, and no other person named Midgette or Midgett or Rocky was running as a candidate in the town election or otherwise actively seeking votes for town office. Given these facts, it is

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not impossible to tell the voter's choice from these five ballots, and the State Board correctly ordered the County Board to count these five votes for Rocky Midgette. *See McIntosh v. Helton,* 828 S.W.2d 364 (Ky.1992) (write-in votes for candidate could be counted for him even though they only designated him by initials rather than name as statute requires; election commission had given approval to use of initials and only one person with initials in question campaigned for position). For these reasons, the trial court's decision should be affirmed in part and reversed in part. We remand the case to the trial court with directions to reverse the State Board's decision in part and remand to the State Board so that it may order the County Board not to count the thirty-six ballots which did not have a name written in.

***220** Affirmed in part, reversed in part, and remanded.

WYNN and JOHN, JJ. concur.

N.C.App.,1994.
In re Protest by Rocky Midgette of 2 Nov. 1993 Manteo Town Election
117 N.C.App. 213, 450 S.E.2d 519

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44 Pa. D. & C.3d 249, 1987 WL 46855 (Pa.Com.Pl.)
(Cite as: 44 Pa. D. & C.3d 249, 1987 WL 46855 (Pa.Com.Pl.))

C

Court of Common Pleas of Pennsylvania, Mercer County.
In re Grove City, Second Ward Council Democrat **Write-In** Nomination

No. 587 C.D. 1987.
June 24, 1987

1 *249 Petition to establish identity by candidate nominated under different **names.

West Headnotes

Elections 144 ⚿172

144 Elections
144VII Ballots
144k165 Form and Contents of Official Ballots
144k172 k. **Names** and Designations of Candidates. Most Cited Cases

Where the intent of the voter can be ascertained, ballots will be **counted** in a disputed election even through the **name** of the candidate is misspelled, the wrong initials are employed, or some other slightly different **name** of similar pronunciation has been written instead of the **candidate's name**.

Michael J. Wherry, for petitioner.

ACKER, P.J.

We have for consideration a "petition of James H. Montgomery to *250 establish identity by candidate nominated under different **names**."

James H. Montgomery, a registered Republican, is currently the incumbent councilman of Grove City Borough Council for the 2nd Ward of Grove City, Pa. His re-election bid for that office was opposed by Joseph M. Jaskol, also a registered Republican, in the May 19, 1987, primary. After a tabulation of the primary votes, the Mercer County Election Board certified that Montgomery had been nominated as the Republican candidate for the council seat.

No candidates were listed on the Democratic ballot for the Second Ward Councilmanic seat. There were, however, a number of write-in votes cast for that office on behalf of both Montgomery and Jaskol. The election board did not certify that either candidate has secured the necessary 10 votes to be the Second Ward nominee of the Democratic Party.[FN1] Rather, the board, pursuant to 25 P.S. §3155, certified that 12 votes under 11 variations of the **name** James H. Montgomery were **written-in** for that nomination at the May 19, 1987, primary. The **names** as written on the ballots, and the number of votes received by each, were certified as follows:

FN1. Under 25 P.S. §3155, the county election board shall not certify the votes cast on irregular ballots for any person unless the total number of votes cast for said person is equal to or greater than the number of signatures required on a nomination petition for the particular office. Under 25 P.S. §2872.1(35), 10 signatures would be needed on a nomination petition for 2nd Ward councilman.

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table

*251 Montgomery now seeks to have these votes counted in his favor, and to be declared the nominee of more than one party, i.e., the nominee of the Democratic Party.

DISCUSSION

Section 3156 of the Election Code, 25 P.S. §2600 et seq., provides in pertinent part:

"Any person who has been nominated at a primary election by more than one party for the same office under different names may, at any time not later than five days after the certification by the county board of the votes cast at a primary election, present a petition to the court of common pleas of the proper county, praying for an order declaring such petitioner by his true name to be the person who was thus nominated by more than one party under differ-

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ent names. If the court shall determine that the different names so appearing on the returns of the primary represent one and the same person, the court shall enter an order finding said fact and directing the county board to revise its return accordingly."

**2 However, the election code itself does not provide any instruction on how the court is to make this determination. Therefore, we turn to the case law on the subject for guidance.

The seminal case on this subject appears to be *252*McCracken Appeal*, 370 Pa. 562, 88 A.2d 787 (1952). Appellee therein, Joseph Kratochvil Jr., received 313 votes as a write-in (sticker) candidate for township treasurer during the general election. His opponent, Thomas H. McCracken, who had previously won the nomination of both the Republican and Democratic tickets, received 314 votes. At issue was one ballot on which the voter had written-in the name "Joseph Kratochvil," without the "Jr." Kratochvil petitioned to have the vote cumulated with his other votes. The election returns board, after a hearing, determined that Joseph Kratochvil and Joseph Kratochvil Jr. were one and the same person and ordered that the vote be cumulated, raising Kratochvil's total to 314 votes. Kratochvil then won the casting of lots due to the tie vote and was declared the successful candidate. McCracken appealed to the court of common pleas, which affirmed the decision of the board. McCracken then appealed to the Pennsylvania Supreme Court, asserting the illegality of Kratochvil's election.

In commenting on the duties of the county election board to canvas and compute the election results, the court stated:

"There could scarcely be a duty more apparent and impelling on an election board than that of ascertaining *for whom* votes were cast. Id. at 565, 88 A.2d at 788 (emphasis in original).

Further, the court stated:

In any disputed election, nothing can be more vital towards the accomplishment of an honest and just selection than the ascertainment of the intention of the voter. What was the intention of the voter who wrote Joseph Kratochvil instead of Joseph Kratochvil Jr.? Can anyone doubt that the voter wished to register his vote for Joseph Kratochvil Jr.? And with that fact established, nothing should be *253 permitted to change the effect of that intention so honestly manifested." Id. at 566, 88 A.2d at 789.

Finally, the court declared, quoting from 9 Ruling Case Law, at 1144:

"[W]here the voter's intent is found it should not be defeated by the fact that the **name** of the candidate is misspelled, the wrong initials employed, or some other or slightly different **name** of like or similar pronounciation has been written instead of that of the candidate actually intended to be voted for. . . . A ballot may be **counted** which contains a **candidate's** surname only, although there are other persons in the county having the same surname, it being shown that there was no other person of such **name** who was a candidate for the same or any other office; and so also if only the middle **name** of the candidate is wrong or if the first **name** is **abbreviated**, or if the wrong initials are used." Id. at 566, 88 A.2d at 789.

The court then concluded from its examination of the record that the **names** of Joseph Kratochvil and Joseph Kratochvil Jr. identify one and the same individual, and affirmed the decision of the election board cumulating the votes.

3 A second decision bearing on this subject is *Parente Appeal*, 390 Pa. 249, 134 A.2d 62 (1957). Appellee therein, John R. Stieska, petitioned the county election board to cumulate all the votes cast in the various forms of his **name and to declare him the successful nominee on the ticket. The board credited Stieska and his principal competitor, Hugo J. Parente, with only such votes as were **written-in** with their full **names**. Stieska appealed the board's action to the court of common pleas, which sustained the appeal and ordered that all the contested **write-in** votes be cumulated. Parente appealed to the Supreme Court, which concluded that the court *254 of common pleas, upon the appeal of a decision of the county election board, is not precluded from cumulating votes for a candidate by **write-ins** on voting machines, if the evidence so warrants it, in order to effectuate the will of the voters. The court then affirmed the cumulation of the following votes:

"John R. Stieska, 58; John Steiska, 33; J. Steiska, 13; J. R. Stieska, 1; Stieska, 59; John T. Stieska, 1;

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John S. Stieska, 1; John Steiska, 2; Steiska, 1; Sleiska, 1;

Hugo J. Parente, 70; Hugo Parente, 27; H. Parente, 8; Parente, 38; Parenti, 5; Hugo Parenti, 1."

From the election code and these cases, it is evident that this court has the power and duty to determine the intent of the voter in casting his ballot, and having found such intent, to see it effectuated. Here, the court is faced with a determination of whether the 12 votes case under variations of the name James H. Montgomery were intended as votes for the petitioner.

Numerous decisions in Pennsylvania have addressed similar problems involving the cumulation of votes.[FN2] These decisions evidence no absolute rule on what variations of a petitioner's name may be allowed in order to cumulate the contested votes. However, the thrust is towards a liberal application ***255** of the cumulation rule as long as the court can determine the voter's intent in casting his ballot.

FN2. See *Antonelli Appeal*, 405 Pa. 179, 174 A.2d 107 (1961); *Nomination of Lamb*, 73 Pa. D. & C.2d 142 (1975); *Petition of Warner*, 51 Sch. L.R. 96 (1956); *Petition of Wenzel*, 51 Sch. L.R. 172 (1956); *In re Kramer's Nomination*, 94 P.L.J. 241 (1945); *In re Nomination of McLaughlin*, 31 Erie L.J. 184 (1947); *In re Election of Edgmont Township Supervisor*, 53 Del. 317 (1965). *In re Recount of Vote in the Second District, Third Ward, Borough of Steelton*, 65 Dauph. 192 (1953); *In re Election for Tax Collector of Seward Borough*, 36 West. 291 (1955).

In the instant case, James H. Montgomery is the incumbent councilman for the Second Ward and is well known to the voters of that ward. There is no evidence of any other James H. Montgomery running as a candidate for that office. [FN3] With the following exception, we are convinced that the variations of the name James H. Montgomery written-in at the May 19 primary represent one and same person who is the petitioner, James H. Montgomery. We do not believe that the one vote cast for "Mantony" is sufficiently close to the petitioner's name to allow its cumulation on his behalf.

FN3. There was however a Robert F. Montgomery running for School Director.

****4** Wherefore, we conclude and find as a fact that the identity of the petitioner, James H. Montgomery, under the different names written-in for the remaining 11 votes is established, and we direct the Mercer County Election Board to revise its return accordingly.

Hence, this

ORDER

And now, on this June 24, 1987, it is hereby ordered and decreed that the county election board as constituted by a prior court order shall **count** as votes for James H. Montgomery upon the Democratic ticket all **write-in** votes cast for the petitioner, James H. Montgomery, except the one vote cast for "Mantony," and shall revise its return accordingly. Those votes to be **counted** are:

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Pa.Com.Pl. 1987.
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Table of Abbreviations

Abbreviations of Common Christian Names

Abbreviation	Name	Abbreviation	Name
Abr	Abraham	Jn/Jno	John
Agn	Agnes	Jnthn	Jonathan
Alex	Alexander	Jos	Joseph
Alf	Alfred	Jud	Judith
Amb	Ambrose	Kath	Katherine
And	Andrew	Lau	Laurance
Ant/Anth	Anthony	Lawr	Lawrence
Art/Arth	Arthur	Len/Leon	Leonard
Barb	Barbara	Let	Letitia or Lettice
Bart/Barth	Bartholomew	Lyd	Lydia
Ben/Benj	Benjamin	Margt/Mgt	Margaret
Brid	Bridget	Margy	Margery
Cath	Catherine	Marm	Marmaduke
Chas	Charles	Math/Matth	Matthew
Charlt	Charlotte	Mich	Michael
Chris	Christopher	Mild	Mildred
Clem	Clement	Mill	Millicent
Const	Constance	Nath	Nathaniel
Cuth	Cuthbert	Neh	Nehemiah
Dan	Daniel	Nic/Nich	Nicholas
Dav	David	Ol	Oliver
Deb	Debora(h)	Pen	Penelope
Den	Den(n)is	Pet	Peter
Dor	Dorothy	Philad	Philadelphia
Doug	Douglas	Phil	Philip
Eben	Ebenezer	Phyl	Phyllis
Edm	Edmond/Edmund	Pris	Priscilla
Edw	Edward	Pru	Prudence
Eliz	Elizabeth	Rach	Rachel

Abbreviation	Name	Abbreviation	Name
Elnr	Eleanor	Reb	Rebecca
Esth	Esther, Hester	Reg	Reginald
Eus	Eustace	Ric/Rich	Richard
Fra	Francis (m.) or Frances (f.) [only abbreviated where sex is obvious]	Rob/Robt	Robert
Fred	Frederick	Rog	Roger
Gab	Gabriel	Rowl	Rowland
Geof	Geoffrey, Jeffery	Sam	Samuel
Geo	George	Sar	Sarah
Gilb	Gilbert	Sim	Simon
Godf	Godfrey	Sol	Solomon
Greg	Gregory	Ste	Stephen
Han	Hannah	Sus	Susan, Susanna
Hel	Helen	Susna/Sus	Susanna, Susannah
Hen/Hy	Henry	Theoph	Theophilus
Hep	Hephzibah	Tho/Thos	Thomas
Herb	Herbert	Tim	Timothy
Hest	Hester	Urs	Ursula
Hum/Humph	Humphrey	Val	Valentine
Isab/Isb	Isabel	Walt	Walter
Jac	Jacob	Wm	William
Jas	James	Win	Winifred
Jerh/Jermh	Jeremiah	Zach	Zachariah

CS FOR SENATE BILL NO. 31(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS THOMAS, FRENCH, MENARD, AND WIELECHOWSKI

A BILL

FOR AN ACT ENTITLED

"An Act relating to the counting of write-in votes."

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

*** Section 1.** AS 15.15.360 is amended by adding a new subsection to read:

(d) Write-in votes shall be counted according to the following rules:

(1) writing in the name of a candidate whose name is printed on the ballot does not invalidate a write-in vote unless the director determines, on the basis of other evidence, that the ballot was so marked for the purpose of identifying the ballot;

(2) in order to vote for a write-in candidate, the voter must write in the candidate's name in the space provided and fill in the oval opposite the candidate's name in accordance with (a)(1) of this section;

(3) a vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that candidate and if the name of the candidate, as it appears on the write-in declaration of candidacy, or the last name of the candidate is written in the space provided;

(4) if the write-in vote is for governor and lieutenant governor, the vote

shall be counted if the oval is filled in and the names of the candidates for governor and lieutenant governor, as they appear on the write-in declaration of candidacy, or the last names of the candidates for governor and lieutenant governor, or the name of the candidate for governor, as it appears on the write-in declaration of candidacy, or the last name of the candidate for governor is written in the space provided;

(5) in counting votes for a write-in candidate, the director shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained.

*** Sec. 2.** AS 15.15 is amended by adding a new section to read:

Sec. 15.15.365. Counting of write-in votes in general election. (a) Write-in votes on a general election ballot shall be counted by candidate only if the aggregate of all votes cast for all write-in candidates for the particular office is

(1) the highest number of votes received by any candidate for the office; or

(2) the second highest number of votes received by any candidate and the difference between the total number of votes received by the candidate having the highest number of votes and the aggregate of all votes cast for all write-in candidates for the office is less than the percentage necessary for a recount at the state's cost under AS 15.20.450.

(b) Write-in votes that do not meet the requirements of this section may not be individually counted under this section.

(c) If the director determines that the requirements of (a) of this section have been met, the director shall establish the place and date for counting those write-in votes, and the director, or a designee of the director, shall count all write-in ballots under AS 15.15.360(d).

(d) This section does not apply to the counting of federal write-in absentee ballots submitted under 42 U.S.C. 1973ff.

*** Sec. 3.** AS 15.15.360(a)(9), 15.15.360(a)(10), 15.15.360(a)(11), and 15.15.360(a)(12) are repealed.

Intent of law will be a good measuring stick

Joe Miller left a number of things in the wake of his failed bid to unseat Sen. Lisa Murkowski, like divisions in the Republican Party and a highlighted need to examine state election law concerning write-in ballots.

Miller's bid for the Senate and Murkowski's successful write-in campaign exposed the vagueness of some election laws, such as exactly what counts as a write-in vote. State law says a person has to fill in the bubble next to the write-in option and then write in the candidate's name.

Whether that means the name needs to be spelled correctly wound up being a topic that wasn't settled until the state's Supreme Court weighed in.

En route to the Supreme Court's ruling, a federal judge described Alaska's laws on the topic as "poorly drafted."

"Wisdom would suggest that the Alaska Legislature act to clarify it to avoid similar disputes in the future," U.S. District Court Ralph Beistline wrote in a decision dismissing Miller's case.

The Supreme Court's decision that turned against Miller was based mainly on prior Supreme Court decisions, which held that a voter's intent was paramount and that minor misspelling shouldn't stand in the way of that.

But there's a difference between having something written in statute and having something addressed in court decisions.

For one thing, a statute in a law book carries greater weight. A new court can overturn an old court's ruling, but to change a statute requires the Legislature to act.

For another, leaving the courts to decide something as important as what constitutes a legal vote leaves the state open to further lengthy and expensive court challenges.

We were always puzzled by why Miller chose to contest the election's results long after basic math suggested the battle was lost: Even if all of the ballots Miller had contested were thrown out, Murkowski still had enough votes to win handily.

But we don't fault Miller for asking the courts to weigh in on the question. Supreme Court decisions are generally based on a set of facts specific to each case. The facts of Miller's case surely differed from the cases that led to the relevant court precedents. So it makes sense, then, that he would at least attempt to see if the cases leading to the precedents establishing voter intent as the standard resembled his enough that those precedents also applied to his case. The courts are the proper venue for that.

But the challenge didn't come cheap. The court case cost the state more than $100,000. And the state has said that Miller will get a bill for part of that total.

Speaking before the state Senate, Sen. Linda Menard referred to the court cases that came in the wake of the November 2010 U.S. Senate election as a debacle.

We agree and hope that Senate Bill 31, of which Menard is a co-sponsor, will allow the state to avoid similar debacles in the future. The bill states that "the election board shall disregard any abbreviation,

misspelling or other minor variation in the form of the name of a candidate."

Who is to say whether this language would have been enough to satisfy Miller or whether he would have sought out another avenue to challenge the election's results had such language been in place last November.

Still, we hope SB 31 passes because as Beistline said, state law — and Alaska voters — can only benefit from less ambiguity.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **SB31**
() Publish Date

Identifier (file name) SB031-OOG-DOE-1-23-11
Title: "An Act relating to the counting of write-in votes"
Sponsor: Senators Thomas, French, Menard, Wielechowski
Requester: (S) STA

Dept. Affected: Office of the Governor
Appropriation: Elections
Allocation: Elections
OMB Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Prepared by: Gail Fenumiai, Director — Phone 465-2644
Division: Division of Elections — Date/Time 1/23/11, 10:18pm
Approved by: Linda J. Perez, Administrative Director — Date 1/23/2011
Office of the Governor

(Revised 12/29/2010 OMB)

ALASKA STATE LEGISLATURE

SENATOR JOE THOMAS

Senate Bill 31:
An Act relating to the counting of write-in votes.

Sponsor Statement

"We start with the bedrock principle that the right of the citizens to cast their ballot and thus participate in the selection of those who control their government is one of the fundamental prerogatives of citizenship."

- Alaska Supreme Court, (*Miller v. Treadwell)*

Last fall, Alaskans reelected Lisa Murkowski to the United States Senate as a write-in candidate with nearly 100,000 votes statewide, something not witnessed by our nation in over fifty years. Because of the unique nature of write-in votes and confusion in state statute there was substantial debate over the validity of nearly 12,000 ballots. In the suit that followed, (*Miller v. Treadwell)*, Joe Miller argued that these ballots should not be counted because the name written was not *identical* to the way Senator Murkowski's name appeared on her declaration of candidacy. **Superior Court Judge William Carey and the Alaska Supreme Court both ruled against this argument, finding that judging the validity of a ballot based on the intent of the voter is paramount.**

Much of this case centered on the interpretation of state statute regarding the counting of ballots. Each court, in their findings, including Federal District Judge Ralph Bieistline, found that AS 15.15.360 was badly worded and left open for legitimate debate. **Senate Bill 31 looks to address this language by inserting a section that would place the intention of the voter above minor variations, mismarks or abbreviations.**

Senate Bill 31 follows on over fifty years of consistent precedent in support of a voter's intent and enfranchisement. In strengthening this statute by inserting federally recognized language from the Uniformed and Overseas Citizens Absentee Voting Act, **SB 31 will reduce potential future litigation while strengthening the public's perception of Alaska's democratic process.**

I urge you to join me in supporting Senate Bill 31.

January – May: State Capitol – Juneau, Alaska 99801 – (907) 465-2327 – 1 (800) 336-7383 – Fax (907) 465-5241
June – December: 1292 Sadler Way Ste 203 – Fairbanks, Alaska 99701 – (907) 456-8161 – Fax (907) 456-8163
Senator.Joe.Thomas@legis.state.ak.us

Quotes of significance to Senate Bill 31 from the 2010 United States Senate Race Court Findings

"AS 15.15.360(a)(11) may not be well written, and it is clearly subject to different interpretations...AS 15.15.360, in general, is terse and somewhat unclear in comparison to the other state statutues. The statute, as Miller reveals, does lack the express language that most states have adopted which permits minor misspellings and errors." - Miller v. Campbell, pg. 15 Superior Court Judge William Carey

"While the issue may be moot, the public interest exception applies...this scenario is certainly susceptible to repetition any time a major write in effort for election to a public office in Alaska occurs." - Miller v. Campbell, pg. 8 Superior Court Judge William Carey

"We start with the bedrock principle that "the right of the citizens to cast their ballot and thus participate in the selection of those who control their government is one of the fundamental prerogatives of citizenship." - Alaska Supreme Court Miller v. Treadwell pg. 3

"In light of our strong and consistently applied policy of construing statutes in order to effectuate voter intent, we hold that abbreviations, misspellings or other minor variations in the form of the name of a candidate will be disregarded in determining the validity of the ballot, so long as the intention of the voter can be ascertained." - Alaska Supreme Court Miller v. Treadwell pg. 6

"Our interpretation of AS 15.15.360...is also consistent with the federally mandated standard for counting write in votes for those voters living or serving in uniform overseas. The Uniformed and Overseas citizens Absentee Voting Act provides that in counting the ballot of a uniformed voter or other voter who is overseas "any abbreviation, misspelling, or other minor variation in the form of the name of a candidate or political party shall be disregarded in determining the validity of the ballot if the intention of the voter can be ascertained." - Alaska Supreme Court Milier v. Treadwell pg. 7

"The Alaska Supreme Court did not make a finding clearly contrary to the face of the statute and its findings were entirely consistent with the State's past practices of making voter intent a priority. This is not to say that Miller's technical arguments are frivolous, for it is easy to understand his view as to the proper interpretation of AS 15.15.360 (a)(11). But it is just as easy to accept the interpretation given by the Alaska Supreme Court. What we have before us is a poorly drafted state statute. Wisdom would suggest that the Alaska Legislature act to clarify it to avoid similar disputes in the future." – Federal District Court Judge Ralph Bieistline pg. 7

LEGISLATIVE RESEARCH SERVICES

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State Capitol, Juneau, AK 99801

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Memorandum

TO: Senator Joe Thomas
FROM: Susan Warner, Legislative Analyst
DATE: January 21, 2011
RE: Legal History of Counting Write-in Votes in Alaska
LRS Report 11.113

You asked about the history in Alaska of write-in vote counting. You were particularly interested in legal precedents, and you asked for copies of pertinent decisions.

Within certain parameters defined by the U.S. Constitution, states have the authority to make their own election laws, and most states allow voters to write in the name of a candidate who is not listed on the ballot. Legal challenges occur most often in close races; courts then attempt to balance the constitutional right of citizens to elect the person of their choice against state laws that are designed to ensure efficient and orderly elections, among other things. The Alaska Supreme Court has consistently held that the right of citizens to select their government representatives is a fundamental prerogative of citizenship and should not be impaired or destroyed by "strained" statutory constructions.[1] As such, the Court in the most recent case (*Miller v. Treadwell,* 2010) held as follows:

> Voter intent is paramount, and any misspelling, abbreviation, or other minor variation in the form of the candidate's name on a write-in ballot does not invalidate a ballot so long as the intention of the voter can be ascertained.[2]

Alaska Voting Law

As you know, Alaska law does not allow write-in voting during primary elections, but provisions must be made for write-in voting on general election ballots. Alaska's rules for counting write-in ballots specify that a vote for a write-in candidate "shall be counted" if the oval is filled in and if the candidate's last name, or the candidate's name as it appears on the declaration of candidacy, is written in the space provided.[3] The law further specifies that the rules on counting ballots are, without exception, mandatory.

Miller v. Treadwell

Voter intent prevailed in litigation over the counting of write-in ballots in Alaska's 2010 U.S. Senate race. Joe Miller, the Republican senate candidate on the general ballot, argued that write-in votes for his opponent should not have been counted unless the candidate's name was spelled flawlessly. The Alaska Supreme Court ruled against Mr. Miller in *Miller v. Treadwell,* and the Court opinion begins with powerful language in support of voter enfranchisement. The Court proclaims that a citizen's right to vote is *of profound importance*; *key to participatory democracy;* and a *polar, cardinal*, and *bedrock principle*. The Court also notes that such longstanding principles have been consistently applied to election issues in Alaska over the past 50 years.

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[1] *Carr v. Thomas,* 586 P.2d 622, 627(1978). We provide this document as Attachment A.

[2] *Miller v. Treadwell,* Alaska Supreme Court No. S-14112, December 22, 2010. Please note the recitation of pertinent case history entitled "Longstanding Alaska Election Principles" on page 2 of that decision (Attachment B).

[3] 15.15.360(a)(11).

Mr. Miller had argued that Alaska statutory language excludes any vote that is not spelled perfectly. The Superior Court held that if the legislature intended a candidate's name to be spelled perfectly, legislators would have used words like *exactly*, *precisely*, or *perfectly*.[4] The Supreme Court agreed and held that Alaska's statutory language is meant to be *inclusive* rather than *exclusive*:

> It is designed to ensure that ballots are counted, not excluded. And this inclusiveness is consistent with the overarching purpose of an election: to ascertain the public will. . . . Voter intent is paramount, and any misspelling, abbreviation, or other minor variation in the form of the candidate's name on a write-in ballot does not invalidate a ballot so long as the intention of the voter can be ascertained.

Additionally, the Court noted that Alaskan voters arrive at their polling places with a variety of backgrounds and capabilities, including some being raised without English as their first language, and such issues should not take away a person's right to decide which candidate to elect:

> We must construe the statute's language in light of the purpose of preserving a voter's choice rather than ignoring it.

Legal Precedents

The decision reached in *Miller v. Treadwell* reflects the tendency for all U.S. courts to favor voter intent over ambiguous statutory language, but election scholar Richard Hasen asserts that the Alaska Supreme Court—even before *Miller*—appears to have gone the furthest in giving emphasis to voter intent.[5] Alaska's 1978 precedent-setting case, *Carr v. Thomas,* involved the question of counting certain ballots, and Alaska's highest court declared that the state would need "clear and unmistakable" statutory language to take away a citizen's right to have his or her voted counted.

Alaska courts have consistently emphasized the importance of voter intent. The decisions for the following Alaska cases are attached to this document:

- *Willis v. Thomas*, 600 P.2d 1079 (1979). The Alaska Supreme Court depended on a determination of voter intent in ruling on the results of a recount of ballots in Senate District F (Attachment D).

- *Fischer v. Stout*, 741 P.2d 217 (1987). The Alaska Supreme Court ruled on whether certain votes or classes of votes were properly counted or rejected in the 1986 race for Senate District H. The Court held that ballots marked with a pen rather than punched still showed clear voter intent and should be counted (Attachment E).

- *Finkelstein v. Stout*, 774 P.2d 786 (1989). The Alaska Supreme Court ruled on a ballot recount for Seat A in House District 13. The Court considered voter intent with regard to questioned signatures on absentee ballots (Attachment F).

- *Edgmon v. Moses*, 152 P.3d 1154 (2007). The Alaska Supreme Court ruled on the results of a recount in the District 37 Democratic primary. Considering ballot markings, the Court found that marks clearly intended as votes should be counted (Attachment G).

[4] *Joe Miller v. Lieutenant Governor Craig Campbell*, Case No. IJU-10-1007CI, Memorandum of Decision and Order on Motion for Summary Judgment and Cross Motions, December 10, 2010. We provide this document as Attachment C.

[5] Richard L. Hasen, "The Democracy Canon," *Stanford Law Review*, Vol. 62, 2009, p. 87.

Addressing Irregular Write-in Votes in Other States

Although Alaska statute does not address the inevitable misspellings and illegibility of written-in names, many states attempt to clarify how such votes will be counted, and these rules always give primacy to voter intent. There are variations among states, but this directive, by its very nature, is subjective and gives vote-counters the authority to determine who a voter intended to elect. Here are examples from four states:

- California accepts a "reasonable facsimile" of a write-in candidate's name (Cal. Elec. Code § 15342).
- Nebraska will count a write-in vote without the first name of the candidate, and the write-in name must be "reasonably close to the proper spelling" (Neb. Rev. Stat. § 32-615).
- Delaware allows for a "misspelled or minor variation" of a write-in candidate (Del. Code Ann. Title 15, § 4972 (b)(8)).
- Washington election officials are required to "exercise all reasonable efforts to determine the voter's intent (WAC 434-262-160).

Some states provide further guidance on counting irregular write-in votes. Washington State has an extensive, pictorial booklet on how election officials are expected to count nearly every deviation from what might be considered a standard marking, including samples of acceptable and unacceptable write-in votes. Attachment H is the portion of the booklet that deals with write-in votes, and the entire document can be viewed at ***http://www.sos.wa.gov/_assets/elections/2009StatewideStandardsonWhatisaVote.pdf***.

We hope this is helpful. If you have questions or need additional information, please let us know.

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Anchorage Daily News

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Our view: No doubt

State smart to review election, need for any changes in law

(01/03/11 19:17:26)

When federal Judge Ralph Beistline tossed Joe Miller's challenge to Alaska's U.S. Senate election, he granted that Alaska's law could be clearer about the primacy of voter intent.

He was right.

The requirement that a write-in candidate's name be written as it appears in its state-qualified form led to the arguments over spelling and how close voters had to be.

In addition, the state's decision to provide, at voters' request, lists of qualified write-in candidates prompted unsuccessful suits by both the Republican and Democratic parties.

While we disagreed with the Division of Elections on the latter point, state courts upheld their call. And the division ran a straight, fair election.

Lawmakers, however, should revisit the law to make clear that voter intent, not spelling, is the key test in deciding which write-in votes count, and to decide whether write-in lists either will or won't be provided at polling places in the future.

The division did well by Alaskans. But clarity in the law may help keep future elections out of court.

BOTTOM LINE: Election law should leave no room for doubt.

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Politics

Print

No 'spelling bee' election in Alaska

Ruth Walker | Christian Science Monitor | Dec 7, 2010

The 2010 elections, the gift that keeps on giving, have imparted new meaning to the phrase "all over but the shouting."

At this writing, Lisa Murkowski looks likely to be headed back to Washington as Alaska's senior senator and into the history books as the first candidate since Strom Thurmond in 1954 to win election to the Senate as a write-in. Her victory, if confirmed, as is now expected, will turn in part on a decision to honor ballots from voters who merely approximated the correct spelling of her name.

How should we feel about that? Are standards slipping irretrievably in the republic?

Her Democratic opponent has conceded defeat. But her Republican opponent, Joe Miller, whose own name was easier to spell and was, moreover, actually on the ballot, has had other ideas.

His campaign has challenged all ballots that fall short orthographically. State authorities, on the other hand, have been counting as valid all those who came close to spelling "Murkowski" right.

Alaskan law requires electoral officials to take into account "voter intent" when counting write-in votes. This standard is common across the country, it turns out. The Los Angeles Times quoted Richard Winger, editor of the election law journal Ballot Access News: "I am not aware of any state that says write-ins can't be counted unless the spelling is perfect."

As a copy editor, I'm with Mr. Miller. What kind of democracy can't spell its leaders' names right? As a student of language, though, I understand that spoken language came first, and that the written form of any word is an approximation of the spoken form; it's not the other way around. After all, there's a reason we call it "language" - from the Latin word for "tongue" - and not "scribblage," or something like that.

The case for a more generous interpretation of what counts as a valid vote for a write-in candidate starts with this primacy of spoken language.

Much of what we recognize as democracy began with spoken language, conversations, and debates in halls of assembly and the public square. Democracy was then furthered by written communication, especially after the development of the printing press.

More recently, speech has gained a boost from new forms of communication - from FDR's fireside chats to YouTube - that have let us hear, and hear repeatedly, what we otherwise might only have read.

Of course we need both modes: Writing - "print" - allows for rereading, for reflection and the consideration of nuance. Speech, especially live, in-person speech, provides immediacy and the expression of feelings.

print

Fix the law: Write-in ballot statute needs repair by Legislature

12.30.10 - 11:53 pm
Editorial

Federal Judge Ralph Beistline wrote in his Tuesday ruling dismissing Joe Miller's amended federal lawsuit in the U.S. Senate race that he can understand Mr. Miller's viewpoint regarding the wording of state election law.

Judge Beistline also said he can easily see the state's view when it comes to the law governing how a write-in candidate's name must appear on the ballot in order to be considered a valid vote.

The judge ultimately deferred to the Alaska Supreme Court, which ruled in Mr. Miller's state lawsuit that the name of Sen. Lisa Murkowski didn't have to be spelled correctly. Mr. Miller argued, in both state and federal court, that Alaska law required a precise spelling.

But Judge Beistline found the Alaska Supreme Court "did not make a finding clearly contrary to the face of the statute and its findings were entirely consistent with the state's past practice of making voter intent a priority."

But the judge, in his ruling, pointedly noted a problem:

"This is not to say that Miller's technical arguments are frivolous, for it is easy to understand his view …

"What we have before us is a poorly drafted state statute. Wisdom would suggest the Alaska Legislature act to clarify it to avoid similar disputes in the future. For now we have to work with what we have and that is what the Alaska Supreme Court has done."

Judge Beistline's message is clear and sound: The Legislature should clarify the law. It should do so this coming session while the subject is fresh.

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Supreme Court takes reasonable approach in election challenge

by Dermot Cole / cole@newsminer.com

Dec 22, 2010 | 757 views | 0 | | 5 | |

FAIRBANKS — The Alaska Supreme Court said it relied on principles applied consistently during the past 50 years to reject Joe Miller's court case and approve the state's approach to counting ballots.

The decision Wednesday helps clear the way for Sen. Lisa Murkowski's re-election to be certified before the next Congress. Miller may pursue a federal court fight, however.

This unanimous ruling is not surprising, given the numerous decisions the court has made in contested elections over the years. The ruling also is reasonable.

The court declared that Miller is dead wrong in claiming state law requires the names of write-in candidates be spelled correctly.

"Our prior decisions clearly hold that a voter's intention is paramount," the four justices said. "In light of our strong and consistently applied policy of construing statutes in order to effectuate voter intent, we hold that abbreviations, misspellings or other minor variations in the form of the name of a candidate will be disregarded in determining the validity of the ballot, so long as the intention of the voter can be ascertained."

The court rejected Miller's argument that anything less than his point of view, supporting correct spelling, would threaten the integrity of the election process.

"But it is Miller's interpretation of the statute that would erode the integrity of the election system, because it would result in disenfranchisement of some voters and ultimately rejection of election results that constitute the will of the people," the judges said. "We have consistently construed election statutes in favor of voter enfranchisement."

The court also found its interpretation of state law is consistent with federal and state rules allowing misspellings on the federal write-in absentee ballot for military voters and civilians overseas.

"Miller's proposed construction of the statute would require us to impose a different, and more rigorous, voting standard on domestic Alaskans than on those who are serving in the military or living abroad," the court said.

Other states use the same approach as Alaska in counting ballots and "we see no basis for Miller to argue that the application of the standard in this election violates equal protection under either the state or federal constitution."

The portion of state law Miller said requires perfect spelling really applies to pseudonyms, the court said.

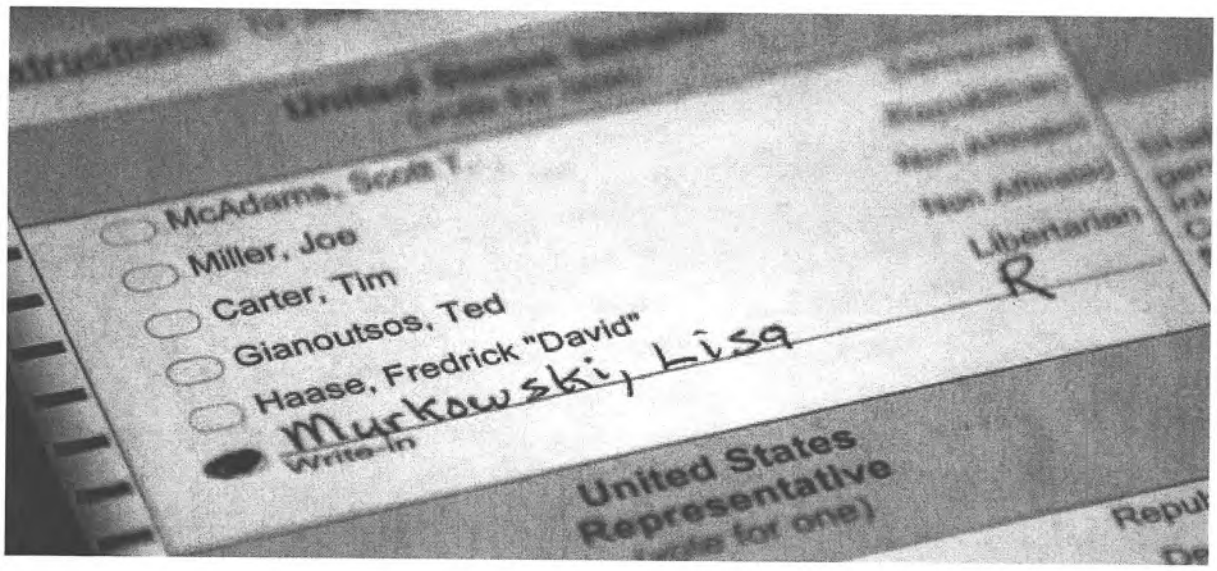
"The 'nickname' field allows a candidate to ensure that his or her pseudonym 'appears on the write-in declaration of candidacy' so that the write-in votes listing that pseudonym will count. Thus, the word 'appears' relates to a pseudonym's possible presence on the ballot, not the particular form of the vote and demonstrates that the statute is inclusive — it is designed to include, rather than exclude, votes."

***

GIVING THANKS: The Mariutto family wants to pass along thanks to the people of Fairbanks for prayers and support for Sabrina, the Monroe High School student who has been stricken with cancer.

Fabio Mariutto, her father, said he is grateful for the more than $17,000 raised at a spaghetti feed fundraiser Dec. 12 and for the daily notes, cards, prayers and "all the other little but important things necessary for life."

"For Sabrina's friends, thank you for being there for her despite the distance of thousands of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Haase, Fredrick "David"
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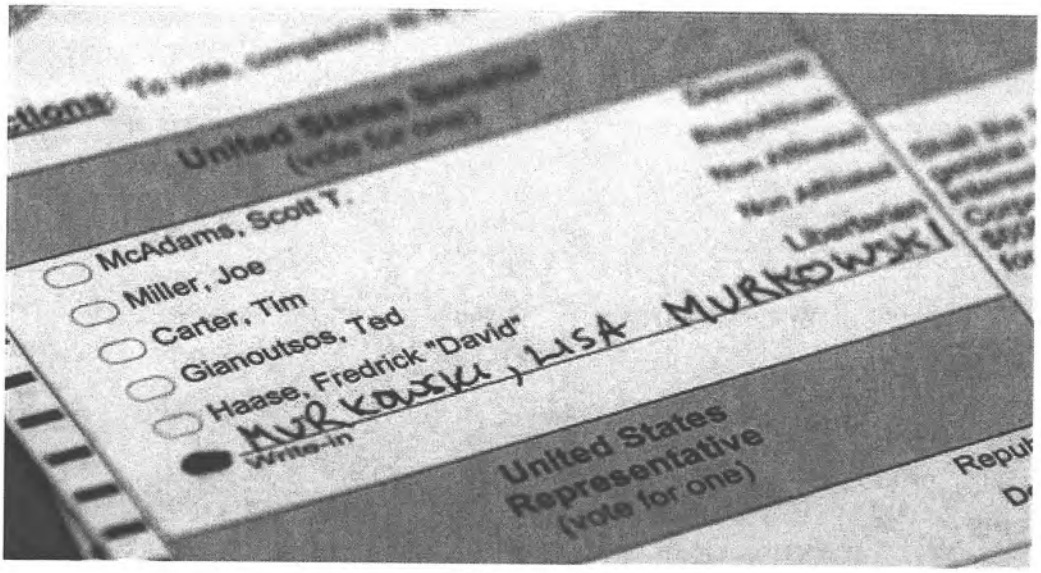
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Haase, Fredrick "David"
MURKOWSKI LISA MURKOWSKI
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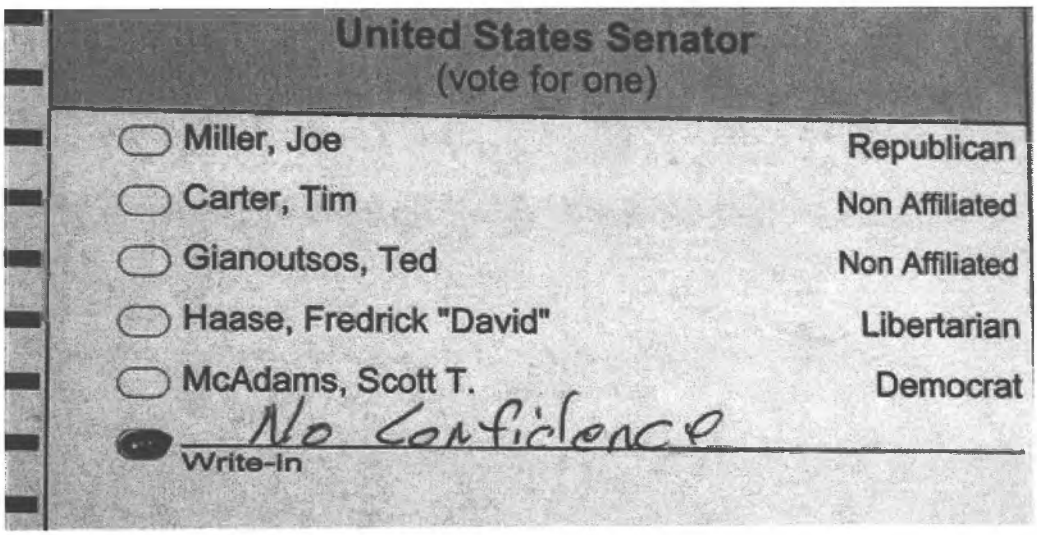
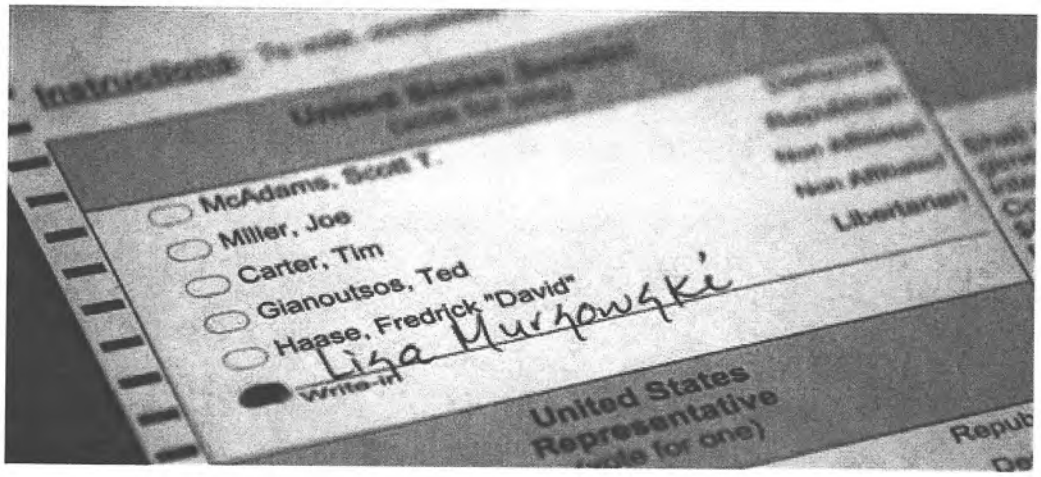


United States Senator
(vote for one)

○ Miller, Joe	Republican
○ Carter, Tim	Non Affiliated
○ Gianoutsos, Ted	Non Affiliated
○ Haase, Fredrick "David"	Libertarian
○ McAdams, Scott T.	Democrat
● No Confidence Write-in	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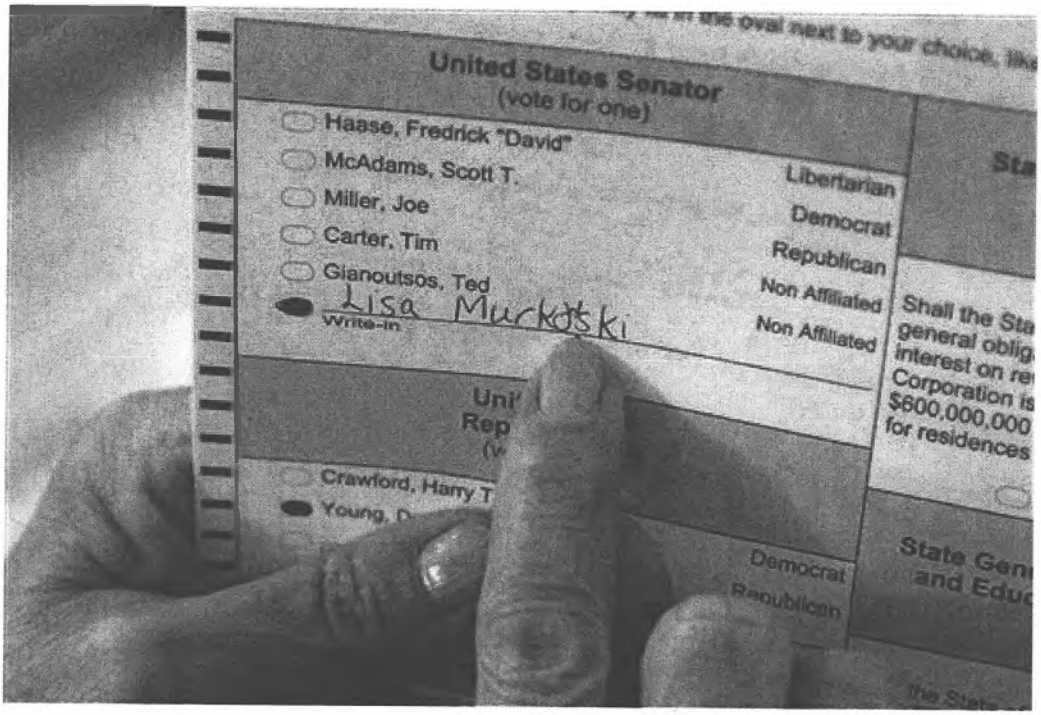
United States Senator
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Haase, Fredrick "David"
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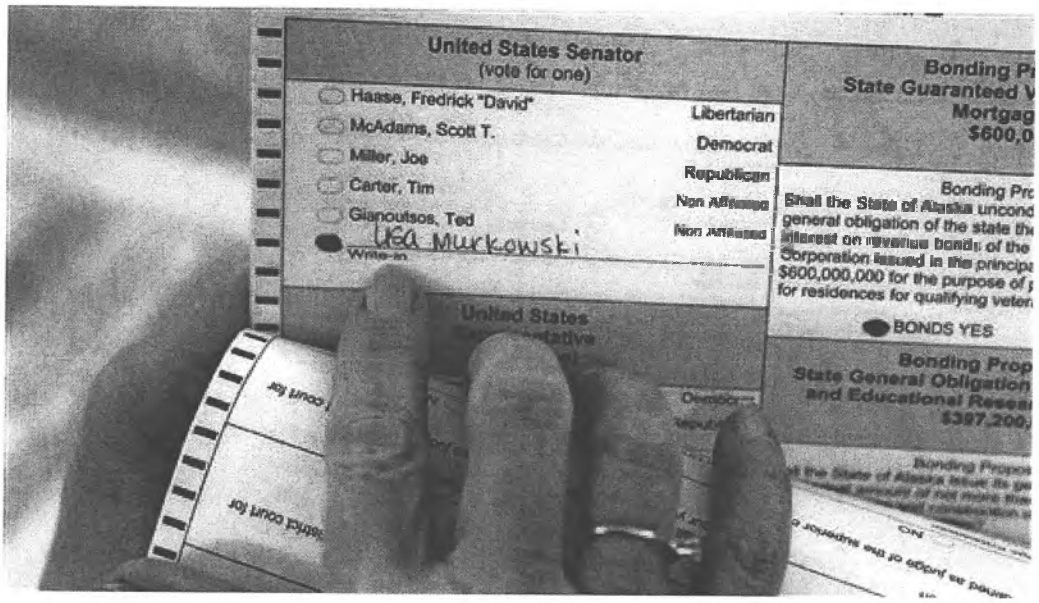
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McAdams, Scott T.
Miller, Joe
Carter, Tim
Gianoutsos, Ted
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ALASKA FEDERATION
OF NATIVES

Memorandum

To: Grier Hopkins, Aide to Senator Joe Thomas

From: Adrian LeCornu, Special Assistant AFN

Date: 1/26/2011

Re: Testimony in regards to SB 31

Attached to this is the Testimony of Ralph Anderson, Co-Chair of Alaska Federation of Natives. Alaska Federation of Natives is the largest Alaska Native group within the state of Alaska, representing over 190 villages and tribal councils, 11 non-profits and 12 of the largest corporations in the state.

While we do not take a position on SB 31, we do support the language within the bill and believe that it strikes the right tone. If this bill were to be merged with others or amended, we would like a chance to review the resulting bill to insure that the tone of this bill is not lost.

We would like to submit the attached document for the Alaska Senate State Affairs committee's consideration. We thank you for taking up this issue.

1577 C Street, Suite 300 • Anchorage, Alaska 99501 • tel 907.274.3611 • fax 907.276.7989 • www.nativefederation.org

ALASKA FEDERATION
OF NATIVES

Testimony of
Ralph Andersen, Co-Chair
Board of Directors
Alaska Federation of Natives

TESTMONY before State Affairs Committee, Senate Bill 31, 27th Alaska Legislature

For the record, my name is Ralph Andersen. I am Co-Chair of the Alaska Federation of Natives' Board of Directors. AFN is the largest and oldest statewide Alaska Native organization in Alaska. Its membership includes the 13 regional Native corporations, 12 regional non-profits that contract and run federal and state programs and over 200 villages and tribes throughout the State. Our organization represents about 100,000 Alaska Natives from all around this state.

I would like to preface my comments today by noting that the AFN Board has taken no formal position on this bill. With that being said, we do believe that a bill that addresses our concerns and the concerns of many Alaska residents should be moved along and passed. The events that prompted this bill were historic and are now well documented, not only politically, but also legally with the action of the Alaska Supreme Court.

Our belief has always been and will continue to be the enfranchisement of those we represent. We would hope that the committee would consider the demographics in Alaska, and especially those in rural Alaska. There are many diverse cultures in this State and many Alaska residents whose first language is not English. In parts of rural Alaska one primary Alaska Native language is spoken with a rudimentary knowledge and use of English. Members of the Committee should also consider the population dynamics of their own districts. In Anchorage, for example, you could find over 87 different languages spoken in homes, and not everyone has achieved total fluency of the English language.[i]

There are also questions around education, and the ability to read and write in English. Reading and writing for some is challenging, not to mention the additional challenges faced by those with learning disabilities. We want to avoid creating a law that disenfranchises people because of their education, being impaired or handicapped, and as a result unintentionally or mistakenly placing the wrong vote.

With these considerations, I am certain you understand that memorizing the exact correct spelling of candidates' names may be difficult, even for those with a good education. We support the language on Page 2, Line 27-29 of the bill that "In counting votes for a write-in candidate, the election board shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained." We believe this language is affirmative on the rights of the voter. I thank you for allowing these comments to be included for the record.

---

[i] Anchorage School District

JuneauEmpire.com

Legislative changes would fix write-in problems, shake up partisan primary system

Sunday, January 23, 2011

Story last updated at 1/22/2011 - 11:26 pm

Legislative changes would fix write-in problems, shake up partisan primary system
By Ben Brown | For the Juneau Empire

The 2010 election cycle in Alaska was unlike anything ever seen before. Things in both the primary and general elections directly resulted from the way Alaska statutes governing elections are written, from the outcome of the primary election to the ultimate determination of general election results. Ambiguity in the Alaska Elections Act is a bad thing, creating controversy where it need not exist.

Rep. Tammie Wilson, R-North Pole, has introduced House Bill 70, and Sens. Joe Thomas (D-Fairbanks), Hollis French (D-Anchorage), Linda Menard (R-Wasilla), and Bill Wielechowski (D-Anchorage) Senate Bill 31, to add the following mandate to the list of rules about how ballots are counted:

"In counting votes for a write-in candidate, the election board shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained."

This language follows what the Alaska Supreme Court has set as a fair and just standard for counting Alaskans' votes, erring on a voter's side when he or she has been unclear, but not so unclear as to have one's vote not count at all. This is inherently fair and reasonable, and should become law. I haven't heard what the total cost for the Division of Elections' work in conducting the write-in count was yet, but it will be a large sum of money, one that had to be spent because the ballots had to be counted. While any candidate had the right to challenge the legality and integrity of the methods put forward by the Division of Elections to count write-in ballots, the cost to all parties of litigating that challenge would have been completely unnecessary had the statute been clear. Yes, there was ample general precedent for discerning voter intent, but case law did not provide direct guidance on spelling a write-in candidate's name.

SB 31 will be heard Tuesday morning in the Senate State Affairs Committee, after which it will move to the Judiciary Committee. The positive fiscal impact of this bill may not be directly considered at any of these hearings, but it nevertheless one more reason it should pass. Clearing up this issue will save a lot of time and money. It is also an issue on which both sides of the aisle appear to agree, so I expect quick passage.

A much more complex and far-reaching piece of elections legislation is HB 77, introduced by Reps. Max Gruenberg (D-Anchorage), Sharon Cissna (D-Anchorage), and Scott Kawasaki (D-Fairbanks). HB 77 would make many significant changes to many components of the election

laws, as evidenced by a simple reading of the title:

"An Act establishing a top two nonpartisan blanket primary election system for elective state executive and state and national legislative offices; changing appointment procedures relating to precinct watchers and members of precinct election boards election district absentee and questioned ballot counting boards, and the Alaska Public Offices Commission; requiring certain written notices to appear in election pamphlets and polling places; relating to declarations of candidacy and letters of intent; and amending the definition of 'political party.'"

HB 77 is 21 pages long, and will require much explanation as it moves through the legislative process. Easily the biggest change HB 77 would make — if ever enacted — would be the elimination of the closed Republican primary and a creation of a single, non-partisan top-two winner primary election. Right now the Division of Elections by law is to create a separate ballot for each political party but only the Republican party has this done. All other candidates are on a single other ballot, and members of other parties can only vote on this ballot. HB 77 would not only place Republicans, Democrats, Greens, Libertarians, and others on the same ballot, but would advance only the first- and second-place winners regardless of party. Two members of the same party could move forward to the general election. This is a vast change from our current system as there would never be more than two candidates in the general election (unless, of course, there were write-in candidates) and because the primary election would no longer determine the nominee of a political party.

Last August's Republican primary election turned out the way it did in no small part because it was a closed primary, and many voters were not able to vote for the candidate who ultimately won the U.S. Senate race. It would be possible to return to a unified primary election but not eliminate the process of moving a candidate from each party on to the general. It will be interesting to see how HB 77's more far-reaching approach is received by the Legislature, in addition to the myriad of other changes it would make.

If we don't fix elections law problems that exist, we have no one but ourselves to blame when costly problems flare up in the future. I am grateful that, while the Legislature is busy writing budgets and considering a universe of other issues, attention is being paid to crucial elections issues too.

• Brown is an attorney who lives in Juneau.

About the Disability Law Center

The Disability Law Center of Alaska is a private non-profit, consumer-directed organization incorporated in 1977, and designated as the Statewide Protection and Advocacy agency to promote the legal and human rights of individuals with physical and/or mental disabilities.

Consumers may access our educational, administrative, and legal services through our four offices, located in Anchorage, Juneau, Bethel and Fairbanks. Services are prioritized through a public input process that occurs annually.

Our advocacy is geared toward improving the lives of individuals and toward creating systemic change for all Alaskans with disabilities in six life domains: health care, individual and community supports, education, transportation, employment and housing.

Disability Law Center Offices

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3330 Arctic Blvd., Suite 103
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Bethel
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Division of Elections

Director's Office
Phone (907) 465-4611
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Court Plaza Building
240 Main Street, 4th Floor
Juneau, AK 99801

www.gov.state.ak.us/ltgov/elections

Protection and Advocacy for Voting Access

DISABILITY LAW CENTER OF ALASKA

DISABILITY LAW CENTER
OF ALASKA

3330 ARCTIC BLVD., SUITE 103
ANCHORAGE, ALASKA 99503

1(800) 478-1234
1(907) 565-1002

What is HAVA?

On October 29, 2002, the Help America Vote Act (HAVA) was signed into law. This law requires states to establish, expand and improve access to voting areas and increase voter participation by individuals with disabilities.

HAVA monies are used by states in collaboration with local governments to enhance accessibility to polling places for individuals with disabilities; provide outreach to the disability community about polling accessibility; and to train poll workers, elections officials and volunteers on methods to promote access and increase voter participation for individuals with disabilities.

What is PAVA?

HAVA has provided specific funds to Protection and Advocacy Systems to ensure that people with disabilities are able to fully participate in the voting process. With this money, Disability Law Center created PAVA – *Protection and Advocacy for Voter Access*. Access includes registering to vote, casting a vote, and accessing polling places. These funds allow PAVA to:

- Develop a disability awareness training for election officials to focus on how to support a person with a disability to vote privately and independently.
- Provide assistance to election officials in surveying polling places and recommending changes to achieve accessibility.
- Develop informational material for people with disabilities on rights in the voting process. This material will be used to educate people with disabilities about their voting rights.

Requirements to Vote

A person may register to vote if that person:

- Is a citizen of the United States
- Is at least 18 years old or will be 18 within 90 days of registering to vote
- Is a resident of Alaska
- Is not a convicted felon, unless unconditionally discharged
- Has not been deemed incompetent to vote
- Is not registered to vote in another state

A person is eligible to vote if that person:

- Is a citizen of the United States
- Is 18 years of age or older
- Has registered to vote in the proper election jurisdiction (neighborhood) at least 30 days prior to the election
- Is not a convicted felon

Sec. 15.15.360. Rules for counting ballots.

(a) The election board shall count ballots according to the following rules:

(1) A voter may mark a ballot only by filling in, making "X" marks, diagonal, horizontal, or vertical marks, solid marks, stars, circles, asterisks, checks, or plus signs that are clearly spaced in the oval opposite the name of the candidate, proposition, or question that the voter desires to designate.

(2) A failure to properly mark a ballot as to one or more candidates does not itself invalidate the entire ballot.

(3) If a voter marks fewer names than there are persons to be elected to the office, a vote shall be counted for each candidate properly marked.

(4) If a voter marks more names than there are persons to be elected to the office, the votes for candidates for that office may not be counted.

(5) The mark specified in (1) of this subsection shall be counted only if it is substantially inside the oval provided, or touching the oval so as to indicate clearly that the voter intended the particular oval to be designated.

(6) Improper marks on the ballot may not be counted and do not invalidate marks for candidates properly made.

(7) An erasure or correction invalidates only that section of the ballot in which it appears.

(8) A vote marked for the candidate for President or Vice-President of the United States is considered and counted as a vote for the election of the presidential electors.

(9) Write-in votes are not invalidated by writing in the name of a candidate whose name is printed on the ballot unless the election board determines, on the basis of other evidence, that the ballot was so marked for the purpose of identifying the ballot.

(10) In order to vote for a write-in candidate, the voter must write in the candidate's name in the space provided and fill in the oval opposite the candidate's name in accordance with (1) of this subsection.

(11) A vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that candidate and if the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate is written in the space provided.

(12) If the write-in vote is for governor and lieutenant governor, the vote shall be counted if the oval is filled in and the names, as they appear on the write-in declaration of candidacy, of the candidates for governor and lieutenant governor or the last names of the candidates for governor and lieutenant governor, or the name, as it appears on the write-in declaration of candidacy, of the candidate for governor or the last name of the candidate for governor is written in the space provided.

(b) The rules set out in this section are mandatory and there are no exceptions to them. A ballot may not be counted unless marked in compliance with these rules.

(c) [Repealed, Sec. 24 ch 113 SLA 2003].

History -

(Sec. 3.36 ch 83 SLA 1960; am Sec. 10 - 12 ch 125 SLA 1962; am Sec. 8 - 10 ch 80 SLA 1963; am Sec. 1 ch 136 SLA 1966; am Sec. 24 ch 69 SLA 1970; am Sec. 26 ch 116 SLA 1972; am Sec. 65 ch 100 SLA 1980; am Sec. 40 ch 82 SLA 2000; am Sec. 14, 24 ch 113 SLA 2003)

Decisions -

Completely filled-in boxes are to be counted. Hickel v. Thomas, 588 P.2d 273 (Alaska 1978).

Punch-card ballots marked entirely by pen instead of punched are valid because they provide clear evidence of the voters' intent. Fischer v. Stout, 741 P.2d 217 (Alaska 1987).

Boxes completely filled in over prior mark are to be counted. Hickel v. Thomas, 588 P.2d 273 (Alaska 1978).

Ballots did not contain overvotes. - Two ballots were improperly categorized as containing overvotes where the voters had completely shaded the ovals for the candidate and all other races on the ballot, there was only a trace touching the edge of the oval next to the opponent's name, and thus, the voters had clearly intended to vote for only one candidate. Edgmon v. State, 152 P.3d 1154 (Alaska 2007).

Ballot was improperly categorized as containing overvotes where the voter had placed an "X" in the oval next to a candidate's name, the "X" was consistent with the votes cast on the remainder of the ballot, and thus, the line striking through the opponent's name and the oval next to it was not a vote for that candidate. Edgmon v. State, 152 P.3d 1154 (Alaska 2007).

Construction of "overvotes". - Reading subsections (a)(1) and (a)(5) of this section together, an overvote occurs if the voter has voted for two candidates with marks as defined by

subsection (a)(1) that clearly indicate the voter's intent to vote for more than one candidate. Edgmon v. State, 152 P.3d 1154 (Alaska 2007).

Use of punch-card machine not required. - Neither this section nor former AS 15.20.730 (rules for counting punch-card ballots) require voters to use a punch-card machine if one is available, but only specify the manner of counting properly punched and hand-marked ballots. Fischer v. Stout, 741 P.2d 217 (Alaska 1987).

Former paragraph unconstitutional. - Former paragraph of this section, which was repealed in 1970, added to the qualifications established by U.S. Const., art. I, Sec. 3, and was therefore unconstitutional. Benesch v. Miller, 446 P.2d 400 (Alaska 1968).

The over-all effect of former paragraph of this section was that of adding to the qualifications established by U.S. Const., art. I, Sec. 3, the additional qualification that in order to be a candidate at the general election, the candidate must not have been defeated in the primary election for that office. Benesch v. Miller, 446 P.2d 400 (Alaska 1968).

Collateral Refs -

Validity where candidate's surname only is written in on ballot. 86 ALR2d 1025.

Sec. 15.15.361. Stickers.

Affixing stickers on a ballot in an election to vote for a write-in candidate is prohibited.

History -

(Sec. 66 ch 100 SLA 1980; am Sec. 41 ch 82 SLA 2000)

Notice: This opinion is subject to correction before publication in the PACIFIC REPORTER. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878, e-mail corrections@appellate.courts.state.ak.us.

THE SUPREME COURT OF THE STATE OF ALASKA

JOE MILLER, Appellant, v. MEAD TREADWELL, in his official capacity as Lieutenant Governor, STATE OF ALASKA, DIVISION OF ELECTIONS, and LISA MURKOWSKI, Appellees.	Supreme Court No. S-14112 Superior Court No. 1JU-10-01007CI O P I N I O N No. 6532 – December 22, 2010
LISA MURKOWSKI, Cross-Appellant, v. JOE MILLER, MEAD TREADWELL, in his official capacity as Lieutenant Governor, STATE OF ALASKA, DIVISION OF ELECTIONS, Cross-Appellees.	Supreme Court No. S-14121

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, William B. Carey, Judge.

Appearances: Thomas V. Van Flein, Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC, Anchorage, and

Michael T. Morley, pro hac vice, Washington, D.C., for Appellant and Cross-Appellee Miller. Joanne M. Grace and Laura F. Fox, Assistant Attorneys General, Anchorage, and Richard A. Svobodny, Acting Attorney General, Juneau, for Appellees and Cross-Appellees Treadwell and State of Alaska, Division of Elections. Timothy A. McKeever and Scott M. Kendall, Holmes Weddle & Barcott, Anchorage, for Appellee and Cross-Appellant Murkowski. Thomas P. Amodio, Reeves & Amodio, LLC, Anchorage, for Amicus Curiae Alaska Federation of Natives.

Before: Carpeneti, Chief Justice, Fabe, Winfree, and Christen, Justices. [Stowers, Justice, not participating.]

PER CURIAM.

I. Introduction

This case presents several issues of constitutional and statutory interpretation that arise from the count of votes following the 2010 election for one of Alaska's two seats in the United States Senate. Two of the contestants for that seat — Joe Miller, the Republican nominee, and Senator Lisa Murkowski, running as a write-in candidate — are parties to the lawsuit. Without seeking a recount, Miller filed suit in superior court challenging several decisions of the Alaska Division of Elections in counting the votes. Murkowski intervened, challenging other vote-counting decisions of the Division. Superior Court Judge William B. Carey upheld the Division's actions. Miller appeals, and Murkowski cross-appeals.

II. Longstanding Alaska Election Principles

In resolving the questions presented by the parties, we are governed by a number of longstanding principles that we have consistently applied to election issues in Alaska over the past 50 years.

We start with the bedrock principle that "[t]he right of the citizen[s] to cast [their] ballot[s] and thus participate in the selection of those who control [their] government is one of the fundamental prerogatives of citizenship."[1] The right to vote "is fundamental to our concept of democratic government."[2] "[It] encompasses the [voter's] right to express [the voter's] opinion and is a way to declare [the voter's] full membership in the political community."[3] We articulated this principle over three decades ago in *Carr v. Thomas*, recognizing the profound importance of citizens' rights to select their leaders and noting that "[c]ourts are reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own."[4] In reviewing and interpreting election statutes, we have uniformly held that "[w]here any reasonable construction of [a] statute can be found which will avoid such a result, the courts should and will favor it."[5] We have applied this principle throughout the years because we recognize that the right to vote is key to participatory democracy. Guided by this polar principle, we declared in *Edgmon v. State, Office of the Lieutenant Governor, Division of Elections* that "the voter shall not be disenfranchised because of mere mistake, but [the

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1 *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978) (quoting *Sanchez v. Bravo*, 251 S.W.2d 935, 938 (Tex. Civ. App. 1952)).

2 *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995). The United States Supreme Court recognized the principle that voting is a fundamental right, emphasizing: "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S. 98, 104 (2000).

3 *Dansereau*, 903 P.2d at 559.

4 *Carr*, 586 P.2d at 626.

5 *Id.* (quoting *Reese v. Dempsey*, 153 P.2d 127, 132 (N.M. 1944)).

voter's] intention shall prevail."[6] Most recently, in *State, Division of Elections v. Alaska Democratic Party*, we noted that "[w]e have consistently emphasized the importance of voter intent because the opportunity to freely cast [one's] ballot is fundamental."[7]

It is in light of our consistent application of these cardinal principles that we examine the issues presented in this case.

III. Voter Intent Is Paramount, And Any Misspelling, Abbreviation, Or Other Minor Variation In The Form Of The Candidate's Name On A Write-In Ballot Does Not Invalidate A Ballot So Long As The Intention Of The Voter Can Be Ascertained.

Joe Miller seeks an interpretation of election statute AS 15.15.360 that would disqualify any write-in votes that misspell the candidate's name. We do not interpret the statute to require perfection in the manner that the candidate's name is written on the ballot. Our prior decisions clearly hold that a voter's intention is paramount.[8] In light of our strong and consistently applied policy of construing statutes in order to effectuate voter intent, we hold that abbreviations, misspellings, or other minor variations in the form of the name of a candidate will be disregarded in determining the validity of the ballot, so long as the intention of the voter can be ascertained.

Miller points to language in AS 15.15.360(a)(11) providing that "[a] vote for a write-in candidate . . . shall be counted if the oval is filled in for that candidate and if the name, as it appears on the write-in declaration of candidacy, of the candidate or the

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[6] 152 P.3d 1154, 1157 (Alaska 2007) (internal citations and quotations omitted).

[7] Case No. S-14054, Order dated Oct. 29, 2010 at 3 (internal citations omitted).

[8] *Edgmon*, 152 P.3d at 1157 ("[W]e have consistently emphasized the importance of voter intent in ballot disputes.").

last name of the candidate is written in the space provided." He argues that this subsection, read in the context of other provisions of the statute, requires that a write-in candidate's name be written and spelled perfectly, even if the voter's intent to vote for a particular candidate can be readily ascertained. But when read as a whole, AS 15.15.360's purpose is inclusive, not exclusive; it is designed to ensure that ballots are counted, not excluded. And this inclusiveness is consistent with the overarching purpose of an election: "to ascertain the public will."[9]

Miller urges that only his interpretation of the statute will "preserv[e] the integrity of the electoral process as a whole." But it is Miller's interpretation of the statute that would erode the integrity of the election system, because it would result in disenfranchisement of some voters and ultimately rejection of election results that constitute the will of the people. We have consistently construed election statutes in favor of voter enfranchisement.

Turning to the language of subsection (a)(11), it is evident that it does not require exact spelling. We agree with the State that subsection (a)(11) concerns pseudonyms. The "nickname" field on the declaration of candidacy form supports this interpretation. If that field were not present, a candidate with a pseudonym might write only his or her legal name on the form, thus invalidating ballots with the candidate's pseudonym written in.[10] The "nickname" field allows a candidate to ensure that his or

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[9] *Boucher v. Bomhoff*, 495 P.2d 77, 79 (Alaska 1972) (internal quotations and citation omitted).

[10] *Compare* AS 15.15.360(11) (requiring write-in vote to include "name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate"), *with* AS 15.15.030(4) (allowing the Director, in placing names on the ballot, to "include in the candidate's name any nickname or familiar form of a proper name of the candidate").

her pseudonym "appears on the write-in declaration of candidacy"[11] so that the write-in votes listing that pseudonym will count. Thus, the word "appears" relates to a pseudonym's possible presence on the ballot, not the particular form of the vote, and demonstrates that the statute is inclusive — it is designed to include, rather than exclude, votes.

As we have recognized, "a true democracy must seek to make each citizen's vote as meaningful as every other vote to ensure the equality of all people under the law."[12] In order to ensure that each citizen's vote is as meaningful as every other vote, we must interpret the election statute to preserve a voter's clear choice rather than to disenfranchise that voter. The State characterizes the standard urged by Miller as the "perfection standard," and we agree that such a standard would tend to disenfranchise many Alaskans on the basis of "technical errors."[13]

Alaskan voters arrive at their polling places with a vast array of backgrounds and capabilities. Some Alaskans were not raised with English as their first language. Some Alaskans who speak English do not write it as well. Some Alaskans have physical or learning disabilities that hinder their ability to write clearly or spell correctly. Yet none of these issues should take away a voter's right to decide which candidate to elect to govern. We must construe the statute's language in light of the

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[11] AS 15.15.360(a)(11).

[12] *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995); *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

[13] *See Carr v. Thomas*, 586 P.2d 622, 625-26 (Alaska 1978) ("There is well-established policy which favors upholding of elections when technical errors or irregularities arise in carrying out directory provisions which do not affect the result of an election.").

purpose of preserving a voter's choice rather than ignoring it. As we have consistently ruled, we remain "reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own, and '[w]here any reasonable construction of the statute can be found which will avoid such a result, [we] should and will favor it.' "[14]

Our interpretation of AS 15.15.360 permitting abbreviations, misspellings, or other minor variations in the form of the name of a write-in candidate so long as the intention of the voter can be ascertained is also consistent with the federally mandated standard for counting the write-in votes of those voters living or serving in uniform overseas. The Uniformed and Overseas Citizens Absentee Voting Act provides that in counting the ballot of a uniformed services voter or other voter who is overseas, "[a]ny abbreviation, misspelling, or other minor variation in the form of the name of a candidate or a political party shall be disregarded in determining the validity of the ballot, if the intention of the voter can be ascertained."[15] The Alaska Administrative Code incorporates this requirement into state law.[16] Miller's proposed construction of the statute would require us to impose a different, and more rigorous, voting standard on domestic Alaskans than on those who are serving in the military or living abroad. Our construction of AS 15.15.360 treats overseas and domestic Alaskan voters equally,

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[14] *Id.* at 626 (quoting *Reese v. Dempsey*, 153 P.2d 127, 132 (N.M. 1944)).

[15] 42 U.S.C. § 1973ff-2(c)(3) (2006).

[16] *See* 6 Alaska Administrative Code (AAC) 25.670(b) (2010) ("Any abbreviation, misspelling, or other minor variation in the form of the name of a candidate or political party will be disregarded in determining the validity of the ballot, if the intention of the voter can be ascertained."). We do not reach the question as to whether any provisions of federal law might conflict with relevant portions of the Alaska Administrative Code, as it is not presented here.

ensures that each write-in vote is treated equally and counted in the same manner, and avoids valuing one person's vote over that of another.[17]

Finally, Miller suggests that our interpretation of AS 15.15.360 will lead to elections being decided by the unbridled discretion of election officials in determining voters' intent through visual inspection of write-in ballots. But Miller concedes that other states use the same standard for counting write-in ballots and that Congress has mandated that standard. We see no basis for Miller to argue that the application of the standard in this election violates equal protection under either the state or federal constitution. First, only one person, the Division's Director, made the initial determinations whether write-in ballots demonstrated voter intent for a particular candidate; this avoids any constitutional infirmities that might arise from different reviewers applying the standard differently.[18] Second, the initial election results are subject to the Director's review during a recount.[19] And, of course, the Director's final determinations are subject to judicial review.[20]

We affirm the decision of the superior court on this issue.

IV. The Manual Count Of Write-In Votes Complied With Alaska Law And Did Not Violate Miller's Right To Equal Protection.

Miller alleges that the Division's procedure to manually count the write-in votes violated 6 AAC 25.085. He argues that this regulation requires the Division to manually examine and count only the write-in ballots the optical scanners had first

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17 *Cf. Bush*, 531 U.S. at 104-09.

18 *Cf. id.*

19 *See* AS 15.20.480.

20 *See* AS 15.20.510.

validated. Miller claims that his interpretation of 6 AAC 25.085 would best "facilitate fairness" under AS 15.15.030.

Neither this regulation nor the statute Miller cites requires a particular procedure for counting write-in votes. Alaska Statute 15.15.030 addresses ballot preparation. It directs that ballots must be prepared "to facilitate fairness, simplicity, and clarity in the voting procedure"; it does not apply to the method used to conduct a count of write-in votes. In addition, Miller's contention that the Division should have manually counted only those write-in ballots that were first validated by the optical scanner ignores the State's uncontested showing that the optical scanner neither sorts nor segregates ballots. The machine merely counts filled-in ovals indicating a vote for those candidates whose names appear on pre-printed ballots and for the "write-in" category. It is possible to quantify the number of ballots that an optical scanner deems invalid, but these ballots are not segregated by the machine. Because the optical scanner counted a sufficient number of ballots for the "write-in" category in this election, it was necessary for the Division to conduct a manual count of the write-in ballots to determine for which candidates the write-in ballots had been cast.[21]

Miller impliedly raises an equal protection argument under *Bush v. Gore*,[22] claiming that Division workers counted more write-in ballots than the optical scanner because they used a more lenient standard than the scanner.[23] But there is no factual

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[21] *See* 6 AAC 25.085(b).

[22] 531 U.S. at 104-10.

[23] The optical scanner detected 102,252 write-in votes. From all of the ballots cast in the election, the Division workers manually sorted out 103,805 ballots cast for a "write-in" candidate. From that total, the Division determined that 101,088 ballots were cast for Lisa Murkowski; 92,929 were unchallenged and 8,159 were challenged but counted.

dispute that the Division workers looked at every ballot cast in the election to segregate the total ballots cast for "write-in" candidates. In an affidavit to the superior court, Division Director Gail Fenumiai explained the three-step procedure as follows. First, "all the ballots cast in the election were sorted by 30 election board workers who worked in 15 teams of two." They sorted the ballots into five categories:

> (1) ballots on which the oval was marked correctly next to a candidate's name that was printed on the ballot;
>
> (2) ballots on which no oval was marked for U.S. Senate, more than one oval was marked for that race, or a name was written in but the oval was unmarked;
>
> (3) ballots on which the write-in oval was marked and the written name was "Lisa Murkowski" or "Murkowski," spelled correctly, and the ballot was not challenged by any observer;
>
> (4) ballots on which the write-in oval was marked and the name written appeared to be a variation or misspelling of Lisa Murkowski or Murkowski; this category also included any ballot challenged by an observer in the sorting process;
>
> (5) ballots on which the write-in oval was marked and the name written in was not "Murkowski," "Lisa Murkowski," or a variation thereof.

Significantly, the candidates had observers present who could challenge the category into which every ballot was sorted. The Division instructed the workers who conducted the initial sort of the ballots not to proceed unless observers were present at the table from both the Miller and Murkowski campaigns.

After the ballots were sorted, the Director personally examined the ballots in category four — ballots on which ovals had been filled in but the handwritten name was a variation or misspelling of "Lisa Murkowski" and other ballots challenged during

the sorting process — to determine voter intent.[24] The Director examined the ballots that were challenged because they contained misspellings of "Lisa Murkowski" or for any other reason. She permitted write-in ballots containing "minor misspellings and phonetic variations of 'Murkowski' to be counted for Lisa Murkowski when [she] determined that the voter clearly intended to vote for that candidate." The Director placed the ballots into one of two envelopes: "challenged counted" or "challenged not counted." If the Director's decision regarding voter intent was not challenged, the ballot was placed in category three (write-in, oval filled, Lisa Murkowski properly spelled, not challenged) or category five (write-in, oval filled, a candidate other than Murkowski), depending on whether the Director decided to count it for Murkowski.

The Director examined ballots in category two in which no oval was filled in for the U.S. Senate race, and those ballots were not counted for any candidate. This was true of ballots on which voters spelled "Lisa Murkowski" correctly but failed to fill in the oval. The Director also examined "over-voted ballots"[25] in category two to determine voter intent. As Director Fenumiai explained:

> 1) I did not count ballots that had no oval filled in for the U.S. Senate race, even if a name was written in.
>
> 2) If a ballot had two ovals filled in for the U.S. Senate race, I examined the ballot to see where the ovals appeared. If the voter had filled in the oval by the name of a candidate printed on the ballot and also by the write-in choice, I counted the ballot if the voter wrote in the name of the same candidate. This is how Joe Miller received many of his 20 write-in votes. I also counted ballots with two ovals marked

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[24] The Director was the only person who made the final decision regarding voter intent. Given this protocol, we see no basis for any concern that inconsistent standards were used to determine the validity of ballots cast in this election.

[25] This refers to a ballot with more than one oval filled in.

when it was clear that the voter crossed out one of the ovals. I did this regardless of whether the voter expresses an intent to vote for a write-in candidate or for a candidate whose name was printed on the ballot. Otherwise, I did not add the ballot to the count.

3) The candidates' observers were able to challenge all of these determinations.

As a result of this process, each candidate's vote tally was increased. The write-in vote count yielded the following tallies:

Lisa Murkowski, unchallenged	92,929
Lisa Murkowski, challenged, counted	8,159
Total counted for Lisa Murkowski	101,088
Lisa Murkowski, challenged, not counted	2,016
Joe Miller	20
Scott McAdams	8
Other registered write-in candidates	53
Other miscellaneous names	620
Total write-in votes	103,805

The total number of write-in votes identified by the Division workers was 103,805 but the optical scanner detected 102,252. Miller claims that because the total write-in votes from the manual count — 103,805 — was higher than the number of write-in votes detected by the optical scanner, the workers must have applied "more lenient standards" that unfairly advantaged Murkowski. He claims that "it is unclear how many additional votes Joe Miller, or any other preprinted candidate, would have gained, had those same standards been applied to all the ballots in the election." But having carefully examined the record in this case, we conclude that the record does not support Miller's contention that ballots in category two were treated differently depending on whether they were cast for candidates whose names were pre-printed on the ballot. Observers

working on Miller's behalf had the opportunity to challenge the sorting of every ballot cast in the election, and every category-two ballot was individually examined, as were the ballots in category four.[26] In addition, only one individual — the Director of the Division — looked at all of the ballots containing anomalies, including both over-votes and under-votes. We fail to see how having one person examine all overcount, undercount, and write-in ballots and all ballots challenged by either candidate is not a uniform standard. Finally, the Director's examination resulted in additional votes for both Miller and Democratic nominee Scott McAdams, as well as Murkowski. Because the Division applied the methodology described above to every precinct, we conclude that the Division's methodology gave all of the ballots — as well as all of the candidates — equal treatment.

For these reasons, we affirm the decision of the superior court on this issue.

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[26] We observe that even if Miller had demonstrated that the Division was more lenient in the threshold it used to validate votes than the optical scanner, the difference he cites would not have changed the outcome of this election.

The optical scanners deemed a total of 2,882 votes for the U.S. Senate race to be invalid. But the Division shows that the number of votes rejected by the optical scanner that could have been cast in Miller's favor is much smaller. The Division begins with the total number of ballots cast in this election (258,746) and subtracts the total number of votes cast for candidates on the pre-printed ballot (153,579) and the total number of write-in votes it identified in its manual tally (103,805). The difference (258,746 - 257,384 = 1,362) is the Division's calculation of the number of votes rejected by the scanners that could have been cast in Miller's favor.

V. The Division's Vote-Counting Procedures Are Not Regulations.

Miller argues that the Division's write-in vote-counting methodology is a regulation, or set of regulations, that should have been enacted pursuant to the Administrative Procedure Act (APA).[27] We disagree.

The APA requires advance notice of a regulation before it can be applied in agency interactions with the public.[28] Common sense statutory interpretations by agencies do not require regulations.[29] By contrast, if a statutory interpretation is "expansive or unforeseeable," the agency may be required to promulgate its interpretation through a regulation.[30] The Division's statutory interpretations of AS 15.15.360 and 6 AAC 25.085 were common sense interpretations and were not required to be promulgated in regulations. We have previously noted that "[n]early every agency action is based, implicitly or explicitly, on an interpretation of a statute or regulation authorizing it to act. A requirement that each such interpretation be preceded by rulemaking would result in complete ossification of the regulatory state."[31] We decline to depart from our previous decisions, and conclude that the Division did not violate the APA. Accordingly, we affirm the decision of the superior court on this issue.

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[27] AS 44.62.010 *et seq.*

[28] AS 44.62.190.

[29] *See Squires v. Alaska Bd. of Architects, Eng'rs & Land Surveyors*, 205 P.3d 326, 334-35 (Alaska 2009); *Alyeska Pipeline Serv. Co. v. State, Dep't of Envtl. Conservation*, 145 P.3d 561, 573 (Alaska 2006); *Alaska Ctr. for the Env't v. State, Office of the Governor, Office of Mgmt. & Budget, Div. of Gov't Coordination*, 80 P.3d 231, 243-44 (Alaska 2003).

[30] *Alyeska Pipeline*, 145 P.3d at 573.

[31] *Id.*

VI. We Affirm The Dismissal Of Miller's Claims For Invalidation Of Two Categories Of Votes: (1) Votes Allegedly Cast By Voters Whose Identities Had Not Been Confirmed, And (2) Write-In Votes Allegedly Cast By The Same Person(s) On Multiple Ballots.

A. Overview

This case comes to us under unusual circumstances. The election was held on November 2, 2010. Without seeking a statutorily available vote recount by the Division[32] or filing a lawsuit in state court to contest the election,[33] on November 9 Miller filed a federal court lawsuit. Miller sought declaratory and injunctive relief (1) stopping the Division from certifying the election results in favor of Murkowski, and (2) directing the Division to follow his interpretation of AS 15.15.360 by invalidating write-in votes "in which a candidate's name is misspelled or is not written on the ballot as it appears on the candidate's write-in declaration of candidacy." On November 19 the federal court issued an injunction against certification, conditioned on Miller's filing a state court lawsuit by November 22 to resolve the disputed interpretation of AS 15.15.360.

Miller filed suit in superior court on November 22, seeking not only declaratory and injunctive relief regarding the interpretation of AS 15.15.360, but also regarding: alleged disparate treatment of ballots, violation of other election statutes, the validity of the Division's write-in vote-counting methodology under the Administrative Procedure Act, the validity of classes of votes the Division counted, and the validity of the election results. Murkowski intervened in Miller's lawsuit, asking for declaratory and injunctive relief regarding the interpretation of election statutes, as well as challenging the validity of two classes of votes not counted by the Division. After expediting the proceedings, on December 10, 2010, Superior Court Judge William B.

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[32] *See* AS 15.20.430–.530.

[33] *See* AS 15.20.540–.560.

Carey upheld all of the Division's disputed actions, treating some claims as pure declaratory judgment requests and treating other claims as an election contest under AS 15.20.540.

It may be that certain legal issues could properly be brought to us pre-election or during an election with appropriate requests for declaratory and even injunctive relief. But the legislature has created two specific legal proceedings for election challenges that would normally apply to many of the issues in this case — an election contest and a recount appeal.[34] And as we have noted, "an election contest and a recount appeal are distinct proceedings."[35]

An election contest is authorized by AS 15.20.540, which provides that "a contest of the election as a whole" is heard first by the superior court.[36] An election contestant must show "malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election" or "any corrupt practice as defined by law sufficient to change the results of the election."[37]

By contrast, AS 15.20.510 provides for a recount appeal directly to our court to challenge the Director's decisions to count or not count votes during a recount of an election for, among other offices, the United States Senate.[38] We have noted that

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[34] *See Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979) (identifying, describing, and comparing the two legal proceedings).

[35] *Id.*

[36] *Id.*; *see also* AS 15.20.550 (providing for superior court's original jurisdiction).

[37] AS 15.20.540.

[38] AS 15.20.510 provides, in relevant part: "A candidate . . . who requested a recount who has reason to believe an error has been made in the recount . . . involving (continued...)

"the inquiry in a recount appeal is whether specific votes or classes of votes were properly counted or rejected."[39] Our review comes only after the Director "review[s] all ballots . . . to determine which ballots, or part of ballots, were properly marked and which ballots are to be counted in the recount[.]"[40] Issues we have considered in a recount appeal "include the validity of punch cards and a variety of marks on ballots, the proper procedures for absentee voting and consequences for failure to follow those procedures, and registration requirements."[41]

With this legal framework in mind, we consider Miller's claims that two classes of votes should not be counted.

B. Multiple write-in ballots cast by the same person(s)

Miller alleged in his complaint that the Division accepted and counted as valid "write-in votes in which the candidate's name apparently was not written on the ballot by the voter" in violation of AS 15.15.360(a)(10), which provides that "the voter" must write in the candidate's name. In its summary judgment motion,[42] the State noted

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[38] (...continued)
candidates for . . . Congress . . . may appeal to the supreme court . . . ."

[39] *Willis*, 600 P.2d at 1081.

[40] AS 15.20.480.

[41] *Cissna v. Stout*, 931 P.2d 363, 367 (Alaska 1996). Miller's claim for declaratory judgment regarding the interpretation of AS 15.15.360 can easily be seen as in the nature of a recount appeal that should not be properly before us. Given the unusual circumstances of this case, we nonetheless chose to decide the legal issues raised regarding Alaska election statutes and regulations.

[42] Under Alaska Civil Rule 56(c), summary judgment may be granted without trial if there are no genuine issues of fact and a party is entitled to judgment as a matter of law.

that under AS 15.15.240 voters "can delegate that authority [to vote] to others — election officials or friends or family members — if they need assistance in writing in the name of a candidate."[43] The State argued that Miller's claim was in the nature of an election contest and that he would have to present some evidence of both (1) improper conduct on the part of someone and (2) an indication that any such wrongful conduct was sufficient to affect the election's outcome.

Miller submitted affidavits from observers of the ballot count attesting that in some precincts many write-in ballots appeared to have been written in similar handwriting. He argued that this evidence was "sufficiently suspicious that it legitimately raises the specter of voter fraud or other electoral improprieties." (This argument reflects that he considered his claim to be an election contest claim under AS 15.20.540, because misconduct is not an element of a recount appeal.[44]) He also argued that this evidence was sufficient to entitle him to further time for discovery regarding the identity of the people who completed the ballots, whether voters had actually requested assistance, why only a few people apparently filled in many ballots, and the total number of ballots that might have been affected.[45]

The superior court denied Miller's request for discovery and granted the State's motion for summary judgment, noting that the admissible portions of Miller's

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[43] AS 15.15.240 provides, in relevant part, that "[a] qualified voter needing assistance in voting may request an election official, a person, or not more than two persons of the voter's choice to assist."

[44] *Willis*, 600 P.2d at 1081 ("[I]n a recount appeal . . . [t]he concept of malconduct does not enter into the question[.]").

[45] Alaska Civil Rule 56(f) allows the superior court broad discretion to grant a party sufficient time to conduct discovery before opposing a summary judgment motion if the party is unable to marshal evidence in the time normally required to oppose the motion.

evidence did not create a genuine issue of material fact regarding misconduct by anyone, and that it was not even sufficient circumstantial evidence to warrant discovery before opposing the summary judgment motion. We agree.

Alaska Statute 15.15.240 allows any qualified voter to ask for assistance, including assistance in writing in the name of a write-in candidate. No reasonable inference of misconduct can arise from the mere fact that the handwriting on multiple ballots appears to be from a small number of people. And though we have interpreted Civil Rule 56(f) liberally to allow a litigant a meaningful opportunity to obtain evidence to present a case,[46] pure speculation cannot support a fishing expedition for evidence to oppose summary judgment in an election contest. We affirm the superior court's summary dismissal of this election contest claim.

C. Ballots cast by allegedly unidentified voters

Miller alleged in his complaint that the Division accepted and counted as valid ballots from voters who, "according to the official election registers from the precinct polling places, . . . neither showed proper identification nor were excused from showing such identification." He noted that Alaska law requires a voter to show identification before being allowed to vote, unless an election official waives that requirement because the voter is known to the official.[47]

In its motion for summary judgment, the State explained that although the voter registers contain spaces for election officials to specify how they verified each voter's identity, there is no statutory or regulatory requirement that the election officials

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[46] *E.g.*, *Kessey v. Frontier Lodge, Inc.*, 42 P.3d 1060, 1062 (Alaska 2002) ("Generally, 'requests made pursuant to Rule 56(f) should be freely granted[.]' " (quoting *Jennings v. State*, 566 P.2d 1304, 1313 (Alaska 1997))); *Gamble v. Northstore P'ship*, 907 P.2d 477, 485 (Alaska 1995); *Munn v. Bristol Bay Hous. Auth.*, 777 P.2d 188, 193 (Alaska 1989).

[47] *See* AS 15.15.225.

actually fill in this information. Construing Miller's claim as an election contest, the State argued that Miller would have to produce some evidence both (1) that misconduct by election officials actually allowed unregistered persons to vote and (2) that the number of votes in question would affect the outcome of the election. Miller responded that he was not bringing an election contest on this issue, but rather was "contesting the validity of particular ballots." He argued that the failure of election officials to mark the register form for some voters was circumstantial evidence that "certain people may have voted without showing identification or being personally known to an election worker" and that he needed discovery to determine who they were.

The superior court treated this claim as an election contest, denied Miller's request for discovery, and granted summary judgment in favor of the State. The court noted that there is no requirement that election workers fill out the register, that the failure to fill out the register did not create a reasonable inference of misconduct by election officials, and that there was no legitimate basis for the requested discovery based solely on the failure to fill out some of the registers.

But Miller did not raise his claim as an election contest within the jurisdiction of the superior court. He instead raised a challenge to "the validity of particular ballots," which is in the nature of a recount appeal that would come directly to us. But he also did not ask for a recount and there is no recount decision about the validity of particular ballots for us to review. Miller cannot avoid the avenues established by the legislature to challenge elections: Miller asserted in the superior court that he did not bring an election contest, and he did not seek a recount by the Division. The only possible issue before us, then, is an issue not decided by the superior court: whether Miller is entitled to a judgment declaring that an entire class of ballots — those from voters for whom election officials did not mark on their registers how the officials verified the voters' identification — is invalid. He is not entitled to such a judgment.

We affirm the superior court's dismissal of the claim because there is no legal requirement that an election official mark the register form for identification verification and the failure to do so does not invalidate a vote.

VII. We Do Not Reach Questions Regarding Miller's Motion To Amend His Complaint To Add Claims About Alleged Voting By Felons.

During the summary judgment briefing, Miller raised a new claim that an unknown number of felons ineligible to vote had actually voted in the election. This claim was discussed at oral argument before the superior court on the summary judgment issues. Shortly after the oral argument, Miller sought leave to file an amended complaint setting out this claim. The superior court issued its order on summary judgment without ruling on the motion to amend. In light of the expedited nature of this case, we accepted Miller's appeal of the summary judgment ruling without waiting for a final judgment from the superior court.

We now decline to reach whether the superior court implicitly denied the motion to amend and whether it was error to do so. We will resolve all issues actually before us by way of this opinion, and we will return jurisdiction to the superior court to consider Miller's motion to amend. But we note the following.

If Miller intends to pursue his superior court claim about improper voting by felons, he must do so as an election contest under AS 15.20.540. He must allege and prove the necessary elements of an election contest claim, including the level of misconduct necessary to support the claim and that the votes in question are sufficient to change the result of the election. In light of our other rulings and the current voting tally, it appears to us that the number of votes in question would have to be in the tens of thousands to change the result of the election.[48] But it is difficult, at best, to quantify

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[48] Miller currently trails by over 10,000 votes. Because any malconduct in (continued...)

the number based on the record before us, and we leave that to the parties to resolve in the superior court should Miller decide to pursue this claim.

Finally, we note that an election contest does not bar certification of an election and that there are no remaining issues raised by Miller that would prevent this election from being certified. Under AS 15.20.560, if an election contest ultimately changes the result of an election, judgment will be so entered and a new certification will be issued.[49]

VIII. The Superior Court Did Not Err In Denying Murkowski's Motion for Summary Judgment On Her Claim That Write-In Ballots With Her Name But Lacking A Filled-In Oval Should Have Been Counted.

The Division did not count a number of ballots for Murkowski because the voters had not filled in the ovals next to the write-in line, even though the voters had written in Murkowski's name. Murkowski argues that these votes should have been counted for her.[50] We disagree. Alaska Statute 15.15.360(a)(10) states that "[i]n order to vote for a write-in candidate, the voter must write in the candidate's name in the space

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[48] (...continued)
allowing ineligible felons to vote would not appear to bias any particular candidate, proportional reduction of votes would be the proper remedy if any ineligible felons were actually shown to have voted. *See Hammond v. Hickel*, 588 P.2d 256, 260 (Alaska 1978).

[49] AS 15.20.560 provides in relevant part that, at the conclusion of an election contest, "[t]he judge shall pronounce judgment on which candidate was elected .... The director shall issue a new election certificate to correctly reflect the judgment of the court."

[50] Like Miller's claim regarding the class of votes by allegedly unidentified voters, this claim is in the nature of an election recount appeal. Like Miller, Murkowski did not request a recount. We therefore consider this claim only as one for declaratory judgment with respect to the interpretation of AS 15.15.360's provisions regarding marking the ovals on ballots.

provided *and* fill in the oval opposite the candidate's name." (Emphasis added.) Although AS 15.15.360(a) does not address spelling, marks that validly "fill in the oval" are subject to the requirements of AS 15.15.360(a)(1) and (a)(5), which state:

> (1) A voter may mark a ballot only by filling in, making "X" marks, diagonal, horizontal, or vertical marks, solid marks, stars, circles, asterisks, checks, or plus signs that are clearly spaced in the oval opposite the name of the candidate, proposition, or question that the voter desires to designate.
>
> . . . .
>
> (5) The mark specified in (1) of this subsection shall be counted only if it is substantially inside the oval provided, or touching the oval so as to indicate clearly that the voter intended the particular oval to be designated.

In other words, the statute mandates that the write-in voter mark the oval in some fashion; a blank oval will invalidate the vote. Writing in the name but not marking the oval is not compliant with the statute. Murkowski is not entitled to declaratory judgment that AS 15.15.360 should be interpreted to excuse write-in voters from marking ovals as required by law.[51] Accordingly, we affirm the decision of the superior court on this issue.

IX. Conclusion

For the reasons set out above, we AFFIRM the decision of the superior court in all respects.

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[51] Murkowski also argues that the Division erred by not counting a number of write-in votes for "Lisa M." and that the superior court erred by affirming the Division's determination. This claim is essentially a recount appeal that may only be brought to us after a recount by the Director, and is not an election contest within the jurisdiction of the superior court. As with Miller's claim about specific votes by allegedly unidentified voters, Murkowski's claim is not properly before us. To the extent she requests declaratory judgment regarding variations on write-in candidates' names, we have already addressed it.

There are no remaining issues raised by Miller that prevent this election from being certified.

SB

33

<TARGET><BILL>SB 33</BILL><SUBJECT>SB
33</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE COMMITTEE REPORT

DATE: 1/28/11

FURTHER:

DATE TURNED IN TO OFFICE: 2/2/11

Judiciary Committee considered SENATE BILL NO. 33

SB 33-DISPOSITION OF SERVICE MEMBERS' REMAINS

"An Act relating to the disposition of remains of a member of the military if the member dies while in a duty status."

and recommends:

[ ] be **replaced** with **CS** _____ (_____) *[ ] Same Title [ ] New Title*

[X] adopt **previous CS** SB 33 (STA) *[ ] Same Title [X] New Title*

[ ] attached amendment(s)

[ ] adopt _____ Letter of Intent

[ ] further referral to _____ Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
MVA			✓	1

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Wielechowski	✓			
	PASKVAN	X			
	McGuire	✓			
CHAIR:	French	✓			

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Joint Armed Services Committee

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Resources Committee
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SENATOR BILL WIELECHOWSKI

January 27, 2011

Senator Hollis French, Chair
Senate Judiciary Committee
State Capitol, Room 417
Juneau, Alaska 99801

Dear Senator French:

I am writing to request a hearing on CS for SB 33(STA) "An Act relating to the disposition of remains of a member of the armed forces if the member dies while in a duty status."

CS for SB 33(STA) will place the State of Alaska in alignment with the Department of Defense Emergency Data Form (DD Form 93) and the Coast Guard Designation of Beneficiaries and Record of Emergency Data Form (CG-2020D), so that the authorized person designated to handle disposition of active duty service and guard member's remains is upheld.

CS for SB 33(STA) will honor the preferences chosen by armed forces members, guarantee that their remains are handled in the manner of their choosing, and ensure that family members avoid painful legal battles in the event of their death.

Included with this letter you will find:

1. Sponsor Statement
2. Current Version of the Bill (LSO188\D)
3. Sectional Summary
4. Fiscal Note
5. Two Statements of Support
6. USA4Military Website Notice of Support
7. 10 USC § 1481
8. Department of Defense Form 1300.18
9. Map of States Comporting with Department of Defense Rules on Disposition
10. DD Form 93

Additionally, Mark San Souci of the Under Deputy Secretary of Defense and Ric Davidge of Vietnam Veterans of America will provide testimonies using the Off-net line. Verdie Bowen of the Alaska

Department of Veterans Affairs will be on hand to answer additional questions. Thank you for your consideration of this request.

Sincerely,

Michael Caulfield
Intern for Sen. Wielechowski
Michael_caulfield@legis.state.ak.us
907-465-2435

ALASKA STATE LEGISLATURE

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Chair
State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Admin Reg Review

SENATOR BILL WIELECHOWSKI

Sponsor Statement: CS for SB 33(STA)
An Act relating to the disposition of remains of a member of the armed services if the member dies while in a duty status

The intent of the CS for Senate Bill 33(STA) is to ensure that active duty service members who make the ultimate sacrifice are properly honored by ensuring that their remains are disposed of by the person of their choosing.

The Department of Defense requires active duty service members, reservists and guard members to complete a Record of Emergency Data (DD Form 93) annually or prior to deployment. The Coast Guard follows the same procedures, but uses a different form, the Designation of Beneficiaries and Record of Emergency Data (CG-2020D). These forms identify the person authorized to direct disposition of a service member's remains in the event that service member is killed in the line of duty.

Senate Bill 33 will place the state in alignment with armed services procedures, so that the person designated to handle disposition of remains is not called into question. Without compliance with these procedures, the handling of the remains may be delayed, and the service member's wishes not honored.

Around twenty states have laws which comport with armed services rules on disposition. At least four other states, including Alaska, are pursuing laws to comport.

The CS for Senate Bill 33(STA) is supported by the Office of the Deputy Under Secretary of Defense.

Please join me in supporting this legislation to ensure the wishes of our service members are upheld and our fallen soldiers receive the proper burial they deserve.

CS FOR SENATE BILL NO. 33(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS WIELECHOWSKI, PASKVAN, AND COGHILL, Menard, Meyer, Dyson, Olson

A BILL

FOR AN ACT ENTITLED

"An Act relating to the disposition of remains of a member of the armed forces if the member dies while in a duty status."

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

* **Section 1.** AS 26.05 is amended by adding a new section to read:

Sec. 26.05.262. Disposition of remains of members of organized militia on duty status under Military Record of Emergency Data Form (DD Form 93). If a member of the organized militia who is in active state service has executed the United States Department of Defense Military Record of Emergency Data Form (DD Form 93), or its successor form, to serve as a record of emergency data and, on that form, has designated a person who is authorized to direct the disposition of the member's remains if the member dies while in a duty status as described in 10 U.S.C. 1481, notwithstanding any other provision of law, the person authorized to direct the disposition of remains on the executed form has the right to make the decisions concerning the disposition of the member's remains.

* **Sec. 2.** AS 26.10 is amended by adding a new section to read:

Sec. 26.10.065. Disposition of remains of state resident armed forces personnel on duty status. (a) Except as provided in (b) of this section, if a state resident who is a member of the armed forces has executed the United States Department of Defense Military Record of Emergency Data Form (DD Form 93), or its successor form, to serve as a record of emergency data and, on that form, has designated a person who is authorized to direct the disposition of the member's remains if the member dies while in a duty status as described in 10 U.S.C. 1481, notwithstanding any other provision of law, the person authorized to direct the disposition of remains on the executed form has the right to make the decisions concerning the disposition of the member's remains.

(b) If a state resident who is a member of the United States Coast Guard has executed the United States Coast Guard Designation of Beneficiaries and Record of Emergency Data Form (CG-2020D), or its successor form, to serve as a record of emergency data and, on that form, has designated a person who is authorized to direct the disposition of the member's remains if the member dies while in a duty status as described in 10 U.S.C. 1481, notwithstanding any other provision of law, the person authorized to direct the disposition of remains on the executed form has the right to make the decisions concerning the disposition of the member's remains.

LEGAL SERVICES

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

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

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

MEMORANDUM January 27, 2011

SUBJECT: Sectional summary of proposed CSSB 33(STA) relating to the disposition of the remains of a member of the armed forces if the member dies while in a duty status
(Work Order No. 27-LS0188\D)

TO: Senator Bill Wielechowski
Attn: Michael Caulfield

FROM: Theresa Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill, which has not yet been read across. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Gives a person the right to make the decisions about the disposition of the remains of a member of the state's organized militia who is in active state service, if the person is authorized by the member on DD Form 93, a Department of Defense emergency data form, to dispose of the member's remains if the member dies while in a duty status under 10 U.S.C. 1481.

Section 2. In sec. 26.10.065(a), gives a person the right to make the decisions about the disposition of the remains of a member of the armed forces who is a state resident, if the person is authorized by the member on DD Form 93, a Department of Defense emergency data form, to dispose of the member's remains if the member dies while in a duty status under 10 U.S.C. 1481.

In sec. 26.10.065(b), gives a person the right to make the decisions about the disposition of the remains of a member of the Coast Guard who is a state resident, if the person is authorized by the member on CG-2020D, a Coast Guard emergency data form, to dispose of the member's remains if the member dies while in a duty status under 10 U.S.C. 1481.

If I may be of further assistance, please advise.

TLB:plm
11-039.plm

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB 33**
() Publish Date

Identifier (file name) SB033-DMVA-VS-1-24-11
Title Disposition of Service Members Remains
Sponsor Senators Wielechowski, Paskvan, Coghill, Menard
Requester Senate State Affairs

Dept. Affected Military & Veterans Affairs
Appropriation Veterans' Services
Allocation
OMB Component Number 9

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Prepared by Verdie Bowen, Director
Division Veterans Services, Department of Military and Veterans Affairs
Approved by McHugh Pierre, Deputy Commissioner
Department of Military and Veterans Affairs

Phone (907)428-6061
Date/Time 1/24/11 11:30 AM
Date 1/24/2011

(Revised 12/29/2010 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 33

Analysis

There is no fiscal impact.

ALASKA VETERANS FOUNDATION

January 21, 2011

Senator Bill Wielechowski
Chairman
Senate Affairs Committee

REF: SB 33

One of the most frustrating and difficult problems we often face as the state's only statewide Veterans Foundation (501c3) representing about 80,000 veterans and their families, is when a veteran or service member dies or is killed in action and we can not find their family.

This happens more then you would think. It's really part of our culture now that many elderly veterans, as a result of divorce or estrangement, die without an ability to notify their next of kin. Just in December of last year we had a two tour Marine, Vietnam Veteran die at home alone and our best efforts and those of the US Department of Veterans Affairs as well as the Department of Defense were unable to find his ex-wife nor his son so that they could be involved in his internment at our National Cemetery.

We strongly support this bill, introduced by you on behalf of our active duty, guard, and reserves that makes it clear that the State of Alaska is in line with most other states in a process that provides for the disposition of service members remains.

We hope this bill becomes law this session, so that this year we can have a process recognized by the State to address this tragedy.

Paul Sheehan
Executive Director

3705 Arctic Blvd #415, Anchorage, AK 99503 907 222 6945 fax 907 222 6933
Ricdavidge.ak@gci.net

Chapter 904 - Anchorage, Alaska
"An Agenda of Service"

January 24, 2011

Senator Wielechowski
Prime Sponsor
SB33

Senator,

Just wanted to send you a note in support of SB33 and HB27 which you have shown leadership on.

We work with the Alaska Veterans Foundation, Inc. and our local hospitals to ensure that no veteran dies alone. It happens.

Although your bill will not directly address this challenge it does make it clear the process we in Alaska will follow when faced with the remains of a service member and/or in some cases veteran with no next of kin available.

Unfortunately this is a growing problem due to the number of our citizens who are estranged from their immediate family.

Again, thanks for being there in support of our military and veterans.

It is an honor,

Ric Davidge
President, VVA 904

Vietnam Veterans of America Alaska Chapter 904
3705 Arctic Blvd, #415, Anchorage, Alaska 99503 Web Site: www.VVA904.org
Ric Davidge, President (907) 222-6927 Cell 907 29 5328 Fax (907) 222-6933 Email: ricdavidge.ak@gci.net

Issue 9: During its first year of consideration (2010 legislative session), 21 states aligned state with Federal policies regarding the disposition of military members who die on active duty.

Comport State Laws with DoD Rules on Disposition

Issue: State laws on the disposition of human remains do not currently provide for the accommodation of the expressed, written wishes of service members through execution of the federally prescribed "Record of Emergency Data"

According to Section 564 of Public Law 109-163, effective January 2006, service members [as defined in Title 10, United States Code, Section 1481(a)(1) – (8)] must designate a person authorized to direct disposition of human remains (PADD). The law, Title 10, United States Code, Section 1482(c), specifies a list of possible designees, but does not stipulate any specific order.

States may not recognize the PADD as the legal designee because the state does not recognize the DD Form 93 (Record of Emergency Data) completed by service members to designate a PADD. The DD Form 93 restricts a services member to designating his or her "surviving spouse, blood relative of legal age, or adoptive relatives of the decedent. If neither of these three can be found, a person in loco parentis may be named."

Without a recognized agent, state statutes normally have a prescribed order of who is recognized as the next-of-kin designated to direct disposition, starting with a spouse, followed by adult children and parents. Because some state laws do not currently recognize the federal form as an acceptable one for service members, there have been several instances of civil actions between family members over the ultimate disposition of a fallen service member's remains.

Desired Outcome: Eliminate potential conflict with federal law, which may reduce the potential for family conflict at a time of bereavement, by states amending their laws on disposition of human remains to recognize the DD Form 93 as the authoritative written instrument for service members.

Progress: Ten states currently recognizes the DD 93 as the authoritative document for use by service members; however, we estimate nine states have statutes with sufficient latitude to allow for its use. The remaining states either do not provide for the designation of an agent, require use of a state specific form, or require a certain type of witnessing that might preclude the recognition of the DD Form 93. In order to add clarity for both family members and funeral directors, we believe statutes in all 50 states should include a statement recognizing the authority of the DD Form 93. The map below provides our current estimation of state flexibility for considering designations made on the DD Form 93.

- DD Form 93 (Record of Emergency Data)
- Public Law 109-163 Sec. 564
- Title 10 USC. Sec. 1481(a)(1-8)
- Title 10 USC. Sec. 1482(c)

Best Practice Examples:
The following are bills that were enacted in 2010 that provide for recognition of the DD Form 93:

Arizona HB 2400
Mississippi SB 2418
Maryland SB 408

10 USC § 1481. Recovery, care, and disposition of remains: decedents covered

(a) The Secretary concerned may provide for the recovery, care, and disposition of the remains of the following persons:

(1) Any Regular of an armed force under his jurisdiction who dies while on active duty.

(2) A member of a reserve component of an armed force who dies while—

(A) on active duty;

(B) performing inactive-duty training;

(C) performing authorized travel directly to or from active duty or inactive-duty training;

(D) remaining overnight immediately before the commencement of inactive-duty training, or remaining overnight, between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training;

(E) hospitalized or undergoing treatment for an injury, illness, or disease incurred or aggravated while on active duty or performing inactive-duty training; or

(F) either—

(i) serving on funeral honors duty under section 12503 of this title or section 115 of title 32;

(ii) traveling directly to or from the place at which the member is to so serve; or

(iii) remaining overnight at or in the vicinity of that place before so serving, if the place is outside reasonable commuting distance from the member's residence.

[(3) Repealed. Pub. L. 99–661, div. A, title VI, § 604(e)(3)(B), Nov. 14, 1986, 100 Stat. 3877.]

(4) Any member of, or applicant for membership in, a reserve officers' training corps who dies while

(A) attending a training camp,

(B) on an authorized practice cruise,

(C) performing authorized travel to or from such a camp or cruise, or

(D) hospitalized or undergoing treatment at the expense of the United States for injury incurred, or disease contracted, while attending such a camp, while on such a cruise, or while performing that travel.

(5) Any accepted applicant for enlistment in an armed force under his jurisdiction.

(6) Any person who has been discharged from an enlistment in an armed force under his jurisdiction while a patient in a United States hospital, and who continues to be such a patient until the date of his death.

(7) A person who—

(A) dies as a retired member of an armed force under the Secretary's jurisdiction during a continuous hospitalization of the member as a patient in a United States hospital that began while the member was on active duty for a period of more than 30 days; or

(B) is not covered by subparagraph (A) and, while in a retired status by reason of eligibility to retire under chapter 61 of this title, dies during a continuous hospitalization of the person that began while the person was on active duty as a Regular of an armed force under the Secretary's jurisdiction.

(8) Any military prisoner who dies while in his custody.

Persons Authorized to Direct Disposition of Remains
DoDI 1300.18

E2.41*E2.42*. Person Authorized to Direct Disposition of Human Remains (PADD). A person, usually the PNOK (see E2.45*E2.46*.), who is authorized to direct disposition of human remains. For disposing of human remains, under the authority of Reference (l), the Secretary of the Military Department concerned is deemed to have such standing if no other such person is available. Service members will *shall* identify a PADD on their DD Form 93. (See instructions at Enclosure 7.) Absent the identification of a PADD by the Service member, then the PADD is recognized in the following order:

E2.41.1*E2.42.1*. Surviving spouse. The legal spouse is one who was married to the deceased as prescribed by civil law, was not divorced from the deceased and has not remarried at the time disposition of remains is to be made. The latter might apply in the case of a Service member who has been declared deceased, body not recovered at the time of the casualty incident, and whose remains are later recovered and identified. If the spouse has remarried at the time disposition is to be made, the right of disposition will go to the next person in order of priority, and the remarried spouse will take priority under paragraph E2.41.8*E2.42.8*.

E2.41.2*E2.42.2*. Children who have reached the age of majority in order of seniority (age).

E2.41.3*E2.42.3*. Parents in order of seniority (age) unless legal custody was granted to another person by reason of court decree or statutory provision. Step-parents, who have not adopted the Service member, serve in *loco parentis* and are not considered parents for PADD purposes.

E2.41.4*E2.42.4*. Blood or adoptive relative of the individual who was granted legal custody of the Service member by reason of a court decree or statutory provision. The person to whom custody was granted remains the PADD despite the fact that the individual had reached the age of majority at the time of death.

E2.41.5*E2.42.5*. Brothers or sisters of legal age in order of seniority (age). When the deceased person has full siblings, half-siblings, or step-siblings, the order of precedence is the full siblings then the half-siblings. Step-siblings are not eligible to direct disposition of remains. Adopted siblings are treated the same as full siblings when adopted by both of the deceased person's biological parents. Adopted siblings are considered as half-siblings when adopted by only one of the deceased person's biological parents.

E2.41.6*E2.42.6*. Grandparents in order of seniority (age).

Change 1, 8/14/09 ENCLOSURE 234 Dodo 1300.18, January 8, 2008

E2.41.7*E2.42.7*. Other adult blood relatives in order of relationship to the individual under the laws of the deceased's domicile. When two individuals are of equal relationship, priority will be determined by age.

E2.41.8*E2.42.8*. Remarried surviving spouse. The remarried surviving spouse is one who was not divorced from the deceased and has remarried at the time disposition of remains is to be made. The latter might apply in the case of a Service member who is declared deceased, body not recovered, and whose remains are later recovered and identified.

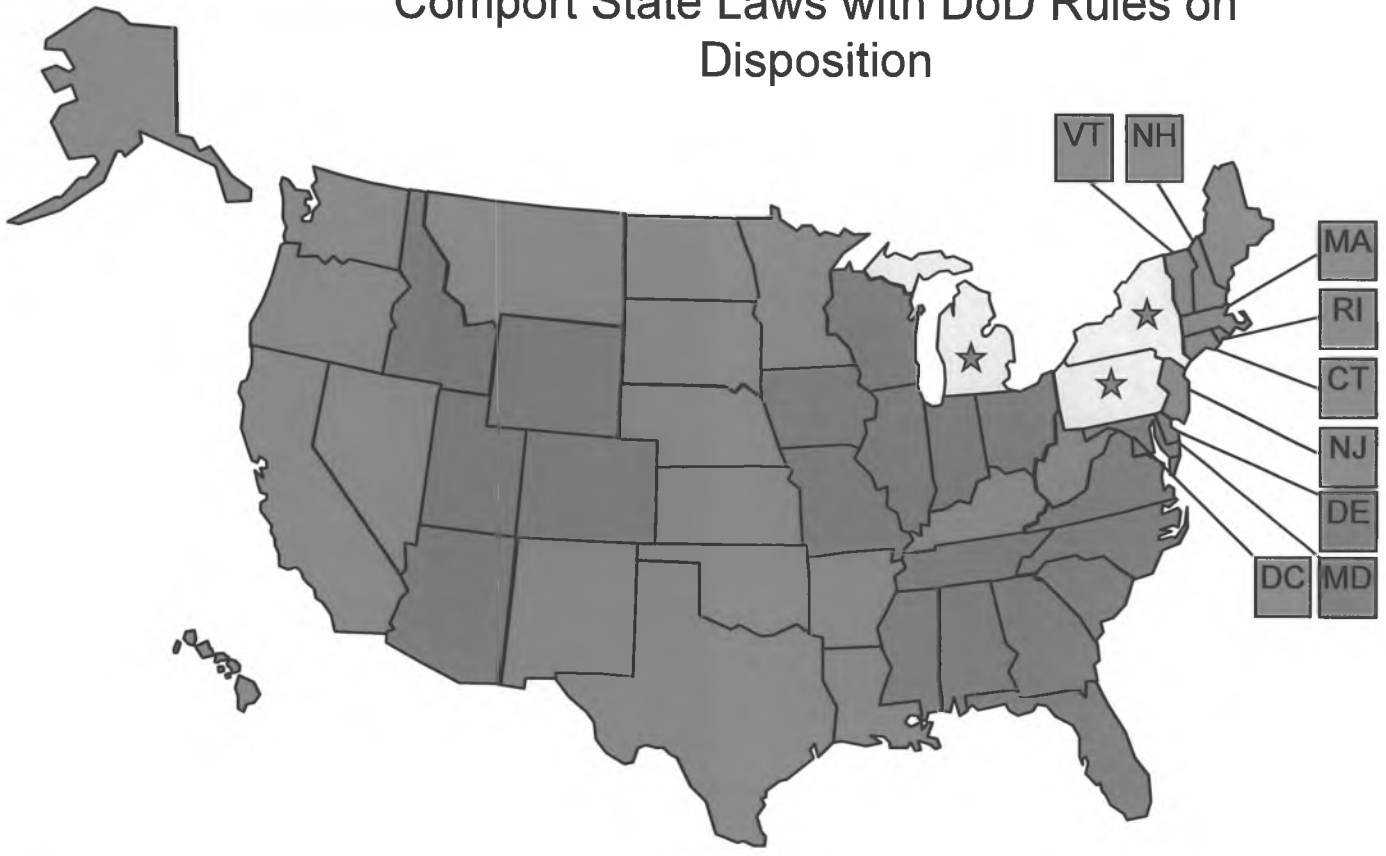
E2.41.9*E2.42.9*. Persons standing in *loco parentis*. *Loco parentis* means any person(s) or institution who acted in place of the member's parent(s) for a period of not less than 1

year at any time before the member joined the military. Seniority in age will control when the persons are of equal relationship.

E2.41.10*E2.42.10*. Legal representative of the estate may make disposition of remains when all efforts to identify or locate a person in categories (1) through (9) are unsuccessful. The legal representative must be properly appointed by a civil court having jurisdiction of the decedent's estate.

E2.41.11*E2.42.11*. When all known persons in categories (1) through (10) relinquish disposition authority or cannot be identified or located, then disposition of the remains will be made by the administrative determination of the Secretary of the Military Department concerned or their designee.

Comport State Laws with DoD Rules on Disposition



- Laws comport with the disposition instructions in Federal statutes and DoD rules
- ★ Legislation pursuing a favorable policy is filed.
- Actively pursuing favorable policy, but no legislation filed as yet.
- Policy not favorable, and Not currently considering favorable adjustments.

As of August 27, 2010

See item 13a. on page 2 and instructions for same item number at the bottom of page 4 for required actions to be taken by Service members to designate a person authorized to direct disposition (PADD).

RECORD OF EMERGENCY DATA

PRIVACY ACT STATEMENT

AUTHORITY: 5 USC 552, 10 USC 655, 1475 to 1480 and 2771, 38 USC 1970, 44 USC 3101, and EO 9397 (SSN).
PRINCIPAL PURPOSES: This form is used by military personnel and Department of Defense civilian and contractor personnel, collectively referred to as civilians, when applicable. **For military personnel**, it is used to designate beneficiaries for certain benefits in the event of the Service member's death. It is also a guide for disposition of that member's pay and allowances if captured, missing or interned. It also shows names and addresses of the person(s) the Service member desires to be notified in case of emergency or death. **For civilian personnel**, it is used to expedite the notification process in the event of an emergency and/or the death of the member. The purpose of soliciting the SSN is to provide positive identification. All items may not be applicable.
ROUTINE USES: None.
DISCLOSURE: Voluntary; however, failure to provide accurate personal identifier information and other solicited information will delay notification and the processing of benefits to designated beneficiaries if applicable.

INSTRUCTIONS TO SERVICE MEMBER

This extremely important form is to be used by you to show the names and addresses of your spouse, children, parents, and any other person(s) you would like notified if you become a casualty (other family members or fiance), and, to designate beneficiaries for certain benefits if you die. IT IS YOUR RESPONSIBILITY to keep your Record of Emergency Data up to date to show your desires as to beneficiaries to receive certain death payments, and to show changes in your family or other personnel listed, for example, as a result of marriage, civil court action, death, or address change.

INSTRUCTIONS TO CIVILIANS

This extremely important form is to be used by you to show the names and addresses of your spouse, children, parents, and any other person(s) you would like notified if you become a casualty. Not every item on this form is applicable to you. **This form is used by the Department of Defense (DoD) to expedite notification in the case of emergencies or death.** It does not have a legal impact on other forms you may have completed with the DoD or your employer.

IMPORTANT: This form is divided into two sections: Section 1 - Emergency Contact Information and Section 2 - Benefits Related Information. READ THE INSTRUCTIONS ON PAGES 3 AND 4 BEFORE COMPLETING THIS FORM.

SECTION 1 - EMERGENCY CONTACT INFORMATION

1. NAME *(Last, First, Middle Initial)*	2. SSN

3a. SERVICE/CIVILIAN CATEGORY	b. REPORTING UNIT CODE/DUTY STATION
☐ ARMY ☐ NAVY ☐ MARINE CORPS ☐ AIR FORCE ☐ DoD ☐ CIVILIAN ☐ CONTRACTOR	

4a. SPOUSE NAME *(If applicable) (Last, First, Middle Initial)*	b. ADDRESS *(Include ZIP Code)* AND TELEPHONE NUMBER
☐ SINGLE ☐ DIVORCED ☐ WIDOWED	

5. CHILDREN a. NAME *(Last, First, Middle Initial)*	b. RELATIONSHIP	c. DATE OF BIRTH *(YYYYMMDD)*	d. ADDRESS *(Include ZIP Code)* AND TELEPHONE NUMBER

6a. FATHER NAME *(Last, First, Middle Initial)*	b. ADDRESS *(Include ZIP Code)* AND TELEPHONE NUMBER

7a. MOTHER NAME *(Last, First, Middle Initial)*	b. ADDRESS *(Include ZIP Code)* AND TELEPHONE NUMBER

8a. DO NOT NOTIFY DUE TO ILL HEALTH	b. NOTIFY INSTEAD

9a. DESIGNATED PERSON(S) *(Military only)*	b. ADDRESS *(Include ZIP Code)* AND TELEPHONE NUMBER

10. CONTRACTING AGENCY AND TELEPHONE NUMBER *(Contractors only)*

SECTION 2 - BENEFITS RELATED INFORMATION

11a. BENEFICIARY(IES) FOR DEATH GRATUITY *(Military only)*	b. RELATIONSHIP	c. ADDRESS *(Include ZIP Code)* AND TELEPHONE NUMBER	d. PERCENTAGE

12a. BENEFICIARY(IES) FOR UNPAID PAY/ALLOWANCES *(Military only)* NAME AND RELATIONSHIP	b. ADDRESS *(Include ZIP Code)* AND TELEPHONE NUMBER	c. PERCENTAGE

13a. PERSON AUTHORIZED TO DIRECT DISPOSITION (PADD) *(Military only)* NAME AND RELATIONSHIP	b. ADDRESS *(Include ZIP Code)* AND TELEPHONE NUMBER

14. CONTINUATION/REMARKS

15. SIGNATURE OF SERVICE MEMBER/CIVILIAN *(Include rank, rate, or grade if applicable)*	16. SIGNATURE OF WITNESS *(Include rank, rate, or grade as appropriate)*	17. DATE SIGNED *(YYYYMMDD)*

Reset

INSTRUCTIONS FOR PREPARING DD FORM 93

(See appropriate Service Directives for supplemental instructions for completion of this form at other than MEPS)

All entries explained below are for electronic or typewriter completion, except those specifically noted. If a computer or typewriter is not available, print in black or blue-black ink insuring a legible image on all copies. Include "Jr.," "Sr.," "III" or similar designation for each name, if applicable. When an address is entered, include the appropriate ZIP Code. If the member cannot provide a current address, indicate "unknown" in the appropriate item. Addresses shown as P.O. Box Numbers or RFD numbers should indicate in Item 14, "Continuations/Remarks", a street address or general guidance to reach the place of residence. In addition, the notation "See Item 14" should be included in the item pertaining to the particular next of kin or when the space for a particular item is insufficient. If the address for the person in the item has been shown in a preceding item, it is unnecessary to repeat the address; however, the name must be entered. Those items that are considered not applicable to civilians will be left blank.

ITEM 1. Enter full last name, first name, and middle initial.

ITEM 2. Enter social security number (SSN).

ITEM 3a. Service. **Military:** Mark X in appropriate block. **Civilian:** Mark two blocks as appropriate. Examples: an Army civilian would mark Army and either Civilian or Contractor; a DoD civilian, without affiliation to one of the Military Services, would mark DoD and then either Civilian or Contractor as appropriate.

ITEM 3b. Reporting Unit Code/Duty Station. See Service Directives.

ITEM 4a. Spouse Name. Enter last name (if different from Item 1), first name and middle initial on the line provided. If single, divorced, or widowed, mark appropriate block.

ITEM 4b. Address and Telephone Number. Enter the "actual" address and telephone number, not the mailing address. Include civilian title or military rank and service if applicable. If one of the blocks in 4a is marked, leave blank.

ITEM 5a-d. Children. Enter last name (only if different from Item 1) first name and middle initial, relationship, and date of birth of all children. If none, so state. Include illegitimate children if acknowledged by member or paternity/maternity has been judicially decreed. Relationship examples: son, daughter, stepson or daughter, adopted son or daughter or ward. Date of birth example: 19950704. For children not living with the member's current spouse, include address and name and relationship of person with whom residing in item 5d.

ITEM 6a. Father Name. Last name, first name and middle initial.

ITEM 6b. Address and Telephone Number of Father. If unknown or deceased, so state. Include civilian title or military rank and service if applicable. If other than natural father is listed, indicate relationship.

ITEM 7a. Mother Name. Last name, first name and middle initial.

ITEM 7b. Address and Telephone Number of Mother. If unknown or deceased, so state. Include civilian title or military rank and service if applicable. If other than natural mother is listed, indicate relationship.

ITEM 8. Persons Not to be Notified Due to Ill Health.
a. List relationship, e.g., "Mother," of person(s) listed in Items 4, 5, 6, or 7 who are not to be notified of a casualty due to ill health. If more than one child, specify, e.g., "daughter Susan." Otherwise, enter "None".
b. List relationship, e.g., "Father" or name and address of person(s) to be notified in lieu of person(s) listed in item 8a. If "None" is entered in Item 8a, leave blank.

ITEM 9a. This item will be used to record the name of the person or persons, if any, other than the member's primary next of kin or immediate family, to whom information on the whereabouts and status of the member shall be provided if the member is placed in a missing status. Reference 10 USC, Section 655. **NOT APPLICABLE to civilians.**

ITEM 9b. Address and telephone number of Designated Person(s). **NOT APPLICABLE to civilians.**

ITEM 10. Contracting Agency and Telephone Number **(Contractors only). NOT APPLICABLE to military personnel.** Civilian contractors will provide the name of their contracting agency and its telephone number. Example: XYZ Electric, (703) 555-5689. The telephone number should be to the company or corporation's personnel or human resources office.

ITEM 11a. Beneficiary(ies) for Death Gratuity **(Military only)**. Enter first name(s), middle initial, and last name(s) of the person(s) to receive death gratuity pay. A member may designate one or more persons to receive all or a portion of the death gratuity pay. The designation of a person to receive a portion of the amount shall indicate the percentage of the amount, to be specified only in 10 percent increments, that the person may receive. If the member does not wish to designate a beneficiary for the payment of death gratuity, enter "None," or if the full amount is not designated, the payment or balance will be paid as follows:

(1) To the surviving spouse of the person, if any;
(2) To any surviving children of the person and the descendants of any deceased children by representation;
(3) To the surviving parents or the survivor of them;
(4) To the duly appointed executor or administrator of the estate of the person;
(5) If there are none of the above, to other next of kin of the person entitled under the laws of domicile of the person at the time of the person's death.

The member should make specific designations, as it expedites payment.

INSTRUCTIONS FOR PREPARING DD FORM 93

(Continued)

ITEM 11a. *(Continued)* Seek legal advice if naming a minor child as a beneficiary. If a member has a spouse but designates a person other than the spouse to receive all or a portion of the death gratuity pay, the Service concerned is required to provide notice of the designation to the spouse. **NOT APPLICABLE to civilians.**

Item 11b. Relationship. **NOT APPLICABLE to civilians.**

ITEM 11c. Enter beneficiary(ies) full mailing address and telephone number to include the ZIP Code. **NOT APPLICABLE to civilians.**

ITEM 11d. Show the percentage to be paid to each person. Enter 10%, 20%, 30%, up to 100% as appropriate. The sum shares must equal 100 percent. If no percent is indicated and more than one person is named, the money is paid in equal shares to the persons named. **NOT APPLICABLE to civilians.**

ITEM 12a. Beneficiary(ies) for Unpaid Pay/Allowance **(Military only)**. Enter first name(s), middle initial, last name(s) and relationship of person to receive unpaid pay and allowances at the time of death. The member may indicate anyone to receive this payment. If the member designated two or more beneficiaries, state the percentage to be paid each in item 10c. If the member does not wish to designate a beneficiary, enter "By Law." The member is urged to designate a beneficiary for unpaid pay and allowances as payment will be made to the person in order of precedence by law (10 USC 2771) in the absence of a designation. Seek legal advice if naming a minor child as beneficiary. **NOT APPLICABLE to civilians.**

ITEM 12b. Enter beneficiary(ies) full mailing address and telephone number to include the ZIP Code. **NOT APPLICABLE to civilians.**

ITEM 12c. If the member designated two or more beneficiaries, state the percentage to be paid each in this section. The sum shares must equal 100 percent. **NOT APPLICABLE to civilians.**

ITEM 13a. Enter the name and relationship of the Person Authorized to Direct Disposition (PADD) of your remains should you become a casualty. Only the following persons may be named as a PADD: surviving spouse, blood relative of legal age, or adoptive relatives of the decedent. If neither of these three can be found, a person standing in loco parentis may be named. **NOT APPLICABLE to civilians.**

ITEM 13b. Address and telephone number of PADD. **NOT APPLICABLE to civilians.**

ITEM 14. Continuations/Remarks. Use this item for remarks or continuation of other items, if necessary. Prefix entry with the number of the item being continued; for example, 5/John J./son/ 19851220/321 Pecan Drive, Schertz TX 78151. Also use this item to list name, address, and relationship of other persons the member desires to be notified. Other dependents may also be listed. This block offers the greatest amount of flexibility for the member to record other important information not otherwise requested but considered extremely useful in the casualty notification and assistance process. Besides continuing information from other blocks on this form, the member may desire to include additional information such as: NOK language barriers, location or existence of a Will, additional private insurance information, other family member contact numbers, etc. If additional space is required, attach a supplemental sheet of standard bond paper with the information.

ITEM 15. Signature of Service Member/Civilian. Check and verify all entries and sign all copies in ink as follows: First name, middle initial, last name. Include rank, rate, or grade if applicable. May be electronically signed (see DoD Instruction 1300.18 for guidelines).

ITEM 16. Signature of Witness. Have a witness (disinterested person) sign all copies in ink as follows: First name, middle initial, last name. Include rank, rate, or grade as appropriate. A witness signature is not required for electronic versions of the DD Form 93 (see DoD Instruction 1300.18).

ITEM 17. Date the member or civilian signs the form. This item is an ink entry and must be completed on all copies.

SB 39

<TARGET><BILL>SB 39</BILL><SUBJECT>SB 39</SUBJECT><COMM>SJUD27</COMM></TARGET>

Senator Hollis French

Sponsor Statement

SB 39 – U.S. Presidential Election Compact

If there is one bedrock rule in elections it is this: the person with the most votes is the winner. This legislation would guarantee the Presidency to the candidate who receives the most votes in the United States.

The concept of 'the person with the most votes wins' is simple, but it hasn't always worked out that way in our Presidential elections.

In 1876 Samuel Tilden received 254,000 more votes that Rutherford Hayes; however, Hayes won the Electoral College tally by one vote by having won a number of states by very small margins. In 1888 Grover Cleveland led in the popular vote over Benjamin Harrison, 48.6 percent to 47.8 percent, but Harrison won the Electoral College by a 233-168 margin, largely by virtue of his 1 percent win in Cleveland's home state of New York. In 2000 Al Gore won the popular vote by just over 500,000 votes but lost in the Electoral College to George Bush 266-271. In 2004 a shift of only 60,000 votes in Ohio from George Bush to John Kerry would have resulted in Kerry winning the Electoral College despite losing the popular vote by over 3 million votes.

SB 39 corrects this defect in our Presidential elections not by doing away with the Electoral College but by modifying how each state's electoral votes are cast. Currently the state's Electoral College votes are cast 100% in favor of the popular vote winner in the state. The bill would have Alaska join a compact made up of states that have pledged to cast their electoral votes in favor of the national popular vote winner. The compact would not go into effect until enough states have joined to put a majority of the Electoral College votes in the compact.

The choice of how to allocate our vote within the Electoral College was given to us by Article II, Section I of the US Constitution. The founding fathers of our country left the decision on how to select electors up to each individual state legislature. The US Supreme Court has written that "the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States." *McPherson v. Blacker*, 146 U.S. 1 at 29 (1892).

Many believe that the current system causes candidates to focus on swing states, and swing state issues, instead of approaching the country as a whole. It is beyond dispute that under the current system candidates spend their campaign funds on just a few states. Here's an example of how this plays out in Alaska. During the final 40 days of the 2008 election, 99% of all media expenditures were made in 17 states. Alaska, needless to say, was not one of them.

In a close presidential election that decides our country's future, all states should be swing states. Every vote should count, and should be sought by every candidate. This bill will promote truly national presidential campaigns, and it will ensure that the person sent to occupy the most powerful office in the world is the one who got the most votes in the election.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 39
(S) Publish Date: 2/11/11

Identifier (file name): SB039OOG-DOE-1-29-11
Dept. Affected: OOG
Title: "An Act ratifying an interstate compact to elect the President and Vice President of the United States by national popular.."
Appropriation: Elections
Allocation: Elections
Sponsor: Senator French
Requester: Senate State Affairs Committee
OMB Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Gail Fenumiai, Director — Phone: 465-2644
Division: Division of Elections — Date/Time: 1/29/2011, 4:41pm
Approved by: Linda Perez, Administrative Director — Date: 1/29/2011
Office of the Governor

(Revised 1/27/2011 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 39

Analysis

This legislation has no fiscal impact for the Division of Elections.

LEGAL SERVICES

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

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

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

MEMORANDUM January 27, 2011

SUBJECT: Sectional summary of SB 39 (Work Order No. 27-LS0372/A)

TO: Senator Hollis French
Attn: Andy Moderow

FROM: Alpheus Bullard
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Ratifies an interstate compact to elect the President and Vice-President of the United States by national popular vote. Under the compact (and the bill), the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia will win the presidency. Under the compact, all of the state's electoral votes would be awarded to the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia. This compact would take effect only when enacted by states possessing a majority of the electoral votes, that is, enough electoral votes to elect a President, which is 270 of 538 electoral votes.

Sections 2 - 5. Conform statutes to the changes made by section one of the bill.

TLAB:ljw
11-051.ljw

National Popular Election of the President

National Popular Vote!

www.NationalPopularVote.com

March 9, 2010

"Agreement Among the States to Elect the President by National Popular Vote"

The National Popular Vote bill would guarantee the Presidency to the candidate who receives the most popular votes in all 50 states (and the District of Columbia).

The bill has passed 29 legislative chambers in 19 states (AR, CA, CO, CT, DE, HI, IL, ME, MD, MA, MI, NV, NJ, NM, NC, OR, RI, VT, WA) and been endorsed by 1,825 state legislators.

The bill has been enacted by state legislatures representing 61 electoral votes — 23% of the 270 necessary to activate the law (Hawaii, Illinois, Maryland, New Jersey, and Washington).

The shortcomings of the current system stem from the winner-take-all rule (i.e., awarding all of a state's electoral votes to the candidate who receives the most popular votes in each state).

Because of the winner-take-all rule, a candidate can win the Presidency without winning the most popular votes nationwide. This has occurred in 4 of the nation's 56 presidential elections (and 1 in 7 of the non-landslide elections). A shift of fewer than 60,000 votes in Ohio in 2004 would have defeated President Bush despite his nationwide lead of 3,500,000 votes.

Another shortcoming of the winner-take-all rule is that presidential candidates have no reason to poll, visit, advertise, or organize in states where they are comfortably ahead or hopelessly behind. In 2008, candidates concentrated over two-thirds of their campaign visits and ad money in just six closely divided "battleground" states. A total of 98% went to just 15 states. In other words, voters in two thirds of the states were essentially spectators to the election.

The U.S. Constitution gives the states exclusive and plenary control over the manner of awarding their electoral votes. The winner-take-all rule is not in the Constitution. It was not the Founder's choice and was used by only 3 states in the nation's first presidential election in 1789. Maine and Nebraska currently award electoral votes by congressional district — a reminder that an amendment to the U.S. Constitution is not required to change the way the President is elected.

Under the National Popular Vote bill, all the electoral votes from the enacting states would be awarded, as a bloc, to the presidential candidate who receives the most popular votes in all 50 states (and DC). The bill would take effect only when enacted by states possessing a majority of the electoral votes — that is, enough electoral votes to elect a President (270 of 538). The bill would replace the current state-by-state system of awarding electoral votes with a system based on winning the most individual votes in all 50 states (and DC).

The bill has been endorsed by the *New York Times*, *Chicago Sun-Times*, *Minneapolis Star-Tribune*, *Los Angeles Times*, *Boston Globe*, *Sacramento Bee*, Common Cause, and Fair Vote.

State polls show strong support for a national popular vote (AK–70%, AR–80%, CA–70%, CO–68%, CT–74%, DC–76%, DE–75%, ID–77%, IA–75%, KY–80%, ME–77%, MA–73%, MI–73%, MS–77%, MO–70%, NH–69%, NE–74%, NV–72%, NM–76%, NY–79%, NC–74%, OH–70%, OK–81%, PA–78%, RI–74%, SD–75%, UT–70%, VT–75%, VA–74%, WA–77%, WI–71%, and WV–81%). Support is strong in every partisan and demographic group.

The National Advisory Board of National Popular Vote includes former congressmen John Anderson (R–Illinois and later independent presidential candidate), John Buchanan (R–Alabama), Tom Campbell (R–California), and Tom Downey (D–New York) and former Senators Birch Bayh (D–Indiana), David Durenberger (R–Minnesota), and Jake Garn (R–Utah).

Additional information is available in our book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* and at `www.NationalPopularVote.com`.

In summary, the National Popular Vote bill will guarantee that every voter in every state will be politically relevant in every presidential election and that every vote will be equal.

The New York Times

Drop Out of the College

New York Times Editorial
March 14, 2006

The Electoral College is an antidemocratic relic. Everyone who remembers 2000 knows that it can lead to the election of the candidate who loses the popular vote as president. But the Electoral College's other serious flaws are perhaps even more debilitating for a democracy. It focuses presidential elections on just a handful of battleground states, and pushes the rest of the nation's voters to the sidelines.

There is an innovative new proposal for states to take the lead in undoing the Electoral College. Legislatures across the country should get behind it.

Both parties should have reason to fear the college's perverse effects. In 2000, the Democrats lost out. But in 2004, a shift of 60,000 votes in Ohio would have elected John Kerry, even though he lost the national popular vote decisively.

Just as serious is the way the Electoral College distorts presidential campaigns. Candidates have no incentive to campaign in, or address the concerns of, states that reliably vote for a particular party. In recent years, the battleground in presidential elections has shrunk drastically. In 1960, 24 states, with 327 electoral votes, were battleground states, according to estimates by National Popular Vote, the bipartisan coalition making the new proposal. In 2004, only 13 states, with 159 electoral votes, were. As a result, campaigns and national priorities are stacked in favor of a few strategic states. Ethanol fuel, a pet issue of Iowa farmers, is discussed a lot. But issues of equal concern to states like Alabama, California, New York and Indiana are not.

The Electoral College discourages turnout because voters in two-thirds of the nation know well before Election Day who will win their states. It also discriminates among voters by weighing presidential votes unequally. A Wyoming voter has about four times as much impact on selecting that state's electors as a California voter does on selecting that state's.

The answer to all of these problems is direct election of the president. Past attempts to abolish the Electoral College by amending the Constitution have run into difficulty. But National Popular Vote, which includes several former members of Congress, is offering an ingenious solution that would not require a constitutional amendment. It proposes that states commit to casting their electoral votes for the winner of the national popular vote. These promises would become binding only when states representing a majority of the Electoral College signed on. Then any candidate who won the popular vote would be sure to win the White House.

The coalition is starting out by trying to have laws passed in Illinois and a few other states. Americans are rightly cautious about tinkering with mechanisms established by the Constitution. But throughout the nation's history, there have been a series of reforms affecting how elections are conducted, like the ones that gave blacks and women the vote and provided for the direct election of United States senators. Sidestepping the Electoral College would be in this worthy tradition of making American democracy more democratic.

The Fayetteville Observer

Our View: Electoral vote change would be good for the state and its people

The Fayette Observer Editorial
May 16, 2007

Four times since the framers met in Philadelphia in 1787, the presidency has gone to the candidate on the losing end of the popular vote. The republic still stands.

That's hardly a compelling argument for leaving things as they are. The Electoral College less than perfectly reflects the will of the people, and the threat of the "faithless elector" who tips an election the way his partisan bias dictates is real, if remote. Both threats would vanish if the election automatically went to the candidate for whom most registered voters pulled the lever.

This is the point at which the conversation normally would turn to amending the federal Constitution to abolish the Electoral College. But the state Senate has just passed a bill that would achieve a comparable effect by simple statute.

The bill provides that, if enough states join in to command a majority in the Electoral College, all of North Carolina's electoral votes will be awarded to the winner of the popular vote — not the statewide winner, but the one who wins nationwide. More than 40 states are already looking at substantially the same bill.

If it works as planned, the problem goes away, with no violence done to the Constitution.

Something else happens, too. North Carolina will less often find itself in political obscurity when the nation chooses its top leader.

During the 2000 election, one analyst noted that the candidates were focusing most of their time and effort on 11 swing states. Ironically, only three of those had more electoral votes than North Carolina, which was not one of the 11. If candidates understand that they have a real shot at our 15 electoral votes right up until the polls close on that fateful Tuesday in November, we are unlikely to be shrugged off or taken for granted again.

The arguments against it are no stronger than those for retaining the Electoral College in all its supreme majesty: (1) it's different; and (2) it means that North Carolina could end up giving its 15 votes to someone not favored by the majority of Tar Heel voters. The first argument lacks heft. The second would make perfect sense, but only if one could ignore the fact that presidential elections are held to enable individual Americans to put someone in the White House, not merely to express each state's collective pique or pleasure.

This is worth a try — for the sake of simplicity and fairness, and in the interest of raising our state's political profile.

Public Policy Polling

Alaska Survey Results

Q1 How do you think we should elect the President: should it be the candidate who gets the most votes in all 50 states, or the current electoral college system? If you think it should be the candidate who gets the most votes in all 50 states, press 1. If you think it should be the current electoral college system, press 2.

Candidate who gets the most votes in all 50 states	70%	*Current electoral college system*	30%

Q2 If you are a woman, press 1, if a man, press 2.

Women	54%	*Men*	46%

Q3 If you are a Democrat, press 1. If a Republican, press 2. If nonpartisan, press 3. If Alaskan Independent Party, press 4. If Republican Moderate Party, press 5. If Green Party, press 6. If other, press 7.

Democrat	18%
Republican	33%
Nonpartisan	44%
Alaskan Independent Party	1%
Other	4%

Q4 If you are white, press 1. If black, press 2. If Alaska native, press 3. If Asian, press 4. If other, press 5.

White	80%	*Asian*	1%
Black	4%	*Other*	10%
Alaska Native	5%		

Q5 If you are 18 to 29 years old, press 1 now. If you are 30 to 45, press 2. If you are 46 to 65, press 3. If older than 65, press 4.

18-29	9%	*46-65*	41%
30-45	34%	*Older than 65*	15%

Q6 Are you or is someone in your household a member of a labor union? If yes, press 1. If no, press 2.

Yes	28%
No	72%

January 27-28, 2010
Survey of 800 Alaska voters

3020 Highwoods Blvd.
Raleigh, NC 27604
information@publicpolicypolling.com / 888 621-6988

Lila Hobbs

From: Bill Parker [billparkerak@yahoo.com]
Sent: Monday, February 14, 2011 10:54 PM
To: Sen. Hollis French
Subject: Support SB 39

The electoral college is an anachronism. The one person, one vote principle makes it illogical. The perceived political advantage for small-population states like ours is outweighed by our duty for equality for all Americans in choosing a President. Please share this with the members of your committee.

Thank You.
Bill Parker
Patrice Parker

Sent from my iPhone

Lila Hobbs

From: Nicholes New [nicholesnew@yahoo.com]
Sent: Monday, February 14, 2011 9:23 PM
To: Sen. Hollis French
Subject: Senate Bill 39, US Presidential Election Compact Bill.

Greetings Senator French,

I am an Alaskan resident and registered voter, who would like to commend and support you in any way that I can with regards to your sponsorship of the Senate Bill 39, US Presidential Election Compact Bill.

I have read the bill and fully understand the effects this bill would have on the residents of Alaska. The opportunity for Alaska to join a compact made up of states that have pledged to cast their electoral votes in favor of the national popular vote winner is a commendable step towards making this great state a presence as much as the 17 states that are focused on at this time. In other words, to me, this bill will give way to a fair and balanced system to encourage and persuade Candidates to focus on all the people; rather than an esoteric group that may have all the power.

I feel this bill is a step into a higher rank of democracy and must be carried with the peoples voice as far as it can reach. I can not convey my passion for your support in this bill.

Having met you personally I feel confident in your endorsement of this bill and wish you all the luck in your pursuit of same.

With Best regards, I am

Sincerely,
Nichole Dewey
nicholesnew@yahoo.com
- Post office box 101528
- Anchorage, AK 99502
- (907)350-9324

Lila Hobbs

From: tom biss [tombiss823@gmail.com]
Sent: Monday, February 14, 2011 8:49 PM
To: Sen. Hollis French
Subject: Supporting Senate Bill 39

Senator French,

I support your sponsorship of Senate Bill 39, US Presidential Election Compact and the beneficial modification it brings to our Electoral College. It may even bring a candidate to the State of Alaska for the first time in years.

V/r

Tom Biss

Lila Hobbs

From: Christopher Dewey [kenaidew@yahoo.com]
Sent: Monday, February 14, 2011 8:38 PM
To: Sen. Hollis French
Subject: SB 39 Support!

Good Morning Senator French,

Thank you for sponsoring Senate Bill 39, US Presidential Election Compact. I lend my whole hearted support to return the power of voting back to the people. Alaskans will have more say in determining the US President and it will ensure a more evenly divided campaign effort from the canidates.

Regards,

Christopher D. Dewey
7038-A Arnold Ave
JBER, AK 99506

We won't tell. Get more on shows you hate to love
(and love to hate): Yahoo! TV's Guilty Pleasures list.

Lila Hobbs

From: heathedward@gmail.com on behalf of Heath Hilyard [Heath@HeathEdward.com]
Sent: Monday, February 14, 2011 4:44 PM
To: Sen. Hollis French
Cc: Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Subject: Support for SB 39 - National Popular Vote

Senator French and Members of the Senate Judiciary Committee:

I would like to take this opportunity to support SB 39 - *U.S. Presidential Election Compact*. As I'm sure you're aware there have been a variety of efforts to reform the U.S. presidential election process in order to address the growing unfairness to states (specifically low population and/or geographically distant states) resulting from pre and post Primary presidential campaign strategies.

These concerns have long led critics to debate the ongoing relevance of the Electoral College. While I recognize that this bill does not ultimately address that larger issue, it does provide a workable alternative to increase parity among states during a presidential campaign.

There are a host of reasons why this legislation is necessary and timely, and I'm certain the committee will have the opportunity to hear from more eloquent speakers with greater expertise than I, so I won't belabor my comments with excessive information you're likely to otherwise be provided.

I appreciate the opportunity to comment on this important legislation.

Respectfully,
Heath E. Hilyard
3105 Eureka, Apt. 5
Anchorage, AK 99503

Lila Hobbs

From: Jack Heesch [akjack@gci.net]
Sent: Monday, February 14, 2011 3:37 PM
To: Sen. Hollis French
Subject: SB39

Senator French:

I want to express my support for SB 39 allowing for a direct vote for the President of the US.

Thank you for introducing and supporting this legislation.

Jack Heesch

Jack R. Heesch, President
The J.R. Heesch Company
P.O. Box 201608
Anchorage, Alaska 99520-1608
(907) 277-7316
(201) 725-0199 cell
akjack@gci.net

Lila Hobbs

From: Jim Babb [jimb66089@gmail.com]
Sent: Monday, February 14, 2011 3:31 PM
To: Sen. Hollis French
Subject: SB-39

Dear Hollis,

Please support SB-39 and ask the committee to do so also

Jim Babb
Anchorage, AK 99503

Cindy Smith

From: Hardaway, Robert [rhardawa@law.du.edu]
Sent: Monday, February 21, 2011 1:24 PM
To: Cindy Smith
Cc: 'Tara Ross'
Subject: FW: Comments of Prof. Hardaway on S.31
Attachments: Statement of Professors Opposing HB 1299.doc; the Case for Preserving Federalism.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

From: Hardaway, Robert
Sent: Monday, February 07, 2011 7:46 PM
To: 'bleber@leg.state.vt.us'
Subject: Comments of Prof. Hardaway on S.31

Re: Hearings on Koza Scheme to cast Alaska's electoral votes in contravention of the vote of the people of Alaska

Dear Ms. Smith,

Although I plan to phone in to give a statement before the Alask legislative hearing scheduled for 3:30 this Wednesday, I was hoping that you would forward this e-mail, along with its attachments to Senator Hollis French.

My name is Robert Hardaway, Professor of Law at the University of Denver Sturm College of Law. I am the author of a number of articles and books on the Electoral College, including "The Electoral College and the Constitution: The Case for preserving Federalism" (Praeger Press), and "Crisis at the Polls" (Greenwood Press). I have also attached an article I wrote for the Arkansas Democrat Gazette entitled "The Case for Preserving Federalism".

I have also attached a statement of professors who opposed a similar bill in the Colorado legislature, including a list of questions to pose to all those supporting a "Koza" type scheme under which a small minority of states could elect a president and in which a state legislature would be required to to ignore the vote of the people in their state in casting its state's electoral votes.

I will leave it to others to lay out the case against undermining the "Grand Compromise" enshrined in the U.S. Constitution to protect the small states, as well as the risks of electing a president with a small minority of the votes case which would occur if the federalist structure of our system of government were to be abolished by circumventing the amendment process.

Instead, I would simply point out that the Koza scheme set forth no national plan for conducting recounts. Instead, recounts would be left to each individual state to conduct under their own laws, with the result that even though the national popular vote might be very close, only some states would conduct a recount, while others not a party to the Koza scheme could be required under their own state laws to opt out of a recount entirely. The result in the case of a close national popular vote would be a catastrophe of unimaginable proportions.

If others are adamant about undermining federalism by abolishing the twin prongs of the Grand Compromise (which include both the Electoral College and the U.S. Senate), they should be encouraged to first work to abolish the Senate, and only then to abolish the second prong to which it is attached.

In order to preserve the separation of powers, the Framers did not want the president to be chosen by (and thereby beholden to) Congress, and thus established a secondary body modeled on a parliament whose only responsibility would be to elect the president. Just as in 1974 in Britain when Labor won the popular vote but did not form the government because it did not elect a majority of members to parliament, once every hudnred years or so the electoral vote does not jibe with the popular vote. That result every hundred years neither justifies the abolition of parliament in Great Britian or the abolishment of federalism in the U.S., and sweep away an electoral system that has been the envy of the world.

Nor after all the gains that minorities have won over the past half century should their rights be taken away through the abolition of federalism. As Vernon Jordan, president of the Urban League testified in 1979

congressional hearings: "Take away the Electoral College and the importance of being black melts away. Blacks, instead of being crucial to victory in major states, simply become 10% of the Electorate, with reduced impact."

Please feel free to call me 24/7 if you have any questions at 303-345-5220.

Respectfully submitted,

Robert Hardaway
Professor of Law
University of Denver Sturm College of Law
2255 E. Eavns
Denver, CO, 80208

PROPOSED QUESTIONS TO BE CONSIDERED AND ANSWERED BY COLORADO SENATORS PRIOR TO VOTING ON HOUSE BILL 09-1299

(Submitted by undersigned Professors)

1. Given that the Colorado Constitution specifically provides that "the electors of the electoral college shall be chosen by direct vote of the people" [Section 20, Colorado Constitution, Schedule], will supporters of House Bill 1299 attach a rider to that bill amending the Colorado Constitution to permit the legislature to select electors other than those chosen by direct vote of the people of Colorado?

2.Inasmuch as the House Bill 1299 includes no provision for a national recount in presidential elections, and there currently exists no federal law provision for conducting recounts in close elections, how would the Colorado legislature allocate its electoral votes in close elections in which some, but not necessarily all states are independently conducting recounts according to their own state's laws and in which the "chief election official" of those states conducting recounts has not certified the popular vote of such state by the First Monday after the second Wednesday in December of an election year due to pending unresolved recounts and court challenges in those states?

Illustration: In 1960, media tabulators of the popular vote gave Kennedy a narrow popular vote margin; however, the Congressional Quarterly declared Nixon the popular vote winner by a relative handful of popular votes. *To this day,* historians can not determine the popular vote winner, since a recount of over 70 million votes in over 42,000 voting districts would have taken years and rendered a different result in each recount. Pierce and Longley's massive study of Americans elections has concluded that it was "impossible to determine what Kennedy's vote plurality—*if it existed at all*—really was. (Emphasis added)

Question 2A: In such a scenario, how would the Colorado legislature cast its electoral votes if it was a Koza member?

3. Inasmuch as federal law [Title 3, Sec. 3] provides that *governor* of each state is required to certify the electoral votes of his state, how should the Colorado legislature cast its electoral votes if the "chief election official" (as provided by the Koza scheme) asserts that

candidate A has a popular vote lead as of the first Monday after the second Wednesday in December, but the governor asserts that candidate B is actually in the lead for the time being, or asserts that the popular vote can not be determined due to pending recounts in some but not necessarily all of the states?

4. If after a presidential election a Koza scheme member state decides to withdraw from the "compact" with other Koza members prior to the time permitted under the Koza scheme (either because it can not determine a popular vote winner in the other states, or its Supreme Court has declared the Koza scheme unconstitutional, or for any other reason), how would the other Koza member states enforce the compact against another state allegedly prematurely withdrawing from the compact?

5. If after a presidential election, members of the Colorado legislature believe that election fraud has occurred in other states, or that the closeness of the national popular vote justifies a national recount, how would Colorado go about forcing other non-Koza states to conduct a recount if such a recount would violate the election laws and provisions of those other states? How would it force Koza states to conduct such recounts?

6. Given that there is presently no national provision for a nationwide recount of popular votes, nor any federal law authorizing such a recount, how would a national recount of the popular vote in all the states be conducted in cases where the closeness of the popular vote justifies such a recount? (Note: some, but not all states provide for an *automatic* recount in elections in which the difference in the popular vote is below a certain percentage)

7. If the popular vote is so fractured that no one candidate has either a majority or plurality above 20% of the popular vote, what would be the procedure under the Koza scheme for a run-off in order to insure that a candidate receives either a majority or at least a substantial plurality of the popular vote?(note: virtually all countries using a popular vote method—such as Russia—at least provide for a run-off)

8. Given that the U.S. Constitution *specifically* and unambiguously prohibits the states from entering into "any agreement, or compact with another state" [ART I, Sec 10(3)], (with only narrowly drawn judicial exclusions relating to settlement of disputes on mundane matters such as water rights, etc.), and that the Supreme Court has NEVER approved compacts or conspiracies among the states to undermine federalism or reformulate the constitutional process for presidential elections, do the supporters of House Bill 1299 intend to attach a rider to that bill proposing an amendment to the U.S. Constitution to abolish the express prohibition of such compacts and conspiracies?

9. How would the legislature best explain to the people of Colorado that the legislature chose to overrule the people's choice of electors pledged to a particular candidate in elections in which, like in 1960, the popular vote can not be determined—all in violation of the Colorado Constitution?

Professor Jim Riley, Professor of Politics
Regis University

Professor Robert Hardaway, Professor of Law
University of Denver Sturm College of Law

If the above questions can not be adequately answered, the undersigned urge consideration of the following ten reasons to vote against HB 1299:

The proposed Compact among states to establish direct election of the President:

1. **Violates Section 10 of Article I of the U.S. Constitution which specifically states that "*no state shall, without the consent of Congress…enter into any Agreement or Compact with another state…*"**

2. **Undermines American federalism, and constitute a cynical scheme to illegally subvert Section I, Article II of the "U.S. Constitution which guarantees to *every* state, not just a favored eleven, a number of electors "*equal to the whole number***

of Senators and Representatives to which the State may be entitled in the Congress:…"

3. **Cynically by-passes the established amending process set forth in Article V, including the approval of "*two thirds of both houses…and the Legislatures of three fourths of the several states…*" of any proposed amendment.**

4. **Diminishes the political influence of racial and ethnic minorities in the United States in presidential elections** [Ref: testimony of Vernon Jordan, president of the National Urban League at 1979 Congressional Hearings: *"Take away the Electoral College and the importance of being black melts away. Blacks, instead of being crucial to victory in major states, simply become 10% of the electorate, with reduced impact"]*

5. **Subverts the "Grand Compromise" entered into by the Founding Fathers at the Constitutional Convention as the basis for federalism and our national union, the two prongs of which were: 1) the equal representation of each state in the Senate along with popular representation in the House, and 2) a number of presidential electors based on the number of representatives to which they were entitled in both the Senate and the House** [Ref: statement of Senator John F. Kennedy in 1956 in opposition to a Republican proposal to abolish the Electoral College: *"It is not only the unit vote for the presidency we are talking about, but a whole solar system of governmental power. If it is proposed to change the balance of power of one of the elements of the solar system, it is necessary to consider the others." (In other words, abolishing the U.S. Senate).]*

6. **Results in the chronic election of candidates who are supported by only a minority of the popular electorate by weakening the two party system and encouraging encourage splinter parties, eventually generating into a prolonged run-off system under which two minor party candidates enjoying little overall popular support can win the presidency despite being opposed by the vast majority of the electorate.**[Ref: note the 1993 Russian multi-party "popular" vote election in which the electorate came within a whisker of being presented with a "runoff" choice between Fascists and Communists, despite the fact that 80% of the electoral opposed both].

7. **Compromises the intention of the Founding Fathers that national support for a presidential candidate be broad as well as deep. The need to create concurrent pluralities throughout the United States would be eliminated and replaced by a myopic focus on population centers largely found in coastal areas.**

8. **Dooms the United States to a destabilizing electoral crisis in *every* election in which the popular vote is close. When the electoral vote is close, as in 2000 (but which occurs only once every hundred years), the recount is isolated to one state. In a so-called "popular vote" election, a recount would be required in *every one* of 170,000 voting precincts and hamlets nationwide, enormously magnifying crises such as that endured in 2000. After the inevitable multiple lawsuits were filed, every recount would doubtlessly show a different result.**

9. **Wipes out the influence of "swing" states such as Colorado in the presidential election contest, as well as require Colorado to cast its electoral votes in direct opposition to the will expressed by the Colorado voters when the national popular vote plurality was different from that in Colorado.**

10. **Violates the Colorado Constitution (Schedule Provisions, Sec. 20) which mandates that "The general assembly shall provide that after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people."**

For these reasons we urge the defeat of HB 1299.

Signed:

Robert M. Hardaway, Professor of Law, University of Denver Sturm College of Law

Jim L. Riley, Professor of Politics, Regis University

(Note: five additional professors from local colleges and universities signed the above ten grounds for opposing HB 1299 in 2007; their names are not listed here today because of insufficient time to contact them to verify their continued opposition).

The case for preserving federalism

BY ROBERT HARDAWAY
SPECIAL TO THE DEMOCRAT-GAZETTE

As the nation gets ready for another presidential election, there are an increasing number of calls for popular election of the president and the abolition of the Electoral College. Such calls are not new. Since 1787, there have been more than 700 bills and proposed constitutional amendments to reform or abolish the Electoral College. All have failed, and the reasons are both political and practical.

The U.S. Constitution itself almost failed to become the supreme law of the land because the small states adamantly refused to join a union in which the large states would dominate the small states in a national legislature. On the verge of dissolution, the Constitutional Convention of 1787 proposed a two-pronged compromise that ultimately saved the union: First, a lower house of the legislature would be elected based on population, while an upper house would guarantee equal representation of each state regardless of population; second, the president would be elected by electors chosen by each state and equal in number to the number of representatives elected by each state to Congress.

Indeed, so critical was this compromise to the establishment of a federal union that the small states insisted that its primary feature be enshrined as the only provision in the Constitution which could not be amended except by unanimous agreement of all the states. Thus under the Constitution, a single state can veto any proposed constitutional amendment to undermine federalism by calling for representation in the Senate based on "one man, one vote" rather than on equal representation of the states.

Nevertheless, if reformers are truly concerned about the fact that citizens of the smaller states have a disproportionate voice in Congress, the first step would be to abolish the U.S. Senate (the first prong of the grand compromise that united the union). The second step would be to abolish the Electoral College (the second prong of the grand compromise, which is inextricably bound up with the first.).

A young Sen. John Kennedy eloquently made this very point when in 1956 he opposed a Senate bill for popular election of the president, stating that "It is not only the unit vote for the presidency we are talking about, but a whole system of governmental power. If it is proposed to change the balance of power of one of the elements of the solar system, it is necessary to consider the others."

At the Constitutional Convention of 1787, only John Hamilton proposed abolishing the states and creating a centralized government rather than a federal system of government based on shared and delegated powers. His proposal was overwhelmingly defeated, as have 700 bills submitted since then to undermine federalism by abolishing the Electoral College.

Advocates of popular election often claim that no other democratic country would tolerate an election in which the popular vote winner is not elected. In fact, this occurs quite frequently in all countries with parliamentary systems. In England, for example, prime ministers are elected by members of Parliament. In 1974, the Labor Party lost the national popular vote by a healthy margin, but nevertheless won three more seats in Parliament, with the result that Labor was able to form the government. As far as can be determined, there was no rioting in the streets or "appeals to the United Nations."

Proposals for "popular election" are often based on an appeal to democratic principles. In fact, so-called "popular" elections rarely produce a leader approved by a majority of the people. Such elections inevitably require "runoffs" in which the two most organized parties often make the cutoff despite lacking widespread support. For example, in the popular election conducted in Russia in 1993, a runoff came within a whisker of presenting the electorate with a choice between a neo-fascist (who blamed the Jews for starting wars and advocated invading Alaska) but who received but 23 percent of the vote, and a hard-core communist who came within a percentage point of finishing second—despite the fact that over two-thirds of the electorate opposed both candidates.

The Founding Fathers understood that the legitimacy of a leader must be based on support of the people that is broad as well as deep. They foresaw the possibility that under a "popular" election system, a regional demagogue might gain overwhelming support in one region of the country, but be strongly opposed by the rest of the country. For example, a segregationist who ran for president in the 1950s might well have succeeded in getting 90 percent of the vote in the deep South and thus win the popular vote, even though he was opposed by majorities of the people in three-quarters of the remaining states. The Electoral College prevents such a result, and insures that a president have broad support across the entire country, not just overwhelming support in one region.

Over the last 200 years, we have become spoiled by the success of the Electoral College in providing the democratic infrastructure for the peaceful transfer of power. Without it, our two-party system would quickly degenerate into a multiplicity of small parties, with the result that minority presidents elected in "runoffs" would rule. In Italy, for example, governments rise and fall from month to month as contentious small parties ebb and flow.

We have also become accustomed to the definitive and speedy result. In 1960, an election based on the popular vote would have been too close to call for several months as recounts went on interminably in every state. Indeed, it has been estimated that the presidency would have been in limbo for as long as six months during a time of nuclear crisis and the Cold War. Fortunately, the Electoral College provided an instant winner in the form of an overwhelming victory for John Kennedy in the Electoral College despite the incredible closeness of the popular vote—thus saving the country from a destabilizing crisis.

True, once every 100 years on average, the vote in the Electoral College is so close that a recount in a single state can affect the election. Indeed, this occurred in 2000, as it did in 1876. But consider what would have happened in 2000 had the country adopted a popular election system. Instead of isolating the recount to one state (Florida), recounts would have been necessary in all 50 states, thus multiplying the national trauma. The country would have been lucky to have a president within the next year.

Minorities are also sure to oppose the abolition of the Electoral College. As Vernon Jordan, president of the Urban League, observed, "Take away the Electoral College and the importance of being black melts away. Blacks, instead of being crucial to victory in major states, simply become 10 percent of the total electorate, with reduced impact."

It is just possible that the founding fathers knew what they were doing when they devised an electoral system that over a period of two centuries has proved to be the envy of the world.

Robert Hardaway is professor of law at the University of Denver College of Law and the author of 14 books on law and public policy. He first debated the issue of the Electoral College with classmate Al Gore in government class at St. Albans High School in Washington, D.C.

Sunday Crossword Pu

THE STATE OF ALASKA
SENATE JUDICIARY COMMITTEE

SB 39: An Act ratifying an interstate compact to elect the President and Vice-President of the United States by national popular vote
February 2011

Submitted By: Tara Ross
Author of *Enlightened Democracy: The Case for the Electoral College*

Overview

I urge you to vote against SB 39. It would create many new, logistical problems for our presidential election process. It would also essentially eliminate the Electoral College, an institution that protects less densely populated states such as Alaska and is critical to the success of our republican democracy.

Problems Created by SB 39. The National Popular Vote plan proposed by SB 39 contains many hidden problems. NPV awards the presidency to the winner of any plurality—even a very small one. Alaska could be required to cast its electoral votes for a candidate who did not qualify for the ballot in Alaska. Recounts would be controlled by 51 different standards (50 states plus D.C.), rather than one national standard. Chaos, litigation, and confusion would result. Some voters would be disenfranchised because their votes would be counted in different ways, depending on their state of residence.

Applying the Electoral College Today. The Electoral College provides many benefits that still serve Americans:

- *The Benefits of Federalism.* Presidential candidates must build national coalitions of voters. Historically speaking, the candidate who builds the broadest coalition will win. Thus, presidents are good representatives for all Americans; they do not merely represent one region, state, or special interest group.
- *Moderation and Compromise.* The Electoral College encourages Americans to work together, across state lines. A direct election system, by contrast, would result in multi-party presidential races, a fractured electorate, increasingly extremist third-party candidates, and constant recounts.
- *Stability and Certainty in Elections.* The Electoral College typically produces quick and undisputed outcomes. Any problems are isolated to one or a handful of states. Fraud is minimized because it is hard to predict where stolen votes will matter.

Conclusion. We must not allow the Electoral College to be eliminated through legislation such as SB 39. This important aspect of our Constitution continues to protect our freedom, just as it did when it was created in 1787.

THE STATE OF ALASKA
SENATE JUDICIARY COMMITTEE

SB 39: An Act ratifying an interstate compact to elect the President and Vice-President of the United States by national popular vote
February 2011

Submitted By: Tara Ross
Author of *Enlightened Democracy: The Case for the Electoral College*

Full Testimony

The bill before you, SB 39, represents the latest attempt to eliminate America's unique and successful presidential system. Abolishing the Electoral College would be unhealthy for the country and especially detrimental to less densely populated states such as Alaska. But eliminating the Electoral College through this roundabout manner, without going through a formal constitutional amendment process, carries its own special dangers.

Proponents claim the National Popular Vote plan outlined in SB 39 will ensure that all voters receive equal attention because each vote will be weighted equally. But the truth is the precise opposite. NPV will lessen the need of presidential candidates to obtain the support of voters in rural areas and in states such as Alaska.

Problems Created by NPV

The plan proposed by NPV is fraught with difficulties—some logistical, some philosophical. I will discuss these latter issues—arguments "for" and "against" the Electoral College—in a moment. But the logistical difficulties of changing the presidential election process without a constitutional amendment need to be fully explored.

The current presidential election process blends federalist and democratic principles. America holds 51 completely separate, purely democratic elections each presidential election year (one in each state, plus D.C.). Local election laws impact the manner in which each of these elections is held, but any differences among states' election codes don't matter. The unique laws of any particular state impact only voters within that state. The country holds 51 completely separate elections, and it achieves 51 different sets of results. Each state's single goal is to select a slate of electors that will represent it in the later, national election among the states. NPV would change this. America would still hold 51 separate elections, but NPV would attempt to derive one single result from these 51 elections. Suddenly, internal variances among states' processes—previously irrelevant—would matter a great deal. Seeking change through a constitutional amendment would avoid these problems. An amendment would help establish one set of national laws to govern one national election. Instead, consider just a few of the logistical problems that could occur with NPV in place:

First, note that NPV can't force states that have rejected NPV to participate in a run-off. Thus, it gives the presidency to the candidate winning *any* plurality, even a very small one. **NPV is not looking for a majority winner. It is not even looking for a minimum plurality.** As a practical and logistical matter, it can't. Thus, a candidate could win with only 15 or 20 percent of votes nationwide. But it gets worse. Under this scheme, Alaska could be forced to award its entire slate of electors to a candidate who was not on its own ballot. Imagine, for instance, that Ron Paul qualifies for the ballot in Texas and obtains a winning plurality solely from Texas voters. Paul did not bother to qualify for the ballot in a place like Alaska. Voters in that state did not have the chance to vote for—or against—him. Yet Alaska would *still* be forced to award its entire slate of electors to the choice of Texas voters. Alaska probably did not nominate a slate of electors for Paul because he was not on its ballot. NPV's compact offers a solution, but it is doubtful that voters in Alaska will like it. Paul would be entitled to personally appoint the three electors who will represent Alaska in the Electoral College vote. In all likelihood, he would select Texans to represent Alaska in the presidential election so that he would not be undermined by a "faithless" elector who was determined to vote for the choice of Alaska's voters.

There are other inconsistencies among states' ballots that would skew the election results. Some states allow felons to vote. Some states do not. States differ in their requirements for ballot qualification. Inevitably, Alaska would have to abide by national election results derived from policies with which it disagrees.

I wish I were done, but I am not. It gets even worse. States have different criteria for what does (or does not) trigger recounts within their borders. These differences could cause a whole host of problems. What if the national total is close—close enough to warrant a recount—but a recount can't be conducted because the margins in individual states were not close? Or perhaps recounts are conducted, but only in two or three states, each with a different idea of how to count a hanging chad. Perhaps a fourth state would see what is going on and choose to conduct a recount that its statutes previously deemed optional. Maybe this fourth state has a different definition of "hanging chad," and its sole goal is to counteract the efforts of the other states.

Such a state of affairs invites chaos, litigation, and confusion each and every election year. Some voters will be disenfranchised by the widely differing ideas of how to count a vote. What if such problems caused one state to pull out of the compact in violation of its terms? How would compliance be enforced? How much litigation would ensue before the presidential election could be resolved?

Formally eliminating the Electoral College through a constitutional amendment would be unhealthy for the country. But NPV's efforts to skirt the constitutional amendment process altogether would create added difficulties. These logistical nightmares could haunt the country each and every presidential election year.

The Benefits of the Electoral College

I do not mean to imply that the only problem with NPV is its logistical difficulties. Eliminating the Electoral College would do serious harm to a country as diverse as our own. The system provides our country with many great benefits that tend to remain unnoticed and thus unappreciated by most Americans.

The history of the Electoral College must be understood if its benefits are to be appreciated. The Founders sought to reconcile two seemingly irreconcilable goals: They wanted the people to govern themselves, but they also wanted to protect minority interests. A pure democracy would not accomplish this objective because it allows 51 percent of the people to rule the other 49 percent—all the time, without exception. If America were a pure democracy, imagine what could happen in the wake of an event like 9/11. A bare majority could enact any law it desired, even if that law were tyrannical, racist, or penalized some for their religious beliefs. The Founders thus did not create a pure democracy. Instead, their Constitution tempers its democratic aspects with republican and federalist characteristics. Safeguards such as the Senate (one state, one vote representation), supermajority requirements to amend the Constitution, and the Electoral College allow the majority to rule, but only while it acts reasonably. Minority political interests are protected.

The Electoral College provides three benefits that still protect Americans today.

The Benefits of Federalism

Electoral College opponents argue that presidential elections are undemocratic. They are wrong. America holds 51 purely democratic elections each presidential election year (each state, plus D.C.). Such a process combines democracy and federalism into one process. The result is that candidates can't win without nationwide support. Obama can't rely solely on big cities in California. Republicans can't rely solely on Texas. They must win simultaneous, concurrent majorities nationwide. They can't achieve those victories unless they reach out to a wide variety of voters. They will fail if they rely upon isolated pockets of support in one region or among voters in one special interest group.

Many dispute that our system creates national coalition-building, arguing that it instead causes a disproportionate focus on mid-sized "swing" states. These arguments appear true if we focus on one or a handful of election years in isolation. But if we look at the states' full histories of voting, we see that the identity of "swing" and "safe" states changes all the time. California is often viewed as irreversibly Democrat, but it voted for Republican candidate George H.W. Bush as recently as 1988. Texas used to be as undeniably Democrat as it is Republican today. States such as Georgia, Kentucky, and Louisiana all voted for Bill Clinton in the 1990s, but they were considered very safe Republican states in 2008.

Ultimately, the Electoral College ensures that the political parties must reach out to all the states. As a matter of history, no political party has ever been able to ignore any state for too long without feeling the ramifications at the polls.

Moderation and Compromise

The most likely consequence of a change to a direct popular vote is the breakdown of the two-party system. Today, third-party candidates do not receive much support. In a direct popular election, everything changes. A vote for Ross Perot or Ralph Nader is no longer "wasted," and the number of presidential candidates would increase. Voters would fracture their votes across many candidates. The result will be lower vote totals per candidate and an increased likelihood that two or more candidates will have close popular vote totals. Recounts would proliferate. Worse, extremist candidates could more easily sway an election, because no candidate is required to obtain majority support.

NPV proponents argue that the President should have the support of most Americans. But in real life, "most" Americans will never agree on their ideal candidate. Individuals' opinions differ too greatly. Given the general inability to obtain majority consensus (or even the consensus of a large plurality), the Electoral College provides the country with the next best alternative. Electing Presidents by states' electoral votes, rather than individuals' votes, creates a method of electing a President who is a good compromise candidate for most Americans, as represented by their states. The Electoral College requires moderation, compromise, and coalition-building from any candidate before he can be successful.

Stability and Certainty in Elections.

The Electoral College encourages stability and certainty in our political system. Events such as those that occurred in 2000 are rare. The Electoral College typically produces quick and undisputed election outcomes for two reasons: First, the system (along with the winner-take-all rule) tends to magnify the margin of victory, giving the victor a certain and demonstrable election outcome. Such certainty can't be provided by a direct popular election. Popular votes are often close, and these close votes can result in constant litigation and recounts. Second, the system controls the impact of fraud and error. In part, this is because it is difficult to predict where stolen votes will make a difference to the national outcome. But if one person can identify a problematic state (think Ohio in 2004), then, in all likelihood, everyone knows and that area is closely watched. It becomes harder to steal votes. To the degree that fraud and errors do occur, the Electoral College makes it possible to isolate the problem to one or a handful of states. The country is given a clear set of problems to resolve one way or another before moving on to a definitive election outcome.

Conclusion

The Electoral College is an important safeguard in our constitutional system of checks and balances, and it is critical to the success of our nation's republican democracy. I urge you to protect the Electoral College by voting "no" on SB 39.

February 22, 2011

The Hon. Hollis French
Chair
Judiciary Committee
Alaska State Legislature
Juneau, Alaska.

Dear Senator:

I respectfully request that you include the enclosed testimony with regard to SB in the record of tomorrow's hearing. I hope to also be able to testify by phone

As my testimony indicates, I am in my professional life the director of an organization that is non-partisan but deeply concerned with the political health and welfare of our democracy. As an individual, I am a liberal. But in both capacities, I believe the prospect of a direct election for president presents a great danger to the broader values underlying our democratic process and it also presents serious practical problems.

I hope you have an opportunity to read this testimony and that you and your colleagues might think twice before moving in this direction.

Thank you for your consideration.

Sincerely Yours,

Curtis Gans

TESTIMONY

of

Curtis Gans, Director

CENTER FOR THE STUDY OF THE AMERICAN ELECTORATE

to

JUDICIARY COMMITTEE

ALASKA STATE SENATE

Re: SB 39

February 8, 2011

My name is Curtis Gans. I am director of the Center for the Study for the American Electorate, a non-partisan, non-profit research and public policy development institution which I co-founded in 1976 and have been its executive director since that time. The primary mission of that institution has been to provide data and analysis about citizen participation in America's political life and to pursue bi-partisanly supported public policy initiatives aimed at enhancing voting and other forms of civic involvement. With respect the issues facing this hearing, I have testified twice before Congress on this issue, have written about it for more than one major publication, have been cited in a variety of publications and now am a mid-wife to a small bi-partisan study committee headed by former Reps. Mickey Edwards and Martin Frost looking for solutions to problems posed by the electoral college, solutions that do not include the direct election of the president.

I am grateful for the opportunity presented to express my considered views on this issue and thank both the elected officials and staff that made this testimony possible.

The question that is being raised by National Popular Vote and the campaign for direct elections for president is not whether our elections should be more democratic but rather what kind of democracy should the United States be.

The proponents of direct elections for president want to ensure: 1. That each citizen's vote to be equal to every other citizen's vote; 2. That the person who gets the greatest number of votes nationally becomes president, whether that vote count constitutes a majority of the American eligible citizens (a result never achieved by any candidate for president since 1824), a majority of those voting (achieved by about 60 percent of the persons elevated to the presidency) or only a plurality of those voting (a group that includes not only Al Gore but also Andrew Jackson, Abraham Lincoln, Woodrow Wilson, Harry S. Truman, John F. Kennedy, Richard Nixon, Bill Clinton and eight other presidents); and 3. That no minor party or independent candidate B a Ralph Nader, Ross Perot, John Anderson or George Wallace B can deny the person with the greatest number of citizen votes the presidency by denying him or her the electoral votes in one or more states..

Direct elections would accomplish all of these goals. The question is at what price.

The basic effect of moving from an electoral college system to direct elections would be to totally nationalize the election of American presidents with some major negative consequences, including but not limited to:

1. Manipulation: The central question in the creation of any system of election is its incentive structure -- what activities it encourages and what it does not. Arguably the worst thing that has happened in the modern era to the conduct of American politics is the coaxial cable and the free rein it has given political consultants to pollute our airwaves with attack ads every biennium -- driving up the cost of campaigns, driving voters both from the polls and increasingly from respect for political leadership or the political process as a whole.

While even with the electoral college increasingly the bulk of campaign resources are poured into televised political advertising, direct elections would insure that almost all monetary resources would be poured into such advertising. There would be virtually no incentive to try to mobilize constituencies, organize specific interests or devote any resources to such things as

voter registration and education. The result of direct elections is that campaigns would be run on the basis of polling the gross number of likely voters across America and targeting television messages to their interests and views. Our election would, in essence, not be a contest between two putative Presidents, but rather between two would-be king-makers, the non-responsible and increasingly irresponsible consultants who generate the advertising -- in a race to the bottom to see who can do the better job of turning off the other's potential voters.

As a corollary to a national media campaign is that the rest of a candidate's political activities would be to alight in various places for brief periods to get free media attention. And it virtually certain that the places the candidates will alight will be those with the largest population and the greatest media reach. That does not, I think, include Alaska B unless a former governor is a nominee.

2. Grassroots engagement: The same incentives that would, under a direct election system, propel all campaign resources into television advertising would virtually eliminate the devotion of any resources to grassroots and citizen involvement. Under the electoral college, there is a strong incentive -- at least in some states -- for campaigns, interests and others to organize groups on the grassroots level because some of those groups may be determinative in winning state electoral votes. It is, for instance, in the Republican Party's interest to organize Christian conservatives in the south to offset the Democratic Party's advantage among African-Americans in the region.

But were the nation as a whole the only base of votes, it is unlikely that any campaign would find it cost-effective to devote any resources to organization and involvement. That, in turn, would undermine the already declining base of political participation and American pluralism.

3. Pluralism: The success of American democracy has rested, in part, on achieving a balance between the will and desires of the majority of Americans and recognizing the rights and

needs of various minorities. The electoral college serves to protect the latter in national politics.

To take the most obvious example, the number of farmers in the United States has dwindled so precipitously that nationally they are no longer a serious numerical factor in electoral outcomes -- despite the fact that most of the food we have on our tables is due to their individual and collective effort. In a system of direct elections, their concerns could easily be ignored. But because their votes are critical to winning electoral votes in several mid-western and western states, their needs must be addressed, their views must be solicited, their allegiances must be competed for.

The needs and aspirations of America's African-American population could easily be ignored in a direct election. They comprise perhaps 12 percent of the eligible electorate. But, in several Southern states, they account for nearly a majority of eligible citizens, and they comprise a significant and, perhaps on occasion, pivotal minorities in several northern states. The electoral college ensures, in national elections, that their views must be taken into account.

Union members, Christian fundamentalists, Latinos, fiscal conservatives, rural denizens are but a few of the significant minorities whose views and needs might be ignored if campaigns were totally nationalized.

American governance -- and the durability of its laws --derives its strength, not from the one-time expression of a national will, but from the coalescence of disparate interests into consensus. Direct election promotes a national will. The electoral college is a primary instrument for forging coalition and consensus.

4. Participation: The undermining of both grassroots activity and pluralism -- mobilization and sub-party level engagement cannot but have a negative effect on participation. So too will the aggregation of votes solely on a national level.

In this age of intense polling, where the movement of national numbers in the Presidential horse-race is tracked more intensively and surely more publicly than the heartbeat and blood pressure of a patient in intensive care, it will become increasingly difficult for the citizen to see how his vote will make much difference in a national electorate in which the margins of victory are usually in the millions of votes. It is much more likely that a citizen will see, in most jurisdictions (the District of Columbia excepted), his or her vote making a difference in the hundreds or thousands (as in less than 1,000 in Florida in 2000) which determine the allocation of electoral votes in individual states. In a sense the existence of an electoral college enhances both the perception and reality of electoral competition, where direct elections acts in precisely the opposite direction.

In recent elections, because of the intense focus of campaign activity B including massive grassroots campaigns, coalition building in those states and effective person-to-person get out the vote campaigns B turnout in the "battleground states" has substantially exceeded that of the other states that have been neglected or get only a televised advertising campaign.

5. Federalism: There were times, particularly in the 1960's, when those who supported segregation of the races tended to use the cover of state's rights to mask their desire to keep African-Americans in their place, when the structure of American federalism -- the diffusion of power between the national government and the states and localities -- was called into question.

More recently, however, there is a bi- or multi-partisan consensus that the idea of states and localities might be a good one -- that the administration of many programs is better handled at levels closer to the citizenry, that the states do serve as innovators and laboratories for useful, productive and, particularly in the cases of welfare reform and crime control, better public policy solutions than the national government can formulate.

In national politics, the instrumentality which forces consideration of federalism is the electoral college. By mandating the gathering of votes by states, it forces the engagement of state

leaders and party organizations and elevates concern about state and local issues. We sacrifice that, I believe, to the detriment of the welfare of American democracy.

6. Recounts: While the situation may not occur often, but likely might have occurred both in the 1960 and 200 elections, a very close election B with disputes over the validity of votes and the bona fides of some casting ballots B might call for a recount as occurred in Florida in 2000 and might have occurred in Illinois and Texas in 1960 but for the grace, then, of Richard Nixon. But if such a recount were needed, one would need a recount of all the ballots cast in the nation, a process that would make the 37-days of recounts, contention and court decisions in Florida in 2000 seem like a pleasant walk in the park.

Supporters of direct elections usually cite polls to buttress their position -- polls which show a majority of Americans supporting direct elections. But I would venture to say that none of those polls raise the consequences of direct elections in the questions that are asked. Were the public asked not only whether they desired direct elections, but whether they desired direct elections even if it meant campaigns only run on television, erosion of grassroots activity and pluralism, declining voter participation and the erosion of federalism, the results might be very different.

Our founding fathers may not have had the best reasons for adopting an indirect system for the election of Presidents. But American democracy has survived, prospered, grown and strengthened under this means of electing our presidents and despite the fact that a handful of winners of a plurality of the national vote were not elevated to the presidency. It is not at all clear whether it would prosper equally in a direct election system.

The electoral college system of electing presidents is not without its flaws, the two most prominent of which are the limited number of states in which the presidency is contested and the profoundly inequitable procedure for decided elections in which neither candidate gets a majority of electoral votes.

Under the present electoral college system and with the exception of Maine and Nebraska, the winner of the popular vote in each state B whether the margin of victory is one vote or 1 million B gets all the electoral votes of that state. So, in states where, by demography and history, one party is assured of victory and the other of defeat, both parties abandon those states in favor of states where there is competition and the electoral votes at stake may determine the electoral college outcome. So, in many recent elections as few as 12 states have been in play. But the problem is not the electoral college per se, but the winner-take-all aspect of the current way electors are chosen.

If instead of either direct elections or winner-take-all, states were to adopt either a proportional allocation of electors based on the popular vote outcome or the Maine-Nebraska system whereby the winner of states overall popular vote gets two electors (the standard based on U.S. Senate representation which is identical in all states) and the balance are given the popular vote winner in each congressional district, there would be an incentive to campaign in virtually every state, to engage in grassroots and coalition building activity, to enhance turnout and, probably but not certainly, achieve an electoral college result closer to that of the national popular vote than under the present system.

The current method of resolving elections in which no candidate achieves a majority of the popular vote is an abomination. Under the present Constitutionally-mandated system, the House of Representatives with each state casting one vote will elect the new president. That, in turn, means that Wyoming with 350,000 eligible voters will have the same clout as California with 24 million. That needs to be radically changed.

States have the power to choose how their electors are selected so they can choose proportionality or the Maine-Nebraska system, but it will take a constitutional amendment to change the method of resolving inconclusive electoral college results. Both, however, are worth doing.

To return to where this testimony started, do we want democracy by plebescite or do we want a democracy which is more complex and more complete.

In sum, I hope you reject SB.39, maintain the modest advantage of small states like Alaska, Connecticut, Vermont and Wyoming, among others in the election of presidents, and keep (and later perhaps improve) a system that has served the nation well and preserved certain essential underpinnings of a healthy American democracy.

Thank you again.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Testimony of Courtney O'Brien
Director of the Public Safety and Elections Task Force

On behalf of the American Legislative Exchange Council
Submitted to the Alaska Senate

February 23, 2011

Mr. Chairman and Members of the Committee:

Thank you for allowing the American Legislative Exchange Council (ALEC) to submit testimony regarding SB 39 and the current effort to replace the Electoral College with a National Popular Vote. My name is Courtney O'Brien, and I am the Director of the Public Safety and Elections Task Force at ALEC in Washington, D.C., which is the nation's largest, nonpartisan membership association of state legislators.

The idea of the National Popular Vote is a problematic one on several fronts. A National Popular Vote would undermine our historical government structure, jeopardize federalism, and would be less efficient than the current system.

The Founders created the Electoral College to ensure a balance is maintained between large and small states and among different interest groups in the country. This is one of the foundational principles of federalism. This system ensures an elected executive has support in different regions and among different groups, and thus protects minority interests.

Furthermore, **SB 39** would have Alaska join the constitutionally questionable interstate compact known as the "Agreement among the States to Elect the President by National Popular Vote." This interstate compact is an end-run around the Constitution. The appropriate way to change the nation's voting system would be to amend the U.S. Constitution, but the inventors of this compact know this will be difficult because Congress has previously rejected more than 1,000 amendments to alter the Electoral College.

The Electoral College, not a National Popular Vote, has worked for America throughout our history and is clearly the best option moving forward. Our membership of almost 2,000 state legislators has passed a *Resolution in Support of the Electoral College* and a

Resolution in Opposition to the National Popular Vote. Both are submitted with this testimony.

Mr. Chairman, I thank you for allowing me to submit testimony on this important matter. If you should have any questions, please feel free to contact me at 202-742-8504, or at cobrien@alec.org. Thank you.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Resolution in Opposition to the National Popular Vote Interstate Compact

Summary

This resolution calls on the State of (insert state) to oppose the plan popularly known as National Popular Vote. The National Popular Vote scheme threatens freedom, representation, and the identity of the United States as a confederation of distinct governing bodies who act according to the wishes of the majority of their citizens. The National Popular Vote scheme would undermine state authority and give some states power over the voice of others. It would render minority groups voiceless and empower densely populated and ideologically homogenous regions as well as radical fringe groups.

Model Resolution

{Title, enacting clause, etc.}

WHEREAS, the plan known as National Popular Vote claims to create a national system for conducting presidential elections, yet fails to create national standards for ballot access; and

WHEREAS, the plan known as National Popular Vote claims to create a national system for conducting presidential elections, yet fails to create national standards for voter qualifications; and

WHEREAS, the plan known as National Popular Vote claims to create a national system for conducting presidential elections, yet fails to create national standards for requiring a recount of ballots within a state; and

WHEREAS, the plan known as National Popular Vote claims to create a national system for conducting presidential elections, yet fails to establish any rule to require a national recount where the national result is within a small margin even if the result in no individual state is within a margin that requires a recount in the state; and

WHEREAS, the plan known as National Popular Vote claims to create a national system for conducting presidential elections, yet fails to create national standards for recounting ballots; and

WHEREAS, the plan known as National Popular Vote claims to use an interstate compact rather than a constitutional amendment to enact a change that most Americans believe requires such an amendment and should at least be the subject of national discussion and deliberation; and

WHEREAS, the plan known as National Popular Vote has no majority requirement, but would allow a candidate with a plurality – however small – to become President.

THEREFORE, BE IT RESOLVED, that the State of (insert state) opposes the plan know as National Popular Vote or any other proposal to manipulate the Electoral College for the purpose of creating a national presidential vote through an interstate compact.

Adopted by the Criminal Justice Task Force at the Annual Meeting, August 2007. Approved by the ALEC Board of Directors September 2007.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Resolution in Support of the Electoral College

Summary

This resolution calls on the State of (insert state) to recognize the current Electoral College system as the best way to elect the President of the United States. The current Electoral College system respects small states, rural areas, and the principle of federalism. Furthermore, this resolution calls on the State of (insert state) to defeat any multi-state compact legislation that would cause (insert state)'s electoral votes to be awarded based on the results of the national popular vote.

Model Resolution

{Title, enacting clause, etc.}

WHEREAS, the Founding Fathers rejected having the President of the United States elected by a national popular vote and instead chose the Electoral College system; and

WHEREAS, the current Electoral College system encourages presidential candidates to campaign in large metropolitan areas and also in rural areas and small states; and

WHEREAS, the current Electoral College system ensures that the winning Presidential candidate has support from multiple regions of the country; and

WHEREAS, the current Electoral College system respects the Founders' strong belief that individual states should have a vital role in electing the President of the United States; and

WHEREAS, the National Popular Vote Interstate Compact diminishes the importance of individual states in presidential elections; and

WHEREAS, the current Electoral College system respects the separation of and balance of power and authority between the States and the Federal government; and

WHEREAS, the current Electoral College system ensures that (insert state)'s electoral votes are awarded based on how the majority of the State's citizens vote;

WHEREAS, under the National Popular Vote Interstate Compact, (insert states)'s electoral votes could be awarded to a candidate that the majority of the State's citizens did not vote for; and

WHEREAS, the current Electoral College system is better suited to handle recounts because they happen at the state level, which is more manageable than if they were to happen at the national level as they might if the National Popular Vote Interstate Compact were adopted; and

WHEREAS, the current Electoral College system creates a needed balance between agrarian and industrial interests; and

WHEREAS, the current Electoral College system best preserves our two-party system and prevents the fracture of America's political structure; and

WHEREAS, the United States Congress has rejected over 1000 amendments to the Constitution to change the Electoral College, including amendments to change to a popular vote system; and

WHEREAS, the constitutionality of the National Popular Vote Interstate Compact is questionable because Article I, Section 10 of the Constitution states that no state, without the consent of Congress, may "enter into any Agreement or Compact with another State."

THEREFORE, BE IT RESOLVED that the State of (insert state) endorses its current Electoral College system as the best way to elect the President of the United States.

BE IT FURTHER RESOLVED that the State of (insert state) shall defeat any legislation that creates a multi-state compact for the purpose of dismantling its current Electoral College System.

Adopted by the Criminal Justice Task Force at the Annual Meeting, August 2007. Approved by the ALEC Board of Directors September 2007.

Cindy Smith

From: Lila Hobbs
Sent: Tuesday, February 22, 2011 1:02 PM
To: Cindy Smith
Subject: FW: S B 39. Senate Judiciary Committee Hearing Wednesday, February 23, 2011

From: carolyn V Brown [mailto:cvbrown1937@yahoo.com]
Sent: Tuesday, February 22, 2011 1:01 PM
To: Sen. Hollis French
Subject: S B 39. Senate Judiciary Committee Hearing Wednesday, February 23, 2011

Senator French:

I am sorry that I can neither be in attendance nor call in to speak to the Judiciary Committee about S B 39 on Wednesday, February 23rd at 1:30 PM. My patient commitments preclude this. I ask your indulgence to consider my written testimony.

The issue of the national popular vote is of sufficient importance and value to me to warrant my written message to you about SB 39 that provides for election of the President and Vice-President of the United States by a national popular vote.

As you know, over our history in America the President and Vice-President have been elected in a variety of ways. This makes for fascinating reading! These election modalities have included election by state governors, by Congress, by state legislatures, by electors, and by national popular vote. The Constitutional Convention never agreed on a method of choosing the President and Vice-President. The matter was turned over to each of the states. This is an important concept.

The US Constitution states in Article II, Section 1, Clause 2 that, "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Numbers of Senators and Representatives to which the State may be entitled in the Congress..."

Our US Constitution permits that Alaska can decide how we wish to elect the President and Vice-President of the United States. Is the current method adequate to represent that each vote in Alaska is equal for this critical selection?

The Electoral College is in place and needs to continue to be an integral part of our electoral process. What we need to do is to develop a renewal of the imperative that the President and Vice-President be elected by a single vote of every voting citizen of America. The current system does not provide this and each vote in Alaska is not equal to all other votes.

The interstate compact provisions of S B 39 provides for a mechanism to elect the President and Vice-President by national popular vote – just as we elect our Assembly Members, School Board Members, Mayors, State and Congressional senators and representatives, and Governors. Why would we want not to do this?

I respectfully ask that you consider and vote affirmatively for S B 39. This legislation can move our State and our Country toward "Participatory Democracy" wherein our single and individual votes genuinely count to elect our President and Vice-President.

There is much to be learned in an open and reasoned discussion on this issue. Please continue with your discussions, considerations and debates on this issue. The election of the President and Vice-President is profoundly important and must become the "will of the people". This simply means that "each vote is equal" and must count.

Please let me know if I can answer questions or provide additional information.

carolyn V Brown MD MPH
1640 Second Street
Douglas Alaska 99824 USA

907-364-2726
907-364-2727 fax
907-321-0784 cellular

cvbrown1937@yahoo.com

Lila Hobbs

From: Bill Parker [billparkerak@yahoo.com]
Sent: Monday, February 14, 2011 10:54 PM
To: Sen. Hollis French
Subject: Support SB 39

The electoral college is an anachronism. The one person, one vote principle makes it illogical. The perceived political advantage for small-population states like ours is outweighed by our duty for equality for all Americans in choosing a President. Please share this with the members of your committee.

Thank You.
Bill Parker
Patrice Parker

Sent from my iPhone

Lila Hobbs

From: Nicholes New [nicholesnew@yahoo.com]
Sent: Monday, February 14, 2011 9:23 PM
To: Sen. Hollis French
Subject: Senate Bill 39, US Presidential Election Compact Bill.

Greetings Senator French,

I am an Alaskan resident and registered voter, who would like to commend and support you in any way that I can with regards to your sponsorship of the Senate Bill 39, US Presidential Election Compact Bill.

I have read the bill and fully understand the effects this bill would have on the residents of Alaska. The opportunity for Alaska to join a compact made up of states that have pledged to cast their electoral votes in favor of the national popular vote winner is a commendable step towards making this great state a presence as much as the 17 states that are focused on at this time. In other words, to me, this bill will give way to a fair and balanced system to encourage and persuade Candidates to focus on all the people; rather than an esoteric group that may have all the power.

I feel this bill is a step into a higher rank of democracy and must be carried with the peoples voice as far as it can reach. I can not convey my passion for your support in this bill.

Having met you personally I feel confident in your endorsement of this bill and wish you all the luck in your pursuit of same.

With Best regards, I am

Sincerely,
Nichole Dewey
nicholesnew@yahoo.com
- Post office box 101528
- Anchorage, AK 99502
- (907)350-9324

Lila Hobbs

From: tom biss [tombiss823@gmail.com]
Sent: Monday, February 14, 2011 8:49 PM
To: Sen. Hollis French
Subject: Supporting Senate Bill 39

Senator French,

I support your sponsorship of Senate Bill 39, US Presidential Election Compact and the beneficial modification it brings to our Electoral College. It may even bring a candidate to the State of Alaska for the first time in years.

V/r

Tom Biss

Lila Hobbs

From: Christopher Dewey [kenaidew@yahoo.com]
Sent: Monday, February 14, 2011 8:38 PM
To: Sen. Hollis French
Subject: SB 39 Support!

Good Morning Senator French,

Thank you for sponsoring Senate Bill 39, US Presidential Election Compact. I lend my whole hearted support to return the power of voting back to the people. Alaskans will have more say in determining the US President and it will ensure a more evenly divided campaign effort from the canidates.

Regards,

Christopher D. Dewey
7038-A Arnold Ave
JBER, AK 99506

We won't tell. Get more on shows you hate to love
(and love to hate): Yahoo! TV's Guilty Pleasures list.

Lila Hobbs

From: heathedward@gmail.com on behalf of Heath Hilyard [Heath@HeathEdward.com]
Sent: Monday, February 14, 2011 4:44 PM
To: Sen. Hollis French
Cc: Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Subject: Support for SB 39 - National Popular Vote

Senator French and Members of the Senate Judiciary Committee:

I would like to take this opportunity to support SB 39 - *U.S. Presidential Election Compact*. As I'm sure you're aware there have been a variety of efforts to reform the U.S. presidential election process in order to address the growing unfairness to states (specifically low population and/or geographically distant states) resulting from pre and post Primary presidential campaign strategies.

These concerns have long led critics to debate the ongoing relevance of the Electoral College. While I recognize that this bill does not ultimately address that larger issue, it does provide a workable alternative to increase parity among states during a presidential campaign.

There are a host of reasons why this legislation is necessary and timely, and I'm certain the committee will have the opportunity to hear from more eloquent speakers with greater expertise than I, so I won't belabor my comments with excessive information you're likely to otherwise be provided.

I appreciate the opportunity to comment on this important legislation.

Respectfully,
Heath E. Hilyard
3105 Eureka, Apt. 5
Anchorage, AK 99503

Lila Hobbs

From: Jack Heesch [akjack@gci.net]
Sent: Monday, February 14, 2011 3:37 PM
To: Sen. Hollis French
Subject: SB39

Senator French:

I want to express my support for SB 39 allowing for a direct vote for the President of the US.

Thank you for introducing and supporting this legislation.

Jack Heesch

Jack R. Heesch, President
The J.R. Heesch Company
P.O. Box 201608
Anchorage, Alaska 99520-1608
(907) 277-7316
(201) 725-0199 cell
akjack@gci.net

Lila Hobbs

From: Jim Babb [jimb66089@gmail.com]
Sent: Monday, February 14, 2011 3:31 PM
To: Sen. Hollis French
Subject: SB-39

Dear Hollis,

Please support SB-39 and ask the committee to do so also

Jim Babb
Anchorage, AK 99503

February 16, 2011

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

OFFICERS AND DIRECTORS
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NADINE WINTERS, Fairbanks

ZACH FICK, Anchorage
STUDENT ADVISOR

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
Juneau, AK 99801-1182
via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

Re: Senate Bill 39
ACLU Statement of Support

Chair French, Vice-Chair Wielechowski:

Thank you for the opportunity to submit written testimony in support of Senate Bill 39, the National Popular Vote Compact.

As you know, the American Civil Liberties Union of Alaska represents thousands of members and activists throughout the state who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we would like to advise the Committee of our **SUPPORT of SB 39**, and we thank Senator French for introducing this Bill.

National Popular Vote Compact

The National Popular Vote compact provides that state election officials in all states participating in the plan would award their Electoral College votes to the presidential candidate who receives the largest number of popular votes in all 50 states and the District of Columbia. This compact would not go into effect until enacted by states collectively possessing a majority of the electoral vote – 270 of the 538 electoral votes.

Today, all states choose their Electors by direct statewide election (except Maine and Nebraska, which select two Electors by a statewide popular vote and the remainder by the popular vote in each Congressional district).

Under the National Popular Vote compact, the Electors would be selected based on a nationwide popular vote.

The National Popular Vote Furthers Core Principles of Democracy

Ensuring the Candidate with the Most Votes Wins. The compact would eliminate the possibility that a candidate who received the most popular votes, but did not receive the requisite 270 Electoral College votes needed to win, could lose the election.

This has happened four times in American history: in 1824 (Adams-Jackson), 1876 (Hayes-Tilden), 1888 (Harrison-Cleveland), and 2000 (Bush-Gore).

Furthering the Principle of One Person, One Vote. By ensuring that each vote cast has an equal impact on the outcome of the Presidential Election, National Popular Vote gives each citizen equal power in the election, regardless of the state in which the voter lives. Instead of voters in a few swing states deciding the outcome, candidates will need to speak to – and listen to – all citizens throughout the country equally.

National Popular Vote Compact is Constitutional

Article II, Section 1 of the Constitution provides that: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." **Thus, the states have inherent power to select their Electors as they see fit**, provided that some other provision of the Constitution, such as the Fourteenth or Fifteenth Amendments, is not violated.

The Supreme Court has held that states have *exclusive* power over the appointment and mode of appointment of electors under the Constitution. Therefore, exercising this state power in no way infringes on any area of supremacy of the United States, as there is no federal power to award electoral votes.

Conclusion

As of November 2009, five states had enacted the National Popular Vote compact: Hawaii, Illinois, Maryland, New Jersey, and Washington. That amounts to 61 (23%) of the 270 electoral votes needed to activate the compact.

The ACLU of Alaska, along with the National ACLU and its more than 500,000 members, support our State joining this group and adding the voices of Alaskans to those Americans who believe that our President should be elected by all Americans.

Thank you again for permitting us to share our support for SB 39. Please feel free to contact the undersigned should you require any additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us
Senator John Coghill, Senator_John_Coghill@legis.state.ak.us

SB 58

<TARGET><BILL>SB 58</BILL><SUBJECT>SB
58</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 1/21/11

FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: _____

Judiciary Committee considered SENATE BILL NO. 58

SB 58-INCREASING NUMBER OF SUPERIOR CT JUDGES

"An Act increasing the number of superior court judges designated for the third judicial district; and providing for an effective date."

and recommends:

[ ] be **replaced** with **CS** _____ (_____) *[ ] Same Title [ ] New Title*

[ ] adopt **previous CS** _____ (_____) *[ ] Same Title [ ] New Title*

[ ] attached amendment(s)

[ ] adopt _____Letter of Intent

[ ] further referral to _____Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)

Dept.	Fiscal	Indet.	Zero	FN #
CRT	✓			
CRT	✓			
ADM/PD	✓			
ADM/OPA	✓			
DPS	✓			

New

~~PREVIOUS~~ FISCAL NOTE(S)

Dept.	Fiscal	Indet.	Zero	FN #
DOL	✓			
LAW	✓			
GOV			✓	

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
John Coghill	Coghill			✓	
	Wielechowski	✓			
Joe Paskvan	Paskvan	X			
Dave McGuire	McGuire	✓			
CHAIR:	French			✓	

APOA
ALASKA PEACE OFFICERS ASSOCIATION

ALASKA ASSOCIATION OF CHIEFS OF POLICE

Women Police of Alaska

February 14, 2011

Senator Hollis French
Senate Judiciary Chair
Alaska State Senate
State Capitol
Juneau AK 99801-1182

Dear Senator French:

On behalf of our respective organizations, we would like to thank you for considering SB 58, an Act increasing the number of superior court judges designated for the third judicial district; and providing for an effective date

We met recently to review proposed legislation and decided to unanimously support this bill.

Again, thank you for addressing this issue. Please contact us if there is anything our organizations can do to assist in the passage of this bill.

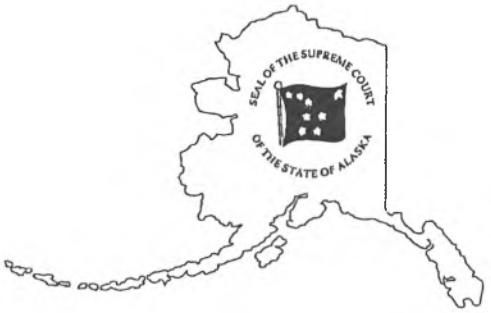
Again, thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organizations can do to assist in the passage of this bill.

Sincerely,

John Lucking Jr., President
Alaska Peace Officers Association
PO Box 240106
Anchorage AK 99524

Tom Clemons, President
Alaska Association of Chiefs of Police
183 Nelson Ave
Wasilla AK 99654

Michele Logan, President
Women Police of Alaska
PO Box 233306
Anchorage AK 99523



ALASKA COURT SYSTEM
State of Alaska
Office of the Administrative Director

820 West 4th Avenue
Anchorage, Alaska 99501-2005
(907) 264-8265
FAX (907) 264-8291

Doug Wooliver
Administrative Attorney

March 17, 2011

The Honorable Joe Thomas
Member, Senate Finance Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Senator Thomas:

During the March 10th Senate Finance Committee hearing on SB 58 you asked for the percentage of Anchorage Child in Need of Aid cases that have had a contested issue and are now before a superior court judge rather than a standing master. There are currently 686 active CINA cases in the Anchorage Superior Court, 56 percent, or 388 cases, are being handled by a superior court judge and not a master.

I hope this answers your question; please let me know if you would like any additional information.

Sincerely,

Doug Wooliver
Administrative Attorney
Alaska Court System

cc: Senate Finance Committee Members

ALASKA COURT SYSTEM
State of Alaska
Office of the Administrative Director

820 West 4th Avenue
Anchorage, Alaska 99501-2005
(907) 264-8265
FAX (907) 264-8291

Doug Wooliver
Administrative Attorney

March 15, 2011

The Honorable Lyman Hoffman
Co-Chair Senate Finance Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Senator Hoffman:

During the Senate Finance Committee hearing on SB 58 on Thursday, March 10th you asked for a three-year average of case filings per judge in both the superior and district courts for each court location. The attached spreadsheet shows the cases per judge for each of the last three fiscal years and a three-year average for each court location and for both superior and district courts. [1]

I hope this answers your questions. Please let me know if you would like additional information.

Sincerely,

Doug Wooliver
Administrative Attorney
Alaska Court System

cc: Senate Finance Committee Members

[1] The district court numbers represents all district court filings, including traffic filings.

Alaska Court System

Review of Judicial Resources for Superior Court Locations with Superior Court Judges - FY08 - FY10

3/15/2011

Location	Number of Superior Court Judges	FY08 Superior Court Filings/Superior Court Judge	FY09 Superior Court Filings/Superior Court Judge	FY10 Superior Court Filings/Superior Court Judge	3-Yr. Average (FY08-FY10) Superior Court Filings/Superior Court Judge
Anchorage	15	645	643	687	658
Juneau	2	532	511	570	538
Fairbanks	6	467	482	535	494
Kenai	3	445	441	505	464
Valdez[1]	0.4	395	450	480	442
Palmer	4	469	465	478	470
Bethel	2	440	460	427	442
Dillingham	1	350	282	351	328
Nome	1	425	405	330	387
Ketchikan	2	346	330	316	331
Kodiak	1	343	310	287	313
Sitka	1	337	272	285	298
Kotzebue	1	338	320	259	306
Barrow	1	203	211	223	212
Totals	40.4	507	503	532	514

[1]At the district's request, the district court judge for the Valdez court is being classified as a part-time "Superior Court Judge - Pro Tem" & as a part-time "District Court Judge"

Alaska Court System

Review of Judicial Resources for District Court Locations with District Court Judges - FY08 - FY10

3/15/2011

Location	Number of District Court Judges & Magistrates	FY08 District Court Filings/District Court Judge & Magistrates	FY09 District Court Filings/District Court Judge & Magistrates	FY10 District Court Filings/District Court Judge & Magistrates	3-Yr. Average (FY08-FY10) District Court Filings/District Court Judge & Magistrates
Anchorage	15	3,670	3,772	4,001	3,814
Juneau	2	2,261	2,121	2,718	2,366
Fairbanks	4.5	3,487	3,454	3,880	3,607
Kenai	3	3,090	3,110	3,154	3,118
Valdez[1]	0.6	913	1,062	1,007	994
Palmer	4	5,236	5,040	5,428	5,234
Bethel	2	1,013	824	895	911
Dillingham	1	842	902	816	853
Nome	1	1,514	1,317	1,253	1,361
Ketchikan	2	1,366	1,346	1,219	1,310
Kodiak	1	2,273	2,065	1,653	1,997
Sitka	1	1,309	904	814	1,009
Kotzebue	1	1,284	1,031	916	1,077
Barrow	1	1,047	890	1,064	1,000
Homer	1	1,682	2,346	1,727	1,918
Totals	40.1	3,011	3,000	3,171	3,060

[1]At the district's request, the district court judge for the Valdez court is being classified as a part-time "Superior Court Judge - Pro Tem" & as a part-time "District Court Judge"

(Prepared by Rhonda McLeod, Alaska Court System)

DETAILED SUMMARY
SB 58

The Alaska Supreme Court is asking for two new superior court judges in Anchorage. The judges will be assigned to civil cases.

The additional judges are needed, in part, because Anchorage superior court judges have the highest caseloads in the state.[1] But also, they are needed because of the amount of work that goes into two categories of cases that has increased significantly over the past few years.

CINA CASES

The first of those case-types is Child in Need of Aid cases. The increased amount of time Anchorage judges are spending on CINA cases is the result of the court system changing the way it handles CINA cases so that families are better served.

Prior CINA practice was to have standing masters preside over all phases of a case with the exception of contested hearings. If a hearing was contested it would be assigned to a superior court judge who would resolve the contested issue and then return the case to the standing master. Although that practice saved

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[1] Cases per superior court judge:

Anchorage	687	With two new judges 606 cases per judge.
Juneau	570	
Fairbanks	535	
Kenai	505	
Valdez	480	
Palmer	478	
Bethel	427	
Dillingham	351	
Nome	330	
Ketchikan	316	
Kodiak	275	
Sitka	285	
Kotzebue	259	
Barrow	223	

superior court time, it led to other problems.

A family was shuffled back and forth between the master and the superior court judge and the judge who made the final decisions did not know the family very well.

The new practice begins the same as the old; a CINA case starts with a master until there is a contested issue. However, once that occurs, the case is permanently assigned to a superior court judge; it does not return to the master.

Having a single judge permanently assigned to the case is a better model in a number of ways, one of which is that it eliminates shuffling the family back and forth between a standing master and the judge.

Another is that the superior court judge with the final decision-making authority in all CINA cases (the standing master makes recommendations to the superior court judge who makes the final decisions) has a much better understanding of the case.

The judge knows the family and the family knows the judge. As social workers and lawyers know, the better you know the family the more details you learn about the issues that brought them into the CINA system.

Having a single judge for the life of the case significantly improves the whole dynamic of the case, leads to better decisions and is a more humane way to treat families. But, it takes more judicial time.

Another important change that takes more judicial time but benefits families is the introduction of more status hearings.

Families will receive a list of things that they need to do in order to

get their children back. They must accomplish those things by a certain date. However, the list of things they need to accomplish can be long and overwhelming.

They may have to:

- Get an evaluation and treatment for substance abuse
- Enroll in parenting classes and or anger management classes
- Find safe and sober housing
- Separate from an abusive partner who is endangering the kids
- Find employment

More and more often judges are trying to break down the lists into manageable segments. Judges schedule frequent status hearings to help keep the families on track and focused so that they are successful.

As legislators you know better than most that deadlines drive behavior. (Things get pretty busy around here just prior to adjournment.) This is equally true for those in court. A court hearing in six months does not impart the same sense of urgency as a hearing in two weeks.

The CINA statutes encourage reunification, and we believe that frequent status hearings increase the likelihood of that result.

But this approach takes more judicial time.

UNREPRESENTED LITIGANTS

In addition to CINA cases, another prime driver behind the current workload is the prevalence of unrepresented litigants in domestic relations cases.

For centuries the courts have been the sole domain of attorneys. That is still largely true, but our society no longer considers this as acceptable.

Although we do not have historical statistics that track these cases, Alaska judges, like judges from across the country, have seen a significant increase in unrepresented litigants over the past several years.

What we know from current data is that when first filed about 33% of the cases have attorneys for both parties, 29% have an attorney for only one party and in 38% of the cases neither party has an attorney. If the only issue is custody (in cases where an unmarried couple have a child), then in 83% of the cases at least one party will be without counsel.

The percentage of unrepresented litigants increases significantly once litigants are filing motions after the initial decree is entered. Most of these post-decree motions relate to child custody disputes.

Judges cite a list of time-consuming challenges that arise when counsel is absent from one side or both sides.

- arguments unrelated to the relevant legal issues, and
- delay stemming from the failure to submit needed information.
- Frequent motion practice,

Although it is difficult to quantify poor presentations and preparation, we do tract motions. Those tell a good part of the story. For example, from FY 2007 through FY 2010 we saw a 21.5% increase in domestic relations cases and a 34% increase in motions filed in those cases. And the first half of FY 11 shows another 5.5% increase in cases and another 23% increase in

motions. The motions are largely filed by unrepresented litigants.

However, even though these litigants take more time, their cases are as important as those where the parties have lawyers and the judiciary is committed to ensuring that they too can meaningfully access the court.

But this approach does mean more work for judges.

ALTERNATIVES

Recognizing, however, that adding new judges is the most expensive way to address workload problems, the court system is developing other ways to deal with these cases.

In his State of the Judiciary address, Chief Justice Carpeneti talked about several of our current projects to better handle family law cases with unrepresented litigants.

He talked about putting instructional videos on the Internet, and a program that uses volunteer attorneys to help in the early settlement of family law cases. He noted that these settlement efforts have been successful a remarkable 70% of the time.

Our Child Custody and Visitation Mediation Program has been both popular and successful as has our use of retired judges to give unrepresented parties a reality check on the nature of their case and the likely outcome.

The court system is using these efforts and others to better manage these cases. And better management means two things (1) the litigants better served with a process that is more appropriate for their case; and (2) more efficient use of judicial resources.

We are asking for two new judges for the Anchorage civil bench; but they could use three and they would still have the highest caseloads in the state. However, it is our plan to use and further develop the alternatives discussed by the Chief Justice to not only make up the one-judge difference, but to help reduce the need for additional civil judge requests in the future.

But today, two new judges are needed because, together, the high caseload in Anchorage and the increased work on CINA cases and family law cases with unrepresented litigants has led to a workload that is not sustainable.

Thank you for hearing this bill. I would be happy to try and answer any questions you may have.

SB 58 Testimony Bullet Points

- Busiest judges (687 cases per judge vs. next busiest at 570 cases per judge)
- Unsustainable workloads
- Two reasons

  1. CINA (Child in Need of Aid cases)

  2. Unrepresented litigants

Child in Need ot Aid cases

- Former practice

  Shuffling between standing master and superior court judge

- Current practice

  One contested issue and it stays forever with judge

  More statue hearings to help families be successful and to reunite parents with their children

- CINA cases are not a race to terminate parental rights. The judges need to spend more of the time available working to reunify families, not tear them apart.

Unrepresented Litigants

- Increasing number of unrepresented litigants (66% of family law cases have at least one unrepresented party and that percentage increases as the cases proceed through the process)
- These cases take extra time because

Lots of motions
Trouble focusing on the legally relevant issues
Delays stemming from incomplete information (especially financial information)

- These cases are just as important as cases where counsel is present

Alternatives

- Using staff to better manage cases
- Using staff to calculate child support
- Using judges to help settle family law cases
- Use of volunteer attorneys and mediators

Conclusion

- Very busy judges with high caseloads
- Very important cases involved
- Working hard to find alternatives
- Even with those alternatives, however, we need these additional judges.

ALASKA COURT SYSTEM
State of Alaska
Office of the Administrative Director

820 West 4th Avenue
Anchorage, Alaska 99501-2005
(907) 264-8265
FAX (907) 264-8291

Doug Wooliver
Administrative Attorney

March 15, 2011

The Honorable Lesil McGuire
Member, Senate Finance Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Senator McGuire:

In both the Senate Judiciary Committee and the Senate Finance Committee hearings on SB 58 you expressed concern about the limited number of women judges in Alaska, particularly the limited number of women superior court judges. In response to your concerns Larry Cohn (Executive Director, Alaska Judicial Council) provided you with a brief history of the number of women who apply for judgeships and the number of women the Council forwards to the governor for possible appointment. In order to supplement the information provided by Mr. Cohn I am attaching a list of all the women judges who are currently serving in Alaska. Confirming your concerns, of the 40 superior court judges in Alaska, only 5 are women.

I included magistrates in my list because, though they are hired directly by the court system and not part of the judicial selection process that goes through the Council and the governor, they are judges and hear thousands of cases each year.

Sincerely,

Doug Wooliver
Administrative Attorney
Alaska Court System

cc: Senate Finance Committee Members

Women Judges in Alaska
January, 2011

Appellate Courts **2 of 8 (25%)**

Supreme Court 2 of 5 (40%)

(Fabe, Anchorage, 1996)
(Christen, Anchorage, 2009)

Court of Appeals 0 of 3 (0%)

Trial Courts **11 of 61 (18%)**

Superior Court 5 of 40 (13%)

First District	1	(Patricia Collins, Juneau, 1999)
Second District	0	
Third District	4	(Sharon Gleason, Anchorage, 2001) (Kari Kristiansen, Palmer, 2006) (Vanessa White, Palmer, 2006) (Anna Moran, Kenai, 2007)
Fourth District	0	

District Court 6 of 21 (29%)

First District	0	
Second District	0	
Third District	5	(Cathy Easter, Anchorage, 2008) (Stephanie Rhoades, Anchorage, 1992) (Pamela Scott-Washington, Anchorage, 2010) (Margaret Murphy, Homer, 2005) (Sharon Illsley, Kenai, 2007)
Fourth District	1	(Jane Kauvar, Fairbanks, 1981)

Magistrates **25 of 43 (58%)**

First District	8	(Elaine Kookesh, Angoon – Kay Clark, Craig – Maureen DesRosiers, Hoonah – Amanda Schultz, Ketchikan – Darlene Whitehorn, Petersburg – Susan Reed, Skagway – Chris Ellis Wrangell – Mary Kay Havens, Yakutat)
Second District	3	(Mary Triber, Barrow – Brook Alowa, Kotzebue – Heide Ivanoff, Unalakleet)
Third District	7	(Carmen Clark, Anchorage – Tina Teaford, Anchorage – Kay Adams, Cordova – Jean Wilkinson, Glennallen – Jennifer Wells, Kenai – Jennifer King, Naknek – Jane Pearson, Unalaska)
Fourth District	7	(Tracy Blais, Delta Junction - Bethany Harbison, Fairbanks – Nikole Schick, Fairbanks – Alicemary Rasley, Fairbanks – Patty Burley, Bethel – Darlene Johnson-Edwards, Emmonak – Nancy Phillips, St. Mary's)

ALASKA COURT SYSTEM
State of Alaska
Office of the Administrative Director

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Doug Wooliver
Administrative Attorney

January 24, 2011

The Honorable Hollis French
Chair, Senate Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Senator French:

The Alaska Supreme Court respectfully requests that the Senate Judiciary Committee schedule SB 58 for a committee hearing. The bill creates two new superior court judge positions in Anchorage. The judges will handle civil cases.

Additional judges are needed because Anchorage superior court judges are the busiest in the state and a combination of more time being devoted to Child in Need of Aid cases and an ever-increasing number of unrepresented litigants has created a workload that is unsustainable.

Adding two new judges will not completely solve this problem, but it will provide some relief as the court works to develop alternative ways to manage the workload.

A fiscal note and sponsor statement are attached. Thank you for considering this request.

Sincerely,

Doug Wooliver
Administrative Attorney
Alaska Court System

Sponsor Statement
SB 58

The Alaska Supreme Court is asking for two new superior court judges in Anchorage. The judges will be assigned to civil cases.

Additional judges are needed because Anchorage superior court judges have the highest caseloads in the state and a combination of devoting more time to Child in Need of Aid (CINA) cases and an ever-increasing number of domestic relations cases where the parties choose to litigate their case without the assistance of attorneys has created a workload that is unsustainable.

Although some of the additional work comes from an increase in case filings, much is the result of improved practices that better meet the needs of those who come to court. This is particularly true with CINA cases.

One change that has impacted workload involves how CINA cases are assigned to judges. Prior practice was to have standing masters (specialists who hear cases and make recommendations to judges) preside over all phases of a case with the exception of contested hearings. If a hearing was contested it would be assigned to an available superior court judge who would resolve the contested issue and then return the case to the standing master. Although that practice saved superior court time, it led to other problems as the family was shuffled back and forth between judges.

The new practice begins the same as the old; a CINA case starts with a master until there is a contested issue. However, once that occurs the case is permanently assigned to a superior court judge; it does not return to the master. This eliminates the judge-shuffling and allows the judge and the family to get to know each other. All parties agree that familiarity improves both the process and the outcome for the families. However, this model results in superior court judges spending more of their time on these cases.

In addition to CINA cases, another prime driver behind the current workload is the prevalence of unrepresented litigants in domestic relations cases. Although we do not have historical statistics that track these cases, Alaska judges, like judges from across the country, have seen a significant increase over the past several years.

Judges cite a list of time-consuming challenges that arise when counsel is absent from one side or both sides. Frequent motion practice, arguments unrelated to the relevant legal issues, delays stemming from the failure to submit needed information and judicial time spent calculating child support awards are some of those challenges. However, even though these litigants take more time, their cases are as important as those where the parties have lawyers and the judiciary is committed to ensuring that they too can meaningfully access the court.

Adding two new judges will not significantly reduce the workload of the Anchorage superior court (Anchorage superior court judges will still be the busiest superior court judges in the state), but it will provide some relief as the court works to develop alternative ways to manage that workload. Thank you for considering this request.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 58
() Publish Date:

Identifier (file name):
Title An Act Relating to the Number of Superior Court Judges
Sponsor Senate Rules Committee
Requester Alaska Supreme Court

Dept. Affected:
RDU Alaska Court System
Component Trial Courts
Component Number

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	888.4	888.4	888.4	888.4	888.4	888.4	888.4
Travel	10.0	10.0	10.0	10.0	10.0	10.0	10.0
Contractual	37.6	37.6	20.0	20.0	20.0	20.0	20.0
Supplies	79.6	79.6	12.0	12.0	12.0	12.0	12.0
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**1,015.6**	**1,015.6**	**930.4**	**930.4**	**930.4**	**930.4**	**930.4**
CAPITAL EXPENDITURES	**425.2**	**425.2**					
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	1,440.8	1,015.6	930.4	930.4	930.4	930.4	930.4
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**1,440.8**	**1,015.6**	**930.4**	**930.4**	**930.4**	**930.4**	**930.4**

Estimate of any current year (FY2011) cost:

POSITIONS

Full-time	**8.0**	**8.0**	**8.0**	**8.0**	**8.0**	**8.0**	**8.0**
Part-time							
Temporary							

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

Senate Bill 58 adds two new superior court judge positions in the third judicial district. This fiscal note reflects the cost of these positions and related staff. This note also reflects the one-time capital expenses necessary to accommodate the new judges. These funds are also in our captial budget request and, if that request is funded, the expeses would be removed from this note.

Prepared by: Doug Wooliver, Administrative Attorney
Division Alaska Court System
Phone 907-463-4750
Date/Time 1/24/2011 @ 10:00 am

Approved by: Doug Wooliver for Christine Johnson, Administrative Director
Alaska Court System
Date 1/24/2011

Alaska Court System
Fiscal Note Calculations for SB 58

Personal Services

Superior Court Judge - Anchorage (2)	514,200
In-Court Clerk - Anchorage, Range 12A (2)	125,200
Law Clerk - Anchorage, Range 13D (2)	123,800
Administrative Assistant - Anchorage, Range 12A (2)	125,200
Subtotal Personal Services	888,400

Travel

Judicial Conferences/Other	10,000

WAN Fees, Software & Licensing	37,600

Supplies (desk, computer, courtroom electronics, and chair) for four PFT positions	79,600
Fiscal Note Total	1,015,600

Breakdown by Expense Category:

Personal Services Total	888,400
Travel Total	10,000
Contractual Total	37,600
Supplies Total	79,600
Total	1,015,600

Capital Expenditures

Remodel Nesbett Courthouse to Accommodate Judges & Staff	425,200

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB058**
() Publish Date

Identifier (file name): SB058-LAW-CIV-01-29-11
Dept. Affected Law
Title An Act increasing the number of superior court judges designated for the third judicial district; and providing for an
Appropriation Civil
Allocation Child Protection
Sponsor Rules
Requester (S) Judiciary
OMB Component Number 2961

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	192.3		192.3	192.3	192.3	192.3	192.3
Travel	1.1		1.1	1.1	1.1	1.1	1.1
Services	26.7		26.7	26.7	26.7	26.7	26.7
Commodities	4.0		4.0	4.0	4.0	4.0	4.0
Capital Outlay	0.9		0.9	0.9	0.9	0.9	0.9
Grants							
Miscellaneous							
TOTAL OPERATING	**225.0**	**0.0**	**225.0**	**225.0**	**225.0**	**225.0**	**225.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	225.0		225.0	225.0	225.0	225.0	225.0
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**225.0**	**0.0**	**225.0**	**225.0**	**225.0**	**225.0**	**225.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	**1.0**		1	1	1	1	1
Part-time	0.5		0.5	0.5	0.5	0.5	0.5
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Eileen Donahue, Division Operations Manager
Phone 465-5427
Division Administrative Services
Date/Time 1/29/11 10:30 AM
Approved by John J. Burns, Attorney General
Department of Law
Date 1/29/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB058

Analysis

This bill adds two new civil judges in Anchorage. Currently a significant portion of cases before the Anchorage judges are CINA (child in need of aid) cases. The addition of two new judges would increase the capacity of the court system to handle CINA cases, but would require an additional attorney in the Anchorage Child Protection Section to utilize the improved capacity to reduce delays inherent in the current system. To the extent the judges increase the capacity of the court system to process criminal cases, the criminal division of the department would similarly experience increased workloads. The Child Protection Section would need at least 1 FTE attorney position and a .5 support position to meet the increased demand on time and resources.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version
() Publish Date

Identifier (file name)SB058-DOA-OPA-1-29-11
Title An Act increasing the number of superior court judges.....
Sponsor Senate Rules Committee
Requester Senate Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Office of Public Advocacy
OMB Component Number 43

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	181.7		181.7	181.7	181.7	181.7	181.7
Travel	4.1		4.1	4.1	4.1	4.1	4.1
Services	30.2		30.2	30.2	30.2	30.2	30.2
Commodities	3.0		3.0	3.0	3.0	3.0	3.0
Capital Outlay	13.4		1.3	1.3	1.3	1.3	1.3
Grants							
Miscellaneous							
TOTAL OPERATING	**232.4**	**0.0**	**220.3**	**220.3**	**220.3**	**220.3**	**220.3**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	232.4		220.3	220.3	220.3	220.3	220.3
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**232.4**	**0.0**	**220.3**	**220.3**	**220.3**	**220.3**	**220.3**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	2.0		2	2	2	2	2
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Rachel Levitt, Acting Director
Division Office of Public Advocacy
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 907 269-3504
Date/Time 1/29/11, 12:00 p.m.
Date 1/29/2011, 12:15:00 PM

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 58

Analysis

This bill will create two new Superior Court judge positions in the Third Judicial District. The agency has been advised that these two judges will be handling Anchorage Child in Need of Aid (CINA) matters. Currently, there are ten Anchorage Superior Court judges handling CINA matters. The addition of two new Superior Court judges will considerably increase the number of CINA cases heard on a weekly basis.

The Office of Public Advocacy currently has five full time staff attorneys in Anchorage who represent parents in CINA matters. These attorneys are within a staff section with a total of eight attorneys and two support staff (one law office assistant and one paralegal). The addition of two more judges will greatly increase the demands on these attorneys and staff to prepare for and appear in court for CINA matters. In order to adequately address the increased demands on the agency, the agency will need one additional attorney and one additional law office assistant.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version
() Publish Date

Identifier (file name) SB058-DOA-PDA-1-29-11
Title: An Act increasing the number of superior court judges.....
Sponsor: Senate Rules Committee
Requester: Senate Judiciary

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	181.7		181.7	181.7	181.7	181.7	181.7
Travel	4.1		4.1	4.1	4.1	4.1	4.1
Services	30.2		30.2	30.2	30.2	30.2	30.2
Commodities	3.0		3.0	3.0	3.0	3.0	3.0
Capital Outlay	13.4		1.3	1.3	1.3	1.3	1.3
Grants							
Miscellaneous							
TOTAL OPERATING	**232.4**	**0.0**	**220.3**	**220.3**	**220.3**	**220.3**	**220.3**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	232.4		220.3	220.3	220.3	220.3	220.3
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**232.4**	**0.0**	**220.3**	**220.3**	**220.3**	**220.3**	**220.3**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	**2.0**		2	2	2	2	2
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Quinlan Steiner, Director — Phone: 907 334-4414
Division: Public Defender Agency — Date/Time: 1/28/11 4:30 PM
Approved by: John Cramer, Deputy Commissioner, Department of Administration — Date: 1/29/11 , 12:15 PM

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 58

Analysis

This bill provides for two new superior court judges in Anchorage. These positions are expected to handle a civil caseload of Child in Need of Aid (CINA) matters. The additional judicial positions are expected to increase weekly court room appearances and will increase the workload associated with all civil cases as the Agency attempts to prepare its cases in a timely manner to meet the demand of increased court hearings.

The civil division has six attorneys who are required to appear before the current ten superior court judges handling CINA matters. The Agency anticipates the need for a single attorney position in the civil division with the additional support of a law office assistant to meet the anticipated workload increase.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB 058**
() Publish Date

Identifier (file name) SB058-DPS-DET-02-01-11
Dept. Affected Public Safety
Title "An act increasing the number of superior court judges."
Appropriation Alaska State Troopers
Allocation AST Detachments
Sponsor Rules by request
Requester Senate Judiciary
OMB Component Number 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	91.6		91.6	91.6	91.6	91.6	91.6
Travel	8.1		8.1	8.1	8.1	8.1	8.1
Services	9.4		9.4	9.4	9.4	9.4	9.4
Commodities	8.2		8.2	8.2	8.2	8.2	8.2
Capital Outlay	18.1						
Grants							
Miscellaneous							
TOTAL OPERATING	**135.4**	**0.0**	**117.3**	**117.3**	**117.3**	**117.3**	**117.3**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	135.4		117.3	117.3	117.3	117.3	117.3
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**135.4**	**0.0**	**117.3**	**117.3**	**117.3**	**117.3**	**117.3**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	**1.0**		1	1	1	1	1
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Lt. Rodney Dial
Phone 907-247-4480
Division Alaska State Troopers
Date/Time 2/1/11 9:38AM<
Approved by Joseph Masters, Commissioner
Department of Public Safety
Date 2/1/2011

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 058

Analysis

This bill amends AS 22.10.120 by increasing superior court judges by two to a new total of 42. The new positions are to be located in Anchorage to handle Child in Need of Aid (CINA) cases and domestic relations cases. It is the department's understanding is that there will be an additional two court rooms added in Anchorage.

This legislation will cause a significant increase in the workload and the demands of the departments Court Service Officers (CSO). In order to adequately address the increased demand for CSO, the department will need one additional CSO.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB58**
() Publish Date

Identifier (file name) SB058-OOG-DOE-1-28-11
Title "An Act increasing the number of superior court judges designated for the third judicial district.."
Sponsor Rules Committee
Requester Senate Judiciary Committee

Dept. Affected OOG
Appropriation Elections
Allocation Elections
OMB Component Number 21

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Gail Fenumiai, Director — Phone 465-2644
Division Division of Elections — Date/Time 1/28/2011, 4:55pm
Approved by Linda Perez, Administrative Director — Date 1/28/2011
Office of the Governor

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB58
2011 LEGISLATIVE SESSION

Analysis

This legislation has no impact for the Division of Elections.

SB

61

<TARGET><BILL>SB 61</BILL><SUBJECT>SB
61</SUBJECT><COMM>SJUD27</COMM></TARGET>

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSSB 61(STA)
(S) Publish Date: 2/21/11

Identifier (file name): SB061-LAW-CIV-02-11-11
Dept. Affected: Law
Title: An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes.
Appropriation: Civil
Allocation: Legislation/Regulations
Sponsor: Rules by request of Legislative Council
Requester: (S) State Affairs
OMB Component Number: 2209

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/11/11 4:00 PM
Approved by: John J. Burns, Attorney General, Department of Law — Date: 2/11/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSSB 61(STA)

Analysis

SB 061 makes technical improvements to the Alaska Statutes. SB 061 should have no fiscal impact on Department of Law.

LEGAL SERVICES

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

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

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

MEMORANDUM February 17, 2011

SUBJECT: Sectional Summary of the 2011 Revisor's Bill
(CSSB 61(STA) - Work Order No. 27-LS0152\I)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Kathryn L. Kurtz KK
Assistant Revisor

The following is a sectional summary of the 2011 revisor's bill. The bill is prepared under AS 01.05.036, which provides, in part, that the revisor of statutes

> . . . shall prepare for submission to the legislature legislation for the correction or removal of the deficiencies, conflicts, or obsolete provisions, or to otherwise improve the form or substance of any portion of the statute law of this state.

To assist the reader in understanding the bill, I have summarized the contents by listing sections that have similar purposes or effects.

Sections that delete, repeal, or update obsolete provisions: Sections 1, 3 - 4, 10 - 12, 15, 17 -19, 36 - 37, 41, and 45 amend provisions that have become obsolete.

Sections that correct errors or oversights: Sections 5, 13, 16, and 20 - 22 correct errors or oversights.

Sections that improve the form or substance of the law: Sections 2, 6 - 9, 14, 23 - 35, 38 - 40, and 42 - 44 propose amendments to improve the form or substance of the statutory law of Alaska.

Section 1. Changes a reference in AS 03.22.050 from "United States Soil Conservation Service" to "United States Department of Agriculture Natural Resources Conservation Service" to reflect the renaming of the service in 1994.

Section 2. Defines "department" for purposes of AS 08.02 as the Department of Commerce, Community, and Economic Development (DCCED). The term "department" is used but not defined in AS 08.02.010 and 08.02.050.

In AS 08.02.010, the effect of adding the definition will be to clarify that it is DCCED and not some other department that is responsible for enforcing compliance with professional designation requirements outlined in that section if there is a violation by a person who is not regulated by a board. Currently, only three of the affected professional groups are not regulated by boards: acupuncturists (AS 08.06), audiologists and speech pathologists (AS 08.11), and dietitians and nutritionists (AS 08.38). Chapters AS 08.06, AS 08.11, and AS 08.38 each define "department" as DCCED, so the addition of the definition in AS 08.02 is consistent with existing law.

For AS 08.02.050, the legislature's intent was explicit in the title of the Act enacting the section: "Authorizing the *Department of Community and Economic Development* to issue permits to certain agencies. . . ." Ch. 62, SLA 2002 (emphasis added).

Section 3. Changes two references to the "American Standards Association" in AS 08.40.120 to "American National Standards Institute" to reflect the current name of that organization.

Section 4. Amends AS 08.42.060(a) to change a reference to "Conference of Funeral Services Examining Boards" to "International Conference of Funeral Service Examining Boards" to reflect the change in that organization's name.

Section 5. Redesignates the last clause of AS 08.86.180(b)(4) as paragraph (b)(5), to correct an error in ch. 26, SLA 2010 (which showed two paragraphs designated (4), that were then combined into one editorially).

Section 6. Amends AS 09.20.050(a) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 7. Amends AS 09.20.050(c) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 8. Amends AS 09.20.080(b) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 9. Changes "math" to "mathematics" in AS 14.07.020(a)(16)(B) to conform to the usage found elsewhere in the Alaska Statutes.

Section 10. Removes the requirement in AS 14.40.809(b) that the University of Alaska Board of Regents enter into a reciprocal agreement with Sheldon Jackson College. Sheldon Jackson College closed in 2007. Also changes "to annually report" to "to report annually" to remove the split infinitive.

Section 11. Amends AS 14.42.015(a) to remove Sheldon Jackson College from the selection process for the member of the Alaska Commission on Postsecondary Education representing private higher education. Sheldon Jackson College closed in 2007.

Section 12. Amends AS 14.42.015(d) to remove Sheldon Jackson College students from the selection process for the postsecondary student member of the Alaska Commission on Postsecondary Education. Sheldon Jackson College closed in 2007.

Section 13. Corrects a typographical error in Executive Order 114 in a cross-reference in AS 16.20.070. Until Executive Order 114, AS 16.20.070 correctly referred to AS 16.20.050 and 16.20.060, and not to AS 16.05.060.

Section 14. Amends AS 18.56.855(j) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 15. Deletes obsolete date reference in AS 21.09.210(e).

Section 16. Corrects an erroneous paragraph reference in AS 21.22.065(j)(2). This should have been changed in 1992 when paragraphs were added to AS 21.22.220 by ch. 67, SLA 1992.

Section 17. Deletes reference in AS 21.34.900(6) to AS 21.34.210, which has been repealed. This corrects an error in ch. 67, SLA 1992 (which repealed and reenacted AS 21.34.900(6) and repealed AS 21.34.210).

Section 18. Deletes obsolete date reference in AS 21.39.040(k)(2).

Section 19. Deletes obsolete date reference in AS 21.40.010.

Section 20. Changes a reference in AS 21.45.300(k) from "(1) of this section" to "(*l*) of this section" to correct an error in ch. 28, SLA 1984. Subsections in the Alaska Statutes are lettered, not numbered.

Section 21. Changes a reference in AS 21.45.300(m) from "(3) of this paragraph" to "(3) of this subsection" to correct an error in ch. 28, SLA 1984. In the Alaska Statutes, paragraphs are numbered subparts of lettered subsections. Also changes "shall not" to "may not" to conform to the drafting manual's style for imposing a prohibition.

Section 22. Deletes a reference in AS 21.96.070(f) to AS 14.03.126, which has been repealed, and inserts instead the text of the definition from former AS 14.03.126.

Section 23. Amends AS 22.15.100(10) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 24. Amends AS 22.15.250 in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 25. Amends AS 22.20.037(a) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 26. Amends AS 22.20.037(c) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 27. Amends AS 22.20.037(d) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 28. Amends AS 22.20.300 in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 29. Amends AS 22.20.310 in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 30. Amends AS 22.20.320 in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 31. Amends AS 22.20.430 in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 32. Amends AS 22.25.090(f) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 33. Amends AS 24.08.330(a) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 34. Amends AS 33.05.030(b) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 35 Amends AS 36.30.030 in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 36. Changes a reference in AS 38.07.010 from "United States Soil Conservation Service" to "United States Department of Agriculture Natural Resources Conservation Service" to reflect the renaming of the service in 1994.

Section 37. Changes a reference in AS 38.07.050 from "United States Soil Conservation Service" to "United States Department of Agriculture Natural Resources Conservation Service" to reflect the renaming of the service in 1994.

Section 38. Changes "cropped" to "crop" in AS 38.07.060, a definitions section, to match the usage in AS 38.07.020(b). The word "cropped" is not used in the chapter to which the definitions apply.

Section 39. Amends AS 39.35.680(22) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 40. Amends AS 40.25.123(c) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 41. Deletes obsolete date reference in AS 42.04.080(b).

Section 42. Changes a reference in AS 42.06.430(7)(A) from "49 U.S.C. 1-1240 (Interstate Commerce Act)" to "Interstate Commerce Act." The enacting law, sec. 5, ch. 6, FSSLA 1973, simply referred to "pipelines subject to the Interstate Commerce Act or the Natural Gas Act", without offering specific numbered citations to federal statutes. The specific U.S.C. references were apparently added editorially. Since then, the U.S.C. sections that comprised the Interstate Commerce Act have been revised, renumbered, and in some cases, repealed, so the spanned reference to the previous location of those sections is no longer useful.

Section 43. Amends AS 43.55.023(a)(2) to insert the word "and" between subparagraphs (A) and (B). This change is suggested at the request of the Department of Law. Although "and" can be inferred from the structure and content of the paragraph, and "or" would not make sense in this context, adding the word "and" is consistent with usage elsewhere in the section (for example, in subsection (*l*)(2)) and is intended to facilitate ease of use.

Section 44. Amends AS 44.37.025(c) in an effort to create uniformity among statutory references to the administrative director of the Alaska Court System.

Section 45. Amends a reference to federal law in AS 45.68.120(a). The cite to 26 U.S.C. 6033(a)(2)(A) was correct when enacted. However, that paragraph was renumbered in 2006 as 26 U.S.C. 6033(a)(3)(A). The text of the provision did not change.

Section 46. Provides an immediate effective date.

KLK:ljw
11-119.ljw

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

SEAN PARNELL, GOVERNOR

LEGISLATION & REGULATIONS SECTION
P.O. BOX 110300
DIMOND COURT HOUSE, 6TH FLOOR
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2520

February 22, 2011

Senator Hollis French, Chair
Senate Judiciary Committee
Alaska State Legislature
State Capital, Room 417
Juneau, Alaska 99801-1182

Re: Hearing Request re: CSSB 61 (STA) - An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes

Dear Senator French:

The Department of Law would appreciate scheduling of the above bill for a hearing in your committee, at your earliest convenience. The bill makes technical improvements in Alaska law.

We have reviewed the bill and have found no legal concerns.

If you have any questions, please feel free to contact me.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Chief Assistant Attorney General

DEB:pav

cc: Heather Brakes, Legislative Director, Office of the Governor
Kathryn Kurtz, Assistant Revisor of Statutes, Legislative Affairs Agency

SB

62

<TARGET><BILL>SB 62</BILL><SUBJECT>SB
62</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 1/24/11

FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered SENATE BILL NO. 62

SB 62-CIVIL LEGAL SERVICES FUND

"An Act allowing appropriations to the civil legal services fund from court filing fees."

and recommends:

[ ] be **replaced** with **CS** _____ (_____) *[ ] Same Title [ ] New Title*

[ ] adopt **previous CS** _____ (_____) *[ ] Same Title [ ] New Title*

[ ] attached amendment(s)

[ ] adopt _____Letter of Intent

[ ] further referral to _____Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
COR			✓	
LAW			✓	

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Coghill			✓	
	Wielechowski	✓			
	PASKVAN	X			
	McGuire	X			
CHAIR:	French	✓			

Alaska State Legislature

Session:
State Capitol
Suite 125
Juneau, AK 99801
Phone: (907) 465-2995
Fax: (907) 465-6592

Interim:
716 W 4th Avenue, Suite 300
Anchorage, AK 99501-2133
Phone: (907) 269-0250
Fax: (907) 269-0249

Senator Lesil McGuire

DATE: February 1, 2011

TO: Senator Hollis French, Chair Senate Judiciary Committee

FR: Senator Lesil McGuire

RE: Request to Schedule SB 62: "An Act allowing appropriations to the civil legal services fund from court filing fees."

Dear Senator French,
Please schedule SB 62 for a hearing in the Senate Judiciary Committee at your earliest convenience.

Attached is a bill packet that contains the following:

1. Sponsor Statement
2. Current Version of the Bill: SB 62
3. Fiscal Note
4. Supporting Documents
   a. Alaska Legal Services Corporation handouts

To Testify:

Nikole Nelson
Executive Director of Alaska Legal Services Corp
(907) 222-4508 Testifying from Anchorage LIO

Vance Sanders
ALSC Board President. 586-1648.
He is Juneau based and will testify in person.

Michele Sharp,
ALSC client, 884-0141. Testifying from Anchorage LIO.

Alaska State Legislature

Session:
State Capitol
Suite 125
Juneau, AK 99801
Phone: (907) 465-2995
Fax: (907) 465-6592

Interim:
716 W 4th Avenue, Suite 300
Anchorage, AK 99501-2133
Phone: (907) 269-0250
Fax: (907) 269-0249

Senator Lesil McGuire

SPONSOR STATEMENT for Senate Bill 62

"An Act allowing appropriations to the civil legal services fund from court filing fees."

This bill is designed to help fund civil legal services for low-income Alaskans. Senate Bill 62 will provide a mechanism for funding the Alaska Legal Services Corporation (ALSC), by allowing the legislature to appropriate up to 25 percent of filing fees paid to the Alaska Court System during the previous fiscal year into the Civil Legal Services Fund.

The Alaska Legal Services Corporation was established in 1966 to address the civil legal aid needs of low-income Alaskans. ALSC is not a state agency, but is instead a nonprofit charitable 501(c)(3) whose funding comes from a variety of state, federal, and private sources. Over the last several years ALSC funding has dwindled, from $4.2 million as of 1987 to less than $3.1 million as of 2010, while it struggles to serve a growing number of poverty-level applicants. Appropriations from the State of Alaska that were once as high as $1.2 million in FY84 are currently at $350,000. Senate Bill 62 aims to correct this lack of funding and helps ensure civil legal representation for Alaska's most needy population.

Alaska Legal Services Corporation

Serving Alaska Communities and Families for over 40 years

Who we are:

- Alaska Legal Services Corporation (ALSC) is a private, non-profit law firm that provides free legal services to seniors and low-income Alaskans.

Our Mission:

- To provide meaningful access to justice in resolving civil legal problems for low-income clients, thus promoting family stability and reducing the legal consequences of poverty.

Who We Serve:

- Alaskans below 125% of the Alaska poverty ceiling
- Seniors --- over 600 per year
- Children --- nearly 1/2 of those assisted have children in their households
- Domestic Violence Victims --- over 400 cases per year
- Rural residents --- 38% of all clients served resided in rural communities
- Veterans---preventing homelessness and assuring access to healthcare

Community Need:

- An estimated 88,000 Alaskans live below the poverty ceiling. At present, there is only one ALSC attorney for every 4,000 Alaskans living in poverty.
- In 2009, ALSC received over 3,400 inquiries and 2,834 applications for legal help.
- We turned away over 500 families that could have been helped if we had the resources.
- Many more did not apply, knowing our resource limitations.

Providing Statewide Access To Justice With Offices In:

Anchorage	Bethel	Dillingham	Fairbanks	Juneau
Kenai	Ketchikan	Kotzebue	Nome	Palmer

Strong Local Support:

- Nearly all of our offices enjoy local financial support. Each office sets its own case acceptance priorities based on local needs.

Our Services:

Legal Advice and Counseling	Court Representation	Advocacy
Community Legal Clinics	On-line Self-Help	Pro Bono program

Types of Cases:

Domestic Violence Protection	Foreclosures	Family Law
Wills & Healthcare Directives	Public Benefits	Consumer Protection
Housing Protection	Debtor Relief	
Health care Advocacy	Employment	
Probates & Estates		
Veteran's Benefits		

Alaska Legal Services Corporation

Access to Justice for Alaskans in Need

Alaska Legal Services Corporation

Serving Victims of Domestic Violence

Who we are:

- ALSC is a non-profit civil legal aid agency, providing free legal services to Alaska's poor. We are by far the largest provider of legal services to domestic violence victims in Alaska. We served over 400 families experiencing domestic violence last year alone. Children were present in 80% of these households.
- ALSC has provided legal assistance, including representation to domestic violence victims, for over 40 years, with a particular emphasis on service delivery in Alaska's rural areas.

Community need:

- In 2009, ALSC saw a 15% increase in requests for assistance from victims of abuse. Our ability to help is limited by available resources, forcing us to turn away over 500 families each year.
- The Governor's initiative funds stronger criminal efforts but relies on pro bono efforts to increase civil representation. The lack of dedicated funding for increased civil representation is a weak link in this initiative.

What we do:

- ALSC attorneys provide advice and/or representation aimed at increasing victims' safety and long term stability by keeping or securing housing, obtaining orders of protection and assisting with income maintenance issues such as securing child support and public benefits.

Why we do what we do:

- Alaska's rates of domestic violence and sexual assault are among the highest in the nation. A 2003 study seeking to explain a decline in domestic violence found the provision of civil legal services to victims significantly lowers the incidence of abuse and was the only service designed to help victims having this impact.
- Domestic Violence is the number one precursor to child abuse and neglect. Services to victims also protect children.
- Legal services address practical matters that make leaving abusive relationships a realistic alternative.

Sean Parnell, Governor
State of Alaska

GOVERNOR'S COUNCIL ON DISABILITIES AND SPECIAL EDUCATION

P.O. Box 240249 • Anchorage, Alaska 99524-0249 • Phone: 907-269-8990 • Fax: 907-269-8995 • Toll Free 888-269-8990

February 8, 2011

Senator Lesil McGuire
State Capitol room 125
Juneau, AK 99801

Dear Senator McGuire,

The Governor's Council on Disabilities and Special Education supports Senate Bill 62, *"An Act allowing appropriations to the civil legal services fund from court filing fees."* As we understand it, this bill will provide a funding mechanism for the Alaska Legal Services Corporation. ALSC is an important entity in so much as they provide legal representation for low income Alaskans, many of whom are persons with disabilities.

The Council is particularly supportive of the work of the Alaska Legal Services Corporation around the issue of domestic violence victims, especially in light of alarming statistics around victimization of persons with disabilities. For instance, reports and studies show:

- Persons with a disability had an age-adjusted rate of rape or sexual assault that was more than twice the rate for persons without a disability (2007 Bureau of Justice Report, Crime Against Persons with Disabilities)
- Persons with a cognitive functioning disability had a higher risk of violent victimization than persons with any other type of disability (2007 Justice Report
- 85% of women with disabilities will experience domestic violence (Feuetstein, 1997)
- More than 90% of people with developmental disabilities will experience physical or sexual abuse at some point in their lives (Valenti-Hein &Schwartz, 1995)
- 97-99% of abusers are known and trusted by the victim who has developmental disabilities (Baladerian, 1991)

While these statistics are alarming, the reality is the Alaska Legal Services Corporation is unable to keep pace with its growing caseload without additional financial support. In 2009 they received over 3,400 inquiries and 2,834 applications for legal help, yet had to turn away over 500 families for lack of resources. SB 62 provides an effective and reasonable approach to funding this severely underfunded agency. Please support the passage of SB62.

Sincerely,

Millie Ryan e/s
Millie Ryan, Executive Director
Governor's Council on Disabilities and Special Education

Cindy Smith

From: Doug Wooliver [dwooliver@courts.state.ak.us]
Sent: Friday, February 04, 2011 9:38 AM
To: Cindy Smith
Subject: SB 62

Good morning Cindy. I will be in Anchorage on Monday and will not be able to attend the Judiciary hearing on SB 62. I though I would explain why we have a zero fiscal note on the bill. All filing fees collected by the court system (and all other monies collected by the court as well) are deposited in the state's general fund and are not retained by or otherwise earmarked for the court. They are just general fund dollars like any other and if the legislature elects to identify some percentage of them for a particular purpose then they are allocating money that does not "belong" to us. This is similar to the way youth courts are now funded with a percentage of court fines collected. Again, those are just general fund dollars that are not in some way "ours." Hope this helps. Doug

Advisory Board on Alcoholism
and Drug Abuse

abada
amhb

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

February 7, 2011

Senator Lesil McGuire
Alaska State Legislature
Capitol Building, Room 125
Juneau, Alaska 99801

Re: SB 62 – Civil Legal Services Fund

Dear Senator McGuire,

On behalf of the Alaska Mental Health Board and Advisory Board on Alcoholism and Drug Abuse, I would like to express our appreciation of your support for legal services for Alaska's indigent and vulnerable citizens. For individuals experiencing mental health and substance use disorders, the non-profit public interest firms are often the only source of legal assistance. Ensuring these firms' ability to serve their clients ensures that Alaskans with disabilities and families affected by substance abuse are able to access the legal system when in need.

Alaska Legal Services, the Disability Law Center, and the Alaska Network on Domestic Violence and Sexual Assault all provide services imperative to the health and safety of vulnerable Alaskans. Without the high quality services offered by their lawyers, paralegals, advocates and staff, many seniors, victims of violence and people experiencing disabilities would be left alone and without recourse when faced with unfair or unjust treatment.

The Boards' appreciate your advocacy on behalf of these agencies, but more importantly, on behalf of their clients and the entire justice system in Alaska.

Sincerely,

J. Kate Burkhart
Executive Director

The TRUST

The Alaska Mental Health Trust Authority

February 7, 2011

Senator Lesil McGuire
State Capitol room 125
Juneau, AK 99801

Dear Senator McGuire,

The Alaska Mental Health Trust Authority is pleased to support SB62: "An Act allowing appropriations to the civil legal services fund from court filing fees." This bill will assist Alaska Legal Services in providing legal representation for low income Alaskans, a great number of which are beneficiaries of The Trust.

Legal representation for Trust beneficiaries is a critical need given the high percentage of beneficiaries who end up in the Correctional system (estimated 42% of the total correctional population), who are in danger of eviction from their homes without adequate legal representation, and who experience domestic violence. In 2009, Alaska Legal Services saw an increase of 15% in requests for assistance from victims of abuse. It is estimated that 40% of those served by Alaska Legal Services are Trust beneficiaries.

This bill will assist low-income members of all Trust beneficiary groups statewide who have critical legal needs affecting their safety, stability and self-sufficiency. This bill will provide legal assistance that will address factors such as safety, economic stability and self-sufficiency, all of which directly impact beneficiaries' ability to keep and maintain suitable housing. Several studies have documented the connection between homelessness and domestic violence. Legal assistance to beneficiaries facing abuse could obtain protective orders to stop the violence as well as the legal right to residence.

Alaska Legal Services is the only statewide comprehensive civil legal services provider. At present, there is only one ALSC attorney for every 4,000 Alaskans living in poverty. There is an overwhelming need throughout the state for the services provided by Alaska Legal Services. Increasing access to services and quality of life among Trust beneficiaries is a high priority of the Trust. This bill would make it possible for more Trust beneficiaries, as well as other Alaskans and their families, to access legal services that can improve their quality of life. Please support the passage of SB62.

Sincerely,

Jeff Jessee
Chief Executive Officer
Alaska Mental Health Trust Authority

3745 Community Park Loop, Suite 200 Anchorage, Alaska 99508 Tel: 907-269-7960 Fax: 907-269-7966 www.mhtrust.org

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB062**
() Publish Date

Identifier (file name): SB062-LAW-CIV-02-04-11
Title An Act allowing appropriations to the civil legal services fund from court filing fees.
Sponsor Senator(s) McGuire
Requester (S) JUD

Dept. Affected Law
Appropriation Civil
Allocation Labor and State Affairs
OMB Component Number 2718

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Eileen Donahue, Division Operations Manager
Division Administrative Services
Approved by John J. Burns, Attorney General
Department of Law

Phone 465-5427
Date/Time 2/4/11 2:30 PM
Date 2/4/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB062

Analysis

This bill would provide an additional source for the civil legal services fund established in AS 37.05.590: an amount from the general fund that is up to 25 percent of the filing fees received by the Alaska Court System during the previous fiscal year.

There is no anticipated fiscal impact to Department of Law.

SB

72

<TARGET><BILL>SB 72</BILL><SUBJECT>SB 72</SUBJECT><COMM>SJUD27</COMM></TARGET>

Sec. 11.61.123. Indecent viewing or photography.

(a) A person commits the crime of indecent viewing or photography if, in the state, the person knowingly views, or produces a picture of, the private exposure of the genitals, anus, or female breast of another person and the view or production is without the knowledge or consent of

(1) the parent or guardian of the person viewed, or who is shown in the picture, if the person who is viewed or shown is under 16 years of age; and

(2) the person viewed or shown in the picture, if the person viewed or shown is at least 13 years of age.

(b) Each viewing of a person, and each production of a picture of a person, whose genitals, anus, or female breast are viewed or are shown in a picture constitutes a separate violation of this section.

(c) This section does not apply to viewing or photography conducted by a law enforcement agency for a law enforcement purpose.

(d) In a prosecution under this section, it is an affirmative defense that the viewing or photography was conducted as a security surveillance system, notice of the viewing or photography was posted, and any viewing or use of pictures produced is done only in the interest of crime prevention or prosecution.

(e) In this section,

(1) "picture" means a film, photograph, negative, slide, book, newspaper, or magazine, whether in print, electronic, magnetic, or digital format; and

(2) "private exposure" means that a person has exposed the person's body or part of the body in a place, and under circumstances, that the person reasonably believed would not result in the person's body or body parts being (A) viewed by the defendant; or (B) produced in a picture; "private exposure" does not include the exposure of a person's body or body parts in a law enforcement facility, correctional facility, designated treatment facility, or a juvenile detention facility; in this paragraph, "correctional facility" has the meaning given in AS 33.30.901, "designated treatment facility" has the meaning given in AS 47.30.915, and "juvenile detention facility" has the meaning given in AS 47.12.990.

(f) Indecent viewing or photography is a

(1) class C felony if the person viewed or shown in a picture was, at the time of the viewing or production of the picture, a minor;

(2) class A misdemeanor if the person viewed or shown in a picture was, at the time of the viewing or production of the picture, an adult.

History -

(Sec. 1 ch 29 SLA 1995; am Sec. 5 ch 33 SLA 1999)

Revisors Notes -

Subsection (f) was enacted as (c) and subsections (c)-(e) were enacted as (d)-(f), respectively. Relettered in 1995.

Amendment Notes -

The 1999 amendment, effective May 28, 1999, made a section reference substitution at the end of paragraph (e)(2).

Editors Notes -

Under Sec. 2, ch. 29, SLA 1995, this section "applies to all offenses committed on or after August 13, 1995."

Collateral Refs -

Criminal prosecution of video or photographic voyeurism. 120 ALR5th 337.

Decisions -

Consent as defense. - Defendant did not claim that he obtained permission for photography from the wrong person because of a reasonable mistake concerning his victims' ages, so no issue of consent was presented. Knutsen v. State, 101 P.3d 1065 (Alaska Ct. App. 2004).

Culpable mental state. - When a defendant obtains permission as required under this section, but the state asserts that, because of the victim's age, someone else's permission was required, the state is obliged to prove that the defendant acted recklessly and with a culpable mental state regarding the victim's age. Knutsen v. State, 101 P.3d 1065 (Alaska Ct. App. 2004).

Sec. 11.61.125. Distribution of child pornography.

(a) A person commits the crime of distribution of child pornography if the person distributes in this state or advertises, promotes, solicits, or offers to distribute in this state any material that is proscribed under AS 11.61.127.

(b) This section does not apply to acts that are an integral part of the exhibition or performance of a motion picture if the acts are performed within the scope of employment by a motion picture operator or projectionist employed by the owner or manager of a theater or other place for the showing of motion pictures, unless the motion picture operator or projectionist

(1) has a financial interest in the theater or place in which employed; or

(2) causes the performance or motion picture to be performed or exhibited without the consent of the manager or owner of the theater or other place of showing.

(c) The possession of 100 or more films, audio, video, electronic, or electromagnetic recordings, photographs, negatives, slides, books, newspapers, magazines, or other materials, including a combination of these items totaling 100 or more, is prima facie evidence of distribution and intent to distribute under (a) of this section.

(d) In this section, "distribution" includes the following, whether or not for monetary or other consideration: delivering, selling, renting, leasing, lending, giving, circulating, exhibiting, presenting, providing, exchanging, placing on a computer network or computer system, and providing billing collection, or other ancillary services for or otherwise supporting these activities.

(e) Distribution of child pornography is a

(1) class B felony; or

(2) class A felony if the person has been previously convicted of distribution of child pornography in this jurisdiction or a similar crime in this or another jurisdiction.

Sec. 11.61.127. Possession of child pornography.

(a) A person commits the crime of possession of child pornography if the person knowingly possesses or knowingly accesses on a computer with intent to view any material that visually depicts conduct described in AS 11.41.455(a) knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct or a depiction of a part of an actual child under 18 years of age who, by manipulation, creation, or modification, appears to be engaged in the conduct.

(b) This section does not apply to persons providing plethysmograph assessments in the course of a sex offender treatment program that meets the minimum standards under AS 33.30.011(5).

(c) Each film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts conduct described in AS 11.41.455(a) that is possessed or accessed in violation of (a) of this section is a separate violation of this section.

(d) In a prosecution under (a) of this section, it is an affirmative defense that the person

(1) possessed or accessed fewer than three depictions described in (a) of this section; and

(2) without allowing any person other than a law enforcement agency to view the depictions, either took reasonable steps to destroy the depictions, or reported the matter to a law enforcement agency and allowed the agency access to the depictions.

(e) In a prosecution under (a) of this section, the prosecution is not required to prove the identity of a minor depicted or that the defendant knew the identity of a minor depicted.

(f) In this section, "computer" has the meaning given in AS 11.46.990.

(g) Possession of child pornography is a class C felony.

Sec. 11.61.128. Distribution of indecent material to minors.

(a) A person commits the crime of distribution of indecent material to minors if

(1) the person, being 18 years of age or older, knowingly distributes to another person any material that depicts the following actual or simulated conduct:

(A) sexual penetration;

(B) the lewd touching of a person's genitals, anus, or female breast;

(C) masturbation;

(D) bestiality;

(E) the lewd exhibition of a person's genitals, anus, or female breast; or

(F) sexual masochism or sadism;

(2) the material is harmful to minors; and

(3) either

(A) the other person is a child under 16 years of age; or

(B) the person believes that the other person is a child under 16 years of age.

(b) In this section, it is not a defense that the victim was not actually under 16 years of age.

(c) In this section, "harmful to minors" means

(1) the average individual, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest in sex for persons under 16 years of age;

(2) a reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, educational, political, or scientific value for persons under 16 years of age; and

(3) the material depicts actual or simulated conduct in a way that is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable for persons under 16 years of age.

(d) Except as provided in (e) of this section, distribution of indecent material to minors is a class C felony.

(e) Distribution of indecent material to minors is a class B felony if the defendant was, at the time of the offense, required to register as a sex offender or child kidnapper under AS 12.63 or a similar law of another jurisdiction.

Sec. 11.61.129. Forfeiture of property used in indecent viewing or photography or child pornography.

(a) Property used to aid a violation of AS 11.61.123 - 11.61.128 or to aid the solicitation of, attempt to commit, or conspiracy to commit a violation of AS 11.61.123 - 11.61.128 may be forfeited to the state upon the conviction of the offender.

(b) In this section, "property" has the meaning given in AS 11.41.468.

Sec. 11.41.452. Online enticement of a minor.

(a) A person commits the crime of online enticement of a minor if the person, being 18 years of age or older, knowingly uses a computer to communicate with another person to entice, solicit, or encourage the person to engage in an act described in AS 11.41.455(a)(1) - (7) and

(1) the other person is a child under 16 years of age; or

(2) the person believes that the other person is a child under 16 years of age.

(b) In a prosecution under (a)(2) of this section, it is not a defense that the person enticed, solicited, or encouraged was not actually a child under 16 years of age.

(c) In a prosecution under this section, it is not necessary for the prosecution to show that the act described in AS 11.41.455(a)(1) - (7) was actually committed.

(d) Except as provided in (e) of this section, online enticement is a class C felony.

(e) Online enticement is a class B felony if the defendant was, at the time of the offense, required to register as a sex offender or child kidnapper under AS 12.63 or a similar law of another jurisdiction.

History -

(Sec. 1 ch 97 SLA 2005)

Effective Date Notes -

Section 1, ch. 97, SLA 2005, which enacted this section, took effect on November 28, 2005.

Editors Notes -

Section 5, ch. 96, SLA 2005, provides that this section applies "to offenses occurring on or after November 28, 2005."

Sec. 11.41.455. Unlawful exploitation of a minor.

(a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts the conduct listed in (1) - (7) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

(1) sexual penetration;

(2) the lewd touching of another person's genitals, anus, or breast;

(3) the lewd touching by another person of the child's genitals, anus, or breast;

(4) masturbation;

(5) bestiality;

(6) the lewd exhibition of the child's genitals; or

(7) sexual masochism or sadism.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts the conduct.

(c) Unlawful exploitation of a minor is a

(1) class B felony; or

(2) class A felony if the person has been previously convicted of unlawful exploitation of a minor in this jurisdiction or a similar crime in this or another jurisdiction.

(d) In this section, "audio recording" means a nonbook prerecorded item without a visual component, and includes a record, tape, cassette, and compact disc.

History -

(Sec. 3 ch 166 SLA 1978; am Sec. 1 ch 57 SLA 1983; am Sec. 1 - 3, ch 161 SLA 1990; am Sec. 8 ch 79 SLA 1992; am Sec. 1, 2 ch 65 SLA 2000; am Sec. 1 ch 131 SLA 2004)

Cross References -

For crime of distribution of child pornography, see AS 11.61.125.

Amendment Notes -

The 2000 amendment, effective May 23, 2000, inserted ", video, electronic, or electromagnetic" and "or aurally" in subsections (a) and (b) and deleted "printed" preceding "material" near the end of subsection (b).

The 2004 amendment, effective September 27, 2004, added paragraph (c)(2) and made related changes.

Decisions -

"Live performance". - This section covers private, noncommercial live performances; however, "live performance" does not include the situation in which a single adult requests a child to display his or her genitals to that adult in private. Braun v. State, 911 P.2d 1075 (Alaska Ct. App. 1996).

Statutory construction. - Defendant's interpretation of this section under the rule of lenity, alleging that it was absurd that he was permitted to have sex with someone between the ages of 16 and 18, yet he was prohibited from photographing someone between those ages, was not persuasive; the relevant provisions simply refer to a child under 18 years of age, and do not distinguish between child pornography produced or possessed for private purposes and that intended for distribution. State v. Parker, 147 P.3d 690 (Alaska 2006).

AS 11.61.127(a) forbids the possession of pornographic material that is generated by the conduct prohibited by AS 11.41.455(a), pornography that was generated by the use of a child under the age of 18; the government had to prove that defendant knew that this child pornography was in their possession and that defendant acted knowingly with respect to the circumstance that the pornography was generated illegally. Ferrick v. State, 217 P.3d 418 (Alaska Ct. App. 2009).

Joinder of offenses. - Where defendant was charged with sexual abuse of a minor, unlawful exploitation of a minor, distribution of child pornography, and possession of child pornography stemming from his sexual involvement with his girlfriend's minor daughter, the trial court did not err in denying defendant's motion to sever the sexual abuse charges from the pornography charges because all charges stemmed from defendant's inappropriate relationship with the young girl and were connected. Ogletree v. State, - P.3d - (Alaska Ct. App. Aug. 19, 2009).

Solicitation of crime. - Where defendant was charged with soliciting the crime of unlawful exploitation of a minor based on his asking victims to take off their clothes and let him photograph them, defendant's argument that he did not "solicit" the crime because the victims could not be guilty of the intended crime was foreclosed by the provision of AS 11.31.110 that it is no defense that the person solicited could not be guilty of the crime that is the object of the solicitation. Braun v. State, 911 P.2d 1075 (Alaska Ct. App. 1996).

Defendant's convictions for soliciting the crime of unlawful exploitation of a minor which were based on his asking victims to take off their clothes and let him photograph them were erroneous since defendant did not ask anyone else to engage in the prohibited conduct, i.e., inducing a child to engage in one of the sexual activities prohibited by this section, and thus he did not commit the crime of solicitation. Braun v. State, 911 P.2d 1075 (Alaska Ct. App. 1996).

Aggravating factors. - Where the superior court found an aggravating factor at the defendant's original sentencing, he faced a sentence more severe than the four-year presumptive term for second felony offenders at the time of his sentencing for exploitation of a minor. Harris v. State, 980 P.2d 482 (Alaska Ct. App. 1999).

Conviction and sentence upheld. - See Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984).

Withdrawal of plea bargain denied. - Where defendant pleaded no contest to three felonies as part of a plea bargain, his decision to plead no contest was not materially influenced by his mistaken understanding concerning the consequences of winning a suppression motion; trial court did not err in denying defendant's motion to withdraw his plea. Parker v. State, 90 P.3d 194 (Alaska Ct. App. 2004).

"Least serious" mitigator held inapplicable. - Defendant's alleged lack of intent to distribute pornographic photographs and videos of children, purportedly evidenced by his concealment of them in a locked briefcase in a closet in his house, even if proven by clear and convincing evidence, did not mandate a "least serious" mitigator. State v. Parker, 147 P.3d 690 (Alaska 2006).

Applied in Qualle v. State, 652 P.2d 481 (Alaska Ct. App. 1982); Harris v. State, 790 P.2d 1379 (Alaska Ct. App. 1990); Parker v. State, 151 P.3d 478 (Alaska Ct. App. 2006).

Cited in Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988); Scroggins v. State, 951 P.2d 442 (Alaska Ct. App. 1998); Labrake v. State, 152 P.3d 474 (Alaska Ct. App. 2007).

Sec. 11.41.270. Stalking in the second degree.

(a) A person commits the crime of stalking in the second degree if the person knowingly engages in a course of conduct that recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member.

(b) In this section,

(1) "course of conduct" means repeated acts of nonconsensual contact involving the victim or a family member;

(2) "family member" means a

(A) spouse, child, grandchild, parent, grandparent, sibling, uncle, aunt, nephew, or niece, of the victim, whether related by blood, marriage, or adoption;

(B) person who lives, or has previously lived, in a spousal relationship with the victim;

(C) person who lives in the same household as the victim; or

(D) person who is a former spouse of the victim or is or has been in a dating, courtship, or engagement relationship with the victim;

(3) "nonconsensual contact" means any contact with another person that is initiated or continued without that person's consent, that is beyond the scope of the consent provided by that person, or that is in disregard of that person's expressed desire that the contact be avoided or discontinued; "nonconsensual contact" includes

(A) following or appearing within the sight of that person;

(B) approaching or confronting that person in a public place or on private property;

(C) appearing at the workplace or residence of that person;

(D) entering onto or remaining on property owned, leased, or occupied by that person;

(E) contacting that person by telephone;

(F) sending mail or electronic communications to that person;

(G) placing an object on, or delivering an object to, property owned, leased, or occupied by that person;

(4) "victim" means a person who is the target of a course of conduct.

(c) Stalking in the second degree is a class A misdemeanor.

History -

(Sec. 1 ch 40 SLA 1993)

History Reports -

For Senate letter of intent in connection with the enactment of this section, see 1993 Senate Journal 1026 - 1027.

Decisions -

Constitutionality. - The potential due process and overbreadth problems in the definition of stalking do not require invalidation of the stalking statutes; rather, those problems should be resolved on a case-by-case basis. Petersen v. State, 930 P.2d 414 (Alaska Ct. App. 1996).

Sufficiency of evidence. - Grand jury evidence was sufficient for indictment for first-degree stalking, under AS 11.41.260, where there was a protective order in place against defendant who nevertheless made ongoing contact with victim, including numerous hang-up calls to the victim and victim's boyfriend, paging the victim when she attended one of her boyfriend's musical performances, and slashing tires on her and her boyfriend's cars. Kenison v. State, 107 P.3d 335 (Alaska Ct. App. 2005).

Construction of "contact". - Inclusion within AS 18.66.100(c)(2) of the phrase "or otherwise communicating" immediately after "contacting" strongly suggests that nonphysical contact must involve some element of direct or indirect communication and does not merely mean coming within view; further, "nonconsensual contact" in this section is not all that is needed for a crime to take place; the contact must also be "repeated," so that it is a course of conduct, and it must place the protected person in fear, and the need for these additional requirements to make stalking a crime argues against a construction that makes merely appearing in the sight of a protected person, without more, a crime. Cooper v. Cooper, 144 P.3d 451 (Alaska 2006).

Stalking of ex-wife as domestic violence. - Ex-husband's threatening communications to his ex-wife constituted stalking; these acts by the ex-husband were sufficient support for the issuance of a protective order under AS 18.66.990(3)(A) because stalking in the second degree is a crime involving domestic violence when committed against a former spouse. McComas v. Kirn, 105 P.3d 1130 (Alaska 2005).

Legitimate nonconsensual contacts and telephone calls not prohibited. - The stalking statutes do not prohibit telephone calls or other nonconsensual contact made for a legitimate purpose, even when the defendant knows that the person contacted may or will unreasonably perceive the contact as threatening. Petersen v. State, 930 P.2d 414 (Alaska Ct. App. 1996).

Husband admitted to having been at a mall at a time when his wife, who had sought a protective order against the husband, was also there, but he denied having seen his wife. Only knowing contact was required, but the superior court's error was harmless in holding that contact must be intentional because there was no conduct that amounted to"contacting" within the meaning of AS 18.66.100(c)(2); being in the mere presence of the husband's wife did not mean the husband was

"contacting" his wife; the meaning of "contacting" had a normal meaning, and a nonphysical "contact" did not mean merely coming within view. Cooper v. Cooper, 144 P.3d 451 (Alaska 2006).

Stated in Cook v. State, 36 P.3d 710 (Alaska Ct. App. 2001).

Cited in Prentzel v. State, 169 P.3d 573 (Alaska 2007).

Cindy Smith

From: Doug Wooliver [dwooliver@courts.state.ak.us]
Sent: Thursday, February 10, 2011 3:43 PM
To: Cindy Smith
Subject: SB 72 Statistics

Hello Cindy. I was unable to attend your Monday hearing on SB 72 (the governor's crime bill), but I did listen to the recording of the hearing. During that hearing the committee wondered how many cases would be impacted by the increased penalties reflected in sections 3, 4 and 5 of the bill. I asked our data people how many times those offenses were charged in FY 10. There were 4 cases of online enticement under AS 11.41.452(d) (section 3) and 1 case under AS 11.41.452(e) (section 4). There were 7 cases filed under AS 11.41.455, (section 5 of the bill), though I can't tell from the numbers I received if any were under the provision that already makes these a class A felony.

Although whenever we compare case numbers with others in the criminal justice system we invariably end up with slightly different numbers, our numbers seem consistent with those included in the Department of Corrections fiscal note (an average of five cases per year for these three case types). If the committee's question is whether there are a lot of these case or just a few, I think the answer is just a few.

Doug

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
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STUDENT ADVISOR

February 16, 2011

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
Juneau, AK 99801-1182
via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

Re: Senate Bill 72
ACLU Review of Constitutional Issues

Chair French, Vice-Chair Wielechowski:

Thank you for the opportunity to submit written testimony with respect to Senate Bill 72.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that respect, we wish to advise you of constitutional issues with the Bill.

As you may know, the ACLU of Alaska Foundation is currently representing several Alaska bookstores and others in *American Booksellers Foundation for Free Expression (ABFFE) v. Burns*. The federal court has already granted a preliminary injunction, on First Amendment grounds, against AS 11.61.128(a).

Section 9 of S.B. 72 would narrow AS 11.61.128(a) to only criminalize the distribution of material "harmful to minors" by an adult if the recipient is under 16 years old and the adult is reckless regarding the recipient's age or the adult believes the recipient is less than 16 years old. The legislation would also add a knowledge requirement as to the content being sent to the minor.

This bill is an improvement on AS 11.61.128(a) which was enjoined October 21, but even with these changes the law would still violate the First Amendment and the Commerce Clause of the US Constitution. We welcome the opportunity to work with the Attorney General and this Committee to amend Section 9 to make it constitutionally sound. We believe that modest changes to the bill would cure the constitutional problems in Section 9 while still providing law enforcement with the means to protect minors from adults looking to prey on them.

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions that may arise, or to answer informally any questions which Members of the Committee may have.

Thank you again for the opportunity to share our thoughts.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us
Senator John Coghill, Senator_John_Coghill@legis.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 72
(S) Publish Date: 1/26/11

Identifier (file name): LL1840-DPS-DET-01-12-11
Title: "An Act relating to the crimes of stalking, online enticement... of a minor, related offenses, and misconduct..."
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Not applicable, initial version.

Prepared by: Lt. Rodney Dial
Division: Alaska State Troopers
Approved by: Joseph Masters, Commissioner
Department of Public Safety

Phone: 907-247-4480
Date/Time: 1/24/11 2:20 PM
Date: 1/12/2011

(Revised 12/29/2010 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 72

Analysis

This bill expands the crime of stalking by adding to the definition of nonconsensual contact, monitoring the victim with a GPS device and using or installing a device to record or photograph events concerning the victim. It also increases penalties for unlawful exploitation of a minor, online enticement of a minor, and provides for the prosecution of offenders from out of state. Finally, this bill adopts new offenses to include: sending explicit images of a minor, and misconduct involving confidential information.

Passage of this legislation will have no fiscal impact on the department.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SB 72
(S) Publish Date: 1/26/11

Identifier (file name): 1840-LAW-CRIM-01-11-11
Dept. Affected: Law
Title: An act relating to crimes of stalking, online enticement, and exploitation of a minor, harassment, distribution of indecent material to a minor, and misconduct.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Rules
Requester: Request of the Governor
OMB Component Number: 2203

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Prepared by: Dave Blaisdell, Director — Phone: 465-3673
Division: Administrative Services — Date/Time: 1/11/11 12:00 AM
Approved by: John J. Burns, Attorney General — Date: 1/11/2011
Department of Law

(Revised 12/29/2010 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 72

Analysis

This bill amends the law relating to stalking by adding to the definition of nonconsensual conduct methods of contacting people with modern technology such as global positioning systems. It makes a clarifying amendment to AS 11.51.100, which prohibits endangering the welfare of a minor. It adopts new statutes to prohibit sending an explicit image of a minor and misconduct involving confidential information. It also increases the penalties for the crimes of online enticement of a minor and unlawful exploitation of a minor. The bill makes it clear that the commissioner of corrections may, in his or her discretion, provide supervised probation to a person on probation for conviction of a misdemeanor.

Although the bill would adopt new crimes we believe that they can be prosecuted with current resources.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **SB 72**
() Publish Date: 1/26/2011

Identifier (file name) SB72-DOC-OC-02-04-11
Title: "An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering..."
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: DOC
Appropriation: Administration and Support
Allocation: Office of the Commissioner
OMB Component Number: 684

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES	**	**	**	**	**	**	**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost **

POSITIONS

Full-time	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Part-time	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Temporary	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Why this fiscal note differs from previous version

This is the first version of the bill

Prepared by: Leslie Houston
Division: Administrative Services
Phone: 465-3339
Date/Time: 02/04/11 3:00 p.m.
Approved by: Joseph D. Schmidt
Commissioner
Date: 2/4/2011

(Revised 12/29/2010 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB 72
2011 LEGISLATIVE SESSION

Analysis

DOC averages two new incarcerations per year for the crime of enticement of a minor. This bill would increase the penalty for this crime from a Class C felony to a Class B felony. This change has the potential to increase mandays by 10,220 in FY12 thru FY17. Applying the current cost of care ($136.44 per day), the increase of cost could be in the range of $0.0 to $1,394.44 to DOC.

DOC averages two incarcerations per year for the crime of online enticement of a minor. This bill increases the penalty for this crime from a Class B felony to a Class A felony if the defendant was, at the time of the offense, a registered or required to register as a sex offender or child kidnapper. This would increase the penalty three years. Applying the current daily cost of care ($136.44 per day), this could potentially increase costs in the range of $0.0 to $747.00 to DOC.

DOC averages one new incarceration per year for the crime of unlawful exploitation of a minor. This bill would increase the penalty for this crime from a Class B felony to a Class A felony. This would increase the penalty three years. This has the potential to increase mandays by 5,475 beginning in FY12 thru FY17. Applying the current daily cost of care ($136.44 per day) could potentially add costs in the range of $0.0 to $747.00 to DOC.
Other provisions that the department is unable to quantify at this time but will closely monitor for potential fiscal impact are as follows:
- Adding Monitoring a Person with a Global Positioning Device or Similar Technology Means
- Adding Child Kidnapper to 2(A) under AS12.63
- Adding Sending and Explicit Image of a Minor in the Degree and Second Degree to Statute
- Adding Crimes Involving Minors Committed Out of State, Specifically Online Enticement to Statute
- Adding Online Enticement of a Minor to Statute

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

SEAN PARNELL, GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
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January 27, 2011

The Honorable Hollis French, Chair
Senate Judiciary Committee
Alaska State Capitol, Room 417
Juneau, Alaska 99801

Re: Senate Bill 72 -- relating to stalking and child exploitation

Dear Senator French:

I am writing to request that you schedule Senate Bill 72 for a hearing in the House Judiciary Committee at your earliest convenience. SB 72 is a bill that builds on and refines legislation adopted by the legislature in the past several years to address the serious problems of sexual exploitation and domestic violence.

The bill expands the crime of stalking to prohibit placing a person in fear of death or physical injury using technology such as global position devices or devices that invade, record or photograph events in private places like the home or office. It also addresses the issue of young people sending explicit images of themselves to others in a way that seeks to protect the young person.

A sectional analysis is attached that describes each provision of the bill. Thank you for your consideration of this request.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By: Richard Svobodny
Deputy Attorney General

SB 72
STALKING AND EXPLOITATION OF A MINOR
Sectional Analysis (Revised)

Sections 1 and 2 expand the crime of stalking by amending the definition of "nonconsensual contact". Stalking prohibits a person from engaging in a course of conduct that places another in fear of death or physical injury. "Course of conduct" is defined as repeated acts of nonconsensual conduct. The bill adds two ways that a defendant may contact a victim that is beyond the victim's consent. First, it includes following or monitoring the victim with a global positioning device. Second, it includes installing or attempting to install a device for observing, recording, or photographing events in the home, workplace, or vehicle of the victim, or on the victim's personal telephone or computer.

Section 3 raises the classification of the crime of online enticement of a minor for a person who is not required to register as a sex offender or child kidnapper from a class C felony to a class B felony. This change, in addition to the amendments to AS 12.55.125(i) in the bill, would be to raise the penalty from a range of zero to two years for a first offense (maximum term of five years) to a range of five to 15 years for a first offense (maximum term of 99 years). Also refer to section 12 of this analysis.

Section 4 raises the classification of the crime of online enticement of a minor for a person who is required to register as a sex offender or child kidnapper from a class B felony to a class A felony. This change, in addition to the amendments to AS 12.55.125(i) in the bill, would be to raise the penalty from a range of one to three years (maximum term of 10 years) to a range of 15 to 30 years for a first offense (maximum term of 99 years). Also refer to section 12 of this analysis.

Section 5 raises the classification of the crime of unlawful exploitation of a minor from a class B felony to a class A felony for all offenders. Under current law the offense is a class A felony if the person has previously been convicted of unlawful exploitation of a minor, and it is a class B felony for other offenders. This change, in addition to the amendments to AS 12.55.125(i) in the bill, would be to raise the penalty from a range of two to 12 years or five to 15 years (depending on whether it is a first or second offense) to a range of 15 to 30 years for a first offense. Also refer to section 12 of this analysis.

Section 6 amends the crime of endangering the welfare of a child in the first degree by prohibiting a parent or guardian from leaving a child under 16 years of age with a person who is required to register as a child kidnapper. The law currently prohibits this conduct if the parent or guardian leaves a child with a person required to register as a sex offender.

Section 7 adopts a new crime – sending an explicit image of a minor. It would prohibit publishing or distributing an image of a minor's genitals, anus, or female breast if the minor is under 16 years of age and the publication or distribution was without the consent of the parent or guardian of the minor. The conduct would not apply to a minor under 16 years of age who publishes or distributes the minor's own image. The prohibited conduct would be a class B misdemeanor (maximum term of imprisonment 90 days) if the person publishes the image to one or two others; a class A misdemeanor (maximum term of imprisonment one year) if the person publishes the image to three or more others; and a class C felony (maximum term of imprisonment five years) if the person publishes the image on the Internet.

Section 8 makes a conforming amendment to AS 11.61.120(a)(6), harassment in the second degree, to make it clear that the new crimes of sending an explicit image of a minor in **Section 7** are not included in the crime of harassment in the second degree.

Section 9 makes two amendments to the crime of distribution of indecent material to minors; first, to clarify that the person must know that the material distributed depicts the prohibited conduct; and second to clarify that if the minor to whom the material is sent is under 16 years of age, the defendant must be reckless as to that circumstance.

Section 10 adopts two new crimes – misconduct involving confidential information in the first and second degrees. The second degree offense prohibits a person from obtaining the confidential information about another person without legal authority or consent to do so. This conduct would be a class B misdemeanor (maximum term of imprisonment 90 days).

Misconduct involving confidential information in the first degree would prohibit a person from violating the second degree prohibition *and* using the confidential information to commit a crime or to obtain a benefit to which a person is not entitled, or injure or deprive another person of a benefit. This conduct would be a class A misdemeanor (maximum term of imprisonment one year).

Section 11 clarifies that a person may be prosecuted for online enticement of a minor and for sending an explicit image of a minor if the minor whose image is published, or with whom the person communicated, was in this state, even if the defendant was in another jurisdiction at the time he or she committed the prohibited acts.

Section 12 amends AS 12.55.125(i) (terms of imprisonment for persons who commit sex offenses) by conforming the terms of imprisonment for persons who commit unlawful exploitation of a minor or online enticement of a minor to the correct level in accord with the changes in **Sections 3 – 5** of the bill.

Section 13 clarifies the law by stating that while the Commissioner of Corrections provides probation officers to the superior court for the active supervision of person on probation for felony offenses, the Commissioner may, at his or her discretion, also provide probation officers for the active supervision of persons released for misdemeanor offenses.

Sections 14 and 15 include the applicability and effective date provisions.

SB 72
STALKING AND EXPLOITATION OF A MINOR
Sectional Analysis

Sections 1 and 2 expand the crime of stalking by amending the definition of "nonconsensual contact". Stalking prohibits a person from engaging in a course of conduct that places another in fear of death or physical injury. "Course of conduct" is defined as repeated acts of nonconsensual conduct. The bill adds two ways that a defendant may contact a victim that is beyond the victim's consent. First, it includes following or monitoring the victim with a global positioning device. Second, it includes installing or attempting to install a device for observing, recording, or photographing events in the home, workplace, or vehicle of the victim, or on the victim's personal telephone or computer.

Section 3 raises the classification of the crime of online enticement of a minor for a person who is not required to register as a sex offender or child kidnapper from a class C felony (maximum term of imprisonment five years) to a class B felony (maximum term of imprisonment 10 years).

Section 4 raises the classification of the crime of online enticement of a minor for a person who is required to register as a sex offender or child kidnapper from a class B felony (maximum term of imprisonment 10 years) to a class A felony (maximum term of imprisonment 20 years).

Section 5 raises the classification of the crime of unlawful exploitation of a minor from a class B felony (maximum term of imprisonment 10 years) to a class A felony (maximum term of imprisonment 20 years).

Section 6 amends the crime of endangering the welfare of a child in the first degree by prohibiting a parent or guardian from leaving a child under 16 years of age with a person who is required to register as a child kidnapper. The law currently prohibits this conduct if the parent or guardian leaves a child with a person required to register as a sex offender.

Section 7 adopts a new crime – sending an explicit image of a minor. It would prohibit publishing or distributing an image of a minor's genitals, anus, or female breast if the minor is under 16 years of age and the publication or distribution was without the consent of the parent or guardian of the minor. The conduct would not apply to a minor under 16 years of age who publishes or distributes the minor's own image. The prohibited conduct would be a class B misdemeanor (maximum term of imprisonment 90 days) if the person publishes the image to one or two others; a class A misdemeanor (maximum term of imprisonment one year) if the person publishes the image to three or more others; and a

class C felony (maximum term of imprisonment five years) if the person publishes the image on the Internet.

Section 8 makes a conforming amendment to AS 11.61.120(a)(6), harassment in the second degree, to make it clear that the new crimes of sending an explicit image of a minor in **Section 7** are not included in the crime of harassment in the second degree.

Section 9 makes two amendments to the crime of distribution of indecent material to minors; first, to clarify that the person must know that the material distributed depicts the prohibited conduct; and second to clarify that if the minor to whom the material is sent is under 16 years of age, the defendant must be reckless as to that circumstance.

Section 10 adopts two new crimes – misconduct involving confidential information in the first and second degrees. The second degree offense prohibits a person from obtaining the confidential information about another person without legal authority or consent to do so. This conduct would be a class B misdemeanor (maximum term of imprisonment 90 days).

Misconduct involving confidential information in the first degree would prohibit a person from violating the second degree prohibition *and* using the confidential information to commit a crime or to obtain a benefit to which a person is not entitled, or injure or deprive another person of a benefit. This conduct would be a class A misdemeanor (maximum term of imprisonment one year).

Section 11 clarifies that a person may be prosecuted for online enticement of a minor and for sending an explicit image of a minor if the minor whose image is published, or with whom the person communicated, was in this state, even if the defendant was in another jurisdiction at the time he or she committed the prohibited acts.

Section 12 amends AS 12.55.125(i) (terms of imprisonment for persons who commit sex offenses) by conforming the terms of imprisonment for persons who commit unlawful exploitation of a minor or online enticement of a minor to the correct level in accord with the changes in **Sections 3 – 5** of the bill.

Section 13 clarifies the law by stating that while the Commissioner of Corrections provides probation officers to the superior court for the active supervision of person on probation for felony offenses, the Commissioner may, at his or her discretion, also provide probation officers for the active supervision of persons released for misdemeanor offenses.

Sections 14 and 15 include the applicability and effective date provisions.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 72
(S) Publish Date: 1/26/11

Identifier (file name): LL1840-DPS-DET-01-12-11
Title: "An Act relating to the crimes of stalking, online enticement... of a minor, related offenses, and misconduct..."
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Not applicable, initial version.

Prepared by: Lt. Rodney Dial
Division: Alaska State Troopers
Phone: 907-247-4480
Date/Time: 1/24/11 2:20 PM

Approved by: Joseph Masters, Commissioner
Department of Public Safety
Date: 1/12/2011

(Revised 12/29/2010 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 72

Analysis

This bill expands the crime of stalking by adding to the definition of nonconsensual contact, monitoring the victim with a GPS device and using or installing a device to record or photograph events concerning the victim. It also increases penalties for unlawful exploitation of a minor, online enticement of a minor, and provides for the prosecution of offenders from out of state. Finally, this bill adopts new offenses to include: sending explicit images of a minor, and misconduct involving confidential information.

Passage of this legislation will have no fiscal impact on the department.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SB 72
(S) Publish Date: 1/26/11

Identifier (file name): 1840-LAW-CRIM-01-11-11
Dept. Affected: Law
Title: An act relating to crimes of stalking, online enticement, and exploitation of a minor, harassment, distribution of indecent material to a minor, and misconduct.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Rules
Requester: Request of the Governor
OMB Component Number: 2203

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							
FUND SOURCE		(Thousands of Dollars)					
1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Prepared by: Dave Blaisdell, Director
Phone: 465-3673
Division: Administrative Services
Date/Time: 1/11/11 12:00 AM
Approved by: John J. Burns, Attorney General
Department of Law
Date: 1/11/2011

(Revised 12/29/2010 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 72

Analysis

This bill amends the law relating to stalking by adding to the definition of nonconsensual conduct methods of contacting people with modern technology such as global positioning systems. It makes a clarifying amendment to AS 11.51.100, which prohibits endangering the welfare of a minor. It adopts new statutes to prohibit sending an explicit image of a minor and misconduct involving confidential information. It also increases the penalties for the crimes of online enticement of a minor and unlawful exploitation of a minor. The bill makes it clear that the commissioner of corrections may, in his or her discretion, provide supervised probation to a person on probation for conviction of a misdemeanor.

Although the bill would adopt new crimes we believe that they can be prosecuted with current resources.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: SB 72
(S) Publish Date: 1/26/11

1840-DOA-PDA-1-12-11
Title: An Act relating to the crimes of stalking, online enticement ...
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	***		***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL							

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Prepared by: Quinlan Steiner, Director — Phone: 907 334-4414
Division: Public Defender Agency — Date/Time: 1/12/11 2:45 PM
Approved by: John Cramer, Deputy Commissioner — Date: _____
Department of Administration

(Revised 12/29/2010 OMB)

FISCAL NOTE #3

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 72

Analysis

This bill expands the definition of "nonconsensual contact" under stalking; creates a new crime for sending an explicit image of a minor without the consent of the minor's parent; and creates new crimes for obtaining confidential information of another person.

The bill also provides for the prosecution of an out of state individual for online enticement of a minor if the communications involve an individual in the State of Alaska. Finally, the bill specifically permits the Department of Corrections to provide active supervision to a person placed on probation for a misdemeanor offense.

Expanding the definition of nonconsensual contact, creating additional crimes, and providing for supervised misdemeanor probation will likely result in an increase in cases assigned to the Public Defender Agency. It is not possible to reliably predict the number of cases that will be assigned to the Agency, however. The Agency, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: SB 72
(S) Publish Date: 1/26/11

Identifier (file name): 1840-DOC-OC-01-20-11
Title: "An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering..."
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: DOC
Appropriation: Administration and Support
Allocation: Office of the Commissioner
OMB Component Number: 684

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost **

POSITIONS

Full-time	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Part-time	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Temporary	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Why this fiscal note differs from previous version

This is the first version of the bill

Prepared by: Leslie Houston, Director — Phone: 465-3339
Division: DOC Admin. Services — Date/Time: 01/25/11 1:00 p.m.
Approved by: Joe Schmidt, Commissioner — Date: 1/25/2011
DOC

(Revised 12/29/2010 OMB)

FISCAL NOTE #4

STATE OF ALASKA **BILL NO. SB 72**
2011 LEGISLATIVE SESSION

Analysis

DOC averages two new incarcerations per year for the crime of enticement of a minor. This bill would increase the penalty for this crime from a Class C felony to a Class B felony. This change has the potential to increase mandays by 10,220 in FY12 thru FY17. Applying the current cost of care ($134.21 per day), the increase of cost could be in the range of $0.0 to $1,371.60 to DOC.

DOC averages two incarcerations per year for the crime of online enticement of a minor. This bill increases the penalty for this crime from a Class B felony to a Class A felony if the defendant was, at the time of the offense, a registered or required to register as a sex offender or child kidnapper. This would increase the penalty three years. Applying the current daily cost of care ($134.21 per day), this could potentially increase costs in the range of $0.0 to $734.80 to DOC.

DOC averages one new incarceration per year for the crime of unlawful exploitation of a minor. This bill would increase the penalty for this crime from a Class B felony to a Class A felony. This would increase the penalty three years. This has the potential to increase mandays by 5,475 beginning in FY12 thru FY17. Applying the current daily cost of care ($134.21 per day) could potentially add costs in the range of $0.0 to $734.80 to DOC.

Other provisions that the department is unable to quantify at this time but will closely monitor for potential fiscal impact are as follows:

- Adding Monitoring a Person with a Global Positioning Device or Similar Technology Means
- Adding Child Kidnapper to 2(A) under AS12.63
- Adding Sending and Explicit Image of a Minor in the Degree and Second Degree to Statute
- Adding Crimes Involving Minors Committed Out of State, Specifically Online Enticement to Statute
- Adding Online Enticement of a Minor to Statute

SB

78

<TARGET><BILL>SB 78</BILL><SUBJECT>SB
78</SUBJECT><COMM>SJUD27</COMM></TARGET>

CS FOR SENATE BILL NO. 78(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR MCGUIRE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to liability of certain limited liability organizations holding liquor licenses; and relating to accidents involving the vehicle of a person under the influence of alcoholic beverages."

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

*** Section 1.** AS 04.21.035 is amended to read:

Sec. 04.21.035. Responsibility of <u>partners of a</u> limited liability <u>partnership or foreign limited liability partnership</u> [ORGANIZATION MEMBERS]. Notwithstanding any other provision of [AS 10.50 OR] AS 32.06, a **<u>partner</u>** [MEMBER] of a limited liability **<u>partnership or a foreign limited liability partnership</u>** [ORGANIZATION] holding a license under this title is not relieved of the obligation or the liability otherwise imposed upon a holder of a liquor license under this title solely because the license is held by a limited liability **<u>partnership or a foreign limited liability partnership</u>** [ORGANIZATION].

*** Sec. 2.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.315. Damages resulting from driving the vehicle of a person under the influence of an alcoholic beverage. (a) A person is not liable beyond the limits of any applicable insurance policy purchased by or on behalf of the owner of the vehicle, or the taxicab or limousine company or the company's owner, agents, or employees, for damages resulting from a motor vehicle accident if the person was driving a vehicle involved in the accident and

(1) before the accident, started driving the vehicle involved in the accident from or near licensed premises;

(2) is, at the time of the accident, a person employed in the course and scope of employment to or under contract to drive a taxicab or limousine, a taxicab or limousine owner, a holder of a taxicab or limousine permit issued by a municipality, or an owner or employee of a company that dispatches taxicabs or limousines;

(3) was not under the influence of an alcoholic beverage, inhalant, or controlled substance at the time of the accident;

(4) was driving the vehicle to the motor vehicle owner's residence or designated residential location at the request of the motor vehicle owner or operator or a law enforcement officer; and

(5) was driving the vehicle because the motor vehicle owner or operator was under the influence of an alcoholic beverage or reasonably believed to be under the influence of an alcoholic beverage.

(b) A person licensed under AS 04.11.080 - 04.11.255, or an agent or employee of the person, is not liable for damages resulting from a motor vehicle accident described under (a) of this section. A person or entity that participates in making arrangements for transportation of a vehicle under (a) of this section is not liable for damages resulting from a motor vehicle accident described in (a) of this section.

(c) This section does not

(1) preclude liability for civil damages as a result of gross negligence or reckless or intentional misconduct;

(2) limit the ability of a person to recover damages under any applicable uninsured or underinsured motor vehicle insurance coverage; or

(3) limit the ability of a person to recover damages under any applicable liability insurance coverage purchased by or on behalf of the person being transported under (a) of this section.

(d) A motor vehicle owner is considered to have given consent to another person to drive the owner's motor vehicle if the other person is involved in an accident and the provisions of (a) of this section apply to the other person.

(e) In this section,

(1) "controlled substance" has the meaning given in AS 28.33.190;

(2) "inhalant" has the meaning given to the phrase "hazardous volatile material or substance" in AS 47.37.270;

(3) "licensed premises" has the meaning given in AS 04.21.080.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Section 2 of this Act applies to a civil action that accrues on or after the effective date of this Act.

27-LS0282\B.1
Gardner
4/4/11

AMENDMENT

OFFERED IN THE SENATE BY SENATOR PASKVAN

TO: CSSB 78( ), Draft Version "B"

Page 2, line 4, following the first occurrence of "vehicle":

Insert ", or the taxicab or limousine company or the company's owner, agents, or employees,"

Sec. 28.20.010 Declaration of Purpose. The legislature is concerned over the rising toll of motor vehicle accidents and the suffering and loss inflicted by them. The legislature determines that it is a matter of grave concern that motorists be financially responsible for their negligent acts so that innocent victims of motor vehicle accidents may be recompensed for the injury and financial loss inflicted upon them. The legislature finds and declares that the public interest can best be served by the requirements that the operator of a motor vehicle involved in an accident respond for damages and show proof of financial ability to respond for damages in future accidents as a prerequisite to the person's exercise of the privilege of operating a motor vehicle in the state.

ALASKA STATE LEGISLATURE

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Senate Resources Committee
Senate Judiciary Committee
Senate Special Committee on World Trade,
Technology, and Innovations

SENATOR LESIL MCGUIRE

Statistics

In 2008 in Anchorage there were 2,777 DUI arrests, out of this amount 453 resulted in accidents. In 2008 there were 16 total fatalities of which 8 resulted in an alcohol related fatality.

In 2008, Alaska experienced 62 fatalities of which 17 resulted in alcohol related fatal crashes.

In 2009, in Anchorage there were 2,604 DUI arrests of which 324 had resulted in accidents.

According to the Anchorage Police Department, in 2009 there were 17 fatal accidents of which 7 were alcohol related. This number is down from 2008 by 4% and our plan is to continue to assist our police department in taking this percentage down every year. Not everyone will participate in the program, but we hope that with every ride taken a life could be saved.

In 2009, Alaska experienced 64 fatalities of which 20 were alcohol related crashes.

ANCHORAGE CHARR
TAVERN, HOTEL, RESTAURANT & RETAILERS ASSOCIATION

off the road

About the program - "Off the Road" is a unique program because we can provide a safe mode of transportation for the patron and their vehicle. There are other programs in Alaska but they will not compare to the "Off the Road". This service can be requested by the patron or by the determination of the on premise liquor licensed establishment to limit liabilities and to protect the general public.

Although we try to encourage those who choose to drink alcohol to do so responsibly, we recognize that some people are going to choose to drink to the point of intoxication. Even those who make provisions for alternative rides may have those plans thwarted -- a designated driver may lapse into drinking, a bus may be missed, and so forth. The programs administrators assume that it is the nature of safety nets to catch more than the minimum. With the philosophy that it is better to accept some limited amount of abuse (such as using the service when other sage ways home may exist) rather than risk excluding any legitimate use, servers are instructed never to turn down an *Off the Road* request. *Our thinking is that the risk of denying a legitimate ride far outweighs the risk of allowing a certain amount of abuse.*

Everyone, regardless of socio-economic level, is a potential victim of a drunk driver. Therefore everyone in our community will benefit from this program – not only the potential drunk driver, but also every person who may be a victim of that drunk driver. Another basic principal of the program is to remove all physical and psychological barriers to its use. The ride home is completely free and confidential. **Since the program started in 2005, there have not been any accidents proving that it is safer to have a sober professional licensed chauffeur transport the patron's vehicle home by not taking the risk of having the patron drive their vehicle.**

The information required on the *Off the Road* voucher is minimal but necessary for responsible operation of the program. The person initiating the call for the ride must complete basic information on the voucher such as the date and time, establishment name, location of the rides origination, the authorizing person's name and signature, the full name of the rider and the exact destination. The safe ride driver will ask the patron if they are covered with insurance or if they have insurance; the drivers will complete the driver's information part of the voucher. The remaining voucher information will be completed by the personnel at the participating establishments. Vouchers must be completely filled out.

In 2008 in Anchorage there were 2,777 DUI arrests out of this amount 453 resulted in accidents. In 2008 there were 16 total fatalities of which 8 resulted in an alcohol related fatality.

In 2008, Alaska experienced 62 fatalities of which 17 resulted in alcohol related fatal crashes.

In 2009, in Anchorage there were 2,604 DUI arrests of which 324 resulted in accidents. In 2009 there were 17 fatal accidents of which 7 were alcohol related. According to the Anchorage Police Department this number is down from 2008 by 4% and our plan is to continue to assist our police department in taking this percentage down every year. Not everyone will participate in the program, but we hope that with every ride taken a life could be saved.

In 2009, Alaska experienced 64 fatalities of which 20 resulted in alcohol related crashes.
In collaboration with the Anchorage Police Department and the Alaska Highway Safety Office ultimately would help reduce the amount of alcohol related fatalities by finding new and strategic measures to fight against impaired driving in general. We would like to see alcohol related DUI's reduced 1% by the end of 2010 and as of this writing, we can say that alcohol related accidents reduced by 4%. According to the Anchorage Police Department alcohol is no longer the main reason for DUI arrests. DUI arrests have increased because the amount of drug use (prescription and illegal) is on the rise in youth as well as adults. Even enough cough syrup while operating a vehicle can be classified as a DUI. We strongly believe through the power of education, we can help our citizens make the right choice. Conducting program awareness classes in the military bases will help partner our efforts in reducing drunken driving.

The overall result would be a reduction of drunk drivers which will benefit the community at large.

According to the Alaska Highway Safety Office in the State of Alaska in 2008, 17 out of 62 fatalities were alcohol related for a rate of 31%. Our motto "one ride taken can result in one life saved".

Currently there are 63 participating establishments. Since 2005 when the program began, over 821 individual rides have taken place and over 2379 vouchers have been sold.

Although the safe ride is free to the patron, program participants purchase ten vouchers at time at $10 each to support the program. Not all establishments use the vouchers for the complete safe ride; some establishment s use the vouchers when a patron is in need of a ride home without a vehicle; the only down side is that the voucher is used but not counted as an "off the road" ride.

In order to be able to maintain a ridership level that is not abused or under-utilized vouchers are assigned as they are purchased to each individual establishment. Vouchers are recorded on a spreadsheet as they are used and returned to us by the safe ride company. The patrons' information is confidential and kept for informational purpose only.

ALASKA STATE LEGISLATURE

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Member

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Senate Resources Committee
Senate Judiciary Committee
Senate Special Committee on World Trade, Technology, and Innovations

SENATOR LESIL MCGUIRE

SPONSOR STATEMENT
CS SENATE BILL NO. 78

Senate Bill 78 comprises of two sections. The first seeks to treat members of limited liability companies ("LLC") in the same manner as shareholders of corporations for liability purposes under Alaska liquor laws. It seeks to reflect the fact that LLC's are more similar to and used in the business world as alternatives to corporations and are less commonly used as alternatives to sole proprietorships or general partnerships, which pass on general liability to their owners. As it is currently written, AS 04.21.035 provides that a member of a limited liability company ("LLC") or a partner of a limited liability partnership that holds a license under Title 4, governing alcoholic beverages, is not relieved of the liability imposed upon a liquor license holder solely because the license is held by a LLC or a limited liability partnership.

However, businesses have recognized the greater flexibility in internal governance matters afforded by the LLC structure and have increasingly turned to LLC's as a preferred form of entity for doing business. Businesses consciously choose LLC's to have greater management and efficiency without sacrificing the limited liability protection from business creditors afforded to owners of corporations. Therefore SB 78 seeks to provide equal treatment to LLCs in the liquor liability context as they are treated in the business world generally.

The committee substitute adds two sections which simply provide a limitation of liability for a taxi or limousine driver who gets in an accident while driving another person's vehicle from a licensed premise. These sections were originally passed in 2004 by a vote of 39-0 in the House and 20-0 in the Senate but had a sunset date of 2007, a fact that was overlooked. This language would correct that oversight and the CS language mirrors the original legislation.

Everyone is a potential victim of a drunk driver. Therefore everyone will benefit from this program – not only the potential drunk driver, but also every person who may be a victim of that drunk driver. Another basic principal of the program is to remove all physical and psychological barriers to its use. The ride home is completely free to the intoxicated person and confidential.

There are 63 participating establishments in the Anchorage Bowl. Since 2005 when the program began, over 821 individual rides have taken place and over 2379 vouchers have been sold.

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SENATOR LESIL MCGUIRE

Summary of Changes
Between SB 78\M and CS for SB 78\B

This document is an identification of the changes between W.O. 27-LS0282\M and W.O. 27-LS0282\B.

The CS for SB 22 adds new language in the title of SB 78. It adds "; and relating to accidents involving the vehicle of a person under the influence of alcoholic beverages."

The CS adds Section 2, which adds a new section to AS 09.65 that relates to damages resulting from driving the vehicle of a person under the influence of an alcoholic beverage. Section 09.65.315 (a) gives five conditions under which a person is not liable beyond the limits of any applicable insurance policy purchased by or on behalf of the owner of the vehicle for damages resulting from a motor vehicle accident.

Section 09.65.315(b) states that the taxicab company, drivers and the person who makes arrangements for transportation are not liable for damages resulting from a motor vehicle accident if they meet described under Section 09.65.315(a).

Section 09.65.315(c) outlines that this statute would not preclude liability for civil damages in cases of gross negligence, reckless or intentional misconduct. It also does not limit the ability of a person to recover damages under any applicable uninsured or underinsured motor vehicle insurance coverage or under any applicable liability insurance coverage purchased by or on behalf of the person being transported.

Section 09.65.315(d) defines what is considered consent to another person to drive the owner's motor vehicle.

Section 09.65.315(e) points to where the definitions of "controlled substance", "inhalant" and "licensed premises" can be found in Alaska Statutes.

The CS adds Section 3, which dictates that Section 2 applies to a civil action that accrues on or after the effective date of this Act.

27-LS0282\B
Mischel/Gardner
3/30/11

CS FOR SENATE BILL NO. 78( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR MCGUIRE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to liability of certain limited liability organizations holding liquor licenses; and relating to accidents involving the vehicle of a person under the influence of alcoholic beverages."

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

*** Section 1.** AS 04.21.035 is amended to read:

Sec. 04.21.035. Responsibility of <u>partners of a</u> limited liability <u>partnership or foreign limited liability partnership</u> [ORGANIZATION MEMBERS]. Notwithstanding any other provision of [AS 10.50 OR] AS 32.06, a **<u>partner</u>** [MEMBER] of a limited liability **<u>partnership or a foreign limited liability partnership</u>** [ORGANIZATION] holding a license under this title is not relieved of the obligation or the liability otherwise imposed upon a holder of a liquor license under this title solely because the license is held by a limited liability **<u>partnership or a foreign limited liability partnership</u>** [ORGANIZATION].

*** Sec. 2.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.315. Damages resulting from driving the vehicle of a person under the influence of an alcoholic beverage. (a) A person is not liable beyond the limits of any applicable insurance policy purchased by or on behalf of the owner of the vehicle for damages resulting from a motor vehicle accident if the person was driving a vehicle involved in the accident and

(1) before the accident, started driving the vehicle involved in the accident from or near licensed premises;

(2) is, at the time of the accident, a person employed in the course and scope of employment to or under contract to drive a taxicab or limousine, a taxicab or limousine owner, a holder of a taxicab or limousine permit issued by a municipality, or an owner or employee of a company that dispatches taxicabs or limousines;

(3) was not under the influence of an alcoholic beverage, inhalant, or controlled substance at the time of the accident;

(4) was driving the vehicle to the motor vehicle owner's residence or designated residential location at the request of the motor vehicle owner or operator or a law enforcement officer; and

(5) was driving the vehicle because the motor vehicle owner or operator was under the influence of an alcoholic beverage or reasonably believed to be under the influence of an alcoholic beverage.

(b) A person licensed under AS 04.11.080 - 04.11.255, or an agent or employee of the person, is not liable for damages resulting from a motor vehicle accident described under (a) of this section. A person or entity that participates in making arrangements for transportation of a vehicle under (a) of this section is not liable for damages resulting from a motor vehicle accident described in (a) of this section.

(c) This section does not

(1) preclude liability for civil damages as a result of gross negligence or reckless or intentional misconduct;

(2) limit the ability of a person to recover damages under any applicable uninsured or underinsured motor vehicle insurance coverage; or

(3) limit the ability of a person to recover damages under any

applicable liability insurance coverage purchased by or on behalf of the person being transported under (a) of this section.

(d) A motor vehicle owner is considered to have given consent to another person to drive the owner's motor vehicle if the other person is involved in an accident and the provisions of (a) of this section apply to the other person.

(e) In this section,

(1) "controlled substance" has the meaning given in AS 28.33.190;

(2) "inhalant" has the meaning given to the phrase "hazardous volatile material or substance" in AS 47.37.270;

(3) "licensed premises" has the meaning given in AS 04.21.080.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Section 2 of this Act applies to a civil action that accrues on or after the effective date of this Act.

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SENATOR LESIL MCGUIRE

SPONSOR STATEMENT
SENATE BILL NO. 78

Senate Bill 78 seeks to treat members of limited liability companies ("LLC") in the same manner as shareholders of corporations for liability purposes under Alaska liquor laws. As it is currently written, AS 04.21.035 provides that a member of a limited liability company ("LLC") or a partner of a limited liability partnership that holds a license under Title 4, governing alcoholic beverages, is not relieved of the liability imposed upon a liquor license holder solely because the license is held by a LLC or a limited liability partnership.

SB 78 seeks to change current statute to reflect the fact that presently, persons engaged in businesses commonly use LLC's instead of corporations while leaving intact the limited liability of the LLC members for all other business purposes. In general, LLC members have limited liability protection from LLC creditors, just like shareholders of corporations do from corporation creditors. However, AS 04.21.035 takes away that limited liability protection with respect to holding a liquor license and in liquor related businesses. To avoid that result under the current statutes, the owner of a liquor business holding a liquor license seeking limited liability protection has to do business through a corporate entity.

Businesses have recognized the greater flexibility in internal governance matters afforded by the LLC structure and have increasingly turned to LLC's as a preferred form of entity for doing business. Businesses consciously choose LLC's to have greater management and efficiency without sacrificing the limited liability protection from business creditors afforded to owners of corporations. LLC's are routinely used in Alaska (as well as the rest of the United States) as limited liability protection entities in place of corporations. Therefore SB 78 seeks to provide equal treatment to LLCs in the liquor liability context as they are treated in the business world generally.

If passed, SB 78 will help to encourage business development by reflecting the fact that LLC's are more similar to and used in the business world as alternatives to corporations and are less commonly used as alternatives to sole proprietorships or general partnerships, which pass on general liability to their owners.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: SB 78
Bill Version:
() Publish Date:

Identifier (file name): SB078-DPS-ABC-03-21-11
Dept. Affected: Public Safety
Title: "An Act relating to liability of certain limited liability organizations holding liquor licenses."
Appropriation: Statewide Support
Allocation: Alcoholic Beverage Control Board
Sponsor: Senator McGuire
Requester: Senate Labor & Commerce
OMB Component Number: 2690

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable; initial version.

Prepared by: Shirley Gifford, Director
Phone: 907-269-0351
Division: Alcoholic Beverage Control Board
Date/Time: 3/21/11 3:45 PM
Approved by: Joseph Masters
Commissioner
Date: 3/21/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB 78
2011 LEGISLATIVE SESSION

Analysis

SB 78 provides members of limited liability companies ("LLC") the same protections as shareholders of corporations for liability purposes under Alaska liquor laws.

Currently AS 04.21.035 provides that a member of a limited liability company ("LLC") or a partner of a limited liability partnership that holds a license under Title 4 is not relieved of the liability imposed upon a liquor license holder solely because the license is held by a LLC or a limited liability partnership.

Passage of this legislation will not have a fiscal impact on the Alcoholic Beverage Control Board.

ALYESKA RESORT
ALASKA

February 14, 2011

VIA EXPRESS COURIER

The Honorable Dennis Egan
Chair
Senate Labor & Commerce Committee
State Capitol, Room 150
Juneau, Alaska 99801

Re: Letter of Support for SB 78

Dear Senator Egan:

Alyeska Resort supports passage of Senate Bill 78, which would treat members of limited liability companies in the same manner as shareholders of corporations for liability purposes under Alaska liquor laws by eliminating the pass through exposure that members of limited liability companies now have under AS 04.21.035.

Summary of AS 04.21.035

Alaska Statute 04.21.035 provides that a member of a limited liability company ("LLC") or a partner of a limited liability partnership that holds a license under Title 4, which governs alcoholic beverages, is not relieved of the liability imposed upon a liquor license holder solely because the license is held by an LLC or a limited liability partnership.

Why AS 04.21.035 Is Unworkable

AS 04.21AS 04.21.035 does not recognize the realities of doing business today in the LLC format, unfairly penalizes those who choose to do business as an LLC rather than a corporation in the alcohol business, and causes unnecessary expense. AS 04.21.035 frustrates business development because it does not reflect the fact that LLC's are more similar to and used in the business world as alternatives to corporations, which do not pass general liability to their owners, than similar to and used as alternatives to sole proprietorships or general partnerships, which do pass general liability to their owners. Owners of businesses elect to use the simplified entity form of an LLC over a corporation while retaining the limited liability protection for the LLC's members. The owners of these businesses, however, cannot realize the benefits of using an LLC instead of a corporation without subjecting themselves to liability under AS 04.21.035.

LLC members typically have limited liability protection from LLC creditors, just like shareholders of corporations do from corporation creditors. Under AS 10.50.265 in the Alaska Revised Limited Liability Company Act, a member of an LLC "is not liable, solely by reason of being a member…for a liability of the company to a third party, whether the liability arises in contract, tort or another form, or for the acts or omissions of another member, manager, agent or

employee of the company to a third party." AS 04.21.035 takes away that limited liability protection with respect to the holding of a liquor license and in liquor related businesses. To avoid that result under the current statutes, the owner of a liquor business holding a liquor license seeking limited liability protection must do business through a corporate entity.

Businesses consciously choose LLC's to have greater management and efficiency without sacrificing the limited liability protection from business creditors afforded to owners of corporations. LLC's are routinely used in Alaska (as well as the rest of the United States) as limited liability protection entities in place of corporations. There is no reason to treat LLC's differently in the liquor liability context than they are treated in the business world generally.

Why AS 04.21.035 Should Be Changed

At the time that AS 04.21.035 was enacted in 1999, the LLC statute in Alaska was relatively new (enacted in 1994) and LLC's were not as well understood and as commonly used by the general business community as they are now. Apparently, in 1999, someone thought in the licensed liquor business LLC's should be treated more like sole proprietorships or general partnerships with unlimited liability for their owners. However, now that LLC's are better understood and more commonly used in place of corporations as limited liability vehicles for doing business, the time has come to place LLC's on equal footing with corporations in the liquor business context. When we met with the Executive Director and staff of the Alaska Alcoholic Beverage Control Board ("ABC") and explained the reasons for changing the statute, the ABC Executive Director and staff understood the reason for the requested change and voiced no opposition to the amendment.

Additionally, we are aware of other corporations that hold liquor licenses and would prefer to hold the liquor licenses as LLC's but will not do so until AS 04.21.035 is amended.

Please feel free to contact me if you have any questions.

Very truly yours,

J. Randall Call

J. Randall Call, Esq.
General Counsel

SENATE BILL 78

Additional Information

CORPORATIONS	GENERAL PARTNERSHIPS
Owned by shareholders; Requires directors and officers; Requires Articles of Incorporation and Bylaws. Sub-S Corporations can be used only in limited circumstances and are not available for certain shareholders. All non-Sub-S Corporations are C-Corporations. Limited liability for owners—no personal liability for shareholders generally for acts of corporation. Officers and Directors maintain fiduciary obligations to run corporations in accordance with applicable laws. Prior to the creation of Limited Liability Companies, which are now authorized by statute in all 50 States*, Sub-S Corporations were used as the corporation of choice for investors. In approximately 1994, Alaska followed the majority of other States in allowing Limited Liability Companies in Alaska.	Owned by partners. No limited liability for owners—all partners are individually liable for acts of partnership. Profits are divided among the partners. LIMITED PARTNERSHIPS At least one general partner which is liable for debts of the Limited Partnership, limited partners are not liable for debts of the Limited Partnership. General Partners in a General Partnership or a Limited Partnership are responsible for the debts of the entity. Prior to the creation of Limited Liability Companies, Limited Partnerships were used as an alternative to Sub-S Corporations for investors, where the Sub-S Corporation was not available to the investment entity. In approximately 2000, Alaska followed the majority of other States in allowing Limited Liability Partnerships in Alaska. A Limited Liability Partnership must start out as a general partnership and be subsequently converted to a Limited Liability Partnership.

Information provided by Aleyska Resort Development

SENATE BILL 78

Additional Information

LIMITED LIABILITY COMPANIES	LIMITED LIABILITY PARTNERSHIPS
Owned by members. Commonly used as alternative to Limited Partnerships and Sub-S Corporations because easier to use—greater flexibility in governance and structuring return on investment to owners. Limited Liability Companies are often managed by the members (owners) without need for officers and/or directors. Managers maintain fiduciary obligations to the LLC. Limited liability for owners—no personal liability for members generally for acts of limited liability company.	Owned by partners Used as alternative to general partnership by vote to amend general partnership agreement to become limited liability partnership and then filing statement of qualification with State Limited liability for owners for partnership obligations incurred after conversion to limited liability partnership

Information provided by Aleyska Resort Development

SENATE BILL 78

Additional Information

PURPOSE OF SENATE BILL 78

Senate Bill 78 deletes the "pass through liability" to members of Limited Liability Companies with respect to liquor license issues imposed by AS 04.21.035, while retaining the current "pass through liability" for limited liability and foreign limited liability partnerships. This modification will make Alaska Law substantively more consistent with other States, including Washington, Oregon, California, Nevada, Idaho and Utah with respect to pass through liability for members of Limited Liability Companies.

***BACKGROUND OF LLCs.**

Starting with the pioneering state of Wyoming in 1977, and ending with the action of the Hawaii legislature in 1996, every state has, during those twenty years, passed laws creating a new type of legal entity called a "limited liability company" (or LLC). These entities, which resemble (and are usually taxed as) partnerships, offer the advantages of limited liability, like corporations. While it has long been possible for partnerships to offer limited liability to their LIMITED partners, a limited partnership always had to have at least one GENERAL partner, who was fully liable for the debts of the business.

In addition, all 50 states and D.C. have now adopted a similar type of entity, the limited liability partnership (LLP) or registered limited liability partnership (RLLP). The LLP (or an RLLP) is simply a garden variety partnership that registers with the state and pays a specified fee, in order to become an LLP or RLLP and to have limited liability conferred upon the partnership, which is generally quite similar to an LLC, except that it may be operated like a regular partnership, for the most part.

However, LLPs are mostly used for professional firms, and in some states (New York and California and, until recently, Nevada) only professional firms may set up LLPs. For professionals, the LLP offers only somewhat limited protection from liability, in that a professional who is a partner in an LLP remains personally liable for his or her own malpractice or gross negligence, or such misdeeds committed by employees of the LLP who operate under that partner's direction. (The same is generally true of professional corporations or professional LLCs.) But in most states, other, non-professional businesses may also operate as LLPs, and generally obtain more liability protection than professional LLPs.

See: www.roninsoft.com/llc.htm

LEGAL SERVICES

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

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

MEMORANDUM March 22, 2011

SUBJECT: Proposed amendments to AS 04.21.035
(Work Order No. 27-LS0282\M)

TO: Senator Lesil McGuire
Attn: Esther Tempel

FROM: Doug Gardner
Director

Currently, AS 04.21.035 is an exception to the protections against individual liability offered to partners of properly registered and maintained LLPs and to members of properly registered and maintained LLCs. In other words, partners of LLPs and LLCs--notwithstanding the fact that they have complied with AS 10.50 (LLCs) or AS 32.06 (LLPs)--are not relieved of the obligation or the liability otherwise imposed upon a liquor license holder under Title 4.

LLCs and LLPs are two approaches that have been used throughout the U.S. in recent years to combine the federal tax benefits of partnerships with the non-liability of the shareholders of corporations.[1] Both LLCs and LLPs are being used to capture the traditional non-liability of shareholders of corporations. Currently, Title 4 treats LLCs differently than how LLCs are treated elsewhere in Alaska law. SB 78 deletes reference to LLCs from AS 04.21.035, thereby allowing members of LLCs to rely on AS 10.50.265 for purposes of liability when the LLC holds a liquor license under Title 4, and allows LLCs to be treated consistently in Alaska law. By removing LLCs from AS 04.21.035 and leaving LLPs in the statute, a person who wants to manage liability under AS 04.21 would be able to form as an LLC rather than as an LLP as long as all the LLC requirements in AS 10.50 are met.

DDG:med
11-028.med

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[1] LLCs can elect for federal tax purposes the pass-through taxation of partnerships, where the partner is taxed on partnership income, but the partnership itself is not. In general (there are exceptions), a corporation is taxed on corporate income, and the shareholders are taxed on their dividends.

ALASKA STATE LEGISLATURE

Session
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Juneau, Alaska 99801-1182
Phone (907) 465-2995
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Interim
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SENATOR LESIL MCGUIRE

MEMORANDUM

DATE: March 23, 2011

TO: Senator Hollis French, Chair, Senate Judiciary Committee

FROM: Senator Lesil McGuire, Senate District N

RE: Hearing Request for SB 78: Liquor License Holder Liability

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I respectfully request that SB 78: Liquor License Holder Liability be scheduled for a hearing in the Senate Judiciary Committee pending referral at your earliest convenience. Accompanying this memo, you will find:

1. Current Version of the Bill: SB 78 (27-LS0282\M)
2. Sponsor Statement
3. Fiscal Note
4. Letter of Support / Supporting Documents

A list of people willing to testify for SB 78 will be forthcoming.

If you have any questions or concerns, please feel free to contact me personally or my staff, Esther Tempel, at 465-2995. Thank you for your time and consideration.

Senator.Lesil.McGuire@legis.state.ak.us

SB

82

<TARGET><BILL>SB 82</BILL><SUBJECT>SB
82</SUBJECT><COMM>SJUD27</COMM></TARGET>

Changes in Senate Judiciary Committee to Senate Bill 82

The Senate Judiciary Committee adopted an amendment requested by the Department of Law. It provides:

* conforming amendments (to changes made by last year's House Bill 126) which permit the Department, a guardian, parent or custodian acting on behalf of a child to apply for custody to the age of 21 in one-year periods, if the extensions are in the best interests of the child and the child consents to it.

* a requirement that when custody of a child in the care of the department is due to expire, the department will file notice with the court 30 days before the date of release and provide that notice to all parties -- including the child -- if the child is 16 years of age or older unless all parties have agreed to a shorter notice period.

27-LS0500\X
Mischel
3/30/11

CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 82(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR DAVIS

A BILL

FOR AN ACT ENTITLED

"An Act relating to the procedures and jurisdiction of the Department of Health and Social Services for the care of children who are in state custody; relating to court jurisdiction and findings pertaining to children who are in state custody; and modifying the licensing requirements for foster care."

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

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

SHORT TITLE. This Act may be known as the Alaska Foster Family Protection Act.

*** Sec. 2.** AS 47.10.080(*l*) is amended to read:

(*l*) Within 12 months after the date a child enters foster care as calculated under AS 47.10.088(f), the court shall hold a permanency hearing. The hearing and permanent plan developed in the hearing are governed by the following provisions:

(1) the persons entitled to be heard under AS 47.10.070 or under (f) of this section are also entitled to be heard at the hearing held under this subsection;

(2) when establishing the permanent plan for the child, the court shall make appropriate written findings, including findings related to whether

(A) and when the child should be returned to the parent or guardian;

(B) the child should be placed for adoption or legal guardianship and whether a petition for termination of parental rights should be filed by the department; and

(C) **there is a compelling reason that the most appropriate placement for** the child **is** [SHOULD BE PLACED] in another planned, permanent living arrangement **and the department has recommended the arrangement under AS 47.14.100(p); the findings under this paragraph must include the steps that** [AND WHAT STEPS] are necessary to achieve the new arrangement;

(3) if the court is unable to make a finding required under (2) of this subsection, the court shall hold another hearing within a reasonable period of time;

(4) in addition to the findings required by (2) of this subsection, the court shall also make appropriate written findings related to

(A) whether the department has made the reasonable efforts required under AS 47.10.086 to offer appropriate family support services to remedy the parent's or guardian's conduct or conditions in the home that made the child a child in need of aid under this chapter;

(B) whether the parent or guardian has made substantial progress to remedy the parent's or guardian's conduct or conditions in the home that made the child a child in need of aid under this chapter;

(C) if the permanent plan is for the child to remain in out-of-home-care, whether the child's out-of-home placement continues to be appropriate and in the best interests of the child; and

(D) whether the department has made reasonable efforts to finalize the permanent plan for the child;

(5) the court shall hold a hearing to review the permanent plan at least annually until successful implementation of the plan; if the plan approved by the court

changes after the hearing, the department shall promptly apply to the court for another permanency hearing, and the court shall conduct the hearing within 30 days after application by the department.

*** Sec. 3.** AS 47.10.080 is amended by adding a new subsection to read:

(w) The court shall recognize a presumption that maintenance of a sibling relationship, including with a sibling who is related by blood, marriage, or adoption through one parent, is in a child's best interest.

*** Sec. 4.** AS 47.10.100 is amended to read:

Sec. 47.10.100. Retention of jurisdiction over child [MINOR]. (a) The court retains jurisdiction over the case and may at any time stay execution, modify, set aside, revoke, or enlarge a judgment or order, or grant a new hearing, in the exercise of its power of protection over the **child** [MINOR] and for the **child's** [MINOR'S] best interest, for a period of time not to exceed two years or in any event extend past the day the **child reaches** [MINOR BECOMES] 19 **years of age**, unless sooner discharged by the court, except that the department may apply for and the court may grant an additional one-year period of **custody or** supervision past [AGE] 19 **years of age and additional one-year periods of custody that do not extend beyond the person's 21st birthday** if continued **custody or** supervision is in the best interests of the person and the person consents to it. An application for any of these purposes may be made by the parent, guardian, or custodian acting in behalf of the **child** [MINOR], or the court may, on its own motion, and after reasonable notice to interested parties and the appropriate department, take action that it considers appropriate.

(b) If the court determines at a hearing authorized by (a) of this section that **the department has complied with the requirements for release of a child under AS 47.14.100(q) and that** it is **in** [FOR] the best interests of the **child** [MINOR] to be released to the **child's own custody, or to the** care or custody of the **child's** [MINOR'S] parent, guardian, or custodian, it **shall** [MAY] enter an order to that effect and the **child** [MINOR] is discharged from the control of the department.

(c) If a **child** [MINOR] is adjudicated a child in need of aid before the **child's** [MINOR'S] 18th birthday, the court may retain jurisdiction over the **child** [MINOR] after the **child's** [MINOR'S] 18th birthday for the purpose of supervising the **child**

[MINOR], but the court's jurisdiction over the minor under this chapter never extends beyond the **child's** [MINOR'S] 19th birthday, except that the department may apply for and the court may grant an additional one-year period of **custody or** supervision past [AGE] 19 **years of age and additional one-year periods of custody that do not extend beyond the person's 21st birthday** if continued **custody or** supervision is in the best interests of the person and the person consents to it. The department may retain jurisdiction over a child [BETWEEN THE CHILD'S 18TH AND 19TH BIRTHDAYS FOR THE PURPOSE OF SUPERVISING THE CHILD,] if the child has been placed **in the custody or** under the supervision of the department before the child's 18th birthday, except that the department may apply for and the court may grant an additional one-year period of **custody or** supervision past [AGE] 19 **years of age and additional one-year periods of custody that do not extend beyond the person's 21st birthday** if continued **custody or** supervision is in the best interests of the person and the person consents to it.

* **Sec. 5.** AS 47.14.100(m) is amended to read:

(m) Prima facie evidence of good cause not to place a child with an adult family member or family friend under AS 47.10.088(i) or under (e) of this section includes the failure to meet the requirements for a foster care license under AS 47.32 and regulations adopted under AS 47.32**, taking into account a waiver, variance, or exemption allowed under AS 47.32.030(a)(3) and 47.32.032**. Prima facie evidence of good cause not to place a child with an adult family member or adult family friend does not include poverty or inadequate or crowded housing. If the department denies a request for placement with an adult family member or a family friend, the department shall inform the adult family member or family friend of the basis for the denial and the right to request a hearing to review the decision. A non-party adult family member or family friend requesting a review hearing under AS 47.10.088(i) or under (e) of this section is not eligible for publicly appointed legal counsel.

* **Sec. 6.** AS 47.14.100 is amended by adding new subsections to read:

(o) Except as provided in (p) and (q) of this section, the department shall continue to search for a suitable adoptive or permanent legal guardianship for a child who is in the custody of the state and who is under 18 years of age.

(p) The department may recommend to the court another planned permanent living arrangement for a child who is in state custody only if

(1) the child is 16 years of age or older;

(2) the department has unsuccessfully made intensive efforts to find a permanent placement for the child; and

(3) the department, after considering reunification, adoption, legal guardianship, or permanent placement with a fit and willing relative, determines that there is a compelling reason that the most appropriate permanency plan for the child is placement in another planned permanent living arrangement, and the department documents for the court the compelling reason for the alternate plan.

(q) The department may release from state custody a child who has been committed to the custody of the department, before the custody is ordered to end, only if

(1) the child, if the child is over 16 years of age and available, and the guardian ad litem are notified not less than 30 days before a motion for release is filed unless the parties agree to a shorter notice period;

(2) the department files a motion with the court for release of state custody that describes the reasons the release is in the best interest of the child; and

(3) a court makes a written finding that release from state custody is in the best interest of the child.

(r) When custody of a child who has been committed to the custody of the department is due to expire, the department shall file a notice of release with the court 30 days before the date of release unless the parties agree to a shorter notice period and distribute the notice to the parties, including the child if the child is 16 years of age or older and available.

(s) The department shall make reasonable efforts to place siblings in the same placement if the siblings are residing in the same home when taken into the custody of the department. If siblings are not placed together after reasonable efforts have been made, the case supervisor for the division with responsibility over the custody of children shall document in the file the efforts that were made and the reason separating the siblings for placement purposes is in the best interest of the children. In this

subsection, "sibling" means two or more persons who are related by blood, adoption, or marriage as a child of one or both parents.

(t) As used in (p) of this section, "compelling reason" may include circumstances in which

(1) the child has specifically requested that emancipation be established;

(2) a parent and child have a significant bond, but the parent is unable to care for the child because of an emotional or physical disability, and the child's foster parents have committed to raising the child to the age of majority and to facilitating visitation with the disabled parent.

(u) In this section, "another planned permanent living arrangement" means a permanent living arrangement for a child who is committed to the custody of the department under AS 47.10.080(c)(1) that is an alternative to permanent placement with an adult family member, and to reunification, adoption, and legal guardianship.

* **Sec. 7.** AS 47.32 is amended by adding a new section to read:

Sec. 47.32.032. Foster care license; variance. (a) The department shall streamline the application and licensing paperwork necessary for a person to be approved as a foster parent or relative placement to the extent consistent with federal law.

(b) The department shall approve a variance of the applicable building code requirements for licensure of a foster care home to the extent permitted by federal law if an applicant does not meet the requirements at the time of inspection and

(1) the home design and construction is consistent with homes located in the community; and

(2) the home is otherwise a safe environment for a child.

adopted

AMENDMENT #1

OFFERED IN THE SENATE

TO: CSSSSB 82(HSS)

Page 3, lines 16 - 17:

Delete "[AN] additional one-year **periods** [PERIOD] of supervision past [AGE] 19 **years of age that do not extend beyond the person's 21st birthday** if continued"

Insert "an additional one-year period of **custody or** supervision past [AGE] 19 **years of age and additional one-year periods of custody that do not extend beyond the person's 21st birthday** if continued **custody or**"

Page 3, line 20:

Delete "minor"

Insert "**child** [MINOR]"

Page 4, lines 3 - 5:

Delete "[AN] additional one-year **periods** [PERIOD] of supervision past [AGE] 19 **years of age that do not extend beyond the person's 21st birthday** if continued"

Insert "an additional one-year period of **custody or** supervision past [AGE] 19 **years of age and additional one-year periods of custody that do not extend beyond the person's 21st birthday** if continued **custody or**"

Page 4, line 8, following "placed":

Insert "**in the custody or**"

Page 4, lines 10 - 13:

Delete "[AN] additional one-year **periods** [PERIOD] of supervision past [AGE] 19

years of age that do not extend beyond the person's 21st birthday if continued"

Insert "an additional one-year period of **custody or** supervision past [AGE] 19 **years of age and additional one-year periods of custody that do not extend beyond the person's 21st birthday** if continued **custody or**"

Page 5, lines 10 - 11:

Delete "Unless the child, department, and guardian ad litem agree to a release from custody without a motion and with less than 30 days' notice, the"

Insert "The"

Page 5, line 12:

Delete "who is under 19 years of age"

Page 5, line 13, following "department":

Insert ", before the date custody is ordered to end,"

Page 5, line 14, following "is":

Insert "over 16 years of age and"

Page 5, line 15, following "filed":

Insert "unless the parties agree to a shorter notice period"

Page 5, following line 19:

Insert a new subsection to read:

"(r) When custody of a child who has been committed to the custody of the department is due to expire, the department shall file a notice of release with the court 30 days before the date of release unless the parties agree to a shorter notice period and distribute the notice to the parties, including the child if the child is 16 years of age or older and available."

Reletter the following subsections accordingly.

Explanation for revisions on page 3, lines 16-18 and page 4, lines 3-5 and 10-12:

Each line allows for "additional periods of supervision past age 19 that do not extend beyond the person's 21st birthday." This language needs to be amended as it is in conflict with AS 47.10.080(c)(2) which allows for only one additional period of supervision beyond the child's 19th birthday.

If section 4 in HB 33 passes as written, without also amending AS 47.10.080(c)(2)(B), there would be a conflict between AS 47.10.080(c)(2) and AS 47.10.100, as amended, since AS 47.10.100 would allow supervision until the 21st birthday and AS 47.10.080(c)(2) would allow supervision only until the 20th birthday.

This revision fixes this conflict by distinguishing between supervision (up until the 20th birthday) and custody (up until the 21st birthday).

Explanation for revisions on page 5, lines 10-11 and line 15:

The bill now says: "Unless the child, department, and guardian ad litem agree to a release from custody without a motion and with less than 30 days' notice, …". If OCS seeks to release custody prior to the time custody ends per court order, it is seeking to modify the court order. This bill would allow the parties to agree to modify a court order without court action, but only the court can modify its earlier order. This could be fixed by just removing the words "without a motion." However, I think adding the words "unless the parties agree to a shorter notice period" to the end of line 15 is a cleaner way to say this.

Explanation for revisions on page 5, line 12:

This section allows a child under 19 years of age to be notified before the state seeks to release custody, but shouldn't it also apply to the over 19- under 21 group? Don't they want advance notice too? If they do, this revision would allow all children to receive advance notice.

Explanation for revisions on page 5, line 13 and the new (r):

There are two ways to release a child from state custody: (1) custody automatically lapses because the time the court ordered custody to end has arrived; and (2) OCS seeks to release custody prior to the time the court ordered custody to end. This bill requires a motion to be filed in either situation. It is bad policy to ask the court for permission to release custody when custody automatically lapses because (1) it uses judicial resources unnecessarily; (2) it incorrectly suggests that the court has the power not to extend custody (only OCS or the GAL can file a petition to extend custody). A better solution is to require OCS to file a notice of release when custody automatically lapses (the new proposed (r)) and a motion to release when custody before custody is set to end. Such a revision would still accomplish the purpose of this bill (to warn an older child that custody is ending).

Explanation for revisions on page 5, line 14:

As we heard during public testimony from the youth foster care advocate in Anchorage (I didn't catch her name), the point of subsection (q) is to avoid a young adult being released to their own care with no warning that state custody is ending. This bill now requires notice to all children under 19, but I propose to limit notice to 16 or older.

Here's why: OCS would never release custody of a child under age 18 to his/her self (unless in the rare case that a 16+-year-old is emancipated, but that child would already be involved since the child is the petitioner in emancipation cases). It serves no purpose to notify a young child – for example, a 2-year-old – prior to OCS filing a motion to release that child to their parents. Giving notice to the child's GAL, who represents the child's best interests, should be sufficient for children under age 16.

Alaska State Legislature

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Committee
Chair
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Senate
Education Committee
Vice-Chair

Legislative Council
Vice-Chair
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Senate
Transportation
Committee
•
Senate
Labor & Commerce
Committee

Senator_Bettye_Davis@legis.state.ak.us
http://www.aksenate.org/

Senator Bettye Davis

Date: March 21, 2011

To: Senator Hollis French
Chair, Judiciary

From: Senator Bettye Davis

RE: **Request for Hearing - SB82 – Foster Care Licensing/State Custody "An Act relating to the procedures and jurisdiction of the Department of Health and Social Services for the care of children who are in state custody; relating to court jurisdiction and findings pertaining to children who are in state custody; and modifying the licensing requirements for foster care."**

Senator French,

You currently have in your possession SB82 – Foster Care Licensing/State Custody. SB82 mirrors HB33, a bill that was originally introduced by Representative Les Gara. I was asked to introduce legislation that mirrored HB33 in an effort to get this important bill moving and hopefully passed.

SB82 modifies various provisions in Title 47, making small but very significant changes that prioritize the needs of youth in foster care. This legislation addresses permanent planning for children in custody under "Another Planned Permanent Living Arrangement (APPLA);" modifies licensing procedures; outlines court requirements for release or termination of custody by the courts; outlines "compelling reason" standards for youth with APPLA permanency goals; and provides a provision to support placement of siblings into the same foster home.

This legislation is supported by the department and carries a zero fiscal note. I would greatly appreciate your consideration in scheduling this important bill for hearing as soon as possible. Please let me know if you have any questions.

Thank you.

Session: (January – April)
State Capitol, Room #30, Juneau, AK 99801-1182 Phone: (907) 465-3822 · Fax: (907) 465-3756 · Toll Free: (800) 770-3822
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Senator_Bettye_Davis@legis.state.ak.us
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Senator Bettye Davis

Senate Bill 82 "An Act relating to the procedures and jurisdiction of the Department of Health and Social Services for the care of children who are in state custody; relating to court jurisdiction and findings pertaining to children who are in state custody; and modifying the licensing requirements for foster care."

SPONSOR STATEMENT

Senate Bill 82 modifies various provisions in Title 47 by making small, but very significant changes that better prioritize the needs of foster children. This legislation seeks to:

1. **Achieve Permanency for Older Children in Foster Care** – Permanency for children in OCS custody is best achieved through reunification with the child's parent, or failing that option, through adoption or guardianship. If these three options are not available, another form of permanency is through APPLA ("Another Planned Permanent Living Arrangement"). This bill seeks to make sure the APPLA option is not chosen unnecessarily by providing guidelines for both OCS and the court as to when APPLA should be used.
2. **Presumption to Keep Siblings Together** – Although OCS attempts to keep siblings together when they enter foster care, this bill creates a statutory presumption that siblings be placed in the same home when possible and when such a placement is in the siblings' best interest. When the children cannot be in the same home, this bill requires an OCS supervisor to document in the file the efforts made and the reason for the separation.
3. **Early Release of Custody** - When OCS files a motion to release a child from state custody before the custody order expires, this bill requires OCS and the court to take extra steps to ensure the child and Guardian ad Litem have ample notice of the motion and that the release is in the child's best interest.
4. **Foster Home Licensing Variance Process** - If a potential foster home cannot meet the building codes required to be a licensed foster home, this bill allows a variance to be granted if the home is consistent with construction of other homes in the community and is otherwise a safe environment for the child.
5. **Streamlining Application Process for Foster Parents**
   This bill requires that paperwork required for foster parent licensing be streamlined as much as possible.
6. **Housekeeping** – The bill includes some minor changes to a statute to make it consistent with last year's legislation to extend foster care to age 21.

Session: (January – April)
State Capitol, Room #30, Juneau, AK 99801-1182 Phone: (907) 465-3822 Fax: (907) 465-3756 Toll Free: (800) 770-3822
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716 West 4th Avenue, Anchorage, AK 99501-2133 Phone: (907) 269-0144 Fax: (907) 269-0148

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: **CSSSSB 82(HSS)**
(S) Publish Date: 3/18/11

Identifier (file name): SSSB082-DHSS-FLSW-03-11-11
Title: Foster Care Licensing/State Custody
Sponsor: Sen. Davis
Requester: Senate HSS Committee

Dept. Affected: Health and Social Services
Appropriation: Children's Services
Allocation: Front Line Social Workers
OMB Component Number: 2305

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable. Initial version.

Prepared by: Christy Lawton, Acting Director — Phone 465-3191
Division: Office of Children's Services — Date/Time 3/11/11 5:00 PM
Approved by: Alison Elgee, Assistant Commissioner — Date 3/11/2011
DHSS Finance & Management Services

(Revised 1/27/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA **BILL NO.** CSSSSB 82(HSS)
2011 LEGISLATIVE SESSION

Analysis:

SSB082 has zero fiscal impact on DHSS. This bill addresses permanent planning for children in custody under "Another Planned, Permanent Living Arrangement (APPLA)"; modifies licensing procedures; outlines court requirements for release or termination of custody by the courts; outlines "compelling reason" standards for youth with APPLA permanency goals; provides a provision to support placement of siblings into the same foster home; and establishes a requirement that the Department will enroll children 6 years of age and younger into a "reading enhancement program" where available. No additional costs are anticipated.

NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

Richard Moore
Senator
Massachusetts Senate
President, NCSL

Tim Rice
Executive Director
Illinois Legislative Information System
Staff Chair, NCSL

William Pound
Executive Director

To: Amanda Metivier, Aide to Alaska Rep. Les Gara

From: Amy Taylor, NCSL Intern and Kelly Crane, NCSL

Date: November 17, 2010

Subject: Another Planned Permanent Living Arrangement

Following is information on state legislation around Another Permanent Planned Living Arrangement as a permanency goal for children in foster care. Also, below is information on states that allow for the reinstatement of parental rights (a strategy states may use to reduce the use of APPLA as a permanency option).

- **State Legislation**

New York:

2005 N.Y. Laws, SB 5805, Chap. 3: Specifies the required contents of permanency hearing reports to the court. Describes acceptable permanency goals. Provides that the permanency goal of "another planned permanent living arrangement" must include a significant connection to an adult who is willing to be a permanency resource for the child.

2007 N.Y. Laws, SB 4551, Chap. 327: Clarifies that the plan of "another planned permanent living arrangement" must include documentation of the child's significant connection to an adult who is willing to be a permanency resource for the child.
New York FCA §§1089(c)(1)(v), 1089(d)(2)(i)(E) can be retrieved at:

Alabama:

Section 12-15-315 of the Alabama Code: States that if the juvenile court determines the permanent plan shall be placement in another planned permanent living arrangement, the Department of Human Resources must document to the juvenile court a compelling reason for determining that it would not be in the best interests of the child to return home, be placed for adoption with no identified resource or with the current foster parent, *or* be permanently placed with a relative, with a transfer of legal and physical custody to the relative or with a transfer of physical custody to the relative but with the Department of Human Resources retaining legal custody, be placed with a kinship guardian, or be placed in adult custodial care.

Denver
7700 East First Place
Denver, Colorado 80230-7143
Phone 303.364.7700 Fax 303.364.7800

Washington
444 North Capitol Street, N.W. Suite 515
Washington, D.C. 20001
Phone 202.624.5400 Fax 202.737.1069

Website www.ncsl.org
Email info@ncsl.org

Connecticut:

Sec. 4. Section 46b-129 of the Connecticut Code: Orders that at a permanency hearing the court shall approve a permanency plan that is in the best interests of the child or youth and takes into consideration the child's or youth's need for permanency. Another Planned living arrangement can be ordered by the court, provided the Commissioner of Children and Families has documented a compelling reason why it would not be in the best interest of the child or youth for the permanency plan to include a different permanency goal. (Sec. 4. Section 46b-129 of the 2010 supplement to the general statutes)

West Virginia:

Section 49-6-5 of West Virginia Code: Orders that a child may be placed in another planned permanent living arrangement, but only in cases where the department has documented to the circuit court a compelling reason for determining that it would not be in the best interests of the child to follow one of the other permanency options. (Section 49-6-5. Disposition of neglected or abused children)

- **Reinstatement of Parental Rights**

Several states have also passed legislation that allows for the reinstatement of parental rights following termination of parental rights. The laws were developed in response to children who were aging out of the foster care system and re-establishing ties with parents and family members.

Legislation for Reinstatement following Termination of Parental Rights

State	Statute or Code	Who Can File Motion or Petition	Who Must Be Notified
Alaska	Alaska Stat. § 47.10.089	A person who has voluntarily relinquished the child.	
California	Cal. Welfare and Institutions Code § 366.26	Child for whom court has determined that adoption is no longer the permanent plan.	Social worker or probation officer, child's attorney, child's tribe, if applicable, former parent
Hawaii	Act 135, 2010 Session Laws	Child who is 14 or older; child's GAL; department	Former parent; child's GAL; department; child's resource family
Illinois	705 Ill. Comp. Stat. 405/2-28 and 705 Ill. Comp. Stat. 405/2-34	Dept of Child and Family Services on behalf of 13 years or older child	Parties to the Juvenile Court proceeding

Louisiana	La. Child. Code Ann. art. 1051	Child in foster care over the age of 15.	Parents, foster parents, CASA volunteer.
Nevada	Nev. Rev. Stat. Ann. § 128.160, 128.170	Child or legal custodian or guardian of child	Parents, child's legal custodian or guardian, person or entity that petitioned for TPR, child's attorney
New York	N.Y. Fam. Ct. Act, §§ 635-637	Attorney, Guardian of child age 14 or older	Court may issue summons to child, guardian and custodian, respondent in TPR proceeding.
Oklahoma	Okla. Stat. Ann. tit. 10 A, § 1-4-909	Child 15 or older	Department, child's attorney, child, former parent, foster parent or relative guardian, GAL, child's tribe
Washington	Wash. Rev. Code Ann §13.34.215	Child 12 or older, or younger if good cause is shown	Department, child's attorney, child, former parent, existing parent, current caregiver, child's tribe.

Please let us know if we can be of further assistance!

Amy Taylor
National Conference of State Legislatures
Children and Families Program

aahc
ALASKA ASSOCIATION OF
Homes for Children

Alaska Baptist Family Services
Anchorage, AK

Alaska Children's Services
Anchorage, AK

Alaska Family Services
Palmer, AK

Covenant House of Alaska
Anchorage, AK

Family Centered Services of Alaska
Fairbanks, AK

Juneau Youth Services
Juneau, AK

Kenai Peninsula Community Care Center
Kenai, AK

Maniilaq Association
Kotzebue, AK

Nome Children's Home
Nome, AK

North Slope Borough Children's Services
Barrow, AK

North Star Behavioral Health
Anchorage & Palmer, AK

Presbyterian Hospitality House
Fairbanks, AK

Providence Behavioral Health Systems
Anchorage, AK

Residential Youth Care
Ketchikan, AK

Searhc
Sitka, AK

The Boys and Girls Home of Alaska
Fairbanks, AK

The Salvation Army Booth Memorial Home
Anchorage, AK

Youth Advocates of Sitka
Sitka, AK

March 7, 2011

Senator Bettye Davis
Alaska Senate
State Capitol
Juneau, Alaska 99801

RE: SB 82: Stability and Opportunity for Foster Youth

Dear Senator Davis,

Alaska Association of Homes for Children (AAHC) thanks you for introducing legislation to improve the service delivery of foster care. Several agencies within our association provide foster care and many of the youth we serve benefit from this critical service.

Unfortunately, we all have witnessed children on long waiting lists for a viable foster care placement for various reasons. The intent of SB 82 provides concrete solutions to streamline the process for foster parents, develop resources for children, and reinforce the goals related to permanency planning.

Placing children in rural areas poses additional challenges related to numerous licensing issues. It can be extremely difficult finding foster homes that meet state licensing requirements. Licensing variances for homes failing to meet specific codes when indicated would provide opportunities for families to open up their homes to provide care for foster children.

Foster care provides for a very cost effective way of helping children. Allowing more families to commit to the many Alaskan children waiting for a quality home creates a win win opportunity for all. AAHC truly appreciates your continued efforts to assist with the foster care system in Alaska.

The provisions within your bill would provide a wise investment in the health and wellbeing of Alaska's children.

Thank you,

Brad Ohs
AAHC President

cc: Representative Les Gara

Advisory Board on Alcoholism and Drug Abuse

abada amhb

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

February 23, 2011

Representative Les Gara
Alaska State Legislature
State Capitol, Room 500
Juneau, Alaska 99801

Re: Support for HB 33

Dear Representative Gara,

On behalf of the Alaska Mental Health Board and the Advisory Board on Alcoholism and Drug Abuse, I would like to express our thanks and appreciation for the commitment that you and your co-sponsors have made to improving the lives of Alaskan children in foster care. HB 33 continues that process of system improvement, and we support the small but very significant changes that better prioritize the needs of foster children.

Being removed from your home, even when that home is not a safe or healthy environment, is traumatic. Being removed from your home and then separated from your brothers and sisters compounds the initial harm caused by abuse or neglect exponentially. While we know this from research and study, the Boards recognized fully the devastating effect this separation has on foster children when we heard from youth involved in the 2011 Youth Policy Summit. No child should have to beg, plead and fight for years to see a brother or sister, and yet we heard how this is the case for far too many youth who grow up in foster care.

HB 33 also prioritizes family connections as an important source of strength, support and resiliency for children and youth who experience abuse or neglect by making family placements easier in rural Alaska. Too often children in rural Alaska are placed with foster parents in urban communities rather than with relatives in villages, with the justification that the rural homes fail to meet foster care licensing standards. How can an aunt in a village where no one has running water ever hope to care for a niece or nephew who is in need, if there is no reasonableness standard in determining a safe physical environment for placement? HB 33 provides that element of reason to family placement decisions.

We are grateful for your continued advocacy for Alaska's children and are glad to be able to support HB 33.

Sincerely,

J. Kate Burkhart
Executive Director

cc: Representative Bill Thomas
Representative Bob Herron
Representative Berta Gardner

NASW ALASKA CHAPTER
National Association of Social Workers

401 E. Northern Lights Blvd., Suite 205
Anchorage, Alaska 99503
907-332-NASW (6279) Fax: 907-332-6270
1-800-478-NASW (6279)
director@naswak.org
http://www.naswak.org

January 2nd, 2011

Representative Les Gara
State of Alaska
State Capitol, Room 500
Juneau, Alaska 99801-1182

Dear Representative Gara:
The National Association of Social Workers (NASW) – Alaska Chapter, a membership organization that represents over 500 social workers across the State of Alaska, supports The Alaska Foster Family Protection Act.

The mission of NASW is to enhance the effective functioning and well-being of individuals, families, and communities through its work and through its advocacy. The Alaska Foster Family Projection act upholds this mission by ensuring that Alaska's most vulnerable children can more easily transition into safe and permanent homes. The increase in the number of rural foster care placements is especially crucial so youth in rural Alaska can continue to live in their home communities. Research demonstrates that youth from rural communities, and specifically Alaska Native youth, have more promising futures when they are able to maintain connection with their communities and tribes.

Thank you for your consistent attention to child welfare issues in Alaska. We look forward to working with you on behalf of children and families in our state.

Sincerely,

Meg Loomis, MSW
Executive Director

January 26, 2011

The Honorable Les Gara
Alaska House of Representatives
State Capital
Juneau, AK. 99801-1181

RE: HB 33: Stability and Opportunity for Foster Youth

Dear Representative Gara,

The members of the Alaska Behavioral Health Association would like to inform you of their support for this legislation. It's intent is consistent with the goals and values of the members that provide services in our state and also provides opportunities to expand a system that is currently incapable of meeting the needs of youth.

Our providers have experienced tremendous difficulties in placing children and youth back in their home communities when a foster home is required due to the home situation of the biological parents. Frequently, homes may be available but they don't meet the more ridged codes and standards that govern construction in metropolitan areas. While no one would ever want a child placed in an unsafe environment, we are aware that minor code violations can be prohibitively expensive to repair and a foster home can be lost.

We hear reports from providers that it often takes up to six months or more from the time a family begins the application process and they are finally able to accept a child in their home. We appreciate the careful attention to ensure that a child is placed in a safe environment; however, redundancy and over-attention can become a barrier rather than a safe guard.

Thank you for your commitment to foster children and working to make their lives better.

Sincerely,

Donn Bennice

Donn Bennice, Ph.D.
President

Alaska Children's Services

The Honorable Les Gara
Alaska House of Representatives
State Capitol
Juneau, AK 99801-1182

RE: HB 33: Stability and Opportunity for Foster Youth

Dear Representative Gara:

This letter is to inform you of the strong support the Administration and Board of Directors have for the above-mentioned bill. It's intent is consistent with the goals and values of the Treatment Foster Care Program operated by Alaska Children's Services and provides opportunities to expand a system that is currently incapable of meeting the needs of youth.

We are particularly appreciative of the section regarding permanency placement. As you have stated the ultimate goal in foster care is to place a child in a good, stable, permanent home through adoption, guardianship, or reunification. Frequently, however, in our haste to find a child a bed or a roof over their head, we lose sight of this goal. By adding additional oversight to the permanency planning process, this goal can be reached.

Alaska Children's Services has experienced tremendous difficulties in placing children and youth back in their home communities when a foster home is required due to the home situation of the biological parents. Frequently, homes may be available but don't meet the more rigid codes and standards that govern construction in metropolitan areas. While no one would ever want to place a child in an unsafe environment, we are aware that minor code violations can be prohibitively expensive to repair and a foster home can be lost.

Alaska Children's Services has three full-time professional staff who comprise the treatment foster care licensing department. They report that it frequently takes up to six months or more from the time a family begins the application process and they are finally able to accept a child in their home. We appreciate the careful attention to ensure that a child is placed in a safe environment; however, redundancy and over-attention can become a barrier rather than a safeguard.

Overall, thank you very much for your continued commitment to one of our most vulnerable populations, our foster children, and please advise if there is more we can do to support this legislation.

Regards,

Jim Maley,
President & CEO

1600 Abbott Road, Anchorage, Alaska 99507-1314 • (907) 346-2101 • Fax (907) 248-9220
email: [illegible] • www.acs.ak.org

Denali Family Services
For Children For Families For Alaska

4600 DeBarr Rd., Suite 301 • Anchorage, Alaska 99508
Phone: (907) 274-8281 • Fax (907) 274-4055
www.denalifs.org

COA

February 8, 2011

Representative Les Gara
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative Gara:

I am writing in support of HB33, the legislation you have proposed relating to foster care in Alaska. Denali Family Services (DFS) is a community mental health agency that provides therapeutic foster care to many children in the custody of the State / Office of Children's Services. DFS is also a child placement agency and in that role, processes foster home applications and licenses foster home in cooperation with OCS (i.e., the license is still a State foster care license). As an agency licensing foster homes, we support using the variance for homes in rural communities as long as the home is a safe environment and there are adequate ways to exit the home in case of a fire.

Denali Family Services serves many adolescents who are moving from care to independence and I am especially pleased to see the language changes that will make extending foster care to age 21 easily accessible for youth who want to take advantage of that opportunity. For youth who do not have a support system in place, those additional three years can make a huge difference in their maturity and readiness to survive on their own.

With regard to the application process for foster parents, DFS has significantly reduced our paperwork requirements in the last two years. In addition, effective this fiscal year, DFS will be utilizing a new foster parent training curricula (Presley Ridge). This curricula offers foster care providers in-depth, specialized training and OCS has agreed that DFS' foster parents who complete the Presley Ridge training will not have to take the OCS CORE training. This change will provide foster parents with more specialized training while maintaining the total hours at a number (per year) that is manageable.

On behalf of Denali Family Services, I am writing in support of HB33. Should you need additional information, please feel free to contact me at 907-222-2322.

Sincerely,

Yvonne M. Chase, PhD, LCSW
President / CEO

Covenant House Alaska

Crisis Center · Community Services Center · Transitional Living

March 30, 2011

Senator Bettye Davis
State Capital Room 30
Juneau, AK 99801

Dear Senator Davis,

Thank you for introducing SB 82, a bill focused on improving Alaska's foster care program and protecting children to the best of our ability. Covenant House Alaska (CHA) serves Alaska's homeless and at-risk youth through our Crisis Center, Transitional Living Programs, Healthcare and Educational/Employment Support. CHA appreciates your commitment to keeping Alaska's youth as safe and healthy as possible.

SB 82 enacts the following changes to protect foster care youth:

> (1) SB 82 requires the department to seek permanency for all youth and, if positive permanency plans are unsuccessful, imposes substantive and procedural protections around planning for youth to be placed in another planned permanent living arrangement;
> (2) SB 82 simplifies the application process to become a foster home and allows the department to waive strict compliance with building code requirements for foster and relative placements if the placement is in the child's best interest and is otherwise preferable and safe; and
> (3) SB 82 requires the department to make all reasonable efforts to place siblings together.

All of the changes listed above evince strong policy underpinnings. Specific to CHA's population of homeless and runaway youth, the provisions regarding waiving strict building code compliance for relatives' homes and placing siblings together are particularly noteworthy. Research indicates that foster care youth who are placed with siblings in the home of a relative or family friend, usually in a familiar community, tend to run away less frequently.

These statutory changes may be viewed as measures targeted to prevent youth homelessness. And, just as important, if a youth comes to Covenant House from the foster care system who qualifies for extended court supervision, it appears that this legislation would allow CHA to work with the department to continue to provide services for the youth.

Thank you for your efforts at protecting Alaska's vulnerable children. Please do not hesitate to contact me if I can answer any questions or provide further feedback on SB 82.

Sincerely,

Deirdre A. Cronin

Deirdre A. Cronin
Executive Director

Regina Chenault, Violent Crimes Compensation Board

Sgt. Kathy Lacey, APD

Lauren Rice, Covenant House

(Possible: Special Agent Jolene Goeden)

SB 86 (FILE 1)

<TARGET><BILL>SB 86</BILL><SUBJECT>SB 86 (FILE 1)</SUBJECT><COMM>SJUD27</COMM></TARGET>

ISSUES FOR SB86

(from the committee hearing and from subsequent discussions with sponsors)

1. Ex-parte Orders for protection of financial assets [language on page 3 at Section 5]:

   Language needs to be tightened up to ensure that the vulnerable adult is notified of all ex-parte hearing requests. We should *consider* an exception for when telling the vulnerable adult is tantamount to telling the bad actor (e.g., someone who is their principal caretaker) but still require that some rationale be filed with the court for its review. The departments argue that this would not "happen very often" but the fact is that under this provision a large number of 3rd parties can potentially file for an emergency ex-parte order – the state, the person's attorney, a person "interested in the estate, affairs, or welfare of the person", etc. So, it is entirely possible that adult daughter files for protection against her adult brother, and mom or dad never knows it without some provision to ensure they do). It would also not hurt to look at tightening hat list a little, in my opinion, but we should at least make sure that the vulnerable adult is always noticed on the request for a hearing. Scott has provided some suggested language, attached.

   At page 4, there was a question as to the standard of evidence for 72 hour hearings. I believe Kelly had said she thought it it was "clear and convincing", but they later reported it is "preponderance of evidence" – this is the same as it is for other exparte orders, but we should probably just clarify it in the committee record.

2. "Undue influence" [throughout the bill starting at page 8] – The department provided an excellent chart showing that as of 1996, 18 states had laws that recognized undue influence in their vulnerable adult statutes. The committee got copies earlier and will get them again today as table copies. Some states use this only in regard to financial exploitation, others use it in the general statutes. This bill proposes the latter, so it could cover other issues where undue influence can come into play – no changes here that I could see, but it may be worthwhile to put this in the record.

3. Reporting law changes:

   A. . [At page 8, section 13].The issue of "may" give name and address" and later mandatory reporter "shall" seems to be because while we are amending the list of mandatory reporters there is a later provision for non-mandatory reporters in law (not replicated in this bill) and many voluntary reporters do not want to give their names and contacts

B. [section 16, starting on pg 8].The issue as to whether the peace officers new duty to report within 24 hours now falls within the "B" misdo penalty was unclear, and did not get any clearer in subsequent conversations. I asked whether there was --- to put it bluntly - any way to make a report after hours or any point to doing so - and found they have a toll free reporting line, so a police officer, given access to phones, could make a call, but it is answered only during work hours, so wouldn't acted on until the next day. So my thought is, we should ensure that no one is in B misdo land for failing to make a call on a weekend when no one will hear it until Monday anyway.

I asked them if OCS has 24 hour reporting at this point, but didn't get an answer yet. I think the house is looking at language "24 hours or at the earliest opportunity" or words to that effect.

C. [section 18, at page 9]. The provision for reckless reporting is a public policy call. This provision for actual damages "suffered by the person who is the subject" of the report does not exist in other reporting laws to my knowledge - I asked them to check the child abuse reporting statutes, as I did not see it there. They did not find it during the meeting, but may have after they left - I didn't hear one way or the other. Actual damages for reputation can be pretty hefty. On the one hand, we certainly don't want people making allegations in reckless disregard of the truth. On the other hand, the reason we have these laws at all is to *require* some people to report and to encourage everyone else to do so. There is a provision already in law that gives immunity to people for good faith reporting, but I am not sure what the point of this provision is. I don't think we are exactly being overwhelmed with false reports of elder abuse so that we need to take action to discourage them by explicitly stating it within reporting law.

D. We need to look at an effective date provision for the new reporting requirements - the law takes effect immediately as written, but new reporters and new requirements should need some implementation time.

4. Investigations and access to financial and medical records {Section 25, starting at page 11]:

(a) You had asked why the department would use an ex-parte order rather than a subpoena. I believe from our discussions that the Department has come to agree with you on this point, and is making this change.

(b) I brought up the concern that much of the material being sought has its own confidentiality protections, and asked what OPA and the departments planned to do to ensure that the material continued to be protected or was properly returned or disposed of - they were of the opinion that their files were also confidential and therefore it would not be a problem. I think we should at least make them talk about this on the record. I don't know if they came to an agreement on new language with the house committee on this or not but I know it came up there as well.

Other odds and ends:

5. Fiduciary duty [page 18, line 22]: Scott has proposed replacement language for the definition of "fiduciary duty" which he can explain. It is in his letter, attached.

6. We have general agreement to update the reporting terms that had been in the revisor's bill (this is just changing language to be consistent through the statutes).

7. We should ask them to tell us about any other issues they are aware of, and any other amendment language they'd like us to consider (trying to get as much of the house amendment language in front of us as possible). I had been waiting for that bill but it is still in subcommittee as far as I last heard).

Issue of fraud as separate standard...in testimony the DOL said that if a person who was competent AND a victim of fraud did not want intervention that would not be dispositve. Can we walk through that?

Standard of evidence for 72 hour hearings? Law said clear and convincing but I think Scott told me later it was preponderance? of evidence. title 18.66.110(a)

Page 4

Is there circumstances under which the vulnerable adult could be the(unnotified) respondent in an ex-parte order? (In other words, given the no- notice provision, which works fine for others, are there scenarios where the exparte order could potentially be issued against the person themselves...could an adult child of someone for instance, use this provision against another adult child *without* notice to the person? OK

Generally, why is undue influence not included in title 13 provisions? It seems it would be a common problem for financial exploitation... NO - all - APS overall statutes

will the placement of this language in title 47 then make the definition applicable to physical or sexual abuse? Jaime. kelly/jaime

Page 9 Do we have 24 hour reporting ~~for~~ TO OCS at this point? Is there a 24-hour point of contact for these reports? So if a VPSO gets a report on a Friday night, is there a place to report by sat night? Law said she'd double check to ensure that the 24 hour reporting standard was not a criminal penalty as was earlier section 13. Also, Coghill wanted a response to apparent conflict between sections 13 "may" language and section 18 "shall"...Paskvan asked about nominal damages for false reports . HF asked about effective dates (which appear to be immediate)... kelly

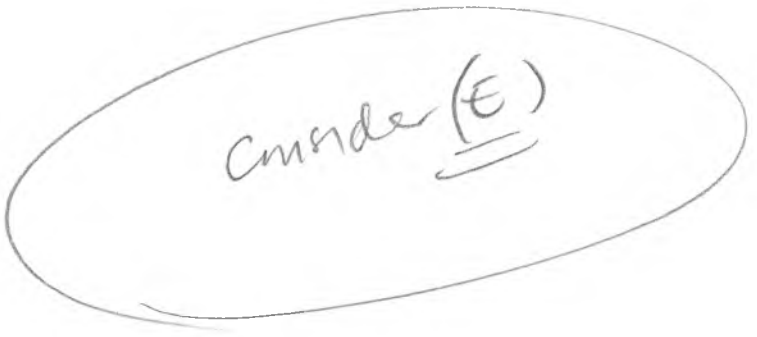
Yes 1884 #

Pages 11-12 Section 25 provisions, again, why not a subpoena?? I know this isn't Scott's area so should I redirect this question to the HSS lawyer? exparte orders subpoenas

"under discussion" Ak one

Page 18 an example of when fraud make an otherwise competent person unable to meet the person's own needs or to seek help without assistance?

Still looking for a list of states that have exparte orders.



3/10/11

SB 06

CS +

(1) "other protective orders (modify) .1e5

(2) Disability law Center modifications

(3) Packet

p 9 line 13 "or not taken"

Department of Commerce, Community, and Economic Development.

* **Sec. 3.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable adult** [AN ELDERLY PERSON OR DISABLED ADULT] as required by AS 47.24.

* **Sec. 4.** AS 08.40.120(a) is amended to read:

(a) Each applicant shall be examined to determine the applicant's

(1) ability to understand plans, design specifications, and engineering terms commonly used in the electrical field;

(2) knowledge of electrical installations and wiring;

(3) familiarity with the regulations contained in the National Electrical Code and the National Electrical Safety Code, as approved by the **American National Standards Institute** [AMERICAN STANDARDS ASSOCIATION];

(4) familiarity with other installation and safety regulations approved by the **American National Standards Institute** [AMERICAN STANDARDS ASSOCIATION];

(5) personal skill and ability.

* **Sec. 5.** AS 08.42.060(a) is amended to read:

(a) The department shall examine applicants for an embalmer's license; the examination may include any or all of the following subjects: (1) theory and practice of embalming, (2) anatomy, (3) pathology, (4) bacteriology, (5) hygiene, including sanitation and public health, (6) chemistry, including toxicology, (7) restorative arts, including plastic surgery and demi-surgery, (8) funeral service arts and sciences [,] and funeral service administration, including accounting, funeral law, psychology, funeral principles, directing, and management, (9) Alaska vital statistics law, and (10) the provisions of this chapter and the regulations adopted by the department under this chapter. The department shall examine applicants for a funeral director's license; the examination may include any or all of the subjects included in (8), (9), and (10) of this subsection. The department may use the examination provided by the **International**

LEGAL SERVICES

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

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

MEMORANDUM March 2, 2011

SUBJECT: "Elderly Persons and Disabled Adults" vs. "Vulnerable Adults": Inconsistent terminology in AS 08.29.200(b)(2), AS 08.63.200(b)(2), and AS 47.24 (SB 61, Work Order No. 27-LS0152\B, and SB 86, Work Order No. 27-GS1722\A)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Kathryn L. Kurtz pp for KK
Assistant Revisor

You inquired about the section removed from SB 61 in the Senate State Affairs Committee, and whether it might fit into SB 86. Section 3 of SB 61 substituted the term "vulnerable adult" for "elderly person or disabled adult" in AS 08.29.200(b) to conform that section to the terminology used in AS 47.24.010. It was removed from the bill out of concern that it might involve a substantive change to the law better handled in a substantive bill rather than a bill revising statutes. SB 86 addresses the subject of protection of vulnerable adults, and I believe the changes to AS 08 suggested in the enclosed amendment would fit within that subject.

Background

In the course of reviewing the Alaska Statutes, one of our drafting attorneys noted a discrepancy between the language of AS 08.29.200(b)(2) and AS 47.24. AS 08.29.200 relates to the confidentiality of communications between a licensed professional counselor and a client. Notwithstanding the general requirement of confidentiality, licensed professional counselors are required under this statute to report "incidents of . . . harm or assaults suffered by an elderly person or disabled adult as required by AS 47.24." AS 08.29.200(b)(2). Although AS 47.24 used to address the protection of "elderly persons and disabled adults," AS 47.24, since 1994, has instead used the term "vulnerable adults."

A related issue is presented in AS 08.63.200(b)(2), which imposes a duty on marital and family therapists to report "harm or assaults suffered by an elderly person or disabled

adult as required by AS 47.24." AS 47.24.010 requires licensed professional counselors[1] and marital and family therapists who believe that a vulnerable adult "suffers from abandonment, exploitation, abuse, neglect, or self-neglect" to report that belief to the Department of Health and Social Services.

The Issue

The problem we see in AS 08.29.200(b)(2) and AS 08.63.200(b)(2) is that they refer to a duty imposed under AS 47.24, but they use different terminology than AS 47.24 ("elderly person or disabled adult" vs. "vulnerable adult"). This raises a question as to whether the reporting duty in these two sections is the same as that imposed in AS 47.24 or somehow different in scope.

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[1] AS 47.24.010(a)(2) specifically requires reporting by:

> (2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

AS 47.30.915(11) defines mental health professional to include licensed professional counselors:

> (11) "mental health professional" means a psychiatrist or physician who is licensed by the State Medical Board to practice in this state or is employed by the federal government; a clinical psychologist licensed by the state Board of Psychologist and Psychological Associate Examiners; a psychological associate trained in clinical psychology and licensed by the Board of Psychologist and Psychological Associate Examiners; a registered nurse with a master's degree in psychiatric nursing, licensed by the State Board of Nursing; **a marital and family therapist licensed by the Board of Marital and Family Therapy; a professional counselor licensed by the Board of Professional Counselors;** a clinical social worker licensed by the Board of Social Work Examiners; and a person who
>
> (A) has a master's degree in the field of mental health;
>
> (B) has at least 12 months of post-masters working experience in the field of mental illness; and
>
> (C) is working under the supervision of a type of licensee listed in this paragraph;

(emphasis added).

History

AS 47.24 was amended in 1994, by ch. 103, SLA 1994. Prior to the 1994 amendment, AS 47.24.010 required mental health professionals[2] and marital and family therapists to report harm to elderly persons. "Elderly person" was defined as "a resident of Alaska who is 65 years of age or older." Former AS 47.24.100(6). A separate statute, former AS 47.24.110, required mental health professionals and marital and family therapists to report when they had reasonable cause to believe a disabled adult had been a victim of assault or sexual assault. The term "disabled adult" was defined for purposes of this section as "a person 18 years of age or older who has a physical or mental disability, or physical or mental impairment, as defined in AS 18.80.300."

AS 18.80.300 defines "physical or mental disability" as:

> (14) "physical or mental disability" means
> (A) a physical or mental impairment that substantially limits one or more major life activities;
> (B) a history of, or a misclassification as having, a mental or physical impairment that substantially limits one or more major life activities;
> (C) having
> (i) a physical or mental impairment that does not substantially limit a person's major life activities but that is treated by the person as constituting such a limitation;
> (ii) a physical or mental impairment that substantially limits a person's major life activities only as a result of the attitudes of others toward the impairment; or
> (iii) none of the impairments defined in this paragraph but being treated by others as having such an impairment; or
> (D) a condition that may require the use of a prosthesis, special equipment for mobility, or service animal;

AS 18.80.300 defines "physical or mental impairment" as:

> (15) "physical or mental impairment" means
> (A) physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including

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[2] In 2002, marital and family therapists and licensed professional counselors were added to the definition of "mental health professional" in AS 47.30.915(11), which is incorporated into AS 47.24.010(a)(2), establishing the duty to report harm to vulnerable adults. Sec. 1, ch. 73, SLA 2002. Marital and family therapists have been expressly included in AS 47.24.010(a)(2) since 1992. Sec. 10, ch. 129, SLA 1992.

> speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine;
>
> (B) mental or psychological disorder, including mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

The term "vulnerable adult," which replaced "elderly person" and "disabled adult" in AS 47.24 is defined in AS 47.24.900(16) as:

> (16) "vulnerable adult" means a person 18 years of age or older who, because of physical or mental impairment, is unable to meet the person's own needs or to seek help without assistance.

This definition is similar to the definition of "disabled adult" but substantially narrower than the definition of "elderly person" previously used in AS 47.24.

Legal Analysis

AS 08.63.200(b)(2), enacted in 1992, which cites AS 47.24, was not changed in 1994 to reflect the shift in terminology from "elderly persons and disabled adults" to "vulnerable adults" made in AS 47.24 by ch. 129, SLA 1994. It appears that the failure to include a conforming amendment to AS 08.63.200(b)(2) in the 1994 Act was an oversight.

This apparent oversight was carried over into AS 08.29.200(b)(2). That paragraph was enacted in sec. 1, ch. 75, SLA 1998 (HCS CSSB 331(FIN)), an act regulating licensed professional counselors. Committee proceedings relating to SB 331 indicate that those statutes were specifically modeled on the statutes regulating marital and family therapists. This explains why AS 08.29.200(b)(2) does not match what was in AS 47.24 in 1998, when AS 08.29.200(b) was enacted: it was modeled on AS 08.63.200(b)(2), which contained an oversight.

I have spoken with the attorney who was drafting in this area at the time these statutes were enacted, and she believes that this explanation reflects what occurred.

The meaning of the existing AS 08.29.200(b)(2) and AS 08.63.200(b)(2) is not clear; because the terminology ("elderly persons and disabled adults") does not match that used in the statutes cited (AS 47.24, which refers to "vulnerable adults"), it is not clear whether the duty to report imposed in AS 08.63.200(b)(2) and AS 08.29.200(b)(2) is the same as that imposed in AS 47.24.010 or a broader duty (particularly as it relates to elderly persons).

However, both sections refer to AS 47.24, so the plain language suggests that the duty is the same as that imposed in AS 47.24. This interpretation would be consistent with

treatment of the issue in the statutes regulating psychologists in AS 08.86.200(b)[3] and licensed social workers in AS 08.95.900(b)[4].

Conclusion

The current statutes are not clear. If it is the legislature's intent that the reporting requirements imposed on licensed professional counselors under AS 08.29.200(b)(2) and marital and family therapists under AS 08.63.200(b)(2) line up with the reporting requirements imposed on those professionals under AS 47.24, then the terminology should be made consistent with that in AS 47.24 by replacing "elderly person or disabled adult" with "vulnerable adult." As an added refinement, the reference to AS 47.24 might be changed to AS 47.24.010, which is the section that actually establishes the reporting requirement in AS 47.24. These are the changes included in the enclosed amendment. If the reporting requirements are meant to be different, then the meaning of "elderly person or disabled adult" should be clarified and the reference to AS 47.24 deleted.

If I can be of any further assistance, please let me know.

KLK:plm
11-123.plm

Enclosures

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[3] This statute was amended in sec. 1, ch. 129, SLA 1994 to refer to "abuse of a vulnerable adult" rather than "elder abuse." This was the only conforming amendment to AS 08 made in that chapter.

[4] This duty to report was added to AS 08.95.900 in sec. 16, ch. 118, SLA 1998.

AMENDMENT

OFFERED IN THE SENATE

TO: SB 86

Page 1, following line 9:

Insert new bill sections to read:

"* **Section 1.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by **AS 47.24.010** [AS 47.24].

* **Sec. 2.** AS 08.63.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by **AS 47.24.010** [AS 47.24]."

Page 1, line 10:

Delete "**Section 1**"

Insert "**Sec. 3**"

Renumber the following bill sections accordingly.

Page 20, line 13:

Delete "sec. 7"

Insert "sec. 9"

Page 20, line 17:
Delete "sec. 7"
Insert "sec. 9"

Page 20, line 19:
Delete "sec. 7"
Insert "sec. 9"

Page 20, line 20:
Delete "sec. 25"
Insert "sec. 27"

Page 20, line 26:
Delete "Sections 1, 2, 3, and 42"
Insert "Sections 3 - 5 and 44"

Page 20, line 30:
Delete "sec. 7"
Insert "sec. 9"

Page 20, line 31:
Delete "sec. 43(a)"
Insert "sec. 45(a)"

Page 21, line 2:
Delete "sec. 7"
Insert "sec. 9"
Delete "sec. 43(b)"
Insert "sec. 45(b)"

Page 21, line 5:

Delete "sec. 25"

Insert "sec. 27"

Delete "sec. 43(c)"

Insert "sec. 45(c)"

Effect of amendments. — The 2009 amendment, effective June 21, 2009, in (a)(1), added "acid" following "deoxyribonucleic", and made a stylistic change.

Effective dates. — Section 16, ch. 88, SLA 2003 makes this section effective July 1, 2003.

Sec. 11.56.765. Failure to report a violent crime committed against a child. (a) A person, other than the victim, commits the crime of failure to report a violent crime committed against a child if the person

(1) witnesses what the person knows or reasonably should know is

(A) the murder or attempted murder of a child by another;

(B) the kidnapping or attempted kidnapping of a child by another;

(C) the sexual penetration or attempted sexual penetration by another

(i) of a child without consent of the child;

(ii) of a child that is mentally incapable;

(iii) of a child that is incapacitated; or

(iv) of a child that is unaware that a sexual act is being committed; or

(D) the assault of a child by another causing serious physical injury to the child;

(2) knows or reasonably should know that the child is under 16 years of age; and

(3) does not in a timely manner report that crime to a peace officer or law enforcement agency.

(b) In a prosecution under this section, it is an affirmative defense that the defendant

(1) did not report in a timely manner because the defendant reasonably believed that doing so would have exposed the defendant or others to a substantial risk of physical injury; or

(2) acted to stop the commission of the crime and stopped

(A) the commission of the crime; or

(B) the completion of the crime being attempted.

(c) In this section,

(1) "incapacitated" has the meaning given in AS 11.41.470;

(2) "mentally incapable" has the meaning given in AS 11.41.470;

(3) "sexual act" has the meaning given in AS 11.41.470;

(4) "without consent" has the meaning given in AS 11.41.470.

(d) Failure to report a violent crime committed against a child is a class A misdemeanor. (§ 1 ch 62 SLA 1999)

Sec. 11.56.767. Failure to report a violent crime committed against an adult. (a) A person, other than the victim, commits the offense of failure to report a violent crime committed against an adult if the person, under circumstances not requiring the person to report as required by AS 11.56.765,

(1) witnesses what the person knows or reasonably should know is

(A) the murder or attempted murder of a person by another;

(B) the kidnapping or attempted kidnapping of a person by another; or

(C) the sexual penetration or attempted sexual penetration by another

(i) of a person without consent of the person;

(ii) of a person who is mentally incapable;

(iii) of a person who is incapacitated; or

(iv) of a person who is unaware that a sexual act is being committed; and

(2) does not, as soon as reasonably practicable, report that crime to a peace officer or law enforcement agency.

(b) In a prosecution under this section, it is an affirmative defense that the defendant

(1) did not report as soon as reasonably practicable because the defendant reasonably believed that

(A) doing so would have exposed the defendant or others to a substantial risk of physical injury; or

(B) effective assistance was already being provided by another person; or

Cindy Smith

From: Levitt, Rachel E (DOA) [rachel.levitt@alaska.gov]
Sent: Tuesday, March 08, 2011 10:37 AM
To: Cindy Smith
Cc: Sterling, Scott A (DOA)
Subject: Meeting Today, SB 86

Cindy:

You will be able to reach me and Scott this afternoon at ~~2~~ 3 p.m. at 707-1749.

Talk to you then.

Thanks,

Rachel

Rachel Levitt
Acting Director
Office of Public Advocacy
900 W. Fifth Avenue, Suite 525
Anchorage, Alaska 99501
Tel: (907) 269-3500
Fax: (907) 269-3987

Cindy Smith

From: Levitt, Rachel E (DOA) [rachel.levitt@alaska.gov]
Sent: Tuesday, March 08, 2011 11:25 AM
To: Cindy Smith; Henriksen, Kelly E (LAW); Gibbens, Joanne C (HSS)
Cc: Sterling, Scott A (DOA)
Subject: RE: Meeting Today, SB 86

That's fine. Talk to you then.

Rachel Levitt
Acting Director
Office of Public Advocacy
900 W. Fifth Avenue, Suite 525
Anchorage, Alaska 99501
Tel: (907) 269-3500
Fax: (907) 269-3987

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Tuesday, March 08, 2011 11:07 AM
To: Levitt, Rachel E (DOA); Henriksen, Kelly E (LAW); Gibbens, Joanne C (HSS)
Cc: Sterling, Scott A (DOA)
Subject: RE: Meeting Today, SB 86

Actually, this is scheduled for 3 p.m. and I will call you then – it may be a few minutes later because we will be moving over to a conference room so that we can talk more comfortably than we can in my office.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Levitt, Rachel E (DOA) [mailto:rachel.levitt@alaska.gov]
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Rachel

Rachel Levitt

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March 16, 2011

Senator Hollis French
Chair, Senate Judiciary Committee
Capitol 120
Juneau, Alaska 99811

Re: SB 86

Dear Senator French and Members of the Senate Judiciary Committee:

The Disability Law Center is the state-designated Protection and Advocacy organization for Alaska. Thank you very much for the opportunity to comment on SB 86, a bill which would make it possible for more people to be subject to conservatorships and which would create a system for ex parte restraining orders, brought by a person or by someone interested in the person's welfare, against people who might have defrauded the person needing assistance.

This is to endorse the general principles behind SB 86, but to encourage you to do more to protect the rights of those persons who would be newly subject to conservatorships and who would be newly protected by protective orders. The system envisioned by SB 86 would place some significant additional restrictions on these people's liberty interests and, in the case of ex parte protective orders, would give people needing protection only a delayed opportunity to be heard. It would also make it possible for a person to have a conservatorship imposed on him or her, and to have a protective order put in place restricting other people from contacting him or her, simply because that person had been a victim of fraud – regardless of whether the person was generally competent to handle business matters. We'd suggest adding to proposed AS 13.26.209 an opportunity for the person to be protected to seek modification or termination of any ex parte protective order on three days' notice, as is now possible with ex parte domestic violence restraining orders; and to add a provision ensuring that counsel for the person to be protected is appointed immediately in cases involving either temporary conservatorships or ex parte protective orders. Language amending proposed AS 13.26.207 and proposed AS 13.26.209 is attached.

Thank you very much, again, for the opportunity to comment.

Sincerely,

Mark Regan
Legal Director

Enclosure

MEMBER OF THE NATIONAL DISABILITY RIGHTS NETWORK

2.02.37

Cindy Smith

From: Lila Hobbs
Sent: Wednesday, March 16, 2011 12:53 PM
To: Cindy Smith
Subject: FW: Testimony on SB 86
Attachments: sb 86 testimony.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

FYI

From: Mark Regan [mailto:mregan@dlcak.org]
Sent: Wednesday, March 16, 2011 12:44 PM
To: Sen. Hollis French
Subject: Testimony on SB 86

Attached please find the Disability Law Center's testimony on Senate Bill 86.

Mark Regan
Legal Director
Disability Law Center of Alaska
3330 Arctic Blvd., Suite 103
Anchorage, Alaska 99503
(907) 565-1002, 565-1000 (fax)

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Chair, Senate Judiciary Committee
Capitol 120
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Thank you very much, again, for the opportunity to comment.

Sincerely,

Mark Regan
Legal Director

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*** Sec. 7.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.207. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or ersons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request shall state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney. The court shall conduct a hearing within 72 hours after the filing. <u>If an attorney has not already been appointed for the respondent, the court shall appoint a lawyer to represent the person at or before the hearing.</u>

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a full or partial conservator or upon the dismissal of the petition for conservatorship.

Sec. 13.26.209. Ex parte protective orders; forms for petitions and orders; fees. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against another person. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition, and that because of the fraud there has been, or is an immediate threat of, a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent. The

court shall cause a copy of the protective order to be served on the respondent.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, at the end of a six-month extension if granted by the court under (d) of this section, or upon the appointment of a temporary or permanent conservator or dismissal of the petition for the ex parte order. If the petitioner is someone other than the person for whose benefit the petition was filed, the court shall appoint a lawyer to represent the person for whose benefit the petition was filed. If the petitioner is someone other than the person for whose benefit the petition was filed, the person for whose benefit the petition was filed may request modification of the ex parte protective order; the court shall schedule a hearing on three days' notice or such shorter notice as the court may prescribe, and shall hear and rule on the request in an expeditious manner.

(d) Upon application filed with the court before the expiration of the 20-day ex parte protective order, the court shall schedule a hearing on whether to extend the protective order for up to six months. The court shall provide at least 10 days' notice to the respondent of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may extend the ex parte protective order for up to six months.

(e) A protective order issued under this section is in addition to any other civil or criminal remedy.

(f) A third party shall comply with a protective order issued under this section. A third party who does not comply with a protective order granted under this section may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees

associated with the failure to comply with the protective order. A third person who does not comply with a protective order granted under this section may also be criminally liable under AS 11.56.740 for violating a protective order.

(g) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long-term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions, protective orders, and instructions for their use by a person seeking a protective order under this section. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order under this section may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(h) Filing fees may not be charged for a petition under this section.

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March 16, 2011

Senator Hollis French
Chair, Senate Judiciary Committee
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Re: SB 86

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This is to endorse the general principles behind SB 86, but to encourage you to do more to protect the rights of those persons who would be newly subject to conservatorships and who would be newly protected by protective orders. The system envisioned by SB 86 would place some significant additional restrictions on these people's liberty interests and, in the case of ex parte protective orders, would give people needing protection only a delayed opportunity to be heard. It would also make it possible for a person to have a conservatorship imposed on him or her, and to have a protective order put in place restricting other people from contacting him or her, simply because that person had been a victim of fraud – regardless of whether the person was generally competent to handle business matters. We'd suggest adding to proposed AS 13.26.209 an opportunity for the person to be protected to seek modification or termination of any ex parte protective order on three days' notice, as is now possible with ex parte domestic violence restraining orders; and to add a provision ensuring that counsel for the person to be protected is appointed immediately in cases involving either temporary conservatorships or ex parte protective orders. Language amending proposed AS 13.26.207 and proposed AS 13.26.209 is attached.

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(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, at the end of a six-month extension if granted by the court under (d) of this section, or upon the appointment of a temporary or permanent conservator or dismissal of the petition for the ex parte order. If the petitioner is someone other than the person for whose benefit the petition was filed, the court shall appoint a lawyer to represent the person for whose benefit the petition was filed. If the petitioner is someone other than the person for whose benefit the petition was filed, the person for whose benefit the petition was filed may request modification of the ex parte protective order; the court shall schedule a hearing on three days' notice or such shorter notice as the court may prescribe, and shall hear and rule on the request in an expeditious manner.

(d) Upon application filed with the court before the expiration of the 20-day ex parte protective order, the court shall schedule a hearing on whether to extend the protective order for up to six months. The court shall provide at least 10 days' notice to the respondent of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may extend the ex parte protective order for up to six months.

(e) A protective order issued under this section is in addition to any other civil or criminal remedy.

(f) A third party shall comply with a protective order issued under this section. A third party who does not comply with a protective order granted under this section may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees

associated with the failure to comply with the protective order. A third person who does not comply with a protective order granted under this section may also be criminally liable under AS 11.56.740 for violating a protective order.

(g) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long-term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions, protective orders, and instructions for their use by a person seeking a protective order under this section. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order under this section may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(h) Filing fees may not be charged for a petition under this section.

STATE OF ALASKA

DEPARTMENT OF REVENUE
Alaska Mental Health
Trust Authority

SEAN PARNELL, GOVERNOR

Office of the Long Term Care Ombudsman

3745 Community Park Loop. Suite 200
Anchorage AK 99508
Phone (907) 334-4480
Fax (907) 334-4486

February 18, 2011

Senators French, Wielechowski, Paskvan, McGuire, and Coghill
Alaska State 27th Legislature
State Capitol
Juneau, AK

Re: SB 86 "Protection of vulnerable adults"

Dear Senators:

The Office of the Long Term Care Ombudsman investigates and resolves complaints made by, or on behalf of, older Alaskans in long term care facilities. In the first seven months of FY 2011, our office received 13 complaints alleging financial exploitation of seniors in assisted living or nursing homes. These cases can involve a family member or caregiver

- exerting undue influence over a senior's decision-making to access bank accounts.
- charging the senior for services and goods he or she did not receive.
- failing to provide a senior with needed care, so as to save the "family" inheritance, or
- forcing a senior to sign over deeds on houses or land.

While 13 cases may not seem significant, even a few instances of exploitation of seniors can lead to hundreds of thousands of dollars in lost assets.

The frustrating thing about these cases is that the exploitation happens so quickly that the State cannot step in fast enough to preserve the seniors' assets. Not only is it wrong for seniors to be taken advantage of in this way, but once the seniors' assets are gone, Medicaid or General Relief pick up the cost of the care. The State is essentially footing the bill for these losses.

I support SB 86, especially the provisions for financial protective orders, emergency conservatorships, and the addition of "undue influence" as a reportable harm. I hope you will give your support to this bill and protect our older Alaskans from financial predators.

Sincerely,

Diana Weber

Diana Weber, MS
State of Alaska Long Term Care Ombudsman
3745 Community Park Loop, Suite 200
Anchorage, AK 99508

Cindy Smith

From: Laughlin, Wilda J (HSS) [wilda.laughlin@alaska.gov]
Sent: Friday, February 18, 2011 1:16 PM
To: Cindy Smith; Sarah Munson
Cc: Brakes, Heather K (GOV); Mayes, Duane G (HSS); Henriksen, Kelly E (LAW); Levitt, Rachel E (DOA); Sterling, Scott A (DOA); Russo, Elizabeth M H (DOA); Gibbens, Joanne C (HSS); Mahlatini, Brenda M (HSS)
Subject: FW: plan for HB 150/SB 86

Cindy/Sarah—

Below is the Administration's plan for presenting SB 86 / HB 150 to the Judiciary committees:

Bill introduction, Duane Mayes, Director of the DHSS Division of Senior & Disabilities Services, in Juneau
Review of Sectional Analysis, Kelly Henriksen, Dept. of Law, in Juneau

Available for questions:
Rachel Levitt (DOA), Director of the Office of Public Advocacy, location TBA (bill sections 1 through 11),
Scott Sterling (DOA), supervising attorney for the Office of Elder Fraud and Assistance, in Juneau (bill sections 1 through 11)
Elizabeth Russo, supervising attorney for the public guardian section, calling in from 227-2343 (bill sections 1 through 11)
Joanne Gibbens, Deputy Director of the Division of Senior & Disabilities Services, in Juneau (bill sections 12 through 41)
Brenda Mahlatini, social services program officer for Adult Protective Services, calling in from Anchorage (bill sections 1 through 11)

Brenda, if possible, please send the number you will be calling from to committee aides Cindy Smith and Sarah Munson.
w.

Wilda J. Laughlin
Legislative Liaison, Dept. of Health and Social Services
Phone (907) 465-1613
Fax (907) 465-3068
Cell (907) 723-3802

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Cindy Smith

From: Sterling, Scott A (DOA) [scott.sterling@alaska.gov]
Sent: Wednesday, March 09, 2011 4:56 PM
To: Cindy Smith
Subject: SB 86 Questions re Ex Parte Laws in sister States
Attachments: FINAL MEMORANDUM OF MARCH 9 2011 RE HB 150 SB 86 EX PARTE LAWS IN SISTER STATES.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Cindy. Here you go.....we have all of the statutes and court rules copied etc. I spared you all that. But it's available if you should need it. Let me know if you need anything else, thanks. Scott.

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION
OFFICE OF PUBLIC ADVOCACY

OFFICE OF ELDER FRAUD AND ASSISTANCE

Sean Parnell, Governor

Rachel Levitt, Director

900 W. 5th Ave., Suite 525
Anchorage, Alaska
99501
(907) 334-5989
Telephone
(907) 375-7788
Facsimile

March 9, 2011

MEMORANDUM

FROM: Scott A. Sterling, Supervising Attorney
Office of Elder Fraud & Assistance
Anchorage, Alaska

TO: Rachel Levitt, Acting Director, OPA

AND TO: HB 150/SB 86 Working Group & Legislative Staff

RE: **HB 150/SB 86– Sister States' Laws**
On Ex Parte Protective Orders

Three sister states—California, Oregon and Washington State—permit ex parte relief from financial exploitation. Following is a brief summary of each state's applicable statutes and court procedures.

A. California

Question 1: Does California law permit ex parte filings for financial protective orders for elders/vulnerable adults?

Answer 1: Yes.

Discussion: California authorizes ex parte protective orders pursuant to California Welfare and Institutions Code, §15657.03. Protective orders are permitted for any "elder or dependent adult who has suffered abuse, including financial abuse. The statute treats financial abuse as a form of domestic violence.

The key legal requirements or restrictions are:

- At the "ex parte" hearing temporary orders may be issued by the Court which last until the next "Order to Show Cause" hearing which must be held no more than 21 days from the date the order is issued.
- No order may be granted on an ex parte basis unless it appears from facts shown in the application for the order (or by attached affidavit) that "great or irreparable injury would result to the applicant before the matter can be heard on notice.
- Absent a showing of exceptional circumstances, the applicant must notify all parties no later than 10:00 a.m. of the court day before the ex parte appearance.
- The court must act on the ex parte application--either issuing or denying the requested order--on the same day the application is submitted.
- An appearance by the responding party as a prerequisite to granting the requested order. If the responding party (personally or through counsel) fails to appear at the hearing (or to file an answer/responsive declaration), the requested relief may be entered by default. The ex parte order may issue only if the court finds that:
  - Reasonable grounds have been asserted to believe there is an immediate and present danger of domestic violence (which includes financial abuse); and
  - An emergency protective order is necessary to prevent the occurrence or reoccurrence of domestic violence (which includes financial abuse).

Question 2: Does California law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: incapacitated/disabled adults may petition through third-party representative

Discussion: Petitioners unable to petition in person for ex parte relief due to incapacity or disability may, through an attorney or third-party representative, move the court to have a guardian ad litem appointed to represent the incapacitated/disabled adult for purposes of the ex parte relief petition. If a guardian or conservator is already in place for the adult then that person may also apply in that capacity.

B. Oregon

Question 1: Does Oregon law permit ex parte filings for financial protective orders for elders/vulnerable adults?

Answer 1: Yes.

Discussion: Oregon law allows ex parte protection orders for financial abuse or threats of financial abuse of elders and vulnerable adults occurring not more than

180 days prior to the date the petition is filed. Abuse is defined as wrongful taking or appropriating money or property of an elder or subjecting the victim to threats of such abuse. Third-parties, such as social workers, elder fraud investigators, peace officers and direct witnesses may testify in addition to the petitioner him or herself.

An ex parte order must be limited to the relief court considers necessary to prevent or remedy the wrongful taking or appropriation of the money or property of the person. Relief can include: directing the respondent to refrain from exercising control over the money or property of the person; requiring the respondent to return custody or control of the money or property of the person to the person; requiring the respondent to follow the instructions of the guardian or conservator of the person; or prohibiting the respondent from transferring the money or property of the elderly person or person with a disability to any person other than the elderly person or person with a disability.

The ex parte relief is limited to preventing or staying an immediate or urgent exploitation or threatened exploitation. If the victim wishes to have a third-party gain control and management of the victim's financial accounts or property then the victim may petition for a formal, noticed protective proceeding to address the need for expanded or long-term relief.

Question 2: Does Oregon law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: Limited.

Discussion: Oregon law allows the elderly or disabled petitioner to apply for relief through a third-party representative including guardian ad litem, guardian or conservator. It appears that the victim may not use the ex parte procedure to seek relief against the victim's guardian or conservator—to obtain that kind of relief the formal, noticed protective proceeding and/or petition to review guardianship/conservatorship is available.

Oregon does address the possibility of a third-party representative filing an ex parte petition ("restraining order") on behalf of a victim where the victim may not agree that he or she actually needs relief. Thus, if a guardian or guardian ad litem files a petition on behalf of an elderly person or a person with a disability, the elderly person or person with a disability retains the right to be represented by independent counsel; have access to personal records; file objections to the restraining order; request a hearing; and present evidence and cross-examine witnesses at any hearing. Notice must be personally served on the elderly person or person with a disability. Personal service must be made not later than 72 hours after the court issues a restraining order.

C. Washington State

Question 1: Does Washington State law permit ex parte filings for financial protective orders for elders/vulnerable adults?

Answer 1: Yes.

Discussion: The court may order relief as it deems necessary for the protection of the vulnerable adult, including, but not limited to restraining the respondent from committing acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult and requiring an accounting by respondent of the disposition of the vulnerable adult's income or other resources.

A petition must be supported by an affidavit made under oath, or a declaration signed under penalty of perjury, stating the specific facts and circumstances which demonstrate the need for the relief sought.

Washington State law allows the court to issue a "temporary protection order" without written notice to either or both the respondent and vulnerable adult if it clearly appears from specific facts shown by affidavit or declaration that immediate and irreparable injury, loss, or damage would result to the vulnerable adult before the respondent and vulnerable adult can be served and heard.

A temporary protection order can also be granted upon satisfactory showing to the court that the respondent and vulnerable adult cannot be served with notice, what efforts were made to serve them, and the reasons why prior notice should not be required.

Question 2: Does Washington State law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: Yes.

Discussion: Washington State law specifically provides that a vulnerable adult, or an interested person on behalf of the vulnerable adult, may seek relief from financial exploitation, by filing a petition for an order for protection in superior court. A petition can be filed by the victim, a legal guardian, a legal fiduciary, the Department of Social and Health Services, or, as stated, an "interested person" on behalf of a vulnerable adult. The petition must explain why the petitioner qualifies as an interested person.

Where the elder/vulnerable adult is not him or herself the petitioner then the elder/vulnerable adult must be provided with notice of the petition. The notice form must include language explaining to the vulnerable adult the purpose and nature of the petition and that the vulnerable adult has the right to participate in the hearing and to either support or object to the petition.

Washington State law also specifically permits the Department of Social and Health Services to seek protective relief from abuse, including financial abuse, for a vulnerable adult, who lacks capacity.

Washington State law includes safeguard provisions when the petitioner is not the vulnerable adult him or herself. When a petition is filed by a third-party notice of the petition and hearing must be personally served upon the vulnerable adult not later than six days before the hearing along with the standard notice form.

The vulnerable adult for whom protection is sought may advise the court at the hearing that he or she does not want all or part of the protection sought in the petition. The court may dismiss the petition or the provisions that the vulnerable adult objects to and any protection order issued or the court may take additional testimony or evidence, or order additional evidentiary hearings to determine whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order. If an additional evidentiary hearing is order the court may issue a temporary order for protection of the vulnerable adult pending a decision after the evidentiary hearing.

Please let me know if you have any questions.

Scott A. Sterling
Asst. Public Advocate

Cindy Smith

From: Sterling, Scott A (DOA) [scott.sterling@alaska.gov]
Sent: Wednesday, March 09, 2011 11:04 AM
To: Wooliver, Douglas A (ACS)
Cc: Cindy Smith; Gretchen Staft; Sarah Munson; Henriksen, Kelly E (LAW); Levitt, Rachel E (DOA)
Subject: SB 86/HB 150 - Sample Of Court Forms For Obtaining Ex Parte Financial Protective Order
Attachments: DOC001.PDF

Good morning all. Attached is a set of forms as used by the California Superior Court (in this case, for Santa Clara County) for petitioning for relief under that state's ex parte financial protective order laws.
This is informational at this point but I thought it might be helpful to Doug and the court system folks, particularly, to see how that process is formatted by a sister state. Please let me know if you have any questions. Scott Sterling, OPA, Office of Elder Fraud and Assistance.

-----Original Message-----
From: opa.civil.section@alaska.gov [mailto:opa.civil.section@alaska.gov]

Sent: Wednesday, March 09, 2011 11:00 AM
To: Meade, Jeremy B (DOA); Sterling, Scott A (DOA)
Subject: EA-100

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Cindy Smith

From: Henriksen, Kelly E (LAW) [kelly.henriksen@alaska.gov]
Sent: Monday, March 21, 2011 3:35 PM
To: Sterling, Scott A (DOA); Cindy Smith
Cc: Gibbens, Joanne C (HSS); Laughlin, Wilda J (HSS); Levitt, Rachel E (DOA)
Subject: RE: SB 86

Cindy, I agree with Scott about the CS from HJUD including provisions that will address questions raised by you and at the SJUD work session. There is one legal question you had that may not be addressed in the HJUD CS, and that is whether, in sec. 18(j), "actual damages" includes reputational damages – it does. "Actual damages" is commonly understood to mean all compensatory damages.

Kelly

From: Sterling, Scott A (DOA)
Sent: Monday, March 21, 2011 2:22 PM
To: Smith, Cindy (LAA)
Cc: Henriksen, Kelly E (LAW); Gibbens, Joanne C (HSS); Laughlin, Wilda J (HSS); Levitt, Rachel E (DOA)
Subject: SB 86

Cindy please just let myself or Kelly know of any information or other input that may be needed as the SJUD CS for SB 86 is worked up. The HJUD CS includes some provisions and language that I think will address some of the questions or problems raised at the SB 86 work session. Thanks. Scott.

Scott A. Sterling

Assistant Public Advocate
State of Alaska
Office of Elder Fraud and Assistance
900 West 5th Avenue, Suite 525
Anchorage, Alaska 99501
Telephone: (907) 334-5932

Cindy Smith

From: Henriksen, Kelly E (LAW) [kelly.henriksen@alaska.gov]
Sent: Wednesday, April 06, 2011 3:52 PM
To: Cindy Smith
Cc: Gibbens, Joanne C (HSS)
Subject: CSSB 86

Cindy, as re changing sec. 52 in the CS, it should read "Sections 16 and 20 of this Act...." Those are the two sections that address mandatory reporters and the obligation of peace officers to report to the dept. within 24 hours. (AS 47.24.010(a) and (e)).

Kelly E. Henriksen
Assistant Attorney General
Human Services Section

State of Alaska Department of Law
P.O. Box 110300
Juneau, AK 99811-0300

(907) 465-6726 (direct)
(907) 465-2539 (fax)

kelly.henriksen@alaska.gov

+ kelly's amendment (from

+ deletion of

Cindy Smith

From: Henriksen, Kelly E (LAW) [kelly.henriksen@alaska.gov]
Sent: Monday, April 11, 2011 3:17 PM
To: Cindy Smith; Laughlin, Wilda J (HSS); Sterling, Scott A (DOA); Gibbens, Joanne C (HSS)
Subject: RE: SB 86 - Work Order - 27-GS1722\X

Follow Up Flag: Follow up
Flag Status: Flagged

Cindy, below are the exact places I think amendments that change the span cite from AS 13.26.165 – 13.26.209 to AS 13.26.207 – 13.26.209 are necessary, following our discussion in SJUD today.

1) p. 2, lines 18 and 23.
2) p. 6, lines 11, 31
3) p. 7, lines 3, 4, 8, 16
4) p. 8, lines 16, 23

A committee member asked about the reference to AS 13.26.185 on p. 6, line 16, to which I replied that that reference was appropriate. I was incorrect. The beginning of that paragraph (2) should be deleted, as follow: (2) [a protective order, after notice and a hearing under AS 13.26.185, or]. It should begin with the sentence on line 17, as follows: "(2) a temporary protective order, after notice and a hearing under AS 13.26.208, the court...." The reference to .185 is no longer needed since we are amending out the references to AS 13.26.165, because .185 only applies to .165 protective orders. We make that part clear in sec. 9 of the bill.

That's it. Please let me know what else I can do to move this forward.

Kelly

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Monday, April 11, 2011 8:59 AM
To: Laughlin, Wilda J (HSS); Sterling, Scott A (DOA); Henriksen, Kelly E (LAW); Gibbens, Joanne C (HSS)
Subject: FW: SB 86 - Work Order - 27-GS1722\X
Importance: High

Here is the CS with the changes we've all been talking about, and a memo that identifies where to find them. Please note that we have a couple of new provisions in modifications but that they just follow existing language on modifications in domestic violence protective orders.

As this is the last week of the session, it is possible that the meeting may be delayed or rescheduled. I will keep you all posted!

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

Cindy Smith

From: Sterling, Scott A (DOA) [scott.sterling@alaska.gov]
Sent: Wednesday, April 13, 2011 8:12 AM
To: Laughlin, Wilda J (HSS); Cindy Smith; Henriksen, Kelly E (LAW); Gibbens, Joanne C (HSS); Trimmer, Beth G (DOA); Russo, Elizabeth M H (DOA)
Subject: RE: SB 86 - Work Order - 27-GS1722\X

CSSB86 version "T" looks fine. Sorry I was out of pocket there for a bit my wireless connection didn't work at the Fairbanks airport but my cell, so far as I can tell, hasn't been disconnected for non-payment as yet. That number is 232-3687.

From: Laughlin, Wilda J (HSS)
Sent: Tuesday, April 12, 2011 2:46 PM
To: Laughlin, Wilda J (HSS); Sterling, Scott A (DOA)
Cc: Trimmer, Beth G (DOA); Henriksen, Kelly E (LAW)
Subject: RE: SB 86 - Work Order - 27-GS1722\X

We can't raise Scott. I am going to give Cindy the OK.

Wilda J. Laughlin
Legislative Liaison, Dept. of Health and Social Services
Phone (907) 465-1613
Fax (907) 465-3068
Cell (907) 723-3802

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From: Laughlin, Wilda J (HSS)
Sent: Tuesday, April 12, 2011 2:15 PM
To: Sterling, Scott A (DOA)
Cc: Trimmer, Beth G (DOA); Henriksen, Kelly E (LAW)
Subject: RE: SB 86 - Work Order - 27-GS1722\X

Hi Scott. We are trying to track you down for your OK of the new CS. The number below is out of order. Do you have a cell?

Beth, can you shed any light on Scott's whereabouts?
w.

Wilda J. Laughlin
Legislative Liaison, Dept. of Health and Social Services
Phone (907) 465-1613
Fax (907) 465-3068
Cell (907) 723-3802

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this e-mail is prohibited. If you think you have received this e-mail in error, please advise the sender by reply e-mail and delete this e-mail immediately.

From: Sterling, Scott A (DOA)
Sent: Monday, April 11, 2011 12:28 PM
To: Laughlin, Wilda J (HSS)
Cc: Trimmer, Beth G (DOA)
Subject: RE: SB 86 - Work Order - 27-GS1722\X

I will call in from 907-451-4552 extension 222. That's the phone number for my hotel room here in Fairbanks.

From: Laughlin, Wilda J (HSS)
Sent: Mon 4/11/2011 10:26 AM
To: Gibbens, Joanne C (HSS); Henriksen, Kelly E (LAW); Mahlatini, Brenda M (HSS); Mayes, Duane G (HSS); Russo, Elizabeth M H (DOA); Sterling, Scott A (DOA); Trimmer, Beth G (DOA)
Subject: FW: SB 86 - Work Order - 27-GS1722\X

Just to be clear—unless you hear otherwise, SB 86 is on the Senate Judiciary schedule today at 1:30. Hopefully it will move out without many questions, but I would like to ask at least Joanne, Kelly, Scott and Brenda to be available. Elizabeth Russo, I will leave it up to you whether to be on line.

Scott/Brenda, can you send me the number you will be calling from?

Brenda—in case you don't have it, the call in number is 855-463-5009.
w.

Wilda J. Laughlin
Legislative Liaison, Dept. of Health and Social Services
Phone (907) 465-1613
Fax (907) 465-3068
Cell (907) 723-3802

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From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Monday, April 11, 2011 8:59 AM
To: Laughlin, Wilda J (HSS); Sterling, Scott A (DOA); Henriksen, Kelly E (LAW); Gibbens, Joanne C (HSS)
Subject: FW: SB 86 - Work Order - 27-GS1722\X
Importance: High

Here is the CS with the changes we've all been talking about, and a memo that identifies where to find them. Please note that we have a couple of new provisions in modifications but that they just follow existing language on modifications in domestic violence protective orders.

As this is the last week of the session, it is possible that the meeting may be delayed or rescheduled. I will keep you all posted!

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

Cindy Smith

From: Gibbens, Joanne C (HSS) [jacoba.gibbens@alaska.gov]
Sent: Tuesday, April 12, 2011 12:28 PM
To: Cindy Smith; Henriksen, Kelly E (LAW); Laughlin, Wilda J (HSS); Sterling, Scott A (DOA)
Subject: RE: CSSB86 version T
Attachments: image001.png

Nothing from me, thanks - Joanne

Joanne Gibbens, MSW
Deputy Director
Division of Senior & Disabilities Services
Phone: (907) 465-5481
Fax: (907) 465-1170

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Tuesday, April 12, 2011 12:27 PM
To: Henriksen, Kelly E (LAW); Laughlin, Wilda J (HSS); Sterling, Scott A (DOA); Gibbens, Joanne C (HSS)
Subject: RE: CSSB86 version T

OK. Anything else? This is last call...

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Henriksen, Kelly E (LAW) [mailto:kelly.henriksen@alaska.gov]
Sent: Tuesday, April 12, 2011 12:24 PM
To: Cindy Smith; Laughlin, Wilda J (HSS); Sterling, Scott A (DOA); Gibbens, Joanne C (HSS)
Subject: RE: CSSB86 version T

I do not see any problems that require an amendment. However, I do see a typo, and include it here just in case it matters at this point: p. 22, line 20, following AS 13.26.207, insert a comma.

Kelly

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Tuesday, April 12, 2011 11:14 AM
To: Laughlin, Wilda J (HSS); Henriksen, Kelly E (LAW); Sterling, Scott A (DOA); Gibbens, Joanne C (HSS)
Subject: CSSB86 version T
Importance: High

Attached is the latest draft of SB86. It contains the changes Kelly asked for in her email yesterday.

Please let me know by 1 p.m. today if this draft requires any further amendments.

Thanks,

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

Cindy Smith

From: Henriksen, Kelly E (LAW) [kelly.henriksen@alaska.gov]
Sent: Tuesday, April 12, 2011 12:24 PM
To: Cindy Smith; Laughlin, Wilda J (HSS); Sterling, Scott A (DOA); Gibbens, Joanne C (HSS)
Subject: RE: CSSB86 version T

I do not see any problems that require an amendment. However, I do see a typo, and include it here just in case it matters at this point: p. 22, line 20, following AS 13.26.207, insert a comma.

Kelly

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Tuesday, April 12, 2011 11:14 AM
To: Laughlin, Wilda J (HSS); Henriksen, Kelly E (LAW); Sterling, Scott A (DOA); Gibbens, Joanne C (HSS)
Subject: CSSB86 version T
Importance: High

Attached is the latest draft of SB86. It contains the changes Kelly asked for in her email yesterday.

Please let me know by 1 p.m. today if this draft requires any further amendments.

Thanks,

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION
OFFICE OF PUBLIC ADVOCACY

OFFICE OF ELDER FRAUD AND ASSISTANCE

Sean Parnell, Governor

Rachel Levitt, Director

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March 11, 2011

MEMORANDUM

FROM: Scott A. Sterling, Supervising Attorney
Office of Elder Fraud & Assistance
Anchorage, Alaska

TO: Cindy Smith, Office of Senator Hollis French

RE: **SB 86 – Changes For Consideration**

Sorry this is not in legislative drafting format but following are some proposed changes to certain sections of SB 86 concerning (1) how to ensure that the adult is always given notice of ex parte proceedings, (2) how to ensure that third-parties receive sufficient notice of ex parte orders and (3) a more legally sound definition of fiduciary duty. Please note that these and numerous other changes will likely be considered and incorporated into the final HJUD HB 150 CS. For SB 86 purposes these changes are referenced to the sections of that bill.

Please let me know if you have any questions.

1. At page 4, line 21, SB 86 after the sentence ending with the words "protective order" add "**A third-party filing for an ex parte order under this section on behalf of a proposed protected person shall certify to the court in writing that a copy of the petition has been actually served upon the proposed protected person or the proposed protected person's legal representative or certify the reasons why providing such service would cause immediate threat of harm to the best interests of the proposed protected person. The court shall cause a copy of any order, including any order setting a hearing on the application for ex parte relief, to be served upon the proposed**

protected person or legal representative. A proposed protected person filing for ex parte relief under this section either in person or through counsel of record is exempt from the requirements of this section.

2. At page 5, line 16, SB 86 replace current subsection (f) with the following: **"(f) A third party who has received actual or legal notice of a protective order issued under this section shall comply with that order. Actual and legal notice of a protective order issued under this section is effective upon the third-party receiving a copy of the order by means of delivery, mail or fax transmission at the nearest residence or place of business of the third-party.**

   Actual and legal notice of a protective order issued under this section is also effective upon all persons upon that order being recorded with the State Recorder.

3. At page 18, line 22, SB 86 replace the existing (18) with:

   (18) "fiduciary duty" means the duty of a third-party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interests of that person.

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March 9, 2011

MEMORANDUM

FROM: Scott A. Sterling, Supervising Attorney
Office of Elder Fraud & Assistance
Anchorage, Alaska

TO: Rachel Levitt, Acting Director, OPA

AND TO: HB 150/SB 86 Working Group & Legislative Staff

RE: **HB 150/SB 86– Sister States' Laws**
On Ex Parte Protective Orders

Three sister states—California, Oregon and Washington State—permit ex parte relief from financial exploitation. Following is a brief summary of each state's applicable statutes and court procedures.

A. California

Question 1: Does California law permit ex parte filings for financial protective orders for elders/vulnerable adults?

Answer 1: Yes.

Discussion: California authorizes ex parte protective orders pursuant to California Welfare and Institutions Code, §15657.03. Protective orders are permitted for any "elder or dependent adult who has suffered abuse, including financial abuse. The statute treats financial abuse as a form of domestic violence.

The key legal requirements or restrictions are:

- At the "ex parte" hearing temporary orders may be issued by the Court which last until the next "Order to Show Cause" hearing which must be held no more than 21 days from the date the order is issued.
- No order may be granted on an ex parte basis unless it appears from facts shown in the application for the order (or by attached affidavit) that "great or irreparable injury would result to the applicant before the matter can be heard on notice.
- Absent a showing of exceptional circumstances, the applicant must notify all parties no later than 10:00 a.m. of the court day before the ex parte appearance.
- The court must act on the ex parte application--either issuing or denying the requested order--on the same day the application is submitted.
- An appearance by the responding party as a prerequisite to granting the requested order. If the responding party (personally or through counsel) fails to appear at the hearing (or to file an answer/responsive declaration), the requested relief may be entered by default. The ex parte order may issue only if the court finds that:
  - Reasonable grounds have been asserted to believe there is an immediate and present danger of domestic violence (which includes financial abuse); and
  - An emergency protective order is necessary to prevent the occurrence or reoccurrence of domestic violence (which includes financial abuse).

Question 2: Does California law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: Incapacitated/disabled adults may petition through third-party representative

Discussion: Petitioners unable to petition in person for ex parte relief due to incapacity or disability may, through an attorney or third-party representative, move the court to have a guardian ad litem appointed to represent the incapacitated/disabled adult for purposes of the ex parte relief petition. If a guardian or conservator is already in place for the adult then that person may also apply in that capacity.

B. Oregon

Question 1: Does Oregon law permit ex parte filings for financial protective orders for elders/vulnerable adults?

Answer 1: Yes.

Discussion: Oregon law allows ex parte protection orders for financial abuse or threats of financial abuse of elders and vulnerable adults occurring not more than

180 days prior to the date the petition is filed. Abuse is defined as wrongful taking or appropriating money or property of an elder or subjecting the victim to threats of such abuse. Third-parties, such as social workers, elder fraud investigators, peace officers and direct witnesses may testify in addition to the petitioner him or herself.

An ex parte order must be limited to the relief court considers necessary to prevent or remedy the wrongful taking or appropriation of the money or property of the person. Relief can include: directing the respondent to refrain from exercising control over the money or property of the person; requiring the respondent to return custody or control of the money or property of the person to the person; requiring the respondent to follow the instructions of the guardian or conservator of the person; or prohibiting the respondent from transferring the money or property of the elderly person or person with a disability to any person other than the elderly person or person with a disability.

The ex parte relief is limited to preventing or staying an immediate or urgent exploitation or threatened exploitation. If the victim wishes to have a third-party gain control and management of the victim's financial accounts or property then the victim may petition for a formal, noticed protective proceeding to address the need for expanded or long-term relief.

Question 2: Does Oregon law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: Limited.

Discussion: Oregon law allows the elderly or disabled petitioner to apply for relief through a third-party representative including guardian ad litem, guardian or conservator. It appears that the victim may not use the ex parte procedure to seek relief against the victim's guardian or conservator—to obtain that kind of relief the formal, noticed protective proceeding and/or petition to review guardianship/conservatorship is available.

Oregon does address the possibility of a third-party representative filing an ex parte petition ("restraining order") on behalf of a victim where the victim may not agree that he or she actually needs relief. Thus, if a guardian or guardian ad litem files a petition on behalf of an elderly person or a person with a disability, the elderly person or person with a disability retains the right to be represented by independent counsel; have access to personal records; file objections to the restraining order; request a hearing; and present evidence and cross-examine witnesses at any hearing. Notice must be personally served on the elderly person or person with a disability. Personal service must be made not later than 72 hours after the court issues a restraining order.

C. Washington State

Question 1: Does Washington State law permit ex parte filings for financial protective orders for elders/vulnerable adults?

Answer 1: Yes.

Discussion: The court may order relief as it deems necessary for the protection of the vulnerable adult, including, but not limited to restraining the respondent from committing acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult and requiring an accounting by respondent of the disposition of the vulnerable adult's income or other resources.

A petition must be supported by an affidavit made under oath, or a declaration signed under penalty of perjury, stating the specific facts and circumstances which demonstrate the need for the relief sought.

Washington State law allows the court to issue a "temporary protection order" without written notice to either or both the respondent and vulnerable adult if it clearly appears from specific facts shown by affidavit or declaration that immediate and irreparable injury, loss, or damage would result to the vulnerable adult before the respondent and vulnerable adult can be served and heard.

A temporary protection order can also be granted upon satisfactory showing to the court that the respondent and vulnerable adult cannot be served with notice, what efforts were made to serve them, and the reasons why prior notice should not be required.

Question 2: Does Washington State law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: Yes.

Discussion: Washington State law specifically provides that a vulnerable adult, or an interested person on behalf of the vulnerable adult, may seek relief from financial exploitation, by filing a petition for an order for protection in superior court. A petition can be filed by the victim, a legal guardian, a legal fiduciary, the Department of Social and Health Services, or, as stated, an "interested person" on behalf of a vulnerable adult. The petition must explain why the petitioner qualifies as an interested person.

Where the elder/vulnerable adult is not him or herself the petitioner then the elder/vulnerable adult must be provided with notice of the petition. The notice form must include language explaining to the vulnerable adult the purpose and nature of the petition and that the vulnerable adult has the right to participate in the hearing and to either support or object to the petition.

Washington State law also specifically permits the Department of Social and Health Services to seek protective relief from abuse, including financial abuse, for a vulnerable adult, who lacks capacity.

Washington State law includes safeguard provisions when the petitioner is not the vulnerable adult him or herself. When a petition is filed by a third-party notice of the petition and hearing must be personally served upon the vulnerable adult not later than six days before the hearing along with the standard notice form.

The vulnerable adult for whom protection is sought may advise the court at the hearing that he or she does not want all or part of the protection sought in the petition. The court may dismiss the petition or the provisions that the vulnerable adult objects to and any protection order issued or the court may take additional testimony or evidence, or order additional evidentiary hearings to determine whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order. If an additional evidentiary hearing is order the court may issue a temporary order for protection of the vulnerable adult pending a decision after the evidentiary hearing.

Please let me know if you have any questions.

Scott A. Sterling
Asst. Public Advocate

16 states @ 1996 -

UNDUE INFLUENCE: CONTEXT, PROVISIONS, AND CITATIONS IN ADULT PROTECTIVE SERVICES LAWS, BY STATE

(Laws current as of 12/31/06)

Prepared by Lori Stiegel and Ellen Klem of the American Bar Association Commission on Law and Aging[1] for the National Center on Elder Abuse[2]

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Research conducted on Westlaw compliments of West Group

CAUTION: Read the explanation of this chart before relying upon the chart. You can find the explanation online at http://www.abanet.org/aging/about/elderabuse.shtml.

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
Hawaii	Financial	For the purpose of this part, 'financial and economic exploitation' means the wrongful or negligent taking, withholding, misappropriation, or use of a dependent adult's money, real property, or personal property. 'Financial and economic exploitation' can include but is not limited to: (A) Breaches of fiduciary relationships such as the misuse of a power of attorney or the abuse of guardianship privileges, resulting in the unauthorized appropriation, sale, or transfer of property; (B) The unauthorized taking of personal assets; (C) The misappropriation, misuse, or transfer of moneys belonging to the dependent adult from a personal or joint account; or (D) The intentional or negligent failure to effectively use a dependent adult's income and assets for the necessities required for the person's support and maintenance. The exploitations may involve coercion, manipulation, threats, intimidation, misrepresentation, or exertion of **undue influence**. Haw. Rev. Stat. § 346-222(7)
Iowa	Financial Physical	Exploitation of a dependent adult which means the act or process of taking unfair advantage of a dependent adult or the adult's physical or financial resources for one's own personal or pecuniary profit, without the informed consent of the dependent adult, including theft, by the use of **undue influence**, harassment, duress, deception, false representation, or false pretenses. Iowa Code Ann. § 235B.2(5)(1)(c)
Kansas	Financial Physical	'Exploitation' means misappropriation of an adult's property or intentionally taking unfair advantage of an adult's physical or financial resources for another individual's personal or financial advantage by the use of **undue influence**, coercion, harassment, duress, deception, false representation or false pretense by a caretaker or another person. Kan. Stat. Ann. § 39-1430(d)
Massachusetts (EPS) Mass. Gen. Laws Ann. ch. 19A, §§ 14 – 26 (*applicable to persons who are 60 or older)*	Financial	'Financial exploitation', an act or omission by another person, which causes a substantial monetary or property loss to an elderly person, or causes a substantial monetary or property gain to the other person, which gain would otherwise benefit the elderly person but for the act or omission of such other person; provided, however, that such an act or omission shall not be construed as financial exploitation if the elderly person has knowingly consented to such act or omission unless such consent is a consequence of misrepresentation, **undue influence**, coercion or threat of force by such other person; and, provided further, that financial exploitation shall not be construed to

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
		interfere with or prohibit a bona fide gift by an elderly person or to apply to any act or practice in the conduct of any trade or commerce declared unlawful by section two of chapter ninety-three A. Mass. Gen. Laws Ann. ch. 19A, § 14
Minnesota	Sexual	'Abuse' means: … For purposes of this section, a vulnerable adult is not abused for the sole reason that the vulnerable adult, who is not impaired in judgment or capacity by mental or emotional dysfunction or **undue influence**, engages in consensual sexual contact with: (1) a person, including a facility staff person, when a consensual sexual personal relationship existed prior to the caregiving relationship; or (2) a personal care attendant, regardless of whether the consensual sexual personal relationship existed prior to the caregiving relationship. Minn. Stat. Ann. § 626.5572, Subd. 2(g)
	Financial	'Financial exploitation' means: … (b) In the absence of legal authority a person: (1) willfully uses, withholds, or disposes of funds or property of a vulnerable adult; (2) obtains for the actor or another the performance of services by a third person for the wrongful profit or advantage of the actor or another to the detriment of the vulnerable adult; (3) acquires possession or control of, or an interest in, funds or property of a vulnerable adult through the use of **undue influence**, harassment, duress, deception, or fraud; or (4) forces, compels, coerces, or entices a vulnerable adult against the vulnerable adult's will to perform services for the profit or advantage of another. Minn. Stat. Ann. § 626.5572, Subd. 9(b)
	Sexual	'Neglect' means: … (c) For purposes of this section, a vulnerable adult is not neglected for the sole reason that: (3) the vulnerable adult, who is not impaired in judgment or capacity by mental or emotional dysfunction or **undue influence**, engages in sexual contact with: (i) a person including a facility staff person when a consensual sexual personal relationship existed prior to the caregiving relationship; or (ii) a personal care attendant, regardless of whether the consensual sexual personal relationship existed prior to the caregiving relationship. Minn. Stat. Ann. § 626.5572, Subd. 17(c)
Montana	Financial	'Exploitation' means: (a) the unreasonable use of an older person or a person with a developmental disability or of a power of attorney, conservatorship, or guardianship with regard to an older person or a person with a developmental disability in order to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of or interest in the person's money, assets, or property by means of deception, duress, menace, fraud, **undue influence**, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
		ownership, use, benefit, or possession of or interest in the person's money, assets, or property; (b) an act taken by a person who has the trust and confidence of an older person or a person with a developmental disability to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of or interest in the person's money, assets, or property by means of deception, duress, menace, fraud, **undue influence**, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the ownership, use, benefit, or possession of or interest in the person's money, assets, or property; (c) the unreasonable use of an older person or a person with a developmental disability or of a power of attorney, conservatorship, or guardianship with regard to an older person or a person with a developmental disability done in the course of an offer or sale of insurance or securities in order to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of the person's money, assets, or property by means of deception, duress, menace, fraud, **undue influence**, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the ownership, use, benefit, or possession of the person's money, assets, or property. Mont. Code Ann. § 52-3-803(3)
Nebraska	Financial	**Exploitation shall mean the taking of property of vulnerable adult by means of undue influence, breach of a fiduciary relationship, deception, or extortion or by any unlawful means.** Neb. Rev. Stat. § 28-358
Nevada	Financial	'Exploitation' means any act taken by a person who has the trust and confidence of an older person or a vulnerable person or any use of the power of attorney or guardianship of an older person or a vulnerable person to: (a) Obtain control, through deception, intimidation or **undue influence**, over the older person's or vulnerable person's money, assets or property with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his money, assets or property; or (b) Convert money, assets or property of the older person or vulnerable person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his money, assets or property. As used in this subsection, '**undue influence**' does not include the normal influence that one member of a family has over another. Nev. Rev. Stat. Ann. § 200.5092(2)
New Hampshire	Financial Physical	**'Exploitation' means the illegal use of an incapacitated adult's person or property for another** person's profit or advantage, or the breach of a fiduciary relationship through the use of a person or a person's property for any purpose not in the proper and lawful execution of a trust, including, but **not limited to, situations where a person obtains money, property, or services from an incapacitated adult through the use of undue influence, harassment, duress, deception,** or fraud. N.H. Rev. Stat. Ann. § 161-F:39(IV)

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
North Dakota	Financial	'Financial exploitation' means the taking or misuse of property or resources of a vulnerable adult by means of **undue influence**, breach of a fiduciary relationship, deception, harassment, criminal coercion, theft, or other unlawful or improper means. N.D. Cent. Code § 50-25.2-01(7)
Oklahoma	General	'Exploitation' or 'exploit' means an unjust or improper use of the resources of a vulnerable adult for the profit or advantage, pecuniary or otherwise, of a person other than the vulnerable adult through the use of **undue influence**, coercion, harassment, duress, deception, false representation or false pretense; Okla. Stat. Ann. tit. 43A, § 10-103 (9)
Rhode Island	Financial	'Exploitation' means an act or process of taking pecuniary advantage of an elderly person by use of **undue Influence**, harassment, duress, deception, false representation or false pretenses. R.I. Gen. Laws § 42-66-4.1(3)
South Carolina	Financial	(3) 'Exploitation' means: (a) causing or requiring a vulnerable adult to engage in activity or labor which is improper, unlawful, or against the reasonable and rational wishes of the vulnerable adult. Exploitation does not include requiring a vulnerable adult to participate in an activity or labor which is a part of a written plan of care or which is prescribed or authorized by a licensed physician attending the patient; (b) an improper, unlawful, or unauthorized use of the funds, assets, property, power of attorney, guardianship, or conservatorship of a vulnerable adult by a person for the profit or advantage of that person or another person; or (c) causing a vulnerable adult to purchase goods or services for the profit or advantage of the seller or another person through: (i) **undue influence**, (ii) harassment, (iii) duress, (iv) force, (v) coercion, or (vi) swindling by overreaching, cheating, or defrauding the vulnerable adult through cunning arts or devices that delude the vulnerable adult and cause him to lose money or other property. S.C. Code Ann. § 43-35-10(3)
Utah	General	'**Undue influence**' occurs when a person uses the person's role, relationship, or power to exploit, or knowingly assist or cause another to exploit, the trust, dependency, or fear of a vulnerable adult, or uses the person's role, relationship, or power to gain control deceptively over the decision making of the vulnerable adult. Utah Code Ann. § 62A-3-301(24)

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
Vermont	Financial	'Exploitation' means: (A) Willfully using, withholding, transferring or disposing of funds or property of a vulnerable adult without or in excess of legal authority for the wrongful profit or advantage of another; (B) Acquiring possession or control of or an interest in funds or property of a vulnerable adult through the use of **undue influence**, harassment, duress, or fraud; (C) The act of forcing or compelling a vulnerable adult against his or her will to perform services for the profit or advantage of another; (D) Any sexual activity with a vulnerable adult when the vulnerable adult does not consent or when the actor knows or should know that the vulnerable adult is incapable of resisting or declining consent to the sexual activity due to age or disability or due to fear of retribution or hardship, whether or not the actor has actual knowledge of vulnerable status. Vt. Stat. Ann. tit. 33, § 6902(6)
Washington	General	'Exploitation' means an act of forcing, compelling, or exerting **undue influence** over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another. Wash. Rev. Code Ann. § 74.34.020(2)(d)
Wyoming	Financial	'Exploitation' means the reckless or intentional act taken by any person, or any use of the power of attorney, conservatorship or guardianship of a vulnerable adult, to: (A) obtain control through deception, harassment, intimidation or **undue influence** over the vulnerable adult's money, assets or property with the intention of permanently or temporarily depriving the vulnerable adult of the ownership, use, benefit or possession of his money, assets or property; Wyo. Stat. Ann. § 35-20-102(a)(ix)

[1] The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

[2] This document was completed for the National Center on Elder Abuse and supported in part by a grant, No. 90AM2792, from the Administration on Aging, U.S. Department of Health and Human Services. Grantees undertaking projects under government sponsorship are encouraged to express freely their findings and conclusions. Therefore, points of view or opinions do not necessarily represent official Administration on Aging policy.

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March 16, 2011

Senator Hollis French
Chair, Senate Judiciary Committee
Capitol 120
Juneau, Alaska 99811

Re: SB 86

Dear Senator French and Members of the Senate Judiciary Committee:

The Disability Law Center is the state-designated Protection and Advocacy organization for Alaska. Thank you very much for the opportunity to comment on SB 86, a bill which would make it possible for more people to be subject to conservatorships and which would create a system for ex parte restraining orders, brought by a person or by someone interested in the person's welfare, against people who might have defrauded the person needing assistance.

This is to endorse the general principles behind SB 86, but to encourage you to do more to protect the rights of those persons who would be newly subject to conservatorships and who would be newly protected by protective orders. The system envisioned by SB 86 would place some significant additional restrictions on these people's liberty interests and, in the case of ex parte protective orders, would give people needing protection only a delayed opportunity to be heard. It would also make it possible for a person to have a conservatorship imposed on him or her, and to have a protective order put in place restricting other people from contacting him or her, simply because that person had been a victim of fraud – regardless of whether the person was generally competent to handle business matters. We'd suggest adding to proposed AS 13.26.209 an opportunity for the person to be protected to seek modification or termination of any ex parte protective order on three days' notice, as is now possible with ex parte domestic violence restraining orders; and to add a provision ensuring that counsel for the person to be protected is appointed immediately in cases involving either temporary conservatorships or ex parte protective orders. Language amending proposed AS 13.26.207 and proposed AS 13.26.209 is attached.

Thank you very much, again, for the opportunity to comment.

Sincerely,

Mark Regan
Legal Director

Enclosure

MEMBER OF THE NATIONAL DISABILITY RIGHTS NETWORK

*** Sec. 7.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.207. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or ersons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request shall state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney. The court shall conduct a hearing within 72 hours after the filing. <u>If an attorney has not already been appointed for the respondent, the court shall appoint a lawyer to represent the person at or before the hearing.</u>

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a full or partial conservator or upon the dismissal of the petition for conservatorship.

Sec. 13.26.209. Ex parte protective orders; forms for petitions and orders; fees. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against another person. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition, and that because of the fraud there has been, or is an immediate threat of, a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent. The

court shall cause a copy of the protective order to be served on the respondent.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, at the end of a six-month extension if granted by the court under (d) of this section, or upon the appointment of a temporary or permanent conservator or dismissal of the petition for the ex parte order. If the petitioner is someone other than the person for whose benefit the petition was filed, the court shall appoint a lawyer to represent the person for whose benefit the petition was filed. If the petitioner is someone other than the person for whose benefit the petition was filed, the person for whose benefit the petition was filed may request modification of the ex parte protective order; the court shall schedule a hearing on three days' notice or such shorter notice as the court may prescribe, and shall hear and rule on the request in an expeditious manner.

(d) Upon application filed with the court before the expiration of the 20-day ex parte protective order, the court shall schedule a hearing on whether to extend the protective order for up to six months. The court shall provide at least 10 days' notice to the respondent of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may extend the ex parte protective order for up to six months.

(e) A protective order issued under this section is in addition to any other civil or criminal remedy.

(f) A third party shall comply with a protective order issued under this section. A third party who does not comply with a protective order granted under this section may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees

associated with the failure to comply with the protective order. A third person who does not comply with a protective order granted under this section may also be criminally liable under AS 11.56.740 for violating a protective order.

(g) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long-term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions, protective orders, and instructions for their use by a person seeking a protective order under this section. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order under this section may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(h) Filing fees may not be charged for a petition under this section.

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION
OFFICE OF PUBLIC ADVOCACY

OFFICE OF ELDER FRAUD AND ASSISTANCE

Sean Parnell, Governor

Rachel Levitt, Director

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March 9, 2011

MEMORANDUM

FROM: Scott A. Sterling, Supervising Attorney
Office of Elder Fraud & Assistance
Anchorage, Alaska

TO: Rachel Levitt, Acting Director, OPA

AND TO: HB 150/SB 86 Working Group & Legislative Staff

RE: **HB 150/SB 86– Sister States' Laws**
On Ex Parte Protective Orders

Three sister states—California, Oregon and Washington State—permit ex parte relief from financial exploitation. Following is a brief summary of each state's applicable statutes and court procedures.

A. California

Question 1: Does California law permit ex parte filings for financial protective orders for elders/vulnerable adults?

Answer 1: Yes.

Discussion: California authorizes ex parte protective orders pursuant to California Welfare and Institutions Code, §15657.03. Protective orders are permitted for any "elder or dependent adult who has suffered abuse, including financial abuse. The statute treats financial abuse as a form of domestic violence.

The key legal requirements or restrictions are:

- At the "ex parte" hearing temporary orders may be issued by the Court which last until the next "Order to Show Cause" hearing which must be held no more than 21 days from the date the order is issued.
- No order may be granted on an ex parte basis unless it appears from facts shown in the application for the order (or by attached affidavit) that "great or irreparable injury would result to the applicant before the matter can be heard on notice.
- Absent a showing of exceptional circumstances, the applicant must notify all parties no later than 10:00 a.m. of the court day before the ex parte appearance.
- The court must act on the ex parte application--either issuing or denying the requested order--on the same day the application is submitted.
- An appearance by the responding party as a prerequisite to granting the requested order. If the responding party (personally or through counsel) fails to appear at the hearing (or to file an answer/responsive declaration), the requested relief may be entered by default. The ex parte order may issue only if the court finds that:
  - Reasonable grounds have been asserted to believe there is an immediate and present danger of domestic violence (which includes financial abuse); and
  - An emergency protective order is necessary to prevent the occurrence or reoccurrence of domestic violence (which includes financial abuse).

Question 2: Does California law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: Incapacitated/disabled adults may petition through third-party representative

Discussion: Petitioners unable to petition in person for ex parte relief due to incapacity or disability may, through an attorney or third-party representative, move the court to have a guardian ad litem appointed to represent the incapacitated/disabled adult for purposes of the ex parte relief petition. If a guardian or conservator is already in place for the adult then that person may also apply in that capacity.

B. Oregon

Question 1: Does Oregon law permit ex parte filings for financial protective orders for elders/vulnerable adults?

Answer 1: Yes.

Discussion: Oregon law allows ex parte protection orders for financial abuse or threats of financial abuse of elders and vulnerable adults occurring not more than

180 days prior to the date the petition is filed. Abuse is defined as wrongful taking or appropriating money or property of an elder or subjecting the victim to threats of such abuse. Third-parties, such as social workers, elder fraud investigators, peace officers and direct witnesses may testify in addition to the petitioner him or herself.

An ex parte order must be limited to the relief court considers necessary to prevent or remedy the wrongful taking or appropriation of the money or property of the person. Relief can include: directing the respondent to refrain from exercising control over the money or property of the person; requiring the respondent to return custody or control of the money or property of the person to the person; requiring the respondent to follow the instructions of the guardian or conservator of the person; or prohibiting the respondent from transferring the money or property of the elderly person or person with a disability to any person other than the elderly person or person with a disability.

The ex parte relief is limited to preventing or staying an immediate or urgent exploitation or threatened exploitation. If the victim wishes to have a third-party gain control and management of the victim's financial accounts or property then the victim may petition for a formal, noticed protective proceeding to address the need for expanded or long-term relief.

Question 2: Does Oregon law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: Limited.

Discussion: Oregon law allows the elderly or disabled petitioner to apply for relief through a third-party representative including guardian ad litem, guardian or conservator. It appears that the victim may not use the ex parte procedure to seek relief against the victim's guardian or conservator—to obtain that kind of relief the formal, noticed protective proceeding and/or petition to review guardianship/conservatorship is available.

Oregon does address the possibility of a third-party representative filing an ex parte petition ("restraining order") on behalf of a victim where the victim may not agree that he or she actually needs relief. Thus, if a guardian or guardian ad litem files a petition on behalf of an elderly person or a person with a disability, the elderly person or person with a disability retains the right to be represented by independent counsel; have access to personal records; file objections to the restraining order; request a hearing; and present evidence and cross-examine witnesses at any hearing. Notice must be personally served on the elderly person or person with a disability. Personal service must be made not later than 72 hours after the court issues a restraining order.

C. Washington State

Question 1: Does Washington State law permit ex parte filings for financial protective orders for elders/vulnerable adults?

Answer 1: Yes.

Discussion: The court may order relief as it deems necessary for the protection of the vulnerable adult, including, but not limited to restraining the respondent from committing acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult and requiring an accounting by respondent of the disposition of the vulnerable adult's income or other resources.

A petition must be supported by an affidavit made under oath, or a declaration signed under penalty of perjury, stating the specific facts and circumstances which demonstrate the need for the relief sought.

Washington State law allows the court to issue a "temporary protection order" without written notice to either or both the respondent and vulnerable adult if it clearly appears from specific facts shown by affidavit or declaration that immediate and irreparable injury, loss, or damage would result to the vulnerable adult before the respondent and vulnerable adult can be served and heard.

A temporary protection order can also be granted upon satisfactory showing to the court that the respondent and vulnerable adult cannot be served with notice, what efforts were made to serve them, and the reasons why prior notice should not be required.

Question 2: Does Washington State law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: Yes.

Discussion: Washington State law specifically provides that a vulnerable adult, or an interested person on behalf of the vulnerable adult, may seek relief from financial exploitation, by filing a petition for an order for protection in superior court. A petition can be filed by the victim, a legal guardian, a legal fiduciary, the Department of Social and Health Services, or, as stated, an "interested person" on behalf of a vulnerable adult. The petition must explain why the petitioner qualifies as an interested person.

Where the elder/vulnerable adult is not him or herself the petitioner then the elder/vulnerable adult must be provided with notice of the petition. The notice form must include language explaining to the vulnerable adult the purpose and nature of the petition and that the vulnerable adult has the right to participate in the hearing and to either support or object to the petition.

Washington State law also specifically permits the Department of Social and Health Services to seek protective relief from abuse, including financial abuse, for a vulnerable adult, who lacks capacity.

Washington State law includes safeguard provisions when the petitioner is not the vulnerable adult him or herself. When a petition is filed by a third-party notice of the petition and hearing must be personally served upon the vulnerable adult not later than six days before the hearing along with the standard notice form.

The vulnerable adult for whom protection is sought may advise the court at the hearing that he or she does not want all or part of the protection sought in the petition. The court may dismiss the petition or the provisions that the vulnerable adult objects to and any protection order issued or the court may take additional testimony or evidence, or order additional evidentiary hearings to determine whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order. If an additional evidentiary hearing is order the court may issue a temporary order for protection of the vulnerable adult pending a decision after the evidentiary hearing.

Please let me know if you have any questions.

Scott A. Sterling
Asst. Public Advocate

This chart contains the following three columns:

1. State. This chart only includes states that have provisions on undue influence.

2. Context. The second column identifies the context(s) of the state's provision(s). The context reflects the fact that undue influence is recognized as a method for committing financial or sexual exploitation and not usually defined as a form of elder abuse, or even as a crime. Some state provisions, however, refer to physical abuse rather than sexual abuse, just as some state definitions of the types of elder abuse include sexual abuse within the definition of physical abuse. To gain a better understanding of the state definitions about types of abuse, see the Types of Abuse Defined in Adult Protective Services Statutes charts available online at http://www.abanet.org/aging/about/elderabuse.shtml. The context column follows the terminology used in the statutory provision. To provide this context, the APS provisions on undue influence are either:
    a. Part of a broader definition of financial exploitation or of sexual or physical abuse/exploitation,
    b. Included as a distinct definition that makes clear that the context relates to one or more types of abuse, or
    c. Part of a general definition that does not clearly reference financial exploitation or physical or sexual abuse/exploitation.

3. Statutory Provision(s) and Citation(s). The pertinent statutory provision(s) and citation(s) are presented in this column. They are copied verbatim from the state laws. If undue influence is part of a broad provision, such as a definition of financial exploitation, then all relevant parts of the provision are provided for context. If a state's law contains multiple provisions, they are separated by a line and a citation is provided for each.

III. If You Find an Error

We strived to be consistent in our interpretation and categorization of the statutes. Despite our best efforts, we may have made errors. It is also possible that APS or other professionals interpret a statute differently than we did or there are state regulations or policies that lead to a different interpretation. Additionally, state laws may have changed since December 31, 2006. If you think we erred or your state has a regulation or policy that leads to a different interpretation, please contact Lori Stiegel of the American Bar Association Commission on Law and Aging at lstiegel@staff.abanet.org or 202-662-8692.

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[1] The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

[2] This document was completed for the National Center on Elder Abuse and supported in part by a grant, No. 90AM2792, from the Administration on Aging, U.S. Department of Health and Human Services. Grantees undertaking projects under government sponsorship are encouraged to express freely their findings and conclusions. Therefore, points of view or opinions do not necessarily represent official Administration on Aging policy.

[3] The Undue Influence curriculum is available from the National Clearinghouse on Abuse in Later Life (NCALL). See the resource page of the NCALL Web site: www.ncall.us/resources.html

Explanation of the "Undue Influence: Context, Provisions, and Citations in Adult Protective Services Laws, by State" Chart
(Laws current as of 12/31/06)
Prepared by Lori Stiegel and Ellen Klem of the American Bar Association Commission on Law and Aging[1] for the National Center on Elder Abuse[2]
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Research conducted on Westlaw compliments of West Group

The chart addresses the adult protective services (APS) laws for each state, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands. This explanation and the chart refer to these jurisdictions generically as "state" or "states."

Unless otherwise indicated, this explanation (1) uses the term "abuse" generally to include abuse, neglect, and exploitation, and (2) uses "elder abuse" to include elder abuse and adult abuse.

CAUTION: This chart is based only on the state APS laws; APS regulations were not reviewed. It is important to recognize that there may be other state laws or regulations or federal laws or regulations that address the issue covered by this chart. For example, there may be criminal laws on financial or sexual exploitation or laws related to wills or other financial and property matters that include provisions on undue influence. Additionally, there may be court decisions that define undue influence in the context of elder abuse or other matters.

NOTE: A few states have multiple laws. Some of those states have separate elder protective services (EPS) laws and APS laws, and those laws are designated in the chart by following the state abbreviation with "EPS" or "APS". Some states have more than one APS law, and those laws are designated in the chart by following the state abbreviation with #1 or #2. Unless otherwise indicated in this explanation or the chart, both APS and EPS laws will generally be referred to as APS laws.

I. Why We Developed This Chart

Awareness is growing of undue influence and the role that it may play in cases involving elder abuse. As a result, state and federal legislative staff, other policy makers, program administrators, practitioners, educators, researchers, reporters, victims and their family members, and others often want to know how many states have laws on undue influence and what those laws say. The "Undue Influence: Context, Provisions, and Citations in Adult Protective Services Laws, by State" chart offers that information.

II. Detailed Explanation of the "Undue Influence: Context, Provisions, and Citations in Adult Protective Services Laws, by State" Chart

Undue influence is usually not defined as a form of elder abuse, or even as a crime. It is, instead, recognized as a process or method used to commit financial or sexual exploitation. (YWCA of Omaha. (2006). *Undue Influence: The Criminal Justice Response*. Omaha, Neb.: Author.)[3]

UNDUE INFLUENCE: CONTEXT, PROVISIONS, AND CITATIONS IN ADULT PROTECTIVE SERVICES LAWS, BY STATE

(Laws current as of 12/31/06)

Prepared by Lori Stiegel and Ellen Klem of the American Bar Association Commission on Law and Aging[1] for the National Center on Elder Abuse[2]

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Research conducted on Westlaw compliments of West Group

CAUTION: Read the explanation of this chart before relying upon the chart. You can find the explanation online at http://www.abanet.org/aging/about/elderabuse.shtml.

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
Hawaii	Financial	For the purpose of this part, 'financial and economic exploitation' means the wrongful or negligent taking, withholding, misappropriation, or use of a dependent adult's money, real property, or personal property. 'Financial and economic exploitation' can include but is not limited to: (A) Breaches of fiduciary relationships such as the misuse of a power of attorney or the abuse of guardianship privileges, resulting in the unauthorized appropriation, sale, or transfer of property; (B) The unauthorized taking of personal assets; (C) The misappropriation, misuse, or transfer of moneys belonging to the dependent adult from a personal or joint account; or (D) The intentional or negligent failure to effectively use a dependent adult's income and assets for the necessities required for the person's support and maintenance. The exploitations may involve coercion, manipulation, threats, intimidation, misrepresentation, or exertion of **undue influence**. Haw. Rev. Stat. § 346-222(7)
Iowa	Financial Physical	Exploitation of a dependent adult which means the act or process of taking unfair advantage of a dependent adult or the adult's physical or financial resources for one's own personal or pecuniary profit, without the informed consent of the dependent adult, including theft, by the use of **undue influence**, harassment, duress, deception, false representation, or false pretenses. Iowa Code Ann. § 235B.2(5)(1)(c)
Kansas	Financial Physical	'Exploitation' means misappropriation of an adult's property or intentionally taking unfair advantage of an adult's physical or financial resources for another individual's personal or financial advantage by the use of **undue influence**, coercion, harassment, duress, deception, false representation or false pretense by a caretaker or another person. Kan. Stat. Ann. § 39-1430(d)
Massachusetts (EPS) Mass. Gen. Laws Ann. ch. 19A, §§ 14 – 26 (*applicable to persons who are 60 or older)*	Financial	'Financial exploitation', an act or omission by another person, which causes a substantial monetary or property loss to an elderly person, or causes a substantial monetary or property gain to the other person, which gain would otherwise benefit the elderly person but for the act or omission of such other person; provided, however, that such an act or omission shall not be construed as financial exploitation if the elderly person has knowingly consented to such act or omission unless such consent is a consequence of misrepresentation, **undue influence**, coercion or threat of force by such other person; and, provided further, that financial exploitation shall not be construed to

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
		interfere with or prohibit a bona fide gift by an elderly person or to apply to any act or practice in the conduct of any trade or commerce declared unlawful by section two of chapter ninety-three A. Mass. Gen. Laws Ann. ch. 19A, § 14
Minnesota	Sexual	'Abuse' means: … For purposes of this section, a vulnerable adult is not abused for the sole reason that the vulnerable adult, who is not impaired in judgment or capacity by mental or emotional dysfunction or **undue influence**, engages in consensual sexual contact with: (1) a person, including a facility staff person, when a consensual sexual personal relationship existed prior to the caregiving relationship; or (2) a personal care attendant, regardless of whether the consensual sexual personal relationship existed prior to the caregiving relationship. Minn. Stat. Ann. § 626.5572, Subd. 2(g)
	Financial	'Financial exploitation' means: … (b) In the absence of legal authority a person: (1) willfully uses, withholds, or disposes of funds or property of a vulnerable adult; (2) obtains for the actor or another the performance of services by a third person for the wrongful profit or advantage of the actor or another to the detriment of the vulnerable adult; (3) acquires possession or control of, or an interest in, funds or property of a vulnerable adult through the use of **undue influence**, harassment, duress, deception, or fraud; or (4) forces, compels, coerces, or entices a vulnerable adult against the vulnerable adult's will to perform services for the profit or advantage of another. Minn. Stat. Ann. § 626.5572, Subd. 9(b)
	Sexual	'Neglect' means: … (c) For purposes of this section, a vulnerable adult is not neglected for the sole reason that: (3) the vulnerable adult, who is not impaired in judgment or capacity by mental or emotional dysfunction or **undue influence**, engages in sexual contact with: (i) a person including a facility staff person when a consensual sexual personal relationship existed prior to the caregiving relationship; or (ii) a personal care attendant, regardless of whether the consensual sexual personal relationship existed prior to the caregiving relationship. Minn. Stat. Ann. § 626.5572, Subd. 17(c)
Montana	Financial	'Exploitation' means: (a) the unreasonable use of an older person or a person with a developmental disability or of a power of attorney, conservatorship, or guardianship with regard to an older person or a person with a developmental disability in order to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of or interest in the person's money, assets, or property by means of deception, duress, menace, fraud, **undue influence**, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
		ownership, use, benefit, or possession of or interest in the person's money, assets, or property; (b) an act taken by a person who has the trust and confidence of an older person or a person with a developmental disability to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of or interest in the person's money, assets, or property by means of deception, duress, menace, fraud, **undue influence**, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the ownership, use, benefit, or possession of or interest in the person's money, assets, or property; (c) the unreasonable use of an older person or a person with a developmental disability or of a power of attorney, conservatorship, or guardianship with regard to an older person or a person with a developmental disability done in the course of an offer or sale of insurance or securities in order to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of the person's money, assets, or property by means of deception, duress, menace, fraud, **undue influence**, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the ownership, use, benefit, or possession of the person's money, assets, or property. Mont. Code Ann. § 52-3-803(3)
Nebraska	Financial	Exploitation shall mean the taking of property of vulnerable adult by means of **undue influence**, breach of a fiduciary relationship, deception, or extortion or by any unlawful means. Neb. Rev. Stat. § 28-358
Nevada	Financial	'Exploitation' means any act taken by a person who has the trust and confidence of an older person or a vulnerable person or any use of the power of attorney or guardianship of an older person or a vulnerable person to: (a) Obtain control, through deception, intimidation or **undue influence**, over the older person's or vulnerable person's money, assets or property with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his money, assets or property; or (b) Convert money, assets or property of the older person or vulnerable person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his money, assets or property. As used in this subsection, '**undue influence**' does not include the normal influence that one member of a family has over another. Nev. Rev. Stat. Ann. § 200.5092(2)
New Hampshire	Financial Physical	'Exploitation' means the illegal use of an incapacitated adult's person or property for another person's profit or advantage, or the breach of a fiduciary relationship through the use of a person or a person's property for any purpose not in the proper and lawful execution of a trust, including, but not limited to, situations where a person obtains money, property, or services from an incapacitated adult through the use of **undue influence**, harassment, duress, deception, or fraud. N.H. Rev. Stat. Ann. § 161-F:39(IV)

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
North Dakota	Financial	'Financial exploitation' means the taking or misuse of property or resources of a vulnerable adult by means of **undue influence**, breach of a fiduciary relationship, deception, harassment, criminal coercion, theft, or other unlawful or improper means. N.D. Cent. Code § 50-25.2-01(7)
Oklahoma	General	'Exploitation' or 'exploit' means an unjust or improper use of the resources of a vulnerable adult for the profit or advantage, pecuniary or otherwise, of a person other than the vulnerable adult through the use of **undue influence**, coercion, harassment, duress, deception, false representation or false pretense; Okla. Stat. Ann. tit. 43A, § 10-103 (9)
Rhode Island	Financial	'Exploitation' means an act or process of taking pecuniary advantage of an elderly person by use of **undue Influence**, harassment, duress, deception, false representation or false pretenses. R.I. Gen. Laws § 42-66-4.1(3)
South Carolina	Financial	(3) 'Exploitation' means: (a) causing or requiring a vulnerable adult to engage in activity or labor which is improper, unlawful, or against the reasonable and rational wishes of the vulnerable adult. Exploitation does not include requiring a vulnerable adult to participate in an activity or labor which is a part of a written plan of care or which is prescribed or authorized by a licensed physician attending the patient; (b) an improper, unlawful, or unauthorized use of the funds, assets, property, power of attorney, guardianship, or conservatorship of a vulnerable adult by a person for the profit or advantage of that person or another person; or (c) causing a vulnerable adult to purchase goods or services for the profit or advantage of the seller or another person through: (i) **undue influence**, (ii) harassment, (iii) duress, (iv) force, (v) coercion, or (vi) swindling by overreaching, cheating, or defrauding the vulnerable adult through cunning arts or devices that delude the vulnerable adult and cause him to lose money or other property. S.C. Code Ann. § 43-35-10(3)
Utah	General	'**Undue influence**' occurs when a person uses the person's role, relationship, or power to exploit, or knowingly assist or cause another to exploit, the trust, dependency, or fear of a vulnerable adult, or uses the person's role, relationship, or power to gain control deceptively over the decision making of the vulnerable adult. Utah Code Ann. § 62A-3-301(24)

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
Vermont	Financial	'Exploitation' means: (A) Willfully using, withholding, transferring or disposing of funds or property of a vulnerable adult without or in excess of legal authority for the wrongful profit or advantage of another; (B) Acquiring possession or control of or an interest in funds or property of a vulnerable adult through the use of **undue influence**, harassment, duress, or fraud; (C) The act of forcing or compelling a vulnerable adult against his or her will to perform services for the profit or advantage of another; (D) Any sexual activity with a vulnerable adult when the vulnerable adult does not consent or when the actor knows or should know that the vulnerable adult is incapable of resisting or declining consent to the sexual activity due to age or disability or due to fear of retribution or hardship, whether or not the actor has actual knowledge of vulnerable status. Vt. Stat. Ann. tit. 33, § 6902(6)
Washington	General	'Exploitation' means an act of forcing, compelling, or exerting **undue influence** over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another. Wash. Rev. Code Ann. § 74.34.020(2)(d)
Wyoming	Financial	'Exploitation' means the reckless or intentional act taken by any person, or any use of the power of attorney, conservatorship or guardianship of a vulnerable adult, to: (A) obtain control through deception, harassment, intimidation or **undue influence** over the vulnerable adult's money, assets or property with the intention of permanently or temporarily depriving the vulnerable adult of the ownership, use, benefit or possession of his money, assets or property; Wyo. Stat. Ann. § 35-20-102(a)(ix)

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STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION
OFFICE OF PUBLIC ADVOCACY

OFFICE OF ELDER FRAUD AND ASSISTANCE

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March 11, 2011

MEMORANDUM

FROM: Scott A. Sterling, Supervising Attorney
Office of Elder Fraud & Assistance
Anchorage, Alaska

TO: Cindy Smith, Office of Senator Hollis French

RE: **SB 86 – Changes For Consideration**

Sorry this is not in legislative drafting format but following are some proposed changes to certain sections of SB 86 concerning (1) how to ensure that the adult is always given notice of ex parte proceedings, (2) how to ensure that third-parties receive sufficient notice of ex parte orders and (3) a more legally sound definition of fiduciary duty. Please note that these and numerous other changes will likely be considered and incorporated into the final HJUD HB 150 CS. For SB 86 purposes these changes are referenced to the sections of that bill.

Please let me know if you have any questions.

Notice

1. At page 4, line 21, SB 86 after the sentence ending with the words "protective order" add "**A third-party filing for an ex parte order under this section on behalf of a proposed protected person shall certify to the court in writing that a copy of the petition has been actually served upon the proposed protected person or the proposed protected person's legal representative or certify the reasons why providing such service would cause immediate threat of harm to the best interests of the proposed protected person. The court shall cause a copy of any order, including any order setting a hearing on the application for ex parte relief, to be served upon the proposed**

protected person or legal representative. A proposed protected person filing for ex parte relief under this section either in person or through counsel of record is exempt from the requirements of this section.

2. At page 5, line 16, SB 86 replace current subsection (f) with the following:
"(f) A third party who has received actual or legal notice of a protective order issued under this section shall comply with that order. Actual and legal notice of a protective order issued under this section is effective upon the third-party receiving a copy of the order by means of delivery, mail or fax transmission at the nearest residence or place of business of the third-party.

What about damages?

Actual and legal notice of a protective order issued under this section is also effective upon all persons upon that order being recorded with the State Recorder.

3. At page 18, line 22, SB 86 replace the existing (18) with:

(18) "fiduciary duty" means the duty of a third-party (person) who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interests of that person.

Blacks: a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION
OFFICE OF PUBLIC ADVOCACY

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March 9, 2011

MEMORANDUM

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Anchorage, Alaska

TO: Rachel Levitt, Acting Director, OPA

AND TO: HB 150/SB 86 Working Group & Legislative Staff

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- Absent a showing of exceptional circumstances, the applicant must notify all parties no later than 10:00 a.m. of the court day before the ex parte appearance.
- The court must act on the ex parte application--either issuing or denying the requested order--on the same day the application is submitted.
- An appearance by the responding party as a prerequisite to granting the requested order. If the responding party (personally or through counsel) fails to appear at the hearing (or to file an answer/responsive declaration), the requested relief may be entered by default. The ex parte order may issue only if the court finds that:
  - Reasonable grounds have been asserted to believe there is an immediate and present danger of domestic violence (which includes financial abuse); and
  - An emergency protective order is necessary to prevent the occurrence or reoccurrence of domestic violence (which includes financial abuse).

Question 2: Does California law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: Incapacitated/disabled adults may petition through third-party representative

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Answer 1: Yes.

Discussion: Oregon law allows ex parte protection orders for financial abuse or threats of financial abuse of elders and vulnerable adults occurring not more than

180 days prior to the date the petition is filed. Abuse is defined as wrongful taking or appropriating money or property of an elder or subjecting the victim to threats of such abuse. Third-parties, such as social workers, elder fraud investigators, peace officers and direct witnesses may testify in addition to the petitioner him or herself.

An ex parte order must be limited to the relief court considers necessary to prevent or remedy the wrongful taking or appropriation of the money or property of the person. Relief can include: directing the respondent to refrain from exercising control over the money or property of the person; requiring the respondent to return custody or control of the money or property of the person to the person; requiring the respondent to follow the instructions of the guardian or conservator of the person; or prohibiting the respondent from transferring the money or property of the elderly person or person with a disability to any person other than the elderly person or person with a disability.

The ex parte relief is limited to preventing or staying an immediate or urgent exploitation or threatened exploitation. If the victim wishes to have a third-party gain control and management of the victim's financial accounts or property then the victim may petition for a formal, noticed protective proceeding to address the need for expanded or long-term relief.

Question 2: Does Oregon law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: Limited.

Discussion: Oregon law allows the elderly or disabled petitioner to apply for relief through a third-party representative including guardian ad litem, guardian or conservator. It appears that the victim may not use the ex parte procedure to seek relief against the victim's guardian or conservator—to obtain that kind of relief the formal, noticed protective proceeding and/or petition to review guardianship/conservatorship is available.

Oregon does address the possibility of a third-party representative filing an ex parte petition ("restraining order") on behalf of a victim where the victim may not agree that he or she actually needs relief. Thus, if a guardian or guardian ad litem files a petition on behalf of an elderly person or a person with a disability, the elderly person or person with a disability retains the right to be represented by independent counsel; have access to personal records; file objections to the restraining order; request a hearing; and present evidence and cross-examine witnesses at any hearing. Notice must be personally served on the elderly person or person with a disability. Personal service must be made not later than 72 hours after the court issues a restraining order.

C. Washington State

Question 1: Does Washington State law permit ex parte filings for financial protective orders for elders/vulnerable adults?

Answer 1: Yes.

Discussion: The court may order relief as it deems necessary for the protection of the vulnerable adult, including, but not limited to restraining the respondent from committing acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult and requiring an accounting by respondent of the disposition of the vulnerable adult's income or other resources.

A petition must be supported by an affidavit made under oath, or a declaration signed under penalty of perjury, stating the specific facts and circumstances which demonstrate the need for the relief sought.

Washington State law allows the court to issue a "temporary protection order" without written notice to either or both the respondent and vulnerable adult if it clearly appears from specific facts shown by affidavit or declaration that immediate and irreparable injury, loss, or damage would result to the vulnerable adult before the respondent and vulnerable adult can be served and heard.

A temporary protection order can also be granted upon satisfactory showing to the court that the respondent and vulnerable adult cannot be served with notice, what efforts were made to serve them, and the reasons why prior notice should not be required.

Question 2: Does Washington State law permit third-parties to petition for ex parte protective order for an elder/vulnerable adult?

Answer 2: Yes.

Discussion: Washington State law specifically provides that a vulnerable adult, or an interested person on behalf of the vulnerable adult, may seek relief from financial exploitation, by filing a petition for an order for protection in superior court. A petition can be filed by the victim, a legal guardian, a legal fiduciary, the Department of Social and Health Services, or, as stated, an "interested person" on behalf of a vulnerable adult. The petition must explain why the petitioner qualifies as an interested person.

Where the elder/vulnerable adult is not him or herself the petitioner then the elder/vulnerable adult must be provided with notice of the petition. The notice form must include language explaining to the vulnerable adult the purpose and nature of the petition and that the vulnerable adult has the right to participate in the hearing and to either support or object to the petition.

Washington State law also specifically permits the Department of Social and Health Services to seek protective relief from abuse, including financial abuse, for a vulnerable adult, who lacks capacity.

Washington State law includes safeguard provisions when the petitioner is not the vulnerable adult him or herself. When a petition is filed by a third-party notice of the petition and hearing must be personally served upon the vulnerable adult not later than six days before the hearing along with the standard notice form.

The vulnerable adult for whom protection is sought may advise the court at the hearing that he or she does not want all or part of the protection sought in the petition. The court may dismiss the petition or the provisions that the vulnerable adult objects to and any protection order issued or the court may take additional testimony or evidence, or order additional evidentiary hearings to determine whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order. If an additional evidentiary hearing is order the court may issue a temporary order for protection of the vulnerable adult pending a decision after the evidentiary hearing.

Please let me know if you have any questions.

Scott A. Sterling
Asst. Public Advocate

16 states @ 1996 -

UNDUE INFLUENCE: CONTEXT, PROVISIONS, AND CITATIONS IN ADULT PROTECTIVE SERVICES LAWS, BY STATE

(Laws current as of 12/31/06)

Prepared by Lori Stiegel and Ellen Klem of the American Bar Association Commission on Law and Aging[1] for the National Center on Elder Abuse[2]

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Research conducted on Westlaw compliments of West Group

CAUTION: Read the explanation of this chart before relying upon the chart. You can find the explanation online at http://www.abanet.org/aging/about/elderabuse.shtml.

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
Hawaii	Financial	For the purpose of this part, 'financial and economic exploitation' means the wrongful or negligent taking, withholding, misappropriation, or use of a dependent adult's money, real property, or personal property. 'Financial and economic exploitation' can include but is not limited to: (A) Breaches of fiduciary relationships such as the misuse of a power of attorney or the abuse of guardianship privileges, resulting in the unauthorized appropriation, sale, or transfer of property; (B) The unauthorized taking of personal assets; (C) The misappropriation, misuse, or transfer of moneys belonging to the dependent adult from a personal or joint account; or (D) The intentional or negligent failure to effectively use a dependent adult's income and assets for the necessities required for the person's support and maintenance. The exploitations may involve coercion, manipulation, threats, intimidation, misrepresentation, or exertion of **undue influence**. Haw. Rev. Stat. § 346-222(7)
Iowa	Financial Physical	Exploitation of a dependent adult which means the act or process of taking unfair advantage of a dependent adult or the adult's physical or financial resources for one's own personal or pecuniary profit, without the informed consent of the dependent adult, including theft, by the use of **undue influence**, harassment, duress, deception, false representation, or false pretenses. Iowa Code Ann. § 235B.2(5)(1)(c)
Kansas	Financial Physical	'Exploitation' means misappropriation of an adult's property or intentionally taking unfair advantage of an adult's physical or financial resources for another individual's personal or financial advantage by the use of **undue influence**, coercion, harassment, duress, deception, false representation or false pretense by a caretaker or another person. Kan. Stat. Ann. § 39-1430(d)
Massachusetts (EPS) Mass. Gen. Laws Ann. ch. 19A, §§ 14 – 26 (*applicable to persons who are 60 or older)*	Financial	'Financial exploitation', an act or omission by another person, which causes a substantial monetary or property loss to an elderly person, or causes a substantial monetary or property gain to the other person, which gain would otherwise benefit the elderly person but for the act or omission of such other person; provided, however, that such an act or omission shall not be construed as financial exploitation if the elderly person has knowingly consented to such act or omission unless such consent is a consequence of misrepresentation, **undue influence**, coercion or threat of force by such other person; and, provided further, that financial exploitation shall not be construed to

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
		interfere with or prohibit a bona fide gift by an elderly person or to apply to any act or practice in the conduct of any trade or commerce declared unlawful by section two of chapter ninety-three A. Mass. Gen. Laws Ann. ch. 19A, § 14
Minnesota	Sexual	'Abuse' means: ... **For purposes of this section, a vulnerable adult is not abused for the sole reason that the vulnerable adult, who is not impaired in judgment or capacity by mental or emotional dysfunction or undue influence, engages in consensual sexual contact with (1) a person, including a facility staff person, when a consensual sexual personal relationship existed prior to the caregiving relationship; or (2) a personal care attendant, regardless of whether the consensual sexual personal relationship** existed prior to the caregiving relationship. Minn. Stat. Ann. § 626.5572, Subd. 2(g)
	Financial	**'Financial exploitation' means: ...** **(b) In the absence of legal authority a person:** **(1) willfully uses, withholds, or disposes of funds or property of a vulnerable adult;** **(2) obtains for the actor or another the performance of services by a third person for the wrongful profit or advantage of the actor or another to the detriment of the vulnerable adult;** **(3) acquires possession or control of, or an interest in, funds or property of a vulnerable adult through the use of undue influence, harassment, duress, deception, or fraud; or** **(4) forces, compels, coerces, or entices a vulnerable adult against the vulnerable adult's will to perform services for the profit or advantage of another. Minn. Stat. Ann. § 626.5572, Subd. 9(b)**
	Sexual	'Neglect' means: ... **(a) For purposes of this section, a vulnerable adult is not neglected for the sole reason that:** **(3) the vulnerable adult, who is not impaired in judgment or capacity by mental or emotional dysfunction or undue influence, engages in sexual contact with:** **(i) a person including a facility staff person when a consensual sexual personal relationship existed prior to the caregiving relationship; or** **(ii) a personal care attendant, regardless of whether the consensual sexual personal relationship existed prior to the caregiving relationship. Minn. Stat. Ann. § 626.5572, Subd. 17(c)**
Montana	Financial	'Exploitation' means: (a) the unreasonable use of an older person or a person with a developmental disability or of a power of attorney, conservatorship, or guardianship with regard to an older person or a person with a developmental disability in order to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of or interest in the person's money, assets, or property by means of deception, duress, menace, fraud, **undue influence**, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
		ownership, use, benefit, or possession of or interest in the person's money, assets, or property; (b) an act taken by a person who has the trust and confidence of an older person or a person with a developmental disability to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of or interest in the person's money, assets, or property by means of deception, duress, menace, fraud, **undue influence**, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the ownership, use, benefit, or possession of or interest in the person's money, assets, or property; (c) the unreasonable use of an older person or a person with a developmental disability or of a power of attorney, conservatorship, or guardianship with regard to an older person or a person with a developmental disability done in the course of an offer or sale of insurance or securities in order to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of the person's money, assets, or property by means of deception, duress, menace, fraud, **undue influence**, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the ownership, use, benefit, or possession of the person's money, assets, or property. Mont. Code Ann. § 52-3-803(3)
Nebraska	Financial	Exploitation shall mean the taking of property of vulnerable adult by means of **undue influence**, breach of a fiduciary relationship, deception, or extortion or by any unlawful means. Neb. Rev. Stat. § 28-358
Nevada	Financial	'Exploitation' means any act taken by a person who has the trust and confidence of an older person or a vulnerable person or any use of the power of attorney or guardianship of an older person or a vulnerable person to: (a) Obtain control, through deception, intimidation or **undue influence**, over the older person's or vulnerable person's money, assets or property with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his money, assets or property; or (b) Convert money, assets or property of the older person or vulnerable person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his money, assets or property. As used in this subsection, '**undue influence**' does not include the normal influence that one member of a family has over another. Nev. Rev. Stat. Ann. § 200.5092(2)
New Hampshire	Financial Physical	'Exploitation' means the illegal use of an incapacitated adult's person or property for another person's profit or advantage, or the breach of a fiduciary relationship through the use of a person or a person's property for any purpose not in the proper and lawful execution of a trust, including, but not limited to, situations where a person obtains money, property, or services from an incapacitated adult through the use of **undue influence**, harassment, duress, deception, or fraud. N.H. Rev. Stat. Ann. § 161-F:39(IV)

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
North Dakota	Financial	'Financial exploitation' means the taking or misuse of property or resources of a vulnerable adult by means of **undue influence**, breach of a fiduciary relationship, deception, harassment, criminal coercion, theft, or other unlawful or improper means. N.D. Cent. Code § 50-25.2-01(7)
Oklahoma	General	'Exploitation' or 'exploit' means an unjust or improper use of the resources of a vulnerable adult for the profit or advantage, pecuniary or otherwise, of a person other than the vulnerable adult through the use of **undue influence**, coercion, harassment, duress, deception, false representation or false pretense; Okla. Stat. Ann. tit. 43A, § 10-103 (9)
Rhode Island	Financial	'Exploitation' means an act or process of taking pecuniary advantage of an elderly person by use of **undue Influence**, harassment, duress, deception, false representation or false pretenses. R.I. Gen. Laws § 42-66-4.1(3)
South Carolina	Financial	(3) 'Exploitation' means: (a) causing or requiring a vulnerable adult to engage in activity or labor which is improper, unlawful, or against the reasonable and rational wishes of the vulnerable adult. Exploitation does not include requiring a vulnerable adult to participate in an activity or labor which is a part of a written plan of care or which is prescribed or authorized by a licensed physician attending the patient; (b) an improper, unlawful, or unauthorized use of the funds, assets, property, power of attorney, guardianship, or conservatorship of a vulnerable adult by a person for the profit or advantage of that person or another person; or (c) causing a vulnerable adult to purchase goods or services for the profit or advantage of the seller or another person through: (i) **undue influence**, (ii) harassment, (iii) duress, (iv) force, (v) coercion, or (vi) swindling by overreaching, cheating, or defrauding the vulnerable adult through cunning arts or devices that delude the vulnerable adult and cause him to lose money or other property. S.C. Code Ann. § 43-35-10(3)
Utah	General	'**Undue influence**' occurs when a person uses the person's role, relationship, or power to exploit, or knowingly assist or cause another to exploit, the trust, dependency, or fear of a vulnerable adult, or uses the person's role, relationship, or power to gain control deceptively over the decision making of the vulnerable adult. Utah Code Ann. § 62A-3-301(24)

STATE	CONTEXT	STATUTORY PROVISION(S) AND CITATION(S)
Vermont	Financial	'Exploitation' means: (A) Willfully using, withholding, transferring or disposing of funds or property of a vulnerable adult without or in excess of legal authority for the wrongful profit or advantage of another; (B) Acquiring possession or control of or an interest in funds or property of a vulnerable adult through the use of **undue influence**, harassment, duress, or fraud; (C) The act of forcing or compelling a vulnerable adult against his or her will to perform services for the profit or advantage of another; (D) Any sexual activity with a vulnerable adult when the vulnerable adult does not consent or when the actor knows or should know that the vulnerable adult is incapable of resisting or declining consent to the sexual activity due to age or disability or due to fear of retribution or hardship, whether or not the actor has actual knowledge of vulnerable status. Vt. Stat. Ann. tit. 33, § 6902(6)
Washington	General	'Exploitation' means an act of forcing, compelling, or exerting **undue influence** over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another. Wash. Rev. Code Ann. § 74.34.020(2)(d)
Wyoming	Financial	'Exploitation' means the reckless or intentional act taken by any person, or any use of the power of attorney, conservatorship or guardianship of a vulnerable adult, to: (A) obtain control through deception, harassment, intimidation or **undue influence** over the vulnerable adult's money, assets or property with the intention of permanently or temporarily depriving the vulnerable adult of the ownership, use, benefit or possession of his money, assets or property; Wyo. Stat. Ann. § 35-20-102(a)(ix)

[1] The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

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STATE OF ALASKA

DEPARTMENT OF REVENUE
Alaska Mental Health
Trust Authority

SEAN PARNELL, GOVERNOR

Office of the Long Term Care Ombudsman

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February 18, 2011

Senators French, Wielechowski, Paskvan, McGuire, and Coghill
Alaska State 27th Legislature
State Capitol
Juneau, AK

Re: SB 86 "Protection of vulnerable adults"

Dear Senators:

The Office of the Long Term Care Ombudsman investigates and resolves complaints made by, or on behalf of, older Alaskans in long term care facilities. In the first seven months of FY 2011, our office received 13 complaints alleging financial exploitation of seniors in assisted living or nursing homes. These cases can involve a family member or caregiver

- exerting undue influence over a senior's decision-making to access bank accounts.
- charging the senior for services and goods he or she did not receive.
- failing to provide a senior with needed care, so as to save the "family" inheritance, or
- forcing a senior to sign over deeds on houses or land.

While 13 cases may not seem significant, even a few instances of exploitation of seniors can lead to hundreds of thousands of dollars in lost assets.

The frustrating thing about these cases is that the exploitation happens so quickly that the State cannot step in fast enough to preserve the seniors' assets. Not only is it wrong for seniors to be taken advantage of in this way, but once the seniors' assets are gone, Medicaid or General Relief pick up the cost of the care. The State is essentially footing the bill for these losses.

I support SB 86, especially the provisions for financial protective orders, emergency conservatorships, and the addition of "undue influence" as a reportable harm. I hope you will give your support to this bill and protect our older Alaskans from financial predators.

Sincerely,

Diana Weber

Diana Weber, MS
State of Alaska Long Term Care Ombudsman
3745 Community Park Loop, Suite 200
Anchorage, AK 99508

SB

86

(FILE 2)

<TARGET><BILL>SB 86</BILL><SUBJECT>SB 86 (FILE 2)</SUBJECT><COMM>SJUD27</COMM></TARGET>

Civil protection orders are intended to protect a victim from abuse. If granted a civil protection order, the courts can order that the abusive person (respondent) not contact the victim (petitioner) in person, by phone, e-mail, text message or through a third party. A civil protection order can order a respondent to not come within 100 yards of the petitioner, their home and workplace, as well as other locations.

There are many types of civil protection orders. The Family Abuse Prevention Act (FAPA) restraining orders can prohibit contact by an abusive intimate partner, ex-partner, parent, child or other family member. The Elderly Persons and Persons with Disability Abuse Prevention Act (EPPDAPA), also known as an Elder Abuse order, can prohibit contact by an abusive family member, partner, ex-partner, child or caretaker.

Stalking Civil Protection Orders, also known as stalking orders, prohibit a person from stalking another person. This order does not require the petitioner and respondent to be intimate partners, ex-partners or family members. Juveniles are also eligible to obtain a civil stalking order against another juvenile or an adult and a restraining order in certain circumstances.

To apply for a Protection Order, please contact the Domestic Violence Resource Center's Protective Order Advocacy Program at (503) 846-3020.

Violations of Protective Orders
Violations of protective orders should be reported to the police. Violations of both restraining orders and stalking orders are mandatory arrest situations for police. Violations usually result in probation and mandated treatment. An offender may be sentenced to jail for any violation. A civil stalking order violation can be a felony under certain circumstances which could result in a prison sentence.

Civil Matters

§ 124.015[1]

Hearing upon request of respondent

- **relief**
- **settlement**
- **effect of proceedings**

(1) The court shall hold a hearing within 21 days following the request, and may cancel or change any order issued under ORS 124.020 (Ex parte hearing) if the respondent, elderly person or person with a disability requests a hearing pursuant to ORS 124.020 (Ex parte hearing) (9).

(2) In addition to the relief granted under ORS 124.020 (Ex parte hearing), the court, in a hearing held pursuant to subsection (1) of this section, may:

(a) Require either party to move from any residence whose title or right to occupy such premises is held jointly by the parties; **and**

(b) Assess against any party reasonable attorney fees and such costs as may be incurred in the hearing.

(3) (a) If the respondent is represented by an attorney, time for the hearing may be extended for up to five days at the request of the petitioner or guardian petitioner so that the petitioner or guardian petitioner may seek representation.

(b) If the elderly person or person with a disability is represented by an attorney, time for the hearing may be extended for up to five days at the request of the respondent or guardian petitioner so that the respondent or guardian petitioner may seek representation.

(4) The court may approve any consent agreement to bring about a cessation of abuse of the parties. However, the court may not approve a term in a consent agreement that provides for restraint of a party to the agreement unless the other party petitioned for and was granted an order under ORS 124.010 (Petition for relief). An order or consent agreement made under this section may be amended at any time and shall continue in effect for a period of one year from the date of the order issued under ORS 124.020 (Ex parte hearing).

(5) An order or agreement made under ORS 124.005 (Definitions for ORS 124.005 to 124.040) to 124.040 (Short title) or ORS 133.310 (Authority of peace officer to arrest without warrant) and 133.381 (Procedure in arrests for violation of

certain restraining orders) may not in any manner affect title to any real property.

(6) No undertaking shall be required in any proceeding under ORS 124.005 (Definitions for ORS 124.005 to 124.040) to 124.040 (Short title).

(7) Any proceeding under ORS 124.005 (Definitions for ORS 124.005 to 124.040) to 124.040 (Short title) shall be in addition to and not in lieu of any other available civil or criminal remedies.

(8) Notwithstanding any right or remedy established in ORS chapter 90 or ORS 105.105 (Entry to be lawful and peaceable only) to 105.168 (Minor as party in proceedings pertaining to residential dwellings), a petitioner or guardian petitioner may enforce an order issued under ORS 124.005 (Definitions for ORS 124.005 to 124.040) to 124.040 (Short title). [1995 c.666 §§5,5a; 2003 c.257 §3a; 2005 c.671 §9; 2007 c.70 §26]

§ 124.012[1]

Filing of petitions

• where contempt proceedings must be conducted

A petition under ORS 124.010 (Petition for relief) may be filed only in a county in which the petitioner or respondent resides. Any contempt proceedings for violation of a restraining order issued under ORS 124.005 (Definitions for ORS 124.005 to 124.040) to 124.040 (Short title) must be conducted by the court that issued the order, or by the circuit court for a county in which a violation of the restraining order occurs. If contempt proceedings are initiated in the circuit court for a county in which a violation of the restraining order occurs, the person initiating the contempt proceedings shall file with the court a copy of the restraining order, certified by the clerk of the court that issued the order. Upon filing of the certified copy of the restraining order, the court shall enforce the order as though that court had issued the order. [2003 c.289 §4]

§ 33.045[1]
Types of sanctions

(1) A court may impose either remedial or punitive sanctions for contempt.

(2) Confinement may be remedial or punitive. The sanction is:

(a) Remedial if it continues or accumulates until the defendant complies with the court's order or judgment.

(b) Punitive if it is for a definite period that will not be reduced even if the defendant complies with the court's order or judgment.

(3) A fine may be remedial or punitive. A fine is:

(a) Punitive if it is for a past contempt.

(b) Remedial if it is for continuing contempt and the fine accumulates until the defendant complies with the court's judgment or order or if the fine may be partially or entirely forgiven when the defendant complies with the court's judgment or order.

(4) Any sanction requiring payment of amounts to one of the parties to a proceeding is remedial.

(5) Any sanction imposed by a court for contempt is in addition to any civil remedy or criminal sanction that may be available as a result of the conduct constituting contempt. In any civil or criminal proceedings arising out of the conduct constituting contempt, the court shall take into consideration any contempt sanctions previously imposed for the same act. [1991 c.724 §4]

A Benchguide for

The Elderly Persons and Persons With Disabilities Abuse Prevention Act

ORS 124.005 – 124.040

Revised and updated as of March, 2008 by a working group of the Elder Law Section of the Oregon State Bar, including Steven A. Heinrich and Eric M. Kearney, with the assistance of Lisa N. Bertalan, Ellyn R. Stier, and Stephen R. Owen.

Revised and updated 2000 by the Honorable Michael S. Loy, Multnomah County Courts.

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March 2008

A Benchguide for
The Elderly Persons and Persons With Disabilities Abuse Prevention Act

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INTRODUCTION

In response to concerns regarding the abuse of the elderly and persons with disabilities the 1995 Oregon Legislature enacted specific legislation to restrain such abuse. The legislation has been amended and expanded since its enactment. While similar to provisions regarding the Family Abuse Prevention Act (FAPA), the Elderly Persons and Persons With Disabilities Abuse Prevention Act (EPPWDAPA) has some key distinctions meant to deal with specific concerns and circumstances regarding the abuse of the elderly and persons with disabilities. These differences include the type of alleged abuse that is actionable, potential remedies to address such abuse, and the role of agents who can appear in these actions on behalf of an elderly person or a person with a disability.

Under EPPWDAPA actions that can fall under the definition of abuse are expanded and the court has greater remedial powers to address such abuse. Under FAPA, abuse is generally defined in terms of attempting, threatening, or using force to physically injure or coerce a victim. The definition of abuse under EPPWDAPA is expanded to include not only physical violence but can also include the wrongful taking of property, neglect or failure to provide care or services, abandonment, derogatory conduct that causes emotional harm, and even the mailing of sweepstakes promotions. To remedy such claims of abuse the court can not only restrain the respondent from further contact with the victim, but can also order the respondent to return money and property to the petitioner, divest control of property, and follow instructions given by a guardian or conservator for the elderly person or the person with a disability.

EPPWDAPA allows this protection to be requested and put in place without the victim appearing personally before the court. Many times the victim may be too physically or mentally incapacitated to be able to appear and advocate for themselves. Other times the alleged victim may not want the protection of the court for a variety of reasons, including their support for the alleged abuser. In these instances the law specifically allows a guardian or guardian ad litem to apply for the relief without the presence of the alleged victim. The alleged victim is only required to be informed of the proceeding by written notice. In the absence an objection from the alleged victim, it is possible that he or she may never directly address the court except through a guardian or guardian ad litem.

The Elderly Persons and Persons With Disabilities Abuse Prevention Act is a powerful legal tool to attempt to address abuse of the elderly and people with disabilities. With the increasing numbers of elderly persons and persons with disabilities in our society, applying this specialized legal protection may unfortunately become more commonplace. A full understanding of the law and the circumstances regarding these potential victims is essential in addressing these issues. This bench guide is an attempt to aid the courts in this understanding.

I. THE PETITION

A. Venue

ORS 124.012

An Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPWDAPA) petition may be filed only in a county where the petitioner or the respondent resides.

ORS 124.005(9) and (3), ORS 124.020(5)

1. Caveat: "Petitioner" and "guardian petitioner" are separately defined. When filling out forms, a "guardian petitioner shall provide information about the (elderly) person (or person with a disability)," "rather than information about the petitioner." The statute is not clear, therefore, whether the relevant residence is that of the guardian petitioner, or the residence of the elderly person or person with a disability.

B. Definitions

ORS 124.010

An elderly person or a person or with a disability (or a "guardian petitioner" on behalf of such a person) may seek relief under EPPWDAPA when:

1. Background.

   a. The elderly person or person with a disability has been the victim of "abuse," as defined in ORS 124.005(1) within the preceding 180 days; and

   b. The elderly person or person with a disability is "in immediate and present danger of further abuse by the abuser."

2. Specific Definitions.

   a. Elderly Person.

ORS 124.005(2)

Under EPPWDAPA, an "elderly person" is "a person 65 years of age or older who is not subject to ORS 441.640 to ORS 441.665."

ORS 441.640 to ORS 441.685

These statutes deal with the requirement to report abuse of a resident of a long term care facility. The only persons who seem technically to "be subject to" ORS 441.640 to ORS 441.685 are persons who are required to

make reports. This plain reading of the statute results in what is apparently the correct result. i.e. despite the restrictions that initially appear to restrict the court from granting relief under EPPWDAPA simply because a victim is a resident of a nursing home or other long term care facility, a close reading of the statutes in question appears to render this restriction a nullity. Any other interpretation would have the inconsistent result of allowing a person with a disability who lives in a long term care facility to avail herself or himself of the protections of ORS 124.005 et seq, while restricting elderly residents of the same facility from receiving the same protections.

b. Person With A Disability.

A "person with a disability" is a person who

ORS 124.005(8)(a);
ORS 410.040(7)(b)

I) Meets the criteria in ORS 410.040(7)(b) by being a person with a mental or physical disability who is:

i) mentally retarded, developmentally disabled, or mentally or emotionally disturbed and resides in or needs placement in a residential program administered by the Department of Human Services; or

ii) an alcohol or drug abuser and resides in or needs placement in a residential program administered by the Department of Human Services; or

iii) Otherwise has a physical or mental disability; or

ORS 124.005(8)(b);
ORS 410.715

II) Suffers brain injury caused by extrinsic forces which results in the person suffering a loss of cognitive, psychological, social, behavioral or physiological function for a sufficient time to affect that person's ability to perform activities of daily living.

c. Guardian Petitioner.

ORS 124.005(3)

A guardian petitioner is a guardian or a guardian ad litem for an elderly person or a

person with a disability who files a petition under ORS 124.005 to ORS 124.040 on behalf of the person.

ORS 124.010(7)

Note: The elderly person or person with a disability retains rights to be represented, have access to records, file objections, request a hearing, and present evidence and cross examine witnesses if a guardian petitioner files an EPPWDAPA petition.

ORS 124.005(1)

d. Abuse.

Unlike the Family Abuse Prevention Act (FAPA), the EPPWDAPA does not limit "abuse" to that between family or household members. "Abuse" under the EPPWDAPA means any of the following:

ORS 124.005(1)(a)

I) Any physical injury caused by other than accidental means or that appears inconsistent with the explanation given of the injury;

ORS 124.005(1)(b)

II) Neglect that leads to physical harm through withholding services necessary to maintain health and well-being;

ORS 124.005(1)(c)

III) Abandonment, including deserting or willfully forsaking an elderly person or a person with a disability, or withdrawing or neglecting duties and obligations that a care giver or other person owes an elderly person or a person with a disability;

ORS 124.005(1)(d)

IV) Willfully inflicting physical pain or injury;

ORS 124.005(1)(e)

V) Using derogatory or inappropriate names, phrases or profanity, ridicule, harassment, coercion, threats, cursing, intimidation, or inappropriate sexual comments or conduct of such a nature as to threaten significant physical or emotional harm to the elderly person or person with a disability;

(Note the potential for use of the EPPWDAPA process by participants in a domestic situation, particularly relating to dissolution of marriage or separation, involving persons over

65 years of age, or persons with a disability, who may seek to gain advantages where the situation does not rise to a level where relief could be granted under FAPA. See also ORS 124.010(4) requiring disclosure of any such pending proceedings.)

ORS 124.005(1)(f)

VI) Causing any sweepstakes promotion to be mailed to an elderly person or a person with a disability who spent more than $500 in the preceding year on sweepstakes, provided that the elderly person or person with a disability represented to the court that the person felt the need for the court's assistance to prevent the person from incurring further expense;

ORS 124.005(1)(g)

VII) Wrongfully taking or appropriating money or property, or knowingly subjecting an elderly person or a person with a disability, to alarm by conveying a threat to wrongfully take or appropriate property of the person, which threat would reasonably be expected to cause the person to believe that the threat would be carried out; or

Church v. Woods, 190 Or. App. 112, 77 P3d 1150, 2003

This case discusses "wrongful" and "taking" in the context of a similar statute, ORS 124.100, which relates to civil actions for abuse of vulnerable persons. Of particular note is the court's discussion of "improper motive" and "improper means" as they relate the concept "wrongful;" as well as the court's discussion of what constitutes a taking, especially as regards joint ownership, right of survivorship, etc. regarding both real and personal property, and regarding both tangible and intangible property.

ORS 124.005(1)(h)

VIII) Sexual contact with a nonconsenting elderly person or person with a disability considered incapable of consenting to a sexual act as described in ORS 163.315 (statutory rape), and as defined in ORS

163.305 (definitions).

e. Immediate and Present Danger.

ORS 124.020(4)

"Immediate and present danger of further abuse by the abuser" includes but is not limited to situations in which the respondent has recently threatened the elderly person or person with a disability with additional abuse.

ORS 124.005

f. Other Defined Terms.

Other terms specially defined for the purposes of EPPWDAPA include:

I. "Interfere" (to hinder or impede);

II. "Intimidate" (to compel or deter conduct by a threat);

III. "Menace" (to act in a threatening manner);

IV. "Molest" (to annoy, disturb or persecute with hostile intent or injurious effect);

V. "Sweepstakes" (a procedure for awarding a prize based on chance; or in which a person is required to purchase, pay something of value, or make a donation as a condition of winning a prize or receiving or obtaining information about a prize; or which is advertized in a way to create a reasonable impression that such a payment, purchase or donation is a condition of winning or receiving information about a prize; and

VII. "Sweepstakes promotion" (an offer to participate in a sweepstakes).

C. Limitations - Persons Against Whom a Petition May NOT Be Filed

ORS 124.010(8)

An elderly person or a person with a disability may not file a petition under ORS 124.005 to 124.040 against a guardian or a conservator of the person.

Note: Although an elderly person or a person with a

disability cannot file an EPPWDAPA against their guardian or conservator, the statute is silent as to whether a guardian petitioner may file an EPPWDAPA petition against a guardian or a conservator of an elderly person or a person with a disability.

D. Time Frames

ORS 124.010(1)

An EPPWDAPA petition must allege both of two different time frames:

ORS 124.010(1)

1. That the prior abuse occurred within the 180 days preceding the filing of the EPPWDAPA petition.

ORS 124.010(6)

   a. Note: Time when the respondent is incarcerated, or has a principal residence more than 100 miles from the principal residence of the elderly person or person with a disability, is not counted as part of this 180-day period.

ORS 124.010(1)

2. That petitioner is in immediate and present danger of further abuse from respondent.

ORS 124.020(4)

   a. Immediate and present danger includes situations in which the respondent has recently threatened further abuse.

E. Requirement to Disclose Other Actions

ORS 124.010(4)

An EPPWDAPA petition must disclose the existence of any of the following pending between the parties:

1. Any other EPPWDAPA proceedings; or

2. Any "Abuse Prevention Act" proceedings; or

3. Any marital annulment, dissolution or separation proceedings; or

4. Any protective proceedings under ORS Chapter 125 (including guardianships and conservatorships).

F. Moving Does Not Affect Rights

ORS 124.010(3)

The right to petition for relief under EPPWDAPA is not affected if the elderly person or a person with a disability

has left the residence or household to avoid abuse.

G. Amendments to Petition

1. Amendments of Petitioner Permitted.

   Nothing in ORS ch. 124 prohibits petitioner from amending the EPPWDAPA petition after filing and before hearing.

ORS 124.020(9)(c)

2. Amendments of Objector Permitted.

   The contested hearing that is set following service on the respondent and/or the elderly person or person with a disability is not limited to issues raised in the request for hearing form.

ORS 124.020(9)(c)

   a. However, if the respondent or the elderly person or person with a disability seeks to raise such an issue the Petitioner of Guardian Petitioner is entitled to a reasonable continuance.

H. Burden and Standard of Proof

ORS 124.010(2)

1. Burden of Proof.

   The petitioner or guardian petitioner has the burden of proof for all claims made under ORS 124.005 to 124.040.

ORS 124.010(2)

2. Standard of Proof.

   The standard of proof is a preponderance of the evidence for all claims made under ORS 124.005 to 124.040.

I. Notice to Elderly Person or Person with a Disability

ORS 124.024(1) and (2)

1. Copies of Documents and Statement of Rights.

   If an EPPWDAPA petition is filed by a guardian petitioner, that person must give notice to the elderly person or the person with a disability or the petition, order, and related forms described in ORS 124.020(6), and must also serve on that person a notice that contains a statement of that person's rights to contact and retain counsel, have access to personal records, file objections, request a hearing, and present evidence and cross examine witnesses.

ORS 124.024(3)

2. Form of Notice.

Notice must be similar to that provided to a respondent.

ORS 124.024(3)

3. Objection Form To Be Included.

The notice must contain an objection form that the elderly person or person with a disability can mail to the court.

ORS 124.024(4)

4. Personal Services Required Within 72 Hours.

This notice must be personally served on the elderly person or person with a disability not later than 72 hours after the court issues a restraining order under ORS 124.020.

The statute is not clear what the result is if such service is not completed within 72 hours.

ORS 124.024(4)

5. Proof of Service Before Contested Hearing.

This notice must be personally served on the elderly person or person and proof of service thereof filed in the proceeding before a contested hearing can be held pursuant to ORS 124.015.

The statute is not clear as to the result when a petition filed by a guardian petitioner, if service on the elderly person or person with a disability is not obtained, but the respondent requests a hearing, and the 21 day period within which the hearing must be held runs.

J. Clerk's Duties

The court clerk has several duties under EPPWDAPA.

1. Information.

ORS 124.010(5)

The court clerk must give the elderly person information provided by the Department of Human Resources about local adult protective services, domestic violence shelters, and local legal services available.

2. Forms, Instructions.

ORS 124.020(9)(a)

The clerk must make available an instruction

brochure and forms for the petition, order, and related forms. The forms must be in substantially the form prescribed by statute.

(Note that OSCA Legal Counsel has developed standard forms and instructions, which OSCA updates as needed to reflect new legislation and case law, and comments from judges and court staff who review the updates.)

3. Copies.

ORS 124.020(7)(a)

If the court allows the petition, the clerk of the court must provide, without charge, the number of certified true copies of the petition and order necessary to effect service on the respondent. The court clerk must also deliver a true copy of the petition and order to the county sheriff for service, unless the court finds service is unnecessary because respondent appeared in person in court.

4. Notify Petitioner if Documents Returned by Sheriff.

ORS 124.020(8)(a)

If the sheriff returns the order and petition to the court, because they are incomplete, the Clerk shall notify the Petitioner or Guardian Petitioner.

5. If Service Not Achieved by Sheriff.

ORS 124.020(8)(b)

If the sheriff cannot achieve service, the sheriff shall notify the petitioner or guardian petitioner, and if that person does not respond within 10 days, the sheriff shall file a return to the clerk showing service was not completed.

6. Provide Hearing Request Form, and Give Notice of Hearing.

ORS 124.020(9)(a)

The respondent, or the elderly person or the person with a disability, may request a court hearing upon any relief granted within 30 days after being served with an EPPWDAPA restraining order or notice thereof. The clerk shall provide a hearing request form in substantially the form provided in statute. The clerk shall also notify the petitioner or guardian petitioner of the time and date of the hearing, and shall provide a copy of the request for hearing.

7. Deliver Proof of Service To Sheriff.

ORS 124.030(1)

The clerk, or any other person serving a restraining order including a security amount and an expiration date, shall deliver to the sheriff a true copy of the proof of service and a true copy of the Petition and a true copy of the Order.

8. Deliver Notice of Early Termination.

ORS 124.030(3)

When an EPPWDAPA restraining order is terminated before the expiration date, the clerk shall deliver a true copy of the termination order upon the sheriff.

K. No Filing, Service, or Hearing Fees

ORS 124.020(7)(d)

The court cannot charge filing, service, or hearing fees. The sheriff cannot charge service fees.

II. Uncontested, Immediate Hearing

A. Ex Parte Hearing Required

ORS 124.020(1)

An EPPWDAPA petitioner is entitled to an ex parte hearing, in person or by telephone, on the same day that the petition is filed or the next judicial day.

B. Testimony May Establish Required Showing

ORS 124.020(3)

1. Who May Testify To Meet Requirement.

EPPWDAPA explicitly provides that the required showing may be made by testimony of the elderly person or person with a disability, a guardian or a guardian ad litem of the person, witnesses to the abuse, or adult protective services workers who have conducted an investigation.

ORS 124.020(1)

2. Under EPPWDAPA there must be a showing that:

   a. The elderly person or a person with a disability;

   b. Has been the victim of abuse;

   c. Committed by the respondent;

   d. Within 180 days preceding the filing of the petition; and that

   e. There is an immediate and present danger of

further abuse to the person.

f. Note that many of these terms are defined and discussed above, and that their statutory definitions may be different from the more common meanings of some of these terms.

ORS 124.020(5)

3. Error in Order Form.

Forms printed in accordance with statute, including the pre-printed form for the Order, contain errors, in that they fail to clarify that "petitioner" should often be interpreted as "elderly person or person with a disability." Although there is a statutory correction (ORS 124.020(5)) in this regard for forms to be filled out by the petitioner or guardian petitioner, there is no such statutory correction for the form of the Order. The court should, nonetheless, make this substitution where common sense dictates, as, for example, in the section requiring a finding that there has been abuse of "the petitioner."

ORS 124.010(4).

4 Intersection of FAPA and EPPWDAPA Processes.

Note also the discussion above regarding the potential use of the EPPWDAPA process by persons who may be seeking advantages in dissolution proceedings, as also discussed above, and the requirement that any such proceedings which are pending be reported to the court per ORS 124.010(4).

C. Burden and Standard of Proof

ORS 124.010(2)

As outlined above, the petitioner or guardian petitioner has the burden of proof in this and all hearings under EPPWDAPA, with the standard of a preponderance of the evidence.

III. Relief

A. Mandatory (Not Discretionary) Relief

ORS 124.020(1)

At the initial hearing the court must order the following relief if petitioner or guardian petitioner requests it, **and** the court finds that:

ORS 124.010(1);

- respondent abused the elderly person or

also see benchguide above at section (I)(B)(2)(d)

person with a disability within the preceding 180 days; and

ORS 124.010;
also see benchguide above at section (I)(B)(2)(d)

- the elderly person or person with a disability is in immediate and present danger of further abuse by respondent.

Note: When a guardian petitioner files a petition, and appears at the ex parte hearing, the elderly person or person with a disability may or may not be present at this ex parte hearing. However, issues may not be raised at this ex parte hearing regarding an objection to the requested relief or regarding other wishes of the elderly person or person with a disability. Such issues are to be addressed through the objection hearing process under ORS 124.020 as set forth below in section IV. Relief requested by a guardian petitioner, if legally appropriate, is to be granted by the court at this ex parte hearing, as the court is without discretion in many of these matters if the specific relief is requested by the guardian petitioner, although the guardian petitioner may have discretion as to whether to request such relief.

1. Restraint from further abuse

ORS 124.020(1)(c)

Order that the respondent be restrained from doing the following to the elderly person or person with a disability:

ORS 124.020(1)(c); 124.005(1)

a. **Abusing**, defined in ORS 124.005(1);

ORS 124.020(1)(c); 124.005(5)

b. **Intimidating**, defined as compelling or deterring conduct by a threat;

ORS 124.020(1)(c); 124.005(7)

c. **Molesting**, defined as annoying, disturbing, or persecuting with hostile intent or injurious effect;

ORS 124.020(1)(c); 124.005(4)

d. **Interfering with**, defined as interposing in a way that hinders or impedes;

ORS 124.020(1)(c); 124.005(6)

e. **Menacing**, defined as acting in a threatening manner;

ORS 124.020(1)(c)

f. **Attempting** to abuse, intimidate, molest, interfere with or menace the elderly person or person with a disability;

ORS 124.020(1)(e)(A);
ORS 124.005(1)(f)

g. **Mailing** any sweepstakes promotion to the elderly person or person with a disability, effective not less than 150 days after entry of the order.

2. Restraint from Entry Onto Specified Premises

ORS 124.020(1)(d)

If requested by petitioner or guardian petitioner, order that respondent be restrained from entering, or attempting to enter, any premises if the court deems it necessary to prevent respondent from abusing, intimidating, molesting, interfering with or menacing the elderly person or person with a disability.

3. Ouster

ORS 124.020(1)(a)

If requested by petitioner or guardian petitioner, order respondent to move out of the residence of the elderly person or person with a disability if:

a. the residence is solely in name of the elderly person or person with a disability; or

b. the elderly person or person with a disability and the respondent jointly own or rent the residence; or

c. the respondent is married to the elderly person or person with a disability.

4. Police "Standby" for Essential Personal Property

ORS 124.020(1)(b);

If requested by petitioner or guardian petitioner, order that a peace officer accompany the party moving from the residence of the elderly person or person with a disability to remove *essential* personal effects.

ORS 124.025(1)&(2)

a. The "standby" time is not required to exceed 20 minutes

b. The peace officer may temporarily interrupt the removal of property at any time.

c. Police "standby" is available on only one occasion.

ORS 124.020

d. Essential person effects include, but are not limited to: clothing, toiletries, medications, Social Security cards, birth certificates,

identification and tools of the trade.

ORS 107.718(d)

Note: The statute does not define *essential personal effects* but see ORS 107.718(d) which deals with FAPA restraining orders and lists the above items as essential personal property.

5. Security Amount

ORS 124.030(4)

Specify the amount of the bond for violation of the restraining order. Although the statutory form specifies a default bond amount at $5,000, the court may impose a higher or lower security amount.

6. Notice to Respondent

ORS 124.020(6), See Form - Notice to Respondent

Notice of respondent's right to request a hearing must accompany order in order to comply with the statute.

7. Notice to Elderly Person or Person With a Disability

ORS 124.024(1)

Guardian petitioners must give notice of petition, order, and related forms described in ORS 124.020(6) to the elderly person or person with a disability named in the petition.

ORS 124.024(4)

Such notice must be provided within seventy-two hours after the court issues a restraining order under ORS 124.020.

8. Sweepstakes Promotions

In addition to restraining the respondent from mailing any sweepstakes promotion to the elderly person or person with a disability, the court can order the respondent to:

ORS 124.020(1)(e)

a. Remove the elderly person or person with a disability from the sweepstakes mailing list (within 150 days of the date the order is entered); or place the elderly person or person with a disability on a list of persons to whom the promotions may not be mailed; *and*

b. Immediately refund any payment received in any form from the elderly person or person with a disability after the court order is

entered.

B. Discretionary Relief

1. Authority to Order the Return of Wrongfully Appropriated Money or Property

ORS 124.020(2)(a)

If the court finds that the elderly person or person with a disability has been the victim of abuse as defined in ORS 124.005(1)(g) the court may order only that relief which the court considers *necessary* to prevent or remedy the ***wrongful*** taking or appropriation of the money or property of the elderly person or person with a disability, including but not limited to the relief which is set forth below at III.B.1.a through d.

ORS 124.005 (1)(g)

Note: ORS 124.005(1)(g): includes the following as one definition of abuse. "Wrongfully taking or appropriating money or property, or knowingly subjecting an elderly person or person with disabilities to alarm by conveying a threat to wrongfully take or appropriate money or property, which threat reasonably would be expected to cause the elderly person or person with a disabilities to believe that the threat will be carried out."

Church v. Woods, 190 Or. App. 112, 118-9, 77 P.3d 1150 (2003)

Note: *see Church v. Woods,* 190 Or. App. 112, 118-9, 77 P.3d 1150 (2003) (internal citations omitted.) defining wrongfully: "[Wrongfully's] ordinary meaning is full of wrong: INJURIOUS, UNJUST, UNFAIR." More specifically, it has a well-understood meaning in the law of torts with regard to interference with legal interests. Conduct generally is "wrongful" if it is carried out in pursuit of an improper motive or by improper means. "Improper means" must be independently wrongful by reason of statutory or common law, beyond the mere fact of the injury complained of. Improper means, for example, include violence, threats, intimidation, deceit, misrepresentation, bribery, unfounded litigation, defamation and disparaging falsehood. The use of undue influence also constitutes an "improper means," in that it involves the procurement of an unfair advantage. That dual meaning of the word "wrongful," focusing alternatively on the defendant's motives or the means by

which property was taken, is sensible in the context of ORS 124.110(1)(a). Accordingly, we adopt it."

ORS 124.020(2)(a)(A)

a. Directing the respondent to **refrain from exercising control** over the money or property of the elderly person or person with a disability;

ORS 124.020(2)(a)(B)

b. Requiring the respondent to **return custody** or control of the money or property of the elderly person or person with a disability to him or her;

ORS 124.020(2)(a)(C)

c. Requiring the **respondent to follow the instructions** of the guardian or conservator of the elderly person or person with a disability; or

ORS 124.020(2)(a)(D)

d. **Prohibiting** the respondent from **transferring the money or property** of the elderly person or person with a disability to any person other than the elderly person or person with a disability.

Note: The statutory order form does not list the above options as possible relief and therefore a pro se petitioner may not know to write them in the "other relief" requested section of the form. The court should inquire if petitioner wants to include any of these options when executing an order where petitioner has alleged the money or property has been wrongfully appropriated.

ORS 133.310(3)

Note: As noted below there are other consequences to ordering the return of property. At the ex parte hearing the respondent has had no opportunity to contest ownership of the allegedly wrongfully obtained property. ORS 133.310(3) requires a peace office to arrest and take into custody a person without a warrant when the officer has probable cause to believe that person has been served with a restraining order and has violated that order. A respondent in possession of allegedly wrongfully obtained property would therefore be subject to mandatory arrest.

C. Additional Discretionary Relief

ORS 124.020(1)(f)

The court may order any additional relief it considers necessary to provide for the safety and welfare of the elderly person or person with a disability.

D. Limits on Relief

The court may not use a restraining order issued under ORS 124.005 to 124.040 to:

ORS 124.020(2)(b)(A)

1. Allow any person other than the elderly person or person with a disability to assume responsibility for managing any money or property of the elderly person or person with a disability;

ORS 124.020(2)(b)(B)

2. Provide relief that is more appropriately obtained in a protective proceeding filed under ORS chapter 125 (Protective Proceedings).

    a. This includes, but is not limited to, giving control or management of the financial accounts or property of the elderly person or person with a disability for any purpose other than necessary to prevent or remedy the wrongful taking or appropriation of money described in 124.005(1)(g).

E. Entry Into Law Enforcement Data System

ORS 124.030 (1)

1. When a EPPWDAPA restraining order is issued and the person to be restrained has actual notice thereof, the clerk of the court shall deliver:

    a. a true copy of the affidavit of proof of service,

    b. a copy of the petition, and

    c. a true copy of the order to a county sheriff.

2. Upon receipt of the order the county sheriff shall entered the order into the Law Enforcement Data System (LEDS), which gives notice to all law enforcement agencies of the order. The order will be fully enforceable in any county in the state.

F. Duration of Relief

ORS 124.020(1)

1. Order remains in effect for a period of one year; or

2. Until the order is withdrawn or amended, whichever is sooner.

G. Dismissal

1. By Written Order

ORS 124.030(2)

The court may dismiss a restraining order at any time, but only by written order.

EPPWDAPA provides no specific standard or guidance for dismissal of restraining orders, and court practices vary considerably. ORCP 54(A)(1) permits dismissal without court order upon filing of a notice by the plaintiff.

2. Notarized Signature Required

ORS 124.030(2)

A restraining order entered under ORS 124.020 can be terminated upon a motion for dismissal by the petitioner or guardian petitioner, only if the motion is notarized.

H. Renewals

1. For Good Cause Shown

ORS 124.035

The court may renew an EPPWDAPA order for "good cause shown" regardless of whether there has been further abuse.

2. Due process may require notice to respondent and an opportunity for a hearing on the renewal.

I. Early Termination

ORS 124.030(3)

When the order is terminated before it expires, the clerk of the court must deliver a true copy of the termination order to the sheriff with whom the original order was filed. The sheriff must then remove the original order from the Law Enforcement Data System.

IV. The Contested Hearing Process

Either the respondent or the elderly person or person with a disability (in a case brought by a guardian petitioner) may request a hearing to object to the order or to its particular provisions.

A. Contested Hearing Requests

1. Timing

ORS 124.020(9)(a)

The respondent or the elderly person or person with a disability must request the hearing within 30 days after the restraining order is served on the

person who requests the hearing

2. Forms

ORS 124.020(9)(a)

The clerk must make the hearing request form available substantially in the form provided in ORS 124.020(6).

B. Scheduling the Contested Hearing

ORS 124.015(1)

1. The court must hold the hearing within 21 days of the hearing request.

Strother and Strother, 130 Or App 624, 630, 883 P2d 249 (1994), *rev den* 320 Or 508 (1995)

However if respondent or the elderly person or person with a disability causes or contributes to the delay, the 21-day rule may not apply. Per *Strother and Strother*, 130 Or App 624, 630, 883 P2d 249 (1994), *rev den* 320 Or 508 (1995), if the delay is attributable to the person requesting the hearing, the hearing may be postponed beyond 21 days in an appropriate circumstance.

ORS 124.015(3)

2. If respondent or the elderly person or person with a disability is represented by counsel and another party so requests, the court may extend the time for hearing up to five (5) days, to allow other parties to seek representation.

C. Contested Hearing Notice Requirements

ORS 124.020(9)(b)

The clerk of the court shall notify all parties of a scheduled contested hearing, and the petitioner or guardian petitioner shall give the clerk sufficient information to allow such notification.

D. Settlement

ORS 124.015(4)

1. The court can approve any consent agreement to bring about a cessation of the abuse.

ORS 124.015(4)

2. However, the settlement cannot provide for restraint of a party unless the other party petitioned for and was granted an order under ORS 124.010.

ORS 124.015(4)

3. Thus, the settlement cannot provide for mutual restraint unless both parties petitioned for and received orders under ORS 124.010.

ORS 124.020(2)(b)(A)

4. In addition, the court cannot use a restraining order

under ORS 124.005 to 124.040 to allow a person other than the elderly person or the person with a disability to assume responsibility for managing the money or property of the person.

ORS 124.020(2)(b)(B)

5. Nor can the court use a restraining order under ORS 124.005 to 124.040 to grant relief that is more appropriately filed under ORS chapter 125 (protective proceedings, including guardianships and conservatorships).

E. Subject Matter of Contested Hearing

ORS 124.020(9)(c)

1. The EPPWDAPA hearing is not limited to issues that respondent raised in the request for hearing.

ORS 124.020(9)(c)

2. The EPWPDAPA hearing may include testimony from witnesses to the abuse and from adult protective services workers.

   Although not specified in ORS 124.020(9), other witnesses may, of course, also testify, as may be appropriate.

ORS 124.020(9)(c)

3. If the respondent, elderly person, or person with a disability seeks to raise an issue at the hearing not previously raised in the request form, the petitioner or guardian petitioner is entitled to a reasonable continuance to prepare a response.

F. Contested Hearing Procedures

1. EPPWDAPA does not specify what takes place at the hearing.

ORS 124.020(9)(d)

2. The court, during the hearing, must exercise its discretion to protect the elderly person or person with a disability from traumatic confrontation with respondent.

ORS 124.020(9)(c)

3. The EPPWDAPA contested hearing may be held in person or by phone.

ORS 45.400

4. Nothing in EPPWDAPA specifically overrides ORS 45.400 relating to telephone testimony, which requires 30 days prior written notice of telephone testimony, but which allows shorter notice if good cause is shown.

ORS 45.400(3)

5. ORS 45.400 contains significant restrictions setting forth situations when telephone testimony is not allowed.

G. Evidentiary Issues

ORS 40.015(2)

1. The Oregon Evidence Code applies to EPPWDAPA hearings.

ORS 124.010(2)

2. The burden of proof is on the petitioner or guardian petitioner to prove a claim by a preponderance of evidence.

H. Available Relief

ORS 124.015(1)

1. The court may cancel or change any order issued under ORS 124.020.

ORS 124.015(2)

2. ORS 124.015 provides relief that is "in addition to the relief granted under ORS 124.020." See Section III., above, for relief available under ORS 124.020. In addition to that relief, under ORS 124.015, the court may also order any of the following:

ORS 124.015(2)(a)

a. Require either party to move from any residence whose title or right to occupy is held jointly by the parties.

> As with many other situations, although the statute speaks of "either party" in this circumstance, this appears to be a function of the fact that the statute was not comprehensively revised when it was changed to allow for petitions by guardian petitioners. When this portion of the statute was written, the only "parties" were the respondent and the elderly person or person with a disability.

ORS 124.015(2)(b)

b. The court may assess against any party reasonable attorney fees and costs incurred in the hearing.

ORS 124.015(4)

c. The court may approve a consent agreement to bring about a cessation of abuse. There are significant restrictions on the content of settlement agreements and restraining orders that are available, however, despite the initial

impression given by the first sentence of ORS 124.015(4). See section IV.D., above.

ORS 124.030(4)

d. The court can increase the security amount that was set at the ex-parte hearing for violation of the order.

V. Foreign Restraining Orders

ORS 24.190

See *FAPA Benchguide* for a discussion of the general statutory provisions regarding foreign restraining orders and their effect.

VI. Contempt—Remedial and Punitive Sanctions

A. Enforcement

ORS 124.015(8)

Notwithstanding ORS chapter 90 (Landlord and Tenant Law) and ORS sections 105.105 to 105.168 (FED statute), a petitioner may enforce an order issued under EPPWDAPA.

B. Contempt Proceedings

As under FAPA, EPPWDAPA restraining orders are enforced through ORS chapter 33 contempt proceedings.

1. See *FAPA Benchguide* on contempt procedures and remedial and punitive sanctions.

ORS 166.293(3)(a)

2. Note that ORS 166.293(3)(a) (providing the court authority to revoke a concealed weapons permit) does not apply when an EPPWDAPA order is violated.

ORS 124.030(4)

3 Pending a contempt hearing for violation of an EPPWDAPA restraining order, a person arrested and taken into custody pursuant to ORS 133.310 may be released as provided in ORS 135.230 to 135.290.

California

§ 15610.07

(a) An elder or dependent adult who has suffered abuse as defined in Section 15610.07 may seek protective orders as provided in this section.

(b) For the purposes of this section, "protective order" means an order that includes any of the following restraining orders, whether issued ex parte, after notice and hearing, or in a judgment:

(1) An order enjoining a party from abusing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, or coming within a specified distance of, or disturbing the peace of the petitioner, and, in the discretion of the court, on a showing of good cause, of other named family or household members or a conservator, if any, of the petitioner.

(2) An order excluding a party from the petitioner's residence or dwelling, except that this order shall not be issued if legal or equitable title to, or lease of, the residence or dwelling is in the sole name of the party to be excluded, or is in the name of the party to be excluded and any other party besides the petitioner.

(3) An order enjoining a party from specified behavior that the court determines is necessary to effectuate orders described in paragraph (1) or (2).

(c) An order may be issued under this section, with or without notice, to restrain any person for the purpose of preventing a recurrence of abuse, if an affidavit shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse of the petitioning elder or dependent adult.

(d) (1) Upon filing a petition for protective orders under this section, the petitioner may obtain a temporary restraining order in accordance with Section 527 of the Code of Civil Procedure, except to the extent this section provides a rule that is inconsistent. The temporary restraining order may include any of the protective orders described in subdivision (b). However, the court may issue an ex parte order excluding a party from the petitioner's residence or dwelling only on a showing of all of the following:

(A) Facts sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises.

(B) That the party to be excluded has assaulted or threatens to assault the petitioner, other named family or household member of the petitioner, or conservator of the petitioner.

(C) That physical or emotional harm would otherwise result to the petitioner, other named family or household member of the petitioner, or conservator of the petitioner.

(2) If a temporary restraining order is granted without notice, the matter shall be made returnable on an order requiring cause to be shown why a permanent order should not be granted, on the earliest day that the business of the court will permit, but not later than 20 days or, if good cause appears to the court, 25 days from the date the temporary restraining order is granted, unless the order is otherwise modified or terminated by the court.

(e) The court may issue, upon notice and a hearing, any of the orders set forth in subdivision (b). The court may issue, after notice and hearing, an order excluding a person from a residence or dwelling if the court finds that physical or emotional harm would otherwise result to the petitioner, other named family or household member of the petitioner, or conservator of the petitioner.

(f) In the discretion of the court, an order issued after notice and a hearing under this section may have a duration of not more than three years, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party. These orders may be renewed upon the request of a party, either for three years or permanently, without a showing of any further abuse since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party. The failure to state the expiration date on the face of the form creates an order with a duration of three years from the date of issuance.

(g) Upon the filing of a petition for protective orders under this section, the respondent shall be personally served with a copy of the petition, notice of the hearing or order to show cause, temporary restraining order, if any, and any affidavits in support of the petition. Service shall be made at least five days before the hearing. The court may, on motion of the petitioner or on its own motion, shorten the time for service on the respondent.

(h) The court may, upon the filing of an affidavit by the applicant that the respondent could not be served within the time required by statute, reissue an order previously issued and dissolved by the court for failure to serve the respondent. The reissued order shall be made returnable on the earliest day that the business of the court will permit, but not later than 20 days or, if good cause appears to the court, 25 days from the date of reissuance. The reissued order shall state on its face the date of expiration of the order.

(i) (1) If a person named in an order issued under this section, after a hearing, has not been served personally with the order but has received actual notice of the existence and substance of the order through personal appearance in court to hear the terms of the order from the court, no additional proof of service is required for enforcement of the order.

(2) If the person named in a temporary restraining order is personally served with the order and notice of hearing with respect to a restraining order or protective order based thereon, but the person does not appear at the hearing, either personally or by counsel, and the terms and conditions of the restraining order or protective order are identical to the temporary restraining order,

California

§ 15610.07

(a) An elder or dependent adult who has suffered abuse as defined in Section 15610.07 may seek protective orders as provided in this section.

(b) For the purposes of this section, "protective order" means an order that includes any of the following restraining orders, whether issued ex parte, after notice and hearing, or in a judgment:

(1) An order enjoining a party from abusing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, or coming within a specified distance of, or disturbing the peace of the petitioner, and, in the discretion of the court, on a showing of good cause, of other named family or household members or a conservator, if any, of the petitioner.

(2) An order excluding a party from the petitioner's residence or dwelling, except that this order shall not be issued if legal or equitable title to, or lease of, the residence or dwelling is in the sole name of the party to be excluded, or is in the name of the party to be excluded and any other party besides the petitioner.

(3) An order enjoining a party from specified behavior that the court determines is necessary to effectuate orders described in paragraph (1) or (2).

(c) An order may be issued under this section, with or without notice, to restrain any person for the purpose of preventing a recurrence of abuse, if an affidavit shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse of the petitioning elder or dependent adult.

(d) (1) Upon filing a petition for protective orders under this section, the petitioner may obtain a temporary restraining order in accordance with Section 527 of the Code of Civil Procedure, except to the extent this section provides a rule that is inconsistent. The temporary restraining order may include any of the protective orders described in subdivision (b). However, the court may issue an ex parte order excluding a party from the petitioner's residence or dwelling only on a showing of all of the following:

(A) Facts sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises.

(B) That the party to be excluded has assaulted or threatens to assault the petitioner, other named family or household member of the petitioner, or conservator of the petitioner.

(C) That physical or emotional harm would otherwise result to the petitioner, other named family or household member of the petitioner, or conservator of the petitioner.

(2) If a temporary restraining order is granted without notice, the matter shall be made returnable on an order requiring cause to be shown why a permanent order should not be granted, on the earliest day that the business of the court will permit, but not later than 20 days or, if good cause appears to the court, 25 days from the date the temporary restraining order is granted, unless the order is otherwise modified or terminated by the court.

(e) The court may issue, upon notice and a hearing, any of the orders set forth in subdivision (b). The court may issue, after notice and hearing, an order excluding a person from a residence or dwelling if the court finds that physical or emotional harm would otherwise result to the petitioner, other named family or household member of the petitioner, or conservator of the petitioner.

(f) In the discretion of the court, an order issued after notice and a hearing under this section may have a duration of not more than three years, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party. These orders may be renewed upon the request of a party, either for three years or permanently, without a showing of any further abuse since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party. The failure to state the expiration date on the face of the form creates an order with a duration of three years from the date of issuance.

(g) Upon the filing of a petition for protective orders under this section, the respondent shall be personally served with a copy of the petition, notice of the hearing or order to show cause, temporary restraining order, if any, and any affidavits in support of the petition. Service shall be made at least five days before the hearing. The court may, on motion of the petitioner or on its own motion, shorten the time for service on the respondent.

(h) The court may, upon the filing of an affidavit by the applicant that the respondent could not be served within the time required by statute, reissue an order previously issued and dissolved by the court for failure to serve the respondent. The reissued order shall be made returnable on the earliest day that the business of the court will permit, but not later than 20 days or, if good cause appears to the court, 25 days from the date of reissuance. The reissued order shall state on its face the date of expiration of the order.

(i) (1) If a person named in an order issued under this section, after a hearing, has not been served personally with the order but has received actual notice of the existence and substance of the order through personal appearance in court to hear the terms of the order from the court, no additional proof of service is required for enforcement of the order.

(2) If the person named in a temporary restraining order is personally served with the order and notice of hearing with respect to a restraining order or protective order based thereon, but the person does not appear at the hearing, either personally or by counsel, and the terms and conditions of the restraining order or protective order are identical to the temporary restraining order,

except for the duration of the order, then the restraining order or protective order may be served on the person by first-class mail sent to that person at the most current address for the person available to the court.

(3) The judicial form for orders issued pursuant to this subdivision shall contain a statement in substantially the following form:

"NO ADDITIONAL PROOF OF SERVICE IS REQUIRED IF THE FACE OF THIS FORM INDICATES THAT BOTH PARTIES WERE PERSONALLY PRESENT AT THE HEARING WHERE THE ORDER WAS ISSUED. IF YOU HAVE BEEN PERSONALLY SERVED WITH A TEMPORARY RESTRAINING ORDER OR EMERGENCY PROTECTIVE ORDER AND NOTICE OF HEARING, BUT YOU DO NOT APPEAR AT THE HEARING EITHER IN PERSON OR BY COUNSEL, AND A RESTRAINING ORDER OR PROTECTIVE ORDER IS ISSUED AT THE HEARING THAT DOES NOT DIFFER FROM THE PRIOR TEMPORARY RESTRAINING ORDER OR EMERGENCY PROTECTIVE ORDER, A COPY OF THE ORDER WILL BE SERVED UPON YOU BY MAIL AT THE FOLLOWING ADDRESS _____. IF THAT ADDRESS IS NOT CORRECT OR YOU WISH TO VERIFY THAT THE TEMPORARY OR EMERGENCY ORDER WAS MADE PERMANENT WITHOUT SUBSTANTIVE CHANGE, CALL THE CLERK OF THE COURT AT _____."

(j) (1) The court shall order the petitioner or the attorney for the petitioner to deliver, or the clerk of the court to mail, a copy of an order issued under this section, or a reissuance, extension, modification, or termination of the order, and any subsequent proof of service, by the close of the business day on which the order, reissuance, extension, modification, or termination was made, to each local law enforcement agency designated by the petitioner or the attorney for the petitioner having jurisdiction over the residence of the petitioner, and to any additional law enforcement agencies within the court's discretion as are requested by the petitioner. Each appropriate law enforcement agency shall make available information as to the existence and current status of these orders to law enforcement officers responding to the scene of reported abuse.

(2) An order issued under this section shall, on request of the petitioner, be served on the respondent, whether or not the respondent has been taken into custody, by any law enforcement officer who is present at the scene of reported abuse involving the parties to the proceeding. The petitioner shall provide the officer with an endorsed copy of the order and a proof of service, which the officer shall complete and send to the issuing court.

(3) Upon receiving information at the scene of an incident of abuse that a protective order has been issued under this section, or that a person who has been taken into custody is the respondent to that order, if the protected person cannot produce an endorsed copy of the order, a law enforcement officer shall immediately attempt to verify the existence of the order.

(4) If the law enforcement officer determines that a protective order has been issued, but not served, the officer shall immediately notify the respondent of the terms of the order and where a written copy of the order can be obtained, and the officer shall at that time also enforce the order. The law enforcement officer's verbal notice of the terms of the order shall constitute service of the order and is sufficient notice for the purposes of this section and for the purposes of Section 273.6 of the Penal Code.

(k) Nothing in this section shall preclude either party from representation by private counsel or from appearing on the party's own behalf.

(l) There is no filing fee for a petition, response, or paper seeking the reissuance, modification, or enforcement of a protective order filed in a proceeding brought pursuant to this section.

(m) Pursuant to paragraph (4) of subdivision (b) of Section 6103.2 of the Government Code, a petitioner shall not be required to pay a fee for law enforcement to serve an order issued under this chapter.

(n) The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any.

(o) (1) An order issued pursuant to this section shall prohibit the person subject to it from owning, possessing, purchasing, receiving, or attempting to purchase or receive, a firearm.

(2) Paragraph (1) shall not apply to a case consisting solely of financial abuse unaccompanied by force, threat, harassment, intimidation, or any other form of abuse.

(3) The court shall order a person subject to a protective order issued under this section to relinquish any firearms he or she owns or possesses pursuant to Section 527.9 of the Code of Civil Procedure.

(4) Every person who owns, possesses, purchases, or receives, or attempts to purchase or receive a firearm while the protective order is in effect is punishable pursuant to subdivision (g) of Section 12021 of the Penal Code.

(p) Any willful disobedience of any temporary restraining order or restraining order after hearing granted under this section is punishable pursuant to Section 273.6 of the Penal Code.

(q) This section does not apply to any action or proceeding covered by Title 1.6C (commencing with Section 1788) of Part 4 of Division 3 of the Civil Code, by Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, or by Division 10 (commencing with Section 6200) of the Family Code. Nothing in this section shall preclude a petitioner's right to use other existing civil remedies.

(r) The Judicial Council shall promulgate forms and instructions therefor, rules for service of process, scheduling of hearings, and any other matters required by this section. The petition and response forms shall be simple and concise.

(s) This section shall become operative on January 1, 2010.

§ 273.6 Penal Code

"Abuse of an elder or a dependent adult" means either of the following:

(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

(a) Any intentional and knowing violation of a protective order, as defined in Section 6218 of the Family Code, or of an order issued pursuant to Section 527.6, 527.8, or 527.85 of the Code of Civil Procedure, or Section 15657.03 of the Welfare and Institutions Code, is a misdemeanor punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in a county jail for not more than one year, or by both that fine and imprisonment.

(b) In the event of a violation of subdivision (a) that results in physical injury, the person shall be punished by a fine of not more than two thousand dollars ($2,000), or by imprisonment in a county jail for not less than 30 days nor more than one year, or by both that fine and imprisonment. However, if the person is imprisoned in a county jail for at least 48 hours, the court may, in the interest of justice and for reasons stated on the record, reduce or eliminate the 30-day minimum imprisonment required by this subdivision. In determining whether to reduce or eliminate the minimum imprisonment pursuant to this subdivision, the court shall consider the seriousness of the facts before the court, whether there are additional allegations of a violation of the order during the pendency of the case before the court, the probability of future violations, the safety of the victim, and whether the defendant has successfully completed or is making progress with counseling.

(c) Subdivisions (a) and (b) shall apply to the following court orders:

(1) Any order issued pursuant to Section 6320 or 6389 of the Family Code.

(2) An order excluding one party from the family dwelling or from the dwelling of the other.

(3) An order enjoining a party from specified behavior that the court determined was necessary to effectuate the order described in subdivision (a).

(4) Any order issued by another state that is recognized under Part 5 (commencing with Section 6400) of Division 10 of the Family Code.

(d) A subsequent conviction for a violation of an order described in subdivision (a), occurring within seven years of a prior conviction for a violation of an order described in subdivision (a) and involving an act of violence or "a credible threat" of violence, as defined in subdivision (c) of Section 139, is punishable by imprisonment in a county jail not to exceed one year, or in the state prison.

(e) In the event of a subsequent conviction for a violation of an order described in subdivision (a) for an act occurring within one year of a prior conviction for a violation of an order described in subdivision (a) that results in physical injury to a victim, the person shall be punished by a fine of not more than two thousand dollars ($2,000), or by imprisonment in a county jail for not less than six months nor more than one year, by both that fine and imprisonment, or by imprisonment in the state prison. However, if the person is imprisoned in a county jail for at least 30 days, the court may, in the interest of justice and for reasons stated in the record, reduce or eliminate the six-month minimum imprisonment required by this subdivision. In determining whether to reduce or eliminate the minimum imprisonment pursuant to this subdivision, the court shall consider the seriousness of the facts before the court, whether there are additional allegations of a violation of the order during the pendency of the case before the court, the probability of future violations, the safety of the victim, and whether the defendant has successfully completed or is making progress with counseling.

(f) The prosecuting agency of each county shall have the primary responsibility for the enforcement of orders described in subdivisions (a), (b), (d), and (e).

(g) (1) Every person who owns, possesses, purchases, or receives a firearm knowing he or she is prohibited from doing so by the provisions of a protective order as defined in Section 136.2 of this code, Section 6218 of the Family Code, or Section 527.6 or 527.8 of the Code of Civil Procedure, or Section 15657.03 of the Welfare and Institutions Code, shall be punished under subdivision (g) of Section 12021.

(2) Every person subject to a protective order described in paragraph (1) shall not be prosecuted under this section for owning, possessing, purchasing, or receiving a firearm to the extent that firearm is granted an exemption pursuant to subdivision (f) of Section 527.9 of the Code of Civil Procedure, or subdivision (h) of Section 6389 of the Family Code.

(h) If probation is granted upon conviction of a violation of subdivision (a), (b), (c), (d), or (e), the court shall impose probation consistent with Section 1203.097, and the conditions of probation may include, in lieu of a fine, one or both of the following requirements:

(1) That the defendant make payments to a battered women's shelter or to a shelter for abused elder persons or dependent adults, up to a maximum of five thousand dollars ($5,000), pursuant to Section 1203.097.

(2) That the defendant reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offense.

(i) For any order to pay a fine, make payments to a battered women's shelter, or pay restitution as a condition of probation under subdivision (e), the court shall make a determination of the defendant's ability to pay. In no event shall any order to make payments to a battered women's shelter be made if it would impair the ability of the defendant to pay direct restitution to the victim or court-ordered child support. Where the injury to a married person is caused in whole or in part by the criminal acts of his or her spouse in violation of this section, the community property may not be used to discharge the liability of the offending spouse for restitution to the injured spouse, required by Section 1203.04, as operative on or

before August 2, 1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse and dependents, required by this section, until all separate property of the offending spouse is exhausted.

The Elder Abuse Act does not specify the standard of review to apply when reviewing protective orders granted under section 15657.03. That statute, includes the following language: "An order may be issued under this section, with or without notice, to restrain any person for the purpose of preventing a recurrence of abuse, if an affidavit shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse of the petitioning elder or dependent adult." (§ 15657.03, subd. (c), italics added.) The "to the satisfaction of the court" language is identical to language in the DVPA.[2] In Quintana v. Guijosa (2003) 107 Cal.App.4th 1077, 1079, 132 Cal.Rptr.2d 538, the appellate court concluded issuance or failure to issue a protective order under the DVPA is reviewed for abuse of discretion. A protective order under the DVPA is also reviewed to determine whether the trial court's findings are supported by substantial evidence. (Sabbah v. Sabbah (2007) 151 Cal.App.4th 818, 822-823, 60 Cal.Rptr.3d 175.) Similarly, injunctions issued under Code of Civil Procedure sections 527.6 and 527.8, which prohibit civil harassment, are reviewed to determine whether the necessary factual findings are supported by substantial evidence. (USS-Posco Industries v. Edwards (2003) 111 Cal.App.4th 436, 444, 4 Cal.Rptr.3d 54; Schild v. Rubin (1991) 232 Cal.App.3d 755, 762, 283 Cal.Rptr. 533.)

In our interpretation of the Elder Abuse Act, and in consideration of analogous statutory language and cases interpreting that language, we hold the issuance of a protective order under the Elder Abuse Act is reviewed for abuse of direction, and the factual findings necessary to support such a protective order are reviewed under the substantial evidence test.

EA-100 Request for Orders to Stop Elder or Dependent Adult Abuse

Clerk stamps date here when form is filed.

(1) Name of the person to be protected:

Address of the person *(Skip this if you have a lawyer. If you want your address to be private, give a mailing address instead):*

City: _____ State: _____ Zip: _____

Person's telephone number *(optional):* (___) _____

Person's lawyer *(if you have one): (Name, address, telephone number, and State Bar number):* _____

Fill in court name and street address:

Superior Court of California, County of

(2) Name of the person you want protection from:

Describe the person: Sex: ☐ M ☐ F Weight: _____

Height: _____ Race: _____ Hair color: _____

Eye color: _____ Age: _____ Date of birth: _____

Court fills in case number when form is filed.

Case Number:

Home address *(if you know):* _____

City: _____ State: _____ Zip: _____

Work address *(if you know):* _____

City: _____ State: _____ Zip: _____

(3) Are you asking for protection for any other family or household members or the conservator of the person in (1)? If "yes," list those persons:

Name	Sex	Age	Lives with you?	How are they related to you?
_____	_____	_____	☐ Yes ☐ No	_____
_____	_____	_____	☐ Yes ☐ No	_____
_____	_____	_____	☐ Yes ☐ No	_____
_____	_____	_____	☐ Yes ☐ No	_____

☐ *Check here if there are more persons. Attach a sheet of paper and write "EA-100, item 3—Additional Protected Persons" for a title.*

(4) If you are asking for protection for any other family or household members or the conservator, why do they need protection?

_____

_____

_____

_____

☐ *Check here if you need more space for your answer. Attach a sheet of paper and write "EA-100, item 4—Why Others Need Protection" for a title.*

This is not a Court Order.

Your name: _____ | Case Number:

5 Who is asking the court for protection?

☐ You, to protect yourself.
☐ A person acting on your behalf: Name: _____
☐ A conservator ☐ Another person with legal authority to represent you.

If you are requesting protection for yourself, indicate that and go on to 6. If someone else is making this request, that person must attach a statement of who he or she is, his or her legal authority to make this request, and information about this representation, including any court appointments, the case numbers, and other relevant matters. Attach a sheet of paper and write "EA-100, item 5—Information About Person Requesting Orders" for a title.

6 Describe the person to be protected:

a. Age: _____

b. If you are under age 65, do you have any physical or mental limitations that prevent you from carrying out normal activities or protecting your rights? ☐ Yes ☐ No *(If yes, describe):* _____

☐ *Check here if you need more space. Attach a sheet of paper and write "EA-100, item 6—Describe Protected Person" for a title.*

7 How do you know the person in 2? *(Describe):*

8 Why are you filing in this court? *(Check all that apply):*

☐ I was abused physically or emotionally in this county by the person in 2.
☐ The person in 2 lives in this county.
☐ Other *(explain):* _____

9 a. Have you or any of the persons named in 3 and the person in 2 been involved in another court case?

☐ Yes ☐ No

If yes, where? County: _____ State: _____

What is the case number? *(If you know):* _____

What kind of case? *(Check all that apply):*

☐ Elder abuse ☐ Dependent adult abuse ☐ Civil harassment
☐ Domestic violence ☐ Criminal
☐ Other *(specify):* _____

b. Are there now any protective or restraining orders relating to you or any of the persons in 3 and the person in 2?

☐ Yes ☐ No *If yes, attach a copy if you have one.*

☐ *Check here if you need more space. Attach a sheet of paper and write "EA-100, item 9—Describe Other Cases" for a title.*

This is not a Court Order.

Your name: _____ | Case Number:

(10) Is this your first request for a protective order against the person in (2)? ☐ Yes ☐ No
If no, are you asking for the renewal of an earlier protective order? ☐ Yes ☐ No
If you are asking for the renewal of an earlier order, provide the following information:
a. What was the case number of the earlier order? _____
b. How long do you want the renewed order to last? ☐ _____ years ☐ permanently

(11) Describe in a. through i. how the person in (2) has abused you.
a. When was the most recent abuse *(provide date or estimated date):* _____
b. Who was there? _____

c. In the most recent abuse, did the person in (2) do any of the following to you: physically abuse, financially abuse, intimidate, molest, attack, assault (sexually or otherwise), hit, follow, stalk, threaten, harass, destroy personal property, keep under surveillance, block movements, or contact you (directly or indirectly) by telephone, mail, e-mail, messenger, or by any other means?
☐ Yes ☐ No
If yes, describe: _____

d. Has the person in (2) previously abused you? ☐ Yes ☐ No
If yes, describe: _____

e. Describe any use or threatened use of guns or other weapons: _____

f. Did the police come? ☐ Yes ☐ No
If yes, did they give you an Emergency Protective Order? ☐ Yes ☐ No ☐ I don't know
Attach a copy, if you have one.

This is not a Court Order.

Your name: _____ | Case Number:

(11) g. Is the person in (2) a caregiver who didn't allow you to have goods or services you needed to avoid physical harm or mental suffering? ☐ Yes ☐ No

If yes, describe how that affected you: _____

h. Did the case involve **solely financial abuse** unaccompanied by force, threat, harassment, intimidation, or any other form of abuse?

☐ Yes, only financial abuse.

☐ No, it included other abuse described above.

i. Describe any injuries or harm you suffered as a result of the actions or deprivation described above:

☐ *Check here if you need more space to explain any of the subparts in item 11. Attach a sheet of paper and write "EA-100, item 11, subpart ___—Describe Abuse" for a title.*

Check the orders you want ☑

(12) ☐ **Personal Conduct Orders**

I ask the court to order the person in (2) to **not** do the following things to me:

a. ☐ Physically abuse, financially abuse, intimidate, molest, attack, assault (sexually or otherwise), hit, follow, stalk, threaten, harass, destroy my personal property, keep me under surveillance, or block my movements.

b. ☐ Contact (either directly or indirectly), or telephone, or send messages or mail or e-mail.

The person in (2) will be ordered not to take any action to get the addresses or locations of any protected person, or of that person's family members or caretakers, unless the court finds good cause not to make the order.

(13) ☐ **Stay-Away Orders**

I ask the court to order the person in (2) to stay at least *(specify):* _____ yards away from me and the places listed below *(check all that apply):*

a. ☐ My home
b. ☐ My job or workplace
c. ☐ My vehicle
d. ☐ Each person listed in (3)
e. ☐ Other *(specify):* _____

If the court orders the person in (2) to stay away from all the places checked above, will that person be able to get to his or her home or job? ☐ Yes ☐ No

If no, explain: _____

This is not a Court Order.

Your name: _____ **Case Number:**

Check the orders you want ☑ *(continued)*

(14) ☐ **Move-Out Order**

I ask the court to order the person in (2) to move out from and not return to my residence at *(address):*

_____

I will suffer physical or emotional harm if the person in (2) does not leave the residence.

The title or lease to the residence is not in the sole name of the person in (2) or the name of the person in (2) and another person.

☐ I ask for this move-out order right away to last until the hearing, because:

a. I have the right to live at the above residence *(explain):* _____

_____

b. The person in (2) assaulted or threatened me.

(15) ☐ **Order About Guns or Other Firearms**

I ask the court to order the person in (2) to be prohibited from owning, possessing, purchasing, or receiving, or attempting to purchase or receive, firearms **and** to sell or turn in any guns or firearms that he or she controls. The abuse in this case is **not solely financial abuse** unaccompanied by force, threat, harassment, intimidation, or any other form of abuse.

(16) ☐ **Other Orders**

What other orders are you asking for? *(Describe):* _____

_____

_____

_____

☐ *Check here if you need more space. Attach a sheet of paper and write "EA-100, item 16—Other Orders" for a title.*

(17) ☐ **Temporary Orders**

Do you want the court to make orders right now on matters listed in (12) through (16)? ☐ Yes ☐ No

If yes, explain why: _____

_____

_____

_____

☐ *Check here if you need more space. Attach a sheet of paper and write "EA-100, item 17—Temporary Orders" for a title.*

(18) **Delivery of Orders to Law Enforcement Agencies**

I request that copies of the court's orders be given by *(check one):*

☐ The court clerk ☐ Myself ☐ My lawyer to the following law enforcement agencies:

Name of Agency: _____

Address: _____

City: _____ State: _____ Zip: _____

☐ *Check here if there are more law enforcement agencies. Attach a sheet of paper and write "EA-100, item 18—Law Enforcement Agencies" for a title.*

This is not a Court Order.

Your name: _____

Case Number:

(19) ☐ Request to Shorten Time for Service

You must have your papers personally served on the person in (2) at least 5 days before the hearing, unless the court orders a different time for service. *(Form EA-142-INFO,* What Is "Proof of Service"?, *explains how to serve (notify) the person in (2). Form EA-140 may be used to show the court that the papers have been served.)*
If your papers cannot be served at least 5 days before the hearing and you need more time, explain why:

_____

_____

_____

(20) No Fee to Serve Orders

If you want the sheriff or marshal to serve the orders on the person in (2) for free, ask the court clerk what you need to do.

(21) ☐ Lawyer's Fees and Court Costs

I ask the court to order payment of my:

a. ☐ Lawyer's fees

b. ☐ Court costs

The amounts requested are:

Item	Amount	Item	Amount
_____	$ _____	_____	$ _____
_____	$ _____	_____	$ _____
_____	$ _____	_____	$ _____

☐ *Check here if you need more space. Attach a sheet of paper and write "EA-100, item 21—Lawyer's Fees and Court Costs" for a title.*

(22) Additional Relief

I ask the court for additional relief as may be proper.

(23) Number of pages attached to this form, if any: _____

This *Request for Orders to Stop Elder or Dependent Adult Abuse* must be personally served on the person in (2). Persons requesting the orders may not serve these papers.

Date: _____

_____ ▶ _____

Lawyer's name *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Name of person filing this request *Signature of person filing this request*

This is not a Court Order.

CONFIDENTIAL

DV-260/CH-102/EA-102 CLETS Information

California Law Enforcement Telecommunications System (CLETS) Information Form

Important Notice: This form MUST NOT become part of the public court file. It is confidential and private. If the court issues a restraining order, this form will provide law enforcement with information that will assist them in enforcing a restraining order.

Person to Be Protected: Fill out this form as much as you can, and give it to the court clerk. The clerk will provide the confidential information on this form to CLETS, a statewide system that lets police know about your order. In addition to providing the information on this form, you must provide a public mailing address on your request for a restraining order filed with the court. This will allow the court to contact you if needed and allow the other side to have their response to your petition served on you. If you want to keep your place of residence confidential, you can use a post office box or "in care of" address on the request that you file.

Case number for your restraining order *(if you know it)*: _____

1 Person to Be Protected *(name)*: _____

Sex: ☐ M ☐ F Height: _____ Weight: _____ Race: _____

Hair Color: _____ Eye Color: _____ Age: _____ Date of Birth: _____

_____

(mailing address listed on restraining order) *(city, state, zip)* *(telephone number [optional])*

Vehicle *(type, model, year)*: _____

Vehicle license number and state: _____

2 Person to Be Restrained *(name)*: _____

Sex: ☐ M ☐ F Height: _____ Weight: _____ Race: _____

Hair Color: _____ Eye Color: _____ Age: _____ Date of Birth: _____

_____

(residence address) *(city, state, zip)* *(telephone number)*

_____

(work place) *(occupation/title)* *(work hours)*

_____

(business address) *(city, state, zip)* *(telephone number)*

Driver's license number and state: _____ Vehicle license number and state: _____

Vehicle *(type, model, year)*: _____

Social Security Number: _____

Describe any marks, scars, or tattoos: _____

Other names used by the restrained person: _____

Describe any guns or firearms you believe the restrained person owns or has access to *(number, types, and locations)*:

_____

_____

_____

3 Other People to Be Protected

Name	Date of Birth	Sex	Race

This is not a Court Order—Do not file in court file.

EA-110 Response to Request for Orders to Stop Elder or Dependent Adult Abuse

Clerk stamps date here when form is filed.

1 Name of person who asked for the protective orders:

_____

2 Your name: _____

Your address *(skip this if you have a lawyer): (If you want your address to be private, give a mailing address instead):*

_____

City: _____ State: _____ Zip: _____

Your telephone *(optional):* (____) _____

Your lawyer *(if you have one): (Name, address, telephone number, and State Bar number):* _____

_____

_____

_____

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

Use this form to give the court your responses to EA-100.

- Read Form EA-151-INFO to protect your rights.
- Fill out this form and then take it to the court clerk.
- You must have the person in 1 served with a copy of this form and any attached pages.

The court will consider your Response at the hearing. Write your hearing date and time here:

Hearing Date → Date: _____ Time: _____

Dept.: _____ Room: _____

You must obey the court's orders until the hearing. If you do not come to this hearing, the court may make the orders requested against you last for up to 3 years.

3 ☐ **Personal Conduct Orders**

a. ☐ I agree to the orders requested.
b. ☐ I do not agree to the orders requested.
c. ☐ I agree to the following orders *(specify):*

_____

_____

4 ☐ **Stay-Away Orders**

a. ☐ I agree to the orders requested.
b. ☐ I do not agree to the orders requested.
c. ☐ I agree to the following orders *(specify):* _____

_____

5 ☐ **Move-Out Order**

a. ☐ I agree to the order requested.
b. ☐ I do not agree to the order requested.
c. ☐ I agree to the following order *(specify):* _____

_____

6 ☐ **Turn In Guns or Other Firearms**

a. ☐ I do not own or have any guns or firearms.
b. ☐ I agree to the order requested.
c. ☐ I do not agree to the order requested.
d. ☐ I agree to the following order *(specify):* _____

_____

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www.FormsWorkflow.com

Your name: _____ **Case Number:**

7 ☐ **Other Orders**

a. ☐ I agree to the orders requested.

b. ☐ I do not agree to the orders requested.

c. ☐ I agree to the following orders *(specify)*: _____

_____

8 ☐ **The court should not make orders against me because** *(Give facts or reasons below):*

_____

_____

_____

_____

_____

_____

_____

☐ *Check here if you need more space. Attach a sheet of paper and write "EA-110, Item 8—Facts and Reasons." Give specific facts and reasons.*

9 ☐ **Lawyer's Fees and Costs**

I ask the court to order payment of my:

a. ☐ Lawyer's fees

b. ☐ Court costs

because the temporary restraining order was issued without enough supporting facts.

The amounts requested are:

Item	Amount	Item	Amount
_____	$_____	_____	$_____
_____	$_____	_____	$_____
_____	$_____	_____	$_____

☐ *Check here if you need more space. Attach a sheet of paper and write "EA-110, Item 9—Lawyer's Fees and Costs" at the top. Give specific items and amounts.*

10 ☐ **Other Relief**

I ask for additional relief as may be proper.

11 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____

Lawyer's name *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

EA-120 Notice of Hearing and Temporary Restraining Order

Clerk stamps date here when form is filed.

1 Name of person to be protected:

Address *(Skip this if you have a lawyer. If you want your address to be private, give a mailing address instead):*

City: State: Zip:

Your telephone number *(optional):*

Your lawyer *(if you have one): (Name, address, telephone number, and State Bar number):*

Fill in court name and street address:

Superior Court of California, County of

2 Name of person to be restrained:

Court fills in case number when form is filed.

Case Number:

Description of that person:

Sex: ☐ M ☐ F Height: Weight: Race:

Hair Color: Eye Color: Age: Date of Birth:

Home Address *(if known):*

City: State: Zip:

Work Address *(if known):*

City: State: Zip:

To the person in 2:

3 Notice of Hearing

A court hearing is scheduled on the request for orders against you to stop abuse:

Name and address of court if different from above:

Hearing Date → Date: Time:

Dept.: Rm.:

If you do not want the court to make orders against you, file Form EA-110. Then go to the hearing and tell the court why you disagree. You may bring witnesses and other evidence. If you do not go to this hearing, the court may make restraining orders against you that could last up to 3 years.

4 Court Orders

The court *(check a or b):*

a ☐ Has scheduled the hearing stated in 3. No orders are issued against you at this time.

b ☐ Has scheduled the hearing stated in 3 **and** has issued the temporary orders against you specified on pages 2, 3, and 4. If you do not obey these orders, you can be arrested and charged with a crime. You may have to go to jail, pay a fine of up to $1,000, or both.

This is a Court Order.

Your name: _____ **Case Number:**

5 ☐ Additional Protected Persons

In addition to the person named in 1, the following family or household members or conservator of the elder or dependent adult named in 1 are protected by the orders indicated below:

Name	Sex	Age

☐ *Additional protected persons are listed at the end of this Order as EA-120 Attachment 5.*

Temporary Orders Against the Restrained Person

(Write the name of the person in 2): _____

The court has made the temporary orders indicated below against you. You must obey all these orders. These orders will expire on the date of the hearing listed in 3 unless they are extended by the court.

6 ☐ Personal Conduct Orders

You must **not** do the following things to the person listed in 1 and each person listed in 5:

☐ a. Physically abuse, financially abuse, intimidate, molest, attack, assault (sexually or otherwise), hit, follow, stalk, threaten, harass, destroy personal property, keep under surveillance, or block movements.

☐ b. Contact (directly or indirectly), telephone, send messages, mail, or e-mail.

☐ c. Take any action, directly or through others, to obtain the addresses or locations of the person in 1 or of that person's family or caretakers. *(If item c. is not checked, the court has found good cause not to make this order.)*

Peaceful written contact through a lawyer or a process server or any other person for service of legal papers related to a court case is allowed and does not violate this order.

7 ☐ Stay-Away Orders

You **must** stay at least *(specify):* _____ yards away from:

a. ☐ The person listed in 1
b. ☐ The home of the person in 1
c. ☐ The job or workplace of the person in 1
d. ☐ The vehicle of person in 1
e. ☐ The persons listed in 5
f. ☐ Other *(specify):* _____

8 ☐ Move-Out Order

You must immediately move out from and not return to *(address):* _____

and must take only the personal clothing and belongings you need until the hearing.

9 ☐ No Guns or Other Firearms

You cannot own, possess, have, buy or try to buy, receive or try to receive, or in any other way get a gun or firearm.

This is a Court Order.

Your name: _____ Case Number:

(10) ☐ Turn In or Sell Guns or Firearms

You must:

- Sell to a licensed gun dealer or turn in to police any guns or firearms that you possess or control. This must be done within 24 hours of being served with this order.
- File a receipt with the court within 48 hours of receiving this order that proves guns have been turned in or sold. *(You may use Form EA-145,* Proof of Firearms Turned In or Sold, *for this.)*

(11) Financial Abuse

This case ☐ does **not** ☐ does involve **solely financial abuse** unaccompanied by force, threat, harassment, intimidation or any other form of abuse.

(12) ☐ Other Orders *(specify):* _____

_____

_____

_____

_____

☐ *Additional orders are attached at the end of this Order as EA-120 Attachment 12.*

Instructions for the Protected Person

To the person in (1): *(Write the name of the person in (1)):* _____

(13) Service of Order on Law Enforcement

If the court issues temporary restraining orders, by the close of business on the date the orders are made,

☐ you ☐ your lawyer ☐ the court clerk

should deliver a copy of this Order and any proof of service forms to each law enforcement agency listed below.

Name of Law Enforcement Agency	Address (City, State, Zip)

(14) Service of Documents

You must have someone personally deliver to the person in (2) a copy of all the documents below:

a. Form EA-120, *Notice of Hearing and Temporary Restraining Order* (completed and filed-stamped)

b. Form EA-100, *Request for Orders to Stop Elder or Dependent Adult Abuse* (completed and filed-stamped)

c. Form EA-110, *Response to Request for Orders to Stop Elder or Dependent Adult Abuse* (blank form)

d. Form EA-151-INFO, *How Can I Respond to a Request for Orders to Stop Elder or Dependent Adult Abuse?*

If the boxes below are checked, you must also have someone personally deliver to the person in (2) a copy of all the documents checked below:

e. ☐ Form EA-145, *Proof of Firearms Turned In or Sold* (blank form)

f. ☐ Other *(specify):* _____

You must file with the court before the hearing a proof of service of these documents on the person in (2).

(For help with service, read Forms EA-142-INFO and EA-150-INFO.)

This is a Court Order.

Your name: _____

Case Number:

Order to Both Parties on Service

(15) ☐ **Time for Service**

(A) To: Person Asking for Order	(B) To: Person Served With Order
Someone 18 or over—**not you or anyone protected by this order**—must personally "serve" a copy of this order on the person in (2) at least _____ days before the hearing.	If you want to respond in writing, someone 18 or over—**not you**—must "serve" Form EA-110 on the person in (1), then file it with the court at least _____ days before the hearing.

(For help with service or responding, read Forms EA-142-INFO and EA-151-INFO .)

(16) **No Fee to Notify (Serve) Restrained Person**

If the sheriff or marshal serves this Order, he or she will do it for free.

Date: _____

▶ _____

Judicial Officer

Warnings and Notices to the Restrained Person in (2)

You Cannot Have Guns or Firearms

(17) If the court orders, you cannot own, have, possess, buy or try to buy, receive or try to receive, or otherwise get a gun while this Order is in effect. If you do, you can go to jail and pay a $1,000 fine. You must sell to a licensed gun dealer or turn in to police any guns or firearms that you have or control in accordance with item (10) above. The court will require proof that you did so. If you do not obey this order, you can be charged with a crime.

(18) **After You Have Been Served With a Restraining Order**

- Obey all the orders.
- If you want to respond, fill out Form EA-110 and file it with the court clerk. You do not have to pay any fee to file your response.
- Serve Form EA-110 on the person in (1) or that person's attorney by the date listed in (15) of this form. You cannot serve the person in (1). The person who serves the person in (1) should complete and sign a *Proof of Service.* Form EA-141 may be used for this purpose. You should take the completed form back to the court clerk before the hearing date or bring it with you to the hearing.
- In addition to the response, you may file and serve declarations signed by you and other persons who have personal knowledge of the facts. Form MC-030, *Declaration,* is available from the clerk's office at the court shown on page 1 of this form. If you do not know how to prepare a declaration, you should see a lawyer. After you have filed the response with the clerk of the court, a copy must be delivered personally or by mail to the person in (2) or to his or her lawyer.
- If you wish to oppose the request for orders, in addition to filing a response, you should be present at the hearing. If you have any witnesses, they must also go to the hearing.
- At the hearing, tell the judge if you agree or disagree with the orders requested.
- Even if you do not go to the hearing, the judge can make the restraining orders last for 3 years.

This is a Court Order.

Your name: _____

Case Number:

(19) Notice Regarding Nonappearance at Hearing and Service of Order

If you have been personally served with a temporary restraining order and notice of hearing, but you do not appear at the hearing either in person or by a lawyer, and a restraining order that does not differ from the previous or temporary restraining order is issued at the hearing, a copy of the order will be served on you by mail at the following address *(insert the address of the person in (2)):*

If that address is not correct or you wish to verify that the temporary order was made permanent without substantive change, contact the clerk of the court.

If both you and the person in (1) are personally present at the hearing where the order is issued, no additional proof of service will be required.

Instructions for Law Enforcement Agencies

(20) This order is effective when made. It is enforceable anywhere in all 50 states, the District of Columbia, all tribal lands, and all U.S. territories and shall be enforced as if it were an order of that jurisdiction by any law enforcement agency that has received the order, is shown a copy of the order, or has verified its existence on the California Law Enforcement Telecommunications System (CLETS). If the law enforcement agency has not received proof of service on the restrained person, and the restrained person was not present at the court hearing, the agency shall advise the restrained person of the terms of the order and then shall enforce it. Violations of this order are subject to criminal penalties.

Information for All Parties

Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the hearing. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (Form MC-410). (Civil Code, § 54.8)

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate

[seal]

I certify that this *Notice of Hearing and Temporary Restraining Order* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

EA-125 Request and Order for Reissuance of Temporary Restraining Order

Clerk stamps date here when form is filed.

(1) Your name *(person asking to reissue order):*

Your address *(skip this if you have a lawyer): (If you want your address to be private, give a mailing address instead):*

City: State: Zip:

Your telephone *(optional):* ( )

Your attorney *(if you have one): (Name, address, telephone number, and State Bar number):*

Fill in court name and street address:

Superior Court of California, County of

(2) Name of person you want protection from:

Description of that person:

Fill in case number:

Case Number:

Sex: ☐ M ☐ F Height: Weight: Race:

Hair Color: Eye Color: Age: Date of Birth:

Home Address *(if known):*

City: State: Zip:

Work Address *(if known):*

City: State: Zip:

(3) ☐ I ask the Court to reissue the Temporary Restraining Order previously filed in this case on Form EA-120.

a. The last Temporary Restraining Order was issued on *(date):*

b. The last hearing date was *(date):*

c. The Order has been reissued _____ times.

(4) ☐ I ask the court to reissue the Order because *(check one):*

a. ☐ I could not get the Order served before the hearing date.

b. ☐ Other *(specify):*

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

Type or print your name

Sign your name

This is a Court Order.

American LegalNet, Inc.
www.FormsWorkflow.com

Your Name: _____ **Case Number:**

Clerk will fill out section below.

(5) The request to reissue the Temporary Restraining Order is:

a. ☐ Granted b. ☐ Denied

The Order listed in (3) is reissued and reset for hearing in this court on the date and time below.
Unless the court extends the time, the Order will end on the date and at the time below.

Name and address of court if different from above:

Hearing Date → Date: _____ Time: _____ _____

Dept.: _____ Room: _____ _____

All orders in the Temporary Restraining Order stay in effect unless this order changes them.

(6) If this Order is granted, a copy of this Order must be served on the person in (2) before the hearing, along with the other documents requesting orders to stop elder or dependent adult abuse.

(7) By the close of business on the date this Order is made, a copy of this Order and any proof of service forms must be delivered to the law enforcement agency listed on Form EA-120, Item (12):

☐ The person in (1).
☐ The attorney of the person in (1).
☐ The clerk of the court.

Date: _____ ▶ _____

Judicial Officer

Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the hearing. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (form MC-410). *(Civil Code, § 54.8)*

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate [seal]

I certify that this *Request and Order for Reissuance of Temporary Restraining Order* is a true and correct copy of the original on file in the court.

Date: _____

Clerk, by _____, Deputy

This is a Court Order.

EA-130 Order After Hearing Restraining Elder or Dependent Adult Abuse

Clerk stamps date here when form is filed.

(1) Name of protected person:

Address *(Skip this if you have a lawyer. If you want your address to be private, give a mailing address instead):*

City: State: Zip:

Your telephone number *(optional):*

Your lawyer *(if you have one): (Name, address, telephone number, and State Bar number):*

Fill in court name and street address:

Superior Court of California, County of

(2) Name of person to be restrained:

Description of that person:

Fill in case number:

Case Number:

Sex: ☐ M ☐ F Height: Weight: Race:

Hair Color: Eye Color: Age: Date of Birth:

Home Address *(if known):*

City: State: Zip:

Work Address *(if known):*

City: State: Zip:

(3) Hearing

There was a hearing:

on *(date):* at *(time):* ☐ a.m. ☐ p.m. Dept.: Rm:

(Name of judicial officer) made the orders at the hearing.

These people were at the hearing:

a. ☐ The person in (1).
b. ☐ The person in (2).
c. ☐ Lawyer of the person in (1) *(name):*
d. ☐ Lawyer of the person in (2) *(name):*

(4) Expiration Date of Order

☐ This Order, except for an award of lawyer's fees, expires at:
(time): ☐ a.m. ☐ p.m. or ☐ midnight on *(date):*

If no expiration date is written here, this Order expires 3 years from the date of issuance.

☐ This renewal Order remains in effect permanently.

This is a Court Order.

Your name: _____ **Case Number:**

(5) ☐ Additional Protected Persons

In addition to the person named in (1), the following family or household members or conservator of the person are protected by the orders indicated below:

Name	Sex	Age

☐ *Additional protected persons are listed at the end of this Order as EA-130 Attachment 5.*

Orders Against the Restrained Person

(Write the name of the person in (2)): _____

(6) This Is a Court Order

To the person in (2): You must obey all the orders indicated below. If you do not obey these orders, you can be arrested and charged with a crime. You may have to go to jail, pay a fine of up to $1,000, or both.

(7) ☐ Personal Conduct Orders

You **must not** do the following things to the person listed in (1) and each person listed in (5):

a. ☐ Physically abuse, financially abuse, intimidate, molest, attack, assault (sexually or otherwise), hit, follow, stalk, threaten, harass, destroy personal property, keep under surveillance, or block movements.

b. ☐ Contact (directly or indirectly), telephone, send messages, mail, or e-mail.

c. ☐ Take any action to obtain the address or location of the person in (1) or of that person's family or caretakers.

Peaceful written contact through a lawyer or a process server or other person for service of legal papers related to a court case is allowed and does not violate this order.

(8) ☐ Stay-Away Orders

You **must** stay at least *(specify):* _____ yards away from:

a. ☐ The person listed in (1)

b. ☐ The home of the person in (1)

c. ☐ The job or workplace of the person in (1)

d. ☐ The vehicle of the person in (1)

e. ☐ The persons in (5)

f. ☐ Other *(specify):* _____

(9) ☐ Move-Out Order

You must move out immediately from and not return to *(address):* _____

(10) ☐ No Guns or Other Firearms

You cannot own, possess, have, buy or try to buy, receive or try to receive, or in any other way get a gun or firearm.

(11) ☐ Turn In or Sell Guns or Firearms

You must:

- Sell to a licensed gun dealer or turn in to police any guns or firearms that you possess or control. This must be done within 24 hours of being served with this order.
- File a receipt with the court within 48 hours of receiving this order that proves guns have been turned in or sold. *(You may use Form EA-145,* Proof of Firearms Turned In or Sold, *for this.)*

This is a Court Order.

Your name: _____ **Case Number:**

(12) Financial Abuse

This case ☐ does **not** ☐ does involve **solely financial abuse** unaccompanied by force, threat, harassment, intimidation, or any other form of abuse.

(13) ☐ Other Orders *(specify):* _____

_____

_____

_____

☐ *Additional orders are attached at the end of this Order as Attachment 13.*

Instructions for the Protected Person

To the person in (1) *(Write the name of the person in (1)):* _____

(14) ☐ Delivery to Law Enforcement Agency

If the court issues restraining orders, by the close of business on the date this Order is made, you or your attorney must deliver a copy of this Order and any proof of service forms to each law enforcement agency listed below:

Name of Law Enforcement Agency	Address (City, State, Zip)
_____	_____
_____	_____
_____	_____
_____	_____

☐ *Additional law enforcement agencies are listed at the end of this Order as EA-130 Attachment 14.*

(15) Service

a. ☐ The people in (1) and (2) were at the hearing or agreed in writing to this order. No other proof of service is needed.

b. ☐ The person in (1) was at the hearing. The person in (2) was not.

(1) ☐ Proof of service of Form EA-120, *Notice of Hearing and Temporary Restraining Order,* was presented to the court. The judge's orders in this form are the same as in Form EA-120 except for the end date. The person in (2) must be served with this Order. Service may be by mail.

(2) ☐ Proof of service of Form EA-120, *Notice of Hearing and Temporary Restraining Order,* was presented to the court. The judge's orders in this form are different from the orders in Form EA-120. Someone—but not anyone in (1) or (5) —must personally serve a copy of this Order to the person in (2).

(16) No Fee to Notify (Serve) Restrained Person

If the sheriff or marshal serves this Order, he or she will do so for free.

Date: _____ _____

Judicial Officer

This is a Court Order.

Your name: _____

Case Number:

Warnings and Notices to the Restrained Person in 2

You Cannot Have Guns or Firearms

If the court orders, you cannot own, have, possess, buy or try to buy, receive or try to receive, or otherwise get a gun while this Order is in effect. If you do, you can go to jail and pay a $1,000 fine. You must sell to a licensed gun dealer or turn in to police any guns or firearms that you have or control in accordance with 10 above. The court will require proof that you did so. If you do not obey this Order, you can be charged with a crime.

Instructions for Law Enforcement Agencies

This Order is effective when made. It is enforceable anywhere in all 50 states, the District of Columbia, all tribal lands, and all U.S. territories and shall be enforced as if it were an Order of that jurisdiction by any law enforcement agency that has received the Order, is shown a copy of the Order, or has verified its existence on the California Law Enforcement Telecommunications System (CLETS). If the law enforcement agency has not received proof of service on the restrained person, and the restrained person was not present at the court hearing, the agency shall advise the restrained person of the terms of the Order and then shall enforce it. Violations of this restraining order are subject to criminal penalties.

(Clerk will fill out this part.)

Clerk's Certificate

Clerk's Certificate
[seal]

I certify that this *Order After Hearing Restraining Elder or Dependent Adult Abuse* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

EA-145 Proof of Firearms Turned In or Sold

Clerk stamps date here when form is filed.

(1) Name of person asking for protection:

_____

(2) Your name:

_____

Your address *(skip this if you have a lawyer): (If you want your address to be private, give a mailing address instead):*

_____

City: _____ State: _____ Zip: _____

Your telephone *(optional):* (_____) _____

Your lawyer *(if you have one): (Name, address, telephone number, and State Bar number):* _____

_____

_____

_____

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

(3) To the person selling or turning in firearms:

If the court has ordered you to sell or turn in your firearms, you may use this form to prove to the court that you have obeyed its orders. You must deliver your weapons unloaded. When you deliver your weapons, ask law enforcement or the licensed gun dealer to complete item (4) or (5) and item (6). After the form is signed, file it with the court clerk. Keep a copy for yourself. For help, read Form EA-151.

(4) To: Law Enforcement

Fill out items (4) and (6) of this form. Keep a copy and give the original to the person who turned in the firearms.

The firearms listed in (6) were turned in on:

Date: _____ at: _____ ☐ a.m. ☐ p.m.

To: _____
Name and title of law enforcement agent

_____
Name of law enforcement agency

_____
Address

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

▶ _____
Signature of law enforcement agent

(5) To: Licensed Gun Dealer

Fill out items (5) and (6) of this form. Keep a copy and give the original to the person who sold the firearms to you.

The firearms listed in (6) were sold on:

Date: _____ at: _____ ☐ a.m. ☐ p.m.

To: _____
Name of licensed gun dealer

_____ (_____) _____
License number *Telephone*

_____
Address

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

▶ _____
Signature of licensed gun dealer

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www.FormsWorkflow.com

Your name: _____

Case Number:

6 **Firearms Make** | **Model** | **Serial Number**

1. _____ _____ _____
2. _____ _____ _____
3. _____ _____ _____
4. _____ _____ _____
5. _____ _____ _____

☐ *Check here if you turned in or sold more firearms. Attach a sheet of paper and write "Item 6—Firearms Turned In or Sold" at the top. Include make, model, and serial number for all firearms.*

7 Do you have, own, possess, or control any other firearms besides the firearms listed in 6? ☐ Yes ☐ No

8 If you answered yes to 7, have you sold or transferred those other firearms? ☐ Yes ☐ No
If yes, check one of the boxes below:

☐ a. I filed the *Proof of Firearms Turned In or Sold* for those firearms with the court on *(date):* _____

☐ b. I am filing the Proof for those firearms along with this Proof.

☐ c. I have not yet filed the Proof for the other firearms. *(Explain why not):* _____

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____
Type or print your name *Sign your name*

EA-150-INFO Can a Restraining Order to Prevent Elder or Dependent Adult Abuse Help Me?

What is a Restraining Order?

It is a court order that helps protect people from being abused.

Can I get a Restraining Order?

If you are a person 65 years or older or a dependent adult, you can ask for a restraining order if you have been:

- Physically abused
- Financially abused
- Mentally or emotionally abused
- Neglected
- Abandoned or abducted
- Isolated, *or*
- Deprived by a caregiver of goods or services you needed to avoid harm or suffering

How will the order help me?

The court can order a person to:

- Not abuse, harass, hit, or threaten you
- Not contact or go near you, *and*
- Not have a gun

What if I am deaf?

If you are deaf, contact the clerk at least 5 days before the hearing. Ask for an interpreter or other accommodation. (See information on Requests for Accommodations below.)

What forms do I need to get the order?

Fill out Forms EA-100 and EA-120. Then file them with the court clerk. If you need to add attachments, you may use form MC-020. Also, complete confidential Form-EA-102 and give it to the clerk.

Where can I get these forms?

You can get the forms at any court, self-help center, or county law library or on the Web at *www.courtinfo.ca.gov/forms.*

How soon can I get the order?

If you ask for a temporary restraining order, the court will decide within 24 hours whether or not to make the order. Sometimes the court decides sooner.

How long does the order last?

If the court makes a temporary order, it will last until your hearing date. At that time, the court will decide to continue or cancel the order. The order could last for up to 3 years.

How will the person to be restrained know about the order?

Someone over 18 years of age—**not you** or anyone else protected by the order— must "serve" (give) the person to be restrained a copy of the order. For help with service, see or ask the court clerk for Form EA-142-INFO.

What if the restrained person does not obey the order?

Call the police. The restrained person can be arrested and charged with a crime.

How much does it cost?

There is no fee for filing the request for a restraining order.

You do not need to pay a fee for service of the order. A sheriff or marshal will serve the order for free. Or you may arrange for service by a registered process server or a private party and pay any fee that is charged.

The court can make the person who loses the case pay all the court fees and the lawyer's fees for the other party.

Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the hearing. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (Form MC-410). (Civil Code, § 54.8.)

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EA-150-INFO Can a Restraining Order to Prevent Elder or Dependent Adult Abuse Help Me?

Do I have to go to court?

Yes. Go to court on the date the clerk gives you.

Do I need a lawyer?

No. But it is a good idea. Ask the court clerk about free and low-cost legal services and self-help centers in your county.

Do I need to bring a witness to the court hearing?

No. But it helps to have proof of the abuse. You can bring:

- A written statement from witnesses made under oath
- Witnesses
- Photos
- Medical or police reports
- Damaged property
- Threatening letters, e-mails, or telephone messages

The court may or may not let witnesses speak at the hearing. So, if possible, you should bring written statements from witnesses signed under penalty of perjury to the hearing. (You can use Form MC-030 for this.)

Will I see the restrained person at the court hearing?

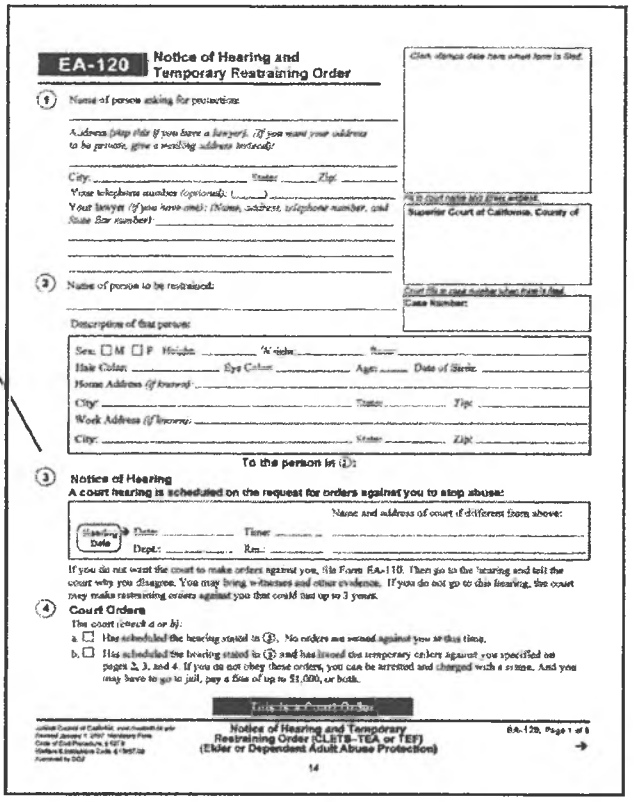
If the person comes to the hearing, yes. But that person does not have the right to speak to you. If you are afraid, tell the court officer.

Can I bring someone with me to court?

Yes. You can bring someone to sit with you during the hearing. But that person cannot speak for you in court. Only you or your lawyer (if you have one) can speak for you.

What if I don't speak English?

When you file your papers, ask the clerk if a court interpreter is available. You may have to pay a fee for the interpreter. If the interpreter is not available for your court date, bring someone to interpret for you. You cannot ask a child under 18 to interpret for you.



EA-120 Notice of Hearing and Temporary Restraining Order

(1) Name of person asking for protection:

Address (skip this if you have a lawyer). If you want your address to be private, give a mailing address instead:

City: State: Zip:

Your telephone number (optional): ( )

Your lawyer (if you have one): (Name, address, telephone number, and State Bar number):

Fill in court name and street address:

Superior Court of California, County of

(2) Name of person to be restrained:

Fill in court case number when form is filed:

Case Number:

Description of that person:

Sex: ☐ M ☐ F Height: Weight: Race:

Hair Color: Eye Color: Age: Date of Birth:

Home Address (if known):

City: State: Zip:

Work Address (if known):

City: State: Zip:

To the person in (2):

(3) Notice of Hearing

A court hearing is scheduled on the request for orders against you to stop abuse:

Name and address of court if different from above:

Hearing Date Date: Time:

Dept.: Rm.:

If you do not want the court to make orders against you, file Form EA-110. Then go to the hearing and tell the court why you disagree. You may bring witnesses and other evidence. If you do not go to this hearing, the court may make restraining orders against you that could last up to 3 years.

(4) Court Orders

The court (check a or b):

a. ☐ Has scheduled the hearing stated in (3). No orders are issued against you at this time.

b. ☐ Has scheduled the hearing stated in (3) and has issued the temporary orders against you specified on pages 2, 3, and 4. If you do not obey these orders, you can be arrested and charged with a crime. And you may have to go to jail, pay a fine of up to $1,000, or both.

Temporary Orders

Notice of Hearing and Temporary Restraining Order (CLETS–TEA or TEF) (Elder or Dependent Adult Abuse Protection)

EA-120, Page 1 of 4

14

What if I move?

Your restraining order works anywhere in the United States. If you move out of California, contact your new local police so they will know about your orders.

Need more information?

Ask the court clerk about free or low-cost legal help.

For help in your area, contact:

[Local information may be inserted.]

EA-151-INFO How Can I Respond to a Request for Orders to Stop Elder or Dependent Adult Abuse?

What is a Restraining Order?

It is a court order.

What does the order do?

The court can order you to:

- Not contact the person who asked for the order
- Not take any action to obtain that person's address or location
- Stay away from that person and the person's home and workplace
- Not have any guns while the order is in effect

Who can ask for a Restraining Order?

A person who is being:

- Financially abused
- Neglected
- Abandoned or abducted
- Isolated
- Harmed, *or*
- Deprived by a caregiver of goods or services necessary to live on

How long does the order last?

If the court makes a temporary order, it will last until your hearing date. At that time, the court will decide to continue or cancel the order. The order could last for up to 3 years.

What if I don't obey the order?

The police can arrest you. You can go to jail and pay a fine.

What if I don't agree with what the order says?

You still must obey the order until the hearing.

If you disagree with the orders the person is asking for, fill out Form EA-110 before your hearing date, serve it, and file it with the court. If you need to add attachments, you may use form MC-020.

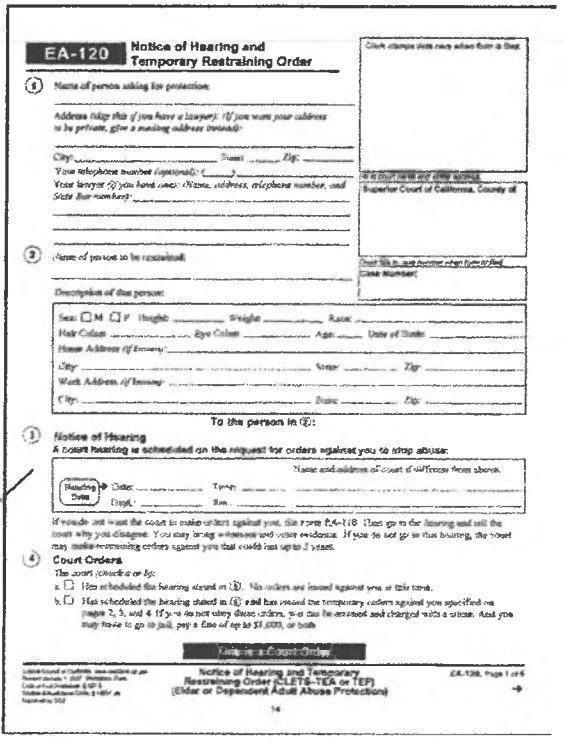
Do I have to serve the other person with a copy of my answer?

Yes. Someone—other than yourself—must mail a copy of your completed Form EA-110 to the person who asked for the order (or that person's lawyer). (This is called "service.")

The person who serves the form by mail should fill out Form EA-141, *Proof of Service by Mail.* Make a copy of the proof of service and file it with the court clerk.

Should I go to the court hearing?

Yes. Go to court on the date listed on Form EA-120. If you do not go to court, the judge can make orders without hearing from you.



EA-120 Notice of Hearing and Temporary Restraining Order

Notice of Hearing and Temporary Restraining Order (CLETS-TEA or TEP) (Elder or Dependent Adult Abuse Protection)

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EA-151-INFO How Can I Respond to a Request for Orders to Stop Elder or Dependent Adult Abuse?

Do I need a lawyer?
No. But it is a good idea. Ask the court clerk about legal services and self-help centers in your county.

Will I see the person who asked for the order at the court hearing?
If the person goes to the hearing, yes. Do not talk to that person unless the judge says you can.

Can I bring a witness to the court hearing?
Yes. You can bring witnesses or documents that support your case. But, if possible, you should also bring to the hearing written statements from the witnesses of what they saw or heard. Their statements must be made under penalty of perjury. You can use Form MC-030 for this.

Can I bring someone with me to court?
Yes. You can bring someone to sit with you during the hearing. But that person cannot speak for you in court. Only you or your lawyer, if you have one, can speak for you.

What if I don't speak English?
When you file your papers, ask the clerk if a court interpreter is available. You may have to pay a fee for the interpreter. If an interpreter is not available for your court date, bring someone to interpret for you. You cannot ask a child under 18 to interpret for you.

What if I am deaf?
If you are deaf, contact the clerk at least 5 days before the hearing. (See information on Requests for Accommodations below.)

Need more information?
Ask the court clerk about free or low-cost legal help.

For help in your area, contact:
[Local information may be inserted]

Requests for Accommodations
Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the hearing. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (Form *MC-410*). *(Civil Code, § 54.8)*

Civil, Criminal and Administration Remedies in Cases of Abuse, Neglect and Financial Exploitation of the Elderly

by Martha L. Ridgway
Ridgway, Romeo & Vincent, LLC
Posted by permission

Introduction

As with other professionals who work with senior citizens, lawyers have observed a shocking increase in the incidents of abuse, neglect and financial exploitation of the elderly.

Cases are brought to our attention from many different sources: the elder himself or herself, a concerned family member, friends and neighbors, social workers, adult protection workers, medical personnel, financial institutions, senior centers and programs, clergy and even other lawyers. When faced with a case of abuse, neglect or financial exploitation of an elder, the attorney can recommend and pursue a number of legal options. This paper will review the statistical realities of the aging population; define the terms abuse, neglect and financial exploitation; identify who the most common perpetrators are; analyze why our elders are mistreated; examine what characteristics make the elderly particularly vulnerable; and address the legal remedies available to the elder and how he or she can fight back.

Statistical Analysis of the Aging Population

It is no secret that our population is rapidly aging. With more elders, there are more people to victimize and greater opportunities to abuse, neglect and financially exploit.

Consider how the following statistics affect the incidents of abuse, neglect and financial exploitation of the elderly.

By the year 2030, there will be 70 million older persons, which is more than twice the number in 1990, and which will represent 20% of the population. Shockingly, two-thirds of all people who have ever lived longer than 65 years are alive today.

Of great significance is the fact that the older population is getting older, with those age 85 and over representing the fastest growing segment of the elder population.

The fact that women typically outlive men represents another factor in the increase in abuse, neglect and financial exploitation. After age 60, women increasingly outnumber men. Significantly, older men are nearly twice as likely to be married (77%) than are older women (43%). Not surprisingly, there are nearly five times as many widows as there are widowers.

Why is this country experiencing such an "age boom?" First,

people are living longer.

The life expectancy in 1900 was only 47. People who reach age 65 now have an average life expectancy of an additional 17.3 years.

Second, the "baby boomers," those born between 1946 and 1964, are aging. The most rapid increases in age are expected to occur between 2010 and 2030, when this generation reaches age 65.

Financial factors also contribute to abuse, neglect and financial exploitation of the elderly.

Medical considerations constitute another factor in abuse, neglect and financial exploitation of the elderly. Most older persons have at least one chronic condition. The most frequently occurring conditions per 100 elderly in 1993 were arthritis (49), hypertension (35), heart disease and hearing impairments (31 each), orthopedic impairments (18), cataracts and sinusitis (15 each), and diabetes, tinnitus and visual impairments (10 each).

Approximately 85% of people age 65 and older are farsighted. As people age, they lose night and peripheral vision. Approximately 70% of men and 30% of women age 65 and older have some degree of hearing loss. Nationally, approximately 10 to 15% of individuals age 65 and over will develop a major depression, which represents the most common form of mental illness experienced by older adults. In 1990, 1.6 million Americans age 65 or older (5%) lived in nursing homes. This percentage increased dramatically with age, ranging from 1% for persons 65-74 years, to 6% for persons 75-84, to 24% for persons 85 and older.

Statistics concerning the incidents of elder abuse, neglect and financial exploitation are scant at best. It has been estimated that as many as 10% of older adults are victimized by elder abuse. However, only one in eight abuse incidents is actually reported. Many of us who work with the elderly suspect that abuse, neglect and financial exploitation are far more prevalent, to the point of representing a national crisis and scandal.

Defining the Terms Abuse, Neglect and Financial Exploitation of the Elderly

Definitions of abuse, neglect and financial exploitation are found in Colorado law in the Protective Services for Adults at Risk of Mistreatment or Self-Neglect Act, C.R.S. □□ 26-3.1-

102-106, and in other sources such as the American Association of Retired Person's publication Domestic Mistreatment of the Elderly -- Towards Prevention, written by Richard L. Douglass, M.P.H., Ph.D., in 1987.

A. Abuse

Abuse generally falls into two categories: physical abuse and psychological abuse.

The definition of abuse under Colorado law is:

...infliction of physical pain or injury, as demonstrated by, but not limited to, substantial or multiple skin bruising, bleeding, malnutrition, dehydration, burns, bone fractures, poisoning, subdural hematoma, soft tissue swelling, or suffocation; ... unreasonable confinement or restraint; or ... nonconsensual sexual conduct or contact classified as a crime under the 'Colorado Criminal Code' of an at-risk adult. (C.R.S. □□ 18-6.5-101-106.)

The definition of an at-risk adult under Colorado law is:
an individual eighteen years of age or older who is susceptible to mistreatment ... or self-neglect ... because the individual is unable to perform or obtain services necessary for the individual's health, safety, or welfare or lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the individual's person or affairs.

Dr. Douglass defines physical abuse as "the infliction of physical pain or injury, or physical coercion (confinement against one's will)." Examples include "slapping, bruising, sexually molesting, cutting, lacerating, burning, physically restraining, pushing, shoving."

According to Dr. Douglass, psychological abuse is "the infliction of mental anguish." Examples include "demeaning, name calling, treating as a child, insulting, ignoring,frightening, humiliating, intimidating, threatening, isolation."

B. Neglect

Pursuant to Colorado law, neglect occurs when
...adequate food, clothing, shelter, psychological care, physical care, medical care, or supervision is not secured for the at-risk adult or is not provided by a caretaker in a timely manner and with the degree of care that a reasonable person in the same situation would exercise...."

C.R.S.□ 26-3.1-101(4)(b).

In Domestic Mistreatment of the Elderly -- Towards Prevention, neglect is divided into two categories: (1) passive neglect, which is defined as "the unintentional failure to fulfill a caretaking obligation; there is no conscious or willful attempt to inflict physical or emotional distress on the older person." Examples include "non-provision of food or health-related services because of the caregiver's infirmity, laziness, or inadequate

skills, knowledge, or understanding of the necessity of prescribed or other essential services."

(2) Active neglect, which is defined as "the intentional failure to fulfill a caretaking obligation, including a conscious and willful attempt to inflict physical or emotional stress or injury on the older person." Examples include "deliberate abandonment, deliberate denial of food or health-related services, depriving of dentures or eyeglasses."

Another category of neglect is self-neglect, in which the elder fails to properly care for himself or herself.

C. Financial Exploitation

Colorado law defines exploitation as
...the illegal or improper use of an at-risk adult or the at-risk adult's resources for another person's profit or advantage.

Dr. Douglass includes in his definition of "material (financial) abuse" the "illegal, or unethical exploitation and/or use of funds, property, or other assets belonging to the older person."

Another interesting and somewhat unusual definition of financial exploitation is found in the Journal of Legal Medicine in an article entitled, "The Physician's Role in Detecting and Reporting Elder Abuse," written in 1982 by Palinesar and Cobb. The authors state:

Financial abuse typically occurs in one of two forms. It may be the misuse of the elderly person's funds by another person, usually a caretaker or close relative; or, a caretaker may withhold medical attention or refrain from making necessary expenditures for the elderly person's benefit in order to conserve funds for inheritance.

Examples of financial exploitation include stealing property and money, using the elder's money and/or credit cards, transferring title to assets, for example, the home or financial accounts, cashing in CDs, money markets, life insurance policies, etc.

Identifying the Most Common Perpetrators of Abuse, Neglect and Financial Exploitation

Unfortunately, nearly anyone can be a perpetrator of abuse, neglect or financial exploitation of the elderly, either through ignorance, inexperience, failure to act or intentional acts. Well meaning caregivers, weary from the demands of catering to an elder, may forget to administer medication. Or, in a moment of extreme stress, a daughter may handle her elderly father too roughly and curse at him for soiling himself. Or, while running errands for an elder, a friend may buy a few items for himself and pay for it with the elder's funds, justifying it because, after

all, he, the friend, has done so much for the elder.

Those who are perpetrators of abuse, neglect and financial exploitation of the elderly tend to fall into specific categories. These include the following:

1. Spouse caregivers;

2. Adult child or other family member caregivers;

3. Caregivers who are unrelated to the elder;

4. Those serving as a fiduciary for the elder, e.g., guardians, conservators,trustees, agents under a power of attorney and personal representatives;

5. Medical facilities and personnel, including hospitals, nursing homes, assisted living facilities and board and care homes;

6. Financial facilities and personnel, including stock brokers, insurance agents and accountants;

7. Others in a position of trust, e.g., lawyers and those who offer to "help" the elder with paying bills, depositing money, filing health insurance claims, etc.; and

8. Strangers perpetrating various "scams," notably telephone fraud.

Why Are Our Elders Mistreated?

In analyzing the problem of elder abuse, neglect and financial exploitation, it is important to identify why senior citizens are particularly vulnerable to mistreatment. In April 1990, the Subcommittee on Health and Long-Term Care of the Select Committee on Aging of the House of Representatives issued a report entitled Elder Abuse: A Decade of Shame and Inaction. The report addressed the primary reasons for mistreatment of the elderly as follows.

1. Retaliation. If the adult child was abused by the elder during childhood, mistreatment may be used to seek revenge. Additionally, unresolved conflicts between the adult child and the elder can lead to retaliation.

2. Violence as a Way of Life. A family history of violence or the mere fact that there is widespread acceptance of violence in this country may lead to mistreatment.

3. Unresolved Conflict. This can occur between elders and their adult children and between elderly spouses.

4. Lack of Close Family Ties. If an elder and the adult child have had an emotionally distant relationship, resentment may occur when the adult child suddenly has to care for the elderly parent. Additionally, lack of close family ties often leads elders to seek non-relative caregivers, who may not feel the same sense of responsibility as a family member.

5. Lack of Financial Resources. This can be a factor for both the elder and the adult child caregiver. The elder may have limited financial resources and, therefore, must rely on the caregiver to supplement some of the expenses. The caregiver may resent having to pay for the elder's care, particularly if it negatively affects the family's resources. Additionally, women are working in much greater numbers and having to sacrifice a job or career to care for an elder can lead to tremendous resentment and stress. Finally, elders who have limited resources are often forced to seek inappropriate caregivers who, themselves, may have financial problems.

6. Resentment of Dependency. A caregiver can become overwhelmed at the amount of time and effort caring for an elder requires. The caregiver's loss of independence can lead to frustration, anger and resentment.

7. Increased Life Expectancy. Because elders are living longer, they are becoming more frail, they require more care and the number of years spent providing care are increased.

8. History of Mental Problems. This is particularly a problem when the caregiver, often an adult child, has mental problems. The elder becomes a target when the caregiver strikes out.

9. Unemployment. When the primary income-producing member of the family is unemployed, intra-family violence increases not only toward the spouse and children, but also toward the dependent elder.

10. History of Alcohol and Drug Abuse. As with mental problems, caregivers who abuse alcohol and drugs tend to be more violent or prone to exploit others.

11. Environmental Conditions. All kinds of environmental conditions, such as living in a crowded home, can lead to violence.

In addition to the above factors, it is this author's observation that greed is a tremendous influence, primarily in circumstances constituting financial exploitation of the elderly. Greed is an emotion that affects relatives and non-related individuals alike. The opportunity to benefit financially is often too great a temptation to resist. In many family circumstances, rationalizations for financially exploiting a relative abound. Examples include, "Mama always loved me best" and "I've sacrificed for Mama by providing care for her, therefore I am

entitled." Additionally, hostility between family members, primarily siblings, results in a race to see who can get his or her hands on the elder's resources first.

Characteristics That Make Elders Particularly Vulnerable

The report Elder Abuse: A Decade of Shame and Inaction identifies the factors that make elders particularly vulnerable to abuse, neglect and financial exploitation.

1. Female. There are more older women than men, which makes being female a risk factor. Additionally, women are more likely to be targets of sexual abuse.

2. Advanced Age. The older the person is, the higher risk he or she has of being abused. Physical and mental impairments may affect the elder's ability to resist abuse.

3. Dependent. The more dependent an elder is, whether physically, emotionally, or financially, the more likely he or she is to be a victim.

4. Problem Drinker. Elders who abuse alcohol are at higher risk of being victims, especially if they have difficulty caring for themselves.

5. Intergenerational Conflict. When long-standing conflicts between parents and adult children are unresolved, the elder is at greater risk of being victimized.

6. Internalizing the Blame. An elderly person who blames himself or herself for a particular situation is more vulnerable and less likely to acknowledge that abuse is the fault of the abuser, not of the elder.

7. Isolation. Loneliness can lead elders to trust an apparently "friendly" individual bent on exploitation. Because the elder is isolated from others, it is less likely that victimization will be detected by third parties.

8. Provocative Behavior. Elders who are demanding, ungrateful, uncooperative or abusive themselves are often more likely to be victims themselves.

Fighting Back: Legal Remedies Available to the Elderly Victims of Abuse, Neglect and Financial Exploitation

There are three categories of legal remedies for the victim of elder abuse, neglect and financial exploitation: (1) criminal, (2) civil and (3) administrative. Although the focus of this paper is on civil and administrative remedies, criminal remedies will be discussed briefly.

A. Criminal Remedies

A criminal case is brought on behalf of the public at large ("the people") by the District Attorney or the Attorney General for violations of state criminal law, and by the U.S. Attorney for violations of federal law. The State of Colorado or the United States are the plaintiff in criminal cases and the perpetrator of abuse, neglect or financial exploitation is the defendant. The victim is not a party to the case, but rather is a witness. It is generally in the discretion of the District or U.S. Attorney to file a criminal case.

Prosecuting cases involving elder abuse, neglect and financial exploitation can be difficult: the victim is often a poor witness, whether from fear, confusion, diminished capacity, memory failure or frailty. Conversely, the defendant is often a better witness and can raise defenses such as the impairment of the elder's memory, claims that the elder made a gift,the elder entered into a contract, etc.

Colorado's Criminal Code contains a section entitled Wrongs to At-risk Adults, C.R.

S. □□ 18-6.5-101-106, which specifically targets abuse, neglect and exploitation cases.

Additionally, provisions in the Criminal Code provide stiffer sentences for defendants who commit crimes against an elderly person or a person with a disability. It is also a crime to violate a civil restraining order.

B. Civil Remedies

In a civil case, a victim of abuse, neglect or financial exploitation, or someone on his or her behalf such as a guardian or conservator, can sue the perpetrator directly for monetary damages. The victim is the plaintiff and the perpetrator is the defendant. As a part of a civil case, a victim can also sue for injunctive relief. An injunction is a court order which directs someone to perform a specific act or to refrain from performing a specific act.

Thus, for example, an elder could sue a perpetrator for money damages for injuries sustained from an assault and battery and, at the same time, ask the court to issue an injunction prohibiting the perpetrator from having any contact with the victim.

As with criminal cases, bringing a civil case can be difficult. For example, the elderly victim may be a poor witness, statutes of limitations may have expired before the elder seeks help, pursuing a lawsuit can be costly and there may be a long delay before a court date.

However, Colorado law provides for an earlier trial date when a party suffers from an illness or condition which raises a medical doubt of survival beyond one year or if the person is age 70 or older and can prove to the court that he has a meritorious claim and a substantial interest in the case.

Another civil remedy is a restraining order, which can be issued separately from and independent of a civil suit. A restraining order is a court order that restrains a person from taking certain actions.

A third civil remedy is to seek the appointment of a guardian and/or a conservator or other protective arrangement on behalf of an elder under the Colorado Probate Code.

1. Civil Suits

There are a number of legal theories under which a victim of elder abuse, neglect or financial exploitation can sue the perpetrator. The following is representative only and is not intended to be an exclusive list of legal theories.

1. Assault is the willful attempt or threat to inflict injury on a person, and any display of force that would cause the victim to fear or expect immediate bodily harm. An assault can be committed without actually touching, striking or harming the victim. An example is shaking a fist in the elder's face in a threatening manner.

2. Battery is the willful physical contact of a person which causes bodily injury or is offensive. This can include punching, hitting or rough handling.

3. Intentional infliction of emotional distress is engaging in conduct for the purpose of causing severe emotional distress on another person or knowing that certain conduct will have that result. An example is threatening to put an elder in the nursing home if he does not "behave."

4. False imprisonment is the intentional restriction of a victim's freedom of movement. This can include the use of physical restraints, removal of the elder's means of transportation (e.g., cane or wheelchair) or locking the elder in a room.

5. Duress is coercing a person to do something against his or her free will, such as forcing an elder to sign a check payable to the perpetrator.

6. Negligence is the failure to use the care that a reasonably prudent person would use under similar circumstances, which results in harm to the victim. An example is failure to administer medication in a timely manner.

7. Conversion is the civil equivalent to theft. Conversion means that a person takes control over the property of another with the intent to deprive the victim of the property, such as stealing money or personal property.

8. Fraud and deception is the making of a false representation of a material fact to another, when the person making the representation knows that the representation is false and knows that the victim will act on it, thereby causing damage to the victim.

Examples include telephone scams, sweepstakes, requests to send money to "win."

9. Breach of fiduciary duty. A fiduciary is a person or entity who, as the result of a particular undertaking, has a duty to act primarily for the benefit of another in matters connected with the undertaking. This duty is often referred to as a fiduciary duty. An example of a fiduciary is a conservator or a stockbroker. When a person breaches a fiduciary duty, the victim incurs damages, such as loss of property or money. An example is self-dealing or using the elder's funds or property.

10. Unjust enrichment occurs when a person benefits unjustly, at the expense of another, and it is unfair for the defendant to retain the benefit. An example is an informal promise to provide care to an elder, being paid in advance, and the caregiver not providing the care.

11. Breach of contract. When a person enters into a contract with another, and fails to perform under the terms of the contract, the defendant has breached the contract.

An example is a written agreement to provide care to an elder, being paid in advance, and the caregiver not providing the care.

12. Constructive trust. When a person acquires the property of another by abusing a confidential relationship that exists between the two people, the court can remedy this abuse by imposing a constructive trust on the property. This means that the defendant no longer owns the property, but that it is held for the benefit of the plaintiff. For example, an adult daughter convinces her elderly mother to deed the home to the daughter without paying the mother. If the mother sues the daughter, the court could hold the property in trust for the benefit of the mother.

13. Other legal remedies. Malpractice (medical, accountant, legal and other professionals), violations of securities laws, etc., are also available to the elderly plaintiff.

2. Restraining Orders

Under Colorado law, C.R.S. □ 14-4-102, in cases of domestic

abuse, a temporary and permanent restraining order can be entered by a municipal, county or district court in order to prevent such abuse. The restraining order can prohibit a person from threatening, molesting, injuring or contacting the party seeking the restraining order. Unfortunately, this statute does not address psychological abuse.

Another provision of Colorado law, C.R.S. □ 13-6-107, addresses restraining orders to prevent emotional abuse of the elderly. Elderly is defined as age sixty years or more. A temporary or permanent restraining order to prevent emotional abuse of the elderly may include restraining a party from repeated acts which constitute verbal threats or assaults; from repeated acts which constitute verbal harassment; from repeated acts which result in the inappropriate use or the threat of inappropriate use of medications upon a person; from repeated acts which result in the inappropriate use of physical or chemical restraints; and from repeated acts which result in the misuse of power or authority granted to a person through a power of attorney or by a court in a guardianship or conservatorship proceeding which results in unreasonable confinement or restriction of the liberty of an elderly person.

As discussed above, violation of a restraining order constitutes a criminal offense. Additionally, a person who violates a restraining order can be held in contempt of court.

3. Guardianship, Conservatorship and Other Protective Arrangements

The Colorado Probate Code, C.R.S. □□ 15-14-101 et. seq., provides that an elder or someone on his or her behalf can petition the court to appoint a guardian and/or a conservator or to enter a protective order for the benefit of the elder. A guardian is a person or institution appointed by the court to make decisions concerning the person of someone who is incapacitated. For example, a guardian decides where the person will reside, what kind of medical treatment will be administered, etc. A conservator is a person or institution appointed by the court to manage the estate and affairs of a person who is unable to manage his or her property and affairs effectively. Instead of appointing a conservator, the court can issue a protective order, authorizing, directing or ratifying any transaction necessary or desirable to achieve any security, service or care arrangement meeting the foreseeable needs of the person in need of protection. An example of a protective arrangement is a court order permitting the sale of the elder's home. A probate court also has broad powers to order an accounting of all funds expended on behalf of the protected person.

C. Administrative Remedies

One of the most important administrative remedies available to

a victim of elder abuse, neglect or financial exploitation is a law entitled Protective Services for Adults at Risk of Mistreatment or Self-Neglect Act. C.R.S. □□ 26-3.1-201 et. seq. This law "urges" (but does not require) professionals and others who are in a position to detect abuse, neglect and financial exploitation of an elder to report to the county Department of Social Services or, during non-business hours, to law enforcement agencies, when they have "observed the mistreatment or self-neglect of an at-risk adult." The statute designates those who are "urged" to report in the following general categories: medical personnel (including hospital and nursing home personnel engaged in the admission of patients); mental health professionals; social workers; dentists; law enforcement officials; court appointed guardians and conservators; fire protection personnel; pharmacists; community centered board staff; financial institution personnel; state and local long-term care ombudsmen; and personnel, volunteers or consultants for any licensed care facility, agency, home or governing board.

Additionally, "any other person may report such known or suspected mistreatment or self-neglect of an at-risk adult." Once the Department has received a report, it is immediately required to "make a thorough investigation." A written report must be made within 48 hours. If it is determined that an at-risk adult is being mistreated or self-neglected, or is at risk thereof, the Department can immediately provide protective services if the adult consents. If the adult does not consent, the Department can file for the appointment of a guardian and/or a conservator for the adult. However, any protective services sought must constitute "the least restrictive intervention."

A victim of abuse, neglect or financial exploitation can also file a complaint against an entity or a person who is regulated by an administrative agency. For example, nursing homes must comply with the regulations of the Colorado Department of Health. Insurance companies are governed by the regulations of the Colorado Commissioner of Insurance. Stock brokerages must comply with the regulations of the Colorado Commissioner of Securities and the U.S. Securities and Exchange Commission. If the administrative agency determines that a potential violation of its regulations has occurred, it can conduct an investigation and take action against the wrongdoer.

Conclusion

As professionals working with the elderly, it is incumbent upon all of us to recognize the signs of elder abuse, neglect and financial exploitation, to identify the victims and to assist them in pursuing their legal rights under the law.

Nevada

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(1) Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2) (a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

(2) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, that restrains the person or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly

remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

(3) A violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Any assault that is a violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

(5) A violation of a court order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

(6) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, the court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen days why the respondent should not be found in contempt of court and punished accordingly. The hearing may be held in the court of any county or municipality in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.

[2006 c 138 § 25; 2000 c 119 § 24; 1996 c 248 § 16; 1995 c 246 § 14; 1992 c 86 § 5; 1991 c 301 § 6; 1984 c 263 § 12.]

Notes:

Short title -- 2006 c 138: See RCW 7.90.900.

Application -- 2000 c 119: See note following RCW 26.50.021.

Severability -- 1995 c 246: See note following RCW 26.50.010.

Finding -- 1991 c 301: See note following RCW 10.99.020.

Violation of order protecting vulnerable adult: RCW 74.34.145.

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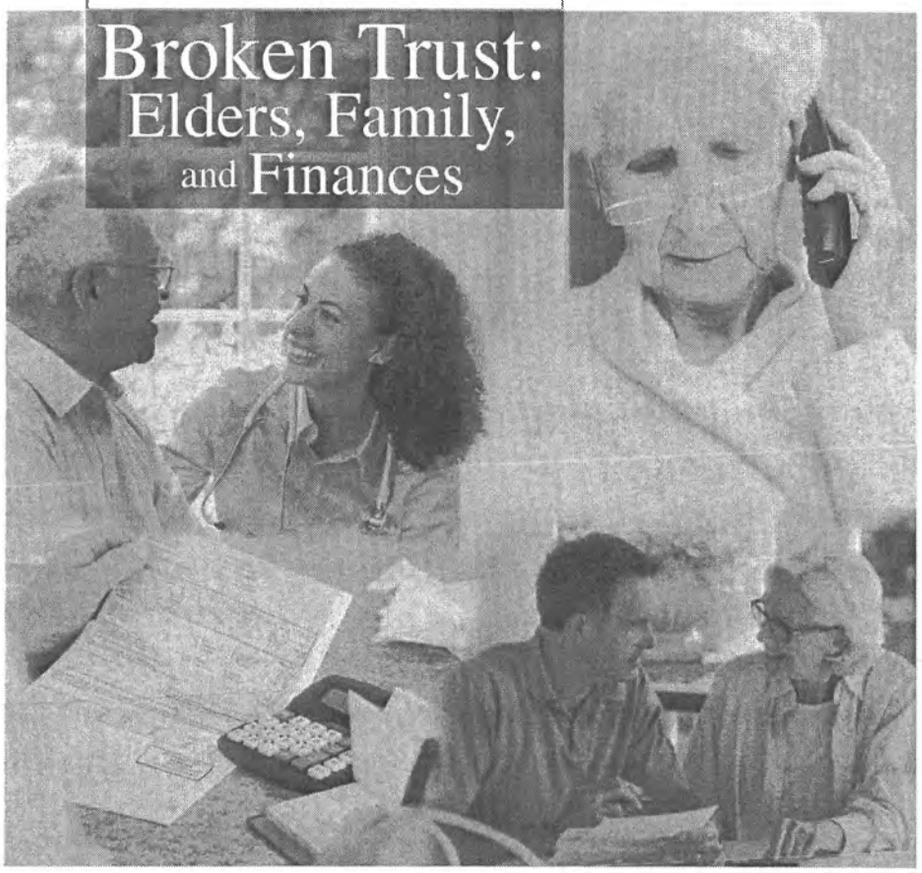
STUDY

Broken Trust: Elders, Family, and Finances



A Study on Elder Financial Abuse Prevention

by the MetLife Mature Market Institute, the National Committee for the Prevention of Elder Abuse, and the Center for Gerontology at Virginia Polytechnic Institute and State University

MARCH 2009

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The National Committee for the Prevention of Elder Abuse (NCPEA)

The NCPEA is an association of researchers, practitioners, educators, and advocates dedicated to protecting the safety, security, and dignity of America's most vulnerable citizens. Established in 1988 to achieve a clearer understanding of abuse and provide direction and leadership to prevent it, the Committee is one of six partners that make up the National Center on Elder Abuse, which is funded by Congress to serve as the nation's clearinghouse on information and materials on abuse and neglect. The mission of NCPEA is to prevent abuse, neglect, and exploitation of older persons and adults with disabilities through research, advocacy, public and professional awareness, interdisciplinary exchange, and coalition building. **www.preventelderabuse.org**

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Established in 1977-78, the Center for Gerontology serves as the organizational unit and focal point for aging-related research and education activities at Virginia Tech. The Center focuses primarily on three streams of coordinated research that enhance the quality of life of older adults: Family Gerontology, Health and Aging, and Elder Rights. **www.gerontology.vt.edu**

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Executive Summary

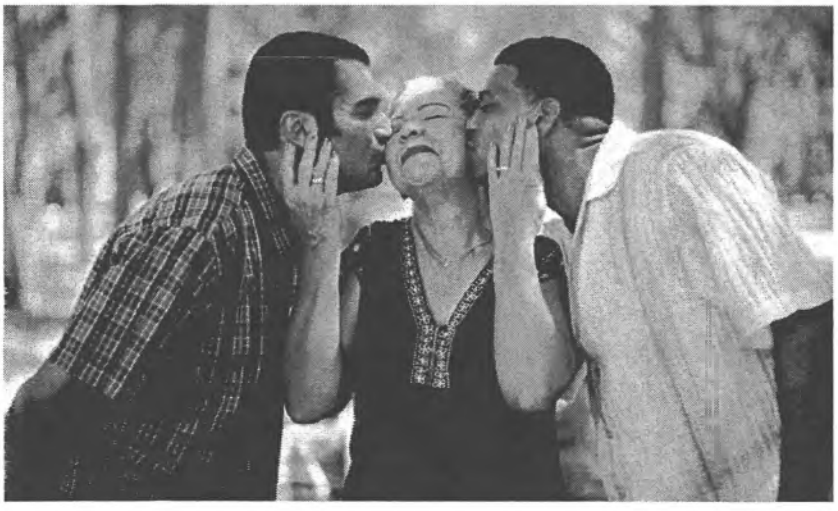
This study from the MetLife Mature Market Institute (MMI), the National Committee for the Prevention of Elder Abuse, and the Center for Gerontology at Virginia Polytechnic Institute and State University provides a comprehensive understanding about the extent and implications of elder financial abuse in all its various manifestations—personal, institutional, and societal. Through an extensive review of available information on elder abuse, this research enhances the understanding of the complexities surrounding elder financial abuse, the current magnitude of the issue, reasons why this issue is likely to grow, and some recommendations of ways to potentially mitigate this complex and devastating crime.

While difficult to present any comprehensive or consensus definition of elder financial abuse, this study considers elder financial abuse as "the unauthorized use or illegal taking of funds or property of people aged 60 and older." It is perpetrated by those who gain, and then violate, the trust of an older person. They can be as close as a family member, neighbor, or friend, or as distant as an invisible voice on the telephone or an e-mail from the other side of the globe.

Key Findings:

- While underreported, the annual financial loss by victims of elder financial abuse is estimated to be at least $2.6 billion dollars
- Elders' vulnerabilities and larger net worth make them a prime target for financial abuse
- The increased aging of the population, social changes, and technology advances will lead to a dramatic increase in the opportunity for a growing level of elder financial abuse
- The perpetrators of elder financial abuse are typically not strangers and most are people who have gained the trust of the older individual, including business and service professionals and family members
- The victims of elder financial abuse come from all walks of life, and this type of abuse affects elders regardless of gender, race, or ethnicity

2009 Met-Life Study



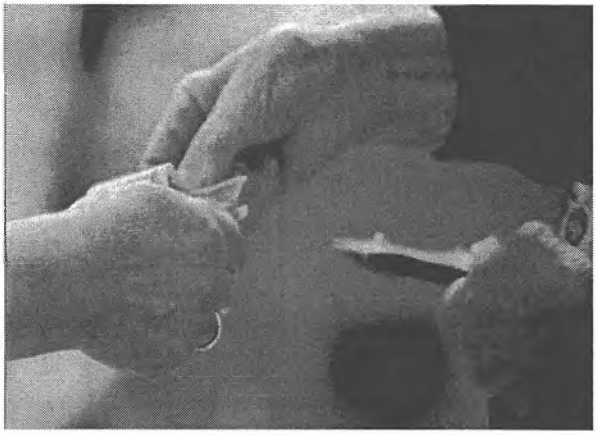
With good reason, financial elder abuse has been characterized by some experts as "the crime of the 21st Century."[1]

–J.F. Wasik, Journalist

Background

It is as old a tale as Shakespeare's *King Lear* and as current as the Internet. It involves older people losing a few precious dollars for everyday living to their entire life savings. It involves millions in increased costs to Medicare and Medicaid because of fraud and the costs of caring for impoverished victims. Based on the research in this study, it robs America's seniors of more than $2.6 billion a year. The 2004 national *Survey of State Adult Protective Services* revealed that victims range in estimated numbers from a low of 100,000 to a high of one million a year. These numbers will undoubtedly grow as the number and economic value of seniors continue to grow.[2]

Elder financial abuse is commonly linked with other forms of abuse and neglect and threatens the health, dignity, and economic security of millions of older Americans.[3-5]



It is estimated to cost Americans tens of billions of dollars annually in health care, social services, investigative and legal costs, and lost income and assets.[6] Elder financial abuse is a problem in every community and among all social strata. It is underrecognized, underreported, and underprosecuted.

The Quad-City Times

Thursday, April 3, 2008

A three-time convicted 70-year-old man told an elderly couple who befriended him that he needed money to receive an inheritance from a deceased family member in England. He showed the couple a document indicating the money was there, and even had someone call them to verify.

The perpetrator visited the couple three days in a row. Each time, the wife signed a check to him. The first was for $11,000. The second was for $5,050. The third was for $3,350. During the fourth visit, about a week later, the swindler accompanied them to a bank, where the couple took out savings and borrowed against a line of credit to give him $17,200. The couple's son learned of the transactions and called the authorities.

The swindler had been previously arrested for securities fraud for taking $300 payments from undercover officers while promising them multi-million-dollar returns on their investments. At that time, he was sentenced to five years in state prison. For his latest crime perpetrated against the elderly couple, he will spend up to ten years in prison.

Methodology

From April through June 2008, leading researchers from the National Committee for the Prevention of Elder Abuse (NCPEA), Dr. Pamela Teaster, Virginia Polytechnic Institute and State University (Virginia Tech), and Dr. Karen Roberto, reviewed all Newsfeed articles from the Administration on Aging's National Center on Elder Abuse (NCEA), collected by the National Association of Adult Protective Services (NAPSA), which tracks media reports daily of elder abuse through Google and Yahoo Alerts (a process that scans billions of Web pages).

This was the first large-scale analysis using this untapped data resource on elder financial abuse on a national basis. The scans identified 357 articles on elder financial abuse of any type from a total of 1,007 articles cited. Of these articles, 266 (75%) reported specific instances of elder financial abuse, victims, and/or perpetrators and formed the basis for additional analysis.

The NCEA's Newsfeed proved to be a valuable resource. Not only did it put a face on the information reported in the primary literature, but most importantly, it provided real-time information on elder financial abuse. Unlike information taken solely from crime statistics or social services reports, which provide only one piece of the puzzle, the Newsfeed captured information from numerous reporting sources. For each of the 266 articles specifically on elder financial abuse, the researchers also collected information on:

- Victim's age, gender
- Perpetrator's age, gender, relationship to victim
- Type of financial abuse
- Frequency of abuse
- Location of abuse
- Amount stolen
- Outcome of each incident

The researchers also searched 12 electronic databases that index academic journals containing primary literature on elder abuse from 1998 through June 2008 (see *Appendix A* on page 35). The search compiled 168 unduplicated articles from journals in the social science, medical, and legal disciplines. At the same time, the researchers conducted a database search of organizational and trade magazines to determine attention given to elder financial abuse by business and private-sector professionals (e.g., bankers, financial planners, insurance agents) who frequently interact with older adults. The search of trade publications published from 2005 to 2008 resulted in 110 unduplicated articles that addressed the issue of elder financial abuse.

As a final source of information, the researchers gathered information about community programs designed to address elder financial abuse. Data on nine specific programs came from the primary literature and the Promising Practice database maintained by the NCEA. Collectively, information from these three sources provided the most up-to-date information available on elder financial abuse and informed our recommendations for continued research and practice on this topic of national importance.

Major Findings

In just the three-month period surveyed, the Newsfeed media reports revealed approximately $396,654,700 in losses from all forms of elder financial abuse. Annualized, this estimates that more than $1.5 billion in losses is reported. However, the actual amount involved is really much higher, as no dollar figure was provided in nearly 40% of the articles. Estimating that the unreported losses are equivalent, the annual loss by victims of elder financial abuse is estimated to be at least $2.6 billion.

Of the 266 articles concerning specific elder financial abuse, business- and industry-related elder financial abuse resulted in the highest losses to victims, followed by Medicare and Medicaid fraud (and that was perpetrated by family, friends, or strangers). The overall dollar amount reported as being taken by families, friends, and strangers was $13,927,600; losses from Medicare and Medicaid fraud totaled $121,388,500, and business and industry fraud totaled $250,152,700.

However, families, friends, neighbors, and caregivers were most frequently involved as perpetrators of elder financial abuse, followed by businesses of varying kinds, and then strangers. Families, friends, neighbors, and caregivers were involved in 55% of the articles; persons not known to the elder and others in 21%; financial professionals of varying types in 18%; and Medicare/Medicaid fraud in 7%.

Furthermore, medical care and other service costs for elder abuse victims are estimated at more than $13 million annually.

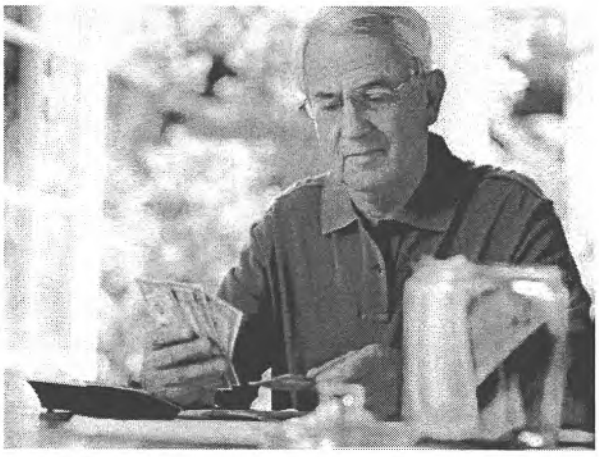
Even more than the economic loss, the human costs suffered by victims when taken advantage of by families, friends, and trusted strangers are immeasurable. Simply put, a victim of any kind of elder financial abuse is never the same after it occurs.

What Is Elder Financial Abuse?

According to the National Center on Elder Abuse, elder financial abuse is the illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder at risk for harm by another due to changes in physical functioning, mental functioning, or both.

The terminology used in the 2006 Older Americans Act is *exploitation,* defined as "...the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an older individual for monetary or personal benefit, profit, or gain, or that results in depriving an older individual of rightful access to, or use of, benefits, resources, belongings, or assets."

For every known case of elder financial abuse, it is estimated that four to five cases may go unreported.[7] Elder financial abuse is also called financial exploitation, misappropriation of funds, and fiduciary, economic, or material abuse. It encompasses a broad range of misconduct,



Herald-Tribune

May 16, 2008

An individual physician is responsible for more than $11 million in medical (Medicare/Medicaid) fraud. He performed unnecessary surgeries on 865 older adults aged 65 and older after reportedly diagnosing them with cancer.

In one case, the doctor diagnosed a piece of chewing gum as a cancerous growth when the patient's biopsy tissue was lost.

Despite a finding that tissue slides in his office were not indicative of cancer, he diagnosed virtually every patient who came into his office with cancer, and would perform surgery, removing four or more layers of skin. This allowed him to charge Medicare and Medicaid higher amounts.

including, but not limited to, fraud, scams, undue influence by family members and trusted others, and illegal viatical settlements; abuse of powers of attorney and guardianship; identity theft; Internet "phishing;" failure to fulfill contracted health care services; and Medicare and Medicaid fraud (See *Appendix B* on page 36 for a Glossary of Terms).

Elder financial abuse is regarded as the third most commonly substantiated type of elder abuse, following neglect and emotional/psychological abuse.[8] It occurs in community or institutional settings, accounting for 30%–50% of all forms of elder abuse,[9] and the problem appears to be growing.

Experts and advocates have decried that inadequacies in its definition frustrate attempts to discover, remedy, or prevent the problem as well as to define its causes and its scope. In addition, the justice and social services systems are often inadequately staffed and funded to address elder financial abuse. Even seasoned professionals have difficulty determining whether elder financial abuse actually occurred or if an elder willingly and knowingly made a poor financial decision. Generally regarded as an issue under state jurisdiction, most states mention financial exploitation in their statutes. However, what constitutes exploitation, who is covered, and who is accountable vary as widely as the solutions for the problem.

Who Experiences Elder Financial Abuse?

Reports from Adult Protective Services (APS) nationally suggest that the "typical" victim of elder financial abuse is between the ages of 70 and 89, white, female, frail, and cognitively impaired.[10] She is trusting of others and may be lonely or isolated. However, professional and trade journals, as well as newspaper articles describing the financial abuse victimization used in this study often yielded descriptions of victims with very diverse profiles (see *Table 1* below). Age breakdown does not necessarily coincide with the number of perpetrators because information was not always provided for both elements.

Specific age was not provided in many cases. General age descriptions included Elderly (94); Senior (14); Older (1); NH/ALF Resident (3); Retirees (1); Estate (1). In some cases gender

Table 1: Victim Profile from Newsfeeds

GENDER		< 60		60–69		70–79		80–89		90–99		>100	
		TOTAL	%	TOTAL	%	TOTAL	%	TOTAL	%	TOTAL	%	TOTAL	%
Male	69	3	4	3	4	8	25	31	39	7	13	0	0
Female	130	0	0	4	3	25	19	39	30	13	10	3	2

was not provided, including Couple (11) and Multiple/Both (53). In the three cases where the male victims were under the age of 60, they were also developmentally disabled.

Aging Women: Prime Targets for Elder Financial Abuse

Some sources indicated that women experience elder financial abuse more than men. Since women tend to live longer than men, there are a greater number of older women than older men in the population. In 2006, there were 21.6 million women age 65+ and 15.7 million men age 65+, or a sex ratio of 138 women for every 100 men. The number of females to males increases with age, ranging from 114 for the 65 to 69 age group to a high of 213 for persons 85 and over.[11]

Though certainly not for all, as age advances, some older women experience cognitive decline and increases in instances of chronic disease. Decreased cognitive functioning, in turn, affects their decision-making capacity, leaving them potentially susceptible to people looking to defraud or deceive them.

For example, women in need of some caregiving may experience theft of their valuables or cash by their paid caregiver. The caregiver may intercept the woman's mail, obtain credit card numbers and bank information, and use this information to commit identity theft.

Some women who experience financial abuse may be lonely due to the death of a spouse or partner. When the partner dies, an older woman

may become responsible for household finances for the first time in years or the first time ever. Women unaccustomed to home maintenance may trust a "professional" for home repairs that were never intended to be done or were intended to be done shoddily.

They also may have predictable patterns in their finances and daily routine, such as when and where they go shopping and when monthly checks arrive. Thus, observant perpetrators of financial abuse can predict when an older woman

STLToday.com (St. Charles, LA)

May 30, 2008

An 85-year-old woman was being cared for by a home health aide (age 40). Between August 2005 and March 2008, the aide "borrowed" $80,000, giving different reasons for the loan each time. It was discovered that she had used the money to gamble. She is charged with financial exploitation of the elderly.

Palm Beach Post

May 28, 2008

Imagine being the man whose primary goal in his last year of life was to face in court the woman who had stolen more than $200,000 from him. Sadly, this elderly man died a month after the perpetrator was arrested, and because his wife suffers from dementia, she was unable to testify.

Between October 2006 and her arrest in late 2007, the female caregiver for this man and his wife convinced them that the poor care she was providing was all that was keeping them out of a nursing home. She effectively isolated them from friends and family, and in February 2007, prior to his being admitted to the hospital, the caregiver arranged for the elderly man and his wife, who had dementia, to sign over one-third interest in their home.

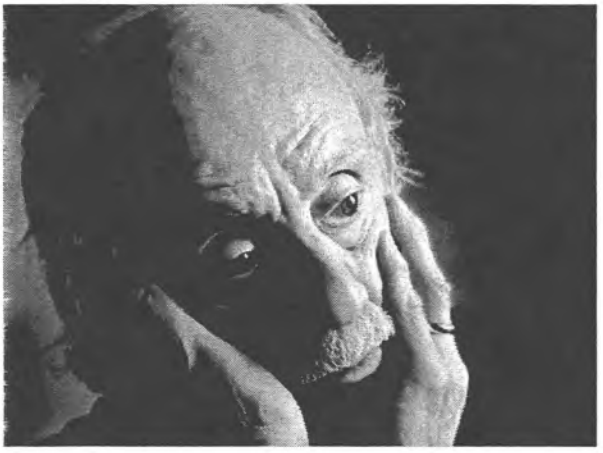
Within two months, she had also gotten them to sign a power of attorney and was posing as their stepdaughter. By the time she was arrested, she had taken out a $150,000 mortgage against the home and run up more than $75,000 in additional credit card debt in the name of the couple (ID theft).

The female caregiver, whose age was not provided, was sentenced to 15 years in prison for elderly exploitation.

will have money on hand or be going to the bank and become the target for a variety of con games and scams.

Women who have not been in a position to make financial decisions may be more trusting in the advice of others, particularly if they are new at seeking financial advice. Women with cognitive problems may be easily influenced by others, especially if that influence increases in intensity and becomes a "hard sell."

Vulnerability to undue influence could lead to a woman changing the beneficiary of a trust or will. It could also induce an agent into changing a power of attorney document. In these situations, she would forfeit her legal rights to another person. Even if this were discovered and reversed, it may prove difficult to impossible to ever recover any assets transferred to the unscrupulous individual.



Embedded in roles as mother and caregiver, women may unwittingly contribute to the dependency of a troubled child who may be posturing to care for them. They may give funds to an errant child who is dependent on the woman for funds for general living, for drugs, or for alcohol. They may enable an adult child who believes that he or she is entitled to the woman's funds. "She would want me to have it" is a common excuse. Women often don't report the financial abuse to protect their children from prosecution.

Aging Men: From "Sweetheart" to Victim

Like older women, older men also experience losses of spouses and friends as they age. Such losses may leave them alone and lonely to the point that they may become unwitting victims of people who seek to befriend them—with the intention of creating a coercive relationship through which he or she gains financially

at the expense and lasting emotional anguish of the elderly man.

One type of elder financial abuse that older men seem to be more susceptible to than women is a "Sweetheart Scam" (although women can fall prey to this form of abuse as well). In these cases, an older man experiences the loneliness accompanying the loss of a spouse or partner, and may also be depressed and possibly experiencing some cognitive and physical decline.

The deceased partner may have fulfilled a caregiving role for the man, and so he feels this loss intensely. His adult children want to help him, but they may have other family responsibilities, living some distance away, or also coping with the loss.

A woman, often younger, "befriends" the older man. Filling the void of loneliness, she may insert herself more and more into the man's life and decision-making. In such a scam, the esteem of the man becomes measured in the ways he lavishes attention on her, the attention manifesting itself in multiple and escalating expenditures for expensive gifts, automobiles, clothes, paying off debt, and signing over wills, trusts, or other legal authority to this new "friend."

Men may tend to be more risk-taking in making financial investments than women, and so they may be prone to being vulnerable to "professionals" or family members who seek to invest their money by promising unrealistically high returns.[12]

Such financial fraud may take the form of faulty insurance policies, refinancing a home loan, investments in stocks and bonds, and unrealistically rapid investment returns. Telemarketers may involve a man in paying for goods and services never rendered or rendered inadequately. Men are often enticed to provide personal information, thus making it possible for thieves to commit identity theft via the telephone, the front door, or the Internet.

Elder Financial Abuse—An Equal Opportunity Crime Against Elders

Marilyn Moon,[13-14] a researcher with extensive work on elder abuse among persons of different races and ethnicities, indicated that there are differences in how financial abuse is viewed among different ethnic groups.

For example, while African-Americans and Caucasians might regard that taking money from an elder "because she would want me to" or "because I am going to get it all anyway" as unacceptable, while in other cultures, such as that of Korean-Americans, it may be regarded as culturally acceptable. Findings from research to date are mixed and require further study in order to establish definitive trends regarding the extent of elder financial abuse among different cultures.

Prevalence of Elder Financial Abuse

Both researchers and practitioners acknowledge that estimates of elder financial abuse represent only the most overt cases, thus significantly underestimating the incidence of financial abuse of elders living in the community. Even less definitive information is available about the prevalence of financial abuse in residential long-term care settings.

Estimates of the occurrence of elder financial abuse vary considerably. The source of information about this abuse is one reason for the variation, as some estimates are predicated on anecdotal information of what people are seeing and reporting at best, while others are founded on a "sentinel approach" (i.e., purposefully selected reporters) to estimating the size of the problem. For example, the 1996 National Incidence Study conducted by the National Center on Elder Abuse found that elder financial abuse constituted 30.2% of 70,942 substantiated cases of elder abuse.[15] According to reports from the Santa Clara County Financial Abuse Specialist Team (FAST) in California, there may be as many as five million elders financially abused yearly.[16] Reports to authorities of its occurrence range from one report for every four or five cases to one report in 100 instances.

The Perpetrators of Elder Financial Abuse

In the review of NAPSA/NCEA Newsfeeds from April 2008 through June 2008, the media reported a total dollar value of elder financial abuse of approximately $396,654,700, with the largest percentage of cases involving close associates of the victim—families, friends, caregivers, and neighbors—as the perpetrator of the abuse, accounting collectively for almost 40% of reported cases. The largest single category included a variety of financial professionals, attorneys, and fiduciary agents.

Table 2: Perpetrators by Type

PERPETRATOR	TOTAL	PERCENTAGE
Trusted Professionals	48	18.0
Family	45	16.9
Caregiver (non-agency)	29	10.9
Caregiver (agency)	25	9.3
Skilled Nursing Facility/Assisted Living	20	7.5
Medicaid/Medical Fraud	18	6.7
Befriending ("Sweetheart Scam")	15	5.6
Home Repair Scam (includes travelers/handyman)	15	5.6
Stranger	14	5.3
Contractors	12	4.5
Criminal (robbery, burglary, rape, drugs, etc.)	8	3.0
Neighbor—Friend	8	3.0
Con Man	5	1.9
Phone Scam	4	1.5
Total	**266***	**99.8%****

***Does not equal 100 due to rounding.*
Number and percentage distribution of perpetrators of financial abuse—from Newsfeeds April 1, 2008—June 30, 2008 (n=266)
**Note, 266 is the number of cases that provided perpetrator information. Total number of cases was 269; total number of articles addressing elder financial abuse in any form was 357 of total of 1,007 articles.*

Elder Financial Abuse by Family Members

Family members, even more so than strangers, financially exploit their elderly relatives. Although there is no definitive estimate of the number of older adults who experience financial abuse by family members, community service providers and other professionals agree that cases actually reported to authorities represent only the very "tip of the iceberg." Like King Lear, when people in their later years encounter health problems that diminish their physical or cognitive capacities, they usually first turn to family members for assistance and support.

In most situations, family members nobly assume their caregiving role; but in others, family members—sons, daughters, grandchildren, nieces, and nephews—take advantage of the elders' dependencies and become perpetrators of financial abuse. Approximately 60% of substantiated Adult Protective Services (APS) cases of financial abuse involve an adult child, compared to 47% for all other forms of abuse.[17]

The elder's grandchildren and other relatives are almost equally as likely to be perpetrators of financial abuse (9.2% and 9.7%, respectively). In the primary literature, male and female relatives are equally likely to be financial abusers of older adults. However, the media-reported instances revealed that elder financial abuse was 2.5 times more likely to be committed by sons than daughters. Overall, 45 incidents (16.9%) of elder financial abuse described in the media involved immediate relatives. Family perpetrators often misuse their powers of attorney to steal money from bank accounts, obtain credit cards to make unauthorized purchases, and embezzle large sums of money by refinancing the elder's home, among other examples of financial abuse.[18]

It is unknown what factors contribute to the likelihood of family members financially exploiting their elderly relatives, as no rigorous research has been done. Scholars and practitioners speculate that, like perpetrators of other types of elder abuse, family members who exploit their elders are dependent upon them for their own survival (e.g., shelter and finances) and their actions may be influenced by problems with alcohol, drug abuse, and gambling, and many may suffer from antisocial behavior disorders.

Tensions and inequalities between the elder and family member, perhaps stemming from the relative's dependency and mental health issues, enhance the likelihood of financial abuse. For example, an unemployed adult child living in the home of a parent might be more likely to exploit the elder than an adult child with a steady income and their own place of residence, or one generation abused another and then the "abuser role" is reversed.[19]

American Bar Association

ABANet

An American Bar Association report noted an ongoing case where a mother gave her son her power of attorney. The mother then sold her home, moved in with the son, and gave the proceeds to her son to build an addition to the son's house where she could live. The son subsequently claimed that the contractors he paid did not do the work on the house. The son then dropped the mother off at a local hospital and refused to bring her home.

After staying in the hospital for about two and a half months, a nursing home was finally located for placement for her. However, because the mother is now impoverished after giving her assets to her son, Medicaid is taking the position that the transfers to the son were disqualifying for Medicaid coverage eligibility purposes, and the placement may very well become disrupted.

Kansas City Star

June 4, 2008

A case was reported of a 72-year-old woman who was found dead, and whose daughter is charged in her murder. She had moved in with her 55-year-old daughter in 2006, at which time she had more than $40,000 in the bank. At the time her daughter was arrested, there were no funds in the bank, and the conditions under which the older woman had been living made it clear that the money had not been spent on her care. For example, the older woman broke her leg. Her daughter, who is a nurse, treated it by dosing her mother with antibiotics and corn starch, and wrapped the leg in a diaper and taped it, rather than get proper care for the injury.

Some family members also feel a sense of entitlement and believe that they have a right to the money and material goods their parents or older relatives have accumulated. They often start with small crimes, such as stealing jewelry and blank checks, before moving on to larger items or coercing elders to sign over the deeds to their homes, change their wills, or liquidate their assets. They feel justified in taking "advance" control over assets that they perceive to be "almost" or "rightfully" theirs.[20] Relatives may believe they are entitled to "reimbursement" for providing care for the elder, or/and may even take preemptive steps to secure assets to prevent their presumed inheritance from being exhausted to pay for the elder's care and medical bills.

"... Family members also feel a sense of entitlement ..."

Table 3: Perpetrator Profile by Age and Gender

	GENDER			
AGE	**MALE**		**FEMALE**	
	TOTAL	**%**	**TOTAL**	**%**
<20	6	5.9	1	1.0
20-29	15	13.9	14	14.4
30-39	15	13.9	25	25.7
40-49	33	31.0	30	30.9
50-59	28	25.9	16	16.0
60-69	7	6.0	9	9.0
70-79	3	2.0	2	0.0
80-89	1	0.9	0	0.0
TOTAL	**108**		**97**	

Businesses as Perpetrators of Elder Financial Abuse

Another type of elder financial abuse is often referred to as "commercial" elder abuse. Elderly people can be an easy mark because of their often trusting nature and because swindlers operate under the guise of the trustworthiness of a business as well as a personal trust relationship.[21] Commercial organizations as perpetrators run the gamut of blue-collar crimes, but several types are noteworthy. The research literature has barely quantified this problem, thus much that we know is case-by-case or highly anecdotal in nature.

While elder financial abuse runs the gamut of types and varieties, some common kinds of commercial theft, fraud, and embezzlement include:

- Life and health insurance misrepresentation or theft (single perpetrators or a sophisticated group or ring)
- Predatory lending:
  - False investment claims
  - "Get rich quick" schemes
  - Credit card bailouts
  - Home loan bailouts

- False sales and promises related to annuities, stocks, and bonds
- False banking practices, including account draining or siphoning
- Property purchasing scams
- High-pressure telephone solicitations, especially for charities
- Magazine and book publishers' solicitations
- Internet scams:
  - Social networks
  - E-mail
  - Medications
  - Assistive devices/medical equipment
  - Clothing
  - Make-up and age-reduction remedies
  - Property and information solicitation
- Identity theft, misrepresentation by various industries, claiming must-have information for verification purposes

While the largest number of cases reported involved family, friends, and caregivers, the aggregate dollar amounts lost through commercial elder abuse was the highest. This is typically the case since investment scams and similar forms of financial abuse involve larger sums of money and often hundreds of victims. We have only to look at the headlines of high profile "Ponzi" schemes where many elderly and non-elderly wealthy victims as well as institutions collectively lose millions of dollars to fraud.

The illegal attempts by various industries involving individual perpetrators or sometimes

teams and involving aspects of fraud and abuse listed on pages 14 and 15 are growing in their intricacy to defraud older adults. These forms of commercial elder abuse are increasing in number, perhaps due to greater vigilance in recognition and reporting. More importantly, they are growing in their complexity, potentially resulting in forms of elder financial abuse that will become more difficult to detect and prevent. Combating these varied types of elder financial abuse will take trained investigators and advocates greater time, savvy, and cunning than the ever-proliferating perpetrators. For this reason, specialized legal units, such as those profiled later in this study and those in NCEA's Promising Practices Database,[22] have been established in some larger metropolitan areas.

Elder Financial Abuse by Acquaintances and Strangers[23]

A large proportion of perpetrators are unrelated to their elderly victims. As noted in the primary literature[24] and as is further evident in the Newsfeeds reviewed, perpetrators of elder

Brooklyn Daily Eagle

April 23, 2008

A 92-year-old woman was victimized by her 63-year-old nephew, who was a judge in New York State. The nephew forged a power of attorney and took $163,000 over a period of some months. The perpetrator has pled guilty to the misdemeanor crime of a forged instrument. He must pay the estate back plus interest, waive rights to any inheritance, and resign from the New York State Bar.

The Brooklyn Tab

June 25, 2008

A 68-year-old man with experience in owning a business and making investments was allegedly scammed out of $26,500 by a man who promised him a $500 a week return on his money. Mr. J had hoped to supplement his and his wife's Social Security income with that money. When Mr. J requested a formal written proposal, the alleged perpetrator was unable to provide one.

Mr. J then requested that his money be returned. This resulted in getting "every excuse in the book" from the alleged perpetrator, but no check. Finally an attorney was retained, a check was provided, but it bounced. Mr. J still has not received his $26,500, nor has he received a $500 a week return on it.

financial abuse include neighbors, apartment managers, home health aides, ministers, those with power of attorney, and guardians.

They initially extended helping hands to the elders and gradually are overcome by greed; contractors and handymen who ripped off the elders with bogus charges; phony financial planners and professional con artists who provided "free" services for elders to gain their trust and then defrauded them later; and others who befriended the elders to take advantage of them.

One trait perpetrators of elder financial abuse have in common is that they exhibit excellent persuasion skills. They are very good at cultivating relationships and convincing older adults that they are worthy of their trust and money. In general, perpetrators are not bound by conventional norms or business ethics, and rationalize their criminal and abusive behavior.

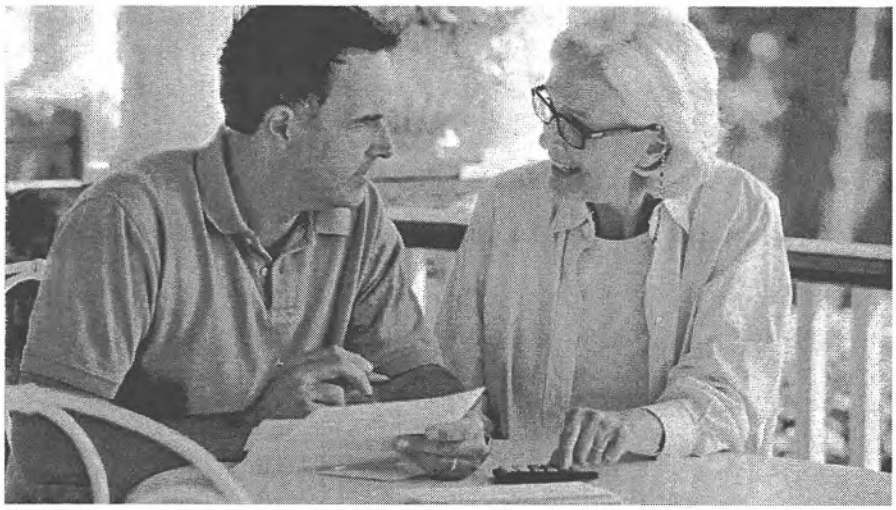
The *Sarasota Herald Tribune* (June 12, 2008) estimated that since 2000, southwest Florida elders alone have lost at least $350 million to swindlers. Individuals involved in exploiting older adults may use "undue influence"—the substitution of one person's will for the true desires of another.[25] In these cases, the perpetrator uses his or her role and power to exploit the trust, dependency, or fear to gain psychological control over the older adult's decision-making, usually for financial gain. Some are career professionals in the business of defrauding others, while others are initially in a position of trust who apparently are overcome by greed. They encourage their elderly victims to make an immediate decision or commitment to purchase products or services, which effectively limits the opportunity for consultation with others.

As the elderly population grows, so too does their presence on the Internet. The Federal Trade Commission reported that in 2004, elders who filed complaints about Internet fraud each lost an average of $1,280 to individuals and businesses operating Internet scams.[26] Common Internet scams used with older adults are "phishing" and identity theft. Using carefully crafted e-mail messages that appear to be from legitimate and reputable banks, companies, and government agencies, the perpetrators often use scare tactics such as threats of account closures to lure in their elderly victims.

As the newest demographic to venture in cyberspace, older adults are generally least educated about the dangers and intricacies of phishing and other fraudulent practices.[27-28]

"Elder financial abuse is a crime growing in intensity and, especially now, with the plummeting economy, elders will be unable to recover from such losses."

–Pamela Teaster, President, National Committee for the Prevention of Elder Abuse



"Approximately 60% of substantiated Adult Protective Services (APS) cases of financial abuse involve an adult child, compared to 47% for all other forms of abuse."

Table 4: Relationship of Perpetrator to Victim

NON-INSTITUTIONAL PERPETRATORS

Family: including "fictive kin" (i.e., non-relatives considered to be "like" family), son/daughter, grandson/granddaughter, niece/nephew, and other relatives

Family, Caregivers, and Friends		**82**
Family		45
Son	18	
Daughter	7	
Nephew/Niece	7	
Granddaughter/Grandson	6	
Other Relatives	6	
Fictive Kin	1	
Caregiver (non-agency)		29
Neighbor/Friend		8
Others		**65**
Befriended ("Sweetheart Scam")	15	
Stranger	14	
Contractors	12	
Handyman/Chores/Caretaker	9	
Con Man	5	
Home Repair Scam	4	
Phone Scams	4	
"Travelers"	2	
Criminal		**8**
Robber/Burglar	4	
Transient	2	
Serial Rapist	1	
Drugs	1	

INSTITUTIONAL PERPETRATORS

Trusted Professionals		**48**
Financial	33	
Attorneys/Paralegal	11	
Pastor/Minister	2	
Executors/Trustees	1	
CPA	1	
Other		**63**
Caregiver (agency/facility)	25	
SNF/ALF/Personal Care Home Owner/Operator/Business Manager	20	
Medicare/Medicaid Fraud	15	
Health Care Fraud	1	
Hearing Aid Business	1	
Therapist	1	

Growing Problem of Elder Financial Abuse

Although elder financial abuse has been poorly understood, there are some compelling reasons to believe its occurrence has increased over the past ten years[29] due to the following:

More Elders in the Population Means More Potential for Elder Financial Abuse

The population of elders generally is increasing, as ours is an aging society. In 1900, adults aged 60 and older constituted about 6% of the population.[30] In 2006, elders aged 60 and older comprised almost 17% of the population.[31] By 2030, elders 60 years of age and older will comprise nearly 25% of the U.S. population.[32]

Older Americans Have the Lion's Share of the Money, and Therefore Are the Obvious Target for Predators Looking for Financial Gains

The older population owns the largest proportion of wealth in the U.S. People over 50 years of age control at least 70% of the net worth of the nation's households.[33] Many elders do not realize the value of their assets, such as their homes that may have appreciated markedly since purchased decades ago.

Diminished Cognitive Abilities Create Greater Vulnerability to Elder Financial Abuse

While the aging population overall is growing, the oldest-old (those aged 85+) are the fastest growing segment of the older population. For many, with advanced age come changes in physical and mental functioning. For those with decreased abilities, decision-making capacity may be compromised, and they thus may fall prey to elder financial abuse without fully understanding the situation. To illustrate, the prevalence of dementia in those 75 and older is 16%,[34] and for those 80 and older, it is 30%. Changes in cognitive abilities make elders dependent on others for help. These "helpers" may have access to homes and assets, and may exercise significant influence over the elder.

Changes in Families Alter Responsibility and Oversight for Providing Care, Which Increases the Potential for Elder Financial Abuse

Families still provide the bulk of care for elders, although they look far different than they did in previous generations. More than half of women (59% in 2007[35]) are in the workforce and are thus unable to be the sole providers of care for elders in their homes. The family structure, and thus perceptions of who is responsible to provide care, are altered due to divorce, alternate living arrangements, and step-families. There are approximately 3.3 million long-distance caregivers and their number is expected to

double over the next 15 years.[36] Non-family members, paid and unpaid, are providing more care as well.

- **Recognizing Diversity Within and Across Cultures Is Necessary for Implementing Effective Prevention, Investigation, and Intervention Efforts**

Due to a rapidly increasing population of different races and ethnicities, perceptions of the problem are as different as its remedies.

For example, what one culture considers elder financial abuse may not be the belief of another, which also affects when it is acceptable and who is acceptable to involve in intervention strategies.

- **Artful and Designing Ways to Financially Abuse Elders Are Increasingly Varied**

Technologies such as the Internet are opening up new and "creative" ways to financially abuse elders. Increasingly, an elder's identity is universally available to others through online purchases, Internet dating, and virtual social networks. Systems to address the problem have not caught up with its growing variety and complexity, such as the growing instances of Internet-based fraud of older consumers.[37]

Houston Chronicle

June 9, 2008

More than 80 older adults of various ages were the victims of securities fraud perpetrated by an attorney over an extended period of time. The amount of money involved was over $10 million, and the attorney asked for probation at his sentencing hearing. He was sentenced to 20 years in prison.

Restitution for a portion of the amount taken was realized by selling his assets, and victims were reimbursed on a pro-rata basis. When he has completed his sentence, he must pay nearly $4 million additional in restitution.

"The older population owns the largest proportion of wealth in the U.S. People over 50 years of age control at least 70% of the net worth of the nation's households."

Aging and Susceptibility to Elder Financial Abuse

There are several reasons why members of the aging population are tempting targets to perpetrators of elder financial abuse. First, the majority of older adults, from the fittest to the frailest, are homeowners. They are often "home alone" within the fast-paced, multi-generational communities in which they live, exposing them to unscrupulous vendors, scam artists, and telemarketers who prey upon innocent individuals who are eager to live out their lives in familiar and comfortable surroundings.

For example, the tendency of fraudulent telephone salespersons to prey on older adults is high, with more than 50% of victims of telemarketing scams being age 50 or older. Elders, who often end up on the "mooch list" of crooked telemarketers, frequently are victimized over and over again. By one FBI estimate,[38] scam artists are bilking older adults out of more than $500 million per year.

The accumulated wealth of the current generation of elders also places them at risk for abuse. They usually have income from Social Security and employer pensions, IRA, or 401(k) savings investments, and, if they are widows/widowers, the proceeds of their late spouse's life insurance. They worry that they will outlive their money and be forced to rely on their children for financial support.

These exploitative phony investment schemes are aware of these fears and often troll for elders with financial means by visiting churches, country clubs, or senior centers. They develop a relationship with them to win their confidence by performing legitimate services, such as tax preparation or financial planning, before pitching a fraudulent investment. Common sense dictates that individuals with great financial resources are highly attractive to family members and others seeking to take large sums of money.

Nevertheless, people with limited means are also at risk of elder financial abuse. The National Elder Abuse Incidence study[39] found that nearly one-half (46%) of elder victims of financial abuse had incomes between $5,000 and $9,999, while just under a third (30%) were those whose incomes fell between $10,000 and $14,999.

Anyone can be a victim of elder financial abuse, but older adults who are socially isolated are also especially vulnerable because they are less likely and able to seek advice before making an important financial decision. In addition, because the sales solicitation itself addresses a need for social interaction on the part of the elderly victim, they may feel obligated to be friendly or compliant in return.

If the older adult appears hesitant to engage in the transaction, the perpetrators have an endless supply of rebuttals for any excuse the victim offers, and can have an aggressive style that intimidates them into complying. These tactics are effective primarily because of their appeal to natural human desires to feel special, to find a bargain, and to please someone else.

Balancing Autonomy and Protection: Understanding the Complexities of Elder Financial Abuse

All adults have the inherent autonomy and freedom to make decisions regarding their personal affairs, resources, care, and services that others might not choose for them. By the same token, elders have the right to be free from abuse, neglect, and financial exploitation. This often delicate balance challenges both identification of potential abuse and successful prevention and prosecution when it does occur.

Scholars, practitioners, and policymakers are all grappling with often complex legal, financial, medical, and familial issues surrounding elder financial abuse. As a result, information about, and documentation of, the problem and practices to prevent and alleviate such abuse are scattered across multiple disciplines and sources. The resulting absence of a comprehensive knowledge base impedes the development of preventive practices, interventions, and policies that strive to eliminate elder financial abuse and maximize individual autonomy and quality of life of older adults.

The Tip of the Iceberg: Why Victims Do Not Report

A significant reason for the underestimation of the occurrence of elder financial abuse is the victims themselves do not report elder financial abuse for a variety of reasons. Among the multitude of reasons uncovered, the victims:

- Do not want government interference in their personal lives
- Do not want their adult child or other family member going to jail or facing public embarrassment
- Feel responsible for what has happened
- Do not realize that they have been financially abused
- Believe financial abuse is a consequence of "doing business" or taking risks
- Fear that they will be placed in a nursing home or other facility
- Do not think anyone will really help them, even if they expose the abuse
- Worry that the perpetrator might harm them even more
- Think resolution will come too late to be of any good
- Believe they will lose even more money to costs of pursuing the financial abuse

Financial and other professionals who deal with elders generally feel a responsibility to help protect their elderly clients from harm or abuse of any kind. However, they often fail to get involved when they suspect elder financial abuse because they:

- Do not know if they are mandated reporters in some states
- Do not want to compromise professional relationships (confidentiality vs. mandatory reporting)
- Are not clear who their client is (older adult or their family members)
- Are not able to determine the actual mental capacity of their older clients, a determination that affects decisions made by them and on their behalf
- Want to avoid adverse publicity to themselves and their organizations
- Do not understand business ethics and practices in relation to elder financial abuse
- Do not want to incriminate a fellow professional
- Want to avoid involvement in a criminal investigation and potential lawsuit

Identifying the Problem: Leading Signs of Elder Financial Abuse

Certain warning signs indicate if older adults are experiencing financial abuse.

- **Unusual degree of fear or submissiveness to caregiver**

  Example: An elder cowers in front of a caregiver or begins trembling or crying when the caregiver discusses finances.

- **Isolation from family, friends, community, and other stable relationships**

  Example: The older person is never alone or permitted to discuss finances without the caregiver also present.

- **Signs of intimidation and threat by another**

  Example: The older person never looks at people directly or averts their gaze.

- **Withdrawn behavior or disheveled appearance**

  Example: The older person tries to avoid talking with others, especially when asked to respond to something specific.

- **Missed appointments, uncharacteristic nonpayment for services**

  Example: The older person, previously prompt and reliable, does not show up for medical appointments or "forgets" to pay bills.

- **Anxiety about personal finances**

  Example: The older person worries a lot about how she will ever pay a bill or have enough to eat.

- **Lack of knowledge about financial status**

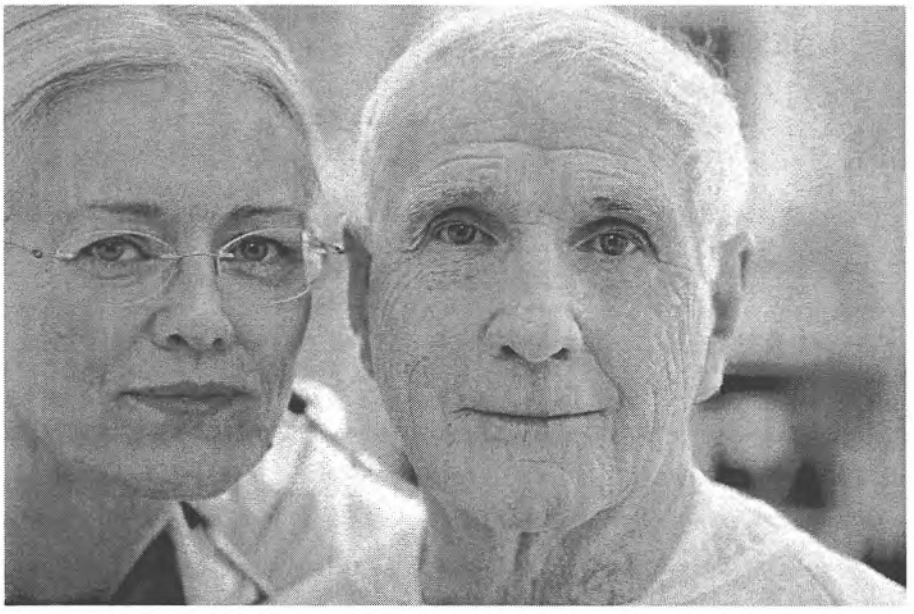
  Example: The older person seems unaware of his money.

- **New "best friends"**

  Example: The older person seems surprisingly or unseemly close and attentive to someone he has just met.

- **Missing belongings or property**

  Example: Glasses, clothes, dentures, money, or all of these are gone. The elder is dismissed as "forgetful."



- **Significant changes in spending patterns**

  Example: The older adult purchases an expensive car even though she has not driven in the past year.

- **Makes sudden changes regarding financial management**

  Example: Power of attorney for financial matters is suddenly changed from a long-time friend to a new person—family member or stranger.

In addition to the behaviors of the elders, there are also notable signs exhibited by family members or others who befriend older adults and engage in elder financial abuse. For example, they frequently:

- Develop a close bond and exert influence over the older person's decisions
- Make false promises or withhold information from the older person
- Show excessive interest in the older person's assets
- Demonstrate excessive control of the older person
- Suddenly acquire expensive possessions
- Control phone use and prevent others from accessing the older person
- Exhibit defensiveness or hostility during appointments or on the phone
- Are reluctant to leave the side of the older person during appointments

Recognizing these warning signs can be a very effective tool in early intervention and prevention of further financial abuse.

"One trait perpetrators of elder financial abuse have in common is that they exhibit excellent persuasion skills. They are very good at cultivating relationships and convincing older adults that they are worthy of their trust and money. In general, perpetrators are not bound by conventional norms or business ethics, and rationalize their criminal and abusive behavior."

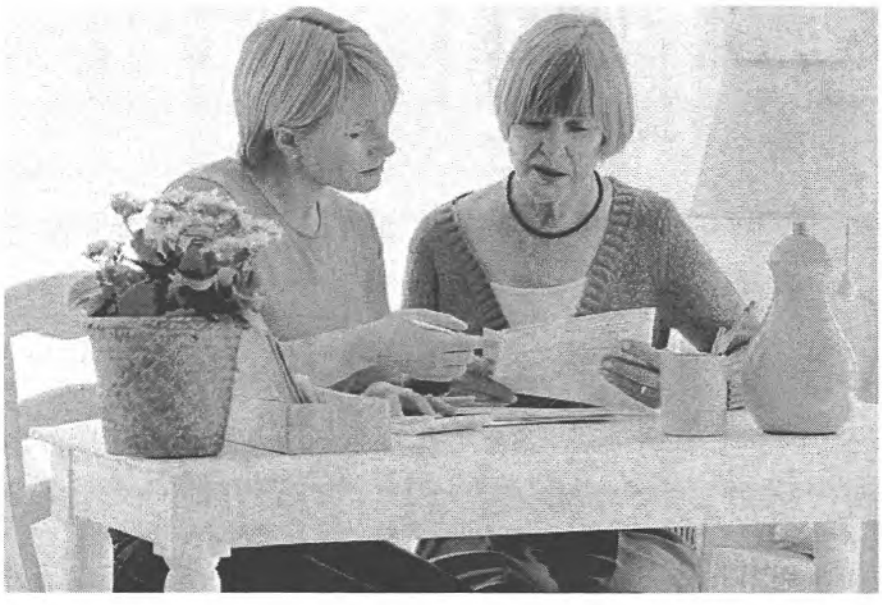
Lasting Impact of Elder Financial Abuse

Perhaps elder financial abuse has received limited attention, both in the popular press and in the research literature, because it is not regarded as visible, life-threatening, or newsworthy as is the physical or sexual abuse of elders. Still, elder financial abuse affects elders and their families in significant and long-lasting ways by putting enormous emotional duress on the elder, increasing their risk of depression, decreasing their quality of life, and increasing unnecessary institutionalization.[40]

A National Institute of Justice study revealed that 20% of victims suffered financial or credit problems, with 14% subsequently suffering health effects.[41] Some scholars contend that the impact of elder financial abuse has the same effect as being a victim of a violent crime, reporting that at least one victim likened this kind of abuse to being raped. If restitution is offered for elder financial abuse, it may come too late to be of any help to an elder, who may well have passed away before any ever reaches him or her.

Elder financial abuse can impact an elder by eradicating nearly all of his or her financial resources. Unlike younger people, an older adult will have little to no ability to recoup these losses over time. Also, even if the courts order restitution, it may take years to receive it, and the victim may well pass away before it ever reaches him or her. Victims may even be murdered by perpetrators who just want their funds and see them as an easy mark.

Loss of finances limits choices in health care and other services. They may be unable to afford needed medications. Restricted choices can reduce or completely destroy an elder's independence. Moreover, such losses can result in shame, guilt, or general mistrust escalating into paranoia or depression. Untreated or undetected depression can cause death by passive or active suicide.[42-43]



Addressing Elder Financial Abuse

Industry and Professional Efforts

Analysis of articles in the trade journals reviewed in this research indicated that the financial industry is also regulating and sanctioning itself, as well as educating its own members and older adults about recognizing and preventing elder financial abuse. Industry professionals and organizations who are taking a lead role include:

- **Attorneys**, especially attorneys specializing in elder law (24 articles)
- **Government entities**, including the Securities Exchange Commission, Federal Trade Commission, the U.S. Postal Service, and other federal state regulators (25 articles)
- **Financial institutions**, including banks, insurance companies, credit unions, and investment firms (21 articles)
- **Financial professionals**, such as CPAs, financial advisors, and brokers (11 articles)
- **Health care facilities**, including nursing homes (10 articles)

Financial services companies have been working closely with the Securities and Exchange Commission (SEC), Financial Industry Regulatory Authority (FINRA), and the North American Securities Administration Association (NASAA). In 2008, financial services companies and agencies participated in the third annual "Seniors Summit" to further examine and refine how financial services companies and regulators can coordinate efforts to protect older consumers from investment fraud and financial abuse.

These include collaborative efforts to expand consumer and professional education, improved corporate policies and procedures, and more focused compliance policies and monitoring.[44]

Because the investment, banking, and insurance industries are highly regulated, considerable attention and resources are focused on compliance with regulatory and ethical considerations in dealing with consumers. In 2005, the securities industry alone was estimated to have spent $25.5 billion on staffing, training, and policies and procedures for compliance with fiduciary and regulatory mandates.[45]

Within the insurance industry, a 2006 survey found that 62% of companies were anticipating changes and improvements to their compliance programs. Their efforts included strengthening and/or adding to their monitoring and surveillance efforts (39%); enhancing their training and communication programs (28%); and adding staff (11%). Other activities include strengthening the company-wide compliance culture, product suitability guidelines, and better defining compliance issues throughout the organization.[46]

Governmental Efforts

The U.S. Senate Special Aging Committee addressed elder financial abuse through a series of Committee hearings held between June 2001 and May 2006. Testimony was provided by federal and state agency officials, criminal justice representatives, state attorneys general, representatives from the financial sector, consumer organizations, academic institutions, and victims and perpetrators of elder financial abuse.

According to U.S. Senate sources[47] and the National Elder Abuse Incidence Study,[48] only 16% of all elder abuse cases are reported and 30% of all reported cases involve financial abuse, a number close to the incidence of news reports involving elder financial abuse found in this study.

The U.S. Senate Committee on Aging[49] reported that nearly 40% of America's seniors rank fear of fraud ahead of their concern for health care and the crisis attendant to it and even higher than terrorism. In all, Americans in general are estimated to lose $40 billion per year to telemarketing fraud and over $50 billion to identity theft.

Additionally, a 2002 press release from the U.S. Special Committee on Aging cited Privacy Rights Clearinghouse estimates that over 700,000 Americans are victims of identity theft each year, with several thousand being elders. Reported incidents among those aged 60 years and older skyrocketed by 218% from 1,821 victims to 5,802 victims between 2000 and 2001.

As recently as February 2008, the Senate Committee on Finance held hearings regarding marketing by Medicare Advantage private plans, with observations that the sale of Medicare benefits by private plans "has been aggressive at best" and at other times "abusive or downright fraudulent."

A National Association of Insurance Commissioners survey of states revealed 39 states with complaints about misrepresentations by insurance agents or companies marketing Medicare products and 22 states reporting fraudulent activity. Other testimony included reports of "hard sell" techniques, inaccurate statements, and misrepresentation on the part of salespeople regarding private Medicare Advantage plans.

One of the most important actions related to elder financial abuse is the Elder Justice Act (EJA), the first federal effort to address this issue. First introduced in the 108th Congress in 2002, its purpose is to increase awareness and knowledge of elder abuse, neglect, and exploitation at the national level, train individuals from various disciplines on these issues, combat elder abuse, and prosecute cases of elder abuse where appropriate. The Act was reintroduced in 2005 and again in 2007. If passed, the EJA will be the first bill to specifically state that it is the right of older adults to be free of abuse, neglect, and exploitation. It will provide federal resources that would work against elder abuse and prevent other older individuals from such abuses in the future.

The 2007 EJA (S. 1070) makes provisions for an Elder Justice Coordinating Council to coordinate various activities related to elder justice at federal, state, and community levels and for both private and not-for-profit entities; secures federal funding for Adult Protective Services and long-term funding for research; provides grants to establish and operate stationary and mobile forensic centers; and creates safer long-term care settings.

Other efforts at the federal level include White House Conferences on Aging (WHCoA) and the Older Americans Act (OAA). At the most recent WHCoA, held in 2005, elder abuse gained considerable visibility, with a recommendation that stressed the creation of a national strategy for the promotion of elder justice through the prevention and prosecution of elder abuse.

Title VII of the Act provides statutory authority and funds distributed by formulas allocated to states to prevent elder abuse, neglect, and exploitation.

Finally, at the federal level, the National Center on Elder Abuse is the premier national resource on elder abuse, neglect, and exploitation. The National Committee for the Prevention of Elder Abuse is one of its partner organizations and focuses on research, advocacy, and education related to preventing and intervening in elder abuse.

States Respond to Elder Financial Abuse

A tool to fight elder financial abuse is State Medicaid Fraud Control Units (MFCUs), whose mission is to investigate and prosecute Medicaid provider fraud and patient abuse and neglect. Most Units are located in Offices of State Attorneys General. In fiscal year 2007, MFCUs recovered more than $1.1 billion in court-ordered restitution, fines, civil settlements and penalties, and obtained 1,205 convictions.[50]

Examples of Promising Local Practices

- One of the first efforts to specifically address elder financial abuse was through the establishment of a Financial Abuse Specialist Team (FAST). Begun in 1993 in Los Angeles, FAST provides expert consultation and training to protective services and other practitioners in cases of elder financial abuse. The team includes members from social services, law enforcement, elder law attorneys, health care professionals and banks. Since 1993, other FASTs have proliferated, both in California and in other states.
- Part of the NCEA's mission is to disseminate information on promising practices related to elder abuse. At this time, the latest iteration of this database includes at least nine programs on elder financial abuse.
- Representing combinations of industry and social services is AARP ElderWatch in Colorado. Founded in 2002, it is a training program for recognizing financial exploitation of elders. The program includes a Web site; a complaint call center that alerts law enforcement, seniors, and banks of financial scams; and a pocket guide for law enforcement on elder abuse. Members include AARP, Attorneys General, Better Business Bureaus, Sheriffs, and TeleSynthesis, Inc.
- In Delaware, at least two programs specifically address elder financial abuse. The Delaware Money Management Program offers money management services to help low-income seniors and adults with physical disabilities who have difficulty budgeting, paying routine bills, and keeping track of financial matters. Its membership includes AARP and the Delaware Division of Services for the Aging and Adults with Physical Disabilities. Another program in Delaware is the Delaware Elder Abuse and Exploitation Project, a law enforcement project utilizing multi-dimensional inter-agency cooperation to prevent and prosecute crimes against elders.
- Missourians Stopping Adult Financial Exploitation (MOSAFE) has developed training packages for frontline financial institution personnel, building on a training package from the Oregon Bankers Association. Materials educate staff to recognize and report possible financial exploitation of vulnerable adults. Its membership includes AARP, the Attorney General, Banker's Association, Alliance of AAAs, Association of Public Administrators, Credit Union Association, Independent Bankers Association, Lt. Governor, Police Chiefs Association, and the Sheriff's Association.
- Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home for the Aged at Riverdale (in New York State) is the first comprehensive elder abuse shelter in the United States. Using the Home's full continuum of care and staff expertise, community network, and collaborative affiliations, the Center uses a coordinated system of crisis intervention, residential and community based services, training, and community awareness programs to provide a wide range of services for victims of elder abuse and neglect. The Center has successfully developed a methodology for identifying and intervening in financial abuse of older adults.

  The Hebrew Home has found that financial abuse occurs in over 60% of the legitimate elder abuse cases it has investigated. Even in cases where there is no physical abuse, financial abuse is the single most common form of abuse to occur.

Preventing Elder Financial Abuse

Any person—elders, family members, or professionals—who suspects that financial abuse of an elder has occurred should report it. One of the challenges in describing and documenting financial abuse stems from the variability in terminology between disciplines and the laws in different states. But, when in doubt, it is always better to err on the side of caution and report suspected financial abuse to the appropriate agencies such as Adult Protective Services, a law enforcement agency, or compliance department of the financial institution. Reports can be made confidentially and the reporting person is protected from civil and criminal liability.

Successful prevention of elder financial abuse involves multiple strategies. There are a variety of actions individuals, family members, financial service professionals, businesses, and organizations can do to help protect elders from getting tangled in the web of elder financial abuse.

Older adults themselves can take several precautions to avoid falling prey to financial abuse. Such actions include:

- **Stay Organized**

Keep belongings neat; keep track of possessions; open and send your own mail; direct deposit Social Security and other checks; complete and sign your own checks whenever possible; use an answering machine to screen calls and do not provide personal information over the telephone.

- **Stay Informed**

Consult with an attorney about future plans, including a power of attorney; consult with an attorney about caregiving arrangements; review your will; know where to go if you suspect abuse; ask for help from police, from employees at a bank, from Adult Protective Services, if needed.

- **Stay Alert**

Do not leave items of value out in the open; do not sign any document unless someone you trust reviews it; do not be left out of decisions about your finances.

Families, particularly those who find themselves in a caregiving role, also need to be aware of situations that place their older loved ones at risk for financial abuse. Family members should periodically inquire about their older family members' financial resources and perceived limitations that may stem from their financial situation. They also need to keep an eye out for such things as:

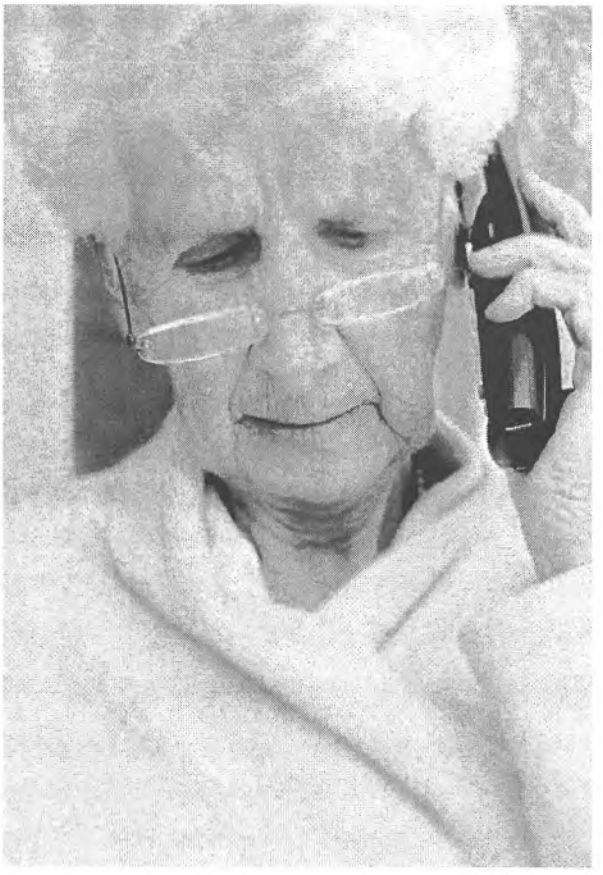
- Unusual worry about finances or fear of an individual
- Unexplained trembling or crying
- Changes in communication patterns
- Any abrupt change in behavior
- Overpayment for goods and services
- Unnecessary services or household repairs
- A set of "out-of-sync" check numbers
- Increased ATM activity
- Unusual cash withdrawals from a financial account in a short period of time
- Missing belongings from the home or room in a facility
- Excessive time spent on the Internet
- A signature that seems forged, unusual, or suspicious
- An unexplained reduction in bank accounts
- An increase in the number and amount of credit card accounts

- An abrupt or unexplained change in the power of attorney, will, or other legal or financial documents
- Sudden transfer of assets to a family member or someone outside the family

Financial service and other professionals, such as bankers and lawyers, are well positioned to contribute to the prevention of elder financial abuse by:

- Educating clients about their rights and about types of consumer fraud and scams
- Describing how family members, with the help of legal counsel, can explore options such as financial conservatorship for clients who are frail, mentally ill, or cognitively impaired
- Encouraging clients or family members to discuss with legal counsel the option to assign financial guardian or power of attorney, as needed
- If children are of concern, educating clients about the option to assign responsibility to an outside person
- Generating media attention on the issue of elder financial abuse and its prevention
- Staying apprised of current trends in elder financial abuse and techniques for stopping it
- Training appropriate personnel in techniques for interviewing older customers
- Seeking assistance from other disciplines (social services, medical/nursing personnel, government agencies)
- Reporting suspected cases of elder financial abuse to local authorities or to their institution's compliance department

Note that some of these steps may not be appropriate for all professionals, and that elder financial abuse situations vary and must be evaluated on a case-by-case basis.



"Some [perpetrators of elderly financial abuse] are career professionals in the business of defrauding others, while others are initially in a position of trust who apparently are overcome by greed. They encourage their elderly victims to make an immediate decision or commitment to purchase products or services, which effectively limits the opportunity for consultation with others."

Resource Docs

Summary

The Scope of the Problem Is Larger Than We Realize

Elder financial abuse is involved in at least 20%–30% of all reported elder abuse.[51] Based on this research study, as well as the work and experience of experts, advocates, and law enforcement agencies, we believe that this number is a significant underestimate, since cases involving only elder financial abuse were likely to go unreported.

Elder Financial Abuse Has Short- and Long-Term Impact

Anecdotal information suggests that the impact of elder financial abuse is hugely demoralizing. It not only affects the elder who is financially abused, but it reaches far beyond its immediate victim, affecting health care and health care costs, living situations, filings for bankruptcy, and costs for its recuperation passed along in service industries.

It may even exacerbate or cause mental and physical illness, including an untimely death for the victim. Media coverage of high profile financial fraud in 2008–2009 reinforces the fact that elder financial abuse can affect those who are or were financially well off, and we can surmise that such abuse has an even more severe impact on the lives of those without financial means.

Elder Financial Abuse Is a Companion to Other Forms of Abuse

This form of abuse is often tied to other forms and may be the precursor to those forms. If that is so, stopping elder financial abuse would prevent or reduce other and equally insidious forms from occurring.

Elder Financial Abuse Exists in Many Races and Ethnicities

Elder financial abuse is submerged in various races and ethnicities. A rising population of elders, with the fastest growing being Hispanic elders, necessitates additional attention, so that a better understanding emerges of how elders in other cultures view the problem.

Generational Differences in Elder Financial Abuse Patterns Are Evolving

The "World War II Generation" is quickly passing away and giving rise to new generations of elders, especially the Baby Boomer generation. With this demographic surge of "new elders" comes new ways of approaching elder finances—widespread use of credit cards, investments, travel, and, above all, information available at unprecedented speeds through the Internet. New methods of dissemination also provide a fertile ground for increasing opportunities for individuals and industries to defraud.

Organizations and families have their own views about their entitlement to the money of past generations. For example, when adult children live in a parent's home, they may think they are due money from a parent, just because they help them in some way, not because the older adult has given them permission to have money. Often, children make the "assumption" that Mom or Dad would "want me to enjoy it now."

The Number of Potential Older Adult Victims Is Growing Rapidly

Advances in health care have allowed populations with particularly vulnerable adults to live longer, a circumstance often accompanied by those who seek to capitalize upon their vulnerability. If someone is having trouble making decisions, he or she could easily become confused when information is presented by a con artist very quickly and with pressure to make a quick decision. An older person, often trusting, might then agree to participate in a sales arrangement that later turns out to be bogus.

Implications

A Multidisciplinary Strategy for Addressing Elder Financial Abuse Holds Great Promise

While law enforcement teams and anti-fraud advocates hold promise and are increasing, it is critical to know both how they work and what they are able to accomplish. Critical information gaps exist beyond a team's own self-reporting. For instance, are they really effective in addressing the problem, and is this approach the best solution to problem resolution?

Bringing multiple disciplines together to bear on the problem of elder financial abuse can be an expensive strategy to resolve the issue. It remains to be seen what are the best ways to maximize a group of assembled experts to deal with elder financial abuse. Cost/benefit analysis on the effectiveness of multidisciplinary teams is also needed.

The Right Kind of Training Is Needed for Both Businesses and the Public Sector

Both the public and private sectors stand to benefit from understanding the problem: banks, insurance, investments, loans, legal, just to name a few. The banking industry has made particularly progressive efforts in this arena (e.g., Massachusetts Bank Reporting Project; Oregon Bankers Association—Elder Financial Abuse Prevention Project). Banks often deal with older customers on a regular basis and get to know them well. They are able to track "unusual" activity in accounts and are in a prime position to work to prevent or intervene in such instances.

A winning approach to addressing the problem is to finally and fully understand the nature and scope of the problem and test intervention strategies to determine what works in the widest context as well as to replicate those approaches that are most effective in preventing and responding to financial abuse. Professionals from all service sectors can be made more aware of the impending signs of elder financial abuse. The challenge is to balance their responsibility to protect the safety of the elders they serve with the elders' right to self-determination.

Better Understand the "Environment" of Elder Financial Abuse

Elder financial abuse is a problem in every community and among all social strata. It is underrecognized, underreported, and underprosecuted. In the financial services sector, a better understanding of the "environment" of elder financial abuse would be productive in better prevention and reporting. A deeper understanding and industry experiences with both compliance efforts and training programs will enhance efforts to better address the problem.

Reinforce Ethical Practices Through Education

Community groups, faith communities, and schools are excellent forums for inculcating these ethical values and making them known. Strategies for discussions about financial decisions are often difficult, but are just as important as discussions about health care decisions. These institutions are valuable community resources which can be engaged as prevention and reporting sources at the local level.

Capture Scope, Effects, and the Cost of the Problem to Adequately Address and Prevent It

It is worth additional effort to understand the breadth and depth of the elder financial abuse problem. Without a unified approach to the problem, we will at best simply chip away at this costly waste of funds and lives. Elder financial abuse, made even more important in our present uncertain economic environment, amplifies the need to understand its scope and effects.

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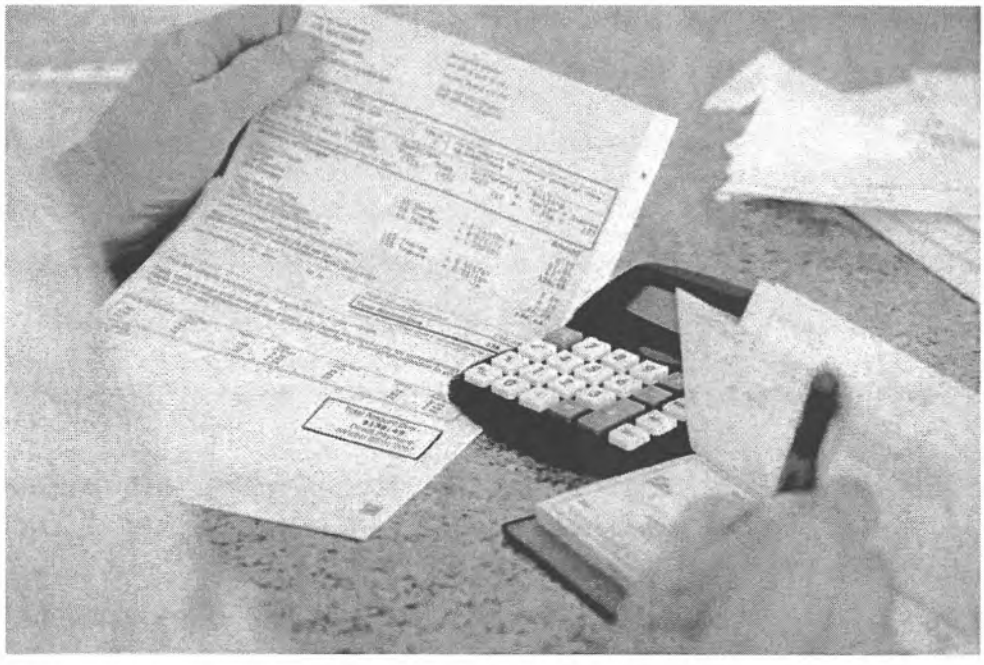

Appendix A: Databases Used to Identify Primary Literature

Ageline

ArticleFirst

ASSIA: Applied Social Sciences Index and Abstracts

Business Reference Suite

CINAHL: Cumulative Index to Nursing and Allied Health

Health Reference Center Academic

Medline (PubMed version)

PsycARTICLES

PsychoINFO

Social Sciences Citation Index

Social Services Abstracts

Sociological Abstracts

Appendix B: Elder Financial Abuse—A Glossary of Terms[1]

- **ELDER ABUSE**—An act or omission which results in harm or threatened harm to the health or welfare of an elderly person. Abuse includes intentional infliction of physical or mental injury, sexual abuse, or withholding of necessary food, clothing, and medical care to treat the physical and mental health needs of an elderly person by one having the care, custody, or responsibility of an elder person.
- **EXPLOITATION**—Exploitation of elderly persons can be referred to as financial abuse, material abuse, fiduciary abuse, financial exploitation, financial mistreatment or maltreatment, and economic victimization.
- **FIDUCIARY MISAPPROPRIATIONS**—Intentional, illegal use of the property or funds of another person for one's own use or other unauthorized purpose, particularly by a public official, a trustee of a trust, an executor or administrator of a dead person's estate, or by any person with a responsibility to care for and protect another's assets (a fiduciary duty).
- **FINANCIAL ABUSE**—A form of financial exploitation that involves wrongful acquisitions of money and valuable objects belonging to an elderly person by friends, relatives, or caretakers; a situation in which a person, including but not limited to, who has care or custody of or who stands in a position of trust, of an elder or dependent adult, takes, secretes, or appropriates their money or property, to any wrongful use, or with the intent to defraud; the illegal or improper use of an older person's funds, property, or resources.
- **FRAUD**—Deception made for personal or economic gain. Fraud can be committed through many methods, including mail, phone, infomercials, and the Internet.
  - **Advance Fee Scheme:** Occurs when a person pays money to someone in anticipation of receiving something of greater value, such as a loan, contract, investment, or gift, and then receives little or nothing in return.
  - **Check Fraud:** A criminal act that involves making the unlawful use of one or more checks or checking accounts in order to illegally acquire or borrow funds that do not exist within the account balance or account-holder's legal ownership.
  - **Identity Fraud or Identity Theft:** Stealing money or getting other benefits by pretending to be someone else.
  - **Insurance Fraud:** Any act committed with the intent to falsely obtain payment from an insurer.
  - **Investment Fraud:** Purchasing or making sales decisions on the basis of false information, frequently resulting in losses (e.g., Ponzi scheme).
  - **Medicare Fraud:** Manufacturers bill Medicare for merchandise or service that was not needed or was not ordered. Includes:
    - **Medical Equipment Fraud:** Equipment manufacturers offer "free" products to individuals. Insurers are then charged for products that were not needed and/or may not have been delivered.

- **"Rolling Lab" Schemes:** Unnecessary and sometimes fake tests are given to individuals at health clubs, retirement homes, or shopping malls and billed to insurance companies or Medicare.
- **Services Not Performed:** Customers or providers bill insurers for services never rendered by changing bills or submitting fake ones.

- **Mortgage Fraud:** A broad variety of actions where the intent is to materially misrepresent information on a mortgage loan application, in order to obtain the loan and defraud a financial institution.
- **Telemarketing Fraud:** Offenders call elders at home, using high-pressure tactics to solicit money for fraudulent investments, insurance policies, travel packages, charities, and sweepstakes.

Internet PHISHING—Attempting to acquire sensitive information such as usernames, passwords, Social Security numbers, and credit card details by masquerading as a trustworthy entity in an electronic communication.

MATERIAL ABUSE—Material victimization of elders by both relatives and non-relatives. The misuse of an elder's money or property, including deception, diverting income, mismanagement of funds, and taking money or possessions against a person's will.

PREDATORY LENDING—Dishonest financial institution willfully misleads or deceives the consumer.

SCAM—A fraudulent or deceptive act or operation; an attempt to swindle a person by gaining his or her confidence. Common scams involving elders include:

- **Lottery Scams or Sweepstakes:** Scammers contact elderly victims online or through the mail and may even send checks or money orders to them. They then ask that some portion of the money be wired back.
- **Repair and Contracting Scams:** Use high pressure tactics to sell unneeded and overpriced contracts for "home improvements."
- **Sweetheart Scams:** Typically involves a stranger ingratiating himself or herself to an elderly person, winning the affections of that person, and then taking over the older person's estate or financial affairs.

UNDUE INFLUENCE—Takes place when one person uses his or her role and power to exploit the trust, dependency, or fear of another to gain psychological control over the weaker person's decision-making, usually for financial gain.

VIATICAL SETTLEMENTS—Sale or transfer of a life insurance death benefit by a terminally ill insured person to another person or company prior to the policyholder's death. Viatical scam operators urge people to liquidate their life insurance without explaining the implications or with the promise of high returns.

[1] Note: There is an inconsistent use of terms in both the primary and trade literature. When used in a legal context, the meaning of terms may differ from state to state.

Appendix C: Resources

AARP: Scam Alert
http://www.aarp.org/community/search.bt?query=Scam+Alert&x=0&y=0

AARP ElderWatch in Colorado
http://www.aarpelderwatch.org/public

AARP Policy and Research for Professionals in Aging: Elder Abuse
http://www.aarp.org/research/legal/elderabuse/

Delaware Money Management Program
http://dhss.delaware.gov/dhss/dsaapd/money.html

Delaware Elder Abuse and Exploitation Project
http://attorneygeneral.delaware.gov/family/elderlyviolence/elderlyabuseandexpl.shtml

Delaware Department of Justice Safe Investing Guide
http://attorneygeneral.delaware.gov/consumers/investmented/2008/pages/investinginfo.shtml

Elder Justice Act (EJA)
http://www.opencongress.org/bill/110-s1070/show

Financial Abuse Specialist Team (FAST)
http://www.preventelderabuse.org/communities/fast.html

Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home
http://aging.senate.gov/events/hr178dr.pdf

Journal of Elder Abuse & Neglect
http://www.haworthpress.com/store/product.asp?sku=J084

MetLife Mature Market Institute
Preventing Elder Abuse *Since You Care* Guide
http://www.metlife.com/assets/cao/mmi/publications/since-you-care-guides/MMI-SYC-Preventing-Elder-Abuse-2007.pdf

Missourians Stopping Adult Financial Exploitation (MOSAFE)
http://www.dhss.mo.gov/MOSAFE/

National Adult Protective Services Association
http://www.apsnetwork.org/

National Center on Elder Abuse
http://www.ncea.aoa.gov

National Center on Elder Abuse Promising Practices Database
http://www.ncea.aoa.gov/NCEAroot/Main_Site/Resources/Promising_Practices/PP_Home.aspx

National Committee for the Prevention of Elder Abuse
http://www.preventelderabuse.org/

National Consumers League's Fraud Center
www.fraud.org

Older Americans Act (OAA)
http://www.aoa.gov/oaa2006/Main_Site/

Resource Brochure to Combating Senior Financial Abuse in Mississippi
http://www.ago.state.ms.us/images/uploads/forms/seniorfinancialabuseguide.pdf

State Medicaid Fraud Control Units (MFCU)
http://www.oig.hhs.gov/publications/mfcu.asp

White House Conferences on Aging (WHCoA): 2005
http://www.whcoa.gov/

Variable and Long-Term Care Products are: • Not A Deposit Or Other Obligation Of Bank • Not FDIC-Insured • Not Insured By Any Federal Government Agency

Only Variable Annuity Products: • Not Guaranteed By Any Bank Or Credit Union • May Go Down In Value

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Article 04. PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS

Sec. 13.26.165. Protective proceedings.

Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or make other protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by the status of being a minor, or that funds are needed for the minor's support and education and that protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and

(B) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.

History -

(Sec. 1 ch 78 SLA 1972)

Decisions -

Assessment of need for conservatorship. - Since a special conservatorship cannot be reconciled with a requirement that a conservatorship candidate be found wholly incapable of making any rational decision, the need for a conservator must be assessed in the context of the person's incapacity and the specific matters for which management or protection may be required. In the Matter of S.H., 987 P.2d 735 (Alaska 1999).

Where doctors provided considerable evidence of a conservatorship candidate's inability to make litigation decisions, even assuming mental illness did not describe his condition, the incapacity documented to the superior court satisfied the statute, and the court did not commit

clear error in accepting the evidence as clear and convincing proof of the candidate's inability to manage his property and affairs effectively. In the Matter of S.H., 987 P.2d 735 (Alaska 1999).

Evidence supported a protective appointment for the father under AS 13.26.165(2)(A) and (B), where substantial evidence demonstrated the father's inability to prioritize his finances, and other evidence, including the father's own testimony, reinforced the daughter's evidence that the father was in need of a conservator; the evidence presented supported the finding that the father abused alcohol and his capacity to perform routine activities could be relevant in evaluating whether appointment of a conservator was appropriate. Farmer v. Farmer, 230 P.3d 689 (Alaska 2010).

Appointment in workers' compensation proceeding. - Appointment of a guardian for an employee in a complex workers' compensation proceeding was appropriate where the employee suffered a serious brain injury that rendered him unable to understand a compromise and release agreement settling his claims with his employer. Gunter v. Kathy-O-Estates, 87 P.3d 65 (Alaska 2004).

Adequacy of findings. - Court did not fail to make the finding required where the evidence showed that the superior court adopted the findings of the probate master. This section does not require the court to find that the father's assets would be wasted unless he was ordered to vacate his home or that obtaining funds for his care mandated his removal. Farmer v. Farmer, 230 P.3d 689 (Alaska 2010).

Length of inability. - This statute does not express or imply a requirement of long term inability, but only specifies that property be in danger of waste or dissipation. In the Matter of S.H., 987 P.2d 735 (Alaska 1999).

Sec. 13.26.170. Protective proceedings; jurisdiction of affairs of protected persons.

Except as otherwise provided under AS 13.27.110, after the service of notice in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the court in which the petition is filed has exclusive jurisdiction to determine

(1) the need for a conservator or other protective order until the proceedings are terminated; and

(2) how the estate of the protected person that is subject to the laws of this state shall be managed, expended, or distributed to or for the use of the protected person or any of the person's dependents.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 21 ch 53 SLA 2008)

Amendment Notes -

The 2008 amendment, effective September 2, 2008, added "Except as otherwise provided under AS 13.27.110" at the beginning of the section, deleted the former paragraph (1) designation preceding "exclusive jurisdiction" and added the current paragraph (1) designation, deleted "Exclusive jurisdiction to determine" at the beginning of paragraph (2), deleted former paragraph (3), which related to concurrent jurisdiction, and made related and stylistic changes.

Sec. 13.26.175. Venue.

Venue for proceedings under AS 13.26.165 - 13.26.315 is

(1) in the place in this state where the person to be protected resides whether or not a guardian has been appointed in another place; or

(2) if the person to be protected does not reside in this state, in any place where the person has property.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.180. Original petition for appointment or protective order.

(a) The person to be protected, any person who is interested in the estate, affairs or welfare of the person to be protected, including a parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

(b) The petition must set out to the extent known, the interest of the petitioner; the name, age, residence and address of the person to be protected; the name and address of the person's guardian, if any; the name and address of the person's nearest relative known to the petitioner; a general statement of the person's property with an estimate of its value, including any compensation, insurance, pension or allowance to which the person is entitled; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also must set out the name and address of the person whose appointment is sought and the basis of priority for appointment.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.185. Notice.

(a) On a petition for appointment of a conservator or other protective order, the person to be protected and the person's spouse or, if none, the person's parents, must be served personally, by certified mail, or by any other method authorized by court rule with notice of the proceedings at least 14 days before the date of hearing if they can be found within the state, or, if they cannot be found within the state, they must be given notice in accordance with AS 13.06.110. Waiver by the person to be protected is not effective unless the person to be protected attends the hearing or, unless minority is the reason for the proceeding, waiver is confirmed in an interview with the visitor.

(b) Notice of a petition for appointment of a conservator or other initial protective order, and of any subsequent hearing, must be given to any person who has filed a request for notice under AS 13.26.190 and to interested persons and other persons as the court may direct. Except as otherwise provided in (a) of this section, notice shall be given in accordance with AS 13.06.110.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 22 ch 53 SLA 2008)

Amendment Notes -

The 2008 amendment, effective September 2, 2008, inserted "by certified mail, or by any other method authorized by court rule" in the first sentence of subsection (a).

Sec. 13.26.190. Protective proceedings; request for notice; interested person.

Any interested person who desires to be notified before any order is made in a protective proceeding may file with the registrar a request for notice subsequent to payment of any fee required by statute or court rule. The clerk shall mail a copy of the demand to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and the person's address, or that of the person's attorney, and is effective only as to matters occurring after the filing. Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in protective proceedings.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.195. Procedure concerning hearing and order on original petition.

(a) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if 14 years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

(b) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has counsel of the person's own choice, the court must appoint a lawyer to represent the person. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

(c) After hearing, upon finding that a basis for the appointment of a conservator or other protective order has been established, the court shall make an appointment or other appropriate protective order.

(d) The court shall investigate alternatives to a conservator and the use of a special conservator as provided in AS 13.26.205(c). A conservator may be appointed only if a less restrictive protective order or the services of a special conservator are not adequate to protect the estate of the protected person. The court shall, to the extent possible, consult with the protected person in determining what action should be taken.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 15 ch 83 SLA 1981; am Sec. 20 ch 84 SLA 2004)

Revisors Notes -

Reorganized in 1972.

Decisions -

Discretion of court. - Trial court did not abuse its discretion by mandating that the father vacate his home in light of the evidence that the father interfered with the daughter's efforts to sell the home. Evidence of the father's inability to attend to his financial obligations supported both the grant of authority to assist the father with his housing, and the post-sale management of the father's money. Farmer v. Farmer, 230 P.3d 689 (Alaska 2010).

Sec. 13.26.200. Permissible court orders.

The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

(1) while a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for the person's benefit or the benefit of the person's dependents;

(2) after hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, the minor's family and members of the minor's household;

(3) after hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of the person's household, all the powers over the person's estate and affairs which the person could exercise if present and not under disability, except the power to make a will; these powers include, but are not limited to, power to make gifts, to convey or release contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond the person's disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise the right to an elective share in the estate of a deceased spouse, and to renounce any interest by testate or intestate succession or by inter vivos transfer;

(4) the court may exercise, or direct the exercise of its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding 20 percent of any year's income of the estate, or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that the protected person either is incapable of consenting or has consented to the proposed exercise of power;

(5) an order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.205. Protective arrangements and single transactions authorized.

(a) If it is established in a proper proceeding that a basis exists as described in AS 13.26.165 for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct, or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit, or retention of funds or property, sale, mortgage, lease, or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

(b) When it has been established in a proper proceeding that a basis exists as described in AS 13.26.165 for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct, or ratify any contract, trust, or other transaction relating to the protected person's financial affairs or involving the person's estate if the court determines that the transaction is in the best interests of the protected person.

(c) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of the protected person's disability, whether the protected person needs the continuing protection of a conservator. If only certain powers need be given to the conservator or the services of a conservator are needed only for a limited number of transactions, a special conservator may be appointed. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters carried out under the order of appointment.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 16 ch 83 SLA 1981)

Decisions -

Assessment of need for conservatorship. - Since a special conservatorship cannot be reconciled with a requirement that a conservatorship candidate be found wholly incapable of making any rational decision, the need for a conservator must be assessed in the context of the person's incapacity and the specific matters for which management or protection may be required. In the Matter of S.H., 987 P.2d 735 (Alaska 1999).

Sec. 13.26.210. Who may be appointed conservator; priorities.

(a) The court may appoint a competent person, including a private professional conservator, private professional full guardian under AS 08.26.020, or the public guardian, as the conservator of the estate of a protected person.

(b) The court may not appoint a person to be a conservator of a protected person if the person

(1) provides, or is likely to provide during the conservatorship, substantial services to the protected person in a professional or business capacity, other than in the capacity of conservator;

(2) is or is likely to become, during the conservatorship, a creditor of the protected person, other than in the capacity of conservator;

(3) is likely to have, during the conservatorship, interests that may conflict with those of the protected person; or

(4) is employed by a person who would be disqualified under (1) - (3) of this subsection.

(c) A person may be appointed as the conservator of a protected person even if (b) of this section applies if the person is the spouse, adult child, parent, or sibling of the protected person and if the court determines that the potential conflict of interest is not substantial and that the appointment would clearly be in the best interests of the protected person.

(d) Subject to (e) and (f) of this section, qualified persons have priority for appointment in the following order:

(1) an individual or qualified conservator nominated by the protected person if the protected person is 14 or more years of age and had, in the opinion of the court, sufficient mental capacity to make an informed choice;

(2) the spouse of the protected person;

(3) an adult child or a parent of the protected person;

(4) a relative of the protected person with whom the protected person has resided for more than six months during the year before the filing of the petition;

(5) a relative or friend of the protected person who has demonstrated a sincere and longstanding interest in the welfare of the protected person;

(6) a private professional conservator;

(7) the public guardian.

(e) When more than one person has equal priority under (d) of this section, the court shall select the person it considers to be the best qualified.

(f) When in the best interest of the protected person, a court may decline to appoint a person who has priority under (d) of this section as conservator of the protected person and may appoint as conservator a person who has a lower priority than another person or who does not have a priority. If the court appoints a person with a lower priority under (d) of this section than another person, the court shall make appropriate written findings related to why the best interests of the respondent require appointment of the person with a lower priority.

(g) In addition to any other requirement of this section, when appointing a relative or friend of the protected person as the conservator of the protected person, the court shall require that the proposed conservator complete one hour of mandatory education on the basics of conservatorship before the appointment or within 30 days after the appointment. If the person is appointed based on the person's agreement to complete the mandatory education and the person fails to complete the mandatory education within the 30 days, the court shall remove the conservator and appoint a successor.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 21 ch 84 SLA 2004; am Sec. 20 ch 56 SLA 2005; am Sec. 23, 24 ch 53 SLA 2008)

Amendment Notes -

The 2005 amendment, effective June 25, 2005, near the beginning of subsection (g) substituted "protected person" for "incapacitated person" and made a stylistic change.

The 2008 amendment, effective September 2, 2008, inserted "conservator, private professional full" and "under AS 08.26.020" in subsection (a), and added the last sentence of subsection (f).

Decisions -

Cited in H.C.S. v. Cmty. Advocacy Project of Alaska, Inc., 42 P.3d 1093 (Alaska 2002).

Sec. 13.26.215. Bond.

(a) The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the property of the estate in the conservator's control plus one year's estimated income minus the value of securities deposited under arrangements requiring an order of the court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization. The court in place of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land.

(b) If the public guardian is appointed as a conservator, the court may not require a bond under this section.

(c) If the court requires a conservator to provide a bond under this section and the conservator is financially unable to provide the bond, the court may order the cost of the bond to be paid from court funds.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 17 ch 83 SLA 1981)

Revisors Notes -

Subsections (b) and (c) enacted as AS 13.26.218. Renumbered in 1981.

Decisions -

Written bond contemplated. - A written bond with explicit provisions is contemplated by this section, a bond that would even be enforced in the absence of a provided penalty. White v. White Co., 4 Alaska 317 (1911).

Conservator liability. - Public conservator was not shielded by absolute quasi-judicial immunity in ward's suit claiming that conservator's employees had intentionally or negligently withheld funds. Trapp v. State, 53 P.3d 1128 (Alaska 2002).

Collateral Refs -

39 Am. Jur. 2d, Guardian and Ward, Sec. 48.

39 C.J.S., Guardian and Ward, Sec. 212 - 220.

Sec. 13.26.220. Terms and requirements of bonds.

(a) The following requirements and provisions apply to any bond required under AS 13.26.215:

(1) unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the conservator and with each other;

(2) by executing an approved bond of a conservator, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party defendant; notice of any proceeding shall be delivered to the surety or mailed by registered or certified mail to the surety at the address as listed with the court where the bond is filed and to the surety's address as then known to the petitioner;

(3) on petition of a successor conservator or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the conservator;

(4) the bond of the conservator is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) A proceeding may not be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

History -

(Sec. 1 ch 78 SLA 1972)

Decisions -

Conservator liability. - Public conservator was not shielded by absolute quasi-judicial immunity in ward's suit claiming that conservator's employees had intentionally or negligently withheld funds. Trapp v. State, 53 P.3d 1128 (Alaska 2002).

Sec. 13.26.225. Acceptance of appointment; consent to jurisdiction; notice.

By accepting appointment, a conservator submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the conservator, or mailed by registered or certified mail to the conservator at the address as listed in the petition for appointment or as thereafter reported to the court and to the conservator's address as then known to the petitioner.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.230. Compensation and expenses.

If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate.

History -

(Sec. 1 ch 78 SLA 1972)

Decisions -

Costs charged to estate. - Since, where the purpose of the conservatorship is to protect the client's property, it is logical that normally the cost of that conservatorship be charged against the estate thus preserved, the court erred in imposing the costs on the client's law firm. In the Matter of S.H., 987 P.2d 735 (Alaska 1999).

Sec. 13.26.235. Death, resignation, or removal of conservator.

The court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. After death, resignation, or removal, the court may appoint another conservator. A conservator so appointed succeeds to the title and powers of the conservator's predecessor.

History -

(Sec. 1 ch 78 SLA 1972)

Decisions -

Grounds for removal. - This section provides simply that conservators may be removed "for good cause." It does not elaborate further and does not list specific grounds for removal. H.C.S. v. Cmty. Advocacy Project of Alaska, Inc., 42 P.3d 1093 (Alaska 2002).

Sec. 13.26.240. Petitions for orders subsequent to appointment.

(a) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order

(1) requiring bond or security or additional bond or security, or reducing bond;

(2) requiring an accounting for the administration of the trust;

(3) directing distribution;

(4) removing the conservator and appointing a temporary or successor conservator; or

(5) granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning the fiduciary responsibility of the conservator.

(c) Upon notice and hearing, the court may give appropriate instructions or make any appropriate order.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.245. General duty of conservator.

In the exercise of powers, a conservator shall act as fiduciary and shall observe the standards of care applicable to trustees under AS 13.36.225 - 13.36.290.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 2 ch 43 SLA 1998)

Revisors Notes -

The reference to "AS 13.36.225 - 13.36.290" was substituted for "AS 13.36.200 - 13.36.275" in 1998 to reflect the 1998 renumbering of those sections.

Decisions -

Cited in Trapp v. State, 53 P.3d 1128 (Alaska 2002).

Sec. 13.26.250. Inventory, implementation report, and records.

Within 90 days after distribution of the order of appointment, every conservator shall prepare and file with the appointing court a conservator implementation report and a complete inventory of the estate of the protected person together with an oath or affirmation that it is complete and accurate so far as the conservator is informed. The conservator shall provide a copy of it to the protected person if the protected person can be located, has attained the age of 14 years, and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The conservator shall keep suitable records of the administration and exhibit them on request of any interested person.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 22 ch 84 SLA 2004)

Editors Notes -

Section 32(c), ch. 84, SLA 2004, provides that this section "as amended by sec. 22 of this Act, has the effect of changing Rule 17(e), Alaska Rules of Probate Procedure, by changing when a report is due and by adding additional material to be included in the report."

Sec. 13.26.255. Accounts.

A conservator shall submit a report to the court at least every year. In addition, a conservator shall account to the court for administration of the trust upon resignation or removal and at other times as the court may direct. On termination of the protected person's minority or disability, a conservator may account to the court or to the former protected person or the protected person's personal representative. Subject to appeal or vacation within the time permitted, an order, made upon notice and hearing, allowing an intermediate account of a conservator, adjudicates as to the conservator's liabilities concerning the matters considered in connection with it; and an order, made upon notice and hearing, allowing a final account, adjudicates as to all previously unsettled liabilities of the conservator to the protected person or the protected person's successors relating to the conservatorship. In connection with any account, the court may require a conservator to submit to a physical check of the estate in the conservator's control, to be made in any manner the court may specify.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 23 ch 84 SLA 2004)

Sec. 13.26.257. Visitor reports.

(a) The initial visitor report of a visitor appointed under AS 13.26.195(b) must include

(1) the results and analyses of medical and other tests and examinations performed that describe the proposed protected person's mental, emotional, physical, and educational condition, adaptive behavior, and social skills, and that specify the data on which the description is based;

(2) recommendations regarding the types and extent of assistance, if any, necessary to meet the essential requirements for managing the property and affairs of the proposed protected person;

(3) an evaluation of the proposed protected person's need for mental health treatment and whether there is a substantial probability that available treatment will significantly improve the proposed protected person's mental condition;

(4) an evaluation of the proposed protected person's need for educational or vocational assistance and whether the assistance can be made available to the protected person;

(5) an evaluation of the probability that the incapacity may significantly lessen, and the type of services or treatment that will facilitate improvement in the condition or skills of the proposed protected person;

(6) a list of the names and addresses of all individuals who examined, interviewed, or investigated the proposed protected person, and the names and addresses of all persons contacted in preparation of the visitor report;

(7) a summary of the information that

(A) was supplied by the person described in (6) of this subsection; and

(B) supports the conclusions of the visitor report;

(8) a description of the alternatives to conservatorship that were considered and not recommended and an explanation of why they are not feasible to meet the needs of the proposed protected person;

(9) a specification of the financial resources of the proposed protected person, the proposed protected person's entitlements to insurance benefits, and publicly operated or sponsored health, mental health, and welfare assistance that might be employed in the provision of services to the proposed protected person; and

(10) if conservatorship is recommended, a conservatorship outline that identifies

(A) potential conservators;

(B) the specific services necessary and available to protect the proposed protected person from serious damage to the proposed protected person's property and affairs;

(C) the means by which the services described in (B) of this paragraph may be financed;

(D) the specific, least restrictive authority needed by the conservator to provide the services described in (B) of this paragraph.

(b) In addition to any initial visitor report provided under (a) of this section, every third year, the court may appoint a visitor to file a report reviewing the conservatorship during the period since the last visitor report, if any.

(c) In addition to the reports under (a) and (b) of this section, at any time during a conservatorship, a court may appoint a visitor to file a report reviewing the conservatorship during the period since the last visitor report, if any.

(d) A visitor report provided under (b) or (c) of this section must include

(1) the name and address of the protected person and the conservator;

(2) the services being provided to the protected person by or through the conservator;

(3) the significant actions taken by the conservator during the reporting period in regard to the protected person;

(4) a financial accounting of the estate that has been subject to the possession or control of the conservator;

(5) a list of the number and nature of the contacts between the conservator and the protected person if the protected person does not reside with the conservator;

(6) any other information requested by the court or necessary or desirable in the opinion of the visitor.

History -

(Sec. 24 ch 84 SLA 2004)

Sec. 13.26.260. Conservators; title by appointment.

The appointment of a conservator vests in the conservator title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys-in-fact. The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of any rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.265. Recording of conservator's letters.

Letters of conservatorship are evidence of transfer of all assets of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets of the estate from the conservator to the protected person, or the protected person's successors. Subject to the requirements of general statutes governing the recordation of documents of title to land or other property, letters of conservatorship, and orders terminating conservatorships, may be recorded to give record notice of title as between the conservator and the protected person.

History -

(Sec. 1 ch 78 SLA 1972)

Revisors Notes -

Minor word changes related to the recording of documents were made in this section in 1988 under sec. 42, ch. 161, SLA 1988.

Cross References -

For recording laws, see AS 40.17.

Sec. 13.26.270. Sale, encumbrance, or transaction involving conflict of interest voidable.

Any sale or encumbrance to a conservator, the conservator's spouse, agent, or attorney, or any corporation or trust in which the conservator has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is voidable unless the transaction is approved by the court after notice to interested persons and others as directed by the court.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.275. Persons dealing with conservators; protection.

A person who in good faith either assists a conservator or deals with the conservator for value in any transaction other than those requiring a court order as provided in AS 13.26.200, is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in AS 13.26.290 are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.280. Powers of conservator in administration.

(a) A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state. In addition, a conservator of the estate of an unmarried

minor, as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in AS 13.26.070 until the minor attains the age of 18 or marries, but the parental rights so conferred on a conservator do not preclude appointment of a guardian as provided by AS 13.26.030 - 13.26.085.

(b) A conservator has power without court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.

(c) A conservator, acting reasonably in efforts to accomplish the purpose for which the conservator was appointed, may act, without court authorization or confirmation, to

(1) collect, hold and retain assets of the estate including land in another state, until, in the conservator's judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which the conservator is personally interested;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

(4) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) invest and reinvest estate assets in accordance with (b) of this section;

(6) deposit estate funds in a bank including a bank operated by the conservator;

(7) acquire or dispose of an estate asset including land in another state for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(8) make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(9) subdivide, develop, or dedicate land to public use; to make or obtain the vacation of plats and adjust boundaries; to adjust differences in valuation on exchange or to partition by giving or receiving considerations; and to dedicate easements to public use without consideration;

(10) enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) grant an option involving disposition of an estate asset, to take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(16) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;

(17) insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;

(18) borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets, and the conservator has a lien on the estate as against the protected person from advances so made;

(19) pay or contest any claim; to settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(20) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration, and protection of the estate;

(21) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) pay any sum distributable to a protected person or the protected person's dependent, without liability to the conservator, by paying the sum to the distributee or by paying the sum for the use of the distributee either to the distributee's guardian or if none, to a relative or other person with custody of the distributee's person;

(23) employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator to advise or assist the conservator in the performance of administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(24) prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of duties; and

(25) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 29, 30 ch 56 SLA 1973; am Sec. 7 ch 99 SLA 2004)

Decisions -

Authority to settle lawsuits. - This section gives a conservator authority to settle a lawsuit. In the Matter of S.H., 987 P.2d 735 (Alaska 1999).

Guardian appointed for an employee in a workers' compensation claim had the authority to dismiss the employee's action to overturn a compromise and release agreement settling the employee's workers' compensation claim with his employer. Gunter v. Kathy-O-Estates, 87 P.3d 65 (Alaska 2004).

Sec. 13.26.285. Distributive duties and powers of conservator.

(a) A conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care, or benefit of the protected person and the protected person's dependents in accordance with the following principles:

(1) the conservator is to consider recommendations relating to the appropriate standard of support, education, and benefit for the protected person made by a parent or guardian, if any; the conservator may not be surcharged for sums paid to persons or organizations actually furnishing support, education, or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person unless the conservator knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person;

(2) the conservator is to expend or distribute sums reasonably necessary for the support, education, care, or benefit of the protected person with due regard to

(A) the size of the estate, the probable duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully able to manage the protected person's affairs and the estate which has been conserved;

(B) the accustomed standard of living of the protected person and members of the protected person's household;

(C) other funds or sources used for the support of the protected person;

(3) the conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves and who are in need of support;

(4) funds expended under this subsection may be paid by the conservator to any person, including the protected person to reimburse for expenditures which the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(b) If the estate is ample to provide for the purposes implicit in the distributions authorized by (a) of this section, a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20 percent of the income from the estate.

(c) When a minor who has not been adjudged disabled under AS 13.26.165(2) attains majority, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(d) When the conservator is satisfied that a protected person's disability (other than minority) has ceased, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the formerly protected person as soon as possible.

(e) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person that may have come into the conservator's possession and inform the executor or a beneficiary named in the will that the will has been so delivered. Once a conservator knows that the protected person has died, the conservator may not exercise authority over the protected person's affairs and estate except to pay reasonable burial expenses and to preserve, account for, and transfer control of assets to a personal representative, a temporary property custodian appointed by the court, or a person authorized to take custody of personal property by affidavit under AS 13.16.680. If, after 40 days from the death of the protected person, no other person has been appointed personal representative and no application or petition for appointment is before the court, the conservator may apply to exercise the powers and duties of a personal representative in order to proceed with administering and distributing the decedent's estate without additional or further appointment. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice under AS 13.16.070 and to any person nominated executor in any will of which the applicant is aware, the court may order the conferral of the power upon determining that there is no objection, and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section has the effect of an order of appointment of a personal representative as provided in AS 13.16.115 and 13.16.245 - 13.16.655 except that estate

in the name of the conservator, after administration, may be distributed to the decedent's successors without prior retransfer to the conservator as personal representative.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 25 ch 84 SLA 2004)

Sec. 13.26.290. Enlargement or limitation of powers of conservator.

Subject to the restrictions in AS 13.26.200(4), the court may confer on a conservator at the time of appointment or later, in addition to the powers conferred by AS 13.26.280 and 13.26.285, any power which the court itself could exercise under AS 13.26.200(2) and (3). The court may, at the time of appointment or later, limit the powers of a conservator otherwise conferred by AS 13.26.280 and 13.26.285 or previously conferred by the court, and may at any time relieve the conservator of any limitation. If the court limits any power conferred on the conservator by AS 13.26.280 and 13.26.285, the limitation shall be endorsed upon the letters of appointment.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.295. Preservation of estate plan.

In investing the estate, and in selecting assets of the estate for distribution under AS 13.26.285(a) and (b), in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, the conservator and the court should take into account any known estate plan of the protected person, including a will, any revocable trust of which the protected person is settlor, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at death to another or others which the protected person may have originated. The conservator may examine the will of the protected person.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.300. Claims against estate and protected person; enforcement.

(a) Subject to AS 13.26.285(e), a conservator shall pay from the estate all just claims against the estate and against the protected person arising before or after the conservatorship was

established upon their presentation and allowance. A claim is considered presented on the first to occur of receipt of the written statement of claim by the conservator or the filing of the claim with the court. A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to the claimant within 60 days after its presentation. The presentation of a claim tolls any statute of limitations relating to the claim until 30 days after its disallowance. A claim may be presented by either of the following methods:

(1) the claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed;

(2) the claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court and deliver or mail a copy of the statement to the conservator.

(b) A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by the applicable statute of limitation, and, upon due proof, procure an order for its allowance and payment from the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party must give notice of the proceeding to the conservator if the outcome is to constitute a claim against the estate.

(c) If it appears that the estate in a conservatorship is likely to be exhausted before all existing claims are paid, preference is to be given to prior claims for the care, maintenance, and education of the protected person or the protected person's dependents and existing claims for expenses of administration.

History -

(Sec. 1 ch 78 SLA 1972; am Sec. 31 ch 56 SLA 1973; am Sec. 26 ch 84 SLA 2004; am Sec. 25 ch 53 SLA 2008)

Amendment Notes -

The 2008 amendment, effective September 2, 2008, added "Subject to AS 13.26.285(e)" at the beginning of subsection (a), and deleted "but before the protected person dies" following "was established" in the first sentence of that subsection.

Sec. 13.26.305. Individual liability of conservator.

(a) Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal the representative capacity and identify the estate in the contract.

(b) The conservator is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if personally at fault.

(c) Claims based on contracts entered into by a conservator in a fiduciary capacity, on obligations arising from ownership or control of the estate, or on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in the fiduciary capacity, whether or not the conservator is individually liable for them.

(d) Any question of liability between the estate and the conservator individually may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding or action.

History -

(Sec. 1 ch 78 SLA 1972)

Decisions -

Claims against conservator. - In the context of whether liability claims may be brought against a conservator, AS 13.26.305(d) plainly allows such claims. Trapp v. State, 53 P.3d 1128 (Alaska 2002).

Sec. 13.26.310. Termination of proceeding.

The protected person, the protected person's personal representative, the conservator, or any other interested person may petition the court to terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedures as in an original proceeding for a protective order. The court, upon determining after notice and hearing that the minority or disability of the protected person has ceased, may terminate the conservatorship. Upon termination, title to assets of the estate passes to the former protected person or to the person's successors subject to provision in the order for expenses of administration or to conveyances from the conservator to the former protected person or the person's successors, to evidence the transfer.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.315. Payment of debt and delivery of property to foreign conservator without local proceedings.

(a) Any person indebted to a protected person, or having possession of property or of an instrument evidencing a debt, stock, or chose in action belonging to a protected person may pay or deliver to a conservator, guardian of the estate, or other like fiduciary appointed by a court of the state of residence of the protected person, upon being presented with proof of the fiduciary's appointment and an affidavit made by the fiduciary or on the fiduciary's behalf stating:

(1) that no protective proceeding relating to the protected person is pending in this state; and

(2) that the foreign conservator is entitled to payment or to receive delivery.

(b) If the person to whom the affidavit is presented is not aware of any protective proceeding pending in this state, payment or delivery in response to the demand and affidavit discharges the debtor or possessor.

History -

(Sec. 1 ch 78 SLA 1972)

Sec. 13.26.320. Foreign conservators.

If no local conservator has been appointed and no petition in a protective proceeding is pending in this state, a domiciliary foreign conservator may file with a court in this state in a judicial district in which property belonging to the protected person is located, authenticated copies of appointment and of any official bond given. Thereafter, the domiciliary foreign conservator may exercise as to assets in this state all powers of a local conservator and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident parties generally.

History -

(Sec. 32 ch 56 SLA 1973)

Article 05. POWERS OF ATTORNEY

Sec. 47.24.010. Reports of harm.

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service for vulnerable adults:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator of a nursing home, residential care or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide.

(b) A report made under this section may include the name and address of the reporting person and must include

(1) the name and address of the vulnerable adult;

(2) information relating to the nature and extent of the abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

(c) The department or its designees shall report to the Department of Law any person required by (a) of this section to report who fails to comply with this section. A person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

(d) This section does not prohibit a person listed in (a) of this section, or any other person, from reporting cases of abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's attention.

(e) If a person making a report under this section believes that immediate action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person may make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and shall, at the earliest opportunity, notify the department. A person may not bring an action for damages against a police officer, village public safety officer, the state, or a political subdivision of the state based on a decision under this subsection to take or not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct; damages awarded in the action may include only direct economic compensatory damages for personal injury.

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

(g) [Repealed, Sec. 14 ch 129 SLA 1994].

(h) [Repealed, Sec. 14 ch 129 SLA 1994].

History -

(Sec. 2 ch 36 SLA 1983; am Sec. 4 ch 108 SLA 1988; am Sec. 10 ch 129 SLA 1992; am Sec. 24 ch 36 SLA 1993; am Sec. 2 ch 103 SLA 1994; am Sec. 2 - 7, 14 ch 129 SLA 1994; am Sec. 11 ch 131 SLA 1994; am Sec. 13 ch 2 SLA 1998; am E.O. No. 102 Sec. 3 (2001))

Revisors Notes -

The amendment made to (a) of this section by Sec. 11, ch. 131, SLA 1994 is not set out above because it was made obsolete by the amendment made by Sec. 2, ch. 129, SLA 1994.

Decisions -

Whistleblower provisions do not extend to volunteers. - Protected relationships under the "whistleblower" provisions of this section does not protect the intangible benefits of volunteering. McAdoo v. Diaz, 884 P.2d 1385 (Alaska 1994).

Cited in Hymes v. DeRamus, 222 P.3d 874 (Alaska 2010).

Collateral Refs -

Validity, construction, and application of state civil and criminal elder abuse laws. 113 ALR5th 431.

Sec. 47.24.011. Duties of the department regarding services and protection for vulnerable adults.

In order to facilitate the provision of supportive and protective services for vulnerable adults, the department shall

(1) compile information on available supportive and protective services for vulnerable adults in the state;

(2) establish, publicize, and maintain a central information and referral service for vulnerable adults;

(3) develop and coordinate a statewide system to serve vulnerable adults who are in need of protective services;

(4) establish criteria and procedures for the authorization and supervision of other state agencies or community-based service providers to serve as designees of the department under this chapter;

(5) in accordance with this chapter, designate other state agencies or community-based service providers to deliver supportive and protective services to vulnerable adults who are in need of protective services;

(6) develop within the central information and referral service for vulnerable adults a central registry for reports of vulnerable adults in need of protective services;

(7) maintain confidentiality of records as provided for in AS 47.24.050; and

(8) adopt regulations to carry out the purposes of this chapter.

History -

(Sec. 8 ch 129 SLA 1994)

Sec. 47.24.013. Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities.

(a) If a report received under AS 47.24.010 regards the abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

(b) The department shall investigate a report received under AS 47.24.010 regarding the abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is less than 60 years of age that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

(c) Upon receipt of a report under (a) or (b) of this section, the long term care ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the department within 60 days after the receipt of the report.

(d) If the long term care ombudsman receives directly a report regarding the abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the report, to the central information and referral service of the department. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

(e) After the results of an investigation by the long term care ombudsman are provided to the department under (c) or (d) of this section, the department may make a final determination as described in AS 47.24.015(b), based on the investigation results provided, regarding services to be offered to the vulnerable adult.

(f) If an investigation conducted by an agency under this section shows reasonable cause to believe that a certified nurse aide has committed abuse, neglect, or misappropriation of property, the agency shall report the matter to the Board of Nursing.

History -

(Sec. 8 ch 129 SLA 1994; am Sec. 14 ch 2 SLA 1998; am E.O. No. 102 Sec. 4, 5 (2001); am E.O. No. 108 Sec. 10 - 14 (2003); am Sec. 26 ch 57 SLA 2005)

Amendment Notes -

The 2003 amendment, effective July 1, 2003, rewrote subsections (a)-(e) to reflect the transfer of functions to the Department of Health and Social Services.

The 2005 amendment, effective July 2, 2005, updated a section reference in subsection (a).

Decisions -

No private right of action. - Nothing in this section or in AS 47.24.015(a) creates a private right of action for elder abuse. Superior court did not err in granting summary judgment with respect to the prisoner's claim for failure to report elder abuse. Hymes v. DeRamus, 222 P.3d 874 (Alaska 2010).

Sec. 47.24.015. Action on reports.

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

(b) After the department conducts an investigation under (a) of this section, the department shall prepare a written report of the investigation, including findings, recommendations, and a determination of whether and what kind of supportive or protective services are needed by and are to be offered to the vulnerable adult. After the department's designee conducts an investigation under (a) of this section, the designee shall prepare a written report of the investigation, including

findings, recommendations, and a proposed determination of whether and what kind of supportive or protective services are to be offered to the vulnerable adult. The department shall prepare, and attach to the designee's report, a final determination regarding services to be offered to the vulnerable adult.

(c) The department, or its designee, shall immediately terminate an investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department or its designee may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective services and the request is made personally by the vulnerable adult and the vulnerable adult is not competent to make the request on the adult's own behalf, or the request is made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department or its designee may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department or its designee may refer the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in AS 44.21.415.

(d) Upon request, a person who made a report to the department under AS 47.24.010 regarding a vulnerable adult shall be notified of the status of the investigation conducted under (a) of this section regarding that vulnerable adult.

(e) A person may not bring an action for damages based on a decision under this section to offer or not to offer protective services to a vulnerable adult.

(f) A person may not bring an action for damages based on the provision of protective services under this section unless the action is based on gross negligence or intentional misconduct. The damages awarded in an action under this section may include only direct economic compensatory damages for personal injury.

(g) If an investigation under this section shows reasonable cause to believe that a certified nurse aide has committed abuse, neglect, or misappropriation of property, the department shall report the matter to the Board of Nursing.

History -

(Sec. 8 ch 129 SLA 1994; am Sec. 15 ch 2 SLA 1998; am Sec. 1 ch 21 SLA 1999; am Sec. 3 ch 64 SLA 2006)

Amendment Notes -

The 2006 amendment, effective September 13, 2006, added paragraph (c)(3), and made related changes.

Decisions -

No private right of action. - Nothing in AS 47.24.013(a) or this section creates a private right of action for elder abuse. Superior court did not err in granting summary judgment with respect to the prisoner's claim for failure to report elder abuse. Hymes v. DeRamus, 222 P.3d 874 (Alaska 2010).

Sec. 47.24.016. Surrogate decision makers for vulnerable adults.

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's consent to receive the services because the vulnerable adult is unable to consent or lacks decision making capacity, and has no guardian or attorney-in-fact to serve as the vulnerable adult's surrogate decision maker, the department may select from the following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services:

(1) the vulnerable adult's spouse, unless

(A) the vulnerable adult and the spouse have separate domiciles; or

(B) the vulnerable adult or the spouse have initiated divorce or dissolution proceedings;

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision making capacity; or

(2) there are allegations that individual is a perpetrator of the abandonment, exploitation, abuse, or neglect of the vulnerable adult.

(c) If the department intends to select a surrogate decision maker from a priority level in the list in (a) of this section and there is more than one individual at that priority level who is willing to be the surrogate decision maker, those individuals

(1) may select from amongst themselves, by majority vote, an individual to serve as the surrogate decision maker; or

(2) as a group may serve as the surrogate decision maker and reach decisions by consensus.

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this section if the department determines that the vulnerable adult has become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable adult who has become able to consent or has regained decision making capacity only if the vulnerable adult consents.

History -

(Sec. 8 ch 129 SLA 1994)

Decisions -

Husband not entitled to automatically assume the role of his wife's surrogate decision maker. - Dismissal of the husband's action alleging that he suffered emotional distress caused by the medical center's release of his wife to her daughter was appropriate, in part because a spouse was not entitled to automatically assume the role of a surrogate decision maker when the health department had not sought the spouse's consent for services. Even if the husband had been acting as his wife's agent, he would have formed a contract between the wife and the medical center that the wife could have enforced, not the husband. Clemensen v. Providence Alaska Med. Ctr., 203 P.3d 1148 (Alaska 2009).

Sec. 47.24.017. Delivery of protective services for vulnerable adults.

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and either the vulnerable adult, the vulnerable adult's guardian or attorney-in-fact, or a surrogate decision maker selected under AS 47.24.016 consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that

the protective services for the vulnerable adult are provided by the department or its designee within 10 working days after the department received the report under AS 47.24.010 regarding the abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the department or the department's designee make it impossible to provide the protective services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

(b) Notwithstanding (a) of this section, if the department determines that an emergency situation exists that necessitates provision of protective services to a vulnerable adult, the department may provide the necessary protective services in a manner determined by the department to be the most appropriate in light of the emergency situation, regardless of whether the vulnerable adult or any other person has consented to receipt of the services.

(c) To the extent practicable, protective services provided under this section shall be delivered in a culturally relevant manner that protects the vulnerable adult's right to the least restrictive environment and maximizes that person's own decision making capabilities.

(d) If the protective services under this section include the placement of a vulnerable adult in an assisted living home at the state's expense, the minimum daily reimbursement rate to the assisted living home for the vulnerable adult is $70. The department may, under its regulations, provide for a daily rate higher than $70 if the additional care provided to the vulnerable adult in the assisted living home justifies the additional reimbursement. In this subsection, "assisted living home" means an assisted living home licensed under AS 47.32.

History -

(Sec. 8 ch 129 SLA 1994; am Sec. 2 - 4 ch 83 SLA 2000; am Sec. 27 ch 57 SLA 2005)

Cross References -

For applicability provisions relating to the 2000 addition of subsection (d) by sec. 2, ch. 83, SLA 2000, and the 2001 and 2002 amendments of that subsection by secs. 3 and 4, ch. 83, SLA 2000, see sec. 14, ch. 83, SLA 2000 in the 2000 Temporary & Special Acts.

Amendment Notes -

The 2005 amendment, effective July 2, 2005, updated a section reference in subsection (d).

Sec. 47.24.019. Petitioning court for certain protective services.

(a) If, after investigation under AS 47.24.015, the department has reasonable cause to believe that a vulnerable adult is in need of protective services and is an incapacitated person, the department may petition the court under AS 13.26 for appointment of a guardian or temporary

guardian, or for a change of guardian, for the vulnerable adult for the purpose of deciding whether to consent to the receipt of protective services for the vulnerable adult.

(b) If, after an investigation under AS 47.24.015, the department has reasonable cause to believe that a vulnerable adult is mentally ill and as a result either is likely to cause serious harm to self or others or is gravely disabled, the department may petition the court under AS 47.30.700 to initiate an involuntary commitment proceeding.

(c) If a vulnerable adult who has consented to receive protective services, or on whose behalf consent to receive protective services has been given, is prevented by a caregiver, guardian, attorney-in-fact, or surrogate decision maker from receiving those services, the department may petition the superior court for an injunction restraining the caregiver, guardian, attorney-in-fact, or surrogate decision maker from interfering with the provision of protective services to the vulnerable adult.

History -

(Sec. 8 ch 129 SLA 1994; am Sec. 2, 3 ch 21 SLA 1999)

Sec. 47.24.020. , 47.24.030l Action; protective services. [Repealed, Sec. 14 ch 129 SLA 1994].

Repealed or Renumbered

Sec. 47.24.040. Monitoring.

If ongoing protective services are provided to a vulnerable adult under AS 47.24.017, the department shall monitor the adult's situation, as the department considers appropriate, until the department determines that the protective services are no longer needed.

History -

(Sec. 2 ch 36 SLA 1983; am Sec. 9 ch 129 SLA 1994)

Sec. 47.24.050. Confidentiality of reports.

(a) Investigation reports and reports of the abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, in accordance with this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate agencies or individuals inside and outside the state, in connection with investigations or

judicial proceedings involving the abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the vulnerable adult who is the subject of the report or the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker consents in writing. The department may not disclose a report of the abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker if that person is an alleged perpetrator of the abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. The department shall, upon request, disclose the number of verified reports of abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

History -

(Sec. 2 ch 36 SLA 1983; am Sec. 4 ch 45 SLA 1994; am Sec. 10 ch 129 SLA 1994; am Sec. 4 ch 21 SLA 1999)

Revisors Notes -

In 2000, "AS 40.25.110 - 40.25.125" was substituted for "AS 09.25.110 - 09.25.125" to reflect the 2000 renumbering of AS 09.25.110 - 09.25.125.

Sec. 47.24.060. Authority of the department. [Repealed, Sec. 14 ch 129 SLA 1994].

Repealed or Renumbered

Sec. 47.24.070. Required review of proposed regulations.

Before adoption by the department, regulations to implement this chapter shall be provided to the Alaska Commission on Aging established under AS 47.45.200 for review.

History -

(Sec. 2 ch 36 SLA 1983; am Sec. 11 ch 129 SLA 1994; am Sec. 12 ch 131 SLA 1994; am Sec. 2 ch 24 SLA 2004; am Sec. 32 ch 99 SLA 2004)

Amendment Notes -

The first 2004 amendment, effective July 24, 2004, substituted "AS 47.45.200" for "AS 44.21.200."

The second 2004 amendment, effective June 26, 2004, substituted "AS 47.44.200" for "AS 44.21.200."

Sec. 47.24.075. - 47.24.110l Reports; definitions. [Repealed, Sec. 14 ch 129 SLA 1994].

Repealed or Renumbered

Sec. 47.24.120. Immunity from liability; retaliation prohibited.

(a) A person who in good faith makes a report under AS 47.24.010, regardless of whether the person is required to do so, is immune from civil or criminal liability that might otherwise be incurred or imposed for making the report.

(b) An employer or supervisor of a person who in good faith makes a report under AS 47.24.010 may not discharge, demote, transfer, reduce pay or benefits or work privileges of, prepare a negative work performance evaluation of, or take other detrimental action against the person because the person made the report. The person making the report may bring a civil action for compensatory and punitive damages against an employer or supervisor who violates this subsection. In the civil action there is a rebuttable presumption that the detrimental action by the employer or supervisor was retaliatory if it was taken within 90 days after the report was made.

History -

(Sec. 3 ch 42 SLA 1988; am Sec. 12 ch 129 SLA 1994)

Sec. 47.24.130. Treatment through spiritual means.

This chapter may not be construed to mean that a person is abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone in accordance with the tenets and practices of a church or religious denomination of which the person is a member or adherent, provided that the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious organization" in AS 05.15.690.

History -

(Sec. 13 ch 129 SLA 1994)

Revisors Notes -

In 1999, "AS 05.15.690" was substituted for "AS 05.15.210" to reflect the 1994 renumbering of AS 05.15.210.

Sec. 47.24.900. Definitions.

In this chapter,

(1) "abandonment" means desertion of a vulnerable adult by a caregiver;

(2) "abuse" means

(A) the wilful, intentional, or reckless nonaccidental, and nontherapeutic infliction of physical pain, injury, or mental distress; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed responsibility for the care of a vulnerable adult voluntarily, by contract, or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision;

(5) "department" means the Department of Health and Social Services;

(6) "designee" means another state agency or a community-based program, individual, or provider of supportive services that has been licensed, or authorized by agreement with the department, to provide one or more services to vulnerable adults;

(7) "exploitation" means unjust or improper use of another person or another person's resources for one's own profit or advantage;

(8) "incapacitated person" means a person whose ability to receive and evaluate information or to communicate decisions is impaired to the extent that the person lacks the ability to provide or arrange for the essential requirements for the person's physical health or safety without court-ordered assistance;

(9) "neglect" means the intentional failure by a caregiver to provide essential care or services necessary to maintain the physical and mental health of the vulnerable adult;

(10) "police officer" has the meaning given in AS 18.65.290;

(11) "protective services" means services that are intended to prevent or alleviate harm resulting from abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; "protective services" includes protective placement;

(12) "public home care provider" has the meaning given in AS 47.05.017(c);

(13) "self-neglect" means an act or omission by a vulnerable adult that results, or could result in the deprivation of essential services necessary to maintain minimal mental, emotional, or physical health and safety;

(14) "supportive services" means the range of services delivered by public and private organizations and individuals that assist the elderly and vulnerable adults with their social, health, educational, recreational, transportation, housing, nutritional, financial, legal, or other needs;

(15) "unable to consent" means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of death or irreparable harm to self or others;

(16) "vulnerable adult" means a person 18 years of age or older who, because of physical or mental impairment, is unable to meet the person's own needs or to seek help without assistance.

History -

(Sec. 13 ch 129 SLA 1994; am E.O. No. 108 Sec. 15 (2003))

Revisors Notes -

Paragraph (12) was enacted as AS 47.24.100(13). Renumbered in 1994.

Amendment Notes -

The 2003 amendment, effective July 1, 2003, substituted "Department of Health and Social Services" for "Department of Administration" in the definition of "department."

Decisions -

Cited in R.J.M. v. State, 946 P.2d 855 (Alaska 1997).

SB

86

(FILE 3)

<TARGET><BILL>SB 86</BILL><SUBJECT>SB 86 (FILE 3)</SUBJECT><COMM>SJUD27</COMM></TARGET>

27-GS1722\T
Mischel
4/11/11

CS FOR SENATE BILL NO. 86(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; making conforming amendments; amending Rules 12(h) and 45(a), Alaska Rules of Criminal Procedure, Rule 77, Alaska Rules of Civil Procedure, Rule 17, Alaska Rules of Probate Procedure, and Rule 9, Alaska Rules of Administration; and providing for an effective date."

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

*** Section 1.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY

PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 2.** AS 08.63.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 3.** AS 11.56.740(a) is amended to read:

(a) A person commits the crime of violating a protective order if the person is subject to a protective order

(1) issued or filed under AS 18.66 and containing a provision listed in AS 18.66.100(c)(1) - (7) and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order; [OR]

(2) issued under AS 18.65.850, 18.65.855, or 18.65.860 and knowingly commits or attempts to commit an act that violates or would violate a provision listed in AS 18.65.850(c)(1) - (3)**; or**

(3) issued under AS 13.26.207 - 13.26.209 and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order.

*** Sec. 4.** AS 11.56.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under **AS 13.26.207 - 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180.

*** Sec. 5.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

*** Sec. 6.** AS 13.26.165 is amended to read:

Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or **issue another** [MAKE OTHER] protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that

(A) a minor owns money or property that requires management or protection **that** [WHICH] cannot otherwise be provided**;**

(B) the minor [,] has or may have business affairs **that** [WHICH] may be jeopardized or prevented by the status of being a minor**;** [,] or

(C) [THAT] funds are needed for the minor's support and education and [THAT] protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, **fraud,** confinement, detention by a foreign power, or disappearance; and

(B) the person has property **that** [WHICH] will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care**,** and welfare of the person or those entitled to be supported by the person and [THAT] protection is necessary or desirable to obtain or provide funds.

*** Sec. 7.** AS 13.26.180(a) is amended to read:

(a) The person to be protected, **a person's attorney or other legal representative,** any person who is interested in the estate, affairs**,** or welfare of the person to be protected, including a parent, guardian, [OR] custodian, **or caregiver, the Department of Health and Social Services,** or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

*** Sec. 8.** AS 13.26.180 is amended by adding a new subsection to read:

(c) The petition may include a request for temporary conservatorship as provided in AS 13.26.206 if it appears that the respondent's property is likely to be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

* **Sec. 9.** AS 13.26.185 is amended by adding a subsection to read:

(c) This section does not apply to a petition or order for an ex parte protective order filed under AS 13.26.207 or a temporary protective order filed under AS 13.26.208.

* **Sec. 10.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.206. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or persons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request must state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney and other persons as ordered by the court. The court shall appoint an attorney for a respondent who is unrepresented to be at the hearing and conduct a hearing within 72 hours after the filing.

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a

full or partial conservator or on the dismissal of the petition for conservatorship.

Sec. 13.26.207. Ex parte protective orders. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against a person other than the protected person. A petition filed on behalf of a protected person by a person other than the protected person must be accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition and that, because of the fraud, there has been or is an immediate threat of a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, unless dissolved earlier by the court at the request of the petitioner or respondent and after notice and, if requested, a hearing, or on the earlier appointment of a temporary or permanent conservator.

Sec. 13.26.208. Temporary protective orders; conversions. On application filed with the court before the expiration of a 20-day ex parte protective order issued under AS 13.26.207, the court shall schedule a hearing on whether to convert the

protective order to a temporary order effective for up to six months. The court shall provide to the protected person and the respondent at least 10 days' notice of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may convert the ex parte protective order to a temporary protective order effective for up to six months.

Sec. 13.26.209. Protective orders; modification; third-party compliance; forms; fees. (a) The petitioner, respondent, or protected person, if the protected person is a vulnerable adult, may request modification of a protective order issued under AS 13.26.207 - 13.26.209. Except as provided in (b) of this section, if a request is made for modification of

(1) an ex parte protective order issued under AS 13.26.207, the court shall schedule a hearing on three days' notice or on shorter notice as the court may prescribe; or

(2) a temporary protective order, after notice and hearing under AS 13.26.208, the court shall schedule a hearing within 20 days after the date the request is made, except that, if the court finds that the request is meritless on its face, the court may deny the request without a hearing.

(b) If a request for a modification is made under this section and the respondent raises an issue not raised by the petitioner, the court may allow the petitioner additional time to respond.

(c) If the court modifies a protective order, the court shall issue a modified order and shall make reasonable efforts to ensure that the order is understood by the petitioner, the respondent, and the protected person who are present at the hearing.

(d) The court shall cause a copy of a protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person and have a protective order and any related order delivered to the appropriate local law enforcement agency for expedited entry in the central registry under AS 18.65.540.

(e) A protective order issued under AS 13.26.207 - 13.26.209 is in addition to any other civil or criminal remedy.

(f) A third party that has received actual or legal notice of a protective order issued under AS 13.26.207 - 13.26.209 shall comply with the order. A third party who does not comply with a protective order granted under AS 13.26.207 - 13.26.209 may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third party who does not comply with a protective order granted under AS 13.26.207 - 13.26.209 may also be criminally liable under AS 11.56.740 for violating a protective order. As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most recently known place of residence or business of the third party.

(g) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions and protective orders and instructions for use of the forms by a person seeking a protective order under AS 13.26.207 - 13.26.209. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(h) Filing fees may not be charged for a petition under AS 13.26.207, for an application under AS 13.26.208, or for a request for modification of a protective order under AS 13.26.209(a).

* **Sec. 11.** AS 13.26 is amended by adding a new section to article 4 to read:

Sec. 13.26.324. Definitions. In AS 13.26.165 - 13.26.324, unless the context requires otherwise, "fraud" means

(1) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(2) offenses against property under AS 11.46.100 - 11.46.740; or

(3) exploitation of another person or another person's resources for personal profit or advantage if no significant benefit accrues to the person who is

exploited.

*** Sec. 12.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating a protective order in violation of **AS 11.56.740(a)(1) or (2)** [AS 11.56.740];

(3) violated a condition of release imposed under AS 12.30.016(e) or (f) or 12.30.027.

*** Sec. 13.** AS 18.65.540(a) is amended to read:

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under **AS 13.26.207 - 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180. The registry must include**,** for each protective order**,** the names of the petitioner and respondent, their dates of birth, and the conditions and duration of the order. The registry shall retain a record of the protective order after it has expired.

*** Sec. 14.** AS 18.65.540(b) is amended to read:

(b) A peace officer receiving a protective order from a court under **AS 13.26.207, 13.26.208,** AS 18.65.850 - 18.65.855, **or** AS 18.66.100 - 18.66.180, a modified order issued under **AS 13.26.209,** AS 18.65.860**,** or AS 18.66.120, or an order dismissing a protective order **shall** [, MUST] take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.

*** Sec. 15.** AS 44.21.415(g) is amended to read:

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED] offenses **against property** under AS 11.46.100 - 11.46.740; or

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older.

*** Sec. 16.** AS 47.24.010(a) is amended to read:

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service for vulnerable adults **in the office of the department that handles adult protective services**:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator **or employee** of a nursing home, residential care, or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide**;**

(16) an educator or administrative staff member of a public or private educational institution.

*** Sec. 17.** AS 47.24.010(b) is amended to read:

(b) A report made under this section may include the name and address of the reporting person and must include

(1) the name and **contact information** [ADDRESS] of the vulnerable adult;

(2) information relating to the nature and extent of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

*** Sec. 18.** AS 47.24.010(c) is amended to read:

(c) The department or its designees shall report to the Department of Law any person required by (a) of this section to report who fails to comply with this section. A person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

*** Sec. 19.** AS 47.24.010(d) is amended to read:

(d) This section does not prohibit a person listed in (a) of this section, or any other person, from reporting cases of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's attention **in the person's nonoccupational capacity. This section does not prohibit**

any other person from reporting a harm under this section.

*** Sec. 20.** AS 47.24.010(e) is amended to read:

(e) If a person making a report under this section believes that immediate action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person **shall** [MAY] make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and shall, **within 24 hours after receiving the report of harm** [AT THE EARLIEST OPPORTUNITY], notify the department. A person may not bring an action for damages against a police officer, **a** village public safety officer, the state, or a political subdivision of the state based on a decision under this subsection to take or not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct; damages awarded in the action may include only direct economic compensatory damages for personal injury.

*** Sec. 21.** AS 47.24.010(f) is amended to read:

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been **unduly influenced, abandoned,** exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

*** Sec. 22.** AS 47.24.010 is amended by adding new subsections to read:

(i) A person required to report under this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(j) A person who recklessly makes a false report under this section is civilly

liable for actual damages suffered by the person who is the subject of the report.

*** Sec. 23.** AS 47.24.013(a) is amended to read:

(a) If a report received under AS 47.24.010 **pertains to** [REGARDS] the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

*** Sec. 24.** AS 47.24.013(b) is amended to read:

(b) The department shall investigate a report received under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is less than 60 years of age that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

*** Sec. 25.** AS 47.24.013(c) is amended to read:

(c) Upon receipt of a report under (a) or (b) of this section, the long term care ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the **office of the** department **that handles adult protective services** within 60 days after the receipt of the report.

*** Sec. 26.** AS 47.24.013(d) is amended to read:

(d) If the long term care ombudsman receives directly a report regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the report, to the central information and referral service of the **office of the** department

that handles adult protective services. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

*** Sec. 27.** AS 47.24.015(a) is amended to read:

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

*** Sec. 28.** AS 47.24.015(c) is amended to read:

(c) The department [,] or its designee [,] shall immediately terminate an investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department or its designee may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective services and the request is made personally by the vulnerable adult and the vulnerable adult is not competent to make the request on the adult's own behalf, or the request is made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department or its designee may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department or its designee may refer the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in **AS 13.26.324** [AS 44.21.415].

* **Sec. 29.** AS 47.24.015 is amended by adding new subsections to read:

(h) In conducting an investigation under this section, the department may issue subpoenas, conduct interviews, and examine any health care or financial records related to a vulnerable adult. The department may seek a court order to enforce a subpoena.

(i) A person may not interfere with the department in the performance of its investigation under this section, including interfering with the department's access to the vulnerable adult.

(j) Notwithstanding any other provision of law, the office of the department that handles adult protective services shall have access to any information compiled or retained by other divisions in the department, regardless of the nature of the information or whether the information is considered confidential, to assist in administering the provisions of this chapter.

(k) The department may audiotape or videotape an interview of a vulnerable adult if the adult has the capacity to consent and gives that consent. The department shall document the consent in its investigative file. The department may not audiotape or videotape an interview of a vulnerable adult who lacks the capacity to consent.

(*l*) The department shall provide for the training of investigators who investigate reports of harm under this section. Training must include instruction in federal, state, and local laws and policies of the department related to vulnerable adults, and in investigative techniques. The department may require other appropriate training.

(m) In this section, "financial records" include financial records related to the vulnerable adult that are maintained by any person.

* **Sec. 30.** AS 47.24.016(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's consent to receive the services because the vulnerable adult is unable to consent or lacks decision making capacity, and has no guardian**, conservator,** [OR] attorney-in-fact**, trustee, or surrogate for health care decisions under AS 13.52.030** to serve as the vulnerable adult's surrogate decision maker, the department may select from the

following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services:

(1) the vulnerable adult's spouse, unless

[(A) THE VULNERABLE ADULT AND THE SPOUSE HAVE SEPARATE DOMICILES; OR

(B)] the vulnerable adult or the spouse have initiated divorce, [OR] dissolution**, or legal separation** proceedings;

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

*** Sec. 31.** AS 47.24.016(b) is amended to read:

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision making capacity; or

(2) there are allegations that individual is a perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult.

*** Sec. 32.** AS 47.24.016(d) is amended to read:

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this section **or AS 13.52.030** if the department determines that the vulnerable adult has become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable adult who has become able to consent or has regained decision making capacity only

if the vulnerable adult consents.

* **Sec. 33.** AS 47.24.017(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and [EITHER] the vulnerable adult, the vulnerable adult's guardian**, conservator,** [OR] attorney-in-fact, **trustee,** [OR] a surrogate decision maker selected under AS 47.24.016**, or a surrogate for health care decisions under AS 13.52.030** consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that the protective services for the vulnerable adult are provided by the department**,** or its designee**,** within 10 working days after the department received the report under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the department or the department's designee make it impossible to provide the protective services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

* **Sec. 34.** AS 47.24.019(c) is amended to read:

(c) If a vulnerable adult who has consented to receive protective services, or on whose behalf consent to receive protective services has been given, is prevented by **any person** [A CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from receiving those services, the department may petition the superior court for an injunction restraining the **person** [CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from interfering with the provision of protective services to the vulnerable adult.

* **Sec. 35.** AS 47.24.050 is amended to read:

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, **under** [IN ACCORDANCE WITH] this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate agencies or individuals

inside and outside the state, in connection with investigations or judicial proceedings involving the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the vulnerable adult who is the subject of the report or the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker consents in writing. The department may not disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker if that person is an alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. The department shall, upon request, disclose the number of verified reports of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

*** Sec. 36.** AS 47.24.130 is amended to read:

Sec. 47.24.130. Treatment through spiritual means. This chapter may not be construed to mean that a person is **unduly influenced,** abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone **under** [IN ACCORDANCE WITH] the tenets and practices of a church or religious denomination of which the person is a member or adherent, **if** [PROVIDED THAT] the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious organization" in AS 05.15.690.

*** Sec. 37.** AS 47.24.900(2) is amended to read:

(2) "abuse" means

(A) the [WILFUL,] intentional, **knowing,** or reckless nonaccidental [,] and nontherapeutic infliction of physical pain, injury, [OR] mental **or emotional** distress**, or fear, including coercion and intimidation**; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

*** Sec. 38.** AS 47.24.900(3) is amended to read:

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed **some or all** responsibility for the care of a vulnerable adult voluntarily, by contract, **as an employee of a business that provides care in an adult's home,** or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

*** Sec. 39.** AS 47.24.900(4) is amended to read:

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision; **in this paragraph, "informed decision" includes a decision made by the vulnerable adult that is free from undue influence;**

*** Sec. 40.** AS 47.24.900(7) is amended to read:

(7) "exploitation"

(A) means unjust or improper use of another person or another person's resources for one's own profit or advantage**, with or without the person's consent; and**

(B) includes acts by a person who stands in a position of trust or confidence with a vulnerable adult or who knows or should know that the vulnerable adult lacks the capacity to consent that involve obtaining profit or advantage through undue influence, deception, fraud, intimidation, or breach of fiduciary duty; in this paragraph, "fraud" has the meaning given in AS 13.26.324(1) and (2);

*** Sec. 41.** AS 47.24.900(9) is amended to read:

(9) "neglect" means the intentional**, knowing, or reckless** failure by a caregiver to provide essential care or services **or access to essential care or services or to carry out a prescribed treatment plan** necessary to maintain the physical and mental health of the vulnerable adult **when the vulnerable adult is unable to provide or obtain the essential care or services or to carry out the prescribed treatment plan on the vulnerable adult's own behalf; in this paragraph, "essential care or services" includes food, clothing, shelter, medical care, and supervision**;

*** Sec. 42.** AS 47.24.900(11) is amended to read:

(11) "protective services" means services that are intended to prevent or alleviate harm resulting from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; **in this paragraph, "services"** ["PROTECTIVE SERVICES"] includes

(A) protective placement;

(B) applying for or obtaining public benefits;

(C) obtaining health care services and supplies;

(D) staying financial transactions;

(E) petitioning for a protective order under AS 13.26.165 - 13.26.209;

(F) assisting with personal hygiene;

(G) obtaining food and clothing;

(H) protection from physical and emotional abuse;

(I) obtaining representative payee services; and

(J) coordinating protective services;

*** Sec. 43.** AS 47.24.900(15) is amended to read:

(15) "unable to consent" means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of **undue influence,**

abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of **loss, waste, or dissipation of income or assets, eviction, physical or mental harm to self or others, or** death [OR IRREPARABLE HARM TO SELF OR OTHERS];

*** Sec. 44.** AS 47.24.900(16) is amended to read:

(16) "vulnerable adult" means a person 18 years of age or older who, because of **incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance** [PHYSICAL OR MENTAL IMPAIRMENT], is unable to meet the person's own needs or to seek help without assistance.

*** Sec. 45.** AS 47.24.900 is amended by adding new paragraphs to read:

(17) "deception" means creating, reinforcing, or failing to correct a false impression or preventing another person from acquiring information that would affect the person's judgment regarding a transaction;

(18) "fiduciary duty" means the duty of a third party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interest of that person;

(19) "financial institution" means an institution subject to state or federal banking or financial regulations, including

(A) a broker-dealer;

(B) a commercial bank;

(C) a savings bank;

(D) a credit union;

(E) a premium finance company;

(F) a small loan company;

(G) a bank holding company;

(H) a financial holding company;

(I) a trust company;

(J) a savings and loan association;

(K) a deferred deposit advance licensee;

(L) an investment bank;

(M) an insurance company subject to regulation by AS 21;

(N) a licensee subject to regulation by AS 21; and

(O) an investment adviser;

(20) "person who stands in a position of trust or confidence" means a person who

(A) is a relative by blood or marriage;

(B) is a joint tenant or tenant in common;

(C) has a legal or fiduciary relationship; or

(D) is a person who has been entrusted with or has assumed responsibility for the use or management of the vulnerable adult's assets or income;

(21) "undue influence" means the use by a person who stands in a position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit the trust, dependency, or fear of a vulnerable adult to gain control over the decision making of the vulnerable adult, including decision making related to finances, property, residence, and health care.

*** Sec. 46.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 12(h), Alaska Rules of Criminal Procedure, is amended to read:

(h) **Continuance of Trial.** A motion for continuance of a trial date will be granted by the court only for cause shown. **In deciding whether to grant the motion, the court shall consider the victim's circumstances and the effect the delay would have on the victim, particularly a victim of advanced age or extreme youth. The court shall place its findings on the record.** The presiding judge of a judicial district may require that a visiting or pro tem judge obtain approval from the presiding judge before granting any continuance of trial.

*** Sec. 47.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(a), Alaska Rules of

Criminal Procedure, is amended to read:

(a) **Priorities in Scheduling Criminal Cases.** The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings and the trial of defendants in custody shall be given preference over other criminal cases. **The court shall consider the circumstances of the victim, particularly a victim of advanced age or extreme youth, in setting the trial date.** Trial dates in criminal cases in the superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

*** Sec. 48.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.26.207, 13.26.208, and 13.26.209(a) - (g), enacted by sec. 10 of this Act, have the effect of amending Rule 17, Alaska Rules of Probate Procedure, relating to conservatorships and protective proceedings, by allowing ex parte and temporary orders and modifications of orders to be issued related to protecting the assets of a person otherwise subject to AS 13.26.165 from financial exploitation.

(b) AS 13.26.209(h), enacted by sec. 10 of this Act, has the effect of amending Rule 9, Alaska Rules of Administration, by requiring that filing fees may not be charged for a petition for an ex parte protective order under AS 13.26.207 for an application for a temporary order under AS 13.26.208, or for modification of a protective order under AS 13.26.209(a), enacted by sec. 10 of this Act.

(c) AS 13.26.206, enacted by sec. 10 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by requiring a hearing within 72 hours of the filing of a petition for the appointment of a temporary conservator.

(d) AS 13.26.208, enacted by sec. 10 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by providing for a hearing on an application for a temporary protective order on 10 days' notice.

(e) AS 13.26.209(a) and (b), enacted by sec. 10 of this Act, have the effect of amending Rule 77, Alaska Rules of Civil Procedure, by providing for a hearing on a request for modification of a protective order on 20 days' notice and for modification of an ex parte

protective order on three days' notice.

*** Sec. 49.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 3 - 5, 46, and 47 of this Act apply to offenses committed on or after the effective date of secs. 3 - 5 of this Act.

*** Sec. 50.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the catch line of

(1) AS 47.24.010 from "Reports of harm" to "Persons required to report; reports of harm";

(2) AS 47.24.013 from "Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities" to "Reports of undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities."

*** Sec. 51.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 13.26.207 and 13.26.209(a) - (g), enacted by sec. 10 of this Act, take effect only if sec. 48(a) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 13.26.209(h), enacted by sec. 10 of this Act, takes effect only if sec. 48(b) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(c) AS 13.26.206, enacted by sec. 10 of this Act, takes effect only if sec. 48(c) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(d) AS 13.26.208, enacted by sec. 10 of this Act, takes effect only if sec. 48(a) and (d) of this Act receive the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(e) AS 13.26.209(a) and (b), enacted by sec. 10 of this Act, take effect only if sec. 48(e) of this Act receive the two-thirds vote of each house required by art. IV, sec. 15,

Constitution of the State of Alaska.

* **Sec. 52.** Sections 16 and 20 of this Act take effect September 1, 2011.

* **Sec. 53.** Except as provided in sec. 52 of this Act, this Act takes effect July 1, 2011.

Alaska State Legislature

Senator Hollis French, Chair
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Juneau, Alaska 99801
Phone: (907) 465-3892
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Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

April 7, 2011

TO: Jean Mischel, Leg Legal

FROM: Cindy Smith

RE: new CS for SB86 Protection of Vulnerable Adults/Minors (GS1722\B)

Please prepare a new CS for SB 86 Protection of Vulnerable Adults/Minors with the following changes to the \B version.

1. In section 13.26.209 (starting on page 5), having to do with protective orders, there is some confusion in the original drafting by the Department of Law that needs to be cleared up. The section addresses both ex-parte orders, which are orders at which the respondent may be excluded from notice requirements, and also 6 month protective orders, which require that all parties receive notice and have the opportunity to be present. The bill as drafted has not separated references to the two different orders and in fact is referring to them inaccurately at times as "a six-month extension" of the ex-parte order. Please look at this section and separate out and correct references to these two different orders. It may be useful to look at domestic violence restraining orders for formatting.

   Also in this section, in the current (c) on page 5, and also in reference to the 6-month protective order, pleas add language that states expiration dates followed by the "unless dissolved earlier by the court".

2. On page 10, at line 24, delete the language "at the earliest opportunity" and reinstate the commas if appropriate.

3. Restrict Section 52 on page 22 to apply to sections 16 and 20 only.

27-GS1722\B
Mischel
4/5/11

CS FOR SENATE BILL NO. 86(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; making conforming amendments; amending Rules 12(h) and 45(a), Alaska Rules of Criminal Procedure, Rule 77, Alaska Rules of Civil Procedure, Rule 17, Alaska Rules of Probate Procedure, and Rule 9, Alaska Rules of Administration; and providing for an effective date."

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

*** Section 1.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY

PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 2.** AS 08.63.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 3.** AS 11.56.740(a) is amended to read:

(a) A person commits the crime of violating a protective order if the person is subject to a protective order

(1) issued or filed under AS 18.66 and containing a provision listed in AS 18.66.100(c)(1) - (7) and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order; [OR]

(2) issued under AS 18.65.850, 18.65.855, or 18.65.860 and knowingly commits or attempts to commit an act that violates or would violate a provision listed in AS 18.65.850(c)(1) - (3)**; or**

(3) issued under AS 13.26.180 or 13.26.209 and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order.

*** Sec. 4.** AS 11.56.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180.

*** Sec. 5.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

*** Sec. 6.** AS 13.26.165 is amended to read:

Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or **issue another** [MAKE OTHER] protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that

(A) a minor owns money or property that requires management or protection **that** [WHICH] cannot otherwise be provided**;**

(B) the minor [,] has or may have business affairs **that** [WHICH] may be jeopardized or prevented by the status of being a minor**;** [,] or

(C) [THAT] funds are needed for the minor's support and education and [THAT] protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, **fraud,** confinement, detention by a foreign power, or disappearance; and

(B) the person has property **that** [WHICH] will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care**,** and welfare of the person or those entitled to be supported by the person and [THAT] protection is necessary or desirable to obtain or provide funds.

*** Sec. 7.** AS 13.26.180(a) is amended to read:

(a) The person to be protected, **a person's attorney or other legal representative,** any person who is interested in the estate, affairs**,** or welfare of the person to be protected, including a parent, guardian, [OR] custodian, **or caregiver, the Department of Health and Social Services,** or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

*** Sec. 8.** AS 13.26.180 is amended by adding a new subsection to read:

(c) The petition may include a request for temporary conservatorship as provided in AS 13.26.207 if it appears that the respondent's property is likely to be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

* **Sec. 9.** AS 13.26.185 is amended by adding a subsection to read:

(c) This section does not apply to a petition or order for an ex parte protective order filed under AS 13.26.209.

* **Sec. 10.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.207. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or persons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request must state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney and other persons as ordered by the court. The court shall appoint an attorney for a respondent who is unrepresented to be at the hearing and conduct a hearing within 72 hours after the filing.

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a full or partial conservator or on the dismissal of the petition for conservatorship.

Sec. 13.26.209. Ex parte protective orders; modification; forms for petitions and orders; fees. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against another person. A petition filed on behalf of a protected person by another person must be accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition and that, because of the fraud, there has been or is an immediate threat of a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent. The court shall cause a copy of the protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, at the end of a six-month extension if granted by the court under (d) of this section, ~~or~~ on the appointment of a temporary or permanent conservator or dismissal of the petition for the ex parte order. "unless dissolved . . . "

(d) On application filed with the court before the expiration of the 20-day ex parte protective order, the court shall schedule a hearing on whether to extend the

protective order for up to six months. The court shall provide to the protected person and the respondent at least 10 days' notice of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may extend the ~~ex parte~~ protective order for up to six months.

(e) The petitioner, respondent, or protected person, if the protected person is a vulnerable adult, may request modification of a protective order issued under this section. If a request is made for modification of a protective order, the court shall schedule a hearing on three days' notice or on shorter notice as the court may prescribe. If the court modifies a protective order under this section, the court shall issue a modified order and shall make reasonable efforts to ensure that the order is understood by the petitioner, the respondent, and the protected person, if the protected person is a vulnerable adult, if present at the hearing.

(f) A protective order issued under this section is in addition to any other civil or criminal remedy.

(g) A third party that has received actual or legal notice of a protective order issued under this section shall comply with the order. A third party who does not comply with a protective order granted under this section may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third party who does not comply with a protective order granted under this section may also be criminally liable under AS 11.56.740 for violating a protective order. As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most recently known place of residence or business of the third party.

(h) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions and protective orders and instructions for use of the forms by a person seeking a protective order under this section. The

forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order under this section may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(i) Filing fees may not be charged for a petition under this section.

* **Sec. 11.** AS 13.26 is amended by adding a new section to article 4 to read:

Sec. 13.26.324. Definitions. In AS 13.26.165 - 13.26.324, unless the context requires otherwise, "fraud" means

(1) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(2) offenses against property under AS 11.46.100 - 11.46.740; or

(3) exploitation of another person or another person's resources for personal profit or advantage if no significant benefit accrues to the person who is exploited.

* **Sec. 12.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating a protective order in violation of **AS 11.56.740(a)(1) or (2)** [AS 11.56.740];

(3) violated a condition of release imposed under AS 12.30.016(e) or (f) or 12.30.027.

* **Sec. 13.** AS 18.65.540(a) is amended to read:

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.870, or AS 18.66.100 - 18.66.180. The registry must include, for each protective order, the names of the petitioner and respondent, their

dates of birth, and the conditions and duration of the order. The registry shall retain a record of the protective order after it has expired.

* **Sec. 14.** AS 18.65.540(b) is amended to read:

(b) A peace officer receiving a protective order from a court under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.855, **or** AS 18.66.100 - 18.66.180, a modified order issued under AS 18.65.860 or AS 18.66.120, or an order dismissing a protective order **shall** [, MUST] take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.

* **Sec. 15.** AS 44.21.415(g) is amended to read:

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED] offenses **against property** under AS 11.46.100 - 11.46.740; or

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older.

* **Sec. 16.** AS 47.24.010(a) is amended to read:

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service for vulnerable adults **in the office of the department that handles adult protective services**:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and

including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator **or employee** of a nursing home, residential care, or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide;

(16) an educator or administrative staff member of a public or private educational institution.

*** Sec. 17.** AS 47.24.010(b) is amended to read:

(b) A report made under this section may include the name and address of the reporting person and must include

(1) the name and **contact information** [ADDRESS] of the vulnerable adult;

(2) information relating to the nature and extent of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

*** Sec. 18.** AS 47.24.010(c) is amended to read:

(c) The department or its designees shall report to the Department of Law any person required by (a) of this section to report who fails to comply with this section. A person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

*** Sec. 19.** AS 47.24.010(d) is amended to read:

(d) This section does not prohibit a person listed in (a) of this section, or any other person, from reporting cases of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's attention **in the person's nonoccupational capacity. This section does not prohibit any other person from reporting a harm under this section**.

*** Sec. 20.** AS 47.24.010(e) is amended to read:

(e) If a person making a report under this section believes that immediate action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person **shall** [MAY] make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and shall [,] at the earliest opportunity **within 24 hours after receiving the report of harm** [,] notify the department. A person may not bring an action for damages against a police officer, **a** village public safety officer, the state, or a political subdivision of the state based on a decision under this subsection to take or not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct;

damages awarded in the action may include only direct economic compensatory damages for personal injury.

* **Sec. 21.** AS 47.24.010(f) is amended to read:

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been **unduly influenced, abandoned,** exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

* **Sec. 22.** AS 47.24.010 is amended by adding new subsections to read:

(i) A person required to report under this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(j) A person who recklessly makes a false report under this section is civilly liable for actual damages suffered by the person who is the subject of the report.

* **Sec. 23.** AS 47.24.013(a) is amended to read:

(a) If a report received under AS 47.24.010 **pertains to** [REGARDS] the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

* **Sec. 24.** AS 47.24.013(b) is amended to read:

(b) The department shall investigate a report received under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is less than 60 years of age that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

* **Sec. 25.** AS 47.24.013(c) is amended to read:

(c) Upon receipt of a report under (a) or (b) of this section, the long term care

ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the **office of the** department **that handles adult protective services** within 60 days after the receipt of the report.

* **Sec. 26.** AS 47.24.013(d) is amended to read:

(d) If the long term care ombudsman receives directly a report regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the report, to the central information and referral service of the **office of the** department **that handles adult protective services**. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

* **Sec. 27.** AS 47.24.015(a) is amended to read:

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

* **Sec. 28.** AS 47.24.015(c) is amended to read:

(c) The department [,] or its designee [,] shall immediately terminate an investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department or its designee may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective

services and the request is made personally by the vulnerable adult and the vulnerable adult is not competent to make the request on the adult's own behalf, or the request is made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department or its designee may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department or its designee may refer the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in **AS 13.26.324** [AS 44.21.415].

*** Sec. 29.** AS 47.24.015 is amended by adding new subsections to read:

(h) In conducting an investigation under this section, the department may issue subpoenas, conduct interviews, and examine any health care or financial records related to a vulnerable adult. The department may seek a court order to enforce a subpoena.

(i) A person may not interfere with the department in the performance of its investigation under this section, including interfering with the department's access to the vulnerable adult.

(j) Notwithstanding any other provision of law, the office of the department that handles adult protective services shall have access to any information compiled or retained by other divisions in the department, regardless of the nature of the information or whether the information is considered confidential, to assist in administering the provisions of this chapter.

(k) The department may audiotape or videotape an interview of a vulnerable adult if the adult has the capacity to consent and gives that consent. The department shall document the consent in its investigative file. The department may not audiotape or videotape an interview of a vulnerable adult who lacks the capacity to consent.

(*l*) The department shall provide for the training of investigators who investigate reports of harm under this section. Training must include instruction in federal, state, and local laws and policies of the department related to vulnerable adults, and in investigative techniques. The department may require other appropriate training.

(m) In this section, "financial records" include financial records related to the vulnerable adult that are maintained by any person.

*** Sec. 30.** AS 47.24.016(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's consent to receive the services because the vulnerable adult is unable to consent or lacks decision making capacity, and has no guardian**, conservator,** [OR] attorney-in-fact**, trustee, or surrogate for health care decisions under AS 13.52.030** to serve as the vulnerable adult's surrogate decision maker, the department may select from the following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services:

(1) the vulnerable adult's spouse, unless

[(A) THE VULNERABLE ADULT AND THE SPOUSE HAVE SEPARATE DOMICILES; OR

(B)] the vulnerable adult or the spouse have initiated divorce**,** [OR] dissolution**, or legal separation** proceedings;

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

* **Sec. 31.** AS 47.24.016(b) is amended to read:

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision making capacity; or

(2) there are allegations that individual is a perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult.

* **Sec. 32.** AS 47.24.016(d) is amended to read:

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this section **or AS 13.52.030** if the department determines that the vulnerable adult has become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable adult who has become able to consent or has regained decision making capacity only if the vulnerable adult consents.

* **Sec. 33.** AS 47.24.017(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and [EITHER] the vulnerable adult, the vulnerable adult's guardian**, conservator,** [OR] attorney-in-fact, **trustee,** [OR] a surrogate decision maker selected under AS 47.24.016**, or a surrogate for health care decisions under AS 13.52.030** consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that the protective services for the vulnerable adult are provided by the department**,** or its designee**,** within 10 working days after the department received the report under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the department or the department's designee make it impossible to provide the protective services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

* **Sec. 34.** AS 47.24.019(c) is amended to read:

(c) If a vulnerable adult who has consented to receive protective services, or

on whose behalf consent to receive protective services has been given, is prevented by **any person** [A CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from receiving those services, the department may petition the superior court for an injunction restraining the **person** [CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from interfering with the provision of protective services to the vulnerable adult.

*** Sec. 35.** AS 47.24.050 is amended to read:

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, **under** [IN ACCORDANCE WITH] this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate agencies or individuals inside and outside the state, in connection with investigations or judicial proceedings involving the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the vulnerable adult who is the subject of the report or the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker consents in writing. The department may not disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker if that person is an alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. The department shall, upon request, disclose the number of verified reports of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

* **Sec. 36.** AS 47.24.130 is amended to read:

Sec. 47.24.130. Treatment through spiritual means. This chapter may not be construed to mean that a person is **unduly influenced,** abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone **under** [IN ACCORDANCE WITH] the tenets and practices of a church or religious denomination of which the person is a member or adherent, **if** [PROVIDED THAT] the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious organization" in AS 05.15.690.

* **Sec. 37.** AS 47.24.900(2) is amended to read:

(2) "abuse" means

(A) the [WILFUL,] intentional, **knowing,** or reckless nonaccidental [,] and nontherapeutic infliction of physical pain, injury, [OR] mental **or emotional** distress**, or fear, including coercion and intimidation**; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

* **Sec. 38.** AS 47.24.900(3) is amended to read:

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed **some or all** responsibility for the care of a vulnerable adult voluntarily, by contract, **as an employee of a business that provides care in an adult's home,** or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

* **Sec. 39.** AS 47.24.900(4) is amended to read:

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision; **in this paragraph, "informed decision"**

includes a decision made by the vulnerable adult that is free from undue influence;

* **Sec. 40.** AS 47.24.900(7) is amended to read:

(7) "exploitation"

(A) means unjust or improper use of another person or another person's resources for one's own profit or advantage**, with or without the person's consent; and**

(B) includes acts by a person who stands in a position of trust or confidence with a vulnerable adult or who knows or should know that the vulnerable adult lacks the capacity to consent that involve obtaining profit or advantage through undue influence, deception, fraud, intimidation, or breach of fiduciary duty; in this paragraph, "fraud" has the meaning given in AS 13.26.324(1) and (2);

* **Sec. 41.** AS 47.24.900(9) is amended to read:

(9) "neglect" means the intentional**, knowing, or reckless** failure by a caregiver to provide essential care or services **or access to essential care or services or to carry out a prescribed treatment plan** necessary to maintain the physical and mental health of the vulnerable adult **when the vulnerable adult is unable to provide or obtain the essential care or services or to carry out the prescribed treatment plan on the vulnerable adult's own behalf; in this paragraph, "essential care or services" includes food, clothing, shelter, medical care, and supervision**;

* **Sec. 42.** AS 47.24.900(11) is amended to read:

(11) "protective services" means services that are intended to prevent or alleviate harm resulting from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; **in this paragraph, "services"** ["PROTECTIVE SERVICES"] includes

(A) protective placement;

(B) applying for or obtaining public benefits;

(C) obtaining health care services and supplies;

(D) staying financial transactions;

(E) petitioning for an ex parte protective order under

AS 13.26.209:

(F) assisting with personal hygiene;

(G) obtaining food and clothing;

(H) protection from physical and emotional abuse;

(I) obtaining representative payee services; and

(J) coordinating protective services;

*** Sec. 43.** AS 47.24.900(15) is amended to read:

(15) "unable to consent" means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of **loss, waste, or dissipation of income or assets, eviction, physical or mental harm to self or others, or** death [OR IRREPARABLE HARM TO SELF OR OTHERS];

*** Sec. 44.** AS 47.24.900(16) is amended to read:

(16) "vulnerable adult" means a person 18 years of age or older who, because of **incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance** [PHYSICAL OR MENTAL IMPAIRMENT], is unable to meet the person's own needs or to seek help without assistance.

*** Sec. 45.** AS 47.24.900 is amended by adding new paragraphs to read:

(17) "deception" means creating, reinforcing, or failing to correct a false impression or preventing another person from acquiring information that would affect the person's judgment regarding a transaction;

(18) "fiduciary duty" means the duty of a third party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act

with due regard for the benefit and interest of that person;

(19) "financial institution" means an institution subject to state or federal banking or financial regulations, including

(A) a broker-dealer;

(B) a commercial bank;

(C) a savings bank;

(D) a credit union;

(E) a premium finance company;

(F) a small loan company;

(G) a bank holding company;

(H) a financial holding company;

(I) a trust company;

(J) a savings and loan association;

(K) a deferred deposit advance licensee;

(L) an investment bank;

(M) an insurance company subject to regulation by AS 21;

(N) a licensee subject to regulation by AS 21; and

(O) an investment adviser;

(20) "person who stands in a position of trust or confidence" means a person who

(A) is a relative by blood or marriage;

(B) is a joint tenant or tenant in common;

(C) has a legal or fiduciary relationship; or

(D) is a person who has been entrusted with or has assumed responsibility for the use or management of the vulnerable adult's assets or income;

(21) "undue influence" means the use by a person who stands in a position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit the trust, dependency, or fear of a vulnerable adult to gain control over the decision making of the vulnerable adult, including decision making related to finances, property, residence, and health care.

*** Sec. 46.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 12(h), Alaska Rules of Criminal Procedure, is amended to read:

(h) **Continuance of Trial.** A motion for continuance of a trial date will be granted by the court only for cause shown. **In deciding whether to grant the motion, the court shall consider the victim's circumstances and the effect the delay would have on the victim, particularly a victim of advanced age or extreme youth. The court shall place its findings on the record.** The presiding judge of a judicial district may require that a visiting or pro tem judge obtain approval from the presiding judge before granting any continuance of trial.

*** Sec. 47.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Priorities in Scheduling Criminal Cases.** The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings and the trial of defendants in custody shall be given preference over other criminal cases. **The court shall consider the circumstances of the victim, particularly a victim of advanced age or extreme youth, in setting the trial date.** Trial dates in criminal cases in the superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

*** Sec. 48.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.26.209(a) - (h), enacted by sec. 10 of this Act, have the effect of amending Rule 17, Alaska Rules of Probate Procedure, relating to conservatorships and protective proceedings, by allowing ex parte orders to be issued related to protecting the assets of a person otherwise subject to AS 13.26.165 from financial exploitation.

(b) AS 13.26.209(i), enacted by sec. 10 of this Act, has the effect of amending Rule 9,

Alaska Rules of Administration, by requiring that filing fees may not be charged for a petition for an ex parte protective order under AS 13.26.209(a), enacted by sec. 10 of this Act.

(c) AS 13.26.207, enacted by sec. 10 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by requiring a hearing within 72 hours of the filing of a petition for the appointment of a temporary conservator.

*** Sec. 49.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 3 - 5, 46, and 47 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 50.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the catch line of

(1) AS 47.24.010 from "Reports of harm" to "Persons required to report; reports of harm";

(2) AS 47.24.013 from "Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities" to "Reports of undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities."

*** Sec. 51.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 13.26.209(a) - (h), enacted by sec. 10 of this Act, take effect only if sec. 48(a) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 13.26.209(i), enacted by sec. 10 of this Act, takes effect only if sec. 48(b) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 52.** Sections 16 - 28 of this Act take effect September 1, 2011.

*** Sec. 53.** Except as provided in sec. 52 of this Act, this Act takes effect July 1, 2011.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
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Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Changes to CSSB86 (JUD) from Version "B" to Version "X":

Protective Orders: Page 2, and Pages 5 through 8:
Provisions regarding ex parte protective orders, 6-month protective orders and permanent protective orders are restructured into separate sections and the sections are renumbered. Permanent protective orders (already in statute) are referenced and amended in AS 13.26.165 (page 2). Ex-parte order provisions are now in 13.26.207(page 5); temporary protective order provisions (6-month orders) are in 13.26.208 (pages 5-6), while modifications, compliance, and forms and fees provisions are in 13.26.209 (pages 6-7). Definitions are listed in 13.26.324 (pages 7-8).

Please note that language in Section 13.26.209 (page 6) dealing with modifications was redrafted to follow similar provisions for modifications in domestic violence protective order statues.

Conforming amendments have been made throughout the bill to these newly renumbered sections as necessary.

Reporting requirements: on Page 11, at lines 11-12:
The phrase "at the earliest opportunity" has been deleted to provide a clear deadline, since failure to report for police officers and village public safety officers is a chargeable offense under section 18 of this bill.

Effective Dates: Section 52, on page 24, at line 3:
The September effective date applies only to sections 16 and 20 of the bill (new reporters and new police reporting requirements), per the committee's discussion.

27-GS1722\X
Mischel
4/9/11

CS FOR SENATE BILL NO. 86(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; making conforming amendments; amending Rules 12(h) and 45(a), Alaska Rules of Criminal Procedure, Rule 77, Alaska Rules of Civil Procedure, Rule 17, Alaska Rules of Probate Procedure, and Rule 9, Alaska Rules of Administration; and providing for an effective date."

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

*** Section 1.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY

PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 2.** AS 08.63.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 3.** AS 11.56.740(a) is amended to read:

(a) A person commits the crime of violating a protective order if the person is subject to a protective order

(1) issued or filed under AS 18.66 and containing a provision listed in AS 18.66.100(c)(1) - (7) and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order; [OR]

(2) issued under AS 18.65.850, 18.65.855, or 18.65.860 and knowingly commits or attempts to commit an act that violates or would violate a provision listed in AS 18.65.850(c)(1) - (3)**; or**

(3) issued under AS 13.26.165 - 13.26.209 and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order.

*** Sec. 4.** AS 11.56.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under **AS 13.26.165 - 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180.

*** Sec. 5.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

*** Sec. 6.** AS 13.26.165 is amended to read:

Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or **issue another** [MAKE OTHER] protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that

(A) a minor owns money or property that requires management or protection **that** [WHICH] cannot otherwise be provided**;**

(B) the minor [,] has or may have business affairs **that** [WHICH] may be jeopardized or prevented by the status of being a minor**;** [,] or

(C) [THAT] funds are needed for the minor's support and education and [THAT] protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, **fraud,** confinement, detention by a foreign power, or disappearance; and

(B) the person has property **that** [WHICH] will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care**,** and welfare of the person or those entitled to be supported by the person and [THAT] protection is necessary or desirable to obtain or provide funds.

*** Sec. 7.** AS 13.26.180(a) is amended to read:

(a) The person to be protected, **a person's attorney or other legal representative,** any person who is interested in the estate, affairs**,** or welfare of the person to be protected, including a parent, guardian, [OR] custodian, **or caregiver, the Department of Health and Social Services,** or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

*** Sec. 8.** AS 13.26.180 is amended by adding a new subsection to read:

(c) The petition may include a request for temporary conservatorship as provided in AS 13.26.206 if it appears that the respondent's property is likely to be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

* **Sec. 9.** AS 13.26.185 is amended by adding a subsection to read:

(c) This section does not apply to a petition or order for an ex parte protective order filed under AS 13.26.207 or a temporary protective order filed under AS 13.26.208.

* **Sec. 10.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.206. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or persons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request must state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney and other persons as ordered by the court. The court shall appoint an attorney for a respondent who is unrepresented to be at the hearing and conduct a hearing within 72 hours after the filing.

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a

full or partial conservator or on the dismissal of the petition for conservatorship.

Sec. 13.26.207. Ex parte protective orders. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against a person other than the protected person. A petition filed on behalf of a protected person by a person other than the protected person must be accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition and that, because of the fraud, there has been or is an immediate threat of a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, unless dissolved earlier by the court at the request of the petitioner or respondent and after notice and, if requested, a hearing, or on the earlier appointment of a temporary or permanent conservator.

Sec. 13.26.208. Temporary protective orders; conversions. On application filed with the court before the expiration of a 20-day ex parte protective order issued under AS 13.26.207, the court shall schedule a hearing on whether to convert the

protective order to a temporary order effective for up to six months. The court shall provide to the protected person and the respondent at least 10 days' notice of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may convert the ex parte protective order to a temporary protective order effective for up to six months.

Sec. 13.26.209. Protective orders; modification; third-party compliance; forms; fees. (a) The petitioner, respondent, or protected person, if the protected person is a vulnerable adult, may request modification of a protective order issued under AS 13.26.165 - 13.26.209. Except as provided in (b) of this section, if a request is made for modification of

(1) an ex parte protective order issued under AS 13.26.207, the court shall schedule a hearing on three days' notice or on shorter notice as the court may prescribe; or

(2) a protective order, after notice and hearing under AS 13.26.185, or a temporary protective order, after notice and hearing under AS 13.26.208, the court shall schedule a hearing within 20 days after the date the request is made, except that, if the court finds that the request is meritless on its face, the court may deny the request without a hearing.

(b) If a request for a modification is made under this section and the respondent raises an issue not raised by the petitioner, the court may allow the petitioner additional time to respond.

(c) If the court modifies a protective order, the court shall issue a modified order and shall make reasonable efforts to ensure that the order is understood by the petitioner, the respondent, and the protected person who are present at the hearing.

(d) The court shall cause a copy of a protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person and have a protective order and any related order delivered to the appropriate local law enforcement agency for expedited entry in the central registry under AS 18.65.540.

(e) A protective order issued under AS 13.26.165 - 13.26.209 is in addition to

any other civil or criminal remedy.

(f) A third party that has received actual or legal notice of a protective order issued under AS 13.26.165 - 13.26.209 shall comply with the order. A third party who does not comply with a protective order granted under AS 13.26.165 - 13.26.209 may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third party who does not comply with a protective order granted under AS 13.26.165 - 13.26.209 may also be criminally liable under AS 11.56.740 for violating a protective order. As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most recently known place of residence or business of the third party.

(g) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions and protective orders and instructions for use of the forms by a person seeking a protective order under AS 13.26.165 - 13.26.209. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(h) Filing fees may not be charged for a petition under AS 13.26.207, for an application under AS 13.26.208, or for a request for modification of a protective order under AS 13.26.209(a).

* **Sec. 11.** AS 13.26 is amended by adding a new section to article 4 to read:

Sec. 13.26.324. Definitions. In AS 13.26.165 - 13.26.324, unless the context requires otherwise, "fraud" means

(1) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(2) offenses against property under AS 11.46.100 - 11.46.740; or

(3) exploitation of another person or another person's resources for

personal profit or advantage if no significant benefit accrues to the person who is exploited.

*** Sec. 12.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating a protective order in violation of **AS 11.56.740(a)(1) or (2)** [AS 11.56.740];

(3) violated a condition of release imposed under AS 12.30.016(e) or (f) or 12.30.027.

*** Sec. 13.** AS 18.65.540(a) is amended to read:

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under **AS 13.26.165 - 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180. The registry must include**,** for each protective order**,** the names of the petitioner and respondent, their dates of birth, and the conditions and duration of the order. The registry shall retain a record of the protective order after it has expired.

*** Sec. 14.** AS 18.65.540(b) is amended to read:

(b) A peace officer receiving a protective order from a court under **AS 13.26.165 - 13.26.208,** AS 18.65.850 - 18.65.855, **or** AS 18.66.100 - 18.66.180, a modified order issued under **AS 13.26.209,** AS 18.65.860**,** or AS 18.66.120, or an order dismissing a protective order **shall** [, MUST] take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.

*** Sec. 15.** AS 44.21.415(g) is amended to read:

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 -

11.41.530;

(B) [THEFT AND RELATED] offenses **against property** under AS 11.46.100 - 11.46.740; or

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older.

* **Sec. 16.** AS 47.24.010(a) is amended to read:

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service for vulnerable adults **in the office of the department that handles adult protective services**:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator **or employee** of a nursing home, residential care, or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide**;**

(16) an educator or administrative staff member of a public or private educational institution.

* **Sec. 17.** AS 47.24.010(b) is amended to read:

(b) A report made under this section may include the name and address of the reporting person and must include

(1) the name and **contact information** [ADDRESS] of the vulnerable adult;

(2) information relating to the nature and extent of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

* **Sec. 18.** AS 47.24.010(c) is amended to read:

(c) The department or its designees shall report to the Department of Law any person required by (a) of this section to report who fails to comply with this section. A person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

* **Sec. 19.** AS 47.24.010(d) is amended to read:

(d) This section does not prohibit a person listed in (a) of this section, or any other person, from reporting cases of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's

attention **in the person's nonoccupational capacity. This section does not prohibit any other person from reporting a harm under this section**.

*** Sec. 20.** AS 47.24.010(e) is amended to read:

(e) If a person making a report under this section believes that immediate action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person **shall** [MAY] make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and shall, **within 24 hours after receiving the report of harm** [AT THE EARLIEST OPPORTUNITY], notify the department. A person may not bring an action for damages against a police officer, **a** village public safety officer, the state, or a political subdivision of the state based on a decision under this subsection to take or not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct; damages awarded in the action may include only direct economic compensatory damages for personal injury.

*** Sec. 21.** AS 47.24.010(f) is amended to read:

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been **unduly influenced, abandoned,** exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

*** Sec. 22.** AS 47.24.010 is amended by adding new subsections to read:

(i) A person required to report under this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(j) A person who recklessly makes a false report under this section is civilly liable for actual damages suffered by the person who is the subject of the report.

* **Sec. 23.** AS 47.24.013(a) is amended to read:

(a) If a report received under AS 47.24.010 **pertains to** [REGARDS] the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

* **Sec. 24.** AS 47.24.013(b) is amended to read:

(b) The department shall investigate a report received under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is less than 60 years of age that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

* **Sec. 25.** AS 47.24.013(c) is amended to read:

(c) Upon receipt of a report under (a) or (b) of this section, the long term care ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the **office of the** department **that handles adult protective services** within 60 days after the receipt of the report.

* **Sec. 26.** AS 47.24.013(d) is amended to read:

(d) If the long term care ombudsman receives directly a report regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the

report, to the central information and referral service of the **office of the** department **that handles adult protective services**. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

*** Sec. 27.** AS 47.24.015(a) is amended to read:

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

*** Sec. 28.** AS 47.24.015(c) is amended to read:

(c) The department [,] or its designee [,] shall immediately terminate an investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department or its designee may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective services and the request is made personally by the vulnerable adult and the vulnerable adult is not competent to make the request on the adult's own behalf, or the request is made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department or its designee may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department or its designee may refer the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in **AS 13.26.324**

[AS 44.21.415].

* **Sec. 29.** AS 47.24.015 is amended by adding new subsections to read:

(h) In conducting an investigation under this section, the department may issue subpoenas, conduct interviews, and examine any health care or financial records related to a vulnerable adult. The department may seek a court order to enforce a subpoena.

(i) A person may not interfere with the department in the performance of its investigation under this section, including interfering with the department's access to the vulnerable adult.

(j) Notwithstanding any other provision of law, the office of the department that handles adult protective services shall have access to any information compiled or retained by other divisions in the department, regardless of the nature of the information or whether the information is considered confidential, to assist in administering the provisions of this chapter.

(k) The department may audiotape or videotape an interview of a vulnerable adult if the adult has the capacity to consent and gives that consent. The department shall document the consent in its investigative file. The department may not audiotape or videotape an interview of a vulnerable adult who lacks the capacity to consent.

(*l*) The department shall provide for the training of investigators who investigate reports of harm under this section. Training must include instruction in federal, state, and local laws and policies of the department related to vulnerable adults, and in investigative techniques. The department may require other appropriate training.

(m) In this section, "financial records" include financial records related to the vulnerable adult that are maintained by any person.

* **Sec. 30.** AS 47.24.016(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's consent to receive the services because the vulnerable adult is unable to consent or lacks decision making capacity, and has no guardian**, conservator,** [OR] attorney-in-fact**, trustee, or surrogate for health care decisions under AS 13.52.030** to serve as

the vulnerable adult's surrogate decision maker, the department may select from the following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services:

(1) the vulnerable adult's spouse, unless

[(A) THE VULNERABLE ADULT AND THE SPOUSE HAVE SEPARATE DOMICILES; OR

(B)] the vulnerable adult or the spouse have initiated divorce, [OR] dissolution**, or legal separation** proceedings;

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

*** Sec. 31.** AS 47.24.016(b) is amended to read:

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision making capacity; or

(2) there are allegations that individual is a perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult.

*** Sec. 32.** AS 47.24.016(d) is amended to read:

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this section **or AS 13.52.030** if the department determines that the vulnerable adult has become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable

adult who has become able to consent or has regained decision making capacity only if the vulnerable adult consents.

*** Sec. 33.** AS 47.24.017(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and [EITHER] the vulnerable adult, the vulnerable adult's guardian**, conservator,** [OR] attorney-in-fact, **trustee,** [OR] a surrogate decision maker selected under AS 47.24.016**, or a surrogate for health care decisions under AS 13.52.030** consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that the protective services for the vulnerable adult are provided by the department**,** or its designee**,** within 10 working days after the department received the report under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the department or the department's designee make it impossible to provide the protective services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

*** Sec. 34.** AS 47.24.019(c) is amended to read:

(c) If a vulnerable adult who has consented to receive protective services, or on whose behalf consent to receive protective services has been given, is prevented by **any person** [A CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from receiving those services, the department may petition the superior court for an injunction restraining the **person** [CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from interfering with the provision of protective services to the vulnerable adult.

*** Sec. 35.** AS 47.24.050 is amended to read:

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, **under** [IN ACCORDANCE WITH] this chapter and regulations adopted under this

chapter, investigation reports may be used by appropriate agencies or individuals inside and outside the state, in connection with investigations or judicial proceedings involving the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the vulnerable adult who is the subject of the report or the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker consents in writing. The department may not disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker if that person is an alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. The department shall, upon request, disclose the number of verified reports of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

* **Sec. 36.** AS 47.24.130 is amended to read:

Sec. 47.24.130. Treatment through spiritual means. This chapter may not be construed to mean that a person is **unduly influenced,** abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone **under** [IN ACCORDANCE WITH] the tenets and practices of a church or religious denomination of which the person is a member or adherent, **if** [PROVIDED THAT] the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious organization" in AS 05.15.690.

* **Sec. 37.** AS 47.24.900(2) is amended to read:

(2) "abuse" means

(A) the [WILFUL,] intentional, **knowing,** or reckless nonaccidental [,] and nontherapeutic infliction of physical pain, injury, [OR] mental **or emotional** distress**, or fear, including coercion and intimidation**; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

*** Sec. 38.** AS 47.24.900(3) is amended to read:

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed **some or all** responsibility for the care of a vulnerable adult voluntarily, by contract, **as an employee of a business that provides care in an adult's home,** or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

*** Sec. 39.** AS 47.24.900(4) is amended to read:

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision; **in this paragraph, "informed decision" includes a decision made by the vulnerable adult that is free from undue influence;**

*** Sec. 40.** AS 47.24.900(7) is amended to read:

(7) "exploitation"

(A) means unjust or improper use of another person or another person's resources for one's own profit or advantage**, with or without the person's consent; and**

(B) includes acts by a person who stands in a position of trust or confidence with a vulnerable adult or who knows or should know that the vulnerable adult lacks the capacity to consent that involve obtaining profit or advantage through undue influence, deception, fraud, intimidation, or breach of fiduciary duty; in this paragraph, "fraud" has the meaning given in AS 13.26.324(1) and (2);

*** Sec. 41.** AS 47.24.900(9) is amended to read:

(9) "neglect" means the intentional**, knowing, or reckless** failure by a caregiver to provide essential care or services **or access to essential care or services or to carry out a prescribed treatment plan** necessary to maintain the physical and mental health of the vulnerable adult **when the vulnerable adult is unable to provide or obtain the essential care or services or to carry out the prescribed treatment plan on the vulnerable adult's own behalf; in this paragraph, "essential care or services" includes food, clothing, shelter, medical care, and supervision**;

*** Sec. 42.** AS 47.24.900(11) is amended to read:

(11) "protective services" means services that are intended to prevent or alleviate harm resulting from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; **in this paragraph, "services"** ["PROTECTIVE SERVICES"] includes

(A) protective placement;

(B) applying for or obtaining public benefits;

(C) obtaining health care services and supplies;

(D) staying financial transactions;

(E) petitioning for a protective order under AS 13.26.165 - 13.26.209;

(F) assisting with personal hygiene;

(G) obtaining food and clothing;

(H) protection from physical and emotional abuse;

(I) obtaining representative payee services; and

(J) coordinating protective services;

*** Sec. 43.** AS 47.24.900(15) is amended to read:

(15) "unable to consent" means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of **loss, waste, or dissipation of income or assets, eviction, physical or mental harm to self or others, or** death [OR IRREPARABLE HARM TO SELF OR OTHERS];

* **Sec. 44.** AS 47.24.900(16) is amended to read:

(16) "vulnerable adult" means a person 18 years of age or older who, because of **incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance** [PHYSICAL OR MENTAL IMPAIRMENT], is unable to meet the person's own needs or to seek help without assistance.

* **Sec. 45.** AS 47.24.900 is amended by adding new paragraphs to read:

(17) "deception" means creating, reinforcing, or failing to correct a false impression or preventing another person from acquiring information that would affect the person's judgment regarding a transaction;

(18) "fiduciary duty" means the duty of a third party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interest of that person;

(19) "financial institution" means an institution subject to state or federal banking or financial regulations, including

(A) a broker-dealer;

(B) a commercial bank;

(C) a savings bank;

(D) a credit union;

(E) a premium finance company;

(F) a small loan company;

(G) a bank holding company;

(H) a financial holding company;

(I) a trust company;

(J) a savings and loan association;

(K) a deferred deposit advance licensee;

(L) an investment bank;

(M) an insurance company subject to regulation by AS 21;

(N) a licensee subject to regulation by AS 21; and

(O) an investment adviser;

(20) "person who stands in a position of trust or confidence" means a person who

(A) is a relative by blood or marriage;

(B) is a joint tenant or tenant in common;

(C) has a legal or fiduciary relationship; or

(D) is a person who has been entrusted with or has assumed responsibility for the use or management of the vulnerable adult's assets or income;

(21) "undue influence" means the use by a person who stands in a position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit the trust, dependency, or fear of a vulnerable adult to gain control over the decision making of the vulnerable adult, including decision making related to finances, property, residence, and health care.

* **Sec. 46.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 12(h), Alaska Rules of Criminal Procedure, is amended to read:

(h) **Continuance of Trial.** A motion for continuance of a trial date will be granted by the court only for cause shown. **In deciding whether to grant the motion, the court shall consider the victim's circumstances and the effect the delay would have on the victim, particularly a victim of advanced age or extreme youth. The court shall place its findings on the record.** The presiding judge of a judicial district may require that a visiting or pro tem judge obtain approval from the presiding judge before granting any continuance of trial.

* **Sec. 47.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Priorities in Scheduling Criminal Cases.** The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings and the trial of defendants in custody shall be given preference over other criminal cases. **The court shall consider the circumstances of the victim, particularly a victim of advanced age or extreme youth, in setting the trial date.** Trial dates in criminal cases in the superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

*** Sec. 48.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.26.207, 13.26.208, and 13.26.209(a) - (g), enacted by sec. 10 of this Act, have the effect of amending Rule 17, Alaska Rules of Probate Procedure, relating to conservatorships and protective proceedings, by allowing ex parte and temporary orders and modifications of orders to be issued related to protecting the assets of a person otherwise subject to AS 13.26.165 from financial exploitation.

(b) AS 13.26.209(h), enacted by sec. 10 of this Act, has the effect of amending Rule 9, Alaska Rules of Administration, by requiring that filing fees may not be charged for a petition for an ex parte protective order under AS 13.26.207 for an application for a temporary order under AS 13.26.208, or for modification of a protective order under AS 13.26.209(a), enacted by sec. 10 of this Act.

(c) AS 13.26.206, enacted by sec. 10 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by requiring a hearing within 72 hours of the filing of a petition for the appointment of a temporary conservator.

(d) AS 13.26.208, enacted by sec. 10 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by providing for a hearing on an application for a temporary protective order on 10 days' notice.

(e) AS 13.26.209(a) and (b), enacted by sec. 10 of this Act, have the effect of amending Rule 77, Alaska Rules of Civil Procedure, by providing for a hearing on a request

for modification of a protective order on 20 days' notice and for modification of an ex parte protective order on three days' notice.

*** Sec. 49.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 3 - 5, 46, and 47 of this Act apply to offenses committed on or after the effective date of secs. 3 - 5 of this Act.

*** Sec. 50.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the catch line of

(1) AS 47.24.010 from "Reports of harm" to "Persons required to report; reports of harm";

(2) AS 47.24.013 from "Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities" to "Reports of undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities."

*** Sec. 51.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 13.26.207 and 13.26.209(a) - (g), enacted by sec. 10 of this Act, take effect only if sec. 48(a) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 13.26.209(h), enacted by sec. 10 of this Act, takes effect only if sec. 48(b) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(c) AS 13.26.206, enacted by sec. 10 of this Act, takes effect only if sec. 48(c) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(d) AS 13.26.208, enacted by sec. 10 of this Act, takes effect only if sec. 48(a) and (d) of this Act receive the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(e) AS 13.26.209(a) and (b), enacted by sec. 10 of this Act, take effect only if sec.

48(e) of this Act receive the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 52.** Sections 16 and 20 of this Act take effect September 1, 2011.

*** Sec. 53.** Except as provided in sec. 52 of this Act, this Act takes effect July 1, 2011.

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4/9/11

CS FOR SENATE BILL NO. 86(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; making conforming amendments; amending Rules 12(h) and 45(a), Alaska Rules of Criminal Procedure, Rule 77, Alaska Rules of Civil Procedure, Rule 17, Alaska Rules of Probate Procedure, and Rule 9, Alaska Rules of Administration; and providing for an effective date."

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

*** Section 1.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY

PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 2.** AS 08.63.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 3.** AS 11.56.740(a) is amended to read:

(a) A person commits the crime of violating a protective order if the person is subject to a protective order

(1) issued or filed under AS 18.66 and containing a provision listed in AS 18.66.100(c)(1) - (7) and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order; [OR]

(2) issued under AS 18.65.850, 18.65.855, or 18.65.860 and knowingly commits or attempts to commit an act that violates or would violate a provision listed in AS 18.65.850(c)(1) - (3)**; or**

(3) issued under AS 13.26.165 - 13.26.209 and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order.

*** Sec. 4.** AS 11.56.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under **AS 13.26.165 - 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180.

*** Sec. 5.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

*** Sec. 6.** AS 13.26.165 is amended to read:

Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or **issue another** [MAKE OTHER] protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that

(A) a minor owns money or property that requires management or protection **that** [WHICH] cannot otherwise be provided**;**

(B) the minor [,] has or may have business affairs **that** [WHICH] may be jeopardized or prevented by the status of being a minor**;** [,] or

(C) [THAT] funds are needed for the minor's support and education and [THAT] protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, **fraud,** confinement, detention by a foreign power, or disappearance; and

(B) the person has property **that** [WHICH] will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care**,** and welfare of the person or those entitled to be supported by the person and [THAT] protection is necessary or desirable to obtain or provide funds.

*** Sec. 7.** AS 13.26.180(a) is amended to read:

(a) The person to be protected, **a person's attorney or other legal representative,** any person who is interested in the estate, affairs**,** or welfare of the person to be protected, including a parent, guardian, [OR] custodian, **or caregiver, the Department of Health and Social Services,** or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

*** Sec. 8.** AS 13.26.180 is amended by adding a new subsection to read:

(c) The petition may include a request for temporary conservatorship as provided in AS 13.26.206 if it appears that the respondent's property is likely to be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

* **Sec. 9.** AS 13.26.185 is amended by adding a subsection to read:

(c) This section does not apply to a petition or order for an ex parte protective order filed under AS 13.26.207 or a temporary protective order filed under AS 13.26.208.

* **Sec. 10.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.206. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or persons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request must state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney and other persons as ordered by the court. The court shall appoint an attorney for a respondent who is unrepresented to be at the hearing and conduct a hearing within 72 hours after the filing.

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a

full or partial conservator or on the dismissal of the petition for conservatorship.

Sec. 13.26.207. Ex parte protective orders. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against a person other than the protected person. A petition filed on behalf of a protected person by a person other than the protected person must be accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition and that, because of the fraud, there has been or is an immediate threat of a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, unless dissolved earlier by the court at the request of the petitioner or respondent and after notice and, if requested, a hearing, or on the earlier appointment of a temporary or permanent conservator.

Sec. 13.26.208. Temporary protective orders; conversions. On application filed with the court before the expiration of a 20-day ex parte protective order issued under AS 13.26.207, the court shall schedule a hearing on whether to convert the

protective order to a temporary order effective for up to six months. The court shall provide to the protected person and the respondent at least 10 days' notice of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may convert the ex parte protective order to a temporary protective order effective for up to six months.

Sec. 13.26.209. Protective orders; modification; third-party compliance; forms; fees. (a) The petitioner, respondent, or protected person, if the protected person is a vulnerable adult, may request modification of a protective order issued under AS 13.26.165 - 13.26.209. Except as provided in (b) of this section, if a request is made for modification of

(1) a protective order, the court shall schedule a hearing on three days' notice or on shorter notice as the court may prescribe; or

(2) a protective order, after notice and hearing under AS 13.26.185, or a temporary protective order, after notice and hearing under AS 13.26.208, the court shall schedule a hearing within 20 days after the date the request is made, except that, if the court finds that the request is meritless on its face, the court may deny the request without a hearing.

(b) If a request for a modification is made under this section and the respondent raises an issue not raised by the petitioner, the court may allow the petitioner additional time to respond.

(c) If the court modifies a protective order, the court shall issue a modified order and shall make reasonable efforts to ensure that the order is understood by the petitioner, the respondent, and the protected person who are present at the hearing.

(d) The court shall cause a copy of a protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person and have a protective order and any related order delivered to the appropriate local law enforcement agency for expedited entry in the central registry under AS 18.65.540.

(e) A protective order issued under AS 13.26.165 - 13.26.209 is in addition to any other civil or criminal remedy.

(f) A third party that has received actual or legal notice of a protective order issued under AS 13.26.165 - 13.26.209 shall comply with the order. A third party who does not comply with a protective order granted under AS 13.26.165 - 13.26.209 may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third party who does not comply with a protective order granted under AS 13.26.165 - 13.26.209 may also be criminally liable under AS 11.56.740 for violating a protective order. As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most recently known place of residence or business of the third party.

(g) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions and protective orders and instructions for use of the forms by a person seeking a protective order under AS 13.26.165 - 13.26.209. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(h) Filing fees may not be charged for a petition under AS 13.26.207, for an application under AS 13.26.208, or for a request for modification of a protective order under AS 13.26.209(a).

*** Sec. 11.** AS 13.26 is amended by adding a new section to article 4 to read:

Sec. 13.26.324. Definitions. In AS 13.26.165 - 13.26.324, unless the context requires otherwise, "fraud" means

(1) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(2) offenses against property under AS 11.46.100 - 11.46.740; or

(3) exploitation of another person or another person's resources for personal profit or advantage if no significant benefit accrues to the person who is

exploited.

*** Sec. 12.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating a protective order in violation of **AS 11.56.740(a)(1) or (2)** [AS 11.56.740];

(3) violated a condition of release imposed under AS 12.30.016(e) or (f) or 12.30.027.

*** Sec. 13.** AS 18.65.540(a) is amended to read:

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under **AS 13.26.165 - 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180. The registry must include**,** for each protective order**,** the names of the petitioner and respondent, their dates of birth, and the conditions and duration of the order. The registry shall retain a record of the protective order after it has expired.

*** Sec. 14.** AS 18.65.540(b) is amended to read:

(b) A peace officer receiving a protective order from a court under **AS 13.26.165 - 13.26.208,** AS 18.65.850 - 18.65.855, **or** AS 18.66.100 - 18.66.180, a modified order issued under **AS 13.26.209,** AS 18.65.860**,** or AS 18.66.120, or an order dismissing a protective order **shall** [, MUST] take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.

*** Sec. 15.** AS 44.21.415(g) is amended to read:

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED] offenses **against property** under AS 11.46.100 - 11.46.740; or

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older.

*** Sec. 16.** AS 47.24.010(a) is amended to read:

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service for vulnerable adults **in the office of the department that handles adult protective services**:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator **or employee** of a nursing home, residential care, or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide**;**

(16) an educator or administrative staff member of a public or private educational institution.

*** Sec. 17.** AS 47.24.010(b) is amended to read:

(b) A report made under this section may include the name and address of the reporting person and must include

(1) the name and **contact information** [ADDRESS] of the vulnerable adult;

(2) information relating to the nature and extent of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

*** Sec. 18.** AS 47.24.010(c) is amended to read:

(c) The department or its designees shall report to the Department of Law any person required by (a) of this section to report who fails to comply with this section. A person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

*** Sec. 19.** AS 47.24.010(d) is amended to read:

(d) This section does not prohibit a person listed in (a) of this section, or any other person, from reporting cases of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's attention **in the person's nonoccupational capacity. This section does not prohibit**

any other person from reporting a harm under this section.

* **Sec. 20.** AS 47.24.010(e) is amended to read:

(e) If a person making a report under this section believes that immediate action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person **shall** [MAY] make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and shall, **within 24 hours after receiving the report of harm** [AT THE EARLIEST OPPORTUNITY], notify the department. A person may not bring an action for damages against a police officer, **a** village public safety officer, the state, or a political subdivision of the state based on a decision under this subsection to take or not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct; damages awarded in the action may include only direct economic compensatory damages for personal injury.

* **Sec. 21.** AS 47.24.010(f) is amended to read:

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been **unduly influenced, abandoned,** exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

* **Sec. 22.** AS 47.24.010 is amended by adding new subsections to read:

(i) A person required to report under this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(j) A person who recklessly makes a false report under this section is civilly

liable for actual damages suffered by the person who is the subject of the report.

* **Sec. 23.** AS 47.24.013(a) is amended to read:

(a) If a report received under AS 47.24.010 **pertains to** [REGARDS] the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

* **Sec. 24.** AS 47.24.013(b) is amended to read:

(b) The department shall investigate a report received under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is less than 60 years of age that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

* **Sec. 25.** AS 47.24.013(c) is amended to read:

(c) Upon receipt of a report under (a) or (b) of this section, the long term care ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the **office of the** department **that handles adult protective services** within 60 days after the receipt of the report.

* **Sec. 26.** AS 47.24.013(d) is amended to read:

(d) If the long term care ombudsman receives directly a report regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the report, to the central information and referral service of the **office of the** department

that handles adult protective services. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

*** Sec. 27.** AS 47.24.015(a) is amended to read:

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

*** Sec. 28.** AS 47.24.015(c) is amended to read:

(c) The department [,] or its designee [,] shall immediately terminate an investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department or its designee may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective services and the request is made personally by the vulnerable adult and the vulnerable adult is not competent to make the request on the adult's own behalf, or the request is made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department or its designee may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department or its designee may refer the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in **AS 13.26.324** [AS 44.21.415].

* **Sec. 29.** AS 47.24.015 is amended by adding new subsections to read:

(h) In conducting an investigation under this section, the department may issue subpoenas, conduct interviews, and examine any health care or financial records related to a vulnerable adult. The department may seek a court order to enforce a subpoena.

(i) A person may not interfere with the department in the performance of its investigation under this section, including interfering with the department's access to the vulnerable adult.

(j) Notwithstanding any other provision of law, the office of the department that handles adult protective services shall have access to any information compiled or retained by other divisions in the department, regardless of the nature of the information or whether the information is considered confidential, to assist in administering the provisions of this chapter.

(k) The department may audiotape or videotape an interview of a vulnerable adult if the adult has the capacity to consent and gives that consent. The department shall document the consent in its investigative file. The department may not audiotape or videotape an interview of a vulnerable adult who lacks the capacity to consent.

(*l*) The department shall provide for the training of investigators who investigate reports of harm under this section. Training must include instruction in federal, state, and local laws and policies of the department related to vulnerable adults, and in investigative techniques. The department may require other appropriate training.

(m) In this section, "financial records" include financial records related to the vulnerable adult that are maintained by any person.

* **Sec. 30.** AS 47.24.016(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's consent to receive the services because the vulnerable adult is unable to consent or lacks decision making capacity, and has no guardian**, conservator,** [OR] attorney-in-fact**, trustee, or surrogate for health care decisions under AS 13.52.030** to serve as the vulnerable adult's surrogate decision maker, the department may select from the

following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services:

(1) the vulnerable adult's spouse, unless

[(A) THE VULNERABLE ADULT AND THE SPOUSE HAVE SEPARATE DOMICILES; OR

(B)] the vulnerable adult or the spouse have initiated divorce**,** [OR] dissolution**, or legal separation** proceedings;

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

*** Sec. 31.** AS 47.24.016(b) is amended to read:

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision making capacity; or

(2) there are allegations that individual is a perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult.

*** Sec. 32.** AS 47.24.016(d) is amended to read:

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this section **or AS 13.52.030** if the department determines that the vulnerable adult has become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable adult who has become able to consent or has regained decision making capacity only

if the vulnerable adult consents.

* **Sec. 33.** AS 47.24.017(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and [EITHER] the vulnerable adult, the vulnerable adult's guardian**, conservator,** [OR] attorney-in-fact, **trustee,** [OR] a surrogate decision maker selected under AS 47.24.016**, or a surrogate for health care decisions under AS 13.52.030** consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that the protective services for the vulnerable adult are provided by the department**,** or its designee**,** within 10 working days after the department received the report under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the department or the department's designee make it impossible to provide the protective services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

* **Sec. 34.** AS 47.24.019(c) is amended to read:

(c) If a vulnerable adult who has consented to receive protective services, or on whose behalf consent to receive protective services has been given, is prevented by **any person** [A CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from receiving those services, the department may petition the superior court for an injunction restraining the **person** [CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from interfering with the provision of protective services to the vulnerable adult.

* **Sec. 35.** AS 47.24.050 is amended to read:

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, **under** [IN ACCORDANCE WITH] this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate agencies or individuals

inside and outside the state, in connection with investigations or judicial proceedings involving the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the vulnerable adult who is the subject of the report or the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker consents in writing. The department may not disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker if that person is an alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. The department shall, upon request, disclose the number of verified reports of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

* **Sec. 36.** AS 47.24.130 is amended to read:

Sec. 47.24.130. Treatment through spiritual means. This chapter may not be construed to mean that a person is **unduly influenced,** abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone **under** [IN ACCORDANCE WITH] the tenets and practices of a church or religious denomination of which the person is a member or adherent, **if** [PROVIDED THAT] the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious organization" in AS 05.15.690.

* **Sec. 37.** AS 47.24.900(2) is amended to read:

(2) "abuse" means

(A) the [WILFUL,] intentional, **knowing,** or reckless nonaccidental [,] and nontherapeutic infliction of physical pain, injury, [OR] mental **or emotional** distress**, or fear, including coercion and intimidation**; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

*** Sec. 38.** AS 47.24.900(3) is amended to read:

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed **some or all** responsibility for the care of a vulnerable adult voluntarily, by contract, **as an employee of a business that provides care in an adult's home,** or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

*** Sec. 39.** AS 47.24.900(4) is amended to read:

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision; **in this paragraph, "informed decision" includes a decision made by the vulnerable adult that is free from undue influence;**

*** Sec. 40.** AS 47.24.900(7) is amended to read:

(7) "exploitation"

(A) means unjust or improper use of another person or another person's resources for one's own profit or advantage**, with or without the person's consent; and**

(B) includes acts by a person who stands in a position of trust or confidence with a vulnerable adult or who knows or should know that the vulnerable adult lacks the capacity to consent that involve obtaining profit or advantage through undue influence, deception, fraud, intimidation, or breach of fiduciary duty; in this paragraph, "fraud" has the meaning given in AS 13.26.324(1) and (2);

*** Sec. 41.** AS 47.24.900(9) is amended to read:

(9) "neglect" means the intentional**, knowing, or reckless** failure by a caregiver to provide essential care or services **or access to essential care or services or to carry out a prescribed treatment plan** necessary to maintain the physical and mental health of the vulnerable adult **when the vulnerable adult is unable to provide or obtain the essential care or services or to carry out the prescribed treatment plan on the vulnerable adult's own behalf; in this paragraph, "essential care or services" includes food, clothing, shelter, medical care, and supervision**;

*** Sec. 42.** AS 47.24.900(11) is amended to read:

(11) "protective services" means services that are intended to prevent or alleviate harm resulting from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; **in this paragraph, "services"** ["PROTECTIVE SERVICES"] includes

(A) protective placement;

(B) applying for or obtaining public benefits;

(C) obtaining health care services and supplies;

(D) staying financial transactions;

(E) petitioning for a protective order under AS 13.26.165 - 13.26.209;

(F) assisting with personal hygiene;

(G) obtaining food and clothing;

(H) protection from physical and emotional abuse;

(I) obtaining representative payee services; and

(J) coordinating protective services;

*** Sec. 43.** AS 47.24.900(15) is amended to read:

(15) "unable to consent" means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of **undue influence,**

abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of **loss, waste, or dissipation of income or assets, eviction, physical or mental harm to self or others, or** death [OR IRREPARABLE HARM TO SELF OR OTHERS];

*** Sec. 44.** AS 47.24.900(16) is amended to read:

(16) "vulnerable adult" means a person 18 years of age or older who, because of **incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance** [PHYSICAL OR MENTAL IMPAIRMENT], is unable to meet the person's own needs or to seek help without assistance.

*** Sec. 45.** AS 47.24.900 is amended by adding new paragraphs to read:

(17) "deception" means creating, reinforcing, or failing to correct a false impression or preventing another person from acquiring information that would affect the person's judgment regarding a transaction;

(18) "fiduciary duty" means the duty of a third party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interest of that person;

(19) "financial institution" means an institution subject to state or federal banking or financial regulations, including

(A) a broker-dealer;

(B) a commercial bank;

(C) a savings bank;

(D) a credit union;

(E) a premium finance company;

(F) a small loan company;

(G) a bank holding company;

(H) a financial holding company;

(I) a trust company;

(J) a savings and loan association;

(K) a deferred deposit advance licensee;

(L) an investment bank;

(M) an insurance company subject to regulation by AS 21;

(N) a licensee subject to regulation by AS 21; and

(O) an investment adviser;

(20) "person who stands in a position of trust or confidence" means a person who

(A) is a relative by blood or marriage;

(B) is a joint tenant or tenant in common;

(C) has a legal or fiduciary relationship; or

(D) is a person who has been entrusted with or has assumed responsibility for the use or management of the vulnerable adult's assets or income;

(21) "undue influence" means the use by a person who stands in a position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit the trust, dependency, or fear of a vulnerable adult to gain control over the decision making of the vulnerable adult, including decision making related to finances, property, residence, and health care.

*** Sec. 46.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 12(h), Alaska Rules of Criminal Procedure, is amended to read:

(h) **Continuance of Trial.** A motion for continuance of a trial date will be granted by the court only for cause shown. **In deciding whether to grant the motion, the court shall consider the victim's circumstances and the effect the delay would have on the victim, particularly a victim of advanced age or extreme youth. The court shall place its findings on the record.** The presiding judge of a judicial district may require that a visiting or pro tem judge obtain approval from the presiding judge before granting any continuance of trial.

*** Sec. 47.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(a), Alaska Rules of

Criminal Procedure, is amended to read:

(a) **Priorities in Scheduling Criminal Cases.** The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings and the trial of defendants in custody shall be given preference over other criminal cases. **The court shall consider the circumstances of the victim, particularly a victim of advanced age or extreme youth, in setting the trial date.** Trial dates in criminal cases in the superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

*** Sec. 48.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.26.207, 13.26.208, and 13.26.209(a) - (g), enacted by sec. 10 of this Act, have the effect of amending Rule 17, Alaska Rules of Probate Procedure, relating to conservatorships and protective proceedings, by allowing ex parte and temporary orders and modifications of orders to be issued related to protecting the assets of a person otherwise subject to AS 13.26.165 from financial exploitation.

(b) AS 13.26.209(h), enacted by sec. 10 of this Act, has the effect of amending Rule 9, Alaska Rules of Administration, by requiring that filing fees may not be charged for a petition for an ex parte protective order under AS 13.26.207 for an application for a temporary order under AS 13.26.208, or for modification of a protective order under AS 13.26.209(a), enacted by sec. 10 of this Act.

(c) AS 13.26.206, enacted by sec. 10 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by requiring a hearing within 72 hours of the filing of a petition for the appointment of a temporary conservator.

(d) AS 13.26.208, enacted by sec. 10 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by providing for a hearing on an application for a temporary protective order on 10 days' notice.

(e) AS 13.26.209(a) and (b), enacted by sec. 10 of this Act, have the effect of amending Rule 77, Alaska Rules of Civil Procedure, by providing for a hearing on a request for modification of a protective order on 20 days' notice and for modification of an ex parte

protective order on three days' notice.

*** Sec. 49.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 3 - 5, 46, and 47 of this Act apply to offenses committed on or after the effective date of secs. 3 - 5 of this Act.

*** Sec. 50.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the catch line of

(1) AS 47.24.010 from "Reports of harm" to "Persons required to report; reports of harm";

(2) AS 47.24.013 from "Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities" to "Reports of undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities."

*** Sec. 51.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 13.26.207 and 13.26.209(a) - (g), enacted by sec. 10 of this Act, take effect only if sec. 48(a) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 13.26.209(h), enacted by sec. 10 of this Act, takes effect only if sec. 48(b) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(c) AS 13.26.206, enacted by sec. 10 of this Act, takes effect only if sec. 48(c) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(d) AS 13.26.208, enacted by sec. 10 of this Act, takes effect only if sec. 48(a) and (d) of this Act receive the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(e) AS 13.26.209(a) and (b), enacted by sec. 10 of this Act, take effect only if sec. 48(e) of this Act receive the two-thirds vote of each house required by art. IV, sec. 15,

Constitution of the State of Alaska.

* **Sec. 52.** Sections 16 and 20 of this Act take effect September 1, 2011.

* **Sec. 53.** Except as provided in sec. 52 of this Act, this Act takes effect July 1, 2011.

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Mischel
4/8/11

CS FOR SENATE BILL NO. 86(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; making conforming amendments; amending Rules 12(h) and 45(a), Alaska Rules of Criminal Procedure, Rule 77, Alaska Rules of Civil Procedure, Rule 17, Alaska Rules of Probate Procedure, and Rule 9, Alaska Rules of Administration; and providing for an effective date."

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

*** Section 1.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY

PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 2.** AS 08.63.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 3.** AS 11.56.740(a) is amended to read:

(a) A person commits the crime of violating a protective order if the person is subject to a protective order

(1) issued or filed under AS 18.66 and containing a provision listed in AS 18.66.100(c)(1) - (7) and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order; [OR]

(2) issued under AS 18.65.850, 18.65.855, or 18.65.860 and knowingly commits or attempts to commit an act that violates or would violate a provision listed in AS 18.65.850(c)(1) - (3)**; or**

(3) issued under AS 13.26.165 - 13.26.209 and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order.

*** Sec. 4.** AS 11.56.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under **AS 13.26.165 - 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180.

*** Sec. 5.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

*** Sec. 6.** AS 13.26.165 is amended to read:

Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or **issue another** [MAKE OTHER] protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that

(A) a minor owns money or property that requires management or protection **that** [WHICH] cannot otherwise be provided**;**

(B) the minor [,] has or may have business affairs **that** [WHICH] may be jeopardized or prevented by the status of being a minor**;** [,] or

(C) [THAT] funds are needed for the minor's support and education and [THAT] protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, **fraud,** confinement, detention by a foreign power, or disappearance; and

(B) the person has property **that** [WHICH] will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care**,** and welfare of the person or those entitled to be supported by the person and [THAT] protection is necessary or desirable to obtain or provide funds.

*** Sec. 7.** AS 13.26.180(a) is amended to read:

(a) The person to be protected, **a person's attorney or other legal representative,** any person who is interested in the estate, affairs**,** or welfare of the person to be protected, including a parent, guardian, [OR] custodian, **or caregiver, the Department of Health and Social Services,** or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

*** Sec. 8.** AS 13.26.180 is amended by adding a new subsection to read:

(c) The petition may include a request for temporary conservatorship as provided in AS 13.26.206 if it appears that the respondent's property is likely to be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

* **Sec. 9.** AS 13.26.185 is amended by adding a subsection to read:

(c) This section does not apply to a petition or order for an ex parte protective order filed under AS 13.26.207 or a temporary protective order filed under AS 13.26.208.

* **Sec. 10.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.206. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or persons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request must state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney and other persons as ordered by the court. The court shall appoint an attorney for a respondent who is unrepresented to be at the hearing and conduct a hearing within 72 hours after the filing.

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a

full or partial conservator or on the dismissal of the petition for conservatorship.

Sec. 13.26.207. Ex parte protective orders. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against a person other than the protected person. A petition filed on behalf of a protected person by a person other than the protected person must be accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition and that, because of the fraud, there has been or is an immediate threat of a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, unless dissolved earlier by the court at the request of the petitioner or respondent and after notice and, if requested, a hearing, or on the earlier appointment of a temporary or permanent conservator.

Sec. 13.26.208. Temporary protective orders; conversions. On application filed with the court before the expiration of a 20-day ex parte protective order issued under AS 13.26.207, the court shall schedule a hearing on whether to convert the

protective order to a temporary order effective for up to six months. The court shall provide to the protected person and the respondent at least 10 days' notice of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may convert the ex parte protective order to a temporary protective order effective for up to six months.

Sec. 13.26.209. Protective orders; modification; third-party compliance; forms; fees. (a) The petitioner, respondent, or protected person, if the protected person is a vulnerable adult, may request modification of a protective order issued under AS 13.26.165 - 13.26.209. If a request is made for modification of a protective order, the court shall schedule a hearing on three days' notice or on shorter notice as the court may prescribe. If the court modifies a protective order, the court shall issue a modified order and shall make reasonable efforts to ensure that the order is understood by the petitioner, the respondent, and the protected person who are present at the hearing.

(b) The court shall cause a copy of a protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person.

(c) A protective order issued under AS 13.26.165 - 13.26.209 is in addition to any other civil or criminal remedy.

(d) A third party that has received actual or legal notice of a protective order issued under AS 13.26.165 - 13.26.209 shall comply with the order. A third party who does not comply with a protective order granted under AS 13.26.165 - 13.26.209 may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third party who does not comply with a protective order granted under AS 13.26.165 - 13.26.209 may also be criminally liable under AS 11.56.740 for violating a protective order. As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most recently known place of residence or business of the third party.

(e) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and

assistance, the long term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions and protective orders and instructions for use of the forms by a person seeking a protective order under AS 13.26.165 - 13.26.209. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(f) Filing fees may not be charged for a petition under AS 13.26.207, for an application under AS 13.26.208, or for a request for modification of a protective order under AS 13.26.209(a).

* **Sec. 11.** AS 13.26 is amended by adding a new section to article 4 to read:

Sec. 13.26.324. Definitions. In AS 13.26.165 - 13.26.324, unless the context requires otherwise, "fraud" means

(1) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(2) offenses against property under AS 11.46.100 - 11.46.740; or

(3) exploitation of another person or another person's resources for personal profit or advantage if no significant benefit accrues to the person who is exploited.

* **Sec. 12.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating a protective order in violation of **AS 11.56.740(a)(1) or (2)** [AS 11.56.740];

(3) violated a condition of release imposed under AS 12.30.016(e) or (f) or 12.30.027.

*** Sec. 13.** AS 18.65.540(a) is amended to read:

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under **AS 13.26.165 - 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180. The registry must include**,** for each protective order**,** the names of the petitioner and respondent, their dates of birth, and the conditions and duration of the order. The registry shall retain a record of the protective order after it has expired.

*** Sec. 14.** AS 18.65.540(b) is amended to read:

(b) A peace officer receiving a protective order from a court under **AS 13.26.165 - 13.26.208.** AS 18.65.850 - 18.65.855, **or** AS 18.66.100 - 18.66.180, a modified order issued under **AS 13.26.209,** AS 18.65.860**,** or AS 18.66.120, or an order dismissing a protective order **shall** [, MUST] take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.

*** Sec. 15.** AS 44.21.415(g) is amended to read:

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED] offenses **against property** under AS 11.46.100 - 11.46.740; or

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older.

*** Sec. 16.** AS 47.24.010(a) is amended to read:

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for

the belief, report the belief to the department's central information and referral service for vulnerable adults **in the office of the department that handles adult protective services**:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator **or employee** of a nursing home, residential care, or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide;

(16) an educator or administrative staff member of a public or private educational institution.

* **Sec. 17.** AS 47.24.010(b) is amended to read:

(b) A report made under this section may include the name and address of the reporting person and must include

(1) the name and **contact information** [ADDRESS] of the vulnerable adult;

(2) information relating to the nature and extent of the **undue**

influence, abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

*** Sec. 18.** AS 47.24.010(c) is amended to read:

(c) The department or its designees shall report to the Department of Law any person required by (a) of this section to report who fails to comply with this section. A person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

*** Sec. 19.** AS 47.24.010(d) is amended to read:

(d) This section does not prohibit a person listed in (a) of this section, or any other person, from reporting cases of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's attention **in the person's nonoccupational capacity. This section does not prohibit any other person from reporting a harm under this section**.

*** Sec. 20.** AS 47.24.010(e) is amended to read:

(e) If a person making a report under this section believes that immediate action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person **shall** [MAY] make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and shall, **within 24 hours after receiving the report of harm** [AT THE EARLIEST OPPORTUNITY], notify the department. A person may not bring an action for damages against a police officer, **a** village public safety officer, the state, or

a political subdivision of the state based on a decision under this subsection to take or not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct; damages awarded in the action may include only direct economic compensatory damages for personal injury.

* **Sec. 21.** AS 47.24.010(f) is amended to read:

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been **unduly influenced, abandoned,** exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

* **Sec. 22.** AS 47.24.010 is amended by adding new subsections to read:

(i) A person required to report under this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(j) A person who recklessly makes a false report under this section is civilly liable for actual damages suffered by the person who is the subject of the report.

* **Sec. 23.** AS 47.24.013(a) is amended to read:

(a) If a report received under AS 47.24.010 **pertains to** [REGARDS] the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

* **Sec. 24.** AS 47.24.013(b) is amended to read:

(b) The department shall investigate a report received under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-

neglect of a vulnerable adult who is less than 60 years of age that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

*** Sec. 25.** AS 47.24.013(c) is amended to read:

(c) Upon receipt of a report under (a) or (b) of this section, the long term care ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the **office of the** department **that handles adult protective services** within 60 days after the receipt of the report.

*** Sec. 26.** AS 47.24.013(d) is amended to read:

(d) If the long term care ombudsman receives directly a report regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the report, to the central information and referral service of the **office of the** department **that handles adult protective services**. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

*** Sec. 27.** AS 47.24.015(a) is amended to read:

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

*** Sec. 28.** AS 47.24.015(c) is amended to read:

(c) The department [,] or its designee [,] shall immediately terminate an investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department or its designee may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective services and the request is made personally by the vulnerable adult and the vulnerable adult is not competent to make the request on the adult's own behalf, or the request is made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department or its designee may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department or its designee may refer the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in **AS 13.26.324** [AS 44.21.415].

* **Sec. 29.** AS 47.24.015 is amended by adding new subsections to read:

(h) In conducting an investigation under this section, the department may issue subpoenas, conduct interviews, and examine any health care or financial records related to a vulnerable adult. The department may seek a court order to enforce a subpoena.

(i) A person may not interfere with the department in the performance of its investigation under this section, including interfering with the department's access to the vulnerable adult.

(j) Notwithstanding any other provision of law, the office of the department that handles adult protective services shall have access to any information compiled or retained by other divisions in the department, regardless of the nature of the information or whether the information is considered confidential, to assist in

administering the provisions of this chapter.

(k) The department may audiotape or videotape an interview of a vulnerable adult if the adult has the capacity to consent and gives that consent. The department shall document the consent in its investigative file. The department may not audiotape or videotape an interview of a vulnerable adult who lacks the capacity to consent.

(*l*) The department shall provide for the training of investigators who investigate reports of harm under this section. Training must include instruction in federal, state, and local laws and policies of the department related to vulnerable adults, and in investigative techniques. The department may require other appropriate training.

(m) In this section, "financial records" include financial records related to the vulnerable adult that are maintained by any person.

*** Sec. 30.** AS 47.24.016(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's consent to receive the services because the vulnerable adult is unable to consent or lacks decision making capacity, and has no guardian**, conservator,** [OR] attorney-in-fact**, trustee, or surrogate for health care decisions under AS 13.52.030** to serve as the vulnerable adult's surrogate decision maker, the department may select from the following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services:

(1) the vulnerable adult's spouse, unless

[(A) THE VULNERABLE ADULT AND THE SPOUSE HAVE SEPARATE DOMICILES; OR

(B)] the vulnerable adult or the spouse have initiated divorce**,** [OR] dissolution**, or legal separation** proceedings;

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

* **Sec. 31.** AS 47.24.016(b) is amended to read:

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision making capacity; or

(2) there are allegations that individual is a perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult.

* **Sec. 32.** AS 47.24.016(d) is amended to read:

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this section **or AS 13.52.030** if the department determines that the vulnerable adult has become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable adult who has become able to consent or has regained decision making capacity only if the vulnerable adult consents.

* **Sec. 33.** AS 47.24.017(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and [EITHER] the vulnerable adult, the vulnerable adult's guardian**, conservator,** [OR] attorney-in-fact, **trustee,** [OR] a surrogate decision maker selected under AS 47.24.016**, or a surrogate for health care decisions under AS 13.52.030** consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that the protective services for the vulnerable adult are provided by the department**,** or its designee**,** within 10 working days after the department received the report under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the

department or the department's designee make it impossible to provide the protective services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

*** Sec. 34.** AS 47.24.019(c) is amended to read:

(c) If a vulnerable adult who has consented to receive protective services, or on whose behalf consent to receive protective services has been given, is prevented by **any person** [A CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from receiving those services, the department may petition the superior court for an injunction restraining the **person** [CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from interfering with the provision of protective services to the vulnerable adult.

*** Sec. 35.** AS 47.24.050 is amended to read:

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, **under** [IN ACCORDANCE WITH] this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate agencies or individuals inside and outside the state, in connection with investigations or judicial proceedings involving the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the vulnerable adult who is the subject of the report or the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker consents in writing. The department may not disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker if that person is an alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being

investigated under this chapter. The department shall, upon request, disclose the number of verified reports of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

* **Sec. 36.** AS 47.24.130 is amended to read:

Sec. 47.24.130. Treatment through spiritual means. This chapter may not be construed to mean that a person is **unduly influenced,** abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone **under** [IN ACCORDANCE WITH] the tenets and practices of a church or religious denomination of which the person is a member or adherent, **if** [PROVIDED THAT] the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious organization" in AS 05.15.690.

* **Sec. 37.** AS 47.24.900(2) is amended to read:

(2) "abuse" means

(A) the [WILFUL,] intentional, **knowing,** or reckless nonaccidental [,] and nontherapeutic infliction of physical pain, injury, [OR] mental **or emotional** distress**, or fear, including coercion and intimidation**; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

* **Sec. 38.** AS 47.24.900(3) is amended to read:

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed **some or all** responsibility for the care of a vulnerable adult voluntarily, by contract, **as an employee of a business that provides care in an adult's home,** or by court order; or

(B) an employee of an out-of-home care facility who provides

care to one or more vulnerable adults;

* **Sec. 39.** AS 47.24.900(4) is amended to read:

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision; **in this paragraph, "informed decision" includes a decision made by the vulnerable adult that is free from undue influence;**

* **Sec. 40.** AS 47.24.900(7) is amended to read:

(7) "exploitation"

(A) means unjust or improper use of another person or another person's resources for one's own profit or advantage**, with or without the person's consent; and**

(B) includes acts by a person who stands in a position of trust or confidence with a vulnerable adult or who knows or should know that the vulnerable adult lacks the capacity to consent that involve obtaining profit or advantage through undue influence, deception, fraud, intimidation, or breach of fiduciary duty; in this paragraph, "fraud" has the meaning given in AS 13.26.324(1) and (2);

* **Sec. 41.** AS 47.24.900(9) is amended to read:

(9) "neglect" means the intentional**, knowing, or reckless** failure by a caregiver to provide essential care or services **or access to essential care or services or to carry out a prescribed treatment plan** necessary to maintain the physical and mental health of the vulnerable adult **when the vulnerable adult is unable to provide or obtain the essential care or services or to carry out the prescribed treatment plan on the vulnerable adult's own behalf; in this paragraph, "essential care or services" includes food, clothing, shelter, medical care, and supervision;**

* **Sec. 42.** AS 47.24.900(11) is amended to read:

(11) "protective services" means services that are intended to prevent or alleviate harm resulting from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; **in this paragraph, "services"** ["PROTECTIVE SERVICES"] includes

(A) protective placement;

(B) applying for or obtaining public benefits;

(C) obtaining health care services and supplies;

(D) staying financial transactions;

(E) petitioning for a protective order under AS 13.26.165 - 13.26.209;

(F) assisting with personal hygiene;

(G) obtaining food and clothing;

(H) protection from physical and emotional abuse;

(I) obtaining representative payee services; and

(J) coordinating protective services;

*** Sec. 43.** AS 47.24.900(15) is amended to read:

(15) "unable to consent" means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of **loss, waste, or dissipation of income or assets, eviction, physical or mental harm to self or others, or** death [OR IRREPARABLE HARM TO SELF OR OTHERS];

*** Sec. 44.** AS 47.24.900(16) is amended to read:

(16) "vulnerable adult" means a person 18 years of age or older who, because of **incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance** [PHYSICAL OR MENTAL IMPAIRMENT], is unable to meet the person's own needs or to seek help without assistance.

*** Sec. 45.** AS 47.24.900 is amended by adding new paragraphs to read:

(17) "deception" means creating, reinforcing, or failing to correct a false impression or preventing another person from acquiring information that would affect the person's judgment regarding a transaction;

(18) "fiduciary duty" means the duty of a third party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interest of that person;

(19) "financial institution" means an institution subject to state or federal banking or financial regulations, including

(A) a broker-dealer;

(B) a commercial bank;

(C) a savings bank;

(D) a credit union;

(E) a premium finance company;

(F) a small loan company;

(G) a bank holding company;

(H) a financial holding company;

(I) a trust company;

(J) a savings and loan association;

(K) a deferred deposit advance licensee;

(L) an investment bank;

(M) an insurance company subject to regulation by AS 21;

(N) a licensee subject to regulation by AS 21; and

(O) an investment adviser;

(20) "person who stands in a position of trust or confidence" means a person who

(A) is a relative by blood or marriage;

(B) is a joint tenant or tenant in common;

(C) has a legal or fiduciary relationship; or

(D) is a person who has been entrusted with or has assumed responsibility for the use or management of the vulnerable adult's assets or income;

(21) "undue influence" means the use by a person who stands in a position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit the trust, dependency, or fear of a vulnerable adult to gain control over the decision making of the vulnerable adult, including decision making related to finances, property, residence, and health care.

*** Sec. 46.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 12(h), Alaska Rules of Criminal Procedure, is amended to read:

(h) **Continuance of Trial.** A motion for continuance of a trial date will be granted by the court only for cause shown. **In deciding whether to grant the motion, the court shall consider the victim's circumstances and the effect the delay would have on the victim, particularly a victim of advanced age or extreme youth. The court shall place its findings on the record.** The presiding judge of a judicial district may require that a visiting or pro tem judge obtain approval from the presiding judge before granting any continuance of trial.

*** Sec. 47.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Priorities in Scheduling Criminal Cases.** The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings and the trial of defendants in custody shall be given preference over other criminal cases. **The court shall consider the circumstances of the victim, particularly a victim of advanced age or extreme youth, in setting the trial date.** Trial dates in criminal cases in the superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

*** Sec. 48.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.26.207, 13.26.208, and

13.26.209(a) - (e), enacted by sec. 10 of this Act, have the effect of amending Rule 17, Alaska Rules of Probate Procedure, relating to conservatorships and protective proceedings, by allowing ex parte and temporary orders and modifications of orders to be issued related to protecting the assets of a person otherwise subject to AS 13.26.165 from financial exploitation.

(b) AS 13.26.209(f), enacted by sec. 10 of this Act, has the effect of amending Rule 9, Alaska Rules of Administration, by requiring that filing fees may not be charged for a petition for an ex parte protective order under AS 13.26.207 for an application for a temporary order under AS 13.26.208, or for modification of a protective order under AS 13.26.209(a), enacted by sec. 10 of this Act.

(c) AS 13.26.206, enacted by sec. 10 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by requiring a hearing within 72 hours of the filing of a petition for the appointment of a temporary conservator.

(d) AS 13.26.208, enacted by sec. 10 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by providing for a hearing on an application for a temporary protective order on 10 days' notice.

* **Sec. 49.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 3 - 5, 46, and 47 of this Act apply to offenses committed on or after the effective date of secs. 3 - 5 of this Act.

* **Sec. 50.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the catch line of

(1) AS 47.24.010 from "Reports of harm" to "Persons required to report; reports of harm";

(2) AS 47.24.013 from "Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities" to "Reports of undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities."

* **Sec. 51.** The uncodified law of the State of Alaska is amended by adding a new section to

read:

CONDITIONAL EFFECT. (a) AS 13.26.207 and 13.26.209(a) - (e), enacted by sec. 10 of this Act, take effect only if sec. 48(a) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 13.26.209(f), enacted by sec. 10 of this Act, takes effect only if sec. 48(b) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(c) AS 13.26.206, enacted by sec. 10 of this Act, takes effect only if sec. 48(c) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(d) AS 13.26.208, enacted by sec. 10 of this Act, takes effect only if sec. 48(a) and (d) of this Act receive the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

* **Sec. 52.** Sections 16 and 20 of this Act take effect September 1, 2011.

* **Sec. 53.** Except as provided in sec. 52 of this Act, this Act takes effect July 1, 2011.

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4/7/11

CS FOR SENATE BILL NO. 86(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; making conforming amendments; amending Rules 12(h) and 45(a), Alaska Rules of Criminal Procedure, Rule 77, Alaska Rules of Civil Procedure, Rule 17, Alaska Rules of Probate Procedure, and Rule 9, Alaska Rules of Administration; and providing for an effective date."

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

*** Section 1.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY

PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 2.** AS 08.63.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 3.** AS 11.56.740(a) is amended to read:

(a) A person commits the crime of violating a protective order if the person is subject to a protective order

(1) issued or filed under AS 18.66 and containing a provision listed in AS 18.66.100(c)(1) - (7) and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order; [OR]

(2) issued under AS 18.65.850, 18.65.855, or 18.65.860 and knowingly commits or attempts to commit an act that violates or would violate a provision listed in AS 18.65.850(c)(1) - (3)**; or**

(3) issued under AS 13.26.165 - 13.26.209 and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order.

*** Sec. 4.** AS 11.56.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under **AS 13.26.165 - 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180.

*** Sec. 5.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

*** Sec. 6.** AS 13.26.165 is amended to read:

Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or **issue another** [MAKE OTHER] protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that

(A) a minor owns money or property that requires management or protection **that** [WHICH] cannot otherwise be provided**;**

(B) the minor [,] has or may have business affairs **that** [WHICH] may be jeopardized or prevented by the status of being a minor**;** [,] or

(C) [THAT] funds are needed for the minor's support and education and [THAT] protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, **fraud,** confinement, detention by a foreign power, or disappearance; and

(B) the person has property **that** [WHICH] will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care**,** and welfare of the person or those entitled to be supported by the person and [THAT] protection is necessary or desirable to obtain or provide funds.

*** Sec. 7.** AS 13.26.180(a) is amended to read:

(a) The person to be protected, **a person's attorney or other legal representative,** any person who is interested in the estate, affairs**,** or welfare of the person to be protected, including a parent, guardian, [OR] custodian, **or caregiver, the Department of Health and Social Services,** or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

*** Sec. 8.** AS 13.26.180 is amended by adding a new subsection to read:

(c) The petition may include a request for temporary conservatorship as provided in AS 13.26.206 if it appears that the respondent's property is likely to be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

* **Sec. 9.** AS 13.26.185 is amended by adding a subsection to read:

(c) This section does not apply to a petition or order for an ex parte protective order filed under AS 13.26.207 or a temporary protective order filed under AS 13.26.208.

* **Sec. 10.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.206. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or persons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request must state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney and other persons as ordered by the court. The court shall appoint an attorney for a respondent who is unrepresented to be at the hearing and conduct a hearing within 72 hours after the filing.

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a

full or partial conservator or on the dismissal of the petition for conservatorship.

Sec. 13.26.207. Ex parte protective orders. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against a person other than the protected person. A petition filed on behalf of a protected person by a person other than the protected person must be accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition and that, because of the fraud, there has been or is an immediate threat of a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, unless dissolved earlier by the court at the request of the petitioner or respondent and after notice and, if requested, a hearing, or on the earlier appointment of a temporary or permanent conservator.

Sec. 13.26.208. Temporary protective orders; conversions. On application filed with the court before the expiration of a 20-day ex parte protective order issued under AS 13.26.207, the court shall schedule a hearing on whether to convert the

protective order to a temporary order effective for up to six months. The court shall provide to the protected person and the respondent at least 10 days' notice of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may convert the ex parte protective order to a temporary protective order effective for up to six months.

Sec. 13.26.209. Protective orders; modification; third-party compliance; forms; fees. (a) The petitioner, respondent, or protected person, if the protected person is a vulnerable adult, may request modification of a protective order issued under AS 13.26.165 - 13.26.209. If a request is made for modification of a protective order, the court shall schedule a hearing on three days' notice or on shorter notice as the court may prescribe. If the court modifies a protective order, the court shall issue a modified order and shall make reasonable efforts to ensure that the order is understood by the petitioner, the respondent, and the protected person who are present at the hearing.

(b) The court shall cause a copy of a protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person.

(c) A protective order issued under AS 13.26.165 - 13.26.209 is in addition to any other civil or criminal remedy.

(d) A third party that has received actual or legal notice of a protective order issued under AS 13.26.165 - 13.26.209 shall comply with the order. A third party who does not comply with a protective order granted under AS 13.26.165 - 13.26.209 may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third party who does not comply with a protective order granted under AS 13.26.165 - 13.26.209 may also be criminally liable under AS 11.56.740 for violating a protective order. As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most recently known place of residence or business of the third party.

(e) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and

assistance, the long term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions and protective orders and instructions for use of the forms by a person seeking a protective order under AS 13.26.165 - 13.26.209. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(f) Filing fees may not be charged for a petition under AS 13.26.180 or 13.26.207.

* **Sec. 11.** AS 13.26 is amended by adding a new section to article 4 to read:

Sec. 13.26.324. Definitions. In AS 13.26.165 - 13.26.324, unless the context requires otherwise, "fraud" means

(1) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(2) offenses against property under AS 11.46.100 - 11.46.740; or

(3) exploitation of another person or another person's resources for personal profit or advantage if no significant benefit accrues to the person who is exploited.

* **Sec. 12.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating a protective order in violation of **AS 11.56.740(a)(1) or (2)** [AS 11.56.740];

(3) violated a condition of release imposed under AS 12.30.016(e) or (f) or 12.30.027.

* **Sec. 13.** AS 18.65.540(a) is amended to read:

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under **AS 13.26.165 - 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180. The registry must include**,** for each protective order**,** the names of the petitioner and respondent, their dates of birth, and the conditions and duration of the order. The registry shall retain a record of the protective order after it has expired.

*** Sec. 14.** AS 18.65.540(b) is amended to read:

(b) A peace officer receiving a protective order from a court under **AS 13.26.165 - 13.26.209,** AS 18.65.850 - 18.65.855, **or** AS 18.66.100 - 18.66.180, a modified order issued under AS 18.65.860 or AS 18.66.120, or an order dismissing a protective order **shall** [, MUST] take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.

*** Sec. 15.** AS 44.21.415(g) is amended to read:

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED] offenses **against property** under AS 11.46.100 - 11.46.740; or

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older.

*** Sec. 16.** AS 47.24.010(a) is amended to read:

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service

for vulnerable adults **in the office of the department that handles adult protective services**:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator **or employee** of a nursing home, residential care, or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide**;**

(16) an educator or administrative staff member of a public or private educational institution.

* **Sec. 17.** AS 47.24.010(b) is amended to read:

(b) A report made under this section may include the name and address of the reporting person and must include

(1) the name and **contact information** [ADDRESS] of the vulnerable adult;

(2) information relating to the nature and extent of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

* **Sec. 18.** AS 47.24.010(c) is amended to read:

(c) The department or its designees shall report to the Department of Law any person required by (a) of this section to report who fails to comply with this section. A person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

* **Sec. 19.** AS 47.24.010(d) is amended to read:

(d) This section does not prohibit a person listed in (a) of this section, or any other person, from reporting cases of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's attention **in the person's nonoccupational capacity. This section does not prohibit any other person from reporting a harm under this section**.

* **Sec. 20.** AS 47.24.010(e) is amended to read:

(e) If a person making a report under this section believes that immediate action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person **shall** [MAY] make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and shall, **within 24 hours after receiving the report of harm** [AT THE EARLIEST OPPORTUNITY], notify the department. A person may not bring an action for damages against a police officer, **a** village public safety officer, the state, or a political subdivision of the state based on a decision under this subsection to take or

not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct; damages awarded in the action may include only direct economic compensatory damages for personal injury.

* **Sec. 21.** AS 47.24.010(f) is amended to read:

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been **unduly influenced, abandoned,** exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

* **Sec. 22.** AS 47.24.010 is amended by adding new subsections to read:

(i) A person required to report under this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(j) A person who recklessly makes a false report under this section is civilly liable for actual damages suffered by the person who is the subject of the report.

* **Sec. 23.** AS 47.24.013(a) is amended to read:

(a) If a report received under AS 47.24.010 **pertains to** [REGARDS] the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

* **Sec. 24.** AS 47.24.013(b) is amended to read:

(b) The department shall investigate a report received under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is less than 60 years of age that is alleged to have

been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

*** Sec. 25.** AS 47.24.013(c) is amended to read:

(c) Upon receipt of a report under (a) or (b) of this section, the long term care ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the **office of the** department **that handles adult protective services** within 60 days after the receipt of the report.

*** Sec. 26.** AS 47.24.013(d) is amended to read:

(d) If the long term care ombudsman receives directly a report regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the report, to the central information and referral service of the **office of the** department **that handles adult protective services**. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

*** Sec. 27.** AS 47.24.015(a) is amended to read:

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

*** Sec. 28.** AS 47.24.015(c) is amended to read:

(c) The department [,] or its designee [,] shall immediately terminate an

investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department or its designee may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective services and the request is made personally by the vulnerable adult and the vulnerable adult is not competent to make the request on the adult's own behalf, or the request is made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department or its designee may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department or its designee may refer the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in **AS 13.26.324** [AS 44.21.415].

*** Sec. 29.** AS 47.24.015 is amended by adding new subsections to read:

(h) In conducting an investigation under this section, the department may issue subpoenas, conduct interviews, and examine any health care or financial records related to a vulnerable adult. The department may seek a court order to enforce a subpoena.

(i) A person may not interfere with the department in the performance of its investigation under this section, including interfering with the department's access to the vulnerable adult.

(j) Notwithstanding any other provision of law, the office of the department that handles adult protective services shall have access to any information compiled or retained by other divisions in the department, regardless of the nature of the information or whether the information is considered confidential, to assist in administering the provisions of this chapter.

(k) The department may audiotape or videotape an interview of a vulnerable adult if the adult has the capacity to consent and gives that consent. The department shall document the consent in its investigative file. The department may not audiotape or videotape an interview of a vulnerable adult who lacks the capacity to consent.

(*l*) The department shall provide for the training of investigators who investigate reports of harm under this section. Training must include instruction in federal, state, and local laws and policies of the department related to vulnerable adults, and in investigative techniques. The department may require other appropriate training.

(m) In this section, "financial records" include financial records related to the vulnerable adult that are maintained by any person.

*** Sec. 30.** AS 47.24.016(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's consent to receive the services because the vulnerable adult is unable to consent or lacks decision making capacity, and has no guardian**, conservator,** [OR] attorney-in-fact**, trustee, or surrogate for health care decisions under AS 13.52.030** to serve as the vulnerable adult's surrogate decision maker, the department may select from the following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services:

(1) the vulnerable adult's spouse, unless

[(A) THE VULNERABLE ADULT AND THE SPOUSE HAVE SEPARATE DOMICILES; OR

(B)] the vulnerable adult or the spouse have initiated divorce**,** [OR] dissolution**, or legal separation** proceedings;

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

*** Sec. 31.** AS 47.24.016(b) is amended to read:

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision making capacity; or

(2) there are allegations that individual is a perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult.

*** Sec. 32.** AS 47.24.016(d) is amended to read:

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this section **or AS 13.52.030** if the department determines that the vulnerable adult has become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable adult who has become able to consent or has regained decision making capacity only if the vulnerable adult consents.

*** Sec. 33.** AS 47.24.017(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and [EITHER] the vulnerable adult, the vulnerable adult's guardian**, conservator,** [OR] attorney-in-fact, **trustee,** [OR] a surrogate decision maker selected under AS 47.24.016**, or a surrogate for health care decisions under AS 13.52.030** consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that the protective services for the vulnerable adult are provided by the department, or its designee, within 10 working days after the department received the report under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the department or the department's designee make it impossible to provide the protective

services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

*** Sec. 34.** AS 47.24.019(c) is amended to read:

(c) If a vulnerable adult who has consented to receive protective services, or on whose behalf consent to receive protective services has been given, is prevented by **any person** [A CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from receiving those services, the department may petition the superior court for an injunction restraining the **person** [CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from interfering with the provision of protective services to the vulnerable adult.

*** Sec. 35.** AS 47.24.050 is amended to read:

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, **under** [IN ACCORDANCE WITH] this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate agencies or individuals inside and outside the state, in connection with investigations or judicial proceedings involving the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the vulnerable adult who is the subject of the report or the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker consents in writing. The department may not disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker if that person is an alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. The department shall, upon request, disclose the

number of verified reports of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

* **Sec. 36.** AS 47.24.130 is amended to read:

Sec. 47.24.130. Treatment through spiritual means. This chapter may not be construed to mean that a person is **unduly influenced,** abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone **under** [IN ACCORDANCE WITH] the tenets and practices of a church or religious denomination of which the person is a member or adherent, **if** [PROVIDED THAT] the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious organization" in AS 05.15.690.

* **Sec. 37.** AS 47.24.900(2) is amended to read:

(2) "abuse" means

(A) the [WILFUL,] intentional, **knowing,** or reckless nonaccidental [,] and nontherapeutic infliction of physical pain, injury, [OR] mental **or emotional** distress**, or fear, including coercion and intimidation**; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

* **Sec. 38.** AS 47.24.900(3) is amended to read:

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed **some or all** responsibility for the care of a vulnerable adult voluntarily, by contract, **as an employee of a business that provides care in an adult's home,** or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

* **Sec. 39.** AS 47.24.900(4) is amended to read:

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision; **in this paragraph, "informed decision" includes a decision made by the vulnerable adult that is free from undue influence;**

* **Sec. 40.** AS 47.24.900(7) is amended to read:

(7) "exploitation"

(A) means unjust or improper use of another person or another person's resources for one's own profit or advantage**, with or without the person's consent; and**

(B) includes acts by a person who stands in a position of trust or confidence with a vulnerable adult or who knows or should know that the vulnerable adult lacks the capacity to consent that involve obtaining profit or advantage through undue influence, deception, fraud, intimidation, or breach of fiduciary duty; in this paragraph, "fraud" has the meaning given in AS 13.26.324(1) and (2);

* **Sec. 41.** AS 47.24.900(9) is amended to read:

(9) "neglect" means the intentional**, knowing, or reckless** failure by a caregiver to provide essential care or services **or access to essential care or services or to carry out a prescribed treatment plan** necessary to maintain the physical and mental health of the vulnerable adult **when the vulnerable adult is unable to provide or obtain the essential care or services or to carry out the prescribed treatment plan on the vulnerable adult's own behalf; in this paragraph, "essential care or services" includes food, clothing, shelter, medical care, and supervision**;

* **Sec. 42.** AS 47.24.900(11) is amended to read:

(11) "protective services" means services that are intended to prevent or alleviate harm resulting from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; **in this paragraph, "services"** ["PROTECTIVE SERVICES"] includes

(A) protective placement;

(B) applying for or obtaining public benefits;

(C) obtaining health care services and supplies;

(D) staying financial transactions;

(E) petitioning for a protective order under AS 13.26.165 - 13.26.209;

(F) assisting with personal hygiene;

(G) obtaining food and clothing;

(H) protection from physical and emotional abuse;

(I) obtaining representative payee services; and

(J) coordinating protective services;

*** Sec. 43.** AS 47.24.900(15) is amended to read:

(15) "unable to consent" means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of **loss, waste, or dissipation of income or assets, eviction, physical or mental harm to self or others, or** death [OR IRREPARABLE HARM TO SELF OR OTHERS];

*** Sec. 44.** AS 47.24.900(16) is amended to read:

(16) "vulnerable adult" means a person 18 years of age or older who, because of **incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance** [PHYSICAL OR MENTAL IMPAIRMENT], is unable to meet the person's own needs or to seek help without assistance.

*** Sec. 45.** AS 47.24.900 is amended by adding new paragraphs to read:

(17) "deception" means creating, reinforcing, or failing to correct a

false impression or preventing another person from acquiring information that would affect the person's judgment regarding a transaction;

(18) "fiduciary duty" means the duty of a third party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interest of that person;

(19) "financial institution" means an institution subject to state or federal banking or financial regulations, including

(A) a broker-dealer;

(B) a commercial bank;

(C) a savings bank;

(D) a credit union;

(E) a premium finance company;

(F) a small loan company;

(G) a bank holding company;

(H) a financial holding company;

(I) a trust company;

(J) a savings and loan association;

(K) a deferred deposit advance licensee;

(L) an investment bank;

(M) an insurance company subject to regulation by AS 21;

(N) a licensee subject to regulation by AS 21; and

(O) an investment adviser;

(20) "person who stands in a position of trust or confidence" means a person who

(A) is a relative by blood or marriage;

(B) is a joint tenant or tenant in common;

(C) has a legal or fiduciary relationship; or

(D) is a person who has been entrusted with or has assumed responsibility for the use or management of the vulnerable adult's assets or income;

(21) "undue influence" means the use by a person who stands in a

position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit the trust, dependency, or fear of a vulnerable adult to gain control over the decision making of the vulnerable adult, including decision making related to finances, property, residence, and health care.

*** Sec. 46.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 12(h), Alaska Rules of Criminal Procedure, is amended to read:

(h) **Continuance of Trial.** A motion for continuance of a trial date will be granted by the court only for cause shown. **In deciding whether to grant the motion, the court shall consider the victim's circumstances and the effect the delay would have on the victim, particularly a victim of advanced age or extreme youth. The court shall place its findings on the record.** The presiding judge of a judicial district may require that a visiting or pro tem judge obtain approval from the presiding judge before granting any continuance of trial.

*** Sec. 47.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Priorities in Scheduling Criminal Cases.** The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings and the trial of defendants in custody shall be given preference over other criminal cases. **The court shall consider the circumstances of the victim, particularly a victim of advanced age or extreme youth, in setting the trial date.** Trial dates in criminal cases in the superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

*** Sec. 48.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.26.207, 13.26.208, and 13.26.209(a) - (e), enacted by sec. 10 of this Act, have the effect of amending Rule 17, Alaska

Rules of Probate Procedure, relating to conservatorships and protective proceedings, by allowing ex parte orders to be issued related to protecting the assets of a person otherwise subject to AS 13.26.165 from financial exploitation.

(b) AS 13.26.209(f), enacted by sec. 10 of this Act, has the effect of amending Rule 9, Alaska Rules of Administration, by requiring that filing fees may not be charged for a petition for an ex parte protective order under AS 13.26.180, amended by secs. 7 and 8 of this Act, or AS 13.26.207, enacted by sec. 10 of this Act.

(c) AS 13.26.206, enacted by sec. 10 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by requiring a hearing within 72 hours of the filing of a petition for the appointment of a temporary conservator.

* **Sec. 49.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 3 - 5, 46, and 47 of this Act apply to offenses committed on or after the effective date of this Act.

* **Sec. 50.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the catch line of

(1) AS 47.24.010 from "Reports of harm" to "Persons required to report; reports of harm";

(2) AS 47.24.013 from "Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities" to "Reports of undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities."

* **Sec. 51.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 13.26.207, 13.26.208, and 13.26.209(a) - (e), enacted by sec. 10 of this Act, take effect only if sec. 48(a) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 13.26.209(f), enacted by sec. 10 of this Act, takes effect only if sec. 48(b) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of

the State of Alaska.

* **Sec. 52.** Sections 16 and 20 of this Act take effect September 1, 2011.

* **Sec. 53.** Except as provided in sec. 52 of this Act, this Act takes effect July 1, 2011.

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CS FOR SENATE BILL NO. 86(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; making conforming amendments; amending Rules 12(h) and 45(a), Alaska Rules of Criminal Procedure, Rule 77, Alaska Rules of Civil Procedure, Rule 17, Alaska Rules of Probate Procedure, and Rule 9, Alaska Rules of Administration; and providing for an effective date."

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

H/S

* **Section 1.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY

New Text Underlined *[DELETED TEXT BRACKETED]*

PERSON OR DISABLED] adult as required by AS 47.24.

* **Sec. 2.** AS 08.63.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by AS 47.24.

* **Sec. 3.** AS 11.56.740(a) is amended to read:

(a) A person commits the crime of violating a protective order if the person is subject to a protective order

(1) issued or filed under AS 18.66 and containing a provision listed in AS 18.66.100(c)(1) - (7) and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order; [OR]

(2) issued under AS 18.65.850, 18.65.855, or 18.65.860 and knowingly commits or attempts to commit an act that violates or would violate a provision listed in AS 18.65.850(c)(1) - (3)**; or**

(3) issued under AS 13.26.180 or 13.26.209 and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order.

* **Sec. 4.** AS 11.56.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180.

* **Sec. 5.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

* **Sec. 6.** AS 13.26.165 is amended to read:

Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or **issue another** [MAKE OTHER] protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that

(A) a minor owns money or property that requires management or protection **that** [WHICH] cannot otherwise be provided**;**

(B) the minor [,] has or may have business affairs **that** [WHICH] may be jeopardized or prevented by the status of being a minor**;** [,] or

(C) [THAT] funds are needed for the minor's support and education and [THAT] protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, **fraud,** confinement, detention by a foreign power, or disappearance; and

(B) the person has property **that** [WHICH] will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care**,** and welfare of the person or those entitled to be supported by the person and [THAT] protection is necessary or desirable to obtain or provide funds.

*** Sec. 7.** AS 13.26.180(a) is amended to read:

(a) The person to be protected, **a person's attorney or other legal representative,** any person who is interested in the estate, affairs**,** or welfare of the person to be protected, including a parent, guardian, [OR] custodian, **or caregiver, the Department of Health and Social Services,** or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

*** Sec. 8.** AS 13.26.180 is amended by adding a new subsection to read:

(c) The petition may include a request for temporary conservatorship as provided in AS 13.26.207 if it appears that the respondent's property is likely to be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

* **Sec. 9.** AS 13.26.185 is amended by adding a subsection to read:

(c) This section does not apply to a petition or order for an ex parte protective order filed under AS 13.26.209.

* **Sec. 10.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.207. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or persons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request must state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney and other persons as ordered by the court. The court shall appoint an attorney for a respondent who is unrepresented to be at the hearing and conduct a hearing within 72 hours after the filing.

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a full or partial conservator or on the dismissal of the petition for conservatorship.

Sec. 13.26.209. Ex parte protective orders; modification; forms for petitions and orders; fees. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against another person. A petition filed on behalf of a protected person by another person must be accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition and that, because of the fraud, there has been or is an immediate threat of a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent. The court shall cause a copy of the protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person.

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(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, at the end of a six-month extension if granted by the court under (d) of this section, or on the appointment of a temporary or permanent conservator or dismissal of the petition for the ex parte order.

(d) On application filed with the court before the expiration of the 20-day ex parte protective order, the court shall schedule a hearing on whether to extend the

protective order for up to six months. The court shall provide to the protected person and the respondent at least 10 days' notice of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may extend the ex parte protective order for up to six months.

(e) Either the petitioner or the respondent may request modification of a protective order issued under this section. If a request is made for modification of a protective order, the court shall schedule a hearing on three days' notice or on shorter notice as the court may prescribe. If the court modifies a protective order under this section, the court shall issue a modified order and shall make reasonable efforts to ensure that the order is understood by the petitioner and by the respondent, if present at the hearing.

(f) A protective order issued under this section is in addition to any other civil or criminal remedy.

(g) A third party that has received actual or legal notice of a protective order issued under this section shall comply with the order. A third party who does not comply with a protective order granted under this section may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third party who does not comply with a protective order granted under this section may also be criminally liable under AS 11.56.740 for violating a protective order. As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most recently known place of residence or business of the third party.

(h) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions and protective orders and instructions for use of the forms by a person seeking a protective order under this section. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of

Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order under this section may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(i) Filing fees may not be charged for a petition under this section.

*** Sec. 11.** AS 13.26 is amended by adding a new section to article 4 to read:

Sec. 13.26.324. Definitions. In AS 13.26.165 - 13.26.324, unless the context requires otherwise, "fraud" means

(1) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(2) offenses against property under AS 11.46.100 - 11.46.740; or

(3) exploitation of another person or another person's resources for personal profit or advantage if no significant benefit accrues to the person who is exploited.

*** Sec. 12.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating a protective order in violation of **AS 11.56.740(a)(1) or (2)** [AS 11.56.740];

(3) violated a condition of release imposed under AS 12.30.016(e) or (f) or 12.30.027.

*** Sec. 13.** AS 18.65.540(a) is amended to read:

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.870, or AS 18.66.100 - 18.66.180. The registry must include, for each protective order, the names of the petitioner and respondent, their dates of birth, and the conditions and duration of the order. The registry shall retain a

record of the protective order after it has expired.

* **Sec. 14.** AS 18.65.540(b) is amended to read:

(b) A peace officer receiving a protective order from a court under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.855, **or** AS 18.66.100 - 18.66.180, a modified order issued under AS 18.65.860 or AS 18.66.120, or an order dismissing a protective order **shall** [, MUST] take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.

* **Sec. 15.** AS 44.21.415(g) is amended to read:

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED] offenses **against property** under AS 11.46.100 - 11.46.740; or

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older.

* **Sec. 16.** AS 47.24.010(a) is amended to read:

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service for vulnerable adults **in the office of the department that handles adult protective services**:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator **or employee** of a nursing home, residential care, or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide**;**

(16) an educator or administrative staff member of a public or private educational institution.

*** Sec. 17.** AS 47.24.010(b) is amended to read:

(b) A report made under this section may include the name and address of the reporting person and must include

(1) the name and **contact information** [ADDRESS] of the vulnerable adult;

(2) information relating to the nature and extent of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

*** Sec. 18.** AS 47.24.010(c) is amended to read:

(c) The department or its designees shall report to the Department of Law any

person required by (a) of this section to report who fails to comply with this section. A person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

*** Sec. 19.** AS 47.24.010(d) is amended to read:

(d) This section does not prohibit a person listed in (a) of this section, or any other person, from reporting cases of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's attention **in the person's nonoccupational capacity. This section does not prohibit any other person from reporting a harm under this section**.

*** Sec. 20.** AS 47.24.010(e) is amended to read:

(e) If a person making a report under this section believes that immediate action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person **shall** [MAY] make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and shall [,] at the earliest opportunity **within 24 hours after receiving the report of harm** [,] notify the department. A person may not bring an action for damages against a police officer, **a** village public safety officer, the state, or a political subdivision of the state based on a decision under this subsection to take or not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct; damages awarded in the action may include only direct economic compensatory

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damages for personal injury.

* **Sec. 21.** AS 47.24.010(f) is amended to read:

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been **unduly influenced, abandoned,** exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

* **Sec. 22.** AS 47.24.010 is amended by adding new subsections to read:

(i) A person required to report under this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(j) A person who recklessly makes a false report under this section is civilly liable for actual damages suffered by the person who is the subject of the report.

* **Sec. 23.** AS 47.24.013(a) is amended to read:

(a) If a report received under AS 47.24.010 **pertains to** [REGARDS] the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

* **Sec. 24.** AS 47.24.013(b) is amended to read:

(b) The department shall investigate a report received under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is less than 60 years of age that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

* **Sec. 25.** AS 47.24.013(c) is amended to read:

(c) Upon receipt of a report under (a) or (b) of this section, the long term care ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the **office of the** department **that handles adult protective services** within 60 days after the receipt of the report.

* **Sec. 26.** AS 47.24.013(d) is amended to read:

(d) If the long term care ombudsman receives directly a report regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the report, to the central information and referral service of the **office of the** department **that handles adult protective services**. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

* **Sec. 27.** AS 47.24.015(a) is amended to read:

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

* **Sec. 28.** AS 47.24.015(c) is amended to read:

(c) The department [,] or its designee [,] shall immediately terminate an investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department or its designee may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective services and the request is made personally by the vulnerable adult and the vulnerable

adult is not competent to make the request on the adult's own behalf, or the request is made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department or its designee may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department or its designee may refer the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in **AS 13.26.324** [AS 44.21.415].

*** Sec. 29.** AS 47.24.015 is amended by adding new subsections to read:

(h) In conducting an investigation under this section, the department may issue subpoenas, conduct interviews, and examine any health care or financial records related to a vulnerable adult. The department may seek a court order to enforce a subpoena.

(i) A person may not interfere with the department in the performance of its investigation under this section, including interfering with the department's access to the vulnerable adult.

(j) Notwithstanding any other provision of law, the office of the department that handles adult protective services shall have access to any information compiled or retained by other divisions in the department, regardless of the nature of the information or whether the information is considered confidential, to assist in administering the provisions of this chapter.

(k) The department may audiotape or videotape an interview of a vulnerable adult if the adult has the capacity to consent and gives that consent. The department shall document the consent in its investigative file. The department may not audiotape or videotape an interview of a vulnerable adult who lacks the capacity to consent.

(*l*) The department shall provide for the training of investigators who

investigate reports of harm under this section. Training must include instruction in federal, state, and local laws and policies of the department related to vulnerable adults, and in investigative techniques. The department may require other appropriate training.

(m) In this section, "financial records" include financial records related to the vulnerable adult that are maintained by any person. #16

*** Sec. 30.** AS 47.24.016(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's consent to receive the services because the vulnerable adult is unable to consent or lacks decision making capacity, and has no guardian**, conservator,** [OR] attorney-in-fact**, trustee, or surrogate for health care decisions under AS 13.52.030** to serve as the vulnerable adult's surrogate decision maker, the department may select from the following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services: #17

(1) the vulnerable adult's spouse, unless

[(A) THE VULNERABLE ADULT AND THE SPOUSE HAVE SEPARATE DOMICILES; OR

(B)] the vulnerable adult or the spouse have initiated divorce, [OR] dissolution**, or legal separation** proceedings; #18

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

*** Sec. 31.** AS 47.24.016(b) is amended to read:

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision making capacity; or

(2) there are allegations that individual is a perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult.

*** Sec. 32.** AS 47.24.016(d) is amended to read:

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this section **or AS 13.52.030** if the department determines that the vulnerable adult has become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable adult who has become able to consent or has regained decision making capacity only if the vulnerable adult consents.

*** Sec. 33.** AS 47.24.017(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and [EITHER] the vulnerable adult, the vulnerable adult's guardian**, conservator,** [OR] attorney-in-fact, **trustee,** [OR] a surrogate decision maker selected under AS 47.24.016**, or a surrogate for health care decisions under AS 13.52.030** consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that the protective services for the vulnerable adult are provided by the department**,** or its designee**,** within 10 working days after the department received the report under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the department or the department's designee make it impossible to provide the protective services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

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*** Sec. 34.** AS 47.24.019(c) is amended to read:

(c) If a vulnerable adult who has consented to receive protective services, or on whose behalf consent to receive protective services has been given, is prevented by

any person [A CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from receiving those services, the department may petition the superior court for an injunction restraining the **person** [CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from interfering with the provision of protective services to the vulnerable adult.

*** Sec. 35.** AS 47.24.050 is amended to read:

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, **under** [IN ACCORDANCE WITH] this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate agencies or individuals inside and outside the state, in connection with investigations or judicial proceedings involving the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the vulnerable adult who is the subject of the report or the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker consents in writing. The department may not disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker if that person is an alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. The department shall, upon request, disclose the number of verified reports of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

*** Sec. 36.** AS 47.24.130 is amended to read:

Sec. 47.24.130. Treatment through spiritual means. This chapter may not be construed to mean that a person is **unduly influenced,** abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone **under** [IN ACCORDANCE WITH] the tenets and practices of a church or religious denomination of which the person is a member or adherent, **if** [PROVIDED THAT] the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious organization" in AS 05.15.690.

*** Sec. 37.** AS 47.24.900(2) is amended to read:

(2) "abuse" means

(A) the [WILFUL,] intentional, **knowing,** or reckless nonaccidental [,] and nontherapeutic infliction of physical pain, injury, [OR] mental **or emotional** distress**, or fear, including coercion and intimidation**; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

*** Sec. 38.** AS 47.24.900(3) is amended to read:

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed **some or all** responsibility for the care of a vulnerable adult voluntarily, by contract, **as an employee of a business that provides care in an adult's home,** or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

*** Sec. 39.** AS 47.24.900(4) is amended to read:

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision; **in this paragraph, "informed decision" includes a decision made by the vulnerable adult that is free from undue**

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influence;

*** Sec. 40.** AS 47.24.900(7) is amended to read:

(7) "exploitation"

(A) means unjust or improper use of another person or another person's resources for one's own profit or advantage**, with or without the person's consent; and**

(B) includes acts by a person who stands in a position of trust or confidence with a vulnerable adult or who knows or should know that the vulnerable adult lacks the capacity to consent that involve obtaining profit or advantage through undue influence, deception, fraud, intimidation, or breach of fiduciary duty; in this paragraph, "fraud" has the meaning given in AS 13.26.324(1) and (2);

*** Sec. 41.** AS 47.24.900(9) is amended to read:

(9) "neglect" means the intentional**, knowing, or reckless** failure by a caregiver to provide essential care or services **or access to essential care or services or to carry out a prescribed treatment plan** necessary to maintain the physical and mental health of the vulnerable adult **when the vulnerable adult is unable to provide or obtain the essential care or services or to carry out the prescribed treatment plan on the vulnerable adult's own behalf; in this paragraph, "essential care or services" includes food, clothing, shelter, medical care, and supervision**;

*** Sec. 42.** AS 47.24.900(11) is amended to read:

(11) "protective services" means services that are intended to prevent or alleviate harm resulting from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; **in this paragraph, "services"** ["PROTECTIVE SERVICES"] includes

(A) protective placement;

(B) applying for or obtaining public benefits;

(C) obtaining health care services and supplies;

(D) staying financial transactions;

(E) petitioning for an ex parte protective order under AS 13.26.209;

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(F) assisting with personal hygiene;

(G) obtaining food and clothing;

(H) protection from physical and emotional abuse;

(I) obtaining representative payee services; and

(J) coordinating protective services;

*** Sec. 43.** AS 47.24.900(15) is amended to read:

(15) "unable to consent" means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of **loss, waste, or dissipation of income or assets, eviction, physical or mental harm to self or others, or** death [OR IRREPARABLE HARM TO SELF OR OTHERS];

*** Sec. 44.** AS 47.24.900(16) is amended to read:

(16) "vulnerable adult" means a person 18 years of age or older who, because of **incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance** [PHYSICAL OR MENTAL IMPAIRMENT], is unable to meet the person's own needs or to seek help without assistance.

*** Sec. 45.** AS 47.24.900 is amended by adding new paragraphs to read:

(17) "deception" means creating, reinforcing, or failing to correct a false impression or preventing another person from acquiring information that would affect the person's judgment regarding a transaction;

(18) "fiduciary duty" means the duty of a third party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interest of that person;

(19) "financial institution" means an institution subject to state or federal banking or financial regulations, including

(A) a broker-dealer;

(B) a commercial bank;

(C) a savings bank;

(D) a credit union;

(E) a premium finance company;

(F) a small loan company;

(G) a bank holding company;

(H) a financial holding company;

(I) a trust company;

(J) a savings and loan association;

(K) a deferred deposit advance licensee;

(L) an investment bank;

(M) an insurance company subject to regulation by AS 21;

(N) a licensee subject to regulation by AS 21; and

(O) an investment adviser;

(20) "person who stands in a position of trust or confidence" means a person who

(A) is a relative by blood or marriage;

(B) is a joint tenant or tenant in common;

(C) has a legal or fiduciary relationship; or

(D) is a person who has been entrusted with or has assumed responsibility for the use or management of the vulnerable adult's assets or income;

(21) "undue influence" means the use by a person who stands in a position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit the trust, dependency, or fear of a vulnerable adult to gain control (deceptively) over the decision making of the vulnerable adult, including decision making related to finances, property, residence, and health care.

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* **Sec. 46.** The uncodified law of the State of Alaska is amended by adding a new section to

read:

DIRECT COURT RULE AMENDMENT. Rule 12(h), Alaska Rules of Criminal Procedure, is amended to read:

(h) **Continuance of Trial.** A motion for continuance of a trial date will be granted by the court only for cause shown. **In deciding whether to grant the motion, the court shall consider the victim's circumstances and the effect the delay would have on the victim, particularly a victim of advanced age or extreme youth. The court shall place its findings on the record.** The presiding judge of a judicial district may require that a visiting or pro tem judge obtain approval from the presiding judge before granting any continuance of trial.

*** Sec. 47.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Priorities in Scheduling Criminal Cases.** The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings and the trial of defendants in custody shall be given preference over other criminal cases. **The court shall consider the circumstances of the victim, particularly a victim of advanced age or extreme youth, in setting the trial date.** Trial dates in criminal cases in the superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

*** Sec. 48.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.26.209(a) - (h), enacted by sec. 10 of this Act, have the effect of amending Rule 17, Alaska Rules of Probate Procedure, relating to conservatorships and protective proceedings, by allowing ex parte orders to be issued related to protecting the assets of a person otherwise subject to AS 13.26.165 from financial exploitation.

(b) AS 13.26.209(i), enacted by sec. 10 of this Act, has the effect of amending Rule 9, Alaska Rules of Administration, by requiring that filing fees may not be charged for a petition

for an ex parte protective order under AS 13.26.209(a), enacted by sec. 10 of this Act.

(c) AS 13.26.207, enacted by sec. 10 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by requiring a hearing within 72 hours of the filing of a petition for the appointment of a temporary conservator.

* **Sec. 49.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 3 - 5, 46, and 47 of this Act apply to offenses committed on or after the effective date of this Act.

* **Sec. 50.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the catch line of

(1) AS 47.24.010 from "Reports of harm" to "Persons required to report; reports of harm";

(2) AS 47.24.013 from "Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities" to "Reports of undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities."

* **Sec. 51.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 13.26.209(a) - (h), enacted by sec. 10 of this Act, take effect only if sec. 48(a) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 13.26.209(i), enacted by sec. 10 of this Act, takes effect only if sec. 48(b) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

* **Sec. 52.** Sections 16 - 28 of this Act take effect September 1, 2011.

* **Sec. 53.** Except as provided in sec. 52 of this Act, this Act takes effect July 1, 2011.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

April 4, 2011

TO: Leg. Legal

FROM: Cindy Smith

RE: CS for SB86 Protection of Vulnerable Adults/Minors

Please prepare a CS for SB86, as follows:

Import the House Judiciary version of the companion bill (27-GH1722\D).

To that version of the bill make the following changes:

1. In Section 13.26.207, add language that requires that if an attorney has not already been appointed for the respondent, the court shall appoint an attorney to represent the person at the hearing.

2. In the exparte order section (Sec. 13.26.209 and any others as needed), add language to allow the person to be protected or the respondent to seek modification or termination of any ex-parte protective order on three days' notice.

3. Add language in 13.26.185 (not currently in the bill) to clarify notice provisions do not apply to the exparte orders created under this bill.

4. Add definitions from revisor's bill (see attached memo).

5. Add a delayed effective date for new reporting provisions in 47.24.010(a) and (e) to go into effect September 1, 2011.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Changes were adopted that were made in the House Judiciary Committee:

1. Page 1: Inserted two new sections to address language changes originally in the revisor's bill.

2. Page 4, line 21, Sec. 10. AS 13.26.207(a): Following "**attorney**" inserted "**and other persons as ordered by the court**"

3. Page 5, line 4; Sec. 10. AS 13.26.209(a): Following "**person.**" inserted "**A petition filed on behalf of a protected person by another person must be accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm.**"

4. Page 4, lines 22-23; Sec. 10. AS 13.26.209(a): Replaced "**The court shall cause a copy of the protective order to be served on the respondent.**" with "**The court shall cause a copy of the protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person.**"

5. Page 6, line 1; Sec. 10. AS 13.26.209(d): Following "**the court shall provide to**" inserted "**the protected person and**"

6. Page 6, line 16; Sec. 10. AS 13.26.209(g): Replaced "**A third party shall comply with a protective order issued under this section.**" with "**A third party that has received actual or legal notice of a protective order issued under this section shall comply with the order.**"

7. Page 6, line 21; Sec. 10. AS 13.26.209(g): Replaced "**person**" with **"party**"

8. Page 6, line 23; Sec. 10. AS 13.26.209(g): Following "**order.**" inserted "**As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most**

recently known place of residence or business of the third party or registering with the Department of Public Safety."

9. Page 7, line 8; Sec. 11. AS 13.26.325: The reference number 13.26.325 was already used, so Legal Services changed it to 13.26.324.

10. Page 7, line 8; Sec. 11. AS 13.26.325(2): Replaced "**theft and related offenses**" with "**offenses against property**"

11. Page 7, line 23; Sec. 12. AS 18.65.530(a)(2): Replaced "**and**" with "**or**"

12. Page 7, line 9, Section 15: this is a new section

13. Page 10, lines 23; Sec. 20. AS 47.24.010(e): Reinserted "**at the earliest opportunity**"

14. Page 13, line 15-18-Page 12, line 2; Sec. 29. AS 47.24.015(h): Redrafted section (h)

15. Page 13, lines 22; Sec. 29. AS 47.24.015(j): Deleted (j) and re-lettered the following subsections accordingly.

16. Page 14, line 6; Sec. 29. AS 47.24.015(m): Replaced "**the following:**" and (1) – (4) with "**any person**"

17. Page 14, line 11; Sec. 30. AS 47.24.016(a): Following "**guardian,**" inserted "**conservator,**"

18. Page 14, lines 20-21; Sec. 30. AS 47.24.016(a)(1): Replaced "**divorce or dissolution**" with "**divorce, [OR] dissolution, or legal separation**"

19. Page 15, line 18; Sec. 33. AS 47.24.017(a): Replaced "**guardian or**" with "**guardian, conservator, [OR]**"

20. Page 16, lines 1-2; Sec. 34. AS 47.24.019(c): Replaced "**a family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**any person**"

21. Page 16, lines 4-5 31; Sec. 34. AS 47.24.019(c): Replaced "**a family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**person**"

22. Page 16, lines 20 and 23; Sec. 35. AS 47.24.050(b): Following "**guardian,**" inserted "**conservator,**"

23. Page 17, line 14; Sec. 37. AS 47.24.900(2)(A): Following "**intentional,**" inserted "**knowing,**"

24. Page 17, line 31; Sec. 39. AS 47.24.900(4): Replaced "**means**" with "**includes**"

25. Page 18, line 10; Sec. 40. AS 47.24.900(7)(B): Following "**deception,**" inserted "**fraud,**"

26. Page 18, line 11-12; Sec. 40. AS 47.24.900(7)(B): Following "**duty;**" inserted "**in this paragraph, "fraud" has the meaning given in AS 13.26.324(1) and (2);**"

27. Page 18, line 14; Sec. 41. AS 47.24.900(9): Following "**intentional,**" inserted "**knowing,**"

28. Page 18, line 20; Sec. 41. AS 47.24.900(9): Replaced "**means**" with "**includes**"

29. Page 18-19, lines 22 on; Sec. 42. AS 47.24.900(11): Legal Services reformatted this section, there was no substantive change.

30. Page 18, line 27; Sec. 42. AS 47.24.900(11)(B)(D): Replaced "**(iv) freezing an account at a financial institution;**" with "**(D) staying financial transactions;**"

31. Page 19, line16; Sec. 43. AS 47.24.900(15)(D): Following "**loss**" inserted "**, waste, or dissipation**"

32. Page 19, lines 29-31; Sec. 45. AS 47.24.900(18): Redrafted (18) description.

33. Page 20, lines 26-28; Sec. 45. AS 47.24.900(21): Replaced " **"undue influence" means a person of trust or confidence uses the person's role, relationship or authority to exploit**" with " **"undue influence" means the use by a person who stands in a position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit**"

34. Page 20, line 28; Sec. 45. AS 47.24.900(21): Deleted "**deceptively**"

35. Page 21, lines 5-8; Sec. 46. Direct Court Rule Amendments 12(h): Replaced language with "**In deciding whether to grant the motion, the court shall consider the victim's circumstances and the effect that delay would have on the victim, particularly a victim of advanced age or extreme youth. The court shall place its findings on the record.**"

36. Page 21, lines 5-7; Sec. 47. Direct Court Rule Amendments 45(a): Deleted all bold language. And replaced with: following "**cases.**" inserted "**The court shall consider the circumstances of the victim, particularly a victim of advanced age or extreme youth, in setting the trial date.**"

37. Page 21 and 22, Secs. 48 and 49: Conforming amendments to adjust for earlier deletions and amendments.

38. A-Page 21, line 18; Sec. 47, Effective Date: Replaced "**immediately under AS 01.10.070(c).**" with "**July 1, 2011.**"

Additional Senate Judiciary Committee Changes incorporated in this SJUD CSSB86 (JUD) GS1722\M:

1. In Section 10, at lines 21-23, added language that requires that if a respondent is unrepresented, the court shall appoint an attorney to represent the person at the hearing.

2. In Section 10 at lines 6–13, added language to allow the person to be protected or the respondent to seek modification or termination of any ex-parte protective order on three days' notice.

3. Add language in 13.26.185 (see lines 6-9, page 4) to clarify notice provisions do not apply to the ex parte orders created under this bill.

4. Add language changes from the revisor's bill (see sections 1 and 2).

5. Add a delayed effective date for new reporting provisions in 47.24.010(a) and (e) to go into effect September 1, 2011 (see line 27 at page 22).

6. Delete reference added by House Judiciary at 13.26.209 (g) (see page 6) "registering with the Department of Public Safety" as a method of serving notice, as that database is not publicly available (the Department of Health and Social Services has requested this change in the House Finance Committee).

STATE OF ALASKA
DEPT. OF HEALTH AND SOCIAL SERVICES
OFFICE OF THE COMMISSIONER

SEAN PARNELL, GOVERNOR

P.O. BOX 110601
JUNEAU, ALASKA 99811-0601
PHONE: (907) 465-3030
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CSHB 150 (JUD) – EXPLANATION OF CHANGES

The following is a description of the changes that have occurred between the originally introduced bill and the version before the House Finance Committee. A total of 40 amendments were made to the original version of the bill. The page references below refer to the current bill version.

1. The first two sections of the bill are newly added.

2. Page 4, line 18; Sec. 9. 13.26.207(a) - Following "**attorney**" inserted "**and other persons as ordered by the court**".

3. Page 4, line 31-page 5, line 3; Sec. 9. AS 13.26.209(a) - Following "**person.**" inserted "**A petition filed on behalf of a protected person by another person must be accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm.**"

4. Page 5, lines 10-12; Sec. 9. AS 13.26.209(a) -Replaced "**The court shall cause a copy of the protective order to be served on the respondent.**" with "**The court shall cause a copy of the protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person.**"

5. Page 5, lines 28-29; Sec. 9. AS 13.26.209(d) - Following "**notice to**" inserted "**the protected person and**" .

6. Page 6, lines 5-6; Sec. 9. AS 13.26.209(f) - Replaced "**A third party shall comply with a protective order issued under this section.**" with "**A third party that has received actual or legal notice of a protective order issued under this section shall comply with the order.**"

7. Page 6, line 10; Sec. 9. AS 13.26.209(f) - Replaced "**person**" with "**party**".

8. Page 6, lines 12-15; Sec. 9. AS 13.26.209(f) - Following "**order.**" inserted "**As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most recently known place of residence or business of the third party or registering with the Department of Public Safety.**"

9. Page 6, line 29; Sec. 10. AS 13.26.324 - The reference number 13.26.325 was already used, so Legal Services changed it to 13.26.324.

10. Page 7, line 1; Sec. 10. AS 13.26.324(2) - Replaced "**theft and related offenses**" with "**offenses against property**".

11. Page 7, line 13; Sec. 11. AS 18.65.530(a)(2) - Replaced "**and**" with "**or**" .

12. Page 7, line 30-Page 8, line 10; Sec. 14. AS 44.21.415(g) - this is a new section

13. Page 10, lines 13-14; Sec. 19. AS 47.24.010(e) - Reinserted "**at the earliest opportunity**".

14. Page 13, lines 5-8; Sec.28. AS 47.24.015(h) - this is a totally redrafted subsection.

15. Page 13, line 13; Sec. 28. AS 47.24.015(j) - Deleted (j) in the original bill and re-lettered the following subsections accordingly.

16. Page 13, line 28; Sec. 28. AS 47.24.015(m) - Replaced "**the following:**" and (1) – (4) with "**any person**"

17. Page 14, line 2; Sec. 29. AS 47.24.015(a) - Following "**guardian,**" inserted "**conservator,**" .

18. Page 14, line 11-12; Sec. 29. AS 47.24.015(a)(1) - Replaced "**divorce or dissolution**" with "**divorce, [OR] dissolution, or legal separation**" .

19. Page 15, line 9; Sec. 32. AS 47.24.017(a) - Replaced "**guardian or**" with "**guardian, conservator, [OR]**".

20. Page 15, line 23; Sec. 33. AS 47.24.019(c) - Replaced "**a family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**any person.**

21. Page 15, line 25; Sec. 33. AS 47.24.019(c) - Replaced "**a family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**person**".

22. Page 16, line 10; Sec. 34. AS 47.24.050(b) - Following "**guardian,**" inserted "**conservator,**"
.

23. Page 16, line 13; Sec. 34. AS 47.24.050(b) - Following "**guardian,**" inserted "**conservator,**"
.

24. Page 17, line 4; Sec. 36. AS 47.24.900(2)(A) - Following "**intentional,**" inserted "**knowing,**" .

25. Page 17, line 21; Sec. 38. AS 47.24.900(4) - Replaced "**means**" with "**includes**".

26. Page 17, line 31; Sec. 39. AS 47.24.900(7)(B) - Following "**deception,**" inserted "**fraud,**" .

27. Page 18, lines 1-2; Sec. 39. AS 47.24.900(7) (B) - Following "**duty;**" inserted "**in this paragraph, "fraud" has the meaning given in AS 13.26.324(1) and (2);**"

28. Page 18, line 4; Sec. 40. AS 47.24.900(9) - Following "**intentional,**" inserted "**knowing,**".

29. Page 18, line 10; Sec. 40. AS 47.24.900(9) - Replaced "**means**" with "**includes**".

30. Page 18, lines 12-26; Sec. 41. AS 47.24.900(11) - Legal Services reformatted this section, but there was no substantial change.

31. Page 18, line 19; Sec. 41. AS 47.24.900(11)(B)(D) - Replaced "**(iv) freezing an account at a financial institution;**" with "**(D) staying financial transactions;**"

32. Page 19, line 6; Sec. 42. AS 47.24.900(15)(D) - Following "**loss**" inserted "**, waste, or dissipation**" .

33. Page 19, lines 19-21; Sec. 44. AS 47.24.900(18) – Redrafted the definition of "fiduciary duty".

34. Page 20, lines 16-18; Sec. 44. AS 47.24.900(21) - Replaced " **"undue influence" means a person of trust or confidence uses the person's role, relationship or authority to exploit**" with " **"undue influence" means the use by a person who stands in a position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit**" .

35. Page 20, line 18; Sec. 44. AS 47.24.900(21) - Deleted "**deceptively**".

36. Page 20, lines 26-29; Sec. 45. Direct Court Rule Amendments 12(h) - Replaced all bold language with "**In deciding whether to grant the motion, the court shall consider the victim's circumstances and the effect that delay would have on the victim, particularly a victim of advanced age or extreme youth. The court shall place its findings on the record.**"

37. Page 21, lines 8-9; Sec. 46. Direct Court Rule Amendments 45(a) - Deleted all bold language.

38. Page 21, line 8; Sec. 46. Direct Court Rule Amendments 45(a) - Following "**cases.**" inserted "**The court shall consider the circumstances of the victim, particularly a victim of advanced age or extreme youth, in setting the trial date.**"

39. Page 21, lines 23-25; Sec. 47. Indirect Court Rule Amendments (c) - Due to the deletion of Page 12, lines 6-14; Sec. 25. AS 47.24.015(j) in original bill, deleted (c). Due to Page 4, lines 3-4; Sec. 7. AS 13.26.207(a) in original bill, inserted new (c).

40. Page 22, line 17; Sec. 51. Effective Date - Replaced "**immediately under AS 01.10.070(c).**" with "**July 1, 2011.**"

#1 moved

27G-1
(3/30/2011)
(11:55 AM)

AMENDMENT (SB86)

OFFERED IN THE HOUSE FINANCE COMMITTEE

BY _____

TO: CSHB 150(JUD)

Page ~~4~~ 5, line ~~28~~ 1:

Delete "**Ex parte protective**"

Insert "**Protective**"

Page 5, line ~~22~~ 26, following "issued,", through line ~~23~~ 27: 28

~~Delete all material~~.

Insert "unless dissolved earlier by the court, ~~or on the~~"

Page 6, line ~~7~~ 6:

Delete "ex parte"

16-28

am / amendment stated "conceptual"

SENATE BILL NO. 86

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 2/9/11
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; amending Rule 12(h), Alaska Rules of Criminal Procedure; amending Rule 45(a), Alaska Rules of Criminal Procedure; amending Rule 65, Alaska Rules of Civil Procedure; amending Rule 17, Alaska Rules of Probate Procedure; amending Rule 9, Alaska Rules of Administration; and providing for an effective date."

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

*** Section 1.** AS 11.56.740(a) is amended to read: new protective order provisions

(a) A person commits the crime of violating a protective order if the person is subject to a protective order

(1) issued or filed under AS 18.66 and containing a provision listed in AS 18.66.100(c)(1) - (7) and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order; [OR]

(2) issued under AS 18.65.850, 18.65.855, or 18.65.860 and knowingly commits or attempts to commit an act that violates or would violate a provision listed in AS 18.65.850(c)(1) - (3)**; or**

(3) issued under AS 13.26.180 or 13.26.209 and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order.

*** Sec. 2.** AS 11.56.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under **AS 13.26.180, 13.26.209;** AS 18.65.850 - 18.65.870**;** or AS 18.66.100 - 18.66.180.

*** Sec. 3.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

*** Sec. 4.** AS 13.26.165 is amended to read:

Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or make other protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by the status of being a minor, or that funds are needed for the minor's support and education and that protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency,

physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, **fraud,** confinement, detention by a foreign power, or disappearance; and

(B) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.

*** Sec. 5.** AS 13.26.180(a) is amended to read:

(a) The person to be protected, **a person's attorney or other legal representative,** any person who is interested in the estate, affairs, or welfare of the person to be protected, including a parent, guardian, [OR] custodian, **or caregiver, the Department of Health and Social Services,** or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

*** Sec. 6.** AS 13.26.180 is amended by adding a new subsection to read:

(c) The petition may include a request for temporary conservatorship as provided in AS 13.26.207 if it appears that the respondent's property will be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

*** Sec. 7.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.207. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or persons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The

request shall state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney. The court shall conduct a hearing within 72 hours after the filing.

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a full or partial conservator or upon the dismissal of the petition for conservatorship.

Sec. 13.26.209. Ex parte protective orders; forms for petitions and orders; fees. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against another person. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition, and that because of the fraud there has been, or is an immediate threat of, a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent. The court shall cause a copy of the protective order to be served on the respondent.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the

petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, at the end of a six-month extension if granted by the court under (d) of this section, or upon the appointment of a temporary or permanent conservator or dismissal of the petition for the ex parte order.

(d) Upon application filed with the court before the expiration of the 20-day ex parte protective order, the court shall schedule a hearing on whether to extend the protective order for up to six months. The court shall provide at least 10 days' notice to the respondent of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may extend the ex parte protective order for up to six months.

(e) A protective order issued under this section is in addition to any other civil or criminal remedy.

(f) A third party shall comply with a protective order issued under this section. A third party who does not comply with a protective order granted under this section may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third person who does not comply with a protective order granted under this section may also be criminally liable under AS 11.56.740 for violating a protective order.

(g) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long-term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions, protective orders, and instructions for their use by a person seeking a protective order under this section. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order under this section

may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(h) Filing fees may not be charged for a petition under this section.

*** Sec. 8.** AS 13.26 is amended by adding a new section to read:

Sec. 13.26.325. Definitions. In AS 13.26.165 - AS 13.26.325, unless the context requires otherwise, "fraud" means

(1) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(2) theft and related offenses under AS 11.46.100 - 11.46.740; or

(3) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited.

*** Sec. 9.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating protective order in violation of **AS 11.56.740(a)(1) and (2)** [AS 11.56.740];

(3) violated a condition of release imposed under AS 12.30.016(e) or (f) or 12.30.027.

*** Sec. 10.** AS 18.65.540(a) is amended to read:

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under **AS 13.26.180, 13.26.209;** AS 18.65.850 - 18.65.870**;** or AS 18.66.100 - 18.66.180. The registry must include for each protective order the names of the petitioner and respondent, their dates of birth, and the conditions and duration of the order. The registry shall retain a record of the protective order after it has expired.

*** Sec. 11.** AS 18.65.540(b) is amended to read:

(b) A peace officer receiving a protective order from a court under

AS 13.26.180, 13.26.209; AS 18.65.850 - 18.65.855**; or** [,] AS 18.66.100 - 18.66.180, a modified order issued under AS 18.65.860 or AS 18.66.120, or an order dismissing a protective order, must take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.

*** Sec. 12.** AS 47.24.010(a) is amended to read:

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service for vulnerable adults **in the department office that handles adult protective services**:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator **or employee** of a nursing home, residential care or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide**;**

(16) an educator or administrative staff member of a public or private educational institution.

*** Sec. 13.** AS 47.24.010(b) is amended to read:

(b) A report made under this section may include the name and address of the reporting person and must include

(1) the name and **contact information** [ADDRESS] of the vulnerable adult;

(2) information relating to the nature and extent of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

*** Sec. 14.** AS 47.24.010(c) is amended to read:

(c) The department**,** or its designees**,** shall report to the Department of Law any person required by (a) of this section to report who fails to comply with this section. A person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

*** Sec. 15.** AS 47.24.010(d) is amended to read:

(d) This section does not prohibit a person listed in (a) of this section, or any other person, from reporting cases of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's attention **in their nonoccupational capacity, nor does it prohibit any other person from reporting a harm under this section**.

*** Sec. 16.** AS 47.24.010(e) is amended to read:

(e) If a person making a report under this section believes that immediate

action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person **shall** [MAY] make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and ~~shall~~ [, AT THE EARLIEST OPPORTUNITY,] notify the department **within 24 hours of receiving the report of harm**. A person may not bring an action for damages against a police officer, village public safety officer, the state, or a political subdivision of the state based on a decision under this subsection to take or not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct; damages awarded in the action may include only direct economic compensatory damages for personal injury.

*** Sec. 17.** AS 47.24.010(f) is amended to read:

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been **unduly influenced, abandoned,** exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

*** Sec. 18.** AS 47.24.010 is amended by adding new subsections to read:

(i) A person required to report under this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(j) A person who recklessly makes a false report under this section is civilly liable for actual damages suffered by the person who is the subject of the report.

*** Sec. 19.** AS 47.24.013(a) is amended to read:

(a) If a report received under AS 47.24.010 regards the **undue influence,**

abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

*** Sec. 20.** AS 47.24.013(b) is amended to read:

(b) The department shall investigate a report received under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is less than 60 years of age that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

*** Sec. 21.** AS 47.24.013(c) is amended to read:

(c) Upon receipt of a report under (a) or (b) of this section, the long term care ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the **office of the** department **that handles adult protective services** within 60 days after the receipt of the report.

*** Sec. 22.** AS 47.24.013(d) is amended to read:

(d) If the long term care ombudsman receives directly a report regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the report, to the central information and referral service of the **office of the** department **that handles adult protective services**. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

*** Sec. 23.** AS 47.24.015(a) is amended to read:

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

*** Sec. 24.** AS 47.24.015(c) is amended to read:

(c) The department, or its designee, shall immediately terminate an investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department, or its designee, may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective services and the request is made personally by the vulnerable adult and the vulnerable adult is not competent to make the request on the adult's own behalf, or the request is made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department, or its designee, may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department, or its designee, may refer the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in AS 13.26.325.

*** Sec. 25.** AS 47.24.015 is amended by adding new subsections to read:

(h) An individual or entity shall cooperate with an investigation initiated by the department under this section. The individual or entity shall permit representatives of the department to obtain and review any financial or health care records related to a

vulnerable adult and to interview staff that have had contact with, treated, or observed the vulnerable adult.

(i) A person may not interfere with the department in the performance of its investigation under this section, including interfering with the department's access to the vulnerable adult.

(j) If an entity or other person denies the department access to a vulnerable adult, a vulnerable adult's residence, or the health care or financial records of a vulnerable adult, the department may file a petition with the court for an ex parte order granting access if the department has not filed a petition for guardianship or conservatorship of the vulnerable adult. The court may grant the ex parte order if the petition shows that the department has received a report of harm under AS 47.24.010 and that the order is necessary for access to the adult or that the health care or financial records are relevant to the department's investigation under AS 47.24.015. Notice of the order shall be given to the party denying access as directed by the court.

(k) Notwithstanding any other provision of law, the office of the department that handles adult protective services shall have access to any information compiled or retained by other divisions within the department, regardless of the nature of the information or whether the information is considered confidential, in order to assist in administering the provisions of this chapter.

(*l*) The department may audiotape or videotape an interview of a vulnerable adult if the adult has the capacity to consent and gives that consent. The department shall document the consent in its investigative file. The department may not audiotape or videotape an interview of a vulnerable adult who lacks the capacity to consent.

(m) The department shall provide for the training of investigators who investigate reports of harm under this section. Training must include instruction in federal, state, and local laws and policies of the department related to vulnerable adults, and in investigative techniques. The department may require other appropriate training.

(n) In this section, "financial records" includes records related to the vulnerable adult maintained by the following:

(1) the vulnerable adult or fiduciary for the vulnerable adult;

(2) a financial institution;

(3) a caregiver of a vulnerable adult;

(4) a member of the vulnerable adult's family.

* **Sec. 26.** AS 47.24.016(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's consent to receive the services because the vulnerable adult is unable to consent or lacks decision making capacity, and has no guardian**, attorney-in-fact, trustee, or surrogate for health care decisions under AS 13.52.030** [OR ATTORNEY IN FACT] to serve as the vulnerable adult's surrogate decision maker, the department may select from the following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services:

(1) the vulnerable adult's spouse, unless

[(A) THE VULNERABLE ADULT AND THE SPOUSE HAVE SEPARATE DOMICILES; OR

(B)] the vulnerable adult or the spouse have initiated divorce or dissolution proceedings;

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

* **Sec. 27.** AS 47.24.016(b) is amended to read:

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision

making capacity; or

(2) there are allegations that individual is a perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult.

* **Sec. 28.** AS 47.24.016(d) is amended to read:

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this section **or AS 13.52.030** if the department determines that the vulnerable adult has become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable adult who has become able to consent or has regained decision making capacity only if the vulnerable adult consents.

* **Sec. 29.** AS 47.24.017(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and either the vulnerable adult, the vulnerable adult's guardian or **attorney-in-fact, trustee** [ATTORNEY IN FACT], [OR] a surrogate decision maker selected under AS 47.24.016**, or a surrogate for health care decisions under AS 13.52.030** consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that the protective services for the vulnerable adult are provided by the department**,** or its designee**,** within 10 working days after the department received the report under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the department or the department's designee make it impossible to provide the protective services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

* **Sec. 30.** AS 47.24.019(c) is amended to read:

(c) If a vulnerable adult who has consented to receive protective services, or on whose behalf consent to receive protective services has been given, is prevented by a **family member,** caregiver, guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker from receiving those services, the department may petition the superior court for an injunction restraining the **family member,** caregiver,

guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker from interfering with the provision of protective services to the vulnerable adult.

*** Sec. 31.** AS 47.24.050 is amended to read:

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, **under** [IN ACCORDANCE WITH] this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate agencies or individuals inside and outside the state, in connection with investigations or judicial proceedings involving the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the vulnerable adult who is the subject of the report or the vulnerable adult's guardian, attorney-in-fact, **trustee,** or surrogate decision maker consents in writing. The department may not disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, attorney-in-fact, **trustee,** or surrogate decision maker if that person is an alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. The department shall, upon request, disclose the number of verified reports of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

*** Sec. 32.** AS 47.24.130 is amended to read:

Sec. 47.24.130. Treatment through spiritual means. This chapter may not be construed to mean that a person is **unduly influenced,** abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone **under** [IN

ACCORDANCE WITH] the tenets and practices of a church or religious denomination of which the person is a member or adherent, **if** [PROVIDED THAT] the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious organization" in AS 05.15.690.

*** Sec. 33.** AS 47.24.900(2) is amended to read:

(2) "abuse" means

(A) the [WILFUL,] intentional, or reckless nonaccidental, and nontherapeutic infliction of physical pain, injury, [OR] mental **or emotional** distress**, or fear, including coercion and intimidation**; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

*** Sec. 34.** AS 47.24.900(3) is amended to read:

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed **some or all** responsibility for the care of a vulnerable adult voluntarily, by contract, **as an employee of a business that provides care in an adult's home,** or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

*** Sec. 35.** AS 47.24.900(4) is amended to read:

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision; **in this paragraph, "informed decision" means a decision made by the vulnerable adult that is free from undue influence;**

*** Sec. 36.** AS 47.24.900(7) is amended to read:

(7) "exploitation~~"~~

(A) means unjust or improper use of another person or another person's resources for one's own profit or advantage**, with or without the person's consent**;

(B) includes acts by a person who stands in a position of

trust or confidence with a vulnerable adult, or who knows or should know that the vulnerable adult lacks the capacity to consent, that involve obtaining profit or advantage through undue influence, deception, intimidation, or breach of fiduciary duty;

*** Sec. 37.** AS 47.24.900(9) is amended to read:

(9) "neglect" means the intentional**, or reckless** failure by a caregiver to provide essential care or services **or access to essential care or services, or to carry out a prescribed treatment plan,** necessary to maintain the physical and mental health of the vulnerable adult **when the vulnerable adult is unable to provide or obtain the services on the vulnerable adult's own; in this paragraph, "essential care or services" means food, clothing, shelter, medical care, and supervision**;

*** Sec. 38.** AS 47.24.900(11) is amended to read:

(11) "protective services"

(A) means services that are intended to prevent or alleviate harm resulting from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; ["PROTECTIVE SERVICES"]

(B) includes

(i) protective placement;

(ii) applying for or obtaining public benefits;

(iii) obtaining health care services and supplies;

(iv) freezing an account at a financial institution;

(v) petitioning for an ex parte protective order under AS 13.26.209;

(vi) assisting with personal hygiene;

(vii) obtaining food and clothing;

(viii) protection from physical and emotional abuse;

(ix) obtaining representative payee services; and

(x) coordinating protective services;

*** Sec. 39.** AS 47.24.900(15) is amended to read:

(15) "unable to consent" means refusal to, or inability to, accept

services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of **loss of income or assets, eviction, physical or mental harm to self or others, or** death [OR IRREPARABLE HARM TO SELF OR OTHERS];

*** Sec. 40.** AS 47.24.900(16) is amended to read:

(16) "vulnerable adult" means a person 18 years of age or older who, because of **incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance** [PHYSICAL OR MENTAL IMPAIRMENT], is unable to meet the person's own needs or to seek help without assistance.

*** Sec. 41.** AS 47.24.900 is amended by adding new paragraphs to read:

(17) "deception" means creating, reinforcing, or failing to correct a false impression or preventing another person from acquiring information that would affect the person's judgment regarding a transaction;

(18) "fiduciary duty" means the duty of a guardian, conservator, trustee, representative payee, or holder of a power of attorney of a vulnerable adult to act for the benefit of the vulnerable adult;

(19) "financial institution" means an institution subject to state or federal banking or financial regulations, including

(A) a broker-dealer;

(B) a commercial bank;

(C) a savings bank;

(D) a credit union;

(E) a premium finance company;

(F) a small loan company;

(G) a bank holding company;

(H) a financial holding company;

(I) a trust company;

(J) a savings and loan association;

(K) a deferred deposit advance licensee;

(L) an investment bank;

(M) an insurance company subject to regulation by AS 21;

(N) a licensee subject to regulation by AS 21; and

(O) an investment adviser;

(20) "person who stands in a position of trust or confidence" means a person who

(A) is a relative by blood or marriage;

(B) is a joint tenant or tenant in common;

(C) has a legal or fiduciary relationship; or

(D) is a person who has been entrusted with or has assumed responsibility for the use or management of the vulnerable adult's assets or income;

Should this include primary caregivers?

(21) "undue influence" means a person of trust and confidence uses the person's role, relationship, or authority to exploit the trust, dependency, or fear of a vulnerable adult deceptively to gain control over the decision making of the vulnerable adult, including decision making related to finances, property, residence, and health care;

*** Sec. 42.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENTS. (a) Rule 12(h), Alaska Rules of Criminal Procedure, is amended to read:

(h) **Continuance of Trial.** A motion for continuance of a trial date will be granted by the court only for cause shown. **In determining cause, the court shall consider whether the victim is vulnerable due to advanced age, and the effect the delay will have on that person; the court shall place its findings on the record.**

The presiding judge of a judicial district may require that a visiting or pro tem judge obtain approval from the presiding judge before granting any continuance of trial.

(b) Rule 45(a), Alaska rules of Criminal Procedure, is amended to read:

(a) The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings**,** [AND] the trial of defendants in custody**, and the trial of cases in which the victim is vulnerable due to advanced age,** shall be given preference over other criminal cases. Trial dates in criminal cases in the superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

*** Sec. 43.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.26.209(a) - (g), enacted by sec. 7 of this Act, has the effect of amending Rule 17, Alaska Rules of Probate Procedure, relating to conservatorships and protective proceedings, by allowing ex parte orders to be issued related to protecting the assets of a person otherwise subject to AS 13.26.165 from financial exploitation.

(b) AS 13.26.209(h), enacted by sec. 7 of this Act, has the effect of amending Rule 9, Alaska Rules of Administration, by requiring that filing fees may not be charged for a petition for an ex parte protective order under AS 13.26.209(a), enacted by sec. 7 of this Act.

(c) AS 47.24.015(j), enacted by sec. 25 of this Act, has the effect of amending Rule 65, Alaska Rules of Civil Procedure, relating to injunctions, by allowing ex parte orders to be issued related to injunctive relief for certain access to persons or records in order to investigate a report of harm under AS 47.24.010 for a vulnerable adult.

*** Sec. 44.** The uncodified law of the state of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 1, 2, 3, and 42 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 45.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 13.26.209(a) - (g), enacted by sec. 7 of this Act, takes effect only if sec. 43(a) of this Act receives the two-thirds vote of each house required

by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 13.26.209(h), enacted by sec. 7 of this Act, takes effect only if sec. 43(b) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(c) AS 47.24.015(j), enacted by sec. 25 of this Act, takes effect only if sec. 43(c) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 46.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the catchline of

(1) AS 47.24.010 from "Reports of harm" to "Persons required to report; reports of harm;"

(2) AS 47.24.013 from "Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities" to "Reports of undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities."

*** Sec. 47.** This Act takes effect immediately under AS 01.10.070(c).

SECTIONAL ANALYSIS

SB 86, "An Act relating to the protection of property of persons under disability and minor; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; amending Rule 12(h), Alaska Rules of Criminal Procedure; amending Rule 45(a), Alaska Rules of Criminal Procedure; amending Rule 65, Alaska Rules of Civil Procedure; amending Rule 17, Alaska Rules of Probate Procedure; amending Rule 9, Alaska Rules of Administration; and providing for an effective date."

Section 1 makes the knowing violation or attempted violation of a financial protective order (introduced in section 7 of this legislation to protect vulnerable adults and elders) a crime.

Section 2 amends the definition of protective orders found in AS 11.56.740 to include financial protective orders being introduced with this legislation to protect the financial security of vulnerable adults and elders.

Section 3 makes the fact that a defendant knowingly directed criminal conduct at a person 65 years of age or older an aggravating factor at sentencing.

Section 4 adds being a victim of fraud as a basis for appointing a conservator by amending AS 13.26.165(2)(a). This will allow courts to protect individuals who may not be suffering from any mental deficiency but are victims of financial abuse.

Section 5 adds attorneys, caregivers, and the Department of Health and Social Services as entities who may petition for conservatorship for an individual. These additions widen the net of

individuals who can help protect victims to include entities who likely have first-hand knowledge of the abuse.

Section 6 creates a procedure for requesting the appointment of a temporary conservator in a conservatorship petition by adding a new subsection to AS 13.26.180. Currently, there is no statutory basis for appointing a conservator on a temporary basis. Under this section, a temporary conservator may be requested if it appears that the respondent's property will be wasted or dissipated during the pendency of the conservatorship proceedings.

Section 7 adds two new statutes. The first provides the statutory basis for temporary conservators to protect the victims of fraud and financial abuse and to ensure that funds are obtained to meet the needs of the respondent and respondent's dependents. Procedurally, this proposed statute parallels the existing statute AS 13.26.140 which deals with temporary guardians. The second statute creates a process for obtaining financial protective orders to immediately stop suspected financial abuse of the elderly and vulnerable adults. An initial 20-day protective order may be obtained ex parte, without notice to the respondent. The protective order may be extended for up to six months, after notice and a hearing at which the respondent may be heard.

Section 8 adds a definition of fraud (which is already found in the statutes creating the Office of Elder Fraud and Assistance) to conservatorship statutes.

Section 9 excludes the crime of violating a financial protective order from the crimes subject to warrantless arrest.

Sections 10 and 11 add financial protective order to the registry of protective orders maintained by the Department of Public Safety and updated by law enforcement officers.

Section 12 adds the concept of undue influence to the list of reportable harms to a vulnerable adult. Employees of nursing homes, residential care or health care facilities and the staff of educational institutions are added to the list of mandated reporters.

Section 13 clarifies information that may be contained in a report of harm to include contact information regarding the vulnerable adult and information regarding any undue influence.

Section 14 adds "undue influence" to the list of reportable harms.

Section 15 adds "undue influence" to the list of reportable harms and clarifies that a mandatory reporter is not prohibited from reporting harm in their non-occupational capacity. It also clarifies that no person is prohibited from making a report of harm.

Section 16 requires mandated reporters to contact law enforcement in situations where they believe the vulnerable adult is at imminent risk of serious physical harm and it is not possible to contact the department. "Undue influence" is added as one of the reportable harms. Law enforcement is required to contact the department within 24 hours of receiving the report.

Section 17 adds "undue influence" and "abandonment" to the list of harms that can be reported regarding a vulnerable adult residing in an out-of-home care facility.

Section 18 adds two new subsections. The first subsection states that a mandatory reporter is not relieved of the obligation to report to the department by reporting to their supervisor or another employee. The second subsection makes an individual who willfully or recklessly makes a false report liable for civil damages.

Section 19 adds" undue influence" to the list of reportable harms regarding vulnerable adults 60 years of age or older residing in an out-of-home care facility. The department is required to transfer these reports to the long term care ombudsman.

Section 20 adds "undue influence" to the list of reportable harms the department is required to investigate regarding individuals under 60 years of age living in out-of-home facilities.

Section 21 clarifies that the department and the long term care ombudsman must provide the results of their actions or investigations to the office of the department that handles adult protective services.

Section 22 adds "undue influence" to the list of reportable harms included in the reports sent to the department by the long term care ombudsman. It is clarified that these reports are sent to the office of the department that handles adult protective services.

Section 23 adds "undue influence" to the list of reportable harms the department is required to investigate.

Section 24 adds "undue influence" to the list of reported harm that applies to an alleged perpetrator.

Section 25 adds seven new subsections. These subsections

- Require individuals and entities to provide the department access to health and financial records of a vulnerable adult as part of its investigation;
- Prohibit anyone from interfering in an investigation;
- Allow the department to file an ex parte order for access to records if necessary if no petition for guardianship or conservatorship has been filed;
- Allow adult protective services access to any departmental information necessary to assist in the case;
- Allow the department to audio or video tape an interview of a vulnerable adult with their consent;
- Require the department to provide training to investigators and
- Define "financial records".

Section 26 adds an attorney-in-fact, a surrogate for health care decisions and a trustee as individuals who may serve as a surrogate decision maker for the purpose of consenting to the receipt of protective services for a vulnerable adult. It also deletes the requirement that in order for a spouse to be a surrogate decision maker, the spouse and vulnerable adult may not be living

in separate domiciles.

Section 27 adds an allegation of "undue influence" to the allegations that would disqualify an individual from being selected as a surrogate decision maker.

Section 28 requires the department to discontinue protective services if a vulnerable adult who has regained the cognitive ability to make their own decisions refuses services. Services may be continued only if the adult consents.

Section 29 adds attorney-in-fact, surrogate for health care decisions and a trustee as individuals who may consent to the provision of protective services to a vulnerable adult and adds undue influence to the list of potential reports of harm.

Section 30 adds family members, trustees and conservators to the list of individuals who may be restrained by a court injunction from interfering with the provision of protective services to a vulnerable adult.

Section 31 adds "undue influence" to the types of harm contained in confidential reports and adds trustee to the list of individuals who may consent to release a confidential report.

Section 32 clarifies that a person is not considered to be unduly influenced if they choose to consent to treatment by spiritual means only.

Section 33 redefines "abuse" to include the infliction of emotional distress or fear, including coercion and intimidation.

Section 34 redefines "caregiver" to include someone who is an employee of a business that provides care in an adult's home.

Section 35 defines "informed decision" as a decision made free from undue influence.

Section 36 redefines "exploitation" to include acts by a person in a position of trust with a vulnerable adult who obtains profit or advantage through undue influence, deception, intimidation or breach of fiduciary duty.

Section 37 redefines neglect to include the willful or reckless failure by a caregiver to provide access to services or to carry out a treatment plan necessary to the health of a recipient. "Essential care or services are defined as food, clothing, shelter, medical care and supervision.

Section 38 expands the definition of protective services to include services that obtain basic health care needs, financial assistance services, and protection from abuse, obtaining basic food, shelter and clothing, among others. Undue influence is added to the list of types of harm.

Section 39 amends the definition of "unable to consent" by adding the concept of "undue influence" and that the inability to consent includes a person's inability to perceive a loss of income or assets, eviction, and physical or mental harm.

Section 40 amends the definition of a vulnerable adult by more clearly defining what constitutes a physical or mental impairment.

Section 41 adds definitions for the following terms:

- Deception
- Fiduciary duty
- Financial institution
- Person who stands in a position of trust or confidence
- Undue influence

Section 42 amends the uncodified law. Under Alaska Rules of Criminal Procedure, the court, when considering a motion for continuance of a trial date, will be required to consider whether the victim is vulnerable due to advanced age and what effect the delay would have on the victim. In addition, trials in which the victim is vulnerable due to advanced age will be added to cases that will be given preference for scheduling.

Section 43 amends Indirect Court Rules in three areas. First, amending Rule 17, Alaska Rules of Probate Procedure, to allow ex parte orders to be issued to protect persons from financial exploitation. Second, amending Rule 9, Alaska Rules of Administration, by not requiring filing fees for an ex parte protective order. Third, amending Rule 65, Alaska Rules of Civil Procedure, by allowing ex parte orders to be issued to access records related to the investigation of a report of harm.

Section 44 amends the uncodified law by indicating that Section 1, 2, 3, and 42 apply to offenses committed on or after the effective date of the Act.

Section 45 amends the uncodified law regarding the number of votes required to enact Sections 7 and 25 of this bill.

Section 46 amends the uncodified law by adding revisor's instructions.

Section 47 provides for an effective date.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: **SB 86**
(S) Publish Date: 2/9/11

Identifier (file name): 1722-DHSS-SDSA-02-08-2011
Title: Adult Protective Services
Sponsor: Rules by Request of the Governor
Requester: Governor

Dept. Affected: Health and Social Services
Appropriation: Senior and Disabilities Services
Allocation: Senior and Disabilities Services Admin
OMB Component Number: 2663

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost: 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Duane Mayes, Director — Phone 269-2083
Division: Senior and Disabilities Services — Date/Time 2/8/11 1:00 PM
Approved by: Alison Elgee, Assistant Commissioner — Date 2/8/2011
DHSS Finance & Management Services

(Revised 1/27/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA **BILL NO.** SB 86
2011 LEGISLATIVE SESSION

Analysis:

This legislation provides additional protections to seniors and other vulnerable adults. The proposed changes in the vulnerable adult statutes add the concept of undue influence as a potential harm. This bill provides additional legal and investigatory tools to the department in order to respond to reports of harm and establish protective services to individuals who need them. There is no fiscal impact anticipated.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: **SB 86**
(S) Publish Date: 2/9/11

Identifier (file name) LL1722-DOA-OPA-2-8-11
Dept. Affected: DOA
Title: An Act relating to the protection of property of persons under disability . . . .
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
Sponsor: Rules by Request
Requester: Governor
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Rachel Levitt, Acting Director
Phone: 907-269-3504
Division: Office of Public Advocacy
Date/Time: 2/8/2011, 10:30 am.
Approved by: John Cramer, Deputy Commissioner
Date: 2/8/2011
Department of Administration

(Revised 1/27/2011 OMB)

FISCAL NOTE #2

STATE OF ALASKA **BILL NO.** SB 86
2011 LEGISLATIVE SESSION

Analysis

This bill will enhance the legal protections against fraud and financial abuse available to elders and vulnerable adults. The Office of Public Advocacy wishes to highlight two portions of the bill that will provide new emergency procedures to protect vulnerable adults who may be served by the agency's Elder Fraud or Probate practices.

In section 7, this bill creates two emergency judicial proceedings to stop and prevent financial exploitation of vulnerable adults. The first is a process for the appointment of temporary conservators. This will allow the court to impose emergency conservatorships to assist vulnerable individuals with their financial affairs to prevent imminent waste or fraudulent dissipation of their estates.

The second creates a process for the imposition of financial protective orders. Individual victims and other concerned parties will be able to apply for the protections of 20 day ex parte protective orders to stop or prevent financial exploitation. The initial ex parte order may be extended for up to six months after notice and a hearing at which the respondent may be heard.

The bill also provides for expanded reporting of financial abuse and enhanced penalties in criminal cases when there is an elderly victim. Additionally, the bill criminalizes violations of the financial protective orders.

The agency does not believe that this will result in significant cost increases to the agency.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: SB 86
(S) Publish Date: 2/9/11

Identifier (file name): 1722-LAW-CIV-02-03-11
Title: An Act relating to property of persons; crime of violating protective order, aggravating factors at sentencing; protection; amending...
Sponsor: Rules
Requester: Request of the Governor

Dept. Affected: Law
Appropriation: Civil
Allocation: Human Services
OMB Component Number: 2962

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager
Division: Administrative Services
Approved by: John J. Burns, Attorney General
Department of Law

Phone: 465-5427
Date/Time: 2/3/11 4:15 PM
Date: 2/3/2011

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 86

Analysis

This bill adds a 20-day and six-month ex parte process for financial fraud, and a temporary conservatorship process when the need exists during the pendency of a regular petition for conservatorship. The bill also expands the list of mandatory reporters of harm to a vulnerable adult, adds the harm of undue influence, and expands the investigative powers of the Office of Adult Protective Services, including the authority to seek an ex parte order for access to a vulnerable adult or records regarding an adult. The bill also amends the crime of violating a protective order by adding the crime of violating a protective order issued to protect a vulnerable adult under AS 13.26.180 or 13.26.209. Violating a protective order is a class A misdemeanor.

There is no anticipated fiscal impact to Department of Law.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: **SB 86**
(S) Publish Date: 2/9/11

Identifier (file name): LL1722-DPS-DSS-02-08-11
Title: "An Act relating to the protection of property...Vulnerable Adults"
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: Public Safety
Appropriation: Statewide Support
Allocation: Records & Identification
OMB Component Number: 1190

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel	16.0						
Services	32.0						
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**48.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	48.0						
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**48.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: David Schade
Phone: 907-269-0202
Division: Statewide Services
Date/Time: 2/8/11 12:00 AM
Approved by: Joseph Masters
Commissioner
Date: 2/8/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE #4

STATE OF ALASKA **BILL NO.** SB 86
2011 LEGISLATIVE SESSION

Analysis

This bill treats AS 13 protective orders in the same manner as stalking, sexual assault, and domestic violence protective orders under AS 18 and will require the development of new protective order forms with substantial collaboration between DPS, the Alaska Court System, DHSS, the Office of Public Advocacy, and the Department of Revenue. The findings and orders for these new AS 13 protective orders will differ from the AS 18 orders in the existing protection order registry, which address violence and domestic situations.

Once the forms are developed, APSIN programming changes will be required to accommodate new fields and types of information required. A separate version of the APSIN central registry must be developed to accommodate these new orders. Note: these new orders do not meet the necessary criteria for entry into the national registry of protection, stalking and sexual assault orders (NCIC) because they do not necessarily involve physical violence.

Programming and analysis for APSIN changes will require 280 hours of contractual work @ $100/hr to evaluate and make recommendations regarding statewide implementation of new processes and procedures for entering and maintaining these new orders into existing APSIN . Additionally, 40 hours of contractual work (at $100/hr) will be required to integrate these new orders in new APSIN.

Statewide training will then be required on the new forms and APSIN procedures. Statewide training costs are included.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number 5
Bill Version **SB 86**
(S) Publish Date 2/9/11

Identifier (file name) LL1722-DPS-DET-02-08-11
Title "An Act relating to the protection of property of persons under disability and minors;...vulnerable adults..."
Sponsor Rules Committee
Requester Governor

Dept. Affected Public Safety
Appropriation Alaska State Troopers
Allocation AST Detachments
OMB Component Number 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable; initial version.

Prepared by Lt Rodney Dial
Division Alaska State Troopers
Approved by Joseph Masters
Commissioner

Phone 907-247-4480
Date/Time 2/8/11 1:30PM
Date 2/8/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE #5

STATE OF ALASKA **BILL NO.** SB 86
2011 LEGISLATIVE SESSION

Analysis

This bill makes several changes to AS 13.26 and AS 47.24 concerning vulnerable adults. It adds fraud as a reason that might necessitate a conservatorship, and as a basis for seeking an ex parte financial protective order. This bill also adds the concept of undue influence to the list of reportable harms and adds certain individuals as mandatory reporters of harm to vulnerable adults. Finally, this bill expands the investigatory authority of the Adult Protective Services Office.

Passage of this legislation will have no fiscal impact on the division.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 6
Bill Version: SB 86
(S) Publish Date: 2/9/11

Identifier (file name): JU2010201722-DOC-OC-02-08-11
Title: "An Act relating to the protection of property of persons under
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 684

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost **

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the first version of the bill.

Prepared by: Leslie Houston, Director
Division: Dept. of Corrections - Administrative Services
Approved by: Joseph D. Schmidt, Commissioner
Dept. of Corrections

Phone: 465-3339
Date/Time: 2/08/11 1:00 p.m.
Date: 2/8/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE #6

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 86

Analysis

This legislation creates a new crime of violating protective orders and adds aggravating factors at sentencing for a crime against a victim 65 years or older. Violation of this law could result in incarceration. However, the Department of Corrections is unable to determine the number of future offenders and therefore is unable to determine the fiscal impact of the passage of this legislation.

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

SEAN PARNELL, GOVERNOR

P.O. BOX 110601
JUNEAU, ALASKA 99811-0601
PHONE: (907) 465-3030
FAX: (907) 465-3068

February 10, 2011

The Honorable Hollis French, Chair
Senate Judiciary Committee
State Capitol Room 417
Juneau, AK 99801

Dear Senator French:

The Department of Health and Social Services respectfully requests a hearing in the Senate Judiciary Committee on Senate Bill 86, "An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; amending Rule 12(h), Alaska Rules of Criminal Procedure; amending Rule 45(a), Alaska Rules of Criminal Procedure; amending Rule 65, Alaska Rules of Civil Procedure; amending Rule 17, Alaska Rules of Probate Procedure; amending Rule 9, Alaska Rules of Administration; and providing for an effective date."

The bill strengthens the laws against financial exploitation and enhances the ability to obtain emergency protection orders for seniors. It improves the ability of those investigating reports of harm to obtain vital information in a timely manner, and will lead to better services and safety for vulnerable adults who are abused, neglected or exploited and unable to protect their own interests.

A copy of Governor Parnell's transmittal letter providing additional information on the bill and the associated fiscal note should be on file with the committee.

Your favorable consideration of this request will be appreciated.

Sincerely,

William J. Streur

William J. Streur
Commissioner

cc: Heather Brakes, Legislative Director, Office of the Governor

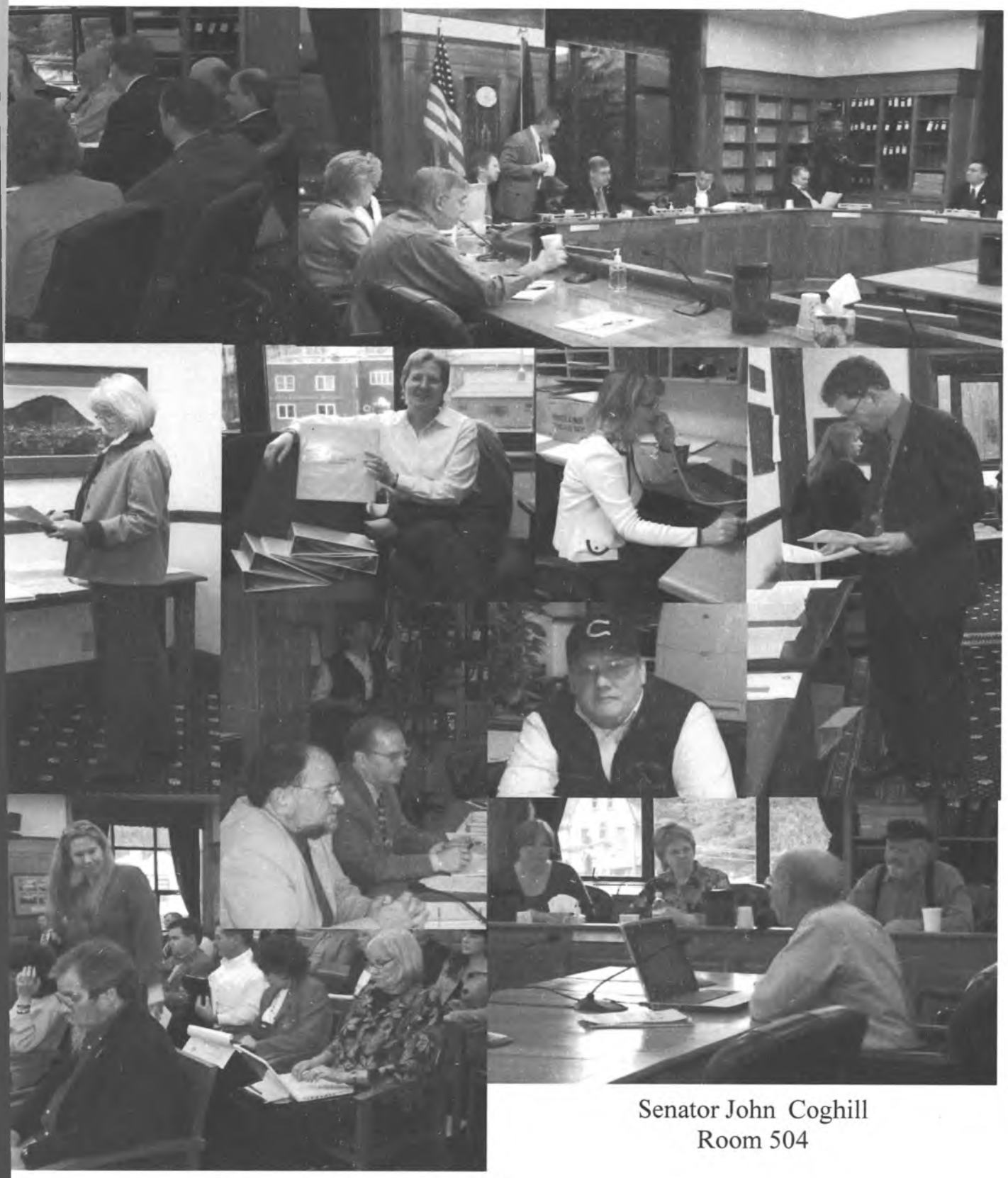
SB

89

<TARGET><BILL>SB 89</BILL><SUBJECT>SB
89</SUBJECT><COMM>SJUD27</COMM></TARGET>

First Session 27th Alaska Legislature

SB 89 Ethics Amendments



Senator John Coghill
Room 504

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CS FOR SENATE BILL NO. 89(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered: 4/1/11
Referred: Judiciary

Sponsor(s): SENATOR COGHILL

A BILL

FOR AN ACT ENTITLED

"An Act clarifying that a legislator or legislative employee is allowed to accept certain compassionate gifts; allowing legislators and legislative employees who are representing persons in an administrative hearing to contact hearing officers and attempt to influence the outcome of the hearing if they are professionals licensed in the state, and allowing legislators and legislative employees who are not professionals licensed in the state to contact hearing officers for the purpose of influencing the outcome of the hearing in certain instances; requiring the Select Committee on Legislative Ethics to maintain a public record of certain ethics disclosures made by legislators and legislative employees; prohibiting a public member of the Select Committee on Legislative Ethics from disclosing confidential information without authorization; clarifying the ethics disclosure requirements for tickets to or gifts in connection with charity events; amending disclosure deadlines under the Legislative Ethics Act; relating to requests to

refrain from disclosure under the Legislative Ethics Act; relating to the applicability of certain provisions of the Legislative Ethics Act to certain legislative employees, volunteers, and interns; establishing a seat for an alternate public member on the Select Committee on Legislative Ethics; clarifying the requirements related to participation by alternate public members and alternate legislative members in the proceedings of the committee; amending the definition of 'legislative employee' in the Legislative Ethics Act; and repealing a procedure for appointment of alternate legislative members."

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

*** Section 1.** AS 24.60.030(a) is amended to read:

(a) A legislator or legislative employee may not

(1) solicit, agree to accept, or accept a benefit other than official compensation for the performance of public duties; this paragraph may not be construed to prohibit lawful solicitation for and acceptance of campaign contributions, solicitation or acceptance of contributions for a charity event, as defined in AS 24.60.080(a)(2)(B), or the acceptance of a **gift** [LAWFUL GRATUITY] under **AS 24.60.075 or 24.60.080** [AS 24.60.080];

(2) use public funds, facilities, equipment, services, or another government asset or resource for a nonlegislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of [EITHER] the legislator, legislative employee, or another person; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) the legislative council, notwithstanding AS 24.05.190, from designating a public facility for use by legislators and legislative employees for health or fitness purposes; when the council designates a facility to be used by legislators and legislative employees for health or fitness purposes, it shall adopt guidelines governing access to and use of the facility; the guidelines may establish times in which use of the facility is limited to specific groups;

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others;

(E) a legislator from use of legislative employees to prepare and send out seasonal greeting cards;

(F) a legislator from using state resources to transport computers or other office equipment owned by the legislator but primarily used for a state function;

(G) use by a legislator of photographs of that legislator;

(H) reasonable use of the Internet by a legislator or a legislative employee except if the use is for election campaign purposes;

(I) a legislator or legislative employee from soliciting, accepting, or receiving a gift on behalf of a recognized, nonpolitical charitable organization in a state facility;

(J) a legislator from sending any communication in the form of a newsletter to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(K) full participation in a charity event approved in advance by the Alaska Legislative Council;

(3) knowingly seek, accept, use, allocate, grant, or award public funds for a purpose other than that approved by law, or make a false statement in connection with a claim, request, or application for compensation, reimbursement, or travel allowances from public funds;

(4) require a legislative employee to perform services for the private benefit of the legislator or employee at any time, or allow a legislative employee to perform services for the private benefit of a legislator or employee on government time; it is not a violation of this paragraph if the services were performed in an unusual or infrequent situation and the person's services were reasonably necessary to permit the legislator or legislative employee to perform official duties;

(5) use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for the purpose of political fund raising or campaigning; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) storing or maintaining, consistent with (b) of this section, election campaign records in a legislator's office;

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under

this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others; or

(E) use by a legislator of photographs of that legislator.

* **Sec. 2.** AS 24.60.030(i) is amended to read:

(i) **A** [EXCEPT FOR SUPPLYING INFORMATION REQUESTED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, OR WHEN RESPONDING TO CONTACTS INITIATED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, A] legislator or legislative employee may not attempt to influence the outcome of an administrative hearing by directly or indirectly contacting or attempting to contact the hearing officer assigned to the hearing or the individual, board, or commission with authority to make the final decision in the **matter** [CASE] unless [THE]

(1) **the legislator or legislative employee is representing another person for compensation subject to AS 24.60.100 and as a professional who is licensed in the state;**

(2) the contact is made in the presence of all parties to the hearing or the parties' representatives **while the legislator or legislative employee is acting as a party or a witness in the matter or responding to a question asked of the legislator or legislative employee by the hearing officer, individual, board, or commission** and the contact is made a part of the record; ~~or~~

(3) the contact is inadvertent and ex parte and the [(2)] fact and substance of the contact **are** [IS] promptly disclosed ~~by~~ the legislator or legislative employee to all parties to the hearing and [THE CONTACT IS] made a part of the record.

* **Sec. 3.** AS 24.60.050(c) is amended to read:

(c) A legislator or legislative employee who participates in a program or receives a loan that is not exempt from disclosure under (a) of this section shall file with the committee by the date required under AS 24.60.105 a disclosure stating the amounts of the loans outstanding or benefits received during the preceding calendar

year from nonqualifying programs. If the committee requests additional information necessary to determine the propriety of participating in the program or receiving the loan, it shall be promptly provided. The committee shall **maintain the disclosure as a public record and promptly forward the information contained in the disclosure** [PROMPTLY COMPILE A LIST OF THE STATEMENTS INDICATING THE LOANS AND PROGRAMS AND AMOUNTS AND SEND IT] to the presiding officer of each house who shall have it published in the supplemental journals on or before the next regularly scheduled publication of ethics disclosures. If a legislator or legislative employee asks the committee to keep any part of the disclosure confidential and a quorum of the committee determines by vote of a majority of committee members that making the entire disclosure public would cause an unjustifiable invasion of personal privacy, the committee may elect to publish only the fact that a person has participated in the program and the amount of benefit that the unnamed person received. The committee shall maintain the disclosure of the name of the person as confidential and may only use the disclosure in a proceeding under AS 24.60.170. If the disclosure becomes part of the record of a proceeding under AS 24.60.170, the disclosure may be made public as provided in that section.

* **Sec. 4.** AS 24.60.060(a) is amended to read:

(a) A legislator**,** [OR] legislative employee**, or public member of the committee** may not knowingly make an unauthorized disclosure of information that is made confidential by law and that the person acquired in the course of official duties. A person who violates this section is subject to a proceeding under AS 24.60.170 and may be subject to prosecution under AS 11.56.860 or another law.

* **Sec. 5.** AS 24.60.080(a) is amended to read:

(a) Except as otherwise provided in this section, a legislator or legislative employee may not

(1) solicit, accept, or receive, directly or indirectly, a gift worth $250 or more, whether in the form of money, services, a loan, travel, entertainment, hospitality, promise, or other form, or gifts from the same person worth less than $250 that in a calendar year aggregate to $250 or more in value;

(2) solicit, accept, or receive a gift with any monetary value from a

lobbyist, an immediate family member of a lobbyist, or a person acting on behalf of a lobbyist, except

(A) food or beverage for immediate consumption;

(B) a contribution to a charity event, [FROM ANY PERSON AT ANY TIME, AND] tickets **to** [FOR] a charity event**, and** [AT ANY TIME, EXCEPT THAT TICKETS TO OR] gifts **to which the tickets may entitle the bearer; however, under this subparagraph a legislator or legislative employee may not solicit, accept, or receive from the same lobbyist, an immediate family member of the lobbyist, or a person acting on behalf of the lobbyist, tickets to a charity event, gifts to which the tickets may entitle the bearer, or both, that in a calendar year aggregate to $250 or more in value** [RECEIVED AT A CHARITY EVENT UNDER THIS SUBPARAGRAPH ARE SUBJECT TO THE CALENDAR YEAR LIMIT ON THE VALUE OF GIFTS RECEIVED BY A LEGISLATOR OR LEGISLATIVE EMPLOYEE IN (1) OF THIS SUBSECTION]; in this subparagraph, "charity event" means an event the proceeds of which go to a charitable organization with tax-free status under 26 U.S.C. 501(c)(3) and that the Alaska Legislative Council has approved in advance; the tickets may entitle the bearer to admission to the event, to entertainment, to food or beverages, or to other gifts or services **in connection with** [INVOLVED IN] the charity event; as long as is generally available to all participants?

(C) a gift that is unconnected with the recipient's legislative status and is from a member of the legislator's or legislative employee's immediate family;

(D) a gift delivered on the premises of a state facility and accepted on behalf of a recognized nonpolitical charitable organization; or

(E) a compassionate gift under AS 24.60.075.

* **Sec. 6.** AS 24.60.080(c) is amended to read:

(c) Notwithstanding (a)(1) of this section, it is not a violation of this section for a person who is a legislator or legislative employee to accept

(1) hospitality, other than hospitality described in (4) of this

subsection,

(A) with incidental transportation at the residence of a person; however, a vacation home located outside the state is not considered a residence for the purposes of this subparagraph; or

(B) at a social event or meal;

(2) discounts that are available

(A) generally to the public or to a large class of persons to which the person belongs; or

(B) when on official state business, but only if receipt of the discount benefits the state;

(3) food or foodstuffs indigenous to the state that are shared generally as a cultural or social norm;

(4) travel and hospitality primarily for the purpose of obtaining information on matters of legislative concern;

(5) gifts from the immediate family of the person; in this paragraph, "immediate family" means

(A) the spouse of the person;

(B) the person's domestic partner;

(C) a child, including a stepchild and an adoptive child, of the person or of the person's domestic partner;

(D) a parent, sibling, grandparent, aunt, or uncle of the person;

(E) a parent, sibling, grandparent, aunt, or uncle of the person's spouse or the person's domestic partner; and

(F) a stepparent, stepsister, stepbrother, step-grandparent, step-aunt, or step-uncle of the person, the person's spouse, or the person's domestic partner;

(6) gifts that are not connected with the recipient's legislative status;

(7) a discount for all or part of a legislative session, including time immediately preceding or following the session, or other gift to welcome a legislator or legislative employee who is employed on the personal staff of a legislator or by a standing or special committee to the capital city or in recognition of the beginning of a

legislative session if the gift or discount is available generally to all legislators and the personal staff of legislators and staff of standing and special committees; this paragraph does not apply to legislative employees who are employed by the Legislative Affairs Agency, the office of the chief clerk, the office of the senate secretary, the legislative budget and audit committee, the office of victims' rights, or the office of the ombudsman;

(8) a gift of legal services in a matter of legislative concern and a gift of other services related to the provision of legal services in a matter of legislative concern;

(9) a gift of transportation from a legislator or a legislative employee to a legislator or a legislative employee if the transportation takes place in the state on or in an aircraft, boat, motor vehicle, or other means of transport owned or under the control of the donor; this paragraph does not apply to travel described in (4) of this subsection or travel for political campaign purposes; or

(10) a contribution to a charity event**, a ticket to a charity event, or a gift in connection with a charity event** [FROM ANY PERSON AT ANY TIME]; in this paragraph, "charity event" has the meaning given in (a)(2)(B) of this section.

* **Sec. 7.** AS 24.60.080(d) is amended to read:

(d) A legislator or legislative employee who accepts a gift under (c)(4) **of this section that has a value of $250 or more or a ticket to a charity event or gift in connection with a charity event under (c)(10)** of this section that has a value of $250 or more shall disclose to the committee, within **60** [30] days after receipt of the gift, the name and occupation of the donor and the approximate value of the gift. A legislator or legislative employee who accepts a gift under (c)(8) of this section that the recipient expects will have a value of $250 or more in the calendar year shall disclose to the committee, within 30 days after receipt of the gift, the name and occupation of the donor, a general description of the matter of legislative concern with respect to which the gift is made, and the approximate value of the gift. The committee shall maintain a public record of the disclosures it receives relating to gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section and shall forward the disclosures to the appropriate house for inclusion in the journal. The committee shall forward to the

Alaska Public Offices Commission copies of the disclosures concerning gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section that it receives from legislators and legislative directors. A legislator or legislative employee who accepts a gift under (c)(6) of this section that has a value of $250 or more shall, within 30 days after receiving the gift, disclose to the committee the name and occupation of the donor and a description of the gift. The committee shall maintain disclosures relating to gifts under (c)(6) of this section as confidential records and may only use, or permit a committee employee or contractor to use, a disclosure under (c)(6) of this section in the investigation of a possible violation of this section or in a proceeding under AS 24.60.170. If the disclosure under (c)(6) of this section becomes part of the record of a proceeding under AS 24.60.170, the confidentiality provisions of that section apply to the disclosure.

*** Sec. 8.** AS 24.60.105 is amended by adding a new subsection to read: Ethics disclosure

(d) A person may submit a written request to refrain from making a disclosure that is required by this chapter if making the disclosure would violate state or federal law, including the United States Constitution and the Constitution of the State of Alaska, or a rule, adopted formally by a trade or profession, that state or federal law requires the person to follow. The committee shall approve or deny the request, or require further justification from the person making the request. At the request of the committee or a person authorized to act on behalf of the committee, a person who seeks to refrain from making a disclosure under this subsection shall provide the committee with justification in writing, and the committee may review the written justification to determine whether it is sufficient.

*** Sec. 9.** AS 24.60.112 is amended to read:

Sec. 24.60.112. Applicability to volunteers and educational trainees. A **person who works more than 30 days as a** legislative volunteer or educational trainee shall be considered to be a legislative employee for purposes of compliance with AS 24.60.030 - 24.60.039, 24.60.060, 24.60.080, 24.60.085, **24.60.155,** 24.60.158 - 24.60.170, 24.60.176, and 24.60.178. If a person believes that a legislative volunteer or educational trainee has violated the provisions of one of those sections, the person may file a complaint under AS 24.60.170. The provisions of AS 24.60.170

apply to the proceeding.

*** Sec. 10.** AS 24.60.130(h) is amended to read:

(h) A member is disqualified from participating as a member in any proceeding before the committee involving a complaint against the member or an employee whose work is supervised by the member or an advisory opinion requested by the member. If a regular legislative member of the committee is disqualified under this subsection from participating in a proceeding involving a complaint, the member's alternate shall be designated under **AS 24.60.131** [(n) OF THIS SECTION].

*** Sec. 11.** AS 24.60.130(o) is amended to read:

(o) Notwithstanding (h) [AND (n)] of this section **and AS 24.60.131**, if a complaint before the committee alleges a violation of this chapter by a group of legislators that includes a legislative member of the committee and that member's alternate, the member and alternate member are disqualified from serving on the committee with regard to the complaint. If the two disqualified members of the committee are members of the majority organizational caucus, the presiding officer of the house in which the two disqualified members serve shall appoint from that house an alternate to serve with regard to the complaint. If one of the two disqualified legislative members of the committee is not a member of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate to serve with regard to the complaint. If a complaint alleges a violation of this chapter that includes all legislative members of the majority organizational caucus of one house, the presiding officer of that house shall appoint from the other house an alternate to serve with regard to the complaint. If the complaint alleges a violation of this chapter that includes all legislative members of a minority organizational caucus of one house, the leader of that minority organizational caucus shall appoint from the other house an alternate to serve with regard to the complaint.

*** Sec. 12.** AS 24.60 is amended by adding a new section to read:

Sec. 24.60.131. Alternate members. (a) When appointing members of the legislature to serve on the committee under AS 24.60.130(b), the speaker of the house of representatives or the president of the senate, as appropriate, shall appoint an

alternate member for each regular member. The alternate member shall have the same qualifications for appointment to the committee as the regular member for whom the alternate stands as alternate. The alternate member's appointment is subject to confirmation as required for appointment of the regular member.

(b) When selecting public members to serve on the committee under AS 24.60.130(b), the Chief Justice of the Alaska Supreme Court shall select one alternate public member. The alternate public member's selection is subject to ratification as required for selection of the regular public members.

(c) Subject to (d) of this section, if a regular member of the committee or a subcommittee is unable to participate in a proceeding other than a proceeding under AS 24.60.170, the chair of the committee or subcommittee that holds the proceeding shall designate the regular member's alternate to participate in place of the regular member at the proceeding, and the alternate shall participate for the duration of that proceeding unless the alternate is unable to participate.

(d) If a regular member of the committee or a subcommittee or an alternate member appointed under (a) or (b) of this section participates at the commencement of a proceeding under AS 24.60.170, the member shall participate for the duration of the proceeding unless the member is disqualified under AS 24.60.130(h) or is unable to continue participating. If the participating member is disqualified under AS 24.60.130(h) or becomes unable to participate, the chair of the committee or subcommittee that holds the proceeding shall designate the member's alternate to participate in place of the member for the duration of the proceeding unless the alternate is disqualified or is unable to participate.

(e) If both a regular legislative member and that member's alternate appointed under (a) of this section are not available to participate at the commencement of a proceeding under AS 24.60.170 because they are disqualified under AS 24.60.130(h), the presiding officer of the house in which the two members serve shall appoint from that house an alternate and designate that alternate to participate in the proceeding; however, if the two members who are not available to participate are not members of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate and

designate that alternate to participate in the proceeding.

(f) A designation under (c) - (e) of this section is a confidential proceeding under AS 24.60.170(*l*) unless the member who is replaced as a result of the designation waives confidentiality.

*** Sec. 13.** AS 24.60.155 is amended to read:

Sec. 24.60.155. Legislative ethics course. A person **who serves for more than 30 days as a legislative volunteer or educational trainee or** who is a legislator, legislative employee, or public member of the committee shall complete a legislative ethics course administered by the committee under AS 24.60.150(a)(4) within 10 days of the first day of the first regular session of each legislature. However, a person **who begins a period of service of more than 30 days as a volunteer or trainee or** who first takes office or begins employment after the 10th day of the first regular session of a legislature shall complete the course required by this section within 30 days after the person's first day of service and, thereafter, as required by this section. The committee may grant a person additional time to complete the course required by this section.

*** Sec. 14.** AS 24.60.990(a)(11) is amended to read:

(11) "legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who **are hourly employees who** perform functions that are incidental to legislative functions, [INCLUDING SECURITY, MESSENGER, MAINTENANCE, AND PRINT SHOP EMPLOYEES,] and other employees designated by the committee;

*** Sec. 15.** AS 24.60.130(n) is repealed.

2

ALASKA STATE SENATE

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Session

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State Capitol
Room 204

SENATOR JOHN COGHILL

Senate Bill 89 Legislative Ethics Amendments

This bill is a product of discussions by the Select Committee of Legislative Ethics over the past couple of years.

The bill draws a bright line for legislators and legislative staff to follow for assisting constituents with problems they encounter with state agencies. Once an issue has been appealed to an administrative hearing officer, the legislator or legislative staffer may no longer make contacts with the agency, unless that person is a licensed professional to represent a person in such a proceeding and is being compensated for that representation. There are also provisions for inadvertent ex parte contact.

It also extends the reporting deadline for reporting gifts of travel and from charitable events from 30 to 60 days and expands legislative ethics training to legislative volunteers or educational trainees who are on the job for more than 30 days.

The bill adds public members of the ethics committee to the statute prohibiting members from knowingly making unauthorized disclosure of confidential information. This bill clarifies that disclosures prohibited by state and federal confidentiality laws are not required by the Select Committee on Legislative Ethics

The committee recommended a statute that would allow an alternate member of the ethics committee who participates in the beginning of a proceeding to participate in the entire proceeding. The Chief Justice of the Alaska Supreme Court would also be required to appoint one alternate for the public members.

SB 89 clarifies that a gift of a ticket from a lobbyist to a charity event sanctioned by Legislative Council cannot exceed $250.00. It also further describes a contribution to a charity event as a ticket to a charity event or a gift in connection with the charity event.

The Ethics Committee has been grappling with the issue of partisan activities while on state travel since 1993. This bill was a first attempt at setting standards by which a legislator or a legislative staffed can participate in a partisan activity or a campaign fundraiser when traveling on legislative business. The State Affairs Committee deleted the language that set a standard but agreed further discussion needs to take place in Senate Judiciary on the issue.

3

ALASKA STATE LEGISLATURE

SENATOR JOHN COGHILL

State Capitol, Room 504, Juneau, AK 99801-1182 (907) 465-3719
301 Santa Claus Lane, Ste. 3B, North Pole, AK 99705 (907) 488-5725

MEMORANDUM

SB 89 Legislative Ethics Bill Summary of Version T

Sec. 1. **Replaces** "lawful gratuity" with **"gift"** to make section of law consistent with the usage of "gift".

Sec. 2. **Bright line** for legislators or staff being actively involved in constituent problems with the State. Once the issue is assigned to an administrative hearing the involvement of the legislative office ceases. Exceptions are included for lawyers and provision for inadvertent exparte contact.

Sec. 3. **Eliminates requirement** of committee to **compile lists of financial disclosure** statements. They must only maintain public records and forward them to chief clerk and senate secretary.

Sec. 4. **Adds public members** to statute **prohibiting disclosure of confidential information.**

Sec. 5. Clarifies that a **ticket to a charity event from a lobbyist**, or gifts received because of the ticket from a lobbyist **cannot exceed $250**.

Sec. 6. **Further describes "a contribution to a charity event"** by clarifying it could be a ticket to a charity event or a gift in connection with a charity event.

Sec. 7. **Extend the reporting period** for gifts of travel for the purpose of obtaining information on legislative matters and disclosure of gifts from charitable events **from 30 days to 60 days.**

Sec. 8. **Allows for exceptions from disclosure** under the legislative ethics law **if** it would be in **violation of the state or federal constitution or state or federal law. The State Affairs Committee added language that includes exceptions for disclosures for a rule, adopted formally by a trade or profession, that state or federal law requires the person to follow.** A written request with justification must be submitted to the committee.

Sec. 9. Requires anyone who is a **volunteer or educational trainee for more than 30 days to take the ethics training. The 30 day guideline was added in State Affairs.**

Sec. 10. Adds cite for new section on Alternate Members to statute describing the committee, its structure and its duties.

Sec. 11. Adds cite for new section on Alternate Members to statute describing the committee, its structure and its duties.

Sec. 12. This is a **new section describing the process for appointing alternates.** The section adds a **new provision that provides for the Chief Justice to appoint an alternate public member.**

Sec. 13. **Adds legislative volunteers and educational trainees** who are in that capacity for **more than 30 days** to the statute requiring the Legislative ethics course. **The 30 day guideline was added in State Affairs.**

Sec. 14. **Redefines** legislative employee.

Sec. 15. **Repeals** old statute describing the process for appointing alternates.

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FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number 1
Bill Version **CSSB 89(STA)**
(S) Publish Date 4/1/11

Identifier (file name) CSSB89-LEG-COU-3-30-2011
Title "Legislative Ethics Act"
Sponsor Senator Coghill
Requester Senate State Affairs Committee

Dept. Affected Legislature
Appropriation Legislative Council
Allocation Select Committee on Ethics
OMB Component Number 2321

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Initial Version

Prepared by Shane Miller, Finance Manager
Division Legislative Affairs Agency
Approved by Pamela Varni, Executive Director
Legislative Affairs Agency

Phone 465-6626
Date/Time 3/30/11 3:59 PM
Date 3/30/2011

(Revised 12/29/2010 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSSB 89(STA)

Analysis

This fiscal note has zero impact on the Legislative Affairs Agency.

27th Legislature(2011-2011)

Bill History/Action for 27 Legislature

BILL: SB 89 **SHORT TITLE:** LEGISLATIVE ETHICS ACT

BILL VERSION:

CURRENT STATUS: (S) JUD **STATUS DATE:** 04/01/11

SPONSOR(s): SENATOR(S) COGHILL

HEARING: (S) JUD Apr 11 1:30 PM BELTZ 105 (TSBldg) TELECONFERENCE

TITLE: "An Act clarifying that a legislator or legislative employee is allowed to accept certain compassionate gifts; allowing legislators and legislative employees to use legislative mailing lists for campaign purposes and nonlegislative purposes; allowing legislators and legislative employees who are representing persons in an administrative hearing to contact hearing officers and attempt to influence the outcome of the hearing if they are professionals licensed in the state, and allowing legislators and legislative employees who are not professionals licensed in the state to contact hearing officers for the purpose of influencing the outcome of the hearing in certain instances; allowing legislators and legislative employees, in certain circumstances, to participate in partisan political activity while on state travel; prohibiting a public member of the Select Committee on Legislative Ethics from disclosing confidential information without authorization; clarifying the ethics disclosure requirements for tickets to or gifts in connection with charity events; amending disclosure deadlines under the Legislative Ethics Act; relating to requests to refrain from disclosure under the Legislative Ethics Act; and establishing a seat for an alternate public member on the Select Committee on Legislative Ethics and clarifying the requirements related to participation by alternate members in the proceedings of the committee."

Bill Number: Search Bills Next Bill

Full Text Fiscal Notes Minutes and Audio Documents

Display Bill History

Jrn-Date	Jrn-Page	Action
02/16/11	0277	(S) READ THE FIRST TIME - REFERRALS
02/16/11	0277	(S) STA, JUD
03/15/11	Text	(S) STA AT 9:00 AM BUTROVICH 205
03/15/11	Text	(S) Heard & Held
03/15/11	Text	(S) MINUTE(STA)
03/31/11	Text	(S) STA AT 9:00 AM BUTROVICH 205
03/31/11	Text	(S) Moved CSSB 89(STA) Out of Committee
03/31/11	Text	(S) MINUTE(STA)
04/01/11	0667	(S) STA RPT CS 1DP 4NR NEW TITLE
04/01/11	0667	(S) DP: MEYER
04/01/11	0667	(S) NR: WIELECHOWSKI, KOOKESH, PASKVAN, GIESSEL
04/01/11	0667	(S) FN1: ZERO(LEG)
04/01/11	0667	(S) REFERRED TO JUDICIARY
04/11/11	Text	(S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

Similar Subject Match or Exact Subject Match
ADMINISTRATIVE PROCEDURE
ATTORNEYS
BOARDS & COMMISSIONS
DISCLOSURE
ETHICS
HEARINGS
LEGISLATORS
LOBBYISTS

Bill Number: Display Bill

Next Bill

Return to Basis Main Menu (27 Legislature)

5

Rynnieva Moss

From: Carolyn Kuckertz
Sent: Tuesday, April 05, 2011 8:30 PM
To: pressreleasedistribution
Subject: Senate Bipartisan Working Group- Press Availability Transcript 4-5-2011

Good Evening Everyone!

Just in case you missed it, here is a transcript of today's Senate Bipartisan Working Group Press Availability.

If you'd rather watch or listen to it: http://gavelalaska.org/media/?media_id=SMJP110405A

In attendance: Sen. Stevens, Sen. Meyer, Sen. Ellis, Sen. Stedman, Sen. Hoffman, Sen. Paskvan

Question: Stefan Milkowski with the Alaska Budget Report, a question about Senator John Coghill's ethics legislation. One thing that was in his original bill was a provision that would have allowed a certain amount of partisan activity, would've allowed legislators to do a certain amount of partisan activity while on state sponsored travel? A question for the rural members, is that something that you support?

Sen. Hoffman: Yes.

Question: Why?

Sen. Hoffman: Because it makes sense.

Sen. Stedman: I could add a little bit to that. It is awkward, for instance, if I travel to Anchorage, where most of the state business is done out of Session, cause that's where most of the people live, it's not rocket science. But to expect me to go to Anchorage, take care of some business, fly all the way back to Sitka, then turn around and fly back to Anchorage and then fly back home is ludicrous. Another situation is when I send a staff member to Anchorage and

maybe they are there for two weeks, three weeks, four weeks or even longer and they can't stop by some political rally after work or on the weekend or stop by some political guys running for this or that, his little booth. It doesn't work. They have, the employees that we have, have rights too. I don't feel that the state, with this huge geographical footprint we have, should have everything concentrated in Anchorage with a concentration on how everything should work out of Anchorage. We need to recognize that, for instance, it's expensive to move a Senator from Golovin to Juneau. It's more expensive to do that from Anchorage to Juneau or Juneau to Juneau. We just need to realize that this is large state and recognize that and work with that. So how that legislation matures through the process, clearly, it's an issue that we need to clean-up and resolve.

Sen. Stevens – I'm not sure I can clarify this, but I can tell you the way the new rules read is, if Senator Stedman say, were in Anchorage for three days of meetings and he wanted to go to a fundraiser for Senator Murkowski or Senator Begich, he would have to fly back to Sitka, fly back to Anchorage to go to an evening fundraiser. Somehow, we've lost the common sense in the whole process. But that has been taken out in the House, I believe, and we'll see what happens to that as we move along.

Question: Senator – is it fair that the state pay for your entire trip? You addressed the logistical problem. But why should the public pay for all of a trip when part of it used for partisan purposes or non-state business?

Sen. Stedman- I think it becomes more of an issue the closer you are to an election. I'll give you an example. For instance, if I happen to be running, and I'll just use 30 days, it was 30 days in front in the election, or you know some number. I think there's need to be some cutoff where you clearly you have an election account to pay that travel. But I can also use an example like this past year, I wasn't running. When I went up to Anchorage to work on issues I couldn't stop by Lisa Murkowski's booth or what have you, her little headquarters and b.s. with them or anything. I wasn't running for anything nor do I have enough in fundraising accounts. Nothing. It just doesn't work. It needs to modified somewhat. I'm not interested in having the state foot the bill for the so-called partisan fundraising activities and stuff like that. That's not the issue at hand.

Sen. Stevens: So to just to look at the bigger picture here – The Select Committee on Legislative Ethics has had several issues that have been percolating over the years that they wanted addressed and I did ask Senator Coghill to carry that bill. He's been quite courageous about stepping up and doing what he thinks is right. The bill will change as it moves through the committee process.

Question: But quickly for the two Finance Co-Chairs- do you support the language that Sen. Coghill came up with on that bill?

Sen. Stedman: I don't know what the language he had is. I haven't looked at it in that detail. I haven't talked with Senator Coghill on the subject since the beginning of the Session in just the concept phase, so I couldn't tell you what his language was.

Senator Hoffman: Same here.

Question: So I am going to give a hypothetical- where somebody spends three days on state business and wants to do one dinner that's partisan business.
How do you guard against the opposite situation where somebody has three days of campaign and they schedule one meeting with an AIDEA official about a project and say they were there on state business.

Senator Stevens: Well then you report it, and then the public throws the (??) out. ***laughter***

Senator Stedman: Clearly, if I'm campaigning in Anchorage, there is something wrong. My voters are in Southeast. They don't vote for me in Anchorage. So, there's a disconnect there. And the funding reports are available and we all look at them and stuff like that. We look at where the money comes from, in-district, out-of-district, all that stuff. That's a standard procedure in the business.

Sen. Hoffman: I think you could put language in there, it may be arbitrary, but say incidental, the amount of time that you spend is incidental to the initial purpose of the trip.

Sen. Stevens: I think as I recall, Senator Coghill had put in an 8 to 5 day and beyond that, I believe that's the wording he used, beyond that you were on your own. You were free to do your own business, whatever that might be. Senator Paskvan, you had some comments, did we bypass you on HB 110? Do you have any thoughts that you want to share with us?

Sen. Paskvan: I think that the Senate Resource Committee, we've been working on this bill for a quite a long time now and I kind of get back to sayings by my carpenter friends. You measure twice and cut once. So that kind of raised the issue of what are the tools that we need to use to measure and what are the tools we need to use to cut? Part of the problem that we have is whether the lack of information at present time puts us in a situation where we don't have enough information to even measure the first time much less getting back to the original carpenter's saying, measure twice cut one. So, I think we're working on it. We're working hard on it. We're going to continue to work on it, but I think we have to do our due diligence as we move forward.

Sen. Stevens: We had a whole bunch of people online, but I think they gave up in disgust. So that's a disadvantage of being online, I guess. So I want to thank them for at least attempting to be with us. That was Mike Mason from Dillingham, KDLG, Andrew Rogers from KRSN and Matt Lichtenstein, KFSK Petersburg. We appreciate them being them with us. One or two more questions. Bob?

Question: Senator Paskvan- Have you placed any requests with the Administration or any department that you haven't gotten a response to yet for information or studies or models on the oil tax bill?

Sen. Paskvan: Over the last couple of months, there's been a lot of requests and there have been responses and those responses have been modified. So, as we move forward, I think we are trying to establish a factual foundation. And again, that's where the difficulty is – Not that there is a lack of response, I think that there is some cooperation, but it's trying to get to the substantive numbers themselves so that when one looks at the tax system, it's not just the nominal rate, it's the effective rate when one rolls the credit system into it. Some credits are applied in the current year, some credits are applied in a subsequent year and other credits are paid out in cash. Trying to assemble all of those components into one unified understanding of what the state brings in far as production tax has been awkward at times. But I think we are heading towards better information to rely upon. But again that gets to the point of the tools necessary so that we can measure once before we proceed from there.

Question: But you are not aware of any requests that have been refused?

Sen. Paskvan: I'm not aware of any request that has been refused.

Question: Judy Erickson, I asked this question last week, but I am going to ask it one more time. You told us last week you were talking with the House. As a long time observer of this process, I haven't quite seen it come down to the wire here with hardly any of members priority bills even in Rules of either body. So, besides the budgets and perhaps Coastal Zone, are there any other bills that you guys have agreed are priorities for this Session with the House? Any agreements with the House?

Sen. Stedman: Just a clarification- House and Senate Priorities together?

Question: Well, I was looking at the Senate priorities. It seems to me that Senator Ellis – his film production tax credit is probably a priority, I think it's still in the Senate-

Sen. Ellis: For me!

Sen. Stevens: and he won't let us forget it either. *laughter*

Questions: But that's what I'm saying, members' priorities. Do you have any agreements?

Sen. Stevens: I think Coastal Zone Management is an issue that is extremely important. We're working towards that. We're anxious to see what the House came up with. Senator Hoffman explained that very clearly. I think that's an important issue. I think we must do something to bring that to conclusion. Whether it's a major change or whether it's a one-year-extension. I'm hoping that we can come to a serious decision on that. Senator Hoffman, any comments on that?

Sen. Hoffman: No. And I'd like to see 97 passed too. That's the revenue sharing bill.

Sen. Stevens: An important bill as well. Thank you all very much. Appreciate it.

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ALASKA STATE LEGISLATURE
SENATE STATE AFFAIRS STANDING COMMITTEE
March 31, 2011
9:03 a.m.

MEMBERS PRESENT

Senator Bill Wielechowski, Chair
Senator Joe Paskvan, Vice Chair
Senator Albert Kookesh
Senator Kevin Meyer
Senator Catherine Giessel

MEMBERS ABSENT

All members present

OTHER LEGISLATORS PRESENT

SENATOR JOHN COGHILL

COMMITTEE CALENDAR

SENATE BILL NO. 104
"An Act relating to manufactured homes, including manufactured homes permanently affixed to land, to the conversion of manufactured homes to real property, to the severance of manufactured homes from real property, to the titling, conveyance, and encumbrance of manufactured homes, and to manufacturers' certificates of origin for vehicles; and providing for an effective date."

- MOVED SB 104 OUT OF COMMITTEE

SENATE BILL NO. 89
"An Act clarifying that a legislator or legislative employee is allowed to accept certain charity events; amending disclosure deadlines under the Legislative Ethics Act; relating compassionate gifts; allowing legislators and legislative employees to use legislative to requests to refrain from disclosure under the Legislative Ethics Act; and establishing mailing lists for campaign purposes and non legislative purposes; allowing legislators a seat for an alternate public member on the Select Committee on Legislative Ethics and legislative employees who are representing persons in an administrative hearing to clarifying the requirements related to participation by alternate members in the contact hearing

CHAIR WIELECHOWSKI asked about the issue of title companies, and stated it seems to be more of a Judiciary issue rather than State Affairs. He said he would like to see more information when the bill reaches Judiciary.

SENATOR PASKVAN moved to report SB 104, version I, from committee with individual recommendations and attached fiscal note(s). There being no objection, the motion carried.

9:07:00 AM
At-ease.

9:08:39 AM

SB 89-LEGISLATIVE ETHICS ACT

CHAIR WIELECHOWSKI announced the next order of business would be SB 89. The new CS is version T.

9:08:59 AM
SENATOR PASKVAN moved to adopt the proposed committee substitute to SB 89, labeled CSSB 89(STA), Version T, as the working document of the committee

CHAIR WIELECHOWSKI objected for discussion purposes.

9:09:20 AM
SENATOR JOHN COGHILL, sponsor of SB 89, said he would comment after the review of the new CS.

MICHELE SYDEMAN, staff to Senator Wielechowski, said she would explain the changes in the CS, version T. This version makes four changes to the previous version. The first substantive change is to remove provisions that would have allowed a legislator to use his or her legislative mailing list for campaign purposes. Underlined text was removed from Version E, page 3, lines 3-4. On page 4, lines 26-27, the same wording was removed.

9:12:27 AM
The next substantive change was removal of the provision allowing a legislator or legislative employee to campaign or participate in partisan activities while on state travel.

The third substantive change added a provision allowing a legislator or legislative employee to request to refrain from

making a disclosure if that would violate a confidentiality rule of his or her profession.

9:14:45 AM
The fourth substantive change adds language clarifying the requirement that volunteers or trainees complete the legislative ethics class. It would now apply only to those who work for more than 30 days. Casual or drop-in employees or volunteers would not have to complete the ethics training.

9:16:11 AM
SENATOR GIESSEL asked what committee is being referred to on page 10, section 8, line 18, which says "the committee shall approve or deny the request."

MS. SYDEMAN answered it referred to the Legislative Ethics Committee.

9:16:42 AM
SENATOR COGHILL said the 30 day change for volunteers was an excellent idea, and he also had no problem with section change to section 8.

RYNIEVA MOSS, staff to Senator Coghill, said a change on page 12 was requested by the Chair of the Legislative Ethics Committee. They had removed language on line 26 which said "or unable to participate." This change got dropped from the new CS.

9:19:33 AM
SENATOR COGHILL said the mailing list issue came from an advisory opinion that they wanted to include in the statutory language. The new CS says legislators may not use mailing list from office in campaign. The advisory opinion went to the direction that you can use it. He noted that would probably make them revise the ethics opinion.

CHAIR WIELECHOWSKI said removal would not alter an existing advisory opinion.

SENATOR COGHILL said he just wanted to clarify. He is okay as long as there is a clear rule.

9:21:23 AM
SENATOR COGHILL stated the big question is what happens with regard to partisan activity while on state travel. This has been discussed since 1993. If you are under state travel, is there any time that partisan activity is acceptable? He tried to find

a way to say that there are times and reasons. For legislators from urban areas, they can go from a committee meeting to a Republican luncheon, but those from out of town cannot because they are away from home on state business.

He said he was trying to find a reasonable solution. The question is left unanswered in the version T CS. He understands the reason. When his bill was introduced, headlines implied they were trying to use state monies to campaign. This leaves a strict prohibition.

CHAIR WIELECHOWSKI noted the bill has a further referral to the Judiciary Committee.

9:24:49 AM
SENATOR COGHILL said he has been tasked to ask the question. It is a tough question. In fairness to people who live outside the urban areas, we need to resolve this issue.

JOYCE ANDERSON, Chair, Legislative Ethics Committee, said this has been an issue since 1993. She feels the legislature needs to decide if they want to change this policy or keep as it is. The Ethics Committee has not made any specific proposal; that is up to the legislature.

9:26:27 AM
SENATOR COGHILL said in the ethics act which applies to members of the administration, they talk about de minimis use of time. Perhaps that could be used in this bill also.

SENATOR PASKVAN asked if there is some place to look for di minimus conduct. If someone just attends a luncheon, that might be okay; if they were the keynote speaker, then that would be another thing. He asked how to define de minimus and what are some examples.

SENATOR COGHILL said he struggles with that, because it is a question of intent. This kind of question would always need to come before the Ethics Committee. If statues list prohibited actions, then intent is not as much of a problem. He would like to see the statutes be clear. Any time there is an ethics complaint, it puts peoples' integrity at risk. He is trying to clarify actions so that a member knows he when has crossed a line.

9:30:21 AM

That is why he put time frames and other specific items in the bill. Action versus intent is too hard to define. Under much of the ethics law we have guidance as to what is ethical behavior, but we need good guidelines as to what is unethical. We have put legislators not in urban areas under an ethical cloud. In this bill he was trying to find a way to dispel that cloud.

CHAIR WIELECHOWSKI said could hold SB 89 or move it to Judiciary. He asked the will of the committee.

SENATOR KOOKESH moved to report CSSB 89(STA), version T, from committee with individual recommendations and attached fiscal note(s). There being no objection, the motion carried.

9:33:01 AM
There being no further business to come before the committee, Chair Wielechowski adjourned the meeting at 9:33 a.m.

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SENATE BILL NO. 89

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY SENATOR COGHILL

Introduced: 2/16/11
Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act clarifying that a legislator or legislative employee is allowed to accept certain compassionate gifts; allowing legislators and legislative employees to use legislative mailing lists for campaign purposes and nonlegislative purposes; allowing legislators and legislative employees who are representing persons in an administrative hearing to contact hearing officers and attempt to influence the outcome of the hearing if they are professionals licensed in the state, and allowing legislators and legislative employees who are not professionals licensed in the state to contact hearing officers for the purpose of influencing the outcome of the hearing in certain instances; allowing legislators and legislative employees, in certain circumstances, to participate in partisan political activity while on state travel; prohibiting a public member of the Select Committee on Legislative Ethics from disclosing confidential information without authorization; clarifying the ethics disclosure requirements for tickets to or gifts in connection with

by the legislator, whether or not it is shared with others; or

(E) use by a legislator of photographs of that legislator.

*** Sec. 2.** AS 24.60.030(i) is amended to read:

(i) **A** [EXCEPT FOR SUPPLYING INFORMATION REQUESTED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, OR WHEN RESPONDING TO CONTACTS INITIATED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, A] legislator or legislative employee may not attempt to influence the outcome of an administrative hearing by directly or indirectly contacting or attempting to contact the hearing officer assigned to the hearing or the individual, board, or commission with authority to make the final decision in the **matter** [CASE] unless [THE]

(1) **the legislator or legislative employee is representing another person for compensation subject to AS 24.60.100 and as a professional who is licensed in the state;**

(2) the contact is made in the presence of all parties to the hearing or the parties' representatives **while the legislator or legislative employee is acting as a party or a witness in the matter or responding to a question asked of the legislator or legislative employee by the hearing officer, individual, board, or commission** and the contact is made a part of the record; or

(3) the contact is inadvertent and ex parte and the [(2)] fact and substance of the contact **are** [IS] promptly disclosed by the legislator or legislative employee to all parties to the hearing and [THE CONTACT IS] made a part of the record.

*** Sec. 3.** AS 24.60.030 is amended by adding a new subsection to read:

(j) Notwithstanding the limitations under (a)(2), (a)(4), and (c) of this section and subject to other laws of the state or the United States, a legislator or legislative employee who is on state travel may participate in partisan political activity, including campaign activity, if the legislator or the legislative employee does not use or authorize the use of state resources to pay for the activity and if the legislator or

legislative employee does not participate in the activity

(1) during a normal workday between 8:00 a.m. and 5:00 p.m., excluding meal breaks;

(2) on a state or municipal election day;

(3) during the 30 days immediately preceding an election in which the participating legislator or the legislator for whom the participating employee works is a candidate for elective office; or

(4) by fund raising for a political party or campaign.

* **Sec. 4.** AS 24.60.031 is amended by adding a new subsection to read:

(d) Notwithstanding the limitations under (a) and (b) of this section and subject to other laws of the state or the United States, a legislator or legislative employee who is on state travel may participate in partisan political activity, including campaign activity, during the state travel if the legislator or the legislative employee does not use or authorize the use of state resources to pay for the activity and if the legislator or legislative employee does not participate in the activity

(1) during a normal workday between 8:00 a.m. and 5:00 p.m., excluding meal breaks;

(2) on a state or municipal election day;

(3) during the 30 days immediately preceding an election in which the participating legislator or the legislator for whom the participating employee works is a candidate for elective office; or

(4) by fund raising for a political party or campaign.

* **Sec. 5.** AS 24.60.060(a) is amended to read:

(a) A legislator, [OR] legislative employee**, or public member of the committee** may not knowingly make an unauthorized disclosure of information that is made confidential by law and that the person acquired in the course of official duties. A person who violates this section is subject to a proceeding under AS 24.60.170 and may be subject to prosecution under AS 11.56.860 or another law.

* **Sec. 6.** AS 24.60.080(a) is amended to read:

(a) Except as otherwise provided in this section, a legislator or legislative employee may not

Title 39. PUBLIC OFFICERS AND EMPLOYEES
Chapter 39.20. COMPENSATION, ALLOWANCES, AND LEAVE

Article 02. TRAVEL REGULATIONS

Sec. 39.20.110. Per diem allowance.

Officials and employees of the state agencies, while traveling on official business and away from their designated post of duty, shall be allowed, instead of their actual expenses for subsistence and all fees or tips, a per diem allowance to be prescribed by the commissioner of administration under the regulatory authority set out in AS 39.20.160 , and in consultation with the head of the agency concerned.

Sec. 39.20.120. Allowable expenses.

Except as provided in AS 39.20.110 - 39.20.170, only actual and necessary traveling expenses shall be allowed to an official or employee.

Sec. 39.20.130. Mileage allowance.

Officials and employees of state agencies shall, under regulations adopted by the commissioner of administration, and whenever the mode of transportation is authorized or approved as more advantageous to the state, be paid an amount, instead of actual expenses of transportation, not to exceed a mileage allowance set by the commissioner of administration for the use of privately-owned automobiles or airplanes, when engaged in official travel inside or outside their designated posts of duty or places of service. In addition to the mileage allowance, there may be allowed reimbursement for the actual cost of ferry fares, and bridge, road, and tunnel tolls. When two or more officials or employees are traveling in the same direction, and it is possible to share a privately-owned automobile or airplane, the mileage permitted shall be allowed only once.

Sec. ⏩39.20.140⏪. Travel costs and travel outside the state.

(a) The Department of Administration may not pay an official or employee for per diem or transportation costs unless the travel is clearly necessary to benefit the state.

(b) The Department of Administration may not reimburse an official or employee or pay for more than the lowest tourist class fare for the most direct route unless

(1) tourist class accommodation is not available;

(2) waiting for tourist class accommodation would occasion a delay harmful to the state; or

(3) the Department of Administration finds that travel by tourist class accommodation is not in the best interest of the state, and authorizes other accommodation.

(c) When the Department of Administration authorizes more expensive travel under (b)(3) of this section, it shall file a justification for that authorization with the travel voucher. When fares other than tourist class are authorized under (b) of this section, the Department of Administration may not reimburse the official or employee or pay for more than the lowest first class fare available.

(d) Officials and employees are authorized to travel only the least number of days necessary to transact the business involved, to secure return passage, and to return.

(e) Every official and employee shall, unless otherwise authorized by law to travel outside the state, obtain prior approval for travel outside the state from the head of the official's or employee's department or from an immediate supervisor, or from the Department of Administration if the official or employee is not within a department or is not under the direct supervision of an official or supervisor. If an employee deviates materially from the travel authorized under this section, the employee must obtain approval for the deviation from the person who approved the travel before the Department of Administration may reimburse the employee for the travel.

Sec. 39.20.150. Advances and recovery.

(a) An agency may advance, through proper disbursing methods, to a person entitled to per diem or mileage allowance under AS 39.20.110 - 39.20.170 the sums considered advisable considering the character and probable duration of the travel to be performed.

(b) Sums advanced and not used for allowable travel expense are recoverable by setoff against salary due, or otherwise, from the person to whom advanced, or the person's estate, by deduction from any amount due from the state, or by other legal methods of recovery that may be necessary.

Sec. 39.20.160. Regulations.

The fixing and payment under AS 39.20.110 - 39.20.170 of travel and per diem allowances and of advances and recovery and reimbursement of travel expenses shall be in accordance with regulations adopted by the commissioner of administration. The regulations shall be uniform for all officials and employees, and all agencies and departments. The regulations shall also govern the use of public transportation facilities by officials and employees. The regulations relate to the internal management of state agencies and their adoption is not subject to AS 44.62 (Administrative Procedure Act).

Sec. 39.20.170. Construction of AS 39.20.110 - 39.20.170.

AS 39.20.110 - 39.20.170 may not be construed to modify or repeal a law providing for the travel expenses of the governor, or members of the legislature, or members of boards or commissions of the state government.

Attachment 3

Prepared by: Ethics Committee
November 18, 2010

HISTORICAL PERSPECTIVE
LEGISLATIVE TRAVEL AND COLLATERAL CAMPAIGN ATIVITY

1993 - Chair of the Ethics Committee in September 1993 recommended

Use of State Funds and Property:
State funds (travel, per diem, or salary stipend) may not be claimed, received or accepted by legislators or legislative employees unless the primary purpose of the trip is official legislative business.

Incidental use of time in travel or pay status may be spent for personal purposes provided:

a.) No time, materials, equipment, or funds are spent in political activities; e.g. fund raising, handing out campaign literature, circulating petitions, or requesting support or assistance for any candidate or cause.
b.) No time, materials, equipment or funds are spent in lobbying activities of any kind.
c.) No unlawful activities are undertaken.

No action taken by the Committee.

1993- Memo from Speaker of the House, Ramona Barnes

In a memo dated September 21, 1993 from Speaker Barnes, she states,

> "During the legislative session each lawmaker is allowed one trip back to their district for legislative business. This applies to both majority and minority members. During the interim all requests from legislators for travel to NCSL and the Western Legislative Conference have been approved as have all travel requests by committee members wishing to attend their committee meetings. Additionally it has been my policy to approve travel requests by members appointed to various task forces and subcommittees to attend events that relate to the work they are involved in. All other travel requests are reviewed on a case by case basis. I approve all staff travel on a case by case basis when such travel is appropriate to their majority or minority status. With respect to attending campaign activities during a state paid trip that involved legislative business, it has not been allowed in the past and is not allowed now."

1993- Letter from Senate President Rick Halford

In a letter dated October 23, 1993, from Senate President, he states,

> "You specifically requested travel authorization information concerning attendance at campaign activities during a state paid trip. State paid travel is authorized for legislative business. Campaign activities are not an acceptable purpose for travelling at state expense."

1994- Ethics Committee suggested the following guidelines

Version 1: Campaign activity may occur provided the legislator completes no less than 7.5 hours per day of non-campaign related state business. The travel authorization request, filed in advance, must indicate what specific state business activities will be undertaken for a minimum of 7.5 hours per day and must indicate what type of campaign activity the legislator will be participating in. This does not apply to legislative employees. Legislative employees are not permitted to participate in campaign activities while in travel status.

No action taken by the Committee.

Version 2: Campaign activity may occur provided the legislator [or legislative employee] completes no less than 4 hours per day of state related business. The travel authorization request must be filed in advance.

No action taken by the Committee.

1995 - Ethics Committee: Open Issue regarding Legislation

What can or can't a legislator or legislative employee do while in "travel status?"

Ethics Committee Minutes: On February 3, 1994, the committee sent a letter to Legislative Council requesting the council to develop guidelines concerning travel, specifically campaign activities while in "travel status." Legislative Council did not respond to the request. The committee continues to receive inquiries on this issue. On February 13, 1995, the committee directed staff to send another letter to Legislative Council.

No response is on file in the Ethics Office.

1996 – Ethics Committee issues Advisory Opinion 96-05

The committee was asked the following by a legislator: Whether a legislator may accept payment for the costs of a trip on which the legislator conducted both legislative business and personal business? The committee concluded it is permissible for a legislator to accept state payment for the costs of a trip on which governmental business was conducted. The committee further noted that it does not have authority, in the context of advisory opinions, to use its judgment in lieu of a legislator's judgment in determining what is necessary state business or how much sate business is necessary to justify accepting state payment for a trip. The committee also cautioned that if a legislator or legislative employee were to intentionally use a façade of legislative business to obtain a government paid trip but were to fail to conduct any governmental business to justify governmental payment, the committee might well find a violation of AS 24.60.0309(a)(2). The committee also noted in the opinion the following statements: *"The ethics committee has, in the past, requested an explanation of legislative travel and per diem policy from Legislative Council. A response has not been forthcoming to date."*

1997/98 -- SB 105, Ethics/Lobbying/Campaign Finance

SB 105 was introduced on February 25, 1997 by the Senate Rules Committee by Request of the Legislative Ethics Committee. SB 105 was signed into law on July 15, 1998. An amendment to the bill, which was not adopted, addressed the subject of state paid travel and campaigning while on that trip. The amendment read as follows:

> SB 105H HCS CCSSB 105(STA) 4/23/98
> House CS for CS for Senate Bill No. 105(STA)
> Section 17. AS 24.60.031 is amended by adding new subsections to read:
>
> (c) A legislator may not travel at state expense to a place in which the legislator plans to hold a campaign fund raising event if the travel occurs less than 48 hours before the event is scheduled to begin. This subsection does not prohibit a legislator from holding a campaign fund raising event in a place to which the legislator travels at state expense if the
>
> (1) travel to the place is completed at least 48 hours before the event was scheduled to begin;
> (2) legislator made a trip at state expense to a place, returned from that place, and then, within 48 hours, made a second trip to the place and the cost of the second trip was not paid for at state expense; or
> (3) travel was to the capital city immediately before the beginning of a legislative session or from the capital city to the legislator's home immediately after the final adjournment of a regular or special legislative session.
>
> (d) In (c) of this section, an event is considered to be a campaign fund raising event only if the legislator, or another person acting on behalf of the legislator with the legislator's expense or implied permission,
>
> (1) asks for contributions for the legislator's campaign at the event;
> (2) announces that the legislator will accept contributions for the legislator's campaign at the event; or
> (3) otherwise uses the event in a manner that clearly demonstrates that a primary purpose of the event is to raise contributions for the legislator's campaign;
>
> the fact that a legislator received campaign contributions at an event is insufficient, without other evidence, to satisfy the proof required by this paragraph.

This subject was discussed at the following committee meetings:

- House State Affairs Committee meeting of April 9, 1998
- House State Affairs Committee meeting of April 16, 1998
- House State Affairs Committee meeting of April 21, 1998
- House Finance Committee meeting of April 24, 1998.

(Minutes from these meetings are attached for your reference.)

2010 – Ethics Committee Staff drafted two versions of possible clarifying statutory language

AS 24.60.030(a)(5) A legislator or legislative employee may use or authorize the use of state funds, facilities, equipment, services or another government asset or resource for the purpose of political fund raising or campaigning: this paragraph does not prohibit

Version 1 – add a new section (B)

(B) limited use of state funds while traveling on legislative business for political fund raising or campaigning purposes if the use

(i) is collateral or incidental to the normal, scheduled performance of official duties;
(ii) does not exceed 10 percent of the total time spent on the trip;
(iii) does not interfere with the performance of public duties, and
(iv) there is no additional cost to the state;

Version 2 – add a new section (B)

(B) limited use of state funds while traveling on legislative business for political fund raising or campaigning purposes if the use

(i) is collateral or incidental to the normal, scheduled performance of official duties;
(ii) does not exceed 10 percent of the total time spent on the trip;
(iii) does not interfere with the performance of public duties,
(iv) does not occur within 30 days of an election in which the legislator or legislative employee is a candidate for office,
(v) generate no additional cost to the state, and
(vi) the proportionate share of the actual cost of the use shall be reimbursed to the state;

No discussion. Item was not before the committee as an agenda item.

2010 - Ethics Committee issues Advisory Opinion 10-01 and then rescinded their action

The committee issued Advisory Opinion 10-01 on May 27, 2010 and then rescinded the opinion at the June 14, 2010 meeting and referred back to the August 19, 2008 letter to the Alaska Public Offices Commission for guidance in this area. AO 10-01 stated that it was the nature of the business conducted rather than whether it is paid for with state resources that should be the governing standard in determining whether an ethical violation has occurred. A statement signed by the legislator designating the primary nature and purpose of the business rather than whether is it paid for by state resources should suffice to govern whether or not collateral activities can or cannot occur. AS 24.60.030(a)(3).

The August 19, 2008 letter to APOC the committee stated a legislative resource, including money provided by the legislature to cover or reimburse costs incurred by a legislator or legislative employee while traveling on legislative business, is a government asset or resource. A government asset or resource may not be used for involvement in or support of or opposition to partisan political activity. AS 24.560.030(a)(2. A legislator or legislative employee may not use or authorize the use of government asset or resource for the purpose of political fund raising or campaigning. AS 24.60.030(a)(5).

20th Legislature(1997-1998)

Bill History/Action for 20 Legislature

BILL: SB 105 **SHORT TITLE:** ETHICS/LOBBYING/CAMPAIGN FINANCE

BILL VERSION: HCS CSSB 105(FIN) AM H

CURRENT STATUS: CHAPTER 74 SLA 98 **STATUS DATE:** 06/03/98

SPONSOR(s): RULES BY REQUEST OF LEGISLATIVE ETHICS COMMITTEE

TITLE: "An Act relating to legislative and executive branch ethics; relating to campaign finances for candidates for state or municipal office; relating to the conduct and regulation of lobbyists with respect to public officials; relating to the filing of disclosures by certain state employees and officials; making a conforming amendment to the definition of 'public official' for employment security statutes; and providing for an effective date."

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Display Bill History

Jrn-Date	Jrn-Page		Action
02/25/97	0494	(S)	READ THE FIRST TIME - REFERRAL(S)
02/25/97	0494	(S)	STATE AFFAIRS, FINANCE
03/11/97	Text	(S)	STA AT 3:30 PM BELTZ ROOM 211
03/11/97	Text	(S)	<BILL HELD OVER TO 3/13 MEETING>
03/11/97	Text	(S)	MINUTE(STA)
03/13/97	Text	(S)	STA AT 3:30 PM BELTZ ROOM 211
03/13/97	Text	(S)	MINUTE(STA)
03/18/97	Text	(S)	MINUTE(STA)
03/25/97	Text	(S)	STA AT 3:30 PM BELTZ ROOM 211
03/25/97	Text	(S)	MINUTE(STA)
03/26/97	0873	(S)	STA RPT CS 3DP NEW TITLE
03/26/97	0873	(S)	DP: GREEN, MILLER, WARD
03/26/97	0873	(S)	FISCAL NOTE TO SB (ADM)
03/26/97	0873	(S)	ZERO FISCAL NOTE TO SB (LAA)
03/26/97	0873	(S)	FISCAL NOTE TO CS (ADM)
04/10/97	Text	(S)	FIN AT 5:00 PM SENATE FINANCE 532
04/10/97	Text	(S)	MINUTE(FIN)
04/10/97	Text	(S)	MINUTE(FIN)
04/15/97	Text	(S)	FIN AT 8:00 AM SENATE FINANCE 532
04/15/97	Text	(S)	MINUTE(FIN)
04/16/97	1163	(S)	FIN RPT CS 2DP 5NR NEW TITLE
04/16/97	1163	(S)	DP: PEARCE; DP IF AM: PHILLIPS
04/16/97	1163	(S)	NR: SHARP, PARNELL, ADAMS, TORGERSON,
04/16/97	1163	(S)	DONLEY
04/16/97	1163	(S)	PREVIOUS ZERO FN APPLIES (LAA)
04/16/97	1163	(S)	ZERO FNS TO CS (LABOR, LAW)
04/16/97	1163	(S)	PREVIOUS ZERO FN APPLIES (LAA)
04/16/97	Text	(S)	FIN AT 8:00 AM SENATE FINANCE 532
04/16/97	Text	(S)	MINUTE(FIN)
04/16/97	Text	(S)	MINUTE(FIN)
04/18/97	1276	(S)	RULES TO CALENDAR & 1NR 4/18/97
04/18/97	1279	(S)	READ THE SECOND TIME
04/18/97	1279	(S)	FIN CS ADOPTED UNAN CONSENT
04/18/97	1280	(S)	AM NO 1 OFFERED AND WITHDRAWN

04/18/97 1281 (S) AM NO 2 FAILED Y4 N13 E3
04/18/97 1282 (S) AM NO 3 FAILED Y4 N13 E3
04/18/97 1283 (S) AMENDMENTS 4, 5 NOT OFFERED
04/18/97 1283 (S) AM NO 6 ADOPTED Y12 N5 E3
04/18/97 1285 (S) AM NO 7 FAILED Y7 N10 E3
04/18/97 1286 (S) AM NO 8 FAILED Y5 N12 E3
04/18/97 1287 (S) AM NO 9 ADOPTED Y17 N- E3
04/18/97 1291 (S) ADVANCED TO THIRD READING UNAN CONSENT
04/18/97 1291 (S) READ THE THIRD TIME CSSB 105(FIN) AM
04/18/97 1292 (S) PASSED Y15 N2 E3
04/18/97 1292 (S) EFFECTIVE DATE(S) SAME AS PASSAGE
04/18/97 1292 (S) LINCOLN NOTICE OF RECONSIDERATION
04/18/97 Text (S) RLS AT 10:45 AM FAHRENKAMP RM 203
04/18/97 Text (S) MINUTE(RLS)
04/21/97 1334 (S) RECON TAKEN UP - IN THIRD READING
04/21/97 1335 (S) RETURN TO SECOND FOR AM 10 UNAN CONSENT
04/21/97 1335 (S) AM NO 10 ADOPTED Y14 N5 E1
04/21/97 1336 (S) AUTOMATICALLY IN THIRD READING
04/21/97 1337 (S) PASSED ON RECONSIDERATION Y17 N2 E1
04/21/97 1337 (S) EFFECTIVE DATE(S) SAME AS PASSAGE
04/21/97 1370 (S) TRANSMITTED TO (H)
04/22/97 1232 (H) READ THE FIRST TIME - REFERRAL(S)
04/22/97 1233 (H) STATE AFFAIRS, FINANCE
02/05/98 Text (H) STA AT 8:00 AM CAPITOL 102
02/05/98 Text (H) MINUTE(STA)
02/12/98 Text (H) STA AT 8:00 AM CAPITOL 102
02/12/98 Text (H) MINUTE(STA)
02/17/98 Text (H) STA AT 8:00 AM CAPITOL 102
02/17/98 Text (H) MINUTE(STA)
02/19/98 Text (H) MINUTE(STA)
02/24/98 Text (H) STA AT 3:00 PM CAPITOL 102
02/24/98 Text (H) MINUTE(STA)
02/26/98 Text (H) STA AT 3:00 PM CAPITOL 102
02/26/98 Text (H) MINUTE(STA)
03/03/98 Text (H) STA AT 3:00 PM CAPITOL 102
03/03/98 Text (H) MINUTE(STA)
03/05/98 Text (H) STA AT 3:00 PM CAPITOL 102
03/05/98 Text (H) MINUTE(STA)
03/12/98 Text (H) STA AT 1:00 PM CAPITOL 102
03/12/98 Text (H) MINUTE(STA)
03/19/98 Text (H) STA AT 3:00 PM CAPITOL 102
03/19/98 Text (H) MINUTE(STA)
03/24/98 Text (H) MINUTE(FIN)
03/26/98 Text (H) STA AT 1:00 PM CAPITOL 102
03/26/98 Text (H) MINUTE(STA)
04/04/98 Text (H) STA AT 10:00 AM CAPITOL 102
04/04/98 Text (H) <BILL HELD OVER FROM 2/17>
04/04/98 Text (H) MINUTE(STA)
04/07/98 Text (H) STA AT 8:00 AM CAPITOL 102
04/07/98 Text (H) <BILL HELD OVER>

04/07/98 Text (H) MINUTE(STA)
04/09/98 Text (H) STA AT 8:00 AM CAPITOL 102
04/09/98 Text (H) <BILL HELD OVER>
04/09/98 Text (H) MINUTE(STA)
04/16/98 Text (H) STA AT 8:00 AM CAPITOL 102
04/16/98 Text (H) MINUTE(STA)
04/18/98 Text (H) STA AT 10:00 AM CAPITOL 102
04/18/98 Text (H) <BILL HELD OVER>
04/18/98 Text (H) MINUTE(STA)
04/21/98 Text (H) STA AT 8:00 AM CAPITOL 102
04/21/98 Text (H) <BILL HELD OVER>
04/21/98 Text (H) MINUTE(STA)
04/23/98 3210 (H) STA RPT HCS(STA) NT 6NR
04/23/98 3210 (H) ...TECHNICAL TITLE CHANGE
04/23/98 3210 (H) NR: JAMES, IVAN, ELTON, BERKOWITZ,
04/23/98 3210 (H) RYAN, HODGINS
04/23/98 3211 (H) FISCAL NOTE (LAW)
04/23/98 3211 (H) ZERO FISCAL NOTE (ETH CMTE)
04/24/98 Text (H) FIN AT 8:00 AM HOUSE FINANCE 519
04/24/98 Text (H) MINUTE(FIN)
04/27/98 Text (H) FIN AT 1:30 PM HOUSE FINANCE 519
05/04/98 Text (H) FIN AT 1:30 PM HOUSE FINANCE 519
05/04/98 Text (H) FIN AT 6:00 PM HOUSE FINANCE 519
05/05/98 Text (H) MINUTE(FIN)
05/05/98 Text (H) MINUTE(FIN)
05/06/98 3556 (H) FIN RPT HCS(FIN) NT 3DP 4NR 1AM
05/06/98 3556 (H) ...TECHNICAL TITLE CHANGE
05/06/98 3556 (H) DP: MULDER, MARTIN, DAVIES
05/06/98 3556 (H) NR: THERRIAULT, GRUSSENDORF, DAVIS,
05/06/98 3556 (H) KELLY; AM: KOHRING
05/06/98 3556 (H) FISCAL NOTE (ADM)
05/06/98 3556 (H) 2 ZERO FNS (H.FIN/LAA, ADM)
05/06/98 3556 (H) FISCAL NOTE (LAW) 4/23/98
05/06/98 3557 (H) ZERO FISCAL NOTE (ETHICS) 4/23/98
05/11/98 3821 (H) RULES TO 1ST SUPPLEMENTAL CAL 5/11/98
05/11/98 3821 (H) READ THE SECOND TIME
05/11/98 3821 (H) FIN HCS ADOPTED UNAN CONSENT
05/11/98 3822 (H) AM NO 1 FAILED Y14 N23 A3
05/11/98 3822 (H) AM NO 2 ADOPTED UNAN CONSENT
05/11/98 3823 (H) AM NO 3 ADOPTED UNAN CONSENT
05/11/98 3823 (H) AM NO 4 NOT OFFERED
05/11/98 3823 (H) AM NO 5 FAILED Y14 N25 A1
05/11/98 3824 (H) WITHDRAW AM NO 6 PASSED Y21 N18 A1
05/11/98 3825 (H) AM NO 7 OFFERED
05/11/98 3825 (H) AM TO AM 7 ADOPTED UNAN CONSENT
05/11/98 3826 (H) AM 7 AS AM FAILED Y12 N27 A1
05/11/98 3826 (H) ADVANCED TO THIRD READING 5/12 CALENDAR
05/12/98 3897 (H) READ THIRD TIME HCS CSSB 105(FIN) AM H
05/12/98 3897 (H) RETURN TO SECOND FOR AM 8 UNAN CONSENT
05/12/98 3898 (H) AM NO 8 ADOPTED Y21 N17 A2

05/12/98 3899	(H)	AUTOMATICALLY IN THIRD READING
05/12/98 3899	(H)	PASSED Y37 N1 A2
05/12/98 3900	(H)	EFFECTIVE DATE(S) SAME AS PASSAGE
05/12/98 3900	(H)	RESCIND ACTION IN PASSING Y25 N14 A1
05/12/98 3901	(H)	RETURN/2ND RESCIND ACTION AM 8 PD Y27N13
05/12/98 3902	(H)	RESCIND ACTION/PASSING AM8 PD Y26 N13 A1
05/12/98 3902	(H)	AM NO 8 FAILED Y18 N22
05/12/98 3903	(H)	AUTOMATICALLY IN THIRD READING
05/12/98 3903	(H)	PASSED Y40
05/12/98 3903	(H)	EFFECTIVE DATE(S) SAME AS PASSAGE
05/12/98 3943	(H)	TRANSMITTED TO (S) AS AMENDED
05/12/98 4166	(S)	CONCUR AM OF (H) Y20 N-
05/26/98 4205	(S)	10:40 AM 5/15/98 TRANSMITTED TO GOVERNOR
07/15/98 4276	(S)	SIGNED INTO LAW 6/3 CHAPTER 74 SLA 98
07/15/98 4277	(S)	EFFECTIVE DATE OF LAW SEE CHAPTER

Similar Subject Match or Exact Subject Match
CAMPAIGNS
DISCLOSURE
EMPLOYMENT
ETHICS
EXECUTIVE BRANCH
GOVERNOR
LEGISLATIVE AGENCIES
LEGISLATORS
LOBBYISTS
PUBLIC EMPLOYEES
PUBLIC OFFICERS

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20th Legislature(1997-1998)

House or Senate Minutes

Bill : SB 105

Dates: 01/01/1997 to 01/06/2011

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03/13/1997	3:40 PM	Senate STATE AFFAIRS	Minutes
03/18/1997	3:37 PM	Senate STATE AFFAIRS	Minutes
03/25/1997	3:33 PM	Senate STATE AFFAIRS	Minutes
04/10/1997	5:14 PM	Senate FINANCE	Minutes
04/10/1997	5:14 PM	Senate FINANCE	Minutes
04/15/1997	8:10 AM	Senate FINANCE	Minutes
04/16/1997	8:11 AM	Senate FINANCE	Minutes
04/16/1997	8:11 AM	Senate FINANCE	Minutes
04/18/1997	10:55 AM	Senate RULES	Minutes
02/05/1998	8:04 AM	House STATE AFFAIRS	Minutes
02/12/1998	8:02 AM	House STATE AFFAIRS	Minutes
02/17/1998	8:12 AM	House STATE AFFAIRS	Minutes
02/19/1998	9:11 AM	House STATE AFFAIRS	Minutes
02/24/1998	3:00 PM	House STATE AFFAIRS	Minutes
02/26/1998	3:00 PM	House STATE AFFAIRS	Minutes
03/03/1998	3:00 PM	House STATE AFFAIRS	Minutes
03/05/1998	3:00 PM	House STATE AFFAIRS	Minutes
03/12/1998	1:00 PM	House STATE AFFAIRS	Minutes
03/19/1998	3:00 PM	House STATE AFFAIRS	Minutes
03/24/1998	1:55 PM	House FINANCE	Minutes
03/26/1998	1:00 PM	House STATE AFFAIRS	Minutes
04/04/1998	10:08 AM	House STATE AFFAIRS	Minutes
04/07/1998	8:06 AM	House STATE AFFAIRS	Minutes
04/09/1998	8:13 AM	House STATE AFFAIRS	Minutes
04/16/1998	8:05 AM	House STATE AFFAIRS	Minutes
04/18/1998	10:03 AM	House STATE AFFAIRS	Minutes
04/21/1998	8:17 AM	House STATE AFFAIRS	Minutes
04/24/1998	1:55 PM	House FINANCE	Minutes
05/05/1998	2:00 PM	House FINANCE	Minutes
05/05/1998	7:30 PM	House FINANCE	Minutes

20TH Legislature (1977-1998)
Committee Minutes
HOUSE STATE AFFAIRS
April 09, 1998

Number 0201

CHAIR JAMES asked Mr. Brown to address Amendment LS0074\L.2, Cramer, 4/3/98.

MR. BROWN explained Amendment L.2 deals with fund-raisers happening when people are traveling at state expense. This language puts a prohibition in place for legislators, governor and lieutenant governor. If you go somewhere at state expense it should have to be incidental if you end up staying there and holding a political fund-raiser it should not at any way be apparent to the public that that was part of the reason there at state expense. This puts a 48-hour ban in place to try to prevent that sort of activity.

Page 17, following line 5, insert a new bill section to read:

*Sec. 21. AS 24.60.031 is amended by adding a new subsection to read:

(c) a legislator may not travel at state expense to a place in which the legislator plans to hold a campaign fund raising event if the travel occurs less than 48 hours before the event is scheduled to begin. This subsection does not prohibit a legislator from holding a campaign fund raising event in a place to which the legislator traveled at state expense if the travel to the place is completed at least 48 hours before the event was scheduled to begin.

Page 48, following line 31, insert a new subsection to read:

(b) Except for travel to the capital city, an elected official may not travel at state expense to a place in which the official plans to hold a campaign fund raising event if the travel occurs less than 48 hours before the event is scheduled to begin. This subsection does not prohibit an elected official from holding a campaign fund raising event in a place to which the elected official traveled at state expense if the travel to the place is completed at least 48 hours before the event was scheduled to begin. In this subsection, "elected official" means the governor or the lieutenant governor.

Number 0210

REPRESENTATIVE BERKOWITZ stated, "I drive home at the end of session ... they want to have a fund-raising event for me when I get there, they can't do it."

MR. BROWN replied they can after 48-hours or if you don't take your state reimbursement for the drive. If it were 48-hours after you got home state expense would cover your reimbursement.

Number 0213

CHAIR JAMES stressed she didn't think that was ever the intent of this amendment, there should be an exception when you go home at the end of the legislative session. She suggested they include that as an amendment to this amendment.

MR. BROWN indicated that was discussed with the drafter as an exemption for adjourning travel not for convening travel.

REPRESENTATIVE BERKOWITZ remarked if you don't want people to travel at state expense solely or primarily to have a fund-raising event, and if that's the case why don't we just say it that way.

CHAIR JAMES asked for a motion to adopt Amendment L.2 for discussion and amending if needed.

Number 0222

REPRESENTATIVE HODGINS made a motion to adopt proposed Amendment L.2 for discussion.

REPRESENTATIVE RYAN objected.

CHAIR JAMES noted there is an objection. Chair James said she believes it should be amended that in the adjourning trip home, especially when they are limited to any campaigning while in the capital and there is so little time, going home should not be the issue.

REPRESENTATIVE HODGINS said he is totally against the amendment since he lives in Kenai and makes many trips to Anchorage. He indicated this means he can't go into Anchorage two days prior to, a function or committee meeting, or something like that. He will be voting against it if it is a 48-hour thing.

CHAIR JAMES responded it is not proper for her to fly from Fairbanks to Anchorage to attend fund-raising. She indicated she has either paid her own way or used her campaign funds to pay and has not traveled to Anchorage for a fund-raiser on state pay because she doesn't believe it's right.

Number 0234

REPRESENTATIVE HODGINS continued. He pointed out Kenai is so close to Anchorage that he will make several trips back and forth. If he has business the day before (an Oil and Gas Committee meeting) and travels on a state warrant and returns to Kenai and the following day travel to Anchorage on his own money for a fund-raiser that would unduly restrict him for the compensation of traveling the day before. He said they're assuming that you...

CHAIR JAMES stressed the four days is a problem in the amendment.

REPRESENTATIVE HODGINS read the amendment which addresses traveling at state expense and travel that occurs less than 48 hours before the event is scheduled to begin. He stressed if he makes a round-trip on Tuesday and attends a fund-raiser on Wednesday...

CHAIR JAMES reiterated this isn't going to work.

MR. BROWN remarked he believes the drafter deleted another sentence when she put the legislative language in there. He indicated at that time they were only dealing with the governor.

Number 0246

CHAIR JAMES noted the governor is what prompted them on the issue of whether or not he should be raising funds while they are in a legislative session when someone is running against him. She said, "We tried to solve on the floor ... so now he can't. That means he can go visit somebody, any place in the state, and have a fund-raiser while he's there. Unless we put something in here, that's still allowed. I don't think it should be, and I think it's fair for both of us to not." She asked that this amendment be withdrawn for now and move onto the next amendment.

Number 0254

REPRESENTATIVE HODGINS removed his motion to adopt Amendment L.2.

CHAIR JAMES indicated they need to talk to the drafter.

No action taken at this meeting.

20TH Legislature (1977-1998)
Committee Minutes
HOUSE STATE AFFAIRS
April 16, 1998

MR. BROWN explained Amendment P.2 deals with the ban of fund-raising by elected officials who have traveled somewhere at state expense for that fund-raiser. The problem with the way it was written is that the ban precluded a...

TAPE 98-52, SIDE B
Number 0004

MR. BROWN continued. That same place, within the 48 hours, and still be able to have a fund-raising event. Especially those on the road system near Anchorage would be penalized by that. He indicated that wasn't the intention that was a drafting error.

> Sec. 17. AS 24.60.031 is amended by adding a new subsection to read:
>
> (c) A legislator may not travel at state expense to a place in which the legislator plans to hold a campaign fund raising event if the travel occurs less than 48 hours before the event is scheduled to begin. This subsection does not prohibit a legislator from holding a fund raising event in a place to which the legislator traveled at state expense if the
>
> (1) travel to the place is completed at least 48 hours before the event was scheduled to begin;
>
> (2) legislator made a trip at state expense to a place, returned from that place, and then, within 48 hours, made a second trip to the place and the cost of the second trip was not paid for at state expense; or
>
> (3) travel was to the capital city immediately before the beginning of a legislative session or from the capital city to the legislator's home immediately after the final adjournment of a regular or special legislative session.
>
> Renumber the following bill sections accordingly.

Page 47, line 28:

Delete: "a new subsection"
Insert: "new subsections"

Page 47, following line 28:

Insert a new subsection to read:

(d) Except for travel to the capital city, the governor or the lieutenant governor may not travel at state expense to a place in which the official plans to hold a campaign fund raising event if the travel occurs less than 48 hours before the event is scheduled to begin. This subsection does not prohibit the governor or the lieutenant governor from holding a campaign fund raising event in a place to which the official traveled at state expense if the

(1) travel to the place is completed at least 48 hours before the event was scheduled to begin;

(2) official made a trip at state expense to a place, returned from that place, and then, within 48 hours, made a second trip to the place and the cost of the second trip was not paid for at state expense.

MR. BROWN said the prohibition doesn't exist right now. It's come up more as an issue in terms of the executive branch and concern about travel at state expense by the chief executive and then fund-raisers being held. He implied the same standard has been put in place for the governor, and the governor's home is considered to be Juneau for the purposes of the governor's term of office. Other than that, there is the same 48-hour ban and the go, come back, and go back again at personal expense or campaign expense exemption.

Number 0022

REPRESENTATIVE BERKOWITZ asked what's a campaign event. If someone slips him a check, is that a campaign event.

MR. BROWN responded no.

REPRESENTATIVE BERKOWITZ asked if he goes around collecting checks from people that's fine.

CHAIR JAMES replied, "No that's a campaign event. If somebody accidentally gives you one, or sends you one, gives you one when you're there - people do that all the time, but if you are making an effort to collect them (indisc. - interrupted) depends on who initiates it."

MR. BROWN added that we would hold that standard if an invitation went out, or a public announcement was made, or there was a guest list, or someone was coordinating the event.

Number 0029

REPRESENTATIVE BERKOWITZ said if he starts calling people and asking for money that doesn't seem to rise to the level of being an event.

MR. BROWN said he doesn't foresee that being a problem, of course for legislators, running for legislative office. this isn't going to happen during session anyway, this is an interim concern. For the governor, as SB 275 is now on its way through the system, it's a concern year-round. He implied that it's a heightened level of concern for the governor.

Number 0037

REPRESENTATIVE ELTON expressed that his heightened concern is for the governor and the lieutenant governor. He asked does this mean that if they're in Anchorage on business that they cannot have dinner with their campaign manager.

MR. BROWN replied he didn't think dinner with the campaign manager is a fund-raising event. If the campaign manager invited ten employees from the timber industry to sit down with the governor, and they were told ahead of time to please bring a check, that would be an event. He expressed the public policy goal is not to have the governor fly to Anchorage at state expense and attend that dinner.

REPRESENTATIVE ELTON indicated they may be discussing a fund-raising event that they will be setting up a month later.

MR. BROWN responded saying that's a strategy, that's not a fund-raising event. He said they didn't want to (indisc.) in that too wide here. It was just to ban a very specific organized type of fund-raising activity. It's a public perception thing, people will say, "Gosh I saw this public official on TV this morning cutting a ribbon, and I know tonight this public official is having a fund-raiser at so and so's house, and I know that this public official traveled to and from Anchorage - is paid by the state."

MR. BROWN implied Ms. Barnett recommended that if it were possible to apportion the cost of your trip, say it was 50 percent business and 50 percent campaign. He said that would be the squeaky clean way to do it, but in terms of enforcement and advising people, it just didn't seem that that was going to be a very workable statute. It seemed easier to say, if it's for state expense you travel at state expense, and if it's for campaign purposes you travel at campaign expense.

Number 0056

REPRESENTATIVE IVAN IVAN indicated he can respect the intent of the legislation to correct deficiencies that occurred several years ago, but it's getting to a borderline of controlling our thinking. He said, "The governor sitting down with his campaign manager, or me sitting down with someone that will help me ... and now his thoughts are going to be controlled."

CHAIR JAMES stated that she doesn't think that was the intent of the conversation. She said she thinks the intent was to try to define a fund-raising event and if it's still questionable, as to what a fund-raising event is, we might want to describe what it is and what it isn't. It's not questionable and would be easy to define. That the questions that Representative Berkowitz had - if somebody hands you an occasional check, when you're out on state business, or whatever, during a period of time, when it's okay to

accept a check, that certainly is not a fund-raising event. Chair James interpreted a fund-raising event as a place where people come, they either pay to come, or they're invited to attend and to bring their checkbook to an event. This could be any kind of event where more than a certain number of people come together for that purpose.

Number 0073

CHAIR JAMES said, "If any one of us has traveled ... and we talk to somebody who is a campaign chairman or something, it wouldn't necessarily happen with the legislator because the legislator is going to be traveling within their own district. ... It's 250 miles from one end of my district to the other and I live in one end, and if I go down the other end - sometimes I go down there for business and sometimes I go down there because I'm campaigning - and it's not like buying an airplane ticket because I don't fly to get there I get in my car and I drive. And then if it's legislative business I turn in the mileage and any expense I had as a legislative trip. If I'm going down there, and going to be campaigning, or having a fund-raiser or something, then I don't do that. I don't turn that in. And so there is a decision as to whether or not you're going on state business or not."

CHAIR JAMES said, "But generally when you're talking about traveling some place on state business, having a fund-raiser happens a lot when we have fund-raisers in Anchorage and I'm in Fairbanks. And so if I'm going to travel down there, even if I'm traveling on fund-raising money, my campaign account is an example, and I'm going to be there for several days, I'm going to do legislative business too, which could be in an election year considered to be almost campaigning too - if I'm going to be talking to the people that I want to talk about, about future issues (indisc.) help as to how things should be addressed. We have many times caucuses in Anchorage, and then we also have a fund-raiser when we have a caucus. To me the caucus is happening because we have the fund-raiser. I'll pay my way with my campaign account to get there. In fact, we don't usually get any reimbursement for going to a caucus anyway because it's a political issue. So, the only time that I would be down there on state business is if I'm going to be there for some kind of a hearing, some kind of a committee meeting, or something to that effect. And if it happens to be that there's a fund-raiser scheduled at that same time, then I either should pay for my way to get down there, under this law, or with my campaign funds, or I should go back home and come back again, one way or the other, or I shouldn't go to the fund-raiser. Now that may affect some of the ways we've been doing things in the legislature because it is true, if we happen to have committee meetings or something and there is a fund-raiser, that there probably are some cases in the past where I was paid to go to Anchorage and back because of the committee. I don't know of any specifics, but there could have been, and I don't know that that ever happened. But it's a possibility, probably not under the current campaign finance law where you can't do any fund-raising in the off-year, then that might not be the case. And so I didn't go to any -- but they had some fund-raisers in this last campaign year for the party, I didn't go to any of them. So I know I haven't done that. But this would make it perfectly clear, that if you're going anywhere to attend a fund-raiser - and the only ones I could think of would be going to Anchorage because that is where a lot of fund-raisers are happening. You don't use state funds to get

there, and I'm perfectly comfortable with that, I think it's a good thing to put into law."

CHAIR JAMES said, as far as the governor is concerned she believes that is also the case. That during an election year, it can't happen in the other three years before that, and it can't happen under this current law because there can't be any fund-raising in those three years. It's only in the year of the campaign that the advantage of the governor and the lieutenant governor is (indisc.) in their being able to travel the state on governmental business, and have a fund-raiser everywhere they go. Chair James indicated that is wrong in her estimation. It doesn't make it fair if the governor can travel all over the state, having fund-raisers and campaigning, and the challengers can't. What we're trying to do is to make a level playing field. She believes this is a rational way of doing it.

Number 0117

REPRESENTATIVE ELTON asked Ms. Barnett how comfortable she is now that the Legislative Ethics Committee is going to have this kind of oversight of the chief administrative officers of the State of Alaska which is under AS 24.60.

MS. BARNETT replied she still doesn't have the P version of the bill but is assuming that other section, page 47, must go under 39.50 or must appear in a different part.

MR. BROWN directed the members to page 1, line 21 of the amendment. He said it refers you to page 47 of Version P of the bill under the Executive Branch Ethics Act.

Number 0126

REPRESENTATIVE ELTON asked how does this effect, for example, the Democratic Party. Every year it has a fund-raiser that's a golf tournament in Anchorage, how would this affect participation. If a person were in Anchorage on business, would they have to return, and then go back assuming that part of those receipts go to the Democratic Party and then to candidates?

MR. BROWN replied, "Right now, all this party building fund-raising - governor's funds, House and Senate Majority fund, those are not fund-raising events for individual candidates. This ban wouldn't apply to those, this is not a very wide net, this net is cast specifically for fund-raisers for individual campaigns. And the biggest one I'd like is, it doesn't apply to campaigning it applies to fund-raising. You can still go kiss every baby you want to, and shake every hand you want to, and hand out a million little plastic flags, you just can't raise money. ... So I don't think it's an onerous intrusion upon the rights of the incumbents to continue behaving politically, it's just targeting a very specific form of their activity which is raising money for themselves. If they were raising money in the off-year for themselves, they'd be violating the Campaign Finance Act. So those have to be party fund-raisers."

CHAIR JAMES reiterated that when you are raising money for your campaign, it doesn't seem right to have the expense of that fund-raiser be paid for by the state, that's the issue. She emphasized, if you get there at state expense, you better pay it back with your campaign expense. It's that simple.

MS. BARNETT referred to Representative Elton's question. She said she's not quite sure that it is clear in this language that it is a fund-raising event solely for that legislator. Maybe there's a way to clean that up a little bit more. She said she's not arguing at all with the notion, or concept. Ms. Barnett said it could be confusing if there was a party fund-raiser where moneys ended up in that legislator's hand at a later point.

REPRESENTATIVE BERKOWITZ said, "When the legislator plans, I think that's the determining phrase, if the party plans, it is something else."

CHAIR JAMES mentioned she is also having a problem with that. She said she is thinking of some of the fund-raisers that occurred in the campaign year. In particular, a majority fund-raiser where individual checks were made out to candidates. She indicated she doesn't feel comfortable with saying that because it's a party event.

MR. BROWN explained, under the Campaign Finance Act, those are reportable either as contributions to the party or to your campaign. The clarity exists in the Campaign Finance Act. He said, "You would be planning to hold an event - if there was a basket with your name on it at the event. If there was only a basket that said 'House Majority Fund' at the event - you know under the law you have no guarantee of receipt of those funds in your personal campaign even though you might be shaking people (indisc.). So I don't know how to go beyond the clarity of an APOC [Alaska Public Offices Commission] has to go on, when very likely some of those funds will end up in your campaign coffer. But they're going through the party first, and they're reportable to the party, and then the party has to report its donation to you, and someone has to make that decision."

Number 0160

CHAIR JAMES reiterated that she understands the intent and that she is not comfortable with the language as well because it's not specific enough.

MS. BARNETT referred to 24.60.031. She said in the existing law there is something that says a legislator or a legislative employee may not accept money from an event held during a legislative session. She said this language may help:

> if a substantial purpose of the event is to raise money on behalf of the member for campaign purposes

MS. BARNETT stated she is a little more comfortable with that where it targets that person.

CHAIR JAMES said she is willing to put Amendment P.2 aside since we will be working on it between now and Saturday to come up with something that's more definitive.

MR. BROWN said, "I asked the drafter, 'Do we know what a fund-raising event is,' and she said 'yes, it's a fund-raising event,' just like you [Chair James] said. So there are times when you want to define, and there are times when you think the language is going to do the job itself. But I think it's -- if there's some gray

area, that's the point of concern here is what's a fund-raising event - if it's party building, if it's a majority event. So I'm happy to work with the drafter and actually put a definition in for the purposes of the subsection of the Legislative Ethics Code and the Executive Branch Ethics Act."

REPRESENTATIVE BERKOWITZ said, another thing, when you're looking at the executive branch, not all governors call Juneau home.

MR. BROWN responded, "It's like a tax home. You have to take a home and not have it, you can't have two. Juneau has to be your home, it is, the governor's house is here - some governor's have chosen not to reside in it - in a very regular basis and they might take exception to that." He said he didn't know if it is possible to craft a statute to enable the governor to say, "I don't want to live in Juneau..."

CHAIR JAMES said she would venture to say that wherever the governor lives that when he goes back and forth between Juneau and that place, he's paid for at state expense, so the same applies.

MR. BROWN remarked that only one of them can be - he can only come home in one direction, you can't be going home both ways. He said, "If you have a suggestion about giving the Chief Executive the option of declaring some other place in the capital city his or her home for the purposes of their term office, I think it would be to that governor's disadvantage to pick some place besides Juneau, unless the governor's really not going to spend very much time here. But if the governor's really going to spend (indisc.) time here..."

REPRESENTATIVE BERKOWITZ said he spends four months of the year here and this doesn't make Juneau his home. If he is living in Clark for example that would be his home.

MR. BROWN said, "That's fine, but I'm going to say it's probably to your advantage, as the governor who wants to raise money. By the way he was the last governor who ran as an incumbent, right. So that's the last time we dealt with this issue really since the last two governors (indisc.) haven't run for reelection - or three. But the issue here is, do you want to be able to come back to Lake Clark and have unlimited fund-raisers within 48 hours, or do you want to be able to come back to Juneau and do that. So you can give the person the option, but they still have to pick one place."

REPRESENTATIVE BERKOWITZ said he doesn't want, by law that we declare that Juneau is the governor's home.

REPRESENTATIVE ELTON stated that he is not totally bothered by that.

MR. BROWN said, "For the purposes of the subsection."

REPRESENTATIVE BERKOWITZ reported that he's raised the point, he's thrown it out there, we've chewed on it, and now he's letting it go.

Number 0196

REPRESENTATIVE HODGINS said, "While we were pondering about the definition of frivolous, I wonder if we should ponder about the

definition of high-centered. I think there's some important stuff in this amendment as I pointed out earlier. My discomfort with the language was discriminatory about my situation. If I traveled to Anchorage from Kenai which I do quite a bit on state business the day before a fund-raiser, I can't really, the way the existing law is, is I cannot really accept - I have to travel on my own nickel even it's going to be for state business if it's 48 hours. This amendment allows me to make a round-trip the day of the thing at my expense and then to attend a fund-raiser which I think is very appropriate. And I would hope that we would go ahead and move this amendment, or some portion of this amendment. I don't have any problem on waiting until Saturday even though I detest Saturday meetings. As long as we don't get high-centered, I'll be here. But if we continue to get high-centered I won't be here."

MR. BROWN suggested the committee adopt the amendment now. He said he can bring forward a definition of a fund-raising event, or we can take this away and come back with one remembering everything that's been discussed.

Number 0209

CHAIR JAMES announced if there's no objection, we'll just set P.2 aside and deal with it again on Saturday. She said this bill is not leaving this committee without this provision in it.

REPRESENTATIVE BERKOWITZ said he thinks we just got off-center.

20th Legislature(1997-1998)
Committee Minutes
HOUSE STATE AFFAIRS
Apr 21, 1998

SB 105 - ETHICS/LOBBYING/CAMPAIGN FINANCE

Number 0088

CHAIR JAMES announced the next order of business is CSSB 105(FIN) am, "An Act relating to legislative and executive branch ethics; relating to campaign finances for candidates for state office; relating to the conduct and regulation of lobbyists with respect to public officials; relating to the filing of disclosures by certain state employees and officials; making a conforming amendment to the definition of 'public official' for employment security statutes; and providing for an effective date."

Number 0090

BEN BROWN, Legislative Administrative Assistant to Senator Kelly Alaska State Legislature, came before the committee. He stated he distributed the revised work draft, LS0079\Q, Cramer, 4/20/98, that incorporates all the amendments made at the last meeting of the State Affairs Committee.

MR. BROWN also distributed Amendment Q.1 that reflects some concerns that other members of the House had, who probably won't have an opportunity to look at the bill in committee themselves.

Number 0096

REPRESENTATIVE MARK HODGINS asked if travel at state expense is included in the amendment.

MR. BROWN replied it is in both sections, the legislative ethics section and the executive branch ethics section. Mr. Brown referred to Section 17, page 15, AS 24.60.031 adds a new subsection on fund-raising during session. Section 74, page 48, AS 39.52.120. The provisions of the two are very similar and they do allow you to "double-back" as long as you pay for your trip - the most recent time you travel somewhere, then there's no 48 hours...

Number 0109

REPRESENTATIVE HODGINS had a question on Section 17, page 15, beginning on line 10.

> (2) legislator made a trip at state expense to a place, returned from that place, and then, within 48 hours, made a second trip to the place and the cost of the second trip was not paid for at state expense;

REPRESENTATIVE HODGINS said, "If I was in Fairbanks on state business, flew into Anchorage on my normal course of going home, and then I flew down to Kenai, and then returned, I haven't really returned to the place that I came from at state expense - which would be Fairbanks. ... I just wanted to make sure there's no problem. ... Let's say that I live in Fairbanks, and I flew on state business to Anchorage and then decided I was going to have a fund-raiser, and it was a heck of a lot cheaper for me to fly to

Kenai at my own money and back ... or I even traveled by car to Palmer and back at my own expense. Does then that absolve me from having to go back to Fairbanks before I have a fund-raiser?"

CHAIR JAMES stated she didn't believe the intent of this is to have you go back to Fairbanks.

Number 0127

REPRESENTATIVE HODGINS gave another example. He said, "Let's say that I lived in Kenai and I'm flying into Anchorage on state business, and then while I'm there I think, well I'm going to have a fund-raiser, there's a fund-raiser planned. Rather than go to Kenai again, if I just rented a car and drove to Palmer and back, made a trip out of town and back at my own expense, I guess that's what I'm asking. As long as you make a trip out of the location, and back at your own expense, it doesn't really matter where you go."

CHAIR JAMES indicated what she would do is reimburse the state out of her campaign money, the cost of getting from Kenai to Anchorage. If you're going to have a fund-raiser, you take your fund-raising money and pay your way to get there.

MR. BROWN stated if you look back at the beginning of prohibition, you may not travel at state expense to a place where you plan to hold a campaign fund-raising event. That's the initial rule you have to look at -- it's a matter of planning. He said, "The best way to protect yourself is to have the most - the leg immediately prior to the fund-raiser, not be paid for at state expense. Someone still might try to challenge you under this but that would be your best first line of defense. Don't pay the last leg of your journey with a state TR [travel request]."

Number 0149

MR. BROWN remarked, "I'm more concerned actually, because it just occurred to me while you were talking, that second might not work if you're really busy going back and forth, and it almost seems (indisc.) subsequent. (Indisc.). So I don't know that we've perfected this language yet, it's a thorny issue. And I don't think I see a problem sequential legs like you do. I think as long as your most recent leg -- we can only close it so tight and there's still going to be a tiny loophole and I think that's probably as tight as we can get it."

Number 0153

REPRESENTATIVE KIM ELTON said he agreed with Mr. Brown. Under the provisions, as amended, he believes the simplest way out the bind in that example would be, when you travel to Fairbanks at state expense, either drive to Anchorage at your own expense or fly to Anchorage at your own expense. Then you don't need to worry about it because you haven't arrived in Anchorage on a state TR.

Number 0159

REPRESENTATIVE HODGINS said his point is, can you cleanse it by taking a shorter trip someplace and going back. Obviously it's cheaper to buy a ticket to Kenai, and back and forth, or to drive to Palmer, back and forth, than it is to pay your own way from

Fairbanks.

Number 0175

CHAIR JAMES stated she doesn't believe this amendment will stay in the bill until the end. But it's very important to her because she doesn't believe they should be traveling on state expense for campaign fund-raising activities. She indicated she feels very strongly about it both on the legislative and governor's side. She would like to leave it in there.

REPRESENTATIVE HODGINS mentioned he agrees wholeheartedly, he's just looking at the loopholes.

Number 0215

REPRESENTATIVE HODGINS made a motion to adopt Amendment Q.1.

Number 0216

MR. BROWN suggested the committee adopt version Q as a work draft and then Amendment Q.1.

Number 0218

REPRESENTATIVE HODGINS amended his motion to adopt HCS CSSB 105, version Q, with the Amendment Q.1.

Number 0219

CHAIR JAMES said, "Before I accept that motion, let's say that we did have an amendment on the floor of Q.1, which will be displaced by this motion, to accept the CS Q and Q.1 the amendment, is there any objection."

REPRESENTATIVE ELTON asked Chair James to explain the motion. He indicated he heard a two-part motion that we adopt version Q and the amendment [Q.1].

CHAIR JAMES replied that's what they did.

Number 0225

REPRESENTATIVE HODGINS made a motion to adopt HCS CSSB 105, version LS0074\Q, there being no objections, that version was before the committee.

Number 0027

REPRESENTATIVE HODGINS made a motion to adopt Amendment Q.1.

Number 0289

REPRESENTATIVE ELTON objected. He said he would like to offer an amendment to the amendment on page 3, line 15 of the amendment.

Page 26, line 16 through 18:
Delete:

A person who requested an opinion, including a legislator, may not require admittance to an executive session of the committee when it is deliberating concerning the advisory opinion.

Number 0232

CHAIR JAMES objected. A roll call vote was taken. Representatives Berkowitz and Elton voted for the amendment. Representative Hodgins, Ivan, James and Ryan, voted against the amendment. The amendment to the amendment failed by a vote of 2-4.

CHAIR JAMES asked if there were any objections to Amendment Q.1. There being none, Amendment Q.1 was adopted.

Number 0240

CHAIR JAMES noted, "We have a fiscal note here, it's a draft, it's not signed, but we will probably have one signed before I move it on for $5,000 from the Attorney General's Office for additional staff time for the reporting that's required by this bill. So we need to move this fiscal note with it was well."

Number 0243

REPRESENTATIVE HODGINS made a motion to move HCS CSSB 105, version Q, as amended, with individual recommendations, and attached fiscal note.

Number 0246

REPRESENTATIVE ELTON objected.

CHAIR JAMES requested a roll call vote. Representatives Ryan, Hodgins, Ivan, James, Elton and Berkowitz voted to move HCS CSSB 105(STA). HCS CSSB 105(STA) moved from the House State Affairs Standing Committee.

20TH Legislature (1977-1998)
Committee Minutes
HOUSE FINANCE
April 24, 1998

SECTION 17: AS 24.60.031(c) BAN ON FUNDRAISING WHEN TRAVELING AT STATE EXPENSE This section adds new

subsections to the fundraising restrictions in the Legislative Ethics Code. Subsection (c) prevents travel at State expense to a place where a fundraiser is planned within 48 hours of the travel. It allows State-paid travel if the fundraiser is at least 48 hours after the travel occurs, if a subsequent trip (not paid for by the State) is made between the two locations, or if the travel is to convene or adjourn for a legislative session in the capital city. Subsection (e) defines `campaign fundraising event'.

Mr. Brown observed that the intent is that fundraising be allowed following the convening or adjourning travel. Similar language was added to the Executive Branch Ethics Act to govern the conduct of the Governor and Lieutenant Governor.

Co-Chair Therriault questioned how the provision would work. Members concluded that further clarification was needed. Mr. Brown stated that he had prepared an amendment to address a second trip. Representative Davies observed that Ethics Committee has advised him to apportion the cost of trips that include state and private business. He noted that it is difficult to apportion costs. He recommended that half of the cost be paid from campaign funds. He noted the imposition on the legislator's time. Mr. Brown stated that he is concern with the definition of fundraising event. He stated that would work with members for a better solution.

SENATE BILL NO. 89

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY SENATOR COGHILL

Introduced: 2/16/11
Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act clarifying that a legislator or legislative employee is allowed to accept certain compassionate gifts; allowing legislators and legislative employees to use legislative mailing lists for campaign purposes and nonlegislative purposes; allowing legislators and legislative employees who are representing persons in an administrative hearing to contact hearing officers and attempt to influence the outcome of the hearing if they are professionals licensed in the state, and allowing legislators and legislative employees who are not professionals licensed in the state to contact hearing officers for the purpose of influencing the outcome of the hearing in certain instances; allowing legislators and legislative employees, in certain circumstances, to participate in partisan political activity while on state travel; prohibiting a public member of the Select Committee on Legislative Ethics from disclosing confidential information without authorization; clarifying the ethics disclosure requirements for tickets to or gifts in connection with

by the legislator, whether or not it is shared with others; or

(E) use by a legislator of photographs of that legislator.

* **Sec. 2.** AS 24.60.030(i) is amended to read:

(i) **A** [EXCEPT FOR SUPPLYING INFORMATION REQUESTED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, OR WHEN RESPONDING TO CONTACTS INITIATED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, A] legislator or legislative employee may not attempt to influence the outcome of an administrative hearing by directly or indirectly contacting or attempting to contact the hearing officer assigned to the hearing or the individual, board, or commission with authority to make the final decision in the **matter** [CASE] unless [THE]

(1) **the legislator or legislative employee is representing another person for compensation subject to AS 24.60.100 and as a professional who is licensed in the state;**

(2) the contact is made in the presence of all parties to the hearing or the parties' representatives **while the legislator or legislative employee is acting as a party or a witness in the matter or responding to a question asked of the legislator or legislative employee by the hearing officer, individual, board, or commission** and the contact is made a part of the record; or

(3) the contact is inadvertent and ex parte and the [(2)] fact and substance of the contact **are** [IS] promptly disclosed by the legislator or legislative employee to all parties to the hearing and [THE CONTACT IS] made a part of the record.

* **Sec. 3.** AS 24.60.030 is amended by adding a new subsection to read:

(j) Notwithstanding the limitations under (a)(2), (a)(4), and (c) of this section and subject to other laws of the state or the United States, a legislator or legislative employee who is on state travel may participate in partisan political activity, including campaign activity, if the legislator or the legislative employee does not use or authorize the use of state resources to pay for the activity and if the legislator or

legislative employee does not participate in the activity

(1) during a normal workday between 8:00 a.m. and 5:00 p.m., excluding meal breaks;

(2) on a state or municipal election day;

(3) during the 30 days immediately preceding an election in which the participating legislator or the legislator for whom the participating employee works is a candidate for elective office; or

(4) by fund raising for a political party or campaign.

*** Sec. 4.** AS 24.60.031 is amended by adding a new subsection to read:

(d) Notwithstanding the limitations under (a) and (b) of this section and subject to other laws of the state or the United States, a legislator or legislative employee who is on state travel may participate in partisan political activity, including campaign activity, during the state travel if the legislator or the legislative employee does not use or authorize the use of state resources to pay for the activity and if the legislator or legislative employee does not participate in the activity

(1) during a normal workday between 8:00 a.m. and 5:00 p.m., excluding meal breaks;

(2) on a state or municipal election day;

(3) during the 30 days immediately preceding an election in which the participating legislator or the legislator for whom the participating employee works is a candidate for elective office; or

(4) by fund raising for a political party or campaign.

*** Sec. 5.** AS 24.60.060(a) is amended to read:

(a) A legislator**,** [OR] legislative employee**, or public member of the committee** may not knowingly make an unauthorized disclosure of information that is made confidential by law and that the person acquired in the course of official duties. A person who violates this section is subject to a proceeding under AS 24.60.170 and may be subject to prosecution under AS 11.56.860 or another law.

*** Sec. 6.** AS 24.60.080(a) is amended to read:

(a) Except as otherwise provided in this section, a legislator or legislative employee may not

Title 39. PUBLIC OFFICERS AND EMPLOYEES
Chapter 39.20. COMPENSATION, ALLOWANCES, AND LEAVE

Article 02. TRAVEL REGULATIONS

Sec. 39.20.110. Per diem allowance.

Officials and employees of the state agencies, while traveling on official business and away from their designated post of duty, shall be allowed, instead of their actual expenses for subsistence and all fees or tips, a per diem allowance to be prescribed by the commissioner of administration under the regulatory authority set out in AS 39.20.160 , and in consultation with the head of the agency concerned.

Sec. 39.20.120. Allowable expenses.

Except as provided in AS 39.20.110 - 39.20.170, only actual and necessary traveling expenses shall be allowed to an official or employee.

Sec. 39.20.130. Mileage allowance.

Officials and employees of state agencies shall, under regulations adopted by the commissioner of administration, and whenever the mode of transportation is authorized or approved as more advantageous to the state, be paid an amount, instead of actual expenses of transportation, not to exceed a mileage allowance set by the commissioner of administration for the use of privately-owned automobiles or airplanes, when engaged in official travel inside or outside their designated posts of duty or places of service. In addition to the mileage allowance, there may be allowed reimbursement for the actual cost of ferry fares, and bridge, road, and tunnel tolls. When two or more officials or employees are traveling in the same direction, and it is possible to share a privately-owned automobile or airplane, the mileage permitted shall be allowed only once.

Sec. ⏩39.20.140⏪. Travel costs and travel outside the state.

(a) The Department of Administration may not pay an official or employee for per diem or transportation costs unless the travel is clearly necessary to benefit the state.

(b) The Department of Administration may not reimburse an official or employee or pay for more than the lowest tourist class fare for the most direct route unless

(1) tourist class accommodation is not available;

(2) waiting for tourist class accommodation would occasion a delay harmful to the state; or

(3) the Department of Administration finds that travel by tourist class accommodation is not in the best interest of the state, and authorizes other accommodation.

(c) When the Department of Administration authorizes more expensive travel under (b)(3) of this section, it shall file a justification for that authorization with the travel voucher. When fares other than tourist class are authorized under (b) of this section, the Department of Administration may not reimburse the official or employee or pay for more than the lowest first class fare available.

(d) Officials and employees are authorized to travel only the least number of days necessary to transact the business involved, to secure return passage, and to return.

(e) Every official and employee shall, unless otherwise authorized by law to travel outside the state, obtain prior approval for travel outside the state from the head of the official's or employee's department or from an immediate supervisor, or from the Department of Administration if the official or employee is not within a department or is not under the direct supervision of an official or supervisor. If an employee deviates materially from the travel authorized under this section, the employee must obtain approval for the deviation from the person who approved the travel before the Department of Administration may reimburse the employee for the travel.

Sec. 39.20.150. Advances and recovery.

(a) An agency may advance, through proper disbursing methods, to a person entitled to per diem or mileage allowance under AS 39.20.110 - 39.20.170 the sums considered advisable considering the character and probable duration of the travel to be performed.

(b) Sums advanced and not used for allowable travel expense are recoverable by setoff against salary due, or otherwise, from the person to whom advanced, or the person's estate, by deduction from any amount due from the state, or by other legal methods of recovery that may be necessary.

Sec. 39.20.160. Regulations.

The fixing and payment under AS 39.20.110 - 39.20.170 of travel and per diem allowances and of advances and recovery and reimbursement of travel expenses shall be in accordance with regulations adopted by the commissioner of administration. The regulations shall be uniform for all officials and employees, and all agencies and departments. The regulations shall also govern the use of public transportation facilities by officials and employees. The regulations relate to the internal management of state agencies and their adoption is not subject to AS 44.62 (Administrative Procedure Act).

Sec. 39.20.170. Construction of AS 39.20.110 - 39.20.170.

AS 39.20.110 - 39.20.170 may not be construed to modify or repeal a law providing for the travel expenses of the governor, or members of the legislature, or members of boards or commissions of the state government.

Attachment 3

Prepared by: Ethics Committee
November 18, 2010

HISTORICAL PERSPECTIVE
LEGISLATIVE TRAVEL AND COLLATERAL CAMPAIGN ATIVITY

1993 - Chair of the Ethics Committee in September 1993 recommended

Use of State Funds and Property:
State funds (travel, per diem, or salary stipend) may not be claimed, received or accepted by legislators or legislative employees unless the primary purpose of the trip is official legislative business.

Incidental use of time in travel or pay status may be spent for personal purposes provided:

a.) No time, materials, equipment, or funds are spent in political activities; e.g. fund raising, handing out campaign literature, circulating petitions, or requesting support or assistance for any candidate or cause.
b.) No time, materials, equipment or funds are spent in lobbying activities of any kind.
c.) No unlawful activities are undertaken.

No action taken by the Committee.

1993- Memo from Speaker of the House, Ramona Barnes

In a memo dated September 21, 1993 from Speaker Barnes, she states,

> "During the legislative session each lawmaker is allowed one trip back to their district for legislative business. This applies to both majority and minority members. During the interim all requests from legislators for travel to NCSL and the Western Legislative Conference have been approved as have all travel requests by committee members wishing to attend their committee meetings. Additionally it has been my policy to approve travel requests by members appointed to various task forces and subcommittees to attend events that relate to the work they are involved in. All other travel requests are reviewed on a case by case basis. I approve all staff travel on a case by case basis when such travel is appropriate to their majority or minority status. With respect to attending campaign activities during a state paid trip that involved legislative business, it has not been allowed in the past and is not allowed now."

1993- Letter from Senate President Rick Halford

In a letter dated October 23, 1993, from Senate President, he states,

> "You specifically requested travel authorization information concerning attendance at campaign activities during a state paid trip. State paid travel is authorized for legislative business. Campaign activities are not an acceptable purpose for travelling at state expense."

1994- Ethics Committee suggested the following guidelines

Version 1: Campaign activity may occur provided the legislator completes no less than 7.5 hours per day of non-campaign related state business. The travel authorization request, filed in advance, must indicate what specific state business activities will be undertaken for a minimum of 7.5 hours per day and must indicate what type of campaign activity the legislator will be participating in. This does not apply to legislative employees. Legislative employees are not permitted to participate in campaign activities while in travel status.

No action taken by the Committee.

Version 2: Campaign activity may occur provided the legislator [or legislative employee] completes no less than 4 hours per day of state related business. The travel authorization request must be filed in advance.

No action taken by the Committee.

1995 - Ethics Committee: Open Issue regarding Legislation

What can or can't a legislator or legislative employee do while in "travel status?"

Ethics Committee Minutes: On February 3, 1994, the committee sent a letter to Legislative Council requesting the council to develop guidelines concerning travel, specifically campaign activities while in "travel status." Legislative Council did not respond to the request. The committee continues to receive inquiries on this issue. On February 13, 1995, the committee directed staff to send another letter to Legislative Council.

No response is on file in the Ethics Office.

1996 – Ethics Committee issues Advisory Opinion 96-05

The committee was asked the following by a legislator: Whether a legislator may accept payment for the costs of a trip on which the legislator conducted both legislative business and personal business? The committee concluded it is permissible for a legislator to accept state payment for the costs of a trip on which governmental business was conducted. The committee further noted that it does not have authority, in the context of advisory opinions, to use its judgment in lieu of a legislator's judgment in determining what is necessary state business or how much sate business is necessary to justify accepting state payment for a trip. The committee also cautioned that if a legislator or legislative employee were to intentionally use a façade of legislative business to obtain a government paid trip but were to fail to conduct any governmental business to justify governmental payment, the committee might well find a violation of AS 24.60.0309(a)(2). The committee also noted in the opinion the following statements: *"The ethics committee has, in the past, requested an explanation of legislative travel and per diem policy from Legislative Council. A response has not been forthcoming to date."*

1997/98 -- SB 105, Ethics/Lobbying/Campaign Finance

SB 105 was introduced on February 25, 1997 by the Senate Rules Committee by Request of the Legislative Ethics Committee. SB 105 was signed into law on July 15, 1998. An amendment to the bill, which was not adopted, addressed the subject of state paid travel and campaigning while on that trip. The amendment read as follows:

> SB 105H HCS CCSSB 105(STA) 4/23/98
> House CS for CS for Senate Bill No. 105(STA)
> Section 17. AS 24.60.031 is amended by adding new subsections to read:
>
> (c) A legislator may not travel at state expense to a place in which the legislator plans to hold a campaign fund raising event if the travel occurs less than 48 hours before the event is scheduled to begin. This subsection does not prohibit a legislator from holding a campaign fund raising event in a place to which the legislator travels at state expense if the
>
> (1) travel to the place is completed at least 48 hours before the event was scheduled to begin;
> (2) legislator made a trip at state expense to a place, returned from that place, and then, within 48 hours, made a second trip to the place and the cost of the second trip was not paid for at state expense; or
> (3) travel was to the capital city immediately before the beginning of a legislative session or from the capital city to the legislator's home immediately after the final adjournment of a regular or special legislative session.
>
> (d) In (c) of this section, an event is considered to be a campaign fund raising event only if the legislator, or another person acting on behalf of the legislator with the legislator's expense or implied permission,
>
> (1) asks for contributions for the legislator's campaign at the event;
> (2) announces that the legislator will accept contributions for the legislator's campaign at the event; or
> (3) otherwise uses the event in a manner that clearly demonstrates that a primary purpose of the event is to raise contributions for the legislator's campaign;
>
> the fact that a legislator received campaign contributions at an event is insufficient, without other evidence, to satisfy the proof required by this paragraph.

This subject was discussed at the following committee meetings:

- House State Affairs Committee meeting of April 9, 1998
- House State Affairs Committee meeting of April 16, 1998
- House State Affairs Committee meeting of April 21, 1998
- House Finance Committee meeting of April 24, 1998.

(Minutes from these meetings are attached for your reference.)

2010 – Ethics Committee Staff drafted two versions of possible clarifying statutory language

AS 24.60.030(a)(5) A legislator or legislative employee may use or authorize the use of state funds, facilities, equipment, services or another government asset or resource for the purpose of political fund raising or campaigning: this paragraph does not prohibit

Version 1 – add a new section (B)

(B) limited use of state funds while traveling on legislative business for political fund raising or campaigning purposes if the use

(i) is collateral or incidental to the normal, scheduled performance of official duties;
(ii) does not exceed 10 percent of the total time spent on the trip;
(iii) does not interfere with the performance of public duties, and
(iv) there is no additional cost to the state;

Version 2 – add a new section (B)

(B) limited use of state funds while traveling on legislative business for political fund raising or campaigning purposes if the use

(i) is collateral or incidental to the normal, scheduled performance of official duties;
(ii) does not exceed 10 percent of the total time spent on the trip;
(iii) does not interfere with the performance of public duties,
(iv) does not occur within 30 days of an election in which the legislator or legislative employee is a candidate for office,
(v) generate no additional cost to the state, and
(vi) the proportionate share of the actual cost of the use shall be reimbursed to the state;

No discussion. Item was not before the committee as an agenda item.

2010 - Ethics Committee issues Advisory Opinion 10-01 and then rescinded their action

The committee issued Advisory Opinion 10-01 on May 27, 2010 and then rescinded the opinion at the June 14, 2010 meeting and referred back to the August 19, 2008 letter to the Alaska Public Offices Commission for guidance in this area. AO 10-01 stated that it was the nature of the business conducted rather than whether it is paid for with state resources that should be the governing standard in determining whether an ethical violation has occurred. A statement signed by the legislator designating the primary nature and purpose of the business rather than whether is it paid for by state resources should suffice to govern whether or not collateral activities can or cannot occur. AS 24.60.030(a)(3).

The August 19, 2008 letter to APOC the committee stated a legislative resource, including money provided by the legislature to cover or reimburse costs incurred by a legislator or legislative employee while traveling on legislative business, is a government asset or resource. A government asset or resource may not be used for involvement in or support of or opposition to partisan political activity. AS 24.560.030(a)(2. A legislator or legislative employee may not use or authorize the use of government asset or resource for the purpose of political fund raising or campaigning. AS 24.60.030(a)(5).

20th Legislature(1997-1998)

Bill History/Action for 20 Legislature

BILL: SB 105 **SHORT TITLE:** ETHICS/LOBBYING/CAMPAIGN FINANCE

BILL VERSION: HCS CSSB 105(FIN) AM H

CURRENT STATUS: CHAPTER 74 SLA 98 **STATUS DATE:** 06/03/98

SPONSOR(s): RULES BY REQUEST OF LEGISLATIVE ETHICS COMMITTEE

TITLE: "An Act relating to legislative and executive branch ethics; relating to campaign finances for candidates for state or municipal office; relating to the conduct and regulation of lobbyists with respect to public officials; relating to the filing of disclosures by certain state employees and officials; making a conforming amendment to the definition of 'public official' for employment security statutes; and providing for an effective date."

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Display Bill History

Jrn-Date	Jrn-Page		Action
02/25/97	0494	(S)	READ THE FIRST TIME - REFERRAL(S)
02/25/97	0494	(S)	STATE AFFAIRS, FINANCE
03/11/97	Text	(S)	STA AT 3:30 PM BELTZ ROOM 211
03/11/97	Text	(S)	<BILL HELD OVER TO 3/13 MEETING>
03/11/97	Text	(S)	MINUTE(STA)
03/13/97	Text	(S)	STA AT 3:30 PM BELTZ ROOM 211
03/13/97	Text	(S)	MINUTE(STA)
03/18/97	Text	(S)	MINUTE(STA)
03/25/97	Text	(S)	STA AT 3:30 PM BELTZ ROOM 211
03/25/97	Text	(S)	MINUTE(STA)
03/26/97	0873	(S)	STA RPT CS 3DP NEW TITLE
03/26/97	0873	(S)	DP: GREEN, MILLER, WARD
03/26/97	0873	(S)	FISCAL NOTE TO SB (ADM)
03/26/97	0873	(S)	ZERO FISCAL NOTE TO SB (LAA)
03/26/97	0873	(S)	FISCAL NOTE TO CS (ADM)
04/10/97	Text	(S)	FIN AT 5:00 PM SENATE FINANCE 532
04/10/97	Text	(S)	MINUTE(FIN)
04/10/97	Text	(S)	MINUTE(FIN)
04/15/97	Text	(S)	FIN AT 8:00 AM SENATE FINANCE 532
04/15/97	Text	(S)	MINUTE(FIN)
04/16/97	1163	(S)	FIN RPT CS 2DP 5NR NEW TITLE
04/16/97	1163	(S)	DP: PEARCE; DP IF AM: PHILLIPS
04/16/97	1163	(S)	NR: SHARP, PARNELL, ADAMS, TORGERSON,
04/16/97	1163	(S)	DONLEY
04/16/97	1163	(S)	PREVIOUS ZERO FN APPLIES (LAA)
04/16/97	1163	(S)	ZERO FNS TO CS (LABOR, LAW)
04/16/97	1163	(S)	PREVIOUS ZERO FN APPLIES (LAA)
04/16/97	Text	(S)	FIN AT 8:00 AM SENATE FINANCE 532
04/16/97	Text	(S)	MINUTE(FIN)
04/16/97	Text	(S)	MINUTE(FIN)
04/18/97	1276	(S)	RULES TO CALENDAR & 1NR 4/18/97
04/18/97	1279	(S)	READ THE SECOND TIME
04/18/97	1279	(S)	FIN CS ADOPTED UNAN CONSENT
04/18/97	1280	(S)	AM NO 1 OFFERED AND WITHDRAWN

04/18/97 1281 (S) AM NO 2 FAILED Y4 N13 E3
04/18/97 1282 (S) AM NO 3 FAILED Y4 N13 E3
04/18/97 1283 (S) AMENDMENTS 4, 5 NOT OFFERED
04/18/97 1283 (S) AM NO 6 ADOPTED Y12 N5 E3
04/18/97 1285 (S) AM NO 7 FAILED Y7 N10 E3
04/18/97 1286 (S) AM NO 8 FAILED Y5 N12 E3
04/18/97 1287 (S) AM NO 9 ADOPTED Y17 N- E3
04/18/97 1291 (S) ADVANCED TO THIRD READING UNAN CONSENT
04/18/97 1291 (S) READ THE THIRD TIME CSSB 105(FIN) AM
04/18/97 1292 (S) PASSED Y15 N2 E3
04/18/97 1292 (S) EFFECTIVE DATE(S) SAME AS PASSAGE
04/18/97 1292 (S) LINCOLN NOTICE OF RECONSIDERATION
04/18/97 Text (S) RLS AT 10:45 AM FAHRENKAMP RM 203
04/18/97 Text (S) MINUTE(RLS)
04/21/97 1334 (S) RECON TAKEN UP - IN THIRD READING
04/21/97 1335 (S) RETURN TO SECOND FOR AM 10 UNAN CONSENT
04/21/97 1335 (S) AM NO 10 ADOPTED Y14 N5 E1
04/21/97 1336 (S) AUTOMATICALLY IN THIRD READING
04/21/97 1337 (S) PASSED ON RECONSIDERATION Y17 N2 E1
04/21/97 1337 (S) EFFECTIVE DATE(S) SAME AS PASSAGE
04/21/97 1370 (S) TRANSMITTED TO (H)
04/22/97 1232 (H) READ THE FIRST TIME - REFERRAL(S)
04/22/97 1233 (H) STATE AFFAIRS, FINANCE
02/05/98 Text (H) STA AT 8:00 AM CAPITOL 102
02/05/98 Text (H) MINUTE(STA)
02/12/98 Text (H) STA AT 8:00 AM CAPITOL 102
02/12/98 Text (H) MINUTE(STA)
02/17/98 Text (H) STA AT 8:00 AM CAPITOL 102
02/17/98 Text (H) MINUTE(STA)
02/19/98 Text (H) MINUTE(STA)
02/24/98 Text (H) STA AT 3:00 PM CAPITOL 102
02/24/98 Text (H) MINUTE(STA)
02/26/98 Text (H) STA AT 3:00 PM CAPITOL 102
02/26/98 Text (H) MINUTE(STA)
03/03/98 Text (H) STA AT 3:00 PM CAPITOL 102
03/03/98 Text (H) MINUTE(STA)
03/05/98 Text (H) STA AT 3:00 PM CAPITOL 102
03/05/98 Text (H) MINUTE(STA)
03/12/98 Text (H) STA AT 1:00 PM CAPITOL 102
03/12/98 Text (H) MINUTE(STA)
03/19/98 Text (H) STA AT 3:00 PM CAPITOL 102
03/19/98 Text (H) MINUTE(STA)
03/24/98 Text (H) MINUTE(FIN)
03/26/98 Text (H) STA AT 1:00 PM CAPITOL 102
03/26/98 Text (H) MINUTE(STA)
04/04/98 Text (H) STA AT 10:00 AM CAPITOL 102
04/04/98 Text (H) <BILL HELD OVER FROM 2/17>
04/04/98 Text (H) MINUTE(STA)
04/07/98 Text (H) STA AT 8:00 AM CAPITOL 102
04/07/98 Text (H) <BILL HELD OVER>

04/07/98 Text (H) MINUTE(STA)
04/09/98 Text (H) STA AT 8:00 AM CAPITOL 102
04/09/98 Text (H) <BILL HELD OVER>
04/09/98 Text (H) MINUTE(STA)
04/16/98 Text (H) STA AT 8:00 AM CAPITOL 102
04/16/98 Text (H) MINUTE(STA)
04/18/98 Text (H) STA AT 10:00 AM CAPITOL 102
04/18/98 Text (H) <BILL HELD OVER>
04/18/98 Text (H) MINUTE(STA)
04/21/98 Text (H) STA AT 8:00 AM CAPITOL 102
04/21/98 Text (H) <BILL HELD OVER>
04/21/98 Text (H) MINUTE(STA)
04/23/98 3210 (H) STA RPT HCS(STA) NT 6NR
04/23/98 3210 (H) ...TECHNICAL TITLE CHANGE
04/23/98 3210 (H) NR: JAMES, IVAN, ELTON, BERKOWITZ,
04/23/98 3210 (H) RYAN, HODGINS
04/23/98 3211 (H) FISCAL NOTE (LAW)
04/23/98 3211 (H) ZERO FISCAL NOTE (ETH CMTE)
04/24/98 Text (H) FIN AT 8:00 AM HOUSE FINANCE 519
04/24/98 Text (H) MINUTE(FIN)
04/27/98 Text (H) FIN AT 1:30 PM HOUSE FINANCE 519
05/04/98 Text (H) FIN AT 1:30 PM HOUSE FINANCE 519
05/04/98 Text (H) FIN AT 6:00 PM HOUSE FINANCE 519
05/05/98 Text (H) MINUTE(FIN)
05/05/98 Text (H) MINUTE(FIN)
05/06/98 3556 (H) FIN RPT HCS(FIN) NT 3DP 4NR 1AM
05/06/98 3556 (H) ...TECHNICAL TITLE CHANGE
05/06/98 3556 (H) DP: MULDER, MARTIN, DAVIES
05/06/98 3556 (H) NR: THERRIAULT, GRUSSENDORF, DAVIS,
05/06/98 3556 (H) KELLY; AM: KOHRING
05/06/98 3556 (H) FISCAL NOTE (ADM)
05/06/98 3556 (H) 2 ZERO FNS (H.FIN/LAA, ADM)
05/06/98 3556 (H) FISCAL NOTE (LAW) 4/23/98
05/06/98 3557 (H) ZERO FISCAL NOTE (ETHICS) 4/23/98
05/11/98 3821 (H) RULES TO 1ST SUPPLEMENTAL CAL 5/11/98
05/11/98 3821 (H) READ THE SECOND TIME
05/11/98 3821 (H) FIN HCS ADOPTED UNAN CONSENT
05/11/98 3822 (H) AM NO 1 FAILED Y14 N23 A3
05/11/98 3822 (H) AM NO 2 ADOPTED UNAN CONSENT
05/11/98 3823 (H) AM NO 3 ADOPTED UNAN CONSENT
05/11/98 3823 (H) AM NO 4 NOT OFFERED
05/11/98 3823 (H) AM NO 5 FAILED Y14 N25 A1
05/11/98 3824 (H) WITHDRAW AM NO 6 PASSED Y21 N18 A1
05/11/98 3825 (H) AM NO 7 OFFERED
05/11/98 3825 (H) AM TO AM 7 ADOPTED UNAN CONSENT
05/11/98 3826 (H) AM 7 AS AM FAILED Y12 N27 A1
05/11/98 3826 (H) ADVANCED TO THIRD READING 5/12 CALENDAR
05/12/98 3897 (H) READ/THIRD TIME HCS CSSB 105(FIN) AM H
05/12/98 3897 (H) RETURN TO SECOND FOR AM 8 UNAN CONSENT
05/12/98 3898 (H) AM NO 8 ADOPTED Y21 N17 A2

05/12/98 3899	(H)	AUTOMATICALLY IN THIRD READING
05/12/98 3899	(H)	PASSED Y37 N1 A2
05/12/98 3900	(H)	EFFECTIVE DATE(S) SAME AS PASSAGE
05/12/98 3900	(H)	RESCIND ACTION IN PASSING Y25 N14 A1
05/12/98 3901	(H)	RETURN/2ND RESCIND ACTION AM 8 PD Y27N13
05/12/98 3902	(H)	RESCIND ACTION/PASSING AM8 PD Y26 N13 A1
05/12/98 3902	(H)	AM NO 8 FAILED Y18 N22
05/12/98 3903	(H)	AUTOMATICALLY IN THIRD READING
05/12/98 3903	(H)	PASSED Y40
05/12/98 3903	(H)	EFFECTIVE DATE(S) SAME AS PASSAGE
05/12/98 3943	(H)	TRANSMITTED TO (S) AS AMENDED
05/12/98 4166	(S)	CONCUR AM OF (H) Y20 N-
05/26/98 4205	(S)	10:40 AM 5/15/98 TRANSMITTED TO GOVERNOR
07/15/98 4276	(S)	SIGNED INTO LAW 6/3 CHAPTER 74 SLA 98
07/15/98 4277	(S)	EFFECTIVE DATE OF LAW SEE CHAPTER

Similar Subject Match or Exact Subject Match
CAMPAIGNS
DISCLOSURE
EMPLOYMENT
ETHICS
EXECUTIVE BRANCH
GOVERNOR
LEGISLATIVE AGENCIES
LEGISLATORS
LOBBYISTS
PUBLIC EMPLOYEES
PUBLIC OFFICERS

Display Bill

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20th Legislature(1997-1998)

House or Senate Minutes

Bill : SB 105

Dates: 01/01/1997 to 01/06/2011

03/11/1997	3:40 PM	Senate STATE AFFAIRS	Minutes
03/13/1997	3:40 PM	Senate STATE AFFAIRS	Minutes
03/18/1997	3:37 PM	Senate STATE AFFAIRS	Minutes
03/25/1997	3:33 PM	Senate STATE AFFAIRS	Minutes
04/10/1997	5:14 PM	Senate FINANCE	Minutes
04/10/1997	5:14 PM	Senate FINANCE	Minutes
04/15/1997	8:10 AM	Senate FINANCE	Minutes
04/16/1997	8:11 AM	Senate FINANCE	Minutes
04/16/1997	8:11 AM	Senate FINANCE	Minutes
04/18/1997	10:55 AM	Senate RULES	Minutes
02/05/1998	8:04 AM	House STATE AFFAIRS	Minutes
02/12/1998	8:02 AM	House STATE AFFAIRS	Minutes
02/17/1998	8:12 AM	House STATE AFFAIRS	Minutes
02/19/1998	9:11 AM	House STATE AFFAIRS	Minutes
02/24/1998	3:00 PM	House STATE AFFAIRS	Minutes
02/26/1998	3:00 PM	House STATE AFFAIRS	Minutes
03/03/1998	3:00 PM	House STATE AFFAIRS	Minutes
03/05/1998	3:00 PM	House STATE AFFAIRS	Minutes
03/12/1998	1:00 PM	House STATE AFFAIRS	Minutes
03/19/1998	3:00 PM	House STATE AFFAIRS	Minutes
03/24/1998	1:55 PM	House FINANCE	Minutes
03/26/1998	1:00 PM	House STATE AFFAIRS	Minutes
04/04/1998	10:08 AM	House STATE AFFAIRS	Minutes
04/07/1998	8:06 AM	House STATE AFFAIRS	Minutes
04/09/1998	8:13 AM	House STATE AFFAIRS	Minutes
04/16/1998	8:05 AM	House STATE AFFAIRS	Minutes
04/18/1998	10:03 AM	House STATE AFFAIRS	Minutes
04/21/1998	8:17 AM	House STATE AFFAIRS	Minutes
04/24/1998	1:55 PM	House FINANCE	Minutes
05/05/1998	2:00 PM	House FINANCE	Minutes
05/05/1998	7:30 PM	House FINANCE	Minutes

20TH Legislature (1977-1998)
Committee Minutes
HOUSE STATE AFFAIRS
April 09, 1998

Number 0201

CHAIR JAMES asked Mr. Brown to address Amendment LS0074\L.2, Cramer, 4/3/98.

MR. BROWN explained Amendment L.2 deals with fund-raisers happening when people are traveling at state expense. This language puts a prohibition in place for legislators, governor and lieutenant governor. If you go somewhere at state expense it should have to be incidental if you end up staying there and holding a political fund-raiser it should not at any way be apparent to the public that that was part of the reason there at state expense. This puts a 48-hour ban in place to try to prevent that sort of activity.

Page 17, following line 5, insert a new bill section to read:

*Sec. 21. AS 24.60.031 is amended by adding a new subsection to read:

(c) a legislator may not travel at state expense to a place in which the legislator plans to hold a campaign fund raising event if the travel occurs less than 48 hours before the event is scheduled to begin. This subsection does not prohibit a legislator from holding a campaign fund raising event in a place to which the legislator traveled at state expense if the travel to the place is completed at least 48 hours before the event was scheduled to begin.

Page 48, following line 31, insert a new subsection to read:

(b) Except for travel to the capital city, an elected official may not travel at state expense to a place in which the official plans to hold a campaign fund raising event if the travel occurs less than 48 hours before the event is scheduled to begin. This subsection does not prohibit an elected official from holding a campaign fund raising event in a place to which the elected official traveled at state expense if the travel to the place is completed at least 48 hours before the event was scheduled to begin. In this subsection, "elected official" means the governor or the lieutenant governor.

Number 0210

REPRESENTATIVE BERKOWITZ stated, "I drive home at the end of session ... they want to have a fund-raising event for me when I get there, they can't do it."

MR. BROWN replied they can after 48-hours or if you don't take your state reimbursement for the drive. If it were 48-hours after you got home state expense would cover your reimbursement.

Number 0213

CHAIR JAMES stressed she didn't think that was ever the intent of this amendment, there should be an exception when you go home at the end of the legislative session. She suggested they include that as an amendment to this amendment.

MR. BROWN indicated that was discussed with the drafter as an exemption for adjourning travel not for convening travel.

REPRESENTATIVE BERKOWITZ remarked if you don't want people to travel at state expense solely or primarily to have a fund-raising event, and if that's the case why don't we just say it that way.

CHAIR JAMES asked for a motion to adopt Amendment L.2 for discussion and amending if needed.

Number 0222

REPRESENTATIVE HODGINS made a motion to adopt proposed Amendment L.2 for discussion.

REPRESENTATIVE RYAN objected.

CHAIR JAMES noted there is an objection. Chair James said she believes it should be amended that in the adjourning trip home, especially when they are limited to any campaigning while in the capital and there is so little time, going home should not be the issue.

REPRESENTATIVE HODGINS said he is totally against the amendment since he lives in Kenai and makes many trips to Anchorage. He indicated this means he can't go into Anchorage two days prior to, a function or committee meeting, or something like that. He will be voting against it if it is a 48-hour thing.

CHAIR JAMES responded it is not proper for her to fly from Fairbanks to Anchorage to attend fund-raising. She indicated she has either paid her own way or used her campaign funds to pay and has not traveled to Anchorage for a fund-raiser on state pay because she doesn't believe it's right.

Number 0234

REPRESENTATIVE HODGINS continued. He pointed out Kenai is so close to Anchorage that he will make several trips back and forth. If he has business the day before (an Oil and Gas Committee meeting) and travels on a state warrant and returns to Kenai and the following day travel to Anchorage on his own money for a fund-raiser that would unduly restrict him for the compensation of traveling the day before. He said they're assuming that you...

CHAIR JAMES stressed the four days is a problem in the amendment.

REPRESENTATIVE HODGINS read the amendment which addresses traveling at state expense and travel that occurs less than 48 hours before the event is scheduled to begin. He stressed if he makes a round-trip on Tuesday and attends a fund-raiser on Wednesday...

CHAIR JAMES reiterated this isn't going to work.

MR. BROWN remarked he believes the drafter deleted another sentence when she put the legislative language in there. He indicated at that time they were only dealing with the governor.

Number 0246

CHAIR JAMES noted the governor is what prompted them on the issue of whether or not he should be raising funds while they are in a legislative session when someone is running against him. She said, "We tried to solve on the floor ... so now he can't. That means he can go visit somebody, any place in the state, and have a fund-raiser while he's there. Unless we put something in here, that's still allowed. I don't think it should be, and I think it's fair for both of us to not." She asked that this amendment be withdrawn for now and move onto the next amendment.

Number 0254

REPRESENTATIVE HODGINS removed his motion to adopt Amendment L.2.

CHAIR JAMES indicated they need to talk to the drafter.

No action taken at this meeting.

20TH Legislature (1977-1998)
Committee Minutes
HOUSE STATE AFFAIRS
April 16, 1998

MR. BROWN explained Amendment P.2 deals with the ban of fund-raising by elected officials who have traveled somewhere at state expense for that fund-raiser. The problem with the way it was written is that the ban precluded a...

TAPE 98-52, SIDE B
Number 0004

MR. BROWN continued. That same place, within the 48 hours, and still be able to have a fund-raising event. Especially those on the road system near Anchorage would be penalized by that. He indicated that wasn't the intention that was a drafting error.

Sec. 17. AS 24.60.031 is amended by adding a new subsection to read:

(c) A legislator may not travel at state expense to a place in which the legislator plans to hold a campaign fund raising event if the travel occurs less than 48 hours before the event is scheduled to begin. This subsection does not prohibit a legislator from holding a fund raising event in a place to which the legislator traveled at state expense if the

(1) travel to the place is completed at least 48 hours before the event was scheduled to begin;

(2) legislator made a trip at state expense to a place, returned from that place, and then, within 48 hours, made a second trip to the place and the cost of the second trip was not paid for at state expense; or

(3) travel was to the capital city immediately before the beginning of a legislative session or from the capital city to the legislator's home immediately after the final adjournment of a regular or special legislative session.

Renumber the following bill sections accordingly.

Page 47, line 28:

Delete: "a new subsection"
Insert: "new subsections"

Page 47, following line 28:

Insert a new subsection to read:

(d) Except for travel to the capital city, the governor or the lieutenant governor may not travel at state expense to a place in which the official plans to hold a campaign fund raising event if the travel occurs less than 48 hours before the event is scheduled to begin. This subsection does not prohibit the governor or the lieutenant governor from holding a campaign fund raising event in a place to which the official traveled at state expense if the

(1) travel to the place is completed at least 48 hours before the event was scheduled to begin;

(2) official made a trip at state expense to a place, returned from that place, and then, within 48 hours, made a second trip to the place and the cost of the second trip was not paid for at state expense.

MR. BROWN said the prohibition doesn't exist right now. It's come up more as an issue in terms of the executive branch and concern about travel at state expense by the chief executive and then fund-raisers being held. He implied the same standard has been put in place for the governor, and the governor's home is considered to be Juneau for the purposes of the governor's term of office. Other than that, there is the same 48-hour ban and the go, come back, and go back again at personal expense or campaign expense exemption.

Number 0022

REPRESENTATIVE BERKOWITZ asked what's a campaign event. If someone slips him a check, is that a campaign event.

MR. BROWN responded no.

REPRESENTATIVE BERKOWITZ asked if he goes around collecting checks from people that's fine.

CHAIR JAMES replied, "No that's a campaign event. If somebody accidentally gives you one, or sends you one, gives you one when you're there - people do that all the time, but if you are making an effort to collect them (indisc. - interrupted) depends on who initiates it."

MR. BROWN added that we would hold that standard if an invitation went out, or a public announcement was made, or there was a guest list, or someone was coordinating the event.

Number 0029

REPRESENTATIVE BERKOWITZ said if he starts calling people and asking for money that doesn't seem to rise to the level of being an event.

MR. BROWN said he doesn't foresee that being a problem, of course for legislators, running for legislative office, this isn't going to happen during session anyway, this is an interim concern. For the governor, as SB 275 is now on its way through the system, it's a concern year-round. He implied that it's a heightened level of concern for the governor.

Number 0037

REPRESENTATIVE ELTON expressed that his heightened concern is for the governor and the lieutenant governor. He asked does this mean that if they're in Anchorage on business that they cannot have dinner with their campaign manager.

MR. BROWN replied he didn't think dinner with the campaign manager is a fund-raising event. If the campaign manager invited ten employees from the timber industry to sit down with the governor, and they were told ahead of time to please bring a check, that would be an event. He expressed the public policy goal is not to have the governor fly to Anchorage at state expense and attend that dinner.

REPRESENTATIVE ELTON indicated they may be discussing a fund-raising event that they will be setting up a month later.

MR. BROWN responded saying that's a strategy, that's not a fund-raising event. He said they didn't want to (indisc.) in that too wide here. It was just to ban a very specific organized type of fund-raising activity. It's a public perception thing, people will say, "Gosh I saw this public official on TV this morning cutting a ribbon, and I know tonight this public official is having a fund-raiser at so and so's house, and I know that this public official traveled to and from Anchorage - is paid by the state."

MR. BROWN implied Ms. Barnett recommended that if it were possible to apportion the cost of your trip, say it was 50 percent business and 50 percent campaign. He said that would be the squeaky clean way to do it, but in terms of enforcement and advising people, it just didn't seem that that was going to be a very workable statute. It seemed easier to say, if it's for state expense you travel at state expense, and if it's for campaign purposes you travel at campaign expense.

Number 0056

REPRESENTATIVE IVAN IVAN indicated he can respect the intent of the legislation to correct deficiencies that occurred several years ago, but it's getting to a borderline of controlling our thinking. He said, "The governor sitting down with his campaign manager, or me sitting down with someone that will help me ... and now his thoughts are going to be controlled."

CHAIR JAMES stated that she doesn't think that was the intent of the conversation. She said she thinks the intent was to try to define a fund-raising event and if it's still questionable, as to what a fund-raising event is, we might want to describe what it is and what it isn't. It's not questionable and would be easy to define. That the questions that Representative Berkowitz had - if somebody hands you an occasional check, when you're out on state business, or whatever, during a period of time, when it's okay to

accept a check, that certainly is not a fund-raising event. Chair James interpreted a fund-raising event as a place where people come, they either pay to come, or they're invited to attend and to bring their checkbook to an event. This could be any kind of event where more than a certain number of people come together for that purpose.

Number 0073

CHAIR JAMES said, "If any one of us has traveled ... and we talk to somebody who is a campaign chairman or something, it wouldn't necessarily happen with the legislator because the legislator is going to be traveling within their own district. ... It's 250 miles from one end of my district to the other and I live in one end, and if I go down the other end - sometimes I go down there for business and sometimes I go down there because I'm campaigning - and it's not like buying an airplane ticket because I don't fly to get there I get in my car and I drive. And then if it's legislative business I turn in the mileage and any expense I had as a legislative trip. If I'm going down there, and going to be campaigning, or having a fund-raiser or something, then I don't do that. I don't turn that in. And so there is a decision as to whether or not you're going on state business or not."

CHAIR JAMES said, "But generally when you're talking about traveling some place on state business, having a fund-raiser happens a lot when we have fund-raisers in Anchorage and I'm in Fairbanks. And so if I'm going to travel down there, even if I'm traveling on fund-raising money, my campaign account is an example, and I'm going to be there for several days, I'm going to do legislative business too, which could be in an election year considered to be almost campaigning too - if I'm going to be talking to the people that I want to talk about, about future issues (indisc.) help as to how things should be addressed. We have many times caucuses in Anchorage, and then we also have a fund-raiser when we have a caucus. To me the caucus is happening because we have the fund-raiser. I'll pay my way with my campaign account to get there. In fact, we don't usually get any reimbursement for going to a caucus anyway because it's a political issue. So, the only time that I would be down there on state business is if I'm going to be there for some kind of a hearing, some kind of a committee meeting, or something to that effect. And if it happens to be that there's a fund-raiser scheduled at that same time, then I either should pay for my way to get down there, under this law, or with my campaign funds, or I should go back home and come back again, one way or the other, or I shouldn't go to the fund-raiser. Now that may affect some of the ways we've been doing things in the legislature because it is true, if we happen to have committee meetings or something and there is a fund-raiser, that there probably are some cases in the past where I was paid to go to Anchorage and back because of the committee. I don't know of any specifics, but there could have been, and I don't know that that ever happened. But it's a possibility, probably not under the current campaign finance law where you can't do any fund-raising in the off-year, then that might not be the case. And so I didn't go to any -- but they had some fund-raisers in this last campaign year for the party, I didn't go to any of them. So I know I haven't done that. But this would make it perfectly clear, that if you're going anywhere to attend a fund-raiser - and the only ones I could think of would be going to Anchorage because that is where a lot of fund-raisers are happening. You don't use state funds to get

there, and I'm perfectly comfortable with that, I think it's a good thing to put into law."

CHAIR JAMES said, as far as the governor is concerned she believes that is also the case. That during an election year, it can't happen in the other three years before that, and it can't happen under this current law because there can't be any fund-raising in those three years. It's only in the year of the campaign that the advantage of the governor and the lieutenant governor is (indisc.) in their being able to travel the state on governmental business, and have a fund-raiser everywhere they go. Chair James indicated that is wrong in her estimation. It doesn't make it fair if the governor can travel all over the state, having fund-raisers and campaigning, and the challengers can't. What we're trying to do is to make a level playing field. She believes this is a rational way of doing it.

Number 0117

REPRESENTATIVE ELTON asked Ms. Barnett how comfortable she is now that the Legislative Ethics Committee is going to have this kind of oversight of the chief administrative officers of the State of Alaska which is under AS 24.60.

MS. BARNETT replied she still doesn't have the P version of the bill but is assuming that other section, page 47, must go under 39.50 or must appear in a different part.

MR. BROWN directed the members to page 1, line 21 of the amendment. He said it refers you to page 47 of Version P of the bill under the Executive Branch Ethics Act.

Number 0126

REPRESENTATIVE ELTON asked how does this effect, for example, the Democratic Party. Every year it has a fund-raiser that's a golf tournament in Anchorage, how would this affect participation. If a person were in Anchorage on business, would they have to return, and then go back assuming that part of those receipts go to the Democratic Party and then to candidates?

MR. BROWN replied, "Right now, all this party building fund-raising - governor's funds, House and Senate Majority fund, those are not fund-raising events for individual candidates. This ban wouldn't apply to those, this is not a very wide net, this net is cast specifically for fund-raisers for individual campaigns. And the biggest one I'd like is, it doesn't apply to campaigning it applies to fund-raising. You can still go kiss every baby you want to, and shake every hand you want to, and hand out a million little plastic flags, you just can't raise money. ... So I don't think it's an onerous intrusion upon the rights of the incumbents to continue behaving politically, it's just targeting a very specific form of their activity which is raising money for themselves. If they were raising money in the off-year for themselves, they'd be violating the Campaign Finance Act. So those have to be party fund-raisers."

CHAIR JAMES reiterated that when you are raising money for your campaign, it doesn't seem right to have the expense of that fund-raiser be paid for by the state, that's the issue. She emphasized, if you get there at state expense, you better pay it back with your campaign expense. It's that simple.

MS. BARNETT referred to Representative Elton's question. She said she's not quite sure that it is clear in this language that it is a fund-raising event solely for that legislator. Maybe there's a way to clean that up a little bit more. She said she's not arguing at all with the notion, or concept. Ms. Barnett said it could be confusing if there was a party fund-raiser where moneys ended up in that legislator's hand at a later point.

REPRESENTATIVE BERKOWITZ said, "When the legislator plans, I think that's the determining phrase, if the party plans, it is something else."

CHAIR JAMES mentioned she is also having a problem with that. She said she is thinking of some of the fund-raisers that occurred in the campaign year. In particular, a majority fund-raiser where individual checks were made out to candidates. She indicated she doesn't feel comfortable with saying that because it's a party event.

MR. BROWN explained, under the Campaign Finance Act, those are reportable either as contributions to the party or to your campaign. The clarity exists in the Campaign Finance Act. He said, "You would be planning to hold an event - if there was a basket with your name on it at the event. If there was only a basket that said 'House Majority Fund' at the event - you know under the law you have no guarantee of receipt of those funds in your personal campaign even though you might be shaking people (indisc.). So I don't know how to go beyond the clarity of an APOC [Alaska Public Offices Commission] has to go on, when very likely some of those funds will end up in your campaign coffer. But they're going through the party first, and they're reportable to the party, and then the party has to report its donation to you, and someone has to make that decision."

Number 0160

CHAIR JAMES reiterated that she understands the intent and that she is not comfortable with the language as well because it's not specific enough.

MS. BARNETT referred to 24.60.031. She said in the existing law there is something that says a legislator or a legislative employee may not accept money from an event held during a legislative session. She said this language may help:

> if a substantial purpose of the event is to raise money on behalf of the member for campaign purposes

MS. BARNETT stated she is a little more comfortable with that where it targets that person.

CHAIR JAMES said she is willing to put Amendment P.2 aside since we will be working on it between now and Saturday to come up with something that's more definitive.

MR. BROWN said, "I asked the drafter, 'Do we know what a fund-raising event is,' and she said 'yes, it's a fund-raising event,' just like you [Chair James] said. So there are times when you want to define, and there are times when you think the language is going to do the job itself. But I think it's -- if there's some gray

area, that's the point of concern here is what's a fund-raising event - if it's party building, if it's a majority event. So I'm happy to work with the drafter and actually put a definition in for the purposes of the subsection of the Legislative Ethics Code and the Executive Branch Ethics Act."

REPRESENTATIVE BERKOWITZ said, another thing, when you're looking at the executive branch, not all governors call Juneau home.

MR. BROWN responded, "It's like a tax home. You have to take a home and not have it, you can't have two. Juneau has to be your home, it is, the governor's house is here - some governor's have chosen not to reside in it - in a very regular basis and they might take exception to that." He said he didn't know if it is possible to craft a statute to enable the governor to say, "I don't want to live in Juneau..."

CHAIR JAMES said she would venture to say that wherever the governor lives that when he goes back and forth between Juneau and that place, he's paid for at state expense, so the same applies.

MR. BROWN remarked that only one of them can be - he can only come home in one direction, you can't be going home both ways. He said, "If you have a suggestion about giving the Chief Executive the option of declaring some other place in the capital city his or her home for the purposes of their term office, I think it would be to that governor's disadvantage to pick some place besides Juneau, unless the governor's really not going to spend very much time here. But if the governor's really going to spend (indisc.) time here..."

REPRESENTATIVE BERKOWITZ said he spends four months of the year here and this doesn't make Juneau his home. If he is living in Clark for example that would be his home.

MR. BROWN said, "That's fine, but I'm going to say it's probably to your advantage, as the governor who wants to raise money. By the way he was the last governor who ran as an incumbent, right. So that's the last time we dealt with this issue really since the last two governors (indisc.) haven't run for reelection - or three. But the issue here is, do you want to be able to come back to Lake Clark and have unlimited fund-raisers within 48 hours, or do you want to be able to come back to Juneau and do that. So you can give the person the option, but they still have to pick one place."

REPRESENTATIVE BERKOWITZ said he doesn't want, by law that we declare that Juneau is the governor's home.

REPRESENTATIVE ELTON stated that he is not totally bothered by that.

MR. BROWN said, "For the purposes of the subsection."

REPRESENTATIVE BERKOWITZ reported that he's raised the point, he's thrown it out there, we've chewed on it, and now he's letting it go.

Number 0196

REPRESENTATIVE HODGINS said, "While we were pondering about the definition of frivolous, I wonder if we should ponder about the

definition of high-centered. I think there's some important stuff in this amendment as I pointed out earlier. My discomfort with the language was discriminatory about my situation. If I traveled to Anchorage from Kenai which I do quite a bit on state business the day before a fund-raiser, I can't really, the way the existing law is, is I cannot really accept - I have to travel on my own nickel even it's going to be for state business if it's 48 hours. This amendment allows me to make a round-trip the day of the thing at my expense and then to attend a fund-raiser which I think is very appropriate. And I would hope that we would go ahead and move this amendment, or some portion of this amendment. I don't have any problem on waiting until Saturday even though I detest Saturday meetings. As long as we don't get high-centered, I'll be here. But if we continue to get high-centered I won't be here."

MR. BROWN suggested the committee adopt the amendment now. He said he can bring forward a definition of a fund-raising event, or we can take this away and come back with one remembering everything that's been discussed.

Number 0209

CHAIR JAMES announced if there's no objection, we'll just set P.2 aside and deal with it again on Saturday. She said this bill is not leaving this committee without this provision in it.

REPRESENTATIVE BERKOWITZ said he thinks we just got off-center.

20th Legislature(1997-1998)
Committee Minutes
HOUSE STATE AFFAIRS
Apr 21, 1998

SB 105 - ETHICS/LOBBYING/CAMPAIGN FINANCE

Number 0038

CHAIR JAMES announced the next order of business is CSSB 105(FIN) am, "An Act relating to legislative and executive branch ethics; relating to campaign finances for candidates for state office; relating to the conduct and regulation of lobbyists with respect to public officials; relating to the filing of disclosures by certain state employees and officials; making a conforming amendment to the definition of 'public official' for employment security statutes; and providing for an effective date."

Number 0090

BEN BROWN, Legislative Administrative Assistant to Senator Kelly Alaska State Legislature, came before the committee. He stated he distributed the revised work draft, LS0079\Q, Cramer, 4/20/98, that incorporates all the amendments made at the last meeting of the State Affairs Committee.

MR. BROWN also distributed Amendment Q.1 that reflects some concerns that other members of the House had, who probably won't have an opportunity to look at the bill in committee themselves.

Number 0096

REPRESENTATIVE MARK HODGINS asked if travel at state expense is included in the amendment.

MR. BROWN replied it is in both sections, the legislative ethics section and the executive branch ethics section. Mr. Brown referred to Section 17, page 15, AS 24.60.031 adds a new subsection on fund-raising during session. Section 74, page 48, AS 39.52.120. The provisions of the two are very similar and they do allow you to "double-back" as long as you pay for your trip - the most recent time you travel somewhere, then there's no 48 hours...

Number 0109

REPRESENTATIVE HODGINS had a question on Section 17, page 15, beginning on line 10.

> (2) legislator made a trip at state expense to a place, returned from that place, and then, within 48 hours, made a second trip to the place and the cost of the second trip was not paid for at state expense;

REPRESENTATIVE HODGINS said, "If I was in Fairbanks on state business, flew into Anchorage on my normal course of going home, and then I flew down to Kenai, and then returned, I haven't really returned to the place that I came from at state expense - which would be Fairbanks. ... I just wanted to make sure there's no problem. ... Let's say that I live in Fairbanks, and I flew on state business to Anchorage and then decided I was going to have a fund-raiser, and it was a heck of a lot cheaper for me to fly to

Kenai at my own money and back ... or I even traveled by car to Palmer and back at my own expense. Does then that absolve me from having to go back to Fairbanks before I have a fund-raiser?"

CHAIR JAMES stated she didn't believe the intent of this is to have you go back to Fairbanks.

Number 0127

REPRESENTATIVE HODGINS gave another example. He said, "Let's say that I lived in Kenai and I'm flying into Anchorage on state business, and then while I'm there I think, well I'm going to have a fund-raiser, there's a fund-raiser planned. Rather than go to Kenai again, if I just rented a car and drove to Palmer and back, made a trip out of town and back at my own expense, I guess that's what I'm asking. As long as you make a trip out of the location, and back at your own expense, it doesn't really matter where you go."

CHAIR JAMES indicated what she would do is reimburse the state out of her campaign money, the cost of getting from Kenai to Anchorage. If you're going to have a fund-raiser, you take your fund-raising money and pay your way to get there.

MR. BROWN stated if you look back at the beginning of prohibition, you may not travel at state expense to a place where you plan to hold a campaign fund-raising event. That's the initial rule you have to look at -- it's a matter of planning. He said, "The best way to protect yourself is to have the most - the leg immediately prior to the fund-raiser, not be paid for at state expense. Someone still might try to challenge you under this but that would be your best first line of defense. Don't pay the last leg of your journey with a state TR [travel request]."

Number 0149

MR. BROWN remarked, "I'm more concerned actually, because it just occurred to me while you were talking, that second might not work if you're really busy going back and forth, and it almost seems (indisc.) subsequent. (Indisc.). So I don't know that we've perfected this language yet, it's a thorny issue. And I don't think I see a problem sequential legs like you do. I think as long as your most recent leg -- we can only close it so tight and there's still going to be a tiny loophole and I think that's probably as tight as we can get it."

Number 0153

REPRESENTATIVE KIM ELTON said he agreed with Mr. Brown. Under the provisions, as amended, he believes the simplest way out the bind in that example would be, when you travel to Fairbanks at state expense, either drive to Anchorage at your own expense or fly to Anchorage at your own expense. Then you don't need to worry about it because you haven't arrived in Anchorage on a state TR.

Number 0159

REPRESENTATIVE HODGINS said his point is, can you cleanse it by taking a shorter trip someplace and going back. Obviously it's cheaper to buy a ticket to Kenai, and back and forth, or to drive to Palmer, back and forth, than it is to pay your own way from

Fairbanks.

Number 0175

CHAIR JAMES stated she doesn't believe this amendment will stay in the bill until the end. But it's very important to her because she doesn't believe they should be traveling on state expense for campaign fund-raising activities. She indicated she feels very strongly about it both on the legislative and governor's side. She would like to leave it in there.

REPRESENTATIVE HODGINS mentioned he agrees wholeheartedly, he's just looking at the loopholes.

Number 0215

REPRESENTATIVE HODGINS made a motion to adopt Amendment Q.1.

Number 0216

MR. BROWN suggested the committee adopt version Q as a work draft and then Amendment Q.1.

Number 0218

REPRESENTATIVE HODGINS amended his motion to adopt HCS CSSB 105, version Q, with the Amendment Q.1.

Number 0219

CHAIR JAMES said, "Before I accept that motion, let's say that we did have an amendment on the floor of Q.1, which will be displaced by this motion, to accept the CS Q and Q.1 the amendment, is there any objection."

REPRESENTATIVE ELTON asked Chair James to explain the motion. He indicated he heard a two-part motion that we adopt version Q and the amendment [Q.1].

CHAIR JAMES replied that's what they did.

Number 0225

REPRESENTATIVE HODGINS made a motion to adopt HCS CSSB 105, version LS0074\Q, there being no objections, that version was before the committee.

Number 0027

REPRESENTATIVE HODGINS made a motion to adopt Amendment Q.1.

Number 0229

REPRESENTATIVE ELTON objected. He said he would like to offer an amendment to the amendment on page 3, line 15 of the amendment.

Page 26, line 16 through 18:
Delete:

A person who requested an opinion, including a legislator, may not require admittance to an executive session of the committee when it is deliberating concerning the advisory opinion.

Number 0232

CHAIR JAMES objected. A roll call vote was taken. Representatives Berkowitz and Elton voted for the amendment. Representative Hodgins, Ivan, James and Ryan, voted against the amendment. The amendment to the amendment failed by a vote of 2-4.

CHAIR JAMES asked if there were any objections to Amendment Q.1. There being none, Amendment Q.1 was adopted.

Number 0240

CHAIR JAMES noted, "We have a fiscal note here, it's a draft, it's not signed, but we will probably have one signed before I move it on for $5,000 from the Attorney General's Office for additional staff time for the reporting that's required by this bill. So we need to move this fiscal note with it was well."

Number 0243

REPRESENTATIVE HODGINS made a motion to move HCS CSSB 105, version Q, as amended, with individual recommendations, and attached fiscal note.

Number 0246

REPRESENTATIVE ELTON objected.

CHAIR JAMES requested a roll call vote. Representatives Ryan, Hodgins, Ivan, James, Elton and Berkowitz voted to move HCS CSSB 105(STA). HCS CSSB 105(STA) moved from the House State Affairs Standing Committee.

20TH Legislature (1977-1998)
Committee Minutes
HOUSE FINANCE
April 24, 1998

SECTION 17: AS 24.60.031(c) BAN ON FUNDRAISING WHEN TRAVELING AT STATE EXPENSE This section adds new

subsections to the fundraising restrictions in the Legislative Ethics Code. Subsection (c) prevents travel at State expense to a place where a fundraiser is planned within 48 hours of the travel. It allows State-paid travel if the fundraiser is at least 48 hours after the travel occurs, if a subsequent trip (not paid for by the State) is made between the two locations, or if the travel is to convene or adjourn for a legislative session in the capital city. Subsection (e) defines `campaign fundraising event'.

Mr. Brown observed that the intent is that fundraising be allowed following the convening or adjourning travel. Similar language was added to the Executive Branch Ethics Act to govern the conduct of the Governor and Lieutenant Governor.

Co-Chair Therriault questioned how the provision would work. Members concluded that further clarification was needed. Mr. Brown stated that he had prepared an amendment to address a second trip. Representative Davies observed that Ethics Committee has advised him to apportion the cost of trips that include state and private business. He noted that it is difficult to apportion costs. He recommended that half of the cost be paid from campaign funds. He noted the imposition on the legislator's time. Mr. Brown stated that he is concern with the definition of fundraising event. He stated that would work with members for a better solution.

AAM 60. TRAVEL

60.010	Introduction to Travel	01/11
60.020	Travel Definitions	04/11
60.030	E-Travel	04/11
60.040	Travel Approvals	04/11
60.050	Travel Purchase Policies	01/11
60.060	Payment Methods for Transportation and Expenses	01/11
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60.070	Travel Advances	07/10
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60.090	Unused Transportation and Accommodations	01/11
60.100	Airline Delays, Rescheduling, and Overheading	01/07
60.110	Excess Baggage	04/05
60.120	Rental Cars	04/10
60.130	Airport Shuttle, Courtesy Van, and Taxi Service	01/07
60.140	Privately Owned Vehicles	04/09
60.150	Privately Owned Aircraft	10/07
60.160	Charters and Group Transportation	01/10
60.170	Alternatives to Travel	04/05
60.180	Boards and Commissions	01/07
60.190	Health and Safety of Travelers	01/10
60.200	Travel Related to Contracts	10/08
60.210	Traveler Reimbursement	04/11
60.220	Travel Expenses - Required Receipts and Documentation	04/11
60.230	Third Party Reimbursements	01/07
60.240	Lodging Types and Rates	04/11
60.250	Meal and Incidental Expense Allowances	04/11
60.260	Contracting for Subsistence	07/05

AAM 60.010 Introduction to Travel (01-11)

The travel policies of the State of Alaska are adopted by the Commissioner of the Department of Administration in accordance with AS 39.20.160. State agencies and travelers are required to comply with these policies whenever traveling on state business and are prohibited

Once the taxes are included they cannot be removed due to local city, borough, or municipality regulations. It is the traveler's responsibility to pay any taxes not removed prior to issuance of receipt.

AAM 60.070 Travel Advances (07-10)

Travel advances are limited to payments made prior to travel commencing, and are generally calculated at 80% of estimated meals and incidental expenses. Departments may authorize higher advances when circumstances warrant. Departments may choose to pay travel advances using either EDI, or through use of the Card at an ATM.

All travel advances require employee notification that any monies owed the State of Alaska by the traveler may be deducted from the employee's paycheck. The Travel Advance Authorization form, available on the Division of Finance web site, needs to be signed only once by a traveler for recovering all subsequent advances through payroll deductions. These forms should be kept on file by travel planners.

A traveler shall not receive an additional travel advance until the previous travel advance and trip has been reconciled and closed out.

Agencies may make exceptions to policies in this section when circumstances justify.

AAM 60.080 Interruption or Deviation of Travel for Traveler Convenience (07-10)

Any interruption or deviation from the most direct and efficient means of travel for traveler convenience requires prior approval at the agency level by the appropriate supervisor or designee. Such approvals must weigh the interests of the state as travelers are not automatically entitled to deviations for personal convenience.

Any additional time or expense resulting from an interruption or deviation for traveler convenience shall be borne solely by the traveler. Travelers are responsible for researching and purchasing air, car, and lodging for the personal portion of the travel on their own time. This is not a work function, and travel planners cannot research or purchase travel outside of the minimum itinerary required to conduct state business. The business itinerary must be documented in a state-authorized fare quote (see 3 below) when the travel is approved.

Travelers should be aware that personal deviations from the state-authorized itinerary may negate workers' compensation coverage. The

greater the personal deviation, the more likely the departure from the course of employment, and thereby workers' compensation coverage.

When a traveler interrupts business travel for personal reasons, the following apply:

1. Per diem, travel allowances, and reimbursements are calculated for the minimum itinerary that is required to conduct state business without regard for the actual itinerary that includes the deviation for personal convenience. For example, a traveler (Anchorage duty station) is traveling on state business (in Seattle) and the business is concluded at noon on Wednesday. For personal reasons the traveler will not return to the duty station until the following Monday. In this example, the traveler's entitlement to per diem, mileage, and other travel reimbursements ends an hour after the first flight that would get the traveler home Wednesday evening is scheduled to land. This entitlement is not increased if the Wednesday evening flight does not operate as scheduled, as travelers relinquish their right to reimbursement for flight delays once they choose to deviate from the business itinerary. See Personal Travel FAQs for other examples.

2. A traveler requesting approved personal air travel deviation for an alternate routing, personal discount coupons to purchase companion travel, or travel that increases airfare, will make the transportation arrangements for the entire trip on their own time. These arrangements will be purchased by the traveler using a personal form of payment instead of a state form of payment. Personal travel segments cannot be purchased at state-contracted rates. Exception: If the only deviation is an extension of dates on either end of the state-authorized dates, departments may opt to pay for the combined airfare when purchased if the personal portion can be recovered from the traveler's reimbursement after travel is complete.

3. A state-authorized fare quote must be obtained when the travel is approved for a price comparison to determine traveler reimbursement. The fare quote may be obtained and saved in E-Travel Online with the research option (no fee), or by calling the contracted travel agency (fee applies). After travel is complete, the traveler must present a copy of the ticket receipt or itinerary showing payment and the state-authorized fare quote to obtain reimbursement. If the traveler cannot produce a state-authorized fare quote, the travel planner will obtain a quote for the lowest fare currently available for the state routing, and any fees will be charged to the traveler. The state will reimburse the lesser amount of either the ticket purchased or the state-authorized fare quote.

4. Rental cars obtained for official state business are authorized only for the minimum business itinerary. The rental period may not extend to

the personal travel. See AAM 60.140 for clarification on personal travel involving privately owned vehicles.

5. Any additional time that reduces the traveler's work week related to indirect travel will be charged to annual leave, personal leave, or leave without pay. In the example 1 above, the employee's leave status would begin Thursday morning when the traveler could have returned to work based on the scheduled flights for the minimum business itinerary. Leave in conjunction with business travel must be documented in prior approval and supervisors are responsible for ensuring that leave is reported appropriately for travelers they supervise.

6. Per diem is allowed when a traveler is granted leave due to illness. However, the per diem allowance shall not be authorized for a period of illness exceeding three calendar days in any one period of absence. Per diem is not authorized if the traveler is hospitalized or otherwise has no actual and necessary business expenses requiring reimbursement.

7. Agencies must ensure that employees combining business and personal travel are well-informed and cautioned that airfares may result in a liability to the employee, should the reason for the business travel be cancelled. Employees leaving on vacation in conjunction with the business event will become responsible for all costs should the business event be cancelled. Employees opting not to travel if the business event is cancelled will be responsible for the cost of travel that the state cannot recover that was attributable to the personal portion of the airfare. The employee may be reimbursed, at the department's option, for the business portion of unused tickets. The business portion of unused tickets paid to employees must be monitored by the department as state assets until they are used or expire. Employees leaving the department prior to the expiration of such a ticket are required to return the state payment for any business portion that is still available for use by the employee.

8. Voluntary denied boarding compensation where the traveler voluntarily vacates his/her seat and takes a later flight may be retained by a traveler (viewed as an insignificant personal travel credit under ethics rules). A traveler cannot volunteer for denied boarding on an outbound flight unless the traveler has previously approved personal travel for the beginning of the travel period. Nor may a traveler volunteer for denied boarding if it may cause a delay in return to work. By accepting a voluntary bump on the return portion, the traveler puts himself on personal travel rather than state business. Travel status ends, no further per diem is allowed, and all state insurance coverage ceases for the duration of the trip. The traveler is

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Links to States' Legislative Ethics and Lobbying Laws

Back to Ethics State Statutes Links

June, 2010

This page contains links to ethics and lobbying statutes for the 50 states. In some cases, links to legislative rules or state constitutions are provided. However, this is not a complete list of all state constitutional ethics provisions and all ethics legislative rules.

AL| AK| AZ| AR| CA| CO| CT| DE| FL| GA| HI| ID| IL| IN| IA| KS| KY| LA| ME| MD| MA| MI| MN| MS| MO| MT| NE| NV| NH| NJ| NM| NY| NC| ND| OH| OK| OR| PA| PR| RI| SC| SD| TN| TX| UT| VT| VI| VA| WA| WV| WI| WY

Alabama

Alabama Code: Code of Ethics for Public Officials, Employees, Etc. Title 36, Chapter 25.

Alaska

Alaska Statutes: Standards of Conduct. Title 24, Chapter 60.
For Regulation of Lobbying, Title 24, Chapter 45.

Arizona

Arizona Revised Statutes

Title 38 - Public Officers and Employees

For Conflict of Interest of Officers and Employees, scroll to Chapter 3, Conduct of Office; Article 8.
For Standards of Conduct for Members of the State Legislature, scroll to Chapter 3, Conduct of Office; Article 8.1.
For Standards for Financial Disclosure, scroll to Chapter 3.1.

Title 41 - State Government

For Registration and Regulation of Lobbyists, scroll to Chapter 7, Legislature; Article 8.1.

Arkansas

Arkansas Code

For Ethics and Conflict of Interest laws for legislators and lobbyists, scroll to Title 21, Public Officers and Employees, Chapter 8.

California

California Government Code

Conflict of Interest: Title 9 Chapter 7

General Prohibition
Disclosure

Ethics: Title 9 Chapter 9.5

Honoraria
Gifts

Travel

Lobbyists: Title 9 Chapter 6

Registration and Reporting
Prohibitions
Exemptions

Colorado

Colorado Revised Statutes

For Code of Ethics for Legislators: Title 24, Government-State; Administration; Article 18, Standards of Conduct; Part 1, Code of Ethics.
For Public Official Disclosure Law and Regulation of Lobbyists: Title 24, Government-State; Administration; Article 6, Colorado Sunshine Law; Part 2, Public Official Disclosure Law; Part 3, Regulation of Lobbyists.

Connecticut

Connecticut General Statutes

Code of Ethics. Title 1, Chapter 10 - §1-79 through 1-101.

Delaware

Delaware Code Annotated

Legislative Conflicts of Interest. Title 29, State Government; Chapter 10.
Laws Regulating the Conduct of Officers and Employees of the State. Title 29, State Government; Chapter 58.

Code of Conduct. Subchapter I.
Financial disclosure. Subchapter II.
Registration of lobbyists. Subchapter IV.

Florida

Florida Statutes

Code of Ethics for Public Officers and Employees. Title X, Chapter 112, Part III.

For lobbyist regulation, go to Legislative Organization, Procedures and Staffing, Title III, Chapter 11. Scroll to 11.045-11.062.

Georgia

Georgia Code

Code of Ethics for Government Service. Title 45, Public Officers and Employees, Chapter 10

For prohibited activities, go to 45-10-3.
For conflict of interest, go to 45-10-20 - 45-10-80.

Ethics in Government Act. Title 21, Elections; Chapter 5.

For powers of the state ethics commission, go to 21-5-6 and 21-5-7.
For honorarium restrictions, go to 21-5-11.
For financial disclosure requirements, go to 21-5-50 - 21-5-53.
For lobbyist regulation, go to 21-5-70 - 21-5-76.

Hawaii

Hawaii Revised Statutes

Standards of Conduct, Chapter 84.
Lobbyist Law, Chapter 97.

Idaho

Idaho Code

Ethics in Government. Title 59, Chapter 7.
Gifts to Public Servants by Persons Subject to their Jurisdiction. Title 18 Chapter 13.
Election Campaign Contributions and Expenditures --Lobbyists. Title 67, Chapter 66.

Illinois

Illinois Compiled Statutes

Illinois Governmental Ethics Act. 5 ILCS 420/, includes financial disclosure and ethical principles.
State Officials and Employees Ethics Act. 5 ILCS 430/, includes gift ban and ethics commission statutes.
Lobbyist Registration Act. 25 ILCS 170/

Indiana

Indiana Code

Legislative Ethics. Title 2, General Assembly; Article 2.1, Legislative Sessions and Procedures; Chapter 3
Bribery, Conflict of Interest, and Official Misconduct. Title 35, Criminal Law and Procedure; Article 44, Offenses Against Public Administration; Chapter 1.
Lobbyists. Title 2, General Assembly; Article 7.
Ethics and Conflicts of Interest. Title 4, State Offices and Administration; Article 2, State Officers Generally; Chapter 6. (In this section, the term "state officer" does not apply to legislator.)

Iowa

Iowa Code

Conflict of Interest of Public Officers and Employees. Title II, Subtitle 2, Chapter 68B.

Scroll to 68B.35 for financial disclosure.
Scroll to 68B.37 for lobbyist reporting.

Kansas

Kansas Statutes

Scroll to Statute Table of Contents and highlight Chapter 46 - Legislatures. Then click the "List Articles in Chapter" button. Highlight Article 2 - State Governmental Ethics and click the "List Statutes in Article" button. State Governmental Ethics Law: 46-215 - 46-293.

Gift restrictions are at 46-237 and 46-237a.
Financial disclosure requirements are at 46-239 and 46-247 - 46-252.
Nepotism restrictions are at 46-246a.
Lobbyist regulation is at 46-265 - 46-271.

Kentucky

Kentucky Revised Statutes

Chapter 6. Ethics laws are from 6.601-6.850.

For Kentucky Legislative Ethics Commission, scroll to 6.651.
For Conduct of Legislators, scroll to 6.731.
For Financial Disclosure, scroll to 6.781.

For Legislative Lobbying, scroll to 6.801.

Chapter 11A. For Executive Agency Lobbying, scroll to 11A.201.

Louisiana

Louisiana Revised Statutes

Code of Governmental Ethics, Chapter 15 (42:1101 - 42:1170).
Lobbyist Disclosure Act (24:50 - 24:58.1).

Maine

Maine Revised Statutes Annotated

Governmental Ethics. Title 1, Chapter 25.
Lobbyist Disclosure Procedures. Title 3, Chapter 15.

Maryland

Maryland Code

For Public Ethics, §15-101 - 15-715, go to State Government; Title 15, Public Ethics.

Subtitle 5 is Conflict of Interest.
Subtitle 6 is Financial Disclosure.
Subtitle 7 is Lobbying regulations.

Massachusetts

General Laws of Massachusetts

Conduct of Public Officials and Employees, Chapter 268A.
For lobbyist regulation, go to Chapter 3, The General Court, and scroll to sections 39 through 50.

Michigan

Michigan Codified Laws

Chapter 15, Public Officers and Employees:

Conflict of Interest: Act 318 of 1968 (15.301-15.310).
Contracts of Public Servants with Public Entities: Act 317 of 1968 (15.322-15.330).
Standards of Conduct for Public Officers and Employees: Act 196 of 1973 (15.341-15.348).
Incompatible Public Offices: Act 566 of 1978 (15.181-15.185).

Chapter 4, Legislature

Lobbyists, Lobbying Agents, and Lobbying Activities: Act 472 of 1978 (4.411-4.431).

Minnesota

Minnesota Statutes

Legislator ethics and lobbyist regulation under Chapter 10A, Campaign Finance and Public Disclosure.

Mississippi

Mississippi Code

For Ethics in Government, scroll to Title 25, Public Officers and Employees, Public Records; Chapter 4, Ethics in Government.
For the Lobbying Law Reform Act of 1994, scroll to Title 5, Legislative Department; Chapter 8.

Missouri

Missouri Revised Statutes

Chapter 105. Public Officers and Employees - Miscellaneous Provisions

For Ethics Laws, scroll to 105.450 - 105.496.
Lobbyist laws start at 105.470.

Montana

Montana Code Annotated

Standards of Conduct. Title 2, Chapter 2.
Lobbying. Title 5, Chapter 7.

Nebraska

Nebraska Revised Statutes

Nebraska Political Accountability and Disclosure Act

Financial disclosure starts at 49-1493.
Lobbying regulations start at 49-1480.
Conflict of Interest starts at 49-1498.

Nevada

Nevada Revised Statutes

For Ethics in Government laws, go to Title 23. Public Officers and Employees; Chapter 281, General Provisions and scroll to NRS 281.411 through 281.581. See also Chapter 281A. Ethics in Government.
For Lobbying Disclosure laws, go to Title 17. State Legislative Department; Chapter 218 State Legislature and scroll to NRS 218.900 through 218.944.

New Hampshire

New Hampshire Revised Statutes

Legislative Ethics Committee: Title 1, Chapter 14-B.
Lobbyist laws: Title 1, Chapter 15.
Financial Disclosure: Title 1, Chapter 15-A.
Gifts, Testimonials and Honorariums:Title 1, Chapter 15-B.
Ethics Guidelines and Procedural Rules, November 2004 Edition (New Hampshire's statutes give the Legislative Ethics Committee the authority to write ethics provisions, which include gift restrictions and conflict of interest measures, among others.)

New Jersey

New Jersey Statutes Annotated

Ethics Laws for legislators and lobbyists are at *N.J.S.A. 52:13C.*
Conflict of interest laws are at *52:13D.*

To use New Jersey's system, scroll to Title 52. Click on the cross button to the left of the title to view all the sections in the title. Click on the arrow icon in the lower right corner of the screen to view more sections. Do this until Section 52:13C is visible. This is the start of the state's legislative ethics laws. Scroll to 52:13D for Conflict of Interest law.

New Mexico

New Mexico Statutes Unannotated

Note that the term "public official" does not apply to legislators in New Mexico.

Governmental Conduct, Chapter 10; Article 16.
Financial Disclosures, Chapter 10; Article 16A.
Governmental Ethics Oversight Committee, Chapter 2; Article 15.
Lobbyist Regulation,Chapter 2; Article 11.

New York

New York State Consolidated Laws

Legislative Ethics Commission: Consolidated Laws, Legislative (LEG), Article 5.
Powers and Duties of Public Officers: Consolidated Laws, Public Officers (PBO), Article 4.
For Financial Disclosure scroll to 73a.
For Code of Ethics, scroll to 74.
For Bribery, scroll to section 75.
Lobbying Act: Consolidated Laws, Legislative (LEG), Article 1-A

North Carolina

North Carolina General Statutes

State Government Ethics Act: Chapter 138A.
Lobbying Act: Chapter 120C.

North Dakota

North Dakota Century Code

Statements of Economic Interest: Title 16, Elections, chapter 16.1-09.
For Legislative Lobbying, go to Title 54, State Government, and scroll to chapter 54-05 and 54-05.1.

Ohio

Ohio Revised Code

Public Officers Ethics: Title 1, State Government; Chapter 102.
Legislative Lobbying: Title 1, State Government; Chapter 101, General Assembly; 101.70-101.79.
Retirement System Lobbying: Title 1, State Government; Chapter 101 General Assembly; 101.90-101.99.
Executive Agency Lobbying: Title 1, State Government; Chapter 121, State Departments; 121.60-121.69.

Oklahoma

Laws governing the Ethics Commission, the conduct of state officers and state employees, and related statutes requiring lobbyist registration, fees, etc. include, but are not limited to, the following:

In the Oklahoma Constitution, found on the Oklahoma Legislatures's Web site: Ethics Rules, Ethics Commission and Criminal Penalties, click on Article XXIX, Ethics Commission.
In the Oklahoma Statutes:
Title 17, Section 48;
Title 21, Sections 308 334, 360 and 463;
Title 68, Section 2358.3;
Chapter 62--Ethics Commission Act [Sections 4200 through 4248.1 of Title 74 of the Oklahoma Statutes [repealed];

Chapter 62--statutes governing lobbying registration and activities [Sections 4249 through 4258 of the Oklahoma Statutes];
and Chapter 62--Appendix: Title 257. Ethics Commission [Section 257:1-1-1 et seq. of the Rules of the Ethics Commission, 74 Oklahoma Statutes, Chapter 62, Appendix] [the "Rules"].

Oklahoma Statutes

A document from the Oklahoma Ethics Commission compiles much of the above.

Oregon

Oregon Revised Statutes

For Ethics laws for legislators go to Chapter 244, Government Standards and Practices.
Financial Disclosure begins at 244.050.
Conflict of Interest begins at 244.120.
Ethics Commission begins at 244.250.
Enforcement begins at 244.350.
For Lobbying regulations to to Chapter 171, Legislature. Scroll to 171.725.

Pennsylvania

Pennsylvania Consolidated Statutes

Title 65 Pa.C.S.A. Public Officers, Chapter 11, Ethics Standards and Financial Disclosure.
Title 65 Pa.C.S.A. Public Officers, Chapter 13, Lobby Regulation and Disclosure.

Rhode Island

Rhode Island General Laws

Code of Ethics for legislators index. Chapter 36-14.
Prohibited activities are at 36-14-5.
Conflict of interest is at 36-14-6.
Contents of Financial disclosure statements at 36-14-17. Other financial disclosure is 36-14-16 to -19.
Lobbying index: Chapter 22-10.
Financial reports are at 22-10-9.

South Carolina

South Carolina Code

Ethics, Government Accountability, and Campaign Reform. Title 8, Chapter 13.
For Rules of Conduct, scroll to section 8-13-700.
Disclosure of Economic Interest begins at 8-13-1110.
Penalties begin at 8-13-1510.
Lobbyists and Lobbying. Title 2, Chapter 17

South Dakota

South Dakota Codified Laws

Lobbyists, Chapter 2-12.
Personal Financial Disclosure for public officers, Chapter 3-1A.
Malfeasance, Misfeasance and Nonfeasance in Office, Chapter 3-16.

Tennessee

Tennessee Code Annotated

Title 3, Legislature, Chapter 5 Ethics and Lobbying.

Comprehensive Ethics Reform Act of 2006
Lobbying

Texas

Texas Government Code

For the Texas Ethics Commission, scroll to Chapter 571.
For Personal Financial Disclosure, Standards of Conduct, and Conflict of Interest scroll to Chapter 572.
For Registration of Lobbyists, scroll to Chapter 305.

Utah

Utah Code

Lobbyist Disclosure and Regulation Act, Title 36, Chapter 11.
Legislative Conflict of Interest, Title 36, Chapter 19.
Prohibiting Employment of Relatives, Title 52, Chapter 03.
Offenses Against Administration of the Government, Title 76, Chapter 8

For bribery, go to 76-8-105.
For alteration of legislation, go to 76-8-107 and 76-8-108.
For failure of a legislator to disclose interest in a bill, go to 76-8-109.

See also Joint Legislative Rules. Joint ethics rules are at JR-16.01-JR-16.07.

Vermont

Vermont Statutes Annotated

For Registration of Lobbyists, go to Title 2, Chapter 11.

Virginia

Code of Virginia

The General Assembly Conflicts of Interest Act, Title 30, Chapter 13, Section 100-129.
Lobbying laws begin at Title 2.2. Administration of Government; Chapter 4, Section 2.2-422.

Washington

Revised Code of Washington

Ethics in Public Service, Chapter 42.52.
Disclosure. Campaign Finances. Lobbying. Records, Chapter 42.17.

West Virginia

West Virginia Code

Public Officers and Employees. Ethics. Conflict of Interest. Financial Disclosure, Chapter 6B.

Ethics Commission powers and duties begin at Article 2.
Lobbyist laws begin at Article 3.
Ethical standards for elected and appointed officials and public employees are at 6B-2-5.
Financial disclosure requirements begin at 6B-2-6.

Wisconsin

Wisconsin Statutes

General Duties of Public Officials. For Code of Ethics for Public Officials and Employees, scroll to Chapter 19 and view statutes 19.41 to 19.59.

Financial disclosure begins at 19.43.
Conflict of interest prohibition is at 19.46.
Honorariums are discussed at 19.56.

For Regulation of Lobbying, go to Chapter 13. Legislative Branch. Scroll to Subchapter III, 13.61 to 13.75.

Wyoming

Wyoming Statutes

Government Ethics Title 9, Chapter 13.
Lobbyists, Title 28, Chapter 7.

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Alaska State Legislature

Select Committee on

Legislative Ethics

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April 23, 2004

ADVISORY OPINION 2004-01

RE: Use of constituent information gathered by a legislator.

You are a legislator and therefore covered by the Legislative Ethics Code. You have requested an advisory opinion concerning facts and circumstances that you have related. The committee relies on facts that you have described in answering your questions. You have waived your right to confidentiality under AS 24.60.160(b).

Statement of Facts

You have asked the following questions:

1. Can constituent information gathered by a candidate who is subsequently elected to office be used by the legislator during his or her term of office?
2. Can constituent information gathered by a legislator be used by the legislator in his or her campaign for re-election and, if so, are there any restrictions on maintaining the database using state resources?

You characterized the information referred to in the questions as:

A. Voter information obtained from the Division of Elections for a small fee.
B. Information obtained from public sources such as Permanent Fund recipients and corporation and business licenses databases which can be downloaded by anyone from public agency internet sites for free or for a small fee.
C. Information gathered about individual constituents during a legislator's term, including email addresses, phone and fax numbers, and issue information.
D. Similar constituent information as in C obtained during a candidate's campaign.

Discussion

In this document
- "constituent" means a natural person residing within a legislator's district;
- "information" means contact information including name and address as well as any other information and facts known about the contact such as issues and legislation the contact is interested in;
- "database" means an organized body of related information which is in a format read by computer database programs.

1. Can constituent information gathered by a candidate who is subsequently elected to

office be used by the legislator during his or her term of office?

This question involves a legislator using, for legislative purposes, information gathered in the course of an election campaign, described in D above. This information was obtained using private resources. There is no prohibition in the ethics code on a legislator using private resources for legislative purposes, so a legislator may use for legislative purposes information gathered during non-legislative time without the use of legislative resources.

> 2. Can constituent information gathered by a legislator be used by the legislator in his or her campaign for re-election and, if so, are there any restrictions on maintaining the database using state resources?

It is assumed in this answer that "information gathered by a legislator" is information collected for the legislator, described in C above, with the help of legislative staff employed to handle constituent concerns using legislative equipment. This information is being gathered for the benefit of the legislator in performing public duties. As long as the purpose is to assist the legislator in performing current legislative duties, the building and maintenance of a database containing constituent information is permitted using legislative resources. As is the case with the files maintained by a legislator's office for legislative use, a database is considered to be the confidential property of the legislator.[1]

There is a general prohibition against using legislative resources for non-legislative purposes:

> (a) A legislator or legislative employee may not . . . (2) use public funds, facilities, equipment, services, or another government asset or resource for a nonlegislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of either the legislator, legislative employee, or another person;

AS 24.60.030(a)(2). However there is an exemption for a de minimis use:

> [AS 24.60.030(a)(2)] does not prohibit (A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

We find that it is considered to be a de minimis use of public assets under AS 24.60.030(a)(2)(A) for a legislator to make a copy of a database created or maintained in the legislator's own office for personal or campaign use.[2]

In regard to voter information and other publicly available databases, the information described in A and B above, a legislator may obtain this information for legislative purposes. This information would probably be combined into the legislator's constituent database. As discussed above, a legislator can make a copy of the legislator's own database for personal or campaign purposes.

In the case of purchased databases, there may be copyright issues if a person copies a database rather than purchasing another license for separate use. If the legislator wants another copy of a commercial database, a separate license, if required, should be purchased with personal funds.

Conclusion

For the reasons stated above, the committee finds that constituent information gathered by a candidate using private resources can be used by that person if subsequently elected to serve as a legislator, and that constituent information gathered by a legislator using legislative resources such as staff time and

equipment for legislative purposes may be copied and used for personal or campaign use by a legislator as a de minimis use of public assets under AS 24.60.030(a)(2)(A).

Adopted by the Select Committee on Legislative Ethics on April 23, 2004

Members present and concurring in this opinion were:

H. Connor Thomas, Chair
Representative Mary Kapsner
Representative Norman Rokeberg
Senator Kim Elton
Senator Ben Stevens
Dennis "Skip" Cook, public member
Ann Rabinowitz, public member
Marianne Stillner, public member

Member present & abstained from voting because not present for entire discussion:

Herman G. Walker, public member

BRC:mdr:lmb
04-164.mdr

[1] When the legislator leaves office, the files and information belong to the legislator. A legislator's files, including information such as databases on a legislator's office computers are considered confidential.

[2] This opinion does not condone the unauthorized copying of copyright protected information.

AO 01-01 -2-

-3- AO 04-01

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Legislative Ethics

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August 19, 2008

ADVISORY OPINION 2008-03

SUBJECT: Conflict of Interest – Use of Government Resources

RE: Use of state resources by legislative aides working for constituents.

Note: Advisory Opinion 08-03 supersedes and is contrary to Advisory Opinion 07-04 adopted on December 12, 2007.

You are a legislative employee and therefore covered by the legislative ethics code. You have requested an advisory opinion concerning facts and circumstances that you have related in connection with three examples. You have asked the committee to provide guidance, in the form of an advisory opinion, as to whether or not the aide in each example given can provide the services described in a manner that is in compliance with restrictions on the use of state resources under the Legislative Ethics Act.[1]

Statement of Facts

Example 1. A constituent asks a legislative aide to serve as her "personal representative" before the Alaska Workers' Compensation Board. The aide understands that this duty will require acting on behalf of the constituent in the matter by communicating with the Board and the employer, creating, typing, copying and delivering motions and hearing exhibits, and attending the hearing as the constituent's advocate. The aide undertakes and accomplishes this duty, and, when transmitting documents on the constituent's behalf, uses legislative letterhead as a coversheet listing the documents transmitted, the intended recipients of the documents, and "information regarding meetings/timeframes/etc."

Example 2. On a constituent's behalf, a legislative aide uses legislative phone lines and e-mail to communicate with the Alaska's Child Support Enforcement Division and negotiate a settlement between the constituent, the Alaska CSED, and the California CSED. The settlement may net the constituent as much as $85,000 in child support back-payments.

Example 3. A legislative aide uses legislative letterhead and e-mail to pursue an informal appeal of the Alaska Permanent Fund Division's denial of a constituent's dividend eligibility. The denial is based on the constituent's alleged failure to meet legal requirements of Alaska residency because the constituent left the state for a time to attend a religious post-secondary school. The aide convinces the division to

reverse the denial by arguing that, because the education sought was not available at Alaska schools, the break in Alaska residency does not disqualify the constituent from eligibility.

Discussion

In the examples given, a hypothetical aide uses either legislative letterhead or legislative e-mail in the course of providing assistance to a constituent. In our Advisory Opinion 07-02, we concluded that an incumbent legislator may use legislative letterhead to communicate on any matter if the matter has a legislative purpose. The same is true of any "official" means of communication used by a legislator (or the legislator's aide) for a legislative purpose. An aide's use of legislative letterhead, legislative e-mail, legislative fax, or any other mode of communication identifiable on its face as legislative is permissible if it is for a legislative purpose.

AS 24.60.030(a)(2) says, in part, that a legislative employee may not

> (2) use public funds, facilities, equipment, services, or another government asset or resource for a nonlegislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of either the legislator, legislative employee, or another person;

The committee notes that, while "legislative action" is defined in AS 24.60.990, "nonlegislative purpose" is not defined. Its opposite, "legislative purpose," is not defined either. The committee concludes that legislative purpose has a broader meaning than "legislative action" that could include the provision of services for constituents with problems dealing with government agencies.

The Legislative Ethics Act refers to constituent services twice in AS 24.60.030.

AS 24.60.030(e)(2) says a legislator may not directly, or by authorizing another to act on the legislator's behalf,

> (2) state or imply that the legislator will perform or refrain from performing a lawful constituent service as a result of a person's decision to provide or not provide a political contribution, donate or not donate to a cause favored by the legislator, or provide or not provide a thing of value;

AS 24.60.030(i) implies that the practice of using legislative resources to resolve constituents' problems in forums outside of the legislature is permitted by the Act.[2] AS 24.60.030(i) states:

> (i) Except for supplying information requested by the hearing officer or the individual, board, or commission with authority to make the final decision in the case, or when responding to contacts initiated by the hearing officer or the individual, board, or commission with authority to make the final decision in the case, a legislator or legislative employee may not attempt to influence the outcome of an administrative hearing by directly or indirectly contacting or attempting to contact the hearing officer assigned to the hearing or the individual, board, or commission with authority to make the final decision in the case unless the
> (1) contact is made in the presence of all parties to the hearing or the parties' representatives and the contact is made a part of the record; or
> (2) fact and substance of the contact is promptly disclosed by the legislator or legislative employee to all parties to the hearing and the contact is made a part of the record.

We also note that the practice of using legislative resources to assist constituents with problems with

government agencies is not a requirement of legislative office, but is the choice of individual legislators. Our intent is not to interfere with a legislator's method of performing constituent services but to provide guidelines with regard to the use of government resources for the private benefit of a person. Legislative offices are one of the viable and necessary avenues by which Alaskans can access state government to obtain or improve service for themselves.

For purposes of this opinion, the committee defines "performing constituent service" as assisting constituents in navigating state bureaucracy and developing a communication line between the state agency and the constituent. The legislative intent in performing constituent service is threefold; to move the constituent's concerns forward, to make sure everyone involved knows what they need to know and to urge the government agency to take timely action. Constituents often do not know about laws, rules or regulations governing a particular agency or it may be they just do not accept the relevant parameters. The fact that state agency personnel are aware legislative offices are looking over their shoulders is positive. Occasionally, engaging in a constituent problem brings to light shortcomings in a law or regulation. A legislator may ask for a formal legislative review of the law or regulation or may introduce legislation to correct or clarify a statute. This type of action provides a benefit to the public in general.

But where do you draw the line when performing constituent services and the use of public resources? The use of public resources to provide help to constituents dealing with government agencies is not prohibited under AS 24.60.030(a)(2) as a nonlegislative purpose. However, that same paragraph prohibits the use of public resources "for the private benefit of either the legislator, legislative employee, or another person . . . ."

This opinion will focus on two areas. First, there is a difference between performing constituent services as defined above and advocating for a constituent's private interest. Legislators and staff must never cross the line and involve themselves in advocating a constituent's private interest. "Advocate" is defined in Webster's New World Dictionary to mean; a person who pleads another's cause, a person who speaks or writes in support of something, or to be in favor of.[3] In that regard, legislative aides should not enter into ongoing litigation or administrative processes regardless of professional certification or expertise. The Act does not prohibit a legislative aide from performing these activities on personal time.

In Example 1 of this opinion, the legislative aide served as the "personal representative" for a constituent before the Worker's Compensation Board; in Example 2, the legislative aide negotiated a settlement with the Alaska Child Support Enforcement Division and an outside state agency; and in Example 3, the legislative aide pursued an appeal for a constituent and convinced a state division to repeal the denial. All these examples fall within the realm of constituent advocacy and provide a private benefit to the constituent. The private benefit referred to does not mean the outcome is favorable to the constituent such as the award of back child support or the successful resolution of a law suit resulting in a monetary award. The amount of time spent on a constituent issue also does not factor into private benefit. The amount of time may depend on the area of the state where the constituent lives and the level of services available. This factor alone could add to the number of hours working on a constituent issue.

The private benefit received by a constituent in these examples is the free representation before the Workers Compensation Board, the free services of a negotiator on a child enforcement issue and the free services in appealing a denial. All these services are customarily performed on a fee basis.

Further, in Example 1, legislative letterhead was used to pursue an informal appeal for a constituent before the Worker's Compensation Board. Advocating a constituent's position with the use of legislative letterhead, a state resource, is also not a permitted use of state resources. In this instance,

there is an appearance of impropriety in that the legislator is attempting to influence the outcome of an issue with a government agency to be in favor of the constituent. AS 24.60.010 states, ". . . a fair and open government requires that legislators and legislative employees conduct the public's business in a manner that preserves the integrity of the legislative process and avoids conflicts of interest or even appearances of conflicts of interest; . . . . "
Secondly, state resources should not be used for activities such as obtaining records from a medical doctor, picking up records from a facility, creating and typing reports or listings of items requested by a state agency, to name a few. This type of preparation work is the responsibility of the constituent. State resources used for these activities would constitute a private benefit. Further, allowing these activities to be performed with the use of state resources would open the door to equal access of state resources for all individuals. As stated earlier, the role of legislative staff is to be the conduit between the constituent and the government agency. Keep in mind, a legislative aide is certainly not prohibited from providing assistance to a constituent if a roadblock occurs, for example, obtaining requested documents.

Conclusion

It is an established legislative practice to use legislative aides, as part of regular duties, to provide assistance to constituents on issues with government agencies. This creates a rebuttable presumption that an aide who does so is performing a service that has a legislative purpose. Providing assistance to constituents as defined in this opinion does not provide a private benefit to the constituent. The volume of public resources that may be expended to provide constituent assistance is not considered to be a private benefit. The volume of public resources expended is dependent upon the facts of the particular case. Performing constituent services does not include advocating for the constituent's private interest and/or preparation work to present the issue to the government agency. It is understood that a constituent may receive a private benefit such as a monetary award for a favorable solution to an issue which in and of itself is not considered a private benefit under AS 24.60.030. -

Adopted by the Select Committee on Legislative Ethics on August 19, 2008.

A unanimous vote of the Committee.

Members present and concurring with this opinion were:

Herman G. Walker, Jr., Chair
Senator Gary Stevens
Senator Con Bunde
Representative Bob Roses
Representative Berta Gardner
Dennis (Skip) Cook, public member
Ann Rabinowitz, public member
H. Conner Thomas, public member
Gary J. Turner, public member

Drafted by: Ethics Staff

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[1] This opinion treats the three examples given as hypothetical, and, as requested, reviews them only for compliance with Legislative Ethics Act provisions relating to the use of state resources. Other laws may apply. For example, a person may not engage in the practice of law in the state unless the person is a

licensed and active member of the Alaska Bar. AS 08.08.210. There is no special exception from this prohibition for constituent advocacy by a legislator or legislative aide. The unauthorized practice of law is a misdemeanor. AS 08.08.230. The "practice of law," as defined in Alaska Bar Rule 63, includes:

> (b) either (i) representing another before a court or governmental body which is operating in its adjudicative capacity, including the submission of pleadings, or (ii) for compensation, providing advice or preparing documents for another which affect legal rights or duties.

[2] Advisory Opinion 05-01, legislative contacts with administrative decision makers, further clarifies the prohibitions and requirements of AS 24.60.030(i).

[3] Webster's New World Dictionary of the American Language, 1968, pages 20-21.

AO 08-03 -4-

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May 27, 2010

ADVISORY OPINION 10-01

SUBJECT: Conflict of Interest – Use of State Resources

RE: Conflict of Interest – State Paid Travel and Collateral Campaign Activities

Note: This advisory opinion was rescinded at the June 14, 2010 Ethics Committee meeting. Refer to the August 19, 2008 letter to the Alaska Public Offices Commission for guidance in this area. (The letter is attached as an addendum to this opinion.)

This opinion was initiated by the Select Committee on Legislative Ethics.

Question Presented

In an August 19, 2008 letter to the Alaska Public Offices Commission, this Committee held that a legislator who travels on legislative business using state resources may not engage in political campaigning or other partisan political party activities during the trip. In reaching this decision, the Committee examined the restrictions imposed upon legislators under AS 24.60.030(a)(2)[1] and 24.60.030 (a)(5)[2], as well as the legislative purposes set out in AS 24.60.010. The committee, at their February 17, 2010 meeting, asked for a review of this position.

Discussion

While we note the prohibitions in the statute above, we also believe that a practical solution exists which ensures compliance with the statutes, provides a practical solution to the issue presented, and incorporates other provisions of AS 24.60 to ensure compliance. In short, we believe that the nature of the business rather than whether it is paid for with state resources should be the governing standard in determining whether an ethical violation has occurred. A statement signed by a legislator designating the primary nature and purpose of the business rather than whether it is paid for by state resources should suffice to govern whether or not collateral activities can or cannot occur. Violations or false statements made in this designation can be enforced pursuant to AS 24.60.030(3)[3]. If a legislator gives as his or her primary or sole purpose for taking the trip as engaging in political campaigning or partisan political activity, then he or she would not be entitled to state paid travel expenses. On the other hand, if the legislator gives as his or her primary purpose traveling to and from the Legislative session, visiting constituents, or engaging in other legislative business, then they should not be barred from engaging in

other incidental activities like political campaigning or partisan political activity during the trip. While this requires reliance on the "honor system," legislators are held to similar standards in soliciting, accepting or receiving gifts.[4]

As has been explained to us, this issue arises primarily in the context of travel by legislators and how it affects different legislators from around the state in different ways. Some legislators are not required to use any state funds to travel to and from the session or to service their constituents. Other legislators use state funds to travel back and forth to Juneau for the session and/or to meet with their constituents. Issues have arisen about whether it is appropriate to engage in other types of activities when State funds have been used to pay for travel expenses in ether context.

Previous discussions have cited AS 24.60.030(a)(2) and (5) for the proposition that if any travel expenses are paid by the State of Alaska to cover or reimburse travel costs, it is a violation of the ethics statute to engage in any activities which are characterized as political campaigning or other partisan political activity. These arguments are based upon the specific language in the statute and also on the limited exceptions set out in the accompanying statutory language[5]. While facially sound, this argument creates significant differences in how different legislators must conduct their affairs in the performance of their duties. For example, all out of town legislators who are compensated for traveling to and from their home towns to Juneau at the beginning of the session would never be able to engage in political campaigning or other partisan political activity before the session began or after it expired. Arguably, a violation could also be alleged if a legislator returned home at the state expense and promptly engaged in political campaigning or other partisan political activity. Neither of these scenarios is faced by legislators who incur no travel costs for attending the Legislative session in Juneau. Additionally, many legislators' representation districts are vast in size and require significant travel expenses in order to properly represent their constituents. If a legislator accepts state money to pay for travel costs to visit his or her constituents, they cannot then engage in any activities characterized as political campaigning or other partisan political activity during the trip. Again, this is not an issue for legislators who do not have to incur travel costs to visit their constituents.

We believe this argument blurs the distinction between direct costs and indirect costs associated with travel by legislators. Another way to look at indirect costs is that they are incidental costs.[6] Because of the nature of the expense, travel costs can either be a direct or indirect expense of a particular endeavor. If a legislator incurs travel expenses for the sole purpose of engaging in non-legislative purposes, or partisan political activity, or for his or her private benefit, then use of state funds to facilitate those activities would not be appropriate or permitted. But when a legislator engages in multiple activities – legitimate legislative business and other activities which may have specific prohibitions in statute – while traveling, it is the primary purpose of the trip that dictates when state funds can be used to cover travel expenses. The tenor of AS 24.60.030 is to preclude direct use of public funds for non-legislative purposes and it is not clear that travel expenses for mixed activities was intended to be prohibited. The primary harm that this subsection prevents is the use of state resources for the direct purpose of political campaigning or partisan political party activity.

Additionally, this argument ignores the prohibitory language found in AS 24.60.030(a)(3). This statute makes it an ethical violation for a legislator or legislative employee to "...make a false statement in connection with a request, or application for compensation, reimbursement, or travel allowance from public funds." Legislators are currently required to fill out a pre authorization travel form naming their purpose for engaging in the proposed travel.[7] This "statement" could be challenged or evaluated in light of the legislator's actual activities at a later time. Certainly, if a legislator made a false statement in this context, he or she would be in violation of AS 24.60.030(a)(3). These statements are a part of the public record and can and may be scrutinized by citizens who could file a complaint based upon the actual

activities of the legislator. This Committee would then be called upon to make a determination of whether a violation has occurred under AS 24.60.170.

This opinion is consistent with committee decisions addressing similar issues. For instance, in Advisory Opinion 96-05, a legislator requested an advisory opinion about whether it is appropriate to accept payment for the costs of a trip on which the legislator conducted both legislative business and personal business. The Select Committee issued the following opinion:

> The ethics committee cannot comment on whether you have complied with legislative policy with regard to travel and per diem allowances. Legislative Council is the body which sets those policies, and which is, together with the House and Senate leadership and the chair of legislative committees, responsible for interpreting and implementing that policy. The ethics committee notes that in approving a request for travel funds, the individual entrusted with approval authority is responsible for reviewing the purpose of the proposed trip and determining that the use of travel money is a valid use of public funds.

Id., at p. 1. The opinion goes on to state:

> It is permissible under the legislative ethics code for a legislator to accept state payment for the costs of a trip on which he or she conducted governmental business. As noted above, the committee does not have authority, in the context of advisory opinions, to use its judgment in lieu of a legislator's judgment in determining what is necessary state business or how much state business is necessary to justify accepting state payment for a trip.
>
> The committee also cautions that if a legislator or legislative employee were to intentionally use a facade of legislative business to obtain a government-paid trip but were to fail to conduct any governmental business to justify governmental payment, the committee might well find a violation of AS 24.60.030(a)(2).

Id., at p. 2.

Conclusion

In short, the enforcement provisions under AS 24.60.030(a)(3) provide sufficient protection against improper use of state funds for transportation costs.[8]

Adopted by the Select Committee on Legislative Ethics on May 27, 2010.

Members present and concurring in this opinion were:
Senator John Coghill
Senator Gary Stevens (via teleconference)
Representative Les Gara (alternate member)
Representative Craig Johnson (alternate member)
Antoinette "Toni" Mallott

Members dissenting from this opinion were:

H. Conner Thomas, Chair
Gary J. Turner, public member
Dennis "Skip" Cook, public member

Member absent:

Herman G. Walker, Jr., public member

BRC:jma

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August 19, 2008

Holly Hill, Executive Director
Alaska Public Offices Commission
2221 East Northern Lights, Rom 128
Anchorage AK 99508-4149

Ms. Hill:

The Select Committee on Legislative Ethics (Committee) is writing in regard to a request (from the former executive director, Brooke Miles) for input concerning regulations to be drafted by the Alaska Public Offices Commission in 2008 on the subject of paid state travel and collateral campaign activity.

Review and discussion of Advisory Opinion 06-03-CD issued by the Alaska Public Offices Commission on October 31, 2006 occurred at four committee meetings; December 12, 2007, January 16, 2008, May 12, 2008, and August 19, 2008.

The Committee looked at the restrictions imposed by AS 24.60, the Legislative Ethics Act, on a legislator or legislative employee who while traveling on legislative business using legislative resources engages in political campaigning or other partisan political activity.

A legislative resource, including money provided by the legislature to cover or reimburse costs incurred by a legislator or legislative employee while traveling on legislative business, is a government asset or

resource. A government asset or resource may not be used by a legislator or legislative employee for involvement in or support of or opposition to partisan political activity. AS 24.60.030(a)(2). More specifically, a legislator or legislative employee may not use or authorize the use of a government asset or resource for the purpose of political fund raising or campaigning. AS 24.60.030(a)(5). (Partisan political activity, political fund raising and campaigning are herein referred to as "partisan political activity.")

The legislature may wish to revisit the absolute restriction in AS 24.60 in view of the vast difference between urban and rural areas in our state. Legislative districts vary greatly in the land mass encompassing a district. Both cost and time expended to visit areas within a district also vary greatly. Travel for a matter of legislative concern or for partisan political activity can be quite costly and time consuming. The extreme example of traveling to a remote area of the state for legislative business and then returning to the legislator's home base and again traveling to the same area for partisan political activity was discussed.

Based on these factors, the Committee looked at de minimis use of state resources as a possible solution. However, de minimis use of a legislative resource for partisan political activity is prohibited under AS 24.60. To allow de minimis use of state resources for partisan political activity would require a legislative change in AS 24.60. Currently the only exception for de minimis use of state resources is for personal reasons if there is no cost to the state or the cost is promptly reimbursed.

If the legislature adopted an exception to AS 24.60.030 to permit partisan political activity that required the legislator to reimburse the state for pro-rated costs of such activity then the use might be considered de minimis. A legislator or legislative employee could then attend an event, for example, that had the overtones of being campaign related or was actually campaign related while on a legislative business trip if the primary purpose of the trip was for a matter of legislative concern. Committee members very strongly stated that a legislative trip should not be planned or scheduled around a campaign activity and further underscored no additional expenses to the state must be incurred when conducting the partisan political activities.

Under a de minimis use exception, the allocation formula allowed under Executive Branch ethics and outlined in AO 06-03-CD is the method the Committee feels is most equitable and fair. The allocation of state funds would be determined based on the percentage of time spent on state business and the percentage of time spent on partisan political activity. The percentage of time spent on a partisan political activity would be used to determine the allocated cost for reimbursement to the state.

After considerable debate, the committee determined travel to and from the legislator's home district to attend a legislative session should be exempt from the requirement of allocating costs for partisan political activity.

We hope our comments will be helpful to the Commission in preparing draft regulations on this subject. I am available to answer any questions.

Sincerely,

Herman G. Walker, Jr.
Chair, Select Committee on Legislative Ethics

Cc: Ethics Committee Members

[1] In pertinent part, AS 24.60.030(a)(2) states, "A legislator or legislative employee may not ... use public funds, facilities, equipment, services, or another government asset or resource for a non-legislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of the legislator, legislative employee, or another person..."

[2] In pertinent part, AS 24.60.030(a)(5) makes it unethical to" use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for the purpose of political fund raising or campaigning..."

[3] AS 24.60.030(a)(3) makes it an ethical violation for a legislator or legislative employee to "...make a false statement in connection with a request, or application for compensation, reimbursement, or travel allowance from public funds."

[4] Under AS 24.60.080 only four types of gifts require disclosure. Legislators are held to the "honor system" in determining how to identify other gifts received. A gift log is no longer required by statute but recommended. *See also* AS 24.60.010 (7)"compliance with a code of ethics is an individual responsibility..."

[5] AS 24.60.030 has a number of noted exceptions to the general rules that state resources may not be used for partisan political activity or political campaigning. See AS 24.60.030(a)(2)(A)-(K), AS 24.60.030(a)(5)(A)-(E), AS 24.60.030(d) and AS 24.60.030(h).

[6] AS 24.60.030(h) allows incidental campaign activities during the employee's workday while on government time. If the activity is more than incidental the employee shall take leave time. A similar analogy could be made regarding legislative travel.

[7] Each legislator must complete a Senate, House, Finance Committee or Legislative Council Pre Travel Authorization Form prior to travel for legislative business and a Legislative Affairs Agency Travel Claim form to request reimbursement after travel has been completed. Additionally, the Senate and House each year approve guidelines for travel and per diem for legislators. Legislative Council has also a travel and per diem policy for both legislators and legislative employees.

[8] The Committee recommends that the Legislature consider amending AS 24.60.030 to clarify this matter.

Document Properties	

Title:	ADVISORY OPINION 10-01
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April 14, 1994

Advisory Opinion 94-07

RE: Must participation in the Violent Crimes Compensation Commission Program be published in the journals?

You are a legislative employee covered by the legislative ethics code. You have filed a disclosure of participation in a state benefit program but asked that the committee refrain from publishing the disclosure in the journal.

Statement of Facts

The facts and circumstances that you have related, and on which the committee relies in answering your questions, are as follows:

You are a legislative employee, covered by the legislative code of ethics. During 1993, you received $763 from the Violent Crimes Compensation Program. You reported this participation in a state benefit program to the committee on February 15 but requested that the committee not publish the disclosure. The committee has chosen to treat your request for confidentiality as a request for an advisory opinion in order to give notice of its decision on the issue your request raises.

Discussion

Under AS 24.60.050(c), a legislator or legislative employee who participates in a state benefit or loan program that is not exempt under (a) of that section must disclose the participation. The programs and loans that are exempt from disclosure under subsection (a) are those that are generally available to members of the public, are subject to fixed, objective eligibility standards, and require minimal discretion in determining qualification. Under subsection (b), the committee publishes a list of programs designating those for which disclosure is required. Appendix G of the Standards of Conduct Handbook, prepared by the ethics committee and published in January 1993, lists those programs that must be reported. The Violent Crimes Compensation Program is one of the programs listed. Therefore, you are required to report your participation, which you did.

Under AS 24.60.050(c), the committee is required to

> promptly compile a list of the statements [of participation in programs or receipt of loans] indicating the loans and programs and amounts and send it to the presiding officer of each house who shall have it published in the supplemental journals within three weeks of the filing date.

The statute on its face does not provide any exceptions to the requirement that each person participating in a program or loan be included on the list that is published in the journals. However, the committee believes that an exception based on the constitutional right of privacy must be read into the publication requirement and should be applied in the case of programs such as the Violent Crimes Compensation Program.[1]

The committee staff contacted the Violent Crimes Compensation office to discuss the privacy issue. According to the staff of that office, the names of participants in the program and files relating to them are kept confidential. There is no public access through the commission to any information on an individual. They do publish an annual report from which any identifying information concerning individuals has been removed.

In Advisory Opinion 88-1, concerning disclosure of representation before a state agency, board, or commission under AS 24.60.100, the committee relied on the constitutional right to privacy and on the state supreme court's implementation of that right to find a limited exemption to the disclosure requirement imposed by the ethics code. The committee permitted the legislator-attorney to refrain from disclosing the name of a client whose privacy would be invaded by disclosure but did require disclosure of the existence of an unnamed client, the subject of the representation, and the body before which the matter was heard.

In Falcon v. Alaska Public Offices Com'n, 570 P.2d 469 (Alaska 1977), the court considered whether a doctor who had been appointed to the State Medical Board was required to reveal the names of patients on his financial disclosure statement. The court stated that whether a privacy invasion is justified turns on the precise nature of the privacy interest involved:

> There must be a "fair and substantial relation" between the statutory means and a legitimate governmental purpose. Thus to determine the validity of the disclosure provisions of the Conflict of Interest law, we must consider both the nature and the extent of the privacy invasion and the strength of the state interest requiring disclosure.

Id. at 476. (Footnotes omitted) In Falcon, the court found that the purposes of the Conflict of Interest law were to promote efficient, ethical government and preserve the integrity and fairness of the political process both in fact and in appearance. Those purposes are similar to the purposes of the legislative ethics code, stated at AS 24.60.010(1) and (2).[2] The court then considered how invasive the revelation of the names of the patients would be and noted that ordinarily disclosure of patients of a physician would involve only a minimal invasion of privacy but that in particular situations, the disclosure might have the effect of making public information that was confidential or sensitive. The court quoted a commentator on how to determine whether information should be considered sensitive:

> [s]ensitive information is that which a person desires to keep private and which, if disseminated, would tend to cause substantial concern, anxiety or embarrassment to a

reasonable person.

Id. at 479. The court gave an example of visits to a physician who specializes in contraceptive matters or abortions as private and sensitive information. The court then concluded: that the extent to which the governmental interest in promoting fair and honest government would not outweigh the individual's privacy interest in protecting sensitive personal information from public disclosure in those kinds of situations. Id. at 480.

Applying this analysis to your situation, the committee must decide whether your participation in the Violent Crimes Compensation program should be considered to be sensitive information. If the committee finds that the information is sensitive, it must weigh whether your privacy interest should take precedence over the governmental interest in public disclosure of your participation in the program. In making this judgment, the committee will consider the possibility of the appearance of impropriety in your participation as well as the possibility of actual impropriety. The committee will also consider the degree of influence you might have had because of your legislative position.

The committee finds that your participation in the Violent Crimes Compensation program should be considered sensitive personal information. You have expressed concern about having the events that happened made public and the committee finds that a reasonable person would have similar concerns. This conclusion is supported by the fact that the information is treated as confidential by the Violent Crimes Compensation Commission. Because the amount of money you received from the program was relatively small and because you do not occupy a position that can take official action or exert official influence over this state program, the committee finds that your name should not be made public.[3] However, in order to comply as completely as possible with the statutory requirements, the committee will publish the fact that a person required to make disclosures under the legislative code of ethics did participate in the program and will disclose the amount of the benefit that you and your family received. Your name will be kept confidential.

Conclusion

For the reasons stated above, the committee finds that under AS 24.60.050, you were required to report your participation in the Violent Crimes Compensation program to the committee but that your constitutional right to privacy requires the committee to keep your name confidential. Accordingly the committee will publish notice that a person required to disclose under AS 24.60.050 participated in that program and will report the amount you received.

Adopted by the Select Committee on Legislative Ethics on April 14, 1994. Members present and concurring in this opinion were:

Joseph P. Donahue, Chair
Representative Jerry Mackie
Representative Brian Porter
Margie MacNeille
Edith Vorderstrasse
Shirley McCoy

Members absent were:

Ed Granger, Vice-Chair
Senator Jay Kerttula
Senator Drue Pearce

94-263.plm

[1] Art. I, sec. 22 constitution of the State of Alaska, states

> The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

[2] AS 24.60.010(1) and (2) state

> The legislature finds that
>
> (1) high moral and ethical standards among public servants in the legislative branch of government are essential to assure the trust, respect, and confidence of the people of this state;
>
> (2) a fair and open government requires that legislators and legislative employees conduct the public's business in a manner that preserves the integrity of the legislative process and avoids conflicts of interest or even appearances of conflicts of interest;

[3] The committee does not now decide that all participants in this program should be kept confidential. Each case should be considered based on its own surrounding circumstances.

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Document Properties	
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May 27, 2010

ADVISORY OPINION 10-01

SUBJECT: Conflict of Interest – Use of State Resources

RE: Conflict of Interest – State Paid Travel and Collateral Campaign Activities

Note: This advisory opinion was rescinded at the June 14, 2010 Ethics Committee meeting. Refer to the August 19, 2008 letter to the Alaska Public Offices Commission for guidance in this area. (The letter is attached as an addendum to this opinion.)

This opinion was initiated by the Select Committee on Legislative Ethics.

Question Presented

In an August 19, 2008 letter to the Alaska Public Offices Commission, this Committee held that a legislator who travels on legislative business using state resources may not engage in political campaigning or other partisan political party activities during the trip. In reaching this decision, the Committee examined the restrictions imposed upon legislators under AS 24.60.030(a)(2)[1] and 24.60.030 (a)(5)[2], as well as the legislative purposes set out in AS 24.60.010. The committee, at their February 17, 2010 meeting, asked for a review of this position.

Discussion

While we note the prohibitions in the statute above, we also believe that a practical solution exists which ensures compliance with the statutes, provides a practical solution to the issue presented, and incorporates other provisions of AS 24.60 to ensure compliance. In short, we believe that the nature of the business rather than whether it is paid for with state resources should be the governing standard in determining whether an ethical violation has occurred. A statement signed by a legislator designating the primary nature and purpose of the business rather than whether it is paid for by state resources should suffice to govern whether or not collateral activities can or cannot occur. Violations or false statements made in this designation can be enforced pursuant to AS 24.60.030(3)[3]. If a legislator gives as his or her primary or sole purpose for taking the trip as engaging in political campaigning or partisan political activity, then he or she would not be entitled to state paid travel expenses. On the other hand, if the legislator gives as his or her primary purpose traveling to and from the Legislative session, visiting constituents, or engaging in other legislative business, then they should not be barred from engaging in

other incidental activities like political campaigning or partisan political activity during the trip. While this requires reliance on the "honor system," legislators are held to similar standards in soliciting, accepting or receiving gifts.[4]

As has been explained to us, this issue arises primarily in the context of travel by legislators and how it affects different legislators from around the state in different ways. Some legislators are not required to use any state funds to travel to and from the session or to service their constituents. Other legislators use state funds to travel back and forth to Juneau for the session and/or to meet with their constituents. Issues have arisen about whether it is appropriate to engage in other types of activities when State funds have been used to pay for travel expenses in ether context.

Previous discussions have cited AS 24.60.030(a)(2) and (5) for the proposition that if any travel expenses are paid by the State of Alaska to cover or reimburse travel costs, it is a violation of the ethics statute to engage in any activities which are characterized as political campaigning or other partisan political activity. These arguments are based upon the specific language in the statute and also on the limited exceptions set out in the accompanying statutory language[5]. While facially sound, this argument creates significant differences in how different legislators must conduct their affairs in the performance of their duties. For example, all out of town legislators who are compensated for traveling to and from their home towns to Juneau at the beginning of the session would never be able to engage in political campaigning or other partisan political activity before the session began or after it expired. Arguably, a violation could also be alleged if a legislator returned home at the state expense and promptly engaged in political campaigning or other partisan political activity. Neither of these scenarios is faced by legislators who incur no travel costs for attending the Legislative session in Juneau. Additionally, many legislators' representation districts are vast in size and require significant travel expenses in order to properly represent their constituents. If a legislator accepts state money to pay for travel costs to visit his or her constituents, they cannot then engage in any activities characterized as political campaigning or other partisan political activity during the trip. Again, this is not an issue for legislators who do not have to incur travel costs to visit their constituents.

We believe this argument blurs the distinction between direct costs and indirect costs associated with travel by legislators. Another way to look at indirect costs is that they are incidental costs.[6] Because of the nature of the expense, travel costs can either be a direct or indirect expense of a particular endeavor. If a legislator incurs travel expenses for the sole purpose of engaging in non-legislative purposes, or partisan political activity, or for his or her private benefit, then use of state funds to facilitate those activities would not be appropriate or permitted. But when a legislator engages in multiple activities – legitimate legislative business and other activities which may have specific prohibitions in statute – while traveling, it is the primary purpose of the trip that dictates when state funds can be used to cover travel expenses. The tenor of AS 24.60.030 is to preclude direct use of public funds for non-legislative purposes and it is not clear that travel expenses for mixed activities was intended to be prohibited. The primary harm that this subsection prevents is the use of state resources for the direct purpose of political campaigning or partisan political party activity.

Additionally, this argument ignores the prohibitory language found in AS 24.60.030(a)(3). This statute makes it an ethical violation for a legislator or legislative employee to "...make a false statement in connection with a request, or application for compensation, reimbursement, or travel allowance from public funds." Legislators are currently required to fill out a pre authorization travel form naming their purpose for engaging in the proposed travel.[7] This "statement" could be challenged or evaluated in light of the legislator's actual activities at a later time. Certainly, if a legislator made a false statement in this context, he or she would be in violation of AS 24.60.030(a)(3). These statements are a part of the public record and can and may be scrutinized by citizens who could file a complaint based upon the actual

activities of the legislator. This Committee would then be called upon to make a determination of whether a violation has occurred under AS 24.60.170.

This opinion is consistent with committee decisions addressing similar issues. For instance, in Advisory Opinion 96-05, a legislator requested an advisory opinion about whether it is appropriate to accept payment for the costs of a trip on which the legislator conducted both legislative business and personal business. The Select Committee issued the following opinion:

> The ethics committee cannot comment on whether you have complied with legislative policy with regard to travel and per diem allowances. Legislative Council is the body which sets those policies, and which is, together with the House and Senate leadership and the chair of legislative committees, responsible for interpreting and implementing that policy. The ethics committee notes that in approving a request for travel funds, the individual entrusted with approval authority is responsible for reviewing the purpose of the proposed trip and determining that the use of travel money is a valid use of public funds.

Id., at p. 1. The opinion goes on to state:

> It is permissible under the legislative ethics code for a legislator to accept state payment for the costs of a trip on which he or she conducted governmental business. As noted above, the committee does not have authority, in the context of advisory opinions, to use its judgment in lieu of a legislator's judgment in determining what is necessary state business or how much state business is necessary to justify accepting state payment for a trip.
>
> The committee also cautions that if a legislator or legislative employee were to intentionally use a facade of legislative business to obtain a government-paid trip but were to fail to conduct any governmental business to justify governmental payment, the committee might well find a violation of AS 24.60.030(a)(2).

Id., at p. 2.

Conclusion

In short, the enforcement provisions under AS 24.60.030(a)(3) provide sufficient protection against improper use of state funds for transportation costs.[8]

Adopted by the Select Committee on Legislative Ethics on May 27, 2010.

Members present and concurring in this opinion were:
Senator John Coghill
Senator Gary Stevens (via teleconference)
Representative Les Gara (alternate member)
Representative Craig Johnson (alternate member)
Antoinette "Toni" Mallott

Members dissenting from this opinion were:

H. Conner Thomas, Chair
Gary J. Turner, public member
Dennis "Skip" Cook, public member

Member absent:

Herman G. Walker, Jr., public member

BRC:jma

Alaska State Legislature

Select Committee on
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August 19, 2008

Holly Hill, Executive Director
Alaska Public Offices Commission
2221 East Northern Lights, Rom 128
Anchorage AK 99508-4149

Ms. Hill:

The Select Committee on Legislative Ethics (Committee) is writing in regard to a request (from the former executive director, Brooke Miles) for input concerning regulations to be drafted by the Alaska Public Offices Commission in 2008 on the subject of paid state travel and collateral campaign activity.

Review and discussion of Advisory Opinion 06-03-CD issued by the Alaska Public Offices Commission on October 31, 2006 occurred at four committee meetings; December 12, 2007, January 16, 2008, May 12, 2008, and August 19, 2008.

The Committee looked at the restrictions imposed by AS 24.60, the Legislative Ethics Act, on a legislator or legislative employee who while traveling on legislative business using legislative resources engages in political campaigning or other partisan political activity.

A legislative resource, including money provided by the legislature to cover or reimburse costs incurred by a legislator or legislative employee while traveling on legislative business, is a government asset or

resource. A government asset or resource may not be used by a legislator or legislative employee for involvement in or support of or opposition to partisan political activity. AS 24.60.030(a)(2). More specifically, a legislator or legislative employee may not use or authorize the use of a government asset or resource for the purpose of political fund raising or campaigning. AS 24.60.030(a)(5). (Partisan political activity, political fund raising and campaigning are herein referred to as "partisan political activity.")

The legislature may wish to revisit the absolute restriction in AS 24.60 in view of the vast difference between urban and rural areas in our state. Legislative districts vary greatly in the land mass encompassing a district. Both cost and time expended to visit areas within a district also vary greatly. Travel for a matter of legislative concern or for partisan political activity can be quite costly and time consuming. The extreme example of traveling to a remote area of the state for legislative business and then returning to the legislator's home base and again traveling to the same area for partisan political activity was discussed.

Based on these factors, the Committee looked at de minimis use of state resources as a possible solution. However, de minimis use of a legislative resource for partisan political activity is prohibited under AS 24.60. To allow de minimis use of state resources for partisan political activity would require a legislative change in AS 24.60. Currently the only exception for de minimis use of state resources is for personal reasons if there is no cost to the state or the cost is promptly reimbursed.

If the legislature adopted an exception to AS 24.60.030 to permit partisan political activity that required the legislator to reimburse the state for pro-rated costs of such activity then the use might be considered de minimis. A legislator or legislative employee could then attend an event, for example, that had the overtones of being campaign related or was actually campaign related while on a legislative business trip if the primary purpose of the trip was for a matter of legislative concern. Committee members very strongly stated that a legislative trip should not be planned or scheduled around a campaign activity and further underscored no additional expenses to the state must be incurred when conducting the partisan political activities.

Under a de minimis use exception, the allocation formula allowed under Executive Branch ethics and outlined in AO 06-03-CD is the method the Committee feels is most equitable and fair. The allocation of state funds would be determined based on the percentage of time spent on state business and the percentage of time spent on partisan political activity. The percentage of time spent on a partisan political activity would be used to determine the allocated cost for reimbursement to the state.

After considerable debate, the committee determined travel to and from the legislator's home district to attend a legislative session should be exempt from the requirement of allocating costs for partisan political activity.

We hope our comments will be helpful to the Commission in preparing draft regulations on this subject. I am available to answer any questions.

Sincerely,

Herman G. Walker, Jr.
Chair, Select Committee on Legislative Ethics

Cc: Ethics Committee Members

[1] In pertinent part, AS 24.60.030(a)(2) states, "A legislator or legislative employee may not ... use public funds, facilities, equipment, services, or another government asset or resource for a non-legislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of the legislator, legislative employee, or another person..."

[2] In pertinent part, AS 24.60.030(a)(5) makes it unethical to" use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for the purpose of political fund raising or campaigning..."

[3] AS 24.60.030(a)(3) makes it an ethical violation for a legislator or legislative employee to "...make a false statement in connection with a request, or application for compensation, reimbursement, or travel allowance from public funds."

[4] Under AS 24.60.080 only four types of gifts require disclosure. Legislators are held to the "honor system" in determining how to identify other gifts received. A gift log is no longer required by statute but recommended. *See also* AS 24.60.010 (7)"compliance with a code of ethics is an individual responsibility..."

[5] AS 24.60.030 has a number of noted exceptions to the general rules that state resources may not be used for partisan political activity or political campaigning. See AS 24.60.030(a)(2)(A)-(K), AS 24.60.030(a)(5)(A)-(E), AS 24.60.030(d) and AS 24.60.030(h).

[6] AS 24.60.030(h) allows incidental campaign activities during the employee's workday while on government time. If the activity is more than incidental the employee shall take leave time. A similar analogy could be made regarding legislative travel.

[7] Each legislator must complete a Senate, House, Finance Committee or Legislative Council Pre Travel Authorization Form prior to travel for legislative business and a Legislative Affairs Agency Travel Claim form to request reimbursement after travel has been completed. Additionally, the Senate and House each year approve guidelines for travel and per diem for legislators. Legislative Council has also a travel and per diem policy for both legislators and legislative employees.

[8] The Committee recommends that the Legislature consider amending AS 24.60.030 to clarify this matter.

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MINUTES from June 16, 2010
FULL COMMITTEE MEETING
Anchorage LIO, Room 550

1. **CALL THE MEETING TO ORDER:** Chair Conner Thomas called the meeting to order at 12:05 p.m. Members present: Senator John Coghill, (via teleconference), Senator Gary Stevens, Representative Les Gara, (alternate for Rep Gardner), Representative Carl Gatto, Gary J. Turner, Dennis (Skip) Cook, Herman G. Walker, Jr., Antoinette (Toni) Mallott. Staff present: Joyce Anderson, Administrator. Also present: Brent Cole, Legal Counsel and Dan Wayne, LAA Legal Counsel (via teleconference).

2. **APPROVAL OF AGENDA:** Chair Thomas asked if there were any objections to the proposed agenda and hearing none, the agenda was approved.

3. **APPROVAL OF MINUTES:** Vice Chair Turner requested the word "almost" be inserted on page 4, third paragraph, first sentence, before "three years now". Member Walker made a motion to approve the minutes as amended. No objections.

4. **PUBLIC COMMENT:** Representative Craig Johnson stated he served as an alternate for Rep Gatto at the May 27th Ethics Committee meeting and wanted to clarify his position on the subject of legislative travel and campaign activity on the same trip. He did not believe it was a violation to have a conversation with a constituent on campaigning in a super market while traveling on state business. He did feel it would not be appropriate to schedule a state paid trip and a fundraiser at the same time. He further stated he believed there needed to be a balance between these two activities but questioned whether the Ethics Committee had the ability to do this within the structure of the law. Rep Johnson wanted the Committee to know for the record that he did not agree with what he and the Committee approved at the last meeting.

5. **CHAIR/STAFF REPORT:** Ms. Anderson informed the committee the NCSL's State Legislatures magazine, June edition, had published an article about 25 innovative web sites. The searchable database of more than 100 advisory opinions from 1984 to the present on our website was showcased. The article also mentioned disclosures could be filed online.

Ms. Anderson also informed the committee that she recently learned the audio from our Ethics Committee meetings were not available to the public and requested the Committee consider making them available, like other interim committees, on BASIS. The Committee determined the audios should be on BASIS. Sen Coghill suggested BASIS and the Ethics website be linked as well.

6. **REVIEW OF ACTION TAKEN AT MAY 27, 2010 MEETING - STATE PAID TRAVEL AND COLLATERAL CAMPAIGN ACTIVITIES:** Chair Thomas reminded members an advisory opinion was approved at the May 27 meeting authorizing collateral campaign activities when on a state paid trip as long as the trip was primarily for legislative business. The results were: YES: 5; NO: 3; with one member absent. A couple of days later, Rep Gara, who voted yes, requested reconsideration of his vote. (See his request via E-mail in meeting packet.)

Chair Thomas stated it was his role as chair to decide if the request was timely. Because the advisory opinion had already been made public, including notification to the Press, and advice had already been given out based on the opinion; he ruled the request was not timely. He stated he asked Ms. Anderson to contact each Committee member to see if there was any interest in rescinding the opinion. Several members expressed their interest in discussing this item further and possibly rescinding the advisory opinion.

Chair Thomas indicated if there was a motion today to rescind the committee's previous action and it passed, the item would be put on the table for discussion. Rep Gara made a motion to rescind the action taken by the Ethics Committee on May 27, 2010.

Discussion on State Paid Travel and Collateral Campaign Activities: Chair Thomas reminded members the Committee did not have the authority to set policy but only interpret the Legislative Ethics Act. The Chair gave the floor to Rep Gara to allow him the opportunity to explain his request to rescind and present his recommendations.

> Rep Gara summarized the E-mail he sent to members: We were given two options at the last meeting; one prepared by Mr. Brent Cole, outside legal counsel, and the other prepared by Mr. Dan Wayne, LAA Legal Counsel. He stated Mr. Cole's opinion was flawed in that campaign fundraising activities were permitted and Mr. Wayne's opinion was also flawed by banning of legitimate, free speech.

Rep Gara recommended accepting Mr. Cole's opinion focusing on the "primary purpose" rule and adding a statement indicating, **"fundraising on a state-paid trip can create the appearance of impropriety."**

The Chair asked Mr. Wayne if the Committee has the authority to make the type of modification Rep Gara is recommending and to also give his legal opinion on the freedom of speech issue. Mr. Wayne stated the Committee has the authority to interpret the statute based on the facts of the question and statutory language. He stated he understood Rep Gara's concerns.

Mr. Wayne pointed out in his updated opinion that if the political activity the person is engaged in is made possible by the use of state resources, and then s/he should not engage in it. The opinion included relevant examples. However, Mr. Wayne concluded the subject matter can be complicated and it would not be difficult to think of unusual conundrums that people could run into.

Sen Stevens agreed this issue was complicated and suggested the committee make it simple and clear for legislators to know when they are in violation and when they are not. He questioned if the legislature should be working this issue, not the Committee.

Member Walker stated that he understood the merit of Sen Stevens' position and Rep Gara's and believes this should be a legislative fix. The public members have been in favor of a legislative fix from the start. He stated there needs to be a balance between urban and rural legislators with the way the state is laid out. The balance should not be determined by this Committee.

Member Cook concurred with Member Walker stating he felt the Legislature should fix this issue, not the Committee. There are problems with both opinions but ultimately it's the statute that is the problem and needs to be addressed. He felt the statute was too absolute in that campaigning is prohibited and there are no exceptions, whatsoever. There are exceptions for everything else. If the Legislature can come up with a quick fix to the state jet issue (Administrator's Note: When this issue came to light, legislation was passed to address it the next legislative session), then they can fix and corrected this situation as well. Member Cook believes the Legislature does not want to loosen up the rules; they want the Ethics Committee to do it for them. As a member of the Committee, he is not willing to do what the Legislature should be doing. The Legislature passed the statute, let the Legislature fix it.

Member Mallott stated she was under the impression from the May 27 minutes that Sen Coghill was going to take this issue to the Legislature for review. Member Mallott also brought up a very common scenario that could occur while a legislator was visiting a village on state business. If a legislator declined an invitation to a potluck to discuss campaign issues, the legislator would be insulting the village and community. Potlucks are a common event in small villages.

Chair Thomas redirected the discussion and requested Mr. Cole to address Rep Gara's concerns before addressing Member Mallott's comments.

Mr. Cole stated it was not uncommon for a statute to be rewritten. He also stated it was not unusual to have two or three interpretations relating to the same statute. Legislators need guidance and he felt Mr. Wayne's interpretation allows for too many limitations for legislators while they are traveling on state business. He did not feel his opinion was "extreme", as some members had stated. He stated if legislators are on a state paid trip to a village, the legislator should be able to communicate with the people there on all facets.

Chair Thomas asked Mr. Cole if the Committee has the authority to revise the opinion as Rep Gara suggested. Mr. Cole stated he believed the Committee has the authority. It would first require rescinding the advisory opinion which has already been approved and then rewriting certain sections as the committee directed. However, he did not agree with Rep Gara's recommendation of prohibiting fundraising only.

Sen Stevens agreed with Mr. Cole's comment that legislators need guidance and it needs to be clear. If a legislator files paperwork to attend a meeting and states the meeting is the primary purpose of the trip, and he approves it as Senate President, and the legislator also attends a campaign fundraising event for himself or herself while on the trip, anyone can file a complaint saying that was not the primary purpose of the trip. In his opinion, it is obvious and clear to him that this person violated the ethics code.

Rep Gara agreed the issue is clarity. He did not agree with Mr. Wayne's opinion since it banned free speech. Rep Gara also stated he agreed that this was the Legislature's job but it was not realistic to expect it to pass. From past experience, even with the best intentions, it is difficult to pass a bill. That is why it is important to come up with something now; a rule that honors the statute but isn't unreasonable or with unintended circumstances.

Rep Gara stated Mr. Cole's opinion makes sense but liked the idea that the Ethics Committee could bar things that raise the appearance of impropriety. Chair Thomas added the Committee has in the past deemed the appearance of impropriety was not in and of itself an ethics code violation.

Mr. Cole stated he did not see how you could say fundraising raises the appearance of impropriety but then allows other candidate campaign activities. In his opinion all campaign activities raise the appearance of impropriety.

Rep Gatto agreed leeway was important but finding the right language was a difficult task. What a legislator might see and what another perceives as proper or improper can be very different.

Chair Thomas believed it boils down to the purpose of the trip; i.e., the specific set of circumstances. He does not believe they can come up with any rule that can guarantee a complaint won't ever be filed.

Sen Stevens stated that he was invited to attend two fundraisers the night before, which he did not attend, but questioned if the Committee was referring to personal fundraisers for the legislators on the state paid trip or any fundraiser. Mr. Wayne indicated there is another opinion on this subject. He believes the statute reads whether you are helping someone else raise money for their campaign or raising money for your campaign, it's all considered fundraising. This would include the situation where your name is listed on an invitation to a fundraiser. Mr. Wayne offered to look up the opinion and provide additional information. Sen Stevens then questioned if it included attending fundraisers for other candidates, such as a fundraiser for Sen Murkowski or President Obama. Member Cook stated the statute reads, "no partisan political activity", which includes all

levels of partisan political activity. Member Cook indicated that's the problem with the statute; it's very broad. Sen Stevens stated the words "primary purpose" definitely clarifies things for him and that he preferred the term.

Chair Thomas stated that there was a motion on the floor and asked each member to voice their opinion before taking a vote.

- Member Cook stated the Legislature should make the policy call through legislation.

- Sen Coghill stated he preferred Mr. Cole's opinion in that the term "primary purpose" was defined and was against rescinding the opinion.

- Rep Gara stated he would like a rule that meets the public's expectations – when on a state paid trip you are not going to a fundraiser on the same trip. He clarified the prohibition doesn't mean you shouldn't be able to talk to a voter or the press while on that trip. He is against the approved opinion and hopes the Committee comes up with a rational rule.

- *MEMBER MALLOTT'S COMMENTS WERE INAUDIBLE.*

- Member Walker had no comment at this time.

- Sen Stevens stated he was against rescinding the opinion without replacing it with something else. He believes in the honor system; i.e., signing paperwork that states the primary purpose of a trip is for legislative business. He believes the committee is delving in dangerous territory in that we are close to writing legislation which is not the Committee's job.

- Rep Gatto stated he was against rescinding the opinion.

- Chair Thomas agreed with Member Cook. The Legislature was clear when they wrote the current legislation. No state resources can be used for campaigning. He also agrees that the prohibition does not mean a legislator cannot talk on the phone about campaign issues. But he stated there are no exceptions in the current statute for the use of state resources and that is a concern that has been voiced by many members. He stated the Legislature should be addressing this issue. Chair Thomas explained that in August of 2008 the Ethics Committee's letter to APOC is what generated this discussion. There was an opinion drafted but never adopted. The Committee maintained its position that there were no exceptions in the statute.

Sen Stevens voiced concern and frustration over rescinding Mr. Cole's opinion due to the fact Legislators had been notified of the opinion and received advice based on the opinion and now the opinion may be rescinded today.

Chair Thomas agreed that it is frustrating to him as well, but if the current opinion is rescinded today and no other opinion is approved, the recommended advice to legislators and staff would be what was in place prior to adopting Mr. Cole's opinion in May. The advice provided after the May 27 opinion was adopted would stand and action taken by legislators and staff during the period the opinion was in force would not be in violation of the Act.

Chair Thomas asked Ms. Anderson to take a roll call vote. YEAS: Skip Cook, Rep Gara, Toni Mallott, Gary Turner, Herman Walker, Jr., Chair Thomas, NAYS: Sen Coghill, Rep Gatto, Sen Stevens. Motion to rescind the committee's May 27 action passes.

Chair Thomas suggested the members break for 10 minutes to review Mr. Wayne's advisory opinion.

Sen Stevens recommended legislators be notified immediately that Mr. Cole's advisory opinion was rescinded today. Ms. Anderson stated she would send out an "All Users" e-mail ASAP.

(Herman Walker leaves the meeting and does not return.)

1:40 p.m. - Members reconvened.

Mr. Wayne presented a revised draft of the 2008 advisory opinion not approved by the committee. He explained that he reviewed previous discussion on this subject and incorporated some of the examples in this opinion. He clarified his drafted opinion was to assist the Committee and not to advocate for any particular policy. The Committee can accept it, modify it or reject it.

(Sen Stevens temporarily leaves the meeting.)

Mr. Wayne proceeded to point out the changes he made from his first draft opinion. He changed the wording from "legislative resources" to "state resources" throughout the opinion to be consistent with the term used in statute. The examples will aid in understanding where the Committee might "draw the line". The long paragraph on page three is new and addresses the interpretation of the two prohibitions in statute in regard to legislators and staff traveling to and from legislative sessions. There was some discussion at previous meetings in relation to the term "incidental" and the long paragraph on page 3 and page 4 covers those concerns. The second paragraph on page 5 covers "inadvertent" campaign activity that many members voiced concerns about; for example, if you're approached by a constituent in the super market with a campaign related issue while traveling on a state paid business trip.

(Sen Stevens returns to the meeting.)

Sen Stevens requested a definition of the terms "political fundraising", "campaigning" and "partisan political activity". Mr. Wayne provided Sen Stevens some examples but explained there were no definitions in statute. Mr. Wayne indicated there are the

obvious examples of when you are campaigning, but there are also gray areas which may be more obvious or less obvious to some and fall subject to interpretation.

Rep Gara requested clarification regarding phone calls and a scenario during a month long special session. What if a legislator received a call from the press stating your opponent has accused you of doing something you did not and you feel you need to address it immediately, and you do, are you engaging in "political activity". Mr. Wayne stated he would have to know the facts of the subject matter that was before the press. Without the facts, he could not answer the question.

Vice Chair Turner commented that APOC also did not have definitions on these three terms. They have said it would greatly help them if there were definitions. He also commented that he did not fully agree with any of the options today and reminded the members there was still the option to adopt the Executive Branch's method, which was prompted by the use of the executive airplane by a sitting governor, such as portioning the expense out.

Members discussed what the next step should be. Rep Gara stated he could agree with members if the consensus was more discussion and more work on the issue. However, he was concerned about what was to be the rule in the meantime. He offered taking it to the Legislature, but felt time was of the essence. He felt that a ruling should be made today and requested feedback from members on his recommendation of adopting Mr. Cole's opinion with the exception of fundraising.

Sen Coghill indicated the pressing concerns were definitions, the freedom of speech issue, and when impropriety of fundraising occurs. He feels the Committee wants a rule that is "prescriptive" rather than something they can use as a guide. For example, the members want to be able to tell people when it is okay to fundraise rather than what is the impropriety in mixing legislative work with campaign work. He felt this was discussion for the Legislature, as was defining terms. He agreed that the statute was too narrow, but the Committee has been pretty clear about what an impropriety might look like. He voiced it was not impossible to get things passed in the Legislature it just takes tenacity. He felt the statute is what it is but there is also a record of the numerous discussions held on this issue and minutes available to the public that shows why the impasse is so difficult to navigate.

Members discussed the next step. Legislators asked what advice the Ethics office will be giving to legislators. Chair Thomas replied that the Committee will stand behind what the statute says and the position outlined in the committee's letter to APOC.

Rep Gara made a motion to accept Mr. Cole's opinion with the exception of fundraising, reiterating that he felt a rule needed to be in place today. If a ruling was not made today, he felt what could happen is that a complaint will be filed and then the Committee will be forced to come up with a rule. He disagrees with this practice.

The Chair disagreed with Rep Gara in that the Committee has already taken a position. The position the Committee has taken is outlined in the letter to APOC. What the Committee has not done is adopt an advisory opinion.

All members agreed there should not be a vote without Member Walker's presence. Rep Gara withdrew his motion.

Members reviewed the August 19, 2008 letter to APOC. Rep Gara noted that the freedom of speech issues continue to be a problem.

Chair Thomas concluded that the item today will be tabled for the next Committee meeting.

7. **ADJOURN**: Member Cook moved to adjourn the meeting at approximately 2:30 p.m. No objections.

Alaska State Legislature

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MINUTES from May 27, 2010
FULL COMMITTEE MEETING
Anchorage LIO, Room 220

1. **CALL THE MEETING TO ORDER:** Vice Chair Gary Turner called the meeting to order at 11:32 a.m. Roll call was taken by Joyce Anderson. Members present: Senator John Coghill, Senator Gary Stevens (attending by teleconference), Representative Les Gara (11:35 a.m.) alternate for Rep Gardner, Chair H. Conner Thomas (11:40 a.m.), Representative Craig Johnson (12:00) alternate for Rep Gatto, Gary J. Turner, Dennis (Skip) Cook, Antoinette (Toni) Mallott. Staff present: Joyce Anderson, Administrator. Absent: Herman G. Walker, Jr. Also present Brent Cole, Legal Counsel and Dan Wayne, LAA Legal Counsel (attending by teleconference).

2. **APPROVAL OF AGENDA:** Vice Chair Turner requested a motion to approve the agenda. Motion to move and approve the agenda made by Rep Johnson. No objections.

3. **APPROVAL OF MINUTES:** Sen Coghill motioned and moved to approve the minutes of the Senate Subcommittee meeting of February 17, 2010, and the Full Committee meeting minutes of February 17, 2010; no objections.

4. **PUBLIC COMMENT:** None.

5. **CHAIR/STAFF REPORT:**

   a. **Ethics disclosures:** Ms. Anderson stated that disclosures, filed between February 18th (deadline for annual disclosures) and April 18th (last day of session) will be published in the Legislative Journal at the end of June. The next publication of interim disclosures will be in January of 2011, unless deemed otherwise by House Clerk and Senate Secretary. A current list of disclosures submitted will be updated and posted on the Ethics website.
   b. There were eight late disclosures filed since the last committee meeting in February. Four were first time late filings and no fine was accessed; Rep Kawasaki, Rep Millett, Rep Stoltze and T. Bannister. The other four varied in reasons for lateness:

Rep Holmes was fined $25 for an inadvertent late filing; Sen Huggins was fined $25 for an inadvertent late filing; S. Long was fined $100 for a late filing; and Sen Dyson's late filing was waived since he had filed with APOC.

c. **Informal Advice Staff Report:** Ms. Anderson provided an explanation of the informal advice provided between November 1, 2009, and May 14, 2010. The report does not include routinely asked questions but questions involving more detailed advice. Ms. Anderson stated that the current method used in preparation of this report is tedious and time consuming. However, she is anticipating the availability of a database this summer which will simplify this task. The database is being developed by the State of Massachusetts and would be available free. Sen Coghill complemented Ms. Anderson on categorizing the report stating it was helpful to him to review advice in this manner.

6. **SECOND LEGAL OPINION:** Chair Thomas arrived at 11:40 a.m. and relieved Vice Chair Turner who was temporarily sitting in for him. Mr. Cole was not scheduled to arrive until 12Noon to present this item. Chair Thomas provided members a history of the subject and the discussions previously held leading up to this point, noting that there are members present today who were not present at prior meetings.

Chair Thomas referred members to the letter in today's meeting packet written by the Ethics Committee in response to APOC's (Alaska Public Offices Commission) request for the Ethics Committee's input concerning regulations on the subject of paid state travel and collateral campaign activity. At the time of this request, (December of 2007), APOC had no regulations in place. APOC's request is what generated the Ethics Committee to hold various discussions and ask for an advisory opinion on the subject. A draft opinion discussed at the January 2008 meeting was not approved or issued but the committee concluded there absolutely cannot be a mixing of state resources for campaigning or incidental partisan political activity. The Committee then wrote APOC stating the position of the Ethics Committee; however, no advisory opinion was ever adopted or a vote taken by the committee.

The Chair also noted that this issue comes up often, most recently, at his and Vice Chair Turner's confirmation hearings, where the House Judiciary Committee questioned both of them about the committee's advice and recommended that the Committee consider submitting a second opinion. The Chair stated that the question before them today is if they should adopt the second opinion or rely on the advice in the draft opinion written by Dan Wayne, LAA legal counsel.

The Chair asked Dan Wayne to go over his opinion and his view on Mr. Cole's second opinion. Mr. Wayne stated he reviewed Mr. Cole's opinion and indicated he did not agree with Mr. Cole's analysis. Mr. Wayne expressed that his opinion was based on **AS 24.60.030, "A legislator or legislative employee may not use public funds, utilities, equipment, services or another government asset or resource for a non-legislative purpose for involvement in or support of or opposition to partisan political activity or for the private benefit of either the legislator or legislative employee or another person."** Mr. Wayne provided the exceptions, as follows:

"This paragraph does not prohibit a) the limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duty. And either the cost or value of related use is nominal or the legislator or legislative employee reimburses the state for the cost of the use." If this were the only exception, "personal use" *could* encompass campaign use or political use. But there's another exception having to do with political campaigning, which is AS 24.60.030(a)(5), and states as follows: **"A legislator or legislative employee may not use or authorize the use of state funds, facilities, equipment, services or government asset or resource",** which is similar to the first exception he read.

He further stated, for the purpose of political fundraising or campaigning, there are five exceptions: **1) this paragraph does not prohibit a) the limited use of state property and resources for personal purposes.** This reiterates the "personal use" exception. It also says it doesn't prohibit the use of mailing lists, computer data or information obtained by a government agency and available to the general public for non-legislative purposes; it doesn't prohibit the storing or maintaining election campaign records in a legislator's office, and it doesn't prohibit a legislator from using a legislator's private office in the Capitol city during a legislative session and for the 10 days immediately before and the 10 days immediately after a legislative session. Also, a legislator is not prohibited from using photographs of him or herself.

He pointed out that what we don't see in this prohibition under 24.60.030(a)(5) is an exception that allows some sort of *de minimis* or case-by-case basis political campaign usage of state resources. In his opinion, he's said that's a "blanket" prohibition. If the exception had "allowed limited use of state property and resources for political purposes or political campaign purposes, or personal purposes including political campaign use," the statute would have so stated. Mr. Wayne stated he was willing to draft something else, if the Committee determined the statute should be interpreted otherwise.

The Chair asked if there were any questions. Sen Stevens asked Mr. Wayne to comment on what the words "primary purpose" means in the second opinion. Mr. Wayne explained that in his opinion the statute does not allow for any "splitting out" or any division between a primary purpose or secondary, minimal purpose as is the case with "personal, non-legislative" use of state resources. Mr. Wayne referred Sen Stevens to Mr. Cole for an explanation.

Sen Stevens pointed out that in Mr. Cole's opinion he mentioned the difference between a legislator who represents a district in downtown Anchorage versus one in rural Alaska with multiple cities/boroughs. For example, at the end of session, when he traveled to Homer from his Kodiak residence, his purpose was to explain what transpired in session. However, since people in Homer know he's running for office in August, it is very difficult reporting what the legislature did and report nothing on the fact that he's running for office. Sen Stevens felt that although this subject needs to simplified and clear and kept as separate as you can, it was very hard to do.

Member Cook stated he initially sided with the prohibition of campaigning with the use of state funds, however, can appreciate what legislators have said and their concerns.

He suggested adopting the formula that was developed when the state owned the aircraft for state travel; that if anyone is going to use the aircraft on state business, if campaigning occurred and exceeded 10%, then the legislator would reimburse the state. When there's reimbursement, you are not using state funds. The "limit" allows someone to address a campaign related question or issue if it inadvertently or unexpectedly comes up and would address concerns brought forth by Sen Stevens.

Rep Gara stated he agreed with Sen Stevens. He emphasized the importance of the word "for". For example, did you take the trip "for" the purpose of campaigning" or "for" a legislative purpose? "For" is the key word in the statute. He felt Mr. Coles' analysis was correct. Rep Gara stated that the practical matter is that people from Anchorage have an advantage over people from Kodiak or Nome, etc., because the reality of political campaigning is the activity is more prevalent in larger cities. If you're in Nome, most of your donations are going to come from outside of Nome. He pointed out the following example: I can go to a legislative meeting during the day in Anchorage and in the evening, I can go to a campaign activity after hours; others who come here for a legislative purpose cannot attend a campaign event after hours.

Vice Chair Turner stated that discussions on this have gone on for almost three years now. He respects the opinions and input from the legislators, but as he's gone on record in the past, there is an advantage to the incumbent, especially in an election year. For example, the challenger has to pay for his/her trip to Anchorage to campaign.

Chair Thomas asked Mr. Wayne about his footnote in his opinion (Draft Opinion 07-08) **"'Although legislators and legislative employees travel to the capital city and sometimes other locations within Alaska in order to participate in legislative sessions, the committee does not consider that travel, or travel outside of the capital, to be within the scope of this opinion...."** Mr. Wayne referred the Chair to wording from the letter written by the Ethics Committee to APOC in the second to last paragraph, **"After considerable debate, the committee determined travel to and from the legislator's home district to attend a legislative session should be exempt from the requirement of allocating costs for partisan political activity."** The Chair stated that the letter to APOC was written *after* Mr. Wayne's opinion was drafted and asked if Mr. Wayne could recollect background on the reasoning for his footnote. Mr. Wayne could not recollect the revolution of the footnote but recalled the committee having a lot of discussion about it and believed at the time there was no "black and white" legal authority to say that travel to and from the session from the home district was exempt, but that as a practical matter had been considered that way and the committee adopted that exception, informally, in their letter to APOC.

The Chair introduced Mr. Cole to the floor and requested that he provide the members a quick overview of his Second Legal Opinion.

NOTE: MR BRENT COLE'S TESTIMONY WAS INAUDIBLE; PLEASE REFER TO HIS SECOND LEGAL OPINION LETTER FOR DETAILS THAT MAY NOT BE IN THE MINUTES.

Mr. Cole explained that he was an "outsider" but aware of the issues and concerns by legislators as well as the general public. He stated his opinion was written with the existing statute in mind, regardless if it does not contain the best language or does not directly address the issue. Existing law has to be followed. He stated he did not focus on one or two provisions of the statute but encompassed all of the provisions in 24.60.030. Conflict of Interest and Unethical Conduct. Mr. Cole stated his opinion contained a melding of all concerns. His solution is provided in the second paragraph of his opinion stating, **"we believe that the nature of the business rather than whether it is paid for with state resources should be the governing standard in determining whether an ethical violation has occurred. A statement signed by a legislator designating the primary nature and purpose of the business rather than whether it is paid for by state resources should suffice to govern whether or not collateral activities can or cannot occur. Violations or false statements made in this designation can be enforced pursuant to AS 24.60.030(3) If a legislator gives as his her primary or sole purpose for taking the trip as engaging in political campaigning or partisan political activity, then s/he would not be entitled to state paid travel expenses."** Mr. Cole added that AS 24.60.030(a)(3) was not considered previously. AS 24.606.030(a)(3) makes it an ethical violation for a legislator or legislative employee to **"...make a false statement in connection with a request, or application for compensation, reimbursement, or travel allowance from public funds."**

The Chair requested comments, consideration or discussion on using percentages.

TESTIMONY FROM THE CHAIR, MR. COLE AND MR. WAYNE IS INAUDIBLE. SEN STEVENS MENTIONS DIFFICULTY IN HEARING TESTIMONY. HOWEVER, SEN STEVENS IN HIS TESTIMONY COMMENTS ON THE DISCUSSION BETWEEN THE CHAIR, MR. WAYNE AND MR. COLE.

Sen Stevens believes the terms "de minimis" and/or "primary" are understandable but splitting the cost and dealing with percentages could be difficult and cumbersome. Sen Stevens also refers to page 4 of Mr. Cole's opinion, **"...the individual entrusted with approval authority is responsible for reviewing the purpose of the proposed trip..."** noting that this is another "check and balance" on the use of state funds. It is the President of the Senate and the Speaker of the House who are responsible for reviewing and examining a request for state paid travel and have the authority to question a request and in turn either approve or deny the request. Basically, legislators are under the "honor system" when it comes to a request for reimbursement for legislative travel.

DUE TO THE DIFFICULTY OF HEARING TESTIMONY, SEN STEVENS NOTIFIES THE MEMBERS HE MAY LEAVE THE MEETING. MS. ANDERSON ASKED SEN STEVENS TO NOTIFY THE CHAIR WHEN HE LEAVES.

Rep Gara recommended the members interpret the statute as presented in Mr. Cole's opinion. He stated there will be a lot of problems if we do not. He provided the following scenario in relation to attending a conference: The conference lasts 6 hours but you are normally you're up 18 hours a day which leaves the remaining 12 hours to be spent doing whatever you do on your personal time, whether you're at the movies, shopping, visiting friends, etc, it's all "personal time". However, in this instance your

"free" time is not "de minimis" to the time spent at the legislative conference. If the committee approves a rule that says, "other than de minimis use", the above example would not fit into the box. He provided another example: If you go to Washington, DC, you're going to want to see many of the attractions which may result in spending a substantial amount of your day doing non-legislative business. We cannot take a set of rules designed to prevent corruption and use them to prevent rational activity. When rural members come in for a Caucus meeting, over a period of 2-3 days, most of the time they spend here, they are not doing legislative business. The meetings end at two o'clock and afterwards, they're dining at a restaurant, etc.

Rep Gara stated he feels the whole legislative process favors the incumbent, although attempts to level the playing field are made by limiting campaign contributions and limiting fundraising activities during legislative session. If we reject Mr. Cole's opinion, the current rule disfavors the incumbent. He explained that during the AGIA special session here in Anchorage, that lasted about 30 days, he was able to campaign and go door-knocking after hours. Others who were here from out of town could not do this on their free time. He reiterated his previous statement: Were you there "for" the AGIA or were you there "for" campaigning? Additionally, he felt what we are doing is regulating someone's free time. If a fundraiser were held during the day during the AGIA session, that is a different story and the person would have violated the statute.

Mr. Cook stated the legislature approves the statutes and the committee is trying work within that framework and has been for the last three years. He feels the statutes are clear in that there is an explicit prohibition on the use of state resources for campaign related activities in that there are exceptions for personal use but no exceptions for political campaigning activity. The simplest way to fix this problem would be for the legislature to amend AS 24.60.030 and remove the prohibition on political campaigning activity or put limits on it in the statute, as was done with the Executive Branch and the state jet. Legislators and the public get upset with the Committee for trying to impose rules, but the committee is only interpreting the statutes that were passed by the legislature. He recommends fixing the statute instead of asking the Committee to interpret it. He would like to see a reimbursement formula similar to AS 39.52.120(f) in which public funds weren't being used for campaigning.

Sen Coghill stated he agreed with Member Cook. However, when a person is in the political arena, that person is always a political person. S/he will always be a policy person with a point of view of a political nature. Under Mr. Wayne's opinion a legislator is always going to be "unethical" because partisan or political activities occur all of the time. Sen Coghill believes the committee needs to address it.

Sen Coghill voiced his opinion on the power of the incumbency. He agreed with Rep Gara. In Mr. Cole's opinion, there are certain disadvantages to legislators and incumbents. He would like to see the term "primary purpose" addressed. He would like take this opinion and move forward with it even though there are questions on the definition of the term "primary". He stated he would be willing to work with Sen Stevens in defining "primary purpose". Sen Coghill also stated that if he were elected again, he would take this issue to the legislature. He felt Mr. Cole's opinion should be

adopted, even though there are questions about what is considered "primary" and he questioned whether the premise of an honor system is reasonable to move forward with.

Sen Coghill motioned that we accept Mr. Cole's legal opinion and adopt the opinion for the Ethics Committee.

Vice Chair Turner stated he had a concern with there being two different standards. One based on AS 39.52.120, with the 90/10 split, and Mr. Cole's opinion, with the term "primary purpose". He believes there will be a lot of questions on why the Executive Branch holds one set of standards and why the Legislature holds another. Mr. Cole stated that the answer would be because there is a specific statute for the Executive Branch and there is not one for the Legislative Branch. Mr. Cole further added that it is not easy to pass any legislation in regards to ethics. Having the issue brought out into the public eye may force the legislature to act. The decision today is going to create more interest, hopefully making legislators realize the legislature needs to get together and address the issue. The public is going to demand it. What's consistent with the statute and what's consistent with reality must be balanced. The difficulty with Alaska is that it's very diverse. It's not just the Republicans or Democrats, it involves urban and rural and incumbent and non-incumbent. It encompasses a lot of different interests competing, which makes this a challenge.

Rep Johnson stated if the motion is adopted, it would be much easier for Sen Coghill, Rep Gara and himself to clarify this in statute through legislation. This would be the opinion the committee would be operating under and this is the law as it stands now. He stated the statute could then be crafted to be consistent with the committee's opinion and put one of the legislative committee member's names on it. The statute would endorse what has been previously determined as unethical behavior by the committee.

The motion was brought before the members for a vote.

YEAS: Sen Stevens, Sen Coghill, Rep Johnson, Rep Gara, Toni Mallott. NAYS: Skip Cook, Gary Turner, Chair Thomas; motion passes.

7. **FY2011 BUDGET BRIEFING:**

   a. **Travel:** Ms. Anderson briefed the members that the Committee had requested an increase in travel due to the fact the travel budget has been consistently exceeded. The Committee also requested an upgrade in the Administrator position and an increase in time for the Secretary's position. The travel budget received a decrease of $2,500 for FY11, the Secretary's position changed from 50% time to 60% time with benefits, and there was no change in the Administrator position. Members were referred to a handout reflecting travel expenses for legislators. Sen Stevens stated he approves travel for senators and travel expenses should be coming out of Senate funds and not Ethics Committee funds. Ms. Anderson stated she would notify LAA Accounting of this change.

   b. **Ethics meeting with House Finance:** Vice Chair Turner provided an update to the members on his and Ms. Anderson's meetings on February 16, 2010, with House

Finance committee members regarding the Ethics budget. Here is a recap: Speaker Chenault was noncommittal. Reps Dahlstrom and Kerttula both who were favorable for a budget increase. Rep Thomas thought the requests were somewhat reasonable but was not comfortable increasing the budget. Sen Stevens was in favor of the increase. Rep Hawker first wanted to know if we had submitted our budget to the governor and if he had accepted it. Ms. Anderson stated the ethics budget has never been presented to the governor in the past and she doesn't think the committee required to do so. They were unsuccessful in meeting with Rep Stoltze after numerous attempts. Rep Gara recommended going to both the governor and legislature for budget requests.

c. **Annual Report:** Ms. Anderson proposed to the committee that an annual report be prepared to improve the visibility of Ethics Committee within the Legislature. Ms. Anderson did some research and found that other Ethics Committees have annual reports. The report would include statistics and goal planning. Ms. Anderson proposed that the report be submitted to legislators at the beginning of legislative session. Sen Coghill stated that when session starts he already has at least 50 annual reports to read through. Rep Gara cautioned against preparing a report. The most important items are already available, the rulings and the informal advice. He stated the time to prepare a report exceeds the need of additional work on the administrator's plate. Chair Thomas suggested Ms. Anderson draft a report and present it to the committee for input to see if it would be beneficial or not.

8. **LEGISLATIVE OVERSIGHT OF ETHICS COMMITTEE:** Vice Chair Turner stated he felt the Ethics Committee is becoming more politicized. The committee is experiencing budget decreases and intent language placed in the budget by the House Finance Subcommittee –Legislature, to name a few. He also noted there are no minutes or an audio recording of the finance meeting in which to review the actual comments by legislators. Also, at the February 16 meeting previously mentioned, it was evident that many legislators may have had issues with many of the Advisory Opinions the Committee has recently passed and informal advice given by the Administrator. As Member Cook mentioned earlier, the committee interprets what's in statute. Additionally, at his and Chair Thomas' confirmation hearings, they felt attacked by some House Judiciary committee members who questioned why the Committee would recommend legislative changes to statutes as well as suggesting that the Committee bend the rules as necessary to fit each fact specific situation. Vice Chair Turner also noted that the Administrator salary is not at the same salary level as her peers in similar positions and upon requesting a salary increase, it was declined again.

Based on the above reasons, Member Turner has come to the conclusion that the Committee should discuss the possibility of becoming a "Commission" like other states have done. This would mean becoming an independent state agency, much like APOC. Vice Chair Turner referred to the article in the packet where Kentucky legislators understood how difficult it could be to sit in judgment of colleagues on ethics issues, then walk out of the meeting and ask those same colleagues for support on a bill or amendment.

Vice Chair Turner, through the Chair, requested that Ms. Anderson present her research to the members. Ms. Anderson stated the difference between a Committee and a Commission is that a Committee is made up of legislators and public members and a Commission is made up of public members only. On the handout titled, "Research of Ethics Oversight Agencies", there are six states which have Legislative Ethics Committees and/or Commissions, eight states that have State Ethics Commissions, Executive and Legislative Branches under one body, and thirty three states are comprised of legislators, and the remaining three states differ from all of them.

(INAUDIBLE – MINTUES REFLECT THE RECOLLECTIONS OF MS. ANDERSON REGARDING THIS QUESTION) Sen Coghill asked Ms. Anderson if she attended any seminars at the COGEL (Council on Governmental Ethics Laws) conference in December 2009 or talked to other participants about this concept and also the subject of budget issues. Ms. Anderson responded she attended a seminar on the subject of budgets and stated other jurisdictions have had problems with their budgets when a controversial decision or decisions were made by the ethics body.

Rep Gara stated that he understood Vice Chair Turner's concern and has witnessed some of it too, where the conduct of legislators was inappropriate toward the public members of the ethics committee, but did not believe that changing the status of Committee was going to change this type of conduct. APOC is a Commission and they get just as much, if not more than the Ethics Committee. Their budget has gone up and down as well. In the end, the Legislature has to approve the budget anyway.

Vice Chair Turner indicated Member Walker was in favor of this idea as well. Vice Chair Turner had hoped this would be a way to gain a little more independence. Under a Commission, the decision on the Administrator's salary would not be influenced by a legislator who may have a difficulty with the Administrator of the Ethics Committee or the committee itself. Having worked in the University system, salary levels are determined through the HR system without political influence. Additionally, the treatment received at the confirmation hearings for public members was influenced by the decision rendered by the Ethics Committee, and not by their personal service or qualifications, which is the point of a confirmation hearing.

Members agreed to table the item for the next meeting where Member Walker would have an opportunity to participate in this discussion.

Rep Johnson did not feel changing the status of the committee would change anything. He did not believe Vice Chair Turner's example of the University system applied, due to the fact the University is part of a collective bargaining unit. Sen Coghill noted there's always room for improvement. He understood Vice Chair Turner's point, with regard to the Committee becoming politicized where this can be an advantage or disadvantage. Sen Coghill noted that he's been on a lot of boards in the past and witnessed decisions from political influence, and unfortunately, it is not an uncommon practice. Rep Johnson stated he sat through the board of Fish & Game confirmations and the political influence is very notable. He apologized if the confirmation hearing was more brutal

than it should have been. He personally appreciates the public members' service on the Ethics Committee and asked the members not to take it personally.

Ms. Anderson stated this has been a challenging year for the Ethics office. Ms. Anderson stated that APOC is now fully staffed after being understaffed for many years. They are now able to perform audits which they have not been staffed to do in the past. The same is true for the ethics office. Her position started out as 80% time and then increased to 90% and is now 100%. During that time period her workload increased. Even before the increase in time, the hours worked were close to 95% to 98%. The ethics office now has a permanent part-time staff person. Now that APOC and the Ethics office have more resources, both agencies are able to do more than just maintain the office. There is time to conduct research and be proactive instead of just reactive. For example, the office reviewed legislative candidate web sites to ensure "solicitations for contributions during a legislative session" were not listed on the web site. Quite a few legislators were notified and removed the prohibiting language. More oversight has been occurring this year than in the past and some of it has not been received very well. Ms. Anderson feels this is unfortunate. The ethics office, in being proactive, is trying to prevent a complaint from being filed against a legislator or a staff person for violating the ethics code.

Chair Thomas recognized and acknowledged testimonies before him today and recommended more follow up on this subject at the next meeting.

9. **OTHER BUSINESS**: Sen Stevens requested to speak on an issue that is not on the agenda. Chair Thomas allowed Sen Stevens to proceed. Sen Stevens stated that he feels sometimes the ethics committee/office goes beyond its responsibilities and look for things to get involved in that the committee should not. One of which has caused consternation among staff and members of the legislature is in regards to the legislature's Accomplishment Book. It is a booklet that the majority publishes every year at the end of every session. It contains detail about what transpired regarding fiscal matters and accomplished legislation. It is his understanding that Ethics staff has now stated the Accomplishment Book is a campaign issue and cannot be distributed two months before the election. He disagrees with this statement because the booklet has been published after session every year and he does not feel this is a campaign-related-item. He would like the Committee members to address this.

Chair Thomas did not know what advice was provided and asked Ms. Anderson if she could respond. Ms. Anderson stated she was aware that Accomplishment Booklets are printed every year and stated that perhaps the staff person she spoke with may have misunderstood the comments she provided. Ms. Anderson stated she had originally met with the staff person regarding another issue and then asked about the Accomplishment Booklet and how it was going to be distributed. The staff person replied that it had already been distributed by E-mail. Ms. Anderson stated she went on to explain an Ethics statute states such a booklet cannot be "mass mailed" during the 60 days before an election if the publication is "from a legislator or about a legislator." She proceeded to pointed out to Sen Stevens that she did not say the booklet could not be distributed.

Sen Stevens stated it may have been a misunderstanding but he was making it clear now that he will allow any Senator to hand out any of the booklets at any time up to the day of an election. He asked Ms. Anderson if she had any objection. Ms. Anderson replied by stating "no" to his question and explaining the statute talks about a "mass mailing" but it does not talk about handing out individual Booklets. Mass mailing means it would be mailed to a group of individuals. Sen Stevens reiterated that is not up to the Ethics office to decide whether or not a Senator can do a mass mailing of the booklet to everyone in their district at any time.

Ms. Anderson replied that she would have to research the statute further about the definition of a "mass mailing" and get back to Sen Stevens. She read AS 24.60.030(c) which states, **unless approved by the committee, during a campaign period for an election in which the legislator or legislative staff employee is a candidate, the legislator or legislative employee may not use or permit another to use state funds, other than funds to which the legislator is entitled to under 24.10.110** (which is a legislator's personal allowance account) **to print or distribute a mass mailing to individuals eligible to vote for the candidate. Campaign period begins 60 days for the date of an election."**

Sen Stevens suggest there be a legal opinion and disagreed with the interpretation. He further stated the booklet was not a campaign item and that it contained the accomplishments of the legislature. Ms. Anderson stated the committee previously issued an advisory opinion on the subject and she would pull the opinion for reference. Sen Stevens stated he was not referring to any mass mailing other than how the Accomplishment Booklet could be distributed. He stated it should be up to the legislator to determine the distribution method and not Ethics. Chair Thomas recommended Sen Stevens request formal advice or a legal opinion. Sen Stevens stated he did not want a legal opinion and reiterated that he believed the Accomplishment Booklet could be published and distributed any way a legislator wanted.

Rep Gara requested a re-visit to an existing opinion regarding a link on a campaign web site that would take the viewer to a legislative website. He stated APOC had referred him to the Ethics office as they thought Ethics had a ruling on this topic. Ms. Anderson stated that APOC is the deciding authority on what can and cannot be on a Campaign website, not the Ethics Committee. She will forward a copy of her paperwork on this issue to Rep Gara.

10. **ADJOURN**: Member Turner made a motion to adjourn the meeting at 2:00 p.m

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Committee forwards amended legislative ethics bill

Posted: March 31, 2011 - 9:17pm

By CHRIS STEIN

THE ASSOCIATED PRESS

JUNEAU — A bill aimed at clarifying recurring ethical questions among legislators was passed out of the Senate State Affairs on Thursday.

The committee stripped out two provisions of the bill before sending it to the Senate Judiciary Committee, but lawmakers said the bill will undergo further deliberations in the Judiciary Committee before reaching the Senate floor.

Bill sponsor Sen. John Coghill, R-North Pole, objected to the committee's removal of a clause allowing lawmakers to campaign on legislative business, a practice currently prohibited.

The committee also removed a clause from the bill that allowed lawmakers to use their mailing list for political purposes.

For legislators who live in rural areas, attending a partisan event, such as political party luncheon, is often easiest done after attending a legislative event like a committee meeting, Coghill said.

"In fairness to those who live outside of urban areas of Alaska, I think it's a fair question to answer," Coghill said.

Committee chair Sen. Bill Wielechowski, D-Anchorage, said both changes were made because the committee did not feel that lawmakers should be using state resources for political reasons.

"The problem is if you're using state funds to travel from one place to another, my personal opinion is you shouldn't be doing partisan activities," Wielechowski said.

Coghill said he proposed the bill to address ethical quandaries that he has dealt as a member of the Select Committee on Legislative Ethics.

Comment

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State Affairs Comte. Approves Ethics Changes – SB 89

Senator John Coghill – Senate District F

For Immediate Release: March 31, 2011

Senate State Affairs Committee Approves
Legislative Ethics Changes, Passes SB 89

(Juneau) – The Senate State Affairs Committee today moved SB 89, which better defines ethical issues for legislators and staff. Among other changes, the bill provides better definitions for gifts; constituent advocacy efforts are given better guidelines; it adds training requirements for volunteers; and makes some conforming changes.

"A remaining concern that has been looking for a solution since 1993 is how state travel impacts some areas of Alaska more than others," said bill sponsor Sen. John Coghill, R-North Pole. "Unfortunately, the State Affairs Committee chose to remove this section from SB 89.

"For convenience, most non-session committee work is done in urban centers, allowing most legislators to conduct state business, civic business, personal business, and political business in their area. Legislators from outside of the urban centers, who are required to travel for state business to do committee work, must leave their home, civic or employment business and, because they are travelling for legislative business, they are forbidden by law to do any partisan activity alongside those urban legislators who are at liberty to do it all.

"The proposal that I put forward has three clear policy positions; (1) it prohibits any campaign fundraising while on state travel, (2) it prohibits partisan activity during regular business hours, 8 am to 5pm and, (3) it makes some exception for luncheons that are partisan.

"My attempt to clarify these tough ethical questions has not found the answer yet, but I think they are worth working on to get to a clear policy for legislators."

SB 89 was moved from the State Affairs committee on to the next committee of referral, the Senate Judiciary committee.

# # #

Senate Republican Caucus Meets with Congressman Don Young

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Coghill introduces ethics bill

The Associated Press
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JUNEAU -- Lawmakers could participate in some partisan political activities while on state travel under a measure introduced by Sen. John Coghill.

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The Republican hopes to provide clarity to an issue he says the legislative ethics committee, on which he serves, has grappled with for years. He expects a debate over what's ethical and what's fair, noting that some people believe incumbents have an inherent advantage.

He considers the issues separate. He says candidates have more fundraising options than sitting legislators.

There are exceptions to legislator politicking: Legislators cannot participate in partisan activities while on state travel if they fall during normal workday hours, on election day, within 30 days of an election in which the lawmaker is running, or are for fundraising.

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The measure also would let lawmakers use legislative mailing lists for campaign purposes.

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NOTES

CS FOR SENATE BILL NO. 89(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR COGHILL

A BILL

FOR AN ACT ENTITLED

"An Act clarifying that a legislator or legislative employee is allowed to accept certain compassionate gifts; allowing legislators and legislative employees who are representing persons in an administrative hearing to contact hearing officers and attempt to influence the outcome of the hearing if they are professionals licensed in the state, and allowing legislators and legislative employees who are not professionals licensed in the state to contact hearing officers for the purpose of influencing the outcome of the hearing in certain instances; requiring the Select Committee on Legislative Ethics to maintain a public record of certain ethics disclosures made by legislators and legislative employees; prohibiting a public member of the Select Committee on Legislative Ethics from disclosing confidential information without authorization; clarifying the ethics disclosure requirements for tickets to or gifts in connection with charity events; amending disclosure deadlines under the Legislative Ethics Act; relating to requests to

refrain from disclosure under the Legislative Ethics Act; relating to the applicability of certain provisions of the Legislative Ethics Act to certain legislative employees, volunteers, and interns; establishing a seat for an alternate public member on the Select Committee on Legislative Ethics; clarifying the requirements related to participation by alternate public members and alternate legislative members in the proceedings of the committee; amending the definition of 'legislative employee' in the Legislative Ethics Act; and repealing a procedure for appointment of alternate legislative members."

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

*** Section 1.** AS 24.60.030(a) is amended to read:

(a) A legislator or legislative employee may not

(1) solicit, agree to accept, or accept a benefit other than official compensation for the performance of public duties; this paragraph may not be construed to prohibit lawful solicitation for and acceptance of campaign contributions, solicitation or acceptance of contributions for a charity event, as defined in AS 24.60.080(a)(2)(B), or the acceptance of a **gift** [LAWFUL GRATUITY] under **AS 24.60.075 or 24.60.080** [AS 24.60.080];

(2) use public funds, facilities, equipment, services, or another government asset or resource for a nonlegislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of [EITHER] the legislator, legislative employee, or another person; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) the legislative council, notwithstanding AS 24.05.190, from designating a public facility for use by legislators and legislative employees for health or fitness purposes; when the council designates a facility to be used by legislators and legislative employees for health or fitness purposes, it shall adopt guidelines governing access to and use of the facility; the guidelines may establish times in which use of the facility is limited to specific groups;

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others;

(E) a legislator from use of legislative employees to prepare and send out seasonal greeting cards;

(F) a legislator from using state resources to transport computers or other office equipment owned by the legislator but primarily used for a state function;

(G) use by a legislator of photographs of that legislator;

(H) reasonable use of the Internet by a legislator or a legislative employee except if the use is for election campaign purposes;

(I) a legislator or legislative employee from soliciting, accepting, or receiving a gift on behalf of a recognized, nonpolitical charitable organization in a state facility;

(J) a legislator from sending any communication in the form of a newsletter to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(K) full participation in a charity event approved in advance by the Alaska Legislative Council;

(3) knowingly seek, accept, use, allocate, grant, or award public funds for a purpose other than that approved by law, or make a false statement in connection with a claim, request, or application for compensation, reimbursement, or travel allowances from public funds;

(4) require a legislative employee to perform services for the private benefit of the legislator or employee at any time, or allow a legislative employee to perform services for the private benefit of a legislator or employee on government time; it is not a violation of this paragraph if the services were performed in an unusual or infrequent situation and the person's services were reasonably necessary to permit the legislator or legislative employee to perform official duties;

(5) use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for the purpose of political fund raising or campaigning; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) storing or maintaining, consistent with (b) of this section, election campaign records in a legislator's office;

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under

this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others; or

(E) use by a legislator of photographs of that legislator.

*** Sec. 2.** AS 24.60.030(i) is amended to read:

(i) **A** [EXCEPT FOR SUPPLYING INFORMATION REQUESTED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, OR WHEN RESPONDING TO CONTACTS INITIATED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, A] legislator or legislative employee may not attempt to influence the outcome of an administrative hearing by directly or indirectly contacting or attempting to contact the hearing officer assigned to the hearing or the individual, board, or commission with authority to make the final decision in the **matter** [CASE] unless [THE]

(1) **the legislator or legislative employee is representing another person for compensation subject to AS 24.60.100 and as a professional who is licensed in the state;**

(2) the contact is made in the presence of all parties to the hearing or the parties' representatives **while the legislator or legislative employee is acting as a party or a witness in the matter or responding to a question asked of the legislator or legislative employee by the hearing officer, individual, board, or commission** and the contact is made a part of the record; or

(3) the contact is inadvertent and ex parte and the [(2)] fact and substance of the contact **are** [IS] promptly disclosed by the legislator or legislative employee to all parties to the hearing and [THE CONTACT IS] made a part of the record.

*** Sec. 3.** AS 24.60.050(c) is amended to read:

(c) A legislator or legislative employee who participates in a program or receives a loan that is not exempt from disclosure under (a) of this section shall file with the committee by the date required under AS 24.60.105 a disclosure stating the amounts of the loans outstanding or benefits received during the preceding calendar

year from nonqualifying programs. If the committee requests additional information necessary to determine the propriety of participating in the program or receiving the loan, it shall be promptly provided. The committee shall **maintain the disclosure as a public record and promptly forward the information contained in the disclosure** [PROMPTLY COMPILE A LIST OF THE STATEMENTS INDICATING THE LOANS AND PROGRAMS AND AMOUNTS AND SEND IT] to the presiding officer of each house who shall have it published in the supplemental journals on or before the next regularly scheduled publication of ethics disclosures. If a legislator or legislative employee asks the committee to keep any part of the disclosure confidential and a quorum of the committee determines by vote of a majority of committee members that making the entire disclosure public would cause an unjustifiable invasion of personal privacy, the committee may elect to publish only the fact that a person has participated in the program and the amount of benefit that the unnamed person received. The committee shall maintain the disclosure of the name of the person as confidential and may only use the disclosure in a proceeding under AS 24.60.170. If the disclosure becomes part of the record of a proceeding under AS 24.60.170, the disclosure may be made public as provided in that section.

*** Sec. 4.** AS 24.60.060(a) is amended to read:

(a) A legislator, [OR] legislative employee, **or public member of the committee** may not knowingly make an unauthorized disclosure of information that is made confidential by law and that the person acquired in the course of official duties. A person who violates this section is subject to a proceeding under AS 24.60.170 and may be subject to prosecution under AS 11.56.860 or another law.

*** Sec. 5.** AS 24.60.080(a) is amended to read:

(a) Except as otherwise provided in this section, a legislator or legislative employee may not

(1) solicit, accept, or receive, directly or indirectly, a gift worth $250 or more, whether in the form of money, services, a loan, travel, entertainment, hospitality, promise, or other form, or gifts from the same person worth less than $250 that in a calendar year aggregate to $250 or more in value;

(2) solicit, accept, or receive a gift with any monetary value from a

lobbyist, an immediate family member of a lobbyist, or a person acting on behalf of a lobbyist, except

(A) food or beverage for immediate consumption;

(B) a contribution to a charity event**,** [FROM ANY PERSON AT ANY TIME, AND] tickets **to** [FOR] a charity event**, and** [AT ANY TIME, EXCEPT THAT TICKETS TO OR] gifts **to which the tickets may entitle the bearer; however, under this subparagraph a legislator or legislative employee may not solicit, accept, or receive from the same lobbyist, an immediate family member of the lobbyist, or a person acting on behalf of the lobbyist, tickets to a charity event, gifts to which the tickets may entitle the bearer, or both, that in a calendar year aggregate to $250 or more in value** [RECEIVED AT A CHARITY EVENT UNDER THIS SUBPARAGRAPH ARE SUBJECT TO THE CALENDAR YEAR LIMIT ON THE VALUE OF GIFTS RECEIVED BY A LEGISLATOR OR LEGISLATIVE EMPLOYEE IN (1) OF THIS SUBSECTION]; in this subparagraph, "charity event" means an event the proceeds of which go to a charitable organization with tax-free status under 26 U.S.C. 501(c)(3) and that the Alaska Legislative Council has approved in advance; the tickets may entitle the bearer to admission to the event, to entertainment, to food or beverages, or to other gifts or services **in connection with** [INVOLVED IN] the charity event;

(C) a gift that is unconnected with the recipient's legislative status and is from a member of the legislator's or legislative employee's immediate family;

(D) a gift delivered on the premises of a state facility and accepted on behalf of a recognized nonpolitical charitable organization; or

(E) a compassionate gift under AS 24.60.075.

*** Sec. 6.** AS 24.60.080(c) is amended to read:

(c) Notwithstanding (a)(1) of this section, it is not a violation of this section for a person who is a legislator or legislative employee to accept

(1) hospitality, other than hospitality described in (4) of this

subsection,

(A) with incidental transportation at the residence of a person; however, a vacation home located outside the state is not considered a residence for the purposes of this subparagraph; or

(B) at a social event or meal;

(2) discounts that are available

(A) generally to the public or to a large class of persons to which the person belongs; or

(B) when on official state business, but only if receipt of the discount benefits the state;

(3) food or foodstuffs indigenous to the state that are shared generally as a cultural or social norm;

(4) travel and hospitality primarily for the purpose of obtaining information on matters of legislative concern;

(5) gifts from the immediate family of the person; in this paragraph, "immediate family" means

(A) the spouse of the person;

(B) the person's domestic partner;

(C) a child, including a stepchild and an adoptive child, of the person or of the person's domestic partner;

(D) a parent, sibling, grandparent, aunt, or uncle of the person;

(E) a parent, sibling, grandparent, aunt, or uncle of the person's spouse or the person's domestic partner; and

(F) a stepparent, stepsister, stepbrother, step-grandparent, step-aunt, or step-uncle of the person, the person's spouse, or the person's domestic partner;

(6) gifts that are not connected with the recipient's legislative status;

(7) a discount for all or part of a legislative session, including time immediately preceding or following the session, or other gift to welcome a legislator or legislative employee who is employed on the personal staff of a legislator or by a standing or special committee to the capital city or in recognition of the beginning of a

legislative session if the gift or discount is available generally to all legislators and the personal staff of legislators and staff of standing and special committees; this paragraph does not apply to legislative employees who are employed by the Legislative Affairs Agency, the office of the chief clerk, the office of the senate secretary, the legislative budget and audit committee, the office of victims' rights, or the office of the ombudsman;

(8) a gift of legal services in a matter of legislative concern and a gift of other services related to the provision of legal services in a matter of legislative concern;

(9) a gift of transportation from a legislator or a legislative employee to a legislator or a legislative employee if the transportation takes place in the state on or in an aircraft, boat, motor vehicle, or other means of transport owned or under the control of the donor; this paragraph does not apply to travel described in (4) of this subsection or travel for political campaign purposes; or

(10) a contribution to a charity event**, a ticket to a charity event, or a gift in connection with a charity event** [FROM ANY PERSON AT ANY TIME]; in this paragraph, "charity event" has the meaning given in (a)(2)(B) of this section.

*** Sec. 7.** AS 24.60.080(d) is amended to read:

(d) A legislator or legislative employee who accepts a gift under (c)(4) **of this section that has a value of $250 or more or a ticket to a charity event or gift in connection with a charity event under (c)(10)** of this section that has a value of $250 or more shall disclose to the committee, within **60** [30] days after receipt of the gift, the name and occupation of the donor and the approximate value of the gift. A legislator or legislative employee who accepts a gift under (c)(8) of this section that the recipient expects will have a value of $250 or more in the calendar year shall disclose to the committee, within 30 days after receipt of the gift, the name and occupation of the donor, a general description of the matter of legislative concern with respect to which the gift is made, and the approximate value of the gift. The committee shall maintain a public record of the disclosures it receives relating to gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section and shall forward the disclosures to the appropriate house for inclusion in the journal. The committee shall forward to the

Alaska Public Offices Commission copies of the disclosures concerning gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section that it receives from legislators and legislative directors. A legislator or legislative employee who accepts a gift under (c)(6) of this section that has a value of $250 or more shall, within 30 days after receiving the gift, disclose to the committee the name and occupation of the donor and a description of the gift. The committee shall maintain disclosures relating to gifts under (c)(6) of this section as confidential records and may only use, or permit a committee employee or contractor to use, a disclosure under (c)(6) of this section in the investigation of a possible violation of this section or in a proceeding under AS 24.60.170. If the disclosure under (c)(6) of this section becomes part of the record of a proceeding under AS 24.60.170, the confidentiality provisions of that section apply to the disclosure.

*** Sec. 8.** AS 24.60.105 is amended by adding a new subsection to read:

(d) A person may submit a written request to refrain from making a disclosure that is required by this chapter if making the disclosure would violate state or federal law, including the United States Constitution and the Constitution of the State of Alaska, or a rule, adopted formally by a trade or profession, that state or federal law requires the person to follow. The committee shall approve or deny the request, or require further justification from the person making the request. At the request of the committee or a person authorized to act on behalf of the committee, a person who seeks to refrain from making a disclosure under this subsection shall provide the committee with justification in writing, and the committee may review the written justification to determine whether it is sufficient.

*** Sec. 9.** AS 24.60.112 is amended to read:

Sec. 24.60.112. Applicability to volunteers and educational trainees. A **person who works more than 30 days as a** legislative volunteer or educational trainee shall be considered to be a legislative employee for purposes of compliance with AS 24.60.030 - 24.60.039, 24.60.060, 24.60.080, 24.60.085, **24.60.155,** 24.60.158 - 24.60.170, 24.60.176, and 24.60.178. If a person believes that a legislative volunteer or educational trainee has violated the provisions of one of those sections, the person may file a complaint under AS 24.60.170. The provisions of AS 24.60.170

apply to the proceeding.

*** Sec. 10.** AS 24.60.130(h) is amended to read:

(h) A member is disqualified from participating as a member in any proceeding before the committee involving a complaint against the member or an employee whose work is supervised by the member or an advisory opinion requested by the member. If a regular legislative member of the committee is disqualified under this subsection from participating in a proceeding involving a complaint, the member's alternate shall be designated under **AS 24.60.131** [(n) OF THIS SECTION].

*** Sec. 11.** AS 24.60.130(o) is amended to read:

(o) Notwithstanding (h) [AND (n)] of this section **and AS 24.60.131**, if a complaint before the committee alleges a violation of this chapter by a group of legislators that includes a legislative member of the committee and that member's alternate, the member and alternate member are disqualified from serving on the committee with regard to the complaint. If the two disqualified members of the committee are members of the majority organizational caucus, the presiding officer of the house in which the two disqualified members serve shall appoint from that house an alternate to serve with regard to the complaint. If one of the two disqualified legislative members of the committee is not a member of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate to serve with regard to the complaint. If a complaint alleges a violation of this chapter that includes all legislative members of the majority organizational caucus of one house, the presiding officer of that house shall appoint from the other house an alternate to serve with regard to the complaint. If the complaint alleges a violation of this chapter that includes all legislative members of a minority organizational caucus of one house, the leader of that minority organizational caucus shall appoint from the other house an alternate to serve with regard to the complaint.

*** Sec. 12.** AS 24.60 is amended by adding a new section to read:

Sec. 24.60.131. Alternate members. (a) When appointing members of the legislature to serve on the committee under AS 24.60.130(b), the speaker of the house of representatives or the president of the senate, as appropriate, shall appoint an

alternate member for each regular member. The alternate member shall have the same qualifications for appointment to the committee as the regular member for whom the alternate stands as alternate. The alternate member's appointment is subject to confirmation as required for appointment of the regular member.

(b) When selecting public members to serve on the committee under AS 24.60.130(b), the Chief Justice of the Alaska Supreme Court shall select one alternate public member. The alternate public member's selection is subject to ratification as required for selection of the regular public members.

(c) Subject to (d) of this section, if a regular member of the committee or a subcommittee is unable to participate in a proceeding other than a proceeding under AS 24.60.170, the chair of the committee or subcommittee that holds the proceeding shall designate the regular member's alternate to participate in place of the regular member at the proceeding, and the alternate shall participate for the duration of that proceeding unless the alternate is unable to participate.

(d) If a regular member of the committee or a subcommittee or an alternate member appointed under (a) or (b) of this section participates at the commencement of a proceeding under AS 24.60.170, the member shall participate for the duration of the proceeding unless the member is disqualified under AS 24.60.130(h) or is unable to continue participating. If the participating member is disqualified under AS 24.60.130(h) or becomes unable to participate, the chair of the committee or subcommittee that holds the proceeding shall designate the member's alternate to participate in place of the member for the duration of the proceeding unless the alternate is disqualified or is unable to participate.

(e) If both a regular legislative member and that member's alternate appointed under (a) of this section are not available to participate at the commencement of a proceeding under AS 24.60.170 because they are disqualified under AS 24.60.130(h), the presiding officer of the house in which the two members serve shall appoint from that house an alternate and designate that alternate to participate in the proceeding; however, if the two members who are not available to participate are not members of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate and

designate that alternate to participate in the proceeding.

(f) A designation under (c) - (e) of this section shall be treated as confidential to the same extent that the identity of the subject of a complaint is required to be kept confidential.

*** Sec. 13.** AS 24.60.155 is amended to read:

Sec. 24.60.155. Legislative ethics course. A person **who serves for more than 30 days as a legislative volunteer or educational trainee or** who is a legislator, legislative employee, or public member of the committee shall complete a legislative ethics course administered by the committee under AS 24.60.150(a)(4) within 10 days of the first day of the first regular session of each legislature. However, a person **who begins a period of service of more than 30 days as a volunteer or trainee or** who first takes office or begins employment after the 10th day of the first regular session of a legislature shall complete the course required by this section within 30 days after the person's first day of service and, thereafter, as required by this section. The committee may grant a person additional time to complete the course required by this section.

*** Sec. 14.** AS 24.60.990(a)(11) is amended to read:

(11) "legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who **are hourly employees who** perform functions that are incidental to legislative functions, [INCLUDING SECURITY, MESSENGER, MAINTENANCE, AND PRINT SHOP EMPLOYEES,] and other employees designated by the committee;

*** Sec. 15.** AS 24.60.130(n) is repealed.

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Wayne
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AMENDMENT

OFFERED IN THE SENATE BY SENATOR COGHILL

TO: CSSB 89(STA)

Page 1, line 7, following "**instances;**":

Insert "**allowing legislators and legislative employees, in certain circumstances, to participate in partisan political activity while on state travel;**"

Page 5, following line 26:

Insert new bill sections to read:

"*** Sec. 3.** AS 24.60.030 is amended by adding a new subsection to read:

(j) Notwithstanding the limitations under (a)(2), (a)(4), and (c) of this section and subject to other state or federal laws, a legislator or legislative employee who is on state travel may participate in partisan political activity, including campaign activity, if

(1) the participation is incidental to the purpose of the travel;

(2) the legislator or the legislative employee does not use or authorize the use of state resources to pay for the activity; and

(3) the legislator or legislative employee does not participate in the activity

(A) during a normal workday between 8:00 a.m. and 5:00 p.m., excluding meal breaks;

(B) on a state or municipal election day;

(C) during the 30 days immediately preceding an election in which the participating legislator or the legislator for whom the participating employee works is a candidate for elective office; or

(D) by fund raising for a political party or campaign.

*** Sec. 4.** AS 24.60.031 is amended by adding a new subsection to read:

(d) Notwithstanding the limitations under (a) and (b) of this section and subject to other state or federal laws, a legislator or legislative employee who is on state travel may participate in partisan political activity, including campaign activity, if

(1) the participation is incidental to the purpose of the travel;

(2) the legislator or the legislative employee does not use or authorize the use of state resources to pay for the activity; and

(3) the legislator or legislative employee does not participate in the activity

(A) during a normal workday between 8:00 a.m. and 5:00 p.m., excluding meal breaks;

(B) on a state or municipal election day;

(C) during the 30 days immediately preceding an election in which the participating legislator or the legislator for whom the participating employee works is a candidate for elective office; or

(D) by fund raising for a political party or campaign."

Renumber the following bill sections accordingly.

Page 13, following line 24:

Insert a new bill section to read:

"* **Sec. 17.** AS 24.60.990(a) is amended by adding a new paragraph to read:

(17) "state travel" means travel with transportation or overnight lodging that is provided or paid for with state resources."

Renumber the following bill section accordingly.

"The word 'inchoate,' not much used in ordinary discourse, means 'just begun.' 'undeveloped.' The common law has given birth to three general offences which are usually termed 'inchoate' or 'preliminary' crimes – attempt, conspiracy, and incitement. A principal feature of these crimes is that they are committed even though the substantive offence is not successfully consummated. An attempt fails, a conspiracy comes to nothing, words of incitement are ignored – in all these instances, there may be liability for the inchoate crime." Andrew Ashworth, *Principles of Criminal Law* 395 (1991).

inchoate crime. See *inchoate offense* under OFFENSE (1).

inchoate dower. See DOWER.

inchoate instrument. See INSTRUMENT (3).

inchoate interest. See INTEREST (2).

inchoate lien. See LIEN.

inchoate offense. See OFFENSE (1).

inchoate right. 1. A right that has not fully developed, matured, or vested. 2. *Patents.* An inventor's right that has not yet vested into a property right because the patent application is pending. [Cases: Patents ⇦182.]

incident, *adj.* Dependent upon, subordinate to, arising out of, or otherwise connected with (something else, usu. of greater importance) <the utility easement is incident to the ownership of the tract>. — **incident,** *n.*

incident, *n.* 1. A discrete occurrence or happening <an incident of copyright infringement>. 2. A dependent, subordinate, or consequential part (of something else) <child support is a typical incident of divorce>.

incidental, *adj.* Subordinate to something of greater importance; having a minor role <the FAA determined that the wind played only an incidental part in the plane crash>.

incidental admission. See ADMISSION (1).

incidental authority. See AUTHORITY (1).

incidental beneficiary. See BENEFICIARY.

incidental damages. See DAMAGES.

incidental demand. See DEMAND (1).

incidental main motion. See MOTION (2).

incidental motion. See MOTION (2).

incidental power. See *incident power* under POWER (3).

incidental use. See USE (1).

incidenter (in-si-**den**-tər). [Latin] *Hist.* Incidentally.

incident of ownership. (*usu. pl.*) Any right of control that may be exercised over a transferred life-insurance policy so that the policy's proceeds will be included in a decedent's gross estate for estate-tax purposes <because Douglas still retained the incidents of ownership after giving his life-insurance policy to his daughter, the policy proceeds were taxed against his estate>. ● The incidents of ownership include the rights to change the policy's beneficiaries and to borrow against, assign, and cancel the policy. [Cases: Internal Revenue ⇦4155. C.J.S. *Internal Revenue* § 510.]

incident power. See POWER (3).

incident to employment. *Workers' compensatio* that is related to or connected with a wor duties. [Cases: Workers' Compensation ⇦ C.J.S. *Workmen's Compensation* §§ 376, 378.]

incidere (in-**sid**-ə-ree), *vb.* [Latin "fall into *Roman law.* To come within the scope of a fall into a legal category; esp. to become inv a situation that entangles a person in a leg ● This term had a similar meaning under law. For example, a person might become (or "fall into") amercement (*incidere in miser* See AMERCEMENT.

incipitur (in-**sip**-i-tər). [Law Latin] *Hist.* It is b This refers to the practice of entering th mencement of a pleading on the court roll.

incite, *vb.* To provoke or stir up (someone to a criminal act, or the criminal act itself). Cf. ABE

incitee. A person who has been incited, esp. to a crime.

inciteful, *adj.* Tending to incite <inciteful spee

incitement, *n.* 1. The act or an instance of pro urging on, or stirring up. 2. *Criminal law.* Th persuading another person to commit a crime ITATION (2). [Cases: Criminal Law ⇦45. C.J.S *nal Law* §§ 115, 124–126.] — **inciteful,** *adj.*

"An inciter is one who counsels, commands or adv commission of a crime. It will be observed that th tion is much the same as that of an accessory be fact. What, then, is the difference between the two? in incitement the crime has not (or has not nec been committed, whereas a party cannot be an ac in crime unless the crime has been committed. An a ry before the fact is party to consummated misc inciter is guilty only of an inchoate crime." (Williams, *Criminal Law* 612 (2d ed. 1961).

"Emphasis upon the theory of one offense with guilt ing to several is quite appropriate because it is still the groundwork of our legal philosophy, so far as pe tors, abettors and inciters are concerned, despite t that some of the statutes require lipservice to the noti separate substantive offense, in the effort to avoid procedural difficulties. It explains how one may be c a crime he could not perpetrate, by having cau procured it as a result of his abetment or incitement." M. Perkins & Ronald N. Boyce, *Criminal Law* 732–33 1982).

inciter. A person who incites another to comm crime; an aider or abettor.

inciting revolt. See MUTINY.

incivile (in-**siv**-ə-lee), *adj.* [Law Latin] Irregular; c the due course of law.

incivism (**in**-si-viz-əm). Unfriendliness toward own country or its government; lack of good cit ship.

inclausa (in-**klaw**-zə). [Law Latin] *Hist.* An enclo near a house; a home close. See CLOSE (1).

in clientela (in kli-ən-**tee**-lə). [Latin] *Hist.* In the tion between client and patron.

inclose, *vb.* See ENCLOSE.

inclosure. See ENCLOSURE.

include, *vb.* To contain as a part of something. ● participle *including* typically indicates a partial <the plaintiff asserted five tort claims, includ slander and libel>. But some drafters use phra

> "The word 'inchoate,' not much used in ordinary discourse, means 'just begun.' 'undeveloped.' The common law has given birth to three general offences which are usually termed 'inchoate' or preliminary' crimes – attempt, conspiracy, and incitement. A principal feature of these crimes is that they are committed even though the substantive offence is not successfully consummated. An attempt fails, a conspiracy comes to nothing, words of incitement are ignored -- in all these instances, there may be liability for the inchoate crime." Andrew Ashworth, *Principles of Criminal Law* 395 (1991).

inchoate crime. See *inchoate offense* under OFFENSE (1).

inchoate dower. See DOWER.

inchoate instrument. See INSTRUMENT (3).

inchoate interest. See INTEREST (2).

inchoate lien. See LIEN.

inchoate offense. See OFFENSE (1).

inchoate right. **1.** A right that has not fully developed, matured, or vested. **2.** *Patents.* An inventor's right that has not yet vested into a property right because the patent application is pending. [Cases: Patents ⇨182.]

incident, *adj.* Dependent upon, subordinate to, arising out of, or otherwise connected with (something else, usu. of greater importance) <the utility easement is incident to the ownership of the tract>. — **incident,** *n.*

incident, *n.* **1.** A discrete occurrence or happening <an incident of copyright infringement>. **2.** A dependent, subordinate, or consequential part (of something else) <child support is a typical incident of divorce>.

incidental, *adj.* Subordinate to something of greater importance; having a minor role <the FAA determined that the wind played only an incidental part in the plane crash>.

incidental admission. See ADMISSION (1).

incidental authority. See AUTHORITY (1).

incidental beneficiary. See BENEFICIARY.

incidental damages. See DAMAGES.

incidental demand. See DEMAND (1).

incidental main motion. See MOTION (2).

incidental motion. See MOTION (2).

incidental power. See *incident power* under POWER (3).

incidental use. See USE (1).

incidenter (in-si-**den**-tər). [Latin] *Hist.* Incidentally.

incident of ownership. (*usu. pl.*) Any right of control that may be exercised over a transferred life-insurance policy so that the policy's proceeds will be included in a decedent's gross estate for estate-tax purposes <because Douglas still retained the incidents of ownership after giving his life-insurance policy to his daughter, the policy proceeds were taxed against his estate>. ● The incidents of ownership include the rights to change the policy's beneficiaries and to borrow against, assign, and cancel the policy. [Cases: Internal Revenue ⇨4155. C.J.S. *Internal Revenue* § 510.]

incident power. See POWER (3).

incident to employment. *Workers' compensatio* that is related to or connected with a wor duties. [Cases: Workers' Compensation ⇨ C.J.S. *Workmen's Compensation* §§ 376, 378.]

incidere (in-**sid**-ə-ree), *vb.* [Latin "fall into *Roman law.* To come within the scope of a fall into a legal category; esp. to become inv a situation that entangles a person in a leg ● This term had a similar meaning under law. For example, a person might become (or "fall into") amercement (*incidere in miser* See AMERCEMENT.

incipitur (in-**sip**-i-tər). [Law Latin] *Hist.* It is b This refers to the practice of entering th mencement of a pleading on the court roll.

incite, *vb.* To provoke or stir up (someone to a criminal act, or the criminal act itself). Cf. ABE

incitee. A person who has been incited, esp. to a crime.

inciteful, *adj.* Tending to incite <inciteful spee

incitement, *n.* **1.** The act or an instance of pro urging on, or stirring up. **2.** *Criminal law.* Th persuading another person to commit a crime ITATION (2). [Cases: Criminal Law ⇨45. C.J.S *nal Law* §§ 115, 124–126.] — **inciteful,** *adj.*

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LEGAL SERVICES

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

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

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

MEMORANDUM January 24, 2012

SUBJECT: Amendment T.5 drafting issues (CSSB 89(STA))
(Work Order No. 27-LS0452\T.5)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Dan Wayne
Legislative Counsel

I am writing to discuss the changes you requested in the enclosed amendment.

The goal of the first change, adding the language "program similar to the" on page 1, lines 11 - 12 of the amendment, is unclear to me. The Legislative Council establishes a program under AS 24.20.060(8), and under current law the Select Committee on Legislative Ethics is required to approve that program and a program under 29 U.S.C. 2801 - 2945. The Select Committee may also approve other internship programs. Questions about whether a particular service rendered by an intern in a program meets the requirements of the gift exception in AS 24.60.080(h) are up to the Select Committee, and, unless AS 24.60 is amended to exclude interns in that program, it's the responsibility of the Select Committee to oversee the interns' compliance with the Act. Addition of the language you've suggested could cause the affected provision to omit services by interns in the program under AS 24.20.060(8) from the gift exception in AS 24.60.080(h), although services by interns in similar programs would be included. Also note that adding "chair" at page 1, line 9, does not negate the full committee's duty (on page 1, lines 8 - 9) to approve all educational programs.

The second change, removing "educational trainee" and adding "intern" (page 10, lines 25, 26, and 30; page 13, lines 7 and 8), does not completely remove "educational trainee" from the Legislative Ethics Act as you intend. AS 24.60.080(h) refers to "a trainee who is participating in an educational program" and "training under 29 U.S.C. 2801 - 2945 (Workforce Investment Act of 1998)." I considered substituting "intern" and "internship" for "trainee" and "training," respectively, when drafting your proposed amendment 27-LS0452\T.2, but the federal Workforce Investment Act does not use "intern" and "internship" to describe people and programs it covers -- it uses "trainee" and "training." I have omitted "trainee" from sec. 10 as you requested. However, unless the federal law changes, or the AS 24.60.080(h) exemption for training under the federal Workforce Investment Act is dropped from the Legislative Ethics Act, I advise keeping the terms "training" and "trainee" (or "educational trainee") in your amendment.

Also, please note that on page 2, line 1 of the enclosed amendment, I've added AS 24.60.155 to the list of Legislative Ethics Act sections that are applicable to volunteers and interns.

If I may be of further assistance, please advise.

DCW:ljw
12-043.ljw

Enclosure

AMENDMENT

OFFERED IN THE SENATE BY SENATOR FRENCH

TO: CSSB 89(STA)

Page 10, following line 12:

Insert a new bill section to read:

"* **Sec. 8.** AS 24.60.080(h) is amended to read:

(h) A legislator, a legislative committee other than the Select Committee on Legislative Ethics, or a legislative agency may accept a gift of (1) volunteer services for legislative purposes so long as the person making the gift of services is not receiving compensation from another source for the services, or (2) the services of **an intern or** a trainee who is participating in an educational program approved by the committee if the services are used for legislative purposes. The **chair of the** committee shall approve **services provided by an intern who is participating in a program similar to the legislative internship program established by the legislative council under AS 24.20.060(8)** [TRAINING UNDER A PROGRAM OF THE UNIVERSITY OF ALASKA] and **services, used for legislative purposes, that are provided by a person because the person is participating in** training under 29 U.S.C. 2801 - 2945 (Workforce Investment Act of 1998)."

Renumber the following bill sections accordingly.

Page 10, line 24, through page 11, line 1:

Delete all material and insert:

"* **Sec. 10.** AS 24.60.112 is repealed and reenacted to read:

Sec. 24.60.112. Applicability to volunteers and interns. A legislative volunteer or intern shall be considered to be a legislative employee for purposes of

compliance with AS 24.60.030 - 24.60.039, 24.60.060, 24.60.080, 24.60.085, 24.60.155, 24.60.158 - 24.60.170, 24.60.176, and 24.60.178. If a person believes that a legislative volunteer or intern has violated the provisions of one of those sections, the person may file a complaint under AS 24.60.170. The provisions of AS 24.60.170 apply to the proceeding."

Page 13, line 7:

Delete "**educational trainee**"

Insert "**intern**"

Page 13, line 11:

Delete "**trainee**"

Insert "**intern**"

27-LS0452\T.2
Wayne
1/21/12

AMENDMENT

OFFERED IN THE SENATE BY SENATOR FRENCH

TO: CSSB 89(STA)

Page 10, following line 12:

Insert a new section to read:

"* **Sec. 8.** AS 24.60.080(h) is amended to read:

(h) A legislator, a legislative committee other than the Select Committee on Legislative Ethics, or a legislative agency may accept a gift of (1) volunteer services for legislative purposes so long as the person making the gift of services is not receiving compensation from another source for the services, or (2) the services of **an intern or** a trainee who is participating in an educational program approved by the committee if the services are used for legislative purposes. The committee shall approve **services provided by an intern who is participating in a legislative internship program established by the legislative council under AS 24.20.060(8)** [TRAINING UNDER A PROGRAM OF THE UNIVERSITY OF ALASKA] and **services, used for legislative purposes, that are provided by a person because the person is participating in** training under 29 U.S.C. 2801 - 2945 (Workforce Investment Act of 1998)."

Renumber the following bill sections accordingly.

Page 10, line 25, following "**volunteers**":

Insert "**, interns,**"

Page 10, line 26, following "volunteer":

Insert "**, intern,**"

Page 10, line 30, following "volunteer":

Insert "**, intern,**"

Page 13, line 7, following "**volunteer**":

Insert "**, intern,**"

Page 13, line 11, following "**volunteer**":

Insert "**, intern,**"

27-LS0452\T.3
Wayne
1/21/12

AMENDMENT

OFFERED IN THE SENATE BY SENATOR FRENCH

TO: CSSB 89(STA)

Page 13, lines 2 - 4:

Delete all material and insert:

"(f) A designation under (c) - (e) of this section shall be treated as confidential to the same extent that the identity of the subject of a complaint is required to be kept confidential."

AMENDMENT

OFFERED IN SENATE JUDICIARY

Page 13, lines 2 – 4: Delete all language.

Insert:

(f) A designation under (c) – (e) if this section shall be treated as confidential to the extent that the identity of the subject of a complaint is required to be kept confidential ~~under AS 24.60.170(c).~~

05.01
08.03

designate that alternate to participate in the proceeding.

(f) A designation under (c) - (e) of this section is a confidential proceeding under AS 24.60.170(*l*) unless the member who is replaced as a result of the designation waives confidentiality.

*** Sec. 13.** AS 24.60.155 is amended to read:

Sec. 24.60.155. Legislative ethics course. A person **who serves for more than 30 days as a legislative volunteer or educational trainee or** who is a legislator, legislative employee, or public member of the committee shall complete a legislative ethics course administered by the committee under AS 24.60.150(a)(4) within 10 days of the first day of the first regular session of each legislature. However, a person **who begins a period of service of more than 30 days as a volunteer or trainee or** who first takes office or begins employment after the 10th day of the first regular session of a legislature shall complete the course required by this section within 30 days after the person's first day of service and, thereafter, as required by this section. The committee may grant a person additional time to complete the course required by this section.

*** Sec. 14.** AS 24.60.990(a)(11) is amended to read:

(11) "legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who **are hourly employees who** perform functions that are incidental to legislative functions, [INCLUDING SECURITY, MESSENGER, MAINTENANCE, AND PRINT SHOP EMPLOYEES,] and other employees designated by the committee;

*** Sec. 15.** AS 24.60.130(n) is repealed.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

January 21, 2012

TO: Dan Wayne, Leg. Legal

FROM: Cindy Smith 465-6641

RE: amendments to SB89 27-LS0452\T

Please draft 2 amendments to SB89, version "T" as follows:

1. An amendment replacing references to "trainee" and "educational trainee" in 24.60.080 (h) and in sections 9 and 13 (and if found elsewhere in the bill, in those places as well!) with the word "intern" in order to be consistent with the language in AS 24.20.060(8).

2. An amendment replacing he language on page 13, lines 2-4 with the original language in 24.60.130(n), per our discussion on Thursday.

Thanks! If you have any questions give me a call – we would like to put this bill back up on Friday, so I'd like to get the amendments by Thursday in order to have time to run them by the bill's sponsor and Ms. Anderson, so we're all on the same page. You are also free to talk with either Rynnieva or Joyce as needed, of course!

Cindy Smith

From: Rynnieva Moss
Sent: Friday, January 20, 2012 8:24 AM
To: Cindy Smith; LAA Legal
Cc: Joyce Anderson
Subject: Attn: Dan Wayne and Cindy Smith

Follow Up Flag: Follow up
Flag Status: Flagged

I received this email from Joyce Anderson yesterday. Would it be appropriate to address this in Judiciary? Cindy, please let Dan know. Thanks.

From: Joyce Anderson
Sent: Thursday, January 19, 2012 6:29 PM
To: Rynnieva Moss
Subject: SB 89 Suggestion

amend #1

Rynieva:

I was working with another legislative office today and realized in AS 24.60.080(h) the term "trainee" is used when the intent is actually referring to legislative interns. New language in SB 89 in Section 9, AS 24.60.112, the term "educational trainees" was added and Section 13, AS 24.60.155, the term "educational trainee" was added -- both are actually referring to "interns."

I think the term should be changed to "intern" to be consistent with the language in AS 24.20.060(8) which addresses the U of A intern program. I

The term "educational trainee" does not really relate to what the term "intern" means when it comes to working in a legislative office.

Is it possible to add this item to SB 89 as an amendment.

Thanks for your consideration.

Joyce

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **CSSB 89**
Fiscal Note Number
Publish Date

Identifier (file name) CSSB89-LEG-COU-1-17-2012
Title "Legislative Ethics Act"
Dept. Affected Legislature
Appropriation Legislative Council
Allocation Select Committee on Ethics
Sponsor Senator Coghill
Requester Senate Judiciary Committee
OMB Component Number 2321

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

initial version

Prepared by Jessica Geary, Finance Manager — Phone 465-6626
Division Legislative Affairs Agency — Date/Time 1/17/12 10:46 AM
Approved by Pamela Varni, Executive Director — Date 1/17/2012
Legislative Affairs Agency

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 89

Analysis

This legislation has zero fiscal impact on the Legislative Affairs Agency.

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
April 15, 2011
1:31 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Joe Paskvan
Senator John Coghill

MEMBERS ABSENT

Senator Lesil McGuire

COMMITTEE CALENDAR

SENATE BILL NO. 89
"An Act clarifying that a legislator or legislative employee is allowed to accept certain charity events; amending disclosure deadlines under the Legislative Ethics Act; relating compassionate gifts; allowing legislators and legislative employees to use legislative to requests to refrain from disclosure under the Legislative Ethics Act; and establishing mailing lists for campaign purposes and nonlegislative purposes; allowing legislators a seat for an alternate public member on the Select Committee on Legislative Ethics and and legislative employees who are representing persons in an administrative hearing to clarifying the requirements related to participation by alternate members in the contact hearing officers and attempt to influence the outcome of the hearing if they are proceedings of the committee."

- HEARD & HELD

SENATE BILL NO. 98
"An Act relating to biometric information."

- MOVED CSSB 98(JUD) OUT OF COMMITTEE

SENATE BILL NO. 104
"An Act relating to manufactured homes, including manufactured homes permanently affixed to land, to the conversion of manufactured homes to real property, to the severance of manufactured homes from real property, to the titling, conveyance, and encumbrance of manufactured homes, and to

manufacturers' certificates of origin for vehicles; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 89
SHORT TITLE: LEGISLATIVE ETHICS ACT
SPONSOR(s): SENATOR(s) COGHILL

02/16/11	(S)	READ THE FIRST TIME - REFERRALS
02/16/11	(S)	STA, JUD
03/15/11	(S)	STA AT 9:00 AM BUTROVICH 205
03/15/11	(S)	Heard & Held
03/15/11	(S)	MINUTE(STA)
03/31/11	(S)	STA AT 9:00 AM BUTROVICH 205
03/31/11	(S)	Moved CSSB 89(STA) Out of Committee
03/31/11	(S)	MINUTE(STA)
04/01/11	(S)	STA RPT CS 1DP 4NR NEW TITLE
04/01/11	(S)	DP: MEYER
04/01/11	(S)	NR: WIELECHOWSKI, KOOKESH, PASKVAN, GIESSEL
04/11/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
04/11/11	(S)	Scheduled But Not Heard
04/13/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
04/13/11	(S)	Scheduled But Not Heard
04/15/11	(S)	JUD AT 1:30 PM BUTROVICH 205

BILL: SB 104
SHORT TITLE: MANUFACTURED HOMES AS REAL PROPERTY
SPONSOR(s): SENATOR(s) FRENCH

03/16/11	(S)	READ THE FIRST TIME - REFERRALS
03/16/11	(S)	STA, JUD
03/29/11	(S)	STA AT 9:00 AM BUTROVICH 205
03/29/11	(S)	Heard & Held
03/29/11	(S)	MINUTE(STA)
03/31/11	(S)	STA AT 9:00 AM BUTROVICH 205
03/31/11	(S)	Moved SB 104 Out of Committee
03/31/11	(S)	MINUTE(STA)
04/01/11	(S)	STA RPT 2DP 3NR
04/01/11	(S)	DP: KOOKESH, MEYER
04/01/11	(S)	NR: WIELECHOWSKI, PASKVAN, GIESSEL
04/06/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
04/06/11	(S)	Heard & Held
04/06/11	(S)	MINUTE(JUD)

04/15/11	(S)	JUD AT 1:30 PM BUTROVICH 205

BILL: SB 98
SHORT TITLE: BIOMETRIC INFORMATION FOR ID
SPONSOR(s): SENATOR(s) WIELECHOWSKI

03/11/11	(S)	READ THE FIRST TIME - REFERRALS
03/11/11	(S)	STA, JUD
03/15/11	(S)	STA AT 9:00 AM BUTROVICH 205
03/15/11	(S)	Heard & Held
03/15/11	(S)	MINUTE(STA)
03/17/11	(S)	STA AT 9:00 AM BUTROVICH 205
03/17/11	(S)	Moved CSSB 98(STA) Out of Committee
03/17/11	(S)	MINUTE(STA)
03/18/11	(S)	STA RPT CS 4DP SAME TITLE
03/18/11	(S)	DP: WIELECHOWSKI, GIESSEL, MEYER, PASKVAN
03/21/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/21/11	(S)	Heard & Held
03/21/11	(S)	MINUTE(JUD)
03/28/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/28/11	(S)	Heard & Held
03/28/11	(S)	MINUTE(JUD)
04/06/11	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
04/06/11	(S)	Heard & Held
04/06/11	(S)	MINUTE(JUD)
04/15/11	(S)	JUD AT 1:30 PM BUTROVICH 205

WITNESS REGISTER

RYNNIEVA MOSS, Chief of Staff
Senator John Coghill
Alaska State Legislature
Juneau, AK
POSITION STATEMENT: Provided a sectional analysis of SB 89 on behalf of the sponsor.

MICHAEL CAUFIELD, Staff
Senator Bill Wielechowski
Alaska State Legislature
Juneau, AK
POSITION STATEMENT: Described the changes in version T of SB 98.

ANDY MODEROW, Staff
Senator Hollis French
Alaska State Legislature
Juneau, AK

POSITION STATEMENT: Described the changes in version D of SB 104.

PAT GREEN, State Government Relations Director
Wells Fargo Bank
Anchorage, AK
POSITION STATEMENT: Answered questions related to SB 104.

JEFF HARRIS, Loan Administration Manager
Wells Fargo Home Mortgage
Anchorage, AK
POSITION STATEMENT: Answered questions related to SB 104.

ACTION NARRATIVE

1:31:21 PM
CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 1:31 p.m. Present at the call to order were Senators Paskvan, Coghill, Wielechowski, and French.

^#sb89

SB 89-LEGISLATIVE ETHICS ACT

1:31:54 PM
CHAIR HOLLIS FRENCH announced the consideration of SB 89. [CSSB 89(STA), 27-LS0452\T was before the committee.]

SENATOR JOHN COGHILL, Sponsor of SB 89, stated that this ethics bill is a work in progress that wound up in his hands. His chief of staff, Ms. Moss, would provide a sectional analysis after which he would offer an amendment. He noted that the current version T removed some of the more contentious issues.

1:33:22 PM
RYNNIEVA MOSS, Chief of Staff to Senator Coghill, sponsor of SB 89, said the only changes in Section 1 appear on page 2. For consistency with AS 24.60.080, the phrase "lawful gratuity" was changed to "gift" and reference to the compassionate gift statute, AS 24.60.075, was inserted.

Section 2 attempts to draw a bright line for legislators and staff in dealing with constituents. It says that unless the legislator is an attorney, the legislative office will sever any assistance it gave to the constituent once a matter goes before an administrative hearing officer. It also allows for inadvertent ex parte contact.

CHAIR FRENCH asked if he were to write a letter on behalf of a constituent asking for a fair hearing on a permanent fund dividend denial, if the letter would go to an administrative hearing officer on the first level or to the department.

MS. MOSS replied the first level is called an informal denial and at that stage he could communicate with the department. Once there's a formal denial and a request for an administrative hearing, the legislator's office would need to back off.

CHAIR FRENCH asked for an example of the point at which it is no longer acceptable for a legislator to act in regard to child placement actions under the Office of Children's Services (OCS).

MS. MOSS replied OCS has worked with legislative offices all during the process even though it's actually a court case. They also have a legislative liaison that legislative offices can contact directly. An example where contact would be limited beyond a certain point would be workers compensation. Once the issue reaches the point of having administrative hearings, the legislative office would have to back away. With regard to child support, once the matter reaches the point of requesting an administrative hearing, the legislative office can no longer be involved.

1:36:43 PM

SENATOR COGHILL explained that the ethics laws were written before there were administrative law judges so this was an attempt to clarify the point at which a legislative office must step away from a constituent issue they'd been working on. He noted that at one point the Ethics Committee suggested a 10-hour limit, but he believes this is a better way. It's okay for a legislative office to help a constituent up to the point of the administrative decision, but it's wrong to put pressure on the decision-maker.

CHAIR FRENCH asked if legislators could safely send complaints to a legislative liaison office about the way their constituents were being treated.

MS. MOSS replied she didn't know the answer, but she didn't believe there was a protection under the law. She added that the biggest problem is when a constituent doesn't say where they are in the process.

1:38:56 PM

CHAIR FRENCH asked if the ten-hour provision was an ethics opinion or in statute at one time.

SENATOR COGHILL replied it was an ethics opinion.

CHAIR FRENCH asked if this would supersede that opinion.

SENATOR COGHILL answered yes.

SENATOR WIELECHOWSKI referred to the workers' compensation example and said he reads the bill to say that a legislator could call a department director to ask about the status of a particular case.

MS. MOSS agreed that would be accurate.

SENATOR WIELECHOWSKI asked for confirmation that the legislator couldn't contact the chief of adjudications.

MS. MOSS replied they could contact the worker that is handling the workers' compensation case, but not the hearing officer or the attorneys for the insurance company or constituent.

SENATOR COGHILL added that the idea was to keep legislators from becoming free legal advisors unless the legislator was practicing law.

1:40:26 PM
MS. MOSS clarified that a non-attorney can handle a workers' compensation case, but once the matter gets to an administrative hearing it's between the constituent, their attorney, and the division under challenge.

SENATOR WIELECHOWSKI asked where it says the legislator couldn't contact the attorney who represents the injured worker.

MS. MOSS replied it doesn't say that specifically, but once the dispute goes to a hearing officer the legislative office isn't supposed to contact those parties. Contacting a constituent's attorney would be considered an ex parte contact.

needs to change

SENATOR WIELECHOWSKI asked where it says that in the bill.

MS. MOSS replied "ex parte" is contacting a party in a case without going through the court.

SENATOR WIELECHOWSKI said his understanding is different.

CHAIR FRENCH said he believes that "ex parte" is between a party and the judge without the other party being present.

SENATOR WIELECHOWSKI agreed.

SENATOR PASKVAN agreed, and said the purpose of that definition of "ex parte" is to encourage contact between the parties directly, but while they're trying to work things out neither party can singularly contact the judge without the other being present.

MS. MOSS added that the bill also requires legislators to disclose any contact that is considered inappropriate.

1:42:51 PM
CHAIR FRENCH summarized that in this case "ex parte" would be between a legislator and a hearing officer, not a legislator and an attorney representing the constituent.

MS. MOSS said when a constituent contacts Senator Coghill's office for help she always asks if they have an attorney.

SENATOR WIELECHOWSKI said he didn't believe that under current law or if this were to pass that it would be illegal or unethical for a legislator to contact a constituent's attorney to express concern about the timeliness of a hearing.

MS. MOSS said she appreciates having that on the record.

SENATOR COGHILL recalled that the administrative law judge who spoke to his office about two years ago agreed with that point.

CHAIR FRENCH noted that Joyce Anderson was online to answer questions about ethics laws.

1:45:36 PM
MS. MOSS said Section 3 releases the Ethics Committee from having to compile disclosure form statements, but they would still have to maintain a record of the forms that are available to the public.

Section 4 adds "or public member of the committee" to AS 24.60.060(a), which is the statute that prohibits disclosure of confidential information.

Sections 5 and 7 have been reworded to make it clear that legislators, their employees, or a public member of the committee may not accept from a lobbyist a ticket to a charitable event that is valued at more than $249.99.

SENATOR COGHILL added that it also allows accepting a charitable gift beyond that amount from somebody other than a lobbyist, but it must be reported and a sanctioned event.

MS. MOSS said Section 7 changes the reporting requirements from 30 days to 60 days for charitable gifts and gifts of travel for purposes of gaining legislative information.

1:47:22 PM
SENATOR PASKVAN asked if this changes what a lobbyist may offer to a legislator.

SENATOR COGHILL answered no. It changes charitable events that are specifically mentioned in statute. The rewording attempts to allow a charitable gift donation from people who are not lobbyists.

1:48:44 PM
CHAIR FRENCH observed that it was a little confusing to talk about tickets to a charitable event in conjunction with gifts, and asked if this was separate from the general gift prohibition.

MS. MOSS responded it addresses circumstances like receiving a ticket to a sanctioned charitable event and winning the door prize.

SENATOR COGHILL added that a question came up about winning a cruise at the "Thanksgiving in March" event. In another instance a legislator was given a gift from a non-lobbyist to sit at a head table, which was valued at more than $400. An ethics complaint was lodged but there was not an ethical problem. But beyond a sanctioned event there might be a problem, he said.

MS. MOSS explained that Section 8 allows certain persons to request a waiver from disclosing clients or making any disclosures that would violate state or federal laws or constitutions. The State Affairs Committee added the language "or a rule adopted formally by a trade or profession, that state or federal law requires the person to follow." So certain occupations don't have to disclose their sources of income from clients.

CHAIR FRENCH asked if it's an ethics disclosure, an Alaska Public Offices Commission (APOC) disclosure, or both.

MS. MOSS replied it's an ethics disclosure.

SENATOR COGHILL added that under HIPPA there are some restrictions on confidentiality, and there was some concern about reporting if a legislative office was working on a healthcare issue for a constituent.

MS. MOSS said Sections 9 and 13 were added in the State Affairs Committee, and state that if someone is a volunteer or educational trainee for 30 days they would be expected to take an ethics class.

Sections 10 and 11 make reference to the new statute in Section 12.

Section 12 is a new section of law that deals with alternate members. It adds an alternate for a public member and allows them to participate in the full proceeding once they've been selected.

SENATOR COGHILL said it became apparent that it would be easier to make a quorum for the public members if there was an alternate. A decision was made that once the alternate was engaged in a particular ethical question they should remain until the conclusion. That would be true for the public and legislative members.

1:53:42 PM
MS. MOSS said Section 14 changes the definition of "legislative employee." It clarifies that hourly employees are not included and are not required to take ethics training.

1:54:28 PM
SENATOR COGHILL observed that the bill was a benign housekeeping matter without his amendment, which addresses how to reasonably and properly allow legislators to participate in partisan political activities while on state travel. Generally speaking, most of the meetings that legislators hold outside of Juneau are held in Anchorage or Fairbanks. Legislators from those urban areas may attend partisan events after conducting state business, but those from out of town cannot. He said he was trying to find a reasonable solution without allowing legislators to use state money to campaign. That's the one-way

valve. "We want them to do one thing nobly, and we don't want them to use it improperly."

1:56:37 PM
SENATOR COGHILL moved Amendment 1, labeled 27-LS0452\T.1.

AMENDMENT 1

OFFERED IN THE SENATE BY SENATOR COGHILL
TO: CSSB 89(STA)

Page 1, line 7, following "**instances;**":
Insert "**allowing legislators and legislative employees, in certain circumstances, to participate in partisan political activity while on state travel;**"

Page 5, following line 26:
Insert new bill sections to read:
"*** Sec. 3.** AS 24.60.030 is amended by adding a new subsection to read:

(j) Notwithstanding the limitations under (a)(2), (a)(4), and (c) of this section and subject to other state or federal laws, a legislator or legislative employee who is on state travel may participate in partisan political activity, including campaign activity, if

(1) the participation is incidental to the purpose of the travel;

(2) the legislator or the legislative employee does not use or authorize the use of state resources to pay for the activity; and

(3) the legislator or legislative employee does not participate in the activity

(A) during a normal workday between 8:00 a.m. and 5:00 p.m., excluding meal breaks;

(B) on a state or municipal election day;

(C) during the 30 days immediately preceding an election in which the participating legislator or the legislator for whom the participating employee works is a candidate for elective office; or

(D) by fund raising for a political party or campaign.

*** Sec. 4.** AS 24.60.031 is amended by adding a new subsection to read:

(d) Notwithstanding the limitations under (a) and (b) of this section and subject to other state or federal laws, a legislator or legislative employee who is on state travel may participate in partisan political activity, including campaign activity, if

(1) the participation is incidental to the purpose of the travel;

(2) the legislator or the legislative employee does not use or authorize the use of state resources to pay for the activity; and

(3) the legislator or legislative employee does not participate in the activity

(A) during a normal workday between 8:00 a.m. and 5:00 p.m., excluding meal breaks;

(B) on a state or municipal election day;

(C) during the 30 days immediately preceding an election in which the participating legislator or the legislator for whom the participating employee works is a candidate for elective office; or

(D) by fund raising for a political party or campaign."

Renumber the following bill sections accordingly.

Page 13, following line 24:

Insert a new bill section to read:

"*** Sec. 17.** AS 24.60.990(a) is amended by adding a new paragraph to read:

(17) "state travel" means travel with transportation or overnight lodging that is provided or paid for with state resources."

Renumber the following bill section accordingly.

CHAIR FRENCH objected and opened discussion on the amendment.

SENATOR COGHILL said he would understand if the Chair decided to set the bill aside for more in depth consideration next session. He explained that the amendment addresses AS 24.60.030, which talks about ethical management, and AS 24.60.031, which talks about the management of fundraising. He read the amendment into the record and the following legal definition of "incidental:" "Subordinate to something of greater importance; having a minor role." He was trying to say that there are reasons to prohibit the activity, but there should be an accommodation for participation in partisan political activity that is clearly incidental. Whereas fund raising for any political party or campaign is absolutely prohibited. This sets the bar and clarifies that the activity has to be very small in comparison to the activity for which the legislator is using state travel.

SENATOR COGHILL said if he goes to Anchorage on state travel and is called by a radio program and gives his opinion, he could be charged with participating in partisan activity when he's really just expressing his beliefs. The question needs to be answered and the forgoing are the criteria he set.

2:03:25 PM
CHAIR FRENCH said he appreciates the thought that went into the amendment and shares some of the concerns. Leveling a complaint that a legislator has violated the ethics rules is a powerful complaint. It will be discussed further over the summer and next year. Some of the questions that arise relate to the size differences in the legislative districts and the sort of things a legislator should be able to do when he/she is paid to travel inside his/her own district. Some things could conceivable be an ethics violation under the current rules that he's not sure should be. Is it a violation if you're traveling to Anchorage on state business and you update your Facebook page relating to your campaign when you're in your hotel room at night? Could you call into a Fairbanks radio show from Anchorage promoting your campaign while on state travel? He reiterated that he'd spend time on the question between now and next year.

2:05:54 PM
SENATOR WIELECHOWSKI said he agrees. If you're traveling to Anchorage and you get a call from a radio station and talk about partisan activities, does it matter if you're in Anchorage or Fairbanks? The problem has been how to define where the line is. The State Affairs Committee couldn't figure it out, but with further dialog there may be a solution.

SENATOR COGHILL said he assumes that some legislators and some people that watch legislators will be bad actors, but others are genuinely concerned about ethical behavior. It's a balance and he's trying to figure out the clearest rule possible. Trying to define motives is not the answer, but defining action items helps establish bright lines so that legislators know what is expected of them as partisan people. It also helps those who genuinely want to keep legislators ethically accountable for the use of state resources.

He said his district includes the Richardson Highway, the Glenn Highway, the Denali Highway, and the coast from Valdez to Whittier so he can be anywhere in those communities and be totally forbidden from going to a Republican event even though he had traveled 800 miles to visit three other communities in the district. It's painful to be unable to participate.

Under the current statutes, there is an exact prohibition on partisan activity anytime a legislator is on the state dime. This leaves legislators vulnerable to people who have bad intentions. The Ethics Committee has discussed this extensively over the years and legislators have repeatedly asked for relief. He asked the committee to carefully consider the amendment; it's his best effort to define what is and is not ethical.

SENATOR COGHILL asked the Chair how he wanted to proceed with the amendment and the bill itself.

2:11:19 PM
SENATOR PASKVAN commented that he looks forward to further healthy debate on the matter and that this committee was best suited for this substantive discussion. It's a complex subject that requires careful consideration from both sides. Legislators should in all instances act ethically, but he doesn't want to give unfair advantage to someone who can use private wealth to scam the system, knowing that the person they're attacking can't fight back because they were traveling at state expense.

SENATOR COGHILL said he's passionate that this is not about fairness; it's about what is ethical. Right now you can't be a partisan politician while on the state dime. That's not reasonable and doesn't address the ethical question.

CHAIR FRENCH stated that he'd leave matters as they are; both the bill and the amendment are in front of the committee and he was maintaining his objection.

2:14:10 PM
SENATOR COGHILL said his office was prepared to work with the committee and was open to suggestions.

CHAIR FRENCH announced he would hold SB 89 in committee.

^#sb98

SB 98-BIOMETRIC INFORMATION FOR ID

2:14:40 PM
CHAIR FRENCH announced the consideration of SB 98 and asked for a motion to adopt the proposed committee substitute (CS).

SENATOR WIELECHOWSKI moved to adopt CS for SB 98, labeled 27-LS0661\T, as the working document.

CHAIR FRENCH objected for discussion purposes.

SENATOR WIELECHOWSKI asked his staff to describe the changes.

2:15:35 PM
MICHAEL CAUFIELD, Staff to Senator Wielechowski, sponsor of SB 98, described the following changes:

Page 2, lines 17-19, contains new language that clarifies that occupational exams are also educational exams, and that the exam administrator may determine what constitutes an acceptable alternative ID other than biometrics. He noted that some questions may still arise about this section.

Page 3, line 18, the phrase "agents of the state," was removed to ensure that the state is exempt from liability, but not the organization that contracts with the state.

Page 3, lines 29-30, creates an exemption for voice data collected for quality assurance purposes, and the exemption for "facial images in a biometric system" was removed.

Page 3, lines 1-2, "facial images" was changed to "facial mapping" in the redefinition of "biometric data" on page 4, lines 1-2.

Page 4, lines 25-26, "facial mapping" was defined as "the use of digital technology to measure the features of an individual's face." This was done to ensure that pictures cannot be defined as biometric information.

SELECT COMMITTEE ON LEGISLATIVE ETHICS

THE ADVISOR

JULY 2010

COMMITTEE MEMBERS

H. Conner Thomas, Chair

Gary J. Turner, Vice-Chair

Sen John Coghill

Dennis "Skip" Cook

Rep Berta Gardner

Rep Carl Gatto

Antoinette "Toni" Mallott

Sen Gary Stevens

Herman G. Walker, Jr.

Staff:

Joyce Anderson, Administrator
269-0150

Linda Leigh, Secretary
269-8179

Campaign Year Activities– *CLARIFICATION*

LEGISLATIVE PAID TRIP AND CAMPAIGNING

The Ethics Committee determined on June 16, that there is an absolute restriction on the use of state resources for purposes related to campaigning (which includes fund raising) and partisan political activity. The office has received many inquiries asking for clarification of this policy.

When a legislator or legislative employee is on a state paid trip (either some expenses or all are reimbursed), campaign activities are prohibited pursuant to AS 24.60.030(a)(2) and (a)(5).

Reimbursement for a legislative trip is considered a use of state resources. What constitutes the use of a "state resource" in this context? The question you need to ask yourself on a state paid trip:

Is this an activity that could be performed only because you are on the state paid trip?

Examples of activities that can be performed only on the state paid trip and are therefore prohibited:

- Campaign door knocking
- Dropping off campaign fliers at businesses and residences
- Attending a campaign fundraiser
- Campaign appearance at a function

*****Keep in mind the above activities apply to all campaigns.*****

Examples of activities that would be permitted on a state paid trip. These are not activities that are only made possible by the use of state resources.

- Returning a call, fax or email from a campaign worker
- Responding to a call from the media
- Working on the details of a future campaign fund raiser to be held in another town

Exception to the above analogy: Responding to a constituent who comes up to you while on the state paid trip asking campaign questions. The best course of action to take is to provide campaign contact information to the constituent.

***

If a complaint were filed alleging the use of state resources for campaign or partisan political reasons, the Ethics Committee would look at the specific facts of the situation and take into consideration whether or not state resources were being used to facilitate the activity or if the activity was something that could still have occurred absent the use of state resources. ■

Inside this issue:

Legislative Paid Trip and Campaigning	cover
Legislative Involvement in Supporting or Opposing Ballot Propositions	2
Legislative Newsletters During a Campaign Period	3
Door Knocking During a Campaign Period, Moratorium on Ethics Complaints During a Campaign Period, & NEW! Legislative Ethics Annual Calendar	4

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LEGISLATIVE INVOLVEMENT IN SUPPORTING OR OPPOSING BALLOT PROPOSITIONS

In Advisory Opinion 97-02, the committee determined that action to support or oppose an initiative (which becomes a ballot proposition) is related to duties of the legislature.

- **Legislators are frequently called on to comment on public issues and to take stands on those issues.**
- **Legislators need to hear from their constituents and others concerning public issues.**

In carrying out this dialogue, a legislator may use state resources, including state paid staff time, state facilities and equipment, and reimbursement for travel expenses.

Some examples of activities include:

⇒ **Preparing communications concerning the legislator's position.**
- Letters
- Mailings
- Brochures or handouts
- Any other written or electronic communication

⇒ **Attending public functions or direct staff to attend on their behalf.**
- Personal appearances in the media, at events and gatherings, including state fairs. (Note: If renting a booth at a state fair, campaign activities cannot be conducted at the same time.)

⇒ **Gathering and presenting information to the public concerning the proposition.**

⇒ **Directing staff to research issues raised by the ballot proposition.**
- The results of the research may be made available to others, including individuals supporting or opposing the proposition.

Keep in mind, that in carrying out this dialogue, a legislator or legislative employee may not allow state resources to be used by groups organized in support of or in opposition to a ballot proposition. The use of state resources in this manner would confer a "private benefit" to the group and allow state resources to be used for "campaigning" both of which are prohibited under AS 24.60.030(a)(2) and AS 24.60.030(a)(5). ■

Email:
ethics_committee@legis.state.ak.us

Website
http://ethics.legis.state.ak.us

LEGISLATIVE NEWSLETTERS
DURING A CAMPAIGN PERIOD

Cutoff Date for distributing a legislative newsletter

Many offices have called asking what is the cutoff date for distributing legislative newsletters prior to an election. (Also applies to constituent meetings.)

The Legislative Ethics Act does not stipulate a date. However, the **closer to Election Day that a newsletter is mailed or e-mailed, the greater the appearance it has of a political "campaign mailing."**

We recommend no later than one month prior to an election, but it is a personal decision each legislator must make. There are always exceptions to this general recommendation. The bottom line rests on the content of the newsletter, the timeliness of the information, timing of distributing the newsletter, and to whom it is being sent.

Primary Election – one month prior is July 24

General Election – one month prior is October 1

Here are some examples:

- May Be Appropriate:
  Major sewer issue in a legislator's district. It may be timely to send information to the residents affected by the issue during the 30 day period.

- Probably Not Appropriate:
  Sending a general information legislative newsletter during the 30 day period that could be sent after the election.

The nine member Ethics Committee would make the determination if a complaint was filed alleging the use of state resources were used for campaign or partisan political purposes. ■

Content of Legislative Newsletter

Campaign related information is prohibited in legislative newsletters. An entire newsletter is considered campaign related even if there is only one campaign statement and the other sections contain legislative information.

Examples of campaign related statements:

"I have filed for a new term as your state Senator/Representative."

(Announcing that you are running for a legislative office is considered campaigning.)

"I hope to be in the legislature next year and will propose the following xxxx";

(OR)

" I will likely file legislation next session on that subject and work with the administration on the issue."

(These statements inform constituents that if they vote for you in the 2010 election this is the action you will take. The statements are ones that would appear on campaign material as part of your campaign platform.)

Including other legislator's names in your newsletter, indicating they are candidates for a particular office and their position on issues.

(Even though there is not a direct endorsement of these candidates, the mere mention that they are candidates and their position on a particular issue is typical of language on campaign literature and has the appearance of campaigning.)

The Ethics Office is available to review newsletters for content appropriate language. ■

DOOR KNOCKING
DURING A CAMPAIGN PERIOD

LEGISLATIVE DOOR KNOCKING

Legislators are not prohibited from "door knocking" in their legislative district for a legislative purpose during a campaign period.

However, door knocking is a traditional way of meeting residents of a legislative district during a campaign. Since the Legislative Ethics Act does not stipulate a cutoff date for legislative door knocking, it is important to note that the closer to Election Day this activity is performed, the greater the appearance it has of "campaigning." We recommend no later than one month prior to an election, but it is a personal decision each legislator must make.

Many legislators hand out their end-of-session legislative newsletter while door knocking. Remember, campaign activities cannot be performed at the same time; i.e., announcing that you are running for another term or handing out campaign literature for example. ■

CAMPAIGN DOOR KNOCKING

Legislators are prohibited from using state resources for campaign door knocking activities at any time.

In Advisory Opinion 07-07, the committee determined that legislators may ***not***—while campaign door knocking—do the following:

- Hand out your legislative business card.
- Verbally give legislative contact information to a constituent.
- Handwrite legislative contact information on campaign materials left with the constituent, either in person or left on the constituent's door.

If, while campaign door knocking, a constituent has a concern about legislative services, you may:

- ❖ provide a legislative business card.
- ❖ verbally give the constituent legislative contact information.

Listing legislative contact information on campaign materials would lead to a violation of **AS 24.60.030(a)(5) or (b).** ■

MORATORIUM ON ETHICS COMPLAINTS
DURING A CAMPAIGN PERIOD

Complaints received concerning the conduct of a candidate for state office during a campaign period shall be returned to the complainant unless the subject of the complaint permits the committee to proceed. **AS 24.60.170(o) & (p)**

Campaign period:

Begins 45 days before a Primary Election and ends at the close of General Election Day or the day the candidate withdraws or the day the results of the primary election are certified, whichever is earlier. **AS 24.60.170(q)**

Campaign period runs from Saturday, July 10 through Tuesday, November 2.

NEW! Legislative Ethics Annual Calendar

Are you having trouble keeping track of all the due dates for Ethics reporting? Wish there was a calendar that showed what was due and when? Well, your wish has come true! The Ethics Committee has posted on their website a calendar of due dates that you are required to track and it's now available! Let us know what you think. HERE'S THE LINK: **http://ethics.legis.state.ak.us**

ALASKA STATE LEGISLATURE

SENATOR JOHN COGHILL

State Capitol, Room 504, Juneau, AK 99801-1182 (907) 465-3719
3340 Badger Road Suite #290, North Pole, AK 99705 (907) 488-5725

MEMORANDUM

Date: March 31, 2011

To: Senator Hollis French, Chairman, Senate Judiciary Committee

From: Senator John Coghill

Re: Scheduling Request for SB 89

I Request SB 89 "An Act relating to legislative ethics and the Select Committee on Legislative Ethics" be scheduled for hearing at your earliest convenience.

Attached is the backup information on the bill.

Thank you for your consideration.

ALASKA STATE LEGISLATURE

SENATOR JOHN COGHILL

State Capitol, Room 504, Juneau, AK 99801-1182 (907) 465-3719
301 Santa Claus Lane, Ste. 3B, North Pole, AK 99705 (907) 488-5725

MEMORANDUM

SB 89 Legislative Ethics Bill Summary of Version T

Sec. 1. **Replaces** "lawful gratuity" with **"gift"** to make section of law consistent with the usage of "gift".

Sec. 2. **Bright line** for legislators or staff being actively involved in constituent problems with the State. Once the issue is assigned to an administrative hearing the involvement of the legislative office ceases. Exceptions are included for lawyers and provision for inadvertent exparte contact.

Sec. 3. **Eliminates requirement** of committee to **compile lists of financial disclosure** statements. They must only maintain public records and forward them to chief clerk and senate secretary.

Sec. 4. **Adds public members** to statute **prohibiting disclosure of confidential information.**

Sec. 5. Clarifies that a **ticket to a charity event from a lobbyist**, or gifts received because of the ticket from a lobbyist **cannot exceed $250**.

Sec. 6. **Further describes "a contribution to a charity event"** by clarifying it could be a ticket to a charity event or a gift in connection with a charity event.

Sec. 7. **Extend the reporting period** for gifts of travel for the purpose of obtaining information on legislative matters and disclosure of gifts from charitable events **from 30 days to 60 days.**

Sec. 8. **Allows for exceptions from disclosure** under the legislative ethics law **if** it would be in **violation of the state or federal constitution or state or federal law. The State Affairs Committee added language that includes exceptions for disclosures for a rule, adopted formally by a trade or profession, that state or federal law requires the person to follow.** A written request with justification must be submitted to the committee.

Sec. 9. Requires anyone who is a **volunteer or educational trainee for more than 30 days to take the ethics training. The 30 day guideline was added in State Affairs.**

Sec. 10. Adds cite for new section on Alternate Members to statute describing the committee, its structure and its duties.

Sec. 11. Adds cite for new section on Alternate Members to statute describing the committee, its structure and its duties.

Sec. 12. This is a **new section describing the process for appointing alternates.** The section adds a **new provision that provides for the Chief Justice to appoint an alternate public member.**

Sec. 13. **Adds legislative volunteers and educational trainees** who are in that capacity for **more than 30 days** to the statute requiring the Legislative ethics course. **The 30 day guideline was added in State Affairs.**

Sec. 14. **Redefines** legislative employee.

Sec. 15. **Repeals** old statute describing the process for appointing alternates.

ALASKA STATE HOUSE OF REPRESENTATIVES

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Room 204

SENATOR JOHN COGHILL

Senate Bill 89 Legislative Ethics Amendments

This bill is a product of discussions by the Select Committee of Legislative Ethics over the past couple of years.

The bill draws a bright line for legislators and legislative staff to follow for assisting constituents with problems they encounter with state agencies. Once an issue has been appealed to an administrative hearing officer, the legislator or legislative staffer may no longer make contacts with the agency, unless that person is a licensed professional to represent a person in such a proceeding and is being compensated for that representation. There are also provisions for inadvertent ex parte contact.

It also extends the reporting deadline for reporting gifts of travel and from charitable events from 30 to 60 days and expands legislative ethics training to legislative volunteers or educational trainees who are on the job for more than 30 days.

The bill adds public members of the ethics committee to the statute prohibiting members from knowingly making unauthorized disclosure of confidential information. This bill clarifies that disclosures prohibited by state and federal confidentiality laws are not required by the Select Committee on Legislative Ethics

The committee recommended a statute that would allow an alternate member of the ethics committee who participates in the beginning of a proceeding to participate in the entire proceeding. The Chief Justice of the Alaska Supreme Court would also be required to appoint one alternate for the public members.

SB 89 clarifies that a gift of a ticket from a lobbyist to a charity event sanctioned by Legislative Council cannot exceed $250.00. It also further describes a contribution to a charity event as a ticket to a charity event or a gift in connection with the charity event.

The Ethics Committee has been grappling with the issue of partisan activities while on state travel since 1993. This bill was a first attempt at setting standards by which a legislator or a legislative staffed can participate in a partisan activity or a campaign fundraiser when traveling on legislative business. The State Affairs Committee deleted the language that set a standard but agreed further discussion needs to take place in Senate Judiciary on the issue.

27-LS0452\T
Wayne
3/30/11

CS FOR SENATE BILL NO. 89(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR COGHILL

A BILL

FOR AN ACT ENTITLED

"An Act clarifying that a legislator or legislative employee is allowed to accept certain compassionate gifts; allowing legislators and legislative employees who are representing persons in an administrative hearing to contact hearing officers and attempt to influence the outcome of the hearing if they are professionals licensed in the state, and allowing legislators and legislative employees who are not professionals licensed in the state to contact hearing officers for the purpose of influencing the outcome of the hearing in certain instances; requiring the Select Committee on Legislative Ethics to maintain a public record of certain ethics disclosures made by legislators and legislative employees; prohibiting a public member of the Select Committee on Legislative Ethics from disclosing confidential information without authorization; clarifying the ethics disclosure requirements for tickets to or gifts in connection with charity events; amending disclosure deadlines under the Legislative Ethics Act; relating to requests to

refrain from disclosure under the Legislative Ethics Act; relating to the applicability of certain provisions of the Legislative Ethics Act to certain legislative employees, volunteers, and interns; establishing a seat for an alternate public member on the Select Committee on Legislative Ethics; clarifying the requirements related to participation by alternate public members and alternate legislative members in the proceedings of the committee; amending the definition of 'legislative employee' in the Legislative Ethics Act; and repealing a procedure for appointment of alternate legislative members."

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

*** Section 1.** AS 24.60.030(a) is amended to read:

(a) A legislator or legislative employee may not

(1) solicit, agree to accept, or accept a benefit other than official compensation for the performance of public duties; this paragraph may not be construed to prohibit lawful solicitation for and acceptance of campaign contributions, solicitation or acceptance of contributions for a charity event, as defined in AS 24.60.080(a)(2)(B), or the acceptance of a **gift** [LAWFUL GRATUITY] under **AS 24.60.075 or 24.60.080** [AS 24.60.080];

(2) use public funds, facilities, equipment, services, or another government asset or resource for a nonlegislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of [EITHER] the legislator, legislative employee, or another person; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) the legislative council, notwithstanding AS 24.05.190, from designating a public facility for use by legislators and legislative employees for health or fitness purposes; when the council designates a facility to be used by legislators and legislative employees for health or fitness purposes, it shall adopt guidelines governing access to and use of the facility; the guidelines may establish times in which use of the facility is limited to specific groups;

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others;

(E) a legislator from use of legislative employees to prepare and send out seasonal greeting cards;

(F) a legislator from using state resources to transport computers or other office equipment owned by the legislator but primarily used for a state function;

(G) use by a legislator of photographs of that legislator;

(H) reasonable use of the Internet by a legislator or a legislative employee except if the use is for election campaign purposes;

(I) a legislator or legislative employee from soliciting, accepting, or receiving a gift on behalf of a recognized, nonpolitical charitable organization in a state facility;

(J) a legislator from sending any communication in the form of a newsletter to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(K) full participation in a charity event approved in advance by the Alaska Legislative Council;

(3) knowingly seek, accept, use, allocate, grant, or award public funds for a purpose other than that approved by law, or make a false statement in connection with a claim, request, or application for compensation, reimbursement, or travel allowances from public funds;

(4) require a legislative employee to perform services for the private benefit of the legislator or employee at any time, or allow a legislative employee to perform services for the private benefit of a legislator or employee on government time; it is not a violation of this paragraph if the services were performed in an unusual or infrequent situation and the person's services were reasonably necessary to permit the legislator or legislative employee to perform official duties;

(5) use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for the purpose of political fund raising or campaigning; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) storing or maintaining, consistent with (b) of this section, election campaign records in a legislator's office;

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under

this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others; or

(E) use by a legislator of photographs of that legislator.

* **Sec. 2.** AS 24.60.030(i) is amended to read:

(i) **A** [EXCEPT FOR SUPPLYING INFORMATION REQUESTED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, OR WHEN RESPONDING TO CONTACTS INITIATED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, A] legislator or legislative employee may not attempt to influence the outcome of an administrative hearing by directly or indirectly contacting or attempting to contact the hearing officer assigned to the hearing or the individual, board, or commission with authority to make the final decision in the **matter** [CASE] unless [THE]

(1) **the legislator or legislative employee is representing another person for compensation subject to AS 24.60.100 and as a professional who is licensed in the state;**

(2) the contact is made in the presence of all parties to the hearing or the parties' representatives **while the legislator or legislative employee is acting as a party or a witness in the matter or responding to a question asked of the legislator or legislative employee by the hearing officer, individual, board, or commission** and the contact is made a part of the record; or

(3) the contact is inadvertent and ex parte and the [(2)] fact and substance of the contact **are** [IS] promptly disclosed by the legislator or legislative employee to all parties to the hearing and [THE CONTACT IS] made a part of the record.

* **Sec. 3.** AS 24.60.050(c) is amended to read:

(c) A legislator or legislative employee who participates in a program or receives a loan that is not exempt from disclosure under (a) of this section shall file with the committee by the date required under AS 24.60.105 a disclosure stating the amounts of the loans outstanding or benefits received during the preceding calendar

year from nonqualifying programs. If the committee requests additional information necessary to determine the propriety of participating in the program or receiving the loan, it shall be promptly provided. The committee shall **maintain the disclosure as a public record and promptly forward the information contained in the disclosure** [PROMPTLY COMPILE A LIST OF THE STATEMENTS INDICATING THE LOANS AND PROGRAMS AND AMOUNTS AND SEND IT] to the presiding officer of each house who shall have it published in the supplemental journals on or before the next regularly scheduled publication of ethics disclosures. If a legislator or legislative employee asks the committee to keep any part of the disclosure confidential and a quorum of the committee determines by vote of a majority of committee members that making the entire disclosure public would cause an unjustifiable invasion of personal privacy, the committee may elect to publish only the fact that a person has participated in the program and the amount of benefit that the unnamed person received. The committee shall maintain the disclosure of the name of the person as confidential and may only use the disclosure in a proceeding under AS 24.60.170. If the disclosure becomes part of the record of a proceeding under AS 24.60.170, the disclosure may be made public as provided in that section.

* **Sec. 4.** AS 24.60.060(a) is amended to read:

(a) A legislator, [OR] legislative employee**, or public member of the committee** may not knowingly make an unauthorized disclosure of information that is made confidential by law and that the person acquired in the course of official duties. A person who violates this section is subject to a proceeding under AS 24.60.170 and may be subject to prosecution under AS 11.56.860 or another law.

* **Sec. 5.** AS 24.60.080(a) is amended to read:

(a) Except as otherwise provided in this section, a legislator or legislative employee may not

(1) solicit, accept, or receive, directly or indirectly, a gift worth $250 or more, whether in the form of money, services, a loan, travel, entertainment, hospitality, promise, or other form, or gifts from the same person worth less than $250 that in a calendar year aggregate to $250 or more in value;

(2) solicit, accept, or receive a gift with any monetary value from a

lobbyist, an immediate family member of a lobbyist, or a person acting on behalf of a lobbyist, except

(A) food or beverage for immediate consumption;

(B) a contribution to a charity event, [FROM ANY PERSON AT ANY TIME, AND] tickets **to** [FOR] a charity event, **and** [AT ANY TIME, EXCEPT THAT TICKETS TO OR] gifts **to which the tickets may entitle the bearer; however, under this subparagraph a legislator or legislative employee may not solicit, accept, or receive from the same lobbyist, an immediate family member of the lobbyist, or a person acting on behalf of the lobbyist, tickets to a charity event, gifts to which the tickets may entitle the bearer, or both, that in a calendar year aggregate to $250 or more in value** [RECEIVED AT A CHARITY EVENT UNDER THIS SUBPARAGRAPH ARE SUBJECT TO THE CALENDAR YEAR LIMIT ON THE VALUE OF GIFTS RECEIVED BY A LEGISLATOR OR LEGISLATIVE EMPLOYEE IN (1) OF THIS SUBSECTION]; in this subparagraph, "charity event" means an event the proceeds of which go to a charitable organization with tax-free status under 26 U.S.C. 501(c)(3) and that the Alaska Legislative Council has approved in advance; the tickets may entitle the bearer to admission to the event, to entertainment, to food or beverages, or to other gifts or services **in connection with** [INVOLVED IN] the charity event;

(C) a gift that is unconnected with the recipient's legislative status and is from a member of the legislator's or legislative employee's immediate family;

(D) a gift delivered on the premises of a state facility and accepted on behalf of a recognized nonpolitical charitable organization; or

(E) a compassionate gift under AS 24.60.075.

* **Sec. 6.** AS 24.60.080(c) is amended to read:

(c) Notwithstanding (a)(1) of this section, it is not a violation of this section for a person who is a legislator or legislative employee to accept

(1) hospitality, other than hospitality described in (4) of this

subsection,

(A) with incidental transportation at the residence of a person; however, a vacation home located outside the state is not considered a residence for the purposes of this subparagraph; or

(B) at a social event or meal;

(2) discounts that are available

(A) generally to the public or to a large class of persons to which the person belongs; or

(B) when on official state business, but only if receipt of the discount benefits the state;

(3) food or foodstuffs indigenous to the state that are shared generally as a cultural or social norm;

(4) travel and hospitality primarily for the purpose of obtaining information on matters of legislative concern;

(5) gifts from the immediate family of the person; in this paragraph, "immediate family" means

(A) the spouse of the person;

(B) the person's domestic partner;

(C) a child, including a stepchild and an adoptive child, of the person or of the person's domestic partner;

(D) a parent, sibling, grandparent, aunt, or uncle of the person;

(E) a parent, sibling, grandparent, aunt, or uncle of the person's spouse or the person's domestic partner; and

(F) a stepparent, stepsister, stepbrother, step-grandparent, step-aunt, or step-uncle of the person, the person's spouse, or the person's domestic partner;

(6) gifts that are not connected with the recipient's legislative status;

(7) a discount for all or part of a legislative session, including time immediately preceding or following the session, or other gift to welcome a legislator or legislative employee who is employed on the personal staff of a legislator or by a standing or special committee to the capital city or in recognition of the beginning of a

legislative session if the gift or discount is available generally to all legislators and the personal staff of legislators and staff of standing and special committees; this paragraph does not apply to legislative employees who are employed by the Legislative Affairs Agency, the office of the chief clerk, the office of the senate secretary, the legislative budget and audit committee, the office of victims' rights, or the office of the ombudsman;

(8) a gift of legal services in a matter of legislative concern and a gift of other services related to the provision of legal services in a matter of legislative concern;

(9) a gift of transportation from a legislator or a legislative employee to a legislator or a legislative employee if the transportation takes place in the state on or in an aircraft, boat, motor vehicle, or other means of transport owned or under the control of the donor; this paragraph does not apply to travel described in (4) of this subsection or travel for political campaign purposes; or

(10) a contribution to a charity event**, a ticket to a charity event, or a gift in connection with a charity event** [FROM ANY PERSON AT ANY TIME]; in this paragraph, "charity event" has the meaning given in (a)(2)(B) of this section.

*** Sec. 7.** AS 24.60.080(d) is amended to read:

(d) A legislator or legislative employee who accepts a gift under (c)(4) **of this section that has a value of $250 or more or a ticket to a charity event or gift in connection with a charity event under (c)(10)** of this section that has a value of $250 or more shall disclose to the committee, within **60** [30] days after receipt of the gift, the name and occupation of the donor and the approximate value of the gift. A legislator or legislative employee who accepts a gift under (c)(8) of this section that the recipient expects will have a value of $250 or more in the calendar year shall disclose to the committee, within 30 days after receipt of the gift, the name and occupation of the donor, a general description of the matter of legislative concern with respect to which the gift is made, and the approximate value of the gift. The committee shall maintain a public record of the disclosures it receives relating to gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section and shall forward the disclosures to the appropriate house for inclusion in the journal. The committee shall forward to the

Alaska Public Offices Commission copies of the disclosures concerning gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section that it receives from legislators and legislative directors. A legislator or legislative employee who accepts a gift under (c)(6) of this section that has a value of $250 or more shall, within 30 days after receiving the gift, disclose to the committee the name and occupation of the donor and a description of the gift. The committee shall maintain disclosures relating to gifts under (c)(6) of this section as confidential records and may only use, or permit a committee employee or contractor to use, a disclosure under (c)(6) of this section in the investigation of a possible violation of this section or in a proceeding under AS 24.60.170. If the disclosure under (c)(6) of this section becomes part of the record of a proceeding under AS 24.60.170, the confidentiality provisions of that section apply to the disclosure.

*** Sec. 8.** AS 24.60.105 is amended by adding a new subsection to read:

(d) A person may submit a written request to refrain from making a disclosure that is required by this chapter if making the disclosure would violate state or federal law, including the United States Constitution and the Constitution of the State of Alaska, or a rule, adopted formally by a trade or profession, that state or federal law requires the person to follow. The committee shall approve or deny the request, or require further justification from the person making the request. At the request of the committee or a person authorized to act on behalf of the committee, a person who seeks to refrain from making a disclosure under this subsection shall provide the committee with justification in writing, and the committee may review the written justification to determine whether it is sufficient.

*** Sec. 9.** AS 24.60.112 is amended to read:

Sec. 24.60.112. Applicability to volunteers and educational trainees. A **person who works more than 30 days as a** legislative volunteer or educational trainee shall be considered to be a legislative employee for purposes of compliance with AS 24.60.030 - 24.60.039, 24.60.060, 24.60.080, 24.60.085, **24.60.155,** 24.60.158 - 24.60.170, 24.60.176, and 24.60.178. If a person believes that a legislative volunteer or educational trainee has violated the provisions of one of those sections, the person may file a complaint under AS 24.60.170. The provisions of AS 24.60.170

apply to the proceeding.

* **Sec. 10.** AS 24.60.130(h) is amended to read:

(h) A member is disqualified from participating as a member in any proceeding before the committee involving a complaint against the member or an employee whose work is supervised by the member or an advisory opinion requested by the member. If a regular legislative member of the committee is disqualified under this subsection from participating in a proceeding involving a complaint, the member's alternate shall be designated under **AS 24.60.131** [(n) OF THIS SECTION].

* **Sec. 11.** AS 24.60.130(o) is amended to read:

(o) Notwithstanding (h) [AND (n)] of this section **and AS 24.60.131**, if a complaint before the committee alleges a violation of this chapter by a group of legislators that includes a legislative member of the committee and that member's alternate, the member and alternate member are disqualified from serving on the committee with regard to the complaint. If the two disqualified members of the committee are members of the majority organizational caucus, the presiding officer of the house in which the two disqualified members serve shall appoint from that house an alternate to serve with regard to the complaint. If one of the two disqualified legislative members of the committee is not a member of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate to serve with regard to the complaint. If a complaint alleges a violation of this chapter that includes all legislative members of the majority organizational caucus of one house, the presiding officer of that house shall appoint from the other house an alternate to serve with regard to the complaint. If the complaint alleges a violation of this chapter that includes all legislative members of a minority organizational caucus of one house, the leader of that minority organizational caucus shall appoint from the other house an alternate to serve with regard to the complaint.

* **Sec. 12.** AS 24.60 is amended by adding a new section to read:

Sec. 24.60.131. Alternate members. (a) When appointing members of the legislature to serve on the committee under AS 24.60.130(b), the speaker of the house of representatives or the president of the senate, as appropriate, shall appoint an

alternate member for each regular member. The alternate member shall have the same qualifications for appointment to the committee as the regular member for whom the alternate stands as alternate. The alternate member's appointment is subject to confirmation as required for appointment of the regular member.

(b) When selecting public members to serve on the committee under AS 24.60.130(b), the Chief Justice of the Alaska Supreme Court shall select one alternate public member. The alternate public member's selection is subject to ratification as required for selection of the regular public members.

(c) Subject to (d) of this section, if a regular member of the committee or a subcommittee is unable to participate in a proceeding other than a proceeding under AS 24.60.170, the chair of the committee or subcommittee that holds the proceeding shall designate the regular member's alternate to participate in place of the regular member at the proceeding, and the alternate shall participate for the duration of that proceeding unless the alternate is unable to participate.

(d) If a regular member of the committee or a subcommittee or an alternate member appointed under (a) or (b) of this section participates at the commencement of a proceeding under AS 24.60.170, the member shall participate for the duration of the proceeding unless the member is disqualified under AS 24.60.130(h) or is unable to continue participating. If the participating member is disqualified under AS 24.60.130(h) or becomes unable to participate, the chair of the committee or subcommittee that holds the proceeding shall designate the member's alternate to participate in place of the member for the duration of the proceeding unless the alternate is disqualified or is unable to participate.

(e) If both a regular legislative member and that member's alternate appointed under (a) of this section are not available to participate at the commencement of a proceeding under AS 24.60.170 because they are disqualified under AS 24.60.130(h), the presiding officer of the house in which the two members serve shall appoint from that house an alternate and designate that alternate to participate in the proceeding; however, if the two members who are not available to participate are not members of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate and

designate that alternate to participate in the proceeding.

(f) A designation under (c) - (e) of this section is a confidential proceeding under AS 24.60.170(*l*) unless the member who is replaced as a result ~~of~~ the designation waives confidentiality.

*** Sec. 13.** AS 24.60.155 is amended to read:

Sec. 24.60.155. Legislative ethics course. A person **who serves for more than 30 days as a legislative volunteer or educational trainee or** who is a legislator, legislative employee, or public member of the committee shall complete a legislative ethics course administered by the committee under AS 24.60.150(a)(4) within 10 days of the first day of the first regular session of each legislature. However, a person **who begins a period of service of more than 30 days as a volunteer or trainee or** who first takes office or begins employment after the 10th day of the first regular session of a legislature shall complete the course required by this section within 30 days after the person's first day of service and, thereafter, as required by this section. The committee may grant a person additional time to complete the course required by this section.

*** Sec. 14.** AS 24.60.990(a)(11) is amended to read:

(11) "legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who **are hourly employees who** perform functions that are incidental to legislative functions, [INCLUDING SECURITY, MESSENGER, MAINTENANCE, AND PRINT SHOP EMPLOYEES,] and other employees designated by the committee;

*** Sec. 15.** AS 24.60.130(n) is repealed.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **CSSB 89**
() Publish Date

Identifier (file name): CSSB89-LEG-COU-3-30-2011
Title: "Legislative Ethics Act"
Sponsor: Senator Coghill
Requester: Senate State Affairs Committee

Dept. Affected: Legislature
Appropriation: Legislative Council
Allocation: Select Committee on Ethics
OMB Component Number: 2321

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Initial Version

Prepared by: Shane Miller, Finance Manager — Phone: 465-6626
Division: Legislative Affairs Agency — Date/Time: 3/30/11 3:59 PM
Approved by: Pamela Varni, Executive Director — Date: 3/30/2011
Legislative Affairs Agency

(Revised 12/29/2010 OMB)

Analysis

This fiscal note has zero impact on the Legislative Affairs Agency.

CS FOR SENATE BILL NO. 89(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered: 4/1/11
Referred: Judiciary

Sponsor(s): SENATOR COGHILL

A BILL

FOR AN ACT ENTITLED

"An Act clarifying that a legislator or legislative employee is allowed to accept certain compassionate gifts; allowing legislators and legislative employees who are representing persons in an administrative hearing to contact hearing officers and attempt to influence the outcome of the hearing if they are professionals licensed in the state, and allowing legislators and legislative employees who are not professionals licensed in the state to contact hearing officers for the purpose of influencing the outcome of the hearing in certain instances; requiring the Select Committee on Legislative Ethics to maintain a public record of certain ethics disclosures made by legislators and legislative employees; prohibiting a public member of the Select Committee on Legislative Ethics from disclosing confidential information without authorization; clarifying the ethics disclosure requirements for tickets to or gifts in connection with charity events; amending disclosure deadlines under the Legislative Ethics Act; relating to requests to

refrain from disclosure under the Legislative Ethics Act; relating to the applicability of certain provisions of the Legislative Ethics Act to certain legislative employees, volunteers, and interns; establishing a seat for an alternate public member on the Select Committee on Legislative Ethics; clarifying the requirements related to participation by alternate public members and alternate legislative members in the proceedings of the committee; amending the definition of 'legislative employee' in the Legislative Ethics Act; and repealing a procedure for appointment of alternate legislative members."

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

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(a) A legislator or legislative employee may not

(1) solicit, agree to accept, or accept a benefit other than official compensation for the performance of public duties; this paragraph may not be construed to prohibit lawful solicitation for and acceptance of campaign contributions, solicitation or acceptance of contributions for a charity event, as defined in AS 24.60.080(a)(2)(B), or the acceptance of a **gift** [LAWFUL GRATUITY] under **AS 24.60.075 or 24.60.080** [AS 24.60.080];

(2) use public funds, facilities, equipment, services, or another government asset or resource for a nonlegislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of [EITHER] the legislator, legislative employee, or another person; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) the legislative council, notwithstanding AS 24.05.190, from designating a public facility for use by legislators and legislative employees for health or fitness purposes; when the council designates a facility to be used by legislators and legislative employees for health or fitness purposes, it shall adopt guidelines governing access to and use of the facility; the guidelines may establish times in which use of the facility is limited to specific groups;

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others;

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(G) use by a legislator of photographs of that legislator;

(H) reasonable use of the Internet by a legislator or a legislative employee except if the use is for election campaign purposes;

(I) a legislator or legislative employee from soliciting, accepting, or receiving a gift on behalf of a recognized, nonpolitical charitable organization in a state facility;

(J) a legislator from sending any communication in the form of a newsletter to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(K) full participation in a charity event approved in advance by the Alaska Legislative Council;

(3) knowingly seek, accept, use, allocate, grant, or award public funds for a purpose other than that approved by law, or make a false statement in connection with a claim, request, or application for compensation, reimbursement, or travel allowances from public funds;

(4) require a legislative employee to perform services for the private benefit of the legislator or employee at any time, or allow a legislative employee to perform services for the private benefit of a legislator or employee on government time; it is not a violation of this paragraph if the services were performed in an unusual or infrequent situation and the person's services were reasonably necessary to permit the legislator or legislative employee to perform official duties;

(5) use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for the purpose of political fund raising or campaigning; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) storing or maintaining, consistent with (b) of this section, election campaign records in a legislator's office;

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under

this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others; or

(E) use by a legislator of photographs of that legislator.

* **Sec. 2.** AS 24.60.030(i) is amended to read:

(i) **A** [EXCEPT FOR SUPPLYING INFORMATION REQUESTED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, OR WHEN RESPONDING TO CONTACTS INITIATED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, A] legislator or legislative employee may not attempt to influence the outcome of an administrative hearing by directly or indirectly contacting or attempting to contact the hearing officer assigned to the hearing or the individual, board, or commission with authority to make the final decision in the **matter** [CASE] unless [THE]

(1) **the legislator or legislative employee is representing another person for compensation subject to AS 24.60.100 and as a professional who is licensed in the state;**

(2) the contact is made in the presence of all parties to the hearing or the parties' representatives **while the legislator or legislative employee is acting as a party or a witness in the matter or responding to a question asked of the legislator or legislative employee by the hearing officer, individual, board, or commission** and the contact is made a part of the record; or

(3) the contact is inadvertent and ex parte and the [(2)] fact and substance of the contact **are** [IS] promptly disclosed by the legislator or legislative employee to all parties to the hearing and [THE CONTACT IS] made a part of the record.

Deleted Secs. 2 & 3 dealing with State travel

* **Sec. 3.** AS 24.60.050(c) is amended to read:

(c) A legislator or legislative employee who participates in a program or receives a loan that is not exempt from disclosure under (a) of this section shall file with the committee by the date required under AS 24.60.105 a disclosure stating the amounts of the loans outstanding or benefits received during the preceding calendar

year from nonqualifying programs. If the committee requests additional information necessary to determine the propriety of participating in the program or receiving the loan, it shall be promptly provided. The committee shall **maintain the disclosure as a public record and promptly forward the information contained in the disclosure** [PROMPTLY COMPILE A LIST OF THE STATEMENTS INDICATING THE LOANS AND PROGRAMS AND AMOUNTS AND SEND IT] to the presiding officer of each house who shall have it published in the supplemental journals on or before the next regularly scheduled publication of ethics disclosures. If a legislator or legislative employee asks the committee to keep any part of the disclosure confidential and a quorum of the committee determines by vote of a majority of committee members that making the entire disclosure public would cause an unjustifiable invasion of personal privacy, the committee may elect to publish only the fact that a person has participated in the program and the amount of benefit that the unnamed person received. The committee shall maintain the disclosure of the name of the person as confidential and may only use the disclosure in a proceeding under AS 24.60.170. If the disclosure becomes part of the record of a proceeding under AS 24.60.170, the disclosure may be made public as provided in that section.

*** Sec. 4.** AS 24.60.060(a) is amended to read:

(a) A legislator**,** [OR] legislative employee**, or public member of the committee** may not knowingly make an unauthorized disclosure of information that is made confidential by law and that the person acquired in the course of official duties. A person who violates this section is subject to a proceeding under AS 24.60.170 and may be subject to prosecution under AS 11.56.860 or another law.

*** Sec. 5.** AS 24.60.080(a) is amended to read:

(a) Except as otherwise provided in this section, a legislator or legislative employee may not

(1) solicit, accept, or receive, directly or indirectly, a gift worth $250 or more, whether in the form of money, services, a loan, travel, entertainment, hospitality, promise, or other form, or gifts from the same person worth less than $250 that in a calendar year aggregate to $250 or more in value;

(2) solicit, accept, or receive a gift with any monetary value from a

lobbyist, an immediate family member of a lobbyist, or a person acting on behalf of a lobbyist, except

(A) food or beverage for immediate consumption;

(B) a contribution to a charity event, [FROM ANY PERSON AT ANY TIME, AND] tickets **to** [FOR] a charity event, **and** [AT ANY TIME, EXCEPT THAT TICKETS TO OR] gifts **to which the tickets may entitle the bearer; however, under this subparagraph a legislator or legislative employee may not solicit, accept, or receive from the same lobbyist, an immediate family member of the lobbyist, or a person acting on behalf of the lobbyist, tickets to a charity event, gifts to which the tickets may entitle the bearer, or both, that in a calendar year aggregate to $250 or more in value** [RECEIVED AT A CHARITY EVENT UNDER THIS SUBPARAGRAPH ARE SUBJECT TO THE CALENDAR YEAR LIMIT ON THE VALUE OF GIFTS RECEIVED BY A LEGISLATOR OR LEGISLATIVE EMPLOYEE IN (1) OF THIS SUBSECTION]; in this subparagraph, "charity event" means an event the proceeds of which go to a charitable organization with tax-free status under 26 U.S.C. 501(c)(3) and that the Alaska Legislative Council has approved in advance; the tickets may entitle the bearer to admission to the event, to entertainment, to food or beverages, or to other gifts or services **in connection with** [INVOLVED IN] the charity event;

(C) a gift that is unconnected with the recipient's legislative status and is from a member of the legislator's or legislative employee's immediate family;

(D) a gift delivered on the premises of a state facility and accepted on behalf of a recognized nonpolitical charitable organization; or

(E) a compassionate gift under AS 24.60.075.

*** Sec. 6.** AS 24.60.080(c) is amended to read:

(c) Notwithstanding (a)(1) of this section, it is not a violation of this section for a person who is a legislator or legislative employee to accept

(1) hospitality, other than hospitality described in (4) of this

subsection,

(A) with incidental transportation at the residence of a person; however, a vacation home located outside the state is not considered a residence for the purposes of this subparagraph; or

(B) at a social event or meal;

(2) discounts that are available

(A) generally to the public or to a large class of persons to which the person belongs; or

(B) when on official state business, but only if receipt of the discount benefits the state;

(3) food or foodstuffs indigenous to the state that are shared generally as a cultural or social norm;

(4) travel and hospitality primarily for the purpose of obtaining information on matters of legislative concern;

(5) gifts from the immediate family of the person; in this paragraph, "immediate family" means

(A) the spouse of the person;

(B) the person's domestic partner;

(C) a child, including a stepchild and an adoptive child, of the person or of the person's domestic partner;

(D) a parent, sibling, grandparent, aunt, or uncle of the person;

(E) a parent, sibling, grandparent, aunt, or uncle of the person's spouse or the person's domestic partner; and

(F) a stepparent, stepsister, stepbrother, step-grandparent, step-aunt, or step-uncle of the person, the person's spouse, or the person's domestic partner;

(6) gifts that are not connected with the recipient's legislative status;

(7) a discount for all or part of a legislative session, including time immediately preceding or following the session, or other gift to welcome a legislator or legislative employee who is employed on the personal staff of a legislator or by a standing or special committee to the capital city or in recognition of the beginning of a

legislative session if the gift or discount is available generally to all legislators and the personal staff of legislators and staff of standing and special committees; this paragraph does not apply to legislative employees who are employed by the Legislative Affairs Agency, the office of the chief clerk, the office of the senate secretary, the legislative budget and audit committee, the office of victims' rights, or the office of the ombudsman;

(8) a gift of legal services in a matter of legislative concern and a gift of other services related to the provision of legal services in a matter of legislative concern;

(9) a gift of transportation from a legislator or a legislative employee to a legislator or a legislative employee if the transportation takes place in the state on or in an aircraft, boat, motor vehicle, or other means of transport owned or under the control of the donor; this paragraph does not apply to travel described in (4) of this subsection or travel for political campaign purposes; or

(10) a contribution to a charity event**, a ticket to a charity event, or a gift in connection with a charity event** [FROM ANY PERSON AT ANY TIME]; in this paragraph, "charity event" has the meaning given in (a)(2)(B) of this section.

*** Sec. 7.** AS 24.60.080(d) is amended to read:

(d) A legislator or legislative employee who accepts a gift under (c)(4) **of this section that has a value of $250 or more or a ticket to a charity event or gift in connection with a charity event under (c)(10)** of this section that has a value of $250 or more shall disclose to the committee, within **60** [30] days after receipt of the gift, the name and occupation of the donor and the approximate value of the gift. A legislator or legislative employee who accepts a gift under (c)(8) of this section that the recipient expects will have a value of $250 or more in the calendar year shall disclose to the committee, within 30 days after receipt of the gift, the name and occupation of the donor, a general description of the matter of legislative concern with respect to which the gift is made, and the approximate value of the gift. The committee shall maintain a public record of the disclosures it receives relating to gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section and shall forward the disclosures to the appropriate house for inclusion in the journal. The committee shall forward to the

Alaska Public Offices Commission copies of the disclosures concerning gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section that it receives from legislators and legislative directors. A legislator or legislative employee who accepts a gift under (c)(6) of this section that has a value of $250 or more shall, within 30 days after receiving the gift, disclose to the committee the name and occupation of the donor and a description of the gift. The committee shall maintain disclosures relating to gifts under (c)(6) of this section as confidential records and may only use, or permit a committee employee or contractor to use, a disclosure under (c)(6) of this section in the investigation of a possible violation of this section or in a proceeding under AS 24.60.170. If the disclosure under (c)(6) of this section becomes part of the record of a proceeding under AS 24.60.170, the confidentiality provisions of that section apply to the disclosure.

*** Sec. 8.** AS 24.60.105 is amended by adding a new subsection to read:

(d) A person may submit a written request to refrain from making a disclosure that is required by this chapter if making the disclosure would violate state or federal law, including the United States Constitution and the Constitution of the State of Alaska, or a rule, adopted formally by a trade or profession, that state or federal law requires the person to follow. The committee shall approve or deny the request, or require further justification from the person making the request. At the request of the committee or a person authorized to act on behalf of the committee, a person who seeks to refrain from making a disclosure under this subsection shall provide the committee with justification in writing, and the committee may review the written justification to determine whether it is sufficient.

Added in State Affairs

*** Sec. 9.** AS 24.60.112 is amended to read:

Sec. 24.60.112. Applicability to volunteers and educational trainees. A **person who works more than 30 days as a** legislative volunteer or educational trainee shall be considered to be a legislative employee for purposes of compliance with AS 24.60.030 - 24.60.039, 24.60.060, 24.60.080, 24.60.085, **24.60.155,** 24.60.158 - 24.60.170, 24.60.176, and 24.60.178. If a person believes that a legislative volunteer or educational trainee has violated the provisions of one of those sections, the person may file a complaint under AS 24.60.170. The provisions of AS 24.60.170

apply to the proceeding.

* **Sec. 10.** AS 24.60.130(h) is amended to read:

(h) A member is disqualified from participating as a member in any proceeding before the committee involving a complaint against the member or an employee whose work is supervised by the member or an advisory opinion requested by the member. If a regular legislative member of the committee is disqualified under this subsection from participating in a proceeding involving a complaint, the member's alternate shall be designated under **AS 24.60.131** [(n) OF THIS SECTION].

* **Sec. 11.** AS 24.60.130(o) is amended to read:

(o) Notwithstanding (h) [AND (n)] of this section **and AS 24.60.131**, if a complaint before the committee alleges a violation of this chapter by a group of legislators that includes a legislative member of the committee and that member's alternate, the member and alternate member are disqualified from serving on the committee with regard to the complaint. If the two disqualified members of the committee are members of the majority organizational caucus, the presiding officer of the house in which the two disqualified members serve shall appoint from that house an alternate to serve with regard to the complaint. If one of the two disqualified legislative members of the committee is not a member of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate to serve with regard to the complaint. If a complaint alleges a violation of this chapter that includes all legislative members of the majority organizational caucus of one house, the presiding officer of that house shall appoint from the other house an alternate to serve with regard to the complaint. If the complaint alleges a violation of this chapter that includes all legislative members of a minority organizational caucus of one house, the leader of that minority organizational caucus shall appoint from the other house an alternate to serve with regard to the complaint.

* **Sec. 12.** AS 24.60 is amended by adding a new section to read:

Sec. 24.60.131. Alternate members. (a) When appointing members of the legislature to serve on the committee under AS 24.60.130(b), the speaker of the house of representatives or the president of the senate, as appropriate, shall appoint an

alternate member for each regular member. The alternate member shall have the same qualifications for appointment to the committee as the regular member for whom the alternate stands as alternate. The alternate member's appointment is subject to confirmation as required for appointment of the regular member.

(b) When selecting public members to serve on the committee under AS 24.60.130(b), the Chief Justice of the Alaska Supreme Court shall select one alternate public member. The alternate public member's selection is subject to ratification as required for selection of the regular public members.

(c) Subject to (d) of this section, if a regular member of the committee or a subcommittee is unable to participate in a proceeding other than a proceeding under AS 24.60.170, the chair of the committee or subcommittee that holds the proceeding shall designate the regular member's alternate to participate in place of the regular member at the proceeding, and the alternate shall participate for the duration of that proceeding unless the alternate is unable to participate.

(d) If a regular member of the committee or a subcommittee or an alternate member appointed under (a) or (b) of this section participates at the commencement of a proceeding under AS 24.60.170, the member shall participate for the duration of the proceeding unless the member is disqualified under AS 24.60.130(h) or is unable to continue participating. If the participating member is disqualified under AS 24.60.130(h) or becomes unable to participate, the chair of the committee or subcommittee that holds the proceeding shall designate the member's alternate to participate in place of the member for the duration of the proceeding unless the alternate is disqualified or is unable to participate.

(e) If both a regular legislative member and that member's alternate appointed under (a) of this section are not available to participate at the commencement of a proceeding under AS 24.60.170 because they are disqualified under AS 24.60.130(h), [or unable to participate] the presiding officer of the house in which the two members serve shall appoint from that house an alternate and designate that alternate to participate in the proceeding; however, if the two members who are not available to participate are not members of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate and

designate that alternate to participate in the proceeding.

(f) A designation under (c) - (e) of this section is a confidential proceeding under AS 24.60.170(*l*) unless the member who is replaced as a result of the designation waives confidentiality.

*** Sec. 13.** AS 24.60.155 is amended to read:

Sec. 24.60.155. Legislative ethics course. A person **who serves for more than 30 days as a legislative volunteer or educational trainee or** who is a legislator, legislative employee, or public member of the committee shall complete a legislative ethics course administered by the committee under AS 24.60.150(a)(4) within 10 days of the first day of the first regular session of each legislature. However, a person **who begins a period of service of more than 30 days as a volunteer or trainee or** who first takes office or begins employment after the 10th day of the first regular session of a legislature shall complete the course required by this section within 30 days after the person's first day of service and, thereafter, as required by this section. The committee may grant a person additional time to complete the course required by this section.

*** Sec. 14.** AS 24.60.990(a)(11) is amended to read:

(11) "legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who **are hourly employees who** perform functions that are incidental to legislative functions, [INCLUDING SECURITY, MESSENGER, MAINTENANCE, AND PRINT SHOP EMPLOYEES,] and other employees designated by the committee;

*** Sec. 15.** AS 24.60.130(n) is repealed.

27-LS0452\D
Wayne
3/3/11

CS FOR SENATE BILL NO. 89( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR COGHILL

A BILL

FOR AN ACT ENTITLED

"An Act clarifying that a legislator or legislative employee is allowed to accept certain compassionate gifts; allowing legislators and legislative employees to use legislative mailing lists for campaign purposes and nonlegislative purposes; allowing legislators and legislative employees who are representing persons in an administrative hearing to contact hearing officers and attempt to influence the outcome of the hearing if they are professionals licensed in the state, and allowing legislators and legislative employees who are not professionals licensed in the state to contact hearing officers for the purpose of influencing the outcome of the hearing in certain instances; allowing legislators and legislative employees, in certain circumstances, to participate in partisan political activity while on state travel; requiring the Select Committee on Legislative Ethics to maintain a public record of certain ethics disclosures made by legislators and legislative employees; prohibiting a public member of the Select Committee on Legislative Ethics

from disclosing confidential information without authorization; clarifying the ethics disclosure requirements for tickets to or gifts in connection with charity events; amending disclosure deadlines under the Legislative Ethics Act; relating to requests to refrain from disclosure under the Legislative Ethics Act; eliminating an exemption for certain legislative employees, volunteers, and interns from the requirement under the Legislative Ethics Act that legislative employees attend a legislative ethics course; establishing a seat for an alternate public member on the Select Committee on Legislative Ethics; clarifying the requirements related to participation by alternate public members and alternate legislative members in the proceedings of the committee; amending the definition of 'legislative employee' in the Legislative Ethics Act; and repealing a procedure for appointment of alternate legislative members."

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

Prohibited conduct and conflict of interest.

*** Section 1.** AS 24.60.030(a) is amended to read:

(a) A legislator or legislative employee may not

(1) solicit, agree to accept, or accept a benefit other than official compensation for the performance of public duties; this paragraph may not be construed to prohibit lawful solicitation for and acceptance of campaign contributions, solicitation or acceptance of contributions for a charity event, as defined in AS 24.60.080(a)(2)(B), or the acceptance of a **gift** [LAWFUL GRATUITY] under **AS 24.60.075 or 24.60.080** [AS 24.60.080];

adds compassionate gifts to exceptions 24.60.075

(2) use public funds, facilities, equipment, services, or another government asset or resource for a nonlegislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of [EITHER] the legislator, legislative employee, or another person; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and

either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of **a legislator's legislative mailing list for campaign purposes, or the use of** mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) the legislative council, notwithstanding AS 24.05.190, from designating a public facility for use by legislators and legislative employees for health or fitness purposes; when the council designates a facility to be used by legislators and legislative employees for health or fitness purposes, it shall adopt guidelines governing access to and use of the facility; the guidelines may establish times in which use of the facility is limited to specific groups;

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others;

(E) a legislator from use of legislative employees to prepare and send out seasonal greeting cards;

(F) a legislator from using state resources to transport computers or other office equipment owned by the legislator but primarily used for a state function;

(G) use by a legislator of photographs of that legislator;

(H) reasonable use of the Internet by a legislator or a legislative employee except if the use is for election campaign purposes;

(I) a legislator or legislative employee from soliciting, accepting, or receiving a gift on behalf of a recognized, nonpolitical charitable

allows use of legislative mailing list for partisan activity per Opinion 84-

organization in a state facility;

(J) a legislator from sending any communication in the form of a newsletter to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(K) full participation in a charity event approved in advance by the Alaska Legislative Council;

(3) knowingly seek, accept, use, allocate, grant, or award public funds for a purpose other than that approved by law, or make a false statement in connection with a claim, request, or application for compensation, reimbursement, or travel allowances from public funds;

(4) require a legislative employee to perform services for the private benefit of the legislator or employee at any time, or allow a legislative employee to perform services for the private benefit of a legislator or employee on government time; it is not a violation of this paragraph if the services were performed in an unusual or infrequent situation and the person's services were reasonably necessary to permit the legislator or legislative employee to perform official duties;

(5) use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for the purpose of political fund raising or campaigning; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of **a legislator's legislative mailing list, or the use of** mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) storing or maintaining, consistent with (b) of this section, election campaign records in a legislator's office;

allows use of legislative mailing list for campaign purposes

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others; or

(E) use by a legislator of photographs of that legislator.

*** Sec. 2.** AS 24.60.030(i) is amended to read: Prohibited conduct and conflict of interest

(i) **A** [EXCEPT FOR SUPPLYING INFORMATION REQUESTED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, OR WHEN RESPONDING TO CONTACTS INITIATED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, A] legislator or legislative employee may not attempt to influence the outcome of an administrative hearing by directly or indirectly contacting or attempting to contact the hearing officer assigned to the hearing or the individual, board, or commission with authority to make the final decision in the **matter** [CASE] unless [THE]

(1) **the legislator or legislative employee is representing another person for compensation subject to AS 24.60.100 and as a professional who is licensed in the state;** representation

(2) the contact is made in the presence of all parties to the hearing or the parties' representatives **while the legislator or legislative employee is acting as a party or a witness in the matter or responding to a question asked of the legislator or legislative employee by the hearing officer, individual, board, or commission** and the contact is made a part of the record; or

(3) the contact is inadvertent and ex parte and the [(2)] fact and substance of the contact **are** [IS] promptly disclosed by the legislator or legislative

employee to all parties to the hearing and [THE CONTACT IS] made a part of the record.

Prohibited conduct and conflict of interest.

*** Sec. 3.** AS 24.60.030 is amended by adding a new subsection to read:

(j) Notwithstanding the limitations under (a)(2) - (4) and (c) of this section and subject to other laws of the state or the United States, a legislator or legislative employee who is on state travel may participate in partisan political activity, including campaign activity during the state travel, if the legislator or the legislative employee does not use or authorize the use of state resources to pay for the activity and if the legislator or legislative employee does not participate in the activity

(1) during a normal workday between 8:00 a.m. and 5:00 p.m., excluding a meal break;

(2) on a state or municipal election day;

(3) during the 30 days immediately preceding an election in which the participating legislator or the legislator for whom the participating employee works is a candidate for elective office; or

(4) by fund raising for a political party or campaign.

adds exception to prohibition for conduct for attending partisan activities while on state travel

*** Sec. 4.** AS 24.60.031 is amended by adding a new subsection to read: Restrictions on fundraising

(d) Notwithstanding the limitations under (a) and (b) of this section and subject to other laws of the state or the United States, a legislator or legislative employee who is on state travel may participate in partisan political activity, including campaign activity, during the state travel if the legislator or the legislative employee does not use or authorize the use of state resources to pay for the activity and if the legislator or legislative employee does not participate in the activity

(1) during a normal workday between 8:00 a.m. and 5:00 p.m., excluding a meal break;

(2) on a state or municipal election day;

(3) during the 30 days immediately preceding an election in which the participating legislator or the legislator for whom the participating employee works is a candidate for elective office; or

(4) by fund raising for a political party or campaign.

sets a standard for attending partisan functions while on state travel.

*** Sec. 5.** AS 24.60.050(c) is amended to read:

(c) A legislator or legislative employee who participates in a program or receives a loan that is not exempt from disclosure under (a) of this section shall file with the committee by the date required under AS 24.60.105 a disclosure stating the amounts of the loans outstanding or benefits received during the preceding calendar year from nonqualifying programs. If the committee requests additional information necessary to determine the propriety of participating in the program or receiving the loan, it shall be promptly provided. The committee shall **maintain the disclosure as a public record and promptly forward the information contained in the disclosure** [PROMPTLY COMPILE A LIST OF THE STATEMENTS INDICATING THE LOANS AND PROGRAMS AND AMOUNTS AND SEND IT] to the presiding officer of each house who shall have it published in the supplemental journals on or before the next regularly scheduled publication of ethics disclosures. If a legislator or legislative employee asks the committee to keep any part of the disclosure confidential and a quorum of the committee determines by vote of a majority of committee members that making the entire disclosure public would cause an unjustifiable invasion of personal privacy, the committee may elect to publish only the fact that a person has participated in the program and the amount of benefit that the unnamed person received. The committee shall maintain the disclosure of the name of the person as confidential and may only use the disclosure in a proceeding under AS 24.60.170. If the disclosure becomes part of the record of a proceeding under AS 24.60.170, the disclosure may be made public as provided in that section.

- provides for disclosure but no register

*** Sec. 6.** AS 24.60.060(a) is amended to read: Confidential Information

(a) A legislator, [OR] legislative employee, **or public member of the committee** may not knowingly make an unauthorized disclosure of information that is made confidential by law and that the person acquired in the course of official duties. A person who violates this section is subject to a proceeding under AS 24.60.170 and may be subject to prosecution under AS 11.56.860 or another law.

- adds public members to prohibition of disclosing confidential information

*** Sec. 7.** AS 24.60.080(a) is amended to read: GIFTS

(a) Except as otherwise provided in this section, a legislator or legislative employee may not

(1) solicit, accept, or receive, directly or indirectly, a gift worth $250

or more, whether in the form of money, services, a loan, travel, entertainment, hospitality, promise, or other form, or gifts from the same person worth less than $250 that in a calendar year aggregate to $250 or more in value;

(2) solicit, accept, or receive a gift with any monetary value from a lobbyist, an immediate family member of a lobbyist, or a person acting on behalf of a lobbyist, except

(A) food or beverage for immediate consumption;

(B) a contribution to a charity event, [FROM ANY PERSON AT ANY TIME, AND] tickets **to** [FOR] a charity event, **and** [AT ANY TIME, EXCEPT THAT TICKETS TO OR] gifts **to which the tickets may entitle the bearer; however, under this subparagraph a legislator or legislative employee may not solicit, accept, or receive from the same lobbyist, an immediate family member of the lobbyist, or a person acting on behalf of the lobbyist, tickets to a charity event, gifts to which the tickets may entitle the bearer, or both, that in a calendar year aggregate to $250 or more in value** [RECEIVED AT A CHARITY EVENT UNDER THIS SUBPARAGRAPH ARE SUBJECT TO THE CALENDAR YEAR LIMIT ON THE VALUE OF GIFTS RECEIVED BY A LEGISLATOR OR LEGISLATIVE EMPLOYEE IN (1) OF THIS SUBSECTION]; in this subparagraph, "charity event" means an event the proceeds of which go to a charitable organization with tax-free status under 26 U.S.C. 501(c)(3) and that the Alaska Legislative Council has approved in advance; the tickets may entitle the bearer to admission to the event, to entertainment, to food or beverages, or to other gifts or services **in connection with** [INVOLVED IN] the charity event;

(C) a gift that is unconnected with the recipient's legislative status and is from a member of the legislator's or legislative employee's immediate family;

(D) a gift delivered on the premises of a state facility and accepted on behalf of a recognized nonpolitical charitable organization; or

(E) a compassionate gift under AS 24.60.075.

clarifies that an allowable gift from a lobbyist is a charity event ticket or gift from a charity event must be less than $250.

*** Sec. 8.** AS 24.60.080(c) is amended to read:

(c) Notwithstanding (a)(1) of this section, it is not a violation of this section for a person who is a legislator or legislative employee to accept

(1) hospitality, other than hospitality described in (4) of this subsection,

(A) with incidental transportation at the residence of a person; however, a vacation home located outside the state is not considered a residence for the purposes of this subparagraph; or

(B) at a social event or meal;

(2) discounts that are available

(A) generally to the public or to a large class of persons to which the person belongs; or

(B) when on official state business, but only if receipt of the discount benefits the state;

(3) food or foodstuffs indigenous to the state that are shared generally as a cultural or social norm;

(4) travel and hospitality primarily for the purpose of obtaining information on matters of legislative concern;

(5) gifts from the immediate family of the person; in this paragraph, "immediate family" means

(A) the spouse of the person;

(B) the person's domestic partner;

(C) a child, including a stepchild and an adoptive child, of the person or of the person's domestic partner;

(D) a parent, sibling, grandparent, aunt, or uncle of the person;

(E) a parent, sibling, grandparent, aunt, or uncle of the person's spouse or the person's domestic partner; and

(F) a stepparent, stepsister, stepbrother, step-grandparent, step-aunt, or step-uncle of the person, the person's spouse, or the person's domestic partner;

(6) gifts that are not connected with the recipient's legislative status;

(7) a discount for all or part of a legislative session, including time immediately preceding or following the session, or other gift to welcome a legislator or legislative employee who is employed on the personal staff of a legislator or by a standing or special committee to the capital city or in recognition of the beginning of a legislative session if the gift or discount is available generally to all legislators and the personal staff of legislators and staff of standing and special committees; this paragraph does not apply to legislative employees who are employed by the Legislative Affairs Agency, the office of the chief clerk, the office of the senate secretary, the legislative budget and audit committee, the office of victims' rights, or the office of the ombudsman;

(8) a gift of legal services in a matter of legislative concern and a gift of other services related to the provision of legal services in a matter of legislative concern;

(9) a gift of transportation from a legislator or a legislative employee to a legislator or a legislative employee if the transportation takes place in the state on or in an aircraft, boat, motor vehicle, or other means of transport owned or under the control of the donor; this paragraph does not apply to travel described in (4) of this subsection or travel for political campaign purposes; or

(10) a contribution to a charity event**, a ticket to a charity event, or a gift in connection with a charity event** [FROM ANY PERSON AT ANY TIME]; in this paragraph, "charity event" has the meaning given in (a)(2)(B) of this section.

clarification of tickets & gifts from charity event

*** Sec. 9.** AS 24.60.080(d) is amended to read:

(d) A legislator or legislative employee who accepts a gift under (c)(4) **of this section that has a value of $250 or more or a ticket to a charity event or gift in connection with a charity event under (c)(10)** of this section that has a value of $250 or more shall disclose to the committee, within **60** [30] days after receipt of the gift, the name and occupation of the donor and the approximate value of the gift. A legislator or legislative employee who accepts a gift under (c)(8) of this section that the recipient expects will have a value of $250 or more in the calendar year shall disclose to the committee, within 30 days after receipt of the gift, the name and occupation of the donor, a general description of the matter of legislative concern with

gifts from charity event more than $250 from non-lobbyist must be reported

reporting of gift of travel & charity events increased to 60 days

respect to which the gift is made, and the approximate value of the gift. The committee shall maintain a public record of the disclosures it receives relating to gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section and shall forward the disclosures to the appropriate house for inclusion in the journal. The committee shall forward to the Alaska Public Offices Commission copies of the disclosures concerning gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section that it receives from legislators and legislative directors. A legislator or legislative employee who accepts a gift under (c)(6) of this section that has a value of $250 or more shall, within 30 days after receiving the gift, disclose to the committee the name and occupation of the donor and a description of the gift. The committee shall maintain disclosures relating to gifts under (c)(6) of this section as confidential records and may only use, or permit a committee employee or contractor to use, a disclosure under (c)(6) of this section in the investigation of a possible violation of this section or in a proceeding under AS 24.60.170. If the disclosure under (c)(6) of this section becomes part of the record of a proceeding under AS 24.60.170, the confidentiality provisions of that section apply to the disclosure.

*** Sec. 10.** AS 24.60.105 is amended by adding a new subsection to read: Deadline for Filing disclosure

(d) A person may submit a written request to refrain from making a disclosure that is required by this chapter if making the disclosure would violate the United States Constitution, the Constitution of the State of Alaska, or other state or federal law. The committee shall approve or deny the request, or require further justification from the person making the request. At the request of the committee or a person authorized to act on behalf of the committee, a person who seeks to refrain from making a disclosure under this subsection shall provide the committee with justification in writing, and the committee may review the written justification to determine whether it is sufficient.

allows for exceptions from disclosure

*** Sec. 11.** AS 24.60.112 is amended to read:

Sec. 24.60.112. Applicability to volunteers and educational trainees. A legislative volunteer or educational trainee shall be considered to be a legislative employee for purposes of compliance with AS 24.60.030 - 24.60.039, 24.60.060, 24.60.080, 24.60.085, **24.60.155,** 24.60.158 - 24.60.170, 24.60.176, and 24.60.178. If

requires volunteers to take ethics classes

a person believes that a legislative volunteer or educational trainee has violated the provisions of one of those sections, the person may file a complaint under AS 24.60.170. The provisions of AS 24.60.170 apply to the proceeding.

*** Sec. 12.** AS 24.60.130(h) is amended to read:

(h) A member is disqualified from participating as a member in any proceeding before the committee involving a complaint against the member or an employee whose work is supervised by the member or an advisory opinion requested by the member. If a regular legislative member of the committee is disqualified under this subsection from participating in a proceeding involving a complaint, the member's alternate shall be designated under **AS 24.60.131** [(n) OF THIS SECTION].

adds alternate members to disqualify provisions

*** Sec. 13.** AS 24.60.130(o) is amended to read:

(o) Notwithstanding (h) [AND (n)] of this section **and AS 24.60.131**, if a complaint before the committee alleges a violation of this chapter by a group of legislators that includes a legislative member of the committee and that member's alternate, the member and alternate member are disqualified from serving on the committee with regard to the complaint. If the two disqualified members of the committee are members of the majority organizational caucus, the presiding officer of the house in which the two disqualified members serve shall appoint from that house an alternate to serve with regard to the complaint. If one of the two disqualified legislative members of the committee is not a member of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate to serve with regard to the complaint. If a complaint alleges a violation of this chapter that includes all legislative members of the majority organizational caucus of one house, the presiding officer of that house shall appoint from the other house an alternate to serve with regard to the complaint. If the complaint alleges a violation of this chapter that includes all legislative members of a minority organizational caucus of one house, the leader of that minority organizational caucus shall appoint from the other house an alternate to serve with regard to the complaint.

alternate to alternate

*** Sec. 14.** AS 24.60 is amended by adding a new section to read:

Sec. 24.60.131. Alternate members. (a) When appointing members of the

legislature to serve on the committee under AS 24.60.130(b), the speaker of the house of representatives or the president of the senate, as appropriate, shall appoint an alternate member for each regular member. The alternate member shall have the same qualifications for appointment to the committee as the regular member for whom the alternate stands as alternate. The alternate member's appointment is subject to confirmation as required for appointment of the regular member.

(b) When selecting public members to serve on the committee under AS 24.60.130(b), the Chief Justice of the Alaska Supreme Court shall select one alternate public member. The alternate public member's selection is subject to ratification as required for selection of the regular public members.

(c) Subject to (d) of this section, if a regular member of the committee or a subcommittee is unable to participate in a proceeding other than a proceeding under AS 24.60.170, the chair of the committee or subcommittee that holds the proceeding shall designate the regular member's alternate to participate in place of the regular member at the proceeding, and the alternate shall participate for the duration of that proceeding unless the alternate is unable to participate.

(d) If a regular member of the committee or a subcommittee or an alternate appointed under (a) or (b) of this section participates at the commencement of a proceeding under AS 24.60.170, the member shall participate for the duration of the proceeding unless the member is disqualified under AS 24.60.130(h) or is unable to continue participating. If the participating member is disqualified under AS 24.60.130(h) or becomes unable to participate, the chair of the committee or subcommittee that holds the proceeding shall designate the member's alternate to participate in place of the member for the duration of the proceeding unless the alternate is disqualified or is unable to participate.

(e) If both a regular legislative member and that member's alternate appointed under (a) of this section are not available to participate in a proceeding under AS 24.60.170 because they are disqualified under AS 24.60.130(h) or unable to participate, the presiding officer of the house in which the two members serve shall appoint from that house an alternate and designate that alternate to participate in the proceeding; however, if the two members who are not available to participate are not

members of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate and designate that alternate to participate in the proceeding.

(f) A designation under (c) - (e) of this section is a confidential proceeding under AS 24.60.170(*l*) unless the member who is replaced as a result of the designation waives confidentiality.

*** Sec. 15.** AS 24.60.155 is amended to read:

Sec. 24.60.155. Legislative ethics course. A person who is a legislator, legislative employee, **legislative volunteer, educational trainee,** or public member of the committee shall complete a legislative ethics course administered by the committee under AS 24.60.150(a)(4) within 10 days of the first day of the first regular session of each legislature. However, a person who first takes office, [OR] begins employment, **or begins service as a volunteer or trainee** after the 10th day of the first regular session of a legislature shall complete the course required by this section within 30 days after the person's first day of service and, thereafter, as required by this section. The committee may grant a person additional time to complete the course required by this section.

ethics course

*** Sec. 16.** AS 24.60.990(a)(11) is amended to read:

(11) "legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who **are hourly employees who** perform functions that are incidental to legislative functions, [INCLUDING SECURITY, MESSENGER, MAINTENANCE, AND PRINT SHOP EMPLOYEES,] and other employees designated by the committee;

legislative employee definition

*** Sec. 17.** AS 24.60.990(a) is amended by adding a new paragraph to read:

(17) "state travel" means travel with transportation or overnight lodging that is provided or paid for with state resources.

Defined state travel

*** Sec. 18.** AS 24.60.130(n) is repealed.

Section 14 replaces Sec 18 dealing with Alternate Members

SB

98

<TARGET><BILL>SB 98</BILL><SUBJECT>SB
98</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

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Chair
State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Administrative Regulation Review

SENATOR BILL WIELECHOWSKI

Senate Bill 98

"An Act Relating to the use of biometric information"

Sponsor Statement

In 2004, the Alaska Legislature unanimously passed legislation outlawing the collection, analysis, or storage of a law-abiding citizen's genetic information without their express written consent. This legislation was drafted in response to rapidly evolving technology that holds great promise for fields such as medicine and law enforcement. However, this technology also holds the potential for misuse by those who would use a person's genetic data to obtain information about them that Alaskans would normally have a right to keep private.

Senate Bill 98 would update Alaska statutes to protect not only Alaskans' DNA, but all similar forms of biometric information. The term "biometric information" refers to any information about an individual based on their unique behavioral or physiological characteristics. The most commonly known forms of biometric information are a person's fingerprints and their DNA, but also includes such information as iris and retinal patterns, hand geometry, voice patterns, and facial characteristics.

Many potential uses of biometric information are still at the rudimentary stages of development. However, new technologies will soon be available that will be able to make use of this information with chilling consequences for individual privacy and civil liberties.

Examples of the potential misuse of biometric information include the collection of an individual's data by potential employers or insurers to weed out applicants that may have a genetic predisposition towards certain illnesses and the use of video surveillance enhanced by facial recognition technology to track citizens' movements without their knowledge.

Alaskans should bear in mind that one of the proposed requirements of the Federal REAL ID Act was that every Alaskan ID card contain a radio frequency identification (RFID) chip, which would allow a citizen's movements to be tracked without their knowledge.

Thankfully, the State of Alaska joined other states in refusing to submit to the REAL ID Act. The legislature should take a similar strong stand to protect Alaskans' biometric information and their constitutional right to privacy.

CS FOR SENATE BILL NO. 98(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS WIELECHOWSKI, Coghill, Ellis, Menard, McGuire, Giessel, Egan, Paskvan, Thomas

A BILL

FOR AN ACT ENTITLED

"An Act relating to biometric information."

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

* **Section 1.** AS 18 is amended by adding a new chapter to read:

Chapter 14. Biometric Information.

Sec. 18.14.010. Biometric information consent. (a) A person may not retain or analyze, or disclose or distribute to another person, biometric information on an individual without first obtaining the informed and written consent of the individual.

(b) An individual may, at any time, revoke or amend the individual's consent provided under (a) of this section.

Sec. 18.14.020. Alternate identification. A person may not require an individual to provide biometric data to the person for the purpose of identifying the individual if the individual provides the person with a valid current

(1) United States passport; or

(2) identification card issued by a state in the United States or by a branch of the armed forces of the United States.

Sec. 18.14.030. Uniform consent form. The Department of Health and Social Services may by regulation adopt a uniform consent form to assist persons to meet the requirements for the consent required by AS 18.14.010. A person who retains or analyzes, or discloses or distributes to another person, biometric information, based on consent that is provided in a uniform consent form that has not been revoked, is exempt from civil liability under AS 18.14.060 and from criminal liability for the retention, analysis, disclosure, or distribution of the biometric information.

Sec. 18.14.040. General authorization. A general authorization for the release of medical records or medical information may not be construed to constitute the informed and written consent required by AS 18.14.010.

Sec. 18.14.050. Private right of action. An individual may bring a civil action against another person who violates AS 18.14.010 or 18.14.020. Except as provided by AS 18.14.030, a person who violates AS 18.14.010 is liable to the individual for actual damages and a penalty of $5,000, except that, if the violation resulted in profit or monetary gain to the person, the penalty is $100,000.

Sec. 18.14.060. Exemptions. This chapter does not apply to the collection, retention, analysis, disclosure, or distribution of

(1) biometric information for a law enforcement purpose, including the identification of perpetrators, the investigation of crimes, the identification of missing or unidentified persons, or the identification of human remains;

(2) biometric information when authorized by state or federal law;

(3) facial images by the Department of Administration for drivers' licenses issued under AS 28.15, for state identification cards issued under AS 18.65.310, for administering AS 28.15, or for administering AS 18.65.310; or

(4) facial images that are not used in a biometric system.

Sec. 18.14.090. Definitions. In this chapter,

(1) "biometric data" means fingerprints, handprints, voices, facial images, iris images, retinal images, vein scans, hand geometry, or finger geometry;

(2) "biometric information" means biometric data that is used in a biometric system for fingerprint recognition, hand geometry recognition, finger geometry recognition, voice recognition, facial recognition, iris scans, retinal scans, or

vein recognition;

(3) "biometric system" means an automated system capable of

(A) capturing biometric data from an individual's biometric information;

(B) extracting and processing the biometric data captured under (A) of this paragraph;

(C) storing the biometric data extracted under (B) of this paragraph;

(D) comparing the biometric data extracted under (B) of this paragraph with biometric data stored for the individual for use in future recognition of the individual; and

(E) determining how well the extracted and stored biometric data match when compared under (D) of this paragraph, and indicating whether an identification or verification of identity has been achieved;

(4) "facial recognition" means the use of an image of the visible physical structure of an individual's face for recognition purposes;

(5) "finger geometry recognition" means the use of the shape and dimensions of one or more fingers for recognition purposes;

(6) "fingerprint recognition" means the use of the physical structure of an individual's fingerprint for recognition purposes;

(7) "governmental entity" means a state agency, a municipality, and an agency of a municipality; in this paragraph, "state agency" means an agency of the executive, judicial, or legislative branch of state government;

(8) "hand geometry recognition" means the use of the physical structure of an individual's hand for recognition purposes;

(9) "iris scan" means the use of an image of the physical structure of an individual's iris for recognition purposes;

(10) "person" has the meaning given in AS 01.10.060, and includes a governmental entity;

(11) "retinal scan" means the use of the pattern of blood vessels in an individual's eye for recognition purposes;

(12) "vein recognition" means the use of the veins in an individual's skin for recognition purposes.

LEGAL SERVICES

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MEMORANDUM March 14, 2011

SUBJECT: Sectional summary of SB 98 relating to biometric information (Work Order No. 27-LS0661\A)

TO: Senator Bill Wielechowski
Attn: Michelle Sydeman

FROM: Theresa Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents

Section 1. Adds a new chapter, AS 18.14, relating to biometric information.

Sec. 18.14.010 prohibits retaining, analyzing, disclosing, or distributing an individual's biometric information without obtaining the individual's consent. Allows the individual to revoke or amend the consent.

Sec. 18.14.020 prohibits a person from requiring an individual to provide biometric data for identification if the individual provides certain other identification.

Sec. 18.14.030 authorizes the Department of Health and Social Services to adopt a uniform consent form for sec. 18.14.010. If a person uses an unrevoked uniform consent form for an individual's consent, exempts the person from civil liability under sec. 18.14.060 and criminal liability for retention, analysis, disclosure, or distribution of the individual's biometric information.

Sec. 18.14.040 states that a general authorization for the release of medical information does not constitute the consent required by sec. 18.14.010.

Sec. 18.14.050 provides an individual with a private right of action for violations of secs. 18.14.010 or 18.14.020. Establishes that the violator of sec. 18.14.010 is liable to the individual for actual damages and a penalty.

Sec. 18.14.060 lists the exemptions from the chapter.

Sec. 18.14.090 defines terms for the chapter.

If I may be of further assistance, please advise.

TLB:plm
11-139.plm

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Judiciary Committee

Member
Administrative Regulation Review

SENATOR BILL WIELECHOWSKI

Explanation of Changes From Original to CS, Version "B"

- **Page 1, Line 13**: The "and" has been changed to an "or," allowing a person to only present one form of identification.
- **Page 2, Line 18 and 21:** The term "biometric information" has been added to clarify.
- **Page 2, Lines 22-25:** Exemptions were clarified for the issuance of drivers' licenses, ID cards, and pictures not entered into a biometric system.
- **Page 2, Line 28:** Vein scans, hand geometry, and finger geometry were added as definitions of biometric data.
- **Page 2, Line 30:** Finger geometry recognition was included as a definition of biometric information. Its corresponding definition was added on **Page 3, Lines 17 and 18**.
- **Page 3, Line 1:** The word "palm" was removed from "palm vein recognition" in the definition of biometric information.

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Biometrics Fact Sheet

- There is a growing trend for companies and organizations to use biometric data as a means of identifying individuals. By giving personal biometric information, like fingerprints, iris scans, or facial images, a person gives away highly personal, traceable information.

- Passports, identification cards, and social security cards can be used to travel abroad, identify oneself in court, and a plethora of other activities. These should be suitable checks of identification.

- Organizations that collect biometric data routinely sell that data to third parties, without our consent.

- There is no doubt biometric data can be extremely helpful in fields such as medicine and security, but we should never be forced to give up such personal identification. This bill does not ban biometrics, but bans their use without our consent.

ELECTRONIC FRONTIER FOUNDATION

Biometrics: Who's Watching You?

September 2003

Introduction

Among the many reactions to the September 11 tragedy has been a renewed attention to biometrics. The federal government has led the way with its new concern about border control. Other proposals include the use of biometrics with ID cards and in airports, e.g. video surveillance enhanced by facial-recognition technology.

The purpose of this document is to sketch out EFF's concerns about biometrics. In today's public arena, biometric technologies are being marketed as a "silver bullet" for terrorism; however, very little independent, objective scientific testing of biometrics has been done. Deploying biometric systems without sufficient attention to their dangers makes them likely to be used in a way dangerous to civil liberties. This document is very much a work in progress and we welcome comments.

What Are Biometrics?

Biometrics refers to the automatic identification or identity verification of living persons using their enduring physical or behavioral characteristics. Many body parts, personal characteristics and imaging methods have been suggested and used for biometric systems: fingers, hands, feet, faces, eyes, ears, teeth, veins, voices, signatures, typing styles, gaits and odors.

Our Major Concerns

- **Biometric technology is inherently individuating and interfaces easily to database technology, making privacy violations easier and more damaging.** If we are to deploy such systems, privacy must be designed into them from the beginning, as it is hard to retrofit complex systems for privacy.
- **Biometric systems are useless without a well-considered threat model.** Before deploying any such system on the national stage, we must have a realistic threat model, specifying the categories of people such systems are supposed to target, and the threat they pose in light of their abilities, resources, motivations and goals. Any such system will also need to map out clearly in advance how the system is to work, in both in its successes and in its failures.
- **Biometrics are no substitute for quality data about potential risks**. No matter how accurately a person is identified, identification alone reveals nothing about whether a person is a terrorist. Such information is completely external to any biometric ID system.
- **Biometric identification is only as good as the initial ID.** The quality of the initial "enrollment" or "registration" is crucial. Biometric systems are only as good as the initial identification, which in any foreseeable system will be based on exactly the document-based methods of identification upon which biometrics are supposed to be an improvement. A terrorist with a fake passport would be issued a US visa with his own biometric attached to the name on the phony passport. Unless the terrorist A) has already entered his biometrics into the database, and B) has garnered enough suspicion at the border to merit a full database search, biometrics won't stop him at the border.
- **Biometric identification is often overkill for the task at hand.** It is not necessary to identify a person (and to create a record of their presence at a certain place and time) if all you really want to know is whether they're entitled to do something or be somewhere. When in a bar, customers use IDs to prove they're old enough to drink, not to prove who they are, or to create a record of their presence.
- **Some biometric technologies are discriminatory.**A nontrivial percentage of the population cannot present suitable features to participate in certain biometric systems. Many people have fingers that simply do not "print well." Even if people with "bad prints" represent 1% of the population, this would mean massive inconvenience and suspicion for that minority. And scale matters. The INS, for example, handles about 1 billion distinct entries and exits every year. Even a seemingly low error rate of 0.1% means 1 million errors, each of which translates to INS resources lost following a false lead.
- **Biometric systems' accuracy is impossible to assess before deployment** Accuracy and error rates published by biometric technology vendors are not trustworthy, as biometric error rates are intrinsically manipulable. Biometric systems fail in two ways: false match (incorrectly matching a subject with someone else's reference sample) and false non-match (failing to match a subject with her own reference sample). There's a trade-off between these two types of error, and biometric systems may be "tuned" to favor one error type over another. When subjected to real-world testing in the proposed operating environment, biometric systems frequently fall short of the performance promised by vendors.
- **The cost of failure is high.** If you lose a credit card, you can cancel it and get a new one. If you lose a biometric, you've lost it for life. Any biometric system must be built to the highest levels of data security, including transmission that prevents interception, storage that prevents theft, and system-wide architecture to prevent both intrusion and compromise by corrupt or deceitful agents within the organization.

Despite these concerns, political pressure for increasing use of biometrics appears to be informed and driven more by marketing from the biometrics industry than by scientists. Much federal attention is devoted to deploying biometrics for border security. This is an easy sell,

because immigrants and foreigners are, politically speaking, easy targets. But once a system is created, new uses are usually found for it, and those uses will not likely stop at the border.

With biometric ID systems, as with national ID systems, we must be wary of getting the worst of both worlds: a system that enables greater social surveillance of the population in general, but does not provide increased protection against terrorists.

Some Current Biometric Initiatives

Sec. 403(c) of the **USA-PATRIOT Act** specifically requires the federal government to "develop and certify a technology standard that can be used to verify the identity of persons" applying for or seeking entry into the United States on a U.S. visa "for the purposes of conducting background checks, confirming identity, and ensuring that a person has not received a visa under a different name."

The recently enacted **Enhanced Border Security and Visa Entry Reform Act of 2002**, Sec. 303(b)(1), requires that only "machine-readable, tamper-resistant visas and other travel and entry documents that use biometric identifiers" shall be issued to aliens by October 26, 2004. The Immigration and Naturalization Service (INS) and the State Department currently are evaluating biometrics for use in U.S. border control pursuant to EBSVERA.

Even prior to September 11, however, large-scale civilian biometric identification systems were being pushed. Both the **Personal Responsibility and Work Opportunity Act of 1995** (PRWOA), a welfare reform law, and the **Immigration Control and Financial Responsibility Act of 1996** (ICFRA), an immigration reform law, called for the use of "technology" for identification purposes.

The PRWOA requires the states to implement an electronic benefits transfer program "using the most recent technology available . . . which may include personal identification numbers, photographic identification . . . and other measures to protect against fraud and abuse." This law covers, for example, the Food Stamps program.

The ICFRA requires the President to "develop and recommend . . . a plan for the establishment of a data system or alternative system . . . to verify eligibility for employment in the United States, and immigration status in the United States for purposes of eligibility for benefits under public assistance programs . . . or government benefits." This system "must be capable of reliably determining with respect to an individual whether . . . the individual is claiming the identity of another person."

The **Illegal Immigration Reform and Immigrant Responsibility Act of 1996** (IIRAIRA) requires the INS to include on alien border crossing cards "a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable." The State Department collects fingerprints and photographs of aliens for these cards.

The **Truck and Bus Safety and Regulatory Reform Act of 1988** (TBSRRA) requires "minimum uniform standards for the biometric identification of commercial drivers."

EFF's concerns about biometrics

Why be concerned about biometrics? Proponents argue that: A) biometrics themselves aren't dangerous because all the real dangers are associated with the database behind the biometric information, which is little different from problems of person-identifying information (PII) databases generally; B) biometrics actually promote privacy, e.g., by enabling more reliable identification and thus frustrating identity fraud.

But biometric systems have many components. Only by analyzing a system as a whole can one understand its costs and benefits. Moreover, we must understand the unspoken commitments any such system imposes.

Surveillance

The chronic, longitudinal capture of biometric data is useful for surveillance purposes. Our Surveillance Monitor page highlights some of these issues. Biometric systems entail repeat surveillance, requiring an initial capture and then later captures.

Another major issue relates to the "voluntariness" of capture. Some biometrics, like faces, voices, and fingerprints, are easily "grabbed." Other biometrics, at least under present technology, must be consciously "given." It is difficult, for instance, to capture a scan of a person's retina or to gather a hand geometry image without the subject's cooperation. Easily grabbed biometrics are a problem because people can't control when they're being put into the system or when they're being tracked. But even hard-to-grab biometrics involve a trust issue in the biometric capture device and the overall system architecture.

Databases

To be effective, a biometric system must compare captured biometric data to a biometric database. Our National ID System page highlights issues surrounding database abuse, which has both static and dynamic dimensions.

The static issues surrounding databases are mainly about safeguarding large and valuable collections of personally identifying information. If these databases are part of an important security system, then they (and the channels used to share PII) are natural targets for attack, theft, compromise, and malicious or fraudulent use.

The dynamic issues surrounding databases mainly concern the need to maintain reliable, up-to-date information. Databases that seek to maintain accurate residence information must be updated whenever one moves. Databases that are used to establish eligibility for benefits must be updated so as to exclude persons no longer eligible. The broader the function of the system, the more and broader the updating that is required, increasing the role of general social surveillance in the system.

It may seem that one of the issues that plagues token-based ID systems (like ID cards) -- the security or integrity of the token itself -- does not apply for biometric systems, because "you are your ID." But the question of the reliability of the token is really a question about trust. In an ID card system, the question is whether the system can trust the card. In biometric systems, the question is whether the individual can trust the system. If someone else captures your signature, fingerprint, or voice, for instance, what prevents it from being used by others? Any use of biometrics with a scanner run by someone else involves trusting someone's claim about what the scanner does and how the captured information will be used.

Vendors and scanner operators may say that they protect privacy in some way, perhaps by hashing the biometric data or designing the database to enforce a privacy policy. But the end user typically has no way to verify whether such technical protections are effective or implemented properly. End-users should be able to verify any such claims, and to leave the system completely if they are not satisfied. Exiting the system, of course, should at least include the expungement of the end-user's biometric data and records.

Linking

An oft-noted risk of biometric systems is the use of biometrics as a linking identifier. This risk, of course, depends to some extent on standardization. Consider, for instance, the use of the Social Security number as a linker across disparate databases. While the private sector would not have been able to develop anything like the SSN on its own, once the government created this identifier, it became a standard way of identifying individuals. Standardization therefore creates new privacy risks because information gathered for one purpose can be used for completely unrelated, unconsented-to purposes.

Currently, Automated Fingerprint ID Systems (AFIS) are heavily used by the government in connection with law enforcement, but there is at present little standardization within the AFIS industry. If law enforcement and private industry were to unify their fingerprint databases under one common standard, such as under a national ID system, this would potentially put one's entire life history in interoperating databases that are only a fingerprint away.

Tracking

By far the most significant negative aspect of biometric ID systems is their potential to locate and track people physically. While many surveillance systems seek to locate and track, biometric systems present the greatest danger precisely because they promise extremely high accuracy. Whether a specific biometric system actually poses a risk of such tracking depends on how it is designed.

Why should we care about perfect tracking? EFF believes that perfect tracking is inimical to a free society. A society in which everyone's actions are tracked is not, in principle, free. It may be a livable society, but would not be our society.

EFF believes that perfect surveillance, even without any deliberate abuse, would have an extraordinary chilling effect on artistic and scientific inventiveness and on political expression. This concern underlies constitutional protection for anonymity, both as an aspect of First Amendment freedoms of speech and association, and as an aspect of Fourth Amendment privacy.

Implemented improperly, biometric systems could:

- increase the visibility of individual behavior. This makes it easier for measures to be taken against individuals by agents of the government, by corporations, and by our peers.
- result in politically damaging and personally embarrassing disclosures, blackmail and extortion. This hurts democracy, because it reduces the willingness of competent people to participate in public life.
- increase the 'circumstantial evidence' available for criminal prosecution. This might dramatically affect the existing balance of plausible -sounding evidence available to prosecutors, and hence increase the incidence of wrongful conviction. Many criminal cases are decided by plea bargaining, a process that is sensitive to the perceived quality of evidence. Even ambiguous or spurious evidence generated by complex technical systems may be difficult for overburdened public defenders to challenge.
- enable the matching of people's behavior against pre-determined patterns. This could be used by the government to generate suspicion, or by the private sector to classify individuals into micro-markets, the better to manipulate consumer behavior.
- aid in repressing readily locatable and trackable individuals. While the public's concern is usually focused on the exercise of state power, these technologies may also greatly empower corporations. If proper privacy safeguards are not constructed into such systems, they would prove useful in dealing with such troublesome opponents as competitors, regulators, union organizers, whistleblowers, and lobbyists, as well as employees, consumer activists, customers and suppliers.

The Attributes of Biometric Systems

How Do Biometrics Compare to Other Types of ID?

Currently other than personally recognizing someone, or having a trusted third party personally swear to their identity, the only other technique for identifying a person is through the use of a "token." These tokens, which are in essence representations of the oath of a trusted third party, come in two basic forms:

- **Knowledge tokens**, such as passwords, secret PINs (Personal Identification Numbers), or knowledge of personal data (knowing one's mother's maiden name, e.g.), or
- **Physical tokens** such as ID cards, passports, chip cards, or plain old keys.

Token IDs offer certain advantages over biometric identification. Security against "false acceptance" of impostors can be raised by increasing the complexity of the token used for identification. Also, in the event of loss or compromise, the token, be it a password, PIN, key, or ID card, can be revoked, changed or reissued, a biometric measurement cannot.

The advantage of biometrics is that unlike tokens, biometrics cannot be lost, loaned, or forgotten. Token-based systems must verify that the presenter is the authorized user, not an unauthorized person who has come to possess the token.

Used carefully, biometrics may be combined with token-based systems to mitigate the vulnerability of ID tokens to unauthorized use.

Functions of Biometric Systems

One useful way of thinking about biometrics is that they are used for one of two purposes: A) To prove that you are who you say you are (positive ID), or B) To prove that you are not who you say you are not (negative ID).

In a positive ID situation, the subject asserts that she is Jane Doe and submits a "live" sample (a fingerprint, for example) to the system. The system then checks its database of previously enrolled or registered samples to see if the live sample matches the reference sample. A positive ID system is designed to prevent more than one person from using a single identity.

In a negative ID situation, John Roe claims *not* to be someone already known to the system. Here, the system checks its database to see that Roe is not on the watchlist of suspected criminals and terrorists, whose biometrics are already in the system. A negative ID system is designed to prevent one person from using more than one identity.

When biometrics are employed to effect negative identification, one need not be enrolled. The only persons who must be "in" the database are those whom the operator is trying to keep out or catch.

Biometrics alone cannot establish "true identity." A biometric system cannot prevent someone from furnishing fake credentials when they first enter the system. They can only prevent them from using another identity once enrolled.

Common Aspects of All Biometric Systems:

All biometric technology systems have certain aspects in common. All are dependent upon an accurate reference or "registration" sample. If a biometric system is to identify a person, it first must have this sample, positively linked to the subject, to compare against. Modern biometric identification systems, based on digital technology, analyze personal physical attributes at the time of registration and distill them into a series of numbers. Once this reference sample is in the system, future attempts to identify a person are based on a comparison of a "live" sample and the reference sample or samples.

A perfect system would recognize a person 100% of the time, and reject an impostor 100% of the time. However, biometric samples are gathered from people in environmental conditions that are uncontrollable, over equipment that may slowly be wearing out, and using technologies and methods that vary in their level of precision. Consequently, the accuracy of biometric systems is assessed in light of these confounding variables via its tendency to experience either a "false match" (also called a "false accept") or a "false non-match" ("false reject"). The point at which these two rates intersect is called the equal error rate or crossover point.

Biometric systems may be "tuned" to diverge from the equal error rate to provide a match threshhold that satisfies the designer's requirements. If a system compares a large number of persons against a small number of samples, and the consequence of a false match is low, (for example, at a border crossing or airport that is looking for a short list of criminals) a system biased towards a higher "false accept" or "false match" rate may be desirable. The advantage to biasing a system in this manner is that it is likely to err on the side of safety, and less likely to let a criminal slip through undetected. The disadvantage is that the system will falsely associate innocent people with criminals. If other safeguards are in place and the system operators understand the system's bias towards false match, the result can be a relatively trivial loss of convenience due to increased scrutiny (extra inspection of luggage, questioning, etc.) Biasing such a system towards a high "false non-match" or "false reject" rate will result in fewer passengers slowed down at the gate, but at the cost of possibly losing the sought-after criminals.

When assessing the utility or the cost of a biometric system, it's important to bear the common features of all such systems in mind. How is the reference sample to be gathered and catalogued? How it the live sample going to be gathered? Can a live sample be captured without the subject's knowledge and cooperation? What are the implications of all four possible outcomes (true match, true non-match, false match, false non-match)? What is the value of a successful system, and what is the cost, to all parties, should it fail?

Further, we should not assess failure simply from the perspective of the core biometric technology itself. Even an ideal system can be defeated easily if it is incorporated into an insecure or poorly-designed overall system architecture. Any biometric system, especially one that involves a component of telecommunication, must be very carefully designed to prevent the loss or interception of user biometrics. Any deployed system must incorporate safeguards to prevent the interception of biometric data while it is being communicated. If a user's biometric is intercepted, criminals may be able to replicate either the sample itself or the string of binary data produced by a successfully-matched sample. Armed with such intercepted biometric data, a criminal would be able to effect a potentially very damaging identity theft.

Types of Biometrics

A proper assessment is built not only on a general understanding of biometrics, but also on an understanding of specific technologies. An understanding of both biometrics in general and specific biometric technologies is a necessary condition for a solid understanding of the larger social implications of biometrics.

Signature

The biometric most familiar to us is the signature. Our ability to judge by sight if one signature matches another has made this a time-proven and legally-binding biometric. However, by sight alone, most of us cannot recognize the pressure of the pen on the paper or the speed and rhythms of its traverse of the page. Computers can do all these things, and quantify, analyze and compare each of these properties to make signature recognition a viable biometric technology. Being based on things that are not visible (pen pressure and velocity, for example), signature-based biometric technology, offers a distinct advantage over regular signature verification -- in addition to mimicking the letter forms, any potential forger has to fabricate a signature at the same speed, and with the same pen weight, as his victim.

Signature biometrics pose a couple of unique problems. The first is the comfort with which people are already willing to use their signature as a form of identification. While this high level of consumer acceptance is viewed as a strength by vendors of such systems, this bears with it a strong downside. Without proper notification, a person may sign an electronic signature pad and unwittingly also be surrendering a reference or live biometric sample. Since the custom of leaving a signature as one's "official mark" is based on the presumption of irreproducibility (i.e., that a forger would be hard-pressed to imitate a signature just by looking at it), people are willing to provide a signature without giving its potential for reproduction a second thought. However, electronic data is easy to copy and transmit. And so, a forger posing as a delivery man might fraudulently secure a signature biometric by presenting a victim with a "gift" box, requesting a signature to confirm delivery, and making off with the victim's biometric data.

The second unique property of signature biometrics is that unlike all other biometrics, which either establish an identity (identification) or confirm an identity (authentication), a signature can convey *intent* (authorization). In other words, a traditional signature on paper is taken both to authenticate the signator, and to convey the signator's legal authority. An electronic system that solicits a user's non-signature biometric must provide a separate step to convey the user's legal authorization for any binding transaction. A signature-based biometric system could mimic our current legally customary acceptance of a signature to simultaneously convey both identity and authority.

Keystroke Dynamics

The rhythms with which one types at a keyboard are sufficiently distinctive to form the basis of the biometric technology known as keystroke dynamics. While distinct, keystroke dynamics are not sufficiently unique to provide identification, but can be used to confirm a user's identity.

Keystroke dynamics, unlike other biometric technologies, is 100% software-based, requiring no sensor more sophisticated than a home computer. Because of this, deployment is occurring in fairly low-stakes, computer-centric applications, such as content filtering (Net Nanny owns BioPassword, the leading keystroke dynamics vendor) and digital rights management, in which passwords to download music are bolstered with by keystroke dynamic verification, to prevent password-sharing. As a general rule, any method involving home or office computers is inherently insecure, as these devices leave a lot more room for experimentation than devices like ATMs or entry systems, and the information they use tends to travel over unsecured communication lines.

Hand Geometry

Perhaps the most ubiquitous electronic biometric systems are hand geometry based. Hand-geometry-based systems require the subject to place his or her hand (usually the right hand) on a plate where it is photographically captured and measured. Made of 27 bones and a complex web of interconnected joints, muscles, and tendons, the human hand presents a sufficiently peculiar conformation of anatomical features to enable authentication, but is not considered sufficiently unique to provide full identification. Further, the geometry of the hand is variable over time, as hand shape may be altered due to injury, disease, aging, or dramatic weight swings. A simple hand-geometry system will measure length and thickness of digits, width of the palm at various points, and the radius of the palm. This results in a relatively simple identification that can be expressed in a very simple, compact string of data. Efforts have been made to improve the accuracy of hand geometry, including three-dimensional sampling (i.e., a second camera measuring the thickness of the hand from the side), and a patented

system (owned by the British concern, Neusciences) that measures the pattern of the veins of the hand. Neusciences claims that their system provides a high degree of accuracy and that the hand vein feature is unique and relatively invariable, changing little over a person's lifespan.

In deployment, traditional hand geometry systems have found acceptance in applications requiring verification of an identity, rather than a full proof or establishment of an identity. Airports, prisons, and factories have successfully employed hand-geometry-based systems to restrict access to runways, to prevent walk-out escapes during visits, and to ensure that time cards are being punched only by the worker, and not by that worker's pal on his or her behalf. In all these instances, the subject is attempting to prove or disprove his or her membership in a relatively small group of people (authorized runway personnel, prisoners/visiting family, factory workers). When stakes are high, these systems are not relied on exclusively to confirm identity; rather, they are used to provide an additional layer of security above and beyond that provided by existing security systems.

Since they must accommodate the largest of hands, any hand geometry or hand vein system must be somewhat bulky, and requires the user to perform an obtrusive task (placing his or her hand on the platen for sampling). Because of this obtrusiveness, hand-based biometrics represent less of a privacy threat than some other systems: subjects cannot have their biometric features sampled without their knowledge, and the sampling method is unambiguous in its intent.

Fingerprint

Fingerprinting is a highly familiar and well-established biometric science. The traditional use of fingerprinting, of course, has been as a forensic criminological technique, used to identify perpetrators by the fingerprints they leave behind them at crime scenes. Scientists compare a latent sample left at a crime scene against a known sample taken from a suspect. This comparison uses the unique features of any given fingerprint, including its overall shape, and the pattern of ridges, valleys, and their bifurcations and terminations, to establish the identity of the perpetrator.

In the context of modern biometrics, these features, called fingerprint minutiae, can be captured, analyzed, and compared electronically, with correlations drawn between a live sample and a reference sample, as with other biometric technologies. Fingerprints offer tremendous invariability, changing only in size with age, are highly resistant to modification or injury, and very difficult to "forge" in any useful way. Although the development of some sort of surreptitious sensor is not inconceivable, the reality is that sensors remain obtrusive, requiring a willful finger pressure to gather a useful sample. Unlike other systems, based on cameras and high-tech sensors, fingerprint sampling units are compact, rugged, and inexpensive, with commercially available systems from multiple vendors offering very good accuracy. Next-generation scanners can analyze below the surface of the skin, and can add pore pattern recognition in addition to the more obvious minutia of the fingerprint.

Facial Recognition

Facial recognition sprung into the national spotlight during the 2001 Super Bowl, when Tampa police scanned the faces of game fans without their knowledge for the purpose of spotting terrorists in the crowd. While this proved a public relations nightmare in January 2001, the use of this technology in New Orleans at the post-9/11 Super Bowl of 2002 generated little controversy. Facial recognition remains one of the more controversial biometric technologies because of its very *un*obtrusiveness. With good cameras and good lighting, a facial recognition system can sample faces from tremendous distances without the subject's knowledge or consent.

Most facial recognition technology works by one of two methods: facial geometry or eigenface comparison. Facial geometry analysis works by taking a known reference point (for example, the distance from eye to eye), and measuring the various features of the face in their distance and angles from this reference point. Eigenface comparison uses a palette of about 150 facial abstractions, and compares the captured face with these archetypal abstract faces. In laboratory settings, facial recognition results are excellent, but critics have questioned the effectiveness of the technology in real-world circumstances. Nevertheless, the accuracy of facial recognition has been good enough for casinos to have put the the technology to use since the late 1990s as a means to spot banned players. Facial recognition technology proponents claim good performance even against disguises, weight changes, aging, or changes in hairstyle or facial hair.

Eye biometrics: Iris/Retina

The human eye offers two features with excellent properties for identification. Both the iris (the colored part visible at the front of the eye) and the veins of the retina (the thin film of nerve endings inside the eyeball that capture light and send it back to your brain) provide patterns that can uniquely identify an individual. Retinal scanning is the older technology, and requires the subject to look into a reticle and focus on a visible target while the scan is completed. It's definitely one of the more intrusive biometric technologies, with some subjects reporting discomfort at the scanning method. Iris recognition has an advantage in ease of use, in that it merely requires the subject to look at a camera from a distance of three to ten inches. The iris scanner illuminates the iris with invisible infra-red light, which shows details on darker -colored eyes that are not visible to the naked eye. The pattern of lines and colors on the eye are, as with other biometrics, analyzed, digitized, and compared against a reference sample for verification.

Iridian Technologies, who hold the patents on iris recognition, claim that the iris is the most accurate and invariable of biometrics, and that their system is the most accurate form of biometric technology. Iridian's system also has the benefit of extremely swift comparisons. The compay claims that it can match an iris against a database of 100,000 reference samples in 2-3 seconds, whereas a fingerprint search against a comparable database might take 15 minutes.

Voice Verification

None of us finds it remarkable when a friend recognizes our voice on the telephone. However, what we find easy to do is still a very hard problem for computers, especially when their job is to identify someone positively. The prospect of accurate voice verification offers one great advantage, which is that it would allow a remote identification using the phone system, an infrastructure that's already been built and thus has zero client-side cost: no special reader needs to be installed in your home. Even without the phone system, the sampling apparatus, a microphone, remains far cheaper than competing, largely optically-based biometric technologies.

But voice recognition technology is still not good enough to be used as a front-line biometric technology. Simply put, voice verification systems have to account for a lot more variables than do other systems, starting with the inevitable compression of a voice captured by cheap microphones (especially those found on phone handsets), discriminating a voice from background noise and other sonic artifacts, and the human voice's tremendous variability, due to colds, aging, and simple tiredness. Also, just as a voice can be surreptitiously recorded over the telephone or face-to-face, a person's voice can be captured surreptitiously by a third party (either by tapping or bugging) and replayed, or a person's voice might be biometrically sampled remotely without consent during a fake door-to-door or telephone sales call. Because of these difficulties, commercial deployments of voice verification have been limited to "backup" status, systems in which there are other token-based methods of identification, with voice verification providing an added layer of protection.

Characterizing Different Biometrics

Different biometric features have characteristics that make them more or less useful for particular applications. Dr. James Wayman, director of the National Biometric Test Center at San Jose State University, categorizes biometric features in terms of five qualities:

- **Robustness**: repeatable, not subject to large changes.
- **Distinctiveness**: there are wide differences in the pattern among the population.
- **Accessibility**: easily presented to an imaging sensor.
- **Acceptability**: perceived as non-intrusive by the user.
- **Availability**: a user may present a number of independent measurable features.

Dr. Wayman explains these qualities by comparing fingerprinting to hand geometry.

> *"Fingerprints are extremely distinctive, but not very robust, sitting at the very end of the major appendages you use to explore the world. Damaging your fingerprints requires less than a minute of exposure to household cleaning chemicals. Many people have chronically dry skin and cannot present clear prints. Hands are very robust, but not very distinctive. To change your hand geometry, you'd have to hit your hand very hard with a hammer. However, many people (somewhat less than 1 in 100) have hands much like yours, so hand geometry is not very distinctive. Hands are easily presented without much training required, but most people initially misjudge the location of their fingerprints, assuming them to be on the tips of the fingers. Both methods require some "real-time" feedback to the user regarding proper presentation. Both fingerprints and the hand are accessible, being easily presented. In the 1990 Orkand study*, only 8% of customers at Department of Motor Vehicle offices who had just used a biometric device agreed that electronic fingerprinting "invades your privacy." Summarizing the results of a lengthy survey, the study rated the public acceptance of electronic fingerprinting at 96%. To our knowledge, there is no comparable polling of users regarding hand geometry, but we hypothesize that the figures would not be too different. With regard to availability, our studies have shown that a person can present at least 6 nearly-independent fingerprints, but only one hand geometry (your left hand may be a near mirror image of your right)."*
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> **Orkand Corporation, "Personal Identifier Project: Final Report", April 1990, State of California Department of Motor Vehicles report DMV88-89, reprinted by the U.S. National Biometric Test Center.*

Characterizing Biometric Applications

Dr. Wayman suggests characterizing biometric applications in terms of seven variables:

- **Cooperative vs. Non-Cooperative** This refers to the behavior of the "threat" or would-be deceptive user. Is the "threat" trying to cooperate with the system? If the threat is trying to enter a restricted area, she either cooperates with the positive ID system to try to fool it into thinking she's allowed in, or deceptively tries not to cooperate with a negative ID system so as not to trigger the alarm. One implication of this variable is the scope of database search. In cooperative applications, users may first identify themselves with a card or PIN, so that the system need only match against the claimed identity's template. In non-cooperative applications, users can't be trusted to identify themselves correctly, so the entire database may need to be searched.
- **Overt vs. Covert** Is the user aware that the biometric sampling and identification is occurring?
- **Habituated vs. Non-Habituated** Is the intended user expected to be experienced in the use of the system?
- **Attended vs. Non-Attended** Will the intended user be supervised when using the system?
- **Standard vs. Non-Standard Environment** How controlled are the environmental conditions for operation?
- **Public vs. Private** Will users be customers (public) or employees (private)?
- **Open vs. Closed** Will the application be required to exchange biometric data with other systems or not?

Dr. Wayman explains that the positive biometric identification (hand geometry) of users of the Immigration and Naturalization Service's Passenger Accelerated Service System (INSPASS) for rapidly admitting frequent travelers into the United States:

> *"can be classified as a cooperative, overt, non-attended, non-habituated, standard environment, public, closed application. The system is cooperative because those wishing to defeat the system will attempt to be identified as someone already holding a pass. It will be overt because all will be aware that they are required to give a biometric measure as a condition of enrollment into this system. It will be non-attended and in a standard environment because collection of the biometric will occur near the passport inspection counter inside the airports, but not under the direct observation of an INS employee. It will be non-habituated because most international travelers use the system less than once per month. The system is public because enrollment is open to any frequent traveler into the United States. It is closed because INSPASS does not exchange biometric information with any other system." (emphases added)*

Characterizing Biometric ID Systems

Dr. Wayman suggests that biometric ID systems should be viewed in terms of a generic biometric system made up of five basic components or subsystems, depending on the application: data collection, transmission, signal processing (which comprises feature extraction, quality control, pattern matching), storage, and decision.

- **Data collection** Biometric systems involve at least two discrete data collection steps. First, any biometric system must contain a biometric characteristic deemed "true" or canonical from the system's viewpoint. The term "enrollment" or "registration" refers to the first entry of biometric data into the database. Second, the system must compare a later-submitted "sample" (often called a "live sample") to the sample in the database. (Scale is crucial to the enrollment step, sometimes for quite mundane reasons. In the context of biometric visa issuance by the State Department, for instance, the government has been looking at whether or not U.S. consulates around the world have room to handle the additional equipment and physical traffic needed for data collection.)
- **Transmission** Many biometric systems collect data at one location but store and/or process it at another. Such systems require data transmission.
- **Signal processing** Once a biometric is acquired, it must be prepared for comparison. There are three basic tasks here: feature extraction, quality control, and pattern matching. A fourth task in large-scale systems is pattern classification.
  - *Feature extraction* involves finding the true biometric pattern amid noise and signal degradation, preserving the critical information, and discarding redundant or unnecessary data. Dr. Wayman gives the example of a text-independent speaker-recognition system. A properly implemented system isolates "features that depend only on the speaker and not on the words being spoken." At the same time, the system focuses on features that do not change "even if the speaker has a cold or is not speaking directly into the microphone."
  - *Quality control* involves checking to see if the signal is of good quality. Ideally, it should be possible to make a quick determination so that another measure can be taken if the signal is inadequate.
  - *Pattern matching* involves comparing the live sample to the reference sample in the database. If the user claims to be Jane Doe, the pattern-matching process may only need to compare the sample to Jane Doe's stored template. In other situations, the sample must be compared to multiple templates. The pattern-matching process generates a quantitative "distance" measure of the comparison -- how close are they? Even for the same person, the distance is rarely if ever zero.
  - *Pattern classification* is a technique aimed at reducing the computational overhead of pattern matching. In large-scale systems, it can be computationally taxing to match each sample against all stored templates in the database. If biometric patterns can be categorized, then it may be possible to perform the match against only the stored templates in that category. This is sometimes referred to as "binning." A different technique with the same goal is "filtering," which involves partitioning the database based on information not contained in the biometric itself. If you know the person is a man, you don't need to check against women's biometrics. Both of these techniques introduce additional error possibilities; if binning or filtering is erroneous, then the true template is not used and a false non-match results.
- **Decision** This subsystem implements the biometric ID system's actual policy with regard to matching. In general, lowering the number of false non-matches raises the number of false matches, and vice versa. The signal processing subsystem yields a quantitative "distance" measure, but "how close or far is enough?" is a matter of policy. In a high-security application where the cost of a false acceptance could be high, system policy might prefer very few false acceptances and many more false rejections. In a commercial setting where the cost of a false acceptance could be small and treated as a cost of doing business, system policy might favor false acceptances in order not to falsely reject and thereby inconvenience large numbers of legitimate customers. The inevitable existence of these errors means that any biometric ID system must also have well-designed policies for exception handling.
- **Storage** Biometric reference samples must be stored somewhere for matching purposes. For systems only performing "one-to-one" matching, the database may be distributed on cards carried by each enrolled user. The user simply presents his or her biometric and the system checks to see if it matches the template stored on the card. Depending upon system policy, no central database need exist, although in this application a centralized database can be used to detect counterfeit cards or to reissue lost cards without re-collecting the biometric pattern.

  In other cases, centralized storage is necessary because the system must match the live sample to multiple templates. As the number of templates grows, speed becomes an increasingly significant issue. One technique is to partition the database (i.e., binning or filtering) so that any sample need only be matched to the templates in one partition. This increases system speed and decreases false

matches at the expense of increasing the false non-match rate owing to partitioning errors. System error rates thus change with increasing database size and ID systems do not linearly scale.

Full biometric patterns cannot be reconstructed from the stored reference samples if these are stored as templates, which reduce data richness dramatically. Templates themselves are often created using the system vendor's proprietary feature extraction algorithms. Whether stored templates themselves can be used to "spoof" the system internally is entirely dependent on the security of the system architecture.

Biometric ID systems may store not only the templates but also raw data. One reason to do so would be to allow changes to the system or to change system vendors without having to re-collect data from all enrolled users. Full raw data storage is a riskier practice in that new templates may be extracted from the data or the raw data itself may be used against the system.

The State of Scientific Testing of Biometric ID Systems

According to Dr. Wayman,

> *"Testing of biometric devices requires repeat visits with multiple human subjects. Further, the generally low error rates mean that many human subjects are required for statistical confidence. Consequently, biometric testing is extremely expensive, generally affordable only by government agencies. Few biometric technologies have undergone rigorous, developer/vendor-independent testing to establish robustness, distinctiveness, accessibility, acceptability and availability in 'real-world' (non-laboratory) applications."*

An in-depth discussion of the statistical methodology in testing biometric ID systems is beyond the scope of this discussion. We recommend Dr. Wayman's website to interested persons. Note, however, that it is very difficult to generalize from test results. At this time, scientists have no way of accurately estimating how large a test is needed to adequately characterize any biometric device in any application, even with advance knowledge of theoretical error rates.

Media Coverage/Resources

Check out this page for helpful resources including lots of media coverage and links related to the topic.

Acknowledgements:

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Want to learn how you can defend free speech, stand up for privacy, fight for government transparency, support consumer rights, and protect your right to innovation in the digital world? Visit **http://eff.org/fight** to find ways to help.

What Is Privacy in the Context of Biometrics?

The issue of privacy is central to biometrics. Critics complain that the use of biometrics poses a substantial risk to privacy rights. Proponents claim that biometrics protect privacy. Evaluating these arguments requires, in the first instance, an understanding of what privacy means. In this chapter we explore the definition of privacy in general.

Working Definition of Privacy

We all might have strong subjective ideas about what privacy is. Yet, the word "privacy" is hard to define, in part because the meaning depends greatly on the situation, culture, environment, and moment. In the immediate aftermath of September 11, for example, many Americans welcomed more intrusive governmental measures to increase public safety, even though that meant their privacy could suffer. As one New Yorker put it, "I want Big Brother on my shoulder, looking out for me." Pre-September 11, a frequent question asked at "Introduction to Biometrics" seminars was, "What about the privacy concerns?" Post-September 11, the more frequently asked question became, "What about the security aspects?"

Privacy scholar Ruth Gavison sees privacy as consisting of three parts: secrecy, anonymity, and solitude. She offers what is perhaps the extreme privacy model: "Privacy is a limitation of others' access to an individual.... In perfect privacy no one has any information about X, no one pays any attention to X, and no one has physical access to X" (Gavison 1980, 428).

Robert Ellis Smith, the editor of *Privacy Journal*, defines privacy as "the desire by each of us for physical space where we can be free of interruption, intrusion, embarrassment, or accountability and the attempt to control the time and manner of disclosures of personal information about ourselves" (Smith 2000, 6/ Smith 2002, 1–8). This definition hints at three types of privacy recognized by U.S. courts: physical, decisional, and information privacy.

Based on her survey of the extensive privacy literature, however, Professor Lillian R. Bevier concluded that "privacy is a chameleon-like word, used denotatively to designate a range of wildly disparate interests—from confidentiality of personal information to reproductive autonomy—and connotatively to generate goodwill on behalf of whatever interest is being asserted in its name" (Bevier 1995, 458).

Most important from the standpoint of biometrics, privacy includes an aspect of autonomy—as various scholars have expressed it: our control over information about ourselves, control over who can sense us, or control over the intimacies of personal identity. This control over information about us, or what is termed "information privacy" (or "informational privacy"), lies at the heart of the privacy concerns raised by this new technological reality. Individuals have an interest in determining how, when, why, and to whom information about themselves, in the form of a biometric identifier, would be disclosed.

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What Privacy Concerns Does the Use of Biometrics Implicate?

With this working definition of privacy in mind, we next discuss the privacy concerns implicated by the use of biometrics. These concerns relate to identification and invasiveness.

The Individual Gives Up a Biometric Identifier

To determine the specific privacy concerns implicated by biometrics, we must first focus on what exactly is disclosed when biometric data is collected. Regardless of whether an individual voluntarily provides a biometric identifier or is forced to surrender it as part of state action or government-required scheme, he is giving up information about himself. When biometrics, like fingerprinting, iris recognition, or retinal scanning is used, he discloses robust and distinctive information about his identity. When other biometrics, such as hand or finger geometry, are used, at a minimum, he discloses accurate information about who he is. Depending on the biometric, he is giving information about himself that could be used to identify him over large-scale databases.

Invasive Aspects of the Information

Beyond this fundamental disclosure, invasive implications might also be related to privacy concerns that stem from the biometric identification information disclosed. These invasive implications for privacy are essentially three-fold:

- The invasive effects of a secondary market, defined as disclosure of the biometric identification information to third parties
- Any invasive information that might be additionally obtained as part of the biometric identifier
- The invasiveness that might be associated with actual physical harm caused by the technology

Invasive Secondary Market Effects Once a biometric identifier is captured or collected from an individual in the primary market, and even if it is captured only once, the biometric identifier could easily be replicated, copied, and otherwise shared among countless public and private sector databases. This sharing in a secondary market could conceivably take place without the individual's knowledge or consent. Indeed, biometric identifiers could be bought and sold in a secondary market much the way names and addresses on mailing lists are currently bought and sold by data merchants.

An example illustrates the secondary market effect: I give my face and fingerprints to my local sports club so I can access the club and keep better track of my workouts. I do this by presenting my face to a camera whenever I enter and by touching my finger to the computer display on the treadmill and other equipment. I get a detailed monthly fitness report. The sports club conveniently enrolled both of my index fingers so I don't even have to remember which pointer

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finger to use. After a while, I start receiving marketing information telling me to show up at the local grocery store, retail outlet, and so on, because I am already preregistered and biometrically enrolled in their systems. That's because, along with my facial photograph, the sports club kept my raw data, or file images, in addition to the fingerprint templates, and sold the information to others.

Later, while shopping in the mall, sales associates insist on selling me athletic gear, protein supplements, and diet aids because their facial recognition system identified me as a failed jock from the sports club. Later, the police are confronted with the grisly homicide of the sports club manager in his office, where the only evidence is a single latent print left on the murder weapon. After no matches are made against the FBI's criminal master file, the new sports club management readily agrees to turn over the file images of fingerprints of all its members, including mine, so the latent print can be searched against them.

Particularly with respect to the private sphere, where the conduct of private actors has traditionally been given a large degree of freedom of action from government interference, few current legal limits exist in the United States on the use of biometric information held by private actors. This observation is not meant to suggest that the federal or state governments would not be able to regulate the use of biometric information held by private actors; rather, it emphasizes what the present regulatory baseline is with respect to the regulation of biometric information: Until regulatory action has been taken by government, the use of biometrics is left to the market. The legal situation is very different in the European Union, where a comprehensive privacy protection framework exists.

Invasive Information Is Obtained In addition to the identification information associated with the biometric, invasive information threatening privacy could conceivably include three other types of concerns. First, biometric identifiers could be used extensively for law enforcement purposes, as raised in the sports club example. Fingerprints have long been used by law enforcement, and electronic finger images—or what are in effect the next generation of fingerprints—are presently being used by various law enforcement agencies as part of their databases, such as the FBI's Integrated Automated Fingerprint Identification System (IAFIS).

Second, it is possible (and this point needs to be stressed: *only* possible) that some biometrics might capture more than just mere identification information. Information about a person's health and medical history might also be incidentally obtained. Recent scientific research, while the subject of controversy, suggests that fingerprints might disclose such information about a person. For example, Dr. Howard Chen, in his work on dermatoglyphics, or the study of the patterns of the ridges of the skin on parts of the hands and feet, notes that "certain chromosomal disorders are known to be associated with characteristic dermatoglyphic abnormalities," specifically citing Down syndrome, Turner syndrome, and Klinefelter syndrome as chromosomal disorders that cause unusual fingerprint patterns in a person. Certain nonchromosomal disorders, such as chronic, intestinal pseudo-obstruction (CIP) (described in the next paragraph),

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leukemia, breast cancer, and Rubella syndrome, have also been implicated by certain unusual fingerprint patterns.

Dr. Marvin M. Schuster, the recently retired director of the division of digestive diseases at Johns Hopkins Bayview Medical Center, has discovered a "mysterious relationship" between an uncommon fingerprint pattern, known as a digital arch, and a medical disorder called CIP that affects 50,000 people nationwide. Based on the results of a seven-year study, Dr. Schuster found that 54 percent of CIP patients have this rare digital arch fingerprint pattern. In comparison, arch fingerprints appear in only seven percent of the general population. Schuster's discovery suggests a genetic basis to the disease. Schuster explained that in the case of CIP, "the more digital arches there are in the fingerprint, the stronger the correlation [to the condition]. The majority of CIP patients possess at least one digital arch. This discovery offers an important clue in diagnosing CIP, and it suggests that the disorder is congenital. It could potentially save people with CIP from multiple needless operations" (Hancock and Hendricks 1996).

While still extremely controversial within the scientific communities, several researchers report a link between fingerprints and homosexuality. For example, psychologists at the University of Western Ontario report that homosexual males are more likely than their heterosexual counterparts to show asymmetry in their fingerprints. "What we found is a statistically significant difference between groups of heterosexual and homosexual men," researcher Doreen Kimura said (Associated Press 1994). While this research is far from conclusive, the availability of such information with its possible links to medical and related information again raises concern about privacy and can create misperceptions.

From examining the retina or iris, an expert can determine that a patient may be suffering from common afflictions such as diabetes, arteriosclerosis, and hypertension; furthermore, a medical professional can also detect unique diseases of the iris and the retina. Moreover, the onset of certain diseases (such as diabetes) and conditions (such as pregnancy) may cause the retinal pattern to change; are the changes enough to cause a previously enrolled user to be rejected by a system because the user's biometric is no longer recognized by the system? Although both the iris and retina contain medical information, it is by no means obvious that the biometric data taken of the iris or retina implicates privacy concerns related to the disclosure of medical information. A necessary area of further technical inquiry is whether the computerized code taken of the iris or retina actually contains any medical information or if the information captured is sufficient to be used for any type of diagnostic purpose.

Much research remains to be done; however, a biometric identifier with any possible links to medical information will raise lingering questions about the privacy aspects of the information disclosed. More important, the mere perception that such sensitive information may be disclosed could dissuade people from using potentially beneficial biometric systems.

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Actual Physical Harm; Physical Invasiveness Part of the "urban legend" surrounding biometrics holds that retinal scanning "shoots a laser beam into the eye." This is not the case, but urban legends die hard. Anecdotally, certain aviators, who are extremely proud of their 20/20 vision, supposedly had a hard time accepting retinal scanning devices in an experimental program because at least some of them feared the devices would adversely affect their perfect vision. Other users feared that diseases, such as conjunctivitis, may result from having to come into close proximity with a binocular-like device that strangers had touched. Some users of biometrics have complained that hand geometry systems dry their hands. Such fears, even when unfounded, can negatively affect the system because dissatisfied users will go out of their way not to cooperate with the system; some may even actively engage in acts of sabotage to prevent its use.

Documented cases of biometrics causing actual harm to a person are difficult, if not impossible, to find, but many of the technologies are fairly new. And to date, no enterprising plaintiff's attorney has brought a class-action lawsuit for personal injury on this biometrics-induced harm basis. The bottom line is that any liability resulting from any proven actual physical harm caused by biometric systems would be addressed by the individual state's tort liability regimes. On a related note, eventually, the judiciary will also have the opportunity to decide the admissibility of biometric identification as scientific evidence using the prevailing standards articulated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* in 1993.

Biometrics as Privacy's Foe: Criticisms of Biometrics

This section discusses the "foe" side of the coin: the criticisms of biometrics leading to loss of anonymity and autonomy and the "Big Brother" scenario, including the danger of function creep and degradation of the individual's reasonable expectation of privacy.

The Loss of Anonymity; the Loss of Autonomy

A basic criticism of biometrics is that we, as individuals, risk losing our anonymity and autonomy whenever biometric systems are deployed. Part of controlling information about ourselves includes our ability to keep other parties from knowing things about us, like who we are. While we all know that a determined party—whether the government or a private party—can learn our identity (and much more about us), the use of biometrics makes it clear that our identity is now fully established within seconds. As Roger Clarke explains, "The need to identify oneself may be intrinsically distasteful to some people.... They may regard it as demeaning, or implicit recognition that the organization with whom they are dealing exercises power over them" (Clarke 1994).

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Robert Ellis Smith agrees, noting that, "In most cases, biometric technology is impersonal" (Smith 1996). At the same time, as the technology improves, its use may become more ubiquitous, and individuals may find that they are required to provide a biometric identifier in unexpected, unwelcome, or unforeseen circumstances. Moreover, you cannot simply "make up" a biometric as you can a name, an address, or a phone number. In this sense, perhaps, the loss of anonymity leads to an inevitable loss of individual autonomy.

Biometrics should not really be blamed for the fact that there is less individual anonymity in society today than in decades or centuries past, however. Rather, far larger economic, political, and technological forces have been at work. America's transformation from an agrarian to industrial to post-industrial service (or "information age") economy, combined with the massive growth of government since the New Deal of the 1930s, have put a greater premium on the need for information about individuals and organizations. At the same time, technical advances have made it much easier and more convenient to collect, compile, and keep extensive information on individuals. This information-centric trend takes place because in the Information Age information has great value as a commodity. The computer, the enabler of "info-centrism," has helped make information a valuable commodity because it can process large amounts of personal information from large numbers of people in little time and at low cost.

While a biometric identifier is an accurate identifier, it is not the first nor the only identifier used to match or locate information about a person. Names and numerical identifiers such as social security numbers, account numbers, and military service numbers have long been used to access files with personal information. Moreover, the impressive search capabilities of computer systems with their abilities to search, for example, the full text of stored documents, make identifiers far less important for locating information about an individual.

We also should not lose sight of the fact that there is usually a good reason why individual recognition in the form of identification or verification is needed. Balancing the equities involved and depending on the case, the benefits—to the individual as well as to society—of establishing a person's identity generally outweigh the costs of losing anonymity. For example, given the massive problem of missing and abused children, many citizens would eagerly support the idea of day care providers using biometrics to make certain that our children get released at the end of the day to a parent or guardian whose identity has been verified. However, reasonable people can disagree as to the cost-benefit analysis.

Similarly, to consider a "pocketbook" example, the world's financial community has long been concerned about growing problems of ATM fraud and unauthorized account access, estimated to cost $500 million a year, check fraud at least $2 billion, and credit card fraud about $1.5 billion per year. The financial services industry believes that a significant percentage of these losses could be eliminated by the use of biometrics, by ensuring that only the authorized account

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holder could access the account. MasterCard, for example, has been evaluating various biometrics since 1995 and believes fingerprint technology is the best technology to reduce credit card fraud. According to Joel Lisker, the company's senior vice president of security and risk management, "We estimate that a fingerprint system, fully implemented, could save the financial services industry billions of dollars" (Haapaniemi 1998).

Critics give too much credit to biometrics' alleged ability to erode anonymity without giving enough attention to the market's ability to protect privacy in response. It is not obvious that more anonymity will be lost when biometrics are used. Public and private sector organizations already have the ability to gather substantial amounts of information about individuals by tracking, for example, credit card use, consumer spending, and demographic factors.

A parallel to the financial services industry might be helpful. Despite the existence of many comprehensive payment systems such as credit cards, which combine extreme ease of service with extensive record-keeping, many Americans still prefer to use cash for transactions—a form of payment that leaves virtually no record. An individual who wants anonymity might have to go to greater lengths to get it in the biometric world, but the ability of the marketplace to accommodate a person's desire for anonymity should not be so readily dismissed. Moreover, as explained next, the ability of biometrics to serve as privacy enhancing technologies should not be discounted.

The Biometric-Based "Big Brother" Scenario

Aside from the alliterative qualities the phrase possesses, critics of biometrics seem to inevitably link the technology to "Big Brother." Biometrics, in combination with impressive advancements in computer and related technologies, would, its critics argue, enable the State to monitor the actions and behavior of its citizenry. In this vein, concern has been expressed that biometric identifiers will be used routinely against citizens by law enforcement agencies. As Marc Rotenberg of the Electronic Privacy Information Center has succinctly explained, "Take someone's fingerprint and you have the ability to determine if you have a match for forensic purposes" (American Banker 1996).

This "Big Brother" concern, however, goes beyond normal police work. Every time an individual used her biometric identifier to conduct a transaction, a record would be made in a database that the government, using computer technology, could then match and use against the citizen—even in ways that are not authorized or meet with our disapproval. To borrow the reasoning of a 1973 report on national identity card proposals, the biometric identifier, in ways far more effective than a numerical identifier, "could serve as the skeleton for a national dossier system to maintain information on every citizen from cradle to grave" (U.S. Department of Health, Education and Welfare 1973).

Roger Clarke has perhaps offered the best worst-case *1984*-like scenario:

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> Any high-integrity identifier [such as biometrics] represents a threat to civil liberties, because it represents the basis for a ubiquitous identification scheme, and such a scheme provides enormous power over the populace. All human behavior would become transparent to the State, and the scope for nonconformism and dissent would be muted to the point envisaged by the antiutopian novelists (Clarke 1994).

At least one example exists from U.S. history of supposedly confidential records being used in ways never likely intended. In November 1941, almost two weeks before the Japanese attack on Pearl Harbor, President Franklin D. Roosevelt ordered a comprehensive list made to include the names and addresses of all foreign-born and American-born Japanese living in the United States. To compile the list, staffers used 1930 and 1940 census data. Working without the benefit of computers, staffers compiled the list in one week. Following the attack, President Roosevelt issued Executive Order 9066, authorizing military personnel to detain and relocate persons of Japanese ancestry. By the spring of 1942, the U.S. government forced persons of Japanese descent, including U.S. citizens, to relocate from their homes on the West Coast and report to relocation centers. An estimated 120,000 people, many of whom were U.S. citizens, were held without judicial review. John Miller and Stephen Moore, two libertarian scholars, contend, "The history of government programs indicates that privacy rights are violated routinely whenever expediency dictates" (Miller and Moore 1995).

Function Creep

The biometric-based "Big Brother" scenario would not happen instantly. Rather, when first deployed, biometrics would be used for limited, clearly specified, sensible purposes—to combat fraud, to improve airport security, to protect our children, and so on. But consider what Justice Louis Brandeis (of "right to privacy" fame) warned in his famous *Olmstead v. United States* dissent of 1927:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

What would inevitably happen over time, according to civil libertarians, is a phenomenon known as "function creep" or "mission creep": identification systems incorporating biometrics would gradually spread to additional purposes not announced or not even intended when the identification systems were originally implemented.

The classic example of function creep is the use of the Social Security Number (SSN) in the United States. Originated in 1936, the SSN's sole purpose was to

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facilitate record-keeping for determining the amount of Social Security taxes to credit to each contributor's account. In fact, the original Social Security cards containing the SSN bore the legend, "Not for Identification." By 1961, the Internal Revenue Service (IRS) began using the SSN for tax identification purposes. By 2002, countless transactions from credit to employment to insurance to many states' drivers licenses require a Social Security Number and countless private organizations ask for it even when it is not needed specifically for the transaction at hand. From "Not for Identification," the SSN has become virtual mandatory identification.

Moreover, given the consequences of function creep, the size, power, and scope of government will expand as all citizens get their biometric identifiers thrown into massive government databases by the "men [and women] of zeal, well-meaning but without understanding" about whom Justice Brandeis warned. In effect, an old Russian proverb aptly identifies the danger of biometrics for freedom-loving Americans: "If you are a mushroom, into the basket you must go."

Reduction of the Individual's Reasonable Expectation of Privacy

Just as function creep implies that biometrics will gradually (and innocently) grow to be used by zealous, well-meaning bureaucrats in numerous, creative ways in multiple forums, function creep will also enable the government to use the new technology of biometrics to reduce further over time the citizenry's reasonable expectations of privacy.

Analogies can be drawn from previous cases in which the government has used cutting-edge technology to intrude in an area in which the private actor had manifested a subjective expectation of privacy. For example, the Environmental Protection Agency (EPA), in an effort to investigate industrial pollution, used "the finest precision aerial camera available" mounted in an airplane flying in lawful airspace to take photographs of Dow Chemical Company's 2,000-acre Midland, Michigan, facilities. Fearful that industrial competitors might try to steal its trade secrets, Dow took elaborate precautions at its facility. Despite the precautions the company took to ensure its privacy, the Supreme Court, in a 5–4 vote handed down in 1985, found that Dow had no reasonable, legitimate, and objective expectation of privacy in the area the EPA had photographed. The dissent noted that, by basing its decision on the method of surveillance used by the government, as opposed to the company's reasonable expectation of privacy, the Court ensured that "privacy rights would be seriously at risk as technological advances become generally disseminated and available to society" (*Dow Chemical Co. v. United States*, 476 U.S. 227 (1986)).

Some contend that biometrics is precisely the kind of technological advance the *Dow* dissenters warned about. Citizens no longer would have a reasonable expectation of privacy any time they use a biometric identifier because the gov-

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ernment's use of biometrics and computer matching would be merely utilizing commercially available technologies.

Cultural, Religious, and Philosophical Objections

Other criticisms of the use of biometrics originate on cultural, religious, and philosophical grounds. These objections might not be shared by large numbers of people, but to the extent those who advocate them have sincerely held beliefs, they merit discussion.

Cultural: Stigma and Dignity

Simon Davies of Privacy International notes that it is no accident that biometric systems are being tried out most aggressively with welfare recipients. The British scholar contends that they are in no position to resist the State-mandated intrusion. Interestingly, in the 1995 GAO Report on the use of biometrics to deter fraud in the nationwide Electronics Benefit Transfer (EBT) program, the U.S. Department of the Treasury expressed concern over how finger imaging would impact on the dignity of the recipients and called for more testing and study.

While stigma and dignity arguments tied to the less fortunate elements of society have a strong emotional appeal, the available empirical data from Connecticut suggests that the majority of entitlement recipients actually support the use of biometrics. Some have criticized such surveys as flawed because the recipients could be reluctant to provide their true opinions because of retaliation fears.

Religious Objections

Several religious groups criticize biometrics on the ground that individuals are forced to sacrifice a part of themselves to a godless monolith in the form of the State. For example, certain Christians interpret biometrics to be a "mark of the beast," an objection based on language in the New Testament's "Revelation":

> [The Beast] causeth all, both small and great, rich and poor, free and bond, to receive a mark in their right hand, or in their foreheads: And that no man might buy or sell, save that he had the mark, or the name of the beast, or the number of his name.... And his number is six hundred, threescore, and six (Revelation, 13:16–18).

Certain Christians consider biometrics to be the brand discussed in Revelation and biometric readers as the only means of viewing these brands. For example, stressing that "the Bible says the time is going to come when you cannot buy or sell except when a mark is placed on your head or forehead," fundamentalist Christian Pat Robertson has expressed doubts about biometrics and has noted how the technology is proceeding according to scripture. And at least one religious group has complained that the hand geometry devices used by California were making "the mark of the beast" on enrollees' bands.

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FTC Fines ChoicePoint $15 Million for Security Breach

Los Angeles Times (LATWP News Service) (CA) - Thursday, January 26, 2006

Author: *Joseph Menn*

The Federal Trade Commission hit data broker ChoicePoint Inc. with the largest civil penalty in the agency's history Thursday for allowing sensitive information on 163,000 consumers to get into the hands of Los Angeles con artists last year.

The commission levied a $10 million penalty, on top of $5 million in restitution, making a total worth more than 10 percent of the company's profit last year. The agency declared that the company gave false assurances to the public about its security precautions while being so careless that it sold information to a purported business customer whose own ChoicePoint file identified a link to possible fraud.

Other con artists posing as customers applied for multiple accounts from the same publicly available fax machine, submitted revoked business licenses and in at least one case omitted the applicant's surname, according to the commission.

While some of the FTC's allegations were previously reported, many of the details were new, including complaints that the company failed to inquire after would-be customers applied with suspended articles of incorporation, mismatching addresses on supporting documents, and contact numbers belonging to residential or cellular phones.

Revealed because of a California disclosure law, the ChoicePoint breach launched a national debate about data security that has prompted new laws in more than a dozen states and 18 pieces of proposed federal legislation.

Most are aimed at making it harder for identity thieves to get Social Security numbers and other information that can be used to open credit accounts and make fraudulent purchases in the names of innocent consumers.

In announcing Thursday's settlement, FTC Chairwoman Deborah Platt Majoras said the commission wanted to serve notice to other businesses that consumer information must be protected.

Data security "must be a priority for financial and corporate America," she said. Signaling that the agency would continue to lead in the enforcement of identity theft, she said consumers should know that "we will make sure that your information is safeguarded and you don't have to worry that it will fall into the wrong hands and harm you."

The action generally won praise from consumer groups. Thursday's penalty "is a lot of money," even for a big company like ChoicePoint, said Chris Hoofnagle, West Coast director of the nonprofit Electronic Privacy Information Center. "It shows that the FTC is getting serious about security."

ChoicePoint still faces several private lawsuits over the data breach. The Securities and Exchange Commission also is investigating whether Chairman Derek Smith and another top executive improperly sold company shares before the breach became public.

The company was informed of the problem months earlier by investigators with the Los Angeles County Sheriff's Department. They arrested a Nigerian national, Olatunji Oluwatosin, who pleaded guilty last month to committing $2.5 million in fraud and is facing at least seven years in jail.

Beginning in January 2002, Oluwatosin used fake businesses with mail drops in Beverly Hills, Hollywood and elsewhere to set up ChoicePoint accounts and access personal information on more than 1,500 people, according to the district attorney's office. Search warrants served on ChoicePoint turned up a much wider fraud

problem.

The FTC cited ChoicePoint for violating the Fair Credit Reporting Act, which requires buyers of credit reports to have a proper purpose, and for violating basic fair-practices laws. It said ChoicePoint unfairly failed to protect consumer information and was deceptive when it made such statements as "Every ChoicePoint customer must successfully complete a rigorous credentialing process."

In legal papers filed with the settlement, the FTC said ChoicePoint improperly released nearly 10,000 credit reports and that about 800 cases of identity theft resulted. The $5 million in restitution will be distributed to those people and future victims of the data breach.

ChoicePoint didn't admit to the FTC assertions or to any wrongdoing in the settlement. It did agree to revamp its procedures in several ways, including instituting mandatory visits to many customers. It also must submit to security audits every two years through 2026.

By itself, the financial payout will do modest harm to ChoicePoint. Even after a charge for the penalty, the Alpharetta, Ga., company reported fourth-quarter earnings of $28 million Thursday on revenue of $258 million.

ChoicePoint shares dropped $3.35, or 7 percent, to $42.95 after the settlement was announced.

Section: *Financial*
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ALASKA STATE LEGISLATURE

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SENATOR BILL WIELECHOWSKI

SB 98—Biometric Information: What Are Other States Doing?

What are other states doing regarding the collection of biometric data?

In 2008, our office requested a research report asking which states have legislation preventing the collection of a person's biometric data, such as a fingerprints or DNA, for purposes other than law enforcement.

We received a comprehensive list of states that have laws prohibiting genetic discrimination in employment, prohibiting employers from requesting or requiring genetic information, prohibiting employers from performing genetic testing, and similar situations. In all, the researcher identified through the NCSL employment laws in 36 jurisdictions.

When it comes to non-genetic biometric information, the researcher identified 33 states which have some form of legislation, which includes a wide range of topic from prohibiting the use of lie detectors by anyone except peace officers in California, to requiring the Commissioner of Health and Social Services to examine the use of biometric identifiers for recipients of public assistance.

Among some of the more notable laws are Indiana, which prohibits the collection of personal information, including voice prints, by state agencies to that which is relevant and necessary to accomplish a statutory purpose; and New Hampshire which prohibits the collection of "biometric data" in connection with motor vehicle licensing.

Other states, such as Oregon, require those who apply for a driver's license to submit to the collection of biometric data.

Essentially, all states which have laws regarding DNA tend to protect that information at least for employment purposes, but the states vary greatly when it comes to other biometric information.

What About the Federal Government?

You will also find on Page 2 of the document in your packet titled, "Biometrics: Who's Watching You?" there is a description of some of the federal initiatives involving the biometrics. The most recent of these is the USA Patriot Act, which requires the use of biometric technology to identify foreign visitors, and the Enhanced Border and Visa Entry Reform Act of 2002, which is specific to border crossings.

LEGISLATIVE RESEARCH REPORT

NOVEMBER 20, 2008

REPORT NUMBER 09.031

STATE LAWS REGARDING BIOMETRIC PRIVACY

PREPARED FOR SENATOR BILL WIELECHOWSKI

BY ROGER WITHINGTON, LEGISLATIVE ANALYST

You asked for information regarding privacy. Specifically, you wished to know what states, if any, have laws that prohibit the collection of a person's biometric data, such as a fingerprint or deoxyribonucleic acid (DNA), for purposes other than law enforcement.

As you may know, the term "biometrics" is used for the various ways humans can be identified through unique aspects of their bodies. Fingerprints are probably the most commonly known biometric identifier. Other biometric identifiers include hand prints, vein dimensions, iris designs, blood vessels on retinas, body odor, walking characteristics, voice patterns, facial features, and genetic profile.[1]

The National Conference of State Legislatures (NCSL) collects information on actions state legislatures have taken to safeguard a persons' genetic information.[2] One common theme in state law is to protect employees and job seekers from genetic screening and discrimination. In Table 1, we provide NCSL's summary of state employment laws that pertain to a person's genetic information. As you can see from Table 1, genetic nondiscrimination in employment laws is now in place in 35 jurisdictions. In addition, laws in 19 states prohibit an employer from requesting genetic information or a genetic test from an employee; laws in 26 states prohibit an employer from requiring genetic information or a genetic test from an employee; laws in 16 states prohibit an employer from performing a genetic test on an employee; laws in 11 states prohibit an employer from obtaining an employee's genetic information or genetic test result; and laws in 14 states specify penalties for genetic discrimination in employment. As examples, we include as Attachment A genetic nondiscrimination employment laws from Arkansas, Iowa, New Hampshire, Oklahoma, and Wisconsin.

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[1] The Privacy Rights Clearinghouse, *http://www.privacyrights.org/ar/Privacy-IssuesList.htm.*

[2] NCSL's summary of state genetic privacy laws can be found at *http://www.ncsl.org/programs/health/genetics/prt.htm.* Alaska's Genetic Privacy law can be found at AS 18.13.010 through AS 18.13.100.

907-465-3991
907-465-3908 (fax)

Alaska Legislature
Legislative Research Services
w3.legis.state.ak.us/laa/research/research.php

State Capitol
Juneau, AK 99801

Table 1: State Genetic Privacy in Employment Laws	
Provisions	**State**
Genetic discrimination prohibited in hiring, firing, and/or terms, conditions or privileges of employment	Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wisconsin
Employer Prohibited From Requesting Genetic Information Genetic Test	Arkansas, Connecticut, Idaho, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New York, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Virginia, Wisconsin
Employer Prohibited From Requiring Genetic Information Genetic Test	Arkansas, Connecticut, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New York, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wisconsin
Employer Prohibited From Performing Genetic Test	California, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, Oklahoma, Oregon, Rhode Island, South Dakota, Vermont, Virginia, Wisconsin
Employer Prohibited From Obtaining Genetic Information Genetic Test Result	Arkansas, Idaho, Kansas, Massachusetts, Michigan, Minnesota, New York, Oklahoma, Oregon, South Dakota, Utah
Specific Penalties for Genetic Discrimination in Employment	Arkansas, Idaho, Iowa, Minnesota, Missouri, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Virginia, Wisconsin
Notes:	Current through November 2007. Arizona Revised Statutes, §41-1463; Arkansas Code Annotated, §11-5-401 to 405; California Code Annotated, Government Code §12926 and §12940; General Statutes of Connecticut, §46a-60; Delaware Code Annotated, §19-710 to 711; District of Columbia Code, §2-1401.01; Hawaii Revised Statutes, § 378-01 to 10; Idaho Code, §39-8301 to §39-8304; Illinois Compiled Statutes, §410-513/25 and §215 ILCS 5/356v; Iowa Code, §729.6; Kansas Statutes Annotated, §44-1002, §44-1009; Louisiana Statutes, §23:302, §23:303; Maine Revised Statutes, 5 §19301 and 5 §19302; Annotated Code of Maryland, Human Relations Commission §49B-15 to 16; Massachusetts General Laws, §151B; Michigan Compiled Laws, §37.1201, §37.1202; Minnesota Statutes, §181.974; Missouri Revised Statutes, §375.1300, §375.1306; Revised Statutes of Nebraska, §48-236; Nevada Revised Statutes, §613.345; New Hampshire Revised Statutes, §141-H; New Jersey Statutes, §10:5-5, §10:5-12; New Mexico Statutes, §24-21-1 to 7; New York Consolidated Laws, Executive Code §292, §296; General Statutes of North Carolina, §95-28.1A; Oklahoma Statutes, §36-3614.2; Oregon Revised Statutes, §659A.300 to 306; General Laws of Rhode Island, §28-6.7-1; South Dakota Compiled Laws, § 60-2-20; Texas Code, Labor Code 2§21-402; Utah Code, §26-45-103; Vermont Statutes, §18-9333; Code of Virginia, §40.1-28.7:1; Revised Code of Washington, §49.44.180; Wisconsin Statutes, §111.372.
Source:	National Conference of State Legislatures, *http://www.ncsl.org/programs/health/genetics/ndiscrim.htm*.

The state laws described above do not generally extend privacy protections to non-genetic based biometric identifiers such as fingerprints. We were unable to locate a comprehensive list of state laws that prohibit the collection of a person's non-genetic biometric data. In conjunction with NCSL, we searched the statutes of each state for laws that pertain, to some degree, to an individual's non-genetic biometric data and identified 33.

Most of the laws identified by our search are quite dissimilar; they range from preventing schools from collecting the biometric information of students without the written consent of the student's parent or guardian, to establishing inmate telephone systems within state prisons that can identify inmates through biometric identifiers. None of these laws, however, appear to pertain to your

issue of expressly prohibiting employers from collecting non-genetic biometric information from their employees or prospective employees.[3] We include each of these 33 laws as Attachment B; a brief summary of each of these laws is as follows.

Arizona Revised Statutes § 15-109: Prevents schools from collecting biometric information from a pupil unless the pupil's parent or guardian gives written permission.

California Codes, Civil Code § 52.7: Except as provided in law, a person shall not require, coerce, or compel any other individual to undergo the subcutaneous implanting of an identification device.

California Codes, Financial Code § 13082: Adding tactually discernible numerical keypad, such as fingerprint biometrics, to point-of-sale devices to aid visually impaired individuals.

California Codes, Penal Code § 637.3: With the exception of peace officers carrying out his or her official duties, no person or entity shall use any system which examines or records in any manner voice prints, or other voice stress patterns of another person to determine the truth or falsity of statements made by such other person without his or her express written consent given in advance of the examination.

California Codes, Penal Code § 4017.1: Except as provided in law, any person confined in a county jail, industrial farm, road camp, or city jail who is required or permitted by an order of the board of supervisors or city council to perform work, and any person while performing community service in lieu of a fine or custody or who is assigned to work furlough, may not be employed to perform any function that provides access to personal information of private individuals, including the following: addresses; telephone numbers; health insurance, taxpayer, school, or employee identification numbers; mothers' maiden names; demand deposit account, debit card, credit card, savings account, or checking account numbers, PINs, or passwords; social security numbers; places of employment; dates of birth; state or government-issued driver's license or identification numbers; alien registration numbers; government passport numbers; unique biometric data, such as fingerprints, facial scan identifiers, voice prints, retina or iris images, or other similar identifiers; unique electronic identification numbers; address or routing codes; and telecommunication identifying information or access devices.

Connecticut General Statutes § 17b-30: Requires the Commissioner of Social Services and the Commissioner of Motor Vehicles to examine available biometric identifier systems to be used by the state's temporary family assistance program and any other program determined by the Commissioner of Social Services.

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[3] The list does not include laws that states have adopted in relation to the National Crime Prevention and Privacy Compact or laws that refer to biometrics information in specific identity theft laws. The National Crime Prevention and Privacy Compact Act is a federal law that establishes a method by which states can exchange criminal records for noncriminal justice purposes without charging each other for the information. The URL for the Federal Bureau of investigation's National Crime Prevention and Privacy Compact Act website is *http://www.fbi.gov/hq/cjisd/web%20page/cc.htm.*

Florida Annotated Statutes § 311.125: Establishes the Uniform Port Access Credential Card, which is required of those individuals who work at Florida's seaports. This card must include at a minimum a digital full-face photograph, a digital fingerprint, a multilayered security process, a two-dimensional barcode with technology specifications that will allow the unique biometric identifiers to reside in the barcode, a unique identifying code or number, scanning capability to compare required identifiers with information on file in the central database.

Illinois Compiled Statutes 105 ILCS 5/10-20.40 and 105 ILCS 5/34-18.34: Establishes minimum policies for school districts that collect biometric information from students.

Illinois Compiled Statutes 740 ILCS 14/1 (2008), Biometric Information Privacy Act: Relates to the retention, destruction, and privacy of an individual's biometric information. Prohibits unauthorized disclosure and exempts such information from the Freedom of Information Act. Establishes that no provision be construed to conflict with the Criminal Identification Act; the Private Detective, Alarm, Security, Fingerprint Vendor, and Locksmith Act, or another similar act.

Indiana Statutes § 4-1-6-2: Limits the collection, maintenance, and use of personal information, including voice prints, by state agencies, to that which is relevant and necessary to accomplish a statutory purpose.

Indiana Statutes § 26-2-8-116: Allows electronic signature authentication and identification to be used for certain individuals, under certain circumstances.

Louisiana Revised Statutes 37:1182: Grants the Louisiana Board of Pharmacy the authority to require applicants for any pharmacological license, registration, certificate, permit, or any other designation, to provide the information necessary to verify an applicant's identity including birth certificates, passport documents, legal status documents, and any other biometric information deemed appropriate by the board.

Nebraska Revised Statutes § 87-802: Requires that individuals be notified in the event of a security breach that compromises their personal information. Personal information is defined as a name in combination with another identifying data element, including a fingerprint, voice print, or retina or iris image, or other unique physical representation.

Nevada Revised Statutes § 639.2353: Allows a prescription to be transmitted electronically without the health care practitioner's signature if it contains a facsimile signature, security code or other unique identifier; or a voice recognition system, biometric identification technique or other approved security system is used to identify the practitioner.

New Hampshire Revised Statutes 91-A:10: Prevents the state from releasing data sets that contain biometric identifiers.

New Hampshire Revised Statutes 260: 10-b: Prohibits the collection and retention of any biometric data in connection with motor vehicle registration, operation, and driver licensing. "Biometric data" includes voice data used for comparing live speech with a previously-created speech model of a person's voice.

New Jersey Statutes § 39:2A-29: Permits the New Jersey Motor Vehicle Commission to make technological improvements including the modernization of software and hardware, the addition of surveillance cameras, alarms, and access systems, and the use of biometrics.

North Carolina General Statutes § 130A-480: Prohibits the collection of biometric identifiers, including voice prints, within statute that directs the State Health Director to develop a "syndromic" surveillance program for hospital emergency departments in order to detect and investigate public health threats resulting from a terrorist incident or epidemic.

Ohio Revised Code 3701.75: Establishes standards for using electronic signatures in health care records. One standard requires that some electronic signature systems use either a two-level access control mechanism that assigns a unique identifier to each system user or a biometric access control device.

Oregon Revised Statutes § 807.024: Requires a person who applies for issuance, renewal or replacement of a driver license, driver permit or identification card to submit to collection of biometric data by the Department of Transportation for the purpose of establishing his or her identity.

Pennsylvania Statutes § 1802: Appointees, employees and prospective employees engaged in the service of the Commissions or the Board of Gaming shall submit to fingerprinting and photographing by the Pennsylvania State Police or by a local law enforcement agency.

South Carolina Code § 30-2-10: Requires that all state agencies, boards, commissions, institutions, departments, and other state entities develop privacy policies and procedures to ensure that the collection of personal information (including biometric identifiers) pertaining to the citizens of South Carolina is limited to such personal information required by any such entity to fulfill a legitimate public purpose.

Texas Statutes, Business and Commerce Code § 35.50: Provides that biometric identifiers may not be captured for commercial purposes except with prior notification and consent. Additionally provides that once captured, the biometric information may not be sold, leased, or otherwise disclosed unless the individual consents to the disclosure; the disclosure completes a financial transaction that the individual requests or authorizes; the disclosure is required or permitted by a federal or state statute; or the disclosure is made by or to a law enforcement agency for a law enforcement purpose.

Texas Statutes, Business and Commerce Code § 503.001: Defines a "biometric identifier" as a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry. This law establishes that a person may not capture a biometric identifier of an individual for commercial purposes unless the person informs the individual before capturing the biometric identifier, and receives the individual's consent to capture the biometric identifier.

Texas Statutes, Government Code § 495.025: The State requests proposals from private vendors for a contract to provide pay telephone service to eligible inmates confined in facilities operated by the department. The telephone system must have the capacity to use a biometric identifier of the inmate making the call.

Texas Statutes, Government Code § 531.1063: The Texas Health and Human Services Commission and the Texas Department of Human Services shall develop and implement a Medicaid Fraud Pilot Program. The program must include participant smart cards and biometric readers that reside at the point of contact with Medicaid providers, recipients, participating pharmacies, hospitals, and appropriate third-party participants; and a secure finger-imaging system that is compliant with the Health Insurance Portability and Accountability Act (HIPAA).

Texas Statutes, Government Code § 560.001: Provides that a government body in possession of a biometric identifier may not sell, lease, or otherwise disclose the information unless the individual consents to the disclosure; the disclosure completes a financial transaction that the individual requests or authorizes; the disclosure is required or permitted by a federal or state statute; or the disclosure is made by or to a law enforcement agency for a law enforcement purpose.

Texas Statutes, Transportation Code § 521.032: Establishes the Enhanced Driver's License or Personal Identification Certificate which requires the applicant to submit a biometric identifier as designated by the Department of Transportation.

Vermont Statutes 23 V.S.A. § 634: Prevents the Department of Motor Vehicles from implementing any procedures or processes for identifying applicants for licenses, learner permits, or non-driver identification cards that involve the use of biometric identifiers.

Virginia Code § 2.2-3801 through § 2.2-3809: Includes voice prints in the definition of personal information. Requires that state agencies collect, maintain, use, and disseminate only that personal information permitted or required by law. This law prohibits agencies from disseminating information to another system without specifying requirements for security and usage including access limitations, and receiving reasonable assurances that those requirements and limitations will be observed.

Revised Code of Washington § 46.20.037: This law requires implementation of a voluntary biometric matching system for driver's licenses and identification cards within two years of the full implementation of the Real ID Act. This law states that the biometric matching system is to be used only to verify the identity of an applicant for a renewal or duplicate driver's license or identification card by matching a biometric identifier submitted by the applicant against the biometric identifier submitted when the license was last issued.

West Virginia Code § 17B-2-12a: Vision screening conducted as part of driver's licensure shall not be used to collect any type of personal biometric identifying information.

Included in your request was a document entitled "The Alaskan Biometric Collection Act." As you may know, within this document the author notes that the University of Alaska, Fairbanks requires individuals taking the Certified Public Accountant (CPA) examination to submit to fingerprinting before and possibly during the examination. This fingerprint condition is, however, required by the American Institute of Certified Public Accountants (AICPA), the national, professional organization for all Certified Public Accountants which sets the auditing standards and the ethical standards for all CPAs; the National Association of State Boards of Accountancy (NASBA), which

serves as a forum for the boards of accountancy throughout the United States; and Prometric, which provides testing services for those seeking to take the CPA exam.[4] According to Ken Bishop, Senior Vice President for NASBA, no state prevents Prometric—or any of its subcontractors (the UAF is one of these subcontractors)—from obtaining fingerprint data from those taking the CPA exam.[5]

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

[4] The URL for the American Institute of Certified Public Accountants is *http://www.aicpa.org/*. The URL for the National Association of State Boards of Accountancy is *http://www.nasba.org*. The URL for Prometric is *http://www.prometric.com/*.

[5] Ken Bishop, Senior Vice President for NASBA, can be contacted at 615-312-3755. In addition, Mr. Bishop notes that Prometric doesn't capture or retain a copy of an individual's fingerprint. Prometric captures an algorithm, or a mathematical representation, based on a person's fingerprint.

Citizens for Privacy in Alaska

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."

We are very concerned with the rapid erosion of our privacy rights, <u>and we urge you to support legislation</u> to strengthen our biometric privacy laws this session. If someone can present a valid US Passport OR a driver's license (State issued ID) as identification, they should be exempt from any biometrics (fingerprints)-as-ID mandate *(note that criminal background checks will not be affected by this legislation. This legislation is specifically focused on biometrics-as-ID mandates).*

	STATUS: AGREED WITH THE GOAL?	FIRST & LAST NAME	ORGANIZATION	TITLE	CITY & STATE	PERSONAL STATEMENT
	SEE STATEMENT	Whitney Brewster	Alaska State Director, Division of Motor Vehicles	Director	Anchorage, AK	"The Alaska State Division of Motor Vehicles has no interest in capturing Alaskans fingerprints, retinal or iris scans, palm veins or other biometric information."
1	**YES**	**Horst Poepperl**	Borealis Broadband Co	President, IT security expert	Anchorage, AK	

1	**SEE STATEMENT**	Jeffrey Mittman	ACLU - Alaska	Executive Director	Anchorage, AK	"...the ACLU of Alaska endorses protection for individuals' personal biometric information, and applauds the proactive introduction of this bill (SB190) to avoid violations before they occur. The ACLU will be pleased to support SB190 subsequent to the minor revisions outlined below..."
	YES	Gretchen Guess	Alaska	Former Senator	Anchorage, AK	"I AGREE..... thank you for taking up the cause...I know the time and energy it takes to get one of these bills past the choicepoint lobbyists..."
	YES	Mark Lerner	Stop Real ID National Coalition	President, Founder	Missouri	"I AGREE. Information is being shared far more broadly than anyone is being told. Most importantly, the courts have not previously factored in that biometrics do not determine identity, breeder documents do."
2	**YES**	Jason Giaimo	Net Gain Business Consultants of Alaska	President. Former VP of the Alaska chapter of the Institute of Management Accountants	Anchorage, AK	Our privacy is guaranteed by Section 22 of the Alaska State Constitution, "The right of the people to privacy is recognized and shall not be infringed." Our privacy laws urgently need to be updated to reflect new technology, to include biometrics, and to stem the rapid erosion of our privacy.
2	**YES**	Tim Pearson	Pearson Consulting	President, Pearson Consulting	Anchorage, AK	I AGREE and look forward to helping you with this campaign!

2	**YES**	Allan Johnston	Wedbush Morgan Securities	Managing Director, Retired	Anchorage, AK	
2	**YES**	Tyler Arnold	TylerSystems Inc.	President & CEO	Anchorage, AK	"Being forced to hand over private data, that will in turn be commercialized, just so I can gain a common industry accreditation is simply unacceptable. I look forward to doing everything I can to pass sensible legislation that will help me preserve my rights as an Alaskan citizen. "
2	**YES**	Barbara Brown	Alaska voter	Alaska voter	Anchorage, AK	Oh, this steams me up. I am so sorry for you, and I AGREE with you...NO FINGERPRINTS!
2	**YES**	Dan Boland	State of Alaska, Audit Division	Auditor, State of Alaska	Anchorage, AK	"This whole thing about a foreign (or American) owned company accumulating and storing personal data including biometrics is just criminal. Seems to me, criminals are writing the laws. This biometric requirement should be repealed, apologies sent out to CPA applicants, the data destroyed and the company and the folks promoting it exposed. Additionally those people that instituted this policy both on the national level and the state level should be investigated for improper behavior....I applaud you for standing up to the thugs."

2	**YES**	Patrick Lorenz	British Petroleum	Senior Financial Analyst, BP Alaska	Anchorage, AK	"For what its worth, I do agree with you goal, but if unable to influence the process, would have to weigh the advantages of being a CPA or putting my identity at risk with these companies. Unfortunately I would choose to not take the risk."
	YES	Tim Wiepking	Institute of Management Accountants, fmr. President	Fmr. President	Anchorage, AK	It is very admirable you are standing up to this…I VERY much agree, NO FINGERPRINTS!
	YES	Tom Gill	UAA, formerly with BP	Engineering Dept Student	Anchorage, AK	Finger printing should NOT be the required form of identification to sit for the CPA exam.--Tom Gill
	YES	Karen Demichelis	Demichelis & Associates	President	Anchorage, AK	I SUPPORT THIS!
	YES	Chris Brownwell	Resident, Alaska, noted author			"I agree with your legislation push…(the Federal) policies always have a nefarious, hidden purpose. Leftists want to control our lives and will use our identities to do just that."

	YES	Jack-Taylor Ridgeway	Privacy Rights supporter	Privacy Rights supporter		"All of these oppressive encroachments are whittling away at the average Americans ability to engage in free commerce. These practices are unconstitutional, therefore unlawful....this has got to stop now."
	YES	Hetal Giaimo			Anchorage, AK	Collecting fingerprints as ID is clearly unnecessary when a US passport or drivers license is offered. This is really disgraceful and needs to be stopped.
	YES	Laura Dirksen	20 year teacher at an Anchorge Christian School.	Alaska resident, teacher	Anchorage, AK	Having been a teacher for nearly 20 years at an Anchorage Christian school....I AGREE, our privacy laws need to be updated to prevent fingerprint collection.
	YES	Joe Dirksen	US ARMY	Aircraft specialist	Anchorage, AK	
	YES	Cindy Miller	Accenture	Fmr. Acting CFO, Unocal Alaska	Anchorage, AK	I DO NOT SUPPORT FINGERPRINTING ANYONE FOR ENTRANCE EXAMS! THIS IS ALMOST OBSCENE.

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ZACH FICK, Anchorage
STUDENT ADVISOR

March 14, 2011

The Honorable Bill Wielechowski, Chair
The Honorable Joe Paskvan, Vice-Chair
Senate State Affairs Committee
Alaska State Senate
Juneau, AK 99801
via email: Senator_Bill_Wielechowski@legis.state.ak.us
Senator_Joe_Paskvan@legis.state.ak.us

Re: Senate Bill 98
ACLU Statement of Support

Chair Wielechowski, Vice-Chair Paskvan:

Thank you for the opportunity to submit a written statement of support for SB 98.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions.

From a constitutional rights and privacy perspective, **the ACLU of Alaska endorses protections for individuals' personal biometric information, and applauds the proactive introduction of this Bill to avoid violations of privacy before they occur**.

Need for Biometrics Legislation

Recent advances in genomics, bioinformatics and data mining are encouraging a worldwide proliferation of "gene banks" – large collections of

biological samples that usually include genetic information derived from those samples, as well as linked medical, family history or lifestyle information. The use of these biological repositories for genetics research could lead to advances in public health, such as the identification of genetic factors in diseases, or the development of diagnostic tests. ***On the other hand, they also create an avenue for privacy infringements, stigmatization and discrimination, and improper commercial exchange of personal data.***

The ACLU supports legislation to prevent privacy infringement and genetic discrimination. SB 98 can advance these goals.

Protections Against Coerced Consent

Given the ability to condition the provision of necessary services on the disclosure of personal information, we are also pleased to note that SB 98 is intended to protect against coerced "consent."

Given the sensitivity of biometric information, and the plethora of medical information obtainable from it, we endorse legislation that would protect Alaskans from improperly being compelled to waive their rights to protect their personal, private information.

Thank you again for the opportunity to share our support of this bill.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Albert Kookesh
Senator Kevin Meyer
Senator Catherine Giessel

CS FOR SENATE BILL NO. 98(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS WIELECHOWSKI, Coghill, Ellis, Menard, McGuire, Giessel, Egan, Paskvan, Thomas, Dyson, Wagoner

A BILL

FOR AN ACT ENTITLED

"An Act relating to biometric information."

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

*** Section 1.** AS 18 is amended by adding a new chapter to read:

Chapter 14. Biometric Information.

Sec. 18.14.010. Biometric information collection. (a) A person may not collect the biometric information of another individual unless the person first

(1) notifies the individual in a clear manner that the biometric information is being collected, the specific purpose for which the biometric information will be used, and how long the biometric information will be kept; and

(2) receives, in a written, electronic, or other form by which the consent can be documented, the individual's full consent to the collection of the biometric information, the specific purpose for which the biometric information will be used, and how long the biometric information will be kept.

(b) Unless the individual's biometric information was needed for a specific authorized law enforcement, security, or fraud prevention purpose, an individual may,

at any time, revoke or amend the individual's consent provided under (a) of this section.

Sec. 18.14.020. Disclosure of biometric information. (a) A collector and a collector's contractor may not disclose, transfer, or distribute the biometric information of another individual, except to a contractor or to a person to authenticate the identity of the individual providing the biometric information.

(b) A disclosure, transfer, or distribution under (a) of this section may only be made for the original purpose for which the information was collected.

Sec. 18.14.030. Sale of biometric information. A person may not sell biometric information, except that a contractor may sell the contractor's business to another person and transfer the biometric information to the buyer.

Sec. 18.14.040. Alternate identification. If a person who administers an occupational examination requires an individual taking the examination to provide biometric information to the person for the purpose of identifying the individual taking the examination, the person may not require that the individual provide the biometric information if the individual provides the person with alternate identification acceptable to the person administering the occupational examination. In this section, "occupational examination" includes an examination required for admission to an institution of higher learning.

Sec. 18.14.050. Disposal. (a) When a collector no longer needs an individual's biometric information for the collector's original purpose, or if an individual requests in writing that the individual's biometric information be removed from all databases or other storage systems and be permanently destroyed, the collector and the collector's contractor, if any, shall, within 120 days and unless prohibited by other law, a regulation, or a court order, remove the individual's biometric information from all databases and storage systems and destroy the biometric information.

(b) Within 30 days after determining that the collector no longer needs an individual's biometric information for the collector's original purpose or that the individual has requested the removal and destruction, the collector shall notify the collector's contractor, if any, that the collector is to remove the individual's biometric information from all databases and storage systems and destroy the biometric

information.

Sec. 18.14.060. Use of biometric information. A collector may not use biometric information for marketing purposes or for general surveillance purposes, but a collector may use the biometric information for a specific authorized security or fraud prevention purpose in addition to the specific purpose for which the biometric information was collected.

Sec. 18.14.070. Storage of biometric information. A collector and a contractor shall store an individual's biometric information in a secure manner, which may include encryption or another appropriate method, to ensure that the identity of the individual who provided the biometric information is protected.

Sec. 18.14.080. Right of action. (a) Except as provided in (b) of this section, an individual may bring a civil action against a person who knowingly violates this chapter. A person who violates this chapter is liable to the individual for actual damages and a penalty of $5,000, except that, if the violation resulted in profit or monetary gain to the person, the penalty is $100,000. In this subsection, "knowingly" has the meaning given in AS 11.81.900.

(b) An action for damages, a penalty, or both may not be brought against the state, the agencies of the state, or the officers or employees of the state or the agencies of the state for violations of this chapter or for other claims arising under this chapter.

Sec. 18.14.085. Exemptions. (a) This chapter does not apply to the collection, retention, analysis, disclosure, or distribution of

(1) biometric information for a law enforcement purpose, including the identification of perpetrators, the investigation of crimes, the identification of missing or unidentified persons, or the identification of human remains;

(2) biometric information when authorized by state or federal law; or

(3) facial images by the Department of Administration for drivers' licenses issued under AS 28.15, for state identification cards issued under AS 18.65.310, for administering AS 28.15, or for administering AS 18.65.310.

(b) This chapter does not apply to the retention of voices recorded for quality assurance purposes.

Sec. 18.14.090. Definitions. In this chapter,

(1) "biometric data" means fingerprints, handprints, voices, facial mapping, iris images, retinal images, vein scans, hand geometry, or finger geometry;

(2) "biometric information" means biometric data that is used in a biometric system for fingerprint recognition, hand geometry recognition, finger geometry recognition, voice recognition, facial recognition, iris scans, retinal scans, or vein recognition;

(3) "biometric system" means an automated system capable of

(A) capturing biometric data from an individual's biometric information;

(B) extracting and processing the biometric data captured under (A) of this paragraph;

(C) storing the biometric data extracted under (B) of this paragraph;

(D) comparing the biometric data extracted under (B) of this paragraph with biometric data stored for the individual for use in future recognition of the individual; and

(E) determining how well the extracted and stored biometric data match when compared under (D) of this paragraph, and indicating whether an identification or verification of identity has been achieved;

(4) "collector" means a person who collects the biometric information of another individual;

(5) "contractor" means a person who contracts with a collector to store the biometric information collected by the collector, and includes a person to whom the contractor sells the contractor's business and transfers the biometric information;

(6) "facial mapping" means the use of digital technology to measure the features of an individual's face;

(7) "facial recognition" means the use of facial mapping for recognition purposes;

(8) "finger geometry recognition" means the use of the shape and dimensions of one or more fingers for recognition purposes;

(9) "fingerprint recognition" means the use of the physical structure of

an individual's fingerprint for recognition purposes;

(10) "governmental entity" means a state agency, a municipality, and an agency of a municipality; in this paragraph, "state agency" means an agency of the executive, judicial, or legislative branch of state government;

(11) "hand geometry recognition" means the use of the physical structure of an individual's hand for recognition purposes;

(12) "iris scan" means the use of an image of the physical structure of an individual's iris for recognition purposes;

(13) "person" has the meaning given in AS 01.10.060, and includes a governmental entity;

(14) "retinal scan" means the use of the pattern of blood vessels in an individual's eye for recognition purposes;

(15) "vein recognition" means the use of the veins in an individual's skin for recognition purposes.

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SENATOR BILL WIELECHOWSKI

Explanation of Changes From CS, Version "B", to CS for SB 98, Version "T"

- **Sec 18.14.010**: This section now has strengthened language to further clarify consent needs to be provided for biometric information to be collected, the consent needs to be documented, and unless required for law enforcement or security purposes, the consent may be revoked at any time.
- **Sec 18.14.020:** This section now restricts the disclosure of biometric information to third parties, except to a person the collector has contracted with to the store the information. Additionally, the information may only be used for the original purpose of the collection. It no longer mandates a collector to accept an alternate ID.
- **Sec 18.14.030:** This section now says the sale of biometric information is prohibited, unless the storage entity is acquired by another storage entity. A uniform consent form to be drafted by the DHSS is no longer in the bill.
- **Sec 18.14.040:** This section now specifically says occupational examinations must allow acceptable other forms of ID to be used in lieu of biometric identification.
- **Sec 18.14.050:** This section sets time limits on how long biometric information can be stored. Biometric information will be deleted upon request of the individual or when the original reason for the collection is no longer necessary. The section allows 30 days for the collecting entity to notify the storage entity, and 120 days for the storage entity to delete the data.

- **Sec 18.14.060:** This section states that biometric information cannot be used for marketing or general surveillance purposes, but it may be used for fraud prevention.
- **Sec 18.14.070:** This section states that biometric information shall be stored in a secure manner.
- **Sec 18.14.080:** This section provides a private right of action for individuals to bring against private entities who violate this chapter. The state and its agents are exempt, but not immune to injunctions.
- **Sec 18.14.085:** This section provides exemptions for the use of biometric information without consent:
    - When used for law enforcement purposes
    - When authorized by state or federal law
    - For facial images used by the Department of Admin for drivers licenses and ID cards
    - For voice retention for quality assurance purposes
- **Sec 18.14.090:** Definitions remain unchanged

27-LS0661\T.1
Bannister
4/15/11

AMENDMENT #2

OFFERED IN THE SENATE SENATOR PASKVAN

TO: CSSB 98( ), Draft Version "T"

Page 2, line 12:

Delete "If"

Insert "(a) Except as provided in (b) of this section, if"

Page 2, line 17, following "examination.":

Insert new material to read:

"(b) If the collection of the biometric information of an individual taking an occupational examination is legitimately necessary to establish the security of the occupational examination, the person who administers the occupational examination may collect the biometric information, but the person shall comply with the collection and other requirements of this chapter with regard to the biometric information, and the person shall require the person's contractor, if any, to agree to comply with the collection and other requirements of this chapter with regard to the biometric information.

(c)"

failed 2/2

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Changes in CS for SB 98 Version "E" to Version "T"

- **In Sec 18.14.040, Page 2, Lines 17-19**, a clarification has been made to ensure that exams for entrance to institutions of higher learning have been included as occupational exams.
- **In Sec 18.14.040, Page 2, Lines 17,** a clarification has been made to ensure an administer of an exam may determine what an acceptable alternate ID is.
- **In Sec 18.14.080, Page 3, Line 18,** the term "agents of the state," or what could possibly be construed as a contractor with the state, has been removed as organizations exempted from a private right of action.
- **In Sec 18.14.085, Page 3, Lines 29-30,** an exemption has been made for voice data collected for quality assurance purposes.
    - Additionally, the exemption for "facial images in a biometric system" has been removed as "facial images" have been changed to "facial mapping" under the definition of "biometric data".
- **In Sec 18.14.090, Page 3, Lines 1-2,** "facial images" have been replaced by "facial mapping" in the definitions of biometric data.
    - **Page 3, Lines 25-26,** "facial mapping" has been defined as "the use of digital technology to measure the features of an individual's face."

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Sec. 18.14.030. Sale of biometric information. A person may not sell biometric information, except that a contractor may sell the contractor's business to another person and transfer the biometric information to the buyer.

Sec. 18.14.040. Alternate identification. If a person who administers an occupational examination requires an individual taking the examination to provide biometric information to the person for the purpose of identifying the individual taking the examination, the person may not require that the individual provide the biometric information if the individual provides the person with alternate identification acceptable to the person administering the occupational examination. In this section, "occupational examination" includes an examination required for admission to an institution of higher learning.

Sec. 18.14.050. Disposal. (a) When a collector no longer needs an individual's biometric information for the collector's original purpose, or if an individual requests in writing that the individual's biometric information be removed from all databases or other storage systems and be permanently destroyed, the collector and the collector's contractor, if any, shall, within 120 days and unless prohibited by other law, a regulation, or a court order, remove the individual's biometric information from all databases and storage systems and destroy the biometric information.

(b) Within 30 days after determining that the collector no longer needs an individual's biometric information for the collector's original purpose or that the individual has requested the removal and destruction, the collector shall notify the collector's contractor, if any, that the collector is to remove the individual's biometric information from all databases and storage systems and destroy the biometric

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(1) biometric information for a law enforcement purpose, including the identification of perpetrators, the investigation of crimes, the identification of missing or unidentified persons, or the identification of human remains;

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(3) facial images by the Department of Administration for drivers' licenses issued under AS 28.15, for state identification cards issued under AS 18.65.310, for administering AS 28.15, or for administering AS 18.65.310.

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an individual's fingerprint for recognition purposes;

(10) "governmental entity" means a state agency, a municipality, and an agency of a municipality; in this paragraph, "state agency" means an agency of the executive, judicial, or legislative branch of state government;

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Changes from the CS for SB 98, Version "D" to the CS for SB 98, Version "E"

Page 2, Lines 12-16: Section added requiring occupational exams that use biometrics as a form of ID must allow for alternate forms of ID if so desired by test takers.

Page 3, Lines 14-17: Subsection added that provides immunity from private rights of action towards the state and its employees.

27-LS0661\E
Bannister
3/31/11

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(b) A disclosure, transfer, or distribution under (a) of this section may only be made for the original purpose for which the information was collected.

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Sec. 18.14.050. Disposal. (a) When a collector no longer needs an individual's biometric information for the collector's original purpose, or if an individual requests in writing that the individual's biometric information be removed from all databases or other storage systems and be permanently destroyed, the collector and the collector's contractor, if any, shall, within 120 days and unless prohibited by other law, a regulation, or a court order, remove the individual's biometric information from all databases and storage systems and destroy the biometric information.

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27-LS0661\D
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(b) A disclosure, transfer, or distribution under (a) of this section may only be made for the original purpose for which the information was collected.

Sec. 18.14.030. Sale of biometric information. A person may not sell biometric information, except that a contractor may sell the contractor's business to another person and transfer the biometric information to the buyer.

Sec. 18.14.040. Disposal. (a) When a collector no longer needs an individual's biometric information for the collector's original purpose, or if an individual requests in writing that the individual's biometric information be removed from all databases or other storage systems and be permanently destroyed, the collector and the collector's contractor, if any, shall, within 120 days and unless prohibited by other law, a regulation, or a court order, remove the individual's biometric information from all databases and storage systems and destroy the biometric information.

(b) Within 30 days after determining that the collector no longer needs an individual's biometric information for the collector's original purpose or that the individual has requested the removal and destruction, the collector shall notify the collector's contractor, if any, that the collector is to remove the individual's biometric information from all databases and storage systems and destroy the biometric information.

Sec. 18.14.050. Use of biometric information. A collector may not use biometric information for marketing purposes or for general surveillance purposes, but a collector may use the biometric information for a specific authorized security or fraud prevention purpose in addition to the specific purpose for which the biometric information was collected.

Sec. 18.14.060. Storage of biometric information. A collector and a contractor shall store an individual's biometric information in a secure manner, which

may include encryption or another appropriate method, to ensure that the identity of the individual who provided the biometric information is protected.

Sec. 18.14.070. Private right of action. An individual may bring a civil action against a person who knowingly violates this chapter. A person who violates this chapter is liable to the individual for actual damages and a penalty of $5,000, except that, if the violation resulted in profit or monetary gain to the person, the penalty is $100,000. In this section, "knowingly" has the meaning given in AS 11.81.900.

Sec. 18.14.080. Exemptions. This chapter does not apply to the collection, retention, analysis, disclosure, or distribution of

(1) biometric information for a law enforcement purpose, including the identification of perpetrators, the investigation of crimes, the identification of missing or unidentified persons, or the identification of human remains;

(2) biometric information when authorized by state or federal law;

(3) facial images by the Department of Administration for drivers' licenses issued under AS 28.15, for state identification cards issued under AS 18.65.310, for administering AS 28.15, or for administering AS 18.65.310; or

(4) facial images that are not used in a biometric system.

Sec. 18.14.090. Definitions. In this chapter,

(1) "biometric data" means fingerprints, handprints, voices, facial images, iris images, retinal images, vein scans, hand geometry, or finger geometry;

(2) "biometric information" means biometric data that is used in a biometric system for fingerprint recognition, hand geometry recognition, finger geometry recognition, voice recognition, facial recognition, iris scans, retinal scans, or vein recognition;

(3) "biometric system" means an automated system capable of

(A) capturing biometric data from an individual's biometric information;

(B) extracting and processing the biometric data captured under (A) of this paragraph;

(C) storing the biometric data extracted under (B) of this paragraph;

(D) comparing the biometric data extracted under (B) of this paragraph with biometric data stored for the individual for use in future recognition of the individual; and

(E) determining how well the extracted and stored biometric data match when compared under (D) of this paragraph, and indicating whether an identification or verification of identity has been achieved;

(4) "collector" means a person who collects the biometric information of another individual;

(5) "contractor" means a person who contracts with a collector to store the biometric information collected by the collector, and includes a person to whom the contractor sells the contractor's business and transfers the biometric information;

(6) "facial recognition" means the use of an image of the visible physical structure of an individual's face for recognition purposes;

(7) "finger geometry recognition" means the use of the shape and dimensions of one or more fingers for recognition purposes;

(8) "fingerprint recognition" means the use of the physical structure of an individual's fingerprint for recognition purposes;

(9) "governmental entity" means a state agency, a municipality, and an agency of a municipality; in this paragraph, "state agency" means an agency of the executive, judicial, or legislative branch of state government;

(10) "hand geometry recognition" means the use of the physical structure of an individual's hand for recognition purposes;

(11) "iris scan" means the use of an image of the physical structure of an individual's iris for recognition purposes;

(12) "person" has the meaning given in AS 01.10.060, and includes a governmental entity;

(13) "retinal scan" means the use of the pattern of blood vessels in an individual's eye for recognition purposes;

(14) "vein recognition" means the use of the veins in an individual's skin for recognition purposes.

ALASKA STATE LEGISLATURE

Session

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Senator_Bill_Wielechowski@legis.state.ak.us

Chair
State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Administrative Regulation Review

SENATOR BILL WIELECHOWSKI

Explanation of Changes From CS, Version "B", to Work Draft, Version "D"

- **Sec 18.14.010**: This section now requires a person collecting biometric information to specify a specific purpose when acquiring documented consent to collect the information.
- **Sec 18.14.020:** This section now restricts the disclosure of biometric information to third parties, except to a person the collector has contracted with to the store the information. Additionally, the information may only be used for the original purpose of the collection.
- **Sec 18.14.030:** The sale of biometric information is prohibited, unless the storage entity is acquired by another storage entity.
- **Sec 18.14.040:** This section sets time limits on how long biometric information can be stored. Biometric information will be deleted upon request of the individual or when the original reason for the collection is no longer necessary. The section allows 30 days for the collecting entity to notify the storage entity, and 120 days for the storage entity to delete the data.
- **Sec 18.14.050:** Biometric information cannot be used for marketing or general surveillance purposes, but it may be used for fraud prevention.
- **Sec 18.14.060:** Biometric information shall be stored in a secure manner.
- **Sec 18.14.070:** The word "knowingly" has been added to page 3, line 4, to ensure the party at fault is the one responsible.
- **Sec 18.14.080:** Exemptions remain unchanged

- **Sec 18.14.090:** Definitions remain unchanged

Key Omissions

- **Alternate identification** in lieu of biometric identifier statute removed in **Sec 18.14.020**
- **Uniform Consent Form** removed, allowing separate organizations to draft different consent forms in **Sec 18.14.030**

Cindy Smith

From: Tim Pearson [tim.pearson@gci.net]
Sent: Monday, March 28, 2011 11:18 AM
To: Sen. Hollis French
Cc: Kristen Peterson; Cindy Smith; Lila Hobbs; Andy Moderow
Subject: SB 98 "An Act relating to biometric information" -- please pass out of Sen. Judiciary Committee today -- a request from a resident of Senate District M

Senator French,

As a resident of Senate District M, I ask that you pass SB 98 -- "an act relating to biometric information" out of Senate Judiciary today.
I realize that the Judiciary committee meets today at 1:30 pm.

Alaskans deeply value their privacy and this bill has broad bipartisan support.

SB 98 does not affect law enforcement and the only opponents are the data mining companies who profit from collecting the personal information of Alaskans.

Collecting biometric data is also a poor security practice. Once collected (even if by an employer for security purposes), and stolen, biometric data can not be replaced -- a person cannot get a new set of fingerprints. They will have live for the rest of their lives with the issues of a compromised identity -- always questioned, always in fear of how it might be misused.

Security experts recommend other techniques, like multifactor authentication, to establish database, computer, and building security.
(Multifactor authentication is an electronic token carried by a user that repeatedly generates a time-based number that must be appended to a password when a person logs in.)

Please pass SB 98 today so that it can come to a floor vote.

Thank you for your efforts to protect Alaskan's privacy as quickly as possible.

All the best,

Tim

Tim Pearson
3941 Starburst Circle
Anchorage, AK 99517
(907) 952-3948 c
tim.pearson@gci.net

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
1057 W. Fireweed, Suite 207
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JUNE PINNELL-STEPHENS, Fairbanks
NADINE WINTERS, Fairbanks

ZACH FICK, Anchorage
STUDENT ADVISOR

March 21, 2011

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
Juneau, AK 99801-1182
via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

Re: CS Senate Bill 98 (STA)
ACLU Statement of Support

Chair French, Vice-Chair Wielechowski:

Thank you for the opportunity to submit a written statement of support for the Senate State Affairs Committee Substitute for Senate Bill 98.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions.

From a constitutional rights and privacy perspective, **the ACLU of Alaska endorses protections for individuals' personal biometric information, and applauds the proactive introduction of this Bill to avoid violations of privacy before they occur**.

Need for Biometrics Legislation

Recent advances in genomics, bioinformatics and data mining are encouraging a worldwide proliferation of "gene banks" – large collections of biological samples that usually include genetic information derived from those samples, as well as linked medical, family history or lifestyle information. The use of these biological repositories for genetics research

could lead to advances in public health, such as the identification of genetic factors in diseases, or the development of diagnostic tests. ***On the other hand, they also create an avenue for privacy infringements, stigmatization and discrimination, and improper commercial exchange of personal data.***

The ACLU supports legislation to prevent privacy infringement and genetic discrimination. CS for SB 98 (STA) can advance these goals.

Protections Against Coerced Consent

Given the ability to condition the provision of necessary services on the disclosure of personal information, we are also pleased to note that the Committee Substitute for SB 98 is intended to protect against coerced "consent."

For the above reasons, the ACLU is pleased to support SB 98, and thanks Senator Wielechowski for sponsoring this legislation to protect privacy rights.

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions which Members of the Committee may have. Thank you again for the opportunity to share our support of this bill.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us
Senator John Coghill, Senator_John_Coghill@legis.state.ak.us

Cindy Smith

From: Sheela Tallman [Sheela.Tallman@PREMERA.com]
Sent: Monday, April 11, 2011 7:21 PM
To: Cindy Smith
Subject: RE: SB98

Follow Up Flag: Follow up
Flag Status: Flagged

That would be great, thank you.

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Monday, April 11, 2011 4:34 PM
To: Sheela Tallman
Subject: RE: SB98

I did! I am providing a copy to the bill's sponsor, Sen. Wielechowski. I know that his office is working on that bill and we do not have another hearing on it scheduled at this time, but I can let you know if it is scheduled in the next few days (our session ends on Sunday).

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Sheela Tallman [mailto:Sheela.Tallman@PREMERA.com]
Sent: Monday, April 11, 2011 1:50 PM
To: Cindy Smith
Subject: RE: SB98

Hello, I wanted to reach out and make sure you received a copy of our letter and see if you had any questions. I am happy to talk with you about the bill at your convenience.

Thanks,
Sheela

Sent from my Windows Mobile® phone.

From: Cindy Smith <Cindy_Smith@legis.state.ak.us>
Sent: Monday, April 11, 2011 1:36 PM
To: Sheela Tallman <Sheela.Tallman@PREMERA.com>
Subject: SB98

Hi,

I am away from my desk a lot in this last week of the session so I thought I'd see if you can let me know by email what your questions/concerns with SB98 are –

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

April 4st, 2011

Dear Senator:

My name is Herbert Eckmann, a voter from Anchorage and very concerned citizen of this great State.

I URGE YOU to stand up for ALL Alaskans privacy. Pass a strong Biometric Privacy law this session that includes an opt-out for ALL ALASKANS who show a driver's license or passport as ID. I agree with Citizens for Privacy in Alaska; we need a privacy law that:

"makes illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Herbert Eckmann
A concerned Alaskan Voter
Kmal2@gci.net

April 2st, 2011

Dear Senator:

My name is Eileen Becker, Chairman of the Alaska Republican Party Region 7, and my personal view is that you should STRONGLY support biometric privacy legislation that protects ALL Alaskans from being fingerprinted for ID purposes.

I support Citizens for Privacy in Alaska in their goal below:

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Eileen Becker
Chairman, Alaska Republican Party, Region 7
Homer, AK
district35republican@webtv.net

April 3st, 2011

Dear Senator:

My name is Joe Dirksen, a voter, a long-time Alaskan, a member of the Alaska National Guard and, like most Alaskans, I am a strong supporter of privacy rights. My personal view is that **you should strongly support the new biometric privacy bill**... if it says that no fingerprinting of innocent Alaskans for ID should be required, as noted below:

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Will you stand up for our privacy rights?

Sincerely,

Joe Dirksen
Anchorage voter
South Anchorage, 99507
jldirksen@acsalaska.net

April 3st, 2011

Dear Senator:

Please support REAL biometric privacy legislation that would make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport.

Thank you,

Elizabeth Merrill
A Concerned Alaskan VOTER
Elizabeth_merrill@hotmail.com

(I have updated my comments on this bill)

April 4st, 2011

Dear Senator:

My name is Eileen Becker, from Homer. I support SB 98 (THE BIOMETRIC PRIVACY BILL) because too many of our rights to privacy are being sold to the highest bidder.

It is time to say NO and protect ourselves and our families. PROTECT ALL ALASKANS.

Thank you,

Eileen Becker
Owner of Peninsula Communications, Inc, privately owned radio stations here in Alaska
Mother of 5 children and 8 grandchildren
Alaska resident since 1973
DISTRICT35REPUBLICAN@WEBTV.NET
ALASKAN VOTER, REPUBLICAN PARTY

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

April 2st, 2011

Dear Senator:

I'm an Anchorage voter and resident named Cindy Baldwin, and I am writing to you to urge you to stand up for ALASKAN'S privacy.

As for my personal view, **I support** the new biometric privacy bill and I STRONGLY support Citizens for Privacy in Alaska's position that no fingerprinting of innocent Alaskans for ID should be required. Please don't water this one down; we all need this protection.

Sincerely,

Cindy

Cindy Baldwin
Anchorage voter
cindyb.alaska@gmail.com

April 2st, 2011

Dear Senator:

As a dedicated member of Alaska's Republican Party, I would like to ask you to support the Wielechowski/Coghill "biometric privacy bill" (and its House companion bill) so long as it protects ALL Alaskan's from being forced into being fingerprinted for ID purposes.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Jerad McClure
Member, Alaska Republican Party
jaredlainak@gmail.com

April 2st, 2011

Dear Senator:

We vote...the data-miner's lobbyists don't. Please stand up for ALASKANS and our privacy, and **support** the new biometric privacy bill... if it says that no fingerprinting of innocent Alaskans for ID should be required.

My name is Laura Dirksen, a school teacher and resident of south Anchorage. Having taught for nearly 20 years at an Anchorage Christian school – I AGREE that our privacy laws need to be updated to *prevent* fingerprint collection "as ID."

I urge your support for protecting the biometric privacy of Alaskans. Passports and driver's licenses are sufficient identification.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Laura Dirksen

Laura Dirksen
Christian school teacher, and a voter
Anchorage
jldirksen@acsalaska.net

04/ 01/2011

Dear Senator:

My name is Dr. Frank Jeffries, Assistant Professor of Business and Public Policy at UAA.

I recently learned of a grass-roots group of Alaskan voters called the "Citizens for Privacy in Alaska" and of their courageous support for a MUCH NEEDED privacy bill. Although this is my personal view, I urge you to support it.

I strongly support a biometric privacy bill that:

"makes illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,
Dr. Frank Jeffries
Assistant Professor of Business and Public Policy
University of Alaska, Anchorage
taikodad@gci.net

04/ 01/2011

Dear Senator:

As Director of the Maserculiq Village Corporation in Marshall, Alaska – I can tell you that I am a very strong supporter of privacy. I hope you will show us that you are as well, but supporting the Biometric Privacy Bill when it comes before you.

I support real protection that:

"makes illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,
George Owletuck
Director, Maserculiq Village Corporation
Marshall, Alaska
George.owletuck@gmail.com

PS This is my personal position

March 31, 2011

Dear Senator:

My name is Eunice Trask – a long time resident (and voter) from Anchorage. I'm a member of Citizens for Privacy in Alaska, and I've heard you are standing up for Alaskans privacy against Outside dataminer-lobbyists. GOOD FOR YOU! I SUPPORT THE BIOMETRIC PRIVACY BILL and I hope you will too.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."

Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

We Alaskans should lead the country in standing up for privacy and in a return to dignity of the individual. Please stand up for our privacy – innocent people shouldn't be compelled to give fingerprints as ID! Isn't the right to privacy guaranteed in our State Constitution?

Sincerely,

Eunice Trask

Registered Voter...and I will
Anchorage

Dear Senator:

My name is JP Godfrey, a Management Consultant in private practice in Anchorage.

I have to say, what Citizens for Privacy in Alaska is doing is astonishing – and I strongly support them and **I strongly support this privacy bill!** Don't let the lobbyists water it down, we need REAL protection.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."

Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Sincerely,
JP Godfrey
CEO, Management Consultant
Anchorage, AK
jpgod@gci.net

PS. I vote

March 31, 2011

Dear Senator:

My name is Mark V. Johnson, Business Development Manager for GCI Industrial Telecom in Anchorage. Today I became aware of what the Citizens for Privacy in Alaska group is doing – and I SUPPORT THEM IN STANDING UP FOR ALASKAN'S PRIVACY. I hope you will too.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."
Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Sincerely,

Mark

Mark V. Johnson
Business Development Manager,
GCI Industrial Telecom
Anchorage, AK
mjohnson@gci.com

March 31, 2011

Dear Senator:

As owner and President of Pacific Rim Media – I can tell you that I am a strong supporter of the Citizens for Privacy in Alaska. They are standing up for our privacy and I hope you will too.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."
Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Sincerely,

Russel

Russell Pounds
President, Pacific Rim Media
Anchorage, AK
Russell@prmalaska.com
www.prgalaska.com

March 31, 2011

Dear Senator:

My name is Anna von Reitz, a technology analyst, author and President of the Gas for Alaskan's Association – and I support what Citizens for Privacy in Alaska is doing.

Please stand with them on this, this issue cuts across all party lines.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."
Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Sincerely,
Anna von Reitz
President, Gas for Alaskan
Big Lake, AK
avannavon@gmail.com

March 31, 2011

Dear Senator:

I'm writing to ask to you support the STRONGEST version of SB 98 **which would prevent anyone from ever collecting** or disseminating biometric data. As an Alaskan I value my privacy greatly as well as that of my clients.

The gradual degradation of our privacy over the last few years is deeply troubling to me – it is now impossible to know who has our data and what they are doing with it. But, at least one has protections using credit cards and the like – you may get dinged but you are covered. And if your email gets targeted by the advertisers, drug purveyors and sexual enhancement folks (and yes, my mother gets those too) you have recourse.

On the other hand, if our biometric information gets loose into cyberspace all hell can break loose if your prints, or mine, get used by an unscrupulous person, much less a terrorist.

Now is the time to draw the line, hard and fast. This is no time to become spineless and give into lobbyists who have many assurances of safety, but no guarantees and no accountability when this data gets loose – and you all know that it will.

Please a support meaningful, strong SB 98. The "Alternative ID" section must stay.

Thanks. Ken.

Kenneth G. Robertson
Robertson Law Office
310 K Street, Suite 200
Anchorage, Alaska 99501
(907) 278-5657
(907) 346-2810 Fax
www.robertsonlaw.net

April 1st, 2011

Dear Senator:

My name is Tim Pearson, an Anchorage business professional and Co-Chairman of the Citizens for Privacy in Alaska. I urge your support for protecting the biometric privacy of Alaskans.

Please remember that unlike credit cards, stolen or lost fingerprints and biometric information cannot be replaced. Innocent Alaskans *deserve the option* of not being forced to provide their fingerprints. Passports and driver's licenses are sufficient identification.

Alaskan businesses do not want to take on the **legal liability** of losing the irreplaceable data of their employees or customers. There is no way to make people whole again.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

PLEASE stand up for our privacy -- and pass a strong Biometric Privacy law this session that includes the "Alternative ID" provision (ie. allows an opt-out for people who show a driver's license or passport as ID).

Sincerely,

Tim Pearson

President, Pearson Consulting
Graduate of Harvard University
Fmr Vice President of Human Resources, GCI
tim@timpearson.net
952-3498

April 1st, 2011

Dear Senator:

As an attorney and Principal at my firm, Woelber and Jacobson, LLC, I can tell you that I am a STRONG SUPPORTER OF PRIVACY. I learned about Citizens for Privacy in Alaska today, and I urge your support for a biometric privacy bill...but only one that offers the safeguards below:

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Tonja Woelber

Attorney, Principal at
Woelber & Jacobson, LLC
Anchorage, AK
twoelber@alaska.net

04/ 01/2011

Dear Senator:

My name is James MacKenzie, Director of the Food Bank of Alaska. I learned that you were planning to stand up for our privacy rights through a friend today, and I STRONGLY urge your support of the new Biometric Privacy Rights bill – so long as it contains REAL protection as noted below.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

James MacKenzie
Director, Food Bank of Alaska
Anchorage, AK
mackenzie.jamesa@gmail.com

PS note that this is my personal position on this subject

Dear Senator:

I am a past President of Alaska Chapter of the Institute of Management Accountants (IMA) and have been employed in mostly accounting and/or financial positions over my work life.

From the financial side, the people who typically steal large amounts of money from businesses or non-profits are well thought of or even "Pillars of the Community" --- before the disgracing headline hits. Collecting biometric data will do nothing to reduce the amount of criminal activity within financial circles.

A passport or a driver's license is adequate identification for test taking purposes. AS A MEMBER OF THE ANCORAGE BUSINESS COMMUNITY – I URGE YOU TO SUPPORT THE NEW BIOMETRIC PRIVACY BILL.

I am also a member of Citizens for Privacy in Alaska, and we are all watching this bill closely. **"Our goal** is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."

Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Thank you for your consideration.

Sincerely
Tim A. Wiepking
Anchorage, 99508
529-0766

March 31, 2011

Dear Alaska Legislators:

My name is Taylor Ridgeway. I am a strong supporter of Citizens for Privacy in Alaska, and I URGE you to stand up for Alaska's privacy rights against the data-miner's lobby! All of these oppressive encroachments are whittling away at the average Americans ability to engage in free commerce. These practices are unconstitutional...this has got to stop!

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Sincerely
Taylor Ridgeway
Taylor.ridgeway@gmail.com

March 31, 2011

Dear Alaska Legislators:

My name is Kelly Mazzei, a voter from Anchorage. **You must stand up to these Outside data-miner lobbyists and support our privacy rights!** I am also a member of Citizens for Privacy in Alaska.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Sincerely

Kelly Mazzei

A REGISTERED VOTER
Anchorage
kamazzei@gmail.com

Dear Senators and Representatives:

My name Barbara Brown, resident of Anchorage, and I urge your support for protecting the biometric privacy of Alaskans. I am also a member of Citizens for Privacy in Alaska.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Will you stand up for Alaskans and support this bill?

Barbara Brown
4071 MacInnes St.
Anchorage, AK 99508
cloudy@acsalaska.net

March 30, 2011

Dear Senator / Representative:

As an Alaskan voter, small business owner and accountant, **I urge you to support and pass biometric privacy legislation *this session.***

I am also a member of Citizens for Privacy in Alaska, and we are all watching this bill closely.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."

Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Karen Demichelis, Principal
Demichelis & Associates
karen.demichelis@gmail.com
tel: 907-360-2661

Dear Senator:

March 30, 2011

As the owner and President of a small business, I **have no need for fingerprint "biometric" security systems and I never will.**

The ABSOLUTE LAST thing I would want would be to be **legally liable** for a data breach involving my employee's fingerprints! *Their privacy would be compromised for the rest of their lives* because fingerprints are like passwords that you can never change. I would be responsible for that…I can only imagine the lawsuits! **Alaskan businesses are NOT interested the risky proposition of fingerprint security systems.**

I strongly support the bi-partisan bill to protect our private biometric data (SB 98), and URGE you to pass it into law *this session* with the "Alternative ID" section intact.

We Alaskans have entrusted YOU to stand up for our privacy rights against Federal intrusion and corporate special interests…and we are all watching this bill closely.

Global data-miner ChoicePoint/LexisNexis/Reed Elsevier, has NO legitimate voice in this process, please don't even grant them a meeting. They have flown a team of east coast lobbyists to Juneau to "influence" you -- and will attempt to scare you with a bunch of nonsense because **they profit by exploiting Alaskan's loss of privacy.**

If they weren't making money off collecting and trafficking our private information, why would they be here?

Who will you stand with?

Regards,
Jason Giaimo
Anchorage Real Estate Investor, Accountant, Small business owner
(907) 602-9250
Giaimo1@aol.com

Dear Senator:

My name is Allan R. Johnston, Vice President of Wedbush Morgan Securities. I am a member of Citizens for Privacy in Alaska....and I urge you to **support this biometric privacy bill!**

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."

Allan R Johnston

Vice President and Regional Manager

Wedbush Morgan Securities

101 West Benson Blvd, Ste 500

Anchorage, AK 99503

allanrjohnston@gmail.com

Dear Senator:

My name is Tyler Arnold, Founder and CEO of **TylerSystems, Inc**. a rapidly growing global technology firm based in Anchorage. I urge your support for protecting the biometric privacy of Alaskans. I am also a member of Citizens for Privacy in Alaska, and we are watching this bill closely.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."

Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

PLEASE stand up for our privacy -- and support this bill.

Tyler Arnold
CEO, TylerSystems, Inc.
227-9541
tyler@tylersystems.com

March 30, 2011

Dear Senator:

As a small business owner, I write this email to you with great concern over the future of freedom in this country. Alaska has always been at the heart of cherishing individual freedom. Right now there are very wealthy forces from outside this country that are plotting to take away "our" freedom of privacy.

If you have an ounce of respect for our forefathers who died to provide us with some small degree of human dignity, I implore you to join in the battle to defend these rights. To put it bluntly, tells these foreign data-mining companies (Lexis Nexis/Reed Elsevier) to go to hell!

I am not sure if you feel it like I do, but there is revolution in the air throughout the world. You need to make a choice and decide if you are going to sell out your family's freedoms and privacy to the corporate interests, or take a stand and let freedom ring. I hope you will make the right choice.

Sincerely,

Andrew

Andrew Wilkins

Small business owner
aawilkens@yahoo.com

March 30, 2011

Senator:

Please support REAL biometric privacy legislation that would make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID or a United States passport (the "Alternative Identification" provision).

Please do not let Choice Point (LexisNexis/ReedElsevier) or any other company or corporation gut this bill. Please protect Alaskans from privacy intrusions by passing Senate Bill 98 in the format of the original intent as requested by Citizens for Privacy in Alaska – with the "Alternative ID" section in-tact.

Thank you.

Daniel

Daniel Boland

Registered Alaskan Voter
8231 Kip Court
Anchorage AK 99507

Mt1dan@gci.net

March 29th 2011

Dear Senator Hollis French:

We are a group of Alaskan voters who strongly support the need for stronger privacy legislation.

Specifically, we are *Citizens for Privacy in Alaska, and we urge you to support and pass the new Alaskan Biometric Privacy Legislation SB-98 this session*.

All Alaskans cherish their privacy - it's even guaranteed by our State Constitution. As with opposing REAL ID, we Alaskans look to YOU, our representatives to stand up for our privacy rights against the Federal Government and corporate intrusion.

This privacy bill is supported by nearly everyone - from Libertarians to liberal Democrats, from conservative Republicans to the ACLU; from school teachers to military families, to CEOs, IT experts and oil company managers. Not surprisingly, only the lobbyists for the global data-mining firms seem to object (ChoicePoint/LexisNexis) because *this bill threatens their ability to profit from the exploitation of Alaskan's loss of privacy*.

SB-98 says essentially that biometrics (fingerprints etc) should not be required as identification when a valid driver's license or US passport is presented (this bill would not affect fingerprints taken for background checks and it would not affect law enforcement in any way).

As you may know, NY Senator Chuck Schumer and SC Senator Lindsey Graham have proposed as "the cornerstone" of their immigration Reform a Federal Government plan to **FINGERPRINT ALL AMERICANS** under a new biometric National (work) ID Card program. A city in Arizona is right now considering mandating all customers of the local pharmacy be fingerprinted in order to pick up their prescriptions...those who object will be *denied their medicine*. With this rapidly deteriorating national privacy climate, Alaskans urgently need strong biometric privacy legislation now.

As you know, there are *very few issues* on which Alaskans from across the political spectrum agree. *The urgent need to protect our privacy* from constant and increasing Federal Government and corporate intrusion is one of them. Please do all you can to support the Biometric Privacy bill and pass it into law this session.

Signed,

Citizens for Privacy in Alaska

Co-chair: Tim Pearson – business owner

Co-chair: Jason Giaimo, business owner

Gretchen Guess: Alaskan voter, former Senator

Horst Poepperl: CEO and IT data privacy expert, Borealis Broadband Corporation

Mark Lerner: President, Stop REAL ID National Coalition

Jason Dowell: Libertarian Party Alaska, member

Cindy Miller: Former CFO of Unocal Alaska

Joe Dirksen: Resident, Alaska, Alaskan Voter, military family

Eunice Trask: Alaskan voter

Laura Dirksen: 20 year teacher at an Anchorage Christian School. Alaskan Voter

Barbara Brown: Alaskan Voter

Dan Boland: State of Alaska, Audit Division, Alaskan Voter

Arzu Smith: CPA candidate

Tom Gill: UAA, formerly with BP, Alaskan Voter

Tim Wiepking: Institute of Management Accountants, former President, Alaskan Voter

George Ascott: Alaska resident, Alaskan Voter

Ralph Taylor: Taylor Consultants, President

Allan Johnston: Wedbush Morgan Securities, Alaskan Voter

Angela Gill: Alaskan Voter, medical professional

Andrew Blackman, CPA: Partner with Shapiro Lobel LLP

Karen Demichelis: President, Accountant, Demichelis & Associates, Alaskan Voter

Tyler Arnold: TylerSystems Inc. CEO, Alaskan Voter

Joel Smith: Former President of the Institute of Management Accountants, SF chapter

Tim Pearson: Pearson Consulting, Alaskan Voter

Jason Giaimo: Net Gain Business Consultants of Alaska, Alaskan Voter

Jack-Taylor Ridgeway: Privacy Rights supporter, advocate

Patrick Lorenz: Management, Analyst, British Petroleum, Alaskan Voter

Dianne Kelly: CPA, State of New Jersey

Chuck Kaucic: Alaskan voter, Wasilla

Chris Brownwell: Resident, Alaska, noted author, Alaskan Voter, military family

Hetal Giaimo: Alaskan Voter

Dawn Brownwell: Alaska Voter, military family

Kelly Mazzei: Alaskan Voter

Andrew Wilkins: IT expert at a large national bank.

Bruce Sollenberger: Alaskan Voters

Wendi Sollenberger: Alaskan Voters

Jeffrey Mittman: Executive Director, ACLU - Alaska

...this is only a partial list of voters and supporters who are watching this bill

ALASKA SENATE and ALASKA HOUSE SUPPORT INCLUDES:

Bill sponsor: Senator Bill Wielechowski

Co-sponsor: Senator Coghill

Co-sponsor : Senator Kevin Meyer

Co-sponsor: Senator Johnny Ellis

Will be a bill sponsor or co-sponsor: **Representative Berta Gardner**

Co-sponsor: Representative Allan Dick

Co-sponsor: Representative Wes Keller

Does not oppose: Whitney Brewster Alaska State Director, Division of Motor Vehicles

Does not oppose: Alaska Department of Health and Social Services

Reviewed SB190 (previous version of SB-98): previous Alaska Attorney General

Supported SB190 (previous version of SB-98) in committee: Senator Kookesh

Supported SB190 (previous version of SB-98) in committee: Senator Egan

Supported SB190 (previous version of SB-98) in committee: Senator French

Supported SB190 (previous version of SB-98) in committee: Senator McGuire

Supported SB190 (previous version of SB-98) in committee: Senator Paskvan

Co-sponsoring SB-98: Senator Cathy Giessel

Co-sponsoring SB-98: Senator Linda Menard

Will co-sponsor: Representative Tammie Wilson

Will co-sponsor: Representative Chris Tuck

Will co-sponsor: Representative Sharon Cissna

Will co-sponsor "very probably" Representative Mark Neuman

PROMETRIC

April 4, 2011

The Honorable Hollis French
Chairman
Senate Judiciary Committee
Alaska State Senate

Re: Alaska SB 0098A

Dear Chairman French:

I am writing to present information regarding the use of biometrics as a test security measure. Attached to this letter is a fact sheet which provides relevant data regarding biometrics as implemented by Prometric on behalf of its testing clients.

Prometric is the largest provider of integrated testing services in the world. Prometric's test administration services include the development of test content, the administration of tests via test center based services, internet based testing services, and paper based testing services and test result and data management services. Prometric administers over 9 million tests per year.

As the leading global provider of test services, Prometric, in concert with its clients, is responsible for the security and integrity of testing services. This includes protecting the content of the examinations which we administer and to make certain that testing and evaluation of candidates is valid and fair.

Why Biometrics

There are numerous methods by which individuals can threaten the integrity of the testing process. One such method involves the impersonation of a test taker or candidate by another individual. There are at least three reasons why such impersonation or proxy testing occurs. The first is the simple substitution of one person for a real candidate for the purpose of providing that candidate an advantage. This is usually distinguished by two individuals conspiring without necessarily a profit motive as in a friend or relative substitutes to obtain a higher score.

The second reason for proxy testing is a variant of the first, however, in this case the motivation is a professional test taker who takes tests for any individual willing to pay the price.

The third reason for proxy testing is by a professional test taker for the purpose of stealing test content. The content is then used to provide gray market study materials or to provide real content for the purpose of memorization.

In each case the public is harmed because candidates without valid criteria are permitted to practice a profession, exercise a certification, enter an institution of higher education, or display a credential that they are not entitled to and did not earn.

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Examples

Prometric tracks many security statistics across a wide variety of misconduct. For a nine month period in 2010 ending in September, Prometric undertook 329 proxy testing investigations.

There have been significant and high profile proxy testing cases over the last several years involving Prometric and its clients in which proxy testing was an issue. In each case cited below, the incidents are documented, however, Prometric's internal privacy protection policies prohibit identifying the individuals or the programs.

a. The first example, which was one of the factors involved in Prometric looking at implementing a biometric solution world wide, involved a massive proxy testing scheme involving 600 candidates in 10 US states. The client is a large testing organization which provides its own examinations and which acts as an aggregator providing testing for other organizations. The examinations were major large volume exams for admission to US educational institutions. In the summer of 2004 Prometric assisted this client along with law enforcement in investigating the matter. We discovered during the course of the investigation that the following activities were occurring:

- Chinese examinees were paying $3000.00 each to the conspirators for professional test takers to take one of the three academic tests involved.
- The professional test takers were armed with high quality forged identification documentation including passports so that the documentation presented would pass any test center scrutiny of the credentials.
- Analysis of credit card data and digital photos after the fact demonstrated that the 600 tests were in fact taken by a small number of professional test takers and that candidate fees were paid using a small pool of credit cards.
- The ring had been operating for at least 3 years, was discovered through a tip to the client, and required more than 600 schools and individuals to be notified the scores were obtained fraudulently.

b. In 2007 and 2008, Prometric assisted a large medical client in investigating a ring of individuals who were using false candidate profiles to capture exam content. In this case the individuals obtained seemingly legitimate credentials from a school which credentials were used by the client to create test eligibility files. This ring of professional test takers then took examinations in at least two US states and 3 foreign countries in order to capture content on behalf of a test preparation company. Our belief is that this was a small group of professional test takers, registering under a number of different identities, and having appropriate forged ID documents. Prometric and the client identified at least 8 different individuals that may have been part of the ring through credit card usage. Our strong belief is that had the client been using biometrics, an earlier flag would have been thrown that showed a suspicious pattern of test taking resulting in prevention of the ring from accessing future tests and attempting to capture content.

c. In 2009, through a tip from a Prometric employee, Prometric discovered a professional test taker who was taking entry level work safety examinations on behalf of an immigrant community in the UK. In this case, Prometric operates a number of mobile test vehicles, essentially complete

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test centers in the back of tractor trailers in the UK. The client was not using biometrics although the technology was available for use. In at least 10 cases, the professional test taker arrived in place of the real candidate, using a different mobile location each time and with false identification documents that passed inspection by the test center administrators. Prometric caught the professional test taker because the individual attempted to employ a Prometric employee in the scam to avoid having to travel to numerous locations. Had the professional test taker simply continued to travel to multiple locations and use false identification, we might not have caught the individual as quickly. Had biometrics been used with this client, we would have caught the individual on the second attempt.

d. In October 2010, Prometric performed a surprise audit at a test center in India and discovered that individuals were present at the site and sitting US academic entry examinations on behalf of other individuals. While an investigation is still ongoing, we were by virtue of examination of the records able to determine that proxy testing was occurring. This involved a number of candidates present at the site although an exact count is not available until completion of the investigation.

e. In 2008 Prometric caught two sisters impersonating each other for the purpose of taking a higher education entrance examination for a health profession. The sisters were similar enough in appearance that average scrutiny of real US state drivers licenses did not reveal the false identity. In this case one sister traveled across the border from New York to Canada in an attempt to impersonate the other and obtain higher scores on her behalf. We were able to identify the impersonation because biometrics was in operation for this program in both New York and Canada.

f. In 2010, based on a tip through a security hotline, Prometric was made aware that a candidate for an association certification exam claimed that another individual associated with the test center, had taken the exam on her behalf. Prometric and the client began an investigation and based on a review of exam performance determined that the point gain from first attempt to second attempt indicated that someone did take the exam as a proxy for the candidate. The test center was located in Ontario Canada and we terminated the center's contract with Prometric over the issue and the client will discipline the candidate.

Use of Government Identification

In most if not all of these cases, Prometric has determined that government quality false identification documents were used by the proxy testers. In the first example this occurred at least 600 times. This is a large problem in the testing industry. A casual review of the internet, without any attempt to do more than a brief search, reveals at least 15 websites offering false ID documents. Most of these sites offer US and Canadian identity documents. The use of a website to acquire fake ID is not uncommon and computer technology enables sophisticated IDs difficult to detect for the average person. The criminal test takers in the case of the Chinese students likely had access to professional criminals capable of producing identification documents that are not discernible from real ID documents by anyone other than a professional. While Prometric and clients are working on technology that will enable better detection of false identity documents, biometrics is an equally effective and safe means of combating test fraud.

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What is clear for each of the examples set out above is that biometrics would have stopped each of these incidents within 2 or 3 tests at the most. The trend we believe is toward greater use of biometrics as a fraud deterrent.

Websites offering false identification documents: (Note: the safety of any of these sites has not been verified. Prometric suggests that only an IT professional verify the site.)

www.theidshop.com
www.photoidcards.com
www.howtochangeyouridentity.info
www.fake-id.de
www.buyfakeidonline.com
www.newidcards.com
www.newid.com
www.fluxcard.com
www.myfakeid.co.uk
www.nextdayid.co.uk
www.fakepassportsale.cc
www.fakeidfree.com
www.marketingoazis.hu
www.developersdex.com
www.topix.com

Use of Biometrics by Prometric

Prometric's biometric program is characterized by integrity, security, and adherence to privacy principles. The attached fact sheet contains additional information regarding our program, but I highlight here our adherence to strict privacy obligations.

1. Biometrics is used only to ensure the integrity of testing programs. Prometric does not and will not sell biometric information and we adhere to the highest standards of data privacy. Prometric uses the services of LexisNexis for processing the biometric data. Our contract with LexisNexis requires that the data be used solely for the detection of fraud and protecting the integrity of testing programs. LexisNexis is prohibited from any use of the biometric and demographic data except as permitted by Prometric in writing.

2. The biometric data and demographic data is securely stored and protected with stringent security measures. The data is segregated from all other LexisNexis data and LexisNexis programs. Prometric and LexisNexis meet or exceed current industry best practices for computer system and data center protections. Prometric regularly audits LexisNexis compliance and clients have also audited them.

3. Prometric collects only the information necessary to implement a test integrity program. All data is deleted within a reasonable time after the reason for collection is fulfilled. Prometric does not retain biometric data beyond such period of time as is necessary to fulfill the underlying program integrity needs.

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PROMETRIC

4. Prometric adheres to the US Department of Commerce Safe Harbor regime for meeting strict European Union data protection requirements. Prometric and its clients routinely manage consent rules and varied data privacy requirements.

I trust that this information is of assistance in your consideration of a bill regulating biometric practices. Should you have additional questions, feel free to contact me per the below contact information.

Sincerely,

Anthony R. Scicchitano
SVP and General Counsel
443-455-8493 Direct
443-455-6481 Fax
anthony.scicchitano@prometric.com

cc: Honorable Bill Wielechowski

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Identity Management – Biometric Check-in Fact Sheet

Advantages to Testing Sponsors and Test Takers:

- ID management and biometrics verify test taker information at the time of check-in, during breaks, and when returning to test at a later date. These procedures attempt to deter proxy testing, cheating and collaboration by test takers and testing proctors.
    - Example: In 2008 two sisters testing for a medical exam, attempted to test for one another. The first sister took the exam at a testing center in the United States and passed. Several months later the same sister crossed the country border into Canada and presented the ID of her sister attempting to test for the same exam under her sister's name. Although she had presented a new ID, her fingerprints matched that of her real ID. This was enough evidence to use for investigative purposes and identify this as a true proxy testing incident.
- Biometrics:
    - Electronically and accurately captures test taker information from government-issued photo ID documents, and recognizes if a test taker has enrolled and tested with Prometric previously
    - Protects the value of the credentialing program; credentials facilitate public trust, help support the economy, and enable individuals to contribute to society
    - Protects intellectual property
    - Deters proxy testing
    - Provides an enhanced method of identity verification to validate ID and fingerprint data has not been previously presented under a different name
    - Increases test takers perception of security and increases deterrence of cheating
    - Improves overall testing experience, specifically for return test takers
    - Keeps the test taker's data secure
    - Stringent security barriers build respect for credentials among peers and in marketplace

Prometric's Implementation Methods:

- Biometric check-in is combined with several other standard security procedures in Prometric Test Centers worldwide including, digital video recording (DVR) monitoring, and protocol that prevents test taker's to bring items into the testing room during the examination.
- Biometric Consent Tool – a consent form is presented to the test taker during the scheduling and registration process asking the test taker to agree to the use of biometrics during check-in.
    - Dependent upon the location of the testing center and the laws within that country, the test taker will be presented with the appropriate consent form. There is a form for each of the following possible scenarios: fingerprinting is prohibited, the country has no laws against the use of fingerprints, consent is required, or consent is implied.
    - This feature acts as a means of preparing the test taker, prior to arriving at the test center, for what to expect during the biometric check-in process. This is expected to further minimize anything unexpected on the part of the test taker.
- Prometric works with each testing sponsor/organization to include information regarding biometric check-in within the sponsors test taker materials, including the sponsor's website and candidate bulletins.

URGENT FAX; April 7, 2011

WE DEMAND REAL BIOMETRIC PRIVACY PROTECTION FOR ALL ALASKANS

Dear Senator:

My name is Horst Poepperl, CEO of Borealis Broadband Inc. I've already sent several emails in support of SB-98, but as I understand it, the current version has been watered down significantly with exemptions.

First of all, I do want to say that I appreciate and am grateful for those senators and representatives who have already taken a public stand for personal privacy, like our founding fathers intended. Especially those of you who have taken the time to respond to my emails personally. You have my heartfelt gratitude and support. The rest of this email might be informational for you but otherwise redundant.

For the rest of you:

How utterly disappointing and what a dangerous game to play with our personal information.

I would like to go on record AGAIN as OPPOSING the watering down of this privacy legislation and SUPPORTING strong privacy protections. If it continues as is, then you are making a very serious mistake regarding the privacy of your fellow Alaskans. It is much more prudent to pass strong privacy legislation and, if necessary, loosen it up on a case-by-case basis later. Doing the reverse and tightening up the legislation later is completely useless - your fellow Alaskans will already have their biometrics floating around cyberspace waiting to be sold to whomever...or lost to hackers.

In February of 2010 it was revealed that Israel had stolen biometric information from the passports of visitors to the country. Innocent and unsuspecting citizens of many countries were affected when the Mossad used their biometric information to fake passports and commit an assassination. http://www.timesonline.co.uk/tol/news/world/middle_east/article7029553.ece

Go ahead and take some time to read the article and see how that affected those people. Some of these people had to literally hide in their houses for a while and could no longer travel to entire parts of the world until the deception had been made public. Even today, they have to look over their shoulders for the rest of their lives in case some extremist didn't get the memo.

Yes, it's an extreme example, but the point is, IT'S ALREADY HAPPENED. More than once. It's hard to think of an even more egregious use of stolen personal data, but I'm sure someone will figure out how to top that one at some point in the future.

Maybe next time, they'll just buy the information like everyone else and crank out fake passports to their hearts' content. Maybe they'll buy it from Choicepoint. Maybe that technique will become all the rage for other countries, hackers or criminals. Maybe some Alaskans' biometric data will be used because you didn't take the privacy issue seriously.

In my personal opinion, and saying this with all due respect, you DO NOT need to entertain Choicepoint or any data mining company. To me, the very idea that you would seriously entertain the wants of a foreign (or domestic) company of data snitches is just putrageous. What the hell for? Why give even one iota of leeway to a company that makes its money ratting out your personal information to the highest bidder? A new market for them, at our expense?

As far as other companies are concerned, you need to ask yourself; "what did they do before fingerprint readers were introduced commercially?" Suddenly we should believe that fingerprints are critical for their security procedures? Really? Fingerprint readers aren't even in widespread use yet as the consumer version of that technology has not yet fully matured. I think they just want to keep the door open and that's not nearly a good enough reason to sacrifice more of my privacy.

As a career professional in the IT industry for the past 27 years, it just boggles my mind that we would even consider releasing more privacy information in light of all the historical abuse already. To me, with what I've seen, experienced and know about this issue, it is just mind-numbingly dumb to even contemplate releasing additional information into this cesspool that the data-miners and other companies have created. Much less something as personal and unchangeable as fingerprints.

In the words of one of my buddies from my military days, "That can't get nuttin' but ugly." He said that every time he was looking at a problem that had no upside. Allowing the release of fingerprint biometrics has no upside. Period. Even for the National Security argument; no nation has ever been made more secure by ratting out its citizens.

Or maybe you need a reminder of how often data is stolen or lost:

http://www.privacyrights.org/data-breach/new That link will take you to a site that lists data breaches in chronological order. Be prepared for a long list.

I've already been notified that various pieces of my personal data were lost or stolen four times in the space of just six years. Once even by the Veteran's Administration, who, incidentally, probably has my fingerprints. Where is my compensation for creating all that work, stress and hassle for me for something that didn't have to be? I saw plenty of finger pointing but no one taking responsibility.

That's my skin in this game. I'm not at all interested in having you expose me to even more abuse and I will strongly resent it if you do. If a person wants to willingly give up their biometrics, then fine, let them. But never, ever, create or allow the conditions that FORCE us to.

I urge you to strengthen the privacy legislation as tight as you possibly can AND PROTECT ALL ALASKANS WITH IT. Making it airtight with the commitment to review on a case-by-case basis in the future would be acceptable for now. You will never go wrong with protecting our privacy and passing strong privacy legislation is the lowest risk path to take, not to mention the right thing to do by any measuring stick, no matter how much the lobbyists try to muddy the water for you. But you will most definitely screw up badly if you allow the release of our biometrics and force Alaskans to give up their fingerprints with weak legislation. You won't be able to correct that mistake later - once the data is out, it's out.

Best regards,

Horst Poepperl
CEO
Borealis Broadband, Inc.
Professional Quality Internet Service

FAX

April 8, 2011

Dear Senator:

My name is Gretchen Guess, I am a former Senator, a former member of the Alaska State House of Representatives, and a resident of Anchorage. I fully support a ban on the compulsory fingerprinting of innocent Alaskans for ID purposes, and I urge you to pass a strong privacy law this session that:

"makes illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Gretchen Guess
Anchorage
guessak@gmail.com

FAX

April 8, 2011

Dear Senator:

My name is Eric Britten, former Chairman of the Anchorage Chamber of Commerce and Past Chair of the Alaska State Chamber of Commerce.

I am writing to you in support of a ban on compelling law-abiding Alaskans to be fingerprinted for ID purposes. I urge you to pass a strong privacy law ***this session*** that:

"makes illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Eric Britten
Former Chairman of the Anchorage Chamber of Commerce
Past Chair of the Alaska State Chamber of Commerce
eric@brittenassociates.com
(907) 440-8181

April 7st, 2011

Dear Senator:

My name is Ted McMillan, a resident of Anchorage. I fully support NOT fingerprinting innocent Alaskans-for-ID, as described in the "Our goal" statement below.

Privacy rights are a basic freedom of every law abiding citizen. There's just some things you shouldn't do… involuntarily tracking law abiding citizens is one of them.

Having a company lobby to protect its revenue stream is almost immoral.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,
Ted McMillan
Anchorage
tmcmillan@gci.com

April 5, 2011

PREMERA | BLUE CROSS BLUE SHIELD OF ALASKA

Senator Hollis French
Alaska State Legislature
State Capitol Room 417
Juneau, AK 99801-1182

Jack C. McRae
Senior Vice President

RE: CSSB 98 Biometric information

Dear Senator French:

I am writing on behalf of Premera Blue Cross Blue Shield of Alaska to express concern about CSSB98(STA), " an Act relating to biometric information."

Under proposed new Section 1, new Sec. 18.14.090 Definitions, "biometric data" includes "voices" and "biometric system" means "an automated system capable of capturing biometric data from an individual's biometric information...storing the biometric data extracted... and comparing the biometric data extracted...with biometric data stored for the individual for use in future recognition of the individual..."

Proposed new section Sec 18.14.060 Exemptions sets forth exemptions to the collection, retention, analysis, disclosure or distribution of biometric information, but there is no exemption for quality control purposes.

Premera, as well as many other organizations, records telephone calls in our Customer Service department strictly for quality assurance purposes in order to provide quality and valued service to our customers.

We do not believe that regulating the recording of voices for this purpose is intended by this legislation and suggest that a related exemption be included in the legislation for clarity. Therefore, we request that the following language be added to CSSB98 (STA) to Section 1. Chapter 14 Biometric Information, under Sec. 18.14.060 Exemptions on page 2 after line 25: "(5) voices when used for quality assurance purposes."

Thank you for your consideration of this request. Please let me know if you have questions or would like to discuss this matter further.

Sincerely,

Jack C. McRae

Jack C. McRae
Senior Vice President

P.O. Box 327
Seattle, WA 98111

tel 425.918.5757
fax 425.918.5635
jack.mcrae@premera.com

www.premera.com

An Independent Licensee of the
Blue Cross Blue Shield Association

Michael W. DePasquale
Chief Executive Officer

March 25, 2011

Honorable Hollis S. French II
Chair, Senate Judiciary Committee
State Capitol, Room 205
Juneau, AK 99801-1182

RE: SB 98

Dear Senator French:

On behalf of BIO-key International, I write to respectfully oppose SB 98, which would require prior written consent for the use of biometric technology in identity applications, and force any person, government agency, or business wishing to use a biometric as part of their business process to accept a photo ID as an valid alternative to doing so. In short, a photo ID check does not provide the same anti-fraud benefits as a biometric does, and is not an equivalent substitute. It does not address the problems of "identity theft with cooperation" and "one person having multiple identities" (aliases), which are central to so many identity theft and fraud scenarios, and can only be detected and prevented using biometrics.

BIO-key International develops and delivers advanced identification solutions to commercial and government enterprises who otherwise struggle with managing identity. Our finger identification technology accurately identifies and authenticates users, patients and customers in some of the world's largest identification deployments to improve security, guarantee identity, and help prevent identity theft. In fact, in part as a response to the FBI's misidentification problems such as those cited by Senator Wielechowski, our technology has been added to the FBI's recently deployed Next Generation Identification System, significantly improving the accuracy of that system.

It is noteworthy that the driver of the bus involved in the gruesome accident in New York City, killing 15 passengers, had his license suspended under several aliases, but was never detected, because the names didn't match. He was employed because his current photo ID driving record was clean. See http://www.nbcnewyork.com/news/local/Crash-Driver-Used-Alias-118194134.html. Without biometrics, how can a business needing to know who it is dealing with stop a person from either shedding their existing ID to assume a new one, or, as is the case in the exam fraud that the IACPA seeks to prevent, sharing it with a paid proxy to go take the exam for them?

Additionally, many commercial applications of biometrics are for safety, not just security - to automate the process of positive ID, without requiring an individual to carry an identification card. Hospitals, Blood Centers, and other beneficial entities rely on BIO-key to make a positive identification of their patients and donors in order to properly associate that person with their medical history, or to prevent prescription or medical ID fraud. In many of these cases, a misidentification can have deadly

consequences, as with the case of a blood transfusion to the wrong patient, or misidentification of surgery patient. A photo ID check only validates the name of a person, and does not ensure that it is the same individual, even if the name matches.

A search of the Houston (TX) County Hospital records found that they had 2500 or more "Maria Garcia's" in their records, and found that there had been three in the hospital at the same time! Biometrics are introduced to automate the positive ID of an individual, not just confirm that they have a particular name.

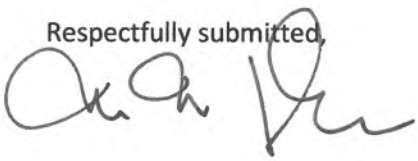
SB 98 assumes that the goal of a biometric system is simply to ensure that someone is matching the name that they say they are, and correctly envisions that a photo ID check is sufficient to achieve that goal. However, because there are so many people with the same name, and because people move over time, this is not a sufficient means to assure a consistent identity of a single individual over time. Even the government, with its immense access to information on individuals, uses biometrics in public assistance programs to prevent double dipping on benefits, and in law enforcement, because they recognize the failures of photo ID checks to determine if someone is a first time applicant for assistance or has a past criminal record that they might want to hide. Businesses struggle with the same issues, with much less access to data, as part of trying to prevent fraud and identity theft. Don't private entities have the right to know who they are trusting or doing business with, and to know that the Alaska laws support their using proven tools to assure the identity of those people?

Protecting individual privacy is important, but in the case of biometrics, the majority of people actually prefer the convenience and ID-Theft resistance of biometrics. Twice a year, Unisys Corporation commissions a recurring, statistical measure of consumer concern about four areas of security: national, financial, Internet and personal safety. The Unisys Security Index tracks trends in consumer perception of pressing security issues. Their objective findings inform the conversation about personal security and the use of biometrics.

The most recent Security Index was issued in October 2010 and can be downloaded in its entirety from http://www.unisyssecurityindex.com/. The study found that Americans are seriously concerned about identity theft and bankcard fraud. A 2009 study focused on biometrics for personal identification. It found that 73% of Americans are willing to use fingerprint identification to verify their identity with banks, government agencies and other organizations to prevent fraudulent misuse of their personal information.

I ask that full consideration be given to the many beneficial uses of biometric technology, and not focus on a small area of potential abuse in order to cut off this valuable and cost-saving means to prevent fraud and assure identity. Please vote no on SB 98.

Respectfully submitted,



Michael W. DePasquale

Allaire Corporate Center • 3349 Highway 138 • Building D • Suite B • Wall, NJ 07719
Telephone (732) 359-1100 Facsimile (732) 359-1101

March 29th 2011

Dear Senator Hollis French:

We are a group of Alaskan voters who strongly support the need for stronger privacy legislation.

Specifically, we are *Citizens for Privacy in Alaska, and we urge you to support and pass the new Alaskan Biometric Privacy Legislation SB-98 this session.*

All Alaskans cherish their privacy - it's even guaranteed by our State Constitution. As with opposing REAL ID, we Alaskans look to YOU, our representatives to stand up for our privacy rights against the Federal Government and corporate intrusion.

This privacy bill is supported by nearly everyone - from Libertarians to liberal Democrats, from conservative Republicans to the ACLU; from school teachers to military families, to CEOs, IT experts and oil company managers. Not surprisingly, only the lobbyists for the global data-mining firms seem to object (ChoicePoint/LexisNexis) because *this bill threatens their ability to profit from the exploitation of Alaskan's loss of privacy*.

SB-98 says essentially that biometrics (fingerprints etc) should not be required as identification when a valid driver's license or US passport is presented (this bill would not affect fingerprints taken for background checks and it would not affect law enforcement in any way).

As you may know, NY Senator Chuck Schumer and SC Senator Lindsey Graham have proposed as "the cornerstone" of their Immigration Reform a Federal Government plan to **FINGERPRINT ALL AMERICANS** under a new biometric National (work) ID Card program. A city in Arizona is right now considering mandating all customers of the local pharmacy be fingerprinted in order to pick up their prescriptions...those who object will be *denied their medicine*. With this rapidly deteriorating national privacy climate, Alaskans urgently need strong biometric privacy legislation now.

As you know, there are *very few issues* on which Alaskans from across the political spectrum agree. *The urgent need to protect our privacy* from constant and increasing Federal Government and corporate intrusion is one of them. Please do all you can to support the Biometric Privacy bill and pass it into law this session.

Signed,

Citizens for Privacy in Alaska

Co-chair: Tim Pearson – business owner

Co-chair: Jason Giaimo, business owner

Gretchen Guess: Alaskan voter, former Senator

Horst Poepperl: CEO and IT data privacy expert, Borealis Broadband Corporation

Mark Lerner: President, Stop REAL ID National Coalition

Jason Dowell: Libertarian Party Alaska, member

Cindy Miller: Former CFO of Unocal Alaska

Joe Dirksen: Resident, Alaska, Alaskan Voter, military family

Eunice Trask: Alaskan voter

Laura Dirksen: 20 year teacher at an Anchorage Christian School. Alaskan Voter

Barbara Brown: Alaskan Voter

Dan Boland: State of Alaska, Audit Division, Alaskan Voter

Arzu Smith: CPA candidate

Tom Gill: UAA, formerly with BP, Alaskan Voter

Tim Wiepking: Institute of Management Accountants, former President, Alaskan Voter

George Ascott: Alaska resident, Alaskan Voter

Ralph Taylor: Taylor Consultants, President

Allan Johnston: Wedbush Morgan Securities, Alaskan Voter

Angela Gill: Alaskan Voter, medical professional

Andrew Blackman, CPA: Partner with Shapiro Lobel LLP

Karen Demichelis: President, Accountant, Demichelis & Associates, Alaskan Voter

Tyler Arnold: TylerSystems Inc. CEO, Alaskan Voter

Joel Smith: Former President of the Institute of Management Accountants, SF chapter

Tim Pearson: Pearson Consulting, Alaskan Voter

Jason Giaimo: Net Gain Business Consultants of Alaska, Alaskan Voter

Jack-Taylor Ridgeway: Privacy Rights supporter, advocate

Patrick Lorenz: Management, Analyst, British Petroleum, Alaskan Voter

Dianne Kelly: CPA, State of New Jersey

Chuck Kaucic: Alaskan voter, Wasilla

Chris Brownwell: Resident, Alaska, noted author, Alaskan Voter, military family

Hetal Giaimo: Alaskan Voter

Dawn Brownwell: Alaska Voter, military family

Kelly Mazzei: Alaskan Voter

Andrew Wilkins: IT expert at a large national bank.

Bruce Sollenberger: Alaskan Voters

Wendi Sollenberger: Alaskan Voters

Jeffrey Mittman: Executive Director, ACLU - Alaska

...this is only a partial list of voters and supporters who are watching this bill

ALASKA SENATE and ALASKA HOUSE SUPPORT INCLUDES:

Bill sponsor: Senator Bill Wielechowski

Co-sponsor: Senator Coghill

Co-sponsor : Senator Kevin Meyer

Co-sponsor: Senator Johnny Ellis

Will be a bill sponsor or co-sponsor: **Representative Berta Gardner**

Co-sponsor: Representative Allan Dick

Co-sponsor: Representative Wes Keller

Does not oppose: Whitney Brewster Alaska State Director, Division of Motor Vehicles

Does not oppose: Alaska Department of Health and Social Services

Reviewed SB190 (previous version of SB-98): previous Alaska Attorney General

Supported SB190 (previous version of SB-98) in committee: Senator Kookesh

Supported SB190 (previous version of SB-98) in committee: Senator Egan

Supported SB190 (previous version of SB-98) in committee: Senator French

Supported SB190 (previous version of SB-98) in committee: Senator McGuire

Supported SB190 (previous version of SB-98) in committee: Senator Paskvan

Co-sponsoring SB-98: Senator Cathy Giessel

Co-sponsoring SB-98: Senator Linda Menard

Will co-sponsor: Representative Tammie Wilson

Will co-sponsor: Representative Chris Tuck

Will co-sponsor: Representative Sharon Cissna

Will co-sponsor "very probably" Representative Mark Neuman

FAX

April 13, 2011

Dear Senator French:

My name is Tyler Arnold, Founder and CEO of **TylerSystems, Inc**. a rapidly growing global technology firm based in Anchorage. I urge your support for protecting the biometric privacy of Alaskans. I am also a member of Citizens for Privacy in Alaska, and we are watching this bill closely.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."

Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

PLEASE stand up for our privacy -- and support this bill.

Tyler Arnold
CEO, TylerSystems, Inc.
227-9541
tyler@tylersystems.com

April 13, 2011

Dear Senator French:

I am writing in support of protecting biometric data. I am a past President of Alaska Chapter of the Institute of Management Accountants (IMA) and have been employed in mostly accounting and/or financial positions over my work life.

From the financial side, the people who typically steal large amounts of money from businesses or non-profits are well thought of or even "Pillars of the Community" --- before the disgracing headline hits.

Collecting biometric data will do nothing to reduce the amount of criminal activity within financial circles.

A passport or a driver's license is adequate identification for test taking purposes. SUPPORT THE NEW BIOMETRIC PRIVACY BILL

Thank you for your consideration.

Sincerely
Tim A. Wiepking
Anchorage, 99508
529-0766

04/ 13/2011

Dear Senator French:

My name is Dr. Frank Jeffries, an Assistant Professor of Business and Public Policy at a major educational institution in Alaska. This is my personal view.

I recently learned of a grass-roots group of Alaskan voters called the "Citizens for Privacy in Alaska" and of their courageous support for a MUCH NEEDED privacy bill. Although this is my personal view, I urge you to support it.

I strongly support a biometric privacy bill that:

"makes illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,
Dr. Frank Jeffries
Assistant Professor of Business and Public Policy
Anchorage
taikodad@gci.net

April 13st, 2011

Senator French:

My name is Kathryn Eckmann, a voter and very concerned citizen of this great State.

Stand up for ALL Alaskans privacy! Pass a strong Biometric Privacy law this session that protects ALL Alaskans...not just a select few. I agree with Citizens for Privacy in Alaska; we need a privacy law that:

"makes illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Kathryn

Kathryn Eckmann
A concerned Alaskan Voter
Kmal2@gci.net

April 13, 2011

FAX

Dear Senator French:

My name is Kelly Mazzei, from Anchorage. I strongly support the Biometric Privacy Bill, and I hope that you will also. Alaskans are at risk and we need this to pass this session!

I support and agree with Citizens for Privacy in Alaska that we need to:

"make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Kelly Mazzei
Anchorage Voter
kamazzei@gmail.com

April 13st, 2011

Dear Senator French:

My name is Eileen Becker, from Homer. I support SB 98 (THE BIOMETRIC PRIVACY BILL) because too many of our rights to privacy are being sold to the highest bidder.

It is time to say NO and protect ourselves and our families. PROTECT ALL ALASKANS.

Thank you,

Eileen Becker
Owner of Peninsula Communications, Inc, privately owned radio stations here in Alaska
Mother of 5 children and 8 grandchildren
Alaska resident since 1973
DISTRICT35REPUBLICAN@WEBTV.NET
ALASKAN VOTER, REPUBLICAN PARTY

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

April 13st, 2011

Dear Senator French:

My name is Tim Pearson, an Anchorage business professional and Co-Chairman of the Citizens for Privacy in Alaska. I urge your support for protecting the biometric privacy of Alaskans, PLEASE PASS SOMETHING THIS SESSION!

Please remember that unlike credit cards, stolen or lost fingerprints and biometric information cannot be replaced. Innocent Alaskans *deserve the option* of not being forced to provide their fingerprints. Passports and driver's licenses are sufficient identification.

Alaskan businesses do not want to take on the **legal liability** of losing the irreplaceable data of their employees or customers. There is no way to make people whole again.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

PLEASE stand up for our privacy -- and pass a strong Biometric Privacy law this session that includes the "Alternative ID" provision (ie. allows an opt-out for people who show a driver's license or passport as ID).

Sincerely,

Tim Pearson

President, Pearson Consulting
Graduate of Harvard University
Fmr Vice President of Human Resources, GCI
tim@timpearson.net
952-3498

April 13st, 2011

Dear Senator French:

My name is Joe Dirksen, a voter, a long-time Alaskan, a member of the Alaska National Guard and, like most Alaskans, I am a strong supporter of privacy rights. My personal view is that **you should strongly support the new biometric privacy bill**... if it says that no fingerprinting of innocent Alaskans for ID should be required, as noted below:

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Will you stand up for our privacy rights?

Sincerely,

Joe Dirksen
Anchorage voter
South Anchorage, 99507
jldirksen@acsalaska.net

04/ 13/2011

FAX

Dear Senator French:

As Director of a Village Corporation in Marshall, Alaska – I can tell you that I am a very strong supporter of privacy. I hope you will show us that you are as well, but supporting the Biometric Privacy Bill when it comes before you.

I support real protection that:

"makes illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,
George Owletuck
Director, a native Village Corporation
Marshall, Alaska
George.owletuck@gmail.com

PS This is my personal position

FAX

April 13, 2011

Dear Senator French:

My name is Gretchen Guess, I am a former Senator, a former member of the Alaska State House of Representatives, and a resident of Anchorage. I fully support a ban on the compulsory fingerprinting of innocent Alaskans for ID purposes, and I urge you to pass a strong privacy law this session that:

"makes illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Gretchen Guess
Anchorage
guessak@gmail.com

April 13st, 2011

Dear Senator French:

My name is Herbert Eckmann, a voter from Anchorage and very concerned citizen of this great State.

I URGE YOU to stand up for ALL Alaskans privacy. Pass a strong Biometric Privacy law this session that includes an opt-out for ALL ALASKANS who show a driver's license or passport as ID. I agree with Citizens for Privacy in Alaska; we need a privacy law that:

"makes illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Herbert Eckmann
A concerned Alaskan Voter
Kmal2@gci.net

URGENT FAX; April 13, 2011

PASS BIOMETRIC PRIVACY PROTECTION FOR ALL ALASKANS THIS SESSION!

Dear Senator French:

My name is Horst Poepperl, CEO of Borealis Broadband Inc. I've already sent several emails in support of SB-98, but as I understand it, the current version has been watered down significantly with exemptions.

First of all, I do want to say that I appreciate and am grateful for those senators and representatives who have already taken a public stand for personal privacy, like our founding fathers intended. Especially those of you who have taken the time to respond to my emails personally. You have my heartfelt gratitude and support. The rest of this email might be informational for you but otherwise redundant.

For the rest of you:

How utterly disappointing and what a dangerous game to play with our personal information.

I would like to go on record AGAIN as OPPOSING the watering down of this privacy legislation and SUPPORTING strong privacy protections. If it continues as is, then you are making a very serious mistake regarding the privacy of your fellow Alaskans. It is much more prudent to pass strong privacy legislation and, if necessary, loosen it up on a case-by-case basis later. Doing the reverse and tightening up the legislation later is completely useless - your fellow Alaskans will already have their biometrics floating around cyberspace waiting to be sold to whomever...or lost to hackers.

In February of 2010 it was revealed that Israel had stolen biometric information from the passports of visitors to the country. Innocent and unsuspecting citizens of many countries were affected when the Mossad used their biometric information to fake passports and commit an assassination. http://www.timesonline.co.uk/tol/news/world/middle_east/article7029553.ece

Go ahead and take some time to read the article and see how that affected those people. Some of these people had to literally hide in their houses for a while and could no longer travel to entire parts of the world until the deception had been made public. Even today, they have to look over their shoulders for the rest of their lives in case some extremist didn't get the memo.

Yes, it's an extreme example, but the point is, IT'S ALREADY HAPPENED. More than once. It's hard to think of an even more egregious use of stolen personal data, but I'm sure someone will figure out how to top that one at some point in the future.

Maybe next time, they'll just buy the information like everyone else and crank out fake passports to their hearts' content. Maybe they'll buy it from Choicepoint. Maybe that technique will become all the rage for other countries, hackers or criminals. Maybe some Alaskans' biometric data will be used because you didn't take the privacy issue seriously.

In my personal opinion, and saying this with all due respect, you DO NOT need to entertain Choicepoint or any data mining company. To me, the very idea that you would seriously entertain the wants of a foreign (or domestic) company of data snitches is just putrageous. What the hell for? Why give even one iota of leeway to a company that makes its money ratting out your personal information to the highest bidder? A new market for them, at our expense?

As far as other companies are concerned, you need to ask yourself; "what did they do before fingerprint readers were introduced commercially?" Suddenly we should believe that fingerprints are critical for their security procedures? Really? Fingerprint readers aren't even in widespread use yet as the consumer version of that technology has not yet fully matured. I think they just want to keep the door open and that's not nearly a good enough reason to sacrifice more of my privacy.

As a career professional in the IT industry for the past 27 years, it just boggles my mind that we would even consider releasing more privacy information in light of all the historical abuse already. To me, with what I've seen, experienced and know about this issue, it is just mind-numbingly dumb to even contemplate releasing additional information into this cesspool that the data-miners and other companies have created. Much less something as personal and unchangeable as fingerprints.

In the words of one of my buddies from my military days, "That can't get nuttin' but ugly." He said that every time he was looking at a problem that had no upside. Allowing the release of fingerprint biometrics has no upside. Period. Even for the National Security argument; no nation has ever been made more secure by ratting out its citizens.

Or maybe you need a reminder of how often data is stolen or lost:

http://www.privacyrights.org/data-breach/new That link will take you to a site that lists data breaches in chronological order. Be prepared for a long list.

I've already been notified that various pieces of my personal data were lost or stolen four times in the space of just six years. Once even by the Veteran's Administration, who, incidentally, probably has my fingerprints. Where is my compensation for creating all that work, stress and hassle for me for something that didn't have to be? I saw plenty of finger pointing but no one taking responsibility.

That's my skin in this game. I'm not at all interested in having you expose me to even more abuse and I will strongly resent it if you do. If a person wants to willingly give up their biometrics, then fine, let them. But never, ever, create or allow the conditions that FORCE us to.

I urge you to strengthen the privacy legislation as tight as you possibly can AND PROTECT ALL ALASKANS WITH IT. Making it airtight with the commitment to review on a case-by-case basis in the future would be acceptable for now. You will never go wrong with protecting our privacy and passing strong privacy legislation is the lowest risk path to take, not to mention the right thing to do by any measuring stick, no matter how much the lobbyists try to muddy the water for you. But you will most definitely screw up badly if you allow the release of our biometrics and force Alaskans to give up their fingerprints with weak legislation. You won't be able to correct that mistake later - once the data is out, it's out.

Best regards,

Horst Poepperl
CEO
Borealis Broadband, Inc.
Professional Quality Internet Service

Dear Senator French:

April 13, 2011

As the owner and President of a small business, **I have no need for fingerprint "biometric" security systems and I never will.**

The ABSOLUTE LAST thing I would want would be to be **legally liable** for a data breach involving my employee's fingerprints! *Their privacy would be compromised for the rest of their lives* because fingerprints are like passwords that you can never change. I would be responsible for that…I can only imagine the lawsuits! **Alaskan businesses are NOT interested the risky proposition of fingerprint security systems.**

I strongly support the bi-partisan bill to protect our private biometric data (SB 98), and URGE you to pass it into law *this session* with the "Alternative ID" section intact.

We Alaskans have entrusted YOU to stand up for our privacy rights against Federal intrusion and corporate special interests…and we are all watching this bill closely.

Global data-miner ChoicePoint/LexisNexis/Reed Elsevier, has NO legitimate voice in this process, please don't even grant them a meeting. They have flown a team of east coast lobbyists to Juneau to "influence" you -- and will attempt to scare you with a bunch of nonsense because **they profit by exploiting Alaskan's loss of privacy.**

If they weren't making money off collecting and trafficking our private information, why would they be here?

Who will you stand with?

Regards,
Jason Giaimo
Anchorage Real Estate Investor, Accountant, Small business owner
(907) 602-9250
Giaimo1@aol.com

April 13, 2011

URGENT FAX:

SUBJECT: PLEASE DON'T PUT ALASKANS AT RISK FOR ANOTHER YEAR-
PASS THE PRIVACY BILL (SB-98) THIS SESSION

Dear Senator French:

Last week, data-miner Epsilon may have exposed your family's personal data to criminal hackers during a massive data-breach, as reported in the Wall Street Journal. About a dozen of my Alaskan friends also received notices that their secure data was accessed by criminals. Epsilon stores private data for customers of firms like Citibank, JP Morgan, Disney etc.

What if you or your children had been forced to give this data-miner fingerprints-for-ID? Might it be possible for a criminal hacker to place your children's fingerprints at a crime scene? (that's easy to do). Would you be able to prove their innocence?

If this sounds theoretical, look up Mr. Brandon Mayfield. He's an attorney from Oregon who was jailed because his fingerprints were *thought* to be on a bomb that blew up a train in Madrid in 2004 (there are hundreds of other examples). Will the Federal Government (or a foreign data-mining corporation) abide by an Alaskan law that says they can't sell the info once collected? Would we ever know if they breached this law?

In March, RSA Security, one of the world's most secure networks was hacked, with criminals gaining access to its corporate network and stealing information about its SecurID two-factor authentication products.

If you ask data-security experts (and I encourage you to do so), to a person they will tell you that **the only way to be 100% sure information will not be lost, stolen or accessed...is not to collect it in the first place**.

Please take a bold stand for real biometric privacy. **Alaskan's are demanding it.**
Ban fingerprints-as-ID mandates for all law-abiding Alaskans.

Jason Giaimo
Founder, Co-Chairman
Citizens for Privacy in Alaska
907 602 9250
(Go to www.PrivacyNowAK.org you will be shocked by what you find)

FAX

April 13st, 2011

Dear Senator French:

As a dedicated member of Alaska's Republican Party, I would like to ask you to support the Wielechowski/Coghill "biometric privacy bill" (and its House companion bill) so long as it protects ALL Alaskan's from being forced into being fingerprinted for ID purposes.

Sincerely,

Jerad McClure
Member, Alaska Republican Party
jaredlainak@gmail.com

04/ 13/2011

Dear Senator French:

My name is James MacKenzie, Director of a major non-profit firm in Anchorage. I learned that you were planning to stand up for our privacy rights through a friend today, and I STRONGLY urge your support of the new Biometric Privacy Rights bill – so long as it contains REAL protection as noted below.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

James MacKenzie
Director, Anchorage Voter
Anchorage, AK
mackenzie.jamesa@gmail.com

PS note that this is my personal position on this subject

Dear Senator French: April 13, 2011

My name is JP Godfrey, a Management Consultant in private practice in Anchorage.

I have to say, what Citizens for Privacy in Alaska is doing is astonishing – and I strongly support them and **I strongly support this privacy bill!** Don't let the lobbyists water it down, we need REAL protection.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."

Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Sincerely,
JP Godfrey
CEO, Management Consultant
Anchorage, AK
jpgod@gci.net

FAX

April 13, 2011

Dear Senator French:

As an Alaskan voter, small business owner and accountant, **I urge you to support and pass biometric privacy legislation *this session.***

I am also a member of Citizens for Privacy in Alaska, and we are all watching this bill closely.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."

Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Karen Demichelis, Principal
Demichelis & Associates
karen.demichelis@gmail.com
tel: 907-360-2661

April 13, 2011

Dear Senator French:

I'm writing to ask to you support the STRONGEST version of SB 98 **which would prevent anyone from ever collecting** or disseminating biometric data. As an Alaskan I value my privacy greatly as well as that of my clients.

The gradual degradation of our privacy over the last few years is deeply troubling to me – it is now impossible to know who has our data and what they are doing with it. But, at least one has protections using credit cards and the like – you may get dinged but you are covered. And if your email gets targeted by the advertisers, drug purveyors and sexual enhancement folks (and yes, my mother gets those too) you have recourse.

On the other hand, if our biometric information gets loose into cyberspace all hell can break loose if your prints, or mine, get used by an unscrupulous person, much less a terrorist.

Now is the time to draw the line, hard and fast. This is no time to become spineless and give into lobbyists who have many assurances of safety, but no guarantees and no accountability when this data gets loose – and you all know that it will.

Please a support meaningful, strong SB 98. The "Alternative ID" section must stay.

Thanks. Ken.

Kenneth G. Robertson
Robertson Law Office
310 K Street, Suite 200
Anchorage, Alaska 99501
(907) 278-5657
(907) 346-2810 Fax
www.robertsonlaw.net

April 13, 2011

Dear Senator French:

My name is Kelly Mazzei, a voter from Anchorage. **You must stand up to these Outside data-miner lobbyists and support our privacy rights!** I am also a member of Citizens for Privacy in Alaska.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Sincerely

Kelly Mazzei

A REGISTERED VOTER
Anchorage
kamazzei@gmail.com

April 13st, 2011

Dear Senator French:

We vote...the data-miner's lobbyists don't. Please stand up for ALASKANS and our privacy, and **support** the new biometric privacy bill... if it says that no fingerprinting of innocent Alaskans for ID should be required.

My name is Laura Dirksen, a school teacher and resident of south Anchorage. Having taught for nearly 20 years at an Anchorage Christian school – I AGREE that our privacy laws need to be updated to *prevent* fingerprint collection "as ID."

I urge your support for protecting the biometric privacy of Alaskans. Passports and driver's licenses are sufficient identification.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates.

Sincerely,

Laura Dirksen

Laura Dirksen
Christian school teacher, and a voter
Anchorage
jldirksen@acsalaska.net

April 13, 2011

Dear Senator French:

As owner and President of Pacific Rim Media – I can tell you that I am a strong supporter of the Citizens for Privacy in Alaska. They are standing up for our privacy and I hope you will too.

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport."
Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Sincerely,

Russel

Russell Pounds
President, Pacific Rim Media
Anchorage, AK
Russell@prmalaska.com
www.prgalaska.com

IMPORTANT FAX

April 13, 2011

Dear Senator French:

My name is Taylor Ridgeway. I am a strong supporter of Citizens for Privacy in Alaska, and I URGE you to stand up for Alaska's privacy rights against the data-miner's lobby! All of these oppressive encroachments are whittling away at the average Americans ability to engage in free commerce. These practices are unconstitutional...this has got to stop!

"Our goal is to make illegal the practice of requiring innocent people to provide fingerprints or other biometrics as identification when they are willing to show their driver's license (State/military issued ID) or a United States passport." Note that criminal background checks or law enforcement will not be affected by this legislation. This is specifically focused on biometrics-as-ID mandates

Sincerely

Taylor Ridgeway

Taylor.ridgeway@gmail.com

SB 101

<TARGET><BILL>SB 101</BILL><SUBJECT>SB 101</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 3/14/11

FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 3/30/11

Judiciary Committee considered SENATE BILL NO. 101

SB 101-ENTITY TRANSACTIONS ACT

"An Act adopting the Alaska Entity Transactions Act; relating to changing the form of entities, including corporations, partnerships, limited liability companies, business trusts, and other organizations; amending Rule 79, Alaska Rules of Civil Procedure, and Rules 602(b)(2), 602(c), and 605.5, Alaska Rules of Appellate Procedure; and providing for an effective date."

and recommends:

[ ] be **replaced** with **CS** _____ (_____) *[ ] Same Title [ ] New Title*

[ ] adopt **previous CS** _____ (_____) *[ ] Same Title [ ] New Title*

[ ] attached amendment(s)

[ ] adopt _____Letter of Intent

[ ] further referral to _____Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
CED			✓	

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
John Coghill	Coghill			✓	
	Wielechowski			✓	
Joe Paskvan	Paskvan	X			
CHAIR:	French			✓	

Senator Joe Paskvan

Alaska State Senate • District E • Fairbanks • Ft Wainwright

Senate Bill 101: Entity Transactions Act
Senate Judiciary Committee
March 25, 2011

Contents of Bill Packet

1. SB 101 Sponsor Statement
2. SB 101 Bill
3. SB 101 Fiscal Note
4. SB 101 Back-Up: Memorandum RE: Update of Alaska Business Statutes
5. SB 101 Back-Up: Uniform Law Commission's Entity Transactions Act Summary
6. SB 101 Back-Up: Uniform Law Commission's Legislative Fact Sheet
7. SB 101 Back-Up: Council of State Governments (CSG) 2011 Suggested State Legislation: Model Entity Transactions Act

In Juneau:
State Capitol, Juneau, AK 99801
(907) 465-3709 Office • (907) 465-4714 Fax

senator_joe_paskvan@legis.state.ak.us

In Fairbanks:
1292 Sadler Way, Ste. 308 Fairbanks, AK 99701
(907) 451-4347 Office • (907) 451-4348 Fax

Senator Joe Paskvan

Alaska State Senate • District E • Fairbanks • Ft Wainwright

Sponsor Statement
Senate Bill 101: Entity Transactions Act

Senate Bill 101 conforms to the Uniform Law Commissioners' Model Entity Transaction Act (META). If implemented in the State of Alaska, this legislation will help facilitate transactions between more than one form of entity, improve the existing business climate in Alaska, and help reduce unnecessary administrative and legal burdens currently imposed on Alaska companies.

During the past twenty years many new types of business entities – including limited liability companies, limited liability partnerships, and limited liability limited partnerships – have been recognized under state law. As a result of the proliferation of new entity forms, many businesses now utilize various types of entities in their organizational structures. The relaxation of federal tax rules governing entity classification has led to an increase in the volume of restructuring and acquisition transactions by and among the various types of entity forms.

Because of the lack of clear statutory authority allowing transactions between more than one form of entity, these transactions have often required the use of multiple indirect steps, as opposed to a single transaction.

Senate Bill 101 will offer new statutory authority to permit cross-entity transactions in order to remain responsive to the needs of Alaskan companies and should be enacted in order to allow Alaska businesses the opportunity to engage in cross-entity transactions.

Adopting SB 101 will be an important step towards bringing Alaska more into the mainstream of statutory business law.

I urge your support of this legislation.

In Juneau:
State Capitol, Juneau, AK 99801
(907) 465-3709 Office • (907) 465-4714 Fax

senator_joe_paskvan@legis.state.ak.us

In Fairbanks:
1292 Sadler Way, Ste. 308 Fairbanks, AK 99701
(907) 451-4347 Office • (907) 451-4348 Fax

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **SB 101**
() Publish Date

Identifier (file name): SB101-CCED-CBPL-03-14-11
Dept. Affected: DCCED

Title: An Act adopting the Alaska Entity Transactions Act
Appropriation: Corporations, Business and Professional Licensing
Allocation: Corporations, Business and Professional Licensing

Sponsor: Senator Paskvan
Requester: Senate Judiciary
OMB Component Number: 2360

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by: Don Habeger, Director — Phone: 465-2536
Division: Corporations, Business and Professional Licensing — Date/Time: 3/18/11 9:00 AM
Approved by: Susan K. Bell, Commissioner — Date: 3/18/2011
Commerce, Community, and Economic Development

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 101

Analysis

The financial impact to the Division for implementing the Alaska Entity Transaction Act (Act) is nominal.

Two states have adopted the Model Entity Transaction Act, Kansas and Idaho. Kansas was not able to provide statistics regarding how many entities have Merged, Converted, Domesticated, or Interest Exchanged in accordance with the Act. Idaho adopted the Act in July of 2007 and has had 196 entities take advantage of the Act.

The filings generated by the Act with be easily absorbed into the staff's normal document processing duties and no additional staff would be required. The Division receives a combined average of 200 regular mergers and conversions annually so a few more will have no impact.

Regulations for fees will need to be established. This should not be costly or time consuming since the fee language used throughout current regulations is adequate to establish fees for the Act.

Sherman & Howard L.L.C.

ATTORNEYS & COUNSELORS AT LAW
633 SEVENTEENTH STREET, SUITE 3000
DENVER, COLORADO 80202
TELEPHONE: (303) 297-2900
FAX: (303) 298-0940
OFFICES IN: COLORADO SPRINGS
RENO • LAS VEGAS • PHOENIX • SCOTTSDALE
ST. LOUIS • VAIL • STEAMBOAT

Memorandum

To: Senator Joe Paskvan, Chair, Senate labor and Commerce Committee

From: Steve Miller, Sherman & Howard L.L.C.

Date: October 26, 2009

Re: Update of Alaska Business Statutes

BACKGROUND

During the past twenty years many new types of business entities – including limited liability companies, limited liability partnerships, and limited liability limited partnerships – have been recognized under state law. As a result of the proliferation of new entity forms, many businesses now utilize various types of entities in their organizational structures. The relaxation of federal tax rules governing entity classification has led to an increase in the volume of restructuring and acquisition transactions by and among the various types of entity forms. These transactions have often required the use of multiple indirect steps, as opposed to a single transaction, because of the lack of clear statutory authority allowing transactions between more than one form of entity.

Many states have addressed this need by providing new legislation to facilitate transactions between more than one form of entity. Some states have added provisions in their individual entity laws to authorize entities organized under each law to convert to other forms of entities or to allow mergers between entity forms. For example, Delaware has adopted separate provisions in both its General Corporation Law and its Limited Liability Company Act that, functioning together, allow a merger between a corporation and a limited liability company. See DEL. CODE ANN. tit. 8, §§ 263.264 (2008) (corporations), DEL. CODE ANN. tit. 6, §§ 18-209 (2008) (limited liability companies). Other states have taken a more comprehensive approach and have chosen to enact new statutes that address cross-entity mergers and conversions in one act and central location. These statutes, known as "junction box" statutes, contain provisions allowing all types of corporate and unincorporated entities to engage in mergers, conversions,

and, in some cases, interest exchanges and domestication transactions. See ALA. CODE §§I 10-15-1 to -7 (2007); COLO. REV. STAT. ANN. §§ 7-90-101 to -604 (West 2008).

ALASKA LAW

As noted above, many states have adopted new or amended existing provisions to facilitate transactions between different entity forms. While states have taken varying approaches to inter-entity transactions, virtually all states have addressed certain types of transactions. In fact, Alaska is the ***only*** state that does not authorize a limited liability company to merge with another form of entity.

Currently Alaska law authorizes only the following mergers, consolidations and conversions:

- two or more domestic corporations may merge, Alaska Stat. § 10.06.530;
- one or more foreign corporations and one or more domestic corporations may be merged or consolidated, or participate in an exchange, Alaska Stat. § 10.06.562;
- a limited liability company may merge or consolidate with or into a limited liability company or a foreign limited liability company, Alaska Stat. § 10.50.500;
- any other entity may convert to a limited liability company, Alaska Stat. § 10.50.570;
- any other entity may convert to a limited partnership, Alaska Stat. § 32.11.095; and
- a partnership may be merged with one or more partnerships or limited partnerships. Alaska Stat. § 32.06.905.

As a result of the limited provisions governing inter-entity transactions, Alaska businesses are required to complete restructuring transactions in two or three indirect steps rather than directly in a single transaction. For example, an Alaska limited liability company cannot merge directly into an Alaska corporation. Nevertheless, a similar result can be obtained by (i) forming a foreign limited liability company; (ii) merging the Alaska limited liability company with and into the foreign limited liability company; (iii) converting the surviving entity of the merger, the foreign limited liability company, into a foreign corporation pursuant to the provisions of that state's business laws; and (iv) merging the foreign corporation with and into an Alaska corporation. Likewise, an Alaska limited liability company could be converted into an Alaska corporation through the use of foreign entities to facilitate the conversion.

While it may be theoretically possible to attain many of the same results accomplished by a comprehensive inter-entity merger or conversion statute without having such a statute

available, it is certainly much more efficient and economical to accomplish inter-entity transactions in a single step. As noted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in connection with the adoption of the Model Entity Transactions Act (discussed infra):

> The problem with mergers, conversions, interest exchanges and changing the location of entities is that an entity involved may have to be dissolved to accomplish the desired end. This means technically winding down the business, satisfying creditors and interest holders in the wind down, and potentially incurring adverse tax consequences. This is a burden when the objective is not to dissolve the business but to continue it in another form or another location. The hazards of the process are many and very costly. A statute that allows these events to occur without dissolving at least one of the entities involved will increase efficiency and lower costs . . . Cross-entity transactions should be available.

Model Entity Transactions Act Summary, (2007), at http://www.nccusl.org/Update/ActSearchResults.aspx. Adopting new legislation in Alaska to facilitate transactions between more than one form of entity would improve the existing business climate in Alaska and help reduce unnecessary administrative and legal burdens currently imposed on Alaska companies.

MODEL & STATE LAW PROVISIONS

Both NCCUSL and the American Bar Association ("ABA") have undertaken efforts in recent years to facilitate transactions between entities. NCCUSL included provisions permitting entities to engage in mergers with other entity forms and authorizing the conversion of one form of entity to another in the Uniform Limited Liability Company Act (1996 and 2006), Uniform Limited Cooperative Association Act (2007), Uniform Partnership Act (1997) and Uniform Limited Partnership Act (2001). Similarly, the ABA amended the Model Business Corporation Act in 1999 to authorize mergers between corporations and other forms of entities, and again in 2002 to authorize the conversion of entities into and out of the corporate form. Unlike a junction box statute, which applies to transactions between multiple entities, each of these statutes only apply if an entity of the type formed under the statute is a party to the transaction.

Given the inherent limitations in the acts previously adopted, NCUSSL and the ABA set out to draft a comprehensive junction box statute that would allow differing forms of entities to merge with each other or convert to other entity forms. The Model Entity Transactions Act ("META"), the most recent version of which is attached to this memorandum as Appendix A, originally was adopted by NCCUSL and the ABA in 2004 and provides a comprehensive statutory framework that addresses all varieties of cross-entity transactions. Under META, all types of corporate and unincorporated organizations may engage in mergers, conversions, interest exchanges (essentially a triangular merger accomplished without the use of a transitory

third party), and domestications (a transaction in which an existing entity moves is jurisdiction of organization to another state while still retaining whatever form it had before the domestication).

Implementation of META or a similar junction box statute would require conforming amendments and repeals to Alaska's existing business statutes. Appendix 2 of META provides a guide for analyzing existing statutes to determine which statutes should be amended or repealed and whether additional provisions should be added. As noted in Appendix 2, two goals should be paramount in deciding how to approach revisions to existing state laws: "(1) avoiding any potential inconsistency between META's provisions and similar provisions in the state's entity statutes; and (2) making the interplay between META and the state's various entity laws relatively easy to navigate." Model Entity Transactions Act, Appendix 2, (2007), at http://www.nccusl.org/Update/ActSearchResults.aspx. The appendix sets forth four separate approaches to achieving this cohesion. The simplest method would likely be to be limit existing Alaska entity laws to "same-type transactions". This approach would likely require the least amount of alterations to existing Alaska entity laws, as few amendments should be necessary for entity laws that do not have any cross-type merger provisions. Id. At 91.

Some states have found it useful to expand the coverage of their junction box statutes beyond inter-form mergers and conversions to include administrative matters such as entity names, registered agent, effects of dissolution, filings with the filing officer and treatment of foreign entities. These statutes seek to coordinate the non-substantive rules applicable to differing organizational forms, where appropriate, into a comprehensive junction box statute in order to eliminate inadvertent differences that may be set forth in existing entity laws. For instance, "where one statute speaks of a sixty-day grace period for filing a corrective report while another speaks of a two-month period, most would agree that it makes sense to coordinate the provisions..." Robert R. Keatinge, Plumbing and Other Transitional Issues. 58 Bus. Law 1051, 1058 (2003).

Although Alaska's need to act is greatest in the area of inter-entity mergers and conversions, it may be prudent to undertake efforts to coordinate the administrative rules governing Alaska business organizations in connection with any proposed legislation. Attached as Appendix B is a copy of Colorado's Corporations and Associations Act, COLO. REV. STAT. ANN. §§ 7-90-101 to -604. The Corporations and Associations Act is an example of a comprehensive junction box statute that addresses both inter-entity mergers and conversions and administrative matters such as filings, annual reports, entity names and registered agents. As with the adoption of META, implementation of a more comprehensive junction box statute would require a thorough analysis of the overall existing statutory framework in Alaska and could require significant amendments to existing state law.

RECOMMENDATIONS & CONCLUSION

Alaska is in need of new statutory authority to permit cross-entity transactions in order to remain responsive to the needs of Alaskan companies. While Alaska could adopt a patchwork of legislative amendments to its existing entity laws, adoption of a comprehensive junction box statute would help to avoid inconsistencies and conflicts between existing statutes. META is a general statute that is designed to fit with any state's existing entity laws and should be enacted

in an appropriate form in Alaska in order to allow Alaska businesses the opportunity to engage in cross-entity transactions. Adopting META, or enacting similar provisions adopted by other states, would be an important step towards bringing Alaska more into the mainstream of statutory business law.

Uniform Law Commission
The National Conference of Commissioners on Uniform State Laws
Contact Us: **312.450.6600**

Entity Transactions Act Summary

The Uniform Law Commissioners have provided unincorporated organization law to the states since the first Uniform Partnership Act in 1914. The current portfolio of uniform acts on unincorporated organizations includes the Uniform Partnership Act (1997), the Uniform Limited Partnership Act (2001), the Uniform Limited Liability Company Act (1996) and the Uniform Unincorporated Nonprofit Organization Act (1996). Corporate law has been the focus of the American Bar Association for at least 50 years. It is responsible for the Model Business Corporation Act and the Model Not-for-Profit Corporation Act. It also prepared a Prototype Limited Liability Company Act. Partnerships, limited partnerships, limited liability partnerships, limited liability limited partnerships, limited liability companies and corporations are the basic entities under American law (business trusts and cooperatives are also growing in importance) that provide the means to aggregate capital, and limit liability where applicable, along with the structure to organize an enterprise, whether it is for profit or nonprofit.

All of this uniform and model act work has made American law particularly efficient for entrepreneurs. Anyone who establishes and develops a business has choices available for the entity that may be chosen to do business. As a business grows, these options also allow for some changes in form and location of the entity chosen. For example, a small enterprise that chooses to be a partnership initially has the opportunity to reorganize as a corporation when the business is big enough to want the advantage of the corporate form. Not-for-profit activities also have a greater array of organizational forms, now including the limited liability company and the limited partnership along with the not-for-profit corporation. American law is particularly flexible and responsive to the needs of both the for-profit and the not-for-profit sectors. American business organization law is the envy of the rest of the world for this reason.

However, more can be done. There is no comprehensive statutory framework for changing entity form, whether for merger of entities, conversion of one entity to another, exchanging interests to merge businesses without merging the entities (called an interest exchange), or for changing the location of the entity (called a domestication). The newest uniform acts on limited liability companies and limited partnerships have limited provisions. The Model Business Corporation Act has been modified to do some of these kinds of transactions. The comprehensive effort had not been done until the Model Entity Transactions Act (META), promulgated by the Uniform Law Commissioners and the American Bar Association in 2004.

The Uniform Law Commissioners and the American Bar Association have a long relationship going back to the founding of the Commissioners. Every drafting committee the Commissioners authorize to work on an act has advisors from the American Bar Association. However, in this instance the need to draw together corporate law with the law of unincorporated organizations, meant a more formal joint relationship was necessary. META is a product of this joint relationship.

The problem with mergers, conversions, interest exchanges and changing the location of entities is that an entity involved may have to be dissolved to accomplish the desired end. This means technically winding down the business, satisfying creditors and interest holders in the winding down, and potentially incurring adverse tax consequences. This is a burden when the objective is not to dissolve the business but to continue it in another form or another location. The hazards of the process are many and very costly. A statute that allows these events to occur without dissolving at least one of the entities involved will increase efficiency and lower costs. A general statute, not limited in scope to less than all of the kinds of entities commonly involved in these transactions, is highly desirable. Cross-entity transactions should be available. That statute should also be one that can be fit with the existing entity law in a state so that it is not necessary to repeal all the existing entity law to accomplish the objective. META is the general statute that is designed to fit in with a state's existing entity law to accomplish the objective.

META governs the course of four kinds of transactions: merger of one entity with another, conversion of an entity to another kind of entity, an interest exchange between two entities so that one of them is controlled by the other without actually merging the two entities and the domestication of an entity originally organized in one state in another state. A merger occurs when one entity acquires another entity and the result is a single entity composed of both the original entities. A conversion occurs when one kind of entity converts to another kind, i.e., a limited liability company converts into a business corporation. An interest exchange occurs when interest holders transfer their interests in one entity to another for interests in the second entity. For example, the holders of all interests in a limited partnership transfer their interests to a corporation in return for shares of stock in the corporation. A domestication occurs when an entity formed under the laws of one state becomes an entity formed in another state, extinguishing its entity status in the first state. The articles of META essentially provide the procedures to accomplish each of these transactions.

META authorizes each of these kinds of transactions. It authorizes different entities to merge, i.e., a corporation may merge with a limited partnership. It authorizes a partnership to convert to a limited liability company. An interest swap may occur between a limited partnership and a limited liability company. A corporation may change its place of organization from one state to another. These are examples of the kinds of transactions authorized. They can occur between an entity in one state and a foreign entity formed originally in another state, providing that the law of the foreign state permits such a transaction.

In each kind of transaction, there must be a plan that is approved by the interest holders in the entities. The plan generally describes the transaction and its effect in detail. Approval of the plan proceeds according to the organic statute and rules that govern the pre-existing entities, or if none, by unanimous consent of all interest holders. If, for example, a partnership agreement governing a limited partnership provides for consent of partners to one of the kinds of transactions subject to META, the agreement would be the organic rules that would determine the approval of the plan. Otherwise all the partners would have to consent.

Once a plan is approved, a statement relevant to the transaction must be filed in the office in a state in which entity statements or charters are normally filed. The filing puts the transaction and the identity of the entity that survives in public records. That entity becomes the entity with the capacity to do business and it has the applicable liability shield from that time onward.

The objective in these procedures is to make sure that no interest is extinguished in the process of any of the transactions under META, whether a merger, conversion, interest exchange or domestication. This is true for an interest holder such as a shareholder in a corporation or holder of a partnership interest. It is also true for creditor interests that pre-existed the given transaction. The point of the procedures is to end with an entity that continues the business of those entities it succeeds without extinguishing obligations incurred by these entities in a seamless, nondisruptive transfer.

There are a few exclusions from META. If mergers in a state are already governed by the merger provisions in a state's enactment of a uniform or model act, META will not apply or displace those provisions. The same is true for interest exchanges when a state has the Model Business Corporation Act. Not all entities will necessarily be governed by META. There are special corporations, for example, that should not be included, depending upon their status in a state. META allows for them to be specifically excluded.

META is a model act, not a uniform act, although several of the acts affected are uniform acts. Although there is some uniformity in entity law, i.e., partnership law, it is not true across the full spectrum of entity law. This means that using META from state to state is likely to mean much adaptation of META provisions. The effect of utilizing META may have the impact of introducing more uniformity of law relating to entities from state to state, but use of its language in a uniform way cannot be expected.

Business organization law and the law relating to not-for-profit organizations has been much refurbished, updated and improved in the 30 years preceding 2004, the year of META. Development has been dynamic and good for economic function in the entire United States. META adds another element to this dynamic progression of law relating to these entities. It is good for business and not-for-profit ventures alike. It should be studied, adapted and enacted in every state as soon as practicable.

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Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws

Contact Us: **312.450.6600**

Legislative Fact Sheet - Entity Transactions Act

Act	Entity Transactions Act
Origin	Completed by the National Conference of Commissioners on Uniform State Laws in 2005.
Description	This act will allow conversion of one kind of business organization to another, or the merger of two or more business organizations into one organization.
Endorsements	
Enactments	District of Columbia, Idaho, Kansas
2011 Introductions	Alaska, Connecticut

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ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 116th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

SUGGESTED STATE LEGISLATION 2011 Volume 70

Developed by the
Committee on Suggested State Legislation

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The Council of State Governments is the premier multibranch organization forecasting policy trends for the community of states, commonwealths and territories on a national and regional basis.

CSG alerts state elected and appointed officials to emerging social, economic and political trends; offers innovative state policy responses to rapidly changing conditions; and advocates multistate problem-solving to maximize resources and competitiveness.

CSG promotes excellence in decision-making and leadership skills and champions state sovereignty.

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Foreword

The Council of State Governments (CSG) is pleased to bring to you the **2011 *Suggested State Legislation*** volume, a valued series of compilations of draft legislation from state statutes on topics of current interest and importance to the states. The draft legislation found in this book represents many hours of work by The Council's Committee on Suggested State Legislation, CSG Policy Task Forces, and CSG staff.

The entries in this book were selected from hundreds of submissions. Most are based on existing state statutes. Neither The Council nor the Committee seeks to influence the enactment of state legislation. Throughout the years, however, both have found that the experiences of one state may prove beneficial to others. It is in this spirit that these proposals are presented.

The Council of State Governments
Lexington, Kentucky

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Introduction

"A single state's experience in a new field frequently leads to the adoption of similar action in other states, *if the problem is general, the approach is well conceived, and other states can be made aware of the action."*

That statement is a simple one, but it remains as true today as it did when it first appeared in the introduction to the 28th volume of ***Suggested State Legislation.*** For more than 60 years, The Council of State Governments' Suggested State Legislation (SSL) program has informed state policy-makers about a broad range of legislative issues, and its national Committee on Suggested State Legislation has been an archetype of interstate dialogue, one successfully imitated in a variety of ways.

The Committee on Suggested State Legislation originated as a group of state and federal officials who first met in August of 1940 to review state laws relating to U.S. security. The result was ***A Legislative Program for Defense.*** That group reconvened following the nation's entry into World War II in order to develop a volume of ***Suggested State War Legislation***. That publication was succeeded by ***Suggested State Legislation,*** an annual volume of draft legislation about topics of major governmental interest. In keeping with CSG's current mission, the SSL Committee now focuses more on issues arising from major trends impacting the states, such as an aging population. Today, SSL Committee members represent all regions of the country. They are generally legislators and legislative staff, and include the CSG policy task force chairs.

Traditionally, SSL volumes were the culmination of a yearlong process in which legislation was received and reviewed by members of the SSL Committee in a series of meetings. Traditionally, the volumes were produced at the end of the SSL Cycle. More recently, the SSL volumes were released concurrently online at CSG's STARS database. However, even under this system, in some cases, the items that the committee voted to include in a volume had to be held for as long as 11 months before they could be distributed to the states.

Beginning with the 2003 SSL Cycle, the SSL Committee produces SSL volumes electronically in segments, one segment after every committee meeting. Each segment will be published on-line approximately two months after a meeting. The electronic parts will be combined into a book that CSG will continue to publish at the end of the SSL Cycle, at least for the immediate future.

The SSL Committee considers legislation submitted by state officials and staff, CSG Associates and CSG staff. It will consider legislation from other sources, but only when that legislation is submitted through a state official. Other sources include public interest groups and members of the corporate community who are not CSG Associates.

Throughout the SSL solicitation, review and selection processes, members of the Committee employ a specific set of criteria to determine which items will appear in the volume:

- Is the issue a significant one currently facing state governments?
- Does the issue have national or regional significance?
- Are fresh and innovative approaches available to address the issue?
- Is the issue of sufficient complexity that a bill drafter would benefit from having a comprehensive draft available?
- Does the bill or Act represent a practical approach to the problem?
- Does the bill or Act represent a comprehensive approach to the problem or is it tied to a narrow approach that may have limited relevance for many states?
- Is the structure of the bill or Act logically consistent?
- Are the language of and style of the bill or Act clear and unambiguous?

All items selected for publication in SSL are presented in a general format as shown in

the following ***Suggested State Legislation*** Style Manual and Sample Act. However, beginning with the 1997 volume, items presented in ***Suggested State Legislation*** volumes more closely reflect the style and form as they were submitted to the program. Entries from the National Conference of Commissioners on Uniform State Laws are rarely changed from their submitted format.

Revisions in the headings and numbering and other modifications may be necessary in order to conform to local practices, and decisions must be made regarding optional sections and provisions. Thus, readers should note that ***Suggested State Legislation*** drafts typically do not duplicate actual state legislation.

A "Statement," in lieu of a draft Act, might appear in a volume when the SSL Committee has reviewed and approved a piece of legislation, but its length and/or complexity preclude its publication in whole or in the standard SSL format. "Notes" also may be used when the Committee is particularly interested in highlighting and summarizing a variety of legislative actions undertaken by the states in a particular area.

State officials and staff, CSG Associates, and CSG staff are encouraged to submit at any time legislation which is likely to be of interest and relevance to other states. In order to facilitate the selection and review process, it is particularly helpful for respondents to provide information on the current status of the legislation, an enumeration of other states with similar provisions, and any summaries or analyses of the legislation that may have been undertaken.

Legislation and accompanying materials should be submitted to the Suggested State Legislation Program, The Council of State Governments, 2760 Research Park Drive, P.O. Box 11910, Lexington, Kentucky 40578-1910, (859) 244-8000, fax (859) 244-8001, or ssl@csg.org.

Readers should keep in mind that neither The Council of State Governments nor the SSL Committee are in the position of advocating the enactment of items that are presented in SSL Volumes. Instead, the entries are offered as an aid to state officials interested in drafting legislation in a specific area, and can be looked upon as a guide to areas of broad current interest in the states.

Interested readers can find out more about the SSL program by visiting the SSL pages at CSG's Internet Web site at www.csg.org.

SSL Criteria

- Does the issue have national or regional significance?
- Are fresh and innovative approaches available to address the issue?
- Is the issue of sufficient complexity that a bill drafter would benefit from having a comprehensive draft available?
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- Does the bill or Act represent a comprehensive approach to the problem or is it tied to a narrow approach that may have limited relevance for many states?
- Is the structure of the bill or Act logically consistent?
- Is the language and style of the bill or Act clear and unambiguous?

The word "Act" as used herein refers to both proposed and enacted legislation. Attempts are made to ensure that items presented to committee members are the most recent versions. However, interested parties should contact the originating state for the ultimate disposition in the state of any docket entry in question, including substitute bills and amendments. Furthermore, the Committee on Suggested State Legislation does not guarantee that entries presented on its dockets or in a ***Suggested State Legislation*** volume represent the exact versions of those items as enacted into law, if applicable.

Model Entity Transactions Act

According to the Uniform Law Commissioners (ULC), anyone who establishes and develops a business in America has choices available for the entity that may be chosen to do business. As a business grows, these options also allow for some changes in form and location of the entity chosen. For example, a small enterprise that chooses to be a partnership initially has the opportunity to reorganize as a corporation when the business is big enough to want the advantage of the corporate form. Not-for-profit activities also have a greater array of organizational forms, now including the limited liability company and the limited partnership along with the not-for-profit corporation. American law is particularly flexible and responsive to the needs of both the for-profit and the not-for-profit sectors.

However, until recently, there was no comprehensive statutory framework for changing entity form, whether for merger of entities, conversion of one entity to another, exchanging interests to merge businesses without merging the entities (called an interest exchange), or for changing the location of the entity (called a domestication). The problem with mergers, conversions, interest exchanges and changing the location of entities is that an entity involved may have to be dissolved to accomplish the desired end. This means technically winding down the business, satisfying creditors and interest holders in the winding down, and potentially incurring adverse tax consequences. This is a burden when the objective is not to dissolve the business but to continue it in another form or another location. The hazards of the process are many and very costly. A statute that allows these events to occur without dissolving at least one of the entities involved will increase efficiency and lower costs. A general statute, not limited in scope to less than all of the kinds of entities commonly involved in these transactions, is highly desirable. Cross-entity transactions should be available. That statute should also be one that can be fit with the existing entity law in a state so that it is not necessary to repeal all the existing entity law to accomplish the objective. The ULC/American Bar Association Model Entity Transaction Act (META) is a general statute that is designed to fit with a state's existing entity law to accomplish the objective.

META governs four kinds of transactions: *merger* of one entity with another, *conversion* of an entity to another kind of entity, an *interest exchange* between two entities so that one of them is controlled by the other without actually merging the two entities and the *domestication* of an entity originally organized in one state in another state. A merger occurs when one entity acquires another entity and the result is a single entity composed of both the original entities. A conversion occurs when one kind of entity converts to another kind, i.e., a limited liability company converts into a business corporation. An interest exchange occurs when interest holders transfer their interests in one entity to another for interests in the second entity. For example, the holders of all interests in a limited partnership transfer their interests to a corporation in return for shares of stock in the corporation. A domestication occurs when an entity formed under the laws of one state becomes an entity formed in another state, extinguishing its entity status in the first state. The articles of META essentially provide the procedures to accomplish each of these transactions.

META authorizes each of these kinds of transactions. It authorizes different entities to merge, i.e., a corporation may merge with a limited partnership. It authorizes a partnership to convert to a limited liability company. An interest swap may occur between a limited partnership and a limited liability company. A corporation may change its place of organization from one state to another. These are examples of the kinds of transactions authorized. They can occur between an entity in one state and a foreign entity formed originally in another state, providing that the law of the foreign state permits such a transaction.

In each kind of transaction, there must be a plan that is approved by the interest holders in the entities. The plan generally describes the transaction and its effect in detail. Approval of the plan proceeds according to the organic statute and rules that govern the pre-existing entities, or if none, by unanimous consent of all interest holders. If, for example, a partnership agreement governing a limited partnership provides for consent of partners to one of the kinds of transactions subject to META, the agreement would be the organic rules that would determine the approval of the plan. Otherwise all the partners would have to consent.

Once a plan is approved, a statement relevant to the transaction must be filed in the office in a state in which entity statements or charters are normally filed. The filing puts the transaction and the identity of the entity that survives in public records. That entity becomes the entity with the capacity to do business and it has the applicable liability shield from that time onward.

The objective in these procedures is to make sure that no interest is extinguished in the process of any of the transactions under META, whether a merger, conversion, interest exchange or domestication. This is true for an interest holder such as a shareholder in a corporation or holder of a partnership interest. It is also true for creditor interests that pre-existed the given transaction. The point of the procedures is to end with an entity that continues the business of those entities it succeeds without extinguishing obligations incurred by these entities in a seamless, nondisruptive transfer.

META is a model Act, not a uniform Act. This means states generally will have to adapt some META provisions to their own statutes. To do this, states must first identify all of the existing statutory provisions that allow for same-type (all of the entities involved are the same, e.g., a merger between two corporations) and cross-type (more than one type of entity is involved in the transaction, e.g., a merger between a corporation and a partnership), mergers, interest exchanges, conversions, and domestications for any kind of entity. An entity is defined in Section 102 to include all types of partnerships (general partnerships, limited liability partnerships, limited partnerships, and limited liability limited partnerships), limited liability companies, all types of corporations (including non-profit corporations, close corporations in those states that have separate statutes for close corporations, and professional corporations), business trusts, cooperatives, and unincorporated nonprofit associations (at least in states that have the Uniform Unincorporated Nonprofit Associations Act or have statutes that allow an unincorporated nonprofit organization to hold property in its own name). Many states have statutes governing other types of business organizations. Texas, for example, has special statutory provisions for real estate investment trusts (in most other states, REITs would be considered a type of business trust). These special types of entities should also be included in the review process.

The next step is to analyze the overall existing statutory framework for same-type and cross-type transactions. This analysis will reveal that there are gaps in coverage for many of the types of transactions covered by the act, either directly or by default, even in those states that have adopted Chapter 9 and 11 of the Model Business Corporation Act and the uniform unincorporated organization acts.

Every state will have provisions for mergers of corporations into other corporations but not all states authorize interest exchanges between corporations (the corporate statutes generally refer to these as share exchanges) and only a few states specifically authorize corporations to enter into merger or interest exchange transactions with other types of organizations. Moreover, very few existing corporate statutes have provisions for conversions of corporations into other types of entities or authorize corporations to domesticate in another state.

The same-type and cross-type landscape with respect to unincorporated entities is even less complete. The Uniform Partnership Act (1997) (RUPA), which has been adopted in approximately 2/3 of the states (and in the District of Columbia, Puerto Rico and the Virgin

Islands) only authorizes mergers and conversions of general partnerships and limited partnerships. It does not allow conversions into any other type of entity or mergers with any other type of entity; nor does it authorize interest exchange or domestication transactions. Several states that have adopted RUPA have provisions allowing same-type and cross-type conversions and mergers of general partnerships with not only limited partnerships but also with corporations and limited liability companies; and a few RUPA states have expanded the list to include any business entity (it is unclear in many of these states, however, whether these statutes apply to non-profit entities). With the exception of Ohio, which authorizes mergers and consolidations of general partnerships with other partnerships and "other domestic or foreign entities," there are apparently no same-type or cross-type provisions in the general partnership statutes of the approximately one-third of the states that still have the 1914 Uniform Partnership Act.

The statutory framework for limited partnership same-type and cross-type transactions is also quite varied. Most states have the Uniform Limited Partnership Act (1976 with 1985 Amendments). That act has no provisions dealing with merger, interest exchange, conversion, or domestication transactions. According to Volume 6A of Uniform Laws Annotated (Supp. 2004), 19 states have adopted provisions authorizing limited partnerships to merge with or convert into some other types of entities. Arizona, for example, only authorizes limited partnerships to convert into general partnerships, but also authorizes limited partnerships to merge with any other type of business entity. Some states allow conversions of limited partnerships into limited liability companies and a few states expand the conversion list to include corporations; most also allow mergers of limited partnerships into other limited partnerships and some other types of entities. Several states appear to exclude non-profit organizations, business trusts, and cooperatives from their cross-form list.

As of October 2007, the Uniform Limited Partnership Act (2001) had been adopted in 16 states. It authorizes a conversion of a limited partnership into any other type of organization, conversion of any other organization into a limited partnership, a merger of a limited partnership with any other type of organization and a domestication (which is a type of conversion under ULPA (2001)). It does not, however, have any specific provisions for interest exchanges.

Most limited liability company statutes have provisions authorizing mergers and conversions, although the scope of coverage is quite varied. The Uniform Limited Liability Company Act (1997) (ULLCA), which has been adopted in eight states and the Virgin Islands, authorizes the conversion of a limited liability company into a general or limited partnership (but not into a corporation or any other type of entity) and a merger of a limited liability company with other limited liability companies or any "other domestic or foreign entities." ULLCA does not, however, have any provisions authorizing limited liability companies to enter into interest exchange or domestication transactions. In the other 42 states there are substantial differences from the ULLCA scheme with respect to same-type and cross-type transactions. The recently-adopted revised Uniform Limited Liability Company Act (2006) authorizes cross-type mergers, conversions, and domestications, but does not provide for interest exchanges; and the Uniform Limited Cooperative Association Act (2007) authorizes cross-type mergers and conversions.

There are no same-type or cross-type provisions in the Uniform Unincorporated Nonprofit Associations Act. Moreover, there are very few same-type or cross-type provisions in statutes governing all the other types of entities that exist under state law. There are some exceptions, however, such as the Delaware Statutory Trust Act which allows mergers and conversions of business trusts into other entities, and the Minnesota cooperative statute which allows farm cooperatives to convert into limited liability companies.

Once the analysis of the existing same-type and cross-type statutes has been made, decisions need to be made as to which ones should be amended or repealed and whether to add

additional provisions to these statutes. Under META, if the statute governing an entity has same-type provisions, those provisions govern the transaction in question. META provides default rules, however, if the other applicable entity statute has no same-type provisions for the transaction in question. META also applies to cross-type transactions (but defaults to applicable state entity law for approval requirements and the like).

In deciding how to amend, repeal or add to the existing entity statutes, states should avoid any potential inconsistency between META's provisions and similar provisions in the state's entity statutes and make the interplay between META and the state's various entity laws relatively easy to navigate. There are several ways to achieve these goals. First, states can limit existing laws to same-type transactions. One method, which it is anticipated will be the method chosen by most states, is as follows:

With respect to the state's corporation statutes:

(i) Repeal any cross-type provisions from the state's corporation merger statutes. The amendments necessary for this purpose in a state that has adopted the Model Business Corporation Act and the Model Nonprofit Corporation Act are found in Sections A2-1 and A2-2, respectively, In states whose corporate codes do not have any cross-type merger provisions no amendments to the state's corporate merger provisions will be necessary. Most state also may not have interest exchange provisions in their corporate codes. If that is the case, same-type provisions for interest exchanges do not need to be added to the corporate codes because under META the requirements for approval of a merger and other rights that a shareholder would have in a merger, for example, dissenters' rights, apply. See Sections 203(a) (mergers) and 303(a) (interest exchange).

(ii) Repeal any conversion provisions in the state's corporation statutes. Article 3 of META will, therefore, govern all conversions.

(iii) Retain any existing domestication provisions in the state's organic laws. As is pointed out in the Legislative Note to META Section 501, these entity specific domestication provisions will be listed in Section 501(e) with the result being that Article 5 of META will apply to those types of entities whose organic laws do not already have domestication provisions.

With respect to the state's other entity statutes:

(i) Amend all the merger, interest exchange, and conversion provisions in the state's other entity statutes by stripping out all of the cross-type provisions in the merger provisions, and by repealing any interest exchange or conversion provisions. Any existing domestication provisions would be retained and an appropriate reference to those provisions would be included in Section 501(e). The appropriate amendments for states that have adopted the Uniform Partnership Act (1997), the Uniform Limited Partnership Act (2001), the Uniform Limited Liability Company Act (1996) or the ABA Prototype Limited Liability Company Act are found in Sections A2-3, A2-4, A2-5, and A2-6, respectively.

(ii) The existing requirements for approval of mergers, interest exchanges, conversions, domestications, and amendment of the organic rules in the state's existing organic laws for unincorporated entities need to be carefully reviewed. If they require unanimity (or they are silent on what vote is required), then the suggested amendments in this appendix will make all the voting requirements for both same-type and cross-type transactions involving unincorporated entities consistent. The situation is more complicated, however, if there is not complete consistency among those organic laws; for example, as is sometimes the case, if the state's partnership statutes require unanimity but its LLC statute requires only a majority vote for some or all transactions. If there is not complete consistency, decisions will need to be made whether to retain the differences or to make all of the voting requirements either unanimous or majority. Other issues that will need to be resolved are what the appropriate vote should be for transactions other than mergers (i.e., interest exchanges, conversions, and domestications) where

there are no existing voting provisions other than for mergers; what is the appropriate voting requirement for a transaction under META where an unincorporated entity organic law does not have any same-type or cross-type provisions for that type of transaction; and how the voting requirements under META relate to the vote required to amend an unincorporated entity's organic rules. Once this analysis is completed, it will be possible to construct the appropriate amendments to the state's existing unincorporated entity organic laws.

Another method of integrating META with a state's organic laws is to delete from the existing organic laws any provisions that deal with cross-type transactions and add same-type merger and interest exchange, and domestication provisions to every organic law that does not currently have these provisions. Thus all same-type entity transactions would be governed by the state's organic laws and all cross-type transactions would be governed by META. This approach will require a large number of changes to existing organic laws in most states because same-type merger and interest exchange, and domestication provisions would have to be added to many of the state's organic laws, including its unincorporated nonprofit, cooperative, and business trust statutes. Article 5 of META would also not be enacted because the organic laws for each type of entity would have domestication provisions.

States can also repeal all the existing same-type and cross-type transaction provisions in all of the organic laws and add to META all the corporate merger approval and related statutory provisions such as appraisal rights, as well as substantially modifying Sections 203, 303, 403, and 503 so that there will be one set of approval provisions for a corporation engaging in a META transaction and a second set of approval provisions for unincorporated entities engaging in a META transaction. Making all of these modifications will be a monumental task.

Finally, integrating META with a state's existing organic laws could be achieved by repealing any provisions for cross-type transactions from the corporation laws (see Sections A2-1 and A2-2 for the appropriate amendments in a state that has enacted the Model Business Corporation Act and the Model Nonprofit Corporation Act) and, in addition by repealing all of the provisions for same-type and cross-type transactions in all of the state's unincorporated entity organic laws. This approach, which is a variant of avoids the problem of incorporating the corporation law voting requirements and related provisions such as appraisal rights. It will work best, however, in a state where all of the existing unincorporated entity organic laws require unanimity for approval of a merger or similar transaction (and where unanimity is also required to amend each type of entity's organic rules), since that is the ultimate default rule in META. This approach will be quite cumbersome if the state's unincorporated entity organic laws require less than unanimous consent for some types of entities, because the less than unanimous approval requirements would have to be incorporated into META.

The ULC suggests states place a reference to META in the state's entity statutes specifying the transactions that are governed by META. As an alternative to the statutory references proposed in this appendix, legislative notes could be used in those states that follow that practice. A note would be placed in the corporate statutes at the end of the merger and share exchange provisions stating that META is the primary statute that applies to reorganization transactions involving a corporation and another form of entity. For other entities whose organic laws have merger provisions, the legislative notes would appear at the end of those provisions stating META is the primary statute for any cross-type merger involving that type of entity and also is the primary statute governing both same-type and cross-type interest exchange and domestication transactions where that type of entity is a party. Finally, if there are no merger provisions for a particular type of entity, a legislative note should be placed at the end of the governing statute stating that META is the statute that governs merger, interest exchange, conversion and domestication transactions where that type of entity is involved.

Interested readers can see how one state adopted META by viewing amendments Kansas

made to its law when it adopted META as SB 132 in 2009. However, the text in this *SSL* volume is the model ULC language, includes legislative notes about the act, and excludes line numbers. Readers can access official commentary about the act and detailed suggestions about how to implement the Act vis-à-vis existing business entity laws at this Web address: http://www.law.upenn.edu/bll/archives/ulc/ueta/2007_final.htm or at www.nccusl.org.

Submitted as:
Kansas
SB 132
Status: Enacted into law in 2009.

Comment:

Notes about ULC Acts:

For information on the specific drafting rules used by the ULC, the ULC *Procedural and Drafting Manual* is available online at www.nccusl.org.

In general, the use of bracketed language in ULC acts indicates that a choice must be made between alternate bracketed language, or that specific language must be inserted into the empty brackets. For example: "An athlete agent who violates Section 14 is guilty of a [misdemeanor] [felony] and, upon conviction, is punishable by [ ].

A word, number, or phrase, or even an entire section, may be placed in brackets to indicate that the bracketed language is suggested but may be changed to conform to state usage or requirements, or to indicate that the entire section is optional. For example: "An applicant for registration shall submit an application for registration to the [Secretary of State] in a form prescribed by the [Secretary of State]. [An application filed under this section is a public record.] The application must be in the name of an individual, and, except as otherwise provided in subsection (b), signed or otherwise authenticated by the applicant under penalty of perjury."

The sponsor may need to be consulted when dealing with bracketed language.

Questions about META?

Michael Kerr, ULC Legislative Director: 312-915-0195, michael.kerr@nccusl.org
Harry Haynsworth, Chair of the META drafting committee: hhaynsworth@briggs.com

Suggested State Legislation

(Title, enacting clause, etc.)

MODEL ENTITY TRANSACTIONS ACT
(Last Revised or Amended in 2007)

[ARTICLE] 1
GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Model Entity Transactions Act.

SECTION 102. DEFINITIONS. In this [act]:

LEGAL SERVICES

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

(907) 465-3867 or 465-2450
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 24, 2011

SUBJECT: Sectional summary of SB 101 relating to the Alaska Entity Transactions Act (Work Order No. 27-LS0437\A)

TO: Senator Joe Paskvan
Attn: Jeff Stepp

FROM: Theresa Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. In this sectional summary, "new chapter" or "chapter" means the Alaska Entity Transactions Act to be numbered AS 10.55, and "department" means the Department of Commerce, Community, and Economic Development. Please be aware that many terms in the new chapter are defined at the end of the new chapter.

Section 1. Conforming change (AS 10.26.670 repealed).

Section 2. Adds two sections to the article on organic change in AS 10.06, the for-profit corporations chapter. Sec. 10.06.595 allows, with exceptions, corporations to enter into mergers, interest exchanges, conversions, or domestications under the new chapter (the Alaska Entity Transactions Act). States that specific provisions do not apply to certain transactions covered by the new chapter. Sec. 10.06.600 defines terms for the article to conform to the application of the new chapter.

Section 3. Conforming and editorial change (AS 10.15.450 repealed).

Section 4. Adds AS 10.20.285 as a new section in the nonprofit corporations chapter to state that a corporation may, under the new chapter, enter into mergers, interest exchanges, conversions, and domestications that are not covered by certain sections of the nonprofit corporations chapter.

Section 5. Adds AS 10.30.058 as a new section in the chapter on cemetery organizations to state that cemetery associations and nonprofit cemetery corporations may enter into mergers, interest exchanges, conversions, and domestications under the new chapter.

Section 6. Adds a new section to the chapter on religious corporations (AS 10.40) to state that a corporation formed under AS 10.40 may enter into mergers, interest exchanges, conversions, and domestications under the new chapter.

Section 7. Amends AS 10.45.240, a section of the professional corporations chapter, to state that the provision in the state's for-profit corporations code relating to entering into mergers, interest exchanges, conversions, and domestications under the new chapter applies to professional corporations.

Section 8. Adds a new section to the limited liability company chapter to state that a limited liability company may, under the new chapter, enter into mergers, interest exchanges, conversions, and domestications that are not covered by certain sections of the limited liability company chapter.

Section 9. Conforming change (AS 10.50.570 has been repealed).

Section 10. Adds definitions to AS 10.50, the chapter on limited liability companies, conforming to the application of the new chapter.

Section 11. Adds the new chapter containing the Alaska Entity Transactions Act.

Sec. 10.55.103. Indicates how the new chapter relates to other laws, including principles of law and equity.

Sec. 10.55.104. Requires entities to satisfy certain governmental notice or approval requirements for mergers when involved in an interest exchange, conversion, or domestication. Addresses the diversion of property held for charitable purposes.

Sec. 10.55.105. Includes a filing under the chapter in an entity's public record.

Sec. 10.55.106. Provides that achieving a result under the new chapter does not prevent achieving the same result under another law.

Sec. 10.55.107. Allows a transaction plan (under certain conditions) to refer to facts that can be found outside the plan, even if the facts are not within the control of a party to the transaction.

Sec. 10.55.108. States that approval of a transaction by the unanimous vote or consent of an entity's interest holders satisfies the chapter's transaction approval requirements, unless, for a domestic entity, the organic law or organic rules state otherwise.

Sec. 10.55.109. Addresses when dissenters' rights are available to an interest holder. As a default provision, states that the interest holder may use the procedures under AS 10.06.576.

Sec. 10.55.110. Lists the entities that may not take part in a transaction under the chapter. Includes, among others, financial institutions and insurers.

Sec. 10.55.120. Requires that the name that a domestic entity takes under this chapter comply with certain requirements.

Sec. 10.55.201. Provides the general authorization for mergers. Lists certain excluded transactions.

Sec. 10.55.202. States that a domestic entity may become a party to a merger by approving a plan of merger. States what the plan must contain and allows it to contain any other provision not prohibited by law.

Sec. 10.55.203. States that a plan of merger is not effective unless it has been approved. Describes what approval is required.

Sec. 10.55.204. Describes how a plan merger for a domestic merging entity may be amended. Allows the plan to be abandoned and states how this may be done, depending on whether the statement of merger has become effective or been filed.

Sec. 10.55.205. Requires a statement of merger to be signed and filed with the department. Identifies what the statement of merger must contain and allows it to contain any other provision not prohibited by law. Requires, if a domestic entity is the surviving entity, that the surviving entity's public organic document satisfy this state's requirements, with certain exceptions. Allows a signed plan of merger with the required contents to be filed with the department instead of a statement of merger and to have the same effect as a statement of merger. States when the statement of merger becomes effective.

Sec. 10.55.206. Lists the effects of a merger on the entities involved. States, with exceptions, that a merger does not give the rights that an interest holder, governor, or third party would otherwise have when there is a dissolution, liquidation, or winding up. Addresses interest holder liability when a merger becomes effective. For foreign entities that are the surviving entities, allows for service of process on the entity regarding liabilities and provides for appointment of the department as the entity's agent for the service of process. When a merger becomes effective, cancels the foreign qualification of a foreign merging entity that is not the surviving entity.

Sec. 10.55.301. Provides the general authorization for a domestic or foreign entity to acquire the interests of other entities or for its interests to be acquired by other entities. Conditions the foreign entity's authorization on the authorization of the foreign entity's jurisdiction or organization. Provides a special interest exchange rule for certain protected agreements that have domestic entity merger provisions but no interest exchange provisions. Excludes certain share exchanges under AS 10.06 (the for-profit corporations code).

Sec. 10.55.302. States that a domestic entity may be an acquired entity in an interest exchange by approving an interest exchange plan. States what the plan must contain and allows it to contain any other provision not prohibited by law.

Sec. 10.55.303. States that a plan of interest exchange is not effective unless it has been approved. Describes what approval is required.

Sec. 10.55.304. Describes how an interest exchange plan for a domestic acquired entity may be amended. Allows the plan to be abandoned and states how this may be done, depending on whether the statement of interest exchange has become effective or been filed.

Sec. 10.55.305. Requires a statement of interest exchange to be signed and filed with the department. Identifies what the statement of interest exchange must contain and allows it to contain any other provision not prohibited by law. Allows, for a domestic acquired entity, a signed plan of interest exchange with the required contents to be filed with the department instead of a statement of interest exchange and to have the same effect as a statement of interest exchange. States when the statement of interest exchange becomes effective.

Sec. 10.55.306. Lists the effects of an interest exchange on the entities involved. States, with exceptions, that an interest exchange does not give the rights that an interest holder, governor, or third party would otherwise have when there is a dissolution, liquidation, or winding up. Addresses interest holder liability.

Sec. 10.55.401. Provides the general authorization for conversion of domestic and foreign entities. Conditions the conversion authorization of foreign entities to the law of the foreign jurisdiction. Provides a special rule for certain protected agreements that have domestic entity merger provisions but no conversion provisions.

Sec. 10.55.402. States that a domestic entity may convert to a different type of entity by approving a plan of conversion. States what the plan must contain and allows it to contain any other provision not prohibited by law.

Sec. 10.55.403. States that a plan of conversion is not effective unless it has been approved. Describes what approval is required.

Sec. 10.55.404. Describes how a plan of conversion may be amended. Allows the plan to be abandoned and states how this may be done, depending on whether the statement of conversion has become effective or been filed. Indicates what the statement of abandonment must contain when done after a statement of conversion is filed but the filing is not yet effective.

Sec. 10.55.405. Requires a statement of conversion to be signed and filed with the department. Identifies what the statement of conversion must contain and allows it to contain any other provision not prohibited by law. Requires, if the converted entity is a domestic entity, the entity's public organic document to satisfy this state's requirements, with certain exceptions. Allows, for a domestic converting entity, a signed plan of conversion with the required contents to be filed with the department instead of a statement of conversion and to have the same effect as a statement of conversion. States when a statement of conversion becomes effective.

Sec. 10.55.406. Lists the effects of a conversion on the entities involved. States, with exceptions, that a conversion does not give the rights that an interest holder, governor, or third party would otherwise have when there is a dissolution, liquidation, or winding up. Addresses interest holder liability. Provides that a foreign entity that is the converted entity may be served with process in this state regarding liabilities and appoints the commissioner as the agent to receive the process. Provides that the foreign qualification of a converting entity that is a qualified foreign entity is cancelled when the conversion becomes effective. Provides that a conversion does not require an entity to wind up its affairs and does not constitute or cause a dissolution of the entity.

Sec. 10.55.501. Provides the general authorization for a domestic entity to become a foreign entity of the same type, if the law of the foreign jurisdiction authorizes the domestication. Provides the general authorization for a foreign entity to become a domestic entity of the same type in this state, if the law of the foreign jurisdiction authorizes the domestication. Provides a special rule for certain protected agreements that have merger provisions relating to domestic entities but no domestication provisions.

Sec. 10.55.502. States that a domestic entity may become a foreign entity in a domestication by approving a plan of domestication. States what the plan must contain and allows it to contain any other provision not prohibited by law.

Sec. 10.55.503. States that a plan of domestication is not effective unless it has been approved. Describes what approval is required.

Sec. 10.55.504. Describes how a plan of domestication of a domestic entity may be amended. Allows the plan to be abandoned and states how this may be done, depending on whether the statement of conversion has become effective or been filed. Indicates what the statement of abandonment must contain after the statement of conversion has been filed.

Sec. 10.55.505. Requires a statement of domestication to be signed and filed with the department. Identifies what the statement of domestication must contain and allows it to contain any other provision not prohibited by law. Requires, if the domesticated entity is a domestic entity, the entity's public organic document to satisfy this state's requirements, with certain exceptions. Allows, for a domestic domesticating entity, a signed plan of domestication with the required contents to be filed with the department instead of a statement of domestication and to have the same effect as a statement of domestication. States when a statement of domestication becomes effective.

Sec. 10.55.506. Lists the effects of a domestication for the entities involved. States, with exceptions, that a domestication does not give the rights that an interest holder, governor, or third party would otherwise have when there is a dissolution, liquidation, or winding up. Addresses interest holder liability. Provides that a foreign entity that is the domesticated entity may be served with process in this state regarding liabilities and appoints the commissioner as the agent to receive process. Provides that the foreign qualification of a domesticating entity that is a qualified foreign entity is cancelled upon

domestication. Provides that a domestication does not require an entity to wind up its affairs and does not constitute or cause a dissolution.

Sec. 10.55.601. States the requirements for a document to meet in order to be entitled to be filed by the department under this chapter. Requires payment, or arrangement for payment, of the filing fee and any other required tax, license fee, or penalty.

Sec. 10.55.602. Allows the department to establish and furnish non-mandatory forms for the documents filed under this chapter.

Sec. 10.55.603. Directs the department to collect fees for being served with process, for copying documents, for certifying documents, and for filing documents under this chapter. Directs the department to establish the amount of the fees by regulation.

Sec. 10.55.604. Establishes when a document accepted for filing becomes effective.

Sec. 10.55.605. Allows an entity to correct a filed document under certain circumstances. Indicates how to make the correction. States when the correction is effective.

Sec. 10.55.606. Directs the department to file eligible documents. Indicates how the department is to file a document. Addresses the situation when the department refuses to file a document. Describes the department filing duty as ministerial and as not affecting the validity of the document or the correctness of the information in the document, and as not creating a presumption of validity, invalidity, or information correctness or incorrectness.

Sec. 10.55.607. Allows an appeal if the department refuses to file a document. Allows the court's decision to be appealed as in other civil proceedings.

Sec. 10.55.608. Provides that a department certificate (delivered with a copy of the filed document) conclusively establishes that the original is on file.

Sec. 10.55.609. Establishes a criminal penalty for signing a document knowing it is false for delivery to the department.

Sec. 10.55.610. Allows the department to submit interrogatories (formal questions) to an entity that is a party to a transaction to determine if the entity has complied with the chapter. Indicates when the answers are due and establishes certain criteria for the answers, including who is to answer the questions. Allows a court petition to be filed about the due date, modification, or setting aside of the questions.

Sec. 10.55.615. Establishes that the questions requested by the department and the answers are confidential. Establishes when the department may disclose information from them.

Sec. 10.55.620. Establishes a criminal penalty for failing to answer interrogatories from the department. Allows the department to delay or base its filing of a document on receiving proper answers and on the information in the answers.

Sec. 10.55.625. Gives the department the necessary power to implement the chapter.

Sec. 10.55.701. Requires that, when applying and construing this chapter, consideration must be given to promoting consistency among enacting states.

Sec. 10.55.702. Indicates how the chapter relates to the Electronic Signatures in Global and National Commerce Act.

Sec. 10.55.901. Defines terms for the new chapter.

Sec. 10.55.902. Gives the new chapter a short title: Alaska Entity Transactions Act.

Section 12. Amends a section in the partnership chapter to create an exception for the new chapter relating to the consent required to become a partner.

Section 13. Amends a section in the partnership chapter to create an exception for the new chapter that relates to a partner's transferable interest. States that a partner's interest is personal property, whether or not transferable.

Section 14. Conforming change (AS 32.06.902, 32.06.903, and 32.06.904 are repealed).

Section 15. Conforming change (AS 32.06.902, 32.06.903, and 32.06.904 are repealed).

Section 16. Amends the partnership chapter to remove the ability of a partnership to merge with a limited partnership under that chapter.

Section 17. Amends the partnership chapter to conform merger plans to the change in bill section 16.

Section 18. Amends the partnership chapter to conform the merger approval requirements to the change in bill section 16.

Section 19. Amends the partnership chapter to provide that a merger between a partnership and another form of entity is covered by the new chapter.

Section 20. Amends the partnership chapter to conform the provisions about the effect of a merger to the change in bill section 16.

Section 21. Amends the partnership chapter to conform the statement of merger to the change in bill section 16.

Section 22. Conforming change (AS 32.06.902, 32.06.903, and 32.06.904 are repealed). Deletes reference to AS 32.06.908. States that partnerships or limited partnerships may

enter into mergers, interest exchanges, conversions, and domestications under the new chapter or in any other manner provided by law.

Section 23. Adds a definition of "domestic limited liability partnership."

Section 24. Adds definitions to the partnership chapter.

Section 25. Adds a provision allowing for amending a limited partnership certificate by filing a plan of merger, interest exchange, conversion, or domestication under the new chapter.

Section 26. Amends the limited partnership chapter to state that a partner's interest is personal property, whether or not the interest is transferable.

Section 27. Amends the limited partnership chapter to require that a limited partnership keep at its office a copy of any statement of merger, interest exchange, conversion, or domestication filed under the new chapter.

Section 28. Amends the limited partnership chapter to remove conversions from the application of the partnership chapter (AS 32.06) and to make the application of AS 32.06 to cases not covered by the limited partnership chapter subject to the new chapter.

Section 29. Amends the limited partnership chapter to change the definition of "limited partnership" to exclude certain entities and to limit the term to entities under the chapter.

Section 30. Repeals certain statutes.

Section 31. Describes how certain changes in the bill make indirect court rule amendments.

Section 32. Allows the department to get started on regulations for the Act.

Section 33. Provides a saving clause for actions and proceedings that are begun, or rights that have accrued, before the bill's effective date.

Section 34. Makes bill section 32 go into effect immediately.

Section 35. Gives the bill, except as provided in sec. 34, an effective date of July 1, 2013.

If I may be of further assistance, please advise.

TLB:plm:ljw
11-178.plm

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Transmitted via email

March 26, 2010

Senator Joe Paskvan
AK State Capitol, Room #7
Juneau, AK 99801
Sen.Joe.Paskvan@legis.state.ak.us

Dear Senator Paskvan:

I am writing in support of Senate Bill 304. Senate Bill 304 will create a statutory framework to facilitate corporate transactions between different types of legal entities. Under current law, transactions which involve a merger, sale or transfer of certain assets where a limited liability company in a party to the transaction require additional steps, cost and complexity. The current problems with transactions between limited liability companies and certain other limited liability entities are not based on sound policy; they are simply a result of the accumulation of unresolved issues. Adoption by Alaska of the Model Entity Transaction Act will remove unnecessary steps to such transactions.

As Doyon has grown, its corporate structure has grown more complex. The passage of Senate Bill 304 will help to take some of the unnecessary complexity out of transactions, and will avoid the need to incorporate in other jurisdictions where the laws are better defined for complex transactions.

Respectfully submitted,

Norman L. Phillips, Jr.
President and CEO

SB 104

<TARGET><BILL>SB 104</BILL><SUBJECT>SB 104</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE COMMITTEE REPORT

DATE: 4/1/11

FURTHER:

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered SENATE BILL NO. 104

SB 104-MANUFACTURED HOMES AS REAL PROPERTY

"An Act relating to manufactured homes, including manufactured homes permanently affixed to land, to the conversion of manufactured homes to real property, to the severance of manufactured homes from real property, to the titling, conveyance, and encumbrance of manufactured homes, and to manufacturers' certificates of origin for vehicles; and providing for an effective date."

and recommends:

[X] be **replaced** with **CS** SB104 (JUD) *[✓] Same Title [ ] New Title*

[ ] adopt **previous CS** _____ (_____) *[ ] Same Title [ ] New Title*

[ ] attached amendment(s)

[ ] adopt _____Letter of Intent

[ ] further referral to _____Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
ADMIN			✓	

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Coghill	✓			
	Wielechowski	✓			
	PASKVAN	X			
CHAIR:	French	✓			

Alaska State Legislature

Senator Hollis French

SB 104 – MOBILE HOMES AS REAL PROPERTY

Sponsor Statement

Senate Bill 104 establishes procedures to convert manufactured homes to real property, through a defined process within the Division of Motor Vehicles. This change will give the owners of manufactured homes better access to traditional mortgage financing, which often features lower interest rates.

Currently, when a manufactured home is affixed to a permanent foundation on land owned by an individual, the vaguely defined title surrender procedure used by the Division of Motor Vehicles lacks a record notice. Without a record notice, homeowners are often left with unmarketable titles, and lenders hold unperfected security interests in the property, placing all parties in a real estate transaction – the buyer, the lender, and the seller - at risk.

Conversion will help increase home values for consumers, give security to lenders and provide fixed procedures for the DMV to follow. Nothing requires the conversion of a manufactured home in the legislation, leaving that choice to consumers.

Many Alaskans live in manufactured homes. This legislation treats residents that permanently affix a manufactured home to land they own the same as if their home was built on the property. I urge you to support this fair legislation.

CS FOR SENATE BILL NO. 104(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR FRENCH

A BILL

FOR AN ACT ENTITLED

"An Act relating to manufactured homes, including manufactured homes permanently affixed to land, to the conversion of manufactured homes to real property, to the severance of manufactured homes from real property, to the titling, conveyance, and encumbrance of manufactured homes, and to manufacturers' certificates of origin for vehicles; and providing for an effective date."

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

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

FINDINGS AND PURPOSE. (a) The legislature finds the legal status of manufactured homes affixed or to be affixed to real property in the state needs to be clarified.

(b) The purpose of this Act is to establish a clear statutory procedure for

(1) converting to real property manufactured homes that are affixed to real property; and

(2) severing manufactured homes from real property.

* **Sec. 2.** AS 06.05.207 is amended by adding a new subsection to read:

(c) In this section, "real property" includes a manufactured home that has become real property under AS 34.85.010. In this subsection, "manufactured home" has the meaning given in AS 45.29.102.

* **Sec. 3.** AS 06.15.250 is amended by adding a new subsection to read:

(b) In this section, "real property" includes a manufactured home that has become real property under AS 34.85.010. In this subsection, "manufactured home" has the meaning given in AS 45.29.102.

* **Sec. 4.** AS 06.45.060(5)(A) is amended to read:

(A) loans to members shall be made in conformity with regulations adopted by the commissioner, except that

(i) a residential real estate loan that is made to finance the acquisition of a one- to four-family dwelling for the principal residence of a credit union member that is secured by a first lien on the dwelling may have a maturity not exceeding 30 years;

(ii) a loan to finance the purchase of a **manufactured** [MOBILE] home that is secured by a first lien on the **manufactured** [MOBILE] home, to be used as the residence of a credit union member, or for the repair, alteration, or improvement of a residential dwelling that is the residence of a credit union member must have a maturity not to exceed 20 years unless the loan is insured or guaranteed under (iii) of this subparagraph;

(iii) a loan secured by the insurance or guarantee of the federal government, of a state government, or an agency of either may be made for the maturity and under the terms and conditions specified in the law under which the insurance or guarantee is provided;

(iv) a loan or aggregate of loans to a director or member of the supervisory or credit committee of the credit union making the loan that exceeds $20,000 plus pledged shares shall be approved by the board of directors;

(v) loans to other members for which directors or members of the supervisory or credit committee act as guarantor or endorser shall be approved by the board of directors when the loans standing alone or when added to an outstanding loan or loans of the guarantor or endorser exceed $20,000;

(vi) the rate of interest may not exceed the greater of 15 percent a year or the rate specified in AS 45.45.010(b);

(vii) the taking, receiving, reserving, or charging of a rate of interest greater than is allowed by this paragraph, when knowingly done, is considered a forfeiture of the entire interest that the note, bill, or other evidence of debt carries with it, or that has been agreed to be paid on the note, bill, or other evidence of debt; if a greater rate of interest has been paid, the person by whom it has been paid or the person's legal representatives may recover back from the credit union taking or receiving it the entire amount of interest paid, but the action must be commenced within two years from the time the usurious collection was made;

(viii) a borrower may repay a loan before maturity in whole or in part on any business day without penalty;

(ix) loans shall be paid or amortized under regulations adopted by the commissioner that consider the needs or conditions of the borrowers, the amounts and duration of the loans, the interests of the members and the credit union, and other factors established in regulations adopted by the commissioner;

(x) the total dollar amount of real estate loans and **manufactured** [MOBILE] home loans outstanding may not exceed 25 percent of the assets of the credit union without the written approval of the commissioner;

(xi) a credit union with assets of less than $3,000,000 may make real estate loans with maturities in excess of 15 years only with the approval of the commissioner;

* **Sec. 5.** AS 06.45.060 is amended by adding a new subsection to read:

(b) In this section, "manufactured home" has the meaning given in AS 45.29.102.

* **Sec. 6.** AS 06.60.990(33) is amended to read:

(33) "residential mortgage loan" means a loan that is primarily for personal, family, or household use and that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or residential real estate located in the state; in this paragraph,

(A) "manufactured home" has the meaning given in AS 45.29.102;

(B) "residential real estate" means real property on which a dwelling is constructed or intended to be constructed**, including a manufactured home that has become real property under AS 34.85.010**;

* **Sec. 7.** AS 09.45 is amended by adding a new section to read:

Article 13. General Provisions.

Sec. 09.45.990. Definitions. In this chapter,

(1) "manufactured home" has the meaning given in AS 45.29.102;

(2) "real property" includes a manufactured home that has become real property under AS 34.85.010.

* **Sec. 8.** AS 28.05.061(a) is amended to read:

(a) The Department of Administration shall file, maintain, and appropriately index records of

(1) vehicle registrations under AS 28.10.071(a) - (c);

(2) stolen, converted, recovered, and unclaimed vehicles under AS 28.10.071(d);

(3) titles and documents creating and evidencing liens or encumbrances under AS 28.10.381;

(4) abandoned vehicles under AS 28.11.030(c); [AND]

(5) driver's license and driving records under AS 28.15.151**;**

(6) applications under AS 28.10.262 for cancellation of a manufacturer's certificate of origin for a manufactured home;

(7) applications under AS 28.10.263 for cancellation of a certificate of title to a manufactured home;

(8) applications under AS 28.10.264 for confirmation of the nonapplication of AS 28.10 to a manufactured home;

(9) applications under AS 28.10.265 for a certificate of title to a severed manufactured home;

(10) manufacturer's certificates of origin accepted for cancellation by the department under AS 28.10.262 for a manufactured home; and

(11) certificates of title accepted for cancellation by the department under AS 28.10.263 for a manufactured home.

*** Sec. 9.** AS 28.05.061 is amended by adding new subsections to read:

(e) For cancelled manufacturer's certificates of origin, cancelled certificates of title, or applications for confirmation filed under (a)(8), (10), or (11) of this section, the department's record must state

(1) the name of each owner of the manufactured home;

(2) the date the manufacturer's certificate of origin or the certificate of title was accepted for cancellation if the certificate was cancelled under (a)(10) or (11) of this section; and

(3) the recording information for the affixation affidavit required by AS 28.10.266.

(f) For applications for certificates of title under (a)(9) of this section, the department's record must state the name of each owner of the manufactured home and the recording information for the severance affidavit recorded under AS 40.17.125.

(g) In this section, "recording information" means the district where the affidavit was recorded, and the date and serial numbers of the affidavit's recording in the recording district.

*** Sec. 10.** AS 28.10.201(b) is amended to read:

(b) The owner of a vehicle described in AS 28.10.011 as being exempt from registration and the owner of a snowmobile or off-highway vehicle may not apply for, nor may the department issue, a certificate of title for the vehicle. However, the department

(1) may issue a certificate of title to the owner of a vehicle exempt from registration under AS 28.10.011(3), (6), (7), or (10) only upon application by that owner; and

(2) **except as provided in (e) of this section,** shall issue a certificate of title to the owner of a **manufactured** [MOBILE] home upon application, display of evidence of ownership satisfactory to the department, and payment of a fee of $100 by the owner; a certificate of title issued under this paragraph must comply with AS 28.10.231.

* **Sec. 11.** AS 28.10.201 is amended by adding a new subsection to read:

(e) The department may not issue a certificate of title to a manufactured home if an application for the manufactured home has been filed under AS 28.10.262 - 28.10.264.

* **Sec. 12.** AS 28.10.211(c) is amended to read:

(c) When an application for title refers to a new vehicle, the application must be accompanied by a "manufacturer's **certificate** [STATEMENT] of origin" and other information reasonably required by the department.

* **Sec. 13.** AS 28.10.211 is amended by adding a new subsection to read:

(f) The holder of a manufacturer's certificate of origin for a manufactured home may deliver the certificate to any person to facilitate conveying or encumbering the manufactured home, and a person who receives the manufacturer's certificate of origin holds it in trust for the person delivering it.

* **Sec. 14.** AS 28.10.221 is amended by adding a new subsection to read:

(d) Except as provided in AS 28.10.263, the department may not suspend or revoke a certificate of title to a manufactured home based on the fact that the manufactured home is affixed in any manner to real property.

* **Sec. 15.** AS 28.10.261 is amended by adding a new subsection to read:

(c) Notwithstanding another provision of law to the contrary, a certificate of title to a manufactured home issued by the department is prima facie evidence of the facts appearing on it, even if the manufactured home is affixed in any manner to real property.

* **Sec. 16.** AS 28.10 is amended by adding new sections to article 2 to read:

Sec. 28.10.262. Cancellation of manufacturer's certificate of origin for manufactured home. (a) If a manufactured home is permanently affixed to real property under AS 34.85.150, or if the owner intends to permanently affix the manufactured home to real property under AS 34.85.150, the owner may submit to the department an application requesting that the department cancel the manufacturer's certificate of origin for a manufactured home and update the department's records under AS 28.05.061.

(b) The application under (a) of this section must comply with AS 28.10.266.

(c) Subject to AS 28.05.041, if the department is satisfied that the application filed under (a) of this section complies with (b) of this section, the department shall cancel the manufacturer's certificate of origin for the manufactured home, update the department's records under AS 28.05.061, and issue a written acknowledgment that the department has cancelled the certificate of origin under this section. The department shall deliver the written acknowledgment to the owner of the manufactured home and to a person identified under AS 28.10.266(12).

(d) When the department has cancelled the manufacturer's certificate of origin under (c) of this section, the manufactured home is not subject to this chapter.

Sec. 28.10.263. Cancellation of certificate of title to manufactured home. (a) If a manufactured home is permanently affixed to real property under AS 34.85.150, or if the owner intends to permanently affix the manufactured home to real property under AS 34.85.150, the owner may submit to the department an application requesting that the department cancel the certificate of title to a manufactured home and update the department's records under AS 28.05.061.

(b) The application under (a) of this section must comply with AS 28.10.266.

(c) Subject to AS 28.05.041, if the department is satisfied that the application filed under (a) of this section complies with (b) of this section and that there are no outstanding liens or encumbrances filed against the manufactured home under AS 28.10.381, the department shall cancel the certificate of title to the manufactured home, update the department's records under AS 28.05.061, and issue a written acknowledgment that the department has cancelled the certificate of title under this section. The department shall deliver the written acknowledgment to the owner of the

manufactured home and to a person identified under AS 28.10.266(12).

(d) When the department has cancelled a certificate of title under (c) of this section, the manufactured home is not subject to this chapter.

Sec. 28.10.264. Confirmation of nonapplication of chapter. (a) The owner of a manufactured home may submit an application to the department requesting that the department indicate on the department's records that the manufactured home is not subject to this chapter if

(1) the manufactured home is permanently affixed to real property under AS 34.85.150, or the owner intends to permanently affix the manufactured home to real property under AS 34.85.150; and

(2) the manufactured home

(A) is not covered by a manufacturer's certificate of origin or a certificate of title;

(B) is covered by a manufacturer's certificate of origin, but the owner of the manufactured home, after diligent search and inquiry, is unable to produce the certificate of origin; or

(C) is covered by a certificate of title, but the owner of the manufactured home, after diligent search and inquiry, is unable to produce the certificate of title.

(b) The application under (a) of this section must comply with AS 28.10.266 and be accompanied by a bond or cash deposit described in (c) of this section.

(c) The bond that accompanies the application under (b) of this section must be in the form prescribed by the department and executed by the applicant. The amount of the bond or cash deposit that accompanies the application under (b) of this section must be equal to one and one-half times the value of the manufactured home as determined by the department and must be conditioned to indemnify former owners, secured parties, and subsequent purchasers of the manufactured home and their successors against loss resulting from a defect in or undisclosed security interest on the title of the applicant. An injured party may bring a court action against the bond or cash deposit for a breach of the conditions of the bond or cash deposit, but the liability of the bond surety or the department may not exceed the amount of the bond or cash

deposit. The department shall return the bond or cash deposit at the end of three years after the submission under (b) of this section, except that service on the department of notice that an action is pending against the bond or cash deposit extends that period until 45 days after a final decision in the action on the bond or cash deposit.

(d) If the department is satisfied that the application filed under (a) of this section complies with (b) of this section, the department shall, subject to AS 28.05.041, indicate under AS 28.05.061 on the department's records that the manufactured home is not subject to this chapter and shall provide to the owner a written confirmation that the owner of the manufactured home has submitted an application that complies with (b) of this section and that the manufactured home is not subject to this chapter. The department shall deliver the written confirmation to the owner of the manufactured home and to a person identified under AS 28.10.266(12).

(e) When the department has provided a written confirmation under (d) of this section, the manufactured home is not subject to this chapter.

Sec. 28.10.265. Certificate of title to severed manufactured home. (a) The owner of a manufactured home may submit an application to the department requesting that the department issue a certificate of title to a manufactured home and update the department's records under AS 28.05.061 if

(1) the manufactured home was permanently affixed to real property under AS 34.85.150;

(2) an affixation affidavit was recorded for the manufactured home under AS 40.17.125; and

(3) after the occurrence of (1) and (2) of this subsection, the manufactured home was severed from the real property to which it was affixed.

(b) The application under (a) of this section must comply with AS 28.10.266.

(c) Subject to AS 28.05.041, if the department is satisfied that the application filed under (a) of this section complies with (b) of this section, the department shall issue a certificate of title to the manufactured home under AS 28.10.231 - 28.10.241, update the department's records under AS 28.05.061, and issue to the owner and to a person identified under AS 28.10.266(12) a written acknowledgment that the department has issued a certificate of title under this section.

(d) When the department has issued a certificate of title under (c) of this section, the manufactured home is subject to this chapter.

Sec. 28.10.266. Application provisions. An application under AS 28.10.262 - 28.10.265 must provide

(1) the name, residence, and mailing address of the owner of the manufactured home;

(2) a description of the manufactured home, including the name of the manufacturer, the make, the model name, the model year, the manufacturer's serial number for the manufactured home, and other information required by the department about the manufactured home;

(3) whether the manufactured home is new or used;

(4) for an application under AS 28.10.262 - 28.10.264, the date of purchase by the owner of the manufactured home and the name and address of the person from whom the home was acquired;

(5) for an application under AS 28.10.262 - 28.10.264, the name and address of any person who holds a lien or an encumbrance against the manufactured home and the order of apparent priority;

(6) a statement signed by the owner, stating

(A) any facts or information known to the owner that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on it; or

(B) that the owner does not know any facts or information that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home;

(7) subject to AS 28.10.268, for an application under AS 28.10.262 - 28.10.264, a certified copy of an affixation affidavit that complies with AS 34.85.060 and that has been recorded under AS 40.17.125 for the manufactured home;

(8) for an application under AS 28.10.265, a certified copy of a severance affidavit that complies with AS 34.85.120 and that has been recorded under AS 40.17.125 for the manufactured home;

(9) for an application under AS 28.10.262, the original manufacturer's

certificate of origin;

(10) for an application under AS 28.10.263, the original certificate of title;

(11) for an application under AS 28.10.264 or 28.10.265, a declaration that complies with AS 28.10.267;

(12) if desired by the applicant, the name and mailing address of one person, in addition to the owner, to receive a written acknowledgment from the department under AS 28.10.262, 28.10.263, or 28.10.265 or a written confirmation under AS 28.10.264; and

(13) other information and documents the department reasonably requires

(A) to identify the owner of the manufactured home;

(B) to determine the existence or nonexistence of liens or encumbrances on the manufactured home;

(C) for an application under AS 28.10.262 - 28.10.264, to enable the department to determine whether the owner satisfied the applicable requirements of AS 34.85.010; and

(D) for an application under AS 28.10.265, to enable the department to determine whether the owner of the manufactured home is entitled to a certificate of title.

Sec. 28.10.267. Declaration. (a) The declaration required by AS 28.10.266(11) must be made under oath or affirmation by an attorney authorized under AS 08.08 to practice law in the state or an agent of a title insurance company entitled under AS 21.66 to transact a title insurance business in this state.

(b) The declaration must state that the manufactured home is free and clear of all liens and encumbrances and

(1) any facts or information known to the attorney or agent that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home; or

(2) that the attorney or agent does not know any facts or information that could reasonably affect the validity of the title to the manufactured home or the

existence or nonexistence of a lien or encumbrance on the manufactured home.

Sec. 28.10.268. Time of satisfaction. If a person delivers an application under AS 28.10.262 - 28.10.264 for a manufactured home to the department within 30 days after an affixation affidavit for the manufactured home is recorded under AS 40.17.125, and if the application is accepted by the department, the requirements of AS 28.10.262 - 28.10.264 are considered to be satisfied on the date the affixation affidavit is recorded, and, if the manufactured home is conveyed or encumbered on and after that date, the manufactured home shall be conveyed and encumbered as real property.

Sec. 28.10.269. Definitions. In AS 28.10.201 - 28.10.269, unless the context indicates otherwise,

(1) "affixation affidavit" means an affixation affidavit under AS 34.85.060;

(2) "severance affidavit" means a severance affidavit under AS 34.85.120.

*** Sec. 17.** AS 28.10.371 is amended by adding new subsections to read:

(b) Notwithstanding (a) of this section, a lien on a manufactured home for the purchase of the manufactured home is valid against judicial lien creditors and execution creditors on and after the date the lien attaches under AS 45.29 against the manufactured home.

(c) Notwithstanding (a) of this section, the holder of a lien on a manufactured home may deliver a lien release document to a person to facilitate conveying or encumbering the manufactured home. A person receiving the lien release document holds the document in trust for the lienholder.

*** Sec. 18.** AS 28.10.381 is amended by adding a new subsection to read:

(c) Except as otherwise provided in AS 28.10.262, 28.10.263, and AS 34.85, after a certificate of title to a manufactured home has been issued and while the manufactured home is subject to a lien or encumbrance under (a) of this section,

(1) the department may not cancel the manufacturer's certificate of origin for the manufactured home under AS 28.10.262, or cancel the certificate of title to the manufactured home under AS 28.10.263; and

(2) the validity and priority of the lien or encumbrance continues.

* **Sec. 19.** AS 28.10.391 is amended by adding a new subsection to read:

(e) Notwithstanding another provision of this section, the creation or termination of a lien or encumbrance with respect to a manufactured home that has been converted to real property under AS 34.85.010 is governed by the laws that apply to real property.

* **Sec. 20.** AS 28.10.661(2) is amended to read:

(2) "vehicle" includes mobile homes for the purposes of provisions relating to certificates of title**; in this paragraph, "mobile home" means a manufactured home**.

* **Sec. 21.** AS 28.10.661 is amended by adding a new paragraph to read:

(3) "manufactured home" has the meaning given in AS 45.29.102.

* **Sec. 22.** AS 29.45.070 is amended to read:

Sec. 29.45.070. Mobile homes. Mobile homes, trailers, house trailers, trailer coaches, and similar property used or intended to be used for residential, office, or commercial purposes and **permanently affixed** [ATTACHED] to **real property under AS 34.85.150** [THE LAND OR CONNECTED TO WATER, GAS, ELECTRIC, OR SEWAGE FACILITIES] are classified as real property for tax purposes unless expressly classified as personal property by ordinance. This section does not apply to house trailers and mobile homes that are unoccupied and held for sale by persons engaged in the business of selling mobile homes. **In this section, "mobile home" has the meaning given to "manufactured home" in AS 45.29.102.**

* **Sec. 23.** AS 34.03.360 is amended by adding a new paragraph to read:

(23) "mobile home" has the meaning given to "manufactured home" in AS 45.29.102.

* **Sec. 24.** AS 34.70.200(3) is amended to read:

(3) "residential real property" means real property whose primary purpose is to provide a single-family dwelling, or two single-family dwellings in one building**, including a manufactured home that has become real property under AS 34.85.010; in this paragraph, "manufactured home" has the meaning given in AS 45.29.102**;

* **Sec. 25.** AS 34.80.090(6) is amended to read:

(6) "residential real property" means real property on which there are one to four attached or detached dwelling units, or any number of apartments if the apartments are in a horizontal property regime formed under AS 34.07 or any number of units if the units are in a common interest community created under AS 34.08; **"residential real property" includes a manufactured home that has become real property under AS 34.85.010; in this paragraph, "manufactured home" has the meaning given in AS 45.29.102;**

* **Sec. 26.** AS 34 is amended by adding a new chapter to read:

Chapter 85. Manufactured Home Property Act.

Sec. 34.85.010. Real property characterization. A manufactured home becomes real property if

(1) the home is permanently affixed to land under AS 34.85.150;

(2) an affixation affidavit has been recorded under AS 40.17.125;

(3) the ownership interests in the manufactured home and in the real property to which the manufactured home is permanently affixed are identical, except as provided by AS 34.85.040; and

(4) the manufactured home is

(A) covered by a manufacturer's certificate of origin that the owner of the manufactured home is able to produce, and the department has cancelled the manufacturer's certificate of origin under AS 28.10.262;

(B) covered by a certificate of title that the owner of the manufactured home is able to produce, and the department has cancelled the certificate of title under AS 28.10.263; or

(C) not covered by a manufacturer's certificate of origin or a certificate of title, or if the manufactured home is covered by a manufacturer's certificate of origin or a certificate of title but the owner of the manufactured home, after diligent search and inquiry, was unable to produce the manufacturer's certificate of origin or certificate of title, and the department has provided a written confirmation under AS 28.10.264.

Sec. 34.85.020. Effect of real property characterization. (a) When a

manufactured home becomes real property under AS 34.85.010, a mortgage, deed of trust, lien, or security interest that can attach to land, buildings erected on land, or fixtures affixed to land or buildings attaches to the manufactured home in the same manner as if the manufactured home were built from ordinary building materials on the land where the manufactured home is located.

(b) If the title to a manufactured home is transferred after the manufactured home becomes real property under AS 34.85.010, title to the manufactured home, together with the land to which the converted manufactured home is affixed, shall be transferred by deed or other form of conveyance that is effective to transfer an interest in real property.

(c) When a manufactured home becomes real property under AS 34.85.010, the manufactured home is governed by the laws applicable to real property in effect on the date the manufactured home satisfies AS 34.85.010.

Sec. 34.85.040. Ownership interest exception. If the owner of a manufactured home is not the owner of the real property on which the manufactured home is located, the requirement under AS 34.85.010(3) that the ownership interests be identical is satisfied if the owner possesses the real property under

(1) a lease in a recordable form that has a term that continues for at least 20 years after the date of execution of the affixation affidavit; and

(2) the lessor of the real property consents.

Sec. 34.85.060. Affixation affidavit requirements. An affixation affidavit must provide

(1) the name of the manufacturer, the make, the model name, the model year, the dimensions, and the manufacturer's serial number of the manufactured home;

(2) whether the manufactured home is new or used;

(3) a statement that the person executing the affidavit is

(A) the owner of the real property described in the affixation affidavit; or

(B) not the owner of the real property described in the affixation affidavit, and the person

(i) is in possession of the real property under a lease in recordable form that has a term that continues for at least 20 years after the date of execution of the affidavit; and

(ii) the lessor of the real property consents;

(4) if (3)(B)(ii) of this section applies, the consent of the lessor of the real property endorsed on or attached to the affidavit and acknowledged or proved in the manner required for the conveyance to be recorded;

(5) the street address and the legal description of the real property to which the manufactured home is or shall be permanently affixed;

(6) if the manufactured home is not covered by a certificate of title, a statement by the owner to that effect;

(7) an owner's statement under AS 34.85.070;

(8) a statement whether or not the manufactured home is subject to a lien or encumbrance;

(9) if the manufactured home is subject to a lien or encumbrance, a statement giving the name and address of each person who holds a lien or encumbrance on the manufactured home, including each holder of a lien or encumbrance shown on a certificate of title issued by the department, the original principal amount secured by each lien and encumbrance, and a statement that

(A) the lien or encumbrance shall be released; or

(B) each lien or encumbrance on the manufactured home has been released and proof of the release;

(10) if the manufactured home is not covered by a manufacturer's certificate of origin or a certificate of title, a statement by the owner of the manufactured home that the manufactured home is not covered by a manufacturer's certificate of origin or a certificate of title and that the owner of the manufactured home will apply to the department under AS 28.10.264;

(11) a statement that the manufactured home is or will be permanently affixed to the real property; and

(12) the name and address of a person designated for filing the certified copy of the affixation affidavit with the department.

Sec. 34.85.070. Owner's statement for affixation affidavit. (a) An owner's statement for an affixation affidavit must comply with (b) or (c) of this section.

(b) If a manufactured home is covered by a manufacturer's certificate of origin, the owner of the manufactured home shall

(1) state that the manufactured home is covered by a manufacturer's certificate of origin, provide the date the manufacturer's certificate of origin was issued, provide the manufacturer's serial number, state that the original manufacturer's certificate of origin for the manufactured home is annexed to the affixation affidavit and is endorsed to the owner of the manufactured home, and state that the owner of the manufactured home will surrender the manufacturer's certificate of origin for cancellation under AS 28.10.262; or

(2) state that the owner of the manufactured home, after diligent search and inquiry, has been unable to produce the original manufacturer's certificate of origin for the manufactured home and shall apply to the department under AS 28.10.264.

(c) If a manufactured home is covered by a certificate of title, the owner of the manufactured home shall

(1) state that the manufactured home is covered by a certificate of title, provide the date the title was issued and the title number, and state that the owner shall surrender the title for cancellation under AS 28.10.263; or

(2) state that the owner, after diligent search and inquiry, has been unable to produce the certificate of title to the manufactured home and shall apply to the department under AS 28.10.264.

Sec. 34.85.080. Effect on liens and encumbrances. Permanently affixing a manufactured home to real property or recording an affixation affidavit under AS 40.17.125 does not impair the rights of a holder of, or the character of, a lien or encumbrance on a manufactured home under AS 28.10.381 unless an application to cancel the title is filed with the department under AS 28.10.263 and the lien or encumbrance is released under AS 28.10.401.

Sec. 34.85.090. Filing affixation affidavit with department. When a person designated in an affixation affidavit to file the affixation affidavit with the department

receives a certified copy of the recorded affixation affidavit, the person shall deliver the certified copy of the affixation affidavit to the department for filing under AS 28.10.262 - 28.10.264.

Sec. 34.85.100. Use of affidavit. (a) Except as provided in AS 34.85.010, 34.85.020, 34.85.090, and AS 40.17.125, an affixation affidavit is not necessary or effective to convey or encumber a manufactured home or to change the character of a manufactured home to real property.

(b) A conveyance of land on which a manufactured home is located must recite that the conveyance does not affect the title to the manufactured home and that the transfer or encumbrance of the manufactured home can only be made under AS 28.10 if

(1) an affixation affidavit has not been recorded for the manufactured home; or

(2) a severance affidavit has been recorded for the manufactured home.

(c) An agreement that waives the requirements of (a) or (b) of this subsection is void.

Sec. 34.85.110. Severance of manufactured home. If an affixation affidavit has been recorded for a converted manufactured home and if the converted manufactured home is severed from the real property to which it was affixed, each person having an interest in the real property shall record a severance affidavit in the recording district where the affixation affidavit was recorded.

Sec. 34.85.120. Severance affidavit. The severance affidavit must contain or be accompanied by

(1) the name, residence, and mailing address of the owner of the manufactured home;

(2) a description of the manufactured home, including the name of the manufacturer, the make, the model name, the model year, the dimensions, and the manufacturer's serial number of the manufactured home;

(3) whether the manufactured home it is new or used;

(4) the serial numbers and date when the affixation affidavit was recorded;

(5) a statement

(A) of any facts or information known to the person signing the affidavit that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home; or

(B) that the person signing the affidavit does not know any facts or information that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home;

(6) a declaration made under oath or affirmation by an attorney authorized under AS 08.08 to practice law in the state or an agent of a title insurance company entitled under AS 21.66 to transact a title insurance business in this state that the manufactured home is free and clear of all liens and encumbrances, and

(A) stating any facts or information known to the attorney or agent that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home; or

(B) that the attorney or agent does not know any facts or information that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home; and

(7) the name and address of the person designated to file the certified copy of the severance affidavit with the department under AS 28.10.265.

Sec. 34.85.130. Filing of severance affidavit. On receipt of a certified copy of the severance affidavit by the person designated in the affidavit for filing with the department, the person shall file the certified copy with the department under AS 28.10.262 - 28.10.264.

Sec. 34.85.140. Affidavit form and acknowledgment. (a) An affixation affidavit and a severance affidavit must be acknowledged in the same manner as a conveyance of real property and must be in a form that may be recorded under AS 40.17.

(b) The department shall establish by regulation the forms for an affixation affidavit and a severance affidavit.

Sec. 34.85.150. Permanently affixed. A manufactured home is permanently affixed when it is

(1) anchored to real property by attachment to a permanent foundation;

(2) constructed in accordance with applicable state and local building codes and manufacturer's specifications as provided in the Model Manufactured Home Installation Standards of the federal Department of Housing and Urban Development (24 C.F.R. 3285); and

(3) connected to a residential utility, including water, gas, electricity, sewer, or septic service.

Sec. 34.85.190. Definitions. In this chapter, unless the context requires otherwise,

(1) "affixation affidavit" means an affixation affidavit under AS 34.85.060;

(2) "department" means the Department of Administration;

(3) "manufactured home" has the meaning given in AS 45.29.102;

(4) "permanently affixed" means when a manufactured home is permanently affixed under AS 34.85.150;

(5) "severance affidavit" means a severance affidavit under AS 34.85.120.

Sec. 34.85.195. Short title. This chapter may be cited as the Manufactured Home Property Act.

* **Sec. 27.** AS 40.17 is amended by adding a new section to read:

Sec. 40.17.125. Recording affidavits related to manufactured homes. (a) A recorder shall record an affixation affidavit and a severance affidavit if the affidavit meets the requirements for recording under AS 40.17.030 and is offered for recording in the recording district where the real property to which the manufactured home affixed is located.

(b) A recording officer shall place on the recorded affidavit

(1) the indexing information for the recorded affidavit; and

(2) an indication that the recorded affidavit was recorded.

(c) In this section,

(1) "affidavit" means an affixation affidavit or a severance affidavit;

(2) "affixation affidavit" has the meaning given in AS 34.85.190;

(3) "manufactured home" has the meaning given in AS 45.29.102;

(4) "recorded affidavit" means an affidavit recorded under this section;

(5) "severance affidavit" has the meaning given in AS 34.85.190.

*** Sec. 28.** AS 45.10.220(2) is amended to read:

(2) "goods" means personal chattels purchased primarily for personal, family, or household use and not for commercial or business use, but does not include money or, except as provided in the next phrase, chose in action; "goods" includes [BUT IS NOT LIMITED TO] merchandise certificates or coupons issued by a retail seller to be used in their face amount instead of cash in exchange for goods or services sold by the seller and goods**, including a manufactured home,** that, at the time of sale or subsequently, are to be so affixed to real property as to become a part of it, whether or not severable from it; **in this paragraph, "manufactured home" has the meaning given in AS 45.29.102;**

*** Sec. 29.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: REGULATIONS. The Department of Administration shall adopt regulations necessary to implement this Act. The regulations must take effect under AS 44.62 (Administrative Procedure Act) on January 1, 2013.

*** Sec. 30.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SAVING CLAUSE. This Act may not be interpreted to impair a right or claim existing under law before January 1, 2013, of a person claiming an interest in a manufactured home. In this section, "manufactured home" has the meaning given in AS 45.29.102.

*** Sec. 31.** Section 29 of this Act takes effect immediately under AS 01.10.070(c).

*** Sec. 32.** Except as provided in sec. 31 of this Act, this Act takes effect January 1, 2013.

AMENDMENT

OFFERED IN THE SENATE

TO: CSSB 104( ), Draft Version "D"

Page 21, line 22:

Delete "2012"

Insert "2013"

Page 21, line 26:

Delete "2012"

Insert "2013"

Page 21, line 29:

Delete "2012"

Insert "2013"

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **SB104**
Fiscal Note Number:
Publish Date:

Identifier (file name): SB104-DOA-DMV-12-6-2011
Title: Manufactured Homes as Real Property
Sponsor: Senator French
Requester: Senate Judiciary

Dept. Affected: Administration
Appropriation: Motor Vehicles
Allocation: Motor Vehicles
OMB Component Number: 2348

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Update for session

Prepared by: Whitney Brewster, Director — Phone: 907-269-5559
Division: Motor Vehicles — Date/Time: 12/1/11 4:30 PM
Approved by: John Cramer, Deputy Commissioner, Department of Administration — Date: 12/6/2011

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB104

Analysis

The effective date of this bill is January 1, 2012.

This bill will have only a small financial impact on the Division of Motor Vehicles (DMV). DMV will aborb any implementation costs in its operating budget.

Senator Hollis French

Capitol Room 417
465-3892
465-6595 fax

MEMORANDUM

Date: April 14, 2011

To: Senate Judiciary Committee Members

From: Senator Hollis French

RE: Changes in CS for Senate Bill 104 (version \D)

Section 27 of the bill, starting on page 20 of the legislation, was modified in this draft, responding to feedback received from the Department of Natural Resources recorder's office. The changes to Sec. 27 are as follows:

Sec. 40.17.125(a) was modified so that the recorder's office won't have to determine whether an affixation or severance affidavit meets requirements under sec. 34.85 in this legislation. Under AS 40.17.035, the recorder's office cannot be tasked with determining whether the contents of a document are legally sufficient to achieve the purposes of the document; instead, as clarified under regulation, the person submitting documents for recording must ensure that the prerequisites for recording as established by regulation and statute are met.

Sec. 40.17.125(b) received two minor changes in the CS. The first modifies the action taken by the recorder on the recording affidavit, changing 'write' to 'place' on page 20 line 30 of the legislation. This change reflects that the recording office no longer writes on recorded affidavits - instead, they affix bar codes that contain relevant information. In addition, the original draft required an affidavit to be recorded in land records; in the CS, Sec. 40.17.125(b) changes 'in land records' to 'the public record,' to match where the recorder files land records today.

Sec. 40.17.125(c) in the original draft (version \I) was removed in the CS. This language required the recorder's office to automatically send a certified copy of

the recorded affidavit to a person designated on an affidavit. This doesn't match current recording office procedures, which require an individual to request and pay for certified copies of affidavits.

In regards to this last change, conforming amendments were made to Sec. 34.85.060(12) and Sec. 34.85.120(7) in Section 26 of the CS to remove references to the automatic mailing of a certified affidavit. In addition, sec 28.10.266(7) and sec. 28.10.266(8) of the CS, found in section 16 on page 10 of the legislation, were modified to ensure that an affidavit complies with affixation requirements under sec. 34.85 of the legislation.

In section 16 of the legislation, the original draft required DMV to notify a primary lienholder of completed conversion procedures, in instances when the conversion involved cancelling a manufacturer's certificate of origin or title. Yet under sec. 28.10.267 of the legislation, a conversion cannot take place until a manufactured home is free and clear of all liens and encumbrances. Because a primary lienholder would never exist through a conversion procedure, the lienholder notification provisions were replaced in the CS with language that allows the applicant to indicate one person, in addition to the owner, that receives written acknowledgement of completed conversions under sec. 28.10.262-265. This change is reflected in sec. 28.10.262(c), 28.10.263(c), 28.10.264(d), 28.10.265(c) and 28.10.266(12) of CS version \D.

If you have any questions about these changes, please contact Andy Moderow in my office at 907-465-4923.

27-LS0467\D
Bannister
4/7/11

CS FOR SENATE BILL NO. 104( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR FRENCH

A BILL

FOR AN ACT ENTITLED

"An Act relating to manufactured homes, including manufactured homes permanently affixed to land, to the conversion of manufactured homes to real property, to the severance of manufactured homes from real property, to the titling, conveyance, and encumbrance of manufactured homes, and to manufacturers' certificates of origin for vehicles; and providing for an effective date."

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

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

FINDINGS AND PURPOSE. (a) The legislature finds the legal status of manufactured homes affixed or to be affixed to real property in the state needs to be clarified.

(b) The purpose of this Act is to establish a clear statutory procedure for

(1) converting to real property manufactured homes that are affixed to real property; and

(2) severing manufactured homes from real property.

*** Sec. 2.** AS 06.05.207 is amended by adding a new subsection to read:

(c) In this section, "real property" includes a manufactured home that has become real property under AS 34.85.010. In this subsection, "manufactured home" has the meaning given in AS 45.29.102.

*** Sec. 3.** AS 06.15.250 is amended by adding a new subsection to read:

(b) In this section, "real property" includes a manufactured home that has become real property under AS 34.85.010. In this subsection, "manufactured home" has the meaning given in AS 45.29.102.

*** Sec. 4.** AS 06.45.060(5)(A) is amended to read:

(A) loans to members shall be made in conformity with regulations adopted by the commissioner, except that

(i) a residential real estate loan that is made to finance the acquisition of a one- to four-family dwelling for the principal residence of a credit union member that is secured by a first lien on the dwelling may have a maturity not exceeding 30 years;

(ii) a loan to finance the purchase of a **manufactured** [MOBILE] home that is secured by a first lien on the **manufactured** [MOBILE] home, to be used as the residence of a credit union member, or for the repair, alteration, or improvement of a residential dwelling that is the residence of a credit union member must have a maturity not to exceed 20 years unless the loan is insured or guaranteed under (iii) of this subparagraph;

(iii) a loan secured by the insurance or guarantee of the federal government, of a state government, or an agency of either may be made for the maturity and under the terms and conditions specified in the law under which the insurance or guarantee is provided;

(iv) a loan or aggregate of loans to a director or member of the supervisory or credit committee of the credit union making the loan that exceeds $20,000 plus pledged shares shall be approved by the board of directors;

(v) loans to other members for which directors or members of the supervisory or credit committee act as guarantor or endorser shall be approved by the board of directors when the loans standing alone or when added to an outstanding loan or loans of the guarantor or endorser exceed $20,000;

(vi) the rate of interest may not exceed the greater of 15 percent a year or the rate specified in AS 45.45.010(b);

(vii) the taking, receiving, reserving, or charging of a rate of interest greater than is allowed by this paragraph, when knowingly done, is considered a forfeiture of the entire interest that the note, bill, or other evidence of debt carries with it, or that has been agreed to be paid on the note, bill, or other evidence of debt; if a greater rate of interest has been paid, the person by whom it has been paid or the person's legal representatives may recover back from the credit union taking or receiving it the entire amount of interest paid, but the action must be commenced within two years from the time the usurious collection was made;

(viii) a borrower may repay a loan before maturity in whole or in part on any business day without penalty;

(ix) loans shall be paid or amortized under regulations adopted by the commissioner that consider the needs or conditions of the borrowers, the amounts and duration of the loans, the interests of the members and the credit union, and other factors established in regulations adopted by the commissioner;

(x) the total dollar amount of real estate loans and **manufactured** [MOBILE] home loans outstanding may not exceed 25 percent of the assets of the credit union without the written approval of the commissioner;

(xi) a credit union with assets of less than $3,000,000 may make real estate loans with maturities in excess of 15 years only with the approval of the commissioner;

* **Sec. 5.** AS 06.45.060 is amended by adding a new subsection to read:

(b) In this section, "manufactured home" has the meaning given in AS 45.29.102.

* **Sec. 6.** AS 06.60.990(33) is amended to read:

(33) "residential mortgage loan" means a loan that is primarily for personal, family, or household use and that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or residential real estate located in the state; in this paragraph,

(A) "manufactured home" has the meaning given in AS 45.29.102;

(B) "residential real estate" means real property on which a dwelling is constructed or intended to be constructed**, including a manufactured home that has become real property under AS 34.85.010**;

* **Sec. 7.** AS 09.45 is amended by adding a new section to read:

Article 13. General Provisions.

Sec. 09.45.990. Definitions. In this chapter,

(1) "manufactured home" has the meaning given in AS 45.29.102;

(2) "real property" includes a manufactured home that has become real property under AS 34.85.010.

* **Sec. 8.** AS 28.05.061(a) is amended to read:

(a) The Department of Administration shall file, maintain, and appropriately index records of

(1) vehicle registrations under AS 28.10.071(a) - (c);

(2) stolen, converted, recovered, and unclaimed vehicles under AS 28.10.071(d);

(3) titles and documents creating and evidencing liens or encumbrances under AS 28.10.381;

(4) abandoned vehicles under AS 28.11.030(c); [AND]

(5) driver's license and driving records under AS 28.15.151**;**

(6) applications under AS 28.10.262 for cancellation of a manufacturer's certificate of origin for a manufactured home;

(7) applications under AS 28.10.263 for cancellation of a certificate of title to a manufactured home;

(8) applications under AS 28.10.264 for confirmation of the nonapplication of AS 28.10 to a manufactured home;

(9) applications under AS 28.10.265 for a certificate of title to a severed manufactured home;

(10) manufacturer's certificates of origin accepted for cancellation by the department under AS 28.10.262 for a manufactured home; and

(11) certificates of title accepted for cancellation by the department under AS 28.10.263 for a manufactured home.

*** Sec. 9.** AS 28.05.061 is amended by adding new subsections to read:

(e) For cancelled manufacturer's certificates of origin, cancelled certificates of title, or applications for confirmation filed under (a)(8), (10), or (11) of this section, the department's record must state

(1) the name of each owner of the manufactured home;

(2) the date the manufacturer's certificate of origin or the certificate of title was accepted for cancellation if the certificate was cancelled under (a)(10) or (11) of this section; and

(3) the recording information for the affixation affidavit required by AS 28.10.266.

(f) For applications for certificates of title under (a)(9) of this section, the department's record must state the name of each owner of the manufactured home and the recording information for the severance affidavit recorded under AS 40.17.125.

(g) In this section, "recording information" means the district where the affidavit was recorded, and the date and serial numbers of the affidavit's recording in the recording district.

*** Sec. 10.** AS 28.10.201(b) is amended to read:

(b) The owner of a vehicle described in AS 28.10.011 as being exempt from registration and the owner of a snowmobile or off-highway vehicle may not apply for, nor may the department issue, a certificate of title for the vehicle. However, the department

(1) may issue a certificate of title to the owner of a vehicle exempt from registration under AS 28.10.011(3), (6), (7), or (10) only upon application by that owner; and

(2) **except as provided in (e) of this section,** shall issue a certificate of title to the owner of a **manufactured** [MOBILE] home upon application, display of evidence of ownership satisfactory to the department, and payment of a fee of $100 by the owner; a certificate of title issued under this paragraph must comply with AS 28.10.231.

* **Sec. 11.** AS 28.10.201 is amended by adding a new subsection to read:

(e) The department may not issue a certificate of title to a manufactured home if an application for the manufactured home has been filed under AS 28.10.262 - 28.10.264.

* **Sec. 12.** AS 28.10.211(c) is amended to read:

(c) When an application for title refers to a new vehicle, the application must be accompanied by a "manufacturer's **certificate** [STATEMENT] of origin" and other information reasonably required by the department.

* **Sec. 13.** AS 28.10.211 is amended by adding a new subsection to read:

(f) The holder of a manufacturer's certificate of origin for a manufactured home may deliver the certificate to any person to facilitate conveying or encumbering the manufactured home, and a person who receives the manufacturer's certificate of origin holds it in trust for the person delivering it.

* **Sec. 14.** AS 28.10.221 is amended by adding a new subsection to read:

(d) Except as provided in AS 28.10.263, the department may not suspend or revoke a certificate of title to a manufactured home based on the fact that the manufactured home is affixed in any manner to real property.

* **Sec. 15.** AS 28.10.261 is amended by adding a new subsection to read:

(c) Notwithstanding another provision of law to the contrary, a certificate of title to a manufactured home issued by the department is prima facie evidence of the facts appearing on it, even if the manufactured home is affixed in any manner to real property.

* **Sec. 16.** AS 28.10 is amended by adding new sections to article 2 to read:

Sec. 28.10.262. Cancellation of manufacturer's certificate of origin for manufactured home. (a) If a manufactured home is permanently affixed to real property under AS 34.85.150, or if the owner intends to permanently affix the manufactured home to real property under AS 34.85.150, the owner may submit to the department an application requesting that the department cancel the manufacturer's certificate of origin for a manufactured home and update the department's records under AS 28.05.061.

(b) The application under (a) of this section must comply with AS 28.10.266.

(c) Subject to AS 28.05.041, if the department is satisfied that the application filed under (a) of this section complies with (b) of this section, the department shall cancel the manufacturer's certificate of origin for the manufactured home, update the department's records under AS 28.05.061, and issue a written acknowledgment that the department has cancelled the certificate of origin under this section. The department shall deliver the written acknowledgment to the owner of the manufactured home and to a person identified under AS 28.10.266(12).

(d) When the department has cancelled the manufacturer's certificate of origin under (c) of this section, the manufactured home is not subject to this chapter.

Sec. 28.10.263. Cancellation of certificate of title to manufactured home. (a) If a manufactured home is permanently affixed to real property under AS 34.85.150, or if the owner intends to permanently affix the manufactured home to real property under AS 34.85.150, the owner may submit to the department an application requesting that the department cancel the certificate of title to a manufactured home and update the department's records under AS 28.05.061.

(b) The application under (a) of this section must comply with AS 28.10.266.

(c) Subject to AS 28.05.041, if the department is satisfied that the application filed under (a) of this section complies with (b) of this section and that there are no outstanding liens or encumbrances filed against the manufactured home under AS 28.10.381, the department shall cancel the certificate of title to the manufactured home, update the department's records under AS 28.05.061, and issue a written acknowledgment that the department has cancelled the certificate of title under this section. The department shall deliver the written acknowledgment to the owner of the

manufactured home and to a person identified under AS 28.10.266(12).

(d) When the department has cancelled a certificate of title under (c) of this section, the manufactured home is not subject to this chapter.

Sec. 28.10.264. Confirmation of nonapplication of chapter. (a) The owner of a manufactured home may submit an application to the department requesting that the department indicate on the department's records that the manufactured home is not subject to this chapter if

(1) the manufactured home is permanently affixed to real property under AS 34.85.150, or the owner intends to permanently affix the manufactured home to real property under AS 34.85.150; and

(2) the manufactured home

(A) is not covered by a manufacturer's certificate of origin or a certificate of title;

(B) is covered by a manufacturer's certificate of origin, but the owner of the manufactured home, after diligent search and inquiry, is unable to produce the certificate of origin; or

(C) is covered by a certificate of title, but the owner of the manufactured home, after diligent search and inquiry, is unable to produce the certificate of title.

(b) The application under (a) of this section must comply with AS 28.10.266 and be accompanied by a bond or cash deposit described in (c) of this section.

(c) The bond that accompanies the application under (b) of this section must be in the form prescribed by the department and executed by the applicant. The amount of the bond or cash deposit that accompanies the application under (b) of this section must be equal to one and one-half times the value of the manufactured home as determined by the department and must be conditioned to indemnify former owners, secured parties, and subsequent purchasers of the manufactured home and their successors against loss resulting from a defect in or undisclosed security interest on the title of the applicant. An injured party may bring a court action against the bond or cash deposit for a breach of the conditions of the bond or cash deposit, but the liability of the bond surety or the department may not exceed the amount of the bond or cash

deposit. The department shall return the bond or cash deposit at the end of three years after the submission under (b) of this section, except that service on the department of notice that an action is pending against the bond or cash deposit extends that period until 45 days after a final decision in the action on the bond or cash deposit.

(d) If the department is satisfied that the application filed under (a) of this section complies with (b) of this section, the department shall, subject to AS 28.05.041, indicate under AS 28.05.061 on the department's records that the manufactured home is not subject to this chapter and shall provide to the owner a written confirmation that the owner of the manufactured home has submitted an application that complies with (b) of this section and that the manufactured home is not subject to this chapter. The department shall deliver the written confirmation to the owner of the manufactured home and to a person identified under AS 28.10.266(12).

(e) When the department has provided a written confirmation under (d) of this section, the manufactured home is not subject to this chapter.

Sec. 28.10.265. Certificate of title to severed manufactured home. (a) The owner of a manufactured home may submit an application to the department requesting that the department issue a certificate of title to a manufactured home and update the department's records under AS 28.05.061 if

(1) the manufactured home was permanently affixed to real property under AS 34.85.150;

(2) an affixation affidavit was recorded for the manufactured home under AS 40.17.125; and

(3) after the occurrence of (1) and (2) of this subsection, the manufactured home was severed from the real property to which it was affixed.

(b) The application under (a) of this section must comply with AS 28.10.266.

(c) Subject to AS 28.05.041, if the department is satisfied that the application filed under (a) of this section complies with (b) of this section, the department shall issue a certificate of title to the manufactured home under AS 28.10.231 - 28.10.241, update the department's records under AS 28.05.061, and issue to the owner and to a person identified under AS 28.10.266(12) a written acknowledgment that the department has issued a certificate of title under this section.

(d) When the department has issued a certificate of title under (c) of this section, the manufactured home is subject to this chapter.

Sec. 28.10.266. Application provisions. An application under AS 28.10.262 - 28.10.265 must provide

(1) the name, residence, and mailing address of the owner of the manufactured home;

(2) a description of the manufactured home, including the name of the manufacturer, the make, the model name, the model year, the manufacturer's serial number for the manufactured home, and other information required by the department about the manufactured home;

(3) whether the manufactured home is new or used;

(4) for an application under AS 28.10.262 - 28.10.264, the date of purchase by the owner of the manufactured home and the name and address of the person from whom the home was acquired;

(5) for an application under AS 28.10.262 - 28.10.264, the name and address of any person who holds a lien or an encumbrance against the manufactured home and the order of apparent priority;

(6) a statement signed by the owner, stating

(A) any facts or information known to the owner that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on it; or

(B) that the owner does not know any facts or information that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home;

(7) subject to AS 28.10.268, for an application under AS 28.10.262 - 28.10.264, a certified copy of an affixation affidavit that complies with AS 34.85.060 and that has been recorded under AS 40.17.125 for the manufactured home;

(8) for an application under AS 28.10.265, a certified copy of a severance affidavit that complies with AS 34.85.120 and that has been recorded under AS 40.17.125 for the manufactured home;

(9) for an application under AS 28.10.262, the original manufacturer's

certificate of origin;

(10) for an application under AS 28.10.263, the original certificate of title;

(11) for an application under AS 28.10.264 or 28.10.265, a declaration that complies with AS 28.10.267;

(12) if desired by the applicant, the name and mailing address of one person, in addition to the owner, to receive a written acknowledgment from the department under AS 28.10.262, 28.10.263, or 28.10.265 or a written confirmation under AS 28.10.264; and

(13) other information and documents the department reasonably requires

(A) to identify the owner of the manufactured home;

(B) to determine the existence or nonexistence of liens or encumbrances on the manufactured home;

(C) for an application under AS 28.10.262 - 28.10.264, to enable the department to determine whether the owner satisfied the applicable requirements of AS 34.85.010; and

(D) for an application under AS 28.10.265, to enable the department to determine whether the owner of the manufactured home is entitled to a certificate of title.

Sec. 28.10.267. Declaration. (a) The declaration required by AS 28.10.266(11) must be made under oath or affirmation by an attorney authorized under AS 08.08 to practice law in the state or an agent of a title insurance company entitled under AS 21.66 to transact a title insurance business in this state.

(b) The declaration must state that the manufactured home is free and clear of all liens and encumbrances and

(1) any facts or information known to the attorney or agent that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home; or

(2) that the attorney or agent does not know any facts or information that could reasonably affect the validity of the title to the manufactured home or the

existence or nonexistence of a lien or encumbrance on the manufactured home.

Sec. 28.10.268. Time of satisfaction. If a person delivers an application under AS 28.10.262 - 28.10.264 for a manufactured home to the department within 30 days after an affixation affidavit for the manufactured home is recorded under AS 40.17.125, and if the application is accepted by the department, the requirements of AS 28.10.262 - 28.10.264 are considered to be satisfied on the date the affixation affidavit is recorded, and, if the manufactured home is conveyed or encumbered on and after that date, the manufactured home shall be conveyed and encumbered as real property.

Sec. 28.10.269. Definitions. In AS 28.10.201 - 28.10.269, unless the context indicates otherwise,

(1) "affixation affidavit" means an affixation affidavit under AS 34.85.060;

(2) "severance affidavit" means a severance affidavit under AS 34.85.120.

*** Sec. 17.** AS 28.10.371 is amended by adding new subsections to read:

(b) Notwithstanding (a) of this section, a lien on a manufactured home for the purchase of the manufactured home is valid against judicial lien creditors and execution creditors on and after the date the lien attaches under AS 45.29 against the manufactured home.

(c) Notwithstanding (a) of this section, the holder of a lien on a manufactured home may deliver a lien release document to a person to facilitate conveying or encumbering the manufactured home. A person receiving the lien release document holds the document in trust for the lienholder.

*** Sec. 18.** AS 28.10.381 is amended by adding a new subsection to read:

(c) Except as otherwise provided in AS 28.10.262, 28.10.263, and AS 34.85, after a certificate of title to a manufactured home has been issued and while the manufactured home is subject to a lien or encumbrance under (a) of this section,

(1) the department may not cancel the manufacturer's certificate of origin for the manufactured home under AS 28.10.262, or cancel the certificate of title to the manufactured home under AS 28.10.263; and

(2) the validity and priority of the lien or encumbrance continues.

* **Sec. 19.** AS 28.10.391 is amended by adding a new subsection to read:

(e) Notwithstanding another provision of this section, the creation or termination of a lien or encumbrance with respect to a manufactured home that has been converted to real property under AS 34.85.010 is governed by the laws that apply to real property.

* **Sec. 20.** AS 28.10.661(2) is amended to read:

(2) "vehicle" includes mobile homes for the purposes of provisions relating to certificates of title**; in this paragraph, "mobile home" means a manufactured home**.

* **Sec. 21.** AS 28.10.661 is amended by adding a new paragraph to read:

(3) "manufactured home" has the meaning given in AS 45.29.102.

* **Sec. 22.** AS 29.45.070 is amended to read:

Sec. 29.45.070. Mobile homes. Mobile homes, trailers, house trailers, trailer coaches, and similar property used or intended to be used for residential, office, or commercial purposes and **permanently affixed** [ATTACHED] to **real property under AS 34.85.150** [THE LAND OR CONNECTED TO WATER, GAS, ELECTRIC, OR SEWAGE FACILITIES] are classified as real property for tax purposes unless expressly classified as personal property by ordinance. This section does not apply to house trailers and mobile homes that are unoccupied and held for sale by persons engaged in the business of selling mobile homes. **In this section, "mobile home" has the meaning given to "manufactured home" in AS 45.29.102.**

* **Sec. 23.** AS 34.03.360 is amended by adding a new paragraph to read:

(23) "mobile home" has the meaning given to "manufactured home" in AS 45.29.102.

* **Sec. 24.** AS 34.70.200(3) is amended to read:

(3) "residential real property" means real property whose primary purpose is to provide a single-family dwelling, or two single-family dwellings in one building**, including a manufactured home that has become real property under AS 34.85.010; in this paragraph, "manufactured home" has the meaning given in AS 45.29.102**;

* **Sec. 25.** AS 34.80.090(6) is amended to read:

(6) "residential real property" means real property on which there are one to four attached or detached dwelling units, or any number of apartments if the apartments are in a horizontal property regime formed under AS 34.07 or any number of units if the units are in a common interest community created under AS 34.08; **"residential real property" includes a manufactured home that has become real property under AS 34.85.010; in this paragraph, "manufactured home" has the meaning given in AS 45.29.102;**

* **Sec. 26.** AS 34 is amended by adding a new chapter to read:

Chapter 85. Manufactured Home Property Act.

Sec. 34.85.010. Real property characterization. A manufactured home becomes real property if

(1) the home is permanently affixed to land under AS 34.85.150;

(2) an affixation affidavit has been recorded under AS 40.17.125;

(3) the ownership interests in the manufactured home and in the real property to which the manufactured home is permanently affixed are identical, except as provided by AS 34.85.040; and

(4) the manufactured home is

(A) covered by a manufacturer's certificate of origin that the owner of the manufactured home is able to produce, and the department has cancelled the manufacturer's certificate of origin under AS 28.10.262;

(B) covered by a certificate of title that the owner of the manufactured home is able to produce, and the department has cancelled the certificate of title under AS 28.10.263; or

(C) not covered by a manufacturer's certificate of origin or a certificate of title, or if the manufactured home is covered by a manufacturer's certificate of origin or a certificate of title but the owner of the manufactured home, after diligent search and inquiry, was unable to produce the manufacturer's certificate of origin or certificate of title, and the department has provided a written confirmation under AS 28.10.264.

Sec. 34.85.020. Effect of real property characterization. (a) When a

manufactured home becomes real property under AS 34.85.010, a mortgage, deed of trust, lien, or security interest that can attach to land, buildings erected on land, or fixtures affixed to land or buildings attaches to the manufactured home in the same manner as if the manufactured home were built from ordinary building materials on the land where the manufactured home is located.

(b) If the title to a manufactured home is transferred after the manufactured home becomes real property under AS 34.85.010, title to the manufactured home, together with the land to which the converted manufactured home is affixed, shall be transferred by deed or other form of conveyance that is effective to transfer an interest in real property.

(c) When a manufactured home becomes real property under AS 34.85.010, the manufactured home is governed by the laws applicable to real property in effect on the date the manufactured home satisfies AS 34.85.010.

Sec. 34.85.040. Ownership interest exception. If the owner of a manufactured home is not the owner of the real property on which the manufactured home is located, the requirement under AS 34.85.010(3) that the ownership interests be identical is satisfied if the owner possesses the real property under

(1) a lease in a recordable form that has a term that continues for at least 20 years after the date of execution of the affixation affidavit; and

(2) the lessor of the real property consents.

Sec. 34.85.060. Affixation affidavit requirements. An affixation affidavit must provide

(1) the name of the manufacturer, the make, the model name, the model year, the dimensions, and the manufacturer's serial number of the manufactured home;

(2) whether the manufactured home is new or used;

(3) a statement that the person executing the affidavit is

(A) the owner of the real property described in the affixation affidavit; or

(B) not the owner of the real property described in the affixation affidavit, and the person

(i) is in possession of the real property under a lease in recordable form that has a term that continues for at least 20 years after the date of execution of the affidavit; and

(ii) the lessor of the real property consents;

(4) if (3)(B)(ii) of this section applies, the consent of the lessor of the real property endorsed on or attached to the affidavit and acknowledged or proved in the manner required for the conveyance to be recorded;

(5) the street address and the legal description of the real property to which the manufactured home is or shall be permanently affixed;

(6) if the manufactured home is not covered by a certificate of title, a statement by the owner to that effect;

(7) an owner's statement under AS 34.85.070;

(8) a statement whether or not the manufactured home is subject to a lien or encumbrance;

(9) if the manufactured home is subject to a lien or encumbrance, a statement giving the name and address of each person who holds a lien or encumbrance on the manufactured home, including each holder of a lien or encumbrance shown on a certificate of title issued by the department, the original principal amount secured by each lien and encumbrance, and a statement that

(A) the lien or encumbrance shall be released; or

(B) each lien or encumbrance on the manufactured home has been released and proof of the release;

(10) if the manufactured home is not covered by a manufacturer's certificate of origin or a certificate of title, a statement by the owner of the manufactured home that the manufactured home is not covered by a manufacturer's certificate of origin or a certificate of title and that the owner of the manufactured home will apply to the department under AS 28.10.264;

(11) a statement that the manufactured home is or will be permanently affixed to the real property; and

(12) the name and address of a person designated for filing the certified copy of the affixation affidavit with the department.

Sec. 34.85.070. Owner's statement for affixation affidavit. (a) An owner's statement for an affixation affidavit must comply with (b) or (c) of this section.

(b) If a manufactured home is covered by a manufacturer's certificate of origin, the owner of the manufactured home shall

(1) state that the manufactured home is covered by a manufacturer's certificate of origin, provide the date the manufacturer's certificate of origin was issued, provide the manufacturer's serial number, state that the original manufacturer's certificate of origin for the manufactured home is annexed to the affixation affidavit and is endorsed to the owner of the manufactured home, and state that the owner of the manufactured home will surrender the manufacturer's certificate of origin for cancellation under AS 28.10.262; or

(2) state that the owner of the manufactured home, after diligent search and inquiry, has been unable to produce the original manufacturer's certificate of origin for the manufactured home and shall apply to the department under AS 28.10.264.

(c) If a manufactured home is covered by a certificate of title, the owner of the manufactured home shall

(1) state that the manufactured home is covered by a certificate of title, provide the date the title was issued and the title number, and state that the owner shall surrender the title for cancellation under AS 28.10.263; or

(2) state that the owner, after diligent search and inquiry, has been unable to produce the certificate of title to the manufactured home and shall apply to the department under AS 28.10.264.

Sec. 34.85.080. Effect on liens and encumbrances. Permanently affixing a manufactured home to real property or recording an affixation affidavit under AS 40.17.125 does not impair the rights of a holder of, or the character of, a lien or encumbrance on a manufactured home under AS 28.10.381 unless an application to cancel the title is filed with the department under AS 28.10.263 and the lien or encumbrance is released under AS 28.10.401.

Sec. 34.85.090. Filing affixation affidavit with department. When a person designated in an affixation affidavit to file the affixation affidavit with the department

receives a certified copy of the recorded affixation affidavit, the person shall deliver the certified copy of the affixation affidavit to the department for filing under AS 28.10.262 - 28.10.264.

Sec. 34.85.100. Use of affidavit. (a) Except as provided in AS 34.85.010, 34.85.020, 34.85.090, and AS 40.17.125, an affixation affidavit is not necessary or effective to convey or encumber a manufactured home or to change the character of a manufactured home to real property.

(b) A conveyance of land on which a manufactured home is located must recite that the conveyance does not affect the title to the manufactured home and that the transfer or encumbrance of the manufactured home can only be made under AS 28.10 if

(1) an affixation affidavit has not been recorded for the manufactured home; or

(2) a severance affidavit has been recorded for the manufactured home.

(c) An agreement that waives the requirements of (a) or (b) of this subsection is void.

Sec. 34.85.110. Severance of manufactured home. If an affixation affidavit has been recorded for a converted manufactured home and if the converted manufactured home is severed from the real property to which it was affixed, each person having an interest in the real property shall record a severance affidavit in the recording district where the affixation affidavit was recorded.

Sec. 34.85.120. Severance affidavit. The severance affidavit must contain or be accompanied by

(1) the name, residence, and mailing address of the owner of the manufactured home;

(2) a description of the manufactured home, including the name of the manufacturer, the make, the model name, the model year, the dimensions, and the manufacturer's serial number of the manufactured home;

(3) whether the manufactured home it is new or used;

(4) the serial numbers and date when the affixation affidavit was recorded;

(5) a statement

(A) of any facts or information known to the person signing the affidavit that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home; or

(B) that the person signing the affidavit does not know any facts or information that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home;

(6) a declaration made under oath or affirmation by an attorney authorized under AS 08.08 to practice law in the state or an agent of a title insurance company entitled under AS 21.66 to transact a title insurance business in this state that the manufactured home is free and clear of all liens and encumbrances, and

(A) stating any facts or information known to the attorney or agent that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home; or

(B) that the attorney or agent does not know any facts or information that could reasonably affect the validity of the title to the manufactured home or the existence or nonexistence of a lien or encumbrance on the manufactured home; and

(7) the name and address of the person designated to file the certified copy of the severance affidavit with the department under AS 28.10.265.

Sec. 34.85.130. Filing of severance affidavit. On receipt of a certified copy of the severance affidavit by the person designated in the affidavit for filing with the department, the person shall file the certified copy with the department under AS 28.10.262 - 28.10.264.

Sec. 34.85.140. Affidavit form and acknowledgment. (a) An affixation affidavit and a severance affidavit must be acknowledged in the same manner as a conveyance of real property and must be in a form that may be recorded under AS 40.17.

(b) The department shall establish by regulation the forms for an affixation affidavit and a severance affidavit.

Sec. 34.85.150. Permanently affixed. A manufactured home is permanently affixed when it is

(1) anchored to real property by attachment to a permanent foundation;

(2) constructed in accordance with applicable state and local building codes and manufacturer's specifications as provided in the Model Manufactured Home Installation Standards of the federal Department of Housing and Urban Development (24 C.F.R. 3285); and

(3) connected to a residential utility, including water, gas, electricity, sewer, or septic service.

Sec. 34.85.190. Definitions. In this chapter, unless the context requires otherwise,

(1) "affixation affidavit" means an affixation affidavit under AS 34.85.060;

(2) "department" means the Department of Administration;

(3) "manufactured home" has the meaning given in AS 45.29.102;

(4) "permanently affixed" means when a manufactured home is permanently affixed under AS 34.85.150;

(5) "severance affidavit" means a severance affidavit under AS 34.85.120.

Sec. 34.85.195. Short title. This chapter may be cited as the Manufactured Home Property Act.

* **Sec. 27.** AS 40.17 is amended by adding a new section to read:

Sec. 40.17.125. Recording affidavits related to manufactured homes. (a) A recorder shall record an affixation affidavit and a severance affidavit if the affidavit meets the requirements for recording under AS 40.17.030 and is offered for recording in the recording district where the real property to which the manufactured home affixed is located.

(b) A recording officer shall place on the recorded affidavit

(1) the indexing information for the recorded affidavit; and

(2) an indication that the recorded affidavit was recorded.

(c) In this section,

(1) "affidavit" means an affixation affidavit or a severance affidavit;

(2) "affixation affidavit" has the meaning given in AS 34.85.190;

(3) "manufactured home" has the meaning given in AS 45.29.102;

(4) "recorded affidavit" means an affidavit recorded under this section;

(5) "severance affidavit" has the meaning given in AS 34.85.190.

*** Sec. 28.** AS 45.10.220(2) is amended to read:

(2) "goods" means personal chattels purchased primarily for personal, family, or household use and not for commercial or business use, but does not include money or, except as provided in the next phrase, chose in action; "goods" includes [BUT IS NOT LIMITED TO] merchandise certificates or coupons issued by a retail seller to be used in their face amount instead of cash in exchange for goods or services sold by the seller and goods**, including a manufactured home,** that, at the time of sale or subsequently, are to be so affixed to real property as to become a part of it, whether or not severable from it; **in this paragraph, "manufactured home" has the meaning given in AS 45.29.102;**

*** Sec. 29.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: REGULATIONS. The Department of Administration shall adopt regulations necessary to implement this Act. The regulations must take effect under AS 44.62 (Administrative Procedure Act) on January 1, 2012.

*** Sec. 30.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SAVING CLAUSE. This Act may not be interpreted to impair a right or claim existing under law before January 1, 2012, of a person claiming an interest in a manufactured home. In this section, "manufactured home" has the meaning given in AS 45.29.102.

*** Sec. 31.** Section 29 of this Act takes effect immediately under AS 01.10.070(c).

*** Sec. 32.** Except as provided in sec. 31 of this Act, this Act takes effect January 1, 2012.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: SB 104\I
() Publish Date

Identifier (file name) SB104-DOA-DMV-03-25-11
Title: Manufactured Homes as Real Property
Sponsor: Senator French
Requester: Senate State Affairs

Dept. Affected: Administration
Appropriation: Motor Vehicles
Allocation: Motor Vehicles
OMB Component Number: 2348

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable; initial version

Prepared by: Whitney Brewster, Director
Division: Motor Vehicles
Approved by: John Cramer, Director
Department of Administration

Phone: 907-269-5574
Date/Time: 3/25/11 4:00 PM
Date: 3/25/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB 104\I

Analysis

This bill will have only a small financial impact on the Division of Motor Vehicles (DMV). DMV will absorb any implementation costs in its operating budget.

LEGAL SERVICES

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

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

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

MEMORANDUM March 28, 2011

SUBJECT: Sectional summary for SB 104 relating to manufactured homes (Work Order No. 27-LS0467\I)

TO: Senator Hollis French
Attn: Andy Moderow

FROM: Theresa Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. States the findings and purpose for the bill.

Section 2. Adds a new subsection to AS 06.05.207 of the banking code. Defines "real property" to include a manufactured home that has become real property under new sec. 34.85.010.

Section 3. Adds a new subsection to AS 06.15.250 of the mutual savings bank chapter. Defines "real property" to include a manufactured home that has become real property under new sec. 34.85.010.

Section 4. Amends AS 06.45.060(5)(A) of the credit union chapter to change "mobile home" to "manufactured home."

Section 5. Adds a new subsection to AS 06.45.060 of the credit union chapter to provide a definition of "manufactured home."

Section 6. Amends the definition of "mortgage loan" in AS 06.60.990(19) of the mortgage lending regulation chapter to include a manufactured home that has become real property under new sec. 34.85.010.

Section 7. Adds a new definition section to AS 09.45, the chapter relating to real property actions, to define "real property" to include a manufactured home that has become real property under new sec. 34.85.010 and to define "manufactured home."

Section 8. Amends AS 28.05.061(a), which relates to vehicle records, to list manufactured home documents as records that the Department of Administration is to file, maintain, and index.

Section 9. Adds new subsections to AS 28.05.061, which relates to vehicle records, to indicate what the department record must state for certain documents relating to manufactured homes. Defines "recording information" for AS 28.05.061.

Section 10. Amends AS 28.10.201(b) to reference a new subsection added by bill sec. 11 and to change "mobile home" to "manufactured home."

Section 11. Adds a new subsection to AS 28.10.201. Prohibits the department from issuing a certificate of title to a manufactured home if an application has been filed under secs. 28.10.262 - 28.10.264.

Section 12. Amends AS 28.10.211(c) to substitute "manufacturer's certificate of origin" for "manufacturer's statement of origin."

Section 13. Adds a new subsection to AS 28.10.211, relating to applications for vehicle titles. Allows the holder of a manufacturer's certificate of origin for a manufactured home to deliver the certificate to a person to facilitate the home's conveyance or encumbrance. The recipient holds it in trust.

Section 14. Adds a new subsection to AS 28.10.221, which relates to the refusal, suspension, or revocation of a vehicle title. Prohibits the department, with an exception for new sec. 28.10.263, from suspending or revoking a certificate of title to a manufactured home because the home is affixed to real property.

Section 15. Adds a new subsection to AS 28.10.261, which relates to evidence. Makes a manufactured home's certificate of title issued by the department prima facie evidence of what it says, even if the home is affixed to real property.

Section 16. Adds new sections to AS 28.10.

Sec. 28.10.262. Directs the department to cancel a manufacturer's certificate of origin to a manufactured home if an application is filed and certain other conditions are met. States that when a person satisfies this section, the manufactured home is not subject to AS 28.10.

Sec. 28.10.263. Directs the department to cancel a certificate of title to a manufactured home if an application is filed and certain other conditions are met. States that when a person satisfies this section, the manufactured home is not subject to AS 28.10.

Sec. 28.10.264. Directs the department, if an application is filed and certain other conditions are met, to confirm that the owner of a manufactured home has submitted an application that complies with (b) of this section and that the manufactured home is not subject to AS 28.10.

Sec. 28.10.265. Directs the department to issue a certificate of title for a manufactured home if an application is filed and certain other conditions are met. States that when a person satisfies this section, the manufactured home is subject to AS 28.10.

Sec. 28.10.266. Lists what an application under secs. 28.10.262 - 28.10.265 must provide.

Sec. 28.10.267. Establishes the requirements for the declaration required by sec. 28.10.266(11) for an application under sec. 28.10.264 or 28.10.265.

Sec. 28.10.268. Indicates the time when the requirements of secs. 28.10.262 - 28.10.264 are considered to be satisfied if an application under one of those sections is delivered to the department within 30 days after an affixation affidavit is recorded.

Sec. 28.10.269. Defines terms for AS 28.10.201 - 28.10.269.

Section 17. Adds new subsections to AS 28.10.371, which relates to liens and encumbrances on vehicles, to address certain situations involving liens on manufactured homes.

Section 18. Adds a new subsection to AS 28.10.381, which relates to liens and encumbrances on vehicles, to generally prohibit cancelling certificates while a lien or encumbrance is outstanding, and to state that the validity and priority of the liens and encumbrances continue.

Section 19. Adds a new subsection to AS 28.10.391, which relates to liens and encumbrances on vehicles, to indicate that the liens and encumbrances of converted manufactured homes are governed by real property law.

Section 20. Amends AS 28.10.661(2) to define "mobile home" as a "manufactured home" for the chapter.

Section 21. Adds a new paragraph to AS 28.10.661 to define "manufactured home" for the chapter.

Section 22. Amends AS 29.45.070, which relates to municipal taxation, to reflect the conversion to real property allowed by the new chapter in AS 34.85.

Section 23. Amends AS 34.03.360 of the state's uniform residential landlord and tenant act to add a definition of "mobile home."

Section 24. Amends AS 34.70.200(3) of the chapter dealing with disclosures in residential real property transfers to include as residential real property manufactured homes that have become real property under AS 34.85.010.

Section 25. Amends AS 34.80.090(6) of the chapter that deals with escrow transactions for residential real property to include converted manufactured homes as residential real property.

Section 26. Adds a new chapter relating to converting manufactured homes to real property.

Sec. 34.85.010. Lists the criteria for a manufactured home to become real property.

Sec. 34.85.020. Describes the effects of converting a manufactured home to real property.

Sec. 34.85.040. Describes how the ownership interest requirement of sec. 34.85.010 can be satisfied when the manufactured home owner does not own the real property where the home is located.

Sec. 34.85.060. Establishes what an affixation affidavit must provide.

Sec. 34.85.070. Describes what an owner's statement required for an affixation affidavit must state.

Sec. 34.85.080. Indicates that permanently affixing a manufactured home to real property or recording an affixation affidavit does not affect liens and encumbrances on the manufactured home unless certain conditions are met.

Sec. 34.85.090. Directs the recipient of a certified copy of an affidavit to deliver the copy to the department under secs. 28.10.262 - 28.10.264.

Sec. 34.85.100. States that, except as provided by certain statutes, an affixation affidavit is not necessary or effective to convey or encumber a manufactured home or to change the character of a manufactured home to real property. Indicates what a conveyance of land on which a manufactured home is located must recite. Voids an agreement that waives this section.

Sec. 34.85.110. Directs each person having an interest in the real property from which a converted manufactured home is severed to record a severance affidavit.

Sec. 34.85.120. Establishes what a severance affidavit must contain or be accompanied by.

Sec. 34.85.130. Directs the recipient of a certified copy of a severance affidavit to deliver the copy to the department under secs. 28.10.262 - 28.10.264.

Sec. 34.85.140. Requires an affixation affidavit and a severance affidavit to be acknowledged like real property conveyances and be in a recordable form. Directs the department to establish the forms for the affidavits.

Sec. 34.85.150. Establishes when a manufactured home is considered to be permanently affixed to real property.

Sec. 34.85.190. Defines terms for the new chapter.

Sec. 34.85.195. Gives the chapter a short title.

Section 27. Adds a new section to the state's chapter on the recording of real property documents. Directs the recorder to record an affixation affidavit and a severance affidavit if they meet specified requirements. Indicates what the recording officer must write on the recorded affidavit. Directs the recording officer to send a certified copy to the person designated in the affidavit.

Section 28. Amends the definition of "goods" in the Alaska Retail Installment Sales Act to include manufactured homes.

Section 29. Directs the Department of Administration to adopt regulations for this Act.

Section 30. Preserves rights and claims existing before January 1, 2012.

Section 31. Sets an immediate effective date for bill sec. 29, which authorizes the adoption of implementing regulations.

Section 32. Sets the effective date for all of the bill except bill sec. 29, which authorizes the adoption of implementing regulations.

If I may be of further assistance, please advise.

TLB:ljw
11-196.ljw

WELLS FARGO

Senior Bank Administration
MAC K3212-051
P.O. Box 196127
Anchorage, AK 99519

Wells Fargo Bank, N.A.

March 21, 2011

Senator French
State Capitol
Room 417
Juneau, AK 99801

RE: SB-104 Manufactured Housing Conversion Procedure Process

Dear Senator French:

Wells Fargo is writing to support SB-104, the Manufactured Housing Conversion Procedure Process bill.

SB-104 will amend state law in Alaska to provide a formal method of eliminating the certificate of title to a manufactured home, converting the home to real property when the home is or will be permanently affixed to real property, and obtaining a new certificate of title when a home previously affixed to real property is severed.

Alaska's current statutes do not meet the eligibility requirements to sell a mortgage loan for a manufactured home to Fannie Mae or Freddie Mac, including the process to legally classify the home as real property and placing the lender in first lien position.

Wells Fargo has had to turn away business to potential borrowers because Alaska does not have a clear method of converting a factory built home to real property, especially older manufactured homes that come back on the market for resale.

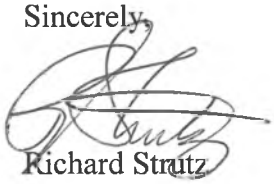
SB-104 would bring state definitions of manufactured homes into accordance with HUD definitions to create a system for title transfer and property conversion. Additionally, it would create a means for titling manufactured homes that have been affixed to property, but the title cannot be found.

We feel the bill will: (1) Help manufactured homeowners who have their manufactured home already affixed to real property be better able to gain access to credit and be able to more easily sell their homes; (2) Help manufactured homeowners in the state increase the value of their homes by allowing them to convert their manufactured homes to real property, including manufactured homes not covered by certificates of title or for which the certificates of title cannot be found; (3) Help lenders gain perfected security interests in manufactured homes; and (4) Help the Alaska Division of Motor Vehicles by putting

in place a formalized procedure for canceling a title when a manufactured home is put on a permanent foundation.

Thank you for the opportunity to provide comment on SB-104.

Sincerely,



Richard Strutz
Regional President
Wells Fargo Bank, N.A.
Anchorage, AK

Alaska Bankers Association

P.O. Box 241489 • Anchorage, Alaska 99524-1489 • Ph. 907-261-3525 • Fax 907-562-1758

March 25, 2011

Senator French
State Capitol
Room 417
Juneau, AK 99801

RE: SB-104 Manufactured Housing Conversion Procedure Process

Dear Senator French:

The Alaska Bankers Association consists of the following eight member banks: Alaska Pacific Bank, Denali State Bank, First Bank Ketchikan, First National Bank Alaska, KeyBank, Mt. McKinley Bank, Northrim Bank, and Wells Fargo Bank.

The Alaska Bankers Association supports SB-104, the Manufactured Housing Conversion Procedure Process bill.

SB-104 will amend state law in Alaska to provide a formal method of eliminating the certificate of title to a manufactured home, converting the home to real property when the home is or will be permanently affixed to real property, and obtaining a new certificate of title when a home previously affixed to real property is severed.

Alaska, unlike the vast majority of states, has no formal statutory procedure for converting a manufactured home to real property. Under current Alaska law including Alaska's Uniform Commercial Code, a security interest in a manufactured home permanently affixed to land can be perfected only by noting the secured party's interest on the home's certificate of title and recording a deed of trust with a fixtures clause and an appropriate description of the home. The need for legislation arises from the fact that the Alaska Division of Motor Vehicles ("DMV") will not issue a title for a manufactured home that is affixed to a permanent foundation, notwithstanding the requirements of the Uniform Commercial Code, and has created and administers a vaguely defined procedure with no record notice. The result for many Alaska manufactured homeowners is an unmarketable title to their home and for many lenders an unperfected security interest in their collateral.

In addition, Alaska's current statute does not meet the eligibility requirements to sell a mortgage for a manufactured home to Fannie Mae or Freddie Mac, including the process to legally classify the home as real property and placing the lender in first lien position. Alaska also does not have a clear method to convert a factory built home to real property, especially older manufactured homes that come back on the market for resale.

Alaska Bankers Association
P.O. Box 241489 • Anchorage, Alaska 99524-1489 • Ph. 907-261-3525 • Fax 907-562-1758

AK SB-104 will bring state definitions of manufactured housing into accordance with HUD definitions to create a system for title transfer and property conversion. Additionally, the bill will create a means for titling manufactured homes that have been affixed to property, but the title can't be found.

This bill is good for manufactured home owners and good for lenders that finance manufactured homes.

Thank you for the opportunity to provide comment on SB-104.

Sincerely,

ALASKA BANKERS ASSOCIATION

Joe Beedle
President

First American Title

TERRY E. BRYAN
VICE PRESIDENT
ALASKA STATE MANAGER

Transmitted via Fax

907-465-6595

Attention: Andy Moderow

April 6, 2011

Senator Hollis French

State Capitol Room 417

Juneau, AK 99801

First American Title Insurance Company supports Alaska Senate Bill 104.

First American Title has been operating, in multiple locations within the great state of Alaska for more than 30 years and feels that we are an integral part of the economic community. Passage of SB 104 is truly in the best interest of the citizens of Alaska.

In addition, as a representative of the Alaska Land Title Association's Legislative Committee, I feel confident that they will acknowledge their support following a membership poll, later today. The Alaska Land Title Association is made up of more than 25 statewide member companies, within Alaska.

If anyone from your office or committee wishes to discuss this issue, please feel free to contact myself, at your earliest convenience.

Respectfully Submitted,

Terry E. Bryan

Terry E. Bryan

Vice President – Alaska State Manager

3035 C Street, Anchorage, AK 99503
TEL 907.561.1844 ▾ FAX 907.561.1948
terbryan@firstam.com ▾ www.firstam.com

ALASKA LAND TITLE ASSOCIATION

P.O. Box 241811 • Anchorage, Alaska 99524

April 6, 2011

Senator Hollis French
Alaska State Capitol Room 417
Juneau, AK 99801

Re: Senate Bill 104

Dear Senator French,

As Past President of the Alaska Land Title Association and current Chairman of the Legislative and Regulatory Committee I have polled the members of my committee and with unanimous consent I offer that committees support of Senate Bill 104. ALTA's bylaws require 30 days notice before the board can hold a meeting and pass a resolution of support but I can assure you that that vote would be unanimous as well. That board represents 25 member companies throughout the state of Alaska.

We believe that Senate Bill 104 will protect the interest of Alaska's homeowners as well as the interest of the real estate finance industry and the land title industry.

If you or anyone in your office has any questions regarding my industry's take on this proposed legislation please do not hesitate to call me at my office.

Sincerely,

Roger L. Floerchinger
Legislative and Regulatory Affairs Committee
Alaska Land Title Association
(907) 456-3474

Senator Hollis French

Capitol Room 417
465-3892
465-6595 fax

MEMORANDUM

Date: April 4, 2011

To: Senator Hollis French
Chair, Senate Judiciary Committee

From: Andy Moderow, Staff to Senator French

RE: Potential Witnesses for SB 104

The following individuals have expressed interest in the Senate Bill 104 hearing scheduled for April 6, 2011 in front of the Senate Judiciary Committee:

Ethan Hormann - Branch Manager, Wells Fargo Home Mortgage - Anchorage, AK

George Ginsberg - Wells Fargo Outside Counsel, McGlinchey Stafford, PLLC

Jeff Harris, Loan Administration Manager, Wells Fargo Home Mortgage

Patrick Green, Regional Director, State Government Relations, Wells Fargo & Company

Senator Hollis French

Capitol Room 417
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MEMORANDUM

Date: April 4, 2011

To: Senator Hollis French
Chair, Senate Judiciary Committee

From: Andy Moderow, Staff to Senator French

RE: Potential Witnesses for SB 104

The following individuals have expressed interest in the Senate Bill 104 hearing scheduled for April 15, 2011 in front of the Senate Judiciary Committee:

Ethan Hormann - Branch Manager, Wells Fargo Home Mortgage - Anchorage, AK

Jeff Harris, Loan Administration Manager, Wells Fargo Home Mortgage

Patrick Green, Regional Director, State Government Relations, Wells Fargo & Company

I'M HOME
Innovations in Manufactured Homes

NATIONAL CONSUMER LAW CENTER

MANUFACTURED HOUSING RESOURCE GUIDE

Titling Homes as Real Property

BACKGROUND

For 17 million Americans, the pathway to the American Dream of homeownership is through manufactured housing. Today's manufactured housing is a high-quality and affordable entry into asset and wealth building for many families. Assets are the foundation for promoting long-term economic opportunity for most Americans. They provide security during unexpected financial troubles. They foster long-term planning and the drive to set and reach dreams, such as going to college and starting a business. For the last few generations of Americans, homeownership has been the bedrock of household financial assets. Even during times of economic insecurity in the housing market, homeownership remains the primary source of wealth for many Americans and continues to be the American Dream.

One hurdle that keeps many owners of manufactured homes from enjoying the same benefits as owners of site-built homes is classification as personal property. Whether a home is classified as real or personal property significantly affects the home's asset-building potential, mostly due to financing and tax implications. In lending as well as state and local public policy, manufactured homes are often treated as if they are cars, even though they look as good, are built as well and last as long as traditionally built homes. They're often issued titles as motor vehicles, rather than real estate. They are commonly assessed with "blue book" values and are often taxed as personal property. This makes manufactured homes more expensive to finance and lowers resale values, reducing homeowners' opportunities to enjoy property appreciation and build equity.

About This Legislative Guide

This guide provides advocates and practitioners with the information they need to assess the benefits of converting manufactured homes from personal to real property and to develop strong policies that allow for the easy and voluntary conversion of homes to real property. It is intended to provide a detailed overview of the laws and regulations involved at the state and federal levels. This guide:

- Outlines the importance of real property designation in seven key areas;
- Analyzes current state statutes; and
- Provides recommendations for strong policies that allow for the classification of manufactured homes as real property.

MANUFACTURED HOMES ARE HOMES: THE IMPORTANCE OF REAL PROPERTY DESIGNATION

Black's Law Dictionary defines real property as "[l]and, and generally whatever is erected or growing upon or fixed to land." On the other hand, it defines personal property as "[i]n broad and general sense, everything that is the subject of ownership, not coming under the denomination of real estate."

Manufactured homes are traditionally titled as personal property, largely due to the modern manufactured home's mid-20th century roots in the travel trailer industry. Advances in building technology and increased government regulation have resulted in a quality home construction comparable to site-built homes. Legally, however, manufactured homes are still bound by many of the same norms as their travel trailer ancestors, including use of certificates of title, similar to an automobile.

Although some manufactured homes are designated real estate and despite their many similarities to site-built homes, most manufactured homes are still considered personal property, absent an affirmative action by the homeowner to change its designation. All too often, however, homeowners are not permitted to classify their homes as real property, even if they take affirmative action in an attempt to do so.

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Each category has advantages and disadvantages (see chart on "The Importance of Designation as Real Property"), but homeowners generally benefit from classification as real property, particularly when financing the home. The real property designation generally provides more favorable status in terms of taxation and consumer protection. Although more than three-quarters of states have some statutory method for converting a manufactured home from personal property to real property, these existing conversion statutes are often inadequate. Following is a discussion of the implications of property designation status.

The Importance of Designation as Real Property: A Summary of Advantages and Disadvantages for Homeowners

Advantages of Real Property Classification	Disadvantages of Real Property Classification
Increased availability of favorable financing	Possible greater tax burden
More favorable titling options	Possible loss of some consumer protections
Equitable taxation	Limitations on bankruptcy cram down
Possibility of homestead exemptions	
Better consumer protections	
Stronger protections for heirs	
More vibrant resale market	
Equitable safeguards upon default	

Designation as real property affects owners of manufactured housing in seven key areas. These seven key areas affected touch each phase of the homeownership process from appraisals to financing, to taxation, to resale, and include:

1. Appraisals and Sales
2. Financing
3. Taxes and Tax Exemptions
4. Federal and State Consumer Protections
5. Protections for Spouses and Joint Ownership
6. Rights upon Default
7. Bankruptcy

1. Appraisals and Sales

Home appraisers and real estate agents must typically be licensed by the state. In some states, there are restrictions placed on these professions regarding real property, and sometimes appraisers are not permitted to appraise personal property. Even where there are regulations in place allowing real estate appraisers to appraise manufactured housing considered personal property, the confusing status of such housing is discouraging, even for seasoned appraisal professionals. Difficulties in obtaining an accurate appraisal also severely limit financing options for prospective purchasers and homeowners seeking refinancing, as most traditional mortgage lenders require an appraisal. Similarly, in some states real estate agents and brokers are prohibited from listing properties not classified as real property. This can be a tremendous disadvantage to owners of homes considered personal property, because it is difficult to sell a home without the assistance of an agent. These limitations not only hurt individual homeowners, but also harm the broader resale market for manufactured homes.

Imprecise conversion statutes make it harder for appraisers to appraise manufactured homes. It is evident that both homeowners and the industry would benefit from clear, easily monitored regulations that allow appraisers to more accurately determine the legal status and value of a home (Georgia and Alabama are two examples of states where appraisal boards have made efforts recently to clear up confusion that may arise after converting a manufactured home from personal to real property). Policies that allow clear and easy determination of a home's status as real property would make appraisals more accurate, lenders more comfortable with the knowledge that the home's status is settled, and homes easier to sell, as buyers would be assured of a home's status.

2. Financing

Most site-built homes are financed by a real estate mortgage, while manufactured homes classified as personal property are financed by chattel lending. Chattel is the legal term for personal property, as opposed to "real" property, which generally includes land and the structures attached to the land. Chattel loans, which include loans for televisions and automobiles, differ in many respects from mortgages. The key disadvantages to chattel financing of homes compared to conventional mortgage financing include shorter loan terms (typically 20 years instead of 30), higher interest rates (at least two to five percentage points higher) and a smaller pool of lenders from which to choose.

Permitting conversion of a manufactured home to real property can improve financing options, but it does not automatically permit the owner or purchaser to obtain conventional financing terms. However, designation of a manufactured home as personal property is almost certain to preclude favorable, conventional financing terms.

3. Taxes and Tax Exemptions

Although each state tax code is unique, states typically differentiate between real and personal property in several situations. Manufactured homes are almost universally considered personal property at the time of purchase, even if they are later converted to real property (unless the home is a used unit and was converted to real property by a previous owner.) As such, the buyer pays sales tax at purchase. In contrast, buyers of site-built homes usually pay excise or transfer taxes, which are calculated at a lower rate that factors in both the home purchase transaction and a sales tax on building materials. Because of this different tax structure, in states without a sales tax reduction or exemption for buyers of manufactured homes homebuyers are typically taxed at a far higher rate when buying a manufactured home The inequity is exacerbated when a home is sold as personal property and then converted to real property. In this case, the home is often taxed at a higher rate (i.e. as personal property) upon sale, but after conversion the homeowner's annual property tax bill is higher than it would have been, because real property is taxed at a higher annual rate than personal property tax rate.

This classification also affects the broader community by determining which government entity receives the tax payment. Real property taxes are typically paid to a local municipality, while in many jurisdictions taxes on personal property and sales tax revenue go to the state. There are significant revenue consequences for government entities when the classification of homes is changed; the fact that changing the classification of manufactured homes creates winners and losers in regard to tax revenue can make reform difficult.

Exempt or protected property, which may not be subject to taxation or may be unavailable to creditors seeking to enforce judgments, is also affected. A home's classification as real or personal property may also affect the owner's ability to claim the property as exempt. One such issue that many states have addressed is the homestead exemption. In many states, the homestead exemption applies to a manufactured home regardless of property classification. Thus, even if a manufactured home is treated as personal property for most purposes, it may qualify for the homestead exemption because of the liberal construction of homestead exemption laws in many states. However, in some states the applicability of the homestead exemption to manufactured homes has not been clearly established.

4. Federal and State Consumer Protections

Some federal and state consumer protection statutes apply only to real property, while others apply only to personal property. Although such distinctions can be explained by the separate evolution of laws dealing with goods and services and laws regulating real property transactions, the distinctions can lead to results that are inconsistent and at times inequitable. Such inconsistencies are especially apparent when looking at a manufactured home transaction, because the same home may be considered goods or real property. The distinction can have important consequences for the homeowner. While the home remains the same, the protections that apply depend upon the home's classification as real or personal property. A discussion of existing federal and state laws and their consequences for owners of manufactured homes follows.

- ***Federal Truth in Lending Act.*** The federal Truth in Lending Act (TILA) requires certain disclosures in any consumer credit transaction. It only applies to loans over $25,000 if the creditor takes a security interest in the borrower's principal dwelling. This is true for both real and personal property, and it covers manufactured homes. Thus, TILA covers credit secured by a manufactured home that is the consumer's principal dwelling regardless of whether the home is considered real or personal property.

- ***Federal Real Estate Settlement and Procedures Act.*** The federal Real Estate Settlement Procedures Act (RESPA) requires disclosures about closing costs (both before and at the time of settlement), and notices about escrow accounts, changes in loan servicing, and the right to obtain account information through a written request. It also prohibits kickbacks

and unearned fees for settlement services, charges for preparation of certain documents, and steering of borrowers to a particular title insurance company. Furthermore, it regulates the handling of escrow accounts. RESPA applies to all loans secured by a first or subordinate lien on one-to-four family residential real property. The loan must also be made by a federally insured lender or be federally related in a manner specified by the law. The U.S. Department of Housing and Urban Development (HUD) regulations interpreting RESPA limit the Act's coverage to certain mortgage loans and to real property.

The regulations do provide RESPA protection to certain owners of manufactured homes, as they include coverage for loans secured by real property upon which there is a manufactured home. However, the regulations do not explicitly state that any manufactured home classified as real property is covered by RESPA, an omission that calls for clarification. Loans on homes classified as personal property on leased land are clearly not covered by RESPA.

- ***The Federal Credit Practices Rule and the Federal Reserve Board's Regulation AA, Unfair or Deceptive Acts or Practices.*** The Federal Trade Commission (FTC) has authority to create rules that define and prevent unfair or deceptive acts or practices. One such rule is the Credit Practices Rule. It limits late charges and informs cosigners of their liability, while also prohibiting consumer credit contracts from containing confessions of judgment, wage assignments, and waivers of exemption. Although the rule explicitly excludes credit involving the purchase of real property, it is silent on other types of real estate loans (e.g. refinancing or lines of credit. Accordingly, although the rule clearly applies to credit involving the purchase of a home considered personal property, there is some ambiguity as to its application when a home is real property.

  The Credit Practices Rule does not apply to creditors outside of the FTC's authority, including banks, savings and loans, and credit unions. The regulators of these three types of entities have their own versions of the rule, however. The Federal Reserve Board (FRB) adopted a version of the Credit Practices Rule, and its guidelines defer how the dwelling is treated to state law, but if it is considered real property then the transaction would be exempt from this rule. The Office of Thrift Supervision (OTS) enacted an analogous rule that excludes real property and looks to state law to make that determination. The National Credit Union Administration (NCUA) enacted a similar rule applicable to credit unions and provides no exemption for real property loans.

- ***The Federal Fair Housing Act.*** The federal Fair Housing Act prohibits discrimination in the sale, rental or financing of homes. Analysis of the scope of the Act is difficult because different sections use different language to describe which transactions are covered. In most instances the Act applies to dwellings, which would certainly include manufactured homes, however one section ambiguously applies to dwellings and also to refinance loans secured by real estate. Although no cases appear on point, arguably the Act applies to the sale of all homes, but to refinancing of a manufactured home only if it is considered real property.

- ***The Federal Magnuson-Moss Warranty Act.*** The Magnuson-Moss Act regulates, simplifies and standardizes written warranties, implied warranties and service contracts. It applies only to personal property – not real property – and it covers the sale of both new and used goods. The Act has almost universal application to the sale of new manufactured homes, because even in states where a home may be converted to real property, it is generally classified as personal property at the time of sale.

- ***State Warranty Laws.*** Article 2 of the Uniform Commercial Code (UCC) sets forth warranty law for goods and has been enacted into law in every state but Louisiana. The UCC addresses both express and implied warranties and also sets forth consumer remedies for breach of warranty. Article 2 of the UCC defines goods as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale." Although Article 9 of the UCC makes more specific reference to the definition of goods to be inclusive of manufactured homes, the Article 2 definition appears to be broad enough to cover new manufactured homes, because they are movable when manufactured, even if they are or will be permanently placed upon land or titled as real property. If a home is attached to land and sold as part of the land, however, it is less likely to fall within the scope of Article 2 of the UCC. In such instances common law warranties may apply, or courts may look to the UCC by analogy. Regardless, it is the permanent attachment to the land rather than the home's designation as real or personal property that will determine applicability.

- ***State Laws Prohibiting Unfair and Deceptive Acts and Practices.*** All 50 states have at least one enacted statute applicable to most consumer transactions designed to prevent deception and abuse, though not all apply to real property transactions. In some states real property is excluded because courts have ruled that real estate is not "goods or services," terminology used in many of the statutes. In other states, however, such language includes real property. Some statutes explicitly cover real property or all property. In other states, courts have found legislative intent to cover real property where the statute is silent about coverage of real estate. Even in states where the statute does not apply to the sale of real estate, services and personal property related to such transactions may be covered.

5. Protections for Spouses and Joint Ownership

At common law, "dower interest" protects a wife by not allowing her to be "disinherited" by her husband; a "curtsey interest" provides a similar protection for a husband. Both interests typically apply only to real property. Some states retain the dower and curtsey interest, but most states provide a similar protection for spouses and children through a concept known as an "elective share." States that use elective shares may still have protections for real property not available for personal property, such as a requirement that any conveyance of the homestead be authorized by both spouses, which may or may not include manufactured homes not considered real property. This has tremendous impact on families living in manufactured homes. If the home is titled in only one spouse's name, that spouse could transfer the home without obtaining any consent from the other spouse. Were the home real property, lenders involved in the closing would require that both spouses consent to the transfer.

Furthermore, there are different ways by which two or more people can jointly hold title to property. The co-owners may have an undivided interest in the property that each owner may transfer or bequeath, or the ownership may include a right of survivorship, which provides that upon the death of one owner, the other takes full title to the property, subject to the liabilities of the decedent. At common law, married couples may hold real property as "tenants by the entireties." Some states now allow both real and personal property to be held by the entireties, while other states have enacted special statutes extending the right to hold property as tenants by the entireties to manufactured homes. A tenancy by the entireties provides some advantages not available to other forms of co-ownership. Neither spouse can individually transfer or encumber the real property in a way that will affect the other spouse's right of survivorship in the whole property. Unlike other types of co-ownership, a creditor cannot attach or execute upon entireties property to collect a debt owed by only one of the property owners; entireties property can only be attached for joint debts. This is a significant disadvantage for owners of manufactured homes classified as personal property and not allowed to be held by the entireties.

6. Rights upon Default

The distinction between real property and personal property is especially important in the event of default. When a homeowner fails to make payments, the rights and responsibilities of the homeowner and lender depend upon the home's classification. If a home is personal property, the rights of the creditor and homeowner are governed by the UCC. Article 9 of the UCC applies to any contractual transaction that uses personal property as security. If a manufactured home is personal property and not affixed to real property, then it is governed only by Article 9 or other state laws dealing with repossession – not by state foreclosure law.

Such a home is generally subject to self-help repossession: a taking of the home by the lender without any oversight. Such repossession does not allow the homeowner to assert any claims or defenses that might stop the repossession and is also likely to involve the taking of the homeowner's household goods and belongings. The primary restriction that the UCC places on self-help repossession is that the creditor is liable to the consumer if he or she breaches the peace during the repossession.

If a home is real property, then in most states the creditor must use the foreclosure process when a homeowner defaults. In some states, foreclosure is a relatively balanced process, with judicial supervision, reasonable advance notice to the homeowner, and an opportunity for the homeowner to present defenses prior to foreclosure. Several states, however, allow nonjudicial foreclosure. In these states, a home (whether site-built or manufactured) can be sold by the creditor without any involvement of a judge and with minimal notice (as little as 14 or 15 days, respectively, in Virginia and Georgia, for example). While in the vast majority of states the foreclosure process provides more protections, in isolated cases when the homeowner lives in nonjudicial foreclosure states, classifying the homes as personal property may in fact provide more protections.

It is important to note that when a home is placed on real property the home may become a "fixture." UCC Article 9 defines fixtures as goods that have become so related to particular real property that an interest in them arises under real property law. When a home is a fixture, the lender may choose a UCC remedy or state foreclosure law, unless there is a law that specifies a procedure for converting a manufactured home to real property, which may specify the default remedy.

7. Bankruptcy

Bankruptcy Code Section 1322 enables bankruptcy courts to modify the rights of holders of most secured claims and may modify the payment amount, defer payments, or eliminate a creditor's lien. The modification may allow a consumer filing bankruptcy to keep a possession that secures a loan while reducing the monthly payment. This right to modify has limitations, including the limitation that applies to debts secured by real property that is the debtor's principal residence. This limitation means that owners of manufactured homes classified as real property will generally not be allowed to modify a first mortgage on their home. Although a homeowner whose home is not real property was previously eligible for such a modification, recent changes to bankruptcy law make it unclear whether the homeowner can modify a personal property loan on their primary residence.

For now, real property designation may be a disadvantage to some homeowners if courts continue to use the distinction between real and personal property to determine whether a loan is eligible for modification. Homeowners whose manufactured homes are classified as real property may not be able to modify debts secured by the home, whereas they would be eligible for a cram down if the home were personal property. However, several recently introduced bills propose permitting bankruptcy courts to modify the terms of real property loans on a borrower's principal residence, which would make the home's classification less important.

ANALYSIS OF STATE STATUTES THAT ALLOW CONVERSION FROM PERSONAL TO REAL PROPERTY

Approximately three-quarters of the states have statutes that set forth a procedure to convert a manufactured home from personal to real property and document that conversion. Generally, the procedure involves surrendering the certificate of title or manufacturer's certificate of origin and then filing an affidavit in the local county land records. Typically, the manufactured home must be permanently affixed to the land, a concept often specifically defined. Many states also require that the homeowner own the land in addition to the home. Other states allow a home to be converted to real property if it is permanently affixed to land that the owner is renting, typically requiring that the lease be for a minimum specified period of time.

Many state statutes that allow homes on rented land to be converted to real property were created to allow financing of manufactured homes under the Freddie Mac Leasehold Estate Mortgage Program. Fannie Mae manages a similar program that is being piloted in New Hampshire. Statutes that allow homes on rented land to be treated as real property have particular significance in resident-owned communities, and communities owned by nonprofits or community land trusts because in such situations, each homeowner rents a lot from the cooperative, nonprofit or land trust. Some statutes allow homes under these conditions to be treated as real estate.

Title purging after conversion to real estate is critical in order to avoid opportunities of fraud and provide lenders with the security of clear ownership by the homeowner. A state that does not have a title purging statute may still grant requests to cancel a manufactured home's certificate of title. For example, if a home has a certificate of title, a state motor vehicle department may grant a request to cancel the title upon a showing that the home is not capable of being operated on a public highway. Some states have administrative rules allowing cancellation of the title. Even without a title purging statute, a state motor vehicle department may agree to cancel a title if the owner shows that a home no longer meets the jurisdiction's definition of motor vehicle because it has been attached to the land. However, as discussed in a later section, the effect of title purging, by statute or otherwise, may not always be clear. A few states, such as New York, specifically forbid title purging.

Strengths of Existing State Conversion Laws

Cancellation of Certificate of Title. Conversion statutes in states that use a certificate of title for manufactured homes generally also prescribe procedures to make sure that the certificate of title is cancelled when the home is converted to real property. This is key, because the coexistence of two title documents – the certificate of title and the deed – enables an unscrupulous owner to sell the manufactured home twice, assigning the certificate of title to one buyer and conveying a deed to the other.

Protection of Secured Lenders. Most conversion statutes ensure the protection of secured parties. Before a state allows for the conversion of a manufactured home from personal to real property, they typically require the secured party to either release its security interest or accept a mortgage in substitution for the UCC security.

Opportunities to Strengthen Existing State Conversion Laws

Increase Clarity. The ultimate effect of using a state's conversion statute is not always clear. Some state statutes indicate that once a home is converted to real property, foreclosure law applies. Others achieve the same result by stating that the home, upon conversion, is subject to all laws that apply to real estate. Some conversion statutes say nothing about the implications of the conversion or state only some effect on the manner in which the home is taxed. Other statutes merely provide that upon completion of the requirements the title may be surrendered, without stating if all real estate laws apply to the home thereafter.

Adding to the confusion, a state's statute may be located among the state's manufactured home statutes or may be part of the state's motor vehicle, finance or tax laws. Although some courts have held that when a statute treats a manufactured home as real property for one purpose, such as taxation, it should be treated as real property for other purposes as well, such as bankruptcy. The lack of clarity in the statute can leave homeowners vulnerable.

In addition, some statutes lack clarity as to whether the statutory conversion procedure supplants common law methods of conversion. Such common law methods of conversion, rules created by precedent of previous court cases rather than statutes created by a legislature, typically involve actions of the homeowner that are sufficient to show that the home has become a part of the land on which it is sited.

Lenders wanting to sell their loans on the secondary mortgage market may insist that a home be converted to real property. Fannie Mae, for example, requires a manufactured home be legally classified as real property, and financing must be secured by a mortgage or deed of trust recorded in the jurisdiction's land records. In states where there is less clarity around conversion, a lender may be reluctant to extend conventional style financing. Therefore, clarity is critical in regulations for converting a manufactured home from personal to real property.

Ensure Reasonable Land Ownership and Lease Requirements. Many states permit a manufactured home to convert to real property only if the home and the land that home is placed upon are both owned by the same person. Although policymakers and practitioners may be unfamiliar with the idea of a home being real property even though it sits upon land owned by another, there are several common examples. Many commercial buildings are not owned by the same entity which owns the land, yet the buildings are generally classified as real property. Similarly, community land trust homes sit on land leased, not owned, by the homeowner, and often homes in such situations are classified as real property.

More recent statutes for the conversion of manufactured homes permit the home itself to become real property, even when placed on leased land. Unfortunately, many of these statutes place severe restrictions on such conversions. Typically, they require long-term leasehold interest by the homeowners, often between 20 and 35 years. While long-term leases do provide some protection to homeowners and secured lenders, this protection is not comprehensive. Even with a long-term lease, the homeowner may still be vulnerable to rent increases or other changes that might ultimately force the home off the land. Lease requirements also put landowners, with the power to permit or deny a long-term lease, in control of a homeowner's ability to classify the home as real property. Requiring such a lease to convert the home to real property places many owners of manufactured homes on leased land at a disadvantage without actually conferring the safeguards that the measure may seek to put in place.

A Special Note on State Automatic Conversion Laws

Many issues must be considered before creating a new conversion statute or modernizing existing statutes. A list of recommendations is available at the end of this legislative guide. However, advocates are cautioned to pay special attention to the issue of automatic conversion versus procedures for conversion – each has advantages and disadvantages. Most states that have enacted conversion statutes require that the homeowner take affirmative steps to convert the home to real property. Although conversion to real property may take place without any sort of bureaucratic procedure in states that continue to permit common law conversions, the number of such states is decreasing as more states make the statutory conversion process the sole means of conversion. Even states that continue to allow common law conversions generally require clear intentional acts on the part of the homeowner to convert the home to real property.

There is an alternative to such conversion requirements. A scant few states provide for automatic conversion to real property by virtue of physical actions of the homeowner, such as connection to utility service, rather than requiring procedural actions. Such approaches get rid of bureaucratic hurdles to real property designation, clearly benefiting homeowners who want their homes to be treated as real property.

There are, however, some potential disadvantages to an automatic conversion process. Automatic conversions may create confusion as to the status of the home. If conversion depends upon certain facts, such as whether the home sits upon a permanent foundation or is connected to utilities, it may be unclear to prospective buyers, lenders and even the homeowner whether the home is real or personal property. Making the determination may require verification of factual criteria that can give rise to disputes. A well-documented formal conversion process may avoid many of these issues. Alternatively, a conversion that occurs automatically upon the sale to the consumer would ease the burden of verifying that the home was, in fact, converted to real property.

An automatic conversion also removes the conversion option from the homeowner's control. Although homeowners will generally benefit from a real property designation, there may be situations in which the homeowner would benefit from maintaining a personal property designation. For example, in some states treatment as real property may entail a significant tax increase for the homeowner.

Even more disadvantageous to many homeowners is an unusual provision found in several conversion statutes that permits homes on leased land to become real property only if the home is financed through Fannie Mae, Freddie Mac, the Federal Housing Administration and other similar programs. Most of these statutes were enacted in response to Freddie Mac's program to make mortgage loans on manufactured homes atop leased land, which required that the home be real property. Such conversions statutes were designed to increase the likelihood of conventional financing for owners of manufactured homes, but it is not clear why the benefits of a real property designation should be denied to homeowners on leased land who already own their homes or are financing the home in some other way. Therefore, state conversion statues must be reasonable and not overly burdensome with regard to land ownership and lease requirements.

Call for Reasonable Permanent Foundation Requirements. A majority of states with a statutory method for converting manufactured homes to real property require that the home be placed upon a permanent foundation before conversion. This requirement may mirror the standard foundation required for installation of all manufactured homes in that state, while in other states this requirement is more stringent than standard installation requirements.

States differ as to foundation requirements. Some may permit footings and piers; others may require a more extensive and expensive foundation, such as a masonry wall for the entire perimeter of the home. In addition to cost, a requirement for a permanent foundation presents other difficulties. Few homeowners on leased land would invest in such a foundation without feeling secure in their right to remain on the land. In addition, many manufactured home community owners, and in some cases local government regulations, prohibit such extensive foundations in land-lease communities. Therefore, states should not impose requirements regarding a home's foundation beyond those required to site any manufactured home.

Remove Permission of Landowner Requirements. Of the states that do permit homes sited on leased land to become real property, some, unfortunately, require that the homeowner obtain the permission of the landowner (expressed as a clause in the lease) in order to reclassify the home. Requiring such permission is an unnecessary burden on the homeowner as a conversion of the home to real property need not affect landowner rights. The permission of the landowner may be seen as necessary to protect secured lenders, because lenders may fear that landowners will treat the home as a fixture and convey it with the land. However, such fraudulent activity can be prevented by clear cross-referencing between the land deed and the home deed. Therefore, state conversion laws should not require permission from the landowner, nor should they affect the landowner's interests.

Create User Friendly Conversion Statutes. In states with conversion statutes, courts commonly find that a home continues to be personal property until the statutory procedures are followed. Thus, even if a home is permanently affixed to the land, it may be considered personal property unless the owner surrendered the title and filed the proper papers to convert it to real property.

If the conversion is completed as part of a financing arrangement, it is likely that the conversion process will be properly followed, as the lender wishes to ensure that its security interest in the home is properly recorded and perfected. When a homeowner attempts conversion on his or her own, however, successful completion of the required procedures is less certain. Requirements may be relatively complex for a lay person, and homeowners may not be able to afford the services of an attorney to assist in the conversion process. Therefore, state conversion statues should be straight-forward and not require professional expertise.

RECOMMENDATIONS FOR STRONG LAWS TO PROMOTE MANUFACTURED HOMES AS REAL PROPERTY

- Conversion should be available regardless of who owns the land upon which the home is placed.
- Conversion should make the home real property for all purposes.
- Conversion should protect secured parties' interest in the home.
- Conversion should not require homes on rented land to have a specific lease term.
- Conversion should not impose requirements regarding the home's foundation beyond those required to site any manufactured home.
- Conversion should not affect the landowner's interests, if the home is on rented land, nor should it require the permission of the landowner.
- Conversion procedures should create a clear chain of ownership to facilitate title searches.
- Conversion procedures should be user-friendly and permit homeowners to convert their homes without hiring a professional for assistance.
- The Real Estate Settlement and Procedures Act should apply to all loan transactions secured by a manufactured home,

regardless of the home's classification as real or personal property.

- Conversion should provide a bright line rule for when a home is real property, to ensure predictable and consistent results.
- Conversion procedures should include the cancellation of certificates of title, in order to reduce the possibility of fraud.
- Protections against unfair and deceptive practices (state UDAP statutes) should apply to manufactured home sales and state homestead exemption laws should apply to manufactured homes, regardless of whether the home is real or personal property.
- Laws regarding appraisers and real estate agents should eliminate restrictions that impede their involvement in manufactured home sales, regardless of whether the home is real or personal property.
- Automatic treatment of homes as real property should be considered in states where manufactured and site-built homes are taxed at substantially the same rate.

ABOUT I'M HOME

I'M HOME, or Innovations in Manufactured Homes, is an initiative of CFED, a national nonprofit organization dedicated to expanding economic opportunities for all Americans. The I'M HOME network includes nonprofit and for-profit, national and local partners who together work toward ensuring that all homeowners, regardless of whether their home is manufactured or site-built, enjoy the same rights and privileges of homeownership, including asset building opportunities. For more information about I'M HOME, please visit www.cfed.org/go/imhome.

ABOUT THE NATIONAL CONSUMER LAW CENTER

The National Consumer Law Center (NCLC) is the nation's consumer law expert, helping consumers, their advocates and public policymakers use powerful and complex consumer laws on behalf of low-income and vulnerable Americans seeking economic justice. NCLC is the leading consumer legal advocate promoting legal protections for owners of manufactured homes. For more information about NCLC please visit www.consumerlaw.org.

Appendix A

EXISTING STATE CONVERSION STATUES

In the following summaries of state statutes that specify a procedure for the conversion of a manufactured home to real property, the terminology of the statutes as to manufactured or mobile homes is retained.

Alabama

A mobile home title may be cancelled if the home is affixed to real property owned by the homeowner – ownership of both the home and the land must be identical. The owner must submit an application to the state department of revenue, including a release of any liens noted on the title. If the mobile home is later detached from the land, the owner must reapply for a new certificate of title.[1] This statute is part of the state title law and does not state whether the home is treated as real property for foreclosure or other purposes after the title is cancelled.

Arizona

A mobile home permanently affixed, i.e., installed on real property owned by the homeowner,[2] and for which an affidavit of affixture is recorded, shall be assessed as real property for tax purposes.[3] A mobile located in a mobile home park will, along with the leasehold interest, be treated as real property if the homeowner files an affidavit of affixture with the county recorder and: (1) the home was installed on the real property with all wheels and axles removed in compliance with local and state installation standards; (2) the owner of the home entered into a lease of at least twenty years for the lot and the lease specifically permits the recording of an affidavit of affixture; and (3) a memorandum of lease, signed by both landlord and tenant, is recorded that lists specified information.[4] Regardless of whether the home is located in a park, the affidavit of affixture must identify the holder of any security interest in the home that is not terminated by the consent of the secured party, and any such interest survives recordation of the affidavit.[5] When an affidavit of affixture is recorded, the owner must surrender the certificate of title.[6] A lien on a mobile home for which an affidavit of affixture is recorded may be perfected either in the manner provided by law for real property or in the manner provided for fixtures.[7]

Arkansas

If a mobile or manufactured home is affixed to real estate, the title may be surrendered to the state department of finance and administration for cancellation. After cancellation, a security interest, lien, or encumbrance may be obtained in the same manner as for real property.[8]

California

If a manufactured or mobile home is affixed to a permanent foundation in compliance with state standards,[9] default and sale are governed by California's mortgage foreclosure laws.[10] The homeowner must own the land or have a minimum 35-year lease.[11] Any lienholders must consent to the attachment of the home to the land.[12] The owner must surrender the certificate of title, and a statement that the home was affixed to real property is to be recorded in the county land records.[13] Once these procedures are completed, the home is deemed a fixture and an improvement to the real property.[14] Default and sale are also governed by the state mortgage foreclosure laws if the creditor has a security interest in the land in addition to the home.[15]

Colorado

The owner of a manufactured home, once it is permanently affixed to the ground so that it can no longer be drawn over the public highways, may surrender the certificate of title and apply for purging of the title. The owner must also obtain the consent of the holders of any unreleased security interests in the home. The home then becomes real property, and subject to all laws that would apply to real estate.[16] Although the statute does not

explicitly state that the homeowner must also own the land upon which the home is placed, it appears that after conversion the home is taxed as part of the land upon which it sits, and so conversion would only be practical when the homeowner also owns the land. Although the statute does not address retitling, the Colorado Division of Motor Vehicles, Department of Revenue, currently permits a bonding procedure to allow homeowners to reestablish title.[17]

Connecticut

Title conveyances to manufactured homes are recorded on the land records with the town clerk's office of municipality.[18] While the document conveying title to homes on leased land must recite information about the land or park where the home is located,[19] it appears to allow conveyance of homes located upon land owned by the homeowner by deed, and such home would become part of the real property.[20]

Florida

The owner of a mobile home permanently affixed to land also owned by the homeowner, or in which the homeowner has a recorded leasehold interest of at least 30 years, may retire title to the home.[21] Before title is retired the following documents must be recorded in the official records of the clerk of court in the county where the home is located: (1) the original title to the home, including a statement by any recorded lienholder that the security interest has been released or will be upon retirement of title; (2) legal description of the real property, and if the homeowner's interest in the property is a leasehold, a copy of the lease; and (3) a sworn statement of the owner that he or she owns the home and the real property or leasehold interest. After the title is retired, the home is only conveyed by deed or real estate contract along with the property to which it is affixed.[22] A new title may be obtained if the home is to be removed from the land.[23]

Another Florida statute provides that if the mobile home is classified as personal property by a seller or lender at the time a security interest in the home was granted, it shall continue to be so classified for all purposes relating to the loan and security agreement.[24]

Georgia

A manufactured or mobile home is personal property unless: (1) the home is or is to be permanently affixed to real property and one or more persons with an ownership interest in the home also has an ownership interest in the real property; and (2) the owner and all holders of security interests sign and file a certificate of permanent location with the clerk of the local superior court and the state revenue commissioner. Once such a certificate is properly filed, the home is a part of the real property for all legal purposes, including foreclosure.[25]

Idaho

A manufactured home may constitute real property if the home is permanently affixed to a foundation and the running gear is removed. The home must be sited on land owned (or being purchased) by the homeowner or, if the home is being financed in accordance with a federal housing agency's guidelines, is leased by the homeowner. The homeowner must record with the county recorder a statement of intent to declare the home as real property, and must turn over the certificate of title. Upon exercise of this option, lending institutions may treat the home as real property.[26] Physical removal of the home from the land is then prohibited unless the owner applies to have a new certificate of title issued.[27]

Indiana

If a manufactured home is attached to real estate by a permanent foundation, the owner may submit the certificate of title and an affidavit to the bureau of motor vehicles.[28] The county recorder is then to record the affidavit in the county real estate records,[29] and the home is thereafter deemed to be an improvement to the real estate.[30]

Iowa

Iowa has separate provisions depending on whether or not the home is in a manufactured home community. If the home is located in a manufactured home community and installed on a permanent foundation, the owner may surrender the certificate of title to the county treasurer for the purpose of assuring eligibility for federal mortgage lending programs. The title cannot be surrendered if there are unreleased security interests. A foreclosure action on a manufactured home whose title has been surrendered must be conducted as a real estate foreclosure. The owner may reapply for a certificate of title at a later date.[31] If the home is not in a manufactured home community, it must be placed on a permanent foundation. If a security interest is noted on the title, the homeowner must tender a mortgage on the real estate to the creditor, or the secured party must consent to the conversion, in which case the secured party retains a security interest in the home that is separate from any interest in the land. This statute is a tax law that does not state whether foreclosure law applies after the home is converted to real property.[32]

Kansas

Whenever a manufactured or mobile home is permanently affixed to real property by placement upon a permanent foundation that cannot be removed intact from the land, the owner may apply to have the certificate of title eliminated. The application must include an affidavit signed by the owner and all parties having a security interest in the home. If the application is approved, it is filed in the county registry of deeds. Once the certificate of title is eliminated, ownership of the home is an incident of ownership of the land under governing real property law, and the home is subject to a lien only as part of the real property.[33]

Kentucky

When a manufactured home is or is to be permanently affixed to real estate, the owner may file an affidavit of conversion with, and surrender the certificate of title to, the county clerk, who is then to record the affidavit. The home is then deemed an improvement of the real estate.[34]

Louisiana

A manufactured home is considered immovable when a document describing the home and the land is recorded in the local parish records. The document must include a declaration by the owner of the home and any holder of a security interest in the home that the home is to remain permanently attached to the land. Once this document is recorded, the home is subject to all laws concerning immovable property.[35] However, the rights of the holder of a validly recorded chattel mortgage or a security interest perfected under Article 9 of the UCC are unaffected.[36] The owner may reverse the process so that the home is once again treated as movable property by filing another statement of intent and applying for a new certificate of title.[37]

Michigan

The owner of a mobile home affixed to real property in which the owner also has an ownership interest, may apply for cancellation of the certificate of title. To be considered affixed to the real property, the wheels, towing hitches and running gear must be removed and the home must be attached to a foundation or other support system. The application must include the written consent of each holder of a security interest to termination of the security interest and cancellation of the title. Once the title is cancelled, the mobile home is considered part of the realty and a lienholder may perfect a new security interest or lien on the mobile home only in the manner prescribed by the real estate laws.[38] The owner may reapply for a certificate of title at a later date.[39]

In 2003, the Sixth Circuit had held that security interests in manufactured homes in Michigan could be perfected only by recording them on the title, not by recording a traditional mortgage.[40] The legislature responded by amending its titling laws to recognize both methods.[41] It amended the statute again two years later to make this rule retroactive.[42]

Minnesota

When a manufactured home is affixed to real property, and financed by a mortgage on the real property, the owner of the home must surrender the certificate of title to the registrar of motor vehicles for cancellation. The department is then to issue a notice of surrender, which may be recorded in the county recorder's office or the registrar of titles. The statute provides that the manufactured home is then deemed to be an improvement to real property. The department may not cancel the certificate of title, however, if an unsatisfied security interest is noted on it.[43]

Mississippi

An owner of a manufactured or mobile home ,who also owns the land on which the home is located, has the option of declaring whether the home is to be classified as personal or real property. To be classified as real property, the wheels and axles must be removed and the home must be anchored and blocked in accord with rules adopted by the commissioner of insurance.[44] A certificate that the home has been classified as real property is then recorded in the county land records,[45] and the home's certificate of title may be sent to the state tax commission for cancellation.[46] The home is then treated as real property for purposes of *ad valorem* taxation, and a security interest in the home and land may be obtained through the use of a mortgage or deed of trust.[47]

Missouri

The owner of a manufactured home may convert it to real property by attaching it to a permanent foundation on real property that the owner of the home also owns, and removing or modifying the transportation apparatus so that it is impractical to reconvert it to be readily movable.[48] Unlike the other statutes summarized in this subsection, this statute does not provide for surrender of the title or recordation of a document in the county land records.

Montana

A manufactured home is considered an improvement to real property if the running gear is removed, the home is attached to a permanent foundation on land that is owned or being purchased by the owner of the home (or that is placed on the land with the permission of the landowner), and a statement of intent declaring the manufactured home as an improvement to real property is recorded with the county. The statement of intent must include, inter alia, a description of any security interests in the home and approval from all lienholders to eliminate the certificate of title. After these steps are completed, the manufactured home may not be removed from the land unless the owner files a statement of reversal of this declaration. A manufactured home that has been declared an improvement to real property must be treated by lending institutions in the same manner as any other improvement to real property.[49]

Nebraska

The title for a mobile or manufactured home may be canceled if it is affixed to real property in which the owner of the home has any ownership interest. The statute defines ownership interest as fee simple interest, or an interest as a lessee that continues for at least twenty years after the required affidavit. The title is surrendered for cancellation to the county clerk or designated official where the title is issued or to the Department of Motor Vehicles if title is issued by the department. Along with the title to be surrendered an affidavit of affixture on a form provided by the department must be submitted. The form requires among other things, the names and addresses of all owners of the home, a description of the home, the legal description of the real property, a statement that the home is affixed, and the written consent of each lien holder to release its lien and cancel the title. After the title is canceled and the affidavit recorded, the home is treated as part of the real property.[50] The statute also provides a method for returning the home to the status of personal property.[51]

Nevada

A mobile or manufactured home is eligible to become real property if it becomes permanently affixed to land. The owner of the home must either own the land or, if the home is being financed in accordance with the guidelines

of a federal housing program, lease it. The owner must record an affidavit of conversion in the county recorder's office, deliver a copy of the affidavit and all documents relating to the home to the manufactured housing division of the state department of business and industry, and pay the current year's personal property tax.[52] (But homes that are sited on lots outside mobile home parks in accordance with local zoning laws are automatically recorded as real property without the need for an affidavit.[53]) Once the home is converted to real property, it is deemed to be a fixture and an improvement to the real property.[54]

New Hampshire

A manufactured home placed on a site not owned by the homeowner but connected to utilities shall be deemed real estate for the purposes of transfer and shall be subject to attachment, liens, foreclosure and execution in the same manner as real estate.[55] However, security interests in manufactured housing may also be created and perfected under the U.C.C. as adopted by New Hampshire.[56] The statute does not address homes placed on land owned by the homeowner. Owners of manufactured homes in this situation must rely upon common law to determine if the home becomes real property. New Hampshire also has a statute which allows any lending institution to treat a manufactured home the same as realty for the purposes of securing loans to finance the home. When a lending institution exercises this option, no certificate of title is required, and all of the provisions of real estate law, including conveyances, deeds, and foreclosure, apply to the home. The home must be placed on a foundation or slab and hooked up to all conventional and necessary utility systems and must be intended to be used as a permanent dwelling unit.[57]

New Jersey

New Jersey requires that all manufactured homes not taxed as real property must have certificates of ownership (titles) issued by the Director of the Division of Motor Vehicles.[58] A manufactured home is taxed as real property when it is affixed to the land by a permanent foundation, or if by a nonpermanent foundation but connected to utility systems so as to render it habitable on a permanent basis.[59] However, a manufactured home installed in a park is not taxed as real property.[60] When a mobile or manufactured home is relocated from a park to land which the owner of the home also has an interest in or title to, the owner must file a notice with the Director of the Division of Motor Vehicles at least 10 days before the move. If the director accepts the notice as complete, the certificate of ownership is canceled on the date of relocation.[61]

North Carolina

A manufactured home qualifies as real property if it is a residential structure; the moving hitch, wheels, and axle have been removed; and the owner either owns the land on which it is located or has a lease of at least twenty years that expressly provides for disposition of the mobile home upon termination of the lease.[62] The owner of such a home may have the certificate of title cancelled by submitting it, along with an affidavit, to the division of motor vehicles.[63] If the certificate of title shows a security interest that has not been released, the division may not cancel the title without the written consent of all secured parties. The affidavit is then to be filed in the county registry of deeds. An owner who wishes to separate the home from the land after the title has been cancelled can apply for a new certificate of title. Once the certificate of title is cancelled and the affidavit is recorded, the manufactured home becomes an improvement to real property and any lien on the home shall be perfected and given priority in the manner provided for real property liens.[64]

Ohio

To be taxed as real property, a manufactured or mobile home must be affixed to a permanent foundation and be located on land that the owner of the home also owns.[65] The owner of a home, which will be taxed as real property, must surrender the certificate of title to the county auditor.[66] The owner must either satisfy any liens on the home, or, with the lienholder's consent, give the lienholder a mortgage on the home and land. Once surrendered, the title is to be deactivated, but it can be reactivated upon application by the homeowner. These statutes do not state what effect the deactivation of the title has outside the context of taxation, but a bankruptcy case holds that if a home was converted to real property through this procedure for taxation purposes it is also real property for purposes of bankruptcy law.[67]

Oregon

The owner of a manufactured structure, or the dealer selling it, may apply to the county assessor to have the structure recorded in the county deed records. The owner must either own the land on which the structure is located, or hold a recorded lease of twenty years or more that specifically permits the structure to be recorded in the county deed records. The owner must turn over any ownership document for cancellation. The deed records must list any unreleased security interest in the manufactured structure. Once recorded in the deed records, the manufactured structure is subject to the same provisions of law applicable to any other building, housing, or structure on the land, and may be sold separately from the land or leasehold estate only if the owner applies to have it removed from the deed records.[68]

Pennsylvania

Upon application, the department of transportation may cancel a certificate of title for a mobile home that is affixed to real property.[69] The home must be permanently mounted on a foundation.[70] The owner must complete a form and return it, along with the title, to the department of transportation.[71] If a lien appears on the certificate of title, the title will not be cancelled until the home owner submits satisfactory evidence that the lien has been recorded against the land.[72] After cancellation, the ownership interest in the mobile home, together with all liens and encumbrances on it, is transferred to and encumbers the real property.[73]

South Carolina

The owner of a manufactured home may affix the home to real property by installing it in accordance with the state installation standards, removing the wheels, axles, and towing hitch, and filing an affidavit for retirement of title.[74] The homeowner must either own the land on which it is located or have a leasehold estate of thirty-five years or more in the land. The local register of deeds or clerk of court must then record the affidavit as if it were a deed to real property. Upon completion of this process, the home is to be treated as real property for all purposes except condemnation.[75] The title certificate may be cancelled by presenting it to the division, along with a clocked and stamped copy of the affidavit.[76] Any party listed on the title certificate as having a security interest in the home must either lease the lien or consent to the cancellation of the title.[77] Once a manufactured home has been converted to real property in this manner, a manufactured home severance affidavit must be filed before it can be severed from the land.

South Dakota

If a mobile or manufactured home is fixed to real property, and the owner of the home also owns the land, the owner may request that the title to the home be surrendered.[78] If the owner wants to remove the home from the real property at a later time, the owner may apply to have a title reissued.[79] These statutes are part of the state motor vehicle titling laws and do not state the effect of surrendering the title.

Tennessee

If a manufactured home is affixed to real property, and the ownership of the home is identical to the ownership of the land, the owner may surrender the title to the state department of safety. The owner must submit an affidavit of affixation that, *inter alia*, certifies that all permits required by applicable governmental authorities have been obtained, the foundation system complies with the law and with the manufacturer's specifications, and the wheels and axles have been removed. All lienholders must have released their liens on the home. If the affidavit complies with all the statutory requirements, the county register of deeds is to record it. The home is then subject to taxation as an improvement to the land, but the statute does not specify the effect on foreclosure.[80]

Texas

A manufactured home can be treated as real property, if it is attached to land that the homeowner also owns, or which the homeowner is leasing under a long-term lease as defined by the state department of housing and community affairs.[81] To be attached to land it must be installed in compliance with state rules and connected to

a utility.[82] The owner must file an application for a statement of ownership and location with the department. In addition, each lienholder must either release the lien or give written consent to the conversion of the home to real property.[83] Within sixty days after the department issues a statement of ownership, the owner must file a certified copy in the real property records of the county in which the home is located and notify the department and the tax assessor-collector that the certified copy has been filed.[84] The home is then considered real property for all purposes.[85]

Another Texas statute provides that, if a consumer buys real property and a manufactured home at the same time, and certain other conditions are met, the creditor may elect to treat the home as if it were residential real property for all purposes in connection with the credit transaction.[86] If the creditor so elects, and discloses this election conspicuously to the consumer, then the transaction is considered to be a residential real property transaction for all purposes.[87]

Utah

A manufactured or mobile home is considered an improvement to real property if the homeowner also owns the land to which it is permanently affixed, or leases the land and is financing the home in accordance with federal housing agency guidelines. The owner must surrender the title and complete an affidavit that, *inter alia*, identifies any security interests in the home. The affidavit and the receipt for the surrender of the title are then recorded by the county recorder. The homeowner may acquire a new title upon removing the mobile home from the land. Since this statute is part of the state mortgage lending and servicing act, it is likely that it will govern whether foreclosure is the appropriate way for the lender to proceed in the event of default.[88]

Vermont

If a mobile home is financed while the home is permanently sited in a manner intended for continuous residential occupancy by the homeowner on land also owned by the homeowner, it shall be financed as a residence.[89] Otherwise a mobile home may be financed under 9 V.S.A. § 41a(b)(4) or 9 V.S.A. Pt. 3, Ch. 59, both of which regulate chattel loans.

Virginia

The owner of a manufactured home or house trailer that exceeds the size permitted for highway travel must apply for a title within thirty days after purchase. Once the wheels and other equipment that made the home mobile are removed and the home has been attached to realty, then the owner may return the title to the department of motor vehicles for cancellation. The home may then be transferred only as real estate. Any security interest perfected on the title continues despite the cancellation of the title.[90] A bankruptcy court has held that the determination of whether a mobile home is real or personal property must be made on a case-by-case basis and an owner's failure to comply with the statute, while it might be indicative of the owner's intent that home remain personal property, is not conclusive.[91]

Washington

The owner of a manufactured home that is affixed to land (i.e., installed in accordance with state installation standards[92]) may apply to have the title eliminated. The owner of the home must also own the land on which it is sited, have a lease of thirty-five years or more for the land, or be purchasing the land under a real estate contract.[93] The owner must submit the title and an application, which must identify any security interests, to the department of licensing for approval.[94] After approval, the title is to be cancelled and the approved application is to be recorded in the county real property records.[95] The statute provides that the manufactured home is then to be treated as real property as if it were a site-built structure,[96] except for purposes of taxation.[97] If the title has not been eliminated, the home is not real property.[98] The statute provides a procedure to obtain a new title if the home is to be removed from the land.[99]

West Virginia

The commissioner of motor vehicles may cancel a certificate of title for a mobile or manufactured home that is affixed to real property owned by the homeowner.[100] The homeowner must submit an application and the certificate of title. The cancellation certificate is then to be recorded in the county deed records. Upon recordation, the statute provides that the home is to be treated for all purposes as an appurtenance to the real estate to which it is affixed.[101]

Wisconsin

The owner of a manufactured home must obtain a certificate of title,[102] unless the homeowner is not a resident of Wisconsin[103] or the homeowner intends to make the home a fixture to land in which the homeowner has an ownership or leasehold interest.[104] The leasehold interest must be subject to Wisconsin's real property statutes which exclude leases for a term limited to one year or less.[105]

Wyoming

If a mobile home is installed on a permanent foundation and is taxable as real property,[106] and all liens have been paid, the certificate of title is to be surrendered to and cancelled by the county clerk.[107]

ENDNOTES

1 Ala. Code § 32-8-30.

2 Ariz. Rev. Stat. Ann. § 42-15201(2).

3 Ariz. Rev. Stat. Ann. § 42-15202.

4 Ariz. Rev. Stat. Ann. § 33-1501. A home recorded as real property under this statute is to be assessed as personal property for tax purposes, however. Ariz. Rev. Stat. § 42-15203(K).

5 Ariz. Rev. Stat. Ann. §§ 33-1501, 42-15203.

6 Ariz. Rev. Stat. Ann. § 28-2063.

7 Ariz. Rev. Stat. Ann. § 42-15205.

8 Ark. Code Ann. §§ 27-14-807, 27-14-1603.

9 Cal. Health & Safety Code § 18551 (West) (includes construction standards, plan approval, etc.).

10 Cal. Health & Safety Code § 18039.1 (West).

11 Cal. Health & Safety Code § 18551(a)(1)(A) (West).

12 Cal. Health & Safety Code § 18551(a)(1)(B) (West).

13 Cal. Health & Safety Code § 18551(a)(2), (3) (West).

14 Cal. Health & Safety Code § 18551(a)(4) (West).

15 Cal. Health & Safety Code § 18039.1 (West).

16 Colo. Rev. Stat. Ann. § 38-29-118.

17 http://www.dola.state.co.us/dpt/dpt_news/docs/Bulletins/2007%20bulletins/BULLEINNO04-07.pdf

18 Conn. Gen. Stat. Section 21-67a

19 Conn. Gen. Stat. Section 21-67a(c)

20 Connecticut information at www.efanniemae.com/sf/guides/ssg/relatedsellinginfo/manufachousing/.

21 Fla. Stat. §319.261

22 Fla. Stat. §319.261(5)

23 Fla. Stat. §319.261(6)

24 Fla. Stat. § 320.015.

25 Ga. Code Ann. §§ 8-2-180 to 8-2-183.

26 Idaho Code Ann. §§ 63-304(2), 63-305(1). Cf. In re Sasinouski, 52 B.R. 67 (Bankr. Idaho 1985) (even though home owner did not comply with Idaho title purging statute, land and mobile home were both encumbered by the deed of trust on land, where deed of trust did not explicitly exclude mobile home and lender relied upon appraisal that included both the home and land when making the loan).

[27] Idaho Code Ann. § 63-305.

[28] Ind. Code § 9-17-6-15.1.

[29] Ind. Code § 9-17-6-15.3.

[30] Ind. Code § 9-17-6-15.5.

[31] Iowa Code § 435.26A.

[32] Iowa Code § 435.26. See also Ford v. Venard, 340 N.W.2d 270 (Iowa 1983) (holding that Iowa's title purging statute was not intended to be the exclusive method to convert mobile home to real property and that common-law methods of converting personal to real property remained).

[33] Kan. Stat. Ann. § 58-4214.

[34] Ky. Rev. Stat. Ann. § 186A.297 (West).

[35] La. Rev. Stat. Ann. § 9:1149.4. See also La. Rev. Stat. Ann. § 9:1146.3.

[36] La. Rev. Stat. Ann. § 9:1149.4.

[37] La. Rev. Stat. Ann. § 9:1149.6.

[38] Mich. Comp. Laws Ann. § 125.2330i(5).

[39] Mich. Comp. Laws Ann. § 125.2330i.

[40] Boyd v. Chase Manhattan Mortg. Corp. (In re Kroskie), 315 F.3d 644 (6th Cir. 2003).

[41] Mich. Pub. Act No. 44, S.B. 425 (2003), enacting Mich. Comp. Laws Ann. § 125.2330i..

[42] Mich. Comp. Laws Ann. § 125.2330i, as amended by Mich. Pub. Act No. 162, H.B. 4484 (2005). See In re Ozwalt, 444 F.3d 524 (6th Cir. 2006) (interpreting statute to allow security interest in mobile home to be perfected by filling of mortgage with county registry, without notation on title, even when transaction occurred before statutory amendments); MERS v. Pickrell, 721 N.W.2d 276 (Mich. Ct. App. 2006) (in light of 2005 statutory amendment, creditor has option of perfecting security interest in mobile home either under the Act or under real estate law, even for home that was affixed to real estate before earlier amendments in 2003); In re Hoggard, 330 B.R. 595, 605 (Bankr. W.D. Mich. 2005) (concluding that 2003 legislation overruled Kroskie; also finding security interest in home protected by Revised Article 9's priority rules). But cf. In re Gregory, 316 B.R. 82 (Bankr. W.D. Mich. 2004) (interpreting title purging statute not to have retroactive effect, a conclusion rejected by Sixth Circuit in In re Ozwalt, but finding security interest in home protected against bankruptcy trustee's strong-arm power because of Revised Article 9's changes to priority rules)

[43] Minn. Stat. § 168A.141. See also Minn. Stat. § 273.125 (standards for taxing mobile homes as real property).

[44] Miss. Code Ann. § 27-53-15.

[45] Id. See also Opinion Miss. Att'y Gen., Miller, No. 2005-0131, 2005 WL 1220419 (Miss. Att'y Gen. Apr. 8, 2005).

[46] Miss. Code Ann. § 63-21-30.

[47] Miss. Code Ann. § 27-53-15.

[48] Mo. Rev. Stat. §§ 700.111, 700.010(5) (definition of "manufactured home" as one that is, inter alia, readily movable). See In re Estate of Parker, 25 S.W.3d 611 (Mo. Ct. App. 2000) (mobile home not converted to real property when the home was held jointly by married couple and placed on land held by only by one spouse as it was not placed on land held by the owner of the home).

[49] Mont. Code Ann. § 15-1-116.

[50] Neb. Rev. Stat. § 60-169.

[51] Neb. Rev. Stat. § 60-169.

[52] Nev. Rev. Stat. § 361.244. See In re Colver, 13 B.R. 521 (Bankr. D. Nev. 1981) (mobile home placed on land owned by owner of home with its wheels removed remained personal property in absence of compliance with statute and when lender stated in security instrument that home would remain person property over the life of the loan).

[53] Nev. Rev. Stat. §§ 278.02095, 361.244(5).

[54] Nev. Rev. Stat. § 361.244(3).

[55] N.H. Rev. Stat. § 477:44; see also N.H. Rev. Stat. §80:18-a (defining "mortgage" for tax collection purposes to include security interests in manufactured housing created and perfected under N.H. Rev. Stat. § 477:44).

[56] N.H. Rev. Stat. § 477:44 IV.

[57] N.H. Rev. Stat. Ann. § 384:16-d.

[58] N.J. Stat. Ann. § 39:10-2, §39:10-6.

[59] N.J. Stat. Ann. § 39:10-2, §54:4-1.5-a.

[60] N.J. Stat. Ann. § 39:10-2, §54:4-1.5-b.

[61] N.J. Stat. Ann. § 39:10-2, §39:10-11.1.

[62] N.C. Gen. Stat. § 105-273(13).

[63] N.C. Gen. Stat. § 20-109.2.

[64] N.C. Gen. Stat. §§ 47-20.6, 47-20.7.

[65] Ohio Rev. Code Ann. § 4503.06(B)(1), (2) (West).

[66] Ohio Rev. Code Ann. § 4505.11 (West.

[67] In re Cluxton, 327 B.R. 612 (B.A.P. 6th Cir. 2005). See also Benner v. Hammond, 673 N.E.2d 205 (Ohio Ct. App. 1996) (holding that home that had title purged under revenue statute and was considered real property under the owner's mortgage was not a "trailer" for the purposes of a restrictive covenant).

[68] Or. Rev. Stat. § 446.626. See also Or. Rev. Stat. § 446.611 (means of perfecting security interest in mobile home that still has an ownership document).

[69] 75 Pa. Cons. Stat. § 1140.

[70] Pa. Code tit. 67, § 401.5(a).

[71] Id.

[72] Pa. Code tit. 67, § 401.5(b).

[73] 75 Pa. Cons. Stat. § 1140.

[74] S.C. Code § 56-19-510. See also S.C. Code § 56-19-500(1).

[75] S.C. Code § 56-19-510.

[76] S.C. Code § 56-19-520.

[77] Id.

[78] S.D. Codified Laws § 32-3-3.2.

[79] S.D. Codified Laws § 32-3-3.3.

[80] Tenn. Code Ann. § 55-3-138. See also Tenn. Code Ann. § 55-3-138 (procedure for reapplying for new certificate).

[81] Tex. Occ. Code Ann. § 1201.2055 (Vernon).

[82] Tex. Occ. Code Ann. § 1201.003(2-a) (Vernon).

[83] Tex. Occ. Code Ann. § 1201.2075 (Vernon).

[84] Tex. Occ. Code Ann. § 1201.2055 (Vernon).

[85] Id. See also Tex. Prop. Code Ann. § 2.001 (Vernon).

[86] Tex. Fin. Code Ann. § 347.455 (Vernon).

[87] Id.

[88] Utah Code Ann. § 70D-1-20. See also Utah Code Ann. § 41-1a-503.

[89] Vt.. Stat. Ann. tit. 9, § 2603 (b)

[90] Va. Code Ann. § 46.2-653.

[91] In re Banks, 259 B.R. 848 (Bankr. E.D. Va. 2001).

[92] Wash. Rev. Code § 65.20.020.

[93] Wash. Rev. Code §§ 65.20.020, 65.20.040.

[94] Wash. Rev. Code § 65.20.040.

[95] Wash. Rev. Code § 65.20.050.

[96] Id. See also Wash. Rev. Code §§ 65.20.030, 65.20.060 (manufactured home whose title has been eliminated may be conveyed only by deed or real estate contract).

[97] Wash. Rev. Code § 65.20.910.

[98] Wash. Rev. Code § 65.20.030.

[99] Wash. Rev. Code § 65.20.070.

[100] W. Va. Code § 17A-3-12b.

[101] Id. See also W. Va. Code § 15-5-12 (tax statute providing that a mobile home sited on land owned by someone other than the home owner is classified as personal property whether or not it is permanently affixed to the land, unless the certificate of title has been cancelled).

[102] Wis. Stat. §101.9203 (1)

[103] Wis. Stat. §101.9203 (3)

[104] Wis. Stat. §101.9203 (4)

[105] Wis. Stat. §706.001

[106] See Wyo. Stat. Ann. § 39-15-101(a)(v) (to be real property, must be physically or constructively annexed to the real property and adapted to the use of the real property, and there must be evidence of intent to make it a permanent part of the real property).

[107] Wyo. Stat. Ann. § 31-2-502.

SB 110

<TARGET><BILL>SB 110</BILL><SUBJECT>SB 110</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 3/21/11

FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 3/22/12

Judiciary Committee considered SENATE BILL NO. 110

SB 110-HUMAN TRAFFICKING/SEX OFFENSES

"An Act relating to human trafficking; and relating to sentencing and conditions of probation in criminal cases involving sex offenses."

and recommends:

[✓] be **replaced** with **CS** SB 110 (JUD) [ ] *Same Title* [✓] *New Title*

[ ] adopt **previous CS** _____ (_____) [ ] *Same Title* [ ] *New Title*

[ ] attached amendment(s)

[ ] adopt _____ Letter of Intent

[ ] further referral to _____ Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)

Dept.	Fiscal	Indet.	Zero	FN #
LAW		✓		1
DPS			✓	2
COR		✓		3
Adm/OPA		✓		4
Adm/PD		✓		5

PREVIOUS FISCAL NOTE(S)

Dept.	Fiscal	Indet.	Zero	FN #

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
John Coghill	Coghill	✓			
	Wielechowski	✓			
Joe Paskvan	PASKVAN	X			
CHAIR:	French	✓			

ALASKA STATE LEGISLATURE

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Chair
State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Admin Reg Review

SENATOR BILL WIELECHOWSKI

Sponsor Statement

Senate Bill 110 – Strengthening Human Trafficking and Sex Offense Statutes

"An Act relating to human trafficking; and relating to sentencing and conditions of probation in criminal cases involving sex offenses"

Senate Bill 110 is a bill designed to strengthen existing human trafficking laws in Alaska and give judges more discretion in setting the conditions of probation in criminal cases involving sex offenses.

Sexual exploitation is a serious problem in the state of Alaska. Traffickers prey on vulnerable Alaskans, a large number of whom are underage females. Statistics show Native Alaskans also are disproportionately targeted.

Current state law, however, only recognizes the crime of "trafficking" when victims are transported across state lines. SB 110 would close that loophole, allowing law enforcement to prosecute traffickers who prey on victims within state borders.

SB 110 would also allow judicial discretion in imposing conditions of probation on criminal cases involving sex offenses. Judges could include, as part of probation, the requirement that certain defendants refrain from residing within 500 feet of school grounds.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SB110 \A**
() Publish Date

Identifier (file name): SB110-LAW-CRIM-03-25-11
Dept. Affected Law
Title An Act relating to human trafficking; and relating to sentencing and conditions of probation in criminal cases involving sex offenses.
Appropriation Criminal
Allocation Criminal Justice Litigation
Sponsor SENATOR(S) WIELECHOWSKI
Requester (S) JUD
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost ***

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager
Phone 465-5427
Division Administrative Services
Date/Time 3/25/11 10:00 AM
Approved by John J. Burns, Attorney General
Department of Law
Date 3/25/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB110 \A

Analysis

SB 110 adds a new, more serious level of human trafficking. It would adopt an unclassified felony if a person induces. compels, or entices a person under 18 years old to move from one place to another and engage in sexual conduct, adult entertainment, or prohibited acts.

The bill also amends current law prohibiting human trafficking by making it a class A felony to compel, entice, or induce another person to move from one place to another in the state to engage in sexual conduct, adult entertainment, or forced labor.

This bill would have an indeterminate fiscal impact to the Department of Law.

ALASKA STATE LEGISLATURE

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State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Admin Reg Review

SENATOR BILL WIELECHOWSKI

Fact Sheet: Human Trafficking In Alaska

What Is Trafficking?

International and federal laws reflect the idea that human trafficking involves **recruiting, harboring or transporting** a person in order to **exploit them in some way**, usually through forced labor or the commercial sex trade.

Trafficking **does not necessarily involve smuggling**. Victims **do not have to be foreign born**.

Fixing Alaska State Law

The loophole: Federal law reflects this. Current Alaska law, however, stipulates that trafficking only occurs when a perpetrator compels or induces another person **to cross state lines** before exploiting them.

SB 110 would amend the state human trafficking statute **to include preying upon people *within* the state of Alaska**.

The Grim Reality: Trafficking In Alaska

Sex traffickers prey upon minors and adults, urban dwellers and rural and people of all races. It is **extremely difficult to quantify the number** of prostitution or trafficking activity in the state. Victims do not trust law enforcement. Most estimates come from prostitution arrests in a given area.

What we do know:

Traffickers are targeting Native girls.

- "A disproportionate number of women working in the Anchorage sex trade are Alaska Native and pimps and sex traffickers are pursuing Native girls..." [ADN, 12/02/10]
- "Native girls are targeted in part because they're considered 'versatile,' meaning they can be advertised on the Internet as Hawaiian or Asian. 'It's all comes down to money,' (FBI Special Agent Jolene Goeden) said, with the pimps hauling in thousands of dollars a week." [News Miner, 10/16/10]
- A man recently charged with sex trafficking in Anchorage was caught on tape talking to an associate about going to the Alaska Federation of Natives convention to "catch a Native" for his prostitution stable. The men "got at least some of their "stable" of prostitutes from Alaska Native villages, prowling the AFN convention and streets surrounding the Covenant House shelter." [ADN, 12/02/10]

Trafficking doesn't mean using force.

- Many vulnerable young girls are lured into service with enticements like a place to stay, a hot meal, having their hair done.
- "They're lured into the lifestyle with such things as gifts, shopping trips and alcohol and drugs, the agents said. At some point, their boyfriend, or pimp, wants payback." [News Miner, 10/16/10]
- "Sex traffickers use a combination of mind games and beatings, promises and drugs to control girls, authorities said." [ADN, 12/02/10]

Traffickers hunt victims in places vulnerable girls can be found: bus stations, shelters and in their villages.

- "The Native women and girls are being hunted at places where teens gather: malls, Anchorage's central bus stop downtown, the McLaughlin Youth Center, Covenant House." [News Miner, 10/16/10]
- "Alaska Native girls are commonly lured from their hometowns by friends or relatives who are already working as prostitutes. They invite the girl to come hang out and go shopping rent-free." [ADN, 12/02/10]

A majority of sexual trafficking victims have a history of sexual abuse.

- "We've been told, 'I'd rather be getting paid for it than giving it away for free," (APD's Sgt. Kathy) Lacey said." [News Miner, 10/16/10]

A majority of sexual trafficking victims are runaways.

- "Many are runaways. Under-age kids can't rent cars or rent hotel rooms, after all, and they have to get money somehow." [ADN, 12/02/10]

National Statistics

- "The majority of American victims of commercial sexual **exploitation tend to be runaway or thrown away youth** who live on the streets who become victims of prostitution." [US Department Of Justice]

- **450,000:** Number of children in the United States who run away from home each year. [National Runaway Switchboard]

- **1 out of 3:** Number of teens on U.S. streets who will be lured into prostitution **within 48 hours** of leaving home. [National Runaway Switchboard]

- **It happens everywhere.** "Pimp-controlled commercial sexual exploitation of children is linked to **escort and massage services, private dancing, drinking and photographic clubs, major sporting and recreational events, major cultural events, conventions, and tourist destinations**." [US Department Of Justice]

- **12-14:** The average age a girl enters prostitution in the United States. [US Department Of Justice]

- **11-14:** The average age a boy enters prostitution in the United States. [US Department Of Justice]

More Alaska Native girls ensnared in sex trafficking
by Alex DeMarban / The Tundra Drums
10.16.10 - 08:37 am
http://www.newsminer.com/printer_friendly/9919153

ANCHORAGE, Alaska - Sex-crimes investigators say they're seeing more rural Alaska Native girls and women who leave their families and village for Anchorage, only to be lured into prostitution by pimps and the promise of security.

The sex-traffickers see young Native runaways as especially easy prey, said investigators. They're adrift in the big city, separated from a support network, and seeking money and attention.

Kathy Lacey, an investigator with the Anchorage Police Department, and Jolene Goeden, a Federal Bureau of Investigation agent, shared the information with scores of delegates at the Association of Village Council Presidents annual convention on Oct. 6.

They didn't give specific numbers but said they've seen a rising trend in roughly the past year or so.

The two came to Bethel to begin the process of educating rural residents about what's happening, so parents can warn children. They want potential victims to be wary.

"When someone pulls up in a really nice Cadillac Escalade and they're promising them the world, we hope they're going to think twice before getting into that car," Goeden said.

The information prompted an immediate discussion from delegates, who called it "frightening." Some elders spoke in Yup'ik and talked of lost values. They urged parents and grandparents to monitor their kids.

The Native women and girls are being hunted at places where teens gather: malls, Anchorage's central bus stop downtown, the McLaughlin Youth Center, Covenant House. They're lured into the lifestyle with such things as gifts, shopping trips and alcohol and drugs, the agents said.

At some point, their boyfriend, or pimp, wants payback.

The "sex-trafficking world is incredibly, incredibly violent. Once that grooming process is over it turns into, 'You owe me. I need you to do this for me one time. And then it happens over and over again,'" Goeden said.

Native girls are targeted in part because they're considered "versatile," meaning they can be advertised on the Internet as Hawaiian or Asian.

"It's all comes down to money," she said, with the pimps hauling in thousands of dollars a week.

It's hard to rescue some girls, especially from villages. They may not see themselves as victims,

particularly those who have experienced sexual or domestic violence.

"We've been told, 'I'd rather be getting paid for it than giving it away for free," Lacey said.

Others may be afraid to seek help, out of fear for their lives.

"They don't feel like they have a choice in leaving this life," Lacey said.

The sex ring grows as girls recruit friends from the villages, promising them a free place to stay, shopping trips and free meals at their 'boyfriend's' house, the investigators said.

National statistics hold true in Anchorage: One in three street girls are drawn into prostitution in 48 hours, Lacey said.

Economic difficulties in villages seem to be one factor in the increasing trend.

"We don't want to scare you and give you the impression that every young girl or every woman that comes to Anchorage, that this happens to them, but it is happening and it is happening to a number of young Alaska Native girls," said Goeden.

The investigators see girls 18 or younger as victims, Lacey said. They arrest them, but only to separate them from their pimp and get them social services, such as counseling and housing.

They don't follow through with prosecuting them, Lacey said.

After the presentation, Andrew George of Nightmute stood before the crowd and spoke forcefully in Yup'ik.

Parents and family need to teach their children and protect them. Native children are in dire need, he said, according to a convention interpreter.

Ray Watson, chair of AVCP, a tribal consortium providing social services in the Bethel region, said delegates must go home and warn villagers about what's happening.

Myron Naneng, president of the group, said rural schools need to invite the Anchorage investigators into their classrooms.

'I can't get my sister back:' Investigators warn of sex traffickers targeting Natives

Posted: December 2, 2010 - 7:21 pm

By KYLE HOPKINS
khopkins@adn.com

http://community.adn.com/adn/node/154636#ixzz1HTj2d5uW

A disproportionate number of women working in the Anchorage sex trade are Alaska Native and pimps and sex traffickers are pursuing Native girls at events like AFN, police warned tribes and villagers today.

"There have been traffickers and pimps who specifically target Native girls because they feel that they're versatile and they can post them (online) as Hawaiian, as Native, as Asian, as you name it," said Jolene Goeden, a special agent for the FBI in Anchorage.

Far from home and surrounded by strangers, girls from remote villages are particularly vulnerable to sex-trade recruiters said Goeden and Sgt. Kathy Lacey, supervisor for the Anchorage police vice unit. The investigators delivered a kind of "Prostitution 101" to people from villages across the state at an annual Bureau of Indian Affairs conference, telling community leaders and health workers to be on the lookout for pimps preying on Alaska Native women and girls.

The pair gave a **a similar, shorter talk in October in Bethel**. For some, the stories were personal.

"We don't think that this is happening in our in small villages. It happens. It happened to my baby sister," said a woman from a rural hub city, who said her sister was 14 years old when she disappeared while visiting the Alaska Federation of Natives convention in Anchorage about four years ago.

Her family tracked the girl down at a downtown shelter for homeless teens, her body surging with drugs, said the woman, who I'm not identifying because it would also identify her sister.

"That really ruined her life," the woman said sharply. "I can't get my sister back the way she …"

Her voiced trailed off before a shell-shocked crowd of about 200 at the Egan Civic and Convention Center.

Sex traffickers use a combination of mind games and beatings, promises and drugs to control girls, authorities said.

Alaska Native girls are commonly lured from their hometowns by friends or relatives who are already working as prostitutes. They invite the girl to come hang out and go shopping rent-free. Others are recruited while visiting the city.

About one-third of the women arrested this year for prostitution in Anchorage are Alaska Native, according to Lacey's figures. It's unclear how many under-age Native girls are the victims of pimps or sex traffickers.

Four Anchorage residents **charged last year with running a sex-trafficking ring** got at least some of their "stable" of prostitutes from Alaska Native villages, prowling the AFN convention and streets surrounding the Covenant House shelter.

(**Read an account of phone calls** overheard on a jail phone, including one of the men talking about trying to "catch a Native" during AFN.)

It was an Alaska Native girl who moved to Anchorage to stay with family at the age of 12 who helped point investigators toward another prostitution kingpin: **Don Webster, also known as Jerry Starr**, Goeden said.

Webster, who was sentenced to 30 years in prison in 2008, had tried to recruit the girl, Goeden said.

The FBI agent got to know the teen during visits to a youth jail. The pair talked about how the girl ended up selling her body at age 14 in Anchorage.

"Her response to me was, 'I could be back home in the village where I could be having sex with my grandpa for free, or I could be here getting paid for me,'" Goeden said.

"I didn't know what to say. I had no idea how to respond to this little girl."

Regardless of where they're from, many prostitutes are former sexual abuse victims, Lacey told the crowd. Many are addicted to drugs, Lacey said.

"It used to be every prostitute we patted down had a crack pipe on them. Not any more, the drug of choice is heroin," she said after today's meeting.

Many are runaways. Under-age kids can't rent cars or rent hotel rooms, after all, and they have to get money somehow.

"(That) especially holds true when you get young girls from the villages that come in here and they come in to visit an auntie or whoever they're going to visit and they decide that they're gong to run away," Lacey said. Very quickly they're propositioned by someone trying to lead them on a path toward prostitution, she said.

Authorities in Alaska prefer to prosecute pimps under federal sex trafficking laws. Under those rules, anyone who uses force, coercion or fraud to sell commercial sex acts can be prosecuted for trafficking. The law also applies to anyone who pimps girls under the age of 18.

In comparison, the state law only allows for prosecution of trafficking if the victim is transferred across state lines, Lacey said. She is working with Goeden and the Children's Justice Act task force to strengthen state laws and mirror federal penalties.

People always ask why the girls don't leave pimps or sex traffickers on their own, the investigators told the crowd.

Some feel so bad about themselves they don't believe they deserve anything better, they said. Others don't know who to ask for help or are afraid of violent reprisals.

Some, particularly those from small communities, don't want their friends or family to know what's happening to them.

"These girls typically, almost always, do not see themselves as a victim," Goeden said

Have tips or questions for the investigators? You can reach Goeden at Jolene.goeden@ic.fbi.gov or by calling 276-4441 and Lacey at 786-8500 or klacey@ci.anchorage.ak.us.

Sex Trafficking In Alaska

SA Jolene Goeden
Sgt Kathy Lacey

The beginning….

Salvation Army obtained a grant – working group formed (foreign born victims)
APD obtained a grant – foreign born and domestic victims
Webster case
Innocence Lost Task Force – formed December 2008

Agenda

What is sex trafficking?
Stages of exploitation through sex trafficking
The victim
Sex Trafficking of Alaska Natives
Medical/social issues of victims
Why don't the girls just leave?
Warning signs?
What is needed?

What is human trafficking?

Recruitment, Harboring, Transportation, Provision or Obtaining of a Person

- For Labor or Services
- Through the use of FORCE, FRAUD, or COERCION

Trafficking may NOT involve smuggling. Victims do not have to be foreign born.

Definitions

FORCE: beatings, sexual assault, confinement
FRAUD: false/deceptive employment, false marriage, false promises, lies
COERCION: threat to family, threat of criminal process/deportation, drugs
- Threat can be direct or implied

Two Types Of Trafficking

Labor Trafficking
- domestic servitude
- industry
- migrant work

Sex Trafficking

SEX TRAFFICKING

The recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

Induced by force, fraud, or coercion OR Under the age of 18 (significant difference between Federal Statute and State Statute)

What is a commercial sex act?

Prostitution: The giving or receiving of sex or a sex act in exchange for compensation

Compensation can be anything of value – it does not have to be money

$$$$$$

Sex trafficking

vs.

Prostitution

Transition Continuum

I----------I----------I

couch surfing	survival sex	forced comm. sex

Homeless or runaway kids/young adults are very vulnerable.

Types of Prostitution

Street Walkers

In Call Escort and Massage Parlors

Out Call

Street Walkers

The Tracks
- -Spenard
- -Fairview
- -Mt. View

Addictions

Survival Sex

In Call/Out Call

All internet based

Postings on a variety of websites including - CraigsList, CityVibe, NaughtyNightLife, Backpage
Graphic ads
Slang and language specific to "pimp and ho" culture

Profile of a Sex Trafficking Victim

Majority have been victims of some type of abuse.
Majority have been runaways
Have unique status of being BOTH victim/offender

- Law enforcement (typically) treats them as offenders
- Social agencies treat them as victims

Profile continued…

Have been recruited into life by pimp or madam

Have been "broken" by pimp and "turned out"

Refer to pimp as "boyfriend" or "daddy"

"Easy in, hard out"

Typically very loyal

Chemical dependency issues

Sex Trafficking and Children

- One in seven children will be a runaway before the age of 18.
- One in three teens on the street will be lured into prostitution within 48 hours of leaving home.
- -NCMEC

Runaway and Sexual Exploitation

30% of shelter youth and 70% of street youth are victims of commercial sexual exploitation. They may engage or be coerced into prostitution for "survival sex" to meet daily needs for food, shelter, drugs.
75% of child victims engaged in prostitution are under the control of a pimp.

(American Journal of Public Health – Commercial Sexual Exploitation of Children in the U.S.)

Age of Entry

12-14 is the average age of entry into prostitution for girls in the U.S., boys enter at younger ages. (Estes & Weiner, 2005)
The average age of entry into prostitution for girls is between age 13 to 14. (NCMEC)

Alaska Native Children

Typical ages seen by LE – 15 to 17 yo

Alaska Native girls viewed by traffickers as "versatile" and vulnerable

Recruited by other AK Native girls

Very hard to quantify and come up with numbers

Alaska Native Women

Disproportionate number of Alaska Native women involved in prostitution by population

Vice numbers for arrests

Often starts as survival sex

Research & Trends

The Minnesota Indian Women's Resource Center

"Shattered Hearts – The Commerical Sexual Exploitation of American Indian Women and Girls in Minnesota"

www.miwrc.org

Anchorage Example

Alaska Native girl. Moved to Anchorage at age 12.
Started running away from home soon after got to Anchorage. Using alcohol heavily by age 13. In & out of MYC.
Recruited by first pimp at age 14. Traded and sold among pimps for next two years.
Assault charge – MYC until 18.
Returned to street. Pregnant.

STAGES

These stages apply to children and adults.

Recruitment

Grooming

Breaking In

RECRUITMENT

Schools
Malls
Bus Accommodation Center
McLaughlin
Covenant House
Home (generational)
Strip clubs/bars
Streets
Friends/family

Rural Recruitment

Usually through family/friends

Promises or lures of better life

Distance from family and other support structures

Grooming

"F with the mind and the body will follow."
Love and Attention
Isolate from family
Shower with gifts
Nails, hair, nice clothes
Photograph – make girl feel beautiful (model)
Alcohol and drugs

"He made me feel special. He found me when I was broken. He built me up. Broke me back down. And built me back up again to where I thought he was my everything."

Breaking In

Physical assaults
Sexual assaults
Sex with pimps male friends
DV type cycle – rollercoaster
Remove identity
"You owe me" or "Just this one time"

OBSTACLES IN IDENTIFICATION

Victims do not see themselves as victims
They DO NOT self report
General mistrust of law enforcement
Focused mistrust of law enforcement
Threats – fear of retaliation/violence
Believe no worse off then previous situation
Not familiar with area/location and the "system"
Don't know where to turn for help
Fear of being labeled a prostitute
Shame and guilt – blame self

Trauma Bond

Survival response

Dysfunctional attachment developed during risk

Results in trouble identifying – do not see themselves as a victim

Requires intensive therapy

Why don't they just leave?

Believe they aren't any worse off than previous situation.
Fear of being physically harmed
Fear of having another victim endure physical harm.
Threat to family
Shame
Inability to navigate the "system"

Don Webster a.k.a Jerry Starr

DON WEBSTER

AKA Jerry Starr
Several girls in "stable" at any given time
Recruited juveniles from other girls, the streets, adults at strip clubs
Promised better life
Crack – got girls addicted or increased addiction - Issues

Jerry Starr continued…

Took property and identification/isolated
Created a dependence – food, shelter, drugs
Created new "family"
Physical force/violence
The Box
Culture of fear. (Roller coaster)
Ages 13 to 30 y.o.

Life with Jerry….

"Life without the possibility of parole."

"He was our doctor. He would clean me up after a beating. He'd put me in the shower, tell me he loved me and tell me that I made him do it. Give me crack for my injuries and send me back out."

Victim's Journal Entry – Perception of Addiction

"Tastes like addiction. Smells like addiction. This is addiction feeding the addiction. You haven't eaten in days and your gums are bleeding. Swearing to God the pipes all you're needing. It's robbing or stealing or turning a trick. You do whatever it takes to suck on the devils dick. The more you feed it the harder it is to tame. Taking in the beast. Playing it like a game. Lying to yourself saying the same old shit. I don't need it. I just don't want to quit. The hunger of addiction calls. There's nothing romantic about it. Going through withdrawals you're craving a sample. Well here's a taste. Picking and scratching the scabs on your face. Your life support system is a syringe. Killing a piece of your soul every time you binge. Pray."

Victim read this at trial and it helped to establish her state of mind during the trafficking.

Jerry Starr continued…

Indicted Federally. Trial was in January 2008.
3 ½ week trial. 12 victims testified.
Convicted on 28 counts of sex trafficking and drug trafficking related charges.
Sentenced to 30 years, register as a SO, lifetime restraining order, $3.6 million restitution

How are the victims today??? Critical services needed for their recovery.

Medical Issues Associated with Prostitution

Traumatic Brain Injury – beatings, head injuries, black eyes with no recollection of being hit in eye.
Choking
STD's
Pregnancies – chemical use and without medical attention. Multiple miscarriages.
Broken bones (often untreated) – ribs common

Mental Health Issues Associated with Prostitution

PTSD
Bipolar Disorder
Anxiety Disorders
Depression
Eating disorders
Borderline
Chemical Dependence

Warning Signs

Signs of current physical abuse
Sexually transmitted diseases
Runaway status or history of running away
Expensive gifts – clothing, jewelry, etc.
Presence of an older boyfriend
Drug addiction
Withdrawal or lack of interest in previous activities

What is needed?

Education/prevention
More emergency and supportive housing
Medical and mental health services – providers need to have knowledge of sex trafficking
Help navigating the system – medical, mental health, legal, public assist, etc.
They need someone to believe in them and believe they are worth saving.

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Shattered Hearts

The Commercial Sexual Exploitation Of American Indian Women And Girls

Summary Report
November 2009

The Minnesota Indian Women's Resource Center

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Dedication

The full report and this executive summary are dedicated to Bill 'Big Wolf' Blake, who devoted his life to ensuring that Native children would have an environment where they could thrive in safety. Bill, a member of the Red Lake Nation and a Sergeant with the Minneapolis Police Department, was a passionate supporter of this project and an active participant in a meeting with American Indian elders, community leaders, and service providers to discuss this report and next steps just days before his unexpected death. Though we grieve his passing, we are immensely grateful for the time that we had him, and for his tireless work to prevent violence against our children. Thank you, Bill, and we wish you a good journey.

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We especially want to thank the American Indian elders, community leaders, and program staff who reviewed the draft of this report and provided us with feedback and guidance for communicating this very difficult and troubling information. Migwetch, pilamaya yelo, and nya:weh to:

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Joy Persall, Board Chair
Becky Beane, Vice Chair
Sue Kmetz, Treasurer
Janice Bad Moccasin
Yvonne Barrett
Margaret Boyer
Theresa Carr
Marlene Helgemo
Julie Nielson
Jim Nicholson

Background

The topic of this report is the commercial sexual exploitation of American Indian women and girls in Minnesota, including but not limited to sex trafficking. In 2006, the Legislature passed Minnesota Statute Section 299A.79 requiring the Commissioner of Public Safety to develop a plan to address current human trafficking and prevent future human trafficking in Minnesota. In 2008, Minneapolis was identified as one of thirteen U.S. cities having a high concentration of criminal activity involving the commercial sexual exploitation of juveniles.[1] The same year, The Advocates for Human Rights released its sex trafficking needs assessment, commissioned by the Minnesota Human Trafficking Task Force pursuant to a mandate from the Commissioner of Public Safety. Citing advocates' and law enforcement personnel's estimate that at least 345 American Indian women and girls had been sexually trafficked in Minnesota since 2005, the report noted the significant lack of information about American Indian victims and the relative absence of services to not only help them find safety, but to also heal from the trauma of life in prostitution.[2]

Police reports from Duluth showed that Native girls were being lured off reservations, taken onto ships in port, beaten, and gang-raped. Tribal advocates in South Dakota and Minnesota had also begun raising red flags, reporting that Native girls were being trafficked into prostitution, pornography, and strip shows over state lines and internationally to Mexico. In Canada, where the history and current circumstances of Native (Aboriginal) people closely parallel those of American Indians in the U.S., research studies were consistently finding Aboriginal women and girls to be hugely over-represented in the sex trade. An international report on the commercial sexual exploitation of children described Canadian Aboriginal and American Indian youth as being at greater risk than any other youth in Canada and the U.S. for sexual exploitation and trafficking.[3]

Closer to home, increasing numbers of Native women and girls entering MIWRC programs were disclosing that they had been trafficked into prostitution. MIWRC contacted other Native-specific agencies in the Twin Cities to ask what their caseworkers were seeing in terms of sexual exploitation of Native women and girls. Several reported a surprising number of younger Native women coming in for domestic violence and sexual assault services, later acknowledging that their assailant had trafficked them for prostitution.

Despite Minnesota's significant efforts to identify and meet the needs of sex trafficking victims, to our knowledge there has never been any report describing the commercial sexual exploitation of indigenous girls and women in Minnesota or even nationally. To address that gap in knowledge, MIWRC approached the W.K. Kellogg Foundation about support to develop a report which would aggregate what was known to date about the commercial sexual exploitation of American Indian women and girls in Minnesota, and to develop a set of recommendations for addressing the needs of Native victims. The W.K. Kellogg Foundation agreed to support the project, which began in November 2008 and resulted in the comprehensive report that is the basis for this summary. The full report can be accessed and downloaded from MIWRC's website at http://www.miwrc.org

In 2007, a long time resident of the Supportive Housing Program at the Minnesota Indian Women's Resource Center (MIWRC) came into a staff member's office, saying she was looking for a job but no one would give her a break. The resident was having trouble completing her GED due to dyslexia, and had very little useful work experience. She told the staff member that the only way she knew how to make money was to prostitute herself, and she did not want to go back to that.

Her story, which she was disclosing for the first time, was alarming. She had been pimped out by her mother at the age of 12 to support the mother's crack habit. By the time she was 14 she had begun to pimp out other young girls to feed her own drug addiction. At the point in time when she walked into the staff member's office, she had done hard time in prison, given birth to six children, and lost custody of them all. The MIWRC staff member realized that under current Minnesota law, this resident was a victim of a federal crime, the prostitution of a juvenile under the Trafficking Victims Protection Act (TVPA).

Rather than being recognized or protected as a trafficking victim, she was criminalized. Today, even though she has been repeatedly beaten and sexually assaulted by pimps and johns, she is ineligible for most federally-funded services and supports for victims of physical and sexual violence because of her prostitution arrests. And all she wants to know is, who will ever give her a chance?

Sources of information used this report include:

Two regional round table discussions (Minneapolis and Duluth) with a total of 30 advocates from programs that provide outreach and crisis services to American Indian women and girls (housing and other basic needs, domestic violence and sexual assault, chemical dependency)

- Data collected during intake interviews with 95 clients entering MIWRC programs, over a 6-month period
- 2007 Minnesota Student Survey data tables provided by the Minnesota Department of Health and the Minnesota Department of Education
- Secondary analysis of non-reservation American Indian data from the 2006 Wilder Research study of homelessness in Minnesota
- Publications and reports developed by or for governmental agencies, advocacy groups, and foundations in the U.S. and Canada
- Articles from human services, social services, law enforcement, and social science journals in the U.S. and Canada
- Interviews and meetings with law enforcement and corrections personnel

Limitations of the report

The time frame for this project was quite short, which limited the sources of information that could be accessed. We did not use a systematic approach in identifying all sources of relevant data or apply a rigorous framework to evaluating the cited sources. The data collected by MIWRC involved a small sample in limited geographic areas. Therefore, what we report here should be considered an exploratory, preliminary study.

Definitions and Terms

We recognize that men and boys are also victims of sexual exploitation, and our focus on women and girls is not intended to deny the experiences of male victims. Our intent is to examine the impacts that are gender-specific to females, so these definitions all refer to women and girls.

American Indian, Aboriginal, Native

We use the terms American Indian or Native when referring to indigenous people in the U.S., and Aboriginal or Native when referring to indigenous people in Canada.

Adolescents, girls, young adults, and youth

The terms "girls" and "adolescents" are used to describe females ages 12 to 18. The term "youth" includes young women and young men ages 12 to 24.

Commercial sexual exploitation

Commercial sexual exploitation is defined as the exploitation of a woman's or girl's sexuality for financial or other non-monetary gains, in manner that involves significant benefits to the exploiter and violates the exploited person's human right to dignity, equality, autonomy, and physical and mental well-being.[4]

Sex trade

The sex trade is the "business" of commercial sexual exploitation—transactions in which sexually-oriented activity is exchanged for food, shelter, drugs, transportation, approval, money, or safety. Similar to the slave trade, the vast majority of women and girls in the sex trade are exploited in exchange for survival needs and/or the benefit of a more powerful person.[6] The sex trade includes:

- Street prostitution
- Escort agencies
- Massage parlors
- Brothels, "trick pads" and "sex party houses"
- Bars and clubs that sell "lap dances" and "private dances"
- Businesses that organize and sell "private parties" with strippers and nude dancers
- Strip clubs
- Pornography and live "sex shows"
- Phone and Internet sex

Prostitution

Prostitution is defined as the act of engaging in sexual intercourse or performing other sexual acts in exchange for money or other considerations, including food, shelter, transportation and other basic needs. We use the terms "in prostitution" or "involved in prostitution," and "prostituted" rather than "prostitute" because we find it unreasonable to assign a label to an exploited person that does not acknowledge the fact that she is being exploited. We choose not to use the term "sex worker" because it implies that prostitution is a career choice rather than a form of sexual violence.

We do not refer to battered women as 'battering workers'. And just as we would not turn a woman into the harm done to her (we don't refer to a woman who has been battered as a 'batteree) we should not call a woman who has been prostituted a "prostitute." – Melissa Farley [5]

Sex trafficking

International, federal, and Minnesota laws all reflect the idea that trafficking involves the recruiting, harboring, receipt or transportation of persons in order to exploit them. The federal trafficking law requires that three elements be present for a crime to be considered trafficking (process, means, and end). In Minnesota, the victim is not required to establish "means" to prove that she did not consent. Rather, courts determine responsibility based on the conduct of the trafficker.[7]

* Adapted from the Freedom Network Institute on Human Trafficking.

The Trafficking Victims Protection Act of 2000 (federal law) defines sex trafficking as:

The recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is under 18 years of age. [8]

Minnesota law characterizes sex trafficking as a type of promotion of prostitution. In their 2008 sex trafficking needs assessment report to the State of Minnesota, The Advocates for Human Rights described the differences in sex trafficking definitions in Minnesota state law and federal law:

"... federal law requires that traffickers use the means of 'force, fraud or coercion' to recruit or maintain an adult in sex trafficking while Minnesota does not. Minnesota law recognizes that a person can never consent to being sexually exploited and considers individuals who have been prostituted by others as trafficking victims. Federal law requires an assessment of the level of 'consent' of the prostituted person in determining whether the crime of trafficking has occurred." [9]

In the research literature described later in this summary, the average age of sex trade entry for women and girls in prostitution is age 12-14, which suggests that the majority of adult prostituted women were initially victims of juvenile sex trafficking under both federal and Minnesota law. We consider sex trafficking and pimping to be overlapping issues, since women's experiences in prostitution and sex trafficking are quite similar in regard to violence, control, exploitation, and the level of victimization.[10] Therefore, in this summary and the report that is its basis, we use the State of Minnesota's definition for sex trafficking, with the understanding that women and girls involved in "survival sex" experience deliberate exploitation of their vulnerability, with a clear sexual benefit to the exploiter:

... receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of an individual. [11]

Some states do not allow juveniles to be considered the victims of statutory sex crimes after the age of 15.[12] In Minnesota, the age of consent is 16, though criminal charges may not result in a conviction if the perpetrator is only a few years older than the victim. For instance, if the victim is 13, 14, or 15, coercion must be proven to convict the perpetrator of first-degree criminal sexual conduct if he is less than 48 months older than the victim.[13] The Office of Juvenile Justice and Delinquency Prevention described the dilemma confronting police officers at the point of contact with juveniles involved in prostitution:

On the one hand, they are offenders involved in illegal and delinquent behavior. On the other, they are children who are being victimized by unscrupulous adults.[14]

The Advocates for Human Rights report that on May 21, 2009, the Minnesota Legislature unanimously passed and the governor signed a bill amending Minnesota's sex trafficking law, which will enable law enforcement and prosecutors to better hold the perpetrators accountable. Specifically, the amendments

Provide law enforcement and prosecutors with the ability to arrest and charge sex traffickers with higher penalties where an offender repeatedly traffics individuals into prostitution, where bodily harm is inflicted, where an individual is held more than 180 days, or where more than one victim is involved;

- Increase the fines for those who sell human beings for sex;
- Criminalize the actions of those individuals who receive profit from sex trafficking;
- Categorize sex trafficking with other "crimes of violence" to ensure that those who sell others for sex are prohibited from possessing firearms; and
- Add sex trafficking victims to those victims of "violent crime" who are protected from employer retaliation if they participate in criminal proceedings against their traffickers.[15]

Victim of commercial sexual exploitation

The definition for "victim" is perhaps the most contested and least resolved issue related to sex trafficking and other forms of commercial sexual exploitation. If the federal definition for sex trafficking is used, a victim must prove she did not consent. This requirement has led to controversy over whether a woman or child can ever give informed consent to be purchased and used for another person's benefit or gratification without regard for her own safety or well-being. Minnesota law defines a sex trafficking victim as anyone subjected to the practices defined as sex trafficking.[16] Though the conduct of the trafficker is supposed to be the basis used by Minnesota courts to determine whether a person has been trafficked for sexual purposes, to date no one has ever been prosecuted for sex trafficking under the Minnesota law, so there is no "test case" for establishing victimization.

With the understanding that women and girls involved in "survival sex" experience deliberate sexual exploitation of their vulnerability with a clear benefit to the exploiter, the definition we use in this report for a victim of commercial sexual exploitation (which includes trafficking victims) is:

Any woman or girl who has been sexually exploited for the benefit of her exploiter, whether the exploiter receives some financial benefit or gains other things of value, including goods, power, or status. If the victim is under 18, she is automatically considered a sex trafficking victim.

Survival sex

We use the term "survival sex" to describe the exchange of sex for money and other considerations such as food, shelter, transportation, or safety by women and girls who often do not think of themselves as involved in prostitution and view this exchange as "what I have to do to survive."

Runaway and thrown-away

A runaway is defined as a girl who leaves home or a place of legal residence without the permission of parent(s) or legal guardian(s) for at least 24 hours. If a girl has been told to leave or was locked out of her home and told not to return, if she is a runaway who was not actively sought by her parent after leaving, or if her parent(s) or guardian(s) failed to provide food or basic needs and she left home to meet those needs, we consider her to be thrown-away.

Pimp or trafficker

We use both terms to describe a person who 1) promotes and/or profits from the sale and/or abuse of another person's body or sexuality for sexual purposes, or 2) who promotes and/or profits from the production and/or sale of sexual images made of that person.

John

Because it is the most recognized term for a purchaser for sexual services, we use the term john to describe an adult male who provides some type of compensation to engage in a sexual encounter with a woman or girl. It is important to remember that if the girl is under the age of 18, this person is a sex offender.

The Context

Understanding the context of Native women's experience in the history of this nation is critical for understanding Native women's and girls' unique vulnerability to commercial sexual exploitation. Four fundamental beliefs have been found to be essential for a coherent and resilient sense of self, which protects a person against sexual exploitation and/or helps a victim of such exploitation to heal:

- The world is a good and rewarding place
- The world is predictable, meaningful, and fair
- I am a worthy person
- People are trustworthy.[21]

The traumatic experiences of American Indian people during the colonial era and their constant exposure to new losses and new trauma each generation have had a devastating effect on Native people, families, and communities, and on their ability to sustain those four beliefs.

In the process of developing trade and military relationships with American Indian villages, early British colonists viewed the sexual and marital norms of Native communities through their own ethnocentric lens. As a result, they interpreted Native women's sexual and reproductive freedom to be proof of their promiscuity and depravity, and Native men's respectful acceptance of those freedoms as proof that they were too weak to assert their rightful authority over their women or their land. These attitudes justified colonists' assaults on Native women and Native land.

Following the establishment of the United States, the U.S. Supreme Court and Congress redefined the status of American Indian people, declaring that they were wards of the U.S. government and citizens of "dependent nations," stripping them of their rights to their land, to self-governance, and to negotiating as independent nations. As the new nation expanded westward, the U.S. government adopted formal extermination policies to clear Native-occupied land for settlement.[22] Native women were primary targets of these policies due to their reproductive ability to assure the continuance of their people.[23]

A series of additional U.S. government policies further eliminated American Indians' ability to be self-sufficient, to transmit their language and culture to new generations, and to retain sovereignty over economic and political decisions that affected them. These included:

- The relocation of Indian people to remote rural reservations by the U.S. Army, where they were forced to depend on the U.S. government for all of their basic needs.
- The 1887 Dawes Allotment Act that split reservations into 160-acre parcels, each allotted to an individual head of a family. This legislation allowed the U.S. government to sell all unallotted land. In 1891 alone, the government sold over 17 million acres of Indian land.[27]

[Indian women are] of that tender Composition, as if they were design'd rather for the Bed than Bondage…[the] multiplicity of Gallants [was] never a Stain to a Female's Reputation …[the] more Whorish, the more Honorable. [John Lawson, Surveyor for the Carolina Colony][17]

[The men] are courteous and polite to the women, gentle, tender, and fondling even to an appearance of effeminacy. [King's Botanist John Bartram, describing Indians in the colonial Southeast][18]

I heard one man say that he had cut out a [Native] woman's private parts and had them for exhibition on a stick…I also heard of numerous instances in which men had cut out the private parts of females and stretched them over the saddle-bows and wore them over their hats while riding in the ranks. [U.S. Army Lieutenant James Connor describing Colonel Chivington's attack on Black Kettle's Cheyenne camp at Sand Creek, November 28, 1864][19]

The camp had been fired and the dead bodies of some twenty-two women and children were lying scattered over the ground; those who had been wounded in the first instance, had their brains beaten out with stones. Two of the best-looking of the squaws were lying in such a position, and from the appearance of the genital organs and of their wounds, there can be no doubt that they were first ravished and then shot dead. Nearly all the dead were mutilated. [U.S. Calvary Lieutenant Royal E. Whitman, commanding officer at Camp Grant, describing Tucson citizens' massacre of peaceful Indians at the camp, September 1871][20]

[In the mission schools] these children were being indoctrinated into the rituals and beliefs of the Catholic Church. It was not out of the question for the abusers to warn the children that if they spoke about what happened to them that they would be committing a mortal sin and they would burn in hell…the children were required to go to confession at least once per week. Can you imagine their fear when they looked through the confessional screen and saw the face of the priest that had been abusing them? What were they to think? Don't you know that they were already suffering from the guilt pushed upon them by their abusers? When they saw the priest behind the confessional screen they knew that they had no one and nowhere they could turn for help. They buried what happened to them deep inside. [Tim Giago][24]

The haunting memories of forced relocation and broken promises on the part of the federal government have affected the overall well being of the American Indian community. This has resulted in high rates of severe mental and physical health disparities. [National Council of Urban Indian Health][25]

The sterilization of Indian women affected their families and friends: many marriages ended in divorce, and numerous friendships became estranged or dissolved completely. The women had to deal with higher rates of marital problems, alcoholism, drug abuse, psychological difficulties, shame, and guilt. Sterilization abuse affected the entire Indian community. [Lawrence, 2000][26]

- The removal of Native children from their homes, often forcibly, to attend government-funded residential boarding schools where they were severely punished for speaking their Native language, pressured to adopt the "superior" values and behaviors of the dominant Christian society, and subjected to physical and sexual abuse by school teachers and administrators.[28]
- The Indian Relocation Program initiated in 1952, which promised financial support and good jobs to reservation Indians if they moved to major cities. By 1980, 75,000 had relocated, and when the promised assistance did not materialize, the result was high rates of severe mental and physical health disparities, unemployment, poverty, and alcohol abuse.[29]
- Public Law 280, which authorized some states to unilaterally assume jurisdiction over criminal and civil matters on reservations. In Minnesota, only two tribes retained federal jurisdiction for criminal matters.[30]
- A 1953 Congressional resolution to end federal relations with tribes as quickly as possible, resulting in the termination of 109 tribes by the early 1960s.[31]
- Partnerships with mainstream organizations to systematically remove Native children from their homes for adoption into white families, including the Indian Adoption Project and the Adoption Resource Exchange of North America (ARENA). By 1969, 25-35% of all Native children had been separated from their families, and between 1941 and 1978, 68% of all Native children had been removed from their homes and placed in orphanages or white foster homes, or adopted into white families.[32]
- The sterilization of American Indian women and girls as young as 15 in an effort to control Native populations. By 1975, an estimated 25,000 American Indian women and girls had been given hysterectomies by Indian Health Services physicians without their consent, and sometimes without their knowledge during appendectomies and other surgeries.[33]

The traumatic experiences of American Indian people during the colonial era and their constant exposure to new losses and government-sponsored new trauma each generation significantly reduced the ability of Native people, families, and communities to develop and sustain the four beliefs found to be essential for a coherent and resilient sense of self. The absence of time and safety to grieve losses and heal from trauma resulted in generational trauma, the passing of trauma responses to the next generation.[34] Research has found that when a dominant society refuses to recognize a people's grief and losses as legitimate, the result of this disenfranchised grief is sadness, anger, and shame, feeling helpless and powerless, struggles with feelings of inferiority, and difficulty with self-identity.[35] Together, generational trauma and disenfranchised grief have had a profound impact on Native communities' ability to protect their women and girls or respond in positive ways to those that are victims of sexual exploitation.

Today, Native women continue to have the highest rates of physical and sexual victimization in the nation. Over one-third of Native women will be raped during their lifetimes, compared to less than one in five women in the general population.[36] Native women in the U.S. are more than 2.5 times more likely to be raped or sexually assaulted than women in the general population.[37] Native women are also more frequently injured during a sexual assault. Half of the Native women who reported having been raped in the National Crime Victim Survey also reported sustaining physical injuries during the rape, compared to 30 percent of U.S. women in the general population.[38]

Lifetime rates of women's physical and sexual victimization, by race

Year	Authors	n	Sample	Type of victimization	AI/AN	White	Black	Hisp
1999	Walters & Simon[39]	68	New York City	Nonpartner sexual violence	27%			
1999	Walters & Simon[40]	68	New York City	Interpersonal violence	25%			
2000	Tjaden & Thoennes[41]	86	National	Intimate partner rape	16%	8%	7%	8%
1998	Tjaden & Thoennes[42]	86	National	Rape	34%	18%	19%	15%
2004	Malcoe, Duran & Montgomery[43]	312	Oklahoma	Severe physical intimate partner violence	39%			
2004	Malcoe & Duran[44]	422	Oklahoma	Intimate partner sexual violence	49%			
2003	Bohn, 2003[45]	30	Minnesota	Intimate partner physical or sexual violence	87%			

*Note: Comparisons with other racial/ethnic groups are given when multiple groups were included in the study. Otherwise, the entire sample for the study was American Indian.

Though not specific to American Indian women or girls, research with prostituted women and girls in the U.S. has found even higher rates of physical and sexual violence:

- At least 84% had been victims of aggravated assault
- 49% had been kidnapped
- 53% had been victims of sexual torture, including being burned, gagged, hung, and being bound while body parts were mutilated by pinching, clamping, and stapling.[46]

Canadian studies of prostituted girls and women, many of whom were Native, reported that most had experienced extreme violent victimization:

- 75% had sustained severe physical injuries from pimps and johns that included stabbings, beatings, broken bones (jaws, ribs, collar bones, fingers), and spinal injuries.[47]
- Half had suffered concussions and fractured skulls when pimps and/or johns assaulted them with baseball bats and crowbars, or slammed their heads against walls or car dashboards.[48]
- 68% were recently raped and 72% had been kidnapped.[49]
- 90% had been physically assaulted in prostitution, 82% of whom described johns as their assailants.[50]
- 83-88% describe verbal assaults as an intrinsic and extremely damaging part of prostitution. Johns called them names during sex intended to humiliate, eroticize, or justify the john's treatment of the women, often using racial slurs.
- In addition to violence at the hands of johns, the vast majority reported extreme physical and sexual violence by pimps, boyfriends, and husbands.[51,54,55,56,57]
- The 1985 death rate for prostituted women was 40 times higher than that of the general population. Over 500 Native women have been reported missing over the past 30 years.[58,59]

For Native women, "colonial trauma response" resulting from violent victimization adds another layer of psychological impact to generational trauma and disenfranchised grief. Research has found that whenever a Native woman experiences racism, abuse, and/or injustice, it connects her to a collective, historical sense of injustice and trauma. Just as people with post-traumatic stress disorder are "triggered" to relive traumatic events they have experienced, Native women are "triggered" to connect their own traumatic experiences to those experienced by their female ancestors, in a very immediate and emotional way.[60] In particular, sexual assault, prostitution, and sex trafficking are experienced as a continuation of the colonization process, in which

All you have to do is drive down First Street and ask somebody. It is so frickin' visible. I can't even believe it...Where we're located right on the corner of First Ave East and First Street down here. [Second speaker] In Duluth. [First speaker] It's prime area for street prostitution and there's [three strip bars] there. So now, right around the corner from North Shore is another strip place, and so there's a lot that happens right there. The liquor store is right there too. So, especially in the summer...it's not invisible by any means, way, shape or form. If you even sit on a corner for a day you'll know who they are. Because people are coming, they're just getting into cars...I've overheard people negotiating prices, so it's really visible [Advocates]

I work in the housing program portion of a women's shelter. I see the [Native] women and we accept the women escaping from prostitution. I did my data collection for a report and I couldn't believe how many people that we had...it was pretty close to 30 women, escaped from prostitution in a few short months. [Advocate]

The [Native] women are inside the bars and prostitution is happening in the bars, which makes it harder for the police to catch because it's not an outside thing. I see more of that coming down here...it's not just the pimps, it's the establishments that are making money off that girl being in the bar, bringing those patrons in because they know she's there on Wednesdays. And the young girls that want to drink, they get a fake ID. That's the prime way to get them in and recruit them. [Advocate]

Native women's sacred selves are exploited for the gratification of a person who claims the right to do so while ignoring or invalidating the impact on the woman herself.

Prevalence

Involvement in Prostitution

Advocates attending the two regional round tables reported that Native women's and girls' involvement in the sex trade is widespread. Advocates in the Duluth area reported that Native women and girls are highly visible in street prostitution and strip bars, especially when ships are in port and during times of the year when tourism is highest, such as hunting season and summer months. In Minneapolis, advocates reported that the most visible involvement of Native women in prostitution occurs in bars, especially strip bars. Their comments also suggest a large number of prostituted Native women seeking to enter women's shelters to escape prostitution.

The data collected from 95 Native women and girls entering MIWRC programs also suggest that the trafficking of Native girls and women into prostitution is a significant problem in Minnesota. Overall, 40 percent of new clients (37 Native women and girls over a 6-month period) reported involvement in some type of commercial sexual exploitation and 27 percent reported experiences consistent with the definition of a sex trafficking victim under current Minnesota law.

Very few research reports or publications have addressed the number of Native women and girls involved in prostitution in Minnesota. Prostitution arrests are often used to estimate the amount of prostitution-related activity in a given area. In a study based on analysis of Hennepin County Corrections data, researchers reported 70 women on probation for prostitution-related offenses in Hennepin County, 24 percent of which were American Indian.[61]

Over the six months that MIWRC screened incoming clients for sex trafficking, whenever one reported trading sex for shelter, food, drugs, money, or something else of value, MIWRC staff asked whether she had ever been arrested for a prostitution-related offense. Overall, 46 percent of those reporting survival sex or prostitution also reported at least one prostitution arrest, and 16 percent had three or more arrests. Of the 25 Native women and girls who met the state definition of a trafficking victim at the time they entered prostitution, 72 percent had been arrested for prostitution one or more times.

Data provided to MIWRC by Hennepin County Corrections show a total of 313 arrests for prostitution-related offenses in 2008. Twelve (4%) were American Indian women arrested for prostitution or loitering with intent to commit prostitution, almost twice their representation (2.2%) in the county's adult female population. Minneapolis Police Department data show a significant decline in the number of Native women arrested for prostitution-related offenses from 2004 to 2008, but a Minneapolis police officer reported that this reflects the low priority given to addressing prostitution when there has been no public outcry, rather than an actual decline in Native women's involvement in prostitution.[62]

We were unable to access any recent data showing the number of Native girls apprehended for prostitution-related offenses. A Minneapolis police officer and a Hennepin County Corrections staff member reported that by County policy, juveniles are no longer arrested for prostitution, but may instead be arrested for a status offense such as truancy or runaway.[63,64,65] However, we were also unable to access any city, county, or state law enforcement data showing the number of truant or runaway American Indian juvenile females.

In 2007, the Minnesota Office of Justice Programs conducted an online human trafficking survey with service providers, nurses, and law enforcement statewide. Twelve respondents reported working with a total of 345 American Indian female victims of sex trafficking over the previous three years.[66] In response to OJP's 2008 human trafficking survey, twelve service providers reported working with a total of 79 American Indian sex trafficking victims in the three-year period prior to the interview.[67] The significant difference in the 2007 and 2008 numbers, which overlap by two years, suggests that one or more of the 2007 providers did not participate in the 2008 survey. These numbers were also estimates, since most respondents did not use a systematic method to track the number of Native victims.[68,69]

In the absence of data to establish prevalence, estimates by advocacy groups working with women and girls in prostitution are often considered the most reliable. At Breaking Free, a non-profit organization serving women and girls in prostitution, Executive Director Vednita Carter has estimated that between 8,000 to 12,000 Minnesota women and children of all races are involved in prostitution on any given night, statewide.[70,71] PRIDE (from Prostitution to Independence, Dignity and Equality), a program of the Family and Children Service of Minneapolis, estimates that there are at least 1,000 juveniles currently in prostitution in Minnesota.[72] Neither of these advocacy organizations provided estimates for different racial groups.

In contrast to the absence of published reports on Native women's and girls' involvement in the sex trade in the U.S., there have been a fair number of Canadian studies on Aboriginal women's and girls' involvement in prostitution and other forms of commercial sexual exploitation. In all of the studies identified for inclusion in this report, the number of prostituted Native women and girls identified through the research was hugely disproportionate to their representation in the population. A national study involving 22 communities across Canada found that Aboriginal children represented up to 90 percent of children in the sex trade in some communities.[77] More recently, Canadian youth crime expert Michael Chettleburgh estimated that 90 percent of all urban Canadian teenagers in prostitution are Aboriginal.[78] In five surveys of street-involved youth across British Columbia between 2000 and 2006, the McCreary

Minneapolis arrests for prostitution-related offenses, American Indian females 2004 - 2008*

	2004	2005	2006	2007	2008
Prostitution	83	57	70	53	9
Loitering with intent	28	11	24	28	3
Promoting prostitution	1	3	2	3	-
Total prostitution-related arrests	112	71	96	84	12

*Data faxed to MIWRC by the Minneapolis Police Department on December 19, 2008.

Percent of incoming MIWRC clients reporting involvement in prostitution and pornography at intake* (n=95)

Exchanged sex for:	Number	Percent
Shelter	24	25%
Food	14	15%
Money	32	34%
Drugs or alcohol	30	32%
Transportation	10	11%
Some other type of assistance	5	5%
Was involved in:		
Asked to recruit or pimp other girls	21	22%
Pressured/forced to pose for nude photos or videos	11	12%

*Some reported multiple types of sexual exploitation, so percentages may total more than 100%.

Percent of incoming MIWRC clients trafficked into prostitution by another person* (n=95)

	Number	Percent
Shelter	10	11%
Food	7	7%
Money	17	18%
Drugs or alcohol	17	18%
Transportation	4	4%
Some other benefit	5	5%

*Some reported being trafficked for multiple benefits, so percentages may total more than 100%.

Native representation in Canadian studies of women and girls in prostitution

Year	Region	% found to be Native	Native % of population
2002	Vancouver BC [73]	52%	1.7-7.0%
2001	Victoria BC [74]	15%	2.0%
2001	Canada [75]	14-60%	2 to 3%
2001	Vancouver BC [76]	63%	1.7-7.0%

A lot of the [youth] drop-in centers now have computers...In St. Paul, they actually cleaned out their computers not too long ago, and they found quite a few of their youth that were uploading pictures off their phones onto the computers to post them onto Craigslist. [Advocate]

My Space too. That's what I see with a lot of young girls, and starting to get victimized by men getting them to show their body or their body parts. [Second speaker] Sexting. That sex texting stuff too, sending nude photos to people through their phones. [Advocate]

Centre Society, a non-profit community-based youth health research and youth engagement organization, found:

- The proportion of female Aboriginal street youth increased from 38% in the 2000 survey to 56% in the 2006 survey.
- Across all five surveys, 34-57% of the street youth reporting involvement in prostitution were Aboriginal.
- Of the street youth that were Native females, the various surveys found that 24-56% had been prostituted.[79]

Involvement in the Internet Sex Trade

Several of the advocates attending the regional round tables described younger Native girls' use of technology and experiences with being caught up in the internet-based sex trade. The advocates identified Craigslist as a site commonly used to prostitute Native girls and women, and noted pimps' use of the internet to recruit Native teen girls from the Twin Cities for the stripping and prostitution circuit in the northern part of the state during hunting and tourist seasons. A Minneapolis police officer with extensive experience working with prostitution crime confirmed that in the Twin Cities, Craigslist is a primary venue for the commercial sexual exploitation of Native women and underage girls.[80] Canadian research has also found Native women and girls involved in online pornography. In Vancouver, British Columbia, almost two-thirds (64%) of the prostituted women interviewed for a study (over half of whom were Aboriginal) reported having had pornography made of them.[81]

In 1999, the Hofstede Committee Report on juvenile prostitution in Minnesota called attention to the ease with which johns could use the Internet to download naked images of underage girls, converse with their pimps, make appointments, and still retain anonymity. The Committee noted that law enforcement was challenged in two ways: determining the girls' ages, and distinguishing between legal escorts and prostituting women.[82] A recent study of prostituted women and girls in Chicago found that almost ten percent were in contact with johns through the Internet, specifically Craigslist. In addition to the online sex trade options described 10 years earlier by the Hofstede Committee, johns were also able to access live, interactive strip shows and sex shows via web-cam, still relatively invisible to law enforcement.[83]

Patterns in Entering the Sex Trade

Age of Entry

Ten years ago, the Hofstede Report on juvenile sex trafficking reported that 14 was the average age at which girls entered prostitution in Minnesota.[84] In the past few years, Vednita Carter, Executive Director of Breaking Free, has described the average age of

entry into prostitution as 13, but she recently announced that her organization is seeing a larger number of younger girls.[85] At the round tables hosted by MIWRC in Duluth and Minneapolis, advocates reported that the Native women and girls they work with have entered prostitution and other types of commercial sexual exploitation at various ages related to specific life circumstances. Most agreed that Native girls in prostitution enter the sex trade around the age of 13, but some noted that women in their late 20s and early 30s enter the sex trade to support their children when their 5-year eligibility for public assistance has ended and they are unable to find jobs.

Of the 37 Native women and girls reporting commercial sexual exploitation during intake at the Minnesota Indian Women's Resource Center, almost half (42%) were 15 or younger when they first entered the sex trade, and over 20 percent were 12 or younger. One 14-year-old had been trafficked into pornography at the age of 11, reporting that she had been photographed or filmed for pornography 10 times in the previous six months. Almost one-fourth (24%) of the incoming clients reporting involvement in prostitution had entered at age 27 or older, which supports the advocates' emphasis on Native mothers' vulnerability when their public assistance eligibility has ended.

In Seattle, an area similar to Minneapolis in its population of low-income American Indians, findings from studies of women and girls in prostitution found similar early ages of entry.

- In one study with women and girls in street prostitution, escort services, strip clubs, phone sex, and massage parlors, 100% had entered the sex trade between the ages of 12 and 14.[86]
- A study published in June 2008 found that girls entered prostitution around the age of 12 or 13.[87]

No research was identified that estimated the age of entry for prostituted American Indian girls or women in the U.S. However, several Canadian studies reported the average age of Aboriginal girls entering the sex trade as 14, noting that some start as early as the age of nine.[88,89,90,91,92] The most recent Canadian research we identified suggests that Aboriginal girls are entering prostitution at younger ages than in years past. Citizen groups conducting safety patrols in Winnipeg have reported children as young as eight years old being approached on the street or in back lanes by men in vehicles, presumably for the purpose of sexual exploitation.[93] A 2002 study by the Urban Native Youth Association in Vancouver also found commercial sexual exploitation of children as young as nine, with 11-13 being the average age of entering prostitution.[94]

Modes of Entry

Stripping, Exotic Dancing, and Escort

The advocates attending the two regional round tables described bars and strip clubs as prime recruiting grounds for pimps, asserting that bar and club owners are often complicit. In both Duluth and Minneapolis, advocates mentioned a "circuit" moving Native girls recruited as "dancers" to various strip clubs throughout

Age when MIWRC clients entered prostitution/ pornography (n=33)*

Age at entry	Number	Percent
8-12	7	21%
13-15	7	21%
16-17	7	21%
18-23	5	15%
27-38	6	18%
39-55	1	6%

*Age was not documented for four clients that reported involvement in prostitution

Everybody I've come across has been young [at the time they entered prostitution] Like, 12, 13, 14 sometimes 15. I met one woman who was maybe 19, she was really the exception. There's definitely that 12-15 range. They seem like babies! [Second speaker] I think the other age group are those [ages] 20 to 30 with young kids and their 5-year MFIP has run out. [Advocates]

Several of [our prostituted clients] have talked about when they started, and the youngest so far was 12. [Advocate]

They're letting underage girls into stripping. They [pimps] helping them get their fake IDs and stuff. There are 16, 15-year-olds stripping in town here. [Advocate]

Some pimp, male or female, has put this all together and provided everything, and just told her 'All you have to do is dance.' When you talk about entering prostitution, dancing doesn't seem as harsh to the individual as actually street-walking. You don't look at it as if you're doing anything wrong, because you go to clubs and nowadays the dancers in clubs are more seductive than some of the stuff the girls do on the stage. [Advocate]

You can walk into any strip club and you know, the people who work there are recruiters, so it seems so much less dangerous. I don't think other people think of it as sexual exploitation.... [Second speaker] There's a couple of pimps up at [a local club] right now who've got a couple of girls...I know a few people who started off cocktail waitressing at a strip club and then it becomes normalized and then they're stripping. I had a friend who was cocktail waitressing and then she got a $4,000 tip from a football player, and then after that she was stripping. [Advocates]

[One of the girls in my family] she asked her father 'What do you think about stripping?' because her friends are doing it and it's just becoming more and more common. [Advocate]

One woman [dancing in a rural Midwest strip club] had her pimp along...and she had to meet the quota. So she had to do whatever it takes to get that money. The men shoved bullets up her, beer bottles, shoved dollar bills up her. [Heidi Somerset, a survivor of prostitution and stripping, when giving a talk in Moorhead, Minnesota][93]

the state and sometimes to other states. A study involving interviews with dancers in rural Midwest strip clubs found that in addition to working as strippers, many reported being required to accept degrading treatment by customers, provide the club manager with sex during the "job interview," and allow the manager to prostitute them to customers.[96]

At the round tables, advocates in Minneapolis and Duluth reported that once Native girls begin dancing in strip clubs, they are quickly taken over by a pimp who moves them from place to place, prostituting them out of the bars and clubs in the circuit. Findings from the 2007 and 2008 surveys of advocates and law enforcement personnel conducted by the Minnesota Office of Justice Programs support the round table advocates' reports. In both OJP surveys, respondents reported that traffickers were moving Native female victims from reservations to the Twin City metro and other cities, from one city to another, and from Minnesota to another state.[97,98]

Regardless of what part of the sex trade girls enter, research has found that they are frequently involved in more than one type of commercial sexual exploitation, and pimps are usually involved in recruiting or "managing" them. A study in Chicago found that 28 percent of prostituted girls started as escorts when first recruited, and at the time of the interview 41 percent were working for an escort service. Almost 93 percent of those that entered the sex trade via an escort service had a pimp at recruitment. In addition to involvement in prostitution via escort businesses, 43 percent were also trading sex at private parties and 68 percent were also trading sex at a hotel.[99]

Canadian research has found similar patterns. Aboriginal girls are often recruited as dancers in their early teens and then moved across Canadian provinces for "dance shows," where they quickly enter prostitution. Eventually losing ties with their communities, they become even more vulnerable as they age, and are often moved by pimps into more dangerous areas of the sex trade.[100] Similar to the U.S. studies, most are involved in multiple areas of the sex trade. A study in Victoria, BC found Aboriginal and other women in prostitution involved in one or more other types of commercial sexual exploitation, including street prostitution, strip bars, and escort agencies. Though they represented only two percent of the region's population, 15 percent of the women and girls in escort services were Aboriginal.[101]

Recruitment by Pimps and Gangs

At the round tables, advocates reported that a significant number of the prostituted Native girls and women they see were recruited into the sex trade by pimps (male and female), gang members (male and female), or Native girls or women managed by pimps. Advocates in both Duluth and Minneapolis described the ways that pimps and their recruiters target the most vulnerable American Indian girls and women:

- Recruiting young Native girls at parties in houses that are deliberately set up for recruitment purposes—on reservations, in Duluth, and in the Twin Cities
- Inviting young Native girls on reservations or in Duluth to go on a road trip or to a party, taking them further and further from home until they have lost all contact with people that might help them escape
- Posing as "boyfriends" interested in a long-term commitment, then convincing the girls to begin stripping or prostituting to "help out"

- Promising girls "quick money" and a glamorous career as a dancer, then using force or persuasion to convince them to begin prostituting
- Approaching girls ages 12-14 on the street in poor neighborhoods to offer money for nude photos, work as "exotic dancers," or other sex-related activities
- Coercing Native women and girls under their control to enter shelters and drop-in centers for homeless youth, to recruit Native women and girls in desperate need of shelter and safety

Similar to what advocates reported at the round tables, a study with adolescent girls in corrections placement for prostitution in the Midwest found that they had been approached by pimps and recruiters in many locations: while walking, hanging out with friends on the street or at corner stores, at friends' homes, and even outside the juvenile justice center while waiting to meet with a probation officer.[103]

A 2005 study of prostituted adolescent girls in Atlanta identified a two-stage strategy used by pimps to prepare a girl for prostitution, much like the process described by the advocates attending the round tables. Initially, the pimp makes the girl feel attractive and valued, develops a sexual relationship with her, spends money on her, introduces her to drugs, and constantly assures her that she is "special." By the end of this first phase, the girl has formed a deep attachment to her "protector." In the second phase, the pimp moves her around to eliminate her relationships with family and others, then breaks her will and self-esteem through physical and verbal abuse. At this point, the girl has no option to refuse when the pimp pressures her to begin prostituting. The study found that women played multiple roles in this process: pimps, recruiters, groomers, watchers (who make sure girls get to and from their assigned locations), and wife-in-laws (other women trafficked by the same pimp living together and managed by either the pimp or the woman closest to him).[104]

Similar to the advocates' descriptions at the round tables and studies in the U.S., Canadian research has found that pimps coerce Native women and girls under their control to approach friends and peers with tales of a better, more glamorous lifestyle in the sex trade. Also similar to the accounts of the Minnesota advocates, Canadian studies have found that pimps recruit Aboriginal girls by inviting them to parties at "trick pads," providing them with drugs, and then trafficking them for prostitution.[112,113] A 2004 Canadian report indicated that drug dealers and gang members have taken over most pimp-controlled prostitution, some using the same grooming process that is seen in finesse pimping, and in 2005, Canadian school administrators reported that pimps and their recruiters have begun targeting adolescent Native girls on school grounds.[114,115]

Advocates attending the round tables in Duluth and Minneapolis reported that in most cases, a Native girl or woman controlled by a pimp described that person

Finesse pimping:

Grooming a vulnerable girl for prostitution to the point that her emotional dependency on the pimp and her drug habit make it impossible for her to refuse a pimp's request that she enter the sex trade. Typical steps in the "grooming" process are:

- Encouraging the girl to move in with the pimp/trafficker (male or female)
- Taking care of her basic needs
- Purchasing small gifts
- Providing free drugs
- Generally treating her with great kindness
- Once she feels obligated to repay the pimp, presenting her with "opportunities" for a lucrative "modeling" career working for an escort service
- When she agrees, moving her quickly into prostitution as a source of income for the pimp.[102]

They're just these really beautiful girls and those men will sit there and stroke that. Like, 'You're so beautiful,' and then just start to turn them into objects. Talking about their body like 'Oh, this is so nice about your body, or your body is so much better,' and the pimp starts to separate them from the other girls...It is so intentional. [Advocate]

The older guys will look for the younger girls at parties...And then what happens is they'll start, like, dating or seeing the pimp...so they engage that way and then [the pimp will] take 'em, like 'Let's go down to the cities for a trip,' and then they'll be brought down to the cities. And then it'll be 'Let's go down to Morton,' and they'll get further and further away until they end up in Illinois or Iowa and then they're stuck. [Advocate]

They [pimps] are working them right out of the shelter...there are women that will pose [as battered women] to get in the shelter and bring women out...And that homeless youth drop-in center, that is a target place and it has been a target place ever since it's been open, and it continues. And advocates are always trying to figure out, you know, you want kids coming in for services, how you keep them safe. [Advocate]

With runaways, it's a place to sleep. [Second speaker] Yeah, so they're already doing survival sex kind of stuff. But it's like, 'Don't worry, you won't need to go out on the street anymore. You won't need to do this. You can just stay here.' And then pretty soon it's like, 'You know, you have to start contributing, I'm not going to financially cover you. So, here, I can get you set up doing this. You're so hot, you're so good looking, you should go strip.' [Advocate]

Guerilla pimping:

- Using threat, physical violence, and intimidation against a girl or woman to coerce her into prostitution and to prevent her from trying to escape
- Using threat of harm to someone a girl cares about (usually her mother or siblings) to coerce her into prostitution and to prevent any efforts to escape[105]

A couple of girls had talked her into it. Kind of bribed her...like the description of 'Look at this, look at what I have, you should come up here it could be yours too.' And then...when she got up here, she realized she didn't want to do this and she thought she could walk away, but she couldn't. Those girls actually beat the crap out of her, so she ended up in the hospital. Somebody, not her, called the cops, but she was a mess and they beat the hell out of her. And the guy [pimp] had never had anything to do with it. [Second speaker] He didn't have to...They're handling it. [Advocates]

as her boyfriend. The advocates described the types of pimps and recruiters they have most frequently encountered in their work with prostituted Native girls and women:

- African-American men from Chicago (usually affiliated with Gangster Disciples) who appear in Duluth at various times of the year to take over and organize prostitution in the area
- Latino and American Indian members of Latino gangs in Minneapolis, often girls' boyfriends
- Native Mob members who move back and forth between Duluth and Minneapolis
- Native girls and women in a "ring" managed by a gang-affiliated pimp
- Native girls and women who are gang members themselves and are trying to raise their status in the gang by forcing other girls and women into prostitution as a source of revenue for the gang
- Landlords targeting Native women with children, forcing them or their children into prostitution by threatening the family with rent increases and/or eviction

The data collected from incoming MIWRC clients over a 6-month period also reflect guerilla recruitment (recruitment by force) by prostitution rings and gang members. Whenever incoming MIWRC clients met the state definition of a trafficking victim, MIWRC staff asked them to describe any factors that might put them at risk of re-involvement in commercial sexual exploitation. Eighty percent of the younger women and adolescent girls reported that they were at risk of further commercial sexual exploitation due to fear of violence against themselves or others; one specifically said she had been trafficked into prostitution by a gang.

Findings from the 2007 Minnesota Student Survey strongly suggest that American Indian girls in Minnesota are more affected by gangs than girls in the general population. Girls identifying as "Indian only" in the Minnesota Student Survey also reported concern about gang activity at their schools: 32 percent of 6th grade and 26 percent of 9th grade Native girls reported that illegal gang activity was a problem at their school, compared to 16 percent of girls in the general population. Minnesota Student Survey participant responses also showed that 28 to 33 percent of Native girls in the 6th grade had been threatened at school in the previous 12 months, compared to 20 percent of girls in the general population. It cannot be determined how frequently these threats are part of guerilla recruitment, but they clearly indicate Native girls' lack of safety at school.

Gang research in the U.S. and Canada supports the advocates' stories of Native girls trafficked into prostitution by gangs. In 2001, an international study of the commercial sexual exploitation of minors in the U.S., Canada, and Mexico found significant gang involvement. The research team reported that girls affiliated with Native gangs were expected to provide male gang members with sex on demand.'[108] A Minnesota study of gang members conducted from 1995 to 1998 involved interviews with 100 current and former gang members, 14 of whom were Native members of Latin Kings, Vice Lords, Gangster Disciples, and Native Mob. Most of the Native girls participating in the study reported that they provided male gang members with sex on demand and/or were trafficked for drugs and money. Several Native male gang members interviewed for the study reported their gangs' use of guerilla pimping methods.[109]

Recent U.S. studies suggest that Native gangs are growing rapidly, and expanding into drug trafficking activities. In 2006, *Minnesota Public Radio* reported that authorities estimated there were hundreds of young Native men on White Earth, Red Lake, and Leech Lake reservations that consider themselves part of a gang.[110] In January 2009, the National Gang Intelligence Center announced that several American Indian gangs, particularly Native Mob, have expanded beyond Indian Country, on and off reservations. Native Mob was described as one of the largest and most violent Native American gangs operating in the United States, with most of its activity centered in Minnesota, Michigan, Wisconsin, North Dakota, and South Dakota. The report noted that Native Mob and other urban and suburban gangs in Minnesota are expanding their drug distribution activities, sometimes working in conjunction with Mexican drug trafficking and criminal organizations.[111]

In 2007, the Native Women's Association of Canada (NWAC) reported that Native girls were currently being "banged-in" by four different Native gangs, required to have sex with multiple members of the gang in order to become a member.[116] A study in Winnipeg also found significant involvement of Native women and girls with gangs. Most "gang girls" were between the ages of 14 and 24, though the fastest-growing segment was under the age of 16. Female Native gang members frequently used guerilla pimping methods to recruit girls for prostitution to increase their own status in the gang, much like the stories told by the advocates at round tables.[117]

As this report was being completed, a flurry of news articles described rapid expansion of Native gangs in Canada. Speakers at a May 2009 conference hosted by the National Aboriginal Gang Commission described Native gangsters' growing involvement in drug trafficking and prostitution, branching out to own strip clubs and produce pornography. De Lano Gilkey, a gang expert from the U.S., warned conference attendees that addressing younger Native youth's admiration of the gangster lifestyle is of critical importance, saying "These wanna-bes are the gonna-bes."[118]

Recruitment by family and friends

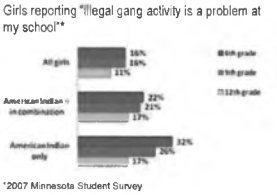
The advocates at the round tables described a recent trend. Native girls in their early teens recruiting their friends for stripping and/or prostitution by promoting the idea that the sex trade is a glamorous way to make "quick money." The intake data collected by MIWRC over a 6-month period also showed that in over half the cases of Native women and girls reporting that they had been involved in prostitution, a friend was the primary recruiter, sometimes managed by a pimp.

One of the most disturbing findings of the round table discussions was the frequency of reports that Native adults were involved in trafficking their young female relatives. One of the Duluth advo-

The latest one that I had contact with, she's twelve years old. She's a gang member now...She fought it, trying to stay away from [the gang]. She kept coming to me for about a month...Because of her friends, her family, the sort of lifestyle, where she lived, it was all around her. And her friends kept saying, 'Oh, come on, come on. Jom. You've got to be part of us'...And then she came one Sunday, and she pulled out her rag [gang bandana], and said, 'I'm a member. I was initiated over the weekend.' She was 'jumped in,' beat up, and she had to do something. I'm afraid she's going to have to do a lot more. [Canadian advocate working with Aboriginal girls, cited in Nimmo, 2001][106]

When you get a girlfriend, she gotta be gang raped. She's gotta go around and get boned by all of us guys. All of us Kings...We meet girls and stuff at pow-wows and they hang around with us and then they get the idea that we wanna go out with them, but we really don't. And then they just bring it up. 'Is it all right if we roll with you? Make us a Queen or something?' Then we're like, 'Yeah, we'll make you a Queen.' Then we'll take them back to our house...Everybody on the rez has got their cellular phones or their pagers. Then we'll each get a page and we'll go call somebody and say, 'Hey, there's gonna be an initiation'...You take them in your bedroom or on the couch. In the back or down in the basement. Wherever. Then whenever they're done, they'll come out. Then whoever is next, they'll take. She stays in the bedroom. She can't come out and then whoever got done with her will come back out and say 'Hey, whoever's next, go ahead.' [Native male Latin King gang member, Minnesota study, quoted in Harrington and Cavett, 2000][107]

Girls reporting "Illegal gang activity is a problem at my school"*



*2007 Minnesota Student Survey

It's a family affair when they're younger and then at some point there's a shift where they can start getting some of their own money in their own hands. So they're looking at it look like, 'If my mom moves me around my mom gets my money. If I work with someone who gives me a cut, I get my money.' [Advocate]

We just talked to a young girl that walked into my office that was 14 years old, that was recruited when she was 12 by another 14 year old girl. Which is not as intimidating when your girlfriend comes over and says, 'Hey, come see what I'm doing to make some money.' [Advocate]

I see [viewing the sex trade as glamorous] as a new trend for the ones that I am working with. [Second speaker] They're all into that glamorized type of talk amongst one another. [First speaker] And I see more of the stuff that comes through Duluth as being more glamorized. And the girls recruiting other girls because then they won't have to do so much work and that's what they're expected to do. Then, the girls fight amongst each other over this guy! [Advocates]

cates reported that of the three Native pimps she had encountered in her work with prostituted Native women and girls, two were mothers trafficking their children. In both Duluth and Minneapolis, advocates indicated that being trafficked by a family member generally led to a girl seeking out a pimp so she could have access to her own money.

The information collected from incoming MIWRC clients supports the advocates' accounts. MIWRC staff report that new clients are frequently reluctant to admit family involvement in prostitution at intake, but many disclose this information after getting to know and trust program staff. Despite this reluctance, five (18%) of the 28 new clients that disclosed involvement in prostitution and also identified their recruiter said that adult family members had prostituted them when they were children or young adolescents.

Though we were unable to identify any research that focused specifically on Native girls, some U.S. studies have found family involvement in prostituting their children while others have not. In a large study of commercially sexually exploited youth in the U.S., Canada, and Mexico, researchers found that molestation by family members was a common type of child sexual exploitation, but there was no mention of trafficking by family members.[116] In contrast, research in Atlanta and Chicago identified significant involvement of families and friends in the sex trafficking of underage girls. One Atlanta study found that while pimps' use of female recruiters was becoming increasingly common, these recruiters were frequently a girl's peers or family members, male and female. In some cases, they were siblings only slightly older than the girls being recruited.[120] A Chicago study found that 19 percent of the prostituted women and girls in the sample had been recruited by a friend, and 10 percent had been recruited by a family member, most often a sister or a cousin.[121] Recent research in Ohio also found that underage girls were usually recruited for prostitution by a friend or a friend of a friend who worked for a pimp, often someone they knew from their neighborhoods.[122] Some researchers have reported that youth in conflict with their families frequently have friends and siblings already in prostitution, and that many of these youth become involved in prostitution as a way to assert their autonomy and make money at the same time.[123,124]

Canadian research with prostituted Native women and youth has reported findings very similar to the advocates' stories at round tables and the data collected from incoming MIWRC clients. One Canadian study of 150 commercially sexually exploited Aboriginal youth found that they often had friends who had told them about the "easy money" and the potential to have some control over their lives by entering the sex trade. Other Canadian studies have found family-based sex trafficking to be quite common in some Aboriginal communities.[125] In one study with 45 Native women in prostitution, almost one-fourth were from families involved in prostitution: five had sisters in prostitution, four had mothers in prostitution (one of whom also had a prostituting grandmother), two had fathers that were pimps, and one had a father that pimped both his wife and his daughter.[126]

Factors that Facilitate Entry

Generational Trauma

At both round tables, advocates kept returning to the impact of historical trauma and the cultural loss resulting from it as they talked about the unique vulnerability of American Indian girls to commercial sexual exploitation and the absence of safety in Native girls' lives. Though a significant body of research in the U.S. links generational trauma to substance abuse, child abuse, and violence in American Indian communities, we were not able to identify any that describes the role of historical trauma in the commercial sexual exploitation of American Indian women and girls.

Several Canadian studies with prostituted Aboriginal women and girls in Canada have also found historical trauma and generational trauma to play important roles in Native girls' entry into the sex trade. In her findings from research with sexually trafficked Aboriginal girls, Anupriya Sethi described the legacy of colonization and residential schools as a root cause of their vulnerability to recruitment for prostitution.[127] In a study of prostituted Aboriginal youth in 22 Canadian communities, the Native researchers that conducted the research reported that every youth participant in their focus groups spoke of the physical, sexual, and/or emotional abuse they had experienced in their home lives. The researchers found that the parents, relatives, other caregivers, and neighbors in these youth's lives all suffered from the legacy of cultural fragmentation, unable to break the cycle of pain and despair and turning to alcohol, drugs, and violence to deal with feelings of hopelessness.[128]

The advocates attending the MIWRC round tables emphasized that though each of the facilitating factors described below is an influence that increases the likelihood of a Native girl entering the sex trade, every one of them is a result of historical/generational trauma and cultural loss.

Who recruited MIWRC clients into prostitution (those that named their recruiter) (n=28)*

Recruiter	Number	Percent
Friend/friends	14	50%
Family member (mother, aunt, step-uncle, uncle)	5	18%
Boyfriend	5	18%
Pimp/gang/landlord	3	11%
Neighborhood/self	3	11%

* Nine clients that reported involvement in prostitution did not identify the person that recruited them, and several clients were recruited by two people acting together, so percentages add to more than 100%.

A lot of the women who are being prostituted, it's just the bottom line that was there. The majority of the time it means that we need to recognize where this came from in our communities. I mean, American Indian people say over and over again 'This is not how we treat our children. This is not where we are as far as respecting youth.' And I think traditionally that was true, but something dramatic like genocide happened. It was like a nuclear bomb, so the war site is exactly the best example of what happened to our communities. [Advocate]

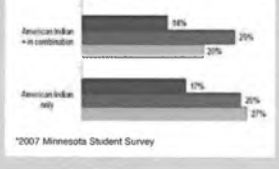
Runaway, Thrown Away, and/or Homeless

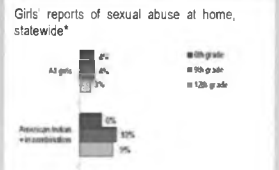
The vast majority of advocates attending the round tables described homelessness as the major factor in Native girls and women's entry into the sex trade, whether it be a result of running away from home to seek glamour in the big city, leaving home to escape violence and abuse, or losing housing because of poverty. Native girls' responses to the 2007 statewide Minnesota Student Survey support the advocates' accounts of Native girls' risk related to running away and homelessness: 25 percent of 9th-grade Native girls reported having run away at least once in the previous 12 months, compared to 11 percent of girls in the general population.

Some advocates talked about their own and other Native women's experiences in prostitution, reflecting that trading sex can seem like a reasonable choice when there was no other way to support and sustain yourself or your children. At both round tables, the advocates also identified the need for safe shelter as the strongest force keeping Native girls and women in prostitution when they want to leave it.

Kids running away. Running away from home... I work with the girls on reservations, there is nothing going on, they don't know what to do... [They say] 'I'm outta here. I have family in Duluth, I have a sister in Duluth or someone in Duluth.' It seems like Duluth is the place to be. Easier to get to, it's friendly... That's a lot of the wording: 'I gotta get out of here, there's absolutely nothing. I got nothing, I got to live wherever I can live.' [Advocate]

There's the survival aspect. And that's what they're doing, the ones that I see out on the reservation. They would never identify themselves as prostituting or using sex to get what they want. But that's what they're doing. [Advocate]





Studies with prostituted women and girls in the U.S. have consistently found that 50 to 75 percent ran away from home as adolescents.[129,130] In the Hennepin County study with women on probation for prostitution described earlier, 61 percent of the participants reported that they had run away when they were minors, most frequently because of "family problems."[131] Children of the Night, a national organization that works to rescue children from prostitution, says that of the one and one-half million children that run away each year in the U.S., it is safe to estimate that about one-third will have some type of involvement with prostitution and/or pornography.[132]

Research has consistently found that when youth run away from home with no place to go, it is usually because of parental neglect, physical or sexual abuse, family substance abuse, and/or family violence.[133,134,135,136] In one study, 43 percent of runaway adolescents said they had left home because of physical abuse, and 24 percent reported leaving because of sexual abuse.[137] A 1999 study with runaways in medium-sized Midwest cities found that:

- 81% had been pushed or grabbed in anger by an adult in their home
- 64% had been threatened with a gun or knife
- 59% felt neglected
- 28% were abandoned by their parents for at least 24 hours
- 21% had been forced by a caregiver to engage in a sexual activity.[138]

The National Center for Missing and Exploited Children reported that up to 77 percent of prostituted teens ran away from home at least once before turning to prostitution to meet survival needs.[139]

Runaway and thrown-away youth have very few legitimate ways to pay for their basic needs. Getting a job is very difficult without an address, phone number, high school diploma, work experience, or references, and even if they succeed, they usually do not have the identification needed to open a checking account or cash a check. Some fear being sent back home if they use their real name or home address.[140,141]

Research with Aboriginal youth in Canada has also identified running away from home and homelessness as major risk factors for entering prostitution. One study that analyzed 400 youths' social services case files in two large Canadian cities found that while 44 percent of the Aboriginal youth that ran away at least once had begun prostituting, only 13 percent of Aboriginal youth that never ran away entered the sex trade.[145]

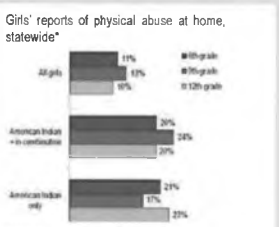
Homelessness, whether it occurs as a result of running away, being thrown away, or because of family poverty, has also been identified as a primary risk factor for the commercial sexual exploitation of youth in the U.S.[147] One study found that being homeless for more than 30 days is the single most determining factor in young children and teens entering prostitution, and youth advocacy groups report that homeless youth can expect to be approached by a pimp, john, or drug dealer within 36 hours when they are first on the street.[148,149,150]

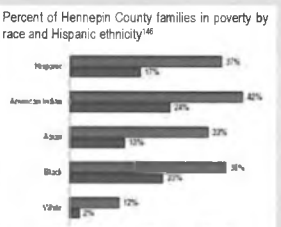
In the 2006 Wilder Research statewide study of homelessness, non-reservation American Indians represented 28 percent of the unaccompanied youth ages 17 or younger in outstate Minnesota and 12 percent in the Twin Cities area, though they represent only two percent of Minnesota's total youth population.[142] Over the years that the Wilder Research has conducted this study (every three years since 1994), there has been a 100 percent increase in the proportion of American Indians in the category "unaccompanied homeless youth," from 10 percent in 1994 to 20 percent in 2006.[144] Sixty percent of the participating Native girls ages 17 and younger reported having left home to be on their own by the age of 13.[143]

In research with commercially sexually exploited youth in Canada, interviewers found very high rates of homelessness prior to entering prostitution, and also while in prostitution. In Winnipeg, where a significant proportion of prostituted youth are Aboriginal, researchers found that 86 percent of prostituted youth had been homeless for 40 days or more.[151] The McCreary Centre Society reported similar findings from five surveys of British Columbia street-involved youth that it conducted between 2000 and 2006. An average of 61 percent of youth across all five surveys reported a great need for safe housing.[152] Other McCreary Centre Society findings that were consistent across several surveys include:

- 34-57% of prostituted youth on the street were Aboriginal
- 34-44% of younger prostituted youth were living or had recently lived in precarious housing situations (on the street, couch-surfing, and staying in shelters, transition houses, hotels, squats, abandoned buildings, tents, and cars).
- 50% of older prostituted youth had lived in precarious housing during the past year
- 95% of older prostituted youth had lived in precarious housing at some point in time.[153]

Studies in the U.S. and Canada have found that 84 to 90 percent of adult women in prostitution are currently homeless or have been homeless in the past.[154,155] In Vancouver, one study in which over half of the participants were Aboriginal women





Poverty-related reasons homeless Native girls and women left stable housing*

	Age group		
	<18 (n=20)	18-21 (n=31)	22 + (n=26)
Could not afford rent/house payments	29%	39%	42%
Eviction, foreclosure, or lease was not renewed	29%	33%	39%
Family lost its housing (asked of youth & young adults only)	33%	27%	NA

*Based on analysis of the non-reservation American Indian female subset of the 2006 Homelessness in Minnesota data, provided by Wilder Research.

The landlord piece is not uncommon, not uncommon at all. Landlords put the women in a situation where they actually end up owing rent or they know they're getting rates half off of rent, or some landlords even up the rent. It was in the woman's range at first and now she fell on hard times, she lost a job, she still owes rent and the landlord will go ahead and proposition them in that manner, swap or trade. And if not for the mother, then for the daughters. And the fact that the mom says we need a place to live. 'You know, you just gotta go in there, he's not going to do anything to you, just go, you don't wanna be out on the streets.' And the kid feels, you know, 'I owe this to our family', the loyalty piece, so you do it. And once it's done, once that's all it takes. [Advocate]

I was talking to some of the young girls there [at a school] about incest, and they really don't think that incest is as bad as a pedophile having sex with a two-year-old. So they thought, 'Well, it's a family member, it's at home and it's safe.' They really didn't correlate that it's the same thing. It is as bad, as damaging, and they don't get it. [Advocate]

I know women I've worked with that have been sexually assaulted by family members and it was ongoing, and that's why they left. And then they found out they could get paid for it, so think 'What's the difference?' [Advocate]

Some of the parents aren't even caring if the kids are in school or anything else. So, basically, she's running her own life at 12 and 14. [Advocate]

found that 86 percent of prostituted women had been or were currently homeless, and all of the women that were interviewed cited safe housing as a current, urgent need.[156]

At the round tables hosted by MIWRC, advocates reported that American Indian women with children living in poverty are at especially high risk of being trafficked into prostitution, especially by landlords who threaten them with rent increases or refuse to provide the documentation they need to receive government subsidies. The information collected from incoming MIWRC clients supports the advocates' reports, with one-fourth disclosing that they had traded sex for shelter.

Nationally, communities of color are significantly over-represented in poverty statistics. From 2001-2004, the poverty rate for American Indians, calculated as a 3-year average, was 25.3 percent, higher than any other group in the nation.[157] By the end of 2008, the non-Hispanic White poverty rate had dropped to 8.6 percent, while the American Indian rate had risen to 27.1 percent, the Hispanic and Asian rates had risen to a lesser degree (1.5% and 0.7%, respectively), and the Black rate had dropped slightly (down 0.2%).[158]

County-level 2008 Census figures are not available, but even prior to the current economic downturn, the 2000 U.S. Census found that 47 percent of Native families in Hennepin County were headed by a single mother, and over 40 percent of those households, home to one-third of all Native children in the county, lived in poverty.[159] In the 2007 Wilder Research homelessness survey, two-thirds of the non-reservation homeless Native women and 20 percent of the homeless Native girls under the age of 17 were mothers; close to one-third reported leaving their most recent regular housing for reasons related to poverty.[160]

Repeated Exposure to Abuse, Exploitation, and Violence

At the round tables hosted by MIWRC, the advocates in both Duluth and Minneapolis reported that Native girls and women with extensive histories of abuse, exploitation, and violence are extremely vulnerable to being recruited into the sex trade. Advocates described four types of experiences that they saw most frequently in Native girls trafficked into prostitution:

- Physical and sexual abuse in childhood
- Severe parental neglect as a child or teen
- Physical and sexual violence in early dating relationships
- Constant exposure to sexual exploitation and violence in their neighborhoods

Advocates at both round tables reported that most if not all of the prostituted Native women and girls they encountered had been sexually abused as children, and often, these victims had run away from home and entered the sex trade because of that abuse. The advocates also emphasized the negative impact of childhood sexual abuse on Native girls' ability to recognize or prevent their own exploitation by others.

Other studies in the U.S. support the advocates' accounts, finding that 60 to 73 percent of youth in prostitution and 55 to 90 percent of prostituted adult women were sexually abused in their homes as children.[161,162,163,164,165] Physical abuse at home has also been identified as a major risk factor for youth entry into the sex trade in Canada, the U.S., and Mexico.[166] Studies with runaway adolescents have found that the more abuse the adolescent has experienced at home, the more time she will spend on her own, the more likely she will have friends who sell sex, and the more likely she will be to abuse drugs and alcohol.[167,168,169] Canadian research has found similarly high rates of physical and sexual abuse among prostituted Aboriginal youth and women:

- 80% of prostituted youth were physically, sexually, emotionally, and verbally abused by parents, family friends, neighbors, and peers in their home communities, which caused them to run away with no safe place to go.[170]
- Almost three-fourths of women in street prostitution, 52% of whom were Aboriginal, reported physical abuse in childhood; 82% reported sexual abuse as a child.[171]
- 41% of youth on probation for prostitution in two large Canadian cities reported parental neglect, compared to five percent of non-Aboriginal youth.[172]

Findings from the 2007 Minnesota Student Survey suggest that Native girls in Minnesota experience much higher levels of childhood abuse than their peers in the general population. Overall, American Indian 9th-grade girls' rates of reported physical abuse at home were close to double the rate of their peers in the general population. In all age groups (6th, 9th, and 12th grades), Native girls' rates for reporting sexual abuse at home were double those of girls in the general population.

American Indians have the highest rates of reported child maltreatment in the nation and the state, and the highest rates of foster placement in both as well. These are some findings from government reports:

- Nationally, American Indian children have the highest rates of victimization in the nation—21.7 children per 1,000, compared to the white rate of 10.7 children per 1,000.[173]
- Of the children for whom maltreatment reports were made, American Indians and Alaska Natives were 20 times more likely than white children to be determined to be maltreated.[174]
- In both 2007 and 2008, statewide rates of American Indian child maltreatment reports were more than six times Native children's representation in the population.[175,176]
- American Indians also had the highest 2007 and 2008 statewide rates of recurring maltreatment at twelve-month follow-up.[177,178]
- Though 62% of the 2008 American Indian child maltreatment reports in Minnesota were for neglect, Native rates of reported physical abuse, sexual abuse, and medical neglect were also higher than those of any other group.[179]
- As of April 2009, American Indian children accounted for 10% of child maltreatment victims statewide, more than six times their representation in the child population.[180]
- In 2007, American Indians represented 12 percent of all children in foster care but only one percent of the state's child population.[181]

In Hennepin County, which has the largest concentration of American Indian children in the state, Native children represented 8% of the confirmed child maltreatment cases, more than 6 times their representation in the county's child population.[182] An even higher proportion (9%) of the children in Hennepin County foster care were American Indian, more than four times their representation in the county's child population.[183]

Child maltreatment by race, statewide 2008[184]

	American Indian	Black	Asian	White	Two or more races	Hispanic*
Total maltreatment reports per 1,000 in the MN child population	78.5	51.0	8.5	11.9	42.0	29.7
Neglect (non-medical)	62.4	37.2	5.5	7.6	32.4	19.4
Physical abuse	17.4	13.9	2.8	3.7	10.5	7.6
Sexual abuse	6.7	3.9	0.7	1.3	3.5	2.5
Medical neglect	1.4	0.9	0.2	0.1	0.6	0.3
Percent recurring within 6 months	5.8%	8.1%	3.9%	3.7%	6.6%	3.6%
Percent recurring within 12 months	14.5%	13.1%	3.9%	5.8%	11.7%	5.7%

*Children in the Hispanic category can be any race(s).

American Indian youth also have the highest rates of out-of-home placement in Minnesota. In 2008, Native children represented 12 percent of all children in foster care but only one percent of the state's child population. In Hennepin County, the most racially and ethnically diverse county in Minnesota, nine percent of children in foster care in 2007 were American Indian, more than four times their representation in the total child population.[185,186]

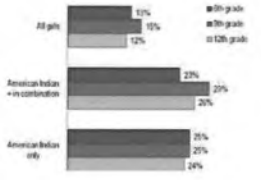
Though the number of Native children separated from their families is itself alarming, foster placement is also a risk factor for entering the sex trade. In their book *Being Heard: The Experiences of Young Women in Prostitution*, Gorkoff and Runner reported that 63 percent of prostituted girls and young women in their study had been involved with the child protection system as children. Over three-fourths had been in foster and group homes, often for many years.[187]

Homeless Native females' experiences with abuse, neglect, and violence

	Age group			
Percent of homeless non-reservation Native females that reported...	11-17	18-20	21	22+
Physical mistreatment as a child	45%	41%	40%	54%
Sexual mistreatment as a child	30%	41%	20%	51%
Parental neglect (no food, shelter, or medical care; extended absence)	32%	33%	60%	41%
Homelessness is due to feeling unsafe from violence in the house	28%	31%	Not asked	
Homelessness is due to physical or sexual abuse in the home	17%	31%	Not asked	
Percent of homeless non-reservation females that reported...	**11-17**	**18-21**	**22 and older**	
Being in a physically abusive relationship during the past 12 months	20%	48%	25%	
Staying in an abusive situation because she had no other housing options	5%	48%	50%	
Physically/sexually attacked or beaten while without a regular place to stay	10%	16%	31%	

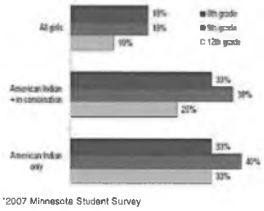
* Based on analysis of the non-reservation American Indian female subset of the 2006 Homelessness in Minnesota data, provided by Wilder Research.

Girls reporting that a family member physically assaulted another family member*



*2007 Minnesota Student Survey

Girls reporting that they hit or beat up another person in the past 12 months*



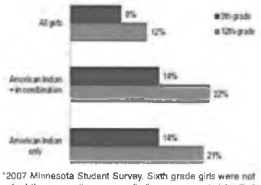
*2007 Minnesota Student Survey

The 2006 Wilder Research study of homelessness also found high rates of childhood abuse and out-of-home placement among non-reservation homeless American Indian girls and women. Over one-fourth of the Native girls ages 12-17 (28%) and 24 percent of Native females 18-20 reported having left foster care or a group home without a permanent place to go. Overall, almost 30 percent had lived in a group home at some point in time.[188]

Several of the advocates at the MIWRC round tables reported that Native girls' constant exposure to violence and sexual exploitation in their peer groups and neighborhoods causes them to view these threats to their safety as "no big deal." Advocates in both Duluth and in Minneapolis reported a growing number of Native girls and young adult women who consider "free-lancing," prostitution without a pimp, to be a glamorous and exciting way to empower themselves and make quick money at the same time.

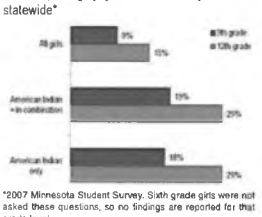
Native girls' responses to the 2007 Minnesota Student Survey reflect significant violence in their lives. In 6th, 9th, and 12th grades, Native girls' rates of physical and sexual abuse were double those

Girls reporting sexual assault by a date, statewide*



*2007 Minnesota Student Survey. Sixth grade girls were not asked these questions, so no findings are reported for that grade level.

Girls reporting physical assault by a date, statewide*



*2007 Minnesota Student Survey. Sixth grade girls were not asked these questions, so no findings are reported for that grade level.

We have young ladies that come in that have difficulties defining what they've been through... We had a young lady who was being held in Mexico for three years, and she didn't think that she was traumatized. [Advocate]

Sexual exploitation for the young women and the girls we work with is such a secondary issue. It's like, 'Help me find shelter, help me find food, help me find clinics.' And then if you work with them long enough, it's 'Oh yeah, I was sexually exploited.' [Advocate]

A majority of them have been exposed to sexual abuse. And so, it's kind of like, they're making the decision now, they're in control of their bodies and they're going to do what they need to do to get what it is that they want. [Advocate]

The idea of liberation, 'My body, my choice. I can do it myself.' 'All woman-run. You're seeing more women that know how to do these things and are very skilled at how to prevent more harm from coming to themselves. And so they're handing together, creating all female call services. [Advocate]

Two years ago I was working with three sisters who had been prostituted by their mother since they were two, and the girls were about 15, 16, 17. They were just shifting and turning on their mother and taking their profits...it was kind of a struggle, mom still wanted money for her drug addiction, and they were starting to want to take their money. [Advocate]

I think they come into prostitution with addictions. I think they start, you know, they're experimenting around with drugs and then they find a ready source, because pimps latch onto that as a method to get them into it. [Advocate]

I also know a girl here, she got turned out with drugs, and she had to feed her addiction. So, she was really young and they gave her whatever, and then she had to keep that up. And it doesn't matter what your family status is, period. Because this girl I knew, her family status is pretty good. [Advocate]

MIWRC clients that know someone in the sex trade (n=95)

Know someone in prostitution	Number	Percent	Know someone who traffics others	Number	Percent
Know at least one person	45	47%	Know at least one pimp	27	28%
Personal friend	44	46%	Boyfriend/ partner	13	14%
Family member(s)	25	26%	Landlord	4	4%
Cousin(s)	13	11%	Friend(s)	3	3%
Aunt	8	8%	Drug dealer(s)	3	3%
Sister	4	4%	Unspecified family	2	2%
Mother	2	2%	Pimp(s)	2	2%
Two or more family	7	7%	Uncle and brother	1	1%
Mother's friend	1	1%	Mother/aunt's friend	1	1%
			Boyfriend's friend	1	1%
			Unspecified person(s)	9	10%
			Friend(s)	3	3%

of their peers in the general population, they were more likely than girls in the general population to report a family member physically assaulting another family member at home, and also more likely to report that they themselves had used physical violence against another person in the previous 12 months.

Canadian research has found similar patterns. In a study in five areas of British Columbia, prostituted Aboriginal youth told interviewers that a cycle of violence has been normalized in their communities, and that it is impossible for many caught in that cycle to break the pattern.[189] In other Canadian studies, Aboriginal street youth described violence as part of their daily life.[190] In the U.S., national research with over 1,200 runaway and thrown-away youth in shelters and living on the street found that about one-half of those staying in shelters and two-thirds of those living on the street carried a weapon, and one-fourth of the street youth said they had committed a violent act using a weapon.[191]

Similar to the trend reported by the advocates, Canadian research has found that Native youth sexually exploited by family members at an early age often view the sex trade as a way to have some control over their lives.[192,193] One study found that sexually exploited youth often saw no harm in being paid for sex, since it was taken for free when they were still at home.[194] A second study reported that for many Aboriginal youth, the sex trade presents an illusion of escape and independence.[195]

An international study in the U.S., Canada, and Mexico found that exposure to an existing prostitution zone and social groups that condone or tolerate child-adult sexual relationships are both key contributing factors in youth entering prostitution.[196] Canadian studies with prostituted Native women and youth reported similar findings. Many grew up in environments where prostitution was common, and some reported that their own sex trade involvement was a result of learned behavior and day-to-day survival in their families for generations.[197] One Canadian researcher commented that an invitation from a man cruising by in his car to watch an indecent act in exchange for cash can seem quite reasonable to an Aboriginal adolescent living in a poor neighborhood where street prostitution is concentrated and there are no legitimate jobs.[198]

Information collected from Native women and girls entering MIWRC programs supports the advocates' reports that young Native girls are often exposed to the idea that prostitution is a "career option." Almost half (46%) of the 95 women and girls screened for commercial sexual exploitation said they have a personal friend in prostitution, and over one-fourth (26%) said they have a family member in prostitution. Over one-fourth (28%) of the 95 women and girls entering MIWRC programs said they know someone who makes others sell or trade sex, almost half of these clients described the trafficker as their boyfriend.

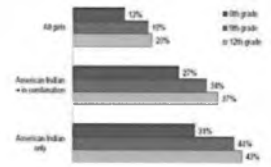
Addiction

Advocates attending the two MIWRC round tables described parental addiction as an important contributor to Native girls entering prostitution, but noted that pimps and gang members often provide Native girls and women with free drugs to get them addicted and then prostitute them. Advocates at both round tables agreed that personal addictions often keep Native women and girls in the sex trade long past the point when they want to leave it.

In the Wilder Research study of homelessness in Minnesota, over half (56%) of the non-reservation Native girls age 21 and younger described their parents' drug and alcohol use as the partial or main reason they were currently homeless.[199] A national study of runaway and thrown-away youth found that 31 percent of youth staying in shelters and 45 percent of those living on the street reported problematic substance use by a family member (most often a step-parent) during the 30 days prior to their leaving home. These youth reported that adult family members' substance abuse made them more likely to get into arguments with the youth, to neglect or ignore them, or to hit them.[200] The Michigan Network of Runaway, Homeless, and Youth Services described similar findings, reporting that 41 percent of the youth they had served reported leaving home because of an adult's substance abuse.[201]

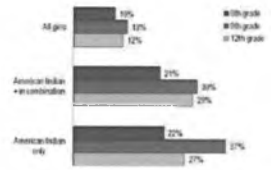
Research has found that substance abuse is both a predictor for and a consequence of entering prostitution. In the U.S., national research with 200 prostituted juveniles and adults found that 55 percent were addicted to drugs prior to entering the sex trade. 30 percent had become addicted following entry, and 15 percent became addicted at the same time they entered.[202] Studies with prostituted Aboriginal women in Vancouver have also found that while drug use often facilitated entry into prostitution, participants' use had escalated as a result of being in prostitution, and 60 percent were currently in prostitution to maintain a drug addiction.[203,204] A Montreal study with 165 fe-

Girls reporting that a family member's alcohol use repeatedly caused family, health, job, or legal problems, statewide*



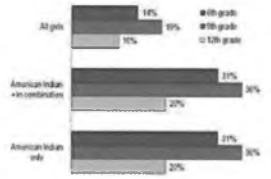
*2007 Minnesota Student Survey

Girls reporting that a family member's drug use repeated caused family, health, job, legal problems, statewide*



*2007 Minnesota Student Survey

Girls reporting first use of alcohol at age 12 or younger, statewide*



*2007 Minnesota Student Survey

One of the clients I work with, she comes and goes, she knows she's been diagnosed with FAE and her children have been diagnosed as well. So her mother drank and she drank while she was pregnant with her kids. So, she's working to keep herself in a home and she's exchanging sex for her home and so she has no problem with her kids doing the same thing, her daughters. [Second speaker] I think the other thing with FASD what we know about that brain damage is you have a 15 year old girl's body but you have an 8 year old girl's mental capacity, because your brain is not formed correctly because you're brain damaged. [Advocates]

I have trouble making decisions, if they're bad or they're right, and that's what has been hardest throughout my life. I realize that it's right or wrong after I've done it, and then that's what makes it really bad...because you can get in a lot of trouble and I've gotten into lots of trouble...it's hard to say no to things...I used to do anything and everything, just, you know, for the hell of it, or just to have fun...but there's be so much trouble...you think of having fun, you think you're going to have fun, and what's wrong with that and then you realize fun turns into trouble and trouble turns into danger. [FASD-affected woman interviewed in a British Columbia study][205]

male street youth, none of whom were in prostitution at baseline, found at follow-up that substance abuse was a significant predictor for girls entering prostitution.[765]

In the Hennepin County study of women on probation for prostitution described earlier, 64 percent of American Indian women that provided drug use information at the time of arrest admitted currently using drugs and/or alcohol. One in five used both drugs and alcohol at the time of arrest, and half had received prior treatment for chemical dependency.[205]

Even without pimp involvement, American Indian women are at particularly high risk for substance abuse. A study in seven tribal communities found that parental alcoholism, sexual abuse, combined physical and sexual abuse, emotional abuse, and emotional neglect as a child each contributed to double the risk of alcohol dependence. Native women who had experienced four or more categories of these adverse experiences in childhood had seven times the risk of alcohol dependence.[207]

Alcohol poses a different type of prostitution recruitment risk for Native girls whose mothers used it while pregnant. The Centers for Disease Control (CDC) currently use the term Fetal Alcohol Spectrum Disorders to describe three alcohol-related disorders: fetal alcohol syndrome (FAS), fetal alcohol effects (FAE), and alcohol-related neurodevelopmental disorder (ARND). FAE encompasses behavioral and cognitive problems in children who were prenatally exposed to alcohol, but who do not have all of the typical diagnostic features of FAS. Children with ARND might have functional or mental problems linked to prenatal alcohol exposure, including behavioral or cognitive abnormalities or a combination of the two.[209] Advocates at both MIWRC round tables reported working with FASD-affected Native girls and women in prostitution. The advocates described FASD as a critical risk factor because it results in impaired judgment and impulsiveness, which puts them at very high risk of commercial sexual exploitation. Advocates also identified FASD as a factor affecting some Native parents that prostitute their children, and noted the prevalence of FASD among Native youth living in foster care.

The CDC has reported that the fetal alcohol syndrome rate for American Indians is 30 times the rate for whites.[210] The incidence of FASD in Canadian Native communities is similarly high.[211,212] Some studies have found that youth affected by FAS or FAE are particularly vulnerable to sexual exploitation by pimps offering them free drugs at house parties. Once they are addicted and have significant drug debt, they are threatened and told they must work off their debt through prostitution. They are also extremely vulnerable to guerrilla recruitment strategies.[111,214]

Girls reporting problematic substance abuse, statewide*

	9th grade			12th grade		
Percent of girls reporting they...	American Indian only	American Indian + in combination	All girls	American Indian only	American Indian + in combination	All girls
Could not remember what said or did after using alcohol/drugs 2 or more times	16%	15%	8%	22%	21%	15%
Used more alcohol/drugs than intended 2 or more times	16%	14%	8%	21%	21%	16%
Continued to use alcohol even though it was hurting relationships with friends or family	20%	18%	8%	20%	15%	9%
Have needed to use more alcohol/drugs to get the same effect in the past 12 months	18%	16%	6%	21%	17%	12%
Had 5 or more drinks in a row at least once in the past 2 weeks	28%	23%	13%	35%	32%	25%

*2007 Minnesota Student Survey

Research with FASD-affected youth and adults has identified a number of impacts that significantly increase their vulnerability to commercial sexual exploitation:

- Teenagers and adults with FAS or FAE seem to 'plateau' academically and in daily functioning but their problems grow more serious as attention deficits, poor judgment, and impulsivity create obstacles to employment and stable living.[215]
- Adolescents and adults with FAS/FAE have been described as 'innocent,' 'immature,' and have been found to be easily victimized.[216]
- FASD-affected adults often suffer from substantial mental illness as well, including major depression, psychotic disorders, and anxiety disorders.[217]
- 62 percent of people with FASD have had a disrupted school experience between the ages of 12 and 20.[218]
- 90 percent have had mental health problems diagnosed.[219]
- 40 percent of FASD-affected youth ages 6-11, 48 percent of those ages 12-20, and 52 percent of those over age 21 have exhibited inappropriate sexual behavior, and the same proportion of the three age groups have been sexually victimized.[220]
- 79% of FASD-affected girls ages 12 and up have exhibited sexually inappropriate behavior.[221]

Failure to Finish High School

Research has found that a minors that have been expelled from school or are no longer interested in finishing school are at a high risk of becoming involved in prostitution.[224] The Hennepin County study of 70 women on probation for prostitution reported similar findings. Only one of the 17 American Indian women in the study sample had completed high school.[225]

Not completing high school is a major barrier to Native girls finding legal employment. Less than half of Minnesota's American Indian students (41.4%) graduated on time in the 2006-2007 school year, with 19 percent dropping out that year.[226] In the 2007 Minnesota Student Survey, American Indian girls were less likely than girls in the general population to report that they like school (74.9% gave positive responses), and the most likely to report truancy in the past 30 days (44.5% reported being truant).[226] Native youth detachment from school is also a problem in Canada. In Canada's 2001 Census, 62 percent of Aboriginal people living on reserves and 48 percent of those living off-reserve had less than a high school education.[227] Canadian studies have also found that Native girls affiliated with gangs were typically two to three years behind their age cohort if they were still in school, but few finished 10th grade.[228] One Canadian study found that while street-involved girls were more frequently in

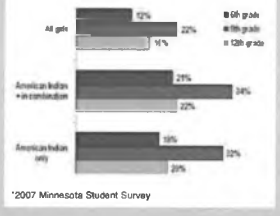
High school graduation rates, Minnesota public schools 2006 and 2007 (National Governor's Association rates)[222]

Racial group	Graduated on time	Dropped out	Continuing
American Indian	41.4%	18.6%	27.3%
Asian/Pacific Islander	65.7%	6.0%	19.2%
Black	41.3%	13.3%	32.8%
White	80.4%	4.2%	10.7%
Hispanic (any race)	41.3%	19.5%	23.8%

Percent of Native street-involved youth currently attending school[223]

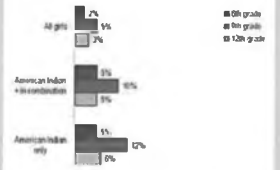
Percent in school	Prostituted youth	Unprostituted youth
2000 Street-Involved Youth	58%	63%
2006 Street-Involved Youth	57%	66%
2006 survey, girls only	69%	76%

Girls that thought about killing themselves during the past year, Statewide*



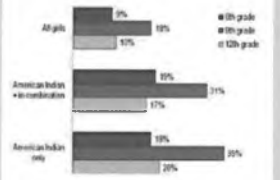
*2007 Minnesota Student Survey

Girls that tried to kill themselves during past year, Statewide*



*2007 Minnesota Student Survey

Girls that hurt themselves on purpose during the past year, Statewide*



*2007 Minnesota Student Survey

school than street-involved boys, those that were in prostitution were much less likely to be attending school than girls not in the sex trade.[229]

Mental and Emotional Vulnerability

Advocates at both MIWRC round tables described mental health issues as a significant factor in Native girls' and women's vulnerability to recruitment into the sex trade. Several advocates emphasized the mental health impacts of generational trauma on Native families, and by extension, the effect on Native girls' emotional vulnerability.

Among Native women, research has found that depression and post-traumatic stress disorder are frequently linked to a history of child abuse, adult re-victimization (especially forced sex), and lifetime abuse.[210,211,232] Exposure to racial discrimination has also been found to play a role Native girls' mental health, often resulting in withdrawn behavior, anxiety, depression, and physical complaints related to stress.[233]

> *We're talking mental health, we're talking about borderline personality disorders, post-traumatic stress, anxiety. Bipolar. And I think in the beginning, it's dissociation. [Second speaker] Right, because that's the only way to deal with it, is you dissociate, it's like an out of body experience. They go somewhere else or they become someone else to be able to detach what they just had to go through. [Advocates]*

> *That void. Culture and identity, all those things that lead to that searching and that hopeless feeling of there's no place for me, all that conflict between two worlds and just being vulnerable to being taken somewhere down a path that might lead somewhere. [Advocate]*

In the 2007 Minnesota Student Survey, Native girls were more likely than girls in the general population to report that they had thought about suicide and that they had attempted suicide in the past 12 months. SAVE (Suicide Awareness Voices of Education) reports that the suicide rate for American Indian youth ages 10 to 15 in Minnesota is two to three times the rate of other groups in the state.[234] In Canada, the 2003 completed suicide rate for Aboriginal female youth ages 15 to 24 was almost 9 times that of female youth in the general population.[235] A recent study reported that 29 percent of American Indian teens in their sample believed they had only a 50-50 chance of living to age 35, compared to 10 percent of white teens. Those that predicted a high likelihood of early death were also much more likely to engage in subsequent risky behavior.[236]

Self-injury (cutting/scraping, slashing, or burning) also appears to be a common behavior among American Indian girls in Minnesota. In the 2007 Minnesota Student Survey, 6th and 9th grade American Indian girls reported having deliberately hurt themselves during the past year at twice the rates of girls in the general population. Studies with homeless youth in the U.S. have reported similar findings. In a study of 428 street youth in Washington State, 14 percent of whom were American Indian, self-injurious acts were found to be extremely common. Over two-thirds (69%) of the youth reported that they had engaged in self-injury, which was related to a history of sexual abuse, physical abuse and/or neglect, and in the researchers' words, "deviant survival strategies."[237]

In Canada, research with prostituted Aboriginal adolescents found that almost one-third had engaged in self-harm (self-cutting or slashing).[238] A Canadian study of incarcerated Canadian women who regularly engaged in self-harm found that 64 percent were Aboriginal.[239] These are some of the reasons the research participants gave when asked what motivated them to cut or slash themselves:

- A cry for attention or nurturing
- Self-punishment or self-blame
- Coping with isolation or loneliness
- Distracting themselves from or cleansing themselves of emotional pain
- A way to feel again, or to re-connect with reality
- Expression of painful life experiences
- Feeling in control, having power over self

Barriers to Exiting the Sex Trade

Limited Access to Emergency and Supportive Housing

Studies of women and girls in prostitution cite a lack of safe shelter as a primary barrier to assisting those who want to leave the sex trade.[240,241] In both Minneapolis and Duluth, advocates reported that government funding agencies and other grantmakers impose inflexible eligibility requirements and policies that effectively lock prostituted Native women and girls out of emergency shelter and transitional housing facilities. These policies and rules frequently sabotage advocates' efforts to help Native girls and women exit the sex trade. For instance, several advocates described federal regulations that exclude anyone with a felony conviction from eligibility for public housing programs.

Several advocates reported that local transitional housing programs and some domestic violence shelters refuse access to Native women and girls who disclose involvement in prostitution, even if they are attempting to escape a pimp's violence. Minnesota state law also allows landlords and managers of subsidized housing to refuse to rent to a person with a history of prostitution.[242]

Advocate story:

I worked with someone for three years who was stripping. She was sexually abused as a child, got married at eighteen to someone who was abusive to her and when they got divorced, she did all the things she was supposed to. Got her child got out.

There's a strip club down the road that she made a little money at and she was good looking and was able to do that, and pretty soon that's the only work experience she has, that's her whole entire life...She's traveling the circuit, she can't make any money, she's getting stuck places, sleeping in her car, staying at guys' houses who are holding guns to her head. She doesn't use, completely sober. And I spent three years with appointments over the phone...she just could never be safe. There was no place to go.

I said if she could get up here we would get her into a shelter up here. And they kicked her out almost immediately and told her to go to the homeless shelter. She was used to being up all night, and that was an issue at the shelter. That was her job hours...she was up until six in the morning and then slept all day, and that was what she got in trouble for and got kicked out for.

So what ended up happening was we found a place for her where she could go for a period of time in a whole different city and we got four tires donated for her car and filled it full of gas and off she went. And that was the best we could do. And she was here and she knew us, we could provide counseling and we could provide stuff. It was just so, I don't know, a very sad situation.

Investigative resources are spread so thin that federal agents are forced to focus only on the highest-priority felonies while letting the investigation of some serious crime languish for years. Long delays in investigations without arrest leave child sexual assault victims vulnerable or suspects free to commit other crimes, including, in two cases the Post found, homicide. With overwhelmed federal agents unable to complete thousands of investigations or supplement those done by poorly trained tribal police, many low-priority felonies never make it to federal prosecutors in the first place...Federal investigators usually take the lead when the victim is 9 or younger, authorities say; tribal investigators take the lead with older victims. But federal prosecutors often decline those cases precisely because the victim has been interviewed too many times or by investigators who aren't specially trained to handle child sexual assault [Source: Lawless lands: Promises, justice broken. Series in the Denver Post. November 11, 2007].

We dealt with a case where the girl was screaming for help and even did a self-report and they wouldn't open the case until the mother abandoned the kids. One of the things is, it's very dependent upon the youth's age. If they are 16, 17, they all just become disposable, forgotten. And if you don't get all of the information from the youth, if you don't have enough substantiated evidence about who, what, when, where, why, they can't open cases, they have nothing to work with. And the girls are not gonna talk. [Second speaker] Exactly. Even though we're mandated reporters and we're supposed to tell those things, if we don't have enough information, they can't open the case. You have to have enough information to warrant the opening of the case, or to even get them to investigate. [Advocate]

We ask our women, 'What do you need?' but our services aren't set up to help them, and I feel like it's an injustice to them, to pry into their life and say 'What the hell is going on, and how can I help you?' We don't even know, and our services aren't set up for that, so what can we do as organizations to make sure that we're all on the same page, that we treat the survivor the same no matter way? [Advocate]

Absence of Other Options for Self-sufficiency

As noted earlier in this report, most American Indian women and girls in the sex trade have not completed high school, so they rarely have marketable job skills or a formal employment history. Though 90 to 95 percent want to escape prostitution, most do not feel they have any other realistic options for consistently earning enough money to survive.[243,244]

Distrust of Law Enforcement

Advocates at both round tables described Native women's and girls' distrust of police, fear that they will be arrested if they ask police for help, and fear that their trafficker would suffer no real consequences even if they did file a complaint, provide evidence, and agree to testify. Some Minneapolis advocates reported interactions with city police in which they or their clients felt they were not treated well. Advocates working with prostituted Native girls in Duluth expressed frustration that the FBI chose not to prosecute a recent case involving four trafficked underage girls even though the girls were willing to testify and Duluth police had gathered extensive evidence. Echoing the Duluth advocates' accounts, Kathy Black Bear at Rosebud Tribal Services in South Dakota reported that last year, an underage Rosebud girl living in Sioux Falls was trafficked to Mexico and kept there from January to March 2008. Ms. Black Bear reported that the FBI declined to investigate the case, so the tribe hired a private investigator to travel to Mexico, who successfully found the girl and brought her home.[245]

Conversations with Minneapolis police officers suggest that limited staff time and budget constraints are often the reason that more pimps are not investigated.[246,247] One reported that cost tends to limit law enforcement efforts to the investigation of large prostitution rings that traffic minors, especially those that also traffic drugs, because prosecution is more likely to result in a conviction.[248] Minneapolis Police Department 3rd Precinct Inspector Lucy Gerold noted that most purchasers of sexual services apprehended by the police have been allowed to plea bargain their sentences down to restorative justice.[249] In September 2008, Susan Segal, the Minneapolis City Attorney, reported that the her office was currently reviewing its plea bargain standards in "john cases," and that prevention and treatment for prostituted minor girls is the current focus of the department's work and the direction taken in the prostitution review calendar with the court.[250]

Similar to the Duluth advocates' accounts, the *Denver Post* reported that from 1997 to 2006, federal prosecutors rejected almost two-thirds of reservation cases brought to them by FBI and Bureau of Indian Affairs investigators.[251] It was outside the scope of this report to get extensive input from law enforcement personnel on this barrier, but a larger discussion of their perspectives should be included in future reports on this topic.

Child Protection Policies

Some of advocates working with adolescent girls reported encountering challenges when child protection policies and priorities prevented opening a case for an adolescent girl who was being prostituted or at extremely high risk of being prostituted. The scope and time frame for this report limited our ability to access the perspectives of county child protection workers, but these should also be included in further discussions of this issue.

Limited Resources for Support and Healing

Lack of services designed for Native women and girls in prostitution

Advocates repeatedly emphasized the fact that very few of the programs and services available to prostituted Native women and girls are designed to meet their needs, especially if they have not yet reached the point where they have made a firm commitment to leaving prostitution forever. Advocates also reported that program funders' requirements can restrict prostituted Native women's and girls' access to the types of support they need.

The research literature suggests a significant lack of federal funding or state funding for assisting domestically trafficked adult women. Though the Trafficking Victims Protection Act provides for a grant program that local and state authorities can use to provide services to mostly U.S. citizen victims, those funds were never requested by the Department of Justice, and subsequently no programs were ever funded.[252] Violence Against Women Act (VAWA) monies can be used for services to women in prostitution, but cannot be used for services to domestic victims of sex trafficking.[253,254] Victims of domestic violence and physical or sexual assault are eligible for reparations through Victims of Crime Act (VOCA) funding, but not if they were "committing a crime or any misconduct that is connected with the incident"—which automatically excludes prostituted women beaten or sexually assaulted by a pimp or a john."[255]

Inadequate Support from the Mental Health System

Earlier in this report, we described the overall emotional and mental vulnerability of Native girls and women. Experiencing prostitution adds significant mental health consequences to pre-existing emotional problems. The advocates described many prostituted Native women and girls as living in a constant state of fear that is based on very real threat, with no access to appropriate mental health services. They reported that most mental health professionals have no experience providing services to prostituted women, who live in an environment where rape and injury are routine occurrences and there is no protection against either.

Advocates also described misdiagnosis and over-diagnosis as significant problems for Native women and girls in prostitution or attempting to exit prostitution. Some questioned whether the criteria for certain mental health disorders were even appropriate for prostituted American Indian women and girls.

Though recognizing a need for psychiatric and psychological services for Native women who are severely traumatized, several of the advocates at the Minneapolis round table reported significant discomfort with having to se-

What are you going to do to get her out? Because recognizing them, identifying them, that's great—but once she's ready to get out, are you going to have a place for her? This is not an overnight fix. This is not just 'Get her housing and her whole life is going to be better.' We're talking about incest, mental health issues, trauma that is life-long [Second speaker] In housing funding streams, the programming has become more and more [difficult]. The reporting and the documentation and the things that they're supposed to track, that advocates can't keep up with just 'Let's get you into housing.' Housing is really complicated, it takes a lot of time and energy to get all that stuff in place.' [Advocates]

[The programs I work with] are battered women's programming, and the attitude is 'It doesn't happen here' because there's no money for it [working with prostituted women], for them to have that kind of programming. When I used to run the shelter here, we never touched on that, that wasn't something we ever, ever talked about. [Advocate]

That diagnosis of bipolar, I think it's archaic. We're talking about trauma, multiple generations of trauma...That diagnosis doesn't accurately describe our experiences. And so the mental health field is kind of off the hook in addressing the social problems that go with that. And it's like, 'Here, we've done our share, this is what she has, give her the pills and refer her onto someone else.' [Advocate]

A counselor or a therapist can recognize some of the symptoms of PTSD as bipolar, or as schizophrenic. And unless you are well versed, or, I don't want to discredit any therapist, but I think doing more research and more involvement of what happens with mental health is needed, and I don't think a lot of therapists do that. Then you're stuck into a category. Because research is showing that PTSD has a lot of symptoms and if you're saying 'Oh, well she has disassociated, therefore she's schizophrenic.' [Advocate]

When the victim cannot fight or flee, she may try to form a protective relationship with her captor. She hopes that if she can prove her love and loyalty to the pimp, she can 'love' him into being good. This can become such a desperate attachment that she actually believes she loves him, and passes up chances to escape. Stockholm Syndrome is often the real reason for what others see as the 'choice' to stay in the sex industry. [Joe Parker, co-founder of a foundation that provides services to prostituted women and men][261]

Right now mental health is what is being funded the most, so a lot of times our women cannot receive resources until we get her the diagnosis. People are handing out the diagnosis, and that can be because they know housing comes first, and the most open model to people in prostitution is 'We'll take you where you're at and we'll move you forward rather than making you do those steps. You can't even get them into a lot of housing programs that focus on where you are now, until you get a diagnosis. We have one woman we're working with, she got a diagnosis from like five doctors. [Advocate]

Finally, it got to the point where she wanted to leave, but this was absolutely not abuse to her. She was in control of her body, and those guys were idiots that wanted to give her any money for it. And, the fact of the matter was that she was never safe. [Advocate]

Their mentality is 'This guy is taking care of me. He has provided for me. My family has let me down and this man cares about me. So, no matter what you guys are trying to tell me, I'm not trying to hear that because when you're gone at 5 o'clock, he's still gonna be here. So everything you're telling me is a lie because he takes me home, he takes care of me, and me turning tricks is okay because I need to help out somehow. I can't work. I don't have a job and I can't find a job, so I'm doing what I can to help out' [Advocate]

cure a mental health diagnosis as a condition to obtain rapid client access to emergency or supportive housing. Some were also concerned that the mental health field could potentially becoming the favored approach for addressing prostitution.

Research has found that prostituted women and girls often dissociate to survive psychologically, allowing their minds to distance themselves from experiences that are too much for them to process at the time.[256][257] Some survivors of abuse describe this as "leaving your body."[258] However research has found that frequent dissociation can lead to a lack of connection in a person's thoughts, memory and sense of identity, which would significantly hamper a prostituted woman's or girl's ability to take steps to remove herself from a painful or dangerous situation.[259]

In a recent study with prostituting women in Vancouver, over half of whom were Aboriginal, 89 percent had at least one PTSD symptom, 81 percent reported at least three numbing and avoidance PTSD symptoms, and 85 percent reported at least two physiological hyper-arousal symptoms.[260] These included:

- Having a difficult time falling or staying asleep
- Feeling more irritable or having outbursts of anger
- Having difficulty concentrating
- Feeling constantly "on guard" or like danger is lurking around every corner
- Being "jumpy" or easily startled

Dependency, Denial, and Distrust of Advocates

Joe Parker, co-founder of a foundation that provides services to prostituted women and men, asserts that prostituted people's loyalty to a pimp must be viewed as a manifestation of Stockholm Syndrome, which has been described as a psychological condition common to hostage situations, in which the hostage becomes emotionally bonded to her captor.[261][262] Advocates at both round tables described the tendency of prostituted Native women and girls to insist that they are in prostitution by choice, and to minimize or deny any harm they have experienced. The advocates emphasized the extensive period of time it takes to build enough trust with prostituted Native women and girls that they are even willing to consider that they are being exploited, and the longer period of time it takes until they become willing to leave the sex trade. Some advocates cautioned that prostituted Native women and girls have been manipulated and exploited most of their lives. They asserted that prostituted Native women and girls need to be offered ongoing options without any pressure, because any program that requires them to immediately adopt a new belief system and/or way of thinking and behaving could trigger even higher levels of mistrust.

Fear, Shame, and the "Don't Talk" Rule

During the round table discussions, several advocates commented that Native communities are often aware that certain families in the community are sexually exploiting and trafficking their girls into prostitution, but ignore the signs

that this is occurring because they are reluctant to "interfere." Long-time advocates described this as "the don't talk rule," and reflected that at one time, this same silence existed around domestic violence in Native communities.

Research with Native child victims of physical and sexual abuse, physical and sexual assault, and commercial exploitation supports the advocates' reports at round tables. In one study, American Indian Native survivors of childhood sexual abuse told researchers that when girls in their communities are sexually assaulted by a family member (or even a member of another Native family in the same community), reporting the assault often results in significant social repercussions, so most victims are too afraid to report.[264] In recent interviews with sexual violence survivors, activists, and support workers in three regions of Indian Country (Standing Rock Sioux Reservation in North and South Dakota, the State of Oklahoma, and the State of Alaska), Amnesty International found that a number of the Native women would only agree to be interviewed if their anonymity was guaranteed. These women described the barriers to reporting sexual assault as fear of breaches in confidentiality, fear of retaliation, and a lack of confidence that reports will be taken seriously or result in perpetrators being brought to justice.[265]

In the Canadian study with 150 commercially sexually exploited Aboriginal youth in 22 communities described earlier, prostituted youth reported that prior to running away from home, they had no one they could talk to about the physical and sexual violence they had experienced at the hands of family members and other adults in the community. Similar to the advocates' accounts, these youth reported that people are often reluctant to "interfere." The youth felt that either they would not be believed, or that telling someone would simply trigger new violence.[266]

Absence of a Common, Evidence-based Approach

In addition to those listed above, advocates described two additional barriers they have encountered in trying to determine what services and approaches would result in the best outcomes for prostituted Native women and girls. Both are related to a lack of a uniform, evidence-based approach to working with prostituted Native girls and women.

The first is the absence of appropriate training for anyone working with prostituted Native women and girls, and trainers having cultural knowledge and extensive experience in working with this population. Because addressing this issue is relatively new to Native communities, advocates felt that no common language or body of knowledge has yet been established. Though they reported that participating in the round tables and sharing information and perspectives had significantly increased their own knowledge and awareness, they felt that training is extremely important for new advocates who have never been exposed to hearing stories of severe sexual and psychological violence. The advocates emphasized the importance of appropriate training to ensure that new advocates practice self-care and learn to balance compassion with good boundaries, as a way to prevent advocate burn-out and support good client outcomes.

Another barrier noted by the advocates related to the lack of an evidence-based approach to assisting Native women and girls in prostitution is a lack of systematic data collection that could help estimate the number involved in the various forms of commercial sexual exploitation, the number that meet the state's legal definition for traf-

We've got families that have been in prostitution for generations and you get one that starts talking, she's out of the family. You know, even sisters who were sexually abused by their father also, they're mad at her, you know, 'You better not move back to our rez.' [Second speaker] And then that causes a lot of drinking and drugs because they're ousted. [Advocates]

One of the things we need to work on is that denial. We first have to recognize that this is happening...In our community, what is slowly killing us is that denial, that there is sexual abuse, there is incest happening, and as a result we're setting our future off to be utilized by someone else sexually. [Advocate]

You do not call the police. I don't care what is going on, you call the police and your house will get stoned. Even neighbors who were not involved in what was happening. You just do not do it. That is a big piece that these women and girls are getting, when they're little. [Advocate]

ficking, their current paths of entry, the prevalence of violence they are experiencing, and their needs while in prostitution and when trying to exit. Most of the advocates voiced a high level of interest in a collaborative data collection effort if MIWRC or a group of collaborators would provide a questionnaire and technical assistance, and enter and analyze those data. There was strong agreement that these data are essential for effective planning and services.

Conclusions

On July 22, 2009, MIWRC held a listening session with 33 Native community leaders and elders to discuss the draft of this report and to gather input on recommended action steps. Their comments are included in the following discussion.

The Social Ecology of Native Girl's Vulnerability to Sex Trade Recruitment

Social ecology is the study of people in their environment and the influence of that environment on human development and behavior.[267] This theoretical model allows for examination of layered social and economic influences on Native children's ability to develop the four beliefs described at the beginning of this summary as essential for a coherent and resilient sense of self:

- The world is predictable, meaningful, and fair
- I am a worthy person
- People are trustworthy.[268]

Overall, the information we gathered for this report demonstrates that the sex trafficking of Native women and girls is neither a new problem nor a rare occurrence. It is, however, a very complex problem in its origins, activities, and solutions. In reviewing our findings, we recognized that a social ecology framework is a useful approach for summarizing the influences that contribute to Native girls' and women's involvement in the sex trade. Using a social ecology lens, we identified four major layers of influences that in combination make American Indian women and girls extremely vulnerable to sex trafficking:

- The impact of the majority society
- Neighborhood and community environments
- The influence of family and friends
- The cumulative impact on the individual

The social ecology of Native girls' vulnerability

Influence of the Majority Society

Government actions

The first and most pervasive layer of influence is that of the majority society. The historical review provided as context describes a series of U.S. government actions that contributed to the poverty and social problems that plague American Indian communities today. These include:

- The removal of Native people from their traditional land base to remote rural reservations, which forced them to become dependent on the U.S. government for food and other basic needs
- The large-scale removal of Native children from their families and communities to boarding schools and adoptive homes, which prevented intergenerational transmission of language and cultural norms for community and family roles and responsibilities
- The widespread physical and sexual abuse of Native children in boarding schools, which significantly impacted their ability to parent their own children in healthy ways
- Prohibitions against practicing traditional spirituality and participating in ceremonies, which impeded grieving of losses and healing from trauma
- Urban relocation initiatives that failed to provide the promised resources, leaving Native families in dire poverty and isolated from the community support that had been present on the reservation
- Government-sponsored assaults on Native women's bodies, including rape in military action and involuntary sterilization by Indian Health Service physicians

I remember going to some kind of historical presentation where they were talking about the Voyageurs, and how they would keep an Indian woman in a trundle bed under their bed for 'their purposes.' And I was so appalled that anybody in the Historical Society would still be dramatizing that, like this was some great and wonderful historical event. And I was really hurt because I'm an Indian woman, and I went there with a group of school kids...if I'm appalled and offended, think of what it's doing to these poor little minds. They're being taught that, 'Oh, Indian women, All they're good for is sex.' [Native community leader discussing report findings]

I'm currently the chief baby-sitter for my granddaughters, who are both 13, the critical age, and one of them is wearing the Britney Spears look. And, I'm like, 'Don't you want to put something over that?' And, you know, monitoring their Internet activity...it's the clothing and the cosmetics and the ads that all say women are less valued than men...it is a sort of hammering, constant message. [Native community elder and leader discussing report findings]

Racism and the targeting of Native women for sexual violence

In the historical review, advocates' round table discussions, Canadian studies of prostituted Native women and youth, and the listening session with community leaders and elders, racism was consistently identified as a key factor in sexual violence against Native women and girls and in extreme physical and sexual violence against prostituted Native women and youth. The research cited in this report also shows Native women and girls to be more frequent sexual assault victims than any other group of women in the country, and more likely to sustain injuries in those assaults.

Media glamorization of sexual exploitation and sex as a marketing tool

Advocates participating in the two round tables reported Native girls' perception of the sex trade, particularly dancing in strip clubs, as a glamorous career option in which they could make a lot of money very quickly. A number of community leaders and elders at the listening session to discuss the report findings described the massive influence of the media (especially the sexualized nature of music videos) and the constant use of sex as a marketing tool as significant majority-society influences encouraging Native girls and boys to view sexual exploitation as glamorous and profitable.

Socioeconomic inequality and the emphasis on money as proof of success

The advocates' stories, the Canadian literature on the relationship between poverty, homelessness, and Aboriginal women and youth entering the sex trade, and the over-representation of Native women and girls in the Wilder Research study of homelessness in Minnesota all show socioeconomic inequality to be a major factor facilitating Native women's and girls' entry into the sex trade. As we reported earlier, American Indian poverty is the highest in the nation, increasing over the past three years while Black, Hispanic, and White poverty rates declined.[269]

The advocates' discussions at the two round tables and the Canadian literature on studies of prostituted Aboriginal youth all described young Native girls' belief that the money they could earn in the sex trade would empower them, allowing them the freedom to run their own lives and make their own choices. Advocates also repeatedly described pimps' emphasis on money as a way to solve problems and realize dreams as a major incentive for Native girls to begin dancing in strip clubs and then move into prostitution.

Government priorities based on group size and influence

American Indians are a small demographic group in Minnesota, representing only 1.6 percent of the state's population.[270] Research has shown that whenever decisions must be made about the allocation of government resources, small low-income groups have limited influence over those decisions in comparison to more affluent, higher-status groups.[271]

Underfunded "safety net" systems

Our discussions with local police and advocates' stories about trying to find help from law enforcement and child protection units of local government highlight inadequate funding of these agencies as a significant barrier to identifying and protecting Native girls who have been trafficked into prostitution, and to active pursuit of pimps that traffic Native girls and women. In combination, the prevalence of homelessness among Native women and girls, Native girls' high rates of running away, and the severe shortage of housing options for Native women and girls trying to avoid or escape the sex trade reflect a woefully inadequate system for meeting the emergency shelter needs of low-income, sexually exploited Native girls and women. Not only does the absence of an effective safety net make Native girls more vulnerable to sexual exploitation, it also makes it extremely difficult for trafficked girls to successfully exit the sex trade.

Unequal gendered consequences for roles in prostitution

The attribution of responsibility for women's involvement in the sex trade is deeply rooted in the notion that prostitution is a business transaction between equals and prostituted women have chosen the sex trade as a form of employment. Popular use of the term "the oldest profession" perpetuates this idea, despite a body of research indicating that most prostituted women and girls want out of the sex trade but have no other way to shelter or support themselves.

There is significant gender bias in social and legal sanctions for women and girls engaged in selling sex, compared to those experienced by the men who buy it. Catharine MacKinnon has described a gap between the promise of civil rights and the real lives of prostituted women. She notes the ways that the prostitution law fails to protect the civil rights of women involved in prostitution while favoring the civil rights of pimps and johns, citing court decisions to make these points:

- The law does not protect prostituted women's freedom from arbitrary arrest, because it makes women into criminals for being victimized as women, and enforcement of prostitution law has traditionally involved police officers impersonating johns in order to arrest prostituting women.
- The law does not protect a prostituted woman's rights to property, since she cannot declare any parts of herself off-limits, while pimps and johns retain the right to use her body as they choose.
- The law does not protect prostituted women's right to liberty, since liberty is the ability to set limits on one's condition or to leave it.[272]

Our conversations with law enforcement personnel and advocates' stories at the round tables show that purchasers of sexual services typically receive light sentences and are frequently permitted to do community service or restorative justice rather than jail time. This unequal treatment disproportionately softens penalties for men's purchase of sexual services while it criminalizes and stigmatizes women engaged in the same transaction.

Federal definitions of "deserving" victims

The advocates' stories of Native adult women who had been trafficked into prostitution as children illustrated the impact of federal guidelines for "deserving" victims. As adults trying to exit the sex trade, many had been refused access to emergency shelters, victim services, and federally-funded housing due to their prostitution convictions. Donna Hughes, professor and Carlson Endowed Chair at the University of Rhode Island, has pointed out the overlap in definitions of sex trafficking and pimping, emphasizing that women's experiences in prostitution and sex trafficking are quite similar in regard to violence, control, exploitation, and level of victimization. Hughes notes that in multiple studies of women in prostitution, the average reported age of entry suggests that 70 percent were, by definition, victims of sex trafficking at the time they entered the sex trade.[273] Child victims of sex trafficking do not cease to be victims simply because they turned 18. Their victimization in childhood continues to impact their lives as adults.

I have a 10-year-old now, and...when we set up camp [at a powwow] he wants to be gone and run around, and all the boys are running around...and then when they go to the vendor booths, the first place they always go is the one where they have all the hats and the pimp gear and all the bling and all that. He always wants to buy that stuff. He always wants that hat with the bunny sign on it. [Native community leader discussing the report findings.]

It wasn't too long ago, I was at a venue of Native people and I was within ear's length of a group of young girls. One of the young girls said that her baby needed diapers and so she did a booty call so she could get money to get diapers for her kid...so that was prostitution in the definition of the word. But she didn't see that. That was the normalcy of it, you know, 'I need this for my child and I'm going to use what I have.' 'If you have money, you can go to the store...If you don't have money, you have to use what you have at your disposal...And that was shared with a bunch of young girls, and none of them were appalled by it. There was more of a 'Yeah, I understand that,' than 'Oh, my god, how could you do something like that?' [Native community leader discussing report findings.]

We all knew which houses were doing what in our community. And historically, because of who they were or who they were related to, or they're on the board, they were able to get away with it. Right? Everybody looked the other way on it. [Advocate]

Some of us in this room have addressed this on several occasions, but it was always hard to get the community to jump on board. I mean, it was—you know, you always had the choir. You always had the people that worked in the field that were interested in helping the victims that were in front of them at their desk, but there was not any cry from the community to deal with it on a community basis, at a community level, and so there are those pockets of safety for people that are committing these heinous crimes on a regular basis. [Community elder and leader discussing the report findings]

Influence of neighborhood and community environments

Gang activity and community normalization of violence

The discussions of advocates at the two round tables and the research literature from Canada and the U.S. all noted the considerable influence of gangs in Native communities, gangs' use of violence to coerce Native girls into prostitution, and Native girls' efforts to be as safe as they can in an unsafe environment through sexual relationships with gang members. Native girls' responses to the 2007 Minnesota Student Survey indicated significant levels of gang presence at their schools, and similar to the Canadian research we cited, showed violence to be a common feature of Native girls' school and neighborhood life in Minnesota.

A visible and active sex trade

Advocates repeatedly described young Native girls being approached on the street and offered money for sex, and in Canadian studies, Aboriginal youth reported the same experience. In the data collected by MIWRC, a significant number of Native women and girls reported knowing someone in prostitution, and many reported knowing a trafficker. The discussions at the advocates' round tables and the Canadian literature on Aboriginal youth in prostitution described frequent exposure of Native youth to a visible and active neighborhood sex trade as a key influence in normalizing survival sex and prostitution.

Social isolation and the "don't talk" rule

Research in poor neighborhoods has found that high levels of neighborhood violence and crime contribute to social isolation, where safety concerns limit the degree to which people become involved with or interact with their neighbors. The long-term success of children in these neighborhoods has been found to be strongly related to community members' willingness to support parents' efforts to keep their children safe.[274] Minneapolis and Duluth both have large urban concentrations of American Indians in low-income, high-crime neighborhoods where short-term residence in rental housing is the norm. The advocates' accounts and participants in Canadian research on prostituted youth both emphasized community norms for minding one's own business and the potentially dangerous consequences of calling the police.

The advocates' reports and the literature on abuse at boarding schools describe current Native community members' reluctance to get involved and the pervasiveness of "don't talk" rule. Both view these unhelpful social norms as responses of Native children that experienced or witnessed abuse at boarding schools. Teachers and administrators perpetrating sexual and physical abuse forced these children to accept responsibility for their own abuse. The children learned to be ashamed of their own sexuality, and also learned that telling anyone about the abuse they or others had experienced only led to increased violence and additional shame. Passed down to consecutive generations, the end result of these efforts to avoid harm to self or others is a lack of safety for sexually exploited children and an absence of accountability for perpetrators in Native communities.

A crime-based underground economy

Though community participation in an underground economy was not included in our description of factors contributing to Native girls' and women's vulnerability to entering the sex trade, some advocates did comment on Native girls' reliance on "boosters" selling stolen clothing, shoes, and accessories at very low prices. The community leaders and elders at the listening session pointed out that Native girls' and women's routine use of "boosters" increases their risk of involvement in other types of illegal activity, and viewing the sex trade as an acceptable way to get the things they want.

Limited jobs, few options for education and career planning

In the neighborhoods where American Indians are concentrated in Minneapolis and Duluth, unemployment rates are high and opportunities for legal, living-wage employment are extremely limited, as are options for a quality education. Research has found that inner-city schools consistently receive lower ratings for quality of education and student achievement than suburban schools, reflecting the broader patterns of inequality elsewhere in American society.[275] Students in these schools have been described as a "captured market," because their socioeconomic status makes them completely dependent upon the public school system.[276] The high American Indian school dropout rates suggest that unrewarding school experiences contribute to a belief that educational attainment and career planning are neither useful nor realistic life goals.

Influence of families and friends

Poverty

The advocates' discussions at the round tables, the research literature from Canadian studies of prostituted Aboriginal women and youth, and the comments from community leaders and elders all emphasized the importance of family poverty in two types of vulnerability among Native women and girls:

- Vulnerability to homelessness
- Vulnerability to landlord pimps that threaten rent increases and/or eviction.

Physical and sexual victimization

Canadian studies' findings that childhood physical and sexual abuse are common among prostituted Native women and girls and runaway Native youth, Minnesota Student Survey findings on Native girls' reports of physical and sexual abuse at home and having run away from home, and state and local data on American Indian child maltreatment show that many Native girls are at very high risk of being trafficked into the sex trade because of prior victimization. The Wilder Research study of homelessness also found that Native women and girls frequently reported physical or sexual violence at home as the reason for their current homelessness. Other studies' findings of high rates of partner violence among low-income Native women suggest that many Native women and girls are forced to leave home to avoid violent victimization, resulting in homelessness that further increases their vulnerability to sex trafficking.

Prostitution and survival sex

At both round tables, advocates described Native girls whose families were involved in generational prostitution and girls' friends already involved in stripping and/or prostitution. The Canadian studies of Aboriginal youth involvement in prostitution reported similar findings. The data collected from clients entering MIWRC programs confirmed that many have friends in prostitution, and also showed that clients reporting involvement in prostitution were most often recruited by a friend.

Substance abuse

At round tables, advocates reported Native mothers trafficking their daughters into prostitution to feed an addiction, and the Canadian studies of prostituted youth that we cited also identified parental substance abuse as a facilitating factor for Native youth running away from home and entering the sex trade. In the 2007 Minnesota Student Survey, the propor-

We need to also remember that this sub rosa economy is working all the time. The sale of illegal goods, all of that happens in our community, and the inability of young women to understand what they're doing in exchanging a sexual favor for money to buy diapers is part of that. [Community elder and leader discussing report findings]

What I'm saying is it is so commonplace because boosters are so prevalent. I mean, in other advocacy and other outreach, I was in people's homes and we were talking about healthy housing and education and their booster shows up and is trying to sell me clothes that they just got from the plus size clothing store, and he had an entire trunk of all this beautiful stuff. [Advocate]

tion of American Indian girls reporting problematic drug and alcohol use by a family member was much higher than that of girls in the general population, and the responses of homeless American Indian women and girls in the Wilder Research study of homelessness indicate that family substance abuse often forces Native women and girls to leave home without any other place to stay. The advocates and studies with prostituted Aboriginal youth in Canada both identified Fetal Alcohol Syndrome Disorder (FASD) as an indirect affect of mothers' substance abuse on Native girls' vulnerability to sexual exploitation.

Parents affected by generational trauma, FASD, and/or mental illness

At the advocates' round tables and in findings from Canadian studies with prostituted Native women and youth, unresolved generational trauma was identified as a root cause of the community violence, domestic violence, child abuse, and substance abuse that pervades Native communities in the U.S. and Canada. Advocates also reported knowing FASD-affected Native mothers trafficking their children, and the research we cited confirms that a FASD-affected, mentally ill or cognitively-impaired parent can increase their children's vulnerability to sexual exploitation.

The cumulative effect on Native girls

Lack of workforce preparation, sex trade viewed as a glamorous career option

Native girls' responses to the 2007 Minnesota Student Survey show high levels of disengagement from school and truancy, and data on American Indian school dropout shows that many leave school without the education level necessary to succeed at most living-wage jobs. The absence of employment opportunities in their neighborhoods and the lack of social networks for securing first jobs leave many Native girls with no employment history or job skills. The glamorization of sexual exploitation in the popular media, a highly visible sex trade, and girls' awareness that sex can be a resource for meeting basic needs combine to normalize the sex trade, encouraging Native girls to view it as a reasonable way to obtain money.

Absence of safety and emotional vulnerability

Native girls' reports of physical and sexual violence at home, gang presence and threat of violence in their schools, and physical and sexual violence by dates in the 2007 Minnesota Student Survey shows an alarming lack of safety in their lives. Advocates' stories at the round tables and Canadian research with runaway and prostituted Native youth also described the tremendous emotional vulnerability of Native girls in this type of home and community environment, especially to pimps and recruiters that promise to take care of and protect them. The reluctance of community members to intervene and community antagonism to anyone who calls the police makes Native girls even more vulnerable to guerrilla recruitment into prostitution. The very limited options for emergency shelter and crisis services leave the vast majority without alternatives that could offer protection or support.

Native girls' own trauma responses

Native girls' responses to the 2007 Minnesota Student Survey show that many use alcohol before the age of 12, show signs of alcohol dependency before leaving high school, and participate in violence against others. Research showing the prevalence of sexual assault and the link between sexual assault trauma and substance abuse among American Indian women confirms that these traumas make a significant number of Native girls and women vulnerable to prostitution recruitment by a pimp promising them safety. Advocates' reports of prostituted Native women's reluctance to trust and their dependency on pimps indicate that these trauma responses frequently expose them to new violence and new trauma.

Last Words

At the July 22, 2009 listening session to discuss the report findings, all of the Native community leaders and elders in attendance confirmed the seriousness of the problem and inspired us with their commitment to working together on a community response to end the commercial sexual exploitation of Native women and children.

Based on the information presented in this report, we conclude that commercial sexual exploitation of Native girls and women is neither harmless nor victimless. The widespread notion that prostitution is a voluntary career choice made by a fully informed adult has no basis in reality for the vast majority of prostituted Native women and girls. We find it unreasonable and cruel to assume that any Native person in prostitution has made an informed choice to endure extreme violence and subjugation at the hands of pimps and purchasers of sexual services, or to voluntarily decided to accept this maltreatment as an acceptable occupational hazard.

We found that most prostituted Native women and girls are trafficked into the sex trade as children but were never identified or protected as trafficking victims. Unable to find the support to leave prostitution, at the point that these victims reach the age of 18, they are immediately considered criminals and are often refused access to shelters and other services for trafficking, sexual assault, domestic violence, and stalking victims.

While stripping and pornography are often framed as relatively harmless aspects of the sex trade, we have identified these as gateways to prostitution for a significant number of Native women and girls. While some enter the sex trade to pursue the illusion of a glamorous and lucrative career, continued involvement in prostitution is almost always due to an absence of other options.

Because our focus for this report was the commercial sexual exploitation of Native women and girls, we did not address the prostitution of Native boys or Two-Spirit (gay, lesbian, and bisexual) youth. However, a number of Canadian studies reported that though girls made up 75-80 percent of Aboriginal youth in the sex trade, the remaining 20-25 percent were boys, Two-Spirit, and transsexual individuals.[277,278,279,280] In a 2008 Canadian study of street youth, 23 percent of Aboriginal boys and 54 percent of Aboriginal girls described themselves as not entirely heterosexual, bisexual, or gay/lesbian. These youth were much more likely than heterosexual-identifying youth to report having been kicked out of their homes or having run away, which makes them even more vulnerable to commercial sexual exploitation.[281]

Next Steps

The community leaders and elders that attended the listening session agreed on three main points regarding next steps toward addressing the commercial sexual exploitation of Native people:

- Any approach to addressing the problem must prioritize the healing and empowerment of Native communities, and ensure that they are not re-victimized as a result of the information brought forth in this report.

Feedback from Native community leaders

I'm really happy that this report came out. I'm really happy that finally we can sit in a group like this and talk about it, because we can't hide it any more. We can't tell our girls it's okay, because it's not okay...I really want to continue to be a part of this dialogue because I think it's long overdue.

The report shines a light on this—it's a stake in the ground. It says 'Look at this.' This is something that needs attention, and we're not going to solve this now or in the next little while, but if we don't start, we'll never solve it.

One of our spiritual leaders said to us some years ago, those of us who are older, who have been victimized by racism in this country and also those of us who are women who have victimized in whatever ways simply because we are women—what he said to us was, 'That pain is yours. That is your pain, and you need to deal with it, but don't pass it on to your children. They will experience their own difficulties and they will have to deal with that, but do not talk to them about what you have dealt with. I think [that] until we do deal with our own pain, it's impossible not to pass it on.

- To ensure community engagement and an emphasis on healing and empowerment, the next stage of strategic planning must be led by a committed and knowledgeable group of Native people.
- This is not solely a women's issue—it is a community issue that also involves Native boys and Two-Spirit youth and adults.

Recommendations for Action

The recommendations we provide here came from:

- Advocates attending the two regional round tables
- American Indian community leaders and elders that attended the listening session
- Prostituted Aboriginal women and youth and Aboriginal community members participating in Canadian studies of commercial sexual exploitation
- Patterns of risk identified in data and literature gathered for this report

Increase Awareness of the Problem

Provide education to a cross section of leadership on:

- The impact of poverty and other risk factors on Native youth's disproportionate involvement in the sex trade
- The extreme violence and trauma experienced by Native women and youth in prostitution
- Traffickers' recruitment strategies and the significance of strip clubs, pornography, online and phone sex, and escort services as gateways to prostitution for Native youth

Reframe the conversation and change the language

- Increase awareness that prostitution is not a life style choice, is not a victimless crime, and that the vast majority of prostituted people were trafficked into the sex trade as children--clearly identify prostitution as a form of sexual violence
- Highlight the proven relationship between men's belief that sex is a commodity that they have the right to purchase and the likelihood that they will commit violence against a woman
- Eliminate terms that place the onus of responsibility on the exploited person; rather than "prostitute," promote use of "person in prostitution" or "prostituted person"

Hold Sexual Exploiters Accountable

- Prosecute all cases of juvenile sex trafficking to the fullest extent of the law
- Reduce demand by increasing penalties for the purchase of sexual services (particularly sex with minors), and prohibit plea bargain agreements that allow purchasers to reduce their penalties through community service and/or restorative justice
- Support efforts by American Indian communities to hold families involved in multi-generational trafficking of their children accountable
- Identify, arrest, and prosecute anyone attempting to recruit vulnerable Native adults and youth for prostitution at homeless shelters, battered women's shelters, and other places providing emergency services
- Address gangs' use of violence to force Native youth into prostitution

Begin Outreach

- Recruit Native survivors of prostitution for employment as outreach workers and community educators
- Use harm reduction strategies, including providing condoms/promoting consistent condom use and partnering street nurses with outreach workers to provide Hepatitis B vaccinations
- Distribute information about domestic sex trafficking, sexual assault programs and related programs and services through community agencies, hospital emergency rooms, health clinics, and food shelves so that sexually exploited Native women and youth are more aware of places they can find help
- Establish protocols to identify and interrupt recruitment at outreach and drop-in programs, and ensure that programs are safe

Improve access to emergency shelter and transitional housing

All of the information we gathered on the types of housing prostituted Native women and girls need to successfully exit the sex trade emphasized three key points that should inform any plan to improve emergency shelter and housing options:

- The sex trade reinforces dependency on a pimp, so victims of commercial sexual exploitation often take a very long time to make the final decision to complete separate themselves
- These victims have known nothing but exploitation most of their lives, so are very reluctant to trust any program or organization that applies limits or makes demands
- The most useful and effective services have the fewest requirements, and focus on "meeting victims where they are"

For these reasons, these are the aspects of emergency shelter and transitional housing needed to provide effective support to prostituted Native women and youth to avoid or leave the sex trade:

- 24-hour, 7 days a week "safe houses" statewide, where sexually exploited Native women and youth can access emergency shelter, showers, clothing, food, referrals for health care, and other basic needs
- Transitional and supportive housing facilities with culturally competent staff statewide, specifically designed for prostituted Native women and youth
- Shelters, transitional housing and outreach services should link prostituted and at-risk Native girls and women to an array of holistic services to meet basic needs, receive health care, and work toward access to permanent safe housing
- Funding for transitional housing that is long-term and covers operating expenses—length of stay must be adequate to ensure that prostituted Native girls and women have enough time to build the skills and stability they need to secure gainful employment

To provide the greatest access, existing emergency and transitional housing facilities should:

- To the extent possible, revise public housing policies blocking access to anyone with a felony conviction, to allow access for victims of sex trafficking whose convictions were due to having been trafficked
- Work with child protection systems in the best interest of the families
- Give prostituted people attempting to exit the sex trade the same priority as people with a mental health diagnosis, rather than requiring them to get a mental health diagnosis for priority access

Increase Options for Self-sufficiency to Reduce Vulnerability

Poverty is one of the major factors in vulnerability to commercial sexual exploitation. The following are recommendations for services and programs that can help Native women and youth stay in school and/or gain the skills and resources they need to become self-sufficient

- Provide opportunities to finish high school that include mentoring, flexible hours, and access to high quality childcare so that those with children can participate
- Tailor employment services, academic, and career counseling to match prostituted Native women's and youth skills and interests, and accommodate learning styles
- Build relationships with employers willing to provide internship and apprenticeship programs where prostituted Native women and youth can develop skills and build confidence in their abilities

Promote Healing

- Hold community forums and workshops in American Indian communities to raise awareness of sex trafficking, the vulnerability of Native women, youth, and Two-Spirit people, and available resources for trafficking victims and their families
- Build community support for believing Native people that report sexual abuse and sexual exploitation, valuing and protecting them rather than stereotyping and isolating them
- Engage Native communities in recognizing and addressing the role of silence and denial in generational abuse and sexual exploitation, and in working as a community to hold all traffickers of Native people accountable
- Engage Native communities in holding producers and sellers of media and products that sexualize Native women and children accountable
- Encourage culturally based agencies to incorporate programming to meet the unique needs of sexually exploited women and youth, and provide opportunities for collaboration and networking to streamline services
- Create healing centers where victims and families can re-engage in traditional healing and build stronger cultural identities
- Provide culturally based healing that holistically addresses chemical dependency, mental illness and sexual trauma

Improve Systems and Increase Collaboration Between Systems

Engage child protection, law enforcement, schools, and Native community-based housing and social service agencies in collaborative efforts.

- Standardize intake procedures that can accurately identify victims of sex trafficking and provide them with immediate access to appropriate resources
- Develop training protocols in partnership with other stakeholders to raise awareness and install effective response mechanisms
- Support coordinated efforts by local law enforcement, Tribal law enforcement, the FBI, and the Coast Guard and other agencies to identify, investigate, and prosecute sex traffickers
- Investigate possible sex trafficking when youth report sexual abuse in the home, and ensure that a trained child protection worker works closely with police and Native programs to meet the unique needs of prostituted Native children
- Target gangs in schools, housing complexes, and neighborhoods by developing zero tolerance strategies to prevent and interrupt criminal activities with youth
- Develop coordinated responses to truant and runaway Native youth that divert them from the juvenile justice system to Native programs that serve sexually exploited Native youth

When the court case has begun against a Native sex trafficking victim's trafficker:

- Provide victims with a specific advocate who has the skills and knowledge to deal with her/him respectfully and for the length of time necessary
- Provide Pro Bono legal services to the victim and a safe space where she/he and the attorney can meet
- Do not require victims to be in the same room as the accused trafficker
- Develop alternatives to corrections placement in foster care and group homes for prostituted Native youth so they are not isolated from their culture and community
- Improve protections for victims who have outstanding warrants for their arrest, if those arrests are related to being trafficked, and consider that probation violations may be related to being trafficked

Provide Extensive Training to all Professionals that Come into Contact with Prostituted Native Women and Youth

In addition to basic training on the dynamics and impacts of the sex trade, various professionals should receive more in-depth training. These are some of the main topics we suggest:

For police officers, prosecutors, courts, and guardians ad litem:

- The importance of screening runaway and truant Native youth for involvement in the sex trade, and making social services arrangements on site rather than releasing them back to the community
- Establishing guidelines for recognizing when a prostituted Native person may be affected by FASD and or PTSD
- Networking with referral agencies for culturally-appropriate intervention and support services

For medical and emergency room personnel:

- The importance of treating prostituted victims of sexual or physical assault as assault victims, even when their injuries were perpetrated by a purchaser of sexual services or a pimp
- Information about trafficking laws, how to contact law enforcement, and how to keep a trafficking victim safe until the police arrive

For teachers and school administrators, 5th through 12th grade:

- Sex trade culture and terminology, common recruitment strategies, trafficker profiles, and indicators that a student is being trafficked
- Information about trafficking laws, how to contact law enforcement, and how to keep a trafficking victim safe until the police arrive
- Referral agencies for culturally-appropriate intervention and support services.

For workers in child protection, child welfare, and family social services:

- Sex trade culture and terminology, and the importance of early intervention
- Culturally-specific screening tools for sex trafficking and other forms of commercial sexual exploitation
- Follow-up strategies for protecting and monitoring sexually exploited Native adolescents and teens to provide a safety net for those that continue living with their families, including providing information on suitable referral services

For mental health professionals:

- The guilt and shame experienced by prostituted and trafficked Native adults and youth, and the need to respond immediately and skillfully
- The importance of a nonjudgmental approach that does not include a timeline for progress.
- The importance of a careful diagnosis that takes potential FASD and PTSD into account as possible aggravating factors
- Prostituted Native women's frequent experiences with unnecessary or inappropriate medications

Project Limitations and Future Research

Methodologically, our decision to convene round table discussions with advocates working with American Indian women and girls in crisis situations and use the information gathered there as a framework turned out to be a very useful approach. Our assumption that these advocates were likely to come into contact with trafficked and prostituted Native women and girls was correct. In the absence of any prior source of systematically collected data on Native women and girls in prostitution or other areas of the sex trade in either Minnesota or the U.S., triangulating advocates' experiences and observations with findings from published research, local data, and MIWRC client screening data allowed us to develop a basic understanding of a little-understood and complex problem within relatively short period of time.

Though it was useful as a starting point, the data collected by MIWRC via client screening and the two advocates' round table discussions represented a very small number of participants in very limited geographic areas. MIWRC is currently revising and expanding its screening tool and process to improve our ability to identify trafficking victims and provide them with appropriate services and supports. We expect to implement the new tool and process in October 2009.

There is an urgent need for a regional study involving a systematic and coordinated data collection process, to develop findings that can be generalized to the larger population. At both round tables and at the listening session with Native community leaders and elders in Minneapolis, Native participants emphasized the great need for more in-depth information to build upon what was found in producing this report, but they also voiced a serious concern that research could not take priority over adequate funding for direct services to prostituted Native people. With that qualifier in place, regarding future research, we recommend that:

- Funding for coordinated and appropriate support services to victims of commercial sexual exploitation is the community's highest priority—additional research will require a separate funding pool
- Any future research should involve identification, experiences, and needs of all American Indian victims, regardless of gender or sexual orientation
- Data collection should involve multiple agencies and programs providing culturally-specific crisis services to Native people for emergency shelter and housing, domestic violence, sexual assault, substance abuse, crisis intervention, and the needs of at-risk youth
- Because this exploratory study found indications of trafficking between cities in Minnesota, Wisconsin, North Dakota, and South Dakota, we recommend a regional study that includes two large urban Indian communities in each of the four states: Minneapolis, Duluth, Grand Forks, Fargo, Sioux Falls, Rapid City, Milwaukee, and Green Bay

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SENATOR BILL WIELECHOWSKI

March 23, 2011

Senator Hollis French
Senate Judiciary Committee
State Capitol
Juneau, Alaska 99801

Dear Senator French:

I am writing to request that you schedule a hearing on Senate Bill 110, "An Act relating to human trafficking; and relating to sentencing and conditions of probation in criminal cases involving sex offenses" at your earliest convenience.

This legislation will strengthen current state human trafficking laws. Sexual exploitation is a serious problem in the state. Traffickers prey on vulnerable Alaskans, a large number of whom are underage females. Native Alaskans are also disproportionately targeted. Current state law only recognizes the crime of "trafficking" when victims are transported across state lines. SB 110 would close that loophole, allowing law enforcement to prosecute traffickers who prey on victims within state borders.

SB 110 would also allow judicial discretion in imposing conditions of probation to include requiring defendants to refrain from residing within 500 feet of school grounds in specific cases.

Thank you for your consideration of this request. Any questions you or your staff may have should be directed to me or my staff Christy Harvey at 465-6259.

Sincerely,

Senator Bill Wielechowski

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MEMORANDUM

March 19, 2012

SUBJECT: Prostitution Offenses in CSSB 218 (JUD)
(Work Order No. 27-GS2627\M)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Doug Gardner
Director

There are two issues I want to call to your attention regarding the draft of CSSB 218(JUD).

1. Section 18. Section 18 of the bill expands AS 11.66.140, which provides that corroboration of certain testimony is not required, to the offense of promoting prostitution in the fourth degree under AS 11.66.135. It is unclear how eliminating the need for corroboration "of the person whose prostitution is alleged to have been compelled or promoted" in the context of AS 11.66.135 would actually work. AS 11.66.135(a) provides that a person commits the crime of promoting prostitution in the fourth degree if:

> (a) A person commits the crime of promoting prostitution in the fourth degree if the person engages in conduct that institutes, aids, or facilitates prostitution under circumstances not proscribed under AS 11.66.130(a)(4)[1].

In a prosecution under AS 11.66.135, the evidence and witnesses would likely be those with personal knowledge, or investigating officers and records, relating to facilitating a prostitution enterprise. Since AS 11.66.135 does not relate to a person whose prostitution has been compelled or promoted, it is hard to envision how AS 11.66.140 would apply to testimony regarding a prostitution enterprise. Does the committee want to extend the application of AS 11.66.140 to AS 11.66.135, where it does not appear it would be necessary or applicable?

---

[1] AS 11.66.130(a)(4) provides: (4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

2. Section 19. Section 19 of this bill expands the prostitution offenses that would allow the prosecution to file for forfeiture of property used to institute, aid, or facilitate the offenses. Does the committee want to allow forfeiture of property in a misdemeanor prostitution case brought under AS 11.66.100? I note that CSSB 218(JUD), version M, eliminates section 5 of the prior SB 218, version A, where prostitution was increased to a C felony under certain circumstances. Should this section stay in the bill in light of the fact that the felony prostitution provision in SB 218, version A, is not present in the bill?

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MEMORANDUM March 15, 2012

SUBJECT: SB 110 and SB 218, Human Trafficking and Sex Trafficking (CSSB 110(JUD); Work Order No. 27-LS0646\E)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Doug Gardner
Director

There are three issues that I wanted to call to your attention regarding SB 110 and SB 218.

1. As we briefly discussed on the telephone, while I was incorporating most of SB 218 into SB 110, as you requested, I noticed several instances where sex trafficking was treated differently than human trafficking, and so I took the step we discussed of treating both offenses, in the first degrees, similarly throughout the bill. Here are the places, by statute citation, where I added human trafficking to include it with sex trafficking so that both offenses are treated similarly:

- AS 04.06.110, Peace Officer Powers;
- AS 04.11.370(a)(7), Revocation of License for Licensed Premises;
- AS 12.55.035(b)(1), Fines;
- AS 15.80.010(9), Crimes of Moral Turpitude (all human trafficking convictions regardless of degree);
- AS 28.15.046(c)(10), Restriction on DMV Issuing Licenses;
- AS 47.12.110(d)(1)(B)(viii), Juvenile Delinquency Hearings Open to Public; and
- AS 47.12.315(a)(1)(H), Public Release of Certain Information.

Please review these changes to make sure that they conform to the intent of the committee.

In addition, should the new C felony prostitution offense in AS 11.66.100(c) be added to the definition of sex offense in AS 12.63.100(6)? I note that SB 110 added the new offense of human trafficking in the first degree to the definition of sex offense in AS 12.63.100(6).

2. With regard to online enticement in the first degree in section 19 of the bill, the way the bill is currently drafted, online enticement that is B felony conduct and online enticement that is A felony conduct would both be serious felonies. It would appear that the intention of the committee is for the A felony offense of online enticement provided for in AS 11.41.452(e) to be a serious felony, but not online enticement that is a B felony (online enticement is an A felony when the offender is a registered sex offender). Given that in other situations, such as sexual assault in the second degree, which is a B felony, the legislature has not included a class B felony as a serious felony, I would assume that citation to AS 11.41.452(e) should be included to clarify this situation.

3. The final matter I wanted to call to your attention is the issue of not providing a defense of mistake of age for the crime of prostitution for the defendant, in cases where the victim is under 18 years of age, and the defendant is 18 years of age or older and at least 3 years older[1] than the victim.[2] I note that in the offense of promoting prostitution, provided for in AS 11.66.110, the legislature eliminated the mistake of age defense set forth in AS 11.41.445. Eliminating the defense of mistake of age in the offense of promoting prostitution in the first degree was found constitutional by the Alaska Court of Appeals in *Bell v. State of Alaska*, 668 P.2d 829 (Alaska App. 1983), where the court distinguished the offense of promoting prostitution in the first degree from the holding by the court in *State v. Guest*, 583 P.2d 836 (Alaska 1978), that offenses involving "statutory

---

[1] I also note that the sexual abuse of a minor statutes all contain a four year age separation between the offender and the other person, with the exception of sexual abuse of a minor in the fourth degree, which contains a three year age separation. Was it a conscious choice to use a three year age difference, or should it have been four years as provided in AS 11.41.434(SAM I) - AS 11.41.438(SAM III)?

[2] In a similar situation a defense of mistake of age is provided for the crimes of sexual abuse of a minor under AS 11.41.434 - 11.41.440. *State v. Guest*, 583 P.2d 836 (Alaska 1978), regarding the necessity of this defense in the statutory rape context. AS 11.41.445 provides:

> (a) In a prosecution under AS 11.41.434 - 11.41.440 it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless the offense was committed without the consent of the victim.
>
> (b) In a prosecution under AS 11.41.410 - 11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant
>
> (1) reasonably believed the victim to be that age or older; and
>
> (2) undertook reasonable measures to verify that the victim was that age or older.

rape" or sexual abuse of a minor must allow the defendant to present the defense of mistake of age in order to pass constitutional muster. I am including much of the court's discussion from *Bell* relevant to this issue for your convenience:

> We also note that AS 11.66.110(b) is in accord with the common law view that there should be no exculpation for mistake where, if the facts had been as the actor believed them to be, his conduct would still be illegal or immoral. As Bell recognizes on appeal, his conduct would still have been illegal even if D.W. had been sixteen or over. AS 11.66.130(a)(2). Moreover, although it might be arguable that the offense of prostitution should be considered a *malum prohibitum* crime, we think it manifest that *promoting* prostitution is an offense "which reasoning members of society regard as condemnable," and thus, is *malum in se*. *Hentzner v. State*, 613 P.2d at 826. Accordingly, there can be little doubt that Hentzner's basic requirement of an awareness or consciousness of wrongdoing is satisfied, despite the fact that AS 11.66.110(b) precludes mistake of age as a defense to the offense of promoting prostitution in the first degree.
>
> In continuing to press his claim that AS 11.66.110(b) imposes an unconstitutional standard, Bell relies upon *State v. Guest*, 583 P.2d 836 (Alaska 1978), in which the supreme court upheld a trial court's decision to instruct the jury on a defense of reasonable mistake of age in a statutory rape case. Following the reasoning of *Speidel* and *Alex,* the court stated that an intent requirement must be read into former AS 11.15.120 to save it from unconstitutionality. To refuse a defense of mistake of age in a statutory rape case, according to the *Guest* court, would be to impose significant criminal liability without any criminal mental element. *Id.* at 839.
>
> Bell relies most heavily upon the following language in *Guest:*
>
> > **It has been urged in other jurisdictions that where an offender is aware he is committing an act of fornication he therefore has sufficient criminal intent to justify a conviction for statutory rape because what was done would have been unlawful under the facts as he thought them to be. We reject this view. While it is true that under such circumstances a mistake of fact does not serve as a complete defense, we believe that it should serve to reduce the offense to that which the offender would have been guilty of had he not been mistaken. Thus, if an accused had a reasonable belief that the person with whom he had sexual intercourse was sixteen years of age or older, he may not be convicted of statutory rape. If, however, he did not have a reasonable belief that the victim was eighteen years of**

> **age or older, he may still be criminally liable for contribution to the delinquency of a minor.** [Emphasis added.]

Id. (citations and footnotes omitted). The court cited in support of its position section 2.04(2) of the Model Penal Code (Proposed Official Draft 1962), which provides:

> Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

We believe the problem addressed in *Guest* is distinguishable from the issue at hand. As we have stated, Bell did not lack criminal intent; he intended to promote prostitution. See *Hentzner v. State*, 613 P.2d at 826; *Wheeler v. State*, 659 P.2d at 1251. The court in Guest was careful to point out that fornication was not itself a crime, so that it could not have been considered as a lesser-included offense of statutory rape. Also, although the court went on to observe that Guest *might* still have been guilty of contributing to the delinquency of a minor under former AS 11.40.130 if he did not have a reasonable belief that his partner was under eighteen, it is clear that Bell was *necessarily* guilty of promoting prostitution in the third degree if the facts were as he supposed them to be.

This distinction is supported by analysis of other authorities. The revised criminal code contains no provision paralleling the second sentence of MPC § 2.04(2), quoted by the *Guest* court. Instead, AS 11.81.600(b)(2) provides:

> (b) A person is not guilty of an offense unless he acts with a culpable mental state with respect to each element of the offense, except that no culpable mental state must be proved
>
> (2) *if an intent to dispense with the culpable mental state requirement for that element clearly appears.*

(Emphasis added.) AS 11.66.110(b), by proscribing any defense to AS 11.66.110(a)(2) based upon mistake of age, clearly demonstrates a legislative intent to dispense with knowledge of age.

More importantly, despite the language of MPC § 204(2), the Model Penal Code takes essentially the same approach as the Revised Code to in its treatment of criminal intent for the offense of promoting prostitution. MPC § 251.2(2) (1980) makes the conduct proscribed by AS 11.66.130(a)(2) -- promoting prostitution in the third degree -- a misdemeanor, while § 251.2(3)(c) provides that the same conduct shall be a felony if "the actor promotes prostitution of a child under 16, *whether or not he is aware of the child's age.*" Similarly, New York Penal Law § 230.30 (1978), from which AS 11.66.110 appears to be derived, provides that it shall be a felony to "knowingly" advance or profit from the prostitution of a person less than sixteen years old, while New York Penal Law § 15.20(3) (1967) provides that

> Notwithstanding the use of the term "knowingly" in any provision of this chapter defining an offense in which the age of a child is an element thereof, knowledge by the defendant of the age of such child is not an element of any such offense and it is not, unless expressly so provided, a defense to a prosecution therefor that the defendant did not know the age of the child or believed such age to be the same as or greater than that specified in the statute.

We find it highly persuasive that these statutory schemes are, when applied to the precise conduct engaged in by Bell, in consonance with the approach taken in the Revised Code.

Under the Revised Alaska Criminal Code, it is Bell's intentional procurement of a person under the age of sixteen years for prostitution that renders him liable for first-degree promoting, regardless of his actual awareness of that person's age. **The act of procuring another for purposes of prostitution is *malum in se*, without regard to the age of the person procured, and thus, as we have indicated, in a prosecution for procuring a person under the age of sixteen years, the intent to procure satisfies the minimal constitutional requirement of criminal intent. *Hentzner v. State*, 613 P.2d at 826. We hold that AS 11.66.110(b), which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree, does not violate due process of law.** We therefore conclude that the trial court did not err in rejecting Bell's challenge to the instruction on mistake of age. [Emphasis added.]

Bell, *supra*, at 833 - 835. The caution that should be observed in removing the defense of mistake of age for moving the offense of prostitution from a B misdemeanor to a

C felony where the defendant is 18 years of age or older and at least three years older than the victim is as follows:

- In *Bell*, as quoted and emphasized above, the court relied on the fact that the defendant was being prosecuted for a *malum in se* offense, where the underlying offense of promoting prostitution was completed whether the offender was aware of the other person's age or not. Under these circumstances, the *Bell* court found that eliminating a mistake of age defense passed constitutional muster. The concern is that the decision in *Bell* may not apply to prostitution as provided in AS 11.66.100, given the *malum prohibitum* status of prostitution. Put differently, since the court in *Bell* placed significant emphasis on the *malum in se* nature of the offense of promoting prostitution, in contrast to the *malum prohibitum* offense of prostitution, a court may be less willing to approve of a statute imposing significant increased criminal liability -- from a B misdemeanor to a C felony -- where the offender is unable to present a mistake of age defense.

- A reviewing court might consider the amendment in AS 11.66.100 so similar to the offenses of sexual abuse of a minor, in other words adding a SAM component to prostitution that from the standpoint of substantive due process, if a SAM defendant may present a mistake of age defense, then a defendant charged with prostitution with an age component should be allowed to as well.

- I would observe that a proponent of the amendments to AS 11.66.100 in section 10 of the bill might argue that, like the facts in *Bell*, a defendant charged with prostitution as a C felony would necessarily be guilty of what is likely the lesser included offense of prostitution as a B misdemeanor without regard to the age of the other person, and therefore, as the court reasoned in *Bell*, the defendant was necessarily guilty of the lesser offense if the facts were as the defendant supposed them to be. However, the ruling in *Bell* was shaped in large part by the idea that even the lesser included offense of promoting prostitution in the third degree, which was a misdemeanor in 1980, was still a *malum in se* offense, where the offense of prostitution is not. A court would likely give significant weight to the different offenses involved, and might distinguish the facts of *Bell*, and conclude that, like the situation in *Guest*, a defendant guilty of a lesser included offense, but one that is *malum prohibitum*, should be allowed to present a defense of mistake of age.

DDG:ljw
12-198.ljw

Enclosure

Cindy Smith

From: Kendra Kloster
Sent: Thursday, February 09, 2012 11:06 AM
To: Cindy Smith
Subject: RE: sb110

Sounds good. That gives me some time over the weekend to come up with some new ideas.

From: Cindy Smith
Sent: Thursday, February 09, 2012 10:34 AM
To: Kendra Kloster
Subject: RE: sb110

Yeah, a blank CS is fine – and maybe we can talk Monday? Our bosses will both be busy that day with oil taxes and so I have no meeting to worry about.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Kendra Kloster
Sent: Thursday, February 09, 2012 10:19 AM
To: Cindy Smith
Cc: Thomas Presley
Subject: RE: sb110

Thanks. I will touch base with you tomorrow or early next week when you have time to discuss a CS. I can order a blank CS after working on changes and removing the part of the bill that had already passed if that works for you.

From: Cindy Smith
Sent: Thursday, February 09, 2012 9:24 AM
To: Kendra Kloster
Cc: Thomas Presley
Subject: RE: sb110

Friday the 17th it is! And also for SJR 13 – it'll be Bill day in SJUD ☺

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Kendra Kloster
Sent: Wednesday, February 08, 2012 5:15 PM
To: Cindy Smith
Subject: sb110

Hi Cindy,

Just wanted to follow up with you that I will be working on the sex trafficking bill the remaining part of this week and next to get ready for a hearing when you are ready for us. Sen. W is interested in a Friday hearing next week if you are still working on a schedule. If you have a full schedule then we will go with the next available opening for a hearing in JUD. Thanks much!

Kendra Kloster
Office of Senator Bill Wielechowski
907.465.6259
800.550.2435
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APOA

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February 10, 2012

Senator Bill Wielechowski
Alaska State Senate
State Capitol
Juneau AK 99801-1182

Dear Senator Wielechowski:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing Senate Bill 110, an act relating to human trafficking; and relating to sentencing and conditions of probation in criminal cases involving sex offenses.

The APOA State Board of Directors recently reviewed this proposed legislation and decided to unanimously support this bill.

We thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515, if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

John Lucking, Jr.
State President

PO Box 240106
Anchorage AK 99524

t 907 277 0515
f 907 272 5355

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION

VIOLENT CRIMES COMPENSATION BOARD

SEAN PARNELL, GOVERNOR

P.O. BOX 110230
JUNEAU, ALASKA 99811-0230
PHONE: (907) 465-3040
TOLL FREE: 1-800-764-3040
FAX: (907) 465-2379

February 13, 2012

The Honorable Senator Wielechowski
State Capitol, Room 101
Juneau, Alaska 99801

Re: Senate Bill, 110 Human Trafficking/Sex Offenses

I write on behalf of the Violent Crimes Compensation Board in support of Senate Bill 110.

The proposed legislation strengthens existing state legislation by extending the definition of trafficking to include the movement or enticement of young women within the state of Alaska, not just across state lines.

As Board members, we have seen the terrible results of human trafficking on the lives of young women and their families. Very often these victims are young vulnerable native women who have left their villages and come to Anchorage, only to find themselves homeless and alone. These women are specifically targeted by these predators, given enticements in the form of clothing, housing and jewellery, and are then abused, beaten, sexually assaulted, deliberately addicted to controlled substances and alcohol and then prostituted out to make money for their abusers.

Over the course of the last few years, the Board has seen 23 claims stemming from federal human trafficking investigations, and has paid out over $150,000 in compensation or assistance to trafficking victims. This compensation has been in the form of payment for mental health counseling, and for drug and alcohol treatment programs, as well as for medical expenses, and assistance in relocation to a safer environment. None of these 23 claims were for victims trafficked *to* Alaska. All were already Alaskan residents.

This proposed legislation closes the gap, and the Board strongly supports its passage

Respectfully submitted

Gerad Godfrey
Chair, Violent Crimes Compensation Board

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Cindy Smith

From: Kendra Kloster
Sent: Friday, March 16, 2012 3:57 PM
To: Cindy Smith
Subject: SB110

Follow Up Flag: Follow up
Flag Status: Flagged

Cindy,

The section I was asking about earlier is section 15 in SB218 – when looking through the CS for SB110 Version E I wasn't see this section included unless it got incorporated in another location?

Thanks,

Kendra Kloster
Office of Senator Bill Wielechowski
State Capital Bldg. Rm 101
907.465.6259

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March 13, 2012

Senator Hollis French, Chairman
Sentate Judiciary Committee
State Capitol Room 417
Juneau AK, 99801

Re: Bill No.: SB 110

Dear Chairman French:

The purpose of this letter is to follow up on the February 17, 2012 Senate Judiciary Committee hearing at which the Human Trafficking/Sex Offenses, SB 110, was discussed and tabled, and to offer recommendations based on both the hearing and my recent discussion with Katherine Tepas of the Governor's office following Governor Parnell's transmittal of HB 359 and its companion bill, SB 218.

I was able to listen to the testimony provided at the hearing on SB 110 by way of conference call, but unfortunately, was disconnected before I was able to provide testimony of my own. Based on the testimony, it seems that there is some concern over whether the bill is necessary given the state's code sections prohibiting the promotion of prostitution.

While the promotion of prostitution provisions do require fewer elements, human trafficking encompasses more than just sex trafficking. As such, amendments to the human trafficking statute would bring Alaska's laws more in line with the federal definition of human trafficking, and would provide greater protection against labor trafficking.

Under U.S. federal law, "severe forms of trafficking in persons" includes both sex trafficking and labor trafficking, which are defined as follows:

- Sex trafficking is the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, OR in which the person induced to perform such an act has not attained 18 years of age, (22 USC § 7102; 8 CFR § 214.11(a)).

- Labor trafficking is the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery, (22 USC § 7102).

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Acknowledging that Alaska's promotion of prostitution laws are beneficial in that they contain no requirement that the victim be induced to move in or about the state; but that amendments to the state's human trafficking laws are necessary in order to protect native Alaskans from labor trafficking, I have attached proposed language amending SB 110 which I hope will provide the best of both worlds.

As you can see, the proposed amendments preserve most of the language of the existing human trafficking statute, but redefine the existing provisions as 'sex trafficking' while adding a new provision entitled 'labor trafficking.' The labor trafficking provision does not require that the victim be induced to coming to the state of Alaska or even being moved within the state, thereby giving native Alaskans the same protection against labor trafficking as the promotion of prostitution statutes provide against sex trafficking. Mirroring the sex trafficking provisions, the labor trafficking offenses are catagorized as first, second, or third degree offenses.

In light of the Governor's recent transmission of HB359/SB218, I took the liberty of reaching out to his office to discuss ways to strengthen the pending anti-human trafficking legislation, including SB110. Per my conversation with Ms. Tepas, I will likewise be providing the Governor with a copy of the proposed amendments attached here, in the hopes that he will support amending the language of SB110 to providing increased protection against labor trafficking to native Alaskans, regardless of whether the element of transportation was involved.

I would welcome the opportunity to discuss any thoughts or concerns you have regarding SB 110 or the proposed amendments attached hereto. Please do not hestitate to contact me at (202) 745-1001, ext. 132, if I can be of further assistance in this regard.

Sincerely,

James Dold,
Policy Counsel

Washington, DC | New Jersey | Tokyo
P.O. Box 53315 Washington, DC 20009
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Proposed Amendments

KEY: Deletions appear in [brackets] and additions are underlined.

Sect. __. AS 11.41.360 is amended to read:

Sec. 11.41.360. **Labor Trafficking [HUMAN TRAFFICKING} in the first degree.** (a) A person commits the crime of labor trafficking [human trafficking] in the first degree if the person compels or induces another person [to come to this state] to engage in [sexual conduct, adult entertainment or] labor [in the state] or provide services through the use of [by] force, threat of force against any person, coercion or by deception.
(b) In this section,

(1) "deception" has the meaning given in AS 11.46.180 ["adult entertainment" means the conduct described in AS 23.10.350(f)(1) - (3); "sexual conduct" has the meaning given in AS 11.66.150.]
(c) Labor trafficking [Human trafficking] in the first degree is a class A felony.

Sec.___. AS 11.41.365 is amended to read:

Sec. 11.41.365. **Labor trafficking [HUMAN TRAFFICKING] in the second degree.** (a) A person commits the crime of labor trafficking [human trafficking] in the second degree if the person obtains a benefit from the commission of labor trafficking [human trafficking] under AS 11.41.360, with reckless disregard that the benefit is a result of the trafficking.
(b) Labor trafficking [Human trafficking] in the second degree is a class B felony.

Sec. 3. AS 11.31.120(h)(2) is amended to read:

E that is labor trafficking [human trafficking] in the first degree under AS 11.41.360

Sec. 13. AS 11.66.145 is amended to read:

Sec. 11.66.145. Forfeiture. Property used to institute aid, or facilitate, or received or derived from, a violation of **AS.11.66.100-11.66.135** [AS 11.66.110-11.66.135] and **AS.11.41.360- 11.41.365** shall be forfeited.

Sec. 21. AS 15.80.010(9) is amended to read:

(9) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping,

incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, **sex trafficking** [PROMOTING PROSTITUTION], **labor trafficking**, criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography;

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STUDENT ADVISORS

March 16, 2012

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
State Capitol
Juneau, AK 99801
via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

Re: CS for SB 110 (M version)
ACLU Review of Legal Issues

Dear Chair French and Vice-Chair Wielechowski:

Thank you for the opportunity to submit written testimony with respect to CS for Senate Bill 110 (M version).

As you know, the American Civil Liberties Union of Alaska represents thousands of members and activists throughout the state who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we would like to advise the Committee of some concerns with respect to the proposed version of the bill.

The CS for SB 110 (M version) is an Improvement on the Original

The original version of SB 110 contained several concerning provisions which were vague and would have inadvertently criminalized much innocent teenage sexual conduct, by prohibiting "entic[ing]" or "induc[ing]" sexual conduct with someone under the age of 18 by any kind of deception. This original version would, for instance, make a 17-year-old boy guilty of an unclassified felony for having sex with a 16-year-old girl after telling her falsely that he wasn't romantically involved with anyone else. The M version imposes a requirement that any "human trafficking" would only occur if the victim were under the age of 18 and if the offender were at least four years older.

The CS Retains Some Arbitrary Consequences, and
Imposes an Outsized Penalty for Some Potentially Innocent Conduct

Generally, the Legislature has determined the age of consent to be 16. However, the M version of the bill would make consensual sexual activity between a 22-year-old and a 17-year-old an unclassified felony – the same grade as rape – as long as the 22-year-old "deceived" the 17-year-old in some way, and as long as the 17-year-old traveled 100 miles to reach the site where they have sex, which would include, say, driving from Seward to Anchorage. It appears, conversely, that the 22-year-old could drive from Anchorage to Seward to have sex with the 17-year-old and go unpunished.

The term "by deception" has been very broadly construed by the Alaska courts. Virtually any misrepresentation qualifies as deception. *State v. McDonald*, 872 P.2d 627, 653 (Alaska App. 1994) (holding evidence that kidnapping defendant lured adult woman into van using "deception" with false promise of information regarding ongoing child custody dispute). Within the ordinary realm of consensual romantic and sexual relations, people lie about all sorts of facts: whether one is married or not, whether one is in a committed relationship or not, how much money one makes, etc. While deception in the context of romantic and sexual relationships is not laudatory, not all such misrepresentations should not be the subject of criminal penalties.

In addition to the broad meaning of the term "by deception," the terms "entice" and "induce" are also so broad that the bill could criminalize more than the exploitative activity the drafters intended. While the trafficking of young people from rural Alaska to urban areas is serious, the current version – as a result of problems with the underlying statute – still sweeps too broadly beyond the targeted behavior.

Thank you again for letting us share our concerns. Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us
Senator John Coghill, Senator_John_Coghill@legis.state.ak.us

Cindy Smith

From: Steiner, Quinlan G (DOA) <quinlan.steiner@alaska.gov>
Sent: Wednesday, March 21, 2012 10:34 AM
To: Cindy Smith
Subject: RE: SB110

The only other thing I would suggest is to take sexual conduct out of the human trafficking statute and deal with that issue in the sex trafficking statute.

From: Steiner, Quinlan G (DOA)
Sent: Wednesday, March 21, 2012 10:25 AM
To: 'Cindy Smith'
Subject: SB110

This would narrow it, but still be broader than promoting prostitution, and eliminate the possibility of a prosecution for deception in the in-state dating context.

(a) A person commits the crime of human trafficking in the second degree if

(1) the person compels or induces another person to come to this state to engage in sexual conduct, adult entertainment, or labor in the state by force or threat of force against any person, or by deception; or

(2) the person compels or induces another person in this state to engage in sexual conduct with a third person, adult entertainment, or labor by force or threat of force against any person, or by deception.

CS FOR SENATE BILL NO. 110(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS WIELECHOWSKI, McGuire

A BILL

FOR AN ACT ENTITLED

"An Act relating to human trafficking and sex trafficking, to punishment and fines for those offenses, and to peace officer powers to enforce human trafficking and sex trafficking laws in licensed premises; including human trafficking in the first degree and sex trafficking in the first degree in the definition of 'serious felony offense' for the offense of conspiracy and including sex trafficking and online enticement of a minor in the definition of 'most serious felony' for sentencing; relating to prostitution and promoting prostitution; relating to sex offenses; including human trafficking and sex trafficking in the list of offenses that make hearings for certain delinquent minors public and require disclosure of the names of certain delinquent minors; and providing for an effective date."

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

* **Section 1.** AS 04.06.110 is amended to read:

Sec. 04.06.110. Peace officer powers. The director and the persons employed for the administration and enforcement of this title may, with the concurrence of the commissioner of public safety, exercise the powers of peace officers when those powers are specifically granted by the board. Powers granted by the board under this section may be exercised only when necessary for the enforcement of the criminally punishable provisions of this title, regulations of the board, and other criminally punishable laws and regulations, including investigation of violations of laws against prostitution and **sex trafficking** [PROMOTING PROSTITUTION] described in **AS 11.66.100 - 11.66.135, human trafficking described in AS 11.41.355 - 11.41.365,** [AS 11.66.100 - 11.66.130] and laws against gambling, promoting gambling, and related offenses described in AS 11.66.200 - 11.66.280.

*** Sec. 2.** AS 04.11.370(a) is amended to read:

(a) A license or permit shall be suspended or revoked if the board finds

(1) misrepresentation of a material fact on an application made under this title or a regulation adopted under this title;

(2) continuation of the manufacture, sale, or service of alcoholic beverages by the licensee or permittee would be contrary to the best interests of the public;

(3) failure on the part of the licensee to correct a defect that constitutes a violation of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or other laws after receipt of notice issued by the board or its agent;

(4) conviction of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010;

(5) conviction of an agent or employee of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates a law, regulation, or ordinance;

(6) failure of the licensee to comply with the public health, fire, or

safety laws and regulations in the state;

(7) use of the licensed premises as a resort for illegal possessors or users of narcotics, prostitutes, **human traffickers,** or **sex traffickers** [PROMOTERS OF PROSTITUTION]; in addition to any other legally competent evidence, the character of the premises may be proved by the general reputation of the premises in the community as a resort for illegal possessors or users of narcotics, prostitutes, **human traffickers,** or **sex traffickers** [PROMOTERS OF PROSTITUTION];

(8) occurrence of illegal gambling within the limits of the licensed premises;

(9) the licensee permitted a public offense involving moral turpitude to occur on the licensed premises;

(10) violation by a licensee of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010; or

(11) violation by an agent or employee of a licensee of a provision of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates the law, condition or restriction, regulation, or ordinance.

* **Sec. 3.** AS 11.31.120(h)(2) is amended to read:

(2) "serious felony offense" means an offense

(A) against the person under AS 11.41, punishable as an unclassified or class A felony;

(B) involving controlled substances under AS 11.71, punishable as an unclassified, class A, or class B felony;

(C) that is criminal mischief in the first degree under AS 11.46.475; [OR]

(D) that is terroristic threatening in the first degree under AS 11.56.807**;**

(E) that is human trafficking in the first degree under AS 11.41.355; or

(F) that is sex trafficking in the first degree under AS 11.66.110.

* **Sec. 4.** AS 11.41 is amended by adding a new section to read:

Sec. 11.41.355. Human trafficking in the first degree. (a) A person commits the crime of human trafficking in the first degree if

(1) the person violates AS 11.41.360 by compelling or inducing another person to engage in

(A) sexual conduct;

(B) adult entertainment; or

(C) an act described in AS 11.41.455(a)(1) - (7); and

(2) the other person compelled or induced is under 18 years of age.

(b) Human trafficking in the first degree is an unclassified felony.

* **Sec. 5.** AS 11.41.360(a) is amended to read:

(a) A person commits the crime of human trafficking in the **second** [FIRST] degree if the person compels or induces another person to [COME TO THIS STATE TO] engage in sexual conduct, adult entertainment, or labor in the state by force or threat of force against any person, or by deception.

* **Sec. 6.** AS 11.41.360(c) is amended to read:

(c) Human trafficking in the **second** [FIRST] degree is a class A felony.

* **Sec. 7.** AS 11.41.365 is amended to read:

Sec. 11.41.365. Human trafficking in the third [SECOND] degree. (a) A person commits the crime of human trafficking in the **third** [SECOND] degree if the person obtains a benefit from the commission of human trafficking under **AS 11.41.355 or 11.41.360** [AS 11.41.360,] with reckless disregard that the benefit is a result of the trafficking.

(b) Human trafficking in the **third** [SECOND] degree is a class B felony.

* **Sec. 8.** AS 11.41.370 is amended by adding new paragraphs to read:

(4) "adult entertainment" means the conduct described in AS 23.10.350(f)(1) - (3);

(5) "sexual conduct" has the meaning given in AS 11.66.150.

* **Sec. 9.** AS 11.66.100(b) is amended to read:

(b) **Except as provided in (c) of this section, prostitution** [PROSTITUTION] is a class B misdemeanor.

* **Sec. 10.** AS 11.66.100 is amended by adding new subsections to read:

(c) Prostitution is a class C felony if

(1) the defendant violates (a) of this section as a patron of a prostitute;

(2) the prostitute is under 18 years of age; and

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution under (c) of this section, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was 18 years of age or older.

* **Sec. 11.** AS 11.66.110(a) is amended to read:

(a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 18 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

* **Sec. 12.** AS 11.66.110(c) is amended to read:

(c) Except as provided in (d) of this section, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree is a class A felony.

* **Sec. 13.** AS 11.66.120 is amended to read:

Sec. 11.66.120. Sex trafficking [PROMOTING PROSTITUTION] in the second degree. (a) A person commits the crime of **sex trafficking** [PROMOTING

PROSTITUTION] in the second degree if the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution;

(2) procures or solicits a patron for a prostitute; or

(3) offers, sells, advertises, promotes, or facilitates travel that includes commercial sexual conduct as enticement for the travel; in this paragraph, "commercial sexual conduct" means sexual conduct for which anything of value is given or received by any person.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the second degree is a class B felony.

*** Sec. 14.** AS 11.66.130 is amended to read:

Sec. 11.66.130. Sex trafficking [PROMOTING PROSTITUTION] in the third degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the third degree if, with intent to promote prostitution, the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;

(2) as other than a patron of a prostitute, induces or causes a person 18 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property **under** [PURSUANT TO] an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the third degree is a class C felony.

*** Sec. 15.** AS 11.66.135 is amended to read:

Sec. 11.66.135. Sex trafficking [PROMOTING PROSTITUTION] in the fourth degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree if the person engages in conduct that institutes,

aids, or facilitates prostitution under circumstances not proscribed under AS 11.66.130(a)(4).

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree is a class A misdemeanor.

* **Sec. 16.** AS 11.66.140 is amended to read:

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under **AS 11.66.110 - 11.66.135** [AS 11.66.110 - 11.66.130], it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence.

* **Sec. 17.** AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree,** and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree,** and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses

against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies;

(4) class A misdemeanors, which characteristically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

* **Sec. 18.** AS 11.81.250(b) is amended to read:

(b) The classification of each felony defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, **human trafficking in the first degree,** misconduct involving a controlled substance in the first degree, **sex trafficking in the first degree under AS 11.66.110(a)(2),** and kidnapping, is designated in the section defining it. A felony under **the** [ALASKA] law **of this state** defined outside this title for which no penalty is specifically provided is a class C felony.

* **Sec. 19.** AS 12.55.035(b) is amended to read:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of **not** [NO] more than

(1) $500,000 for murder in the first or second degree, attempted murder in the first degree, murder of an unborn child, sexual assault in the first degree,

sexual abuse of a minor in the first degree, kidnapping, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree** or misconduct involving a controlled substance in the first degree;

(2) $250,000 for a class A felony;

(3) $100,000 for a class B felony;

(4) $50,000 for a class C felony;

(5) $10,000 for a class A misdemeanor;

(6) $2,000 for a class B misdemeanor;

(7) $500 for a violation.

* **Sec. 20.** AS 12.55.085(f) is amended to read:

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260 - 11.41.320, **11.41.355 - 11.41.365** [11.41.360 - 11.41.370], 11.41.410 - 11.41.530, AS 11.46.400, or AS 11.61.125 - 11.61.128;

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

* **Sec. 21.** AS 12.55.125 is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, **sex trafficking** [OR PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2)**, or human trafficking in the first degree** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to

adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) **human trafficking in the second degree under AS 11.41.360 involving sexual conduct or adult entertainment,** unlawful exploitation of a minor under AS 11.41.455(c)(2), online enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, **sex trafficking** [OR PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2)**, or human trafficking in the first degree** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, online enticement of a minor under AS 11.41.452(d), unlawful exploitation of a minor under AS 11.41.455(c)(1), [OR] distribution of child pornography under AS 11.61.125(e)(2)**, or attempt, conspiracy, or solicitation to commit human trafficking in the second degree under AS 11.41.360 involving sexual conduct or adult entertainment,** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, distribution of child pornography under AS 11.61.125(e)(1), or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years.

* **Sec. 22.** AS 12.55.185(10) is amended to read:

(10) "most serious felony" means

(A) arson in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **online enticement of a minor under AS 11.41.452(e),** or any unclassified or class A felony prescribed under AS 11.41; or

(B) an attempt, or conspiracy to commit, or criminal solicitation under AS 11.31.110 of, an unclassified felony prescribed under AS 11.41;

* **Sec. 23.** AS 12.55.185(16) is amended to read:

(16) "sexual felony" means sexual assault in the first degree, sexual abuse of a minor in the first degree, **human trafficking in the first degree, sex**

trafficking in the first degree under AS 11.66.110(a)(2), sexual assault in the second degree, sexual abuse of a minor in the second degree, **online enticement of a minor,** unlawful exploitation of a minor, distribution of child pornography, **human trafficking in the second degree involving sexual conduct or adult entertainment,** sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, and felony attempt, conspiracy, or solicitation to commit those crimes;

*** Sec. 24.** AS 12.63.100(6) is amended to read:

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 - 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 - 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;

(v) AS 11.61.125 - 11.61.128;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who

was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense;

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200; [OR]

(viii) AS 11.61.118(a)(2) if the offender has a previous conviction for that offense;

(ix) human trafficking in the first degree under AS 11.41.355;

(x) sex trafficking in the first degree under AS 11.66.110(a)(2);

*** Sec. 25.** AS 15.80.010(9) is amended to read:

(9) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, **sex trafficking, human trafficking** [PROMOTING PROSTITUTION], criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography;

*** Sec. 26.** AS 28.15.046(c) is amended to read:

(c) The department may not issue a license under this section to an applicant who has been convicted of any of the following offenses within 20 years of the time of application:

(1) sexual abuse of a minor in any degree under AS 11.41.434 - 11.41.440;

(2) sexual assault in any degree under AS 11.41.410 - 11.41.425;

(3) incest under AS 11.41.450;

(4) unlawful exploitation of a minor under AS 11.41.455;

(5) contributing to the delinquency of a minor under AS 11.51.130;

(6) a felony involving possession of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(7) a felony or misdemeanor involving distribution of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(8) **sex trafficking** [PROMOTING PROSTITUTION] in the first or second degree under AS 11.66.110 or 11.66.120;

(9) indecent exposure in the first or second degree under AS 11.41.458 or 11.41.460**;**

(10) human trafficking in the first degree under AS 11.41.355 and human trafficking in the second degree involving sexual conduct or adult entertainment.

* **Sec. 27.** AS 47.12.110(d) is amended to read:

(d) Notwithstanding (a) of this section, a court hearing on a petition seeking the adjudication of a minor as a delinquent shall be open to the public, except as prohibited or limited by order of the court, if

(1) the department files with the court a motion asking the court to open the hearing to the public, and the petition seeking adjudication of the minor as a delinquent is based on

(A) the minor's alleged commission of an offense, and the minor has knowingly failed to comply with all the terms and conditions required of the minor by the department or imposed on the minor in a court order entered under AS 47.12.040(a)(2) or 47.12.120;

(B) the minor's alleged commission of

(i) a crime against a person that is punishable as a felony;

(ii) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(iii) arson under AS 11.46.400 - 11.46.410;

(iv) burglary under AS 11.46.300;

(v) distribution of child pornography under AS 11.61.125;

(vi) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; [OR]

(vii) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; or

(viii) human trafficking in the first degree under AS 11.41.355; or

(C) the minor's alleged commission of a felony and the minor was 16 years of age or older at the time of commission of the offense when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's commission of an offense that is a felony; or

(2) the minor agrees to a public hearing on the petition seeking adjudication of the minor as a delinquent.

*** Sec. 28.** AS 47.12.315(a) is amended to read:

(a) Notwithstanding AS 47.12.310, when an agency takes action under AS 47.12.040(a)(1) to adjust a matter, or when, under AS 47.12.040(a)(2), the court directs the agency to adjust the matter, the agency

(1) shall, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent

minor on the basis of the minor's commission of at least one offense and, on the basis of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a preliminary inquiry to determine if any action on that matter is appropriate, and, if the minor is alleged to be a delinquent minor on the basis of the minor's commission of another offense, exercise of agency jurisdiction is based on the minor's alleged commission of that other offense, and that other offense is one of the following:

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; [OR]

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; **or**

(H) human trafficking in the first degree under AS 11.41.355; and

(2) may, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense if the minor has knowingly failed to comply with all terms and conditions required of the minor by the agency to adjust the matter under AS 47.12.060(b).

* **Sec. 29.** AS 11.41.360(b)(1) and 11.41.360(b)(3) are repealed.

* **Sec. 30.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1, 2, 11 - 15, 18, and 25 - 28 of this Act apply to

offenses committed before, on, or after the effective date of the Act.

(b) Sections 3 - 10, 16, 17, 19 - 24, and 29 of this Act apply to offenses committed on or after the effective date of this Act.

* **Sec. 31.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes is instructed to change the catch line of AS 11.66.110 from "Promoting prostitution in the first degree" to "Sex trafficking in the first degree."

* **Sec. 32.** This Act takes effect July 1, 2012.

27-LS0646\X
Gardner
3/21/12

CS FOR SENATE BILL NO. 110(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS WIELECHOWSKI, McGuire

A BILL

FOR AN ACT ENTITLED

"An Act relating to human trafficking and sex trafficking, to punishment and fines for those offenses, and to peace officer powers to enforce human trafficking and sex trafficking laws in licensed premises; including human trafficking in the first degree and sex trafficking in the first degree in the definition of 'serious felony offense' for the offense of conspiracy and including sex trafficking and online enticement of a minor in the definition of 'most serious felony' for sentencing; relating to prostitution and promoting prostitution; relating to sex offenses; including human trafficking and sex trafficking in the list of offenses that make hearings for certain delinquent minors public and require disclosure of the names of certain delinquent minors; and providing for an effective date."

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

*** Section 1.** AS 04.06.110 is amended to read:

Sec. 04.06.110. Peace officer powers. The director and the persons employed for the administration and enforcement of this title may, with the concurrence of the commissioner of public safety, exercise the powers of peace officers when those powers are specifically granted by the board. Powers granted by the board under this section may be exercised only when necessary for the enforcement of the criminally punishable provisions of this title, regulations of the board, and other criminally punishable laws and regulations, including investigation of violations of laws against prostitution and **sex trafficking** [PROMOTING PROSTITUTION] described in **AS 11.66.100 - 11.66.135, human trafficking described in AS 11.41.355 - 11.41.365,** [AS 11.66.100 - 11.66.130] and laws against gambling, promoting gambling, and related offenses described in AS 11.66.200 - 11.66.280.

*** Sec. 2.** AS 04.11.370(a) is amended to read:

(a) A license or permit shall be suspended or revoked if the board finds

(1) misrepresentation of a material fact on an application made under this title or a regulation adopted under this title;

(2) continuation of the manufacture, sale, or service of alcoholic beverages by the licensee or permittee would be contrary to the best interests of the public;

(3) failure on the part of the licensee to correct a defect that constitutes a violation of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or other laws after receipt of notice issued by the board or its agent;

(4) conviction of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010;

(5) conviction of an agent or employee of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates a law, regulation, or ordinance;

(6) failure of the licensee to comply with the public health, fire, or

safety laws and regulations in the state;

(7) use of the licensed premises as a resort for illegal possessors or users of narcotics, prostitutes, **human traffickers,** or **sex traffickers** [PROMOTERS OF PROSTITUTION]; in addition to any other legally competent evidence, the character of the premises may be proved by the general reputation of the premises in the community as a resort for illegal possessors or users of narcotics, prostitutes, **human traffickers,** or **sex traffickers** [PROMOTERS OF PROSTITUTION];

(8) occurrence of illegal gambling within the limits of the licensed premises;

(9) the licensee permitted a public offense involving moral turpitude to occur on the licensed premises;

(10) violation by a licensee of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010; or

(11) violation by an agent or employee of a licensee of a provision of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates the law, condition or restriction, regulation, or ordinance.

*** Sec. 3.** AS 11.31.120(h)(2) is amended to read:

(2) "serious felony offense" means an offense

(A) against the person under AS 11.41, punishable as an unclassified or class A felony;

(B) involving controlled substances under AS 11.71, punishable as an unclassified, class A, or class B felony;

(C) that is criminal mischief in the first degree under AS 11.46.475; [OR]

(D) that is terroristic threatening in the first degree under AS 11.56.807**;**

(E) that is human trafficking in the first degree under AS 11.41.355; or

(F) that is sex trafficking in the first degree under AS 11.66.110.

* **Sec. 4.** AS 11.41 is amended by adding a new section to read:

Sec. 11.41.355. Human trafficking in the first degree. (a) A person commits the crime of human trafficking in the first degree if

(1) the person violates AS 11.41.360 by compelling or inducing another person to engage in

(A) sexual conduct;

(B) adult entertainment; or

(C) an act described in AS 11.41.455(a)(1) - (7); and

(2) the other person compelled or induced is under 18 years of age.

(b) Human trafficking in the first degree is an unclassified felony.

* **Sec. 5.** AS 11.41.360(a) is amended to read:

(a) A person commits the crime of human trafficking in the **second** [FIRST] degree if the person compels or induces another person to [COME TO THIS STATE TO] engage in sexual conduct, adult entertainment, or labor in the state by force or threat of force against any person, or by deception.

* **Sec. 6.** AS 11.41.360(c) is amended to read:

(c) Human trafficking in the **second** [FIRST] degree is a class A felony.

* **Sec. 7.** AS 11.41.365 is amended to read:

Sec. 11.41.365. Human trafficking in the third [SECOND] degree. (a) A person commits the crime of human trafficking in the **third** [SECOND] degree if the person obtains a benefit from the commission of human trafficking under **AS 11.41.355 or 11.41.360** [AS 11.41.360,] with reckless disregard that the benefit is a result of the trafficking.

(b) Human trafficking in the **third** [SECOND] degree is a class B felony.

* **Sec. 8.** AS 11.41.370 is amended by adding new paragraphs to read:

(4) "adult entertainment" means the conduct described in AS 23.10.350(f)(1) - (3);

(5) "sexual conduct" has the meaning given in AS 11.66.150.

* **Sec. 9.** AS 11.66.100(b) is amended to read:

(b) **Except as provided in (c) of this section, prostitution** [PROSTITUTION] is a class B misdemeanor.

* **Sec. 10.** AS 11.66.100 is amended by adding new subsections to read:

(c) Prostitution is a class C felony if

(1) the defendant violates (a) of this section as a patron of a prostitute;

(2) the prostitute is under 18 years of age; and

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution under (c) of this section, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was 18 years of age or older.

* **Sec. 11.** AS 11.66.110(a) is amended to read:

(a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 18 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

* **Sec. 12.** AS 11.66.110(c) is amended to read:

(c) Except as provided in (d) of this section, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree is a class A felony.

* **Sec. 13.** AS 11.66.120 is amended to read:

Sec. 11.66.120. Sex trafficking [PROMOTING PROSTITUTION] in the second degree. (a) A person commits the crime of **sex trafficking** [PROMOTING

PROSTITUTION] in the second degree if the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution;

(2) procures or solicits a patron for a prostitute; or

(3) offers, sells, advertises, promotes, or facilitates travel that includes commercial sexual conduct as enticement for the travel; in this paragraph, "commercial sexual conduct" means sexual conduct for which anything of value is given or received by any person.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the second degree is a class B felony.

* **Sec. 14.** AS 11.66.130 is amended to read:

Sec. 11.66.130. Sex trafficking [PROMOTING PROSTITUTION] in the third degree.

(a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the third degree if, with intent to promote prostitution, the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;

(2) as other than a patron of a prostitute, induces or causes a person 18 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property **under** [PURSUANT TO] an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the third degree is a class C felony.

* **Sec. 15.** AS 11.66.135 is amended to read:

Sec. 11.66.135. Sex trafficking [PROMOTING PROSTITUTION] in the fourth degree. (a) A person commits the crime of **sex trafficking** [PROMOTING

PROSTITUTION] in the fourth degree if the person engages in conduct that institutes, aids, or facilitates prostitution under circumstances not proscribed under AS 11.66.130(a)(4).

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree is a class A misdemeanor.

* **Sec. 16.** AS 11.66.140 is amended to read:

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under **AS 11.66.110 - 11.66.135** [AS 11.66.110 - 11.66.130], it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence.

* **Sec. 17.** AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree under AS 11.41.355,** and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree under AS 11.41.355,** and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies;

(4) class A misdemeanors, which characteristically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

*** Sec. 18.** AS 11.81.250(b) is amended to read:

(b) The classification of each felony defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking in the first degree under AS 11.66.110(a)(2),** and kidnapping, is designated in the section defining it. A felony under **the** [ALASKA] law **of this state** defined outside this title for which no penalty is specifically provided is a class C felony.

*** Sec. 19.** AS 12.55.035(b) is amended to read:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of **not** [NO] more than

(1) $500,000 for murder in the first or second degree, attempted murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, kidnapping, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree under AS 11.41.355** or misconduct involving a controlled substance in the first degree;

(2) $250,000 for a class A felony;

(3) $100,000 for a class B felony;

(4) $50,000 for a class C felony;

(5) $10,000 for a class A misdemeanor;

(6) $2,000 for a class B misdemeanor;

(7) $500 for a violation.

* **Sec. 20.** AS 12.55.085(f) is amended to read:

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260 - 11.41.320, **11.41.355 - 11.41.365** [11.41.360 - 11.41.370], 11.41.410 - 11.41.530, AS 11.46.400, or AS 11.61.125 - 11.61.128;

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

* **Sec. 21.** AS 12.55.125 is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, **sex trafficking** [OR PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2)**, or human trafficking in the first degree under**

AS 11.41.355 may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) **human trafficking in the second degree under AS 11.41.360 involving sexual conduct or adult entertainment,** unlawful exploitation of a minor under AS 11.41.455(c)(2), online enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, **sex trafficking** [OR PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2)**, or human trafficking in the first degree under AS 11.41.355** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, online enticement of a minor under AS 11.41.452(d), unlawful exploitation of a minor under AS 11.41.455(c)(1), [OR] distribution of child pornography under AS 11.61.125(e)(2)**, or attempt, conspiracy, or solicitation to commit human trafficking in the second degree under AS 11.41.360 involving sexual conduct or adult entertainment,** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the

defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, distribution of child pornography under AS 11.61.125(e)(1), or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years.

*** Sec. 22.** AS 12.55.185(10) is amended to read:

(10) "most serious felony" means

(A) arson in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **online enticement of a minor under AS 11.41.452(e),** or any unclassified or class A felony prescribed under AS 11.41; or

(B) an attempt, or conspiracy to commit, or criminal solicitation under AS 11.31.110 of, an unclassified felony prescribed under AS 11.41;

*** Sec. 23.** AS 12.55.185(16) is amended to read:

(16) "sexual felony" means sexual assault in the first degree, sexual abuse of a minor in the first degree, **human trafficking in the first degree, sex trafficking in the first degree under AS 11.66.110(a)(2),** sexual assault in the second degree, sexual abuse of a minor in the second degree, **online enticement of a minor,** unlawful exploitation of a minor, distribution of child pornography, **human trafficking in the second degree involving sexual conduct or adult entertainment,** sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, and felony attempt, conspiracy, or solicitation to commit those crimes;

*** Sec. 24.** AS 12.63.100(6) is amended to read:

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 - 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 - 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction

for that offense;

(v) AS 11.61.125 - 11.61.128;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense;

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200; [OR]

(viii) AS 11.61.118(a)(2) if the offender has a previous conviction for that offense;

(ix) human trafficking in the first degree under AS 11.41.355;

(x) sex trafficking in the first degree under AS 11.66.110(a)(2);

*** Sec. 25.** AS 15.80.010(9) is amended to read:

(9) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, **sex trafficking, human trafficking** [PROMOTING PROSTITUTION], criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography;

*** Sec. 26.** AS 28.15.046(c) is amended to read:

(c) The department may not issue a license under this section to an applicant who has been convicted of any of the following offenses within 20 years of the time of application:

(1) sexual abuse of a minor in any degree under AS 11.41.434 - 11.41.440;

(2) sexual assault in any degree under AS 11.41.410 - 11.41.425;

(3) incest under AS 11.41.450;

(4) unlawful exploitation of a minor under AS 11.41.455;

(5) contributing to the delinquency of a minor under AS 11.51.130;

(6) a felony involving possession of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(7) a felony or misdemeanor involving distribution of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(8) **sex trafficking** [PROMOTING PROSTITUTION] in the first or second degree under AS 11.66.110 or 11.66.120;

(9) indecent exposure in the first or second degree under AS 11.41.458 or 11.41.460**;**

(10) human trafficking in the first degree under AS 11.41.355 and human trafficking in the second degree involving sexual conduct or adult entertainment.

*** Sec. 27.** AS 47.12.110(d) is amended to read:

(d) Notwithstanding (a) of this section, a court hearing on a petition seeking the adjudication of a minor as a delinquent shall be open to the public, except as prohibited or limited by order of the court, if

(1) the department files with the court a motion asking the court to open the hearing to the public, and the petition seeking adjudication of the minor as a delinquent is based on

(A) the minor's alleged commission of an offense, and the minor has knowingly failed to comply with all the terms and conditions required of the minor by the department or imposed on the minor in a court order entered under AS 47.12.040(a)(2) or 47.12.120;

(B) the minor's alleged commission of

(i) a crime against a person that is punishable as a felony;

(ii) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(iii) arson under AS 11.46.400 - 11.46.410;

(iv) burglary under AS 11.46.300;

(v) distribution of child pornography under AS 11.61.125;

(vi) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; [OR]

(vii) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; or

(viii) human trafficking in the first degree under AS 11.41.355; or

(C) the minor's alleged commission of a felony and the minor was 16 years of age or older at the time of commission of the offense when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's commission of an offense that is a felony; or

(2) the minor agrees to a public hearing on the petition seeking adjudication of the minor as a delinquent.

*** Sec. 28.** AS 47.12.315(a) is amended to read:

(a) Notwithstanding AS 47.12.310, when an agency takes action under AS 47.12.040(a)(1) to adjust a matter, or when, under AS 47.12.040(a)(2), the court directs the agency to adjust the matter, the agency

(1) shall, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the

agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent minor on the basis of the minor's commission of at least one offense and, on the basis of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a preliminary inquiry to determine if any action on that matter is appropriate, and, if the minor is alleged to be a delinquent minor on the basis of the minor's commission of another offense, exercise of agency jurisdiction is based on the minor's alleged commission of that other offense, and that other offense is one of the following:

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; [OR]

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; **or**

(H) human trafficking in the first degree under AS 11.41.355; and

(2) may, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense if the minor has knowingly failed to comply with all terms and conditions required of the minor by the agency to adjust the matter under AS 47.12.060(b).

* **Sec. 29.** AS 11.41.360(b)(1) and 11.41.360(b)(3) are repealed.

* **Sec. 30.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1, 2, 11 - 15, 18, and 25 - 28 of this Act apply to offenses committed before, on, or after the effective date of the Act.

(b) Sections 3 - 10, 16, 17, 19 - 24, and 29 of this Act apply to offenses committed on or after the effective date of this Act.

* **Sec. 31.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes is instructed to change the catch line of AS 11.66.110 from "Promoting prostitution in the first degree" to "Sex trafficking in the first degree."

* **Sec. 32.** This Act takes effect July 1, 2012.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

March 20, 2012

TO: Leg Legal

FROM: Cindy Smith

RE: CS for SB 110 LS0646\E

We need a new CS with the following changes to CSSB 100 \E.

1. Add language of Sections 12 and 15 from SB 218 (GS2627\A).

2. We need a provision in 12.55.185 (16) for sex trafficking and human trafficking and on line enticement of a minor (A felony level).

3. Please move the definition (an Act described in AS 11.41.455(a)1-7) from line 10 to line 30, so that it is included as part of the sexual conduct definition.

4. Add Human Trafficking in the 2nd degree at page 14 line 9.

5. Add language in amendment 27G-2-C, attached.

27G-2-C
3/15/2012
(3:03 pm)
Carpeneti

AMENDMENT

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY _____

TO: HB 359

Page 4, line 29 through page 5, line 3:

Delete all material and insert:

"(c) Prostitution is a class C felony if

(1) the defendant is a patron of a prostitute;

(2) the prostitute is under 18 years of age;

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution for a felony under this section that provides that the prostitute be under 18 years of age, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was that age or older."

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
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Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

March 12, 2012

TO: Leg. Legal

FROM: Cindy Smith

RE: Judiciary CS for SB 110 LS0646\A

Using **version \A of SB 110** Human Trafficking as the starting point:

1. Delete references to enticing on lines 7 and line 13 of page 1.

2. One lines 13-14 of page 1, delete the language "to come to this state or move from one place to another in the state"

3. **From Senate Bill 218 (GS2627\A), ADD:** sections 1 through 3, Sections 5—11, Section 14, Sections 17-19 and sections 21-24, plus appropriate applicability provisions, and effective date.

This is a Judiciary CS and we need it for the meeting on Friday, March 16.

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION CENTRAL OFFICE

SEAN PARNELL, GOVERNOR

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SENATE BILL 218
SEX TRAFFICKING AND HUMAN TRAFFICKING
SECTIONAL ANALYSIS

The increased scrutiny of crimes related to promoting prostitution of children in Alaska has prompted the proposed change in terminology from promoting prostitution to sex trafficking. There are good reasons for this change. First, a child who is put into prostitution by an adult should be considered and described as a victim, not a prostitute. The change in terminology will encourage this change. Second, a majority of law enforcement officers now refer to the crime of promoting prostitution of children as sex trafficking. Changing Alaska law will facilitate better communication and understanding.

Sections 1, 2, 7 -- 11, 14, 17 – 19, and 21 -- 24 change the statutes prohibiting promoting prostitution to prohibiting sex trafficking. The elements of the offenses remain the same. These sections also make conforming amendments to other laws that currently refer to the crime of promoting prostitution so that they cross-reference sex trafficking.

Section 3 adds the crimes of human trafficking in the first degree and sex trafficking in the first degree to the felonies described as "serious felony offenses" in the state's conspiracy law, AS 11.21.120. This change would enable the state to investigate and potentially prosecute offenders who work with other people to plan and engage in human trafficking or sex trafficking.

Section 4 amends the crime of distribution of indecent materials to minors, AS 11.61.128. This proposed amendment is in response to the recent decision by a federal district court judge holding the current version of the statute to be unconstitutional in violation of the first amendment, because it applies to conduct that is constitutionally protected. In response to the decision that the current law is overbroad, the bill would require that the state prove the defendant intentionally distributed, or possessed with intent to distribute, harmful material to another person that the offender knows is under 16 years of age or believes is under 16 years of age.

Sections 5 and 6 raise the penalty for being a patron of a prostitute, if the prostitute is a minor under 18 years of age, from a class B misdemeanor to a class C felony. It also specifies the legislative intent that the age of the prostitute is a circumstance that does not require proof of a culpable mental state.

Section 12: Under current law, no corroboration is required of the testimony of an alleged victim in a prosecution for promoting prostitution (sex trafficking) in the first, second, and third

degrees. The bill adds the crime of promoting prostitution (sex trafficking) in the fourth degree to those crimes that do not require corroboration of the testimony of an alleged victim.

Section 13: Under current law property used to facilitate or derived from a crime of promoting prostitution (sex trafficking) is subject to forfeiture. The bill adds the crime of prostitution to these crimes. Under the bill property used to facilitate or derived from the crime of prostitution would be subject to forfeiture.

Section 15 corrects an error in AS 11.81.250(b). Under current law the crime of promoting prostitution (sex trafficking) in the first degree under AS 11.66.110(a)(2) – where the person promoted is a child – is an unclassified felony. The bill adds this offense to the other offenses described as unclassified felonies in Alaska law.

Section 16 allows the testimony of a witness in a hearing addressing the competency of a defendant for being tried for a crime by way of contemporaneous two-way video conference. It allows this testimony if the witness would be required to travel more that 50 miles to attend the hearing in person or if the witness lives in a place where people customarily travel by air to the court site.

Section 19, in addition to conforming the definition of most serious felony to the changes in the sex trafficking provisions, also corrects an omission in the definition of most serious felony by including online enticement of a minor in the definition.

Section 20 adds a new provision to sex offender registration law that requires a person present in Alaska, who is convicted of an offense out of state that requires registration in that jurisdiction, to register in Alaska. This requirement would apply even if Alaska does not have a criminal provision similar to the crime in the other state that requires registration there. A person would be required to register for 15 years if convicted of one offense, and for life if convicted for two or more offenses.

Section 25 adopts Rule 38.3, Alaska Rules of Criminal Procedure, addressing the use of testimony by contemporaneous two-way video conference. It would allow this testimony if the parties agree to its use. If the parties do not agree, it would allow contemporaneous two-way video conference testimony if the court finds that its use is necessary to further an important public policy, the witness is unavailable, and the testimony is given under oath and is subject to cross-examination.

Section 26 addresses the applicability of the changes described above.

Section 27 is an instruction to the revisor of statutes regarding the heading of AS 11.66.110.

Section 28 provides for an effective date of July 1, 2012.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 218**
Fiscal Note Number: 1
(S) Publish Date: 2/22/12

Identifier (file name): 0627-LAW-CRIM-02-17-12
Dept. Affected: Law
Title: An Act relating to sex trafficking and distribution of indecent materials.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Rules
Requester: Request of the Governor
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 2/17/12 3:40PM
Approved by: Michael C. Geraghty, Attorney General — Date 2/17/2012
Department of Law

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 218

Analysis

The bill changes the description of the crime of promoting prostitution under AS 11.66.110 – 11.66.135 from promoting prostitution in the first, second, third, and fourth degrees to sex trafficking in the first, second, third, and fourth degrees.

It adds the crimes of human trafficking in the first degree and sex trafficking in the first degree to the definition of "serious felony offense" under the conspiracy law.

The bill amends the crime of distribution of indecent materials to minors under AS 11.61.128 in response to the judicial decision that the current law is unconstitutional due to over breadth by requiring the prosecution to prove that the offender intentionally distributed, or possessed with the intent to distribute, harmful material to another person that the offender knows is under 16 years of age or believes is under 16 years of age.

It adopts a procedure for contemporaneous two-way videoconference in criminal trials where the court finds that it is necessary to further an important public policy, that the witness is unavailable, and the testimony is given under oath and subject to cross-examination. The bill would also allow contemporaneous two-way videoconference testimony in hearings addressing the competency of a defendant to be tried for criminal charges if the witness resides 50 or more miles away from the place of the hearing or the customary travel to the site of the hearing is by air.

The bill would require a person present in Alaska to register as a sex offender if the person is required to register as a sex offender in another jurisdiction.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 218**
Fiscal Note Number: 2
(S) Publish Date: 2/22/12

Identifier (file name): 0627-DPS-R&I-02-21-12
Title: SEX TRAFFICKING AND DISTRIBUTION OF INDECENT MATERIAL TO MINORS
Sponsor: Rules by Request of the Governor
Requester: Governor Parnell

Dept. Affected: Public Safety
Appropriation: Statewide Support
Allocation: Records & Identification
OMB Component Number: 1190

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	109.5		109.5	109.5	109.5	109.5	109.5
Travel	5.0		5.0	5.0	5.0	5.0	5.0
Services	5.8		5.8	5.8	5.8	5.8	5.8
Commodities	1.0		1.0	1.0	1.0	1.0	1.0
Capital Outlay	2.9		2.9	2.9	2.9	2.9	2.9
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**124.2**	**0.0**	**124.2**	**124.2**	**124.2**	**124.2**	**124.2**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF	124.2		124.2	124.2	124.2	124.2	124.2
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**124.2**	**0.0**	**124.2**	**124.2**	**124.2**	**124.2**	**124.2**

POSITIONS							
Full-time	**1**		1	1	1	1	1
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: David Schade, Director — Phone (907) 269-0202
Division: Division of Statewide Services — Date/Time 2/21/12 11:07 AM
Approved by: Joe Masters, Commissioner — Date 2/21/2012
Department of Public Safety

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 218

Analysis

This proposed legislation would require a person who is required to register as a sex offender or child kidnapper in another jurisdiction to register in Alaska even if there is no substantive law in Alaska that is similar to the offense the person was convicted of.

For the department's Records & Identification bureau to continue to accomplish a core service of providing public access to current information regarding sex offenders in Alaska, the determination that a person must register as a sex offender or child kidnapper in Alaska because of their requirement to register in another jurisdiction must be made timely and must be based on information that has been validated.

Considerable research and analysis of the criminal history background of persons with sex offense convictions outside of Alaska would be required to determine whether the offense of conviction is a registerable offense under the current laws of that jurisdiction and whether or not the person is subject to that jurisdiction's registration requirements. Coordination with the jurisdiction's sex offender central registry office would need to occur to obtain source documents and other relevant information on the person.

Additionally, it is anticipated that the department would need to continually monitor the status of registration laws and legal cases affecting sex offender registration in all jurisdictions to ensure a person required to register in Alaska under proposed AS 12.63.100(6)(D) continued to be subject to the registration requirements of the jurisdiction that their offense was committed in.

The department anticipates that these additional efforts will require one new full-time Criminal Justice Planner position. This position would be responsible to review and evaluate offender records with out-of-state sex offense convictions to determine the requirement to register under proposed AS 12.63.100(6)(D), to coordinate with other jurisdictions' sex offender central registry offices, and to monitor sex offender registration laws in other jurisdictions and any changes for possible impact to currently registered offenders.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 218**
Fiscal Note Number: 3
(S) Publish Date: 2/22/12

Identifier (file name): 0627-DPS-DET-02-17-12
Title: SEX TRAFFICKING AND DISTRIBUTION OF INDECENT MATERIAL TO MINORS
Sponsor: Rules by Request of the Governor
Requester: Governor Parnell

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Lt. Rodney Dial — Phone: (907) 247-4480
Division: Alaska State Troopers — Date/Time: 2/17/12 5:25 PM
Approved by: Joseph A. Masters, Commissioner — Date: 2/17/2012
Department of Public Safety

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 218

Analysis

This bill changes the name of the crime of "promoting prostitution" to "sex trafficking" in numerous sections in Alaska Statutes; makes changes to Alaska Statute to address recent court decisions regarding the distribution of indecent material to minors; adds AS 11.61.100 (Prostitution) to AS 11.66.145 (Forfeiture) relating to the forfeiture of property used in prostitution offenses; would define human trafficking and sex trafficking in the first degrees as serious felony offenses for purposes of the state conspiracy law; and requires a person who is required to register as a sex offender or child kidnapper in another jurisdiction to register in Alaska.

This bill will have no fiscal impact on the Division of Alaska State Troopers.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 218**
Fiscal Note Number: 4
(S) Publish Date: 2/22/12

Identifier (file name): 0627-DOA-PDA-2-17-12
Title: Sex trafficking and distribution of indecent materials
Sponsor: Rules by Request of the Governor
Requester: Governor

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	****	****	****	****	****	****	****

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		****	****	****	****	****	****	****

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner — Phone: 465-4414
Division: Public Defender Agency — Date/Time: 2/17/12 3:00 PM
Approved by: John Cramer, Deputy Commissioner — Date: 2/17/2012
Department of Administration

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 218

Analysis

This bill changes the language used to describe conduct "promoting prostitution" to the phrase "sex trafficking," prohibits the intentional distribution of indecent material to persons known or believed to be less than 16 years of age, and prohibits possession with the intention to distribute indecent material to persons known or believed to be less than 16 years of age. This bill elevates the charge of prostitution from a B misdemeanor to an A misdemeanor if the subject person is under the age of 18. This bill includes "online enticement of a minor in the definition of "most serious felony." The bill also creates the crimes of: conspiracy to commit human trafficking, a class B felony which carries a sentence of up to 10 years imprisonment, and conspiracy to commit sex trafficking, a class A felony which carries a sentence of up to 20 years imprisonment. This bill amends the definition of "sex offense" for the purpose of sex offender registration requirements by including any conviction in another state that would require registration as a sex offender in that state.

Additionally, this bill amends Rule 38 of the Alaska Rules of Criminal Procedure by adding a new section that allows for testimony using two-way video conferencing. The bill also specifies that video conference testimony is allowed for witnesses whose testimony is used to determine competency of the defendant under this section, where the witness would be required to travel more than 50 miles to court, or where air travel to court is customary.

This bill will result in increases in felony cases and more complex sentencing for certain felonies. The Public Defender Agency does not have a reliable method for determining how many more persons may be charged for failing to register as a sex offender under the new definition or whether those charged would qualify for representation by the Public Defender. The Agency, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 218**
Fiscal Note Number: 5
(S) Publish Date: 2/22/12

Identifier (file name): LL0627-DOA-OPA-2-17-12
Title: Sex trafficking and distribution of indecent material
Sponsor: Rules by Request of the Governor
Requester: Governor

Dept. Affected: Administration
Appropriation: Legal & Advocay Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Richard Allen, Director — Phone: 907-269-3504
Division: Office of Public Advocacy — Date/Time: 2/17/12 3:00 PM
Approved by: John Cramer, Deputy Commissioner — Date: 2/17/2012
Department of Administration

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 218

Analysis

This bill changes the language used to describe conduct "promoting prostitution" to the phrase, "sex trafficking," prohibits the intentional distribution of indecent material to persons known or believed to be less than 16 years of age, and prohibits possession with the intention to distribute indecent material to persons known or believed to be less than 16 years of age. This bill elevates the charge of prostitution from a B misdemeanor to an A misdemeanor if the subject person is under the age of 18. This bill includes "online enticement of a minor in the definition of "most serious felony." The bill also creates the crimes of: conspiracy to commit human trafficking, a class B felony which carries a sentence of up to 10 years imprisonment, and conspiracy to commit sex trafficking, a class A felony which carries a sentence of up to 20 years imprisonment. This bill amends the definition of "sex offense" for the purpose of sex offender registration requirements by including any conviction in another state that would require registration as a sex offender in that state.

Additionally, this bill amends Rule 38 of the Alaska Rules of Criminal Procedure by adding a new section that allows for testimony using two-way video conferencing. The bill also specifies that video conference testimony is allowed for witnesses whose testimony is used to determine competency of the defendant under this section, where the witness would be required to travel more than 50 miles to court, or where air travel to court is customary.

This bill will result in increases in felony cases and more complex sentencing for certain felonies. The Office of Public Advocacy does not have a reliable method for determining how many more persons may be charged for failing to register as a sex offender under the new definition or whether those charged would qualify for representation by the Office of Public Advocacy. Therefore, the Office of Public Advocacy submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 218**
Fiscal Note Number: 6
(S) Publish Date: 2/22/12

Identifier (file name): JU2011200627
Title: "An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degr
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**	**	**	**	**	**	**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by: Leslie Houston, Director
Division: Department of Corrections - Administrative Services
Approved by: Joseph D. Schmidt, Commissioner
Department of Corrections

Phone: 907-465-3339
Date/Time: 2/17/12 8:30 PM
Date: 2/17/2012

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 218

Analysis

This bill adds human trafficking in the first degree and sex trafficking in the first degree to the conspiracy statues (AS 11.31.120). A person convicted of this new crime would be subject to punishment for a Class B felony. The average sentence for a Class B felony is five years. The average daily cost of care in a DOC facility is $134.90. Therefore, one individual convicted of conspiring to commit sex trafficking in the first degree could cost the Department of Corrections $246,192.50 based on a five year *average* sentence.

In the past five years, DOC has seen an average of 2.4 convictions for promoting prostitution (sex trafficking). However, DOC does not have any historical data on conspiracy to commit sex or human trafficking, as this would be a new crime if this legislation were to pass. Therefore, DOC is currently unable to quanitfy the fiscal impacts of the passage of this legislation.

The Department will closely monitor the potential future fiscal impacts should this legislation pass.

SENATE BILL NO. 218

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 2/22/12
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degree; relating to the crime of furnishing indecent material to minors, the crime of online enticement of a minor, the crime of prostitution, and the crime of sex trafficking; relating to forfeiture of property used in prostitution offenses; relating to sex offender registration; relating to testimony by video conference; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

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

*** Section 1.** AS 04.06.110 is amended to read:

Sec. 04.06.110. Peace officer powers. The director and the persons employed for the administration and enforcement of this title may, with the concurrence of the commissioner of public safety, exercise the powers of peace officers when those powers are specifically granted by the board. Powers granted by the board under this section may be exercised only when necessary for the enforcement of the criminally

punishable provisions of this title, regulations of the board, and other criminally punishable laws and regulations, including investigation of violations of laws against prostitution and **sex trafficking** [PROMOTING PROSTITUTION] described in **AS 11.66.100 - 11.66.135** [AS 11.66.100 - 11.66.130] and laws against gambling, promoting gambling, and related offenses described in AS 11.66.200 - 11.66.280.

* **Sec. 2.** AS 04.11.370(a) is amended to read:

(a) A license or permit shall be suspended or revoked if the board finds

(1) misrepresentation of a material fact on an application made under this title or a regulation adopted under this title;

(2) continuation of the manufacture, sale, or service of alcoholic beverages by the licensee or permittee would be contrary to the best interests of the public;

(3) failure on the part of the licensee to correct a defect that constitutes a violation of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or other laws after receipt of notice issued by the board or its agent;

(4) conviction of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010;

(5) conviction of an agent or employee of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates a law, regulation, or ordinance;

(6) failure of the licensee to comply with the public health, fire, or safety laws and regulations in the state;

(7) use of the licensed premises as a resort for illegal possessors or users of narcotics, prostitutes, or **sex traffickers** [PROMOTERS OF PROSTITUTION]; in addition to any other legally competent evidence, the character of the premises may be proved by the general reputation of the premises in the community as a resort for illegal possessors or users of narcotics, prostitutes, or **sex**

traffickers [PROMOTERS OF PROSTITUTION];

(8) occurrence of illegal gambling within the limits of the licensed premises;

(9) the licensee permitted a public offense involving moral turpitude to occur on the licensed premises;

(10) violation by a licensee of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010; or

(11) violation by an agent or employee of a licensee of a provision of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates the law, condition or restriction, regulation, or ordinance.

*** Sec. 3.** AS 11.31.120(h)(2) is amended to read:

(2) "serious felony offense" means an offense

(A) against the person under AS 11.41, punishable as an unclassified or class A felony;

(B) involving controlled substances under AS 11.71, punishable as an unclassified, class A, or class B felony;

(C) that is criminal mischief in the first degree under AS 11.46.475; [OR]

(D) that is terroristic threatening in the first degree under AS 11.56.807**;**

(E) that is human trafficking in the first degree under AS 11.41.360; or

(F) that is sex trafficking in the first degree under AS 11.66.110.

*** Sec. 4.** AS 11.61.128(a) is amended to read:

(a) A person commits the crime of distribution of indecent material to minors

if

(1) the person, being 18 years of age or older, **intentionally** [KNOWINGLY] distributes **or possesses with intent to distribute any material described in (2) and (3) of this subsection** to **either**

(A) a child that the person knows is under 16 years of age; or

(B) another person that the person believes is a child under 16 years of age;

(2) the material is [ANOTHER PERSON ANY] material that **the person knows** depicts the following actual or simulated conduct:

(A) sexual penetration;

(B) the lewd touching of a person's genitals, anus, or female breast;

(C) masturbation;

(D) bestiality;

(E) the lewd exhibition of a person's genitals, anus, or female breast; or

(F) sexual masochism or sadism; **and**

(3) [(2)] the material is harmful to minors [; AND

(3) EITHER

(A) THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE; OR

(B) THE PERSON BELIEVES THAT THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE].

*** Sec. 5.** AS 11.66.100(b) is amended to read:

(b) **Except as provided in (c) of this section, prostitution** [PROSTITUTION] is a class B misdemeanor.

*** Sec. 6.** AS 11.66.100 is amended by adding a new subsection to read:

(c) Prostitution is a class C felony if

(1) the person described in (a)(1) of this section is under 18 years of age; the age of the person is a circumstance that does not require proof of a culpable

mental state; and

(2) the person described in (a)(2) of this section is 18 years of age or older and at least three years older than the person described in (a)(1) of this section.

*** Sec. 7.** AS 11.66.110(a) is amended to read:

(a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 18 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

*** Sec. 8.** AS 11.66.110(c) is amended to read:

(c) Except as provided in (d) of this section, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree is a class A felony.

*** Sec. 9.** AS 11.66.120 is amended to read:

Sec. 11.66.120. Sex trafficking [PROMOTING PROSTITUTION] in the second degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the second degree if the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution;

(2) procures or solicits a patron for a prostitute; or

(3) offers, sells, advertises, promotes or facilitates travel that includes commercial sexual conduct as enticement for the travel; in this paragraph, "commercial sexual conduct" means sexual conduct for which anything of value is given or received by any person.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the second degree is a class B felony.

*** Sec. 10.** AS 11.66.130 is amended to read:

Sec. 11.66.130. Sex trafficking [PROMOTING PROSTITUTION] in the third degree. (a) A person commits the crime of **sex trafficking** [PROMOTING

PROSTITUTION] in the third degree if, with intent to promote prostitution, the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;

(2) as other than a patron of a prostitute, induces or causes a person 18 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property pursuant to an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the third degree is a class C felony.

* **Sec. 11.** AS 11.66.135 is amended to read:

Sec. 11.66.135. Sex trafficking [PROMOTING PROSTITUTION] in the fourth degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree if the person engages in conduct that institutes, aids, or facilitates prostitution under circumstances not proscribed under AS 11.66.130(a)(4).

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree is a class A misdemeanor.

* **Sec. 12.** AS 11.66.140 is amended to read:

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under **AS 11.66.110 - 11.66.135** [AS 11.66.110 - 11.66.130], it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence.

* **Sec. 13.** AS 11.66.145 is amended to read:

Sec. 11.66.145. Forfeiture. Property used to institute, aid, or facilitate, or received or derived from, a violation of **AS 11.66.100 - 11.66.135** [AS 11.66.110 -

11.66.135] shall be forfeited.

* **Sec. 14.** AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies;

(4) class A misdemeanors, which characteristically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

* **Sec. 15.** AS 11.81.250(b) is amended to read:

(b) The classification of each felony defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking in the first degree under AS 11.66.110(a)(2),** and kidnapping, is designated in the section defining it. A felony under **the** [ALASKA] law **of this state** defined outside this title for which no penalty is specifically provided is a class C felony.

* **Sec. 16.** AS 12.47.100 is amended by adding a new subsection to read:

(h) In a hearing to determine competency under this section, the court may allow the testimony of a witness, including the psychiatrist or psychologist who examined the defendant, to testify concerning the competency of the defendant by contemporaneous two-way video conference if the witness would be required to travel more than 50 miles to the court or lives in a place from which people customarily travel by air to the court. In this subsection, "contemporaneous two-way video conference"

(1) means a conference among people at different places by means of transmitted audio and video signals;

(2) includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

* **Sec. 17.** AS 12.55.035(b) is amended to read:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the

offense, a fine of no more than

(1) $500,000 for murder in the first or second degree, attempted murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, kidnapping, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), or misconduct involving a controlled substance in the first degree;

(2) $250,000 for a class A felony;

(3) $100,000 for a class B felony;

(4) $50,000 for a class C felony;

(5) $10,000 for a class A misdemeanor;

(6) $2,000 for a class B misdemeanor;

(7) $500 for a violation.

* **Sec. 18.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, or **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) unlawful exploitation of a minor under AS 11.41.455(c)(2), online enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, or **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, online enticement of a minor under AS 11.41.452(d), unlawful exploitation of a minor under AS 11.41.455(c)(1), or distribution of child pornography under AS 11.61.125(e)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, distribution of child pornography under AS 11.61.125(e)(1), or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant

has two prior convictions for sexual felonies, 99 years.

*** Sec. 19.** AS 12.55.185(10) is amended to read:

(10) "most serious felony" means

(A) arson in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **online enticement of a minor,** or any unclassified or class A felony prescribed under AS 11.41; or

(B) an attempt, or conspiracy to commit, or criminal solicitation under AS 11.31.110 of, an unclassified felony prescribed under AS 11.41;

*** Sec. 20.** AS 12.63.100(6) is amended to read:

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; [OR]

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 - 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 - 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction

for that offense;

(v) AS 11.61.125 - 11.61.128;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense;

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200; [OR]

(viii) AS 11.61.118(a)(2) if the offender has a previous conviction for that offense; **or**

(D) a crime in another jurisdiction that requires the person to register as a sex offender or child kidnapper in that jurisdiction;

*** Sec. 21.** AS 15.80.010(9) is amended to read:

(9) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, **sex trafficking** [PROMOTING PROSTITUTION], criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography;

*** Sec. 22.** AS 28.15.046(c) is amended to read:

(c) The department may not issue a license under this section to an applicant who has been convicted of any of the following offenses within 20 years of the time of

application:

(1) sexual abuse of a minor in any degree under AS 11.41.434 - 11.41.440;

(2) sexual assault in any degree under AS 11.41.410 - 11.41.425;

(3) incest under AS 11.41.450;

(4) unlawful exploitation of a minor under AS 11.41.455;

(5) contributing to the delinquency of a minor under AS 11.51.130;

(6) a felony involving possession of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(7) a felony or misdemeanor involving distribution of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(8) **sex trafficking** [PROMOTING PROSTITUTION] in the first or second degree under AS 11.66.110 or 11.66.120;

(9) indecent exposure in the first or second degree under AS 11.41.458 or 11.41.460.

* **Sec. 23.** AS 47.12.110(d) is amended to read:

(d) Notwithstanding (a) of this section, a court hearing on a petition seeking the adjudication of a minor as a delinquent shall be open to the public, except as prohibited or limited by order of the court, if

(1) the department files with the court a motion asking the court to open the hearing to the public, and the petition seeking adjudication of the minor as a delinquent is based on

(A) the minor's alleged commission of an offense, and the minor has knowingly failed to comply with all the terms and conditions required of the minor by the department or imposed on the minor in a court order entered under AS 47.12.040(a)(2) or 47.12.120;

(B) the minor's alleged commission of

(i) a crime against a person that is punishable as a felony;

(ii) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the

crime;

(iii) arson under AS 11.46.400 - 11.46.410;

(iv) burglary under AS 11.46.300;

(v) distribution of child pornography under AS 11.61.125;

(vi) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; or

(vii) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or AS 11.71.050; or

(C) the minor's alleged commission of a felony and the minor was 16 years of age or older at the time of commission of the offense when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's commission of an offense that is a felony; or

(2) the minor agrees to a public hearing on the petition seeking adjudication of the minor as a delinquent.

*** Sec. 24.** AS 47.12.315(a) is amended to read:

(a) Notwithstanding AS 47.12.310, when an agency takes action under AS 47.12.040(a)(1) to adjust a matter, or when under AS 47.12.040(a)(2) the court directs the agency to adjust the matter, the agency

(1) shall, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent minor on the basis of the minor's commission of at least one offense and, on the basis of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a preliminary inquiry to determine if any action on that matter is appropriate, and, if the minor is alleged to be a delinquent minor on the basis of the minor's commission of

another offense, exercise of agency jurisdiction is based on the minor's alleged commission of that other offense, and that other offense is one of the following:

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; or

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; and

(2) may, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense if the minor has knowingly failed to comply with all terms and conditions required of the minor by the agency to adjust the matter under AS 47.12.060(b).

*** Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. The Alaska Rules of Criminal Procedure are amended by adding a new section to read:

Rule 38.3. Video Conference Testimony.

(a) **In General.** In every trial the testimony of witnesses shall be taken in open court, unless otherwise provided by statute or rule.

(b) **Testimony by Video Conference.** The parties may agree to take testimony from a witness by contemporaneous two-way video conference presented in open court. Absent the parties' agreement, the court may authorize the

contemporaneous two-way video conference testimony of a witness if

(1) the requesting party establishes that testimony by two-way video conference is necessary to further an important public policy;

(2) the requesting party establishes that the witness is unavailable; and

(3) the testimony is given under oath and subject to cross-examination.

(c) **Procedures for Taking Video Conference Testimony.** If the trial court authorizes video conference testimony under (b) of this rule, it shall determine the procedures for taking the contemporaneous two-way video conference testimony. The parties, the court, the trier of fact, and the public must be able to see and hear the witness; and the witness must see and hear the courtroom proceedings, including the defendant, as if the witness were sitting in the courtroom's witness stand. The persons who are present with the witness must be identified. The parties may move to exclude any person other than the video conference technician from the witness's presence; the court, in its discretion, may exclude a person other than the video conference technician from the presence of the witness.

(d) **Definitions.**

(1) Contemporaneous Two-Way Video Conference. Contemporaneous two-way video conference means a conference among people at different places by means of transmitted audio and video signals. It includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

(2) Unavailable. In this rule, a witness is unavailable if

(A) by clear and convincing evidence the court finds under Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska Rules of Criminal Procedure, that the witness is unavailable;

(B) by clear and convincing evidence the court finds that under the circumstances the witness is unavailable; or

(C) the parties agree that the witness is unavailable.

*** Sec 26.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1, 2, 7 - 11, 14, 17 - 19, 21 - 24, and 27 of this Act

apply to offenses committed before, on, or after the effective date of the Act.

(b) Sections 3 - 6, 12, 13, 16, 20, and 25 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 27.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes is instructed to change the heading of AS 11.66.110 from "Promoting prostitution in the first degree" to "Sex trafficking in the first degree".

*** Sec. 28.** This Act takes effect July 1, 2012.

27-LS0646\D
Gardner
3/1/12

CS FOR SENATE BILL NO. 110( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS WIELECHOWSKI, McGuire

A BILL

FOR AN ACT ENTITLED

"An Act relating to human trafficking; and relating to sentencing in criminal cases involving sex offenses."

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

* **Section 1.** AS 11.41 is amended by adding a new section to read:

Sec. 11.41.355. Human trafficking in the first degree. (a) A person commits the crime of human trafficking in the first degree if being 18 years of age or older the person compels, entices, or induces another person under 18 years of age to come to this state or move 100 miles or more within this state to engage in sexual conduct, adult entertainment, or an act described in AS 11.41.455(a)(1) - (7) in the state by

(1) force or threat of force against any person; or

(2) deception.

(b) It is an affirmative defense to a prosecution under (a)(2) of this section that, at the time of the offense, the person compelled, enticed, or induced was 16 years of age or older, and the defendant and the person compelled, enticed, or induced were in a consensual dating or sexual relationship.

(c) Human trafficking in the first degree is an unclassified felony.

* **Sec. 2.** AS 11.41.360(a) is amended to read:

(a) A person commits the crime of human trafficking in the **second** [FIRST] degree if **being 18 years of age or older** the person compels**, entices,** or induces another person **18 years of age or older** to come to this state **or move 100 miles or more within this state** to engage in sexual conduct **or** [,] adult entertainment [, OR LABOR] in the state by

(1) force or threat of force against any person**;** [,] or

(2) [BY] deception.

* **Sec. 3.** AS 11.41.360(c) is amended to read:

(c) Human trafficking in the **second** [FIRST] degree is a class A felony.

* **Sec. 4.** AS 11.41.360 is amended by adding a new subsection to read:

(d) It is an affirmative defense to a prosecution under (a)(2) of this section that, at the time of the offense, the person compelled**, enticed,** or induced was 16 years of age or older, and the defendant and the person compelled or induced were in a consensual dating or sexual relationship.

* **Sec. 5.** AS 11.41.365 is amended to read:

Sec. 11.41.365. Human trafficking in the third [SECOND] degree. (a) A person commits the crime of human trafficking in the **third** [SECOND] degree if the person

(1) being 18 years of age or older compels, entices, or induces another person to come to this state or move 100 miles or more within this state to engage in labor in this state by force or threat of force against any person, or by deception; or

(2) obtains a benefit from the commission of human trafficking under **AS 11.41.355, 11.41.360, or (1) of this subsection** [AS 11.41.360,] with reckless disregard that the benefit is a result of the trafficking.

(b) Human trafficking in the **third** [SECOND] degree is a class B felony.

* **Sec. 6.** AS 11.41.370 is amended by adding new paragraphs to read:

(4) "adult entertainment" means the conduct described in AS 23.10.350(f)(1) - (3);

(5) "deception" has the meaning given in AS 11.46.180;

(6) "sexual conduct" has the meaning given in AS 11.66.150.

*** Sec. 7.** AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, promoting prostitution in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree under AS 11.41.355,** and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, promoting prostitution in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree under AS 11.41.355,** and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies;

(4) class A misdemeanors, which characteristically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public

health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

*** Sec. 8.** AS 12.55.085(f) is amended to read:

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260 - 11.41.320, **11.41.355 - 11.41.365** [11.41.360 - 11.41.370], 11.41.410 - 11.41.530, AS 11.46.400, or AS 11.61.125 - 11.61.128;

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

*** Sec. 9.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, [OR] promoting prostitution in the first degree under AS 11.66.110(a)(2)**, or human trafficking in the first degree under AS 11.41.355** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim

was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) unlawful exploitation of a minor under AS 11.41.455(c)(2), online enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, [OR] promoting prostitution in the first degree under AS 11.66.110(a)(2)**, or human trafficking in the first degree under AS 11.41.355** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical

injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, online enticement of a minor under AS 11.41.452(d), unlawful exploitation of a minor under AS 11.41.455(c)(1), or distribution of child pornography under AS 11.61.125(e)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, distribution of child pornography under AS 11.61.125(e)(1), or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term

of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years.

*** Sec. 10.** AS 12.63.100(6) is amended to read:

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 - 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 - 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;

(v) AS 11.61.125 - 11.61.128;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense;

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200; or

(viii) AS 11.61.118(a)(2) if the offender has a previous conviction for that offense; **or**

(ix) AS 11.41.355;

*** Sec. 11.** AS 11.41.360(b) is repealed.

27-LS0646\M
Gardner
2/15/12

CS FOR SENATE BILL NO. 110( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS WIELECHOWSKI, McGuire

A BILL

FOR AN ACT ENTITLED

"An Act relating to human trafficking; and relating to sentencing in criminal cases involving sex offenses."

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

*** Section 1.** AS 11.41 is amended by adding a new section to read:

Sec. 11.41.355. Human trafficking in the first degree. (a) A person commits the crime of human trafficking in the first degree if the person violates AS 11.41.360 by compelling, enticing, or inducing another person to engage in sexual conduct, adult entertainment, or an act described in AS 11.41.455(a)(1) - (7), and the other person compelled or induced is under 18 years of age.

(b) Human trafficking in the first degree is an unclassified felony.

*** Sec. 2.** AS 11.41.360(a) is amended to read:

(a) A person commits the crime of human trafficking in the **second** [FIRST] degree if **being 18 years of age or older** the person compels**, entices,** or induces another person **under 18 years of age and at least four years younger than the**

offender to come to this state **or move from one place to another over a distance greater than 100 miles inside the state** to engage in sexual conduct, adult entertainment, or labor in the state by force or threat of force against any person, or by deception.

*** Sec. 3.** AS 11.41.360(c) is amended to read:

(c) Human trafficking in the **second** [FIRST] degree is a class A felony.

*** Sec. 4.** AS 11.41.365 is amended to read:

Sec. 11.41.365. Human trafficking in the third [SECOND] degree. (a) A person commits the crime of human trafficking in the **third** [SECOND] degree if the person obtains a benefit from the commission of human trafficking under **AS 11.41.355 or 11.41.360** [AS 11.41.360,] with reckless disregard that the benefit is a result of the trafficking.

(b) Human trafficking in the **third** [SECOND] degree is a class B felony.

*** Sec. 5.** AS 11.41.370 is amended by adding new paragraphs to read:

(4) "adult entertainment" means the conduct described in AS 23.10.350(f)(1) - (3);

(5) "sexual conduct" has the meaning given in AS 11.66.150.

*** Sec. 6.** AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, promoting prostitution in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree under AS 11.41.355,** and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled

substance in the first degree, promoting prostitution in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree under AS 11.41.355.** and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies;

(4) class A misdemeanors, which characteristically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

*** Sec. 7.** AS 12.55.085(f) is amended to read:

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260 - 11.41.320, **11.41.355 - 11.41.365** [11.41.360 - 11.41.370], 11.41.410 - 11.41.530, AS 11.46.400, or AS 11.61.125 - 11.61.128;

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of

AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

*** Sec. 8.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, [OR] promoting prostitution in the first degree under AS 11.66.110(a)(2), **or human trafficking in the first degree under AS 11.41.355** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) unlawful exploitation of a minor under AS 11.41.455(c)(2), online enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, [OR] promoting prostitution in the first degree under AS 11.66.110(a)(2)**, or human trafficking in the first degree under AS 11.41.355** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, online enticement of a minor under AS 11.41.452(d), unlawful exploitation of a minor under AS 11.41.455(c)(1), or distribution of child pornography under AS 11.61.125(e)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following

presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, distribution of child pornography under AS 11.61.125(e)(1), or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years.

* **Sec. 9.** AS 12.63.100(6) is amended to read:

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a

sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 - 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 - 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;

(v) AS 11.61.125 - 11.61.128;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense;

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200; or

(viii) AS 11.61.118(a)(2) if the offender has a previous conviction for that offense; **or**

(ix) AS 11.41.355:

*** Sec. 10.** AS 11.41.360(b)(1) and 11.41.360(b)(3) are repealed.

APOA

ALASKA PEACE OFFICERS ASSOCIATION

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Anchorage

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Wasilla

Thecla LaLonde, President
Wrangell Chapter
Wrangell

February 10, 2012

Senator Bill Wielechowski
Alaska State Senate
State Capitol
Juneau AK 99801-1182

Dear Senator Wieiechowski:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing Senate Bill 110, an act relating to human trafficking; and relating to sentencing and conditions of probation in criminal cases involving sex offenses.

The APOA State Board of Directors recently reviewed this proposed legislation and decided to unanimously support this bill.

We thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515, if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

John Lucking, Jr.
State President

PO Box 240106
Anchorage AK 99524

t 907 277 0515
f 907 272 5355

Making A Difference In The Last Frontier

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION

VIOLENT CRIMES COMPENSATION BOARD

SEAN PARNELL, GOVERNOR

P.O. BOX 110230
JUNEAU, ALASKA 99811-0230
PHONE: (907) 465-3040
TOLL FREE: 1-800-764-3040
FAX: (907) 465-2379

February 13, 2012

The Honorable Senator Wielechowski
State Capitol, Room 101
Juneau, Alaska 99801

Re: Senate Bill, 110 Human Trafficking/Sex Offenses

I write on behalf of the Violent Crimes Compensation Board in support of Senate Bill 110.

The proposed legislation strengthens existing state legislation by extending the definition of trafficking to include the movement or enticement of young women within the state of Alaska, not just across state lines.

As Board members, we have seen the terrible results of human trafficking on the lives of young women and their families. Very often these victims are young vulnerable native women who have left their villages and come to Anchorage, only to find themselves homeless and alone. These women are specifically targeted by these predators, given enticements in the form of clothing, housing and jewellery, and are then abused, beaten, sexually assaulted, deliberately addicted to controlled substances and alcohol and then prostituted out to make money for their abusers.

Over the course of the last few years, the Board has seen 23 claims stemming from federal human trafficking investigations, and has paid out over $150,000 in compensation or assistance to trafficking victims. This compensation has been in the form of payment for mental health counseling, and for drug and alcohol treatment programs, as well as for medical expenses, and assistance in relocation to a safer environment. None of these 23 claims were for victims trafficked *to* Alaska. All were already Alaskan residents.

This proposed legislation closes the gap, and the Board strongly supports its passage

Respectfully submitted

Gerad Godfrey
Chair, Violent Crimes Compensation Board

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FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **SB110**
Fiscal Note Number
Publish Date 5

Identifier (file name) SB110-DOA-PDA-12-12-11
Title Human Trafficking/Sex Offenses
Sponsor Senators Wielechowski, McGuire
Requester Senate Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	****	****	****	****	****	****	****

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		****	****	****	****	****	****	****

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Update for session

Prepared by Quinlan Steiner
Division Public Defender Agency
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 907 334-4414
Date/Time 11/17/11 3:00 PM
Date 12/12/2011

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB110

Analysis

This bill expands the range of conduct that may be prosecuted as human trafficking to include enticing someone to move within the state of Alaska to engage in sexual conduct or adult entertainment by force, threat or deception. It would also make human trafficking an unclassified felony if the victim is a minor.

The agency cannot reliably predict the number of additional cases that may be prosecuted as a result of this bill. Accordingly, the Public Defender Agency has submitted an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB110**
Fiscal Note Number: 2
() Publish Date:

Identifier (file name): SB110-DPS-DET-02-16-12
Title: HUMAN TRAFFICKING/SEX OFFENSES
Sponsor: Senator(s) Wielechowski, McGuire
Requester: (S) JUD

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated on new fiscal note form.

Prepared by: Lt. Rodney Dial — Phone: (907) 247-4480
Division: Alaska State Troopers — Date/Time: 2/16/12 8:28 PM
Approved by: Joseph A. Masters, Commissioner — Date: 2/16/2012
Department of Public Safety

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB110

Analysis

This bill amends AS 11.41 by adding a new section, AS 11.41.355 human trafficking in the first degree; amends AS 11.41.360 to human trafficking in the second degree; amends AS 11.41.365 to human trafficking in the third degree; amends AS 12.63.100(6) to include the crime of human trafficking in the first degree to the definition of "sex offense"; and amends statutes regarding the sentencing and conditions of probation in criminal cases involving sex offenses.

It is not anticipated that this bill will increase the number of investigations conducted by the department. There is no fiscal impact to the AST as a result of this legislation.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **SB 110**
Fiscal Note Number: 3
Publish Date:

Identifier (file name): SB110-DOC-OC-12-22-11
Title: "An Act relating to human trafficking; and relating to sentencing and conditions of probation in criminal cases..."
Sponsor: Senator Wielechowski
Requester: Senate Judiciary

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**	**	**	**	**	**	**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated to reflect current fiscal year.

Prepared by: Leslie Houston, Director — Phone: 907-465-3339
Division: Department of Corrections - Administrative Services — Date/Time: 12/22/11 3:45 PM
Approved by: Joseph D. Schmidt, Commissioner — Date: 12/22/2011
Department of Corrections

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 110

Analysis

SB 110 amends existing human trafficking laws and levels of crimes for human trafficking. If passed, this bill would make human trafficking in the first degree an unclassified felony; human trafficking in the second degree a class A felony; and human trafficking in the third degree a class B felony.

This bill also includes provisions that could restrict sex offenders from living within 500 feet of a school.

The Department of Corrections is unable to determine the fiscal impacts of the passage of this legislation, as we cannot estimate the total number of actual violations that will occur. The Department of Corrections will closely monitor potential future fiscal impacts of this legislation.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: SB110
Fiscal Note Number: 4
Publish Date:

Identifier (file name): SB110-DOA-OPA-12-12-2011
Title: Human Trafficking/Sex Offenses
Sponsor: Senators Wielechowski, McGuire
Requester: Senate Judicial

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Richard Allen, Director — Phone: 907 269-3504
Division: Office of Public Advocacy — Date/Time: 11/29/2011 11:43 a.m.
Approved by: John Cramer, Deputy Commissioner — Date: 12/12/2011
Department of Administration

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB110
2012 LEGISLATIVE SESSION

Analysis

This bill expands the range of conduct that may be prosecuted as human trafficking to include enticing someone to move within the state of Alaska to engage in sexual conduct or adult entertainment by force, threat, or deception. It would also make human trafficking an unclassifed felony if the victim is a minor.

The agency cannot reliably predict the number of additional cases that may be prosecuted as a result of this bill. Accordingly, the Office of Public Advocacy has submitted an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **SB 110**
Fiscal Note Number
Publish Date

Identifier (file name) SB110-LAW-CRIM-12-14-11
Title An Act relating to human trafficking; and relating to sentencing and conditions of probation in criminal cases.
Sponsor SENATORS WIELECHOWSKI
Requester (S) Judiciary

Dept. Affected Law
Appropriation Criminal
Allocation Criminal Justice Litigation
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by Eileen Donahue, Division Operations Manager — Phone 465-5427
Division Administrative Services — Date/Time 2/16/12 5:25PM
Approved by Michael C. Geraghty, Attorney General — Date 2/16/2012
Department of Law

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB 110
2012 LEGISLATIVE SESSION

Analysis

SB 110 adds a new, more serious level of human trafficking. It would adopt an unclassified felony if a person induces, compels, or entices a person under 18 years old to move from one place to another and engage in sexual conduct, adult entertainment, or prohibited acts.

The bill also amends current law prohibiting human trafficking by making it a class A felony to compel, entice, or induce another person to move from one place to another in the state to engage in sexual conduct, adult entertainment, or forced labor.

This bill would have an indeterminate fiscal impact to the Department of Law.

CHAIR FRENCH noted that the administration is pretty consistent about supporting its own bills.

MS. RUTHERDALE said that DOL does not take a position on bills. She said that every suggestion she made, and every change that OCS made, was incorporated into the bill.

SENATOR PASKVAN said that he is taking this to mean that the language in the bill is the best that can be achieved.

MS. RUTHERDALE replied that is correct. She said that as a practicing lawyer she does not want a bill that will cause any harm and she does not believe that this bill will do so.

2:28:13 PM
CHAIR FRENCH noted there is support from many different associations, such as the Alaska Association of Homes for Children, the Advisory Board on Alcoholism and Drug Abuse, the National Association of Social Workers, the Alaska Behavioral Health Association, Alaska Children's Services, and Denali Family Services.

CHAIR FRENCH announced that he would hold SB 82 in committee in order to see a document with the amendment included.

SB 110-HUMAN TRAFFICKING/SEX OFFENSES

2:29:11 PM
CHAIR FRENCH announced the consideration of SB 110.

2:29:19 PM
SENATOR WIELECHOWSKI said the committee has heard that there are human traffickers targeting young Native girls, and it is a serious problem. He noted that putting someone on a plane from a village to Anchorage for the purpose of sex trafficking should be made illegal. There is a trafficking law, but it only applies to transporting someone from out of state, not instate. He noted that the bill does a few things: Section 1 changes human trafficking in the first degree by adding a provision for persons under age 18 and increasing the penalty for that; this section also adds the word "enticing."

Section 2 also adds a provision about "entices", and it adds that to "move from one place to another in the state" constitutes the crime of human trafficking.

He noted that there are concerns on the broad nature of the language. He feels that encouraging someone to move from one part of the state to another is just as serious as encouraging them to move from Seattle to Alaska.

Another major provision is in Section 8, which says a judge should have authority to remove sex offenders who live near schools, but is not a blanket application to all convicted sex offenders.

2:34:21 PM
LAUREN RICE, Director of Public Affairs, Covenant House Alaska (CHA), testified in support of SB 110. CHA offers shelter for unaccompanied youth--emergency shelter, food, healthcare, access to permanent housing. It is located in Anchorage, but about 44 percent of the children come from outside of Anchorage and almost 45 percent are Alaska Native.

Covenant House Alaska began taking an active role in combating human trafficking about five years ago. Both the Anchorage Police Department (APD) and the FBI have given them long term trafficking prevention strategies. CHA has witnessed a visible decrease around its area, but this is still very prevalent in the state. CHA has helped kids coming from other countries, out of state, and in state. Youth in need of protection against active human trafficking are identified on a monthly basis.

She noted the roots of trafficking are found in childhood trauma; the vast majority of youth being trafficked are victims of sexual or physical violence in their younger years. The issue requires a holistic approach to really protect Alaska's children. One young woman told CHA staff she could stay at home and be raped by her grandfather, or she could be paid for the same act. Covenant House Alaska is committed to giving youth choices beyond human trafficking.

2:39:07 PM
CHAIR FRENCH asked what the scope of the problem is within the state.

MS. RICE replied CHA used to collect data on an informal basis and have become more sophisticated about it. They wanted to make sure that they had services to help, depending on the answers to these questions. She said they know that about 50 percent of the girls in their facility have been sexually abused, and 35 percent of their kids (both male and female) have engaged in "survival sex" or informal prostitution in order to get the

commodities that they need. Of those, probably half have been tied to active trafficking situations. But that number is truly a guess; it used to be significantly more visible and has become less so because APD has targeted individuals who were hanging around outside the shelter and targeting kids. However, they know that kids are still being trafficked on the Internet, and there is proof of that.

2:41:51 PM
REGINA CHENAULT, representing herself, testified in support of SB 110. She is a trauma surgeon who has treated patients who have experienced violent sexual crimes. She serves on the state violent crimes board, and last year Sexual Assault Against Minors were the highest growing category of crimes. They don't know if that is due to increased reporting or increased occurrence of assaults. She also serves on the State Trauma Committee, where they are tallying injuries.

She said she is a mother of three and fears this could happen to her children, because it crosses all groups and all lines. She noted that 85 percent of Alaska Natives serving a prison sentence for sexual assault of minors were sexually assaulted themselves as minors; this is a cycle the state needs to end. Traffickers are even targeting children who hang out at malls. She said that the definition of trafficking should be strong, and should include trafficking within the state. She noted the Webster Case; there are victims who now have children, drug dependency, and lifelong STDs.

She recently learned that a group of Koreans are targeting children in the villages. There's a scheme set up where a customer cannot get to the point of having sex with a child until they first hire an adult prostitute and have sex with him or her. In this way, they ensure it's not a sting operation. This ring seems to be the fastest growing group that is targeting children in Alaska.

2:48:20 PM
ANNE CARPENETI, Criminal Division, Department of Law said that this is a serious problem in the state. She said she had a long conversation with Sergeant Lacey from APD and learned that the problem is enforcement. For her, trafficking is moving individuals from one place to another. But the new trend is what used to be called "pimping" or "promoting prostitution."

CHAIR FRENCH asked where promoting prostitution comes in, and what is missing from that statute.

MS. CARPENETI replied nothing; promoting prostitution in the first degree is an unclassified felony if the person is under age 18. It is much easier to prove promoting prostitution than trafficking. Under this bill DOL has to prove force, deception, and movement for trafficking. This does not attack the problem of promoting prostitution. It can be called trafficking, but it is really promoting prostitution of young women. Some young women actually come to urban areas on their own with no support, and they become easy victims. Right now, she said, no prosecutor would bring charges under this bill when he or she could bring charges under promoting prostitution.

2:51:29 PM
SENATOR COGHILL said one of the problems that he sees is that some people are surviving off of sexual behavior. He asked if this would still be under the prostitution issue or would the trafficking bill take care of this.

MS. CARPENETI replied if you induce or cause someone to engage in commercial sex, it would be considered prostitution. The problem is getting the victims to let them know who the perpetrators are. She said the range of penalty for a first felony conviction for promoting prostitution of a child under age 18 is 20-30 years, depending on the age of the victim. If the victim is under 13, the penalty would be 25-35 years; if the victim is between 13 and 18, the penalty would be 20-30 years. Current law takes this very seriously.

SENATOR WIELECHOWSKI said he has a slightly different take on it. Section 2 deals with human trafficking. It deals with prostitution, but also adult entertainment--forcing someone to work through force, or threat of force. When speaking about prostitution you are only speaking talking about AS 11.41.360.

MS. CARPENETI replied there is a crime in Title 23 dealing with forced labor. She said DOL has suggestions. For example, the forced labor of young children in Title 23 for commercial sex is a class C felony. She agreed that prostitution does not deal with labor. The problem in the state is not the trafficking, it's the prostitution. People aren't found and moved from one place to another; they are found in one place and victimized.

CHAIR FRENCH asked if she could go back over the last five years and let the committee know how many trafficking prosecutions there have been and how many prostitution prosecutions.

SENATOR COGHILL clarified how many charges, versus convictions.

MS. CARPENETI said that there are some concerns about the second degree language, which DOL found to be overbroad. "Entices" is a very broad word.

SENATOR WIELECHOWSKI said he and his staff have been working with Ms. Carpeneti.

2:56:41 PM
QUINLAN STEINER, Director, Alaska Public Defender Agency, said he has the same concerns that Ms. Carpeneti expressed. Definition of these words becomes quite broad. Enticing does not imply changing someone's mind or forcing an individual to do something other than simply offering an enticement. "Move from one place to another" might run into some constitutional problems. The combination of the three concepts causes him some concern on how this might be charged.

2:58:52 PM
DOUG GARDINER, Director, Legislative Legal Services, introduced himself and said he was available to answer questions.

CHAIR FRENCH said that Senator Wielechowski says that the word enticed comes from statutes in other states.

MR. GARDNER replied this term comes from the on-line statute in existing Alaska Statutes. He said he does not have a specific definition for entice, and is not aware of any case law in the state that defines this. He noted that Senator Coghill made a good point; what would happen if you moved an underage person within the state for sexual purposes, but DOL was unable to prove there was some type of agreement for prostitution. In that case, DOL might actually be better off with the proposal for promoting human trafficking.

3:01:34 PM
Chair French announced he would hold SB 110 in committee.
There being no further business to come before the committee, Chair French adjourned the meeting at 3:01 p.m.

SB 128

<TARGET><BILL>SB 128</BILL><SUBJECT>SB 128</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

Session:
State Capitol
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Senator Lesil McGuire

MEMORANDUM

To: Senator Hollis French, Chairman
Senate Judiciary Committee

Cc: Cindy Smith, Aide
Senate Judiciary Committee

From: Senator Lesil McGuire

Date: April 10, 2012

Re: Hearing request for SB 128 "An Act relating to brewery licenses."

Please schedule Senate Bill 128, relating to brewery licenses, at your earliest convenience.

Attached to this memo please find:

- SB 128, the original bill, Version M
- Sponsor statement
- CS for SB128, Version B
- Letters of Support

The contact for SB 128 is Genevieve Wojtusik, 465-3579

Thank you.

27-LS0647\D
Gardner
4/2/12

CS FOR SENATE BILL NO. 128( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR MCGUIRE

A BILL

FOR AN ACT ENTITLED

"An Act relating to brewery licenses and brewery special events permits."

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

*** Section 1.** AS 04.11.080 is amended by adding a new paragraph to read:

(22) brewery special events permit.

*** Sec. 2.** AS 04.11.130(e) is amended to read:

(e) **Except as provided in (f) of this section and unless** [UNLESS] prohibited by AS 04.16.030, a holder of a brewery license may sell not more than 36 ounces a day of the brewery's product to a person for consumption on the premises if

(1) the brewery does not allow live entertainment, televisions, pool tables, dart games, dancing, electronic or other games, game tables, or other recreational or gaming opportunities on the premises where the consumption occurs;

(2) the brewery does not provide seats at the counter or bar where the product is served; and

(3) the room where the consumption occurs is not open before 9:00 a.m. and serving of the product ends not later than **10:00** [8:00] p.m.

*** Sec. 3.** AS 04.11.130 is amended by adding a new subsection to read:

(f) A brewery licensed under this section is eligible for a brewery special events permit that authorizes the holder to sell or dispense beer manufactured on the brewery premises for consumption on the premises for a specific occasion and for a limited period of time. The board may issue a brewery special events permit if an application for the permit is received in the main office of the board at least 10 days before the date of the event for which the permit is requested. The application must be signed by the holder of the brewery license or the holder's authorized agent, must include the written approval of the law enforcement agency having jurisdiction over the brewery premises, and must be submitted with a fee of $50. The board may not issue to a holder of a brewery license more than five brewery special events permits in a calendar year. AS 04.11.130(e)(1) and (2) do not apply to a brewery special events permit issued under this subsection.

*** Sec. 4.** AS 04.21.025(a) is amended to read:

(a) As a condition of issuance or renewal of a license and selling alcoholic beverages under a license, the board shall require a licensee who sells or serves alcoholic beverages and a licensee's agents and employees who sell or serve alcoholic beverages or check the identification of a patron to complete an alcohol server education course approved by the board, if the license is for a

(1) beverage dispensary;

(2) restaurant or eating place;

(3) club;

(4) package store;

(5) recreational site;

(6) pub;

(7) conditional contractor**;**

(8) a brewery conducting activities under AS 04.11.130(e) and (f).

*** Sec. 5.** AS 04.21.065(a) is amended to read:

(a) A holder of one of the following types of licenses or permits shall post on the licensed or designated premises three separate warning signs as described in (b) of this section:

(1) beverage dispensary license;

(2) restaurant or eating place license;

(3) club license;

(4) brewery license **or brewery special events permit**; this paragraph applies only to a brewery that permits a person to sample portions of the brewery's product;

(5) package store license;

(6) common carrier dispensary license;

(7) recreational site license;

(8) pub license;

(9) winery license; this paragraph applies only to a winery that permits a person to sample portions of the winery's product;

(10) caterer's permit;

(11) special events permit;

(12) conditional contractor's permit;

(13) another license or permit issued by the board authorizing consumption of alcoholic beverages.

Senate Bill 128 | Denali Brewing| Craft Beer made in Alaska

Respectfully addressed Board Chair and Senate Committee Members,

We write to express our support for Senate Bill 128. Denali Brewing is located in Talkeetna, Alaska and has been making honest beers using only the finest ingredients since July of 2009. Our sleepy little town transitions from December solitude to July bustle. As a small business operator in Alaska for 16 years our ability to manager business is what will enable us to operate successfully. Our tasting room is closed by 6 pm for seven months of the year but in the remaining months it is critical to our operation to be able to serve small quantities of our product to interested folk. By providing a quality experience to our guest we bring attention to what a great state Alaska is to visit. Without exception there is not a single evening during our summer season that we do not turn guest away. Many of these folks are local hard working Alaskans that take advantage of the longer days to work past 8pm and would prefer to support their local brewery. Some of these folk have driven two hours from Anchorage to enjoy their favorite beer only to be told no. The nuances of the difference between a brew pub and a brewery escape many of these folks leaving them frustrated at us. Equally important are the visitors to our state that are here to experience genuine Alaskan hospitality. People from all over the world come to Talkeetna to experience the mountains, rivers, and creative flavor that can only be found here. Sadly, after a day of fishing or exploring our back yard we are forced to hastily usher these folks out of our establishment. This is no way to gain support for a local industry that has a long tradition of bringing visitors to our state and employing many. Manufacturing in Alaska is not easy; S.B. 128 will give small business owners further freedom to manage their business responsibly. Thank you for the opportunity to be heard.

Sassan Mossanen, General Manager

Denali Brewing Company

P.O. Box 1021, Talkeetna Ak. 99676

Work (907) 733-2535

Brewing quality craft ales

47160 Spruce Haven Street
Kenai, AK 99611
907-776-4055
kenaibrewstop@alaska.net
www.kassiksbrewstop.com

Dear Board Members:

Kassik's Kenai Brew Stop dba Kassik's Brewery is a small, family-owned brewery located in Nikiski, Alaska. We have been in business for over five years and have been gratified with the continuing growth in consumer acceptance of our product. As we continue to grow we find that while our small size and limited budget can work to our advantage by making us focus on providing quality products in an efficient manner, we are also limited in our ability to expand by those same factors.

In bringing our product to the attention of potential consumers, as a small Alaska brewery we can't hope to compete with the national print and television advertising campaigns of the large national brands. Instead, we rely primarily on providing a quality product and letting our customers tell their friend and neighbors. We make personal visits to the local bars and restaurants to place our product and work with our distributor. We also support our community by donating beer to many non-profit events.

We believe that another effective marketing tool for local breweries would be to allow them to showcase their Alaska Made product by bringing potential consumers to the brewery on special occasions such as on the brewery's anniversary, or the announcement of a new product line. At the present time we are constrained in our ability to host such a special event by AS 04.11.130(e) which limits the allowable individual consumption and activities on the premises of a brewery to such an extent that a large special event on the brewery premises would be impractical.

The purpose of this letter is to request the support of the board for legislation that would allow a brewery to obtain a "special events permit" modeled after the non-profit special events permit currently provided under AS 04.11.240. We believe that such a permitting system would satisfy the public interest in controlling the sale of alcoholic beverages to individuals by a brewery, while at the same time providing Alaska businesses with a marketing tool allowing them to better compete with the national brands in informing consumers about their product. For that reason we request the board to consider recommending to the legislature an amendment to AS 04.11 that would create a Brewery Special Events Permit. We have taken the liberty of drafting suggested language for such an amendment and it is attached for your consideration.

We appreciate the support and assistance the staff of the ABC Board has provided our business. We hope that you view the foregoing request in the spirit in which it is intended: to provide a way for the small Alaska breweries to inform consumers about their products. Thank you for your attention to this request.

Very truly yours,

Debara Kassik

March 29, 2012

Dear State of Alaska Senators,

King Street Brewing Company is a new small brewery located in Anchorage, Alaska founded by Shane Kingry and Dana Walukiewicz. We opened to the public in the fall of 2011, and have had great reception by local establishments and the general public. This community support has allowed us to grow and hire our first employee. To ultimately succeed, we must continue this growth, but as a small business our marketing dollars pale in comparison to the established national and international marketing organizations, with unlimited product promotion budgets, that we're competing against.

To compete in this environment, we have focused our efforts on a grass-roots marketing strategy that emphasizes our high quality, locally produced product. These marketing efforts, which include Facebook and generating email lists, are centered at our brewery and adjoining tap room. From there we introduce our product directly to consumers and educate the public on where they can enjoy our beers around Anchorage.

We would like to expand these promotional efforts to also include special events at the brewery such as an anniversary party or showcase a new product offering. At the present time we are constrained by AS 04.11.130(e) which limits the allowable individual consumption and activities on the premises of a brewery to such an extent that a special event on the brewery premises would be impractical.

The purpose of this letter is to request your support for the passage of Senate Bill 128, which would allow a brewery to obtain a special events permit modeled after the non-profit special events permit currently provided under AS 04.11.240. We believe that such a permit would satisfy the public interest in controlling the sale of alcoholic beverages to individuals by a brewery, while at the same time providing Alaskan businesses with marketing tools to better compete with the national brands in informing consumers about their product. For that reason, we request the Members of the Alaska State Senate to consider the passage of Senate Bill 128.

Thank you for your attention to this bill.

Sincerely,

Dana Walukiewicz

Member / Co-Owner

King Street Brewing Company
7924 King Street
Anchorage, Alaska 99518

SB 134

<TARGET><BILL>SB 134</BILL><SUBJECT>SB 134</SUBJECT><COMM>SJUD27</COMM></TARGET>

CS FOR SENATE BILL NO. 134(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR KOOKESH

A BILL

FOR AN ACT ENTITLED

"An Act relating to child support awards; and repealing Rule 90.3, Alaska Rules of Civil Procedure."

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

* **Section 1.** AS 25 is amended by adding a new chapter to read:

Chapter 28. Child Support Awards.

Sec. 25.28.010. Guidelines; primary physical custody. (a) A tribunal shall calculate a child support award in a case in which one parent is awarded primary physical custody as an amount equal to the adjusted annual income of the noncustodial parent multiplied by a percentage specified in (b) of this section.

(b) To calculate the child support award, the tribunal shall multiply the noncustodial parent's adjusted annual income by the following percentages:

(1) 20 percent for one child;

(2) 27 percent for two children;

(3) 33 percent for three children; and

(4) an additional three percent for each additional child.

(c) The tribunal may allow the obligor parent to reduce child support payments by up to 75 percent for a period in which the obligor parent has extended visitation of more than 27 consecutive days. The order must specify the amount of the reduction that is allowable if the extended visitation is exercised.

(d) The tribunal may calculate child support based on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed. A determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility. Potential income shall be based on the parent's work history, qualifications, and job opportunities. The tribunal also may impute potential income for nonincome producing or low income producing assets.

(e) In this section, "adjusted annual income" means the parent's total income from all sources less

(1) mandatory deductions, including

(A) federal, state, and local income tax;

(B) social security tax or the equivalent contribution to an alternate plan established by a public employer, and self-employment tax;

(C) Medicare tax;

(D) mandatory union dues;

(E) mandatory contributions to a retirement or pension plan;

(2) voluntary contributions to a retirement or pension plan or account in which the earnings are tax-free or tax-deferred, except that the total amount of these voluntary contributions plus any mandatory contributions under (1)(E) of this subsection may not exceed 7.5 percent of the parent's gross wages and self-employment income;

(3) child support and alimony payments arising from previous relationships that are required by another tribunal and actually paid;

(4) child support for children from prior relationships living with the parent, calculated by using the formula under this chapter; and

(5) work-related child care expenses for the child who is the subject of the child support order.

Sec. 25.28.020. Guidelines; shared, divided, and hybrid custody awards. (a) The tribunal shall calculate shared, divided, and hybrid physical custody awards as provided in this section.

(b) The tribunal shall calculate a child support award in a case in which the parents are awarded shared physical custody by

(1) calculating the annual amount each parent would pay to the other parent under AS 25.28.010 assuming the other parent had primary custody; in this calculation, the income limit in AS 25.28.030(c) and the minimum support amount in AS 25.28.030(d) apply;

(2) multiplying the amount determined under (1) of this subsection for each parent by the percentage of time the other parent has physical custody of the child; however, if the tribunal finds that the percentage of time each parent will have physical custody does not accurately reflect the ratio of funds each parent will directly spend on supporting the child, the tribunal shall vary this percentage to reflect its findings;

(3) determining which parent has the greater amount under (2) of this subsection; the parent with the greater amount under (2) of this subsection is the obligor parent, and the annual award is equal to the difference between the two amounts under (2) of this subsection multiplied by 1.5; however, if this amount is greater than the amount of support calculated under AS 25.28.010 assuming the obligor parent has primary custody, the annual support is the amount calculated under AS 25.28.010.

(c) The child support award for shared custody under (b) of this section must be paid in 12 equal monthly installments, except that if

(1) shared custody is based on the obligor parent's having physical custody for periods of 30 consecutive days or more, the total annual award may be paid in equal installments over those months in which the obligor parent does not have physical custody; or

(2) the obligor parent's income is seasonal, the tribunal may order

unequal monthly support payments as provided in AS 25.28.030(g) and (h).

(d) The child support order must state that failure to exercise sufficient physical custody to qualify for shared physical custody under (b) or (c) of this section is grounds for modification of the child support order. Denial of visitation by the custodial parent is not cause to increase a child support award.

(e) The tribunal shall

(1) calculate a child support award in a case in which the parents are awarded divided custody by determining the amount each parent would pay to the other parent for support of a child for whom that parent has primary physical custody under AS 25.28.010, taking into account the income limit in AS 25.28.030(c) and the minimum support amount in AS 25.28.030(d), and offsetting those amounts; and

(2) consider whether the amount determined under (1) of this subsection should be varied under AS 25.28.030(b).

(f) The tribunal shall

(1) calculate a child support award in a case in which the parents are awarded hybrid custody by

(A) applying AS 25.28.010, taking into account the income limit in AS 25.28.030(c) and the minimum support amount in AS 25.28.030(d), to determine support for a child in the primary physical custody of each parent;

(B) applying (b) of this section to determine support for a child in the shared physical custody of the parents;

(C) adjusting pro rata the percentages provided in AS 25.28.010(b) based on the number of children to which each type of custody applies; and

(D) combining the amounts to determine the net obligation; and

(2) consider whether the amount determined under (1) of this subsection should be varied under AS 25.28.030(b).

Sec. 25.28.030. Exceptions to support awards. (a) Notwithstanding the requirements in AS 25.28.010 and 25.28.020, the tribunal may vary the award for the reasons stated in this section.

(b) The tribunal may vary the child support award as calculated under the other provisions of this chapter for good cause on proof by clear and convincing evidence that manifest injustice would result if the support award were not varied. The tribunal shall specify in writing the reason for the variation, the amount of support that would have been required but for the variation, and the estimated value of any property conveyed instead of support calculated under the other provisions of this chapter. Good cause may include a finding that unusual circumstances exist that require variation of the award in order to award an amount of support that is just and proper for the parties to contribute toward the nurture and education of their children. The tribunal shall consider the custodial parent's income in this determination.

(c) The calculation for primary physical custody under AS 25.28.010 does not apply to the extent that the parent has an adjusted annual income of more than $105,000. The tribunal may make an additional award only if it is just and proper, taking into account the needs of the child, the standard of living of the child, and the extent to which that standard should reflect the supporting parent's ability to pay.

(d) Except as provided in AS 25.28.010(c) and 25.28.020, the minimum child support amount that may be ordered is $50 a month or $600 a year.

(e) In addition to ordering a parent to pay child support as calculated under this chapter, the tribunal may, in appropriate circumstances and when the parents are minors as described in (f) of this section, order one or more grandparents of a child to pay child support to an appropriate person in an amount determined by the tribunal to serve the best interests of the child; however, the amount may not exceed the lesser of

(1) a proportionate share of the amount required to provide care in a supervised setting to the grandchild, as determined by the tribunal; or

(2) the amount that would have been awarded if the child's parents had the incomes of the child's grandparents and AS 25.28.010 and 25.28.020 were applied.

(f) An order under (e) of this section may be issued only with respect to a child whose parents are both minors, and the order terminates when either parent becomes 18 years of age. The tribunal shall specify in writing the reasons it considers it to be appropriate to order a grandparent to pay child support under this subsection and the factors considered in setting the amount of the child support award. In this

subsection, "grandparent" means the natural or adoptive parent of the minor parent.

(g) If the noncustodial parent's income is seasonal, the tribunal may order that the annual support amount be paid in unequal monthly payments, with higher payments during the months the parent expects to receive higher income and lower payments in other months; the tribunal may not make an unequal payment order unless

(1) the tribunal finds that the burden of budgeting for periods of unequal income should be placed on the obligee rather than the obligor; and

(2) the obligee agrees.

(h) An order of the tribunal for unequal payments under (g) of this section must specify the annual support amount, the average monthly support amount, and the amount due for each month. The order must provide that variations from the average monthly amount begin with monthly payments in excess of the average monthly amount so that a deficit situation cannot occur. Until the excess payments begin, the tribunal shall order payment of the average monthly amount.

Sec. 25.28.040. Health care expenses. (a) The tribunal shall include in the order coverage of the child's health care needs and require health insurance for the child if insurance is available to either parent or both parents at a reasonable cost. The tribunal shall consider whether the child is eligible for services through the Indian Health Service, any other entity, or other insurance coverage before ordering either parent or both parents to provide health care coverage through insurance, cash medical support, or other means. The tribunal shall find that health insurance is available only if the dependent child has reasonable geographic access to the covered services or the insurance includes the coverage of transportation needed for the services.

(b) The tribunal shall allocate equally the cost of insurance between the parents unless the tribunal orders otherwise for good cause. An obligor's child support obligation shall be decreased by the amount of the obligee's portion of health insurance payments ordered by the tribunal and actually paid by the obligor. The tribunal shall increase a child support award by the obligor's portion of health insurance if the obligee is ordered to, and actually does, obtain and pay for insurance.

(c) The cost of insurance is the cost attributable to the child for whom support is paid. If the cost to the employee of covering the employee alone is the same as the

cost to the employee of covering the employee and dependents, then there is no additional cost to the employee for adding the child and no portion of the cost of coverage may be allocated to the child. If dependent coverage can be added for a single cost, rather than for each dependent, and the dependent coverage covers dependents in addition to the child subject to the order, the cost of the dependent coverage shall be allocated equally among the dependents covered. If there is reason to believe that there is an incremental cost to the employee for insuring dependents but evidence of that incremental cost is unavailable, the cost of insurance is determined by dividing the total cost of coverage by the number of family members covered and multiplying that amount by the number of children subject to the order.

(d) The tribunal shall allocate equally between the parties the cost of reasonable health care expenses not covered by insurance unless the tribunal orders otherwise for good cause. A party shall reimburse the other party for the party's share of the uncovered health care expenses within 30 days after receipt of the bill for the health care, payment verification, and, if applicable, a health insurance statement indicating what portion of the cost is uncovered. The tribunal shall allocate the reasonable, uncovered health care expenses exceeding $5,000 in a calendar year based on the parties' relative financial circumstances when the expenses occur.

(e) For the purpose of establishing a monthly support obligation for health care expenses, a court shall find that the cost of cash medical support or private health insurance is reasonable under this section if the cost to the responsible parent does not exceed five percent of the responsible parent's gross income. In calculating the percentage for purposes of health insurance coverage, the cost is the cost of adding the dependent child to the existing insurance coverage or the difference between self-only and family coverage.

(f) In this section,

(1) "cash medical support" means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment or otherwise, or for other health care expenses not covered by insurance;

(2) "health care expenses" includes medical, dental, vision, and mental health counseling expenses.

Sec. 25.28.050. Child support affidavit and documentation. (a) Subject to the confidentiality requirements of Rule 90.1(f), Alaska Rules of Civil Procedure, each parent in a proceeding of a tribunal at which child support is involved shall file a statement under oath, accompanied by documentation verifying the statement, that states the parent's adjusted annual income and the components of adjusted annual income as described in AS 25.28.010(e). This statement and documentation must be filed with a party's initial pleading in superior court, including the dissolution petition, divorce complaint or answer, motion to modify, and any response to a motion to modify. The documents must be redacted to delete social security numbers and to provide only partial financial account information as provided in Rule 90.1(f), Alaska Rules of Civil Procedure. The statement must state whether the parent has access to health insurance for the children and, if so, the additional cost to the parent of the children's health insurance.

(b) While there is an ongoing monthly support obligation, each party shall provide to the other party, within 30 days after a written request, documents such as tax returns and pay stubs showing the party's income for the prior calendar year. The party making the request shall provide documentation of the party's annual income for the same period at the time the request is made. A request under this section may not be made more than once a year. This section does not preclude discovery under the Alaska Rules of Civil Procedure.

(c) Unless the information has already been provided to the tribunal under Rule 90.1(f), Alaska Rules of Civil Procedure, a statement under (a) of this section must be accompanied by a confidential information sheet as described in Rule 90.1, Alaska Rules of Civil Procedure. Once a complete confidential information sheet has been submitted to the tribunal listing names, dates of birth, and social security numbers as required, the parties shall omit or redact social security numbers from documents subsequently filed in the action unless otherwise ordered by the tribunal.

(d) The tribunal may withhold or assess costs or attorney fees for a violation of this section as the circumstances and discouragement of like conduct in the future may require. Costs and attorney fees may be imposed on offending attorneys or parties.

Sec. 25.28.060. Travel expenses. After determining an award of child support under this chapter, the court shall allocate between the parties reasonable travel expenses that are necessary to exercise visitation as may be just and proper for the parties to contribute.

Sec. 25.28.070. Modification; defense against arrearages. (a) A tribunal may modify a final child support award on a showing of a material change of circumstances as provided by state law. A material change of circumstances shall be presumed if support as calculated under this chapter is more than 15 percent greater or less than the outstanding support order. An award may be modified to require cash medical support regardless of whether insurance is available to either parent if neither parent has purchased health insurance. In this subsection, support includes health insurance payments or monthly cash medical support made under AS 25.28.040.

(b) A tribunal may not modify a child support arrearage retroactively, except as authorized by AS 25.27.166(d). A modification that is effective on or after the date that a motion for modification, or a notice of petition for modification by the child support services agency, is served on the opposing party is not considered a retroactive modification.

(c) The tribunal may find that a parent and a parent's assignee are precluded from collecting arrearages for support of a child that accumulated during a time period exceeding nine months for which the parent agreed or acquiesced to the obligor exercising primary custody of the child. A finding that preclusion is a defense must be based on clear and convincing evidence.

Sec. 25.28.080. Third-party custody. (a) When the state, or another third party entitled to child support, has custody of all children of a parent, the parent's support obligation to the third party is an amount equal to the adjusted annual income of the parent multiplied by the percentage specified in AS 25.28.010(b). If the third party has custody of some but not all children, the parent's support obligation to the third party is an amount equal to the adjusted annual income of the parent, multiplied by the percentage specified in AS 25.28.010(b) for the total number of the parent's children, multiplied by the number of the parent's children in third-party custody, divided by the total number of the parent's children. In this subsection, the number of

the parent's children includes only children of the parent who live with the parent, are substantially supported by the parent, or are in custody of the third party entitled to support.

(b) If, in addition to a support obligation to a third party, one or both parents retain primary or shared physical custody of at least one of their children, the support obligation between the parents is calculated under the other provisions of this chapter, without consideration of the third-party custodian or any children in the custody of the third-party custodian, except that the percentage in AS 25.28.010(b) must be adjusted pro rata for the number of children in the primary custody of a parent, or shared custody of the parents, compared to the total number of children. After that calculation is completed, any support owed may be offset with support owed to a third-party custodian under (a) of this section in order to minimize transactions.

Sec. 25.28.090. Support order forms. All court orders for payment or modification of child support shall be entered on a form developed by the administrative director of the court. A party may lodge a duplicate of the tribunal form produced by a laser printer or similar device. A device may also print, in a contrasting typestyle equivalent to that produced by a typewriter, text that otherwise would have been entered by a typewriter or word processor. A party or attorney who lodges a duplicate certifies by lodging the duplicate that it is identical to the current version of the court form.

Sec. 25.28.100. Dependent tax deduction. The court may allocate the dependent tax deduction for each child between the parties as is just and proper and in the child's best interests. The allocation must be consistent with AS 25.24.152 and federal law.

Sec. 25.28.300. Definitions. In this chapter,

(1) "child support" and "child support obligation" have the meaning given "duty of support" in AS 25.27.900;

(2) "divided custody" means that one parent has primary physical custody of one or more children of the relationship and the other parent has primary custody of one or more other children of the relationship, and the parents do not share physical custody of any of their children;

(3) "hybrid custody" means that at least one parent has primary physical custody of one or more children of the relationship, and the parents have shared physical custody of at least one child of the relationship;

(4) "primary physical custody" or "primary custody" means that a child resides with the other parent for a period, specified in the custody order, of less than 30 percent of the year;

(5) "shared physical custody" or "shared custody" means that a child resides with one parent for a period, specified in writing in the custody order, of at least 30 percent but not more than 70 percent of the year, regardless of the status of legal custody;

(6) "tribunal" means the superior court or the child support services agency created in AS 25.27.010.

* **Sec. 2.** AS 47.10.120(a) is amended to read:

(a) When a child in need of aid is committed under this chapter, the court or the child support services agency created in AS 25.27.010 shall, after giving the parent a reasonable opportunity to be heard, require that the parent pay to the department in a manner that the court or the child support services agency directs a sum to cover in full or in part the maintenance and care of the child. The support obligation shall be calculated under **AS 25.28** [RULE 90.3(i) OF THE ALASKA RULES OF CIVIL PROCEDURE].

* **Sec. 3.** AS 47.12.230(a) is amended to read:

(a) When a delinquent minor is committed under this chapter, the court or the child support services agency created in AS 25.27.010 shall, after giving the parent a reasonable opportunity to be heard, require that the parent pay to the department in a manner that the court or the child support services agency directs a sum to cover in full or in part the maintenance and care of the minor. The support obligation shall be calculated under **AS 25.28** [RULE 90.3(i) OF THE ALASKA RULES OF CIVIL PROCEDURE].

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

REPEAL OF COURT RULE. Rule 90.3, Alaska Rules of Civil Procedure, is repealed.

* **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

NONAPPLICABILITY OF TWO-THIRDS VOTE REQUIREMENT. Because the rule repealed in sec. 4 of this Act is a substantive rule rather than a rule of practice or procedure, the repeal of the rule takes effect even if sec. 4 of this Act does not receive the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

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Mischel
4/5/12

CS FOR SENATE BILL NO. 134(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR KOOKESH

A BILL

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(b) To calculate the child support award, the tribunal shall multiply the noncustodial parent's adjusted annual income by the following percentages:

(1) 20 percent for one child;

(2) 27 percent for two children;

(3) 33 percent for three children; and

New Text Underlined *[DELETED TEXT BRACKETED]*

(4) an additional three percent for each additional child.

(c) The tribunal may allow the obligor parent to reduce child support payments by up to 75 percent for a period in which the obligor parent has extended visitation of more than 27 consecutive days. The order must specify the amount of the reduction that is allowable if the extended visitation is exercised.

(d) The tribunal may calculate child support based on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed. A determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility. Potential income shall be based on the parent's work history, qualifications, and job opportunities. The tribunal also may impute potential income for nonincome producing or low income producing assets.

(e) In this section, "adjusted annual income" means the parent's total income from all sources less

(1) mandatory deductions, including

(A) federal, state, and local income tax;

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(2) voluntary contributions to a retirement or pension plan or account in which the earnings are tax-free or tax-deferred, except that the total amount of these voluntary contributions plus any mandatory contributions under (1)(E) of this subsection may not exceed 7.5 percent of the parent's gross wages and self-employment income;

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(2) multiplying the amount determined under (1) of this subsection for each parent by the percentage of time the other parent has physical custody of the child; however, if the tribunal finds that the percentage of time each parent will have physical custody does not accurately reflect the ratio of funds each parent will directly spend on supporting the child, the tribunal shall vary this percentage to reflect its findings;

(3) determining which parent has the greater amount under (2) of this subsection; the parent with the greater amount under (2) of this subsection is the obligor parent, and the annual award is equal to the difference between the two amounts under (2) of this subsection multiplied by 1.5; however, if this amount is greater than the amount of support calculated under AS 25.28.010 assuming the obligor parent has primary custody, the annual support is the amount calculated under AS 25.28.010.

(c) The child support award for shared custody under (b) of this section must be paid in 12 equal monthly installments, except that if

(1) shared custody is based on the obligor parent's having physical custody for periods of 30 consecutive days or more, the total annual award may be paid in equal installments over those months in which the obligor parent does not have physical custody; or

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unequal monthly support payments as provided in AS 25.28.030(g) and (h).

(d) The child support order must state that failure to exercise sufficient physical custody to qualify for shared physical custody under (b) or (c) of this section is grounds for modification of the child support order. Denial of visitation by the custodial parent is not cause to increase a child support award.

(e) The tribunal shall

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(2) consider whether the amount determined under (1) of this subsection should be varied under AS 25.28.030(b).

(f) The tribunal shall

(1) calculate a child support award in a case in which the parents are awarded hybrid custody by

(A) applying AS 25.28.010, taking into account the income limit in AS 25.28.030(c) and the minimum support amount in AS 25.28.030(d), to determine support for a child in the primary physical custody of each parent;

(B) applying (b) of this section to determine support for a child in the shared physical custody of the parents;

(C) adjusting pro rata the percentages provided in AS 25.28.010(b) based on the number of children to which each type of custody applies; and

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(b) The tribunal may vary the child support award as calculated under the other provisions of this chapter for good cause on proof by clear and convincing evidence that manifest injustice would result if the support award were not varied. The tribunal shall specify in writing the reason for the variation, the amount of support that would have been required but for the variation, and the estimated value of any property conveyed instead of support calculated under the other provisions of this chapter. Good cause may include a finding that unusual circumstances exist that require variation of the award in order to award an amount of support that is just and proper for the parties to contribute toward the nurture and education of their children. The tribunal shall consider the custodial parent's income in this determination.

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(d) Except as provided in AS 25.28.010(c) and 25.28.020, the minimum child support amount that may be ordered is $50 a month or $600 a year.

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(1) a proportionate share of the amount required to provide care in a supervised setting to the grandchild, as determined by the tribunal; or

(2) the amount that would have been awarded if the child's parents had the incomes of the child's grandparents and AS 25.28.010 and 25.28.020 were applied.

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(1) the tribunal finds that the burden of budgeting for periods of unequal income should be placed on the obligee rather than the obligor; and

(2) the obligee agrees.

(h) An order of the tribunal for unequal payments under (g) of this section must specify the annual support amount, the average monthly support amount, and the amount due for each month. The order must provide that variations from the average monthly amount begin with monthly payments in excess of the average monthly amount so that a deficit situation cannot occur. Until the excess payments begin, the tribunal shall order payment of the average monthly amount.

Sec. 25.28.040. Health care expenses. (a) The tribunal shall include in the order coverage of the child's health care needs and require health insurance for the child if insurance is available to either parent or both parents at a reasonable cost. The tribunal shall consider whether the child is eligible for services through the Indian Health Service, any other entity, or other insurance coverage before ordering either parent or both parents to provide health care coverage through insurance, cash medical support, or other means. A court shall find that health insurance is available only if the dependent child has reasonable geographic access to the covered services or the insurance includes the coverage of transportation needed for the services.

(b) The tribunal shall allocate equally the cost of insurance between the parents unless the tribunal orders otherwise for good cause. An obligor's child support obligation shall be decreased by the amount of the obligee's portion of health insurance payments ordered by the tribunal and actually paid by the obligor. The tribunal shall increase a child support award by the obligor's portion of health insurance if the obligee is ordered to, and actually does, obtain and pay for insurance.

(c) The cost of insurance is the cost attributable to the child for whom support is paid. If the cost to the employee of covering the employee alone is the same as the

cost to the employee of covering the employee and dependents, then there is no additional cost to the employee for adding the child and no portion of the cost of coverage may be allocated to the child. If dependent coverage can be added for a single cost, rather than for each dependent, and the dependent coverage covers dependents in addition to the child subject to the order, the cost of the dependent coverage shall be allocated equally among the dependents covered. If there is reason to believe that there is an incremental cost to the employee for insuring dependents but evidence of that incremental cost is unavailable, the cost of insurance is determined by dividing the total cost of coverage by the number of family members covered and multiplying that amount by the number of children subject to the order.

(d) The tribunal shall allocate equally between the parties the cost of reasonable health care expenses not covered by insurance unless the tribunal orders otherwise for good cause. A party shall reimburse the other party for the party's share of the uncovered health care expenses within 30 days after receipt of the bill for the health care, payment verification, and, if applicable, a health insurance statement indicating what portion of the cost is uncovered. The tribunal shall allocate the reasonable, uncovered health care expenses exceeding $5,000 in a calendar year based on the parties' relative financial circumstances when the expenses occur.

(e) For the purpose of establishing a monthly support obligation for health care expenses, a court shall find that the cost of cash medical support or private health insurance is reasonable under this section if the cost to the responsible parent does not exceed five percent of the responsible parent's gross income. In calculating the percentage for purposes of health insurance coverage, the cost is the cost of adding the dependent child to the existing insurance coverage or the difference between self-only and family coverage.

(f) In this section,

(1) "cash medical support" means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment or otherwise, or for other health care expenses not covered by insurance;

(2) "health care expenses" includes medical, dental, vision, and mental health counseling expenses.

Sec. 25.28.050. Child support affidavit and documentation. (a) Subject to the confidentiality requirements of Rule 90.1(f), Alaska Rules of Civil Procedure, each parent in a proceeding of a tribunal at which child support is involved shall file a statement under oath, accompanied by documentation verifying the statement, that states the parent's adjusted annual income and the components of adjusted annual income as described in AS 25.28.010(e). This statement and documentation must be filed with a party's initial pleading in superior court, including the dissolution petition, divorce complaint or answer, motion to modify, and any response to a motion to modify. The documents must be redacted to delete social security numbers and to provide only partial financial account information as provided in Rule 90.1(f), Alaska Rules of Civil Procedure. The statement must state whether the parent has access to health insurance for the children and, if so, the additional cost to the parent of the children's health insurance.

(b) While there is an ongoing monthly support obligation, each party shall provide to the other party, within 30 days after a written request, documents such as tax returns and pay stubs showing the party's income for the prior calendar year. The party making the request shall provide documentation of the party's annual income for the same period at the time the request is made. A request under this section may not be made more than once a year. This section does not preclude discovery under the Alaska Rules of Civil Procedure.

(c) Unless the information has already been provided to the tribunal under Rule 90.1(f), Alaska Rules of Civil Procedure, a statement under (a) of this section must be accompanied by a confidential information sheet as described in Rule 90.1, Alaska Rules of Civil Procedure. Once a complete confidential information sheet has been submitted to the tribunal listing names, dates of birth, and social security numbers as required, the parties shall omit or redact social security numbers from documents subsequently filed in the action unless otherwise ordered by the tribunal.

(d) The tribunal may withhold or assess costs or attorney fees for a violation of this section as the circumstances and discouragement of like conduct in the future may require. Costs and attorney fees may be imposed on offending attorneys or parties.

Sec. 25.28.060. Travel expenses. After determining an award of child support under this chapter, the court shall allocate between the parties reasonable travel expenses that are necessary to exercise visitation as may be just and proper for the parties to contribute.

Sec. 25.28.070. Modification; defense against arrearages. (a) A tribunal may modify a final child support award on a showing of a material change of circumstances as provided by state law. A material change of circumstances shall be presumed if support as calculated under this chapter is more than 15 percent greater or less than the outstanding support order. An award may be modified to require cash medical support regardless of whether insurance is available to either parent if neither parent has purchased health insurance. In this subsection, support includes health insurance payments or cash medical support made under AS 25.28.040.

(b) A tribunal may not modify a child support arrearage retroactively, except as authorized by AS 25.27.166(d). A modification that is effective on or after the date that a motion for modification, or a notice of petition for modification by the child support services agency, is served on the opposing party is not considered a retroactive modification.

(c) The tribunal may find that a parent and a parent's assignee are precluded from collecting arrearages for support of a child that accumulated during a time period exceeding nine months for which the parent agreed or acquiesced to the obligor exercising primary custody of the child. A finding that preclusion is a defense must be based on clear and convincing evidence.

Sec. 25.28.080. Third-party custody. (a) When the state, or another third party entitled to child support, has custody of all children of a parent, the parent's support obligation to the third party is an amount equal to the adjusted annual income of the parent multiplied by the percentage specified in AS 25.28.010(b). If the third party has custody of some but not all children, the parent's support obligation to the third party is an amount equal to the adjusted annual income of the parent, multiplied by the percentage specified in AS 25.28.010(b) for the total number of the parent's children, multiplied by the number of the parent's children in third-party custody, divided by the total number of the parent's children. In this subsection, the number of

the parent's children includes only children of the parent who live with the parent, are substantially supported by the parent, or are in custody of the third party entitled to support.

(b) If, in addition to a support obligation to a third party, one or both parents retain primary or shared physical custody of at least one of their children, the support obligation between the parents is calculated under the other provisions of this chapter, without consideration of the third-party custodian or any children in the custody of the third-party custodian, except that the percentage in AS 25.28.010(b) must be adjusted pro rata for the number of children in the primary custody of a parent, or shared custody of the parents, compared to the total number of children. After that calculation is completed, any support owed may be offset with support owed to a third-party custodian under (a) of this section in order to minimize transactions.

Sec. 25.28.090. Support order forms. All court orders for payment or modification of child support shall be entered on a form developed by the administrative director of the court. A party may lodge a duplicate of the tribunal form produced by a laser printer or similar device. A device may also print, in a contrasting typestyle equivalent to that produced by a typewriter, text that otherwise would have been entered by a typewriter or word processor. A party or attorney who lodges a duplicate certifies by lodging the duplicate that it is identical to the current version of the court form.

Sec. 25.28.100. Dependent tax deduction. The court may allocate the dependent tax deduction for each child between the parties as is just and proper and in the child's best interests. The allocation must be consistent with AS 25.24.152 and federal law.

Sec. 25.28.300. Definitions. In this chapter,

(1) "child support" and "child support obligation" have the meaning given "duty of support" in AS 25.27.900;

(2) "divided custody" means that one parent has primary physical custody of one or more children of the relationship and the other parent has primary custody of one or more other children of the relationship, and the parents do not share physical custody of any of their children;

(3) "hybrid custody" means that at least one parent has primary physical custody of one or more children of the relationship, and the parents have shared physical custody of at least one child of the relationship;

(4) "primary physical custody" or "primary custody" means that a child resides with the other parent for a period, specified in the custody order, of less than 30 percent of the year;

(5) "shared physical custody" or "shared custody" means that a child resides with one parent for a period, specified in writing in the custody order, of at least 30 percent but not more than 70 percent of the year, regardless of the status of legal custody;

(6) "tribunal" means the superior court or the child support services agency created in AS 25.27.010.

* **Sec. 2.** AS 47.10.120(a) is amended to read:

(a) When a child in need of aid is committed under this chapter, the court or the child support services agency created in AS 25.27.010 shall, after giving the parent a reasonable opportunity to be heard, require that the parent pay to the department in a manner that the court or the child support services agency directs a sum to cover in full or in part the maintenance and care of the child. The support obligation shall be calculated under **AS 25.28** [RULE 90.3(i) OF THE ALASKA RULES OF CIVIL PROCEDURE].

* **Sec. 3.** AS 47.12.230(a) is amended to read:

(a) When a delinquent minor is committed under this chapter, the court or the child support services agency created in AS 25.27.010 shall, after giving the parent a reasonable opportunity to be heard, require that the parent pay to the department in a manner that the court or the child support services agency directs a sum to cover in full or in part the maintenance and care of the minor. The support obligation shall be calculated under **AS 25.28** [RULE 90.3(i) OF THE ALASKA RULES OF CIVIL PROCEDURE].

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

REPEAL OF COURT RULE. Rule 90.3, Alaska Rules of Civil Procedure, is repealed.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

NONAPPLICABILITY OF TWO-THIRDS VOTE REQUIREMENT. Because the rule repealed in sec. 4 of this Act is a substantive rule rather than a rule of practice or procedure, the repeal of the rule takes effect even if sec. 4 of this Act does not receive the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

ALASKA STATE LEGISLATURE
Senator Albert M. Kookesh

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Labouchere Bay
Lake Minchumina
Lime Village
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Port Alice
Port Protection
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Takotna
Tanacross
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Tatitlek
Tazlina
Telida
Tenakee Springs
Tetlin Junction
Tok
Tonsina
Tyonek
Utopia Creek
Venetie
View Cove
Waterfall
Whale Pass
Wiseman
Yakutat

February 15, 2012

Senator Hollis French, Chair
Senate Judiciary
State Capitol Building, Rm 417
Juneau, AK 99801

Dear Senate French,

I respectfully request a hearing for Senate Bill 134 "**An act relating to child support awards; repealing Rule 90.3, Alaska Rules of Civil Procedure; and providing for an effective date.**" The bill will put the child support rule into statute and change the calculation formula from the current percentage approach which only takes in account the non-custodial parents income to an income shares model that considers the net income of both parents. In 1987, the Alaska Supreme Court enacted Civil Rule 90.3. The court frankly admitted this was a substantive law and recognized that courts are not supposed to pass substantive laws as it is the legislator's responsibility. In the 25 years since then, the legislature has not replaced the Civil Rule 90.3 with an actual law. This bill proposes to correct this long standing deficiency.

CS SB 134 was moved out of Senate HESS Committee today to the Senate Judiciary Committee. Enclosed is CS SB 134, sponsor statement, fiscal notes, legislative research report and letter.

Thank you for your consideration, if you have any questions please don't hesitate in contacting me or my staff Dorothy Shockley at 465-3018.

Respectfully,

Albert M. Kookesh

Senator Albert Kookesh

Enclosures

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Sponsor Statement

SB 134

SB 134 puts the Child Support Civil Rule 90.3 guidelines into statute. In 1987, the Alaska Supreme Court enacted Civil Rule 90.3. The Supreme Court admitted this was a substantive law that the Legislature could replace at any time. In the 25 years since then, the Legislature has not replaced civil rule 90.3 with an actual law. This bill proposes to correct that long-standing deficiency.

One of the major problems with having the child support guidelines set by a court rule is the people affected by current guidelines have not had the opportunity to speak to the individuals with the power to make changes. Instead every four years they are encouraged to write letters or testify before a review committee made up of lawyers and judges who then submit their recommendations to the Supreme Court Justices who make the final decisions. With the rule in statute, individuals will have the opportunity to speak to lawmakers who have the power to make changes. Proposals to amend can be made in the future through the legislative process.

The bill proposes enactment of the current rule into statute with the exception of how the child support obligation is calculated. Currently the non-custodial parent's support obligation is based solely on his or her income, without regard to what the other parent makes. With this bill it will be changed to an income shares model which calculates support as the share of each parent's income estimated allocation to the child, if the original household were intact.

According to 2005 statistics (Legislative Research Report, November 2010)

- Twenty four (24) states establish their child support guidelines statutorily through their legislature while 16 states use court rule only, and 11 states use a combination of rule, commission and or agency.
- Thirty five (35) states consider the income of both parents in determining child support payments.

SB 134 changes the word court to tribunal in some cases back to court and adds number (6) to definition in Sec. 25.28.300 (page 18) to read "tribunal" means the superior court or the child support services agency created in AS 25.27.010. It also includes changes made by SB 96 addressing medical support.

The Child Support Services Division has no objections to the bill. I would appreciate your prompt and favorable action on this bill.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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MEMORANDUM April 20, 2011

SUBJECT: Child support obligation when children of obligor are living separately (Work Order No. 27-LS0671\A)

TO: Senator Albert Kookesh
Attn: Dorothy Shockely

FROM: Jean M. Mischel
Legislative Counsel

You have asked whether the above-referenced draft bill takes into account all children of an obligor, whether or not all are subject to a support order. The income share approach does account for a child or children of an obligor who may be living with the obligor and not subject to a separate order of support by inferring a portion of income for that child or children.

The calculation of child support is made by multiplying the presumptive support obligation by the noncustodial parent's proportionate income share of combined monthly net income with the other parent of the child under sec. 25.28.010(a). Monthly net income, as defined under sec. 25.28.010(g) at page 10 of the bill draft, excludes the following in relation to other children:

> (3) child support and alimony payments arising from previous relationships that are required by another tribunal and actually paid; [and]
> (4) child support for children from prior relationships living with the parent, calculated by using the formula under this chapter; . . . .

Therefore, a child not subject to an order and living with a noncustodial parent of another child, is treated as if the child were the subject of a support order under the bill draft in terms of calculating net income from which a share for the noncustodial parent's support obligation is derived. However, children from a subsequent relationship are not considered in the calculation of the parent's net income. In "unusual circumstances" a court may vary an award if the award would result in "manifest injustice" under sec. 25.28.030 at pages 12 and 13 of the bill draft.

If I may be of further assistance, please advise.

JMM:ljw
11-274.ljw

LEGISLATIVE RESEARCH REPORT

NOVEMBER 22, 2010

REPORT NUMBER 11.076

CHILD SUPPORT GUIDELINES IN OTHER STATES

PREPARED FOR SENATOR ALBERT KOOKESH

BY TIM SPENGLER, LEGISLATIVE ANALYST

You were interested in child support guidelines in other states. Specifically, you wanted to know if other states codify their child support guidelines in statute. Additionally, you wanted to know how many states consider the income of *both* parents when deciding child support payment amounts. Briefly, about half of the states have established guidelines in statute, and most (35) states take into consideration both parents' incomes when deciding child support award amounts.[1]

Background on Federal Guidance and Mandates

Historically, the rationale and methodology behind calculating child support payments developed differently across the country's legal jurisdictions.[2] As a result, divorcing couples and their children were subject to child support award processes that were often amorphous and inconsistent, which often times led to inadequate financial support from the obligor parent (the payer of the support). In the 1930s, recognizing that federal entitlement programs for the impoverished were being burdened by the victims of insufficient support awards, the federal government began providing guidance to the states. Federal involvement through legislation increased over subsequent years, culminating in the Child Support Enforcement Amendments of 1984 (P.L. 98-378), the Family Support Act of 1988 (P.L. 100-485), and subsequent amendments to those laws, which collectively provide the child support mandates under which modern state child support guidelines have been developed.

States comply with federal mandates through the adoption of child support guidelines in statue, regulation, court rule, or some combination of the three. The federal mandates seek to address the problems of earlier child support regimes by accomplishing the following four main goals:

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[1] Much of the background information in this report was taken from a previous report from our agency.

[2] Information in this section is summarized from Laura W. Morgan, "Child Support Guidelines," National Legal Research Group, 1999; accessed through the FindLaw online library at *http://library.findlaw.com/1999/Jan/1/241469.html#consistent*. Ms. Morgan served as the Chair of the Child Support Committee of the Family Law Section of the American Bar Association from 1997 to 2003. She maintains the website "Support Guidelines.com" (*http://www.supportguidelines.com/*), which provides extensive information on child support matters.

(1) increase the adequacy of child support awards;

(2) increase the consistency and predictability of child support awards;

(3) increase compliance through perceived fairness of child support awards; and

(4) increase the ease of administration of child support cases.

Pursuant to federal regulations, at a minimum, state guidelines must accomplish the following:

- Consider all earnings and income of the absent parent;
- Be based on specific descriptive and numeric criteria and result in the computation of the support obligation;
- Provide for the health care needs of the children, through health insurance coverage or other means; and
- Provide that in any judicial or administrative proceeding for the award of child support, there shall be a rebuttable presumption that the amount of the award, which would result from the application of the state's guideline, is the correct amount of child support to be awarded.[3]

Under federal law, the child support awards resulting from state guidelines enjoy a "rebuttable presumption" of correctness. That is, in order to deviate from the guideline amounts, the party challenging the award must establish that the application of the guideline is somehow unreasonable or unjust to their particular circumstances. Courts also must extensively record and justify deviation from the guidelines.

States with Child Support Guidelines in Statue

According to the National Conference of State Legislatures, the following 24 states establish their child support guidelines statutorily through their legislatures: California, Colorado, Florida, Georgia, Illinois, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, New York, Ohio, Oklahoma, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.[4] Some of these states also concurrently establish guidelines in regulation (often through a child support commission).

The remaining 26 states (including Alaska) establish their child support guidelines by court rule or agency regulation. These states are Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Wisconsin. In Alaska, child support guidelines are provided in the Alaska Court Rules, Rules of Civil Procedure 90.3. We provide, as Attachment A, a table from the National Conference of State Legislatures that details which branch of government establishes child support guidelines in each state. The table includes relevant statutory and court rule citations from all states.

[3] 45 C.F.R § 302.56 and 45 C.F.R. § 302.56(f-g).

[4] We corresponded with Rochelle Finzel, children and families program manager, National Conference of State Legislators, at (303) 364-7700. The information NCSL provided on this matter was compiled in 2005, so some changes may have occurred since then.

Thirty-five (35) States Consider the Income of Both Parents in Determining Child Support Payments

In order to meet both federal requirements and the goal of providing adequate support, states have largely implemented two basic child support calculation models, respectively known as the *income shares* and the *percentage of income*. These models are used for calculating the amount of a child support award to be paid by the obligor parent.

The *income shares* model is used in 35 states and is based on the income of both parents. Alaska, along with 11 other states, employs the *percentage of income* model, which (usually) bases the award only on the non-custodial parent's income.[5] Three states (Delaware, Hawaii, and Montana) use the *Melson Formula* to calculate child support awards. This formula is generally thought to be more complex than the other models.[6]

The ***income shares*** model is based on the concept that a child should receive the same proportion of parental income that he or she would have received if the parents lived together. In an intact household, the income of both parents is generally pooled and spent for the benefit of all household members, including any children. Thus, the *income shares* model **calculates support as the share of each parent's income** estimated to have been allocated to the child if the original household were intact.

Using the *income shares* model, computation of child support is basically a four-step process:

(1) The income of the parents (gross or net) is determined and added together.[7]

(2) A "basic child support obligation" is computed based on the combined income of the parents, using a table or grid in the guidelines. The amounts in the table are derived from economic data on household expenditures on children.

(3) A "presumptive child support obligation" is then computed by adding expenditures for work-related child care expenses and extraordinary medical expenses to the basic child support obligation. Other add-ons and deductions may also be calculated.

(4) The presumptive child support obligation is prorated between each parent based on his or her proportionate share of total income. The obligor's share is payable as child support, while the obligee's share is retained and presumed to be spent directly on the child.

Distinguishing features of the income shares model include the following:

- It embodies the underlying economic assumption that as income increases, the proportion of income spent on child support decreases.
- It illustrates that both parents are sharing in the support of the child, thereby potentially increasing the perception of fairness to both parents.
- Compared to the *percentage of income* model, the *income shares* model can more easily take into consideration adjustments for shared and split custody, health care

[5] The states that the employ the *percentage of income* model are Alaska, Arkansas, Georgia, Illinois, Massachusetts, Minnesota, Mississippi, Nevada, North Dakota, Tennessee, Texas, and Wisconsin.

[6] The Melson Formula was developed by a Delaware Family Court judge; additional information on the formula can be found online at *http://courts.delaware.gov/Help/Support/SupportChapter8.pdf.*

[7] Whether the calculation is based on gross or net income varies among states.

needs, child care expenses, other children (previous or subsequent) needing support, and children's ages by the manipulation of income, add-ons and deductions and then allocating these costs between the parents. Because these factors can be built into the *income shares* formula, there is less reason for deviation from the guidelines' presumptive award. Limiting deviation meets the ideal of perceived fairness, as well as the federal requirement that the number of cases in which deviation is granted be limited. Limited deviation also meets the goals of consistency and predictability.

The ***percentage of income*** model (used in Alaska and 11 other states), stipulates that in *primary custody* arrangements—those in which the custodial parent has physical custody for over 70 percent of the year—**support amounts are based solely on the income of the non-custodial spouse** (obligor) and the number of children involved. In Alaska, and a number of other states, in *shared custody* situations—those in which each parent has custody for at least 30 percent of the year—the calculation includes the income of both parents, with the *percentage of income* model applied separately to each, then adjusted for the time each has physical custody. The parent with the higher calculation in this scenario becomes the obligor.

Proponents of the *percentage of income* model argue that both parents are assumed to contribute to the child's upbringing in the same proportion as the obligor. The custodial parent is making the contribution in the manner he or she would have made had the parties not divorced. Thus, there is no need to adopt a more complex formula. Many have argued, however, that it is inherently unfair for the custodial parent's income not to affect the presumptive amount. Typically, under this model, only a large disparity between the custodial parent's income and the non-custodial parent's income will be viewed as a justifiable factor upon which to base a deviation. Some states, including Alaska, address this concern in part by considering the income of both parents in shared custody situations. Those incomes are multiplied by the percentage of time each parent has physical custody, and, as we noted earlier, the role of obligor is assigned to the parent with the larger calculated amount.

Opponents of the *percentage of income* model also argue that it generally does not directly adjust for child care, extraordinary medical expenses, or whether other children are being supported in the obligor's household. Most states using this model have attempted to address a number of the above concerns by explicitly identifying these issues as factors for courts to consider as exceptions or deviations, or as expenses to be shared equally or reimbursed by one of the parties.

Despite their differences, child support guideline models have certain aspects in common. First, most of the guidelines incorporate a "self-support" reserve for the obligor.[8] Second, all the guidelines have a provision relating to imputed income.[9] Third, by federal regulation, all the guidelines take into consideration the health care expenses for the children, by insurance or other means. Lastly, most guidelines have incorporated into the presumptive child support formula special additions for child care expenses, special formulas for shared custody, split custody, and extraordinary visitation, and special deductions for the support of previous and subsequent children.

We hope you find this information to be useful. Please let us know if you have questions or need additional information.

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[8] A self-support reserve means that the obligor is allowed to retain a certain amount of income below which level, support is minimal. For example, under the Washington state *income shares* model, the formula is not applied for obligors with net earnings of less than $500 per month.

[9] Imputed income is benefits that accrue even though no money is received. For example, an employee receives imputed income when an employer offers free health insurance and life insurance coverage or the use of a company car.

Attachment A

"Which Branch of Government Establishes Each States' Child Support Guidelines," a table including statutory and court rule citations, National Conference of State Legislatures, compiled in 2005

NCSL
NATIONAL CONFERENCE of STATE LEGISLATURES

GO

Issues & Research » Human Services » [Child Support] Establishment Responsibility Go 17623 Share Comment

Which Branch of Government Establishes Each States' Child Support Guidelines

State and Statute Section	Legislature	Court	Agency	Commission	Comment
Alabama Ala. R.J.A. R. 32		X			The Administrative Director of Courts reviews the guidelines and makes recommendations to the Alabama Supreme Court.
Alaska Ak. Rules of Civ. Pro. Rule 90.3(I)		X			
Arizona Ar. Rev. Stat. §25-320		X			The Chief Justice of the Arizona Supreme Court appoints a committee to review guidelines. The committee makes recommendations to the S.Ct. for approval.
Arkansas Ar. Code Ann. § 9-12-312		X			The Chief Justice of the Arkansas Supreme Court appoints a committee to review guidelines. The committee makes recommendations to the S.Ct. for approval.
California Cal. Fam. Code §4050 et seq.	X				The Legislature statutorily amends the guidelines based on the recommendations of the Judicial Council (§68500).
Colorado Colo. Rev. Stat. Ann. §14-10-115	X			X	The Legislature statutorily amends the guidelines based on the recommendations of a 17 member child support commission.
Connecticut Conn. Gen. Stat §46b-215a-c			X	X	The Legislature created the Commission for Child Support Guidelines; an 11 member commission established to promulgate child support guidelines. Such guidelines are reviewed by the legislative regulation review committee, which is responsible for approving all "agencies" rules and regulations.
Delaware Fam. Ct. Civ. R. 52		X			

Washington, D.C. D.C. Code Ann. § 16-916.2	X			X	The Council of the District of Columbia provides for the guidelines in code amending such based on the recommendations of a 15 member child support guidelines commission.
Florida Fla. Stat. Ann. §61.3	X				
Georgia Ga. Code Ann. §19-6-15	X			X	The General Assembly provides for the guidelines in code amending such based on the recommendations of a commission appointed by the Governor.
Hawaii Hawaii Rev. Stat. 576D-7		X			The Family Court establishes the guidelines in consultation with child support enforcement agency (Attorney General's Office).
Idaho Idaho Code 32-706A		X			
Illinois 305 ILCS 5/12-4.20c	X			X	The General Assembly statutorily amends the guidelines based on the recommendations of the Child Support Advisory Committee.
Indiana Ind. Stat. Ann. §33-2.1-10-1 to 9		X		X	The Indiana Supreme Court adopts amendments to the guidelines based on the recommendation of a 12 member child support advisory committee.
Iowa Iowa Code Ann. §598.21		X			
Kansas K.S.A. §20-165		X			
Kentucky Ky. Rev. Stat. Ann. §403.213	X			X	The General Assembly statutorily amends the guidelines based on the recommendation of a 10 member commission.
Louisiana La. Rev. Stat. Ann. §9:315.12	X				
Maine Me. Rev. Stat. Ann. tit. 9 §311 After October 1, 1997 tit. 19-A §2001	X				
Maryland Md. Code Ann., Fam. Law §12-202(c)	X				The General Assembly provides for the guidelines in code amending such based on the recommendations of the Child Support Enforcement Administration of the Department of Human Resources.

Massachusetts Mass. Gen. Laws Ann. ch. 208 §28		X			
Michigan Mich. Comp. Laws §552.519. Sec. 19(1) & (3)(a)(vi)		X			Michigan law creates a friend of the court bureau within the state court administrative office, under the supervision and direction of the supreme court. Such bureau is responsible for establishing and reviewing the child support guidelines.
Minnesota Minn. Stat. Ann. §518.551	X				The Legislature statutorily amend the guidelines based on the recommendation of the department of human services.
Mississippi Miss. Code Ann. §43-19-101 (5)	X				The Legislature statutorily amend the guidelines based on the recommendation of the department of human services.
Missouri Mo. Stat. Ann. §452.340(7)		X			
Montana Mont. Code Ann. §40-5-209			X		
Nebraska Neb. Rev. Stat. §42-364.16		X			
Nevada Nev. Rev. Stat. §125B.070	X				The Legislature statutorily amends the guidelines based on the recommendations of the State Bar of Nevada.
New Hampshire N.H. Rev. Stat. Ann. § 458-C:6	X				The Legislature statutorily amends the guidelines based on the recommendations of the division of human services, department of health and human services.
New Jersey N.J. Stat. Ann. §2A.:17-56.25 Admin. R. 5:6A			X		
New Mexico	X			X	The Legislature statutorily amends the guidelines based on the recommendations of "an appropriate executive or legislative commission or executive department."
New York N.Y. Soc. Serv. Law §111b(10)	X				The Legislature statutorily amends the guidelines based on the recommendations of the Department of Social Services.
North Carolina N.C. Gen. Stat. §15-13.4(c1)		X			The Conference of Chief District Judges is required to establish the guidelines. In addition, the conference must get specific input prior to amending and must report its findings to the General Assembly.
North Dakota			X		

N.D. Code Ann. §14-09-09.7					
Ohio Ohio Rev. Code Ann. §3113.21.5(G)	X			X	The General Assembly provides for the guidelines in code amending such based on the recommendations of the department of human services. The department, in turn, is required to establish a child support guideline advisory commission to assist the department in completing the review.
Oklahoma Okl. Stat. Ann. §119.1	X				The Legislature statutorily amends the guidelines based on the recommendations of the Judiciary Committees of the Senate and the House of Representatives.
Oregon Or. Rev. Stat. §25.270			X		
Pennsylvania Pa. Con. Stat. Ann. §1910.16-1 (Rules of Civic Procedure)		X			
Rhode Island R.I. Gen. Laws §15-5-16.2		X			The family court is responsible for establishing guidelines by an administrative order.
South Carolina S.C. Code of Laws §20-7-852(D)			X		
South Dakota S.D. Codified Laws Ann. §25-7-6.12	X				The Legislature statutorily amends the guidelines based on the recommendations of the department of social services. (In the year 2000, the Governor is responsible for establishing a commission to review the guidelines and report its recommended changes to the Legislature.
Tennessee Tenn. Code Ann. §36-5-101 (2) & (3)		X	X		Guidelines were originally established by the department of children's services. However, the Tenn. Supreme Court is permitted to modify the guidelines. If the court fails to review the guidelines, then the agency is required to review and make recommendations to the court.
Texas Tex. Fam. Code Ann. §111.001	X			X	The Legislature statutorily amends the guidelines based on the recommendations of a 25 member or more advisory committee appointed by the Texas Supreme Court.
Utah Utah Code Ann. §78-45-7.13	X			X	The Legislature statutorily amends the guidelines based on the recommendations of an 11 member advisory committee appointed by the Governor. [Committee reports to the Legislative Judiciary Interim Committee.]

Vermont Vt. Stat. Ann. tit.15 §654			X		
Virginia Va. Code Ann. §20-108.2 (H)	X			X	The General Assembly provides for the guidelines in code amending such based on the recommendations of a panel of representatives organized by the Secretary of Health and Human Services.
Washington Wash. Rev. Code Ann. §26.19.025	X				
West Virginia W. Va. Code §48A-1B-1	X				
Wisconsin Wis. Stat. Ann. §49.22(9)			X		
Wyoming Wyo. Stat. Ann. §20-6-305	X				The Legislature statutorily amends the guidelines based on the recommendations of the department of family services.

Denver Office
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Washington Office
Tel: 202-624-5400 | Fax: 202-737-1069 | 444 North Capitol Street, N.W., Suite 515 | Washington, D.C. 20001

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October 5, 2005

Ms. Beth Adams
Alaska court System
820 W. 4th Avenue
Anchorage, AK 99501

Dear Ms. Adams,

I am writing to make comments on the current Alaska child support guidelines (Civil Rules 90.3) I have worked for Senator Albert Kookesh for the past three years as his Legislative Aide. In the scope of my job I take calls from constituents, usually when our office is contacted people are out of options in resolving their situation(s).

First of all I would like to say I do appreciate what this department does. On the other hand we have taken many calls from frustrated obligors in the Child Support Services Division (CSSD). I have read the complex civil rule so I am somewhat aware of how it is suppose to work, unfortunately that is not the case with the people we hear from.

We have heard of peoples saving accounts zeroed out!

75% of wages deducted!

Drivers Licenses taken so the person can not drive to work!

No consideration given to present family; when 2/3 of wages deducted!

No communication, no explanation for changes and or reviews, and no call backs.

Under AS 25.24.160 (a)(1) **it requires that child support be set in an amount which is just and proper.** When someone can't go to work because he/she doesn't have a drivers license and his/her savings is wiped out and he/she can't support him or her self, little alone the family he/she has right now, that is not just and proper. Most people find they are helpless with no place to go.

I would like to suggest;

- No more than 33% percent of wages be taken, period. People are finding they cannot live on anything less, especially in rural Alaska, where the cost of living is 3 times higher than urban Alaska.
- Only two thirds of savings and other income be garnished.
- Consideration is given to ALL of the children in calculating the support payments. The 'subsequent' children have the same rights and needs as those under court order.

- The automated system is scary, the employer should have some control, like deducting only one third of ones pay.
- **Involve the parent(s) in any changes and reviews. If you involve the parent(s) in decisions, that's gives them ownership and a since of control and therefore are more cooperative**.
- A handbook in layman's terms.

Your consideration to making this Department more user friendly would benefit everyone, especially the children you are serving.

Thank you for your time.

Sincerely,

Dorothy J. Shockley
Legislative Aide to Senator Albert Kookesh

ALASKA WOMEN'S LOBBY

AWL Mission: To defend and advance the rights and needs of Women, Children and Families in Alaska

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Kari Robinson

Joanne Schmidt

Libby Silberling

Shannon Vargas

March 29, 2012

Senator French
Members of Senate Judiciary

Dear Chair French:

While we appreciate Senator Kookesh's desire to provide citizens a more accessible forum to promote revision to the child support process by moving the process from a court rule into statute, we are not convinced that such would be the case and are also concerned with the other significant change encompassed in SB134, Child Support Awards.

As of 2005, about half of the states establish child support guidelines statutorily and about half through court rule or agency regulation. The four-year review mentioned in the sponsor statement is a federal regulation to which states must comply no matter where the guidelines are placed. While amending court rules can be a laborious process, they can be revised through court procedures or through the legislative process at anytime; not just every four years. And while it may be easier to amend a statute through the legislative process, we are not convinced that it should be easy to change child support guidelines. Stability of the procedures in what can be volatile determinations should be the preference.

Currently Alaska uses a percentage of income model for determining support amounts and SB 134 proposes changing that process to an income shares model. It seems that the income shares model focuses on the standards of living of the custodial and non-custodial households after divorce. It doesn't consider whether or not children should be supported at the same level after the divorce as before; which violates a basic tenet of child support that being the child should remain at the same standard of living before and after the divorce. While more states employ the income shares model (37), no state has shown that use of the model results in appropriate child support awards.("Introduction to the Income-Share Child Support Guidelines", Roger F. Gay). In fact, at every level of income where income between the parties is not equal, the Income Shares model produces child support awards that are lower than any other state's currently existing child support guideline. (The "Cost Shares" Model of Child Support Guidelines", Laura W. Morgan, Family Law Consulting)

We respectfully suggest this issue deserves more research time to ensure that the best interests of children including their standard of living can be protected.

Cindy Smith

From: gayle@alaska.com
Sent: Wednesday, April 04, 2012 11:02 AM
To: Cindy Smith
Subject: SB 134

Good morning. My name is Gayle Brown and I practice family law in Anchorage. I was present for the family law meeting yesterday wherein Senator Kookesh and Ms. Shockley were available by phone to tell us about the new bill regarding Civil Rule 90.3 being made into a statute and completely modified. When asked why a rule that has been in place for 25 years must be completely overhauled the answer we were given was because it is fair. That was the only reason given, nothing else. I am not opposed to making the child support rule into a statute, what I am opposed to is fixing something that is not broken. It does not make any sense to me and it did not matter how much Senator Kookesh or Ms.
Shockley raised their voices at my colleagues and I, what they were saying did not make sense.

Before the child support system is overhauled please conduct more research and come up with a better reason than it is "fair." As someone who has practiced family law for approximately 18 years I think this will do more harm than good for the obligors, obligees and children.

Thank you.

Gayle J. Brown, Attorney at Law
750 W. 2nd Ave., Ste. 207
Anchorage, Alaska 99501
(907) 274-1074 Telephone
(907) 274-3311 Facsimile

SNYDER & HOAG LLC

David A. Snyder, Licensed in Oregon & Washington
John Hoag, Licensed in Alaska
Lane Toensmeier, Of Counsel, Licensed in Oregon
Kathleen Pearson, Paralegal

April 3 2012

Honorable Senator French and other
Member of the Senate Judiciary Committee
Juneau, Alaska

Re: SB 134

Dear Committee Members,

I have previously responded to Senator French's request to hear from members of the bar who belong to the Family Law Section regarding SB 134. Today I attended by phone a Family Law Section meeting on the bill and listed both to Senator Kookesh and his legislative aid, Dorothy Shockley, discuss the bill.

I urge the Legislature not to pass this bill this legislative session. It provides for fundamental changes in how child support will be calculated and will have far reaching effects in this state. Years of court made decisions on how to calculate child support will become useless, and the result will be a long lasting surge of litigation as a result of its passage.

I am mostly retired and do a lot of volunteer work with victims of domestic violence, many of whom are low income. I do not see them benefiting from this bill. Ms Shockley told the Section meeting that the bill was a result of mostly non custodial men complaining that they were paying too much child support because their ex wives' income was not being considered. Yet my examination of the spreadsheet calculations led me to conclude that noncustodial parents with lower incomes will be paying more and not less as a result of this Bill. Senator Kookesh disagreed with my conclusion. One of us is wrong.

I suggest that if the Committee decides that this bill has merit, that it table it for this session and hold hearings between now and the next legislative session on the impact that this bill would have on child support calculations. Give those of us who practice in this area the time to go through a large number of existing cases and see what changes would result in the child support payments. Then the legislature can consider real examples and not hypothetical's as to the impact of this legislation.

Senator Kookesh told us today that he strongly believes that how child support is calculated should be as the result of a statute and not a court made rule. I strongly believe that changes in how child support is calculated should be carefully made with assurances that the changes will be for the betterment of the citizens of this State, and that's more important than which governmental body writes the rule.

Sincerely,

John Hoag

Mail correspondence to:
P.O. Box 1796
Petersburg, AK 99833
Office: 907.772.5079 • Fax: 907.772.5089 • Cell: 907.650.7440
E-mail — jhoag@snyderandhoagllc.com
Web Site — www.snyderandhoagllc.com

Cindy Smith

From: Atticus Beau <atticusbeau@gmail.com>
Sent: Tuesday, April 03, 2012 4:05 PM
To: Sen. Hollis French
Subject: SB134 changing Child Support Calculations

Senator French,
In regards to SB134 changing the Child Support Calculations I disagree with it.

As I understand the motivation behind the Bill it is to be more Fair.
Fair to Whom? Child support is never a place of consensus. So In truth the only ones being happy with this is the Higher paid Non Custodial Parents - Maybe.

I do not see the fairness to the children. Statistically to raise a child is far more expensive then child support is paid in Majority of CS cases.

Is being Fair the only Issue? Or is there issues for Child Support vs Temporary Assistance?
Does this decrease Child Support Cases or allow better organization?

If there is a need for fairness maybe look at caping the Interest Charged especially for those with Higher Child Support amounts
I do know some Non Custodial Parents Low Income or Not when they get behind. They can never catch up.

Thanks for your time
Atticu Beau

Cindy Smith

From: Jessie Archibald <jarchibald@ccthita.org>
Sent: Tuesday, April 03, 2012 2:23 PM
To: Sen. Hollis French
Subject: Comment HB 344

Dear Senator French,
I attended a family law CLE teleconference this afternoon (Alaska Bar) concerning HB 344. There were many concerns expressed by attorneys in the audience, but the one thing that caught my eye was when I reviewed the actual calculations.

The main "pitch" for this bill was that the shared income model took both parents income into consideration, so it was more fair.

Fortunately, the presenters also attached some calculations to compare the new proposed amount vs. the amount a parent would pay if rule 90.3 was used.

Interestingly enough, the pattern outlined in the examples showed under the new legislation, the lower income parent pays more (than 90.3 would require) while the higher the income, the less the payor would pay than he/she would pay under Rule 90.3.

The end result:

The low income payors pay more and higher income payors pay less under the proposed legislation.

Is that fair?

I would respectfully request that this bill **not** be passed through committee.

Thanks for requesting input,

Jessie M. Archibald
TCSU Attorney
Central Council Tlingit & Haida
320 West Willoughby Ave., Suite 300
Juneau, AK 99801
(907) 463-7114
FAX: (907) 463-7730
jarchibald@ccthita.org

Cindy Smith

From: Whitney Bostick <Whitney@alaskaresolutions.com>
Sent: Wednesday, April 04, 2012 11:09 AM
To: Cindy Smith; Dorothy Shockley
Cc: JoAnne Baker; karajd2000@aol.com; A Porter
Subject: Information from a family law section member

Ms. Smith and Ms. Shockley,
We received the research below from a section member and they requested we pass this information along to your offices.

Here is the Home Page for Child Services Policies and the types of things it does. The commentary link and a few of the other links are good reads: http://www.childservicepolicies.com/child-support-models

This additional article has an excellent, and brief, explanation of the 4 main American methods/formulas for calculating child support, and their history and theory.
http://www.courts.mi.gov/scao/services/focb/formula/psi-ch3.pdf The bottom line is that there may be lots more research to do before just jumping ship to a new formula. However, the question of legislative versus court rule creation and amendment to any formula remains.

And here's another link to a typical list of current national child support issues/projects sponsored by a large American university
http://www.irp.wisc.edu/research/childsup/cspolicy/cspolicy05-07.htm

The last comment for the moment is that the ten or so articles I've just read (links picked up from Family Law Quarterly and places like that) seem to conclude unanimously that the income shares model (to which the current proposed bill would switch Alaska) by comparison to other formulas does have low income parents paying MORE than they pay under our current approach; that the Melson or hybrid formula mentioned has middle income parents paying MORE compared to the simple income shares approach; and that the income of obligor formula (which Alaska currently uses) has high income parents paying MORE than they are likely to be assessed under the income shares approach to which the bill proposes us to change. So basically, it could be said that the bill benefits higher income obligors and hurts low income obligors.... probably the opposite of what is intended or what the public would like to see?

Thank you for your assistance in sharing the information provided and coordinating with those interested in testifying today.
-Whitney

Cindy Smith

From: Steinberg, Stacy K (LAW) <stacy.steinberg@alaska.gov>
Sent: Friday, April 06, 2012 8:34 AM
To: Cindy Smith; Dorothy Shockley
Cc: Behr, Deborah E (LAW); Badgley, Cori M (LAW); Mallonee, John R (DOR)
Subject: RE: CS for SB 134

Thank you, Cindy.
Cindy and Dorothy, I reviewed this draft and suggest two small, but important changes:
Page 6, line 21 replace "A court" with "The tribunal"
Page 9, line 12 after "or" insert "monthly"
I will be at the hearing this afternoon to answer questions.
Stacy Steinberg
Attorney General's Office

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Thursday, April 05, 2012 4:11 PM
To: Steinberg, Stacy K (LAW)
Subject: CS for SB 134

Just sent this to you but got a bounce-back, so I'm trying again. This is a CS for SB 134 which will be heard tomorrow in Senate Judiciary Committee. It is based on the current Court rule.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

Cindy Smith

From: Ingrid Varenbrink <varenbrinki@alaskabar.org>
Sent: Sunday, March 04, 2012 3:46 PM
Cc: Cindy Smith; 'Whitney Bostick'
Subject: IMPORTANT: Senate Bill 134: Let the Senate know what you think about this bill!

Importance: High

On Wednesday, March 7, at 1:30 p.m. the Senate Judiciary Committee will be hearing Senate Bill 134, which would repeal Civil Rule 90.3, place child support guidelines in state statute, and change the model used in determining child support obligations to an income shares model.

You can read the bill here:

http://www.legis.state.ak.us/PDF/27/Bills/SB0134B.PDF

and the sponsor's statement here:

http://www.aksenate.org/sponsor/SB134_ss_sen_kookesh.pdf

If members of the family law section would like to provide comments to the committee, they can testify by phone or in writing.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

Ingrid Varenbrink
Fee Arb Coordinator
Alaska Bar Association
550 W. 7th Ave, Suite 1900
Anchorage, AK 99501
Phone: 907/272-7469
Fax: 907/272-2932
Job Share with JoAnne Baker
bakerj@alaskabar.org
varenbrink@alaskabar.org
Please respond to both Ingrid & JoAnne
This email is CONFIDENTIAL if it concerns a fee arbitration or grievance matter.

Cindy Smith

From: Ingrid Varenbrink <varenbrinki@alaskabar.org>
Sent: Monday, March 05, 2012 10:09 AM
To: Cindy Smith
Subject: FW: IMPORTANT: Senate Bill 134: Let the Senate know what you think about this bill!

I received this comment below from Mr. Eschbacher.

Ingrid Varenbrink

From: Gary Eschbacher [mailto:gre@eschbacherlaw.com]
Sent: Monday, March 05, 2012 9:48 AM
To: Ingrid Varenbrink
Subject: RE: IMPORTANT: Senate Bill 134: Let the Senate know what you think about this bill!

You need to put a limitations section for the collection of back child support. Also, you need a provision wherein the parties change custody but fail to go back to court to change child support-very important. You only cover from sole to shared.

From: Ingrid Varenbrink [mailto:varenbrinki@alaskabar.org]
Sent: Sunday, March 04, 2012 3:46 PM
Cc: 'Cindy_Smith@legis.state.ak.us'; 'Whitney Bostick'
Subject: IMPORTANT: Senate Bill 134: Let the Senate know what you think about this bill!
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Ingrid Varenbrink
Fee Arb Coordinator
Alaska Bar Association

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Anchorage, AK 99501
Phone: 907/272-7469
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Job Share with JoAnne Baker
bakerj@alaskabar.org
varenbrink@alaskabar.org
Please respond to both Ingrid & JoAnne
This email is CONFIDENTIAL if it concerns a fee arbitration or grievance matter.

Cindy Smith

From: Dorothy Shockley
Sent: Monday, April 02, 2012 4:05 PM
To: Cindy Smith
Subject: RE: updated report from leg research

Ok, sounds good. What time?
I've been invited to participate (via teleconference) in a discussion on SB 134 with a law firm tomorrow at noon.

Senator Coghill asked about non-monetary payments, and a lawyer called and suggested having a statute of limitations.....
I talked to Senator Kookesh, at this late date he just want to get it into statute and work on amendments next year.

I talked to leg finance in regards to the WA table, he talked to dept. of labor and they agree it doesn't need adjusting.....and will explain the particulars in an email.

Dorothy J. Shockley
Legislative Staff
Office of Senator Albert Kookesh
State Capitol, Room 11
Juneau, AK 99801
1-888-288-3473/907-465-3018
Fax 907-465-2827

"*Take care of the old person you are going to become.*" Late Walter Soboleff Tlingit Elder at 102 years young

---

From: Cindy Smith
Sent: Monday, April 02, 2012 3:50 PM
To: Dorothy Shockley
Subject: RE: updated report from leg research

Hi Dorothy,

I will send this out to the committee.

We are also getting some concerns expressed by attorneys who practice in this arena – Sen. French had sent out a link to the bill and asked for any comments – and I will scan and send those to you shortly. I am running in and out of the office today! Maybe we can talk tomorrow morning?

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Dorothy Shockley
Sent: Monday, April 02, 2012 2:31 PM
To: Cindy Smith
Subject: updated report from leg research

Hi Cindy,

Attached is a short 5 page updated report from Leg research. The number of states who have established guidelines in statute went from 24 to 26; and states that use shared income went from 35 to 37. Will you pass this on to the other members?

Thank you. Does your Boss have any questions?

Dorothy J. Shockley
Legislative Staff
Office of Senator Albert Kookesh
State Capitol, Room 11
Juneau, AK 99801
1-888-288-3473/907-465-3018
Fax 907-465-2827

"*Take care of the old person you are going to become*." Late Walter Soboleff Tlingit Elder at 102 years young

LEGAL SERVICES

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FAX (907) 465-2029
Mail Stop 3101

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

MEMORANDUM March 12, 2012

SUBJECT: Two-thirds vote requirement (CSSB 134 (HSS)
(Work Order No. 27-LS0671\I))

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Jean M. Mischel
Legislative Counsel

You have asked for an opinion on whether the above-referenced bill draft requires a two thirds vote of the legislature. The answer is no. CSSB 134(HSS) both codifies portions of Rule 90.3, Alaska Rules of Civil procedure, and repeals, in sec. 4 of the bill, the rule in its entirety.

Art. IV sec. 15 of the Constitution of the Sate of Alaska confers rule-making power on the Alaska Supreme Court as follows:

> The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

In adopting the rule, the Alaska Supreme Court expressly stated that Rule 90.3 was not adopted under the Court's rule-making powers and is not subject to the two-thirds vote requirement in a note published with the rule which provides:

> This rule is adopted under the supreme court's interpretive authority pursuant to Article IV, Section 1 of the Alaska Constitution. Thus, it may be superseded by legislation even if the legislation does not meet the procedural requirements for changing rules promulgated under Article IV, Section 15.

If I may be of further assistance, please advise.

JMM:plm
12-155.plm

October 5, 2005

Ms. Beth Adams
Alaska court System
820 W. 4th Avenue
Anchorage, AK 99501

Dear Ms. Adams,

I am writing to make comments on the current Alaska child support guidelines (Civil Rules 90.3) I have worked for Senator Albert Kookesh for the past three years as his Legislative Aide. In the scope of my job I take calls from constituents, usually when our office is contacted people are out of options in resolving their situation(s).

First of all I would like to say I do appreciate what this department does. On the other hand we have taken many calls from frustrated obligors in the Child Support Services Division (CSSD). I have read the complex civil rule so I am somewhat aware of how it is suppose to work, unfortunately that is not the case with the people we hear from.

We have heard of peoples saving accounts zeroed out!

75% of wages deducted!

Drivers Licenses taken so the person can not drive to work!

No consideration given to present family; when 2/3 of wages deducted!

No communication, no explanation for changes and or reviews, and no call backs.

Under AS 25.24.160 (a)(1) **it requires that child support be set in an amount which is just and proper.** When someone can't go to work because he/she doesn't have a drivers license and his/her savings is wiped out and he/she can't support him or her self, little alone the family he/she has right now, that is not just and proper. Most people find they are helpless with no place to go.

I would like to suggest;

- No more than 33% percent of wages be taken, period. People are finding they cannot live on anything less, especially in rural Alaska, where the cost of living is 3 times higher than urban Alaska.
- Only two thirds of savings and other income be garnished.
- Consideration is given to ALL of the children in calculating the support payments. The 'subsequent' children have the same rights and needs as those under court order.

256
1/2

- The automated system is scary, the employer should have some control, like deducting only one third of ones pay.
- **Involve the parent(s) in any changes and reviews. If you involve the parent(s) in decisions, that's gives them ownership and a since of control and therefore are more cooperative**.
- A handbook in layman's terms.

Your consideration to making this Department more user friendly would benefit everyone, especially the children you are serving.

Thank you for your time.

Sincerely,

Dorothy J. Shockley
Legislative Aide to Senator Albert Kookesh

CHILD SUPPORT GUIDELINES (CIVIL RULE 90.3) REVIEW COMMITTEE
ISSUE LIST 2007

General Comments

Rule has proved extremely effective; many problems have been fixed. *Mendel (18)*

Rule fair and just; many revisions since last review are beneficial to children. But the way the rule is applied and enforced is problematic. *Hodson (169); St. Clair (213)*

System is fair in the way allocates child support. *Stockard (146)*

Substantive rule does not belong in Rules of Civil Procedure. *Wasche (4)*

Create non-partisan board to review all child support laws and rules. *Miller (223)*; *R. Rude (230)*

Changes that affect a large portion of society should not be decided by a committee. *Walker (126A)*

Review Required by Federal Law (42 U.S.C. Sec. 667; 45 CFR 302.56)

1. Considering economic data on the cost of raising children and case data, gathered through sampling or other methods, does the application of Civil Rule 90.3 result in appropriate child support awards?

2. Based on the same considerations, are deviations from Civil Rule 90.3 appropriately limited?

Support Generally

3. Institute the Income Shares Model. *McIntosh (5); Goforth (28); Corcoran (33); V. Rude (42); Hasty (52); A Travelin Man (53); Ipsen (59) Scott (83); Bishop (90); Demšar-King (92); Mahurin (93); Berger (96); Steik (99); Yerkes (100); Schwartz (102); Knapp (104); Ethridge (115); Laughlin (117); Johnson (122); Van Eck (123); Anderson (127); Johnson (129); Jarvis (131); Barnard (137); Lemons (142); Ferguson (143); Gilbert (145, 145#2); Matlock (151); Cagle (176); Hatfield (172); Thompson (184); Weldon (187); Allen (192); Thompson (207); Pitts (214); R. Rude (230); Webster (238); Teesateskie (246)*

4. Do not consider income of custodial parent. *Kuffner (107); Stockard (146); Krzynowek (209)*

5. Take into account non-custodial parent's child-related living expenses. *Larche (14); Ahmasuk (85); Avis (86); Townsend (126); Christian (128); Mack (135); Hatfield (172); Thompson (184); Weldon (187); Mr. Anonymous (226)*

6. Reduce percentages on which support is based. *Ahmasuk (85); Bishop (90); Laughlin (117).* Use sliding scale. *Gilbert (145, 145#2); Heilman (153); Thompson (184); A Travelin Man (53).* Studies show that percentage required for child support decreases as income increases. *Cagle (176)*

7. Increase percentage of support
   a. with age. *Bayless (171); Kakaruk (109)*
   b. with increased cost of living. *Wright (170)*

8. Make percentages equal for multiple children. *Villaran (237)*

9. Base support on actual costs of raising children. *Brosdahl (23); Thompson (81); Berger (96); Steik (99); Ahmasuk (85 #2); Bayless (171); Hatfield (172); Wasche (4)*

10. Base support on cost of living where children reside. *Avis (86); Bracken (125)*

11. Base support on economic analysis of Alaskan intact family. *Scott (83)*

12. Update economic analyses. *Cagle (176)*

13. Base support on actual time with parents. *Defedericis (72); CristyandJason (#121)*

14. Base support on expenses of split family, not intact family. *Weldon (187)*

15. Institute cap on amount of support paid. *St. Clair (213)*

16. Don't award support, other than college fund investments, if custodial parent capable of supporting household. *Hyde (118)*

17. Allow obligor to pay portion of support directly into college savings plan. *Avis (86)*

18. Make custodial parent account for how support spent. *Moses (6); Thompson (81); Avis (86); Thompson (184); Weldon (187); Thompson (207); Mr. Anonymous (226); Aldeman (229); Whaley (234); Webster (238)*

19. Major wage earner should have the majority of expenses for child care. *McIntosh (5)*

20. Non-custodial parent should receive notice when custodial parent incurs large expenses, such as orthodontia. *Larche (14)*

21. Eliminate support payments if non-custodial parent not allowed visitation, or child refuses to visit. *Bassetti (29); Corcoran (33); Tinker (112)*

22. Don't allow support when custody switches from custodial parent to non-paying parent with large amount of arrearages. *Dennis (20)*

23. Unfair that ex-partner's payment of his ex-wife's child support takes precedence because they were married, even though that child was born later. *KS (62)*

24. Don't allow custodial mother to collect support from multiple fathers. *Upton (61)*

25. State in rule that support payments are mandatory even if case on appeal. *Clark (205)*

26. Limit the amount of time that can pass before initial request for support. *La Vigne (173)*

27. Leaving determination of child support to complete discretion of judges based on "needs of child" leads to inconsistent orders. *Rose (183)*

Income

28. Rule should specify treatment of:
    a. Children's insurance benefits, both as income and credit;
    b. State/federal adoption subsidies, both as income and credit - Also see *Barnard (137)*;
    c. Income/deduction for accelerated versus non-accelerated depreciation for businesses or the self employed;
    d. Value of on-base housing for military.
    Morse (3)

29. Base support on actual current income. *Christian (128); Zaragoza (163); Weldon (187); Hatter (67)*

30. Base support on average of income over 2 or 3 years. *Baran (194)*

31. Base support on tax returns, not "state average" for profession. *Olcott (82)*

32. Base support on 60-hour work week to capture cash income from off-the-books employment. *Boutin (79)*

33. Base support on gross income. *Hancock (255)*

34. Base support on parents' standard of living. Allow party to petition court for judgment of "equal living standard." *Miller (210)*

35. Base support on "household" income (include income of new spouse of custodial parent.) *Little (45); Matta (60); Anderson (127); Christian (128); Davis (138); Ferguson (143); Ahmasuk (85 #2); Weldon (187); Eisenhower (202)*

36. Count value of underlying assets that produce capital gains, usually stocks, and impute that value to income; delete Section A.16. of Commentary. *Kirk, p. 2, #7 (77); 8/27/07 committee minutes.*

37. Include all gifts and inheritances as income. *Butterfield, pp. 7-8, #9-10 (225)*

38. Clarify Commentary, Sec. III.A. #21, to specify that income from interest in an estate (direct or through a trust), including one-time inheritances, counts as income. *Butterfield, p. 8, #10 (225)*

39. Include comp. time as income where obligor can choose to convert overtime to comp. time. *Larche (14)*

40. Include free rent as income, like housing provided by an employer. *Sharrock (139)*

41. Include welfare, Denali Kid Care, food bank, church donations, and farm income as income. *Howe (21)*

42. Exclude income from overtime or second job. *Dodson (47); Gilbert (145, 145#2); Mr. Anonymous (226)*

43. Exclude income from veterans benefits, disability, and Social Security. *Howe (21)*

44. Exclude income from COLA, military housing allowance (BAH), and military "basic allowance for subsistence" (BAS). *Henry (158); Jansen (39); Hatfield (172); Moore (113)*

45. Define "ordinary and necessary" in a way that does not require an experienced attorney to figure out. Other states have specific definition. *Young (51)*

46. Incorporate Rule 26 into Rule 90.3. *DuFresne (217)*

47. Make all income decisions final and binding on the parties. *DuFresne (217)*

Deductions

48. Allow deduction of monthly expenses such as rent, gas, and food. *Weldon (185)*

49. Allow deduction of out-of-pocket costs associated with work. *Klein (251)*

50. Include salespeople, who sometimes have substantial non-reimbursed business expenses, in discussion of deductions (Commentary, Section III.B.). *Kirk, p.3, #8 (77); 8/27/07 committee minutes.*

51. Allow deduction of child care expenses when obligor paying half. *Tyrone (64)*

52. Increase the allowable percentage that can be deducted for retirement contributions. *Klein (251)*

53. Don't penalize voluntary contributions of 7.5% of gross wages by subtracting mandatory contributions to retirement plan that are paid in lieu of social security tax, such as State of Alaska employees. *Finn (193)*

54. Allow deduction for unusually high costs of visitation (Bush travel). *Ahmasuk (85 #2)*

Reduced Payments for Extended Visitation

55. Clarify that visitation is defined as a percentage of days during the year. *Howe (21)*

56. Eliminate this provision. If the obligor has household suitable for children, a 75% reduction for less than 1 month's increased time is not in direct relationship to increased costs. *Hodson (169)*

57. Make visitation credit automatic. Parent receiving the credit should get it even if custodial parent cuts short the visitation period. *Butterfield. p. 2, # 1 (225) Also see Issue #110 for suggested change to forms.*

Potential Income

58. Potential income should be imputed and used to reduce/offset child support paid by non-custodial parent. *Larche (14)*

59. Fathers should not be penalized if they choose to quit their jobs. *Ahmasuk (85 #2)*

60. Amend exception to determination of potential income for parent taking care of child from under 2 years of age to kindergarten age. *Hodson (169)*

61. Amend paragraph (a)(4) as follows:
"When a parent is voluntarily underemployed, the court may impute income from the income of a new spouse. Half of the passive income of a new spouse will be presumed to be income available to an underemployed parent, if the income is reported as joint income on tax returns. A court may examine lifestyle and expenditures of an underemployed parent when imputing income if there is an obvious inconsistency between that individual's claimed income and the parent's lifestyle and expenditures." *Domke (179)*

62. Mandate that unemployed obligor demonstrate good faith effort to find employment commensurate with skills and education, unless physically or mentally incapable. *Messer (218)*

Shared, Divided, and Hybrid Physical Custody

63. Implement a comparative income approach for all situations. Consider allowing use of existing shared formula as the basic formula, adjusted appropriately for hybrid and divided. Use actual number of overnights proportional to both parents' incomes. *Alteneder/Marz, p. (181)*

64. Eliminate use of percentage of income approach in 60/40 shared custody situation. *Townsend (126)*

65. Penalize the parent who makes the greater amount of money when custody is 50/50. *Davis (40)*

66. Make child support zero in 50/50 custody, with each parent paying half the medical costs. *Bassetti (29);* - also split daycare and activities. *Johnson (56)*

67. Apply a cap on shared support after it is calculated. Limitation in (b)(1)(A) that applies income cap before calculating shared support amount could result in the lower earner paying support to the higher earner. *Mendel (18)*

68. Use sliding scale instead of current 90.3(b)(1)(C). *Pradell (49)*

69. Use adjustment from 0.5 to 1.5 instead of current 90.3(b)(1)(C). The 1.5 multiplier can create gross inequities against the payor. Default multiplier should be 1.0. Some judges already use 1.0 as default; rule should be consistent. *Leslie (199)*

70. Explain where the1.5% comes from (Commentary, Section V.B.) *Townsend (126)*

71. In shared custody both parties should be referred to as custodial parents. *Ward* (7); *Townsend (126); Alteneder/Marz, p. 1, #1 (181)* Use the terms payor and recipient or similar accurate terms. *Leslie (199)*

72. Remove incentives for fathers to fight for shared custody to reduce or eliminate child support. *Hodson (169)*

73. Calculate divided custody in the same way as for hybrid custody, by figuring the 90.3(a) percentage for the total number of children, then dividing that percentage by the number of children. *Butterfield, p. 4, #4 (225)*

74. 30% custody equals 109.5, not 110, overnights per year. (Commentary, Section V.) *Kirk, p. 3, #9 (77); 8/27/07 committee minutes.*

Income Cap

75. Apply cap at the end of the calculation rather than the beginning. *Kirk, p. 1, #3 (77); 8/27/07 committee minutes.*

76. Raise income cap. *Gilbert (145, 145#2); Hodson (169)*

77. Lower income cap. *Thompson (184 #2)*

78. Eliminate income cap entirely. *DuFresne (217)*

79. Change income cap to between $50,000 and $100,000. *Gilbert (145, 145#2)*

Minimum support amount

80. Increase minimum support amount. *Kirk, p. 2, #5 (77); 8/27/07 committee minutes; Wade (3); Chapman (36); Martin (80)*

81. Return to across-the-board $50 minimum for individuals below poverty guidelines. *Alteneder/Marz (181)*

82. Add new section 90.3(c)(6) as follows:

    "In the event a custodial parent's net income, after including child support calculated pursuant to this rule, exceeds the non-custodial parent's net income by 20% or more, the child support calculated pursuant to this rule shall be adjusted downward such that the custodial parent's net income exceeds the non-custodial parent's net income by no more than 20%." *Wasche* (4)

Subsequent Children

83. Divide support equally between all children of the common parent. *Jansen (39); Atkinson (211)*

84. Consider need to support subsequent spouses and children. *Ward (7); Andrews (34); Brownlee (24); Goforth (28); Jansen (39); Ipsen (59); Mahurin (93); Steik (99); Ethridge*

(115); Van Eck (123); Eilertsen (136); Ferguson (143); Matlock (151); Cagle (176); Hatfield (172); Duncan (182); Booth (200); Pitts (214); Houser (253)

85. First or primary family should have priority when determining support. *DuFresne (217)*

Health Care Coverage

86. Create exception for mandatory health care coverage if children are Alaska Native. *Ahmasuk (85 #2)*

87. Require parents to share costs of supplements, specialty foods prescribed by an M.D. for child with anemia, food allergies, or autoimmune disorder. *Nelson (159)*

88. Divide health insurance premiums equally among covered parties. Deduct allocation for each child when calculating support. *Hatfield (172)*

89. Ex is allowed to automatically deduct my 50% portion of the cost of insurance from his child support payment, while I have no means to collect his 50% of medical bills. *Nelson (159)*

90. Insurance companies won't communicate with parent who does not have the insurance, and parent with insurance won't reimburse other parent for paying co-pay or bill. *Butterfield, p. 5, #7 (225)*

Failure to File Documentation

91. Language proposed by Judge Bolger:

    90.3(e)(2) "If a party fails to file the required income statement or any required documentation, then the court may impose any sanctions which may apply. The court may also calculate the parties' income based on other available evidence. The court may rely on government reports on occupational wages or earnings if supported by evidence of the parties' age, health, residence or work history." *Bolger (76); 8/27/07 committee minutes.*

92. Provide that retroactive modification can go back to the date of a request under (e)(2), either by eliminating (e)(2) altogether, or by adding a sanction to (e)(2) if a party fails to respond. *Kirk, p. 2, #6 (77); 8/27/07 committee minutes.*

93. Make it an annual requirement to produce income information and include penalties for failure to do so. *DuFresne (217)*

Definition of Shared Physical Custody

94. Lower definition of shared physical custody to 25% or less. *Kirk, p. 2, #4 (77); 8/27/07 committee minutes.*

Travel Expenses

95. Provide more guidance to judges, such as list of factors to consider. *Butterfield, pp. 6-7, #8 (225)*

96. Require custodial parent to notify non-custodial parent of pending move so that transportation issues and costs, and visitation schedules, can be discussed while both parties are living in the same community within Alaska. *Roque (26)*

97. Require parents to share costs of reasonable travel expenses required to exercise visitation. Stipulate that if non-custodial parent relocates, absent employment or other obligation, the custodial parent may get waiver. *Hatfield (172)*

Modification

98. When obligor learns of older child for whom support is owed, allow retroactive modification for younger child or adjustment for older child. *Kirk, p.1, #2 (77); 8/27/07 committee minutes.*

99. Amend 90.3(h)(2) to clarify whether modification can be made effective retroactively to date CSSD gave notice of request to opposing party if CSSD determined that no modification was merited and requesting party later files motion to modify in court. *Kirk, p. 1, #1 (77), 8/27/07 committee minutes.*

100. Allow custodial parent who does not have shared physical custody an annual review of award without having to submit their own financial information. *Hodson (169)*

101. Absent unusual circumstance, limit petition to modify support to once every two years. Require both parents to submit income and expense information. *Hatfield (172)* Limit modifications to every 3 years. *Brownlee (24)*

102. Give consideration to highly educated person with good potential income who is laid off and unable to find work. *Finn (193)*

103. Don't allow modification based on increases in non-custodial parent's income. Studies show that percentage required for child support actually decreases as income increases. *Cagle (176)*

104. Amend 90.3(h)(1) as follows:

"A final child support award may be modified upon a showing of a material change of circumstances as provided by state law. A material change of circumstances will be presumed if ~~support~~ income as calculated under this rule is more than 15 percent greater ~~or less than the outstanding support order~~. For purposes of this paragraph, ~~support~~income[1] includes health insurance payments made pursuant to (d)(1) of this rule." *Teseniar (216)*

105. Ban retroactive payments if father was unaware of child's existence. *Mack (135); Kriska (188)*

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[1] Changing "support" to "income" in this sentence was not part of the proposed change, but may make sense from the standpoint of internal consistency.

Dependent Tax Deduction

106. Grant dependent tax deduction to obligor. *Ahmasuk (85); Duncan (182); Booth (200); Mr. Anonymous (226)*

Forms

107. Eliminate Support Order Form. Parties, attorneys, and judges should be able to create their own form. Existing form makes order more complicated than necessary. Having form available only in PDF format is troublesome. *Wasche* (4)

108. Change DR-300 and DR-301, p. 2, to clarify that an amount of child support for each child must be specified. *Butterfield, p. 5, #6 (225)*

109. Add to court forms, under "Notice to Party Ordered to Pay Support (Obligor)" that obligor should write "child support" on the memo line of their check or money order, and keep copies of all records showing payment of child support. *Butterfield, p. 3, #2 (225)*

110. Change forms DR-300 and 301 so that judge has to check a box to undo the credit. Include line to allow judge to change percentage of credit. *Butterfield, p. 3, para. 5, #1, (225) Also see Issue # 57*

111. Clarify form to require, in shared custody, specific percentages of time each parent will have custody. *Butterfield, p. 4, #3 (225)*

112. Correct error in DR-308, lines 4.d. and 5.d. *Butterfield, p. 4, #5 (225)*

113. Require all court forms relating to child support to be written using plain language. *Alteneder/Marz, p. 4, #3 (181)*

Website

114. Partner with CSSD to develop a more sophisticated on-line calculator. *Alteneder/Marz, p. 5, #4 (181)*

Additional Public Comment "Issues" for 2007 Issue List:

New Letter:

84. Reference to letter from Dorothy Shockley should be added to category #84. *Shockley (256)*

113.1 (New category to be added for new issue) A handbook should be written in layman's terms. *Shockley (256)*

New Categories:

PFD

115. Make application for PFD mandatory or automatic for those who owe child support. *Robertson--Hebert (41); Hurst (48); Smith (55); Miss B (65); Polly (108); KS (62); Appreciative Client (206)*

Courts/Judges

116. Training of masters, judges, and attorneys (various issues - see letter). *Butterfield (225); Hodson (169)*

117. Overall, the court system has done a good job of interpreting and rationally applying the rule. *Butterfield (225)*

118. Require all court forms, instructions, and informational materials relating to child support to be written in plain language. Partner with CSSD to develop a more sophisticated on-line calculator. *Alteneder/Marz (181)*

119. CSSD should be the sole authority for income determination and be the first avenue of recourse in disputed support calculations. *DuFresne (217)*

120. Various proceedings take too long. *Willson (25); Jeno (46);Young (51); Hope (196); Kuffner (107); Hodson (169)*

121. Courts biased in favor of fathers. *Hodson (169)*

Statutory Changes

122. Amend statutes re: "friendly parent" provision in the best interests of the child standard. Friendly parenting provisions are being used to switch custody unjustly. The 2004 revision to eliminate "friendly parent" statute from being used against DV victims did not go far enough. Law gives implied preference for shared custody and should be revamped to remove any preference for joint legal or physical custody. *Hodson (169)*

123. Allow obligor to pay reasonable rate for Denali Kid's Care and drop crummy, expensive private coverage. Win/win for state, parents, and children. *Mr. Anonymous (226)*

124. State should pay cost of raising child and collect later. *Kertulla (147); Defedericis (72)*

CSSD

125. *Johnson (56); Appreciative Client (206); Ward (7); Howe (21); Willson (25); McKinney (27); Jensen (39); V. Rude (42); Bertelson (44); Elmes (8); Valmont (12); Davis (13); Garrett (17); Dennis (20; Doyle (22); Garrett (17); Mack (31); Stewart (35); Chapman (36); Hale (38); Robertson-Hebert (41); V. Rude (42); Bertelson (44); CristyandJason (121); Bertelson (44); Little (45); Jeno (46); Larche (14); Taylor (54); Chiklak (91); Nordby (95); Ahmasuk (85 #2); Bishop (116); Townsend (126); Walker (126A); Andrews (111); Davis (138); Stockard (146); Wolf (149); Atkinson (211); Neece (168); Wright (170); Rice (175); Huffman (190); Benoit-Ruch (191); Baran (194); Hope (196); Leslie (199); Boynton (203); Blackbird (208); Gillis-Boyd (212); D.B. (215); Teseniar (216); DuFresne (217); Miller (223); Mr. Anonymous (226); LEM (229); Rude (230); Anderson (232); Benitz (233); Whaley (234); Armstrong (250); Armstrong (254); Shockley (256).*

CHILD SUPPORT GUIDELINES (CIVIL RULE 90.3) REVIEW COMMITTEE
ISSUE LIST 2008 – AFTER COMMITTEE DRAFT CIRCULATED FOR COMMENT

Note: These are the issues that were used in the initial Issues List, which recorded comments received before the committee circulated a draft for public comment. Only those issues with a commenter's name and number in bold received comments in this circulation.

General Comments

I agree with the proposed changes to Rule 90.3. ***Partyka (P45)***

All proposed changes look reasonable, and certainly will assist the court in some child support cases. ***Judge White (P51)***

Outcome of process should be a more fair rule; right now it is inconsistent, and leads to people feeling that outcomes are arbitrary and unfair. ***Yerkes (P64)***

No help for the children. ***Jennings (P29)***

Your so called annual changes and recommendations should be written in clear and plain English; average parent only has a high school diploma. ***Banner (P50)***

I don't fully understand the proposed changes. ***Hyde (P4)***

I have no idea what this is. ***Rourke (P3)***

All the guidelines and rules don't amount to much if they are not enforced. ***Elmes (P43)***

What a waste of time, and what a crock of beans; the best thing that could happen to the Child Support System is to scrap it; this letter is falling on deaf ears and a waste of time on my part. ***De Federicis (P48)***

System is biased towards fathers. ***Walker Sr. (P18); Bassetti (P10); Tuttle (P80); De Federicis (P48)***

Rule 90.3, under (a)(1)(A) and (B), is unfair to anyone getting older. You are making it so a person has to pay support on their retirement. ***No Name Given (P69)***

The statement that the primary purpose of 90.3 is to ensure that orders are adequate to meet children's needs, and subject to the ability of parents to pay is very untrue. You force dads to pay regardless of ability, if they don't you criminalize them. ***No Name Given (P67)***

Purpose of child support awards are subject to the ability of "parents" to pay, all cases I know of only person whose income is considered is the paying party; I have never heard or seen anyone who had their taxes deducted as written in your commentary. As a matter of fact they have to pay the taxes even on the monies taken by child support. Taxation without representation!; Are income statements available for perusal by both parties? ***Rude (P54)***

Review Required by Federal Law (42 U.S.C. Sec. 667; 45 CFR 302.56)

1. Considering economic data on the cost of raising children and case data, gathered through sampling or other methods, does the application of Civil Rule 90.3 result in appropriate child support awards?

On page 2 of the Report, on Economic Cost of Raising Children, It is a leap of logic to say "economic data supports the conclusion that Alaska's guidelines for awarding child support continue to be appropriate and adequate," because there is no discussion of how the data brings you to this conclusion, it assumes existing standard is appropriate. Same argument with these statements: 1) awards are comparable with other states 2) committee concludes that application of 90.3 results in appropriate child support awards. Your conclusions are highly subjective. Father's rights groups and others disagree, so you should prove that awards are appropriate, and not just expect us to take your word for it. ***Thompson (P56)***

2. Based on the same considerations, are deviations from Civil Rule 90.3 appropriately limited?

Support Generally

3. Institute the Income Shares Model. ***Hughes (P63); Yerkes (P64); Hughes (P84); Gleeson (P76); Greer (P57)***

4. Do not consider income of custodial parent.

5. Take into account non-custodial parent's child-related living expenses.

6. Reduce percentages on which support is based.

7. Increase percentage of support
   a. with age.
   b. with increased cost of living.

8. Make percentages equal for multiple children.

9. Base support on actual costs of raising children.

10. Base support on cost of living where children reside. ***Hughes (P63); Hughes (P84); Tuttle (P80); Saunders (P71)***

11. Base support on economic analysis of Alaska intact family.

12. Update economic analyses.

13. Base support on actual time with parents. ***Imel (P40); No Name Given (P31); No Name Given (P19); Kalmakoff (P38)***

14. Base support on expenses of split family, not intact family. ***Sundsten (P81)***

15. Institute cap on amount of support paid.

16. Don't award support, other than college fund investments, if custodial parent capable of supporting household.

17. Allow obligor to pay portion of support directly into college savings plan.

18. Make custodial parent account for how support spent. ***Sanders (P66); Tuttle (P80)***

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20. Non-custodial parent should receive notice when custodial parent incurs large expenses, such as orthodontia.

21. Eliminate support payments if non-custodial parent not allowed visitation, or child refuses to visit. ***White (P5); Hughes (P63); Yerkes (P64); Bassetti (P10); Hughes (P84)***

22. Don't allow support when custody switches from custodial parent to non-paying parent with large amount of arrearages.

23. Unfair that ex-partner's payment of his ex-wife's child support takes precedence because they were married, even though that child was born later.

24. Don't allow custodial mother to collect support from multiple fathers.

25. State in rule that support payments are mandatory even if case on appeal.

26. Limit the amount of time that can pass before initial request for support.

27. Leaving determination of child support to complete discretion of judges based on "needs of child" leads to inconsistent orders.

<u>Income</u>

28. Rule should specify treatment of:
    a. Children's insurance benefits, both as income and credit;
    b. State/federal adoption subsidies, both as income and credit
    c. Income/deduction for accelerated versus non-accelerated depreciation for businesses or the self employed;
    d. Value of on-base housing for military.

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32. Base support on 60-hour work week to capture cash income from off-the-books employment.

33. Base support on gross income.

34. Base support on parents' standard of living. Allow party to petition court for judgment of "equal living standard."

35. Base support on "household" income (include income of new spouse of custodial parent.) ***Conklin (P27)***

36. Count value of underlying assets that produce capital gains, usually stocks, and impute that value to income; delete Section A.16. of Commentary.

37. Include all gifts and inheritances as income.

38. Clarify Commentary, Sec. III.A. #21, to specify that income from interest in an estate (direct or through a trust), including one-time inheritances, counts as income.

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41. Include welfare, Denali Kid Care, food bank, church donations, and farm income as income.

42. Exclude income from overtime or second job.

43. Exclude income from veterans benefits, disability, and Social Security. ***Miller (P70)***

43.1 Law should not protect men from having to pay child support if they have filed for social security disability.

43.2 "Means based veteran's benefits in Committee. II A is vague and inaccurate. ***Barron (P16); Coleman (P73)***

44. Exclude income from COLA, military housing allowance (BAH), and military "basic allowance for subsistence" (BAS). ***Perkinson (P61); Hughes (P63); Tuttle (P80)***

45. Define "ordinary and necessary" in a way that does not require an experienced attorney to figure out. Other states have specific definition.

46. Incorporate Rule 26 into Rule 90.3.

47. Make all income decisions final and binding on the parties.

Deductions

48. Allow deduction of monthly expenses such as rent, gas, and food.

49. Allow deduction of out-of-pocket costs associated with work. It is unfair not to adjust income for living expenses and travel that is required by employer, even when person is still paying cost of primary residence. ***Thompson (P56)***

50. Include salespeople, who sometimes have substantial non-reimbursed business expenses, in discussion of deductions (Commentary, Section III.B.).

51. Allow deduction of child care expenses when obligor paying half.

52. Increase the allowable percentage that can be deducted for retirement contributions.

53. Don't penalize voluntary contributions of 7.5% of gross wages by subtracting mandatory contributions to retirement plan that are paid in lieu of social security tax, such as State of Alaska employees.

54. Allow deduction for unusually high costs of visitation (Bush travel).

54.1. Would like the committee to consider clarifying how much of a deduction a parent receives when she has children from a prior relationship. ***Partyka (P45)***

Reduced Payments for Extended Visitation

55. Clarify that visitation is defined as a percentage of days during the year.

56. Eliminate this provision. If the obligor has household suitable for children, a 75% reduction for less than 1 month's increased time is not in direct relationship to increased costs.

57. Make visitation credit automatic. Parent receiving the credit should get it even if custodial parent cuts short the visitation period

Potential Income

58. Potential income should be imputed and used to reduce/offset child support paid by non-custodial parent.

59. Fathers should not be penalized if they choose to quit their jobs. People are penalized for taking college classes to increase potential income; they are still charged as though working. ***Rude (P54)***

60. Amend exception to determination of potential income for parent taking care of child from under 2 years of age to kindergarten age.

61. Amend paragraph (a)(4) as follows:
"When a parent is voluntarily underemployed, the court may impute income from the income of a new spouse. Half of the passive income of a new spouse will be presumed to be income available to an underemployed parent, if the income is reported as joint income on tax returns. A court may examine lifestyle and expenditures of an underemployed parent when imputing income if there is an obvious inconsistency between that individual's claimed income and the parent's lifestyle and expenditures."

62. Mandate that unemployed obligor demonstrate good faith effort to find employment commensurate with skills and education, unless physically or mentally incapable. ***Finch (P2); No Name Given (P1); Butler (P6); No Name Given (P67); Jessup (P9); Hope (P30)***

Shared, Divided, and Hybrid Physical Custody

63. Implement a comparative income approach for all situations. Consider allowing use of existing shared formula as the basic formula, adjusted appropriately for hybrid and divided. Use actual number of overnights proportional to both parents' incomes.

64. Eliminate use of percentage of income approach in 60/40 shared custody situation.

65. Penalize the parent who makes the greater amount of money when custody is 50/50.

66. Make child support zero in 50/50 custody, with each parent paying half the medical costs.

67. Apply a cap on shared support after it is calculated. Limitation in (b)(1)(A) that applies income cap before calculating shared support amount could result in the lower earner paying support to the higher earner.

68. Use sliding scale instead of current 90.3(b)(1)(C).

69. Use adjustment from 0.5 to 1.5 instead of current 90.3(b)(1)(C). The 1.5 multiplier can create gross inequities against the payor. Default multiplier should be 1.0. Some judges already use 1.0 as default; rule should be consistent.

70. Explain where the 1.5% comes from (Commentary, Section V.B.)

71. In shared custody both parties should be referred to as custodial parents.

72. Remove incentives for fathers to fight for shared custody to reduce or eliminate child support.

73. Calculate divided custody in the same way as for hybrid custody, by figuring the 90.3(a) percentage for the total number of children, then dividing that percentage by the number of children.

74. 30% custody equals 109.5, not 110, overnights per year. ***Alteneder (P74); Master Rasley (P65)***

Income Cap

75. Apply cap at the end of the calculation rather than the beginning.

76. Raise income cap. Your recommendations make sense in that it takes more to live so you adjusted for inflation. ***Scheff (P23)***

77. Lower income cap.

78. Eliminate income cap entirely.

79. Change income cap to between $50,000 and $100,000.

Minimum support amount

80. Increase minimum support amount. ***Fyfe (P52); Wade (P22); Shields (P41); Jessup (P9); Butler (P6)***

81. Return to across-the-board $50 minimum for individuals below poverty guidelines.

82. Add new section 90.3(c)(6) as follows:

    "In the event a custodial parent's net income, after including child support calculated pursuant to this rule, exceeds the non-custodial parent's net income by 20% or more, the child support calculated pursuant to this rule shall be adjusted downward such that the custodial parent's net income exceeds the non-custodial parent's net income by no more than 20%."

Subsequent Children

83. Divide support equally between all children of the common parent.

84. Consider need to support subsequent spouses and children.

85. First or primary family should have priority when determining support.

Health Care Coverage

86. Create exception for mandatory health care coverage if children are Alaska Native.

87. Require parents to share costs of supplements, specialty foods prescribed by an M.D. for child with anemia, food allergies, or autoimmune disorder. ***Nelson (P7)***

88. Divide health insurance premiums equally among covered parties. Deduct allocation for each child when calculating support.

89. Ex is allowed to automatically deduct my 50% portion of the cost of insurance from his child support payment, while I have no means to collect his 50% of medical bills.

90. Insurance companies won't communicate with parent who does not have the insurance, and parent with insurance won't reimburse other parent for paying co-pay or bill.

90.1. Noncustodial parent should not get credit on his support when all he can provide is medical insurance, if I can provide medical and dental insurance at no additional cost for the plan. ***Fulks (P77)***

90.2. Trying to get reimbursed by noncustodial parent for medical needs not covered by insurance is not reasonable in domestic violence situations. ***Fulks (P77)***

Failure to File Documentation

91. Sanctions for not providing requested financial information:

90.3(e)(2) "If a party fails to file the required income statement or any required documentation, then the court may impose any sanctions which may apply. The court may also calculate the parties' income based on other available evidence. The court may rely on government reports on occupational wages or earnings if supported by evidence of the parties' age, health, residence or work history." Bolger (76); 8/27/07 committee minutes. **NOT recommended in this form by the committee.**

No Name Given (P69); Judge Steinkruger (P37); Thompson (P56)

91.1. After proposed new language in Comm. VIII, add case citation for McDonald v. Trihub, 173 P.3d 416 (Alaska 2007) which explains referencing to DOL statistics. ***Butterfield (P55)***

92. Provide that retroactive modification can go back to the date of a request under (e)(2), either by eliminating (e)(2) altogether, or by adding a sanction to (e)(2) if a party fails to respond.

93. Make it an annual requirement to produce income information and include penalties for failure to do so. ***Bassetti (P10)***

Definition of Shared Physical Custody

94. Lower definition of shared physical custody to 25% or less. ***Tuttle (P80); Moses (P36)***

Travel Expenses

95. Provide more guidance to judges, such as list of factors to consider.

96. Require custodial parent to notify non-custodial parent of pending move so that transportation issues and costs, and visitation schedules, can be discussed while both parties are living in the same community within Alaska.

97. Require parents to share costs of reasonable travel expenses required to exercise visitation. Stipulate that if non-custodial parent relocates, absent employment or other obligation, the custodial parent may get waiver.

Modification

98. When obligor learns of older child for whom support is owed, allow retroactive modification for younger child or adjustment for older child.

99. Amend 90.3(h)(2) to clarify whether modification can be made effective retroactively to date CSSD gave notice of request to opposing party if CSSD determined that no modification was merited and requesting party later files motion to modify in court.

100. Allow custodial parent who does not have shared physical custody an annual review of award without having to submit their own financial information.

101. Absent unusual circumstance, limit petition to modify support to once every two years. Require both parents to submit income and expense information.

102. Give consideration to highly educated person with good potential income who is laid off and unable to find work.

103. Don't allow modification based on increases in non-custodial parent's income. Studies show that percentage required for child support actually decreases as income increases.

104. Amend 90.3(h)(1) as follows:

"A final child support award may be modified upon a showing of a material change of circumstances as provided by state law. A material change of circumstances will be presumed if income as calculated under this rule is more than 15 percent greater, For purposes of this paragraph, income includes health insurance payments made pursuant to (d)(1) of this rule."

Deleted: support

Deleted: or less than the outstanding support order

Deleted: support

105. Ban retroactive payments if father was unaware of child's existence.

105.1. Would like to see a timeline when can then file for modification under shared custody; need this clarified for the child/children's continued support; do not think judge should prescribe time line of abandonment. Would like to see language to recognize parent with physical custody to be allowed a court order to be processed immediately. ***Hope (P30)***

Dependent Tax Deduction

106. Grant dependent tax deduction to obligor. ***Seppilu (P24); Hughes (P63); Hughes (P84)***

Forms

107. Eliminate Support Order Form. Parties, attorneys, and judges should be able to create their own form. Existing form makes order more complicated than necessary. Having form available only in PDF format is troublesome.

108. Change DR-300 and DR-301, p. 2, to clarify that an amount of child support for each child must be specified.

109. Add to court forms, under "Notice to Party Ordered to Pay Support (Obligor)" that obligor should write "child support" on the memo line of their check or money order, and keep copies of all records showing payment of child support.

110. Change forms DR-300 and 301 so that judge has to check a box to undo the credit. Include line to allow judge to change percentage of credit.

111. Clarify form to require, in shared custody, specific percentages of time each parent will have custody.

112. Correct error in DR-308, lines 4.d. and 5.d.

113. Require all court forms relating to child support to be written using plain language. ***Fyfe (P53)***

Website

114. Partner with CSSD to develop a more sophisticated on-line calculator.

PFD

115. Make application for PFD mandatory or automatic for those who owe child support.

Courts/Judges

116. Training of masters, judges, and attorneys

117. Overall, the court system has done a good job of interpreting and rationally applying the rule.

118. Require all court forms, instructions, and informational materials relating to child support to be written in plain language. Partner with CSSD to develop a more sophisticated on-line calculator.

119. CSSD should be the sole authority for income determination and be the first avenue of recourse in disputed support calculations.

120. Various proceedings take too long.

121. Courts biased in favor of fathers.

Statutory Changes

122. Amend statutes re: "friendly parent" provision in the best interests of the child standard. Friendly parenting provisions are being used to switch custody unjustly. The 2004 revision to eliminate "friendly parent" statute from being used against DV victims did not go far enough. Law gives implied preference for shared custody and should be revamped to remove any preference for joint legal or physical custody.

123. Allow obligor to pay reasonable rate for Denali Kid's Care and drop crummy, expensive private coverage. Win/win for state, parents, and children.

124. State should pay cost of raising child and collect later.

CSSD

125. *CSSD.* ***Shockley(P86); Swafford (P28); Manery (P44); Walker (P26); Butler (P6); Locher (P47); Tuttle (P80); Cruz (P17); Thompsen (P83); Cato (P34); Hope (P30) ; Scardina (P79); Close (P85); Goodrich (P33); Close (P49); Cato (P34); Tuttle (P80); Mielke (P60); Smith (P20); Elmes (P43); Cato (P34); Lowry (P35); Neece (P78); Imel (P40); Armstrong (P21) ; No last Name (P32); Greer (P57); Epipeke (P82); Swenson (P42); Kalmakoff (P38); No Name Given (P68); Brown (P75); Scheff (P23); Mullin (P39); Walker Sr. (P25)***

OTHER

126. State should pay support if they take custody of children.

127. Other. ***Walker Sr. (P58); Walker Sr. (P59); Walker Sr. (P62); Walker Sr. (P15); Walker Sr. (P14); Walker Sr. (P13); Walker Sr. (P12); Walker Sr. (P11); Walker Sr. (P8); Walker Sr. (P46); Walker Sr. (P72)***

PUBLIC HEARING - Child Support Guidelines Review Committee
April 23, 2008

Summary of Testimony:

Welcome by Judge Joannides. She informed participants that they are limited to three minutes of testimony, but that if there was time afterward we could come back to those show had additional comments. She asked that participants address comments to the proposed rule changes, not to individual situations or cases or interactions with CSSD. This committee is not in a position to change CSSD procedures, but just to recommend changes to the rule.

1. **Sara Sundsten (Kodiak)**: She is involved with the guidelines even though she has no kids. Her husband got a letter from CSSD saying he owes back support for a child that resulted from a one-night stand. Why does the system put so much burden on fathers? The law is very general, yet each situation is different. The Commentary that defines income (III.A) and references what would be available if the family had been intact is not applicable when the father and child were not ever a part of an intact family.

2. **Jerome W. Epipeke (Gambell)**: Like the previous testifier, he was overwhelmed by a letter from CSSD saying he owes a great amount of back child support. Believes the mother should have come forward earlier rather than waiting many years until it became a large dollar amount. He cannot pay because he's deeply in debt and lives in an area with high unemployment. He is disappointed with the system.

3. **Linda Thompsen (Anchorage)**: She wants a required review of a child support order whenever a party seeks a review. Her ex-husband was $50,000 in arrears and he never paid. She sought review from CSSD, but did not get her situation reviewed. The children lost their home because her ex did not pay. Suggests there ought to be some enforcement against those who do not pay. Moreover, her ex was working under the table as a trucker, and yet failed to pay child support as ordered by CSSD.

A separate issue is that her son got into trouble when the ex had custody, and ended up in state custody. So, she's paying child support for that boy, yet he is not living with the ex. Why does the her support money go to the ex when the child is in state custody and really they are both non-custodial parents?

4. **David C. Hughes (Fairbanks)**: he is in the military here, was divorced in AK, and the ex and children now live in Florida. Feels penalized because he earns a COLA for Alaska and that is considered income, so a portion goes to the ex. Commentary III. A.28: suggests deleting COLA from income when it is not needed by the children, and suggests that 28 should include BAH (base allowance for housing), BAS (base allowance for subsistence) and specialty pay, but include COLA only if the custodial parent and children remain in AK with servicemember.

He also believes there is a problem with determining the federal tax rate for a parent who is a servicemember. The CSSD calculator uses a formula with zero rate for single, but court uses pay stub. These can differ if someone has more deductions listed on their W-4 so that more tax is withheld in every paycheck. CSSD should calculate the

actual tax, but should put in an actual number for child exemptions, so it's easier to align their calculations with what the court uses.

He asked about the review every four years, and the committee explained the federal requirements.

He expressed a preference for using the income shares methodology.

He believes that Alaska uses a higher percentaqe rate (27%) than other states (which are 25%), generally. [He was incorrect in his assumption about Alaska's rates.]

He believes the rule should provide a penalty for a custodial parent who moves away and refuses to send the child back for court-ordered visitation. Should be $500 fee for each offense of not sending the children, and the offender should pay airfare and legal fees if needed.

5. **Tina Close (Arkansas):** She lived here and three fathers of her children are in debt to her for tens of thousands of dollars. Obligor works under the table for a trucking company, and she cannot collect the amount owed to her children. She suggests that the rule could include a provision saying that after a certain amount of child support debt, the obligor is sanctioned for non-payment, perhaps with jail after he or she is a set dollar amount in arrears.

6. **Dorothy Shockley (Fairbanks)**: She is a legislative aide in Senator Kookesh's office. She receives numerous calls from constituents having problems working with CSSD and how they calculate income and how zealous CSSD is about taking money from people's bank account. She suggests they perhaps need more staff to do their job more fairly. She explained that after the court decides a child support amount, people can have drastic change in circumstances, and there should be a faster way to get the support amount revised.

Ken Kirk suggested that the legislature may wish to pass child support guidelines, since these are substantive.

Testimony ended at 5:50 p.m.

Notes by Nancy Meade

Newspaper Notices of Public Hearing – to be published approx. April 21, 22, and 23

1. Anchorage Daily News - Notice for Community Datebook:

Public Hearing to take testimony on proposed changes to Alaska's child support guidelines. Proposals are posted at http://www.state.ak.us/courts/comment.htm. Testify at the Legislative Information Office, 716 W. Fourth Ave., Suite 200, at 5:00 p.m. on Wednesday, April 23. (264-0573; Rule90.3@courts.state.ak.us)

2. Juneau Empire

Public Hearing to take testimony on proposed changes to Alaska's child support guidelines. Proposals are posted at http://www.state.ak.us/courts/comment.htm. Testify at the Legislative Information Office, State Capitol, Terry Miller Building, Suite 111, at 5:00 p.m. on Wednesday, April 23. (264-0573; Rule90.3@courts.state.ak.us)

3. Kodiak Mirror

Public Hearing to take testimony on proposed changes to Alaska's child support guidelines. Proposals are posted at http://www.state.ak.us/courts/comment.htm. Testify at the Legislative Information Office, Kodiak Plaza Building, 112 Mill Bay Road, at 5:00 p.m. on Wednesday, April 23. (264-0573; Rule90.3@courts.state.ak.us)

4. Fairbanks Daily News-Miner

Public Hearing to take testimony on proposed changes to Alaska's child support guidelines. Proposals are posted at http://www.state.ak.us/courts/comment.htm. Testify at the Legislative Information Office, 1292 Sadler Way, Suite 308, at 5:00 p.m. on Wednesday, April 23. (264-0573; Rule90.3@courts.state.ak.us)

2010-2011 Civil Rule 90.3 Review
Summary of Comments *

No.	*Page No.*	*Surname*	*Issue Category*	*Notes*
1	1	Hope	Education (custody)	Judge erred in ordering 50/50 shared custody; ignored parties' history while supported pre-divorce. Decision imposed significant personal and financial burden on mother.
2	4	Leonard	Form	Short form order similar to 1040A
3	6	Hope		(Addendum to No. 1) See #1 above
4	9	Smyth	Support generally	*CS s/ be based on BI* Child was "kidnapped" by mother at birth; OCS action resulted in father being reunited with him. CSSD efforts to collect back support in these circumstances in not in best interest of child since it places unreasonable burden on both parents
5	11	Wasche	Shared income approach	1) CSG are substantive law and don't belong in a court rule and 2) state should adopt shared income model
6	13	Esmonde	Support generally	CS amounts are too high and CSSD has too much authority
7	14	Lockuk	Collection	Start taking CS from first paycheck. Too many parents quit/switch jobs to avoid paying
8	15	Hanson	Enforcement	Obligors should be required to file for PFD
9	16	Burnett	Support generally; health ins	CS amounts are disproportionately high for non-custodial parents
10	17	Nelson	Support generally; penalties	CS amounts are too high and shouldn't have gone to child's mother when the children were living with another family member. Interest and penalties on arrearages make the debt overwhelming. System is unfair to non-custodial parents (men).
11	21	Terrell	Collection	7 kids, 3 dads, receives $32/month in support. Fathers have combined $150K+ in arrearages.
12	22	Davis	Shared income; subsequent children; modification	Custodial parent's income and obligor's subsequent children should be considered in the calculation. Support should be based on applicable rate in custodial parents' home state.
13	23	Vergara	FORWARD?	No comment. Looking for information on an existing case.
14	25	Perry	Accountability	Custodial parents should be required to account for how CS is spent.
15	26	McNair	Inaccurate calculation; health insurance	Judge erroneously calculated CS based on fraudulent information provided by the other party. Judge failed to account for a child from another relationship and costs of insurance.
16	28	Friday	Income	Can the court order support to be paid from military retirement if the parent does not have any other income?
17	29	Peasant	Support generally; penalties	CS too burdensome for non-custodial parents; jail should not be a sanction for non-payment

No.	Page No.	Surname	Issue Category	Notes
18	30	Kowchee	FORWARD?	Not a comment. Appears to be trying to modify or appeal a support order.
19	31	Passi	Support generally; enforcement	Why is she ordered to pay support to children's grandmother during an extended summer visit when the father is behind in his support payments to her?
20	32	Schroeder	Enforcement	CSSD is failing to enforce a wage garnishment order. Non-custodial parent is employed by a family-owned business.
21	33	Ishnook	Education (custody)	Wants visitation; custodial parent is not allowing it to happen without a court order.
22	34	Eaton	Enforcement	The system provides too many protections for non-paying obligors at the expense of children
23	35	Twitchell	Support generally	1) CSSD takes more money from him than it pays to custodial parent (about $16/mo); 2) payments are late and 3) unfair that self-employed individuals can underreport income and pay less support.
24	37	Stout	Interstate collection	CSSD failed to provide timely information about modification and enforcement actions filed in another state.
25	38	Tichenor	Collections; penalties	System needs to be more aggressive in pursuing payments. Jail for anyone 90 days in arrears unless there's "a medical or life emergency."
26	40	Twitchell		(Second input) See #23 above
27	42	Bennis	Shared income approach; subsequent children	Custodial parent who opted not to take payments through CSSD because the amount ordered was too high. Suggests: 1) get rid of 20% of income rule; 2) use shared calculation and consider living expenses of obligor and 3) consider subsequent obligor's subsequent children in calculations
28	43	Lepping	Penalties	Why no interest or penalties imposed on late payments?
29	44	Valentine	Subsequent children	All children "biologically related" to the noncustodial parent should be considered in determine payments
30	45	Valentine	Education; automatic recalc	(Second input) Reduced income should trigger a recalculation and decrease in CS.
31	46	Stoll	Shared income approach	20% rule is too burdensome. "Melson Formula" (shared calculation) should be adopted.
32	49	Saling	Support generally	$50 minimum is too low.
33	50	Creedon	Support minimum; penalties	Minimum CS should at least meet the cost of child care so the custodial parent can earn a living. Don't suspend DL for failure to make payments. Loss of license results in loss of job, which results in loss of payments
34	51	Stice	Subsequent children	20% base amount is too high; subsequent children should be considered in calculations; 2nd family suffers as a result of too generous payments to husband's ex.
35	52	Madison	Enforcement	State should have more aggressively pursued CS. She had to wait 26 years before getting payments.
36	53	Carle	Enforcement	Older child receives support but younger child does not (?) [my copy is very hard to read]

No.	Page No.	Surname	Issue Category	Notes
37	54	Dayton	Forward? Education; enforcement	Attempting to file an appeal because $50 ordered is too little and CSSD is not making adequate efforts to collect $10K arrears.
38	60	Jordan	Forward?	Info request, no comment
39	61	Etheridge	Enforcement	CSSD is not aggressive enough in pursuing a parent who doesn't make payments. License revocation is not an adequate remedy.
40	62	Synder	Shared income approach	Custodial parent's income should be considered in calculations
41	63	Swan	Education, enforcement	Still paying 9 years after he relinquished parental rights and child was adopted by a relative.
42	66	Sibson	Support generally, education, enforcement	CS shouldn't be required to be paid if non-custodial parent is denied visitation; parent who can't provide safe, stable home should not be awarded custody.
43	69	delCarpio	Support generally	Voluntary retirement contributions should not be excluded from income in calculations
44	70	Mike	Support generally; subsequent children; shared income approach	Pays too much and still has a large arrearage; can't get CS modified; impoverished while ex and kids are living well.
45	74	Brown	Enforcement	Not receiving payments from the non-custodial parent, enforcement efforts not adequate.
46	75	Steel	Support generally, enforcement	Paying too much. Still being billed for a child after 2010 TPR.
47	76	Doe	Downward modification; support generally	1) CS should be recalculated when obligor's income drops; 2) regional cost of living should be considered.
48	78	Tyone	Enforcement	Check DNA before ordering support
49	79	Gonzalez	Enforcement	No receiving support from a parent who owns property and has had well paid jobs.
50	80	Grote	Education	Arrears owed on child claimed by another man; obligor relinquished parental rights, needs help to get rid of case
51	82	Megyesi	Support generally; shared income approach	1) CS should be dictated by cost of living in state where custodial parent lives; 2) custodial parent's income should be considered in calculation; 3) custodial parent's willingness to promote contact should be a factor; 4) the non-custodial parent's ability to pay support "without suffering hardship"
52	84	Anonymous	Enforcement	Agency should make better efforts to make all obligors pay.
53	86	Hunter	Support generally, enforcement, education	Unable to work due to disabilities and can't afford a coat or shoes. Only potential income is PFD but the state takes all of it to cover CS obligation.
54	87	Petruska		Missing

No.	Page No.	Surname	Issue Category	Notes
55	88	Sommerville	Education; enforcement; shared income approach	Payments she made directly to father should be counted as support; custodial parent's income should be considered in the calculation. Non-custodial parent's basic needs should be considered
56	90	Miller	Support generally, enforcement	Agency should modify when income drops as it does when income increases, not require obligor to go to court. Time in jail should result in reduction as well as when parent is receiving disability or workers comp payments. 40% payments too high for obligor on SSDI
57	92	Lightner	Shared income approach	Consider custodial parent's higher income in calculations.
58	93	Suggs	Enforcement	Sending her a check for $5.60 is a waste of time, ink, and postage
59	94	Lyons		System should better address situations where a non-custodial parent is voluntarily un/under-employed. Court should have considered his PFD and native dividends in setting support. More aggressive enforcement and consequences for late payment. Also unhappy that the child's PFD and dividends can't be used for her support.
60	98(.1)	Upton		CSSD holding $4500 in funds that were "pre-paid." Won't refund any amount or increase payments to the child.
61	100	Knowlton		Nothing paid in almost 10 years; arrears over $13K but no action by CSSD.
62	N/A	(Duplicate)		
63	103	Fleming		Reference to comment submitted earlier.
64	104	Mendel		Modify income cap to impose it after the calculation is made to limit the amount of support. Current system is unfair to parent with lower income.
65	105	Dubin		Request for modification of current support order. Forwarded to appropriate office?
66	106	O'Hara		Using last year's figures for income and child care expenses results in unfair calculation. Hard to get an adjustment when actual care expenses are lower than claimed by the custodial parent.
67	108	Daves		Allow credit at 25% visitation not 28% (110 days). Allow CSSD to modify with proof that non-custodial parents has child for more overnights than stated in the custody order.
68	109	Arts		Non-custodial parent payments for back support are too low based on current employment and assets. Gender basis in decision.
69	110	Marjason		Support calculation should consider lower cost of living in state where custodial parent resides. Custodial parent's household income should be a factor in setting amount. Ex-wife in intentionally unemployed because she is supported by current husband.

No.	Page No.	Surname	Issue Category	Notes
70	111	Burger		Support ordered is too high for his current income.
71	114	Hayden		Ex owes $273K but CSSD is making no effort to enforce support order. Claimed they couldn't find him; she tried Google and located him in minutes.
73	118	Barclay	Support generally; forms	VA disability payments cannot be included in income. Example in our instructions that includes these payments should be removed.
74	121	Tipton	Enforcement	CSSD is failing to enforce support orders for wife's ex-husband.
75	122	Khamphanh	FORWARD	Agrees to pay $50 month, although it is a hardship
76	123	Landrum	FORWARD; Education	Support amount needs to be modified because he's in jail and order includes children that aren't his.
77	127	Laroux	Support generally, Education	Consider household income of re-married former spouse; should receive credit when custodial parent moves out of state with children making shared custody impossible.
78	128	Laughlin	Support generally	Non-custodial parent's monetary gifts of $20K/year for 10 years should be considered income in calculating support
79	130	Morgan	Support generally, Education	Alaska calculation doesn't take into account his other children; he now lives in another state so feels support should be calculated at that level, not Alaska. CSSD staff is unhelpful and modification takes too long.
80	132	Stallings	Enforcement	CSSD is failing to enforce arrears against a self-employed non-custodial parent.
81	134	Burgener	FORWARD; support generally; medical, enforcement	Asking CSSD to recognize hardship and reduce her support and medical support obligation. Appears to be asking an AG to participate in a hearing. Submitted docs that appear to be evidence for her hearing. Claims no knowledge of arrears until property lien notice.
82	149	Locher	Enforcement	Why not pay a lump sum pay off arrears when obligor receives a Native dividend.
83	156	Brockman	Education, Support generally; subsequent children	Support bill is 75% of monthly income of a single parent with 4 other children. She's homeless and has to use the Food Bank to feed her family.
84	157	Withrow	Support after 18	Custodial parent should be required to request support after 18 within a short time after the child's birthday. Delay in request can result in a large arrearage for the obligor.
85	158	Franco		(see also p. 162)
86	159	Miller	Enforcement	Taking away the obligor's drivers license is not an effective enforcement tool since it makes it impossible for him/her to work.
87	160	Goulette	Enforcement	Reduce level for felony non-payment from $5K to $2500. More active and aggressive enforcement is needed. Visitation should be conditional on making regular payments. 100% wage garnishment when arrears reach $5K, seize all property at $10K

No.	Page No.	Surname	Issue Category	Notes
88	162	Franco	Enforcement; education	Enforcement when receiving welfare; support level too low if custodial parent has 100% custody;
89	163	Tuchscherer	forms	3d party custodian; indicate "credit" on form
90	164	Banner	General; enforcement	Driver's license should not be taken; obligee should account for funds; Enforcement more aggressive when receiving welfare
91	171	Stevens	n/a	Unintelligible
92	172	Saechao	Enforcement	Enforcement from self-employed obligor
93	174	Rose	Subsequent children	Calc excludes cost to care for subsequent children; imposes hardship on blended family
94	175	Hunter	(Follow-up?) Downward mods	No downward mods (military deployments temporary; CS goes up but not down)
95	177	Taylor	Shared income approach	Custodian parent's income should be considered in the income calc
96	178	Stubblefield	Support generally; enforcement	No notifying ER's/no income w/holding if payments current; limit CSSD power to sweep accounts; custodial parent lack of contribution to kids (if unwilling to work, no consequences)
97	180	Stephenson	Support generally; retroactive awards; welfare	Not wanting to share personal info; retroactive awards of support when parent unaware of paternity and another dad on the birth cert; making dad presumptive obligor because of mom on welfare; SOL for putting parent's name on birth cert;
98	183	Gum	Support generally	Dead beat dad voluntarily unemployed (tho disabled)
99	184	Mongeau		She lost 2 ½ years of support payments when her attorney failed to notify her that a support order was issued in father's favor in his action to modify custody. Father should have been ordered to pay the back support.
100	189	Shiedt	Enforcement	Father is self-employed and not paying adequate support
101	190	Walker		Appears to be complaining that the SS administration has not been forwarding full payments to custodial parent. ?
102	192	Collins	Support generally	Complaint that $30/month is too high for an incarcerated father. Is appealing because of hardship.
103	193	Arabie	Education	Cannot lien on native stock; taking too much; custodial parent had no custody past 10 years;
104	196	Baldwin	Enforcement (arbitrary)	30-year saga of mis-management obligation.
105	200	Smith (R)	Support generally	Attach my PFD while I'm in jail and give it to my daughter.
106	201	Washington	Forward? Subsequent children; de jure v. de facto?	Wants DNA test and won't pay until it happens; drivers license issue; subsequent child suffering b/c of obligation re 1st child. Bio mom doesn't see 1st child but dad has obligation (welfare?)
107	203	Walker	Unintelligible	(Second input)
108	205	Marczesky-Lakin	Education from judge; mod	Modification; doesn't understand ruling

No.	Page No.	Surname	Issue Category	Notes
109	206	Smith (J)	Education, extended visitation credit	50/50 custody; M vol unemployed so F pays $1100 which supports C1 and M; has child for 3 of 4 weeks when M takes vacation and still has to pay
110	207	Mack	Enforcement	Failure to collect on debt dating back to 1983
111	208	Perry	Support generally	Support too high or make obligee account for funds
112	209	Carter	Support generally	Require obligee account for funds
113	210	Holmes	Support generally; shared income approach	Eliminate 110 overnight threshold and base the calc on straight % of time; don't forget custodial expenses; shared income approach (modified)
114	212	Nolton	Education	Same obligation during periods of unemployment
115	213	Rude	Support generally	Case arrears upon reactivation; IRS refund attached.
116	223	Kish	Educational	Support payment too high
117	224	LaVigne		
118	225	Hockin	Subsequent children; support generally	Income should be based on guaranteed salary (not bonuses, etc.); subsequent children worth zero; obligee should provide accounting; no custody to unemployed parent; lower percentages
119	227	Brandner	Support generally	Disgruntled with obligee and system
120	232	Shaffer	Rule changes	Provide better definition of start date for support in rule; allow parties up to 2X/year to ask for updated income info; specify that support includes only payments made directly to obligee or CSSD and does not include payments made to third parties for children's expenses.
121	234	Franco	Enforcement; support generally	No help with enforcement except when she was collecting public benefits; support amounts too low
122	235	Sergie	Forward?	Questions about specific case
123	236	Sikorski	Forward?	Question about his case; support amount too high for obligor paid at minimum wage for part time job.
124	239	Maillelle	Forward?	Questions about his case.
125	240	Lopez	Support generally; forward?	$50/month too much for incarcerated obligor.
126	243	Anonymous	Support generally; shared income approach; subsequent children	20% too high, especially in Bush communities; custodial parents income should be considered in calculation along with obligor's subsequent children.
127	244	Ellison	Support generally; military pay	Children's PFDs should be required to be saved; military deployment, TDY and COLA amounts should not be included in support calculations
	246	Johnson		No comment attached.
129	248	Riggs	Support generally	CSSD requires him to provide insurance for adopted children covered by stipend from state where adopted; support amount and retroactive application has been very burdensome; custodial parent's voluntary unemployment should be considered in calculation along with amounts he is paying for mortgage on home occupied by custodial parent.

No.	Page No.	Surname	Issue Category	Notes
130	249	Young	Support generally	Seasonal employee feels enforcement should recognize his varying income.
131	251	Steumke	Shared income approach; treatment of military pay	Ex-wife's voluntary underemployment and lengthy student status should be considered in calculation; why is his BHA counted as income but not her GI bill payments? Obligee should be required to provide accounting.
132	255	Jackson	Enforcement	CSSD didn't contact him for three years after ex-wife applied for support; other payments to support household should be considered support; support debt included periods when parties were reconciled and he was living in the home; CSSD still sending statements showing $0 balance more than 5 years after last payment.
133	257	Bigelow	Education; support generally	How does he get support modified now that ex-wife in employed and earning more than he does?
134	258	Fimbres	Support generally	Interest shouldn't be charged on arrears; couldn't challenge support order because he didn't have $ for filing fee state should establish fund to pay filing fees for those who can't afford them.
135	260	Fimbres		Duplicate.
136	262	Butterfield	Rule; enforcement	Rule should be modified to give credit for costs of prior children in shared custody arrangement in calculating support for a child with another parent; CSSD should allow downward modification when provided with proof of unemployment due to medical disability; CSSD has an institutional bias against fathers.
137	268	Jacobs	Education; enforcement	CSSD continues to garnish and then refund payments to parent who no longer has a support obligation.
138	269	Hart	Enforcement	CSSD continues to calculate support including BAS that he does not receive; agency refuses to correct error since difference is less than 15%
139	270	Uttke	Education; enforcement	Doesn't understand why she owes so much support or why state keeps taking her PFD and fails to pursue collection from children's fathers.
140	272	Moe	Enforcement; court	Mother angry about failure to enforcement support obligation and state's failure to pursue criminal charges for son's abuse by father.
141	286	Morrow	Support generally	Incarcerated; makes $27/month can't get a reduction from $50 minimum
142	287	Sapp	Support generally	Incarcerated; makes $27/month can't get a reduction from $50 minimum
143	288	Sundsten	Support generally	Support should be "a rate of cost for a child" rather than a percentage of non-custodial parents income; employee travel expenses should not be included in income calculation; arrears from birth of child creates an insurmountable debt for obligor.
144	291	Fimbres	Support generally, enforcement	Interest should not be charged on CS arrears; denied "due process" because he couldn't afford filing fee for appeal.
145	293	Howard		Can't read

No.	Page No.	Surname	Issue Category	Notes
146	297	Pitt	Support generally, subsequent children	Assessing 20% per child is too much for father with children by two mothers; calc should consider household income of the custodial parent; custodial parent's voluntary underemployment should be considered.
147	301	Baldwin		Link access and support; require accounting by custodial parent.
148	302	Fyffe	Subsequent children	Consider subsequent children in calculation
149	303	Littleton	Enforcement	As obligor: CSSD erred in requiring her to provide medical coverage when child covered by custodial parent's plan, in failing to account for her travel expenses, and not reducing support during extended summer visitation. As obligee: support hasn't increased in 14 years; higher costs of supporting a teen justify increase in payment from non custodial parent.
150	305	Stalzer	Enforcement; shared income, support generally	Enforce requests for documents from custodial parent; include subsequent children in calcs; adopt income share model; work travel expenses should be considered.
151	307	Crombie	Support generally, shared income	Tax deduction should go to parent with income; consider custodial parent's income in calculation
152	308	Boyce	Enforcement	CSSD wouldn't modify downward when he went back to school and income dropped.
153	309	Brandon	Enforcement, support generally	Modification when income drops is too difficult; got a well-paid job overseas but lost it because he can't get a passport while in arrears.
154	310	Mueller	Support generally	Military OHA and BAS should be excluded from income; child support obligations should not be enforced in a country that does not recognize visitation and custody rights.
155	314	Brown	Support generally, education	CSSD/courts refused to recognize transfer of house to custodial parent in lieu of child support. She got the house and a support order.
156	316	Lustig	Education	Question only
157	317	Smith	Forward? Education	Paying support but paternity has not been established and he is not allowed visitation
158	319	"Kobuk"	Support generally, enforcement	Why can support be reduced when unemployed and in treatment required by OCS?
159	320	Pendergrass	Enforcement, support generally	Arrears should start to accrue when a case is filed or reopened, not retroactive to an earlier event/date; support paid to the state when custodial parent is receiving public benefits should be assessed to both parents; make custodial parents account for how they spend support.
160	321	Edwards	Enforcement	Why no withholding with first paycheck? Self-employed obligor who owes $80K

No.	Page No.	Surname	Issue Category	Notes
161	322	Benavides	Shared income; subsequent children; accountability	Include entire household income of custodial parent too. Blended family issues. Account for expenditures (debit cards).
162	324	Diamond	Support generally	(Huh?)
162.5	325	Chisholm	Enforcement	Taking DL prevents parent from working; impact on credit; no mod reduction despite requests by obligee and why paperwork required to mod anyway?
163	328	Mays	Education	Asks that AK BAH and other entitlements not be counted as income after moved to new duty stn (lack of understanding of mod process).
164	329	Brooks	Potential income	Need to define potential income as based on parent's work history, qualifications, and job opportunities. Here, obligor unwilling to be underemployed ("able-bodied, certified geologist")
165	332	Lee	SSI income and enforcement	SSI paid to children and obligee should offset support obligation of disabled obligor. CSSD does not count CIB or CIC as CS. Better data sharing between SSA and CSSD.
166	335	Mueller	n/a	n/a
167	336	Keller	Disability income	Support payments replaced by SSI or SSDI
168	337	Young	Enforcement	Goes up when income is up; does not go down when income is down.
169	338	Anonymous	Shared income; Accounting	Burden unfairly heavy on noncusdial parent. Should make obligee do accounting
170	340	Moore	Support generally	Eliminate no-fault divorce law; award no support if 50/50 custody arrangement. Keep alimony out of 90.3
171	341	Werner	Enforcement; correct calc?	Custodian moves frequently, no info sharing across state lines.
172	344	Marz	Support generally	Eliminated "primary" and "shared" labels (devisive); use actual percentage of time (not percent of overnights) child is with each parent.
173	345	Mead	Education	Taking too much; I'm disabled. No understanding of mod process

*** CATEGORIES OF COMMENTS FROM PAST REVIEW**

ID	*Comment Category*
A	General Comments
B	Review Requested by Federal Law
C	Support Generally
D	Income
E	Deductions
F	Reduced Payments for Extended Visitation
G	Potential Income
H	Shared, Divided, Hybrid Physical Custody
I	Income Cap
J	Minimum Support Amount
K	Subsequent Children
L	Health Care Coverage
M	Failure to File Documentation
N	Definition of Shared Physical Custody
O	Travel Expenses
P	Modification
Q	Dependent Tax Deduction
R	Forms

Review Required by Federal Law (42 U.S.C. Sec. 667; 45 CFR 302.56)

1. Considering economic data on the cost of raising children and case data, gathered through sampling or other methods, does the application of Civil Rule 90.3 result in appropriate child support awards?

2. Based on the same considerations, are deviations from Civil Rule 90.3 appropriately limited?

Rule 90.3 Generally
Child Support Generally
Custody Generally
90.3(a) - Guidelines - Primary Physical Custody
90.3(a)(1) - Adjusted Annual Income
Income Generally
90.3(a)(2) - Percentage of Income Approach
90.3(a)(3) - Reduced Payments for Extended Visitation
90.3(a)(4) - Potential Income
90.3(b) - Shared, Divided, and Hybrid Physical Custody
90.3(b) - Shared, Divided, and Hybrid Physical Custody
90.3(b)(2) - Divided Custody
90.3(b)(3) - Hybrid Custody
Thinks form DR-308, lines 4.d. and 5.d. are in error. Item 4 on the form is the calculation of support owed to mom for children in her primary custody. *See letter p. 4 and example p. 10 - Butterfield (225)*
90.3(c) - Exceptions
90.3(d) - Health Care Coverage
90.3(e) - Child Support Affidavit and Documentation
90.3(f)(1) - Definition of Shared Physical Custody
90.3(g) - Travel Expenses
90.3(h) - Modification
90.3(i) - Third Party Custody
90.3(j) - Support Order Form
90.3(k) - Dependent Tax Deduction

Commentary
Forms
Statutory Changes
Courts/Judges
PFD
Prior Children
Subsequent Children
Penalties/Enforcement Provisions
Interest/Arrearages
CSSD
Miscellaneous

Calculations were completed based only on the information provided:

> *I was asked for an example of how the income shared model calculates a child support award. Let's say the mother makes $1,000 per month and has their one child for 10 months per year. The father makes $1,500 and has their child for 2 months per year.*

There are two important factors missing: the age of the child and whether or not this income includes the annual Permanent Fund Dividend. These calculations assume the income provided is NET income and PFD was not added.

This is a standard primary custody calculation as Dad's two months of physical custody do not meet the threshold of 25% custody. (2/12 = 17%)

Total Income:

Mom	$1,000 per month	(1000/2500 = 40%)
Dad	$1,500 per month	(1500/2500 = 60%)
	$2,500 per month in combined monthly income	

Based on the economic table for a child age 0-11, the base monthly support is $526.00. Since Mom has primary physical custody, Dad's obligation is the presumptive support obligation multiplied by his proportionate income share:

$526.00 x 60% = $315.60 per month

For a child over the age of 12, the base monthly support is $650.00. This results in a support obligation owed by Dad as follows:

$650.00 x 60% = $390.00 per month

For comparison purposes, a calculation was also completed using the Civil Rule 90.3 guidelines.

Dad's NET monthly income	$1,500.00
Percentage of income for 1 child	.20
Dad's child support obligation	$ 300.00 per month

Sample Child Support Calculations under SB 134

Monthly Combined Income	Non-Custodial Parent's Proportional Share	One Child Family (under age 12) Monthly Obligation	One Child Family (under age 12) CR 90.3 Obligation	Three Child Family (under age 12) Monthly Obligation	Three Child Family (under age 12) CR 90.3 Obligation
$1,000.00	90%	$198.00	$180.00	$386.10	$297.00
	70%	$154.00	$140.00	$300.30	$231.00
	50%	$110.00	$100.00	$214.50	$165.00
	30%	$75.00	$60.00	$175.00	$99.00
	10%	$75.00	$50.00	$175.00	$50.00
$2,500.00	90%	$473.40	$450.00	$920.70	$742.50
	70%	$368.20	$350.00	$716.10	$577.50
	50%	$263.00	$250.00	$511.50	$412.50
	30%	$157.80	$150.00	$306.90	$247.50
	10%	$75.00	$50.00	$175.00	$82.50
$4,000.00	90%	$548.10	$720.00	$1,066.50	$1,188.00
	70%	$426.30	$560.00	$829.50	$924.00
	50%	$304.50	$400.00	$592.50	$660.00
	30%	$182.70	$240.00	$355.50	$396.00
	10%	$75.00	$80.00	$175.00	$132.00
$5,500.00	90%	$720.00	$990.00	$1,398.60	$1,633.50
	70%	$560.00	$770.00	$1,087.80	$1,270.50
	50%	$400.00	$550.00	$777.00	$907.50
	30%	$240.00	$330.00	$466.20	$544.50
	10%	$80.00	$110.00	$175.00	$181.50
$7,000.00	90%	$887.40	$1,260.00	$1,725.30	$2,079.00
	70%	$690.20	$980.00	$1,341.90	$1,617.00
	50%	$493.00	$700.00	$958.50	$1,155.00
	30%	$295.80	$420.00	$575.10	$693.00
	10%	$98.60	$140.00	$191.70	$231.00

Minimum allowable support

SAMPLE CALCULATIONS UNDER SB 134

Child Support Calculations for a 1-child Family (under age 12)				
Income Shares Calculations				
Combined Annual Income			$12,000.00	Calculation
Combined Monthly Income			$1,000.00	per CR 90.3
Custodial Parent	$100.00	10%		
Non-Custodial Parent	$900.00	90%		
Base Support Obligation	$220.00	Proportionate Support Obligation	$198.00	$180.00
Custodial Parent	$300.00	30%		
Non-Custodial Parent	$700.00	70%		
Base Support Obligation	$220.00	Proportionate Support Obligation	$154.00	$140.00
Custodial Parent	$500.00	50%		
Non-Custodial Parent	$500.00	50%		
Base Support Obligation	$220.00	Proportionate Support Obligation	$110.00	$100.00
Custodial Parent	$700.00	70%		
Non-Custodial Parent	$300.00	30%		
Base Support Obligation	$220.00	Proportionate Support Obligation	~~$66.00~~ *** $75.00	$60.00
Custodial Parent	$900.00	90%		
Non-Custodial Parent	$100.00	10%		
Base Support Obligation	$220.00	Proportionate Support Obligation	~~$22.00~~ *** $75.00	~~$20.00~~ *** $50.00

Child Support Calculations for a 3-child Family (under age 12)				
Income Shares Calculations				
Combined Annual Income			$12,000.00	Calculation
Combined Monthly Income			$1,000.00	per CR 90.3
Custodial Parent	$100.00	10%		
Non-Custodial Parent	$900.00	90%		
Base Support Obligation	$429.00	Proportionate Support Obligation	$386.10	$297.00
Custodial Parent	$300.00	30%		
Non-Custodial Parent	$700.00	70%		
Base Support Obligation	$429.00	Proportionate Support Obligation	$300.30	$231.00
Custodial Parent	$500.00	50%		
Non-Custodial Parent	$500.00	50%		
Base Support Obligation	$429.00	Proportionate Support Obligation	$214.50	$165.00
Custodial Parent	$700.00	70%		
Non-Custodial Parent	$300.00	30%		
Base Support Obligation	$429.00	Proportionate Support Obligation	~~$128.70~~ *** $175.00	$99.00
Custodial Parent	$900.00	90%		
Non-Custodial Parent	$100.00	10%		
Base Support Obligation	$429.00	Proportionate Support Obligation	~~$42.90~~ *** $175.00	~~$33.00~~ *** $50.00

***minimum allowable monthly support obligation

SAMPLE CALCULATIONS UNDER SB 134

Child Support Calculations for a 1-child Family				
Income Shares Calculations				
Combined Annual Income		$30,000.00		Calculation
Combined Monthly Income		$2,500.00		per CR 90.3
Custodial Parent	$250.00	10%		
Non-Custodial Parent	$2,250.00	90%		
Base Support		Proportionate Support		
Obligation	$526.00	Obligation	$473.40	$450.00
Custodial Parent	$750.00	30%		
Non-Custodial Parent	$1,750.00	70%		
Base Support		Proportionate Support		
Obligation	$526.00	Obligation	$368.20	$350.00
Custodial Parent	$1,250.00	50%		
Non-Custodial Parent	$1,250.00	50%		
Base Support		Proportionate Support		
Obligation	$526.00	Obligation	$263.00	$250.00
Custodial Parent	$1,750.00	70%		
Non-Custodial Parent	$750.00	30%		
Base Support		Proportionate Support		
Obligation	$526.00	Obligation	$157.80	$150.00
Custodial Parent	$2,250.00	90%		
Non-Custodial Parent	$250.00	10%		
Base Support		Proportionate Support		
Obligation	$526.00	Obligation	~~$52.60~~ *** $75.00	$50.00

Child Support Calculations for a 3-child Family				
Income Shares Calculations				
Combined Annual Income		$30,000.00		Calculation
Combined Monthly Income		$2,500.00		per CR 90.3
Custodial Parent	$250.00	10%		
Non-Custodial Parent	$2,250.00	90%		
Base Support		Proportionate		
Obligation	$1,023.00	Support Obligation	$920.70	$742.50
Custodial Parent	$750.00	30%		
Non-Custodial Parent	$1,750.00	70%		
Base Support		Proportionate		
Obligation	$1,023.00	Support Obligation	$716.10	$577.50
Custodial Parent	$1,250.00	50%		
Non-Custodial Parent	$1,250.00	50%		
Base Support		Proportionate		
Obligation	$1,023.00	Support Obligation	$511.50	$412.50
Custodial Parent	$1,750.00	70%		
Non-Custodial Parent	$750.00	30%		
Base Support		Proportionate		
Obligation	$1,023.00	Support Obligation	$306.90	$247.50
Custodial Parent	$2,250.00	90%		
Non-Custodial Parent	$250.00	10%		
Base Support		Proportionate		
Obligation	$1,023.00	Support Obligation	~~$102.30~~ *** $175.00	$82.50

***minimum allowable monthly support obligation

SAMPLE CALCULATIONS UNDER SB 134

Child Support Calculations for a 1-child Family				
Income Shares Calculations				
Combined Annual Income			$48,000.00	Calculation
Combined Monthly Income			$4,000.00	per CR 90.3
Custodial Parent	$400.00	10%		
Non-Custodial Parent	$3,600.00	90%		
Base Support		Proportionate Support		
Obligation	$609.00	Obligation	$548.10	$720.00
Custodial Parent	$1,200.00	30%		
Non-Custodial Parent	$2,800.00	70%		
Base Support		Proportionate Support		
Obligation	$609.00	Obligation	$426.30	$560.00
Custodial Parent	$2,000.00	50%		
Non-Custodial Parent	$2,000.00	50%		
Base Support		Proportionate Support		
Obligation	$609.00	Obligation	$304.50	$400.00
Custodial Parent	$2,800.00	70%		
Non-Custodial Parent	$1,200.00	30%		
Base Support		Proportionate Support		
Obligation	$609.00	Obligation	$182.70	$240.00
Custodial Parent	$3,600.00	90%		
Non-Custodial Parent	$400.00	10%		
Base Support		Proportionate Support		
Obligation	$609.00	Obligation	~~$60.90~~ *** $75.00	$80.00

Child Support Calculations for a 3-child Family				
Income Shares Calculations				
Combined Annual Income			$48,000.00	Calculation
Combined Monthly Income			$4,000.00	per CR 90.3
Custodial Parent	$400.00	10%		
Non-Custodial Parent	$3,600.00	90%		
Base Support		Proportionate		
Obligation	$1,185.00	Support Obligation	$1,066.50	$1,188.00
Custodial Parent	$1,200.00	30%		
Non-Custodial Parent	$2,800.00	70%		
Base Support		Proportionate		
Obligation	$1,185.00	Support Obligation	$829.50	$924.00
Custodial Parent	$2,000.00	50%		
Non-Custodial Parent	$2,000.00	50%		
Base Support		Proportionate		
Obligation	$1,185.00	Support Obligation	$592.50	$660.00
Custodial Parent	$2,800.00	70%		
Non-Custodial Parent	$1,200.00	30%		
Base Support		Proportionate		
Obligation	$1,185.00	Support Obligation	$355.50	$396.00
Custodial Parent	$3,600.00	90%		
Non-Custodial Parent	$400.00	10%		
Base Support		Proportionate		
Obligation	$1,185.00	Support Obligation	~~$118.50~~ *** $175.00	$132.00

***minimum allowable monthly support obligation

SAMPLE CALCULATIONS UNDER SB 134

Child Support Calculations for a 1-child Family				
Income Shares Calculations				
Combined Annual Income			$66,000.00	Calculation
Combined Monthly Income			$5,500.00	per CR 90.3
Custodial Parent	$550.00	10%		
Non-Custodial Parent	$4,950.00	90%		
Base Support Obligation	$800.00	Proportionate Support Obligation	$720.00	$990.00
Custodial Parent	$1,650.00	30%		
Non-Custodial Parent	$3,850.00	70%		
Base Support Obligation	$800.00	Proportionate Support Obligation	$560.00	$770.00
Custodial Parent	$2,750.00	50%		
Non-Custodial Parent	$2,750.00	50%		
Base Support Obligation	$800.00	Proportionate Support Obligation	$400.00	$550.00
Custodial Parent	$3,850.00	70%		
Non-Custodial Parent	$1,650.00	30%		
Base Support Obligation	$800.00	Proportionate Support Obligation	$240.00	$330.00
Custodial Parent	$4,950.00	90%		
Non-Custodial Parent	$550.00	10%		
Base Support Obligation	$800.00	Proportionate Support Obligation	$80.00	$110.00

Child Support Calculations for a 3-child Family				
Income Shares Calculations				
Combined Annual Income			$66,000.00	Calculation
Combined Monthly Income			$5,500.00	per CR 90.3
Custodial Parent	$550.00	10%		
Non-Custodial Parent	$4,950.00	90%		
Base Support Obligation	$1,554.00	Proportionate Support Obligation	$1,398.60	$1,633.50
Custodial Parent	$1,650.00	30%		
Non-Custodial Parent	$3,850.00	70%		
Base Support Obligation	$1,554.00	Proportionate Support Obligation	$1,087.80	$1,270.50
Custodial Parent	$2,750.00	50%		
Non-Custodial Parent	$2,750.00	50%		
Base Support Obligation	$1,554.00	Proportionate Support Obligation	$777.00	$907.50
Custodial Parent	$3,850.00	70%		
Non-Custodial Parent	$1,650.00	30%		
Base Support Obligation	$1,554.00	Proportionate Support Obligation	$466.20	$544.50
Custodial Parent	$4,950.00	90%		
Non-Custodial Parent	$550.00	10%		
Base Support Obligation	$1,185.00	Proportionate Support Obligation	~~$118.50~~ *** $175.00	$181.50

***minimum allowable monthly support obligation

SAMPLE CALCULATIONS UNDER SB 134

Child Support Calculations for a 1-child Family				
Income Shares Calculations				
Combined Annual Income		$84,000.00		Calculation
Combined Monthly Income		$7,000.00		per CR 90.3
Custodial Parent	$700.00	10%		
Non-Custodial Parent	$6,300.00	90%		
Base Support Obligation	$986.00	Proportionate Support Obligation	$887.40	$1,260.00
Custodial Parent	$2,100.00	30%		
Non-Custodial Parent	$4,900.00	70%		
Base Support Obligation	$986.00	Proportionate Support Obligation	$690.20	$980.00
Custodial Parent	$3,500.00	50%		
Non-Custodial Parent	$3,500.00	50%		
Base Support Obligation	$986.00	Proportionate Support Obligation	$493.00	$700.00
Custodial Parent	$4,900.00	70%		
Non-Custodial Parent	$2,100.00	30%		
Base Support Obligation	$986.00	Proportionate Support Obligation	$295.80	$420.00
Custodial Parent	$6,300.00	90%		
Non-Custodial Parent	$700.00	10%		
Base Support Obligation	$986.00	Proportionate Support Obligation	$98.60	$140.00

Child Support Calculations for a 3-child Family				
Income Shares Calculations				
Combined Annual Income		$84,000.00		Calculation
Combined Monthly Income		$7,000.00		per CR 90.3
Custodial Parent	$700.00	10%		
Non-Custodial Parent	$6,300.00	90%		
Base Support Obligation	$1,917.00	Proportionate Support Obligation	$1,725.30	$2,079.00
Custodial Parent	$2,100.00	30%		
Non-Custodial Parent	$4,900.00	70%		
Base Support Obligation	$1,917.00	Proportionate Support Obligation	$1,341.90	$1,617.00
Custodial Parent	$3,500.00	50%		
Non-Custodial Parent	$3,500.00	50%		
Base Support Obligation	$1,917.00	Proportionate Support Obligation	$958.50	$1,155.00
Custodial Parent	$4,900.00	70%		
Non-Custodial Parent	$2,100.00	30%		
Base Support Obligation	$1,917.00	Proportionate Support Obligation	$575.10	$693.00
Custodial Parent	$6,300.00	90%		
Non-Custodial Parent	$700.00	10%		
Base Support Obligation	$1,917.00	Proportionate Support Obligation	$191.70	$231.00

***minimum allowable monthly support obligation

Rule 90.3. Child Support Awards.

(a) **Guidelines--Primary Physical Custody.** A child support award in a case in which one parent is awarded primary physical custody as defined by paragraph (f) will be calculated as an amount equal to the adjusted annual income of the non-custodial parent multiplied by a percentage specified in subparagraph (a)(2).

(1) Adjusted annual income as used in this rule means the parent's total income from all sources minus:

(A) mandatory deductions such as:

(i) federal, state, and local income tax,

(ii) Social Security tax or the equivalent contribution to an alternate plan established by a public employer, and self-employment tax,

(iii) Medicare tax,

(iv) mandatory union dues,

(v) mandatory contributions to a retirement or pension plan;

(B) voluntary contributions to a retirement or pension plan or account in which the earnings are tax-free or tax-deferred, except that the total amount of these voluntary contributions plus any mandatory contributions under item (a)(1)(A)(v) above may not exceed 7.5% of the parent's gross wages and self-employment income;

(C) child support and alimony payments arising from prior relationships which are required by other court or administrative proceedings and actually paid;

(D) child support for children from prior relationships living with the parent, calculated by using the formula provided by this rule; and

(E) work-related child care expenses for the children who are the subject of the child support order.

(2) The percentage by which the non-custodial parent's adjusted income must be multiplied in order to calculate the child support award is:

(A) 20% (.20) for one child;

(B) 27% (.27) for two children;

(C) 33% (.33) for three children; and

(D) an extra 3% (.03) for each additional child.

(3) The court may allow the obligor parent to reduce child support payments by up to 75% for any period in which the obligor parent has extended visitation of over 27 consecutive days. The order must specify the amount of the reduction which is allowable if the extended visitation is exercised.

(4) *Potential Income.* The court may calculate child support based on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed. A determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility. Potential income will be based upon the parent's work history, qualifications, and job opportunities. The court also may impute potential income for non-income or low income producing assets.

(b) **Shared, Divided, and Hybrid Physical Custody.**

(1) *Shared Physical Custody.* A child support award in a case in which the parents are awarded shared physical custody as defined by paragraph (f) will be calculated by:

(A) Calculating the annual amount each parent would pay to the other parent under paragraph (a) assuming the other parent had primary custody. In this calculation the income limit in subparagraph (c)(2) and the minimum support amount in subparagraph (c)(3) apply.

(B) Multiplying this amount for each parent by the percentage of time the other parent will have physical custody of the children. However, if the court finds that the percentage of time each parent will have physical custody will not accurately reflect the ratio of funds each parent will directly spend on supporting the children, the court shall vary this percentage to reflect its findings.

(C) The parent with the larger figure calculated in the preceding subparagraph is the obligor parent and the annual award is equal to the difference between the two figures multiplied by 1.5. However, if this figure is higher than the amount of support which would be calculated under paragraph (a) assuming primary custody, the annual support is the amount calculated under paragraph (a).

(D) The child support award is to be paid in 12 equal monthly installments except as follows:

(i) if shared custody is based on the obligor parent having physical custody for periods of 30 consecutive days or more, the total annual award may be paid in equal installments over those months in which the obligor parent does not have physical custody; or

(ii) if the obligor parent's income is seasonal, the court may order unequal monthly support payments as provided in subparagraph (c)(5).

(E) The child support order must state that failure to exercise sufficient physical custody to qualify for shared physical custody under this rule is grounds for modification of the child support order. Denial of visitation by the custodial parent is not cause to increase child support.

(2) *Divided Physical Custody.* A child support award in a case in which the parents have divided custody is calculated, first, by determining what each parent would owe the other for children in that parent's primary physical custody under paragraph (a), taking into account the income limit in subparagraph (c)(2) and the minimum support amount in subparagraph (c)(3), and offsetting those amounts. Second, because divided custody is an "unusual circumstance," the court must consider whether this support amount should be varied under subparagraph (c)(1).

(3) *Hybrid Physical Custody.* A child support award in a case in which the parents have hybrid custody is calculated by applying paragraph (a), taking into account the income limit in subparagraph (c)(2) and the minimum support amount in subparagraph (c)(3), to determine support for children in the primary physical custody of each parent and applying subparagraph (b)(1) to determine support for children in the shared physical custody of the parents. In these calculations, the subparagraph (a)(2) percentages must be adjusted pro rata based on the number of children in each type of custody. These results are then combined to determine the net obligation. Finally, because hybrid custody is an "unusual circumstance," the court must consider whether this support amount should be varied under subparagraph (c)(1).

(c) **Exceptions.**

(1) The court may vary the child support award as calculated under the other provisions of this rule for good cause upon proof by clear and convincing evidence that manifest injustice would result if the support award were not varied. The court must specify in writing the reason for the variation, the amount of support which would have been required but for the variation, and the estimated value of any property conveyed instead of support calculated under the other provisions of this rule. Good cause may include a finding that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children. The court shall consider the custodial parent's income in this determination.

(2) Paragraph (a) does not apply to the extent that the parent has an adjusted annual income of over $105,000. In such a case, the court may make an additional award only if it is just and proper, taking into account the needs of the children, the standard of living of the children and the extent to which that standard should reflect the supporting parent's ability to pay.

(3) The minimum child support amount that may be ordered is $50 per month ($600 per year) except as provided in subparagraph (a)(3) and paragraph (b).

(4) In addition to ordering a parent to pay child support as calculated under this rule, the court may, in appropriate circumstances, order one or more grandparents of a child to pay child support to an appropriate person in an amount determined by the court to serve the best interests of the child. However, the amount may not exceed the smaller of (A) a proportionate share of the amount required to provide care in a supervised setting to the grandchild, as determined by the court, or (B) the amount that would have been awarded if the child's parents had the incomes of the child's grandparents and paragraphs (a) and (b) were applied. An order under this paragraph may be issued only with respect to a child whose parents are both minors, and the order terminates when either parent becomes 18 years of age. The court must specify in writing the reasons why it considers it to be appropriate to order a grandparent to pay child support under this paragraph and the factors considered in setting the amount of the child support award. In this paragraph, "grandparent" means the natural or adoptive parent of the minor parent.

(5) If the non-custodial parent's income is seasonal, the court may order that the annual support amount be paid in unequal monthly payments, with higher payments during the months the parent expects to receive higher income and lower payments in other months. The court should not make such an order unless (a) it finds that the burden of budgeting for periods of unequal income should be placed on the obligee rather than the obligor and (b) the obligee agrees. The court's order must specify the annual support amount, the average monthly support amount, and the amount due month by month. The order must provide that variations from the average monthly amount begin with monthly payments in excess of the average monthly amount such that a deficit situation cannot occur. Until the excess payments begin, the average monthly amount must be ordered.

(d) **Health Care Coverage.**

(1) *Health Insurance.* The court shall address coverage of the children's health care needs and require health insurance for the children if insurance is available to either parent at a reasonable cost. The court shall consider whether the children are eligible for services through the Indian Health Service (or any other entity) or other insurance coverage before ordering the obligor to provide health care coverage through insurance or other means. The court shall allocate equally the cost of this insurance between the parties unless the court orders otherwise for good cause. An obligor's child support obligation will be decreased by the amount of the obligee's portion of health insurance payments ordered by the court and actually paid by the obligor. A child support award will be increased by the obligor's portion of health insurance if the obligee is ordered to, and actually does obtain and pay for insurance. The cost of insurance is the cost attributable to the children for whom support is paid. If the cost to the employee of covering the employee alone is the same as the cost to the employee of covering the employee and dependents, then there is no additional cost to the employee for adding

the children and no portion of the cost of coverage may be allocated to the children. If dependent coverage can be added for a single cost, rather than per dependent, and the dependent coverage covers dependents in addition to the children subject to the order, the cost of the dependent coverage will be allocated equally among the dependents covered. If there is reason to believe that there is an incremental cost to the employee for insuring dependents but evidence of that incremental cost is unavailable, the cost of insurance is determined by dividing the total cost of coverage by the number of family members covered and multiplying that amount by the number of children subject to the order.

(2) *Uncovered Health Care Expenses.* The court shall allocate equally between the parties the cost of reasonable health care expenses not covered by insurance unless the court orders otherwise for good cause. A party shall reimburse the other party for his or her share of the uncovered expenses within 30 days of receipt of the bill for the health care, payment verification, and, if applicable, a health insurance statement indicating what portion of the cost is uncovered. Reasonable, uncovered expenses exceeding $5,000 in a calendar year will be allocated based on the parties' relative financial circumstances when the expenses occur.

(e) **Child Support Affidavit and Documentation.**

(1) Subject to the confidentiality requirements of Civil Rule 90.1(f), each parent in a court proceeding at which child support is involved must file a statement under oath which states the parent's adjusted annual income and the components of this income as provided in subparagraph (a)(1). This statement must be filed with a party's initial pleading (such as the dissolution petition, divorce complaint or answer, etc.), motion to modify, and any response to a motion to modify. The statement must be accompanied by documentation verifying the income. The documents must be redacted to delete social security numbers and to provide only partial financial account information as provided in Civil Rule 90.1(f). The statement must state whether the parent has access to health insurance for the children and, if so, the additional cost to the parent of the children's health insurance. For any infraction of these rules, the court may withhold or assess costs or attorney's fees as the circumstances of the case and discouragement of like conduct in the future may require; and such costs and attorney's fees may be imposed upon offending attorneys or parties.

(2) While there is an ongoing monthly support obligation, either party must provide to the other party, within 30 days of a written request, documents such as tax returns and pay stubs showing the party's income for the prior calendar year. The party making the request must provide documentation of his or her annual income for the same period at the time the request is made. A request under this section may not be made more than once per year. This section does not preclude discovery under other civil rules.

(3) Unless the information has already been provided to the court under Civil Rule 90.1(f), a statement under subsection (e)(1) of this rule must be accompanied by a confidential information sheet as described in Civil Rule 90.1(f). Once a complete

confidential information sheet has been submitted to the court listing names, dates of birth, and social security numbers as required, the parties shall omit or redact social security numbers from documents subsequently filed in the action unless otherwise ordered by the court. This paragraph applies to documents filed with the court on or after October 15, 2006.

(f) **Definitions.**

(1) *Shared Physical Custody.* A parent has shared physical custody (or shared custody) of children for purposes of this rule if the children reside with that parent for a period specified in writing in the custody order of at least 30, but no more than 70, percent of the year, regardless of the status of legal custody.

(2) *Primary Physical Custody.* A parent has primary physical custody (or primary custody) of children for purposes of this rule if the children reside with the other parent for a period specified in the custody order of less than 30 percent of the year.

(3) *Divided Custody.* Parents have divided custody under this rule if one parent has primary physical custody of one or more children of the relationship and the other parent has primary custody of one or more other children of the relationship, and the parents do not share physical custody of any of their children.

(4) *Hybrid Custody.* Parents have hybrid custody under this rule if at least one parent has primary physical custody of one or more children of the relationship, and the parents have shared physical custody of at least one child of the relationship.

(5) *Health Care Expenses.* Health care expenses include medical, dental, vision, and mental health counseling expenses.

(g) **Travel Expenses.** After determining an award of child support under this rule, the court shall allocate reasonable travel expenses which are necessary to exercise visitation between the parties as may be just and proper for them to contribute.

(h) **Modification.**

(1) *Material Change of Circumstances.* A final child support award may be modified upon a showing of a material change of circumstances as provided by state law. A material change of circumstances will be presumed if support as calculated under this rule is more than 15 percent greater or less than the outstanding support order. For purposes of this paragraph, support includes health insurance payments made pursuant to (d)(1) of this rule.

(2) *No Retroactive Modification.* Child support arrearage may not be modified retroactively, except as allowed by AS 25.27.166(d). A modification which is effective on or after the date that a motion for modification, or a notice of petition for modification by

the Child Support Services Division, is served on the opposing party is not considered a retroactive modification.

(3) *Preclusion.* The court may find that a parent and a parent's assignee are precluded from collecting arrearages for support of a child that accumulated during a time period exceeding nine months for which the parent agreed or acquiesced to the obligor exercising primary custody of the child. A finding that preclusion is a defense must be based on clear and convincing evidence.

(i) **Third Party Custody.**

(1) When the state, or another third party entitled to child support, has custody of all children of a parent, the parent's support obligation to the third party is an amount equal to the adjusted annual income of the parent multiplied by the percentage specified in subparagraph (a)(2). If the third party has custody of some but not all children, the parent's support obligation to the third party is an amount equal to the adjusted annual income of the parent, multiplied by the percentage specified in subparagraph (a)(2) for the total number of the parent's children, multiplied by the number of the parent's children in third party custody, divided by the total number of the parent's children. For purposes of this paragraph, the number of the parent's children only includes children of the parent who live with the parent, are substantially supported by the parent or who are in custody of the third party entitled to support.

(2) If, in addition to a support obligation to a third party, one or both parents retain primary or shared physical custody of at least one of their children, the support obligation between the parents is calculated pursuant to the other paragraphs of this rule, without consideration of the third party custodian or any children in the custody of the third party custodian, except that the percentage in 90.3(a)(2) must be adjusted pro rata for the number of children in the primary custody of a parent, or shared custody of the parents, compared to the total number of children. After that calculation is completed, any support owed may be offset with support owed to a third party custodian under the preceding subparagraph in order to minimize transactions.

(j) **Support Order Forms.** All orders for payment or modification of child support shall be entered on a form developed by the administrative director. A party may lodge a duplicate of the court form produced by a laser printer or similar device. A device may also print, in a contrasting typestyle equivalent to that produced by a typewriter, text that otherwise would have been entered by a typewriter or word processor. A party or attorney who lodges a duplicate certifies by lodging the duplicate that it is identical to the current version of the court form.

(k) **Dependent Tax Deduction.** The court may allocate the dependent tax deduction for each child between the parties as is just and proper and in the child's best interests. The allocation must be consistent with AS 25.24.152 and federal law.

(Added by SCO 833 effective August 1, 1987; amended by SCO 935 effective January 15, 1989; by SCO 1008 effective January 15, 1990; by SCO 1192 effective July 15, 1995; by SCO 1246 effective July 15, 1996; by SCO 1269 effective July 15, 1997; by SCO 1295 effective January 15, 1998; by SCO 1362 effective October 15, 1999; by SCO 1399, effective October 15, 2000; by SCO 1417 effective April 15, 2001; by SCO 1526 effective April 15, 2005; by SCO 1595 effective October 15, 2006; by SCO 1686 effective April 15, 2009; and by SCO 1716 effective nunc pro tunc to July 1, 2009)

Note: This rule is adopted under the supreme court's interpretive authority pursuant to Article IV, Section 1 of the Alaska Constitution. Thus, it may be superseded by legislation even if the legislation does not meet the procedural requirements for changing rules promulgated under Article IV, Section 15.

Note to Civil Rule 90.3(c)(1)(B): The Federal Poverty Guidelines are usually revised each February. The new poverty income guideline for one person in Alaska in 1999 is $10,320 (Federal Register, Vol. 64, No. 52, 13428-13430, March 18, 1999). The Alaska Supreme Court has indicated that the poverty guideline that should be used is the guideline for the state in which the obligor resides. **See Carstens v. Carstens,** 867 P.2d 805, 810 (Alaska 1994).

Note to Civil Rule 90.3(h)(1): Section 44 of ch. 87 SLA 1997 amended AS 25.24.170(b) to allow support to be modified without a showing of a material change in circumstances *as necessary to comply with federal law*. Federal law eliminates the need for a showing only in cases being enforced by CSSD that are being reviewed under CSSD's period- ic review and modification program. According to § 152 of ch. 87 SLA 1997, the amendment to AS 25.24.170(b) has the effect of amending Civil Rule 90.3 by changing the standard for certain modifications of a support order.

Note to Civil Rule 90.3(h)(2): AS 25.27.166(d), enacted by § 14 of ch. 57 SLA 1995, has the effect of amending Civil Rule 90.3(h)(2) by allowing retroactive modification of child support arrearage under circumstances involving disestablishment of paternity, to the extent such modification is not prohibited by federal law.

Note to SCO 1269: Civil Rule 90.3(c)(3) was added by § 44 ch. 107 SLA 1996. Section 22 of ch. 107 SLA 1996 enacts 25.27.195(b), which allows CSSD to vacate an administrative support order that was based on a default amount rather than the obligor's actual ability to pay. If an order is vacated on this basis, AS 25.27.195(d) allows the agency to modify the obligor's arrearages under the original order. According to § 50 ch. 107 SLA 1996, AS 25.27.195(d) has the effect of amending Rule 90.3(h)(2), which prohibits retroactive modification of child support arrearages.

Note: Section 41 of ch. 87 SLA 1997 amends AS 25.20.050 relating to paternity actions. According to § 150 of the Act, § 41 has the effect of amending Civil Rule 90.3 by requiring the court in a paternity action to issue a temporary child support order upon a showing by clear and convincing evidence of paternity.

Note: Chapter 106 SLA 00 amends various laws relating to medical support orders. According to section 24 of the act, the act amends Civil Rule 90.3 "by specifying that a medical support order may be issued even when a support order for periodic monetary payments is not issued and by setting the requirements for medical support orders."

Note: Chapter 108 SLA 04 (HB 514) enacted several amendments to the child support statutes, including a provision that permits periodic modifications of a child support order without a showing of materially changed circumstances. According to Section 17 of the Act, statutory modifications to AS 25.27.190(e) have the effect of amending Civil Rule 90.3 by changing the grounds for modifying a support order.

Note: Chapter 45 SLA 2009 (SB 96), effective July 1, 2009, enacted changes relating to child support, including changes concerning orders for medical support of a child. According to section 13 of the Act, AS 25.27.060(c) as amended by section 4 of the Act, has the effect of changing Civil Rule 90.3 by changing standards for issuance of medical and other support orders by the court.

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Mischel
3/25/10

CS FOR SENATE BILL NO. 46( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR KOOKESH

A BILL

FOR AN ACT ENTITLED

"An Act relating to child support awards; and repealing Rule 90.3, Alaska Rules of Civil Procedure."

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

*** Section 1.** AS 25 is amended by adding a new chapter to read:

Chapter 28. Child Support Awards.

Sec. 25.28.010. Guidelines; primary physical custody. (a) A tribunal shall calculate a child support award in a case in which one parent is awarded primary physical custody as an amount equal to the adjusted annual income of the noncustodial parent multiplied by a percentage specified in (b) of this section.

(b) To calculate the child support award, the tribunal shall multiply the noncustodial parent's adjusted annual income by the following percentages:

(1) 20 percent for one child;

(2) 27 percent for two children;

(3) 33 percent for three children; and

(4) an additional three percent for each additional child.

(c) The tribunal may allow the obligor parent to reduce child support payments by up to 75 percent for a period in which the obligor parent has extended visitation of more than 27 consecutive days. The order must specify the amount of the reduction that is allowable if the extended visitation is exercised.

(d) The tribunal may calculate child support based on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed. A determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility. Potential income shall be based on the parent's work history, qualifications, and job opportunities. The tribunal also may impute potential income for nonincome producing or low income producing assets.

(e) In this section, "adjusted annual income" means the parent's total income from all sources less

(1) mandatory deductions, including

(A) federal, state, and local income tax;

(B) social security tax or the equivalent contribution to an alternate plan established by a public employer, and self-employment tax;

(C) Medicare tax;

(D) mandatory union dues;

(E) mandatory contributions to a retirement or pension plan;

(2) voluntary contributions to a retirement or pension plan or account in which the earnings are tax-free or tax-deferred, except that the total amount of these voluntary contributions plus any mandatory contributions under (1)(E) of this subsection may not exceed 7.5 percent of the parent's gross wages and self-employment income;

(3) child support and alimony payments arising from previous relationships that are required by another tribunal and actually paid;

(4) child support for children from prior relationships living with the parent, calculated by using the formula under this chapter; and

(5) work-related child care expenses for the child who is the subject of the child support order.

Sec. 25.28.020. Guidelines; shared, divided, and hybrid custody awards. (a) The tribunal shall calculate shared, divided, and hybrid physical custody awards as provided in this section.

(b) The tribunal shall calculate a child support award in a case in which the parents are awarded shared physical custody by

(1) calculating the annual amount each parent would pay to the other parent under AS 25.28.010 assuming the other parent had primary custody; in this calculation, the income limit in AS 25.28.030(c) and the minimum support amount in AS 25.28.030(d) apply;

(2) multiplying the amount determined under (1) of this subsection for each parent by the percentage of time the other parent has physical custody of the child; however, if the tribunal finds that the percentage of time each parent will have physical custody does not accurately reflect the ratio of funds each parent will directly spend on supporting the child, the tribunal shall vary this percentage to reflect its findings;

(3) determining which parent has the greater amount under (2) of this subsection; the parent with the greater amount under (2) of this subsection is the obligor parent, and the annual award is equal to the difference between the two amounts under (2) of this subsection multiplied by 1.5; however, if this amount is greater than the amount of support calculated under AS 25.28.010 assuming the obligor parent has primary custody, the annual support is the amount calculated under AS 25.28.010.

(c) The child support award for shared custody under (b) of this section must be paid in 12 equal monthly installments, except that if

(1) shared custody is based on the obligor parent's having physical custody for periods of 30 consecutive days or more, the total annual award may be paid in equal installments over those months in which the obligor parent does not have physical custody; or

(2) the obligor parent's income is seasonal, the tribunal may order

unequal monthly support payments as provided in AS 25.28.030(g) and (h).

(d) The child support order must state that failure to exercise sufficient physical custody to qualify for shared physical custody under (b) or (c) of this section is grounds for modification of the child support order. Denial of visitation by the custodial parent is not cause to increase a child support award.

(e) The tribunal shall

(1) calculate a child support award in a case in which the parents are awarded divided custody by determining the amount each parent would pay to the other parent for support of a child for whom that parent has primary physical custody under AS 25.28.010, taking into account the income limit in AS 25.28.030(c) and the minimum support amount in AS 25.28.030(d), and offsetting those amounts; and

(2) consider whether the amount determined under (1) of this subsection should be varied under AS 25.28.030(b).

(f) The tribunal shall

(1) calculate a child support award in a case in which the parents are awarded hybrid custody by

(A) applying AS 25.28.010, taking into account the income limit in AS 25.28.030(c) and the minimum support amount in AS 25.28.030(d), to determine support for a child in the primary physical custody of each parent;

(B) applying (b) of this section to determine support for a child in the shared physical custody of the parents;

(C) adjusting pro rata the percentages provided in AS 25.28.010(b) based on the number of children to which each type of custody applies; and

(D) combining the amounts to determine the net obligation; and

(2) consider whether the amount determined under (1) of this subsection should be varied under AS 25.28.030(b).

Sec. 25.28.030. Exceptions to support awards. (a) Notwithstanding the requirements in AS 25.28.010 and 25.28.020, the tribunal may vary the award for the reasons stated in this section.

(b) The tribunal may vary the child support award as calculated under the other provisions of this chapter for good cause on proof by clear and convincing evidence that manifest injustice would result if the support award were not varied. The tribunal shall specify in writing the reason for the variation, the amount of support that would have been required but for the variation, and the estimated value of any property conveyed instead of support calculated under the other provisions of this chapter. Good cause may include a finding that unusual circumstances exist that require variation of the award in order to award an amount of support that is just and proper for the parties to contribute toward the nurture and education of their children. The tribunal shall consider the custodial parent's income in this determination.

(c) The calculation for primary physical custody under AS 25.28.010 does not apply to the extent that the parent has an adjusted annual income of more than $105,000. The tribunal may make an additional award only if it is just and proper, taking into account the needs of the child, the standard of living of the child, and the extent to which that standard should reflect the supporting parent's ability to pay.

(d) Except as provided in AS 25.28.010(c) and 25.28.020, the minimum child support amount that may be ordered is $50 a month or $600 a year.

(e) In addition to ordering a parent to pay child support as calculated under this chapter, the tribunal may, in appropriate circumstances and when the parents are minors as described in (f) of this section, order one or more grandparents of a child to pay child support to an appropriate person in an amount determined by the tribunal to serve the best interests of the child; however, the amount may not exceed the lesser of

(1) a proportionate share of the amount required to provide care in a supervised setting to the grandchild, as determined by the tribunal; or

(2) the amount that would have been awarded if the child's parents had the incomes of the child's grandparents and AS 25.28.010 and 25.28.020 were applied.

(f) An order under (e) of this section may be issued only with respect to a child whose parents are both minors, and the order terminates when either parent becomes 18 years of age. The tribunal shall specify in writing the reasons it considers it to be appropriate to order a grandparent to pay child support under this subsection and the factors considered in setting the amount of the child support award. In this

subsection, "grandparent" means the natural or adoptive parent of the minor parent.

(g) If the noncustodial parent's income is seasonal, the tribunal may order that the annual support amount be paid in unequal monthly payments, with higher payments during the months the parent expects to receive higher income and lower payments in other months; the tribunal may not make an unequal payment order unless

(1) the tribunal finds that the burden of budgeting for periods of unequal income should be placed on the obligee rather than the obligor; and

(2) the obligee agrees.

(h) An order of the tribunal for unequal payments under (g) of this section must specify the annual support amount, the average monthly support amount, and the amount due for each month. The order must provide that variations from the average monthly amount begin with monthly payments in excess of the average monthly amount so that a deficit situation cannot occur. Until the excess payments begin, the tribunal shall order payment of the average monthly amount.

Sec. 25.28.040. Health care expenses. (a) The tribunal shall include in the order coverage of the child's health care needs and require health insurance for the child if insurance is available to either parent or both parents at a reasonable cost. The tribunal shall consider whether the child is eligible for services through the Indian Health Service, any other entity, or other insurance coverage before ordering either parent or both parents to provide health care coverage through insurance, cash medical support, or other means. A court shall find that health insurance is available only if the dependent child has reasonable geographic access to the covered services or the insurance includes the coverage of transportation needed for the services.

(b) The tribunal shall allocate equally the cost of insurance between the parents unless the tribunal orders otherwise for good cause. An obligor's child support obligation shall be decreased by the amount of the obligee's portion of health insurance payments ordered by the tribunal and actually paid by the obligor. The tribunal shall increase a child support award by the obligor's portion of health insurance if the obligee is ordered to, and actually does, obtain and pay for insurance.

(c) The cost of insurance is the cost attributable to the child for whom support is paid. If the cost to the employee of covering the employee alone is the same as the

cost to the employee of covering the employee and dependents, then there is no additional cost to the employee for adding the child and no portion of the cost of coverage may be allocated to the child. If dependent coverage can be added for a single cost, rather than for each dependent, and the dependent coverage covers dependents in addition to the child subject to the order, the cost of the dependent coverage shall be allocated equally among the dependents covered. If there is reason to believe that there is an incremental cost to the employee for insuring dependents but evidence of that incremental cost is unavailable, the cost of insurance is determined by dividing the total cost of coverage by the number of family members covered and multiplying that amount by the number of children subject to the order.

(d) The tribunal shall allocate equally between the parties the cost of reasonable health care expenses not covered by insurance unless the tribunal orders otherwise for good cause. A party shall reimburse the other party for the party's share of the uncovered health care expenses within 30 days after receipt of the bill for the health care, payment verification, and, if applicable, a health insurance statement indicating what portion of the cost is uncovered. The tribunal shall allocate the reasonable, uncovered health care expenses exceeding $5,000 in a calendar year based on the parties' relative financial circumstances when the expenses occur.

(e) For the purpose of establishing a monthly support obligation for health care expenses, a court shall find that the cost of cash medical support or private health insurance is reasonable under this section if the cost to the responsible parent does not exceed five percent of the responsible parent's gross income. In calculating the percentage for purposes of health insurance coverage, the cost is the cost of adding the dependent child to the existing insurance coverage or the difference between self-only and family coverage.

(f) In this section,

(1) "cash medical support" means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment or otherwise, or for other health care expenses not covered by insurance;

(2) "health care expenses" includes medical, dental, vision, and mental health counseling expenses.

Sec. 25.28.050. Child support affidavit and documentation. (a) Subject to the confidentiality requirements of Rule 90.1(f), Alaska Rules of Civil Procedure, each parent in a proceeding of a tribunal at which child support is involved shall file a statement under oath, accompanied by documentation verifying the statement, that states the parent's adjusted annual income and the components of adjusted annual income as described in AS 25.28.010(e). This statement and documentation must be filed with a party's initial pleading in superior court, including the dissolution petition, divorce complaint or answer, motion to modify, and any response to a motion to modify. The documents must be redacted to delete social security numbers and to provide only partial financial account information as provided in Rule 90.1(f), Alaska Rules of Civil Procedure. The statement must state whether the parent has access to health insurance for the children and, if so, the additional cost to the parent of the children's health insurance.

(b) While there is an ongoing monthly support obligation, each party shall provide to the other party, within 30 days after a written request, documents such as tax returns and pay stubs showing the party's income for the prior calendar year. The party making the request shall provide documentation of the party's annual income for the same period at the time the request is made. A request under this section may not be made more than once a year. This section does not preclude discovery under the Alaska Rules of Civil Procedure.

(c) Unless the information has already been provided to the tribunal under Rule 90.1(f), Alaska Rules of Civil Procedure, a statement under (a) of this section must be accompanied by a confidential information sheet as described in Rule 90.1, Alaska Rules of Civil Procedure. Once a complete confidential information sheet has been submitted to the tribunal listing names, dates of birth, and social security numbers as required, the parties shall omit or redact social security numbers from documents subsequently filed in the action unless otherwise ordered by the tribunal.

(d) The tribunal may withhold or assess costs or attorney fees for a violation of this section as the circumstances and discouragement of like conduct in the future may require. Costs and attorney fees may be imposed on offending attorneys or parties.

Sec. 25.28.060. Travel expenses. After determining an award of child support under this chapter, the court shall allocate between the parties reasonable travel expenses that are necessary to exercise visitation as may be just and proper for the parties to contribute.

Sec. 25.28.070. Modification; defense against arrearages. (a) A tribunal may modify a final child support award on a showing of a material change of circumstances as provided by state law. A material change of circumstances shall be presumed if support as calculated under this chapter is more than 15 percent greater or less than the outstanding support order. An award may be modified to require cash medical support regardless of whether insurance is available to either parent if neither parent has purchased health insurance. In this subsection, support includes health insurance payments or cash medical support made under AS 25.28.040.

(b) A tribunal may not modify a child support arrearage retroactively, except as authorized by AS 25.27.166(d). A modification that is effective on or after the date that a motion for modification, or a notice of petition for modification by the child support services agency, is served on the opposing party is not considered a retroactive modification.

(c) The tribunal may find that a parent and a parent's assignee are precluded from collecting arrearages for support of a child that accumulated during a time period exceeding nine months for which the parent agreed or acquiesced to the obligor exercising primary custody of the child. A finding that preclusion is a defense must be based on clear and convincing evidence.

Sec. 25.28.080. Third-party custody. (a) When the state, or another third party entitled to child support, has custody of all children of a parent, the parent's support obligation to the third party is an amount equal to the adjusted annual income of the parent multiplied by the percentage specified in AS 25.28.010(b). If the third party has custody of some but not all children, the parent's support obligation to the third party is an amount equal to the adjusted annual income of the parent, multiplied by the percentage specified in AS 25.28.010(b) for the total number of the parent's children, multiplied by the number of the parent's children in third-party custody, divided by the total number of the parent's children. In this subsection, the number of

the parent's children includes only children of the parent who live with the parent, are substantially supported by the parent, or are in custody of the third party entitled to support.

(b) If, in addition to a support obligation to a third party, one or both parents retain primary or shared physical custody of at least one of their children, the support obligation between the parents is calculated under the other provisions of this chapter, without consideration of the third-party custodian or any children in the custody of the third-party custodian, except that the percentage in AS 25.28.010(b) must be adjusted pro rata for the number of children in the primary custody of a parent, or shared custody of the parents, compared to the total number of children. After that calculation is completed, any support owed may be offset with support owed to a third-party custodian under (a) of this section in order to minimize transactions.

Sec. 25.28.090. Support order forms. All court orders for payment or modification of child support shall be entered on a form developed by the administrative director of the court. A party may lodge a duplicate of the tribunal form produced by a laser printer or similar device. A device may also print, in a contrasting typestyle equivalent to that produced by a typewriter, text that otherwise would have been entered by a typewriter or word processor. A party or attorney who lodges a duplicate certifies by lodging the duplicate that it is identical to the current version of the court form.

Sec. 25.28.100. Dependent tax deduction. The court may allocate the dependent tax deduction for each child between the parties as is just and proper and in the child's best interests. The allocation must be consistent with AS 25.24.152 and federal law.

Sec. 25.28.300. Definitions. In this chapter,

(1) "child support" and "child support obligation" have the meaning given "duty of support" in AS 25.27.900;

(2) "divided custody" means that one parent has primary physical custody of one or more children of the relationship and the other parent has primary custody of one or more other children of the relationship, and the parents do not share physical custody of any of their children;

(3) "hybrid custody" means that at least one parent has primary physical custody of one or more children of the relationship, and the parents have shared physical custody of at least one child of the relationship;

(4) "primary physical custody" or "primary custody" means that a child resides with the other parent for a period, specified in the custody order, of less than 30 percent of the year;

(5) "shared physical custody" or "shared custody" means that a child resides with one parent for a period, specified in writing in the custody order, of at least 30 percent but not more than 70 percent of the year, regardless of the status of legal custody;

(6) "tribunal" means the superior court or the child support services agency created in AS 25.27.010.

*** Sec. 2.** AS 47.10.120(a) is amended to read:

(a) When a child in need of aid is committed under this chapter, the court or the child support services agency created in AS 25.27.010 shall, after giving the parent a reasonable opportunity to be heard, require that the parent pay to the department in a manner that the court or the child support services agency directs a sum to cover in full or in part the maintenance and care of the child. The support obligation shall be calculated under **AS 25.28** [RULE 90.3(i) OF THE ALASKA RULES OF CIVIL PROCEDURE].

*** Sec. 3.** AS 47.12.230(a) is amended to read:

(a) When a delinquent minor is committed under this chapter, the court or the child support services agency created in AS 25.27.010 shall, after giving the parent a reasonable opportunity to be heard, require that the parent pay to the department in a manner that the court or the child support services agency directs a sum to cover in full or in part the maintenance and care of the minor. The support obligation shall be calculated under **AS 25.28** [RULE 90.3(i) OF THE ALASKA RULES OF CIVIL PROCEDURE].

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

REPEAL OF COURT RULE. Rule 90.3, Alaska Rules of Civil Procedure, is repealed.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

NONAPPLICABILITY OF TWO-THIRDS VOTE REQUIREMENT. Because the rule repealed in sec. 4 of this Act is a substantive rule rather than a rule of practice or procedure, the repeal of the rule takes effect even if sec. 4 of this Act does not receive the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 134**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB134CS(HSS)-LAW-CIV-03-02-12
Title: An Act relating to child support awards; and repealing Rule 90.3, Alaska Rules of Civil Procedure.
Sponsor: Senator Kookesh
Requester: (S) Judiciary

Dept. Affected: Law
Appropriation: Civil
Allocation: Collections and Support
OMB Component Number: 2210

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services			2,660.9				
Travel			13.4				
Services			429.0				
Commodities			61.7				
Capital Outlay			12.1				
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**3,177.1**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1007	I/A Rcpts (Other)			3,177.1				
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**3,177.1**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time			1				
Temporary			19				

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Effective date starting FY 14.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 3/2/12 2:30 PM
Approved by: Michael C. Geraghty, Attorney General — Date: 3/2/2012
Department of Law

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 134

Analysis

SB 134 will establish Alaska child support guidelines in statute and repeal the court Civil Rule 90.3 child support guidelines. The bill changes child support calculation formulas from the current percentage approach that only takes into account the non-custodial parent's income to an income shares model that considers the income of both parents. Additionally, the bill increases the minimum support amount required of the non-custodial parent and decreases the percentage of time required for a finding of shared custody.

AS 25.24.170(b) and AS 25.27.190(e) consider the adoption, enactment or significant modification to the guidelines a material change of circumstance for the purpose of a modification of the order. This would allow custodial and non-custodial parents to request a modification of their existing order(s). Federal law, 45 CFR 303.8(e), requires the Child Support Services Division (CSSD) to complete modification requests within 180 days from receipt of the request. CSSD could lose significant federal funds if it cannot meet this requirement. CSSD estimates it is enforcing approximately 20,000 child support orders that would be eligible for modification. CSSD conservatively anticipates 10,000 modification requests will be submitted in the first six months, with about ½ of the requests on court orders. The Attorney General's Office, Collections & Support Unit, represents CSSD in court when the agency requests modification of a court-issued child support order. The Collections & Support Section currently processes about 700 modification requests a year with 3.5 attorneys. The anticipated increase in modification requests from 700 to 5,000 in one year will require non-permanent positions of 12.5 attorneys, 2 paralegals, and 5 support positions to meet the anticipated initial demand.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB134B**
Fiscal Note Number
() Publish Date

Identifier (file name) SB134-DOR-CSSD-03-06-12
Title An Act Relating to Child Support Awards
Sponsor Senator Kookesh
Requester (S) JUD

Dept. Affected Revenue
Appropriation Child Support Services
Allocation Child Support Services
OMB Component Number 111

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	502.8		1,508.5	353.5	353.5	353.5	353.5
Travel							
Services	85.0		4,507.6	10.8	10.8	10.8	10.8
Commodities	166.0						
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**753.8**	**0.0**	**6,016.1**	**364.3**	**364.3**	**364.3**	**364.3**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts	497.5		3,970.6	240.4	240.4	240.4	240.4
1003	GF Match	256.3		2,045.5	123.9	123.9	123.9	123.9
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**753.8**	**0.0**	**6,016.1**	**364.3**	**364.3**	**364.3**	**364.3**

POSITIONS							
Full-time	**5**		5	5	5	5	5
Part-time							
Temporary	**24**		24				

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated to show funding in FY13 budget for CSSD to hire and train staff prior to the bill's effective date.

Prepared by John Mallonee
Division Child Support Services
Approved by Alicia Egan, Legislative Liaison
Department of Revenue

Phone 269-6801
Date/Time 3/6/12 2:30pm
Date 3/6/2012

(Revised 1/17/2012 OMB)

Analysis

SB 134 will establish Alaska child support guidelines in statute and repeal the court Civil Rule 90.3 child support guidelines. The bill changes child support calculation formulas from the current percentage approach that only takes into account the non-custodial parent's income to an income shares model that considers the income of both parents. Additionally, the bill increases the minimum support amount required of the non-custodial parent and decreases the percentage of time required for a finding of shared custody.

AS 25.24.170(b) and AS 25.27.190(e) consider the adaption, enactment or significant modification to the guidelines a material change of circumstance for the purpose of a modification of the order. This would allow the custodial or non-custodial parents to request a modification of their existing order(s). 45 CFR 303.8(e) requires a modification to be completed 180 days from receipt of the request. Failure to meet this requirement could result in the loss of federal funds. There are approximately 20,000 child support orders that would be eligible for modification. The division conservatively anticipates 10,000 modification requests will be submitted in the first six months. The modification section currently completes an estimated 3,000 modifications/year with a staff of 14. The anticipated increase in modification requests and the increased time required to perform the calculations will require 24 non-permanent staff. The five permanent staff will be needed because of the additional work required to determine the awards under the income shares approach.

Every four years as required by 45 CFR 302.56(e) the state must review the guidelines and revise if appropriate. Currently this is done by the Supreme Court. If the guidelinse are placed in statute then another process would be required to satisfy this requirement.

The funding requested for FY 2013 will allow the Division to hire and train the required staff prior to effective date. This ensures that the Division can begin processing modification as soon as the changes become effective.

SB 135

<TARGET><BILL>SB 135</BILL><SUBJECT>SB 135</SUBJECT><COMM>SJUD27</COMM></TARGET>

RECEIVED
DEPARTMENT OF LAW
NOV 04 2011

In the Court of Appeals of the State of Alaska

Floyd Demientieff,	)	
	)	Court of Appeals No. **A-10874**
Appellant,	)	
v.	)	**Order**
	)	
State of Alaska,	)	
	)	
Appellee.	)	Date of Order: **11/4/11**
	)	

Trial Court Case # **4BE-07-00056CI**

Before: Coats, Chief Judge, and Mannheimer and Bolger, Judges.

The State seeks full-court reconsideration of a single-judge order that granted a non-routine extension of time to the Public Defender Agency to file their opening brief in this case. The challenged extension gives the Public Defender Agency a total of 406 days to file the brief — the original 30 days, plus extensions totaling 376 days.

The State asserts (correctly) that there are currently dozens of pending cases where this Court has granted the Public Defender Agency more than 300 days to file their opening brief. This Court notes that we have granted similarly lengthy extensions to the Office of Public Advocacy and to attorneys working under contract with the Office of Public Advocacy.

The State contends that, because this Court is granting such lengthy extensions, this Court has essentially abrogated the briefing time limits established in Appellate Rule 503.5, and has abandoned its duty to insure that appeals are decided in a timely fashion — thus violating the rights of crime victims and potentially prejudicing

MR → KMR
→ copy for me

the State's ability to re-assemble its case in the event that a defendant's appeal is successful and a re-trial is required.

The Clerk of the Appellate Courts, Marilyn May, recently circulated a report that contains a summary of briefing statistics drawn from all Court of Appeals cases that were closed during Fiscal Year 2011 — that is, all cases closed between July 1, 2010 and June 30, 2011.

This Court has examined the underlying data, and we have generated our own supplemental report that separately analyzes (1) the cases handled by the Public Defender Agency, (2) the cases handled by the Office of Public Advocacy, and (3) the cases handled by attorneys working under contract with OPA. This report provides the average length of extension granted in these three categories of cases, and it also tracks how many briefs were filed during Fiscal Year 2011 by each attorney working for, or under contract with, the two agencies.

These statistics bear out the State's assertions regarding the length of time it is taking to complete the briefing in criminal appeals. However, the statistics also show that the Public Defender Agency and the Office of Public Advocacy (if its contract attorneys are included) are each filing approximately a brief per week.

We agree with the State that the current level of appellate delay is not acceptable, but we do not think that it would be helpful to suddenly stop granting extensions of time to the defense bar, or to suddenly impose a new limit on the amount of extended time that will be granted in any particular case.

Accordingly:

1. The single-judge decision granting the extension of time in Demientieff's case is **AFFIRMED**, but

2. We hereby direct the Clerk of the Appellate Courts to promptly arrange a meeting between this Court and supervisory personnel of the Public Defender Agency,

the Office of Public Advocacy, and the Office of Special Prosecutions and Appeals to discuss strategies for reducing the amount of time it is taking to brief criminal appeals. We further direct the Clerk to promptly distribute a copy of this Court's supplemental statistical report to each of these three agencies.

Entered at the direction of the Court.

Clerk of the Appellate Courts

Beth Adams

Beth Adams, Chief Deputy Clerk

Enclosure

cc: Office of Public Advocacy

Distribution:

Tracey Wollenberg
Assistant Public Defender
900 W 5th Ave Ste 200
Anchorage AK 99501

Kenneth Rosenstein
OSPA
310 K St Ste 308
Anchorage AK 99501

Opening Briefs

AT Rep	# of Cases	Average Extension	Standard Deviation
PD	46	313.9	159.4
AT Rep	# of Cases	Avg Ext	Stnd Dev
PD K	1	363.0	0.0
AT Rep	# of Cases	Avg Ext	Stnd Dev
OPA	23	333.7	241.6
AT Rep	# of Cases	Avg Ext	Stnd Dev
OPA K	34	292.6	206.8
AT Rep	# of Cases	Avg Ext	Stnd Dev
Private	18	200.3	180.9
AT Rep	# of Cases	Avg Ext	Stnd Dev
pro se	10	92.1	80.0
AT Rep	# of Cases	Avg Ext	Stnd Dev
OSPA	4	90.8	28.3
Total Cases:	136		

Appellee's Briefs

AE Rep	# of Cases	Avg Ext	Stnd Dev
PD	4	86.5	15.7
AE Rep	# of Cases	Avg Ext	Stnd Dev
OPA	0	*N/A*	*N/A*
AE Rep	# of Cases	Avg Ext	Stnd Dev
OSPA	100	154.4	89.4

Public Defender Appellate Division:

AT Atty Name	# of Briefs
Allard	2
AT Atty Name	# of Briefs
Foote-Jones	2
AT Atty Name	# of Briefs
McFarland	5
AT Atty Name	# of Briefs
Moudy	6
AT Atty Name	# of Briefs
Q. Steiner	1
AT Atty Name	# of Briefs
Wollenberg	4

PD Trial Offices:

AT Atty Name	# of Briefs
Franklin	1

Total Briefs (Appellate & Trial Offices): 50

AT Atty Name	# of Briefs
Barr	4
AT Atty Name	# of Briefs
Garton	3
AT Atty Name	# of Briefs
Mock	4
AT Atty Name	# of Briefs
Reineke	12
AT Atty Name	# of Briefs
White	5
AT Atty Name	# of Briefs
Richard	1

Office of Public Advocacy:		Total Briefs:	23
AT Atty Name	# of Briefs	*AT Atty Name*	# of Briefs
Bair	8	Trimmer	9
AT Atty Name	# of Briefs	*AT Atty Name*	# of Briefs
Berens	1	Dickson	1
AT Atty Name	# of Briefs	*AT Atty Name*	# of Briefs
Glover	2	Griffin	1
AT Atty Name	# of Briefs		
McDannel	1		

OPA Contract Attorneys:		Total Briefs:	34
AT Atty Name	# of Briefs	*AT Atty Name*	# of Briefs
Allen	4	Angstman	1
AT Atty Name	# of Briefs	*AT Atty Name*	# of Briefs
Brown	1	Butler	1
AT Atty Name	# of Briefs	*AT Atty Name*	# of Briefs
Chaffin	1	Duffy	1
AT Atty Name	# of Briefs	AT Atty Name	# of Briefs
George	2	Graper	1
AT Atty Name	# of Briefs	AT Atty Name	# of Briefs
Gould	1	Hiebert	1
AT Atty Name	# of Briefs	AT Atty Name	# of Briefs
Kamai	1	Kerry	3
AT Atty Name	# of Briefs	AT Atty Name	# of Briefs
Libbey	1	Malin	4
AT Atty Name	# of Briefs	AT Atty Name	# of Briefs
Martinez	5	McCune	1
AT Atty Name	# of Briefs	AT Atty Name	# of Briefs
A. Steiner	2	Stroup	1
AT Atty Name	# of Briefs	AT Atty Name	# of Briefs
Torres	1	Wittenbrader	1

S1

(16) at the request of the victim, the right to be notified by the appropriate law enforcement agency or the prosecuting attorney of a request for a continuance that may substantially delay the date of trial, sentencing, including a proceeding before a three-judge panel under AS 12.55.175, or an appeal.

Lila Hobbs

From: karen.dynamic@gci.net on behalf of Karen Foster <karen.dynamic@gci.net>
Sent: Friday, January 27, 2012 7:38 AM
To: Lila Hobbs
Subject: Today's Hearing

The earlier email I sent had the wrong date for the new defense attorney. It should have been 2009 Can you please change it. Thanks,

Karen

State of Alaska v. Kenneth Dion

November, 2006	Kenneth Dion Identified	
September 15, 2008	First Trial Date	4 month delay
January 5th, 2009	Second Trial Date	4 month delay
May 11, 2009	Third Trial Date	4 month delay
March 23, 2010	New Defense attorney assigned	
April 19, 2010	Fourth Trial Date	One year delay
July 15, 2010	New Prosecutor assigned	
August 30, 2010	Fifth Trial Date	4 month delay
February 7th, 2011	Sixth Trial Date	6 month delay
May 10th, 2011	Went to Trial, Jury finally selected.	
June 15th, 2011	Dion convicted	
October 31st, 2011	Dion sentenced to 124 years	

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB135**
Fiscal Note Number
() Publish Date

Identifier (file name) SB135-DOA-OPA-1-27-12
Title Continuances in Criminal Trials; Victims
Sponsor Senators French and Dyson
Requester Senate Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Office of Public Advocacy
OMB Component Number 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Richard Allen, Director — Phone 907-269-3504
Division Office of Public Advocacy — Date/Time 01/27/2012 9:15 a.m.
Approved by John Cramer, Deputy Commissioner — Date 1/27/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB135
2012 LEGISLATIVE SESSION

Analysis

This bill amends AS 12.61.010(a) by requiring that the victim of a crime be notified of any request for a continuance or pending motions that may substantially delay the prosecution, and inform the court of the victim's position on these motions. This bill amends Rule 45 (d)(2) of the Alaska Rules of Criminal Procedure by adding language that requires the court to grant continuances only after consideration of the crime victim as provided in a new subsection (h) that this bill would also add to Rule 45. The new subsection (h) requires the court to consider the victim's position on motions to continue.

Courts currently consider the impact of delay on a victim's rights under the state constitution. The Office of Public Advocacy believes that the victim's concerns are already considered by parties in trial cases as a result of constitutional requirements concerning crime victims. The compulsory language in the amendment to Rule 45 may have the collateral effect of causing additional hearings and delay if the victim cannot be located. This will be impacted by how the courts interpret "substantial delay."

Although this bill may increase hearings and delay, the Office of Public Advocacy (OPA) cannot reliably predict whether this will occur or what the fiscal impact will be. Therefore, the Agency submits an indeterminate fiscal note.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Summary of Changes SB 135, Version M

- Section 2, lines 12-15 – incorporates a definition of "substantially delay"
- Section 3, line 24 – removes the word "only"
- Section 3, line 25 – "if known" was added to provide for instances where the victim cannot be contacted or does not wish to participate
- Section 4, line 4 – "if known" was added again to account for the aforementioned circumstances

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

TO: Leg Legal

FROM: Cindy Smith

RE: CS for SB 135 0966\A

Please draft a committee substitute for SB 135 Continuances in Criminal Trials, making the following changes:

On page 4 at line 11, after the word motion, add language to this effect:

"in this section a substantial delay means, for a misdemeanor, any delay of one month or longer, for a felony, any delay of two months or longer, and for an appeal, any delay of six months or longer."

On page 4, at lines 20, omit the word "only"

On page 4 at line 21 insert the words "if known" after the word "victim" (so that it reads ..interests if the crime victim, if known, ..."

On page 4 at line 31, insert the words "if known" after the word "motion"

Any this

(5) inform the victim of a pending motion that may delay the prosecution for a substantial period and inform the court of the victim's position on the motion; in this paragraph, "substantial period" means, for a misdemeanor, any delay of one month or longer, and for a felony, any delay of two months or longer.

1 year (?)

30 / and to 45

6 - 1yr. appeals

27-LS0966\M
Gardner
2/3/12

CS FOR SENATE BILL NO. 135(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS FRENCH, Dyson

A BILL

FOR AN ACT ENTITLED

"An Act relating to the rights of crime victims; relating to the duties of prosecuting attorneys; and amending Rule 45, Alaska Rules of Criminal Procedure."

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

*** Section 1.** AS 12.61.010(a) is amended to read:

(a) Victims of crimes have the following rights:

(1) the right to be present during any proceeding in

(A) the prosecution and sentencing of a defendant if the defendant has the right to be present, including being present during testimony even if the victim is likely to be called as a witness;

(B) the adjudication of a minor as provided under AS 47.12.110;

(2) the right to be notified by the appropriate law enforcement agency or the prosecuting attorney of **any request for a continuance that may substantially delay the prosecution and of** the date of trial, sentencing, including a proceeding

New Text Underlined [DELETED TEXT BRACKETED]

before a three-judge panel under AS 12.55.175, an appeal, and any hearing in which the defendant's release from custody is considered;

(3) the right to be notified that a sentencing hearing or a court proceeding to which the victim has been subpoenaed will not occur as scheduled;

(4) the right to receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts and to be provided with information as to the protection available;

(5) the right to be notified of the procedure to be followed to apply for and receive any compensation under AS 18.67;

(6) at the request of the prosecution or a law enforcement agency, the right to cooperate with the criminal justice process without loss of pay and other employee benefits except as authorized by AS 12.61.017 and without interference in any form by the employer of the victim of crime;

(7) the right to obtain access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having medical assistance administered; however, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;

(8) the right to make a written or oral statement for use in preparation of the presentence report of a felony defendant;

(9) the right to appear personally at the defendant's sentencing hearing to present a written statement and to give sworn testimony or an unsworn oral presentation;

(10) the right to be informed by the prosecuting attorney, at any time after the defendant's conviction, about the complete record of the defendant's convictions;

(11) the right to notice under AS 12.47.095 concerning the status of the defendant found not guilty by reason of insanity;

(12) the right to notice under AS 33.16.087 of a hearing concerning special medical parole of the defendant;

(13) the right to notice under AS 33.16.120 of a hearing to consider or review discretionary parole of the defendant;

(14) the right to notice under AS 33.30.013 of the release or escape of the defendant; and

(15) the right to be notified orally and in writing of and receive information about the office of victims' rights from the law enforcement officer initially investigating the crime and from the prosecuting attorney assigned to the offense; at a minimum, the information provided must include the address, telephone number, and Internet address of the office of victims' rights; this paragraph

(A) applies only to victims of felonies and to victims of class A misdemeanors if the class A misdemeanor is a crime involving domestic violence or a crime against a person under AS 11.41; if the victim is an unemancipated minor, the law enforcement officer and the prosecuting attorney shall also provide the notice required by this paragraph to the parent or guardian of the minor;

(B) is satisfied if, at the time of initial contact with the crime victim, the investigating officer and prosecuting attorney each give each crime victim a brochure or other written material prepared by the office of victims' rights and provided to law enforcement agencies for that purpose.

*** Sec. 2.** AS 12.61.015(a) is amended to read:

(a) If a victim of a felony or a crime involving domestic violence requests, the prosecuting attorney shall make a reasonable effort to

(1) confer with the person against whom the offense has been perpetrated about that person's testimony before the defendant's trial;

(2) in a manner reasonably calculated to give prompt actual notice, notify the victim

(A) of the defendant's conviction and the crimes of which the defendant was convicted;

(B) of the victim's right in a case that is a felony to make a written or oral statement for use in preparation of the defendant's presentence report, and of the victim's right to appear personally at the defendant's

sentencing hearing to present a written statement and to give sworn testimony or an unsworn oral presentation;

(C) of the address and telephone number of the office that will prepare the presentence report; and

(D) of the time and place of the sentencing proceeding;

(3) notify the victim in writing of the final disposition of the case within 30 days after final disposition of the case;

(4) confer with the victim of a crime involving domestic violence concerning a proposed plea agreement before entering into an agreement**;**

(5) inform the victim of a pending motion that may substantially delay the prosecution and inform the court of the victim's position on the motion; in this paragraph a "substantial delay" is

(A) for a misdemeanor, a delay of one month or longer;

(B) for a felony, a delay of two months or longer; and

(C) for an appeal, a delay of six months or longer.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(d)(2), Alaska Rules of Criminal Procedure, is amended to read:

(2) The period of delay resulting from an adjournment or continuance granted at the timely request or with the consent of the defendant and the defendant's counsel. The court shall grant such a continuance only if it is satisfied that the postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal offenses**, and after consideration of the interests of the crime victim, if known, as provided in (h) of this rule**. A defendant without counsel shall not be deemed to have consented to a continuance unless the defendant has been advised by the court of the right to a speedy trial under this rule and of the effect of consent.

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

DIRECT COURT RULE AMENDMENT. Rule 45, Alaska Rules of Criminal

Procedure, is amended by adding a new subsection to read:

(h) **Victim's Interest in Ruling on Motion to Continue.** Before ruling on a motion for a continuance in a case involving a victim, as defined in AS 12.55.185, the court shall consider the victim's position, if known, on the motion to continue and the effect of a continuance on the victim.

Senator Hollis French

Capitol Room 417
465-3892
465-6595 fax

MEMORANDUM

Date: January 27, 2012

To: Senate Judiciary Committee

From: Senator Hollis French

RE: Witnesses for SB 135

The following individuals will testify (online and in person) on Senate Bill 135 during the bill hearing on Friday, January 27th:

- Susan Sullivan, Executive Director, Victims for Justice
- Victor Kester, Executive Director, Office of Victims' Rights
- Nancy Haag, Executive Director, Standing Together Against Rape
- Lisa Mariotti, Policy Director, AK Network on Domestic Violence & Sexual Assault
- Karen Foster, Mother of Bonnie Craig and Founder of Alaska Citizens for Justice

If you have any questions, please contact Lila Hobbs in my office at 907-465-3892.

Alaska State Legislature

Senator Hollis French

SPONSOR STATEMENT

SB 135 – Continuances in Criminal Cases

Article I, section 24 of our constitution is entitled "Rights of Crime Victims." The amendment passed by an overwhelming majority when it was placed before Alaskan voters in 1994. Included in its eight specific provisions is the promise that crime victims will have "the right to timely disposition of the case following the arrest of the accused."

In the eighteen years since the amendment passed, the promise of a timely disposition of the case has often not been kept. Moreover, the breaches of that promise frequently occur in the most serious of cases. Delays in the trial of a case, known as continuances, can go on for years.

SB 135 requires prosecutors and judges to consider a victim's right to a timely disposition of their case when deciding whether to allow continuances. This legislation will also ensure that victims are notified of any requests or motions that could substantially delay speedy prosecution of their case.

Repeated delays prevent victims from reaching emotional, physical, and financial closure from the trauma that they suffered as a result of the crime perpetrated against them. Delays in prosecution can also affect the availability of witnesses, a victim's ability to recall important details, and it can create other impediments to a successful trial.

Currently, Alaska is one of 27 states with constitutional provisions to protect a victim's rights; however, there is no statute in place to implement it. With this important piece of legislation, Alaska will join 15 other states that have enacted a statutory provision recognizing this crucial right.

SB 135 will guarantee a victim's right to a timely resolution in the court system. I urge your support of this legislation.

LEGAL SERVICES

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

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

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

MEMORANDUM December 14, 2011

SUBJECT: Sectional Analaysis of 27-LS0966\A

TO: Senator Hollis French
Attn: Lila Hobbs

FROM: Doug Gardner
Director

You requested a sectional analysis of the above referenced bill. Preliminarily, please note that a sectional analysis should not be considered an authoritative interpretation of a bill -- the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it relates to a particular set of circumstances, please advise.

Overview of the Bill

As an overview, the bill has the primary purpose of amending statute and court rule to provide a right to victims of crime defined by AS 12.55.185, to notice from the prosecuting attorney of any request for a continuance that will substantially delay trial. The bill also provides that the prosecuting attorney must inform the court of the victim's position on the motion. The bill requires that prior to ruling on the motion, the court must consider the victim's position on a motion to continue that may substantially delay the prosecution. The bill provides that the court must consider the effect such a continuance will have on the victim. With that overview, a brief sectional analysis follows.

Section one of the bill amends AS 12.61.010(a)(2), by adding a provision to the enumerated rights of crime victims providng that a victim has a right to be notified by the appropriate law enforcement agency, or the prosecuting attorney, of any request for a continuance that may substantially delay the prosecution

Section two of the bill amends AS 12.61.015(a), the duties of a prosecuting attorney, to include the duty to inform the victim, as defined in AS 12.55.185, of a pending motion that may substantially delay the prosecution, and inform the court of the victim's position on the motion.

Section three of the bill amends Criminal Rule 45(d)(2), which is the criminal rule that provides the court with the authority to grant a continuance in a criminal case. This section adds a provision that requires that a court, when considering a motion to grant a continuance, may do so only after considering the victim's interest in a ruling by the court

on the motion to continue. This section references the new section of Criminal Rule 45 added in section four of the bill.

Section four of the bill amends Criminal Rule 45, by adding a new section (h), entitled "Victim's Interest on Ruling on Motion to Continue." Section (h) provides that before ruling on a motion to continue in a case involving a victim of crime as defined in AS 12.55.185, that the court must consider the victim's position on the motion to continue, and the effect that a continuance will have on the victim.

DDG:ljw
11-458.ljw

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 135**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB135-LAW-CRIM-01-24-12
Title: An Act relating to the rights of crime victims, relating to the duties of prosecuting attorneys; amending Rule 45.
Sponsor: Senators French
Requester: (S) Judiciary

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 1/24/12 9:00AM
Approved by: Richard Svobodny, Acting Attorney General — Date: 1/24/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 135

Analysis

SB 135 provides that a victim has the right to be notified of a request for a continuance that may substantially delay the prosecution of a case, including the trial, sentencing, appeal, and any hearing addressing the defendant's release from custody. It requires the prosecution to inform the victim of any pending motion that may substantially delay the prosecution and to inform the court of the victim's position on the motion. The term "substantially" is not defined.

It could be argued that the prosecution and the courts are already considering the victim's position before granting a motion to continue a case and that the additional requirements in the bill are unnecessary. To the extent that the position of victims are not already being considered by the court, this bill could add to the cost of a prosecution.

For example **Section 1** requires notice of a request for a continuance and applies to both felonies and misdemeanors. In 2011 the state prosecuted 7,561 felonies and 22, 721 misdemeanors. Additional notification could require significant staff time.

Therefore the fiscal impact cannot be accurately determined.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **SB135**
Fiscal Note Number:
Publish Date:

Identifier (file name): SB135-DOC-OC-02-09-12
Title: "An Act relating to the rights of crime victims; relating to the duties of prosecuting attorneys..."
Sponsor: Senators French and Dyson
Requester: Senate Judiciary

Dept. Affected: DOC
Appropriation: Administration and Support
Allocation: Office of the Commissioner
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by: Leslie Houston, Director — Phone: 907-465-3339
Division: Department of Corrections - Administrative Services — Date/Time: 02/09/12 10:00AM
Approved by: Joseph D. Schmidt, Commissioner — Date: 2/9/2012
Department of Corrections

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB135

Analysis

This legislation requires prosecutors and judges to consider a victim's right to a timely disposition of their case when deciding whether to allow continuances. This legislation also ensures the victims are notified of any requests or motions that could substantially delay prosecution of their case. Passage of this legislation poses no fiscal impact on DOC.

STATE OF ALASKA
OFFICE OF VICTIMS' RIGHTS

January 17, 2012

The Honorable Hollis French, Senator
State of Alaska Senate
Chair, Judiciary Committee
Alaska State Legislature
State Capital
Juneau, Alaska 99801

Re: Senate Bill 135, Continuances in Criminal Trials; Victims

Dear Senator French:

I write in support of Senate Bill 135, Continuances in Criminal Trials; Victims.

The proposed legislation strengthens notification standards for informing crime victims of any request for a continuance that may substantially delay the prosecution, the date of trial, sentencing, an appeal, and any hearing which the defendant's release from custody is considered.

The amendments to Alaska Criminal Rule 45 strengthen a crime victim's right to address the court, and for the court to consider the crime victim's perspective, before issuing an order based on a motion for continuance.

Both components to the proposed legislation fortify a crime victim's statutory rights and Alaska Constitutional rights to be "treated with dignity, respect, and fairness" and "to timely disposition of the case..." (Alaska Constitution, Article 1, Section 24). The proposed legislation also stands to amplify the crime victim's voice before the court and other criminal justice agencies regarding delay in the criminal justice process.

I believe strongly that the administration of justice is improved when a crime victim's voice is heard and considered within the Alaska criminal justice system.

1007 WEST 3RD AVENUE, SUITE 205 • ANCHORAGE, ALASKA 99501-1936
TELEPHONE: 1-907-272-2620 • FACSIMILE: 1-907-272-2640

In sum, the proposed legislation wisely aligns with the Alaska Constitutional rights of a crime victim - especially with regard to the timely disposition of a criminal case.

I stand ready to testify in support of this legislation.

Respectfully submitted,

D. Victor Kester
Executive Director

Dear Lawmakers,

I am writing to encourage your support for Senator Hollis French's SB 135 dealing with a victim's constitutional right to "timely disposition of their case."

As many of you may recall, my daughter, Bonnie Craig, was murdered in September 1994. Her killer, Kenneth Dion was finally sentenced October 31st, 2011. For 17 years our family, friends and the community waited for justice. Our constitutional right to "timely disposition of our case" was violated again and again. I vowed, when thrown into this horror story, that I would make sure the things that went wrong in our case would be changed for others.

Protecting a victim's right to "timely disposition" is the most important change that needs to come out of this incredible tragedy. It was the most egregious violation that our family had to endure, and that violation was at the hands of the State of Alaska, not the criminal. I need your help to ensure all future victims will have their constitutional rights protected in Alaska. Let's balance the scales of justice and honor the victim's right to "timely disposition."

Do not be mistaken. It is not okay to think "At least the criminal is behind bars and can't hurt anyone else." The pain inflicted on the victims is inexcusable and the prosecution of the case against the defendant weakens daily. Delays are a tactical advantage for defense attorneys to accommodate defense attorneys, rarely the defendant.

Kenneth Dion was identified November 2006. From the time he was identified our family was basically placed under a "gag order." Nothing could be said to the press, our friends, or the community. Our incredible grief - the wounds being ripped wide open, bringing us back to the day we were notified of Bonnie's death - were to be muzzled, and kept deep within us. We weren't allowed to share the news, our private trauma, our personal hell, for four months. As a family, we tried to continue our life as if nothing was happening, pretending this incredible burden and stress didn't exist. It was tearing us apart, eating at the very core of our existence, like a cancer. It destroyed relationships and financially ruined me. It affected our health and my parenting abilities. It could, and can, destroy a whole family.

Finally, May 1st, 2007 the news was released. Although we talked with the press and could finally share the information with friends, the gag was, once again, placed on our family members to avoid all contact with media. The threat of a "change of

venue" is not something a victim's family can take lightly. Until a jury is selected, avoiding any media coverage is critical. Our jury was selected more than 4 years later. During that time it became abundantly clear that the defense attorney and the defendant hold all the power and they call all the shots. Victims can only sit back and wait without complaining.

I know that you will never be able to even imagine the pain and suffering a parent, a sister and brothers goes through while awaiting a trial. Our pain and stress and fear was multiplied ten-fold with the memories of Joshua Wade being acquitted. We knew things could go wrong, evidence could get lost, a technicality could cause a mistrial, investigators and witnesses could die or be lost. We know memories fade. We know each day something could come up that could make it impossible to prosecute the man who brutally raped and murdered Bonnie. Our life is in a limbo, teetering on insanity. It is beyond comprehension. Yet, we try to continue our life with a new kind of normalcy.

Our first trial date was set for September, 2008. Please keep in mind that the killer was identified November, 2006. I wept when Judge Patrick MMcKay set the date. It was like having your guts ripped out of your body. He justified it by saying it would give both the prosecution and the defense plenty of time to prepare and that there would be absolutely no reason for any continuance. He vowed that he wanted to make sure both sides would be prepared, so we were going to have pretrial conferences to avoid any surprises or complications from arising. And we did. By the time we got to trial we had 45 pre-trial conferences, status and motion hearings. The judges, both Judge McKay and Judge Jack Smith were trying to make sure the defense was getting all they needed and getting ready for trial. They both failed. If the defense asks for anything, the judge, in fear of an appeal, will always grant the defense more time, even if it meant losing Pat Gullufson, our prosecutor of 3 years who had to retire for medical reasons. (July 15, 2010 a new prosecutor, Paul Miovas, took the case over. He successfully handled the case in less than 10 months.)

More than once, Lee De Grazia, the first public defender, misled the Judge. We all knew it and yet he never called her on it. One month before the trial was to start she claimed she fired her "DNA Expert" and would need more time. We all sat there amazed and wondering if she was lying. Had she even hired one yet? She doesn't need to answer to anyone. There was no accountability She made a mockery of the whole system. When the case was finally handed over to Office of Public Advocacy defense attorney Andrew Lambert (03/23/09) he told Judge McKay that De Grazia had done virtually nothing on the case and the judge

responded, "I was afraid of that." 18 months had been wasted on a totally incompetent defense attorney.
Make no mistake, the delays are not about affording the defendant a fair trial, nor protecting the defendant's rights. They are for the benefit of, more times than not, the defense attorney's schedule and needs. The litigation of a case is dictated by the personal life of the defense attorney. Timely disposition is about case management and having efficient and effective counsel. It is about prioritizing cases that have been lingering on for the benefit of the defense attorney's schedules. You can't imagine how disheartening it is to hear your case is going to be delayed, yet again, for 4-5 months because the defense attorney wants to go on their second, one month vacation of the year and he needs about a week to do a divorce case for a buddy of his and he is going to visit some schools for his daughter. Why can't co-counsel take over?

If a builder is building a home he can't tell the client he is going away for a month on vacation and will need 3-4 more months. In just about any profession a project must be completed before those involved can decide to take time off.
If you were diagnosed with cancer and the doctor goes for vacation for a month you have the opportunity to use another doctor. Victims have no choice, but to sit and wait. Prosecutors can't request that we use another defense attorney or that co-counsel handle the scheduled hearing, nor can the judge tell a defense attorney they will need to hold off on their vacation.

Below, I have listed each trial date that was set. I can never describe the sickening feeling a family feels when you are told, once again, that the trial date will be changed. You feel like you are going to vomit. Again, it's like your guts are being ripped out of you. In many cases I was on the verge of tears, knowing we would be given no consideration. And, it is always incredulous reasoning, something that you think may require an extra week or two, delays the trial by 4 months or more.

Preparing for each pretrial hearing is mentally exhausting. You have difficulty functioning and sleeping in fear of what the defense is going to do each time. The tension and anxiety are overwhelming. Getting to court is difficult. We had 45 pretrial hearings. Please consider what that does to families. As a victim, you can't plan life too far in advance; you can't start to rebuild your life.

Refusal to deal with "timely disposition" is a refusal to address the inefficiencies in our justice system. and allowing the "justice system" to re-victimize the victims. Please, support Senator French's SB 135 to honor victim's constitutional right to

"timely disposition of their case." Show the victims the respect they deserve and stop the re-victimization of the victims.

Sincerely yours,

Karen Foster

Karen Foster

November, 2006	Defendant Identified	
September 15, 2008	First Trial Date	4 month delay
January 5th, 2009	Second Trial Date	4 month delay
May 11, 2009	Third Trial Date	4 month delay
April 19, 2010	Fourth Trial Date	One year delay
August 30, 2010	Fifth Trial Date	4 month delay
February 7th, 2011	Sixth Trial Date	6 month delay
May 10th, 2011	Went to Trial, Jury finally selected.	

January 24, 2012

The Honorable Hollis French, Senator
Chair, Senate Judiciary Committee
Alaska State Legislature, State Capitol
Juneau, Alaska 99801

RE: Senate Bill 135, Continuances in Criminal Trials; Victims

Dear Senator French:

On behalf of the Board of Directors of Victims for Justice, I am writing to support Senate Bill 135.

Time and time again, we see continuances provided to defendants in criminal cases for reasons that seem insufficient and sometimes disingenuous, with absolutely no consideration given to the challenges this presents to victims in the case.

We have supported victims of violent crimes, and the surviving family members of homicide victims, in cases where so many continuances have been granted that they caused the trial to be delayed more than a decade. This length of delay can work to the benefit of the defendant, when witnesses die or leave the state, memories fade, prosecutors change over and over and it becomes difficult or impossible to win a conviction. And these delays work to the serious disadvantage of victims who only want to see justice done, and to society in general.

We have known victims to travel hundreds or thousands of miles, and incur great expense and inconvenience so that they may exercise their right to attend a trial or hearing, only to have the trial or hearing continued with absolutely no consideration given as to how this impacts the victim.

We recognize that courts want to extend the benefit of the doubt to defendants, who, after all, are the ones whose liberty is at stake. However, we feel the courts often fail to take into consideration the rights afforded by our state Constitution to victims in these situations. Senate Bill 135 puts the victim in the picture, and supports the judge who considers the victim when deciding whether to grant a continuance.

This bill is a very modest change to existing statutes and court rules. It simply describes a means to implement the requirements of our state Constitution and statutes with regard to victims. However, in a very important way, this bill brings balance to our justice system.

The Board of Directors of Victims for Justice strongly support SB 135.

Regards,

Susan Sullivan

Susan Sullivan
Executive Director

1057 West Fireweed Lane, Suite 101 • Anchorage, AK 99503 • 907-278-0977 • Toll Free 1-888-835-1213 • Fax 907-258-0740 • www.victimsforjustice.org

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www.andvsa.org

ANDVSA
Alaska Network on Domestic Violence & Sexual Assault

Pro Bono Office
PO Box 6631
Sitka, Alaska 99835
Phone: (907) 747-7545
Fax: (907)747-7547

January 25, 2012

Honorable Senator Hollis French
State Capitol, Room 417
Juneau, Alaska 99801

Re: Senate Bill 135, Right to a Timely Disposition

Dear Senator French:

Thank you so much for introducing this very important bill. The Alaska Network on Domestic Violence and Sexual Assault strongly supports Senate Bill 135. It is our understanding that this bill will provide a victim of crime, including domestic violence and sexual assault crime victims, a notice from law enforcement or prosecution when there will be a request for a continuance that would substantially delay a prosecution. All too often in Alaska victims have been disappointed in the process, procedure and outcome of their case. This bill will provide for consideration of the victim's wishes, the impact that continual delays will have on a victim of crime, and provide the victim with information of what to expect or what not to expect, in the nearer future.

Our eighteen member victim service agencies throughout the state witness daily the impact these delays have on the people they serve. Time and time again, our advocates appear in court with victims of both domestic violence and sexual assault, only to have their courage and hopes dashed by yet another delay. It has become a 'tactic' which, when employed, disheartens the victim, decreases their sense of safety and decreases their faith in the criminal justice system and the State of Alaska. Hopefully, this bill will strike a balance between the Constitutional right to a speedy trial for both defendants and victims.

Sincerely,

Peggy Brown
Executive Director

cc: Lisa Mariotti, Policy Director

Standing Together Against Rape

Crisis Intervention | Advocacy | Education | Prevention

January 20, 2012

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801

Re: Senate Bill 135, Continuances in Criminal Cases

Dear Senator French:

Standing Together Against Rape (STAR) strongly supports any bill that affords a victim of crime the opportunity to have their voice and concerns heard by the justice system. Senate Bill 135 appears to strengthen "the right to a timely disposition of the case following the arrest of the accused" as stated in the Alaska Constitution.

Crime victims, in particular, victims of sexual assault feel a tremendous amount of anxiety when contemplating facing the person who assaulted them in court. The anxiety builds, creating sleepless nights and increased reliance on coping skills. The day arrives, and the trail is continued. This pattern can be repeated over and over and over again. If the offender is incarcerated the victim is afraid they will be released. If the offender is not incarcerated the victim feels they must continue watching over their shoulder at the market, the department store, the movies, etc. The ability of the victim to move about freely may be inhibited.

While I believe it is not the intent of prosecution to re-victimize crime victims, repeated continuances often do. At the same time STAR recognizes the need for the prosecution to put forth a strong case, to increase the possibility of conviction, to hear defense requests and to lessen the likelihood of appeal. Hopefully this bill will allow for a balance to be struck between the two.

Respectfully submitted,

Standing Together Against Rape
Nancy A Haag, MSW
Executive Director

SB 138

<TARGET><BILL>SB 138</BILL><SUBJECT>SB 138</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Session

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Interim

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Senator_Bill_Wielechowski@legis.state.ak.us

Chair
State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Administrative Regulation Review

SENATOR BILL WIELECHOWSKI

Protecting Alaskans From Unethical Telephone Billing Practices
SPONSOR STATEMENT

Senate Bill 138 would prohibit the practice of third-party telephone bill cramming in the state of Alaska. Cramming is the practice of third-party businesses charging customers on their telephone bills without properly obtaining prior authorization. The charges are included in monthly telephone bills, and the payments are relayed from the telecommunications provider to the third-party company.

Unlike normal businesses where a customer agrees to pay for services and is billed directly from the company, cramming charges consumers through an unlikely mechanism for unauthorized services. Customers do not expect to pay for groceries at the airport or gasoline at a restaurant, and customers expect the same treatment for monthly telephone bills. SB 138 would make sure consumers get what they expect, telephone bills that only contain charges related to telecommunication services. Cramming is a multi-billion dollar industry in the United States and occurs in Alaska on a smaller scale. This bill would stop third party telephone bill cramming in Alaska in its infancy and keep more money in consumer's pockets to spend on legitimate goods and services.

In the absence of congressional action, Vermont enacted popular legislation in 2011 to ban cramming. The State of Alaska has regulatory authority over landlines and wireless service providers in rural Alaska that are carriers of last resort, so this bill would target cramming as it relates to those services.

I ask that you support SB 138 to protect Alaska consumers from this deceptive and unethical practice.

ALASKA STATE LEGISLATURE

Session

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Senator_Bill_Wielechowski@legis.state.ak.us

Chair
State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Administrative Regulation Review

SENATOR BILL WIELECHOWSKI

MEMORANDUM

DATE: 23 February 2012

TO: Senator Egan

FROM: Senator Wielechowski PW

SUBJ: Changes in CS to SB 138

Below you will find a description of the changes made to SB 138. These changes are a combination of advice from the Attorney General's office and suggestions from Billing Services Group (BSG).

- In section 1, the definition for "telecommunications carrier" has been limited to a single definition. Previously, this definition captured "those who were eligible for universal service fund." This change was made because previous language captured wireless carriers, which is not the intent of SB 138.
- In section 1, subsection d was moved from section 3 and placed in this section. This was done because the RCA's jurisdiction is defined by statutes 42.05. Previously, the RCA was given regulatory authority by placing section 1, subsection d in section 3. Sections 2-4, though, are written into consumer protection statutes, beginning with 45.50.
- In section 3, subsection c, the language of the exceptions was cleaned up on advice from the attorney at the RCA. The previous language was redundant.
- In section 3, subsection c, part 4, (A) – suggestions by BSG to clarify how express authorization is obtained and verified.
- Section 3, subsection d, defines "billing agent" and "express authorization"
- Section 3, subsection d, part 3 makes the definition of "telecommunications carrier" inclusive of landline telephone bills only. Previously, the definitions captured wireless carriers.

CS FOR SENATE BILL NO. 138(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS WIELECHOWSKI, DAVIS, AND EGAN, Ellis, Thomas

A BILL

FOR AN ACT ENTITLED

"An Act relating to the inclusion of the charges of a vendor of goods or services on the bills of certain telecommunications carriers; and adding an unlawful act to the Alaska Unfair Trade Practices and Consumer Protection Act."

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

* **Section 1.** AS 42.05 is amended by adding a new section to article 8 to read:

Sec. 42.05.715. Telecommunications carrier bills; disclosures and contested charges. (a) A telecommunications carrier shall clearly identify in separate sections of a customer's bill

(1) charges by each person or billing agent that generates a charge on the bill; and

(2) the information provided to the telecommunications carrier under (b) of this section.

(b) A person or billing agent may not charge customers of a telecommunications carrier on the carrier's bill for a product or service unless the

person or billing agent provides to the telecommunications carrier the following information:

(1) the amount charged for each product or service, separately identifying taxes or surcharges;

(2) a clear and concise description of the product or service that is the basis of the charge;

(3) the name of the entity providing the product or service or otherwise generating the charge; and

(4) a toll-free telephone number or other no-cost means of contacting the entity generating the charge to resolve a dispute regarding the charge.

(c) A telecommunications carrier may not discontinue services to a customer based on the customer's failure to pay a charge of another person or billing agent appearing on the telecommunications carrier's bill, when the customer has contested the charge using the contact information provided under (b) of this section and orally or electronically informed the telecommunications carrier of the reason for nonpayment.

(d) A telecommunications carrier may recover from a person or billing agent reasonable costs incurred in implementing billing changes or otherwise complying with this section.

(e) The commission may adopt regulations to carry out the provisions of this section.

(f) In this section,

(1) "billing agent" has the meaning given in AS 45.50.476;

(2) "telecommunications carrier" means a telecommunications utility required to be certificated by or registered with the Regulatory Commission of Alaska.

* **Sec. 2.** AS 45.50.471(b) is amended by adding a new paragraph to read:

(58) violating AS 45.50.476 (charges billed by telecommunications carriers).

* **Sec. 3.** AS 45.50 is amended by adding a new section to read:

Sec. 45.50.476. Charges billed by telecommunications carriers. (a) Except as provided in (c) of this section, a person or billing agent may not bill charges for

goods or services on a customer's telephone bill from a telecommunications carrier.

(b) A person or billing agent may not induce a telecommunications carrier, directly or through an intermediary, to bill a customer for goods or services of a vendor unless the billing is permitted under (c) of this section.

(c) This section does not apply to an itemized billing in compliance with AS 42.05.715 for

(1) the sale of goods or services governed by an effective tariff of

(A) a public utility operating under a certificate of public convenience and necessity issued by the Regulatory Commission of Alaska; or

(B) a carrier operating under a certificate, license, or authorization issued by the Federal Communications Commission;

(2) direct-dial or dial-around services initiated from the customer's telephone;

(3) operator-assisted telephone calls, collect calls, or telephone services provided to facilitate communications to or from inmates in a correctional center; or

(4) goods or services for which the person or billing agent has provided the telecommunications carrier with

(A) the following:

(i) an electronic letter with the consumer's express authorization of the charge;

(ii) proof that a written confirmation of the charge was provided to the consumer; and

(iii) the consumer's birthdate or the last four digits of the consumer's social security number; or

(B) independent third-party verification of the customer's express authorization.

(d) Telecommunications carriers have no duty to verify independently the accuracy of information received from a person or billing agent under this section.

(e) In this section,

(1) "billing agent" means a person or entity that aggregates consumer

billings or serves as a clearinghouse for aggregate billings and submits charges for goods or services to the billing telecommunications carrier on behalf of itself or a vendor;

(2) "express authorization" means

(A) a customer agreement to be billed for the charges in a signed, written document in paper, electronic, or digital form; or

(B) oral agreement to be billed for the charges after the customer's identity has been verified by an independent third-party verification company using unique identifying information;

(3) "telecommunications carrier" means a telecommunications utility required to be certificated by or registered with the Regulatory Commission of Alaska.

*** Sec. 4.** AS 45.50.481(a) is amended to read:

(a) Nothing in AS 45.50.471 - 45.50.561 applies to

(1) an act or transaction regulated under laws administered by the state, by a regulatory board or commission except as provided by AS 45.50.471(b)(27), [AND] (30), **and (58),** or officer acting under statutory authority of the state or of the United States, unless the law regulating the act or transaction does not prohibit the practices declared unlawful in AS 45.50.471;

(2) an act done by the publisher, owner, agent, or employee of a newspaper, periodical, or radio or television station in the publication or dissemination of an advertisement, when the owner, agent, or employee did not have knowledge of the false, misleading, or deceptive character of the advertisement or did not have a direct financial interest in the sale or distribution of the advertised product or service;

(3) an act or transaction regulated under AS 21.36 or AS 06.05 or a regulation adopted under the authority of those chapters.

27-LS1002\U
Kirsch
3/28/12

CS FOR SENATE BILL NO. 138( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS WIELECHOWSKI, DAVIS, AND EGAN, Ellis, Thomas

A BILL

FOR AN ACT ENTITLED

"An Act relating to the inclusion of the charges of a vendor of goods or services on the bills of certain telecommunications carriers; and adding an unlawful act to the Alaska Unfair Trade Practices and Consumer Protection Act."

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

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Sec. 42.05.715. Telecommunications carrier bills; disclosures and contested charges. (a) A telecommunications carrier shall clearly identify in separate sections of a customer's bill

(1) charges by each person or billing agent that generates a charge on the bill; and

(2) the information provided to the telecommunications carrier under (b) of this section.

(b) A person or billing agent may not charge customers of a telecommunications carrier on the carrier's bill for a product or service unless the

person or billing agent provides to the telecommunications carrier the following information:

(1) the amount charged for each product or service, separately identifying taxes or surcharges;

(2) a clear and concise description of the product or service that is the basis of the charge;

(3) the name of the entity providing the product or service or otherwise generating the charge; and

(4) a toll-free telephone number or other no-cost means of contacting the entity generating the charge to resolve a dispute regarding the charge.

(c) A telecommunications carrier may not discontinue services to a customer based on the customer's failure to pay a charge of another person or billing agent appearing on the telecommunications carrier's bill, when the customer has contested the charge using the contact information provided under (b) of this section and orally or electronically informed the telecommunications carrier of the reason for nonpayment.

(d) A telecommunications carrier may recover from a person or billing agent reasonable costs incurred in implementing billing changes or otherwise complying with this section.

(e) The commission may adopt regulations to carry out the provisions of this section.

(f) In this section,

(1) "billing agent" has the meaning given in AS 45.50.476;

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Sec. 45.50.476. Charges billed by telecommunications carriers. (a) Except as provided in (c) of this section, a person or billing agent may not bill charges for

goods or services on a customer's telephone bill from a telecommunications carrier.

(b) A person or billing agent may not induce a telecommunications carrier, directly or through an intermediary, to bill a customer for goods or services of a vendor unless the billing is permitted under (c) of this section.

(c) This section does not apply to an itemized billing in compliance with AS 42.05.715 for

(1) the sale of goods or services governed by an effective tariff of

(A) a public utility operating under a certificate of public convenience and necessity issued by the Regulatory Commission of Alaska; or

(B) a carrier operating under a certificate, license, or authorization issued by the Federal Communications Commission;

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(A) the following:

(i) an electronic letter with the consumer's express authorization of the charge;

(ii) proof that a written confirmation of the charge was provided to the consumer; and

(iii) the consumer's birthdate or the last four digits of the consumer's social security number; or

(B) independent third-party verification of the customer's express authorization.

(d) Telecommunications carriers have no duty to verify independently the accuracy of information received from a person or billing agent under this section.

(e) In this section,

(1) "billing agent" means a person or entity that aggregates consumer

billings or serves as a clearinghouse for aggregate billings and submits charges for goods or services to the billing telecommunications carrier on behalf of itself or a vendor;

(2) "express authorization" means

(A) a customer agreement to be billed for the charges in a signed, written document in paper, electronic, or digital form; or

(B) oral agreement to be billed for the charges after the customer's identity has been verified by an independent third-party verification company using unique identifying information;

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*** Sec. 4.** AS 45.50.481(a) is amended to read:

(a) Nothing in AS 45.50.471 - 45.50.561 applies to

(1) an act or transaction regulated under laws administered by the state, by a regulatory board or commission except as provided by AS 45.50.471(b)(27), [AND] (30), **and (58),** or officer acting under statutory authority of the state or of the United States, unless the law regulating the act or transaction does not prohibit the practices declared unlawful in AS 45.50.471;

(2) an act done by the publisher, owner, agent, or employee of a newspaper, periodical, or radio or television station in the publication or dissemination of an advertisement, when the owner, agent, or employee did not have knowledge of the false, misleading, or deceptive character of the advertisement or did not have a direct financial interest in the sale or distribution of the advertised product or service;

(3) an act or transaction regulated under AS 21.36 or AS 06.05 or a regulation adopted under the authority of those chapters.

LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY
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Juneau, Alaska 99801-1182
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MEMORANDUM January 11, 2012

SUBJECT: Sectional Summary of SB 138 (Work Order No. 27-LS1002\D)

TO: Senator Bill Wielechowski
Attn: Sam Gottstein

FROM: Lisa Moritz Kirsch
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill -- the bill itself is the best statement of its contents.

Section 1. Creates a new section to AS 42.05.715 of the Alaska Public Utilities Regulatory Act that

- requires telecommunications carriers to disclose detailed information on bills;
- precludes a telecommunications carrier from billing for a third person, corporation, or billing agent, unless the telecommunications carrier bill includes certain details of the third party's billing and a toll free-contact for the third party to resolve a disputed charge;
- forbids a telecommunications carrier from discontinuing service to a customer who uses the contact information on the bill to contest a charge and refuses to pay a charge from a third person, corporation, or billing agent; and
- defines the term "telecommunications carrier."

Section 2. Adds a new unlawful act or practice to the list in AS 45.50.471(b) for violation of new section AS 45.50.476.

Section 3. Creates a new section, AS 45.50.476, that precludes a telecommunications carrier from billing for another vendor of goods or services unless the services fall within a narrow list of exceptions, gives the Regulatory Commission of Alaska authority to adopt regulations to implement this section, and defines "telecommunications carrier" as it is defined in section 1 of this bill for AS 42.05.715 of the Alaska Public Utilities Regulatory Act.

Section 4. Adds the new unlawful act or practice from section 2 to the exceptions to the exclusive jurisdiction of the state, a regulatory board, or a commission.

LMK:ljw
12-008.ljw

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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
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05609-1001

TESTIMONY OF ELLIOT BURG BEFORE THE U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION (JULY 13, 2011)

My name is Elliot Burg. I am a Senior Assistant Attorney General in the Vermont Attorney General's Office, where I have worked on issues of consumer protection since 1987 I very much appreciate the opportunity to testify today on the subject of cramming, on behalf of Vermont Attorney General William H Sorrell

Since the spring of 2010, I have overseen a multi-pronged investigation into "cramming" in Vermont—that is, the practice of charging consumers and businesses on their local telephone bills for third-party services[1] without their authorization or knowledge Based on the results of that investigation, which is still ongoing, some important observations can be made about the *nature and scope* of the problem of cramming. In addition, out of the investigation has come a state legislative proposal, enacted into law earlier this year, which represents a potential *solution* to the problem

The investigation

In the spring of 2010, the Vermont Attorney General's Office sent a Civil Investigative Subpoena under the state's Consumer Fraud Act, 9 V.S A § 2460, to the first of what would ultimately be four billing aggregators—the companies that arrange for the placement of charges on local telephone bills to pay for third-party services[2] Based on complaints filed by consumers with the state, there was reason to believe that the sellers of those services (called "merchants" here) had violated the Act by charging consumers[3] without their authorization. There was also reason to believe that neither the vendors nor the aggregators were complying with a Vermont statute enacted in the year 2000 that sought to address the problem of cramming by requiring notice to consumers[4] of billing in the form of a letter containing specified information about the charges, any right to cancel, and contact information for the Attorney General's Office

---

[1] What are sold in this way are almost always services, rather than goods.

[2] Information and documents produced in response to such a subpoena are deemed confidential under 9 V.S.A. § 2460. As a result, this testimony details only facts obtained from other sources or otherwise made public, such as through formal settlements.

[3] Under the Vermont Consumer Fraud Act, the term "consumer" in most situations includes businesses.

[4] The notice requirement, enacted in the year 2000 and now substantially amended (as discussed below), was set out in 9 V.S A. § 2466. That section required merchants to send the notice, but held both merchants and aggregators liable if that did not occur.

The aggregators were asked by subpoena to identify merchants for whom they had arranged for charges to appear on local telephone bills in Vermont. The Attorney General's Office then subpoenaed the merchants with the highest total of dollars billed, for detailed information on their Vermont "customers," their methods of doing business, and their marketing materials, including web pages and telephonic scripts. Surveys were mailed to a number of the customers, asking, among other things, whether they were aware that they had been charged for the particular service, whether they had received notice of the charges other than on their local telephone bill, and whether they had consented to the charges.

The merchants consisted mostly of companies we had never heard of—such as More Local Reach, MyiProducts, YPD—that offered email, third-party voice mail, computer technical support, online directory listings, website hosting, and other services.

Conclusions drawn about the nature and scope of cramming

Three main conclusions were arrived at as a result of our investigation:

1. The level of consumer awareness about third-party charges on local telephone bills is very low. Of the 562 responses to 1700 surveys mailed in connection with the first of the aggregators to be investigated, only 8 (1.4%) recalled having received any separate written notice of their charges (although the merchants claimed to have provided notice, either online or through the mail), and only an estimated 27.4% noticed the charge within the first three months of its appearance on their telephone bill.[5]

2. *The incidence of cramming is very high.* Of the 562 respondents, fully 503 (89.5%) stated that they had not agreed to be charged for the third-party services that appeared on their telephone bill. Indeed, a number of these consumers indicated that they had no reason to order the services for which they were charged; the respondents gave such explanations as, "[I] have an answering machine [and so] would never use this service," "I had voicemail from the phone company [and] did not need [another service]," and "[I] can't imagine agreeing to voicemail since we have always had a personal voice recorder."

3. Deceptive telemarketing scripts have been used. Of the merchants who telemarketed their potential customers—usually businesses—a number used scripts that misstated the purpose of the call. Typical of those scripts was one employed by eBridge, Inc., which offered an online directory to local businesses using a script that began, "The reason I'm calling today is to make sure your information is listed correctly." In fact, the reason for the call was to sign up the business for a $49.95-per month service.

[5] A total of 234 (41.6%) responding consumers indicated on the survey that they noticed a third-party charge on their local telephone bill. It was then possible to identify the billing records of 205 of these consumers; and of that number, 135 (65.9%) were charged for fewer than four months. The resulting percentage of consumers who noticed the charge, but only within the first three months, was 41.6% x 65.9%, or 27 4%.

Merchant settlements

The investigation also led to a series of settlements, all in the form of Assurances of Discontinuance, with eight merchants. It is anticipated that there will be another 20 or more such settlements before the initiative is over. In all, the eight companies charged more than 7,000 consumers and 1,300 businesses in Vermont a total of over $639,000.

The settlements were with the following companies:

- Douglas-Lambert Laboratories LLC, doing business as Orbit Telecom, of Henderson, Nevada, which charged more than 1,200 Vermonters over $119,000 for a voicemail service between 2004 and 2006.

- Durham Technology, LLC, d/b/a MyiProducts IMail, of Indianapolis, Indiana, which charged more than 1,300 Vermonters over $78,000 for a voicemail service between 2005 and 2010.

- eBridge, Inc., also known as Lawstar, Inc., doing business as B2B-ISP, eLink-ISP, InMySip, MSMB-ISP, and Zip Wide Web, Inc., also known as ZWW-ISP, based in Encino, California, which charged 485 Vermont businesses over $93,000 for an online business directory service between 2004 and 2010.

- Liveonthenet.com, based in Huntsville, Alabama, which charged 852 Vermonters over $56,000 for personal computer technical support between 2005 and 2008.

- More Local Reach, Inc., of Boca Raton, Florida, which charged 214 Vermont businesses over $58,000 for online directory services between 2007 and 2010.

- Residential Email LLC, based in Henderson, Nevada, which charged more than 1,170 Vermonters over $65,000 for an email service between 2005 and 2006.

- The Internet Business Association, Inc., based in Carson City, Nevada, which charged 435 businesses over $86,000 for an internet and website address service between 2007 and 2010.

- YPD Corporation of Smyrna, Georgia, which charged 201 Vermont businesses over $84,000 for online directory services between 2007 and 2010.[6]

Given that there are many more such companies, consumer losses in Vermont over the past six years have likely totaled in the millions of dollars—a significant issue for a state with a population of only 620,000, and an indicator that the problem nationwide is very substantial.

[6] An example of these settlements accompanies this testimony as Attachment 1.

The solution: prohibition, not disclosure

Vermont's through-the-mail notice requirement enacted in 2000 to address the problem of cramming has not worked. For a decade, consumers have not received, seen or understood notifications that merchants claim to have provided; most of them have not readily noticed the merchants' charges on their telephone bills; and very few of them recall ever having agreed to be billed. In short, despite the notice requirement, consumers have continued to be crammed, a fact that is not surprising in light of the low level of public awareness that non-telephone charges can appear on one's telephone bill (any more than that third-party charges can be passed through to a person's electric bill, fuel bill, or monthly mortgage account statement).

In January 2011, the Attorney General's Office presented legislation *prohibiting* most third-party charges on local telephone bills for introduction in the Vermont Legislature. With the support of the local telephone companies, this anti-cramming measure passed both the Vermont House and Senate by voice vote, and on May 27, 2011, it was signed into law by Governor Peter Shumlin and became effective immediately.

The new law,[7] which amends the earlier notice requirement, 9 V.S.A. § 2466, contains a general prohibition on third-party charges to local telephone bills, with the following limited exceptions:

- Billing for goods or services marketed or sold by a company subject to the jurisdiction of the Vermont Public Service Board;
- Billing for direct dial or dial-around services initiated from the consumer's telephone; and
- Operator-assisted telephone calls, collect calls, and telephone services that facilitate communication to or from correctional center inmates.

Vermont's statutory approach takes account of actual consumer expectations—*i.e.*, that consumers do *not* anticipate that they will be charged on their local telephone bills for third-party services. It is straightforward to enforce. It does not interfere with other methods of receiving payment for services provided, such as credit cards, debit cards, personal checks, and electronic funds transfers. And it is viewed as a solution to the problem of cramming in our state—one that other jurisdictions may wish to adopt in the future.

[7] The text of the law is set out in Attachment 2 to this testimony.

Attachment 1

STATE OF VERMONT
SUPERIOR COURT
WASHINGTON UNIT

In Re eBridge, Inc., a/k/a Lawstar, Inc., d/b/a B2B-ISP, eLink-ISP, InMyZip, MSMB2B-ISP, and Zip Wide Web, Inc., a/k/a ZWW-ISP	))))	**Civil Division** **Docket No.** 276-5-11 Wncv

ASSURANCE OF DISCONTINUANCE

WHEREAS eBridge, Inc., a/k/a Lawstar, Inc., d/b/a B2B-ISP, eLink-ISP, InMyZip, MSMB2B-ISP, and Zip Wide Web, Inc., a/k/a ZWW-ISP, (hereinafter referred to as "eBridge"), is a California corporation with offices 16133 Ventura Blvd., Suite 855, Encino, CA 91436;

WHEREAS eBridge is a third-party provider of an online business directory to businesses, the charges for which were placed on local telephone bills with the assistance of a San Antonio-based company called Enhanced Services Billing, Inc. (ESBI);

WHEREAS eBridge solicited Vermont businesses over the telephone to purchase its service;

WHEREAS eBridge's charges to businesses averaged $49.95 per month;

WHEREAS during the period 2004 to 2010, eBridge charged a total of $93,007 to 485 businesses for its services that appeared on local telephone bills in Vermont's area code 802, with $16,983 refunded;

WHEREAS sellers of goods or services that are to be charged on a consumer's (including a business') local telephone bill are required under 9 V.S.A. § 2466 to mail a notice to the party to be charged, containing information specified in the statute, including the consumer assistance address and telephone number specified by the Attorney General, which

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

notice must be a separate document sent for the sole purpose of providing that information and may not contain any inducement to purchase goods or services;

WHEREAS eBridge mailed notices to Vermont businesses that were charged for its services on their local telephone bills;

WHEREAS the Attorney General alleges that eBridge violated the Vermont Consumer Fraud Act, 9 V.S.A. § 2466, by not complying with that provision's notice requirements in that eBridge's notices (i) failed to include the consumer assistance address and telephone number specified by the Attorney General; and (ii) did not constitute separate documents sent for the sole purpose of providing the information required by the statute;

WHEREAS the script used by eBridge's telemarketers stated at the outset, "The reason I'm calling today is to make sure your information is listed correctly.";

WHEREAS the Attorney General alleges that the primary purpose of eBridge's calls was, instead, to solicit the purchase of its service, which was explained later in the company's telemarketing script;

WHEREAS the Attorney General therefore alleges that eBridge's script misrepresented the purpose of the company's sales calls, in violation of the Consumer Fraud Act prohibition on deceptive trade practices, 9 V.S.A. § 2453(a);

AND WHEREAS the Attorney General is willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459;

THEREFORE, the parties agree as follows:

1. *Injunctive relief.* eBridge shall comply strictly with all provisions of Vermont law, including but not limited to provisions of the Vermont Consumer Fraud Act, 9 V.S.A. chapter 63, relating to the placement of charges on local telephone bills and the prohibition on deceptive trade practices.

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Vermont 05609

2. *Consumer relief.*

a. For each business from which eBridge has received money through a charge on a local telephone bill with a number in area code 802, eBridge shall, within ten (10) business days of signing this Assurance of Discontinuance, arrange for an electronic credit record to the business' local telephone company in the amount of all such monies that have not been previously refunded. eBridge shall use due diligence to ensure that accurate credits are provided to each business to whom a credit is due.

b. If a credit record sent under the preceding paragraph is not accepted or is returned by the local telephone company, eBridge shall, within ten (10) days of learning of the non-acceptance or the return, send to the business, by first-class mail, postage prepaid, a check in the amount of the credit due to the business' last known address, accompanied by a letter in substantially the form attached as Exhibit 1.

c. No later than 60 (sixty) days after signing this Assurance of Discontinuance, eBridge shall provide to the Vermont Attorney General's Office the names and addresses of the businesses whose telephone numbers were credited, and to which letters and payments were sent, under this Assurance of Discontinuance, along with the date and amount of each credit or payment.

d. No later than ninety (90) days after signing this Assurance of Discontinuance, eBridge shall pay the total dollar amount of all checks returned as undeliverable to the Vermont Attorney General's Office to be treated as unclaimed funds, along with a list in Excel format of the businesses to whom the monies due were not paid and their last known addresses.

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Vermont 05609

3. *Civil penalties, fees and costs.* Within twenty (20) days of signing this Assurance of Discontinuance, eBridge shall pay to the State of Vermont, in care of the Vermont Attorney General's Office, the sum of ten thousand dollars ($10,000.00) in civil penalties and costs.

4. *Binding effect.* This Assurance of Discontinuance shall be binding on eBridge, its successors and assigns.

5. *Release.* The State of Vermont hereby releases and discharges any and all claims that it may have against eBridge or its affiliates based on conduct or activities arising under or in connection with the Vermont Consumer Fraud Act prior to the date of this Assurance of Discontinuance.

Date: 3/31/11

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: _____
Elliot Burg
Assistant Attorney General

Date: 4/1/11

eBridge, Inc.

by: _____
Its Authorized Agent

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

APPROVED AS TO FORM:

Elliot Burg
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609
For the State of Vermont

Peter J. Shakow, Esq.
Bird, Marella, Boxer, Wolpert,
Nessim, Drooks & Lincenberg, P.C.
1875 Century Park East, 23rd Floor
Los Angeles, CA 90067
For eBridge, Inc.

Exhibit 1 (Letter to Businesses)

Dear [Name of Business]:

eBridge, Inc. has entered into a settlement with the Vermont Attorney General's Office to resolve claims that we did not properly notify you of the fact that your business would be billed on your local telephone bill for our online business directory service, and that we used deceptive practices to interest you in buying our service.

As part of that settlement, we are enclosing a refund check for all of these charges. You have no obligation to do anything in response to this payment.

Sincerely,

eBridge, Inc.

Office of the
ATTORNEY
GENERAL
Montpelier,
Vermont 05609

Attachment 2

Vermont "Anti-Cramming" Statute (2011)

9 V.S.A. § 2466 is amended to read:

§ 2466. GOODS AND SERVICES APPEARING ON TELEPHONE BILL

(a) Except as provided in subsection (f) of this section, a seller shall not bill a consumer for goods or services that will appear as a charge on the person's bill for telephone service provided by any local exchange carrier.

(b) No person shall arrange on behalf of a seller of goods or services, directly or through an intermediary, with a local exchange carrier, to bill a consumer for goods or services other than as permitted by this section. This prohibition applies, but is not limited, to persons who aggregate consumer billings for a seller and to persons who serve as a clearinghouse for aggregated billings.

(c) Failure to comply with this section is an unfair and deceptive act and practice in commerce under this chapter.

(d) The attorney general may make rules and regulations to carry out the purposes of this section.

(e) Nothing in this section limits the liability of any person under existing statutory or common law.

(f)(1) This section shall apply to billing aggregators described in 30 V.S.A. § 231a, but shall not apply to:

(A) billing for goods or services marketed or sold by persons subject to the jurisdiction of the Vermont public service board under 30 V.S.A. § 203;

(B) billing for direct dial or dial around services initiated from the consumer's telephone; or

(C) operator-assisted telephone calls, collect calls, or telephone services provided to facilitate communication to or from correctional center inmates.

(2) Nothing in this section affects any rule issued by the Vermont public service board.

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION

OFFICE OF OVERSIGHT AND INVESTIGATIONS
MAJORITY STAFF

UNAUTHORIZED CHARGES ON TELEPHONE BILLS

STAFF REPORT FOR CHAIRMAN ROCKEFELLER
JULY 12, 2011

EXECUTIVE SUMMARY

In May 2010, Chairman Rockefeller launched an investigation into third-party billing on landline telephone bills. He opened the investigation because consumers had complained for years that they were finding mysterious charges on their telephone bills for services they had not purchased. To understand the scope and the severity of this problem, commonly referred to as "cramming," the Senate Commerce Committee staff has conducted a wide-ranging investigation over the past year.

The evidence obtained through this investigation suggests that third-party billing is causing extensive financial harm to all types of landline telephone customers, from residences and small businesses, to government agencies and large companies. Over the past decade, telephone customers appear to have been scammed out of billions of dollars through third-party billing on landline telephones. Unauthorized third-party charges are a nationwide problem.

THIRD-PARTY BILLING AND THE RISE OF CRAMMING

Cramming is not a new problem. It began appearing in the 1990s, when telephone companies opened their billing platforms to an array of third-party vendors offering a variety of services. For the first time, telephone numbers became a payment method equivalent to credit card numbers. Consumers and businesses could purchase products or services with their telephone numbers and the charges for the services would later appear on their telephone bills.

While the telephone companies' decision to open their billing platforms had the potential to benefit consumers and businesses, cramming quickly emerged as an unintended consequence. The rise of cramming was so significant in the late 1990s that federal authorities, consumer advocates, and telephone companies all agreed that changes to the telephone companies' third-party billing systems were needed.

At the time, both the Federal Communications Commission (FCC) and the telecommunications industry advocated for a voluntary approach, rather than rulemaking or congressional action. The United States Telephone Association told Congress that the industry "needed flexibility to deal with cramming on a case specific basis" and that "mandatory guidelines or a one-size-fits-all approach would erode that ability." Although mandatory requirements for telephone companies were discussed, the problem was addressed almost exclusively through voluntary guidelines. The only mandatory requirements placed on telephone companies at the federal level have been the FCC's "Truth-in-Billing" regulations, which require disclosure of third-party charges on telephone bills.

Over a decade later, thousands of consumers still regularly complain to the Federal Trade Commission (FTC) and the FCC about cramming, while state and federal authorities continue to bring law enforcement actions against individuals and companies for cramming. These cases have shown that consumers continue to be scammed out of millions of dollars through cramming.

THE SENATE COMMERCE COMMITTEE'S INVESTIGATION

To understand the scope of the cramming problem, the Committee requested information related to third-party billing and cramming from telephone companies; state and federal regulatory agencies; companies that offer third-party billing as a method of payment; consumers, businesses, and government agencies that have been affected by cramming; and companies that specialize in auditing telephone bills.

The evidence obtained and analyzed by Committee staff suggests that third-party billing on landline telephones has largely failed to become a reliable method of payment that consumers and businesses use to conduct legitimate commerce. Rather, it created cramming, a problem of massive proportions likely affecting millions of telephone users and costing them billions of dollars in unauthorized third-party charges over the past decade. With the exception of legitimate third-party vendors that offer services like satellite television and long distance, third-party billing appears to be primarily used by con artists and unscrupulous companies to scam telephone customers.

The key findings of the Committee staff's investigation are the following:

Third-party billing is a billion dollar industry. Telephone companies place approximately 300 million third-party charges on their customers' bills each year, which amount to more than $2 billion worth of third-party charges on telephone bills every year. Over the past five years, telephone companies have placed more than $10 billion worth of third-party charges on their customers' landline telephone bills.

A substantial percentage of third-party charges are unauthorized. While Committee staff cannot determine precisely how many third-party charges are unauthorized, the evidence obtained through the investigation suggests it is a large percentage.

- Telephone customers with third-party charges on their telephone bills overwhelmingly reported that the charges were unauthorized. Committee staff has spoken with more than 500 individuals and business owners whose telephone bills included third-party charges. Not one person said the charges were authorized. Law enforcement agencies have reported similar findings when conducting surveys for their own cramming investigations.

- Committee staff is aware of hundreds of third-party vendors whose actions suggest they are engaged in cramming. For example, a company specializing in auditing telephone bills reported that over 800 different third-party vendors had placed unauthorized third-party charges on its clients' landline telephone bills.

- Committee staff has found hundreds of egregious examples of cramming. Third-party vendors have enrolled deceased persons in their so-called "services" and charged family members' telephone bills for it. They have charged telephone lines dedicated to fire alarms, security systems, bank vaults, elevators, and 911 systems. Senior citizens' telephones have been enrolled in webhosting services, even though they have never used

the Internet. A children's hospital was charged for a "celebrity tracker" e-mail service that provided "daily celebrity news feeds, photos, and videos." A national bank's telephone lines were charged for "credit protection plans." Third-party vendors even crammed unauthorized charges for voicemail services onto AT&T's own telephone lines.

Telephone companies profit from cramming. Over the past decade, telephone companies have generated over $1 billion dollars in revenue by placing third-party charges on their customers' telephone bills. Since 2006, AT&T, Qwest, and Verizon have earned more than $650 million through third-party billing. Verizon explained that it "receives a flat fee between $1 and $2 per charge for placing third-party charges" on its customers' bills. Because telephone companies generate revenue by placing third-party charges on their customers' bills, telephone companies profit from cramming. Documents reviewed by the Committee staff show that some telephone company employees feel financial pressure to approve third-party vendors even though the companies appear to be crammers.

Cramming affects every segment of the landline telephone customer base. Unauthorized third-party charges harm residences, small businesses, nonprofits, corporations, government agencies, and educational institutions. The Committee has accumulated thousands of examples of cramming on nonresidential telephone bills.

Examples of cramming on small business telephone lines. A small business that owns Popeyes and Krispy Kreme franchises reported that third-party vendors placed more than $4,000 worth of charges on its telephone bills for electronic facsimile and other services it did not authorize or use. A small business owner in Nevada reported that seventeen different third-party vendors charged him over $4,000 for online business listings, voicemail, identity theft protection, and streaming video services he did not authorize or use. A bicycle store owner in Illinois reported approximately $1,500 of unauthorized charges for "virtual fax and voicemail" services she did not authorize or use.

Examples of cramming on corporate telephone lines. Large organizations are particularly susceptible to cramming because they often have thousands of telephone lines in hundreds of locations. Crammers appear to target them specifically. A national food chain reported over $100,000 worth of unauthorized third-party charges on a yearly basis. Other companies provided similar figures. A national retail chain reported $550,000 in unauthorized third-party charges on its telephone bills over the past decade. The retail chain estimates it has spent $400,000 in resources battling unauthorized third-party charges.

Examples of cramming on government telephone lines. Local, state, and federal agencies also reported cramming on their landline telephone bills. The United States Postal Service would have paid almost $550,000 in unauthorized third-party charges if it had not hired an auditor to examine its bills. The United States Naval Station in San Diego, California, reported its telephone bills included $11,000 worth of unauthorized third-party charges in one quarter in 2009. Since November 2009, Los Angeles County has received $306,000 in billing credits for unauthorized third-party charges on its AT&T

landline telephone bills. Los Angeles, Chicago, New York, and other large city governments also battled cramming charges.

Many third-party vendors are illegitimate and created solely to exploit third-party billing. Committee staff has found third-party vendors operating out of post office boxes, fake offices, and residences, with "presidents" that know nothing about their "companies." One woman admitted that she became involved because "a friend said do you want to become president of a company." Another "president" admitted that he did nothing more than sign his name to papers that were submitted to telephone companies.

Many telephone customers experiencing cramming did not receive help from their telephone companies. Although telephone companies said they instructed their representatives to assist customers with cramming problems, consumers and businesses frequently reported that the telephone companies were not helpful. Company representatives frequently stated incorrectly that telephone companies were "legally obligated to place the charges on their bills," and that, "there was nothing they could do to help them." Only after these consumers contacted the Better Business Bureau or their state attorneys general did their telephone companies provide assistance for many of them. Business and government offices had similar experiences. For example, an AT&T Senior Account Manager for the City of Tyler, Texas, stated, "Neither myself or my team can do anything to resolve these for you and this isn't the first time we've been asked." He added, "My former account Dallas County would have 20-30 per month…I wish, I really wish there was some way we could help but there is not."

The telephone companies are aware that cramming is a major problem on their third-party billing systems. While telephone companies regularly tell their regulators and the media that their cramming complaint rates are low, internal documents reviewed by Committee staff show that the companies understand cramming is a major customer service problem. The companies have received hundreds of thousands of complaints using words like "fraud," "scam," "theft," "hoodwinked," "shocked," "disgusted," "upset," "stealing," "bad business," "taking advantage," "disappointed," and "unethical" to describe their experiences with third-party billing. Furthermore, telephone companies deal with only a small fraction of the actual number of their dissatisfied, angry customers, because most customers either never realize they are being charged or they complain directly to third-party vendors. Over an eight month period in 2010, for example, more than 200,000 people directly called a set of related third-party vendors to cancel their services because they "did not understand," "did not remember," or "did not authorize" the charges. Over the same period, those third-party vendors only received 2,746 cramming complaints forwarded from telephone companies.

III. OVERVIEW OF THIRD-PARTY BILLING ON LANDLINE TELEPHONES

There are two types of third-party billing on landline telephones: (1) third-party billing where a vendor, such as a satellite television network or a large long distance provider, contracts directly with a telephone company to place charges on its customers' bills; and (2) third-party billing where the telephone company contracts with a "billing aggregator," or "clearinghouse," which maintains business relationships with hundreds of other smaller third-party vendors.

The Committee's investigation has focused on the latter arrangement because most third-party charges come through aggregators, and because consumer cramming complaints reviewed by Committee staff overwhelmingly relate to third-party charges placed through aggregators. As will be discussed in the section on "Illegitimate Third-Party Vendors," many third-party vendors that bill through aggregators appear to be created solely to exploit the weaknesses of the landline telephone third-party billing system.

A. The Third-Party Billing Ecosystem

When the Committee opened the investigation, Committee staff's understanding was that three types of companies play a role in third-party billing: third-party vendors, billing aggregators, and telephone companies.

Third-Party Vendors: Hundreds of different third-party vendors charge their customers for services through telephone bills. These companies claim to offer an array of services, including long distance, voicemail, online backup, online photo storage, roadside assistance, and electronic facsimile. To gain access to the telephone companies' third-party billing systems, they enter into contracts with billing aggregators. They also register directly with telephone companies and receive a carrier identification code ("sub-CIC") number.

Billing Aggregators: The FTC has explained that billing aggregators open "the gate to the telephone billing and collection system" and "act as intermediaries between the [third-party] vendors and the local phone companies" by "contracting with the local phone companies…to have the local telephone companies collect…charges from consumers."[30] Once the charges are collected by the phone companies, the billing aggregators, after taking their fee, pass the revenues back to their client vendors. A handful of aggregators manage third-party vendors' access to landline telephone bills. Aggregator names that appear commonly on phone bills are: ESBI, ILD Teleservices, OAN, Payment One, the Billing Resource, Transaction Clearing, and USBI.

Telephone Companies: Telephone companies control access to their customers' telephone bills and distribute the revenue generated from third-party charges. To place charges on telephone bills, a third-party vendor must first acquire a sub-CIC number and approval from a telephone company. Once a third-party vendor's charges appear on

[30] Federal Trade Commission, *Telephone "Crammers" Settle FTC Charges: Billing Aggregators Debited Phone Bills for Charges Consumers Didn't Authorize* (Aug. 6, 2001).

telephone customers' bills, the telephone companies, after collecting their fees, pass the revenue back to the billing aggregators, which then distribute the revenue to the third-party vendors. Committee staff has found that many telephone companies – from large national carriers like AT&T and Verizon to small independent carriers – place third-party charges on their customers' bills.[31]

FIGURE I—THIRD PARTY BILLING AS COMMONLY UNDERSTOOD

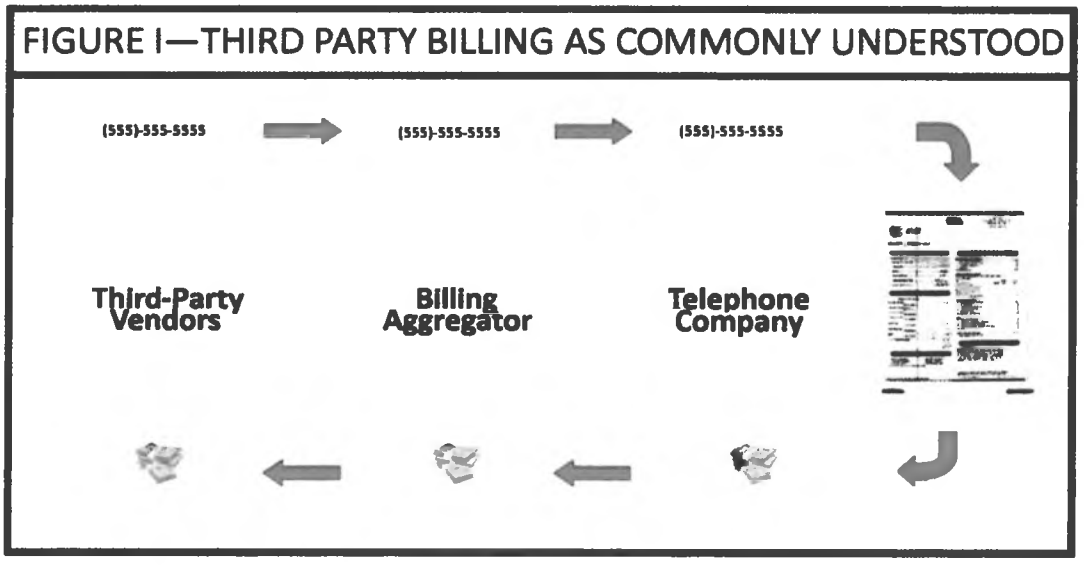
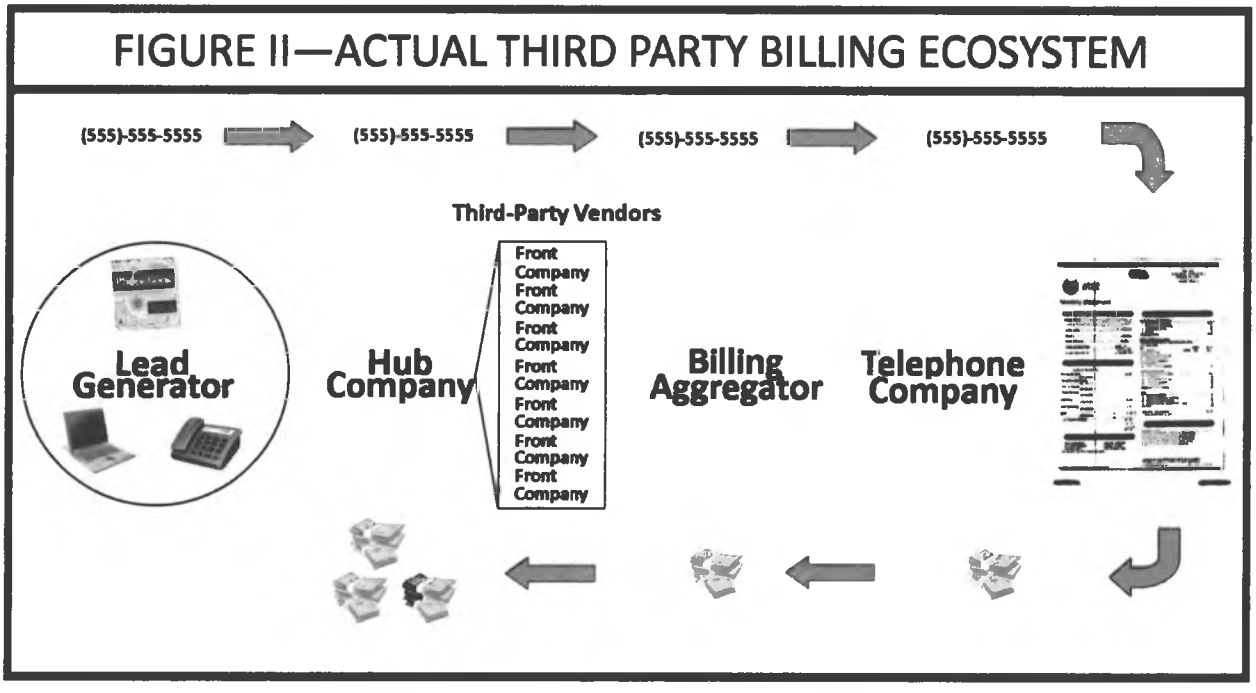


Figure I illustrates the third-party charge process as it is usually described by the involved parties. The third-party vendor allegedly sells a consumer a service and obtains the consumer's "authorization" to bill his or her telephone number. The vendor passes the number to a billing aggregator, which in turn passes the number on to the telephone company that provides the consumer's landline telephone service. The vendor's charge then begins appearing on the customer's telephone bill. Once a customer pays his or her bill, the telephone company collects the portion of the payment that covers the third-party charges and, after taking its fees for placing the third-party charges, distributes the revenue to the billing aggregator, which then distributes to the corresponding third-party vendor.

As Committee staff conducted the investigation, it became apparent that the actual third-party billing ecosystem is more complicated. Many third-party vendors are actually "front companies" for "hub companies" that handle every aspect of the vendors' business. In other

[31] A number of smaller telephone companies do not allow third-party charges on their customers' bills. For example, the Shenandoah Telephone Company (Shentel) recently wrote Chairman Rockefeller that it eliminated third-party billing in 2007 after receiving cramming complaints from its customers. Letter from David E. Ferguson, Vice President – Customer Services, Shenandoah Telephone Company, to Senator John D. Rockefeller IV (July 5, 2011). The Western Telecommunications Alliance told Committee staff that some of its members terminated third-party billing "out of respect for their customers' dissatisfaction with being" crammed and due to "spending an inordinate amount of time and resources trying to get those charges removed from their customers' bills." E-mail message from Western Telecommunications Alliance to Commerce Committee Staff (July 11, 2011).

words, many third-party vendors do not actually provide the services they claim to provide in their applications to the telephone companies. Committee staff found dozens of examples of third-party vendors that were in fact controlled by hub companies.



The apparent purpose of hub companies is to game the third-party billing system. If a large number of consumers complain to telephone companies or law enforcement authorities about a particular third-party vendor, the hub company can simply shift additional enrollments to other third-party vendors it controls. When one larger company operates through multiple smaller third-party vendors, it is more difficult for telephone companies and other authorities to determine how much cramming is occurring and who is responsible for it. Part V of this report provides detailed information about hub companies Committee staff examined during this investigation.

Complicating matters further, Committee staff found evidence that hub companies outsource marketing and enrollment to companies called "lead generators." Lead generators are paid to obtain customers' "authorizations" to bill their telephone numbers. They pass the allegedly authorized telephone numbers onto the hub companies, which then pass the numbers to the billing aggregators under the names of different front companies. This arrangement invites abuse because lead generators are apparently paid based upon how many consumers they enroll, rather than for providing services or maintaining relationships with customers. Their practices will be discussed further in the next section of this report.

B. The Cost and Scope of Third-Party Billing

To understand the scope of third-party billing, the Committee requested financial information about third-party billing from eight providers of landline telephone service – AT&T, Verizon, Qwest, CenturyLink, Windstream, FairPoint, Frontier, and Cincinnati Bell. Based upon

third-party billing. In a complaint to the Better Business Bureau (BBB), an AT&T customer shared the following sentiment, which is also expressed in thousands of other complaints:

> I am concerned for many like myself who really have to decide whether they are going to pay their bills or eat for the month. When I have tried [to contact] these fly by night companies who are bil[k]ing me with AT&T's blessing, I get the runaround or disconnected. This is very frustrating and it needs to stop. I never agreed to have AT&T allow third party billers to charge me for services I never ordered and do not want.[35]

A. How Cramming Occurs

For cramming to occur, three separate actions are required: (1) a third-party vendor obtains the telephone number of a consumer who has allegedly purchased a service, (2) the third-party vendor submits that telephone number to a telephone company through a billing aggregator, and (3) the telephone company places the allegedly "authorized" charge for the third-party vendor on the consumer's telephone bill. Because telephone companies do not have their own processes to determine if a consumer has "authorized" a charge, once a company engaged in cramming has obtained a consumer's telephone number, it is a simple process to have the charge placed on the consumer's telephone bill. As a result, at its most basic level, cramming is about obtaining telephone numbers.

Crammers obtain telephone numbers in one of two ways. They either obtain a consumer's telephone number without ever interacting with the consumer; or they dupe a consumer, through abusive marketing, into providing his or her telephone number and "authorization." When they are asked to provide proof that a consumer has "authorized" a charge, crammers routinely provide information that is inaccurate or insufficient to show that a consumer knowingly purchased the service.

1. No Consumer Involvement

In the 1990s, the GAO observed that "[s]ome vendors apparently have simply lifted names and numbers from telephone directories to charge businesses for nonexistent services."[36] Through its investigation, Committee staff has obtained evidence showing that, over a decade later, third-party vendors continue to engage in similar practices. A third-party vendor needs nothing more than information that is publicly available, or that can be purchased from "lead generators," to enroll consumers in its so-called services. Unlike credit cards, which consumers know to protect, telephone numbers are widely available. Once crammers have obtained this information, it is a simple process to submit those numbers to telephone companies.

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[35] Better Business Bureau, Complaint Activity Report, Case No. 27102339 (June 29, 2009) (AT&T Doc. CST009711).

[36] General Accounting Office, *Overview of the Cramming Problem* (GAO/T-RCED-00-28) (Oct. 25, 1999).

Telephone customers frequently submit complaints to telephone companies, consumer advocates, and regulatory offices with proof that they did not provide their telephone numbers to the third-party vendors that placed charges on their bills. The following examples are representative of thousands of complaints reviewed by Committee staff.

Deceased Relatives Many telephone customers complained that third-party vendors provided the names of deceased relatives when asked who authorized the charges on their telephone bills. A telephone customer stated, "they informed me my deceased son, he died nine years ago, had signed me up for this service,"[37] while another stated, "they told me it [the service] was ordered by Jean W.—he has been deceased for 36 years."[38] Another frustrated customer stated, "They informed me that my husband…had ordered the service and I would have to know his security information. When I explained that my husband died 13 years ago, they told me that I must have ordered it in his name."[39]

Incorrect Personal Information Telephone customers repeatedly complained that the information that third-party vendors provided as proof of authorization was incorrect. A Verizon customer complained that "it was done in our daughter's name but with her actual name reversed, wrong e-mail address, wrong birth date, but with our correct home phone number and home address. Neither we nor she ever signed up for this service."[40]

A Connecticut resident complained that a third-party vendor called Billviaphone.com had his address wrong and had informed him that "Michael…had signed up online."[41] He explained that, "[t]here's no Michael here, just Mark & Nancy."[42] In another complaint, a manager from the Oklahoma Corporation Commission contacted AT&T on behalf of an Oklahoma resident. She was "concerned" about the proof of enrollment that had been provided because it was not the information for the person who had been charged.[43]

Unpublished Numbers Numerous businesses and government agencies told Committee staff they have incurred crammed charges on telephone lines that are dedicated to alarm systems, elevators, modems, and other lines that are not assigned to any employees. They stated that they do not believe their employees could have enrolled those telephone lines in any services because the telephone numbers for the lines are unpublished and unknown to employees. For example, a large, multistate bank sent Committee staff a spreadsheet showing the following examples of cramming since May 2010:

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[37] Consumer complaint to Arkansas Attorney General (Dec. 14, 2009) (AT&T Doc. CST029520).

[38] Consumer complaint to Kansas Attorney General (Nov. 1, 2009) (AT&T Doc. CST030067).

[39] Consumer complaint to Oregon PUC (July 2, 2008) (Qwest Doc. QSC0015024).

[40] Consumer complaint to Verizon (Aug. 20, 2009) (Verizon Doc. VZ_003_002040).

[41] Consumer e-mail to Better Business Bureau of Connecticut (Aug. 21, 2009) (AT&T Doc. CST009842).

[42] *Id.*

[43] E-mail from Oklahoma Corporation Commission to AT&T employees (Feb. 9, 2010) (AT&T Doc. CST0219835).

- alarm lines incurred charges for directory listings, "eBusiness Marketing Materials," "online business," electronic facsimile, long distance plans, and Internet radio;
- an ATM line incurred charges for "Internet services;"
- remote call forwarding lines incurred charges for "Instant 411," online coupons, directory listings, photo storage, electronic facsimile, monthly ringtones, IT support, Internet TV, and music downloads;
- a modem line incurred charges for voicemail;
- a data line incurred charges for music downloads;
- emergency call lines incurred charges for electronic facsimile and online diet services;
- equipment monitoring lines incurred charges for voicemail;
- a VoIP test line incurred charges for music downloads; and
- a facsimile line incurred charges for online entertainment news.

Another bank told Committee staff that it believes that much of the $20,000 worth of cramming it incurred in the first several months of 2011 occurred on unpublished telephone numbers for modems, alarms, facsimile machines, and other telephone lines that are not assigned to individual employees. An office property company reported that it has incurred charges on telephone lines for elevators and alarms. The U.S. Naval Computer and Telecommunication Station in San Diego stated that the crammed charges it has incurred on central office trunk lines must be "100% fraud" because Naval personnel do not know the telephone numbers associated with those lines, the numbers are unpublished, and the numbers do not appear on caller identification records because they are not connection points for telephone calls.[44]

Fake Internet Enrollments Telephone customers have repeatedly complained that they were told they enrolled for third-party vendors' services via websites, even though they did not have a computer or access to the Internet. An AT&T Arkansas customer explained, "I was told it was 'triggered' online. I have no computer…and have never been on-line."[45]

This type of complaint frequently came from senior citizens or their caregivers. A Qwest customer complaining on behalf of her father was told "that it was an online order of some sort," but she explained that "her father who lives in an assisted living facility…does not own, or [know] how to use a computer."[46]

In a particularly egregious example, a man complained on behalf of his 82 year-old mother-in-law about a third-party vendor called Talent & More LLC,[47] which charged her telephone number for a "web-hosting personal profile" allegedly marketed to "casting agents"

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[44] Committee staff telephone interview with United States Navy personnel (May 2, 2011).

[45] Consumer complaint to Arkansas Attorney General (Dec. 18, 2009) (AT&T Doc. CST029539).

[46] Consumer complaint to Oregon PUC (Apr. 24, 2008) (Qwest Doc. QSC0014820).

[47] Letter to the Office of the Connecticut Attorney General (July 22, 2009) (AT&T Doc. CST 2622056).

1. Time and Money

The unauthorized charges that are crammed onto telephone customer's bills are typically between $10 and $50. These charges, although relatively minor if they occur only once, can quickly amount to significant losses for telephone customers. To maximize revenue, crammers charge consumers on a recurring monthly basis for their "services," so that the charges will continue as long as consumers fail to discover them.

Residences and small businesses affected by cramming have generally experienced losses in the hundreds and thousands of dollars.[59] Larger organizations, like government agencies and corporations, sometimes experience unauthorized third-party charges worth tens of thousands of dollars a year.[60] Because large organizations often have thousands of telephone lines in hundreds of locations, they are particularly susceptible to cramming.

For example, the United States Postal Service would have incurred over $500,000 worth of unauthorized charges if it had not hired a company to audit its telephone bills, while a large food chain told Committee staff that it incurs approximately $100,000 worth of unauthorized charges on a yearly basis.[61] Even AT&T experiences cramming on its telephone lines. Committee staff confirmed that third-party vendors associated with one hub company crammed at least 80 of AT&T's own telephone lines with charges for services such as voice mail, sometimes for periods as long as 18 months.[62]

Battling unauthorized third-party charges also costs telephone customers significant amounts of time, effort, and money. Telephone customers shared the following experiences in complaints, which are similar to those of thousands of other customers:

- A Qwest customer stated, "this is the 5th time that I have had charges added to my bill…[e]very time I have spent at least a half hour of my time getting these services removed…I'm sick of this."[63]

- An AT&T customer expressed his frustration after he tried unsuccessfully to have third-party charges removed from his bill. He stated, "[t]his is the 2nd or 3rd time within about 4 years that something like this has happened to us with AT&T . . . where they arbitrarily

[59] See Appendix A, "Cramming Case Studies," for summaries of telephone customers' experiences with third-party billing and cramming.

[60] *Id.*

[61] *Id.*

[62] 86 separate e-mails from AT&T employees to billing aggregator ESBI regarding cramming on 86 AT&T corporate telephone lines (dated Mar. 2, 2009 – Nov. 4, 2010) (produced to Committee by daData, Inc., without Bates numbers).

[63] State of Utah, Division of Public Utilities, Informal Complaint Report, Index No. 3343 (Aug. 3, 2010) (Qwest Doc. QSC0015631).

telephone companies. She receives a monthly check worth a few hundred dollars for serving as "president" of the company.[106]

3. Low Rates of Usage

Committee staff obtained evidence from multiple third-party vendors showing that few, if any, of their "customers" were using the services for which the companies were charging them. These findings are consistent with those of other law enforcement inquiries into cramming. Low usage rates are strong evidence that consumers did not knowingly purchase the services and were not aware they were being charged for them.

"Voicemail" Services MySnS's third-party vendors each charged telephone customers for "voicemail" services that were accessible only by dialing specific 1-800 telephone numbers. The Committee obtained MySnS's telephone bill for December 2010, which showed that approximately 925 unique numbers dialed the 1-800 telephone numbers dedicated to "voicemail" services during the month.[107] At the time, at least 97,000 telephone customers were being charged for these services.[108] At best, less than 1% of the telephone customers charged for "voicemail" services used it in December 2010.

"Online Photo Storage" Services daData provided usage data for Coast to Coast Photo, Photo Cubbie, Residential Photo, and USA Photo House, which provided "online photo storage" and "100 prints per month" for $14.95 per month. Of the 64,250 telephone customers that these third-party vendors enrolled in 2009 and 2010,[109] less than 2% loaded a digital picture to the websites.[110]

"Casual Online Gaming" Services With assistance from MORE International's counsel, a counsel for the Committee enrolled in the "casual online gaming services" offered by EZPhoneBill, a third-party vendor associated with MORE, to determine whether enrolled telephone customers were using the company's services. Committee staff had noticed that few, if any, "customers" appeared to be using its online gaming website, games.ezphonebill.com. Before Committee counsel accessed the website, the front page listed "No scores logged yet!" for its "All Time Top Scores," even though it had enrolled more than 20,000 telephone customers in the service and generated almost $1 million dollars by charging those customers $14.95 per month.[111]

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[106] Committee Staff Telephone Interview (Feb. 9, 2011).

[107] MySnS Corporate Telephone Invoice (Dec. 11, 2010) (produced to Committee on Apr. 15, 2011).

[108] The number of enrolled customers is likely much higher, as MySnS only provided enrollment data for a subset of the third-party vendors that used the 1-800 numbers for voicemail services in December 2010.

[109] daData response to Questions 1(b), 1(j), and 1(k) (Apr. 1, 2011) (daData Doc. DAT158722).

[110] Letter from Margaret Krawiek, Counsel to daData, to Senator John D. Rockefeller IV (Apr. 1, 2011).

[111] Letter from Linda Goldstein, Counsel to MORE International, to Erik Jones, Counsel to Senate Commerce Committee (Feb. 3, 2011).

5. Committee Staff Calls to the Third-Party Vendors' "Customers"

The Committee obtained the contact information for thousands of the telephone customers who had been charged by third-party vendors that were related to daData, MySnS, and MORE International. At random, Committee staff called consumers who had allegedly purchased services from the following third-party vendors: BLVD Network, Total Protection Plus, MyInfoGuard, Coast to Coast Voice, Nationwide Assist Fax, TriVoice International, Agora Solution, MyBillingServices, Xoom Telecommunications, and EZPhoneBill.

Committee staff called approximately 1700 randomly selected "customers," and spoke to over 500 of them about their experiences. Not a single individual or business owner reported that they had authorized the third-party vendors' charges on their telephone bills. Telephone customers either reported that they had already found the unauthorized charges and had them removed, or they were surprised to learn that their telephone bills included third-party charges.

Staff calls to "customers" of Total Protection Plus, for example, resulted in clear evidence of cramming. This daData-controlled vendor allegedly "offers customers electronic fax capabilities with online data back-up voice messaging with ID theft protection, and stand-alone voicemail access."[116] daData informed the Committee that the Total Protection Plus "service" was marketed to individuals. The company provided the Committee the names, telephone numbers, and other information about customers who had allegedly purchased the service.

Although these documents identified the telephone numbers that were enrolled in Total Protection Plus as "Home Phone" numbers, Committee staff called dozens of the numbers and discovered that they belonged to government agencies and businesses. For example, some of the numbers belonged to a Taco Bell, a Wal-Mart, a Publix grocery store, the Broward County Sheriff's Office, an emergency room, a Capital One bank, the Jacksonville Aviation Authority, a juvenile detention center, Prince George's County Community Center, and the West Virginia Department of Highways. Documents daData produced to the Committee show numerous instances in which business and government offices complained that their telephone numbers had been enrolled in Total Protection Plus.

6. Enrollments and Financials

The third-party vendors related to daData, MySnS, and MORE International have enrolled millions of telephone customers in their "services" and have generated millions of dollars through recurring monthly charges. Over the past two years, daData-related third-party vendors enrolled over 800,000 telephone customers and generated more than $50 million in revenue.[117] As of April 2011, approximately 350,000 telephone customers were being charged by daData-related vendors on a monthly basis.[118] Between 2007 and 2010, MySnS-related vendors enrolled 1,201,460 telephone customers and generated $13 million in revenue.[119]

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[116] Lustigman Feb. 17, 2011 Letter, *supra* note 85, at 4.

[117] daData response to Questions 1(b), 1(j), and 1(k) (Apr. 1, 2011) (daData Doc. DAT158722).

[118] *Id.*

[119] Letter from Joel Dichter, Counsel to MySnS, to Senator John D. Rockefeller IV (Jan. 19, 2011).

Cindy Smith

From: Thomas Presley
Sent: Wednesday, February 29, 2012 6:26 PM
To: Cindy Smith
Subject: SB 138 Hearing Request
Attachments: SB138 Ver.R.PDF; SB138-Sponsor statement.pdf; SB138-Sectional Analysis.pdf; SB138 Back up material-7.13.11 Testimony of Elliot Burg and VT Cramming Bill.pdf; SB138 backup material- US Senate Committee Findings.PDF; SB138-Exhibit II - Sample Enterprise Bill.pdf; SB138-Exhibit II -Sample Residential Bill.pdf; SB138-Fact Sheet.pdf; SB138 letter of support.pdf; Memo re SB 138 changes to Ver.R.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Cindy,

I am emailing you to request a hearing for SB 138 – a bill that prohibits unauthorized third-party charges to landline telephone bills. Attached you will find the following:

- SB 138 Version R
- SB 138 Sponsor Statement
- SB 138 Sectional Analysis
- SB 138 back up – testimony from VT Attorney General on cramming
- SB 138 back up – US Senate Committee Report on cramming
- SB 138 back up – Samples of home/enterprise telephone bills
- SB 138 Fact sheet
- SB 138 Letters of support
- SB 138 memo re: changes to Version R

SB 138 has two committee recommendations: Senate Labor and Commerce and Judiciary. It was moved out of Labor and Commerce yesterday.

Thank you for taking the time to review and consider SB 138. Please don't hesitate to contact me if you have any questions or concerns.

Thomas Presley
Office of Senator Bill Wielechowski
907.465.6252

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Chair
State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Administrative Regulation Review

SENATOR BILL WIELECHOWSKI

S.B. 138 Protecting Alaskans From Unethical Billing Practices

Fact Sheet

- According to an investigation by the U.S. Senate Committee on Commerce, Science and Transportation, telephone companies have placed more than $10 billion worth of third-party charges on their customers' landline telephone bills over the past five years.

- Unauthorized third-party charges have been found on bills for residences, small businesses, nonprofits, corporations, government agencies, and educational institutions.

- The unauthorized charges "crammed" on telephone customer's bills are typically between $10 and $50. These charges, although relatively minor can quickly amount to significant losses for telephone customers.

- The intent of SB138 is to ensure that authorization for third-party charges and services is clearly obtained prior those charges being included on telephone bills.

- Obvious examples of cramming have been found on bills for deceased persons, the elderly, lines for fire alarms, elevators, and bank safes.

- Committee report shows evidence of third-party vendors operating out of fake offices with presidents who have no knowledge of their "companies."

- California, Illinois, Indiana, Kansas, Maryland, Minnesota, New Jersey, New York, Vermont, and Virginia have all passed laws banning cramming.

AKPIRG
Alaska Public Interest Research Group
P.O. Box 101093 • Anchorage, AK 99510 • www.akpirg.org

In Support of SB 138:
Protect Consumers from Tricks, Traps, and Hidden Fees

Unbeknownst to most consumers, it's not just the telephone company that can charge money through a telephone bill. What's more, most charges made by third-parties on telephone bills are scams—unauthorized charges tacked on and hidden in the small print in a practice often referred to as "cramming".

Across the nation, the practice nets about $2 billion each year in largely unauthorized or fraudulent fees, often through fly-by-night operations created solely to exploit the system, operating out of P.O. Boxes or non-existent offices.

Unfortunately, the systems set-up by telephone companies have failed to solve the problem. In fact, telephone companies profit from cramming by charging fees to the third-parties, generating substantial revenue.

Here in Alaska, we have an opportunity to nip this problem in the bud. SB 138 would help end the practice of "cramming" unauthorized third party fees onto telephone bills for landlines, and for those wireless companies over which the Regulatory Commission of Alaska has authority.

Tricks, traps, and hidden fees harm consumers and do nothing to support Alaska's economy. On behalf of our members, we strongly urge your support.

Sincerely,

Matt Wallace
Executive Director
Alaska Public Interest Research Group

Alaska Public Interest Research Group is a non-partisan, non-profit, citizen oriented statewide organization researching, educating and advocating on behalf of consumers and the public interest.

Craig F. Graziano
Office of Consumer Advocate, Iowa Department of Justice
Prepared Testimony
Judiciary Committee, Alaska Senate
March 26, 2012

Thank you, Mr. Chairman and Members of the Committee. My name is Craig Graziano. I am an attorney with the Office of Consumer Advocate in the Iowa Department of Justice. I also chair the Consumer Protection Committee for the National Association of State Utility Consumer Advocates. I am very pleased to address you today regarding the experience in Iowa with respect to the cramming of unauthorized charges onto consumer phone bills.

In Iowa, we have had a statute and regulation on the books since 1999. They prohibit unauthorized changes in telecommunications service, including both third-party and first-party "cramming."[1] The statute authorizes the Iowa Utilities Board to assess civil monetary penalties up to $10,000 per violation.

The statute excludes wireless billings. As a result, our experience is largely confined to wireline billings. That is not to say the problem is confined to wireline billings. On the contrary, there is evidence nationally of its spread to wireless billings.[2]

Our office has had a steady enforcement effort in place for a decade, and I always go back to a statement our consultant made in our rule-making proceeding many years ago. She said: "The key point is to put in place a set of rules that will halt a fraudulent, unfair and deceptive practice. We can call them slamming and cramming and whatever we want, but we're dealing with classic consumer fraud, trying to get people to pay for something they haven't in fact bought."

Over the years, we have filed hundreds of petitions against scores of companies. Most of the cases have settled upon terms including a modest civil monetary penalty, typically $1,500 today. We think the penalties take the profit out of the offending practices. They also have a beneficial sentinel effect that extends beyond the individual company and throughout the industry. Since our effort began, the volume of complaints has declined markedly. Some types of complaints appear to have dried up entirely. Previously frustrated consumers have often expressed appreciation for our efforts.

Our experience shows that the problem is complicated. We've regularly seen complaints regarding recurring charges for such things as long distance, online yellow page, voicemail and

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[1]Iowa Code § 476.103; 199 Iowa Admin. Code 22.23.

[2]See S. Hrg. 112-171, "Unauthorized Charges on Telephone Bills: Why Crammers Win and Consumers Lose," 112 Cong., 1st Sess. (July 13, 2011), pp. 9-10 (Florida Attorney General reached settlements with the four major wireless providers regarding unauthorized charges on wireless bills); *Verizon Wireless Data Usage Charges* (Consent Decree), 25 F.C.C.R. 15105 (FCC. 2010) (FCC reached consent decree with Verizon Wireless requiring refunds of data usage charges exceeding $50 million, $25 million voluntary payment to U.S. Treasury and compliance plan designed to eliminate cramming). There were news reports last month of thousands of complaints about charges for "mobile purchases" stemming from allegedly unsolicited and unwanted text messages from a company known as Love Genie Tips. "Look out for third-party charges on cellphone bill," *Palm Beach Post* (Feb. 24, 2012).

web hosting services. We've also seen complaints about charges for services that have little or nothing to do with telecommunications, such as a diet plan. In earlier years, we saw many complaints regarding allegedly bogus charges for individual long distance, collect, directory assistance and other types of calls. We have often seen complaints involving allegedly defective third-party verification recordings and allegedly bogus Internet sign-ups.

I've selected a few illustrative complaints. They only scratch the surface.

In one case,[3] a collect call was supposedly accepted on a fax line at a school at 4:00 a.m. on Sunday.

In a second case,[4] a series of calls from a sex hotline was supposedly received at the home of a 65-year old grandmother who lived alone. The company provided a voice recording supposedly showing that the call had been accepted by a male who identified himself as "Marcus Welby."

In a third case,[5] the consumer advised that a voice recording had been "doctored" to make it appear an authorization had been given when in fact an authorization had not been given. The consumer wrote:

> The tape is fraudulent. Kevin will swear that the recorded conversation never took place. The giveaway is that Kevin is project manager and head of the drafting department. He has never been or ever uses the term "administrative assistant" when referring to himself . . . . The tape [also] refers to "internet dial-up services." Why would we order "dial-up," when we have had high speed DSL for years?

In a recent federal court case in California, another company acknowledged that many of the voice recordings had been "spliced" or "otherwise falsified," apparently by telemarketers, most of whom were located overseas. Among other techniques, the telemarketers would digitally record the consumer's voice when the verifier was not on line, and then play the consumer's recorded voice in response to the verifier's questions when the consumer was not on line, in such a way that the call would classify as a valid sale. According to the evidence, there were tens of thousands of fraudulently manufactured sales, and by one study, 44 per cent of the recordings that had supposedly passed the TPV company's screens should have failed.[6]

In a fourth Iowa case,[7] the company had supposedly obtained a birth date as validation of an alleged Internet order. The consumer denied having placed the order. He advised that he graduated from high school the year before the supposed birth date. He also advised that the e-

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[3]C-2007-0086.

[4]C-2005-0204.

[5]C-2009-0184.

[6]*FTC v. Inc21.com*, 745 F.Supp.2d 975, 991 (N.D. Cal. 2010), *appeal pending*, No. 11-15330 (9th Cir.).

[7]C-2009-0286.

mail address supposedly supplied by him as a part of the order was similarly incorrect. According to the company, the order nevertheless *passed* its validation test, because the IP address from which the order came was within 100 miles of the consumer's street address.

The Federal Communications Commission later issued an order proposing a forfeiture of $3,000,000 against this same company for alleged cramming violations of the same character.[8] What all of this tells us is that the company – and both the FCC's experience and our Iowa experience confirm there are other companies doing the same thing – instituted a supposed validation system that does not validate. Contrast a PIN number system in which, if I put in a wrong PIN number, the system bounces back "invalid PIN number," and the transaction is rejected rather than approved.

Our experience suggests that many consumers never notice the unauthorized charges and hence that complaints are the tip of an iceberg. In 2005, for example, we had eleven complaints against two companies, each disputing a charge between $5.00 and $8.00 for a single collect call. An investigation by the Federal Trade Commission later revealed a "massive" fraudulent billing scheme that collected more than $30 million in bogus collect call charges from millions of consumers.[9]

Before closing, I'd like to share two additional observations. First, it has long been my view that the states are the best forum in which to seek to stop the problem. They are close to the complainants. They often have the resources both to assist the victims and to institute enforcement proceedings. There is also a history on the role of the states. In the 1990s, state public utility commissions and state attorneys general, in actions affecting nearly 400,000 consumers, ordered carriers to pay at least $13.4 million in restitution and at least $4.1 million in penalties for cramming and slamming violations. That's according to the U.S. Government Accountability Office.[10] For reasons such as these, I think efforts such as yours are precisely what is needed most.

Lastly, it is important to be wary when you write exceptions into your statute, so as not to exclude the very things you are trying to reach. Twelve years ago, the Iowa Utilities Board wrote a rule excluding "acceptance of collect calls" from the Iowa definition of cramming. For many years, both the Board and our office thought this language excluded billings for collect calls from the definition of cramming in cases in which the calls were accepted and the charges thus authorized, but, and this is the important point, that billings for collects calls that were not accepted and for which the charges were not authorized fell within the definition of cramming and were therefore prohibited. I think that view accords with most views on the topic, including those of the Federal Trade Commission in the case of the massive $30 million collect call fraudulent billing scheme that I mentioned a moment ago. Last year, however, the Iowa Supreme Court held that the rule as written has the effect of removing collect call charges

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[8] *VoiceNet Telephone, LLC*, FCC 11-91, 26 F.C.C.R. 8874, 2011 WL 2433349 (FCC 2011).

[9] "Phone Bill 'Cramming' Defendant Settles FTC Charges," http://www.ftc.gov/opa/2007/10/nationwide.shtm (FTC 2007)

[10] U.S Government Accountability Office, "*Telecommunications: State and Federal Actions to Curb Slamming and Cramming*," Report No. GAO/RCED-99-193 (July 1999), http://www.gao.gov/archive/1999/rc99193.pdf, p. 14.

altogether from the Iowa definition of cramming, whether or not the calls were accepted and the charges thus authorized.[11] Again, you want to be careful when you write exceptions so as not to end up excluding the very things you are trying to reach.

In summary, I think the goal should be to eradicate unauthorized charges on phone bills. I'd like to thank you again for inviting my testimony. I'd be happy to attempt to answer any questions.

[11] *Evercom Systems, Inc. v. Iowa Util. Bd.*, 805 N.W.2d 758 (Iowa 2011).

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March 23, 2012

The Honorable Hollis French, Chair
Senate Judiciary Committee
Alaska State Capitol, Room 417
Juneau, AK 99801-1182

RE: SB 138 (Wielechowski, Davis, Egan)—Support

Dear Chair French:

On behalf of the members of AARP in Alaska, we encourage you and your colleagues on the Senate Judiciary Committee to support SB 138, authored by your Committee Vice-Chair Senator Bill Wielechowski and Senators Bettye Davis and Dennis Egan and co-sponsored by Senators Johnny Ellis and Joe Thomas.

Essentially, SB 138 would prohibit "cramming." Cramming is the practice of submitting or including unauthorized charges on a consumer's telephone bill. Examples of cramming include charges that are added without a clear description of the service provided (such as "monthly fee" and "service charge") and charges for services that the customer did not request or authorize (such as voice mail, caller ID, pay-per-call services, and club memberships)

SB 138 will help curb this deceptive marketing practice.

AARP recommends an "AYE" vote on SB 138.

Should you have any questions about our position, please feel free to contact me (586-3637) or Patrick Luby, AARP Advocacy Director (907-762-3314).

Thank you for your consideration.

Sincerely,

Marie Darlin

Marie Darlin, Coordinator
AARP Capital City Task Force
415 Willoughby Avenue, Apt. 506
Juneau, AK 99801
586-3637 (voice)
463-3580 (fax)

CC: Vice-Chair Bill Wielechowski
Senator John Coghill
Senator Lesil McGuire
Senator Joe Paskvan

Jennie Chin Hansen, President
Addison Barry Rand, Chief Executive Officer

Senator Hollis French, Chair
Senate Judiciary Committee
Alaska State Legislature
Juneau, Alaska

March 22, 2012

RE: CSSB 138

Dear Senator French,

Alaska Communications discourages further action on CSSB 138. However, if further action is taken by the Senate Judiciary Committee, Alaska Communications recommends a few amendments, which are attached to this letter.

If enacted, CSSB 138 would place new burdens on telecommunications providers that provide third party billing services. Alaska Communications opposes this legislation because there is no evidence of a problem in this area that needs fixing. We are not aware of any consumer rebellion tied to third party billing, we do not have a large in-box filled with complaints, and we are not aware of this being an issue for other telecommunications providers in Alaska. For these reasons, we see no need for legislation such as CSSB 138.

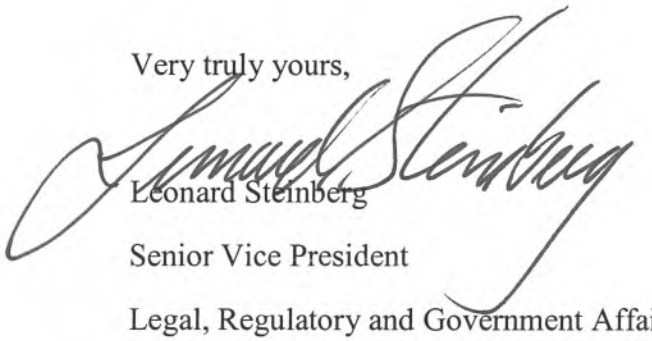
Alaska Communications does bill customers for third parties at the same time it bills for its own services. Customers do short pay bills and when they inform us of the reason we allocate the funds submitted appropriately. Too often, however, customers fail to explain why they bill is short paid or how to allocate the funds they submit. In the absence of any information from the customer, Alaska Communications applies a rational allocation of the funds between itself and the third parties. This can lead to nonpayment of telephone bills through no fault of the telephone provider.

Alaska Communications takes its responsibility to provide quality services very seriously. Customers too, however, need to be responsible and explain why they have short paid a bill and

how to allocate any funds submitted. Therefore, although Alaska Communications sees no need for this legislation at all, we submit the attached proposed amendment providing for customer responsibility for your consideration.

Please let me know if you would like additional information.

Very truly yours,



Leonard Steinberg

Senior Vice President

Legal, Regulatory and Government Affairs

CS for SB138 – Suggested Amendments

"An Act relating to the inclusion of the charges of a vendor of goods or services on the bills of certain telecommunications carriers; and adding an unlawful act to the Alaska Unfair Trade Practices and Consumer Protection Act."

***Section 1.**
Section 42.05.715 (b) add new subsection (5):

(5) Telecommunications carriers may recover the reasonable costs of implementing bill changes and other related costs associated with this section from the person or billing agent covered by this section.

Section 42.05.715(c) add new subsection (1):

(1) To invoke the non-discontinuance of service protection described in this subsection, a customer must inform the telecommunications carrier in writing that a billing dispute exists. A customer who makes a partial payment to the telecommunications carrier by subtracting a disputed amount must inform the telecommunications carrier in writing of that fact and instruct the telecommunications carrier on how to apply the payment. A customer's failure to prescribe payment application allows the telecommunications provider to apply payments in accordance with its standard practices. In this circumstance, payment delinquencies could prompt the discontinuation of telecommunications services.

***Section 3.**
Section 45.50.476(c)(4) add new subsection (C)

(C) Telecommunications carriers have no obligation to independently verify the accuracy of the information provided by the vendor of goods and services under this subsection.

SB 140

<TARGET><BILL>SB 140</BILL><SUBJECT>SB 140</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

SB140 Cathinone Bath Salts
Changes from Version B to Version I.

New Sections 1 and 2 were added to the bill to amend the penalties for the cathinone substances listed in the original bill.

In Section 1, sales, distribution, manufacture, and possession of 500 milligrams or more of the substances remain classified as Misconduct involving a Controlled Substance (MICS) in the 4th degree, a Class C felony.

In Section 2, possession of **under** 500 milligrams are classified as MICS in the 5th degree, an A misdemeanor.

In Section 3, a technical amendment was made by legislative legal drafters to transfer methicathinone from the list of Schedule 1 substances into Schedule 2, so that all the cathinone-related substances are listed in the same schedule.

Section 4 repeals the methicathinone listing in Schedule 1.

Cindy Smith

From: Christine Marasigan
Sent: Thursday, February 09, 2012 3:12 PM
To: Cindy Smith
Subject: RE: draft explanation of changes

Perfection as always.

From: Cindy Smith
Sent: Thursday, February 09, 2012 2:49 PM
To: Christine Marasigan
Subject: draft explanation of changes

This look OK to you?

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

CS FOR SENATE BILL NO. 140(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS MEYER, GIESSEL, AND OLSON, Egan, McGuire, Wagoner, Huggins

A BILL

FOR AN ACT ENTITLED

"An Act classifying certain substances as schedule IIA controlled substances and providing penalties relating to those substances; and providing for an effective date."

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

* **Section 1.** AS 11.71.040(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person

(1) manufactures or delivers any amount of a schedule IVA or VA controlled substance or possesses any amount of a schedule IVA or VA controlled substance with intent to manufacture or deliver;

(2) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance;

(3) possesses

(A) any amount of a

(i) schedule IA **controlled substance;** or

(ii) IIA controlled substance **except a controlled substance listed in AS 11.71.150(e)(11) - (15);**

(B) 25 or more tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(C) one or more preparations, compounds, mixtures, or substances of an aggregate weight of

(i) three grams or more containing a schedule IIIA or IVA controlled substance except a controlled substance in a form listed in (ii) of this subparagraph;

(ii) 12 grams or more containing a schedule IIIA controlled substance listed in AS 11.71.160(f)(7) - (16) that has been sprayed on or otherwise applied to tobacco, an herb, or another organic material; **or**

(iii) 500 milligrams or more of a schedule IIA controlled substance listed in AS 11.71.150(e)(11) - (15);

(D) 50 or more tablets, ampules, or syrettes containing a schedule VA controlled substance;

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of six grams or more containing a schedule VA controlled substance;

(F) one or more preparations, compounds, mixtures, or substances of an aggregate weight of four ounces or more containing a schedule VIA controlled substance; or

(G) 25 or more plants of the genus cannabis;

(4) possesses a schedule IIIA, IVA, VA, or VIA controlled substance

(A) with reckless disregard that the possession occurs

(i) on or within 500 feet of school grounds; or

(ii) at or within 500 feet of a recreation or youth center; or

(B) on a school bus;

(5) knowingly keeps or maintains any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place that is used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30;

(6) makes, delivers, or possesses a punch, die, plate, stone, or other thing that prints, imprints, or reproduces a trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of these upon a drug, drug container, or labeling so as to render the drug a counterfeit substance;

(7) knowingly uses in the course of the manufacture or distribution of a controlled substance a registration number that is fictitious, revoked, suspended, or issued to another person;

(8) knowingly furnishes false or fraudulent information in or omits material information from any application, report, record, or other document required to be kept or filed under AS 17.30;

(9) obtains possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; or

(10) affixes a false or forged label to a package or other container containing any controlled substance.

*** Sec. 2.** AS 11.71.050(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fifth degree if the person

(1) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one ounce containing a schedule VIA controlled substance;

(2) possesses

(A) less than 25 tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(B) one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than

(i) three grams containing a schedule IIIA or IVA controlled substance except a controlled substance in a form listed in (ii) of this subparagraph;

(ii) 12 grams but more than six grams containing a schedule IIIA controlled substance listed in AS 11.71.160(f)(7) - (16) that has been sprayed on or otherwise applied to tobacco, an herb, or another organic material; **or**

(iii) 500 milligrams containing a schedule IIA controlled substance listed in AS 11.71.150(e)(11) - (15);

(C) less than 50 tablets, ampules, or syrettes containing a schedule VA controlled substance;

(D) one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than six grams containing a schedule VA controlled substance; or

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance; or

(3) fails to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under AS 17.30.

* **Sec. 3.** AS 11.71.150(e) is amended to read:

(e) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the nervous system:

(1) amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) methamphetamine, its salts, isomers, and salts of its isomers;

(3) methylphenidate;

(4) phenmetrazine and its salts;

(5) fenethylline;

(6) N-ethylamphetamine;

(7) 3,4-methylenedioxy-N-ethylamphetamine, also known as N-ethyl-

alpha-methyl-3,4(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA;

(8) N-hydroxy-3,4-methylenedioxyamphetamine, also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA;

(9) 4-methylaminorex, also known as 2-amino-4-methyl-5-phenyl-2-oxazoline;

(10) N,N-dimethylamphetamine, also known as N,N,alpha-trimethylybenzencethaneamine or N,N,alpha-trimethylphenethyline, its salts, optical isomers, and salts of optical isomers**;**

(11) cathinone;

(12) 2-methylamino-1-phenylpropan-1-one, also known as methcathinone and cat, its salts, optical isomers, and salts of isomers;

(13) 4-methylmethcathinone, also known as mephedrone, its salts, isomers, and salts of isomers;

(14) 3,4-methylenedioxypyrovalerone, also known as MDPV, its salts, isomers, and salts of isomers;

(15) substituted cathinones, including any compound, except bupropion or a compound listed in another schedule, structurally derived from 2-amino-1-phenyl-1-propanone by modification in any of the following ways:

(A) by substitution in the phenyl ring to any extent with alkyl, alkoxy, alkylenedioxy, haloalkyl, hydroxyl, or halide substituents, whether or not further substituted in the phenyl ring by one or more other univalent substituents;

(B) by substitution at the 3-position with an alkyl substituent;

(C) by substitution at the nitrogen atom with alkyl or dialkyl groups or by inclusion of the nitrogen atom in a cyclic structure.

*** Sec. 4.** AS 11.71.140(b)(5) is repealed.

*** Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

27-LS1032\I
Luckhaupt
2/3/12

CS FOR SENATE BILL NO. 140(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS MEYER, GIESSEL, AND OLSON, Egan

A BILL

FOR AN ACT ENTITLED

"An Act classifying certain substances as schedule IIA controlled substances and providing penalties relating to those substances; and providing for an effective date."

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

*** Section 1.** AS 11.71.040(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person

(1) manufactures or delivers any amount of a schedule IVA or VA controlled substance or possesses any amount of a schedule IVA or VA controlled substance with intent to manufacture or deliver;

(2) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance;

(3) possesses

(A) any amount of a

(i) schedule IA **controlled substance;** or

(ii) IIA controlled substance **except a controlled substance listed in AS 11.71.150(e)(11) - (15);**

(B) 25 or more tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(C) one or more preparations, compounds, mixtures, or substances of an aggregate weight of

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(ii) 12 grams or more containing a schedule IIIA controlled substance listed in AS 11.71.160(f)(7) - (16) that has been sprayed on or otherwise applied to tobacco, an herb, or another organic material; **or**

(iii) 500 milligrams or more of a schedule IIA controlled substance listed in AS 11.71.150(e)(11) - (15);

(D) 50 or more tablets, ampules, or syrettes containing a schedule VA controlled substance;

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of six grams or more containing a schedule VA controlled substance;

(F) one or more preparations, compounds, mixtures, or substances of an aggregate weight of four ounces or more containing a schedule VIA controlled substance; or

(G) 25 or more plants of the genus cannabis;

(4) possesses a schedule IIIA, IVA, VA, or VIA controlled substance

(A) with reckless disregard that the possession occurs

(i) on or within 500 feet of school grounds; or

(ii) at or within 500 feet of a recreation or youth center; or

(B) on a school bus;

(5) knowingly keeps or maintains any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place that is used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30;

(6) makes, delivers, or possesses a punch, die, plate, stone, or other thing that prints, imprints, or reproduces a trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of these upon a drug, drug container, or labeling so as to render the drug a counterfeit substance;

(7) knowingly uses in the course of the manufacture or distribution of a controlled substance a registration number that is fictitious, revoked, suspended, or issued to another person;

(8) knowingly furnishes false or fraudulent information in or omits material information from any application, report, record, or other document required to be kept or filed under AS 17.30;

(9) obtains possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; or

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(2) possesses

(A) less than 25 tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(B) one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than

(i) three grams containing a schedule IIIA or IVA controlled substance except a controlled substance in a form listed in (ii) of this subparagraph;

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(iii) 500 milligrams containing a schedule IIA controlled substance listed in AS 11.71.150(e)(11) - (15);

(C) less than 50 tablets, ampules, or syrettes containing a schedule VA controlled substance;

(D) one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than six grams containing a schedule VA controlled substance; or

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance; or

(3) fails to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under AS 17.30.

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(e) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the nervous system:

(1) amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) methamphetamine, its salts, isomers, and salts of its isomers;

(3) methylphenidate;

(4) phenmetrazine and its salts;

(5) fenethylline;

(6) N-ethylamphetamine;

(7) 3,4-methylenedioxy-N-ethylamphetamine, also known as N-ethyl-

alpha-methyl-3,4(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA;

(8) N-hydroxy-3,4-methylenedioxyamphetamine, also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA;

(9) 4-methylaminorex, also known as 2-amino-4-methyl-5-phenyl-2-oxazoline;

(10) N,N-dimethylamphetamine, also known as N,N,alpha-trimethylybenzencethaneamine or N,N,alpha-trimethylphenethyline, its salts, optical isomers, and salts of optical isomers**;**

(11) cathinone;

(12) 2-methylamino-1-phenylpropan-1-one, also known as methcathinone and cat, its salts, optical isomers, and salts of isomers;

(13) 4-methylmethcathinone, also known as mephedrone, its salts, isomers, and salts of isomers;

(14) 3,4-methylenedioxypyrovalerone, also known as MDPV, its salts, isomers, and salts of isomers;

(15) substituted cathinones, including any compound, except bupropion or a compound listed in another schedule, structurally derived from 2-amino-1-phenyl-1-propanone by modification in any of the following ways:

(A) by substitution in the phenyl ring to any extent with alkyl, alkoxy, alkylenedioxy, haloalkyl, hydroxyl, or halide substituents, whether or not further substituted in the phenyl ring by one or more other univalent substituents;

(B) by substitution at the 3-position with an alkyl substituent;

(C) by substitution at the nitrogen atom with alkyl or dialkyl groups or by inclusion of the nitrogen atom in a cyclic structure.

*** Sec. 4.** AS 11.71.140(b)(5) is repealed.

*** Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

TO: Legislative Legal

FROM: Cindy Smith

RE: SB 140 Cathinone Bath Salts 27- LS1032\B

Please prepare a CS that makes the following changes:

1. Establish a separate A misdemeanor penalty for possession of 500 milligrams or less.
2. Incorporate the attached language from the Crime Lab into the new lists for cathinone.

Call me at 465-6641 if you have any questions.

Alaska State Legislature

Interim:
716 West 4th Ave.
Anchorage, Alaska 99501
(907) 269-0199

Session:
State Capitol Building
Juneau, Alaska 99801-1182
(907) 465-4945

Senator Kevin Meyer
Senate District O

SPONSOR STATEMENT FOR SB 140

"An Act classifying certain synthetic cathinones as schedule IIA controlled substances; and providing for an effective date."

SB 140 would classify certain synthetic cathinones, commonly known as synthetic cocaine and marketed as 'bath salts,' as a schedule IIA controlled substance.

Marketed as bath salts or plant food with names like 'Meow-Meow,' Vanilla Sky,' 'Ivory Snow,' and 'Bliss,' synthetic cathinones are inexpensive, accessible, and undetectable in most drug tests. Many users of this drug use them in combination with or as a legal alternative to cocaine, ecstasy or methamphetamines.

Drug effects include impaired perception, reduced motor control, disorientation, extreme paranoia and violent episodes. Synthetic cathinones are abused mainly by snorting and oral ingestion. The U.S. Drug Enforcement Administration, the U.S. Military, and the Municipality of Anchorage have all taken action to control or prohibit use of this drug.

According to the National Council of State Legislatures, as of October 24, 2011 there are 33 states that have adopted laws or have departmental rules banning chemical compounds associated with 'bath salts.' Seven states have legislation pending.

Should SB 140 pass, it would be unlawful throughout the State of Alaska to sell, use, purchase, possess, manufacture, transport or deliver synthetic cathinones, the chemical compounds which are being marketed as 'bath salts' and synthetic cocaine.

Advisory Board on Alcoholism
and Drug Abuse

abada
amhb

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

January 24, 2012

Senator Kevin Meyer
Alaska State Capitol, Room 103
Juneau, Alaska 99801

Re: Letter of Support for SB 140

Dear Senator Meyer,

The Advisory Board on Alcoholism and Drug Abuse appreciates your recognition of the need to regulate cathinone and similar substances marketed as "bath salts." These substances pose a serious risk to the health and welfare of Alaskans and should be Schedule IIA controlled substances.

Cathinone, methcathinone, and methylenedioxypyrovalerone (MPDV) produce amphetamine-like effects. Commonly marketed as "bath salts," these drugs can be inhaled, ingested, injected, or smoked. The expected effect is a sort of euphoria, but these chemicals also have dangerous effects. "Bath salts" substances have been reported to cause extreme anxiety and paranoia, delusional thinking, visual and auditory hallucinations leading to violent outbursts, self-mutilation, and suicidal thoughts and actions.

Nationwide, there were 6,072 calls to poison centers about designer drugs labeled as "bath salts" in 2011.[1] In 2010, that number was 303 calls.[2] This reflects the rapid increase in use of these synthetic drugs in the United States. In response, the U.S. Drug Enforcement Administration invoked its emergency scheduling powers in September 2011 to make possession and sale of mephedrone, MDPV, and methylone (common "bath salts" substances") illegal. This emergency regulation will expire in September 2012. State and city governments across the country are taking similar action through emergency powers, ordinances, and legislation in an effort to protect health and safety.[3]

The Advisory Board on Alcoholism and Drug Abuse supports SB 140 and we appreciate your work on behalf of Alaskans.

Sincerely,

Robert Coghill, Jr. Chairman
Advisory Board on Alcoholism and Drug Abuse

---

[1] American Association of Poison Control Centers report on "closed human exposures calls to poison centers about exposures to bath salts as of December 31, 2011," updated January 5, 2012. Available online at http://www.aapcc.org/dnn/Portals/0/Bath%20Salts%20Data%20for%20Website%201.5.2012.pdf.

[2] *Id.*

[3] Nevada's Board of Pharmacy just restricted "bath salts" substances through its emergency powers in January, 2012. Maine, Louisiana, Kentucky, Ohio, Delaware, and nearly three-quarters of U.S. states have acted to prohibit sale and/or possession of these substances. The Municipality of Anchorage passed an ordinance in October 2011 to prohibit manufacture, sale, and possession of these substances.

MUNICIPALITY OF ANCHORAGE

Office of the Mayor

Phone: 907-343-7100
FAX: 907-343-7180

Mayor Dan Sullivan

January 25, 2012

The Honorable Kevin Meyer
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: Senate Bill 140

Dear Senator Meyer,

Thank you for introducing Senate Bill 140, *"An Act classifying certain substances as schedule IIA controlled substances; and providing for an effective date."*

The Municipality of Anchorage fully supports the passage of SB 140. The use of cathinone and its derivatives (commonly referred to as "bath salts") has quickly become a significant health and public safety issue.

Due to the huge range in potency between the various compounds and products, municipal first responders have encountered users of these drugs having severe reactions, including from bizarre and dangerous behavior to unconsciousness. Users who operate machinery, especially motor vehicles, have had significant accidents and present a danger to others that is on par with operating under the influence of alcohol.

In response, the Municipality has enacted its own local code, but does not have the jurisdiction to deal with the influx of the drug on a state-wide basis or impose the kinds of meaningful criminal sentences that are needed to stem the manufacture, distribution, and sale of these drugs.

Thank you again for introducing this important legislation.

Sincerely,

Dan Sullivan
Mayor

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB140**
Fiscal Note Number
() Publish Date

Identifier (file name) SB140-DPS-LAB-01-23-12
Title CATHINONE BATH SALTS
Sponsor Senators Meyer, Giessel, Olson
Requester (S) JUD

Dept. Affected Public Safety
Appropriation Statewide Support
Allocation Laboratory Services
OMB Component Number 527

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Orin Dym, Laboratory Manager — Phone (907) 269-5743
Division Scientific Crime Detection Laboratory — Date/Time 1/13/12 1:00 PM
Approved by Joe Masters, Commissioner — Date 1/23/2012
Department of Public Safety

(Revised 11/28/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB140
2012 LEGISLATIVE SESSION

Analysis

This proposed legislation would add certain synthetic substances to the Schedule IIA list of statutorily controlled substances and provide for an effective date.

The Scientific Crime Detection Laboratory (crime lab) provides analysis of suspected controlled substances, issues reports, and provides expert testimony for the State of Alaska. The crime lab currently receives an average of ten submittals each month from law enforcement referencing "suspected bath salts." If these substances become controlled, the Chemistry Section of the lab can expect some change in requests for laboratory service, but is unable to determine how significant that change will be; whether it will remain roughly ten submittals per month or if it will increase.

These substances are unlike most that have been previously criminalized in that they are not "street drugs" but legally contrived and sold online via the internet and locally over-the-counter through tobacco shops. Because actual fiscal impact is unknown and difficult to determine, the crime lab is not requesting any additional funds or positions at this time but also does not wish to leave a matter the crime laboratory cannot fully assess without the reality of possible, though not probable, future fiscal impact.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version
Fiscal Note Number
Publish Date

Identifier (file name) SB 140-DOC-OC-01-13-12
Title "An Act classifying certain substances as Schedule IIA
Sponsor Senator Meyer, Giessel & Olson
Requester Senate Judiciary Committee

Dept. Affected DOC
Appropriation Admin & Support
Allocation Commissioner's Office
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**	**	**	**	**	**	**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by Leslie Houston, Director — Phone 907-465-3339
Division Admin. Services, Department of Corrections — Date/Time 1/13/12 11:32 AM
Approved by Joseph D. Schmidt, Commissioner — Date 1/13/2012
Department of Corrections

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB 140
2012 LEGISLATIVE SESSION

Analysis

This legislation classifies certain substances as Schedule IIA controlled substances.

Currently, possession of a schedule IIA is a Class C felony with a possible sentence of 0-2 years. Manufacturing or delivering a schedule IIA controlled substance is a Class B felony with a possible sentence of 0-4 years. The current average daily cost to house an inmate is $134.90. Therefore, housing an offender could cost the department anywhere from $0.0 (no time served) to $196,954.00 (for a 4-year sentence).

DOC analyzed the impacts of similar laws passed in recent years (Example, HB 7 - Synthetic Marijuana), we have found zero convictions and therefore zero offenders being housed in DOC facilities.

The department is currently unable to quantify the fiscal impacts of this bill, as we cannot predict the number of offenses that will occur. Should this legislation pass, the department will closely monitor the potential future fiscal impacts.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB 140**
Fiscal Note Number
() Publish Date

Identifier (file name) SB140-LAW-CRIM-01-25-12
Title An Act classifying certain substances as schedule IIA controlled substances.
Sponsor Senators Meyer, Giessel and Olson
Requester (S) Judiciary

Dept. Affected Law
Appropriation Criminal
Allocation Criminal Justice Litigation
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager — Phone 465-5427
Division Administrative Services — Date/Time 1/25/12 5:10PM
Approved by Richard Svobodny, Acting Attorney General — Date 1/25/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 140

Analysis

SB 140 adds new substances to Schedule IIA of Alaska's controlled substances. These substances are currently not controlled. They are sometimes referred to as synthetic cocaine or bath salts. It is difficult to predict the number of cases that would be filed after these substances are included in Alaska's schedules of controlled substances but the number should not be great.

Schedule IIA currently includes, among other substances, amphetamines and methamphetamines, which are fairly dangerous substances.

The fiscal impact is zero.

Alaska State Legislature

Interim:
716 West 4th Ave.
Anchorage, Alaska 99501
(907) 269-0199

Session:
State Capitol Building
Juneau, Alaska 99801-1182
(907) 465-4945

Senator Kevin Meyer
Senate District O

TO: Senator Hollis French
Senate Judiciary Committee

FROM: Senator Kevin Meyer

DATE: January 18, 2012

RE: SB 140 Request for Hearing

I respectfully request the Senate Judiciary Committee schedule a hearing for SB 140, "An Act classifying certain synthetic cathinones as schedule IIA controlled substances; and providing for an effective date."

The following documents are attached and will be sent electronically:

- Current version of the bill
- Sponsor Statement
- Support Documentation
- Letters of Support to follow
- Staff member assigned to the bill: Christine R. Marasigan, 465-6876

This bill would make it unlawful throughout the State of Alaska to sell, use, purchase, possess, manufacture, transport or deliver synthetic cathinones, the chemical compounds which are being marketed as 'bath salts' and synthetic cocaine.

Please contact Christine if you have any questions regarding this legislation.

Cindy Smith

From: Cindy Smith
Sent: Monday, February 06, 2012 4:56 PM
To: Christine Marasigan
Subject: FW: Message from 4th fl00r copier
Attachments: S4th fl00r 12020616460.pdf

Take a look at this and let me know if you see any problems. This establishes possession of less than 500 milligrams as a Class A misdo, everything else as a C felony.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: postmaster@legis.state.ak.us [mailto:postmaster@legis.state.ak.us]
Sent: Monday, February 06, 2012 4:47 PM
To: Cindy Smith
Subject: Message from 4th fl00r copier

Cindy Smith

From: Christine Marasigan
Sent: Monday, February 06, 2012 12:09 PM
To: Cindy Smith
Subject: FW: change

Follow Up Flag: Follow up
Flag Status: Flagged

RE: SB 140
No worries if there is no change on our bill, crime lab says it isn't necessary.

From: Dym, Orin W (DPS) [mailto:orin.dym@alaska.gov]
Sent: Monday, February 06, 2012 12:04 PM
To: Christine Marasigan
Cc: Howell, Kelly A (DPS)
Subject: RE: change

No, from a chemistry point of view it does not add anything.

Orin Dym
Forensic Laboratory Manager
Alaska Scientific Crime Detection Laboratory
907-269-5743

From: Christine Marasigan [mailto:Christine_Marasigan@legis.state.ak.us]
Sent: Monday, February 06, 2012 12:03 PM
To: Dym, Orin W (DPS)
Cc: Howell, Kelly A (DPS)
Subject: RE: change

Is it necessary?

From: Dym, Orin W (DPS) [mailto:orin.dym@alaska.gov]
Sent: Monday, February 06, 2012 12:02 PM
To: Christine Marasigan
Cc: Howell, Kelly A (DPS)
Subject: RE: change

It is fine.

Orin Dym
Forensic Laboratory Manager
Alaska Scientific Crime Detection Laboratory
907-269-5743

From: Christine Marasigan [mailto:Christine_Marasigan@legis.state.ak.us]
Sent: Monday, February 06, 2012 11:41 AM
To: Dym, Orin W (DPS)
Subject: change

Mr. Dym,
Ryan from Rep. Stoltze's office had a change to HB 253 regarding page 2, line 11.

Current version:

(12) methcathinone, its salts, optical isomers, and salts of optical isomers;

Changes:
(12) 2-methylamino-1-phenylpropan-1-one, also known as methcathinone and cat, its salts, optical isomers, and salts of optical isomers;

I assume that this is a change you agree with. If so, we will change the Senate version as well. If it is NOT a change you agree with, please let me know immediately.

Thank you,
Christine

Christine R. Marasigan
Staff to Senator Kevin Meyer
Alaska State Capitol
Juneau, AK 99801
Phone: (907) 465-4945
Fax: (907) 465-3476
Email: christine_marasigan@legis.state.ak.us

If you would like to receive Senator Kevin Meyer's electronic newsletter, please send an email with the subject line "subscribe" with your name and address to: senator_kevin_meyer@legis.state.ak.us

Cindy Smith

From: LIO Kodiak
Sent: Thursday, January 26, 2012 11:26 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Cc: Cindy Smith
Subject: SB 140 - Written Testimony for 01/27/12

From: Timothy Luther [mailto:tbheluther@yahoo.com]
Sent: Thursday, January 26, 2012 10:40 AM
To: LIO Kodiak
Subject: Re: SB 140 -Friday

Hi Lorna,

I don't think I can make it to the hearing on SB 140, I am sending you my written testimony--if you can forward it to them I would appreciate it. Becky

Dear Senate Judiciary Committee Members:
Senator Hollis French
Senator Bill Wielechowski
Senator Joe Paskvan
Senator Lesil McGuire
Senator John Coghill

I would like to share some thoughts concerning SB 140.
I am a concerned community member of Kodiak. I have been a foster parent of teenage boys and currently my husband works with teens that are struggling to find their way in society- hence they are making very poor choices that affect them personally, their family and their community. We have seen first hand the affects of drugs/ synthetics and alcohol- its negative affects on youth, families and communities.

1. I would like to know if SB 140 is going to provide means for state agencies to test for synthetics, bath salts and the like? We have found that agencies do not want to or can not afford to test for these drugs. Once youth know they are not going to be tested they will use the drugs all the more, and whats the point of spending the money to make something illegal if we are not going to take the steps to follow thru. If its going to be illegal agencies like Juvenile Probation Officers, State Troopers, hospitals, etc should be required to test for them and Agencies Directors should not be allowed to deny the test due to funding.

2. There needs to be some type of law that allows Police, State Troopers, City and Borough governments to deal with Adult Entertainment shops. This is a serious problem in Kodiak. We have a shop that sells synthetics to minors. Along with this SB 140 needs to be written in such a way that it

covers promotion, advertisement, packaging, and ingredients. Currently, when packaging is changed or ingredients are altered laws become null and void and the drug is back on the market. We don't have time for new laws to be developed each time a new synthetic drug is discovered, we dont have time to wait for new testing laws to be approved. Can SB 140 be written is such a way that it covers future changes to Bath Salts or any other synthetic that is developed?

3. I would like to see funding and grant monies be put in place for communities to provide training for parents, schools, assemblies, organizations, youth programs for at risk teens and pre teens, afterschool clubs etc. These funds may already be in place but there seems to be a serious lack of current information available to community members. I see first hand how parents don't know what resources are available to them or where to go to find out the information they need to help succeed in the healthy fight for their child/teens life.

Thank you for all your doing, your hard work is appreciated.

Sincerely,
Rebecca Luther
PO Box 376
Kodiak, AK 99615

SB 151

<TARGET><BILL>SB 151</BILL><SUBJECT>SB 151</SUBJECT><COMM>SJUD27</COMM></TARGET>

27-LS1132\U
Gardner
3/20/12

CS FOR SENATE BILL NO. 151(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS MEYER, Hoffman, Dyson, Menard, Paskvan, Egan, Davis, Ellis, McGuire

A BILL

FOR AN ACT ENTITLED

"An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

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

*** Section 1.** AS 12.55.155(d) is amended to read:

(d) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence below the presumptive range set out in AS 12.55.125:

(1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

(2) the defendant, although an accomplice, played only a minor role in the commission of the offense;

(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but that

significantly affected the defendant's conduct;

(4) the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant;

(5) the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age;

(6) in a conviction for assault under AS 11.41.200 - 11.41.220, the defendant acted with serious provocation from the victim;

(7) except in the case of a crime defined by AS 11.41.410 - 11.41.470, the victim provoked the crime to a significant degree;

(8) before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained;

(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;

(10) the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant's immediate family;

(11) after commission of the offense for which the defendant is being sentenced, the defendant assisted authorities to detect, apprehend, or prosecute other persons who committed an offense;

(12) the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;

(13) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;

(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;

(16) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior;

(17) except in the case of an offense defined by AS 11.41 or AS 11.46.400, the defendant has been convicted of a class B or C felony, and, at the time of sentencing, has successfully completed a court-ordered treatment program as defined in AS 28.35.028 that was begun after the offense was committed;

(18) except in the case of an offense defined under AS 11.41 or AS 11.46.400 or a defendant who has previously been convicted of a felony, the defendant committed the offense while suffering from a mental disease or defect as defined in AS 12.47.130 that was insufficient to constitute a complete defense but that significantly affected the defendant's conduct;

(19) the defendant is convicted of an offense under AS 11.71, and the defendant sought medical assistance for another person who was experiencing a drug overdose contemporaneously with the commission of the offense;

(20) except in the case of an offense defined under AS 11.41 or AS 11.46.400, the defendant committed the offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct; in this paragraph, "fetal alcohol spectrum disorder" means a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

March 19, 2012

TO: Leg Legal

FROM: Cindy Smith, Sen. French

RE: Committee CS for SB 151 LS1132\O

Please prepare a Judiciary CS for SB 151, starting with the \O version, incorporating the following changes:

1. On page 2, at lines 13-14 delete language in bold ("and except as provided by (20) of this subsection,")

2. Also on page 2, at line 21, after the number (20) add the words "except in the case of an offense defined under AS 11.41, or AS 11.46.400"

3. Also on page 2, at line 29, delete all language after the word "pregnancy".

I need this CS for a meeting on Wednesday, March 21.

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;

(16) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior;

(17) except in the case of an offense defined by AS 11.41 or AS 11.46.400, the defendant has been convicted of a class B or C felony, and, at the time of sentencing, has successfully completed a court-ordered treatment program as defined in AS 28.35.028 that was begun after the offense was committed;

(18) except in the case of an offense defined under AS 11.41 or AS 11.46.400 or a defendant who has previously been convicted of a felony, **and, ~~except as provided by (20) of this subsection,~~** the defendant committed the offense while suffering from a mental disease or defect as defined in AS 12.47.130 that was insufficient to constitute a complete defense but that significantly affected the defendant's conduct;

(19) the defendant is convicted of an offense under AS 11.71, and the defendant sought medical assistance for another person who was experiencing a drug overdose contemporaneously with the commission of the offense;

except AS 11.41 or 11.46.400 -

(20) the defendant committed the offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct; in this paragraph, "fetal alcohol spectrum disorder" means a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy, ~~as determined by a~~ neuropsychological examination.

medical diagnosis

physician a coder. or a diagnostic team. "credentialed by DHSS"

mitigating factors clear & convincing evidence

27-LS1132\O
Gardner
3/12/12

CS FOR SENATE BILL NO. 151( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS MEYER, Hoffman, Dyson, Menard, Paskvan, Egan, Davis, Ellis, McGuire

A BILL

FOR AN ACT ENTITLED

"An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

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

*** Section 1.** AS 12.55.155(d) is amended to read:

(d) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence below the presumptive range set out in AS 12.55.125:

(1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

(2) the defendant, although an accomplice, played only a minor role in the commission of the offense;

(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but that

significantly affected the defendant's conduct;

(4) the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant;

(5) the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age;

(6) in a conviction for assault under AS 11.41.200 - 11.41.220, the defendant acted with serious provocation from the victim;

(7) except in the case of a crime defined by AS 11.41.410 - 11.41.470, the victim provoked the crime to a significant degree;

(8) before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained;

(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;

(10) the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant's immediate family;

(11) after commission of the offense for which the defendant is being sentenced, the defendant assisted authorities to detect, apprehend, or prosecute other persons who committed an offense;

(12) the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;

(13) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;

(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;

(16) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior;

(17) except in the case of an offense defined by AS 11.41 or AS 11.46.400, the defendant has been convicted of a class B or C felony, and, at the time of sentencing, has successfully completed a court-ordered treatment program as defined in AS 28.35.028 that was begun after the offense was committed;

(18) except in the case of an offense defined under AS 11.41 or AS 11.46.400 or a defendant who has previously been convicted of a felony, **and, except as provided by (20) of this subsection,** the defendant committed the offense while suffering from a mental disease or defect as defined in AS 12.47.130 that was insufficient to constitute a complete defense but that significantly affected the defendant's conduct;

(19) the defendant is convicted of an offense under AS 11.71, and the defendant sought medical assistance for another person who was experiencing a drug overdose contemporaneously with the commission of the offense;

(20) the defendant committed the offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct; in this paragraph, "fetal alcohol spectrum disorder" means a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy, as determined by a neuropsychological examination.

Law

DRAFT
SB 151

* **Section 1.** AS 12.55.155(d)(18) is amended to read:

(18) except in the case **of a** [OF AN OFFENSE DEFINED UNDER AS 11.41 OR AS 11.46.400 OR A] defendant who has previously been convicted of a felony, the defendant committed the offense while suffering from a mental disease or defect as defined in AS 12.47.130 that was insufficient to constitute a complete defense but that significantly affected the defendant's conduct;

* **Sec. 2.** AS 12.55.155(d) is amended by adding a new paragraph to read:

(20) except in the case of a defendant who has previously been convicted of a felony, the defendant committed the offense

(A) while suffering from a condition diagnosed as a fetal alcohol spectrum disorder;

(B) the fetal alcohol spectrum disorder substantially impairs the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life; and

(C) the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct.

* **Sec. 3.** AS 12.55.185 is amended by adding a new paragraph to read:

(20) "fetal alcohol spectrum disorder" means a disorder in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy, as determined by a neuropsychological examination.

Cindy Smith

From: Michael Jeffery <mjeffery@courts.state.ak.us>
Sent: Monday, March 19, 2012 11:13 AM
To: Cindy Smith
Subject: RE: SB 151

I'll give you a try after my 4:00 p.m. hearing today....
Mike

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Monday, March 19, 2012 10:40 AM
To: Michael Jeffery
Subject: RE: SB 151

Hi Mike!

I am blowing by all your suggested times here, and so am now wondering what your schedule looks like toward the end of the day today – anytime after 4 OR tomorrow morning early OR tomorrow OR around lunch time tomorrow.

J
It's that point in the session where we're all running around more than is necessarily useful...

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Michael Jeffery [mailto:mjeffery@courts.state.ak.us]
Sent: Saturday, March 17, 2012 7:42 PM
To: Cindy Smith
Subject: SB 151

Hello, Cindy!
I understand that Teri Tibbett is talking with ycu about SB 151 and that my name came up.

If we need to talk over the weekend, any time Saturday night or Sunday (except 10:30-noon and 2:00-3:00) would be great. Monday morning would be even better: between 8:30 and 10:15, 11:15-noon, 3:30-4:00 would all work subject to more hearings that might appear like magic on my calendar!

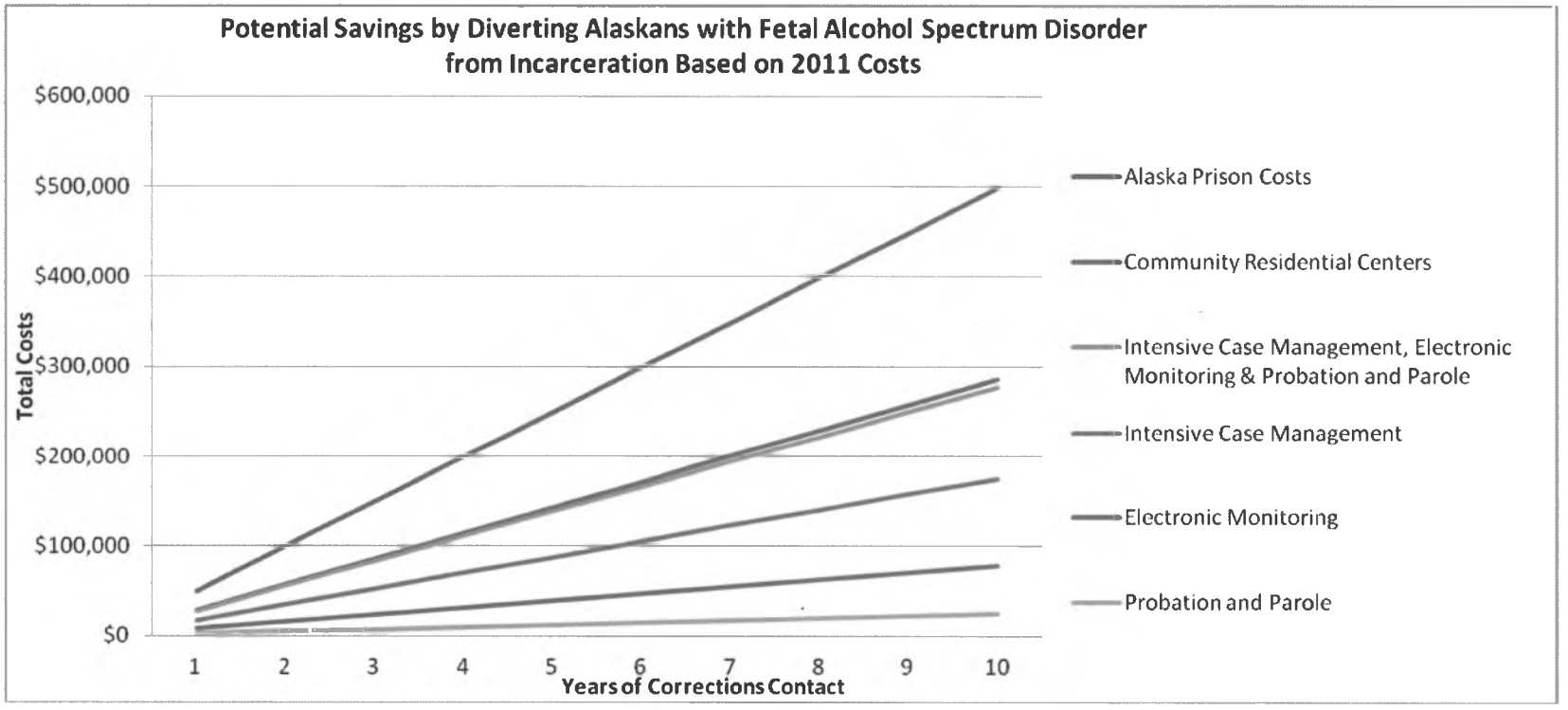
My cell is 907.878.2001. Office phone is 907.852.4800, when recorded message starts, dial 259 and you will skip the message and go right to my phone.

I understand that one of the issues is whether to retain the exception to the mitigating factor for people that have a prior felony. This is actually a big deal in the context of the "Smart Justice" purposes of the bill. FASD-affected persons can easily run up felony convictions for silly property crimes presenting little risk to public safety. I have a great example I can talk with you about from Wainwright. The way presumptive sentencing works, the minimum presumptive sentence jumps substantially if there are one or more prior felonies. If the exception for persons with prior felonies remains in, the potential savings to the state and the humanity of reducing jail time and increasing community supervision will be greatly reduced.

Have a good weekend! It's -30 with -45 windchill today. It's also the "solstice" at Barrow. We are having 12 hours of daylight today.

Mike Jeffery

Click here to report this email as spam.



	Alaska Prison Costs	Community Residential Centers	Intensive Case Management, Electronic Monitoring & Probation and Parole	Intensive Case Management	Electronic Monitoring	Probation and Parole
Daily Costs	$136.44	$78.34	$76.01	$48.00	$21.25	$6.76
Yearly Costs	$49,800.60	$28,594.10	$27,743.65	$17,520.00	$7,756.25	$2,467.40

Source of Corrections Costs: http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf
Intensive Case Management costs based on a per person rate of $48/day (highest estimate).
Prepared by: Advisory Board on Alcoholism and Drug Abuse/Alaska Mental Health Board - 3.30.12

From: Terri
A revised version
of what she sent
you friday

Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership
431 N. Franklin St. Suite 203, Juneau, Alaska 99801 ▪ (907) 465-8920
Webpage: www.hss.state.ak.us/fasd.htm
Email: akfasdpartnership@alaska.gov

SB 151 - Inclusion of FASD as a Mitigating Factor

The Need for SB 151

Individuals diagnosed with a fetal alcohol spectrum disorder (FASD) are disproportionately represented within Alaska's criminal justice system. The intent underlying Alaska's sentencing structure – that people will modify their behaviors based on the criminal justice system's response to their crimes – is not met when applied to individuals with FASD. These disabilities manifest as deficits in executive function, resulting in impaired adaptive behavior, memory difficulties, an inability to plan, and a failure to recognize the consequences of actions. In the interest of justice, it is important to take these deficits into account during sentencing. Neither the offender nor society benefits from holding individuals with FASD to community standards that they cannot possibly attain given their impairments.

SB 151 fulfills a recommendation adopted by the Alaska Criminal Justice Assessment Commission: "The legislature should create a statutory mitigating factor for use at criminal sentencing, recognizing when the wrongful conduct was substantially affected by an organic brain disorder." [1]

A draft resolution being proposed by the Commission on Youth At Risk of the American Bar Association for consideration at this year's annual ABA meeting states: "... the American Bar Association urges lawyers and judges, as well as bar associations and law school clinical programs, to support training that includes law school law enforcement, and legal/judicial education curricula on enhanced awareness of the child and adult disability of Fetal Alcohol Spectrum Disorders (FASD) and its impact on individuals in the child welfare, juvenile justice, and adult criminal justice systems, and that they work with medical, mental health, and FASD disability experts to promote: ... (d) applying FASD as a mitigating factor in the mitigation of juvenile justice and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism."

Overview of the changes proposed in SB 151

SB 151 proposes to allow FASD as a mitigating factor for sentencing in certain cases where there is *clear and convincing* evidence that a "defendant committed an offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct."

SB 151 would, for the purposes of the subsection on mitigating factors, define fetal alcohol spectrum disorder as any "a condition of impaired brain function in the range of permanent birth defects caused

[1] Alaska Criminal Justice Assessment Commission (2000). *Final Report.* Retrieved October 12, 2010 from www.hss.ajc.state.ak.us/reports/CJAC Final 2004.pdf, at p.71.

3.19.12

by maternal consumption of alcohol during pregnancy *as determined by a physician or interdisciplinary team using current FASD diagnostic guidelines*."

The Alaska FASD Partnership and members of the Partnership's legal issues workgroup support removing limiting language from the current statute that creates an "exception" to the application of "mental disease or defect" as a mitigating factor for "offenses against a person" or if the defendant was previously convicted of a felony.

The workgroup suggests that this limiting language, which only applies to the mitigating factor related to individuals with a "mental disease or defect" could be discriminatory. None of the other 19 mitigating factors currently in statute have this limiting language.

David Fleurant, Executive Director of the Disability Law Center of Alaska, who participates in the FASD legal issues workgroup, suggests that the current statute appears to discriminate against individuals with disabilities in the application of mitigating factors "for no rational purpose. No other state which employs 'mental disease or defect' as a mitigating factor limits its application in such a manner."

In light of how FASD adversely impacts an individual's executive function, a significant percentage of the convictions against individuals with FASD involve offenses against the person and/or are committed by felons who are cycling through the criminal justice system. With the limiting language, the state is far less likely to "catch" a person with FASD who is cycling through the corrections system. Therefore, the Partnership and the legal issues workgroup of the Partnership support removing this limiting language from the statute so as to achieve the intended goal of SB 151.

The legislation *DOES NOT*:

1) *require* a judge to use the mitigating factor;
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3) The goal is not a "get out of jail free" card, but an attempt to be "smarter" within the justice system to better direct people who have impaired brain function to services both within and after release from the criminal justice system.

What are mitigating factors?

The Legislature has decided in the presumptive sentencing law that judges should give jail time within certain ranges in all felonies (with the exception of "class C felonies" where the minimum presumptive term is 0 years). The amount of the presumptive term depends on the severity of the crime and whether or not a defendant has prior felonies. There are 34 statutory aggravating factors that could result in a sentence above the presumptive range, if proved by clear and convincing evidence. A judge must sentence a person to at least the minimum presumptive term unless a "mitigating factor" is shown by clear and convincing evidence. There are 19 statutory mitigating factors. With the current mental disease or defect mitigating factor, the defendant must *also* show by clear and convincing evidence that the condition "significantly affected the defendant's conduct." The proposed fetal alcohol spectrum disorder mitigating factor also requires proof by clear and convincing evidence that the condition "significantly affected the defendant's conduct" before a judge could consider it. If the required showing has been made for any mitigating factor, it is legally possible for the judge to sentence below the minimum term (but if the minimum term is more than 4 years, the lower limit is half the minimum presumptive term).

There are special rules when there is a factor in a case that does not fit within the statutory list but which is so important in a case that it would be manifestly unjust to sentence a person without considering the factor. If the sentencing judge finds that such a "non statutory mitigating factor" exists, then the judge must refer the case to a three judge sentencing panel. If at least two judges on the panel agree, the panel can sentence with the same lower limits applicable to a statutory mitigating factor. If the panel does not agree, the case is referred back to the original judge to impose at least the minimum presumptive term. The "three judge panel" method is very cumbersome, time consuming and expensive. SB 151 is a "statutory mitigating factor" and would not require any referral to a three judge sentencing panel.

What are Fetal Alcohol Spectrum Disorders?

FASD is not a medical diagnosis, but an umbrella term for the range of diagnoses associated with damage caused by maternal alcohol consumption during pregnancy. These medical diagnoses can include Fetal Alcohol Syndrome (FAS), Partial Fetal Alcohol Syndrome (PFAS), Alcohol-Related Birth Defects (ARBD), and Alcohol-Related Neurodevelopmental Disorder (ARND). Note that the term, Fetal Alcohol Effects (FAE), is no longer commonly used, having been replaced by the PFAS, ARBD and ARND diagnoses.

Each diagnosis has its own symptoms and attributes, but common among all the diagnoses is permanent, life-long brain damage – often affecting decision-making, judgment and impulse control. FASD is a brain-based disorder, similar to autism, traumatic and acquired brain injury, and other cognitive impairments.

FASDs appear in individuals differently. Some alcohol-exposed individuals may exhibit impulsivity, hyperactivity and risky behaviors. Some have difficulties with memory, while others have very good memories. Some have low IQs, while others have normal IQs.

Experts report that the different presentations are influenced by many variables, including when the mother drank, how much she drank, the genetic makeup (or genotype) of the baby, and the genotype of the mother.

Primary behavior characteristics of people with impaired brain function include: impulsiveness, memory difficulties, anger and frustration, difficulty pairing actions to consequences. Secondary behaviors that develop in reaction to or as a result of the primary disability, include substance abuse and mental health problems, anger and aggression, homelessness, involvement with the criminal justice system, and more.

Neurologist Dr. Susan Hunter-Joerns, a member of the Juneau FASD Diagnostic Team, wrote that structural brain damage "often significantly impair[s] cognitive behavior, common sense, the ability to understand right from wrong, cause-and-effect, consider consequences, ability to recognize social norm ... even though defendants may verbally seem able to talk about the issues. Making long term goals, planning appropriate actions, delaying gratification, and understanding the legal system, are often significant problems."

Who in Alaska is qualified to give a diagnosis of FAS/FASD?

Though some physicians may be qualified to diagnose all the disorders on the FASD spectrum, the preferred method of diagnosis, according to Susan Astley, Professor of Epidemiology and Pediatrics at the University of Washington and director of the Washington State FASD Diagnostic and Prevention Network, is by an interdisciplinary diagnostic team using current, rigorous FASD diagnostic guidelines. This preferred method is also advocated for nationally by the Centers for Disease Control and Prevention.

Each diagnosis on the spectrum requires evaluation and testing related to the Central Nervous System (CNS) to detect damage that cannot be measured alone by physical attributes. Interdisciplinary diagnostic teams using the 4-Digit Diagnostic Code include evaluations by a medical professional, psychologist, occupational therapist, and speech-language pathologist. These evaluations can detect the nuances of the disability.

How many diagnostic teams and/or physicians are available to give FASD diagnoses in Alaska?

Currently, through the Division of Behavioral Health FASD Diagnostic Team Provider Agreement, Alaska has eight active FASD diagnostic teams – in Bethel, Fairbanks, Mat-Su, Kenai, Juneau, Sitka, and two in Anchorage (Southcentral Foundation and ASSETS). Alaska also has a trained diagnostic team at Alaska Psychiatric Institute (API) for children who enter the service system through that door. In the past there were teams in Dillingham and Kodiak — both locations that are interested in reviving their teams at some point, but do not have the resources to do it at this time. Alaska also has had team in Nome, Copper Center, and Ketchikan. The majority of FASD diagnoses in Alaska are determined by the diagnostic teams overseen by DHSS.

How many people are diagnosed with FAS/FASD in Alaska annually?

In 2011, Alaska's FASD diagnostic teams diagnosed 179 individuals. The average per year number is around 153 per year, according to the Alaska Department of Health & Social Services.

What is Alaska's diagnostic standard based on?

In 1999, the DHSS Office of FAS, in conjunction with the statewide FASD Steering Committee, agreed to use the 4-Digit Diagnostic Code as the standard diagnostic system for Alaska's developing Diagnostic Team Network. The 4-Digit Diagnostic Code was developed at the University of Washington's FASD Diagnostic and Prevention Network by Drs. Susan Astley and Sterling Clarren. The 4-Digit Diagnostic Code measures: 1) facial features, 2) growth deficiency, 3) central nervous system damage/dysfunction, and 4) prenatal alcohol exposure. The client's diagnosis is derived after a thorough evaluation by an interdisciplinary team of professionals, which generally includes a physician (or nurse practitioner), psychologist, occupational therapist, speech-language pathologist, social worker, and family advocate. For more information on the FASD 4-Digit Code, visit: http://depts.washington.edu/fasdpn/htmls/4-digit-code.htm.

The 4-Digit Diagnostic Code is considered the "gold standard" for FASD diagnosis and provides a reliable, evidence-based diagnostic process that gives detailed information about the individual client and how best to help that person work with their disability to reach their full potential. All team members are required to complete the University of Washington FASD 4-Digit Diagnostic Code Training Course.

The economic benefits of SB 151

The cost of incarceration in Alaska's prison is about $136 per day. Over the course of five to ten years in an Alaskan prison, an inmate is expected to cost the state close to $250,000-$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

According to the 2009 ISER Study, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?*, the cost of providing services is less than the cost of incarceration. With appropriate supports, clients with FASD, T/ABI and other brain-based disabilities can live successfully in the community as contributing citizens, *and* provide jobs for Alaskan case workers, clinicians, assisted living providers, mental health and substance abuse

counselors, psychologists and psychiatrists. Not only does SB 151 further the cause of justice for a vulnerable population, it represents a better investment of our state's resources.

Additionally, the state's movement toward "Smart Justice" will promote less crime, reduced public costs, and greater rehabilitative effect on offenders. The research behind "Smart Justice" suggests that spending money on rehabilitating offenders is more cost effective than paying the high costs associated incarceration and recidivism, including public safety, courts, prisons, alcoholism and drug abuse programs.

FASD in other jurisdictions

Judges nationwide are experiencing repeat offenders diagnosed with these disorders who, as a direct result of their disabilities, are effectively unable to understand the charges against them, or comply with the conditions of their sentence. There is a growing body of research affirming that FASDs are brain disorders effectively impairing "judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."

Kate Burkhart, attorney and executive director of the Alaska Advisory Board on Alcoholism and Drug abuse, wrote that the language in SB 151 "is commensurate with the federal sentencing guidelines and other western state laws that provide for such a mitigating factor. While none of the western states surveyed expressly include FASD in their definitions of mental defect, Utah includes a broad definition that would include FASD. The other states and federal guidelines would permit but do not mandate consideration of FASDs in sentencing unless they impair comprehension or ability to form intent."

Burkhart noted that Utah defines "mental illness" as "a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result of an injury, or residual effect of a physical or mental disease that includes, but is not limited to, mental retardation" which is further defined to mean "significant sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior."

Idaho permits consideration of mental condition creating an "inability to appreciate the wrongfulness" of conduct or to conform to legal requirements at sentencing."

Washington permits the courts to consider "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired."

Nationally, advocates within the American Bar Association are proposing a resolution urging lawyers, judges, bar associations and law school clinical programs to promote "applying FASD as a factor in the mitigation of juvenile and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism." The resolution also asks, "that state and federal laws and policies reflect the serious effects of prenatal alcohol exposure by a) including persons diagnosed with FASD, or suffering from the affects of prenatal alcohol exposure, within the statutory definition of developmental disabilities ... and b) enhancing identification and diagnosis of ... persons with FASD." Their intent is that this resolution would be approved by the ABA House of Delegates at the annual meeting in Chicago in August 2012.

Internationally, Alaska is among the forerunners in awareness, diagnosis, and prevention of fetal alcohol spectrum disorders, both nationally and internationally. However, Canada and parts of Australia are leading the world in establishing laws and practices that address FASD as a brain-based disability with specific interventions and solutions.

The Canadian Bar Association passed a resolution in 2010 acknowledging that FASDs involve a range of neurological and behavioral challenges that can include "impaired mental functioning, poor executive

functioning, memory problems, impaired judgment, inability to control impulse behavior, inability to understand the consequences of their actions, and inability to internally modify behavior control."

The resolution also acknowledged that "the criminal justice system is based on normative assumptions that a person acts in a voluntary manner, makes informed choices with respect to the decision to commit crimes, and learns from their own behavior and the behavior of others" and " these normative assumptions and sentencing principals such as specific and general deterrence, are not valid for those with FASDs.

Following are other highlights addressed in the CBA's resolution:

- sentencing options available to courts are often ineffective in changing the behavior of those with FASD and those with FASD are frequently repeat offenders
- some courts have ruled that absolutely no rehabilitative or deterrent purpose is served by incarceration of those with FASD;
- laws, programs or activities could ameliorate the disadvantages experienced by those with FASD whose behavior is judged on a standard that they are incapable of meeting because of their disability;
- the Canadian bar is resolved to urge the federal government to amend criminal sentencing laws to accommodate the disability of those with FASD.

In Heather Douglas' article, *The sentencing response to defendants with fetal alcohol spectrum disorder* (2010) published by Thomas Reuters in Australia, the author notes that "as a result of deficits in executive function resulting in memory difficulties, inability to plan and failure to recognize the consequences of actions, many of those with FASD are likely to fail to pay fines and to breach probation orders ... Suspended sentences will not be useful in a context where cause and effect is not understood. In prison, highly suggestible FASD sufferers are likely to be victimized. While FASD clients cannot be cured of all their symptoms, techniques and approaches have been identified that can be employed by professionals to help the person reach his or her potential."

Conclusion

Ira Chasnoff, M.D., an international expert on FASD, wrote in an article "Is Fetal Alcohol Spectrum Disorders a Mitigating Factor in Criminal Litigation and Sentencing?" in *Psychology Today* (2011), "We are in an ethical conundrum. Children, youth and young adults with FASD are more likely than not to end up before the court on criminal or civil charges, but the legal system has not come close to resolving how their cases should be treated. Most individuals with FASD have normal IQs, and most can relate a story as to how they ended up before the judge. Most can even state they understand the charges against them. But the truth is that neurocognitive damage that inhibits executive functioning, decision-making, and emotional and behavioral regulation has tremendous bearing on the capacity of these individuals to understand the ramifications of their actions. These people look normal, they speak normally, but they often have only a superficial understanding of the charges against them."

As noted by Canadian Judge Barry Stuart in R. v. Sam (1993), FASD takes away someone's "... ability to act within the norms expected by society." It is "manifestly unfair to make an individual pay for their disability with their freedom. Society is failed because a sentence calculated for a 'normal' offender cannot serve the same ends when imposed on an offender with FASD," he said. "Not only can traditionally calculated sentences be hopelessly ineffective when applied to FASD offenders, but the punishment itself, calibrated for a non-disabled individual, can have a substantially more severe effect on someone with the impairments associated with FASD," Judge Stuart concluded.

Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership
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SB 151 fulfills a recommendation adopted by the Alaska Criminal Justice Assessment Commission: "The legislature should create a statutory mitigating factor for use at criminal sentencing, recognizing when the wrongful conduct was substantially affected by an organic brain disorder." [1]

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Overview of the changes proposed in SB 151

SB 151 proposes to allow FASD as a mitigating factor for sentencing in certain cases where there is *clear and convincing* evidence that a "**defendant committed an offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct**."

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The legislation *DOES NOT*:

1) *require* a judge to use the mitigating factor;
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diagnostic teams using the 4-Digit Diagnostic Code include evaluations by a medical professional, psychologist, occupational therapist, and speech-language pathologist. These evaluations can detect the nuances of the disability, that may include adaptive functioning, individual strengths and challenges for the individual, and other information for developing an appropriate individual service plan.

How many diagnostic teams and/or physicians are available to give FASD diagnoses in Alaska?

Currently, through the Division of Behavioral Health FASD Diagnostic Team Provider Agreement, Alaska has eight active FASD diagnostic teams – in Bethel, Fairbanks, Mat-Su, Kenai, Juneau, Sitka, and two in Anchorage (Southcentral Foundation and ASSETS). Alaska also has a trained diagnostic team at Alaska Psychiatric Institute (API) for children who enter the service system through that door. In the past there were teams in Dillingham and Kodiak — both locations that are interested in reviving their teams at some point, but do not have the resources to do it at this time. Alaska also has had team in Nome, Copper Center, and Ketchikan.

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The 4-Digit Diagnostic Code is considered the "gold standard" for FASD diagnosis and provides a reliable, evidence-based diagnostic process that gives detailed information about the individual client and how best to help that person work with their disability to reach their full potential. All team members are required to receive very specific training from the University of Washington on the 4-digit code process.

The economic benefits of CSSB 151

The cost of incarceration in Alaska's prison is about $136 per day. Over the course of five to ten years in an Alaskan prison, an inmate is expected to cost the state close to $250,000-$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

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FASD in other jurisdictions

It is the intent of the sponsor to include FASD language because judges nationwide are experiencing a flood of repeat offenders diagnosed with these disorders who, as a direct result of their disabilities, are effectively unable to understand the charges against them, or comply with the conditions of their sentence. There is a growing body of research affirming that FASD and are brain disorders effectively impairing "judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."

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Burkhart noted that Utah defines "mental illness" as "a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result of an injury, or residual effect of a physical or mental disease that includes, but is not limited to, mental retardation" which is further defined to mean "significant sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior."

Idaho permits consideration of mental condition creating an "inability to appreciate the wrongfulness" of conduct or to conform to legal requirements at sentencing."

Washington permits the courts to consider "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired."

Nationally, advocates within the American Bar Association are proposing a resolution urging lawyers, judges, bar associations and law school clinical programs to promote "applying FASD as a factor in the mitigation of juvenile and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism." The resolution also asks, "that state and federal laws and policies reflect the serious effects of prenatal alcohol exposure by a) including persons diagnosed with FASD, or suffering from the affects of prenatal alcohol exposure, within the statutory definition of developmental disabilities ... and b) enhancing identification and diagnosis of ... persons with FASD." Their intent is that this resolution would be approved by the ABA House of Delegates at the annual meeting in Chicago in August 2012.

Internationally, Alaska is among the forerunners in awareness, diagnosis, and prevention of fetal alcohol spectrum disorders, both nationally and internationally. However, Canada and parts of Australia are leading the world in establishing laws and practices that address FASD as a brain-based disability with specific interventions and solutions.

The Canadian Bar Association passed a resolution in 2010 acknowledging that FASDs involve a range of neurological and behavioral challenges that, can include "impaired mental functioning, poor executive

functioning, memory problems, impaired judgment, inability to control impulse behavior, inability to understand the consequences of their actions, and inability to internally modify behavior control."

The resolution also acknowledged that "the criminal justice system is based on normative assumptions that a person acts in a voluntary manner, makes informed choices with respect to the decision to commit crimes, and learns from their own behavior and the behavior of others" and " these normative assumptions and sentencing principals such as specific and general deterrence, are not valid for those with FASDs.

Following are other highlights addressed in the CBA's resolution:

- sentencing options available to courts are often ineffective in changing the behavior of those with FASD and those with FASD are frequently repeat offenders
- some courts have ruled that absolutely no rehabilitative or deterrent purpose is served by incarceration of those with FASD;
- laws, programs or activities could ameliorate the disadvantages experienced by those with FASD whose behavior is judged on a standard that they are incapable of meeting because of their disability;
- the Canadian bar is resolved to urge the federal government to amend criminal sentencing laws to accommodate the disability of those with FASD.

In Heather Douglas' article, *The sentencing response to defendants with fetal alcohol spectrum disorder* (2010) published by Thomas Reuters in Australia, the author notes that "as a result of deficits in executive function resulting in memory difficulties, inability to plan and failure to recognize the consequences of actions, many of those with FASD are likely to fail to pay fines and to breach probation orders ... Suspended sentences will not be useful in a context where cause and effect is not understood. In prison, highly suggestible FASD sufferers are likely to be victimized. While FASD clients cannot be cured of all their symptoms, techniques and approaches have been identified that can be employed by professionals to help the person reach his or her potential."

Conclusion

Ira Chasnoff, M.D., an international expert on FASD, wrote in an article "Is Fetal Alcohol Spectrum Disorders a Mitigating Factor in Criminal Litigation and Sentencing?" in *Psychology Today* (2011), "We are in an ethical conundrum. Children, youth and young adults with FASD are more likely than not to end up before the court on criminal or civil charges, but the legal system has not come close to resolving how their cases should be treated. Most individuals with FASD have normal IQs, and most can relate a story as to how they ended up before the judge. Most can even state they understand the charges against them. But the truth is that neurocognitive damage that inhibits executive functioning, decision-making, and emotional and behavioral regulation has tremendous bearing on the capacity of these individuals to understand the ramifications of their actions. These people look normal, they speak normally, but they often have only a superficial understanding of the charges against them."

As noted by Canadian Judge Barry Stuart in R. v. Sam (1993), FASD takes away someone's "... ability to act within the norms expected by society." It is "manifestly unfair to make an individual pay for their disability with their freedom. Society is failed because a sentence calculated for a 'normal' offender cannot serve the same ends when imposed on an offender with FASD," he said. "Not only can traditionally calculated sentences be hopelessly ineffective when applied to FASD offenders, but the punishment itself, calibrated for a non-disabled individual, can have a substantially more severe effect on someone with the impairments associated with FASD," Judge Stuart concluded.

Alaska State Legislature

Interim:
716 West 4th Ave.
Anchorage, Alaska 99501
(907) 269-0199

Session:
State Capitol Building
Juneau, Alaska 99801-1182
(907) 465-4945

Senator Kevin Meyer
Senate District O

TO: Senator Hollis French
Senate Judiciary Committee

FROM: Senator Kevin Meyer

DATE: March 6, 2012

RE: CSSB 151 Request for Hearing

I respectfully request the Senate Judiciary Committee schedule a hearing for CSSB 151, "An Act relating to inclusion of fetal alcohol spectrum disorders, traumatic and acquired brain injury, and intellectual disability in the definition of 'mental disease or defect'; and relating to mitigation at sentencing in a criminal case for a defendant suffering from a mental disease or defect."

The following documents are attached and will be sent electronically:

- Current version of the bill
- Sponsor Statement
- Support Documentation
- Letters of Support
- Staff member assigned to the bill: Christine R. Marasigan, 465-6876

This bill would include FASD as a mitigating factor in sentencing. It allows judges some flexibility when sentencing those who are affected by FASD.

Please contact Christine if you have any questions regarding this legislation.

Alaska State Legislature

Interim:
716 West 4th Ave.
Anchorage, Alaska 99501
(907) 269-0199

Session:
State Capitol Building
Juneau, Alaska 99801-1182
(907) 465-4945

Senator Kevin Meyer

Senate District O

SPONSOR STATEMENT FOR SB 151

"An Act relating to inclusion of fetal alcohol spectrum disorders, traumatic and acquired brain injury and intellectual disability in the definition of 'mental disease or defect'; and relating to mitigation at sentencing in a criminal case for a defendant affected by a mental disease or defect."

SB 151 would include Fetal Alcohol Spectrum Disorders (FASD) and Traumatic and Acquired Brain Injury (A/TBI) as *impaired brain function* under the state's existing definition of *mental disease or defect.* If SB 151 passed, FASD and A/TBI could apply as a mitigating factor in sentencing. This would allow some flexibility in sentencing for those who are affected by FASD or A/TBI when there is clear and convincing evidence that the defendant has an *impaired brain function* as defined under *mental disease or defect.*

SB 151 does not require a judge to use the mitigating factor and it DOES NOT automatically adjust a presumptive sentence. The defense would have to prove that the defendant's disability *significantly affected the defendant's conduct* and *substantially impaired judgment, behavior, and capacity to recognize reality* in order to apply the mitigating factor.

Evidence shows that directing people with mental illness and other brain disorders to supported services, both inside and outside of Corrections, significantly reduces the high financial and social costs associated with re-incarceration and recidivism. Felons and repeat offenders with an FASD and/or A/TBI are more likely to stop committing crimes when they are given the same supports that benefit people with mental illness and other disabilities, which can include Therapeutic Court, housing and employment assistance, case management, counseling and rehabilitation.

DISABILITY LAW CENTER OF ALASKA

ANCHORAGE
3330 Arctic Boulevard
Suite 103
Anchorage, AK 99503
(907) 565-1002
FAX (907) 565-1000
1-800-478-1234
www.dlcak.org

March 2, 2012

Senator Kevin Meyer
State Capitol Room 103
Juneau AK, 99801

Re: Support for SB 151

Dear Senator Meyer:

The Disability Law Center of Alaska supports the objective of SB 151, which is to allow the courts to take into consideration during sentencing whether the defendant was diagnosed with a fetal alcohol spectrum disorder, a traumatic brain injury or an acquired brain injury. If these conditions cannot be considered as mitigating factors, then as one jurist observed, these individuals are paying for their disability with their freedom.

Thank you for your efforts in correcting this manifest injustice.

Sincerely,

DISABILITY LAW CENTER OF ALASKA

David C. Fleurant
Executive Director

MEMBER OF THE NATIONAL DISABILITY RIGHTS NETWORK

Alaska FASD Partnership

Over 75 organizations and individuals supporting:

Advocacy ▪ Diagnosis ▪ Case Management ▪ Prevention ▪ Substance Abuse Treatment for Pregnant Women ▪ Parent Navigation ▪ Training for Parents ▪ Public Awareness ▪ Alternatives to Incarceration ▪ Court Interpreters ▪ Peer Support ▪ Training for Judges, Public Defenders, and Prosecutors ▪ Training for Educators and Medical Professionals ▪ Traditional Healing ▪ Supported Housing and Employment ▪ Family Support

March 2, 2012

Senator Kevin Meyer
Alaska State Legislature
Juneau, Alaska 99801

Dear Senator Meyer,

It is with great pleasure that the Alaska FASD Partnership supports the proposed committee substitute for SB 151 to include FASD, Traumatic and Acquired Brain Injury, and Intellectual Disability as "impaired brain function" in the definition of "mental disease or defect."

The Partnership also supports the bill's intent to include FASD and traumatic and acquired brain injury as mitigating factors related to sentencing.

Individuals diagnosed with a fetal alcohol spectrum disorder (FASD) or a traumatic or acquired brain injury (T/ABI) are disproportionately represented within Alaska's criminal justice system. However, the intent underlying Alaska's sentencing structure – that people will modify their behaviors based on the criminal justice system's response to their crimes – is not met when applied to individuals with FASD or T/ABI. These disabilities manifest as deficits in executive function resulting in impaired adaptive behavior, memory difficulties, an inability to plan, and a failure to recognize the consequences of actions. In the interest of justice, it is important to take these deficits into account during sentencing. Neither the offender nor society benefits from holding individuals with FASD or T/ABI to community standards that they cannot possibly attain given their impairments.

The cost of incarceration in Alaska's prison is about $136 per day. Over the course of five to ten years in an Alaskan prison, an inmate is expected to cost the state close to $250,000-$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

According to the 2009 ISER Study, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?*" the cost of providing services is less than the cost of incarceration. With appropriate supports, clients with FASD, T/ABI and other brain-based disabilities can live successfully in the community as contributing citizens, ***and*** provide jobs for Alaskan case workers, clinicians, assisted living providers, mental health and substance abuse

Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership
431 N. Franklin St. Suite 203, Juneau, Alaska 99801 ▪ (907) 465-8920
Webpage: www.hss.state.ak.us/fasd.htm ▪ email: akfasdpartnership@alaska.gov

counselors, psychologists and psychiatrists. Not only does CSSB 151 further the cause of justice for a vulnerable population, it represents a better investment of our state's resources.

Additionally, the state's movement toward "Smart Justice" will promote less crime, reduced public costs, and greater rehabilitative effect on offenders. The research behind "Smart Justice" suggests that spending money on rehabilitating offenders is more cost effective than paying the high costs associated incarceration and recidivism, including public safety, courts, prisons, alcoholism and drug abuse programs.

Thank you for the time and effort you have put into supporting this important effort.

Sincerely,

Monica Charles Leinberger

Monica Charles-Leinberger, Chair
Alaska FASD Partnership

Partnership members include: *Abused Women's Aid in Crisis, Advisory Board on Alcoholism and Drug Abuse, Alaska Behavioral Health Association, Alaska Center for Children & Adults, Alaska Children's Services, Alaska Mental Health Board, Alaska Mental Health Trust Authority, Alaska Peer Support Consortium, Alaska Youth & Family Network, All-Alaska Pediatric Partnership, Anchorage Coordinated Resources Project, Anchorage School District (Anchorage), Arctic FASD Regional Training Center, Assets Inc., Association for the Education of Young Children-SEAK, Big Brothers Big Sisters of Alaska, Boys & Girls Home of Alaska, Camp Fire USA Alaska Council, Central Council of the Tlingit & Haida Indian Tribes of Alaska, Christian Health Associates, Copper Basin Neurodevelopmental Center, Deltana Community Services Partnership, Dena A Coy/Southcentral Foundation, Diocese of Juneau, Fairbanks Community Behavioral Health Center, Family Centered Services of Alaska, Frontier Community Services, Gastineau Human Services, Governor's Council on Disabilities and Special Education, Hoonah Indian Association, Hope Community Resources, Independent Living Center, Kenai Peninsula FASD Program, Ketchikan Indian Community, Kinetictions, Kobuk Valley Consulting, Kodiak Area Native Association, Juneau Family Health and Birth Center, Juneau FASD Diagnostic Clinic, Juneau Partnerships for Families and Children, Lower Kuskokwim School District, Lynn Canal Counseling Services, Nenana City School District, Nome Youth Facility, Nondalton Tribe, Regional Wellness Forum, Set Free Alaska, Inc. (Wasilla), Southcentral Foundation FAS Diagnostic Team, Southeast Regional Health Consortium, Southeast Regional Resource Center, Southern Kenai Peninsula Communities Project, Sprout Family Services, Stone Soup Group, Tongass Substance Screening, UAA Department of Health Sciences, UAA Center for Human Development, Volunteers of America-Alaska ...and many individuals.*

Advisory Board on Alcoholism and Drug Abuse

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

March 2, 2012

Senator Kevin Meyer
Alaska State Capitol, Room 103
Juneau, Alaska 99801

Re: Letter of Support for CSSB 151 – Mitigation at Sentencing for a Defendant Affected by FASD

Dear Senator Meyer,

The Alaska Mental Health Board and Advisory Board on Alcoholism and Drug Abuse support the committee substitute for SB 151 (CSSB 151). This bill recognizes the special needs presented by Alaskans experiencing fetal alcohol spectrum disorders (FASD) in the justice system.

It is an objective of Alaska's comprehensive mental health program that people with mental and cognitive disabilities are treated with dignity in all aspects of life. Our judges, prosecutors, defenders, and court staff work to ensure that everyone who appears in court is treated fairly and with respect. However, Alaskans experiencing FASD often present with special needs and situations that impede the course of justice. Low cognitive functioning, inability to understand and stay within accepted social norms, limited short term memory, impulsivity, and impaired judgment can all result in a person experiencing FASD not being able to explain his or her actions, understand why they resulted in a criminal charge, or understand the criminal justice process. Usually, these impairments do not rise to the level of legal incompetence – but they often make it hard for judges and juries to make decisions that serve our notions of fairness and justice.

Based on research in other jurisdictions, an estimated 60% of inmates experience an FASD, brain injury, or similar organic cognitive impairment. The cost of incarceration is very high and usually does not result in restoration or rehabilitation. In fact, according to a 2009 ISER Study,[1] the cost of prison far exceeds the cost of services. CSSD 151 allows judges – **at their discretion** – to modify presumptive sentences to take into account the defendant's disabilities and to provide the sort of sentence needed to prevent recidivism and ensure a just outcome for victims, defendants, and our communities.

We thank you for your work on behalf of all Alaskans.

Sincerely,

J. Kate Burkhart
Executive Director

[1] *The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?* published by Institute of Social and Economic Research (ISER), University of Alaska (January 2009). Available online at www.iser.uaa.alaska.edu.

The TRUST

The Alaska Mental Health Trust Authority

March 2, 2012

Senator Kevin Meyer
State Capitol Building
Juneau, Alaska 99801

Dear Senator Meyer,

The Alaska Mental Health Trust Authority is pleased to support SB 151, adding fetal alcohol spectrum disorders and traumatic and acquired brain injury as mitigating factors under "mental disease or defect" in state statute. The Trust also supports the bill's intention to use the word "intellectual disability" to describe Alaskans with developmental disabilities, rather than the archaic term "mental retardation."

This legislation is an important step in the state's recognition that people with disabilities are better served with supports and services, rather than incarceration without supports.

SB 151 fulfills a recommendation adopted by the Alaska Criminal Justice Assessment Commission that "the legislature should create a statutory mitigating factor for use at criminal sentencing, recognizing when the wrongful conduct was substantially affected by an organic brain disorder." [1]

SB 151 also supports a recommendation currently before the American Bar Association stating that the ABA "... urges lawyers and judges, as well as bar associations and law school clinical programs, to support training that includes law school law enforcement, and legal/judicial education curricula on enhanced awareness of the child and adult disability of Fetal Alcohol Spectrum Disorders (FASD) and its impact on individuals in the child welfare, juvenile justice, and adult criminal justice systems, and that they work with medical, mental health, and FASD disability experts to promote: ... (d) applying FASD as a mitigating factor in the mitigation of juvenile justice and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism."

The Trust thanks Senator Meyer's efforts to address issues related to people with disabilities, so that the most appropriate (and cost effective) outcomes are realized.

Sincerely,

Jeff Jessee
Chief Executive Officer
Alaska Mental Health Trust Authority

[1] Alaska Criminal Justice Assessment Commission (2000). *Final Report.* Retrieved October 12, 2010 from www.hss.ajc.state.ak.us/reports/CJAC Final 2004.pdf. at p.71.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**CSSB 151(HSS)**
Fiscal Note Number	1
(S) Publish Date	3/6/12

Identifier (file name)	SB151-LAW-CRIM-03-02-12	Dept. Affected	Law
Title	An Act realing to mitigation at sentencing in a criminal case for a defendant found by the court to have been...	Appropriation	Criminal
		Allocation	Criminal Justice Litigation
Sponsor	Senator Meyer		
Requester	(S) Health and Social Services	OMB Component Number	2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by	Eileen Donahue, Division Operations Manager	Phone	465-5427
Division	Administrative Services	Date/Time	3/2/12 5:00 PM
Approved by	Michael C. Geraghty, Attorney General Department of Law	Date	3/2/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 151(HSS)

Analysis

SB 151 would add as a mitigating factor at sentencing. It would allow a new mitigator if the defendant was affected by a fetal alcohol spectrum disorder that significantly affected the defendant's behavior. If proven, the court would have discretion to reduce the term of imprisonment to below the presumptive range.

The proposed new factor would not apply to persons convicted of crimes against a person (AS 11.41), arson in the first degree (AS 11.46.400), or if the person being sentenced had previously been convicted of a felony.

The fiscal impact for the Departmetn of Law is indeterminate because it will require expert testimony on the issue of whether the person suffers from such a disorder and if so, did it significantly affect his or her behavior.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSSB 151(HSS)**
Fiscal Note Number: 2
(S) Publish Date: 3/6/12

Identifier (file name): SB151-ACS-TRC-3-02-2012
Title: Mitigation at sentencing for defendant with FASD
Sponsor: Senator Meyer
Requester:

Dept. Affected: Alaska Court System
Appropriation: Trial Courts
Allocation:
OMB Component Number: 768

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0..0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by: Nancy Meade, General Counsel — Phone: 907-463-4736
Division: Alaska Court System — Date/Time: 3/02/2012 4:00 p.m.
Approved by: Nancy Meade for Christine Johnson, Administrative Director — Date: 3/2/2012
Alaska Court System

(Revised 11/17/2011 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 151(HSS)

Analysis

Senate Bill 151 adds a new factor to the list of mitigating factors in AS 12.55.155(d) that the court shall consider at sentencing; if proven, the court may then impose a sentence below the presumptive range for certain crimes. Specifically, except for defendants convicted of offenses against persons , arson, and criminal mischief, and except if the defendant has any prior felony conviction, the court may consider whether the defendant committed the offense "while affected by a fetal alcohol spectrum disorder that was insufficient to constitute a complete defense . . . but that significantly affected the defendant's conduct."

The court cannot predict the number of cases in which parties will attempt to prove this factor as a mitigator at sentencing, but believes the sentencing hearings will be held and handled in the normal course without a fiscal impact. The Alaska Court System therefore submits a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSSB 151(HSS)**
Fiscal Note Number: 3
(S) Publish Date: 3/6/12

Identifier (file name): SB151-DOA-PDA-1-23-12
Title: Fetal Alcohol Spec. Disorder as Mitigator
Sponsor: Senators Meyer, Hoffman, Dyson, Menard
Requester: Senate Health and Social Services

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner, Public Defender — Phone: 907 334-4414
Division: Public Defender Agency — Date/Time: 1/20/12 12:15 PM
Approved by: John Cramer, Deputy Commissioner — Date: 1/23/2012
Department of Administration

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 151(HSS)

Analysis

AS 12.55.155(d) allows a sentencing court to impose a sentence less than the presumptive range where mitigating factors have been proven. This bill amends AS 12.55.155(d) by adding section 20, which allows the court to find a factor of mitigation where the defendant committed the offense while affected by fetal alcohol spectrum disorder.

The Public Defender Agency does not anticipate a fiscal impact from this change. Accordingly, the Agency submits a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**CSSB 151(HSS)**
Fiscal Note Number	4
(S) Publish Date	3/6/12

Identifier (file name)	SB151-DOC-OC-03-02-12	Dept. Affected	DOC
Title	"An Act relating to mitigation at sentencing in a criminal defendant convicted of certain sex offenses a prohibition... "	Appropriation	Admin & Support
		Allocation	Commissioner's Office
Sponsor	Senator Meyer		
Requester	(S)HSS	OMB Component Number	694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by	Leslie Houston, Director	Phone	907-465-3339
Division	Department of Corrections - Administrative Services	Date/Time	3/2/12 11:05 AM
Approved by	Joseph D. Schmidt, Commissioner	Date	3/2/2012
	Department of Corrections		

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 151(HSS)

Analysis

This bill would add fetal alcohol spectrum disorder to the list of mitigating factors at sentencing in a criminal trial. The burden of assessment would be on the courts and therefore would have zero fiscal impact on the Department of Corrections.

SB 165

<TARGET><BILL>SB 165</BILL><SUBJECT>SB 165</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

Sponsor Statement
SB165 Uniform Probate Code; Trusts, Wills; Disposition of Human Remains

Alaska first modernized its trust and estate legislation in 1997. Since then, the trust and estate planning community continuously makes recommendations to the legislature for updates and improvements to Alaska's trust and estate laws to ensure that Alaska can continue to provide the best possible planning solutions. Alaska's trust and estate laws have significant impact on our economy, bringing literally millions of dollars to the state and creating jobs within the trust, banking, insurance and legal fields.

Senate Bill 165 provides for amendments to statute in the following areas:

- Extends protection for retirement plan assets to the beneficiaries of retirement plans (often the surviving spouse).
- Provides means of representation for minors and incapacitated persons in dealing with settlements of accounts or settlement agreements.
- Amends the 2003 Alaska Principal and Income Act to conform with current IRS regulations.
- Provides rules concerning who may control the disposition of decedents' remains.
- Makes conforming amendments to Alaska's laws regarding insurable interests to align with changes to the Uniform Trust Code.
- Provides that IRA interests can be voluntarily transferred to a family member or trust.
- Makes amendments to Alaska's community property provisions to update and clarify the ownership of community property.
- Allows a beneficiary to extend the time funds will be held in a Uniform Transfer to Minors Account.

Passage of SB 165 will ensure that Alaska remains the premier state in which to establish trusts and estates. I urge your support for this important legislation.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Dennis Egan
Senator Lesil McGuire
Senator John Coghill

Senate Judiciary Committee

SECTIONAL ANALYSIS FOR SENATE BILL 165

Sec. 1. Asset Protection for Inherited Retirement Plans. Alaska Statute 09.38.017(a) protects an individual's interest in a retirement plan from the claims of the individual's creditors. The amendment extends this protection to claims of a beneficiary's creditors (e.g., creditors of an individual's spouse). Arizona, Florida, and Texas have enacted similar provisions.

Sec. 2. This is a conforming amendment for Sec. 28.

Sec. 3. These are definitional changes implementing Sec. 1.

Sec. 4. through Sec. 5. Representation for Settlement Agreements. Alaska Statute 13.06.120 provides that minors, incapacitated persons, and similar persons may be represented by another person who has the same interests in the matter. This type of representation is important in order to simplify and make more efficient proceedings that involve persons who are not legally competent to represent themselves. The existing statute clearly applies to judicial proceedings. However, often it is important to have representation of minors and incapacitated persons with respect to the settlement of accounts of trustees of trusts and with respect to settlement agreements. These amendments clarify that the statute not only applies to court proceedings but also to non-judicial settlement proceedings.

Sec. 6 through Sec. 22. Amendments to 2003 Alaska Principal and Income Act. This modern act allows a person creating a new trust, or a trustee of an existing trust, to adopt a "unitrust" approach for determining the income of the trust which may be required to be distributed annually. A unitrust distributes a certain percentage of its assets annually to the current beneficiary. The use of this percentage unitrust approach allows the trustee to invest in order to maximize total return for both income and remainder beneficiaries.

Since 2003, the Internal Revenue Service has issued final regulations with respect to unitrusts. The Alaska Principal and Income Act amendments contained in this bill are designed to update Alaska's provisions to take advantage of these new regulations.

In summary, the most important changes contained in the bill expressly allow a trustee to choose a unitrust rate of three to five percent rather than be limited to the four percent amount presently in the law. The changes provide an explicit definition of income for a trust drafted as a unitrust. Language is added to provide the ordering of distributions among types of income and principal. A smoothing period of up to five years is allowed for determining the assets to be used when applying the unitrust percentage. Also, the new provisions clarify how the unitrust rules will apply to retirement benefits. These new changes will facilitate the use of unitrusts under Alaska law and maximize flexibility to take advantage of federal income tax planning.

Sec. 23 through 25. Amendments to Alaska Uniform Transfers to Minors Act. The Alaska Uniform Transfers to Minors Act allows donors, personal representatives, trustees, and obligors, to transfer assets to an account for the benefit of a minor. A custodian is named who may make distributions for the benefit of the minor. Under the existing statutes, the minor is entitled to the property when the minor reaches age 18 years or 21 years, depending on the type of transfer. The statute allows this age of distribution to be extended in certain circumstances to age 25 years.

A number of situations have arisen both in Alaska and in other states where it is undesirable for assets to be distributed later than the ages 18, 21, or 25 years, due to problems the minor may have, including substance abuse problems, immaturity, and the inability to manage assets. Often, the minor himself or herself is willing to have the assets remain in a custodial setting, managed by a competent person who will make distributions for the benefit of the minor. The amendments in this bill would allow for the extension to an age greater than that presently specified in the statute, as long as the minor consents to the extension during the six-month period when the minor attains the age when otherwise the assets would be distributed under the statute.

Sec. 26. Decedents Remains. Alaska does not presently have adequate statutory authority with respect to who may control the disposition of a decedent's remains. This has resulted in arguments and disputes among relatives and friends. Businesses involved in this area need protection concerning who is the person entitled to give them directions. This new act resolves the present uncertainty of the law. It provides authority for a person to provide directions and a form for a disposition document. If a person has not provided directions, then a priority list is provided of the persons who may control the disposition of the decedent's remains. Businesses who follow these directions or priority list are protected from liability.

Sec. 27. Insurable Interests. For many years, individuals have relied on life Insurance in helping to meet their financial, business, and estate planning needs. Often, their needs are best served by having one or more life insurance contracts held in an irrevocable trust, partnership, or limited liability company. In particular, irrevocable life insurance trusts have been widely used throughout the United States to own life insurance policies.

However, a relatively recent federal court case *(Chawla, ex rel Giesinger v. Transamerica Occidental Life Ins. Co.*, 2005 WL 405405 (E.D. Va. 2005)) had the effect of pointing out that while state insurance statutes typically require purchasers of insurance contracts to have an "insurable interest" in the life or body of the insured, the statutory provisions describing who may have an insurable interest did not specifically include trusts and business entities which are commonly used to purchase and own such policies. This case raised sufficient uncertainty about the status of life insurance trusts that in July, 2010, the Uniform Law Commission approved amendments to the Uniform Trust Code to clarify the situation.

Alaska has previously adopted substantial portions of the Uniform Trust Code. The proposed amendment to AS 21.42.020 is based in large part on the recommended amendments to the Uniform Trust Code, and also clarifies that persons with insurable interests may form business entities for the purposes of purchasing, holding, and administering life insurance contracts. Other states, for example Delaware, have already amended their statutes for these reasons, or are considering such amendments.

Sec. 28. Transfers of IRA Interests. Lifetime estate planning often occurs by a participant making gifts, sales or other transfers of property during lifetime to family members or trusts for their benefit. For many individuals, one of their most valuable assets is their individual retirement account (IRA). Alaska law (AS 09.38.017) protects IRAs from claims of creditors. This protection

could be construed to even prohibit voluntary transfers of the participant's interest in an IRA, which would prevent lifetime transfers of IRAs for estate planning and other purposes. Although it is important to maintain that creditor protection for IRAs, it would be beneficial to permit voluntary transfers of IRAs. Therefore, this section clarifies that the participant of an IRA may voluntarily transfer his or her IRA during lifetime.

Sec. 29 through Sec. 33. Community Property. In 1998, Alaska enacted an optional community property system. Several amendments have been made to Alaska's act, and this bill proposes further amendments designed to improve the act. Specifically, the amendments accomplish the following:

a. Add references to a community property trust in appropriate provisions.

b. Eliminate language stating a confusing statute of limitations and incorporates by reference a new statute of limitations.

c. Provide clarification that property which spouses agree is community property is owned as community property regardless of the form of title to the property. If title to community property is in a form that provides for survivorship ownership between the spouses then the survivorship ownership is presumed to have been made with the consent of both spouses. If one spouse designates a beneficiary for an interest in property, the designation is only effective for that spouse's one half interest unless the other spouse consents in writing. Various family designations are presumed to have been made with the consent of the other spouse. The testimony of one spouse is sufficient to rebut a presumption.

d. Enact remedies for improper transfers and limitation periods within which those remedies must be pursued.

Sec. 34. Repealed sections.

Sec. 35. Indirect rule change.

Sec. 36. Applicability

Sec. 37. Requirement for two-thirds majority vote of each house.

LEGAL SERVICES

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

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

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

MEMORANDUM February 18, 2012

SUBJECT: CSSB 165(JUD) applicability amendment
(Work Order No. 27-LS0819\E.1)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Terry Bannister
Legislative Counsel

This memo accompanies the applicability amendment described above.

Applicability. Applying the changes to AS 13.46 to transfers under the Alaska Uniform Transfers to Minors Act that pre-date the effective date of these changes may raise a constitutional impairment of contracts issue if the changes operate as a substantial impairment of any contractual relationships involved in the transfers.

If I may be of further assistance, please advise.

TLB:plm
12-107.plm

Enclosure

LEGAL SERVICES

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

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

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

MEMORANDUM February 17, 2012

SUBJECT: CSSB 165(JUD) draft (Work Order No. 27-LS0819\E)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Terry Bannister
Legislative Counsel

This memo accompanies the bill described above.

1. Correction. In bill sec. 39(b), the reference in the D.1 amendment to "AS 13.36.215(5)" has been corrected to read "AS 13.36.215(b)."

2. Single subject issue. As you are aware, it is my opinion that, by combining all of the subjects in the bill, the bill is not confined to one subject, which violates the constitutional requirement that a bill be confined to one subject.[1] This issue is present in SB 165 without the amendments added by the Senate Judiciary Committee, and the addition of the trust property appointment provisions do not change this.

The Alaska Supreme Court standard is that an "act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject."[2]

Historically, the Alaska Supreme Court has interpreted Alaska's single subject rule to permit very broad subject matter in one bill without violating the single subject requirement. For example, the Court has held that bills relating to such broad themes as "development of water resources,"[3] "taxation,"[4] "land,"[5] "intoxicating liquor,"[6] and

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[1] Art. 2, sec. 13, Alaska State Constitution.

[2] State v. First Nat'l Bank of Anchorage, 660 P.2d 406 (Alaska 1982).

[3] Gellert v. State, 522 P.2d 1120 (Alaska 1974).

[4] North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 545 (Alaska 1978).

[5] State v. First Nat'l Bank of Anchorage, 660 P.2d 406 (Alaska 1982).

"criminal law"[7] are acceptable.[8] However, there was a strong dissent in one case against allowing broad subject matter in a single bill.[9] And in 2010, for the first time, the Alaska Supreme Court invalidated a piece of proposed legislation for failure to satisfy the single subject requirement.[10] Please be aware that failure to comply with this requirement could jeopardize this bill if it were ever challenged.

3. Applicability (bill section 39). Applying the changes in AS 09.38.017 to retirement plans that pre-date the effective date of these changes and applying the changes and new provisions contained in AS 13.36.157 - 13.36.159 and AS 13.36.215(5) to trusts that pre-date the effective date of these changes may raise constitutional impairment of contracts issues if the changes or provisions affect provisions that are considered essential parts of the retirement plans or trusts.

If I may be of further assistance, please advise.

TLB:plm
12-099.plm

Enclosure

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[6] Van Brunt v. State, 646 P.2d 872 (Alaska App. 1982).

[7] Galbraith v. State, 693 P.2d 880 (Alaska App. 1985).

[8] Evans v. State, 56 P.3d 1046, 1070 (Alaska 2002).

[9] Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173 (Alaska 1985). In his dissent, at page 1182, Justice Moore stated: "This court has mistakenly continued to give the rule such an extremely liberal interpretation that the rule has become a farce."

[10] Croft v. Parnell, 236 P.3d 369 (Alaska 2010).

AMENDMENT

OFFERED IN THE SENATE

TO: SB 165

Page 15, following line 10:

Insert a new subsection to read:

"(j) A custodian is not required to give a written notice of the minor's right to compel immediate distribution under (h) of this section, and the minor may not compel distribution of custodial property under (i) of this section, if

(1) the transferor or another person pays the tax liability resulting from the delay of distribution;

(2) the transferor or another person indemnifies and holds both the minor and the custodial property harmless from claims resulting from the delay of distribution; and

(3) the custodian gives the minor written notice of

(A) the change to distribution resulting from the operation of this subsection;

(B) the payment of the tax liability; and

(C) the indemnification of the minor and the custodial property."

Amendment language from Rep. Gruenberg

SB165 Conceptual Amendment drafted by Ervin Henley

p 15 l 16 add a new subsection to read:

"(j) The ~~trustor~~ custodian need not give written notice of the minor's right to compel immediate distribution ~~and~~ under (h) of this section and the minor shall have no right to compel distribution of custodial property under (i) of this section if ~~the custodian gives the minor written notice of~~ the trustor or another person pays the entire tax liability resulting from these changes and indemnifies and holds both the minor and the trust harmless thereon, and gives the minor written notice of the changes and the person's payment of the tax liability and the person's indemnification of the trust and the minor."

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB165**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB165-DCED-INS-01-31-12
Title: PRINCIP. & INC/PROBATE/UTMA/RETIREMT/ETC.
Sponsor: Senate Judiciary
Requester: Senate Judiciary

Dept. Affected: DCCED
Appropriation: Insurance Operations
Allocation: Insurance Operations
OMB Component Number: 354

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0		0.0	0.0	0.0	0.0	0.0
Travel	0.0		0.0	0.0	0.0	0.0	0.0
Services	0.0		0.0	0.0	0.0	0.0	0.0
Commodities	0.0		0.0	0.0	0.0	0.0	0.0
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by: Linda Hall, Director — Phone: 907-465-2515
Division: Insurance — Date/Time: 1/31/12 4:54 PM
Approved by: JoEllen Hanrahan, Director Administrative Services — Date: 1/31/2012
Commerce, Community, and Economic Development

(Revised 11/28/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB165
2012 LEGISLATIVE SESSION

Analysis

SB 165 makes changes to the Uniform Probate Code, Uniform Trust Code, and creates a Disposition of Human Remains Act.

Section 27 (AS.21.42.020) provides that a trustee or a trust may procure an insurance contract on the life or body of an individual and the proceeds may be payable to the trustee if the trustee or trust owns the insurance contract, a settler of the trust has an insurable interest in the individual insured, and the proceeds of the contract are primarily for the benefit of a trust beneficiary.

There is no fiscal impact to the Division of Insurance as a result of this legislation.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 165**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB165-DOR-TRS-01-31-12
Title: PRINCIP. & INC/PROBATE/UTMA/RETIREMT/ETC.
Sponsor: (S) JUD
Requester: (S) JUD

Dept. Affected: Revenue
Appropriation: Taxation and Treasury
Allocation: Treasury
OMB Component Number: 121

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial note.

Prepared by: Alicia Egan, Legislative Liaison — Phone: 907-465-6829
Division: Commissioners Office — Date/Time: 1/31/12 6:25 AM
Approved by: Jerry Burnett, Director Administrative Services — Date: 1/31/2012
Department of Revenue

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 165

Analysis

As written, the bill has no effect on the programs or investments managed by the Department of Revenue .

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
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Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

Changes to SB 165 Principal and Income/Probate/Retirement, etc. In Version "D"

In Section 1, language was changed to more clearly delineate the kinds of retirement accounts covered by the provisions of the section.

In Section 28, a definition of an individual retirement account is provided for the purposes of the section, which governs voluntary transfers of accounts.

CS FOR SENATE BILL NO. 165(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to property exemptions for retirement plans, individual retirement accounts, and Roth IRAs; relating to pleadings, orders, liability, and notices under the Uniform Probate Code; relating to the appointment of trust property; relating to the Alaska Principal and Income Act; relating to the Alaska Uniform Transfers to Minors Act; relating to the disposition of human remains; relating to insurable interests for life insurance policies; relating to transfers of individual retirement plans; relating to the community property of married persons; and amending Rule 301(a), Alaska Rules of Evidence."

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

*** Section 1.** AS 09.38.017(a) is amended to read:

(a) In addition to the exemption under AS 09.38.015(b), the following are exempt from a claim of an individual's **or beneficiary's** creditor:

(1) the interest of the individual **or beneficiary** in a retirement plan; [AND]

(2) the money or other assets payable to the individual from a retirement plan**;**

(3) the interest of a beneficiary in

(A) a retirement plan if the beneficiary acquired the interest as a result of the death of an individual; the beneficiary's interest is exempt to the same extent that the individual's interest was exempt immediately before the individual died;

(B) an individual retirement account that has been transferred by the individual to the beneficiary during the individual's lifetime; the beneficiary's interest is exempt to the same extent that the individual's interest was exempt immediately before the transfer to the beneficiary;

(4) the money or other assets payable to a beneficiary from

(A) a retirement plan if the beneficiary acquired the money or other assets as a result of the death of an individual who would have had, during the individual's life, an exemption in the money or other assets;

(B) an individual retirement account if the beneficiary acquired the money or other assets as a result of the transfer of the money or other assets by an individual who would have had, at the time of the transfer, an exemption in the money or other assets.

*** Sec. 2.** AS 09.38.017(d) is amended to read:

(d) A retirement plan exempt from claims under (a) of this section is conclusively presumed to be a spendthrift trust under this section**, except for transfers or assignments under AS 34.40.113**.

*** Sec. 3.** AS 09.38.017(e) is amended to read:

(e) In this section,

(1) "alternate payee" has the meaning given in 26 U.S.C. 414(p)(8);

(2) **"beneficiary" includes a person, trust, or trustee who has,**

before or after the death of an individual, a direct or indirect beneficial interest in a retirement plan; in this paragraph, "beneficial interest" includes an interest that is acquired

(A) as a designated beneficiary, survivor, co-annuitant, heir, or legatee; or

(B) if excludible from gross income under 26 U.S.C. (Internal Revenue Code), as a

(i) rollover under 26 U.S.C. 408 or 26 U.S.C. 408A;

(ii) a distribution from one retirement plan to another retirement plan; or

(iii) a distribution that is similar to (i) or (ii) of this subparagraph;

(3) "individual" means [AN INDIVIDUAL WHO IS] a participant in, **an owner** [A BENEFICIARY] of, or an alternate payee of a retirement plan;

(4) "individual retirement account" means an individual retirement account established under 26 U.S.C. 408 or a Roth IRA established under 26 U.S.C. 408A;

(5) [(3)] "retirement plan" means

(A) a retirement plan that is qualified under 26 U.S.C. 401(a), 26 U.S.C. 403(a), 26 U.S.C. 403(b), [26 U.S.C. 408, 26 U.S.C. 408A, OR] 26 U.S.C. 409**, 26 U.S.C. 414(d), 26 U.S.C. 414(e), or 26 U.S.C. 457** (Internal Revenue Code)**;**

(B) an individual retirement account; and

(C) the teachers' retirement system under AS 14.25, the judicial retirement system under AS 22.25, the public employees' retirement system under AS 39.25, and the elected public officers' retirement system under former AS 39.37.

*** Sec. 4.** AS 13.06.120 is amended to read:

Sec. 13.06.120. Pleadings; when parties bound by orders; notice. In any proceedings involving trusts, nonprobate assets, or estates of decedents, minors, protected persons, or incapacitated persons brought under AS 13.06 - AS 13.36 or

AS 13.38, [INCLUDING ANY JUDICIALLY SUPERVISED SETTLEMENTS AND ANY NONJUDICIAL PROCEEDINGS AND SETTLEMENTS,] the following apply:

(1) interests to be affected shall be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner;

(2) persons are bound by orders binding others in the following cases:

(A) orders binding the sole holder or all co-holders of a power of revocation or a general or nongeneral power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests, as objects, takers in default, or otherwise, are subject to the power;

(B) to the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate the conservator controls; orders binding a guardian bind the ward if no conservator of the estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary, and in proceedings involving creditors or other third parties; orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and orders binding an agent having authority to act with respect to the particular questions or dispute bind the principal; if there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent the minor child;

(C) an unborn person, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable who is not otherwise represented is bound by an order to the extent the interest is adequately represented by another party having a substantially identical interest in the proceeding;

(D) with regard to interests given upon the happening of a certain event to persons who comprise a certain class, orders binding the living

persons who would constitute the class, if the event had happened immediately before the commencement of the proceeding, bind all members of the class;

(E) with regard to an interest given to a living person when the same interest or a share of the interest is to pass to the surviving spouse or to persons who are or might be the distributees, devisees, heirs, or issue of the living person upon the happening of a future event, orders binding the living person bind the surviving spouse, distributees, devisees, heirs, or issue of the living person;

(F) with regard to interests given to a person or a class of persons, or to both, upon the happening of a future event, if the same interest or a share of the interest is to pass to another person or class of persons, or to both, upon the happening of an additional future event, orders binding the living person or class of persons who would take the interest upon the happening of the first event bind the persons and classes of persons who might take on the happening of the additional future event;

(G) if a person is designated by a trust instrument to represent and bind a born or unborn beneficiary of the trust and receive a notice, information, accounting, or report for the beneficiary, then the beneficiary is bound by an order binding the designated person; in this subparagraph,

(i) the settlor may make the designation in the trust instrument, in a separate document, or by a trust protector authorized in the trust instrument to make the designation;

(ii) except as otherwise provided in this subparagraph, a person designated under (i) of this subparagraph may not represent and bind a beneficiary while the designated person is serving as trustee;

(iii) except as otherwise provided in this subparagraph, a person designated under (i) of this subparagraph may not represent and bind another beneficiary if the designated person also is a beneficiary, unless the designated person was named by the settlor, is the beneficiary's spouse, or is a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse; in this sub-

subparagraph, "spouse" means the individual to whom the beneficiary is married and with whom the beneficiary is living, and a physical separation primarily for education, business, health, and similar reasons does not prevent the individual from being considered to be living with the beneficiary;

(3) a person representing another person under (2)(A) - (F) of this section and a person designated under (2)(G)(i) of this section are not liable to the beneficiary whose interests are represented, or to a person claiming through that beneficiary, for an action or omission to act made in good faith;

(4) notice is required as follows:

(A) notice as prescribed by AS 13.06.110 shall be given to every interested person or to one person who can bind an interested person as described in (2)(A), (B), or (D) - (G) of this section; notice may be given both to a person and to another person who may bind the person;

(B) notice is given to unborn persons, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable, and persons who are not represented under (2)(A), (B), or (D) - (G) of this section, by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn persons, the minor, the incapacitated person, or the person whose identity or location is unknown or not reasonably ascertainable;

(5) at any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of an unborn person, a minor, an incapacitated person, or a person whose identity or address is unknown or not reasonably ascertainable, if the court determines that representation of the interest otherwise would be inadequate; if not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests; the court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

*** Sec. 5.** AS 13.06.120 is amended by adding a new subsection to read:

(b) In this section,

(1) "order" means a judicial order, nonjudicial order, the result of the

settlement of an account of a fiduciary under a procedure authorized by AS 13.06 - 13.36 or AS 13.38, and a settlement agreement resulting from a proceeding;

(2) "proceeding" means a judicial proceeding, nonjudicial proceeding, the settlement of an account of a fiduciary under a procedure authorized by AS 13.06 - 13.36 or AS 13.38, and a settlement negotiation, even if the settlement negotiation does not involve a judicial or nonjudicial third party who decides or facilitates a settlement.

* **Sec. 6.** AS 13.36.157 is repealed and reenacted to read:

Sec. 13.36.157. Exercise of power of appointment. (a) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of that principal to a trustee of an appointed trust for, and only for the benefit of, a current beneficiary of the invaded trust to the exclusion of other current beneficiaries. A permissible appointee of a power of appointment held by a beneficiary of the appointed trust is not considered a beneficiary of the appointed trust. The successor and remainder beneficiaries of the appointed trust may be one or more of the successor and remainder beneficiaries of the invaded trust to the exclusion of other successor and remainder beneficiaries.

(b) An authorized trustee exercising the power under (a) of this section may grant a discretionary power of appointment, including a presently exercisable power of appointment, in the appointed trust to one or more of the current beneficiaries of the invaded trust, to the extent that the beneficiary who is granted the power to appoint is authorized to receive the principal outright under the terms of the invaded trust. A permissible appointee is not limited to the beneficiaries of the invaded trust.

(c) Under (a) and (b) of this section, if the beneficiaries of the invaded trust are described by a class, the beneficiaries of the appointed trust may include present or future members of that class.

(d) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust if the current beneficiaries of the appointed trust are the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust are the same as the successor and remainder beneficiaries of the

invaded trust. The shares of the current beneficiaries of the appointed trust must be the same as the shares of the current beneficiaries of the invaded trust, and the shares of the successor and remainder beneficiaries of the appointed trust must be the same as the shares of the successor and remainder beneficiaries of the invaded trust.

(e) If the authorized trustee exercises the power under (d) of this section, the appointed trust must include the same standard authorizing the trustee to distribute the income or invade the principal of the appointed trust as the standard in the invaded trust. However, the standard authorizing the trustee to distribute the income or invade the principal of the appointed trust may be changed if the trustee appoints to an appointed trust that is a special needs trust, a pooled trust, or a third-party trust.

(f) If an authorized trustee exercises the power under (d) and (e) of this section to extend the duration of the appointed trust beyond the duration of the invaded trust for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust under (e) of this section, may also provide an additional trustee with unlimited discretion to invade the principal of the appointed trust during the extended duration. The trustee with unlimited discretion continues to be subject to the restrictions in (d) - (h) of this section.

(g) Under (d) - (f) of this section, if the beneficiaries of the invaded trust are described by a class, the beneficiaries of the appointed trust include present or future members of that class.

(h) If the authorized trustee exercises the power under (d) - (g) of this section and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust must grant this power of appointment in the appointed trust, and the class of permissible appointees shall be the same as in the invaded trust.

*** Sec. 7.** AS 13.36 is amended by adding new sections to read:

Sec. 13.36.158. Additional provisions relating to exercise of a power of appointment. (a) An exercise of the power to invade trust principal under AS 13.36.157 is the exercise of a special power of appointment.

(b) The appointed trust to which an authorized trustee appoints the assets of the invaded trust under AS 13.36.157 may have a duration that is longer than the

duration set out in the invaded trust.

(c) If an authorized trustee has unlimited discretion to invade the principal of a trust and if the same trustee or another trustee has a power, not dependent on unlimited discretion, to invade principal under the trust instrument, the authorized trustee having unlimited discretion may exercise the power of appointment under AS 13.36.157(a) - (c).

(d) An authorized trustee may exercise the power to appoint in favor of an appointed trust under AS 13.36.157 whether or not there is a current need to invade principal under the terms of the invaded trust.

(e) An authorized trustee exercising the power under AS 13.36.157 - 13.36.159 has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under AS 13.36.157 - 13.36.159 if there is substantial evidence of a contrary intent of the settlor and it cannot be established that the settlor would be likely to have changed this intention under the circumstances existing at the time the trustee exercises the power. The provisions of the invaded trust may not be viewed alone as substantial evidence of a contrary intent of the settlor unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(f) The provisions of AS 13.36.157 - 13.36.159 may not be construed to abridge the right of a trustee to appoint property further in trust under the terms of the governing instrument of a trust, another provision of law, or common law, or as directed by a court having jurisdiction over the trust.

(g) Nothing in AS 13.36.157 - 13.36.159 creates or implies a duty to exercise a power to invade principal. An inference of impropriety may not be made, and liability is not incurred, as a result of an authorized trustee not exercising the power conferred under AS 13.36.157.

(h) A power authorized by AS 13.36.157 may be exercised, subject to the provisions of AS 13.36.159(a), unless expressly prohibited by the terms of the governing instrument. A general prohibition against amending or revoking the invaded

trust and a provision that constitutes a spendthrift clause do not preclude the exercise of a power under AS 13.36.157.

(i) An authorized trustee may not exercise a power authorized by AS 13.36.157 to

(1) reduce, limit, or modify a beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust, or a right to withdraw a specified dollar amount, if the mandatory right has come into effect with respect to the beneficiary, but the mandatory right may be reduced, limited, or modified during any extended duration of the trust; however, notwithstanding the other provisions in this paragraph, but subject to the other limitations in AS 13.36.157 - 13.36.159, an authorized trustee may exercise a power authorized by AS 13.36.157 to appoint to an appointed trust that is a special needs trust, a pooled trust, or a third-party trust;

(2) decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence, and prudence unless the court having jurisdiction over the trust specifies otherwise;

(3) eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under AS 13.36.157 unless a court having jurisdiction over the trust specifies otherwise;

(4) fix as binding and conclusive the value of an asset for purposes of distribution, allocation, or otherwise; or

(5) jeopardize

(A) the deduction or exclusion originally claimed with respect to a contribution to the invaded trust that qualified for the annual exclusion under 26 U.S.C. 2503(b), the marital deduction under 26 U.S.C. 2056(a) or 26 U.S.C. 2523(a), or the charitable deduction under 26 U.S.C. 170(a), 26 U.S.C. 642(c), 26 U.S.C. 2055(a), or 26 U.S.C. 2522(a) (Internal Revenue Code);

(B) the qualification of a transfer as a direct skip under 26 U.S.C. 2642(c) (Internal Revenue Code);

(C) the election to treat a corporation as a subchapter S corporation under 26 U.S.C. 1362 (Internal Revenue Code); or

(D) another specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under 26 U.S.C. (Internal Revenue Code).

(j) Before exercising the power under AS 13.36.157, an authorized trustee shall consider the tax implications of the exercise of the power.

(k) An authorized trustee may not exercise a power described in AS 13.36.157 - 13.36.159 in violation of the limitations on validity in AS 34.27.051 or 34.27.100, or the restrictions on exercising certain powers in AS 13.36.153 by trustees who are not independent. A violation voids the entire exercise of the power unless the exercise is modified to correct the violation.

(*l*) Unless a court having jurisdiction over the trust directs otherwise, an authorized trustee may not exercise a power authorized by AS 13.36.157 to change the provisions regarding the determination of the compensation of a trustee. The commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as for the invaded trust.

(m) A trustee may not receive a payment, a commission, or other compensation for appointing property from the invaded trust to an appointed trust under AS 13.36.157. However, a trustee may be compensated at an hourly rate for the time spent considering and implementing the exercise of a power to appoint.

(n) Unless the invaded trust expressly provides otherwise, the provisions in AS 13.36.157 - 13.36.159 apply to

(1) a trust, whether testamentary or inter vivos, governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and

(2) a trust that has a trustee who is an individual domiciled in this state, or a trustee that is an entity having an office in this state, if a majority of the trustees select this state as the location for the primary administration of the trust and the selection is made by an instrument in writing that is signed and acknowledged by a majority of the trustees; the instrument exercising this selection shall be kept with the records of the invaded trust.

(o) A power to pay principal that includes words such as "best interests," "welfare," "comfort," or "happiness" is not considered a limitation or modification of the right to distribute principal.

(p) In this section, "internal revenue code" means the Internal Revenue Code of the United States (26 U.S.C.) as it exists on the effective date of this Act and as it is amended from time to time.

Sec. 13.36.159. Implementation of power of appointment. (a) Unless the authorized trustee provides otherwise, the appointment of

(1) all of the assets comprising the principal of the invaded trust to an appointed trust includes subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust;

(2) a part but not all of the assets comprising the principal of the invaded trust to an appointed trust may not include subsequently discovered assets belonging to the invaded trust or principal paid to or acquired by the invaded trust after the appointment to the appointed trust; those subsequently discovered assets remain the assets of the invaded trust.

(b) The exercise of the power to appoint to an appointed trust under AS 13.36.157 shall be evidenced by an instrument in writing that is signed, dated, and acknowledged by the authorized trustee. The exercise of the power is effective 30 days after the date of service of the instrument as specified in (d) of this section, unless the persons entitled to notice consent in writing to a sooner effective date.

(c) An authorized trustee may exercise the power authorized by AS 13.36.157 without the consent of the settlor or a person interested in the invaded trust and without court approval. However, an authorized trustee may seek court approval for the exercise. When seeking court approval, notice shall be sent to all qualified beneficiaries.

(d) A copy of the invaded trust, the appointed trust, and the instrument exercising the power shall be delivered to

(1) the settlor, if living, of the invaded trust;

(2) a person having the right, under the terms of the invaded trust, to

remove or replace the authorized trustee exercising the power under AS 13.36.157; and

(3) a qualified beneficiary or a person who may represent and bind the qualified beneficiary under AS 13.06.120.

(e) Notice under (d) of this section to a qualified beneficiary is not required if the settlor has exempted the authorized trustee from providing notification or information to beneficiaries under AS 13.36.080(b). Notice under (d) of this section shall be provided under AS 13.06.110.

(f) The instrument exercising the power must state whether the appointment is of all or part of the assets comprising the principal of the invaded trust and, if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.

(g) A person entitled to notice under (d) of this section may object to the trustee's exercise of the power under AS 13.36.157 - 13.36.159 by serving a written notice of objection on the trustee before the effective date of the exercise of the power. The failure to object does not constitute consent.

(h) The receipt of a copy of the instrument exercising the power does not, before the expiration of the limitation period in AS 13.36.100 with respect to a report disclosing the exercise, affect the right of a qualified beneficiary to object to the exercise of the power under AS 13.36.157 and to request the court to modify or to reverse the exercise.

(i) A copy of the instrument exercising the power shall be kept with the records of the invaded trust.

*** Sec. 8.** AS 13.36.215 is amended by adding a new subsection to read:

(b) In AS 13.36.157 - 13.36.159,

(1) "appointed trust" means an irrevocable trust that receives principal from an invaded trust under AS 13.36.157, including a new trust created by the settlor of the invaded trust or by the trustees, acting in that capacity, of the invaded trust;

(2) "authorized trustee" means, with regard to an invaded trust, a trustee with the authority to pay trust principal to or for a current beneficiary; in this paragraph, "trustee" does not include a settlor or a beneficiary to whom income or

principal must be paid, currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee other than by the exercise of a power of appointment held in a nonfiduciary capacity;

(3) "current beneficiary" means a person or, with regard to a class of persons, a person who is or will become a member of the class, to whom a trustee may distribute principal when exercising a power under AS 13.36.157;

(4) "invade" means pay directly to the beneficiary of a trust or apply to the benefit of a beneficiary;

(5) "invaded trust" means an irrevocable inter vivos or testamentary trust the principal of which is appointed under AS 13.36.157;

(6) "pooled trust" means a trust described in 42 U.S.C. 1396p(d)(4)(C) that meets the requirements for a pooled trust under the regulations of this state relating to the Medicaid treatment of trusts;

(7) "principal" means the assets of a trust, including accrued and accumulated income, but excluding income that is currently required to be distributed;

(8) "special needs trust" means a trust under 42 U.S.C. 1396p(d)(4)(A) that meets the requirements for a special needs trust under the regulations of this state relating to the Medicaid treatment of trusts;

(9) "third-party trust" means a trust that is

(A) established by a third party with the assets of the third party to provide for supplemental needs for a person eligible when the trust is created or at a future time for needs-based public assistance; and

(B) exempt from the provisions of the regulations of this state relating to the Medicaid treatment of trusts;

(10) "unlimited discretion" means the unlimited right to distribute principal that is not modified in any manner.

* **Sec. 9.** AS 13.38.200(b) is amended to read:

(b) In exercising a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the governing instrument or this chapter, including AS 13.38.210 and **13.38.300 - 13.38.490** [13.38.300 - 13.38.410], a fiduciary shall administer a trust or estate impartially based on what is fair and

reasonable to all of the beneficiaries, except to the extent that the governing instrument clearly manifests an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

*** Sec. 10.** AS 13.38.210(c) is amended to read:

(c) A trustee may not make an adjustment under this section if

(1) the adjustment would diminish the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which a federal estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment; the prohibition in this paragraph does not apply to a trust after the trustee determines that the marital deduction has not been claimed or has not been allowed;

(2) the adjustment would reduce the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a federal gift tax exclusion;

(3) the adjustment would change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) the adjustment is from any amount that is permanently set aside for charitable purposes under the governing instrument and for which a federal estate or gift tax charitable deduction has been taken, unless both income and principal are permanently set aside for charitable purposes under the governing instrument;

(5) possessing or exercising the power to make an adjustment would cause an individual to be treated as the owner of all or part of the trust for federal income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) possessing or exercising the power to make an adjustment would cause all or part of the trust assets to be subject to federal estate or gift tax with respect to an individual, and the assets would not be subject to federal estate or gift tax with respect to the individual if the trustee did not possess the power to make an adjustment;

(7) the trustee is a beneficiary of the trust; or

(8) the trust has been converted to a unitrust under **AS 13.38.300 - 13.38.435** [AS 13.38.300 - 13.38.410].

* **Sec. 11.** AS 13.38.300 is amended to read:

Sec. 13.38.300. Power to convert to unitrust. Unless expressly prohibited by the governing instrument, a trustee may release the power to adjust under AS 13.38.210 and may convert a trust into a unitrust as described in **AS 13.38.300 - 13.38.435** [AS 13.38.300 - 13.38.410] if

(1) the trustee determines that the conversion will enable the trustee to better carry out the intent of the settlor or testator and the purposes of the trust;

(2) the trustee gives written notice of the trustee's intention to release the power to adjust, of the trustee's intention to convert the trust into a unitrust, **of the unitrust percentage selected, of the smoothing period selected,** and of how the unitrust will operate, including what initial decisions the trustee **intends to** [WILL] make under **AS 13.38.340** [THIS SECTION], to all the sui juris beneficiaries who

(A) are currently eligible to receive income from the trust;

(B) would be eligible, if a power of appointment were not exercised, to receive income from the trust if the interest of all of the beneficiaries eligible to receive income under (A) of this paragraph were to terminate immediately before the giving of the notice; and

(C) would, if a power of appointment were not exercised, receive a distribution of principal if the trust were to terminate immediately before the giving of the notice;

(3) there are at least one sui juris beneficiary under (2)(A) of this section and at least one sui juris beneficiary under (2)(B) or (C) of this section; and

(4) a sui juris beneficiary does not object to the conversion to a unitrust in a writing delivered to the trustee within 60 days after the mailing of the notice under (2) of this section.

* **Sec. 12.** AS 13.38.310(a) is amended to read:

(a) A trustee may petition the court to approve the conversion to a unitrust if

(1) a beneficiary timely objects to the conversion to a unitrust; [OR]

(2) there is not a sui juris beneficiary who is eligible under

AS 13.38.300(2); or

(3) the trustee is a beneficiary [AS 13.38.300(2)(A), AND THERE IS NOT A SUI JURIS BENEFICIARY WHO IS ELIGIBLE UNDER AS 13.38.300(2)(B) OR (C)].

*** Sec. 13.** AS 13.38.330(b) is amended to read:

(b) After a trust has been converted to a unitrust, "income" in the governing instrument means an annual distribution equal to **the amount produced by the application of a fixed unitrust percentage established under (d) of this section to** [FOUR PERCENT OF] the net fair market value, as determined annually, of the trust's assets, whether the assets would be considered income or principal under other provisions of this chapter**, averaged over the lesser of**

(1) the preceding years in the smoothing period selected by the trustee; or

(2) the period during which the trust has been in existence.

*** Sec. 14.** AS 13.38.330 is amended by adding a new subsection to read:

(d) The unitrust percentage to be used in determining the unitrust amount must be a reasonable current return from the unitrust of at least three percent and not more than five percent, taking into account the intentions of the trustor of the unitrust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings for the unitrust, projected appreciation for the unitrust, and the effect of projected inflation on the unitrust.

*** Sec. 15.** AS 13.38.340 is amended to read:

Sec. 13.38.340. Trustee's discretionary powers regarding unitrust. The trustee may, in the trustee's discretion, from time to time, determine

(1) the effective date of a conversion to a unitrust;

(2) the provisions for prorating a unitrust distribution for a short year in which a beneficiary's right to payments commences or ceases;

(3) the frequency of unitrust distributions during the year;

(4) the effect of other payments from or contributions to the trust on the trust's valuation;

(5) whether to value the trust's assets annually or more frequently;

(6) **whether to use a smoothing period of three, four, or five years;**

(7) what valuation dates to use;

(8) [(7)] how frequently to value nonliquid assets and whether to estimate their value;

(9) [(8)] whether to omit trust property occupied or possessed by a beneficiary from the calculations; and

(10) [(9)] other matters necessary for the proper functioning of the unitrust.

*** Sec. 16.** AS 13.38.350(b) is amended to read:

(b) Unless otherwise provided by the governing instrument, a unitrust distribution shall be considered to have been paid from net income as net income would be determined if the trust were not a unitrust. To the extent net income is insufficient, the unitrust distribution shall be considered to have been paid from **ordinary income that is allocable under federal income tax rules to net income as determined for a unitrust. To the extent that the ordinary income is insufficient, the unitrust distribution is considered to have been paid from** net realized short-term capital gains. To the extent **net** income**, ordinary income,** and net realized short-term capital gains are insufficient, the unitrust distribution shall be considered to have been paid from net realized long-term capital gains. To the extent **net** income**, ordinary income,** and net realized short-term and long-term capital gains are insufficient, the unitrust distribution shall be paid from the principal of the trust.

*** Sec. 17.** AS 13.38.360 is amended to read:

Sec. 13.38.360. Court orders regarding unitrust. The trustee or, if the trustee declines to petition the court, a beneficiary may petition the court to

[(1) SELECT A PAYOUT PERCENTAGE DIFFERENT THAN FOUR PERCENT;

(2)] provide for a distribution of net income, as would be determined if the **unitrust** [TRUST] were not a unitrust, in excess of the unitrust distribution if the distribution is necessary to preserve a tax benefit [;

(3) AVERAGE THE VALUATION OF THE TRUST'S NET ASSETS OVER A PERIOD OTHER THAN THREE YEARS].

* **Sec. 18.** AS 13.38.390(b) is amended to read:

(b) If AS 13.38.380(a)(3), (4), or (6) applies to all the trustees, the trustees may petition the court to direct a conversion. **In the alternative, the trustees may appoint an independent person who shall be granted the authority, while acting in a fiduciary capacity, to make decisions in place of the trustees relating to a conversion, reconversion, and the exercise of discretionary powers under AS 13.38.340.**

* **Sec. 19.** AS 13.38.400 is amended to read:

Sec. 13.38.400. Reconversion from a unitrust. A trustee may reconvert a trust that has been converted into a unitrust under AS 13.38.300 by following the same procedures provided in **AS 13.38.300 - 13.38.435** [AS 13.38.300 - 13.38.410] for converting a trust into a unitrust. If a unitrust is reconverted under this section, the trustee's power to adjust under AS 13.38.210 applies to the trustee after the reconversion.

* **Sec. 20.** AS 13.38 is amended by adding new sections to article 2 to read:

Sec. 13.38.420. Additional unitrust provisions. (a) The unitrust amount may be determined by reference to the net fair market value of the unitrust's assets in one or more years.

(b) Distribution of a unitrust amount is considered a distribution of all of the income of a unitrust and is considered to be an income interest.

(c) Distribution of a unitrust amount is considered to be a reasonable apportionment of the total return of a unitrust.

(d) A unitrust that provides for a distribution based on a unitrust percentage in excess of five percent of the net fair market value of the unitrust assets a year is considered to have paid out all of the income of the unitrust and to have paid out principal of the unitrust to the extent that the distribution exceeds five percent a year.

(e) The governing instrument of a unitrust may grant discretion to the trustee to adopt a consistent practice of treating capital gains as part of the unitrust amount to the extent that the unitrust amount exceeds the income determined as if the trust were not a unitrust, or the governing instrument may specify the ordering of classes of income.

(f) Unless the terms of the unitrust specifically provide otherwise, a unitrust amount is considered to have been made from the following sources, which are listed in order of priority:

(1) net income determined as if the trust were not a unitrust;

(2) ordinary income not allocable to net income;

(3) net realized short-term capital gains;

(4) net realized long-term capital gains; and

(5) the principal of the trust estate.

(g) The unitrust governing instrument may provide that the trustee may exclude assets used by the unitrust beneficiary, such as a residence property or tangible personal property, from the net fair market value of the unitrust assets for the purposes of computing the unitrust amount. These assets may be considered equivalent to income or to the unitrust amount.

Sec. 13.38.430. Power to treat gains as part of distribution of principal. Unless prohibited by the unitrust's governing instrument or specifically addressed by AS 13.38.350 or 13.38.420, the trustee of a unitrust may treat gains from the sale of capital assets of the unitrust to be part of a distribution of principal to a beneficiary, and, if the trustee treats these gains as part of a distribution of principal to a beneficiary, the trustee shall treat these gains consistently on the unitrust's books, records, and tax returns as part of a distribution to a beneficiary.

Sec. 13.38.435. Definitions. In AS 13.38.300 - 13.38.435,

(1) "smoothing period" means the period of years over which the fair market value of the assets of a unitrust are averaged;

(2) "unitrust amount" means the amount that is distributed from a unitrust to a beneficiary;

(3) "unitrust percentage" means the unitrust percentage established under AS 13.38.330(d).

*** Sec. 21.** AS 13.38.690(a) is repealed and reenacted to read:

(a) A trustee shall allocate

(1) to income that portion of a payment that equals the greater of the following:

(A) the portion that the payor characterizes as interest, a dividend, a remittance in place of interest, or a remittance in place of a dividend; or

(B) the portion that is characterized as imputed interest for federal income purposes;

(2) to principal that portion of a payment that remains after the allocation is made under (1) of this subsection.

*** Sec. 22.** AS 13.38.690(b) is amended to read:

(b) If **no** [A] part of a payment under a contract calling for equal installments over a fixed period of time is [NOT] allocable to income under the provisions of (a) of this section, the difference between the trust's acquisition value of the contract and the total expected return **is** [SHALL BE] considered to be interest. The trustee shall allocate to income the portion of each payment equivalent to interest on the then unpaid principal balance at the rate specified in the contract or at a rate necessary to amortize the difference between the expected return and the acquisition value, where that rate is readily ascertainable by the trustee.

*** Sec. 23.** AS 13.38.690(c) is amended to read:

(c) If **no** [THERE IS NOT A] portion of a payment from a separate fund held exclusively for the benefit of the trust [THAT] is allocable to income under (a) or (b) of this section, but the internal net income of the fund determined as if the fund were a separate trust subject to **AS 13.38.200 - 13.38.410, 13.38.500 - 13.38.690, or 13.38.710 - 13.38.860** [AS 13.38.500 - 13.38.860] is readily ascertainable by the trustee, the **internal net income of the fund is considered to be the income earned by the fund, and the** portion of the payment equal to the then undistributed net income of the fund realized since the trust acquired its interest in the fund is considered to be a distribution of **that internal net** income **of the fund** and shall be allocated to the trust income account. The balance of the payment described in this subsection shall be allocated to principal. **The power to adjust under AS 13.38.210, the power to convert to a unitrust under AS 13.38.300, and the provisions of AS 13.38.420 apply to retirement benefits covered by this subsection that are payable to a trust. These powers and provisions may be exercised by the payee**

trustee or in the governing instrument for the retirement benefits separately and independently from the exercise by the payee trustee or in the governing instrument of these powers and provisions for the trust, as if the retirement benefits and the trust were separate trusts subject to this chapter.

*** Sec. 24.** AS 13.38.690(d) is amended to read:

(d) A trustee shall allocate 10 percent of the part of the payment that is required to be made during the accounting period to income and the balance to principal if there is **no** [NOT A] part of the payment that is allocable to income under (a) - (c) of this section and all or part of the payment is required to be made. The trustee shall allocate the entire payment to principal if **no** [A] part of a payment is [NOT] required to be made or the payment received is the entire amount to which the trustee is entitled. In this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

*** Sec. 25.** AS 13.38.690(e) is amended to read:

(e) If, to obtain a federal estate or gift tax marital deduction for a trust, the trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate **to income** the additional amount necessary to obtain the marital deduction [TO INCOME].

*** Sec. 26.** AS 13.46.190 is amended to read:

Sec. 13.46.190. Termination of custodianship. The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of the

(1) minor's attainment of 21 years of age with respect to property transferred under AS 13.46.030 or 13.46.040 unless the time of transfer of the custodial property to the minor is changed under AS 13.46.195 **or 13.46.197**;

(2) minor's attainment of 18 years of age with respect to property transferred under AS 13.46.050 or 13.46.060**, unless the time of transfer of the custodial property to the minor is changed under AS 13.46.197**;

(3) time specified in the transfer under AS 13.46.080 if the time of transfer of the custodial property to the minor is changed under AS 13.46.195 **or 13.46.197**; or

(4) minor's death.

* **Sec. 27.** AS 13.46 is amended by adding a new section to read:

Sec. 13.46.197. Extension of custodial term by custodian. (a) A custodian may extend the custodial term under this section to an age older than the age that is specified by this chapter or a transferring document made under AS 13.46.080, subject to the right of the minor to compel immediate distribution under (c) of this section.

(b) To extend the custodial term under (a) of this section, the custodian shall give the minor written notice of the custodian's intent to extend the custodial term. The notice must specify the duration of the extension by indicating the new custodial term and must inform the minor of the minor's right to compel immediate distribution under (c) of this section. The custodian shall give the notice during the later of the following periods:

(1) the six-month period that precedes the last day of the custodial term; or

(2) the six-month period that begins on the minor's 18th birthday.

(c) Rather than permit the extension of the custodial term, the minor may compel immediate distribution of all or part of the custodial property by giving written notice to the custodian

(1) during the six-month period that begins on the day that is the last day of the current custodial term; or

(2) within 90 days after receiving the custodian's notice under (b) of this section.

(d) If a minor does not exercise the minor's right to compel distribution under (c) of this section, the custodial term shall be extended as indicated in the custodian's notice given under (b) of this section, and the minor may not compel the immediate distribution of custodial property before the end of the custodial term, as extended.

(e) A custodian may extend the custodial term more than once under this section.

(f) In this section, "custodial term" means the period of time provided in or allowed by this chapter during which the custodian is directed to hold custodial property until the property is transferred to the minor.

* **Sec. 28.** AS 13.46.990(11) is amended to read:

(11) "minor" means an individual who has not attained the age of 18 years, except that when used in reference to the beneficiary for whose benefit custodial property is held or to be held, "minor" means an individual who has not attained the age at which the custodian is required under AS 13.46.190**,** [AND] 13.46.195**, and 13.46.197** to transfer the custodial property to the beneficiary;

* **Sec. 29.** AS 13 is amended by adding a new chapter to read:

Chapter 75. Disposition of Human Remains.

Sec. 13.75.010. Directions by decedent. (a) A person may provide directions for the disposition of the person's remains by placing the directions in a disposition document. The directions may include or be limited to designating an agent to control the disposition of the person's remains.

(b) A disposition document must be signed by the person and acknowledged before a notary public, and contain the form and contents required by AS 13.75.030. A disposition document may be a separate document or it may be contained in another document, including a will or prepaid funeral or burial contract. The disposition document may be modified or revoked only by a subsequent disposition document that complies with this subsection.

Sec. 13.75.020. Persons authorized to control disposition. (a) The following persons, in the priority listed, may control disposition of a decedent's remains:

(1) a person designated in a disposition document as the disposition agent for the decedent;

(2) a person serving, or nominated by the decedent in the decedent's will to serve, as the personal representative of the decedent's estate, if the person is acting according to the decedent's written instructions contained in the decedent's will;

(3) the individual who was the spouse of the decedent at the time of the decedent's death;

(4) the sole surviving competent adult child of the decedent, or, if there is more than one surviving competent adult child of the decedent, the majority of the surviving competent adult children; fewer than one-half of the surviving competent adult children may exercise the rights and duties of this section if these surviving adult

children use reasonable efforts to notify all other surviving competent adult children that they are exercising these rights and duties and are not aware of any opposition by one-half or more of all of the surviving competent adult children;

(5) the surviving competent parents of the decedent; if one of the surviving competent parents is absent, the remaining competent parent may exercise the rights and duties of this section after reasonable efforts have been unsuccessful in locating the absent surviving competent parent; in this paragraph, "absent" means a person who is unable to communicate decisions or participate in making decisions regarding the disposition of a decedent's remains personally, telephonically, or through electronic communication;

(6) the surviving competent adult person in the next degrees of kindred, the two surviving competent adult persons of the same degree of kindred if there are two, or, if there are more than two surviving competent adult persons of the same degree of kindred, the majority of those persons; fewer than the majority of surviving competent adult persons of the same degree of kindred may exercise the rights and duties of this section if those persons use reasonable efforts to notify all other surviving competent adult persons of the same degree of kindred that they are exercising these rights and duties and are not aware of any opposition by one-half or more of all surviving competent adult persons of the same degree of kindred;

(7) in the case of an indigent or another individual whose final disposition is the responsibility of the state or a municipality, a public administrator, medical examiner, coroner, or another public official charged with arranging the final disposition of the decedent; or

(8) another person who is willing to assume legal and financial responsibility.

(b) If a person takes control of the disposition under (a) of this section, the person is liable for the reasonable costs of the disposition.

(c) In this section,

(1) "adult" means a person who is 18 years of age or older;

(2) "competent" means a person who does not suffer from disabilities that prevent the person from managing the person's property or affairs.

Sec. 13.75.030. Form of disposition document. A disposition document must be in substantially the following form:

DISPOSITION DOCUMENT

You can select Part 1, Part 2, or both, by completing the part(s) you select, including providing any signatures indicated. Part 3 contains general statements and a place for your signature. You must sign in front of a notary.

PART 1. APPOINTMENT OF AGENT TO CONTROL DISPOSITION OF REMAINS. If you appoint an agent, you and your agent must complete this part as indicated, and the agent must sign this part.

I, _____, being of sound mind, wilfully and voluntarily make known my desire that, on my death, the disposition of my remains shall be controlled by _____ (name of agent first named below), and, with respect to that subject only, I appoint that person as my agent. All decisions made by my agent with respect to the disposition of my remains, including cremation, are binding.

ACCEPTANCE BY AGENT OF APPOINTMENT.

THE AGENT, AND EACH SUCCESSOR AGENT, BY ACCEPTING THIS APPOINTMENT, AGREES TO AND ASSUMES THE OBLIGATIONS PROVIDED IN THIS DOCUMENT. AN AGENT MAY SIGN AT ANY TIME, BUT AN AGENT'S AUTHORITY TO ACT IS NOT EFFECTIVE UNTIL THE AGENT SIGNS BELOW TO INDICATE THE ACCEPTANCE OF APPOINTMENT. ANY NUMBER OF AGENTS MAY SIGN, BUT ONLY THE SIGNATURE OF THE AGENT ACTING AT ANY TIME IS REQUIRED.

AGENT:

Name: _____

Address: _____

Telephone Number: _____

Signature Indicating Acceptance of Appointment:

_____

Date of Signature: _____

SUCCESSORS:

If my agent dies, becomes legally disabled, resigns, or refuses to act, I appoint the following persons (each to act alone and successively, in the order named) to serve as my agent to control the disposition of my remains as authorized by this document:

(1) First Successor

Name: _____

Address: _____

Telephone Number: _____

Signature of First Successor Indicating Acceptance of Appointment:

_____

Date of Signature: _____

(2) Second Successor

Name: _____

Address: _____

Telephone Number: _____

Signature of Second Successor Indicating Acceptance of Appointment:

_____

Date of Signature: _____

PART 2. DIRECTIONS FOR THE DISPOSITION OF MY REMAINS.

Stated below are my directions for the disposition of my remains:

_____

_____

_____

_____

If the disposition of my remains is by cremation, then (pick one):

( ) I do not wish to allow any of my survivors the option of

canceling my cremation and selecting alternative arrangements, regardless of whether my survivors consider a change to be appropriate.

( ) I wish to allow only the survivors I have designated below to have the option of canceling my cremation and selecting alternative arrangements, if they consider that a change to be appropriate:

_____

_____

_____

_____

PART 3. GENERAL PROVISIONS AND SIGNATURE.

WHEN DIRECTIONS BECOME EFFECTIVE. The directions, including any appointment of an agent, in this disposition document become effective on my death.

REVOCATION OF PRIOR APPOINTMENTS. I revoke any prior appointment of any person to control the disposition of my remains.

SIGNATURE OF PERSON MAKING DISPOSITION DOCUMENT

Signature: _____

Date of signature: _____

(Notary acknowledgment of signature)

Sec. 13.75.040. Agent's appointment. The person appointed as an agent in a disposition document may sign the disposition document at any time, but the agent's authority to act is not effective until the agent signs the instrument.

Sec. 13.75.050. Exercise of authority. If a person fails to exercise the person's authority to control disposition under AS 13.75.020 within 48 hours after receiving notification of the decedent's death or within 48 hours after the decedent's death, whichever is earlier, the person may not control the disposition of the decedent's remains, and the right to control the disposition of the decedent's remains passes to the person who is next listed in priority under AS 13.75.020. If the person to whom the right to control the disposition passes under this section fails to exercise the person's authority to control the disposition within 48 hours after being notified that the

authority to control the disposition has passed to the person, the authority to control the disposition passes to the person who is next listed in priority under AS 13.75.020.

Sec. 13.75.060. Certain persons prohibited from control. If a person is charged with a felonious killing in connection with a decedent's death and if the funeral director or the cemetery knows about the charge, then the person may not control disposition, and the right to control disposition passes to the person who is next listed in priority under AS 13.75.020.

Sec. 13.75.070. Prohibition of cremation; written instructions. A person may not authorize cremation for a decedent's remains if a decedent has left directions in a disposition document that the decedent does not wish to be cremated.

Sec. 13.75.080. Implementation of directions. (a) The person authorized to control the disposition shall carry out the directions of the decedent to the extent that the decedent's estate or the person is financially able to carry out the directions.

(b) Notwithstanding any other provision in AS 13.06 - 13.36 (Uniform Probate Code), if a person provides directions in a disposition document that is contained in a will, the directions shall be carried out immediately without the necessity of probate. If the will is not probated or is declared invalid for testamentary purposes, the directions are valid to the extent to which they have been acted on in good faith.

Sec. 13.75.090. Misrepresentation; liability. If a person represents that the person knows the identity of a decedent, and, with the intent to procure the disposition of the decedent's remains, signs a statement, other than a death certificate, that identifies the decedent, the person guarantees the identity of the decedent and is liable for any damages that result, directly or indirectly, from that guarantee.

Sec. 13.75.100. Liability. (a) A disposition organization is not liable for carrying out the directions of a decedent if the disposition organization carries out the directions of a decedent or a person who establishes that the person is entitled to control the disposition.

(b) This section may not be construed to reduce or eliminate the liability of a disposition organization for its negligence or reckless acts.

Sec. 13.75.110. Disputes. (a) A person listed in AS 13.75.020 who is involved in a dispute with one or more persons listed in AS 13.75.020 about which of the

persons has the authority to control disposition may bring an action in the superior court to resolve the dispute.

(b) If there is a dispute with one or more persons listed in AS 13.75.020 about which person has the authority to control disposition, a cemetery organization or funeral establishment is not liable for refusing to accept, to inter, or otherwise to dispose of the decedent's remains until the cemetery organization or funeral establishment receives a court order or another suitable confirmation that the dispute has been resolved.

Sec. 13.75.120. Exemptions. The disposition of the remains of a member of the organized militia under AS 26.05.262, the disposition of the remains of a member of the armed forces under AS 26.10.065(a), and the disposition of the remains of a member of the United States Coast Guard under AS 26.10.065(b) are exempt from this chapter.

Sec. 13.75.190. Definitions. In this chapter,

(1) "control" means the authority to control disposition;

(2) "directions" means

(A) instructions for the disposition of a person's remains;

(B) the appointment of an agent to handle the disposition of a person's remains; or

(C) both (A) and (B) of this paragraph;

(3) "disposition" means disposition of a decedent's remains, including cremation, but does not include an anatomical gift; in this paragraph, "anatomical gift" has the meaning given in AS 13.52.390;

(4) "disposition document" means a disposition document authorized by AS 13.75.010

(A) in which a person provides directions regarding the disposition of the person's remains; and

(B) that complies with AS 13.75.030;

(5) "disposition organization" means

(A) a cemetery association formed under AS 10.30.010;

(B) a nonprofit cemetery corporation authorized by

AS 10.30.055;

(C) a person operating a crematory;

(D) a person operating a columbarium;

(E) a funeral home or other type of funeral establishment;

(F) a funeral director or an embalmer.

Sec. 13.75.195. Short title. This chapter may be cited as the Disposition of Human Remains Act.

*** Sec. 30.** AS 21.42.020 is amended by adding new subsections to read:

(e) Notwithstanding (a) of this section, a trustee, acting in a fiduciary capacity, may procure or cause to be procured an insurance contract that is on the life or body of an individual and under which the proceeds of the insurance contract are payable to the trustee, acting in a fiduciary capacity, if

(1) the trustee, acting in a fiduciary capacity, owns the insurance contract or the trust itself owns the insurance contract;

(2) on the date the contract is made, a settlor of the trust is the individual insured, has an insurable interest in the individual insured, or would have had an insurable interest in the individual insured if the settlor were living at the time the contract was made; in this paragraph, "settlor" means a person, including a person for whom a fiduciary or agent is acting, who executes the trust instrument; and

(3) the proceeds of the contract are primarily for the benefit of a trust beneficiary who has an insurable interest in the individual insured, except that, if the determination of the trust beneficiary's insurable interest is based on (d)(1) of this section, the trust beneficiary's relation by blood or law must be within the third degree.

(f) A person who has an insurable interest in the life or body of an individual may form a business firm that is substantially or solely for the purpose of purchasing, holding, or administering an insurance contract on the life or body of the individual. In this subsection, "firm" has the meaning given in AS 21.97.900, but also includes a business trust and a joint venture.

*** Sec. 31.** AS 34.40 is amended by adding a new section to read:

Sec. 34.40.113. Transfers of individual retirement accounts. (a) Notwithstanding a provision in AS 09.38.017(d), AS 34.40.110, or another law to the

contrary, a person may voluntarily transfer or assign the person's interest in an individual retirement account if the person

(1) is the owner of or a participant in the individual retirement account; or

(2) acquired the interest as a result of the death of another individual.

(b) In this section, "individual retirement account" means an individual retirement account established under 26 U.S.C. 408 or a Roth IRA established under 26 U.S.C. 408A.

*** Sec. 32.** AS 34.77.030(g) is amended to read:

(g) Whether or not the community property agreement provides that all property acquired by either or both spouses during the marriage is community property, and except to the extent otherwise expressly provided **by the spouses** in the community property agreement **or by the settlors in a community property trust**, property acquired by a spouse during marriage and after the determination date is individual property if acquired

(1) by gift or a disposition at death made by a third person to the spouse and not to both spouses;

(2) in exchange for or with the proceeds of other individual property of the spouse;

(3) from appreciation or income of the spouse's individual property except to the extent that the income or appreciation is classified as community property under AS 34.77.130;

(4) by a decree, community property agreement, written consent, or reclassification under AS 34.77.060(b) designating it as the individual property of the spouse;

(5) as a recovery for damage to property under AS 34.77.140, except as specifically provided otherwise in a decree, community property agreement, **community property trust,** or written consent; [OR]

(6) as a recovery for personal injury, except for the amount of the recovery attributable to expenses paid or otherwise satisfied from community property**; or**

(7) as a transfer to a community property trust and declared by the trust to be the individual property of the spouse.

* **Sec. 33.** AS 34.77.050(b) is amended to read:

(b) A gift of community property to a third person that is not allowed under (a) of this section is subject to **AS 34.77.140(e) - (h)** [(d) OF THIS SECTION] unless both spouses act together in making the gift or the other spouse ratifies the gift.

* **Sec. 34.** AS 34.77.110 is amended by adding new subsections to read:

(f) Property that spouses agree in a community property agreement is community property or property that is transferred to a community property trust and expressly declared by the trust to be community property is owned as community property regardless of the form of title to the property, even if the title indicates that the property is owned unequally by the spouses or is only in the name of one spouse.

(g) If the title to community property is in a form that provides for ownership by survivorship between the spouses, then ownership by survivorship is presumed to have been made with the consent of both spouses.

(h) If a spouse with management and control of community property designates a beneficiary for the property on the death of one or both of the spouses, and if the community property is held in a form of title that permits a beneficiary designation, the beneficiary designation is effective only for the designating spouse's one-half interest in the community property unless the other spouse consents in writing to the designation. A designation of the following as the beneficiary is presumed to have been made with the consent of the other spouse:

(1) the other spouse or an ancestor or descendant of either spouse;

(2) a charity; or

(3) a trust, to the extent that the beneficiaries consist of persons or entities identified in (1) or (2) of this subsection.

(i) The testimony of one spouse is sufficient to rebut a presumption established under this section.

(j) A disposition of community property contrary to (e) - (h) of this section is voidable. An action in court to void the disposition must be commenced within the time specified by AS 34.77.140(e).

* **Sec. 35.** AS 34.77.140(d) is amended to read:

(d) Except as provided otherwise in **(e) - (h) of this section** [AS 34.77.050(d)], a spouse must begin an action against the other spouse under (a) of this section within three years after acquiring actual knowledge of the facts giving rise to the claim.

* **Sec. 36.** AS 34.77.140 is amended by adding new subsections to read:

(e) Except as provided by (f) - (h) of this section, if a gift of community property during marriage by a spouse does not comply with AS 34.77.050(a), the nondonor spouse may bring an action to recover the property or the amount of money by which the gift exceeded the limit under AS 34.77.050(a). The nondonor spouse may bring the action against the donor spouse, the gift recipient, or both. The nondonor spouse must commence the action within the earliest of the following times:

(1) one year after the nondonor spouse receives notice of the gift;

(2) one year after dissolution of the marriage; or

(3) on or before the deadline for filing a claim under AS 13.16.460 after the death of the donor spouse.

(f) If a recovery under (e) of this section occurs during the marriage of the donor spouse and the nondonor spouse, the property or money that is recovered is considered community property. If the recovery occurs after the dissolution of the marriage of the donor and nondonor spouses or after the death of either the donor or the nondonor spouse, the recovery is limited to 50 percent of the property or money that would have been recovered if the recovery had occurred during the marriage.

(g) If a transfer of community property to a third person during marriage by a spouse acting without the other spouse becomes a completed gift on the death of the donor spouse, or if an arrangement involving community property during marriage by a spouse acting without the other spouse is intended to be and becomes a gift to a third person on the death of the donor spouse, the surviving spouse may bring an action in court against the gift recipient to recover one-half of the gift. To bring an action under this subsection, the surviving spouse must commence the action on or before the deadline for filing a claim under AS 13.16.460.

(h) If a spouse who would have been entitled to bring an action under (e) - (g)

of this section predeceases the donor spouse, the deceased spouse's successor in interest may bring an action for recovery under (e) - (g) of this section, but the action must be commenced within one year after the deceased spouse's death. Recovery in an action under this subsection is the same as if the donor spouse had predeceased the spouse entitled to the recovery, but the amount of the recovery is calculated as of the date of the death of the spouse entitled to the recovery.

*** Sec. 37.** AS 13.38.330(c); AS 34.77.050(d), and 34.77.110(d) are repealed.

*** Sec. 38.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGE. AS 34.77.110(i), enacted by sec. 34 of this Act, has the effect of amending Rule 301(a), Alaska Rules of Evidence, by specifying the evidence that is sufficient to rebut a presumption under AS 34.77.110(i), enacted by sec. 34 of this Act.

*** Sec. 39.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 09.38.017(a), as amended by sec. 1 of this Act, AS 09.38.017(d), as amended by sec. 2 of this Act, and AS 09.38.017(e), as amended by sec. 3 of this Act, apply to a retirement plan that exists before, on, or after the effective date of this Act. In this section, "retirement plan" has the meaning given in AS 09.38.017(e), as amended by sec. 3 of this Act.

(b) AS 13.36.157, repealed and reenacted by sec. 6 of this Act, AS 13.36.158 and 13.36.159, enacted by sec. 7 of this Act, and AS 13.36.215(b), enacted by sec. 8 of this Act, apply to a trust that exists before, on, or after the effective date of this Act.

(c) AS 13.46.190, as amended by sec. 26 of this Act, AS 13.46.197, enacted by sec. 27 of this Act, and AS 13.46.990(11), as amended by sec. 28 of this Act, apply to a transfer that is made before, on, or after the effective date of this Act. In this subsection, "transfer" has the meaning given in AS 13.46.990.

(d) AS 34.40.113, added by sec. 31 of this Act, applies to an individual retirement account that exists before, on, or after the effective date of this Act. In this section, "individual retirement account" means an individual retirement account established under 26 U.S.C. 408 or a Roth IRA established under 26 U.S.C. 408A.

*** Sec. 40.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. AS 34.77.110(i), enacted by sec. 34 of this Act, takes effect only if sec. 38 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

AMENDMENT

OFFERED IN THE SENATE BY SENATOR FRENCH

TO: CSSB 165(JUD), Draft Version "E"

Page 35, following line 23:

Insert a new subsection to read:

"(c) AS 13.46.190, as amended by sec. 26 of this Act, AS 13.46.197, enacted by sec. 27 of this Act, and AS 13.46.990(11), as amended by sec. 28 of this Act, apply to a transfer that is made before, on, or after the effective date of this Act. In this subsection, "transfer" has the meaning given in AS 13.46.990."

Reletter the following subsection accordingly.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
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Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

SB 165 Changes in Version "E"

- Amendment D.3 adds sections 6 through 8 on pages 7-14 to clarify provisions dealing with modification of existing trusts.

- Amendment D.2 revises language regarding custodial accounts for minors in sections 26 through 28, pages 22-24.

- Amendment D.1 inserts the definition for "settlor" at section 30(e)2, page 31, at lines 18-19.

Alaska State Legislature

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Senator John Coghill

Senate Judiciary Committee

SECTIONAL ANALYSIS FOR SENATE BILL 165

Sec. 1. Asset Protection for Inherited Retirement Plans. Alaska Statute 09.38.017(a) protects an individual's interest in a retirement plan from the claims of the individual's creditors. The amendment extends this protection to claims of a beneficiary's creditors (e.g., creditors of an individual's spouse). Arizona, Florida, and Texas have enacted similar provisions.

Sec. 2. This is a conforming amendment for Sec. 28.

Sec. 3. These are definitional changes implementing Sec. 1.

Sec. 4. through Sec. 5. Representation for Settlement Agreements. Alaska Statute 13.06.120 provides that minors, incapacitated persons, and similar persons may be represented by another person who has the same interests in the matter. This type of representation is important in order to simplify and make more efficient proceedings that involve persons who are not legally competent to represent themselves. The existing statute clearly applies to judicial proceedings. However, often it is important to have representation of minors and incapacitated persons with respect to the settlement of accounts of trustees of trusts and with respect to settlement agreements. These amendments clarify that the statute not only applies to court proceedings but also to non-judicial settlement proceedings.

Section 6 through 8. Existing Alaska Statute 13.36.157 provides a trustee with a method to modify an existing trust, commonly referred to as "decanting". Alaska enacted its "decanting" statute in 1998. Alaska copied New York's statute. At the present time, the following states have enacted decanting statutes: Alaska, Arizona, Delaware, Florida, Indiana, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, South Dakota, and Tennessee. In addition, decanting statutes are pending before Illinois, Michigan, and Virginia.

New York recently did a thorough revision of its decanting statute and enacted this new revised statute in 2011. The proposed amendment to Alaska's decanting statute closely tracks the changes made by New York with modifications necessary to accommodate Alaska's procedural provisions.

The purposes of a decanting statute are to allow a trustee to modify a trust in order to correct errors and to adjust to changed circumstances and laws. The revised draft distinguishes between trustees who have unlimited discretion and those without unlimited discretion. A trustee without unlimited discretion must maintain the same beneficiaries in the new trust and apply the same standard for distributions. The trustee cannot be a settlor or beneficiary of the trust, and has a fiduciary duty to exercise the power of appointment in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under prevailing circumstances. A trustee must exercise the power in writing and must give written notice to the settlor, any person having the right to remove or replace the trustee, and any qualified

beneficiary. A beneficiary may object to the exercise if it is an abuse of discretion, or fails to comply with the trustee's duties stated above. Restrictions exist to protect mandatory distribution rights, tax benefits, and to prohibit the trustee from exercising the power to either increase the trustee's compensation or decrease the trustee's liability.

Implementation of irrevocable trusts is best accomplished if the law provides reasonable flexibility to adjust to changed circumstances and to correct errors. The reason why so many states have enacted decanting statutes is because of the need for this flexibility. Amendment to Alaska's decanting statute to include these revised provisions will benefit the residents of the state of Alaska, many of whom use lifetime or testamentary trusts to implement their estate planning purposes.

Sec. ~~6~~ 9 through Sec. ~~22~~25. Amendments to 2003 Alaska Principal and Income Act. This modern act allows a person creating a new trust, or a trustee of an existing trust, to adopt a "unitrust" approach for determining the income of the trust which may be required to be distributed annually. A unitrust distributes a certain percentage of its assets annually to the current beneficiary. The use of this percentage unitrust approach allows the trustee to invest in order to maximize total return for both income and remainder beneficiaries.

Since 2003, the Internal Revenue Service has issued final regulations with respect to unitrusts. The Alaska Principal and Income Act amendments contained in this bill are designed to update Alaska's provisions to take advantage of these new regulations.

In summary, the most important changes contained in the bill expressly allow a trustee to choose a unitrust rate of three to five percent rather than be limited to the four percent amount presently in the law. The changes provide an explicit definition of income for a trust drafted as a unitrust. Language is added to provide the ordering of distributions among types of income and principal. A smoothing period of up to five years is allowed for determining the assets to be used when applying the unitrust percentage. Also, the new provisions clarify how the unitrust rules will apply to retirement benefits. These new changes will facilitate the use of unitrusts under Alaska law and maximize flexibility to take advantage of federal income tax planning.

Sec. ~~23~~ 26 through ~~25~~28. Amendments to Alaska Uniform Transfers to Minors Act. The Alaska Uniform Transfers to Minors Act allows donors, personal representatives, trustees, and obligors, to transfer assets to an account for the benefit of a minor. A custodian is named who may make distributions for the benefit of the minor. Under the existing statutes, the minor is entitled to the property when the minor reaches age 18 years or 21 years, depending on the type of transfer. The statute allows this age of distribution to be extended in certain circumstances to age 25 years.

A number of situations have arisen both in Alaska and in other states where it is undesirable for assets to be distributed later than the ages 18, 21, or 25 years, due to problems the minor may have, including substance abuse problems, immaturity, and the inability to manage assets. Often, the minor himself or herself is willing to have the assets remain in a custodial setting, managed by a competent person who will make distributions for the benefit of the minor. The amendments in this bill would allow for the extension to an age greater than that presently specified in the statute, as long as the minor consents to the extension during the six-month period when the minor attains the age when otherwise the assets would be distributed under the statute.

Sec. ~~26~~29. Decedents Remains. Alaska does not presently have adequate statutory authority with respect to who may control the disposition of a decedent's remains. This has resulted in arguments and disputes among relatives and friends. Businesses involved in this area need protection concerning who is the person entitled to give them directions. This new act resolves the present uncertainty of the law. It provides authority for a person to provide directions and a form

for a disposition document. If a person has not provided directions, then a priority list is provided of the persons who may control the disposition of the decedent's remains. Businesses who follow these directions or priority list are protected from liability.

Sec. ~~27~~30. **Insurable Interests.** For many years, individuals have relied on life Insurance in helping to meet their financial, business, and estate planning needs. Often, their needs are best served by having one or more life insurance contracts held in an irrevocable trust, partnership, or limited liability company. In particular, irrevocable life insurance trusts have been widely used throughout the United States to own life insurance policies.

However, a relatively recent federal court case *(Chawla, ex rel Giesinger v. Transamerica Occidental Life Ins. Co.*, 2005 WL 405405 (E.D. Va. 2005)) had the effect of pointing out that while state insurance statutes typically require purchasers of insurance contracts to have an "insurable interest" in the life or body of the insured, the statutory provisions describing who may have an insurable interest did not specifically include trusts and business entities which are commonly used to purchase and own such policies. This case raised sufficient uncertainty about the status of life insurance trusts that in July, 2010, the Uniform Law Commission approved amendments to the Uniform Trust Code to clarify the situation.

Alaska has previously adopted substantial portions of the Uniform Trust Code. The proposed amendment to AS 21.42.020 is based in large part on the recommended amendments to the Uniform Trust Code, and also clarifies that persons with insurable interests may form business entities for the purposes of purchasing, holding, and administering life insurance contracts. Other states, for example Delaware, have already amended their statutes for these reasons, or are considering such amendments.

Sec. ~~28~~31. **Transfers of IRA Interests.** Lifetime estate planning often occurs by a participant making gifts, sales or other transfers of property during lifetime to family members or trusts for their benefit. For many individuals, one of their most valuable assets is their individual retirement account (IRA). Alaska law (AS 09.38.017) protects IRAs from claims of creditors. This protection could be construed to even prohibit voluntary transfers of the participant's interest in an IRA, which would prevent lifetime transfers of IRAs for estate planning and other purposes. Although it is important to maintain that creditor protection for IRAs, it would be beneficial to permit voluntary transfers of IRAs. Therefore, this section clarifies that the participant of an IRA may voluntarily transfer his or her IRA during lifetime.

Sec. ~~29~~–32 **through** Sec. ~~33~~36. **Community Property.** In 1998, Alaska enacted an optional community property system. Several amendments have been made to Alaska's act, and this bill proposes further amendments designed to improve the act. Specifically, the amendments accomplish the following:

a. Add references to a community property trust in appropriate provisions.

b. Eliminate language stating a confusing statute of limitations and incorporates by reference a new statute of limitations.

c. Provide clarification that property which spouses agree is community property is owned as community property regardless of the form of title to the property. If title to community property is in a form that provides for survivorship ownership between the spouses then the survivorship ownership is presumed to have been made with the consent of both spouses. If one spouse designates a beneficiary for an interest in property, the designation is only effective for that spouse's one half interest unless the other spouse consents in writing. Various family designations are presumed to have been made with the consent of the other spouse. The

testimony of one spouse is sufficient to rebut a presumption.

d. Enact remedies for improper transfers and limitation periods within which those remedies must be pursued.

Sec. ~~34~~37. Repealed sections.

Sec. ~~35~~38. Indirect rule change.

Sec. ~~36~~39. Applicability

Sec. ~~37~~40. Requirement for two-thirds majority vote of each house.

27-LS0819\E
Bannister
2/15/12

CS FOR SENATE BILL NO. 165(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to property exemptions for retirement plans, individual retirement accounts, and Roth IRAs; relating to pleadings, orders, liability, and notices under the Uniform Probate Code; relating to the appointment of trust property; relating to the Alaska Principal and Income Act; relating to the Alaska Uniform Transfers to Minors Act; relating to the disposition of human remains; relating to insurable interests for life insurance policies; relating to transfers of individual retirement plans; relating to the community property of married persons; and amending Rule 301(a), Alaska Rules of Evidence."

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

*** Section 1.** AS 09.38.017(a) is amended to read:

(a) In addition to the exemption under AS 09.38.015(b), the following are exempt from a claim of an individual's **or beneficiary's** creditor:

(1) the interest of the individual **or beneficiary** in a retirement plan; [AND]

(2) the money or other assets payable to the individual from a retirement plan**;**

(3) the interest of a beneficiary in

(A) a retirement plan if the beneficiary acquired the interest as a result of the death of an individual; the beneficiary's interest is exempt to the same extent that the individual's interest was exempt immediately before the individual died;

(B) an individual retirement account that has been transferred by the individual to the beneficiary during the individual's lifetime; the beneficiary's interest is exempt to the same extent that the individual's interest was exempt immediately before the transfer to the beneficiary;

(4) the money or other assets payable to a beneficiary from

(A) a retirement plan if the beneficiary acquired the money or other assets as a result of the death of an individual who would have had, during the individual's life, an exemption in the money or other assets;

(B) an individual retirement account if the beneficiary acquired the money or other assets as a result of the transfer of the money or other assets by an individual who would have had, at the time of the transfer, an exemption in the money or other assets.

*** Sec. 2.** AS 09.38.017(d) is amended to read:

(d) A retirement plan exempt from claims under (a) of this section is conclusively presumed to be a spendthrift trust under this section**, except for transfers or assignments under AS 34.40.113**.

*** Sec. 3.** AS 09.38.017(e) is amended to read:

(e) In this section,

(1) "alternate payee" has the meaning given in 26 U.S.C. 414(p)(8);

(2) **"beneficiary" includes a person, trust, or trustee who has,**

before or after the death of an individual, a direct or indirect beneficial interest in a retirement plan; in this paragraph, "beneficial interest" includes an interest that is acquired

(A) as a designated beneficiary, survivor, co-annuitant, heir, or legatee; or

(B) if excludible from gross income under 26 U.S.C. (Internal Revenue Code), as a

(i) rollover under 26 U.S.C. 408 or 26 U.S.C. 408A;

(ii) a distribution from one retirement plan to another retirement plan; or

(iii) a distribution that is similar to (i) or (ii) of this subparagraph;

(3) "individual" means [AN INDIVIDUAL WHO IS] a participant in, **an owner** [A BENEFICIARY] of, or an alternate payee of a retirement plan;

(4) "individual retirement account" means an individual retirement account established under 26 U.S.C. 408 or a Roth IRA established under 26 U.S.C. 408A;

(5) [(3)] "retirement plan" means

(A) a retirement plan that is qualified under 26 U.S.C. 401(a), 26 U.S.C. 403(a), 26 U.S.C. 403(b), [26 U.S.C. 408, 26 U.S.C. 408A, OR] 26 U.S.C. 409**, 26 U.S.C. 414(d), 26 U.S.C. 414(e), or 26 U.S.C. 457** (Internal Revenue Code)**;**

(B) an individual retirement account; and

(C) the teachers' retirement system under AS 14.25, the judicial retirement system under AS 22.25, the public employees' retirement system under AS 39.25, and the elected public officers' retirement system under former AS 39.37.

*** Sec. 4.** AS 13.06.120 is amended to read:

Sec. 13.06.120. Pleadings; when parties bound by orders; notice. In any proceedings involving trusts, nonprobate assets, or estates of decedents, minors, protected persons, or incapacitated persons brought under AS 13.06 - AS 13.36 or

AS 13.38, [INCLUDING ANY JUDICIALLY SUPERVISED SETTLEMENTS AND ANY NONJUDICIAL PROCEEDINGS AND SETTLEMENTS,] the following apply:

(1) interests to be affected shall be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner;

(2) persons are bound by orders binding others in the following cases:

(A) orders binding the sole holder or all co-holders of a power of revocation or a general or nongeneral power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests, as objects, takers in default, or otherwise, are subject to the power;

(B) to the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate the conservator controls; orders binding a guardian bind the ward if no conservator of the estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary, and in proceedings involving creditors or other third parties; orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and orders binding an agent having authority to act with respect to the particular questions or dispute bind the principal; if there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent the minor child;

(C) an unborn person, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable who is not otherwise represented is bound by an order to the extent the interest is adequately represented by another party having a substantially identical interest in the proceeding;

(D) with regard to interests given upon the happening of a certain event to persons who comprise a certain class, orders binding the living

persons who would constitute the class, if the event had happened immediately before the commencement of the proceeding, bind all members of the class;

(E) with regard to an interest given to a living person when the same interest or a share of the interest is to pass to the surviving spouse or to persons who are or might be the distributees, devisees, heirs, or issue of the living person upon the happening of a future event, orders binding the living person bind the surviving spouse, distributees, devisees, heirs, or issue of the living person;

(F) with regard to interests given to a person or a class of persons, or to both, upon the happening of a future event, if the same interest or a share of the interest is to pass to another person or class of persons, or to both, upon the happening of an additional future event, orders binding the living person or class of persons who would take the interest upon the happening of the first event bind the persons and classes of persons who might take on the happening of the additional future event;

(G) if a person is designated by a trust instrument to represent and bind a born or unborn beneficiary of the trust and receive a notice, information, accounting, or report for the beneficiary, then the beneficiary is bound by an order binding the designated person; in this subparagraph,

(i) the settlor may make the designation in the trust instrument, in a separate document, or by a trust protector authorized in the trust instrument to make the designation;

(ii) except as otherwise provided in this subparagraph, a person designated under (i) of this subparagraph may not represent and bind a beneficiary while the designated person is serving as trustee;

(iii) except as otherwise provided in this subparagraph, a person designated under (i) of this subparagraph may not represent and bind another beneficiary if the designated person also is a beneficiary, unless the designated person was named by the settlor, is the beneficiary's spouse, or is a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse; in this sub-

subparagraph, "spouse" means the individual to whom the beneficiary is married and with whom the beneficiary is living, and a physical separation primarily for education, business, health, and similar reasons does not prevent the individual from being considered to be living with the beneficiary;

(3) a person representing another person under (2)(A) - (F) of this section and a person designated under (2)(G)(i) of this section are not liable to the beneficiary whose interests are represented, or to a person claiming through that beneficiary, for an action or omission to act made in good faith;

(4) notice is required as follows:

(A) notice as prescribed by AS 13.06.110 shall be given to every interested person or to one person who can bind an interested person as described in (2)(A), (B), or (D) - (G) of this section; notice may be given both to a person and to another person who may bind the person;

(B) notice is given to unborn persons, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable, and persons who are not represented under (2)(A), (B), or (D) - (G) of this section, by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn persons, the minor, the incapacitated person, or the person whose identity or location is unknown or not reasonably ascertainable;

(5) at any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of an unborn person, a minor, an incapacitated person, or a person whose identity or address is unknown or not reasonably ascertainable, if the court determines that representation of the interest otherwise would be inadequate; if not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests; the court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

*** Sec. 5.** AS 13.06.120 is amended by adding a new subsection to read:

(b) In this section,

(1) "order" means a judicial order, nonjudicial order, the result of the

settlement of an account of a fiduciary under a procedure authorized by AS 13.06 - 13.36 or AS 13.38, and a settlement agreement resulting from a proceeding;

(2) "proceeding" means a judicial proceeding, nonjudicial proceeding, the settlement of an account of a fiduciary under a procedure authorized by AS 13.06 - 13.36 or AS 13.38, and a settlement negotiation, even if the settlement negotiation does not involve a judicial or nonjudicial third party who decides or facilitates a settlement.

* **Sec. 6.** AS 13.36.157 is repealed and reenacted to read:

Sec. 13.36.157. Exercise of power of appointment. (a) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of that principal to a trustee of an appointed trust for, and only for the benefit of, a current beneficiary of the invaded trust to the exclusion of other current beneficiaries. A permissible appointee of a power of appointment held by a beneficiary of the appointed trust is not considered a beneficiary of the appointed trust. The successor and remainder beneficiaries of the appointed trust may be one or more of the successor and remainder beneficiaries of the invaded trust to the exclusion of other successor and remainder beneficiaries.

(b) An authorized trustee exercising the power under (a) of this section may grant a discretionary power of appointment, including a presently exercisable power of appointment, in the appointed trust to one or more of the current beneficiaries of the invaded trust, to the extent that the beneficiary who is granted the power to appoint is authorized to receive the principal outright under the terms of the invaded trust. A permissible appointee is not limited to the beneficiaries of the invaded trust.

(c) Under (a) and (b) of this section, if the beneficiaries of the invaded trust are described by a class, the beneficiaries of the appointed trust may include present or future members of that class.

(d) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust if the current beneficiaries of the appointed trust are the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust are the same as the successor and remainder beneficiaries of the

invaded trust. The shares of the current beneficiaries of the appointed trust must be the same as the shares of the current beneficiaries of the invaded trust, and the shares of the successor and remainder beneficiaries of the appointed trust must be the same as the shares of the successor and remainder beneficiaries of the invaded trust.

(e) If the authorized trustee exercises the power under (d) of this section, the appointed trust must include the same standard authorizing the trustee to distribute the income or invade the principal of the appointed trust as the standard in the invaded trust. However, the standard authorizing the trustee to distribute the income or invade the principal of the appointed trust may be changed if the trustee appoints to an appointed trust that is a special needs trust, a pooled trust, or a third-party trust.

(f) If an authorized trustee exercises the power under (d) and (e) of this section to extend the duration of the appointed trust beyond the duration of the invaded trust for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust under (e) of this section, may also provide an additional trustee with unlimited discretion to invade the principal of the appointed trust during the extended duration. The trustee with unlimited discretion continues to be subject to the restrictions in (d) - (h) of this section.

(g) Under (d) - (f) of this section, if the beneficiaries of the invaded trust are described by a class, the beneficiaries of the appointed trust include present or future members of that class.

(h) If the authorized trustee exercises the power under (d) - (g) of this section and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust must grant this power of appointment in the appointed trust, and the class of permissible appointees shall be the same as in the invaded trust.

*** Sec. 7.** AS 13.36 is amended by adding new sections to read:

Sec. 13.36.158. Additional provisions relating to exercise of a power of appointment. (a) An exercise of the power to invade trust principal under AS 13.36.157 is the exercise of a special power of appointment.

(b) The appointed trust to which an authorized trustee appoints the assets of the invaded trust under AS 13.36.157 may have a duration that is longer than the

duration set out in the invaded trust.

(c) If an authorized trustee has unlimited discretion to invade the principal of a trust and if the same trustee or another trustee has a power, not dependent on unlimited discretion, to invade principal under the trust instrument, the authorized trustee having unlimited discretion may exercise the power of appointment under AS 13.36.157(a) - (c).

(d) An authorized trustee may exercise the power to appoint in favor of an appointed trust under AS 13.36.157 whether or not there is a current need to invade principal under the terms of the invaded trust.

(e) An authorized trustee exercising the power under AS 13.36.157 - 13.36.159 has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under AS 13.36.157 - 13.36.159 if there is substantial evidence of a contrary intent of the settlor and it cannot be established that the settlor would be likely to have changed this intention under the circumstances existing at the time the trustee exercises the power. The provisions of the invaded trust may not be viewed alone as substantial evidence of a contrary intent of the settlor unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(f) The provisions of AS 13.36.157 - 13.36.159 may not be construed to abridge the right of a trustee to appoint property further in trust under the terms of the governing instrument of a trust, another provision of law, or common law, or as directed by a court having jurisdiction over the trust.

(g) Nothing in AS 13.36.157 - 13.36.159 creates or implies a duty to exercise a power to invade principal. An inference of impropriety may not be made, and liability is not incurred, as a result of an authorized trustee not exercising the power conferred under AS 13.36.157.

(h) A power authorized by AS 13.36.157 may be exercised, subject to the provisions of AS 13.36.159(a), unless expressly prohibited by the terms of the governing instrument. A general prohibition against amending or revoking the invaded

trust and a provision that constitutes a spendthrift clause do not preclude the exercise of a power under AS 13.36.157.

(i) An authorized trustee may not exercise a power authorized by AS 13.36.157 to

(1) reduce, limit, or modify a beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust, or a right to withdraw a specified dollar amount, if the mandatory right has come into effect with respect to the beneficiary, but the mandatory right may be reduced, limited, or modified during any extended duration of the trust; however, notwithstanding the other provisions in this paragraph, but subject to the other limitations in AS 13.36.157 - 13.36.159, an authorized trustee may exercise a power authorized by AS 13.36.157 to appoint to an appointed trust that is a special needs trust, a pooled trust, or a third-party trust;

(2) decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence, and prudence unless the court having jurisdiction over the trust specifies otherwise;

(3) eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under AS 13.36.157 unless a court having jurisdiction over the trust specifies otherwise;

(4) fix as binding and conclusive the value of an asset for purposes of distribution, allocation, or otherwise; or

(5) jeopardize

(A) the deduction or exclusion originally claimed with respect to a contribution to the invaded trust that qualified for the annual exclusion under 26 U.S.C. 2503(b), the marital deduction under 26 U.S.C. 2056(a) or 26 U.S.C. 2523(a), or the charitable deduction under 26 U.S.C. 170(a), 26 U.S.C. 642(c), 26 U.S.C. 2055(a), or 26 U.S.C. 2522(a) (Internal Revenue Code);

(B) the qualification of a transfer as a direct skip under 26 U.S.C. 2642(c) (Internal Revenue Code);

(C) the election to treat a corporation as a subchapter S corporation under 26 U.S.C. 1362 (Internal Revenue Code); or

(D) another specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under 26 U.S.C. (Internal Revenue Code).

(j) Before exercising the power under AS 13.36.157, an authorized trustee shall consider the tax implications of the exercise of the power.

(k) An authorized trustee may not exercise a power described in AS 13.36.157 - 13.36.159 in violation of the limitations on validity in AS 34.27.051 or 34.27.100, or the restrictions on exercising certain powers in AS 13.36.153 by trustees who are not independent. A violation voids the entire exercise of the power unless the exercise is modified to correct the violation.

(*l*) Unless a court having jurisdiction over the trust directs otherwise, an authorized trustee may not exercise a power authorized by AS 13.36.157 to change the provisions regarding the determination of the compensation of a trustee. The commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as for the invaded trust.

(m) A trustee may not receive a payment, a commission, or other compensation for appointing property from the invaded trust to an appointed trust under AS 13.36.157. However, a trustee may be compensated at an hourly rate for the time spent considering and implementing the exercise of a power to appoint.

(n) Unless the invaded trust expressly provides otherwise, the provisions in AS 13.36.157 - 13.36.159 apply to

(1) a trust, whether testamentary or inter vivos, governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and

(2) a trust that has a trustee who is an individual domiciled in this state, or a trustee that is an entity having an office in this state, if a majority of the trustees select this state as the location for the primary administration of the trust and the selection is made by an instrument in writing that is signed and acknowledged by a majority of the trustees; the instrument exercising this selection shall be kept with the records of the invaded trust.

(o) A power to pay principal that includes words such as "best interests," "welfare," "comfort," or "happiness" is not considered a limitation or modification of the right to distribute principal.

(p) In this section, "internal revenue code" means the Internal Revenue Code of the United States (26 U.S.C.) as it exists on the effective date of this Act and as it is amended from time to time;

Sec. 13.36.159. Implementation of power of appointment. (a) Unless the authorized trustee provides otherwise, the appointment of

(1) all of the assets comprising the principal of the invaded trust to an appointed trust includes subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust;

(2) a part but not all of the assets comprising the principal of the invaded trust to an appointed trust may not include subsequently discovered assets belonging to the invaded trust or principal paid to or acquired by the invaded trust after the appointment to the appointed trust; those subsequently discovered assets remain the assets of the invaded trust.

(b) The exercise of the power to appoint to an appointed trust under AS 13.36.157 shall be evidenced by an instrument in writing that is signed, dated, and acknowledged by the authorized trustee. The exercise of the power is effective 30 days after the date of service of the instrument as specified in (d) of this section, unless the persons entitled to notice consent in writing to a sooner effective date.

(c) An authorized trustee may exercise the power authorized by AS 13.36.157 without the consent of the settlor or a person interested in the invaded trust and without court approval. However, an authorized trustee may seek court approval for the exercise. When seeking court approval, notice shall be sent to all qualified beneficiaries.

(d) A copy of the invaded trust, the appointed trust, and the instrument exercising the power shall be delivered to

(1) the settlor, if living, of the invaded trust;

(2) a person having the right, under the terms of the invaded trust, to

remove or replace the authorized trustee exercising the power under AS 13.36.157; and

(3) a qualified beneficiary or a person who may represent and bind the qualified beneficiary under AS 13.06.120.

(e) Notice under (d) of this section to a qualified beneficiary is not required if the settlor has exempted the authorized trustee from providing notification or information to beneficiaries under AS 13.36.080(b). Notice under (d) of this section shall be provided under AS 13.06.110.

(f) The instrument exercising the power must state whether the appointment is of all or part of the assets comprising the principal of the invaded trust and, if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.

(g) A person entitled to notice under (d) of this section may object to the trustee's exercise of the power under AS 13.36.157 - 13.36.159 by serving a written notice of objection on the trustee before the effective date of the exercise of the power. The failure to object does not constitute consent.

(h) The receipt of a copy of the instrument exercising the power does not, before the expiration of the limitation period in AS 13.36.100 with respect to a report disclosing the exercise, affect the right of a qualified beneficiary to object to the exercise of the power under AS 13.36.157 and to request the court to modify or to reverse the exercise.

(i) A copy of the instrument exercising the power shall be kept with the records of the invaded trust.

*** Sec. 8.** AS 13.36.215 is amended by adding a new subsection to read:

(b) In AS 13.36.157 - 13.36.159,

(1) "appointed trust" means an irrevocable trust that receives principal from an invaded trust under AS 13.36.157, including a new trust created by the settlor of the invaded trust or by the trustees, acting in that capacity, of the invaded trust;

(2) "authorized trustee" means, with regard to an invaded trust, a trustee with the authority to pay trust principal to or for a current beneficiary; in this paragraph, "trustee" does not include a settlor or a beneficiary to whom income or

principal must be paid, currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee other than by the exercise of a power of appointment held in a nonfiduciary capacity;

(3) "current beneficiary" means a person or, with regard to a class of persons, a person who is or will become a member of the class, to whom a trustee may distribute principal when exercising a power under AS 13.36.157;

(4) "invade" means pay directly to the beneficiary of a trust or apply to the benefit of a beneficiary;

(5) "invaded trust" means an irrevocable inter vivos or testamentary trust the principal of which is appointed under AS 13.36.157;

(6) "pooled trust" means a trust described in 42 U.S.C. 1396p(d)(4)(C) that meets the requirements for a pooled trust under the regulations of this state relating to the Medicaid treatment of trusts;

(7) "principal" means the assets of a trust, including accrued and accumulated income, but excluding income that is currently required to be distributed;

(8) "special needs trust" means a trust under 42 U.S.C. 1396p(d)(4)(A) that meets the requirements for a special needs trust under the regulations of this state relating to the Medicaid treatment of trusts;

(9) "third-party trust" means a trust that is

(A) established by a third party with the assets of the third party to provide for supplemental needs for a person eligible when the trust is created or at a future time for needs-based public assistance; and

(B) exempt from the provisions of the regulations of this state relating to the Medicaid treatment of trusts;

(10) "unlimited discretion" means the unlimited right to distribute principal that is not modified in any manner.

*** Sec. 9.** AS 13.38.200(b) is amended to read:

(b) In exercising a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the governing instrument or this chapter, including AS 13.38.210 and **13.38.300 - 13.38.490** [13.38.300 - 13.38.410], a fiduciary shall administer a trust or estate impartially based on what is fair and

reasonable to all of the beneficiaries, except to the extent that the governing instrument clearly manifests an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

*** Sec. 10.** AS 13.38.210(c) is amended to read:

(c) A trustee may not make an adjustment under this section if

(1) the adjustment would diminish the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which a federal estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment; the prohibition in this paragraph does not apply to a trust after the trustee determines that the marital deduction has not been claimed or has not been allowed;

(2) the adjustment would reduce the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a federal gift tax exclusion;

(3) the adjustment would change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) the adjustment is from any amount that is permanently set aside for charitable purposes under the governing instrument and for which a federal estate or gift tax charitable deduction has been taken, unless both income and principal are permanently set aside for charitable purposes under the governing instrument;

(5) possessing or exercising the power to make an adjustment would cause an individual to be treated as the owner of all or part of the trust for federal income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) possessing or exercising the power to make an adjustment would cause all or part of the trust assets to be subject to federal estate or gift tax with respect to an individual, and the assets would not be subject to federal estate or gift tax with respect to the individual if the trustee did not possess the power to make an adjustment;

(7) the trustee is a beneficiary of the trust; or

(8) the trust has been converted to a unitrust under **AS 13.38.300 - 13.38.435** [AS 13.38.300 - 13.38.410].

* **Sec. 11.** AS 13.38.300 is amended to read:

Sec. 13.38.300. Power to convert to unitrust. Unless expressly prohibited by the governing instrument, a trustee may release the power to adjust under AS 13.38.210 and may convert a trust into a unitrust as described in **AS 13.38.300 - 13.38.435** [AS 13.38.300 - 13.38.410] if

(1) the trustee determines that the conversion will enable the trustee to better carry out the intent of the settlor or testator and the purposes of the trust;

(2) the trustee gives written notice of the trustee's intention to release the power to adjust, of the trustee's intention to convert the trust into a unitrust, **of the unitrust percentage selected, of the smoothing period selected,** and of how the unitrust will operate, including what initial decisions the trustee **intends to** [WILL] make under **AS 13.38.340** [THIS SECTION], to all the sui juris beneficiaries who

(A) are currently eligible to receive income from the trust;

(B) would be eligible, if a power of appointment were not exercised, to receive income from the trust if the interest of all of the beneficiaries eligible to receive income under (A) of this paragraph were to terminate immediately before the giving of the notice; and

(C) would, if a power of appointment were not exercised, receive a distribution of principal if the trust were to terminate immediately before the giving of the notice;

(3) there are at least one sui juris beneficiary under (2)(A) of this section and at least one sui juris beneficiary under (2)(B) or (C) of this section; and

(4) a sui juris beneficiary does not object to the conversion to a unitrust in a writing delivered to the trustee within 60 days after the mailing of the notice under (2) of this section.

* **Sec. 12.** AS 13.38.310(a) is amended to read:

(a) A trustee may petition the court to approve the conversion to a unitrust if

(1) a beneficiary timely objects to the conversion to a unitrust; [OR]

(2) there is not a sui juris beneficiary who is eligible under

AS 13.38.300(2); or

(3) the trustee is a beneficiary [AS 13.38.300(2)(A), AND THERE IS NOT A SUI JURIS BENEFICIARY WHO IS ELIGIBLE UNDER AS 13.38.300(2)(B) OR (C)].

* **Sec. 13.** AS 13.38.330(b) is amended to read:

(b) After a trust has been converted to a unitrust, "income" in the governing instrument means an annual distribution equal to **the amount produced by the application of a fixed unitrust percentage established under (d) of this section to** [FOUR PERCENT OF] the net fair market value, as determined annually, of the trust's assets, whether the assets would be considered income or principal under other provisions of this chapter**, averaged over the lesser of**

(1) the preceding years in the smoothing period selected by the trustee; or

(2) the period during which the trust has been in existence.

* **Sec. 14.** AS 13.38.330 is amended by adding a new subsection to read:

(d) The unitrust percentage to be used in determining the unitrust amount must be a reasonable current return from the unitrust of at least three percent and not more than five percent, taking into account the intentions of the trustor of the unitrust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings for the unitrust, projected appreciation for the unitrust, and the effect of projected inflation on the unitrust.

* **Sec. 15.** AS 13.38.340 is amended to read:

Sec. 13.38.340. Trustee's discretionary powers regarding unitrust. The trustee may, in the trustee's discretion, from time to time, determine

(1) the effective date of a conversion to a unitrust;

(2) the provisions for prorating a unitrust distribution for a short year in which a beneficiary's right to payments commences or ceases;

(3) the frequency of unitrust distributions during the year;

(4) the effect of other payments from or contributions to the trust on the trust's valuation;

(5) whether to value the trust's assets annually or more frequently;

(6) **whether to use a smoothing period of three, four, or five years;**

(7) what valuation dates to use;

(8) [(7)] how frequently to value nonliquid assets and whether to estimate their value;

(9) [(8)] whether to omit trust property occupied or possessed by a beneficiary from the calculations; and

(10) [(9)] other matters necessary for the proper functioning of the unitrust.

*** Sec. 16.** AS 13.38.350(b) is amended to read:

(b) Unless otherwise provided by the governing instrument, a unitrust distribution shall be considered to have been paid from net income as net income would be determined if the trust were not a unitrust. To the extent net income is insufficient, the unitrust distribution shall be considered to have been paid from **ordinary income that is allocable under federal income tax rules to net income as determined for a unitrust. To the extent that the ordinary income is insufficient, the unitrust distribution is considered to have been paid from** net realized short-term capital gains. To the extent **net** income**, ordinary income,** and net realized short-term capital gains are insufficient, the unitrust distribution shall be considered to have been paid from net realized long-term capital gains. To the extent **net** income**, ordinary income,** and net realized short-term and long-term capital gains are insufficient, the unitrust distribution shall be paid from the principal of the trust.

*** Sec. 17.** AS 13.38.360 is amended to read:

Sec. 13.38.360. Court orders regarding unitrust. The trustee or, if the trustee declines to petition the court, a beneficiary may petition the court to

[(1) SELECT A PAYOUT PERCENTAGE DIFFERENT THAN FOUR PERCENT;

(2)] provide for a distribution of net income, as would be determined if the **unitrust** [TRUST] were not a unitrust, in excess of the unitrust distribution if the distribution is necessary to preserve a tax benefit [;

(3) AVERAGE THE VALUATION OF THE TRUST'S NET ASSETS OVER A PERIOD OTHER THAN THREE YEARS].

* **Sec. 18.** AS 13.38.390(b) is amended to read:

(b) If AS 13.38.380(a)(3), (4), or (6) applies to all the trustees, the trustees may petition the court to direct a conversion. **In the alternative, the trustees may appoint an independent person who shall be granted the authority, while acting in a fiduciary capacity, to make decisions in place of the trustees relating to a conversion, reconversion, and the exercise of discretionary powers under AS 13.38.340.**

* **Sec. 19.** AS 13.38.400 is amended to read:

Sec. 13.38.400. Reconversion from a unitrust. A trustee may reconvert a trust that has been converted into a unitrust under AS 13.38.300 by following the same procedures provided in **AS 13.38.300 - 13.38.435** [AS 13.38.300 - 13.38.410] for converting a trust into a unitrust. If a unitrust is reconverted under this section, the trustee's power to adjust under AS 13.38.210 applies to the trustee after the reconversion.

* **Sec. 20.** AS 13.38 is amended by adding new sections to article 2 to read:

Sec. 13.38.420. Additional unitrust provisions. (a) The unitrust amount may be determined by reference to the net fair market value of the unitrust's assets in one or more years.

(b) Distribution of a unitrust amount is considered a distribution of all of the income of a unitrust and is considered to be an income interest.

(c) Distribution of a unitrust amount is considered to be a reasonable apportionment of the total return of a unitrust.

(d) A unitrust that provides for a distribution based on a unitrust percentage in excess of five percent of the net fair market value of the unitrust assets a year is considered to have paid out all of the income of the unitrust and to have paid out principal of the unitrust to the extent that the distribution exceeds five percent a year.

(e) The governing instrument of a unitrust may grant discretion to the trustee to adopt a consistent practice of treating capital gains as part of the unitrust amount to the extent that the unitrust amount exceeds the income determined as if the trust were not a unitrust, or the governing instrument may specify the ordering of classes of income.

(f) Unless the terms of the unitrust specifically provide otherwise, a unitrust amount is considered to have been made from the following sources, which are listed in order of priority:

(1) net income determined as if the trust were not a unitrust;

(2) ordinary income not allocable to net income;

(3) net realized short-term capital gains;

(4) net realized long-term capital gains; and

(5) the principal of the trust estate.

(g) The unitrust governing instrument may provide that the trustee may exclude assets used by the unitrust beneficiary, such as a residence property or tangible personal property, from the net fair market value of the unitrust assets for the purposes of computing the unitrust amount. These assets may be considered equivalent to income or to the unitrust amount.

Sec. 13.38.430. Power to treat gains as part of distribution of principal. Unless prohibited by the unitrust's governing instrument or specifically addressed by AS 13.38.350 or 13.38.420, the trustee of a unitrust may treat gains from the sale of capital assets of the unitrust to be part of a distribution of principal to a beneficiary, and, if the trustee treats these gains as part of a distribution of principal to a beneficiary, the trustee shall treat these gains consistently on the unitrust's books, records, and tax returns as part of a distribution to a beneficiary.

Sec. 13.38.435. Definitions. In AS 13.38.300 - 13.38.435,

(1) "smoothing period" means the period of years over which the fair market value of the assets of a unitrust are averaged;

(2) "unitrust amount" means the amount that is distributed from a unitrust to a beneficiary;

(3) "unitrust percentage" means the unitrust percentage established under AS 13.38.330(d).

* **Sec. 21.** AS 13.38.690(a) is repealed and reenacted to read:

(a) A trustee shall allocate

(1) to income that portion of a payment that equals the greater of the following:

(A) the portion that the payor characterizes as interest, a dividend, a remittance in place of interest, or a remittance in place of a dividend; or

(B) the portion that is characterized as imputed interest for federal income purposes;

(2) to principal that portion of a payment that remains after the allocation is made under (1) of this subsection.

*** Sec. 22.** AS 13.38.690(b) is amended to read:

(b) If **no** [A] part of a payment under a contract calling for equal installments over a fixed period of time is [NOT] allocable to income under the provisions of (a) of this section, the difference between the trust's acquisition value of the contract and the total expected return **is** [SHALL BE] considered to be interest. The trustee shall allocate to income the portion of each payment equivalent to interest on the then unpaid principal balance at the rate specified in the contract or at a rate necessary to amortize the difference between the expected return and the acquisition value, where that rate is readily ascertainable by the trustee.

*** Sec. 23.** AS 13.38.690(c) is amended to read:

(c) If **no** [THERE IS NOT A] portion of a payment from a separate fund held exclusively for the benefit of the trust [THAT] is allocable to income under (a) or (b) of this section, but the internal net income of the fund determined as if the fund were a separate trust subject to **AS 13.38.200 - 13.38.410, 13.38.500 - 13.38.690, or 13.38.710 - 13.38.860** [AS 13.38.500 - 13.38.860] is readily ascertainable by the trustee, the **internal net income of the fund is considered to be the income earned by the fund, and the** portion of the payment equal to the then undistributed net income of the fund realized since the trust acquired its interest in the fund is considered to be a distribution of **that internal net** income **of the fund** and shall be allocated to the trust income account. The balance of the payment described in this subsection shall be allocated to principal. **The power to adjust under AS 13.38.210, the power to convert to a unitrust under AS 13.38.300, and the provisions of AS 13.38.420 apply to retirement benefits covered by this subsection that are payable to a trust. These powers and provisions may be exercised by the payee**

trustee or in the governing instrument for the retirement benefits separately and independently from the exercise by the payee trustee or in the governing instrument of these powers and provisions for the trust, as if the retirement benefits and the trust were separate trusts subject to this chapter.

*** Sec. 24.** AS 13.38.690(d) is amended to read:

(d) A trustee shall allocate 10 percent of the part of the payment that is required to be made during the accounting period to income and the balance to principal if there is **no** [NOT A] part of the payment that is allocable to income under (a) - (c) of this section and all or part of the payment is required to be made. The trustee shall allocate the entire payment to principal if **no** [A] part of a payment is [NOT] required to be made or the payment received is the entire amount to which the trustee is entitled. In this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

*** Sec. 25.** AS 13.38.690(e) is amended to read:

(e) If, to obtain a federal estate or gift tax marital deduction for a trust, the trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate **to income** the additional amount necessary to obtain the marital deduction [TO INCOME].

*** Sec. 26.** AS 13.46.190 is amended to read:

Sec. 13.46.190. Termination of custodianship. The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of the

(1) minor's attainment of 21 years of age with respect to property transferred under AS 13.46.030 or 13.46.040 unless the time of transfer of the custodial property to the minor is changed under AS 13.46.195 **or 13.46.197**;

(2) minor's attainment of 18 years of age with respect to property transferred under AS 13.46.050 or 13.46.060**, unless the time of transfer of the custodial property to the minor is changed under AS 13.46.197**;

(3) time specified in the transfer under AS 13.46.080 if the time of transfer of the custodial property to the minor is changed under AS 13.46.195 **or 13.46.197**; or

(4) minor's death.

* **Sec. 27.** AS 13.46 is amended by adding a new section to read:

Sec. 13.46.197. Extension of custodial term by custodian. (a) A custodian may extend the custodial term under this section to an age older than the age that is specified by this chapter or a transferring document made under AS 13.46.080, subject to the right of the minor to compel immediate distribution under (c) of this section.

(b) To extend the custodial term under (a) of this section, the custodian shall give the minor written notice of the custodian's intent to extend the custodial term. The notice must specify the duration of the extension by indicating the new custodial term and must inform the minor of the minor's right to compel immediate distribution under (c) of this section. The custodian shall give the notice during the later of the following periods:

(1) the six-month period that precedes the last day of the custodial term; or

(2) the six-month period that begins on the minor's 18th birthday.

(c) Rather than permit the extension of the custodial term, the minor may compel immediate distribution of all or part of the custodial property by giving written notice to the custodian

(1) during the six-month period that begins on the day that is the last day of the current custodial term; or

(2) within 90 days after receiving the custodian's notice under (b) of this section.

(d) If a minor does not exercise the minor's right to compel distribution under (c) of this section, the custodial term shall be extended as indicated in the custodian's notice given under (b) of this section, and the minor may not compel the immediate distribution of custodial property before the end of the custodial term, as extended.

(e) A custodian may extend the custodial term more than once under this section.

(f) In this section, "custodial term" means the period of time provided in or allowed by this chapter during which the custodian is directed to hold custodial property until the property is transferred to the minor.

* **Sec. 28.** AS 13.46.990(11) is amended to read:

(11) "minor" means an individual who has not attained the age of 18 years, except that when used in reference to the beneficiary for whose benefit custodial property is held or to be held, "minor" means an individual who has not attained the age at which the custodian is required under AS 13.46.190, [AND] 13.46.195**, and 13.46.197** to transfer the custodial property to the beneficiary;

* **Sec. 29.** AS 13 is amended by adding a new chapter to read:

Chapter 75. Disposition of Human Remains.

Sec. 13.75.010. Directions by decedent. (a) A person may provide directions for the disposition of the person's remains by placing the directions in a disposition document. The directions may include or be limited to designating an agent to control the disposition of the person's remains.

(b) A disposition document must be signed by the person and acknowledged before a notary public, and contain the form and contents required by AS 13.75.030. A disposition document may be a separate document or it may be contained in another document, including a will or prepaid funeral or burial contract. The disposition document may be modified or revoked only by a subsequent disposition document that complies with this subsection.

Sec. 13.75.020. Persons authorized to control disposition. (a) The following persons, in the priority listed, may control disposition of a decedent's remains:

(1) a person designated in a disposition document as the disposition agent for the decedent;

(2) a person serving, or nominated by the decedent in the decedent's will to serve, as the personal representative of the decedent's estate, if the person is acting according to the decedent's written instructions contained in the decedent's will;

(3) the individual who was the spouse of the decedent at the time of the decedent's death;

(4) the sole surviving competent adult child of the decedent, or, if there is more than one surviving competent adult child of the decedent, the majority of the surviving competent adult children; fewer than one-half of the surviving competent adult children may exercise the rights and duties of this section if these surviving adult

children use reasonable efforts to notify all other surviving competent adult children that they are exercising these rights and duties and are not aware of any opposition by one-half or more of all of the surviving competent adult children;

(5) the surviving competent parents of the decedent; if one of the surviving competent parents is absent, the remaining competent parent may exercise the rights and duties of this section after reasonable efforts have been unsuccessful in locating the absent surviving competent parent; in this paragraph, "absent" means a person who is unable to communicate decisions or participate in making decisions regarding the disposition of a decedent's remains personally, telephonically, or through electronic communication;

(6) the surviving competent adult person in the next degrees of kindred, the two surviving competent adult persons of the same degree of kindred if there are two, or, if there are more than two surviving competent adult persons of the same degree of kindred, the majority of those persons; fewer than the majority of surviving competent adult persons of the same degree of kindred may exercise the rights and duties of this section if those persons use reasonable efforts to notify all other surviving competent adult persons of the same degree of kindred that they are exercising these rights and duties and are not aware of any opposition by one-half or more of all surviving competent adult persons of the same degree of kindred;

(7) in the case of an indigent or another individual whose final disposition is the responsibility of the state or a municipality, a public administrator, medical examiner, coroner, or another public official charged with arranging the final disposition of the decedent; or

(8) another person who is willing to assume legal and financial responsibility.

(b) If a person takes control of the disposition under (a) of this section, the person is liable for the reasonable costs of the disposition.

(c) In this section,

(1) "adult" means a person who is 18 years of age or older;

(2) "competent" means a person who does not suffer from disabilities that prevent the person from managing the person's property or affairs.

Sec. 13.75.030. Form of disposition document. A disposition document must be in substantially the following form:

DISPOSITION DOCUMENT

You can select Part 1, Part 2, or both, by completing the part(s) you select, including providing any signatures indicated. Part 3 contains general statements and a place for your signature. You must sign in front of a notary.

PART 1. APPOINTMENT OF AGENT TO CONTROL DISPOSITION OF REMAINS. If you appoint an agent, you and your agent must complete this part as indicated, and the agent must sign this part.

I, _____, being of sound mind, wilfully and voluntarily make known my desire that, on my death, the disposition of my remains shall be controlled by _____ (name of agent first named below), and, with respect to that subject only, I appoint that person as my agent. All decisions made by my agent with respect to the disposition of my remains, including cremation, are binding.

ACCEPTANCE BY AGENT OF APPOINTMENT.

THE AGENT, AND EACH SUCCESSOR AGENT, BY ACCEPTING THIS APPOINTMENT, AGREES TO AND ASSUMES THE OBLIGATIONS PROVIDED IN THIS DOCUMENT. AN AGENT MAY SIGN AT ANY TIME, BUT AN AGENT'S AUTHORITY TO ACT IS NOT EFFECTIVE UNTIL THE AGENT SIGNS BELOW TO INDICATE THE ACCEPTANCE OF APPOINTMENT. ANY NUMBER OF AGENTS MAY SIGN, BUT ONLY THE SIGNATURE OF THE AGENT ACTING AT ANY TIME IS REQUIRED.

AGENT:

Name: _____

Address: _____

Telephone Number: _____

Signature Indicating Acceptance of Appointment:

_____

Date of Signature: _____

SUCCESSORS:

If my agent dies, becomes legally disabled, resigns, or refuses to act, I appoint the following persons (each to act alone and successively, in the order named) to serve as my agent to control the disposition of my remains as authorized by this document:

(1) First Successor

Name: _____

Address: _____

Telephone Number: _____

Signature of First Successor Indicating Acceptance of Appointment:

_____

Date of Signature: _____

(2) Second Successor

Name: _____

Address: _____

Telephone Number: _____

Signature of Second Successor Indicating Acceptance of Appointment:

_____

Date of Signature: _____

PART 2. DIRECTIONS FOR THE DISPOSITION OF MY REMAINS.

Stated below are my directions for the disposition of my remains:

_____

_____

_____

_____

If the disposition of my remains is by cremation, then (pick one):

( ) I do not wish to allow any of my survivors the option of

canceling my cremation and selecting alternative arrangements, regardless of whether my survivors consider a change to be appropriate.

( ) I wish to allow only the survivors I have designated below to have the option of canceling my cremation and selecting alternative arrangements, if they consider that a change to be appropriate:

_____

_____

_____

_____

PART 3. GENERAL PROVISIONS AND SIGNATURE.

WHEN DIRECTIONS BECOME EFFECTIVE. The directions, including any appointment of an agent, in this disposition document become effective on my death.

REVOCATION OF PRIOR APPOINTMENTS. I revoke any prior appointment of any person to control the disposition of my remains.

SIGNATURE OF PERSON MAKING DISPOSITION DOCUMENT

Signature: _____

Date of signature: _____

(Notary acknowledgment of signature)

Sec. 13.75.040. Agent's appointment. The person appointed as an agent in a disposition document may sign the disposition document at any time, but the agent's authority to act is not effective until the agent signs the instrument.

Sec. 13.75.050. Exercise of authority. If a person fails to exercise the person's authority to control disposition under AS 13.75.020 within 48 hours after receiving notification of the decedent's death or within 48 hours after the decedent's death, whichever is earlier, the person may not control the disposition of the decedent's remains, and the right to control the disposition of the decedent's remains passes to the person who is next listed in priority under AS 13.75.020. If the person to whom the right to control the disposition passes under this section fails to exercise the person's authority to control the disposition within 48 hours after being notified that the

authority to control the disposition has passed to the person, the authority to control the disposition passes to the person who is next listed in priority under AS 13.75.020.

Sec. 13.75.060. Certain persons prohibited from control. If a person is charged with a felonious killing in connection with a decedent's death and if the funeral director or the cemetery knows about the charge, then the person may not control disposition, and the right to control disposition passes to the person who is next listed in priority under AS 13.75.020.

Sec. 13.75.070. Prohibition of cremation; written instructions. A person may not authorize cremation for a decedent's remains if a decedent has left directions in a disposition document that the decedent does not wish to be cremated.

Sec. 13.75.080. Implementation of directions. (a) The person authorized to control the disposition shall carry out the directions of the decedent to the extent that the decedent's estate or the person is financially able to carry out the directions.

(b) Notwithstanding any other provision in AS 13.06 - 13.36 (Uniform Probate Code), if a person provides directions in a disposition document that is contained in a will, the directions shall be carried out immediately without the necessity of probate. If the will is not probated or is declared invalid for testamentary purposes, the directions are valid to the extent to which they have been acted on in good faith.

Sec. 13.75.090. Misrepresentation; liability. If a person represents that the person knows the identity of a decedent, and, with the intent to procure the disposition of the decedent's remains, signs a statement, other than a death certificate, that identifies the decedent, the person guarantees the identity of the decedent and is liable for any damages that result, directly or indirectly, from that guarantee.

Sec. 13.75.100. Liability. (a) A disposition organization is not liable for carrying out the directions of a decedent if the disposition organization carries out the directions of a decedent or a person who establishes that the person is entitled to control the disposition.

(b) This section may not be construed to reduce or eliminate the liability of a disposition organization for its negligence or reckless acts.

Sec. 13.75.110. Disputes. (a) A person listed in AS 13.75.020 who is involved in a dispute with one or more persons listed in AS 13.75.020 about which of the

persons has the authority to control disposition may bring an action in the superior court to resolve the dispute.

(b) If there is a dispute with one or more persons listed in AS 13.75.020 about which person has the authority to control disposition, a cemetery organization or funeral establishment is not liable for refusing to accept, to inter, or otherwise to dispose of the decedent's remains until the cemetery organization or funeral establishment receives a court order or another suitable confirmation that the dispute has been resolved.

Sec. 13.75.120. Exemptions. The disposition of the remains of a member of the organized militia under AS 26.05.262, the disposition of the remains of a member of the armed forces under AS 26.10.065(a), and the disposition of the remains of a member of the United States Coast Guard under AS 26.10.065(b) are exempt from this chapter.

Sec. 13.75.190. Definitions. In this chapter,

(1) "control" means the authority to control disposition;

(2) "directions" means

(A) instructions for the disposition of a person's remains;

(B) the appointment of an agent to handle the disposition of a person's remains; or

(C) both (A) and (B) of this paragraph;

(3) "disposition" means disposition of a decedent's remains, including cremation, but does not include an anatomical gift; in this paragraph, "anatomical gift" has the meaning given in AS 13.52.390;

(4) "disposition document" means a disposition document authorized by AS 13.75.010

(A) in which a person provides directions regarding the disposition of the person's remains; and

(B) that complies with AS 13.75.030;

(5) "disposition organization" means

(A) a cemetery association formed under AS 10.30.010;

(B) a nonprofit cemetery corporation authorized by

AS 10.30.055;

(C) a person operating a crematory;

(D) a person operating a columbarium;

(E) a funeral home or other type of funeral establishment;

(F) a funeral director or an embalmer.

Sec. 13.75.195. Short title. This chapter may be cited as the Disposition of Human Remains Act.

*** Sec. 30.** AS 21.42.020 is amended by adding new subsections to read:

(e) Notwithstanding (a) of this section, a trustee, acting in a fiduciary capacity, may procure or cause to be procured an insurance contract that is on the life or body of an individual and under which the proceeds of the insurance contract are payable to the trustee, acting in a fiduciary capacity, if

(1) the trustee, acting in a fiduciary capacity, owns the insurance contract or the trust itself owns the insurance contract;

(2) on the date the contract is made, a settlor of the trust is the individual insured, has an insurable interest in the individual insured, or would have had an insurable interest in the individual insured if the settlor were living at the time the contract was made; in this paragraph, "settlor" means a person, including a person for whom a fiduciary or agent is acting, who executes the trust instrument; and

(3) the proceeds of the contract are primarily for the benefit of a trust beneficiary who has an insurable interest in the individual insured, except that, if the determination of the trust beneficiary's insurable interest is based on (d)(1) of this section, the trust beneficiary's relation by blood or law must be within the third degree.

(f) A person who has an insurable interest in the life or body of an individual may form a business firm that is substantially or solely for the purpose of purchasing, holding, or administering an insurance contract on the life or body of the individual. In this subsection, "firm" has the meaning given in AS 21.97.900, but also includes a business trust and a joint venture.

*** Sec. 31.** AS 34.40 is amended by adding a new section to read:

Sec. 34.40.113. Transfers of individual retirement accounts. (a) Notwithstanding a provision in AS 09.38.017(d), AS 34.40.110, or another law to the

contrary, a person may voluntarily transfer or assign the person's interest in an individual retirement account if the person

(1) is the owner of or a participant in the individual retirement account; or

(2) acquired the interest as a result of the death of another individual.

(b) In this section, "individual retirement account" means an individual retirement account established under 26 U.S.C. 408 or a Roth IRA established under 26 U.S.C. 408A.

* **Sec. 32.** AS 34.77.030(g) is amended to read:

(g) Whether or not the community property agreement provides that all property acquired by either or both spouses during the marriage is community property, and except to the extent otherwise expressly provided **by the spouses** in the community property agreement **or by the settlors in a community property trust**, property acquired by a spouse during marriage and after the determination date is individual property if acquired

(1) by gift or a disposition at death made by a third person to the spouse and not to both spouses;

(2) in exchange for or with the proceeds of other individual property of the spouse;

(3) from appreciation or income of the spouse's individual property except to the extent that the income or appreciation is classified as community property under AS 34.77.130;

(4) by a decree, community property agreement, written consent, or reclassification under AS 34.77.060(b) designating it as the individual property of the spouse;

(5) as a recovery for damage to property under AS 34.77.140, except as specifically provided otherwise in a decree, community property agreement, **community property trust,** or written consent; [OR]

(6) as a recovery for personal injury, except for the amount of the recovery attributable to expenses paid or otherwise satisfied from community property**; or**

(7) as a transfer to a community property trust and declared by the trust to be the individual property of the spouse.

*** Sec. 33.** AS 34.77.050(b) is amended to read:

(b) A gift of community property to a third person that is not allowed under (a) of this section is subject to **AS 34.77.140(e) - (h)** [(d) OF THIS SECTION] unless both spouses act together in making the gift or the other spouse ratifies the gift.

*** Sec. 34.** AS 34.77.110 is amended by adding new subsections to read:

(f) Property that spouses agree in a community property agreement is community property or property that is transferred to a community property trust and expressly declared by the trust to be community property is owned as community property regardless of the form of title to the property, even if the title indicates that the property is owned unequally by the spouses or is only in the name of one spouse.

(g) If the title to community property is in a form that provides for ownership by survivorship between the spouses, then ownership by survivorship is presumed to have been made with the consent of both spouses.

(h) If a spouse with management and control of community property designates a beneficiary for the property on the death of one or both of the spouses, and if the community property is held in a form of title that permits a beneficiary designation, the beneficiary designation is effective only for the designating spouse's one-half interest in the community property unless the other spouse consents in writing to the designation. A designation of the following as the beneficiary is presumed to have been made with the consent of the other spouse:

(1) the other spouse or an ancestor or descendant of either spouse;

(2) a charity; or

(3) a trust, to the extent that the beneficiaries consist of persons or entities identified in (1) or (2) of this subsection.

(i) The testimony of one spouse is sufficient to rebut a presumption established under this section.

(j) A disposition of community property contrary to (e) - (h) of this section is voidable. An action in court to void the disposition must be commenced within the time specified by AS 34.77.140(e).

* **Sec. 35.** AS 34.77.140(d) is amended to read:

(d) Except as provided otherwise in **(e) - (h) of this section** [AS 34.77.050(d)], a spouse must begin an action against the other spouse under (a) of this section within three years after acquiring actual knowledge of the facts giving rise to the claim.

* **Sec. 36.** AS 34.77.140 is amended by adding new subsections to read:

(e) Except as provided by (f) - (h) of this section, if a gift of community property during marriage by a spouse does not comply with AS 34.77.050(a), the nondonor spouse may bring an action to recover the property or the amount of money by which the gift exceeded the limit under AS 34.77.050(a). The nondonor spouse may bring the action against the donor spouse, the gift recipient, or both. The nondonor spouse must commence the action within the earliest of the following times:

(1) one year after the nondonor spouse receives notice of the gift;

(2) one year after dissolution of the marriage; or

(3) on or before the deadline for filing a claim under AS 13.16.460 after the death of the donor spouse.

(f) If a recovery under (e) of this section occurs during the marriage of the donor spouse and the nondonor spouse, the property or money that is recovered is considered community property. If the recovery occurs after the dissolution of the marriage of the donor and nondonor spouses or after the death of either the donor or the nondonor spouse, the recovery is limited to 50 percent of the property or money that would have been recovered if the recovery had occurred during the marriage.

(g) If a transfer of community property to a third person during marriage by a spouse acting without the other spouse becomes a completed gift on the death of the donor spouse, or if an arrangement involving community property during marriage by a spouse acting without the other spouse is intended to be and becomes a gift to a third person on the death of the donor spouse, the surviving spouse may bring an action in court against the gift recipient to recover one-half of the gift. To bring an action under this subsection, the surviving spouse must commence the action on or before the deadline for filing a claim under AS 13.16.460.

(h) If a spouse who would have been entitled to bring an action under (e) - (g)

of this section predeceases the donor spouse, the deceased spouse's successor in interest may bring an action for recovery under (e) - (g) of this section, but the action must be commenced within one year after the deceased spouse's death. Recovery in an action under this subsection is the same as if the donor spouse had predeceased the spouse entitled to the recovery, but the amount of the recovery is calculated as of the date of the death of the spouse entitled to the recovery.

* **Sec. 37.** AS 13.38.330(c); AS 34.77.050(d), and 34.77.110(d) are repealed.

* **Sec. 38.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGE. AS 34.77.110(i), enacted by sec. 34 of this Act, has the effect of amending Rule 301(a), Alaska Rules of Evidence, by specifying the evidence that is sufficient to rebut a presumption under AS 34.77.110(i), enacted by sec. 34 of this Act.

* **Sec. 39.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 09.38.017(a), as amended by sec. 1 of this Act, AS 09.38.017(d), as amended by sec. 2 of this Act, and AS 09.38.017(e), as amended by sec. 3 of this Act, apply to a retirement plan that exists before, on, or after the effective date of this Act. In this section, "retirement plan" has the meaning given in AS 09.38.017(e), as amended by sec. 3 of this Act.

(b) AS 13.36.157, repealed and reenacted by sec. 6 of this Act, AS 13.36.158 and 13.36.159, enacted by sec. 7 of this Act, and AS 13.36.215(b), enacted by sec. 8 of this Act, apply to a trust that exists before, on, or after the effective date of this Act.

(c) AS 34.40.113, added by sec. 31 of this Act, applies to an individual retirement account that exists before, on, or after the effective date of this Act. In this section, "individual retirement account" means an individual retirement account established under 26 U.S.C. 408 or a Roth IRA established under 26 U.S.C. 408A.

* **Sec. 40.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. AS 34.77.110(i), enacted by sec. 34 of this Act, takes effect only if sec. 38 of this Act receives the two-thirds majority vote of each house required

by art. IV, sec. 15, Constitution of the State of Alaska.

AMENDMENT

OFFERED IN THE SENATE BY SENATOR FRENCH

TO: CSSB 165( ), Draft Version "D"

Page 23, lines 10 - 11:

Delete "has the meaning given in AS 13.36.390"

Insert "means a person, including a person for whom a fiduciary or agent is acting, who executes the trust instrument"

AMENDMENT

OFFERED IN THE SENATE BY SENATOR FRENCH

TO: CSSB 165( ), Draft Version "D"

Page 14, line 29, through page 15, line 29:

Delete all material.

Insert new bill sections to read:

"* **Sec. 23.** AS 13.46.190 is amended to read:

Sec. 13.46.190. Termination of custodianship. The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of the

(1) minor's attainment of 21 years of age with respect to property transferred under AS 13.46.030 or 13.46.040 unless the time of transfer of the custodial property to the minor is changed under AS 13.46.195 **or 13.46.197**;

(2) minor's attainment of 18 years of age with respect to property transferred under AS 13.46.050 or 13.46.060**, unless the time of transfer of the custodial property to the minor is changed under AS 13.46.197**;

(3) time specified in the transfer under AS 13.46.080 if the time of transfer of the custodial property to the minor is changed under AS 13.46.195 **or 13.46.197**; or

(4) minor's death.

* **Sec. 24.** AS 13.46 is amended by adding a new section to read:

Sec. 13.46.197. Extension of custodial term by custodian. (a) A custodian may extend the custodial term under this section to an age older than the age that is specified by this chapter or a transferring document made under AS 13.46.080, subject to the right of the minor to compel immediate distribution under (c) of this section.

(b) To extend the custodial term under (a) of this section, the custodian shall

give the minor written notice of the custodian's intent to extend the custodial term. The notice must specify the duration of the extension by indicating the new custodial term and must inform the minor of the minor's right to compel immediate distribution under (c) of this section. The custodian shall give the notice during the later of the following periods:

(1) the six-month period that precedes the last day of the custodial term; or

(2) the six-month period that begins on the minor's 18th birthday.

(c) Rather than permit the extension of the custodial term, the minor may compel immediate distribution of all or part of the custodial property by giving written notice to the custodian

(1) during the six-month period that begins on the day that is the last day of the current custodial term; or

(2) within 90 days after receiving the custodian's notice under (b) of this section.

(d) If a minor does not exercise the minor's right to compel distribution under (c) of this section, the custodial term shall be extended as indicated in the custodian's notice given under (b) of this section, and the minor may not compel the immediate distribution of custodial property before the end of the custodial term, as extended.

(e) A custodian may extend the custodial term more than once under this section.

(f) In this section, "custodial term" means the period of time provided in or allowed by this chapter during which the custodian is directed to hold custodial property until the property is transferred to the minor.

*** Sec. 25.** AS 13.46.990(11) is amended to read:

(11) "minor" means an individual who has not attained the age of 18 years, except that when used in reference to the beneficiary for whose benefit custodial property is held or to be held, "minor" means an individual who has not attained the age at which the custodian is required under AS 13.46.190**,** [AND] 13.46.195**, and 13.46.197** to transfer the custodial property to the beneficiary;"

Page 26, line 30:

Delete "AS 13.46.495(g);"

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2/10/12

AMENDMENT

OFFERED IN THE SENATE BY SENATOR FRENCH

TO: CSSB 165( ), Draft Version "D"

Page 1, line 3, following "**Code;**":

Insert "**relating to the appointment of trust property;**"

Page 7, following line 5:

Insert new bill sections to read:

"* **Sec. 6.** AS 13.36.157 is repealed and reenacted to read:

Sec. 13.36.157. Exercise of power of appointment. (a) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of that principal to a trustee of an appointed trust for, and only for the benefit of, a current beneficiary of the invaded trust to the exclusion of other current beneficiaries. A permissible appointee of a power of appointment held by a beneficiary of the appointed trust is not considered a beneficiary of the appointed trust. The successor and remainder beneficiaries of the appointed trust may be one or more of the successor and remainder beneficiaries of the invaded trust to the exclusion of other successor and remainder beneficiaries.

(b) An authorized trustee exercising the power under (a) of this section may grant a discretionary power of appointment, including a presently exercisable power of appointment, in the appointed trust to one or more of the current beneficiaries of the invaded trust, to the extent that the beneficiary who is granted the power to appoint is authorized to receive the principal outright under the terms of the invaded trust. A permissible appointee is not limited to the beneficiaries of the invaded trust.

(c) Under (a) and (b) of this section, if the beneficiaries of the invaded trust are described by a class, the beneficiaries of the appointed trust may include present or

future members of that class.

(d) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust if the current beneficiaries of the appointed trust are the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust are the same as the successor and remainder beneficiaries of the invaded trust. The shares of the current beneficiaries of the appointed trust must be the same as the shares of the current beneficiaries of the invaded trust, and the shares of the successor and remainder beneficiaries of the appointed trust must be the same as the shares of the successor and remainder beneficiaries of the invaded trust.

(e) If the authorized trustee exercises the power under (d) of this section, the appointed trust must include the same standard authorizing the trustee to distribute the income or invade the principal of the appointed trust as the standard in the invaded trust. However, the standard authorizing the trustee to distribute the income or invade the principal of the appointed trust may be changed if the trustee appoints to an appointed trust that is a special needs trust, a pooled trust, or a third-party trust.

(f) If an authorized trustee exercises the power under (d) and (e) of this section to extend the duration of the appointed trust beyond the duration of the invaded trust for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust under (e) of this section, may also provide an additional trustee with unlimited discretion to invade the principal of the appointed trust during the extended duration. The trustee with unlimited discretion continues to be subject to the restrictions in (d) - (h) of this section.

(g) Under (d) - (f) of this section, if the beneficiaries of the invaded trust are described by a class, the beneficiaries of the appointed trust include present or future members of that class.

(h) If the authorized trustee exercises the power under (d) - (g) of this section and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust must grant this power of appointment in the appointed trust, and the class of permissible appointees shall be the same as in the invaded trust.

* **Sec. 7.** AS 13.36 is amended by adding new sections to read:

Sec. 13.36.158. Additional provisions relating to exercise of a power of appointment. (a) An exercise of the power to invade trust principal under AS 13.36.157 is the exercise of a special power of appointment.

(b) The appointed trust to which an authorized trustee appoints the assets of the invaded trust under AS 13.36.157 may have a duration that is longer than the duration set out in the invaded trust.

(c) If an authorized trustee has unlimited discretion to invade the principal of a trust and if the same trustee or another trustee has a power, not dependent on unlimited discretion, to invade principal under the trust instrument, the authorized trustee having unlimited discretion may exercise the power of appointment under AS 13.36.157(a) - (c).

(d) An authorized trustee may exercise the power to appoint in favor of an appointed trust under AS 13.36.157 whether or not there is a current need to invade principal under the terms of the invaded trust.

(e) An authorized trustee exercising the power under AS 13.36.157 - 13.36.159 has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under AS 13.36.157 - 13.36.159 if there is substantial evidence of a contrary intent of the settlor and it cannot be established that the settlor would be likely to have changed this intention under the circumstances existing at the time the trustee exercises the power. The provisions of the invaded trust may not be viewed alone as substantial evidence of a contrary intent of the settlor unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(f) The provisions of AS 13.36.157 - 13.36.159 may not be construed to abridge the right of a trustee to appoint property further in trust under the terms of the governing instrument of a trust, another provision of law, or common law, or as directed by a court having jurisdiction over the trust.

(g) Nothing in AS 13.36.157 - 13.36.159 creates or implies a duty to exercise

a power to invade principal. An inference of impropriety may not be made, and liability is not incurred, as a result of an authorized trustee not exercising the power conferred under AS 13.36.157.

(h) A power authorized by AS 13.36.157 may be exercised, subject to the provisions of AS 13.36.159(a), unless expressly prohibited by the terms of the governing instrument. A general prohibition against amending or revoking the invaded trust and a provision that constitutes a spendthrift clause do not preclude the exercise of a power under AS 13.36.157.

(i) An authorized trustee may not exercise a power authorized by AS 13.36.157 to

(1) reduce, limit, or modify a beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust, or a right to withdraw a specified dollar amount, if the mandatory right has come into effect with respect to the beneficiary, but the mandatory right may be reduced, limited, or modified during any extended duration of the trust; however, notwithstanding the other provisions in this paragraph, but subject to the other limitations in AS 13.36.157 - 13.36.159, an authorized trustee may exercise a power authorized by AS 13.36.157 to appoint to an appointed trust that is a special needs trust, a pooled trust, or a third-party trust;

(2) decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence, and prudence unless the court having jurisdiction over the trust specifies otherwise;

(3) eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under AS 13.36.157 unless a court having jurisdiction over the trust specifies otherwise;

(4) fix as binding and conclusive the value of an asset for purposes of distribution, allocation, or otherwise; or

(5) jeopardize

(A) the deduction or exclusion originally claimed with respect to a contribution to the invaded trust that qualified for the annual exclusion under 26 U.S.C. 2503(b), the marital deduction under 26 U.S.C. 2056(a) or 26

U.S.C. 2523(a), or the charitable deduction under 26 U.S.C. 170(a), 26 U.S.C. 642(c), 26 U.S.C. 2055(a), or 26 U.S.C. 2522(a) (Internal Revenue Code);

(B) the qualification of a transfer as a direct skip under 26 U.S.C. 2642(c) (Internal Revenue Code);

(C) the election to treat a corporation as a subchapter S corporation under 26 U.S.C. 1362 (Internal Revenue Code); or

(D) another specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under 26 U.S.C. (Internal Revenue Code).

(j) Before exercising the power under AS 13.36.157, an authorized trustee shall consider the tax implications of the exercise of the power.

(k) An authorized trustee may not exercise a power described in AS 13.36.157 - 13.36.159 in violation of the limitations on validity in AS 34.27.051 or 34.27.100, or the restrictions on exercising certain powers in AS 13.36.153 by trustees who are not independent. A violation voids the entire exercise of the power unless the exercise is modified to correct the violation.

(*l*) Unless a court having jurisdiction over the trust directs otherwise, an authorized trustee may not exercise a power authorized by AS 13.36.157 to change the provisions regarding the determination of the compensation of a trustee. The commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as for the invaded trust.

(m) A trustee may not receive a payment, a commission, or other compensation for appointing property from the invaded trust to an appointed trust under AS 13.36.157. However, a trustee may be compensated at an hourly rate for the time spent considering and implementing the exercise of a power to appoint.

(n) Unless the invaded trust expressly provides otherwise, the provisions in AS 13.36.157 - 13.36.159 apply to

(1) a trust, whether testamentary or inter vivos, governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and

(2) a trust that has a trustee who is an individual domiciled in this state, or a trustee that is an entity having an office in this state, if a majority of the trustees select this state as the location for the primary administration of the trust and the selection is made by an instrument in writing that is signed and acknowledged by a majority of the trustees; the instrument exercising this selection shall be kept with the records of the invaded trust.

(o) A power to pay principal that includes words such as "best interests," "welfare," "comfort," or "happiness" is not considered a limitation or modification of the right to distribute principal.

(p) In this section, "internal revenue code" means the Internal Revenue Code of the United States (26 U.S.C.) as it exists on the effective date of this Act and as it is amended from time to time;

Sec. 13.36.159. Implementation of power of appointment. (a) Unless the authorized trustee provides otherwise, the appointment of

(1) all of the assets comprising the principal of the invaded trust to an appointed trust includes subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust;

(2) a part but not all of the assets comprising the principal of the invaded trust to an appointed trust may not include subsequently discovered assets belonging to the invaded trust or principal paid to or acquired by the invaded trust after the appointment to the appointed trust; those subsequently discovered assets remain the assets of the invaded trust.

(b) The exercise of the power to appoint to an appointed trust under AS 13.36.157 shall be evidenced by an instrument in writing that is signed, dated, and acknowledged by the authorized trustee. The exercise of the power is effective 30 days after the date of service of the instrument as specified in (d) of this section, unless the persons entitled to notice consent in writing to a sooner effective date.

(c) An authorized trustee may exercise the power authorized by AS 13.36.157 without the consent of the settlor or a person interested in the invaded trust and without court approval. However, an authorized trustee may seek court approval for

the exercise. When seeking court approval, notice shall be sent to all qualified beneficiaries.

(d) A copy of the invaded trust, the appointed trust, and the instrument exercising the power shall be delivered to

(1) the settlor, if living, of the invaded trust;

(2) a person having the right, under the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under AS 13.36.157; and

(3) a qualified beneficiary or a person who may represent and bind the qualified beneficiary under AS 13.06.120.

(e) Notice under (d) of this section to a qualified beneficiary is not required if the settlor has exempted the authorized trustee from providing notification or information to beneficiaries under AS 13.36.080(b). Notice under (d) of this section shall be provided under AS 13.06.110.

(f) The instrument exercising the power must state whether the appointment is of all or part of the assets comprising the principal of the invaded trust and, if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.

(g) A person entitled to notice under (d) of this section may object to the trustee's exercise of the power under AS 13.36.157 - 13.36.159 by serving a written notice of objection on the trustee before the effective date of the exercise of the power. The failure to object does not constitute consent.

(h) The receipt of a copy of the instrument exercising the power does not, before the expiration of the limitation period in AS 13.36.100 with respect to a report disclosing the exercise, affect the right of a qualified beneficiary to object to the exercise of the power under AS 13.36.157 and to request the court to modify or to reverse the exercise.

(i) A copy of the instrument exercising the power shall be kept with the records of the invaded trust.

* **Sec. 8.** AS 13.36.215 is amended by adding a new subsection to read:

(b) In AS 13.36.157 - 13.36.159,

(1) "appointed trust" means an irrevocable trust that receives principal from an invaded trust under AS 13.36.157, including a new trust created by the settlor of the invaded trust or by the trustees, acting in that capacity, of the invaded trust;

(2) "authorized trustee" means, with regard to an invaded trust, a trustee with the authority to pay trust principal to or for a current beneficiary; in this paragraph, "trustee" does not include a settlor or a beneficiary to whom income or principal must be paid, currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee other than by the exercise of a power of appointment held in a nonfiduciary capacity;

(3) "current beneficiary" means a person or, with regard to a class of persons, a person who is or will become a member of the class, to whom a trustee may distribute principal when exercising a power under AS 13.36.157;

(4) "invade" means pay directly to the beneficiary of a trust or apply to the benefit of a beneficiary;

(5) "invaded trust" means an irrevocable inter vivos or testamentary trust the principal of which is appointed under AS 13.36.157;

(6) "pooled trust" means a trust described in 42 U.S.C. 1396p(d)(4)(C) that meets the requirements for a pooled trust under the regulations of this state relating to the Medicaid treatment of trusts;

(7) "principal" means the assets of a trust, including accrued and accumulated income, but excluding income that is currently required to be distributed;

(8) "special needs trust" means a trust under 42 U.S.C. 1396p(d)(4)(A) that meets the requirements for a special needs trust under the regulations of this state relating to the Medicaid treatment of trusts;

(9) "third-party trust" means a trust that is

(A) established by a third party with the assets of the third party to provide for supplemental needs for a person eligible when the trust is created or at a future time for needs-based public assistance; and

(B) exempt from the provisions of the regulations of this state relating to the Medicaid treatment of trusts;

(10) "unlimited discretion" means the unlimited right to distribute

principal that is not modified in any manner."

Renumber the following bill sections accordingly.

Page 27, line 3:

Delete "sec. 31"

Insert "sec. 34"

Page 27, line 5:

Delete "sec. 31"

Insert "sec. 34"

Page 27, following line 13:

Insert a new subsection to read:

"(b) AS 13.36.157, repealed and reenacted by sec. 6 of this Act, AS 13.36.158 and 13.36.159, enacted by sec. 7 of this Act, and AS 13.36.215(5), enacted by sec. 8 of this Act, apply to a trust that exists before, on, or after the effective date of this Act."

Reletter the following subsection accordingly.

Page 27, line 14:

Delete "sec. 28"

Insert "sec. 31"

Page 27, line 20:

Delete "sec. 31"

Insert "sec. 34"

Page 27, line 21:

Delete "sec. 35"

Insert "sec. 38"

27-LS0819\D
Bannister
1/27/12

CS FOR SENATE BILL NO. 165( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to property exemptions for retirement plans, individual retirement accounts, and Roth IRAs; relating to pleadings, orders, liability, and notices under the Uniform Probate Code; relating to the Alaska Principal and Income Act; relating to the Alaska Uniform Transfers to Minors Act; relating to the disposition of human remains; relating to insurable interests for life insurance policies; relating to transfers of individual retirement plans; relating to the community property of married persons; and amending Rule 301(a), Alaska Rules of Evidence."

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

*** Section 1.** AS 09.38.017(a) is amended to read:

(a) In addition to the exemption under AS 09.38.015(b), the following are exempt from a claim of an individual's **or beneficiary's** creditor:

(1) the interest of the individual **or beneficiary** in a retirement plan; [AND]

(2) the money or other assets payable to the individual from a retirement plan;

(3) the interest of a beneficiary in

(A) a retirement plan if the beneficiary acquired the interest as a result of the death of an individual; the beneficiary's interest is exempt to the same extent that the individual's interest was exempt immediately before the individual died;

(B) an individual retirement account that has been transferred by the individual to the beneficiary during the individual's lifetime; the beneficiary's interest is exempt to the same extent that the individual's interest was exempt immediately before the transfer to the beneficiary;

(4) the money or other assets payable to a beneficiary from

(A) a retirement plan if the beneficiary acquired the money or other assets as a result of the death of an individual who would have had, during the individual's life, an exemption in the money or other assets;

(B) an individual retirement account if the beneficiary acquired the money or other assets as a result of the transfer of the money or other assets by an individual who would have had, at the time of the transfer, an exemption in the money or other assets.

*** Sec. 2.** AS 09.38.017(d) is amended to read:

(d) A retirement plan exempt from claims under (a) of this section is conclusively presumed to be a spendthrift trust under this section**, except for transfers or assignments under AS 34.40.113**.

*** Sec. 3.** AS 09.38.017(e) is amended to read:

(e) In this section,

(1) "alternate payee" has the meaning given in 26 U.S.C. 414(p)(8);

(2) **"beneficiary" includes a person, trust, or trustee who has, before or after the death of an individual, a direct or indirect beneficial interest in a retirement plan; in this paragraph, "beneficial interest" includes an interest**

that is acquired

(A) as a designated beneficiary, survivor, co-annuitant, heir, or legatee; or

(B) if excludible from gross income under 26 U.S.C. (Internal Revenue Code), as a

(i) rollover under 26 U.S.C. 408 or 26 U.S.C. 408A;

(ii) a distribution from one retirement plan to another retirement plan; or

(iii) a distribution that is similar to (i) or (ii) of this subparagraph;

(3) "individual" means [AN INDIVIDUAL WHO IS] a participant in, **an owner** [A BENEFICIARY] of, or an alternate payee of a retirement plan;

(4) "individual retirement account" means an individual retirement account established under 26 U.S.C. 408 or a Roth IRA established under 26 U.S.C. 408A;

(5) [(3)] "retirement plan" means

(A) a retirement plan that is qualified under 26 U.S.C. 401(a), 26 U.S.C. 403(a), 26 U.S.C. 403(b), [26 U.S.C. 408, 26 U.S.C. 408A, OR] 26 U.S.C. 409**, 26 U.S.C. 414(d), 26 U.S.C. 414(e), or 26 U.S.C. 457** (Internal Revenue Code)**;**

(B) an individual retirement account; and

(C) the teachers' retirement system under AS 14.25, the judicial retirement system under AS 22.25, the public employees' retirement system under AS 39.25, and the elected public officers' retirement system under former AS 39.37.

*** Sec. 4.** AS 13.06.120 is amended to read:

Sec. 13.06.120. Pleadings; when parties bound by orders; notice. In any proceedings involving trusts, nonprobate assets, or estates of decedents, minors, protected persons, or incapacitated persons brought under AS 13.06 - AS 13.36 or AS 13.38, [INCLUDING ANY JUDICIALLY SUPERVISED SETTLEMENTS AND ANY NONJUDICIAL PROCEEDINGS AND SETTLEMENTS,] the following

apply:

(1) interests to be affected shall be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner;

(2) persons are bound by orders binding others in the following cases:

(A) orders binding the sole holder or all co-holders of a power of revocation or a general or nongeneral power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests, as objects, takers in default, or otherwise, are subject to the power;

(B) to the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate the conservator controls; orders binding a guardian bind the ward if no conservator of the estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary, and in proceedings involving creditors or other third parties; orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and orders binding an agent having authority to act with respect to the particular questions or dispute bind the principal; if there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent the minor child;

(C) an unborn person, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable who is not otherwise represented is bound by an order to the extent the interest is adequately represented by another party having a substantially identical interest in the proceeding;

(D) with regard to interests given upon the happening of a certain event to persons who comprise a certain class, orders binding the living persons who would constitute the class, if the event had happened immediately before the commencement of the proceeding, bind all members of the class;

(E) with regard to an interest given to a living person when the same interest or a share of the interest is to pass to the surviving spouse or to persons who are or might be the distributees, devisees, heirs, or issue of the living person upon the happening of a future event, orders binding the living person bind the surviving spouse, distributees, devisees, heirs, or issue of the living person;

(F) with regard to interests given to a person or a class of persons, or to both, upon the happening of a future event, if the same interest or a share of the interest is to pass to another person or class of persons, or to both, upon the happening of an additional future event, orders binding the living person or class of persons who would take the interest upon the happening of the first event bind the persons and classes of persons who might take on the happening of the additional future event;

(G) if a person is designated by a trust instrument to represent and bind a born or unborn beneficiary of the trust and receive a notice, information, accounting, or report for the beneficiary, then the beneficiary is bound by an order binding the designated person; in this subparagraph,

(i) the settlor may make the designation in the trust instrument, in a separate document, or by a trust protector authorized in the trust instrument to make the designation;

(ii) except as otherwise provided in this subparagraph, a person designated under (i) of this subparagraph may not represent and bind a beneficiary while the designated person is serving as trustee;

(iii) except as otherwise provided in this subparagraph, a person designated under (i) of this subparagraph may not represent and bind another beneficiary if the designated person also is a beneficiary, unless the designated person was named by the settlor, is the beneficiary's spouse, or is a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse; in this sub-subparagraph, "spouse" means the individual to whom the beneficiary is married and with whom the beneficiary is living, and a physical

separation primarily for education, business, health, and similar reasons does not prevent the individual from being considered to be living with the beneficiary;

(3) a person representing another person under (2)(A) - (F) of this section and a person designated under (2)(G)(i) of this section are not liable to the beneficiary whose interests are represented, or to a person claiming through that beneficiary, for an action or omission to act made in good faith;

(4) notice is required as follows:

(A) notice as prescribed by AS 13.06.110 shall be given to every interested person or to one person who can bind an interested person as described in (2)(A), (B), or (D) - (G) of this section; notice may be given both to a person and to another person who may bind the person;

(B) notice is given to unborn persons, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable, and persons who are not represented under (2)(A), (B), or (D) - (G) of this section, by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn persons, the minor, the incapacitated person, or the person whose identity or location is unknown or not reasonably ascertainable;

(5) at any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of an unborn person, a minor, an incapacitated person, or a person whose identity or address is unknown or not reasonably ascertainable, if the court determines that representation of the interest otherwise would be inadequate; if not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests; the court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

* **Sec. 5.** AS 13.06.120 is amended by adding a new subsection to read:

(b) In this section,

(1) "order" means a judicial order, nonjudicial order, the result of the settlement of an account of a fiduciary under a procedure authorized by AS 13.06 - 13.36 or AS 13.38, and a settlement agreement resulting from a proceeding;

(2) "proceeding" means a judicial proceeding, nonjudicial proceeding, the settlement of an account of a fiduciary under a procedure authorized by AS 13.06 - 13.36 or AS 13.38, and a settlement negotiation, even if the settlement negotiation does not involve a judicial or nonjudicial third party who decides or facilitates a settlement.

*** Sec. 6.** AS 13.38.200(b) is amended to read:

(b) In exercising a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the governing instrument or this chapter, including AS 13.38.210 and **13.38.300 - 13.38.490** [13.38.300 - 13.38.410], a fiduciary shall administer a trust or estate impartially based on what is fair and reasonable to all of the beneficiaries, except to the extent that the governing instrument clearly manifests an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

*** Sec. 7.** AS 13.38.210(c) is amended to read:

(c) A trustee may not make an adjustment under this section if

(1) the adjustment would diminish the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which a federal estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment; the prohibition in this paragraph does not apply to a trust after the trustee determines that the marital deduction has not been claimed or has not been allowed;

(2) the adjustment would reduce the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a federal gift tax exclusion;

(3) the adjustment would change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) the adjustment is from any amount that is permanently set aside for charitable purposes under the governing instrument and for which a federal estate or gift tax charitable deduction has been taken, unless both income and principal are permanently set aside for charitable purposes under the governing instrument;

(5) possessing or exercising the power to make an adjustment would cause an individual to be treated as the owner of all or part of the trust for federal income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) possessing or exercising the power to make an adjustment would cause all or part of the trust assets to be subject to federal estate or gift tax with respect to an individual, and the assets would not be subject to federal estate or gift tax with respect to the individual if the trustee did not possess the power to make an adjustment;

(7) the trustee is a beneficiary of the trust; or

(8) the trust has been converted to a unitrust under **AS 13.38.300 - 13.38.435** [AS 13.38.300 - 13.38.410].

*** Sec. 8.** AS 13.38.300 is amended to read:

Sec. 13.38.300. Power to convert to unitrust. Unless expressly prohibited by the governing instrument, a trustee may release the power to adjust under AS 13.38.210 and may convert a trust into a unitrust as described in **AS 13.38.300 - 13.38.435** [AS 13.38.300 - 13.38.410] if

(1) the trustee determines that the conversion will enable the trustee to better carry out the intent of the settlor or testator and the purposes of the trust;

(2) the trustee gives written notice of the trustee's intention to release the power to adjust, of the trustee's intention to convert the trust into a unitrust, **of the unitrust percentage selected, of the smoothing period selected,** and of how the unitrust will operate, including what initial decisions the trustee **intends to** [WILL] make under **AS 13.38.340** [THIS SECTION], to all the sui juris beneficiaries who

(A) are currently eligible to receive income from the trust;

(B) would be eligible, if a power of appointment were not exercised, to receive income from the trust if the interest of all of the beneficiaries eligible to receive income under (A) of this paragraph were to terminate immediately before the giving of the notice; and

(C) would, if a power of appointment were not exercised, receive a distribution of principal if the trust were to terminate immediately

before the giving of the notice;

(3) there are at least one sui juris beneficiary under (2)(A) of this section and at least one sui juris beneficiary under (2)(B) or (C) of this section; and

(4) a sui juris beneficiary does not object to the conversion to a unitrust in a writing delivered to the trustee within 60 days after the mailing of the notice under (2) of this section.

*** Sec. 9.** AS 13.38.310(a) is amended to read:

(a) A trustee may petition the court to approve the conversion to a unitrust if

(1) a beneficiary timely objects to the conversion to a unitrust; [OR]

(2) there is not a sui juris beneficiary who is eligible under **AS 13.38.300(2); or**

(3) the trustee is a beneficiary [AS 13.38.300(2)(A), AND THERE IS NOT A SUI JURIS BENEFICIARY WHO IS ELIGIBLE UNDER AS 13.38.300(2)(B) OR (C)].

*** Sec. 10.** AS 13.38.330(b) is amended to read:

(b) After a trust has been converted to a unitrust, "income" in the governing instrument means an annual distribution equal to **the amount produced by the application of a fixed unitrust percentage established under (d) of this section to** [FOUR PERCENT OF] the net fair market value, as determined annually, of the trust's assets, whether the assets would be considered income or principal under other provisions of this chapter**, averaged over the lesser of**

(1) the preceding years in the smoothing period selected by the trustee; or

(2) the period during which the trust has been in existence.

*** Sec. 11.** AS 13.38.330 is amended by adding a new subsection to read:

(d) The unitrust percentage to be used in determining the unitrust amount must be a reasonable current return from the unitrust of at least three percent and not more than five percent, taking into account the intentions of the trustor of the unitrust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings for the unitrust, projected appreciation for the unitrust, and the effect of projected inflation on the unitrust.

* **Sec. 12.** AS 13.38.340 is amended to read:

Sec. 13.38.340. Trustee's discretionary powers regarding unitrust. The trustee may, in the trustee's discretion, from time to time, determine

(1) the effective date of a conversion to a unitrust;

(2) the provisions for prorating a unitrust distribution for a short year in which a beneficiary's right to payments commences or ceases;

(3) the frequency of unitrust distributions during the year;

(4) the effect of other payments from or contributions to the trust on the trust's valuation;

(5) whether to value the trust's assets annually or more frequently;

(6) **whether to use a smoothing period of three, four, or five years;**

(7) what valuation dates to use;

(8) [(7)] how frequently to value nonliquid assets and whether to estimate their value;

(9) [(8)] whether to omit trust property occupied or possessed by a beneficiary from the calculations; and

(10) [(9)] other matters necessary for the proper functioning of the unitrust.

* **Sec. 13.** AS 13.38.350(b) is amended to read:

(b) Unless otherwise provided by the governing instrument, a unitrust distribution shall be considered to have been paid from net income as net income would be determined if the trust were not a unitrust. To the extent net income is insufficient, the unitrust distribution shall be considered to have been paid from **ordinary income that is allocable under federal income tax rules to net income as determined for a unitrust. To the extent that the ordinary income is insufficient, the unitrust distribution is considered to have been paid from** net realized short-term capital gains. To the extent **net** income**, ordinary income,** and net realized short-term capital gains are insufficient, the unitrust distribution shall be considered to have been paid from net realized long-term capital gains. To the extent **net** income**, ordinary income,** and net realized short-term and long-term capital gains are insufficient, the unitrust distribution shall be paid from the principal of the trust.

* **Sec. 14.** AS 13.38.360 is amended to read:

Sec. 13.38.360. Court orders regarding unitrust. The trustee or, if the trustee declines to petition the court, a beneficiary may petition the court to

[(1) SELECT A PAYOUT PERCENTAGE DIFFERENT THAN FOUR PERCENT;

(2)] provide for a distribution of net income, as would be determined if the **unitrust** [TRUST] were not a unitrust, in excess of the unitrust distribution if the distribution is necessary to preserve a tax benefit [;

(3) AVERAGE THE VALUATION OF THE TRUST'S NET ASSETS OVER A PERIOD OTHER THAN THREE YEARS].

* **Sec. 15.** AS 13.38.390(b) is amended to read:

(b) If AS 13.38.380(a)(3), (4), or (6) applies to all the trustees, the trustees may petition the court to direct a conversion. **In the alternative, the trustees may appoint an independent person who shall be granted the authority, while acting in a fiduciary capacity, to make decisions in place of the trustees relating to a conversion, reconversion, and the exercise of discretionary powers under AS 13.38.340.**

* **Sec. 16.** AS 13.38.400 is amended to read:

Sec. 13.38.400. Reconversion from a unitrust. A trustee may reconvert a trust that has been converted into a unitrust under AS 13.38.300 by following the same procedures provided in **AS 13.38.300 - 13.38.435** [AS 13.38.300 - 13.38.410] for converting a trust into a unitrust. If a unitrust is reconverted under this section, the trustee's power to adjust under AS 13.38.210 applies to the trustee after the reconversion.

* **Sec. 17.** AS 13.38 is amended by adding new sections to article 2 to read:

Sec. 13.38.420. Additional unitrust provisions. (a) The unitrust amount may be determined by reference to the net fair market value of the unitrust's assets in one or more years.

(b) Distribution of a unitrust amount is considered a distribution of all of the income of a unitrust and is considered to be an income interest.

(c) Distribution of a unitrust amount is considered to be a reasonable

apportionment of the total return of a unitrust.

(d) A unitrust that provides for a distribution based on a unitrust percentage in excess of five percent of the net fair market value of the unitrust assets a year is considered to have paid out all of the income of the unitrust and to have paid out principal of the unitrust to the extent that the distribution exceeds five percent a year.

(e) The governing instrument of a unitrust may grant discretion to the trustee to adopt a consistent practice of treating capital gains as part of the unitrust amount to the extent that the unitrust amount exceeds the income determined as if the trust were not a unitrust, or the governing instrument may specify the ordering of classes of income.

(f) Unless the terms of the unitrust specifically provide otherwise, a unitrust amount is considered to have been made from the following sources, which are listed in order of priority:

(1) net income determined as if the trust were not a unitrust;

(2) ordinary income not allocable to net income;

(3) net realized short-term capital gains;

(4) net realized long-term capital gains; and

(5) the principal of the trust estate.

(g) The unitrust governing instrument may provide that the trustee may exclude assets used by the unitrust beneficiary, such as a residence property or tangible personal property, from the net fair market value of the unitrust assets for the purposes of computing the unitrust amount. These assets may be considered equivalent to income or to the unitrust amount.

Sec. 13.38.430. Power to treat gains as part of distribution of principal. Unless prohibited by the unitrust's governing instrument or specifically addressed by AS 13.38.350 or 13.38.420, the trustee of a unitrust may treat gains from the sale of capital assets of the unitrust to be part of a distribution of principal to a beneficiary, and, if the trustee treats these gains as part of a distribution of principal to a beneficiary, the trustee shall treat these gains consistently on the unitrust's books, records, and tax returns as part of a distribution to a beneficiary.

Sec. 13.38.435. Definitions. In AS 13.38.300 - 13.38.435,

(1) "smoothing period" means the period of years over which the fair market value of the assets of a unitrust are averaged;

(2) "unitrust amount" means the amount that is distributed from a unitrust to a beneficiary;

(3) "unitrust percentage" means the unitrust percentage established under AS 13.38.330(d).

* **Sec. 18.** AS 13.38.690(a) is repealed and reenacted to read:

(a) A trustee shall allocate

(1) to income that portion of a payment that equals the greater of the following:

(A) the portion that the payor characterizes as interest, a dividend, a remittance in place of interest, or a remittance in place of a dividend; or

(B) the portion that is characterized as imputed interest for federal income purposes;

(2) to principal that portion of a payment that remains after the allocation is made under (1) of this subsection.

* **Sec. 19.** AS 13.38.690(b) is amended to read:

(b) If **no** [A] part of a payment under a contract calling for equal installments over a fixed period of time is [NOT] allocable to income under the provisions of (a) of this section, the difference between the trust's acquisition value of the contract and the total expected return **is** [SHALL BE] considered to be interest. The trustee shall allocate to income the portion of each payment equivalent to interest on the then unpaid principal balance at the rate specified in the contract or at a rate necessary to amortize the difference between the expected return and the acquisition value, where that rate is readily ascertainable by the trustee.

* **Sec. 20.** AS 13.38.690(c) is amended to read:

(c) If **no** [THERE IS NOT A] portion of a payment from a separate fund held exclusively for the benefit of the trust [THAT] is allocable to income under (a) or (b) of this section, but the internal net income of the fund determined as if the fund were a separate trust subject to **AS 13.38.200 - 13.38.410, 13.38.500 - 13.38.690, or**

13.38.710 - 13.38.860 [AS 13.38.500 - 13.38.860] is readily ascertainable by the trustee, the **internal net income of the fund is considered to be the income earned by the fund, and the** portion of the payment equal to the then undistributed net income of the fund realized since the trust acquired its interest in the fund is considered to be a distribution of **that internal net** income **of the fund** and shall be allocated to the trust income account. The balance of the payment described in this subsection shall be allocated to principal. **The power to adjust under AS 13.38.210, the power to convert to a unitrust under AS 13.38.300, and the provisions of AS 13.38.420 apply to retirement benefits covered by this subsection that are payable to a trust. These powers and provisions may be exercised by the payee trustee or in the governing instrument for the retirement benefits separately and independently from the exercise by the payee trustee or in the governing instrument of these powers and provisions for the trust, as if the retirement benefits and the trust were separate trusts subject to this chapter.**

* **Sec. 21.** AS 13.38.690(d) is amended to read:

(d) A trustee shall allocate 10 percent of the part of the payment that is required to be made during the accounting period to income and the balance to principal if there is **no** [NOT A] part of the payment that is allocable to income under (a) - (c) of this section and all or part of the payment is required to be made. The trustee shall allocate the entire payment to principal if **no** [A] part of a payment is [NOT] required to be made or the payment received is the entire amount to which the trustee is entitled. In this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

* **Sec. 22.** AS 13.38.690(e) is amended to read:

(e) If, to obtain a federal estate or gift tax marital deduction for a trust, the trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate **to income** the additional amount necessary to obtain the marital deduction [TO INCOME].

* **Sec. 23.** AS 13.46.195(d) is amended to read:

(d) The time for transfer to the minor of custodial property transferred under AS 13.46.040 may be changed under this section if the governing will or trust or

nomination provides in substance that the custodianship is to continue until the time the minor attains a specified age. That time may not be earlier than the time the minor attains 18 years of age [OR LATER THAN THE TIME THE MINOR ATTAINS 25 YEARS OF AGE], and, in that case, the governing will or trust or nomination shall determine the time to be specified in the transfer under AS 13.46.080.

*** Sec. 24.** AS 13.46.195(e) is amended to read:

(e) The time for transfer to the minor of custodial property transferred under AS 13.46.030 may be changed under this section if the transfer under AS 13.46.080 provides in substance that the custodianship is to continue until the time the minor attains a specified age. That time may not be earlier than the time the minor attains 18 years of age [OR LATER THAN THE TIME THE MINOR ATTAINS 25 YEARS OF AGE].

*** Sec. 25.** AS 13.46.195 is amended by adding new subsections to read:

(h) Notwithstanding (b) - (f) of this section, a custodian may extend the time for transfer to the minor of custodial property to an age older than the age that is specified in the transfer document or that is specified otherwise by this chapter. To extend the time for transfer, the custodian shall give the minor written notice of the minor's right to compel immediate distribution under (i) of this section. The custodian shall give the notice during the later of the following periods:

(1) the six-month period that precedes the age for distribution specified in the transfer document or specified otherwise by this chapter; or

(2) the six-month period that begins on the minor's 18th birthday.

(i) Notwithstanding (h) of this section, a minor may compel immediate distribution of custodial property by giving written notice to the custodian. To compel immediate distribution, the minor shall give the notice during the six-month period that begins on the date that is the later of

(1) the age for distribution specified in the transfer document or specified otherwise by this chapter; or

(2) the minor's 18th birthday.

*** Sec. 26.** AS 13 is amended by adding a new chapter to read:

Chapter 75. Disposition of Human Remains.

Sec. 13.75.010. Directions by decedent. (a) A person may provide directions for the disposition of the person's remains by placing the directions in a disposition document. The directions may include or be limited to designating an agent to control the disposition of the person's remains.

(b) A disposition document must be signed by the person and acknowledged before a notary public, and contain the form and contents required by AS 13.75.030. A disposition document may be a separate document or it may be contained in another document, including a will or prepaid funeral or burial contract. The disposition document may be modified or revoked only by a subsequent disposition document that complies with this subsection.

Sec. 13.75.020. Persons authorized to control disposition. (a) The following persons, in the priority listed, may control disposition of a decedent's remains:

(1) a person designated in a disposition document as the disposition agent for the decedent;

(2) a person serving, or nominated by the decedent in the decedent's will to serve, as the personal representative of the decedent's estate, if the person is acting according to the decedent's written instructions contained in the decedent's will;

(3) the individual who was the spouse of the decedent at the time of the decedent's death;

(4) the sole surviving competent adult child of the decedent, or, if there is more than one surviving competent adult child of the decedent, the majority of the surviving competent adult children; fewer than one-half of the surviving competent adult children may exercise the rights and duties of this section if these surviving adult children use reasonable efforts to notify all other surviving competent adult children that they are exercising these rights and duties and are not aware of any opposition by one-half or more of all of the surviving competent adult children;

(5) the surviving competent parents of the decedent; if one of the surviving competent parents is absent, the remaining competent parent may exercise the rights and duties of this section after reasonable efforts have been unsuccessful in locating the absent surviving competent parent; in this paragraph, "absent" means a person who is unable to communicate decisions or participate in making decisions

regarding the disposition of a decedent's remains personally, telephonically, or through electronic communication;

(6) the surviving competent adult person in the next degrees of kindred, the two surviving competent adult persons of the same degree of kindred if there are two, or, if there are more than two surviving competent adult persons of the same degree of kindred, the majority of those persons; fewer than the majority of surviving competent adult persons of the same degree of kindred may exercise the rights and duties of this section if those persons use reasonable efforts to notify all other surviving competent adult persons of the same degree of kindred that they are exercising these rights and duties and are not aware of any opposition by one-half or more of all surviving competent adult persons of the same degree of kindred;

(7) in the case of an indigent or another individual whose final disposition is the responsibility of the state or a municipality, a public administrator, medical examiner, coroner, or another public official charged with arranging the final disposition of the decedent; or

(8) another person who is willing to assume legal and financial responsibility.

(b) If a person takes control of the disposition under (a) of this section, the person is liable for the reasonable costs of the disposition.

(c) In this section,

(1) "adult" means a person who is 18 years of age or older;

(2) "competent" means a person who does not suffer from disabilities that prevent the person from managing the person's property or affairs.

Sec. 13.75.030. Form of disposition document. A disposition document must be in substantially the following form:

DISPOSITION DOCUMENT

You can select Part 1, Part 2, or both, by completing the part(s) you select, including providing any signatures indicated. Part 3 contains general statements and a place for your signature. You must sign in front of a notary.

PART 1. APPOINTMENT OF AGENT TO CONTROL

DISPOSITION OF REMAINS. If you appoint an agent, you and your agent must complete this part as indicated, and the agent must sign this part.

I, _____, being of sound mind, wilfully and voluntarily make known my desire that, on my death, the disposition of my remains shall be controlled by _____ (name of agent first named below), and, with respect to that subject only, I appoint that person as my agent. All decisions made by my agent with respect to the disposition of my remains, including cremation, are binding.

ACCEPTANCE BY AGENT OF APPOINTMENT.

THE AGENT, AND EACH SUCCESSOR AGENT, BY ACCEPTING THIS APPOINTMENT, AGREES TO AND ASSUMES THE OBLIGATIONS PROVIDED IN THIS DOCUMENT. AN AGENT MAY SIGN AT ANY TIME, BUT AN AGENT'S AUTHORITY TO ACT IS NOT EFFECTIVE UNTIL THE AGENT SIGNS BELOW TO INDICATE THE ACCEPTANCE OF APPOINTMENT. ANY NUMBER OF AGENTS MAY SIGN, BUT ONLY THE SIGNATURE OF THE AGENT ACTING AT ANY TIME IS REQUIRED.

AGENT:

Name: _____

Address: _____

Telephone Number: _____

Signature Indicating Acceptance of Appointment:

_____

Date of Signature: _____

SUCCESSORS:

If my agent dies, becomes legally disabled, resigns, or refuses to act, I appoint the following persons (each to act alone and successively, in the order named) to serve as my agent to control the disposition of my remains as authorized by this document:

(1) First Successor

Name: _____

Address: _____

Telephone Number: _____

Signature of First Successor Indicating Acceptance of Appointment:

_____

Date of Signature: _____

(2) Second Successor

Name: _____

Address: _____

Telephone Number: _____

Signature of Second Successor Indicating Acceptance of Appointment:

_____

Date of Signature: _____

PART 2. DIRECTIONS FOR THE DISPOSITION OF MY REMAINS.

Stated below are my directions for the disposition of my remains:

_____

_____

_____

_____

If the disposition of my remains is by cremation, then (pick one):

( ) I do not wish to allow any of my survivors the option of canceling my cremation and selecting alternative arrangements, regardless of whether my survivors consider a change to be appropriate.

( ) I wish to allow only the survivors I have designated below to have the option of canceling my cremation and selecting alternative arrangements, if they consider that a change to be appropriate:

_____

_____

_____

PART 3. GENERAL PROVISIONS AND SIGNATURE.

WHEN DIRECTIONS BECOME EFFECTIVE. The directions, including any appointment of an agent, in this disposition document become effective on my death.

REVOCATION OF PRIOR APPOINTMENTS. I revoke any prior appointment of any person to control the disposition of my remains.

SIGNATURE OF PERSON MAKING DISPOSITION DOCUMENT

Signature: _____

Date of signature: _____

(Notary acknowledgment of signature)

Sec. 13.75.040. Agent's appointment. The person appointed as an agent in a disposition document may sign the disposition document at any time, but the agent's authority to act is not effective until the agent signs the instrument.

Sec. 13.75.050. Exercise of authority. If a person fails to exercise the person's authority to control disposition under AS 13.75.020 within 48 hours after receiving notification of the decedent's death or within 48 hours after the decedent's death, whichever is earlier, the person may not control the disposition of the decedent's remains, and the right to control the disposition of the decedent's remains passes to the person who is next listed in priority under AS 13.75.020. If the person to whom the right to control the disposition passes under this section fails to exercise the person's authority to control the disposition within 48 hours after being notified that the authority to control the disposition has passed to the person, the authority to control the disposition passes to the person who is next listed in priority under AS 13.75.020.

Sec. 13.75.060. Certain persons prohibited from control. If a person is charged with a felonious killing in connection with a decedent's death and if the funeral director or the cemetery knows about the charge, then the person may not control disposition, and the right to control disposition passes to the person who is next listed in priority under AS 13.75.020.

Sec. 13.75.070. Prohibition of cremation; written instructions. A person

may not authorize cremation for a decedent's remains if a decedent has left directions in a disposition document that the decedent does not wish to be cremated.

Sec. 13.75.080. Implementation of directions. (a) The person authorized to control the disposition shall carry out the directions of the decedent to the extent that the decedent's estate or the person is financially able to carry out the directions.

(b) Notwithstanding any other provision in AS 13.06 - 13.36 (Uniform Probate Code), if a person provides directions in a disposition document that is contained in a will, the directions shall be carried out immediately without the necessity of probate. If the will is not probated or is declared invalid for testamentary purposes, the directions are valid to the extent to which they have been acted on in good faith.

Sec. 13.75.090. Misrepresentation; liability. If a person represents that the person knows the identity of a decedent, and, with the intent to procure the disposition of the decedent's remains, signs a statement, other than a death certificate, that identifies the decedent, the person guarantees the identity of the decedent and is liable for any damages that result, directly or indirectly, from that guarantee.

Sec. 13.75.100. Liability. (a) A disposition organization is not liable for carrying out the directions of a decedent if the disposition organization carries out the directions of a decedent or a person who establishes that the person is entitled to control the disposition.

(b) This section may not be construed to reduce or eliminate the liability of a disposition organization for its negligence or reckless acts.

Sec. 13.75.110. Disputes. (a) A person listed in AS 13.75.020 who is involved in a dispute with one or more persons listed in AS 13.75.020 about which of the persons has the authority to control disposition may bring an action in the superior court to resolve the dispute.

(b) If there is a dispute with one or more persons listed in AS 13.75.020 about which person has the authority to control disposition, a cemetery organization or funeral establishment is not liable for refusing to accept, to inter, or otherwise to dispose of the decedent's remains until the cemetery organization or funeral establishment receives a court order or another suitable confirmation that the dispute has been resolved.

Sec. 13.75.120. Exemptions. The disposition of the remains of a member of the organized militia under AS 26.05.262, the disposition of the remains of a member of the armed forces under AS 26.10.065(a), and the disposition of the remains of a member of the United States Coast Guard under AS 26.10.065(b) are exempt from this chapter.

Sec. 13.75.190. Definitions. In this chapter,

(1) "control" means the authority to control disposition;

(2) "directions" means

(A) instructions for the disposition of a person's remains;

(B) the appointment of an agent to handle the disposition of a person's remains; or

(C) both (A) and (B) of this paragraph;

(3) "disposition" means disposition of a decedent's remains, including cremation, but does not include an anatomical gift; in this paragraph, "anatomical gift" has the meaning given in AS 13.52.390;

(4) "disposition document" means a disposition document authorized by AS 13.75.010

(A) in which a person provides directions regarding the disposition of the person's remains; and

(B) that complies with AS 13.75.030;

(5) "disposition organization" means

(A) a cemetery association formed under AS 10.30.010;

(B) a nonprofit cemetery corporation authorized by AS 10.30.055;

(C) a person operating a crematory;

(D) a person operating a columbarium;

(E) a funeral home or other type of funeral establishment;

(F) a funeral director or an embalmer.

Sec. 13.75.195. Short title. This chapter may be cited as the Disposition of Human Remains Act.

*** Sec. 27.** AS 21.42.020 is amended by adding new subsections to read:

(e) Notwithstanding (a) of this section, a trustee, acting in a fiduciary capacity, may procure or cause to be procured an insurance contract that is on the life or body of an individual and under which the proceeds of the insurance contract are payable to the trustee, acting in a fiduciary capacity, if

(1) the trustee, acting in a fiduciary capacity, owns the insurance contract or the trust itself owns the insurance contract;

(2) on the date the contract is made, a settlor of the trust is the individual insured, has an insurable interest in the individual insured, or would have had an insurable interest in the individual insured if the settlor were living at the time the contract was made; in this paragraph, "settlor" has the meaning given in AS 13.36.390; and

(3) the proceeds of the contract are primarily for the benefit of a trust beneficiary who has an insurable interest in the individual insured, except that, if the determination of the trust beneficiary's insurable interest is based on (d)(1) of this section, the trust beneficiary's relation by blood or law must be within the third degree.

(f) A person who has an insurable interest in the life or body of an individual may form a business firm that is substantially or solely for the purpose of purchasing, holding, or administering an insurance contract on the life or body of the individual. In this subsection, "firm" has the meaning given in AS 21.97.900, but also includes a business trust and a joint venture.

*** Sec. 28.** AS 34.40 is amended by adding a new section to read:

Sec. 34.40.113. Transfers of individual retirement accounts. (a) Notwithstanding a provision in AS 09.38.017(d), AS 34.40.110, or another law to the contrary, a person may voluntarily transfer or assign the person's interest in an individual retirement account if the person

(1) is the owner of or a participant in the individual retirement account; or

(2) acquired the interest as a result of the death of another individual.

(b) In this section, "individual retirement account" means an individual retirement account established under 26 U.S.C. 408 or a Roth IRA established under 26 U.S.C. 408A.

*** Sec. 29.** AS 34.77.030(g) is amended to read:

(g) Whether or not the community property agreement provides that all property acquired by either or both spouses during the marriage is community property, and except to the extent otherwise expressly provided **by the spouses** in the community property agreement **or by the settlors in a community property trust,** property acquired by a spouse during marriage and after the determination date is individual property if acquired

(1) by gift or a disposition at death made by a third person to the spouse and not to both spouses;

(2) in exchange for or with the proceeds of other individual property of the spouse;

(3) from appreciation or income of the spouse's individual property except to the extent that the income or appreciation is classified as community property under AS 34.77.130;

(4) by a decree, community property agreement, written consent, or reclassification under AS 34.77.060(b) designating it as the individual property of the spouse;

(5) as a recovery for damage to property under AS 34.77.140, except as specifically provided otherwise in a decree, community property agreement, **community property trust,** or written consent; [OR]

(6) as a recovery for personal injury, except for the amount of the recovery attributable to expenses paid or otherwise satisfied from community property**; or**

(7) as a transfer to a community property trust and declared by the trust to be the individual property of the spouse.

*** Sec. 30.** AS 34.77.050(b) is amended to read:

(b) A gift of community property to a third person that is not allowed under (a) of this section is subject to **AS 34.77.140(e) - (h)** [(d) OF THIS SECTION] unless both spouses act together in making the gift or the other spouse ratifies the gift.

*** Sec. 31.** AS 34.77.110 is amended by adding new subsections to read:

(f) Property that spouses agree in a community property agreement is

community property or property that is transferred to a community property trust and expressly declared by the trust to be community property is owned as community property regardless of the form of title to the property, even if the title indicates that the property is owned unequally by the spouses or is only in the name of one spouse.

(g) If the title to community property is in a form that provides for ownership by survivorship between the spouses, then ownership by survivorship is presumed to have been made with the consent of both spouses.

(h) If a spouse with management and control of community property designates a beneficiary for the property on the death of one or both of the spouses, and if the community property is held in a form of title that permits a beneficiary designation, the beneficiary designation is effective only for the designating spouse's one-half interest in the community property unless the other spouse consents in writing to the designation. A designation of the following as the beneficiary is presumed to have been made with the consent of the other spouse:

(1) the other spouse or an ancestor or descendant of either spouse;

(2) a charity; or

(3) a trust, to the extent that the beneficiaries consist of persons or entities identified in (1) or (2) of this subsection.

(i) The testimony of one spouse is sufficient to rebut a presumption established under this section.

(j) A disposition of community property contrary to (e) - (h) of this section is voidable. An action in court to void the disposition must be commenced within the time specified by AS 34.77.140(e).

*** Sec. 32.** AS 34.77.140(d) is amended to read:

(d) Except as provided otherwise in **(e) - (h) of this section** [AS 34.77.050(d)], a spouse must begin an action against the other spouse under (a) of this section within three years after acquiring actual knowledge of the facts giving rise to the claim.

*** Sec. 33.** AS 34.77.140 is amended by adding new subsections to read:

(e) Except as provided by (f) - (h) of this section, if a gift of community property during marriage by a spouse does not comply with AS 34.77.050(a), the

nondonor spouse may bring an action to recover the property or the amount of money by which the gift exceeded the limit under AS 34.77.050(a). The nondonor spouse may bring the action against the donor spouse, the gift recipient, or both. The nondonor spouse must commence the action within the earliest of the following times:

(1) one year after the nondonor spouse receives notice of the gift;

(2) one year after dissolution of the marriage; or

(3) on or before the deadline for filing a claim under AS 13.16.460 after the death of the donor spouse.

(f) If a recovery under (e) of this section occurs during the marriage of the donor spouse and the nondonor spouse, the property or money that is recovered is considered community property. If the recovery occurs after the dissolution of the marriage of the donor and nondonor spouses or after the death of either the donor or the nondonor spouse, the recovery is limited to 50 percent of the property or money that would have been recovered if the recovery had occurred during the marriage.

(g) If a transfer of community property to a third person during marriage by a spouse acting without the other spouse becomes a completed gift on the death of the donor spouse, or if an arrangement involving community property during marriage by a spouse acting without the other spouse is intended to be and becomes a gift to a third person on the death of the donor spouse, the surviving spouse may bring an action in court against the gift recipient to recover one-half of the gift. To bring an action under this subsection, the surviving spouse must commence the action on or before the deadline for filing a claim under AS 13.16.460.

(h) If a spouse who would have been entitled to bring an action under (e) - (g) of this section predeceases the donor spouse, the deceased spouse's successor in interest may bring an action for recovery under (e) - (g) of this section, but the action must be commenced within one year after the deceased spouse's death. Recovery in an action under this subsection is the same as if the donor spouse had predeceased the spouse entitled to the recovery, but the amount of the recovery is calculated as of the date of the death of the spouse entitled to the recovery.

* **Sec. 34.** AS 13.38.330(c); AS 13.46.195(g); and AS 34.77.050(d) and 34.77.110(d) are repealed.

*** Sec. 35.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGE. AS 34.77.110(i), enacted by sec. 31 of this Act, has the effect of amending Rule 301(a), Alaska Rules of Evidence, by specifying the evidence that is sufficient to rebut a presumption under AS 34.77.110(i), enacted by sec. 31 of this Act.

*** Sec. 36.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 09.38.017(a), as amended by sec. 1 of this Act, AS 09.38.017(d), as amended by sec. 2 of this Act, and AS 09.38.017(e), as amended by sec. 3 of this Act, apply to a retirement plan that exists before, on, or after the effective date of this Act. In this section, "retirement plan" has the meaning given in AS 09.38.017(e), as amended by sec. 3 of this Act.

(b) AS 34.40.113, added by sec. 28 of this Act, applies to an individual retirement account that exists before, on, or after the effective date of this Act. In this section, "individual retirement account" means an individual retirement account established under 26 U.S.C. 408 or a Roth IRA established under 26 U.S.C. 408A.

*** Sec. 37.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. AS 34.77.110(i), enacted by sec. 31 of this Act, takes effect only if sec. 35 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

Brenda Nations
w/ the American
Council of Life
insurers would like
to talk to you about
SB 165 - princip. +
inc/probate

She has an amendment
She would like to
offer up.

512-394-0049

D.1

Cindy Smith

From: Brenda Nation <BrendaNation@acli.com>
Sent: Monday, January 30, 2012 12:32 PM
To: Cindy Smith
Subject: RE: AK SB 165 by Senate Judiciary Committee

Hi Cindy, this is good news!! Thanks so much for your help with this.
I would like to listen to the hearing, but there is no need for me to testify. Can I call in to listen, or will the hearing be available via Internet?

Brenda

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Monday, January 30, 2012 4:34 PM
To: Brenda Nation
Subject: RE: AK SB 165 by Senate Judiciary Committee

Brenda – I have runt his by the attorneys who are working on the bill and they have no problem with your suggested amendment to the definition of settlor. So as it moves through committee we will make this change.

If you would still like to testify on this issue, the call in number is 1 (855) 463-5009 and you'd just let the moderator know you'd like to testify on SB 165. The meeting starts at 1:30 pm. Alaska time and this bill is the first item on the agenda.

Let me know if you do decide to call in – I have to send your name in to the conference operators so they know to plug you into the meeting!

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Brenda Nation [mailto:BrendaNation@acli.com]
Sent: Friday, January 27, 2012 11:21 AM
To: Cindy Smith
Subject: AK SB 165 by Senate Judiciary Committee

Hi Cindy, thank you for speaking with me today. By way of introduction, I represent the American Council of Life Insurers (ACLI), a national trade association representing more than 300 legal reserve life insurers operating in the United States. Our members represent over 90% of the assets and premiums of the U.S. life insurance and annuity industry.

Our interest in SB 165 is with regard to Section 27 of the bill, relating to insurable interests for life insurance policies. We support the committee's proposed adoption of the language in this section, that for the most part, tracks the Insurable Interest Amendments to the Uniform Trust Code (UTC), which were adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in July, 2010 (attached). These amendments were drafted with much consideration by NCCUSL experts over their model recommendation for several years, and were given congratulatory recognition by ACLI when they were adopted.

ACLI actively participated in the NCCUSL effort from its beginning, voicing our concern in protecting against the problem of stranger-originated life insurance (STOLI) by inadvertently broadening the model insurable interest law with respect to trusts. The NCCUSL Drafting Committee's Reporter's Summary (attached) highlights this concern.

In SB 165, Section 27, AS 21.42.020(e)(2) states that the term "settlor" has the meaning given in AS 13.36.390, which reads: " 'settlor' means a person who transfers property in trust and includes a person who furnishes the property transferred to a trust even if the trust is created by another person." However, the NCCUSL insurable interest amendments define "settlor" more narrowly to mean "a person that executes a trust instrument. The term includes a person for which a fiduciary or agent is acting." An explanation for the change in the UTC definition of "settlor" is included in the comments attached to the NCCUSL Insurable Interest Amendments and reads in pertinent part:

With regard to language of the amendment, subsection (a) provides that the term "settlor "is limited to a person who executes the trust instrument. This is narrower than the UTC definition of "settlor," which, in addition to the person who executes the trust instrument, would include a person who merely contributes property to the trust. See UTC Section 103(15). As explained in the comment to Section 103(15), the broader definition serves a useful purpose in connection with the UTC generally; however, none of those situations relates to the issue of whose life should properly be the subject of a life insurance policy that is used to fund a trust. Moreover, to use the broader definition would needlessly complicate the issue of whose life should be the subject of insurance because it would be rare, if ever, that a life insurance policy used to fund a trust for estate planning purposes would be on the life of someone other than the settlor signing the trust or someone in whose life that settlor would have an insurable interest. Because there are situations in which a trust instrument will be executed by a fiduciary or agent for the creator of the trust, subsection (a) also makes clear that in such circumstances the fiduciary or agent is deemed to be the equivalent of the settlor.

ACLI respectfully requests that the reference to the current AK statutory definition of "settlor" be stricken and that the term be defined in the bill to track the NCCUSL Insurable Interest Amendments' definition of "settlor." **Our suggested amendment would be as follows on Page 22, lines 22 - 23:**

Sec. 27. AS 21.42.020 is amended by adding new subsections to read:
(e) Notwithstanding (a) of this section, a trustee, acting in a fiduciary capacity, may procure or cause to be procured an insurance contract that is on the life or body of an individual and under which the proceeds of the insurance contract are payable to the trustee, acting in a fiduciary capacity, if
(1) the trustee, acting in a fiduciary capacity, owns the insurance contract or the trust itself owns the insurance contract;
(2) on the date the contract is made, a settlor of the trust is the individual insured, has an insurable interest in the individual insured, or would have had an insurable interest in the individual insured if the settlor were living at the time the contract was made; in this paragraph, "settlor" ~~has the meaning given in AS 13.36.390~~ means a person that executes a trust instrument, and the term includes a person for which a fiduciary or agent is acting; and
(3) the proceeds of the contract are primarily for the benefit of a trust beneficiary who has an insurable interest in the individual insured, except that, if the

26 determination of the trust beneficiary's insurable interest is based on (d)(1) of this
27 section, the trust beneficiary's relation by blood or law must be within the third degree.
28 (f) A person who has an insurable interest in the life or body of an individual
29 may form a business firm that is substantially or solely for the purpose of purchasing,
30 holding, or administering an insurance contract on the life or body of the individual. In
31 this subsection, "firm" has the meaning given in AS 21.97.900, but also includes a
27-LS0819\B
SB0165A -23- SB 165
New Text Underlined [DELETED TEXT BRACKETED]
1 business trust and a joint venture.

We appreciate your consideration of this amendment, and I am available to discuss at your convenience. My contact information is below. I am based in Austin, Texas and so there's a three hour time difference between us.

Brenda Nation
American Council of Life Insurers | Financial Security...for Life.
Regional Vice President, State Relations
(512) 394-0049 t (866) 953-4112 f
brendanation@acli.com

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Washington, DC 20001-2133

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MANLEY & BRAUTIGAM
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OF COUNSEL
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January 31, 2012

VIA Fax
907-465-6595

Senator Hollis French
Alaska State Capitol, Room #417
Juneau, Alaska 99801

Re: Senate Bill No. 165

Dear Senator French:

I am writing to express my support for SB 165. 8B165 goes a long way to improve our Alaska Statues and is much needed to better meet the needs of Alaskans.

I know you are very familiar with this Bill. If you would like to discuss it, please call me.

Sincerely,

MANLEY & BRAUTIGAM, P.C.

By: Peter B. Brautigam

PBB:elh
cc: Governor Sean Parnell
Dave Shaftel
Beth Chapman
M:\Forms\PBBForms\00hold\SenatorFrench-ltr.wpd

Memorandum

TO:	**Senator Hollis French, Chairman of the Senate Judiciary Committee, Alaska State Legislature**
FROM:	**Beth Chapman and Dave Shaftel**
DATE:	**February 6, 2012**
RE:	**Section Analysis: Amendments to AS 13.36.157, Trustee's Power to Appoint to Another Trust**

Section _____. Existing Alaska Statute 13.36.157 provides a trustee with a method to modify an existing trust, commonly referred to as "decanting". Alaska enacted its "decanting" statute in 1998. Alaska copied New York's statute. At the present time, the following states have enacted decanting statutes: Alaska, Arizona, Delaware, Florida, Indiana, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, South Dakota, and Tennessee. In addition, decanting statutes are pending before Illinois, Michigan, and Virginia.

New York recently did a thorough revision of its decanting statute and enacted this new revised statute in 2011. The proposed amendment to Alaska's decanting statute closely tracks the changes made by New York with modifications necessary to accommodate Alaska's procedural provisions.

The purposes of a decanting statute are to allow a trustee to modify a trust in order to correct errors and to adjust to changed circumstances and laws. The revised draft distinguishes between trustees who have unlimited discretion and those without unlimited discretion. A trustee without unlimited discretion must maintain the same beneficiaries in the new trust and apply the same standard for distributions. The trustee cannot be a settlor or beneficiary of the trust, and has a fiduciary duty to exercise the power of appointment in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under prevailing circumstances. A trustee must exercise the power in writing and must give written notice to the settlor, any person having the right to remove or replace the trustee, and any qualified beneficiary. A beneficiary may object to the exercise if it is an abuse of discretion, or fails to comply with the trustee's duties stated above. Restrictions exist to protect mandatory distribution rights, tax benefits, and to prohibit the trustee from exercising the power to either increase the trustee's compensation or decrease the trustee's liability.

Implementation of irrevocable trusts is best accomplished if the law provides reasonable flexibility to adjust to changed circumstances and to correct errors. The reason why so many states have enacted decanting statutes is because of the need for this flexibility. Amendment to Alaska's decanting statute to include these revised provisions will benefit the residents of the state of Alaska, many of whom use lifetime or testamentary trusts to implement their estate planning purposes.

Memorandum

TO: **Senator Hollis French, Chairman of the Senate Judiciary Committee, Alaska State Legislature**
FROM: **David Shaftel & Caroline Wanamaker**
DATE: **February 3, 2012**
RE: **Amendments to Uniform Transfer to Minors Act**

During the hearing on Senate Bill 165 before the Senate Judiciary Committee, Senators McGuire and French requested information concerning the ages of distribution under the Act. In addition, Senator McGuire wanted to make sure that the amendments did not reduce the ages for distributions under the existing Act. These matters are discussed below.

Type of Transfer	Default Rule	Variations Permitted at Time Transfer is Made
Irrevocable Gift *AS 13.46.030*	Age 21 *AS 13.46.190(1)*	Age 18 to 25, with minor's right to compel distribution at age 21 *AS 13.46.195* *AS 13.46.080*
Exercise of Power of Appointment *AS 13.46.030*	Age 21 *AS 13.46.190(1)*	Age 18 to 25 *AS 13.46.195* *AS 13.46.080*
Personal Representative's or Trustee's Transfer Authorized by Will or Trust *AS 13.46.040*	Age 21 *AS 13.46.190(1)*	Age 18 to 25 *AS 13.46.195* *AS 13.46.080*
Personal Representative's or Trustee's transfer under Will or Trust that does not authorize transfer *AS 13.46.050*	Age 18 *AS 13.46.190(2)*	Cannot presently be changed
Transfer by Obligor *AS 13.46.060*	Age 18 *AS 13.46.190(2)*	Cannot presently be changed

The latest version of these amendments is not intended to change any of the above periods of time in which the custodian can presently retain the assets in the account. The main purpose of the amendments is to allow the custodian to increase the duration of time in which the assets remain in the account. However, the minor will have the right to compel immediate distribution of the assets to the minor during the six month period that begins on the date that is the age for distribution specified in accordance with the Act ("this chapter").

It is very important that these amendments maintain the qualification of a gift to an account as a "present interest" within the meaning of Section 2503(b) of the Internal Revenue Code. This will allow gifts of $13,000 or less each year to be gift tax-free.

Here are several examples of the intended goals of these amendments:

Example 1. *(AS 13.46.030 Gift)* Parent forms a UTMA account for child without specifying the age at which the account terminates and makes annual exclusion gifts of $13,000 a year. Because Parent did not vary the default age at the time of setting up the account, the age upon which the account terminates and the assets are distributed to the child is 21. As child nears the age of twenty-one years, custodian of the account decides that it would be in the best interests of the child to extend the duration of the account until age thirty. Custodian would give the child notice of this intention to extend the account. Notice would be given within the six month period prior to age twenty-one. The child would have the right to compel distribution at age twenty-one. If the child did not compel distribution during the six month period that begins at age twenty-one, then the assets would remain in the account until age thirty.

Example 2. *(AS 13.46.040 Gift)* Parent's will leaves assets to minor child. A provision in the will authorizes the personal representative of parent's estate to form a UTMA account for child without specifying the age of termination of the account.. Because Parent did not vary the default age at the time of setting up the account, the age upon which the account terminates and the assets are distributed to the child is 21. As child nears age twenty-one, custodian of the account decides that it would be wise to extend the account to age twenty-five. Child will have the right to compel distribution at age twenty-one. As child approaches age twenty-five, personal representative again decides that it would wise to postpone distribution, now until age thirty. Child will have the right to compel distribution at age twenty-five.

Example 3. *(AS 13.46.060 Transfer)* Due to a personal injury accident, debtor owes minor child $25,000. Debtor may pay this amount to a UTMA account with an appropriate custodian. As the child nears age eighteen, the custodian determines that it would be wise to extend the account until age thirty. Child has the right to compel distribution at age eighteen. If the child does not compel distribution, then the assets would remain in the account until age thirty.

Example 4. Assume that an account has been extended to age thirty and the custodian again decides that it would be wise to extend the account until age forty. The procedure for extension of time can be repeated again. The custodian would give the child notice during the six month period that proceeds age thirty. The child would have the right to compel distribution during the six month period that begins on the date that is the age for distribution specified by this chapter, which would be age thirty due to the prior extension of time.

SB 168

<TARGET><BILL>SB 168</BILL><SUBJECT>SB 168</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA COURT SYSTEM
State of Alaska
Office of the Administrative Director

SPONSOR STATEMENT
Senate Bill 168

Senate Bill 168 was introduced by request of the Alaska Supreme Court. The bill amends the statutory provisions that govern the geographic cost of living adjustments that apply to judges' and justices' salaries. Under the proposed legislation judges' and justices' geographic cost of living adjustments would be calculated in the same manner as for executive branch employees who are not represented by a union.

Under current law, and unlike other state employees, judges and justices have two caps on their cost of living adjustment. The first is an artificially low adjustment calculation; the second is a restriction on the portion of their salary to which the adjustment applies.

Alaska Statute 22.35.010 states that the geographic cost of living adjustment for judges and justices is limited to a maximum of 17.5% and applies only to the first $40,000 of their salary (for a maximum of $7,000). No other state employees are subject to these restrictions.

By comparison, the geographic cost of living adjustment applied to the salaries of attorneys in the executive branch in Barrow, Kotzebue and Nome is 36.92%, in Bethel it is 32.26%, and in Dillingham it is 27.75%. As with all state employees other than judges, those adjustments apply to the attorneys' full salaries. By capping judicial adjustments at $7,000, the judges in those same communities have an effective geographic cost of living adjustment of less than 5% of their salaries. Obviously, that does not fully offset the higher cost of living in those communities.

The severely limited cost of living adjustments are unfair to rural judges and they likely discourage qualified candidates from applying for judicial openings in rural Alaska. The attached bill is intended to address these problems.

Thank you for your consideration of this bill.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **SB168**
Fiscal Note Number
Publish Date

Identifier (file name) SB168-ACS-TRC-01-18-12
Title Geographic Differential for Judges
Sponsor
Requester Alaska Court System

Dept. Affected Alaska Court System
Appropriation Trial Courts
Allocation
OMB Component Number 768

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	765.8		765.8	765.8	765.8	765.8	765.8
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**765.8**	**0.0**	**765.8**	**765.8**	**765.8**	**765.8**	**765.8**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF	765.8		765.8	765.8	765.8	765.8	765.8
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**765.8**	**0.0**	**765.8**	**765.8**	**765.8**	**765.8**	**765.8**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version of fiscal note.

Prepared by Douglas Wooliver, Deputy Administrative Director
Division Alaska Court System
Approved by Christine Johnson, Administrative Director by Douglas Wooliver
Alaska Court System

Phone 907-463-4750
Date/Time 01/18/2012 2:00 p.m.
Date 1/18/2012

(Revised 11/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB168

Analysis

Senate Bill 168 amends the statutes governing the geographic cost of living adjustments that apply to judges' salaries. Under current law, and unlike all other state employees, judges have two caps on their cost of living adjustment. The first is an artifically low adjustment calculation; the second is a restriction on the amount of a judge's salary to which the adjustment applies.

Alaska Statute 22.35.010 states that the geographic cost of living adjustment for judges is limited to a maximum of 17.5% and applies only to the first $40,000 of their salary (for a maximum of $7,000). No other state employees are subject to these restrictions.

Senate Bill 168 fixes this discrepancy by deleting AS 22.35.010 and tying the geographic differentials received by judges to the statute that sets the geographic differentials for all other non-covered state employees.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **SB168**
Fiscal Note Number
Publish Date

Identifier (file name) SB168-ACS-APP-01-18-12
Title Geographic Differential for Judges
Sponsor
Requester Alaska Court System

Dept. Affected Alaska Court System
Appropriation Appellate Courts
Allocation
OMB Component Number 767

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	29.2		29.2	29.2	29.2	29.2	29.2
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**29.2**	**0.0**	**29.2**	**29.2**	**29.2**	**29.2**	**29.2**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF	29.2		29.2	29.2	29.2	29.2	29.2
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**29.2**	**0.0**	**29.2**	**29.2**	**29.2**	**29.2**	**29.2**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version of fiscal note.

Prepared by Douglas Wooliver, Deputy Administrative Director
Division Alaska Court System
Approved by Christine Johnson, Administrative Director by Douglas Wooliver
Alaska Court System

Phone 907-463-4750
Date/Time 01/18/2012 2:00 p.m.
Date 1/18/2012

(Revised 11/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB168

Analysis

Senate Bill 168 amends the statutes governing the geographic cost of living adjustments that apply to judges' salaries. Under current law, and unlike all other state employees, judges have two caps on their cost of living adjustment. The first is an artifically low adjustment calculation; the second is a restriction on the amount of a judge's salary to which the adjustment applies.

Alaska Statute 22.35.010 states that the geographic cost of living adjustment for judges is limited to a maximum of 17.5% and applies only to the first $40,000 of their salary (for a maximum of $7,000). No other state employees are subject to these restrictions.

Senate Bill 168 fixes this discrepancy by deleting AS 22.35.010 and tying the geographic differentials received by judges to the statute that sets the geographic differentials for all other non-covered state employees.

Alaska Court System

Review of Geographic Differentials[1]

Court Locations w/Geographic Differentials	FY13 Base Salary (with 2% COLA)	Statutory Judicial Geo-Diff %	Current Judicial Statutory Geo Diff Payment Per Judge By Location (on $40,000)	Statutory Judicial Geo-Diff % Paid Individual Judge on Full Salary
Appellate Courts:				
Fairbanks (1)	197,654	3.5%	1,400	6,918
Juneau (1)	197,654	0.0%	-	-
Superior Courts:				
Barrow (1)	181,440	17.5%	7,000	31,752
Bethel (2)	181,440	17.5%	7,000	31,752
Dillingham (1)	181,440	17.5%	7,000	31,752
Fairbanks (6)	181,440	3.5%	1,400	6,350
Juneau (2)	181,440	0.0%	-	-
Kenai (3)	181,440	0.0%		-
Kodiak (1)	181,440	10.5%	4,200	19,051
Kotzebue (1)	181,440	17.5%	7,000	31,752
Nome (1)	181,440	17.5%	7,000	31,752
Palmer (4)	181,440	0.0%		-
Sitka (1)	181,440	0.0%	-	-
District Courts:				
Bethel (1)	153,840	17.5%	7,000	26,922
Fairbanks (3)	153,840	3.5%	1,400	5,384
Homer (1)	153,840	0.0%	-	-
Juneau (2)	153,840	0.0%	-	-
Kenai (1)	153,840	0.0%	-	-
Palmer (4)	153,840	0.0%	-	-
Valdez (1)	153,840	10.5%	4,200	16,153

Increased Cost of Change to Differentials	**249,199**

[1] As is the case with other state employees, some judges currently receive a geographic differential. Unlike other state employees, however, a judge's geographic differential is calculated only upon the first $40,000 of salary, not the entire salary. Additionally, the geographic differential paid to some judges is substantially lower than the differential paid to other state employees in the same location. For example, second district judges in Kotzebue are paid a 17.5% geographic differential, while other state employees in this community are paid 51% and will be paid 60% if the FY13 rates proposed by the unions are accepted.

Alaska Court System

Review of Geographic Differentials[1]

Court Locations w/Geographic Differentials	FY13 Base Salary (with 2% COLA)	Statutory Judicial Geo-Diff %	Current Geographic Differential Payment Per Judge By Location	Non-Covered Geo-Diff % Applicable to Exempt Employees	Non-Covered Geo-Diff % Paid on Judge's Full Salary	Union Geo-Diff % Proposed for FY13	Union Geo-Diff % Paid on Judge's Full Salary
Appellate Courts:							
Fairbanks (1)	197,654	3.5%	1,400	15.2%	29,984	3.0%	5,930
Juneau (1)	197,654	0.0%	-	0.0%	-	5.0%	9,883
Superior Courts:							
Barrow (1)	181,440	17.5%	7,000	36.9%	66,988	50.0%	90,720
Bethel (2)	181,440	17.5%	7,000	32.3%	58,533	50.0%	90,720
Dillingham (1)	181,440	17.5%	7,000	27.8%	50,350	37.0%	67,133
Fairbanks (6)	181,440	3.5%	1,400	15.2%	27,524	3.0%	5,443
Juneau (2)	181,440	0.0%	-	0.0%	-	5.0%	9,072
Kenai (3)	181,440	0.0%		7.5%	13,608	0.0%	-
Kodiak (1)	181,440	10.5%	4,200	7.5%	13,608	11.0%	19,958
Kotzebue (1)	181,440	17.5%	7,000	36.9%	66,988	60.0%	108,864
Nome (1)	181,440	17.5%	7,000	36.9%	66,988	37.0%	67,133
Palmer (4)	181,440	0.0%		3.6%	6,532	0.0%	-
Sitka (1)	181,440	0.0%	-	3.6%	6,532	5.0%	9,072
District Courts:					-		-
Bethel (1)	153,840	17.5%	7,000	32.3%	49,629	50.0%	76,920
Fairbanks (3)	153,840	3.5%	1,400	15.2%	23,338	3.0%	4,615
Homer (1)	153,840	0.0%	-	7.50%	11,538	0.0%	-
Juneau (2)	153,840	0.0%	-	0.0%	-	5.0%	7,692
Kenai (1)	153,840	0.0%	-	7.50%	11,538	0.0%	-
Palmer (4)	153,840	0.0%	-	3.60%	5,538	0.0%	-
Valdez (1)	153,840	10.5%	4,200	19.1%	29,383	11.0%	16,922
Total Gross Wages for All Judges			71,400		844,853		734,008
Fringe Benefits @ 2.8%			1,999		23,656		20,552
			73,399		868,509		754,560
Increased Cost of Changes to Differentials					**795,110**		**681,161**

[1] As is the case with other state employees, some judges currently receive a geographic differential. Unlike other state employees, however, a judge's geographic differential is calculated only upon the first $40,000 of salary, not the entire salary. Additionally, the geographic differential paid to some judges is substantially lower than the differential paid to other state employees in the same location. For example, second district judges in Kotzebue are paid a 17.5% geographic differential, while other state employees in this community are paid 51% and will be paid 60% if the FY13 rates proposed by the unions are accepted.

1/30/2012

Prepared by Rhonda McLeod, Alaska Court System

CS FOR SENATE BILL NO. 168(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to geographic cost-of-living salary adjustments for justices of the supreme court and judges of the superior and district courts; and providing for an effective date."

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

* **Section 1.** AS 22.35.010 is amended to read:

Sec. 22.35.010. Geographic cost-of-living adjustment. The following geographic cost-of-living adjustments apply to [THE FIRST $40,000 OF] the base salary of a justice of the supreme court or a judge of the superior or district court earned during a fiscal year:

Location of Primary Office	Percent Change
First Judicial District	0
Second Judicial District	17.5
Third Judicial District other than **Dillingham,** Kodiak, and Valdez	0

Dillingham	**17.5**
Kodiak and Valdez	10.5
Fourth Judicial District other than Bethel	3.5
Bethel	17.5.

* **Sec. 2.** This Act takes effect July 1, 2012.

27-LS1181\M
Bailey
3/14/12

CS FOR SENATE BILL NO. 168(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to geographic cost-of-living salary adjustments for justices of the supreme court and judges of the superior and district courts; and providing for an effective date."

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

* **Section 1.** AS 22.35.010 is amended to read:

Sec. 22.35.010. Geographic cost-of-living adjustment. The following geographic cost-of-living adjustments apply to [THE FIRST $40,000 OF] the base salary of a justice of the supreme court or a judge of the superior or district court earned during a fiscal year:

Location of Primary Office	Percent Change
First Judicial District	0
Second Judicial District	17.5
Third Judicial District other than **Dillingham,** Kodiak, and Valdez	0

New Text Underlined [DELETED TEXT BRACKETED]

Dillingham	**17.5**
Kodiak and Valdez	10.5
Fourth Judicial District other than Bethel	3.5
Bethel	17.5.

*** Sec. 2.** This Act takes effect July 1, 2012.

ALASKA COURT SYSTEM
State of Alaska
Office of the Administrative Director

820 West 4th Avenue
Anchorage, Alaska 99501-2005
(907) 264-8265
FAX (907) 264-8291

Doug Wooliver
Deputy Administrative Director

March 23, 2012

The Honorable Hollis French
Chair, Senate Judiciary Committee
State Capitol, Room 417
Juneau, Alaska 99801

Dear Senator French:

The current statute governing geographic pay differentials for judges limits the rate of the differential to a maximum of 17.5% and applies only to the first $40,000 of a judge's salary (17.5% of $40,000 is $7,000). Because that amount of differential does not fully cover the increased cost of living in many rural communities, the court system requested the introduction of SB 168. That bill would have applied to judges' salaries the same geographic pay differentials that apply to the salaries of most other non-union state employees.

The attached draft committee substitute takes a different approach. Instead of changing the differential rates for judges the CS preserves the current rates, but removes the $40,000 cap. It also adds Dillingham to the statute[1].

This alternative to SB 168 has the effect of increasing rural court judge's geographic differentials from a maximum of $7,000 to a maximum of $31,752. Although the draft CS applies lower differential rates to the salaries of judges than are applied to the salaries of other state employees, the actual dollar amount of the differential is similar to that received by many of the state attorneys practicing in rural Alaska.

The draft CS is an approach that the court system considered a likely amendment to the original bill and is one that we support.

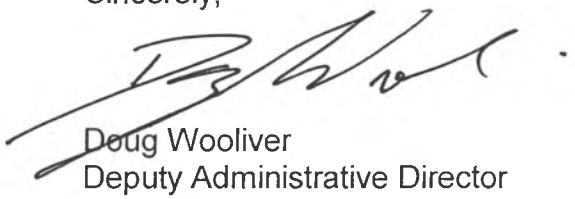
---

[1] At the time the original geographic pay differential statute was adopted there was not a resident superior court judge in Dillingham. However, since that judgeship was created in 1996 the court has always provided that judge with the same geographic differential received by other judges in the region.

The draft CS also reduces our fiscal notes from a total of $795,110 to $241,199, which we hope will addresses the "sticker shock" associated with the original bill.

Thank you for your consideration of this draft CS and please let me know if you have any questions.

Sincerely,



Doug Wooliver
Deputy Administrative Director
Alaska Court System

27-LS1268\A.1
Bailey
2/24/12

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 300

Page 1, line 5, through page 2, line 9:

Delete all material and insert:

"* **Section 1.** AS 22.35.010 is amended to read:

Sec. 22.35.010. Geographic cost-of-living adjustment. The following geographic cost-of-living adjustments apply to [THE FIRST $40,000 OF] the base salary of a justice of the supreme court or a judge of the superior or district court earned during a fiscal year:

Location of Primary Office	Percent Change
First Judicial District	0
Second Judicial District	17.5
Third Judicial District other than **Dillingham,** Kodiak, and Valdez	0
Dillingham	**17.5**
Kodiak and Valdez	10.5
Fourth Judicial District other than Bethel	3.5
Bethel	17.5"

Renumber the following bill section accordingly.

ALASKA COURT SYSTEM
State of Alaska
Office of the Administrative Director

820 West 4th Avenue
Anchorage, Alaska 99501-2005
(907) 264-8265
FAX (907) 264-8291

Doug Wooliver
Deputy Administrative Director

January 18, 2012

The Honorable Hollis French
Chair, Senate Judiciary Committee
State Capitol Room 417
Juneau, Alaska 99801

Dear Senator French:

The Alaska Court System respectfully requests that the Senate Judiciary Committee schedule a committee hearing for SB 168.

Senate Bill 168 was introduced by request of the Alaska Supreme Court. The bill amends the statutory provisions that govern the geographic cost of living adjustments that apply to judges' and justices' salaries. Under the proposed legislation judges' and justices' geographic cost of living adjustments would be calculated in the same manner as for executive branch employees who are not represented by a union.

Under current law, and unlike other state employees, judges and justices have two caps on their cost of living adjustment. The first is an artificially low adjustment calculation; the second is a restriction on the portion of their salary to which the adjustment applies.

Alaska Statute 22.35.010 states that the geographic cost of living adjustment for judges and justices is limited to a maximum of 17.5% and applies only to the first $40,000 of their salary (for a maximum of $7,000). No other state employees are subject to these restrictions.

By comparison, the geographic cost of living adjustment applied to the salaries of attorneys in the executive branch in Barrow, Kotzebue and Nome is 36.92%, in Bethel it is 32.26%, and in Dillingham it is 27.75%. As with all state employees other than judges, those adjustments apply to the attorneys' full salaries. By capping judicial adjustments at $7,000, the judges in those same communities have an effective geographic cost of living adjustment of less than 5% of their salaries. Obviously, that does not fully offset the higher cost of living in those communities.

The severely limited cost of living adjustments are unfair to rural judges and they likely

discourage qualified candidates from applying for judicial openings in rural Alaska. The attached bill is intended to address these problems.

Thank you for your consideration of this request.

Doug Wooliver
Deputy Administrative Director
Alaska Court System

SB 172

<TARGET><BILL>SB 172</BILL><SUBJECT>SB 172</SUBJECT><COMM>SJUD27</COMM></TARGET>

Senator Fred Dyson

SPONSOR STATEMENT

SB 172 – An Act Relating to Health Care Decisions, Including Do Not Resuscitate Orders

The purpose of this bill is to provide for the protection of a patient's right to prevent a physician from issuing a Do Not Resuscitate (DNR) order on the patient without the expressed consent of that patient, or if the patient lacks capacity, without the expressed consent of the authorized agent of the patient, or, if no one is available or known to be authorized to speak for the patient and the patient lacks capacity, without the concurrence of a second physician.

In 2004 the Alaska Legislature drafted the current AS 13.52 *Health Care Decisions Act.* The Legislature included language in AS 13.52.120(a) establishing a *presumption in favor of life.* Legislative Legal states the language of the Health Care Decision Act, when read in its entirety, supports interpreting the chapter to allow a patient (or the patient's authorized representative) to prevent a physician from issuing a DNR order, but that ambiguities in the chapter could result in other interpretations.

This ambiguity in statute allows unnecessary emotional and mental anguish to Alaskan residents faced with critical end of life decisions. SB 172 clarifies the authority of DNR decisions with respect to patients and physicians, and amends the Alaska Health Care Directive form to allow patients to accept or refuse life-sustaining procedures.

Contact: Chuck Kopp, Staff to Senator Fred Dyson, (907)465-2199

SENATOR FRED DYSON

CSSB 172 - Section Analysis

Section 1. Amends AS 13.52.045 *Withholding or withdrawing of life-sustaining procedures.*
A Do-Not-Resuscitate (DNR) order does not prevent a health care institution or facility from providing life-sustaining procedures (i.e. assisted ventilation and intubation, blood transfusions, antibiotics, dialysis, artificial nutrition and hydration) to the patient.

Section 2. Amends AS 13.52.060(e) *Obligations of health care providers, institutions, and facilities.*
A health care provider may not decline to comply with a DNR order for reasons of conscience if the order is consistent with the provisions of AS 13.52; nor can a health care provider, health care institution or facility decline to comply with an individual instruction or a health care decision that requests that a do not resuscitate order be made ineffective, except as provided by AS 13.52.030(h).

Section 3. Amends AS 13.52.060(f) *Obligations of health care providers, institutions, and facilities.*
A health care provider, health care institution or facility may not decline to comply with an individual instruction or health care decision that requests that a do not resuscitate order be made ineffective, except as provided by AS 13.52.030(h).

Section 4. Amends AS 13.52.065(a) *Do not resuscitate protocol and identification requirements.*
A physician may issue a DNR order for a patient of the physician only as provided in this section.

Section 5. Amends AS 13.52.065(b) to state that the protocol adopted by DHSS for withholding of CPR by health care providers and institutions must comply with this section.

Section 6. Amends AS 13.52.065 by adding new subsections-
(g) a physician may not issue a DNR order without the express consent of the patient, if the patient has capacity and is 18 years or older; consent may also be provided by an advance health care directive or by a person authorized to make health care decisions for the patient.

(h) a physician may issue a DNR without the express consent required in (g) if patient does not have capacity, no one is authorized to make health care decisions for patient, and,

(1) patient has advance health care directive which indicates patient wants a DNR order; or,

(2) patient has advance health care directive which is silent about issuance of a DNR order and another physician concurs in the decision to issue a DNR order; or

(3) patient does not have an advance health care directive, and another physician concurs in the decision to issue a do not resuscitate order.

(i) a physician shall revoke a DNR order for a patient if
(1) DNR order violates (g) of this section;
(2) patient has capacity and requests DNR be revoked;
(3) patient does not have capacity, patient does not have advance health care directive that indicates patient wants a DNR order, and a person authorized to make health care decisions for the patient requests the revocation of the DNR order; or
(4) patient is under 18 years of age and parent or guardian of patient requests that the DNR order be revoked.

(j) a physician may revoke a DNR order issued by another physician for a patient, if the physician has a physician-patient relationship with the patient.

Section 7. Amends AS 13.52.080(a) *Immunities*
Amends AS 13.52.080(a) to replace a citation to a subsection that is repealed by this bill (AS 13.52.065(f) *Do not resuscitate protocol and identification requirements*).

Section 8. Amends AS 13.52.300 the *Optional form* used to create an advance health care directive. A new section, *Life-Sustaining Procedures*, is added under Part 2 – Instructions for Health Care, (6)End-of-Life Decisions, giving patients the opportunity to accept or decline life-sustaining procedures, or identify specific life-sustaining procedures they wish to receive.

Section 9. Amends AS 13.52.390(17) *Definitions*
The definition for "Health care decision" is expanded to include *a direction relating to the provision of cardiopulmonary resuscitation or other resuscitative measures;*

Section 10. Repeals AS 13.52.065(f), which currently addresses how DNR orders are made ineffective.

Section 11. Adds a provision to indicate how DNR orders made before the bill's effective date are to be treated in light of the bill.

SENATOR FRED DYSON

CSSB 172 (27-LS0991\D) – EXPLANATION OF CHANGES

The substantive changes in Committee Substitute for SB 172 as introduced on 01/20/12 are as follows:

1. Section 2, p. 2, line 3; and Section 3, p. 2, line 12 – INSERT - **except as provided in AS 13.52.030(h)** to clarify that health care providers may decline to comply with a decision of a surrogate who the health care provider observes is not abiding by the wishes, values and best interest of the patient.

2. Section 2, p. 2, lines 5 – 6, and Section 3, p. 2, lines 14 - 15 –
DELETE - [cardiopulmonary resuscitation or other resuscitative measures be provided];
INSERT - **a do not resuscitate order be made ineffective**.

   This reflects the narrow focus of the bill to protect patients from being subject to DNR orders against their consent, and is consistent with current statutory language in AS 13.52.065(f).

3. Section 3, p.2, line 13 - DELETE [advance health care directive] and INSERT **individual instruction**.

   This language change was the original draft intent of Legislative Legal, and is a correction to keep language internally consistent within AS 13.52.060, subsection (f), and with the purpose of the bill.

4. Section 6, p. 3, adds new subsection (h)(3) – when physicians may issue do not resuscitate orders without express consent of patient.

   This particular situation was not previously addressed.

5. Section 6, p. 3, lines 19 and 20 – DELETE [subsection (i)(3)].

   This change recognizes that in the case of a patient who does not have capacity, a dated advance health care directive may not reflect the current wishes, values and best interest of the patient.

6. Section 6, p. 3, lines 23 and 24 – DELETE [or does not oppose]

   This change removes ambiguity.

7. Section 6, p.3, lines 29 – 31, and p.4, lines 1 and 2 - DELETE [; or (2) health care obligation to the patient arising out of the physician's (A) individual relationship with the patient; or (B) employment by the health care institution or health care facility where the patient is being treated.]

   This language change keeps the relationship more narrowly defined to the physician-patient relationship. It provides less complication and is consistent with current chapter language in 13.52.065.

8. Section 8, p. 5, lines 11 - 14 - DELETE all amended language.

   Current statutory language in AS 13.52.080 *Immunities,* and AS 13.52.090 *Statutory Damages* adequately covers health care provider, health care institution and health care facility immunity and liability considerations.

9. Section 9, p. 5, line 16, 20 & 21- DELETE all amended language.

   See comment on #10 below.

10. Section 10, p. 5, lines 29 - 31 and p. 6, lines 1 - 3- DELETE all new subsection language.

    Section 13.52.120(b) already states that withholding or withdrawing of CPR or other life sustaining procedures must be *consistent with this chapter*, and statutory language in AS 13.52.080 *Immunities,* and AS 13.52.090 *Statutory Damages* adequately covers health care provider, health care institution and health care facility immunity and liability considerations.

11. Section 11, p.13, lines 2 - 11 – *Life-Sustaining Procedures.* In addition to the options of receiving or not receiving life-sustaining procedures, an additional option is provided to allow for a patient to select specific life-sustaining procedures so that this is not an "all or none" proposition when electing to receive or not receive life-sustaining procedures.

27-LS0991\D
Bannister
3/1/12

CS FOR SENATE BILL NO. 172( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS DYSON, Davis, Coghill, McGuire, Olson

A BILL

FOR AN ACT ENTITLED

"An Act relating to health care decisions, including do not resuscitate orders."

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

*** Section 1.** AS 13.52.045 is amended by adding a new subsection to read:

(b) A health care institution or health care facility may not interpret the issuance of a do not resuscitate order for a patient as preventing the health care institution or health care facility from providing life-sustaining procedures to the patient.

*** Sec. 2.** AS 13.52.060(e) is amended to read:

(e) A health care provider may decline to comply with an individual instruction or a health care decision for reasons of conscience, except **that a health care provider may not decline to comply with** [FOR] a do not resuscitate order **that is consistent with this chapter for reasons of conscience**. A health care institution or health care facility may decline to comply with an individual instruction or health care decision if the instruction or decision is contrary to a policy of the institution or facility that is expressly based on reasons of conscience and if the policy was timely

communicated to the patient or to a person then authorized to make health care decisions for the patient. **Notwithstanding the other provisions of this subsection, this subsection does not, except as provided by AS 13.52.030(h), allow a health care provider, health care institution, or health care facility to decline to comply with an individual instruction or a health care decision that requests that a do not resuscitate order be made ineffective.**

*** Sec. 3.** AS 13.52.060(f) is amended to read:

(f) A health care provider, health care institution, or health care facility may decline to comply with an individual instruction or a health care decision that requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the provider, institution, or facility. **Notwithstanding the other provisions of this subsection, this subsection does not, except as provided by AS 13.52.030(h), allow a health care provider, health care institution, or health care facility to decline to comply with an individual instruction or a health care decision that a requests that do not resuscitate order be made ineffective.** In this subsection, "medically ineffective health care" means health care that according to reasonable medical judgment cannot cure the patient's illness, cannot diminish its progressive course, and cannot effectively alleviate severe discomfort and distress.

*** Sec. 4.** AS 13.52.065(a) is amended to read:

(a) A physician may issue a do not resuscitate order for a patient of the physician **only as provided in this section**. The physician shall document the grounds for the order in the patient's medical file.

*** Sec. 5.** AS 13.52.065(b) is amended to read:

(b) The department shall by regulation adopt a protocol, subject to the approval of the State Medical Board, for do not resuscitate orders that sets out a standardized method of procedure for the withholding of cardiopulmonary resuscitation by health care providers and health care institutions. **The protocol adopted by the department must comply with this section.**

*** Sec. 6.** AS 13.52.065 is amended by adding new subsections to read:

(g) Except as provided in (h) of this section, a physician may not issue a do not resuscitate order for a patient of the physician without the express consent of

(1) the patient, if the patient has capacity and is 18 years of age or older; under this paragraph, the consent may be provided by an advance health care directive; or

(2) a person authorized to make health care decisions for the patient.

(h) A physician may issue a do not resuscitate order for a patient of the physician without the express consent required by (g) of this section if the patient does not have capacity, no person is authorized to make health care decisions for the patient, and,

(1) if the patient has an advance health care directive, the directive indicates that the patient wants a do not resuscitate order;

(2) if the patient has an advance health care directive, the directive is silent about the issuance of a do not resuscitate order and another physician concurs in the decision to issue a do not resuscitate order; or

(3) if the patient does not have an advance health care directive, another physician concurs in the decision to issue a do not resuscitate order.

(i) A physician shall revoke a do not resuscitate order issued for a patient if

(1) the issuance of the do not resuscitate order violates (g) of this section;

(2) except as provided in (4) of this subsection, the patient has capacity and requests that the do not resuscitate order be revoked;

(3) the patient does not have capacity, the patient does not have an advance health care directive that indicates that the patient wants a do not resuscitate order, and a person authorized to make health care decisions for the patient requests the revocation of the do not resuscitate order; or

(4) the patient is under 18 years of age and the parent or guardian of the patient requests that the do not resuscitate order be revoked.

(j) A physician may revoke a do not resuscitate order issued by another physician for a patient, if the physician has a physician-patient relationship with the patient.

* **Sec. 7.** AS 13.52.080(a) is amended to read:

(a) A health care provider or health care institution that acts in good faith and

in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for

(1) providing health care information in good faith under AS 13.52.070;

(2) complying with a health care decision of a person based on a good faith belief that the person has authority to make a health care decision for a patient, including a decision to withhold or withdraw health care;

(3) declining to comply with a health care decision of a person based on a good faith belief that the person then lacked authority;

(4) complying with an advance health care directive and assuming in good faith that the directive was valid when made and has not been revoked or terminated;

(5) participating in the withholding or withdrawal of cardiopulmonary resuscitation under the direction or with the authorization of a physician or upon discovery of do not resuscitate identification upon an individual;

(6) causing or participating in providing cardiopulmonary resuscitation or other life-sustaining procedures

(A) under AS 13.52.065(e) when an individual has made an anatomical gift;

(B) because an individual has made a do not resuscitate order ineffective under **AS 13.52.065** [AS 13.52.065(f)] or another provision of this chapter; or

(C) because the patient is a woman of childbearing age and AS 13.52.055 applies; or

(7) acting in good faith under the terms of this chapter or the law of another state relating to anatomical gifts.

*** Sec. 8.** AS 13.52.300 is amended to read:

Sec. 13.52.300. Optional form. The following sample form may be used to create an advance health care directive. The other sections of this chapter govern the effect of this or any other writing used to create an advance health care directive. This

form may be duplicated. This form may be modified to suit the needs of the person, or a different form that complies with this chapter may be used, including the mandatory witnessing requirements:

ADVANCE HEALTH CARE DIRECTIVE

Explanation

You have the right to give instructions about your own health care to the extent allowed by law. You also have the right to name someone else to make health care decisions for you to the extent allowed by law. This form lets you do either or both of these things. It also lets you express your wishes regarding the designation of your health care provider. If you use this form, you may complete or modify all or any part of it. You are free to use a different form if the form complies with the requirements of AS 13.52.

Part 1 of this form is a durable power of attorney for health care. A "durable power of attorney for health care" means the designation of an agent to make health care decisions for you. Part 1 lets you name another individual as an agent to make health care decisions for you if you do not have the capacity to make your own decisions or if you want someone else to make those decisions for you now even though you still have the capacity to make those decisions. You may name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. Unless related to you, your agent may not be an owner, operator, or employee of a health care institution where you are receiving care.

Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you that you could legally make for yourself. This form has a place for you to limit the authority of your agent. You do not have to limit the authority of your agent if you wish to rely on your agent for all health care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right, to the extent allowed by law, to

(a) consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition, including the administration or discontinuation of psychotropic medication;

(b) select or discharge health care providers and institutions;

(c) approve or disapprove proposed diagnostic tests, surgical procedures, and programs of medication;

(d) direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care; and

(e) make an anatomical gift following your death.

Part 2 of this form lets you give specific instructions for any aspect of your health care to the extent allowed by law, except you may not authorize mercy killing, assisted suicide, or euthanasia. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, including the provision of artificial nutrition and hydration, as well as the provision of pain relief medication. Space is provided for you to add to the choices you have made or for you to write out any additional wishes.

Part 3 of this form lets you express an intention to make an anatomical gift following your death.

Part 4 of this form lets you make decisions in advance about certain types of mental health treatment.

Part 5 of this form lets you designate a physician to have primary responsibility for your health care.

After completing this form, sign and date the form at the end and have the form witnessed by one of the two alternative methods listed below. Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health care agents you have named. You should talk to the person you have

named as your agent to make sure that the person understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health care directive or replace this form at any time, except that you may not revoke this declaration when you are determined not to be competent by a court, by two physicians, at least one of whom shall be a psychiatrist, or by both a physician and a professional mental health clinician. In this advance health care directive, "competent" means that you have the capacity

(1) to assimilate relevant facts and to appreciate and understand your situation with regard to those facts; and

(2) to participate in treatment decisions by means of a rational thought process.

PART 1

DURABLE POWER OF ATTORNEY FOR
HEALTH CARE DECISIONS

(1) DESIGNATION OF AGENT. I designate the following individual as my agent to make health care decisions for me:

_____

(name of individual you choose as agent)

_____

(address) (city) (state) (zip code)

_____

(home telephone) (work telephone)

OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able, or reasonably available to make a health care decision for me, I designate as my first alternate agent

_____

(name of individual you choose as first alternate agent)

_____

(address) (city) (state) (zip code)

_____

(home telephone) (work telephone)

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent

_____

(name of individual you choose as second alternate agent)

_____

(address) (city) (state) (zip code)

_____

(home telephone) (work telephone)

(2) AGENT'S AUTHORITY. My agent is authorized and directed to follow my individual instructions and my other wishes to the extent known to the agent in making all health care decisions for me. If these are not known, my agent is authorized to make these decisions in accordance with my best interest, including decisions to provide, withhold, or withdraw artificial hydration and nutrition and other forms of health care to keep me alive, except as I state here:

_____

_____

_____

(Add additional sheets if needed.)

Under this authority, "best interest" means that the benefits to you resulting from a treatment outweigh the burdens to you resulting from that treatment after assessing

(A) the effect of the treatment on your physical, emotional, and cognitive functions;

(B) the degree of physical pain or discomfort caused to you by the treatment or the withholding or withdrawal of the treatment;

(C) the degree to which your medical condition, the treatment, or the withholding or withdrawal of treatment, results in a severe and continuing impairment;

(D) the effect of the treatment on your life expectancy;

(E) your prognosis for recovery, with and without the treatment;

(F) the risks, side effects, and benefits of the treatment or the withholding of treatment; and

(G) your religious beliefs and basic values, to the extent that these may assist in determining benefits and burdens.

(3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE. Except in the case of mental illness, my agent's authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box. In the case of mental illness, unless I mark the following box, my agent's authority becomes effective when a court determines I am unable to make my own decisions, or, in an emergency, if my primary physician or another health care provider determines I am unable to make my own decisions. If I mark this box, my agent's authority to make health care decisions for me takes effect immediately.

(4) AGENT'S OBLIGATION. My agent shall make health care decisions for me in accordance with this durable power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

(5) NOMINATION OF GUARDIAN. If a guardian of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able, or reasonably available to act as guardian, I nominate the alternate agents whom I have named under (1) above, in the order designated.

PART 2

INSTRUCTIONS FOR HEALTH CARE

If you are satisfied to allow your agent to determine what is best for you in making health care decisions, you do not need to fill out this part of the form. If you do fill out this part of the form, you may strike any wording you do not want. There is a state protocol that governs the use of do not resuscitate orders by physicians and other health care providers. You may obtain a copy of the protocol from the Alaska Department of Health and Social Services. A "do not resuscitate order" means a directive from a licensed physician that emergency cardiopulmonary resuscitation should not be administered to you.

(6) END-OF-LIFE DECISIONS. Except to the extent prohibited by law, I direct that my health care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have marked below: (Check only one box.)

(A) [ ] Choice To Prolong Life

I want my life to be prolonged as long as possible within the limits of generally accepted health care standards; OR

(B) [ ] Choice Not To Prolong Life

I want comfort care only and I do not want my life to be prolonged with medical treatment if, in the judgment of my physician,

I have (check all choices that represent your wishes)

[ ] (i) a condition of permanent unconsciousness: a condition that, to a high degree of medical certainty, will last permanently without improvement; in which, to a high degree of medical certainty, thought, sensation, purposeful action, social interaction, and awareness of myself and the environment are absent; and for which, to a high degree of medical certainty, initiating or continuing life-sustaining procedures for me, in light of my medical outcome, will provide only minimal medical benefit for me; or

[ ] (ii) a terminal condition: an incurable or irreversible illness or injury that without the administration of life-sustaining procedures will result in my death in a short period of time, for which there is no

reasonable prospect of cure or recovery, that imposes severe pain or otherwise imposes an inhumane burden on me, and for which, in light of my medical condition, initiating or continuing life-sustaining procedures will provide only minimal medical benefit;

[ ] Additional instructions:_____

_____

(C) Artificial Nutrition and Hydration. If I am unable to safely take nutrition, fluids, or nutrition and fluids (check your choices or write your instructions),

[ ] I wish to receive artificial nutrition and hydration indefinitely;

[ ] I wish to receive artificial nutrition and hydration indefinitely, unless it clearly increases my suffering and is no longer in my best interest;

[ ] I wish to receive artificial nutrition and hydration on a limited trial basis to see if I can improve;

[ ] In accordance with my choices in (6)(B) above, I do not wish to receive artificial nutrition and hydration.

[ ] Other instructions: _____

_____

(D) Relief from Pain.

[ ] I direct that adequate treatment be provided at all times for the sole purpose of the alleviation of pain or discomfort; or

[ ] I give these instructions:

_____

_____

(E) **Life-Sustaining Procedures. "Life-sustaining procedures" means any medical treatment, procedure, or intervention that may keep you alive but will not remove your terminal condition or remove permanent unconsciousness; "life-sustaining procedures" includes assisted ventilation, renal dialysis, surgical procedures, blood transfusions, and the administration of drugs, including**

antibiotics, or artificial nutrition and hydration.

[ ] I wish to receive all life-sustaining procedures.

[ ] I do not wish to receive any life-sustaining procedures.

[ ] I wish to receive the following life-sustaining procedures:

_____

_____

_____

_____

(F) Should I become unconscious and I am pregnant, I direct that

_____

_____

(7) OTHER WISHES. (If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that

_____

_____

Conditions or limitations: _____

_____.

(Add additional sheets if needed.)

PART 3

ANATOMICAL GIFT AT DEATH

(OPTIONAL)

If you are satisfied to allow your agent to determine whether to make an anatomical gift at your death, you do not need to fill out this part of the form.

(8) Upon my death: (mark applicable box)

(A) [ ] I give any needed organs, tissues, or other body parts, OR

(B) [ ] I give the following organs, tissues, or other body parts only

_____

_____

(C) [ ] My gift is for the following purposes (mark any of the

following you want):

[ ] (i) transplant;

[ ] (ii) therapy;

[ ] (iii) research;

[ ] (iv) education.

(D) [ ] I refuse to make an anatomical gift.

PART 4

MENTAL HEALTH TREATMENT

This part of the declaration allows you to make decisions in advance about mental health treatment. The instructions that you include in this declaration will be followed only if a court, two physicians that include a psychiatrist, or a physician and a professional mental health clinician believe that you are not competent and cannot make treatment decisions. Otherwise, you will be considered to be competent and to have the capacity to give or withhold consent for the treatments.

If you are satisfied to allow your agent to determine what is best for you in making these mental health decisions, you do not need to fill out this part of the form. If you do fill out this part of the form, you may strike any wording you do not want.

(9) PSYCHOTROPIC MEDICATIONS. If I do not have the capacity to give or withhold informed consent for mental health treatment, my wishes regarding psychotropic medications are as follows:

_____ I consent to the administration of the following medications:

_____ I do not consent to the administration of the following medications:

Conditions or limitations: _____

_____.

(10) ELECTROCONVULSIVE TREATMENT. If I do not have the capacity to give or withhold informed consent for mental health

treatment, my wishes regarding electroconvulsive treatment are as follows:

_____ I consent to the administration of electroconvulsive treatment.

_____ I do not consent to the administration of electroconvulsive treatment.

Conditions or limitations: _____

_____.

(11) ADMISSION TO AND RETENTION IN FACILITY. If I do not have the capacity to give or withhold informed consent for mental health treatment, my wishes regarding admission to and retention in a mental health facility for mental health treatment are as follows:

_____ I consent to being admitted to a mental health facility for mental health treatment for up to _____ days. (The number of days not to exceed 17.)

_____ I do not consent to being admitted to a mental health facility for mental health treatment.

Conditions or limitations: _____

_____.

OTHER WISHES OR INSTRUCTIONS

_____

_____

_____

Conditions or limitations: _____

_____.

PART 5

PRIMARY PHYSICIAN

(OPTIONAL)

(12) I designate the following physician as my primary physician:

_____

(name of physician)

_____

(address) (city) (state) (zip code)

_____

(telephone)

OPTIONAL: If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

_____

(name of physician)

_____

(address) (city) (state) (zip code)

_____

(telephone)

(13) EFFECT OF COPY. A copy of this form has the same effect as the original.

(14) SIGNATURES. Sign and date the form here:

_____

(date) (sign your name)

_____

(print your name)

_____

(address) (city) (state) (zip code)

(15) WITNESSES. This advance care health directive will not be valid for making health care decisions unless it is

(A) signed by two qualified adult witnesses who are personally known to you and who are present when you sign or acknowledge your signature; the witnesses may not be a health care provider employed at the health care institution or health care facility where you are receiving health care, an employee of the health care provider who is providing health care to you, an employee of the health care institution or health

care facility where you are receiving health care, or the person appointed as your agent by this document; at least one of the two witnesses may not be related to you by blood, marriage, or adoption or entitled to a portion of your estate upon your death under your will or codicil; or

(B) acknowledged before a notary public in the state.

ALTERNATIVE NO. 1

Witness Who is Not Related to or a Devisee of the Principal

I swear under penalty of perjury under AS 11.56.200 that the principal is personally known to me, that the principal signed or acknowledged this durable power of attorney for health care in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, and that I am not

(1) a health care provider employed at the health care institution or health care facility where the principal is receiving health care;

(2) an employee of the health care provider providing health care to the principal;

(3) an employee of the health care institution or health care facility where the principal is receiving health care;

(4) the person appointed as agent by this document;

(5) related to the principal by blood, marriage, or adoption; or

(6) entitled to a portion of the principal's estate upon the principal's death under a will or codicil.

_____

(date) (signature of witness)

_____

(printed name of witness)

_____

(address) (city) (state) (zip code)

Witness Who May be Related to or a Devisee of the Principal

I swear under penalty of perjury under AS 11.56.200 that the

principal is personally known to me, that the principal signed or acknowledged this durable power of attorney for health care in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, and that I am not

(1) a health care provider employed at the health care institution or health care facility where the principal is receiving health care;

(2) an employee of the health care provider who is providing health care to the principal;

(3) an employee of the health care institution or health care facility where the principal is receiving health care; or

(4) the person appointed as agent by this document.

_____

(date) (signature of witness)

_____

(printed name of witness)

_____

(address) (city) (state) (zip code)

ALTERNATIVE NO. 2

State of Alaska

_____ Judicial District

On this _____ day of _____, in the year _____, before me, _____ (insert name of notary public) appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that the person executed it.

Notary Seal

_____

(signature of notary public)

*** Sec. 9.** AS 13.52.390(17) is amended to read:

(17) "health care decision" means a decision made by an individual or

the individual's agent, guardian, or surrogate regarding the individual's health care, including

(A) selection and discharge of health care providers and institutions;

(B) approval or disapproval of proposed diagnostic tests, surgical procedures, and programs of medication;

(C) direction to provide, withhold, or withdraw artificial nutrition and hydration if providing, withholding, or withdrawing artificial nutrition, artificial hydration, or artificial nutrition and hydration is in accord with generally accepted health care standards applicable to health care providers or institutions;

(D) the administration or withdrawal of psychotropic medications, the use of electroconvulsive treatment, and the admission to a mental health facility; [AND]

(E) making an anatomical gift at death; **and**

(F) a direction relating to the provision of cardiopulmonary resuscitation or other resuscitative measures;

*** Sec. 10.** AS 13.52.065(f) is repealed.

*** Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONTINUING EFFECT OF DO NOT RESUSCITATE ORDERS. A do not resuscitate order made under AS 13.52 before the effective date of this Act continues in effect under AS 13.52, unless the do not resuscitate order is revoked under AS 13.52.065(i) or (j), added by sec. 6 of this Act, or made ineffective under another provision of AS 13.52, as amended by this Act.

SENATE BILL NO. 172

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY SENATORS DYSON, Davis, Coghill, McGuire, Olson

Introduced: 1/20/12
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act relating to health care decisions, including do not resuscitate orders."

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

*** Section 1.** AS 13.52.045 is amended by adding a new subsection to read:

(b) A health care institution or health care facility may not interpret the issuance of a do not resuscitate order for a patient as preventing the health care institution or health care facility from providing life-sustaining procedures to the patient.

*** Sec. 2.** AS 13.52.060(e) is amended to read:

(e) A health care provider may decline to comply with an individual instruction or a health care decision for reasons of conscience, except **that a health care provider may not decline to comply with** [FOR] a do not resuscitate order **that is consistent with this chapter for reasons of conscience**. A health care institution or health care facility may decline to comply with an individual instruction or health care decision if the instruction or decision is contrary to a policy of the institution or facility that is expressly based on reasons of conscience and if the policy was timely

communicated to the patient or to a person then authorized to make health care decisions for the patient. **Notwithstanding the other provisions of this subsection, this subsection does not allow a health care provider, health care institution, or health care facility to decline to comply with an individual instruction or a health care decision that requests that cardiopulmonary resuscitation or other resuscitative measures be provided.**

*** Sec. 3.** AS 13.52.060(f) is amended to read:

(f) A health care provider, health care institution, or health care facility may decline to comply with an individual instruction or a health care decision that requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the provider, institution, or facility**, except that this subsection does not allow a health care provider, health care institution, or health care facility to decline to comply with an advance health care directive or a health care decision that requests that cardiopulmonary resuscitation or other resuscitative measures be provided**. In this subsection, "medically ineffective health care" means health care that according to reasonable medical judgment cannot cure the patient's illness, cannot diminish its progressive course, and cannot effectively alleviate severe discomfort and distress.

*** Sec. 4.** AS 13.52.065(a) is amended to read:

(a) A physician may issue a do not resuscitate order for a patient of the physician **only as provided in this section**. The physician shall document the grounds for the order in the patient's medical file.

*** Sec. 5.** AS 13.52.065(b) is amended to read:

(b) The department shall by regulation adopt a protocol, subject to the approval of the State Medical Board, for do not resuscitate orders that sets out a standardized method of procedure for the withholding of cardiopulmonary resuscitation by health care providers and health care institutions. **The protocol adopted by the department must comply with this section.**

*** Sec. 6.** AS 13.52.065 is amended by adding new subsections to read:

(g) Except as provided in (h) of this section, a physician may not issue a do not resuscitate order for a patient of the physician without the express consent of

(1) the patient, if the patient has capacity and is 18 years of age or older; under this paragraph, the consent may be provided by an advance health care directive; or

(2) a person authorized to make health care decisions for the patient.

(h) A physician may issue a do not resuscitate order for a patient of the physician without the express consent required by (g) of this section if the patient does not have capacity, no person is authorized to make health care decisions for the patient, and,

(1) if the patient has an advance health care directive, the directive indicates that the patient wants a do not resuscitate order; or

(2) if the patient has an advance health care directive, the directive is silent about the issuance of a do not resuscitate order and another physician concurs in the decision to issue a do not resuscitate order.

(i) A physician shall revoke a do not resuscitate order issued for a patient if

(1) the issuance of the do not resuscitate order violates (g) of this section;

(2) except as provided in (5) of this subsection, the patient has capacity and requests that the do not resuscitate order be revoked;

(3) the patient has an advance health care directive that indicates that the patient does not want a do not resuscitate order;

(4) the patient does not have capacity, the patient does not have an advance health care directive that indicates that the patient wants a do not resuscitate order, and a person authorized to make health care decisions for the patient requests or does not oppose the revocation of the do not resuscitate order; or

(5) the patient is under 18 years of age and the parent or guardian of the patient requests that the do not resuscitate order be revoked.

(j) A physician may revoke a do not resuscitate order issued by another physician for a patient, if the physician has a

(1) physician-patient relationship with the patient; or

(2) health care obligation to the patient arising out of the physician's

(A) individual relationship with the patient; or

(B) employment by the health care institution or health care facility where the patient is being treated.

* **Sec. 7.** AS 13.52.080(a) is amended to read:

(a) A health care provider or health care institution that acts in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for

(1) providing health care information in good faith under AS 13.52.070;

(2) complying with a health care decision of a person based on a good faith belief that the person has authority to make a health care decision for a patient, including a decision to withhold or withdraw health care;

(3) declining to comply with a health care decision of a person based on a good faith belief that the person then lacked authority;

(4) complying with an advance health care directive and assuming in good faith that the directive was valid when made and has not been revoked or terminated;

(5) participating in the withholding or withdrawal of cardiopulmonary resuscitation under the direction or with the authorization of a physician or upon discovery of do not resuscitate identification upon an individual;

(6) causing or participating in providing cardiopulmonary resuscitation or other life-sustaining procedures

(A) under AS 13.52.065(e) when an individual has made an anatomical gift;

(B) because an individual has made a do not resuscitate order ineffective under **AS 13.52.065** [AS 13.52.065(f)] or another provision of this chapter; or

(C) because the patient is a woman of childbearing age and AS 13.52.055 applies; or

(7) acting in good faith under the terms of this chapter or the law of another state relating to anatomical gifts.

* **Sec. 8.** AS 13.52.080(c) is amended to read:

(c) A health care provider, health care institution, or health care facility is not subject to civil or criminal liability, or to discipline for unprofessional conduct, if a do not resuscitate order prevents the health care provider, health care institution, or health care facility from attempting to resuscitate a patient who requires cardiopulmonary resuscitation or other resuscitative measures because of complications arising out of health care being administered to the patient by the health care provider, health care institution, or health care facility. This subsection does not apply if

(1) the complications suffered by the patient are caused by gross negligence or reckless or intentional actions on the part of the health care provider, health care institution, or health care facility**; or**

(2) the do not resuscitate order relied on by the health care provider, health care institution, or health care facility was issued in violation of AS 13.52.065.

* **Sec. 9.** AS 13.52.120(b) is amended to read:

(b) Notwithstanding any other provision of law **except (h) of this section**, death resulting from the withholding or withdrawal of cardiopulmonary resuscitation or other life-sustaining procedures does not, for any purpose, constitute a suicide or homicide if the withholding or withdrawal is

(1) consistent with this chapter**, except that a violation of AS 13.52.065(g) - (i), does not, for any purpose, constitute a homicide**; and

(2) from an individual

(A) for whom a do not resuscitate order has not been issued;

(B) for whom a do not resuscitate order has been issued under

(i) the protocol for do not resuscitate orders established under AS 13.52.065; or

(ii) a do not resuscitate identification found on the individual.

* **Sec. 10.** AS 13.52.120 is amended by adding a new subsection to read:

(h) The provisions of (b) of this section do not apply to a person who orders or causes the withholding or withdrawal of cardiopulmonary resuscitation or other life-

sustaining procedures if the person acts intentionally, recklessly, with criminal negligence, or with gross negligence. In this subsection, "intentionally," "recklessly," and "criminal negligence" have the meanings given in AS 11.81.900.

*** Sec. 11.** AS 13.52.300 is amended to read:

Sec. 13.52.300. Optional form. The following sample form may be used to create an advance health care directive. The other sections of this chapter govern the effect of this or any other writing used to create an advance health care directive. This form may be duplicated. This form may be modified to suit the needs of the person, or a different form that complies with this chapter may be used, including the mandatory witnessing requirements:

ADVANCE HEALTH CARE DIRECTIVE

Explanation

You have the right to give instructions about your own health care to the extent allowed by law. You also have the right to name someone else to make health care decisions for you to the extent allowed by law. This form lets you do either or both of these things. It also lets you express your wishes regarding the designation of your health care provider. If you use this form, you may complete or modify all or any part of it. You are free to use a different form if the form complies with the requirements of AS 13.52.

Part 1 of this form is a durable power of attorney for health care. A "durable power of attorney for health care" means the designation of an agent to make health care decisions for you. Part 1 lets you name another individual as an agent to make health care decisions for you if you do not have the capacity to make your own decisions or if you want someone else to make those decisions for you now even though you still have the capacity to make those decisions. You may name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. Unless related to you, your agent may not be an owner, operator, or employee of a health care institution where you are receiving care.

Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you that you could legally make for yourself. This form has a place for you to limit the authority of your agent. You do not have to limit the authority of your agent if you wish to rely on your agent for all health care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right, to the extent allowed by law, to

(a) consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition, including the administration or discontinuation of psychotropic medication;

(b) select or discharge health care providers and institutions;

(c) approve or disapprove proposed diagnostic tests, surgical procedures, and programs of medication;

(d) direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care; and

(e) make an anatomical gift following your death.

Part 2 of this form lets you give specific instructions for any aspect of your health care to the extent allowed by law, except you may not authorize mercy killing, assisted suicide, or euthanasia. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, including the provision of artificial nutrition and hydration, as well as the provision of pain relief medication. Space is provided for you to add to the choices you have made or for you to write out any additional wishes.

Part 3 of this form lets you express an intention to make an anatomical gift following your death.

Part 4 of this form lets you make decisions in advance about certain types of mental health treatment.

Part 5 of this form lets you designate a physician to have primary

responsibility for your health care.

After completing this form, sign and date the form at the end and have the form witnessed by one of the two alternative methods listed below. Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health care agents you have named. You should talk to the person you have named as your agent to make sure that the person understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health care directive or replace this form at any time, except that you may not revoke this declaration when you are determined not to be competent by a court, by two physicians, at least one of whom shall be a psychiatrist, or by both a physician and a professional mental health clinician. In this advance health care directive, "competent" means that you have the capacity

(1) to assimilate relevant facts and to appreciate and understand your situation with regard to those facts; and

(2) to participate in treatment decisions by means of a rational thought process.

PART 1

DURABLE POWER OF ATTORNEY FOR
HEALTH CARE DECISIONS

(1) DESIGNATION OF AGENT. I designate the following individual as my agent to make health care decisions for me:

_____

(name of individual you choose as agent)

_____

(address) (city) (state) (zip code)

_____

(home telephone) (work telephone)

OPTIONAL: If I revoke my agent's authority or if my agent is not

willing, able, or reasonably available to make a health care decision for me, I designate as my first alternate agent

_____

(name of individual you choose as first alternate agent)

_____

(address) (city) (state) (zip code)

_____

(home telephone) (work telephone)

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent

_____

(name of individual you choose as second alternate agent)

_____

(address) (city) (state) (zip code)

_____

(home telephone) (work telephone)

(2) AGENT'S AUTHORITY. My agent is authorized and directed to follow my individual instructions and my other wishes to the extent known to the agent in making all health care decisions for me. If these are not known, my agent is authorized to make these decisions in accordance with my best interest, including decisions to provide, withhold, or withdraw artificial hydration and nutrition and other forms of health care to keep me alive, except as I state here:

_____

_____

_____

(Add additional sheets if needed.)

Under this authority, "best interest" means that the benefits to you resulting from a treatment outweigh the burdens to you resulting from that treatment after assessing

(A) the effect of the treatment on your physical, emotional, and cognitive functions;

(B) the degree of physical pain or discomfort caused to you by the treatment or the withholding or withdrawal of the treatment;

(C) the degree to which your medical condition, the treatment, or the withholding or withdrawal of treatment, results in a severe and continuing impairment;

(D) the effect of the treatment on your life expectancy;

(E) your prognosis for recovery, with and without the treatment;

(F) the risks, side effects, and benefits of the treatment or the withholding of treatment; and

(G) your religious beliefs and basic values, to the extent that these may assist in determining benefits and burdens.

(3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE. Except in the case of mental illness, my agent's authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box. In the case of mental illness, unless I mark the following box, my agent's authority becomes effective when a court determines I am unable to make my own decisions, or, in an emergency, if my primary physician or another health care provider determines I am unable to make my own decisions. If I mark this box, my agent's authority to make health care decisions for me takes effect immediately.

(4) AGENT'S OBLIGATION. My agent shall make health care decisions for me in accordance with this durable power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

(5) NOMINATION OF GUARDIAN. If a guardian of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able, or reasonably available to act as guardian, I nominate the alternate agents whom I have named under (1) above, in the order designated.

PART 2

INSTRUCTIONS FOR HEALTH CARE

If you are satisfied to allow your agent to determine what is best for you in making health care decisions, you do not need to fill out this part of the form. If you do fill out this part of the form, you may strike any wording you do not want. There is a state protocol that governs the use of do not resuscitate orders by physicians and other health care providers. You may obtain a copy of the protocol from the Alaska Department of Health and Social Services. A "do not resuscitate order" means a directive from a licensed physician that emergency cardiopulmonary resuscitation should not be administered to you.

(6) END-OF-LIFE DECISIONS. Except to the extent prohibited by law, I direct that my health care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have marked below: (Check only one box.)

(A) [ ] Choice To Prolong Life

I want my life to be prolonged as long as possible within the limits of generally accepted health care standards; OR

(B) [ ] Choice Not To Prolong Life

I want comfort care only and I do not want my life to be prolonged with medical treatment if, in the judgment of my physician,

I have (check all choices that represent your wishes)

[ ] (i) a condition of permanent unconsciousness: a condition that, to a high degree of medical certainty, will last permanently without improvement; in which, to a high degree of medical certainty, thought, sensation, purposeful action, social interaction, and awareness of

myself and the environment are absent; and for which, to a high degree of medical certainty, initiating or continuing life-sustaining procedures for me, in light of my medical outcome, will provide only minimal medical benefit for me; or

[ ] (ii) a terminal condition: an incurable or irreversible illness or injury that without the administration of life-sustaining procedures will result in my death in a short period of time, for which there is no reasonable prospect of cure or recovery, that imposes severe pain or otherwise imposes an inhumane burden on me, and for which, in light of my medical condition, initiating or continuing life-sustaining procedures will provide only minimal medical benefit;

[ ] Additional instructions:_____

_____

(C) Artificial Nutrition and Hydration. If I am unable to safely take nutrition, fluids, or nutrition and fluids (check your choices or write your instructions),

[ ] I wish to receive artificial nutrition and hydration indefinitely;

[ ] I wish to receive artificial nutrition and hydration indefinitely, unless it clearly increases my suffering and is no longer in my best interest;

[ ] I wish to receive artificial nutrition and hydration on a limited trial basis to see if I can improve;

[ ] In accordance with my choices in (6)(B) above, I do not wish to receive artificial nutrition and hydration.

[ ] Other instructions: _____

_____

(D) Relief from Pain.

[ ] I direct that adequate treatment be provided at all times for the sole purpose of the alleviation of pain or discomfort; or

[ ] I give these instructions:

_____

_____

(E) **Life-Sustaining Procedures. "Life-sustaining procedures" means any medical treatment, procedure, or intervention that may keep you alive but will not remove your terminal condition or remove permanent unconsciousness; "life-sustaining procedures" includes assisted ventilation, renal dialysis, surgical procedures, blood transfusions, and the administration of drugs, including antibiotics, or artificial nutrition and hydration.**

[ ] I wish to receive life-sustaining procedures.

[ ] I do not wish to receive life-sustaining procedures.

(F) Should I become unconscious and I am pregnant, I direct that

_____

_____

(7) OTHER WISHES. (If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that

_____

_____

Conditions or limitations: _____

_____.

(Add additional sheets if needed.)

PART 3

ANATOMICAL GIFT AT DEATH

(OPTIONAL)

If you are satisfied to allow your agent to determine whether to make an anatomical gift at your death, you do not need to fill out this part of the form.

(8) Upon my death: (mark applicable box)

(A) [ ] I give any needed organs, tissues, or other body parts, OR

(B) [ ] I give the following organs, tissues, or other body parts only

_____

_____

(C) [ ] My gift is for the following purposes (mark any of the following you want):

[ ] (i) transplant;

[ ] (ii) therapy;

[ ] (iii) research;

[ ] (iv) education.

(D) [ ] I refuse to make an anatomical gift.

PART 4

MENTAL HEALTH TREATMENT

This part of the declaration allows you to make decisions in advance about mental health treatment. The instructions that you include in this declaration will be followed only if a court, two physicians that include a psychiatrist, or a physician and a professional mental health clinician believe that you are not competent and cannot make treatment decisions. Otherwise, you will be considered to be competent and to have the capacity to give or withhold consent for the treatments.

If you are satisfied to allow your agent to determine what is best for you in making these mental health decisions, you do not need to fill out this part of the form. If you do fill out this part of the form, you may strike any wording you do not want.

(9) PSYCHOTROPIC MEDICATIONS. If I do not have the capacity to give or withhold informed consent for mental health treatment, my wishes regarding psychotropic medications are as follows:

_____ I consent to the administration of the following medications:

_____ I do not consent to the administration of the following medications:

Conditions or limitations: _____

_____.

(10) ELECTROCONVULSIVE TREATMENT. If I do not have the capacity to give or withhold informed consent for mental health treatment, my wishes regarding electroconvulsive treatment are as follows:

_____ I consent to the administration of electroconvulsive treatment.

_____ I do not consent to the administration of electroconvulsive treatment.

Conditions or limitations: _____

_____.

(11) ADMISSION TO AND RETENTION IN FACILITY. If I do not have the capacity to give or withhold informed consent for mental health treatment, my wishes regarding admission to and retention in a mental health facility for mental health treatment are as follows:

_____ I consent to being admitted to a mental health facility for mental health treatment for up to _____ days. (The number of days not to exceed 17.)

_____ I do not consent to being admitted to a mental health facility for mental health treatment.

Conditions or limitations: _____

_____.

OTHER WISHES OR INSTRUCTIONS

_____

_____

_____

Conditions or limitations: _____

_____.

PART 5

PRIMARY PHYSICIAN

(OPTIONAL)

(12) I designate the following physician as my primary physician:

_____

(name of physician)

_____

(address) (city) (state) (zip code)

_____

(telephone)

OPTIONAL: If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

_____

(name of physician)

_____

(address) (city) (state) (zip code)

_____

(telephone)

(13) EFFECT OF COPY. A copy of this form has the same effect as the original.

(14) SIGNATURES. Sign and date the form here:

_____

(date) (sign your name)

_____

(print your name)

_____

(address) (city) (state) (zip code)

(15) WITNESSES. This advance care health directive will not be valid for making health care decisions unless it is

(A) signed by two qualified adult witnesses who are personally known to you and who are present when you sign or acknowledge your signature; the witnesses may not be a health care provider employed at the health care institution or health care facility where you are receiving

health care, an employee of the health care provider who is providing health care to you, an employee of the health care institution or health care facility where you are receiving health care, or the person appointed as your agent by this document; at least one of the two witnesses may not be related to you by blood, marriage, or adoption or entitled to a portion of your estate upon your death under your will or codicil; or

(B) acknowledged before a notary public in the state.

ALTERNATIVE NO. 1

Witness Who is Not Related to or a Devisee of the Principal

I swear under penalty of perjury under AS 11.56.200 that the principal is personally known to me, that the principal signed or acknowledged this durable power of attorney for health care in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, and that I am not

(1) a health care provider employed at the health care institution or health care facility where the principal is receiving health care;

(2) an employee of the health care provider providing health care to the principal;

(3) an employee of the health care institution or health care facility where the principal is receiving health care;

(4) the person appointed as agent by this document;

(5) related to the principal by blood, marriage, or adoption; or

(6) entitled to a portion of the principal's estate upon the principal's death under a will or codicil.

_____

(date) (signature of witness)

_____

(printed name of witness)

_____

(address) (city) (state) (zip code)

Witness Who May be Related to or a Devisee of the Principal

I swear under penalty of perjury under AS 11.56.200 that the principal is personally known to me, that the principal signed or acknowledged this durable power of attorney for health care in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, and that I am not

(1) a health care provider employed at the health care institution or health care facility where the principal is receiving health care;

(2) an employee of the health care provider who is providing health care to the principal;

(3) an employee of the health care institution or health care facility where the principal is receiving health care; or

(4) the person appointed as agent by this document.

_____

(date) (signature of witness)

_____

(printed name of witness)

_____

(address) (city) (state) (zip code)

ALTERNATIVE NO. 2

State of Alaska

_____ Judicial District

On this _____ day of _____, in the year _____, before me, _____ (insert name of notary public) appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that the person executed it.

Notary Seal

_____

(signature of notary public)

* **Sec. 12.** AS 13.52.390(17) is amended to read:

(17) "health care decision" means a decision made by an individual or the individual's agent, guardian, or surrogate regarding the individual's health care, including

(A) selection and discharge of health care providers and institutions;

(B) approval or disapproval of proposed diagnostic tests, surgical procedures, and programs of medication;

(C) direction to provide, withhold, or withdraw artificial nutrition and hydration if providing, withholding, or withdrawing artificial nutrition, artificial hydration, or artificial nutrition and hydration is in accord with generally accepted health care standards applicable to health care providers or institutions;

(D) the administration or withdrawal of psychotropic medications, the use of electroconvulsive treatment, and the admission to a mental health facility; [AND]

(E) making an anatomical gift at death; **and**

(F) a direction relating to the provision of cardiopulmonary resuscitation or other resuscitative measures;

* **Sec. 13.** AS 13.52.065(f) is repealed.

* **Sec. 14.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONTINUING EFFECT OF DO NOT RESUSCITATE ORDERS. A do not resuscitate order made under AS 13.52 before the effective date of this Act continues in effect under AS 13.52, unless the do not resuscitate order is revoked under AS 13.52.065(i) or (j), added by sec. 6 of this Act, or made ineffective under another provision of AS 13.52, as amended by this Act.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB172**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB172-DHSS-EP-1-27-12
Title: Care Directives / Do Not Resuscitate Orders
Sponsor: Dyson
Requester: Senate Health and Social Services

Dept. Affected: Health and Social Services
Appropriation: Public Health
Allocation: Emergency Programs
OMB Component Number: 2877

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable. Initial version.

Prepared by: Ward B. Hurlburt, M.D. MPH / Chief Medical Officer, Director — Phone 269-6680
Division: Public Health — Date/Time 1/27/12 4:30 PM
Approved by: Nancy Rolfzen, Assistant Commissioner — Date 1/27/2012
DHSS Finance & Management Services

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB172

Analysis

This bill specifies that a health care provider may not decline to comply with a do not resuscitate order that is consistent with the chapter for reasons of conscience. The bill amends the statutes specifically as it relates to requests that cardiopulmonary resuscitation or other resuscitative measures be provided. It provides that the protocol adopted by the department must comply with the amended language provided section.

Implementation of the bill as written would require the Division of Public Health's Section of Emergency Programs, Emergency Medical Services (EMS) Unit to upgrade the statewide DNR protocol in the Comfort One program.

Implementation of the bill as written would require the Division of Public Health's Section of Emergency Programs, Emergency Medical Services (EMS) Unit to upgrade the statewide Do Not Resuscitate protocol materials. While the program already budgets on-going printing costs as part of the base budget, revising these materials will have one-time costs associated that are not considered part of the base. This involves modifying already printed administrative forms and procedures that support the Comfort One program. Also, the current inventory of forms already printed and distributed will need to be replaced with the updated forms. The cost to update the forms and replace the inventory can be absorbed without reducing services elsewhere.

The Division of Public Health provides about 4500 enrollment forms and a lesser number of each of two pamphlets each year. The Comfort One enrollment forms are distributed to the three main EMS Regions (Southern, Southeast, and Interior). Southern Region is the largest user of the forms and has had an increasing number of requests for the forms. The three regions send forms out to the other four regions upon request.

LEGAL SERVICES

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

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

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

MEMORANDUM October 28, 2011

SUBJECT: Question regarding AS 13.52 (Work Order No. 27-LS0991)

TO: Senator Fred Dyson
Attn: Chuck Kopp

FROM: Terry Bannister
Legislative Counsel

You have asked whether AS 13.52 adequately protects the right of a patient, or the patient's designee, to overrule a physician's decision to issue a do not resuscitate (DNR) order. This question was prompted by a recent situation in which a physician at a hospital issued a DNR order against the express wishes and directions of both the patient and the patient's wife who held his durable power of attorney.[1] You have referred me to AS 13.52.065, which addresses DNR protocol and identification requirements, AS 13.52.100, which addresses the patient's right to make health care decisions while the patient has capacity, and AS 13.52.120, which addresses a presumption in favor of life.

AS 13.52.065(a) does allow a physician to issue a do not resuscitate order. However, that provision cannot be read in isolation from the rest of AS 13.52 (the "chapter"). AS 13.52 is fairly clear that a patient with capacity has the right to make a DNR order ineffective. However, the chapter is not as clear that an individual can prevent a doctor from placing the order or that an authorized agent of the patient may make a DNR order ineffective or prevent the doctor from placing the DNR order.

With certain exemptions for conscience or where medically ineffective standards are involved,[2] AS 13.52.060(d) requires a health care provider,[3] to comply with an individual instruction[4] of the patient, and with a health care decision made by an authorized person. The term, "individual instruction," appears to cover a DNR order, because it covers a

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[1] I am presuming this was a durable power of attorney for health care.

[2] AS 13.52.060(e) - (f).

[3] The term includes a physician.

[4] Defined in AS 13.52.390 as an individual's direction concerning a health care decision for the individual.

health care decision,[5] which in turn includes any care, treatment, service, or procedure that affects an individual's physical or mental condition.[6]

The chapter's specific provisions regarding DNR orders, AS 13.52.065(f) and AS 13.52.100(c), clearly allow DNR orders to be made ineffective if a patient who is able to make the decision requests this, but these sections do not expressly address authorized agents. However, with regard to patients without capacity, AS 13.52.100(c) states that if the individual is not able to make the decision, the DNR protocol authorized by AS 13.52.065(b) be used. The sample form in AS 13.52.300 for an advance care directive states that the protocol governs the use of DNR orders by health care providers; the exact meaning of "use" is not defined in the chapter or the protocol, so it is left up to interpretation. The DNR protocol established by the Department of Health and Social Services[7] states that a DNR patient may revoke the patient's DNR status at any time and in any manner in accordance with AS 13.52,[8] but does not go into more detail or expressly address revocation by agents of the individual.

It can also be argued that in this chapter a reference to a "patient" also includes an authorized agent of an adult individual. This interpretation is supported by AS 13.52.060(d) mentioned above. It is also supported by AS 13.52.080(a)(6)(B), because that provision appears to indicate that AS 13.52.065(f) is not the only provision under which a DNR order can be made ineffective. This position is also supported by AS 13.52.010's allowing a patient to make advance health care directives and appoint agents regarding health care decisions. And, under AS 13.52.010(b), an agent may be given the authority under a durable power of attorney for health to make any health care decision the principal could have made while having capacity.[9]

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[5] See AS 13.52.390(17).

[6] See AS 13.52.390(16).

[7] The current protocol was adopted in 1996 under AS 18.12, a chapter that was repealed when AS 13.52 was enacted in 2004 (with an effective date of January 1, 2005). Under sec. 18, ch. 83, SLA 2004, the Department of Health and Social Services was given authority to adopt regulations to implement AS 13.52, and under sec. 19, ch. 83, SLA 2004, the Department of Law's regulations attorney was directed to make certain citation changes in 7 AAC 16 to reflect the new chapter (these do not appear in the regulations) until the new regulations were adopted. Under sec. 19, ch. 83, SLA 2004, the regulations in 7 AAC 16 were to continue in effect until the Department of Health and Social services adopted regulations for the 2004 act.

[8] See 7 AAC 16.010(g).

[9] See AS 13.52.010(b).

The fact that the chapter at AS 13.52.300 contains an advance care directive form to state health care decisions and to appoint agents also supports an interpretation that individuals may indicate their wishes, and appoint agents, regarding DNR orders. The form itself contains language that the individual has the right to give instructions about the individual's own health care, although this language is qualified by making the right "to the extent allowed by law." But the form states that the DNR protocol governs the use of DNR orders. Finally, AS 13.52.120(a) states that the chapter establishes a presumption in favor of life, which would seem to support interpreting the chapter to allow a patient (or the patient's authorized representative) to prevent a physician from issuing a DNR order.

In AS 13.52 it seems clear that a patient with capacity has the right to make a DNR order ineffective. And while I would tend to conclude that the better interpretation of AS 13.52 is that a doctor's right to issue a DNR order is limited by the decision of the patient or the patient's authorized representative, and that an agent with that authority can revoke a DNR order, there are some ambiguities in the chapter that could result in other interpretations.

It would be helpful to know the exact basis for the positions taken by the physician and the hospital.

If I may be of further assistance, please advise.

TLB:ljw
11-419.ljw

LEGAL SERVICES

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MEMORANDUM December 30, 2011

SUBJECT: Bill relating to health care decisions, including do not resuscitate orders (Work Order No. 27-LS0991\M)

TO: Senator Fred Dyson
Attn: Chuck Kopp

FROM: Terry Bannister
Legislative Counsel

This memo accompanies the bill described above.

1. "Intervening care." After reviewing what you were requesting and the terms used in the chapter, it appears that you are referring to "life-sustaining procedures" (see the definition in AS 13.52.300). Please read the complete definition and make sure that this is what you had in mind. The new section uses that term instead of "intervening care." The provision has been moved to AS 13.52.045, which addresses the provision of life-sustaining procedures.

Contrary to what I indicated on the phone, it appears that the selection of life-sustaining procedures is not sufficiently addressed in the form provided under AS 13.52.300, so it is necessary to change the form. Unfortunately, this requires that the entire form be laid out in your bill even though the actual changes are small.

2. Use of "advance health care directive." After reviewing your question about the substitution of "advance health care directive" for "individual instruction" in AS 13.52.060(e), I decided to return to "individual instruction" because it is narrower than "advance health care directive," and a narrower term is consistent with the goal of the changes to AS 13.52.060(e) (to limit the health care provider's right to decline to comply for reasons of conscience).

3. Authorization by another physician to revoke a DNR order. Language has been added to proposed sec. 13.52.065(j) to identify which physicians may revoke another physician's DNR. Please examine sec. 13.52.065(j)(2)(B): is employment of the physician by the health care facility or institution the relationship that you had in mind?

If I may be of further assistance, please advise.

TLB:ljw
11-476.ljw
Enclosure

LEGISLATIVE RESEARCH SERVICES

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Memorandum

TO: Senator Fred Dyson
FROM: Chuck Burnham, Legislative Analyst
DATE: January 19, 2012
RE: State Laws: Assuring Healthcare Provider Compliance with Advance Health Directives
LRS Report 12.142

You asked about states' laws on "do not resuscitate orders" (DNRs). Specifically, you asked how other states prevent healthcare providers from using their patient care management authority to issue DNRs against the will of patients who have terminal conditions.

Background

As you likely know, all states have laws codifying patients' control, to varying degrees, over the medical care they receive in their final days of life.[1] Such legal mechanisms are commonly known as "advanced health directives," and may include "do not resuscitate orders" (DNRs). Typically, DNRs are used by elderly individuals or those with terminal illnesses to direct healthcare providers to suspend treatment should the patient experience a medical event that, in the absence of intervention, is likely to bring about death. In the absence of a DNR, medical ethics and standards of practice generally compel physicians to attempt life-saving measures; however, this requirement is limited when, in the judgment of the attending physician, such care would not ultimately prove beneficial to the patient. This concept is embodied in the Code of Ethics of the American Medical Association (AMA), which includes the following language in AMA Opinion 2.035:

> Physicians are not ethically obligated to deliver care that, in their best professional judgment, will not have a reasonable chance of benefiting their patients. Patients should not be given treatments simply because they demand them. Denial of treatment should be justified by reliance on openly stated ethical principles and acceptable standards of care, as defined in Opinion 2.03, "Allocation of Limited Medical Resources," and Opinion 2.095, "The Provision of Adequate Health Care," not on the concept of "futility," which cannot be meaningfully defined.

Recognizing the emotional and trying atmosphere that surrounds end-of-life care, the AMA provides in Opinion 2.037 a framework of considerations and actions to be taken by healthcare providers in circumstances where their prescribed treatment differs from the wishes of terminal patients. That Opinion frames the issue as follows:

> When further intervention to prolong the life of a patient becomes futile, physicians have an obligation to shift the intent of care toward comfort and closure. However, there are necessary value judgments involved in coming to the assessment of futility. These judgments must give consideration to patient or proxy assessments of worthwhile outcome. They should also take into account the physician or other provider's perception of intent in treatment, which should not be to prolong the dying process without benefit to the patient or to others with legitimate interests. They may also take into account community and institutional standards, which in turn may have used physiological or functional outcome measures. Nevertheless, conflicts between the parties may persist in determining what is futility in the particular instance.[2]

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[1] Alaska's laws on advanced healthcare directives are codified at AS 13.52. For the purposes of this report, the term "patient" generally includes individuals receiving care, their families, and other proxies that may be involved in end-of-life decisions should the patient become incapacitated.

[2] The AMA Code of Medical Ethics is available online at *http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics.page?*.

The AMA recommends that healthcare institutions adopt policies that use a due process approach in determining medical futility. Opinion 2.037 outlines a seven-step approach that emphasizes fostering understanding and cooperation between patient and physician, involvement of institutional bodies such as ethics committees where disagreements remain, and the swift and orderly transfer of patients to other institutions when agreement cannot be reached.

Patient Protections in State Laws

Although the policies of the AMA generally appear to strike a reasonable balance between the wishes of patients and the medical judgment of physicians, those policies do not carry the weight of law. The concern that you contemplate—that physicians may order a DNR over the wishes of the patient at a point too early in the end-of-life process—is clearly shared by policymakers in a number of other jurisdictions.

For example, the Uniform Law Commission (ULC) includes protection against physicians superseding the wishes of patients in its Uniform Healthcare Decisions Act.[3] Section 7 of the Act, "Obligations of Healthcare Provider," includes the following:

> (d) Except as provided in subsections (e) and (f), a health-care provider or institution providing care to a patient shall:
>
> > (1) comply with an individual instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health-care decisions for the patient; and
> >
> > (2) comply with a health-care decision for the patient made by a person then authorized to make health-care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity.

The Act then allows that should a healthcare provider decline to comply with the instructions of a patient for reasons of conscience, policy, or conflict with generally accepted healthcare standards, the patient should be promptly informed and treatment should continue until transfer to another facility can be arranged.[4] The Act, in part or in total, has been adopted by a number of states including Alaska and, for example, Mississippi and New Mexico.

Although the policies of the AMA and the Uniform Act have clearly influenced policymakers' approaches to protecting patients' wishes in end-of-life circumstances, states nonetheless vary considerably in their laws on the topic. For instance, in California and Hawaii, physicians may issue orders specifying withholding end-of-life treatment, but only with the signature of a patient or legally recognized proxy. Similar orders may be issued by physicians in Tennessee and Virginia only with the "consent" of the affected patient. Medical doctors in Ohio may issue a "DNR Identification" order, but state law makes clear that the legal "declaration" of a patient regarding treatment preferences supersedes the physician's DNR.[5]

It is important to note that although the states we have mentioned, and others, have taken steps to protect patients from becoming subject to a DNR order against their will, determinations on when to discontinue efforts at life-saving interventions such as cardio pulmonary resuscitation (CPR) fall to the purview of physicians, the policies of the institutions in which they practice, and the accepted standards of medical practice. Therefore, patients' authority under the laws we've discussed necessarily extend only to whether they desire or refuse medical intervention through an advanced directive at the end of life rather than to the duration or timing of the cessation of those measures.

We hope this is helpful. If you have questions or need additional information, please let us know.

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[3] Established in 1892, the ULC, also known as the National Conference of Commissioners on Uniform State Laws, seeks to provide states with "non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law." The ULC is comprised of lawyers, judges, legislators, and academics who have been appointed by state governments. More information is available on the Commission's website at *http://www.nccusl.org/Default.aspx*.

[4] Full text of the Act is available online at *http://www.nccusl.org/Default.aspx*.

[5] We include, as attachments, examples of relevant statutes of California, Delaware, Florida, Georgia, Hawaii, Mississippi, New Mexico, Ohio, Tennessee, and Virginia.

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PROVIDENCE
Health & Services
Alaska

February 14, 2012

Senator Fred Dyson
State Capitol, Room 121
Mailstop 3100
Juneau, AK 99801-1182

Dear Senator Dyson:

I recently became aware that in a letter dated January 18, 2012 from you to Senator Bettye Davis, and subsequently made part of the public record for Senate Bill 172, there are statements attributed to the "Chief Operating Officer" and the "Chief Medical Officer" of an area hospital in reference to a specific patient and family. For a number of reasons, I believe that the "chief operating officer" referenced in your letter may be me, and the "chief medical officer" would then be Roy Davis, MD. I wish to clarify a statement attributed to Providence executives in order to avert misunderstanding among interested parties who are neither familiar with the case referenced in your letter nor the mechanisms and laws for physician prescriptions, including "Do Not Resuscitate" ("DNR") orders.

While I presently serve as the chief executive officer of Providence Health & Services Alaska, at the time referenced in your letter, I served as the chief operating officer. You and I spoke on at least two occasions about the case in question. I explained that these cases are almost always highly complicated and emotionally demanding for all parties. Physicians do an outstanding job of considering each patient's needs and of determining the appropriateness for such orders under these challenging circumstances.

Roy Davis, MD, our chief medical officer, indicates that he never spoke with you about the patient matter. However, you did speak with Richard Mandsager, MD. Dr. Mandsager serves as chief executive officer for Providence Alaska Medical Center, and he recalls speaking with you about certain details of the case. We suspect that your reference to the "chief medical officer" was in fact to Dr. Mandsager in his role as chief executive officer.

The specific clarification we wish reflected in the public record is that neither Dr. Mandsager nor any other executive of Providence Health & Services represented to you that the DNR order would be removed from the referenced patient's medical record. Such an action is inconsistent with policy, bylaws and community practice. As such, removal of the DNR was never considered.

I respectfully request that you correct the official record on this important matter.

Sincerely,

Bruce Lamoureux

Bruce Lamoureux
Sr Vice President/Chief Executive Alaska Region

BL:lb

Cc: Senator Bettye Davis
Senator Hollis French
Representative Bob Lynn

Providence Health & Services Alaska
Review of Senate Bill 172 and House Bill 309
Prepared by Providence Physician Leadership - February 10, 2012 and Unanimously Endorsed by the Providence Alaska Medical Center's (PAMC) Medical Executive Committee, elected representatives of physicians who hold medical privileges at PAMC – February 13, 2012

At first glance, Senate bill # 172 and its partner bill #309 in the House, appear to empower patients to make decisions about their health care at the end of life (Sec. 1 pg 1 lines 3-7). However, on further review these bills contain language involving a very complex decision making process that normally occurs between a patient and his or her physician.

These bills attempt to legislate a complex decision making process and make a "one size fits all" model for end-of-life care. Specifically, these bills are concerned with advanced health care directives which may be made independently or may accompany a will or estate planning. The advanced health care directive is designed to give direction to your family, loved ones and health care providers about care choices if you become critically ill and cannot make decisions for yourself. Ideally, every individual would make this directive ahead of time, when they are clear of mind and not under stress or distracted in any way. In reality, fewer than 1 in 5 individuals arriving to a hospital have an advanced directive(Halpern NA, Pastores SM, Chou JF, Chawla S, Thaler HT, Palliat Med. 2011 Apr;14(4):483-9. Epub 2011 Mar 18; . Knott CI, Psirides AJ, Young PJ, Sim D., Crit Care Resusc. 2011 Sep;13(3):167-74).

These bills also address requests by patients or health care providers to use or not to use advanced medical procedures in an attempt to keep them alive. New terminology adopted by several states terms these issues as "Allow Natural Death," (AND). In Alaska, the terminology utilized is called DNR (do not resuscitate) orders and advanced resuscitative measures. A DNR order can be initiated with or without an advance health care directive. Historically, A DNR is a written agreement that is made between a physician and a patient after discussion about a patient's medical condition. A DNR can answer questions about whether a patient wants CPR (chest compressions or cardiopulmonary resuscitation), wants artificial breathing applied (also called intubation) or some assistance with breathing if an individual needs assistance on a temporary or long term basis. It addresses artificial nutrition if an individual is temporarily or permanently unable to swallow or eat. It addresses the use of antibiotics for infection and other medications to support blood pressure. It addresses the use of electricity/shocking of the heart to reset or restart the heart if the heart stops. .

The decisions made by an individual about how they want to spend their end days are complex and personal. Each person has their own set of circumstances that guide their decision making. The decision may be based on what types of illnesses an individual has or how long they have had these illnesses. It may have to do with their ability or inability to tolerate pain and suffering. It may be directly or indirectly related to religious or cultural beliefs. It may reflect a preference to allow all bodily processes to occur

naturally and not be artificially supported. It may have to do with a desire not to be a burden to family or loved ones if circumstances alter one's ability to care for themselves. It may reflect financial concerns.

The list of reasons why people make decisions is lengthy and unique to each individual. These decisions should be discussed at length with family and loved ones and preferably with a physician who can communicate the degree and prognosis of illnesses with the individual and their loved ones. Ideally, everyone knows and understands the choices and why they are made.

In reality, fewer than 1 in 5 patients admitted to the hospital have made these decisions even though they may have very complicated advanced illnesses or injuries (Halpern, et.al. and Knott et.al.). In general, the American culture tends to not discuss death and dying and is generally unprepared to address these issues until they are forced to do so when confronted by a life altering or life threatening injury or illness. The decisions must then be made under stress. The worst case scenario presents when a patient is not able to make decisions and family members must make decisions while hoping they know what a patient may want. Often families do not know, are unsure, or simply are not present or cannot be found. Whenever possible, these decisions are made in advance. When they have not been made in advance, the medical team caring for the patient is faced with making the decisions together with available family members. Decisions are based upon what is known about the illness(es) or injuries, progression of disease, and benefits vs. harm of interventions. These decisions are crafted with input from family regarding patient preferences. It is a complex process and made with due diligence, generally with the input of many care providers, in addition to family wishes. They are not made lightly.

It is important to note that advanced interventions including CPR, artificial breathing techniques, artificial nutrition, shocking of the heart, etc. are helpful only in very specific medical circumstances. They are not applicable to each and every end of life illness or injury no matter what is portrayed on TV (references: code of Ethics of the American Medical Association (AMA), Opinions 2.035, 2.095). In fact, many of these interventions are painful and are rarely successful (Ebell & Alfonsa; Family Practice 2011; 28:505-515) . They are often associated with severe painful and sometimes persistent complications that leave the few who survive the procedures permanently impaired. CPR for example, was designed to be utilized in only a specific subset of heart patients (Kouwenhouen JAMA 1960 173: 1064-7). It was not recommended for other situations because the likelihood of survival is so low and the risks of complications are so high. For example, advanced cancer patients have not been shown to benefit from CPR. The procedure frequently causes broken ribs and a broken breast bone and collapsed lungs, to mention only a few of the potential complications. The benefits of the procedures should clearly outweigh the potential risks of the complications associated with these procedures. In end stage cancer, the benefits rarely outweigh the risks. When they do outweigh the risks, then CPR and other advanced aggressive procedures are performed. However, medical standards do not recommend doing advanced aggressive interventions in every case (references: code of Ethics of the American Medical Association (AMA), Opinions 2.035, 2.095). In these situations, the

recommendation is to provide full support for patients, but not to provide procedures that have a higher risk of injury than to provide benefit, irrespective of a DNR that may be in effect.

The House and Senate bills do not reflect the complexity of this decision making process. This legislation is inappropriate for a large portion of individuals by mandating the following:

1. These bills attempt to mandate that aggressive potentially hazardous interventions be performed on every patient who requests it, no matter what the underlying disease, injury or illness (Sec.2 pg 2, lines 2-6, Sec 3. Pg 2 lines 11-15.

2. If the patient is not capable of decision making, a surrogate decision maker can mandate that potentially hazardous interventions be performed EVEN if the patient's advance health care directive states otherwise (Sec. 3. Pg 2 lines 11-15, Sec 6. Pg2, lines 29-31and pg 3, line 4, Sec 12, pg 19, lines 18,19).

3. It agrees that health care providers can identify medical futility (when procedures or interventions will not help a patient condition) but it further mandates that health care providers cannot refuse to apply potentially harmful interventions to patients if they or their families demand it. This is true even when the procedures are deemed to be medically ineffective (Sec 3. pg 2, lines 7-18) .

4. In short, it mandates that providers batter patients, by performing painful and potentially harmful procedures that are in direct contrast to generally acceptable medical practice s (Sec 3. pg 2, lines 7-18) .

5. It mandates that under certain circumstances health care providers may not adhere to their medical creed to "first do no harm". It mandates that providers harm patients. (Sec 3. pg 2, lines 7-18).

6. It does not encourage or support the input of medical providers or collaborative efforts to determine the best course of care by weighing all of the care options with clear understanding and discussion of risks vs. benefits (Sec 3. pg 2, lines 7-18) ..

7. It encourages individuals to direct hospitals and health care providers to perform potentially harmful interventions on patients who will not benefit from these interventions (Sec 3. pg 2, lines 7-18, (Sec.2 pg 2, lines 2-6). It negates individual freedom to choose.

8. It allows surrogate decision makers to reverse decisions made by individuals who have completed advance health care directives (Sec.2 pg 2, lines 2-6, Sec 3. pg 2, lines 7-18, Sec 6 pg 3 line 4, Sec. 13.52.300 pg 7, lines 6-11, and 15 and 16.)

9. It mandates that all previously established health care directives become null and void if they were established previously but not in accordance with the new bill directives (Sec 6 pg 3, lines 14-26, Sec 14. Pt 19, lines 23-27).

10. It threatens litigation to providers who will not inflict harm on patients by refusing to perform medically ineffective harmful procedures and aggressive interventions when patients or their families request it (Sec 8. Pg 5, lines 12-14).

11. It defaults automatically to doing aggressive painful potentially hazardous procedures on all patients who have not previously established written health care directives that specifically refuse to have CPR or other advanced aggressive interventions (Sec. 6 pg 3 lines 5-10, Sec 4. Pg 2 lines 19-22).

12. It mandates that a physician revoke DNR orders under any circumstance in which a patient, a family member or a surrogate decision maker demands it – even if the interventions demanded are medically ineffective. (Sec.2 pg 2, lines 2-6, Sec 3. pg 2, lines 7-18)

13. It states that a physician who has an "individual relationship with the patient" may revoke a DNR. It does not specify what that relationship might be. (Sec 6. Pg 3, line 3)It states that a physician who is employed by the health care institution where the patient is being treated may revoke a DNR order without establishing a professional patient -physician relationship (Sec. 6 pg 4, lines 1 and 2).

14. The advance health care directive form has been altered to indicate that any selection by an individual that does not ask for full resuscitation efforts must wish to die (Sec 13.52.300, pg 11 lines 8-31 and pg 12, lines 1-11.). It does not address or support an individual's right to request that their care be focused upon relief of pain and suffering, maximizing comfort and avoiding the prolonging of the dying process.

15. The new version of the advance health care directive form does not encourage graduated selection of interventions. It is an all or none proposition (Sec 13.52.300, pg 13, lines 2-10).

Page 19 simply needs to be deleted altogether.

Why the medical community has grave concerns

- It does not allow those individuals with the most expert understanding of health and disease and prognosis to exercise their expertise.
- It implies that DNR orders are made flippantly and without deep compassionate concern for the welfare of patients.
- It makes an assumption that doing potentially harmful and painful interventions are always in the patients' best interests despite accepted medical standards that indicate otherwise.
- It ignores the Hippocratic Oath and that health care providers must first do no harm . It supports the battery of patients by mandating that harmful procedures be performed on patients without regard to the benefit vs. risk assessment of these interventions

- It does not support the time honored tradition of patient physician relationship in which these discussions should be made.
- It makes an assumption that every patient feels that the quantity of life trumps the quality of life
- It does not promote death with dignity
- It forces families and loved ones to reconsider the decisions of their loved ones and consider reversing decisions that may cause irreparable psychological and emotional damage in the long run.
- It assumes that physicians do not err on the side of over-utilizing CPR. It assumes that providers underutilize these aggressive procedures. This is untrue.

Considerations for Alaska citizens who do not want government intrusion into personal medical decision making

- It makes an assumption that each individual values the quantity of life over the quality of life without regard to the degree of suffering an individual may experience.
- It assumes that every individual wants artificial support even when it has been shown to not be helpful.
- It assumes that every person wants to have CPR and undergo potential pain and suffering from these procedures even when they have been shown not to be of any benefit.
- It allows other individuals to reverse your right to death with dignity because they are afraid to lose you. It implies that they may not value your life if they do not at least try the aggressive resuscitative measures.
- It forces others to ignore your choices and decide for themselves whether or not to honor your wishes.
- It mandates that every individual should be treated the same. It is a "cookie cutter approach" to medical care assuming that each person wants the same thing as proponents for the right to life.
- It has the potential to reverse a well thought out decision for end of life care that may have been made by you for reasons unknown to other individuals.
- It does not allow those who have not yet made advanced directives to have well thought out approaches to their medical care and instead defaults to the use of aggressive medical interventions

- It assumes that physicians do not make medical decisions incorporating acceptable medical standards of care.
- It assumes that a patient and their physician cannot tailor a unique care plan for each individual. Instead, a legislator with no medical experience whatsoever can mandate the procedures that will happen to you at the end of life.
- It mandates patients with extremely advanced medical conditions undergo these procedures simply because they do not have advance health care directives.
- It insists that all previously established advanced health directives and DNR orders be reconsidered and must be in compliance with the new standards established with this new bill.

SENATOR FRED DYSON

January 18, 2012

Senator Bettye Davis
State Capitol Room 30
Juneau, Alaska 99801

SB 172

Re: AS 13.52 Alaska Health Care Decisions Act – Do Not Resuscitate (DNR) Orders & End of Life Decisions

Dear Senator Davis,

Thank you for your valuable support as a co-sponsor of the attached bill amending AS 13.52 *Alaska Health Care Decisions Act.* Ambiguities in the current law concerning the rights of patients and their surrogates to refuse or invalidate a DNR order have resulted in unnecessary distress of Alaskan residents facing critical end of life decisions.

In August 2011 my office was contacted by a recently discharged Anchorage area hospital patient and his wife, Mervin and Margery Mullins. The couple stated that a physician at the hospital put a Do-Not-Resuscitate order on Mervin, who has brain cancer, but doing much better than the prognosis. The DNR order was issued against the expressed wishes of both Mervin and Margery. When they protested, the physician told them that a DNR order is issued at the sole direction of a physician for his/her patient. Margery met with the hospital Chief Ethicist who confirmed their attending physician was correct. According to the Mullins, they were also told that the Durable Power of Attorney held by Margery "did not matter" because the decision was the physician's to make.

I had several conversations with the hospital Chief Operating Officer and Chief Medical Officer. They stated there is ambiguity in the law as to what a hospital (health care facility) can do with respect to overruling a DNR order placed on a patient by a physician. I explained my view - that the presumption of the law is in favor of life and of the patient's rights on end of life decisions, stated as such in AS.13.52.120(a) *In the absence of evidence to the contrary of the patient's intent, this chapter establishes a presumption in favor of life, consistent with the best interest of the patient.* The Chief Medical Officer agreed and directed that the DNR order be removed from Mr. Mervin Mullins.

I asked Legislative Legal to advise me on what the law actually says in AS 13.52 with respect to DNR orders and end of life decisions, and their opinion on whether the law adequately protects the patient (or his/her agent) right to overrule a physician's decision to issue a DNR order. I have attached to this correspondence the memos from Legal, dated October 28, 2011, and December 30, 2011.

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senator.fred.dyson@legis.state.ak.us • www.akrepublicans.org

In part, Legal states -

> *AS 13.52 is fairly clear that a patient with capacity has the right to make a DNR order ineffective. However, the chapter is not as clear that an individual can prevent a doctor from placing the order or that an authorized agent of the patient may make a DNR order ineffective or prevent the doctor from placing the DNR order. (emphasis added)*
>
> *Finally, AS 13.52.120(a) states that the chapter establishes a presumption in favor of life, which would seem to support interpreting the chapter to allow a patient (or the patient's authorized representative) to prevent a physician from a issuing a DNR order. In AS 13.52 it seems clear that a patient with capacity has the right to make a DNR order ineffective. And while I would tend to conclude that the better interpretation of AS 13.52 is that a doctor's right to issue a DNR order is limited by the decision of the patient or the patient's authorized representative, and that an agent with that authority can revoke a DNR order, there are some ambiguities in the chapter that could result in other interpretations. (emphasis added)*

Based on this review by Legal, the stated confusion in the law by an Anchorage area hospital facility, and the experience of the Mullins couple, I asked Legal to draft an amendment to AS 13.52 clarifying the ambiguities. Specifically, that a physician may not issue a DNR order without the expressed consent of the patient, or if the patient lacks capacity, without the expressed consent of the authorized agent of the patient, or, if no one is available or known to be authorized to speak for the patient, without the concurrence of a second physician.

The Advance Health Care Directive sample form provided in AS 13.52.300 is also amended to allow the patient the option of accepting or decline life-sustaining procedures (treatments that will keep you alive, but not remove your terminal condition).

If you agree with me that this is an important matter and find the amendments to AS 13.52 to be acceptable, I would very much welcome your support as a co-sponsor.

Best regards,

Fred Dyson

Health Care Decisions Act – AS 13.52

Concerns and a legal review of the law with respect to DNR orders

Terms

Individual instruction – an individual's direction concerning health care decisions for the individual

Health care – any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition

Health care decision – a decision made by an individual or individual's agent, guardian or surrogate regarding the individual's health care

Advance health care directive – an individual instruction or a durable power of attorney for health care

Concern

It appears that patient or surrogate consent is not required by Providence Alaska Medical Center for issuance of a Do Not Resuscitate (DNR) order. Providence Alaska is a partner in the WWAMI medical education program. The University of Washington Medical Center, Harborview Medical Center and Seattle VA Medical Centers all state with respect to disagreements about DNR orders – *At the UW, Harborview, and VA Medical Centers, the policy is to write a DNR order only with patient/family agreement. If there is disagreement, every reasonable effort should be made to communicate with the patient or family. In many cases, this will lead to resolution of the conflict. In difficult cases, an ethics consultation can prove helpful. Nevertheless, CPR should generally be provided to such patients, even if judged futile.(emphasis added) – Ethics in Medicine, Do Not Resuscitate Orders, University of Washington School of Medicine.*

Question

Does current law protect the right of a patient, or the patient's designee, to make ineffective a physician's decision to issue a DNR order?

Legal Opinion

State of Alaska, Legislative Legal opinion of October 28, 2011, states *AS 13.52 is fairly clear that a patient with capacity has the right to make a DNR order ineffective. However, the chapter is not as clear that an individual can prevent a doctor from placing the order or that an authorized agent of the patient may make a DNR order ineffective or prevent the doctor from placing the DNR order.*

Review of current law (AS 13.52 Health Care Decisions Act)

- ✓ AS 13.52.065(a) allows a physician to issue a DNR order. However, this cannot be read in isolation from the rest of AS 13.52 (Health Care Decisions Act).

- ✓ AS 13.52 is fairly clear that a patient with capacity has the right to make a DNR order ineffective.

- ✓ The chapter is not as clear that an individual can prevent a doctor from placing the order or that an authorized agent of the patient may make a DNR order ineffective or prevent the doctor from placing the DNR order.

- ✓ Rights of health care providers and institutions - right to object for reasons of conscience (except a DNR); right not to comply with medically ineffective health care (13.52.060(e-f) and 13.52.120(e)); right of health care provider not to comply with a decision of a surrogate who provider observes is not

abiding by wishes, values and best interests of patient (13.52.030(g-h)); and right of judicial relief (13.52.140).

- ✓ AS 13.52.060(d) requires a health care provider to comply with an individual instruction of the patient, and with a health care decision made by an authorized person. AS 13.52.060(d) *a health care provider, health care institution, or health care facility providing care to a patient shall comply with (1) an individual instruction of the patient...; and (2) a health care decision for the patient made by a person then authorized to make health care decisions for the patient* to the same extent as if the decision had been made by the patient while having capacity.

- ✓ The term "individual instruction" appears to cover a DNR order (approving or disapproving) because it covers a health care decision, see AS 13.52.390(17), which includes any care, treatment, service, or procedure that affects an individual's physical or mental condition.

- ✓ Specific provisions regarding DNR orders - AS 13.52.065(f) *Do not resuscitate protocol and identification requirements*, and AS 13.52.100(c) *Capacity*, clearly allow DNR orders to be made ineffective if a patient who is able to make the decision requests it, but these sections do not expressly address authorized agents. A do not resuscitate order may not be made ineffective unless, 1.) a physician revokes the do not resuscitate order; 2.) a patient for whom the order is written and who has capacity requests that the do not resuscitate order be revoked; or 3.) the patient for whom the order is written is under 18 years of age and the parent or guardian of the patient requests that the DNR order be revoked.

- ✓ The DNR protocol established by Department of Health and Social Services states that a DNR patient may revoke the patient's DNR status at any time and in any manner in accordance with AS 13.52, but does not address revocation by agents of the individual.

- ✓ AS 13.52.060(d), mentioned above, and AS 13.52.080(a)(6)(B)*Immunities,* both indicate that an authorized agent of the patient may make a DNR order ineffective. Also, AS 13.52.010 *Advance health care directives,* allows a patient to make advance health care directives and appoint agents regarding health care decisions. Under AS 13.52.010(b), an agent may be given the authority under a durable power of attorney for health to make any health care decision the principal could have made while having capacity.

- ✓ AS 13.52.300 - The Advance Health Care Directive form allows persons to state health care decisions and appoint agents which supports an interpretation that individuals may indicate their wishes and appoint agents regarding DNR orders.

- ✓ AS 13.52.120(a) *Effect of this chapter,* states the chapter establishes a presumption in favor of life, which would seem to support interpreting the chapter to allow a patient (or authorized representative) to prevent a physician from issuing a DNR order.

Conclusion of Legislative Legal

In AS 13.52 it seems clear that a patient with capacity has the right to make a DNR order ineffective. And while I would tend to conclude that the better interpretation of AS 13.52 is that a doctor's right to issue a DNR order is limited by the decision of the patient or the patient's authorized representative, and that an agent with that authority can revoke a DNR order, there are some ambiguities in the chapter that could result in other interpretations. – October 28, 2011 Legal Memo to Senator Dyson

Response to February 10, 2012 Letter Outlining Concerns with SB 172

This legislation is consistent with current law. The intent is to clarify ambiguities within the Health Care Decisions Act – AS 13.52. We appreciate the opportunity to review this legislation with you.

Sectional Analysis & Health Care Decisions Act – AS 13.52
A legal review of the Sectional Analysis of Senate Bill 172 (SB172), and of the current law (Health Care Decisions Act) pertaining to end of life decisions in AS 13.52, are provided along with this response and will be helpful to understanding the specifics of the legislation.

1. Providence – *These bills attempt to mandate that aggressive potentially hazardous interventions be performed on every patient who requests it, no matter what the underlying disease, injury or illness (Sec. 2, pg 2, lines 2 -6; Sec. 3, pg 2, lines 11-15).*

   Response – This is a broad overstatement. Sec. 2, pg 2, lines 2 -6; and Sec. 3, pg 2, lines 11-15, restates more clearly what AS 13.52 already states. See October 28, 2011, State of Alaska, Legislative Legal opinion attached.

   Note: On p. 2, line 13, the term "advanced health care directive" will be amended to "individual instruction", to be consistent with the more narrow focus of limiting the health care provider's right to decline to comply with a patient request that cardiopulmonary resuscitation be provided.

2. Providence – *If the patient is not capable of decision making, a surrogate decision maker can mandate that potentially hazardous interventions be performed EVEN if the patient's advance health care directive states otherwise (Sec. 3, pg 2, lines 11-15; Sec. 6, pg 2, lines 29-31 and pg 3, line 4; and Sec. 12, pg 19, lines 18-19).*

   Response – This is not correct. An advanced health care directive indicating a patient's choice for a DNR order or choice not to prolong life must be adhered to (see 13.52.030(g)) and this legislation does not change that. Rather, it reiterates the authority of patient advance health care directives in Sec. 6, pg 3, lines 2-3 which states in part, *under this paragraph, the consent (to a DNR order) may be provided by an advance health care directive.* Further, the rights of health care providers and institutions not to comply with a decision of a surrogate who the provider observes is not abiding by the wishes, values and best interests of a patient are protected under 13.52.030(g-h) *Surrogates*, and under 13.52.140 *Judicial relief*.

3. Providence – *It agrees that health care providers can identify medical futility (when procedures or interventions will not help a patient condition) but it further mandates that health care providers cannot refuse to apply potentially harmful interventions to patients if they or their*

families demand it. This is true even when the procedures are deemed to be medically ineffective (Sec. 3, pg 2, lines 7-18).

Response – Much of this section is current law, not new law. Only lines 11 – 15 contain new language, which clarifies that a health care provider, health care institution or facility may not decline to comply with an individual instruction or health care decision that requests CPR or other resuscitative measures be provided.

4. Providence – *In short, it mandates that providers batter patients, by performing painful and potentially harmful procedures that are in direct contrast to generally acceptable medical practice (Sec. 3, pg 2, lines 7-18).*

   Response – See response to #3.

5. Providence – *It mandates that under certain circumstances health care providers may not adhere to their medical creed to "first do no harm". It mandates that providers harm patients (Sec. 3, pg 2, lines 7-18).*

   Response – See response to #3.

6. Providence – *It does not encourage or support the input of medical providers or collaborative efforts to determine the best course of care by weighing all of the care options with clear understanding and discussion of risks vs. benefits (Sec. 3, pg 2, lines 7-18).*

   Response – See response to #3; also, the authority to issue or make ineffective DNR orders is, unfortunately, often viewed as a zero sum game. If the physician gains decision making authority, the patient loses. If the patient gains decision making authority, the physician loses. This legislation does nothing to discourage the dialogue surrounding these difficult decisions. Ideally, agreement will be reached. But in the end, if there is an impasse between the patient (or surrogate) and the physician with respect to a DNR order, the law says the presumption is in favor of life, and with that of patient consent to a DNR order being required.

   With respect to parents of a child patient, sometimes they cannot accept, even after long and painful discussions that their child will not survive. They will not "give up". May CPR be done long enough (not prolonged) for the parents looking on to demonstrate its futility? The health care provider is also treating the family, even though the child is beyond saving. Public safety and critical care personnel with substantial service in the profession know the relevancy of this argument.

7. Providence – *It encourages individuals to direct hospitals and health care providers to perform potentially harmful interventions on patients who will not benefit from these interventions (Sec. 3, pg 2, lines 7-18; Sec. 2, pg 2, lines 2-6). It negates individual freedom to choose.*

   Response – see response to #3 and #6; also, with respect to DNR orders, this legislation most certainly supports the patient's individual freedom to choose, and protects them from becoming subject to a DNR order against their will. Determinations of when to discontinue efforts at life-saving interventions fall to the purview of physicians, the policies of the health care institutions, and the accepted standards of medical practice.

8. Providence - *It allows surrogate decision makers to reverse decisions made by individuals who have completed advance health care directives (Sec. 2, pg 2, lines 2-6; Sec. 3, pg 2, lines 7-18; Sec. 6, pg 3, line 4; Sec. 13.52.300, pg 7, lines 6-11, and 15 and 16).*

   Response – this is not correct. See response to #2; also, a real misunderstanding occurs here with respect to what is current law, and what is being proposed in the legislation. The reference to Sec. 13.52.300, pg 7, lines 6-11, and 15 and 16, is all current law as stated in the sample Advance Health Care Directive form. None of this is new or amended language that is being proposed. Rather, the language in question on the form is merely giving the explanation that Part 1 of the form is a durable power of attorney for health care and advising the reader that they may appoint an agent, limit or not limit the agent's authority to make health care decisions for the patient, and if they choose not to limit the agent's authority, a careful description of the specific actions an agent make take on their behalf is identified.

9. Providence – *It mandates that all previously established health care directives become null and void if they were established previously but not in accordance with the new bill directives (Sec. 6, pg 3, lines 14 – 26; Sec. 14, pg 19, lines 23-27).*

   Response – this is an incorrect, overly broad statement. Rather, the bill language mentioned in Sec. 14, pg 19, lines 23 – 27 speaks only to indicate how DNR orders made before the bill's effective date are to be treated in light of the bill.

   Further, 13.52.150 *Do not resuscitate orders and identification of other jurisdictions* states that with respect to DNR orders or DNR identification executed, issued or authorized in another state or territory or possession of the United States - a health care provider or health care institution may presume, in the absence of actual notice to the contrary, that the DNR order or the DNR identification complies with the laws of this state, regardless of where or when it was executed, issued, or authorized, and that the patient is a qualified patient.

10. Providence – *It threatens litigation to providers who will not inflict harm on patients by refusing to perform medically ineffective harmful procedures and aggressive interventions when patients or their families request it (Sec. 8, pg 5, lines 12-14).*

    Response – the language of this section is consistent with current law liability for gross negligence or reckless or intentional actions, and states that immunities from liability do not apply to health care providers, institutions and facilities if the DNR order relied on by these entities was issued in violation of AS 13.52.065.

    The legislation protects health care providers from criminal liability by providing that a violation of 13.52.065 *Do not resuscitate protocol and identification requirements* does not, for any purpose, constitute a homicide (Sec. 9, pg 5, lines 20-21).

11. Providence – *It defaults automatically to doing aggressive painful potentially hazardous procedures on all patients who have not previously established written health care directives that specifically refuse to have CPR or other advanced aggressive interventions (Sec. 6, pg 3, lines 5-10; Sec. 4, pg 2, lines 19-22).*

    Response – this is not correct. This legislation allows patients (or surrogates) to make health care decisions with respect to DNR orders. Most patients do not have advanced health care directives, but defer making end of life decisions until they must be made.

    A misunderstanding occurs here in the sections of legislation identified. Sec. 6, pg 3, lines 5-10 speaks to when a physician may issue a DNR order without the express consent of the patient in various situations, one of which is when a patient has an advance health care directive which indicates the patient wants a DNR, and another situation in which a patient has an advance health care directive which is silent about the issuance of a DNR and another physician concurs in the decision to issue a DNR order.

12. Providence – *It mandates that a physician revoke DNR orders under any circumstance in which a patient, a family member or a surrogate decision maker demands it – even if the interventions demanded are medically ineffective (Sec. 2, pg 2, lines 2-6; Sec. 3, pg 2, lines 7-18).*

    Response – this is an incorrect, overly broad statement. See responses to #2, #6 and #7. True, the legislation protects patients from becoming subject to DNR orders against their will. However, the law clearly lays out process for determining who has standing to act on behalf of the patient, and who does not (13.52.030 *Surrogates).*

13. Providence – *It states that a physician who has "an individual relationship with the patient" may revoke a DNR. It does not specify what that relationship might be (Sec. 6, pg 3, line 31). It states that a physician who is employed by the health care institution where the patient is being treated may revoke a DNR order without establishing a professional patient-physician relationship (Sec. 6, pg 4, lines 1 and 2).*

    Response – we welcome proposed language from Providence. The central idea is to limit the number of uninvolved physicians who could raise objections to a DNR order. Sec. 6, pg 3, line 30 contains the key contextual language *arising out of the physician's* "individual relationship with the patient"; or "employment by the health care institution or health care facility where the patient is being treated". With respect to *individual relationship* – a patient could have close friends, who just happen to be physicians, who know much about the patient's medical situation, and personal values and wishes, but who are not the patient's primary care providers. With respect to *employment by the health care institution....where the patient is being treated* - the patient-physician relationship is implied, but not clearly stated.

14. Providence – *The advance health care directive form has been altered to indicate that any selection by an individual that does not ask for full resuscitation efforts must wish to die (Sec. 13.52.300, pg 11, lines 8-31, and pg 12, lines 1-11). It does not address or support an individual's right to request that their care be focused upon relief of pain and suffering, maximizing comfort and avoiding the prolonging of the dying process.*

    Response – a complete misunderstanding occurs here in the sections of legislation identified. The reference to Sec. 13.52.300, pg 11, lines 8-31, and pg 12, lines 1-11, is all current law as stated in the sample Advance Health Care Directive form. None of this is new or amended language that is being proposed. Further, the plain meaning of this form is clear - to enable patients to provide detailed instructions for health care concerning end-of-life decisions. The form covers the choice to prolong life, not to prolong life (and under what circumstances), additional instructions from patient, choices concerning artificial nutrition and hydration, and relief from pain.

15. Providence - *The new version of the advance health care directive form does not encourage graduated selection of interventions. It is an all or none proposition (13.52.300, pg 13, lines 2-10).* Response – This legislation incorporates the entirety of the current form, with one amendment (pg 13, lines 2-10) to provide an additional choice in the Alaska Health Care Directive form to allow patients to accept or refuse life-sustaining procedures. The current form under Part 2 – Instructions for Health Care, on pages 11 – 13 of the bill, give ample opportunities for graduated selection of interventions as stated in response to #14.

Cindy Smith

From: Paradise, Lisabeth <Lisabeth.Paradise@providence.org>
Sent: Friday, February 24, 2012 12:25 PM
To: Sen. Hollis French
Subject: HB 309!

Dear Senator French,

I am writing to encourage you to take a stand **AGAINST** HB 309 and SB 172.

These bills have the capacity to negate a person's advanced directive and take *medical* decision making out of the hands of the professionals who practice medicine, and place it in the hands of state government.

I do not believe that the people of Alaska would agree with government involvement in our personal health care decisions.

The central tenant of this amendment, which is flawed in an irreparable way, is that of a physician being compelled to provide medical procedures or therapies, which in his or her own judgment, ***inflict greater harm than good*** at the instruction of a patient or his surrogate decision maker.
Advanced directives are meant to allow a patient to approve or disapprove proposed medical procedures; not mandate a specific therapy or therapies.

As an advocate for patients living with chronic illness, and those nearing the end-of-life for most of my professional career, I am involved daily with difficult discussions regarding delivering appropriate, evidenced based, compassionate care to those facing their end days.
I strongly believe that health care providers do their best to promote and preserve life in a manner that is consistent with current standards of care; utilizing medical data that provides prognostic indication, similar case experiences, religious preferences and social norms.
Rarely, **if ever,** is a unilateral decision made about CPR, intubation or aggressive resuscitation.
These are difficult, moral and ethical decisions that weigh heavily upon a medical team with the full understanding that each individual is unique and no one solution applies to all of our society.

This pending legislation is alarming to those who work daily with patients and families who are navigating the complex waters of medical management of chronic and terminal illness.

Providing appropriate medical care is part of the ethical code that nurses and physicians must use to guide their care. Offering a medical intervention which has proven to be harmful, painful , ineffective or is associated with complications which may lead to death, is *inconsistent* with this ethical groundwork.

These bills do not allow open discussion between family members, spouses and loved ones to help make a determination about patient wishes, preferences, prognosis, outcomes and long term impact. In short, they legislate a belief that life, any type or quality of life, must be persevered or those not adhering to this directive will suffer the penalties of law.

Please take the time to examine the serious and harmful content of these bills.
HB 309 is not "fixable" by any edits of language within it. The current statute 13.52.065 is very clear and does not require any revision.

I look forward to hearing from you.

Lisabeth Paradise, MS, FNP, ACHPN
Palliative Care/Family Nurse Practitioner
Providence Palliative Care Service
Providence Alaska Medical Center
Anchorage, Alaska

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MEMORANDUM January 23, 2012

SUBJECT: Sectional summary of SB 172 relating to health care decisions, including do not resuscitate orders
(Work Order No. 27-LS0991\B)

TO: Senator Fred Dyson
Attn: Chuck Kopp

FROM: Terry Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Amends AS 13.52.045 to prohibit a health care institution or health care facility from interpreting the issuance of a do not resuscitate order as preventing the providing of life-sustaining procedures to the patient.

Section 2. Amends 13.52.060(e) to prohibit a health care provider from declining, for reasons of conscience, to comply with a do not resuscitate order that is consistent with this chapter. Also states that the subsection does not allow a health care provider, health care institution, or health care facility to decline to comply with an individual instruction or a health care decision that requests that cardiopulmonary resuscitation or other resuscitative measures be provided.

Section 3. Amends AS 13.52.060(f) to state that the subsection does not allow a health care provider, health care institution, or health care facility to decline to comply with an advance health care directive or a health care decision that is consistent with the chapter and that requests that cardiopulmonary resuscitation or other resuscitative measures be provided. The subsection addresses declining to comply with an individual instruction or a health care decision that requires medically ineffective health care or health care contrary to generally accepted health care standards.

Section 4. Amends AS 13.52.065(a) limits a physician's right to issue a DNR order. The order may be issued only as provided in AS 13.52.065.

Section 5. Amends AS 13.52.065(b) to require that the protocol (adopted by the department) for withholding cardiopulmonary resuscitation comply with AS 13.52.065.

Section 6. Adds new subsections to AS 13.52.065.

Sec. 13.52.065(g) prohibits a physician from issuing a do not resuscitate order for a patient of the physician without the express consent described in the subsection (except as provided by (h)).

Sec. 13.52.065(h) states when a physician may issue a do not resuscitate order for a patient of the physician without the express consent required by (g) of this section.

Sec. 13.52.065(i) requires a physician to revoke a do not resuscitate order issued for a patient under certain listed circumstances.

Sec. 13.52.065(j) allows a physician to revoke a do not resuscitate order issued by another physician under certain described circumstances.

Section 7. Amends AS 13.52.080(a) to replace a citation to a subsection that is repealed by this bill.

Section 8. Amends AS 13.52.080(c) to provide that its immunity provisions do not apply if a do not resuscitate order relied on by the health care provider, health care institution, or health care facility was issued in violation of AS 13.52.065.

Section 9. Amends AS 13.52.120(b) to clarify that a violation of the new provisions (added by bill sec. 6) does not, in the context of the provision's required consistency with the chapter, constitute a homicide. Adds a cross reference to the new (h) as an exception for applying the subsection's approach to suicide or homicide.

Section 10. Adds AS 13.52.120(h) to state that the provisions in (b) about homicide and suicide do not apply to a person who orders or causes the withholding or withdrawal of life-sustaining procedures and acts intentionally, recklessly, with criminal negligence, or with gross negligence.

Section 11. Amends the optional form in AS 13.52.300 to add a wish regarding life-sustaining procedures.

Section 12. Amends AS 13.52.390 (the definition section) to change the definition of "health care decision" to state that the term includes a direction about receiving cardiopulmonary resuscitation or other resuscitative measures.

Section 13. Repeals AS 13.52.065(f), which currently addresses how DNR orders are made ineffective.

Section 14. Adds a provision to indicate how DNR orders made before the bill's effective date are to be treated in light of the bill.

If I may be of further assistance, please advise.

TLB:plm
12-040.plm

SENATOR FRED DYSON

CSSB 172 (27-LS0991\D) – EXPLANATION OF CHANGES

The substantive changes in Committee Substitute for SB 172 as introduced on 01/20/12 are as follows:

1. Section 2, p. 2, line 3; and Section 3, p. 2, line 12 – INSERT - **except as provided in AS 13.52.030(h)** to clarify that health care providers may decline to comply with a decision of a surrogate who the health care provider observes is not abiding by the wishes, values and best interest of the patient.

2. Section 2, p. 2, lines 5 – 6, and Section 3, p. 2, lines 14 - 15 –
   DELETE - [cardiopulmonary resuscitation or other resuscitative measures be provided];
   INSERT - **a do not resuscitate order be made ineffective**.

   This reflects the narrow focus of the bill to protect patients from being subject to DNR orders against their consent, and is consistent with current statutory language in AS 13.52.065(f).

3. Section 3, p.2, line 13 - DELETE [advance health care directive] and INSERT **individual instruction**.

   This language change was the original draft intent of Legislative Legal, and is a correction to keep language internally consistent within AS 13.52.060, subsection (f), and with the purpose of the bill.

4. Section 6, p. 3, adds new subsection (h)(3) – when physicians may issue do not resuscitate orders without express consent of patient.

   This particular situation was not previously addressed.

5. Section 6, p. 3, lines 19 and 20 – DELETE [subsection (i)(3)].

   This change recognizes that in the case of a patient who does not have capacity, a dated advance health care directive may not reflect the current wishes, values and best interest of the patient.

6. Section 6, p. 3, lines 23 and 24 – DELETE [or does not oppose]

   This change removes ambiguity.

7. Section 6, p.3, lines 29 – 31, and p.4, lines 1 and 2 - DELETE [; or (2) health care obligation to the patient arising out of the physician's (A) individual relationship with the patient; or (B) employment by the health care institution or health care facility where the patient is being treated.]

   This language change keeps the relationship more narrowly defined to the physician-patient relationship. It provides less complication and is consistent with current chapter language in 13.52.065.

8. Section 8, p. 5, lines 11 - 14 - DELETE all amended language.

   Current statutory language in AS 13.52.080 *Immunities,* and AS 13.52.090 *Statutory Damages* adequately covers health care provider, health care institution and health care facility immunity and liability considerations.

9. Section 9, p. 5, line 16, 20 & 21- DELETE all amended language.

   See comment on #10 below.

10. Section 10, p. 5, lines 29 - 31 and p. 6, lines 1 - 3- DELETE all new subsection language.

    Section 13.52.120(b) already states that withholding or withdrawing of CPR or other life sustaining procedures must be *consistent with this chapter*, and statutory language in AS 13.52.080 *Immunities,* and AS 13.52.090 *Statutory Damages* adequately covers health care provider, health care institution and health care facility immunity and liability considerations.

11. Section 11, p.13, lines 2 - 11 – *Life-Sustaining Procedures.* In addition to the options of receiving or not receiving life-sustaining procedures, an additional option is provided to allow for a patient to select specific life-sustaining procedures so that this is not an "all or none" proposition when electing to receive or not receive life-sustaining procedures.

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March 7, 2012

Stephen T. Rust, MD, FACP, FAAHPM
Director of Palliative Care
Providence Alaska Medical Center
3200 Providence Drive
Anchorage, AK 99508

Re: CSSB 172

Dear Dr. Rust:

This will respond to your request for a legal analysis of the most current version of the Committee Substitute for Senate Bill 172 (CSSB 172), which changes current law on Do Not Resuscitate orders.

We have analyzed the most recent version of Senate Bill 172, along with the 11 numbered changes in the most recent version of the committee substitute for that bill. While the changes in CSSB 172 eliminate the exposure to criminal penalties that were in the original bill, the fundamental change in the current law is still reflected in the committee substitute. CSSB 172 still requires a physician to perform procedures that may violate his or her conscience, violate recognized standards of medical care, or what could constitute medically ineffective health care, contrary to generally accepted health care standards. Sections 2, 3, 6 and 13 of the bill still require a physician to perform cardio-pulmonary resuscitation on a patient who has arrested even when such medical procedure is medically contra-indicated.

The current bill also directly contradicts provisions in three different places in the current Alaska Health Care Decisions Act. First, in AS 13.52.060(e), a health care provider may decline to comply with "an individual instruction," meaning the patient's instruction, "for reasons of conscience." Currently, the exception is that if there is a Do Not Resuscitate order, all health care providers must abide by it and cannot resuscitate a patient for which there is a DNR in place. AS 13.52.060(e) also permits a physician to decline complying with a patient's instruction if the instruction is "contrary to a policy of the institution or facility that is expressly based on reasons of conscience. . ." Consonant with the Ethical and Religious Directives for Catholic Health Care Services, Catholic hospitals do not require resuscitation when such is medically and clinically contra-indicated. Requiring a Catholic hospital to provide or allow the provision of such a procedure when not medically indicated may raise First Amendment, Freedom of Exercise implications.

Second, AS 13.52.060(f) permits a physician to decline a patient's instruction that "requires medically ineffective health care or health care contrary to generally accepted health care standards . . ."

Third, AS 13.52.120(e) states "this chapter does not authorize or require a health care provider or institution to provide health care contrary to generally accepted health care standards applicable to the health care provider or institution."

Although CSSB 172 purports to leave all of that language in, it essentially eliminates those provisions when a patient instructs a physician to attempt to resuscitate the patient after the patient has arrested, meaning stopped breathing or the patient's heart has stopped beating or both; in other words, after the patient has died a natural death. In essence, the CSSB 172 still permits, as the original bill did, the patient to dictate what health care the physician must provide. This is contrary to the entire spirit of the Health Care Decisions Act when it was enacted in 2004, later when it was amended in 2006, and again when it was amended in 2008.

As you may know, Alaska's Health Care Decisions Act was patterned on and very closely follows the Uniform Health Care Decisions Act drafted by the National Conference of Commissioners on Uniform State Laws. The act represents a very comprehensive and cohesive treatment of health care decisions, including but not limited to end of life decisions. As is the case with all uniform laws, they are intended to be uniform so that when people travel from one state to another, they will have the benefit of the same or similar laws on similar subjects. In addition, uniformity assists courts when it is necessary for them to interpret the laws. The changes proposed in CSSB 172 would very significantly destroy that uniformity with the other acts that have been passed in other states. One of the Legislative Research Services memorandums to Senator Dyson dated January 19, 2012, acknowledges that Alaska's act came from the Uniform Health Care Decisions Act. The section from the Uniform Health Care Decisions Act cited in the Legislative Research Services memo is identical to the Alaska equivalent statute, AS 13.52.060(d). That uniformity would be destroyed by the proposed legislation.

Another fundamental point is that the proposed CSSB 172 is not needed. The existing statute already has a mechanism to deal with the situation that apparently provided the impetus for CSSB 172. In that situation, the physician's clinical judgment was that attempted resuscitation following arrest was not clinically indicated while the patient wanted such medical care to be provided anyway. The Alaska Health Care Decisions Act provides a mechanism that comes into play when there is such a dispute between physician and patient or surrogate decision maker. AS 13.52.060(g) provides that when the patient has requested care that the provider is unwilling to provide, care for the patient is transferred to other providers. Subsection (g) sets up a procedure under which the physician informs the patient of the physician's declining to carry out the patient's instructions. The physician then "provides continuing care to the patient until a transfer is affected." Assuming the patient or surrogate assists with the transfer, a physician also

then has the duty to "immediately cooperate and comply with the decision by the patient . . . to transfer . . . to another health care institution, to another health care facility, to the patient's home, or to another location chosen by the patient." This authority would include the ability to transfer to another physician.

Thus, the Health Care Decision Act already provides a mechanism for resolving disputes between patients and their physicians when the patient wants some procedure or medical care that the physician thinks is medically ineffective, unethical or is contra-indicated. When the opposite situation occurs, that is a physician recommending certain care but the patient refusing to consent to it, the result is already established: the patient will not receive the care. The only problem arises when the patient wants affirmative care to be provided that the physician thinks is clinically inappropriate. The statute already provides a way to resolve that situation.

CSSB 172, including the recent changes, appears to be based upon three fundamental mischaracterizations. First, the changes proposed in CSSB 172 confuse cardio-pulmonary resuscitation, a specific medical procedure brought to bear on a person who has died through the cessation of respiration or the cessation of cardio-activity or both with what are referred to as "life sustaining procedures." Cardio-pulmonary resuscitation becomes relevant only when there has been a cardiac or respiratory arrest. "Life-sustaining procedures," as generally understood and as used by AS 13.52, are "bridge" treatments that keep a person alive. "Life sustaining procedures" are defined in the Act at 13.52.390(26) and are defined to mean "any medical treatment, procedure or intervention that, in the judgment of the primary physician, when applied to a patient with a qualifying condition, [i.e., terminal or permanently unconscious] would not be effective to remove the qualifying condition and would serve only to prolong the dying process . . ." In other words, "life sustaining procedures" are treatments applied to people who are still living. They are further defined in the same section to include "assisted ventilation, renal dialysis, surgical procedures, blood transfusion, and the administration of drugs, including antibiotics, or artificial nutrition and hydration." All these treatments are applied to people who are still living. The changes proposed by CSSB 172 confuse CPR with life-sustaining procedures as if they were all the same thing. They are different procedures with different purposes and applied at different times to the patient.

The proposed changes also confuse resuscitation, a medical procedure which is done on a physician's order (like all other care) or medical staff (of physicians) policy with a decision to withhold or withdraw life-sustaining procedures which is a decision always left to the patient or his surrogates.

The Alaska Health Care Decisions Act distinguishes between cardio-pulmonary resuscitation and life sustaining procedures. The proposed changes will confuse or obliterate those distinctions and thus create ample grounds for disputes over correct statutory interpretation.

The second mischaracterization is that the proposed changes confuse the concept of "consent for treatment." The second numbered change proposed for CSSB 172 gives as the reason for that change that it "reflects the narrow focus of the bill to protect patients from being subject to DNR orders against their consent. . . ." The concept of "consent for treatment" applies to treatment that is proposed or recommended by a physician which cannot be administered unless and until a patient consents to the recommended treatment. Procedures performed on the patient to which there has been no informed consent, absent an emergency and presumed consent, are considered battery; and thus all medical treatment requires consent before it can be administered. "Consent for treatment," applies to treatment that is being recommended by the physician. The underlying assumption of the proposed changes for CSSB 172 is that a patient "consents" to a DNR. The DNR is the absence of a medical procedure, not a medical procedure. A patient does not and cannot logically "consent" to treatment that is not being proposed or recommended. This confusion with consent for treatment leads to a transformation of approval of treatment recommended by the physician to a direct order by the patient to the physician that the physician will perform a certain procedure.

It has always been the case, and continues to be the case, that a patient has the option of declining recommended treatment. Even if it is universally accepted that the proposed treatment is good for the patient, the patient can still decline that treatment. But there is a world of difference between a patient's right to decline recommended treatment and a patient's prerogative to demand medical procedures that the doctor thinks are medically ineffective or inappropriate.

The third fundamental confusion is the assumption that the Health Care Decisions Act is ambiguous on whether a physician has the authority to impose or revoke a DNR order. The statute is not ambiguous on that point. AS 13.52.065(f) states that a DNR order may not be revoked unless a physician revokes it. The first sentence in that subsection could be argued to be ambiguous because it also refers to a patient requesting that a DNR order be revoked. But the second and last sentence of subsection (f) makes it clear that it is only a physician who can revoke the DNR order. It states "any physician of a patient for whom a do not resuscitate order is written may revoke the Do Not Resuscitate order if the person for whom the order is written requests that the physician revoke the Do Not Resuscitate order." (Emphasis supplied.) A patient can request it, but a physician's order can be revoked only by a physician. There is really no ambiguity on that point.

If the legislature had intended that when a patient requested the DNR order to be revoked the physician was required to do so, the above underlined word would have been "shall."

The fact that the legislature used the word "may" unambiguously shows that it is the physician who makes the decision. In addition, the definition of "health care decision" found in AS 13.52.390(19) lists five areas upon which the patient can decide the health care that he wants. But requiring resuscitation in the face of a DNR is not among them. The statute thus excludes mandating resuscitation after the patient dies from the definition of "health care decision." Section 9 of CSSB 172 would change that.

Also, Section 10 of CSSB 172 expressly repeals outright A.S. 13.52.060(f) [the current DNR provision] in its entirety, which is a tacit admission that it unambiguously gives the ability to revoke a DNR solely to the physician.

As the Legislative Research Service memorandum dated January 19, 2012 to Senator Dyson sets out, the American Medical Association Code of Medical Ethics has opinions on these issues. E-2.035 provides "physicians are not ethically obligated to deliver care that, in their best professional judgment, will not have a reasonable chance of benefiting their patients. Patients should not be given treatments simply because they demand them. . . ." This is a standard of medical ethics applied across the country.

AMA Code of Ethics Opinion E-2.037 provides that "when further intervention to prolong the life of a patient becomes futile, physicians have an obligation to shift the intent of care toward comfort and closure."

The AMA has a specific medical ethic opinion on Do Not Resuscitate orders. E-2.22 states "when a patient suffers cardiac or respiratory arrest, attempts should be made to resuscitate the patient, except when cardio pulmonary resuscitation (CPR) is not in accord with the patient's expressed desires or is clinically inappropriate." As you know, many patients are inappropriate for resuscitation procedures because of their frailness or other conditions that make the traumatic resuscitation procedures contra-indicated.

In all of medical practice, only a physician has the authority to enter orders calling for the administration of health care to patients in a hospital. The proposed changes would reverse that universal practice when it came to Do Not Resuscitate orders and elevate the patient's desires and demands over the physician's best clinical judgment. Medical care in recent times is always subject to the consent of a patient. Even if the doctor recommends a certain procedure, the patient has the authority to decline to have it administered to him or her. The proposed changes turn this right to decline recommended medical care into a demand that the physician provide medical care regardless of the physician's best medical judgment.

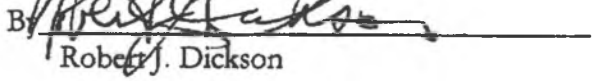
Finally, we note the Division of Legal and Research Services Memorandum dated December 30, 2011, to Senator Dyson, which apparently formed the basis for the CSSB 172, had a number of errors. That memo indicated that the selection of life-sustaining procedures was not sufficiently addressed in the statutory form. Although the term "life-sustaining procedures" is not set out in the form, the form provides for "choice to prolong life" which is understood by all concerned to include a request to use appropriate life-sustaining procedures "within the limits of generally accepted health care standards." The form goes on to address specifically artificial nutrition and hydration and relief from pain. But the initial choice would already call for the application of life-sustaining procedures. The memorandum also suggests that the term "individual instruction" appears to cover a DNR order. As indicated above, it does not. The same sentence misquotes the definition of "health care decision" and mis-cites to the wrong section of the statute. See text of that memorandum on p.2 at fn. 5 and 6. The correct cite is to AS 13.52.390(20). The memorandum then goes on to state that "AS 13.52.065(f) clearly allowed DNR orders to be made ineffective if a patient who is able to make the decision requests this. . . ." As explained above, that is not the case. Finally, in the final paragraph the memorandum states that "it seems that a patient with capacity has the right to make a DNR order ineffective." But that is inconsistent with the language of AS 13.52.062(f), as discussed above.

Consequently, CSSB 172 does not merely "clarify" what was the intent in the original enactment, it is diametrically opposed to the carefully crafted statutory scheme that complied with the uniform law on the subject and with national medical ethical codes. In the last analysis, the changes are unnecessary because the problem attempted to be solved is already addressed within the existing terms of the statute by permitting a patient to transfer to another physician or facility.

We hope the foregoing is helpful. Please let us know if there is further clarification or explanation needed.

Very truly yours,

ATKINSON, CONWAY & GAGNON

By 
Robert J. Dickson

RJD/jkh

114799/5000.9999

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KENNETH R. ATKINSON

JOHN M. CONWAY
(1936-2009)

March 8, 2012

Stephen T. Rust, MD, FACP, FAAHPM
Director of Palliative Care
Providence Alaska Medical Center
3200 Providence Drive
Anchorage, AK 99508

Re: CSSB 172
Supplement to March 7 analysis

Dear Dr. Rust:

Mr. Jim Jordon, Executive Director of the Alaska State Medical Association has raised a very good point about the statutes governing physicians that require them to adhere to the AMA Code of Ethics. His point was passed on by Laurie Herman. The purpose of this is to follow-up on that point.

The bottom line is that the statutes and regulations governing physicians requires them to adhere to the nine AMA "Principles of Medical Ethics" appearing at the beginning of the book "Code of Medical Ethics" which includes both those principles as well as all of the opinions adopted by the AMA Counsel on Ethical and Judicial Affairs. None of those nine general principles specifically addresses end-of-life issues or Do Not Resuscitate orders. The closest one is principle VIII which states "a physician shall, while caring for a patient, regard responsibility to the patient as paramount." The nine "principles of medical ethics" do not include the specific ethics opinions referenced in our letter of March 7th.

The details are that Chapter 64 of Title 8 of the Alaska Statutes is the chapter that governs the Alaska State Medical Board, physician licensing, and physician discipline. A.S. 08.64.326(a)(11) states:

> The board may impose a sanction if the board finds after a hearing that a licensee . . .
>
> * * *
>
> (11) Has violated any code of ethics adopted by regulation by the board;

The State Medical Board has adopted regulations which include 12 AAC 40.955 entitled "Ethical Standards." 12 AAC 40.955(a) states:

> The Principles of Medical Ethics of The American Medical Association on p.xiv of the 2002 – 03 Edition of the Council on Ethical and Judicial Affairs, Code of Medical Ethics, published by the American Medical Association are adopted by reference as the ethical standards for physicians and applies to all physicians subject to this chapter.

The AMA publishes its Code of Medical Ethics which includes the nine "Principles of Medical Ethics" now appearing on p.xv of the 2006 – 07 Edition; but they are the same as those referenced in the 2002 – 03 Edition. The "Code of Medical Ethics" includes both these general principles and over 300 pages of ethics opinions on various matters which have been adopted by the Council on Ethical and Judicial Affairs. The State Medical Board's regulation does not explicitly incorporate all of these opinions. But from our conversation with Mr. Jordon, Executive Director of the Alaska State Medical Association, we understand that the State Medical Board interprets its own regulation to include not just simply the nine general principles, but also all of the opinions that are published as part of the "Code of Medical Ethics" by the AMA.

That being the case, requiring a physician to perform or authorize a resuscitation when he did not think it was medically effective or ethical would put him in the impossible position of either violating the new provisions of the Alaska Health Care Act as amended by CSSB 172 or violating the State Medical Board's disciplinary statutes.

Very truly yours,

ATKINSON, CONWAY & GAGNON

By _____
Robert J. Dickson

RJD/jkh

114842/5000.9999

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February 14, 2012

PROVIDENCE
Health & Services
Alaska

Senator Fred Dyson
State Capitol, Room 121
Mailstop 3100
Juneau, AK 99801-1182

Dear Senator Dyson:

I recently became aware that in a letter dated January 18, 2012 from you to Senator Bettye Davis, and subsequently made part of the public record for Senate Bill 172, there are statements attributed to the "Chief Operating Officer" and the "Chief Medical Officer" of an area hospital in reference to a specific patient and family. For a number of reasons, I believe that the "chief operating officer" referenced in your letter may be me, and the "chief medical officer" would then be Roy Davis, MD. I wish to clarify a statement attributed to Providence executives in order to avert misunderstanding among interested parties who are neither familiar with the case referenced in your letter nor the mechanisms and laws for physician prescriptions, including "Do Not Resuscitate" ("DNR") orders.

While I presently serve as the chief executive officer of Providence Health & Services Alaska, at the time referenced in your letter, I served as the chief operating officer. You and I spoke on at least two occasions about the case in question. I explained that these cases are almost always highly complicated and emotionally demanding for all parties. Physicians do an outstanding job of considering each patient's needs and of determining the appropriateness for such orders under these challenging circumstances.

Roy Davis, MD, our chief medical officer, indicates that he never spoke with you about the patient matter. However, you did speak with Richard Mandsager, MD. Dr. Mandsager serves as chief executive officer for Providence Alaska Medical Center, and he recalls speaking with you about certain details of the case. We suspect that your reference to the "chief medical officer" was in fact to Dr. Mandsager in his role as chief executive officer.

The specific clarification we wish reflected in the public record is that neither Dr. Mandsager nor any other executive of Providence Health & Services represented to you that the DNR order would be removed from the referenced patient's medical record. Such an action is inconsistent with policy, bylaws and community practice. As such, removal of the DNR was never considered.

I respectfully request that you correct the official record on this important matter.

Sincerely,

Bruce Lamoureux

Bruce Lamoureux
Sr Vice President/Chief Executive Alaska Region

BL:lb

Cc: Senator Bettye Davis
Senator Hollis French
Representative Bob Lynn

ALASKA STATE SENATE

SENATOR FRED DYSON

May 23, 2012

Stephen T. Rust, MD
Director of Palliative Care
Providence Alaska Medical Center
3200 Providence Drive
Anchorage, AK 99508

Re: CSSB 172 & Response to Providence Alaska Medical Center's Legal Analysis Memo of March 7, 2012

Dear Dr. Stephen Rust,

I appreciate your patience and professionalism working with my office and the Legislature on our efforts to clarify the roles and responsibilities of physicians and patients with respect to do not resuscitate (DNR) orders as addressed in AS 13.52, the Alaska Health Care Decisions Act. It is my hope that we will find points of agreement on how the law is applied to the process of a physician issuing a DNR order, and a patient's right to make the order ineffective.

This letter is in response to the March 7, 2012 legal analysis memo of CSSB 172 (Version I) that was prepared by the Law Offices of Atkinson, Conway and Gagnon for Providence Alaska Medical Center. I will refer to this legal analysis as "the Memo". I would note that the current version of the bill is Version D, which I have included with this letter for your convenience.

My prime concern pertains to the process of physician issued DNR orders - that of a health care provider unilaterally disregarding the expressed wish of a fully informed patient, who has capacity to make their own health care decisions. The Alaska Health Care Decisions Act (AHCDA) in AS 13.52 makes it explicitly clear that the patient (or surrogate) and health care professional work together in end of life decisions, with neither party retaining absolute authority over the other. Nevertheless, AHCDA is heavily weighted with language protecting the self-determination and autonomy of the patient with respect to end of life care. Most importantly, SB 172 does nothing to change what the law already requires, it only states it more clearly.

In short, if the medical community would agree to follow the law *as it is written,* I would not be pursuing this legislation. The Memo identified three (3) points of law within AHCDA that protect physician rights with respect to provision of care: AS 13.52.060(e)- conscience rights of health care providers and health care facilities; AS 13.52.060(f)- right to decline 'medically ineffective' healthcare; and AS 13.52.120(e)- right not to

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senator.fred.dyson@legis.state.ak.us • www.akrepublicans.org

provide healthcare contrary to generally accepted health care standards. I would also add AS 13.52.030(h), which protects a physician's right not to follow a surrogate's direction when the primary health care provider observes a surrogate to not be abiding by the wishes, values and best interest of the patient. Finally, the Memo rightly identifies the patient safeguard provided in AS 13.52.060(g) for when a health care facility or provider refuses to comply with an individual instruction or health care decision of a patient. I believe each of these protections is necessary, however, they must be considered in balance with the entirety of the AHCDA.

The Memo failed to recognize or identify the important patient protections of AHCDA, which provide counterbalance to the health care provider & facility protections. There is a healthy tension built into the AHCDA which encourages the patient and physician to work together. The relevant patient protections in existing law are as follows -

1. Sec. 13.52.060(d)(1)(2) Obligations of health care providers, institutions, and facilities. – notes the health care provider protections mentioned above, then states,

> *A health care provider, health care institution, or health care facility providing care to a patient shall comply with*
>
> *(1) an individual instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health care decisions for the patient; and*
>
> *(2) a health care decision for the patient made by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity.(emphasis added)*

2. Sec. 13.52.065(f) Do not resuscitate protocol and identification requirements

> *(f) A do not resuscitate order may not be made ineffective unless a physician revokes the do not resuscitate order, a patient for whom the order is written and who has capacity requests that the do not resuscitate order be revoked, or the patient for whom the order is written is under 18 years of age and the parent or guardian of the patient requests that the do not resuscitate order be revoked. Any physician of a patient for whom a do not resuscitate order is written may revoke the do not resuscitate order if the person for whom the order is written requests that the physician revoke the do not resuscitate order. (emphasis added)*

3. Sec. 13.52.080(a)(6)(B) Immunities

A health care provider or health care institution that acts in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for

(6) causing or participating in providing cardiopulmonary resuscitation or other life-sustaining procedures

(B) because an individual has made a do not resuscitate order ineffective under AS 13.52.065 (f) or another provision of this chapter; (emphasis added)

4. Sec. 13.52.100(a)(b)(c) Capacity

a) *This chapter does not affect the right of an individual to make health care decisions while having capacity to make health care decisions.*

b) *An individual is rebuttably presumed to have capacity to make a health care decision, to give or revoke an advance health care directive, and to designate or disqualify a surrogate.*

c) *An individual who is a qualified patient,* ***including an individual for whom a physician has issued a do not resuscitate order, has the right to make a decision regarding the use of cardiopulmonary resuscitation and other life-sustaining procedures as long as the individual is able to make the decision****. If an individual who is a qualified patient, including an individual for whom a physician has issued a do not resuscitate order, is not able to make the decision, the protocol adopted under AS 13.52.065 for do not resuscitate orders governs a decision regarding the use of cardiopulmonary resuscitation and other life-sustaining procedures. (emphasis added)*

5. Sec. 13.52.120(a) Effect of this chapter

   a) *In the absence of evidence to the contrary of the patient's intent, this chapter establishes a presumption in favor of life, consistent with the best interest of the patient. (emphasis added)*

6. Sec. 13.52.130. Prohibited requirements

   As a condition of receiving or being insured for health care services, a health care provider, a health care institution, a health care service plan, an insurer issuing health insurance, a self-insured employee welfare benefit plan, or a nonprofit hospital plan may not require an individual to execute a health care directive, obtain a do not resuscitate order from a physician, or possess do not resuscitate identification.(emphasis added)

These are clearly significant patient protections in the AHCDA that mitigate unilateral physician decision making with respect to DNR orders. Sections 13.52.080 and 13.52.100 mentioned above clearly refute the legal Memo's argument that only the physician may revoke a DNR order, or make an order for cardio-pulmonary resuscitation.

The Memo highlights the very ambiguity in the law which SB 172 seeks to address. It referenced the Ethical and Religious Directives for Catholic Health Care Services, and expressed a concern that SB 172 may bring about a Free Exercise of Religion complaint. In my reading of the Directives, I find that our legislation is entirely consistent with the declarations, and that the Directives never give unilateral authority on end of life decisions to a physician. SB 172 is no more likely to bring about a Free Exercise complaint than is current law. The Directives state in part,

> *"Neither the health care professional nor the patient acts independently of the other; both participate in the healing process. The free and informed consent of the person or the person's surrogate is required for medical treatments and procedures. The functional integrity of the person may be sacrificed to maintain the health or life of the person when no other morally permissible means is available. The free and informed judgment made by a competent adult patient concerning the use or withdrawal of life-sustaining procedures should always be respected and normally complied with, unless it is contrary to Catholic moral teaching."*

The Memo states that SB 172 is contrary to the spirit of the AHCDA. I was one of the prime sponsors of the AHCDA legislation in 2004 and Chair of the House HESS Committee. I have spoken with the legislators and staff members involved with the passage of AHCDA who affirm that SB 172 is entirely consistent with what was intended by the legislative body at that time.

The Memo takes some pains to explain the nuances of 'life-sustaining procedure' and 'cardiopulmonary resuscitation'. This was unnecessary, as SB 172 does not confuse CPR with life sustaining procedures. The language pertaining to life-sustaining procedures in Section 1 of the proposed bill simply says patients who are under a DNR order, do not forgo a right to receive other health care that would help sustain their life. It is straightforward. Further, the Section 8 amendment in CSSB172 concerning life-sustaining procedures to the Advanced Health Care Directives Form was made at Providence Alaska Medical Center request, not the bill sponsor.

The Memo argues that SB 172 destroys the uniformity between AHCDA and the Uniform Health Care Decisions Act. Legislative Legal advises my office that there was not an attempt at uniformity between the two Acts. Some sections were made uniform, but no legislative intent was directed toward cohesive uniformity between the Acts.

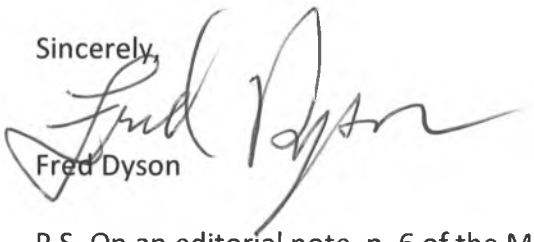
The Memo argues that a DNR order is not treatment as it is not a 'medical procedure'; therefore, "consent for treatment" from the patient for a DNR order is not required. This flawed logic fails to recognize that the default ethical standard/practice in medicine is that, in absence of a DNR order, physicians will attempt life-saving measures, and is properly the expectation of the patient. Further, this reasoning denies a DNR order to be 'health care'. A DNR order directly impacts *how* a patient is treated. Once a patient is under a DNR order, many other decisions about patient health care logically and procedurally follow. A DNR order is a health care decision, and we believe existing law in AHCDA clearly states this decision is not to be made unilaterally by the physician. Section 9 of CSSB 172 amends the current definition of 'health care decision' to include *a direction relating to the provision of cardiopulmonary resuscitation or other resuscitative measures* as identified in current law (see 13.52.100(c) above).

Finally, I do not wish to do away with the protections in statute against provision of 'clinically inappropriate' care. I do wish the decision making process surrounding DNR orders to recognize that a disease outcome model of understanding patient's wishes is not the only frame of reference for these decisions. A physician should be actively seeking to understand the deep values of his/her patient, and asking not only "what's the matter with you?", but "what matters to you?" We should never have a "surprise" at death's door with the patient expecting something entirely different than the physician. Sometimes, what matters to the patient is living to see a special moment or event, and then they can die in peace. The only way to know this is to spend time working through these issues with the patient and their families. It does not all fit well within a 15 minute appointment, and undoubtedly these discussions are very draining for physicians, but they must be done. Otherwise, we are left with a paternalistic approach to end of life decisions. Undoubtedly, it is easier and less expensive for health care

facilities and providers to make these decisions regardless of patient wishes. But I don't think that is what any of us truly desire.

In closing, I believe that our differing patient health care perspectives concerning DNR orders are not that far apart. I do appreciate Providence Alaska Medical Center's good work in many areas of health care. I and my family have directly benefited from Providence health care. Please don't consider this disagreement to mean disapproval of PAMC. This discussion has helped refine my thoughts on DNR orders and the process by which they are issued and made ineffective. I look forward to continuing the dialogue with hopes of achieving a common understanding and interpretation of what AHCDA requires of patients and physicians with respect to the issuance of DNR orders.

Sincerely,



Fred Dyson

P.S. On an editorial note, p. 6 of the Memo mis-cites the wrong section of the ACHDA by referring to AS 13.52.062(f), which does not exist. The correct cite is AS 13.52.065(f).

CC: Senator Hollis French, Senate Judiciary Chair
Senator Bettye Davis, Senate Health & Social Services Chair

Cindy Smith

From: Lewis, Jill (HSS) <jill.lewis@alaska.gov>
Sent: Saturday, March 24, 2012 9:21 AM
To: Cindy Smith
Cc: Hurlburt, Ward B (HSS); Laughlin, Wilda J (HSS); Chandler, Sierra B S (HSS); Robison, Elizabeth K (HSS)
Subject: Re: a question regarding regulations

I was able to find the original legislation passed in 2004, HB025. Page 51, lines 19-29, subsection (b) directs the Department of Law to change the citations in 7 AAC 16.10 from AS 18.12 to AS 13.52. Apparently that correction was not made, however, this confirms that the current regulations are the DNR protocols for AS 13.52.

Jill Lewis
Deputy Director
Alaska Division of Public Health
w: (907) 465-8617 c: (907) 209-6754

From: Lewis, Jill (HSS)
To: Smith, Cindy (LAA)
Cc: Hurlburt, Ward B (HSS); Laughlin, Wilda J (HSS); Chandler, Sierra B S (HSS); Robison, Elizabeth K (HSS); Lewis, Jill (HSS)
Sent: Fri Mar 23 18:32:20 2012
Subject: RE: a question regarding regulations

Cindy,

AS 18.12 was repealed in 2004 when AS 13.52.065 was enacted, and later amended in 2006. While I cannot say for sure, it appears that the department determined at least once, and perhaps additional times on review, that the existing protocol satisfied the requirement in AS 13.52. I cannot find another regulation with AS 13.52.065 as its statutory authority.

Jill
465-8617

From: Lewis, Jill (HSS)
Sent: Friday, March 23, 2012 5:55 PM
To: Smith, Cindy (LAA)
Cc: Hurlburt, Ward B (HSS); Laughlin, Wilda J (HSS); Chandler, Sierra B S (HSS); Robison, Elizabeth K (HSS)
Subject: RE: a question regarding regulations

Cindy, I have looked and haven't found a regulation that references AS 13.52 as its authority. I believe the regulations in 7 AAC 16.010 meet the requirements of AS 13.52.065 although that isn't the citation. I will need to check with the Department of Law for clarification.

Jill
465-8617

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Friday, March 23, 2012 5:20 PM
To: Lewis, Jill (HSS)
Cc: Hurlburt, Ward B (HSS); Laughlin, Wilda J (HSS); Chandler, Sierra B S (HSS); Robison, Elizabeth K (HSS)
Subject: RE: a question regarding regulations

Thanks.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Lewis, Jill (HSS) [mailto:jill.lewis@alaska.gov]
Sent: Friday, March 23, 2012 5:12 PM
To: Cindy Smith
Cc: Hurlburt, Ward B (HSS); Laughlin, Wilda J (HSS); Chandler, Sierra B S (HSS); Robison, Elizabeth K (HSS)
Subject: RE: a question regarding regulations

Let me do more research. AS 13.52 is listed in our Comfort One materials as an authorizing statute but it isn't referenced in the regulations.

Jill
465-8617

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Friday, March 23, 2012 5:06 PM
To: Lewis, Jill (HSS)
Cc: Hurlburt, Ward B (HSS); Laughlin, Wilda J (HSS); Chandler, Sierra B S (HSS); Robison, Elizabeth K (HSS)
Subject: RE: a question regarding regulations

The statute I am looking at was passed in 2005 – this DNR protocol was adopted some years prior to that and the regulations cited are for AS 18.12.035(B) and not 13.52.065(b)

Is there any regulation tying Comfort One to AS 13.52.065?

Cindy Smith
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(907) 465-3892
www.senate.org

From: Lewis, Jill (HSS) [mailto:jill.lewis@alaska.gov]
Sent: Friday, March 23, 2012 4:57 PM
To: Cindy Smith
Cc: Hurlburt, Ward B (HSS); Laughlin, Wilda J (HSS); Chandler, Sierra B S (HSS); Robison, Elizabeth K (HSS)
Subject: RE: a question regarding regulations

Cindy,

The department's do not resuscitate protocol, Comfort One, and standards are set out in 7 AAC 16.010. The program is operated by the Division of Public Health's Emergency Medical Services Unit. Below is a link to the website which has copies of the brochures for patients and health care providers, enrollment forms, and an FAQ.

http://www.hss.state.ak.us/dph/emergency/ems/programs/Comfort_One.htm

JILL LEWIS ◊ DEPUTY DIRECTOR ◊ ALASKA DIVISION OF PUBLIC HEALTH ◊ DEPARTMENT OF HEALTH AND SOCIAL SERVICES
P.O. BOX 110610 ◊ JUNEAU, ALASKA 99811-0610 ◊ OFFICE: (907) 465-8617 ◊ MOBILE: (907) 209-6754 ◊ FAX: (907) 465-4632

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From: Laughlin, Wilda J (HSS)
Sent: Friday, March 23, 2012 4:25 PM
To: Lewis, Jill (HSS); Hurlburt, Ward B (HSS)
Subject: FW: a question regarding regulations
Importance: High

Need ASAP

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Friday, March 23, 2012 4:24 PM
To: Laughlin, Wilda J (HSS)
Subject: RE: a question regarding regulations

ASAP. It's in relation to a bill in the committee.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: Laughlin, Wilda J (HSS) [mailto:wilda.laughlin@alaska.gov]
Sent: Friday, March 23, 2012 4:21 PM
To: Cindy Smith
Subject: RE: a question regarding regulations

When do you need it?

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Friday, March 23, 2012 4:20 PM
To: Laughlin, Wilda J (HSS)
Subject: a question regarding regulations

In a recent bill hearing, the subject of do not resuscitate orders was discussed.

According to AS 13.52.065 (b):

"The department shall by regulation adopt a protocol, subject to the approval of the State Medical Board, for do not resuscitate orders that sets out a standardized method of procedure for the withholding of cardiopulmonary resuscitation by health care providers and health care institutions".

Can you provide me those regs and that protocol?

Thanks --

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

Alaska State Medical Association

4107 Laurel Street • Anchorage, Alaska 99508 • (907) 562-0304 • (907) 561-2063 (fax)

March 19, 2012

Honorable Hollis French
State of Alaska
Senate
Chair, Senate Judiciary Committees
State Capitol Room 417
Juneau, AK 99801

RE: SB 172 – Health Care Decisions and Do Not Resuscitate Orders

Dear Senator French:

The Alaska State Medical Association (ASMA) represents physicians statewide and is primarily concerned with the health of all Alaskans.

Thank-you for the opportunity to testify on SB 172 which pertains to health care decisions and do not resuscitate orders.

ASMA urges you not to make any changes in the current law which has been termed Alaska's Health Care Decision Act until you have thoroughly explored all material aspects of this very complex subject. A bill of this complexity introduced in the second 90 day session of a two year Legislature cannot be properly addressed in the time allocated and available. SB 172 deals with death, dying and end of life care, all of which our society for the most part abhors discussing.

It is estimated that only 20% of us have adopted advance directives that document our decisions as to when and how our end of life care is provided. The other 80% of us, leave these decisions until we are gravely ill when decisions are made in an environment that is highly emotionally charged; and often are made by surrogates who may or may not know what care we desired. These decisions are as well guided by closely held personal beliefs, religious tenets, and cultures.

Physicians providing end of life care are an integral part of this decision making process and responsible, first and foremost to the patient. In providing their counsel they are guided by their medical expertise and by their code of ethics (The Principles of Medical Ethics of the American Medical Association which are adopted in AS 08.64, see AS 08.64.326(a)(11), and 12 AAC 40.955 (a)). A physician who violates this code of medical ethics is subject to disciplinary action.

SB 172 (and the work draft seen by ASMA for a committee substitute) provides for the impossible situation for physicians of either violating provisions of SB 172 or violating the AMA's Code of Medical Ethics and thus violating the Alaska State Medical Board's disciplinary statutes.

ASMA understands that Alaska's current Health Care Decision Act was patterned on and closely follows the Uniform Health Care Decision Act drafted by the National Conference of Commissioners on Uniform State Laws. The uniformity benefits the people when they travel from one state to another. It would appear that uniformity would be disrupted by SB 172.

SB 172 would provide a "one size fits all proscription for advance health care directives which is not appropriate for all medical situations that can present. Attached is a very recent article that provides an interesting discussion of the potential "default options". ("Time to Revise the Approach to Delivering Cardiopulmonary Resuscitation Status", Journal of the American Medical Association, March 7, 2012.) This article infers that much more discussion is needed. (Also please note that the 20% of those estimated to have enacted advance directives in Alaska, should SB 172 be enacted, would need to have their personal attorney examine their existing advance directives and modify them if required by this proposed bill.)

SB 172 will impact every Alaskan and every aspect of it needs to be thoroughly addressed by the Legislature. ASMA does not believe that the required and warranted attention can be given to the varied and complex issues in the less than 30 days remaining in this session. To do otherwise, can be a result fraught with unintended consequences most of which could be expected to adversely impact the patient/physician relationship and the care provided.

ASMA stands ready to assist you in forming a group representing various stakeholders to examine all of the pertinent issues in a manner that "first does no harm".

Sincerely,

Mary Ann Foland

By: Mary Ann Foland, MD, President
For: The Alaska State Medical Association

Donna Stephens
Testimony CSSB 172 – Health Care Decisions including Do Not Resuscitate Orders.
(907) 229-0721
donna@hospiceofanchorage.org

March 19, 2011

I. Introduction
   a. RN w a Master in Education Counseling
   b. Executive Director at Hospice of Anchorage for 3 years, volunteer for 28 years
   c. Teach adjunct at UAA – Psychology Department – Intro to Death and Dying
   d. I am testifying as an individual
   e. Thank you for your consideration of this important topic

II. First learned about death
   a. at 5 – uncle from car accident
   b. at 12 – a 3 yo cousin with cancer
   c. at 14 - a friend w muscular dystrophy
   d. at 20 – a 5 yo. cousin

III. In nursing school:
   I learned about how to help people recover from disease, but from my experiences as a child I've always been concerned about how we care for people who biologically can not recover and their families. My heart goes out to Mrs. Mullens in her pain and grief.

IV. What I've learned
   a. Most people fear what they don't know
   b. As a culture American's avoid learning about death and therefore when faced with a life-threatening crisis
      i. most of us do not have any knowledge of the choices we might face nor about what is legal or ethical. Most people are committed "to doing the right thing" – but they don't know what that is.
      ii. we are overwhelmed with emotional pain of fearing loss,
      iii. we ask that our doctors and hospitals - 'stop death'
      iv. when it's biologically impossible (and the doctor is brave enough and takes the time to have that conversation with the individual and family) people sometimes (actually quite often) react with anger as a way to avoid the pain.

V. The solution to the problem
   a. Isn't in this bill. In my opinion this bill creates many more problems for good end of life care than we already have (and we have plenty) and offers no workable solutions.
   b. Because there is no one right way to die, the solution is in each of us learning about the benefits and burdens of some of the common choices we are apt to face, and also the legal and ethical issues that guide care at end of life. And then very importantly talking, with all our loved ones,

about how each of us as individuals want to live until we die - what we want and don't want and why. Hospice of Anchorage hopes to be able to convene a coalition of stakeholders on this important topic.

c. This bill however is not addressing how to care for people at the end of life, which is where the real problem is, but what to do after they die.
    i. Resuscitation is done after someone dies.
    ii. It has a less than 1 % chance of bringing a person w an advanced chronic illness back to life and then only with a high likelihood that the individual's condition will be much worse. (http://www.compassionandsupport.org/index.php/for_professionals/molst_training_center/cpr)
    iii. As Ira Byock, MD, a national expert in end of life care, currently practicing palliative medicine at Dartmouth- Hitchcock Medical Center, in his just published book: The Best Care Possible, pointed out, "The Presidential Commission for the study of Bioethical Issues, and court decision, have said the people have a right to refuse any medical treatments that are offered, and must be give a chance to decide among legitimate and available treatments for their conditions. But the Commission, and the courts have also said that people do not have a right to receive any treatments they desire. The responsibility for determining what treatment options are indicated rest with physicians." (p165) It is against the law to practice medicine without a medical license.

d. This bill in attempting to honor the choices of individual for care at end of life, is actually making it harder to honor choice in a number of ways but most concerning to me (besides the demand that physicians provide futile care):
    i. negates individual freedom to choose and allows surrogate decision makers to reverse decisions made by individuals? In doing so it places an undue burden on families. (Research shows that families whose loved ones die in the hospital suffer multiple negative effects, including higher rates of illness and PTSD, then persons who die at home.)
    ii. it calls into question previously established health care directives and Alaska's Comfort 1 system for expected home deaths.
    iii. it assumes that people who do not ask for full resuscitation efforts must wish to die. While in some circumstances I would not want CPR, I certainly do not want to die. It does not allow for a range of treatments.

VI. In conclusion

a. Physicians and hospitals are programmed to cure, to save lives. And despite advanced medical care, 100% of people still die. It is extremely difficult for physicians and hospitals to stop aggressive treatments, including trying to resuscitate people who have died. It is the rare physician that is willing to write a DNR order when the individual or family express a preference for that procedure, even knowing full well that

procedure is futile and may cause long lasting trauma to the survivors who may witness or demand a CPR attempt. The adherence to the ethics of good medical care should be applauded, not condemned, as this bill attempts to do.

b. Both healthcare professionals and individuals in Alaska need to learn to talk about dying and the choices to be made long before we are in crisis. I have testified as an individual as we do not have an agency statement on this bill. However, Hospice of Anchorage, a volunteer hospice, caring for Alaskans since 1982, is committed to making end of life easier and leading discussions. Please call us if you would like to learn more.

Testimony on SB172
before the Alaska Senate Judiciary Committee
3/19/2012

My name is Bryan Talbott-Clark. I'm a Master-level social worker with Hospice of Anchorage, testifying on my own behalf in opposition to SB 172. In my work here, and in a previous hospital internship, I've worked with numerous families on advance directives and the importance of making their wishes known.

What my experience tells me is that people don't like to talk or think about death until they have no choice. Physicians being people too, most of them don't like to talk about it, either. As I've read about the situations that prompted this bill, I do see a problem that should be addressed, but it's nothing to do with the subject of this bill. The real problem is very much one of understanding and communication around end-of-life issues.

I have to say, it appears to me that some of that very lack of understanding is reflected in the design of this legislation. A Do Not Resuscitate order is not the same as an Advance Directive; it's a statement of professional judgment that resuscitative measures are not medically indicated. A patient's judgment can't make something medically indicated when it isn't. This bill would amount to letting people require medical professionals to act unprofessionally, forcing them to give inappropriate treatments. If the patient or their power of attorney question their doctor's judgment, they can vote with their feet and get another doctor, who can readily revoke a DNR if his or her professional judgment says that's appropriate. But a patient should no more be able to revoke a DNR than they should be able to prescribe their own morphine.

I mentioned communication. If the general public were better educated about their options, if more doctors were more willing to discuss end-of-life issues with their patients sooner, there would be a lot fewer nasty surprises like the situation that prompted this bill. That's what we should be talking about – getting the word out about what kind of choices we may have at the end of our lives, and empowering people to talk about it with their families and their doctors before an illness forces their hand. But this bill won't do any of that.

As you know, the work of a legislator is very much like the work of a doctor. You must always be cautious in considering any intervention, because every intervention carries the risk of harmful consequences, some known, some unforeseen. These consequences must be weighed against the expected benefit of the intervention, whether it's a medical procedure or a legislative act.

The bill before you is clearly the wrong medicine. The predictable harm it will do is substantial, not even counting unforeseen consequences, while its intended effects entirely miss the mark. It will do nothing to improve communication between patients and doctors, while at the same time it stands to criminalize good medical practice and force good doctors to choose between following their ethics and obeying the law.

It's not a matter of tweaking or fixing the bill; SB 172 is the wrong approach entirely, and should not move forward. I urge that the committee act accordingly. Thank you.

Donna Stephens
Testimony CSSB 172 – Health Care Decisions including Do Not Resuscitate Orders.
(907) 229-0721
donna@hospiceofanchorage.org

March 19, 2011

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Time to Revise the Approach to Determining Cardiopulmonary Resuscitation Status

Craig D. Blinderman, MD, MA
Eric L. Krakauer, MD, PhD
Mildred Z. Solomon, EdD

In US hospitals, cardiopulmonary resuscitation (CPR) is the de facto default option—patients must "opt out" by requesting or consenting to a do-not-attempt-resuscitation order. Despite its worthy intent, requiring all patients or their surrogates to consent to a do-not-attempt-resuscitation order to avoid CPR has resulted in an ethically unjustifiable practice that exposes many patients to substantial harms.

Whenever there is a plausible risk of cardiac arrest, the standard approach is to ask patients or their surrogates about their preferences regarding CPR. However, the very act of asking can suggest to the patient and family that CPR may be beneficial, even when the clinician believes otherwise. Additionally, research in cognitive psychology has revealed that default options are often interpreted as recommendations or guidelines, or as the path of least resistance, and that such default options significantly affect decision making.[1] For these reasons, patients or their surrogates may be biased toward choosing full resuscitation status, even when CPR likely would bring little or no benefit and would risk considerable harm. Therefore, the standard approach of neutrally seeking consent to withhold CPR may inadvertently diminish patients' and families' comprehension of the clinical situation and lead to decisions that are grounded neither in patients' values[2] nor in their best interest.

Instead of assuming that CPR must always be offered, we suggest 3 distinct approaches based on the likelihood and degree of potential benefits and harms of resuscitation. In all 3 approaches, physicians must take the time to fully explain the patient's prognosis and likely disease trajectory, clarify any misconceptions, and elicit the patient's values and goals, which should form the basis for all CPR discussions. However, the options offered by the physician should change as the likely proportion of burdens to benefits increases.

Approach 1: Consider CPR as a Plausible Option

Physicians should discuss CPR as a plausible option when the relative benefits and harms of CPR are uncertain, as is often the case in patients whose chronic illness has not reached end stage. Fried et al[3] have shown that patient preferences for treatment are determined by their attitudes toward the burden of treatment and the likelihood of those possible outcomes. Thus, physicians should explore the patient's or surrogate's understanding of the disease, clarify any misconceptions, and discuss the likelihood of successful CPR (approximately 16% of hospitalized patients survive to discharge following CPR)[4] and possible harms of attempting CPR (eg, injury related to resuscitation efforts, prolonged stay in an intensive care unit, disability, anoxic brain injury, or nursing home placement). Physicians should seek a nuanced understanding of the patient's values and expect that patients in medically similar circumstances may choose differently. The discussion, the resulting resuscitation preferences and status, and the patient's values and goals should be recorded in the medical record.

Approach 2: Recommend Against CPR

Physicians should recommend against CPR when there is a low likelihood of benefit from CPR and a high likelihood of harm, such as when patients have advanced incurable cancer, advanced dementia, or end-stage liver disease.[4] Patients in this category who survive resuscitation are likely to spend their last hours or days in an intensive care unit or have an anoxic brain injury. The physician should approach such patients or their surrogates with a presumption against providing CPR but also remain attentive when discussing the patient's values and goals for unique personal, familial, religious, or cultural factors that might make an attempt at CPR unusually beneficial.

For most of these high-risk patients, physicians should recommend against CPR and explain that they do not want to expose the patient to a procedure that is unlikely to be beneficial and will most likely cause significant harm. Assent to this recommendation by a patient or surrogate would then allow the physician to write a do-not-attempt-resuscitation order. Physicians must be careful not to give

See also p 915.

Author Affiliations: Department of Anesthesiology, Columbia University Medical Center, New York, New York (Dr Blinderman); Division of Medical Ethics (Dr Solomon), Departments of Medicine (Dr Krakauer) and Global Health and Social Medicine (Drs Krakauer and Solomon), Harvard Medical School, Boston, Massachusetts; Palliative Care Service and Optimum Care Committee, Massachusetts General Hospital, Boston (Dr Krakauer); and Department of Anesthesiology, Children's Hospital of Boston, Boston, Massachusetts (Dr Solomon).
Corresponding Author: Craig D. Blinderman, MD, MA, Columbia University Medical Center, 622 W 168th St, PH5-530B, New York, NY 10032 (cdb21@columbia.edu).

the impression that withholding CPR means giving up (ie, that other treatments will not be provided) or that the patient will be ignored or abandoned. On the contrary, physicians should explain that their intent is to protect the patient and ensure the best possible experience in the final phase of life.

Despite such a recommendation, some patients in this category or their surrogates may request that CPR be attempted for a variety of reasons, including religious or cultural beliefs. It is ethically acceptable for the physician to acquiesce to such a request as long as it is grounded in the patient's values and goals and there is a potential for a modicum of medical benefit.[5]

Approach 3: Do Not Offer CPR

Physicians should not offer CPR to the patient who will die imminently or has no chance of surviving CPR to the point of leaving the hospital. Once this determination is made, and absent extraordinary but reasonable patient values or goals that might make the harms of CPR in this situation worth risking, it is, in our opinion, not only ethical, but also imperative, that CPR not be offered. The physician's primary responsibility is to protect the patient from unnecessary harm. Indeed, CPR was not intended to be used in this clinical situation.[6]

Not offering CPR for imminently dying patients should be explicitly permitted by hospital policy. However, the decision not to offer CPR should be disclosed to the patient or surrogate. As in the previous approach, physicians should not give the impression that not attempting CPR means giving up or that the patient will be ignored or abandoned, but rather that the intent is to protect the patient from harm and maximize comfort.

If a patient or surrogate continues to insist that CPR be attempted, an ethics consultation should be requested if available. If the ethics consultants concur that the case falls within this clinical situation, and absent highly unusual patient values or goals, the consultants should gently and respectfully inform the patient or surrogate of their support for the decision to not attempt CPR and enter a note to this effect in the medical record. Support from a social worker, chaplain, or patient advocate should be made available to the patient and family as appropriate.

Conclusions

Whenever there is a reasonable chance that the benefits of CPR might outweigh its harms, CPR should be the default option. However, in imminently dying patients, a default status of full resuscitation is not justifiable. Not only is CPR in this situation likely to harm patients without compensatory benefit, the default framework likely influences patients and surrogates to request that full resuscitation is attempted even when the physician believes doing so may be inappropriate. The default option in this situation should be an order to not attempt CPR, perhaps coupled with consultation by a palliative care specialist. Similar reasoning may have motivated 15% of nursing homes in Wisconsin to develop policies that make withholding CPR the default option and to offer full-code status only on an opt-in basis.[7]

Physicians are responsible for recommending the medical means to honor their patients' values and for helping them to identify and achieve their health care goals. This responsibility becomes crucial in the setting of life-threatening illness, in which patients are especially vulnerable and may be exposed to potentially harmful life-sustaining interventions. While promotion of patient autonomy is a fundamental responsibility of physicians, protecting the patient from harm becomes increasingly important as the patient becomes more vulnerable. Sometimes, it should be preeminent.

Conflict of Interest Disclosures: All authors have completed and submitted the ICMJE Form for Disclosure of Potential Conflicts of Interest. Dr Blinderman reported that he has served on speakers bureaus for Cephalon and has received travel accommodations and honorarium from the International Multidisciplinary Forum on Palliative Care for speaking at a conference in 2010 and from the Vietnam-Centers for Disease Control and Prevention-Harvard Medical School-AIDS Partnership for training and supporting Vietnamese clinicians in palliative care. Drs Krakauer and Solomon did not report any disclosures.

REFERENCES

1. Halpern SD, Ubel PA, Asch DA. Harnessing the power of default options to improve health care. *N Engl J Med*. 2007;357(13):1340-1344.
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3. Fried TR, Bradley EH, Towle VR, Allore H. Understanding the treatment preferences of seriously ill patients. *N Engl J Med*. 2002;346(14):1061-1066.
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7. Kane RS, Burns EA. Cardiopulmonary resuscitation policies in long-term care facilities. *J Am Geriatr Soc*. 1997;45(2):154-157.

Cindy Smith

From: Herman, Laurie <Laura.Herman@providence.org>
Sent: Saturday, March 17, 2012 2:04 PM
To: Cindy Smith
Subject: SB172

Hi Cindy,

Dr. Ryan McGhan, a critical care intensivist in Anchorage will be calling in via the 855 number to testify on SB172 on Monday in Senate Judiciary. He works nights so will sleep for a few hours and get up to call in so it would be very difficult for him to go to the LIO.

Thanks.

Laurie

This message is intended for the sole use of the addressee, and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the addressee you are hereby notified that you may not use, copy, disclose, or distribute to anyone the message or any information contained in the message. If you have received this message in error, please immediately advise the sender by reply email and delete this message.

AHCHA
Alaska Home Care & Hospice Association

April 24, 2012

Alaska State Senators,

We, members of the Alaska Home Care and Hospice Association (AHCHA), are writing to express the concerns of our membership related to a bill that was recently reviewed in the Alaska State Senate Judiciary Committee – SB 172. The bill was apparently introduced to address a perceived gap in the current Alaska Statute (Health Care Decisions Act AS 13.52, enacted in 2004), specifically the issue that a physician can issue a 'Do Not Resuscitate' (DNR) order without the expressed consent of a patient or surrogate decision maker. The current laws, and ethical health care processes, already allow a physician to decline to provide CPR while assisting the patient/family to find a physician willing to follow the patient/family wishes.

Our concerns relate to the impact that this proposed bill would have on our current DNR, 'Expected Home Death', and/or 'Comfort One' processes that occur outside of the acute care setting, and which are recognized state wide by healthcare, law enforcement and emergency response organizations. Home Health staff, Hospice staff and Physicians throughout the state, often care for the medically frail and dying members of our communities in the comfort of the dying persons home. The current law is reasonably clear on these types of situations, allowing Alaskan citizens to die peacefully at home when they have indicated that preference. Our position is that the current law has worked well for over 5 years. It allows Alaskans to express their desires related to end of life choices, and to die peacefully at home without the threat of their wishes being disregarded.

SB 172 appears to negate any Advance Directives currently in place, requiring that health care providers revisit the issue with patients and families, and to bow to the wishes of a surrogate decision maker who can now demand that CPR be provided, even when there is clearly no benefit to the patient, and/or the patient previously indicated that he or she does not desire resuscitation. While patients/surrogate decision makers may always decline any offered treatment, they have never had a right to demand a medical procedure that has not been offered. This bill would change that time honored dynamic. It will place community health care providers in the position of being required to provide a procedure that they know is futile and possibly traumatic for the family to witness.

The wording of SB 172 is ambiguous and may create increased confusion among health care providers and members of the community, resulting in increased strain on our Emergency Response System and more expensive, futile, and potentially distressing trips to the Emergency Room at the end of life.

We urge you to carefully consider the potential impact of any proposed changes to our current law in this session or future sessions of the legislature. The proposed SB 172 is trying to fix something that does not need to be fixed, and may create potential legal and medical problems, as well as unnecessary anguish for physicians, nurses, and Alaskan families in its wake.

Sincerely,

Jacob Malouf

Jacob Malouf, RN	President, Alaska Homecare and Hospice Association (907)729-5198
Pat Dooley, RN	Program Director, Providence Hospice (907) 212-4409
Shannon Updike, RN	Manager, PeaceHealth-Ketchikan Medical Center (907) 225-8914
Elizabeth Faulkner, RN	Manager, Sitka Comm Hospital Home Health Agency (907) 747-1750
Linda Wagner, RN	Clinical Coordinator, South Peninsula Home Health Care (907) 235-0348
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Our View: First do no harm

Bill on CPR in terminal cases raises its own serious issues

(03/21/12 19:05:32)

Sen. Fred Dyson testified that his strong respect for life prompted his effort to rewrite part of the state's patients' rights law. Senate Bill 172 would not restrict a patient's right to refuse treatment to prolong life. But in cases where the patient's or a spouse or other family member's demands for treatment conflicted with a doctor's judgment or ethical standards, cardio pulomonary resuscitation might be required.

Medical professionals who testified were not in favor of the bill, pointing out that CPR is not a gentle procedure, especially for older terminal patients and that it may prolong life at a cost of much greater pain and misery for the patient.

That runs counter to the medical maxim, "First do no harm." Respect for life could make dying far more painful than it needs to be. Many who have been with a dying loved one have experienced that point where the patient waves off any more help, when they realize the fight for life is over. Hence the mercy in giving patients the right to refuse treatment, either at the time or in advance.

On the other side of that equation is testimony by one widow who said both she and her husband wanted life-sustaining treatment, no matter the pain, until the end, because of their faith -- faith that is often most precious at such times. What should doctors, who might argue that CPR in such cases could break ribs, cause more suffering or even hasten death, do in such cases? How would they reconcile the amended law and their own code?

The patients' rights law is good in letting patients decide when to simply let nature take its course. In one sense Dyson's bill keeps that decision with the patient and spouse or other surrogate. But the bill

creates a dilemma for doctors -- who already, with families, face hard calls about how far to go in prolonging a life.

There is no template answer for end of life decisions. In most cases, those final decisions are best made by patients and families. But in these most personal times, they're not the only ones involved. Lawmakers need to think this one over for awhile.

BOTTOM LINE: Patients' rights rewrite may solve one problem, create more.

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Providence Health & Services Alaska
Review of Senate Bill 172 and House Bill 309
Prepared by Providence Physician Leadership - February 10, 2012 and Unanimously Endorsed by the Providence Alaska Medical Center's (PAMC) Medical Executive Committee, elected representatives of physicians who hold medical privileges at PAMC – February 13, 2012

At first glance, Senate bill # 172 and its partner bill #309 in the House, appear to empower patients to make decisions about their health care at the end of life (Sec. 1 pg 1 lines 3-7). However, on further review these bills contain language involving a very complex decision making process that normally occurs between a patient and his or her physician.

These bills attempt to legislate a complex decision making process and make a "one size fits all" model for end-of-life care. Specifically, these bills are concerned with advanced health care directives which may be made independently or may accompany a will or estate planning. The advanced health care directive is designed to give direction to your family, loved ones and health care providers about care choices if you become critically ill and cannot make decisions for yourself. Ideally, every individual would make this directive ahead of time, when they are clear of mind and not under stress or distracted in any way. In reality, fewer than 1 in 5 individuals arriving to a hospital have an advanced directive(Halpern NA, Pastores SM, Chou JF, Chawla S, Thaler HT, Palliat Med. 2011 Apr;14(4):483-9. Epub 2011 Mar 18; . Knott CI, Psirides AJ, Young PJ, Sim D., Crit Care Resusc. 2011 Sep;13(3):167-74).

These bills also address requests by patients or health care providers to use or not to use advanced medical procedures in an attempt to keep them alive. New terminology adopted by several states terms these issues as "Allow Natural Death," (AND). In Alaska, the terminology utilized is called DNR (do not resuscitate) orders and advanced resuscitative measures. A DNR order can be initiated with or without an advance health care directive. Historically, A DNR is a written agreement that is made between a physician and a patient after discussion about a patient's medical condition. A DNR can answer questions about whether a patient wants CPR (chest compressions or cardiopulmonary resuscitation), wants artificial breathing applied (also called intubation) or some assistance with breathing if an individual needs assistance on a temporary or long term basis. It addresses artificial nutrition if an individual is temporarily or permanently unable to swallow or eat. It addresses the use of antibiotics for infection and other medications to support blood pressure. It addresses the use of electricity/shocking of the heart to reset or restart the heart if the heart stops. .

The decisions made by an individual about how they want to spend their end days are complex and personal. Each person has their own set of circumstances that guide their decision making. The decision may be based on what types of illnesses an individual has or how long they have had these illnesses. It may have to do with their ability or inability to tolerate pain and suffering. It may be directly or indirectly related to religious or cultural beliefs. It may reflect a preference to allow all bodily processes to occur

naturally and not be artificially supported. It may have to do with a desire not to be a burden to family or loved ones if circumstances alter one's ability to care for themselves. It may reflect financial concerns.

The list of reasons why people make decisions is lengthy and unique to each individual. These decisions should be discussed at length with family and loved ones and preferably with a physician who can communicate the degree and prognosis of illnesses with the individual and their loved ones. Ideally, everyone knows and understands the choices and why they are made.

In reality, fewer than 1 in 5 patients admitted to the hospital have made these decisions even though they may have very complicated advanced illnesses or injuries (Halpern, et.al. and Knott et.al.). In general, the American culture tends to not discuss death and dying and is generally unprepared to address these issues until they are forced to do so when confronted by a life altering or life threatening injury or illness. The decisions must then be made under stress. The worst case scenario presents when a patient is not able to make decisions and family members must make decisions while hoping they know what a patient may want. Often families do not know, are unsure, or simply are not present or cannot be found. Whenever possible, these decisions are made in advance. When they have not been made in advance, the medical team caring for the patient is faced with making the decisions together with available family members. Decisions are based upon what is known about the illness(es) or injuries, progression of disease, and benefits vs. harm of interventions. These decisions are crafted with input from family regarding patient preferences. It is a complex process and made with due diligence, generally with the input of many care providers, in addition to family wishes. They are not made lightly.

It is important to note that advanced interventions including CPR, artificial breathing techniques, artificial nutrition, shocking of the heart, etc. are helpful only in very specific medical circumstances. They are not applicable to each and every end of life illness or injury no matter what is portrayed on TV (references: code of Ethics of the American Medical Association (AMA), Opinions 2.035, 2.095). In fact, many of these interventions are painful and are rarely successful (Ebell & Alfonsa; Family Practice 2011; 28:505-515) . They are often associated with severe painful and sometimes persistent complications that leave the few who survive the procedures permanently impaired. CPR for example, was designed to be utilized in only a specific subset of heart patients (Kouwenhouen JAMA 1960 173: 1064-7). It was not recommended for other situations because the likelihood of survival is so low and the risks of complications are so high. For example, advanced cancer patients have not been shown to benefit from CPR. The procedure frequently causes broken ribs and a broken breast bone and collapsed lungs, to mention only a few of the potential complications. The benefits of the procedures should clearly outweigh the potential risks of the complications associated with these procedures. In end stage cancer, the benefits rarely outweigh the risks. When they do outweigh the risks, then CPR and other advanced aggressive procedures are performed. However, medical standards do not recommend doing advanced aggressive interventions in every case (references: code of Ethics of the American Medical Association (AMA), Opinions 2.035, 2.095). In these situations, the

recommendation is to provide full support for patients, but not to provide procedures that have a higher risk of injury than to provide benefit, irrespective of a DNR that may be in effect.

The House and Senate bills do not reflect the complexity of this decision making process. This legislation is inappropriate for a large portion of individuals by mandating the following:

1. These bills attempt to mandate that aggressive potentially hazardous interventions be performed on every patient who requests it, no matter what the underlying disease, injury or illness (Sec.2 pg 2, lines 2-6, Sec 3. Pg 2 lines 11-15.

2. If the patient is not capable of decision making, a surrogate decision maker can mandate that potentially hazardous interventions be performed EVEN if the patient's advance health care directive states otherwise (Sec. 3. Pg 2 lines 11-15, Sec 6. Pg2, lines 29-31and pg 3, line 4, Sec 12, pg 19, lines 18,19).

3. It agrees that health care providers can identify medical futility (when procedures or interventions will not help a patient condition) but it further mandates that health care providers cannot refuse to apply potentially harmful interventions to patients if they or their families demand it. This is true even when the procedures are deemed to be medically ineffective (Sec 3. pg 2, lines 7-18) .

4. In short, it mandates that providers batter patients, by performing painful and potentially harmful procedures that are in direct contrast to generally acceptable medical practice s (Sec 3. pg 2, lines 7-18) .

5. It mandates that under certain circumstances health care providers may not adhere to their medical creed to "first do no harm". It mandates that providers harm patients. (Sec 3. pg 2, lines 7-18).

6. It does not encourage or support the input of medical providers or collaborative efforts to determine the best course of care by weighing all of the care options with clear understanding and discussion of risks vs. benefits (Sec 3. pg 2, lines 7-18) ..

7. It encourages individuals to direct hospitals and health care providers to perform potentially harmful interventions on patients who will not benefit from these interventions (Sec 3. pg 2, lines 7-18, (Sec.2 pg 2, lines 2-6). It negates individual freedom to choose.

8. It allows surrogate decision makers to reverse decisions made by individuals who have completed advance health care directives (Sec.2 pg 2, lines 2-6, Sec 3. pg 2, lines 7-18, Sec 6 pg 3 line 4, Sec. 13.52.300 pg 7, lines 6-11, and 15 and 16.)

9. It mandates that all previously established health care directives become null and void if they were established previously but not in accordance with the new bill directives (Sec 6 pg 3, lines 14-26, Sec 14. Pt 19, lines 23-27).

10. It threatens litigation to providers who will not inflict harm on patients by refusing to perform medically ineffective harmful procedures and aggressive interventions when patients or their families request it (Sec 8. Pg 5, lines 12-14).

11. It defaults automatically to doing aggressive painful potentially hazardous procedures on all patients who have not previously established written health care directives that specifically refuse to have CPR or other advanced aggressive interventions (Sec. 6 pg 3 lines 5-10, Sec 4. Pg 2 lines 19-22).

12. It mandates that a physician revoke DNR orders under any circumstance in which a patient, a family member or a surrogate decision maker demands it – even if the interventions demanded are medically ineffective. (Sec.2 pg 2, lines 2-6, Sec 3. pg 2, lines 7-18)

13. It states that a physician who has an "individual relationship with the patient" may revoke a DNR. It does not specify what that relationship might be. (Sec 6. Pg 3, line 3)It states that a physician who is employed by the health care institution where the patient is being treated may revoke a DNR order without establishing a professional patient -physician relationship (Sec. 6 pg 4, lines 1 and 2).

14. The advance health care directive form has been altered to indicate that any selection by an individual that does not ask for full resuscitation efforts must wish to die (Sec 13.52.300, pg 11 lines 8-31 and pg 12, lines 1-11.). It does not address or support an individual's right to request that their care be focused upon relief of pain and suffering, maximizing comfort and avoiding the prolonging of the dying process.

15. The new version of the advance health care directive form does not encourage graduated selection of interventions. It is an all or none proposition (Sec 13.52.300, pg 13, lines 2-10).

Page 19 simply needs to be deleted altogether.

Why the medical community has grave concerns

- It does not allow those individuals with the most expert understanding of health and disease and prognosis to exercise their expertise.
- It implies that DNR orders are made flippantly and without deep compassionate concern for the welfare of patients.
- It makes an assumption that doing potentially harmful and painful interventions are always in the patients' best interests despite accepted medical standards that indicate otherwise.
- It ignores the Hippocratic Oath and that health care providers must first do no harm . It supports the battery of patients by mandating that harmful procedures be performed on patients without regard to the benefit vs. risk assessment of these interventions

- It does not support the time honored tradition of patient physician relationship in which these discussions should be made.
- It makes an assumption that every patient feels that the quantity of life trumps the quality of life
- It does not promote death with dignity
- It forces families and loved ones to reconsider the decisions of their loved ones and consider reversing decisions that may cause irreparable psychological and emotional damage in the long run.
- It assumes that physicians do not err on the side of over-utilizing CPR. It assumes that providers underutilize these aggressive procedures. This is untrue.

Considerations for Alaska citizens who do not want government intrusion into personal medical decision making

- It makes an assumption that each individual values the quantity of life over the quality of life without regard to the degree of suffering an individual may experience.
- It assumes that every individual wants artificial support even when it has been shown to not be helpful.
- It assumes that every person wants to have CPR and undergo potential pain and suffering from these procedures even when they have been shown not to be of any benefit.
- It allows other individuals to reverse your right to death with dignity because they are afraid to lose you. It implies that they may not value your life if they do not at least try the aggressive resuscitative measures.
- It forces others to ignore your choices and decide for themselves whether or not to honor your wishes.
- It mandates that every individual should be treated the same. It is a "cookie cutter approach" to medical care assuming that each person wants the same thing as proponents for the right to life.
- It has the potential to reverse a well thought out decision for end of life care that may have been made by you for reasons unknown to other individuals.
- It does not allow those who have not yet made advanced directives to have well thought out approaches to their medical care and instead defaults to the use of aggressive medical interventions

- It assumes that physicians do not make medical decisions incorporating acceptable medical standards of care.
- It assumes that a patient and their physician cannot tailor a unique care plan for each individual. Instead, a legislator with no medical experience whatsoever can mandate the procedures that will happen to you at the end of life.
- It mandates patients with extremely advanced medical conditions undergo these procedures simply because they do not have advance health care directives.
- It insists that all previously established advanced health directives and DNR orders be reconsidered and must be in compliance with the new standards established with this new bill.

Hollis French- Senate Judiciary Chair

Hollis,

Thank you for hearing SB 172-I think you will hear why this is a very important clarification of the existing statues.

We would appreciate your allowing the hearing on SB-172 to proceed as follows:

Sponsor presentation- including explanation of the changes in the Sponsor substitute, (most of the sponsor changes are a result of meetings with Providence staff), and sectional analysis.

Testimony of Margery Mullins, the person whose experience with her husband (now deceased) brought the problems with ambiguities in the existing statues to light.

Testimony of Providence staff and supporters and Attorney(s)

Terry Banister to answer legal questions from committee

Testimony of Doctor's

-Dr. Ward Hurlburt-Chief Medical Officer of the State

-Dr. George Rhyneer- Former Chief Medical officer at Prov.

-Dr. Donald Olsen-Alaska State Senate

Final questions and debate.

ALASKA STATE SENATE

SENATOR FRED DYSON

Date: January 30, 2012

To: Senator Hollis French, Chair
Senate Judiciary

From: Senator Fred Dyson

Re: Committee Hearing Request for SB 172

I respectfully request a committee hearing be scheduled for SB 172, "An Act relating to health care decisions, including do not resuscitate orders."

Contact: Chuck Kopp, Staff to Senator Fred Dyson, (907)465-2199

During Session (January - May): Alaska State Capitol • Juneau, Alaska 99801 • (800) 342-2199 • (907) 465-2199 • (907) 465-4587 (fax)
During Interim (June-December): 10928 Eagle River Road, Suite 238 • Eagle River, Alaska 99577 • (907) 694-6683 • (907) 694-1015 (fax)
senator.fred.dyson@legis.state.ak.us • www.akrepublicans.org

Sec. 13.52.010. Advance health care directives.

(a) Except as provided in AS 13.52.173 , an adult may give an individual instruction. Except as provided in AS 13.52.177 , the instruction may be oral or written. The instruction may be limited to take effect only if a specified condition arises.

(b) An adult may execute a durable power of attorney for health care, which may authorize the agent to make any health care decision the principal could have made while having capacity. The power remains in effect notwithstanding the principal's later incapacity and may include individual instructions. The power must be in writing, contain the date of its execution, be signed by the principal, and be witnessed by one of the following methods:

(1) signed by at least two individuals who are personally known by the principal, each of whom witnessed either the signing of the instrument by the principal or the principal's acknowledgment of the signature of the instrument; or

(2) acknowledged before a notary public at a place in this state.

(c) Unless related to the principal by blood, marriage, or adoption, an agent under a durable power of attorney for health care may not be an owner, operator, or employee of the health care institution at which the principal is receiving care.

(d) A witness for a durable power of attorney for health care may not be

(1) a health care provider employed at the health care institution or health care facility where the principal is receiving health care;

(2) an employee of the health care provider providing health care to the principal, or of the health care institution or health care facility where the principal is receiving health care; or

(3) the agent.

(e) At least one of the individuals used as a witness for a durable power of attorney for health care shall be someone who is not

(1) related to the principal by blood, marriage, or adoption; or

(2) entitled to a portion of the estate of the principal upon the principal's death under a will or codicil of the principal existing at the time of execution of the durable power of attorney for health care or by operation of law then existing.

(f) Unless otherwise specified in the durable power of attorney for health care, the authority of an agent becomes effective only upon a determination that the principal lacks capacity and ceases to be effective upon a determination that the principal has recovered capacity.

(g) Unless otherwise specified in a written advance health care directive, a determination that a principal lacks or has recovered capacity, or that another condition exists that affects an individual instruction or the authority of an agent, shall be made by

(1) the primary physician, except in the case of mental illness;

(2) a court in the case of mental illness, unless the situation is an emergency; or

(3) the primary physician or another health care provider in the case of mental illness where the situation is an emergency.

(h) An agent shall make a health care decision in accordance with the principal's individual instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.

(i) A health care decision made by an agent for a principal is effective without judicial approval.

(j) A written advance health care directive may include the individual's nomination of a guardian of the individual.

(k) Except as provided in AS 13.52.247 (a), an advance health care directive, including an advance health care directive that is made in compliance with the laws of another state, is valid for purposes of this chapter if it complies with this chapter, regardless of where or when it was executed or communicated.

(l) Notwithstanding the sample form provided under AS 13.52.300, an individual instruction that would be valid by itself under this chapter is valid even if the individual instruction is contained in a writing that also contains a durable power of attorney for health care and the durable power of attorney does not meet the witnessing or other requirements of this chapter.

Sec. 13.52.020. Revocation of advance health care directive.

(a) Except in the case of mental illness under (c) of this section, a principal may revoke the designation of an agent only by a signed writing or by personally informing the supervising health care provider.

(b) Except in the case of mental illness under (c) of this section and except as provided by AS 13.52.183 , a principal may revoke all or part of an advance health care directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke.

(c) In the case of mental illness, an advance health care directive may be revoked in whole or in part at any time by the principal if the principal does not lack capacity and is competent. A

revocation is effective when a competent principal with capacity communicates the revocation to a physician or other health care provider. The physician or other health care provider shall note the revocation on the principal's medical record. In the case of mental illness, the authority of a named agent and an alternative agent named in the advance health care directive continues in effect as long as the advance health care directive appointing the agent is in effect or until the agent has withdrawn. For the purposes of this subsection, a principal is not considered competent when

(1) it is the opinion of the court in a guardianship proceeding under AS 13.26, the opinion of two physicians, at least one of whom is a psychiatrist, or the opinion of a physician and a professional mental health clinician, that the principal is not competent; or

(2) a court in a hearing under AS 47.30.735 , 47.30.750, or 47.30.770 determines that the principal is gravely disabled; in this paragraph, "gravely disabled" has the meaning given in AS 47.30.915 (7)(B).

(d) A health care provider, agent, guardian, or surrogate who is informed of a revocation shall promptly communicate the fact of the revocation to the supervising health care provider and to any health care institution at which the patient is receiving care.

(e) A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or in a durable power of attorney for health care.

(f) An advance health care directive that conflicts with an earlier advance health care directive revokes the earlier directive to the extent of the conflict.

Sec. 13.52.025. Rescission of withdrawal by agent.

A person who has withdrawn as an agent may rescind the withdrawal by executing an acceptance after the date of the withdrawal. A person who rescinds a withdrawal shall give notice to the principal if the principal has capacity or to the principal's health care provider if the principal does not have capacity.

Sec. 13.52.030. Surrogates.

(a) Except in the case of mental health treatment and except as provided by AS 13.52.173 and 13.52.193, a surrogate may make a health care decision for a patient who is an adult if an agent or guardian has not been appointed or the agent or guardian is not reasonably available, and if the patient has been determined by the primary physician to lack capacity.

(b) Subject to AS 13.52.055 (b), a surrogate may make a decision regarding mental health treatment for a patient who is an adult if

(1) an agent or guardian has not been appointed or the agent or guardian is not reasonably available;

(2) the mental health treatment is needed on an emergency basis; and

(3) the patient has been determined to lack capacity by

(A) two physicians, one of whom is a psychiatrist; or

(B) a physician and a professional mental health clinician.

(c) Except as provided for anatomical gifts in AS 13.52.173 , an adult may designate an individual to act as surrogate for that adult by personally informing the supervising health care provider. Except as provided by AS 13.52.173 or 13.52.193, in the absence of a designation, or if the designee is not reasonably available, a member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate:

(1) the spouse, unless legally separated;

(2) an adult child;

(3) a parent; or

(4) an adult sibling.

(d) Except as provided by (l) of this section or AS 13.52.173 or 13.52.193, if none of the individuals eligible to act as surrogate under (c) of this section is reasonably available, an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available may act as surrogate.

(e) A surrogate shall communicate the surrogate's assumption of authority as promptly as practicable to the health care provider, the health care institution, and the members of the patient's family specified in (c) of this section who can be readily contacted.

(f) If more than one member of a class under (c)(2) - (4) of this section assumes authority to act as surrogate, the members of that class do not agree on a health care decision, and the supervising health care provider is informed of the disagreement, the supervising health care provider shall comply with the decision of a majority of the members of that class who have communicated their views to the provider. If the class is evenly divided concerning the health care decision and the supervising health care provider is informed of the even division, that class and all individuals having a lower priority under (c)(2) - (4) of this section are disqualified from making the decision, and the primary physician, after consulting with all individuals in that evenly divided class who are reasonably available, shall make a decision based on the consultation and the primary physician's own determination of the best interest of the patient.

(g) A surrogate shall make a health care decision in accordance with the patient's individual instructions or other advance health care directives, if any, and other wishes to the extent known to the surrogate. Otherwise, the surrogate shall make the decision in accordance with the

surrogate's determination of the patient's best interest. In determining the patient's best interest, the surrogate shall consider the patient's personal values to the extent known to the surrogate.

(h) If a patient's primary health care provider observes that a surrogate is not abiding by the wishes, values, and best interest of the patient, the primary health care provider may decline to comply with a decision of the surrogate and shall notify the health care institution where the primary health care provider is providing health care to the patient.

(i) A health care decision made by a surrogate for a patient is effective without judicial approval.

(j) A patient who has capacity may, at any time, disqualify another person, including a member of the patient's family, from acting as the patient's surrogate by a signed writing or by personally informing the supervising health care provider of the disqualification.

(k) Unless related to the patient by blood, marriage, or adoption, a surrogate may not be an owner, operator, or employee of the health care facility where the patient is receiving care.

(l) A supervising health care provider may require an individual claiming the right to act as a surrogate for a patient to provide a written declaration under penalty of perjury stating facts and circumstances reasonably sufficient to establish the claimed authority.

Sec. 13.52.040. Decisions by guardian.

(a) Subject to AS 13.52.183 , 13.52.193, and 13.52.203, a guardian shall comply with the ward's individual instructions and may not revoke a ward's advance health care directive executed before the ward's incapacity unless a court expressly authorizes the revocation.

(b) Unless there is a court order to the contrary, a health care decision of an agent takes precedence over that of a guardian.

(c) Except as provided in (a) of this section, a health care decision made by a guardian for the ward is effective without judicial approval.

Sec. 13.52.045. Withholding or withdrawing of life-sustaining procedures.

Notwithstanding any other provision of this chapter, an agent or a surrogate may determine that life-sustaining procedures may be withheld or withdrawn from a patient with a qualifying condition when there is

(1) a durable power of attorney for health care or other writing that clearly expresses the patient's intent that the procedures be withheld or withdrawn; or

(2) no durable power of attorney for health care or other writing that clearly expresses the patient's intent to the contrary, the patient has a qualifying condition as determined under AS

13.52.160 , and withholding or withdrawing the procedures would be consistent with the patient's best interest.

Sec. 13.52.050. Decisions for exceptional procedures.

Unless there is a durable power of attorney for health care or another writing clearly expressing an individual's intent to the contrary, an agent or surrogate may not consent on behalf of a patient to an abortion, sterilization, psychosurgery, or removal of bodily organs except when the abortion, sterilization, psychosurgery, or removal of bodily organs is necessary to preserve the life of the patient or to prevent serious impairment of the health of the patient.

Sec. 13.52.055. Pregnancy.

(a) Before implementing a health care decision for a woman of childbearing age that would affect a fetus if present, the supervising health care provider shall take reasonable steps to determine whether the woman is pregnant.

(b) Notwithstanding any other provision of this chapter to the contrary, an advance health care directive by a patient or a decision by the person then authorized to make health care decisions for a patient may not be given effect if

(1) the patient is a woman who is pregnant and lacks capacity;

(2) the directive or decision is to withhold or withdraw life-sustaining procedures;

(3) the withholding or withdrawal of the life-sustaining procedures would, in reasonable medical judgment, be likely to result in the death of the patient; and

(4) it is probable that the fetus could develop to the point of live birth if the life-sustaining procedures were provided.

(c) This section does not apply to emergency services in the field.

Sec. 13.52.060. Obligations of health care providers, institutions, and facilities.

(a) Before implementing a health care decision made for a patient, a supervising health care provider, if possible, shall promptly communicate to the patient the decision made and the identity of the person making the decision.

(b) A supervising health care provider who knows of the existence of an advance health care directive, a revocation of an advance health care directive, or a designation or disqualification of a surrogate shall promptly record its existence in the patient's health care record, shall request a copy if it is in writing, and shall arrange for its maintenance in the health care record if a copy is furnished.

(c) A supervising health care provider who makes or is informed of a determination that a patient lacks or has recovered capacity, or that another condition exists that affects an individual instruction or the authority of an agent, a guardian, or a surrogate, shall promptly record the determination in the patient's health care record and communicate the determination to the patient, if possible, and to any person then authorized to make health care decisions for the patient.

(d) Except as provided in (e), (f), and (i) of this section and by AS 13.52.253 , a health care provider, health care institution, or health care facility providing care to a patient shall comply with

(1) an individual instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health care decisions for the patient; and

(2) a health care decision for the patient made by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity.

(e) A health care provider may decline to comply with an individual instruction or a health care decision for reasons of conscience, except for a do not resuscitate order. A health care institution or health care facility may decline to comply with an individual instruction or health care decision if the instruction or decision is contrary to a policy of the institution or facility that is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health care decisions for the patient.

(f) A health care provider, health care institution, or health care facility may decline to comply with an individual instruction or a health care decision that requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the provider, institution, or facility. In this subsection, "medically ineffective health care" means health care that according to reasonable medical judgment cannot cure the patient's illness, cannot diminish its progressive course, and cannot effectively alleviate severe discomfort and distress.

(g) A health care provider, health care institution, or health care facility that declines to comply with an individual instruction or a health care decision shall

(1) promptly inform the patient, if possible, and any person then authorized to make health care decisions for the patient that the provider, institution, or facility has declined to comply with the instruction or decision;

(2) provide continuing care to the patient until a transfer is effected; and

(3) unless the patient or person then authorized to make health care decisions for the patient refuses assistance, immediately cooperate and comply with a decision by the patient or a person then authorized to make health care decisions for the patient to transfer the patient to another health care institution, to another health care facility, to the patient's home, or to another location

chosen by the patient or by the person then authorized to make health care decisions for the patient.

(h) Except as provided for civil commitments under AS 47.30.817 , a health care provider, health care institution, or health care facility may not require or prohibit the execution or revocation of an advance health care directive as a condition for providing health care.

(i) Notwithstanding the exception in (e) of this section for do not resuscitate orders, a health care provider may perform cardiopulmonary resuscitation or other resuscitative measures on a patient even if there is a do not resuscitate order for the patient if the condition requiring cardiopulmonary resuscitation or other resuscitative measures is precipitated by complications arising out of medical services being provided by the health care provider to the patient.

(j) The provisions of (i) of this section do not apply when a health care provider performs emergency medical services on a patient in the field, unless an online physician orders the health care provider to perform cardiopulmonary resuscitation or other resuscitative measures; in this subsection,

(1) "health care provider" does not include a physician;

(2) "in the field" does not include in a health care facility, health care institution, hospital, or mental health facility;

(3) "online physician" means a physician who is immediately available in person or by radio or telephone, when medically appropriate, for communication of medical direction to health care providers.

Sec. 13.52.065. Do not resuscitate protocol and identification requirements.

(a) A physician may issue a do not resuscitate order for a patient of the physician. The physician shall document the grounds for the order in the patient's medical file.

(b) The department shall by regulation adopt a protocol, subject to the approval of the State Medical Board, for do not resuscitate orders that sets out a standardized method of procedure for the withholding of cardiopulmonary resuscitation by health care providers and health care institutions.

(c) The department shall develop standardized designs and symbols for do not resuscitate identification cards, forms, necklaces, and bracelets that signify, when carried or worn, that the carrier or wearer is an individual for whom a physician has issued a do not resuscitate order.

(d) A health care provider other than a physician shall comply with the protocol adopted under (b) of this section for do not resuscitate orders when the health care provider is presented with a do not resuscitate identification, an oral do not resuscitate order issued directly by a physician if the applicable hospital allows oral do not resuscitate orders, or a written do not resuscitate order entered on and as required by a form prescribed by the department.

(e) Notwithstanding (d) of this section, if an individual has made an anatomical gift to occur at death and is in a hospital when a do not resuscitate order or an order to withdraw life-sustaining procedures is to be implemented for the individual, the order may not be implemented until the subject of the anatomical gift can be evaluated to determine if it is suitable for donation.

(f) A do not resuscitate order may not be made ineffective unless a physician revokes the do not resuscitate order, a patient for whom the order is written and who has capacity requests that the do not resuscitate order be revoked, or the patient for whom the order is written is under 18 years of age and the parent or guardian of the patient requests that the do not resuscitate order be revoked. Any physician of a patient for whom a do not resuscitate order is written may revoke the do not resuscitate order if the person for whom the order is written requests that the physician revoke the do not resuscitate order.

Sec. 13.52.070. Health care information.

(a) Unless otherwise specified in an advance health care directive, a person then authorized to make health care decisions for a patient has the same rights as the patient to request, receive, examine, copy, and consent to the disclosure of medical or other health care information.

(b) Notwithstanding (a) of this section, if there is a question about the principal's capacity, an agent or a surrogate of the principal may immediately access the personal health care information necessary to determine the principal's capacity, even if the agency or surrogacy does not become effective until the principal lacks capacity.

Sec. 13.52.080. Immunities.

(a) A health care provider or health care institution that acts in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for

(1) providing health care information in good faith under AS 13.52.070;

(2) complying with a health care decision of a person based on a good faith belief that the person has authority to make a health care decision for a patient, including a decision to withhold or withdraw health care;

(3) declining to comply with a health care decision of a person based on a good faith belief that the person then lacked authority;

(4) complying with an advance health care directive and assuming in good faith that the directive was valid when made and has not been revoked or terminated;

(5) participating in the withholding or withdrawal of cardiopulmonary resuscitation under the direction or with the authorization of a physician or upon discovery of do not resuscitate identification upon an individual;

(6) causing or participating in providing cardiopulmonary resuscitation or other life-sustaining procedures

(A) under AS 13.52.065 (e) when an individual has made an anatomical gift;

(B) because an individual has made a do not resuscitate order ineffective under AS 13.52.065 (f) or another provision of this chapter; or

(C) because the patient is a woman of childbearing age and AS 13.52.055 applies; or

(7) acting in good faith under the terms of this chapter or the law of another state relating to anatomical gifts.

(b) An individual acting as an agent, a guardian, or a surrogate under this chapter is not subject to civil or criminal liability or to discipline for unprofessional conduct for health care decisions made in good faith.

(c) A health care provider, health care institution, or health care facility is not subject to civil or criminal liability, or to discipline for unprofessional conduct, if a do not resuscitate order prevents the health care provider, health care institution, or health care facility from attempting to resuscitate a patient who requires cardiopulmonary resuscitation or other resuscitative measures because of complications arising out of health care being administered to the patient by the health care provider, health care institution, or health care facility. This subsection does not apply if the complications suffered by the patient are caused by gross negligence or reckless or intentional actions on the part of the health care provider, health care institution, or health care facility.

Sec. 13.52.090. Statutory damages.

(a) A health care provider or institution that intentionally violates this chapter is liable to the aggrieved individual or the individual's estate for damages of $10,000 or actual damages resulting from the violation, whichever is greater, plus attorney fees as provided by court rule.

(b) A person who intentionally falsifies, forges, conceals, defaces, or obliterates an individual's advance health care directive or a revocation of an advance health care directive without the individual's consent, or who coerces or fraudulently induces an individual to give, revoke, or not to give an advance health care directive, is liable to that individual for damages of $10,000 or actual damages resulting from the action, whichever is greater, plus attorney fees as provided by court rule.

Sec. 13.52.100. Capacity.

(a) This chapter does not affect the right of an individual to make health care decisions while having capacity to make health care decisions.

(b) An individual is rebuttably presumed to have capacity to make a health care decision, to give or revoke an advance health care directive, and to designate or disqualify a surrogate.

(c) An individual who is a qualified patient, including an individual for whom a physician has issued a do not resuscitate order, has the right to make a decision regarding the use of cardiopulmonary resuscitation and other life-sustaining procedures as long as the individual is able to make the decision. If an individual who is a qualified patient, including an individual for whom a physician has issued a do not resuscitate order, is not able to make the decision, the protocol adopted under AS 13.52.065 for do not resuscitate orders governs a decision regarding the use of cardiopulmonary resuscitation and other life-sustaining procedures.

Sec. 13.52.110. Status of copy.

A copy of a written advance health care directive, revocation of an advance health care directive, or designation or disqualification of an agent or a surrogate has the same effect as the original.

Sec. 13.52.120. Effect of this chapter.

(a) In the absence of evidence to the contrary of the patient's intent, this chapter establishes a presumption in favor of life, consistent with the best interest of the patient.

(b) Notwithstanding any other provision of law, death resulting from the withholding or withdrawal of cardiopulmonary resuscitation or other life-sustaining procedures does not, for any purpose, constitute a suicide or homicide if the withholding or withdrawal is

(1) consistent with this chapter; and

(2) from an individual

(A) for whom a do not resuscitate order has not been issued;

(B) for whom a do not resuscitate order has been issued under

(i) the protocol for do not resuscitate orders established under AS 13.52.065; or

(ii) a do not resuscitate identification found on the individual.

(c) The issuance of a do not resuscitate order under this chapter, the possession of do not resuscitate identification under this chapter, or the making of a health care directive under this chapter does not affect in any manner the sale, procurement, or issuance of a policy of life insurance, and does not modify the terms of an existing policy of life insurance. A policy of life insurance is not legally impaired or invalidated in any manner by the withholding or withdrawal of life-sustaining procedures from an insured individual or the withholding or withdrawal of cardiopulmonary resuscitation from an individual who possesses do not resuscitate identification or for whom a do not resuscitate order has been issued, notwithstanding any term of the policy to the contrary.

(d) This chapter does not authorize mercy killing, assisted suicide, or euthanasia.

(e) This chapter does not authorize or require a health care provider or institution to provide health care contrary to generally accepted health care standards applicable to the health care provider or institution.

(f) This chapter does not authorize an agent or a surrogate to consent to the admission of an individual to a mental health facility unless the individual's written advance health care directive expressly so provides, and the period of admission may not exceed 17 days.

(g) This chapter does not affect other statutes of this state governing treatment for mental illness of an individual involuntarily committed to a mental health facility.

Sec. 13.52.130. Prohibited requirements.

As a condition of receiving or being insured for health care services, a health care provider, a health care institution, a health care service plan, an insurer issuing health insurance, a self-insured employee welfare benefit plan, or a nonprofit hospital plan may not require an individual to execute a health care directive, obtain a do not resuscitate order from a physician, or possess do not resuscitate identification.

Sec. 13.52.135. Discriminatory treatment prohibited.

When determining the best interest of a patient under this chapter, health care treatment may not be denied to a patient because the patient has a disability or is expected to have a disability.

Sec. 13.52.140. Judicial relief.

On petition of a patient, the patient's agent, guardian, or surrogate, or a health care provider or institution involved with the patient's care, the superior court may enjoin or direct a health care decision or order other equitable relief. A proceeding under this section is governed by AS 13.26.090 - 13.26.320.

Sec. 13.52.150. Do not resuscitate orders and identification of other jurisdictions.

A do not resuscitate order or a do not resuscitate identification executed, issued, or authorized in another state or a territory or possession of the United States is valid for the purposes of this chapter if it complies with the laws of this state. A health care provider or health care institution may presume, in the absence of actual notice to the contrary, that the do not resuscitate order or the do not resuscitate identification complies with the laws of this state, regardless of where or when it was executed, issued, or authorized, and that the patient is a qualified patient.

THE ALASKA HEALTH CARE DECISIONS ACT, ANALYZED

KENNETH C. KIRK*

This Article reviews and examines the Alaska Health Care Decisions Act ("AHCDA"), found at section 13.52 of the Alaska Statutes and effective January 1, 2005. The AHCDA is examined functionally, historically, philosophically, and by hypothetical application to well-known cases. The Article identifies a number of errors and ambiguities in the AHCDA and concludes that while the AHCDA expresses itself as an attempt to balance the societal concerns of sanctity of life and the right to self-determination, in practice it is likely to promote termination of life support in circumstances supported by neither of those two philosophical imperatives.

I. INTRODUCTION

After four years of debate, the 2004 Alaska Legislature finally passed the Alaska Health Care Decisions Act ("AHCDA").[1] The AHCDA is an ambitious attempt to pull together a number of statutory schemes related to the end of life, including laws on advance directives (also known as "living wills"), termination of life support for those who are terminally ill or permanently unconscious, laws related to decision making for the mentally ill, and laws related to organ donation. The AHCDA also adds a section on surrogate decision making for those who have not filled out an advance medical directive and have no court-appointed guardian. The AHCDA includes an optional form called an advance healthcare directive, which can be used to appoint a decision maker for healthcare decisions in the event a person is incapacitated.[2] The advance healthcare directive also provides instructions for healthcare, including decisions to withdraw life

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1. ALASKA STAT. § 13.52 (2004).

2. § 13.52.300.

support (which includes feeding tubes); changes the system for making anatomical gifts at death; allows appointment of a surrogate decision maker for mental health treatment; and indicates the physician who will have the right, under certain circumstances, to make decisions on a patient's behalf.[3]

This Article will examine the AHCDA from several different perspectives. Part II reviews the AHCDA functionally, with an emphasis on what its various parts achieve and how well these parts fit together. Part III culls the legislative history to show how the bill evolved from a "Five Wishes" statement to its current form. Part IV examines the AHCDA from a philosophical perspective, showing how the various emphases on sanctity of life, right to self-determination, and quality of life have been factored, albeit somewhat unevenly, into the Act. Part V applies the AHCDA to the well-known cases involving Karen Ann Quinlan, Nancy Cruzan, Terri Schiavo, Sun Hudson, and Ora Mae Magouirk to see how those cases would likely have come out under the AHCDA. Finally, Part VI considers the likely practical effects of the AHCDA, analyzing whether the probable results are in fact consistent with the aims on which the AHCDA purports to be based.

II. FUNCTIONAL ANALYSIS

The Health Care Decisions Act is a hybrid enactment, covering a number of different areas relating to decision making on medical issues.

The AHCDA's most distinctive attribute is the new advance healthcare directive form, with the activating portion at the beginning of the statute,[4] and the optional form itself at the conclusion (except for the definitions).[5] Under the old living will statute,[6] a terminally ill individual could direct that his attending physician withhold or withdraw procedures that merely prolonged the dying process and were not necessary to keep him comfortable and to relieve pain.[7] The individual could also make an organ donation on the same document[8] or separately. Under the new form, in a single document, the individual can designate an agent to make healthcare decisions if he or she becomes incapacitated; can

3. *Id.*
4. § 13.52.010.
5. § 13.52.300.
6. ALASKA STAT. §§ 18.12.010–.100 (2002) (repealed 2004).
7. § 18.12.010(a) (repealed 2004).
8. § 13.50.030 (repealed 2004).

limit that agent's authority; can indicate, when the person has a "qualifying condition,"[9] whether life should be prolonged by artificial means, artificial nutrition or hydration, or whether pain relief should be provided; can direct an anatomical gift at death, and even what types of use to which the gift can be made; can delegate authority for mental health treatment; and can designate a primary physician for decision-making purposes.[10] The AHCDA provides details regarding how the form must be witnessed, when it is effective,[11] what the agent must consider in making decisions on the person's behalf, and how it may be revoked, among other limitations.

Noticeably, the statutes related to guardianship were not incorporated into the AHCDA, but were instead left in Title 13.[12] However, several portions of the AHCDA do relate to guardians. Under the guardianship statutes, a person nominated by the respondent has priority to be selected as guardian,[13] and under the AHCDA the form may include the individual's nomination of a guardian;[14] thus, the AHCDA provides a method for nominating the person who will be given priority under the guardianship statutes. The sample form, if left unaltered, simply nominates the person who is designated to make healthcare decisions as the guardian.[15] Note, however, that under the guardianship statutes, a general guardian has a great deal of authority with regard to finances (assuming a separate conservator has not been appointed), and a different person might be better able to handle those duties. As a result, patients are advised to consider carefully the decision to designate a healthcare agent that will also act as the preferred guardian. Separating the functions of healthcare agent and guardian would require writing a separate instruction on the form, as the appointment of a guardian is otherwise automatic in the last paragraph of Part One of the statutory form.

Interestingly, absent a court order to the contrary, a healthcare decision made by an agent[16] takes precedence over that of a

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9. Defined as either a condition of permanent unconsciousness or a terminal condition. ALASKA STAT. § 13.52.300 (2004).

10. *Id.*

11. § 13.52.010(f). The form is only effective during the time the principal lacks capacity. *Id.*

12. §§ 13.26.090–.155.

13. § 13.26.145(d)(1).

14. § 13.52.010(j).

15. § 13.52.300 pt. 1(5).

16. An "agent" refers to one appointed under an advance healthcare directive.

guardian,[17] and the guardian is required to comply with the ward's healthcare directive unless a court expressly authorizes the revocation. Attorneys who represent petitioners in guardianship cases have already noticed the potential malpractice trap; consequently, they now draft proposed orders for the court so that their guardians will be able to act according to their own perceptions of the ward's best interest and will not be overruled by an appointed agent. To understand the problem, imagine that you are the attorney for the petitioner in a guardianship case, and your client has asked you to secure guardianship over a relative with dementia, in part so that reasonable healthcare decisions can be made. In your proposed orders, which are ultimately adopted by the court, you neglect to state clearly that the guardian's decisions will overrule any decisions by an agent (probably because you are using the same forms you used in the past, when this was not an issue). On the eve of an important medical procedure, you discover that the ward has a pre-existing, valid healthcare directive, naming another individual as the agent. The agent will not consent to the medical procedure, so it cannot be performed. The malpractice risk in that scenario should be apparent.

In recognition of the fact that a significant portion of the population does not, and will not, have advance directives, the AHCDA includes a detailed provision allowing for the appointment of surrogates for individuals who do not have advance healthcare directives or guardians.[18] A patient can designate such a surrogate by personally informing the supervising healthcare providers of the identity of the desired surrogate.[19] If the patient fails to do so, a surrogate is appointed according to a priority list, beginning with the patient's spouse, then adult children, then parents, then adult siblings, and finally "an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available."[20] The surrogate is to act in accordance with the patient's individual instructions and wishes; otherwise, the surrogate may make the decision in accordance with his or her determination of the patient's best interest, considering the patient's personal values.[21] The patient's primary healthcare provider may overrule the

17. § 13.52.040(b).
18. § 13.52.030.
19. § 13.52.030(c).
20. § 13.52.030(d).
21. § 13.52.030(g).

surrogate's decision if it appears that he or she is not abiding by the wishes, values, and best interests of the patient.[22]

The AHCDA has specific restrictions on when life support (including the withholding of artificial nutrition and hydration) may be withheld or withdrawn. The patient must have a "qualifying condition," which means either a terminal condition or a state of permanent unconsciousness.[23] However, the standards for do-not-resuscitate orders (commonly called "DNR" or "Comfort One" orders) are different under the AHCDA. Specifically, the order must be entered by a physician and does not require the consent of the patient, agent, guardian, surrogate, or family.[24]

The rules on anatomical gifts (also known as "organ donation") primarily involve two different sections of the AHCDA. The first, section 13.52.170, allows the patient to make an anatomical gift in a variety of ways.[25] The second, section 13.52.180, allows other individuals (again, according to a priority list) to make anatomical gifts on the patient's behalf, unless the patient had previously and specifically objected.[26] The statute also provides a form for a third party to make the gift,[27] and other sections of the statute attempt to sort out the necessary details and prevent abuses.[28]

Finally, there are the mental health provisions.[29] Part Four of the optional form directive allows an individual to make a variety of decisions about mental health treatment, including whether he or she consents to administration of psychotropic medications, electroconvulsive treatment, or mental health commitment.[30] The remaining mental health provisions, for the most part, carve out

22. § 13.52.030(h).
23. § 13.52.390(36).
24. § 13.52.065.
25. § 13.52.170.
26. § 13.52.180.
27. § 13.52.190.
28. §§ 13.52.200–.270.
29. Whether mental health treatment even falls within the AHCDA depends on whether the AHCDA is viewed as primarily related to medical care or to end-of-life issues. If the AHCDA is aimed at medical care in general, including mental health treatment, this part of the statute makes sense. But, if one thinks of the AHCDA as related primarily to questions surrounding the end-of-life, the section on mental health treatment does not fit at all.
30. § 13.52.300, pt. 4.

exceptions to the general rules applicable to other medical treatments.[31]

Most of the laws related to mental health commitments are not in the AHCDA, but rather in section 47.30[32] of the Alaska Statutes, which covers involuntary mental health commitments. Under the involuntary commitment statute, an individual can be committed by a peace officer, a psychiatrist or other physician, or a psychologist;[33] the AHCDA adds the designated healthcare agent to the list of people who can initially order a commitment.[34] Additionally, under the AHCDA, the agent can commit the patient for up to seventeen days,[35] whereas the statute on involuntary commitments mandates a probable cause hearing within three days.[36]

The mental health portion of the advance directive itself is nothing new; indeed, it is lifted word-for-word from the old statute, which was titled "Personal Declaration of Preference for Mental Health Treatment"[37] and was repealed effective the same day the AHCDA took effect.[38] Both forms allow the agent to make the decisions on psychotropic medication, electroconvulsive treatment, and involuntary commitment for up to seventeen days.[39]

Curiously, under Part Four of the AHCDA's form, the default rule is that the healthcare agent can make mental health decisions on behalf of the patient.[40] Consequently, there is a risk that those who do not read the form carefully or check off the boxes indicating non-consent will inadvertently give the agent the authority to consent to highly invasive and controversial mental

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31. *E.g.*, § 13.52.020(a)–(c) (outlining exceptions to the general rules regarding revocation of a directive); § 13.52.030 (relating to surrogates); § 13.52.120(f) (regarding commitments to mental health facilities).

32. §§ 47.30.700–.815.

33. § 47.30.705.

34. § 13.52.300.

35. *Id.*

36. § 47.30.715.

37. ALASKA STAT. §§ 47.30.950–.980 (2002) (repealed 2004).

38. ALASKA STAT. § 13.52.300 (2004); ALASKA STAT. §§ 47.30.950–.980 (2002) (repealed 2004).

39. ALASKA STAT. § 13.52.300 (2004); ALASKA STAT. §§ 47.30.950–.980 (2002) (repealed 2004).

40. ALASKA STAT. § 13.52.300, pt. 4 (2004). The optional form directive reads as follows: "If you are satisfied to allow your agent to determine what is best for you in making these mental health decisions, you do not need to fill out this part of the form." *Id.*

health treatments.[41] Under the repealed mental health declaration, there was no such default.[42] Rather, a patient who did not wish to give an agent those powers did not have to fill out the form in the first place.[43]

Moreover, the witnessing requirements were more stringent under the prior statute. Under that statute, neither witness could be related to the patient,[44] and the agent was expected to accept the appointment in writing.[45] Under the AHCDA, one witness may be a relative of the patient's.[46] As a result, it is easier to delegate important mental health decisions, and such delegation can even be done accidentally by leaving Part Four of the statutory form blank.

This puzzling default in the mental health section underscores a problem that surfaces throughout the AHCDA: people are encouraged to fill out these forms as part of estate planning or general good stewardship, even if they do not have current medical problems; however, many parts of the statutory form seem designed for those with an existing major medical issue.

III. HISTORICAL ANALYSIS

The AHCDA's history is unusual in that it took a full four years of work in various committees in order for the bill to become law. The bill was introduced in 2001, in the first session of the 22nd legislature, as House Bill 197.[47] After the House Health, Education and Social Services ("HESS") Committee and the Judiciary Committee made amendments, the bill passed the House during the second session of that legislature in 2002.[48] It did not pass the Senate (it was never even scheduled for a Senate hearing), and so, technically speaking, it died. However, in the following legislature,

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41. Although some individuals with current psychological disorders may wish to give a trusted agent the authority to make these decisions on his or her behalf, it is unlikely that a person who has no current mental disorder would want to appoint someone to override his or her express wishes in this regard. After all, mental health treatment is generally recommended only for conscious patients. If the patient is conscious and agrees to the treatment, there is no need for the agent to be involved. So, presumably if the agent is acting, it is because the patient is not in agreement, at the time the decision must be made, with the proposed treatment.

42. *See* ALASKA STAT. §§ 47.30.950–.980 (2002) (repealed 2004).

43. *Id.*

44. § 47.30.954 (repealed 2004).

45. § 47.30.970 (repealed 2004).

46. ALASKA STAT. § 13.52.010(e) (2004).

47. H.B. 197, 22d Leg., 1st Sess. (Alaska 2001).

48. H.B. 197, 22d Leg., 2d Sess. (Alaska 2002).

the bill was reintroduced in exactly the same form.[49] Finally, in 2004, after being amended numerous times by both the House and Senate committees, the bill received near-unanimous legislative approval and became law.[50]

From the beginning, the bill was touted as being based on the "Five Wishes."[51] The Five Wishes is a document developed by the Aging With Dignity organization,[52] which prompts the declarant to make choices regarding the following:

1. Comfort care (such as how much medicine should be provided, whether warm baths should be given, and whether religious readings or "well-loved poems" should be read aloud to the declarant when near death);
2. How people should treat the declarant (such as whether people should be around when death is near, whether members of a church or synagogue should be asked to pray for the declarant, and whether there is a preference to die in the home);
3. What loved ones should be told (including, for example, whether the declarant wishes forgiveness from family or friends, how the declarant wishes to be remembered, and instructions for memorial services);
4. Desired medical treatment (including especially the question of withdrawal of life support); and,
5. Which person should be named to make healthcare decisions if the declarant is no longer able to do so.

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49. *Minutes, H. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 1st Sess. 6 (Alaska Feb. 13, 2003), *available at* http://www.legis.state.ak.us/PDF/23/M/HHES2003-02-131507. pdf.

50. H.B. 25, 23d Leg., 2d Sess. (Alaska 2004).

51. *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 6 (Alaska Mar. 8, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2004-03-081333.pdf; *Minutes, H. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 1st Sess. 11–13 (Alaska Feb. 13, 2003), *available at* http://www.legis.state.ak.us/PDF/23/M/HHES2003-02-131507.pdf; *Minutes, H. Judiciary Comm.*, 22d Leg., 2d Sess. 36–39 (Alaska Mar. 20, 2002), *available at* http://www.legis.state.ak.us/PDF/22/M/HJUD2002-03-201315.pdf; *Minutes, H. Health, Educ. and Soc. Serv. Comm.* 22d Leg., 1st Sess. 8–13 (Alaska Apr. 17, 2001), *available at* http://www.legis.state.ak.us/PDF/22/M/HHES2001-04-171502. pdf.

52. The Dying Process: Five Wishes Document, http://www.learningplaceonline.com/stages/together/wishes/wishes-1.htm (last visited Sept. 26, 2005) [hereinafter Five Wishes Document].

The 2001 version of the bill closely resembled the Five Wishes document, including the many details of comfort care.[53] However, by 2002, legislative committees had substantially rewritten the bill;[54] eventually, the finished product was merely "inspired by" the Five Wishes.[55]

The Five Wishes document is a personal document not a legal document, and, as such, is written in lay language. By contrast, the AHCDA is more comforting to lawyers, as it is drafted in the style of a legal document and employs language and stylistic trends familiar to lawyers.[56]

The legislature's desire to provide something similar to the Five Wishes explains those portions of the AHCDA related to the healthcare directive, but those portions account for less than half of the total Act. The rest of the bill was explained as an attempt to bring together, under a single chapter, a variety of laws which previously had been scattered throughout the statutes.[57] The bill can be said to have accomplished this.[58]

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53. *Compare* H.B. 197, 22d Leg. 13, 1st Sess. (Alaska 2001) *with* Five Wishes Document, *supra* note 52, Part B, Wish 3.

54. *Compare* H.B. 197, 22d Leg., 1st Sess. (Alaska 2001) *with* H.B. 197, 22d Leg., 2d Sess. (Alaska 2002).

55. *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 1st Sess. 6 (Alaska May 16, 2003), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2003-05-161351. pdf.

56. *Compare* ALASKA STAT. § 13.52.300, pt. 2(6)(B)(i)–(ii) (2004) (defining "a condition of permanent unconsciousness" as "a condition that, to a high degree of medical certainty, will last permanently without improvement; in which, to a high degree of medical certainty, thought, sensation, purposeful action, social interaction, and awareness of myself and the environment are absent; and for which, to a high degree of medical certainty, initiating or continuing life sustaining procedures for me, in light of my medical outcome, will provide only minimal medical benefit for me") *with* Five Wishes Document, *supra* note 52 (using terms such as being "close to death," "in a coma and not expected to wake up or recover," or "have permanent and severe brain damage and are not expected to recover").

57. *Minutes, H. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 1st Sess. 8 (Alaska Feb. 13, 2003), *available at* http://www.legis.state.ak.us/PDF/23/M/HHES2003-02-131507.pdf; *Minutes, H. Judiciary. Comm.*, 22d Leg., 2d Sess. 9–10 (Alaska Apr. 10, 2002), *available at* http://www.legis.state.ak.us/PDF/22/M/HJUD2002-04-101318.pdf; *Minutes, H. Judiciary Comm.*, 22d Leg., 2d Sess. 37 (Alaska Mar. 20, 2002), *available at* http://www.legis.state.ak.us/PDF/22/M/HJUD2002-03-201315.pdf.

58. *See, e.g.*, ALASKA STAT. §§ 18.12.010–.100 (2002) (repealed 2004) (living wills and "Do Not Resuscitate" protocols), 13.50.010–.070 (repealed 2004) (organ donation), 47.30.950–.980 (mental health powers of attorney). Current versions at ALASKA STAT. § 13.52 (2004).

For the most part, philosophical discussions about end-of-life issues did not occur in the legislature until 2004, when the bill reached the Senate HESS Committee. The chairman, Senator Fred Dyson (R-Eagle River), raised a number of questions about life support termination, as did the Alaska Catholic Conference.[59] In addition to numerous committee meetings, a meeting was held off record and included the Alaska Catholic Conference's representative, the Lieutenant Governor's chief of staff, and a staff member of a legislator who advocated passage of the bill.[60] As a result of this meeting, a number of changes were made to the bill, including the addition of a broad statement that, in the absence of evidence to the contrary of the patient's intent, the AHCDA established a presumption in favor of life,[61] and a clarification that the AHCDA does not authorize mercy killing, assisted suicide, or euthanasia.[62] The changes did not entirely satisfy the Catholic Conference[63] but seemed to assuage the concerns of Senator Dyson, for when the bill moved to the Senate Judiciary Committee, Senator Dyson advocated its passage.[64]

One of the more interesting exchanges in the Senate HESS Committee centered on the issue of pregnancy. Senator Dyson, who described himself as "irrevocably pro-life regarding the abortion issue" took the position that if a pregnant woman was in an unconscious state, efforts should be made to keep the child alive, even if that meant continuing life support past a point of physical benefit for the woman.[65] Senator Gretchen Guess (D-Anchorage) took the position that the statute should not overturn a healthcare directive and that the healthcare directive ought to have an option for a pregnant woman to determine whether she would want to be kept alive so that the child might be

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59. *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 6, 18 (Alaska Mar. 8, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2004-03-081333.pdf.

60. *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 24 (Alaska Mar. 24, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2004-03-241344.pdf.

61. ALASKA STAT. § 13.52.120(a) (2004).

62. § 13.52.120(d).

63. *Minutes, S. Judiciary Comm.*, 23d Leg., 2d Sess. 16 (Alaska Apr. 29, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SJUD2004-04-290808.pdf.

64. *Id.*

65. *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 11–12 (Alaska Mar. 8, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2004-03-081333.pdf.

born.[66] This seems to have led to an odd compromise under which the statute and the sample form say two different things. In the sample form[67] the declarant is to answer the question "should I become unconscious and I am pregnant, I direct that" (followed by several blank lines). However, a section of the AHCDA says that, if a pregnant woman lacks capacity, a directive or decision to withhold or withdraw life-sustaining procedures may not be given effect if it is probable that the fetus could develop to the point of live birth with the provision of such life-sustaining procedures.[68] In other words, if life support will enable the baby to be born alive, then life support must be continued, regardless of what the mother might have said in her directive. So the AHCDA itself would overrule a directive to discontinue life support. The resolution of any tension between a directive and the AHCDA may hinge on whether the doctor has actually read the statute or only the approved statutory form.

After four years of testimony, committee hearings, committee substitutes, and debate, the final version of House Bill 25 passed the Senate unanimously, and was then adopted by the House with only one dissenting House vote.[69] The governor signed the Act the following month, and it took effect on January 1, 2005.[70]

IV. PHILOSOPHICAL ANALYSIS

A central premise of this article posits that people approach end-of-life issues from three different philosophical positions. This section of the Article will analyze how each of these positions ultimately influenced the adoption of the AHCDA.

A. Self-Determination

The first of these positions is an emphasis on self-determination, that is, the ability to make one's own decisions about one's own life. This is usually referenced as a "constitutional right" to self-determination. In *Cruzan v. Missouri Department of Health,*[71] a case involving a woman in a vegetative state whose

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66. *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 12, 29 (Alaska Apr. 14, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2004-04-141341.pdf (testimony of Sen. Gretchen Guess).

67. ALASKA STAT. 13.52.300, pt. 2(6)(E) (2004).

68. § 13.52.055(b).

69. H.J. 23, 2d Sess., at 4026 (Alaska 2004); S.J. 23, 2d Sess., at 3248 (Alaska 2004).

70. H.J. 23, 2d Sess., at 4508 (Alaska 2004).

71. 497 U.S. 261 (1990).

family wanted to remove her feeding tube, the United States Supreme Court held that the early common law rule that individuals are to be free from the restraint or interference of others[72] and the requirement for informed consent to medical treatment[73] suggested that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.[74] The Court noted in *Cruzan* that this right to self-determination may also extend to allowing others to exercise what it called a substituted judgment.[75] Substituted judgment involves informing the medical providers of what the patient, presumably unable to express his or her own wishes, would have wanted regarding cessation of medical treatment. Interestingly, Chief Justice Rehnquist's majority opinion does not actually find that there is a constitutional right to refuse medical treatment, but rather notes that such a right could be inferred from the Court's previous decisions.[76] In the subsequent case of *Washington v. Glucksberg*,[77] the Court, again in an opinion written by Chief Justice Rehnquist, noted that while that right could be inferred (since it had been "strongly suggested" by previous opinions), it had not actually been pronounced by the Court.[78]

B. Sanctity of Life

The second significant philosophical position represents an emphasis on the sanctity of life. The Supreme Court has recognized this position, not as a constitutional right, but as a legitimate state interest,[79] which a state can consider in establishing laws. In *Cruzan*, it was this interest, among others, that justified allowing Missouri to require clear and convincing evidence that the individual would want life support terminated.[80] In *Glucksberg*, the state's interest in the preservation of life was a factor in upholding the state of Washington's prohibition of assisted suicide.[81]

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72. *Id.* at 267 (citing Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

73. *Id.* at 269 (citing Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914)).

74. *Id.* at 278.

75. *Id.* at 284.

76. *See id.* at 278–79.

77. 521 U.S. 702 (1997).

78. *See id.* at 720.

79. *Id.* at 728–29; *Cruzan*, 497 U.S. at 280.

80. *Cruzan*, 497 U.S. at 281.

81. *Glucksberg*, 521 U.S. at 728–29.

C. Quality of Life

A patient's quality of life has never been specifically recognized as either a legitimate interest or a right by the Supreme Court. Nonetheless, concern for a patient's quality of life influenced the debate over the AHCDA.

A moderate quality of life position may be defined as concern for the pain and misery that accompany the end of life. An extreme position suggests that once one is no longer able to do anything useful, productive, or interesting, one ought to die. Various courts and professional groups have taken diverging positions on this philosophical question.

In *In re Quinlan*,[82] the New Jersey Supreme Court factored into its decision-making calculus the likelihood of the patient ever returning to "cognitive life," thus taking a position somewhere between the moderate and the extreme positions outlined above.[83]

In one survey of doctors and medical administrators, a remarkable 89% believed it was ethical to withdraw nutrition and hydration from patients in a vegetative state, with a majority endorsing the view that patients in a vegetative state would be "better off dead."[84] One version of this philosophy was expressed in the legislative hearings on the AHCDA by Dr. Maria Wallington, a medical ethicist.[85] She testified that the decision to terminate life support should hinge on whether "what is needed to keep the person alive actually allows him/her to go on with life" or the chance the person will become healthy again and not depend on medical care.[86]

Remarkably, throughout the lengthy history of committee hearings and floor debates in 2001, 2002, and 2003, there was hardly any examination of the philosophical underpinnings of the law, which initially appeared to be strongly influenced by the right to self-determination. Throughout the committee minutes, legislators appeared to assume that people should be able to make their own choices regarding end-of-life decisions.[87] Examples, both

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82. 355 A.2d 647 (N.J. 1976).

83. *Id.* at 664.

84. Kirk Payne et al., *Physicians' Attitudes about the Care of Patients in the Persistent Vegetative State: A National Survey*, 125 ANNALS OF INTERNAL MED. 104, 105 (1996).

85. *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 12-14 (Alaska Apr. 7, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES 2004-04-071745.pdf.

86. *Id.*

87. *See, e.g.*, *Minutes, H. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 1st Sess. 17 (Alaska Feb. 27, 2003), *available at* http://www.legis.state.ak.us/PDF/23/

good and bad, were given from the personal experiences of witnesses and legislators.[88] However, no one raised much concern for the sanctity of life, until the bill reached the Senate HESS Committee in March 2004.[89] At that point, intertwined with the debate over the pregnancy provisions of the bill and the hammering out of various details, the concern for the sanctity of life finally surfaced.[90] Senator Dyson and the Alaska Catholic Conference raised the issue, and a few witnesses took opposing positions.[91]

Notably, a significant portion of the debate centered on the issue of withdrawal of artificial nutrition and hydration.[92] Senator Dyson raised this as a main question about the bill in the opening

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M/HHES2003-02-271504.pdf; *Minutes, H. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 1st Sess. 4 (Alaska Feb. 13, 2003), *available at* http://www.legis.state.ak.us/PDF/23/M/HHES2003-02-131507.pdf; *Minutes, H. Judiciary Comm.*, 22d Leg., 2d Sess. 12 (Alaska Apr. 10, 2002), *available at* http://www.legis.state.ak.us/PDF/22/M/HJUD2002-04-101318.pdf; *Minutes, H. Health, Educ. and Soc. Serv. Comm.*, 22d Leg., 1st Sess. 27 (Alaska Apr. 24, 2001), *available at* http://www.legis.state.ak.us/PDF/22/M/HHES2001-04-241508.pdf; *Minutes, H. Health, Educ. and Soc. Serv. Comm.*, 22d Leg., 1st Sess. 8 (Alaska Apr. 17, 2001), *available at* http://www.legis.state.ak.us/PDF/22/M/HHES2001-04-171502.pdf.

88. *See, e.g.*, *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 1st Sess. 6 (Alaska May 16, 2003), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2003-05-161351.pdf; *Minutes, H. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 1st Sess. 20–21 (Alaska Feb. 27, 2003), *available at* http://www.legis.state.ak.us/PDF/23/M/HHES2003-02-271504.pdf; *Minutes, H. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 1st Sess. 3-4 (Alaska Feb. 13, 2003), *available at* http://www.legis.state.ak.us/PDF/23/M/HHES2003-02-131507.pdf; *Minutes, H. Judiciary Comm.*, 22d Leg., 2d Sess. 11 (Alaska Apr. 10, 2002), *available at* http://www.legis.state.ak.us/PDF/22/M/HJUD2002-04-101318.pdf; *Minutes, H. Health, Educ. and Soc. Serv. Comm.*, 22d Leg., 1st Sess. 11 (Alaska Apr. 17, 2001), *available at* http://www.legis.state.ak.us/PDF/ 22/M/HHES2001-04-171502.pdf.

89. *See Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 18-19 (Alaska Mar. 8, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2004-03-081333.pdf.

90. *See id.*

91. Including, curiously, Dr. Maria Wallington, who purported to represent Providence Health Systems, which is owned by Sisters of Providence, a branch of the Roman Catholic Church. With the Alaska Catholic Conference (representing the Catholic bishops in Alaska) on one side of several issues, and Dr. Wallington of Providence Health Systems on the other, two different agencies of the Roman Catholic Church (sometimes thought to be "monolithic") weighed in on opposite sides of the debate. *See id.* at 8.

92. *Id.* at 14–19.

of his committee's hearing.[93] A representative of the Alaska Nurses' Association argued that withholding fluid and nutrition actually allows a patient to die naturally.[94] Dr. Wallington argued that the law should safeguard the choices made in a person's advance directive.[95] On the other hand, the Alaska Catholic Conference representative argued that the law should have a strong presumption in favor of life, quoting the statement of then-Pope John Paul II that administration of water and food always represents a natural means of preserving life, not a medical act, even when provided by artificial means.[96]

Ultimately, for the most part, the resulting bill is based on the right to self-determination, with a few specific overlays based on concern for the sanctity of life. Life support, including artificial nutrition and hydration, can be withdrawn only if the person is in a state of permanent unconsciousness (meaning a coma or a permanent vegetative state, depending on how one interprets the definitions) or has a terminal illness.[97] A surrogate, whether appointed by the patient or selected according to the statutory procedure, can make decisions for the patient; but in doing so, the surrogate must consider the patient's personal values, including any religious beliefs.[98] Life support may not be withdrawn for a pregnant woman if her child could survive to birth with the procedures in place.[99] Further, a healthcare provider may decline to provide "medically ineffective health care or healthcare contrary to generally accepted health care standards," but only after providing the family an opportunity to transfer the patient to another institution.[100] Finally, the AHCDA explicitly states that, in the absence of evidence of the patient's intent to the contrary, the law establishes a presumption in favor of life, consistent with the patient's best interest.[101]

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93. *Id.* at 7.

94. *Id.* at 9.

95. *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 12 (Alaska Apr. 7, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2004-04-071745.pdf.

96. *Id.* at 20.

97. ALASKA STAT. §§ 13.52.045, .390 (2004).

98. §§ 13.52.030(g), .390(6)(G).

99. § 13.52.055.

100. § 13.52.060(f)–(g).

101. § 13.52.120.

D. Distrust of Lawyers

A distrust for lawyers seems, if only speculatively, to have influenced the bill. Such distrust is evidenced by the fact that the AHCDA vests final decision-making authority in patients, their agents, or their surrogates, with some limited rights-of-refusal or review by their doctors.[102] Further, doctors, not courts, decide whether a person lacks capacity.[103] A doctor may decline to comply with a surrogate's decisions if he or she believes that the surrogate is not abiding by the wishes, values, and best interest of the patient.[104] The doctor can otherwise refuse to comply with the individual instruction or decision for a variety of reasons, such as "reasons of conscience,"[105] or a belief that the proposed treatment would be ineffective or contrary to generally accepted healthcare standards.[106] It is the doctor who ultimately decides whether to issue a "Do Not Resuscitate" order.[107] The AHCDA grants healthcare providers fairly broad immunity in making these decisions.[108] The role of the judiciary receives only the briefest mention,[109] and an agent's healthcare decision can even overrule the decision of a court-appointed guardian (unless a court order specifically provides otherwise).[110]

In his book *Strangers at the Bedside*,[111] historian David Rothman chronicles how, beginning in the 1960s, the United States evolved from a society of unwavering acceptance of the decisions of doctors to a society in which lawyers, bioethicists, politicians, judges, and ethics committees are involved in the decision-making. He credits the shift in part to the fact that most Americans no longer have a trusted family doctor whom they know well enough to trust with end-of-life decisions.[112] Nonetheless, the AHCDA places some of the decision-making authority directly into the physician's hands.[113] Thus, the AHCDA assumes that patients want

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102. *See* §§ 13.52.010-.395.
103. § 13.52.010(g).
104. § 13.52.030(h).
105. § 13.52.060(e).
106. § 13.52.060 (f).
107. § 13.52.065.
108. § 13.52.080.
109. § 13.52.140.
110. § 13.52.040(b).
111. DAVID J. ROTHMAN, STRANGERS AT THE BEDSIDE: A HISTORY OF HOW LAW AND BIOETHICS TRANSFORMED MEDICAL DECISION MAKING (Walter de Gruyter 2003) (1991).
112. *See id.* at 128–31.
113. ALASKA STAT. § 13.52.300, pt. 5 (2004); *see also* § 13.52.030(h).

their primary physicians to make such decisions. This is a questionable assumption in an age when many people go to a clinic, family practice group, or emergency room for primary care. At no point did legislators discuss this issue in the many committee hearings on the bill. Therefore, whether the AHCDA reflects an atavistic view of primary physicians or merely a general hesitancy to let lawyers make these decisions is uncertain.[114]

An emphasis on decision making by physicians may have also resulted from the drafters' focus on patients with pre-existing medical conditions, rather than on those who fill out the advance directive form as part of general estate planning.[115] For instance, the designation of a primary physician will typically pose little problem for someone with cancer, who would likely designate his or her oncologist. Regardless, under the AHCDA, nearly all end-of-life decisions will be made by doctors in consultation with family members, and very few decisions will be made by judges.

V. APPLICATION TO CASES

One rarely appreciates the implications of a statute until one applies the statute to a set of facts. This part of the Article will examine some of the best-known cases from recent memory to determine how they might have turned out under the AHCDA.

A. Karen Ann Quinlan

In April of 1975, Karen Ann Quinlan, a twenty-one year old New Jersey woman, stopped breathing.[116] She was revived, but suffered anoxia, or a loss of oxygen in the blood stream going to the brain.[117] Quinlan ended up in a "chronic persistent vegetative state," which was explained as a "primitive reflex level" of neurological function, with the brain stem working, but other parts of the brain nonfunctional.[118] She was sustained by a respirator and feeding tube, and it was assumed by the doctors (incorrectly, as it

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114. The Alaska Legislature has invariably had fewer attorney members than most legislatures. In the current 24th Alaska Legislature, only eleven of sixty legislators hold law degrees, according to their legislative web sites. *See* Alaska Leg. State Senate, http://w3.legis.state.ak.us/senate/24/senate.htm (last visited Oct. 19, 2005); Alaska Leg. H. R., http://w3.legis.state.ak.us/house/24/house.htm (last visited Oct. 19, 2005).

115. *See, e.g.*, *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 11–22 (Alaska Apr. 7, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2004-04-071745.pdf.

116. *In re* Quinlan, 355 A.2d 647, 653–54 (N.J. 1976).

117. *Id.* at 654.

118. *Id.* at 654–55.

turned out) that her primitive level of brain stem function would be insufficient for her to breathe on her own.[119]

Karen's father filed a petition, asking that he be appointed guardian and that the letters of guardianship contain an express power to authorize the discontinuance of all extraordinary medical procedures.[120] The hospital opposed the discontinuance, and the judge denied the father's request.[121] On appeal, the Supreme Court of New Jersey found that if Karen were able to do so, she could decide to discontinue the life support apparatus.[122] Addressing the question of substitution of judgment, the court determined that her guardian could "assert her right to privacy" on her behalf.[123] The court did not assert a broad right of guardians to make such decisions, but rather found such a right to be reasonable within the context of these particular facts.[124] In doing so, the court balanced the individual's right to privacy against the State's interest in the preservation and sanctity of human life and a physician's right to administer medical treatment according to his best judgment.[125] The court applied a sliding scale, finding that the State's interest weakened, and the individual's right to privacy grew, "as the degree of bodily invasion increase[d] and the prognosis dim[med]."[126] The court incorporated consideration of Karen's quality of life into the analysis.[127] It said that the "focal point of decision should be the prognosis as to the reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of that biological vegetative existence to which Karen seems to be doomed."[128] As the court's words indicate, the quality of life philosophical position is implicated whenever the focus is on the possibility of returning to a sapient or more productive level of life.[129]

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119. *See id.* at 655.
120. *Id.* at 651.
121. *Id.*
122. *Id.* at 663.
123. *Id.* at 664.
124. *Id.*
125. *Id.* at 663–64. The doctors in this case were opposed to the removal of life support. *Id.* at 663.
126. *Id.* at 664.
127. *Id.*
128. *Id.* at 669.
129. Conversely, the sanctity of life position would tend to consider any life as being valuable, even if it were sub-cognitive. The self-determination position would be neutral unless the patient had expressed her wishes in some way.

The court announced a rather curious requirement for termination of life support: although the father was appointed guardian, in order to terminate life support he had to obtain the concurrence of the rest of the family.[130] Furthermore, the attending physicians, in consultation with the hospital ethics committee, had to determine that there was no reasonable possibility of Karen ever emerging from her vegetative state.[131]

How would the Quinlan case be analyzed under the AHCDA? Because Karen did not have an advance healthcare directive,[132] her father would have turned to the surrogacy statute,[133] and because she had no spouse or adult child, her father would be next in line to be Karen's surrogate under the AHCDA.[134] Therefore, he would have the authority to act, assuming Karen's mother did not object.[135]

As surrogate, Mr. Quinlan would inform the attending physician that he wanted life support removed. The doctor would turn to section 13.52.045 and see that, because Karen did not sign a directive to the contrary, he would not be prohibited from removing the life support.[136]

Next, the same section would direct him over to section 13.52.160 to see whether Karen had a "qualifying condition."[137] That section does not actually define "qualifying condition," but rather requires that the determination be made by the patient's primary physician and at least one other physician.[138] A "qualifying condition" is defined in section 13.52.390(36) as either a terminal condition or permanent unconsciousness.[139]

The definition of "terminal condition" is "an incurable or irreversible illness or injury" that will result in imminent death, for which there is no reasonable prospect of cure or recovery, that imposes severe pain or an inhumane burden on the patient, and for which continuing life sustaining procedures will provide only

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130. *See In re Quinlan*, 355 A.2d at 671–72.

131. *Id.*

132. *See id.* at 664.

133. ALASKA STAT. § 13.52.030 (2004).

134. § 13.52.030(c).

135. Karen's mother would have the same right as Karen's father to declare herself a surrogate. *See id.*

136. § 13.52.045.

137. *Id.*

138. § 13.52.160. In the case of permanent unconsciousness, the doctors must also consult with a neurologist. *Id.*

139. § 13.52.390(36).

minimal medical benefit.[140] The definition of "terminal condition" would be problematic here, because there was no guarantee that Karen would die within a "short period of time" if life-sustaining procedures were discontinued.[141] Additionally, Karen's family members did not request removal of the feeding tube, further casting doubt on whether removal of the respirator would result in death.[142]

The doctor would next turn to the definition of "permanent unconsciousness": a condition that will last "permanently without improvement," in which thought, sensation, purposeful action, social interaction, and awareness of self and the environment are absent, and for which initiating or continuing life sustaining procedures provide only minimal medical benefit.[143] This definition is also problematic for a person in a vegetative state because it requires that sensation be absent.[144] Doctors seem to be in some disagreement as to whether a patient in a persistent vegetative state feels pain.[145] If Karen felt pain, one would assume sensation was not absent, and the definition of permanent unconsciousness could not legitimately be met.[146] There is no general consensus in neurology on this issue, probably due to the fact that although patients in a vegetative state react to painful stimuli,[147] they lack a connection to the "higher" parts of the brain that understand what pain is.[148] According to one survey of doctors, about 30% of the respondents believe that vegetative state patients experience pain,

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140. § 13.52.390(42).

141. In fact, to everyone's surprise, after the respirator was eventually removed, Karen Quinlan lived for another ten years. Ascension Health, Healthcare Ethics Cases: Quinlan, Karen Ann, http://www.ascensionhealth.org/ethics/public/cases/case21.asp (last visited Oct. 25, 2005).

142. The Quinlan family was strict Roman Catholic and made the decision to remove her from the respirator only after consultation with, and approval by, the church, which would not have approved removal of the feeding tube. *In re* Quinlan, 355 A.2d 647, 657–60 (N.J. 1976).

143. § 13.52.390(31).

144. *Id.*

145. Payne et al., *supra* note 84, at 105 tbl. 2.

146. For instance, the *Cruzan* decisions made several references to her responses to painful stimuli. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 266–67 n.1 (1990) (quoting Cruzan v. Harmon, 760 S.W.2d 408, 411 (Mo. 1989)).

147. Jan Kassubek et al., *Activation of a Residual Cortical Network During Painful Stimulation in Long-term Postanoxic Vegetative State*, 212 J. NEUROLOGICAL SCI. 85, 88 (2003).

148. *See generally* S. Laureys et al., *Cortical Processing of Noxious Somatosensory Stimuli in the Persistent Vegetative State*, 17 NEUROIMAGE 732 (2002).

and about 13% believe they experience hunger and thirst.[149] Given that the majority of doctors believe there is no sensation, combined with the possibility of "doctor shopping" by the family,[150] it is probably safe to assume that the Quinlans could, today, find a doctor who agrees that Karen meets the criteria for "permanent unconsciousness." This is even further evident when considering that 88% of the doctors responding to the survey believed it was ethical to withdraw artificial nutrition and hydration from a patient in a vegetative state.[151]

The legislative history also yields some guidance. The definition of "permanent unconsciousness" was based on an Illinois statute,[152] which includes the mandate that sensation be absent.[153] While the Illinois courts have not specifically addressed the question of whether reaction to painful stimuli constitutes sensation, several Illinois Supreme Court decisions have concluded that the condition of permanent unconsciousness covers the patient in a vegetative state.[154] Also, during legislative hearings in 2004, the Alaska legislative aide who had been shepherding the bill through the legislature specifically referenced "vegetative state" among the circumstances that would constitute a qualifying condition for purposes of removal of life support.[155]

Let us assume that the primary physician and one other doctor, after consulting with the neurologist,[156] have informed the attending physician that at least one of the qualifying conditions has been met, either because they assume Karen will die within a short period of time without life support or because they believe she does not have sensation. The matter would then be back in the hands of the attending physician, who would return to section

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149. *See* Payne et al., *supra* note 84, at 105.

150. Nothing in the AHCDA, or other Alaska laws, prohibit the surrogate from looking for another doctor who agrees with him or her. *See* ALASKA STAT. § 13.52 (2004).

151. Payne et al., *supra* note 84, at 107.

152. *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 25 (Alaska Mar. 24, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2004-03-241344.pdf (testimony of Linda Sylvester).

153. 755 ILL. COMP. STAT. 40/10 (2005).

154. *See, e.g., In re* Estate of Greenspan, 558 N.E.2d 1194, 1197 (Ill. 1990); *In re* Estate of Longeway, 549 N.E.2d 292, 298 (Ill. 1989).

155. *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 24 (Alaska Apr. 14, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2004-04-141341.pdf (testimony of Linda Sylvester).

156. The neurologist does not have to agree with the primary physician; he or she only needs to be consulted. ALASKA STAT. § 13.52.160 (2004).

13.52.045 and see that there must be an additional determination that withdrawing the life support would be consistent with the patient's best interest.[157] However, this decision is initially made by the surrogate.[158] The doctor would thus direct Mr. Quinlan to make the determination and, to the extent known to him, to consider Karen's wishes and personal values.[159] He would explain that "best interest" means that the benefits to the individual outweigh the burdens on the individual. In this decision, several factors should be considered: "the effect of treatment on the physical, emotional, and cognitive functions of the patient"; "the degree of pain or discomfort caused by either treatment or withdrawal of treatment"; the degree to which Karen's medical condition results in a severe and continuing impairment; the effect of treatment on her life expectancy; the prognosis for recovery; the risks, side effects, and benefits of treating or not treating; and Karen's religious beliefs and basic values.[160] Presumably, Mr. Quinlan would report back that he has considered all of those factors and still believes it to be in Karen's best interest to withdraw life support.

The decision would now go back to the medical professionals for several possible vetoes. First, the patient's primary healthcare provider may determine that the surrogate is not abiding by the wishes, values, and best interest of the patient, and may therefore decline to comply with the surrogate's decision.[161] Alternatively, the healthcare provider may decline to comply for reasons of conscience.[162] It is hard to say whether Karen's physicians would veto the surrogate's decision; they testified that "removal from the respirator would not conform to medical practices, standards and traditions,"[163] but that standard is not recognizably close to the standard under the AHCDA.[164] Under the AHCDA, a healthcare provider can refuse to provide healthcare contrary to generally accepted healthcare standards.[165] But here it would not be a question of providing healthcare, but rather of withdrawing it. As best as can be determined from the case law, the doctors never asserted an objection of conscience.[166] However, they might have

157. § 13.52.045.
158. *Id.*
159. § 13.52.030(g).
160. § 13.52.390(6).
161. § 13.52.030(h).
162. § 13.52.060(e).
163. *In re* Quinlan, 355 A.2d 647, 655 (N.J. 1976).
164. *See* § 13.52.060(f).
165. *Id.*
166. *See Quinlan*, 355 A.2d at 647–72.

argued that removal was not in Karen's best interest, especially in 1976.

If either side chose to go to court, they could do so under section 13.52.140, which provides that a court, through a guardianship proceeding, may enjoin or direct a healthcare decision.[167] A probate court judge adjudicating Karen's case would need to know what legal standard to apply, and immediately he or she would encounter a problem: there is an apparent error in the section on judicial relief. Section 13.52.140 says that a proceeding to enjoin or direct a healthcare decision is governed by sections 13.26.165–.320.[168] However, these statutory sections do not cover adult guardianships, but rather conservatorships.[169] In Alaska, conservators deal only with financial matters, not with medical decisions,[170] and the procedural protections are less than those for appointment of a guardian.[171] The statute should have referenced sections 13.26.090–.155, for guardians of incapacitated adults. There is, within those sections, a specific provision as to what a guardian is or is not allowed to do:

> A guardian may not . . . consent on behalf of the ward to the withholding of lifesaving medical procedures; however, a guardian is not required to oppose the cessation or withholding of lifesaving medical procedures when those procedures will serve only to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure of or relief from the illness or condition being treated unless the ward has clearly stated that lifesaving medical procedures not be withheld . . . .[172]

Is the probate court to look only to this section of the guardianship statutes and determine whether a guardian is fulfilling that duty, or is the probate court to look at the AHCDA and review all of its decision-making requirements (including whether the patient has a qualifying condition, and whether it is in the patient's best interest to withdraw life support)? That question will undoubtedly have to be answered in future litigation.

At any rate, the likely end result is that Karen Quinlan would still have her respirator removed, as she would be found to have met the standards of both the guardianship and healthcare decision laws related to removal of life support. In fact, Karen continued to

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167. § 13.52.140.
168. *Id.*
169. §§ 13.26.165-.320.
170. § 13.26.280.
171. *See* §§ 13.26.165-.320.
172. § 13.26.150(e)(3).

breathe after removal of the respirator[173] and could survive for as long as she had the feeding tube inserted.[174] Under the AHCDA, she could have the tube removed only upon her father's consent or if the doctors concluded that it was "medically ineffective health care,"[175] a problematic standard that will be examined in more detail in the Sun Hudson case below.

B. Nancy Beth Cruzan

In January 1983, a Missouri woman, Nancy Cruzan, was in a serious automobile accident.[176] Paramedics were able to restore her breathing and heart beat.[177] After three weeks in a coma, she progressed to a vegetative state.[178] She was able to take some food orally, but in order to ease the feeding and ensure that she had sufficient nutrition, a "gastrostomy feeding and hydration tube" was surgically inserted.[179] However, after several years with no improvement, Nancy's parents, who had already been appointed as co-guardians, petitioned in Missouri state court for authority to remove the feeding tube.[180]

Initially, the only evidence as to Nancy's own wishes was testimony by a former roommate that Nancy once said that she would not wish to continue her life unless she could live at least halfway normally.[181] The trial court authorized the withdrawal of life support, but the state appealed.[182] The Missouri Supreme Court reversed, based on Missouri's living will statute, which had a policy strongly favoring preservation of life.[183] Specifically, Missouri required clear and convincing evidence of the patient's wishes for removal of life support when there was not a specific advance directive.[184] The Supreme Court affirmed, holding that Missouri had a legitimate interest in the protection and preservation of

173. Ascension Health, Healthcare Ethics Cases: Quinlan, Karen Ann, http://www.ascensionhealth.org/ethics/public/cases/case21.asp (last visited Sept. 21, 2005).
174. *Id.*
175. § 13.52.060 (f).
176. Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 266 (1990).
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 267–68.
181. *Id.* at 268.
182. *See id.*
183. *Id.*
184. *See id.* at 265.

human life, which it was entitled to safeguard with a statute designed to guard against potential abuses.[185]

There, the case law ends, but not the case. The publicity surrounding *Cruzan* brought forward two new witnesses who had known Nancy before her accident and who learned about the case through the news coverage surrounding the appeal.[186] They both related conversations with Nancy, which supported the idea that she would not want to live in a vegetative state.[187] Aided by friendlier medical testimony the second time around, Mr. and Mrs. Cruzan prevailed in a new trial; third-party attempts to intervene and appeal were refused, and the feeding tube was removed, resulting in Nancy Cruzan's death twelve days later.[188]

In many respects, Nancy Cruzan's situation was similar to that of Karen Quinlan. However, a significant difference is that Nancy Cruzan did not need a respirator.[189] However, she did need a feeding tube, and unlike the Quinlans, the Cruzan family wanted the feeding tube removed.[190] The AHCDA makes no distinction between respirators and feeding tubes; they are all considered "life sustaining procedures" that may be withheld if the qualifying conditions are met.[191] This distinction may make a big difference to the Roman Catholic Church and, judging by the number of protestors in both the Cruzan and Schiavo cases,[192] to quite a lot of other people as well. However, it makes no legal difference in Alaska. It should be noted that defining artificial hydration and nutrition as medical care constitutes a significant philosophical choice on the legislature's part; the Catholic Church, among others,

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185. *Id.* at 282.

186. WILLIAM H. COLBY, LONG GOODBYE: THE DEATHS OF NANCY CRUZAN 333–36 (2002).

187. *Id.*

188. *Id.* at 341–89.

189. Cruzan v. Harmon, 760 S.W.2d 408, 411 (Mo. 1988). Another potentially significant difference is that Cruzan was married at the time of her accident. However, Cruzan's husband agreed to dissolution of their marriage before the case reached the point of contested litigation. COLBY, *supra* note 187, at 29. Hence, Cruzan's marriage does not affect the outcome of the analysis.

190. *Cruzan*, 760 S.W.2d. at 410–11.

191. *See* ALASKA STAT. § 13.52.390(26) (2004).

192. COLBY, *supra* note 18, at 371–77; *All Things Considered: Protesters at Schiavo Hospice Grow Agitated* (NPR broadcast Mar. 27, 2005); Larry Copeland and Laura Parker, *Terri Schiavo's Case Doesn't End With Her Passing*, USA Today, Apr. 1, 2005, at A1.

would define it not as medical care but as feeding, and thus a basic responsibility which must not be withdrawn.[193]

The next difference looks like a complication, but it actually leads to a simplification: Nancy Cruzan's parents were already her guardians when they decided to withhold artificial nutrition and hydration.[194] As her guardians, they would be surprised to discover that the AHCDA does not grant them any authority: it only allows an *agent or surrogate* to withhold or withdraw life sustaining procedures.[195] A guardian is not an agent or a surrogate. The definition of an agent requires that the declarant have executed a durable power of attorney for healthcare.[196] Furthermore, the definition of surrogate specifically excludes guardians.[197]

The operation of these definitions, as they apply to the AHCDA, might be cause for consternation. However, not all of the laws related to end-of-life decision-making were included in Chapter 13.52. For example, under section 13.26.150(e)(3), which is part of the guardianship statutes, a guardian can oppose cessation of "life saving medical procedures" under a set of conditions similar to those in the AHCDA.[198] The guardian may consent to the withholding of such procedures when "[the procedures] will only serve to prolong the dying process, and offer no reasonable expectation of effecting a cure of or relief from the condition being treated if the ward has not clearly stated that the life sustaining medical procedures not be withheld . . . ."[199] While Nancy never prohibited such procedures from being withheld,[200] another portion of that set of conditions is problematic. It refers to prolonging the dying process. Prior to the removal of the feeding tube, Nancy was not dying; the consensus was that she could possibly live for

193. *Minutes, S. Health, Educ. and Soc. Serv. Comm.*, 23d Leg., 2d Sess. 20 (Alaska Apr. 7, 2004), *available at* http://www.legis.state.ak.us/PDF/23/M/SHES2004-04-071745.pdf (testimony of Chip Wagoner, representing the Alaska Catholic Conference).

194. *See Cruzan*, 760 S.W.2d at 410.

195. The AHCDA states "an agent or a surrogate may determine that life-sustaining procedures may be withheld or withdrawn . . . ." § 13.52.045.

196. § 13.52.390(2).

197. § 13.52.390(40).

198. § 13.26.150(e)(3).

199. *Id.*

200. Ms. Cruzan had only made general statements to a roommate that she would not want to continue her life unless she could live "halfway normally." *See* Cruzan v. Harmon, 760 S.W.2d 408, 411, 424 (Mo. 1988).

another thirty years.[201] Unfortunately, this requirement in section 13.26.150(e)(3) seems to have been written for terminally ill patients, not patients in a coma or a vegetative state. However, technically speaking, the feeding tube prolongs the dying process.[202] Furthermore, the feeding tube appears to meet the other requirements of section 13.26.150(e) because it would offer no reasonable expectation of a cure or relief for Cruzan.[203] Under these circumstances, the guardian would undoubtedly be legally justified in taking action.[204] Nothing in the adult Guardianship Statutes or the AHCDA requires a guardian to seek specific court approval to withhold or withdraw life support.[205] Under section 13.52.140, the superior court may enjoin or direct a healthcare decision, but an application to the superior court is not required.[206] A healthcare decision made by a guardian is effective without judicial approval.[207]

A question remains as to the conscience clause in section 13.52.060(e), which allows a healthcare provider to decline to comply with an instruction for reasons of conscience.[208] The state-run institution in which Nancy lived out her final years strongly opposed, on moral grounds, the removal of the feeding tube.[209] However, the AHCDA's conscience clause has different standards for healthcare providers and healthcare institutions or facilities. The provider may decline to comply for reasons of conscience,[210] but another provider can easily be brought in to remove the tube. Under the statute, the healthcare facility can object to an instruction only if it is contrary to a written policy of the facility that is expressly based on reasons of conscience.[211] Nothing in the case law or background materials suggests that the Missouri Rehabilitation Center had any such written policy. Therefore the facility would not have had the right to object.

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201. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 266 n.1 (1990) (citing *Harmon,* 760 S.W.2d at 411).

202. Nancy Valko, *Of Living Wills and Butterfly Ballots*, LIFEISSUES.NET, http://www.lifeissues.net/writers/val/val_11_livingwills.html (last visited Oct. 19, 2005).

203. *See* § 13.26.150(e)(3).

204. *See id.*

205. §§ 13.26.090-.155; §§ 13.52.010-.395.

206. § 13.52.040(c).

207. *Id.*

208. § 13.52.060.

209. COLBY, *supra* note 18, at 188–96.

210. § 13.52.060(e).

211. *Id.*

The AHCDA's section on judicial relief allows the healthcare provider to petition the superior court for an injunction.[212] In *Cruzan*, the facility may have sought this relief because the appeals featured the State of Missouri, representing its healthcare institution as a party, and the Cruzans as the opposing party.[213] After the appeals, the State of Missouri was dismissed from the guardianship case.[214] Even if the State of Missouri had continued to be involved with the guardianship case, the guardianship statute would have formed the substantive basis for the decision to withdraw life support, and the conditions of that statute appear to be easily met.[215]

Analyzing Cruzan's case under the AHCDA demonstrates that when a patient is in a terminal, comatose, or vegetative state, and has not executed an advance directive, a close family member who wants to remove life support should not claim the status of surrogate. Rather, the family member should petition to be appointed guardian first and then act under the guardianship statute. Because the guardianship statutes were not updated to be consistent with the AHCDA, it is easier for a guardian to find sufficient legal justification to terminate life support.

C. Teresa Marie Schindler-Schiavo

In February of 1990, Terri Schiavo suffered a heart attack at the age of twenty-seven.[216] The heart attack caused her to enter into a vegetative state.[217] Her husband, Michael Schiavo, was appointed guardian without objection.[218] By 1993, however, serious disagreements between Terri's parents and Michael ensued.[219] The parents petitioned to have Michael removed as guardian,[220] and Michael eventually petitioned the court to allow him to remove the feeding tube that kept Terri alive.[221] The trial court found clear and

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212. § 13.52.140.

213. *See* Cruzan v. Harmon, 760 S.W.2d 408, 410 (Mo. 1988).

214. COLBY, *supra* note 18, at 330–31, 341.

215. § 13.26.150(e)(3).

216. Schindler v. Schiavo, 780 So.2d 176, 177 (Fla. Dist. Ct. App. 2001) [hereinafter Schiavo I].

217. *Id.*

218. *Id.*; *see also* Jay Wolfson, Guardian ad Litem, A Report to Governor Jeb Bush and the 6th Judicial Circuit in the Matter of Theresa Marie Schiavo 8 (Dec. 1, 2003), *available at* http://www.miami.edu/ethics/schiavo/wolfson%27s%20report.pdf [hereinafter Wolfson Report].

219. *Schiavo I*, 780 So.2d at 178; *see also* Wolfson Report, *supra* note 218, at 8.

220. *Schiavo I*, 780 So.2d at 177–78.

221. *Id.* at 177.

convincing evidence to support removal of the feeding tube.[222] Despite interventions by Terri's parents, the Florida governor and legislature, and the United States Congress and President, the courts sided with Michael Schiavo and allowed the feeding tube to be removed.[223] Terri Schiavo died on March 31, 2005.[224]

The first court action in the Schiavo case was the uncontested petition by Michael Schiavo to be appointed guardian.[225] Under Alaska law, a spouse has priority for appointment as guardian, unless the incapacitated person nominated someone else at a time when she had sufficient mental capacity to make an informed choice.[226] A court may decline to appoint a person who has priority when it is in the best interest of the incapacitated person.[227]

In the Schiavo case, there was initially no reason for the court to consider that it might not be in Terri's best interest to appoint her husband as her guardian.[228] When Terri's parents petitioned to remove Michael as the guardian, an Alaska court would have turned to section 13.26.125 and found that, while the court was clearly empowered to remove and replace a guardian, the statutes do not dictate the substantive standard for taking such action. Subsection (e) of that section states that a guardian may be removed if there is "probable cause to believe [he] is not performing [his] responsibilities effectively and there is an imminent danger that the physical health or safety of the ward will be seriously impaired . . . ."[229] However, it is clear from the context of that subsection that there may be other bases.[230] The Alaska

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222. *Id.* at 179.

223. Schindler v. Schiavo, 403 F.3d 1223, 1226 (Fla. 11th Cir. 2005) [hereinafter Schiavo II].

224. Abby Goodnough, *Schiavo Dies, Ending Bitter Case over Feeding Tube*, N.Y. TIMES, Apr. 1, 2005, *available at* http://www.nytimes.com.

225. *Schiavo I*, 780 So. 2d at 177.

226. ALASKA STAT. § 13.26.145(d)(1)-(2) (2004).

227. § 13.26.145(f).

228. Later issues arose largely for two reasons. First, Michael Schiavo took the position that his wife should be allowed to die. Even before applying to the court for an order to terminate life support, he had entered a DNR order for her. Diana Lynne, *The Whole Terri Schiavo Story*, WORLD NET DAILY, Mar. 25, 2005, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=43463; *see also* Wolfson Report, *supra* note 218, at 10. Second, Michael began to live with a woman he referred to as his fiancé and with whom he had two children. Jamie Thompson, *She's the Other Woman in Michael Schiavo's Heart*, ST. PETERSBURG TIMES, Mar. 26, 2005, *available at* http://www.sptimes.com/2005/03/26/Tampabay/She_s_the_other_woman.shtml.

229. § 13.26.125(e).

230. *See id.*

Supreme Court addressed this question recently in *H.C.S. v. Community Advocacy Project of Alaska, Inc.*[231] The court concluded that before removing or replacing a guardian, the trial court should first determine whether there has been a material change in circumstances since the guardian was originally appointed, and if there has been, whether the existing appointment is in the ward's best interest.[232] Terri's parents alleged abuse by Michael, but the judge found inadequate evidence of abuse.[233] In all likelihood, the same judge who would later order removal of Terri's feeding tube would not have removed Michael from his position as guardian for proposing a DNR order.

This leaves the question of whether a conflict existed due to Michael's romantic interest in another woman. Nothing in the Alaska statutes or case law indicates whether such a conflict would have been sufficient, in and of itself, to justify removal. The priority section of the guardianship statutes states that the court may not appoint a person who has "interests that may conflict with those of the incapacitated person."[234] However, this provision is included among several other bases for disqualification that relate to financial, not personal, interests.[235] If the person is providing substantial services in a business or professional capacity,[236] is a creditor of the incapacitated person,[237] or is employed by someone else who would be disqualified,[238] the person may not be appointed. Because the definition of a conflict of interest is unclear under this statute, Terri's parents could have argued that Michael's personal relationship warranted his removal. It is this very ambiguity, however, that makes it impossible to say how the judge might have ruled.

Note that the three cases examined thus far involved guardians rather than agents, and so the surrogacy section of the AHCDA did not apply.[239] Given that all three of these women were relatively young and healthy before a sudden trauma placed them in a vegetative state, it is hardly surprising that they did not have

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231. 42 P.3d 1093 (Alaska 2002); *see also* Wolfson Report, *supra* note 218, at 11, 34 n.1.

232. *H.C.S.*, 42 P.3d at 1099.

233. *See* Schiavo I, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001).

234. ALASKA STAT. § 13.26.145(b)(3) (2004).

235. § 13.26.145.

236. § 13.26.145(b)(1).

237. § 13.26.145(b)(2).

238. § 13.26.145(b)(4).

239. *In re* Quinlan, 355 A.2d 647, 653–54 (N.J. 1976); Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988); Schiavo I, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001).

appointed healthcare agents. It should also not be surprising that at least two of them already had guardians,[240] for the simple reason that in the *Cruzan* and *Schiavo* cases, the family members in question waited for a number of years before petitioning the court to remove life support.[241] In the meantime, a myriad of medical and other decisions had to be made, so that guardianship would have been a normal and expected action, even if the thought of removing life support was on no one's mind at the time. For instance, approximately 50% of patients who are diagnosed as being in a vegetative state one month after the injury will recover consciousness within a year.[242] Therefore, if the patient is in a vegetative or minimally conscious state, as opposed to being comatose, there will almost certainly be significant delays before the issue of removing life support comes to the fore.

There can be no surrogate under Alaska law if a guardian is already appointed and available.[243] Thus, surrogates are unlikely to make life-support decisions for patients in a vegetative state because, by the time life support decisions are being made, the patient will likely have a guardian. A variety of non-medical decisions need to be made for someone in a vegetative or minimally conscious state, so a guardian would be appointed to make those decisions. A guardianship petition may be dismissed if there are feasible alternatives to guardianship,[244] and a surrogate would be a feasible alternative to guardianship if only medical decisions need to be made.

Another potential problem with the AHCDA exists. Assume hypothetically that no one, including Michael Schiavo, had been appointed Terri's guardian. Suppose instead he argued for surrogate status under the AHCDA. In the absence of a designation by the patient as to whom she wanted as her surrogate, the first priority for appointment goes to the spouse, "unless legally separated."[245] One might naturally assume that because he had moved in with another woman, fathered two children by her, and began referring to her as his fiancée, Michael Schiavo would be considered legally separated from his wife. That would be an incorrect assumption. Legal separation has a specific meaning in

240. In the *Quinlan* case, the issue of termination of life support came up in the initial litigation over the appointment of a guardian. *Quinlan*, 355 A.2d at 651.

241. *Cruzan*, 760 S.W.2d at 411, 413; *Schiavo I*, 780 So.2d at 177–78.

242. The Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State*, 330 NEW ENG. J. MED. 1572, 1572 (1994).

243. § 13.52.030(a).

244. § 13.26.113(d).

245. § 13.52.030(c)(1).

Alaska, and it is not based on the general facts of the case, but rather on whether a decree of legal separation has been entered under section 25.24.450.[246] Because there was no legal separation decree between Michael and Terri Schiavo, Michael would still have been entitled to priority to be the surrogate, despite his conflicted circumstances. The primary healthcare provider could decline to comply with specific decisions made by Michael,[247] but not with his right to be the surrogate. Of course the hospital, the parents, or any other interested person could petition for judicial relief under section 13.52.140 or guardianship under section 13.26.105.

Assuming Michael was able to maintain his position as guardian, we would again return to the statutes to determine his authority to consent to withdrawal of life-saving medical procedures. As in the *Cruzan* case, the question would be whether the procedures in question serve only to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure or relief from the illness or condition being treated.[248] Suppose for the sake of argument no one had been appointed guardian, and Michael was seeking to act under surrogacy authority. He would have to establish, among other things, that his wife was in a state of permanent unconsciousness,[249] and again there is the question of whether she experienced sensation.[250] Terri's autopsy report indicated that, toward the end of her life, she was given acetaminophen,[251] but it is unclear whether this was for pain, fever, or inflammation. If the definition of permanent unconsciousness in the AHCDA is interpreted literally, surrogates will not be able to terminate life support for patients such as Nancy Cruzan and Terri Schiavo. The statute states that thought, sensation, purposeful action, social interaction, *and* awareness of self and the environment must be absent for the person to be found permanently unconscious.[252] A literal interpretation means that each of those five prongs must be absent, so that if the patient still experiences sensation, they are not

246. § 25.24.450.
247. § 13.52.030(h).
248. § 13.26.150(e)(3).
249. This state is known as a "qualifying condition." § 13.52.390(36).
250. *See* AUTOPSY REPORT OF THERESA SCHIAVO, CASE # 5050439 1 (June 13, 2005), http://news.findlaw.com/hdocs/docs/schiavo/61305autopsyrpt.pdf.
251. *Id.*
252. § 13.52.390(31)(b).

permanently unconscious.[253] However, under Illinois law, sensation is interpreted as consciousness, and under this interpretation, a surrogate would be able to direct removal of a feeding tube for a person in a vegetative state.[254] Furthermore, given that the majority of doctors believe it is appropriate to remove feeding tubes for patients in vegetative states[255] and the possibility of "doctor shopping" by the guardian, there is little doubt that Terri Schiavo's fate would not have changed under the AHCDA.

D. Sun Hudson

If the Quinlan, Cruzan, and Schiavo cases look remarkably similar from a factual viewpoint, the sad case of Sun Hudson is quite different.[256] Sun was born with a genetic condition called thanatophoric dysplasia, a form of dwarfism, which includes a narrow chest, small ribs, and underdeveloped lungs.[257] Infants born with this condition, if they are not stillborn, usually die shortly after birth from respiratory failure.[258] This condition normally restricts the growth of the rib cage so that the baby slowly suffocates.[259] Texas Children's Hospital, where Sun was born, placed him on a ventilator, but informed his mother that further treatment would be futile, merely prolonging the inevitable, and that in their view he should be removed from the ventilator.[260] His mother refused, and the matter ended up in probate court, where the judge eventually ruled that five-month old Sun could be taken off life support,

253. Sensation is defined as the activity of the sensors, or the immediate result of this activity before the combination with other data. THE NEW LEXICON WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE, ENCYCLOPEDIC EDITION 907 (1989).

254. *See* Keiner v. Cmty. Convalescent Ctr., 549 N.E.2d 292, 298 (Ill. 1998) (stating in part that a patient in a persistent vegetative state is unable to purposely interact with stimulation from his environment).

255. Payne, *supra* note 84, at 107, Table 4.

256. Associated Press, *Infant Born with Fatal Defect Dies After Being Taken Off Life Support*, ABC13.NET, Mar. 15, 2005, http://abclocal.go.com/ktrk/news/031405_local_baby1.html; Associated Press, *Houston Mother Loses Fight to Keep Baby on Life Support*, NBC5.COM, Mar. 15, 2005, http://www.nbc5.com/health/428633/detail.html; Rick Casey, *No Villains in This Sad Story*, HOUSTONCHRONICLE.COM, Feb. 23, 2005, http://www.chron.com/cs/CDA/ssistory.mpl/metropolitan/casey/3047420.

257. *Infant Born with Fatal Defect Dies After Being Taken Off Life Support*, *supra* note 257.

258. Rick Casey, *supra* note 256.

259. *Id.*

260. *Houston Mother Loses Fight to Keep Baby on Life Support*, *supra* note 256.

despite his mother's objections.[261] Under Texas law, the mother was allowed ten days to find another hospital willing to take over care.[262] When the mother was unable to find another hospital, Sun was removed from the ventilator, and he died a few breaths later, on March 15, 2005.[263]

The AHCDA applies only to adults,[264] so under Alaska law, Sun's mother would act on her baby's behalf under general parental rights rather than as a surrogate.[265] Nonetheless, the hospital could have determined that keeping Sun on a respirator would constitute "medically ineffective health care," which is care that "cannot cure the illness, cannot diminish its progressive course, and cannot effectively alleviate severe discomfort and distress."[266] This would have been a questionable determination, however, because the respirator diminished the progressive course of the malady by prolonging Sun's life.

Another way in which the Alaska and Texas procedures diverge is that under Alaska law, if the mother chose to seek a transfer, the hospital would have had to provide continuing care until the transfer was effected.[267] By contrast, there is a ten-day time limit under Texas law.[268] In Alaska, the search for a hospital willing to take the child could go on indefinitely.

Alternatively, the hospital could have turned to section 13.52.140, under which it could have requested the superior court to direct a healthcare decision. At that point, the court has the dilemma noted earlier: should it review the surrogate's decision under the standards provided in the AHCDA or under the standards provided in the guardianship act? The judicial relief section of the AHCDA appears to direct the court to the guardianship act.[269] However, another question arises as to whether to consult the section on guardians of minors or guardians of incapacitated persons. The statute does not provide guidance

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261. Casey, *supra* note 256.

262. *Id.*

263. *Infant Born with Fatal Defect Dies After Being Taken Off Life Support*, *supra* note 256.

264. *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000); Stanley v. Illinois, 405 U.S. 645 (1972); Evans v. Taggart, 88 P.3d 1078 (Alaska 2004).

265. ALASKA STAT. § 13.52.030(a) (2004).

266. § 13.52.060(f).

267. § 13.52.060(g)(2).

268. TEX. HEALTH & SAFETY CODE ANN. § 166.046(e) (Vernon 2002).

269. The AHCDA states that "[a] proceeding under this section is governed by AS 13.26.165–13.26.320." § 13.52.140. These sections are a part of the guardianship statutes.

because it mistakenly directs that the statute on conservatorships be used.[270] Understandably, the statute on minor guardianships does not address termination of life support beyond generally authorizing the guardian to facilitate medical care and treatment.[271] The article regarding incapacitated persons, which does address termination issues, is not limited to adults and can apply to any incapacitated person.[272] If the court turns to this article, it may hold that a guardian can consent to withholding life-saving medical procedures, as long as those procedures serve only to prolong the dying process, under section 13.26.150(e)(3). However, nothing in the guardianship statutes suggests that the judge may order the withholding of life-sustaining procedures if the guardian does not want them withheld.

On the other hand, if the judge interprets the section of the AHCDA which states that "[a] proceeding under this section is governed by" the guardianship statutes as merely referring to the procedure, then it would look to the AHCDA for the standards to be applied in determining whether life support should be terminated. However this is a stretch, not only because section 13.52.140 does not refer to *procedure*, but rather a *proceeding*, and the AHCDA does not appear to contemplate that the decisions be made by a judge.[273] If a judge heard a case similar to that of baby Sun's, the judge would have to determine whether the condition is "incurable or irreversible," whether "without administration of life-sustaining procedures death would result in a short period of time," whether "there is no reasonable prospect of cure or recovery," and whether "the condition imposes severe pain or an inhumane burden on the patient."[274] Assuming the other conditions were met, the court might nonetheless have a difficult time finding that there would be an "inhumane burden" on the baby, who was apparently not in any particular pain and breathing reasonably well on the ventilator.

Assuming the judge would not find an inhumane burden, this would have left the hospital with one remaining alternative: it could petition the court to appoint someone other than the mother as the

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270. Section 13.52.140 points to sections 13.26.165-.320, part of the guardianship statutes covering conservatorships.

271. § 13.26.070(3).

272. § 13.26.090.

273. *See* § 13.52.030(a).

274. This is the definition of a "terminal condition" under section 13.52.390(42). Life-sustaining procedures may be withheld or withdrawn from a patient with a "qualifying condition." § 13.52.045. The definition of "qualifying condition" includes a "terminal condition." § 13.52.390(36).

child's guardian, hoping that the appointee would be more likely to agree with its position. However, section 13.26.045 allows appointment of a guardian for a minor only if all parental rights of custody have been terminated or suspended by circumstances or a prior court order. None of those conditions occurred in this case. Therefore, regardless of the hospital's position, it is likely Sun Hudson would have lived a little while longer under the AHCDA.

E. Ora Mae Magouirk

In April 2005, at the height of the Schiavo controversy, one of the hot topics of discussion on the Internet was the unusual case of a widow who was allegedly being starved to death in a hospice. Unlike the previous cases, it is not possible to conclusively state the facts of this case.[275] However, for purposes of this Article, ascertaining the precise facts from among the multiple versions is unnecessary. Therefore, the following version has been pieced together by combining the various sources, with no representation of accuracy.

Ora Mae Magouirk was an eighty-one year old woman living in Alabama. Because she was a widow without any surviving children, her granddaughter helped take care of her by running errands and bringing her food. The granddaughter also had a general power of attorney. Magouirk had a living will, which said

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275. Only a few articles appeared in the mainstream press, none of which were able to determine which side of the controversy gave the most accurate facts. Most of the information available on the case comes from Internet news sources that have a particular philosophical perspective and whose information, therefore, is necessarily suspect. *See, e.g.*, Sarah Foster, *Closest Kin Prevented from Visiting 'Grandma,'* WORLDNETDAILY.COM, Apr. 12, 2005, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=43763; Sarah Foster, *Granddaughter Yanks Grandma's Feeding Tube*, WORLDNETDAILY.COM, Apr. 7, 2005, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=43688; Mark A. R. Kleiman, *Mae Magouirk: Is There a Reporter in the House?*, MARK A. R. KLEINMAN: A WEBLOG FOR THE REALITY-BASED COMMUNITY, Apr. 8, 2005, http://www.markarkleiman.com/archives/_/2005/04/mae_magouirk_is_there_a_reporter_in_the_house.php; Mark A. R. Kleiman, *Magouirk Update*, MARK A. R. KLEINMAN: A WEBLOG FOR THE REALITY-BASED COMMUNITY, Apr. 11, 2005, http://www.markarkleiman.com/archives/schiavo_/2005/04/magouirk_update.php; Denis O'Hayer, *Georgia Case Mirrors Schiavo Battle*, 11 ALIVE.COM, Apr. 8, 2005, http://www.11alive.com/help/search/search_article.aspx?storyid=61478; Charles Yoo, *Illness Splits Woman's Kin*, THE ATLANTA JOURNAL-CONSTITUTION, Apr. 12, 2005, http://www.ajc.com/hp/content/metro/0405/12illness.html; Maria Vitale Gallagher, *Woman's Starvation Stopped in a Terri Schiavo-Like Situation*, LIFENEWS.COM, Apr. 11, 2005, http://www.lifenews.com/bio905.html.

that nutrition and hydration were to be withheld only if she were either comatose or in a vegetative state. In March 2005, Magouirk was hospitalized for an aortic problem, reportedly lucid at the time. The granddaughter had her transferred to a hospice, telling other relatives they should let her pass away, and apparently not telling the hospice about the living will. Magouirk was only able to eat foods such as Jell-O and chips of ice. On learning of this, Magouirk's sister and brother insisted on placement of a feeding tube, and made arrangements for Magouirk to be transported to the hospital at the University of Alabama at Birmingham to begin the procedure. However, while they were at the hospice awaiting her transport to the hospital, the granddaughter went to court and obtained an emergency order appointing herself as guardian; she again refused to have the feeding tube inserted. A few days later, after hearing from Magouirk's siblings, the probate judge ordered that she be "adequately fed" pending a determination of her condition, which was to be based on the opinion of three mutually agreed-upon neurologists. There is no available record of the final decision. Magouirk reportedly died a few months later at a relative's home.

Perhaps the first and foremost lesson one can learn from the Magouirk case is that having an advance directive is useless if one's medical providers are unaware of it. In Alaska, most of the major hospitals have now set up directories that will store copies of advance directives for those who provide one.[276] In addition, declarants should provide a copy to any physician they see on a regular basis and any surgeon or specialist who may be treating them for a particular problem (and to the declarant's lawyer, of course).

In the Magouirk case, the granddaughter's power of attorney did not include medical decision-making, and the living will apparently did not include appointment of an agent for health-care decisions. Therefore, under the AHCDA, the hospice would have referred to section 13.52.030, the section on surrogates. The sources reflect conflicting information on Magouirk's ability to express herself at the time she arrived at the hospice. However, if she had been able to express an opinion, she could have designated a surrogate and informed her healthcare providers of her choice. Assuming that she could not express an opinion, the healthcare providers would have looked to the priority list to see who should

276. Confirmed by phone calls by author's staff to major hospitals in Alaska. Telephone interviews by author's staff with Providence Hospital, Alaska Regional Hospital, and Alaska Native Medical (July 19-22, 2005).

make decisions on her behalf.[277] Magouirk did not have a surviving spouse, adult child, or parent, but the fourth priority is an adult sibling. Magouirk had two adult siblings. Either her sister or brother could have stepped forward and claimed the position of surrogate, or they could have both done so and would have had to reach consensus.[278] Had they both stepped forward and not been able to agree on decisions, the doctor would have broken the tie.[279] Either way, the sister and brother were both inclined to have a feeding tube inserted, and there is no reason to think that doing so would have been so far outside generally accepted healthcare standards that the provider would have been entitled to refuse. Presumably, the tube would have been inserted.

Could the granddaughter nonetheless have gone to probate court and received an emergency guardianship order? After all, a surrogate may make decisions only if a guardian has not been appointed,[280] and while an *agent* may, in certain circumstances, be able to overrule a guardian,[281] there is nothing in the AHCDA that suggests that a *surrogate* can overrule a guardian. The granddaughter could have applied for temporary guardianship under section 13.26.140, and if she convinced the court that an emergency order was necessary to protect the respondent from serious injury, illness, or disease, she could have obtained it.[282] The maneuver may or may not have worked. The granddaughter would have had to file a petition that provides the names and addresses of "the individuals most closely related to the respondent by blood or marriage."[283] This would have required her to provide the names of the brother and sister and take the risk that the court would contact them and learn that they were opposed to her guardianship.

The guardianship statutes also have a priority list, which is similar to, but not identical to, the list in the AHCDA.[284] One of the differences between the two lists could be absolutely critical in this case: the surrogate list begins with a spouse, then an adult child, then a parent, then an adult sibling, and finally an adult who has exhibited special care and concern for the patient.[285] The

277. § 13.52.030(c).
278. *See* § 13.52.030(f).
279. *See id.*
280. *See* § 13.52.030(a).
281. § 13.52.040(b).
282. *See* § 13.26.140(d).
283. *See* § 13.26.105(b)(6).
284. The guardianship priority list is at section 13.26.145(d); the surrogate preference list is at section 13.52.030(c).
285. § 13.52.030(c).

guardianship list begins with the spouse, then an adult child or parent, then a relative with whom the incapacitated person has resided for more than six months, then a relative or friend who has demonstrated a sincere longstanding interest in the welfare of the incapacitated person.[286] As adult siblings, the brother and sister would have had priority over the granddaughter for appointment as surrogates, but for guardianship appointment, the siblings would have been on the same priority level as relatives who had demonstrated a sincere, longstanding interest in the welfare of the incapacitated person. In fact, the granddaughter might have been considered higher on the list than the siblings, because while she was not actually living with Magouirk, she had apparently been helping to provide for her for some time.

Regardless of who was appointed as guardian (if the probate court even found a necessity for guardianship given the availability of a surrogate), the court would have still had the authority to review and amend a decision of the guardian[287] and, therefore, could have directed the insertion or withholding of the feeding tube. The court would have considered whether the procedures in question would "serve only to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure of, or relief from, the illness or condition being treated . . . ."[288] While Magouirk was elderly and had a potentially dangerous aortic condition, the information at hand suggests that she was not terminal, and, therefore, would probably not have qualified for cessation of life-sustaining treatment. She was also not in a vegetative state, so she would have experienced severe discomfort from being given inadequate nutrition and hydration, which would have unquestionably factored into a judge's decision.

VI. CONCLUSION

In the spring of 2005, the news of the moment was the death of Terri Schiavo by dehydration. Congress passed legislation to stop this action in a late-night session,[289] and numerous writs, cases, and appeals were filed. In the end, judicial authority won out over congressional dissent. Ms. Schiavo's feeding tube was disconnected and she slowly died. In the meantime, the media and the internet buzzed with stories about a deformed baby in Houston and an

286. § 13.26.145(d).
287. *See* § 13.26.125(a)(1).
288. *See* § 13.26.150(e)(3).
289. Terry Schiavo Law, Pub. L. No. 109-3, 119 Stat. 15 (2005).

elderly woman in a hospice in Georgia. End-of-life decisions were the water-cooler topic of the season.

The majority public sentiment seems to have been that Ms. Schiavo should not have been "starved to death,"[290] an observation supported by the legislative response. In the U.S. House of Representatives, where the vote was recorded, 203 representatives voted in favor of the bill to provide her with specific relief and only 58 representatives voted against the bill.[291] The U.S. Senate passed the same bill on a voice vote, and the President promptly signed it. Based on the overwhelming legislative response, one could assume that the majority of Americans seem to be opposed to removal of a feeding tube from a patient in a minimally conscious or vegetative state.

Nonetheless, in Alaska,[292] the recently passed AHCDA would, in all likelihood, have resulted in Terri Schiavo's death by dehydration, just as it actually happened in Florida. Despite the fact that the AHCDA says that it establishes a presumption in favor of life,[293] the specifics and the legislative history allow plenty of leeway to terminate life support, including removal of a feeding tube in circumstances in which most people believe it would be wrong to do so.[294]

The AHCDA needs to be revisited, regardless of the philosophical position from which one approaches these issues. For example, the misdirection in section 13.52.140, in which the reader is referred to the conservatorship statutes instead of the guardianship statutes; the dichotomy between what the form suggests about the right to direct that life support be terminated even if one is pregnant[295] and the statute that does not allow it;[296]

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290. Ninette Sosa, et al., *Schiavo's Feeding Tube Removed*, CNN.com, Mar. 18, 2005, http://www.cnn.com/2005/LAW/03/18/schiavo.brain-damaged/.

291. 151 CONG. REC. H1728 (daily ed. Mar. 20, 2005). One hundred seventy-four representatives did not vote. *Id.*

292. At present, the Senate is Republican-controlled by a margin of twelve to eight, and the House of Representatives by twenty-six to fourteen. Committee/Member Information of the Alaska State Legislature, http://www.legis.state.ak.us/basis/commbr_info.asp? session=24 (last visited Sept. 26, 2005). The Governor is Republican as well. Republican Governors Association, http://www.rga.org/ (last visited Sept. 26, 2005).

293. *See* ALASKA STAT. § 13.52.120(a) (2004).

294. *See supra* notes 152–55 and accompanying text.

295. The sample Advance Health Directive given in the statutes has a section that seems to allow a person to enter end-of-life directives in case that person is unconscious and pregnant. § 13.52.300, pt. 2, item (6)(E).

296. § 13.52.055(b).

and the possible misconception as to what "legally separated" means in the context of a spouse taking control as a surrogate,[297] all need to be clarified.

When it addresses these technical concerns, the legislature should also consider whether the actual effect of the AHCDA will accomplish its purpose. The AHCDA purports to be based on the right to self-determination, combined with a concern for the sanctity of life.[298] Instead, it has been infused with enough loopholes such that doctors and surrogates can terminate lives, even of the unwilling, based on their own philosophical convictions. Although many people espouse the philosophy that those who cannot lead a productive life are "better off dead," this is not the philosophy the legislature appears to have endorsed, at least explicitly, when it passed the AHCDA.[299] If the legislature did not intend this result, it should consider a number of changes to the AHCDA, including a re-examination of whether the definition of "permanent unconsciousness" should include those in a vegetative state.

297. § 13.52.030(c)(1).
298. *See* § 13.52.010.
299. *See id.*

SB 173

<TARGET><BILL>SB 173</BILL><SUBJECT>SB 173</SUBJECT><COMM>SJUD27</COMM></TARGET>

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 173**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB173-LAW-CIV-01-27-12
Title: An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes.
Sponsor: Rules by request of Legislative Council
Requester: (S) Judiciary

Dept. Affected: Law
Appropriation: Civil
Allocation: Legislation/Regulations
OMB Component Number: 2209

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 1/27/12 1:20 PM
Approved by: Richard Svobodny, Acting Attorney General — Date: 1/27/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB 173
2012 LEGISLATIVE SESSION

Analysis

SB 173 makes technical improvements to the Alaska Statutes. SB 173 should have no fiscal impact on Department of Law.

LEGAL SERVICES

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MEMORANDUM January 23, 2012

SUBJECT: Sectional Summary of the 2012 Revisor's Bill
(Work Order No. 27-LS0888\A)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee

FROM: Kathryn L. Kurtz KK
Assistant Revisor

The following is a sectional summary of the 2012 revisor's bill. The bill is prepared under AS 01.05.036, which provides, in part, that the revisor of statutes

> . . . shall prepare for submission to the legislature legislation for the correction or removal of the deficiencies, conflicts, or obsolete provisions, or to otherwise improve the form or substance of any portion of the statute law of this state.

To assist the reader in understanding the bill, I have summarized the contents by listing sections that have similar purposes or effects.

Sections that delete, repeal, or update obsolete provisions: Sections 1 - 3, 7 - 12, and 14 amend or repeal provisions that have become obsolete.

Sections that correct errors or oversights: Sections 4 - 6 correct errors or oversights.

Sections that improve the form or substance of the law: Section 13 proposes an amendment to improve the form or substance of the statutory law of Alaska.

SECTION 1. Amends AS 18.50.165(a) to remove the phrase "on and after July 1, 1997" in two places. The subsection requires the state registrar of vital statistics to prepare a form for acknowledging paternity under AS 25.20.055. The date is long past, along with any transition period needed to adapt to the requirements specified -- the date reference has become obsolete.

SECTION 2. Amends AS 18.56.110(g) to remove the phrase "beginning after June 30, 1983". This subsection has been in place since 1981. The limitation it expresses originally applied to periods beginning after June 30, 1982; that was extended by sec. 2,

ch. 35, SLA 1982, to apply to periods beginning after June 30, 1983. Given the length of time the provision has now been in place, the date reference has become obsolete.

SECTION 3. Amends AS 26.05.060 to remove references to 48 U.S.C. 473 - 479, part of a larger portion of the federal code that was omitted from the 1970 (and subsequent) editions of the United States Code because it related to Alaska as a territory. Since those sections became obsolete for federal purposes when Alaska achieved statehood, the reference to them here in the Alaska Statutes is also obsolete. The section retains language that makes the Alaska National Guard and the Alaska Naval Militia subject to all applicable federal laws.

SECTION 4. Amends AS 29.60.800 to change the name of the "municipal harbor facility grant fund" to the "harbor facility grant fund", in order to match the changes made in secs. 6 and 7, ch. 7, SLA 2011. Those sections made regional housing authorities eligible to apply for the harbor facility grants, and removed the word "municipal" in reference to those grants in AS 29.60.810 and 29.60.820.

SECTION 5. Amends AS 42.05.711(r) to remove a definition of the term "renewable energy resources" by reference to AS 42.45.045, since that section is the subject of a delayed repeal scheduled to occur in 2013. The text of the definition now found in AS 42.45.045 is added to AS 42.05.711 by the following section of this bill, so that AS 42.05.711 will not be affected by the repeal of AS 42.45.045. Also changes a reference to the effective date of the subsection to August 31, 2010, the actual effective date of the subsection.

SECTION 6. Amends AS 42.05.711 by adding a new subsection. See the analysis for the previous section.

SECTION 7. Amends AS 43.20.014(f)(1), which defines "school district" by reference to the definition in AS 14.03.126 (repealed by sec. 8, ch. 41, SLA 2006, effective June 30, 2009). This bill section removes the reference to AS 14.03.126, and inserts the text of the definition from that section as it read prior to the repeal.

SECTION 8. In AS 43.55.019(g)(1), substitutes a reference to the definition of "school district" in AS 43.20.014, as amended by sec. 7, for a reference to AS 14.03.126, which has been repealed. See Sec. 7 for further explanation.

SECTION 9. In AS 43.56.018(f)(1), substitutes a reference to the definition of "school district" in AS 43.20.014, as amended by sec. 7, for a reference to AS 14.03.126, which has been repealed. See Sec. 7 for further explanation.

SECTION 10. In AS 43.65.018(f)(1), substitutes a reference to the definition of "school district" in AS 43.20.014, as amended by sec. 7, for a reference to AS 14.03.126, which has been repealed. See Sec. 7 for further explanation.

SECTION 11. In AS 43.75.018(f)(1), substitutes a reference to the definition of "school district" in AS 43.20.014, as amended by sec. 7, for a reference to AS 14.03.126, which has been repealed. See Sec. 7 for further explanation.

SECTION 12. In AS 43.77.045(f)(1), substitutes a reference to the definition of "school district" in AS 43.20.014, as amended by sec. 7, for a reference to AS 14.03.126, which has been repealed. See Sec. 7 for further explanation.

SECTION 13. Amends AS 44.62.190, relating to notice of the proposed adoption, amendment or repeal of a regulation. The paragraph amended, AS 44.62.190(a)(6), provides for electronic notice of these changes to legislators. The amendment deletes the qualifying phrase "if the state agency has the technological capability," because, according to the Regulations Attorney at the Department of Law, all state departments now have this capability. This section also deletes the clause permitting an agency that does not have the technological capability to furnish electronic notification to legislators through an alternative method.

SECTION 14. Repeals AS 21.27.380(f), which provides for the renewal of two year trainee licenses issued to a managing general agent, reinsurance intermediary broker, reinsurance intermediary manager, or surplus lines broker. The provisions permitting issuance of those two year trainee licenses, AS 21.27.600, 21.27.680, 21.27.740, and 21.27.800, were repealed by sec. 53, ch. 96, SLA 2004, making the renewal provision in AS 21.27.380(f) superfluous.

SECTION 15. Provides for an immediate effective date.

TEXT OF REPEALED PROVISION

AS 21.27.380(f):

> (f) A two-year trainee license issued to a managing general agent, reinsurance intermediary broker, reinsurance intermediary manager, or surplus lines broker may be renewed only once.

KLK:plm
12-039.plm

STATE OF ALASKA

SEAN PARNELL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
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January 23, 2012

Senator Hollis French, Chair
Senate Judiciary Committee
Alaska State Legislature
State Capitol, Room 417
Juneau, Alaska 99801-1182

Re: Hearing Request re: 2012 Revisor's Bill (SB 173)

Dear Senator French:

The Department of Law would appreciate scheduling of the above bill for a hearing in your committee, at your earliest convenience. The bill makes important technical improvements in Alaska law.

We have reviewed the bill and have found no legal concerns.

If you have any questions, please feel free to contact me.

Sincerely,

RICHARD SVOBODNY
ACTING ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Chief Assistant Attorney General

DEB:pav

cc: Heather Brakes, Legislative Director, Office of the Governor
Kathryn Kurtz, Assistant Revisor of Statutes, Legislative Affairs Agency

STATE OF ALASKA

DEPARTMENT OF LAW

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January 24, 2012

Senator Hollis French, Chair
Senate Judiciary Committee
Alaska State Legislature
State Capitol, Room 417
Juneau, Alaska 99801-1182

Re: 2012 Revisor's Bill (SB 173)

Dear Senator French:

The Department of Law has reviewed the 2012 revisor's bill (SB 173).

The bill presents no legal issues.

Sincerely,

RICHARD SVOBODNY
ACTING ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Chief Assistant Attorney General

RXS:DEB:pav

cc: Kathryn Kurtz, Assistant Revisor of Statutes, Legislative Affairs Agency
Heather Brakes, Legislative Director, Office of the governor
Cori Badgley, Legislative Liaison, Civil Division

SB 180

<TARGET><BILL>SB 180</BILL><SUBJECT>SB 180</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

SENATOR DONALD C. OLSON

Session
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Community & Regional Affairs
Member
Senate Finance Committee
Ethics Committee
Legislative Council
Northern Waters Task Force
Education Funding District Cost Factor
Finance Subcommittee Chair
Fish & Game
Health & Social Services
Public Safety
Finance Subcommittee Member
Environmental Conservation

Sponsor Statement
SB 180 -- Naturally Occurring Asbestos in Gravel

HB 258 authorizes and regulates the use of gravel or aggregate material that contains naturally occurring asbestos (NOA). There are documented cases of NOA being found in several areas of the state, including Juneau, along the Dalton Highway and Ambler. Discovery of NOA in local gravel pits has delayed and, in Ambler's case, halted construction projects. The use of NOA in construction projects may be regulated by states. Virginia and California have been regulating NOA for many years. With the passage of SB 180, the discovery of NOA in local gravel sources and the cost of transporting non-NOA gravel and material will not impact the success and completion of construction projects and important future state infrastructure in Rural Alaska.

Several large projects are on the state's horizon that will require the use of large amounts of gravel. These large projects are in mineral rich areas of the state critical to the future development of Alaska. Most notably, it is estimated that the gas pipeline alone may use 50 to 60 million cubic yards of new gravel. Many miles of the Dalton Highway will be reconstructed in support of the project, requiring additional gravel. In Rural Alaska, almost all airport construction and upgrades require material from local gravel sources; a new small airport can use up to 25,000 cubic yards of gravel. The use of NOA gravel and materials should be resolved before it becomes an issue during the actual construction process of any of these large future projects.

SB 180 directs the Department of Transportation and Public Facilities to develop and implement statewide regulations and standard operating procedures (SOP) to allow for the use of NOA for both State and private construction projects. SB 180 will balance the needs of moving Alaska forward; building critical infrastructure, completing construction projects while protecting the health of Alaskan workers and communities.

LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY
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Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM December 22, 2011

SUBJECT: Sectional summary of draft bill relating to naturally occurring asbestos (Work Order No. 27-LS0400\B)

TO: Representative Reggie Joule
Attn: Brodie Anderson

FROM: Emily Nauman EN
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 of the bill contains legislative findings and purpose statements to explain and support the measure.

Section 2 of the bill creates immunity from civil action or a claim for civil damages based on an alleged asbestos-related death, injury, illness, or disability or asbestos-related property damage claim in specified circumstances.

Section 3 of the bill adds a new section, AS 18.31.250, to describe how a person may qualify for immunity under sec. 2 of the bill related to use of aggregate material containing naturally occurring asbestos in construction projects that are not initiated or contracted for by the Department of Transportation and Public Facilities (DOT).

Section 4 of the bill directs DOT to establish standards and procedures for gravel and aggregate materials that contain naturally occurring asbestos.

Section 5 of the bill, a temporary law provision, permits DOT to review and approve site-specific plans submitted for DOT projects and for projects not initiated by the department during the interim period before initial standards and operating procedures adopted under sec. 4 of this bill take effect.

Section 6 of the bill authorizes DOT to use a specific standard previously adopted by the California Air Resources Board on an interim basis for the purpose of determining the

asbestos content of a bulk sample in a bulk test required under the new permanent law provisions until the department adopts its initial standards that may be more relevant to this state's experience.

Section 7 of the bill gives the measure an immediate effective date.

ELN:ljw
11-470.ljw

AIP Project Schedule
2011-2013
FAA Airports Division, Alaskan Region
(Last saved: August 15, 2011)

http://www.faa.gov/airports/alaskan/aip/media/aip_project_list.pdf

STATE OF ALASKA - NORTHERN REGION

AMBLER AFM

Project: Extend primary and crosswind runways, clear runway visibility zone, expand runway safety areas, construct new apron, construct new SREB, and relocate airport access road. Project delayed until a suitable material source can be found that does not contain asbestos.

Construction Start: 2014

Likely Completion Date: 2015

Sponsor/POC: AKDOT Ryan Anderson 451-5129

Airports POC: Matt Freeman, 271-5455

ATO POC: Ed Vey, 271-3056

FAA Flight Procedures POC: Kyle Christiansen, 271-5187

NAS Impacts: Existing VASI's.

AVN Impacts: Update all IAP's. Need new runway data by end of 2006.

ALASKA STATE LEGISLATURE

SENATOR DONALD C. OLSON

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Chair
Community & Regional Affairs
Member
Senate Finance Committee
Ethics Committee
Legislative Council
Northern Waters Task Force
Education Funding District Cost Factor
Finance Subcommittee Chair
Fish & Game
Health & Social Services
Public Safety
Finance Subcommittee Member
Environmental Conservation

Delayed projects in Ambler due to NOA

- Airport Extension
- Replace Grizzly Bridge
- Solid Waste Site
- Riverbank Erosion in front of town
- Road construction and maintenance
- School Playground
- Future Home sites

NWALT Northwest Arctic Leadership Team

The Honorable Donny Olson
State Senate
Alaska State Capitol
Juneau, AK 99801-1182

January 31, 2012

Dear Senator Olson:

The Northwest Arctic Leadership Team (NWALT) writes in support of Senate Bill 180. As you know, NWALT is a partnership of the Northwest Arctic Borough, Maniilaq Association, the Northwest Arctic Borough School District and NANA Regional Corporation. It is our charge to maximize resources and reduce duplication of efforts to address issues affecting the people of Northwest Alaska while honoring and perpetuating our Iñupiat cultural heritage.

Enactment of SB 180 is essential for completion of long-needed construction and public works projects in the Upper Kobuk Valley, most of which have been put on hold for over a decade due to naturally occurring asbestos (NOA) in the local gravel sources. Projects delayed in Ambler add up to over $10 million and include:

1. Airport runway extension and upgrades to Grizzly Bridge, which are necessary to reach the airport (the last improvement to the airport was in 1991 and to Grizzly Bridge was in 1976)
2. Upgrades to water and sewer services (last improvements in 1973 and 1982 respectively)
3. Building of new homes (last new homes completed in 1991 by the Northwest Inupiat Housing Authority)
4. Upgrades to existing dumpsite (opened in 1976 with no improvements since)
5. To secure the embankment protecting homes from river erosion

In Kobuk, a necessary addition to the school to accommodate students attending high school in the village has been delayed since grades 9-12 were made available in the village five years ago.

The use of NOA-containing material in construction and public works projects in the Upper Kobuk is necessary to the maintenance and improvement of local infrastructure so that residents may have the opportunity to enjoy a quality of life similar to that of residents who have the benefit of NOA-free gravel sources. Additionally, this legislation is a crucial part of the long-term solution to an important issue affecting rural Alaskans across the State, as well as proposed development projects such as the Ambler Mining District Access Project.

NWALT Northwest Arctic Leadership Team

We thank you for your advocacy on this important issue.

Sincerely,

Siikauraq Martha Whiting
NWALT Co-Chair
Mayor
Northwest Arctic Borough

Marie N. Greene
NWALT Co-Chair
President/CEO
NANA Regional Corporation

Ian Erlich
President/CEO
Maniilaq Association

Norm Eck, Ph.D.
Superintendent of Schools
Northwest Arctic Borough School District

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**CSSB 180(TRA)**
Fiscal Note Number	1
(S) Publish Date	2/24/12

Identifier (file name)	SB180-DOLWD-LSS-2-17-12	Dept. Affected	Labor and Workforce Development
Title	Naturally Occurring Asbestos in Gravel	Appropriation	Labor Standards and Safety
		Allocation	Occupational Safety and Health
Sponsor	Senator Olson		
Requester	Senate Transportation	OMB Component Number	970

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by	Grey Mitchell, Director	Phone	465-4855
Division	Labor Standards and Safety	Date/Time	2/17/12 2:36 PM
Approved by	Click Bishop, Commissioner	Date	2/17/2012
	Department of Labor and Workforce Development		

(Revised 1/17/2012 OMB)

FISCAL NOTE #1

STATE OF ALASKA **BILL NO.** CSSB 180(TRA)
2012 LEGISLATIVE SESSION

Analysis

The proposed legislation intends to require the Alaska Department of Transportation and Public Facilities to establish standards and operating procedures in connection with public construction and maintenance projects to allow for the use of gravel or aggregate containing a limited amount of naturally occurring asbestos in a manner that avoids significant human health risks while mitigating significantly higher costs associated with using only gravel or aggregate that is 100 percent free of asbestos. The proposed legislation also intends to require users of gravel or aggregate containing a limited amount of naturally occurring asbestos to prepare project plans that demonstrate conformance with established standards and to shield providers of gravel or aggregate containing a limited amount of asbestos from liability under certain conditions.

There is no anticipated financial impact to the department as a result of this legislation. Existing resources would be used to provide consultative assistance to the Department of Transportation and Public Facilities in establishing and implementing standards for the use of aggregate or gravel that contains a limited amount of naturally occurring asbestos. Electronic means of communication will be utilized to avoid the need for travel.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSSB 180(TRA)**
Fiscal Note Number: 2 **CORRECTED PUBLISH DATE**
(S) Publish Date: 2/24/12

Identifier (file name): SB180-DEC-AQ-02-16-12
Title: Naturally Occurring Asbestos In Gravel
Sponsor: Senator Olson
Requester: Senate Transportation Committee

Dept. Affected: Environmental Conserv
Appropriation: Environmental Health
Allocation: Air Quality
OMB Component Number: 2061

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0		0.0	0.0	0.0	0.0	0.0
Travel	7.8		8.2	0.7	0.7	0.7	0.7
Services	0.0		0.0	0.0	0.0	0.0	0.0
Commodities	0.0		0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0		0.0	0.0	0.0	0.0	0.0
Grants, Benefits	0.0		0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0		0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**7.8**	**0.0**	**8.2**	**0.7**	**0.7**	**0.7**	**0.7**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts	0.0		0.0	0.0	0.0	0.0	0.0
1003	GF Match	0.0		0.0	0.0	0.0	0.0	0.0
1004	GF	7.8		8.2	0.7	0.7	0.7	0.7
1005	GF/Prgm (DGF)	0.0		0.0	0.0	0.0	0.0	0.0
1037	GF/MH (UGF)	0.0		0.0	0.0	0.0	0.0	0.0
1178	temp code (UGF)	0.0		0.0	0.0	0.0	0.0	0.0
TOTAL		**7.8**	**0.0**	**8.2**	**0.7**	**0.7**	**0.7**	**0.7**

POSITIONS							
Full-time	**0**		**0**	**0**	**0**	**0**	**0**
Part-time	**0**		**0**	**0**	**0**	**0**	**0**
Temporary	**0**		**0**	**0**	**0**	**0**	**0**

CHANGE IN REVENUES	**0.0**		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required,*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Alice Edwards, Director — Phone (907) 465-5109
Division: Air Quality — Date/Time 2/16/12 3:46 PM
Approved by: Lynn Kent — Date 2/18/2012
Deputy Commissioner

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 180(TRA)

Analysis

The Department of Environmental Conservation is tasked with consulting with the Department of Transportation & Public Facilities on the development of standards and operating procedures to allow the use of gravel or aggregate material that contains naturally occurring asbestos in transportation and public facilities construction projects.

Travel:
This fiscal note assumes Air Quality will assign staff to membership on an inter-agency task force(s) to establish interim standards and develop standard operating procedures. Membership will require travel to multiple planning and public meetings during FY2013 and FY2014, with annual meetings occurring thereafter.

Naturally Occurring Asbestos in Alaska and Experiences and Policy of Other States Regarding its Use

A joint project
By
Dr. Robert A. Perkins, PE
Institute of Northern Engineering
University of Alaska Fairbanks
And
John Hargesheimer, PE, CIH
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Nortech

September 2009

Institute of Northern Engineering

University of Alaska Fairbanks
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Citation:
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Front cover photo: Asbestos at material site MS 105 on the Dalton Highway

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1. California Regulation
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    b. ATCM II
2. Virginia Regulation
    a. Directive I
    b. Directive II
3. Excel file with USGS 2009 Alaska Resource Data File is available electronically from the authors.

EXECUTIVE SUMMARY

Naturally Occurring Asbestos (NOA) occurs in mineral deposits in Alaska. Some localities in Alaska do not have gravel sources that are NOA-free, which impacts the cost of heavy construction projects such as roads and airports. Because airborne asbestos fibers are a significant human health risk, mining and industrial use of asbestos is rare in the United States. Disposition of existing asbestos materials in industry and buildings is tightly regulated by federal and state authorities. The use of NOA is not regulated by federal agencies or most states. Determining if NOA can be safely used in heavy construction materials and what can or should be done with NOA materials that are already in place are complex questions. The ultimate answer depends on propensity for the NOA in each scenario to actually release asbestos fibers that may be inhaled by humans, which in turn depends on the amount and type of asbestos mineral, how it is handled in processing, and how it is maintained. Practical analysis of this depends on laboratory analysis, as well as regulation or control of operations. Implementation of these requires stakeholder education and cooperation and agency oversight. This report summarizes these from the perspective of the Alaska Department of Transportation (ADOT).

Some key points:

- NOA is present in many states, but only a few have regulations governing its use.
- There are many regions in Alaska that have minerals in surface rocks that may contain asbestos and asbestos has been discovered in many locations in Alaska.
- Gravel is constantly in demand for heavy construction projects, if a major project, such as the gas pipeline is built, it will require very large quantities of gravel
- All future material site exploration should consider the possibility of encountering NOA, and those areas indicated by mapping as possible NOA minerals should be carefully investigated.
- California, which does have NOA regulations, uses a threshold asbestos concentration, below which the material is not considered NOA. If the material is NOA, regulations cover its use. Virginia is similar.
- Starting with a site-specific plan and then covering the material and reducing dust are key features of those regulations, if NOA is over the threshold asbestos content.
- We present a review of dust suppression and capping techniques, many of which might be useful, depending on the situation.
- Education of the public and worker training are important components of any NOA plan.

The key conclusion is that NOA can be used in many projects, but precautions are needed, especially a plan for its use. Considering the importance of NOA to ADOT's mission we recommend that the ADOT take the lead in a statewide effort to develop an appropriate NOA policy and program by coordinating a stakeholders working group effort. NOA programs in other states were developed with input from industry, public health, environmental and state organizations and agencies. The outputs of the NOA programs included source characterization, geologic mapping, standardized operating procedures (SOP), program exemption procedures, and local authority. Successful implementation of a NOA program will require significant commitment and change in industry, operational, management, design and construction practices for use of NOA materials. To insure comprehensive input and facilitate stakeholder "buy in," the statewide working group should include federal and state, and local government, as well as industry, community and public health interested parties.

Here we assume that in order for projects that must use NOA to proceed, the ADOT must have a standard or SOP that contains the goals and guidelines that the ADOT must follow in order to use NOA safely. The SOP in turn would require a specific action plan for each project. Of course other project owners could use the ADOT's SOP. Thus, the ADOT's goal with the NOA working group is to develop an SOP that is directed towards ADOT projects, but also satisfies the goals the various stakeholders. We note here that protecting the public health and safety is the overarching goal the ADOT's operations, but the ADOT's approach via building safe roads and airports is different than, for example, the EPA's approach of limiting public exposure to carcinogens. The goals and charges of all the agencies can be reconciled into a workable SOP, but the coordination effort should not be underestimated.

Here is a putative outline of the SOP required for safe use of NOA and the steps likely required to garner wide stakeholder approval of the SOP.

1. The SOP includes
    a. site investigation and characterizations
        i. Laboratory practices
    b. review of design alternates to use non-NOA materials
        i. Cost analysis
    c. evaluation of human health concerns and agency involvement
    d. designs that use NOA
        i. typical drawings and specifications
    e. acceptable construction practices
        i. typical contract provisions
        ii. QA/QC
    f. acceptable and required O&M practices
        i. State forces
        ii. Local forces
    g. O&M and other issues related to in-place NOA

    h. the administrative procedures for the entire process, including lines of authority and approval authority
        i. interagency communications
        ii. documentation
2. For each project or situation
    a. a site specific NOA plan
    b. including outline construction specifications or O&M procedures
    c. public involvement and education
    d. QA/QC

However to be successful, the SOP must be acceptable to

- The agencies who may have some jurisdiction or be involved
- The DOT design, construction and O&M staff and experts
- The contractors and material site owners and suppliers
- The general public
- Involved and concerned public.

Thus, we recommend the ADOT take the lead and develop a NOA Action Plan that involves a consultant to the DOT. Here are the main steps of that Action Plan that will lead to a workable SOP:

- Outline the SOP
- Contact all interested parties and notify them of the Action Plan and request a statement of their interest
- Meet with all the major players and discuss the issues – either at a roundtable or individually
- Prepare a draft of the SOP and an example Site Specific Plan for ADOT review
- Distribute the draft to interested stakeholders
- Hold a meeting to review the draft and discuss comments and changes
- Determine if new laws or regulations are needed
- If not, the ADOT promulgates the SOP
- If new laws or regulations are needed, ADOT starts the process.

INTRODUCTION

Asbestos is a term for naturally occurring silicate minerals with long, thin fibrous crystals that were historically mined and utilized in a wide-variety of manufactured products because of favorable chemical and physical properties. By the 1980s inhalation of asbestos fibers was found to be a human carcinogen responsible for diseases such as asbestosis, mesothelioma and lung cancer and the mining and use of asbestos in manufactured products was banned. While mining and manufacturing has since ended in the United States, Naturally Occurring Asbestos (NOA) is a constituent of some rocks and soils existing in varying types and quantities in several locations throughout the nation including Alaska. The United States Occupational Safety and Health Administration (OSHA) regulates asbestos exposure in the workplace; however, federal regulations do not address non-occupational exposure from NOA. Due to the lack of regulatory guidance associated with NOA, some states with substantial NOA concerns, such as California, have implemented state-wide regulations controlling the use of soils with NOA.

Due to geography, land mass, limited road systems and relatively sparse and scattered population centers within Alaska, NOA has not been a historical concern for the state. However, over the past several years NOA has been encountered in Alaska and has impacted state projects (e.g. Dalton Highway, Ambler, etc). Meanwhile the Alaska Department of Transportation & Public Facilities (ADOT) has an ever-increasing demand for gravel and rock to construct and repair the state's roads and airports. Large construction projects such as the proposed gas line or railroad extension will require gravel and rock source development.

The ADOT contracted with the Institute of Northern Engineering (INE) of the University of Alaska Fairbanks through the Alaska University Transportation Center to report on the available background information in Alaska and a literature search of information from other states that have similar NOA issues. INE contracted with Nortech Environmental, an Alaska consulting firm, to provide expertise in asbestos issues in Alaska, and to perform the literature search and consultations with other states.

This paper reviews NOA background, analytical issues, policies and regulations that have been considered and/or implemented by other authorities involved with NOA and who have developed NOA policy options. Identified NOA control strategies and technologies are evaluated and analyzed according to their effectiveness, enforcement, affordability and consistency with emerging US standards and ADOT programs. The literature is clear that NOA gravels can be used safety with proper workforce training, understanding and implementation of appropriate control strategies and technology. Implementation of effective Alaskan NOA policies, including development of any SOP to deal with NOA,

will require program consensus, including an educational component, and must involve all stakeholders in the NOA issue (resource owner, owner, designer, contractor, local, regional and state government, and communities) in a holistic approach.

BACKGROUND

Asbestos History

The word 'asbestos' is of Greek origin and has the meaning "inextinguishable" or "indestructible." Today asbestos is the commercial term for a group of silicate minerals consisting of magnesium, calcium and iron all with fibrous tendencies. The favorable properties of asbestos were known and utilized by the ancient Greeks and Romans, Europeans throughout the Middle Ages, and most of the industrial world by the modern era. Asbestos was added in manufactured material for thermal and electrical insulation as well as for strength and chemical stability. These favorable traits lead to the continued use of asbestos in manufactured products through the industrial expansion of the 20th Century. By mid-1960 a high frequency of respiratory disease within the asbestos mining, manufacturing, shipbuilding and construction industries began to gain the attention of medical researchers.

Asbestos is naturally occurring in many parts of the world and was historically mined as raw ore. After the ore was segregated, the asbestos was broken down into fibers and fiber bundles during a milling process, and then further refined depending on the use. Asbestos was included in the manufacture of thermal piping insulation and spray-applied fireproofing as well as resilient floor coverings, acoustical materials, gaskets, plaster, vermiculite, joint compound, wall board, roofing products, industrial mastics, textile and friction productions such as automotive brakes.

In mineralogy, the word 'asbestos' describes a series of magnesium silicate minerals that naturally occur in fibrous form or 'asbestiform.' The six varieties of recognized asbestos minerals comprise two mineralogical groups: serpentines and amphiboles. The only variety of serpentine asbestos is chrysotile or 'white asbestos,' while the amphibole group has five mineral varieties: amosite or 'brown asbestos' (cummingtonite-grunerite asbestos), crocidolite or 'blue asbestos' (riebeckite asbestos), anthophyllite asbestos, tremolite asbestos and actinolite asbestos. Amosite and crocidolite are the trade names used for the asbestos varieties of the cummingtonite-grunerite and riebeckite series respectively. The name 'Amosite' originated as an acronym for "Asbestos Mines of South Africa."

Chrysotile is the predominant asbestos variety used commercially in the United States. Chrysotile has a crystal structure of a sheet of silicate rolled into a straw-like, hollow tube. The property creates a hydrophilic or 'water loving' tendency, and therefore water is often used to reduce airborne chrysotile fiber concentrations during processing and removal activities. Crocidolite and Amosite are the two additional asbestos varieties exclusively mined and intentionally added to commercial products. The other three forms of amphibole asbestos are generally found in trace amounts and are often described as a contaminant in mining operations. The crystal structure of amphiboles is a chain structure of

magnesium and silicon ions that form into long straight fibers. The molecular arrangement makes the amphiboles hydrophobic or 'water fearing' and difficult to wet and therefore, water is somewhat less effective as dust control with this group.

Asbestos has become a serious health and safety concern due to widespread use in manufactured products; many of which are still used today. The primary pathway of exposure for asbestos is inhalation of airborne fibers; ingestion is generally a minor pathway. Particles smaller than 10 μm in aerodynamic diameter, such as asbestos fibers, are known to readily enter the lungs. Asbestos dust may also be ingested directly into the mouth during respiration, hand-mouth contact while eating or smoking, or indirectly by swallowing of mucus. Dermal exposure to asbestos has been known to cause irritation; however, no serious health effects from skin exposure have been identified.

Asbestos is known to cause or contribute to fibrosis and malignancies of the lung and other organs. The U. S. Environmental Protection Agency (EPA) has classified asbestos as a Group A human carcinogen meaning sufficient evidence exists to connect exposure and human carcinogenicity. Exposure to airborne asbestos has been linked to Asbestosis- a debilitating, non-malignant lung disease; mesothelioma – a rare cancer of the chest and abdominal lining, and cancers of the lung, esophagus, stomach, colon and other organs. Other conditions associated with asbestos exposure are build-up of fluid in the lungs known as pleural effusion and deposits in the pleural cavity called pleural plaques.

Data from asbestos work exposure suggests the risks of asbestosis and lung cancer are "dose-dependent" meaning they decrease proportionately with a decrease in total asbestos exposure. Mesothelioma however is not recognized as a dose-response related illness and has been linked to primarily amphibole asbestos exposure.

The time between exposure and resulting disease is known as the latency period, and typically spans between ten and forty years. The age at which asbestos exposure occurs is relatively unimportant for determining the lifetime risk of lung cancer. On the other hand, the age at which asbestos exposure occurs is very important in determining the lifetime risk of developing mesothelioma. The earlier exposure occurs, the more time mesothelioma has to develop; thus the concern for asbestos exposure to school children.[1]

Asbestos exposure and cigarette smoking increases the lung cancer rate significantly above the rate due to either smoking (ten times) or asbestos exposure (five times) alone. A smoker routinely exposed to asbestos experiences a synergistic effect from the two thereby increasing their risk of developing a lung disease by fifty to ninety times more than a person who does not smoke and is not exposed to asbestos. OSHA standards require employers of workers who

are exposed to asbestos to be provided information packets on smoking cessation programs and to ban smoking in all workplaces where any asbestos exposure is possible.

Asbestos Regulations

Although NOA is not regulated per se, here we review the most important asbestos regulations. The EPA regulates asbestos products primarily under three laws:

- Clean Air Act (CAA), at 40 CFR 61 Subpart M – National Emission Standard for a Hazardous Air Pollutant – Asbestos (NESHAP);
- Toxic Substances Control Act (TSCA), at 40 CFR 763 Asbestos; and
- Asbestos Hazard Emergency Response Act (AHERA) which amended TSCA in 1986.

Asbestos is further regulated by several federal agencies and some Alaska agencies.

NESHAP

The asbestos NESHAP regulates the emission of asbestos from the workplace into ambient air primarily during removal activities, building renovation/demolition and associated waste disposal operations. The NESHAP allows no visible emission of asbestos from the workplace during any regulated activity.

Three key NESHAP concepts are 'asbestos-containing material' (ACM), 'friable' material, and 'Regulated ACM' (RACM). A material is defined as ACM if it contains more than 1% asbestos as determined by polarized light microscopy (PLM) analysis. Untested materials identified as suspect by an accredited inspector must be Presumed ACM (PACM). Friable is defined as a material that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure. Nonfriable materials are subdivided into Category I nonfriable (packings, gaskets, asphalt roofing products and resilient floor covering) and Category II nonfriable (such as wallboard, cement asbestos products, asbestos-containing plasters, and any nonfriable ACM not listed in Category I). Category II nonfriable ACM are materials that may become friable during handling or disposal.

RACM includes all friable ACM, nonfriable ACM that has become friable, Category II materials that will be made friable by the proposed activity and all Category I materials that will be subjected to operations causing fibers to become airborne. Prior to the demolition or renovation of any non-exempt structure in the United States, the owner or operator of the facility must inspect for the presence of asbestos, including Category I and II non friable ACM. NESHAP requires building owners and operators to notify the EPA (or a designated state agency) before demolishing any non-exempt structure. In addition, it requires a ten day advance notification if scheduled activities will disturb equal or greater than (≥) 260 linear feet on pipes, ≥160 square feet on surfaces and ≥35 cubic feet of debris of RACM. The NESHAP standard also prohibits emissions of asbestos to the outside air and requires emission control procedures and appropriate work

practices during collection, packaging, transportation and disposal of regulated ACM waste.

AHERA

EPA issued regulations pursuant to the 1986 Asbestos Hazard Emergency Response Act (AHERA) in October of 1987. AHERA applies to public, nonprofit private and Defense Department kindergarten to twelfth grade school buildings. It requires them to conduct ACM inspections, develop comprehensive ACM management plans, and select asbestos response actions to deal with asbestos hazards. AHERA established a series of accredited personnel and set the training requirements for each. The AHERA occupational survey does not require inspection of all portions of the school (ie exterior, roof etc) nor the removal of asbestos identified, but does require that schools select and implement an appropriate response action for each identified asbestos hazard. The response action may be encapsulation, enclosure, removal or an approved Operations Maintenance and Repair Program (O&M Program). Encapsulation deals with applying a chemical coating or impregnation of the ACM building material in order to prevent any fiber release, while enclosure consists of sealing the ACM in an airtight structure. O&M Programs and Management in Place (MIP) are generally the most utilized and preferred response method until the ACM has become deteriorated or will be impacted by renovation activities thus requiring removal.

The Asbestos School Hazard Abatement Reauthorization Act (ASHARA) was enacted on November 28, 1990. ASHARA amended AHERA to require accreditation for any person who inspects for ACM in a public or commercial building, or who designs or conducts a response action with respect to friable ACM in such a building. ASHARA does not require building owners to conduct inspections for asbestos-containing materials in public and commercial buildings; however, should the owner decide to conduct an inspection an accredited inspector must be used.

TSCA

EPA's Asbestos Ban and Phase Out Rule (ABPO) (40 CFR 763 Subpart I) was published in the Federal Register on July 12, 1989, under TSCA. The rule was to prohibit the importation, manufacture and processing of 94 percent of all remaining asbestos products in the United States over a period of seven years, beginning in 1990. However, the U.S. Fifth Circuit Court of Appeals vacated most of the ABPO and remanded it to EPA in October 1991. EPA subsequently banned several paper products and has used general TSCA authority to control re-introduction of asbestos products into the market place.

OSHA

OSHA currently has three standards for asbestos exposure. The general industry standard, 29 CFR 1910.1001, applies to all occupational exposures to asbestos in all industries except the shipyard and construction industries. This

standard would apply to workers handling NOA if exposures were above the PELs. The shipyard standard, 29 CFR 1915.100, applies to asbestos exposure in all shipyard work and the construction standard, 29 CFR 1926.1101, applies to asbestos exposure in all construction work, including demolition and building maintenance.

All three standards are similar, with each standard setting two permissible exposure limits (PEL), the time-weighted average (TWA) and the excursion limit (EL). The TWA is 0.1 fiber per cubic centimeter of air (f/cc) averaged over an eight-hour period, while the EL is 1.0 f/cc averaged over a 30-minute period where exposure is likely to be the greatest. Each standard specifies training, medical monitoring and recordkeeping requirements for employers of workers who are exposed to asbestos. Differences exist primarily in the areas of effective dates for worker training, medical monitoring, and in work practices specific to the industry. The construction standard is the most detailed and divides asbestos work into classes, I-IV, based on the type of the material, the work being performed, how the material will be impacted, and the amount of ACM involved in the work. For all construction work scheduled to impact PACM or ACM, a competent person must conduct an initial exposure assessment to determine employee worst-case exposure and to establish the engineering controls, work practices, and personal protective equipment that may be required. The standard also supplements the OSHA Hazard Communication Standard (29CFR 1910.1200 and 29 CFR 1926.59) by requiring building and facility owners to notify prospective contractors and subcontractors, tenants, and the owner's own employees about the presence, location and amount of PACM and ACM in the building. This standard requires owners to conduct asbestos inspection or surveys so that the necessary information is available for compliance with notification requirements. The General Industry Standards would apply to workers handling NOA if there exposure were over the PEL.

DOT

The U.S. Department of Transportation (DOT) regulates the transportation of hazardous materials including friable asbestos under the Hazardous Materials Transportation Act (HTMA). DOT's hazardous materials regulations (HMR) are found at 49 CFR 171-180. These regulations require the proper packaging, labeling, shipping manifests, marking, placarding and trained employees associated with shipping of ACM and waste. Proper shipping papers must accompany asbestos-containing shipments with packages properly marked and labeled with the Class 9 diamond. The markings must include the North American identification number, NA2212, and the proper DOT descriptive name (RQ, Asbestos 9, NA2212, PG III). Laboratory samples in shipment are exempt from the regulations, except for the packaging requirements of 49 CFR 173.4.

MSHA

As of April 29, 2008, the U.S. Department's of Labor Mine Safety and Health Administration (MSHA) revised exposure limits on asbestos for miners. The

ruling changes health standards for asbestos exposure at metal and nonmetal mines, surface coal mines and surface areas of underground coal mines. The new ruling lowered MSHA's permissible exposure limits to match those of OSHA. The previous MSHA PEL of 2.0 f/cc was once the same as OSHA's; however, MSHA has not made continuing amendments to the standard in past years which reduced the PEL to 1.0, 0.5, 0.2 and eventually 0.1 f/cc. In addition, the ruling allowed for Phase Contrast Microscopy (PCM) to analyze airborne asbestos samples and Transmission Electron Microscopy (TEM) to reanalyze samples found to be above the PEL via PCM.

Alaska

The Alaska Department of Labor (ADOL) has adopted, with a few modifications, the federal regulations OSHA for asbestos and asbestos removal activities. Federal government has delegated authority to the Alaska Department of Environmental Conservation (ADEC) to implement federal programs which extend the NESHAP, ASHARA and AHERA requirements and the Alaska Department of Occupation Safety and Health (AKOSH) to oversee worker protection.

Other States

Some states have adapted more stringent AHERA and OSHA type regulations, and in some large metropolitan areas the city regulates asbestos and asbestos abatement directly. Other states such as California have developed statewide policies concerning issues not addressed in Federal regulations such as Naturally Occurring Asbestos (NOA) found in soils and rock.

Relevancy of Regulations

None of these regulations, except California and Virginia, discussed elsewhere, apply directly to NOA as likely to be encountered by the AK DOT. The MSHA and ADOL/OSHA regulations apply regarding worker exposure, if workers were exposed over the PEL. The detailed ADOL/OSHA regulations regarding asbestos demolition and disposal do not apply to NOA.

Naturally Occurring Asbestos

Naturally Occurring Asbestos (NOA) has been generally accepted as the generic term to identify any of the six (Chrysotile, Amosite, Crocidolite, Actinolite, Tremolite, Anthophyllite) varieties of asbestos when encountered in natural geological deposits. Asbestos is not chemically altered through a refining process to obtain the hazardous end product we encounter in manufactured goods; but rather raw asbestos ore is mined and crushed down into a usable form. Consequently, NOA describes the location of asbestos (in situ rock and soil) rather than a variety of asbestos.

The mineralogical community uses the term "asbestiform" to describe the morphology of a mineral which has longitudinal parting and can be split into individual fibers. Not all asbestiform minerals are regulated varieties of asbestos; however, all regulated asbestos are asbestiform. Asbestiform minerals consist of fibers that grow almost exclusively in one dimension, are easily bent and occur as bundles of smaller fibers which are called fibrils. This bundling effect of asbestiform minerals is used as a unique distinguishing feature. Asbestiform minerals are long and thin, with aspect ratios of typically 20:1 to 100:1 or greater. Most asbestiform fibers are less than 0.1 microns in width, and nearly all are less than 0.5 micron. Individual asbestiform fibers are visible only with the aid of a microscope. It is important to note these forms became regulated due mainly to their presence in commercial products and several other asbestiform minerals exist, in addition to the six regulated forms, and may be encountered in natural deposits and pose heath hazards similar to that of the regulated varieties.

Geologic Occurrence of Asbestos Minerals

Metamorphic rocks are the result of the transformation of a protolith (existing rock) in a process called metamorphism during which the protolith is subjected to heat and pressure causing profound physical and/or chemical change. Prior to the transformation, the protolith may begin as sedimentary rock, igneous rock or another older metamorphic rock. A large portion of the Earth's crust is composed of metamorphic rocks which are classified by texture and by chemical and mineral assemblage. They may be formed simply by being deep beneath the Earth's surface, subjected to high temperatures and the great pressure of the rock layers above it. They can be formed by tectonic processes such as continental collisions which cause horizontal pressure, friction and distortion or when rock is heated up by hot molten rock, magma, from the Earth's interior, later referred to as igneous intrusion.

Serpentines (Chrysotile) are a magnesium silicate, while amphiboles are generally iron-magnesium silicates with varying amounts of sodium and calcium. If the protolith contains these chemical components asbestos formation is more likely than those that do not. All rocks which have this chemical composition have the potential to contain amphibole asbestos or serpentine asbestos; however, the non-asbestiform varieties of these minerals considerably more dominant than asbestiform.[2]

Asbestos minerals are generally associated with ultramafic rocks and their metamorphic protolith, including serpentinite (serpentine rock). Ultramafic rocks are those igneous rocks composed mainly of iron-magnesium silicate minerals, such as olivine and pyroxene. They include the rock types dunite, peridotite, pyroxenite, and hornblendite. Ultramafic rocks form in high-temperature and high-pressure environments deep beneath the earth's surface. By the time they are exposed at the earth's surface, ultramafic rocks have typically undergone a type of metamorphism known as serpentinization, a process that alters the

original iron-magnesium minerals to one or more waterbearing magnesium silicate minerals (lizardite, antigorite, chrysotile) that belong to the serpentine mineral group. The mineral chrysotile is often present as asbestos in the resulting rock. Metamorphism of ultramafic rocks and serpentinite may also lead to the formation of amphibole asbestos minerals. Conditions favorable for asbestos formation may occur repeatedly during the metamorphic process and, consequently, it is very common for at least a small quantity of asbestos to be present in metamorphosed ultramafic rock bodies. [3]

While generally associated with serpentinite and ultramafic rocks, chrysotile asbestos may less commonly occur in other rocks that originally contained the minerals olivine and pyroxene. These include metamorphosed mafic plutonic rocks like gabbro or mafic volcanic rocks such as basalt that are commonly associated with ultramafic rocks or serpentinite. Chrysotile and the amphibole forms of asbestos may also form in magnesium-rich limestones and dolomites which are metamorphosed carbonate rocks. The amphibole asbestos minerals are most commonly found in metamorphosed ultramafic rocks, including serpentinite, and in metamorphosed mafic plutonic rocks, metamorphosed mafic volcanic rocks, metamorphosed iron-rich chert, and metamorphosed ironstones. In many of these geologic environments, Asbestos is thought to be more likely found where changes in the geology occur such as near geologic contacts, along dike boundaries, or near inclusions of different rocks or in fault and shear zones where natural fluid flow has been enhanced. [3]

Asbestos minerals may also be found in sedimentary rocks, stream sediments, or soils derived from parent materials that contain asbestos. Alluvial deposits that contain asbestiform materials are likely to be found in any watershed that drains ultramafic rocks.[4]

Soils derived from parent materials that contain chrysotile asbestos and amphibole asbestos may also contain asbestos fibers and are an important potential source of airborne asbestos. Weathering and leaching reduce the amounts of asbestos in soils over time, yet little is known about the rates of weathering and leaching of asbestos in soil environments. Available information suggests that substantial reductions in the amount of chrysotile may take hundreds or thousands of years, depending on the soil environment, and somewhat longer for amphibole asbestos. [2]

NOA in USA

In the United States, the presence of asbestos or asbestiform minerals in rocks has been identified in 20 states, and mined in 17 states in the last 100 years. [5] In addition to known previous mining locations, reports of asbestos or other fibrous minerals has been identified through geological surveys and other miscellaneous encounters. The United States Geological Survey (USGS) has an ongoing effort of compiling these sites and locating them on maps that are available on its web-

site at http://tin.er.usgs.gov/mrds[6]. The sites on these maps give an indication of the major areas of concern, which are most particularly located along the Appalachian and Rocky Mountains as well as in the Western Cordillera. In some of these areas, such as California and Virginia, the NOA issue has been known for some time and local agencies have responded in a variety of ways such as implementing state and local policies and regulations for testing and handling suspect and known NOA. The health risks associated with NOA are based on the potential for exposure. The exposure pathway of greatest concern is through inhalation, which requires the asbestos to become airborne. Experts believe that natural factors such as wind erosion pose little threat to human exposure, but rather disturbance of NOA-containing rock and soil under dry conditions. Because of this health risks are generally quantified though activity-based sampling on a site-specific basis. Below is a list of some areas in the US where NOA has been identified, and local responses to the occurrence:

Virginia

In 1987 the presence of NOA in Fairfax County, Virginia, was brought to the attention of the Fairfax County Air Pollution Control Division (Fairfax APCD) during the construction of an underground parking garage. As a result from the NOA-containing rock being drilled and crushed with no mitigation controls in place, the entire construction project was reportedly covered with NOA-containing dust. Several drill operators experienced itching and skin irritation which through subsequent medical and geological investigations was determined to be caused by tremolite asbestos fibers. The Fairfax County Soil Science Office later performed sampling and found a vein of asbestiform actinolite and tremolite comprising 10.9 square miles. Since the NOA discovery, Fairfax County has implemented NOA-specific policies regarding construction project that will impact soil.[7]

California

Serpentinite is California's official state rock and the source of much of the NOA found there. El Dorado Hills, a community in the Sierra foothills near Sacramento is a community that has had ongoing NOA issues associated with fibrous amphiboles in bedrock and soils since 1999. Reports have indicated that airborne concentrations of asbestos regularly reach levels of concern through non-construction activities such has recreation and gardening. In February 2002, during a construction project at a local school, veins of asbestos-containing minerals were discovered. The school soil was remediated that summer, but in September 2003, the EPA carried out activity-based sampling which involved measuring NOA in the breathing zone during recreational activities around the school which yielded varying results of airborne asbestos concentrations. Results underwent criticism for analysis methods and definition of asbestiform vs non-asbestiform minerals; however, a generally consensus was reached that a potential health risk existed for asbestos exposure existed in the area.[8]

Minnesota

Silver Bay, located on the shore of Lake Superior, served as a processing mill for Northeastern Minnesota's is rich in iron-ore mining operations. Historically the lake not only served as a steady water supply, but also as a dump site for the mine tailings. Amphiboles are known to be present in this area iron-oxide ore, and mineral fibers were later detected in the air and water supply of several towns, including Duluth. In 1975 after ongoing legal battles, the 8th Circuit Court of Appeals instituted the "control-city" standard where air monitoring at Silver Bay was required to yield results equal to or less than the control city; in this case St. Paul. [8]

New Jersey

A milling facility associated with a marble and limestone quarry near Sparta, NJ has been accused of emitting fibrous tremolite in dust generated from milling and quarry activities. The geology of the area suggests that amphibole minerals are present; however, emissions testing illustrated that the tremolite mineral present was non-asbestiform. Samples were later collected from homes in close proximity to the quarry which did not yield conclusive evidence that asbestos had migrated from the quarry or milling operation. Analysis methods and the definition of asbestos were again scrutinized; however, the quarry and milling facility are still operational.[8]

Washington

On Sumas Mountain in western Washington State a major low-moving landslide is occurring in altered serpentinite rock near the headwaters of Swift Creek. The landslide material contains both asbestiform and non-asbestiform lizardite, resulting in chrysotile being the asbestiform mineral of concern. Erosion resulting from the slide releases large quantities of sediment into the drainage and eventually the area river. To prevent flooding, the river is routinely dredged and staged in piles along the river. This staged material has historically been utilized as a local source of fill and has formed an area used for recreational activities. In 2006, the US EPA engaged in activity-based sampling in which three activities involving different levels of disturbance of the dredged material were simulated for this study: loading and unloading of dredged material with heavy equipment, shoveling and raking dredged material over a surface, and recreational activity, such as biking, jogging and walking on the dredged materials. Sampling indicated that a potential health risk regarding airborne asbestos fibers existed for several of the activities. In 2007, the US EPA released a fact sheet warning residents to limit their exposures through avoiding contact with the dredged materials. [8]

Montana

Libby is a small town located in the northwest corner of Montana approximately 35 miles East of Idaho and 65 miles south of Canada. In the 1880's, gold miners discovered vermiculite near Libby, and by 1920 the Zonolite Company had formed and began mining the vermiculite. Vermiculite is used in many common commercial products, including attic insulation, fireproofing materials, masonry fill, and as an additive to potting soils and fertilizers. In 1963, W.R. Grace purchased the Zonolite mining operation which remained in production until 1990.[9] In the fall of 1999, a series of newspaper articles state the ore deposit contained small amounts of asbestiform amphiboles. In response to these articles, the EPA sent an Emergency Response Team to Libby in November 1999 to address the asbestos concerns. The vermiculite ore mined from Libby was contaminated with fibrous amphiboles consisting of tremolite and the asbestiform amphiboles winchite and richterite. [8]Tremolite is a regulated form of asbestos; however, papers by Meeker[10] and Gunter[11] concluded that tremolite made up less than 10% of the amphibole population suggesting the winchite and richterite likely contributed to the increase in asbestos related illness affecting the former Libby miners. Multiple studies yielded results illustrating that rates of lung cancer, asbestosis and mesothelioma were about 2.5 times higher in the Libby miners than expected. [8]

EPA implemented a program to inspect all Libby properties for elevated asbestos levels. Between 2002 and 2003, approximately 3500 properties were inspected, with 12,000 soil samples being collected. As of 2009, the EPA has completed cleanups at over 1100 properties including the vermiculite processing plants and other "highly contaminated" public areas with an estimated 100 large property cleanups scheduled for the 2009 constructed season.[9]

Analytical Methods for Quantifying Asbestos in Soils

Various types of microscopic analysis are used to determine the amount of asbestos present in soils. The most common forms are discussed below. Additionally, variations exist for each method depending on sample preparation and counting methods utilized.

Polarized Light Microscopy (PLM)

PLM analysis is the standard method used to test for the presence or absence of asbestos in building materials. PLM results report a visual estimation of the weight percentage of asbestos in a sample. PLM analysis typically begins by viewing a sample under a stereoscope at 10X – 50X magnification; fibrous sub-samples are then selected to be viewed under a light microscope at 100X – 500X magnification. By correctly interpreting light interactions, analysts can accurately distinguish asbestos from non-asbestos materials (glass, cellulose) as well as

identify the variety of asbestos present. Accuracy of this method depends on the uniformity of the material, the type of analysis and the analyst's experience. "Point Counting" considered more accurate than standard PLM is one variation of the method where the analyst views a set number of grid points and documents the material present. The number of points that have asbestos versus no asbestos determines the percentage of asbestos reported. [12]

Common forms of PLM analysis are not applicable for materials which contain highly varied, non-uniform and non-manufactured materials such as soils, gravels, dusts or large quantities of fibers smaller than 0.25 µm.

Transmission Electron Microscopy (TEM)

TEM is capable of identifying the largest range of asbestos fibers/structures of all Electron Microscopy analysis and can differentiate between asbestos and non-asbestos fibers/structures. TEM is used for air, bulk, dust and soil sampling. TEM analysis utilizes an electron microscope for which the level of magnification can resolve down to10 nanometer (nm) particles and can identify asbestos particles by appearance, chemical composition and crystalline structure. Depending on the variation of TEM analysis results are either a visual estimation of a weight percent, or are "semi-quantitative" based on actually weighing the sample then estimating the weight of asbestos found by the fibers size and density.

In addition to bulk sample analysis, TEM is also used to analyze microvac (ASTM D-5755) and wipe (ASTM D-6480) samples. These sampling techniques are common to quantify asbestos levels in settled dust. Both methods require settled dust to be collected from a known surface area. The laboratory analysis consists of digesting the media (filter or wipe) in solution and analyzing via TEM. Samples can be qualitatively analyzed which yields an "absent" or "present" result for asbestos and notes the types of asbestos observed. Samples can also be analyzed qualitatively for which the solution with the digested media is diluted known magnitudes until asbestos fibers can be accurately counted with the microscope. By using known sampling surface areas, dilution factors and analysis areas, the microscopist can calculate the amount of asbestos structures present per square centimeter (st/cm^2) of dust. While this method is a very useful tool in determining the concentration of asbestos in settled dust, concentrations of asbestos in settled dust are not regulated by any agency since the asbestos is neither airborne nor present in a building material.

TEM allows for more accurate identification of much smaller fibers than PLM analysis. EPA method 600/R-93/116, Section 2.5[13] summarizes the TEM bulk analysis. Many laboratories have developed their own methods to provide a full quantitative analysis of bulk samples via TEM.

Scanning Electron Microscopy (SEM)

SEM is primarily used for asbestos analysis for air and dust samples with the asbestos fibers being identified using their chemical composition and appearance. Asbestos fibers too small to be detected using light microscopy can be seen.[14] SEM can be used to observe particle down to approximately 0.1 µm. SEM has not historically been heavily used for regulatory purposes; however, recently it has become more popular for studying amphiboles in their natural setting.[15]

CARB Method 435

The California Air Resources Board (CARB) adopted a NOA-specific testing method in 1990 known as CARB Method 435. (M435 or CARB 435) California currently requires this method for the analysis of gravels or mineralized soils to detect the presence of asbestos. In this method, the soil/aggregate sample is weighed, dried, milled (crushed to fine powder) and then analyzed by PLM or TEM. The CARB method is designed to detect "loose" asbestos fibers, unlike sieving methods which are used to analyze ACM mixed in soil.[16]

PLM analysis utilizes either a 400 or 1000 point count to obtain a level of detection of 0.25% and 0.1% respectively. The PLM resolution is only accurate down to 0.25 µm; asbestos fibers/bundles smaller than that (specifically amphiboles) will not be detected using PLM. For the CARB 435 TEM Method the sample is weighed, dried, milled, put into suspension and analyzed. Results are given in percent asbestos by mass with sensitivities down to 0.001%.[17]

CARB 435 results are considered representative of the worst case conditions when the NOA aggregate becomes pulverized due to handling, use application or natural conditions.

EPA Region 1 Proprietary Soil Characterization

This is a proprietary method that separates and analyzes the different portions of the sample. PLM or TEM analysis may be used for the final analysis but the method includes observations of the fractions of materials present, classification by particle size and source categories, including organic, man-made, geological and asbestos materials. Since this method does not alter the materials present for analysis, results represents the materials as they exist in their natural setting. EPA Region 1 Soil Characterization provides a visual estimation of the weight percentage.[18]

Analytical Methods for Quantifying Asbestos in Air

Typically asbestos air samples are collected by "pulling" a known rate of air through a 25mm cassette by either an electric or battery operated vacuum pump. The air is forced through either a 0.45 micron (µm) (TEM) or 0.8 µm (PCM) mixed cellulose ester (MCE) filter which is then analyzed for asbestos fibers/structures

by TEM or PLM respectively. The concentration of airborne asbestos is calculated by the density of asbestos present on the filter and the volume of air sampled.

Phase Contrast Microscopy (PCM)

PCM (NIOSH 7400 Method) sampling method is a very common form of determining airborne fiber concentrations using a light microscope. The PCM method counts all fibers meeting the criteria of greater than 5 (µm) in length and 0.3 µm in diameter and meet the 3:1 aspect ratio (whether asbestos fibers or not) and reports results in fibers per cubic centimeter (f/cc) of air. PCM only counts fibers that are present in the fields observed, and does not identify the type of fiber (asbestos, cellulose, fiberglass, ect).[19]

This method is widely used for monitoring airborne fiber concentrations during asbestos removal/impacting projects, including determining OSHA approved worker exposures through a time-weighted average (TWA). TWA's calculate the average concentration of fibers a given worker was exposed to during his/her work shift.

Transmission Electron Microscopy (TEM)

For TEM air sampling analysis, the same collection procedure is used as with PCM sampling, except the cassette filter has a smaller pour size and results are reported in asbestos structures per square millimeter (Str/mm^2).[20] The results are reported in Str/mm^2 since the analysis includes all asbestos particles 0.5 microns and larger in length and may not necessarily be fibers. TEM allows for the analysis of very fine fibers while simultaneously determining their chemical composition and crystalline structure.

TEM Method 7402[21] is typically used when a PCM sample is found to have elevated fiber levels. Method 7402 analyzes a separate piece of the same cassette filter under an Election Microscope, opposed to a light microscope, which allows the analyst to determine if there is actually an elevated level of asbestos fibers, or if the fiber level was elevated due to a high number of miscellaneous fibers meeting the PCM counting criteria. This method is a useful complimentary tool to the PCM 7400 Method.

Elutriator Method

The Elutriator Method (Superfund EPA 540-R-97-028) begins by sieving the soil sample into fine a course fragments. The fine soil fractions are then placed in a closed tumbler chamber where any respirable dust created during tumbling is collected on air cassettes. The cassettes are then analyzed via TEM by ISO 10312[22] counting rules which are designed for samples collected from ambient

conditions, specifically indoors. This method is used to identify the amount of respirable fibers present within a soil sample.[18]

NOA AND EFFECTS ON ALASKAN CONSTRUCTION PROJECT

Historical Alaska NOA Incidents

Alaska has large known deposits of ultramafic and serpentine mineral ore located throughout the state. The documented cases of NOA encounters in the state have been limited and comparatively small. The potential for larger and more serious incidents can be expected to increase as public and professional awareness examine proposed activities with more scrutiny and existing material sites are exhausted and new site are developed. The following is a brief synopsis of several known NOA incidents in Alaska.

Juneau

In 2005, NOA was found to be present in Juneau's city-run Stabler's Point Rock Quarry causing several contractors to stop using the material until additional information and guidance was made available. Stabler's Point consists of the hardest local rock, metamorphosed mafic volcanic rock, which has been known to historically contain NOA. According to a Memorandum issued by the City/Borough of Juneau in 2005, scattered veins of asbestos-containing rock have also been reported in the following Juneau quarries: Lemon Creek, Treadwell, Upper and Lower Fish Creek and Bonnie Brae. The city believes that asbestos is likely to be present in most Juneau areas with high quality rock.[32]

Of the initial samples collected from the Stabler's Quarry two were found to contain tremolite asbestos at 3% and 5%.[33] Later some samples were also found to contain actinolite asbestos.[34] Blasting and rock crushing operations, which are known to release asbestos fibers from rock, had been occurring on a regular basis for several years prior to the discovery of NOA at the quarry. A private consulting firm hired by one of the contractors utilizing the quarry later stated given the presence of asbestos at the quarry, and the limited air sampling performed, it would appear as though workers were occasionally exposed to airborne asbestos levels in excess of workplace exposure standards.[34]

The rock aggregate obtained from the Stabler's Quarry was used for several years on a variety of private and commercial construction projects throughout the Juneau area and was a topic of concern for many local residents. In addition, aggregate collection (blasting) and refining (crushing) methods used were performed under general conditions meaning no methods were implemented to reduce airborne fiber concentrations during work activities. Since the discovery of NOA at the Stabler's Quarry, sampling efforts have been performed as well as requiring the use of wet methods and respirators for quarry workers.

As in most situations, once NOA was discovered activity was stopped until an assessment could be performed. In the Juneau case, the majority of the asbestos-containing gravel aggregate was used in construction projects where it would not be left exposed. The quarry itself implemented engineering controls

such as PPE for workers and the use of wet methods. In addition, attempts were made to focus mining efforts on portions of the quarry which yielded the lowest concentrations of NOA. Material from this mine is currently only used on projects where it will not remain exposed after completion; such as paved road construction. The City of Juneau originally was researching the possibility of implementing local NOA regulations; however, as of yet no regulations have be made.

Dalton Highway

As described by Perkins et al[5] the Dalton Highway (formerly known as the Haul Road) was constructed in the early 1970's and runs adjacent to the Trans-Alaska Pipeline connecting the Prudhoe Bay oil fields of Alaska's North Slope to the state highway system near Fairbanks. Most of the Dalton Highway is unpaved and is primarily utilized by pipeline employees and truckers supplying the oil fields.

In 2000, the Alaska Department of Transportation & Public Facilities (ADOT) awarded a contract to replace culverts and bridge abutments and to add surfacing material to approximately 20 miles of gravel road from Milepost (MP) 90 to 111 on the Dalton Highway. The project utilized surfacing gravel from a material site (MS) located at MP 105. The project contractor constructed a 1 to 2 foot thick gravel pad at MP 107 for a project staging area and temporary housing site since the closest permanent habitation was located approximately 70 miles away. An estimated 30 truckloads of gravel had been removed from MS 105 before workers noticed several large pieces of fibrous material suspected to be asbestos, after which aggregate extraction from this site was terminated.

After ultramafic rock containing actinolite and tremolite asbestos was confirmed at MS 105, concerns about worker exposure on the project site, as well as potential exposure in the temporary living quarters due to cross-contamination arose. Furthermore, questions were raised on how to safely complete the project, as well as address public health concerns for driving on the Dalton Highway. The project contractor retained a consultant to assess the problem, recommend work plan modifications, provide necessary worker training, perform exposure monitoring and reporting.

Results from the assessment included close to 700 breathing zone air samples collected from workers; 3% of which had asbestos fiber concentrations at or near 0.1f/cc per the NIOSH 7400 PCM[19] method. 36 of those samples were additionally analyzed via NIOSH 7402[21] (modified TEM analysis) which illustrated approximately 40% of the fibers observes were asbestos. Results concluded that workers who impacted the material the greatest, such as bulldozer and grader operators, were at the highest risk of exposure. Asbestos fiber release from rock crushing operations would have presumably been higher. Samples for potential motorist exposure were collected under conditions simulating "worse case scenario" - driving with windows open while following heavy equipment

which produced a visible dust cloud – indicated fiber concentrations well below the OSHA PEL.

The discovery of NOA at MS 105 on the Dalton Highway incurred significant delays and added millions of dollars to the project costs. After the assessment was completed, the MS 105 was abandoned for a MS which yielded non-NOA gravel to complete the project. The new MS was tested for the presence of NOA prior to starting work. Existing portions of road bed constructed with NOA along the project length were identified and capped with NOA-free material. Work practices and method of construction was modified to minimize worker exposure and NOA accessibility.

Similar to Juneau, the NOA concern at Material Site 105 on the Dalton Highway was discovered after workers had begun to remove and use the material. During this project; however, the NOA-containing aggregate was used to construct the gravel pad for temporary living quarters, as well as to resurface approximately 20 miles of the unpaved Dalton Highway. The NOA assessment for this project illustrated that some workers were at risk of being exposed to asbestos above regulatory limits, but motorist traveling down the gravel highway, in a "worse case scenario" were not. Regardless of the remoteness of the area and the low health risk it posed to the public, it was agreed that known NOA-containing gravel on the highway would be capped and work practices would be modified to address NOA exposure concerns during project construction. Equipment and camp facilities were decontaminated and workers were provided training. MS 105 was no longer utilized as an aggregate source for the remainder of the project and has been closed indefinitely as an aggregate source.

Ambler

Ambler is Kowagniut Inupiat Eskimo village located in northwestern Alaska along the North bank of the Kobuk River. Ambler is approximately forty-five miles north of the Arctic Circle, one hundred and forty miles east of Kotzebue and three hundred and twenty miles northwest of Fairbanks.

In 2003, the ADOT was conducting routine soil testing in preparation for a scheduled Ambler project requiring the use of gravel aggregate. Tests results reported the presence of chrysotile asbestos in the aggregate samples taken from the local gravel pit. This was the only available gravel aggregate source for Ambler and consequently had previously been used to construct the community airport, roads and utility systems. The pit is commercially owned by the local development corporation (NANA), who closed and placarded the pit soon after the NOA discovery.

All roads in Ambler, including the airport runways, are finished with unpaved gravel surfaces. All-terrain vehicles (ATV's) are the most prevalent means of transportation and create substantial visible dust, generated from the unpaved

community road surfaces, during summer months. In 2007, the Agency for Toxic Substances and Disease Registry (ATSDR) performed an exposure investigation[35] primarily focused on ATV generated dust and potential asbestos exposure for both ATV riders and the general public. The assessment concluded that exposure to visible dust generated from the Ambler roadways created a higher than average health risk concerning asbestos.

In addition to the asbestos related health concerns, several community projects which require the use of the gravel aggregate have subsequently been put on hold or cancelled. In 2004, a multi- year effort was undertaken by R&M Consultants to locate an aggregate source free of NOA. However, no location within a reasonable distance (15-25 miles) was identified that would definitively yield non-NOA aggregate.[36] Since the NOA discovery in 2003, the gravel pit has been restricted from use. Due to the inability to use gravel for regular maintenance, the Ambler runway began to dilapidate until the crown had lost its vertical rise and ruts and potholes became increasingly prevalent and obnoxious due to lack of drainage and replenishing aggregate. The runway was also a major source of dust emissions from the airplanes prop wash during take off and landing. The runway was operated by ADOT that concluded runway repairs were required to continue safe operations. ADOT also decided due to the NOA concern in the community they would apply a dust-suppressing poly synthetic palliative called Durasoil to the surface of the runway after the repairs were complete. ADOT had experienced positive results using this form, and variety, of dust suppressant in other remote areas of Alaska to control fugitive dust. Since no non-NOA containing aggregate sites were available, the known NOA-containing quarry was utilized as the aggregate source for the runway repairs. A consultant was retained to assist with a Ambler public meeting, the development of NOA project work plan, training of project workers, community relations during construction while oversight, monitoring and project reporting. Monitoring documented a Negative Exposure Assessment (NEA) with no air sampling results exceeding the OSHA PEL at any point during the project.[37]

Since the discovery of chrysotile in the Ambler gravel pit, the following NOA-related investigative efforts have been performed to date:

- **Asbestos at Ambler Material Pit Preliminary Assessment**.[38] Alaska Department of Health & Social Services, Division of Public Health, Section of Epidemiology, October 23, 2003.
    - Chrysotile asbestos discovered in Ambler quarry during routine soil testing.
    - Quarry was closed indefinitely.
- **Limited Health Survey**.[39] Alaska Department of Labor and Workforce Development, Occupational Safety & Health Labor Standards and Safety Division, November 2003.
    - School area soil, interior dust and air samples confirmed Chrysotile NOA

- Recommended material site cap, school cleaning, HEPA filtration and administrative controls to control summer risk

- **Ambler Airport Rehabilitation: Airport Materials Site Investigation**.[36] R&M Consultants. 2004 Geotechnical Report.
  - Soil boring was performed around Ambler area to find an alternative, non-NOA gravel source. Results indicated that no non-NOA gravel source was available within reasonable distance to Ambler.
- **Naturally Occurring Asbestos Summary of Requirements and Recommendations.**[40] Alaska Native Tribal Health Consortium (ANTHC). August 2005
- **Public Health Evaluation and Assessment – Interim Report**.[41] May 20, 2005. Middaugh, John P.
  - Medical records review for residents of Ambler, Kobuk, Shungnak and Kiana, to see if asbestos-related diseases had occurred
  - No asbestos-related diagnoses on death certificate; no mesothelioma cases dating back to 1970
  - On review of chest X-ray, nine people with pleural plaques suspicious for asbestos exposure were identified.
- **Investigation of Possible Environmental Asbestos Exposure in Northwest Alaska – Interim Report**.[42] Chimonas, Marc; Middaugh, John and Arnold, Scott. June 15, 2005: Alaska Division of Public Health
  - Expert review of 130 chest X-rays from villagers 50 and older; interviews conducted
  - Twenty-one individuals with either pleural plaques or pulmonary fibrosis suspicious for asbestos exposure. Some were exposed to asbestos occupationally.
  - Not possible to definitively establish or exclude environmental asbestos exposure as a cause of disease
- **Exposure Investigation Final Report**.[35] Agency for Toxic Substances and Disease Registry. June 2007
  - Chrysotile NOA confirmed in gravel used to construct roads
  - Ambient sampling confirmed airborne NOA, but not likely to be a public health concern
  - Visible airborne dust levels behind four-wheelers exposed trailing riders to a high-level of respiratory exposure and confirmed public health concerns.
- **Federal Aviation Administration, Ambler Airfield, Alaska Winter Exposure Assessment.**[43] ***NORTECH*** Environmental Engineering, Health & Safety. June 2008 Report.
  - FAA technician tasks were performed while personal and area air samples were running. Results indicated area fiber concentrations were below 0.01 f/cc while the personal TWA was below 0.10 f/cc.
  - Frequent cleaning of facilities was recommended.

- **Federal Aviation Administration, Ambler Airfield, Alaska Summer Exposure Assessment**[44] ***NORTECH*** Environmental Engineering, Health & Safety. August 2008 Report.
    - FAA technician tasks were performed while personal and area air samples were running. Results indicated area fiber concentrations were below 0.01 f/cc while the personal TWA was below 0.10 f/cc. Area samples were also collected while planes landed/took off with all results below 0.01 f/cc.
    - Frequent cleaning of facilities was recommended.
- **Ambler Airport Dust Suppression**.[37] ***NORTECH*** Environmental Engineering, Health & Safety in association with R&M Consultants. November, 2008 Report.
    - Utilized NOA-containing gravel to resurface runway using "wet methods" as needed. Palliative applied to runway surface for dust suppression.
    - Personal and area air monitoring illustrated the PEL and clearance concentrations were not exceeded.

In addition to the studies listed above, a *Naturally Occurring Asbestos Dust Control Working Group* has been established as a result of the Ambler NOA. This working group is a consortium of federal, state and local groups who help to manage and oversee NOA-related projects and concerns in Ambler in the interest of public safety. The group consists of the City of Amber, ANTHC, ATSDR, USRD, HIS, Maniilaq, DOH and ADOT.

Ambler is located between the Jade Mountains and the Cosmos Hills; small mountain ranges along the southern slopes of the Brooks Range. The rocks in these mountains are mineral-rich and contain large ore deposits. Bornite, reportedly one of the world's richest copper deposits, exists within these ranges and major jade deposits are found in the Jade Mountains. Serpentine rocks, commonly containing asbestos, have been mapped in both these ranges.[45, 46] An asbestos mine was temporarily operated at Asbestos Mountain in the Cosmos Hills near Kobuk. The asbestos has apparently been eroded from these rocks and transported throughout the area by glaciers, water and wind. Sedimentary deposits have been found with varying concentrations of asbestos throughout the area.[36]

The NOA found in Ambler poses many issues not previously encountered in Alaska. Ambler requires the use of gravel to maintain the limited road system, runway, public utilities and local projects. With no apparent asbestos-free gravel sources within a reasonable distance and only year round air travel access identifying methods to use NOA safety are significant to the regional corporation source owner and local community. ADOT held public meetings in Ambler to obtain feedback, report progress and provide information regarding NOA, asbestos health hazards, risk and effective methods to reduce exposure (avoidance of visible dust clouds, road watering, regular household cleaning to

remove visible dust accumulations, removing footwear prior to entering homes and driving slower on the roads, etc).

Alaskan Construction Projects

The presence of NOA and its effects on construction projects in general, as well as its effects on certain Alaskan Construction projects, are noted in other sections. Here we examine the occurrence of NOA in Alaska and its likely effect on future construction projects. Most heavy construction projects such as dams, roads, airports, pipelines, and railways require large quantities of natural materials, sand, rock, and fill soil. These materials are excavated, processed, and transported to the sites where they are needed. Ideally the transport distance from excavation to installation and the processing steps are minimized. In any case, the excavation, processing, and transport are key cost drivers in most heavy construction projects. If material sources proximate to the project have NOA or are likely to contain NOA, the project owners and designers must make a decision to obtain NOA-free materials further from the project at a greater cost, or to use the NOA materials and make allowances for handing the NOA material in such a manner to keep airborne asbestos fibers and their human health hazards to a minimum. Other sections of this report deal with methods of ameliorating fiber release from NOA-containing materials after they have been installed and regulations in other states that have established standards for NOA materials that establish benchmark concentrations, which, together with prudent work methods, are protective of human health.

This chapter will: examine the need for gravel and similar materials in Alaska, discuss the mineralogy of Alaska with respect to asbestos, present a map of mineral occurrences that may contain NOA and their location with respect to transportation corridors, and examine the implications for projects. Finally we will present some conclusions.

Alaska Gravel Needs

Many heavy construction projects move large quantities of soil within their right of way. These are often called "unclassified materials." Over these are then placed "classified" or "select" materials. The exact definition and qualities of these material are dependent on the particular type of project and its specifications. These materials generally must be imported from off the right of way, usually from special "material sites." Here we will just refer to those imported materials collectively as "gravel." We will discuss them in relation to historical and known current demands for gravel, as well as estimates for future projects.

Highways

Here we discuss some likely gravel needs in the DOT's Northern Region. Currently, for projects on the highway system, there is gravel available, although

it may involve a longer haul distance. Generally, these sources have not been checked for NOA. New sources are needed for the routine maintenance (M&O) activities and routine construction projects. DOT Northern Region used 2 million CY from 64 different material sites in 2007 and 1.6 million CY from 40 different materials sites in 2008.[23] The DOT generally has enough material for maintenance and operations (M&O) and new projects, although most new projects are improvements to existing roads. The large rocks used to armor stream banks and other hydraulic structures is known as "rip rap" and rocks large enough for rip rap are usually scarce.

The Trans Alaska Pipeline System (TAPS) and future 48"Gas Pipeline

The TAPS project used 73 million CY of gravel, total. The workpad required 32 million CY. [24] Of that, the Dalton Highway (Haul Road) required about 13 million CY for its prism. Many access roads to material sites were required for Haul Road construction, and may have been counted in either the Haul Road number or not. Certainly the 225 access roads were counted in the 73 million CY. Thus, if the Haul Road and its material sites were counted in, the TAPS project would have required 50 to 60 million CY of gravel without the Haul Road. The most likely route of the proposed gas line will follow the Dalton Highway and the Alaska Highway, there will not be a major new highway. However we do not believe that Alyeska will allow the gas pipeline to use Alyeska's workpad or construct close to TAPS, therefore new workpads and many new access roads will be required. There will be new camp pads, airports, and compressor stations. Not counting the DOT upgrade work, we estimate that the gas line will need to mine 50 to 60 million CY of new gravel. (Referring the annual DOT usage, the new pipeline will require 25-fold the annual DOT requirement, and most of that in the first year or two of construction).

Special highway construction

If the gas line is built, AK DOT will need to reconstruct many miles of substandard road. Large sections of the Dalton Highway need reconstruction.

Airports

Virtually all airport construction and upgrades require material from local sources. In some locations material is barged in from long distances, but this is expensive. There are about 256 bush airports owned by the ADOT.[25] A new small airport may require 25,000 CY of gravel. In addition, gravel is needed for access roads and maintenance of both the runway and the access roads.

Railroad Extension

There is currently a study regarding extending the Alaska Railroad from Fairbanks to Delta (90 miles) and from Delta through Canada (200 miles).[26] A rough estimate for that yields 14 million CY of fill, gravel, and ballast for the main line. Much of the line would be close to the Alaska Highway. However access roads, camps, and ancillary structures – there will be many bridges – may require another 5 million CY.

Mining and other industry

Mining needs gravel for access roads. Smaller mines generally have some material available on-site, but major new mines will require gravel from outside the mine. Extrapolation from Alyeska's numbers (73 million CY in 800 miles) one could say 91,000 CY per mile of new infrastructure. That would include main road and roads to gravel sources and pads for ancillary structures. Minimizing haul distances is economical, which tends to increase the number of material sites. Two new material sites per mile might be a good estimate.

Balance between Existing and new MS

Most of the smaller scale road maintenance is done with existing gravel sources. The volume is generally not large and the costs of opening a new pit are often greater than the haul costs from a more distant pit. A major project will require a lot of gravel and thus justify the extra costs of opening closer pits. Besides direct costs, safety is an important consideration when hauling of gravel on an active highway, and minimizing the number of construction rigs on a traveled highway is good practice.

Since the existing open material sources are just adequate for current needs, it is clear that many new gravel sources will be needed if any of the major projects come to fruition.

Mineralogy of Alaska with respect to asbestos

"Asbestos" is a commercial term, not the name of a particular chemical or geological rock type. While there are six asbestos types that are regulated due to known human health effects, there are other, similar minerals that are not regulated. Some of these may likewise have adverse health effects. Within minerals of a certain chemistry, some of the mineral may have crystallized into large crystals or masses, while other portions may have crystallized in fibers or bundles of fibers. In general, "Asbestos is defined as certain minerals that have crystallized in a finely fibrous habit, in bundles of easily separable fibers and/or fibers which are composed of smaller diameter fibrils, and with a hair-like elongated shape resembling organic fibers, with exceptionally smooth faces and displaying unusual adamantine or silky luster" [8]

As noted by Gosen[31] asbestos is most commonly defined as the asbestiform variety of several specific, naturally occurring, hydrated silicate minerals. Asbestos typically includes chrysotile, the asbestiform member of the serpentine group, and several members of the amphibole mineral group, including, but not limited to, the asbestiform varieties of (1) riebeckite (commercially called crocidolite), (2) cummingtonite-grunerite (commercially called amosite), (3) anthophyllite (anthophyllite asbestos), (4) actinolite (actinolite asbestos), and (5) tremolite (tremolite asbestos). Other amphiboles are known to occur in the

fibrous or asbestiform habit,[27] such as winchite, richterite[30] and fluoro-edenite,[29,28] but usually they have not been specifically listed in the asbestos regulations. The many different ways that asbestos and asbestiform and other related terms have been described are summarized in Lowers and Meeker.[30]

The geological conditions necessary for the formation of NOA have been reviewed and the rock types known to host NOA include serpentinites, altered **ultramafic** and some **mafic** rocks, dolomitic marbles and metamorphosed dolostones, metamorphosed iron formations, and alkalic intrusions and carbonatites.[31] In summary, there are many types of minerals that might contain asbestos, and these include rock types very common in Alaska.

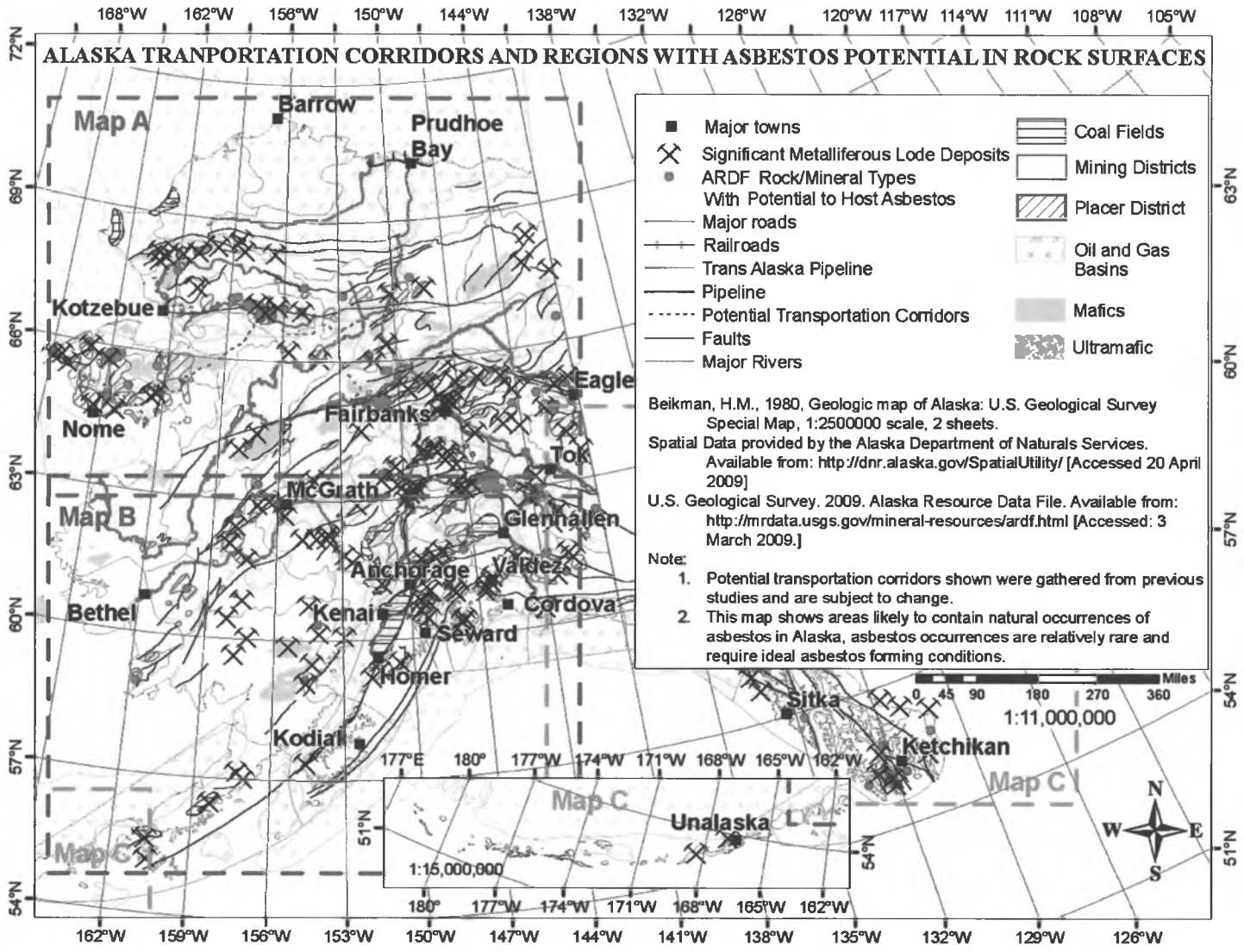
Map of mineral occurrences that may contain NOA and their location with respect to transportation corridors

Next follows some maps that show the regions of Alaska that may contain asbestos, based on the mineral type. The mineral types are taken from the above reference sources, and the mineral locations are based on the USGS map, *Geologic map of Alaska, U.S. Geological Survey Special Map, by H. M. Beikman, 1980.* In addition, in Appendix 3, is the USGS database of all geological exploration and mining that identified asbestos. These have been mapped along with the transportation corridors identified by ADOT planning. Note the northern region had more detailed planning maps.

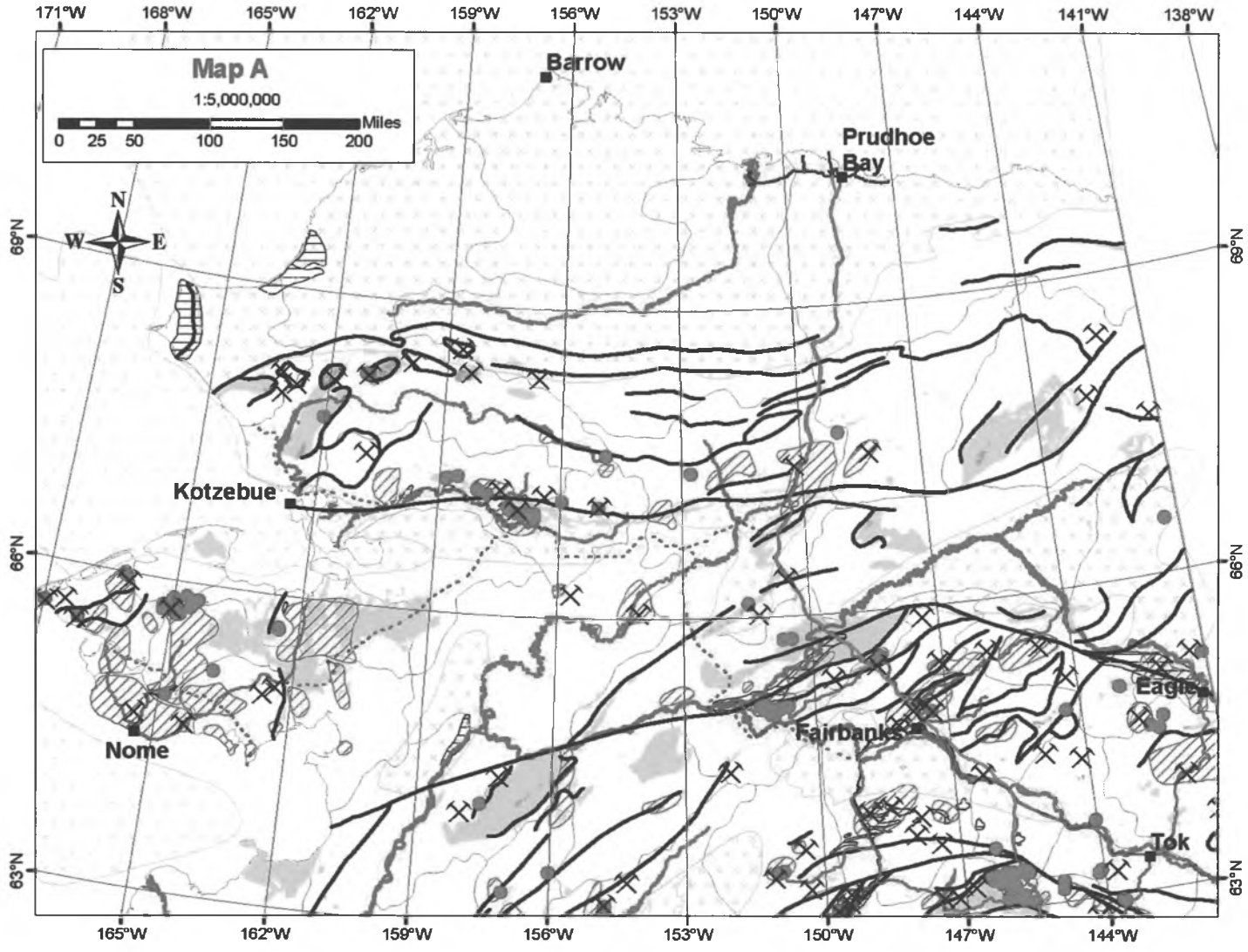
It is important to realize that the map is of the bedrock, or parent material. If the rock erodes, it will move down-gradient via colluvial or alluvial transport. Thus asbestos might be found in sites distant from the origins.

The first map is an index, and the following three maps show greater detail.

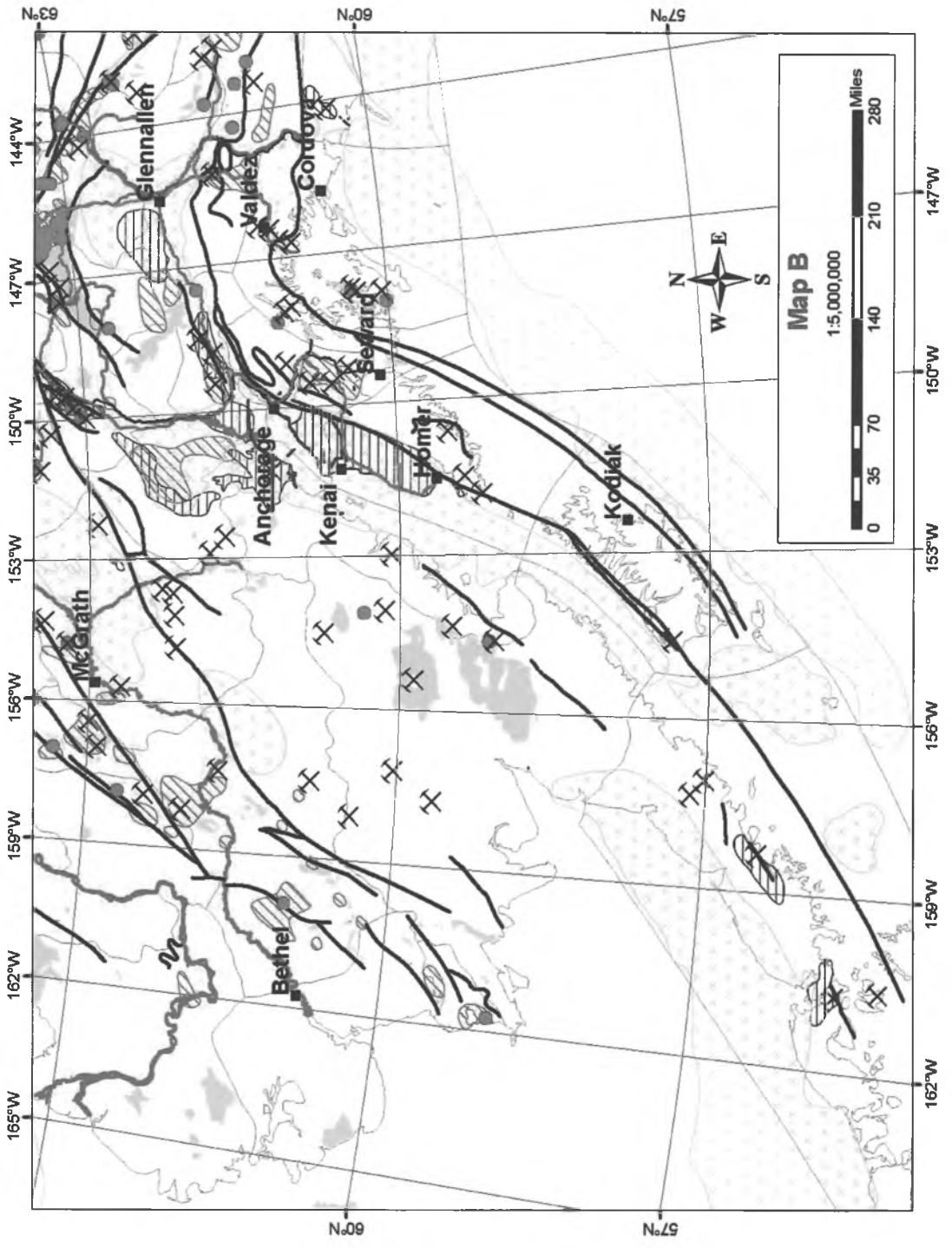
Acknowledgement
The work of Kyle Obermiller, an undergraduate student in UAF's Geological Engineering program on the geological mapping was appreciated and is hereby acknowledged.


ALASKA TRANPORTATION CORRIDORS AND REGIONS WITH ASBESTOS POTENTIAL IN ROCK SURFACES
Map A
Map B
Map C
Barrow
Prudhoe Bay
Kotzebue
Nome
Fairbanks
Eagle
Tok
McGrath
Glennallen
Anchorage
Valdez
Cordova
Bethel
Kenai
Seward
Homer
Kodiak
Sitka
Ketchikan
Unalaska
Major towns
Significant Metalliferous Lode Deposits
ARDF Rock/Mineral Types With Potential to Host Asbestos
Major roads
Railroads
Trans Alaska Pipeline
Pipeline
Potential Transportation Corridors
Faults
Major Rivers
Coal Fields
Mining Districts
Placer District
Oil and Gas Basins
Mafics
Ultramafic
Beikman, H.M., 1980, Geologic map of Alaska: U.S. Geological Survey Special Map, 1:2500000 scale, 2 sheets.
Spatial Data provided by the Alaska Department of Naturals Services. Available from: http://dnr.alaska.gov/SpatialUtility/ [Accessed 20 April 2009]
U.S. Geological Survey. 2009. Alaska Resource Data File. Available from: http://mrdata.usgs.gov/mineral-resources/ardf.html [Accessed: 3 March 2009.]
Note:
1. Potential transportation corridors shown were gathered from previous studies and are subject to change.
2. This map shows areas likely to contain natural occurrences of asbestos in Alaska, asbestos occurrences are relatively rare and require ideal asbestos forming conditions.
Miles
0 45 90 180 270 360
1:11,000,000
1:15,000,000
N
S
E
W

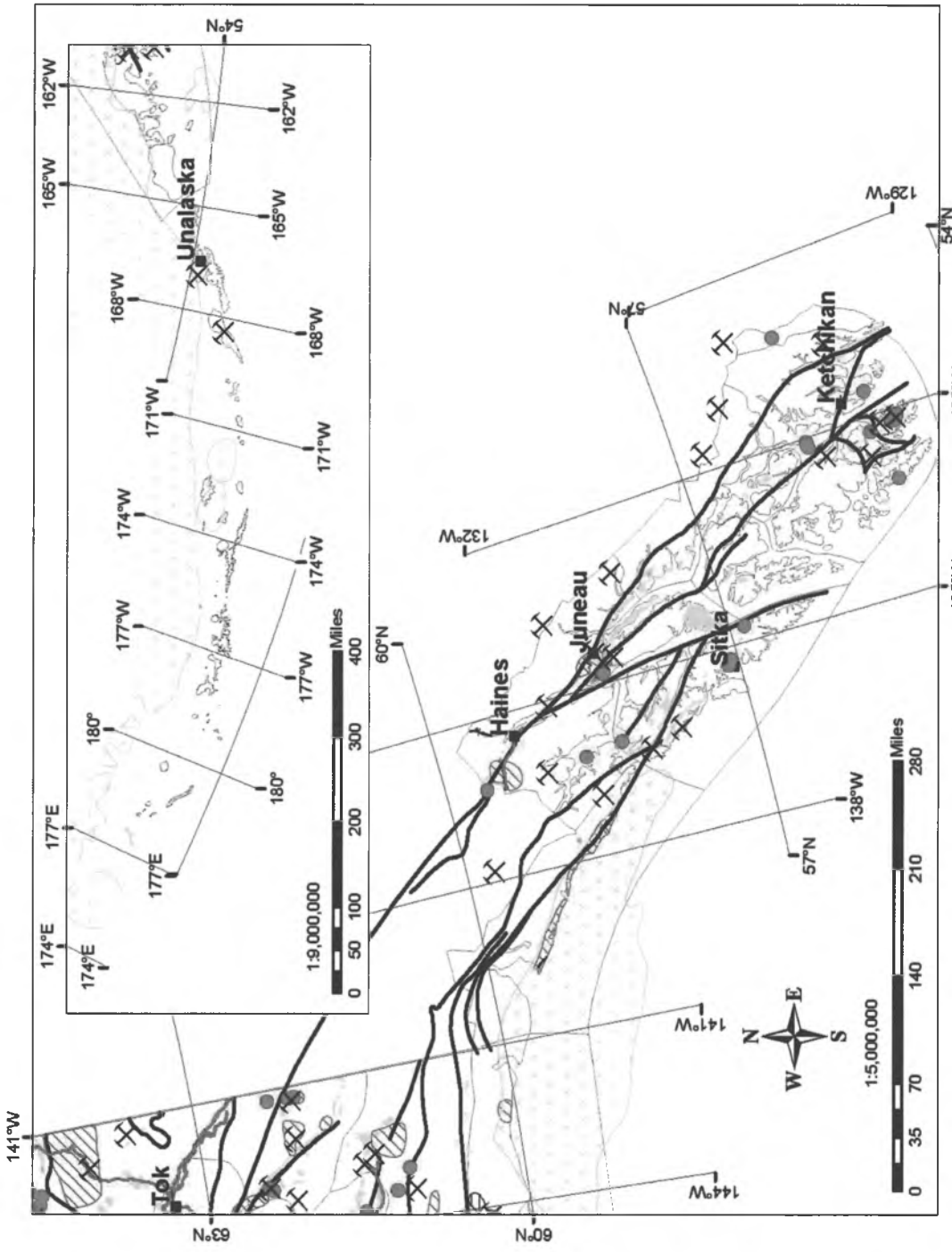
Index Map



Map A, Northern Alaska



Map B South Central



Map C, Southeast and panhandle

Conclusions and recommendations regarding future projects.

It is clear that many of Alaska's current transportation corridors traverse regions containing minerals that may contain NOA. Although Alaska is a huge state, as a practical matter, gravel must be obtained reasonably close to the project. It is also clear that large quantities of gravel will be needed for future projects. While not all the areas that mineralogy mapping has identified as possible asbestos sources will contain asbestos, the mining and geological exploration done in those areas has identified that asbestos is found in these regions. Since asbestos was often found during the exploration for other minerals, it seems likely that asbestos is fairly common in those regions. We know of projects such as Ambler and the Dalton Highway that have been impeded by NOA, thus it is reasonable to expect future projects to be impeded, if they traverse areas with mafic and ultramafic rock and other minerals as identified on the map.

While finding NOA in pre-construction geological exploration is usually a negative for the project, its untoward effects are paltry compared to finding asbestos once construction using the material has started. Therefore all projects that use gravel or other mineral resources in areas identified with mafic or ultramafic rock, or down-gradient or downstream from those minerals must include analysis for asbestos as part of the material site exploration process. If asbestos is identified, its type and extent should be quantified, if possible.

If asbestos is found the project managers must make a decision. Non-asbestos containing earth materials should be used if possible. However if material without asbestos is not readily available, the project managers must make a decision about using the material with NOA or, presumably, importing non-NOA material, or perhaps rerouting or abandoning the project. Using the guidelines and information presented in other sections of this paper will help. Reiterating the key conclusion – if a project's material source is in a region identified on the maps in these chapters as likely to contain asbestos, the material site exploration phase must include an assessment of the material site for asbestos.

Footnote to Chapter
Summary of Asbestos Minerals

Table 1 Summary of minerals where fibrous crystal form or cleavage has generated concern (not an exhaustive list) Mineral Asbestiform or fibrous probability Remarks Serpentine minerals Chrysotile Always Most common type of asbestos; almost the only form mined today Antigorite Rare Amphibole minerals Riebeckite Probable (crocidolite) Previously mined as asbestos in South Africa, Australia and Russia, but not common elsewhere Cummingtonite-grunerite Probable (amosite) Previously mined as asbestos in South Africa. Non-asbestiform habit is common Tremolite-actinolite Probable Widespread occurrence both as asbestiform and non-asbestiform habits, but only rarely mined as abestos Winchite-richterite Probable Rarely encountered Anthophyllite Probable Previously mined as asbestos in Finland and in the eastern USA. Often associated with talc. Arfvedsonite, fluor-edenite, etc. Possible Rarely encountered Zeolites Erionite, mordenite Almost always fibrous Not considered as asbestos, rarely encountered Clay minerals Palygorskite, sepiolite Fibrous habit possible or common Not considered as asbestos, rarely encountered Others Brucite, wollastonite, talc, balangeroite Fibrous habit possible or common Not considered as asbestos, and, except for talc, rarely encountered

Table 1 Summary of minerals where fibrous crystal form or cleavage has generated concern (not an exhaustive list)

Mineral	Asbestiform or fibrous probability	Remarks
Serpentine minerals		
Chrysotile	Always	Most common type of asbestos; almost the only form mined today
Antigorite	Rare	
Amphibole minerals		
Riebeckite	Probable (crocidolite)	Previously mined as asbestos in South Africa, Australia and Russia, but not common elsewhere
Cummingtonite-grunerite	Probable (amosite)	Previously mined as asbestos in South Africa. Non-asbestiform habit is common
Tremolite-actinolite	Probable	Widespread occurrence both as asbestiform and non-asbestiform habits, but only rarely mined as abestos
Winchite-richterite	Probable	Rarely encountered
Anthophyllite	Probable	Previously mined as asbestos in Finland and in the eastern USA. Often associated with talc.
Arfvedsonite, fluor-edenite, etc.	Possible	Rarely encountered
Zeolites		
Erionite, mordenite	Almost always fibrous	Not considered as asbestos, rarely encountered
Clay minerals		
Palygorskite, sepiolite	Fibrous habit possible or common	Not considered as asbestos, rarely encountered
Others		
Brucite, wollastonite, talc, balangeroite	Fibrous habit possible or common	Not considered as asbestos, and, except for talc, rarely encountered

OTHER STATES NOA REGULATIONS

Several large areas of asbestiform mineral deposits exist in the United States. These deposits host both serpentine and/or amphibole minerals in mafic and ultramafic rock formations and have varying concentrations of asbestos. Some states have implemented policies in order to safely address NOA concerns while attempting to limit adverse affects on projects in which NOA-containing rock will be impacted.

Virginia

Fairfax County has adopted a two stage approach for dealing with local NOA. The Fairfax County Health Department, Air Pollution Control Division (Fairfax APCD) oversees the potential public health concern associated with exposure to asbestos generated from construction activities. They enforce the Fairfax APCD Control Requirement Directives 1 and 2 for Construction Activities in Actinolite/Tremolite Soil Sources (CRD 1 and 2). The Virginia Department of Labor and Industry, Occupational Health Division (VDLI) regulates the interior of the construction site as it pertains to employee exposure under the Asbestos Standard, 29 CFR 1926.1101. These two agencies work in concert to control the emissions of asbestos fibers during work activities. The program is founded in the approach of proper disposal and capping of both the NOA source and constructed project. The following is a brief summary of CRD 1 and 2:

Directive 1 – Standards of performance for Actinolite/tremolite soil sources

1. Compliance Plan - A written compliance plan must be submitted to the Fairfax APCD for review and approval before work begins on the construction project.

2. Dust Control - Effective dust control must be practiced at all times.

3. Air Monitoring – Air monitoring must be performed during all phases of earthwork involving actinolite or tremolite containing material and comply with ambient air concentration standards for asbestos.

4. Disposal and Cap - An appropriate, safe, disposal site must be used to dispose of actinolite or tremolite contaminated soils whether they are to remain on site or be removed. All final disposal areas and the finished grade of the developed land shall be covered with six inches of clean compacted material.

5. Notification – Sufficient notice of asbestos shall be given to all employees and contractors on the site in compliance with the OSHA Asbestos Standard (29 CFR 1926.1101).

Directive 2 – Monitoring and Reporting Requirements

1. Monitoring requirements
    a. The monitoring and sample analysis will be conducted by competent personnel and closely supervised by an experienced individual certified with NIOSH 582 course training or equivalent [we should expound on that]
    b. Air monitoring samples will be collected.
    c. Project Reports of the perimeter, area, and personal monitoring results will be submitted to the Fairfax County Health Department.

2. Project Reporting Requirements
    a. A written description of the work activities.
    b. Diagram of the Construction Project.
    c. Air Monitoring Results.
    d. Violations to Directive 1 detected by air monitoring

3. A 24-hour average standard for asbestos ambient air concentrations is calculated

John Yetman was interviewed on the effectiveness of Fairfax County's NOA program, as well as public and commercial response. Mr. Yetman is a Senior Environmental Health Specialist with the Fairfax County Health Department, and has managed the county's NOA program for over 20 years. The NOA program described above has been in effect in Fairfax County since 1993. The NOA found in Fairfax County is typically beneath several feet of clay, so the program is designed exclusively for excavation and soil impacting activities. The soils of Fairfax County have been mapped, with known NOA encompassing 11 square miles of the 400+ square mile county. The geological maps are reportedly accurate to +/- 500 feet. If excavation/soil impacting activities are to occurring within this 11 square mile area, the contractor is required to submit a compliance plan as mentioned above.

The compliance plan describes location and activities associated with the project, dust control methods and worker and public safety controls. If the project is located within the NOA area per the soil map, the contractor is required to have a compliance plan approved through the county health department. If the project site is located within 500 feet of the mapped boundary, the contractor may submit a limited compliance plan which outlines the same requirements as the full plan; however, implementation of the plan is only required if suspect NOA is discovered.

Dust control consists primarily of applying water and/or slowing operations so that no visible dust is present. Air monitoring is required at all times soil impacting activity is occurring which consist of both area and personal sampling using PCM cassettes and analysis. The area monitoring is performed at several points on the perimeter of the "work zone", a term used to describe the area of

the jobsite that has controlled access from the public. Area monitoring is a 24-hour average with the Fairfax County Air Pollution standard being 0.02 f/cc. Personal samples are also collected from workers inside the work zone to determine and 8-hour TWA with a maximum allowable fiber concentration of 0.10 f/cc. All air monitoring is required to be performed by a third party. All air monitoring results are required to be submitted in a final close out report; however, exceedences in airborne fiber concentrations are reported to the county health department immediately. Samples with elevated fiber levels may be further analyzed using Method 7402 which utilizes TEM to determine if the fibers meeting the PCM counting rules are asbestos.

Mr. Yetman explained that NOA-containing soils are encouraged to remain onsite; however, soils can be utilized as fill for other jobsites located within the known NOA area. If soils are removed from Fairfax County, it is strongly recommended the contractor inform the recipient of the possible contamination in the soil, and obtain a signature of acknowledgement.

Directive 1 also requires that 6 inches of clean cap be applied to all disturbed soils within the NOA area. Allowances are made when the soil is to be covered with vegetative-sod, in which case only 3 inches of cap is required.

Mr. Yetman felt that the program has been very successful for the county. He explained that the public and local contractors have become accustom to the NOA requirements, and they very rarely experience issues. He also noted that fiber level exceedences have become less common as contractors have developed effective means for dealing with dust suppression.

The "backbone", as described by Yetman, of Fairfax County's NOA management plan is the county soil map. This is an efficient way to identify if NOA will be a concern for the project, and if a compliance plan is required. Additionally, Mr. Yetman explained that the Health Department makes certain to explain the liability associated with removing NOA-containing material offsite, or outside of Fairfax County, which has seemed to reduce this occurrence.

California

The State of California Air Resources Board (CARB) has implemented regulations designed to significantly decrease the chances that asbestos in soil and rock can become airborne, and thus minimizing public exposure to asbestos. These state regulations are referred to as the Airborne Toxic Control Measures. (ATCM's) The first ATCM applies to surfacing applications and was originally adopted in 1990, but was amended in 2001. The second ATCM applies to construction, grading, quarrying and surface mining operations.

According to the CARB's Implementation Guidance Document for the Asbestos Airborne Toxic Control Measure for Surfacing Applications[47], the first Asbestos

ATCM prohibits the sale or use of restricted material for unpaved surfacing unless it has been tested and found to have an asbestos content that is less than 0.25 percent. The ATCM defines restricted materials as aggregate material extracted from an ultramafic (or ultrabasic) rock unit as shown on referenced geologic maps; ultramafic rock including serpentine; or aggregate material shown to have an asbestos content of 0.25 percent or more; or any mixture containing 10% ultramafic/serpentine materials.

The test method required to determine the asbestos content is either CARB Method 435 or a method approved by the CARB's Executive Officer. If restricted material is being sold or supplied for surfacing purposes, the producer of the material (quarry operator) is required to provide the recipient the following information: the amount of material sold or supplied; the dates the material was sold or supplied, sampled and tested; and a statement verifying that the asbestos content of the material is less than 0.25 percent. Anyone who sells or supplies restricted material, but did not extract the material from the ground, must provide all of the above information with the exception of the date that the material was sampled and tested. If restricted material is being sold or supplied for non-surfacing purposes the supplier must notify the recipient with a warning statement that the material may contain asbestos.

The amended ATCM contains the following surfacing exemptions:

- sand and gravel operations;
- roads located at quarries and mines;
- maintenance operations on existing roads;
- emergency road repairs;
- asphalt and concrete materials;
- landfill operations;
- results of a geologic evaluation;
- steep surfaces with limited access;
- surfacing applications in remote locations;
- roads located at construction sites; and
- riprap (material placed along water course or shoreline to prevent erosion)

The amended ATCM also allows the district authority to require geologic evaluation for the presence of rocks that may contain asbestos and the authority to require testing of any aggregate material for its asbestos content. This authority would typically be exercised if there is credible evidence indicating the potential presence of asbestos outside of an ultramafic rock unit.

There are two possibilities for the regions with mapped mafic or ultramafic rock, either the asbestos content is ≥0.25% or the asbestos content is <0.25. If the asbestos content is <0.25%, the material can be used for surfacing or any other use, if the material has ≥0.25% asbestos, its use is restricted. Minerals taken from mapped areas are restricted and must be tested and certified prior to use. In addition to mapped restricted areas the program includes a number of

exemptions and has district authority to implement regional priorities. The 0.25 threshold was derived from the detection limit per the test method. Since only PLM 400 point count is required, if one fiber is observed in the counting area the sample has 0.25% asbestos. If fibers are observed outside of the counting area, the sample is reported as having "trace" amounts of asbestos present, and be considered <0.25% asbestos.

Any person who sells, supplies, or offers for sale or supply restricted material for non-surfacing applications must provide with each sale or supply a written receipt containing the following statement:

"WARNING!
This material may contain asbestos.
It is unlawful to use this material for surfacing or any application in which it would remain exposed and subject to possible disturbances.
Extreme care should be taken when handling this material to minimize the generation of dust."

Thus, NOA-containing material may be used for construction projects as long as the affected material is not to remain exposed. If NOA-containing aggregate is used for road construction, the dust suppressing method used, such as capping, must be designed to last for an extended period of time (ie greater than 5 years). Asphalt or concrete would suffice as an appropriate method, while water application or other short-term palliatives would not.

If an approved asbestos bulk test method has been used to perform two or more tests on any one volume of aggregate material, whether by the same or a different person, the arithmetic average of these test results shall be used to determine the asbestos content of the aggregate material.

The sampling frequency required for determining the asbestos content of any aggregate material is required to be the following unless the APCO approved an alternate testing frequency.

- Storage Piles and Conveyer Belts – Minimum of 3 random grab samples per 1000 tons
- Aggregate Covered Surfaces – Minimum of 3 random grab samples per
    - 1 mile of road
    - 1 acre of surface area
    - 2 miles or 2 acres of road shoulder

The second ATCM, which applies to construction, grading, quarrying, and surface mining operations was adopted in July, 2002. This ATCM requires more stringent dust control measures at these operations. For example, an approved dust mitigation plan may be required, depending on the size of the project, or proximity to a receptor such as a hospital, school, day care center, work site, business, residence or permanent campground. The requirements for road

construction and maintenance differ somewhat from those for general construction and grading (e.g., development of a shopping center). Other requirements of the proposed ATCM address post-construction stabilization of disturbed areas. These areas must be revegetated, paved, or covered with at least three inches of non-asbestos-containing material. NOA-containing material may be transported if the loads are adequately wetted or covered with tarps.

According to the CARB's Regulatory Advisory: Asbestos Airborne Toxic Control Measure for Construction, Grading, Quarrying and Surface Mining[48], the second California ATCM applies to road construction and maintenance, construction and grading operations, and quarries and surface mines when the activity occurs in an area where naturally-occurring asbestos is likely to be present according to currently published NOA maps. Areas are subject to the regulation if they are identified on maps published by the department of Conservation as ultramafic rock units or if the Air Pollution Control Officer (APCO) or owner/operator has knowledge of the presence of ultramafic rock, serpentine, or naturally-occurring asbestos on the site. The ATCM also applies if ultramafic rock, serpentine, or asbestos is discovered during any operation or activity.

Road construction and maintenance operations are required to use dust control measures for a specified set of emission sources and prevent visible emissions from crossing the project boundaries. California has local air pollution control or air quality management districts which must also be notified before any work begins. For construction and grading projects that will disturb one acre or less, the regulation requires several specific actions to minimize emissions of dust such as vehicle speed limitations, application of water prior to and during the ground disturbance, keeping storage piles wet or covered, and track-out prevention and removal. Construction projects that will disturb more than one acre must prepare and obtain district approval for an asbestos dust mitigation plan. The plan must specify how the operation will minimize emissions and must address specific emission sources. Regardless of the size of the disturbance, activities must not result in emissions that are visible crossing the property line. Quarries and surface mines must also obtain district approval for an asbestos dust mitigation plan which must address specific emission sources. In addition, they must meet specific opacity standards for certain types of equipment and ensure that there are no emissions visibly crossing the property line.

Records related to the applicability of the regulation or compliance with the specific provisions of the regulation or the asbestos dust mitigation plan must be kept for seven years. The results of any air monitoring or bulk sampling required by the district, any bulk sampling to document the applicability of, or compliance with, the regulation, and any other records specified in the dust mitigation plan must be reported to the district.

The second ATCM has the following exemptions:

- Homeowners and tenants working on their own residential property

- Agricultural operations and timber harvesting
    - Except for the construction of roads and structures in connection with agricultural and timber operations

In addition, districts may grant an exemption under any of the following conditions:

- A geological evaluation demonstrates that ultramafic rock or serpentine is not likely to be found;
- Road construction and maintenance activities in a remote location;
- The processing of rock from an alluvial deposit.
- For emergency road repairs, district notification may be delayed.

CARB's Manager of Emissions Evaluations, Robert Krieger, provided feedback on California's NOA regulations. Mr. Krieger explained that while the state of California has developed the ATCM's, it is the responsibility of the local air pollution district authority to implement and regulate, and the districts have the option of placing more stringent requirements than the ATCM's. While asbestos has several definitions, California has taken a conservative approach that any asbestos exposure is harmful, thus the ATCM's designed to reduce or eliminate asbestos exposure to the public; consequently, imposing the 0.25% standard. Additionally, districts can implement air sampling requirements for projects encountering NOA; the ATCM does not address air monitoring requirements.

Mr. Krieger mentioned that historically when NOA was discovered on a school's property it had been removed. More recently, however, this practice has been determined to be costly and unnecessary. If NOA-containing material is found to be on a school's property, or is used as fill during a construction project, it must be covered with a minimum of 12 inches of clean fill. Projects not on school grounds where NOA-containing material is used a 3 inch layer of clean fill is required.

John Clinkenbeard, a Certified Professional Geologist (C.P.G.) for the State of California, explained the USGS has developed geological maps of the entire state of California available at 1:250,000 resolution. At this resolution, a boundary line on the map is approximately 1,000 feet wide and the smallest area resolution is 25 acres. When the local district authority reviews a construction permit, they reference these maps to evaluate if the proposed project site falls with in areas of known ultramafic or serpentine formations, or an area with known asbestos present. If the project is to occur in an area of concern the ATCM applies. If the project area is outside of the known areas of concern, the project site must undergo a geological evaluation by a third party C.P.G. Evaluations are also used when the project location is close to the boundary line, or the Contractor believes that asbestos is not present. California is presently working on increasing the statewide geological map resolution to 1:100,000; however, this project is not anticipated on being completed for several years. Some districts have funded mapping efforts in order to obtain a 1:24 map resolution.

After discussing NOA in Alaska, Mr. Clinkenbeard referenced Airborne Visual Inferred Spectroscopy (AVIRIS) as a possible geological mapping option. Imaging spectroscopy is a new tool that can be used to map specific materials by detecting specific chemical bonds. As a result it is an excellent tool for environmental assessments, mineral mapping and exploration, vegetation communities/species and health studies, and general land management studies.[49] The AVIRIS technology is aircraft-mounted and can collect data at a rate of 2 square kilometers per second. While this technology may not be feasible for Alaska's entire landmass, project specific uses may prove to be beneficial.

Jeff Wright with the CARB was contacted regarding M435 asbestos testing. The M435 method was developed in 1990 and was designed to detect serpentine asbestos in gravel/soil. The ATCM's requirements result in a large quantity of soil and gravel being tested for the presence of asbestos per M435; therefore, many testing laboratories throughout the state perform this analysis. CARB performed an interlaboratory study of California laboratories which offered the M435 testing. Samples were "spiked" with a known amount of asbestos and sent to the labs for analysis. The results of the study indicated vast discrepancies in the sample results.[50] All the laboratories included in the study were national accredited to analyze asbestos, however; M435 is unique from other test methods and while all the labs where adhering to M435 protocol, several different varieties of milling and homogenizing equipment was used. Mr. Wright explained that increased sample pulverization has been known to decrease asbestos concentrations via PLM analysis because the fibers are reduced in size to the point where they no longer meet the definition of a fiber; in contrast, asbestos concentration results per TEM analysis tend to increase. Because NOA is typically not uniform in samples, after the material has been milled sample homogenization should occur. PLM analysis examines only a small fraction of the sample, and TEM examines approximately one millionth of that, making homogenizing the samples an extremely important process.

Mr. Wright explained that California is in the process of undergoing several changes to M435. The proposed changes are as followed:

- Sampling
    - Bias field sampling per the discretion of the C.P.G.
        - Perform "target sampling" which focuses on areas or materials most likely to contain NOA opposed to "random" sampling in which the NOA may not be sampled
- Processing
    - Formulate a M435 accreditation for testing laboratories
        - California is working with NVLAB to develop an M435 accreditation

        - Require specific equipment to be used for the pulverizing and homogenizing processes
- Analysis
    - Move away from quantitative analysis
        - Results would be reported as "present" or "absent"
    - Additional analysis
        - If PLM observes no asbestos, require the sample to be analyzed via TEM

Other States

The following states either have, or are in the process of implementing NOA regulations: Massachusetts, New Hampshire, Pennsylvania, and Texas.

NOA CONTROL STRATEGIES AND TECHNOLOGIES

The following are a number of NOA control strategies and technologies that can be used to ameliorate asbestos release from NOA and NOA-containing material. After presenting some general information generated by the federal EPA, the items are divided into manage-in-place, dust suppression methods, covering or capping, and road maintenance. Finally, long term maintenance requires some public education.

EPA Facts Sheet: Methods for Reducing NOA Exposure[51]

Below is a list of methods recommended by the EPA to reduce asbestos exposure resulting from NOA. These are general methods, and must be applied on a project-specific basis:

- *Wet road surfaces with water using trucks, hoses, or sprinklers*
- *Wet piles of excavated material and cover them with tarps, plastic sheeting, or other items*
- *Continuously mist the work area*
- *Install wind barriers around the work area*
- *Clean or decontaminate equipment and vehicles to ensure that no equipment or workers track soil out of the work area (a gravel pad, tire shaker, or wheel wash system may be used to clear soil from vehicles)*
- *Wet the work area using a spray system attached directly to rock cutting or drilling equipment, such as a fine-mist sprayer or a variable-rate fogger nozzle*
- *Excavate utility trenches to an adequate depth and backfill them with clean soil so that future repair work will not need excavation into potential NOA-containing materials*
- *When transporting NOA-containing materials, avoid overloading trucks; keep the material below the top of each truck compartment and cover material with a tarp*
- *Limit personnel and vehicle access to the work area*
- *Identify NOA-containing areas with signs*
- *Reduce driving speed*
- *Reduce drilling or excavating speeds*
- *Excavate during periods of calm or low winds*

Roads and Parking with NOA in place and for unpaved roads and parking areas:

- *Cover roads with non-NOA-containing rock, chemical sealants or dust suppressants, chip seals, limestone aggregate, petroleum sealants, or asphalt cement paving*

- *Wet road surfaces with water*
- *Install windbreaks or berms*
- *Reduce driving speed*
- *Avoid dusty areas, especially in windy conditions*

And throughout communities:

- *Cover areas of rock and soil with clean soil, rock, vegetation, or other material*
- *Pave over unpaved walkways, driveways, or roadways containing NOA*
- *Landscape areas with vegetation, such as NOA-tolerant plants, and add a layer of organic mulch or NOA-free soil. Water plants often until they are established to minimize erosion*
- *Water garden areas before digging*
- *Keep windows and doors closed on windy days and during periods when nearby rock or soil may be disturbed, such as during construction*
- *Limit track-in by using entryway (door) mats, and wipe down pets before they enter buildings to reduce the amount of soil tracked indoors*
- *Allow children to play in outdoor areas only if the area has a ground covering, such as wood chips, mulch, sand, pea gravel, grass, asphalt, shredded rubber, or rubber mats*
- *Relocate outdoor activities to areas that do not contain NOA (walk, run, hike, and bike only on paved trails)*
- *Avoid dusty areas, especially in windy conditions*

Manage In Place

The ideal method for managing NOA material is in place and undisturbed; especially if the NOA material is not exposed. Fairfax County, Virginia, for example has a large NOA deposit which exists beneath non-NOA material. Unless this material is required to be impacted through construction or other activities, Fairfax County has taken the position to leave the material in place. NOA does not pose a health risk if it remains in a location where asbestos fibers cannot become airborne; such as beneath non-NOA material.

Separation

A variation on manage-in-place is to separate the NOA from associated non-NOA materials. Separation and excavation of the NOA materials for a source of gravel aggregate might serve as a control method, if the locations are known and the amounts are small. However this method seldom practical, since NOA deposits commonly extend miles, if not hundreds of miles. Excavation is generally only utilized as amelioration method when soils with known NOA are required to be impacted for projection such as road and building construction and utility work. Excavation requires the disturbance of the NOA, hence the potential for airborne exposure.

Dust Suppression

If NOA material is required to be disturbed, dust generating activities should be limited at all times. The most common engineering control used to reduce dust levels, hence airborne asbestos exposure, is the use of water and/or wet methods during NOA-related activities. The following is a list produced by the EPA of engineering and work practices that reduce exposure to NOA on excavation, grading, or utility work at construction sites.[51]

Reducing Vehicle Traffic and/or Speed

Dust emissions from unpaved road surfaces are directly proportional to the number of vehicles traveling on it, thus, reducing the amount of traffic will in turn reduce the amount of dust generated. By implementing weight or use restrictions on vehicles traversing the unpaved road could significantly limit the amount of traffic on a NOA-containing unpaved road and in some circumstances it may be possible to remove an unpaved road, or section of road, from service to the general public. An example of this type of control was recently imposed by the City of Kotzebue, in an effort to reduce particulate matter smaller than 10 microns in diameter (PM_{10}) emissions, where anyone under the age of 14 is prohibited from operating off road vehicles on city streets unless accompanied by an adult on the same vehicle.[52]

The rate at which a vehicle travels on an unpaved surface is also proportional to the amount of dust generated[53] meaning the efficiency of speed reduction as a dust control measure increases as the speed is reduced. For example, if the base speed is 40 miles per hour, a reduction to 20 miles per hour results in a 65% reduction in dust emissions; a further reduction to 15 miles per hour results in an 80% reduction in dust emissions. [54] Vehicular speed reduction can be achieved through posted signage coupled with enforcement and/or roadway manipulation such as speed bumps. The initial implementation of both these methods would be minimal, with immediate results. Major costs associated with these methods include increased travel time and additional law enforcement. While enforcement of these methods may be difficult in some rural Alaska communities, it may be a very practical, enforceable and effective for reducing airborne asbestos at quarries, construction sites and more densely populated areas.

In a best case scenario, at optimal conditions, both of these control methods would still not address the issue of exposed NOA on the roadway. Substantial amounts of dust would still be produced during dry conditions and natural elements such as wind would continue to make asbestos airborne. In most situations, these methods should be either approached as interim responses, or used in combination with other methods.

Water Application

Federal regulations require the use of "wet methods" when impacting ACM's which have potential of releasing asbestos into the air. Due to the moisture, particles/fibers adhere to each other through the surface tension of connecting water droplets and the adhesion of droplets to particles/fibers reducing the amount of emissions released during impact. The same principle applies to NOA-containing unpaved road systems; if they remain wet, dust emissions will be minimal. The easiest and most effective way to accomplish this is direct application of water to the surface of the roadway.

A large water source exists in most communities throughout Alaska. While more heavily populated areas have the required means to extract and apply water in sufficient quantities, many smaller communities do not. Often times some form of water application system can be implemented; however, may be too laborious to continue for long term.[55] In Amber, for example, no water trucks or large tanks were available for water application on so a simple gravity feed system was utilized. This system consisted of 4 - 275 gallon interconnected square plastic containers (totes) placed in the back of a truck which were filled with water from the Kobuk River and attached to a perforated pipe on the back of the truck.[37]

Applying water to surfaces provides effective, but short-term reductions in dust generation with water typically needing to be re-applied ever 0.5 – 12 hours depending on temperature and humidity. It has been determined that regular, light watering is more effective than less frequent, heavy watering.[55]

If the necessary equipment and water source are available, wetting unpaved surfaces can be greatly reduce dust emissions while remaining cost effective. Additionally, if wetting were coupled with one or both of the traffic control methods, evaporation from the roads surface would occur slower and dust emissions would be lower yet. Continuing costs would include equipment maintenance and workers performing the application. If equipment is not available, start up costs could be significant. Wetting is a practical control method to be used as a construction project control method or a short-term solution. Due to water having to be continuously applied to keep the surface moist, alternate long term control strategies should be investigated.

Increasing Moisture Content

The application of deliquescent salts such as calcium chloride, magnesium chloride and sodium chloride (common rock salt) are also implemented as dust control methods. These salts absorb moisture from the atmosphere and when mixed with surfacing soils will keep the treated soils at higher moisture content than untreated soils. For example at 77ºF and 90% humidity calcium chloride will absorb more than 17 times its own weight in water.[53] Potential disadvantages to the use of these salts are that roads may become slippery when wet, vehicle corrosion may occur and roads may become more susceptible to freeze and

thaw damage. Additionally, salts applied for dust suppression initially penetrate the roads surface several centimeters, followed by a gradual rise to the surface by capillarity action, making them susceptible to being washed off by rain. Prolonged rainfall will leach the salts from the roadway, potentially impact groundwater and surface water quality, and attract wildlife potentially causing safety concerns. Typically if the proper buffer zone exists between the water and the treated area, water quality impacts will remain minimal.[54] The practical utility of an application of one of these salts is no more than one year.[53] Sodium chlorides generally considered less effective than either calcium or magnesium chloride. Application of these materials is generally required 1-2 times per season.

Several locations in Alaska have utilized calcium chloride for dust control in recent years including Kotzebue, Teck Cominco's Red Dog Mine, and Haines, among other locations.[53] Environmental impacts of chlorides include metal corrosion, and degradation to nearby vegetation, surface, groundwater, and aquatic species.[53] In addition, because calcium chloride can substantially lower the freezing temperature of water, concentrations of the palliative in road soils can change the thermal stability of these soils.[53] This could potentially create issues in areas where extremely heavy loads are forced to wait until the road has completely frozen in order to supply adequate reinforcement such as on the Dalton Highway.

Covering or Capping of Installed NOA

Another common engineering control is to place a cover system (or cap) over the NOA. These materials may include non-NOA soil or rock, concrete, chemical sealants or dust suppressants, chip seals, limestone aggregate, petroleum sealants, asphalt paving, geotextiles, wood chips, mulch, sand, pea gravel, shredded rubber, rubber mats, and vegetation. Several factors, including cover material properties and site characteristics, affect the type of cover system appropriate for a particular area.

Palliatives

The majority of palliatives used on unpaved roads and airfields consist of chemicals designed to bind soil particulates together, formeing larger particles less likely to become airborne. Petroleum-based binders, organic nonpetroleum dust suppressants (lignins), electrochemical stabilizers, synthetic polymer products and pozzuolannic minerals comprise the main palliatives and our discussed further below:

Petroleum-based binders used as capping materials for dust suppression include emulsified asphalts, cutback asphalt (liquid asphalt), dust oils and modified asphalt emulsions.[55] These products are applied to the surface soil as a thin layer of asphalt which binds the soil particles together, consequently

waterproofing the road as well. Some binders increase the mass of fine particulates, instead of binding particles together. Both variations result in decreased emissions. When asphalt is used to bind particles together, the emulsified asphalt, because it is a mixture of asphalt and water in very small droplets, has the capability to penetrate unpaved road surfaces to coat more than just the surface particles, especially if the product is mechanically mixed into the top inch or two of road surface with a grader. Petroleum-based binders that contain fractions of lighter solvents, and especially those containing polycyclic aromatic hydrocarbons (many of which are carcinogens), can contaminate waterways if any migration of these lighter fractions occurs due to runoff.[53]

Organic non-petroleum dust suppressants include lignosulfonates, resins, and vegetable oils. Lignosulfonates originate from lignin, a complex compound which binds wood cells together as a natural polymer. Most commonly lignin is derived from wood fibers during paper manufacturing. Lignosulfonates bind surface soil particles together due to a combination of chemical and physical interactions. Lignosulfonates are known to greatly increase dry strength under dry conditions and retain effectiveness through extended dry periods. Generally 1-2 applications of lignosulfonates are required per season. Lignosulfonates are water soluble and will leach out of, or deeper into, roadway surface with rainfall and may become partially or totally destroyed.[55] These products are also corrosive to aluminum and its alloys unless calcium carbonate is added. Glacial tills contain low levels of clay and have low plasticity; consequently, lignosulfonates may be of limited value in controlling dust emissions from these soils. Furthermore, because lignosulfonates are derivatives of sulfuric acid, leaching may adversely impact watershed areas by affecting the acidity of water sources. Lignosulfonates are reported to not bind well on roads that had been treated previously with chloride compounds.[56]

Electrochemical stabilizers include sulphonated petroleum, ionic stabilizers, and enzymes. These products are intended to neutralize the ionic charges of clay-sized particles, thereby allowing electrostatic forces to bind the particles. Electrochemical stabilizers are generally effective regardless of climatic conditions.[55] To be effective, electrochemical stabilizers need to be worked into the road surface, requiring equipment that may not be available in remote rural communities. The performance of this material is dependent on fine-clay mineralogy which is unlikely to be encountered in most areas of Alaska.

Synthetic polymer products include polyvinyl acrylics and acetates that bind soil particles together and form a semi-rigid film on the road surface. These products are found as either a water soluble liquid or a powder intended to be mixed with water. Because synthetic polymer products are almost exclusively applied as a liquid, the material takes approximately 12-24 hours to cure during which time traffic should be kept minimal on application surfaces until the curing process is complete. Additionally, the product should be applied during a time of year when temperatures will not approach freezing, otherwise the curing process will not

work. The synthetic polymer products "Durasoil" was used as the dust suppressant in Ambler, as well as many other unpaved runways throughout northwest Alaska.[37] Synthetic polymer treatments are generally required once every 3-5 years.

Pozzolanic minerals, such as lime and cement, are typically added to non-plastic road surface material to produce a thin crust by agglomerating with fine dust particles. These stabilizers must be field mixed into the road material and compacted. These surfaces do increase the dry strength of material under dry conditions; however, once hardened it cannot re-harden if disturbed by abrasive forces, such as some off road vehicles and grading. Generally treatment with this method is applied once every ten years.

Gravel Replenishment

Asbestos-containing dust emissions from unpaved surfaces can be reduced by the addition of several inches of non-NOA containing gravel. This action would reduce the concentration of NOA on the surface; therefore, reduce the rate at which asbestos is allowed to become airborne.[57] Gravel provides a hard-wearing surface that shields underlying NOA from the abrasive forces of vehicle wheels. Traffic causes abrasion between the NOA and non-NOA aggregates, however, which over time creates fine dust. The degradation is somewhat dependent upon the hardness of the aggregate. Newly applied gravel will not reduce the strength of vortex airflows behind passing vehicles from entraining loose soil particles into the air. If the road-base is not well-constructed using crushed aggregate, surface gravel will be pushed down into the road surface by traffic, especially during wet conditions. If the road surface does not contain enough fine material of high cohesion to hold surface gravel in place, traffic can also cause surface gravel to be expelled laterally from the road's driving lanes. To be effective over more than a short period of time, new gravel applied to a road should be anchored to the road surface by incorporation into a cohesive surface layer through either well-graded aggregate mixes or by the use of soil adhesives (i.e., palliatives).[53]

In the event the newly applied gravel is lost to the roadway surface through vertical migration into non-cohesive soils, the use of geotextile fabrics may be of benefit. These fabrics are constructed of polymer threads that are very high in tensile strength, and are available in designs that either form.

Paving

Paving includes a variety of surfacing materials with the three general types being bituminous concrete, concrete and chip seals.

The most effective, and expensive, method currently available to control dust emissions from unpaved surfaces is the application of pavement or other durable materials to the road surfaces. Bituminous or Portland concrete provide durable

surface which prevents the abrasion of underlying soils. Bituminous concrete is a hot mixture of asphalt and well-graded aggregate, while Portland concrete is a composite material of cement, water and aggregate. Concrete requires less maintenance and is considered more durable than bituminous surfacing. Both methods are designed to support heavy traffic and unless the roadway typically carries 250 to 500 vehicles per day, the use of either of these paving options will likely not be cost effective.[55] Kotzebue has several roads which typically meet this "traffic quota" on a daily basis, and recently have had some of the main roads paved.[53] These forms of paving are not typically used on secondary roads, and would virtually never be considered for rural Alaska.

Chip seal surfaces, also called macadam, consist of one to three layers of aggregate and asphalt. Asphalt is sprayed over each aggregate layer as it is applied. After all the aggregate layers are in place with asphalt being applied over each individually, a covering of smaller stones is placed on top and then the entire system is compacted with the finished chip seal typically being 1 to 4 cm thick. Applying chip –sealing to an NOA-containing unpaved road would reduce dust emissions into the atmosphere because the chip sealant would bind the surface material. Annual dust control efficiencies of paved surfaces have been estimated by researchers to range from 90 to 99.9 percent.[57] A standard three-layered chip surface at 3.75 cm would be expected to last 10 years before additional surface treatment is required. Most chip seals require a second coat after 1 year and a third in approximately five years.

Durable Surfacing Materials

Fiberglass plates are used in cold climate oilfields to provide temporary road surfaces over native soil. These interlocking plates are typically manufactured in sections that are 14 feet long by 8 feet wide by 2 inches thick. The plates are designed to carry very heavy loads over short distances without the need to construct structural roadbeds in areas like northwestern Alaska, where construction aggregate is in very limited supply. The plates are expensive, costing about $2,000 per plate, but appear to have a significant lifespan.[58].Some questions exists, however, as to whether such plates are skid resistant at the vehicle speeds typical in rural communities.

Road Maintenance

The effectiveness of any dust suppressant applied to a road surface depends upon many factors such as type of road, traffic, intended uses climate, type of dust suppressant, drainage, and available maintenance resources. These factors must be considered together in the proper maintenance of a road that will safely and cost-effectively resist dust generation. For example, if the road surface is not well drained, water will puddle either on the road surface or in adjacent low spots. Standing water will float soil fines to the surface and distribute them across the roadway surface with passing traffic. Standing water adjacent to a roadway has

the potential to saturate the road sub-base, resulting in structural failure as evidenced by potholes. Aggregate in a roadway surface reduces tire forces on fine materials that increases the release of dust from a roadway. The loss of fines in the roadway surface leaves the aggregate unanchored and vulnerable to being pushed to the side of the road by tire forces. The success of palliatives to reduce dust depends on the repair and maintenance of good drainage on and adjacent to the road.[53]

Control Strategies for long term management of in place NOA.

Education

In rural communities throughout Alaska, the availability of law enforcement to assist in applicable dust suppressing methods is likely to be limited or non-existent. Imposing speed limits and vehicle use restrictions in these communities will be most effective if the residents of the community understand their purpose. Education about NOA and its potential health effects is a vital step in obtaining local support for any control method used. Education techniques for NOA-affected areas may include advertising, public meetings, information packets and making available NOA-knowledgeable experts. If residents understand the reasons for implemented controlled methods in their communities, a positive local response can result in social pressure applied throughout to adhere to new policies for the well-being of the community as a whole.

Residents in areas with geology favorable for NOA formation should be educated in basic NOA knowledge. In rural communities with a known NOA issue, such as Ambler, where airborne asbestos fibers from NOA are likely to be present, NOA general housekeeping and personal hygiene techniques should be implemented which requires specific education efforts. Education efforts could be carried out through State agencies or consulting firms with knowledge and experience with NOA. The cost for this effort would include travel to the subject community, preparation of materials (information packets) and potentially on-going assistance as new issues develop; however, these costs will be minimal considering many control methods are dependent on community support. If residents are unwilling to comply with newly imposed policies, any control method is likely to fail or have minimal effect.

Workers and the general public need to be properly educated regarding general housekeeping and persona hygiene practices appropriate for locals with NOA exposure potential. This control technologies include:

- Routine hand and clothes washing
- Boot/shoe removal at work and home
- Wet wiping and/or HEPA vacuum of visible dust accumulations as they develop
- Wet methods
- Controlling or avoiding visible NOA dust

Analysis with Discussion

Introduction

The asbestos standards, such as the training requirements for asbestos workers, were written on the premise of encounters solely in manufactured products. While the EPA has developed several documents to help increase knowledge and prevent exposure resulting from NOA, no Federal regulations have been implemented. This has resulted in several states implementing their own set of regulations and guidance documents. However, of the 20 states where NOA is known to exist, only a few have, or are beginning to, implement NOA regulations. The remaining states (such as Alaska) deal with NOA on a project-specific basis which typically exhibits substantial project delays and increased costs.

While there are limited general recommendations (see EPA NOA dust guidance), recommended NOA amelioration methods need to be selected on a site-specific basis because the exposure is dependent on a vast number of variables related to site specific conditions and work practices chosen for processing/handling. The single most important goal for almost all NOA-containing sites, materials, and systems is to prevent asbestos fibers from becoming airborne to eliminate respiratory exposure to asbestos. Several methods have been utilized to achieve this goal, with the main options being: manage in-place, dust suppression, cover or cap, and excavation/removal of NOA-containing material.

It is clear that gravel sources with NOA are present in Alaska and they have the potential to affect public health, project development and costs. At the same time it is well documented nationally and with Alaskan experience that use of proper NOA control strategies allow the safe employment of NOA materials. While past project experience in Alaska has not documented significant exposure or post project health concerns, NOA has been costly to some projects. This was primarily due to lack of advanced knowledge of NOA's presence, failure to characterize and notify, which resulted in changed conditions and non-competitive contract modifications after the contract has been awarded. Even if NOA is known during the project planning stages, the best course of action may not be clear because there are professional NOA geologic, risk and regulatory interpretations and definitional issues that will generate discussion and require resolution. The successful implementation of a NOA program will therefore require development and needs to involve training and transition for all involved including state, regional corporations, private resource owners, project designers, contractors, operation and maintenance staff, community and local residents.

Resource owners need to better understand their resource, develop the knowledge and marketing expertise to have it properly characterized and categorized for appropriate uses. Designer's need to develop the necessary project specifications requiring resource certification as well as contractor training and experience. Successful contractors need to learn how to develop

competitive work plans for safely utilizing NOA materials on project specific basis. For both companies and citizens in affected areas these changes include learning about the hazards and taking personal responsibility for controlling or avoiding activities creating airborne visible dust as well as implementing life style and work practice changes involving life style modifications such as housing/office boot/shoe removal, utilization of wet methods and HEPA filtration for routine cleaning of visible dust accumulations.

Liability

The liability of ADOT and suppliers of NOA materials may be divided into three:

1. Tort liability to individuals and organizations,
2. Contractors have additional liability to protect their workers and the public from the contractor's operations, and
3. Legal liability to agencies for failure to follow applicable laws and regulations.

Tort

If the ADOT's use of NOA damages an individual or organization, ADOT may incur tort liability. For example, if a resident of a village downwind from an ADOT airport that used NOA in the runway were to die of a disease known to be caused by asbestos exposure, the victims family might sue the ADOT. Although it takes years of heavy asbestos exposure to cause those diseases, and for most asbestos diseases asbestos is a "risk factor" not the sole cause, there are other causes, most notably smoking, sympathetic juries frequently find for the plaintiff, almost regardless of fault. Due to the tort reform movement, Alaska's current tort laws have reduced the windfall aspects of such suits, but they are certainly possible. Here we can suggest little except developing good standards for use of NOA, having review by all agencies concerned with health and environmental safety, then strictly documenting conformance. Such defensive practices will not make such suits impossible, but will make their defense much easier.

The owners of NOA materials sites face essentially the same tort issues as the ADOT. The question if this liability can be handed off from the owner to the ADOT is one that requires legal advice. California has a system of notification and paperwork that would seem to hand that liability off to the purchaser of the materials. We do not know if this has been tested in court. We doubt the CARB has the legal authority to change the state's tort laws. However, as above, conforming to established procedures is often a strong defense.

Contractors' liability

The contractors' liability to follow the state's labor laws regarding occupation health and safety are fairly straight-forward, if the NOA is mentioned in the project bid documents. The contractor's liability to third parties, such as the public, may be more complicated. The contractor's general liability insurance will defend them; however the contractor's insurance company will then try to recover

from the state and/or the material owner. This may be forestalled by appropriate contact terms regarding insurance, but clearly this is a item for expert risk management and legal advice. Finally, if the specifications do not make clear the need to get certain permits and the contractor's operations are impacted, the contractor may try recover from the ADOT for defective specifications.

Liability for laws and regulation compliance

CERCLA and RCRA deal with *wastes.* NOA is not a *waste* thus mining and incorporation of NOA does not come under either of those laws. However, for example, if the NOA mining segregated some materials that had a lot of asbestos from other materials, and thus had small mounds of asbestos materials on the site, might these mounds be waste piles? Here the regulatory standard is 1% asbestos, so if the mounds had less than 1% asbestos, they would not be asbestos under the CERCLA or RCRA regulations. Here the authors have not obtained further clarifications regarding mining and mine waste. While this would be the responsibility of the owner of the NOA materials site, these clarifications should be obtained in the next phase to enhance communications between the ADOT and the material site owners.

California Experiences

The California NOA regulations do address many issues and procedures that may bear on liability. The California NOA regulations separate the "notice requirements" into two categories; material intended for surfacing, and material not intended for surfacing. In addition to the notification variations, material intended for surfacing must have an asbestos content of <0.25% asbestos per the CARB 435 analysis, unless the surfacing application is considered one or more of the 11 surfacing ATCM exemptions. These notification requirements are intended to both "hand-off" liability to the purchasers and produce adequate documentation. (Signage and placard requirements for regulated material are intended more to prevent accidental misuse and/or handling than for recordkeeping or proof of receipt.)

Once the NOA-containing material is in the possession of the purchaser, it is their responsibility to provide adequate protection and training to the employees which handle the material. The end-use of the material is also the purchaser's responsibility at this point. They must insure they not only adhere to all OSHA, EPA, State and Local requirements during handling and transport, but also to their approved site specific Work Plan. The purchaser must also insure the material is approved by the regulating agency for its intended end use. Often the end use of the regulated material will managed by a third party where they would be in responsible charge of obtaining approval, permits, etc., for the materials end use and any required dust control strategies (capping, paving, etc.).

Resource owners and contractors have raised liability concerns regarding the sale and use of NOA materials. In some instances it is understood litigation may

already have been filed against NOA resource owners for the sale and use of NOA materials. This is a real concern that if not properly understood and addressed will impact the safe use of NOA materials and create unnecessary project costs. CERCLA Section 9604 provides for resource owner protection against naturally occurring hazards. Liability for resource processors and/or contractors can be addressed through their compliance with NOA program requirements. It is not possible to prevent all lawsuits and particularly frivolous filed cases. Therefore the effectiveness of the recommended NOA program to be developed will likely be tested legally and provide court interpretation and resolution of liability concerns.

Ambler, for example, is a unique case which would not completely comply with any of the existing 11 surfacing exemptions or the Construction, Grading, Quarrying and Surface Mining ATCM for California. While California's state NOA regulations are undoubtedly the most developed in the United States, it is unlikely the drafters/authors were required to take into account communities such as this. Had similar circumstances existed, certainly specific exemptions would have been established to address this. Alaska can look to, and even adopt, the California NOA regulations; however, scenarios exist in Alaska unlike anywhere else in the United States, and special provisions and/or exemptions will be a necessity of this future rule.

Examples of Liability

In the Swift Creek Washington case where NOA-containing Sumas Mountains would periodically experience landslides which flowed into the Swift Creek River where the material was dredged and staged along the shoreline to prevent flooding. There was no organization deemed the Responsible Party, and several federal, state and local agencies are currently involved in the Swift Creek NOA concern. It was determined that the EPA Superfund program had limitations on spending money on this type of cleanup because the material of concern was naturally-occurring. This makes NOA sites exempt by law from the EPA Superfund program, except where the material was moved by unnatural forces (ie construction, dredging). This caveat allowed the EPA to use funding to assist in the Swift Creek NOA concern.[60]

Libby, Montana, which has been declared an EPA Superfund site, has had ongoing federal cleanup efforts since 1999. In this case, processing mined vermiculite constituted the majority of the contamination; consequently, the asbestos was not viewed as naturally-occurring. In 2003, in a ruling issued by the District Court of Montana, the court said the mining company, W.R. Grace, was liable for costs related to the investigation and cleanup of asbestos contamination in Libby and ruled that the EPA's revised method for calculating indirect, or overhead, costs is appropriate and that those costs may be recovered from W.R. Grace. The ruling meant W.R. Grace was responsible to pay all of the $54.5 million in costs that the EPA incurred through December 31, 2001. Costs incurred after that date were to be resolved in future proceedings if disputed by

W.R. Grace. In May, 2009, W.R. Grace and three individual defendants were acquitted of criminal charges under the Clean Air Act alleging they conspired to conceal the health dangers posed by the contamination.[61]

NOA proposed for use

While NOA materials are known to be present in 20 of the 50 states, only a handful are moving ahead with implementing NOA regulatory control policies. Those states that have implemented NOA regulations have focused their programs on:

- Geologic mapping of "restricted" areas with materials likely to contain NOA
- Compliance level characterization of NOA free materials based on the limit of detection of less than 0.25% asbestos content
- Asbestos characterization sampling for use of materials from restricted areas
- Utilization Compliance Plan Submittal, Review and Approval
    - Source, transport route and work product
- Providing local authority to interpret program requirements site specifically and implement additional testing where necessary.
- Development of necessary program exemptions
    - area wide
    - regional

While education and training with regards to NOA exposure, work practices, and safe uses is key to any program, the submittal and approval of site specific compliance plans for approval by local authorities will insure the long term viability of an effective "living" program for that project's NOA.

NOA site specific work plan might note the availability and cost of NOA-free material as those affect project design options. Control technologies that eliminate or reduce exposure pathways might minimize individual project costs. The remoteness of many Alaska projects and absence of alternative transportation routes may require reasonable exemptions, based on a balance of benefits and risks.

Similarly, the concentration and variety of NOA will play a major role in determining the most cost effective control strategies. While federal regulations are indifferent to the form of asbestos, control methods for NOA should not be. Forms of asbestos that break apart and easily become airborne should be held to a higher standard than those which are tightly bound within a rock matrix. This highlights the importance of developing a consensus standard as well as mapping and sampling efforts to properly characterize specific asbestos materials present as well as the risk. The authors recognize this may be quite difficult in practice, but certain broad guidelines are possible and these may help project planners and designers.

NOA in place - control technologies

NOA control methods should start with the least expensive options first. In general terms there are four control methods: education, wetting, palliatives, and capping.

By itself and together will all the other control methods educational outreach to the staff, industry and general public regarding the hazards and methods of controlling or avoiding airborne dust is almost always advised. Outreach such as encouraging implementing speed controls and restrictions on vehicle use in sensitive areas (i.e., near schools, hospitals, and residential areas) and modifying life style habits to reduce personal exposure are all worthy of consideration.

If a road base lacks adequate drainage, the embankment will be weak and the effectiveness of dust control measures will be limited. Reconstructing unpaved roads to provide good drainage and a solid base is needed for dust palliatives, capping with clean material, or paving to be effective. If the road soils are of poor quality, geotextiles may be a feasible option to add support to the road surface. According to Succarieh,[54] expert professional advice about the road is often needed. The ADOT Local Technical Assistance Program (LTAP) may assist As part of the educational program it is recommended that the ADOT LTAP enhance their NOA knowledge and resources for distribution.

If sufficient equipment and manpower is available, watering roads during high dust periods should be performed; however, this is a short-term effective method of dust control and more long-term control methods should be investigated. Historical monitoring data illustrates that high dust generation rates are greatest during the two-month period following breakup, therefore, short term control measures like watering can provide limited benefits if impacted communities have access to watering equipment.[54]

Another control technology is application of dust palliatives. In order to obtain the greatest benefits from the application of dust palliatives, site-specific investigations of local traffic and soil is required. Investigations should begin with an assessment of the soils used to construct and surface the unpaved roads. The ADOT's LTAP, may assist rural communities with technical assistance and/or training on proper techniques for soil analyses useful in the palliative selection process.[54]

Some deliquescent salts and/or synthetic polymer products may provide adequate levels of dust control on unpaved roads. Again this depends heavily on the soil and traffic conditions in the respective community. These products have been tested in several locations in Alaska and have been demonstrated to provide varying control of dust emissions. Because the successful use of these products is dependent upon a number of factors that vary from community to

community, pilot tests of selected products for a summer season should be undertaken in affected communities before community-wide application is pursued. [54]

Contractor Feedback

Approximately 150 contractors in California who likely encounter NOA were contacted via email and asked to provide general feedback regarding associated California regulations. The email contained 5 basic questions in combination with a short narrative explaining the purpose of the inquiries. Only one of the contractors contacted replied, with limited applicable information. This contractor expressed the following when asked about their opinion on the California NOA regulations:

> *For the most part, the measures taken are reasonable and consist of greater than normal dust control through the use of more water on grade during earth moving operations and trenching.*

The contractor explained equipment "wash systems" are routinely utilized for decontaminating equipment prior to leaving a NOA site. Another precaution was capping the native material with either a hard surface (concrete, asphalt, ect) or "clean" soil. The thickness of the cap varies depending on the perceived threat of the asbestos, and when soil capping is used it is underlain with a warning fabric to prevent excavations being made into the NOA at a later date.

This contractor did not have certified asbestos workers on staff to perform the removal/handling of hazardous materials such as NOA. They stated their employees are trained to look for hazardous while work is being performed, and if material is encountered which may be hazardous it is either avoided or remediated by a qualified contractor. The following quote explains their route of action if hazardous materials are required to be abated:

> *When we do have a situation develop where hazardous materials are present and they need to be remediated then a proper contractor is brought into service under contract with the property owner keeping us out of the loop.*

To close, the contractor states the NOA regulations in California are not "unbearable" but do add additional costs to affected projects.

Future and Plan of Action

The regulatory authority utilized in the states evaluated included a state-wide program that was implemented across at the local, county level. Typically, multiple disciplines are involved including health, environmental and air pollution control divisions of the regulatory authority.

To date the Alaskan documented experiences in Juneau, Dalton and Ambler all involved transportation projects. Fortunately, once identified they were handled appropriately with additional assessment, training and work practice and product use modifications, each demonstrating once it is known, the NOA material can be safely used. However, while the experiences may not have resulted in any significant human exposures, the late identification resulted in changed conditions and costly non-competitive contract modifications. While NOA encounters in Alaska have been comparatively limited, the need for implementation of a state-wide NOA policy is reinforced by the lengthy, problematic and consequently expensive circumstances that have occurred due to lack of standard operating procedure and/or regulatory guidance. Road and pipeline pad construction and maintenance have and will be the largest future use of gravel resources. For these reasons it is recommended and appropriate for ADOT to take the lead in the further evaluation and development of NOA strategy alternatives and program development. It is anticipated and recommended that ADOT develop internal NOA operations and maintenance (O&M) and design standards for ADOT projects. For maximum effectiveness the department's internal policies and SOP for NOA should reflect a statewide, industry and regulatory consensus. These NOA standards will involve awareness education, resource characterization, acquisition, use as well as required training and development of design requirements, contractor's work practices and O&M practices.

It is readily apparent that the NOA concerns go well beyond the ADOT areas of responsibility involving all aspects of the local people, resource use and community. As demonstrated by other states moving to address NOA issues, a more holistic approach to NOA should involve public health, worker, community and environmental protection advocacy. The existing Alaskan "dust working group" comprised of regulatory and government stakeholders appears as a natural technical committee that could be expanded to include industry and be instrumental for the technical information exchange, development of a statewide NOA strategy(s) consensus and facilitate with the implementation of a successful statewide program.

Clearly the ADOT needs an SOP that that tells ADOT planners, designers and operators how to handle NOA, and this SOP will certainly call for a specific plan for each project. However in order for the SOP to be successful, it must be acceptable to all relevant state and federal agencies, and acceptable to all other stakeholders, such a contractors, materials site owners, and affected communities. Thus the first step is for the ADOT to formulate a NOA Action Plan to solicit comments and advice from all stakeholders, develop drafts of the SOP, circulate drafts to all stakeholders, and present the drafts to all stakeholders.

Working Group

Through the development of the NOA Action Plan (AP) the professional and technical issues can be resolved by the stakeholders working group and applied

with state conditions to existing programs developed elsewhere to develop an Alaskan specific program consensus and AP. It is recommended that the working group be comprehensive in make up and include all interested parties or stakeholders. Representatives from government, community and industry should be included. The following is considered a minimum list of known stakeholders that we recommend ADOT consider and include in forming a statewide stakeholder working group.

- BIA
- Alaska Geological Survey
- Denali Commission
- EPA
- ADOT
- ADEC
- DHSS
- Alaska Native Tribal Health Consortium.
- Alaska Tribal Air Call
- Denali Pipeline
- Alyeska Pipeline
- Native Corporations
- Village corporations in areas with NOA
- Community Health Consortium

Coordinating the working group and developing an NOA AP to achieve the goals and targets of these recommendations will require significant commitment and change in operational, management, building and behavioral practices at all levels of agencies and state government. For the AP to be successful, it must have both long term overarching goals and short term, manageable and achievable actions that have short delivery timelines. The statewide working group of stakeholders will be important to providing the forum for technology transfer, alternative strategy consideration, program development and successful implementation of the consensus achieved.

Work of the Working Groups

ADOT's initial working group purpose and scope of work should be fivefold:

- Inform stakeholders on NOA background and needs and solicit participation;
- Define existing NOA control strategies in use;
- Brainstorm actions that best meet all NOA stakeholders unique needs and objectives;
- Develop a Statewide government, industry and community NOA SOP
- Meet and present the SOP to all stakeholders
- Finalize the SOP and develop an example of a site-specific plan for Implementation

How to begin

The California regulations and EPA guidance are a good beginning to any NOA SOP. With some cut and paste and modification for remote projects and Alaskan conditions, those documents could form a draft of the SOP. However caution is needed to not present these or any document to the agencies as a fait accompli. Rather, all stakeholders, especially the relevant agencies, need to help ADOT define the issues and insure the final SOP does not conflict with the charge of any of those agencies

CONCLUSIONS AND RECOMMENDATIONS

This paper reviews NOA background, analytical issues, policies and regulations that have been considered and/or implemented by other authorities involved with NOA and have developed NOA policy options. Based on the analysis of the findings the following conclusions and recommendations have been developed.

- NOA gravels are present throughout the nation and in Alaska which have the potential to impact public health, project development and associated costs.
    - Transportation projects have been adversely impacted by NOA in Juneau, Ambler and on the Dalton Highway.
    - Material site investigations must check for NOA, especially in regions with mineral types likely to contain NOA.
- NOA gravels can be used safety with proper training, understanding and implementation of appropriate control strategies and technologies
    - Technical and regulatory interpretation and definitional issues remain
- Established state NOA programs evaluated have focused their programs on
    - Geologic mapping of "restricted" NOA areas
    - Characterization of NOA free materials based on the analytical procedure's limit of detection of less than 0.25% asbestos content
    - Source characterization sampling from restricted areas
    - If ≥0.25% asbestos, Compliance Plan Submittal and Approval should be required
    - Local authority enforcement to interpret program requirements site specifically and implement additional testing where necessary
    - Development of necessary program exemptions
    - States with NOA programs were developed across public health, environmental and air pollution divisions at the state level and implemented at the local, county level.

It is recommended that ADOT write an action plan to undertake development of a NOA SOP as the lead coordinating entity of a holistic statewide approach that involves all stakeholders and develops a statewide agency, industry and community consensus standard for NOA use. In order to do this, the ADOT should convene a statewide stakeholder's working group to resolve technical issues, work out a consensus on a state wide NOA program.

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CSSB 180: Sectional and Explanation of Changes

Section 1. Findings - deleted in this version, can travel with bill.

Section 2. Immunities. The bill creates a new subsection in title 9 (Code of Civil Procedure) Ch. 65, which deals with limits or conditions for immunity. The original bill provided immunity to landowners, and to the state and contractors, as long as they followed the provisions of a site specific plan outlined later in this bill.

The new CS removes immunity provisions for the state, since it will be the state's decision to allow use of NOA in certain circumstances. The immunity provisions for the others remain (if they follow the provisions of the bill and the site-specific plans).

Sec. 3 Naturally Occurring Asbestos

Title 18 deals with Asbestos. This creates a new Article 2A regarding naturally occurring asbestos and the use of materials containing NOA. These provisions apply to non-state entities.

(a) Provides that an entity may qualify for immunity under the provisions in title 9 when using a gravel or aggregate material that has a content **equal to or greater than 0.25 percent** of naturally occurring asbestos using a bulk test method specified by DOT.
(b) In order to qualify, the person having legal authority for a private contractor that is within the designated area must prepare and submit a site specific plan. Before gravel extraction can begin, DOT must approve the plan.
(c) In order to be immunized the private contractor has to adhere to the plan, including monitoring and mitigation requirements.

A new subsection was added in the house version to define the minimum detectable amount of asbestos as .25 for the purpose of designating gravel and aggregate as NOA.

Section 4. Title 44 (Authorizing statutes, Department of Transportation) A new article 3A. **Use of Materials Containing Naturally Occurring Asbestos,** provides:

44.42.400 Program Administration

(a) A single employee is responsible for oversight for the provisions that follow.
(b) A municipality or community may request to become an area designated by the Department as an area which may use NOA under the immunity provisions. The community must apply to the department, the department can approve only after reviewing tests for NOA, considering availability of other construction materials that are free of NOA, and after soliciting public input from the resident of the area. The department can require relevant information from the applicant (tests, information on other options, etc). After designation, the department shall notify, including through signage, potentially affected persons that the area has been so designated.
(c) The department can also make designations in places where there is no municipality or community. The department is responsible for tests, etc., in these areas and must notify potentially affected persons using same methods as in (b).
(d) Provides a definition of "community, which follows PCE model.

44.42.410 Site-Specific Use Plans.

(a) Requires contractors, after consultation with the owners of land on which the NOA will be placed, to submit a site-specific use plan to the department which
  (1) Meets standards adopted by the Department in consultation in regulation as outlined in 420 (the next section of the bill)
  (2) Demonstrates how methods used will comply with acceptable standards
  (3) Outlines long-term maintenance plans to ensure that human health and air quality are maintained
  (4) - (6) Describes how the material will be contained, buried, sealed or otherwise capped to ensure that asbestos does not become airborne because of vehicle use, road maintenance or grading if applicable.

(b) Similar set of provisions for department managed projects such as airports, or other public works projects

(c) The department will review and either approve or disapprove plans taking into account construction seasons in the project location.
(d) Projects may not be approved unless the Department determines it is economically unreasonable to undertake the project with materials free from naturally occurring asbestos.
(e) The department in consultation with other departments, shall develop a monitoring and mitigation plan for the project. If the site specific use plan is approved, the monitoring and mitigation plan developed by DOT will be attached to that plan and to qualify for immunity the party that has direct control over or responsibility for the monitoring and mitigation must comply with the plan developed by DOT.
(f) On approval, the department
  (1) Provides the contractor a copy of the approved SSUP that includes
    (A)The monitoring nd mitigation plan
    (B)Requirement that the contractor submit all asbestos-related data
    (C)Recommendations for reducing exposure to airborn asbestos fibers
  (2) Provides the plan to the mayor or manager of a municipality affected by the use of the gravel
  (3) may provide to all contractors copies of OSHA, EPA and USMS recommended practices
(g) Provides for recording the presence of naturally occurring asbestos and noting that subsequent interest holders may have legal obligations with regard to the NOA in the project area.
(h) Results of monitoring or testing performed must be provided to the department.

There is a new provision that surfacing materials cannot contain NOA.

44.42.420 Regulations

Section provides that the Department in consultation with listed other departments may adopt regulations under the AAPA to revise statewide standards on use of NOA, and that must include procedures for completing site investigations, laboratory standards, procedures for evaluating human health concerns, construction operation and maintenance practices etc., etc.

Section 5. Uncodified law:

Provides interim project authorization through December 31, 2013, which allows early designation by DOT on a temporary basis of sites, which may then submit site specific plans etc... Sets California Air Resources Board CARB Method 435 as the interim standard for determining asbestos content under these provisions.

Note that the data base provisions in SB 180 were dropped from the house version, since the House decided to require applications from communities as the trigger for DOT decisions on use.

"aggregate material"

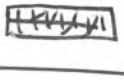
Immunity questions:

1. Does any other state that uses NOA immunize the state?
2. Do they immunize any other parties (contractors, landowners, etc.)?
3. Are there any other similar (construction or hazardous material related) programs
   in Alaska that provide immunity from suit to the state or to contractors?
4. If the DOT sets maintenance and ongoing testing as part of a site specific plan, who becomes responsible for that? What happens if over time, maintenance is not done according to the plan? Who is liable then? How long do these requirements stay in effect?
5. What happens if the maintenance essentially requires further work from the state and the state fails to either provide or fund that work?
6. The immunity for landowners does not appear to be tied to any site specific plan use. Is this correct?

"the person"

"economically unreasonable"? 25%

Is asbestos = cancer linear?



STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

DIVISION OF PUBLIC HEALTH, SECTION OF EPIDEMIOLOGY

ENVIRONMENTAL HEALTH, HIV/STD, IMMUNIZATION, INFECTIOUS DISEASES

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April 2, 2012

The Honorable Hollis French
State Senate
Alaska State Capitol
Juneau, AK 99801-1182

Dear Senator French,

During the March 23rd Senate Judiciary Committee hearing regarding SB180, a question was raised about the baseline prevalence of pleural changes in the United States or Alaska. I have personally researched this question.

Unfortunately, there is no formal surveillance system for pleural changes among the general state or U.S. population. I spoke with Dr. Al Franzblau, a physician with the University of Michigan School of Public Health who is a subject matter expert in the field of radiographic diagnosis of pneumoconiosis, which includes pleural changes due to asbestos-related diseases. Dr. Franzblau stated that an accurate prevalence estimation is difficult to make because of the wide variability in the sensitivity and specificity of diagnosing pleural changes from chest x-rays. He stated that he has seen papers that estimate the prevalence of pleural abnormalities among people with no known exposure to asbestos to vary considerably (from <1% to >10%), depending on the population studied, methodology employed, and experience/training of the individual(s) reading the films. Dr. Franzblau said that he would try to send me a link to some of the papers he was referring to when he is able.

Below is a list of the abstracts I was able to pull from PubMed related to this issue for your review. Please let me know if you have additional questions related to this matter.

Sincerely,

Joe McLaughlin, MD

Joe McLaughlin, MD, MPH
State Epidemiologist and Chief,
Alaska Section of Epidemiology
3601 C Street, Suite 540
Anchorage, AK 99503

Related abstracts from PubMed:

Br J Ind Med. 1984 Aug;41(3):384-8.
Radiographic changes in a group of chrysotile miners and millers exposed to low asbestos dust concentrations.
Cordier S, Theriault G, Provencher S.
Abstract
Radiographic changes in 342 Quebec asbestos miners exposed to low levels of asbestos dust for an average period of 20 years were studied. Their estimated cumulative exposure ranged from 7 fibres per cubic centimeter X years (f-y/cc) to 300 f-y/cc. Of these workers, 2.1% showed a small opacity score of 1/0 or more and 2.7% showed pleural changes. No linear relationship could be established between small opacity score and any index of exposure to asbestos. Pleural changes were related to age. A referent group of office workers within the same mining industry showed a prevalence of 2.1% (1/48) for small irregular opacities 1/0 or more, and for pleural changes.

J Occup Med. 1989 Sep;31(9):775-80.
Public health implications of the variability in the interpretation of 'B' readings for pleural changes.
Parker DL, Bender AP, Hankinson S, Aeppli D.
Abstract
During 1985 in Minnesota, an initial reading of 566 radiographs found 30% of them to be positive for pleural changes. However, only 4% were considered positive by at least two out of three readers from National Institute for Occupational Safety and Health panel reading the radiographs under blind conditions. The implications of this variability in radiographic readings for public health decisions was illustrated in Minnesota, where selective overreading of radiographs of female subjects created an illusion of a generalized environmental problem rather than an occupational exposure. One solution to this dilemma is establishment of criteria to minimize false-positive pleural findings. The study also supports the need for more careful consideration of other disease processes in the interpretation of "B" readings.

Am J Ind Med. 2000 Mar;37(3):291-5.
The prevalence of pleural plaques and/or pulmonary changes among construction workers in Okayama, Japan.
Kishimoto T, Morinaga K, Kira S.
Abstract
BACKGROUND:
Since asbestos has been widely used in Japanese building materials since 1960s, a large number of Japanese construction workers may be exposed to asbestos occupationally.
METHODS:
Among 2951 construction workers in Okayama, Japan, the prevalence of asbestos-induced pleural or pulmonary changes was examined by screening chest x-rays; these findings were confirmed by computed tomography (CT) scanning of the chest.
RESULTS:
Among 2951 construction workers, 168 (5.7%) were found to have significant findings for pleural plaque or pulmonary changes on chest x-ray. Seventy-four had both pleural plaque and asbestosis, 85 pleural plaques alone, and 9 asbestosis alone. In 11 subjects, pleural plaques were suggested by chest x-ray, but neither pleural plaque nor asbestosis was demonstrated by chest CT. Honeycombing as one of the characteristic findings of asbestosis was found in 29 subjects. Others showed subpleural spots or curvilinear shadow, which suggested the early stage of asbestosis. The occupations of these workers were carpenters (64), plasterers (27), and concrete board cutters (14). About 30% of the workers with these findings were aware that they were handling asbestos in activities such as installation of asbestos boards, and/or asbestos spraying.
CONCLUSIONS:

As the incidence of malignant mesothelioma and primary lung cancer associated with asbestos exposure are high, screening by chest CT is necessary for detecting asbestos-induced pulmonary and/or pleural lesions. Education for protection such as telling about the presence of asbestos in building materials is also necessary.

Occup Environ Med. 2003 Jan;60(1):35-41; discussion 41-2.

Asbestos related diseases from environmental exposure to crocidolite in Da-yao, China. I. Review of exposure and epidemiological data.

Luo S, Liu X, Mu S, Tsai SP, Wen CP.

Abstract

BACKGROUND:

Scattered patches of crocidolite, one form of asbestos, were found in the surface soil in the rural county of Da-yao in southwestern China. In 1983, researchers from the West China University of Medical Sciences (WCUMS) discovered that residents of two villages in Da-yao had hyperendemic pleural plaques and excessive numbers of pleural mesotheliomas.

AIMS:

To review and summarise epidemiological studies, along with other relevant data, and to discuss the potential contribution to environmental risk assessment.

METHODS:

This report is based on a review of several clinical/epidemiological studies conducted by WCUMS researchers since 1984, which included one cross sectional medical examination survey, one clinical/pathological analysis of 46 cases of mesothelioma, and three retrospective cohort mortality studies. Additional information acquired from reviewing original data first hand during a personal visit along with an interview of medical specialists from Da-yao County Hospital was also incorporated.

RESULTS:

The prevalence of pleural plaque was 20% among peasants in Da-yao over 40 years of age in the cross sectional survey. The average number of mesothelioma cases was 6.6 per year in the 1984-95 period and 22 per year in the 1996-99 period, in a population of 68 000. For those mesothelioma cases that were histology confirmed, there were 3.8 cases/year in the first period and 9 cases/year in the second. Of the 2175 peasants in this survey, 16 had asbestosis. Lung cancer deaths were significantly increased in all three cohort studies. The annual mortality rate for mesothelioma was 85 per million, 178 per million, and 365 per million for the three cohort studies, respectively. The higher exposed peasants had a fivefold increased mesothelioma mortality compared to their lower exposed counterparts. There were no cases of mesothelioma in the comparison groups where no crocidolite was known to exist in the environment. In the third cohort study, almost one of five cancer deaths (22%) was from mesothelioma. The ratio of lung cancer to mesothelioma deaths was low for all three studies (1.3, 3.0, and 1.2, respectively).

CONCLUSIONS:

The observation of numerous mesothelioma cases at Da-yao was a unique finding, due mainly to their lifetime exposure to crocidolite asbestos. The finding of cases dying at a younger age and the relatively high ratio of mesothelioma cases to lung cancer could also be another unique result of lifetime environmental exposure to crocidolite asbestos. Although the commercial use of crocidolite has been officially banned since 1984, the incidence of mesothelioma has continued to show a steady increase, particularly among peasants. Since the latency of mesothelioma is approximately 30-40 years, the ban had little effect in the 1990s. The increased awareness and changes in diagnosis over time may also contribute to the increase. Furthermore, exposure to asbestos stoves and walls continued. The government implemented reduction of these exposures. However, from a public health standpoint, the most important issue is the complete avoidance of further exposure to asbestos.

Environ Health. 2008 Jun 20;7:30.

Modelling prevalence and incidence of fibrosis and pleural plaques in asbestos-exposed populations for screening and follow-up: a cross-sectional study.

Paris C, Martin A, Letourneux M, Wild P.

Abstract

BACKGROUND:
CT-Scan is currently under assessment for the screening of asbestos-related diseases. However, to date no consensus exists as to how to select high-risk asbestos-exposed populations suitable for such screening programs. The objective of this study is to select the most relevant exposure variables for the prediction of pleural plaques and asbestosis in order to guide clinicians in their use of CT-Scan.
METHODS:
A screening program of non malignant asbestos-related diseases by CT-scan was conducted among asbestos-exposed volunteers in France. Precise assessments of asbestos exposure were obtained by occupational hygiene measurements and a job-exposure matrix. Several parameters were calculated (time since first exposure, duration, intensity and cumulative exposure to asbestos). Predictive parameters of prevalence and incidence were then estimated by standard logistic and a complementary log-log regression models.
RESULTS:
1011 subjects were recruited in this screening program among them 474 (46.9%) presented with pleural plaques and 61 (6.0%) with interstitial changes compatible with asbestosis on CT-scan. Time since first exposure ($p < 0.0001$) and either cumulative or mean exposure ($p < 0.0001$) showed independent associations with both pleural plaques and asbestosis prevalence and pleural plaques incidence. Modelling incidence of pleural plaques showed a 0.8% to 2.4% yearly increase for a mean exposure of 1 f/ml.
CONCLUSION:
Our findings confirmed the role played by time since first exposure and dose but not duration in asbestos-related diseases. We recommend to include these parameters in high-risk populations suitable for screening of these diseases. Short-periodicity of survey of pleural plaques by CT-Scan seemed not to be warranted.

Radiologically recognized pleural changes in nonpneumoconiotic silica-exposed coal miners.
Orriols R, Muñoz X, Sunyer J, Isidro I, Tura JM, Ferrer J.
Abstract
OBJECTIVES:
Whether nonpneumoconiotic silica-exposed coal miners develop radiologically recognizable pleural changes was studied.
METHODS:
In a retrospective follow-up study, the oldest and the most recent chest X-rays of 765 workers with a profusion category lower than 1/0 according to the International Labour Office were read.
RESULTS:
Altogether 720 (94.1%) workers had no abnormalities, and 45 (5.9%) showed some pleural alteration in the first X-ray. In 43 (6%) of the 720 with no initial abnormalities, some pleural change was detected in the last X-ray. There was a statistical difference ($P = 0.022$) according to silica exposure category [low: 5 (2.4%); medium: 8 (6%); high: 30 (8%)]. The relative risk for any pleural alteration was significantly increased in relation to the silica-exposed group [medium: odds ratio (OR) 5.72, 95% confidence interval (95% CI) 1.4-23.5, $P = 0.016$; high: OR 7.62, 95% CI 2.1-27.2, $P = 0.002$] and to rib alterations (OR 3.74, 95% CI 1.4-9.7, $P = 0.007$). In 19 (2.6%) workers with no alterations initially, a costophrenic sinus alteration was detected later. Again the silica exposure categories [low: 1 (0.5%); medium: 3 (2.2%); high: 15 (4.2%)] differed significantly ($P = 0.033$). The relative risk of costophrenic sinus obliteration was significantly increased in relation to the silica-exposed group [medium: OR 8.59, 95% CI 0.7-113, $P = 0.102$; high: OR 16.44, 95% CI 1.5-177, $P = 0.021$]. The appearance of two costophrenic sinus obliterations and the disappearance of four were detected in the last chest X-ray of the 45 workers with some pleural alteration initially.
CONCLUSIONS:
Costophrenic sinus obliteration can be found in nonpneumoconiotic silica-exposed coal miners and seems to be associated with silica exposure intensity.

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Asbestos Exposure – Ambler
Public Health Evaluation and Assessment
Interim Report

May 20, 2005

John P. Middaugh, M.D.
Scott Arnold, Ph.D.

Introduction

Many individuals, agencies, and stakeholders have been working together to evaluate the significance of the discovery in the fall of 2003 of naturally occurring asbestos in the gravel pit at Ambler. Several meetings have been hosted by the Northwest Arctic Borough to share information and identify steps needed to develop recommendations for the community.

Public Health Findings

The Alaska Division of Public Health has been working with the Maniilaq Health Center, Maniilaq Association, the Alaska Native Tribal Health Consortium, and several national asbestos experts to obtain information on the medical and public health significance of the presence of asbestos in Ambler.

Inhalation of asbestos fibers is the primary route of human exposure. The likelihood of developing asbestos-related diseases is related to the length of exposure and the concentration of asbestos.

We performed a medical records search to determine if any asbestos-related diseases have ever been identified in residents of Ambler, Kobuk, Shungnak, and Kiana.

- We reviewed all death certificates from 1980 to the present to see if there were any residents of Maniilaq villages who had died with any asbestos-related diagnosis. There were no residents with any asbestos-related diagnoses on the death certificate.

- We reviewed the State Cancer Registry and the Alaska Native Tumor Registry to see if there were any asbestos-related cancers that had been diagnosed and reported from any residents of Ambler, Kobuk, Shungnak, and Kiana. There were no residents who had been diagnosed with mesothelioma from any of these villages dating back to 1970. There were no reported cases of lung cancer from Ambler, Kobuk, or Shungnak dating back to 1970. There were 5 reported cases of lung cancer, all from the village of Kiana. These 5 cases occurred from 1984 to 2003, and they included 4 different cell types of lung cancer.

- We reviewed computerized medical records in the RPMS medical record system. There were no residents of the 4 villages who ever had been diagnosed with any asbestos-related disease.

- We reviewed existing chest x-rays from 128 residents from the 4 villages who were 50 years and older – 28 of these residents were from Ambler. Because of the past epidemics of tuberculosis and other common pulmonary diseases, there were many abnormalities. An expert, certified nationally as a chest x-ray reader for asbestos-related disease, reviewed these x-rays on behalf of the Maniilaq Association and the Alaska Division of Public Health.
  - Of the 28 residents of Ambler whose chest x-rays were reviewed, 2 had pleural changes that were probably caused by prior exposure to asbestos.
  - Of the 100 residents of Kobuk, Shungnak, and Kiana whose chest x-rays were reviewed, 7 had pleural changes that might have been caused by prior exposure to asbestos.
  - The asbestos-related changes were in the form of pleural plaques, and their appearance suggests that they were due to asbestos exposure many years ago, possibly due to occupational exposure.

- After receiving the information from reading the chest x-rays, a medical epidemiologist from the Section of Epidemiology visited Maniilaq, reviewed all available medical records, and with the help of a local interpreter, interviewed the patients who were still living and who agreed to be interviewed.
  - Several of the residents described past employment working in mines.
  - Many of the residents worked in mining many years ago, and they were unable to provide detailed information that would enable specific characterization of exposure to asbestos.
  - Of the 9 people with pleural plaques suspicious for asbestos exposure, 1 recalled working in an asbestos mine, 1 worked with asbestos as a construction worker, 1 was repeatedly exposed to high levels of mine dust while washing her husband's clothing, 1 refused interview, 2 had other medical conditions not-related to asbestos that definitively explained the x-ray findings, and the results for the remaining 3 were inconclusive because they had non-asbestos related lung diseases but these diseases did not definitively account for the x-ray changes.
- There are no medical tests to determine the amount of asbestos a person has been exposed to during their lifetime.
- There are no medical tests that are uniquely specific to identifying asbestos-related disease, but general clinical tests of lung function and chest x-rays are used to diagnose the disease and its impact. It is particularly difficult to identify mild cases.
- Persons who are exposed to asbestos have a greatly increased risk of developing asbestos-related disease if they smoke tobacco.

Asbestos Deposits in the Kobuk River Area

- Asbestos has been documented to be naturally present in the Kobuk valley for at least one century, and archaeologists have evidence that asbestos has been used by Alaska Natives for hundreds of years.

- Twelve asbestos deposits have been identified in the Ambler/Shungnak/Kobuk area.
- Asbestos mining occurred near Shungnak in the 1940s. Approximately 45 tons of tremolite asbestos was mined from Asbestos Mountain near the head of Dahl Creek in the 1940s.
- Approximately one ton of chrysotile asbestos was removed near Dahl Creek in 1945.
- Limited development of asbestos deposits on Bismark Mountain, Jade Mountain, and Cosmos Creek also occurred in the 1940s.
- Local Alaska Natives were employed to mine and develop these asbestos deposits in the 1940s.

Environmental Sampling Near Ambler

Since the discovery of naturally occurring asbestos in the Ambler gravel pit during the fall of 2003, several sampling efforts have occurred (Table 1). Gravel from the Ambler gravel pit has been used throughout Ambler for roads, housing and building pads, and the airport runway for 30 to 40 years.

- The unprocessed soil from the easternmost portion of the gravel pit contains trace amounts of asbestos (<1%). The sieved processed soil remaining in the gravel pit contains 5% to 10% asbestos. Pure chysotile asbestos has also been identified in the gravel pit.
- Chrysotile asbestos has been detected in air samples within the school at 0.01 fibers/cubic centimeter. For comparison, the OSHA standard based on an 8-hour time weighted average is 0.1 fibers/cubic centimeter.
- Asbestos concentrations ranged from trace amounts (<1%) to 5% in samples of gravel used for construction that came from the Ambler gravel pit.
- Chrysotile asbestos was found in soil used to cover the gravel at the new Ambler school, although in very low levels.
- Asbestos was not detected in three ambient air samples collected last year near the road in Ambler.
- In an effort to locate a new, asbestos-free gravel pit site, the Alaska Department of Transportation and Public Facilities investigated 7 candidate material sites adjacent to the Ambler and Kobuk Rivers over an approximately 10 mile area. Of the 40 soil samples collected from the proposed new material site, 17 contained trace amounts (<1%) of asbestos. Of the 30 samples collected from the other 6 candidate sites, 12 samples contained trace amounts to 1% asbestos.

Planned Construction Activities

- Several major construction projects important to the village have been on hold until the extent of asbestos could be determined and its significance assessed:
  - Runway repairs at the airport
  - New sewage lagoon
  - New washeteria with underground piping to the new sewage lagoon

- The Alaska Native Tribal Health Consortium (ANTHC) engineers are proceeding with construction planning, including provisions to protect workers from asbestos exposure in accordance with Occupational Safety and Health Administration (OSHA) requirements.

- Based upon the characteristics of the planned construction projects, ANTHC believes that all of the construction projects can be accomplished within OSHA standards for worker protection.

Summary and Public Health Recommendations

- Additional public health medical record and chest x-ray reviews will be needed, but they will not provide much additional information to assist in deciding on construction this summer.
- There would be minimal increase in risk to residents from marginal exposure to asbestos as a result of any of the proposed construction activities if they were to proceed this summer. The asbestos that is present has been present for decades, and now that it is known to be present, construction projects can take precautions to minimize airborne dust and worker exposure can be controlled to OSHA standards.
- Deferring the construction projects carries risks to the community. The community needs to have a sound airport runway, a functioning sewage lagoon, and a working water and sewer system.
- With use of personal air monitors, worker safety and health can be protected if the proposed construction proceeds.
- Ambient air monitoring during construction will enable monitoring of community exposures.
- Additional soil testing in Ambler is essential to determine if asbestos is present other than from past use of gravel from the Ambler gravel pit.
- Soil testing in Kobuk, Shungnak, and Kiana should be done to determine if asbestos is present in the villages.
- Given the long history of use of gravel from the gravel pit, it is unlikely that Ambler will ever be asbestos-free in the future. However, the low concentrations of asbestos to which the residents will be exposed are unlikely to pose a significant threat to the public's health. The Alaska Division of Public Health will continue to assist the community to assess the extent of past, present, and future health hazards and, if necessary, develop practical risk management approaches.

Table 1. Recent Sampling for Asbestos in the Ambler area.

Agency	Year	Sample location	Number of samples	Amount of asbestos
Alaska Department of Transportation and Public Facilities	2003	Ambler gravel pit	3	1 to 10%
Department of Labor and Workforce Development	2003	Under school-original soil	2	not detected
		Near school from gravel originating from the gravel pit	3	< 1%
		Gravel pit	2	<1%
		Gravel pit	1	pure chrysotile mineral
		Wipe samples inside of school	3	asbestos detected
		Air sample	1	0.01 fibers/cc
NANA (prepared by Stevens Exploration Management Corp.)	2004	Ambler gravel pit	visual examination of screened reject	5 to 10 % asbestos
		Gravel pit-easternmost portion	3	<1%
Alaska Native Tribal Health Consortium	2004	Lagoon test hole	2 composite	not detected
		Sand/gravel from the Redstone Ave stockpile,WTP and washeteria pad, and lift station	3	0.75% to 5%
		WTP and washeteria pad	1 composite	1.7%
		Ambler borrow pit	1 composite	1.46%
Alaska Department of Environmental Conservation	2004	Air samples collected July and August for Total Suspended Particulates (TSP)	The 3 filters with the highest TSP	not detected
		Soil sample from the school yard	1	asbestos detected
Alaska Department of Transportation and Public Facilities	2005	Seven material sites were investigated	Proposed site-40 samples	17/40 samples-asbestos detected at <1%
			Six other sites-five samples each	12/30 samples-asbestos detected <1% to 1%

NORTHWEST ARCTIC BOROUGH ASSEMBLY
RESOLUTION 12-05

A RESOLUTION OF THE NORTHWEST ARCTIC BOROUGH ASSEMBLY SUPPORTING THE EXTRACTION AND USE OF GRAVEL WITH LOW LEVELS OF NATURALLY OCCURRING ASBESTOS AND FOR RELATED PURPOSES

WHEREAS: many gravel sources—particularly in the Ambler region—of the Northwest Arctic Borough contain low levels of naturally occurring asbestos (NOA); and

WHEREAS: the presence of NOA has prevented a significant number of gravel sources from being developed, and in turn prevented many construction and community projects from being undertaken; and

WHEREAS: the City of Ambler stated an urgent need for gravel to repair eroding beaches, the airport runway; and community homes; and

WHEREAS: without using gravel containing low levels of NOA potentially available through sale from NANA Regional Corporation, the City of Ambler cannot otherwise undertake these repair projects without affordable gravel sources; and

WHEREAS: a recent study indicates that careful use and appropriate control strategies can minimize the risk that low amounts of NOA in gravel and aggregate sources present during extraction and use; and

WHEREAS: House Bill 258 is being considered by the Alaska Legislature to allow for the use of gravel and aggregate containing low levels of NOA by implementing standards and operating procedures for use and extraction; and

WHEREAS: the Borough desires to support the use of gravel containing low levels of NOA in a safe and responsible manner.

NOW THEREFORE BE IT RESOLVED, by the Northwest Arctic Borough Assembly:

1. The Borough supports the passage of HB 258 to facilitate the use of gravel or aggregate containing low levels of naturally occurring asbestos; and

2. The Borough supports NANA and City of Ambler's extraction and use of gravel containing low levels of naturally occurring asbestos.

PASSED AND ADOPTED THIS 28th DAY OF FEBRUARY, 2012.

Walter G. Sampson, Assembly President

PASSED AND APPROVED THIS 28th DAY OF FEBRUARY, 2012.

Siikauraq Martha Whiting, Mayor

ATTESTED THIS 28th DAY OF FEBRUARY, 2012.

Helena Hildreth, Borough Clerk **ATTEST:**

A RESOLUTION SUPPORTING SALE OF GRAVEL TO BE USED FOR AMBLER EMERGENCY AND BUILDING PROJECTS

WHEREAS, the City of Ambler is organized as a municipal corporation under the laws of the State of Alaska; and

WHEREAS, NANA Regional Corporation, Inc. (NANA) is organized pursuant to the Alaska Native Claims Settlement Act (ANCSA, P.L. 92-203); and

WHEREAS, beach erosion is an ongoing and urgent problem that is putting structures as well as community infrastructure at risk of eroding; and,

WHEREAS, the airport at Ambler is in urgent need of gravel to make it safer to land aircraft; and

WHEREAS, naturally occurring asbestos (NOA) has been found in the gravel at Ambler; and,

WHEREAS this naturally occurring asbestos (NOA) has held up projects that better the community needs for the past (however many) years; and,

WHEREAS, the City of Ambler recognizes that housing needs have not been met due to the gravel shortage; and,

WHEREAS, the City of Ambler recognizes the urgent need to have gravel supplied to upgrade the airport runway and other Ambler projects, and fully supports NANA'S sale of gravel containing NOA for community projects, and;

WHEREAS, if NANA sells gravel with NOA, standard operating procedures for the extraction, transportation, and placement of the gravel will be followed and in addition the airport runway will be paved; and

BE IT THEREFORE RESOLVED by the City Council of the City of Ambler that the City of Ambler supports NANA's sale of gravel containing NOA and understands that standard operating procedures will be used in the extraction, transportation, and placement of the gravel.

ADOPTED, this 15TH day of July, 2011, at a duly called meeting held in Ambler, Alaska by a vote of 4 for, 0 against, and 3 not voting.

LEGISLATIVE RESEARCH SERVICES

Alaska State Legislature
Division of Legal and Research Services
State Capitol, Juneau, AK 99801

(907) 465-3991 phone
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research@legis.state.ak.us

Memorandum

TO: Senator Donald Olson
FROM: Susan Haymes, Legislative Analyst
DATE: March 21, 2012
RE: Naturally Occurring Asbestos and Immunity from Liability
LRS Report 12.257

You asked if laws governing the use of naturally occurring asbestos in California and Virginia provide for immunity from liability similar to the proposed language in SB 180 and HB 258.

The short answer to your question is no. Neither California nor Virginia have any provisions that create immunity from a civil action or a claim for civil damages based on the use of gravel and aggregate materials containing naturally occurring asbestos (NOA).

According to John Yeltman, Environmental Health Specialist, Fairfax County Health Department, the state of Virginia does not have a law that provides for liability immunity from claims relating to the use of gravel or other aggregate materials containing naturally occurring asbestos.[1] Mr. Yeltman notes that the potential exposure to naturally occurring asbestos is not a statewide issue, but exists primarily in Fairfax County. The county operates a NOA program which has established standards and requirements to control exposure to asbestos generated from construction activities. Soil and other materials containing asbestos can be used as fill as long as the recipient has been notified of the asbestos and the fill is capped with at least six inches of clean material. Mr. Yeltman explained that if the responsible party does not provide a warning and an asbestos-related injury or illness occurs, the party could be sued under Virginia law.

The California Air Resources Board (CARB) implemented regulations in that state, known as Airborne Toxic Control Measures, to minimize public exposure to NOA in rock and soil. The CARB established a 0.25 percent threshold for asbestos content. If the asbestos content is less than 0.25 percent, the material may be used for surfacing or any other use; if the material has greater than or equal to 0.25 percent, its use is restricted. Any person who sells, supplies, or offers for sale restricted material for non-surfacing applications must provide a written receipt containing a warning that it is unlawful to use the material for surfacing or any application in which the material would remain exposed (CA Code of Regulations, Title 17, Section 93106).[2]

We searched Lexis, the state of California's online statutes, and the National Conference of State Legislature's 50-State Bill Information Service for state laws and proposed legislation. We found no laws or proposed legislation that provide immunity from liability for persons supplying or using materials containing naturally occurring asbestos for asbestos-related claims.[3]

We hope this is helpful. If you have questions or need additional information, please let us know.

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[1] Mr. Yeltman can be reached at 703.246.2541.

[2] More information on the California NOA program can be accessed at *www.arb.ca.gov/toxics/asbestos/reginfo.htm*.

[3] California laws can be accessed at *www.leginfo.ca.gov/calaw.html*, and state legislation can be accessed at the National Conference of State Legislature's 50-State Bill Information Service at *www.ncsl.org/issues-research.aspx?tabs=966,124,829*. California does allow immunity from liability to an owner of a building that has asbestos-containing construction materials, if the owner provides notice to employees and occupants of the buildings (Cal Health & Safety Code § 25915.5).

Representative Reggie Joule
Alaska State Legislature District 40

Department of Law & Department Labor and Workforce Development Answers on Worker's Compensations Claims and HB 258 Immunity

From: Scavera, Paula D (DOL)
Sent: Tuesday, March 20, 2012 9:59 AM
To: Badgley, Cori M (LAW); Brodie Anderson
Cc: Anjilvel, Saritha R (LAW)
Subject: RE: HB 258 (naturally occurring asbestos) - Immunity and Work

After reviewing HB 258 within the Department (including the Workers' Compensation Division), the Department agrees with the Department of Law's assessment of the bill. Thank you. Paula Scavera

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From: Badgley, Cori M (LAW)
Sent: Tuesday, March 20, 2012 7:43 AM
To: Anderson, Brodie (LAA)
Cc: Anjilvel, Saritha R (LAW); Scavera, Paula D (DOL)
Subject: HB 258 (naturally occurring asbestos) - Immunity and Work

Brodie,

Per our discussion, we asked our immunity experts about worker's compensation, and it turns out that as worker's compensation is considered a benefit rather than a claim, it is typically NOT affected by immunity statutes. We are looking into this further with the specific immunity language in the bill in mind, but I wanted to let you know that this is our initial conclusion.

Department of Labor might also have some thoughts on worker's compensation from an administration and policy point of view.

Thanks!

Cori Badgley
Assistant Attorney General
Legislation and Regulations Section
Department of Law
P.O. Box 110300
Juneau, Alaska 99811
cori.badgley@alaska.gov
(907) 465-2132

27-LS1219\X
Nauman
3/30/12

CS FOR SENATE BILL NO. 180(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR OLSON

A BILL

FOR AN ACT ENTITLED

"An Act directing the Department of Transportation and Public Facilities to develop and implement standards and operating procedures, to evaluate site-specific use plans, and to designate project areas concerning gravel or other aggregate material containing naturally occurring asbestos; authorizing use on an interim basis of gravel or other aggregate material containing naturally occurring asbestos for certain transportation projects and public facilities; providing immunity for certain landowners, extractors, suppliers, transporters, and contractors for certain actions or claims arising in connection with the use of gravel or aggregate material containing naturally occurring asbestos in certain areas; requiring reporting of certain asbestos-related data to the Department of Transportation and Public Facilities; and providing for an effective date."

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

* **Section 1.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.245. Immunity for certain persons supplying or using gravel or other aggregate material; limitations on asbestos-related actions against defendants. (a) Except as provided in (b) of this section, a civil action or claim for damages or costs alleging a death, injury, illness, disability, property damage, or any other damages resulting from the use of gravel or other aggregate material that contains naturally occurring asbestos may not be brought against a defendant

(1) based on the ownership of land within an area designated by the Department of Transportation and Public Facilities under AS 44.42.400(b) or (c) from which gravel or other aggregate material is extracted that, when tested using a bulk method prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass; or

(2) for an act or omission occurring in the course of extracting, supplying, transporting, or using gravel or other aggregate material containing naturally occurring asbestos within an area designated by the Department of Transportation and Public Facilities under AS 44.42.400(b) or (c) when the act or omission was in compliance with the requirements of AS 18.31.250, AS 44.42.410(a) and (d), and applicable regulations developed under AS 44.42.420.

(b) The immunity provided by this section does not apply to the state, but the immunity does apply to a state employee acting within the scope of employment or by a contractor employed by the state acting within the scope of the contract.

(c) In this section, "naturally occurring asbestos" has the meaning given in AS 44.42.430.

* **Sec. 2.** AS 18.31 is amended by adding new sections to read:

Article 2A. Naturally occurring asbestos.

Sec. 18.31.250. Use of materials containing naturally occurring asbestos. (a) A principal construction contractor or, in the absence of an identified principal construction contractor, person having legal authority for the design and construction of a project may qualify for immunity in a civil action under AS 09.65.245(a)(2) for the use of gravel or other aggregate material that, when tested using a bulk test method

prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass.

(b) To qualify for the immunity provided under AS 09.65.245(a)(2), before initiating a construction project not subject to AS 44.42.410(b) that is within an area designated by the Department of Transportation and Public Facilities under AS 44.42.400(b) or (c) and that will use gravel or other aggregate material that contains naturally occurring asbestos, the principal construction contractor or, in the absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project, shall prepare and submit to the Department of Transportation and Public Facilities specific project plans demonstrating compliance with the standards adopted by the department under AS 44.42.420 and the requirements of the site-specific use plan under AS 44.42.410. Before extraction of gravel or other aggregate material may begin, the plan must be approved and returned to the contractor by the department.

(c) To preserve the immunity provided under AS 09.65.245(a)(2), the principal construction contractor or, in the absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project, shall adhere to the site-specific use plan approved by the department and the monitoring and mitigation plan created by the department.

Sec. 18.31.260. Presence of naturally occurring asbestos. The state shall consider 0.25 percent by mass, the minimum detectable amount of asbestos under the California Air Resources Board Method 435, as the baseline for the presence of naturally occurring asbestos in gravel or other aggregate material.

* **Sec. 3.** AS 44.42 is amended by adding new sections to read:

Article 3A. Use of Materials Containing Naturally Occurring Asbestos.

Sec. 44.42.400. Administration and designated use areas. (a) The department shall designate a single employee who reports to the commissioner to oversee the duties assigned to the department in AS 44.42.400 - 44.42.430 and to serve as the point of contact for inquiries related to projects using gravel or other aggregate material containing naturally occurring asbestos.

(b) An area that includes land within a municipality or community may be designated by the department as an area in which certain landowners and contractors are granted immunity under AS 09.65.245(a) for causing asbestos-related injuries only if the municipality or community requests that designation. A municipality or community may request to become an area designated by the department under this subsection by submitting an application to the department. The department may approve an application received under this subsection only after reviewing tests documenting the presence of naturally occurring asbestos in that area, analyzing the effect of the presence of naturally occurring asbestos on construction projects in the area, considering the availability of gravel or other aggregate material free from naturally occurring asbestos in the area, and soliciting public input from residents in the affected municipality or community. The department may require a municipality or community that applies to become a designated area to provide the department with tests documenting the presence of naturally occurring asbestos, information related to the effect of the presence of naturally occurring asbestos on construction projects in the area, information related to availability of gravel or other aggregate material free from naturally occurring asbestos, and other information relevant to the application. After designating an area after approval of an application under this subsection, the department shall notify, including through signage, potentially affected persons that the area has been designated as an area where immunity may be granted under AS 09.65.245(a) for certain landowners and contractors causing asbestos-related injuries.

(c) In places that do not include a municipality or community, the department may designate an area in which certain landowners and contractors are granted immunity under AS 09.65.245(a) for causing asbestos-related injuries. Before designating an area under this subsection, the department shall document the presence of naturally occurring asbestos in that area, analyze the effect of the presence of naturally occurring asbestos on construction projects in the area, consider the availability of gravel or other aggregate material free from naturally occurring asbestos in the area, and solicit public input from potentially affected persons. After designating an area under this subsection, the department shall notify, including

through signage, potentially affected persons that the area has been designated as an area where immunity may be granted under AS 09.65.245(a) for certain landowners and contractors causing asbestos-related injuries.

(d) In this section, "community" means a place in the unorganized borough, in a borough, or in a unified municipality that is not incorporated as a municipality, that is not a reserve, and in which 25 or more individuals reside as a social unit.

Sec. 44.42.410. Site-specific use plan. (a) To qualify for the immunity provided under AS 09.65.245(a)(2), a contractor intending to use, within an area designated by the department under AS 44.42.400(b) or (c), gravel or other aggregate material that, when tested using a bulk test method prescribed by the department in regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass, shall, after consulting with the owner of the land on which the gravel or other aggregate material containing naturally occurring asbestos will be placed, submit a site-specific use plan to the department that

(1) describes the manner in which the proposed use of gravel or other aggregate material that contains naturally occurring asbestos conforms to the standards adopted under AS 44.42.420(b);

(2) demonstrates how the proposed construction operation and maintenance practices comply with those that are required and those that are minimally acceptable, as described in AS 44.42.420(b)(5), and otherwise meet requirements of law applicable to the handling of compounds that contain asbestos;

(3) outlines the efforts that will be made, as a component of long-term maintenance on the completed project or facility, to ensure that human health and air quality are not compromised by the use of the gravel or other aggregate material that contains naturally occurring asbestos;

(4) describes how the gravel or other aggregate material to be used can be contained underneath the project or buried so that asbestos fibers cannot become airborne or otherwise transferred outside of the project area, except as provided in (5) and (6) of this subsection;

(5) if the requirements in (4) of this subsection are economically unreasonable, describes how the gravel or other aggregate material to be used will be

sealed, including chip sealing or mixing with asphalt, in order to prevent asbestos fibers from becoming airborne or otherwise transferred outside of the project area, except as provided in (6) of this subsection; and

(6) if the requirements under (4) and (5) of this subsection are economically unreasonable, describes how the gravel or other aggregate material will be used in order to prevent asbestos from becoming airborne or otherwise transferred outside of the project area, including how the gravel or other aggregate material will be used in order to prevent asbestos from becoming airborne because of vehicle traffic, road maintenance, or grading, if applicable.

(b) For a project that is a transportation facility, including a public highway, airport, or pipeline or railroad track bed, or a public work, as that term is defined in AS 35.95.100, for which the department is the principal construction contractor, and for which the department intends to use, within an area designated by the department under AS 44.42.400(b) or (c), gravel or other aggregate material that, when tested using a bulk testing method prescribed by the department in regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass, the department shall develop a site-specific use plan that details the use of gravel or other aggregate material in the construction or maintenance of the transportation project or public facility in accordance with the requirements of (a) of this section and regulations developed under AS 44.42.420. The department may not begin extraction of the gravel or aggregate material containing naturally occurring asbestos until the site-specific use plan is approved and the monitoring and mitigation plan is completed by the department. The department shall adhere to the site-specific use and monitoring and mitigation plans.

(c) The department shall review each site-specific use plan and shall work toward approving or disapproving the plan, taking into consideration the construction season in the project location.

(d) The department may not approve a plan for construction with gravel or other aggregate material determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass unless

(1) the department determines that it is economically unreasonable to

undertake the construction project with gravel or other aggregate material free from naturally occurring asbestos; and

(2) the completed project will not use gravel or other aggregate material containing naturally occurring asbestos for a surface application.

(e) On developing or receiving a site-specific use plan that meets the requirements of (a) and (d) of this section and the regulations adopted under AS 44.42.420, the department, in consultation with the Department of Environmental Conservation, the Department of Health and Social Services, the Department of Natural Resources, the Department of Law, and the Department of Labor and Workforce Development, shall develop a monitoring and mitigation plan for the project. If the site-specific use plan is approved, the monitoring and mitigation plan developed by the department shall be attached to the site-specific use plan. To qualify for the immunity provided in AS 09.65.245(a)(2), the person that has direct control over or responsibility for the monitoring or mitigation shall comply with the monitoring or mitigation plan developed by the department.

(f) On approval of a site-specific use plan, the department

(1) shall provide to the contractor a copy of the approved site-specific use plan that includes

(A) the monitoring and mitigation plan developed under (e) of this section;

(B) a requirement that all asbestos-related data collected by the contractor during or after construction be submitted to the department; and

(C) recommended methods for reducing exposure to airborne asbestos fibers;

(2) shall provide a copy of the site-specific use plan, including the monitoring and mitigation plan, to the mayor or manager of a municipality affected by the use of gravel or other aggregate material containing asbestos; and

(3) may provide to the contractor copies of the United States Occupational Safety and Health Administration, United States Mine Safety and Health Administration, and United States Environmental Protection Agency recommended practices for handling and use of gravel or other aggregate material containing

naturally occurring asbestos.

(g) Within 60 days after completing a project in accordance with a site-specific plan approved by the department, the person responsible for compliance with the site-specific use plan shall record in the recording district where the property is located a document that includes a description of the affected property, a reference to the most recent recorded conveyance of that property, and a notice indicating the presence of naturally occurring asbestos, and stating that subsequent interest holders may have legal obligations with respect to preventing the naturally occurring asbestos from becoming airborne or otherwise transferred outside of the project area. The person that records a document required under this section shall provide written notification to the department and the landowner that the document has been recorded.

(h) The person responsible for compliance with the site-specific use plan shall submit to the department the results of any monitoring or testing performed in accordance with the site-specific use plan and any mitigation measures undertaken.

Sec. 44.42.420. Regulations. (a) The department, after consultation with the Department of Environmental Conservation, the Department of Health and Social Services, the Department of Natural Resources, the Department of Law, and the Department of Labor and Workforce Development, shall prescribe in regulation a bulk testing method for gravel or other aggregate material containing naturally occurring asbestos.

(b) The department, after consultation with the Department of Environmental Conservation, the Department of Health and Social Services, the Department of Natural Resources, the Department of Law, and the Department of Labor and Workforce Development, may adopt regulations under AS 44.62 (Administrative Procedure Act) to implement AS 44.42.400 - 44.42.430, including regulations revising statewide standards on the use in the construction and maintenance of transportation projects and public facilities of gravel or aggregate material that, when tested using a bulk test method prescribed by the department by regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass. The regulations adopted under this subsection must include

(1) procedures for completing site investigations and characterizations

of proposed projects, including the development and description of appropriate laboratory practices;

(2) procedures for reviewing design alternatives and preparing and evaluating appropriate comparative cost analyses that consider the use of gravel or other aggregate material that does not contain naturally occurring asbestos;

(3) procedures for evaluating human health concerns arising out of gravel or other aggregate material that contains naturally occurring asbestos and documentation of methods and means to be used during periods of handling of the gravel or other aggregate material to ensure compliance with appropriate workplace safety and air quality standards relating to the project and to ensure the health and safety of communities affected by construction projects that use gravel or other aggregate material containing naturally occurring asbestos;

(4) procedures for preparing designs and design specifications for facilities involving use of gravel or other aggregate material that contains naturally occurring asbestos;

(5) procedures for outlining construction operation and maintenance practices that are required and those that are minimally acceptable to meet requirements of law applicable to the handling of compounds that contain asbestos;

(6) procedures for processing, reviewing, and approving or disapproving site-specific use plans and area designation requests received under AS 44.42.400(b) in a uniform manner;

(7) guidelines to analyze the cost of a project;

(8) guidelines for determining whether the cost associated with the use of gravel or other aggregate material free from naturally occurring asbestos under AS 44.42.410(d) is economically unreasonable;

(9) guidelines for determining whether the cost associated with burying or sealing gravel or other aggregate material containing naturally occurring asbestos under AS 44.42.410(a)(2) and (3) is economically unreasonable;

(10) guidelines for establishing areas designated under AS 44.42.400(b) or (c) that take into account the effect on human health in and around the designated area and environmental factors affecting the transfer of asbestos fibers

within and outside of a designated area.

Sec. 44.42.430. Definitions. In AS 44.42.400 - 44.42.430,

(1) "contractor" means the principal construction contractor, or in absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project and includes the department;

(2) "naturally occurring asbestos" means chrysotile, amosite, crocidolite, fibrous tremolite, fibrous anthophyllite, and fibrous actinolite asbestos-containing material that has not been processed in an asbestos mill and that, when tested using a bulk method prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass.

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

INTERIM PROJECT AUTHORIZATION. (a) Notwithstanding AS 44.42.400(a) and (b), added by sec. 2 of this Act, the Department of Transportation and Public Facilities may, on a temporary basis, designate a limited number of areas in the state in which certain landowners and contractors are granted immunity under AS 09.65.245(a) for causing asbestos-related injuries where an inability to complete construction projects has been demonstrated because of lack of gravel or other aggregate material free from naturally occurring asbestos. After designating an area on a temporary basis, the department shall notify, including through signage, potentially affected persons that the area has been designated as an area in which immunity may be granted under AS 09.65.245(a) for certain landowners and contractors causing asbestos-related injuries. Notwithstanding AS 18.31.250, added by sec. 2 of this Act, the Department of Transportation and Public Facilities may approve a limited number of appropriate construction projects until the development and implementation of initial standards under AS 44.42.420, added by sec. 3 of this Act, for projects not subject to AS 44.42.410(b), if, under (b) of this section, the Department of Transportation and Public Facilities prepares and adopts interim standards and requires its contractors to prepare site-specific plans for the use of gravel or other aggregate material that, when tested using the bulk method prescribed in sec. 5 of this Act, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass in

transportation projects and public facilities. The department shall apply the standards developed under (b) of this section to a person described in AS 18.31.250 for a project that is not subject to AS 44.42.410(b).

(b) Notwithstanding AS 44.42.400(a) and (b), added by sec. 2 of this Act, the Department of Transportation and Public Facilities may, on a temporary basis, designate a limited number of areas in the state in which certain landowners and contractors are granted immunity under AS 09.65.245(a) for causing asbestos-related injuries where an inability to complete construction projects has been demonstrated because of lack of gravel or other aggregate material free from naturally occurring asbestos. After designating an area on a temporary basis, the department shall notify, including through signage, potentially affected persons that the area has been designated as an area where immunity may be granted under AS 09.65.245(a) for certain landowners and contractors causing asbestos-related injuries. Notwithstanding AS 44.42.410(b), added by sec. 3 of this Act, the Department of Transportation and Public Facilities may approve a limited number of appropriate transportation projects and public facilities until the development and implementation of initial standards under AS 44.42.420, added by sec. 3 of this Act, after consultation with the Department of Environmental Conservation, the Department of Health and Social Services, the Department of Labor and Workforce Development, and appropriate federal agencies. The Department of Transportation and Public Facilities may prepare and adopt interim standards and operating procedures and may require of its contractors the preparation of site-specific plans for the use of gravel or other aggregate material that when tested using the bulk method prescribed in sec. 5 of this Act, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass.

(c) The authority granted by (a) and (b) of this section expires December 31, 2013.

* **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INTERIM STANDARDS FOR APPLICATION OF ASBESTOS BULK TESTING. Until the Department of Transportation and Public Facilities adopts and prescribes a method of bulk testing under AS 44.42.420(a), added by sec. 3 of this Act, the department shall use California Air Resources Board Method 435, Determination of Asbestos Content of Serpentine Aggregate, adopted on June 6, 1991, as that standard has effect on the effective

date of this Act, as the basis for determining the asbestos content of a bulk sample or for interim use as authorized by sec. 4 of this Act.

* **Sec. 6.** This Act takes effect immediately under AS 01.10.070(c).

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Date: March 29, 2012

TO: Leg Legal

From: Cindy Smith

RE: SB 180 27-LS1219\E Naturally Occurring Asbestos

Please prepare a Senate Judiciary CS for SB 180, as follows:

1. Import the language of the House Finance version of this bill (HB 258, version G).

2. Eliminate all provisions providing immunity to the state (retain immunity provisions for landowners, contractors, etc.)

3. Add a provision that states that no site specific plan shall be approved by DOT using NOA greater than .25% for any surface application, and that any use of NOA gravel over .25% must include plans for capping or sealing the material.

CS FOR HOUSE BILL NO. 258(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered: 3/29/12
Referred: Rules

Sponsor(s): REPRESENTATIVES JOULE, Tammie Wilson

A BILL

FOR AN ACT ENTITLED

"An Act directing the Department of Transportation and Public Facilities to develop and implement standards and operating procedures, to evaluate site-specific use plans, and to designate project areas concerning gravel or other aggregate material containing naturally occurring asbestos; authorizing use on an interim basis of gravel or other aggregate material containing naturally occurring asbestos for certain transportation projects and public facilities; providing immunity for the state and for landowners, extractors, suppliers, transporters, and contractors for certain actions or claims arising in connection with the use of gravel or aggregate material containing naturally occurring asbestos in certain areas; requiring contractors to report certain asbestos-related data to the Department of Transportation and Public Facilities; and providing for an effective date."

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

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

LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature finds that

(1) gravel or similar aggregate material is constantly in demand for major construction and maintenance of state and local transportation projects and public facilities and for all types of construction by public and private entities;

(2) naturally occurring asbestos may be found in sources of gravel and similar aggregate material throughout the state;

(3) while airborne asbestos fibers are a significant threat to workplace safety and public health and are subject to close regulation by federal and state authorities under 42 U.S.C. 7401 - 7671q (Clean Air Act) and 15 U.S.C. 2601 - 2692 (Toxic Substances Control Act), use of materials containing naturally occurring asbestos in construction projects may be regulated by states;

(4) in communities that do not have sources of gravel or similar aggregate material that is free of naturally occurring asbestos, costs of construction are substantially increased because of the necessity of locating alternative sources of gravel or similar aggregate material and transporting that material to distant construction and maintenance sites; and

(5) a recent study suggests that, with careful use and close adherence to appropriate control strategies, state and local transportation projects and public facilities may be safely completed using sources of gravel or similar aggregate material that contains naturally occurring asbestos; the study recommends that the Department of Transportation and Public Facilities establish standards and operating procedures through a statewide process that will apply to the use of gravel and aggregate material that contains asbestos by the department and by any public or private entity.

(b) It is the purpose of this Act

(1) to authorize and direct the Department of Transportation and Public Facilities to develop, implement, and, as circumstances may require or indicate, modify standards and operating procedures to allow the use in the construction and maintenance of transportation projects and public facilities in certain areas of the state of gravel or aggregate material that contains naturally occurring asbestos, with the expectation that use of that

material in a manner that is consistent with those standards and procedures may avoid significant risk to human health and eliminate significantly higher costs of construction and maintenance of projects and facilities associated with using only construction material that is free of asbestos;

(2) to establish that a person that uses gravel that contains naturally occurring asbestos in certain areas of the state may prepare specific project plans that conform to the requirements of this Act and the department's standards and operating procedures; and

(3) to shield persons and the state, including its agencies, officers, and employees, under certain conditions, from liability based on exposure to naturally occurring asbestos.

(c) This Act creates a voluntary program in certain areas of the state and provides civil immunity for the use of gravel or other aggregate material that contains naturally occurring asbestos for contractors meeting the requirements of the program; nothing in this Act mandates a contractor to submit a site-specific plan or to adhere to the requirements of a plan approved by the department.

(d) Because neither the state nor the federal government has established a scale assigning a specific risk level to a corresponding amount of naturally occurring asbestos, this Act accepts 0.25 percent by mass, the minimum detectable amount of asbestos under the California Air Resources Board Method 435, as the baseline for the presence of naturally occurring asbestos in gravel or other aggregate material. Health risks resulting from asbestos exposure vary according to the level, type, and duration of exposure. While exposure to very small concentrations of asbestos may pose some health risk, there is not a practical way to prevent all exposure to asbestos for residents in close proximity to deposits that contain naturally occurring asbestos. The intent of this act is to establish a sensible analytical threshold for detection of naturally occurring asbestos in gravel or other aggregate material and to establish appropriate exceptions for the use of gravel or other aggregate material that contains naturally occurring asbestos for certain public facilities and transportation projects involving unusual circumstances, including projects in remote locations or in regions where gravel or other aggregate material free from naturally occurring asbestos is not reasonably available.

*** Sec. 2.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.245. Immunity for certain persons supplying or using gravel or other aggregate material; limitations on asbestos-related actions against defendants. (a) Notwithstanding AS 09.50.250, a civil action or claim for damages or costs alleging a death, injury, illness, disability, property damage, or any other damages resulting from the use of gravel or other aggregate material that contains naturally occurring asbestos may not be brought against a defendant, including a contractor meeting the requirements of the program or the state and its agencies, officers, and employees,

(1) based on the ownership of land within an area designated by the Department of Transportation and Public Facilities under AS 44.42.400(b) or (c) from which gravel or other aggregate material is extracted that, when tested using a bulk method prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass; or

(2) for an act or omission occurring in the course of extracting, supplying, transporting, or using gravel or other aggregate material containing naturally occurring asbestos within an area designated by the Department of Transportation and Public Facilities under AS 44.42.400(b) or (c) when the act or omission was in compliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (d) and applicable regulations developed under AS 44.42.420.

(b) A civil action or claim based on noncompliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (e) and applicable regulations developed under AS 44.42.420 for damages or costs alleging an asbestos-related death, injury, illness, or disability or alleging asbestos-related property damage or any other asbestos-related damages may only be brought against a defendant that has direct control over or responsibility for compliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (e) and applicable regulations developed under AS 44.42.420.

(c) Notwithstanding AS 09.50.250, a civil action or claim for damages or costs alleging an asbestos-related death, injury, illness, or disability or alleging asbestos-

related property damage or any other asbestos-related damages may not be brought against any state agency or officer or employee of the state for an act or omission occurring in the course of designating a project area under AS 44.42.400(a) or (b), approving a site-specific use plan, or developing or approving a monitoring plan or a mitigation plan under AS 44.42.410.

(d) In this section, "naturally occurring asbestos" has the meaning given in AS 44.42.430.

*** Sec. 3.** AS 18.31 is amended by adding new sections to read:

Article 2A. Naturally occurring asbestos.

Sec. 18.31.250. Use of materials containing naturally occurring asbestos. (a) A principal construction contractor or, in the absence of an identified principal construction contractor, person having legal authority for the design and construction of a project may qualify for immunity in a civil action under AS 09.65.245(a)(2) for the use of gravel or other aggregate material that, when tested using a bulk test method prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass.

(b) To qualify for the immunity provided under AS 09.65.245(a)(2), before initiating a construction project not subject to AS 44.42.410(b) that is within an area designated by the Department of Transportation and Public Facilities under AS 44.42.400(b) or (c) and that will use gravel or other aggregate material that contains naturally occurring asbestos, the principal construction contractor or, in the absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project, shall prepare and submit to the Department of Transportation and Public Facilities specific project plans demonstrating compliance with the standards adopted by the department under AS 44.42.420 and the requirements of the site-specific use plan under AS 44.42.410. Before extraction of gravel or other aggregate material may begin, the plan must be approved and returned to the contractor by the department.

(c) To preserve the immunity provided under AS 09.65.245(a)(2), the principal construction contractor or, in the absence of an identified principal

construction contractor, the person having legal authority for the design and construction of the project, shall adhere to the site-specific use plan approved by the department and the monitoring and mitigation plan created by the department.

Sec. 18.31.260. Presence of naturally occurring asbestos. The state shall consider 0.25 percent by mass, the minimum detectable amount of asbestos under the California Air Resources Board Method 435, as the baseline for the presence of naturally occurring asbestos in gravel or other aggregate material.

*** Sec. 4.** AS 44.42 is amended by adding new sections to read:

Article 3A. Use of Materials Containing Naturally Occurring Asbestos.

Sec. 44.42.400. Administration. (a) The department shall designate a single employee who reports to the commissioner to oversee the duties assigned to the department in AS 44.42.400 - 44.42.430 and to serve as the point of contact for inquiries related to projects using gravel or other aggregate material containing naturally occurring asbestos.

(b) An area that includes land within a municipality or community may be designated by the department as an area in which certain landowners and contractors are granted immunity under AS 09.65.245(a) for causing asbestos-related injuries only if the municipality or community requests that designation. A municipality or community may request to become an area designated by the department under this subsection by submitting an application to the department. The department may approve an application received under this subsection only after reviewing tests documenting the presence of naturally occurring asbestos in that area, analyzing the effect of the presence of naturally occurring asbestos on construction projects in the area, considering the availability of gravel or other aggregate material free from naturally occurring asbestos in the area, and soliciting public input from residents in the affected municipality or community. The department may require a municipality or community that applies to become a designated area to provide the department with tests documenting the presence of naturally occurring asbestos, information related to the effect of the presence of naturally occurring asbestos on construction projects in the area, information related to availability of gravel or other aggregate material free from naturally occurring asbestos, and other information relevant to the application.

After designating an area after approval of an application under this subsection, the department shall notify, including through signage, potentially affected persons that the area has been designated as an area where immunity may be granted under AS 09.65.245(a) for certain landowners and contractors causing asbestos-related injuries.

(c) In places that do not include a municipality or community, the department may designate an area in which certain landowners and contractors are granted immunity under AS 09.65.245(a) for causing asbestos-related illness injuries. Before designating an area under this subsection, the department shall document the presence of naturally occurring asbestos in that area, analyze the effect of the presence of naturally occurring asbestos on construction projects in the area, consider the availability of gravel or other aggregate material free from naturally occurring asbestos in the area, and solicit public input from potentially affected persons. After designating an area under this subsection, the department shall notify, including through signage, potentially affected persons that the area has been designated as an area where immunity may be granted under AS 09.65.245(a) for certain landowners and contractors causing asbestos-related injuries.

(d) In this section, "community" means a place in the unorganized borough, in a borough, or in a unified municipality that is not incorporated as a municipality, that is not a reserve, and in which 25 or more individuals reside as a social unit.

Sec. 44.42.410. Site-specific use plan. (a) To qualify for the immunity provided under AS 09.65.245(a)(2), a contractor intending to use, within an area designated by the department under AS 44.42.400(b) or (c), gravel or other aggregate material that, when tested using a bulk test method prescribed by the department in regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass, shall, after consulting with the owner of the land on which the gravel or other aggregate material containing naturally occurring asbestos will be placed, submit a site-specific use plan to the department that

(1) describes the manner in which the proposed use of gravel or other aggregate material that contains naturally occurring asbestos conforms to the standards adopted under AS 44.42.420(b);

(2) demonstrates how the proposed construction operation and maintenance practices comply with those that are required and those that are minimally acceptable, as described in AS 44.42.420(b)(5), and otherwise meet requirements of law applicable to the handling of compounds that contain asbestos;

(3) outlines the efforts that will be made, as a component of long-term maintenance on the completed project or facility, to ensure that human health and air quality are not compromised by the use of the gravel or other aggregate material that contains naturally occurring asbestos;

(4) describes how the gravel or other aggregate material to be used can be contained underneath the project or buried so that asbestos fibers cannot become airborne or otherwise transferred outside of the project area, except as provided in (5) and (6) of this subsection;

(5) if the requirements in (4) of this subsection are economically unreasonable, describes how the gravel or other aggregate material to be used will be sealed, including chip sealing or mixing with asphalt, in order to prevent asbestos fibers from becoming airborne or otherwise transferred outside of the project area, except as provided in (6) of this subsection; and

(6) if the requirements under (4) and (5) of this subsection are economically unreasonable, describes how the gravel or other aggregate material will be used in order to prevent asbestos from becoming airborne or otherwise transferred outside of the project area, including how the gravel or other aggregate material will be used in order to prevent asbestos from becoming airborne because of vehicle traffic, road maintenance, or grading, if applicable.

(b) To qualify for and preserve the immunity provided under AS 09.65.245(a)(2), the department, in its operating procedures applicable to a project that is a transportation facility, including a public highway, airport, or pipeline or railroad track bed, or a public work, as that term is defined in AS 35.95.100, and for which the contractor intends to use, within an area designated by the department under AS 44.42.400(b) or (c), gravel or other aggregate material that, when tested using a bulk testing method prescribed by the department in regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass,

shall require that

(1) the contractor submit a plan that details the use of gravel or other aggregate material in the construction or maintenance of the transportation project or public facility in accordance with the requirements of (a) of this section and regulations developed under AS 44.42.420;

(2) before the extraction of the gravel or aggregate material containing naturally occurring asbestos may begin, the plan be approved and returned to the contractor by the department;

(3) the contractor adhere to the monitoring, mitigation, and site-specific use plans.

(c) The department shall review each submitted site-specific use plan and shall work toward approving or disapproving the plan, taking into consideration the construction season in the project location.

(d) The department may not approve a plan for construction with gravel or other aggregate material determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass unless the department determines that it is economically unreasonable to undertake the construction project with gravel or other aggregate material free from naturally occurring asbestos.

(e) On receiving a plan that meets the requirements of (a) and (d) of this section and the regulations adopted under AS 44.42.420, the department, in consultation with the Department of Environmental Conservation, the Department of Health and Social Services, the Department of Natural Resources, the Department of Law, and the Department of Labor and Workforce Development, shall develop a monitoring and mitigation plan for the project. If the site-specific use plan is approved, the monitoring and mitigation plan developed by the department shall be attached to the site-specific use plan. To qualify for the immunity provided in AS 09.65.245(a)(2), the party that has direct control over or responsibility for the monitoring or mitigation shall comply with the monitoring or mitigation plan developed by the department.

(f) On approval of a site-specific use plan, the department

(1) shall provide to the contractor a copy of the approved site-specific use plan that includes

(A) the monitoring and mitigation plan developed under (e) of this section;

(B) a requirement that all asbestos-related data collected by the contractor during or after construction be submitted to the department; and

(C) recommended methods for reducing exposure to airborne asbestos fibers;

(2) shall provide a copy of the site-specific use plan, including the monitoring and mitigation plan, to the mayor or manager of a municipality affected by the use of gravel or other aggregate material containing asbestos; and

(3) may provide to the contractor copies of the United States Occupational Safety and Health Administration, United States Mine Safety and Health Administration, and United States Environmental Protection Agency recommended practices for handling and use of gravel or other aggregate material containing naturally occurring asbestos.

(g) Within 60 days after completing a project in accordance with a site-specific plan approved by the department, the contractor shall record in the recording district where the property is located a document that includes a description of the affected property, a reference to the most recent recorded conveyance of that property, and a notice indicating the presence of naturally occurring asbestos, and stating that subsequent interest holders may have legal obligations with respect to preventing the naturally occurring asbestos from becoming airborne or otherwise transferred outside of the project area. The contractor shall provide written notification to the department and the landowner that the document has been recorded.

(h) The contractor shall submit to the department the results of any monitoring or testing performed in accordance with the site-specific use plan and any mitigation measures undertaken.

Sec. 44.42.420. Regulations. (a) The department, after consultation with the Department of Environmental Conservation, the Department of Health and Social Services, the Department of Natural Resources, the Department of Law, and the Department of Labor and Workforce Development, shall prescribe in regulation a bulk testing method for gravel or other aggregate material containing naturally occurring

asbestos.

(b) The department, after consultation with the Department of Environmental Conservation, the Department of Health and Social Services, the Department of Natural Resources, the Department of Law, and the Department of Labor and Workforce Development, may adopt regulations under AS 44.62 (Administrative Procedure Act) to implement AS 44.42.400 - 44.42.430, including regulations revising statewide standards on the use in the construction and maintenance of transportation projects and public facilities of gravel or aggregate material that, when tested using a bulk test method prescribed by the department by regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass. The regulations adopted under this subsection must include

(1) procedures for completing site investigations and characterizations of proposed projects, including the development and description of appropriate laboratory practices;

(2) procedures for reviewing design alternatives and preparing and evaluating appropriate comparative cost analyses that consider the use of gravel or other aggregate material that does not contain naturally occurring asbestos;

(3) procedures for evaluating human health concerns arising out of gravel or other aggregate material that contains naturally occurring asbestos and documentation of methods and means to be used during periods of handling of the gravel or other aggregate material to ensure compliance with appropriate workplace safety and air quality standards relating to the project and to ensure the health and safety of communities affected by construction projects that use gravel or other aggregate material containing naturally occurring asbestos;

(4) procedures for preparing designs and design specifications for facilities involving use of gravel or other aggregate material that contains naturally occurring asbestos;

(5) procedures for outlining construction operation and maintenance practices that are required and those that are minimally acceptable to meet requirements of law applicable to the handling of compounds that contain asbestos;

(6) procedures for processing, reviewing, and approving or

disapproving site-specific use plans and area designation requests received under AS 44.42.400(b) in a uniform manner;

(7) guidelines to analyze the cost of a project;

(8) guidelines for determining whether the cost associated with the use of gravel or other aggregate material free from naturally occurring asbestos under AS 44.42.410(d) is economically unreasonable;

(9) guidelines for determining whether the cost associated with burying or sealing gravel or other aggregate material containing naturally occurring asbestos under AS 44.42.410(a)(2) and (3) is economically unreasonable;

(10) guidelines for establishing areas designated under AS 44.42.400(b) or (c) that take into account the effect on human health in and around the designated area and environmental factors affecting the transfer of asbestos fibers within and outside of a designated area.

Sec. 44.42.430. Definitions. In AS 44.42.400 - 44.42.430,

(1) "contractor" means the principal construction contractor, or in absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project;

(2) "naturally occurring asbestos" means chrysotile, amosite, crocidolite, fibrous tremolite, fibrous anthophyllite, and fibrous actinolite asbestos-containing material that has not been processed in an asbestos mill and that, when tested using a bulk method prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INTERIM PROJECT AUTHORIZATION. (a) Notwithstanding AS 44.42.400(a) and (b), added by sec. 3 of this Act, to ensure early application of the policy described in sec. 1 of this Act, the Department of Transportation and Public Facilities may, on a temporary basis, designate a limited number of areas in the state in which certain landowners and contractors are granted immunity under AS 09.65.245(a) for causing asbestos-related injuries where an inability to complete construction projects has been demonstrated because of lack of gravel or

other aggregate material free from naturally occurring asbestos. After designating an area on a temporary basis, the department shall notify, including through signage, potentially affected persons that the area has been designated as an area in which immunity may be granted under AS 09.65.245(a) for certain landowners and contractors causing asbestos-related injuries. Notwithstanding AS 18.31.250, added by sec. 3 of this Act, the Department of Transportation and Public Facilities may approve a limited number of appropriate construction projects until the development and implementation of initial standards under AS 44.42.420 and the administrative requirements of AS 44.42.400, added by sec. 4 of this Act, for projects not subject to AS 44.42.410(b), if, under (b) of this section, the Department of Transportation and Public Facilities prepares and adopts interim standards and requires its contractors to prepare site-specific plans for the use of gravel or other aggregate material that, when tested using the bulk method prescribed in sec. 6 of this Act, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass in transportation projects and public facilities. The department shall apply the standards developed under (b) of this section to a person described in AS 18.31.250 for a project that is not subject to AS 44.42.410(b).

(b) Notwithstanding AS 44.42.400(a) and (b), added by sec. 3 of this Act, to ensure early application of the policy described in sec. 1 of this Act, the Department of Transportation and Public Facilities may, on a temporary basis, designate a limited number of areas in the state in which certain landowners and contractors are granted immunity under AS 09.65.245(a) for causing asbestos-related injuries where an inability to complete construction projects has been demonstrated because of lack of gravel or other aggregate material free from naturally occurring asbestos. After designating an area on a temporary basis, the department shall notify, including through signage, potentially affected persons that the area has been designated as an area where immunity may be granted under AS 09.65.245(a) for certain landowners and contractors causing asbestos-related injuries. Notwithstanding AS 44.42.410(b), added by sec. 4 of this Act, the Department of Transportation and Public Facilities may approve a limited number of appropriate transportation projects and public facilities until the development and implementation of initial standards under AS 44.42.420 and the administrative requirements of AS 44.42.400, after consultation with the Department of Environmental Conservation, the Department of Health and Social Services, the Department of Labor and Workforce Development, and

appropriate federal agencies. The Department of Transportation and Public Facilities may prepare and adopt interim standards and operating procedures and may require of its contractors the preparation of site-specific plans for the use of gravel or other aggregate material that when tested using the bulk method prescribed in sec. 6 of this Act, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass.

(c) The authority granted by (a) and (b) of this section expires December 31, 2013.

* **Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INTERIM STANDARDS FOR APPLICATION OF ASBESTOS BULK TESTING. Until the Department of Transportation and Public Facilities adopts and prescribes a method of bulk testing under AS 44.42.420(a), added by sec. 4 of this Act, the department shall use California Air Resources Board Method 435, Determination of Asbestos Content of Serpentine Aggregate, adopted on June 6, 1991, as that standard has effect on the effective date of this Act, as the basis for determining the asbestos content of a bulk sample or for interim use as authorized by sec. 5 of this Act.

* **Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

new

AMENDMENT #3

OFFERED IN THE HOUSE FINANCE COMMITTEE REPRESENTATIVE LES GARA

TO: CSHB 258, Version LS0400\Y

Page 6, line 25:
Insert after the word "area" as follows:
" while, if economic, shall be used instead of material containing naturally occurring asbestos,"

Page 7, Line 10:
Insert after the word "area", as follows:
" while, if economic, shall be used instead of material containing naturally occurring asbestos,"

P. 6 line 19 insert, after at least 2 public hearings," after "request."

w/d

- likely offer this on the floor

DOT already requires 2 public meetings.
(Ryan Healy)

AMENDMENT #3

OFFERED IN THE HOUSE FINANCE COMMITTEE REPRESENTATIVE LES GARA

TO: CSHB 258, Version LS0400\Y

Page 6, line 25:
Insert after the word "area" as follows:
" while, if economic, shall be used instead of material containing naturally occurring asbestos,"

Page 7, Line 10:
Insert after the word "area", as follows:
" while, if economic, shall be used instead of material containing naturally occurring asbestos,"

Replaced

adopted as objected to

27-LS0400\L.2
Nauman
3/27/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GARA

TO: CSHB 258(FIN), Draft Version "L"

Page 10, line 3:

Delete "and"

Page 10, line 5, following "fibers":

Insert "; and

(D) a requirement that the contractor post conspicuously located and easily readable warning signs that notify residents of an affected area and persons travelling through an affected area that potentially dangerous airborne asbestos may be present because of the extraction, transportation, or use in a construction project of gravel or other aggregate material containing naturally occurring asbestos"

at p 7 line 2, after "notify",

and at p. 13 line 22, after "notify",

insert ", including through signage,"

allows compensatory damage
but deny punitive – not offered
likely to come up on the floor.

27-LS0400\L.1
Nauman
3/27/12

AMENDMENT #1

OFFERED IN THE HOUSE BY REPRESENTATIVE GARA

TO: CSHB 258(FIN), Draft Version "L"

Page 1, line 6:

Delete "**for the state and for**"

Insert "**from class action lawsuits and barring a claim for punitive damages against the state and**"

Page 1, lines 7 - 8:

Delete "**or claims arising in connection with**"

Insert "**related to**"

Page 1, line 10, following "**Facilities;**":

Insert "**amending Rule 23, Alaska Rules of Civil Procedure;**"

Page 3, line 9:

Delete "liability"

Insert "class action lawsuits and claims for punitive damages"

Page 3, line 12:

Delete "civil immunity"

Insert "protection from a class action lawsuit and bars a claim for punitive damages"

Page 4, line 3:

Delete "civil"

Insert "class"

Page 4, lines 3 - 4:
Delete "damages or costs"
Insert "punitive damages"

Page 4, line 22:
Delete "civil"
Insert "class"
Following "claim":
Insert "for punitive damages"

Page 4, line 30:
Delete "civil"
Insert "class"
Delete "damages or costs"
Insert "punitive damages"

Page 5, line 13:
Delete "immunity in a civil action"
Insert "the immunity provided"

Page 12, following line 22:
Insert a new bill section to read:

"* **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGE. AS 09.65.245, added by sec. 2 of this Act, has the effect of amending Rule 23, Alaska Rules of Civil Procedure, by prohibiting a class action lawsuit against a state or private party in certain circumstances."

Renumber the following bill sections accordingly.

Page 13, line 11:

Delete "sec. 6"

Insert "sec. 7"

Page 14, line 3:

Delete "sec. 6"

Insert "sec. 7"

Page 14, line 14:

Delete "sec. 5"

Insert "sec. 6"

Page 14, following line 14:

Insert a new bill section to read:

"* **Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. Sections 1 - 3 of this Act, AS 44.42.400(b) and (c), and AS 44.42.410, added by sec. 4 of this Act, and sec. 5 of this Act take effect only if sec. 5 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska."

Renumber the following bill section accordingly.

AMENDMENT #2

OFFERED IN THE HOUSE BY REPRESENTATIVE GARA

TO: CSHB 258(FIN), Draft Version "L"

Page 10, line 3:

Delete "and"

Page 10, line 5, following "fibers":

Insert "; and

(D) a requirement that the contractor post conspicuously located and easily readable warning signs that notify residents of an affected area and persons travelling through an affected area that potentially dangerous airborne asbestos may be present because of the extraction, transportation, or use in a construction project of gravel or other aggregate material containing naturally occurring asbestos"

w/d

27-LS1219\E
Nauman
3/16/12

CS FOR SENATE BILL NO. 180( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR OLSON

A BILL

FOR AN ACT ENTITLED

"An Act directing the Department of Transportation and Public Facilities to develop and implement standards and operating procedures, evaluate site-specific use plans, develop and maintain an information database that includes locations of gravel or other aggregate material that contains naturally occurring asbestos and gravel or other aggregate material free from naturally occurring asbestos, and suggests locations to stockpile gravel or other aggregate material free from naturally occurring asbestos, and transmit reports related to the use in the construction and maintenance of transportation projects and public facilities and in the construction of projects by public and private entities of gravel or aggregate material that contains naturally occurring asbestos, and authorizing use on an interim basis of that material for certain transportation projects and public facilities; providing immunity for the state and for landowners, extractors, suppliers, transporters, and contractors for certain actions or

claims arising in connection with the use of gravel or aggregate material containing naturally occurring asbestos; requiring contractors to report certain asbestos-related data to the Department of Transportation and Public Facilities; and providing for an effective date."

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

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

LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature finds that

(1) gravel or similar aggregate material is constantly in demand for major construction and maintenance of state and local transportation projects and public facilities and for all types of construction by public and private entities;

(2) naturally occurring asbestos may be found in sources of gravel and similar aggregate material throughout the state;

(3) while airborne asbestos fibers are a significant threat to workplace safety and public health and are subject to close regulation by federal and state authorities under 42 U.S.C. 7401 - 7671q (Clean Air Act) and 15 U.S.C. 2601 - 2692 (Toxic Substances Control Act), use of materials containing naturally occurring asbestos in construction projects may be regulated by states;

(4) in communities that do not have sources of gravel or similar aggregate material that is free of naturally occurring asbestos, costs of construction are substantially increased because of the necessity of locating alternative sources of gravel or similar aggregate material and transporting that material to distant construction and maintenance sites; and

(5) a recent study suggests that, with careful use and close adherence to appropriate control strategies, state and local transportation projects and public facilities may be safely completed using sources of gravel or similar aggregate material that contains naturally occurring asbestos; the study recommends that the Department of Transportation and Public Facilities establish standards and operating procedures through a statewide process that will apply to the use of gravel and aggregate material that contains asbestos by the

department and by any public or private entity.

(b) It is the purpose of this Act

(1) to authorize and direct the Department of Transportation and Public Facilities to develop, implement, and, as circumstances may require or indicate, modify standards and operating procedures to allow the use in the construction and maintenance of transportation projects and public facilities of gravel or aggregate material that contains naturally occurring asbestos, with the expectation that use of that material in a manner that is consistent with those standards and procedures may avoid significant risk to human health and eliminate significantly higher costs of construction and maintenance of projects and facilities associated with using only construction material that is free of asbestos;

(2) to establish that a person that uses gravel that contains naturally occurring asbestos may prepare specific project plans that conform to the requirements of this Act and the department's standards and operating procedures; and

(3) to shield persons and the state, including its agencies, officers, and employees, under certain conditions, from liability based on exposure to naturally occurring asbestos.

(c) This Act creates a voluntary program and provides civil immunity for the use of gravel or other aggregate material that contains naturally occurring asbestos for contractors meeting the requirements of the program; nothing in this Act mandates a contractor to submit a site-specific plan or to adhere to the requirements of a plan approved by the department.

(d) Because neither the state nor the federal government has established a scale assigning a specific risk level to a corresponding amount of naturally occurring asbestos, this Act accepts 0.25 percent by mass, the minimum detectable amount of asbestos under the California Air Resources Board Method 435, as the baseline for the presence of naturally occurring asbestos in gravel or other aggregate material. Health risks resulting from asbestos exposure vary according to the level, type, and duration of exposure. While exposure to very small concentrations of asbestos may pose some health risk, there is not a practical way to prevent all exposure to asbestos for residents in close proximity to deposits that contain naturally occurring asbestos. The intent of this act is to establish a sensible analytical threshold for detection of naturally occurring asbestos in gravel or other aggregate material and to establish appropriate exceptions for the use of gravel or other aggregate material that

contains naturally occurring asbestos for certain public facilities and transportation projects involving unusual circumstances, including projects in remote locations or in regions where gravel or other aggregate material free from naturally occurring asbestos is not reasonably available.

Ch 65 Actions, Immunities Defenses Burdens

*** Sec. 2.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.245. Immunity for certain persons supplying or using gravel or other aggregate material; limitations on asbestos-related actions against defendants. (a) Notwithstanding AS 09.50.250, a civil action or claim for damages or costs alleging a death, injury, illness, disability, property damage, or any other damages resulting from the use of gravel or other aggregate material that contains naturally occurring asbestos may not be brought against a defendant, including a ~~contractor meeting the requirements of the program or the state and its agencies,~~ officers, and employees,

(1) based on the ownership of land from which gravel or other aggregate material is extracted that, when tested using a bulk method prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass; or

(2) for an act or omission occurring in the course of extracting, supplying, transporting, or using gravel or other aggregate material containing naturally occurring asbestos when the act or omission was in compliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (d) and applicable regulations developed under AS 44.42.420.

(b) A civil action or claim based on noncompliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (e) and applicable regulations developed under AS 44.42.420 for damages or costs alleging an asbestos-related death, injury, illness, or disability or alleging asbestos-related property damage or any other asbestos-related damages may only be brought against a defendant that has direct control over or responsibility for compliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (e) and applicable regulations developed under AS 44.42.420.

(c) Notwithstanding AS 09.50.250, a civil action or claim for damages or costs alleging an asbestos-related death, injury, illness, or disability or alleging asbestos-related property damage or any other asbestos-related damages may not be brought against any state agency or officer or employee of the state for an act or omission occurring in the course of approving a site-specific use plan or in the course of developing or approving a monitoring plan or a mitigation plan under AS 44.42.410.

(d) In this section,

(1) "asbestos" has the meaning given in AS 18.31.500;

(2) "naturally occurring asbestos" means asbestos-containing material that has not been processed in an asbestos mill.

*** Sec. 3.** AS 18.31 is amended by adding a new section to read: Ch 31 Asbestos

Article 2A. Use of materials containing naturally occurring asbestos.

Sec. 18.31.250. Use of materials containing naturally occurring asbestos. (a) A principal construction contractor or, in the absence of an identified principal construction contractor, person having legal authority for the design and construction of a project may qualify for immunity in a civil action under AS 09.65.245(a)(2) for the use of gravel or other aggregate material that, when tested using a bulk test method prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass.

(b) To qualify for the immunity provided under AS 09.65.245(a)(2), before initiating a construction project not subject to AS 44.42.410(b) that will use gravel or other aggregate material that contains naturally occurring asbestos, the principal construction contractor or, in the absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project, shall prepare and submit to the Department of Transportation and Public Facilities specific project plans demonstrating compliance with the standards adopted by the department under AS 44.42.420 and the requirements of the site-specific use plan under AS 44.42.410. Before extraction of gravel or other aggregate material may begin, the plan must be approved and returned to the contractor by the department.

(c) To preserve the immunity provided under AS 09.65.245(a)(2), the

principal construction contractor or, in the absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project, shall adhere to the site-specific use plan approved by the department and the monitoring and mitigation plan created by the department.

*** Sec. 4.** AS 44.42 is amended by adding new sections to read:

Article 3A. Use of Materials Containing Naturally Occurring Asbestos. DOT an h. sites

Sec. 44.42.400. Administration. The department shall

(1) designate a single employee who reports to the commissioner to oversee the duties assigned to the department in AS 44.42.400 - 44.42.430 and to serve as the point of contact for inquiries related to projects using gravel or other aggregate material containing naturally occurring asbestos;

(2) coordinate with the Department of Natural Resources to establish and maintain a database of

(A) sites in the state for which the department has acquired or received information indicating that the sites contain naturally occurring asbestos;

(B) sources of gravel or other aggregate material that, according to information available to the department from reasonably reliable sources, are free from naturally occurring asbestos within reasonable proximity to known sites of naturally occurring asbestos;

(C) sources of gravel or other aggregate material for all known projects the state or a municipality intends to undertake within 25 miles of a community in the next five years where the state or municipality intends to use gravel or other aggregate material containing naturally occurring asbestos that, according to information available to the department from reasonably reliable sources, are free from naturally occurring asbestos; the database must include all sources of gravel or other aggregate material within 25 miles of the community;

(D) communities that have reported to the department that they do not have reasonable access to gravel or other aggregate material free from naturally occurring asbestos; and

(E) all data collected under the requirements of AS 44.42.410(f)(1)(B), by project;

(3) annually transmit to the commissioner and publish on the department's Internet website a report containing

(A) a listing of all current projects for which a plan has been submitted under AS 18.31.250 or AS 44.42.410(b);

(B) a listing of all known projects intended to be undertaken by the state or a municipality in the next five years where the state or municipality intends to use gravel or aggregate material containing naturally occurring asbestos;

(C) suggestions for potential locations to stockpile gravel or other aggregate material free from naturally occurring asbestos for use in future projects and an estimate of the cost of stockpiling that gravel; and

(D) suggestions for potential locations, in coordination with ongoing state and municipal construction projects, to stockpile gravel or other aggregate material free from naturally occurring asbestos for future projects and an estimate of the cost of stockpiling that gravel; and

(4) annually provide a report on the monitoring and mitigation data transmitted by contractors to the department under AS 44.42.410(h) and the results of site monitoring performed by the department to the Department of Environmental Conservation, the Department of Health and Social Services, and the Department of Labor and Workforce Development.

Sec. 44.42.410. Site-specific use plan. (a) To qualify for the immunity provided under AS 09.65.245(a)(2), a contractor intending to use gravel or other aggregate material that, when tested using a bulk test method prescribed by the department in regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass shall, after consulting with the owner of the land on which the gravel or other aggregate material containing naturally occurring asbestos will be placed, shall submit a site-specific use plan to the department that

(1) describes the manner in which the proposed use of gravel or other

aggregate material that contains naturally occurring asbestos conforms to the standards adopted under AS 44.42.420(b);

(2) demonstrates how the proposed construction operation and maintenance practices comply with those that are required and those that are minimally acceptable, as described in AS 44.42.420(b)(5), and otherwise meet requirements of law applicable to the handling of compounds that contain asbestos;

(3) outlines the efforts that will be made, as a component of long-term maintenance on the completed project or facility, to ensure that human health and air quality are not compromised by the use of the gravel or other aggregate material that contains naturally occurring asbestos;

(4) describes how the gravel or other aggregate material to be used can be contained underneath the project or buried so that asbestos fibers cannot become airborne or otherwise transferred outside of the project area, except as provided in (5) and (6) of this subsection;

(5) if the requirements in (4) of this subsection are economically unreasonable, describes how the gravel or other aggregate material to be used will be sealed, including chip sealing or mixing with asphalt, in order to prevent asbestos fibers from becoming airborne or otherwise transferred outside of the project area, except as provided in (6) of this subsection; and

(6) if the requirements under (4) and (5) of this subsection are economically unreasonable, describes how the gravel or other aggregate material will be used in order to prevent asbestos from becoming airborne or otherwise transferred outside of the project area.

(b) To qualify for and preserve the immunity provided under AS 09.65.245(a)(2), the department, in its operating procedures applicable to a project that is a transportation facility, including a public highway, airport, or pipeline or railroad track bed, or a public work, as that term is defined in AS 35.95.100, and for which the contractor intends to use gravel or other aggregate material that, when tested using a bulk testing method prescribed by the department in regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass, shall require that

(1) the contractor submit a plan that details the use of gravel or other aggregate material in the construction or maintenance of the transportation project or public facility in accordance with the requirements of (a) of this section and regulations developed under AS 44.42.420;

(2) before the extraction of the gravel or aggregate material containing naturally occurring asbestos may begin, the plan be approved and returned to the contractor by the department;

(3) the contractor adhere to the monitoring, mitigation, and site-specific use plans.

(c) The department shall review each submitted site-specific use plan and shall work toward approving or disapproving the plan, taking into consideration the construction season in the project location.

(d) The department may not approve a plan for construction with gravel or other aggregate material determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass unless the department determines that it is economically unreasonable to undertake the construction project with gravel or other aggregate material free from naturally occurring asbestos.

(e) On receiving a plan that meets the requirements of (a) and (d) of this section and the regulations adopted under AS 44.42.420, the department, in consultation with the Department of Environmental Conservation, the Department of Health and Social Services, and the Department of Labor and Workforce Development, shall develop a monitoring and mitigation plan for the project. If the site-specific use plan is approved, the monitoring and mitigation plan developed by the department shall be attached to the site-specific use plan. To qualify for the immunity provided in AS 09.65.245(a)(2), the party that has direct control over or responsibility for the monitoring or mitigation shall comply with the monitoring or mitigation plan developed by the department.

(f) On approval of a site-specific use plan, the department

(1) shall provide to the contractor a copy of the approved site-specific use plan that includes

(A) the monitoring and mitigation plan developed under (e) of

this section;

(B) a requirement that all asbestos-related data collected by the contractor during or after construction be submitted to the department; and

(C) recommended methods for reducing exposure to airborne asbestos fibers;

(2) shall provide a copy of the site-specific use plan, including the monitoring and mitigation plan, to the mayor or manager of a municipality affected by the use of gravel or other aggregate material containing asbestos; and

(3) may provide to the contractor copies of the United States Occupational Safety and Health Administration, United States Mine Safety and Health Administration, and United States Environmental Protection Agency recommended practices for handling and use of gravel or other aggregate material containing naturally occurring asbestos.

(g) Within 60 days after completing a project in accordance with a site-specific plan approved by the department, the contractor shall record in the recording district where the property is located a document that includes a description of the affected property, a reference to the most recent recorded conveyance of that property, and a notice indicating the presence of naturally occurring asbestos, and stating that subsequent interest holders may have legal obligations with respect to preventing the naturally occurring asbestos from becoming airborne or otherwise transferred. The contractor shall provide written notification to the department and the landowner that the document has been recorded.

(h) The contractor shall submit to the department the results of any monitoring or testing performed in accordance with the site-specific use plan and any mitigation measures undertaken.

Sec. 44.42.420. Regulations. (a) The department, after consultation with the Department of Environmental Conservation, Department of Health and Social Services, and Department of Labor and Workforce Development, shall prescribe in regulation a bulk testing method for gravel or other aggregate material containing naturally occurring asbestos.

(b) The department, after consultation with the Department of Environmental

Conservation, Department of Health and Social Services, and Department of Labor and Workforce Development, may adopt regulations under AS 44.62 (Administrative Procedure Act) to implement AS 44.42.400 - 44.42.430, including regulations revising statewide standards on the use in the construction and maintenance of transportation projects and public facilities of gravel or aggregate material that, when tested using a bulk test method prescribed by the department by regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass. The regulations adopted under this subsection must include procedures for

(1) completing site investigations and characterizations of proposed projects, including the development and description of appropriate laboratory practices;

(2) reviewing design alternatives and preparing and evaluating appropriate comparative cost analyses that consider the use of gravel or other aggregate material that does not contain naturally occurring asbestos;

(3) evaluating human health concerns arising out of gravel or other aggregate material that contains naturally occurring asbestos and documentation of methods and means to be used during periods of handling of the gravel or other aggregate material to ensure compliance with appropriate workplace safety and air quality standards relating to the project;

(4) preparing designs and design specifications for facilities involving use of gravel or other aggregate material that contains naturally occurring asbestos;

(5) outlining construction operation and maintenance practices that are required and those that are minimally acceptable to meet requirements of law applicable to the handling of compounds that contain asbestos;

(6) processing, reviewing, and approving or disapproving site-specific use plans in a uniform manner.

Sec. 44.42.430. Definitions. In AS 44.42.400 - 44.42.430,

(1) "asbestos" has the meaning given in AS 18.31.500;

(2) "contractor" means the principal construction contractor, or in absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project;

(3) "naturally occurring asbestos" means asbestos-containing material that has not been processed in an asbestos mill.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INTERIM PROJECT AUTHORIZATION. (a) Notwithstanding AS 18.31.250, added by sec. 3 of this Act, to ensure early application of the policy described in sec. 1 of this Act to a limited number of appropriate construction projects until the development and implementation of initial standards under AS 44.42.420 and the administrative requirements of AS 44.42.400, added by sec. 4 of this Act, for projects not subject to AS 44.42.410(b), if, under (b) of this section, the Department of Transportation and Public Facilities prepares and adopts interim standards and requires its contractors to prepare site-specific plans for the use of gravel or other aggregate material that, when tested using the bulk method prescribed in sec. 6 of this Act, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass in transportation projects and public facilities, the department shall apply those standards to a person described in AS 18.31.250 for a project that is not subject to AS 44.42.410(b).

(b) Notwithstanding AS 44.42.410(b), added by sec. 4 of this Act, to ensure early application of the policy described in sec. 1 of this Act to a limited number of appropriate transportation projects and public facilities until the development and implementation of initial standards under AS 44.42.420 and the administrative requirements of AS 44.42.400, after consultation with the Department of Environmental Conservation, Department of Health and Social Services, Department of Labor and Workforce Development, and appropriate federal agencies, the Department of Transportation and Public Facilities may prepare and adopt interim standards and operating procedures and may require of its contractors the preparation of site-specific plans for the use of gravel or other aggregate material that when tested using the bulk method prescribed in sec. 6 of this Act, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass.

(c) The authority granted by (a) and (b) of this section expires December 31, 2013.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INTERIM STANDARDS FOR APPLICATION OF ASBESTOS BULK TESTING.

Until the Department of Transportation and Public Facilities adopts and prescribes a method of bulk testing under AS 44.42.420(a), added by sec. 4 of this Act, the department shall use California Air Resources Board Method 435, Determination of Asbestos Content of Serpentine Aggregate, adopted on June 6, 1991, as that standard has effect on the effective date of this Act, as the basis for determining the asbestos content of a bulk sample or for interim use as authorized by sec. 5 of this Act.

*** Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

ALASKA STATE LEGISLATURE

SENATOR DONALD C. OLSON

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Member
Senate Finance Committee
Ethics Committee
Legislative Council
Northern Waters Task Force
Education Funding District Cost Factor
Finance Subcommittee Chair
Fish & Game
Health & Social Services
Public Safety
Finance Subcommittee Member
Environmental Conservation

Explanation of Changes to version D

- Page 3, lines 12-13
  - After the word "state", inserted "including its agencies, officers, and employees"
- Page 3, lines 19-23
  - On the recommendation of LAW, this language is added to establish why .25 percent NOA by mass is used.
- Page 3, line 31
  - After the word "state", inserted "and its agencies, officers, and employees"
- Page 4, lines 22-23
  - After the word "agency", inserted "or officer or employee of the state"
- Page 5, Line 19
  - Changed AS 09.65.245 to AS 09.65.245**(a)(2),** to separate the gravel pit landowner from the immunity provided to the contractor for adherence to the site-specific plan.
- Page 9, lines 15-22
  - Adds new section to direct DOT to approve or disapprove a submitted site-specific plan. Directs DOT to provide findings to support a determination that a project is "economically unreasonable".

- Page 9, line 23
    - Rewrites the section to:
        - Direct DOT to provide to the contractor a copy of the "approved" plan.
        - Remove the requirement that DOT provide copies of the recommended practices for handling NOA from OSHA, Mine Safety & Health Administration, and the EPA.

ALASKA STATE LEGISLATURE

SENATOR DONALD C. OLSON

Session
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Member
Senate Finance Committee
Ethics Committee
Legislative Council
Northern Waters Task Force
Education Funding District Cost Factor
Finance Subcommittee Chair
Fish & Game
Health & Social Services
Public Safety
Finance Subcommittee Member
Environmental Conservation

SB 180 Use of Naturally Occurring Asbestos
v.D Sectional Analysis

Affected Statutes:

- **AS 09.65 – Actions, Immunities, Defenses, & Duties**
- **AS 18.31 – Asbestos**
- **AS 44.42 – Dept. of DOT&PF**

Section	Statute	Change	Purpose or Effect
1	Uncodified Law	Adds new section	Legislative Findings and Purpose
2	AS 09.65	Adds new section	Creates immunity from civil action or claim for civil damages based on an alleged asbestos related death, injury, illness, disability, or property damage in specific circumstances to certain persons, the State, & state employees. Liability Immunity is provided to persons owning, extracting, supplying, transporting or using gravel or aggregate material containing NOA if the following apply: 1) Gravel or aggregate material contains equal to or greater 0.25 % NOA by mass; **and**

			2) The use of gravel was in compliance with DOT's SOP. If not in compliance, lawsuits can only be brought against those that have direct control or responsibility for the compliance requirements.
3	AS 18.31	Adds New section	Describes how a person may qualify for immunity under section 2 in construction projects that are **not** initiated or contracted for by DOT.
4	44.42.400	Adds 4 new sections	**44.42.400 Administration** 1. Designates a single employee to oversee this program 2. Directs DOT to establish & maintain an informational database on known sites of NOA. 3. Directs DOT to provide annual reports on the use of NOA in AK.
	44.42.410		**44.42.410(a) Site-specific use plan** States the requirements for a site-specific use plan submitted by a contractor intending to use NOA, including a requirement that the contractor **bury or seal** the NOA material if economically practicable. **44.42.410(b)** Directs DOT to require site-specific use plans for DOT projects using NOA material. **44.42.410(c)** Directs DOT to review submitted plans. **44.42.410(d)** DOT **cannot** approve site-specific plan unless it is economically unreasonable to undertake the project with NOA free material. **44.42.410(e)** Directs DOT, in consultation with DEC & DHSS to develop monitoring & mitigation plans and incorporate into the site-specific plan. **44.42.410(f)** Directs DOT to approve or disapprove a site-specific plan. Directs DOT to provide findings to support a determination that a project is economically

			unreasonable. **44.42.410(g)** Directs DOT to provide monitoring and mitigation plan and other safety info to contractors whose plan has been approved. Requires contractors submit all asbestos-related data to DOT. **44.42.410(h)** Requires a contractor, after completing a project, record notice in the recording district where the property is located indicating the presence of NOA material. **44.42.410(i)** Requires contractors to report any monitoring data collected to DOT.
	44.42.420		Directs DOT to establish standards and procedures for testing and use of NOA materials.
	44.42.430		Definitions.
5	Uncodified Law	Adds new section	**Interim Project Authorization** Authorizes certain limited projects to move forward with a site-specific plan approved by interim standards established by DOT&PF with consultation from DEC, DHSS, DLWF Interim Project Authorization ends December 31, 2012
6	Uncodified Law	Adds new section	**Interim Standards for Bulk Testing** Until DOTP&F adopts and prescribes a method of testing the department shall use California Air Resources Board Method 435
7		Effective Date	**Immediate**

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Nauman
3/8/12

CS FOR SENATE BILL NO. 180( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR OLSON

A BILL

FOR AN ACT ENTITLED

"An Act directing the Department of Transportation and Public Facilities to develop and implement standards and operating procedures, evaluate site-specific use plans, develop and maintain an information database that includes locations of gravel or other aggregate material that contains naturally occurring asbestos, gravel or other aggregate material free from naturally occurring asbestos, and suggests locations to stockpile gravel or other aggregate material free from naturally occurring asbestos, and transmit reports related to the use in the construction and maintenance of transportation projects and public facilities and in the construction of projects by public and private entities of gravel or aggregate material that contains naturally occurring asbestos, and authorizing use on an interim basis of that material for certain transportation projects and public facilities; providing immunity for the state and for landowners, extractors, suppliers, transporters, and contractors for certain actions or claims arising in connection with the

use of gravel or aggregate material containing naturally occurring asbestos; requiring contractors to report certain asbestos-related data to the Department of Transportation and Public Facilities; and providing for an effective date."

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

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

LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature finds that

(1) gravel or similar aggregate material is constantly in demand for major construction and maintenance of state and local transportation projects and public facilities and for all types of construction by public and private entities;

(2) naturally occurring asbestos may be found in sources of gravel and similar aggregate material throughout the state;

(3) while airborne asbestos fibers are a significant threat to workplace safety and public health and are subject to close regulation by federal and state authorities under 42 U.S.C. 7401 - 7671q (Clean Air Act) and 15 U.S.C. 2601 - 2692 (Toxic Substances Control Act), use of materials containing naturally occurring asbestos in construction projects may be regulated by states;

(4) in communities that do not have sources of gravel or similar aggregate material that is free of naturally occurring asbestos, costs of construction are substantially increased because of the necessity of locating alternative sources of gravel or similar aggregate material and transporting that material to distant construction and maintenance sites; and

(5) a recent study suggests that, with careful use and close adherence to appropriate control strategies, state and local transportation projects and public facilities may be safely completed using sources of gravel or similar aggregate material that contains naturally occurring asbestos; the study recommends that the Department of Transportation and Public Facilities establish standards and operating procedures through a statewide process that will apply to the use of gravel and aggregate material that contains asbestos by the department and by any public or private entity.

(b) It is the purpose of this Act

(1) to authorize and direct the Department of Transportation and Public Facilities to develop, implement, and, as circumstances may require or indicate, modify standards and operating procedures to allow the use in the construction and maintenance of transportation projects and public facilities of gravel or aggregate material that contains naturally occurring asbestos, with the expectation that use of that material in a manner that is consistent with those standards and procedures may avoid significant risk to human health and eliminate significantly higher costs of construction and maintenance of projects and facilities associated with using only construction material that is free of asbestos;

(2) to establish that a person that uses gravel that contains naturally occurring asbestos may prepare specific project plans that conform to the requirements of this Act and the department's standards and operating procedures; and

(3) to shield persons and the state, including its agencies, officers, and employees, under certain conditions, from liability based on exposure to naturally occurring asbestos.

(c) This Act creates a voluntary program and provides civil immunity for the use of gravel or other aggregate material that contains naturally occurring asbestos for contractors meeting the requirements of the program; nothing in this Act mandates a contractor to submit a site-specific plan or to adhere to the requirements of a plan approved by the department.

(d) Because neither the state nor the federal government has established a scale assigning a specific risk level to a corresponding amount of naturally occurring asbestos, this Act accepts 0.25 percent by mass, the smallest testable amount of asbestos under the California Air Resources Board Method 435, as the baseline for the presence of naturally occurring asbestos in gravel or other aggregate material.

*** Sec. 2.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.245. Immunity for certain persons supplying or using gravel or other aggregate material; limitations on asbestos-related actions against defendants. (a) Notwithstanding AS 09.50.250, a civil action or claim for damages or costs alleging a death, injury, illness, disability, property damage, or any other damages resulting from the use of gravel or other aggregate material that contains naturally occurring asbestos may not be brought against a defendant, including a contractor meeting the requirements of the program or the state and its agencies,

officers, and employees,

(1) based on the ownership of land from which gravel or other aggregate material is extracted that, when tested using a bulk method prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass; or

(2) for an act or omission occurring in the course of extracting, supplying, transporting, or using gravel or other aggregate material containing naturally occurring asbestos when the act or omission was in compliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (d) and applicable regulations developed under AS 44.42.420.

(b) A civil action or claim based on noncompliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (e) and applicable regulations developed under AS 44.42.420 for damages or costs alleging an asbestos-related death, injury, illness, or disability or alleging asbestos-related property damage or any other asbestos-related damages may only be brought against a defendant that has direct control over or responsibility for compliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (e) and applicable regulations developed under AS 44.42.420.

(c) Notwithstanding AS 09.50.250, a civil action or claim for damages or costs alleging an asbestos-related death, injury, illness, or disability or alleging asbestos-related property damage or any other asbestos-related damages may not be brought against any state agency or officer or employee of the state for an act or omission occurring in the course of approving a site-specific use plan or in the course of developing or approving a monitoring plan or a mitigation plan under AS 44.42.410.

(d) In this section,

(1) "asbestos" has the meaning given in AS 18.31.500;

(2) "naturally occurring asbestos" means asbestos-containing material that has not been processed in an asbestos mill.

*** Sec. 3.** AS 18.31 is amended by adding a new section to read:

Article 2A. Use of materials containing naturally occurring asbestos.

Sec. 18.31.250. Use of materials containing naturally occurring asbestos. (a) A principal construction contractor or, in the absence of an identified principal construction contractor, person having legal authority for the design and construction of a project may qualify for immunity in a civil action under AS 09.65.245(a)(2) for the use of gravel or other aggregate material that, when tested using a bulk test method prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass.

(b) To qualify for the immunity provided under AS 09.65.245, before initiating a construction project not subject to AS 44.42.410(b) that will use gravel or other aggregate material that contains naturally occurring asbestos, the principal construction contractor or, in the absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project, shall prepare and submit to the Department of Transportation and Public Facilities specific project plans demonstrating compliance with the standards adopted by the department under AS 44.42.420 and the requirements of the site-specific use plan under AS 44.42.410. Before extraction of gravel or other aggregate material may begin, the plan must be approved and returned to the contractor by the department.

(c) To preserve the immunity provided under AS 09.65.245(a)(2), the principal construction contractor or, in the absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project, shall adhere to the site-specific use plan approved by the department and the monitoring and mitigation plan created by the department.

*** Sec. 4.** AS 44.42 is amended by adding new sections to read:

Article 3A. Use of Materials Containing Naturally Occurring Asbestos.

Sec. 44.42.400. Administration. The department shall

(1) designate a single employee who reports to the commissioner to oversee the duties assigned to the department in AS 44.42.400 - 44.42.430 and to serve as the point of contact for inquiries related to projects using gravel or other aggregate material containing naturally occurring asbestos;

(2) establish and maintain a database of

(A) sites in the state for which the department has acquired or received information indicating that the sites contain naturally occurring asbestos;

(B) sources of gravel or other aggregate material that, according to information available to the department from reasonably reliable sources, are free from naturally occurring asbestos within reasonable proximity to known sites of naturally occurring asbestos;

(C) sources of gravel or other aggregate material for all known projects the state or a municipality intends to undertake within 25 miles of a community in the next five years where the state or municipality intends to use gravel or other aggregate material containing naturally occurring asbestos that, according to information available to the department from reasonably reliable sources, are free from naturally occurring asbestos; the database must include all sources of gravel or other aggregate material within 25 miles of the community;

(D) communities that have reported to the department that they do not have reasonable access to gravel or other aggregate material free from naturally occurring asbestos; and

(E) all data collected under the requirements of AS 44.42.410(g)(1)(B), by project;

(3) annually transmit to the commissioner and publish on the department's Internet website a report containing

(A) a listing of all current projects for which a plan has been submitted under AS 18.31.250 or AS 44.42.410(b);

(B) a listing of all known projects intended to be undertaken by the state or a municipality in the next five years where the state or municipality intends to use gravel or aggregate material containing naturally occurring asbestos;

(C) suggestions for potential locations to stockpile gravel or other aggregate material free from naturally occurring asbestos for use in future projects and an estimate of the cost of stockpiling that gravel; and

(D) suggestions for potential locations, in coordination with ongoing state and municipal construction projects, to stockpile gravel or other aggregate material free from naturally occurring asbestos for future projects and an estimate of the cost of stockpiling that gravel; and

(4) annually provide a report on the monitoring and mitigation data transmitted by contractors to the department under AS 44.42.410(i) and the results of site monitoring performed by the department to the Department of Environmental Conservation, the Department of Health and Social Services, and the Department of Labor and Workforce Development.

Sec. 44.42.410. Site-specific use plan. (a) To qualify for the immunity provided under AS 09.65.245(a)(2), a contractor intending to use gravel or other aggregate material that, when tested using a bulk test method prescribed by the department in regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass shall, after consulting with the owner of the land on which the gravel containing naturally occurring asbestos will be placed, shall submit a site-specific use plan to the department that

(1) describes the manner in which the proposed use of gravel or other aggregate material that contains naturally occurring asbestos conforms to the standards adopted under AS 44.42.420(b);

(2) demonstrates how the proposed construction operation and maintenance practices comply with those that are required and those that are minimally acceptable, as described in AS 44.42.420(b)(5), and otherwise meet requirements of law applicable to the handling of compounds that contain asbestos;

(3) outlines the efforts that will be made, as a component of long-term maintenance on the completed project or facility, to ensure that human health and air quality are not compromised by the use of the gravel or other aggregate material that contains naturally occurring asbestos;

(4) describes how the gravel or other aggregate material to be used can be contained underneath the project or buried so that asbestos fibers cannot become airborne or otherwise transferred outside of the project area, except as provided in (5) and (6) of this subsection;

(5) if the requirements in (4) of this subsection are economically unreasonable, describes how the gravel or other aggregate material to be used will be sealed, including chip sealing or mixing with asphalt, in order to prevent asbestos fibers from becoming airborne or otherwise transferred outside of the project area, except as provided in (6) of this subsection; and

(6) if the requirements under (4) and (5) of this subsection are economically unreasonable, describes how the gravel or other aggregate material will be used in order to prevent asbestos from becoming airborne or otherwise transferred outside of the project area.

(b) To qualify for and preserve the immunity provided under AS 09.65.245(a)(2), the department, in its operating procedures applicable to a project that is a transportation facility, including a public highway, airport, or pipeline or railroad track bed, or a public work, as that term is defined in AS 35.95.100, and for which the contractor intends to use gravel or other aggregate material that, when tested using a bulk testing method prescribed by the department in regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass, shall require that

(1) the contractor submit a plan that details the use of gravel or other aggregate material in the construction or maintenance of the transportation project or public facility in accordance with the requirements of (a) of this section and regulations developed under AS 44.42.420;

(2) before the extraction of the gravel or aggregate material containing naturally occurring asbestos may begin, the plan be approved and returned to the contractor by the department;

(3) the contractor adhere to the monitoring, mitigation, and site-specific use plans.

(c) The department shall review each submitted site-specific use plan and shall work toward approving or disapproving the plan, taking into consideration the construction season in the project location.

(d) The department may not approve a plan for construction with gravel or other aggregate material determined to have a content equal to or greater than 0.25

percent of naturally occurring asbestos by mass unless the department determines that it is economically unreasonable to undertake the construction project with gravel or other aggregate material free from naturally occurring asbestos.

(e) On receiving a plan that meets the requirements of (a) and (d) of this section and the regulations adopted under AS 44.42.420, the department, in consultation with the Department of Environmental Conservation, the Department of Health and Social Services, and the Department of Labor and Workforce Development, shall develop a monitoring and mitigation plan for the project. If the site-specific use plan is approved, the monitoring and mitigation plan developed by the department shall be attached to the site-specific use plan. To qualify for the immunity provided in AS 09.65.245(a)(2), the party that has direct control over or responsibility for the monitoring or mitigation shall comply with the monitoring or mitigation plan developed by the department.

(f) The department shall approve or disapprove a site-specific plan. The department may require a contractor submitting a site-specific plan to provide additional information or test results before the department approves or disapproves a site-specific plan. If the department determines that it is economically unreasonable to undertake a construction project with gravel or aggregate material free from naturally occurring asbestos under (d) of this section or if the department determines that it is economically unreasonable to bury or seal the gravel or other aggregate material that contains naturally occurring asbestos under (a)(4) or (a)(5) of this section, the department shall make findings to support the determination.

(g) On approval of a site-specific use plan, the department

(1) shall provide to the contractor a copy of the approved site-specific use plan that includes

(A) the monitoring and mitigation plan developed under (e) of this section;

(B) a requirement that all asbestos-related data collected by the contractor during or after construction be submitted to the department;

(C) recommended methods for reducing exposure to airborne asbestos fibers; and

(2) shall provide a copy of the site-specific use plan, including the monitoring and mitigation plan, to the mayor or manager of a municipality affected by the use of gravel or other aggregate material containing asbestos.

(h) Within 60 days after completing a project in accordance with a site-specific plan approved by the department, the contractor shall record in the recording district where the property is located a document that includes a description of the affected property, a reference to the most recent recorded conveyance of that property, and a notice indicating the presence of naturally occurring asbestos, and stating that subsequent interest holders may have legal obligations with respect to preventing the naturally occurring asbestos from becoming airborne or otherwise transferred. The contractor shall provide written notification to the department and the landowner that the document has been recorded.

(i) The contractor shall submit to the department the results of any monitoring or testing performed in accordance with the site-specific use plan and any mitigation measures undertaken.

Sec. 44.42.420. Regulations. (a) The department, after consultation with the Department of Environmental Conservation, Department of Health and Social Services, and Department of Labor and Workforce Development, shall prescribe in regulation a bulk testing method for gravel or other aggregate material containing naturally occurring asbestos.

(b) The department, after consultation with the Department of Environmental Conservation, Department of Health and Social Services, and Department of Labor and Workforce Development, shall develop, implement, and revise statewide standards on the use in the construction and maintenance of transportation projects and public facilities of gravel or aggregate material that, when tested using a bulk test method prescribed by the department by regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass. The standards adopted under this subsection must include procedures for

(1) completing site investigations and characterizations of proposed projects, including the development and description of appropriate laboratory practices;

(2) reviewing design alternatives and preparing and evaluating appropriate comparative cost analyses that consider the use of gravel or other aggregate material that does not contain naturally occurring asbestos;

(3) evaluating human health concerns arising out of gravel or other aggregate material that contains naturally occurring asbestos and documentation of methods and means to be used during periods of handling of the gravel or other aggregate material to ensure compliance with appropriate workplace safety and air quality standards relating to the project;

(4) preparing designs and design specifications for facilities involving use of gravel or other aggregate material that contains naturally occurring asbestos;

(5) outlining construction operation and maintenance practices that are required and those that are minimally acceptable to meet requirements of law applicable to the handling of compounds that contain asbestos.

Sec. 44.42.430. Definitions. In AS 44.42.400 - 44.42.430,

(1) "asbestos" has the meaning given in AS 18.31.500;

(2) "contractor" means the principal construction contractor, or in absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project;

(3) "naturally occurring asbestos" means asbestos-containing material that has not been processed in an asbestos mill.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INTERIM PROJECT AUTHORIZATION. (a) Notwithstanding AS 18.31.250, added by sec. 3 of this Act, to ensure early application of the policy described in sec. 1 of this Act to a limited number of appropriate construction projects until the development and implementation of initial standards under AS 44.42.420 and the administrative requirements of AS 44.42.400, added by sec. 4 of this Act, for projects not subject to AS 44.42.410(b), if, under (b) of this section, the Department of Transportation and Public Facilities prepares and adopts interim standards and requires its contractors to prepare site-specific plans for the use of gravel or other aggregate material that, when tested using the bulk method prescribed in sec. 6 of this Act, is determined to have a content equal to or greater than 0.25 percent

naturally occurring asbestos by mass in transportation projects and public facilities, the department shall apply those standards to a person described in AS 18.31.250 for a project that is not subject to AS 44.42.410(b).

(b) Notwithstanding AS 44.42.410(b), added by sec. 4 of this Act, to ensure early application of the policy described in sec. 1 of this Act to a limited number of appropriate transportation projects and public facilities until the development and implementation of initial standards under AS 44.42.420 and the administrative requirements of AS 44.42.400, after consultation with the Department of Environmental Conservation, Department of Health and Social Services, Department of Labor and Workforce Development, and appropriate federal agencies, the Department of Transportation and Public Facilities may prepare and adopt interim standards and operating procedures and may require of its contractors the preparation of site-specific plans for the use of gravel or other aggregate material that when tested using the bulk method prescribed in sec. 6 of this Act, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass.

(c) The authority granted by (a) and (b) of this section expires December 31, 2012.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INTERIM STANDARDS FOR APPLICATION OF ASBESTOS BULK TESTING. Until the Department of Transportation and Public Facilities adopts and prescribes a method of bulk testing under AS 44.42.420(a), added by sec. 4 of this Act, the department shall use California Air Resources Board Method 435, Determination of Asbestos Content of Serpentine Aggregate, adopted on June 6, 1991, as that standard has effect on the effective date of this Act, as the basis for determining the asbestos content of a bulk sample or for interim use as authorized by sec. 5 of this Act.

*** Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

ALASKA STATE LEGISLATURE
HOUSE TRANSPORTATION STANDING COMMITTEE
March 30, 2010
1:05 p.m.

MEMBERS PRESENT

Representative Peggy Wilson, Chair
Representative Craig Johnson, Vice Chair
Representative Kyle Johansen
Representative Cathy Engstrom Munoz
Representative Tammie Wilson
Representative Max Gruenberg
Representative Pete Petersen

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 333
"An Act directing the Department of Transportation and Public Facilities to develop and implement standards and operating procedures allowing for the use in the construction and maintenance of transportation projects and public facilities and in the construction of projects by public and private entities of gravel or aggregate materials that contain naturally occurring asbestos, and authorizing use on an interim basis of those materials for certain transportation projects and public facilities; and relating to certain claims arising out of or in connection with the use of gravel or aggregate materials."

- MOVED CSHB 333(TRA) OUT OF COMMITTEE

HOUSE BILL NO. 313
"An Act relating to the maintenance and repair of railroad crossings and rights-of-way within railroad crossings."

- BILL HEARING RESCHEDULED TO 4/01/10

PREVIOUS COMMITTEE ACTION

BILL: HB 333
SHORT TITLE: NATURALLY OCCURRING ASBESTOS IN GRAVEL
SPONSOR(s): REPRESENTATIVE(s) JOULE

02/10/10	(H)	READ THE FIRST TIME - REFERRALS
02/10/10	(H)	TRA, FIN
03/30/10	(H)	TRA AT 1:00 PM CAPITOL 17

WITNESS REGISTER

REPRESENTATIVE REGGIE JOULE
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Testified as prime sponsor of HB 333.

DEWEY HOFFMAN, Staff
Representative Reggie Joule
Alaska State Legislature
Juneau, Alaska.
POSITION STATEMENT: Testified on behalf of Representative Reggie Joule, the prime sponsor of HB 333.

CHRISTINE HESS, Staff
Representative Reggie Joule
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Testified on behalf of Representative Reggie Joule, the prime sponsor of HB 333.

LANCE MILLER, Vice-President, Resources
NANA Regional Corporation
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 333.

MARY SIROKY, Legislative Liaison
Office of the Commissioner
Department of Transportation & Public Facilities (DOT&PF)
Juneau, Alaska
POSITION STATEMENT: Answered questions during the discussion of HB 333.

LORI VERBRUGGE, Toxicologist
Department of Health and Social Services
Anchorage, Alaska
POSITION STATEMENT: Answered questions during the discussion of HB 333.

WILDA LAUGHLIN
Special Assistant
Department of Health and Social Services (DH&SS)

Juneau, Alaska
POSITION STATEMENT: Answered questions during the discussion of HB 333.

MARIT CARLSON-VAN DORT, Legislative Liaison
Office of the Commissioner
Department of Environmental Conservation (DEC)
Anchorage, Alaska
POSITION STATEMENT: Answered questions during the discussion of HB 333.

ACTION NARRATIVE

1:05:02 PM

CHAIR PEGGY WILSON called the House Transportation Standing Committee meeting to order at 1:05 p.m. Representatives P. Wilson, Gruenberg, Petersen, and T. Wilson were present at the call to order. Representatives Munoz, Johnson, and Johansen arrived as the meeting was in progress.

HB 333-NATURALLY OCCURRING ASBESTOS IN GRAVEL

1:05:06 PM

CHAIR P. WILSON announced that the only order of business would be HOUSE BILL NO. 333, "An Act directing the Department of Transportation and Public Facilities to develop and implement standards and operating procedures allowing for the use in the construction and maintenance of transportation projects and public facilities and in the construction of projects by public and private entities of gravel or aggregate materials that contain naturally occurring asbestos, and authorizing use on an interim basis of those materials for certain transportation projects and public facilities; and relating to certain claims arising out of or in connection with the use of gravel or aggregate materials." [Before the committee was Version E.]

1:06:13 PM

REPRESENTATIVE T. WILSON moved to adopt the proposed committee substitute (CS) for HB 333, labeled 26-LS1248\S, Chenoweth, 3/16/10, as the work draft. There being no objection, Version S was before the committee.

1:06:50 PM

REPRESENTATIVE REGGIE JOULE, Alaska State Legislature, explained that HB 333 would authorize and regulate use of naturally occurring asbestos (NOA), which is due to minerals present in the soil and rocks. This has become problematic in Ambler since there are many projects that need aggregate material, such as the airport or sewage lagoon. He offered that he is working towards resolution of the issue. He introduced his staff, Dewey Hoffman, who is working on the issue of NOA, and asked him to provide more details on HB 333.

DEWEY HOFFMAN, Staff, Representative Reggie Joule, Alaska State Legislature, on behalf of the sponsor, Representative Reggie Joule provided an overview on the bill. He stated that HB 333 would put policies in place to mitigate the difficulties associated with construction in areas of the state with naturally occurring asbestos (NOA). He stated that NOA occurs in mineral deposits throughout Alaska and our state has large known deposits of ultramafic and serpentine mineral ore. These deposits often contain NOA, which is similar to the asbestos we are familiar with and that is known to cause fibrosis or malignancies of the lungs and other major organs. Asbestos is defined in the bill as gravel, rock, sand and similar materials that are determined to have a content of at least 0.25 percent asbestos by mass, setting the threshold for NOA at 0.25 percent.

MR. HOFFMAN said the Department of Transportation & Public Facilities (DOT&PF) hired Nortech, Inc. and the Institute of Northern Engineering, University of Alaska, Fairbanks, to research the issues and recommend solutions. He referred to a series of maps in members' packets which show mineral occurrences in Alaska that likely contain NOA. He also referred to pages 29-32 of the full report titled, Naturally Occurring Asbestos in Alaska and Experiences and Policy of Other States Regarding its Use. This report concludes that NOA can be used in most circumstances without harmful side effects so long as proper procedures are implemented and followed, he stated.

MR. HOFFMAN explained that there are documented cases of NOA being found in several areas of the state, including at a rock quarry in Juneau, along the Dalton Highway at material site 105, and in local gravel pits in Ambler. The NOA was discovered during routine soil testing and has delayed or halted, as in Ambler's case, construction projects for years. Current projects in Ambler that are affected include the Ambler Airport Runway Extension Project, construction of a new sewer lagoon and access road, and housing construction. Some experts believe

that over time more NOA will be documented, particularly in the very areas that are rich in minerals and likely to be developed. Some localities do not have gravel materials nearby that are free of NOA, yet several large projects will require the use of large amounts of gravel. How to handle NOA should be resolved before it becomes an issue during the actual preconstruction or construction process of one of these projects. He referred members to page 27 of the Nortech, Inc. report for more detailed information. He stated that the use of NOA is not currently regulated by the federal government and only a few states, such as Virginia and California have addressed it.

1:12:05 PM

MR. HOFFMAN reported that Virginia and California have been regulating NOA for many years and several other states are in the process of addressing the issue. California uses a threshold for asbestos concentration, below which the material is not considered NOA. Regulation controls are put into place for safety reasons if the material is above the established threshold. This bill has adopted a similar approach. He summarized that the purpose of the bill is to define the measures that must be developed and established in order to safely use gravel or materials containing NOA. After procedures and standards are adopted and a site-specific plan is approved for a construction project, HB 333 would protect the suppliers and users from liability so long as the plan is appropriately followed. The bill would remove the doubt and fear of liability associated with use of NOA, which would encourage suppliers and landowners to offer gravel for sale. This would ensure that work could safely proceed in Alaska while using gravel that has some NOA. This would also help keep construction costs down, he stated.

1:13:54 PM

CHAIR P. WILSON related her understanding that health problems are caused by direct contact with asbestos. She asked what causes the concern if the NOA is contained within the rock.

1:14:48 PM

CHRISTINE HESS, Staff, Representative Reggie Joule, Alaska State Legislature, explained that the biggest concern comes from all-terrain vehicles (ATVs) use, which substantially raises dust levels during the summer months. She explained that the Department of Environmental Conservation (DEC) and the

Department of Health and Social Services (DHSS) have conducted tests in Ambler to identify health issues. The DHSS chest X-ray monitoring only found several people with an indication in their lungs, but the health problems could be attributed to other factors such as smoking. The departments are discussing dust control measures to mitigate health risks.

1:16:30 PM

LANCE MILLER, Vice-President, Resources, NANA Regional Corporation testified in support of HB 333. He stated that currently there is and will continue to be a critical need for gravel for projects throughout Alaska and some gravel may contain asbestos. He recalled that Mr. Hoffman previously mentioned the issues that arose in the 70s on the Dalton Highway project and in 2005 with a Juneau gravel project. He mentioned a chronology of projects exist, but without some protocols in place for gravel containing trace amounts of NOA, many projects will come to a standstill with all the notoriety that asbestos has received nationwide. Asbestos comes from magnesium silicate minerals associated with ultramafic rocks. Interestingly, a lot of the mineral deposits that have formed are located near geologically dynamic area, where the ultramafic rocks have been brought up along the sea floor. Thus, it is not a random coincidence that mineral deposits contain magnesium-rick rocks that contain NOA minerals. In fact, many parts of the state from Juneau to the Arctic region contain mineral deposits and asbestos, but not necessarily at a level to cause any alarm. He referred specifically to the mountains behind Ambler, to Jade Mountain, which is comprised of serpentine. He remarked that the state gem is jade, which also comes from ultramafic rock. California's geology has similar problems to the ones encountered in Alaska's geology. The state rock of California is serpentine, which is the main asbestos bearing rock. California adopted regulations to address NOA, which are similar to the process reflected in HB 333. He commented that California has a record of being protective of health and the environment.

1:20:14 PM

MR. MILLER related that within the Ambler region about $10 million in projects are currently on hold. He offered his belief that not moving forward with projects, such as the planned sewer lagoon and water projects, would affect the health and safety of the residents of Ambler. Using the California standards, some sites in the Ambler area are asbestos free.

Adopting the standards in HB 333, which are basically the California standards, would allow projects to move forward and would provide protection so long as the standard operating procedures are adhered to by landowners and contractors.

1:21:14 PM

REPRESENTATIVE MUNOZ asked for examples of how California is mitigating their asbestos issues.

MR. MILLER offered his understanding that much of the mitigation has occurred by adopting methods of handling material, such as wearing respirators when crushing rock that contains NOA or wetting down the material. The mineral is fibrous and when dry will float in the air, but NOA has water-absorbing properties will not float in the air when wet. California has addressed NOA by developing specific procedures quarries or gravel pits to protect workers. In Alaska, such as at Stabler Point in Juneau, the material is contained within rock so crushing the rock can liberate the NOA. In other locations, such as in Ambler, the natural forces have crushed the rock and released the NOA into streams. Thus, the NOA is contained in gravel.

1:22:59 PM

REPRESENTATIVE PETERSEN referred to HB 333 and asked for the reference to any language that mandates masks be used to protect workers who may be exposed to NOA.

MR. MILLER explained the process for handling NOA would be developed as part of the standard operating procedures (SOP) that would be developed under the bill.

REPRESENTATIVE P. WILSON suggested that the procedures would likely be developed in regulation.

1:23:42 PM

REPRESENTATIVE MUNOZ asked whether "fear of asbestos in the air" would generally cause agencies to "shut down" a project and if such action would be undertaken by the Environmental Protection Agency (EPA).

MR. MILLER responded that usually a project would be shut down by the landowner since SOPs are not currently in place to protect the landowner from risk.

REPRESENTATIVE MUNOZ related her understanding that if the SOPs were in place the landowner would be afforded some legal protection.

MR. MILLER agreed that the SOPs would provide some immunity.

1:24:44 PM

MARY SIROKY, Legislative Liaison, Office of the Commissioner, Department of Transportation & Public Facilities (DOT&PF), explained that three agencies have been working to resolve the issues surrounding NOA in Ambler. The agencies have arrived at some short-term solutions. Thus, HB 333 will not be needed since the three agencies have agreed to develop the SOP for operations on state land. The three agencies, the Department of Transportation & Public Facilities (DOT&PF), Department of Health and Social Services (DH&SS), and Department of Environmental Conservation (DEC) have committed to work with Representative Joule to formulate an agreed upon plan for the projects in Ambler by June 1. The departments have committed to work during the legislative interim to develop the standard operating procedure (SOP) for other sites. She restated that by June 1, 2010, the DOT&PF will develop a plan, in conjunction with DH&SS and DEC, to address the Ambler project sites and during the rest of the year plans to develop the SOP for other state-owned sites. She stated that the departments will also develop recommendations for third-party sites. In response to Chair P. Wilson, she restated the department's goals to address NOA.

THIS NEVER HAPPENED

1:28:13 PM

REPRESENTATIVE P. WILSON asked for the DOT&PF to report to the committee next legislature.

MS. SIROKY agreed to do so.

1:28:34 PM

REPRESENTATIVE T. WILSON asked whether the departments' plans would also address the issue for private properties.

MS. SIROKY answered that she was unaware of any projects with delays due to NOA that are not state projects.

1:29:09 PM

REPRESENTATIVE JOHNSON asked for an indication of the past success rate for cooperation between the DOT&PF, DH&SS, and DEC.

MS. SIROKY related that most of the difficulties have surrounded procedures for third-party aspects of NOA. She related that the three departments have agreed that solutions can be found for state-owned properties.

1:30:07 PM

REPRESENTATIVE JOHNSON related he has not observed much inter-agency cooperation to give him optimism that June 1, 2010 is a realistic date. He said he is not certain that HB 333 is not needed.

MS. SIROKY, in response to Representative Johansen, stated that the Ambler issue has been "on the radar screen for about a year." She recalled the DOT&PF previously worked on NOA issues on the Dalton Highway in the 70s. This is the first issue in recent history that she could remember. In further response to Representative Johansen, she related that the interagency agreement between the three departments was reached yesterday.

1:31:21 PM

REPRESENTATIVE JOHANSEN asked to hear from the sponsor at some point.

MS. SIROKY, in response to Chair P. Wilson, with respect to NOA, offered her belief that the DEC has been involved for some time on the issues of NOA.

1:31:58 PM

REPRESENTATIVE T. WILSON asked whether the DOT&PF will be able to solve the issue without the $355,000 shown in the fiscal note

MS. SIROKY answered that since the departments have agreed they can resolve the issues without the bill, that the DOT&PF will not need the funding. She explained that the fiscal note assumed that certain accounting and regulation's projects would be needed. Under the current plan, the DOT&PF will not develop databases and regulations for third-party ownership. In further response to Representative T. Wilson, she explained that the state does not need to develop regulations to address methods the state will follow. The process that will be used is the

three commissioners will set mandates for their respective departments to implement.

1:33:31 PM

REPRESENTATIVE T. WILSON asked whether the DOT&PF will develop regulations for private parties.

MS. SIROKY related that under the agreement the departments reached, the DOT&PF will address the state-owned sites in Ambler. Secondly, the DOT&PF will develop policies and procedures for other state-owned sites, and finally, the DOT&PF will develop recommendations for other parties to proceed. In further response to Representative T. Wilson, she gave an example of third parties, such as a tribal organization who may wish to use naturally occurring asbestos (NOA) to build a road on tribal property. Additionally, she anticipated some municipalities may encounter similar issues. She pointed out that her expertise is not in asbestos and the EPA does not currently regulate NOA. The current federal regulations for asbestos are limited to worker safety. Thus, NOA, which becomes a fiber in the natural environment and poses a serious health threat poses a different situation than the normal issues encountered, such as during removal of asbestos insulation. She explained some difficulties in Alaska that are not present in California. In California, their roads connect so paving may be a solution to eliminate NOA issues. The problem is more complex in Alaska, with its remote areas and gravel roads or runways in villages.

1:35:38 PM

REPRESENTATIVE PETERSEN referred to the fiscal note analysis which estimated it would take a year and a half to complete the SOP. He asked how the departments would be able to accomplish the work by June 1, 2010.

MS. SIROKY answered that the fiscal note anticipated the development of regulations to address third parties would take time, as well as time necessary to identify the scope of institutional controls. The issue is very complicated, but when the NOA oversight is limited to state sites, the state can better monitor and track the management of NOA. In further response to Representative Petersen, she agreed that the departments believe they can find solutions to the issues at the Ambler airport. In response to Chair P. Wilson, she affirmed

DOT&PF is not aware of any sites other than state-owned entities in which projects have been halted.

CHAIR P. WILSON restated that the DOT&PF will work with the other agencies to develop policies and will come back to the legislature with suggestions for procedures when the NOA involves third parties.

MS. SIROKY agreed.

1:37:51 PM

REPRESENTATIVE JOHNSON asked whether the fiscal note could be zeroed out if the public portion was removed from HB 333 and the bill only applied to the state.

MS. SIROKY stated that she did not know for certain. However, she offered her belief that is the argument she is currently making on this issue. In further response to Representative Johnson, she said she thought that the fiscal note could be a zero fiscal note, but would need to re-read the bill to see if any other implications were in the bill that would necessitate additional funding.

1:39:39 PM

REPRESENTATIVE JOHNSON asked for the reason that the DOT&PF has not already addressed this issue if it is so easy to fix.

MS. SIROKY related that the DOT&PF has held "pointed conversations" on this topic with the other agencies. The departments found that when third parties were removed that they could reach agreement. The departments experienced the most difficulty over determining the "final regulator" for third parties. The main stumbling block surrounded who would ultimately regulate the NOA. Since the NOA issues at Ambler are limited to the state, the departments felt they could reach an agreement for the standard and the SOP. She offered her belief that once the SOP is in place, the departments can work through the issues to regulate third parties. In further response to Representative Johnson, she clarified that the "pointed conversations" were held with the "sister agencies."

1:41:57 PM

MS. SIROKY, in response to Representative Johnson, reiterated that the DOT&PF believes it can develop the methodology for

addressing the issue at Ambler and can develop SOPs for other state-owned sites.

MARIT CARLSON-VAN DORT, Legislative Liaison, Office of the Commissioner, on behalf of the Department of Environmental Conservation (DEC), agreed the department has held conversations with the bill sponsor, the DOT&PF, and the DH&SS. The three departments agreed to find interim solutions for the issues at Ambler. She further agreed that "it did get a little bit stickier" when the agencies discussed regulating third parties and where the authority would ultimately lie. She explained that DEC does not have authority over asbestos, although it does have authority over ambient air quality. The EPA does not regulate ambient air asbestos, but regulates asbestos in Title V, which is the asbestos related to demolition and the related human health issues. Thus, the problem surrounded who would develop the standards, whether the standards should be in statute or in regulation, and the role of the DH&SS in developing health standards for NOA. The DOT&PF responsibility would determine the material specifications and usage. During the legislative interim, the DEC, in conjunction with the other departments will review asbestos product usage, whether it can be used as fill or if a cap of clean material would be required. She maintained her belief that a solution for Ambler can be found and solutions could be arrived at during the legislative interim, which may also result in suggestions for statute changes to present to the legislature.

1:45:12 PM

MS. CARLSON-VAN DORT, in response to Representative T. Wilson, answered that the DEC wants to ensure that Ambler can complete its current project. Any additional project not currently slated will become part of the discussion during the legislature interim with respect to use of NOA materials. In further response to Representative T. Wilson, she responded that removing third parties from HB 333 does not resolve other issues, such as determining and setting the standard in regulation. Additionally, the DEC will review the 0.25 threshold identified in the bill to determine whether it is the appropriate standard.

1:46:38 PM

REPRESENTATIVE PETERSEN asked whether the DEC believes the standard is too high or too low or if the DEC has had time to consider the standard.

MS. CARLSON-VAN DORT stated that she did do not know at this time. The standard in HB 333 was modeled after the California standard. California caps and paves most of their roads, which removes the ambient air and dust issue. While communities in rural Alaska also have ambient NOA air and dust issues, paving is very expensive so other solutions must be found.

1:47:30 PM

LORI VERBRUGGE, Toxicologist, Department of Health and Social Services, stated she has been involved in Ambler issue since 2004 or 2005. She offered that the DH&SS is enthusiastic to work on these issues with the other departments.

1:48:42 PM

WILDA LAUGHLIN, Special Assistant, Department of Health and Social Services (DH&SS), offered her belief that the three departments can work together as Ms. Siroky outlined. In response to Representative T. Wilson, she related her understanding that this has primarily been an issue between the DOT&PF and the DEC. She stated that the DH&SS may need to weigh in on the health aspects and is willing to do so. She offered that the Division of Public Health is working to define the DH&SS's role with respect to NOA.

1:50:34 PM

CHAIR P. WILSON recalled some testing has been conducted in Ambler to find out if residents are experiencing health issues, primarily associated with their lungs.

MS. LAUGHLIN stated that Ms. Verbrugge is better able to assess that question. In response to Representative Johnson, she related that the commissioners are discussing the NOA issues.

REPRESENTATIVE JOHNSON stated he wanted to hear that the commitment is coming from the top level.

MS. LAUGHLIN stated she has briefed Commissioner Hogan.

MS. SIROKY related that Deputy Commissioner Frank Richards is supportive of the plan, as is Roger Healy, the Director of Statewide Design & Engineering Standards. In further response to Representative Johnson, she indicated that the NOA issue

falls under the responsibility of Mr. Richards. She offered to call Commissioner von Scheben for his approval.

MS. CARLSON-VAN DORT related recent conversations she held with Deputy Commissioner Dan Easton and Acting Director of the Division of Air Quality Alice Edwards. She further reported she held discussions last week with Commissioner Hartig and all three are supportive of the NOA agreement.

1:53:40 PM

CHAIR P. WILSON asked Ms. Verbrugge to report on investigations and decisions made with respect to NOA in Ambler.

MS. VERBRUGGE explained during the 2004-2005 period, some reports were made to the community. A medical epidemiologist reviewed charts and X-Rays to determine the extent of asbestos diseases, but the outcome was inconclusive. The epidemiologist did not find direct cause and effect for Mesothelioma, which is a type of lung disease directly linked to asbestos. The epidemiologist found some evidence of lung diseases was consistent with asbestos lung disease, but the final results were not definitive. Thus, the question is still open as to whether health effects in Ambler were due to contact with NOA. In 2005, the federal Agency for Toxic Substances and Disease Registry (ATSDR) collected samples and determined that the exposure by simply walking across the side of the road or along the street would constitute a health hazard for residents of Ambler. The DH&SS has not eliminated the potential for concerns in Ambler, she stated.

CHAIR P. WILSON, after first determining no one else wished to testify, closed public testimony on HB 333.

1:57:15 PM

REPRESENTATIVE JOULE stated that the people in the community of Ambler have pushed for a change. Mayor Morgan Johnson of Ambler has observed the capital projects languish in the community and has worked hard to find solutions to the project delays. In addition to the efforts taken by the DOT&PF, and DEC, the tribal health personnel in NANA, Manilaq, and the Alaska Native Tribal Health Consortium (ANTHC) have all worked together to attempt to move this issue forward.

REPRESENTATIVE JOULE remarked the tendency to "shoot the messengers," but this issue predates today's testifiers. He

said he thought that "we can get there." The appropriate department commitments have been made on the record and to him personally. First and foremost, this issue is about the health and safety of the citizens of Ambler. Further, this issue is about economic development in an area that would benefit from it. In 2003, this issue was initiated, but if a road to Nome is ever undertaken NOA regulations will need to be adopted. He offered his belief the agencies understand and recognize the issue and if this can be accomplished it will happen. He stated he would also appreciate it if the committee could move the bill forward.

REPRESENTATIVE JOULE, in response to Representative Johnson, answered that any liability to the state would be considered as part of the bill and be addressed in the SOP.

2:02:19 PM

REPRESENTATIVE MUNOZ moved to report the proposed committee substitute (CS) for HB 333 labeled, 26-LS1248\S, Chenoweth, 3/16/10, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 333(TRA) was reported form the House Transportation Standing Committee.

2:03:19 PM

ADJOURNMENT

There being no further business before the committee, the House Transportation Standing Committee meeting was adjourned at 2:03 p.m.

CHRIS KENNEDY , Assistant Attorney General, testified on Sections 1 and 14 of SB 39. Those sections are identical to an amendment offered to similar legislation last year and were proposed by the Department of Education as part of the Administration's response to problems discovered by the Toksook Bay law suit. The law suit was filed against the state by 500 plaintiffs after an oil spill occurred on a former BIA school site. A permanent fuel pipe, installed by the BIA, gave way shortly after the school was transferred from BIA to state ownership. Historically, the state and REAAs have strict and joint liability for 100 percent of any damages from a spill of this kind, regardless of fault. Section 1 eliminates strict and joint liability for damages; however, the state and REAAs would continue to be liable under common law for negligence. Section 1 is aimed at the unique circumstance when the state inherits schools with potential latent problems. Section 14 defines the applicability of Section 1, and establishes that it only applies to future claims.

CHAIRMAN TAYLOR asked Mr. Kennedy if he supported those two provisions. MR. KENNEDY replied that he did.

.....

SENATOR PARNELL asked representatives of the Department of Law to describe the scope of the state's liability under SB 39. MR. KENNEDY explained the state will remain liable for its own negligence under common law, but only for the percent of damage it is responsible for. MS. SANSONE agreed and noted AS 46.03.822 (page 1, line 10) is the strict liability statute. She added a negligence action is more difficult to prove because one must establish the state's responsibilities and it would be subject to state discretionary immunity.

SENATOR PARNELL asked if the sovereign immunity principles would still apply. MS. SANSONE replied affirmatively.

CHAIRMAN TAYLOR asked for details about the Toksook Bay oil spill. MR. KENNEDY replied the fuel line that broke was about 30 years old. The state took ownership of the property about one year before the fuel line corroded. CHAIRMAN TAYLOR commented under most proposals currently before the Legislature, the statute of limitations would run out in 15 years so no one could be sued anyway.

MR. KENNEDY explained the title transfer process also complicated the lawsuit. The state settled and received some financial concessions from the federal government.

Cindy Smith

From: Sen. Hollis French
Sent: Saturday, March 24, 2012 3:59 PM
To: Cindy Smith
Subject: Re: asbestos thoughts

Very good thinking. We can call E Hensley Monday.

Sent from my iPhone

On Mar 24, 2012, at 1:38 PM, "Cindy Smith" <Cindy_Smith@legis.state.ak.us> wrote:

> What about this:
>
> A bill that sets the statewide default as "you can't use it".
>
> To that default we make an exception:
>
> Local communities can apply for an exemption if
> 1. There is no non-NOA gravel available in the immediate area (say,w/in 50 miles or whatever..)
> 2. OR have no economically reasonable alternative
>
> NOA in material cannot exceed some upper level amount (.50? 1.0?)
> NOA in exposed materials cannot exceed .25
> DOT must cap or seal any NOA over .25 and should cap or seal all NOA material when possible
>
> DOT sets standards (all the stuff currently in the bill: site specific plans, mitigation, monitoring, and maintenance etc etc)
> DHSS/Public Health Director has to sign off on plans
> Contractors and suppliers who follow state guidelines get immunity
> No immunity for the state since this is the state's policy call to allow it at all.
>
> Note: the newer health report for Ambler is very depressing. The PLAY AREA for kids' soil was showing between .009 and .7 – and they had some trouble doing airborne tests because the dust was so bad that it constituted a major health problem. So, you know, if we made DOT go out and cover some of this stuff with .25 it'd represent a net gain for the community....
>
> c.
>
> Cindy Smith
> Office of Senator Hollis French
> (907) 465-3892
> www.senate.org

SB 186

<TARGET><BILL>SB 186</BILL><SUBJECT>SB 186</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

Sponsor Statement SB 186
Sentencing/Probation/Mentally Ill

Senate Bill 186 provides important corrections to the state's guilty but mentally ill (GBMI) statutes, ensuring that they comply with the United States Supreme Court in *Apprendi v. New Jersey* and *Blakely v. Washington.* The bill provides a procedure for post-conviction findings of GBMI, and adopts a 10 day notice when any party intends to raise the issue. It clarifies that the jury must determine that a defendant is guilty but mentally ill, unless the right to a jury determination is waived by the defendant.

Other changes to the statute ensure that the provisions of the *Blakely* decision are applied to issues of burden of proof in various factors in homicide cases, and clarify when juries must make factual findings to forward to a judge for sentencing purposes.

The bill also clarifies that neither the prosecuting attorney nor the defendant can, without mutual agreement, change the terms of a Rule 11 plea agreement under the Rules of Criminal Procedure after it has been imposed, and that the court may not reduce a period of probation agreed to under a Rule 11 agreement without the consent of the prosecution.

Senate Bill 186 makes important changes to ensure that Alaska's criminal procedures comply with Supreme Court decisions, and that plea agreements made in good faith are upheld by the courts. The bill is supported by the Alaska Department of Law.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

SENATE BILL 186
SECTIONAL ANALYSIS

Section 1 clarifies in statute that in order for a person to be found guilty but mentally ill (GBMI), the fact finder must determine by proof beyond a reasonable doubt that when the defendant committed the crime he or she was guilty but mentally ill. This change is required by the decisions of the United States Supreme Court in *Apprendi v. New Jersey* and *Blakely v. Washington*, holding that the Sixth Amendment right to a jury trial requires that a factual finding that would increase the statutory maximum penalty for an offense must be submitted to a jury and proven beyond a reasonable doubt.

The court of appeals has said that a person who is found guilty but mentally ill does not qualify for parole release, including mandatory parole, until the person no longer suffers from a mental disease or defect that causes the defendant to be dangerous to the public. Because a person who is found GBMI may not qualify for mandatory parole, the factual decisions addressing whether the defendant is GBMI must be submitted to a jury (unless the defendant waives this requirement) and proven beyond a reasonable doubt.

Section 2: Under current law the defense, the prosecution, or the court may raise the question after a guilty verdict, of whether the defendant is guilty but mentally ill. This is possible if the issue has not been raised in the trial. The procedure for addressing this issue needs to be changed to reflect the constitutional requirements articulated in *Apprendi* and *Blakely*. **Section 2** makes these changes. It also adopts a procedure for giving notice 10 days before trial if the party intends to raise the issue after trial.

Section 3 clarifies that the jury must determine whether the defendant is guilty but mentally ill, unless the right is waived by the defendant. The court then determines the sentence.

Section 4 is amended to recognize that current law has other provisions that require a different standard of proof in addition to those specified in the current statute.

Sections 5 and 6 add provisions to ensure that neither the prosecuting authority nor the defendant can, without mutual agreement, change the terms of a Rule 11, Alaska Rules of Criminal Procedure, agreement after it has been imposed. If a defendant, as part of a plea agreement under Rule 11, agrees to a particular period of probation the court may not, without the consent of the prosecution, reduce the period of probation. This has the effect of overruling the decision in *State v. Henry*, 240 P. 3d 846 (Alaska App. 2010). Judges, in sentencing a person who has violated a condition of probation, must still apply the *Chaney* criteria in deciding how much, if any, of the suspended period of incarceration should be imposed.

However, the court may not reduce the period of probation or the period of suspended time (less the time imposed for the probation violation) without the agreement of the prosecuting authority.

Section 7 amends the sentencing law for murder in the first degree to change the burden of proof that the defendant subjected the victim to substantial physical torture or that the defendant was a peace officer who used the officer's authority to facilitate the murder. The current statute provides for a clear and convincing burden on the prosecution. Under the *Apprendi* and *Blakely* decisions, the state must prove these factors beyond a reasonable doubt.

Section 8 clarifies in statute that a if a sentence is imposed on a defendant that would preclude the person from receiving good time, for example a person who has been convicted of the first degree murder of a peace officer, the jury (unless waived by the defendant) must determine the factual issue, in this example, that the victim was a peace officer, beyond a reasonable doubt. Additionally, if a court is sentencing a person who is subject to a presumptive range and the prosecution seeks to increase the range by proof of certain aggravating factors, the jury (unless waived) must determine the factual issue by proof beyond a reasonable doubt.

Section 9 includes guidance to the court in finding the aggravating factor that the defendant's conduct was the most serious in the definition of the offense. AS 12.55.155(c)(10). First, it provides that the jury must determine the facts supporting an allegation that the defendant's conduct was the must serious in the definition of the offense. Because finding a factor in aggravation allows the court to impose a higher term of imprisonment than the presumptive range, the finding by the jury (unless waived) is required by the *Apprendi/Blakely* decisions. After the jury makes this factual determination, the court then makes the legal decision that the factual decision justifies an increase in sentence because the conduct is the most serious in the definition of the offense. The crime of theft provides a good illustration of this. Theft in the second degree, a class C felony, prohibits a person from committing theft of property valued between $500 and $25,000. The maximum term for a class C felony is five years incarceration; the presumptive range is zero to two years for a first felony offense. If the jury finds that the defendant stole an amount close to $25,000, the court may then consider this conduct as the most serious in the definition of second degree theft.

Section 9 also codifies court decisions that clarify that once a factor in aggravation has been decided as required in *Apprendi/Blakely*, other factors in aggravation may be considered without a factual determination beyond a reasonable doubt by the jury. Once one factor in aggravation is decided, the judge may sentence a person up to the maximum term; thus additional factors do not raise the maximum term. *Reandeau v. State*, 265 P.3d 1045 (Alaska App. 2011).

Sections 20 and 11 are conforming to **Sections 5 and 6.**

Section 12 notes the indirect effect of **Section 8** on Rule 32.1, Alaska Rules of Criminal Procedure.

Sections 13 – 15 include applicability provisions, conditional effect of the court rule change, and the effective date, July 1, 2012.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB186**
Fiscal Note Number
() Publish Date

Identifier (file name) SB186-DOA-OPA-2-3-12
Title Sentencing/Probation/Mentally Ill
Sponsor Judiciary
Requester Senate Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Office of Public Advocacy
OMB Component Number 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, intial version

Prepared by Richard Allen, Director — Phone 907-269-3504
Division Office of Public Advocacy — Date/Time 02/03/12 3:00 p.m.
Approved by John Cramer, Deputy Commissioner — Date 2/3/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB186
2012 LEGISLATIVE SESSION

Analysis

This bill requires that post-conviction determination of a defendant being "guilty but mentally ill" requires the party seeking this determination to give notice of this intention 10 days before the trial. This bill also requires that this determination be made by the original fact finder in the trial unless the defendant, with the concurrence of the prosecution, waives this requirement in writing. This bill specifies that the standard of proof to be applied in determining whether the defendant is guilty but mentally ill is a reasonable doubt standard.

The bill also limits the court's discretion to modify the term of probation or suspended incarceration following a certain plea agreement. This bill also permits a trial court to make legal determinations and factual findings on additional aggravating factors that enhance the penalty range on felony offenses.

Although provisions on this bill are subject to litigation, it is not anticipated that this bill will have significant fiscal impact. The Agency, therefore, submits a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB186**
Fiscal Note Number
() Publish Date

Identifier (file name) SB186-DOA-PDA-2-3-12
Title Sentencing/Probation/Mentally Ill
Sponsor Judiciary
Requester Senate Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Quinlan Steiner
Division Public Defender Agency
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 907 334-4414
Date/Time 2/3/12 1:30 PM
Date 2/3/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB186
2012 LEGISLATIVE SESSION

Analysis

This bill requires that post-conviction determination of a defendant being "guilty but mentally ill" requires the party seeking this determination to give notice of this intention 10 days before the trial. This bill also requires that this determination be made by the original fact finder in the trial unless the defendant, with the concurrence of the prosecution, waives this requirement in writing. This bill specifies that the standard of proof to be applied in determining whether the defendant is guilty but mentally ill is a reasonable doubt standard.

The bill also limits the court's discretion to modify the term of probation or suspended incarceration following a certain plea agreement. This bill also permits a trial court to make legal determinations and factual findings on additional aggravating factors that enhance the penalty range on felony offenses.

Although provisions on this bill are subject to litigation, it is not anticipated that this bill will have significant fiscal impact. The Agency, therefore, submits a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB 186**
Fiscal Note Number
() Publish Date

Identifier (file name) SB186-LAW-CRIM-02-04-12
Title An Act relating to mentally ill; sentencing procedures; and probation.
Sponsor Judiciary
Requester (S) Judiciary

Dept. Affected Law
Appropriation Criminal
Allocation Criminal Justice Litigation
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager — Phone 465-5427
Division Administrative Services — Date/Time 2/4/12 12:10PM
Approved by Michael C. Geraghty, Attorney General — Date 2/4/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB 186
2012 LEGISLATIVE SESSION

Analysis

SB 186 makes several changes in criminal procedures in response to the decisions by the United States Supreme Court that factual issues that would increase the potential penalty for conviction of a crime must be decided by a jury (unless the defendant waives this right) by proof beyond a reasonable doubt. The bill also clarifies procedures for deciding certain factors in aggravation.

SB 186 also clarifies procedures for imposition of a sentence after a probation violation if the defendant has made certain agreements as part of a plea negotiation.

The fiscal impact to Department of Law is zero.

Cindy Smith

From: Nancy Meade <NMeade@courts.state.ak.us>
Sent: Monday, February 13, 2012 4:07 PM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. John Coghill; Sen. Lesil McGuire; Sen. Joe Paskvan
Cc: Cindy Smith; Karen Lidster
Subject: SB 186 - Senator Coghill's amendment re felony theft dollar amounts

Follow Up Flag: Follow up
Flag Status: Flagged

On Friday, the Senate Judiciary Committee considered proposed amendments to SB 186 from Senator Coghill that would raise the threshold value amount for a felony theft from $500 to $1500. (Currently, Theft 2 occurs when the value of the stolen item is between $500 and $25,000, and it is a Class C felony. If the value is less than $500, the theft is a misdemeanor.)

Senator Wielechowski asked whether the court system could extract information from its statistics to explain how many felony theft cases are charged, or how many felony convictions result, when the dollar value of the stolen item is below $1500 (or just slightly above $500). The court's statistics are kept by statute, and, unfortunately, they do not describe the value of the items at issue in a theft case. We can say how many charges are brought under a statute, and how many defendants were convicted under a statute, but our statistics do not describe factual details about the cases.

Please let me know if I can help with any other information.

Nancy Meade
General Counsel
Alaska Court System
Anch: 907-264-8264
Juneau: 907-463-4736

LEGAL SERVICES

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

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FAX (907) 465-2029
Mail Stop 3101

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

MEMORANDUM February 15, 2012

SUBJECT: Proposed Amendment to AS 11.41.200(a); AS 11.81.900(b)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Doug Gardner
Director

I spoke with Cindy Smith in your office regarding the enclosed proposed amendment. While I discussed making changes to conform the amendment to other criminal statutes, I elected to provide the amendment as drafted, but enclose this memorandum to spot issues that may arise during hearings on the proposed amendment. It was my view that this was more helpful to you than trying to make some changes, and yet not necessarily fix some of the broader concerns raised by the amendment. My comments in the time available are as follows:

- Currently, the concept embodied in this amendment exists in principle in AS 11.41.230(a)(1)(C) (assault in the third degree). Another way to address the concerns raised in the amendment is to move the provision in AS 11.41.230(a)(1)(C), to assault in the second degree, with a different mental state, etc. A concern that may be raised with the proposed amendment is how the amendment relates to existing AS 11.41.230(a)(1)(C), or 11.41.230(a)(3).
- A serious concern is that not all of the injuries in the proposed amendment to AS 11.81.900(b) (serious bodily injury to a child), would qualify as serious physical injury as the term is currently defined in AS 11.81.900(b)(56). For example, a broken bone from an intentional shove of a child by a person over 18 of a person under 12 years of age, would classify as a class A felony assault. What if the broken bone was a bone in the foot, such as a toe? Many of the serious injuries listed in the proposed amendment are already clearly serious physical injuries as the term is already defined. The inconsistent results of establishing, as noted above, that any fracture of a bone is a serious bodily injury to a child, in contrast to dealing with each injury on a case-by-case basis, through expert testimony, will lead to potentially inapposite results. The general definition of serious physical injury arguably provides more fairness and equity in analyzing what constitutes serious physical injury, than the proposed list in the amending language.
- A disadvantage in this proposal is that because an element of the offense requires proof of a child's age, or proof of age and disability, this statute will render

unavailable the aggravator in AS 12.55.155(c)(5) (vulnerability due to age, disability, etc.). Is this intended? I note that this issue already exists for prosecution under the assault in the third degree statute noted above, but at the A felony level, the consequences are more significant in eliminating this aggravator.

- "...[O]n more than one occasion." Could this language be used in an argument that a defendant may only be charged once for multiple assaults, forcing the state back to existing assault charging theories? Clearly this language would need to be addressed.
- The amendment employs a new term "serious bodily injury" that is not used in the criminal code. This new term overlaps broadly with the term "serious physical injury" which is commonly used in the criminal code but also includes within its meaning conditions which may or may not normally be considered serious. Employing different definitions for broadly similar conditions is never wise. It is impossible to accurately predict how a court will rationalize different statutes imposing different penalties while employing these terms. To the extent there is overlap one can be certain that equal protection and due process issues may require the imposition of a lesser punishment when similar statutes punish the same conduct. In this regard, how this amendment interacts with AS 11.41.220 should be closely examined.
- The amendment uses an age of 12 years. The legislature has previously employed the age of 10 when creating special relationships or conditions to increase the severity of conduct in the assault statutes. For example, AS 11.41.220(a) provides:

> (a) A person commits the crime of assault in the third degree if that person
>
> (1) recklessly
>
> . . .
>
> **(C) while being 18 years of age or older**
>
> **(i) causes physical injury to a child under 10 years of age and the injury would cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment;**
>
> **(ii) causes physical injury to a child under 10 years of age on more than one occasion;**
>
> . . .
>
> **(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least 10 years of age and the injury reasonably requires medical treatment;**
>
> . . . .

Is there a particular reason for using the age of 12 instead of the age of 10 as the legislature has previously done?

- The legislature previously looked at the issues of assaults on children and proof of the injuries and enacted the provisions of AS 11.41.220(a) that are set out above. If this provision and our other assault statutes are no longer seen as sufficiently

criminalizing the conduct, might it be wise to use and expand upon this framework. For example, instead of focusing on whether an injury necessitates medical attention or treatment one could increase the level of the offense if it requires hospitalization or some other factor.

- When the legislature includes things that qualify as aggravating factors as elements in crimes, the prosecution is not permitted to use that aggravating factor to increase the term of imprisonment for the offense. The existence of an aggravating factor allows a court to increase the imprisonment up to maximum for that level of offense. Without an aggravating factor, a court must sentence an offender within the presumptive range for the offense, a term that is usually significantly less than the maximum. Increasing levels of offenses, for example from a C felony to a B felony, may not always result in an increase in punishment due to the loss of aggravating factors being used to increase punishment at sentencing.

DDG:plm
12-095.plm

Enclosure

AMENDMENT

OFFERED IN THE SENATE

TO: SB 186

Page 1, line 1, following "**Act**":

Insert "**relating to assault causing serious bodily injury to a child; relating to a definition of "serious bodily injury to a child";**"

Page 1, following line 6:

Insert new bill sections to read:

"*** Section 1.** AS 11.41.200(a) is amended to read:

(a) A person commits the crime of assault in the first degree if

(1) that person recklessly causes serious physical injury to another by means of a dangerous instrument;

(2) with intent to cause serious physical injury to another, the person causes serious physical injury to any person;

(3) the person knowingly engages in conduct that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life; or

(4) that person recklessly causes serious physical injury to another by repeated assaults using a dangerous instrument, even if each assault individually does not cause serious physical injury**;**

(5) while being 18 years of age or older, that person

(A) intentionally causes serious bodily injury to a child under 12 years of age or to a child under 16 years of age who is mentally or physically impaired; or

(B) recklessly causes serious bodily injury on one or more

than one occasion to a child under 12 years of age or to a child under 16 years of age who is mentally or physically impaired.

*** Sec. 2.** AS 11.81.900(b) is amended by adding a new paragraph to read:

(65) "serious bodily injury to a child" includes second or third degree burns, a fracture of any bone, a concussion, strangulation, injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement, including those sustained by striking children with objects, or other physical injury that results in significant physical injury to the child."

Page 1, line 7:

Delete "Section 1"

Insert "Sec. 3"

Renumber the following bill sections accordingly.

Page 5, line 23:

Delete "sec. 8"

Insert "sec. 10"

Page 5, line 24:

Delete "sec. 9"

Insert "sec. 11"

Page 5, line 29:

Delete "sec. 1"

Insert "sec. 3"

Page 5, line 30:

Delete "sec. 2"

Insert "sec. 4"

Delete "sec. 3"

Insert "sec. 5"

Page 5, line 31:

Delete "sec. 4"

Insert "sec. 6"

Page 6, line 1:

Delete "sec. 7"

Insert "sec. 9"

Page 6, lines 3 - 4:

Delete all material and insert:

"(b) AS 11.41.200(a), as amended by sec. 1 of this Act, AS 11.81.900(b)(65), as added by sec. 2 of this Act, and AS 12.55.090, as amended by sec. 8 of this Act, apply to offenses occurring on or after the effective date of this Act."

Page 6, line 5:

Delete "sec. 8"

Insert "sec. 10"

Page 6, line 10:

Delete "Sections 8 and 9"

Insert "Sections 10 and 11"

Delete "sec. 12"

Insert "sec. 14"

27-LS0811\I.1
Gardner
2/9/12

AMENDMENT

OFFERED IN THE SENATE BY SENATOR COGHILL

TO: SB 186

Page 1, line 1, following "**Act**":

Insert "**relating to property crimes;**"

Page 1, following line 6:

Insert new bill sections to read:

"* **Section 1.** AS 11.46.130(a) is amended to read:

(a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$1,500** [$500] or more but less than $25,000;

(2) the property is a firearm or explosive;

(3) the property is taken from the person of another;

(4) the property is taken from a vessel and is vessel safety or survival equipment;

(5) the property is taken from an aircraft and the property is aircraft safety or survival equipment;

(6) the value of the property is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(A) an offense under AS 11.46.120, or an offense under another law or ordinance with similar elements;

(B) a crime set out in this subsection or an offense under another law or ordinance with similar elements;

(C) an offense under AS 11.46.140(a)(1), or an offense under another law or ordinance with similar elements; or

(D) an offense under AS 11.46.220(c)(1) or (c)(2)(A), or an offense under another law or ordinance with similar elements; or

(7) the property is an access device.

*** Sec. 2.** AS 11.46.140(a) is amended to read:

(a) A person commits the crime of theft in the third degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$250** [$50] or more but less than **$1,500** [$500]; **or**

(2) [REPEALED

(3)] the value of the property is less than **$250** [$50] and, within the past five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of theft or concealment of merchandise, or an offense under another law or ordinance with similar elements.

*** Sec. 3.** AS 11.46.150(a) is amended to read:

(a) A person commits the crime of theft in the fourth degree if the person commits theft as defined in AS 11.46.100 and the value of the property or services is less than **$250** [$50].

*** Sec. 4.** AS 11.46.220(c) is amended to read:

(c) Concealment of merchandise is

(1) a class C felony if

(A) the merchandise is a firearm;

(B) the value of the merchandise is **$1,500** [$500] or more; or

(C) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(i) the offense of concealment of merchandise under this paragraph or (2)(A) of this subsection, or an offense under another law or ordinance with similar elements; or

(ii) an offense under AS 11.46.120, 11.46.130, or 11.46.140(a)(1), or an offense under another law or ordinance with similar elements;

(2) a class A misdemeanor if

(A) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500]; or

(B) the value of the merchandise is less than **$250** [$50] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions of the offense of concealment of merchandise or theft in any degree, or an offense under another law or ordinance with similar elements;

(3) a class B misdemeanor if the value of the merchandise is less than **$250** [$50].

*** Sec. 5.** AS 11.46.260(b) is amended to read:

(b) Removal of identification marks is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

*** Sec. 6.** AS 11.46.270(b) is amended to read:

(b) Unlawful possession is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

* **Sec. 7.** AS 11.46.280(d) is amended to read:

(d) Issuing a bad check is

(1) a class B felony if the face amount of the check is $25,000 or more;

(2) a class C felony if the face amount of the check is **$1,500** [$500] or more but less than $25,000;

(3) a class A misdemeanor if the face amount of the check is **$250** [$50] or more but less than **$1,500** [$500];

(4) a class B misdemeanor if the face amount of the check is less than **$250** [$50].

* **Sec. 8.** AS 11.46.285(b) is amended to read:

(b) Fraudulent use of an access device is

(1) a class B felony if the value of the property or services obtained is $25,000 or more;

(2) a class C felony if the value of the property or services obtained is **$1,500** [$50] or more but less than $25,000;

(3) a class A misdemeanor if the value of the property or services obtained is less than **$1,500** [$50].

* **Sec. 9.** AS 11.46.295 is amended to read:

Sec. 11.46.295. Prior convictions. For purposes of considering prior convictions in prosecuting a crime of theft under AS 11.46.130(a)(6) or **11.46.140(a)(2)** [11.46.140(a)(3)], or in prosecuting the crime of concealment of merchandise under AS 11.46.220(c), a conviction for an offense under another law or ordinance with similar elements is a conviction of an offense having elements similar to those of an offense defined as such under Alaska law at the time the offense was committed. The court shall consider the date of a prior conviction as occurring on the date that sentence is imposed for the prior offense.

* **Sec. 10.** AS 11.46.360(a) is amended to read:

(a) A person commits the crime of vehicle theft in the first degree if, having no right to do so or any reasonable ground to believe the person has such a right, the person drives, tows away, or takes

(1) the car, truck, motorcycle, motor home, bus, aircraft, or watercraft

of another;

(2) the propelled vehicle of another and

(A) the vehicle or any other property of another is damaged in a total amount of **$1,500** [$500] or more;

(B) the owner incurs reasonable expenses as a result of the loss of use of the vehicle, in a total amount of **$1,500** [$500] or more; or

(C) the owner is deprived of the use of the vehicle for seven days or more;

(3) the propelled vehicle of another and the vehicle is marked as a police or emergency vehicle; or

(4) the propelled vehicle of another and, within the preceding seven years, the person was convicted under

(A) this section or AS 11.46.365;

(B) former AS 11.46.482(a)(4) or (5);

(C) former AS 11.46.484(a)(2);

(D) AS 11.46.120 - 11.46.140 of an offense involving the theft of a propelled vehicle; or

(E) a law or ordinance of this or another jurisdiction with elements substantially similar to those of an offense described in (A) - (D) of this paragraph.

*** Sec. 11.** AS 11.46.482(a) is amended to read:

(a) A person commits the crime of criminal mischief in the third degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with intent to damage property of another, the person damages property of another in an amount of **$1,500** [$500] or more;

(2) the person recklessly creates a risk of damage in an amount exceeding $100,000 to property of another by the use of widely dangerous means; or

(3) the person knowingly

(A) defaces, damages, or desecrates a cemetery or the contents of a cemetery or a tomb, grave, or memorial regardless of whether the tomb,

grave, or memorial is in a cemetery or whether the cemetery, tomb, grave, or memorial appears to be abandoned, lost, or neglected;

(B) removes human remains or associated burial artifacts from a cemetery, tomb, grave, or memorial regardless of whether the cemetery, tomb, grave, or memorial appears to be abandoned, lost, or neglected.

* **Sec. 12.** AS 11.46.484(a) is amended to read:

(a) A person commits the crime of criminal mischief in the fourth degree if, having no right to do so or any reasonable ground to believe the person has such a right

(1) with intent to damage property of another, the person damages property of another in an amount of **$250** [$50] or more but less than **$1,500** [$500];

(2) the person tampers with a fire protection device in a building that is a public place;

(3) the person knowingly accesses a computer, computer system, computer program, computer network, or part of a computer system or network;

(4) the person uses a device to descramble an electronic signal that has been scrambled to prevent unauthorized receipt or viewing of the signal unless the device is used only to descramble signals received directly from a satellite or unless the person owned the device before September 18, 1984; or

(5) the person knowingly removes, relocates, defaces, alters, obscures, shoots at, destroys, or otherwise tampers with an official traffic control device or damages the work upon a highway under construction.

* **Sec. 13.** AS 11.46.486(a) is amended to read:

(a) A person commits the crime of criminal mischief in the fifth degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with reckless disregard for the risk of harm to or loss of the property or with intent to cause substantial inconvenience to another, the person tampers with property of another;

(2) with intent to damage property of another, the person damages property of another in an amount less than **$250** [$50]; or

(3) the person rides in a propelled vehicle knowing it has been stolen or that it is being used in violation of AS 11.46.360 or 11.46.365(a)(1).

*** Sec. 14.** AS 11.46.530(b) is amended to read:

(b) Criminal simulation is

(1) a class C felony if the value of what the object purports to represent is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of what the object purports to represent is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of what the object purports to represent is less than **$250** [$50].

*** Sec. 15.** AS 11.46.620(d) is amended to read:

(d) Misapplication of property is

(1) a class C felony if the value of the property misapplied is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property misapplied is less than **$1,500** [$500].

*** Sec. 16.** AS 11.46.730(c) is amended to read:

(c) Defrauding creditors is a class A misdemeanor unless that secured party, judgment creditor, or creditor incurs a pecuniary loss of **$1,500** [$500] or more as a result to the defendant's conduct, in which case defrauding secured creditors is

(1) a class B felony if the loss is $25,000 or more;

(2) a class C felony if the loss is **$1,500** [$500] or more but less than $25,000."

Page 1, line 7:

Delete "**Section 1**"

Insert "**Sec. 17**"

Renumber the following bill sections accordingly.

Page 5, line 23:

Delete "sec. 8"
Insert "sec. 24"

Page 5, line 24:
Delete "sec. 9"
Insert "sec. 25"

Page 5, line 29:
Delete "sec. 1"
Insert "sec. 17"

Page 5, line 30:
Delete "sec. 2"
Insert "sec. 18"
Delete "sec. 3"
Insert "sec. 19"

Page 5, line 31:
Delete "sec. 4"
Insert "sec. 20"

Page 6, line 1:
Delete "sec. 7"
Insert "sec. 23"

Page 6, line 3, following "(b)":
Insert "AS 11.46.130(a), as amended by sec. 1 of this Act, AS 11.46.140(a), as amended by sec. 2 of this Act, AS 11.46.150(a), as amended by sec. 3 of this Act, AS 11.46.220(c), as amended by sec. 4 of this Act, AS 11.46.260(b), as amended by sec. 5 of this Act, AS 11.46.270(b), as amended by sec. 6 of this Act, AS 11.46.280(d), as amended by sec. 7 of this Act, AS 11.46.285(b), as amended by sec. 8 of this Act, AS 11.46.295, as

amended by sec. 9 of this Act, AS 11.46.360(a), as amended by sec. 10 of this Act, AS 11.46.482(a), as amended by sec. 11 of this Act, AS 11.46.484(a), as amended by sec. 12 of this Act, AS 11.46.486(a), as amended by sec. 13 of this Act, AS 11.46.530(b), as amended by sec. 14 of this Act, AS 11.46.620(d), as amended by sec. 15 of this Act, AS 11.46.730(c), as amended by sec. 16 of this Act, and"

Page 6, line 3:

Delete "sec. 6"

Insert "sec. 22"

Delete "applies"

Insert "apply"

Page 6, line 5:

Delete "sec. 8"

Insert "sec. 24"

Page 6, line 10:

Delete "Sections 8 and 9"

Insert "Sections 24 and 25"

Delete "sec. 12"

Insert "sec. 28"

SB 186
Amendment 27-LS0811\1.1
Summary of Amendment

The purpose of this amendment is to raise the threshold amounts for offenses regarding property. The offenses proposed for amendment are theft and its related offenses which include concealment of merchandise, removal of identification marks, unlawful possession, issuing a bad check, and fraudulent use of an access device. This amendment also addresses the crimes of vehicle theft, criminal mischief, criminal simulation, misapplication of property, and defrauding creditors.

These crimes regarding property have a value threshold that distinguishes first, second, third, and fourth degree offenses that, depending on the value of the property, or the loss incurred by the victim, are a Class C felony or an A or B misdemeanor.

The values of these crimes regarding property were set in 1978, and since that time have not been adjusted. This amendment will adjust the value from $500 to $1500, and $50 to $250 establishing the thresholds for C felony, A misdemeanor, and B misdemeanor crimes.

Presently ***Removal of an Identification Mark*** on an item valued at $50.00 is a Class B misdemeanor; with the proposed amendment the value of the property would be raised to $250.00.

I have listed a few of the other offenses (by Section) to show that the change throughout the property offenses sections that we are addressing is consistently $500 is increased to $1500 and $50 is increased to $250.

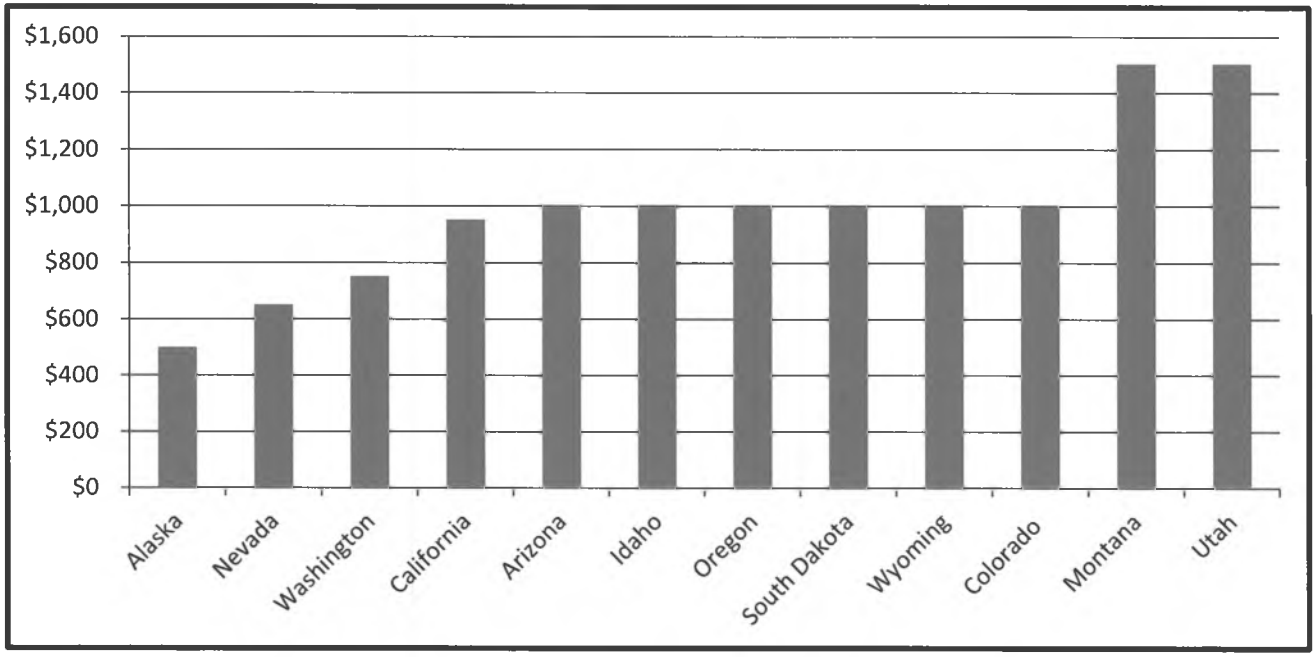
Sec. 1 **Theft in the Second Degree** (Class C Felony) Increases the value of property or services $1500 ($500) but less than $25,000.
Value of property is $250 ($50) or more but less than $1500 ($500) and within the preceding 5 years the person has been convicted or sentenced on two or more separate occasions in this or another jurisdiction.

Sec. 2 **Theft in the Third Degree** (A Misdemeanor) value of property is $250 ($50) but less than $1500 ($500)
Value of property is less than $250 ($50) and within the past 5 years person has been convicted or sentenced on two or more separate occasions in or another jurisdiction.

Sec. 3 **Theft in the Fourth Degree** (B Misdemeanor) value of property is less than $250 ($50).

Property Theft Felony Thresholds in Western U.S.

Alaska	$500
Nevada	$650
Washington	$750
California	$950
Arizona	$1,000
Idaho	$1,000
Oregon	$1,000
South Dakota	$1,000
Wyoming	$1,000
Colorado	$1,000
Montana	$1,500
Utah	$1,500



AK Property Crimes Cases/Charges Filed During FY11

AS 11.46.130(a) Theft 2nd Deg. - $500 - $24,999 (911)
AS 11.46.140(a) Theft 3rd Deg. - $50 - $499 (807)
AS 11.46.150 Theft 4th Deg. - < $50 (404)

Prepared by Jordan Shilling in Senator Coghill's office

Alaska Court System **Property Crimes Under AS 11.46** **Criminal Cases/Charges Filed During FY11**	
	Cases
AS11.46.130(a)(1): Theft 2-Value $500-$24,999	911
AS11.46.130(a)(6): Theft 2- $50-$499, Prior Convictions	62
AS11.46.140(a)(1): Theft 3- Value $50-$499	807
AS11.46.140(a)(2): Theft 3- Access Device	2
AS11.46.140(a)(3): Theft 3- Under $50, Prior Convictions	35
AS11.46.150: Theft 4- Under $50	404
AS11.46.220(c)(1)(C): Conceal Merch-$50-$499, Prior Convics	4
AS11.46.220(c)(2)(A): Conceal Merch- Value $50-$499	12
AS11.46.220(c)(2)(B): Conceal Merch- Undr $50, Priors	5
AS11.46.220(c)(2): Conceal Merch- $50-$499 Or Priors	3
AS11.46.220(c)(3): Conceal Merch - Under $50	45
AS11.46.260(b)(1): Removal Of ID Marks - Value $500+	4
AS11.46.260(b)(2): Removal Of ID Marks -Value $50-$499	1
AS11.46.280(d)(2): Issuing Bad Check- Value $500-$24,999	12
AS11.46.280(d)(3): Issuing Bad Check- Value $50-$499	10
AS11.46.280(d)(4): Issuing Bad Check- Under $50	3
AS11.46.285(b)(2): Fraud Use Access Device- $50 - $24,999	171
AS11.46.285(b)(3): Fraud Use Access Device - under $50	48

AS11.46.360(a)(2)(A): Vehicle Theft 1- Damage $500+	11
AS11.46.482(a)(1): Criminal Mischief 3 - Damage $500+	395
AS11.46.484(a)(1): Crim Mischief 4-Prop Dam $50-$499	738
AS11.46.486(a)(2): Criminal Mischief 5 - Damage Under $50	107
AS11.46.620(d)(1): Misapply Property- Value $500+	3
AS11.46.620(d)(2): Misapply Property- Value Under $500	1
TOTAL	3794

** Subsections addressed in the proposed legislation that are not listed here did not have charges cases listed for FY11 in the Court data.*

27-LS0811\I.1
Gardner
2/9/12

AMENDMENT

OFFERED IN THE SENATE BY SENATOR COGHILL

TO: SB 186

Page 1, line 1, following "**Act**":

Insert "**relating to property crimes;**"

Page 1, following line 6:

Insert new bill sections to read:

"*** Section 1.** AS 11.46.130(a) is amended to read:

(a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$1,500** [$500] or more but less than $25,000;

(2) the property is a firearm or explosive;

(3) the property is taken from the person of another;

(4) the property is taken from a vessel and is vessel safety or survival equipment;

(5) the property is taken from an aircraft and the property is aircraft safety or survival equipment;

(6) the value of the property is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(A) an offense under AS 11.46.120, or an offense under another law or ordinance with similar elements;

(B) a crime set out in this subsection or an offense under another law or ordinance with similar elements;

(C) an offense under AS 11.46.140(a)(1), or an offense under another law or ordinance with similar elements; or

(D) an offense under AS 11.46.220(c)(1) or (c)(2)(A), or an offense under another law or ordinance with similar elements; or

(7) the property is an access device.

*** Sec. 2.** AS 11.46.140(a) is amended to read:

(a) A person commits the crime of theft in the third degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$250** [$50] or more but less than **$1,500** [$500]; **or**

(2) [REPEALED

(3)] the value of the property is less than **$250** [$50] and, within the past five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of theft or concealment of merchandise, or an offense under another law or ordinance with similar elements.

*** Sec. 3.** AS 11.46.150(a) is amended to read:

(a) A person commits the crime of theft in the fourth degree if the person commits theft as defined in AS 11.46.100 and the value of the property or services is less than **$250** [$50].

*** Sec. 4.** AS 11.46.220(c) is amended to read:

(c) Concealment of merchandise is

(1) a class C felony if

(A) the merchandise is a firearm;

(B) the value of the merchandise is **$1,500** [$500] or more; or

(C) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(i) the offense of concealment of merchandise under this paragraph or (2)(A) of this subsection, or an offense under another law or ordinance with similar elements; or

(ii) an offense under AS 11.46.120, 11.46.130, or 11.46.140(a)(1), or an offense under another law or ordinance with similar elements;

(2) a class A misdemeanor if

(A) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500]; or

(B) the value of the merchandise is less than **$250** [$50] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions of the offense of concealment of merchandise or theft in any degree, or an offense under another law or ordinance with similar elements;

(3) a class B misdemeanor if the value of the merchandise is less than **$250** [$50].

*** Sec. 5.** AS 11.46.260(b) is amended to read:

(b) Removal of identification marks is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

*** Sec. 6.** AS 11.46.270(b) is amended to read:

(b) Unlawful possession is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

* **Sec. 7.** AS 11.46.280(d) is amended to read:

(d) Issuing a bad check is

(1) a class B felony if the face amount of the check is $25,000 or more;

(2) a class C felony if the face amount of the check is **$1,500** [$500] or more but less than $25,000;

(3) a class A misdemeanor if the face amount of the check is **$250** [$50] or more but less than **$1,500** [$500];

(4) a class B misdemeanor if the face amount of the check is less than **$250** [$50].

* **Sec. 8.** AS 11.46.285(b) is amended to read:

(b) Fraudulent use of an access device is

(1) a class B felony if the value of the property or services obtained is $25,000 or more;

(2) a class C felony if the value of the property or services obtained is **$1,500** [$50] or more but less than $25,000;

(3) a class A misdemeanor if the value of the property or services obtained is less than **$1,500** [$50].

* **Sec. 9.** AS 11.46.295 is amended to read:

Sec. 11.46.295. Prior convictions. For purposes of considering prior convictions in prosecuting a crime of theft under AS 11.46.130(a)(6) or **11.46.140(a)(2)** [11.46.140(a)(3)], or in prosecuting the crime of concealment of merchandise under AS 11.46.220(c), a conviction for an offense under another law or ordinance with similar elements is a conviction of an offense having elements similar to those of an offense defined as such under Alaska law at the time the offense was committed. The court shall consider the date of a prior conviction as occurring on the date that sentence is imposed for the prior offense.

* **Sec. 10.** AS 11.46.360(a) is amended to read:

(a) A person commits the crime of vehicle theft in the first degree if, having no right to do so or any reasonable ground to believe the person has such a right, the person drives, tows away, or takes

(1) the car, truck, motorcycle, motor home, bus, aircraft, or watercraft

of another;

(2) the propelled vehicle of another and

(A) the vehicle or any other property of another is damaged in a total amount of **$1,500** [$500] or more;

(B) the owner incurs reasonable expenses as a result of the loss of use of the vehicle, in a total amount of **$1,500** [$500] or more; or

(C) the owner is deprived of the use of the vehicle for seven days or more;

(3) the propelled vehicle of another and the vehicle is marked as a police or emergency vehicle; or

(4) the propelled vehicle of another and, within the preceding seven years, the person was convicted under

(A) this section or AS 11.46.365;

(B) former AS 11.46.482(a)(4) or (5);

(C) former AS 11.46.484(a)(2);

(D) AS 11.46.120 - 11.46.140 of an offense involving the theft of a propelled vehicle; or

(E) a law or ordinance of this or another jurisdiction with elements substantially similar to those of an offense described in (A) - (D) of this paragraph.

*** Sec. 11.** AS 11.46.482(a) is amended to read:

(a) A person commits the crime of criminal mischief in the third degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with intent to damage property of another, the person damages property of another in an amount of **$1,500** [$500] or more;

(2) the person recklessly creates a risk of damage in an amount exceeding $100,000 to property of another by the use of widely dangerous means; or

(3) the person knowingly

(A) defaces, damages, or desecrates a cemetery or the contents of a cemetery or a tomb, grave, or memorial regardless of whether the tomb,

grave, or memorial is in a cemetery or whether the cemetery, tomb, grave, or memorial appears to be abandoned, lost, or neglected;

(B) removes human remains or associated burial artifacts from a cemetery, tomb, grave, or memorial regardless of whether the cemetery, tomb, grave, or memorial appears to be abandoned, lost, or neglected.

* **Sec. 12.** AS 11.46.484(a) is amended to read:

(a) A person commits the crime of criminal mischief in the fourth degree if, having no right to do so or any reasonable ground to believe the person has such a right

(1) with intent to damage property of another, the person damages property of another in an amount of **$250** [$50] or more but less than **$1,500** [$500];

(2) the person tampers with a fire protection device in a building that is a public place;

(3) the person knowingly accesses a computer, computer system, computer program, computer network, or part of a computer system or network;

(4) the person uses a device to descramble an electronic signal that has been scrambled to prevent unauthorized receipt or viewing of the signal unless the device is used only to descramble signals received directly from a satellite or unless the person owned the device before September 18, 1984; or

(5) the person knowingly removes, relocates, defaces, alters, obscures, shoots at, destroys, or otherwise tampers with an official traffic control device or damages the work upon a highway under construction.

* **Sec. 13.** AS 11.46.486(a) is amended to read:

(a) A person commits the crime of criminal mischief in the fifth degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with reckless disregard for the risk of harm to or loss of the property or with intent to cause substantial inconvenience to another, the person tampers with property of another;

(2) with intent to damage property of another, the person damages property of another in an amount less than **$250** [$50]; or

(3) the person rides in a propelled vehicle knowing it has been stolen or that it is being used in violation of AS 11.46.360 or 11.46.365(a)(1).

* **Sec. 14.** AS 11.46.530(b) is amended to read:

(b) Criminal simulation is

(1) a class C felony if the value of what the object purports to represent is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of what the object purports to represent is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of what the object purports to represent is less than **$250** [$50].

* **Sec. 15.** AS 11.46.620(d) is amended to read:

(d) Misapplication of property is

(1) a class C felony if the value of the property misapplied is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property misapplied is less than **$1,500** [$500].

* **Sec. 16.** AS 11.46.730(c) is amended to read:

(c) Defrauding creditors is a class A misdemeanor unless that secured party, judgment creditor, or creditor incurs a pecuniary loss of **$1,500** [$500] or more as a result to the defendant's conduct, in which case defrauding secured creditors is

(1) a class B felony if the loss is $25,000 or more;

(2) a class C felony if the loss is **$1,500** [$500] or more but less than $25,000."

Page 1, line 7:

Delete "**Section 1**"

Insert "**Sec. 17**"

Renumber the following bill sections accordingly.

Page 5, line 23:

Delete "sec. 8"
Insert "sec. 24"

Page 5, line 24:
Delete "sec. 9"
Insert "sec. 25"

Page 5, line 29:
Delete "sec. 1"
Insert "sec. 17"

Page 5, line 30:
Delete "sec. 2"
Insert "sec. 18"
Delete "sec. 3"
Insert "sec. 19"

Page 5, line 31:
Delete "sec. 4"
Insert "sec. 20"

Page 6, line 1:
Delete "sec. 7"
Insert "sec. 23"

Page 6, line 3, following "(b)":
Insert "AS 11.46.130(a), as amended by sec. 1 of this Act, AS 11.46.140(a), as amended by sec. 2 of this Act, AS 11.46.150(a), as amended by sec. 3 of this Act, AS 11.46.220(c), as amended by sec. 4 of this Act, AS 11.46.260(b), as amended by sec. 5 of this Act, AS 11.46.270(b), as amended by sec. 6 of this Act, AS 11.46.280(d), as amended by sec. 7 of this Act, AS 11.46.285(b), as amended by sec. 8 of this Act, AS 11.46.295, as

amended by sec. 9 of this Act, AS 11.46.360(a), as amended by sec. 10 of this Act, AS 11.46.482(a), as amended by sec. 11 of this Act, AS 11.46.484(a), as amended by sec. 12 of this Act, AS 11.46.486(a), as amended by sec. 13 of this Act, AS 11.46.530(b), as amended by sec. 14 of this Act, AS 11.46.620(d), as amended by sec. 15 of this Act, AS 11.46.730(c), as amended by sec. 16 of this Act, and"

Page 6, line 3:

Delete "sec. 6"

Insert "sec. 22"

Delete "applies"

Insert "apply"

Page 6, line 5:

Delete "sec. 8"

Insert "sec. 24"

Page 6, line 10:

Delete "Sections 8 and 9"

Insert "Sections 24 and 25"

Delete "sec. 12"

Insert "sec. 28"

SENATE BILL NO. 186

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Introduced: 2/1/12
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to persons found guilty but mentally ill; relating to sentencing procedures for factors that may increase the presumptive range or affect mandatory parole eligibility; relating to the granting of probation; relating to procedures for finding aggravating factors at sentencing; amending Rule 32.1, Alaska Rules of Criminal Procedure; and providing for an effective date."

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

New Section 1. Amendment by Coghill $1,500[500]

*** Section 1.** AS 12.47.040(b) is amended to read:

(b) To return a verdict under (a)(4) of this section, the **fact finder** [JURY] must find beyond a reasonable doubt that the defendant committed the crime and [FIND BY A PREPONDERANCE OF THE EVIDENCE] that, when the defendant committed the crime, the defendant was guilty but mentally ill as defined in AS 12.47.030.

*** Sec. 2.** AS 12.47.060(a) is amended to read:

(a) In a prosecution for a crime when the affirmative defense of insanity is not raised and when evidence of mental disease or defect of the defendant is not admitted at trial under AS 12.47.020, [AND THE DEFENDANT IS CONVICTED OF A CRIME,] the defendant **or** [,] the prosecuting attorney [, OR THE COURT ON ITS OWN MOTION] may raise the issue of whether the defendant is guilty but mentally ill. **A party that seeks a post-conviction determination of guilty but mentally ill must give notice 10 days before trial of intent to do so; however, this deadline is waived if the opposing party presents evidence or argument at trial tending to show that the defendant may be guilty but mentally ill.** A hearing must be held on this issue [AT OR] before the **same fact finder that returned the verdict of guilty under procedures set by the court. In cases decided by a jury, at the request of the defendant and with the concurrence of the prosecuting attorney, the court may decide the issue. A waiver of consideration by a jury must be in writing and in person before the court** [SENTENCING HEARING]. At the hearing, the **fact finder** [COURT] shall determine whether the defendant has been shown to be guilty but mentally ill **beyond a reasonable doubt, considering** [BY A PREPONDERANCE OF THE] evidence presented at the hearing and any evidence relevant to the issue that was presented at trial.

*** Sec. 3.** AS 12.47.060(b) is amended to read:

(b) If the **fact finder** [COURT] finds that a defendant is guilty but mentally ill, **the court** [IT] shall sentence the defendant as provided by law and shall enter the finding of guilty but mentally ill as part of the judgment.

*** Sec. 4.** AS 12.55.025(i) is amended to read:

(i) Except as **otherwise** provided **in this chapter** [BY AS 12.55.125(a)(3), 12.55.145(d), 12.55.155(f), AND 12.55.165], the preponderance of the evidence standard of proof applies to sentencing proceedings.

*** Sec. 5.** AS 12.55.090(b) is amended to read:

(b) **Except as otherwise provided in (f) of this section, the** [THE] court may revoke or modify any condition of probation [,] or may change the period of probation.

*** Sec. 6.** AS 12.55.090 is amended by adding a new subsection to read:

(f) Unless the defendant and the prosecuting authority agree at the probation revocation proceeding or other proceeding, the court may not reduce the specific period of probation, or the specific term of suspended incarceration except by the amount of incarceration imposed for a probation violation, if

(1) the sentence was imposed in accordance with a plea agreement under Rule 11, Alaska Rules of Criminal Procedure; and

(2) the agreement required a specific period of probation or a specific term of suspended incarceration.

*** Sec. 1.** AS 12.55.125(a) is amended to read:

(a) A defendant convicted of murder in the first degree or murder of an unborn child under AS 11.41.150(a)(1) shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, firefighter, or correctional employee who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110;

(3) [THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT] the defendant subjected the murder victim to substantial physical torture;

(4) the defendant is convicted of the murder of and personally caused the death of a person, other than a participant, during a robbery; or

(5) [THE COURT FINDS BY CLEAR AND CONVINCING

EVIDENCE THAT] the defendant is a peace officer who used the officer's authority as a peace officer to facilitate the murder.

* **Sec. 24.** AS 12.55.125 is amended by adding a new subsection to read:

(p) If the state seeks either (1) the imposition of a sentence under (a) of this section that would preclude the defendant from being awarded a good time deduction under AS 33.20.010(a) based on a fact other than a prior conviction; or (2) to establish a fact that would increase the presumptive sentencing range under (c)(2), (d)(2), (e)(4), (i)(1)(A) or (B), or (i)(2)(A) or (B) of this section, the factual question required to be decided shall be presented to a trial jury and proven beyond a reasonable doubt under procedures set by the court, unless the defendant waives trial by jury and either stipulates to the existence of the fact or consents to have the fact proven to the court sitting without a jury. Written notice of the intent to establish a fact under this subsection must be served on the defendant and filed with the court as provided for notice under AS 12.55.155(f)(2).

* **Sec. 25.** AS 12.55.155 is amended by adding new subsections to read:

(i) If the state seeks to establish a factor in aggravation at sentencing under (c)(10) of this section,

(1) the assessment of the facts underlying the state's allegation that the defendant's conduct was among the most serious included in the definition of the offense shall be made by the trial jury under procedures set by the court and as provided in (f)(2) of this section, unless the defendant waives trial by jury, stipulates to the existence of the aggravating factor or to the facts alleged by the state, or consents to have the assessment proved under procedures set out in (f)(1) of this section; factual assertions underlying the state's allegation that the defendant's conduct was among the most serious included in the definition of the offense must be proved beyond a reasonable doubt;

(2) the legal decision concerning whether the defendant's conduct determined under (1) of this subsection was among the most serious included in the definition of the offense shall be made by the court under procedures set out in (f)(1) of this section.

(j) If one of the aggravating factors in (c) of this section is established as

provided in (f)(1) and (2) of this section, the court may increase the term of imprisonment up to the maximum term of imprisonment. Any additional aggravating factor may then be established by clear and convincing evidence by the court sitting without a jury, including an aggravating factor that the jury has found not to have been established beyond a reasonable doubt.

*** Sec. 10.** AS 33.05.050 is amended to read:

Sec. 33.05.050. Report of probation officer. When directed by the court, the probation officer shall report to the court [,] with a statement of the conduct of the probationer while on probation. **Except as otherwise provided by law, the** [THE] court may then discharge the probationer from further supervision and may terminate the proceedings against the probationer, or may extend the probation, as shall seem advisable.

*** Sec. 11.** AS 33.05.070(b) is amended to read:

(b) As speedily as possible after arrest, the probationer shall be taken before the court for the district having jurisdiction over the probationer. **Except as provided in AS 12.55.090(f),** [THEREUPON] the court may revoke the probation and require the probationer to serve the sentence imposed [,] or any lesser sentence [,] and, if imposition of sentence was suspended, may impose any sentence **that** [WHICH] might originally have been imposed, subject to the limitation specified in AS 12.55.086(c).

*** Sec. 12.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. AS 12.55.125(p), enacted by sec. 8 of this Act, and AS 12.55.155(i) and (j), enacted by sec. 9 of this Act, have the effect of changing Rule 32.1, Alaska Rules of Criminal Procedure, by amending procedures for sentencing persons convicted of certain crimes.

*** Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 12.47.040(b), as amended by sec. 1 of this Act, AS 12.47.060(a), as amended by sec. 2 of this Act, AS 12.47.060(b), as amended by sec. 3 of this Act, AS 12.55.025(i), as amended by sec. 4 of this Act, and AS 12.55.125(a), as amended

by sec. 7 of this Act, apply to proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

(b) AS 12.55.090, as amended by sec. 6 of this Act, applies to offenses occurring on or after the effective date of this Act.

(c) AS 12.55.125(p), enacted by sec. 8 of this Act, applies to sentencing proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

*** Sec. 14.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. Sections 8 and 9 of this Act take effect only if sec. 12 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 15.** This Act takes effect July 1, 2012.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **SB186**
Fiscal Note Number
Publish Date

Identifier (file name) SB186-DOC-OC-02-10-12
Title "An Act relating to persons found guilty but mentally ill; relating to sentencing procedures..."
Sponsor Senate Judiciary
Requester Senate Judiciary

Dept. Affected DOC
Appropriation Administration and Support
Allocation Office of the Commissioner
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by Leslie Houston, Director
Division Department of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Department of Corrections

Phone 907-465-3339
Date/Time 02/10/12 9:00AM
Date 2/10/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB186
2012 LEGISLATIVE SESSION

Analysis

This legislation requires a jury to find someone Guilty But Mentally Ill (GBMI) "beyond a reaonsable doubt" as opposed to the current language of "by a preponderance of the evidence." DOC has very few offenders who meet this criteria, therefore, this legislation will have little to no fiscal impact on the department.

SB 190

<TARGET><BILL>SB 190</BILL><SUBJECT>SB 190</SUBJECT><COMM>SJUD27</COMM></TARGET>

Senator Linda Menard

Session
State Capitol, Room 9
Juneau, Alaska 99801
Phone: (907) 465-6600
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600 E. Railroad Ave.
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Alaska State Legislature

To: Senator Hollis French

From: Senator Linda Menard
Alaska State Senate

Date: March 2, 2012

Re: Request for hearing for Senate Bill 190

Honorable Senator Hollis French

I respectfully request a hearing of the Senate Judiciary Committee for Senate Bill 190.

Senate Bill 190 is an act relating to activities, including violations and penalties, under the supervision of the Big Game Commercial Services Board.

Thank you for your consideration.

Linda Menard

Sen. Linda Menard

Senator_Linda_Menard@legis.state.ak.us

Senator Linda Menard

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Alaska State Legislature

Sponsor Statement
Committee Substitute for Senate Bill 190

The Committee Substitute for Senate Bill 190 deals with licensing and disciplinary functions under the supervision of the Big Game Commercial Services Board and creates a retired status master guide-outfitter license. The changes to statute outlined in this sponsor statement were recommended by members of the Big Game Commercial Services Board and numerous other professional hunting guides in the state.

First, the bill would give the Big Game Commercial Services Board the ability to adopt regulations it considers appropriate in addition to regulations already set out in the Board's governing chapter.

The bill would provide retiring guides or outfitters the opportunity to receive, for a one-time payment, a retired master guide-outfitter license. An individual holding a retired status master guide-outfitter license may not guide or outfit in the state under the retire status license, but it will serve as a symbolic recognition of their achievements in the profession. The license is valid for the life of its holder and does not need to be renewed.

The bill also clarifies in statute that a person licensed as a registered guide-outfitter may be employed by another registered guide-outfitter to provide the services of a class-A assistant guide in any game management unit. The purpose is to make the statutes more clear and rid them of ambiguity regarding the relationship between a registered guide who is employed by another registered guide on a specific hunt.

Senate Bill 190 also gives the Big Game Commercial Services Board the ability to suspend or permanently revoke a transporter license or any class of guide license if the board finds, after a hearing, that the licensee engaged in conduct involving unprofessionalism, moral turpitude or gross immorality.

This bill will also allow the Big Game Commercial Services Board to adopt regulations eliminating the need for a contracting registered guide to be present in the field as long as a Class-A assistant guide or other registered guide employed by the contracting guide is conducting the hunt.

Further, the bill will update the statutes in Title 8 that inform the court of which violations by a licensee shall result in board suspension of a license and which violations may result in a board suspension of a license.

27-LS1328\M
Bullard
2/21/12

CS FOR SENATE BILL NO. 190( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS MENARD, Huggins

A BILL

FOR AN ACT ENTITLED

"An Act relating to the duties of the Big Game Commercial Services Board; relating to activities, including violations and penalties, under the supervision of the Big Game Commercial Services Board; creating a retired status master guide-outfitter license; and providing for an effective date."

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

*** Section 1.** AS 08.54.600(c) is amended to read:

(c) **In addition to the regulations required under (a) of this section, the** [THE] board may adopt regulations [AS] the board considers appropriate**, including regulations** to

(1) establish a code of ethics for professions regulated by the board;

(2) establish requirements for the contents of written contracts to provide big game hunting services and transportation services to clients;

(3) authorize the department to request a copy of a big game hunting services or transportation services contract entered into by a person licensed under this

chapter.

*** Sec. 2.** AS 08.54 is amended by adding a new section to read:

Sec. 08.54.608. Retired status master guide-outfitter license. (a) On retiring from guiding or outfitting, or both, and on payment of an appropriate one-time fee, an individual who has held a master guide-outfitter license issued under AS 08.54.610 that has not been suspended or revoked under AS 08.54.710 may apply for a retired status master guide-outfitter license. An individual holding a retired status master guide-outfitter license may not guide or outfit in the state under the retired status license. A retired status license is valid for the life of the license holder and does not require renewal.

(b) An individual with a retired status master guide-outfitter license may apply for a new registered guide-outfitter license under AS 08.54.610.

*** Sec. 3.** AS 08.54.610(d) is amended to read:

(d) **Notwithstanding AS 08.54.750, a** [A] person who is licensed as a registered guide-outfitter may be employed by another registered guide-outfitter to **provide the services of a class-A** [PERFORM THE FUNCTIONS OF A REGISTERED GUIDE-OUTFITTER OR CLASS-A ASSISTANT GUIDE IN THE GAME MANAGEMENT UNIT FOR WHICH THE PERSON IS CERTIFIED UNDER AS 08.54.600 OR OF AN] assistant guide in any game management unit.

*** Sec. 4.** AS 08.54.610(e) is amended to read:

(e) A registered guide-outfitter who contracts for a guided hunt shall be

[(1) PHYSICALLY PRESENT IN THE FIELD WITH THE CLIENT AT LEAST ONCE DURING THE CONTRACTED HUNT; AND

(2)] in the field **supervising** and participating in the contracted hunt **and conducting the hunt**, unless the **board adopts regulations permitting** [HUNT IS BEING CONDUCTED BY] a class-A assistant guide or a registered guide-outfitter employed by **a** [THE] contracting registered guide-outfitter **to conduct a hunt for a contracting registered guide-outfitter**.

*** Sec. 5.** AS 08.54.710 is amended by adding a new subsection to read:

(j) The board may suspend or permanently revoke a transporter license or any class of guide license if the board finds after a hearing that the licensee engaged in

conduct involving unprofessionalism, moral turpitude, or gross immorality.

*** Sec. 6.** AS 08.54.720(f) is amended to read:

(f) In addition to the penalties set out in (b) - (e) of this section and a disciplinary sanction imposed under AS 08.54.710,

(1) the court may order the board to suspend the guide license or transporter license of a person who commits a misdemeanor offense set out in (a)(1), (3) - (5), (7), **(8),** (17), (18), or (19) of this section for a specified period of not more than three years;

(2) the court shall order the board to suspend the guide license or transporter license of a person who commits a misdemeanor offense set out in (a)(2) or **(9) - (14)** [(8) - (14)] of this section for a specified period of not less than one year and not more than five years;

(3) the court shall order the board to suspend the guide license or transporter license for a specified period of not less than three years, or to permanently revoke the guide license or transporter license, of a person who commits an offense set out in (a)(15) or (16) of this section; and

(4) all guns, fishing tackle, boats, aircraft, automobiles, or other vehicles, camping gear, and other equipment and paraphernalia used in, or in aid of, a violation of (a) of this section may be seized by persons authorized to enforce this chapter and may be forfeited to the state as provided under AS 16.05.195.

*** Sec. 7.** AS 08.54.770(a) is amended to read:

(a) The department shall set fees under AS 08.01.065 for each of the following:

(1) registered guide-outfitter license;

(2) class-A assistant guide license;

(3) assistant guide license;

(4) transporter license;

(5) **retired status master guide-outfitter license;**

(6) license application fee.

*** Sec. 8.** AS 08.54.790 is amended by adding new paragraphs to read:

(11) "any class of guide license" does not include a retired status

master guide-outfitter license;

(12) "licensee" means a person to whom a license, other than a retired status master guide-outfitter license, has been issued under this chapter.

* **Sec. 9.** Section 4 of this Act takes effect July 1, 2013.

* **Sec. 10.** Except as provided by sec. 9 of this Act, this Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 190**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB190-DCCED-CBPL-02-17-12
Dept. Affected: DCCED
Title: Big Game Commercial Services Board
Appropriation: Corps, Bus & Professional Licenses
Allocation: Corps, Bus & Professional Licenses
Sponsor: Senator Menard
Requester: Senate Labor and Commerce
OMB Component Number: 2360

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0		0.0	0.0	0.0	0.0	0.0
Travel	0.0		0.0	0.0	0.0	0.0	0.0
Services	0.0		0.0	0.0	0.0	0.0	0.0
Commodities	0.0		0.0	0.0	0.0	0.0	0.0
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1156	Rcpt Svcs (DGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by: Don Habeger, Director — Phone: 465-2536
Division: Corporations, Business and Professional Licensing — Date/Time: 2/17/12 2:45 PM
Approved by: JoEllen Hanrahan, Director Administrative Services — Date: 2/18/2012
Commerce, Community, and Economic Development

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 190

Analysis

SB 190 allows individuals that have retired from guiding or outfitting to pay a one-time fee and obtain a retired status master guide-outfitter license which would not require renewal. Individuals that obtains this license may not guide in the state under the retired status license.

This bill has zero fiscal impact.

ALASKA

PROFESSIONAL HUNTERS ASSOCIATION, INC.

HC 60 Box 229C, Copper Center, AK 99573
Phone: 907-822-3755 Fax: 907-822-3752
Email:office@alaskaprohunter.orgwww.alaskaprohunter.org

Dear Senator Menard,

I'm writing thank you for sponsoring SB 190 and affirm the support of the Alaska Professional Hunters Association for this important bill. As the sitting president of the APHA and a lifelong Alaskan and second generation Registered Guide I know firsthand how burdensome unclear and, or, contradictory statutes and regulations can be. SB 190 will alleviate some of this burden by clarifying the relationship between Registered Guides when they work for each other and, at the same time, protecting the value of the Class A Assistant Guide license. The APHA also appreciates the creation of a retired, non-active, license so that respected, retired guides can stay licensed and not cut into fixed, retirement incomes. This is essential to maintaining the social continuity, of an industry that respects its elders and provides a career path that includes substantial time as an apprentice.

The APHA has always pushed for greater professional competency and accountability. For this reason we vigorously support giving the Big Game and Commercial services board the ability to suspend or revoke guide or transporter licensed for unprofessional behavior, moral turpitude and gross immorality. Having operators, representing themselves as guides, who are amoral or chronically immoral or unprofessional hurts our membership in a business that relies on reputation and word of mouth business. Alaska deserves to have the best and most ethical guides harvesting its big game resource.

In closing I want to once again thank the honored members or the legislature that have taken the time to consider SB 190 and carry it through the process on the behalf of me and my organizations livelihoods! I also want to state that many APHA members have spent their personal time advising and working on drafting SB 190 as recognition of the collaborated effort between your office and our membership. For the sake of brevity I have only used a few examples of the positive aspects of SB 190 but we do support the bill in its entirety.

Thank You,

Gary LaRose

Gary LaRose, President, Alaska Professional Hunters Association

STATE OF ALASKA
DEPARTMENT OF
COMMERCE
COMMUNITY AND
ECONOMIC DEVELOPMENT
Division of Corporations, Business and Professional Licensing

Sean Parnell, Governor
Susan Bell, Commissioner
Don Habeger, Director

Big Game Commercial Services Board

February 9, 2012

Dear Senator Menard and Representative Feige,

The Big Game Commercial Serves Board supports House Bill 229 and Senate Bill 190 for improving the guide industry in Alaska. The Board was reinstated 7 years ago and has worked on these concerns during the meetings. These changes are housekeeping measures the board feels are needed for a healthy industry. The Board was unanimous in the vote in support of submitting this Bill and its contents. We respectfully ask for the passage of this legislation.

Sincerely,

Paul Johnson

Paul Johnson
Chair, BGCSB

P.O. Box 110806, Juneau, AK 99811-0806
Telephone: (907) 465-2543 Fax: (907) 465-2974 Website: http://www.commerce.state.ak.us/occ/pgui.htm

Senator Menard and Senator Huggins,

Thank you for Sponsoring SB190. I've lived in Wasilla since 1984, got my registered guide license in 1986, started our family run business – Alaska Remote Guide Service in 1987, and upgraded my registered guide-outfitter license to master guide-outfitter status a few years back. To my knowledge, there have been no changes to the Big Game Commercial Service Board Statutes since 1994 or before. I think your bill and Representative Feige's HB229 help address some key issues in bringing the statutes current with several changes that have taken place since then in the guide industry. Most of us in the industry want to do what is right, but it is very hard to understand what that is, even after reading the statutes and regulations several times. In fact I was in a working group at the BGCSB meeting in Fairbanks two years ago, when we were discussing supervision and participation issues. Several guides were present along with some top level enforcement personnel. I think it's fair to say that all of us were at least some what confused about what was expected by us in the statutes.

I've been in attendance at every commercial service board meeting for the past several years, and worked in and led several committees that dealt with several issues in this bill. The key concerns that most interested me personally were 08.54.610 (d) and (e). The current requirement in 08.54.610 (e) (1) that the bill asks to delete, works fine for large operations that are lucky enough to have a lodge or main camp in the same Guide Use Area where they hunt. Everybody gets flown to the lodge to start with and then head out hunting from there. By so doing, this requirement has been met. In operations where the main camp or lodge is in a different guide use area or in many smaller operations, meeting this requirement can be a lot more complicated, and requiring the guide to do so can actually impact the quality of the client's hunt and the service that the guide is able to provide.

While the above mentioned points in the bill are my main focus, I fully agree with and support every provision that your bill deals with. I have spent a lot of personal time and effort to help get these issues put forward. As this bill moves forward, feel free to contact me concerning any questions or concerns that may arise, and let me know how I can help. Thank you again for you help!

Sincerely,

Wayne Kubat
Alaska Remote Guide Service
PO Box 874867
Wasilla, Alaska 99687
Phone/Fax:907-376-9568

LEGAL SERVICES

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MEMORANDUM February 29, 2012

SUBJECT: CSSB 190( ) Sectional Summary
(Work Order No. 27-LS1328\M)

TO: Senator Linda Menard
Attn: Michael Rovito

FROM: Alpheus Bullard
Legislative Counsel

You have requested a sectional summary of the above-described Work Order.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Expands the range of regulations the Big Game Commercial Services Board ("board") may adopt.

Section 2. Establishes a retired status master guide-outfitter license.

Section 3. Permits a person licensed as a registered guide-outfitter to be employed by another registered guide-outfitter as a class-A assistant guide in any game management unit. Under existing law, a person licensed as a registered guide outfitter could be employed by another registered guide-outfitter to perform the functions of a registered guide-outfitter or class-A assistant guide in the game management unit for which the person was certified under AS 08.54.600 or as an assistant guide in any game management unit. The bill removes this possibility.

Section 4. Amends the duties, in the field, of a registered guide-outfitter who contracts for a guided hunt.

Section 5. Permits the board to suspend or permanently revoke a transporter license or any class of guide license if the board makes certain findings.

Section 6. Increases the period of time a court may order the board to suspend a guide license or a transporter license for certain violations under AS 08.54.720(a)(8).

Section 7. Directs the Department of Commerce, Community, and Economic Development to set fees for a retired status master guide-outfitter license.

Section 8. Adds new definitions (relating to the addition of a retired status master guide-outfitter license at sec. 1) to AS 08.54.

Section 9. Provides a July 1, 2013, effective date for sec. 4 of the bill.

Section 10. Provides an immediate effective date for secs. 1 - 3 and 5 - 8 of the bill.

TLAB:plm
12-138.plm

SB 195

<TARGET><BILL>SB 195</BILL><SUBJECT>SB 195</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

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Senator Lesil McGuire

SB 195 "An Act establishing a maximum caseload for probation and parole officers."

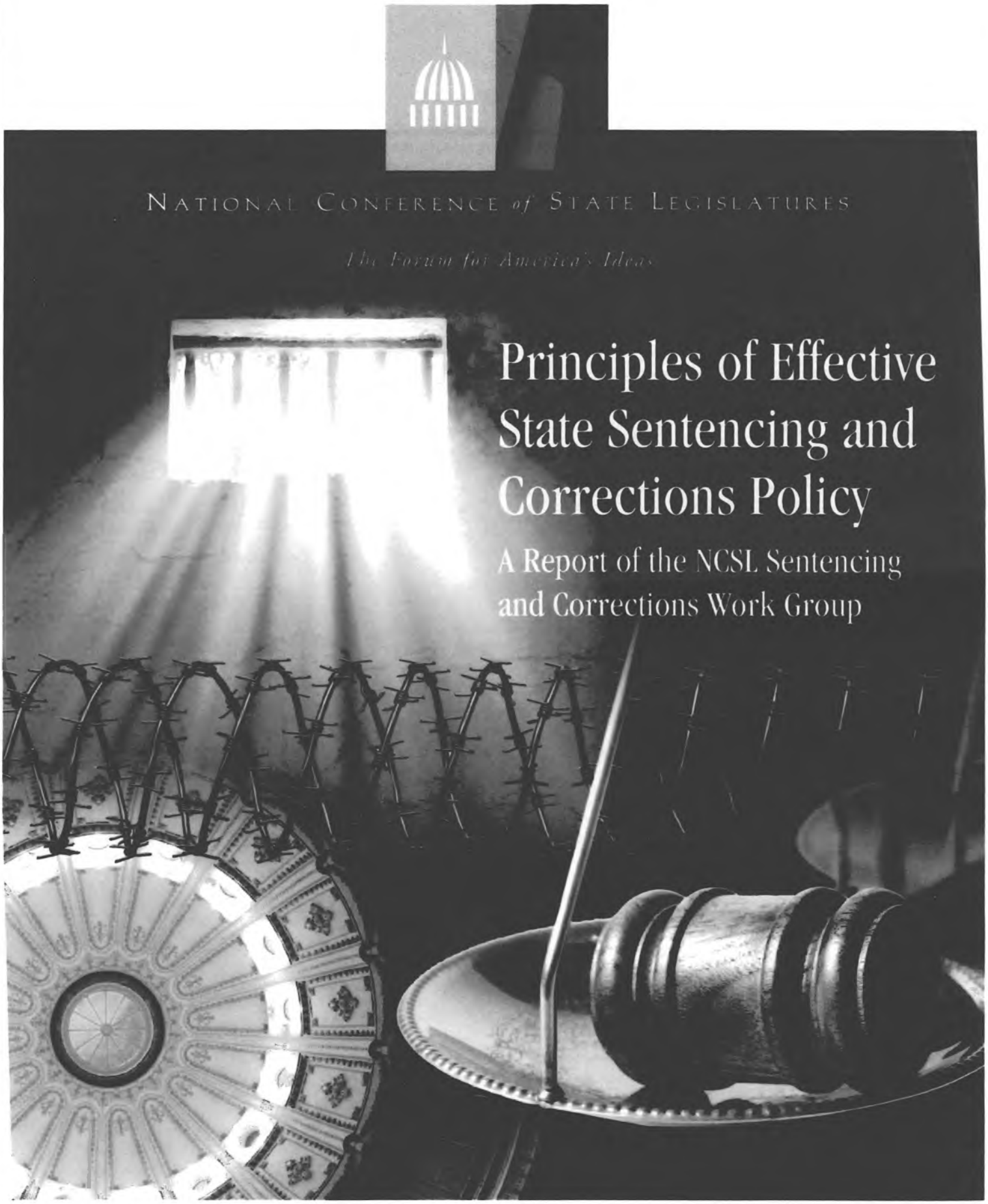
SB 195 will put into statute a maximum of 60 cases for probation and parole officers at any given time.

Currently parole officers in the Anchorage area are often responsible for over 100 cases. That is not an appropriate amount of time to manage their caseload and protect the public. The ability of a parole officer to monitor an individual closely can reduce recidivism rates and help offenders return to our community as productive members of society.

Felony offenders are given the greatest amount of attention. These interactions include home visits, office visits, employment checks, and frequent contact with other agencies including law enforcement and social service programs. Officers use a range of sanctions and treatment interventions to reduce the chance an offender will commit a new crime. Research shows that this approach is more successful and cost-effective than relying on jails or prisons as the only response to criminal behavior.

SB 195 is intended to start a conversation about the effectiveness and systemic costs of our corrections system.

I greatly appreciate your support of Senate Bill 195.



NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

Principles of Effective State Sentencing and Corrections Policy

A Report of the NCSL Sentencing and Corrections Work Group

Principles of Effective State Sentencing and Corrections Policy

A Report of the NCSL Sentencing and Corrections Work Group

Prepared By Alison Lawrence and Donna Lyons

National Conference of State Legislatures
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August 2011

The National Conference of State Legislatures is the bipartisan organization that serves the legislators and staffs of the states, commonwealths and territories.

NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues and is an effective and respected advocate for the interests of the states in the American federal system. It's objectives are:

To improve the quality and effectiveness of state legislatures.

To promote policy innovation and communication among state legislatures.

To ensure state legislatures a strong, cohesive voice in the federal system.

The Conference operates from offices in Denver, Colorado, and Washington, D.C.

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About the Project and Work Group

The NCSL Sentencing and Corrections Work Group project was developed under an NCSL partnership with the Public Safety Performance Project (PSPP) of the Pew Center on the States. The NCSL project responds to the challenges faced by states as they consider corrections and sentencing policies that both manage state spending and protect the public. The Pew PSPP was launched in 2006 to help states advance fiscally sound, data-driven policies and practices in sentencing and corrections. Pew's work has included research, technical assistance, and funding and overseeing a variety of efforts both in states and nationally to support strategies that protect public safety, hold offenders accountable and control corrections costs.

The NCSL Criminal Justice Program assembled the Sentencing and Corrections Work Group in 2010. The bipartisan, 18-member group includes officers of NCSL's Law and Criminal Justice Committee and other legislators who are recognized as leaders on these issues. The group had a one-year work plan to discuss and identify overarching principles for effective state sentencing and corrections policy and to identify key issues and approaches that explain and illustrate the recommendations.

The issues addressed by the NCSL work group reflect the important role of state legislatures in enacting policies that manage prison populations and costs, address offender and community needs, and contribute to the safe and fair administration of criminal justice. The discussions took place during a difficult, recessionary budget climate. A major interest of the work group was how to have an immediate effect on state public safety dollars while also ensuring that the public safety is protected into the future. Many concepts addressed in the *Principles* reflect recent advances in resource-sensitive policies that actually reduce risk and recidivism. Mindful that sentencing and corrections policies reach into various levels and branches of government, the *Principles* also reflect the value that lawmakers place on stakeholders throughout criminal justice systems in policy development and discussions. Apparent throughout the *Principles* is the importance of interbranch and intergovernmental collaboration, information exchange and evaluation in working toward effective sentencing and corrections policies.

It is the intent of NCSL and this work group that the *Principles* and examples presented here will help guide and inform many aspects of state sentencing and corrections policy now and well into the future.

Sentencing and Corrections Work Group Members

Jerry Madden
Representative
Texas
Co-Chair

Joni Cutler
Senator
South Dakota

Debra Hilstrom
Representative
Minnesota

Janice Pauls
Representative
Kansas
Co-Chair

Denton Darrington
Senator
Idaho

William Horne
Assemblymember
Nevada

Mae Beavers
Senator
Tennessee

Brian Frosh
Senator
Maryland

Antonio Maestas
Representative
New Mexico

Alice Bordsen
Representative
North Carolina

Stewart Greenleaf
Senator
Pennsylvania

Curtis Oda
Representative
Utah

Pat Colloton
Representative
Kansas

Phillip Haire
Representative
North Carolina

Robert Stivers
Senator
Kentucky

Michael A. Costello
Representative
Massachusetts

Faye Hanohano
Representative
Hawaii

John Tilley
Representative
Kentucky

Managing Offenders in the Community

Prisons are expensive. The Public Safety Performance Project of the Pew Center on the States reported that approximately $9 of every $10 spent by states on corrections in FY 2008 was devoted to state prisons, even though nearly 70 percent of offenders are supervised in the community. The 2009 Pew report shows that prison spending has increased in recent years at a faster rate than spending on community corrections. The analysis of corrections department data from eight states—Alabama, Georgia, Louisiana, Missouri, Montana, New York, Oregon and Wyoming—covered a 25-year period. During that time, Pew reported, 88 percent of new corrections dollars were allocated to prisons and only 12 percent went to community corrections supervision.

Of every $10 spent by states on corrections in FY 2008, $9 was devoted to state prisons, even though nearly 70 percent of offenders are supervised in the commuunity, according to Pew's Public Safety Performance Project.

Non-prison options for suitable offenders not only helps states do more with their corrections money, but also ensures prison space is available for the most dangerous offenders. Intermediate supervision options such as electronic monitoring, residential programs and problem-solving courts are less costly than incarceration, and they provide a greater degree of monitoring and requirements than traditional probation or parole programs. Residential and community treatment can address substance abuse and mental health needs commonly related to criminal behavior (see also *Treating Drug Offenders*). Non-prison sanctions for probation and parole violations can also provide for offender accountability and reserve costly prison space for offenders who may present a public safety concern.

Adequate funding for community corrections is a perennial challenge, especially as states struggle with the recent recession. Some states are finding ways to use data and evidence to invest in successful, effective supervision strategies; they use savings gained to reinvest in identified policies that further manage costs and achieve better result for both offenders and corrections systems. Policies such as risk-based supervision, administrative supervision and compliance credits allow agencies to focus community resources on the highest-risk offenders and at the same time, hold accountable all offenders who are in the community.

Using community-based supervision options for suitable offenders not only helps states do more with their corrections money, but also ensures prison space is available for the most dangerous offenders.

Tailored Supervision

Many states allow courts and agencies to tailor supervision based on an offender's risk of reoffending and treatment needs (see also *Using Data and Evidence*). Intermediate supervision options, which provide varying levels of surveillance and services, may include such options as electronic monitoring and home confinement, residential placements, or required participation in problem-solving courts. As noted in *Principle 4*, the value of intermediate sanctions depends upon policies that target resources effectively and focus the highest-level supervision on the highest-risk offenders. Creating more intensive supervision for lower-risk offenders usually does not help meet corrections goals, affect cost control, or reduce reoffending.

Electronic Monitoring Electronic monitoring uses technology to track an offender's whereabouts and monitor compliance. For nonviolent offenders, it often is combined with house arrest or is used to enforce curfew and travel restrictions. Correctional agencies also use electronic monitoring as an alternative sanction to jail or prison for violations of supervision conditions or to monitor offenders who are making the transition into the community after prison.

Savings Identified in Florida

Florida's Office of Program Policy Analysis and Government Accountability (OPPAGA) identified several intermediate sanctions for nonviolent offenders that, when used in lieu of prison, could significantly reduce criminal justice costs and reserve prison beds for the most dangerous criminals. Shown below are these sanctions, the suitable offenders and savings expected. The per diem savings are comparable to the state's $55.54 per diem cost of incarceration.

Intermediate Sanctions	Target Population	Per Diem Savings Per Offender
GPS monitoring	Nonviolent felony offenders with minimum sentence of 12 to 24 months' incarceration.	$41.51
Non-treatment residential facilities	Probation technical violators, nonviolent offenders with restitution ordered, or nonviolent offenders in need of structured assistance to obtain employment and gain stability.	$29.53
Day reporting centers	Low-level felony or misdemeanor offenders.	$44.06
Residential substance abuse treatment	Offenders with substance abuse issues.	$26.66

Source: Florida Office of Program Policy Analysis and Government Accountability, 2010.

The Vermont General Assembly increased use of electronic monitoring to provide community supervision for certain offenders who otherwise would be incarcerated. A 2008 law authorized use of electronic monitoring for probation violations and as part of supervision provided in a structured, community transition program. In 2010, the General Assembly created a house arrest sentence for offenders who otherwise would be sent to prison. This allows offenders to continue working, attend treatment, support their families, and remain in their residences except for travel approved by a supervising officer.

Electronic monitoring has been found to be a cost-effective supervision strategy when used in lieu of jail and in conjunction with appropriate services. A 2006 Washington State Institute for Public Policy (WSIPP) analysis of evidence-based policy options determined electronic monitoring to be an economically beneficial supervision tool that does not affect crime incidence. The WSIPP analysis determined that electronic monitoring, when used in lieu of jail, could save Washington State $870 per offender.

Residential Facilities Residential facilities provide offenders with a structured environment and support services in a community-based setting. Colorado's 35 residential facilities serve both offenders diverted from prison and some who are making the transition from prison into the community. Most facilities require offenders to keep a job, and pay room and board, state and federal taxes, and any restitution and child support owed. Offenders participate in programs such as substance abuse treatment; counseling designed to address cognitive reasoning and criminal behavior; employment and vocational courses; and life skills, financial, and anger management training. A Department of Corrections analysis in FY 2008 found that employed offenders were three times more likely to finish the program than those who were unemployed, underscoring the importance of job readiness for community-based offenders.

Problem-Solving Courts Problem-solving courts were identified by state chief justices and court administrators in a 2006 National Center for State Courts survey as one of the two most effective supervision programs

available in their states; mental health and substance abuse programs are the other. These courts, which vary in size, target population and structure, are designed to address the special needs of the target population. In Nevada, 42 problem-solving courts throughout the state include adult, juvenile and family drug courts; mental health courts; reentry courts; driving under the influence courts; a prostitution prevention court; habitual offenders' courts; and veterans' courts.

At least six state legislatures—Colorado, Hawaii, Illinois, Indiana, Nevada and Texas—authorized establishment of veterans' treatment courts in 2009 and 2010.

Veterans' treatment courts are the most recent type of problem-solving court being established in states. At least six state legislatures—Colorado, Hawaii, Illinois, Indiana, Nevada and Texas—took action in 2009 and 2010 to authorize courts that address needs of veterans who become involved in the criminal justice system. Many of these offenders have substance abuse and mental health needs stemming from combat experience; services overseen by the courts partner with veterans' agencies and eligible benefits. California, Iowa, New Hampshire and Oregon have similar policies that authorize diversion of veterans convicted of nonviolent crimes into treatment programs in lieu of prison.

Drug courts are the oldest and most common type of problem-solving courts—in 2010 there were more than 2,500 such courts operating across all 50 states, according to the National Association of Drug Court Professionals. Missouri's first drug court was established in 1993; today that state has the most drug courts per capita of any state in the nation. A Drug Court Coordinating Commission was established by the General Assembly in 2001 to evaluate resources, oversee operation and recommend funding for the state's drug courts. An academic study conducted for the commission projected savings of $7,800 per year for each offender who is supervised in drug court instead of being sent to prison.

The federal Bureau of Justice Assistance's Drug Court Clearinghouse tracks and summarizes cost-benefit evaluations of drug court programs dating back to 2000. Studies comparing drug court participants to similar offenders who are not enrolled have found criminal justice system savings as a result of reduced prison and jail time, lower re-arrest and re-conviction rates, and decreased victim and law enforcement costs. Other benefits—such as increased employment rates and wage earnings, reduced health care costs, and increased parental participation and payment of child support—also have been noted. Studies of statewide drug court programs reveal that, while some drug courts cost more than typical court dockets or probation caseloads, the specialty courts still are more cost-effective than jail or prison.

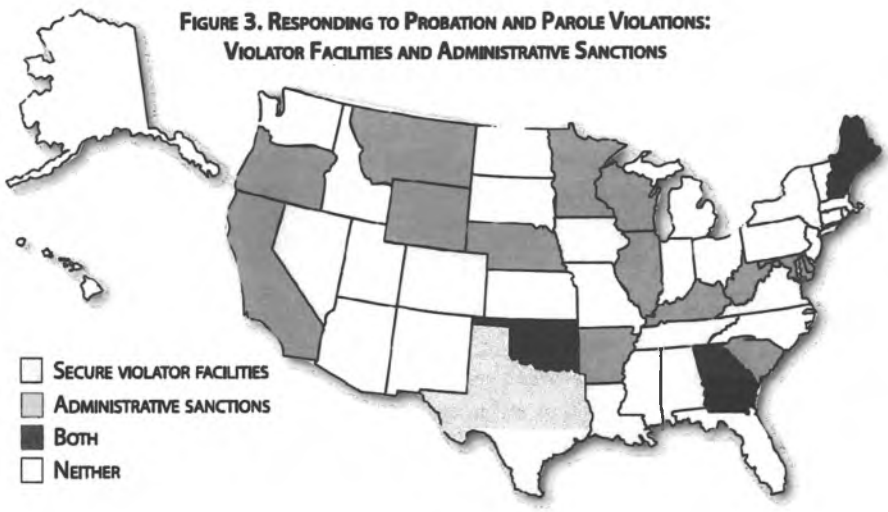
As policymakers explore the value of drug courts, they also can be aware of opportunities for improvement. A two-year examination of problem-solving courts by the National Association of Criminal Defense Lawyers resulted in a 2009 report that questioned the effectiveness of drug courts in addressing the societal problems of substance abuse. The report also cautioned about procedural matters and questioned whether drug court caseloads are adequately diverse and if clients are predominately those with the greatest need for intensive judicial supervision and treatment services (see also *Determining Criminal Sentences* and *Treating Drug Offenders*). As suggested in the *Principles*, policymakers can improve the effectiveness of intermediate and alternative sanctions both by ensuring that approaches are evidence-based and by requiring that community resources safely target offenders who can most benefit from community interventions in lieu of prison.

Probation and Parole Violations Offenders sent to prison for probation and parole violations contribute substantially to state prison populations and related costs. According to the Bureau of Justice Statistics, 35 percent of all state prison admissions in 2009 were offenders who returned to incarceration as a result of parole violations. Although some violators must be returned to prison to protect society, a growing number of states are developing non-prison sanctions for offenders who break the rules of their supervision, known as technical violations.

Alternative sanctions for probation and parole violators are designed to hold offenders accountable for breaking the rules, address issues related to the violations, and minimize the cost of incarceration to the state. Intermediate options allow a violator to remain in the community, continue to work, and pay restitution and child support. Sanctions include residential and community-based treatment programs, specialty court supervision, house arrest, electronic monitoring, work release, community service, secure and residential facilities, increased monitoring and reporting, and possible short periods in jail.

Several states have statutorily authorized community supervision agencies to impose intermediate sanctions for technical violations of probation or parole in lieu of formal court revocation proceedings (see Figure 3). Administrative sanctions allow violations to be swiftly dealt with at the agency level. This not only reduces time and costs of court and parole board hearings, but also provides for offender accountability and reduces reliance on prison as a sanction. Under the Oregon Department of Corrections' structured sanctions program, officers can impose immediate sanctions for violations of probation or parole conditions. A grid is used to determine appropriate sanctions—jail, residential work centers, house arrest and community service—based on the offender's risk level, crime of conviction, and seriousness of the violation. Officers also can order violators to participate in programs such as substance abuse and mental health treatment, employment assistance, and anger management classes. A 2002 evaluation by the Department of Corrections found that offenders who were ordered to community sanctions had lower rates of future re-conviction than those ordered to jail; those ordered to community service had the lowest rate of re-conviction among all community-based options. The overall evaluation conclusions noted that the most effective sanctions include a rehabilitative component.

Figure 3. Responding to Probation and Parole Violations: Violator Facilities and Administrative Sanctions



Several states have secure facilities that are designed to house and treat probation or parole violators instead of sending them to prison, as shown in Figure 3. In 2006, the Tennessee General Assembly authorized the Parole Technical Violators Diversion Program. Parolees who violate a condition of parole but have not committed a new felony may be sent to a secure facility for a six-month term to participate in a community service work crew or attend GED classes during the day and complete treatment programs in the evening. Tennessee offers probation violators the opportunity to complete programming in a Special Technical Violator Unit (STVU) in lieu of revocation to a state prison. In the STVU, the probationer will participate for at least four months in an intensive work and treatment program. As of 2010, New Hampshire requires that all programs and services provided at a parole violator facility be evidence-based and designed to re-engage parolees in their parole plan.

Funding Strategies

Prison populations are beginning to decline as a result of changes in front-end sentencing policies, availability of strategies to provide community-based sanctions for probation and parole violators, and specialized court and other treatment programs for drug offenders and those with mental health and other needs. Some states have created funding mechanisms to reinvest prison savings into programs that safely and successfully supervise offenders in the community.

In some states, state-local partnerships provide "incentive funding" to localities that successfully supervise offenders in the community instead of sending them to state prison for probation and parole violations. At least nine states—Arizona, Arkansas, California, Colorado, Illinois, Kansas, Kentucky, Ohio and Texas—have such arrangements, under which local correctional agencies usually receive state funding and other assistance to implement evidence-based supervision and programming. The goal is to reduce the rate at which probationers and parolees commit new crimes or violate their supervision conditions and are then sent or returned to prison.

In Kansas, a Risk Reduction Initiative adopted by the Legislature in 2007 was designed to increase offender success by reducing the number of revocations to state prison by at least 20 percent. To accomplish this, a grant program was established for local probation agencies that developed risk-reduction supervision and programming. Targeting medium- to high-risk offenders, the initiative uses specialized caseloads, employment training and placement, educational assistance, transportation and housing, and other services to help offenders remain crime- and drug-free. Careful assessment is used to assign offenders to the appropriate level and type of substance abuse, mental health, cognitive and other treatment.

At least nine states—Arizona, Arkansas, California, Colorado, Illinois, Kansas, Kentucky, Ohio and Texas—have "incentive funding" for localities that safely and successfully supervise offenders in the community.

The first round of funding in FY 2008 went to all 31 probation agencies in the state. By FY 2009, the Department of Corrections reported a 25 percent decrease in revocations to prison compared to the FY 2006 baseline; this exceeded the initial goal of 20 percent reduction.

In 2009, the California Legislature created a performance-based state-local funding partnership. Using one-time federal stimulus money, the Legislature allocated funding to local probation departments to implement evidence-based supervision practices designed to increase successful probation completion. Success is measured in terms of decreases in the number of probationers sent to prison for technical violations or new crimes. Continued funding under the act depends upon the rate at which the revocations decline. Each year, counties will be eligible to receive a portion of state savings achieved by reducing the number of prison admissions.

These funding strategies are examples of ones that, related to *Principle 4*, help states partner with local jurisdictions to create incentives for and hold accountable community programs and services.

Options for Low-Level Offenders

Other state community supervision strategies are risk- and resource-sensitive in terms of identifying offenders who are not serious criminals, pose little threat and can be safely sanctioned at lower levels of supervision. State policies provide for administrative supervision, which consists of minimal reporting and monitoring requirements so long as restitution is being paid and the offender remains crime- and drug-free. Other policies move offenders who comply with their supervision conditions to less active supervision or provide an opportunity for early termination of the community supervision term. Table 1 identifies additional information on policies for supervising low-risk offenders. Limiting and decreasing supervision and services for lower-risk offenders focuses resources more effectively on higher-risk offenders, and are among the strategies states can consider that, as suggested in the *Principles*, update and adapt criminal codes to reflect current standards and needs.

Table 1. Options for Supervising Low-Risk Offenders		
Type	**Supervision Components**	**Examples**
Administrative Supervision	Minimal reporting requirements; monitoring to ensure court-ordered payments are being made and no new criminal activity occurs.	Kentucky created an administrative caseload supervision program in 2011 for low-risk offenders who are identified via risk assessment.
Risk-based Supervision Levels	Offender is assigned to a supervision level based on offense, compliance with supervision conditions and risk assessment scores.	In New Hampshire, risk assessments guide both the level of supervision and time spent at each level of supervision. For example, a low- or medium-risk offender will be placed on active supervision for the first 12 months and, if compliant, moved to administrative supervision for the remainder of the term.
Early Termination	Gives courts discretion to review and grant early termination of a probation or parole sentence. Often requires the offender to have paid restitution in full and completed all program and treatment requirements.	Texas has incorporated early termination into a "progressive sanctions and incentives program" administered by local supervision agencies. Includes use of structured, swift and incremental sanctions for violations of supervision, and incentives such as early termination for compliance.
Compliance Credits	Provides probationers or parolees with a monthly credit for compliance with supervision requirements.	Nevada law permits certain probationers to earn 10 days per month for complying with supervision requirements and staying on schedule with all court-ordered fee and restitution payments. An additional 10 days per month can be earned for maintaining employment and participating in education or rehabilitation programs.
Probation Term Limits	Caps the length of time a court can order for a probation sentence.	In 2003, Delaware limited probation sentences to two years for any violent felony, 18 months for drug offenses and one year for all other offenses. Previous law did not set an upper limit on probation terms, and lengthy probation sentences were common.

Source: 2007 Tex. Gen. Laws, Chap. 1205; 2009 Nev. Stats., Chap. 44; 2010 N.H. Laws, Chap. 247; 2011 Ky. Acts, Chap. 2; and Vol. 74 Del. Laws, Chap. 27.

The variety of strategies described help states safely and cost-effectively manage many offenders in the community. Community corrections resources can be maximized with other risk- and resource-sensitive policies that focus the most supervision and services on offenders who need to be watched most closely and who have significant needs that can be addressed in the community.

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on probation

Bail set at $50,000 for man accused of beating girl

ARRAIGNED: Syvinski still in jail; third-party observation required.

By CASEY GROVE
casey.grove@adn.com

(06/11/11 21:15:27)

A man accused of punching a 7-year-old girl multiple times in the head Sunday in Midtown remained in jail after his arraignment Friday in Anchorage Jail Court.

A judge set bail for Byron Syvinski at $50,000 and required that he be under 24-hour observation by a court-approved third party.

Syvinski, 32, faces one count each of third- and fourth-degree assault and one count of first-degree robbery. He did not enter a plea Friday, and Judge Catherine Easter assigned his case to a public defender.

Easter also ordered Syvinski not to return to the Eide Street neighborhood where police and witnesses say he attacked two of his neighbors, including young Am-Marie Martin.

Police wrote in court papers that Syvinski -- who stands 6 feet tall and weighs 240 pounds -- first tried to take a bag from a neighborhood boy, then punched the boy's father when he intervened. Police said the boy hit Syvinski with a metal pole, but that didn't stop him.

Syvinski then walked down the street and ordered Martin to get off her bike, police said. When she didn't, he punched her once, then twice more after she fell to the ground, police said.

Neighbors surrounded Syvinski, who police say was acting delirious when two officers arrived and arrested him. Syvinski had a cast on his broken left arm and the arm was infected, police said. He was taken to a hospital after the incident.

Officers arrested Syvinski on Thursday after he was released from the hospital.

Martin was still at Providence Alaska Medical Center on Friday for continued treatment, said her mother, Andrea Dunwoody, just after the arraignment. The girl suffered a concussion and brain hemorrhage from Syvinski's pounding, police said.

Martin wasn't eating solid food and depended on an intravenous line for nutrients, Dunwoody said.

"She's traumatized. She's depressed. She's angry. She's upset. All of the above," Dunwoody told reporters outside the jail. "He took away my daughter. She's not the same."

The girl has refused to allow male nurses into her hospital room and she also didn't trust the male doctor treating her, Dunwoody said.

"She wants to know why she's there. I can't tell her," Dunwoody said.

Still, small gifts and letters -- some from complete strangers -- had raised Am-Marie's spirits, her

mother said.

In the meantime, Dunwoody is wondering why Syvinski was loose on Anchorage's streets the day of the attack.

Syvinski had called police four times seeking help the day before the attacks, police said. He was taken into protective custody -- either to jail or a hospital but police won't say -- and was back out by Sunday afternoon, when the violence began.

His criminal record, which includes previous assaults and a felony gun theft conviction, indicates repeated drug use, according to court records.

Dunwoody said the Alaska justice system failed to address Syvinski's many problems.

"He should've gotten the help he asked for," she said.

Reach Casey Grove at casey.grove@adn.com or 257-4589.

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Syvinski can't move to halfway house

RULING: Man accused of hitting girl says he was beaten in jail.

By CASEY GROVE
casey.grove@adn.com

(08/13/11 21:53:47)

Alaska State Troopers are investigating the reported jailhouse beating of an Anchorage man accused of punching a young girl in June. But a judge on Friday denied Byron Syvinski's subsequent request to be moved from the jail to a halfway house, saying the 32-year-old remains a danger to the community.

Syvinski is accused of attacking several neighbors, including a 7-year-old girl he allegedly punched in the head multiple times while trying to steal her bike.

Through his court-appointed attorney, Jeff Robinson, Syvinski had sought lowered bail and release to a halfway house because of a beating that left his face bruised and re-injured his previously broken arm, Robinson told Anchorage District Court Judge Patrick Hanley.

Troopers are investigating the alleged July 31 attack on Syvinski by another inmate or inmates at the Anchorage jail, a troopers spokeswoman said.

Syvinski appeared in court for the Friday bail hearing with bruises under his eyes and his left arm in a cast and sling. He's charged with robbery and multiple assault counts for the alleged June 5 attack on his Eide Street neighbors.

Police wrote in court papers that Syvinski was acting delirious when he approached a neighborhood teenager and tried to snatch the boy's bag. Syvinski punched the boy's father in the face before the boy struck Syvinski with a pole, police said.

Syvinski walked down the street to where Am-Marie Martin -- who turned 8 Friday, her mother said -- was on her bike in her driveway, police said. Syvinski ordered the girl off the bike and when she didn't move, he punched her, knocking her to the pavement, police said.

Witnesses told police that Syvinski punched the girl twice more while she was on the ground.

Martin was taken to a hospital with severe head injuries. Syvinski also was taken to a hospital for an infected arm. Police arrested him five days later.

In court Friday, Robinson told Hanley that Syvinski spent some time separated from other inmates for additional medical treatment. It was shortly after Syvinski's release from medical segregation that he was attacked, Robinson said.

"The decision to release him to general population is frightening," Robinson told the judge. "We live in a civilized society; we don't believe in vigilante justice."

Robinson showed Hanley and Assistant District Attorney Brittany Dunlop pictures of Syvinski's injuries taken days after the beating. The photos showed Syvinski's swollen lips and dark bruises

on his body.

"We have no reason to think the (Department of Corrections) can't protect Mr. Syvinski," Dunlop said.

Halfway houses have less security than jails, which could make it easier for Syvinski to escape, the prosecutor argued. That would allow Syvinski -- whose criminal record indicates repeated drug abuse dating back to 1999 -- to possibly get high and attack someone again, she said.

Martin's mother, Andrea Dunwoody, told the judge that Syvinski belonged in jail, not a halfway house. Dunwoody also addressed Syvinski directly.

"Just imagine what my daughter felt when you pounded her head into the ground," she told him. Dunwoody glared at Syvinski, who looked to the floor.

In the end, Hanley agreed with the prosecutor, saying that Syvinski posed a threat to the community and a halfway house did not provide the necessary level of security.

Dunwoody told reporters outside the courtroom that her daughter still suffers from headaches and dizziness but that she is ready for the school year to start.

Dunwoody said she doesn't have much sympathy for Syvinski.

"Like it or not, he's going to get justice in jail," she said. "I don't feel bad that he's got black eyes."

Reach Casey Grove at casey.grove@adn.com or 257-4589.

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Ex-officer arrested again on child porn charge

Anchorage Daily News
(01/10/08 12:25:40)

A former Anchorage police officer, already convicted once of possessing child pornography, has been arrested and charged again.

Bryan Herrera, 44, was charged last month with violating the terms of his probation for having downloaded and stored thousands of child porn images in his computer, according to police spokeswoman Marlene Lammers.

On Wednesday, the Anchorage Police Department's Cyber Crimes Unit detectives re-arrested Herrera on a new charge of child porn possession. He is being held on that charge in lieu of $30,000 bail, Lammers said.

A 12-year veteran at the time, Herrera was charged in October 2005 with collecting images of young children having sex with each other and with adults.He was also accused of setting up a remote-controlled camera in his home so he could tape a teenage girl undressing.

In a plea agreement with the district attorney's office, Herrera pleaded no contest to two counts and was sentenced to serve up to two years in prison. He was released on probation after serving his time. A condition of his release was that he not have a computer with an Internet connection.

In June, probation officers told police they had seized Herrera's laptop and believed he had downloaded and stored child porn on it. Police forensics computer examiners verified the accusation and on Dec. 10 probation officers arrested him, according to Lammers.

while on Parole / Probation Two new crimes

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3AN-08-00346 CR
3PA-08-00146 CR

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Murder parolee questioned in woman's slaying

Man had done yard work for woman found dead in her home.

By JAMES HALPIN and MEGAN HOLLAND
Anchorage Daily News
(06/25/09 22:06:21)

The man being sought for questioning in the slaying of a woman found dead in her home just off West International Airport Road was taken into custody Thursday night while using the restroom at the Flight Deck Bar and Lounge, just a block from the crime scene, according to police.

Kenneth Arnold Wahl, who is on parole for the brutal 1983 killing of a school counselor, was taken to police headquarters for questioning and was held on a felony parole violation, police said. Wahl had not been charged in connection with the death of Elisa Orcutt, 47, though police have named him a "person of interest." Orcutt was found dead in her home in the 5100 block of Cambridge Way on Tuesday.

Police from the vice unit and Community Action Policing team descended on the bar at 832 W. International Airport Road just before 8:30 p.m. and found Wahl in the men's room, police spokeswoman Anita Shell said.

"Patrons at the bar recognized him," Shell said. "He was taken into custody without incident."

Police say Wahl, 45, was doing yard work for Orcutt on Friday, the last day she was seen alive.

Wahl had been arrested six times, and released six times, since 2005 for parole violations stemming from the 1983 murder and was currently wanted on a seventh charge.

Investigators say they have learned of no connection between Wahl and Elisa Orcutt, 47, beyond his doing work at her home.

Orcutt's body was found in her home in the 5100 block of Cambridge Way just before 10 a.m. Tuesday, less than two hours after she missed a court appearance for a divorce that was finalized in her absence.

Since naming Wahl as a man who might have some information, detectives had received reports of possible sightings, homicide Detective Sgt. Slawomir Markiewicz said Thursday afternoon.

"We accounted for all the other neighbors as far as talking to them," Markiewicz said. "He had a place pretty close to the victim's place. Actually, from where he was staying he could see the victim's house." Neighbors say Wahl moved into a small, white pickup camper sitting on pallets in a yard catty-cornered to the Orcutt residence earlier this spring. He'd been doing odd jobs and yard work for the people whose property he was on and other neighbors and landed some work at the Orcutt home last Friday, according to police.

Elisa Orcutt was supposed to meet with her lawyer, Jody Brion, on Saturday in preparation for the divorce trial this week, but didn't show, according to a memorandum Brion filed in court. Brion called her repeatedly over the weekend but didn't reach her.

"Counsel believes that she is very stressed out with the prospect of the trial," Brion wrote in court papers.

About 8:30 a.m. Tuesday, everyone but Orcutt showed up at the courthouse for a hearing. The divorce was granted despite her absence. According to court documents, both Orcutt and her husband suffered from physical and mental impairments. They had no children.

Douglas Orcutt, 56, spent a career working for Alaska Airlines but left his work after being diagnosed with the early onset of Alzheimer's disease, court records say. He moved to Washington in September and filed for divorce in November, citing "irremediable differences" caused by "an incompatibility of temperament existing between the parties." Records say he was in town for the hearing this week.

Court records indicate Elisa Orcutt used to work at a Lowe's Home Improvement Warehouse but was injured on the job and had received Social Security income. She had been diagnosed with bipolar disorder and also suffered from depression and physical problems, according to court records.

"Elisa has been through a lot of stuff," said Pete Johnson, husband of her sister. "She didn't deserve this." If they know a motive for the slaying, police won't say what it is. They have been equally mum on what exactly happened inside the home, saying only they and the killer have that information.

"There was some trauma that caused her death," Markiewicz said. "The nature of the injuries is such that we concluded it must be the result of a homicide."

Wahl was convicted of first-degree murder for the stabbing death of Edward "Larry" Delany, a 40-year-old junior high school counselor. Authorities said Wahl stabbed him with a knife about 40 times in his apartment the day after they hooked up for a sexual encounter in 1983. He was sentenced in 1985 to serve 45 years.

According to Parole Board records, Wahl first appeared before the board in 2003, but was denied parole. He went back before the board in April 2005, when board members changed their minds. He was released two months later.

Conditions of Wahl's parole were standard, including requirements that he: maintain employment, training or treatment; notify his parole officer of a change in residence; possess no firearms; stay away from drugs and alcohol; not leave Anchorage beyond a 50-mile radius without informing his parole officer; not contact the victim's family.

But between his release and April of this year, Wahl was out of jail only for brief periods -- three months, then two days, then three weeks, and then two months -- before being jailed again for parole or probation violations.

He went back before the Parole Board after each one, and each time the board decided to let him go -- in April 2005, December 2005, September 2006 and January 2009. Ronald Taylor, executive director of the Alaska Board of Parole, said he couldn't discuss why the board decided to let Wahl out.

But in April, Wahl vanished from his halfway house. His probation officer searched for him for a day before handing over the search to Alaska State Troopers. A felony warrant for his arrest was issued.

Some fugitives are actively sought, but in many cases they are arrested after incidental contacts,

like traffic stops, troopers spokeswoman Megan Peters said. Various factors affect who is actively sought, including the severity of the crime and whether there is information on the person's location, she said.

Troopers have about 9,300 active arrest warrants, she said. Asked how Wahl's warrant would be prioritized, Peters said, "It goes back to what resources you have available, if you know where somebody is."

Kennith Wahl's time behind bars

Jan. 19, 1983: Arrested for murder.

Nov. 20, 1985: Sentenced to 45 years.

June 9, 2005: Released from prison to a halfway house, the Glennwood Center in downtown Anchorage

Sept. 6, 2005: Back in jail for a parole/probation violation.

March 15, 2006: Released.

May 17, 2006: Back in jail for a parole/probation violation.

June 16, 2008: Released.

July 6, 2008: Back in jail for a parole/probation violation.

July 22, 2008: Released.

Sept. 23, 2008: Back in jail for a parole/probation violation.

Dec. 3, 2008: Released.

Jan. 12, 2009: Begins mandatory six months at a halfway house.

April 9, 2009: Doesn't show up to halfway house. Felony arrest warrant later issued.Kenneth Wahl's time behind bars

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Four charged in armed robbery spree

Posted by crimeblog
Posted: July 29, 2011 - 3:52 pm

From Kyle Hopkins in Anchorage --

A four-man stickup crew has been indicted following a string of gunpoint robberies earlier this year in northeast Anchorage, prosecutors say.

Wearing black masks and gloves, the group held shotguns inches from the face of a Mountain View cigarette shop owner during a holdup in January, police say. The men are accused of blasting a shotgun round through the window of a Bragaw Street convenience store during a March robbery and robbing a cabbie and his passenger in April.

Assistant District Attorney James Fayette outlined the accusations today in **this prosecution bail memo.**

An Anchorage grand jury on Wednesday indicted:

-- Aaron Aasa, 26.
-- Ronald E. Thompson Jr., 18.
-- Brothers Eric Vaifanua, 18, and Faamanu "Junior" Vaifanua, 21.

Both on Probation

They are charged with robbing a cigarette shop called Smoke King in north Mountain View on Jan. 20, holding the shopkeeper and his son at gunpoint, prosecutors say. A security camera taped the invasion:

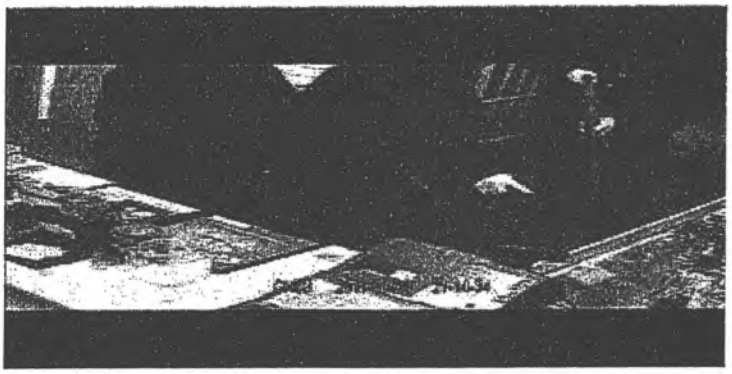
Crime Scene

This is a blog dedicated to the general topic of crime and crime prevention in Alaska. We will post crime-related stories and other relevant items as we come across them. The Daily News encourages community engagement and discussion of issues of crime and criminal justice. Comments are not edited and will be posted immediately. We know that stories about crime often provoke strong reactions, but **we insist that you keep your comments on point, use good taste and show courtesy toward other writers. Posts that violate the Terms of Use will be deleted, and repeat offenders will be banned from adn.com.** When presenting factual information, take care that it is accurate and cite and/or link to sources where appropriate.

Features

Anchorage crime reports

Track APD's latest crime reports in Anchorage, by location.



Photos courtesy of the Anchorage police department.

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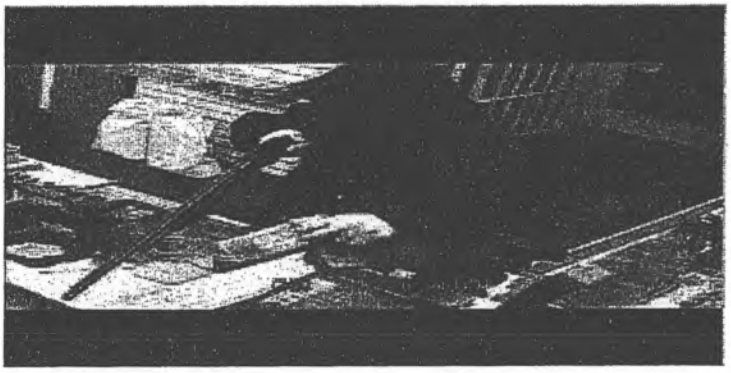

Two months later, three of the men robbed the Mini Stop convenience store on Bragaw Street, prosecutors say.

A break in the robbery investigations came April 10, following the cab-driver robbery.

The early morning holdup came on North Bunn Street where the taxi driver's passenger was trying to pay his fare, prosecutors say. A man with a shotgun had approached the passenger. Another man, carrying a handgun, walked up to the cab driver and demanded cash, prosecutors say.

As the men fled, one fired several shots in the air, prosecutors say. Someone nearby called police to report the sound of shots fired. The witness saw a black SUV speeding away, prosecutors say.

Police soon found the black Ford sitting in a car wash in west Mountain View. In a nearby trash can, police found a Mossberg 12-gauge shotgun, a handgun and white surgical gloves.

Security cameras showed the men pulling the pistol-grip shotgun from the SUV and stashing it in the trash can, prosecutors say.

In the SUV, police found old cartons of "Kool" cigarettes, the same brand that robbers stole from the Mountain View smoke shop and the Bragaw convenience store, prosecutors say.

Among other evidence linking the men to the robberies, police say that Faamanu Vaifanua was wearing white tennis shows that matched footprints left in the snow outside the Smoke King store.

The four are accused of robbery, conspiracy to commit robbery and evidence tampering. Faamanu

Recent crime headlines

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Four charged in armed robbery spree - 7/29/2011 3:52 pm

Police accuse 2 of possessing, distributing child porn - 7/29/2011 11:06 am

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Vaifanua and Thompson were scheduled to appear in court today. Eric Vaifanua and Aaron Aasa were arraigned yesterday.

Attachment	Size
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Senator Lesil McGuire

MEMORANDUM

To: Senator Hollis French, Chairman
Senate Judiciary Committee

Cc: Cindy Smith, Aide
Senate Judiciary Committee

From: Senator Lesil McGuire

Date: February 13, 2012

Re: Hearing request for SB 195, "An Act establishing a maximum caseload for probation and parole officers."

Please schedule Senate Bill 195, relating to child care services, at your earliest convenience.

Attached to this memo please find:

- SB 195, the original bill, Version B
- Sponsor statement
- Back up articles from the Anchorage Daily News
- Back up: NCSL Principles of Effective State Sentencing and Corrections Policy

The contact for SB 195 is Genevieve Wojtusik, 465-3579

Thank you.

February 15, 2012

Senate Judicial Committee
Alaska Legislature

Re: S195

As a Probation/Parole Officer (PO) for the State of Alaska for over sixteen years and in three different offices around the state, I have been assigned to different units during that time and am currently assigned to the sex offender (SO) unit in Anchorage. I keep in mind the goal of protecting the community while supervising felony offenders.

In general, a PO monitors an offender for compliance with conditions set forth by the Superior Court or the Alaska Board of Parole. That means meeting with an offender at least monthly, sometimes twice monthly and a few individuals warrant weekly visits. All contacts require documentation. Contacts are not limited to the office. SOPOs are required to conduct home visits and engage in other collateral contacts such as with employers, family members, neighbors, landlords, and occasionally contact a victim or the parent of a minor victim. During a home visit of a sex offender today, PO cannot simply look for a pile of glossy magazines in the corner of a room or under a piece of furniture. In light of technological advances for example, in order to search for pornography, a PO must search a residence for computers, laptops, thumb drives, CDs, additional hard drives and other devices that have internet connectivity such as smart phones, tablets, X boxes and play stations. We are also expected to monitor compliance with the sex offender registry, monitor the use of email addresses as well as prohibited social networking sites and aliases etc. SOPOs are also expected sit in on treatment groups, attend staffing meetings, communicate possibly multiple times in one month with a treatment provider and prepare various forms utilized during the course of a treatment period. In addition, we write violation documents and reports as well as attend court and parole hearings. Some offenders warrant extensive time and effort with referrals at least initially to get started down the path of rehabilitation or to see if they will reject the rehabilitative offerings.

I appreciate your consideration of legislation limiting our caseload size, which will allow POs to more effectively supervise felony offenders, which will enhance protection of the public and support rehabilitation.

Very truly yours,

Jo Bennett
Probation/Parole Officer II
Anchorage, Alaska

Good morning Chairman French and committee members.

My name is Charles Stewart and I am a probation officer at the Anchorage Complex. First I would like to thank you for considering this bill. It is very important to all state Probation Officers. The goal of every probation officer is to work with offenders and to help them change their criminal thinking and behavior. Doing so will help keep them out of jail.

Unfortunately, we can't do that now. At this time officers are mainly doing paperwork with very little time to work hands on with offenders. We have caseloads of up to 100 or more. The goal of the Department of Corrections is to cut down the recidivisms. Deputy Commissioner Gutierrez explained to you on Jan 25 of 2012 our goal and program to cut down on recidivisms in the future. Deputy Commissioner Gutierrez working with a committee developed a reentry program.

We believe that this is a great program, but we foresee a problem. That problem is the caseload of the probation officers. We have very little time to work hands on with offenders because the current paperwork load is overwhelming given the numbers we supervise. Mainly we put out fires at this time. While we all support the "evidence based" approach to handling offenders, we must have more "face" time with our caseload for it to work. All of the evidence based programs contain significant one-on-one time with offenders. It also requires even more paperwork because we must document what we are doing with these people. Not reducing the caseload is to assure that our recidivism reduction efforts will fail.

Our current recidivisms rate is 66 percent. Andre Rosay, Director of the UAA Justice Center provided you with this information on January 25. In your packets you will see a report from North Carolina (dated March 2011) that shows that a caseload of 60 is an ideal caseload goal for probation officers, and a caseload of 30 for officers carrying a special case loads of

mental health patients, sex offenders or offenders under "increased supervision". In you packets you will find other reports showing that the lower caseloads the more reduction there is in recidivism.

Another piece to this is the cost. On 1/25/12 Deputy Commissioner Edward stated to this committee that the average cost in the state of a hard bed is $134 a day. If allowed to spend more time with offenders in one-on-one supervision, probation officers can reduce recidivism. We estimate that it will save money. For instance, a reduction of just 16 percent per our current case load of 100 or more would save $2,144 a day or $782,560 a year in just one case load. We believe that this kind of savings would pay for an additional probation officer, administration, and space and still save over $600,000 per caseload. This does not take into consideration the other department with in the state that supports the offender and his family.

SB 198

<TARGET><BILL>SB 198</BILL><SUBJECT>SB 198</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Session

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Chair
State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Administrative Regulation Review

SENATE STATE AFFAIRS COMMITTEE

SB 198: A Bill Relating to Police Officer Protections and Certifications
SPONSOR STATEMENT

Police officers in Alaska provide some of the most valuable services to our citizens. Their protection and service allows us to enjoy our communities safely and comfortably. SB 198 acknowledges the value of police officers and proposes changes to statute.

SB 198 requires due process hearings to occur before a police officer has a certificate revoked. Currently, statute allows for revocation of a certificate by the Police Standards Council without a hearing. Revocation of a certificate can mean the end of a career and should be the last resort used to punish those worst offenders. SB 198 also sets a standard for clear and convincing evidence before revocation occurs and allows for suspension before revocation.

SB 198 also adds court officers to the definition of police officers. By doing this, court service officers are recognized for the work they perform. Court officers carry weapons, can arrest people, and serve warrants. Including them in the definition for police officers allows for streamlined training and certification by the Police Standards Council. This change also puts court officers under an already existing framework of liability.

SB 198 provides protection for police officers against retaliation for refusing to take a lie detector test. Evidence in Alaska shows a retaliatory tendency against officers who opt out of taking a lie detector test. Several other states have passed similar protections for public safety officers.

Lastly, SB 198 makes the personal information of police officers confidential. This section provides security and assurance to officers that their safety is a priority. Police officers and their families should not be subject to harassment in or out of their work environment. This section provides guarantee that their employment will not compromise their or their families' safety.

CS FOR SENATE BILL NO. 198(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act establishing procedures relating to issuance, suspension, or revocation of certification of police officers by the Alaska Police Standards Council; making confidential certain information that personally identifies a police officer; relating to requesting or requiring police officers or applicants for employment as peace officers to submit to lie detector tests; and providing for an effective date."

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

*** Section 1.** AS 18.65.240(c) is repealed and reenacted to read:

(c) If a police officer does not meet the standards adopted under (a)(2) of this section, the council may,

(1) before filing an accusation or a statement of issue under AS 44.62.330 - 44.62.630, suspend a certificate that has been issued to the police officer;

(2) following the filing of an accusation, hearing, and decision under

AS 44.62.330 - 44.62.630, revoke the certificate of a police officer;

(3) following the filing of a statement of issues, hearing, and decision under AS 44.62.330 - 44.62.630, refuse to issue a certificate to an applicant.

* **Sec. 2.** AS 18.65.240 is amended by adding a new subsection to read:

(d) In a proceeding to determine the outcome of the accusation or statement of issues, the council shall prove the conduct alleged in the accusation or statement of issues by clear and convincing evidence.

* **Sec. 3.** AS 18.65 is amended by adding a new section to read:

Sec. 18.65.244. Deference to prior resolutions. In a proceeding to revoke, suspend, or refuse to issue a certificate to a police officer, the council may consider past disciplinary actions against the police officer. However, the council shall give substantial weight to the significance of a past removal or reversal of the disciplinary action if the removal or reversal was the result of

(1) an arbitration or grievance proceeding under a collective bargaining agreement;

(2) a grievance, hearing, or other proceeding under applicable personnel rules;

(3) a proceeding under AS 44.62 (Administrative Procedure Act); or

(4) an appeal to a court.

* **Sec. 4.** AS 23.10.037(b) is amended to read:

(b) The provisions of (a) of this section do not apply to the state or a political subdivision of the state when dealing with **an applicant for employment as a police officer in a position with the state or the political subdivision** [POLICE OFFICERS IN ITS EMPLOY OR WITH PERSONS APPLYING TO BE EMPLOYED AS POLICE OFFICERS]. In this subsection, "police **officer** [OFFICERS]" includes **an officer or employee** [OFFICERS AND EMPLOYEES] of the Department of Transportation and Public Facilities who **is** [ARE] stationed at an international airport and **has** [HAVE] been designated to have the general police powers authorized under AS 02.15.230(a).

* **Sec. 5.** AS 39.90.100(a) is amended to read:

(a) A public employer may not discharge, threaten, or otherwise discriminate

against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment [BECAUSE]

(1) **because** the employee, or a person acting on behalf of the employee, reports to a public body or is about to report to a public body a matter of public concern; [OR]

(2) **because** the employee participates in a court action, an investigation, a hearing, or an inquiry held by a public body on a matter of public concern**; or**

(3) in the case of an employee who is a police officer, because the employee refuses under (e) of this section to submit to a test conducted with a lie detector device after being hired.

*** Sec. 6.** AS 39.90.100 is amended by adding new subsections to read:

(e) A police officer who works for a public employer may, after being hired, refuse a request by the employer to submit to a test conducted with a lie detector device. The refusal and the underlying request

(1) are confidential;

(2) may not be made part of the police officer's personnel file or employment record.

(f) In this section, "lie detector device" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or other similar device, mechanical or electrical, that is used to obtain data to support a diagnostic opinion regarding the honesty or dishonesty of a natural person.

*** Sec. 7.** AS 40.25 is amended by adding a new section to read:

Sec. 40.25.145. Confidentiality of police officer information. (a) Except as provided in (b) of this section, information in the possession of a law enforcement agency that personally identifies a police officer who is employed by the agency, including the police officer's photographic image or home address, is confidential and is not subject to inspection under AS 40.25.110 or 40.25.120 unless the police officer voluntarily authorizes its release in writing.

(b) Notwithstanding (a) of this section, information that personally identifies a police officer may be released for inspection under AS 40.25.110 or 40.25.120 if

(1) the police officer is lawfully arrested and the information is a photograph of the police officer; or

(2) the police officer is lawfully arrested and the information is included in one or more of the following:

(A) a report or recording that documents a 911 telephone call;

(B) a police or investigative report;

(C) a complaint made to a law enforcement agency;

(D) the statement of a witness in either a criminal matter or a proceeding related to the adjudication of a minor under AS 47.12.110.

*** Sec. 8.** This Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB198**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB198-DOA-LR-02-24-12
Title: Police Officer Protections/Certification
Sponsor: State Affairs
Requester: Senate State Affairs

Dept. Affected: Administration
Appropriation: Centralized Administrative Services
Allocation: Labor Relations
OMB Component Number: 58

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, intial version

Prepared by: Nicki Neal, Director — Phone: 465-4429
Division: Labor Relations — Date/Time: 2/24/12 1:10 PM
Approved by: John Cramer, Deputy Commissioner — Date: 2/24/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB198

Analysis

This bill will have no fiscal impact on the Labor Relations.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB198**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB198-DPS-APSC-02-28-12
Title: POLICE OFFICER PROTECTIONS/CERTIFICATION
Sponsor: (S) STA
Requester: (S) STA

Dept. Affected: Public Safety
Appropriation: Alaska Police Standards Council
Allocation: Alaska Police Standards Council
OMB Component Number: 519

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: David Sexton, Executive Director — Phone (907) 465-5523
Division: Alaska Police Standards Council — Date/Time 2/28/12 9:12 AM
Approved by: Joseph A. Masters, Commissioner — Date 2/28/2012
Department of Public Safety

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB198

Analysis

This bill establishes procedures relating to the issuance, suspension, and revocation of certification of police officers by the Alaska Police Standards Council (APSC); makes court services officers subject to certification by the APSC; makes confidential certain information that personally identifies a police officer; and prohibits public employers of police officers from requiring police officer applicants or employees to submit to a lie detector test.

The potential fiscal impact to the Department of Public Safety (DPS) relates to the portions of this bill that make binding on the Alaska Police Standards Council (APSC) decisions issued as a result of arbitration, grievance, or administrative hearing proceedings (to include reversal of disciplinary actions) and that preclude APSC from holding revocations hearings prior to a decision being issued in any of these proceedings.

When DPS terminates a trooper, they make a recommendation to the APSC to revoke the trooper's police officer certification. The APSC takes the recommendation under advisement and makes an independent decision whether to revoke the tooper's certification. This process runs independently from any grievance, arbitration, or administrative hearing and serves to limit the liability of the state to pay back wages to the period of time between when the employee was terminated and when the certification was revoked.

The Public Safety Employees Association (PSEA) may file a grievance on behalf of that former trooper. If the case is not settled between PSEA and the State, it will go to arbitration. The arbitrator will determine either that the termination was justified and uphold the state's action or grant the grievance and impose some lesser level of discipline. When the grievance is granted, DPS is ordered to make the former employee whole.

If the APSC is prohibited from revoking a trooper's certification until a final administrative decision is issued (which can take many years), DPS could potentially be required to pay hundreds of thousands of dollars in back wages to cover the period of time from the date of termination until the date of the decision.

Should this bill become law, APSC will be required to amend their regulations dealing with denial and revocation of certificates. Any costs associated with a regulation project could be absorbed within the APSC's existing budget.

The actual fiscal impact to the department cannot be estimated because it is dependent on the number of terminations where the final administrative decision is in the trooper's favor; therefore, an indeterminate fiscal note is being submitted.

LIST OF STATES THAT SUSPEND POLICE CERTIFICATES

1. Arizona - R13-4-109. Denial, Revocation, Suspension, or Cancellation of Peace Officer Certified Status

2. Colorado - Title 24-31-305 2 (a) - Suspension

3. Delaware - Title 1-800-7.1.9 - Suspension

4. Georgia -Title 35-8-7.1 - Suspension

5. Michigan - 28.609b Revocation or suspension of certification; judicial review; jurisdiction; subpoena.

6. Montana - 23.13.702 GROUNDS FOR SANCTION, SUSPENSION, OR REVOCATION OF POST CERTIFICATION

7. Nevada - NAC 289.290 Denial, revocation, suspension and reinstatement of certificate. (NRS 289.510)

8. New Hampshire - Pol 402.02 Revocation or Suspension.

9. New Mexico - 10.29.1.11 GROUNDS FOR DENIAL, REVOCATION OR SUSPENSION OF POLICE OFFICER OR TELECOMMUNICATOR CERTIFICATION; REPORTING REQUIREMENTS

10. Texas - Title 37.7.223.15 - Suspension of License

11. Utah - Title 53-6-211. Suspension or revocation of certification

STATES WITH POLYGRAPH PROTECTION FOR POLICE OFFICERS

1. Arizona - 38-1101 B
2. California - CALIFORNIA CODES GOVERNMENT CODE SECTION 3300-3311 - (3307)
3. Illinois - 50 ILCS 725/3.11

4.Nevada - NRS 289.050

Justices Allow Ban on Polygraph Use

By Joan Biskupic
Washington Post Staff Writer
Wednesday, April 1, 1998; Page A01

The Supreme Court ruled yesterday that state and federal governments may ban the use of polygraph evidence in court, declaring that doubts and uncertainties remain about the accuracy of the so-called lie-detector tests.

Close to 30 states, including Maryland and Virginia, ban polygraph evidence, and some legal experts said yesterday's 8 to 1 decision may prompt the states that do not have outright prohibitions on polygraphs to consider imposing them.

The ruling marks the first time the high court has taken up the issue of polygraph testing, and it comes at a time when the machines are increasingly being used outside the courtroom. Prosecutors use them to extract confessions from suspects and defense lawyers use them for leverage in plea bargains. The military uses them to safeguard national security and prevent espionage, and companies often rely on them to uncover employee wrongdoing or to monitor workers in sensitive jobs.

Although the test results can still be used for these purposes, the Supreme Court yesterday said they can be banned from courtrooms, and sent a signal that their accuracy is in doubt.

Advocates of polygraphs say the instruments have grown increasingly sophisticated in recent years in their ability to determine whether a person is lying by recording their breathing, blood pressure and skin conditions.

But several justices expressed skepticism about the science and the ability of any examiner using the polygraph device to accurately gauge whether someone is telling the truth.

"There is simply no consensus that polygraph evidence is reliable," Justice Clarence Thomas wrote for the court.

Because "uncertainties plague even the best polygraph exams," the court found that prohibiting a defendant from introducing the results of a polygraph test, to show he is telling the truth, does not violate his right to fully defend himself.

Yesterday's case involved Edward G. Scheffer, a former U.S. airman who was court-martialed for using methamphetamines, passing bad checks and going AWOL. Yet he had passed a polygraph test asking whether he had used illegal drugs. The U.S. Court

of Appeals for the Armed Forces said the military's automatic ban on polygraphs was unconstitutional and that Scheffer had a right to at least try to lay a foundation for the reliability of the polygraph result, as he would other evidence.

But the Supreme Court reversed that decision, ruling that Scheffer was not "significantly impaired" by exclusion of the polygraph evidence.

Although only one justice dissented, the majority spoke with no definitiveness.

Thomas and three other justices sought not only to uphold bans on polygraph evidence, but to discourage states from ever allowing their use in court. "By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations," Thomas said, joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia and David H. Souter.

But the other justices in the majority broke ranks, saying that perhaps in the future another dispute might offer a more compelling case for the introduction of polygraph testimony.

Justice Anthony M. Kennedy wrote in a concurring statement that he agreed with the majority that a defendant does not have a constitutional right to use polygraph evidence, but he doubted that an automatic exclusion of the evidence was "wise." Joined by Justices Sandra Day O'Connor, Ruth Bader Ginsburg and Stephen G. Breyer, Kennedy said some later case may be more compelling to say that defendants have a right to introduce polygraphs.

Justice John Paul Stevens, who was the lone dissenter, emphasized the value of the tests to a defendant and noted that the military gives "hundreds of thousands of such tests and routinely uses their results for a wide variety of official decisions."

Stevens called the government's position inconsistent. While it routinely uses the test and says it is an "effective investigatory tool," the Justice Department said it was not reliable enough to be used in court and, unlike other scientific evidence, could mislead a jury by purporting to show the "truth."

"There will always be critics of the polygraph," said Gordon L. Vaughan, counsel for the American Polygraph Association. "But I think the opinions suggest that there is an ongoing debate about the reliability of the polygraph." Thomas wrote that most states ban polygraph evidence, and Vaughan said that breaks down into 29 states with outright bans, 16 states that allow some test results if both the prosecution and defense agree to it. One state, New Mexico, makes them generally admissible.

Federal courts are split on whether polygraph results may be introduced. "This ruling could have some tendency to discourage the admission of polygraphs," said Charles W. Daniels of the National Association of Criminal Defense Lawyers.

Charles L. Hobson, of the Criminal Justice Legal Foundation, which sided with the government, said the ruling in United States v. Scheffer properly gives state and federal governments the ability to limit questionable evidence.

CS FOR SENATE BILL NO. 198(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act establishing procedures relating to issuance, suspension, or revocation of certification of police officers by the Alaska Police Standards Council; making confidential certain information that personally identifies a police officer; relating to requesting or requiring police officers to submit to lie detector tests; and providing for an effective date."

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

* **Section 1.** AS 18.65.240(c) is repealed and reenacted to read:

(c) If a police officer does not meet the standards adopted under (a)(2) of this section, the council may,

(1) before filing an accusation or a statement of issue under AS 44.62.330 - 44.62.630, suspend a certificate that has been issued to the police officer;

(2) following the filing of an accusation, hearing, and decision under

AS 44.62.330 - 44.62.630, revoke the certificate of a police officer;

(3) following the filing of a statement of issues, hearing, and decision under AS 44.62.330 - 44.62.630, refuse to issue a certificate to an applicant.

* **Sec. 2.** AS 18.65 is amended by adding a new section to read:

Sec. 18.65.244. Deference to prior resolutions. In a proceeding to revoke, suspend, or refuse to issue a certificate to a police officer, the council may consider past disciplinary actions against the police officer. However, the council shall give substantial weight to the significance of a past removal or reversal of the disciplinary action if the removal or reversal was the result of

(1) an arbitration or grievance proceeding under a collective bargaining agreement;

(2) a grievance, hearing, or other proceeding under applicable personnel rules;

(3) a proceeding under AS 44.62 (Administrative Procedure Act); or

(4) an appeal to a court.

* **Sec. 3.** AS 39.90.100(a) is amended to read:

(a) A public employer may not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment [BECAUSE]

(1) **because** the employee, or a person acting on behalf of the employee, reports to a public body or is about to report to a public body a matter of public concern; [OR]

(2) **because** the employee participates in a court action, an investigation, a hearing, or an inquiry held by a public body on a matter of public concern**; or**

(3) in the case of an employee who is a police officer, because the employee refuses under (e) of this section to submit to a test conducted with a lie detector device after being hired.

* **Sec. 4.** AS 39.90.100 is amended by adding new subsections to read:

(e) A police officer who works for a public employer may, after being hired, refuse a request by the employer to submit to a test conducted with a lie detector

device. The refusal and the underlying request

(1) are confidential;

(2) may not be made part of the police officer's personnel file or employment record.

(f) In this section, "lie detector device" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or other similar device, mechanical or electrical, that is used to obtain data to support a diagnostic opinion regarding the honesty or dishonesty of a natural person.

*** Sec. 5.** AS 40.25 is amended by adding a new section to read:

Sec. 40.25.145. Confidentiality of police officer information. (a) Except as provided in (b) of this section, information in the possession of a law enforcement agency that personally identifies a police officer who is employed by the agency, including the police officer's photographic image or home address, is confidential and is not subject to inspection under AS 40.25.110 or 40.25.120 unless the police officer voluntarily authorizes its release in writing.

(b) Notwithstanding (a) of this section, information that personally identifies a police officer may be released for inspection under AS 40.25.110 or 40.25.120 if

(1) the police officer is under investigation and the information is a photograph of the police officer; or

(2) the police officer is under investigation and the information is included in one or more of the following:

(A) a report or recording that documents a 911 telephone call;

(B) a police or investigative report;

(C) a complaint made to a law enforcement agency;

(D) the statement of a witness in either a criminal matter or a proceeding related to the adjudication of a minor under AS 47.12.110.

*** Sec. 6.** This Act takes effect immediately under AS 01.10.070(c).

27-LS1306\U
Finley/Wayne
4/11/12

CS FOR SENATE BILL NO. 198( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

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(2) **because** the employee participates in a court action, an investigation, a hearing, or an inquiry held by a public body on a matter of public concern**; or**

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*** Sec. 5.** AS 40.25 is amended by adding a new section to read:

Sec. 40.25.145. Confidentiality of police officer information. (a) Except as provided in (b) of this section, information in the possession of a law enforcement agency that personally identifies a police officer who is employed by the agency, including the police officer's photographic image or home address, is confidential and is not subject to inspection under AS 40.25.110 or 40.25.120 unless the police officer voluntarily authorizes its release in writing.

(b) Notwithstanding (a) of this section, information that personally identifies a police officer may be released for inspection under AS 40.25.110 or 40.25.120 if

(1) the police officer is lawfully arrested and the information is a photograph of the police officer; or

(2) the police officer is lawfully arrested and the information is included in one or more of the following:

(A) a report or recording that documents a 911 telephone call;

(B) a police or investigative report;

(C) a complaint made to a law enforcement agency;

(D) the statement of a witness in either a criminal matter or a proceeding related to the adjudication of a minor under AS 47.12.110.

*** Sec. 6.** This Act takes effect immediately under AS 01.10.070(c).

27-LS1306\E
Wayne
3/22/12

CS FOR SENATE BILL NO. 198( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act establishing procedures relating to issuance, suspension, or revocation of certification of police officers by the Alaska Police Standards Council; making confidential certain information that personally identifies a police officer; relating to requesting or requiring police officers to submit to lie detector tests; and providing for an effective date."

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

*** Section 1.** AS 18.65.240(c) is repealed and reenacted to read:

(c) If a police officer does not meet the standards adopted under (a)(2) of this section, the council may,

(1) before filing an accusation or a statement of issue under AS 44.62.330 - 44.62.630, suspend a certificate that has been issued to the police officer;

(2) following the filing of an accusation, hearing, and decision under

AS 44.62.330 - 44.62.630, revoke the certificate of a police officer;

(3) following the filing of a statement of issues, hearing, and decision under AS 44.62.330 - 44.62.630, refuse to issue a certificate to an applicant.

*** Sec. 2.** AS 18.65.240 is amended by adding a new subsection to read:

(d) In a proceeding to determine the outcome of the accusation or statement of issues, the council shall prove the conduct alleged in the accusation or statement of issues by clear and convincing evidence.

*** Sec. 3.** AS 18.65 is amended by adding a new section to read:

Sec. 18.65.244. Deference to prior resolutions. In a proceeding to revoke, suspend, or refuse to issue a certificate to a police officer, the council may consider past disciplinary actions against the police officer. However, the council shall give substantial weight to the significance of a past removal or reversal of the disciplinary action if the removal or reversal was the result of

(1) an arbitration or grievance proceeding under a collective bargaining agreement;

(2) a grievance, hearing, or other proceeding under applicable personnel rules;

(3) a proceeding under AS 44.62 (Administrative Procedure Act); or

(4) an appeal to a court.

*** Sec. 4.** AS 39.90.100(a) is amended to read:

(a) A public employer may not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment [BECAUSE]

(1) **because** the employee, or a person acting on behalf of the employee, reports to a public body or is about to report to a public body a matter of public concern; [OR]

(2) **because** the employee participates in a court action, an investigation, a hearing, or an inquiry held by a public body on a matter of public concern**; or**

(3) in the case of an employee who is a police officer, because the employee refuses under (e) of this section to submit to a test conducted with a lie

detector device after being hired.

*** Sec. 5.** AS 39.90.100 is amended by adding new subsections to read:

(e) A police officer who works for a public employer may, after being hired, refuse a request by the employer to submit to a test conducted with a lie detector device. The refusal and the underlying request

(1) are confidential;

(2) may not be made part of the police officer's personnel file or employment record.

(f) In this section, "lie detector device" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or other similar device, mechanical or electrical, that is used to obtain data to support a diagnostic opinion regarding the honesty or dishonesty of a natural person.

*** Sec. 6.** AS 40.25 is amended by adding a new section to read:

Sec. 40.25.145. Confidentiality of police officer information. (a) Except as provided in (b) of this section, information in the possession of a law enforcement agency that personally identifies a police officer who is employed by the agency, including the police officer's photographic image or home address, is confidential and is not subject to inspection under AS 40.25.110 or 40.25.120 unless the police officer voluntarily authorizes its release in writing.

(b) Notwithstanding (a) of this section, information that personally identifies a police officer may be released for inspection under AS 40.25.110 or 40.25.120 if

(1) the police officer is lawfully arrested and the information is a photograph of the police officer; or

(2) the police officer is lawfully arrested and the information is included in one or more of the following:

(A) a report or recording that documents a 911 telephone call;

(B) a police or investigative report;

(C) a complaint made to a law enforcement agency;

(D) the statement of a witness in either a criminal matter or a proceeding related to the adjudication of a minor under AS 47.12.110.

*** Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

WORK OF THE

Good afternoon. I would first like to reintroduce you to the Council.

The Mission of the Alaska Police Standards Council:

Is to produce and maintain highly trained and positively motivated professional officers, capable of meeting contemporary law enforcement **standards** *of performance.*

The Core Services we provide the citizens of the State of Alaska:

- In cases of misconduct by a certified police officer, we make a determination whether certification should be revoked.
- We monitor compliance with current regulations and legislation.
- We develop, monitor, and revise law enforcement training.
- We assist academies and departments with funding for academy training.
- We fund specialized and advanced training for departments.
- We determine certification eligibility for all police, probation, and correctional officers and issue appropriate level of certificate.
- We provide pre-employment polygraph and psychological testing for smaller agencies across the state.

Senate Bill 198 directly affects, or more honestly cuts, to the heart of several of our core services. Please keep our ability to provide these services to the people of Alaska in mind as you contemplate this proposed bill.

Let's talk first about certification. In this state, as in most states, you need to earn a certificate in order to possess and wield police powers. Our process certifies that you have the education, training, and moral fiber to do the job as legislation has seen fit to define it.

At any one time we have about 3,000 sworn officers in this state. This bill wants to inhibit and intervene with our ability to, if necessary, decertify an officer. While we consider the ability to decertify an errant officer **critical** to our mission and goals, revoking a certificate is but a scalpel in our tool belt.

I'm assuming that the changes this bill proposes are actions taken in response to a perceived current problem. I'm not sure what this problem is however. In the past 5 years only 6 officers have lost their certificate due to Council revocation. Let me repeat that – 3,000 sworn officers in the state – 6 of them had their certificates **"taken"** away from them by council action over a five year period! These certificates were revoked after charges of sexual assault of a minor, sexual assault, harassment, official misconduct and dishonesty were leveled.

In our world, possible misconduct is reported to APSC staff, which fully investigates the matter, and only if we find it appropriate is the matter given to the full council which **again** reviews all of the facts before taking action. Council action can be further appealed through the court system if the officer so desires.

The council is made up of 13 members, hand picked by the governor and affirmed by the legislature. They are police and correctional management, line officers and union members, and citizens at large. You could not ask for a more balanced, knowledgeable, trustworthy board whose primary mission is the protection of the citizen of Alaska.

Clearly, this bill is a solution in search of a problem.

Our legal counsel from the Department of Law wishes to speak to two proposed changes, the necessity to give "**substantial weight**" to prior decisions in our deliberations, and the changing of the burden of proof for our investigations from the preponderance of evidence to clear and convincing evidence. I have no doubt he will express himself more eloquently than I concerning these legal matters, suffice it to say the Council has grave concerns to being **singled out and held to different standards** than the four dozen other boards and commissions required to uniformly operate under the requirements of the state Administrative Procedures Act. (AS 44.62).

Our next concern revolves around the use of polygraphs and other truth verification devices. We appreciate the work done on an earlier version of this bill, and the cooperation that resulted in not prohibiting pre-employment polygraphs. Right now, both Alaska and federal labor law recognizes the special relationship and trust between the citizens and their law enforcement officers, and allows the use of polygraphs in both pre-employment, and investigative situations. The Council is asking, if it's a good idea to take a polygraph to get a job – what changes that you can't take a polygraph to keep a job? It takes a lot to earn police powers…not everyone is up to the challenge. We request the bar not be lowered, and the standards held to be employed remain the same to stay employed.

WE WILL FIND OURSELVES WAY OUTSIDE THE NORM SHOULD WE BECOME ONE OF THE 1 IN 10 RECOGNIZING THIS EXCEPTION.

In fact, 9 out of 10 states allow for investigative polygraph use in matters concerning law enforcement officer's behavior. As not a single recent Council revocation action hinged on polygraph results, the Council is again at a loss why this section of the bill is being introduced ~~to clip our member's wings~~.

Next, this bill demands that departments cease supplying photographs of our officers in action, in the performance of their duties.

The language in this bill goes against every tenant of Community Policing we have tried to put in place for the last two decades. If adopted, I can no longer show pictures of my officers receiving a check from the local Rotary to go toward Special Olympics, and I can no longer hang the photos of my officers in the lobby of my police department or city hall.

I **want** my community to know who my officers are. That is how you build community support, trust, and cooperation. These images are important to recruitment. AS 39.25.080 already makes it unlawful to disseminate state personnel records information, including a home address. Obviously we have no objection to following current state law. We do object to giving away management rights to run progressive, modern, community orientated departments.

Finally, It would mean a great deal to the Council if we could discuss changes to the definition of police officer, which you will find under section 4. It has been a long time goal of the Council to remove the words "full-time" from the definition of police officer. Removing these two words not only bring part-time, seasonal and reserve officers under our oversight, but protects cities and jurisdictions who are trying to do the right thing by hiring on additional help, only to find their employees are operating outside of regulations.

As proposed today, the Alaska Police Standards Council opposes much of this bill. As stated before however we appreciate all of the work that has gone into making the bill more meaningful, and we look forward to the same cooperative working spirit with this committee as we enjoyed with the last. Thank you for the opportunity to present the council's views on this proposed legislation. I am at your service should you have questions.

Public Safety Employees Association, Inc.

"Representing Alaska's Finest"

A.F.S.C.M.E. Local 83

February 29, 2012

Dear Senator Wielechowski:

On behalf of the Soldotna Police Department employees represented by PSEA, I wish to express our support for Senate Bill 198. SB 198 will improve the quality of police officers protecting Alaskans by strengthening due process, elevating standards, and providing more tools at the Alaska Police Standards Council. This legislation improves this regulatory body and by doing so improves the quality of police officers in Alaska.

My thanks go out to you and the Senate State Affairs Committee for introducing this important legislation.

Rory L. Espy
President
Soldotna Police Bargaining Unit

4228 Laurel Street, Anchorage, Alaska 99508
Phone (907) 337-1979 FAX (907) 337-1753 E-Mail psea@psea.net

Dear Senator Wielechowski:

On behalf of the Sitka. Police Department employees represented by PSEA, I wish to express our support for Senate Bill 198. SB 198 will improve the quality of police officers protecting Alaskans by strengthening due process, elevating standards, and providing more tools at the Alaska Police Standards Council. This legislation improves this regulatory body and by doing so improves the quality of police officers in Alaska.

My thanks go out to you and the Senate State Affairs Committee for introducing this important legislation.

Timothy D White
PSEA Sitka Chapter President
Sitka Police Department
907-747-3245

Dear Senator Wielechowski,

I am writing in support of SB198 and ask you to support this bill both in Committee and on the Floor. As an Alaska State Trooper who works regularly with Court Services Officers (CSO), I am concerned with the fact that CSO's are currently serving without any type of State-recognized (APSC) certification. Requiring certification for this position will provide consistent job requirements and increased avenues for accountability on the job. Thank you.

Sincerely,
Rob Cox
(907) 350-4656

Dear Senator Wielechowski:

On behalf of the Juneau Police Department employees represented by PSEA, I wish to express our support for Senate Bill 198. SB 198 will improve the quality of police officers protecting Alaskans by strengthening due process, elevating standards, and providing more tools at the Alaska Police Standards Council. This legislation improves this regulatory body and by doing so improves the quality of police officers in Alaska.

My thanks go out to you and the Senate State Affairs Committee for introducing this important legislation.

Lee Phelps

Vice President for the Juneau PSEA chapter/Police Officer
Juneau Police Department
6255 Alaway Ave
Juneau, AK 99801
907-500-0648

Public Safety Employees Association, Inc.

"Representing Alaska's Finest"

A.F.S.C.M.E. Local 83

Alaska Senate
Chairman Wielechowski
State Affairs Committee

February 24, 2012

Dear Senator Wielechowski,

My name is Charles Taylor. I am employed as a Court Services Officer (CSO) with the Department of Public Safety, Division of Alaska State Troopers, and I am stationed in Kenai. I ask you to support SB198 both in Committee and on the Floor in its entirety and specifically, as it applies to CSO's (SB 198; Section 4). Alaska Statutes currently require that peace officers be certified. However, there is currently no requirement that CSO's be certified. This bill will correct the issue consistent with current law.

Additionally, I view SB198 as a simple and inexpensive fix that protects the State and its resources. In my employment I am uniformed and equipped similar to State Troopers. Consequently, citizens often mistake me as an Alaska State Trooper. Unlike Troopers, the approximately 60 Court Services Officers serve without any type of State-recognized certification. Without formal recognition of training and qualifications through certification, the State of Alaska may be open to greater liability arising out of actions performed by CSO's. Thank you.

Sincerely,

Charles Taylor

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Public Safety Employees Association, Inc.

"Representing Alaska's Finest"

A.F.S.C.M.E. Local 83

Alaska Senate
Chairman Wielechowski
State Affairs Committee

February 24, 2012

Dear Senator Wielechowski,

I am employed as a Court Services Officer (CSO) with the Alaska State Troopers. I wish to take this opportunity to request your support of SB198. The passage of this legislation would require that CSO's be certified by the Alaska Police Standards Council (APSC) and standardize the training which CSO's receive. Passage of this legislation would greatly enhance the professionalism of the officers serving the State of Alaska court system and increase the accountability of individual officer performance.

Sincerely,

Thomas Robson

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ALASKA CORRECTIONAL OFFICERS ASSOCIATION

"Walking Alaska's Toughest Beat"

March 1, 2012

Senator Bill Wielechowski
State Capitol Room 101
Juneau AK, 99801

Senator Wielechowski,

My supervisor, Brad Wilson, returned from Juneau late last night and probably will not have time before this morning's Senate State Affairs Committee meeting to personally convey his support for the protections Senate Bill 198 would extend to our brothers and sisters serving as Police Officers and Court Service Officers. I know that Brad strongly supports this Bill. I will attempt to speak for him as his subordinate, but also as a retired Correctional Officer. Correctional Officers also fall under Alaska Police Standards' training and certification requirements and they fully understand the need for the protections that SB 198 will afford for our fellow law enforcement agency members.

Correctional Officers know the valuable services that Police Officers and Court Service Officers provide. We know the importance of an Alaska Police Standards certificate and the impact that revocation can have on future employment. We acknowledge that there have been occasions when a certificate needed to be revoked, but we feel **strongly** that a certificate should never be revoked without clear and convincing evidence and due process. SB 198 will provide that protection for Police Officers.

Furthermore, Correctional Officers recognize the very real need to protect members of the law enforcement community from having their personal information publicly released. Most, who have served in this field for any length of time, can recount numerous instances of irate detainees and prisoners defiantly shouting, "*I know where you and your family live and I will get you*". Fortunately, most of the time the person does not know where the Officer lives and the threat is seldom acted upon. However, tragically there have been heartbreaking instances around the nation of just such threats being carried out. Unfortunately, more might have if the officer's personal information had been made public!

We urge the Legislature to quickly pass SB 198.

Thank you,

Jim Lecrone
Business Agent

P.O. Box 210290 • Anchorage, Alaska 99521
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Website: www.acoa.us

Public Safety Employees Association, Inc.

"Representing Alaska's Finest"

A.F.S.C.M.E. Local 83

March 21, 2012

Senate Judiciary Committee
Chairperson Hollis French

My name is Meagan Carmichael. I have worked as a business agent with PSEA since October 2009. During that time, employers have relied on polygraph exams to support several terminations of police officer employees. In one case, an employee declined to take a poly during an internal investigation, and the employer punished the officer by immediately placing him on admin leave, even though the CBA prohibits the employer from disciplining employees who decline polygraphs. The employer relied on his refusal to terminate the officer, and as evidence of his guilt. In another case, a citizen filed a complaint against an officer, and the complainant failed a polygraph regarding the truthfulness of his complaint. The employer disregarded the fact that the complainant failed the polygraph, and gave him a second chance by giving him a second polygraph. The internal investigative report omitted the fact that the complainant failed the polygraph, and the employer fired the officer anyway. Eyewitness testimony from five different police officers supported the officer's version of events. In a third case, an officer volunteered for and passed 2 polygraphs about the truthfulness of his statements during an investigation, but the employer ignored the fact that he passed both polygraphs and fired the officer for allegations of dishonesty anyway. He was a veteran officer with over 10 years of experience, with no prior integrity issues or discipline. When officers are fired for dishonesty, they often face losing their police certifications, and hence their livelihoods. The APSC relies on employer's internal investigations to revoke certificates, and they rely on polygraphs to revoke certificates. Officers cannot get hired as police officers in other states if their certificates are revoked in Alaska. Police officers should enjoy the same rights and protections as any other citizen of the state of Alaska, and the US. This bill will not prevent employers from asking police officers to take polygraphs, but it will protect the officer's ability to decline to take polygraphs, because they are inherently unreliable and inadmissible in court.

Thank you for your time. I am available for questions.
Meagan Carmichael

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March 30, 2012

Re: SB 198/HB 351

As Chief of Police of the Fairbanks Police Department, I ask for this moment of your attention to express my opposition to the above-cited legislation.

I read the concerns that Mr. David Sexton, Executive Director of the Alaska Police Standards Council, provided in testimony, and find my concerns directly overlay his. At point here is the capacity to effectively provide the citizens of Alaska with genuine, effective "quality control" of police applicants through enforcing standards. The degradation of that core function that would come with the passage of this legislation puts in question how seriously we value that level of professionalism. The policing profession inherently calls for certain sacrifices from its members, but the degree of intrusion under current practices is minimal, while the value gained from those same practices has proven great—too great to abandon.

For what worth it might have, let me add this. Over a six year period, I was privileged to represent the United States in various roles generally referred to as international police advising. During that time, I saw and lived the consequences of corruption and compromised standards with the police in many countries. I left that experience nearly phobic of acts that could trigger movement down that proverbial slippery slope. That might help explain my passion in resisting what I see as an unwarranted, rather wholesale degradation of our State's efforts to maintain the highest competence of law enforcement standards that would follow passage of this legislation.

Thank you for your attention.

Sincerely,

Laren J Zager
Chief of Police

JUNEAU POLICE DEPARTMENT

6255 ALAWAY AVE. • JUNEAU, ALASKA 99801

GREG BROWNING
CHIEF OF POLICE

Alaska's Capital City

BUSINESS (907) 586-0600
FAX (907) 463-4808

File

March 30, 2012

Greg Browning
Chief of Police

Page Decker
Asst. Chief of Police

The Honorable Hollis French
State Capitol Room 417
Juneau, Alaska 99801

Dear Senator French,

As the senior administration of the Juneau Police Department, we must tell you that we strongly oppose Senate Bill 198.

Efforts to reduce the authority of the Alaska Police Standards Council should always be scrutinized very carefully.

Although we put together the best hiring practices possible under the law, law enforcement officers are human and are subject to all the frailties of the species.

The experts in law enforcement say that in order to keep graft and corruption out of a police agency, three systems must be in place. First, you have to hire the best possible people. Second, you have to have standards, policies, and procedures in place that provide the best direction possible as officers go about their duties , some of which can have grave consequences for the public. Finally, when officers fail to live up to the standards, there must be a system in place that removes them from the profession.

This bill appears to negatively impact our ability as law enforcement agency administrators to rely on the third requirement to hold our profession to the highest standards; the standards that you as a citizen of Alaska expect.

Finally, the idea of restricting us from displaying photographs of our employees in our workplace or restricting the news media from publishing photographs of officers working newsworthy events seems irrelevant to police certification and seems be born of unbridled paranoia.

Please reconsider supporting this poorly thought-out bill.

Thank you for your consideration as we work together to make Alaska a place that we can all be proud of.

Sincerely,

Greg Browning
Chief of Police
Juneau Police Department

Page Decker
Assistant Chief of Police
Juneau Police Department

AMERICAN CIVIL LIBERTIES UNION of ALASKA

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
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JUNE PINNELL-STEPHENS, Fairbanks
TONY STRONG, Juneau

EMMA HILL, Anchorage
STUDENT ADVISOR

April 13, 2012

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
State Capitol
Juneau, AK 99801
via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

Re: CS for Senate Bill 198 (STA)
ACLU Follow-Up Review of Legal Issues

Dear Chair French and Vice-Chair Wielechowski:

Thank you for the opportunity to submit further written testimony regarding the Committee Substitute for Senate Bill 198 (State Affairs), relating to the regulation of police licenses and confidentiality of police officer information.

This review supplements our prior testimony of April 2, 2012, provided to the Judiciary Committee even with that date, and addresses continued revisions to the proposed Legislation.

Section Seven: The Confidentiality Provision for Police Officer Information is Overbroad and Would Improperly Limit Access to Legitimately Needed Information

Our previous commentary noted that the broad category of personally identifying information could potentially include an officer's name, badge number, and – as the Bill explicitly states – his photograph. Making all such personally identifying information about a police officer confidential would insulate bad actors from any accountability for their actions. If this Bill were to become law as currently drafted, a woman who had been raped or harassed by an unknown police officer would be unable to even view a photo array of the officers on duty the night she was assaulted in order to provide departmental management with information necessary to identify the

perpetrator. Citizens might be unable to review even the most pedestrian police records if the records contained an officer's name or badge number.

We trust that the Judiciary Committee will more narrowly tailor these provisions to address this highly problematic drafting issue. As noted, protection of core, private information about officers is a logical and appropriate goal. However, the provision as currently written threatens meaningful public review of law enforcement practices.

Section Two: The "Clear and Convincing" Standard Is Inappropriate for Public Servants Trusted with the Power to Arrest and to Use Deadly Force

The ACLU wishes to revise previous testimony, and note that the Alaska Bar Rules require a showing of clear and convincing evidence for discipline of an attorney. Alaska Bar Rule 22(e). However, ordinary attorneys do not arrest citizens, search citizens, or shoot firearms in the course of their daily duties.

Given the nature of police officer duties, and their authorization for use of deadly force in the ordinary course of their work, a "clear and convincing" requirement for revocation of police certification is troubling.

Other than attorneys, for other categories of state licensees, a preponderance of the evidence, or "more likely than not," standard applies, as best our review of statutes and case law shows. The State should show the utmost care and caution in certifying a person given the unique privileges to drive an emergency vehicle at high speeds, carry and use a government-issued firearm, search the homes and persons of Alaskan citizens, and arrest Alaskans for alleged criminal activity.

Review of disciplinary action against Alaska police officers does not reveal that they are currently held to unreasonable standards. In fact, several of them have been permitted to retain employment in the face of activity that would leave many Alaskans out of a job.

In one recent case, a police officer told a colleague via e-mail that he wanted to see her breasts and buttocks, using a more vulgar term for both. He also repeatedly and drunkenly told a second colleague in the crude terms that he wanted to have sex with her, even after being repeatedly told by his uninterested colleague to stop. *State v. Alaska Public Safety Employees Ass'n*, 235 P.3d 197, 199 (Alaska 2010). The officer, employed with the Department of Transportation as an airport police officer was fired for the misconduct. An arbitrator reinstated him – not because he was *innocent* of the charges, but because the arbitrator ruled a lesser penalty would suffice. The Alaska Supreme Court upheld the arbitrator's decision in the face of opposition from the state employer.

Similarly, the Alaska Supreme Court also upheld an arbitrator's decision reinstating a trooper who repeatedly lied about his own conduct in training and with civilians, as well as failing to meaningfully investigate several crimes. *State v. Public Safety Employees Ass'n,* 257 P.3d 151,

153 (Alaska 2011). The arbitrator reinstated the trooper – again, not because the claims were false, but because the "State has shown lenience for minor acts of dishonesty in the past." *Id.* at 161-62. A law enforcement officer cannot serve if he cannot testify credibly in court about criminal activity he observes.

These two cases suggest that changing the standard to "clear and convincing" would make it harder to decertify a rogue officer. No one would want his wife, daughter, or mother to be stopped, handcuffed, searched, or arrested by a police officer with a history of disturbing, sexually harassing activity. No one would want to be stopped or arrested by a police officer with a history of dishonesty (even if "minor"); nor would a prosecutor want such an officer as a witness in a criminal case. We recommend the Committee and the Legislature reject the proposed change.

Section Three: The Council Should Only Give
Substantial Weight to an Arbitrator's Findings of Fact

Upon review of the outcomes of police disciplinary proceedings described above, the ACLU has further concerns regarding the statement in Section Three that the Council shall give "substantial weight" to the determinations of arbitrators.

It appears that arbitrators may reverse dismissals ***not because the department reached an incorrect factual conclusion*** as to the truth about the misconduct, but because the arbitrator second-guessed the severity of the punishment or considered the past history of what kind of behavior the agency had tolerated.

In order to protect the public, the Council should be free to set high standards regarding sexual harassment, dishonesty, or other misconduct by officers. The Council – in establishing statewide standards and protecting the public – has a vital role to fill. While the Council should give some deference to *fact-finding* by an arbitrator, it should not be required to give deference to the *scope of a penalty* enforced by an arbitrator.

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions that may arise, or to answer informally any questions which Members of the Committee may have. And again, thank you for the opportunity to share further thoughts.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us
Senator John Coghill, Senator_John_Coghill@legis.state.ak.us

SB 200

<TARGET><BILL>SB 200</BILL><SUBJECT>SB 200</SUBJECT><COMM>SJUD27</COMM></TARGET>

Senator Hollis French
Alaska State Legislature

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SB 200 Eyewitnesses and Lineups
Sponsor Statement

Evidence provided by eyewitnesses is a vital part of many criminal investigations. According to the International Association of Chiefs of Police, some 77,000 people nationwide go to trial each year because eyewitnesses have picked them out of lineups or photo arrays. Eyewitness testimony is arguably some of the most powerful evidence presented at a trial.

Since 1989, however, DNA technology has resulted in over 230 exonerations of people who, on average, had served 12 years in prison, and 75% of those convictions involved misidentifications by eyewitnesses. When innocent people are convicted, not only do they suffer an enormous injustice, but the real perpetrator is never caught and taken off the street.

Organizations such as the American Bar Association, The Police Foundation and the National Institute of Justice have identified procedures that improve the accuracy of eyewitness identifications. Senate Bill 200 will require law enforcement agencies to adopt specific procedures for conducting photo and live line-ups. It will require the Department of Public Safety to create and administer a training program for law enforcement officers on scientific findings and the use of appropriate methods when interviewing eyewitnesses to crimes. I urge your support for this important step toward ensuring that perpetrators are caught, and innocent people are screened out during eyewitness processes.

CS FOR SENATE BILL NO. 200(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR FRENCH

A BILL

FOR AN ACT ENTITLED

"An Act establishing certain requirements and procedures related to the identification of suspects by eyewitnesses to criminal offenses."

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

* **Section 1.** AS 12.50 is amended by adding new sections to read:

Article 4. Identification of Persons by Eyewitnesses.

Sec. 12.50.300. Eyewitness identification proceedings. (a) A law enforcement agency conducting eyewitness identification proceedings shall adopt specific procedures for conducting photo and live lineups, including at a minimum, a requirement that

(1) before a photo or live lineup, a law enforcement officer shall record as compete a description as possible of the perpetrator provided by the eyewitness, in the eyewitness's own words; the statement must include relevant information regarding the conditions under which the eyewitness observed the perpetrator, including location, time, distance, obstructions, lighting, weather conditions, any

impairments relating to the vision of the eyewitness, or other impairments; and

(2) an independent administrator shall conduct the lineup; however, when it is impracticable for an independent administrator to conduct a photo or live lineup,

(A) a blinded administrator shall conduct the lineup; or

(B) the administrator shall use a procedure that achieves neutral administration of the lineup and that consists of simultaneous presentation of the lineup.

(b) The admissibility of an eyewitness identification as evidence is not precluded by the failure of an agency to adopt procedures under or to satisfy requirements of (a) of this section.

Sec. 12.50.310. Training of law enforcement officers. The Department of Public Safety shall create, administer, and conduct a training program for law enforcement officers and recruits in the requirements, methods, technical aspects, and scientific findings related to eyewitness identification proceedings under AS 12.50.300 - 12.50.399.

Sec. 12.50.399. Definitions. For the purposes of AS 12.50.300 - 12.50.399,

(1) "administrator" means the person conducting the lineup;

(2) "blinded administrator" means an administrator who might know who the suspect is, but does not know which lineup member is being viewed by the eyewitness; "blinded administrator" includes an administrator who conducts a photo lineup through the use of a folder system or substantially similar system;

(3) "eyewitness" means a person whose identification by sight of another person may be relevant in a criminal investigation;

(4) "independent administrator" means an administrator who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect;

(5) "law enforcement agency" means a public agency that performs as one of its principal functions an activity relating to crime prevention, control, or reduction or relating to the enforcement of the criminal law; "law enforcement agency" does not include a court;

(6) "law enforcement officer" means an employee of a law enforcement agency;

(7) "live lineup" means a procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime;

(8) "photo lineup" means a procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime;

(9) "suspect" means the person believed by law enforcement to be the possible perpetrator of the offense.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Explanation of Changes CSSB 200\I

On page 1, on line 12, added the word "relevant" to clarify that information listed need not be collected if it isn't relevant to the conditions under which the eyewitness made his/her observations.

On page 2, added a new subsection (b) at lines 9-11, to clarify that the admissibility of eyewitness identification as evidence is not precluded by the failure of an agency to adopt procedures or to satisfy the requirement under subsection (a).

Technical changes were also made in Section 1, subsection (a)(2) on page 2 to clarify provisions about administrators of tests.

27-LS1136\I
Wayne/Gardner
3/13/12

CS FOR SENATE BILL NO. 200(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR FRENCH

A BILL

FOR AN ACT ENTITLED

"An Act establishing certain requirements and procedures related to the identification of suspects by eyewitnesses to criminal offenses."

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

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(B) the administrator shall use a procedure that achieves neutral administration of the lineup and that consists of simultaneous presentation of the lineup.

(b) The admissibility of an eyewitness identification as evidence is not precluded by the failure of an agency to adopt procedures under or to satisfy requirements of (a) of this section.

Sec. 12.50.310. Training of law enforcement officers. The Department of Public Safety shall create, administer, and conduct a training program for law enforcement officers and recruits in the requirements, methods, technical aspects, and scientific findings related to eyewitness identification proceedings under AS 12.50.300 - 12.50.399.

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(1) "administrator" means the person conducting the lineup;

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(3) "eyewitness" means a person whose identification by sight of another person may be relevant in a criminal investigation;

(4) "independent administrator" means an administrator who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect;

(5) "law enforcement agency" means a public agency that performs as one of its principal functions an activity relating to crime prevention, control, or reduction or relating to the enforcement of the criminal law; "law enforcement agency" does not include a court;

(6) "law enforcement officer" means an employee of a law enforcement agency;

(7) "live lineup" means a procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime;

(8) "photo lineup" means a procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime;

(9) "suspect" means the person believed by law enforcement to be the possible perpetrator of the offense.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
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Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

March 12, 2012

TO: Leg Legal

FROM: Cindy Smith

RE: CS for SB 200 LS1136\B

Please draft CS that makes these three changes to SB 200 Eyewitnesses and Lineups:

On page 1, at line 12, after the word "include", insert the word "relevant"

On page 2, at line 2 after the word lineup, insert the word "or"

On page 2, after line 6, insert the following: "The failure or inability to meet the requirements listed in (1) through (3) above does not preclude the admission of eyewitness identifications into evidence".

Thanks! We need this for a committee that meets on Friday, March 16th --

The failure or inability to meet the requirements listed in (1) through (3) above does not preclude the admission of eyewitness identifications into evidence.

Sec. 28.33.033. Presumptions and chemical analysis of breath or blood.

(a) Upon the trial of a civil or criminal action or proceedings arising out of acts alleged to have been committed by a person operating a commercial motor vehicle while under the influence of an alcoholic beverage in violation of AS 28.33.030, the following rules apply with regard to the amount of alcohol in the person's blood or breath at the time alleged:

(1) if there was less than 0.04 percent by weight of alcohol in the person's blood, or less than 40 milligrams of alcohol per 100 milliliters of the person's blood, or less than 0.04 grams of alcohol per 210 liters of the person's breath, that fact does not give rise to a presumption that the person was or was not under the influence of an alcoholic beverage, but that fact may be considered with other competent evidence in determining whether the person was under the influence of an alcoholic beverage;

(2) if there was 0.04 percent or more by weight of alcohol in the person's blood, or 40 milligrams or more of alcohol per 100 milliliters of the person's blood, or 0.04 grams or more of alcohol per 210 liters of the person's breath, it is presumed that the person was under the influence of an alcoholic beverage.

(b) For purposes of this chapter, percent by weight of alcohol in the blood is based upon milligrams of alcohol per 100 milliliters of blood.

(c) The provisions of (a) of this section may not be construed to limit the introduction of any other competent evidence bearing upon the question of whether the person was or was not under the influence of an alcoholic beverage.

(d) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of the person's own choosing administer a chemical test in addition to the test administered at the direction of a law enforcement officer. The failure or inability to ~~obtain~~ adjust procedures or to obtain, meet requirements listed in (1) an additional test by a person does not preclude the admission of evidence relating to ~~the test taken at the direction of a law enforcement officer~~ eyewitness identification; the fact that the person under arrest sought to obtain such an additional test, and failed or was unable to do so, is likewise admissible in evidence.

(e) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the test, including the results of it, shall be made available to the person or person's attorney.

AMERICAN CIVIL LIBERTIES UNION of ALASKA

AMERICAN CIVIL LIBERTIES UNION OF ALASKA FOUNDATION
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

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TONY STRONG, Juneau

ZACH FICK, Anchorage
EMMA HILL, Anchorage
STUDENT ADVISORS

March 16, 2012

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
State Capitol
Juneau, AK 99801
via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

Re: SB 200: Improved Eyewitness Identification
ACLU Review

Dear Chair French and Vice-Chair Wielechowski:

Thank you for the opportunity to provide written testimony with respect to Senate Bill 200, which improves the procedures for eyewitnesses to identify criminal suspects.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. In that context, **we support this legislation.**

This Bill Improves the Reliability of Eyewitness Identification to Strengthen Prosecutions and Minimize False Convictions

The proper goal of the criminal justice system is to convict the guilty and acquit the innocent while respecting individuals' constitutional rights. Mistaken eyewitness testimony frustrates this aim. As Chair French articulated in his sponsor statement, eyewitness identification, while powerful, is not infallible. Indeed, it is its confluence of persuasiveness and fallibility that has led to hundreds of false convictions. This bill is an important step to mitigate the risk of false prosecutions and convictions,

which will protect Alaskans by increasing the odds that the guilty will be convicted and the innocent will be spared.

The ACLU of Alaska supports this bill because it limits the likelihood that an eyewitness will be influenced, intentionally or not, by police. It helps to protect Alaskans' constitutional right to be free from improper prosecution and it enhances the accuracy of legitimate prosecutions.

We are pleased that the Judiciary Committee is considering Senate Bill 200 and we hope that it passes without significant amendment. Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us
Senator John Coghill, Senator_John_Coghill@legis.state.ak.us

john m. murtagh
attorney at law

1101 west seventh avenue
Anchorage, Alaska 99501

Phone (907) 274-8664
Fax (907) 258-6419

February 27, 2012

Senator Hollis French
State Capitol Room 417
Juneau AK, 99801
e-mailed to Cindy_Smith@legis.state.ak.us

Re: Senate Bill Establishing
Certain Procedures Related to the
Identification Suspects by
Eyewitnesses to criminal offenses

Dear Senator French,

Thank you for taking the time to address a very important issue. The problems with suggestive identification techniques have resulted in the convictions of many individuals who were later exonerated by unquestionable DNA evidence. The courts in Alaska are often presented with questions regarding the accuracy of identification procedures. There is no doubt that standardization of the procedures and incorporating the latest scientific knowledge will help assure the accuracy of fact finding as well as providing the courts with guidance.

Although I am sure you are familiar with the case of **Tegoseak v. State,** 221 P.2d 345 (Alaska App., 2009), I would recommend it to others interested in this issue. In that case, the Alaska Court of Appeals did a thorough survey of the current science and law. Many of those concerns are addressed in this draft bill.

I would, however, request that the bill be amended to require "sequential" presentation of the images, rather than a "simultaneous presentation". Science teaches us that with the simultaneous presentation of an array of photos, the witness often picks the photo "least unlike" the offenders. When the photos are presented individually and sequentially, the witness does not engage in the often erroneous comparison process.

Sequential viewing is the procedure adopted by the Wisconsin Attorney General, the California Commission of the Fair Administration of Justice, and by North Carolina (see discussion at page 359 of *Tegoseak.)*

There is now a wealth of science showing, perhaps contrary to common belief, that eyewitness testimony is fraught with error.

Based on my 39 years of criminal defense practice, I can assure you that this bill is an excellent starting point to use science to reduce that potential. I am not able to be the hearing today due to a court conflict so I hope that this letter may be considered instead.

Sincerely yours,

John M. Murtagh
Attorney at law

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **SB 200**
Fiscal Note Number
Publish Date

Identifier (file name) SB200-DOC-OC-02-24-12
Title "An Act establishing procedures for eyewitness identification"
Sponsor Senator French
Requester Senate Judiciary

Dept. Affected DOC
Appropriation Administration and Support
Allocation Office of the Commissioner
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by Leslie Houston, Director
Division Department of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Department of Corrections

Phone 907-465-3339
Date/Time 02/24/12 1045AM
Date 2/24/2012

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 200

Analysis

This legislation amends AS 12.50 by adding new section Article 4. Identification of Persons by Eyewitnesses. Should this legislation pass, it will place a requirement on law enforcement agencies conducting eye witness identification proceedings shall adopt specific procedures for conducting photo and live lineups; require the Department of Public Safety to create, administer, and conduct training programs in the methods, technical aspects, and scientific findings related to eyewitness proceedings under AS 12.50.300-12.50.399; and, provides a section on definitions for purposes of AS 12.50.300-12.50.399.

There is no fiscal impact on the Department of Corrections.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 200**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB200-LAW-CRIM-02-24-12
Dept. Affected: Law
Title: An Act establishing procedures related to the identification of suspects by eyewitnesses to criminal...
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Senator FRENCH
Requester: (S) Judiciary
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 2/24/12 3:30 PM
Approved by: Michael C. Geraghty, Attorney General — Date 2/24/2012
Department of Law

(Revised 1/17/2012 OMB)

STATE OF ALASKA **BILL NO.** SB 200
2012 LEGISLATIVE SESSION

Analysis

SB 200 creates minimum requirements for lineups for eyewitness identification procedures by police agencies. It requires the Department of Public Safety to train law enforcement officers in conducting lineups.

The bill would probably increase litigation concerning the validity of identification procedures, particularly in cases arising from small police agencies. But we expect to be able to address this litigation with current resources.

The Department of Law anticipates zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB200**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB200-DOA-PDA-2-23-12
Title: Eyewitnesses and Lineups
Sponsor: Senator French
Requester: Senate Judiciary

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner — Phone: 907 334-4414
Division: Public Defender Agency — Date/Time: 2/23/12 2:30 PM
Approved by: John Cramer, Deputy Commissioner — Date: 2/23/2012
Department of Administration

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB200

Analysis

SB200 amends AS 12.50 by adding new sections governing eyewitness identification. This bill outlines procedures that police must follow when conducting lineups. These procedures include requiring police to obtain and record eyewitnesses' statements, in their own words, that detail specific information about their observations prior to being shown a lineup. This bill also requires, whenever practical, the lineup be conducted by an administrator who is not directly participating in the investigation and is unaware of suspect's identity in the lineup.

This legislation will have no fiscal impact on the Public Defender Agency.

LexisNexis®

Analysis
As of: Feb 27, 2012

FRANK MOSES TEGOSEAK, Appellant, v. STATE OF ALASKA, Appellee.

Court of Appeals No. A-10074, No. 2248

COURT OF APPEALS OF ALASKA

221 P.3d 345*; *2009 Alas. App. LEXIS 185

December 11, 2009, Decided

PRIOR HISTORY: [**1]

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge. Trial Court No. 3AN-05-5489 Cr.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant sought review of an order from the Superior Court, Third Judicial District, Anchorage (Alaska), which denied his motion to suppress a citizen's identification of him as the driver of a vehicle and convicted him of felony driving under the influence and driving with a suspended license.

OVERVIEW: Defendant was convicted of felony driving under the influence and driving with a suspended license. Both the grand jury and the trial jury heard the testimony of a private citizen who observed a vehicle being driven in an obviously impaired manner, and who later identified defendant from a photographic lineup as having driven the vehicle. On appeal, the court found that it was extremely unlikely that the grand jurors' decision to indict defendant would have been altered if they had known that the citizen's wife identified another man's photograph in the photo lineup, or if they had known that the citizen's identification of defendant's photograph was uncertain. Even assuming that the lineup procedure was unnecessarily suggestive, any error was harmless beyond a reasonable doubt. An officer testified that a codefendant stated that he had taken over driving the vehicle after a stop because defendant had been driving so poorly that he thought defendant was going to kill them. The jury would have convicted defendant even if the citizen had been unable to identify him at trial, and even if the jurors had been told that the citizen was unable to identify the driver in the photo lineup.

OUTCOME: The court affirmed the judgment of the trial court.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Grand Juries > Evidence Before the Grand Jury > Exculpatory Evidence

[HN1] Under Alaska law, a prosecutor must inform a grand jury of exculpatory evidence known to the government.

Criminal Law & Procedure > Grand Juries > Evidence Before the Grand Jury > Exculpatory Evidence

[HN2] For purposes of defining a prosecutor's duty to present evidence to a grand jury, courts define the term "exculpatory evidence" narrowly: it means only the type of evidence that tends, in and of itself, to negate the defendant's guilt.

Criminal Law & Procedure > Eyewitness Identification > Fair Identification Requirement

[HN3] A witness's identification is admissible if the State demonstrates the reliability of the identification under the totality of the circumstances. The phrase "totality of the

circumstances" encompasses five factors: 1) the witness's opportunity to view the perpetrator during the crime; 2) the witness's degree of attention; 3) the accuracy of any prior description given by the witness; 4) the witness's level of certainty when making the identification; and 5) the length of time between the crime and the witness's identification.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Constitutional Errors
Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Definitions
[HN4] Constitutional error requires reversal of a criminal conviction unless the error is shown to be harmless beyond a reasonable doubt. In assessing whether an error is harmless beyond a reasonable doubt, the question is whether there is a reasonable possibility that the error affected the result.

COUNSEL: Tracey Wollenberg, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant.

Eric A. Ringsmuth, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Richard A. Svobodny, Acting Attorney General, Juneau, for the Appellee.

JUDGES: Before: Coats, Chief Judge, and Mannheimer and Bolger, Judges. BOLGER, Judge, concurring.

OPINION BY: MANNHEIMER

OPINION

[*346] MANNHEIMER, Judge.

Following a jury trial, Frank Moses Tegoseak was convicted of felony driving under the influence and driving with a suspended license. [1] Both the grand jury that indicted Tegoseak and the trial jury that convicted him heard the testimony of Robert Maestas, a private citizen who observed a Ford Bronco being driven in an obviously impaired manner, and who later identified Tegoseak from a photographic lineup as having driven the Bronco.

1 *AS 28.35.030(n)* and *AS 28.15.291(a)(1)*, respectively.

In pre-trial motions, Tegoseak argued that the photographic lineup was conducted in an unduly suggestive manner and that the superior court should therefore suppress Maestas's [**2] identification of Tegoseak as the driver. The superior court, employing the test set forth in *Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)*, concluded that Maestas's identification of Tegoseak was reliable despite the arguable flaws in the way the photo lineup was conducted. The court therefore denied Tegoseak's motions and allowed evidence of the identification to be admitted at Tegoseak's trial.

We agree with Tegoseak that there are troublesome aspects to the photographic lineup procedure in this case. In addition, we are aware that scientific research conducted during the past thirty years has cast doubt on the analysis set forth in *Manson v. Brathwaite* -- raising questions as to whether that analysis is a valid method for ascertaining whether a photographic lineup has yielded a reliable identification. Nevertheless, we conclude that any potential suggestiveness in the photo lineup in Tegoseak's case was harmless beyond a reasonable doubt, and we therefore affirm Tegoseak's convictions.

Underlying facts

On June 19, 2005, Robert and Michelle [*347] Maestas [2] were driving around the Anchorage area, looking for a house to purchase. They observed a Ford Bronco that was [**3] traveling slower than normal. While they watched, the Bronco swerved and repeatedly changed lanes without apparent cause.

2 Robert and Michelle Maestas were formerly known as Robert and Michelle Mayer; they changed their names prior to Tegoseak's trial. Thus, in the grand jury transcript, they are referred to as "Mayer". But at trial, and in the parties' briefs to this Court, they are referred to by their current names.

The Maestases could see three occupants in the vehicle: two males in the front seat, and another person in the back seat. Using her cell phone, Michelle Maestas called the Anchorage Police dispatcher to report this vehicle because she and her husband thought that the driver was drunk.

After making this call to the police, the Maestases temporarily lost sight of the Bronco, but they came upon it again a few moments later. It was still being driven in an erratic manner. The Maestases then decided to follow the car. Michelle Maestas called the Anchorage police once more, and this time she remained on the line to assist officers in locating the Bronco as it continued to travel through Anchorage.

The Maestases followed the Bronco to the parking lot of Bell's Nursery on DeArmoun [**4] Road, where the Bronco stopped. Robert Maestas parked the couple's

car near the nursery parking lot in order to keep an eye on the Bronco while they waited for the police to arrive.

While the Bronco was parked in the Bell's Nursery parking lot, Mr. and Mrs. Maestas saw the driver and the front-seat passenger emerge from the Bronco and swap places. While these two men were outside the vehicle, Robert Maestas was able to observe them.

Maestas described both males as having dark or black hair. He described the man who was originally driving the Bronco (and who switched to the passenger seat in the nursery parking lot) as having a "slender build" and "wearing a black shirt". Maestas described the other man (that is, the man who was originally in the passenger seat of the Bronco, and who began driving the vehicle after the switch in the nursery parking lot) as "a heavier set gentleman" who was wearing a "white ... T-shirt".

After the two men switched places in the Bronco, the Bronco left the nursery parking lot and headed east on DeArmoun Road. Just after the Bronco started up DeArmoun, Anchorage Police Officer Gerald Asselin arrived and conducted a traffic stop of the vehicle.

When Officer Asselin [**5] stopped the Bronco, he found that there were two men and one woman inside the vehicle. The man driving the vehicle was wearing a white T-shirt, and the male passenger was wearing a black shirt. The driver was later identified as Edgar Henry, while the passenger was identified as Tegoseak.

Because his dispatcher had informed him that the driver and passenger had just switched places, Officer Asselin questioned both men about who had been driving the Bronco before the vehicle stopped at Bell's Nursery. Based on the men's responses (both verbal and non-verbal), Asselin concluded that Tegoseak had been driving the vehicle prior to the stop at Bell's. In particular, as Asselin later testified, Edgar Henry told the police that he had taken over driving the Bronco after the stop at Bell's Nursery because Tegoseak had been driving so poorly that he thought Tegoseak was going to kill them.

Officer Asselin conducted field sobriety tests of both Henry and Tegoseak. Based on the results of these tests, the officer concluded that he had probable cause to arrest both men. A subsequent breath test showed that Tegoseak had a blood alcohol content of .227 percent (in other words, just under three times [**6] the legal limit). [3]

3 *See AS 28.35.030(a)(2).*

One week later, on June 26th, Officer Asselin contacted Robert and Michelle Maestas and asked them to view a photographic lineup to see if they could identify the two men in the Bronco. This photo lineup was comprised of two separate arrays of six photographs [*348] each. The two arrays were composed so that each of them contained a photograph of one of the men in the Bronco. (The first array contained a photograph of Edgar Henry in position number 5; the second array contained a photograph of Frank Tegoseak in position number 5.)

Asselin showed the photo arrays to Mr. and Mrs. Maestas separately. He told them that he would show them two photo arrays, and he asked them to let him know if they "recognize[d] any of those individuals as being involved." When Asselin showed the first array to Mr. and Mrs. Maestas, he reminded them that, if they did not recognize anyone from the first array of six photographs, he had a second set of photographs to show them.

After Michelle Maestas examined the two arrays of photographs, she picked one person from among the twelve photographs as having been in the Bronco -- but that person was neither Henry nor Tegoseak.

After [**7] Michelle Maestas failed to identify either Henry or Tegoseak, Officer Asselin showed the photographs to Robert Maestas.

When Robert Maestas was shown the first array of six photographs, he selected *three* people from this array as the possible occupants of the Bronco. Maestas told Asselin, "[I]t could have been [number] 1 or 3 that was driving [the Bronco originally], and [number] 5 that was in the passenger seat. ... I think [that], between 1 and 3, those two [photographs] kind of look like the driver that we originally pulled up next to."

The three photographs that Maestas selected were of Edgar Henry and two "fillers" -- that is, two people whose photographs were included, not because the police suspected that they were connected to this incident, but rather to fill out the six-photograph array.

At this point -- that is, after Maestas had apparently identified both the original driver and the original passenger from among the photographs in the first array -- Asselin said to Maestas, "Let me try to at least show you [the second array of photographs]; then you can see the entire compilation of photos. So far, you've said [that] 1 and 3 [in the first array] could be the driver." Asselin [**8] then showed Maestas the second array of six photographs.

When Maestas looked at the second array of photos, he told Asselin that photograph number 5 in this second array could also potentially be the initial driver of the Bronco (that is, the man who was driving before the driver and passenger switched places in the nursery parking lot). Maestas told Asselin that the man "originally driving the car" was "either [number] 5 in [the second array] or [number] 1 in [the first array]." (As we

explained above, Tegoseak's picture was number 5 in the second photo array.)

Asselin asked Maestas to memorialize his identifications on two different "Photographic Lineup" forms. These forms (one for each of the two arrays) apparently had boxes on them that corresponded to the photographs in the arrays. Asselin asked Maestas to place a check mark on the boxes that corresponded to the photographs he had selected.

On the first of these forms (*i.e.,* the form that corresponded to the first photo array), Maestas stated that he identified photograph number 5 in the first array as the man who began driving the Bronco *after* [**9] the car stopped at the nursery. (As explained above, this photograph was of Edgar Henry.)

Asselin then handed Maestas the second form (*i.e.,* the form corresponding to the second photo array). Although Maestas had told Asselin that he was uncertain whether the original driver of the Bronco was photograph number 1 from the first array or photograph number 5 from the second array, Asselin directed Maestas to put a check mark in only one box -- the box corresponding to photograph number 5 from the second array.

Asselin invited Maestas to add a handwritten notation explaining his uncertainty about the identification. Maestas wrote on the form, "When looking at the photos, both [photograph] # 5 on [the second array] and [photograph] # 1 on [the first array] look similar to the original driver that we ... first [saw]."

However, Officer Asselin added his own separate notation to this form. In the officer's notation, he indicated that Maestas had [*349] made an identification from the photographs, and that the person Maestas had identified was Frank Tegoseak (who, as we explained above, was photograph number 5 in the second array). Maestas signed this form.

This same ambiguity concerning the nature or precision [**10] of Maestas's identification is reflected in the testimony given by Asselin and Maestas at the evidentiary hearing.

At the hearing, Asselin testified that he did not remember the exact exchange between himself and Maestas, "but it was clear to [him], based upon the [conversation], that [Maestas] identified [photograph] number 5 [in the second array] as being ... the person who was originally driving the vehicle." Asselin conceded that, while he was showing the photographs to Maestas, "there was some conversation ... where [Maestas] would say, 'Well, [photograph] number 1 [in the first array] looks very similar', but [Maestas] came back to it being [photograph] number 5 [in the second array]."

When Maestas testified at the evidentiary hearing, he acknowledged that he was hesitant to positively identify either photograph 1 from the first array or photograph 5 from the second array -- "because the two photos look similar, ... and [because it was] a week [after the incident]." When Maestas was asked whether he had made a "positive identification", he responded, "I wouldn't say it was 100 percent positive; no."

After hearing this testimony, and after listening to Officer Asselin's tape recording [**11] of the photo lineup procedure, Superior Court Judge Michael L. Wolverton concluded that the photo lineup procedure was not unduly suggestive.

In particular, Judge Wolverton found that the "filler" photographs were well-selected (in the sense that the people depicted in these filler photographs were visually similar to the two suspects). The judge suggested that this fact (the good selection of fillers) was potentially the explanation for Robert and Michelle Maestas's difficulty in selecting Henry and Tegoseak from among the photographs.

Judge Wolverton also concluded that there was nothing wrong in Officer Asselin's act of drawing Robert Maestas's attention to the second array after Maestas had already declared that the first array contained photographs of both suspects. The judge found that Asselin was not trying to suggest that Maestas had chosen prematurely, or to suggest that the second array contained a photograph of at least one of the suspects. Rather, Judge Wolverton found that Asselin was simply "trying to explain" the procedure (*i.e.,* the need to examine both arrays) and to request that Maestas withhold his final judgement until he had seen all twelve of the photographs.

Judge [**12] Wolverton also concluded that, given the circumstances of the case, there was essentially no possibility of a misidentification. The judge remarked that "this might [have been] a different situation if [the occupants of the Bronco] had not been followed and [immediately arrested] -- almost like a hand-off to the police -- [but] we know who was in the vehicle [when] it was stopped, [and the photo lineup] was [merely] a determination as to ... who was driving when" -- a determination that was made "easier ... because one [man] was wearing a white shirt and [the other] was wearing a black shirt."

Tegoseak's claim that his indictment is flawed because the prosecutor did not inform the grand jury that Michelle Maestas failed to identify Tegoseak as one of the men in the Bronco, and that Robert Maestas's identification of Tegoseak was less than certain

[HN1] Under Alaska law, a prosecutor must inform the grand jury of exculpatory evidence known to the government. [4] Tegoseak contends that the prosecutor in his case violated this duty in two ways. First, Tegoseak argues that the prosecutor was required to tell the grand jury that Michelle Maestas had not identified Tegoseak as one of the men in the Bronco [**13] -- and that, in fact, the only man she identified as having been in the Bronco [*350] was a "filler". Second, Tegoseak argues that the prosecutor was required to tell the grand jury that Robert Maestas's identification of Tegoseak was less than certain.

> 4 *Cameron v. State, 171 P.3d 1154, 1157 (Alaska 2007); Frink v. State, 597 P.2d 154, 164-66 (Alaska 1979).*

[HN2] For purposes of defining a prosecutor's duty to present evidence to the grand jury, we have defined the term "exculpatory evidence" narrowly: it means only the type of evidence "that tends, in and of itself, to negate the defendant's guilt". [5] Thus, we have held that a witness's failure to identify the defendant as the perpetrator of the crime, or the fact that a witness's post-event description of the perpetrator did not match the defendant, was not "exculpatory evidence", given the other evidence linking the defendant to the crime. [6]

> 5 *See, e.g., Cathey v. State, 60 P.3d 192, 195 (Alaska App. 2002); State v. McDonald, 872 P.2d 627, 639 (Alaska App. 1994).*
>
> 6 *See, e.g., Wilkie v. State, 715 P.2d 1199, 1201-02 (Alaska App. 1986); Tookak v. State, 648 P.2d 1018, 1020-21 (Alaska App. 1982). See also Abruska v. State, 705 P.2d 1261, 1272-73 (Alaska App. 1985)* [**14] (holding that the victim's potentially contradictory statements about whether it was the defendant who shot him were not exculpatory evidence).

For example, in *Haag v. State, 117 P.3d 775 (Alaska App. 2005)*, the defendant (who was white) argued that the prosecutor violated the duty to present exculpatory evidence because the prosecutor failed to inform the grand jurors that a witness to the crime initially reported that the two perpetrators were black. *Id. at 777-78*. We held that, in the context of the other evidence linking Haag to the crime, the witness's description of the perpetrators as black was not exculpatory: "The fact that [the witness] initially stated that both robbers were black is certainly something that a defense attorney might use to attack [the witness's] later identification of Haag as one of the robbers. But this is not information that *negates Haag's guilt in and of itself" Haag, 117 P.3d at 778* (emphasis added).

In Tegoseak's case, the police responded quickly to the Maestas's report of the Bronco being driven in an erratic manner, and there is essentially no doubt that, when the police stopped the Bronco, the vehicle contained the same people that Michelle and [**15] Robert Maestas had observed minutes before. As Judge Wolverton noted when he issued his rulings on Tegoseak's pre-trial motions, there is essentially no possibility that Tegoseak was misidentified as one of the drivers of the Bronco.

Given these circumstances, it is extremely unlikely that the grand jurors' decision to indict Tegoseak would have been altered if they had known that Michelle Maestas identified another man's photograph in the photo lineup, or if they had known that Robert Maestas's identification of Tegoseak's photograph was uncertain. For this reason, either the evidence that Tegoseak complains of was not "exculpatory" as that term is defined in our cases, or the State's failure to apprise the grand jurors of this evidence was harmless.

Tegoseak's claim on appeal, and a preliminary discussion of the problems that can be encountered in post-crime eyewitness identification

On appeal, Tegoseak renews his argument that the photographic lineup procedure was unduly suggestive, and he further argues that when the facts of the case are analyzed under the factors set forth in *Brathwaite,* this analysis fails to demonstrate that Robert Maestas's identification of him was reliable.

The [**16] photographic lineup in this case does not appear to be overtly suggestive. As Judge Wolverton noted when he denied Tegoseak's suppression motion, the ten filler photographs are quite similar to the two suspects' photographs in facial characteristics and hair style. In other words, Henry's and Tegoseak's photographs did not stand out from the filler photographs in such an obvious way as to practically single out these two men as the suspects.

But even though a photographic lineup may not be overtly suggestive, the procedure by which the photographs are selected, the procedure by which a photo lineup is displayed to a witness, and the procedure by which the witness's identification is elicited, can engender suggestiveness -- even when [*351] this is not the intention of the officer conducting the lineup.

Medical researchers have long recognized the phenomenon that testers influence the persons they are testing. Even though one might think that a test subject's physical reaction to an experimental drug or therapy would remain the same regardless of the mental attitude or desires of the researchers, the truth is that the re-

searchers' expectations regarding the experiment *do* make a difference to [**17] the result.

One well-known problem is the "placebo effect": the recognized phenomenon that when a person *believes* that they are receiving an effective drug or therapy, their body will physically react in accordance with their belief -- even though the substance or treatment they are receiving would ordinarily do nothing to alleviate their condition.

But the placebo effect is compounded by another difficulty known as the "Clever Hans effect". This is the problem that researchers, because of their knowledge of the experiment and their expectations concerning the outcome, can unintentionally influence the responses of the test subjects -- by unconscious signaling, or by small differences in how they interact with test subjects who are receiving the real drug or therapy as opposed to a placebo. [7]

7 In 1891, William von Osten began displaying his horse, "Clever Hans", to the public. Hans would answer questions by tapping his hoof -- either by tapping out a number, or by tapping out the letters of the alphabet that corresponded to the answer (with one tap equaling "A", two taps equaling "B", and so on). Hans could apparently perform mathematical calculations, tell time, identify musical intervals, [**18] and name people.

Von Osten did not intend to trick people. He believed that animals possessed an intelligence equal to that of humans -- and, in his quest to prove this, he attempted to teach many animals how to do simple calculations. However, Clever Hans was the only animal who showed any ability.

The first scientific test of Hans's ability was conducted in 1904 by Professor Carl Stumpf. Stumpf looked for evidence of cheating or trickery to explain Hans's ability, but he found none, and he subsequently endorsed Hans's abilities as genuine. Following Professor Stumpf's endorsement, Clever Hans became a sensation, and people flocked to see him.

In 1907, a group of thirteen scientists (the "Hans Commission") re-tested Clever Hans. Their test is now recognized as a classic experiment in psychology.

Because there was no evidence of connivance or cheating, the scientists began with the assumption that Hans did have an ability of some kind, and they designed their experiment to find out what this ability was.

Hans was tested inside a large tent to avoid outside distractions, such as spectators. The experiment was designed in the following way:

> . A large number of questions were used, to eliminate [**19] the effects of chance;
>
> . Different people posed these questions, in case Hans was picking up signals from his owner, von Osten;
>
> . The questioners sometimes knew the answers to the questions they were asking, but other times they did not;
>
> . The questioners would stand at different distances from Hans during different trials; and
>
> . Some trials were run with Hans blinkered.

The first important finding was that Clever Hans needed to have visual contact with the questioner in order to answer correctly. The farther away the questioner stood, the less accurate Hans became. And when Hans's peripheral vision was obstructed by blinkers, his ability to answer was diminished even further.

The other major finding was that Hans could only answer a question correctly if the questioner also knew the answer to the question. When the questioner did not know the answer to the question, Hans could not give the answer.

These facts -- that Hans could only answer a question correctly if it was posed by a questioner who knew the answer, and only if Hans could see the questioner -- led the psychologists to perceive that Hans was not using intelligence to work out the answers; rather, he was responding to visual cues [**20] given unwittingly by the questioner. These unwitting visual cues took the form of increases or decreases in the tension of the questioner's body, changes in the questioner's facial expression, and other involuntary movements that the questioner would make when Hans reached the right answer.

The results of the experiment with Clever Hans led the scientists to the key insight that an

animal's -- or a person's -- behavior can be influenced by subtle and unintentional cues given by a questioner or researcher.

This effect -- now known as the "Clever Hans effect" -- is one of the primary reasons why scientific tests (and, in particular, clinical trials) must be done using a "double-blind" method: a procedure in which neither the questioner/researcher nor the subject being tested knows the nature of the information required or the treatment being administered.

Source: John Jackson, "Clever Hans" (2005), available at:

www.skeptics.org.uk/article.php?dir=articles&article=clever_hans.php

[*352] In the late 1980s (that is, approximately ten years after the Supreme Court issued its decision in *Brathwaite*), Professor Gary L. Wells of Iowa State University noted that photographic lineups could be affected by [**21] these same difficulties -- that the police officers who conducted photographic lineups could unwittingly be influencing the witnesses they were interviewing. Professor Wells accordingly proposed that photo lineups (like medical trials) should be conducted using a double-blind procedure. [8] In other words, (1) the lineup should be conducted by an officer who does not know which photograph in the lineup represents the suspect and which photographs are fillers, and (2) because witnesses will naturally assume that any photo lineup will contain a photograph of the person whom the police suspect, the witness must affirmatively be told that the lineup may not contain a photograph of the perpetrator.

8 Gary L. Wells, *Eyewitness Identification: a system handbook* (Carswell Legal Publications, 1988); Gary L. Wells & C. A. Elizabeth Luus, "Police Lineups as Experiments: Social methodology as a framework for properly conducted lineups", 16 Personality and Social Psychology Bulletin 106-117 (1990).

In his article, "The Double-Blind Lineup: General Comments and Observations" (2008), [9] Professor Wells notes that police officers can inadvertently (and often unconsciously) influence witnesses by such seemingly [**22] innocuous comments as, "I noticed you paused on photograph number 3". Or, when a witness hesitates between two or three photographs, the officer might say to the witness, "Tell me about photograph 2" -- directing the witness's attention to the photograph that the officer knows is the suspect, rather than to one of the fillers. Or, when the witness has picked a filler, the officer might ask, "Is there any other photograph that stands out to you?" -- a question that obviously would not be asked if the witness had selected the suspect.

9 Available at: www.psychology.iastate.edu/~glwells/homepage.htm, through the link "Meet the double-blind lineup".

According to Professor Wells, there are currently close to 200 cases in which (1) the police identified a person as the suspected perpetrator of a crime, (2) the suspect was included in a photographic or live lineup, (3) the witness who viewed the lineup identified the suspect as the perpetrator, (4) the suspect was convicted, but (5) post-trial DNA testing proved that the suspect was innocent.

One of these cases recently received national publicity through the publication of the book, *Picking Cotton,* [10] and the related story that aired in March [**23] 2009 on the CBS television news show "60 Minutes". [11]

10 Jennifer Thompson-Cannino & Ronald Cotton, with Erin Torneo, *Picking Cotton: Our Memoir of Injustice and Redemption* (St. Martin's Press, 2009).

11 Both the video and the text of the 60 Minutes story, "Picking Cotton" (originally aired in March 2009) are available at:

www.cbsnews.com/stories/2009/03/06/60minutes/main4848039.shtml

As described in the 60 Minutes story, in the summer of 1984, a man broke into Jennifer Thompson's apartment and raped her at knife-point. During the attack, Thompson forced herself to stay alert and study this man carefully -- his physical characteristics, his voice, his accent -- so that, if she survived, she could make sure that he was convicted and sentenced to prison. After about half an hour, Thompson tricked the rapist into letting her get up to fix him a drink; she then took the opportunity to escape from her apartment through the back door.

Police Detective Mike Gauldin interviewed Thompson at the hospital, and he worked with Thompson to assemble a composite sketch of the rapist. After the sketch was broadcast, the police started to receive tips

about the crime. One of these tips was about a young man [**24] named Ronald Cotton. Cotton worked at a restaurant near Thompson's apartment, and he had a previous conviction for breaking and entering, as well as a juvenile record for sexual assault.

Three days after the rape, Detective Gauldin assembled a six-photograph lineup that contained Cotton's picture, and then he called Thompson to come view the lineup. Thompson studied the photographs for about [*353] five minutes, and then she identified Cotton as the man who had raped her.

Thompson subsequently picked Cotton from a live lineup. After Thompson made the live lineup identification, the police informed her that she had picked the same man that she previously selected from the photo lineup. When she heard this, Thompson remembers thinking, "Bingo! I did it right; I did it right."

Later, Thompson identified Cotton again when she testified at his trial. Cotton was convicted and sentenced to life imprisonment plus 50 years.

While in prison, Cotton met a man named Bobby Poole. Poole looked very similar to Cotton; in fact, some of the prison stewards mistook them for each other. Then Cotton heard, from a fellow inmate, that Poole had admitted raping Thompson. Based on this information, Cotton received a [**25] new trial.

At the new trial, Cotton's lawyers summoned Bobby Poole to court so that Jennifer Thompson could see him. But when Thompson looked at Poole, she did not recognize him. Indeed, she felt nothing but anger toward Cotton and his attorneys. She remembers thinking, "How dare you question me? How dare you [suggest that I] could possibly have forgotten what my rapist looked like? ... The one person [I] would never forget?"

Cotton was again convicted. This time, he received two life sentences.

Seven years later (ten years after the rape), Cotton watched the O.J. Simpson trial on television and learned about DNA. He convinced his lawyer to investigate the possibility of DNA testing. By luck, the Birmingham, North Carolina police still had the rape kit, and the kit contained enough viable sperm to conduct a DNA test. The result: Bobby Poole was indeed the rapist -- and Ronald Cotton was innocent.

For people who care about our justice system, this is a bittersweet tale. A man spent a decade in prison for a crime he did not commit -- and yet he was finally exonerated, and he has even become reconciled with the woman whose testimony sent him to prison. Cotton and Thompson are now friends; they [**26] co-authored the book *Picking Cotton,* which describes the case, and they are prominent advocates of reform in police identification practices.

But for the judges and lawyers who administer and actively participate in the criminal justice system, this story has a more fundamental and disquieting aspect. What happened in Ronald Cotton's case lends anecdotal support to the scientific research that casts doubt on the validity of the *Brathwaite* method for assessing the reliability of eyewitness identifications.

The test established by the Supreme Court in Manson v. Brathwaite, and how this test relates to the facts of the Ronald Cotton case

In *Brathwaite,* the United States Supreme Court had to decide whether an eyewitness identification should be suppressed if the identification procedure was unnecessarily suggestive. As this Court explained in *Anderson v. State, 123 P.3d 1110, 1115 (Alaska App. 2005)*, the precise issue confronting the Supreme Court in *Brathwaite* was whether, following an unnecessarily suggestive identification procedure, the witness's identification should be automatically suppressed or whether, instead, the government should be given the opportunity to demonstrate the reliability [**27] of the witness's identification despite the undue suggestiveness of the procedure.

In *Brathwaite,* the Supreme Court rejected a rule of *per se* suppression and instead held that [HN3] the witness's identification would be admissible if the State could demonstrate the reliability of the identification under the "totality of the circumstances". [12] The Supreme Court defined this phrase, "totality of the circumstances", as encompassing the five factors that the Court had set forth in an earlier decision, *Neil v. Biggers:* [13]

> [*354] . the witness's opportunity to view the perpetrator during the crime,
>
> . the witness's degree of attention,
>
> . the accuracy of any prior description given by the witness,
>
> . the witness's level of certainty when making the identification, and
>
> . the length of time between the crime and the witness's identification.

Brathwaite, 432 U.S. at 114, 97 S.Ct. at 2253 (citing *Neil v. Biggers, 409 U.S. at 199-200, 93 S.Ct. at 382*).

12 *Brathwaite, 432 U.S. at 112-14, 97 S.Ct. at 2252-53*, citing *Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199*; *388 U.S.*

293, 87 S.Ct. 1967, 1972, 18 L. Ed. 2d 1199; *388 U.S. 293, 87 S. Ct. 1967, 18 L.Ed.2d 1199 (1967).*
13 *409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).*

With the *Brathwaite* reliability test in mind, we now return to the facts [**28] of the Ronald Cotton case.

One of the crucial events in that case occurred after Bobby Poole was finally identified as a suspect in the case and Ronald Cotton was granted a second trial. At that second trial, Poole was summoned to court so that Jennifer Thompson would have the opportunity to view Cotton and Poole together.

As we explained earlier in this opinion, Thompson spent half an hour in Poole's presence during the rape. During that half hour, Thompson consciously paid attention to, and made a point of remembering, Poole's physical features and the nuances of his voice and speech, so that she could be sure to identify him later. Nevertheless, when Thompson saw the two men together in court, she did not recognize Poole as her attacker. Indeed, even though the two men apparently had similar physical features, Thompson did not even experience any uncertainty. She reaffirmed that Cotton was the rapist -- and Cotton was convicted again.

Years later, when the DNA test results finally proved Cotton's innocence, Detective Gauldin (the detective who conducted the photo lineup) was the one who went to tell Thompson that Poole was the rapist and that Cotton was innocent. Thompson's reaction [**29] was, "No, that can't be true; it's not possible. ... I know Ronald Cotton raped me. There's no question in my mind."

Moreover, even after Thompson knew the truth, her memory of the event remained the same: whenever she thought about the rape, or dreamed about it, it was still Cotton's face that she saw.

This last aspect of the case is particularly troubling: the fact that Thompson's false memory of Cotton as her attacker persisted even after Thompson knew (intellectually) that Cotton was innocent and that Poole had committed the rape. This false memory was clearly the result of the identification procedures employed during the investigation -- because Thompson was not previously acquainted with Cotton, and because she was in Poole's presence (not Cotton's presence) during the half-hour of the rape. But if the five *Brathwaite* factors are applied to this case, it is obvious that a court would have allowed Thompson to testify and identify Cotton as her assailant -- even if the court had found that the photo lineup was unnecessarily suggestive.

Thompson had plenty of opportunity (a half an hour) to view the rapist. And during the attack, she consciously devoted her attention to the rapist, [**30] so that she would remember his physical characteristics and voice. Shortly after the rape, when Thompson was interviewed at the hospital, she worked with the police to develop a composite drawing of her attacker -- a drawing that resembled Ronald Cotton. And when Thompson was shown the photo lineup three days after the rape, she declared she was certain that Cotton was her attacker.

One might conclude that this is simply a rare and unfortunate instance where application of the *Brathwaite* factors would lead a court to admit evidence of a mistaken identification. But there is another, more troubling conclusion that could be drawn: that the *Brathwaite* factors are inadequate to the task of sorting reliable identifications from unreliable identifications.

A photographic lineup is generally conducted in private between a police investigator and a witness. As Professor Wells notes in the recent article he co-authored with Deah S. Quinlivan concerning the validity of the *Brathwaite* factors, when a police investigator conducts a photographic lineup, the investigator interacts directly with the witness: in effect, they have a conversation [*355] about the photos. [14] If the police investigator knows which [**31] photograph represents the person who is under suspicion, there is a danger that the witness's identification will be influenced by the officer's knowledge and expectations, even though, seemingly, there is nothing suggestive about the procedure:

> [When the police investigator knows which photograph is the suspect's photograph, this] creates a situation very similar to one that has been extensively studied by psychological scientists in other contexts in which a tester's knowledge or expectations influence the person being tested in a direction that is consistent with the tester's knowledge or expectations. ... There is no presumption that these tester effects are the result of intentional efforts by the tester or that the tester is aware of influencing the person being tested. ... [T]he concern here is with the kinds of influences that are unintentional, natural by-products of the [personal] interaction.

Wells & Quinlivan at 7-8.

14 Gary L. Wells & Deah S. Quinlivan, "Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: Thirty Years Later" [*i.e.*, 30 years after *Brathwaite*], 33 Law and Human Be-

havior 1-24 (2009), DOI [Digital Object Identifier] 10.1007/s10979-008-9130-3.

Moreover, the *Brathwaite* decision appears to be premised on the assumption that, despite the suggestiveness of an identification procedure, a witness retains a "true" memory of the event which may be independently sufficient to reliably identify the perpetrator -- [**32] if the witness had an adequate opportunity to observe the perpetrator, if the witness was paying attention, etc. In effect, the five *Brathwaite* factors are the test that a court uses to determine if the witness is relying on this presumed independent memory rather than on the result suggested by the identification procedure.

Indeed, even the dissent in *Brathwaite* subscribes to this notion that a witness retains a "true" memory of the event that exists independent of the suggestive photo lineup or show-up, and that this memory can be retrieved despite the previous suggestive procedure. Justice Marshall, writing in dissent, suggested that "when a prosecuting attorney learns that there has been a suggestive confrontation", the prosecutor can "easily" cure this error by "arrang[ing] another lineup under scrupulously fair conditions." *Brathwaite, 432 U.S. at 126-27, 97 S.Ct. at 2259.*

But as Professors Wells and Quinlivan point out in their article on *Brathwaite,* "the dominant view among psychological scientists [is] that, once an eyewitness has mistakenly identified someone, that [mis-identified] person 'becomes' the witness' memory[,] and the error will simply repeat itself [in subsequent [**33] identifications]." [15]

15 *Id.* at 9.

This observation is vividly corroborated by the facts of the Ronald Cotton case. Even when Jennifer Thompson was confronted with Bobby Poole (the real rapist) in court, she had no recollection of him, and she re-affirmed her identification of Ronald Cotton as her attacker. Indeed, this false memory persisted even after Thompson *knew* that the memory was false: she continued to see Ronald Cotton's face when she thought back to the rape even after she learned that the DNA testing had demonstrated Cotton's innocence.

Moreover, even assuming that a "true" memory exists independently of a witness's exposure to a suggestive identification procedure, there is reason to doubt whether the five *Brathwaite* factors are a valid method for judging whether a witness's testimony reflects that independent memory.

For instance, according to the Wells and Quinlivan article, when a witness is asked to estimate how long they were able to observe the perpetrator of a crime, the witness will often grossly over-estimate the amount of time the perpetrator was in their view -- especially if the witness was under stress or anxiety at the time they observed the events. [16] Similarly, a witness [**34] will often inaccurately minimize the amount of time that [*356] their view of the perpetrator was blocked by another person or a physical obstruction. [17]

16 *Id.* at 10.
17 *Id.*

Perhaps more troubling are the results of experiments showing that the comments of a police investigator can alter a witness's perception or memory of how long they were able to view the perpetrator, and how good their view was. In a series of experiments, witnesses were given a poor view of a simulated crime, and then they were shown a photo lineup that did *not* include the culprit. [18] The experiment centered on those witnesses who (mistakenly) identified one of the people in the lineup as having committed the crime. The lineup administrator would tell some of these witnesses, "Good; you identified the suspect in this case", while the administrator would make no suggestive remark to the others. [19]

18 *Id.*
19 *Id.*

Later, when all of these witnesses were asked, "How good was the view that you had of the culprit?" and "How well could you make out the details of the culprit's face?", the overwhelming majority of witnesses who heard no confirmatory remark conceded that, even though they had made an identification from the lineup, their view was not very good and [**35] they could not easily make out the details of the culprit's face. [20] On the other hand, the witnesses who received a confirmatory remark from the lineup administrator had very different perceptions of their own experience. Even though these witnesses had the same poor view of the crime, about 25 percent of them reported that they had a "good" or "excellent" view of the crime, and 20 percent of them declared that they could easily make out the details of the culprit's face. [21]

20 *Id.*
21 *Id.*

The results of these experiments suggest that if the evidence in support of the first *Brathwaite* factor -- opportunity to view -- is based solely on the self-reporting of the witness, then a court would need to know (and try to take account of) what was said to the witness during the identification procedure. In other words, there is reason to believe that this first *Brathwaite* factor is *not* independent of the suggestive identification procedure.

Similarly, many experiments have shown that when a witness receives a confirmatory suggestive remark following their identification of a person in a lineup, this tends to inflate the witness's own perception of how much attention they were paying to the perpetrator of the [**36] crime -- the second *Brathwaite* factor. [22]

22 *Id.* at 11.

The third *Brathwaite* factor -- the witness's degree of certainty in their identification -- is obviously crucial to all stages of a criminal investigation. A witness's certainty (or lack of certainty) may influence whether a person is charged at all, or whether the prosecutor takes the case to trial, and if the case goes to trial, how much weight the jury will give to the witness's testimony.

Of course, life provides many instances of people who are certain about something but who are nevertheless mistaken. The question is: is there a valid correlation between a witness's certainty and the correctness of their identification?

Studies have shown that, among witnesses who make an identification (either correct or mistaken) from a lineup, the statistical correlation between the witness's certainty and the correctness of their identification can be as high as 0.41. [23] (Some studies suggest that the correlation is lower.) To put this figure in perspective, the statistical correlation between height and sex in human beings is considerably higher than 0.4. In other words, these studies suggest that you would have much better success in predicting a person's [**37] sex if you knew their height than you would have in predicting the accuracy of a witness's identification if you knew the witness's degree of certainty. [24]

23 *Id.* at 12.
24 *Id.*

[*357] Nevertheless, the fact that there is a positive correlation between a witness's certainty and the accuracy of their identification means that a witness's degree of certainty is *some* indication of the accuracy of their identification. [25]

25 *Id.*

However, as is the case with *Brathwaite* factors one and two, a lineup administrator's confirmatory remark can have a substantial influence on a witness's degree of certainty. In one study, for example, witnesses who mistakenly identified someone from a lineup were later asked whether they had been "positive" or "nearly positive" when they made their identification. Of the witnesses who did not receive a confirmatory remark from the lineup administrator, only 15 percent reported that they had been "positive" or "nearly positive" when they made their selection from the lineup. However, among the witnesses who received a confirmatory remark following their mistaken identification, 50 percent reported that they had been "positive" or "nearly positive" when they made their selection. [26]

26 *Id.*

As Professors Wells [**38] and Quinlivan observe, one crucial aspect of this experiment is that these witnesses were asked *after the fact* to report on their degree of certainty *at the time they made their identification.* [27] In other words, the lineup administrator's suggestive confirmatory remark was not altering the witness's degree of certainty at the time they made their selection from the lineup. Rather, the confirmatory remark was altering the witness's memory -- their *recollection* of their degree of certainty at that earlier time.

27 *Id.*

This finding has potential importance to a judge's evaluation of a witness's testimony -- in particular, the witness's self-report of their degree of certainty -- at any pre-trial hearing on the *Brathwaite* factors. It suggests that a witness's self-reported degree of certainty is not necessarily trustworthy.

The fourth *Brathwaite* factor -- the "accuracy" of the witness's pre-lineup description of the perpetrator -- suggests a logical error. One can not know whether a witness's description of the perpetrator is "accurate" unless one knows who the perpetrator is.

As illustrated by the Ronald Cotton case, the fact that a witness may have accurately described the defendant in advance [**39] of the lineup, and then selected the defendant's photograph from the lineup, does not prove guilt unless the witness's recollection of the perpetrator is accurate. To conclude that a witness's pre-lineup description was "accurate" (in the sense of describing the true perpetrator of the crime) simply because the witness's description fits the physical characteristics of the defendant is to assume the very fact that needs to be proved.

Instead of the "accuracy" of a witness's pre-lineup description, the fourth *Brathwaite* factor is more properly concerned with the *consistency* between the witness's pre-lineup description of the perpetrator and the physical characteristics of the person whom the witness later selects in the lineup, as well as the *degree* of this consistency (*i.e.,* the amount of detail in the witness's pre-lineup description, and how much of that detail is consistent with physical characteristics of the person whom the witness selected in the lineup).

This fourth *Brathwaite* factor suffers from an underlying analytical weakness. The probative value of this fourth factor -- *i.e.,* the consistency between a witness's pre-lineup description of the culprit and the physical characteristics [**40] of the person who is later selected in the lineup -- hinges in large measure on the assumption that the composition of the lineup has not been influenced by the witness's pre-lineup description of the culprit. This assumption is often false. It is common for the police to rely on the witness's pre-lineup description when they select which photographs to include in a lineup -- because the witness's description is often one of the primary clues that the police rely on when they begin to narrow the field of potential suspects.

Moreover, some studies have shown that when witnesses are confronted with a photo [*358] lineup, they tend to select the person who looks most like their memory of the culprit, even when none of the photos matches their memory exactly. [28] This is apparently what happened in the Ronald Cotton case.

28 *Id.* at 13.

Even though Detective Gauldin did not expressly tell Thompson that the photo lineup contained a photograph of the person whom the police suspected, Thompson made the assumption that her attacker's photograph was among the six photos displayed to her, and she believed that her job was to identify the correct photograph. She later told "60 Minutes" reporter Leslie Stahl, "I ... remember [**41] almost feeling like I was [taking] an SAT [multiple choice] test. You know, where you start narrowing down your choices. You can [immediately] discount A and B, [and then you work on the others]."

What does this mean in terms of *Brathwaite*'s fourth factor? Professors Wells and Quinlivan suggest the following hypothetical: The police assemble a photo lineup, and they include a photo of the defendant because the defendant seems to match the witness's description of the perpetrator. The witness views the lineup and identifies the defendant. A judge later rules that the lineup was unnecessarily suggestive because the filler photographs were too dissimilar to the photograph of the defendant. But then, based on the consistency between the witness's pre-lineup description of the culprit and the defendant's physical characteristics, the judge concludes that the witness's identification of the defendant is reliable. [29] One might well question whether courts should indulge in this form of circular reasoning.

29 *Id.*

The judicial, legislative, and [**42] *law enforcement response to this research*

Despite the tension between the *Brathwaite* analysis of reliability and the results of the past three decades' psychological research into the dynamics of eyewitness identification, few courts have conducted a critical re-examination of the *Brathwaite* approach.

The New York Court of Appeals was the first court to reject *Brathwaite* on state constitutional grounds: *People v. Adams, 53 N.Y.2d 241, 423 N.E.2d 379, 383-84, 440 N.Y.S.2d 902*; *53 N.Y.2d 241, 423 N.E.2d 379, 440 N.Y.S.2d 902, 905-07 (N.Y. 1981).* The New York court concluded that the *Biggers/Brathwaite* approach to assessing the reliability of eyewitness identifications was flawed, and so the New York court instead adopted the *per se* rule of exclusion that the United States Supreme Court rejected in *Brathwaite.* In other words, the New York court ruled that evidence of an eyewitness identification arising from an unnecessarily suggestive police-arranged identification procedure must be suppressed, [**43] regardless of the *Brathwaite* factors. However, the New York decision -- rendered in 1981 -- was not based on the nascent scientific research into eyewitness identification; rather, it was based on the New York court's agreement with the *Brathwaite* dissenters that it was simply too risky to try to assess the reliability of an identification made during an unnecessarily suggestive lineup or showup.

Beginning in the early 1990s, courts began to demonstrate awareness of the growing scientific criticism of the *Brathwaite* approach. In *State v. Ramirez, 817 P.2d 774, 780-81 (Utah 1991)*, the Utah Supreme Court adopted a modified version of the *Brathwaite* factors. The court's primary aim was to craft factors that "more precisely define[d] the focus of the relevant inquiry", and that expressly recognized the problem of witness suggestibility -- a difficulty that has no comparable emphasis in the *Biggers/Brathwaite* factors. *See Ramirez, 817 P.2d at 781.*

See also State v. Hunt, 275 Kan. 811, 69 P.3d 571, 576 (Kan. 2003) (adopting the *Ramirez* formulation of the test for reliability of eyewitness identifications because the *Ramirez* factors "present an approach to the identification issue which heightens ... the reliability [**44] of such identification[s]" and which represents "a refinement in the [*Brathwaite*] analysis").

In *Commonwealth v. Johnson, 420 Mass. 458, 650 N.E.2d 1257, 1261-65 (Mass. 1995)*, the Massachusetts Supreme Court followed the lead of the New York Court of Appeals and rejected the *Brathwaite* reliability analysis in [*359] favor of a *per se* rule of exclusion (under the Massachusetts constitution). The Massachusetts court relied in part on the research conducted into eyewitness identification by Professors Gary Wells and Elizabeth Loftus. *See Johnson, 650 N.E.2d at 1262 n. 9.*

The year 2005 appears to have been a turning point of sorts in the judicial recognition of the growing body of research into the psychological dynamics of eyewitness identification. In that year, two state supreme courts issued opinions that contained lengthy citations and discussions of the research literature: *State v. Ledbetter, 275 Conn. 534, 881 A.2d 290, 311-13 (Conn. 2005)*, and *State v. Dubose, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, 591-92 (Wis. 2005)*. The Connecticut court in *Ledbetter* concluded that the research data was not convincing enough to abandon the *Brathwaite* analysis, but the Wisconsin court in *Dubose* held that an eyewitness identification arising from an unnecessarily [**45] suggestive showup must be suppressed, without regard to any *Brathwaite* reliability analysis.

See also *Smith v. Smith, unpublished, 2003 U.S. Dist. LEXIS 17642, 2003 WL 22290984, *10-14 (S.D. N.Y. 2003)*, a habeas corpus decision which contains a lengthy discussion of the various potential flaws in eyewitness identification testimony. The federal court acknowledged that the current research casts doubt on *Brathwaite,* but the court denied the defendant's petition for habeas corpus relief because the state courts that affirmed the defendant's conviction were not clearly wrong to follow the prevailing *Brathwaite* analysis.

In addition to these few courts that have responded to the psychological research on eyewitness identification, several legislatures and police agencies have enacted new laws or policies based on this research.

In September 2005, the Wisconsin Attorney General issued a "Model Policy and Procedure for Eyewitness Identification". [30] This policy recommended that all police agencies utilize a double-blind, sequential photo lineup procedure. [31] The salient details of this procedure are: (1) the officer conducting the photo lineup does not know who the suspect is, (2) the witness being interviewed is told [**46] that the culprit may not be included among the photographs, (3) the photographs are shown to the witness one at a time, rather than in a group, (4) the witness is not told in advance how many photographs they will see, and (5) the witness is asked to rate each photograph separately (*e.g.,* "yes", "no", or "unsure") -- thus minimizing the danger that the witness will view the procedure as a "multiple choice" test where their task is to pick the one photo that best matches their memory of the culprit. [32]

30 This model policy is available at: www.doj.state.wi.us/dles/tns/eyewitnesspublic.pdf

31 *Id.* at 3.

32 *Id.* at 3 & 8-9. On page 9 of the model policy, the Wisconsin Attorney General recommends that the following instructions be given to each witness before a photo lineup:

> In a moment, I am going to show you a series of photos. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included. Even if you identify someone during this procedure, I will continue to show you all the photos in the series.
>
> Keep in mind that things like hair styles, beards, and mustaches can be easily changed and that complexion colors may look slightly different [**47] in photographs.
>
> You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator.
>
> The photos will be shown to you one at a time and are not in any particular order. Take as much time as you need to look at each one. After each photo, I will ask you "Is this the person you saw [insert description of act here]?" Take your time answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"
>
> Because you are involved in an ongoing investigation, in order to prevent damaging the investigation, you should avoid discussing this identification procedure or its results.
>
> Do you understand the way the photo array procedure will be conducted and the other instructions I have given you?

In April 2006, the California Commission on the Fair Administration of Justice issued its "Report and Recommendations Regarding Eye Witness Identification Procedures". In this report, the California Commission

likewise recommended that all police agencies in the state adopt a double-blind, sequential [*360] photo lineup procedure. [33]

33 California Commission on the Fair Administration of Justice: [**48] Report and Recommendations Regarding Eye Witness Identification Procedures (April 2006), page 5. Available at: www.psychology.iastate.edu/~glwells/California_commission.pdf

In October 2008, a series of articles that appeared in the Dallas Morning News highlighted a number of misidentifications (and ensuing wrongful criminal convictions) that resulted from suggestive showups and photo lineups. [34] These articles contained a discussion of the current psychological research regarding eyewitness identification, and they prompted the Dallas Police Department to alter their procedures.

34 *See, e.g.,* Steve McGonigle & Jennifer Emily, "18 Dallas County cases overturned by DNA relied heavily on eyewitness testimony", Dallas Morning News, October 10, 2008. Available at:

www.dallasnews.com/sharedcontent/dws/dn/dnacases/stories/101208dnproDNAlineups.-263c4f5.html#slcgm_comments_anchor

For more information on this series of articles, see:

www.dallasnews.com/sharedcontent/dws/spe/2008/dna

In September 2009, USA Today reported that five other states (Connecticut, Georgia, Maryland, North Carolina, and West Virginia) and several major metropolitan police departments are changing their identification procedures [**49] in response to the psychological research and the wealth of information confirming that innocent people are indeed being convicted based on mistaken eyewitness identifications. [35]

35 Kevin Johnson, "States Change Police Lineups After Wrongful Convictions", USA Today, September 17, 2009. Available at:

www.usatoday.com/news/nation/2009-09-16-police-lineups_N.htm

In particular, North Carolina has enacted a statute that mandates double-blind, sequential photo lineup procedures. *See* North Carolina Statute 15A-284.52. According to the USA Today article, one of the leading proponents of this revision of North Carolina's lineup procedures was Michael Gauldin -- the chief investigator in the Ronald Cotton case. [36]

36 *Id.*

There can be little doubt that these recent changes in the legal system have been prompted by the confluence of two forces: the increasing amount of psychological research in this area, and the concurrent development of forensic DNA testing. As Professors Gary L. Wells, Amina Memon, and Steven D. Penrod noted in their article, "Eyewitness Evidence: Improving Its Probative Value", 7 Psychological Science in the Public Interest 45 (2006), the last two decades have seen no major change [**50] in how eyewitness identification scientists approach their work; rather, "the advent of forensic DNA testing has changed the way the legal system views eyewitness evidence." [37]

37 *Id.* at 48.

The changing attitude of the legal system is attributable to the fact that "the development of forensic DNA testing in the 1990s [uncovered] definitive cases of the conviction of innocent people in the United States", and that "[e]yewitness identification error was at the heart of the evidence used to convict the vast majority of these innocent people." [38] In other words, DNA testing provided the physical science confirmation of what the psychological scientists had been suggesting for years -- and this made the non-scientific world begin to pay close attention.

38 *Id.*

A re-examination of the photo lineup in Tegoseak's case

As we explained earlier in this opinion, Officer Asselin -- the lead investigator in this case -- knew that Edgar Henry was photograph number 5 in the first array of six photos and that Frank Tegoseak was photograph number 5 in the second array. Asselin first showed the two photographic arrays to Michelle Maestas, but she failed to identify either Edgar Henry or Frank Tegoseak. Thus, [**51] when Asselin next showed the photographs to Robert Maestas, Asselin knew that this was his

final opportunity to get an identification of either Henry or Tegoseak from an eyewitness.

[*361] As we also explained, when Robert Maestas was shown the first array, he "correctly" identified the photograph of Henry (photograph number 5) as being the original passenger in the Bronco, but Maestas also "incorrectly" identified photographs 1 and 3 of this first array as being the original driver.

Asselin knew that this was "wrong", so he said to Maestas, "Let me try to at least show you [the second array of photographs]; then you can see the entire compilation of photos. So far, you've said [that] 1 and 3 [in the first array] could be the driver." Asselin then showed Maestas the second array of six photographs.

When Judge Wolverton ruled on Tegoseak's motion to suppress Maestas's identification, the judge concluded that Asselin's remark to Maestas was not meant to suggest that Maestas should keep looking at more photos because he had not yet successfully identified the culprit. Rather, Judge Wolverton concluded that Asselin's remark was simply intended to clarify the photo lineup procedure -- to remind Maestas [**52] that there were two photo arrays, and that Maestas should examine both arrays before he made his final selections.

But as we have explained, for purposes of assessing the suggestiveness of the photo lineup, the crucial aspect of the communication between Asselin and Maestas was not Asselin's intention when he made these remarks; instead, the crucial aspect was the information or the suggestion that Maestas may have drawn from these remarks.

If -- as appears likely -- Maestas knew or suspected that the photo arrays contained photographs of the two men whom Asselin knew to be the culprits (the two men who had been found in the Bronco), then when Asselin told Maestas to keep looking at more photos even though Maestas had apparently identified both men, Asselin's remark could well have suggested to Maestas that his initial selection was "wrong", and that he had not yet identified the true culprit.

This is not to imply that Asselin was consciously attempting to manipulate Maestas's choice. The suggestiveness of the procedure could have been inadvertent on Asselin's part -- but real, nonetheless.

The potential suggestiveness of Asselin's remark could only have been amplified later, when Maestas [**53] viewed the second array and told Asselin that the original driver of the Bronco was either photograph 1 in the first array (a filler) or photograph 5 in the second array (Tegoseak). Rather than have Maestas place an "X" in the two boxes representing these two photos, Asselin directed Maestas to place an "X" in only one box, the box representing Tegoseak's photo -- although Asselin invited Maestas to add a written notation explaining that Maestas thought that the other photo might also be the driver.

Asselin's reaction to Maestas's ambiguous identification was not necessarily an attempt to manipulate Maestas. Rather, it might be attributed to the phenomenon of "observer bias". Both scientific researchers and police investigators can fall prey to the normal human tendency to pay attention to, or to overemphasize, the results that they expect or hope to see -- and the converse tendency to fail to observe, or to ignore the significance of, results they do not expect or hope to see.

But while Asselin may not have intended to manipulate Maestas, his directions to Maestas may have affected Maestas's perception of the identification procedure. Asselin's directions to Maestas potentially constituted [**54] an inadvertent suggestion that photograph number 5 in the second array (*i.e.,* Tegoseak) was Maestas's "real" selection, and that photograph number 1 in the first array was only a subsidiary alternative selection.

As we explained earlier in this opinion, one of the important findings of the psychological research in this area is that, if a witness makes an identification during a suggestive lineup procedure and then the witness receives some kind of confirmation from the officer administering the lineup, the witness's after-the-fact perception of their identification can be altered: the witness can become artificially more confident in their identification. There is reason to believe that this is what happened to Robert Maestas.

[*362] At the evidentiary hearing on Tegoseak's motion to suppress, Maestas readily admitted that he had selected two photos from the lineup as "look[ing] similar to" the man who was the original driver of the Bronco -- "both [number] 5 on [the second array] and number 1 on [the first array]". When Maestas was asked whether his identification was "positive", Maestas conceded that it was not.

But by the time of Tegoseak's trial ten weeks later, Maestas viewed the matter [**55] differently. When Maestas was questioned about the photo lineup at trial, he now declared that, even though he had initially wavered between photograph 1 in the first array (a filler) and photograph 5 in the second array (Tegoseak), he soon perceived that Tegoseak was the man he had seen in the Bronco.

Here is Maestas's testimony on direct examination:

> *Prosecutor:* And [with regard to] Photo Lineup B, were you able to make an identification [from that array]?

Maestas: I was. ... [Photograph] number 5 ... was the original driver.

Prosecutor: And when you were asked to make the identification, did you hesitate somewhat between [photograph] 5 [in the second array] and [photograph] 1 [in the first array]?

Maestas: I did; I did. But then I had recalled the way that the gentleman's ears kind of stuck out, after the fact.

Prosecutor: Okay. And when you say "the gentleman" -- that's [photograph] number 5?

Maestas: ... Five. Uh-huh. [affirmative]

And here is Maestas's testimony on redirect examination:

Prosecutor: You said [with regard to] the first photo lineup [that] you weren't 100 percent sure. Did you become more sure as you looked at those photos?

Maestas: I -- I became more sure when I recollected, like [**56] I said, what I really distinctly remember was the way the ears stuck out from the head, [from the] side of the head.

Prosecutor: Okay.

Maestas: That's why I was able to make my determination a little easier.

Prosecutor: And that's how you selected [photograph] number 5 [in the second array]?

Maestas: Yes.

Maestas said nothing about the distinctiveness of Tegoseak's ears during the photo lineup procedure itself, nor did he say anything about this physical feature when he testified at the suppression hearing. Rather, as Maestas himself admitted, "[he] became more sure when [he] recollected". By the time of Tegosaek's trial, Maestas "distinctly remember[ed] ... the way the ears stuck out from ... the side of [Tegoseak's] head", and he declared that he was able to identify Tegoseak's photo based on this physical feature. This is arguably an example of the kind of altered memory and altered certainty described in the research literature.

Why we conclude that the potential suggestiveness of the photo lineup is harmless beyond a reasonable doubt

We have covered a lot of ground in this opinion: a lengthy discussion of the Ronald Cotton case, a look at some of the scientific research on the subject of [**57] eyewitness identification, and a description of the recent efforts in various states and cities to improve eyewitness identification procedures. All of this naturally leads to the question: What, if anything, should this Court do in response to what society has learned in the thirty years since *Brathwaite?*

We first wish to clarify that the Ronald Cotton case is simply one case, albeit a prominent one. What happened in that case may provide reason to question the *Brathwaite* analysis, but it does not constitute scientific proof that the *Brathwaite* analysis is flawed.

Second, we acknowledge that our examination of the past three decades' research has not been an exhaustive one. There are many studies in this area that we have not mentioned. And, of course, there are questions in the scientific community about the methodology of particular studies, as well as questions regarding the significance that should [*363] be attributed to the results of various studies.

We do not intend to endorse a particular viewpoint or reach a definitive conclusion at this time. Rather, our goals are more modest: to acknowledge that psychological research into eyewitness identification has furnished new insights into [**58] the potential suggestiveness of identification procedures, and to point out that this research has illuminated the related problem that a suggestive identification procedure can work an after-the-fact alteration of a witness's memory of a criminal episode.

We need go no further at the present time -- because, even assuming that the photo lineup procedure in Tegoseak's case was unnecessarily suggestive, any error was harmless beyond a reasonable doubt. [39]

> 39 [HN4] Constitutional error requires reversal of a criminal conviction unless the error is shown to be harmless beyond a reasonable doubt. *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705*; *386 U.S. 18, 87 S.Ct. 824, 828, 17 L. Ed. 2d 705*; *386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967)*; *Raphael v. State, 994 P.2d 1004, 1010 (Alaska 2000)*. In assessing whether an error is harmless beyond a reasonable doubt, "the question is whether there is a reasonable possibility that the error affected the result."

Dailey v. State, 65 P.3d 891, 896 (Alaska App. 2003), citing *Smithart v. State, 988 P.2d 583, 589 (Alaska 1999)*.

When Judge Wolverton ruled on Tegosaek's suppression motion, he noted that "this might [have been] a different situation if [Tegoseak and Henry] had not been followed and almost [handed]-off to the [**59] police." As Judge Wolverton correctly pointed out, the case against Tegoseak was not a "whodunit" -- not a case where the police knew that a crime had been committed but did not know the identity of the perpetrator. Rather, the State's evidence clearly established (1) that the Bronco was being driven in an erratic manner, (2) that two men -- one wearing a white shirt and one wearing a black shirt -- got out of the Bronco in the nursery parking lot and switched places before getting back in the vehicle and driving off, (3) that only two men were in the Bronco when the police stopped the vehicle minutes later -- one wearing a white shirt and one wearing a black shirt, and (4) that, following the stop, both men initially admitted to having just driven the car. In addition, Officer Asselin testified that Edgar Henry told the police that he had taken over driving the Bronco after the stop at Bell's Nursery because Tegoseak had been driving so poorly that he thought Tegoseak was going to kill them.

Given all of this, we have no doubt that the jury would have convicted Tegoseak even if Maestas had been unable to identify Tegoseak at trial, and even if the jurors had been told that Maestas [**60] was unable to identify the driver in the photo lineup, or that Maestas had identified one of the filler photos as being the driver. In other words, even if the superior court should have granted Tegoseak's motion to suppress Robert Maestas's identification of him as the initial driver of the Bronco, any error was harmless beyond a reasonable doubt.

Conclusion

The judgement of the superior court is AFFIRMED.

CONCUR BY: BOLGER

CONCUR

BOLGER, Judge, concurring.

The research cited in the lead opinion suggests that we should consider changes to the test we currently use to determine whether a photo lineup procedure satisfies due process of law. But I choose to withhold my opinion on this issue until both parties have the opportunity to submit their positions on the relevant research either through an evidentiary hearing or adversarial briefing. This occasion will more likely arise in a case where the research is essential to the outcome. In the present case, I agree with the conclusion of the lead opinion: Any error in the photo lineup procedure was harmless beyond a reasonable doubt.

The Why and How of Blind Sequential Lineup Reform

By: Jeanne Schleh, Assistant Ramsey County Attorney (retired)

The Problem: Faulty Eyewitness Identification & DNA

Eyewitness identification evidence is often crucial in criminal investigations. In a growing number of well-publicized cases nationwide, however, DNA evidence has exonerated individuals who were convicted primarily on the basis of mistaken eyewitness identification. This has brought public scrutiny on law enforcement procedures and challenged law enforcement practitioners both to reexamine long-standing practices and to implement change that will reduce the likelihood of such misidentifications in the future. No one in law enforcement has any interest in convicting the innocent.

More than a decade ago, in the wake of early DNA exonerations, the U.S. Department of Justice's National Institute of Justice (NIJ), under then-Attorney General Janet Reno, formed an inter-disciplinary study group (including law enforcement, prosecutors, defense attorneys and scientists) to examine eyewitness identification procedures. Its landmark 1999 report[1] began the national law enforcement discussion of lineup reform. Already at that time, the scientific evidence from years of laboratory studies showed that eyewitness identification was more reliable when blind sequential procedures were used, but questions remained on whether the reform was practical in the field. Nonetheless, some states and local law enforcement jurisdictions throughout the country, convinced by the scientific evidence, successfully implemented lineup reform following the NIJ report.[2]

Now, ten years after the report, the scientific evidence supporting the reform has only grown, and a growing number of law enforcement agencies have adopted it and found it to be practical in the field.[3] However, even in states like Minnesota and Wisconsin in which substantial headway has been made, there is a long way to go to achieve universal compliance with lineup reform.

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[1] See, U.S. Department of Justice research report, *Eyewitness Evidence, A Guide for Law Enforcement* (October 1999). New Jersey's *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (August 2001); North Carolina's *Recommendations for Eyewitness Identification* (October 2003).

[2] Early reform jurisdictions include the states of New Jersey and North Carolina and the Northampton (MA) Police Department (its then Capt. Ken Patenaude was an NIJ panel member). See, New Jersey's *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (April 2001), www.njdcj.org/agguide/photoid.pdf and *North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification* (October 2003), www.ncids.org/New%20ID.pdf and that state's subsequent enactment in 2006 of sections 15A-284.50 to 15A-284.53 of the *North Carolina General Statutes*, adopting its recommendations.

[3] These include, in Minnesota, the Minnesota Bureau of Criminal Apprehension, Ramsey County, Hennepin County and the Chaska Police Department; in Wisconsin, Milwaukee, Madison and more than 200 other Wisconsin agencies (following the Wisconsin Attorney General's 2005 recommendation that these changes be adopted statewide www.thejusticeproject.org/reports/model-policy-and-procedure); others include: Suffolk County (MA)(Boston and suburbs), Denver (CO), Westfield (MA), Virginia Beach (VA), Santa Clara County (CA) and Dallas (TX).

Rationale for Change to Blind Sequential Lineups

The most widely used law enforcement eyewitness identification procedure nationwide has long been the simultaneous photo array. The typical photo array contains six photos. It is common practice for an investigator with knowledge of the case, and the identity of the suspect, to show the photo lineup to witnesses.

However, 25 years of scientific research on memory and interview techniques convincingly demonstrates that the likelihood of mistaken identification drops sharply if lineups[4] are *blind*[5] (that is, conducted by someone who does not know who the suspect is) and *sequential*. When (as occurred in the DNA exoneration cases), the real perpetrator's photo *is not* present in the lineup, witnesses shown the photos simultaneously are up to three times more likely to identify someone than are witnesses shown the same photos sequentially. When the real perpetrator's photo *is* included in the lineup, laboratory studies show some reduction in the number of correct identifications made using the sequential method. However, that somewhat lower identification rate is offset by the much larger risk of misidentification using the simultaneous method if the perpetrator is not present.

The first meta-analysis[6] in 2001 of 30 laboratory tests comparing sequential and simultaneous photo displays[7] over 16 years of research reveals this differential in numerical terms. Specifically, in perpetrator-absent lineups (the scenario most like the DNA exoneration cases), there is an aggregate error rate of 27 percent (incorrect identification of a specific filler photo, the designated innocent suspect who looked most similar to the real perpetrator) for the simultaneous method compared to a 9 percent error rate when the sequential method was used. The simultaneous method, in short, encouraged guessing. There is a trade-off: In perpetrator-present lineups, the 2001 meta-analysis showed a 15 percent drop in correct identifications (from 50 percent in simultaneous to 35 percent in sequential displays). See Nancy Steblay, et. al., "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentation: A Meta-analytical Comparison," *Law and Human Behavior* 25, no. 5 (October 2001): 459-473.

In the six years following the 2001 meta-analysis, there was an explosion of additional studies. A follow-up meta-analysis, now aggregating the results of 70 tests over 22 years, confirms the significantly greater risk of mistaken identification for simultaneous lineups when the perpetrator is absent. The larger sample, moreover, shows the trade-off drop in incorrect identifications when the perpetrator is present to be lower than it appeared in 2001 (8 percent rather than 15).[8] Most scientists consider these results to be conclusive and the issue to be settled (as demonstrated by the lack of further studies since 2007).

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[4] The terms *lineup* and *photo display* are used interchangeably in this training bulletin.

[5] This procedure is sometimes also referred to as "double blind" to include the fact that the witness likewise does not know the location of the suspect in the sequence (or even if the suspect is included at all). Since this is implicit in any lineup, the term *blind* in this bulletin should be construed to cover both.

[6] Meta-analysis is a cumulative quantitative summary of outcomes across studies.

[7] All of the studies were blind or blinded since that is a presumption in the scientific method.

[8] Dr. Steblay presented this data at the John Jay College of Criminal Justice as "2001+6: An Updated Meta-analysis of Eyewitness Lineup Performance under Sequential versus Simultaneous Formats" (paper presented at conference entitled "Off the Witness Stand: Using Psychology in the Practice of Justice," March 1-3, 2007. This paper is pending publication.

This scientific data supporting the switch to blind sequential lineups as a means of increasing the accuracy of lineups and reducing the likelihood of misidentification is clear, as is the startling implication that the traditional law enforcement method of conducting photo lineups might have inadvertently increased the likelihood of mistaken eyewitness identifications.

On reflection, the reasons for this result also makes sense objectively: (1) Simultaneous photo display encourages *relative judgment* (i.e., a witness comparing photos side by side is more likely to pick a person who looks *most like* the perpetrator—regardless of whether the person is, in fact, the perpetrator). (2) The most professional and well-intentioned investigator who knows where the suspect is in the lineup cannot eliminate all possibility of unintentionally cueing the witness or responding to the witness's identification. Even the smallest response—like the investigator's eyes lighting up when the "right" person is picked—can artificially inflate the witness's level of confidence and convert a "looks like" into a positive identification. If the risk of administrator influence on lineup results (and, therefore, defense attack on those grounds) can be eliminated by having someone other than the investigator who knows the identity of the suspect conduct the lineup, why would we want to do it any other way?

The most common error in the DNA exoneration cases was the identification of a person the police suspected—a person who looked similar to the real perpetrator—but who turned out to be innocent. The typical simultaneous photo array shown in these cases did not contain the photo of the real perpetrator, and the mistaken eyewitness was, in effect, identifying a "filler" photo. Use of the blind sequential method removes, or at least greatly diminishes, the role of police error in the equation.

Essential Components: Sequential Display and Blind Administration (or Functional Equivalent)

Both sequential display and blind administration are necessary components of the reform. Switching from simultaneous to sequential photo displays alone could even increase misidentification, since there is a danger of inadvertently highlighting an individual suspect photo. On the other hand, in a law enforcement setting, an independent administrator may not always be available. The practical realities of conducting lineups under the time pressures and personnel constraints of a criminal investigation, especially in a small department, might mean only an investigator with knowledge of the case is available, or that other options would result in unacceptable delay. In these circumstances, an alternate method still maintaining the blind component may be used: Under this alternative, the investigator who knows the identity of the suspect may show the lineup—as long as it is done in a way that assures that he does not know and cannot see the order in which the photos are presented, and the witness knows this (and therefore will not be looking to the investigator for cues or validation). This is the functional equivalent of blind administration, sometimes referred to as the "blinded" method.

Practical Law Enforcement Experience with the New Method

In Minnesota, Hennepin County, Ramsey County, the Chaska Police Department and the Minnesota Bureau of Criminal Apprehension each have four or more years of experience with implementation of this reform. In each of these jurisdictions, the change has now become standard procedure and has proved no more difficult to administer than the old method.

Concerns that it would result in administrative complications or additional costs have turned out to be unwarranted.

In evaluating its program, Ramsey County discovered some surprising additional benefits: Although meta-analysis of laboratory studies showed some drop in correct identifications using the new methods (as the price paid for far fewer incorrect identifications), investigators using the new method in Ramsey County did not feel they were "losing" identifications and, moreover, felt more confident in identifications that were made. This perception is likely to be a consequence of less overall guessing by witnesses, as well as a reluctance to charge obviously marginal identification cases. Moreover, although Ramsey County investigators were trained on the alternative "blinded" method, in practice, most were able to find, and came to prefer using, an independent administrator. A concern widely expressed before implementation that lineups would be adversely affected if the administrator was not the investigator who had developed rapport with the witness turned out to be a nonissue. Finally, the bonus of adopting this reform has been that in court a major avenue of defense attack on the admissibility and reliability of eyewitness identification procedures used has been eliminated. Other jurisdictions that have adopted the change report a similar experience.

Elements of Eyewitness Lineup Protocol Change

Investigator training on the new method of doing lineups should include an explanation of the scientific data and rationale for change to blind sequential lineups (see above). Instruct that while blind administration by an independent administrator is the preferred route, alternative blinded procedures may be used. The key to implementing this reform is an understanding of what "blind" means and why it is important. Emphasize that this change in no way implies any doubt about the integrity and professionalism of the investigator but simply eliminates all possibility of even unintentionally cueing a witness or inflating a witness's level of confidence in any identification. This, in turn, eliminates these as potential issues in subsequent court proceedings.

Some jurisdictions prefer to use a lineup form (with or without a supplemental report); others instead write a general supplemental report for lineups. Regardless of approach, the following elements are necessary:

- Instructions to the administrator on how to do a blind sequential lineup
- Instructions to the witness (including different language depending on whether an independent or "blinded" administrator is conducting the lineup)
- Documentation of any witness reaction to any of the photos (verbal, physical or emotional)
- If an identification is made, documentation of the witness's level of certainty

A one page (two-sided) Sequential Photo Display Form, developed specifically for use by all Ramsey County law enforcement officers, is appended as an example of a form containing these elements. On the administrator side are all the instructions for the administrator, a section to be

filled out by the administrator during the photo display and a section to be filled out by the administrator after the photo display. On the witness side are the instructions to be read to the witness before the photo display (including alternative language, depending upon whether an independent administrator [IA] or "blinded" functional equivalent [FE] is used) and a section to be completed by the witness after the photo display. This form is designed to be self-explanatory so that an officer from the street with no knowledge of the case could be called in, if necessary, to be the independent administrator.

How to Do a Blind Sequential Lineup

There are several methods by which the photos may be displayed sequentially. All have in common that the witness sees only one photo at a time and must continue to view all photos even if a person is identified before all are shown.[9] After each photo is shown, it must be removed from view before the next photo is shown. Regardless of which method is used, a record must be kept of which photos were shown in which order to which witness.

The low-tech version can be as simple as numbering the photos and placing each in a separate folder bearing the same number (or for the blinded method, having someone else, including another investigator who knows who the suspect is or even a civilian employee, do this for the administrator). The witness is then instructed to look at the folders one at a time (for blinded method, have the witness open the folders in such a manner that the investigator cannot see the photos). Return the folder to the bottom of the pile before handing the witness the next folder, or keep remaining folders out of sight, so the witness does not know how many there are.

The "box with 6 doors" method, developed and used in the state of New Jersey since 2001, has also been widely used in Ramsey County. The standard 6-person simultaneous display is inserted in a box with six numbered doors, built specifically for this purpose. Only one door at a time is opened, and the doors are opened in numerical order. The box is equally adaptable to the blinded method since someone else can prepare the standard 6-pack lineup sheet and insert it in the box. The box is easily transportable to the field.

The high-tech version would be to download lineup photos to a laptop to be shown to the witness one at a time.[10] The witness must be instructed to continue forward only (i.e., may not go back to look at a prior photo). The display should start and end in black.

Do not repeat the display unless the witness requests it. If, after one rotation is completed, the witness requests to see the photos again, the entire array may be repeated. Even if the witness asks to see only one photo, the entire array must be shown. A record must be made of the

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[9] Continuing the photo display when the witness identifies a photo before all photos are shown avoids later legal criticism that the lineup was improperly truncated. In the circumstance that a witness makes an early "filler" pick without having seen the suspect's photo, it also allows an answer to the question of what would have happened had the witness seen the suspect's photo. Conversely, a witness may pick the suspect but then discredit this pick when a later photo is shown.

[10] An elegant software program has been developed by SunGard OSSI (North Carolina) for this purpose. It randomly sorts photos, assigns a discrete number to each lineup shown, maintains a record of which version each witness saw, guides witnesses through a series of questions on each photo (with a beep to prompt the administrator to ask follow-up questions if an identification is made), preserves an audio recording of all questions and answers (downloadable to CD) and generates a report of results including the photos shown, identifying who the suspect was and whom the witness picked. (See Jerry Farris, "Remote Lineup Application," *The Police Chief* 75, no. 8 (August 2008): 96-98.)

number of times the display was shown, and all photos must be shown each time in the same order as the original display. Since the scientific evidence establishes a sharp drop-off in the reliability of any identification made after two cycles, some departments will not allow more than two cycles. Certainly, no criminal charge should be based on an identification requiring more than two cycles. (All eyewitness identification cases should, in any event, have other corroborating evidence.)

Blind Administration

Emphasize the importance of using an independent administrator whenever possible. When the investigator has already interviewed and cultivated a relationship with the witness, he should simply explain that department policy requires another officer to conduct this procedure but that he will be available to talk to the witness as soon as the procedure is done. Whenever an independent administrator is used, the investigator who knows the identity of the suspect must remain out of sight of the witness when the photos are shown.

When no independent administrator is available, a functionally equivalent blinded method must be used to administer the lineup. "Blinded" means that the investigator administering the lineup who knows the identity of the suspect must (1) instruct the witness that he does not know the order of the photos or whether the person who committed the crime is in any of the photos and (2) have the witness view the photos in such a manner that the administrator cannot see which photo the witness is viewing.

Make clear that the blind component requirement is not because there is any question about their professionalism or integrity but because of human nature: It is natural for a witness to look to the investigator for validation, and it is natural for the investigator to be pleased the suspect is picked. The slightest reaction, such as seeing the investigator's eyes light up when the "right" person is picked, can instantly artificially inflate the witness's level of confidence in his or her selection. Blind administration eliminates this risk.

Instructions to the Witness

Before any photo display is shown, the witness should be instructed:

- The person who committed the crime may or may not be included
- I do not know whether any person being investigated is included **(blind)** ***or*** I do not know the order of the photos **(blinded)**
- Even if you identify someone during this procedure, I will continue to show you all photos in the series
- Keep in mind that a photo may be an old one; some things, like hair styles, can be changed, and skin tones may look slightly different in photos
- You should not feel you have to make an identification; it is just as important to clear innocent persons as it is to identify the guilty; whether or not you identify someone, the investigation will continue
- You will see only one photo at a time; they are not in any particular order; take as much time as you need to look at each one
- You should avoid discussing this procedure or the results with any other potential witness in the case

Role of Administrator During and After the Lineup

After the witness has looked at each photo, the administrator should ask, "Is this the person who [describe act committed]? If the answer is no, move on to the next photo. If the answer is yes, follow up with, "How certain are you of your selection?" The witness's exact answers must be documented for any yes answer. (If the witness asks whether you mean a percentage or on a scale of 1 to 10, tell him or her to use whatever method seems right to him or her.) Note also any physical or emotional reactions of the witness.

Be careful not to give the witness any feedback on his or her answer (such as "good work!" or "that's who we thought it was"). (Of course, an independent administrator who does not know who the suspect is will be unable to give such feedback.) Answers other than yes or no may also be helpful to the investigation and should likewise be documented. Even if an identification is made, continue showing the remaining photos in the array." After one cycle of the array has been completed, do not repeat the procedure unless requested by the witness. If requested, show all photos in the array, in the same order, and document any additional comments.

The administrator's report must indicate how many times the array was shown. Keeping track of the number of times photos are displayed before an identification is made provides an additional tool for evaluating the reliability of the identification. If the photo display is shown more than twice, the witness is likely to be "comparison shopping"—i.e., guessing. Documenting this alone is an improvement over the simultaneous display procedure, in which comparing photos to find the person most like the perpetrator (regardless of whether it is, in fact, the perpetrator) was always an inherent, but usually immeasurable, risk.

Many departments (including Ramsey County) complete their eyewitness identification procedure by asking the witness to fill out a form confirming the oral result in the witness's own handwriting. The portion of the Ramsey County form to be completed by the witness indicates how many photos were shown, a check-off that the witness either was or was not able to identify any person, a space to answer in the witness's own words the question, "How certain are you of your identification?" and a signature and date line. If the witness refuses to sign the form, the administrator writes "refused." The entire form, including the witness advisory and the portions completed by the administrator and the witness, is placed in the case file regardless of whether any identification is made. Ramsey County also has an alternate version of its form in simplified language as an option for use with young children, mentally impaired persons or persons with limited knowledge of English. (Both forms are available online at: www.co.ramsey.mn.us/attorney/SPDNA.asp.)

The administrator must also preserve the photo display used, including the order of photos. The 6-person template for simultaneous photo displays may be used for this purpose. If an identification is made, have the witness sign and date the photo.

Follow-up Interview by the Investigator

In cases in which an identification is made, after the witness has answered the level of certainty question, the case investigator who knows who the suspect is may follow up with a supplemental interview as needed. This is the time to develop as many additional facts as possible about

details of any identification made, including exploring what it was about the photo (or photos) selected that made the witness pick it, any follow-up on the witness's level of certainty or confidence in the selection or, in the case of multiple perpetrators, what each individual did.

It continues to be important that the investigator not provide any information that could artificially inflate the level of confidence the witness expressed in any selection. If a witness asks whether he or she has picked the "right" person, that question should not be answered (if at all) until the investigator has asked all follow-up questions and the investigation is complete. Especially if other potential eyewitnesses are yet to be questioned, witnesses may simply be told the investigation is ongoing and needs to be concluded before that question can be answered. If the person picked is ultimately charged with a crime, the witness will eventually find this out. However, being careful not to reinforce the witness's selection, and documenting this, will strengthen any case ultimately charged by eliminating any defense claim that the witness was manipulated into making a positive identification. If witnesses are concerned for their safety and want to know if the suspect is in custody, that question may be answered at the end of the interview.

Selecting Photos for the Lineup

As has typically been the practice in the past, the investigator with knowledge of the case and the identity of the suspect may continue under the new protocol to be involved in assembling the photo lineup. Training on the new protocol is a good opportunity to review lineup photo selection. Use M-RAP descriptors given by the witness to find fillers (*unless* the witness's description does not match the suspect's: in that event, use descriptors matching the suspect's description). Select at least 5 fillers (a larger number may be used). Before finalizing the photo group, look at them together to make sure the suspect does not stand out. Number the photos. Do not make the suspect Number 1. If the blinded method is used, the investigator simply has someone else number the photos and insert them in folders, the box or the laptop.

When there are multiple perpetrators, the same ratio of fillers to suspects should be used (at least 5:1). Typically separate photo displays are prepared for each suspect. If all suspects have similar characteristics (such as in gang cases with multiple perpetrators of the same age and ethnicity), one large lineup containing all suspects could be done containing the same filler-to-suspect ratio.

If more than one witness views the photo display, consider placing the suspect in different positions in each. However, be sure to preserve a photo record of the order of photos shown to each witness and to have each witness sign and date any photo selected. (A good way to preserve the record of the order of photos shown is to print a copy of the 6 photos used in the simultaneous display 6-pack format.)

Training Key® #600

Eyewitness Identification

Recent research findings have prompted development of new guidelines and protocols for using eyewitness identification—whether it be through photo arrays, showups, or lineups.

Background

Although the evidence provided by eyewitnesses can be tremendously helpful in the development of leads, identifying criminals, and exonerating the innocent—it is subject to error. Civilian eyewitnesses frequently prove to be unreliable observers, and erroneous identifications are sometimes the result. Misidentifications by eyewitnesses are normally the result of a combination of factors.

For example, human perception tends to be inaccurate, especially under stress. The average citizen, untrained in observation and placed under extreme stress as a victim of or witness to a crime, may not be able to describe a perpetrator accurately, sometimes even after coming face-to-face with the individual.

Also, a witness, particularly one who is not really sure what the perpetrator actually looked like, may be easily influenced by suggestions conveyed to him or her during the identification process. In *United States* v. *Wade*, the Supreme Court of the United States recognized these facts in saying:

> *The influence of improper suggestions upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor. Perhaps it is responsible for more such errors than all other factors combined.*[1]

Law enforcement officers may unwittingly facilitate misidentifications by using suggestive words or engaging in certain types of suggestive behavior. The average witness, anxious to make an identification and influenced by the police officer's image as an authority figure, can be very sensitive to any suggestion made by the police regarding the identity of the perpetrator. Officers may, totally unintentionally, convey to the witness by word or behavioral cue, that a particular person being viewed is the suspect.

Consequently, great care must be taken by officers conducting any type of eyewitness identification to avoid any action that might lead to an erroneous identification. Scrupulously adhering to the procedures and precautions outlined in this document will help avoid misidentifications that may lead to unjust accusations or even erroneous convictions of innocent persons and divert the investigation away from the real culprit. In addition, even if the actual perpetrator is caught and brought to trial, using improper identification procedures during the investigation will often cause the suppression of identification evidence at trial, resulting in dismissal of the charges or otherwise making it impossible to convict the guilty party.

It is estimated that some 77,000 people nationwide are put on trial because eyewitnesses pick them out of lineups or photo arrays. Recently, changes in eyewitness identification procedures have been spurred by the fact that nearly 200 people have been cleared of crimes through DNA evidence, most of which were convicted based on eyewitness identification.[2]

Research in this field has provided much information on the dynamics of eyewitness identification. For example, the manner in which suspects are presented to witnesses has bearing on whether identification will be made and which individual is more likely to be pinpointed by the witness. In the wake of these and many other research findings, the American Bar Association (ABA) issued a resolution containing *Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* in August 2004. The document has subsequently prompted states such as Wisconsin and California to conduct similar reviews of eyewitness identification practices and to issue recommendations for change in their respective

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jurisdictions that generally mirror the ABA suggestions.[3] No doubt, these findings will continue to influence reforms around the nation. Officers may find that these best practices may also be cited during court proceedings as models for conducting eyewitness identification.

If a court determines that an identification procedure was excessively suggestive, the court may prohibit introduction of the evidence in question. It may rule that any in-court identification of the accused by the victim is inadmissible or suppress other evidence that was obtained as a result of an improper pretrial identification procedure or both. Of course, any of these actions may be fatal to a case.

Today, in evaluating proper identification procedure, the courts will generally be concerned with whether it was suggestive. If the court finds that the procedure was suggestive, the court will then proceed to determine whether, despite the suggestiveness, the identification was reliable when considering the totality of the circumstances.[4]

For purposes of this document, identification procedures may be categorized as showups, lineups, or photo arrays. In a lineup, eyewitnesses are presented with a number of individuals. By contrast, in a showup, witnesses are shown one suspect only. Photo array procedures generally involve showing several photographs to a witness for the purpose of obtaining identification.

Showups

The showup has been widely condemned by the courts and by experts in law, law enforcement, and law enforcement identification procedures.[5] While the courts have not held showups to be categorically improper, they have ruled that the determination of whether a specific showup was excessively suggestive will be made based upon the totality of the circumstances attending that particular showup. In practice, evidence deriving from showups is frequently suppressed because the showup is so inherently suggestive. Consequently, the use of showups should be avoided where possible, particularly when photo arrays or lineups could be used.

It is recognized however, that a showup may provide sufficient probable cause early in an investigation that will help avoid the escape of a prime suspect as well as facilitate the release an innocent person and thus redirect police investigations in potentially more productive areas. Therefore, where use of a showup seems reasonable and appropriate, certain guidelines should be followed to minimize the suggestiveness of the procedure and the risk of suppression of any resultant identification evidence.

Showups conducted in the station house or jail are the most unreliable and hence the most objectionable. Showups should, whenever reasonably possible, conform with the following guidelines:

- Showups should not be used when independent probable cause exists to arrest a suspect.
- Prior to the showup, the witness should provide officers with as complete a description of the suspect as possible.
- When possible, the witness should be taken to the location of the suspect rather than bringing the suspect to the witness.
- Showups should not be conducted when the suspect is in a cell, handcuffed, or dressed in jail clothing.
- Showups should not be conducted with more than one witness present at a time. If showups are conducted separately for multiple witnesses, the witnesses should not be permitted to communicate before or after the showup regarding the identification of the suspect.
- The same suspect should not be presented to the same witness more than once.
- Showup suspects should not be required to put on clothing worn by the perpetrator, speak words uttered by the perpetrator, or perform other actions mimicking those of the perpetrator.[6]
- Words or conduct by the police that may suggest to the witness that the individual is or may be the perpetrator should be scrupulously avoided. For example, one should never tell the witness that the individual was apprehended near the crime scene, that the evidence points to the individual as the perpetrator or that other witnesses have identified the individual as the perpetrator. Unfortunately, the mere fact that the individual has been presented to the witness for identification strongly suggests that the officers believe him to be the guilty party.
- Following the showup, ask the witness how confident he or she is in the identification.
- Before showing the suspect, the following statement should be read to the witness. (Note: The same statement, with minor adjustments for context, should be made prior to using photo arrays or lineups). The statement should include the following:

In a moment I am going to ask you to view (a person) (a series of photos) (a series of individuals).

It is just as important to clear innocent persons from suspicion as to identify guilty parties.

[In the case of lineups and photo arrays say that]: Individual(s) present in the (lineup) (photo array) may not appear exactly as they did on the date of the incident because features such as head hair and facial hair are subject to change.

The person who committed the crime may or may not be present in the group of individuals.

You do not have to identify anyone.

Regardless of whether you make an identification, we will continue to investigate the incident.

Do you understand these instructions?

Lineups

The lineup, if properly conducted, is significantly less suggestive than the showup and hence is generally preferable. Nevertheless, police officers conducting a lineup must also use caution to avoid suggestive influences. Studies of witness psychology reveal that lineup witnesses tend to believe that the guilty party must be one of the individuals in the lineup. Consequently, witnesses tend to pick out the person in the lineup who most closely resembles their perception of the perpetrator, even though the perpetrator may not in fact be

present.

Instructions—similar to those given to a witness prior to a showup—can facilitate an identification and avoid misidentification based on the witness's memory. The witness should be told that he or she is about to view a group of individuals who may have committed the crime. Before making any identification, the witness should be told that the individuals present in the lineup may not appear as they did on the date of the incident due to changes in features, such as head and facial hair or scars. The witness should also be told that the suspect may or may not be in the lineup; and that a positive identification is therefore not mandatory. The witness should be informed that whether or not an identification is made, the investigation will continue. Where two or more witnesses are involved, they should view the lineup separately and should not be allowed to discuss the lineup until all have completed the process.

Many witnesses, in an effort to please the police officers conducting the lineup, feel obligated to pick out someone from the lineup rather than disappoint the officers.[7] Such witnesses are often sensitive to, and strongly influenced by, subtle clues conveyed by the officers that may indicate to the witness that the officer believes that a particular individual in the lineup is the perpetrator. This makes it doubly important that officers conduct the lineup—and conduct themselves—in a nonsuggestive manner. To prevent these suggestive techniques and avoid any tip offs about the suspect's identity, police lineups should be administered by an officer who does not know which person in the lineup is the actual suspect.

Additionally, it has been recommended in the studies cited by the ABA and others that a lineup should be administered sequentially rather than all at once (simultaneously). When witnesses view photos or lineups simultaneously, they tend to make comparative judgments; they try to determine which of those persons present appears to make the best fit to their memory of the suspect. When the suspect is present in the lineup or photo array, they will likely be identified in this manner and no harm is caused. But, if the actual suspect is not present, witnesses still tend to make an identification based on the best fit among those present. This can lead to misidentification. Therefore, studies suggest that sequential presentation of suspects in both photo arrays and lineups is the better approach because witnesses tend to make absolute rather than comparative judgments when viewing suspects individually. In this process, suspects and fillers are presented one at a time and then move out of site as the next person is brought into view.

Preparing for a lineup may be as important to the validity of the procedure as actually conducting it. Selecting individuals as fillers for the lineup is a particularly important issue. In determining which fillers should be presented to the witnesses in a lineup, the following principles should be observed:

1. The lineup should consist of individuals of similar physical characteristics. Witnesses tend to pick out anyone who stands out from the rest of the group in any significant way. Therefore, the individuals who appear in the lineup should be reasonably similar with respect to age; height; weight; hair color, length and style; facial hair, clothing; and other characteristics such as glasses or visible tattoos. Of course, the individuals must be of the same race and sex. Absolute uniformity of the lineup participants is obviously unattainable and is not procedurally necessary.[8] However, lineups should avoid using fillers who so closely resemble the suspect that the witness cannot correctly identify the actual suspect.

2. The lineup should consist of at least five or six persons. The smaller the lineup, the less objective it is. A lineup with only two or three persons is little better than a showup, and suggestive factors become excessively influential. In addition, some authorities caution against the use of plainclothes police officers in lineups because they do not naturally look or act like suspects, a factor that causes witnesses to reject them as possibilities. They also may have been seen by the witness in the community, upon visits to the police station, or in similar contexts.

Preparing a witness for viewing the lineup is another important consideration. Preparation should be limited to nonsuggestive statements, such as explaining the procedure that will be used and making it clear that the individuals in the lineup will be unable to see the witness. Officers should avoid taking any action or making any statement that will adversely affect the validity of the lineup. In particular, before a lineup, officers should avoid:

1. Showing the witness any photos of the suspect.[9]

2. Conducting a showup with the suspect, or allowing the witness—accidentally or otherwise—to see the suspect, such as in an office or holding cell prior to the lineup.

3. Making suggestive statements to the witness, such as telling the witness that the person that is the suspect will be in the lineup. It is even desirable to tell the witness that the perpetrator may not be among those in the lineup. Other common errors that should be avoided include telling the witness that another witness has identified someone in the same lineup, advising the witness to take special notice of some particular individual in the lineup, or making any other statement or action which may cause the witness to focus on a particular individual, or to feel that the witness must pick out somebody.

4. Finally, if more than one witness is to view a lineup, the witnesses should be kept separated prior to the lineup and should not be permitted to discuss the case with each other, compare descriptions, etc.

5. In conducting the lineup, officers who are not assigned to that case should handle the procedure if possible. This helps to minimize the possibility that the officers who are conducting the investigation will in their zeal to solve the case, convey (inadvertently or otherwise) clues to the witness as to which person to pick out, or put pressure on the witness to pick out somebody. The following should also be observed in conducting lineups:

- *Statements that put pressure on the witness to make an identification should be avoided.* Witnesses are anxious to please the officers conducting the lineup, so they should not be made to feel that they are expected to pick out someone. For example, urging a hesitant witness to make an identification or to try harder would be improper.
- *Statements that may cause the witness to focus on a particular individual should be avoided.* The same sort of statements discussed in regard to witness preparation should be avoided during actual conduct of the lineup. Officers are often tempted to prompt a witness when someone in the lineup is a prime suspect and the witness is hesitant to make an identification.
- *The lineup should be presented to one witness at a time.* The common practice of having a group of witnesses view a lineup simultaneously should not be permitted. Courts,

including the U.S. Supreme Court,[10] have disapproved multiple-witness lineups. If for some reason, more than one witness must be present simultaneously, witnesses should be required to make their identifications silently, in writing, and should not be permitted to discuss the identification aloud with each other or with the officers present.

• *If possible, conduct a blank lineup.* Conducting two or more lineups, where one lineup includes the suspect and the others do not, assists the prosecution in later refuting any claim by the defense that the lineup was too small or was suggestive.

• *If multiple lineups are to be conducted for the same witnesses, do not put the suspect in more than one.* Seeing the same face in a second lineup may cause the witness to erroneously recognize the person as the perpetrator, merely because the face is familiar from the first lineup. Because of this, the courts have disapproved this practice.[11]

6. Videotape and audiotape the lineup whenever possible. This procedure provides a historical record of the proceeding should the identification or the process used come into question, or the actual identification process is necessary to assist the prosecution at trial.

In another context the Court has held that requiring a suspect participating in a lineup to speak, even to the extent of uttering the same words used by the criminal does not violate the Fifth Amendment, since it is not "testimonial self-incrimination." Other actions, such as standing, walking, gesturing, and the like are similarly not self-incriminating within the meaning of the Fifth Amendment. Similarly, requiring the suspect to wear certain clothing has been held to be outside of the coverage of the Fifth Amendment.

Following the lineup, certain precautions should be taken. For example, where more than one witness has viewed a lineup, witnesses should be kept separate after the lineup procedure has been completed. While discussions between witnesses following a lineup will presumably not render any previously made identification invalid, it may affect the admissibility of a subsequent in-court identification of the defendant by these witnesses during the trial itself.

Additionally, witnesses should not be praised or congratulated for picking out the suspect. This may serve to reinforce a shaky identification, convincing the witness that he or she has picked out the actual perpetrator when the witness actually has doubt. In addition to increasing the chances of a miscarriage of justice, this may lead to suppression of a later in-court identification of the perpetrator by the same witness.

Photo Identifications

Photographic identifications may take a number of forms. If a single photo is shown to the witness, the photo identification has all of the vices of the showup and is generally regarded by the courts as improper. Consequently, multiple-photo arrays are preferable. In such procedures, the photos may be shown individually, one at a time, or may be displayed simultaneously on a card. This procedure is similar to a lineup, and virtually all of the cautions set forth for lineups in the preceding discussion apply to multiple-photo identification procedures as well.

Specifically, the following recommendations are made regarding photographic identifications presented simultaneously or sequentially:

• There should be at least six photographs.

• The photographs should be of people who are reasonably uniform in age; height; weight and general appearance; and of the same sex and race. If scars or tattoos were present on the suspect, all in the photo array should be similarly marked or the area of the body should be covered for all.

• The photographs themselves should be similar. For example, color photographs and black and white photographs should not be mixed; they should be of approximately the same size and composition.

• Mug shots should not be mixed with snapshots since they are generally recognizable as such and have an immediate tendency to brand an individual.

• If mug shots are used, or if the photographs otherwise include any identifying information regarding the subject of the photograph, this information should be covered so that it cannot be seen by the witness. If only some of the photos have such information, the corresponding portions of photos should be covered so that none of the photos will look different.

• The array should not include more than one photo of the same suspect.

• The photo array should be shown to only one witness at a time.

• As with showups and lineups, no suggestive statements should be made. For example, witnesses should not be told that the suspect's photo is in the group, or that someone else has already picked out one of the photos as being the criminal. Similarly, nothing should be said or done to direct the witness's attention to any particular photograph. For example, pointing to a particular photo and saying, "Is this the guy?" is improper and may lead to suppression.

• As in the case of lineups, it is recommended by some that photo arrays be presented to the witness one at a time, then removed from view before the next photo is presented.

• The photo array should be preserved for future reference. In fact, in some states, failure to preserve the array will lead to suppression of the identification process. Additionally, as in lineups, full details about the identification process should be recorded and preserved—such as the administrator's name; procedures used; date, time and location of the procedure; number of fillers, names of those present during the procedure; and whether the array was viewed more than once by the same witness. Assuming that the photo identification has been properly conducted and that the array itself was not in any way suggestive, preserving this information helps the prosecution refute any claims by the defense to the contrary.

The proper use of photographs to obtain identification of a perpetrator has been approved by the courts.[12] However, the courts appear to prefer that photographic identification procedures be used only to develop investigative leads. Some courts have criticized the practice of using photographic identifications once the suspect has been arrested, preferring that once the suspect is in custody and therefore readily available, a lineup be employed for eyewitness identifications.[13]

The Right to Counsel at Eyewitness Identifications

In 1967, the U.S. Supreme Court held that a suspect has a right to counsel at a post-indictment lineup.[14] Subsequently, the Court expanded this ruling to provide for a right to counsel at any lineup conducted after formal adversary proceedings

have been initiated against the suspect, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.[15] There is, however, no right to have counsel present at a lineup conducted before such adversary proceedings have been initiated. These same rules apply to showups. However, there is no right to counsel at photo identification sessions.[16]

The purpose of having counsel present at the identification is to enable counsel to detect any suggestiveness or other irregularities in the procedure. It should be recognized, however, that the presence-of-counsel requirement may actually help the police in certain instances. First, the department's goal should be to avoid any possibility of an erroneous identification and a resultant miscarriage of justice. Therefore, the presence of counsel may be regarded as a positive step in preventing any such occurrence. In addition, if counsel is present and acquiesces in the procedure being employed, this may preclude any subsequent defense contention that suggestiveness or other impropriety occurred. This will strengthen the prosecution's case. Therefore, to the extent that defense counsel is responsible and objective, cooperation with counsel in constructing and conducting a nonsuggestive and otherwise proper identification procedure may benefit to all concerned.

Summary

Of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately.

Endnotes

[1] 388 U.S. 218, 229 (1967).

[2] Kate Zernike, "Study Fuels Debate Over Police Lineups," The New York Times (April 19, 2006).

[3] See: American Bar Association Criminal Justice Section, "Report to the House of Delegates on Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures," August 2004. Also: California Commission on the Fair Administration of Justice, "Report and Recommendations Regarding Eyewitness Identification Procedures," released April 13, 2006. Also: State of Wisconsin, Office of the Attorney General, "Model Policy and Procedure for Eyewitness Identification," September 2005.

[4] This in turn is to be achieved by analyzing six factors. These are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; (5) the length of time between the crime and the confrontation and (6) whether the witness was a casual observer or the victim of the crime. If in view of these various factors, it appears that the identification was reliable despite the suggestiveness of the procedure, evidence of the identification will be admissible to bolster a subsequent in-court identification. *Neil* v. *Biggers*, 409 U.S. 188 (1972). See also *Manson* v. *Brathwaite*, 432 U.S. 98 (1977). (*Biggers* test applied to photo identifications.)

[5] See *Stovall* v. *Denno*, 388 U.S. 293 (1967).

[6] Although such requirements sometimes may properly be imposed during a lineup, the showup is so inherently suggestive that the same court that would approve their use in a lineup may find them excessively suggestive when employed during a showup.

[7] Although it may surprise many officers to hear it, the average citizen still sees the police officer as a benevolent father figure (or perhaps, in the case of a female officer, a mother figure), with the result that the lineup witness is often extremely anxious to please the officer by making an identification—even though the citizen is not at all certain that the person chosen is the guilty party.

[8] *United States* v. *Lewis*, 547 F.2d 1030, 1035 (8th Cir. 1976).

[9] Even a photo array should be avoided. This is especially true if the suspect is the only person in the photo array who is also in the lineup.

[10] See *Gilbert* v. *California*, 388 U.S. 263 (1967).

[11] See *Foster* v. *California*, 394 U.S. 440 (1969).

[12] *Simmons* v. *United States*, 390 U.S. 377 (1968).

[13] It has been said that once a witness has identified a photo, this influences subsequent identifications. The contention is that the witness thereafter is really only recognizing the previously seen photograph, not the actual criminal. For this reason, the practice of showing a witness a photograph of the defendant just prior to trial to "refresh the witness's memory" should be avoided.

[14] *United States* v. *Wade*, 388 U.S. 218 (1967), *Gilbert* v. *California*, 388 U.S. 263 (1967).

[15] *Kirby* v. *Illinois*, 406 U.S. 682, 688-89 (1972).

[16] *United States* v. *Ash*, 413 U.S. 300 (1973). At least one state supreme court has held that where simulated lineups are filmed or videotaped for later exhibition, there is no right to have counsel present when the film or videotape is subsequently shown to witnesses, *People* v. *Lawrence*, 481 P.2d 212 (1971). Showing witnesses a film or tape of a previously recorded simulated lineup has become known as a "Lawrence lineup."

questions

The following questions are based on information in this *Training Key*. Select the one best answer for each question.

1. Which of the following statements is *false*?

   (a) Improper identification procedures may result in suppression of eyewitness testimony at trial.
   (b) Some eyewitnesses are anxious to please or assist officers and may make identifications based on subtle suggestions or cues from officers during lineups or photo identification.
   (c) Showups should be used even when independent probable cause exists to arrest the suspect in question.
   (d) During showups, the witness should be taken to the location of the suspect rather than bringing the suspect to the witness.

2. Which of the following statements is *false*?

   (a) Showup suspects may be required to put on clothing or speak words uttered by the perpetrator.
   (b) Following a showup, the witness should be asked how confident he or she is in the identification.
   (c) Lineups are inherently less suggestive to witnesses than showups.
   (d) Lineups should be conducted by someone who does not know the identity of the suspect.

3. Which of the following statements is *true*?

   (a) A lineup should consist of at least five or six people.
   (b) Multiple witnesses to the same lineup should be kept separate from one another prior to and following the identification procedure.
   (c) Whenever possible, lineups should be presented to one witness at a time.
   (d) All of the above are true.

answers

1. (c) When independent probable cause exists, the suspect should be taken into custody without conducting a showup.
2. (a) During showups, suspects may not be required to put on clothing worn by or speak words uttered by the perpetrator as these could promote a misidentification.
3. (d) All of the statements are true.

have you read . . . ?

Training Key #596, Video and Audio Recoding of Interrogations and Confessions: An Update, International Association of Chiefs of Police, Alexandria, Virginia 22314.

This document provides protocols for video and audio recording of custodial interviews, interrogations, and confessions. Wherever possible, video and audio recordings should also be used for recording lineups.

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Successful Eyewitness Identification Reform: Ramsey County's Blind Sequential Lineup Protocol

By Susan Gaertner, Ramsey County Attorney, Saint Paul, Minnesota; and John Harrington, Chief of Police, Saint Paul, Minnesota

An article in the October 2008 issue of this magazine raises one of the most critical issues in the law enforcement community today—the problem of faulty eyewitness identification—and urges police chiefs to lead the discussion of reform.[1] Highly publicized DNA exoneration cases, most of which involved mistaken eyewitness identifications, have focused public scrutiny on law enforcement procedures and challenged law enforcement practitioners both to reexamine long-standing practices and to implement change that will reduce the likelihood of such misidentifications in the future. No one in the law enforcement profession has any interest in convicting the innocent.

The Mecklenburg article makes eight general recommendations[2] but is short on practical specifics. It also sidesteps the two essentials in lineup reform that are supported by more than a quarter century of scientific study—that lineups be "blind" (that is, conducted by someone who does not know who the suspect is) and sequential.[3] The article argues that both points require more field study and that there are practical impediments to the implementation of these reforms in a law enforcement setting.

The present article, intended as a pragmatic contribution to the reform discussion, describes the successful implementation of a blind sequential lineup protocol in Ramsey County, Minnesota. Its purpose is not to debate the science but to address the practical application of this change in a law enforcement setting and to provide specifics for any other agency interested in doing the same.

Persuaded by its own review of the science (for reasons stated below), Ramsey County decided to move ahead in 2005 with a year-long pilot project to test whether implementation of blind sequential lineups was feasible and practical for law enforcement practitioners. The pilot was successful and, in April 2006, the new lineup protocol was adopted as countywide policy by all law enforcement agencies in the jurisdiction. The Illinois Field Study (described in the Mecklenburg article) notwithstanding, Ramsey County continues to be satisfied that the bulk of scientific evidence—and pragmatic considerations—support this change. After almost four years of experience with this protocol, the county has concluded that it is feasible, practical, and superior to past eyewitness identification procedures.

Lineup reform need not be delayed for years awaiting the outcome of additional field study when the basic reforms make sense objectively and when experience demonstrates that they can be successfully applied in the field.[4] Implementing this change in protocol has not only proved workable for investigators in Ramsey County but has also improved the uniformity and the quality of eyewitness identification investigations. It has also yielded bonus practical benefits in court.

The county's experience is adaptable to other law enforcement jurisdictions; hopefully, outlining it here will encourage other jurisdictions to replicate this effort—and perhaps provide some shortcuts for doing so.

Background: The Sutherlin Exoneration

Ramsey County is a jurisdiction of 493,215 residents.[5] It has 10 separate law enforcement agencies, including the Saint Paul Police Department (the largest agency, currently with 599 sworn officers), the Ramsey County

Sheriff's Department, seven smaller suburban departments, and a campus police department. The Ramsey County Attorney's Office prosecutes all felony crimes committed in the jurisdiction.

As a result of national discussion of the DNA exoneration cases, the county attorney in March 2001 decided to initiate a systematic postconviction review of cases of all persons convicted in Ramsey County prior to 1995 (when current DNA technology became widely available) to determine if DNA testing could shed new light on the validity of their convictions.[6] Of the 116 cases identified, three, all from the 1980s, were found in which DNA evidence could be outcome-determinative. In only one was the evidence still available. Testing of that evidence resulted in the exoneration of David Sutherlin for a 1985 rape. The primary evidence against Sutherlin was mistaken eyewitness identification.

In the Sutherlin case, the investigator suspected Sutherlin was the rapist based on the victim's physical description of her assailant, which matched Sutherlin's, and the fact that Sutherlin lived close to the location of the crime. His photo was included in a simultaneous photo display, which was shown to the victim by the investigator. The victim said he looked exactly like her assailant. At trial, she could only say, however, that he resembled her attacker. Other evidence presented included that enzymes found on the victim's clothing were consistent with those of Sutherlin as well as 22 percent of the population and that Sutherlin's car had a noisy muffler similar to one heard leaving the scene. The defendant was convicted and sentenced to serve time consecutive to an unrelated double murder.[7]

The 2002 DNA testing of the evidence in the 1985 rape case that exonerated Sutherlin also positively identified the real assailant: it turned out he lived in the same neighborhood as Sutherlin and matched the physical description provided by the victim.[8] Unlike Sutherlin, however, his photo was not on file with the Saint Paul Police Department at the time.[9]

The indisputable evidence of a miscarriage of justice in the Sutherlin case and the failure to retain evidence that would either have confirmed or refuted the validity of two other convictions prompted two reforms in Ramsey County: the development of a countywide evidence retention policy and a reexamination of eyewitness identification procedures.[10]

Review of Practice and Science

The traditional photo identification procedure in Ramsey County, as it has been across the United States, was the simultaneous photo array. The typical photo array contained six photos. It was the usual practice for an investigator with knowledge of the case to show the photo lineup to witnesses.

In the wake of the DNA exonerations, the U.S. Department of Justice's National Institute of Justice (NIJ), under then U.S. attorney general Janet Reno, formed a study group to examine eyewitness identification procedures.[11] The panel reviewed what was then 20 years of scientific research on memory and interview techniques, including scientific evidence supporting blind sequential lineup administration.[12] Its landmark 1999 report began the national law enforcement discussion of lineup reform and made numerous reform recommendations (many of which parallel those in the Mecklenburg article).[13] The panel acknowledged the scientific evidence at that time showing eyewitness identification to be more reliable when photos were shown sequentially and blind procedures were used.[14] However, operating on consensus, the report presented both sequential and simultaneous as acceptable alternative procedures and stopped short of including blind administration in its final recommendations, instead stating that it "may be impractical for some jurisdictions to implement."[15]

The first meta-analysis assessing all laboratory studies comparing the simultaneous and sequential lineup formats came in 2001.[16] It showed that identification errors are significantly more likely (up to three times higher) in a simultaneous format; conversely, the sequential procedure produces fewer misidentifications. The sequential format also produces fewer correct identifications overall. However, the reduction in correct identifications using this method is offset by the much larger reduction of incorrect identifications.[17]

The DNA exonerations, the NIJ report, scientific data, and subsequent open discussion of the science involved in eyewitness identification caused law enforcement jurisdictions throughout the United States to reassess eyewitness identification procedures and whether those procedures contributed to misidentification. New Jersey was the first state to implement statewide blind sequential lineup reform, followed more recently by North Carolina.[18] Ramsey County's review of the NIJ report and the underlying science convinced the jurisdiction that it should attempt to implement the reform, or at least test its feasibility in a law enforcement setting.

Rationale for Change

On reflection, the startling scientific evidence that the traditional law enforcement method of offering photo displays might have inadvertently increased the likelihood of misidentification makes sense objectively for two reasons:

- The risk of administrator influence on lineup results can be essentially eliminated by having someone other than the investigator, who knows the identity of the suspect, conduct the photo lineup, whether the lineup is simultaneous or sequential. (Ramsey County has the utmost confidence in the integrity and professionalism of its investigators but recognizes that even the most well-intentioned investigator who knows which person in the lineup is the suspect cannot eliminate all possibility of unintentionally cueing the witness or responding to the witness's identification or nonidentification of that person.)
- Simultaneous photo display tends to encourage relative judgment; that is, a witness comparing photos side by side can more easily pick the person who looks most like the perpetrator—regardless of whether that person is, in fact, the perpetrator.

The scientific evidence made clear that both components were necessary and that each accomplished a different objective. If a nonblind administrator is used, switching from simultaneous to sequential photo displays alone may even increase misidentification, since there is a danger of inadvertently highlighting an individual suspect photo. On the other hand, while recognizing the necessity of blind administration, the county understood the practical realities of conducting photo lineups under the time pressures and the personnel constraints in a criminal investigation and that, especially in a small department, the investigator with knowledge of the case (a nonblind administrator) might be the only one available. The county therefore set up a practical alternative that still maintained the blind component: If no independent administrator is available, the investigator must use a method that is the functional equivalent (FE)—that is, a method that assures that the investigator does not know and cannot see the order in which the photos are presented and that the witness knows this (and therefore will not be looking to the administrator for cues). This is sometimes called a "blinded" method.

Blind Sequential Lineup Pilot Project

In the spring of 2005, after reviewing the NIJ report and the scientific literature, the county attorney approached the Saint Paul chief of police and Ramsey County Sheriff Bob Fletcher about conducting a pilot project to test the feasibility of employing blind sequential lineups in the field.[19] They agreed. The county attorney developed a new lineup form to facilitate uniformity of application of this protocol change and conducted training of the pilot investigators in April 2005.[20] The training explained the rationale behind both the blind and the sequential components of the protocol.[21] Although using an independent administrator was the preferred method, the training also included the alternative FE (blinded) method. The pilot began May 1, 2005, and lasted one year.

At the outset, some law enforcement personnel were skeptical. Would having an independent administrator conducting the lineups cause unacceptable delays? Would this procedure result in overtime or other administrative complications or costs? Would lineup results be adversely affected because the administrator was not the investigator who had developed a rapport with the witness? Would there be a decline in positive identifications?

After one year, the results were clear: investigators who used this method found it not only workable but no more difficult to apply than the traditional method. There were no associated administrative difficulties or additional overtime costs. However, there was an unexpected benefit: most investigators involved in the pilot came to prefer the new method and felt more confident in the eyewitness identifications that resulted. Notwithstanding laboratory study results,[22] no one felt that appreciably fewer identifications had been made. The fear that independent administrators' lack of rapport with witnesses would adversely affect identifications turned out to be a nonissue. To Ramsey County's surprise, most investigators ended up preferring to use and managed to find an independent administrator; as a result, there was less need, in practice, to use the FE (blinded) option than was anticipated.

Taking the time to have a pilot project and being open to the suggestions of the investigators involved were crucial to winning support for the change. The blind sequential lineup procedure was adopted by all Ramsey County law enforcement agencies in April 2006. Countywide training of all investigators was conducted that month, and the protocol has been used since that time.

Ramsey County Blind Sequential Photo Identification Protocol

A one-page (two-sided) Sequential Photo Display Form was developed specifically for use by all Ramsey County law enforcement officers.[23] It contains all instructions needed in the field to ensure that the basic elements of the new protocol are uniformly applied. On one side are all the instructions for the administrator (whether independent or an FE), a section to be filled out by the administrator during the photo display, and a section to be filled out by the administrator after the photo display. On the other side are the instructions to be read to the witness before the photo display (including alternative language, depending on whether an independent or an FE administrator is used) and a section to be completed by the witness after the photo display. The form is designed to be selfexplanatory, enabling an officer from the street with no knowledge of the case to be called in, if necessary, to be the independent administrator.

In formulating the photo display (typically, six photos), administrators are instructed to use descriptors given by the witness to find fillers. They are instructed to select at least five fillers and, before finalizing the array, to look at them together to make sure the suspect does not stand out.

An independent administrator is to be used whenever possible. Agencies deal with the rapport issue directly. If an investigator has already interviewed and cultivated a relationship with a witness, the investigator explains that department procedures require another officer to show the photos but that the investigator will be available to talk to the witness as soon as the procedure is done. Whenever an independent administrator conducts the procedure, the investigator with knowledge of the suspect's identity must remain out of sight of the witness while the lineup is being conducted.

When no independent administrator is available, the FE method may be used, ensuring first that the investigator in the case with knowledge of the identity of the suspect does not know and cannot see where the suspect is in the order of photos displayed and, second, that the witness knows this. Using the alternate FE language on the Sequential Photo Display Form instructions to the witness, the investigator tells the witness, "I do not know the order of the photos," and instructs the witness not to let the investigator see which photo is being viewed.

Lineup Methods

There are several methods by which the photos may be displayed sequentially. All have in common the fact that the witness sees only one photo at a time and must continue to view all the photos even if a person is identified before all are shown.[24]

The high-tech version of this method would be to use a laptop computer to display and maintain a record of the photos shown. However, no adequate software program was available to Ramsey County in 2005 that adequately addressed technical issues.[25]

The low-tech version can be as simple as numbering the photos and placing each in a separate folder (or, for the FE alternative, having someone else do so for the investigator). The witness can then be instructed to look at the folders one at a time (for the FE alternative, this must be done in such a manner that the investigator cannot see the photos). The remaining folders should be kept out of sight so that the witness does not know how many there will be.

The "box with six doors" method, developed and used in the state of New Jersey since 2001, has been used widely by Ramsey County investigators and is the preferred method for many departments in this jurisdiction. The standard six-person simultaneous photo display sheet is simply inserted in a box built specifically for this purpose. Only one door at a time is opened by the witness. The box is equally adaptable to the FE method since someone else can prepare the six-person lineup sheet and insert it into the box.

Regardless of the method used, a record must be kept of the photos used and the order shown.

Whether an independent administrator or an FE is used, the sequential photo display procedure is the same and includes the following:

- Reading the administrator instructions on the form and completing the case and witness identification information at the top of the form
- Selecting the applicable independent administrator or FE language on the form; reading and checking off the six instructions[26] to the witness and having the witness initial in the spot indicated that she understands the instructions (an alternate simplified instruction form has been developed for use with children, mentally impaired adults, and persons with limited knowledge of English)[27]
- Displaying the photos to the witness one at a time, with only one photo visible at a time, being careful not

to give the witness any feedback during or after the photo display
- Recording any comments the witness makes while examining the photos and any other relevant observations (such as the witness's physical reactions)
- If the witness makes an identification, asking the witness how certain he is of the identification and recording the answer on the form
- Not showing the lineup more than once *unless* the witness requests it; if requested, the entire lineup must be shown, even if the witness requests only one or a few
- Recording the number of times the lineup was shown and what the witness said each time
- At the conclusion of the photo display, having the witness complete the witness section of the form and, if an identification is made, having the witness sign the selected photo
- *Not* giving the witness feedback on the accuracy of any selection, as this can artificially inflate witness confidence in the selection and skew further investigation

The witness section of the form is the record, in the witness's own handwriting, of whether any identification was made and, if so, how certain the witness is of the identification. This portion of the form is to be signed and dated by the witness.

It is critical for administrators to record the number of times a witness is shown the sequence because the scientific evidence strongly supports the conclusion that there is a sharp drop-off in the accuracy of any identification made after two showings.[28]

The completed Sequential Photo Display Form covers all these points and is sufficient to document the procedure; however, some departments require that a general supplementary report be written as well.

Follow-up Interview by Investigator

After an independent administrator has conducted a lineup, the investigator assigned to the case may follow up with a supplemental interview, as needed. This is the time to develop as many additional facts as possible about the details of any identification made, including exploring what it was about the photo (or photos) selected that made the witness pick it, any follow-up on the witness's level of certainty or confidence in the selection, and, in the case of multiple perpetrators, what each individual did.

It is critical that investigators *not* provide any information that could artificially inflate the level of confidence witnesses express in their selections (for example, witnesses must not be told that they did a good job or picked the same person other witnesses picked). If witnesses ask whether they picked the right person, that question should not be answered until investigators have already asked all follow-up questions, if at all. If an investigation is ongoing—and especially if other potential eyewitnesses are yet to be questioned—witnesses may simply be told that the investigation needs to be concluded before that question can be answered. If the person a witness picked is ultimately charged with a crime, the witness will eventually find this out. However, being careful not to reinforce the witness's selection, and documenting this, should eliminate any defense claim that the investigator artificially inflated the witness's level of confidence in his or her selection. If witnesses are concerned for their safety and want to know if the suspect is in custody, that question, of course, may be answered.

Other Implementations of Blind Sequential Lineup Protocols

Ramsey County is not alone in the adoption of this new eyewitness identification protocol. The neighboring jurisdiction, Hennepin County (which contains the city of Minneapolis and suburbs), after a similar pilot in 2004, successfully implemented blind sequential lineups countywide in 2005. Like Ramsey County, officers in Hennepin County may use an alternate "blinded" procedure if an independent administrator is unavailable.[29] In addition to the statewide adoption of this procedure in New Jersey and North Carolina, the Wisconsin Attorney General's Office has formally recommended that this change be adopted statewide,[30] and more than 200 Wisconsin law enforcement agencies, including those in Milwaukee and Madison, have done so to date. Others using this procedure include Denver, Colorado; Suffolk County, Massachusetts (including the Boston Police Department and suburbs); the Northampton, Massachusetts, Police Department; the Westfield, Massachusetts, Police Department; the Chaska, Minnesota, Police Department; the Virginia Beach, Virginia, Police Department; and Santa Clara County, California.[31] In January 2009, the Dallas, Texas, Police Department announced it was withdrawing from the NIJ-sponsored field study mentioned in the Mecklenburg article and was adopting the blind sequential protocol.[32] Seven other Texas jurisdictions had already adopted it. These examples indicate that the protocol can be adapted for large and small agencies in a variety of settings, urban, suburban, small-town, and rural.[33]

Assessment of the Ramsey County Experience

After almost four years of experience with the blind sequential eyewitness identification protocol, Ramsey County investigators and prosecutors report no problems with the change. Notwithstanding laboratory findings that this method may produce a slight drop in correct identifications (as the price for significantly fewer faulty identifications), investigators do not feel that they have lost identifications, and they have increased confidence in the identifications that are made. Use of the form has contributed to uniformity in application of the protocol. Overall, the additional attention paid to this issue has also heightened the county's awareness that no case should be based on eyewitness identification alone and that further investigation is always needed.

Keeping track of the number of times the photos are displayed before an identification is made provides an additional tool for evaluating the reliability of the identification, since it provides a mechanism for assessing whether the witness is "comparison shopping." This alone is an improvement over the simultaneous display procedure, in which comparing photos to find the person most like the perpetrator (regardless of whether it is, in fact, the perpetrator) was always an inherent, but usually unmeasurable, risk.

The change in protocol has not resulted in overtime, delay, or other administrative difficulties. The unexpected bonus of adopting this reform is that, in the courtroom, a major avenue of defense attack on both the admissibility and the reliability of eyewitness identification procedures has been eliminated. Most importantly, however, Ramsey County feels it has taken a significant step in reducing the likelihood of false eyewitness identification.

Conclusion

Ramsey County's change in protocol is not the only model for blind sequential identification reform, nor is it perfect. The county is prepared to make adjustments in the future as scientific knowledge in this area evolves. However, it is confident that this change represents an improvement over prior practice. The Ramsey County experience unequivocally demonstrates that this model can work in a law enforcement setting.

The authors wish to acknowledge the assistance of retired assistant Ramsey County attorney Jeanne Schleh in the writing of this article. Ms. Schleh also designed and implemented the blind sequential training method described herein. ■

Notes:

[1]See Sheri Mecklenburg et al., "Eyewitness Identification: What Chiefs Need to Know Now," *The Police Chief* 75, no. 10 (October 2008): 68–81 (hereafter referred to as the Mecklenburg article).

[2]Ibid., 74–76. These recommendations include standards and training on appropriate interviewing, selecting fillers, instructions to witnesses, memorializing witness verbal and nonverbal reactions in report writing, and raising officer awareness of the potential for influencing the outcome.

[3]This procedure is sometimes also referred to as "double blind" to include the fact that the witness likewise does not know the location of the suspect in the sequence (or even if the suspect is included at all). Since this should be a given in any lineup, this article will simply use the term *blind* to cover both.

[4]Action on this front should not be postponed pending the current NIJ-sponsored field study to which the Mecklenburg article alludes because that study appears to contain the same design flaw that existed in the Illinois study: it is designed to test whether witnesses correctly identify the person the police suspect. However, the crux of the matter in the DNA exoneration cases was that the police did not identify the correct suspect. Unlike laboratory studies, in which scientists can control ground truth (that is, who the real perpetrator is), a field study based on real crime cannot control for a known perpetrator.

[5]U.S. Bureau of the Census, Population Estimates Program, "Minnesota—County," 2006 Population Estimates, http://factfinder.census.gov/servlet/GCTTable?-ds_name=PEP_2006_EST&-mt_name=PEP_2006_EST_GCTT1R_ST2S&-geo_id=04000US27&-format=ST-2&-tree_id=806&-context=gct (accessed February 27, 2009).

[6]Only cases of persons convicted before 1995 who were still imprisoned were reviewed.

[7]While the rape investigation was under way, Sutherlin was arrested on a double murder and was convicted and sentenced for those offenses first, with a consecutive sentence imposed for his ultimate rape conviction. He is still serving time on the murders, but his 2002 exoneration of the rape means he will never serve any prison time for the sex offense. He will also be eligible for earlier release on the murders and, upon release, will not be subject to sex offender registration requirements that would otherwise apply.

[8]He could not be prosecuted due to expiration of the statute of limitations in effect at the time of the crime.

[9]Within a year of the 1985 rape, he did develop an arrest record. By 2002, when the DNA match was made, he had a lengthy record of convictions, although none was sex-related.

[10]This policy, first implemented countywide in 2004, is available on the county attorney's Web site at http://www.co.ramsey.mn.us/attorney/SPDNA.asp.

[11]The interdisciplinary panel of 34 persons included representatives of the criminal justice community (law enforcement agencies, prosecutors, and the defense bar) and social science researchers.

[12]A good summary of scientific recommendations from that time is found in Gary L. Wells et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photo Spreads," *Law and Human Behavior* 22, no. 6 (December 1998): 603–647.

[13]See U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement*, NCJ 178240, October 1999, http://www.ncjrs.org/pdffiles1/nij/178240.pdf (accessed February 26, 2009).

[14]Ibid., 9.

[15]Ibid.

[16]A meta-analysis is a review of existing studies providing a cumulative quantitative summary of outcomes across the studies.

[17]Nancy Steblay et al., "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentation: A Meta-analytic Comparison," *Law and Human Behavior* 25, no. 5 (October 2001): 459–473. Specifically, it shows an aggregate error rate of 27 percent (incorrect identification of a specific filler photo, the designated innocent suspect) for the simultaneous method compared to a 9 percent error rate using the sequential method. An updated meta-analysis, currently under review, again shows significantly greater risk of mistaken identification for simultaneous lineups and somewhat small correct identification rates for sequential lineups. Steblay presented the preliminary data for this more recent meta-analysis at the John Jay College of Criminal Justice as "2001+6: An Updated Meta-analysis of Eyewitness Lineup Performance under Sequential versus Simultaneous Formats," (paper presented at conference titled "Off the Witness Stand: Using Psychology in the Practice of Justice," New York City, March 1–3, 2007).

[18]See New Jersey's *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, April 2001, http://www.njdcj.org/agguide/photoid.pdf (accessed February 26, 2009); the North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification, October 2003, http://www.ncids.org/New%20Legal%20Resources/Eyewitness%20ID.pdf (accessed February 26, 2009); and that state's subsequent enactment in 2006 of sections 15A-284.50 to 15A-284.53 of the *North Carolina General Statute*, adopting its recommendations.

[19]The terms *lineup* and *photo display* are used interchangeably here. Ramsey County rarely conducts in-person lineups.

[20]Participating in the training were the Saint Paul Police Department's homicide and sex crime investigators and the Ramsey County Sheriff's Department's general investigators, as well as investigators from three smaller suburban departments.

[21]Ramsey County's scientific consultant for the training and development of its Sequential Photo Display Form is Nancy Steblay, professor of psychology at Augsburg College in Minneapolis. She also provided oversight and review of scientific references in this article. Dr. Steblay may be contacted at steblay@augsburg.edu.

[22]See note 17.

[23]The form may be downloaded at http://www.co.ramsey.mn.us/attorney/SPDNA.asp.

[24]Continuing the photo display when the witness identifies a photo before all photos are shown avoids later legal criticism that the lineup was improperly truncated. In the circumstance that a witness makes an early "filler" pick without having seen the suspect's photo, it also allows an answer to the question of what would have happened had the witness seen the suspect's photo (in some cases, a witness might revoke the filler pick). Conversely, the witness may pick the suspect but then discredit this pick when a later photo is shown. Regardless of what happens when the full display is completed, documenting all of these reactions is important and useful information about the witness's memory, the quality of lineup fillers, and the strength of the witness's identification—and ultimately whether the police have the right suspect.

[25]An elegant software program has recently been developed by SunGard OSSI for this purpose. It randomly sorts photos, maintains a record of which version witnesses saw, guides witnesses through a series of questions on each photo by blind administration, preserves an audio recording of all answers (which can be downloaded to a discloseable CD), and generates a written report of results. (See Jerry Farris, "Remote Lineup Application," *The Police Chief* 75, no. 8 (August 2008): 96–98, for a description of its use for blind sequential lineups by the Winston-Salem, North Carolina, Police Department.) A variation of this program is currently used by the Tucson, Arizona, Police Department in a field study comparing simultaneous and sequential lineups. It uses blind administration in either format (which the computer randomly assigns). The study, for which Dr. Steblay is the scientific consultant, will run approximately through October 2009.

[26]These instructions advise witnesses (1) that the person who committed the crime may or may not be included in the photos shown; (2) that the administrator does not know whether the person being investigated is included (or, for an FE, that the administrator does not know the order of the photos); (3) that even if the witness identifies someone during the procedure, all photos will continue to be shown; (4) that a photo may be an old one and that some things, like hair styles, can be changed, and skin colors may look slightly different in photos; (5) that witnesses should not feel compelled to make an identification, since it is just as important to clear innocent persons as it is to identify the guilty and that the investigation will continue whether or not an identification is made; and (6) that witnesses will see only one photo at a time, that the photos are not in any particular order, and that they may take as much time as needed to look at each one. Witnesses are also cautioned to avoid discussing this procedure or the results with any other potential witnesses in the case.

[27]This form may also be downloaded at http://www.co.ramsey.mn.us/attorney/SPDNA.asp.

[28]This effect has been found in both field and laboratory studies. For field tests, see Amy Klobuchar et al., "Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project," *Cardozo Public Law, Policy, and Ethics Journal* 4, no. 2 (April 2006): 381–414; for laboratory tests, see Nancy Steblay, *Double-Blind Sequential Police Lineup Procedures: Toward an Integrated Laboratory and Field Practice Perspective*, final report to the National Institute of Justice, grant no. 2004-IJ-CX-0044, http://web.augsburg.edu/~steblay/March2007_Final_NIJ_report.pdf (accessed February 26, 2009).

[29]The inference in the Mecklenburg article that the blind component is optional in Hennepin County is incorrect, as is the statement that the Hennepin County sequential protocol called for witnesses to make a choice after seeing all the photos. The county's protocol requires an alternative blinded procedure if an independent administrator is not available. For the complete report on the field study, see Klobuchar et al., "Improving Eyewitness Identifications."

[30]These very comprehensive guidelines may be viewed at http://www.thejusticeproject.org/reports/model-policy-and-procedure/.

[31]Northampton Police Captain Ken Patenaude was one of the law enforcement members on the original NIJ panel and an early proponent of this change. He remains active in police training on this issue. His protocol materials may be viewed at http://www.innocenceproject.org/docs/Northampton_eyewitness.pdf (accessed February 26, 2009).

[32] Jennifer Emily, "Dallas Police Drop Study, Plan Photo-Lineup Changes," *Dallas Morning News*, January 16, 2009, http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/011609dnmetsequentialblind.4311ff6.html (accessed February 27, 2009).

[33] This list does not purport to be comprehensive.

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Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

PERRY *v.* NEW HAMPSHIRE

CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

No. 10–8974. Argued November 2, 2011—Decided January 11, 2012

Around 3 a.m. on August 15, 2008, the Nashua, New Hampshire Police Department received a call reporting that an African-American male was trying to break into cars parked in the lot of the caller's apartment building. When an officer responding to the call asked eyewitness Nubia Blandon to describe the man, Blandon pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer. Petitioner Barion Perry's arrest followed this identification.

Before trial, Perry moved to suppress Blandon's identification on the ground that admitting it at trial would violate due process. The New Hampshire trial court denied the motion. To determine whether due process prohibits the introduction of an out-of-court identification at trial, the Superior Court said, this Court's decisions instruct a two-step inquiry: The trial court must first decide whether the police used an unnecessarily suggestive identification procedure; if they did, the court must next consider whether that procedure so tainted the resulting identification as to render it unreliable and thus inadmissible. Perry's challenge, the court found, failed at step one, for Blandon's identification did not result from an unnecessarily suggestive procedure employed by the police. A jury subsequently convicted Perry of theft by unauthorized taking.

On appeal, Perry argued that the trial court erred in requiring an initial showing that police arranged a suggestive identification procedure. Suggestive circumstances alone, Perry contended, suffice to require court evaluation of the reliability of an eyewitness identification before allowing it to be presented to the jury. The New Hampshire Supreme Court rejected Perry's argument and affirmed his conviction.

Held: The Due Process Clause does not require a preliminary judicial

inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. Pp. 6–19.

(a) The Constitution protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Only when evidence "is so extremely unfair that its admission violates fundamental conceptions of justice," *Dowling* v. *United States*, 493 U. S. 342, 352 (internal quotation marks omitted), does the Due Process Clause preclude its admission.

Contending that the Due Process Clause is implicated here, Perry relies on a series of decisions involving police-arranged identification procedures. See *Stovall* v. *Denno*, 388 U. S. 293; *Simmons* v. *United States*, 390 U. S. 377; *Foster* v. *California*, 394 U. S. 440; *Neil* v. *Biggers*, 409 U. S. 188; and *Manson* v. *Brathwaite*, 432 U. S. 98. These cases detail the approach appropriately used to determine whether due process requires suppression of an eyewitness identification tainted by police arrangement. First, due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. *Id.*, at 107, 109; *Biggers*, 409 U. S., at 198. Even when the police use such a procedure, however, suppression of the resulting identification is not the inevitable consequence. *Brathwaite*, 432 U. S., at 112–113; *Biggers*, 409 U. S., at 198–199. Instead, due process requires courts to assess, on a case-by-case basis, whether improper police conduct created a "substantial likelihood of misidentification." *Id.*, at 201. "[R]eliability [of the eyewitness identification] is the linchpin" of that evaluation. *Brathwaite*, 432 U. S., at 114. Where the "indicators of [a witness'] ability to make an accurate identification" are "outweighed by the corrupting effect" of law enforcement suggestion, the identification should be suppressed. *Id.*, at 114, 116. Otherwise, the identification, assuming no other barrier to its admission, should be submitted to the jury. Pp. 6–10.

(b) Perry argues that it was mere happenstance that all of the cases in the *Stovall* line involved improper police action. The rationale underlying this Court's decisions, Perry asserts, calls for a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances. This Court disagrees.

If "reliability is the linchpin" of admissibility under the Due Process Clause, *Brathwaite*, 432 U. S., at 114, Perry contends, it should not matter whether law enforcement was responsible for creating the suggestive circumstances that marred the identification. This argu-

ment removes *Brathwaite*'s statement from its mooring, attributing to it a meaning that a fair reading of the opinion does not bear. The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct.

Perry's contention also ignores a key premise of *Brathwaite:* A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances is to deter law enforcement use of improper procedures in the first place. This deterrence rationale is inapposite in cases, like Perry's, where there is no improper police conduct. Perry also places significant weight on *United States* v. *Wade,* 388 U. S. 218, describing it as a decision not anchored to improper police conduct. But the risk of police rigging was the very danger that prompted the Court in *Wade* to extend a defendant's right to counsel to cover postindictment lineups and showups.

Perry's position would also open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications. There is no reason why an identification made by an eyewitness with poor vision or one who harbors a grudge against the defendant, for example, should be regarded as inherently more reliable than Blandon's identification here. Even if this Court could, as Perry contends, distinguish "suggestive circumstances" from other factors bearing on the reliability of eyewitness evidence, Perry's limitation would still involve trial courts, routinely, in preliminary examinations, for most eyewitness identifications involve some element of suggestion. Pp. 10–14.

(c) In urging a broadly applicable rule, Perry maintains that eyewitness identifications are uniquely unreliable. The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen the evidence for reliability before allowing the jury to assess its creditworthiness. The Court's unwillingness to adopt such a rule rests, in large part, on its recognition that the jury, not the judge, traditionally determines the reliability of evidence. It also takes account of other safeguards built into the adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant's Sixth Amendment rights to counsel and to confront and cross-examine the eyewitness, eyewitness-specific instructions warning juries to take care in appraising identification evidence, and state and federal rules of evidence permitting trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury. Many of these safeguards were availed of by Perry's defense. Given the safeguards generally applicable in criminal trials, the introduction of Blandon's eyewitness tes-

Syllabus

timony, without a preliminary judicial assessment of its reliability, did not render Perry's trial fundamentally unfair. Pp. 14–18.

Affirmed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, ALITO, and KAGAN, JJ., joined. THOMAS, J., filed a concurring opinion. SOTOMAYOR, J., filed a dissenting opinion.

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SUPREME COURT OF THE UNITED STATES

No. 10–8974

BARION PERRY, PETITIONER *v.* NEW HAMPSHIRE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

[January 11, 2012]

JUSTICE GINSBURG delivered the opinion of the Court.

In our system of justice, fair trial for persons charged with criminal offenses is secured by the Sixth Amendment, which guarantees to defendants the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution. Those safeguards apart, admission of evidence in state trials is ordinarily governed by state law, and the reliability of relevant testimony typically falls within the province of the jury to determine. This Court has recognized, in addition, a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime.

An identification infected by improper police influence, our case law holds, is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is "a very substantial likelihood of irreparable misidentification," *Simmons* v. *United States*, 390 U. S. 377, 384 (1968), the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the

police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.

We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Petitioner requests that we do so because of the grave risk that mistaken identification will yield a miscarriage of justice.[1] Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

I

A

Around 3 a.m. on August 15, 2008, Joffre Ullon called the Nashua, New Hampshire, Police Department and

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[1]The dissent, too, appears to urge that all suggestive circumstances raise due process concerns warranting a pretrial ruling. See *post,* at 6, 9, 14–17. Neither Perry nor the dissent, however, points to a single case in which we have required pretrial screening absent a police-arranged identification procedure. Understandably so, for there are no such cases. Instead, the dissent surveys our decisions, heedless of the police arrangement that underlies every one of them, and inventing a "longstanding rule," *post,* at 6, that never existed. Nor are we, as the dissent suggests, imposing a *mens rea* requirement, *post,* at 1, 7, or otherwise altering our precedent in any way. As our case law makes clear, what triggers due process concerns is police use of an unnecessarily suggestive identification procedure, whether or not they intended the arranged procedure to be suggestive.

reported that an African-American male was trying to break into cars parked in the lot of Ullon's apartment building. Officer Nicole Clay responded to the call. Upon arriving at the parking lot, Clay heard what "sounded like a metal bat hitting the ground." App. 37a–38a. She then saw petitioner Barion Perry standing between two cars. Perry walked toward Clay, holding two car-stereo amplifiers in his hands. A metal bat lay on the ground behind him. Clay asked Perry where the amplifiers came from. "[I] found them on the ground," Perry responded. *Id.*, at 39a.

Meanwhile, Ullon's wife, Nubia Blandon, woke her neighbor, Alex Clavijo, and told him she had just seen someone break into his car. Clavijo immediately went downstairs to the parking lot to inspect the car. He first observed that one of the rear windows had been shattered. On further inspection, he discovered that the speakers and amplifiers from his car stereo were missing, as were his bat and wrench. Clavijo then approached Clay and told her about Blandon's alert and his own subsequent observations.

By this time, another officer had arrived at the scene. Clay asked Perry to stay in the parking lot with that officer, while she and Clavijo went to talk to Blandon. Clay and Clavijo then entered the apartment building and took the stairs to the fourth floor, where Blandon's and Clavijo's apartments were located. They met Blandon in the hallway just outside the open door to her apartment.

Asked to describe what she had seen, Blandon stated that, around 2:30 a.m., she saw from her kitchen window a tall, African-American man roaming the parking lot and looking into cars. Eventually, the man circled Clavijo's car, opened the trunk, and removed a large box.[2]

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[2]The box, which Clay found on the ground near where she first encountered Perry, contained car-stereo speakers. App. 177a–178a.

Clay asked Blandon for a more specific description of the man. Blandon pointed to her kitchen window and said the person she saw breaking into Clavijo's car was standing in the parking lot, next to the police officer. Perry's arrest followed this identification.

About a month later, the police showed Blandon a photographic array that included a picture of Perry and asked her to point out the man who had broken into Clavijo's car. Blandon was unable to identify Perry.

B

Perry was charged in New Hampshire state court with one count of theft by unauthorized taking and one count of criminal mischief.[3] Before trial, he moved to suppress Blandon's identification on the ground that admitting it at trial would violate due process. Blandon witnessed what amounted to a one-person showup in the parking lot, Perry asserted, which all but guaranteed that she would identify him as the culprit. *Id.*, at 15a–16a.

The New Hampshire Superior Court denied the motion. *Id.*, at 82a–88a. To determine whether due process prohibits the introduction of an out-of-court identification at trial, the Superior Court said, this Court's decisions instruct a two-step inquiry. First, the trial court must decide whether the police used an unnecessarily suggestive identification procedure. *Id.*, at 85a. If they did, the court must next consider whether the improper identification procedure so tainted the resulting identification as to render it unreliable and therefore inadmissible. *Ibid.* (citing *Neil* v. *Biggers*, 409 U. S. 188 (1972), and *Manson* v. *Brathwaite*, 432 U. S. 98 (1977)).

Perry's challenge, the Superior Court concluded, failed at step one: Blandon's identification of Perry on the night

[3] The theft charge was based on the taking of items from Clavijo's car, while the criminal mischief count was founded on the shattering of Clavijo's car window.

of the crime did not result from an unnecessarily suggestive procedure "manufacture[d] . . . by the police." App. 86a–87a. Blandon pointed to Perry "spontaneously," the court noted, "without any inducement from the police." *Id.,* at 85a–86a. Clay did not ask Blandon whether the man standing in the parking lot was the man Blandon had seen breaking into Clavijo's car. *Ibid.* Nor did Clay ask Blandon to move to the window from which she had observed the break-in. *Id.,* at 86a.

The Superior Court recognized that there were reasons to question the accuracy of Blandon's identification: the parking lot was dark in some locations; Perry was standing next to a police officer; Perry was the only African-American man in the vicinity; and Blandon was unable, later, to pick Perry out of a photographic array. *Id.,* at 86a–87a. But "[b]ecause the police procedures were not unnecessarily suggestive," the court ruled that the reliability of Blandon's testimony was for the jury to consider. *Id.,* at 87a.

At the ensuing trial, Blandon and Clay testified to Blandon's out-of-court identification. The jury found Perry guilty of theft and not guilty of criminal mischief.

On appeal, Perry repeated his challenge to the admissibility of Blandon's out-of-court identification. The trial court erred, Perry contended, in requiring an initial showing that the police arranged the suggestive identification procedure. Suggestive circumstances alone, Perry argued, suffice to trigger the court's duty to evaluate the reliability of the resulting identification before allowing presentation of the evidence to the jury.

The New Hampshire Supreme Court rejected Perry's argument and affirmed his conviction. *Id.,* at 9a–11a. Only where the police employ suggestive identification techniques, that court held, does the Due Process Clause require a trial court to assess the reliability of identification evidence before permitting a jury to consider it. *Id.,*

at 10a–11a.

We granted certiorari to resolve a division of opinion on the question whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police. 563 U. S. ___ (2011).[4]

II

A

The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to counsel, *Gideon* v. *Wainwright*, 372 U. S. 335, 343–345 (1963); compulsory process, *Taylor* v. *Illinois*, 484 U. S. 400, 408–409 (1988); and confrontation plus cross-examination of witnesses, *Delaware* v. *Fensterer*, 474 U. S. 15, 18–20 (1985) *(per curiam)*.

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[4] Compare *United States* v. *Bouthot*, 878 F. 2d 1506, 1516 (CA1 1989) (Due process requires federal courts to "scrutinize all suggestive identification procedures, not just those orchestrated by the police."); *Dunnigan* v. *Keane*, 137 F. 3d 117, 128 (CA2 1998) (same); *Thigpen* v. *Cory*, 804 F. 2d 893, 895 (CA6 1986) (same), with *United States* v. *Kimberlin*, 805 F. 2d 210, 233 (CA7 1986) (Due process check is required only in cases involving improper state action.); *United States* v. *Zeiler*, 470 F. 2d 717, 720 (CA3 1972) (same); *State* v. *Addison*, 160 N. H. 792, 801, 8 A. 3d 118, 125 (2010) (same); *State* v. *Reid*, 91 S. W. 3d 247, 272 (Tenn. 2002) (same); *State* v. *Nordstrom*, 200 Ariz. 229, 241, 25 P. 3d 717, 729 (2001) (same); *Semple* v. *State*, 271 Ga. 416, 417–418, 519 S. E. 2d 912, 914–915 (1999) (same); *Harris* v. *State*, 619 N. E. 2d 577, 581 (Ind. 1993) (same); *State* v. *Pailon*, 590 A. 2d 858, 862–863 (R. I. 1991) (same); *Commonwealth* v. *Colon-Cruz*, 408 Mass. 533, 541–542, 562 N. E. 2d 797, 805 (1990) (same); *State* v. *Brown*, 38 Ohio St. 3d 305, 310–311, 528 N. E. 2d 523, 533 (1988) (same); *Wilson* v. *Commonwealth*, 695 S. W. 2d 854, 857 (Ky. 1985) (same).

Apart from these guarantees, we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial. See *Kansas* v. *Ventris*, 556 U. S. 586, 594, n. (2009) ("Our legal system . . . is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses."). Only when evidence "is so extremely unfair that its admission violates fundamental conceptions of justice," *Dowling* v. *United States*, 493 U. S. 342, 352 (1990) (internal quotation marks omitted), have we imposed a constraint tied to the Due Process Clause. See, *e.g.*, *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959) (Due process prohibits the State's "knowin[g] use [of] false evidence," because such use violates "any concept of ordered liberty.").

Contending that the Due Process Clause is implicated here, Perry relies on a series of decisions involving police-arranged identification procedures. In *Stovall* v. *Denno*, 388 U. S. 293 (1967), first of those decisions, a witness identified the defendant as her assailant after police officers brought the defendant to the witness' hospital room. *Id.*, at 295. At the time the witness made the identification, the defendant—the only African-American in the room—was handcuffed and surrounded by police officers. *Ibid.* Although the police-arranged showup was undeniably suggestive, the Court held that no due process violation occurred. *Id.*, at 302. Crucial to the Court's decision was the procedure's necessity: The witness was the only person who could identify or exonerate the defendant; the witness could not leave her hospital room; and it was uncertain whether she would live to identify the defendant in more neutral circumstances. *Ibid.*

A year later, in *Simmons* v. *United States*, 390 U. S. 377 (1968), the Court addressed a due process challenge to police use of a photographic array. When a witness identi-

fies the defendant in a police-organized photo lineup, the Court ruled, the identification should be suppressed only where "the photographic identification procedure was so [unnecessarily] suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.*, at 384–385. Satisfied that the photo array used by Federal Bureau of Investigation agents in *Simmons* was both necessary and unlikely to have led to a mistaken identification, the Court rejected the defendant's due process challenge to admission of the identification. *Id.*, at 385–386. In contrast, the Court held in *Foster* v. *California*, 394 U. S. 440 (1969), that due process required the exclusion of an eyewitness identification obtained through police-arranged procedures that "made it all but inevitable that [the witness] would identify [the defendant]." *Id.*, at 443.

Synthesizing previous decisions, we set forth in *Neil* v. *Biggers*, 409 U. S. 188 (1972), and reiterated in *Manson* v. *Brathwaite*, 432 U. S. 98 (1977), the approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement. The Court emphasized, first, that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. *Id.*, at 107, 109; *Biggers*, 409 U. S., at 198. Even when the police use such a procedure, the Court next said, suppression of the resulting identification is not the inevitable consequence. *Brathwaite*, 432 U. S., at 112–113; *Biggers*, 409 U. S., at 198–199.

A rule requiring automatic exclusion, the Court reasoned, would "g[o] too far," for it would "kee[p] evidence from the jury that is reliable and relevant," and "may result, on occasion, in the guilty going free." *Brathwaite*, 432 U. S., at 112; see *id.*, at 113 (when an "identification is reliable despite an unnecessarily suggestive [police] identification procedure," automatic exclusion "is a Draconian

sanction," one "that may frustrate rather than promote justice").

Instead of mandating a *per se* exclusionary rule, the Court held that the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a "substantial likelihood of misidentification." *Biggers*, 409 U. S., at 201; see *Brathwaite*, 432 U. S., at 116. "[R]eliability [of the eyewitness identification] is the linchpin" of that evaluation, the Court stated in *Brathwaite*. *Id.*, at 114. Where the "indicators of [a witness'] ability to make an accurate identification" are "outweighed by the corrupting effect" of law enforcement suggestion, the identification should be suppressed. *Id.*, at 114, 116. Otherwise, the evidence (if admissible in all other respects) should be submitted to the jury.[5]

Applying this "totality of the circumstances" approach, *id.*, at 110, the Court held in *Biggers* that law enforcement's use of an unnecessarily suggestive showup did not require suppression of the victim's identification of her assailant. 409 U. S., at 199–200. Notwithstanding the improper procedure, the victim's identification was reliable: She saw her assailant for a considerable period of time under adequate light, provided police with a detailed description of her attacker long before the showup, and had "no doubt" that the defendant was the person she had seen. *Id.*, at 200 (internal quotation marks omitted). Similarly, the Court concluded in *Brathwaite* that police use of an unnecessarily suggestive photo array did not

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[5] Among "factors to be considered" in evaluating a witness' "ability to make an accurate identification," the Court listed: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Manson* v. *Brathwaite*, 432 U. S. 98, 114 (1977) (citing *Neil* v. *Biggers*, 409 U. S. 188, 199–200 (1972)).

require exclusion of the resulting identification. 432 U. S., at 114–117. The witness, an undercover police officer, viewed the defendant in good light for several minutes, provided a thorough description of the suspect, and was certain of his identification. *Id.*, at 115. Hence, the "indicators of [the witness'] ability to make an accurate identification [were] hardly outweighed by the corrupting effect of the challenged identification." *Id.*, at 116.

B

Perry concedes that, in contrast to every case in the *Stovall* line, law enforcement officials did not arrange the suggestive circumstances surrounding Blandon's identification. See Brief for Petitioner 34; Tr. of Oral Arg. 5 (counsel for Perry) ("[W]e do not allege any manipulation or intentional orchestration by the police."). He contends, however, that it was mere happenstance that each of the *Stovall* cases involved improper police action. The rationale underlying our decisions, Perry asserts, supports a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances. We disagree.

Perry's argument depends, in large part, on the Court's statement in *Brathwaite* that "reliability is the linchpin in determining the admissibility of identification testimony." 432 U. S., at 114. If reliability is the linchpin of admissibility under the Due Process Clause, Perry maintains, it should make no difference whether law enforcement was responsible for creating the suggestive circumstances that marred the identification.

Perry has removed our statement in *Brathwaite* from its mooring, and thereby attributes to the statement a meaning a fair reading of our opinion does not bear. As just explained, *supra,* at 8–9, the *Brathwaite* Court's reference to reliability appears in a portion of the opinion concerning the appropriate remedy *when the police use an unneces-*

sarily suggestive identification procedure. The Court adopted a judicial screen for reliability as a course preferable to a *per se* rule requiring exclusion of identification evidence whenever law enforcement officers employ an improper procedure. The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct. The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, *notwithstanding* improper police conduct. 432 U. S., at 112–113.[6]

Perry's contention that improper police action was not essential to the reliability check *Brathwaite* required is echoed by the dissent. *Post,* at 3–4. Both ignore a key premise of the *Brathwaite* decision: A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances, the Court said, is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. See 432 U. S., at 112. Alerted to the prospect that identification evidence improperly obtained may be excluded, the Court reasoned, police officers will "guard against unnecessarily suggestive procedures." *Ibid.* This deterrence rationale is inapposite in cases, like Perry's, in which the police engaged in no improper conduct.

Coleman v. *Alabama,* 399 U. S. 1 (1970), another decision in the *Stovall* line, similarly shows that the Court has linked the due process check, not to suspicion of eyewitness testimony generally, but only to improper police arrangement of the circumstances surrounding an identi-

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[6]The Court's description of the question presented in *Brathwaite* assumes that improper state action occurred: "[Does] the Due Process Clause of the Fourteenth Amendment compe[l] the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary." 432 U. S., at 99.

fication. The defendants in *Coleman* contended that a witness' in-court identifications violated due process, because a pretrial stationhouse lineup was "so unduly prejudicial and conducive to irreparable misidentification as fatally to taint [the later identifications]." 399 U. S., at 3 (plurality opinion). The Court rejected this argument. *Id.,* at 5–6 (plurality opinion), 13–14 (Black, J., concurring), 22, n. 2 (Burger, C. J., dissenting), 28, n. 2 (Stewart, J., dissenting). No due process violation occurred, the plurality explained, because nothing "the police said or did prompted [the witness'] virtually spontaneous identification of [the defendants]." *Id.,* at 6. True, Coleman was the only person in the lineup wearing a hat, the plurality noted, but "nothing in the record show[ed] that he was required to do so." *Ibid.* See also *Colorado* v. *Connelly*, 479 U. S. 157, 163, 167 (1986) (Where the "crucial element of police overreaching" is missing, the admissibility of an allegedly unreliable confession is "a matter to be governed by the evidentiary laws of the forum, . . . and not by the Due Process Clause.").

Perry and the dissent place significant weight on *United States* v. *Wade*, 388 U. S. 218 (1967), describing it as a decision not anchored to improper police conduct. See Brief for Petitioner 12, 15, 21–22, 28; *post,* at 2–4, 8–10. In fact, the risk of police rigging was the very danger to which the Court responded in *Wade* when it recognized a defendant's right to counsel at postindictment, police-organized identification procedures. 388 U. S., at 233, 235–236. "[T]he confrontation *compelled by the State* between the accused and the victim or witnesses," the Court began, "is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.,* at 228 (emphasis added). "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification," the Court continued, "has been the degree of suggestion inher-

ent in the manner in which *the prosecution* presents the suspect to witnesses for pretrial identification." *Ibid.* (emphasis added). To illustrate the improper suggestion it was concerned about, the Court pointed to police-designed lineups where "all in the lineup but the suspect were known to the identifying witness, . . . the other participants in [the] lineup were grossly dissimilar in appearance to the suspect, . . . only the suspect was required to wear distinctive clothing which the culprit allegedly wore, . . . the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, . . . the suspect is pointed out before or during a lineup, . . . the participants in the lineup are asked to try on an article of clothing which fits only the suspect." *Id.,* at 233 (footnotes omitted). Beyond genuine debate, then, prevention of unfair police practices prompted the Court to extend a defendant's right to counsel to cover postindictment lineups and showups. *Id.,* at 235.

Perry's argument, reiterated by the dissent, thus lacks support in the case law he cites. Moreover, his position would open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications. External suggestion is hardly the only factor that casts doubt on the trustworthiness of an eyewitness' testimony. As one of Perry's *amici* points out, many other factors bear on "the likelihood of misidentification," *post,* at 9—for example, the passage of time between exposure to and identification of the defendant, whether the witness was under stress when he first encountered the suspect, how much time the witness had to observe the suspect, how far the witness was from the suspect, whether the suspect carried a weapon, and the race of the suspect and the witness. Brief for American Psychological Association as *Amicus Curiae* 9–12. There is no reason why an identification made by an eyewitness with poor vision, for ex-

ample, or one who harbors a grudge against the defendant, should be regarded as inherently more reliable, less of a "threat to the fairness of trial," *post,* at 14, than the identification Blandon made in this case. To embrace Perry's view would thus entail a vast enlargement of the reach of due process as a constraint on the admission of evidence.

Perry maintains that the Court can limit the due process check he proposes to identifications made under "suggestive circumstances." Tr. of Oral Arg. 11–14. Even if we could rationally distinguish suggestiveness from other factors bearing on the reliability of eyewitness evidence, Perry's limitation would still involve trial courts, routinely, in preliminary examinations. Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do. Out-of-court identifications volunteered by witnesses are also likely to involve suggestive circumstances. For example, suppose a witness identifies the defendant to police officers after seeing a photograph of the defendant in the press captioned "theft suspect," or hearing a radio report implicating the defendant in the crime. Or suppose the witness knew that the defendant ran with the wrong crowd and saw him on the day and in the vicinity of the crime. Any of these circumstances might have "suggested" to the witness that the defendant was the person the witness observed committing the crime.

C

In urging a broadly applicable due process check on eyewitness identifications, Perry maintains that eyewitness identifications are a uniquely unreliable form of evidence. See Brief for Petitioner 17–22 (citing studies showing that eyewitness misidentifications are the leading cause of wrongful convictions); Brief for American Psychological Association as *Amicus Curiae* 14–17 (describing

research indicating that as many as one in three eyewitness identifications is inaccurate). See also *post,* at 14–17. We do not doubt either the importance or the fallibility of eyewitness identifications. Indeed, in recognizing that defendants have a constitutional right to counsel at postindictment police lineups, we observed that "the annals of criminal law are rife with instances of mistaken identification." *Wade*, 388 U. S., at 228.

We have concluded in other contexts, however, that the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair. See, *e.g., Ventris*, 556 U. S., at 594, n. (declining to "craft a broa[d] exclusionary rule for uncorroborated statements obtained [from jailhouse snitches]," even though "rewarded informant testimony" may be inherently untrustworthy); *Dowling*, 493 U. S., at 353 (rejecting argument that the introduction of evidence concerning acquitted conduct is fundamentally unfair because such evidence is "inherently unreliable"). We reach a similar conclusion here: The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.

Our unwillingness to enlarge the domain of due process as Perry and the dissent urge rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence. See *supra*, at 7. We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant's Sixth Amendment right to confront the eyewitness. See *Maryland* v. *Craig*, 497 U. S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant."). Another is the

defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted,[7] likewise warn the jury to take care in appraising identification evidence. See, *e.g.*, *United States* v. *Telfaire*, 469 F. 2d 552, 558–559 (CADC 1972) *(per curiam)* (D. C. Circuit Model Jury Instructions) ("If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care."). See also *Ventris*, 556 U. S., at 594, n. (citing jury instructions that informed jurors about the unreliability of uncorroborated jailhouse-informant testimony as a reason to resist a ban on such testimony); *Dowling*, 493

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[7]See Model Crim. Jury Instr. No. 4.15 (CA3 2009); *United States* v. *Holley*, 502 F. 2d 273, 277–278 (CA4 1974); Pattern Crim. Jury Instr. No. 1.29 (CA5 2001); Pattern Crim. Jury Instr. No. 7.11 (CA6 2011); Fed. Crim. Jury Instr. No. 3.08 (CA7 1999); Model Crim. Jury Instr. for the District Courts No. 4.08 (CA8 2011); Model Crim. Jury Instr. No. 4.11 (CA9 2010); Crim. Pattern Jury Instr. No. 1.29 (CA10 2011); Pattern Jury Instr. (Crim. Cases) Spec. Instr. No. 3 (CA11 2010); Rev. Ariz. Jury Instr., Crim., No. 39 (3d ed. 2008); 1 Judicial Council of Cal. Crim. Jury Instr. No. 315 (Summer 2011); Conn. Crim. Jury Instr. 2.6–4 (2007); 2 Ga. Suggested Pattern Jury Instr. (Crim. Cases) No. 1.35.10 (4th ed. 2011); Ill. Pattern Jury Instr., Crim., No. 3.15 (Supp. 2011); Pattern Instr., Kan. 3d, Crim., No. 52.20 (2011); 1 Md. Crim. Jury Instr. & Commentary §§2.56, 2.57(A), 2.57(B) (3d ed. 2009 and Supp. 2010); Mass. Crim. Model Jury Instr. No. 9.160 (2009); 10 Minn. Jury Instr. Guides, Crim., No. 3.19 (Supp. 2006); N. H. Crim. Jury Instr. No. 3.06 (1985); N. Y. Crim. Jury Instr. "Identification—One Witness" and "Identification—Witness Plus" (2d ed. 2011); Okla. Uniform Jury Instr., Crim., No. 9–19 (Supp. 2000); 1 Pa. Suggested Standard Crim. Jury Instr. No. 4.07B (2d ed. 2010); Tenn. Pattern Jury Instr., Crim., No. 42.05 (15th ed. 2011); Utah Model Jury Instr. CR404 (2d ed. 2010); Model Instructions from the Vt. Crim. Jury Instr. Comm. Nos. CR5–601, CR5–605 (2003); W. Va. Crim. Jury Instr. No. 5.05 (6th ed. 2003).

U. S., at 352–353. The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence.

State and federal rules of evidence, moreover, permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury. See, *e.g.*, Fed. Rule Evid. 403; N. H. Rule Evid. 403 (2011). See also Tr. of Oral Arg. 19–22 (inquiring whether the standard Perry seeks differs materially from the one set out in Rule 403). In appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence. See, *e.g.*, *State* v. *Clopten*, 2009 UT 84, A33, 223 P. 3d 1103, 1113 ("We expect . . . that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence].").

Many of the safeguards just noted were at work at Perry's trial. During her opening statement, Perry's court-appointed attorney cautioned the jury about the vulnerability of Blandon's identification. App. 115a (Blandon, "the eyewitness that the State needs you to believe[,] can't pick [Perry] out of a photo array. How carefully did she really see what was going on? . . . How well could she really see him?"). While cross-examining Blandon and Officer Clay, Perry's attorney constantly brought up the weaknesses of Blandon's identification. She highlighted: (1) the significant distance between Blandon's window and the parking lot, *id.*, at 226a; (2) the lateness of the hour, *id.*, at 225a; (3) the van that partly obstructed Blandon's view, *id.*, at 226a; (4) Blandon's concession that she was "so scared [she] really didn't pay attention" to what Perry was wearing, *id.*, at 233a; (5) Blandon's inability to describe Perry's facial features or other identifying marks, *id.*, at 205a, 233a–235a; (6) Blandon's failure to pick Perry

out of a photo array, *id.*, at 235a; and (7) Perry's position next to a uniformed, gun-bearing police officer at the moment Blandon made her identification, *id.*, at 202a–205a. Perry's counsel reminded the jury of these frailties during her summation. *Id.*, at 374a–375a (Blandon "wasn't able to tell you much about who she saw . . . . She couldn't pick [Perry] out of a lineup, out of a photo array . . . . [Blandon said] [t]hat guy that was with the police officer, that's who was circling. Again, think about the context with the guns, the uniforms. Powerful, powerful context clues.").

After closing arguments, the trial court read the jury a lengthy instruction on identification testimony and the factors the jury should consider when evaluating it. *Id.*, at 399a–401a. The court also instructed the jury that the defendant's guilt must be proved beyond a reasonable doubt, *id.*, at 390a, 392a, 395a–396a, and specifically cautioned that "one of the things the State must prove [beyond a reasonable doubt] is the identification of the defendant as the person who committed the offense," *id.*, at 398a–399a.

Given the safeguards generally applicable in criminal trials, protections availed of by the defense in Perry's case, we hold that the introduction of Blandon's eyewitness testimony, without a preliminary judicial assessment of its reliability, did not render Perry's trial fundamentally unfair.

* * *

For the foregoing reasons, we agree with the New Hampshire courts' appraisal of our decisions. See *supra,* at 4–5. Finding no convincing reason to alter our precedent, we hold that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circum-

stances arranged by law enforcement. Accordingly, the judgment of the New Hampshire Supreme Court is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 10–8974

BARION PERRY, PETITIONER *v.* NEW HAMPSHIRE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

[January 11, 2012]

JUSTICE THOMAS, concurring.

The Court correctly concludes that its precedents establish a due process right to the pretrial exclusion of an unreliable eyewitness identification only if the identification results from police suggestion. I therefore join its opinion. I write separately because I would not extend *Stovall* v. *Denno,* 388 U. S. 293 (1967), and its progeny even if the reasoning of those opinions applied to this case. The *Stovall* line of cases is premised on a "substantive due process" right to "fundamental fairness." See, *e.g., id.,* at 299 (concluding that whether a suggestive identification "resulted in such unfairness that it infringed [the defendant's] right to due process of law" is "open to all persons to allege and prove"); *Manson* v. *Brathwaite,* 432 U. S. 98, 113 (1977) ("The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment"). In my view, those cases are wrongly decided because the Fourteenth Amendment's Due Process Clause is not a "secret repository of substantive guarantees against 'unfairness.'" *BMW of North America, Inc.* v. *Gore,* 517 U. S. 559, 598–599 (1996) (SCALIA, J., joined by THOMAS, J., dissenting); see also *McDonald* v. *Chicago,* 561 U. S. ___, ___ (2010) (THOMAS, J., concurring in part and concurring in judgment) (slip op., at 7) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property

could define the substance of those rights strains credulity"). Accordingly, I would limit the Court's suggestive eyewitness identification cases to the precise circumstances that they involved.

SUPREME COURT OF THE UNITED STATES

No. 10–8974

BARION PERRY, PETITIONER *v.* NEW HAMPSHIRE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

[January 11, 2012]

JUSTICE SOTOMAYOR, dissenting.

This Court has long recognized that eyewitness identifications' unique confluence of features—their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process—can undermine the fairness of a trial. Our cases thus establish a clear rule: The admission at trial of out-of-court eyewitness identifications derived from impermissibly suggestive circumstances that pose a very substantial likelihood of misidentification violates due process. The Court today announces that that rule does not even "com[e] into play" unless the suggestive circumstances are improperly "police-arranged." *Ante*, at 2, 11.

Our due process concern, however, arises not from the act of suggestion, but rather from the corrosive effects of suggestion on the reliability of the resulting identification. By rendering protection contingent on improper police arrangement of the suggestive circumstances, the Court effectively grafts a *mens rea* inquiry onto our rule. The Court's holding enshrines a murky distinction—between suggestive confrontations intentionally orchestrated by the police and, as here, those inadvertently caused by police actions—that will sow confusion. It ignores our precedents' acute sensitivity to the hazards of intentional and unintentional suggestion alike and unmoors our rule from the very interest it protects, inviting arbitrary re-

sults. And it recasts the driving force of our decisions as an interest in police deterrence, rather than reliability. Because I see no warrant for declining to assess the circumstances of this case under our ordinary approach, I respectfully dissent.[1]

I

The "driving force" behind *United States* v. *Wade*, 388 U. S. 218 (1967), *Gilbert* v. *California*, 388 U. S. 263 (1967), and *Stovall* v. *Denno*, 388 U. S. 293 (1967), was "the Court's concern with the problems of eyewitness identification"—specifically, "the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability." *Manson* v. *Brathwaite*, 432 U. S. 98, 111–112 (1977). We have pointed to the "'formidable'" number of "miscarriage[s] of justice from mistaken identification" in the annals of criminal law. *Wade*, 388 U. S., at 228. We have warned of the "vagaries" and "'proverbially untrustworthy'" nature of eyewitness identifications. *Ibid.* And we have singled out a "major factor contributing" to that proverbial unreliability: "the suggestibility inherent in the context of the pretrial identification." *Id.*, at 228, 235.

Our precedents make no distinction between intentional and unintentional suggestion. To the contrary, they explicitly state that "[s]uggestion can be created intentionally or unintentionally in many subtle ways." *Id.*, at 229. Rather than equate suggestive conduct with misconduct, we specifically have disavowed the assumption that suggestive influences may only be "the result of police procedures intentionally designed to prejudice an accused." *Id.*, at 235; see also *id.*, at 236 (noting "grave potential for prejudice, intentional or not, in the pretrial lineup"); *id.*, at

[1] Because the facts of this case involve police action, I do not reach the question whether due process is triggered in situations involving no police action whatsoever.

239 (describing lack of lineup regulations addressing "risks of abuse and unintentional suggestion"). "Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused." *Moore* v. *Illinois*, 434 U. S. 220, 224 (1977). The implication is that even police acting with the best of intentions can inadvertently signal "'that's the man.'" *Wade*, 388 U. S., at 236; see also *Kirby* v. *Illinois*, 406 U. S. 682, 690–691 (1972) ("[I]t is always necessary to 'scrutinize *any* pretrial confrontation . . .'").[2]

In *Wade* itself, we noted that the "potential for improper influence [in pretrial confrontations] is illustrated by the circumstances . . . [i]n the present case." 388 U. S., at 233–234. We then highlighted not the lineup procedure, but rather a preprocedure encounter: The two witnesses who later identified Wade in the lineup had seen Wade outside while "await[ing] assembly of the lineup." *Id.*, at 234. Wade had been standing in the hallway, which happened to be "observable to the witnesses through an open door." *Ibid.* One witness saw Wade "within sight of an FBI agent"; the other saw him "in the custody of the agent." *Ibid.* In underscoring the hazards of these circumstances, we made no mention of whether the encounter had been arranged; indeed, the facts suggest that it was not.

More generally, our precedents focus not on the act of suggestion, but on suggestion's "corrupting effect" on

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[2] *Wade* held that the dangers of pretrial identification procedures necessitated a right to counsel; that same day, *Stovall* held that a defendant ineligible for the *Wade* rule was still entitled to challenge the confrontation as a due process violation. Because the two were companion cases advancing interrelated rules to avoid unfairness at trial resulting from suggestive pretrial confrontations, *Wade*'s exposition of the dangers of suggestiveness informs both contexts. See *Manson* v. *Brathwaite*, 432 U. S. 98, 112 (1977) ("*Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability").

reliability. *Brathwaite*, 432 U. S., at 114. Eyewitness evidence derived from suggestive circumstances, we have explained, is uniquely resistant to the ordinary tests of the adversary process. An eyewitness who has made an identification often becomes convinced of its accuracy. "*Regardless of how the initial misidentification comes about*, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent . . . courtroom identification." *Simmons* v. *United States*, 390 U. S. 377, 383–384 (1968) (emphasis added); see also *Wade*, 388 U. S., at 229 (witness is "not likely" to recant). Suggestion bolsters that confidence.

At trial, an eyewitness' artificially inflated confidence in an identification's accuracy complicates the jury's task of assessing witness credibility and reliability. It also impairs the defendant's ability to attack the eyewitness' credibility. *Stovall*, 388 U. S., at 298. That in turn jeopardizes the defendant's basic right to subject his accuser to meaningful cross-examination. See *Wade*, 388 U. S., at 235 ("[C]ross-examination . . . cannot be viewed as an absolute assurance of accuracy and reliability . . . where so many variables and pitfalls exist"). The end result of suggestion, whether intentional or unintentional, is to fortify testimony bearing directly on guilt that juries find extremely convincing and are hesitant to discredit. See *id.*, at 224 ("[A]t pretrial proceedings . . . the results might well settle the accused's fate and reduce the trial itself to a mere formality"); *Gilbert*, 388 U. S., at 273 ("[T]he witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury").

Consistent with our focus on reliability, we have declined to adopt a *per se* rule excluding all suggestive identifications. Instead, "reliability is the linchpin" in deciding admissibility. *Brathwaite*, 432 U. S., at 114. We have explained that a suggestive identification procedure "does

not in itself intrude upon a constitutionally protected interest." *Id.*, at 113, n. 13; see also *Neil* v. *Biggers*, 409 U. S. 188, 198–199 (1972) (rejecting the proposition that "unnecessary suggestiveness alone requires the exclusion of evidence"). "Suggestive confrontations are disapproved because they increase the likelihood of misidentification"—and "[i]t is the likelihood of misidentification which violates a defendant's right to due process." *Id.*, at 198; see also *United States ex rel. Kirby* v. *Sturges*, 510 F. 2d 397, 406 (CA7 1975) (Stevens, J.) ("The due process clause applies only to proceedings which result in a deprivation of life, liberty or property. . . . [I]f a constitutional violation results from a showup, it occurs in the courtroom, not in the police station"). In short, "'what the *Stovall* due process right protects is an evidentiary interest.'" *Brathwaite*, 432 U. S., at 113, n. 14.

To protect that evidentiary interest, we have applied a two-step inquiry: First, the defendant has the burden of showing that the eyewitness identification was derived through "impermissibly suggestive" means.[3] *Simmons*, 390 U. S., at 384. Second, if the defendant meets that burden, courts consider whether the identification was

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[3] Our precedents refer to "impermissibly," "unnecessarily," and "unduly" suggestive circumstances interchangeably. See, *e.g.*, *Brathwaite*, 432 U. S., at 105, n. 8, 107–108, 110, 112–113 ("impermissibly" and "unnecessarily"); *Neil* v. *Biggers*, 409 U. S. 188, 196–199 (1972) ("impermissibly" and "unnecessarily"); *Coleman* v. *Alabama*, 399 U. S. 1, 3–5 (1970) ("unduly" and "impermissibly"); *Simmons* v. *United States*, 390 U. S. 377, 383–384 (1968) ("unduly" and "impermissibly"). The Circuits have followed suit. *E.g.*, *Thigpen* v. *Cory*, 804 F. 2d 893, 895 (CA6 1986) ("unduly"); *Green* v. *Loggins*, 614 F. 2d 219, 223 (CA9 1980) ("unnecessarily or impermissibly"). All reinforce our focus not on the act of suggestion, but on whether the suggestiveness rises to such a level that it undermines reliability. Police machinations can heighten the likelihood of misidentification, but they are no prerequisite to finding a confrontation "so impermissibly suggestive as to give rise to a very substantial likelihood of . . . misidentification." *Simmons*, 390 U. S., at 384.

reliable under the totality of the circumstances. That step entails considering the witness' opportunity to view the perpetrator, degree of attention, accuracy of description, level of certainty, and the time between the crime and pretrial confrontation, then weighing such factors against the "corrupting effect of the suggestive identification." *Brathwaite*, 432 U. S., at 108, 114. Most identifications will be admissible. The standard of "fairness as required by the Due Process Clause," *id.*, at 113, however, demands that a subset of the most unreliable identifications—those carrying a "'very substantial likelihood of . . . misidentification'"—will be excluded. *Biggers*, 409 U. S., at 198.

II

A

The majority today creates a novel and significant limitation on our longstanding rule: Eyewitness identifications so impermissibly suggestive that they pose a very substantial likelihood of an unreliable identification will be deemed inadmissible at trial *only* if the suggestive circumstances were "police-arranged." *Ante*, at 2. Absent "improper police arrangement," "improper police conduct," or "rigging," the majority holds, our two-step inquiry does not even "com[e] into play." *Ante*, at 2, 11. I cannot agree.

The majority does not simply hold that an eyewitness identification must be the product of police action to trigger our ordinary two-step inquiry. Rather, the majority maintains that the suggestive circumstances giving rise to the identification must be "police-arranged," "police rigg[ed]," "police-designed," or "police-organized." *Ante,* at 2, 12–13. Those terms connote a degree of intentional orchestration or manipulation. See Brief for Respondent 19 (no indication that police "deliberately tried to manipulate any evidence"); Brief for United States as *Amicus Curiae* 18 ("[N]o one deliberately arranged the circumstances to obtain an identification"). The majority cate-

gorically exempts all eyewitness identifications derived from suggestive circumstances that were not police-manipulated—however suggestive, and however unreliable—from our due process check. The majority thus appears to graft a *mens rea* requirement onto our existing rule.[4]

As this case illustrates, police intent is now paramount. As the Court acknowledges, Perry alleges an "*accidental* showup." Brief for Petitioner 34 (emphasis added); see *ante,* at 4. He was the only African-American at the scene of the crime standing next to a police officer. For the majority, the fact that the police did not intend that showup, even if they inadvertently caused it in the course of a police procedure, ends the inquiry. The police were questioning the eyewitness, Blandon, about the perpetrator's identity, and were intentionally detaining Perry in the parking lot—but had not intended for Blandon to identify the perpetrator from her window. Presumably, in the majority's view, had the police asked Blandon to move to the window to identify the perpetrator, that could have made all the difference. See Tr. of Oral Arg. 32, 37.

I note, however, that the majority leaves what is required by its arrangement-focused inquiry less than clear. In parts, the opinion suggests that the police must arrange an identification "procedure," regardless of whether they "inten[d] the arranged procedure to be suggestive." *Ante,* at 2, n. 1; see also *ante,* at 7–8. Elsewhere, it indicates that the police must arrange the "suggestive circumstances" that lead the witness to identify the accused. See

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[4]The majority denies that it has imposed a *mens rea* requirement, see *ante,* at 2, n. 1, but by confining our due process concerns to police-arranged identification procedures, that is just what it has done. The majority acknowledges that "whether or not [the police] intended the arranged procedure to be suggestive" is irrelevant under our precedents, *ibid.,* but still places dispositive weight on whether or not the police intended the procedure itself.

ante, at 1–2, 10–11, 18–19. Still elsewhere it refers to "improper" police conduct, *ante,* at 1–2, 9–12, connoting bad faith. Does police "arrangement" relate to the procedure, the suggestiveness, or both? If it relates to the procedure, do suggestive preprocedure encounters no longer raise the same concerns? If the police need not "inten[d] the arranged procedure to be suggestive," *ante,* at 2, n. 1, what makes the police action "improper"? And does that mean that good-faith, unintentional police suggestiveness in a police-arranged lineup can be "impermissibly suggestive"? If no, the majority runs headlong into *Wade.* If yes, on what basis—if not deterrence—does it distinguish unintentional police suggestiveness in an accidental confrontation?

The arrangement-focused inquiry will sow needless confusion. If the police had called Perry and Blandon to the police station for interviews, and Blandon saw Perry being questioned, would that be sufficiently "improper police arrangement"? If Perry had voluntarily come to the police station, would that change the result? Today's opinion renders the applicability of our ordinary inquiry contingent on a murky line-drawing exercise. Whereas our two-step inquiry focuses on overall reliability—and could account for the spontaneity of the witness' identification and degree of police manipulation under the totality of the circumstances—today's opinion forecloses that assessment by establishing a new and inflexible step zero.

B

The majority regards its limitation on our two-step rule as compelled by precedent. Its chief rationale, *ante,* at 7–13, is that none of our prior cases involved situations where the police "did not arrange the suggestive circumstances." *Ante,* at 10; see also *ante,* at 2, n. 1. That is not necessarily true, given the seemingly unintentional encounter highlighted in *Wade.* But even if it were true, it is

unsurprising. The vast majority of eyewitness identifications that the State uses in criminal prosecutions are obtained in lineup, showup, and photograph displays arranged by the police. Our precedents reflect that practical reality.

It is also beside the point. Our due process concerns were not predicated on the source of suggestiveness. Rather, "[i]t is the likelihood of misidentification which violates a defendant's right to due process," *Biggers*, 409 U. S., at 198, and we are concerned with suggestion insofar as it has "corrupting effect[s]" on the identification's reliability. *Brathwaite*, 432 U. S., at 114. Accordingly, whether the police have created the suggestive circumstances intentionally or inadvertently, the resulting identification raises the same due process concerns. It is no more or less likely to misidentify the perpetrator. It is no more or less powerful to the jury. And the defendant is no more or less equipped to challenge the identification through cross-examination or prejudiced at trial. The arrangement-focused inquiry thus untethers our doctrine from the very "'evidentiary interest'" it was designed to protect, inviting arbitrary results. *Id.*, at 113, n. 14.

Indeed, it is the majority's approach that lies in tension with our precedents. Whereas we previously disclaimed the crabbed view of suggestiveness as "the result of police procedures intentionally designed to prejudice an accused," *Wade*, 388 U. S., at 235, the majority's focus on police rigging and improper conduct will revive it. Whereas our precedents were sensitive to intentional and unintentional suggestiveness alike, see *supra*, at 2–3, today's decision narrows our concern to intentionally orchestrated suggestive confrontations. We once described the "primary evil to be avoided" as the likelihood of misidentification. *Biggers*, 409 U. S., at 198. Today's decision, however, means that even if that primary evil is at its apex, we need not avoid it at all so long as the suggestive circum-

stances do not stem from improper police arrangement.

C

The majority gives several additional reasons for why applying our due process rule beyond improperly police-arranged circumstances is unwarranted. In my view, none withstands close inspection.

First, the majority insists that our precedents "aim to deter police from rigging identification procedures," so our rule should be limited to applications that advance that "primary aim" and "key premise." *Ante*, at 2, 11 (citing *Brathwaite*, 432 U. S., at 112). That mischaracterizes our cases. We discussed deterrence in *Brathwaite* because Brathwaite challenged our two-step inquiry as *lacking* deterrence value. Brathwaite argued that deterrence demanded a *per se* rule excluding all suggestive identifications. He said that our rule, which probes the reliability of suggestive identifications under the totality of the circumstances, "cannot be expected to have a significant deterrent impact." *Id.*, at 111.

We rebutted Brathwaite's criticism in language the majority now wrenches from context: Upon summarizing Brathwaite's argument, we acknowledged "several interests to be considered." *Ibid.* We then compared the two rules under each interest: First, we noted the "driving force" behind *Wade* and its companion cases—"the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability"—and found both approaches "responsive to this concern," but the *per se* rule to go "too far" in suppressing reliable evidence. 432 U. S., at 111–112. We noted a "second factor"—deterrence—conceding that the *per se* rule had "more significant deterrent effect," but noting that our rule "also has an influence on police behavior." *Id.*, at 112. Finally, we noted a "third factor"—"the effect on the administration of justice"—describing the *per se* rule as having serious drawbacks on

this front. *Ibid.* That was no list of "primary aim[s]." Nor was it a ringing endorsement of the primacy of deterrence. We simply underscored, in responding to Brathwaite, that our rule was not without deterrence benefits. To the contrary, we clarified that deterrence was a subsidiary concern to reliability, the "driving force" of our doctrine. It is a stretch to claim that our rule cannot apply wherever "[t]his deterrence rationale is inapposite." *Ante*, at 11.

Second, the majority states that *Coleman* v. *Alabama*, 399 U. S. 1 (1970), held that "[n]o due process violation occurred . . . because nothing 'the police said or did prompted'" the identification and shows that our rule is linked "only to improper police arrangement." *Ante*, at 11–12. That misreads the decision. In *Coleman*, the petitioners challenged a witness' in-court identification of them at trial on grounds that it had been tainted by a suggestive pretrial lineup. We held that no due process violation occurred because the in-court identification appeared to be "entirely based upon observations at the time of the assault and not at all induced by the conduct of the lineup," and thus could not be said to stem from an identification procedure "'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" 399 U. S., at 5–6 (plurality opinion). We then dismissed each of the asserted suggestive influences as having had no bearing on the identification at all: The petitioners claimed that the police intimated to the witness that his attackers were in the lineup; we found the record "devoid of evidence that anything the police said or did" induced the identification. *Id.*, at 6. The petitioners claimed that they alone were made to say certain words; we found that the witness identified petitioners before either said anything. One petitioner claimed he was singled out to wear a hat; we found that the witness' identification "d[id] not appear . . . based on the fact that he remembered that [the attacker] had worn a hat." *Ibid.*

Thus, far from indicating that improper police conduct is a prerequisite, *Coleman* merely held that there had been no influence on the witness. In fact, in concluding that the lineup was not "'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification,'" *Coleman* indicates that the two-step inquiry is not truncated at the threshold by the absence of police misconduct.

Third, the majority emphasizes that we should rely on the jury to determine the reliability of evidence. See *ante,* at 15–16. But our cases are rooted in the assumption that eyewitness identifications upend the ordinary expectation that it is "the province of the jury to weigh the credibility of competing witnesses." *Kansas* v. *Ventris*, 556 U. S. 586, 594, n. (2009). As noted, jurors find eyewitness evidence unusually powerful and their ability to assess credibility is hindered by a witness' false confidence in the accuracy of his or her identification. That disability in no way depends on the intent behind the suggestive circumstances.

The majority's appeals to protecting the jury's domain, moreover, appeared in dissent after dissent from our decisions. See *Foster* v. *California*, 394 U. S. 440, 447 (1969) (Black, J., dissenting) ("[T]he jury is the sole tribunal to weigh and determine facts" and "must . . . be allowed to hear eyewitnesses and decide for itself whether it can recognize the truth"); *Simmons*, 390 U. S., at 395 (Black, J., concurring in part and dissenting in part) ("The weight of the evidence . . . is not a question for the Court but for the jury"). So too does the majority's assurance that other constitutional protections like the Sixth Amendment rights to compulsory process and confrontation can suffice to expose unreliable identifications. Compare *ante*, at 6, with *Foster*, 394 U. S., at 448–449 (Black, J., dissenting) ("The Constitution sets up its own standards of unfairness in criminal trials," including the Sixth Amendment "right to compulsory process" and "right to

confront . . . witnesses"). So too does the majority's appeal to leave reliability to the rules of evidence. Compare *ante*, at 17, with *Foster*, 394 U. S., at 448 (Black, J., dissenting) ("'Rules of evidence are designed in the interests of fair trials'"), and *Stovall*, 388 U. S., at 306 (Black, J., dissenting) ("[T]he result . . . is to put into a constitutional mould a rule of evidence"). Those arguments did not prevail then; they should not prevail here.

Fourth, the majority suggests that applying our rule beyond police-arranged suggestive circumstances would entail a heavy practical burden, requiring courts to engage in "preliminary judicial inquiry" into "most, if not all, eyewitness identifications." *Ante*, at 13, 18. But that is inaccurate. The burden of showing "impermissibly suggestive" circumstances is the defendant's, so the objection falls to the defendant to raise. And as is implicit in the majority's reassurance that Perry may resort to the rules of evidence in lieu of our due process precedents, trial courts will be entertaining defendants' objections, pretrial or at trial, to unreliable eyewitness evidence in any event. The relevant question, then, is what the standard of admissibility governing such objections should be. I see no reason to water down the standard for an equally suggestive and unreliable identification simply because the suggestive confrontation was unplanned.

It bears reminding, moreover, that we set a high bar for suppression. The vast majority of eyewitnesses proceed to testify before a jury. To date, *Foster* is the only case in which we have found a due process violation. 394 U. S., at 443. There has been no flood of claims in the four Federal Circuits that, having seen no basis for an arrangement-based distinction in our precedents, have long indicated that due process scrutiny applies to all suggestive identification procedures. See *Dunnigan* v. *Keane*, 137 F. 3d 117, 128 (CA2 1998); *United States* v. *Bouthot*, 878 F. 2d 1506, 1516 (CA1 1989); *Thigpen* v. *Cory*, 804 F. 2d 893, 895 (CA6

1986); see also *Green* v. *Loggins*, 614 F. 2d 219, 223 (CA9 1980). Today's decision nonetheless precludes even the possibility that an unintended confrontation will meet that bar, mandating summary dismissal of every such claim at the threshold.

Finally, the majority questions how to "rationally distinguish suggestiveness from other factors bearing on the reliability of eyewitness evidence," such as "poor vision" or a prior "grudge," *ante*, at 13–14, and more broadly, how to distinguish eyewitness evidence from other kinds of arguably unreliable evidence. *Ante,* at 14–15. Our precedents, however, did just that. We emphasized the "'formidable number of instances in the records of English and American trials'" of "miscarriage[s] of justice from mistaken identification." *Wade*, 388 U. S., at 228. We then observed that "'the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor.'" *Id.*, at 229. Moreover, the majority points to no other type of evidence that shares the rare confluence of characteristics that makes eyewitness evidence a unique threat to the fairness of trial. Jailhouse informants, cf. *ante,* at 15, unreliable as they may be, are not similarly resistant to the traditional tools of the adversarial process and, if anything, are met with particular skepticism by juries.

It would be one thing if the passage of time had cast doubt on the empirical premises of our precedents. But just the opposite has happened. A vast body of scientific literature has reinforced every concern our precedents articulated nearly a half-century ago, though it merits barely a parenthetical mention in the majority opinion. *Ante*, at 14. Over the past three decades, more than two thousand studies related to eyewitness identification have been published. One state supreme court recently appointed a special master to conduct an exhaustive survey of the current state of the scientific evidence and conclud-

ed that "[t]he research . . . is not only extensive," but "it represents the 'gold standard in terms of the applicability of social science research to law.'" *State* v. *Henderson,* 208 N. J. 208, 283, 27 A. 3d 872, 916 (2011). "Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings." *Ibid.;* see also Schmechel, O'Toole, Easterly, & Loftus, Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence, 46 Jurimetrics 177, 180 (2006) (noting "nearly unanimous consensus among researchers about the [eyewitness reliability] field's core findings").

The empirical evidence demonstrates that eyewitness misidentification is "'the single greatest cause of wrongful convictions in this country.'"[5] Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification.[6] Study after study demonstrates

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[5] *State* v. *Henderson,* 208 N. J. 208, 231, 27 A. 3d 872, 885 (2011); see also, *e.g., Benn* v. *United States,* 978 A. 2d 1257, 1266 (D. C. 2009); *State* v. *Dubose,* 285 Wis. 2d 143, 162, 699 N. W. 2d 582, 592 (2005); Dept. of Justice, Office of Justice Programs, E. Connors, T. Lundregan, N. Miller, & T. McEwen, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial 24 (1996); B. Cutler & S. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 8 (1995); Wells, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience, 83 J. of Applied Psychology No. 3 360 (1998).

[6] B. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 9, 48, 279 (2011); see also, *e.g.,* Innocence Project, Facts on Post-Conviction DNA Exonerations (75% of postconviction DNA exoneration cases in the U. S. involved eyewitness misidentification), http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (as visited Jan. 11, 2012, and available in Clerk of Court's case file); Dept. of Justice, National Institute of Justice, Eyewitness Evidence: A Guide for Law Enforcement iii (1999) (85% of 28

that eyewitness recollections are highly susceptible to distortion by postevent information or social cues;[7] that jurors routinely overestimate the accuracy of eyewitness identifications;[8] that jurors place the greatest weight on eyewitness confidence in assessing identifications[9] even though confidence is a poor gauge of accuracy;[10] and that suggestiveness can stem from sources beyond police-orchestrated procedures.[11] The majority today nevertheless adopts an artificially narrow conception of the dangers of suggestive identifications at a time when our concerns should have deepened.

III

There are many reasons why Perry's particular situation might not violate due process. The trial court found

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felony convictions overturned on DNA evidence involved eyewitness misidentification).

[7] See, *e.g.*, Gabbert, Memon, Allan, & Wright, Say it to My Face: Examining the Effects of Socially Encountered Misinformation, 9 Legal & Criminological Psychol. 215 (2004); Douglass & Steblay, Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect, 20 Applied Cognitive Psychol. 859, 864–865 (2006).

[8] See Brigham & Bothwell, The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications, 7 Law & Hum. Behav. 19, 22–24, 28 (1983) (nearly 84% of study respondents overestimated accuracy rates of identifications); see also, *e.g.*, Sigler & Couch, Eyewitness Testimony and the Jury Verdict, 4 N. Am. J. Psychol. 143, 146 (2002).

[9] See Cutler & Penrod, Mistaken Identification, at 181–209; Lindsay, Wells, & Rumpel, Can People Detect Eyewitness-Identification Accuracy Within and Across Situations? 66 J. Applied Psychol. 79, 83 (1981).

[10] See Brewer, Feast, & Rishworth, The Confidence-Accuracy Relationship in Eyewitness Identification, 8 J. Experimental Psychol. Applied 44, 44–45 (2002) ("average confidence-accuracy correlations generally estimated between little more than 0 and .29"); see also, *e.g.*, Sporer, Penrod, Read, & Cutler, Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies, 118 Psychol. Bull. 315 (1995).

[11] See Brief for Wilton Dedge et al. as *Amici Curiae* 8, n. 13.

that the circumstances surrounding Blandon's identification did not rise to an impermissibly suggestive level. It is not at all clear, moreover, that there was a very substantial likelihood of misidentification, given Blandon's lack of equivocation on the scene, the short time between crime and confrontation, and the "fairly well lit" parking lot. App. 56. The New Hampshire Supreme Court, however, never made findings on either point and, under the majority's decision today, never will.

* * *

The Court's opinion today renders the defendant's due process protection contingent on whether the suggestive circumstances giving rise to the eyewitness identification stem from improper police arrangement. That view lies in tension with our precedents' more holistic conception of the dangers of suggestion and is untethered from the evidentiary interest the due process right protects. In my view, the ordinary two-step inquiry should apply, whether the police created the suggestive circumstances intentionally or inadvertently. Because the New Hampshire Supreme Court truncated its inquiry at the threshold, I would vacate the judgment and remand for a proper analysis. I respectfully dissent.

SB 210

<TARGET><BILL>SB 210</BILL><SUBJECT>SB 210</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

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Senator Lesil McGuire

Sponsor Statement for 210

"An Act relating to crimes against children."

On February 8, 2012 the Children's Justice Task Force (CJA) a federally-mandated, state-wide multidisciplinary group presented their findings to the Joint Senate Judiciary and HESS Committees with their system recommendations for improvement through criminal legislation. I became aware through this presentation, research, and other important conversations that we have shortcomings in the current criminal laws regarding the prosecution of harm to children.

Those that suffer from these short comings are Alaska's children and the numbers are staggering. In 2008, approximately 12,400 children were likely victims of at least one incident of maltreatment, which breaks down to 34 children per day. In the instance of a child death, 1 out of every 5 was related to maltreatment.

SB 210 works with the recommendations from CJA to create tougher penalties on crimes committed against a child. The bill includes several different measures including modifying statutes to create increased criminal liability for assaults to children, strengthens statutes regarding exposure of children to drugs, increases penalties when a parent intentionally withholds adequate food or liquids, and creates a criminal law that prohibits an incarcerated person from contacting a victim prior to trial and sentencing.

Together, the Legislature can assist our future generations by providing them with laws that protect their rights and create safer communities for their growth and development. I urge your support for this legislation.

CS FOR SENATE BILL NO. 210(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR MCGUIRE

A BILL

FOR AN ACT ENTITLED

"An Act relating to crimes against children; and providing for an effective date."

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

* **Section 1.** AS 11.41.220(a) is amended to read:

(a) A person commits the crime of assault in the third degree if that person

(1) recklessly

(A) places another person in fear of imminent serious physical injury by means of a dangerous instrument;

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older,

(i) causes physical injury to a child under **12** [10] years of age and the injury would cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment;

(ii) causes physical injury to a child under **12** [10] years

of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member, makes repeated threats to cause death or serious physical injury to another person;

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least **12** [10] years of age and the injury reasonably requires medical treatment;

(4) with criminal negligence, causes serious physical injury under AS 11.81.900(b)(56)(B) to another person by means of a dangerous instrument; or

(5) commits a crime that is a violation of AS 11.41.230(a)(1) or (2) and, within the preceding 10 years, the person was convicted on two or more separate occasions of crimes under

(A) AS 11.41.100 - 11.41.170;

(B) AS 11.41.200 - 11.41.220, 11.41.230(a)(1) or (2), 11.41.280, or 11.41.282;

(C) AS 11.41.260 or 11.41.270;

(D) AS 11.41.410, 11.41.420, or 11.41.425(a)(1); or

(E) a law or ordinance of this or another jurisdiction with elements similar to those of an offense described in (A) - (D) of this paragraph.

* **Sec. 2.** AS 11.51.100(a) is amended to read:

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person is

(A) registered or required to register as a sex offender or child kidnapper under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) charged by complaint, information, or indictment with a

violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; [OR]

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child**; or**

(4) recklessly fails to provide adequate food or liquids to a child, causing protracted impairment of the child's health.

*** Sec. 3.** AS 11.51.100(f) is amended to read:

(f) Endangering the welfare of a child in the first degree under (a)(1)**, (2), or (4)** [OR (2)] of this section is a class C felony.

*** Sec. 4.** AS 11.81.900(56) is amended to read:

(56) "serious physical injury" means

(A) physical injury caused by an act performed under circumstances that create a substantial risk of death; [OR]

(B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy; **or**

(C) physical injury to a person under 12 years of age that causes

(i) serious disfigurement;

(ii) impairment of health, by serious bruising or other injury, that reasonably requires medical evaluation or treatment by a health care professional;

(iii) loss or impairment of the function of a body member or organ; or

(iv) serious impediment of blood circulation or breathing;

* **Sec. 5.** This Act takes effect July 1, 2012.

27-LS1362\M
Wayne
2/24/12

CS FOR SENATE BILL NO. 210( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR MCGUIRE

A BILL

FOR AN ACT ENTITLED

"An Act relating to crimes against children; and providing for an effective date."

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

*** Section 1.** AS 11.41.220(a) is amended to read:

(a) A person commits the crime of assault in the third degree if that person

(1) recklessly

(A) places another person in fear of imminent serious physical injury by means of a dangerous instrument;

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older,

(i) causes physical injury to a child under **12** [10] years of age and the injury would cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment;

(ii) causes physical injury to a child under **12** [10] years

of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member makes repeated threats to cause death or serious physical injury to another person;

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least **12** [10] years of age and the injury reasonably requires medical treatment;

(4) with criminal negligence causes serious physical injury under AS 11.81.900(b)(56)(B) to another person by means of a dangerous instrument; or

(5) commits a crime that is a violation of AS 11.41.230(a)(1) or (2) and, within the preceding 10 years, the person was convicted on two or more separate occasions of crimes under

(A) AS 11.41.100 - 11.41.170;

(B) AS 11.41.200 - 11.41.220, 11.41.230(a)(1) or (2), 11.41.280, or 11.41.282;

(C) AS 11.41.260 or 11.41.270;

(D) AS 11.41.410, 11.41.420, or 11.41.425(a)(1); or

(E) a law or ordinance of this or another jurisdiction with elements similar to those of an offense described in (A) - (D) of this paragraph.

* **Sec. 2.** AS 11.51.100(a) is amended to read:

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person is

(A) registered or required to register as a sex offender or child kidnapper under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) charged by complaint, information, or indictment with a

violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; [OR]

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child**; or**

(4) recklessly fails to provide adequate food or liquids to a child, causing protracted impairment of the child's health.

*** Sec. 3.** AS 11.51.100(f) is amended to read:

(f) Endangering the welfare of a child in the first degree under (a)(1)**, (2), or (4)** [OR (2)] of this section is a class C felony.

*** Sec. 4.** AS 11.81.900(56) is amended to read:

(56) "serious physical injury" means

(A) physical injury caused by an act performed under circumstances that create a substantial risk of death; [OR]

(B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy; **or**

(C) physical injury to a person under 16 years of age that causes

(i) serious disfigurement;

(ii) impairment of health, by bruising or other injury, that reasonably requires medical diagnosis or treatment;

(iii) loss or impairment of the function of a body member or organ; or

(iv) serious impediment of blood circulation or breathing;

*** Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

27-LS1362\D
Wayne
3/15/12

CS FOR SENATE BILL NO. 210( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR MCGUIRE

A BILL

FOR AN ACT ENTITLED

"An Act relating to crimes against children; and providing for an effective date."

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

*** Section 1.** AS 11.41.220(a) is amended to read:

(a) A person commits the crime of assault in the third degree if that person

(1) recklessly

(A) places another person in fear of imminent serious physical injury by means of a dangerous instrument;

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older,

(i) causes physical injury to a child under **12** [10] years of age and the injury would cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment;

(ii) causes physical injury to a child under **12** [10] years

of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member, makes repeated threats to cause death or serious physical injury to another person;

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least **12** [10] years of age and the injury reasonably requires medical treatment;

(4) with criminal negligence, causes serious physical injury under AS 11.81.900(b)(56)(B) to another person by means of a dangerous instrument; or

(5) commits a crime that is a violation of AS 11.41.230(a)(1) or (2) and, within the preceding 10 years, the person was convicted on two or more separate occasions of crimes under

(A) AS 11.41.100 - 11.41.170;

(B) AS 11.41.200 - 11.41.220, 11.41.230(a)(1) or (2), 11.41.280, or 11.41.282;

(C) AS 11.41.260 or 11.41.270;

(D) AS 11.41.410, 11.41.420, or 11.41.425(a)(1); or

(E) a law or ordinance of this or another jurisdiction with elements similar to those of an offense described in (A) - (D) of this paragraph.

*** Sec. 2.** AS 11.51.100(a) is amended to read:

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person is

(A) registered or required to register as a sex offender or child kidnapper under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) charged by complaint, information, or indictment with a

violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; [OR]

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child**; or**

(4) recklessly fails to provide adequate food or liquids to a child, causing protracted impairment of the child's health.

*** Sec. 3.** AS 11.51.100(f) is amended to read:

(f) Endangering the welfare of a child in the first degree under (a)(1)**, (2), or (4)** [OR (2)] of this section is a class C felony.

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(56) "serious physical injury" means

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(B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy; **or**

(C) physical injury to a person under 12 years of age that causes

(i) serious disfigurement;

(ii) impairment of health, by serious bruising or other injury, that reasonably requires medical evaluation or treatment by a health care professional;

(iii) loss or impairment of the function of a body member or organ; or

(iv) serious impediment of blood circulation or breathing;

* **Sec. 5.** This Act takes effect July 1, 2012.

DOL suggests

SB 210

*** Sec. 4.** AS 11.81.900(56) is amended to read:

(56) "serious physical injury" means

(A) physical injury caused by an act performed under circumstances that create a substantial risk of death; [OR]

(B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy; **or**

(C) physical injury to a person under 12 years of age that causes

(i) serious disfigurement;

(ii) impairment of health, by extensive and serious bruising or other

~~evaluation~~

injury, that reasonably requires medical ~~diagnosis or treatment~~;

(iii) loss or impairment of function of a body member or organ; or

(iv) serious impediment of blood circulation or breathing;

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 210**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB210-LAW-CRIM-02-24-12
Title: An Act relating to crimes against children; establishing a new aggravating factor at sentencing in certain...
Sponsor: Senator MCGUIRE
Requester: (S) Judiciary

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/24/12 6:15 PM
Approved by: Michael C. Geraghty, Attorney General — Date: 2/24/2012
Department of Law

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 210

Analysis

SB 210 makes changes to the substantive assault law by adopting new crimes addressing harm to children under 12 years old and to disabled children under 16 years old.

It also adopts new crimes prohibiting exposure to the use, manufacture, display, or delivery of controlled substances. It also makes changes in the crime of criminal nonsupport, and sentencing factors for crimes involving child victims.

The fiscal impact to Department of Law is indeterminate.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: SB210-ACS-TRC-2-24-12
Fiscal Note Number:
Publish Date:

Identifier (file name): SB210-ACS-TRC-2-24-2012
Title: Crimes Against Children
Sponsor: Senator McGuire
Requester:

Dept. Affected: Alaska Court System
Appropriation: Trial Courts
Allocation:
OMB Component Number: 768

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	****	****	****	****	****	****	****

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		****	****	****	****	****	****	****

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by: Nancy Meade, General Counsel
Division: Alaska Court System
Approved by: Nancy Meade for Christine Johnson, Administrative Director
Alaska Court System

Phone: 907-463-4736
Date/Time: 2/24/2012 1:00 p.m.
Date: 2/24/2012

(Revised 11/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB210-ACS-TRC-2-24-12

Analysis

Senate Bill 210 amends the definitions of certain crimes, including assault and endangering the welfare of a minor, by making certain activities either new crimes or more serious crimes. This could have the effect of changing the number and types of criminal cases that are filed with and handled by the court system.

Although the court does not anticipate a significant increase in new cases or in felony case filings, the changes made in this bill will likely result in at least some changes in the number or types of fiings. The precise impact of the changes is speculative, however, and the court therefore submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB210**
Fiscal Note Number
() Publish Date

Identifier (file name) SB210-DOA-PDA-2-24-12
Title Crimes Against Children
Sponsor Senator McGuire
Requester Senate Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	****	****	****	****	****	****	****

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		****	****	****	****	****	****	****

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Quinlan Steiner
Division Public Defender Agency
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 907 334-4414
Date/Time 2/24/12 9:52 AM
Date 2/24/2012

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB210

Analysis

This bill amends AS 11.41.200(a) by adding several components regarding children to the definitions of assault in the first, second, and third degrees. Assault in the first degree is modified by including the following: an adult *intentionally* causing "serious bodily harm" to a child under 16 years of age with a disability, an adult *recklessly* causing "serious bodily harm" to a child under 12 years of age, and an adult *recklessly* causing "serious bodily harm" on multiple occasions to a child under the age 16 with a disability. Assault in the first degree is a class A felony that carries a sentence of up to 20 years imprisonment.

Assault in the second degree is modified by including the following: an adult *knowingly* causing serious "bodily harm" to a child under 16 years of age with a disability, an adult *recklessly* causing "physical injury" to a child under 12 years of age, and an adult recklessly causing "physical injury" on multiple occasions to a child under the age of 16 with a disability. Assault in the second degree is a class B felony that carries a sentence of up to 10 years imprisonment.

Assault in the third degree is modified by changing the age range, from 10 years of age to 12 years of age, when an adult causes physical injury to a child and the injury would cause a reasonable caregiver to seek medical attention from a healthcare professional and changes the age arrange from 10-16 years of age to 12-16 years of age when an adult *knowingly* causes "physical injury to a child and the injury reasonably requires medical treatment. Assault in the third degree is a class C felony that carries a sentence of up to five years imprisonment.

Additionally, this bill amends the crime of endangering the welfare of a minor by including exposing the child to various controlled substances. Penalties for violation of this provision range from a class A misdemeanor to a class B felony with a potential sentence of up to 10 years imprisonment. This bill also makes several changes to the statutes defining criminal non-support by including monetary support ordered in another jurisdiction and basic sustenance to the definition of "support," among others.

Finally, this bill makes changes to AS 12.55.155 by adding as an aggravator for sentencing crimes that resulted in serious bodily harm to a child that resulted in extended or substantial impairment to the child's mental health.

Although the Public Defender Agency cannot predict the number of new cases that will be charged nor the number of cases that will be upgraded to more serious felonies under this bill, these modifications are likely to increase the level, and therefore the cost, at which these cases are charged and litigated. The Agency, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB210**
Fiscal Note Number
() Publish Date

Identifier (file name) SB210-DPS-DET-02-24-12
Title CRIMES AGAINST CHILDREN
Sponsor Senator McGuire
Requester (S) JUD

Dept. Affected Public Safety
Appropriation Alaska State Troopers
Allocation AST Detachments
OMB Component Number 2325

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Lt. Rodney Dial
Division Alaska State Troopers
Approved by Joseph A. Masters, Commissioner
Department of Public Safety

Phone (907) 247-4480
Date/Time 2/24/12 10:15 AM
Date 2/24/2012

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB210

Analysis

This bill amends AS 11.41.200 (Assault in the first degree) by adding sections to include a person 18 years of age or older, causing serious bodily harm to a child under the age of 16 years who has a disability, or a child under the age of 12 years. The bill also amends AS 11.41.210 (Assault in the second degree) by making similar changes.

The bill amends AS 11.51.100 (Endangering the welfare of a child in the first degree) by adding a section making it a crime to recklessly expose a child to the unlawful manufacture, use, display, or delivery of a schedule IA – VIA controlled substance, and by setting new penalties.

The bill makes changes to AS 11.51.120 (Criminal nonsupport) regarding monetary support and necessary food and water.

The bill amends AS 12.55.155 (Factors in aggravation and mitigation) by adding a new section regarding children who were seriously harmed that resulted in protracted and substantial impairment of the child's mental health.

The bill amends AS 28.15.046 (licensing of school bus drivers) to prevent the Department of Administration, Division of Motor Vehicles, from issuing a license to an applicant who has been convicted of "Endangering the welfare of a minor in the first degree" in the previous 20 years.

Finally, this bill amends AS 47.10.086 (Reasonable efforts) and AS 47.10.990 (Definitions) by adding sections referencing "Serious bodily harm."

Passage of this legislation will have no fiscal impact on the Division of Alaska State Troopers.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB210**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB210-DOA-DMV-2-24-2012
Title: Crimes Against Children
Sponsor: Senator McGuire
Requester: Senate Judiciary

Dept. Affected: Administration
Appropriation: Motor Vehicles
Allocation: Motor Vehicles
OMB Component Number: 2348

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Whitney Brewster — Phone: 907-269-5559
Division: Motor Vehicles — Date/Time: 2/24/12 5:15 PM
Approved by: John Cramer, Deputy Commissioner — Date: 2/24/2012
Department of Administration

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB210

Analysis

This bill creates tougher penalties on crimes committed against a child. This bill impacts the Division of Motor Vehicles (DMV) by adding to the list of disqualifying offenses for school bus drivers. In addition to the current disqualifying offenses listed in AS 28.15.046, the DMV would be prohibited from issuing a school bus endorsement to someone who has been convicted of a newly created offense in SB 210 within 20 years of the time of application.

It is anticipated that this bill will have no fiscal impact on the Division of Motor Vehicles (DMV).

KTVA Alaska
Saturday, February 25, 2012

Mom Arrested for Emotional, Physical Abuse of Adopted Children
Anya James, 50, was arrested Tuesday and is charged with ten counts of kidnapping and six counts of first-degree assault.
By Colleen Kelly

An Anchorage mom has been arrested for subjecting her six adopted children to years of emotional and physical abuse, according to Anchorage police.

Following an eight-month investigation, 50-year-old Anya James now faces criminal offenses for the gross mistreatment of her children. James was arrested Tuesday and is charged with ten counts of kidnapping and six counts of first-degree assault.

APD Detective Chris Thomas began the investigation in early October 2010 after receiving a claim of child abuse against four of James' children living in her Hillside home. That same month, several of James' children were removed from the home and hospitalized due to severe malnourishment.

The investigation further revealed that due to malnourishment, James' adopted children endured stunted growth, which prevented some of them from going through puberty during their teenage years.

According to police, the children were confined to small rooms with alarms rigged up to the doors and windows to alert James if the children tried to escape. The mother also used audio and video monitors to oversee the children's activity and conversations.

Despite three functioning bathrooms inside the home, the children were forced to use a bucket filled with kitty litter instead of a toilet placed inside the small rooms.

James is currently booked at the Anchorage Jail; her bail is set at $100,000 cash plus third-party custodian. She will not have contact with any of her adopted children or minors under 16 years old, according to police. She will be arraigned in Superior Court Wednesday afternoon at the Nesbitt Courthouse in downtown Anchorage.

Between 2000 and 2010, James fostered and adopted six children and collected more than $750,000 in adoption subsidies from the State of Alaska.

If you have information about children living under James' care before 2000, contact Anchorage Police Detective Chris Thomas at 786-2628.

Related Content

- 'Hot Sauce Mom' Trial Begins: Opening Arguments Heard

Mom pleads guilty to putting needles in boy's stomach

Anchorage Daily News
Published: February 25th, 2011 10:42 PM
Last Modified: February 28th, 2011 04:45 PM

A 29-year-old Anchorage woman pleaded guilty Friday to first-degree assault and two counts of second-degree assault for abuse of her 5-year-old son that included putting needles in his stomach, according to the Anchorage District Attorney's office.

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Lily Doss-Puder entered her plea before state Superior Court Judge Michael Wolverton, who scheduled sentencing for May, the office said.

The case against her arose last June, when her son was admitted to the hospital for emergency surgery and doctors found three sewing needles in his stomach. Anchorage Police Detective Chris Thomas investigated and, in a review of the child's medical records, found a pattern of injuries to the boy dating to June 2009, the District Attorney's office said.

When Thomas interviewed Doss-Puder, she admitted inserting the needles into her son's stomach, intentionally cutting the webbing of his hand with a knife and intentionally hitting him on the head with a 2-pound weight, the office said.

In exchange for her pleas, Doss-Puder will be sentenced to 18 years in prison with six years suspended, and she won't be allowed to contact her son until he is 18, the District Attorney's office said.

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SB 212

<TARGET><BILL>SB 212</BILL><SUBJECT>SB 212</SUBJECT><COMM>SJUD27</COMM></TARGET>

CS FOR SENATE BILL NO. 212(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR MCGUIRE

A BILL

FOR AN ACT ENTITLED

"An Act relating to crimes of human trafficking; establishing the Human Trafficking Task Force to evaluate services available to victims of human trafficking; and relating to the recommendations and report of the task force."

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

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

HUMAN TRAFFICKING TASK FORCE. (a) The Human Trafficking Task Force is established in the Department of Law. The attorney general, or the attorney general's designee, shall serve as the chair of the task force. The task force consists of representatives of the Department of Law, the Department of Public Safety, the Department of Health and Social Services, and two members, appointed by the governor, representing nongovernmental health and social services organizations that provide services to victims of human trafficking. The task force shall examine the prevalence of the crimes of human trafficking in the state and the services that are available to victims of the crimes of human trafficking under

AS 11.41.360 and 11.41.365.

(b) The task force established in (a) of this section shall submit a report to the legislature by January 15, 2013. The report must include a current assessment of services currently available to victims of human trafficking, recommendations for improving services to victims of human trafficking, and the following information:

(1) the number of human trafficking cases reported to state and local law enforcement agencies in the state since 2007;

(2) the number of human trafficking cases prosecuted under Alaska law;

(3) the number of human trafficking cases state and local law enforcement agencies have investigated in cooperation with federal law enforcement agencies;

(4) the services currently available in the state to victims of human trafficking, including services provided by state agencies, federal agencies, or nongovernmental agencies relating to

(A) medical or psychological counseling;

(B) emergency shelter;

(C) translation;

(D) other assistance related to safe housing and legal services.

(c) The task force established in (a) of this section shall solicit information and input from local, state, and federal agencies, nongovernmental organizations, and other interested persons. The task force shall hold at least one public meeting and shall provide reasonable public notice, teleconference capability, and an opportunity for interested organizations, groups, or individuals to provide written or oral comments. Minutes of meetings and written comments provided to the task force shall be included in the report provided under (b) of this section.

(d) The state agency members of the task force shall be employees of their respective agencies, designated by the attorney general, the commissioner of public safety, or the commissioner of health and social services. Expenses, other than the personnel expenses, of the state agency members of the task force shall be shared by the Department of Law, the Department of Public Safety, and the Department of Health and Social Services. The nongovernmental health and social service organizations whose members are appointed by the governor shall be responsible for their members' costs in participating on the task force.

* **Sec. 2.** Section 1 of this Act is repealed June 1, 2013.

27-LS1370\A.1
Gardner
3/20/12

AMENDMENT #1

OFFERED IN THE SENATE BY SENATOR MCGUIRE

TO: SB 212

Page 1, line 10:

Delete "and"

Page 1, line 11, following "Services":

Insert ", and two members, appointed by the governor, representing nongovernmental health and social services organizations that provide services to victims of human trafficking"

Page 2, line 23, following "The":

Insert "state agency"

Page 2, line 25, following "expenses, of the":

Insert "state agency"

Page 2, line 27, following "Services.":

Insert "The nongovernmental health and social service organizations whose members are appointed by the governor shall be responsible for their members' costs in participating on the task force."

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 212**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB212-LAW-CRIM-02-24-12
Dept. Affected: Law
Title: An Act relating to crimes of human trafficking; establishing the Human Trafficking Task Force to ...
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Senator McGuire
Requester: (S) Judiciary
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel	4.0						
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**4.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF	4.0						
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**4.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/24/12 5:00 PM
Approved by: Michael C. Geraghty, Attorney General — Date: 2/24/2012
Department of Law

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 212

Analysis

SB 212 creates a Human Trafficking Task Force in the Department of Law. Representatives from the Departments of Public Safety and Health and Social Services will participate with the Department of Law.

The task force would be required to assess the prevalence of human trafficking in the State Of Alaska since 2007, the number of prosecutions, and the services available to victims of human trafficking.

The fiscal impact would be $4,000 for travel costs and other costs associated with the task force

Alaska State Legislature

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Senator Lesil McGuire

Sponsor Statement for SB212

"An Act relating to crimes of human trafficking; establishing the Human Trafficking Task Force to evaluate services available to victims of human trafficking; and relating to the recommendations and report of the task force."

Human Trafficking is a major problem facing Alaska and has captured the attention of Governor Parnell, Senator Murkowski, members of the Alaska State Legislature as well as non-profit and community organizations, eliciting the same resounding response "How can we help stop this?"

Suggestions from organizations such as the Polaris Project, the Department of Law, and the Anchorage Police Department have not provided clear answers to this question.

The goal of this legislation is developing a task force that will assist in answering these questions directly.

The task force proposed in SB 212 would be established under the Department of Law. The attorney general or their designee would serve as chair. The task force would consist of representatives from the Department of Law, the Department of Public Safety, and the Department of Health and Social Services.

The legislature would receive a report from the members of the task force by January 15, 2013 on the following information:

1. The number of human trafficking cases reported to the state and local law enforcement agencies in the state since 2007:
2. The number of human trafficking cases prosecuted under Alaska law;
3. The number of human trafficking cases state and local law enforcement agencies have investigated in cooperation with federal law enforcement agencies;
4. The services currently available in the state to victims of human trafficking, including services provided by state agencies, federal agencies, or non-governmental agencies relating to:

a. Medical or psychological counseling;
b. Emergency shelter
c. Translation services
d. Other assistance related to safe housing and legal services.

Obtaining this information through an established task force will provide a full spectrum analysis so that we can begin to address these issues and bring together important agencies and individuals that work separately, but with the same goals.

Please join me with your support to help the State of Alaska understand and combat the complex issue of Human Trafficking.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB 212**
Fiscal Note Number
() Publish Date

Identifier (file name) SB212-LAW-CRIM-02-24-12
Title An Act relating to crimes of human trafficking; establishing the Human Trafficking Task Force to ...
Sponsor Senator McGuire
Requester (S) Judiciary

Dept. Affected Law
Appropriation Criminal
Allocation Criminal Justice Litigation
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

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1178	temp code (UGF)							
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POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager
Division Administrative Services
Approved by Michael C. Geraghty, Attorney General
Department of Law

Phone 465-5427
Date/Time 2/24/12 5:00 PM
Date 2/24/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 212

Analysis

SB 212 creates a Human Trafficking Task Force in the Department of Law. Representatives from the Departments of Public Safety and Health and Social Services will participate with the Department of Law.

The task force would be required to assess the prevalence of human trafficking in the State Of Alaska since 2007, the number of prosecutions, and the services available to victims of human trafficking.

The fiscal impact would be $4,000 for travel costs and other costs associated with the task force

Covenant House Alaska

February 28, 2012

Senator Lesil McGuire
State Capitol Room 125
Juneau AK, 99801

Dear Senator McGuire,

Thank you for introducing SB 212: "An Act relating to crimes of human trafficking; establishing the Human Trafficking Task Force to evaluate services available to victims of human trafficking; and relating to the recommendations and report of the task force."

Covenant House Alaska (CHA) has been working to prevent human trafficking of youth and protect victims once they disclose abuse for the last several years. Based on reports from youth and law enforcement, CHA knows that the frequency and severity of trafficking cases is increasing. It is often difficult for youth to disclose and report trafficking activities because of the emotional manipulation, coercion and fear "pimps" impart on victims. CHA knows that youth are being violently forced into sex trafficking and held against their will. Youth have also reported being slowly led into trafficking by men acting as boyfriends or providers, only to end up in the rough world of drug houses and prostitution. The end result is repeated and systematic physical abuse and rape.

CHA appreciates the introduction of SB 212 and the deliberate work of the Alaska State Legislature to investigate the nature of this crime, its victims and the perpetrators. The Task Force will shine light on a world that few understand or recognize, yet the world of sex trafficking is alive in our state.

Thank you for your continued and committed work to protect victims of all ages in Alaska. Your advocacy is appreciated!

Sincerely,

Deirdre A Cronin

Deirdre A. Cronin
Executive Director

SB 218

<TARGET><BILL>SB 218</BILL><SUBJECT>SB 218</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

Sectional Analysis: CSSB 218 Version B

Sections 1 through 16 amend the theft provisions in statute to increase the financial trigger amounts for 2nd degree theft, 3rd degree theft, 4th degree theft, concealment of merchandise, removal of identification marks, issuance of bad checks, fraudulent use of an access device, vehicle theft, property damage (criminal mischief), criminal simulation, misapplication of property, and defrauding creditors.

Section 17 amends the crime of distribution of indecent materials to minors, in response to a recent decision by a federal district court judge. In response to the decision that the law is overbroad, the bill will require that the state prove the defendant intentionally distributed or possessed with intent to distribute, harmful material to another person that the offender knows if under 16 years of age or believes is under 16 years of age.

Section 18 clarifies in statute that in order for a person to be found guilty but mentally ill (GBMI), the fact finder must determine by proof beyond a reasonable doubt that when the defendant committed the crime he or she was guilty but mentally ill. This change is required by the decisions of the United States Supreme Court in *Apprendi v. New Jersey* and *Blakely v. Washington*, holding that the Sixth Amendment right to a jury trial requires that a factual finding that would increase the statutory maximum penalty for an offense must be submitted to a jury and proven beyond a reasonable doubt.

The court of appeals has said that a person who is found guilty but mentally ill does not qualify for parole release, including mandatory parole, until the person no longer suffers from a mental disease or defect that causes the defendant to be dangerous to the public. Because a person who is found GBMI may not qualify for mandatory parole, the factual decisions addressing whether the defendant is GBMI must be submitted to a jury (unless the defendant waives this requirement) and proven beyond a reasonable doubt.

Section 19: Under current law the defense, the prosecution, or the court may raise the question after a guilty verdict, of whether the defendant is guilty but mentally ill. This is possible if the issue has not been raised in the trial. The procedure for addressing this issue needs to be changed to reflect the constitutional requirements articulated in *Apprendi* and *Blakely*. **Section 19** makes these changes. It also adopts a procedure for giving notice 10 days before trial if the party intends to raise the issue after trial.

Section 20 clarifies that the jury must determine whether the defendant is guilty but mentally ill, unless the right is waived by the defendant. The court then determines the sentence.

Section 21 allows the testimony of a witness in a hearing addressing the competency of a defendant charged with a crime to be given by way of contemporaneous two-way video conference.

Section 22 is amended to recognize that current law has other provisions that require a different standard of proof in addition to those specified in the current statute.

Sections 23 and 24 add provisions to ensure that neither the prosecuting authority nor the defendant can, without mutual agreement, change the terms of a Rule 11, Alaska Rules of Criminal Procedure, agreement after it has been imposed. If a defendant, as part of a plea agreement under Rule 11, agrees to a particular period of probation the court may not, without the consent of the prosecution, reduce the period of probation. This has the effect of overruling the decision in *State v. Henry*, 240 P. 3d 846 (Alaska App. 2010). Judges, in sentencing a person who has violated a condition of probation, must still apply the *Chaney* criteria in deciding how much, if any, of the suspended period of incarceration should be imposed. However, the court may not reduce the period of probation or the period of suspended time (less the time imposed for the probation violation) without the agreement of the prosecuting authority.

Section 25 amends the sentencing law for murder in the first degree to change the burden of proof that the defendant subjected the victim to substantial physical torture or that the defendant was a peace officer who used the officer's authority to facilitate the murder. The current statute provides for a clear and convincing burden on the prosecution. Under the *Apprendi* and *Blakely* decisions, the state must prove these factors beyond a reasonable doubt to the jury.

Section 26 clarifies in statute that if a sentence is imposed on a defendant that would preclude the person from receiving good time, for example a person who has been convicted of the first degree murder of a peace officer, the jury (unless waived by the defendant) must determine the factual issue, in this example, that the victim was a peace officer, beyond a reasonable doubt. Additionally, if a court is sentencing a person who is subject to a presumptive range and the prosecution seeks to increase the range by proof of certain aggravating factors, the jury (unless waived) must determine the factual issue by proof beyond a reasonable doubt.

Section 27 includes guidance to the court in finding the aggravating factor that the defendant's conduct was the most serious in the definition of the offense. AS 12.55.155(c)(10). First, it provides that the jury must determine the facts supporting an allegation that the defendant's conduct was the most serious in the definition of the offense. Because finding a factor in aggravation allows the court to impose a higher term of imprisonment than the presumptive range, the finding by the jury (unless waived) is required by the *Apprendi/Blakely* decisions. After the jury makes this factual determination, the court then makes the legal decision that the factual decision justifies an increase in sentence because the conduct is the most serious in the definition of the offense. The crime of theft provides a good illustration of this. Theft in the second degree, a class C felony, prohibits a person from committing theft of property valued between $500 and $25,000. The maximum term for a class C felony is five years incarceration; the presumptive range is zero to two years for a first felony offense. If the jury finds that the defendant stole an amount close to $25,000, the court may then consider this conduct as the most serious in the definition of second degree theft.

Section 27 also codifies court decisions that clarify that once a factor in aggravation has been decided as required in *Apprendi/Blakely*, other factors in aggravation may be considered without a factual

determination beyond a reasonable doubt by the jury. Once one factor in aggravation is decided, the judge may sentence a person up to the maximum term; thus additional factors do not raise the maximum term. *Reandeau v. State*, 265 P.3d 1045 (Alaska App. 2011).

Sections 28 and 29 are conforming amendments to Sections 23 and 24.

Section 30 adds to Alaska Rules of Criminal Procedure, addressing the use of testimony by contemporaneous two-way video conference. It would allow testimony if the parties agree to its use or if the court finds it necessary under specific circumstances.

Section 31 provides additional indirect Court Rule amendments on the same topic.

Sections 32 – 34 include applicability provisions, conditional effect of the court rule change, and the effective date, July 1, 2012.

27-GS2627\B
Gardner
3/21/12

CS FOR SENATE BILL NO. 218(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to property crimes; relating to the crime of distribution of indecent material to minors; relating to testimony by video conference; relating to persons found guilty but mentally ill; relating to sentencing procedures; relating to probation; relating to procedures for finding aggravating factors at sentencing; amending Rules 32.1 and 38.2, Alaska Rules of Criminal Procedure; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

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

*** Section 1.** AS 11.46.130(a) is amended to read:

(a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$1,500** [$500] or more but less than $25,000;

(2) the property is a firearm or explosive;

(3) the property is taken from the person of another;

(4) the property is taken from a vessel and is vessel safety or survival equipment;

(5) the property is taken from an aircraft and the property is aircraft safety or survival equipment;

(6) the value of the property is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(A) an offense under AS 11.46.120, or an offense under another law or ordinance with similar elements;

(B) a crime set out in this subsection or an offense under another law or ordinance with similar elements;

(C) an offense under AS 11.46.140(a)(1), or an offense under another law or ordinance with similar elements; or

(D) an offense under AS 11.46.220(c)(1) or (c)(2)(A), or an offense under another law or ordinance with similar elements; or

(7) the property is an access device.

* **Sec. 2.** AS 11.46.140(a) is amended to read:

(a) A person commits the crime of theft in the third degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$250** [$50] or more but less than **$1,500** [$500]; **or**

(2) [REPEALED

(3)] the value of the property is less than **$250** [$50] and, within the past five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of theft or concealment of merchandise, or an offense under another law or ordinance with similar elements.

* **Sec. 3.** AS 11.46.150(a) is amended to read:

(a) A person commits the crime of theft in the fourth degree if the person commits theft as defined in AS 11.46.100 and the value of the property or services is less than **$250** [$50].

*** Sec. 4.** AS 11.46.220(c) is amended to read:

(c) Concealment of merchandise is

(1) a class C felony if

(A) the merchandise is a firearm;

(B) the value of the merchandise is **$1,500** [$500] or more; or

(C) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(i) the offense of concealment of merchandise under this paragraph or (2)(A) of this subsection, or an offense under another law or ordinance with similar elements; or

(ii) an offense under AS 11.46.120, 11.46.130, or 11.46.140(a)(1), or an offense under another law or ordinance with similar elements;

(2) a class A misdemeanor if

(A) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500]; or

(B) the value of the merchandise is less than **$250** [$50] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions of the offense of concealment of merchandise or theft in any degree, or an offense under another law or ordinance with similar elements;

(3) a class B misdemeanor if the value of the merchandise is less than **$250** [$50].

*** Sec. 5.** AS 11.46.260(b) is amended to read:

(b) Removal of identification marks is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than

$1,500 [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

* **Sec. 6.** AS 11.46.270(b) is amended to read:

(b) Unlawful possession is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

* **Sec. 7.** AS 11.46.280(d) is amended to read:

(d) Issuing a bad check is

(1) a class B felony if the face amount of the check is $25,000 or more;

(2) a class C felony if the face amount of the check is **$1,500** [$500] or more but less than $25,000;

(3) a class A misdemeanor if the face amount of the check is **$250** [$50] or more but less than **$1,500** [$500];

(4) a class B misdemeanor if the face amount of the check is less than **$250** [$50].

* **Sec. 8.** AS 11.46.285(b) is amended to read:

(b) Fraudulent use of an access device is

(1) a class B felony if the value of the property or services obtained is $25,000 or more;

(2) a class C felony if the value of the property or services obtained is **$1,500** [$50] or more but less than $25,000;

(3) a class A misdemeanor if the value of the property or services obtained is less than **$1,500** [$50].

* **Sec. 9.** AS 11.46.295 is amended to read:

Sec. 11.46.295. Prior convictions. For purposes of considering prior

convictions in prosecuting a crime of theft under AS 11.46.130(a)(6) or **11.46.140(a)(2)** [11.46.140(a)(3)], or in prosecuting the crime of concealment of merchandise under AS 11.46.220(c), a conviction for an offense under another law or ordinance with similar elements is a conviction of an offense having elements similar to those of an offense defined as such under Alaska law at the time the offense was committed. The court shall consider the date of a prior conviction as occurring on the date that sentence is imposed for the prior offense.

*** Sec. 10.** AS 11.46.360(a) is amended to read:

(a) A person commits the crime of vehicle theft in the first degree if, having no right to do so or any reasonable ground to believe the person has such a right, the person drives, tows away, or takes

(1) the car, truck, motorcycle, motor home, bus, aircraft, or watercraft of another;

(2) the propelled vehicle of another and

(A) the vehicle or any other property of another is damaged in a total amount of **$1,500** [$500] or more;

(B) the owner incurs reasonable expenses as a result of the loss of use of the vehicle, in a total amount of **$1,500** [$500] or more; or

(C) the owner is deprived of the use of the vehicle for seven days or more;

(3) the propelled vehicle of another and the vehicle is marked as a police or emergency vehicle; or

(4) the propelled vehicle of another and, within the preceding seven years, the person was convicted under

(A) this section or AS 11.46.365;

(B) former AS 11.46.482(a)(4) or (5);

(C) former AS 11.46.484(a)(2);

(D) AS 11.46.120 - 11.46.140 of an offense involving the theft of a propelled vehicle; or

(E) a law or ordinance of this or another jurisdiction with elements substantially similar to those of an offense described in (A) - (D) of

this paragraph.

*** Sec. 11.** AS 11.46.482(a) is amended to read:

(a) A person commits the crime of criminal mischief in the third degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with intent to damage property of another, the person damages property of another in an amount of **$1,500** [$500] or more;

(2) the person recklessly creates a risk of damage in an amount exceeding $100,000 to property of another by the use of widely dangerous means; or

(3) the person knowingly

(A) defaces, damages, or desecrates a cemetery or the contents of a cemetery or a tomb, grave, or memorial regardless of whether the tomb, grave, or memorial is in a cemetery or whether the cemetery, tomb, grave, or memorial appears to be abandoned, lost, or neglected;

(B) removes human remains or associated burial artifacts from a cemetery, tomb, grave, or memorial regardless of whether the cemetery, tomb, grave, or memorial appears to be abandoned, lost, or neglected.

*** Sec. 12.** AS 11.46.484(a) is amended to read:

(a) A person commits the crime of criminal mischief in the fourth degree if, having no right to do so or any reasonable ground to believe the person has such a right

(1) with intent to damage property of another, the person damages property of another in an amount of **$250** [$50] or more but less than **$1,500** [$500];

(2) the person tampers with a fire protection device in a building that is a public place;

(3) the person knowingly accesses a computer, computer system, computer program, computer network, or part of a computer system or network;

(4) the person uses a device to descramble an electronic signal that has been scrambled to prevent unauthorized receipt or viewing of the signal unless the device is used only to descramble signals received directly from a satellite or unless the person owned the device before September 18, 1984; or

(5) the person knowingly removes, relocates, defaces, alters, obscures, shoots at, destroys, or otherwise tampers with an official traffic control device or damages the work upon a highway under construction.

*** Sec. 13.** AS 11.46.486(a) is amended to read:

(a) A person commits the crime of criminal mischief in the fifth degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with reckless disregard for the risk of harm to or loss of the property or with intent to cause substantial inconvenience to another, the person tampers with property of another;

(2) with intent to damage property of another, the person damages property of another in an amount less than **$250** [$50]; or

(3) the person rides in a propelled vehicle knowing it has been stolen or that it is being used in violation of AS 11.46.360 or 11.46.365(a)(1).

*** Sec. 14.** AS 11.46.530(b) is amended to read:

(b) Criminal simulation is

(1) a class C felony if the value of what the object purports to represent is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of what the object purports to represent is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of what the object purports to represent is less than **$250** [$50].

*** Sec. 15.** AS 11.46.620(d) is amended to read:

(d) Misapplication of property is

(1) a class C felony if the value of the property misapplied is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property misapplied is less than **$1,500** [$500].

*** Sec. 16.** AS 11.46.730(c) is amended to read:

(c) Defrauding creditors is a class A misdemeanor unless that secured party, judgment creditor, or creditor incurs a pecuniary loss of **$1,500** [$500] or more as a

result to the defendant's conduct, in which case defrauding secured creditors is

(1) a class B felony if the loss is $25,000 or more;

(2) a class C felony if the loss is **$1,500** [$500] or more but less than $25,000.

*** Sec. 17.** AS 11.61.128(a) is amended to read:

(a) A person commits the crime of distribution of indecent material to minors if

(1) the person, being 18 years of age or older, **intentionally** [KNOWINGLY] distributes **or possesses with intent to distribute any material described in (2) and (3) of this subsection to either**

(A) a child that the person knows is under 16 years of age; or

(B) another person that the person believes is a child under 16 years of age;

(2) the person knows that the material [TO ANOTHER PERSON ANY MATERIAL THAT] depicts the following actual or simulated conduct:

(A) sexual penetration;

(B) the lewd touching of a person's genitals, anus, or female breast;

(C) masturbation;

(D) bestiality;

(E) the lewd exhibition of a person's genitals, anus, or female breast; or

(F) sexual masochism or sadism; **and**

(3) [(2)] the material is harmful to minors [; AND

(3) EITHER

(A) THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE; OR

(B) THE PERSON BELIEVES THAT THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE].

*** Sec. 18.** AS 12.47.040(b) is amended to read:

(b) To return a verdict under (a)(4) of this section, the **fact finder** [JURY] must find beyond a reasonable doubt that the defendant committed the crime and [FIND BY A PREPONDERANCE OF THE EVIDENCE] that, when the defendant committed the crime, the defendant was guilty but mentally ill as defined in AS 12.47.030.

*** Sec. 19.** AS 12.47.060(a) is amended to read:

(a) In a prosecution for a crime when the affirmative defense of insanity is not raised and when evidence of mental disease or defect of the defendant is not admitted at trial under AS 12.47.020, [AND THE DEFENDANT IS CONVICTED OF A CRIME,] the defendant **or** [,] the prosecuting attorney [, OR THE COURT ON ITS OWN MOTION] may raise the issue of whether the defendant is guilty but mentally ill. **A party that seeks a post-conviction determination of guilty but mentally ill must give notice 10 days before trial of intent to do so; however, this deadline is waived if the opposing party presents evidence or argument at trial tending to show that the defendant may be guilty but mentally ill.** A hearing must be held on this issue [AT OR] before the **same fact finder that returned the verdict of guilty under procedures set by the court. In cases decided by a jury, at the request of the defendant and with the concurrence of the prosecuting attorney, the court may decide the issue. A waiver of consideration by a jury must be in writing and in person before the court** [SENTENCING HEARING]. At the hearing, the **fact finder** [COURT] shall determine whether the defendant has been shown to be guilty but mentally ill **beyond a reasonable doubt, considering** [BY A PREPONDERANCE OF THE] evidence presented at the hearing and any evidence relevant to the issue that was presented at trial.

*** Sec. 20.** AS 12.47.060(b) is amended to read:

(b) If the **fact finder** [COURT] finds that a defendant is guilty but mentally ill, **the court** [IT] shall sentence the defendant as provided by law and shall enter the finding of guilty but mentally ill as part of the judgment.

*** Sec. 21.** AS 12.47.100 is amended by adding a new subsection to read:

(h) In a hearing to determine competency under this section, the court may allow a witness, including the psychiatrist or psychologist who examined the

defendant, to testify concerning the competency of the defendant by contemporaneous two-way video conference if the witness lives in a place from which people customarily travel by air to the court and the procedure allows the parties a fair opportunity to examine the witness. The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified on the record. In this subsection, "contemporaneous two-way video conference"

(1) means a conference among people at different places by means of transmitted audio and video signals;

(2) includes all communication technologies that allow people at two or more places to interact by two-way video and audio transmissions simultaneously.

* **Sec. 22.** AS 12.55.025(i) is amended to read:

(i) Except as **otherwise** provided **in this chapter** [BY AS 12.55.125(a)(3), 12.55.145(d), 12.55.155(f), AND 12.55.165], the preponderance of the evidence standard of proof applies to sentencing proceedings.

* **Sec. 23.** AS 12.55.090(b) is amended to read:

(b) **Except as otherwise provided in (f) of this section, the** [THE] court may revoke or modify any condition of probation [,] or may change the period of probation.

* **Sec. 24.** AS 12.55.090 is amended by adding a new subsection to read:

(f) Unless the defendant and the prosecuting authority agree at the probation revocation proceeding or other proceeding, the court may not reduce the specific period of probation, or the specific term of suspended incarceration except by the amount of incarceration imposed for a probation violation, if

(1) the sentence was imposed in accordance with a plea agreement under Rule 11, Alaska Rules of Criminal Procedure; and

(2) the agreement required a specific period of probation or a specific term of suspended incarceration.

* **Sec. 25.** AS 12.55.125(a) is amended to read:

(a) A defendant convicted of murder in the first degree or murder of an unborn child under AS 11.41.150(a)(1) shall be sentenced to a definite term of imprisonment

of at least 20 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, firefighter, or correctional employee who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110;

(3) [THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT] the defendant subjected the murder victim to substantial physical torture;

(4) the defendant is convicted of the murder of and personally caused the death of a person, other than a participant, during a robbery; or

(5) [THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT] the defendant is a peace officer who used the officer's authority as a peace officer to facilitate the murder.

*** Sec. 26.** AS 12.55.125 is amended by adding a new subsection to read:

(p) If the state seeks either (1) the imposition of a sentence under (a) of this section that would preclude the defendant from being awarded a good time deduction under AS 33.20.010(a) based on a fact other than a prior conviction; or (2) to establish a fact that would increase the presumptive sentencing range under (c)(2), (d)(2), (e)(4), (i)(1)(A) or (B), or (i)(2)(A) or (B) of this section, the factual question required to be decided shall be presented to a trial jury and proven beyond a reasonable doubt under procedures set by the court, unless the defendant waives trial by jury and either stipulates to the existence of the fact or consents to have the fact proven to the court

sitting without a jury. Written notice of the intent to establish a fact under this subsection must be served on the defendant and filed with the court as provided for notice under AS 12.55.155(f)(2).

* **Sec. 27.** AS 12.55.155 is amended by adding new subsections to read:

(i) If the state seeks to establish a factor in aggravation at sentencing under (c)(10) of this section,

(1) the assessment of the facts underlying the state's allegation that the defendant's conduct was among the most serious included in the definition of the offense shall be made by the trial jury under procedures set by the court and as provided in (f)(2) of this section, unless the defendant waives trial by jury, stipulates to the existence of the aggravating factor or to the facts alleged by the state, or consents to have the assessment proved under procedures set out in (f)(1) of this section; factual assertions underlying the state's allegation that the defendant's conduct was among the most serious included in the definition of the offense must be proved beyond a reasonable doubt;

(2) the legal decision concerning whether the defendant's conduct determined under (1) of this subsection was among the most serious included in the definition of the offense shall be made by the court under procedures set out in (f)(1) of this section.

(j) If one of the aggravating factors in (c) of this section is established as provided in (f)(1) and (2) of this section, the court may increase the term of imprisonment up to the maximum term of imprisonment. Any additional aggravating factor may then be established by clear and convincing evidence by the court sitting without a jury, including an aggravating factor that the jury has found not to have been established beyond a reasonable doubt.

* **Sec. 28.** AS 33.05.050 is amended to read:

Sec. 33.05.050. Report of probation officer. When directed by the court, the probation officer shall report to the court [,] with a statement of the conduct of the probationer while on probation. **Except as otherwise provided by law, the** [THE] court may then discharge the probationer from further supervision and may terminate the proceedings against the probationer, or may extend the probation, as shall seem

advisable.

*** Sec. 29.** AS 33.05.070(b) is amended to read:

(b) As speedily as possible after arrest**,** the probationer shall be taken before the court for the district having jurisdiction over the probationer. **Except as provided in AS 12.55.090(f),** [THEREUPON] the court may revoke the probation and require the probationer to serve the sentence imposed [,] or any lesser sentence [,] and, if imposition of sentence was suspended, may impose any sentence **that** [WHICH] might originally have been imposed, subject to the limitation specified in AS 12.55.086(c).

*** Sec. 30.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. The Alaska Rules of Criminal Procedure are amended by adding a new section to read:

Rule 38.3. Video Conference Testimony. (a) **In General.** In every trial, the testimony of witnesses shall be taken in open court, unless otherwise provided by statute or rule.

(b) **Testimony by Video Conference.** The parties may agree to take testimony from a witness at trial by contemporaneous two-way video conference presented in open court. Absent the parties' agreement, the court may authorize the contemporaneous two-way video conference testimony of a witness if

(1) the requesting party establishes that testimony by two-way video conference is necessary to further an important public policy;

(2) the requesting party establishes that the witness is unavailable; and

(3) the testimony is given under oath and subject to cross-examination.

(c) **Procedures for Taking Video Conference Testimony.** If the trial court authorizes video conference testimony under (b) of this rule, it shall determine the procedures for taking the contemporaneous two-way video conference testimony. The parties, the court, the trier of fact, and the public must be able to see and hear the witness; and the witness must see and hear the courtroom proceedings, including the defendant, as if the witness were sitting in the courtroom's witness stand. The persons who are present with the witness must be identified. The parties may move to exclude

any person other than the video conference technician from the witness's presence; the court, in its discretion, may exclude a person other than the video conference technician from the presence of the witness.

(d) **Definitions.**

(1) Contemporaneous Two-Way Video Conference. Contemporaneous two-way video conference means a conference among people at different places by means of transmitted audio and video signals. It includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

(2) Unavailable. In this rule, a witness is unavailable if

(A) by clear and convincing evidence the court finds under Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska Rules of Criminal Procedure, that the witness is unavailable; or

(B) the parties agree that the witness is unavailable.

*** Sec. 31.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. (a) AS 12.55.125(p), enacted by sec. 26 of this Act, and AS 12.55.155(i) and (j), enacted by sec. 27 of this Act, have the effect of changing Rule 32.1, Alaska Rules of Criminal Procedure, by amending procedures for sentencing persons convicted of certain crimes.

(b) AS 12.47.100, as amended by sec. 21 of this Act, has the effect of changing Rule 38.2, Alaska Rules of Criminal Procedure, by providing procedures for televised appearance by witnesses in certain proceedings.

*** Sec. 32.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1 - 17, 23, and 24 of this Act apply to offenses committed on or after the effective date of this Act.

(b) Sections 18 - 22 and 25 - 31 of this Act apply to proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

*** Sec. 33.** The uncodified law of the State of Alaska is amended by adding a new section to

read:

CONDITIONAL EFFECT. (a) Sections 26 and 27 of this Act take effect only if sec. 31(a) of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) Section 21 of this Act takes effect only if sec. 31(b) of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 34.** This Act takes effect July 1, 2012.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

March 21, 2012

TO: Leg Legal

FROM: Cindy Smith 465-6641

RE: CSSB 218 (GS2627\M

Please make the following amendments to CSSB 218 version M.

1. Delete sections 18 and 19.

2. Amend Section 17 with attached language (27.M.2)

3. Amend Section 23 with attached language (27.G.2.A)

4. In section 32, at line 25, insert the words "at trial" after the word "witness"

5. On Page 14, under (d) (2) , delete (B).

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 359(JUD), Draft Version "M"

Page 4, lines 9 - 10:

Delete "**material is** [TO ANOTHER PERSON ANY] material that **the person knows**"

Insert "**person knows that the material** [TO ANOTHER PERSON ANY MATERIAL THAT]"

27G-2-A
3/15/2012
(3:01 pm)
Carpeneti

AMENDMENT

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY _____

TO: HB 359

Page 8, lines 21 - 22, following "witness":

Delete "would be required to travel more than 50 miles to the court or"

Page 8, line 23, following "court":

Insert "; and the procedure allows the parties a fair opportunity to examine the witness. The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified on the record"

Cross appeals. allowed
required certif.

(1) delete sections

[18, 19]

(2)+ amend GH2627\m.2

to sec. 17.

(3) amend sec. 23

w/ 27 G.2.A

(4) ~~Sect~~ sec 32, line 25

~~"at trial" after witness~~

(5) new definition

Diggs v. State

trial judge - order

#6 - Output -

SB 219

(B) by clear and convincing evidence the court finds that under the particular circumstances of the case, the witness is unable to testify in the court room.

27-GS2627\M
Gardner
3/17/12

CS FOR SENATE BILL NO. 218(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to property crimes; relating to the crime of distribution of indecent material to minors; relating to testimony by video conference; relating to persons found guilty but mentally ill; relating to sentencing procedures; relating to probation; relating to procedures for finding aggravating factors at sentencing; amending Rule 32.1, Alaska Rules of Criminal Procedure; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

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

*** Section 1.** AS 11.46.130(a) is amended to read:

(a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$1,500** [$500] or more but less than $25,000;

(2) the property is a firearm or explosive;

(3) the property is taken from the person of another;

(4) the property is taken from a vessel and is vessel safety or survival equipment;

(5) the property is taken from an aircraft and the property is aircraft safety or survival equipment;

(6) the value of the property is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(A) an offense under AS 11.46.120, or an offense under another law or ordinance with similar elements;

(B) a crime set out in this subsection or an offense under another law or ordinance with similar elements;

(C) an offense under AS 11.46.140(a)(1), or an offense under another law or ordinance with similar elements; or

(D) an offense under AS 11.46.220(c)(1) or (c)(2)(A), or an offense under another law or ordinance with similar elements; or

(7) the property is an access device.

*** Sec. 2.** AS 11.46.140(a) is amended to read:

(a) A person commits the crime of theft in the third degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$250** [$50] or more but less than **$1,500** [$500]; **or**

(2) [REPEALED

(3)] the value of the property is less than **$250** [$50] and, within the past five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of theft or concealment of merchandise, or an offense under another law or ordinance with similar elements.

*** Sec. 3.** AS 11.46.150(a) is amended to read:

(a) A person commits the crime of theft in the fourth degree if the person commits theft as defined in AS 11.46.100 and the value of the property or services is less than **$250** [$50].

*** Sec. 4.** AS 11.46.220(c) is amended to read:

(c) Concealment of merchandise is

(1) a class C felony if

(A) the merchandise is a firearm;

(B) the value of the merchandise is **$1,500** [$500] or more; or

(C) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(i) the offense of concealment of merchandise under this paragraph or (2)(A) of this subsection, or an offense under another law or ordinance with similar elements; or

(ii) an offense under AS 11.46.120, 11.46.130, or 11.46.140(a)(1), or an offense under another law or ordinance with similar elements;

(2) a class A misdemeanor if

(A) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500]; or

(B) the value of the merchandise is less than **$250** [$50] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions of the offense of concealment of merchandise or theft in any degree, or an offense under another law or ordinance with similar elements;

(3) a class B misdemeanor if the value of the merchandise is less than **$250** [$50].

*** Sec. 5.** AS 11.46.260(b) is amended to read:

(b) Removal of identification marks is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than

$1,500 [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

*** Sec. 6.** AS 11.46.270(b) is amended to read:

(b) Unlawful possession is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

*** Sec. 7.** AS 11.46.280(d) is amended to read:

(d) Issuing a bad check is

(1) a class B felony if the face amount of the check is $25,000 or more;

(2) a class C felony if the face amount of the check is **$1,500** [$500] or more but less than $25,000;

(3) a class A misdemeanor if the face amount of the check is **$250** [$50] or more but less than **$1,500** [$500];

(4) a class B misdemeanor if the face amount of the check is less than **$250** [$50].

*** Sec. 8.** AS 11.46.285(b) is amended to read:

(b) Fraudulent use of an access device is

(1) a class B felony if the value of the property or services obtained is $25,000 or more;

(2) a class C felony if the value of the property or services obtained is **$1,500** [$50] or more but less than $25,000;

(3) a class A misdemeanor if the value of the property or services obtained is less than **$1,500** [$50].

*** Sec. 9.** AS 11.46.295 is amended to read:

Sec. 11.46.295. Prior convictions. For purposes of considering prior

convictions in prosecuting a crime of theft under AS 11.46.130(a)(6) or **11.46.140(a)(2)** [11.46.140(a)(3)], or in prosecuting the crime of concealment of merchandise under AS 11.46.220(c), a conviction for an offense under another law or ordinance with similar elements is a conviction of an offense having elements similar to those of an offense defined as such under Alaska law at the time the offense was committed. The court shall consider the date of a prior conviction as occurring on the date that sentence is imposed for the prior offense.

*** Sec. 10.** AS 11.46.360(a) is amended to read:

(a) A person commits the crime of vehicle theft in the first degree if, having no right to do so or any reasonable ground to believe the person has such a right, the person drives, tows away, or takes

(1) the car, truck, motorcycle, motor home, bus, aircraft, or watercraft of another;

(2) the propelled vehicle of another and

(A) the vehicle or any other property of another is damaged in a total amount of **$1,500** [$500] or more;

(B) the owner incurs reasonable expenses as a result of the loss of use of the vehicle, in a total amount of **$1,500** [$500] or more; or

(C) the owner is deprived of the use of the vehicle for seven days or more;

(3) the propelled vehicle of another and the vehicle is marked as a police or emergency vehicle; or

(4) the propelled vehicle of another and, within the preceding seven years, the person was convicted under

(A) this section or AS 11.46.365;

(B) former AS 11.46.482(a)(4) or (5);

(C) former AS 11.46.484(a)(2);

(D) AS 11.46.120 - 11.46.140 of an offense involving the theft of a propelled vehicle; or

(E) a law or ordinance of this or another jurisdiction with elements substantially similar to those of an offense described in (A) - (D) of

this paragraph.

*** Sec. 11.** AS 11.46.482(a) is amended to read:

(a) A person commits the crime of criminal mischief in the third degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with intent to damage property of another, the person damages property of another in an amount of **$1,500** [$500] or more;

(2) the person recklessly creates a risk of damage in an amount exceeding $100,000 to property of another by the use of widely dangerous means; or

(3) the person knowingly

(A) defaces, damages, or desecrates a cemetery or the contents of a cemetery or a tomb, grave, or memorial regardless of whether the tomb, grave, or memorial is in a cemetery or whether the cemetery, tomb, grave, or memorial appears to be abandoned, lost, or neglected;

(B) removes human remains or associated burial artifacts from a cemetery, tomb, grave, or memorial regardless of whether the cemetery, tomb, grave, or memorial appears to be abandoned, lost, or neglected.

*** Sec. 12.** AS 11.46.484(a) is amended to read:

(a) A person commits the crime of criminal mischief in the fourth degree if, having no right to do so or any reasonable ground to believe the person has such a right

(1) with intent to damage property of another, the person damages property of another in an amount of **$250** [$50] or more but less than **$1,500** [$500];

(2) the person tampers with a fire protection device in a building that is a public place;

(3) the person knowingly accesses a computer, computer system, computer program, computer network, or part of a computer system or network;

(4) the person uses a device to descramble an electronic signal that has been scrambled to prevent unauthorized receipt or viewing of the signal unless the device is used only to descramble signals received directly from a satellite or unless the person owned the device before September 18, 1984; or

(5) the person knowingly removes, relocates, defaces, alters, obscures, shoots at, destroys, or otherwise tampers with an official traffic control device or damages the work upon a highway under construction.

*** Sec. 13.** AS 11.46.486(a) is amended to read:

(a) A person commits the crime of criminal mischief in the fifth degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with reckless disregard for the risk of harm to or loss of the property or with intent to cause substantial inconvenience to another, the person tampers with property of another;

(2) with intent to damage property of another, the person damages property of another in an amount less than **$250** [$50]; or

(3) the person rides in a propelled vehicle knowing it has been stolen or that it is being used in violation of AS 11.46.360 or 11.46.365(a)(1).

*** Sec. 14.** AS 11.46.530(b) is amended to read:

(b) Criminal simulation is

(1) a class C felony if the value of what the object purports to represent is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of what the object purports to represent is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of what the object purports to represent is less than **$250** [$50].

*** Sec. 15.** AS 11.46.620(d) is amended to read:

(d) Misapplication of property is

(1) a class C felony if the value of the property misapplied is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property misapplied is less than **$1,500** [$500].

*** Sec. 16.** AS 11.46.730(c) is amended to read:

(c) Defrauding creditors is a class A misdemeanor unless that secured party, judgment creditor, or creditor incurs a pecuniary loss of **$1,500** [$500] or more as a

result to the defendant's conduct, in which case defrauding secured creditors is

(1) a class B felony if the loss is $25,000 or more;

(2) a class C felony if the loss is **$1.500** [$500] or more but less than $25,000.

*** Sec. 17.** AS 11.61.128(a) is amended to read:

(a) A person commits the crime of distribution of indecent material to minors if

(1) the person, being 18 years of age or older, **intentionally** [KNOWINGLY] distributes **or possesses with intent to distribute any material described in (2) and (3) of this subsection to either**

(A) a child that the person knows is under 16 years of age; or

(B) another person that the person believes is a child under 16 years of age;

(2) the material is [TO ANOTHER PERSON ANY] material that **the person knows** depicts the following actual or simulated conduct:

(A) sexual penetration;

(B) the lewd touching of a person's genitals, anus, or female breast;

(C) masturbation;

(D) bestiality;

(E) the lewd exhibition of a person's genitals, anus, or female breast; or

(F) sexual masochism or sadism; **and**

(3) [(2)] the material is harmful to minors [; AND

(3) EITHER

(A) THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE; OR

(B) THE PERSON BELIEVES THAT THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE].

*** Sec. 18.** AS 11.66.140 is amended to read:

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under **AS 11.66.110 - 11.66.135** [AS 11.66.110 - 11.66.130], it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence.

*** Sec. 19.** AS 11.66.145 is amended to read:

Sec. 11.66.145. Forfeiture. Property used to institute, aid, or facilitate, or received or derived from, a violation of **AS 11.66.100 - 11.66.135** [AS 11.66.110 - 11.66.135] shall be forfeited.

*** Sec. 20.** AS 12.47.040(b) is amended to read:

(b) To return a verdict under (a)(4) of this section, the **fact finder** [JURY] must find beyond a reasonable doubt that the defendant committed the crime and [FIND BY A PREPONDERANCE OF THE EVIDENCE] that, when the defendant committed the crime, the defendant was guilty but mentally ill as defined in AS 12.47.030.

*** Sec. 21.** AS 12.47.060(a) is amended to read:

(a) In a prosecution for a crime when the affirmative defense of insanity is not raised and when evidence of mental disease or defect of the defendant is not admitted at trial under AS 12.47.020, [AND THE DEFENDANT IS CONVICTED OF A CRIME,] the defendant **or** [,] the prosecuting attorney [, OR THE COURT ON ITS OWN MOTION] may raise the issue of whether the defendant is guilty but mentally ill. **A party that seeks a post-conviction determination of guilty but mentally ill must give notice 10 days before trial of intent to do so; however, this deadline is waived if the opposing party presents evidence or argument at trial tending to show that the defendant may be guilty but mentally ill.** A hearing must be held on this issue [AT OR] before the **same fact finder that returned the verdict of guilty under procedures set by the court. In cases decided by a jury, at the request of the defendant and with the concurrence of the prosecuting attorney, the court may decide the issue. A waiver of consideration by a jury must be in writing and in person before the court** [SENTENCING HEARING]. At the hearing, the **fact finder** [COURT] shall determine whether the defendant has been shown to be guilty

but mentally ill **beyond a reasonable doubt, considering** [BY A PREPONDERANCE OF THE] evidence presented at the hearing and any evidence relevant to the issue that was presented at trial.

*** Sec. 22.** AS 12.47.060(b) is amended to read:

(b) If the **fact finder** [COURT] finds that a defendant is guilty but mentally ill, **the court** [IT] shall sentence the defendant as provided by law and shall enter the finding of guilty but mentally ill as part of the judgment.

*** Sec. 23.** AS 12.47.100 is amended by adding a new subsection to read:

(h) In a hearing to determine competency under this section, the court may allow a witness, including the psychiatrist or psychologist who examined the defendant, to testify concerning the competency of the defendant by contemporaneous two-way video conference if the witness would be required to travel more than 50 miles to the court or lives in a place from which people customarily travel by air to the court. In this subsection, "contemporaneous two-way video conference"

(1) means a conference among people at different places by means of transmitted audio and video signals;

(2) includes all communication technologies that allow people at two or more places to interact by two-way video and audio transmissions simultaneously.

*** Sec. 24.** AS 12.55.025(i) is amended to read:

(i) Except as **otherwise** provided **in this chapter** [BY AS 12.55.125(a)(3), 12.55.145(d), 12.55.155(f), AND 12.55.165], the preponderance of the evidence standard of proof applies to sentencing proceedings.

*** Sec. 25.** AS 12.55.090(b) is amended to read:

(b) **Except as otherwise provided in (f) of this section, the** [THE] court may revoke or modify any condition of probation [,] or may change the period of probation.

*** Sec. 26.** AS 12.55.090 is amended by adding a new subsection to read:

(f) Unless the defendant and the prosecuting authority agree at the probation revocation proceeding or other proceeding, the court may not reduce the specific period of probation, or the specific term of suspended incarceration except by the amount of incarceration imposed for a probation violation, if

(1) the sentence was imposed in accordance with a plea agreement under Rule 11, Alaska Rules of Criminal Procedure; and

(2) the agreement required a specific period of probation or a specific term of suspended incarceration.

*** Sec. 27.** AS 12.55.125(a) is amended to read:

(a) A defendant convicted of murder in the first degree or murder of an unborn child under AS 11.41.150(a)(1) shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, firefighter, or correctional employee who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110;

(3) [THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT] the defendant subjected the murder victim to substantial physical torture;

(4) the defendant is convicted of the murder of and personally caused the death of a person, other than a participant, during a robbery; or

(5) [THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT] the defendant is a peace officer who used the officer's authority as a peace officer to facilitate the murder.

*** Sec. 28.** AS 12.55.125 is amended by adding a new subsection to read:

(p) If the state seeks either (1) the imposition of a sentence under (a) of this

section that would preclude the defendant from being awarded a good time deduction under AS 33.20.010(a) based on a fact other than a prior conviction; or (2) to establish a fact that would increase the presumptive sentencing range under (c)(2), (d)(2), (e)(4), (i)(1)(A) or (B), or (i)(2)(A) or (B) of this section, the factual question required to be decided shall be presented to a trial jury and proven beyond a reasonable doubt under procedures set by the court, unless the defendant waives trial by jury and either stipulates to the existence of the fact or consents to have the fact proven to the court sitting without a jury. Written notice of the intent to establish a fact under this subsection must be served on the defendant and filed with the court as provided for notice under AS 12.55.155(f)(2).

*** Sec. 29.** AS 12.55.155 is amended by adding new subsections to read:

(i) If the state seeks to establish a factor in aggravation at sentencing under (c)(10) of this section,

(1) the assessment of the facts underlying the state's allegation that the defendant's conduct was among the most serious included in the definition of the offense shall be made by the trial jury under procedures set by the court and as provided in (f)(2) of this section, unless the defendant waives trial by jury, stipulates to the existence of the aggravating factor or to the facts alleged by the state, or consents to have the assessment proved under procedures set out in (f)(1) of this section; factual assertions underlying the state's allegation that the defendant's conduct was among the most serious included in the definition of the offense must be proved beyond a reasonable doubt;

(2) the legal decision concerning whether the defendant's conduct determined under (1) of this subsection was among the most serious included in the definition of the offense shall be made by the court under procedures set out in (f)(1) of this section.

(j) If one of the aggravating factors in (c) of this section is established as provided in (f)(1) and (2) of this section, the court may increase the term of imprisonment up to the maximum term of imprisonment. Any additional aggravating factor may then be established by clear and convincing evidence by the court sitting without a jury, including an aggravating factor that the jury has found not to have been

established beyond a reasonable doubt.

* **Sec. 30.** AS 33.05.050 is amended to read:

Sec. 33.05.050. Report of probation officer. When directed by the court, the probation officer shall report to the court [,] with a statement of the conduct of the probationer while on probation. **Except as otherwise provided by law, the** [THE] court may then discharge the probationer from further supervision and may terminate the proceedings against the probationer, or may extend the probation, as shall seem advisable.

* **Sec. 31.** AS 33.05.070(b) is amended to read:

(b) As speedily as possible after arrest, the probationer shall be taken before the court for the district having jurisdiction over the probationer. **Except as provided in AS 12.55.090(f),** [THEREUPON] the court may revoke the probation and require the probationer to serve the sentence imposed [,] or any lesser sentence [,] and, if imposition of sentence was suspended, may impose any sentence **that** [WHICH] might originally have been imposed, subject to the limitation specified in AS 12.55.086(c).

* **Sec. 32.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. The Alaska Rules of Criminal Procedure are amended by adding a new section to read:

Rule 38.3. Video Conference Testimony. (a) **In General.** In every trial, the testimony of witnesses shall be taken in open court, unless otherwise provided by statute or rule.

(b) **Testimony by Video Conference.** The parties may agree to take testimony from a witness at trial by contemporaneous two-way video conference presented in open court. Absent the parties' agreement, the court may authorize the contemporaneous two-way video conference testimony of a witness if

(1) the requesting party establishes that testimony by two-way video conference is necessary to further an important public policy;

(2) the requesting party establishes that the witness is unavailable; and

(3) the testimony is given under oath and subject to cross-examination.

(c) **Procedures for Taking Video Conference Testimony.** If the trial court authorizes video conference testimony under (b) of this rule, it shall determine the procedures for taking the contemporaneous two-way video conference testimony. The parties, the court, the trier of fact, and the public must be able to see and hear the witness; and the witness must see and hear the courtroom proceedings, including the defendant, as if the witness were sitting in the courtroom's witness stand. The persons who are present with the witness must be identified. The parties may move to exclude any person other than the video conference technician from the witness's presence; the court, in its discretion, may exclude a person other than the video conference technician from the presence of the witness.

(d) **Definitions.**

(1) Contemporaneous Two-Way Video Conference. Contemporaneous two-way video conference means a conference among people at different places by means of transmitted audio and video signals. It includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

(2) Unavailable. In this rule, a witness is unavailable if

(A) by clear and convincing evidence the court finds under Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska Rules of Criminal Procedure, that the witness is unavailable;

(B) by clear and convincing evidence the court finds that under the circumstances the witness is unavailable; or

(C) the parties agree that the witness is unavailable.

*** Sec. 33.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. AS 12.55.125(p), enacted by sec. 28 of this Act, and AS 12.55.155(i) and (j), enacted by sec. 29 of this Act, have the effect of changing Rule 32.1, Alaska Rules of Criminal Procedure, by amending procedures for sentencing persons convicted of certain crimes.

*** Sec. 34.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1 - 19, 25, and 26 of this Act apply to offenses committed on or after the effective date of this Act.

(b) Sections 20 - 24 and 27 - 33 of this Act apply to proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

*** Sec. 35.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. Sections 28 and 29 of this Act take effect only if sec. 33 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 36.** This Act takes effect July 1, 2012.

27-LS0646\E
Gardner
3/13/12

CS FOR SENATE BILL NO. 110(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS WIELECHOWSKI, McGuire

A BILL

FOR AN ACT ENTITLED

"An Act relating to human trafficking and sex trafficking, to punishment and fines for those offenses, and to peace officer powers to enforce human trafficking and sex trafficking laws in licensed premises; relating to conditions of probation in criminal cases involving sex offenses; including human trafficking in the first degree and sex trafficking in the first degree in the definition of 'serious felony offense' for the offense of conspiracy and including sex trafficking and online enticement of a minor in the definition of 'most serious felony' for sentencing; relating to prostitution and promoting prostitution; relating to the definition of 'sex offense'; including human trafficking and sex trafficking in the list of offenses that make hearings for certain delinquent minors public and require disclosure of the names of certain delinquent minors; and providing for an effective date."

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

* **Section 1.** AS 04.06.110 is amended to read:

Sec. 04.06.110. Peace officer powers. The director and the persons employed for the administration and enforcement of this title may, with the concurrence of the commissioner of public safety, exercise the powers of peace officers when those powers are specifically granted by the board. Powers granted by the board under this section may be exercised only when necessary for the enforcement of the criminally punishable provisions of this title, regulations of the board, and other criminally punishable laws and regulations, including investigation of violations of laws against prostitution and **sex trafficking** [PROMOTING PROSTITUTION] described in **AS 11.66.100 - 11.66.135, human trafficking described in AS 11.41.355 - 11.41.365,** [AS 11.66.100 - 11.66.130] and laws against gambling, promoting gambling, and related offenses described in AS 11.66.200 - 11.66.280.

* **Sec. 2.** AS 04.11.370(a) is amended to read:

(a) A license or permit shall be suspended or revoked if the board finds

(1) misrepresentation of a material fact on an application made under this title or a regulation adopted under this title;

(2) continuation of the manufacture, sale, or service of alcoholic beverages by the licensee or permittee would be contrary to the best interests of the public;

(3) failure on the part of the licensee to correct a defect that constitutes a violation of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or other laws after receipt of notice issued by the board or its agent;

(4) conviction of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010;

(5) conviction of an agent or employee of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates a law, regulation, or ordinance;

(6) failure of the licensee to comply with the public health, fire, or safety laws and regulations in the state;

(7) use of the licensed premises as a resort for illegal possessors or users of narcotics, prostitutes, **human traffickers,** or **sex traffickers** [PROMOTERS OF PROSTITUTION]; in addition to any other legally competent evidence, the character of the premises may be proved by the general reputation of the premises in the community as a resort for illegal possessors or users of narcotics, prostitutes, **human traffickers,** or **sex traffickers** [PROMOTERS OF PROSTITUTION];

(8) occurrence of illegal gambling within the limits of the licensed premises;

(9) the licensee permitted a public offense involving moral turpitude to occur on the licensed premises;

(10) violation by a licensee of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010; or

(11) violation by an agent or employee of a licensee of a provision of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates the law, condition or restriction, regulation, or ordinance.

*** Sec. 3.** AS 11.31.120(h)(2) is amended to read:

(2) "serious felony offense" means an offense

(A) against the person under AS 11.41, punishable as an unclassified or class A felony;

(B) involving controlled substances under AS 11.71, punishable as an unclassified, class A, or class B felony;

(C) that is criminal mischief in the first degree under AS 11.46.475; [OR]

(D) that is terroristic threatening in the first degree under

AS 11.56.807;

(E) that is human trafficking in the first degree under AS 11.41.355; or

(F) that is sex trafficking in the first degree under AS 11.66.110.

* **Sec. 4.** AS 11.41 is amended by adding a new section to read:

Sec. 11.41.355. Human trafficking in the first degree. (a) A person commits the crime of human trafficking in the first degree if the person violates AS 11.41.360 by compelling or inducing another person to engage in sexual conduct, adult entertainment, or an act described in AS 11.41.455(a)(1) - (7), and the other person compelled or induced is under 18 years of age.

(b) Human trafficking in the first degree is an unclassified felony.

* **Sec. 5.** AS 11.41.360(a) is amended to read:

(a) A person commits the crime of human trafficking in the **second** [FIRST] degree if the person compels or induces another person to [COME TO THIS STATE TO] engage in sexual conduct, adult entertainment, or labor in the state by force or threat of force against any person, or by deception.

* **Sec. 6.** AS 11.41.360(c) is amended to read:

(c) Human trafficking in the **second** [FIRST] degree is a class A felony.

* **Sec. 7.** AS 11.41.365 is amended to read:

Sec. 11.41.365. Human trafficking in the third [SECOND] degree. (a) A person commits the crime of human trafficking in the **third** [SECOND] degree if the person obtains a benefit from the commission of human trafficking under **AS 11.41.355 or 11.41.360** [AS 11.41.360,] with reckless disregard that the benefit is a result of the trafficking.

(b) Human trafficking in the **third** [SECOND] degree is a class B felony.

* **Sec. 8.** AS 11.41.370 is amended by adding new paragraphs to read:

(4) "adult entertainment" means the conduct described in AS 23.10.350(f)(1) - (3);

(5) "sexual conduct" has the meaning given in AS 11.66.150.

* **Sec. 9.** AS 11.66.100(b) is amended to read:

(b) **Except as provided in (c) of this section, prostitution** [PROSTITUTION] is a class B misdemeanor.

*** Sec. 10.** AS 11.66.100 is amended by adding a new subsection to read:

(c) Prostitution is a class C felony if

(1) the person described in (a)(1) of this section is under 18 years of age; the age of the person is a circumstance that does not require proof of a culpable mental state; and

(2) the person described in (a)(2) of this section is 18 years of age or older and at least three years older than the person described in (a)(1) of this section.

*** Sec. 11.** AS 11.66.110(a) is amended to read:

(a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 18 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

*** Sec. 12.** AS 11.66.110(c) is amended to read:

(c) Except as provided in (d) of this section, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree is a class A felony.

*** Sec. 13.** AS 11.66.120 is amended to read:

Sec. 11.66.120. Sex trafficking [PROMOTING PROSTITUTION] in the second degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the second degree if the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution;

(2) procures or solicits a patron for a prostitute; or

(3) offers, sells, advertises, promotes, or facilitates travel that includes commercial sexual conduct as enticement for the travel; in this paragraph, "commercial sexual conduct" means sexual conduct for which anything of value is

given or received by any person.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the second degree is a class B felony.

* **Sec. 14.** AS 11.66.130 is amended to read:

Sec. 11.66.130. Sex trafficking [PROMOTING PROSTITUTION] in the third degree.

(a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the third degree if, with intent to promote prostitution, the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;

(2) as other than a patron of a prostitute, induces or causes a person 18 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property **under** [PURSUANT TO] an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the third degree is a class C felony.

* **Sec. 15.** AS 11.66.135 is amended to read:

Sec. 11.66.135. Sex trafficking [PROMOTING PROSTITUTION] in the fourth degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree if the person engages in conduct that institutes, aids, or facilitates prostitution under circumstances not proscribed under AS 11.66.130(a)(4).

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree is a class A misdemeanor.

* **Sec. 16.** AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this

title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree under AS 11.41.355,** and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree under AS 11.41.355,** and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies;

(4) class A misdemeanors, which characteristically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor

offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

*** Sec. 17.** AS 12.55.035(b) is amended to read:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of **not** [NO] more than

(1) $500,000 for murder in the first or second degree, attempted murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, kidnapping, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **human trafficking in the first degree under AS 11.41.355** or misconduct involving a controlled substance in the first degree;

(2) $250,000 for a class A felony;

(3) $100,000 for a class B felony;

(4) $50,000 for a class C felony;

(5) $10,000 for a class A misdemeanor;

(6) $2,000 for a class B misdemeanor;

(7) $500 for a violation.

*** Sec. 18.** AS 12.55.085(f) is amended to read:

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260 - 11.41.320, **11.41.355 - 11.41.365** [11.41.360 - 11.41.370], 11.41.410 - 11.41.530, AS 11.46.400, or AS 11.61.125 - 11.61.128;

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a

felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

*** Sec. 19.** AS 12.55.185(10) is amended to read:

(10) "most serious felony" means

(A) arson in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **online enticement of a minor,** or any unclassified or class A felony prescribed under AS 11.41; or

(B) an attempt, or conspiracy to commit, or criminal solicitation under AS 11.31.110 of, an unclassified felony prescribed under AS 11.41;

*** Sec. 20.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, **sex trafficking** [OR PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2)**, or human trafficking in the first degree under AS 11.41.355** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the

defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) unlawful exploitation of a minor under AS 11.41.455(c)(2), online enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, **sex trafficking** [OR PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2)**, or human trafficking in the first degree under AS 11.41.355** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is

not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, online enticement of a minor under AS 11.41.452(d), unlawful exploitation of a minor under AS 11.41.455(c)(1), or distribution of child pornography under AS 11.61.125(e)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, distribution of child pornography under AS 11.61.125(e)(1), or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not

involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years.

*** Sec. 21.** AS 12.63.100(6) is amended to read:

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 - 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 - 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;

(v) AS 11.61.125 - 11.61.128;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense;

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former

AS 11.40.110, or former 11.40.200; [OR]

(viii) AS 11.61.118(a)(2) if the offender has a previous conviction for that offense;

(ix) human trafficking in the first degree under AS 11.41.355;

*** Sec. 22.** AS 15.80.010(9) is amended to read:

(9) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, **sex trafficking, human trafficking** [PROMOTING PROSTITUTION], criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography;

*** Sec. 23.** AS 28.15.046(c) is amended to read:

(c) The department may not issue a license under this section to an applicant who has been convicted of any of the following offenses within 20 years of the time of application:

(1) sexual abuse of a minor in any degree under AS 11.41.434 - 11.41.440;

(2) sexual assault in any degree under AS 11.41.410 - 11.41.425;

(3) incest under AS 11.41.450;

(4) unlawful exploitation of a minor under AS 11.41.455;

(5) contributing to the delinquency of a minor under AS 11.51.130;

(6) a felony involving possession of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(7) a felony or misdemeanor involving distribution of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(8) **sex trafficking** [PROMOTING PROSTITUTION] in the first or second degree under AS 11.66.110 or 11.66.120;

(9) indecent exposure in the first or second degree under AS 11.41.458 or 11.41.460**;**

(10) human trafficking in the first degree under AS 11.41.355.

*** Sec. 24.** AS 47.12.110(d) is amended to read:

(d) Notwithstanding (a) of this section, a court hearing on a petition seeking the adjudication of a minor as a delinquent shall be open to the public, except as prohibited or limited by order of the court, if

(1) the department files with the court a motion asking the court to open the hearing to the public, and the petition seeking adjudication of the minor as a delinquent is based on

(A) the minor's alleged commission of an offense, and the minor has knowingly failed to comply with all the terms and conditions required of the minor by the department or imposed on the minor in a court order entered under AS 47.12.040(a)(2) or 47.12.120;

(B) the minor's alleged commission of

(i) a crime against a person that is punishable as a felony;

(ii) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(iii) arson under AS 11.46.400 - 11.46.410;

(iv) burglary under AS 11.46.300;

(v) distribution of child pornography under AS 11.61.125;

(vi) **sex trafficking** [PROMOTING PROSTITUTION]

in the first degree under AS 11.66.110; [OR]

(vii) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; or

(viii) human trafficking in the first degree under AS 11.41.355; or

(C) the minor's alleged commission of a felony and the minor was 16 years of age or older at the time of commission of the offense when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's commission of an offense that is a felony; or

(2) the minor agrees to a public hearing on the petition seeking adjudication of the minor as a delinquent.

*** Sec. 25.** AS 47.12.315(a) is amended to read:

(a) Notwithstanding AS 47.12.310, when an agency takes action under AS 47.12.040(a)(1) to adjust a matter, or when, under AS 47.12.040(a)(2), the court directs the agency to adjust the matter, the agency

(1) shall, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent minor on the basis of the minor's commission of at least one offense and, on the basis of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a preliminary inquiry to determine if any action on that matter is appropriate, and, if the minor is alleged to be a delinquent minor on the basis of the minor's commission of another offense, exercise of agency jurisdiction is based on the minor's alleged commission of that other offense, and that other offense is one of the following:

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as

that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; [OR]

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; **or**

(H) human trafficking in the first degree under AS 11.41.355; and

(2) may, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense if the minor has knowingly failed to comply with all terms and conditions required of the minor by the agency to adjust the matter under AS 47.12.060(b).

* **Sec. 26.** AS 11.41.360(b)(1) and 11.41.360(b)(3) are repealed.

* **Sec. 27.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1, 2, 11 - 15, and 22 - 25 of this Act apply to offenses committed before, on, or after the effective date of the Act.

(b) Sections 3 - 10, 16 - 21, and 26 of this Act apply to offenses committed on or after the effective date of this Act.

* **Sec. 28.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes is instructed to change the catch line of AS 11.66.110 from "Promoting prostitution in the first degree" to "Sex trafficking in the first degree."

* **Sec. 29.** This Act takes effect July 1, 2012.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Date: March 15, 2012

TO: Leg Legal

FROM: Cindy Smith

RE: CS drafting request SB 218 (GS2627\A)

Please provide a Judiciary CS for SB 218 with the following changes:

1. Delete sections 1-3, Sections 5-11, Section 14, Sections 17–24, plus any appropriate applicability provisions.

2. Add all provisions of SB 186 LS0811\I.

3. Add amendment I.1 to SB 186 LS0811.I

4. Make all necessary conforming and title changes.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sean Parnell, Governor

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2075

February 22, 2012

The Honorable Hollis French, Chair
Senate Judiciary Committee
State Capitol Room 417
Juneau, AK 99801

Re: Senate Bill 218 – relating to sex crimes and video conferencing

Dear Chair French:

Senate Bill 218 has been assigned to the Senate Judiciary Committee for your consideration. The Department of Law respectfully requests a hearing in the Judiciary Committee on the bill at your earliest convenience. SB 218 builds on and refines legislation enacted over the past several years to address serious problems of sexual exploitation of children and other victims.

A sectional analysis that describes each section of the bill is attached. I expect Annie Carpeneti, Legislative Liaison from the Department of Law, Criminal Division and representatives from the Department of Public Safety will testify regarding this legislation. Experienced law enforcement officers will also be available if needed.

Thank you for your consideration of this request.

Sincerely

Michael C. Geraghty
Attorney General

Enclosure

printed on recycled paper by C.D.

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION CENTRAL OFFICE

SEAN PARNELL, GOVERNOR

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SENATE BILL 218
SEX TRAFFICKING AND HUMAN TRAFFICKING
SECTIONAL ANALYSIS

The increased scrutiny of crimes related to promoting prostitution of children in Alaska has prompted the proposed change in terminology from promoting prostitution to sex trafficking. There are good reasons for this change. First, a child who is put into prostitution by an adult should be considered and described as a victim, not a prostitute. The change in terminology will encourage this change. Second, a majority of law enforcement officers now refer to the crime of promoting prostitution of children as sex trafficking. Changing Alaska law will facilitate better communication and understanding.

Sections 1, 2, 7 -- 11, 14, 17 – 19, and 21 -- 24 change the statutes prohibiting promoting prostitution to prohibiting sex trafficking. The elements of the offenses remain the same. These sections also make conforming amendments to other laws that currently refer to the crime of promoting prostitution so that they cross-reference sex trafficking.

Section 3 adds the crimes of human trafficking in the first degree and sex trafficking in the first degree to the felonies described as "serious felony offenses" in the state's conspiracy law, AS 11.21.120. This change would enable the state to investigate and potentially prosecute offenders who work with other people to plan and engage in human trafficking or sex trafficking.

Section 4 amends the crime of distribution of indecent materials to minors, AS 11.61.128. This proposed amendment is in response to the recent decision by a federal district court judge holding the current version of the statute to be unconstitutional in violation of the first amendment, because it applies to conduct that is constitutionally protected. In response to the decision that the current law is overbroad, the bill would require that the state prove the defendant intentionally distributed, or possessed with intent to distribute, harmful material to another person that the offender knows is under 16 years of age or believes is under 16 years of age.

Sections 5 and 6 raise the penalty for being a patron of a prostitute, if the prostitute is a minor under 18 years of age, from a class B misdemeanor to a class C felony. It also specifies the legislative intent that the age of the prostitute is a circumstance that does not require proof of a culpable mental state.

Section 12: Under current law, no corroboration is required of the testimony of an alleged victim in a prosecution for promoting prostitution (sex trafficking) in the first, second, and third

degrees. The bill adds the crime of promoting prostitution (sex trafficking) in the fourth degree to those crimes that do not require corroboration of the testimony of an alleged victim.

Section 13: Under current law property used to facilitate or derived from a crime of promoting prostitution (sex trafficking) is subject to forfeiture. The bill adds the crime of prostitution to these crimes. Under the bill property used to facilitate or derived from the crime of prostitution would be subject to forfeiture.

Section 15 corrects an error in AS 11.81.250(b). Under current law the crime of promoting prostitution (sex trafficking) in the first degree under AS 11.66.110(a)(2) – where the person promoted is a child – is an unclassified felony. The bill adds this offense to the other offenses described as unclassified felonies in Alaska law.

Section 16 allows the testimony of a witness in a hearing addressing the competency of a defendant for being tried for a crime by way of contemporaneous two-way video conference. It allows this testimony if the witness would be required to travel more that 50 miles to attend the hearing in person or if the witness lives in a place where people customarily travel by air to the court site.

Section 19, in addition to conforming the definition of most serious felony to the changes in the sex trafficking provisions, also corrects an omission in the definition of most serious felony by including online enticement of a minor in the definition.

Section 20 adds a new provision to sex offender registration law that requires a person present in Alaska, who is convicted of an offense out of state that requires registration in that jurisdiction, to register in Alaska. This requirement would apply even if Alaska does not have a criminal provision similar to the crime in the other state that requires registration there. A person would be required to register for 15 years if convicted of one offense, and for life if convicted for two or more offenses.

Section 25 adopts Rule 38.3, Alaska Rules of Criminal Procedure, addressing the use of testimony by contemporaneous two-way video conference. It would allow this testimony if the parties agree to its use. If the parties do not agree, it would allow contemporaneous two-way video conference testimony if the court finds that its use is necessary to further an important public policy, the witness is unavailable, and the testimony is given under oath and is subject to cross-examination.

Section 26 addresses the applicability of the changes described above.

Section 27 is an instruction to the revisor of statutes regarding the heading of AS 11.66.110.

Section 28 provides for an effective date of July 1, 2012.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 218**
Fiscal Note Number: 1
(S) Publish Date: 2/22/12

Identifier (file name): 0627-LAW-CRIM-02-17-12
Title: An Act relating to sex trafficking and distribution of indecent materials.
Sponsor: Rules
Requester: Request of the Governor

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/17/12 3:40PM
Approved by: Michael C. Geraghty, Attorney General — Date: 2/17/2012
Department of Law

(Revised 8/17/2011 OMB)

STATE OF ALASKA **BILL NO.** SB 218
2012 LEGISLATIVE SESSION

Analysis

The bill changes the description of the crime of promoting prostitution under AS 11.66.110 – 11.66.135 from promoting prostitution in the first, second, third, and fourth degrees to sex trafficking in the first, second, third, and fourth degrees.

It adds the crimes of human trafficking in the first degree and sex trafficking in the first degree to the definition of "serious felony offense" under the conspiracy law.

The bill amends the crime of distribution of indecent materials to minors under AS 11.61.128 in response to the judicial decision that the current law is unconstitutional due to over breadth by requiring the prosecution to prove that the offender intentionally distributed, or possessed with the intent to distribute, harmful material to another person that the offender knows is under 16 years of age or believes is under 16 years of age.

It adopts a procedure for contemporaneous two-way videoconference in criminal trials where the court finds that it is necessary to further an important public policy, that the witness is unavailable, and the testimony is given under oath and subject to cross-examination. The bill would also allow contemporaneous two-way videoconference testimony in hearings addressing the competency of a defendant to be tried for criminal charges if the witness resides 50 or more miles away from the place of the hearing or the customary travel to the site of the hearing is by air.

The bill would require a person present in Alaska to register as a sex offender if the person is required to register as a sex offender in another jurisdiction.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**SB 218**
Fiscal Note Number	2
(S) Publish Date	2/22/12

Identifier (file name)	0627-DPS-R&I-02-21-12	Dept. Affected	Public Safety
Title	SEX TRAFFICKING AND DISTRIBUTION OF INDECENT MATERIAL TO MINORS	Appropriation	Statewide Support
		Allocation	Records & Identification
Sponsor	Rules by Request of the Governor		
Requester	Governor Parnell	OMB Component Number	1190

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	109.5		109.5	109.5	109.5	109.5	109.5
Travel	5.0		5.0	5.0	5.0	5.0	5.0
Services	5.8		5.8	5.8	5.8	5.8	5.8
Commodities	1.0		1.0	1.0	1.0	1.0	1.0
Capital Outlay	2.9		2.9	2.9	2.9	2.9	2.9
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**124.2**	**0.0**	**124.2**	**124.2**	**124.2**	**124.2**	**124.2**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF	124.2		124.2	124.2	124.2	124.2	124.2
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**124.2**	**0.0**	**124.2**	**124.2**	**124.2**	**124.2**	**124.2**

POSITIONS							
Full-time	**1**		1	1	1	1	1
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by	David Schade, Director	Phone	(907) 269-0202
Division	Division of Statewide Services	Date/Time	2/21/12 11:07 AM
Approved by	Joe Masters, Commissioner	Date	2/21/2012
	Department of Public Safety		

(Revised 1/17/2012 OMB)

STATE OF ALASKA **BILL NO.** SB 218
2012 LEGISLATIVE SESSION

Analysis

This proposed legislation would require a person who is required to register as a sex offender or child kidnapper in another jurisdiction to register in Alaska even if there is no substantive law in Alaska that is similar to the offense the person was convicted of.

For the department's Records & Identification bureau to continue to accomplish a core service of providing public access to current information regarding sex offenders in Alaska, the determination that a person must register as a sex offender or child kidnapper in Alaska because of their requirement to register in another jurisdiction must be made timely and must be based on information that has been validated.

Considerable research and analysis of the criminal history background of persons with sex offense convictions outside of Alaska would be required to determine whether the offense of conviction is a registerable offense under the current laws of that jurisdiction and whether or not the person is subject to that jurisdiction's registration requirements. Coordination with the jurisdiction's sex offender central registry office would need to occur to obtain source documents and other relevant information on the person.

Additionally, it is anticipated that the department would need to continually monitor the status of registration laws and legal cases affecting sex offender registration in all jurisdictions to ensure a person required to register in Alaska under proposed AS 12.63.100(6)(D) continued to be subject to the registration requirements of the jurisdiction that their offense was committed in.

The department anticipates that these additional efforts will require one new full-time Criminal Justice Planner position. This position would be responsible to review and evaluate offender records with out-of-state sex offense convictions to determine the requirement to register under proposed AS 12.63.100(6)(D), to coordinate with other jurisdictions' sex offender central registry offices, and to monitor sex offender registration laws in other jurisdictions and any changes for possible impact to currently registered offenders.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 218**
Fiscal Note Number: 3
(S) Publish Date: 2/22/12

Identifier (file name): 0627-DPS-DET-02-17-12
Title: SEX TRAFFICKING AND DISTRIBUTION OF INDECENT MATERIAL TO MINORS
Sponsor: Rules by Request of the Governor
Requester: Governor Parnell

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Lt. Rodney Dial — Phone: (907) 247-4480
Division: Alaska State Troopers — Date/Time: 2/17/12 5:25 PM
Approved by: Joseph A. Masters, Commissioner — Date: 2/17/2012
Department of Public Safety

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 218

Analysis

This bill changes the name of the crime of "promoting prostitution" to "sex trafficking" in numerous sections in Alaska Statutes; makes changes to Alaska Statute to address recent court decisions regarding the distribution of indecent material to minors; adds AS 11.61.100 (Prostitution) to AS 11.66.145 (Forfeiture) relating to the forfeiture of property used in prostitution offenses; would define human trafficking and sex trafficking in the first degrees as serious felony offenses for purposes of the state conspiracy law; and requires a person who is required to register as a sex offender or child kidnapper in another jurisdiction to register in Alaska.

This bill will have no fiscal impact on the Division of Alaska State Troopers.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 218**
Fiscal Note Number: 4
(S) Publish Date: 2/22/12

Identifier (file name): 0627-DOA-PDA-2-17-12
Title: Sex trafficking and distribution of indecent materials
Sponsor: Rules by Request of the Governor
Requester: Governor

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	****	****	****	****	****	****	****

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		****	****	****	****	****	****	****

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner — Phone: 465-4414
Division: Public Defender Agency — Date/Time: 2/17/12 3:00 PM
Approved by: John Cramer, Deputy Commissioner — Date: 2/17/2012
Department of Administration

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 218

Analysis

This bill changes the language used to describe conduct "promoting prostitution" to the phrase "sex trafficking," prohibits the intentional distribution of indecent material to persons known or believed to be less than 16 years of age, and prohibits possession with the intention to distribute indecent material to persons known or believed to be less than 16 years of age. This bill elevates the charge of prostitution from a B misdemeanor to an A misdemeanor if the subject person is under the age of 18. This bill includes "online enticement of a minor in the definition of "most serious felony." The bill also creates the crimes of: conspiracy to commit human trafficking, a class B felony which carries a sentence of up to 10 years imprisonment, and conspiracy to commit sex trafficking, a class A felony which carries a sentence of up to 20 years imprisonment. This bill amends the definition of "sex offense" for the purpose of sex offender registration requirements by including any conviction in another state that would require registration as a sex offender in that state.

Additionally, this bill amends Rule 38 of the Alaska Rules of Criminal Procedure by adding a new section that allows for testimony using two-way video conferencing. The bill also specifies that video conference testimony is allowed for witnesses whose testimony is used to determine competency of the defendant under this section, where the witness would be required to travel more than 50 miles to court, or where air travel to court is customary.

This bill will result in increases in felony cases and more complex sentencing for certain felonies. The Public Defender Agency does not have a reliable method for determining how many more persons may be charged for failing to register as a sex offender under the new definition or whether those charged would qualify for representation by the Public Defender. The Agency, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 218**
Fiscal Note Number: 5
(S) Publish Date: 2/22/12

Identifier (file name): LL0627-DOA-OPA-2-17-12
Title: Sex trafficking and distribution of indecent material
Sponsor: Rules by Request of the Governor
Requester: Governor

Dept. Affected: Administration
Appropriation: Legal & Advocay Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Richard Allen, Director — Phone: 907-269-3504
Division: Office of Public Advocacy — Date/Time: 2/17/12 3:00 PM
Approved by: John Cramer, Deputy Commissioner — Date: 2/17/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE #5

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 218

Analysis

This bill changes the language used to describe conduct "promoting prostitution" to the phrase, "sex trafficking," prohibits the intentional distribution of indecent material to persons known or believed to be less than 16 years of age, and prohibits possession with the intention to distribute indecent material to persons known or believed to be less than 16 years of age. This bill elevates the charge of prostitution from a B misdemeanor to an A misdemeanor if the subject person is under the age of 18. This bill includes "online enticement of a minor in the definition of "most serious felony." The bill also creates the crimes of: conspiracy to commit human trafficking, a class B felony which carries a sentence of up to 10 years imprisonment, and conspiracy to commit sex trafficking, a class A felony which carries a sentence of up to 20 years imprisonment. This bill amends the definition of "sex offense" for the purpose of sex offender registration requirements by including any conviction in another state that would require registration as a sex offender in that state.

Additionally, this bill amends Rule 38 of the Alaska Rules of Criminal Procedure by adding a new section that allows for testimony using two-way video conferencing. The bill also specifies that video conference testimony is allowed for witnesses whose testimony is used to determine competency of the defendant under this section, where the witness would be required to travel more than 50 miles to court, or where air travel to court is customary.

This bill will result in increases in felony cases and more complex sentencing for certain felonies. The Office of Public Advocacy does not have a reliable method for determining how many more persons may be charged for failing to register as a sex offender under the new definition or whether those charged would qualify for representation by the Office of Public Advocacy. Therefore, the Office of Public Advocacy submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 218**
Fiscal Note Number: 6
(S) Publish Date: 2/22/12

Identifier (file name): JU2011200627
Title: "An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degr
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**	**	**	**	**	**	**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by: Leslie Houston, Director
Division: Department of Corrections - Administrative Services
Approved by: Joseph D. Schmidt, Commissioner
Department of Corrections

Phone: 907-465-3339
Date/Time: 2/17/12 8:30 PM
Date: 2/17/2012

(Revised 8/17/2011 OMB)

STATE OF ALASKA **BILL NO. SB 218**
2012 LEGISLATIVE SESSION

Analysis

This bill adds human trafficking in the first degree and sex trafficking in the first degree to the conspiracy statues (AS 11.31.120). A person convicted of this new crime would be subject to punishment for a Class B felony. The average sentence for a Class B felony is five years. The average daily cost of care in a DOC facility is $134.90. Therefore, one individual convicted of conspiring to commit sex trafficking in the first degree could cost the Department of Corrections $246,192.50 based on a five year *average* sentence.

In the past five years, DOC has seen an average of 2.4 convictions for promoting prostitution (sex trafficking). However, DOC does not have any historical data on conspiracy to commit sex or human trafficking, as this would be a new crime if this legislation were to pass. Therefore, DOC is currently unable to quanitfy the fiscal impacts of the passage of this legislation.

The Department will closely monitor the potential future fiscal impacts should this legislation pass.

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STUDENT ADVISORS

March 15, 2012

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
State Capitol
Juneau, AK 99801
via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

Re: SB 218: Video Testimony and Sex Offender Registration
ACLU Review of Legal Issues

Dear Chair French and Vice-Chair Wielechowski:

Thank you for the opportunity to provide written testimony with respect to Senate Bill 218, which – amongst other provisions – permits judicial testimony by video conference and modifies the registration of sex offenders.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. In that context, we wish to advise you of constitutional and policy issues with sections 16, 20, and 25 of the proposed legislation.

Section 16 Unconstitutionally Violates the Confrontation Clause

If enacted, Section 16 of SB 218 would permit, in the context of determining if a criminal defendant were mentally competent to stand trial, a witness, "including the psychiatrist or psychologist who examined the defendant," who would have to "travel more than 50 miles to the court or lives in a place from which people customarily travel by air to the court," to "testify

concerning the competency of the defendant by contemporaneous two-way video conference[.]"

Based on our review of court decisions, we believe the Alaska courts would likely rule that this provision violates the Confrontation Clauses of the federal and Alaska Constitutions. U.S. Const., Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); Alaska Const., Art. I, § 11 ("In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him").

The U.S. Constitution's Confrontation Clause's "right to confront one's accusers is a concept that dates back to Roman times." *Crawford v. Washington*, 541 U.S. 36, 43 (2004). It is a "bedrock procedural guarantee" that "applies to both federal and state prosecutions." *Id.* at 42; *see Lemon v. State*, 514 P.2d 1151 (Alaska 1973).

This essential right serves four purposes: first, it "insures that the witness will give his statements under oath [by] impressing him with the seriousness of the matter," *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (internal quotation omitted); second, it "ensur[es] that evidence admitted against an accused is reliable" by "forc[ing] the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth," *id.* (internal quotation omitted); third, it "permits the jury . . . to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility," *id.* (internal quotation omitted); and fourth, it has a "strong symbolic purpose" of assuring everyone that the prosecution is fair, *id.* at 847. Confrontation "may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.* at 846–47 (internal quotation omitted).

Face-to-face confrontation is "the core of the values furthered by the Confrontation Clause," *id.* at 847 (internal quotation omitted) and "[t]he prosecution *must* produce . . . witnesses . . . against the defendant," *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2534 (2009) (emphasis in original). **The face-to-face confrontation may be denied only if, after a fact-based, "case-specific" inquiry, *Craig*, 497 U.S. at 855, a court determines that *"denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured," id.* at 850 (emphasis added).**

The "necessary to further an important public policy" prong is not easily satisfied. While juvenile victims of sexual violence may be exempted from personally confronting the accused, the denial of face-to-face confrontation is only justified if "it is the presence of the defendant that causes the trauma." *Id.* at 856. But, even the desire to have a child witness avoid "courtroom trauma generally" is insufficient to deny face-to-face confrontation "because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present." *Id.* And, the court must determine that "the emotional distress . . . is more than *de minimis*, *i.e.*, more than mere nervousness or excitement or some reluctance to testify." *Id.* (internal quotation omitted);

Blume v. State, 797 P.2d 664, 674 (Alaska Ct. App. 1990). **Simple need for a witness's testimony,[1] expediency,[2] efficiency,[3]** security,[4] **"convenience and cost-saving,"[5]** and a desire not to leave a severely ill, elderly spouse's side[6] **do not satisfy *Craig*'s important public policy test** nor justify avoiding face-to-face in-person confrontation.[7]

While no court has squarely addressed if "the [federal] Confrontation Clause applies to pretrial competency hearings," *United States v. Hamilton*, 107 F.3d 499, 504 (7th Cir. 1997), such as those in Alaska Stat. § 12.47.100, an Alaska court might hold that the federal and state Confrontation Clauses do. West Virginia holds that a defendant is entitled to face-to-face confrontation in pretrial hearings to determine whether to transfer his case from juvenile to criminal court, *State v. Gary F.*, 432 S.E.2d 793, 800 (W. Va. 1993), and Pennsylvania applies the Confrontation Clauses to pretrial suppression hearings, *Commonwealth v. Atkinson*, 987 A.2d 743, 746 (Pa. Super. Ct. 2009).

The touchstone of a court's inquiry would be the Confrontation Clauses' purpose in a competency hearing. A competency hearing is "critically important," *see Gary F.*, 432 S.E.2d at 801, and "an adversarial proceeding and a critical stage in a criminal proceeding . . . . at which substantive rights may be preserved or lost," *Atkinson*, 987 A.2d at 747 (internal quotation omitted). Indeed, the competency hearing is how the court determines if a "defendant is unable to understand the proceedings against [him] or to assist in [his] own defense," and if not, the defendant "may not be tried, convicted, or sentenced for the commission of a crime so long as the incompetency exists." Alaska Stat. § 12.47.100(a). The court decides this issue through an adversarial process and "[t]he party raising the issue of competency bears the burden of proving the defendant is incompetent by a preponderance of the evidence." *Id.* at § 12.47.100(c).

The court bases its decision on the testimony of "at least one qualified psychiatrist or psychologist," *id.* at § 12.47.100(b), but the scientific expertise of the witness does not affect the

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[1] *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc).

[2] *Id.*

[3] *Commonwealth v. Atkinson*, 987 A.2d 743, 750 (Pa. Super. Ct. 2009).

[4] *Id.*

[5] *Id.* at 751.

[6] *Bush v. State*, 193 P.3d 203, 216 (Wyo. 2008).

[7] In *Melendez-Diaz*, the U.S. Supreme Court directly faced a request to "relax the requirements of the Confrontation Clause to accommodate the 'necessities of trial and the adversary process.'" *Melendez-Diaz*, 129 S. Ct. at 2540. The Court rejected this proposal because "[i]t is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause – like those other constitutional provisions – is binding, and we may not disregard it at our convenience." *Id.* "It is a truism that constitutional protections have costs." *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

Confrontation Clause analysis. "The prosecution *must* produce . . . witnesses . . . against the defendant," *Melendez-Diaz*, 129 S. Ct. at 2534 (emphasis in original), even if the witnesses are scientists offering forensic analysis. "Confrontation is one means of assuring accurate forensic analysis. . . . Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* at 2536–37. "[T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 2534.[8] **The importance of a pretrial competency hearing, with an adversarial process to determine critical rights, likely requires the full protections of the Confrontation Clauses.**

In conducting its inquiry of Section 16, an Alaska court will rely on the *Craig* test. *Blume*, 797 P.2d at 674; *Reutter v. State*, 886 P.2d 1298, 1307 (Alaska Ct. App. 1994) (using *Craig* to evaluate Alaska Stat. § 12.45.046, which allows child victims to testify via closed-circuit television).[9] Using the *Craig* test, **the Eight and Eleventh federal circuits determined "[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. . . . the two are not constitutionally equivalent."** *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (en banc), (emphasis added). **The Confrontation Clause "is most certainly compromised when the confrontation occurs though an electronic medium. Indeed, no court that has considered the question has found otherwise[.]"** *Id.* **"The virtual 'confrontations' offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect."** *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005).

Given (1) the criticism of two-way video testimony and (2) that the supposed benefits of Section 16, such as cost-savings, convenience, and efficiency, do not rise to an "important public policy," a court would likely conclude that Section 16 violates the federal and Alaska Confrontation Clauses. This is especially true because **the Alaska Supreme Court has expressly reserved its ability to interpret the Alaska Confrontation Clause more broadly than the federal one**, *Lemon*, 514 P.2d at 1154 n.5,[10] and because it has "the authority and, when necessary, duty to construe the provisions of the Alaska Constitution to provide greater protections than those arising out of the identical federal clauses," *Doe v. State*, 189 P.3d 999, 1005 (Alaska 2008).

This conclusion is even more inexorable given the Alaska Supreme Court's long-standing recognition that one of the "vital interests" of the Confrontation Clauses is to "enable[] the

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[8] The two categories of witnesses are "those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter." *Melendez-Diaz*, 129 S. Ct. at 2534 (emphasis in original).

[9] The Sixth, Eighth, Ninth, Tenth, and Eleventh federal circuits apply the *Craig* test to evaluate two-way video conference testimony. *Yates*, 438 F.3d at 1313 (listing cases).

[10] The supreme courts of Illinois and Pennsylvania each interpreted their state Confrontation Clause more broadly than the federal one and each concluded that their state Clauses prohibit testimony by closed-circuit television. *People v. Fitzpatrick*, 633 N.E.2d 685, 688 (Ill. 1994); *Commonwealth v. Ludwig*, 594 A.2d 281, 281–82 (Pa. 1991).

defendant to demonstrate to the jury the witnesses' demeanor when confronted by the defendant so that the inherent veracity of the witness is displayed in the crucible of the courtroom," *Lemon*, 514 P.2d at 1153, and that testimony via video may alter "impressions of the witness' demeanor and credibility," *Stores v. State*, 625 P.2d 820, 828 (Alaska 1980).[11]

Even if a court did not completely overturn Section 16, that Section "must be construed to incorporate the requirements of *Craig*." *Reutter*, 886 P.2d at 1307. *Craig* would require that a court permit video testimony only if it "is necessary to further an important public policy," *Craig*, 497 U.S. at 850, which, as noted above, does not include efficiency, speed, convenience, or cost-savings. **At best, Section 16 would be functionally overturned because it would be the rare situation when the need for video testimony in a competency hearing satisfied *Craig*.**[12]

Section 25 Should Be Improved to Enhance Witnesses' Reliability and to Strengthen Its Constitutionality

Section 25's proposed addition to the Alaska Rules of Criminal Procedure tracks *Craig* and so it is likely secure from federal constitutional challenge.[13] **It should, however, be altered to enhance witnesses' reliability and to further buttress its presumed constitutionality.**

Craig and other courts note that the Confrontation Clause increases witnesses' reliability by exposing witness coaching. *E.g. Craig*, 497 U.S. at 847 (face-to-face confrontation may "reveal the child coached by a malevolent adult") (internal quotations omitted). Subpart (c) of Section 25 puts the onus on the parties to "move to exclude any person other than the video conference technician from the witness's presence[.]"

Given that witnesses who testify via video are more able to be coached (because someone in the video room, rather than in the courtroom, with the witness, may more easily coach him) and any coaching is harder to detect, **the Committee should amend the Rule and establish a default of**

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[11] Video testimony causes the "most serious . . . [e]vidence distortion . . . because the picture conveyed may influence a juror's feelings about guilt or believability. . . . Variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanor such as a nervous twitch or paling and blushing in response to an important question . . . Furthermore, the camera itself is selective of what it relates to the viewer. Transmission of valuable first impressions may be impossible, and off-camera evidence is necessarily excluded while the focus is on another part of the body or another witness." *Stores*, 625 P.2d at 828 n.25.

[12] This analysis focused on Section 16's unconstitutionality, but the Committee should also consider practical problems with video testimony, such as the difficulties of having the witness physically use and interact with exhibits, counsel, and the court.

[13] Alaska courts could conclude, however, that the Rule violates the Alaska Confrontation Clause. *Lemon*, 514 P.2d at 1154 n.5

having just the video technician in the room with the witness, but permitting the parties to move to allow others to be present with him. To further caution against coaching, the Committee should also add a provision that a second camera should transmit to the courtroom a live feed of what the witness sees.[14]

Section 20 Is Unwise; It Shackles Alaska's Policy to Outside Jurisdictions

Section 20 adds a requirement that anyone who has been convicted of "a crime in another jurisdiction that requires the person to register as a sex offender or child kidnapper in that jurisdiction" must register with the Alaska sex offender registry. Alaska Stat. § 12.63.100(6) currently ensures that out-of-state offenders register in Alaska if they "committed or attempted to commit" one of Alaska Stat. § 12.63.100(6)'s offenses or "a similar offense [or] law of another jurisdiction." Section 20, then, serves only to unpin the Alaska registry from Alaska crimes and Alaska public policy.

This concern is not academic. Other states require registration for offenses that, if committed in Alaska, would not require the offender to register. In Alaska, for example, while most forms of indecent exposure require offenders to register, not all do: streaking (perhaps done as a prank),[15] is a misdemeanor in Alaska[16] and does not require registration.[17] Other states are more draconian; to continue to use the indecent exposure example, some states require registration for all forms, even for those variants that Alaska has omitted from registration.[18] If Section 20 is enacted, it would commit these individuals to register annually for at least 15 years[19] and suffer the ignominy and consequences of registration.

Registration is life-changing. The Department of Public Safety publishes, on an easily accessible website, each registrant's "name, aliases, address, photograph, physical description, description

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[14] Not all coaching is intentional or malicious. Spectators may innocently influence testimony through their facial expressions and body language. Permitting the court, counsel, and the defendant to see what the witness sees enables them to notice and check that behavior.

[15] Associated Press, *Juneau High School Boys Disciplined for Streaking*, Oct. 28, 2009; Julia O'Malley, *Hey, Nude Hikers, What About the Bugs?*, Anchorage Daily News, May 19, 2010 (discussing nude hiking on Anchorage's trails).

[16] Alaska Stat. § 11.41.460.

[17] Alaska Stat. § 12.63.100(6)(C)(iv) (not requiring registration for indecent exposure so long as it was not "before a person under 16 years of age and the offender [does not have] a previous conviction for that offense").

[18] Including California (Cal. Penal Code § 290(c) for violating California's indecent exposure statute, Cal. Penal Code. § 314); Colorado (Colo. Rev. Stat. § 16-22-103 for violating Colorado's indecent exposure statute, Colo. Rev. Stat. § 18-7-302); and Oklahoma (Okla. Stat. tit. 57, § 582(A) for violating Oklahoma's indecent exposure statute, Okla. Stat. tit. 21, § 1021).

[19] 15 years is the briefest registration period in Alaska. Alaska Stat. §§ 12.63.010(d)(1), 12.63.020(a)(2).

of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements of AS 12.63 or cannot be located." Alaska Stat. § 18.65.087(b). This "'impose[s] significant affirmative obligations and a severe stigma on every [registrant],'" *Doe*, 189 P.3d at 1009 (quoting *Smith v. Doe*, 538 U.S. 84, 111 (Stevens, J., dissenting)) (first alteration in original), and "through aggressive public notification of their crimes," *id.* (internal quotation omitted), causes registrants to risk "public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson," *id.* at 1010 n.80.

If obligated to register, one must register each year for at least 15 years.[20] Once on the registry, there is "no mechanism" through which one "can petition the state or a court for relief from the obligations of continued registration and disclosure." *Id.* at 1017.

At least 136 jurisdictions have sex offender registries.[21] The State, if it enacts Section 20, will bind Alaska to each of these jurisdictions in an ever-changing, complex web. The Alaska Supreme Court held that Alaska's registry is "punitive" and, when applied "to defendants who committed their crimes before the legislature enacted [the Alaska Sex Offender Registration Act]," *Doe*, 189 P.3d at 1019, violates the Alaska *Ex Post Facto* Clause.[22]

The complex interaction between Alaska and each of these 135 jurisdictions may present future *ex post facto* issues, which may expose the State to expensive and lengthy litigation. Section 20 applies to offenses committed only after its enactment. But, how would it apply in the following example? (1) Another jurisdiction, like Alaska, does not require otherwise innocent college-student streakers to register. (2) A college student in that jurisdiction streaks on July 1, 2013. (3) The individual moves to Alaska on January 1, 2014 and does not have to register here. (4) On February 1, 2014, that jurisdiction amends its laws, with a retroactive date to January 1, 2010, to require streakers to register. Does that person now need to register in Alaska? With at least 135 other jurisdictions, this hypothetical is plausible and implicates the Alaska *Ex Post Facto* Clause. If the State incorrectly requires this individual to register, it would likely face an *ex post facto* challenge and a suit for civil damages. Section 20, rather than being clear and efficient, makes Alaska law more turbid and turbulent.

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[20] Alaska Stat. §§ 12.63.010(d)(1), 12.63.020(a)(2).

[21] The Dru Sjodin National Sex Offender Public Website, administered by the U.S. Department of Justice, lists 136 jurisdictions with sex offender registries: the 50 States; the District of Columbia; the 4 territories of Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands; and 81 Native Tribes. United States Department of Justice National Sex Offender Public Website, *at* http://www.nsopw.gov/Core/PublicRegistrySites.aspx (last visited Mar. 7, 2012).

[22] Alaska Const., Art. I, § 15 ("No . . . ex post facto law shall be passed.").

No matter one's assessment regarding registration as a policy matter, clearly placement on the registry – because of its significant, irrevocable consequences – should never be done without intentional review and action by the Alaska Legislature. Were Section 20 to be enacted, individuals would be forced to register and bear the heavy costs associated thereto, even though they had not committed an offense that Alaska, in **its** sound policy judgment, had decided warrants registration.

Alaska should not abdicate its sovereignty and wisdom, it should not cede its policymaking to other jurisdictions, and it should not expose itself to needless constitutional litigation. The Legislature should continue to exercise its considered judgment in determining which offenses do justify registration. Section 20 would make Alaska's registry an appendage to all other jurisdictions.

Conclusion

We hope to work with the Judiciary Committee to address the above-noted problems with Senate Bill 218, so that final legislation would not impermissibly deprive Alaskans of their constitutional rights nor abdicate the Legislature's policy judgments about the offender registry.

Thank you again for letting us share our concerns. Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
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Senator John Coghill, Senator_John_Coghill@legis.state.ak.us

contemporaneous two-way video conference testimony of a witness if

(1) the requesting party establishes that testimony by two-way video conference is necessary to further an important public policy;

(2) the requesting party establishes that the witness is unavailable; and

(3) the testimony is given under oath and subject to cross-examination.

(c) **Procedures for Taking Video Conference Testimony.** If the trial court authorizes video conference testimony under (b) of this rule, it shall determine the procedures for taking the contemporaneous two-way video conference testimony. The parties, the court, the trier of fact, and the public must be able to see and hear the witness; and the witness must see and hear the courtroom proceedings, including the defendant, as if the witness were sitting in the courtroom's witness stand. The persons who are present with the witness must be identified. The parties may move to exclude any person other than the video conference technician from the witness's presence; the court, in its discretion, may exclude a person other than the video conference technician from the presence of the witness.

(d) **Definitions.**

(1) Contemporaneous Two-Way Video Conference. Contemporaneous two-way video conference means a conference among people at different places by means of transmitted audio and video signals. It includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

(2) Unavailable. In this rule, a witness is unavailable if

(A) by clear and convincing evidence the court finds under Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska Rules of Criminal Procedure, that the witness is unavailable;

(B) by clear and convincing evidence the court finds that under the circumstances the witness ~~is unavailable;~~ or

(C) the parties agree that the witness is unavailable.

*** Sec 26.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1, 2, 7 - 11, 14, 17 - 19, 21 - 24, and 27 of this Act

Ten years later, with the Adam Walsh Act of 2006, Congress again passed legislation increasing the categories of people that states were required to register as sex offenders and for how long they would have to do so.[98] The Act also authorized a national registry that would incorporate the information from every state registry.

The Adam Walsh Act significantly expands the federal requirements of who must register as a sex offender. The Act defines a sex offense as a "criminal offense that has an element involving a sexual act or sexual contact with another."[99] The law exempts consensual sexual conduct when the victim was at least 13 and the offender was no more than four years older.[100] For the first time, federal law under the Adam Walsh Act requires some juveniles to register (see Chapter VII, "Sex Offender Laws and Child Offenders").

The Adam Walsh Act creates three tiers or levels of registrants, determined solely by the conviction offense, with Tier I crimes the least serious and Tier III crimes the most serious. The tiers dictate the duration of the registry requirement.[101]

The Act also sets the frequency with which a former offender must update registry information: Tier I sex offenders must do so every year; Tier II sex offenders must do so every six months; and Tier III offenders must do so every three months. A registrant must not only register with local law enforcement in the jurisdiction where

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in sexual acts involving penetration with victims of any age through the use of force or the threat of serious violence; and (2) engaging in sexual acts involving penetration with victims below the age of 12."

97 Ibid. Megan's Law is most commonly associated, however, with its community notification provisions, discussed below.

98 The act is named after a six-year-old boy who was abducted and murdered in 1981. Adam's severed head was found in a canal about 100 miles from his family home. The rest of his remains have never been found, nor has anyone been convicted of his murder. His father, John Walsh, is a prominent national victims' rights advocate and the host of the television show America's Most Wanted. "About John Walsh," http://www.amw.com/about_amw/John_Walsh.cfm (accessed January 14, 2007).

99 Adam Walsh Act, Title I, Sec. 111(5)(A)(i).

100 Ibid., Sec. 111(5)(C).

101 Ibid., Sec. 111. Tier III registrants are those who committed a sex crime punishable by more than one year in prison and comparable or more severe than aggravated sexual abuse, abusive sexual contact with a child under 13, kidnapping of a child by someone other than the guardian, any sex crime occurring after the offender was a Tier II offender. Ibid., Sec. 111(4). Tier II registrants are "those who are not a Tier III offender" and whose offense is against a minor, is punishable by imprisonment of more than one year, and is comparable or more severe to sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, abusive sexual contact, involves the use of a minor in a sexual performance, solicitation of a minor to practice prostitution, production or distribution of child pornography, or if the sex offense occurs after the offender becomes a Tier I sex offender. Ibid. Sec. 111(3). A Tier I sex offender is defined as "a sex offender other than a Tier II or Tier III sex offender." Ibid. Sec. 111(2).

he or she resides, but must also register in the jurisdiction where he or she is employed or and goes to school.[102] The Act makes failure to register a violation of federal law, carrying with it a fine or imprisonment.[103] These registration requirements are applied to all registrants, for the duration of their registration. So, for example, a man convicted of soliciting an underage prostitute would have to register in the jurisdiction where he lives and also in the jurisdiction where he is employed (if different) and provide information about his employer to the police, even if his work does not involve contact with children.

One of the goals of the Act was to create more uniformity among state registration schemes, to avoid some of the confusion as to registration requirements when registrants moved to different states. However, since the Act does not limit the authority of states to go beyond federal law (see below), uniformity will still be elusive.

Moreover, the Act will preclude state officials from instituting registration laws they deem more reasonable or effective but which fall below the federal mandate.

In 1996 Congress authorized the creation of a national registry of offenders convicted of coercive, penetrative sex with anyone, sex with children under the age of 12, recidivists of any sexual offense, and sexually violent predators.[104] In 2005 the national registry went online with links to state online registries.[105] The Adam Walsh Act requires all states to upload their online sex offender database to the national database by 2009.[106]

State Registration Laws

> The only reason I am considered a sex offender is because I committed an offense that triggers registration. In any other context, my crime

102 Ibid. Sec. 113(a).
103 Ibid. Sec. 141. Failure to register is also a deportable offense for non-citizens.
104 The Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, 42 USC. Sec. 14072. Pam Lyncher was a victim of sexual assault and the founder of Justice for All, a victims' rights group. She died with her two daughters when TWA Flight 800 crashed in New York in July 1996. Justice for All, "In Memory," http://www.jfa.net/memory.html (accessed September 8, 2006). The FBI maintains the registry. 42 USC. sec. 14072.
105 Dru Sjodin National Sex Offender Public Website, http://www.nspor.gov (accessed March 16, 2007).
106 ibid.

would never be considered a sex offense, and I would not be considered a threat to society.
—Trent B., a Pennsylvania registrant convicted of streaking[107]

While federal law requires states to register former offenders convicted of certain offenses, it does not limit states' authority to increase the number of offenses that trigger registration or the duration of the requirement to register.

Expanding the Definition of Sex Offender

Most people assume that a registered sex offender is someone who has sexually abused a child or engaged in a violent sexual assault of an adult. A review of state sex offender registration laws by Human Rights Watch reveals that states require individuals to register as sex offenders even when their conduct did not involve coercion or violence, and may have had little or no connection to sex. For example:

- At least five states require registration for adult prostitution-related offenses;[108]
- At least 13 states require registration for public urination; of those, two limit registration to those who committed the act in view of a minor;[109]
- At least 29 states require registration for consensual sex between teenagers;[110] and

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107 Email communication from Trent B. to Human Rights Watch, January 11, 2007.

108 Alabama, Ala. Code §13A-200(b); Michigan, Mich. Comp. Laws §28.722 & §750.455; Oregon, Or. Rev. Stat. §181.594, 595; Tennessee, Tenn. Code Ann §40-39-202, 203; West Virginia, W. Va. Code §15-12-2, §61-8-6, §61-8-7. These provisions are distinct from prostitution-related offenses with children. At least 39 states require persons to register as sex offenders for prostitute-related offenses against children.

109 Arizona, Ariz. Rev. Stat. §13-3821 (if the individual has more than one previous conviction for public urination—two if exposed to a person under 15; three if exposed to a person over 15); California, Cal. Penal Code §314(1)-(2), 290; Connecticut, Conn. Gen. Stat. §53a-186, §54-250, §54-251 (if the victim was under 18); Georgia, O.C.G.A. §42-1-12, 16-6-8 (if done in view of a minor); Idaho, Idaho Code Ann. §18-4116, 8306, 8304; Kentucky, Ky. Rev. Stat. Ann. §510.148, §17.520, 500, §510.150; Massachusetts, Mass. Gen. Laws ch. 272 §16, ALM GL ch. 6 §178G, 178C; Michigan, Mich. Comp. Laws §167(1)(f), §28.722, 723; New Hampshire, N.H. Rev. Stat. Ann. §651-B:1, RSA 651-B:2, 645:1(II), (III); Oklahoma, 57 Okl.St. §582.21, §1021; South Carolina, S.C. Code Ann. §23-3-430; Utah, Utah Code Ann. §77-27-21.5, §76-9-702.5; Vermont, Vt. Stat. Ann. Tit. 13, §2601, §5407, 5401.

110 Alabama, Ala. Code §13A-6-63, §13A-11-200; Alaska, Alaska Stat. S11.41.434, §12.63.010, 100; Arizona, A.R.S. §13-1405, 3821; Arkansas, Ark. Code Ann §12-12-903, 905, §5-14-110; Colorado, Colo. Rev. Stat. §16-22-103, §18-3-402, 411; Connecticut, Conn. Gen. Stat. § 54-250, § 54-251, § 53a-70; Florida, Fla. Stat. Ann. §775.21, § 794.011; Indiana, Burns Ind. Code Ann § 11-8-8-7, § 11-8-8-5; Louisiana, La. R.S. 15:542, 15: 541, 14:92(A)(7); Maine, 34-A M.R.S. § 11222, 34-A M.R.S. § 11203, 17-

- At least 32 states require registration for exposing genitals in public;[111] of those, seven states require the victim to be a minor.[112]

Case study: Oklahoma

Oklahoma law treats any type of public exposure as a sex offense that triggers 10 years on the sex offender registry, even if the offender had no sexual or lascivious motivation or intent at the time he or she exposed him- or herself. According to a local newspaper, nearly 600 registrants appear on Oklahoma's website for engaging in indecent exposure.[113]

In 1999 a high school senior in Salina, Oklahoma was arrested for what his mother described to the local media as a "high school thing."[114] He reportedly exposed himself to a group of female freshman gym students on his way to the restroom.

A M.R.S. § 254; Maryland, Md. Criminal Procedure Code Ann. § 11-704, 11-701, 3-308; Massachusetts, ALM GL ch. 6, § 178C, 178D, ALM GL ch. 272, § 35A; Michigan, MCLS § 28.723, 28.722, 750.520e; Minnesota, Minn. Stat. § 243.166, Subd. 1b(a)(1)(iii), 609.345 (2006); Missouri, 589.400 R.S.Mo., § 566.032 R.S.Mo.; New Hampshire, N.H. Rev. Stat. Ann. §651-B:1, RSA 651-B:2, RSA 632-A:2; New Jersey, N.J. Stat. Ann. §2c 14-2, § 2C:7-2, 2C:14-3b; North Carolina, N.C. Gen. Stat. § 14-208.7, 14-208.6, 14-27.7A; North Dakota, N.D. Cent. Code § 12.1-32-15, 12.1-20-07; Oklahoma, 57 Okl. St. § 582, 21 Okl. St. § 1123; Rhode Island, R.I. Gen. Laws § 11-37.1-3, 11-37.1-2; South Carolina, S.C. Code Ann. § 23-3-430, § 16-3-655; South Dakota, S.D. Codified Laws § 22-24B-2, 22-24B-1, 22-22-7; Tennessee, Tenn. Code Ann. § 40-39-202, 40-39-203, 39-13-506; Texas, Tex. Code Crim. Proc. art. 62.002, 62.001, Tex. Penal Code §21.11; Utah, Utah Code Ann. § 77-27-21.5, § 76-5-401, 76-5-401.2; Washington, Rev. Code Wash. (ARCW) § 9A.44.130, § 9A.44.096; West Virginia, W.Va. Code § 15-12-2, § 61-8B-9; Wisconsin, Wis. Stat. §301.45, §948.02 (2006).

111 Alabama: Code of Ala. § 13A-11-200, 13A-6-68; Arizona: A.R.S. § 13-3821, § 13-1402; Arkansas: A.C.A. § 12-12-905, § 12-12-903, § 5-14-112; California: Cal Pen Code § 290, § 314; Colorado: C.R.S. 16-22-103 (2006), 18-3-411 (2006), 18-7-302 (2006);Connecticut: Conn. Gen. Stat. § 54-250, 54-251, 53a-186; Idaho: Idaho Code § 18-8304, 18-4116 ;Illinois: 730 ILCS 150/3, 730 ILCS 150/2, 720 ILCS 5/11-9; Iowa: Iowa Code § 692A.2, 692A.1, 709.9 (2006); Kansas: K.S.A. § 22-4904, 22-4902, 21-3508 (2006); Kentucky: KRS §17.510, 17.500, 510.148, 510.150 (2006); Louisiana: La. R.S. 15:542, 15:541, 14:81; Massachusetts: ALM GL ch. 6, § 178E, 178C, ALM GL ch. 272, § 16; Michigan: MCLS § 28.723, 28.722, 750.335a; Minnesota: Minn. Stat. § 243.166, 617.23 (2006); Montana: Mont. Code Anno. § 46-23-504, 46-23-502, 45-5-504 (2005); Nevada: Nev. Rev. Stat. Ann. § 179D.450, 179D.400, 179D.410, 201.220; New Mexico: N.M. Stat. Ann. § 29-11A-4, 29-11A-3, 30-9-14.3; North Dakota: N.D. Cent. Code § 12.1-32-15, 12.1-20-12.1; South Carolina: S.C. Code Ann. § 23-3-430, 16-15-130 (2006); South Dakota: S.D. Codified Laws § 22-24B-2, 22-24B-1, 22-24-1.2; Tennessee: Tenn. Code Ann. § 40-39-203, 40-39-202, 39-13-511; Texas: Tex. Code Crim. Proc. art. 62.051, 62.001, Tex. Penal Code § 21.08; Vermont: 13 V.S.A. § 5407, 5401, 2601; West Virginia: W.Va. Code § 15-12-2, 61-8-9.

112 Alaska: Alaska Stat. § 12.63.100, § 11.41.460 (to anyone under 16 AND the offender has a prior conviction for the offense); Delaware: 11 Del. C. § 4120, 4121(a)(4), 765 (exposed to person under 16); Florida: Fla. Stat. § 775.21, 800.04 (exposed to anyone under 16 and must be in a lewd or lascivious manner); Georgia: O.C.G.A. § 42-1-12, 16-6-8; Missouri: § 589.400 R.S.Mo., § 566.083 R.S.Mo. (exposure to a child less than 14 years old); North Carolina: N.C. Gen. Stat. § 14-208.7, 14-208.6, 14-190.9 (exposure by anyone over 18 to anyone under 16; must be for the purpose of sexual arousal/gratification); Utah: Utah Code Ann. § 77-27-21.5, 76-9-702.5 (exposure to a child under age 14).

113 Curtis Killman, "Sex Offenders Struggle to Find Jobs," *Tulsa World*, July 10, 2005.

114 Ibid. The paper did not report the name of the youth.

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Bell v. State
668 P.2d 829
Alaska App.,1983.
September 09, 1983

Term

668 P.2d 829

Court of Appeals of Alaska.
Willie B. BELL, Appellant,
v.
STATE of Alaska, Appellee.

No. 5821.
Sept. 9, 1983.

Christine Schleuss, Asst. Public Defender, Dana Fabe, Public Defender, Anchorage, for appellant.

W.H. Hawley, Jr., Asst. Atty. Gen., Anchorage, Wilson L. Condon, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

BRYNER, Chief Judge.

Willie B. Bell appeals his convictions for promoting prostitution in the first degree in violation of AS 11.66.110(a)(2) and managing a prostitution enterprise in violation of AS 11.66.120(a)(1). He also appeals the sentence imposed. We affirm.

Bell was a twenty-nine-year-old army sergeant when he procured two sixteen-year-old girls, C.R. and M.J., and one fourteen-year-old girl, D.W., for prostitution. C.R. began living with Bell and engaging in prostitution after Bell promised to marry her and to buy her a new car and new clothing. At Bell's direction, D.W. and M.J. worked as prostitutes in May, 1980. On May 22, 1980, Bell assaulted M.J., claiming that she had been drinking instead of "working." Fearing that Bell would harm them, C.R. and M.J. left him and contacted police, who obtained a search warrant to record conversations between M.J., C.R. and Bell. A telephone conversation between Bell and C.R. and a conversation involving Bell, M.J. and C.R. were recorded pursuant to the warrant and used as evidence against Bell.

The indictment returned against Bell charged two counts of promoting prostitution in the first degree, alleging that he induced D.W. to engage in prostitution when she was under the age of sixteen (Count I) (AS 11.66.110(a)(2)), and that he induced C.R. to engage in prostitution by means of force (Count II) (AS 11.66.110(a)(1)). Count III of the indictment, as it went to the jury, alleged that Bell was guilty of attempted promotion of prostitution in the first degree, AS 11.66.110 (a)(1) and AS 11.31.100(a), regarding M.J. The indictment also alleged that Bell managed, supervised, controlled or owned a prostitution enterprise other than a house of prostitution in violation of AS 11.66.120(a)(1) (Count IV). Bell was convicted of Counts I and IV. On Count II, Bell was acquitted of the charge but convicted of the lesser-included offense of promoting prostitution in the third degree, AS 11.66.130. On Count III, Bell was found not guilty of the charge but guilty of the lesser-included offense of attempted promotion of prostitution in the third degree, AS 11.66.130 and 11.31.100(a). Bell was not sentenced on Counts II and III. Superior Court Judge Milton M. Souter sentenced Bell

to a five-year term with two years suspended on Count I, and a four-year term with three years suspended on Count IV. The sentences for these offenses were to run concurrently. Subsequently, Judge Souter refused to reduce the sentence.

On appeal, Bell argues that: (1) he should have been allowed to present a reasonable mistake of age defense to the charge contained in Count I; (2) a partially inaudible tape recording should not have been admitted into evidence; (3) the search warrant for recording of conversations was improperly issued and executed; (4) supplemental instructions given to the jury were unduly coercive; (5) the sentences imposed by the trial court violated his double jeopardy rights; and (6) Judge Souter gave improper consideration to a letter Bell wrote, while awaiting sentencing, to the fourteen-year-old daughter of another inmate.

I. MISTAKE OF AGE

Bell asserts that the trial court erred in refusing to give a proposed jury instruction providing for a reasonable mistake of age defense to the charge of inducing a person under the age of sixteen to engage in prostitution in violation of AS 11.66.110(a)(2).[FN1] Bell argues that AS 11.66.110(b) violates his due process rights under the United States and Alaska constitutions by expressly precluding mistake of age as a defense to the charge of violating AS 11.66.110(a)(2). We find this argument unpersuasive and conclude that the legislature may, consistent with the requirements of constitutional due process, preclude mistake of age from constituting a defense to the crime of promoting prostitution in the first degree.

FN1. AS 11.66.110 provides:

PROMOTING PROSTITUTION IN THE FIRST DEGREE.

(a) A person commits the crime of promoting prostitution in the first degree if he

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 16 years of age to engage in prostitution; or

(3) induces or causes a person in his legal custody to engage in prostitution.

(b) In a prosecution under (a) (2) of this section, it is not a defense that the defendant reasonably believed that the person he induced or caused to engage in prostitution was 16 years of age or older.

(c) Promoting prostitution in the first degree is a class B felony.

The jury was instructed on the elements of this offense. The court then instructed that:

It is not a defense to the crime charged in Count I of the Indictment that the defendant reasonably believed that the person he induced or caused to engage in prostitution was 16 years of age or older.

The instruction proposed by Bell stated:

It is a defense to Count I of the indictment, Inducing a Person Under 16 Years of Age to Engage in Prostitution, that the defendant reasonably and in good faith believed that the female person was of the age of

> sixteen years or older, even though, in fact, she was under the age of sixteen years. If from all the evidence you have a reasonable doubt as to the question whether defendant reasonably and in good faith believed that she was sixteen years of age or older, you must give the defendant the benefit of that doubt and find him not guilty.

It is apparent that the legislature considered procurement of a person under sixteen to be an aggravated form of promoting prostitution. The commentary to the Revised Criminal Code, 2 Senate Journal, Supplement No. 47, at 109 (1978), states that by denying a defendant the defense of reasonable mistake as to age, creation of strict liability was intended as to the element of the offense involving age of the victim.[FN2] Supporting the validity of the legislature's decision in this regard is the supreme court's opinion in *Hentzner v. State,* 613 P.2d 821 (Alaska 1980), in which the court held:

> FN2. *See also* Alaska Criminal Code Revision Part 4, at 103 (Tent. Draft 1977) (Commentary to AS 11.66.140).

> Where a crime involved may be said to be *malum in se,* that is, one which reasoning members of society regard as condemnable, awareness of the commission of the act necessarily carries with it an awareness of wrongdoing. In such a case the requirement of criminal intent is met on proof of conscious action, and it would be entirely acceptable to define the word "wilfully" to mean no more than a consciousness of the conduct in question.
> *Id.* at 826. *See also* *Wheeler v. State,* 659

P.2d 1241, 1254 n. 18 (Alaska App.1983).

Bell correctly states the well-recognized rule in this jurisdiction that criminal intent is a necessary ingredient of criminal liability and that one charged with criminal conduct must have an awareness or consciousness of wrongdoing. *Speidel v. State,* 460 P.2d 77, 78 (Alaska 1969). In *Speidel,* the awareness of wrongdoing was in the context of a larceny-type crime, for which courts have historically required a specific intent to wrongfully deprive. In *Alex v. State,* 484 P.2d 677 (Alaska 1971), the supreme court discussed the intent required for non-larceny crimes:

> However, as applied to crimes generally, what is imperative, is that an accused's act be other than simply inadvertent or neglectful. What is essential is not an awareness that a given conduct is a "wrongdoing" in the sense that it is proscribed by law, but rather, an awareness that one is committing the specific acts which are defined by law as a "wrongdoing." It is, however, no defense that one was not aware that his acts were wrong in the sense that they were proscribed by law. So long as one acts intentionally, with cognizance of his behavior, he acts with the requisite awareness of wrongdoing.

Id. at 681–82.[FN3]

> FN3. *See also State v. Rice,* 626 P.2d 104, 115 (Alaska 1981) (Matthews, J., concurring) (a statute prohibiting the transportation of illegally taken game was overbroad, because it included "within its ambit the conduct of people who have no reason to believe that what they are doing is criminal").

We believe this language is applicable to Bell's actions, since he was consciously

committing the acts proscribed by law. As an element of this offense, Bell was required to be aware that he was procuring women to engage in acts of prostitution. Indeed, the jurors in this case were instructed that they must be convinced beyond a reasonable doubt

> that the defendant engaged in conduct which caused or induced [D.W.] to engage in prostitution; [and] that the defendant engaged in said conduct with the specific intent to cause or induce [D.W.] to engage in prostitution.

Thus, while Bell was not required to know the age of those whom he procured, this is not to say that the offense did not require *mens rea* or a culpable mental state.

We also note that AS 11.66.110(b) is in accord with the common law view that there should be no exculpation for mistake where, if the facts had been as the actor believed them to be, his conduct would still be illegal or immoral. [FN4] As Bell recognizes on appeal, his conduct would still have been illegal even if D.W. had been sixteen or over. AS 11.66.130 (a)(2). [FN5] Moreover, although it might be arguable that the offense of prostitution should be considered a *malum prohibitum* crime, we think it manifest that *promoting* prostitution is an offense "which reasoning members of society regard as condemnable," and thus, is *malum in se.* Hentzner v. State, 613 P.2d at 826. Accordingly, there can be little doubt that *Hentzner* 's basic requirement of an awareness or consciousness of wrongdoing is satisfied, despite the fact that AS 11.66.110(b) precludes mistake of age as a defense to the offense of promoting prostitution in the first degree.

> FN4. In the landmark case of *Regina v. Prince,* L.4., 2 Cr.Cas.Res. 154 (1875), the defendant was convicted of taking a girl under sixteen years of age from under the

> care of her father, even though the defendant reasonably believed she was older. The defense of mistake of age was disallowed on the ground that removal of an unmarried girl from the lawful custody of her parents would have been a crime even had she been as old as he believed. Hence, the defendant acted at his peril.
>
> FN5. AS 11.66.130 provides, in relevant part:
>
> (a) A person commits the crime of promoting prostitution in the third degree if, with intent to promote prostitution, he ...
>
> (2) as other than a patron of a prostitute, induces or causes a person 16 years of age or older to engage in prostitution ....
>
> (b) Promoting prostitution in the third degree is a class A misdemeanor.

In continuing to press his claim that AS 11.66.110(b) imposes an unconstitutional standard, Bell relies upon *State v. Guest,* 583 P.2d 836 (Alaska 1978), in which the supreme court upheld a trial court's decision to instruct the jury on a defense of reasonable mistake of age in a statutory rape case. Following the reasoning of *Speidel* and *Alex,* the court stated that an intent requirement must be read into former AS 11.15.120 to save it from unconstitutionality. To refuse a defense of mistake of age in a statutory rape case, according to the *Guest* court, would be to impose significant criminal liability without any criminal mental element. *Id.* at 839.

Bell relies most heavily upon the following language in *Guest:*

> It has been urged in other jurisdictions that where an offender is aware he is

> committing an act of fornication he therefore has sufficient criminal intent to justify a conviction for statutory rape because what was done would have been unlawful under the facts as he thought them to be. We reject this view. While it is true that under such circumstances a mistake of fact does not serve as a complete defense, we believe that it should serve to reduce the offense to that which the offender would have been guilty of had he not been mistaken. Thus, if an accused had a reasonable belief that the person with whom he had sexual intercourse was sixteen years of age or older, he may not be convicted of statutory rape. If, however, he did not have a reasonable belief that the victim was eighteen years of age or older, he may still be criminally liable for contribution to the delinquency of a minor.

Id. (citations and footnotes omitted). The court cited in support of its position section 2.04(2) of the Model Penal Code (Proposed Official Draft 1962), which provides:

> Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

We believe the problem addressed in *Guest* is distinguishable from the issue at hand. As we have stated, Bell did not lack criminal intent; he intended to promote prostitution. *See Hentzner v. State,* 613 P.2d at 826; *Wheeler v. State,* 659 P.2d at 1251. The court in *Guest* was careful to point out that fornication was not itself a crime, so that it could not have been considered as a lesser-included offense of statutory rape. Also,

although the court went on to observe that Guest *might* still have been guilty of contributing to the delinquency of a minor under former AS 11.40.130 if he did not have a reasonable belief that his partner was under eighteen, it is clear that Bell was *necessarily* guilty of promoting prostitution in the third degree if the facts were as he supposed them to be.

This distinction is supported by analysis of other authorities. The revised criminal code contains no provision paralleling the second sentence of MPC § 2.04(2), quoted by the *Guest* court. Instead, AS 11.81.600(b)(2) provides:

> (b) A person is not guilty of an offense unless he acts with a culpable mental state with respect to each element of the offense, except that no culpable mental state must be proved
>
> (2) *if an intent to dispense with the culpable mental state requirement for that element clearly appears.*

(Emphasis added.) AS 11.66.110(b), by proscribing any defense to AS 11.66.110(a)(2) based upon mistake of age, clearly demonstrates a legislative intent to dispense with knowledge of age.

More importantly, despite the language of MPC § 204(2), the Model Penal Code takes essentially the same approach as the Revised Code to in its treatment of criminal intent for the offense of promoting prostitution. MPC § 251.2(2) (1980) makes the conduct proscribed by AS 11.66.130(a)(2)—promoting prostitution in the third degree—a misdemeanor, while § 251.2(3)(c) provides that the same conduct shall be a felony if "the actor promotes prostitution of a child under 16, *whether or not he is aware of the child's age.*" Similarly, New York Penal Law § 230.30 (1978), from which AS 11.66.110 appears to be derived, provides that it shall be a felony

to "knowingly" advance or profit from the prostitution of a person less than sixteen years old, while New York Penal Law § 15.20 (3) (1967) provides that

> Notwithstanding the use of the term "knowingly" in any provision of this chapter defining an offense in which the age of a child is an element thereof, knowledge by the defendant of the age of such child is not an element of any such offense and it is not, unless expressly so provided, a defense to a prosecution therefor that the defendant did not know the age of the child or believed such age to be the same as or greater than that specified in the statute.

We find it highly persuasive that these statutory schemes are, when applied to the precise conduct engaged in by Bell, in consonance with the approach taken in the Revised Code.

Under the Revised Alaska Criminal Code, it is Bell's intentional procurement of a person under the age of sixteen years for prostitution that renders him liable for first-degree promoting, regardless of his actual awareness of that person's age. The act of procuring another for purposes of prostitution is *malum in se,* without regard to the age of the person procured, and thus, as we have indicated, in a prosecution for procuring a person under the age of sixteen years, the intent to procure satisfies the minimal constitutional requirement of criminal intent. *Hentzner v. State,* 613 P.2d at 826. We hold that AS 11.66.110(b), which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree, does not violate due process of law. We therefore conclude that the trial court did not err in rejecting Bell's challenge to the instruction on mistake of age.

II. PARTIALLY INAUDIBLE TAPE

Bell argues that error occurred when a

recording of a telephone conversation between Bell and C.R. was played for the jury. At trial, Bell's attorney objected to admission of the recorded telephone conversation, contending that parts of the tape were substantially inaudible. The tape of another conversation was played without objection. Before this tape was played, the trial judge gave a cautionary instruction admonishing the jury to consider only what it actually heard on both tapes.[FN6]

FN6. The jury was instructed:

> [I] want to admonish the jury that there are portions of these tapes that are impossible to hear .... Consider only what you hear, only what you actually hear on the tapes, together with any other evidence .... But don't speculate what is on the tape where there isn't credible evidence .... The tapes are going to be hard to understand. Don't guess at what's on those tapes.

The trial court's decision to admit the phone tape is reversible error only if it constituted an abuse of discretion. *Robinson v. State,* 593 P.2d 621, 624 n. 5 (Alaska 1979). In *Dana v. State,* 623 P.2d 348 (Alaska App.1981), we considered the correctness of the trial court's admission of a tape which had "significant gaps" due to equipment failure. We held that there could be no abuse of discretion in admitting the flawed tape unless its prejudicial impact outweighed its probative value. *Id.* at 353–54.

In the present case, after weighing the possibility of prejudice against the probative value of the tape, and taking into account the other evidence at trial, the cautionary instruction, and the fact that most of the tape is audible, we conclude that Judge Souter did not abuse his discretion in admitting the tape.

III. ISSUANCE AND EXECUTION OF THE GLASS WARRANT

Bell argues that procedures outlined in the federal electronic surveillance act should supplement the requirements, enumerated in *State v. Glass,* 583 P.2d 872 (Alaska 1978), that must be met before electronic monitoring of conversations is permitted. We considered and rejected a similar argument in *Jones v. State,* 646 P.2d 243, 248 (Alaska App.1982). *See also Gallagher v. State,* 651 P.2d 1185, 1187 (Alaska App.1982). Our holdings in *Jones* and *Gallagher* are dispositive of this issue.

Bell also contends that probable cause for the issuance of a *Glass* warrant did not exist because it was not known whether relevant conversations would occur between Bell, M.J. and C.R., and because M.J. and C.R. were neither reliable nor credible. Bell's motion to suppress on this ground was denied at the omnibus hearing.

The judge's determination that probable cause existed is entitled to great deference by this court. *Spinelli v. United States,* 393 U.S. 410, 419, 89 S.Ct. 584, 590–91, 21 L.Ed.2d 637, 645 (1969). We find ample facts to support issuance of the search warrant. C.R. and M.J. stopped working for Bell less than a week before they testified at the proceeding to issue the *Glass* warrant. Since C.R. had worked for Bell for nearly six months and given him $5,000 of the money she made by prostitution, it was logical to assume she could contact him and that he would have some interest in talking to her. Although M.J. had worked for Bell for only a few weeks, the same reasoning applies. We believe the court correctly found that sufficient probable cause existed to issue the *Glass* warrant. *United States v. Ventresca,* 380 U.S. 102, 108, 85 S.Ct. 741, 745–46, 13 L.Ed.2d 684, 689 (1965); *Martel v. State,* 511 P.2d 1055, 1055 n. 1 (Alaska 1973); *Rosa v. State,* 633 P.2d 1027, 1029–30 (Alaska App.1981).

Bell, relying on *Spinelli v. United States,* and *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), additionally contends that the search warrant should not have been issued because C.R. and M.J. were neither reliable nor credible. Bell's reliance on the rulings in *Aguilar* and *Spinelli* is misplaced, because those cases set forth criteria for ascertaining the reliability and credibility of informants who have provided hearsay information. Neither C.R. nor M.J. was a confidential informant; both testified personally and were under oath at the time. The magistrate thus had ample opportunity to assess their credibility. Accordingly, the *Aguilar-Spinelli* standards do not apply in this case, and Bell's argument is without merit.

Next, Bell argues that the recordings should have been suppressed because the police failed to comply with Alaska Rule of Criminal Procedure 37(b)(2), and because the police failed to mail a copy of the warrant and receipt to Bell in compliance with the provision of the warrant requiring that Criminal Rule 37(b)(1) and (2) be satisfied.[FN7]

FN7. Alaska R.Crim.P. 37 provides, in pertinent part:

> (b) *Execution and Return With Inventory.* The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant
>
> (1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a copy of the supporting affidavits, and receipt for the property taken, or
>
> (2) shall leave the copies and the receipt at the place from which the property was taken ....

The court ordered that a copy of the

warrant and receipt be mailed to Bell within ten days of May 27, 1980, when the warrant was executed. Officer George Novaky stated in an affidavit that, although he did not specifically advise Bell of the recording at the time of Bell's arrest and although Bell was not sent a copy of the search warrant, Novaky included information concerning the recording in police reports made available to Bell on June 16, 1980. Additionally, on June 13, 1980, Bell obtained actual notice of the recording when he appeared at a bail hearing with his attorney. At the bail hearing, Officer Michael Grimes testified that electronic surveillance was used to record Bell's conversation. Bell's attorney then declined to question Grimes, and the tape was played. It is unclear from the record whether Bell received notice of the recording in a copy of Officer Novaky's complaint at the time of his arraignment on May 28, 1980; consequently, we assume that Bell first received notice at the bail hearing on June 13, 1980—slightly more than two weeks after police recorded Bell's conversations.

Under the circumstances, Bell has shown no prejudice stemming from untimely notification of execution of the warrant authorizing his telephone conversation to be monitored and recorded. Nor does it appear that the late notification was the result of bad faith on the part of investigating officers. We hold that the untimely notice to Bell did not justify suppression of the recording made pursuant to the *Glass* warrant. *See* Gallagher v. State, 651 P.2d 1185 (Alaska App.1982).

IV. COERCIVE INSTRUCTION DURING DELIBERATIONS

Bell argues that a supplemental instruction issued by Judge Souter was coercive and that it was essentially an " *Allen* charge." FN8 We disagree. During deliberations, the jury sent a note to the judge inquiring if inability to agree on one count of the indictment constituted a hung jury. The judge replied:

FN8. *Allen v. United States,* 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

If you were to be unable to agree to a verdict on one Count of the Indictment, you would be a hung jury as to that one Count, but you would not be a hung jury as to the remaining Counts unless you were also unable to agree to your verdicts on them also. *In my opinion you have not deliberated long enough yet to be able to validly reach the conclusion that you cannot agree to a verdict on any one or more Counts of the Indictment.* [Emphasis added.]

The jury subsequently returned its verdicts on the four counts, as well as the two lesser-included offenses.

The Alaska Supreme Court proscribed *Allen* charges in *Fields v. State,* 487 P.2d 831, 836 (Alaska 1971). In *Fields,* the jury was instructed, after extensive deliberations and at least two prior communications indicating a deadlock, that it was required to continue deliberations until a unanimous verdict was reached. This instruction was found to be so coercive as to require reversal of the conviction. We find that Judge Souter's instruction lacked the coerciveness proscribed by *Fields.* We note in this regard that Standard 15–4.4(b) of the ABA Standards Relating to Trial by Jury specifically provides that a court may require continued deliberations if a jury is unable to agree.[FN9] In this case, the jury had not deliberated for an extended time, the communication did not unequivocally indicate a deadlock, and the court's instruction did not imply that the jury would be required to deliberate until unanimity was reached. Under these circumstances the supplemental instruction did not constitute an abuse of discretion and Bell's argument must fail.

FN9. ABA Standard Relating to Trial by Jury § 15–4.4(b) (1980)

provides:

> If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

The Commentary to Standard 15-4.4(b) states:

> This paragraph confirms that a trial judge may send the jury back for further deliberations notwithstanding its indication that it has been unable to agree....
>
> ....
>
> There is no coercion if a court requires jurors to deliberate a reasonable length of time.

V. DOUBLE JEOPARDY

Bell additionally argues that his sentences on Count I [FN10] and Count IV [FN11] violate double jeopardy under *Whitton v. State,* 479 P.2d 302 (Alaska 1970). The *Whitton* court adopted the following analysis to determine whether or not a double jeopardy violation had occurred:

> FN10. Bell's conviction on Count I was for inducing or causing a person under 16 years of age [D.W.] to engage in prostitution, AS 11.66.110(a)(2). *See supra* n. 1.

> FN11. Conviction on count IV was for violating AS 11.66.120(a)(1), a class C felony, which provides:
>
> (a) A person commits the crime

> of promoting prostitution in the second degree if he
> (1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution ....
>
> AS 11.66.150(2) defines a "prostitution enterprise" as
> [A]n arrangement in which two or more persons are organized to render sexual conduct in return for a fee.
>
> The jury was instructed in the language of both these statutes.

The trial judge first would compare the different statutes in question, as they apply to the facts of the case, to determine whether there were involved differences in intent or conduct. He would then judge any such differences he found in light of the basic interests of society to be vindicated or protected, and decide whether those differences were substantial or significant enough to warrant multiple punishments ....

> If such differences in intent or conduct are significant or substantial in relation to the social interests involved, multiple sentences may be imposed, and the constitutional prohibition against double jeopardy will not be violated. But if there are no such differences, or if they are insignificant or insubstantial, then only one sentence may be imposed under double jeopardy.

Id. at 312 (footnotes omitted).

We must therefore compare AS 11.66.110(a)(2) and AS 11.66.120(a)(1) as applied to the facts of Bell's case, to determine whether differences in intent or conduct were involved in this case. Then, if there are differences, we must decide whether, in light of the societal

interests to be protected, the differences were so substantial as to warrant multiple punishment.

AS 11.66.110(a)(2) proscribes the conduct of inducing or causing a person under the age of sixteen to engage in prostitution. AS 11.66.120(a)(1) prohibits managing, supervising, controlling or owning a prostitution enterprise. We believe that, under the *Whitton* analysis, the offenses proscribed by the two statutes in question involve different intents and different conducts. Bell's conviction on Count I was based squarely upon his inducement of D.W. Bell's conviction under AS 11.66.120(a)(1), on the other hand, required proof of management of a prostitution enterprise. No showing of inducement is necessary to establish the offense, since a prostitution enterprise can be comprised entirely of persons who willingly take part in the business, without inducement or promotion. Clearly Bell's conduct in arranging for two or more people to provide sexual services for a fee, a part of which would accrue to him, goes beyond the act of inducing a single person under the age of sixteen to engage in prostitution. The finding that Bell managed a prostitution business with at least two women working for him involved the element of management and required proof of an enterprise, neither of which were involved in the inducement charge. We thus conclude that Bell's intent and conduct clearly differed on the two charges.

We must also determine whether such differences in intent or conduct are substantial in relation to the societal interests involved. As we have stated in connection with Bell's mistake of age claim, AS 11.66.110(a)(2) imposes criminal liability for non-forcible inducement of individuals under sixteen to engage in acts of prostitution with others. This liability is imposed without regard to any pecuniary gain on the part of the offender. We believe that the primary aim of

this provision is to protect individuals, particularly those who are young and therefore more vulnerable, from being led into committing acts of prostitution by the efforts of others. By contrast, AS 11.66.120 (a)(1) seeks to prevent and punish the commercial aspects of ongoing organized prostitution by subjecting persons who manage prostitution-related activities as business enterprises to sanctions greater than those applicable to persons who commit individual acts of prostitution, without regard to age of the persons managed. We therefore conclude that multiple punishment was appropriate in this case because of the differences in intent and conduct and because of the differing societal interests furthered by the two statutes in question.

VI. REFUSAL TO REDUCE SENTENCE

Finally, Bell contends that denial of the motion to reduce his sentence was error. While incarcerated prior to sentencing, Bell wrote a letter to L.S., the fourteen-year-old daughter of a fellow inmate. The letter was produced at the sentencing hearing, and the father of L.S. was called to testify. He stated that Bell had threatened him with violence if he did not testify favorably to Bell. Judge Souter stated that the threats convinced him to increase Bell's sentence by one year. The judge stated that, although the letter could easily be interpreted as an attempt "to strike a sexual relationship" with L.S., he would give Bell the "benefit of the doubt" and not consider it in sentencing him. Later, Bell moved for reconsideration of the sentence, based on discovery of a letter from the father of L.S. to Bell; the letter indicated that the father had committed perjury at Bell's sentencing. FN12 A hearing was subsequently held on Bell's motion to reconsider the sentence.

FN12. The letter from L.S.'s father, written to Bell prior to his sentencing, contained a postscript

> which stated, "Tell [L.S.] I love her and when I write I'll tighten it for you. I'll get you a picture 'a pose'."

Judge Souter refused to reduce Bell's sentence, reasoning that, in writing to L.S., Bell had been "attempting to arrange for [L.S.] to become a prostitute for him or to be involved with him in a sexual relationship." The original sentence was based on Judge Souter's belief that Bell had threatened L.S.'s father; at that point Judge Souter did not believe that Bell had "propositioned" L.S. On resentencing, Judge Souter changed his reasoning for Bell's sentence; he was persuaded that L.S.'s father had lied, but he was also persuaded that Bell *had* been trying to establish a sexual relationship with the fourteen-year-old L.S.[FN13]

> FN13. Judge Souter stated:
>
> > The court was not persuaded of this fact when the presentation of evidence concluded at the sentencing hearing, but the contents of the postscript [on the letter from L.S.'s father to Bell] have caused the court to re-examine this question and to resolve it contrary to the way it was resolved at the sentencing hearing.

Bell now claims that, because the trial court did not reduce his sentence after finding that Bell had not threatened L.S.'s father, double jeopardy was violated. However, he fails to cite any authority supporting his theory that failure to reduce a sentence may violate double jeopardy. Judge Souter's reinterpretation of Bell's letter to L.S. in light of the letter from L.S.'s father to Bell was not unreasonable. Nor can we find that Judge Souter abused his discretion in refusing to reduce the original sentence, based on his reinterpretation of the letter. Since there was no increase in the original sentence, no

violation of double jeopardy is involved.

Bell also contends that the effective increase in the period of incarceration based upon the letter was not justified under the sentencing goals set forth in *State v. Chaney*, 477 P.2d 441, 442 (Alaska 1970). The fact that Bell attempted to arrange a romantic involvement with a fourteen-year-old girl while he was incarcerated for promoting the prostitution of another girl under the age of sixteen indicates a lack of remorse on Bell's part and a greater need for deterrence of Bell himself; it therefore justifies imposition of a more severe sentence. We conclude that Bell's sentence was not clearly mistaken.

The conviction and sentence are AFFIRMED.

Alaska App.,1983.
Bell v. State
668 P.2d 829

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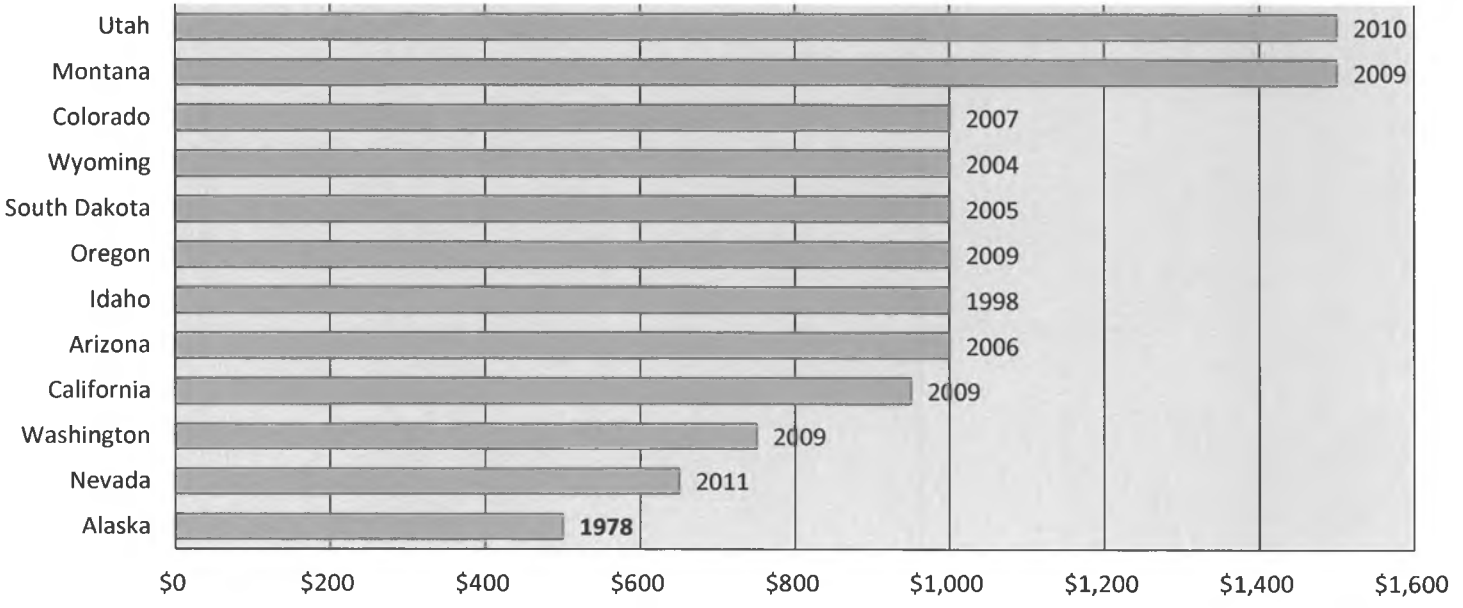
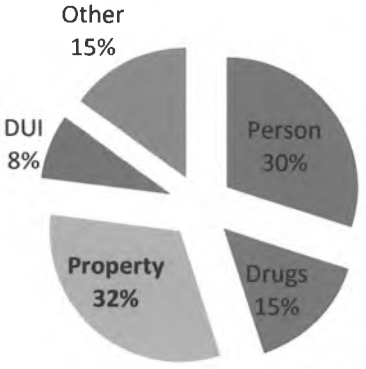
Theft Felony Thresholds in Western U.S. and Year of Adoption



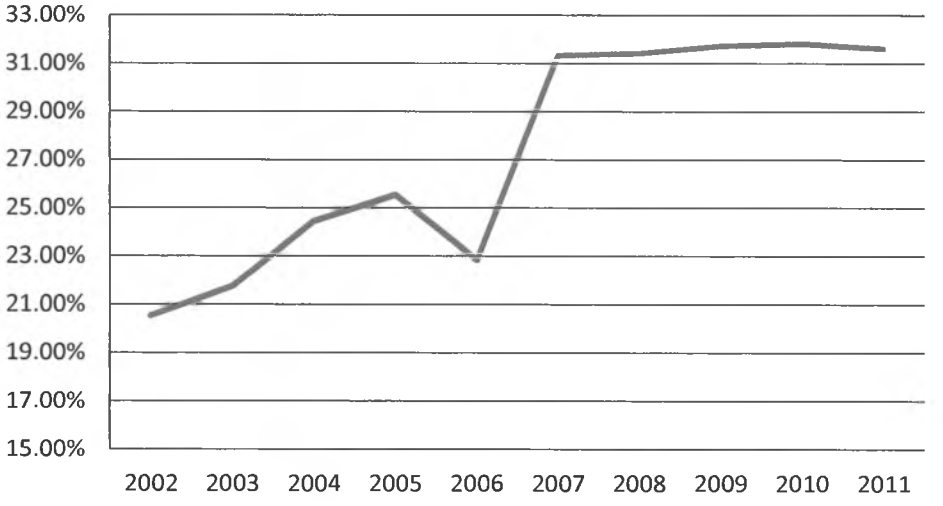
Alaska	$500
Nevada	$650
Washington	$750
California	$950
Arizona	$1,000
Idaho	$1,000
Oregon	$1,000
South Dakota	$1,000
Wyoming	$1,000
Colorado	$1,000
Montana	$1,500
Utah	$1,500

AK Felonies by Case Type FY11



U.S. Dollar Inflation	
1978	2011
$50	$173.06
$500	$1730.61

Property Crimes as a Precentage of All Felonies



Prepared by Jordan Shilling in Senator Coghill's office

Conviction Year	Offense Class as Determined by CSSB 218 "Theft" offenses	Count of Convictions Resulting in Sentence Time
2010	Felony C	637
2010	Misd. A	710
2010	Misd. B	142
2011	Felony C	796
2011	Misd. A	831
2011	Misd. B	170
2012 (as of 03/21/2012)	Felony C	178
2012 (as of 03/21/2012)	Misd. A	162
2012 (as of 03/21/2012)	Misd. B	34

Average Number of Adjudicated Sentence Days. Does not factor in Suspended time or probation time
664.36
189.33
69.8
582.84
175.78
57.17
644.34
164.77
34.32

SB 224

<TARGET><BILL>SB 224</BILL><SUBJECT>SB 224</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

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Senator Joe Paskvan, V. Chair
Senator Bettye Davis
Senator Linda Menard
Senator Cathy Giessel

Senate Labor and Commerce Committee

SB 224 Evidence Rules: Union/Employee Privilege Sponsor Statement

Senate Bill 224 seeks to protect confidential information acquired by an agent of an employee's union in the course of providing that employee advocacy services relating to anticipated or ongoing disciplinary proceedings. Without the expectation of confidentiality, union members are hesitant to be fully forthcoming to their representative, severely hampering the union agent's ability to advise and represent the member and denying the employee the full and effective advocacy to which she or he is entitled.

The bill provides exceptions to this privilege, including being ordered by the court to disclose information concerning the commission of a crime, or if the employee consents to the disclosure. The bill also provides that where federal or state law preempts or conflicts with this act, the federal or state law prevails to the extent of the preemption or conflict.

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Senate Labor and Commerce Committee

Sectional Analysis

SB 224 Evidence Rules: Union/Employee Privilege

Section 1. This section amends Alaska Statute 09.25, adding a new section 09.25.405 that provides that confidential communications between an employee and an employee representative of an organization are privileged conversations when conducted in an advocacy setting in a disciplinary matter and provides for the definition of "organization."

Section 2. This section amends AS 23.40, adding a new section AS 23.40.065.

Subsection (a) provides that an individual cannot be compelled in any proceeding to disclose information acquired from an employee represented by the individual if such information was obtained in confidence by that individual in connection with providing advocacy services in regards to disciplinary proceedings of the employee.

Subsection (b) provides exception to the privilege.

Subsection (c) provides that a conflict between federal or state law, this statute is preempted and does not apply.

Subsection (d) defines "organization" and "proceeding."

Section 3. This section declares an indirect court rule change.

Section 4. This section provides that Sections 1 and 2 can only take effect upon a 2/3rds vote of both houses of the Legislature for Section 3.

SENATE BILL NO. 224

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Introduced: 3/5/12
Referred: Labor and Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act making privileged certain communications between employees and employee union representatives; and amending Rule 402 and Rule 501, Alaska Rules of Evidence."

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

*** Section 1.** AS 09.25 is amended by adding a new section to article 3 to read:

Sec. 09.25.405. Privileged communication between employees and employee advocates. Confidential communications between an employee and an individual who represents the employee on behalf of an organization in connection with the individual's providing advocacy services to the employee that are related to anticipated or ongoing disciplinary proceedings are privileged as provided under AS 23.40.065. In this section, "organization" has the meaning given in AS 23.40.065.

*** Sec. 2.** AS 23.40 is amended by adding a new section to article 1 to read:

Sec. 23.40.065. Privileged communication between employees and employee organizations. (a) An individual may not be compelled in a proceeding to

disclose information the individual acquired from an employee while the individual represented the employee on behalf of an organization, if the information was communicated

(1) in confidence; and

(2) in connection with the individual's providing advocacy services to the employee that are related to anticipated or ongoing disciplinary proceedings.

(b) Nothing in (a) of this section prohibits a person from disclosing information

(1) to prevent a crime that would cause serious physical injury or death or create a risk of imminent serious physical injury or death;

(2) in a civil or criminal proceeding against the organization;

(3) as required by the superior court following a hearing in camera;

(4) when, after being fully informed regarding the nature and extent of the privilege under this section, the employee waives the privilege in writing; or

(5) after the employee's death, on written consent by the employee's personal representative.

(c) If a provision of this section is preempted by federal law or is in conflict with a federal or state law in a particular situation, the provision does not apply to the extent of the preemption or conflict.

(d) In this section,

(1) "organization" means a labor or employee organization of any kind in which employees participate and which exists for the primary purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of employment;

(2) "proceeding" means

(A) a proceeding heard before a legislative, judicial, administrative, or other governmental body or official authorized to hear evidence under oath; or

(B) an arbitration, hearing, or meeting that is part of a grievance procedure conducted under a collective bargaining agreement.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to

read:

INDIRECT COURT RULE CHANGE. AS 09.25.405, enacted by sec. 1 of this Act, and AS 23.40.065, enacted by sec. 2 of this Act, have the effect of amending Rules 402 and 501, Alaska Rules of Evidence, by creating a new privilege preventing a person from being compelled to testify or produce evidence in a court and precluding admissibility of certain evidence in certain cases.

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

CONDITIONAL EFFECT. AS 09.25.405, enacted by sec. 1 of this Act, and AS 23.40.065, enacted by sec. 2 of this Act, take effect only if sec. 3 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**SB 224**
Fiscal Note Number	1
(S) Publish Date	3/23/12

Identifier (file name)	SB224-DOA-LR-3-7-12	Dept. Affected	Administration
Title	Evidence Rules: Union/Employee Privilege	Appropriation	Centralized Administrative Services
		Allocation	Labor Relations
Sponsor	Senate Labor & Commerce		
Requester	Senate Labor & Commerce	OMB Component Number	58

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, intial version

Prepared by	Nicki Neal, Director	Phone	(907)465-4429
Division	Personnel & Labor Relations	Date/Time	3/7/12 10:20 AM
Approved by	John Cramer, Deputy Commissioner	Date	3/7/2012
	Department of Administration		

(Revised 1/17/2012 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 224

Analysis

SB 224 will have no fiscal impact on the Division of Labor Relations.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB 224**
Fiscal Note Number
() Publish Date

Identifier (file name) SB224-LAW-CIV-03-28-12
Title An Act making privileged certain communications between employees and employee union....
Sponsor Labor & Commerce
Requester (S) Judiciary

Dept. Affected Law
Appropriation Civil
Allocation Labor and State Affairs
OMB Component Number 2718

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Sheila Bugbee, Administrative Officer
Division Administrative Services
Approved by Michael C. Geraghty, Attorney General
Department of Law

Phone 465-3675
Date/Time 3/28/2012 8:30AM
Date 3/28/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 224

Analysis

Senate Bill 224 creates a new evidentiary privilege for communications between an employee and their union — a union testimonial privilege. The privilege would apply to communications between a union member and the union when those communications relate to disciplinary proceedings. Importantly, the privilege applies not only to union grievance procedures but also to any subsequent civil court proceedings when the terminated union employee sues the employer for wrongful termination. The union member holds the privilege indefinitely under the bill. Although a zero fiscal note attaches to this bill, there are potential fiscal impacts to be considered, including whether this privilege will make it more difficult for the State of Alaska and other employers to defend the interests of workplace safety in wrongful termination cases. These concerns are currently before the Alaska Supreme Court in *Peterson v. State of Alaska*, Supreme Court No.:S-14233.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 224**
Fiscal Note Number: 2
(S) Publish Date: 3/23/12

Identifier (file name): SB224-DOLWD-ALRA-3-16-12
Title: Evidence Rules: Union/Employee Privilege
Sponsor: Senate Labor and Commerce
Requester: Senate Labor and Commerce

Dept. Affected: Labor and Workforce Development
Appropriation: Commissioner and Administrative Services
Allocation: Alaska Labor Relations Agency
OMB Component Number: 1200

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Mark Torgerson, Administrator/Hearing Examiner — Phone: 907-269-4895
Division: Alaska Labor Relations Agency — Date/Time: 3/16/12 12:00 PM
Approved by: Click Bishop, Commissioner — Date: 3/16/2012
Department of Labor and Workforce Development

(Revised 1/17/2012 OMB)

FISCAL NOTE #2

STATE OF ALASKA **BILL NO.** SB 224
2012 LEGISLATIVE SESSION

Analysis

This bill provides that confidential communications between an employee and a person who represents the employee on behalf of an organization related to disciplinary proceedings are privileged under AS 23.40.065.

The bill also provides that a person who represents an employee and obtains information from the employee in confidence and that is related to disciplinary proceedings may not be compelled to disclose the information in a proceeding held to take evidence under oath or an arbitration, hearing, or meeting, unless (1) to prevent crime that would cause serious injury or death; (2) in a civil or criminal proceeding against the organization; (3) as ordered in an in camera proceeding in superior court; (4) when the employee knowingly waives the privilege; and (5) after the employee's death, with consent from the employee's personal representative.

There is no fiscal impact anticipated to the department as a result of this legislation.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Explanation of Changes SB 224 Evidence Rules: Union/Employee Privilege

1. The word "individual was replaced with the word "advocate" which is then a defined term in Section 2(d).

2. In Section 2 (b), the following changes were made:

   The provisions of (1) and (2) were changed to more closely track the language of similar provisions in existing privileges under Court Rules.

   Provision (3) was added to clarify that no privilege exists for matters of workplace safety.

CS FOR SENATE BILL NO. 224(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE LABOR AND COMMERCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act making privileged certain communications between employees and employee union representatives; and amending Rule 402 and Rule 501, Alaska Rules of Evidence."

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* **Section 1.** AS 09.25 is amended by adding a new section to article 3 to read:

Sec. 09.25.405. Privileged communication between employees and employee advocates. Confidential communications between an employee and an advocate who represents the employee on behalf of an organization in connection with an employee disciplinary proceeding are privileged as provided under AS 23.40.065. In this section, "advocate," "organization," and "proceeding" have the meanings given in AS 23.40.065.

* **Sec. 2.** AS 23.40 is amended by adding a new section to article 1 to read:

Sec. 23.40.065. Privileged communication between employees and employee organizations. (a) An advocate may not be compelled in a proceeding to

disclose information the advocate acquired from an employee while the advocate represented the employee on behalf of an organization, if the information was communicated

(1) in confidence; and

(2) in connection with the advocate's providing advocacy services to the employee that are related to disciplinary proceedings.

(b) Nothing in (a) of this section prohibits an advocate from disclosing information

(1) that an advocate receives from an employee to whom the advocate provides advocacy services, on behalf of an organization, if the advocate's services were sought, obtained, or used to enable or aid the employee in committing or planning to commit acts or omissions that the employee knew or reasonably should have known constitute fraud or a crime;

(2) in a proceeding concerning an alleged breach of either the organization's legal duty to the employee or the employee's legal duty to the organization;

(3) to prevent physical injury or death in a workplace;

(4) as required by the superior court following a hearing in camera;

(5) when, after being fully informed regarding the nature and extent of the privilege under this section, the employee waives the privilege; or

(6) after the employee's death, on written consent by the employee's personal representative.

(c) If a provision of this section is preempted by federal law or is in conflict with a federal or state law in a particular situation, the provision does not apply to the extent of the preemption or conflict.

(d) In this section,

(1) "advocate" means an individual who represents an employee on behalf of an organization in connection with a proceeding that is related to employee discipline;

(2) "organization" means a labor or employee organization of any kind in which employees participate and which exists for the primary purpose of dealing

with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of employment;

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(A) a proceeding heard before a legislative, judicial, administrative, or other governmental body or official authorized to hear evidence under oath; or

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27-LS1427\M
Wayne
4/5/12

CS FOR SENATE BILL NO. 224(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE LABOR AND COMMERCE COMMITTEE

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(2) in a proceeding concerning an alleged breach of either the organization's legal duty to the employee or the employee's legal duty to the organization;

(3) to prevent physical injury or death in a workplace;

(4) as required by the superior court following a hearing in camera;

(5) when, after being fully informed regarding the nature and extent of the privilege under this section, the employee waives the privilege; or

(6) after the employee's death, on written consent by the employee's personal representative.

(c) If a provision of this section is preempted by federal law or is in conflict with a federal or state law in a particular situation, the provision does not apply to the extent of the preemption or conflict.

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with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of employment;

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Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Date: April 4, 2012

TO: Leg Legal

FROM: Cindy Smith

RE: CS for SB 224 LS-1427

Please provide a Judiciary CS for SB 224, with the following changes:

Replace the term "individual" with the word "advocate" wherever it appears throughout the bill.

In Section 1, delete the words "the individual's providing advocacy" and delete the words "anticipated or ongoing".

In Section 2, delete the words "anticipated or ongoing" on page 2 at line 6.

Delete language in (1) and replace (1) with "furtherance of crime or fraud" language modelled on the lawyer's privilege Court Rule language, attached.

Delete language in (2) and replace with "breach of duty" provision modeled on attorney privilege attached.

Add a new provision under (b) that makes an exception when it is necessary to ensure workplace or public safety, or to fulfill any mandatory reporting requirements or other disclosures required by law.

In item (4) delete the words "in writing"

Add definition for "advocate" as follows: "an individual who represents the employee on behalf of an organization in connection with disciplinary proceedings under AS 23.40.065".

SENATE BILL NO. 224

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Introduced: 3/5/12
Referred: Labor and Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act making privileged certain communications between employees and employee union representatives; and amending Rule 402 and Rule 501, Alaska Rules of Evidence."

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(b) Nothing in (a) of this section prohibits a person from disclosing information

(1) to prevent a crime that would cause serious physical injury or death or create a risk of imminent serious physical injury or death;

(2) in a civil or criminal proceeding against the organization;

(3) as required by the superior court following a hearing in camera;

(4) when, after being fully informed regarding the nature and extent of the privilege under this section, the employee waives the privilege ~~in writing~~; or

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(c) If a provision of this section is preempted by federal law or is in conflict with a federal or state law in a particular situation, the provision does not apply to the extent of the preemption or conflict.

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Cindy Smith

From: Ptacin, John M (LAW) <john.ptacin@alaska.gov>
Sent: Monday, March 26, 2012 11:40 AM
To: Cindy Smith
Subject: FW: SB 224/HB 327 (Evidence Rules: Union Employee Privilege) - Alaska Supreme Court brief
Attachments: Brief of Appellee State of Alaska.pdf; Appendix to Brief of Appellee State of Alaska.pdf

Importance: High

Hi Cindy,

Here is a copy of the state's brief. The Alaska Supreme Court heard argument on Feb. 28th, 2011. If you need any other briefing, or have any follow up questions, just let me know. I will be in person to testify on Friday (SB 224).

John

John M. Ptacin
Assistant Attorney General-Labor and State Affairs Section
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
(Tel) 907-269-5073
(Fax) 907-258-4978

CONFIDENTIALITY NOTICE: This communication with its content and any attachments may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s). Unauthorized interception, review, use, or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

Rule 501. Privileges Recognized Only as Provided.

Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to:

(1) refuse to be a witness; or

(2) refuse to disclose any matter; or

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(Added by SCO 364 effective August 1, 1979)

Return to top

Rule 502. Required Reports Privileged by Statute.

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer of an agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

(Added by SCO 364 effective August 1, 1979)

Return to top

Rule 503. Lawyer-Client Privilege.

(a) **Definitions.** As used in this rule:

(1) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A representative of the client is one having authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client.

(3) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services.

(5) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, or (2) between the client's lawyer and the lawyer's representative, or (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The authority to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought, obtained or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) *Breach of Duty by Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or

(4) *Document Attested by Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; and by SCO 1522 effective October 15, 2003)

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Rule 504. Physician and Psychotherapist-Patient Privilege.

(a) **Definitions.** As used in this rule:

(1) A patient is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A physician is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) **[Effective March 1, 1999.]** A psychotherapist is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, (B) a person

licensed or certified as a psychologist or psychological examiner under the laws of any state or nation or reasonably believed by the patient so to be, while similarly engaged, [OR] (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged, or (D) a person licensed as a professional counselor under the laws of a state or nation, or reasonably believed by the patient so to be, while similarly engaged.

(4) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) **General Rule of Privilege.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional conditions, including alcohol or drug addiction, between or among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the patient, by the patient's guardian, guardian ad litem or conservator, or by the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) **Exceptions.** There is no privilege under this rule:

(1) *Condition on Element of Claim or Defense.* As to communications relevant to the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, of any party claiming through or under the patient, of any person raising the patient's condition as an element of that person's own case, or of any person claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or after the patient's death, in any proceeding in which any party puts the condition in issue.

(2) *Crime or Fraud.* If the services of the physician or psychotherapist were sought, obtained or used to enable or aid anyone to commit or plan a crime or fraud or to escape detection or apprehension after the commission of a crime or a fraud.

(3) *Breach of Duty Arising Out of Physician-Patient Relationship.* As to a communication relevant to an issue of breach, by the physician, or by the psychotherapist, or by the patient, of a duty arising out of the physician-patient or psychotherapist-patient relationship.

(4) *Proceedings for Hospitalization.* For communications relevant to an issue in proceedings to hospitalize the patient for physical, mental or emotional illness, if the physician or psychotherapist, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization.

(5) *Required Report.* As to information that the physician or psychotherapist or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection, or as to information or matters contained in or reasonably raised by a report submitted under AS 08.64.336, other than information that would establish the identity of a patient, unless the court finds that it is necessary to admit the identifying information in order to serve the interests of justice.

(6) *Examination by Order of Judge.* As to communications made in the course of an examination ordered by the court of the physical, mental or emotional condition of the patient, with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise. This exception does not apply where the examination is by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that the lawyer may advise the defendant whether to enter a plea based on insanity or to present a defense based on the defendant's mental or emotional condition.

(7) *Criminal Proceeding.* For physician-patient communications in a criminal proceeding. This exception does not apply to the psychotherapist-patient privilege.

(Added by SCO 345 effective August 1, 1979; amended by SCO 850 effective January 15, 1988; by SCO 1108 effective January 15, 1993; by

SCO 1153 effective July 15, 1994; by SCO 1337 effective March 1, 1999; and by SCO 1522 effective October 15, 2003)

Note: SCO 1108 incorporated changes in Evidence Rule 504(a)(3) made by the legislature in ch. 129 § 12 SLA 1992. This legislation added the language in subparagraph (a)(3), "or (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged."

SCO 1108 was entered for the sole reason that the legislature has mandated the above amendment. If ch. 129 § 12 SLA 1992 is invalidated by a court of competent jurisdiction, SCO 1108 shall be considered automatically rescinded.

Note to SCO 1337: Evidence Rule 504(a)(3) was amended by § 5 ch. 75 SLA 1998 to expand the definition of "psychotherapist" to include licensed professional counselors. Section 1 of this order is adopted for the sole reason that the legislature has mandated the amendment.

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Rule 505. Husband-Wife Privileges.

(a) **Spousal Immunity.**

(1) *General Rule.* A husband shall not be examined for or against his wife, without his consent, nor a wife for or against her husband, without her consent.

(2) *Exceptions.* There is no privilege under this subdivision:

(A) In a civil proceeding brought by or on behalf of one spouse against the other spouse; or

(B) In a proceeding to commit or otherwise place a spouse, the property of a spouse or both the spouse and the property of the spouse under the control of another because of the alleged mental or physical condition of the spouse; or

(C) In a proceeding brought by or on behalf of a spouse to establish the spouse's competence or

(D) In a proceeding in which one spouse is charged with:

(i) A crime against the person or the property of the other spouse or of a child of either, whether such crime was committed before or during marriage.

(ii) Bigamy, incest, adultery, pimping, or prostitution.

(iii) A crime related to abandonment of a child or nonsupport of a spouse or child.

(iv) A crime prior to the marriage.

(v) A crime involving domestic violence as defined in AS 18.66.990.

(E) In a proceeding involving custody of a child.

(F) Evidence derived from or related to a business relationship involving the spouses.

(b) **Confidential Marital Communications.**

(1) *General Rule.* Neither during the marriage nor afterwards shall either spouse be examined as to any confidential communications made by one spouse to the other during the marriage, without the consent of the other spouse.

(2) *Exceptions.* There is no privilege under this subdivision:

(A) If any of the exceptions under subdivision (a) (2) of this rule apply; or

(B) If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud; or

(C) In a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction; or

(D) In a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made; or

(E) In a proceeding under the Rules of Children's Procedure; or

(F) If the communication was primarily related to and made in the context of a business relationship involving both spouses or the spouses and third parties.

(Added by SCO 364 effective August 1, 1979; amended by SCO 823 effective August 1, 1987; by SCO 1269 effective July 15, 1997; and by SCO 1522 effective October 15, 2003)

Note to SCO 1269: Evidence Rule 505(a) was amended by § 70 ch. 64 SLA 1996. Section 13 of this order is adopted for the sole reason that the legislature has mandated the amendment.

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Rule 506. Communications to Clergymen.

(a) **Definitions.** As used in this rule:

(1) A member of the clergy is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.

(2) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in that individual's professional character as spiritual adviser.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the person, by the person's guardian or conservator, or by the person's personal representative if the person is deceased. The member of the clergy may claim the privilege on behalf of the person. The authority so to do is presumed in the absence of evidence to the contrary.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

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Rule 507. Political Vote.

Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

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Rule 508. Trade Secrets.

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

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Rule 509. Identity of Informer.

(a) **Rule of Privilege.** The United States, the State of Alaska and sister states have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) **Who May Claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished by the informer.

(c) **Exceptions.**

(1) *Voluntary Disclosure -- Informer a Witness.* No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the prosecution.

(2) *Testimony on Merits.*

(i) If a party claims that a government informer may be able to give testimony necessary to a fair determination of the issue of guilt, innocence, credibility of a witness testifying on the merits, or punishment in a criminal case, or of a material issue on the merits in a civil case to which the state is a party, and if the government invokes the privilege, the party shall be given an opportunity to show that the party's claim is valid. The judge shall hear all evidence presented by the party and the government, and both sides shall be permitted to be present with counsel during the presentation of evidence, subject to subdivision (c) (2) (ii) of this rule.

(ii) If the government requests an opportunity to submit to the court, by affidavit or testimony or otherwise, evidence concerning the information possessed by an informant, which submission might tend to reveal the informant's identity, the judge shall permit the government to make its submission without disclosure to the other party. Neither the attorney for the government, nor the other party or the other party's attorney may be present when the judge is examining the *in camera* submission. Although the submission generally will consist of affidavits, the judge may direct that witnesses appear before the judge, without the government or the other party present, to give testimony.

(iii) If the judge finds that there is a reasonable possibility that the informant can give the testimony sought, and if the government elects not to disclose the informant's identity, the judge shall, either on motion of a party or sua sponte, dismiss criminal charges to which the testimony would relate if the informant's testimony is material to guilt or innocence. In criminal

proceedings in which the informant's testimony is not material to guilt or innocence and in civil proceedings the judge may make any order that justice requires.

(iv) Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

(3) *Legality of Obtaining Evidence.*

(i) When a defendant challenges the legality of the means by which evidence was obtained by the prosecution and the prosecution relies upon information supplied by an informer to support its claim of legality, if the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible the judge may require the identity of the informer to be disclosed. In determining whether or not to require disclosure, the judge shall hear any evidence offered by the parties and both the defendant and the government shall have the right to be represented by counsel.

(ii) If the judge determines that disclosure of the informant's identity is necessary, upon request by the prosecution the disclosure shall be made to the court alone, not to the defendant. The judge may, if necessary, examine the informant or other witnesses about the informant, but such examination will be *in camera* and neither the defendant nor the prosecution shall be present or represented.

(iii) If disclosure of the identity of the informer is made to the court and not to the defendant, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the prosecution.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

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Rule 510. Waiver of Privilege by Voluntary Disclosure.

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or

the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

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Rule 511. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

(Added by SCO 364 effective August 1, 1979)

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Rule 512. Comment Upon or Inference From Claim of Privilege--Instruction.

(a) **Comment or Inference Not Permitted.** The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) **Claiming Privilege Without Knowledge of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) **Jury Instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

(d) **Application -- Self-Incrimination.** The foregoing subsections do not apply in a civil case with respect to the privilege against self-incrimination.

(Added by SCO 364 effective August 1, 1979)

NEA-ALASKA
Affiliated with the National Education Association

March 19, 2012

Senator Dennis Egan
State Capitol Room 510
Juneau, AK 99801

Re: Senate Bill 224

Dear Senator Egan:

On behalf of NEA-Alaska, I wish to express our support for Senate Bill 224, which makes privileged certain communications between employees and employee union representatives. It is important that members feel the conversations they have with their union representatives remain confidential. When members have the confidence to speak openly with union representatives, NEA-Alaska is better able to advocate for its members.

I thank you and the Senate Labor and Commerce committee for introducing and hearing this important legislation.

Sincerely,

Barb Angaiak

Barb Angaiak
President

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GENERAL TEAMSTERS LOCAL 959
STATE OF ALASKA

Affiliated with the International Brotherhood of Teamsters
Rick Boyles, Secretary-Treasurer
520 E. 34th Ave., Suite 102, Anchorage, Alaska 99503
Phone (907) 565-8122 • Fax (907) 565-8199

March 20, 2012

Hand Delivered

Senator Egan
Labor and Commerce Committee
State Capitol Room 108
Juneau, AK, 99801

RE: Senate Bill 224, Privileged Communications

Dear Senator Egan:

On behalf of our Teamster Local 959 Business Representatives and the members that we represent around the state, we wish to thank the Committee for introducing this legislation in regards to the impact of privileged communications. Senate Bill 224 would allow free candid and confidential conversations between employees and their Business Representative. In addition, this bill allows the Business Representatives to fully investigate workplace disputes. Senate Bill 224 establishes privilege similar to the "attorney-client" privilege, between a Business Representative and member. This correlates to conversations that occur during the administration of the Collective Bargaining Agreement.

Additionally, previous legislatures have recognized other privileges for persons other than doctors, lawyers and spouse, such as:

- Evident Rule 503, protects communication between clients and lawyers' representatives;
- 08.63.200, protects communications between marital and family therapists and their patients;
- 08.95.900, protects communications between licensed social workers, their employees and clients;
- 08.86.200, protects communications made to "psychological associates";
- 08.80.315, protects records of pharmacists and communications between pharmacists and patients;
- 08.04.662, protects communications of accountants and their clients.

Considering the above examples and Senate Bill 224, we believe the merit of privilege is to ensure that members, clients, and patients can confide freely in their

Representatives or provide support in order to help them reduce problems, resolve litigations, and/or get appropriate service.

For these reasons, we thank you for introducing this important bill.

Sincerely,

TEAMSTERS LOCAL 959

Rick Boyles
Secretary-Treasurer

Public Employees Local 71

BOB JOHNSON
Business Manager/
Secretary-Treasurer

DENNIS MOEN
President

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March 20, 2012

RE: Support for Senate Bill 224 & House Bill 327

Dear Labor and Commerce Committee Member:

For almost 40 years Public Employees Local 71 has had the privilege to serve as a representative for the Labor Trades and Crafts positions with the State of Alaska and have added other Public Employee groups along the way. During this time we have worked with the employers to come to agreements on tough issues with our members and in most cases both sides have come away feeling better about the situation than going in.

What we do as a labor union is ensure that our union members will have representation in the work place as set out in the National Labor Relations Act and further expanded in the Weingarten decision that states that a union member had the right to have a union representative at investigatory meetings that could lead to discipline.

Public Employees deserve the same rights that union members in the private sector enjoy. It has been our experience that having the employee's representative present at such meetings expedites the resolution of grievances as well as fosters a cooperative relationship between the employer, the employee and the union.

We at Public Employees' Local 71 strongly urge you to support and employee's right to be represented in the work place.

Sincerely,

Robert Johnson
Business Manager
Secretary-Treasurer

AMERICAN CIVIL LIBERTIES UNION of ALASKA

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
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EMMA HILL, Anchorage
STUDENT ADVISORS

March 22, 2012

The Honorable Dennis Egan, Chair
The Honorable Joe Paskvan, Vice-Chair
Senate Labor & Commerce Committee
Alaska State Senate
State Capitol
Juneau, AK 99801
Via email: Senator_Dennis_Egan@legis.state.ak.us
Senator_Joe_Paskvan@legis.state.ak.us

Re: SB 224: Union-Employee Privilege
ACLU Letter of Support

Dear Chair Egan & Vice-Chair Paskvan:

Thank you for the opportunity to provide this Letter in Support of Senate Bill 224.

The American Civil Liberties Union of Alaska (ACLU) represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. **From that perspective, we wish to offer our statement of support for SB 224.**

Constitutional Values Served by the Bill

While we do not argue that SB 224 is required by the Alaska or federal Constitutions, we do note that the bill supports some of the important rights outlined by both constitutions.

The federal constitution prohibits passing any laws that would infringe "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amend. I. The Alaska Constitution prohibits any violation of the right "peaceably to assemble, and to petition the government." Alaska Const., Art. I, Sec. VI.

Among many groups of people who may petition the government about their grievances are public employees who may wish to ask for changes in the terms of their employment or to complain about mistreatment. Contesting

unfair disciplinary treatment and communicating with a union representative are aspects of this right.

While confidentiality is not constitutionally required as to all communications relating to the right to seek redress of grievances, confidentiality can be an important element of promoting full and frank discussions of those grievances. The privilege as described in the bill will assist in promoting the rights of public employees to seek redress of grievances from the government, by ensuring that communications with union representatives will not be used against them later.

That the bill presents a qualified privilege which can be overcome "as required by the superior court following a hearing in camera" ensures that documents and communications that are appropriately disclosed in the interests of justice should be so disclosed. While the bill does not lay out the grounds by which the Superior Court should require disclosure, typical considerations by a court in such a circumstance include whether the information is available from another source, whether the party seeking the information has exhausted all other alternatives, whether the information sought is "highly relevant" or merely cumulative with other evidence, and whether the party seeking the information has a "compelling need" for it. *See, e.g., Newton v. National Brodcasting Co.*, 109 F.R.D. 522, 527 (D. Nev. 1985) (discussing how a qualified journalist privilege may be overcome).

The committee may wish to consider whether it wishes to give more specific guidance to any courts considering the privilege to decide how and when such a privilege should be overcome.

Conclusion

We hope that the Labor and Commerce Committee will pass SB 224.

Thank you again for letting us share our thoughts. Please feel free to contact the undersigned if you have any questions or wish additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Linda Menard, Senator_Linda_Menard@legis.state.ak.us
Senator Bettye Davis, Senator_Bettye_Davis@legis.state.ak.us
Senator Cathy Giessel, Senator_Cathy_Giessel@legis.state.ak.us

(907) 586-4004 **Douglas Kemp Mertz** *fax (888) 293-2530*
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TESTIMONY IN SUPPORT OF SB 224 ON PRIVILEGED UNION COMMUNICATIONS

I am here to testify in support of SB 224. From my own experience I can tell you that it is vital to the rights of individual workers and to the rights of workers to organize effectively.

For the past two years I have been litigating on behalf of a state employee who was fired under outrageous circumstances. To add to his injuries, the State adopted a litigation tactic that is unfair and offensive.

The state required him, like every other state employee, to pursue his claim through an administrative process before he was allowed to file a lawsuit. The state required him, like every other state employee, to use a union official as his advocate and banned attorneys from participating in the process.

Then, when the administrative process ended without resolving the dispute, he was free to bring a lawsuit; but when he did, *the state subpoenaed all the union records related to him*, including all correspondence and emails and notes of meetings between the employee and his union advocate, and even correspondence from his private attorney, related to tactics, to evaluations of the case, and to settlement positions. In short, according to the State, nothing that passes between the employee and his union advocate is private, no matter that for decades the unions and their members had thought they were private. It is a tactic that would be considered unethical and blatantly wrong if used against a litigant who had an attorney in the administrative phase; but here the state itself banned use of an attorney.

Why does this matter?

Confidentiality between an advocate and his client has for centuries been recognized as essential to a fair legal system. Allowing the other side in litigation to obtain all the information and correspondence that has always been considered private would destroy the relationship between advocate and client. This is so whether or not the advocate is an attorney. It would, as the California Supreme Court said, be ridiculous to think that the only advice a union advocate could tell his client would be, "Don't talk to me."

If there were no right to confidentiality, an employer could call a union advocate as a witness against his own client;

If there were no right to confidentiality between a union and its members, an employer could subpoena the other side's notes and minutes of private strategy sessions during collective bargaining sessions; this has already happened in other states.

If there were no right to confidentiality, an employer could subpoena confidential reports of wrongdoing so it could intimidate and punish workers who were reporting misconduct through their union;

If there were no right to confidentiality, no union member would ever talk to his union advocate and the entire system of administrative remedies for worker grievances would become a meaningless nullity.

Why is the Issue Coming up Now?

For decades this tactic was not used by the State or any other employer in Alaska. When it was tried Outside, it almost always failed. But now the Department of Law has decided to try it and has vigorously, if wrongly, defended it. It is on the table right now, being used against public employees right now, and if not challenged is likely to be used against all workers who are members of organized labor. In our case, the state superior court judge refused to stop the practice and said we should take it to the Legislature or to the Alaska Supreme Court. We did appeal his ruling to the Alaska Supreme Court, but it is likely to be many months before the court makes a ruling.

Why should the Legislature address it Now?

This obnoxious practice is before the Alaska Supreme Court. So why should the Legislature use its own judgment on it instead of letting the court do it?

The answer is that the Alaska Supreme Court is doing something different from what you are doing: It is examining whether the Department of Law's tactic violates the Constitution's requirement of due process. It is not deciding whether prohibiting the practice is a good idea. It is is far more difficult to establish a constitutional violation than to decide whether the tactic is basically unfair and repugnant.

You have the ability right now to decide whether union members should be protected from this outrageous tactic. We urge you to pass this bill.

Douglas K. Mertz
March 19, 2012

IN THE SUPREME COURT OF THE STATE OF ALASKA

Russell Peterson, Jr.,	)	
	)	
Petitioner,	)	**Supreme Court No. S-14233**
	)	
vs.	)	
	)	
State of Alaska,	)	
	)	
Respondent.	)	
	)	

Superior Court No. 1JU-10-569 CI

PETITION FOR REVIEW FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
HON. PHILIP M. PALLENBERG, JUDGE

PETITIONER'S OPENING BRIEF

Douglas K. Mertz
Attorney for the Petitioner
Alaska Bar No. 7505027
Mertz Law Office
319 Seward Street, Ste 5
Juneau, Alaska 99801
907 586-4004

Filed in the Supreme Court of the
State of Alaska this _____ day of
July, 2011

Marilyn May, Clerk

By:_____
Deputy Clerk

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PROVISIONS RELIED ON

U.S. Const. 1st Amend.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. 14th Amend. Sec. 1

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Const. Art. 1, Sec. 1. Inherent Rights.

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Alaska Const. Art. 1, Sec. 7 Due Process.

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Alaska Const. Art. 12, Sec. 6 Merit System.

The legislature shall establish a system under which the merit principle will govern the employment of persons by the State.

Alaska Statute 23.40.080. Rights of public employees.

Public employees may self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Alaska R. Evidence 408

Compromise and Offers to Compromise.

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution, but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement.

Alaska R. Evidence 501

Rule 501. Privileges Recognized Only as Provided.

Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to:

(1) refuse to be a witness; or

(2) refuse to disclose any matter; or

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

Collective Bargaining Agreement with the State for AFSCME Local 52, Sec. 103

Exclusive Representation.

The Employer will not negotiate or handle grievances with any individual or employee organization other than the Union with respect to terms and conditions of employment of bargaining unit members in the GGU. When individuals or organizations other than the Union request negotiations or seek to represent bargaining unit members in grievances or to otherwise represent bargaining unit members in Employer/employee matters, the Employer shall advise them that the Union is the exclusive representative for such matters. Similarly, the Union will so advise individuals or organizations making such requests.

JURISDICTIONAL STATEMENT

This case comes on a Petition for Review from an order of the trial court of the Hon. Philip M. Pallenberg, dated March 17, 2011. This court granted the Petition for Review on April 27, 2011, and ordered briefing. This court has jurisdiction under AS 22.05.010.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

When a State of Alaska employee who is a union member is terminated, the State requires that the employee pursue a mandatory grievance process before he can file suit. The State requires that the employee be represented by the union in that process and does not allow a private attorney to participate. When the grievance process has ended and the employee then files suit, may the State, in the subsequent litigation, subpoena all internal union documents, communications, and files related to the member, including all communications between union officials and the member related to the grievance and all communications between the union and the member's private attorney working on the same matter? Does a lay advocate-client privilege similar to an attorney-client privilege apply when the party is not allowed to have his attorney represent him but only a lay advocate?

STATEMENT OF THE CASE

The petitioner, Russell Peterson, a former State employee, filed an action for unjust termination against the State.[1] [Exc. 1] Before filing the court case, he exhausted his administrative remedies by filing a grievance through his union, as required. [Exc. 51] Under the Collective Bargaining Agreement with the State, only a union representative was allowed to represent the employee in the grievance process; his private attorney was not permitted to

[1] The State claimed that Mr. Peterson had failed to note on his employment application that he had been convicted of a felony almost twenty years earlier. Mr. Peterson's defense is that he was told by a State employment officer that he did not need to list offenses that occurred so long ago, that he had a genuine confusion about whether old offenses were juvenile adjudications or adult convictions, and that the State had known about his record soon after he was hired and had decided that it was not a firing offense since he has had a clean record since moving to Alaska many years ago. [Exc. 1-6] These issues remain to be tried.

participate. [Exc. 20][2] After the grievance process ended and the employee filed suit, the State's attorney attempted to obtain discovery in several problematic ways, including a subpoena of all the union's records related to the member and his grievance, including all private communications, notes, and files related to the grievance, and all communications from Mr. Peterson's private attorney to the union.[3]

Mr. Peterson objected to this and related demands,[4] on the basis that communications with his union representatives should be considered privileged as the union representative was acting in the role of an attorney when no attorney was allowed, and that to allow one side in litigation to have access to all the private factual and strategic communications between the opposing party and his legal representative would violate due process. U.S.

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[2] The entire collective bargaining agreement in effect at the time of the incidents in this case is at http://www.afscmelocal52.org/component/option,com_docman/task,doc_download/gid,258/.

[3] The initial subpoena was quashed by the court because the State's attorney had improperly used a court form intended for use in children's cases instead of a subpoena duces tecum to a deposition. [Exc 28, 31] The state's attorney then served a subpoena in proper form. [Exc. 50]

[4] The State also subpoenaed all records of Mr. Peterson's mental health provider, including a memo from his attorney to his psychiatrist outlining the likely course of litigation so that the stresses of the litigation could be factored into his mental health treatment. [Exc. 158-175] And the State seized hundreds of emails from and to Mr. Peterson which were transmitted over the State's email system during his employment, including emails to his union stewards and other union officials and emails to his private attorney, marked as "confidential." [*Id.*] The trial court ruled that the memo to the psychiatrist must be produced because by writing to someone other than the client, the attorney waived the client's privilege, notwithstanding the fact that the psychiatrist also had a privilege for patient/client communications. But the trial court ruled that the emails to and from union officials could not be seized because Mr. Peterson had a reasonable expectation of privacy in those communications. [Exc. 169-175] Neither of those rulings is the subject of this Petition.

Const., 14th Amend., Sec. 1; Alaska Const. Art. 1, Sec. 7.

On March 1, 2011, the trial court ruled that the State could obtain all the union records because the attorney/client privilege applies only to attorney representation, not to a non-lawyer advocate performing the same function. [Exc. 159-175] Petitioner contends that it is a fundamental violation of due process to permit one side in litigation to discover private communications, opinions, and strategies between the other party and his legal advocate. There had been a trial date but the court took it off the calendar so the State could pursue its discovery claims.

STANDARD OF REVIEW

Rulings on discovery and on discovery are generally reviewed for abuse of discretion. *Christensen v. NCH Corp.*, 956 P. 2d 468 (Alaska 1998). However, when, as here, the issue before the court is purely one of law, the court is not bound by the lower court's decision; consequently, the "clearly erroneous" standard used in reviewing a trial court's factual findings is inapplicable. *Day v. A & G Construction Co.*, 528 P.2d 440, 443 n.3 (Alaska 1974). The court will adopt the rule of law that is most persuasive in light of precedent, reason, and policy. *Guin v. Ha*, 591 P. 2d 1281 (Alaska 1979).

SUMMARY OF ARGUMENT

State and federal courts and administrative agencies have long recognized that when the government permits or – as in this case – *requires* lay advocates to be the sole legal representatives of employees in legal proceedings, the representation must have the same privilege of confidentiality that adheres when the advocate is a bar member. Some courts and agencies have recognized a broader union privilege that precludes the government from

forcing union officials to divulge confidential discussions during the collective bargaining process; the State's demands here may be an opening wedge for such a demand, but existence of a broader privilege need not be decided in this case. Where, as here, a constitutional due process right is at issue, the courts have universally held that a court may recognize a privilege without legislative action, and this court has done so on several occasions.

ARGUMENT

I. Courts have consistently recognized a due process right to representation in legal proceedings involving employment rights. The right to representation includes the right to confidentiality between client and legal representative.

A. Employment is a right and a public employer may not deprive an employee of that right without due process

Alaska has long recognized that employment is a right, and a public employer may not deprive an employee of that right without due process.[5] *See* Alaska Constitution, Art. I, Sec. 1, and Article 12, Section 6 ("This constitution is dedicated to the principle [...] that all persons have a natural right to . . . the enjoyment of the rewards of their own industry.").

Due process includes the right to notice and an opportunity to be heard.[6] When due process is implicated, there is a right to counsel, including in civil cases.[7] As this court held,

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[5] *Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 35 (Alaska 1980); *Herscher v. State, Dep't of Commerce*, 568 P.2d 996, 1002 (Alaska 1977).

[6] *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983).

[7] *Langfeldt-Haaland v. Saupe Enterprises, Inc.*, 768 P.2d 1144 (Alaska 1989); *Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977).

> "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363, 1369 (1914) (citations omitted). *See* Nichols v. Eckert, 504 P.2d 1359 (Alaska 1973); Frontier Saloon, Inc. v. Alcoholic Beverage Control Board, 524 P.2d 657 (Alaska 1974). And, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 170 (1932).

Otton v. Zaborac, 525 P. 2d 537, 539 (Alaska 1974). Before a government employee may be fired, a hearing must be held at which the employee may present his own defense by testimony and other evidence in an adversarial hearing. *North Slope Borough v. Barraza*, 906 P.2d 1377 (Alaska 1995).[8] And this court has noted that the requirement of an adversarial hearing may, in limited circumstances under a collective bargaining agreement, be waived when there are "fair, reasonable, and efficacious procedures by which employer-employee disputes may be resolved." *Cassel v. State Dept of Admin.*, 14 P.3d 278, 286 (Alaska 2000). Persons who are employed other than "at will" have a sufficient property interest in continuing their employment absent just cause for their removal, to require that they be given notice and an opportunity to be heard under the due process clause of the Alaska constitution before their employment is terminated. *Casey v. City of Fairbanks*, 670 P2d 1133 (Alaska 1983).[9]

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[8] *North Slope Borough v. Barazza* cited *Storrs v. Municipality of Anchorage*, 721 P.2d 1146 (Alaska 1986) and *Nichols v. Eckert*, 504 P.2d 1359, 1365 (Alaska 1973), for the right to an adversarial hearing with witnesses. *See also Cassel v. State, Department of Administration*, 14 P.3d 278, 286 (Alaska 2000), which affirms the right of a terminated public employee to present evidence, by testimony or otherwise, in his own defense.

[9] *See also FV American Eagle v. State*, 627 P.2d 284 (Alaska 1982); *Crutchfield v. State*, 627 P.2d 182 (Alaska 1980).

B. There is a constitutional right to counsel in civil cases arising from the due process clause

There is a constitutional right to counsel in civil cases arising from the due process clause, *Langfeldt-Haaland v. Saupe Enters*, 768 P.2d 1144 (Alaska 1989).[10] As noted above, this court has held that the "right to be heard" would be of little value if it did not include "the right to be heard by counsel."[11]

In this case, the State has prohibited private attorneys from appearing as counsel and mandated the use of union officials to represent the members. Section 103 of the collective bargaining agreement between the State and the General Government Unit of State employees is explicit regarding who may represent an employee and who may not:

> The Employer will not negotiate or handle grievances with any individual or employee organization other than the Union with respect to terms and conditions of employment of bargaining unit members in the GGU. When individuals or organizations other than the Union request negotiations or seek to represent bargaining unit members in grievances or to otherwise represent bargaining unit members in Employer/employee matters, the Employer shall advise them that the Union is the exclusive representative for such matters. Similarly, the Union will so advise individuals or organizations making such requests.

[Exc. 20] Thus the State has explicitly and emphatically decreed that attorneys may not represent employees in Mr. Peterson's situation, but only union officials may do so.

The question then is, what becomes of the rights associated with legal representation

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[10] *Accord, Otton v. Zaborac*, 525 P.2d 537 (Alaska 1974).

[11] *Otton v. Zaborac*, 525 P.2d 537 (Alaska 1974), quoting from *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L. Ed. 158, 10 (1932).

– such as client confidentiality – in a matter requiring constitutional due process standards, when the State has prohibited attorneys from representing a party.

II. Confidentiality Between Advocate And Client Is Critical To Effective Representation.

This court has consistently upheld the importance of confidentiality between a client and his legal representative. Evidence Rule 503 offers substantial protections for such communications in almost all instances. This court held that the attorney-client privilege extends to client communications with a non-lawyer working with a lawyer in legal representations.[12] Although the facts of that case differ from this case, the court made certain points that matter here:

> ...the very heart of the common-law privilege was to protect the facts given by the client to his attorney. The privilege was based on the necessity that an attorney have the full disclosure of the facts from his client.[13]

The court has also noted the important public policy purpose of the privilege:

> Other jurisdictions have held, however, that lawyer-client privilege is more than just a testimonial exclusion. "The privilege against disclosure is essentially a means for achieving a policy objective of the law. The objective is to enhance the value which society places upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others will be informed. . . . If client and counsel must confer in public view and hearing, both privilege and policy are stripped of value." The Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal.App.2d 41, 53-54, 69 Cal.Rptr. 480 (1968) (since superseded by statute).[14]

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[12] *American Nat. Watermattress Corp. v. Manville*, 642 P.2d 1330, 1333-1334 (Alaska 1982).

[13] *Id.* at 1334, citations omitted.

[14] *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248, 1261 n.23 (Alaska, 1993).

The court has stated that the attorney-client privilege is entitled to "greater solicitude" than the physician-patient privilege.[15] This makes relevant the court's treatment of the physician-patient privilege. In *Allred v. State*, 554 P.2d 411 (Alaska 1976), the court found that a common law psychotherapist-patient privilege exists, based on consideration of the following factors that apply to all claims of privilege:

> Professor Wigmore has proposed four canons to be used as a basis for determining whether, for any particular relationship, a common law privilege is desirable. These are:
>
> > (1) The communications must originate in a confidence that they will not be disclosed.
> >
> > (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> >
> > (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
> >
> > (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. 8 J. Wigmore, Evidence, § 2285. (Emphasis in original).[16]

The court found that the need for confidentiality is essential in order to make the relationship work. So the question then becomes, is the need to maintain confidentiality between a person in a legal dispute and his authorized advocate any less critical when the advocate is not a bar member; and does it make a difference that the State itself has prohibited private attorneys from participating in the process in this matter.

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[15] *Lewis v. State*, 565 P.2d 846 (Alaska 1977) at note 4.

[16] 554 P.2d at 417.

III. Courts And Labor Agencies Have Consistently Recognized Confidentiality As a Due Process Right Where Lay Advocates Are Permitted, But Have Varied In Whether There Is a Broader Union Privilege In Other Contexts.[17]

A. State courts and agencies.

Several states have addressed this issue or related ones.

California: In California, the seminal case is *Welfare Rights Org. v. Crisan*, 661 P.2d 1073, 33 Cal 3d 766, 90 Cal. Rptr 919 (Cal. 1983). In *Crisan*, a statute permitted welfare recipients to be represented by lay advocates, although attorneys were not barred, as here. The California Supreme Court held that the privileges that would otherwise be applicable to an attorney-client relationship also apply to the lay relationship when the Legislature has created a system of lay representation. The court held,

> [T]he considerations which support the privilege are so generally accepted that the Legislature must have implied its existence as an integral part of the right to representation by lay persons. Otherwise that right would, in truth, be a trap by inducing confidential communications and then allowing them to be used against the claimant. We do not attribute such a sadistic intent to the Legislature.

661 P.2d at 1076-77.[18] The court also said,

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[17] The best analyses of caselaw on this topic is found in these articles: Moberly, Michael D., Extending a Qualified Evidentiary Privilege to Confidential Communications between Employees and Their Union Representatives, 5 Nev. L.J. 508 (2004-2005); Rubinstein, Mitchell, Is a Full Labor Relations Evidentiary Privilege Developing?, 29 Berkeley J. Emp. & Lab. Law 221 (2008). Also useful is Goldman, David, Union Discovery Privileges, The Labor Lawyer Vol. 17. No. 2, p. 241 (2001), which analyzes the First Amendment protections against obtaining confidential union information on members and bargaining strategy under the First Amendment and other authorities.

[18] Other courts have noted that this privilege does not extend to immunizing underlying factual information known by the union official, see *American Airlines, Inc. v. Superior Court*, 8 Cal. Rptr. 3d 146 (Cal. App. 2004); *Walker v. Huie*, 142 F.R.D. 497, 500 (D.Utah 1992). The

> As Justice Broussard noted at oral argument, the Legislature could not have intended that the only sound advice the authorized representative could give was, "Don't talk to me."[19]

Subsequently a California appeals court held that *Crisan* did not create a broad union-member privilege but was limited to the situation where the state itself created a system of lay representation, or where "required by constitutional principles, state or federal." *American Airlines, Inc. v. Superior Court*, 8 Cal Rptr 3d 146, 114 Cal. App. 881 (Cal. App. 2004), citing *Crisan, id.*, 661 P.2 1073.

New York: In New York, there are two key cases. In *City of Newburgh v. Newman*, 70 A.D. 2D 362, 421 NYS 2d 673 (1979), a police commissioner had questioned an officer of a police union regarding his observations of and communications with a member who had sought union advice and assistance concerning discipline charges against him. The court upheld the ruling of the Public Employee Relations Board that such questioning was improper. It quoted with approval the board's finding that

> An aspect of the right of public employees to organization and representation is the privilege of consulting with appropriate union officials as to matters affecting them as employees. Such consultations are in the nature of internal communications and, like other internal union affairs, they may be deemed confidential by the union and the employees. To invade that confidentiality tends to inhibit the employees from seeking the advice of their union representatives as to matters affecting their interest and similarly to deter the representatives from proffering advice, if sought. Thus, questioning by responsible representatives of an employer as to private internal union affairs such as events transpiring during discussions relating to the rights of

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defendants here have gone well beyond a discovery request for factual information and made a sweeping demand for materials that undoubtedly would be privileged if held by an attorney.

[19] *Welfare Rights Org. v. Crisan*, 661 P.2d 1073, 1076-77 (Cal. 1983).

> employees in the face of anticipated disciplinary charges interferes with the full measure of the protected right of organization and representation accorded by the Taylor Law.[20]

[70 A.D. 2D 364-5.] The court found that its ruling did not create a common-law privilege "on a par with that of attorney-client" but found that its ruling was "strictly limited to communications between a union member and an officer of the union, and operates as against the public employer, on a matter where the member has a right to be represented by a union representative." *Id.* at 366.

In *Seelig v. Shepard*, 578 N.Y.S. 2D 965, 152 Misc. 2d 699 (Supr. Ct. 1991), investigators sought testimony of a union official on his communications with members, and the official objected. The court summarized the need to protect such communications:

> Petitioner does not have, and, as I understand him, does not even claim to have, a broad common-law privilege, an analogue of the attorney-client privilege. There is, however, plainly a need, for the benefit of society as a whole, for unions to be free to function without harassment and interference from government. Accordingly, there arises, in the context of rules regulating relations between management and labor, a species of privilege for labor union leaders. If unions are to function, leaders must be free to communicate with their members about the problems and complaints of union members without undue interference. Members must be able to have confidence that what they tell their representatives on such subjects cannot be pried out of the representatives by an overzealous governmental agency. Union members must know and be secure in feeling that those whom they elect from among their ranks will be their spokespersons and representatives, not the unwilling agents of the employer. The union leadership councils must be free to confer among themselves, exchange views, make plans and arrive at negotiating strategies without intrusion from the organs of official power.

152 Misc. 2d at 701-2, 578 N.Y.S. 2d at 967. The court also held that requiring an official to

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[20] The Taylor Law is New York State's statutory recognition of the rights of workers to organize and be represented through unions, the equivalent to Alaska Statutes 23.40.070-260 and specifically AS 23.40.080.

testify on communications with members could violate the members' associational rights under the First Amendment (U.S. Const. 1st Amend.) due to the chilling effect of compelled disclosure.[21]

Seelig was followed by *District No. 1-PCD v. Apex Mar Co.*, 296 AD 2d 32 (NY App. Div. 2002), in which the court found that an arbitrator illegally allowed an employer to demand a confidential statement by a union member made to a union official; it found that the demand "may have breached the confidentiality protections that have been recognized as attaching to communications between a union member and the union with respect to representation matters." *Id*, at fn. 2.[22]

Illinois: In Illinois a full labor relations privilege has been recognized. In *Illinois Educ. Labor Relations Bd. v. Homer Cmty. Consol. Sch. Dist.*, 547 N.E.2d 182 (Ill. 1989), a reverse situation occurred: During labor negotiations, a teachers union sought the school district's

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[21] The court held,

> Petitioner contends that compelling his testimony would have a chilling effect on the associational rights of his members. Insofar as intra-Union communications on labor relations matters are concerned, the privilege I have described above is available to protect the members' rights. To the extent that questioning about communications made by petitioner to non-Union members is concerned, such questioning, allowed by the labor relations privilege described above, may well give rise to serious problems for the preservation of First Amendment rights. (*See, New York State Commn. on Govt. Integrity v Congel*, 142 Misc 2d 9 [Sup Ct 1988, Glen, J.], mod 156 AD2d 274 [1st Dept 1989], supra.) *Id* at 703.

[22] A Federal District Court, construing New York law, found that this privilege should be strictly construed to attempts by the employer to obtain confidential information and that it should not be expanded to a full equivalent to an attorney-client privilege. *In re Grand Jury Subpoenas*, 995 F. Supp. 332, 336 (E.D. NY 1998).

documents related to its bargaining strategy. The Illinois Supreme Court found the documents were subject to a qualified labor relations privilege, citing the four factors in *Wigmore* that this court cited in *Allred v. State*, 554 P.2d 411 (Alaska 1976), when it found a psychotherapist-patient privilege. The court also analogized the interest in confidentiality to that attorney work-product privilege (547 N.E. 2d at 187), and quoted from a National Labor Relations Board decision revoking subpoenas for union records of communications with members:

> ...requiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members.[23]

New Hampshire: The New Hampshire Supreme Court addressed the situation in which a grand jury sought evidence from a union official as part of its criminal investigation, and found that whatever privilege may exist as to employer efforts to gain evidence from a union, there was insufficient reason to find such a privilege as to grand jury testimony. *In re Grand Jury Subpoena*, 926 A.2d 280 (N.H. 2007). The court acknowledged that a state administrative agency had declared an employer subpoena of union records to be an illegal and unfair labor practice, *New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police*, PELRB Decision No. 94-74 (August 31, 1994); and discussed at length in rulings by two federal labor relations boards that found such employer discovery to be illegal.

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[23] *Berbiglia, Inc., v. NLRB*, 233 N.L. R. B 1476, 1495 (1977) *aff'd* 602 F.2d 839 (8th Cir. 1979). The Illinois court also noted that this labor privilege is qualified and could be overcome by a showing of necessity after an in camera inspection of the documents.

New Jersey: In *Rawlings v. Police Dept of Jersey City*, 627 A.2d 602 (N.J. 1993), a policeman was arrested for sale of drugs. The police department, as his employer, demanded an immediate drug test and sought the testimony of a union official who gave advice to the arrested member. The court rejected the claim that the official was in the position of a lawyer representing a client, with little analysis of what protections may apply, and applied the definition of "lawyer" in the state's evidence code literally.

B. Federal Courts:

Federal courts have held widely diverse opinions. The U.S. Supreme Court has not addressed this specific issue but several of its decisions are relevant to the rights of unions and union members.

In *NLRB v. J. Weingarten, Inc.*, 420 US 251 (1975), the Court held that a union member had a right to have a union representative present during an investigative interview by the employer and commented at length on the importance of allowing a worker to have representation during any interview or questioning. This right – now commonly referred to as the "Weingarten" right – is recognition that an employer may not invade the important relationship between union member and his union officials who are aiding him.[24]

In *Teamsters Local 391 v. Terry*, 494 U.S. 558, 567, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990), the Court held that there is a right to a jury trial in a suit by a member against a union for failure to represent and breach of its fiduciary duty; the court analyzed the nature of the fiduciary duty to protect its members' interests. It is a logical extension that forcing the

[24] The Supreme Court analyzed issues related to privileges in general in *Jaffee v. Redmond*, 518 U.S. 1 (1996), in which it recognized the psychotherapist-patient privilege.

union to reveal what it has learned in confidence as part of its mandated duty to represent its members in a legal proceeding would breach that relationship of trust by converting the union into management's agent for the collection and transmittal of information that employees might not otherwise choose to reveal.

The Supreme Court has also held that states may not refuse to allow lay representation in a case involving a non-attorney "jailhouse lawyer", except if inmates are given a reasonable alternative, *Johnson v. Avery*, 393 U.S. 483, 490 (1969). The underlying rule adopted by the court is that the party must have access to effective legal representation, whether by an attorney or by a lay advocate.[25]

In *Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139, 1143 (9th Cir. 1976), the Ninth Circuit Court of Appeals found a privilege against a demand for disclosure to an employer of employee statements made to NLRB investigators during an official investigation, citing evidence that employees would not provide information that the NLRB needed in litigation if they knew that the employers could obtain the statements.

A Federal District Court in New York found that a union-member privilege existed but should be limited to attempts by the employer to obtain confidential information and that it should not be expanded to a full equivalent to an attorney-client privilege. *In re Grand Jury Subpoenas*, 995 F. Supp. 332, 336 (E.D. NY 1998).

The union-member privilege was recognized in *International Union v. Garner*, 102

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[25] The Court has even granted a petition for writ of certiorari filed by a non-attorney jailhouse lawyer. *See Mitchell H. Rubinstein*, Jailhouse Lawyer Granted Cert. By Supreme Court, ADJUNCTLAWPROFESSORBLOG, Feb. 7, 2008, http://lawprofessors.typepad.com/adjunctprofs/2008/02/jailhouse-lawyer.html.

F.R.D. 108 (M.D. Tenn. 1984). The case involved an attempt by an employer to gain access to union authorization cards signed by members and was largely based on application of the First Amendment to confidentiality in the union-member relationship.

In *Patterson v. Heartland Indus. Partners*, 225 F.R.D. 204 (N.D. Ohio 2004), the court rejected a full labor relations privilege under labor principles, but accepted the proposition that First Amendment Freedom of Association principles prevent the disclosure of confidential labor relations information.

On the other hand, some federal courts have been less receptive to union confidentiality. In *Walker v. Huie,*142 F.R.D. 497, 500 (D.Utah 1992), the court found that there was no basis for a union-member privilege that would withstand the duty to testify before a grand jury.

A full union relations privilege was rejected by a magistrate judge in *Ahearn v. Rescare W. Va.*, 208 F.R.D. 565 (S.D. Va. 2002), who found that some protections applied but others did not. A district court rejected a claim of a general privilege of members with union officials, *Atwood v. Burlington Industries Equity, Inc.*, 908 F. Supp. 319 (MD N.C. 1995), and in *McCoy v. Southwest Airlines*, 211 F.R.D.381, 387 (C.D. Cal. 2002), a federal magistrate judge found that no privilege should apply to union representation in a grievance proceeding when there was no express statutory authorization for lay representation, as there was in *Crisan* (and there is in the instant case).

In contrast, in *Woods v. N.J. Dept of Education*, 858 F. Supp. 51, 55 (D. N.J. 1993), which involved Special Education hearings at which lay advocates are permitted, the court found that a privilege attached to communications with the advocate. In *NLRB v. Jackson*

Hospital Corporation, 257 F.R.D. 302, 311-12 (D. D.C. 2009), the court acknowledged the existence of a "de facto attorney-client privilege" where there is no actual attorney-client relationship but one entity is acting like the other's attorney, focusing on statements made by an individual to agency staff who the individual believed were providing him with legal advice. The court found that the "common interest" of the two in a common effort was sufficient to provide a privilege. Conversely, in *Nemecek v. Bd. Of Governors of the University of N.C.*, 2000 WL 33672978 (E.D. N.C. 2002), the court expressed skepticism regarding whether a privilege attached to a lay representative in the absence of a statute permitting lay representation.

C. Federal Administrative Agencies

The most frequently cited administrative ruling on this topic is *Cook Paint and Varnish Co.*, 258 NLRB 1230 (1981). The National Labor Relations Board found that the employer committed an unfair labor practice when it questioned a union steward who had been involved in another employee's grievance arbitration and threatened to discipline the steward if he did not turn over his notes. The Board held,

> Clearly, the scope of Respondent's questioning . . . impinged upon protected union activity. For while questions posed by Nulton may be termed "factual inquiries," the very facts sought were the substance of conversations between an employee and his steward, in the course of fulfilling his representational functions. Such consultation between an employee potentially subject to discipline and his union steward constitutes protected activity in one of its purest forms. To allow Respondent here to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives. Such actions by Respondent also inhibit stewards in obtaining needed information from employees since the steward knows that, upon demand of Respondent, he will be required to reveal the substance of his discussions or face disciplinary action himself. In short, *Respondent's probe into . .*

> *. protected activities has not only interfered with the protected activities of those two individuals but has also cast a chilling effect over all of its employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline.*

Cook Paint, 258 NLRB at 1232 [emphasis added]. *Cook Paint* built on the earlier NLRB decision in *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977), *aff'd* 602 F.2d 839 (8th Cir. 1979), in which the Board noted that the employer was engaged in a "fishing expedition," and that forcing a union to open its files to the employer would be "subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members."

See also *U.S. Department of Treasury*,38 F.L.R.A. 1300, 1302 (1991), in which the Federal Labor Relations Agency held that when the employer required the union representative to disclose, under threat of disciplinary action, statements that the employee had made to the representative while the representative was representing him in a disciplinary proceeding, the conversations between the union representative and employee constituted protected union activity.

State administrative agencies in Washington and New Hampshire responsible for public sector labor-management relations held that unions were not required to disclose investigatory notes to employers for use in labor arbitrations. *N.H. Troopers Ass'n v. N.H. Dep't of Safety*, No. P-0754:2, PELRB Decision No. 94-74 (N.H. Pub. Employee Relations Bd. August 31, 1994),[26] (recognizing a labor relations privilege as against the employer, but not as against third parties); *IBEW, Local 77*, No. 15544-U-00-3932, 2003 WL 21658695 (Wash. Pub. Employment Relations Comm'n 2003).

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[26] Available at http://www.nh.gov/pelrb/Decisions/1994/94-74.pdf.

D. Summary

Courts and administrative agencies in other jurisdictions have been uniform in holding that when lay representation is allowed or required, due process requires recognition of a confidentiality privilege between the party and the lay advocate, at least as to demands from the employer in civil litigation. Most courts that have considered the issue have declined to extend this to a more general labor union privilege or to extend it to confidentiality in grand jury proceedings. Courts and agencies have largely analyzed this issue in terms of the constitutional right of due process, the constitutional right to freedom of association under the First Amendment, and state and federal statutory rights to maintain unions.

In this case, in which lay union representation has been both authorized and mandated by the State, and that same State is now attempting to obtain confidential union files, there is no question that precedents in other jurisdictions would protect the files, notes, and communications of the union in connection with representation of its member. There are literally no cases that would find a lack of a privilege in these circumstances.

IV. The courts universally agree that they can recognize a privilege when constitutional due process requires it; beyond that, it is a matter of whether courts or legislatures set the basic rules governing legal processes.

A subsidiary issue is who has the authority to recognize a union-member privilege in whatever form it may take.

Every court that has reviewed this point has concluded that when a privilege must be recognized to satisfy a constitutional requirement, such as due process in connection with lay

representation, the courts are fully empowered to make such rulings.[27] Indeed, the opening language of the section of the Alaska Rules of Evidence on privileges, ER 501, explicitly states that a person may not refuse to testify or to produce materials "Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court." In other words, when there is a constitutional basis for a privilege, it provides protections notwithstanding the fact that neither this court nor the legislature has codified it.

In states in which evidence codes – including recognition of privileges – is a legislative prerogative, not a creation of the courts, there has been a hesitation on the part of some judges to recognize privileges beyond what is necessary to comply with constitutional minimums, e.g., *American Airlines, Inc. v. Superior Court*, op. cit.; *McCoy v. Southwest Airlines*, op cit. It is important to note here that in California and New York, the evidence rules used in courts are creations of the legislatures[28] whereas in Alaska the Rules of Evidence are

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[27] *Seelig*, op. cit.; *New York State Commn. on Govt. Integrity v Congel*, op. cit.; *Patterson v. Heartland Indus. Partners*, op. cit.; *International Union v. Garner*, op. cit.;

[28] California Evidence Code, found at www.leginfo.ca.gov; 2006 New York Code: Civil Practice Law and Rules, Secs. 4501-4548. It should be noted that in both *Crisan*, op. cit., in California, and *Seelig*, op. cit., in New York, the finding of a union-member privilege was not because of anything in the respective evidence code, but was result of a statutory scheme of lay representation that gave rise to a constitutional right of confidentiality. There is some confusion among the federal courts on recognition of privileges due to the fact that the Federal Rules are initially promulgated by the Supreme Court but then are reviewed and sometimes changed by Congress. As an example of the unsettled nature of the federal view on this matter, although Congress mandated that U.S. District Courts promulgate rules of confidentiality in mediations, the Ninth Circuit has questioned whether the District Courts actually have that authority. The *Facebook Inc. v. Pacific Northwest Software Inc.*, 2011 WL 1346951 (No 08-16745) (9th Cir. Apr. 11, 2011), in which the court stated in dicta, "It's doubtful that a district court can augment the list of privileges by local rule" and stated that

promulgated by the Alaska Supreme Court under its constitutional authority to prescribe rules of process in the courts. There is thus no reason to defer to the legislature in recognizing privileges or other rules of confidentiality.

The history of recognition of privileges in Alaska is instructive. This court recognized the psychotherapist-patient privilege as a matter of common law while ruling on a specific case and only later codified it through inclusion in the Rules of Evidence.[29] Likewise, this court has recognized common-law confidentiality privileges as to non-lawyers working with attorneys,[30] executive privilege,[31] deliberative process privilege,[32] and a conditional privilege for publication of defamatory material based on employer-employee relationship. In none of these cases did the court hold off from recognizing a privilege so that it could first be codified in court rules or so that the legislature could first enact such a privilege. Indeed, while some of those privileges (attorney-client, physician-patient, and several others) are now codified in the Rules of Evidence, several others (executive privilege, deliberative process privilege, conditional privilege regarding defamatory material) have not been added to the Evidence Rules although the court has recognized them and their constitutional basis.

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privileges are created by federal common law, not local rules. But the rules and authorities for federal evidence rules are sui generis to the federal courts and have no relevance here.

[29] *Allred v. State*, 554 P.2d 411 (Alaska 1976).

[30] *Amer. Nat. Watermattress Corp v. Manville*, 642 P.2d 1330, 1333-4 (Alaska 1982).

[31] *Doe v. Alaska Superior Ct., Third Jud. Dist.*, 721 P. 2d 617 (Alaska1986).

[32] *Capital Info. Group v. Office of Governor*, 923 P. 2d 29 (Alaska 1996).

In short, when there are constitutional grounds for a privilege, the courts, including this one, have never hesitated in recognizing them without a prior codification in rule or in statute.

V. Joint privilege: Any reason not to recognize joint representation? Two positives make a negative?

One of the issues in this appeal concerns the fact that while the union lay representative was representing Mr. Peterson in his grievance, Mr. Peterson also had a private attorney advising him and attempting to advise the union advocate. The State has demanded all communications between the union and the private attorney. The State apparently contends that by communicating with a non-lawyer, the attorney waived the attorney-client privilege, at least as to those communications. What becomes of the confidentiality of Mr. Peterson's communications with his attorney, or his communications with his union representative, when the attorney and the representative confer?

The joint privilege has long been recognized in the criminal context in which attorneys for codefendants work together,[33] as well as in civil cases.[34] Here, the question boils down to the State's "two positives make a negative" claim, i.e., that a communication

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[33] *See, e.g., US v. Austin*, 416 F. 3d 1016 (9th Cir. 2005); *US v. Henke*, 222 F. 3d 633 (9th Cir. 2000).

[34] In *NLRB v. Jackson Hospital Corp.*, 257 F.R.D. 302, 311-12 (D. D.C. 2009), the court found that the "principle of common interest" protected communications between two entities when they were pursuing a common interest and the cooperating in a joint legal effort.

between one person who has the right to maintain confidentiality of client communications (the private attorney), with another person with a confidentiality privilege (the union representative), results in the two privileges cancelling each other out so there is no longer *any* privilege. As strange as that result may seem, it was the rationale used by the trial court in permitting the State to obtain a confidential memo from the private attorney to his client's psychiatrist regarding how the litigation could affect his treatment. (Exc. 160-163). But applying the joint privilege approach, when two entities with a privilege communicate with a common interest in a common client, there is no logical reason that the privilege should not continue to apply. Any other result – such as two positives cancelling each other out and making a negative – would be absurd and contrary to the rationale for observing a privilege in the first place.

VI. The Issues in this Case regarding Confidentiality Privileges Need a Thorough Review.

Obviously we believe that in this case the trial court's order allowing the State to obtain confidential union records relating to its representation of Mr. Peterson should be reversed without delay. If the ruling is not reversed, there are far-reaching ramifications that should be noted.

A. Lay representation in the courts of Alaska.

It is an everyday occurrence for municipal prosecutions in Alaska to be handled by a paralegal, intern, or other non-admitted person; in other places police officers prosecute cases without lawyers. (We pointed out that the U.S. Supreme Court has held that jailhouse

lawyers who are not admitted may represent prisoners in the absence of an alternative,[35] and the Court has even granted a certiorari petition filed by such a non-admitted person on behalf of another prisoner.[36]) So non-lawyers have and will continue to present cases in Alaskan courts. If the trial court's literal interpretation that the privilege only applies to admitted bar members, the question then becomes whether communications between the non-lawyer doing the courtroom prosecution and others, e.g., in a police department or a municipal prosecutor's office, can be discovered by a defendant. If the trial court ruling stands, the question is an open one.

B. Mediations.

Many, perhaps most, mediators, are not lawyers, and there is no requirement that they be lawyers. In a typical mediation, the mediator may meet separately with each side and discuss confidential facts and confidential settlement positions. Although there is a rule barring admission into evidence of offers of compromise in subsequent litigation (Evidence Rule 408), it is entirely conceivable that a mediator could be subpoenaed to turn over notes and made to testify to his or her recollections of confidential information and positions.[37]

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[35] *See Johnson v. Avery*, 393 U.S. 483, 490 (1969). The U. S. Supreme Court recognized that states may prohibit the practice of law by jailhouse lawyers only if the inmates are provided with a reasonable alternative to assistance from such laypersons.

[36] *Mitchell H. Rubinstein*, Jailhouse Lawyer Granted Cert. By Supreme Court, ADJUNCTLAWPROFESSORBLOG, Feb. 7, 2008, http://lawprofessors.typepad.com/adjunctprofs/2008/02/jailhouse-lawyer.html.

[37] This has happened in California, where the state Supreme Court recently held that the mediation provisions of state statutes made the mediator's testimony confidential and inadmissible. *Michael Cassel, Petitioner, v. The Superior Court of Los Angeles County*, 244 P.3d 1080, 51 Cal. 4th 113, 119 Cal. Rptr. 3d 437 (Cal. 2011).

Many mediators protect against this by requiring confidentiality agreements that preclude such a tactic, but a private contractual agreement may not prevent a court subpoena, if the courts do not recognize a privilege for communications with a non-lawyer mediator. If the tactic were to become widespread, it would grievously diminish the likelihood that parties to a dispute would agree to mediation and be frank with the mediator, knowing that the mediator could be forced to repeat what they say to the other side.[38]

C. Statutory Permission for Lay Representation.

To our knowledge, the State's mandate of lay representation in union member grievances is the only such instance in Alaska; but in other jurisdictions statutory systems of lay representation are more common, as in the California case cited above, *Welfare Rights Org. v. Crisan*, 661 P.2d 1073 (Cal. 1983), in which there was a statutory scheme for lay advocates in welfare entitlement hearings. Since the Legislature (or, as here, the executive branch as part of a collective bargaining agreement) can create lay representation systems, any future lay representation system would create the unintended breaches of confidentiality if the trial court decision were not overruled.

D. Calling the advocate as a witness against his own client.

In this case and in similar cases, if there is no privilege attached to client communications, a lay advocate could be called by the other side to testify against his or her own client. It has not arisen in this case yet, but if there is no privilege, there is nothing to

[38] Similarly, in arbitrations, a non-attorney arbitrator could be forced to divulge information that the parties thought confidential. There is also a question whether a judge or retired judge who acts as a settlement judge and hears confidences can be made to divulge them, since the judge would not be a lawyer-advocate for a client, and would not be, strictly speaking, acting as a judge in the matter.

prevent it from happening, in which case, a union member would be very foolish to share any information with his or her advocate.

E. Demanding the state's confidential documents and subpoenaing its staff as witnesses.

If the state can subpoena union documents related to the grievance process, then it is likely that the employee could demand the State's internal documents and subpoena its staff in the Division of Personnel, since in the grievance and arbitration phases, the state is represented by laypersons, not by attorneys. Internal discussions of strategy and settlement postures would be fair game. So far in this case, the State had resisted all efforts to obtain such materials, but it is likely that if the State succeeds in wiping out the employee's confidentiality rights in this phase, the employee would be justified in demanding the same access to all the State's confidential internal communications. The result would be balanced but hardly fair if neither side could have confidentiality in its internal communications.

F. Confidentiality of collective bargaining strategy.

If there is no confidentiality in union-member relations, it is conceivable that management could subpoena records of the union's collective bargaining strategy and strategic discussions, in which case the entire viability of unions as representatives of the workforce would be in grave jeopardy, and the union's fiduciary duty to its members would be impossible to maintain.[39]

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[39] *See Teamsters Local 391 v. Terry*, 494 U.S. 558, 567, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (union has fiduciary duty to protect members' interests). Forcing the union to reveal what it has learned in confidence would breach that relationship of trust by converting it into management's agent for the collection and transmittal of information that employees might not otherwise choose to reveal.

G. Role of unions in prelitigation dispute resolution.

If there is no confidentiality in union-member representation, the entire value of unions as part of the administrative phase of dispute resolution would be lost, and either unions would be forced to lay off their lay staff and hire lawyers for all their grievances and do away with the system in which employees act as union stewards for members. The prelitigation administrative process would become meaningless without advocates and would simply be a time-waster before litigation.

CONCLUSION

The situation in this case has implications for the rights of individual employees as well as for sensible administration of justice. It is a constitutional right to have effective representation at hearings mandated by due process. If the representation is not by an attorney – and particularly where the State itself forbids attorney representation – it must at least have the essential safeguards that would apply if the advocate were an attorney, chief among which is confidentiality so that the client can safely share his or her side of the case without fear that it will all be divulged to the other side. When the employer that seeks to invade the confidential relationship is also the entity that prevented the employer from using an attorney as an advocate, it is all the more vital that the courts safeguard confidentiality and prevent this attack on due process and fair adjudications.

The court should reverse the trial court.

Respectfully submitted this 18th of July, 2011.

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IN THE SUPREME COURT OF THE STATE OF ALASKA

RUSSELL PETERSON, JR.	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
STATE OF ALASKA,	)	
	)	
Respondent.	)	Supreme Court No.: **S-14233**
	)	

Trial Court Case No.: 1JU-10-569 CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
HONORABLE PHILIP M. PALLENBERG, JUDGE

BRIEF OF APPELLEE STATE OF ALASKA

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ALASKA STATUTES:

AS 23.40.110(a)(1), (5). Unfair Labor Practices.

(a) A public employer or an agent of a public employer may not

(1) interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080 ;

(5) refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

AS 23.40.210(a). Agreement; Cost-Of-Living Differential.

(a) Upon the completion of negotiations between an organization and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years. The agreement shall include a pay plan designed to provide for a cost-of-living differential between the salaries paid employees residing in the state and employees residing outside the state. The plan shall provide that the salaries paid, as of August 26, 1977, to employees residing outside the state shall remain unchanged until the difference between those salaries and the salaries paid employees residing in the state reflects the difference between the cost of living in Alaska and living in Seattle, Washington. The agreement shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency.

COURT RULES

ALASKA RULES OF CIVIL PROCEDURE:

Rule 26(b)(1). General Provisions Governing Discovery; Duty of Disclosure.

b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons

having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 45(d). Subpoena.

(d) **Subpoena for Taking Depositions--Place of Examination.**

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the court for any judicial district of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subparagraph (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of the judicial district in which the deposition is to be taken may be required to attend an examination at any place within the district, unless otherwise ordered by the court. A nonresident of the judicial district in which the deposition is to be taken, and a nonresident of the state subpoenaed within the state, may be required to attend at any place within the district wherein the nonresident is served with a subpoena, unless otherwise ordered by the court.

ALASKA RULE OF EVIDENCE:

Rule 501. Privileges Recognized Only as Provided.

Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to:

(1) refuse to be a witness; or

(2) refuse to disclose any matter; or

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(Added by SCO 364 effective August 1, 1979)

Rule 502. Required Reports Privileged by Statute.

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer of an agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

(Added by SCO 364 effective August 1, 1979)

Rule 503. Lawyer-Client Privilege.

(a) Definitions. As used in this rule:

(1) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A representative of the client is one having authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client.

(3) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services.

(5) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, or (2) between the client's lawyer and the lawyer's representative, or (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the

successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of Crime or Fraud. If the services of the lawyer were sought, obtained or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants Through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or

(4) Document Attested by Lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint Clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; and by SCO 1522 effective October 15, 2003)

Rule 504. Physician and Psychotherapist-Patient Privilege.

(a) Definitions. As used in this rule:

(1) A patient is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A physician is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) [Effective March 1, 1999.] A psychotherapist is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, (B) a person licensed or certified as a psychologist or psychological examiner under the laws of any state or nation or reasonably believed by the patient so to be, while similarly engaged, [OR] (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged, or (D) a person licensed as a professional counselor under the laws of a state or nation, or reasonably believed by the patient so to be, while similarly engaged.

(4) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional conditions, including alcohol or drug addiction, between or among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, by the patient's guardian, guardian ad litem or conservator, or by the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions. There is no privilege under this rule:

(1) Condition on Element of Claim or Defense. As to communications relevant to the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, of any party claiming through or under the patient, of any person raising the patient's condition as an element of that person's own case, or of any person claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or after the patient's death, in any proceeding in which any party puts the condition in issue.

(2) Crime or Fraud. If the services of the physician or psychotherapist were sought, obtained or used to enable or aid anyone to commit or plan a crime or fraud or to escape detection or apprehension after the commission of a crime or a fraud.

(3) Breach of Duty Arising Out of Physician-Patient Relationship. As to a communication relevant to an issue of breach, by the physician, or by the psychotherapist, or by the patient, of a duty arising out of the physician-patient or psychotherapist-patient relationship.

(4) Proceedings for Hospitalization. For communications relevant to an issue in proceedings to hospitalize the patient for physical, mental or emotional illness, if the physician or psychotherapist, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization.

(5) Required Report. As to information that the physician or psychotherapist or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection, or as to information or matters contained in or reasonably raised by a report submitted under AS 08.64.336, other than information that would establish the identity of a patient, unless the court finds that it is necessary to admit the identifying information in order to serve the interests of justice.

(6) Examination by Order of Judge. As to communications made in the course of an examination ordered by the court of the physical, mental or emotional condition of the patient, with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise. This exception does not apply where the examination is by order of the court upon the request of the lawyer for the defendant in a criminal

proceeding in order to provide the lawyer with information needed so that the lawyer may advise the defendant whether to enter a plea based on insanity or to present a defense based on the defendant's mental or emotional condition.

(7) Criminal Proceeding. For physician-patient communications in a criminal proceeding. This exception does not apply to the psychotherapist-patient privilege.

(Added by SCO 345 effective August 1, 1979; amended by SCO 850 effective January 15, 1988; by SCO 1108 effective January 15, 1993; by SCO 1153 effective July 15, 1994; by SCO 1337 effective March 1, 1999; and by SCO 1522 effective October 15, 2003)

Note: SCO 1108 incorporated changes in Evidence Rule 504(a)(3) made by the legislature in ch. 129 § 12 SLA 1992. This legislation added the language in subparagraph (a)(3), "or (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged."

SCO 1108 was entered for the sole reason that the legislature has mandated the above amendment. If ch. 129 § 12 SLA 1992 is invalidated by a court of competent jurisdiction, SCO 1108 shall be considered automatically rescinded.

Note to SCO 1337: Evidence Rule 504(a)(3) was amended by § 5 ch. 75 SLA 1998 to expand the definition of "psychotherapist" to include licensed professional counselors. Section 1 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Rule 505. Husband-Wife Privileges.

(a) Spousal Immunity.

(1) General Rule. A husband shall not be examined for or against his wife, without his consent, nor a wife for or against her husband, without her consent.

(2) Exceptions. There is no privilege under this subdivision:

(A) In a civil proceeding brought by or on behalf of one spouse against the other spouse; or

(B) In a proceeding to commit or otherwise place a spouse, the property of a spouse or both the spouse and the property of the spouse under the control of another because of the alleged mental or physical condition of the spouse; or

(C) In a proceeding brought by or on behalf of a spouse to establish the spouse's competence or

(D) In a proceeding in which one spouse is charged with:

(i) A crime against the person or the property of the other spouse or of a child of either, whether such crime was committed before or during marriage.

(ii) Bigamy, incest, adultery, pimping, or prostitution.

(iii) A crime related to abandonment of a child or nonsupport of a spouse or child.

(iv) A crime prior to the marriage.

(v) A crime involving domestic violence as defined in AS 18.66.990.

(E) In a proceeding involving custody of a child.

(F) Evidence derived from or related to a business relationship involving the spouses.

(b) Confidential Marital Communications.

(1) General Rule. Neither during the marriage nor afterwards shall either spouse be examined as to any confidential communications made by one spouse to the other during the marriage, without the consent of the other spouse.

(2) Exceptions. There is no privilege under this subdivision:

(A) If any of the exceptions under subdivision (a) (2) of this rule apply; or

(B) If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud; or

(C) In a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction; or

(D) In a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made; or

(E) In a proceeding under the Rules of Children's Procedure; or

(F) If the communication was primarily related to and made in the context of a business relationship involving both spouses or the spouses and third parties.

(Added by SCO 364 effective August 1, 1979; amended by SCO 823 effective August 1, 1987; by SCO 1269 effective July 15, 1997; and by SCO 1522 effective October 15, 2003)

Note to SCO 1269: Evidence Rule 505(a) was amended by § 70 ch. 64 SLA 1996. Section 13 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Rule 506. Communications to Clergymen.

(a) Definitions. As used in this rule:

(1) A member of the clergy is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.

(2) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in that individual's professional character as spiritual adviser.

(c) Who May Claim the Privilege. The privilege may be claimed by the person, by the person's guardian or conservator, or by the person's personal representative if the person is deceased. The member of the clergy may claim the privilege on behalf of the person. The authority so to do is presumed in the absence of evidence to the contrary.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 507. Political Vote.

Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

Rule 508. Trade Secrets.

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 509. Identity of Informer.

(a) Rule of Privilege. The United States, the State of Alaska and sister states have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished by the informer.

(c) Exceptions.

(1) Voluntary Disclosure -- Informer a Witness. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the prosecution.

(2) Testimony on Merits.

(i) If a party claims that a government informer may be able to give testimony necessary to a fair determination of the issue of guilt, innocence, credibility of a witness testifying on the merits, or punishment in a criminal case, or of a material issue on the merits in a civil case to which the state is a party, and if the government invokes the privilege, the party shall be given an opportunity to show that the party's claim is valid.

The judge shall hear all evidence presented by the party and the government, and both sides shall be permitted to be present with counsel during the presentation of evidence, subject to subdivision (c) (2) (ii) of this rule.

(ii) If the government requests an opportunity to submit to the court, by affidavit or testimony or otherwise, evidence concerning the information possessed by an informant, which submission might tend to reveal the informant's identity, the judge shall permit the government to make its submission without disclosure to the other party. Neither the attorney for the government, nor the other party or the other party's attorney may be present when the judge is examining the in camera submission. Although the submission generally will consist of affidavits, the judge may direct that witnesses appear before the judge, without the government or the other party present, to give testimony.

(iii) If the judge finds that there is a reasonable possibility that the informant can give the testimony sought, and if the government elects not to disclose the informant's identity, the judge shall, either on motion of a party or sua sponte, dismiss criminal charges to which the testimony would relate if the informant's testimony is material to guilt or innocence. In criminal proceedings in which the informant's testimony is not material to guilt or innocence and in civil proceedings the judge may make any order that justice requires.

(iv) Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

(3) Legality of Obtaining Evidence.

(i) When a defendant challenges the legality of the means by which evidence was obtained by the prosecution and the prosecution relies upon information supplied by an informer to support its claim of legality, if the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible the judge may require the identity of the informer to be disclosed. In determining whether or not to require disclosure, the judge shall hear any evidence offered by the parties and both the defendant and the government shall have the right to be represented by counsel.

(ii) If the judge determines that disclosure of the informant's identity is necessary, upon request by the prosecution the disclosure shall be made to the court alone, not to the defendant. The judge may, if necessary, examine the informant or other witnesses about the informant, but such examination will be in camera and neither the defendant nor the prosecution shall be present or represented.

(iii) If disclosure of the identity of the informer is made to the court and not to the defendant, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the prosecution.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

ISSUE PRESENTED FOR REVIEW

May an employee who has sued his former employer withhold relevant information in discovery by asserting a "union testimonial privilege," despite the fact that no such privilege currently exists under Alaska law, and despite the mandate of Alaska Rule of Evidence 501, which limits the creation of new evidentiary privileges?

STATEMENT OF THE CASE

I. Introduction

Mr. Peterson asks this Court to take the unusual step of creating a new evidentiary privilege for communications between an employee and his union — a union testimonial privilege. [Pet. Br. 3] No other jurisdiction has adopted such a privilege. Because new evidentiary privileges obscure the search for truth, because Alaska Rule of Evidence 501 limits the creation of new privileges, and because the proposed privilege would undermine important public policy goals, this Court should decline to adopt this new privilege.

Mr. Peterson sued his state employer for wrongful termination, and the state sought Mr. Peterson's union file in discovery pursuant to the Alaska Rules of Civil Procedure. [Exc. 001-008, 050] The subpoena for the union file was reasonably calculated to lead to the discovery of evidence which would establish that the state did not breach its duty of good faith and fair dealing in terminating Mr. Peterson and that Mr. Peterson failed to exhaust his administrative remedies.[1] Without access to Mr. Peterson's union file, the state will not be able to prove that Mr. Peterson failed to

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[1] *Noffke v. Perez*, 178 P.3d 1141, 1150 (Alaska, 2008).

fully pursue the grievance procedure provided in his collective bargaining agreement. [Tr. 033-039]

Mr. Peterson's union communications are not subject to any existing evidentiary privileges.[2] Courts refuse to extend the attorney-client privilege because the union representative is not a lawyer to the individual member during a labor dispute.[3] And when Mr. Peterson's private counsel inserted himself into the grievance process, the union and the private counsel did not enter into a joint representation of Mr. Peterson, nor was the union acting as an agent of Mr. Peterson's private counsel, because the union represents all of its members during a dispute.[4] [Tr. 020-021] Accordingly, Mr. Peterson may not withhold the requested documents unless this Court creates a new evidentiary privilege.

This Court possesses a limited authority to create new privileges. Alaska Rule of Evidence 501 limits the creation of new common-law privileges — since its enactment in 1979, this Court has not created a new common-law privilege.[5] Moreover, a union testimonial privilege would undermine important public policy objectives --- for instance, it would undermine the exhaustion doctrine by making it

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2 Alaska R. of Evid. 501-509.

3 *Walker v. Huie*, 142 F.R.D. 497, 501 (D. Utah 1992).

4 *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175-6 (7th. Cir. 1995) *citing Seymour v. Olin Corp.*, 666 F.2d 202, 208 (5th. Cir. 1982).

5 SCO 364 effective August 1, 1979. The last common-law privilege was adopted in *Allred v. State*, 554 P.2d 411 (Alaska 1976) and it was the psychotherapist-patient privilege.

impossible for an employer to prove that an employee failed to exhaust the grievance process provided by a collective bargaining agreement. This Court should permit the legislature to debate the policy implications of such a new privilege or seek public input before adopting this unique privilege, as the legislature has yet to enact a statute which even implies the creation of such a privilege.[6] No court has adopted a union testimonial privilege applicable to civil litigation.[7] And privileges that are similar to the union testimonial privilege, such as the lay advocate privilege, do not apply in the labor relations context because labor relations statutes do not equate union representatives to attorneys.[8]

Finally, due process does not require the union testimonial privilege. State employees are afforded multiple opportunities to be heard both before and after the State terminates their employment. [Exc. 125, 128, 001-008] And the rules of discovery

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[6] Administrative Rule 44(e) permits this Court to adopt a new privilege but should submit notice to interested parties under this rule.

[7] Michael Moberly, *Extending A Qualified Evidentiary Privilege To Confidential Communications Between Employees And Their Union Representatives*, 5 Nev. L.J. 508, 568-569 (2004-2005). New York courts have arguably adopted the union testimonial privilege in limited circumstances. *Seelig v. Shepard* 152 Misc.2d 699, 699-700 (N.Y. Sup. Ct. 1991)(the case did not involve civil litigation); *See also, City of Newburgh v. Newman*, 70 AD.2d 362, 365-66 (3d Dept. 1979)(upholding an unfair labor practices decision of a labor relations board). Unlike courts in Alaska, New York courts have the authority to recognize new common law privileges and do not need to interpret whether statutory language and legislative history plainly demonstrate the legislature's intent to create a new privilege. *Am. Airlines, Inc. v. Superior Court*, 114 Cal.App.4th 881, 893 (Cal App. 4th 2004); Alaska Rules Of Evidence 501.

[8] *Am. Airlines, Inc. v. Superior Court*, 114 Cal.App.4th 881, 890 (Cal App. 4th 2004).

promote due process in that they ensure Mr. Peterson is not erroneously deprived of a property interest.[9]

The Court should decline to create a new evidentiary privilege for union communications, and thus should uphold the decision of the superior court allowing the state access to Mr. Peterson's union file.

II. Facts And Proceedings

Russell Peterson applied for a position as a Microcomputer/Network Technician II with the Division of Labor and Workforce Development ("the state") on January 16, 2007 and was hired on January 24, 2007. [Exc. 002-003] Unbeknownst to the state, Mr. Peterson falsified his employment application by certifying that he had never been convicted of a felony, when in fact he had been convicted of numerous felonies. [Exc. 016, 108, 110-111, 125] The employment application made it explicit that Mr. Peterson needed to disclose past felonies and applicants who fail to disclose are subject to termination. [Exc. 108-121].

In an odd twist of fate, it was Mr. Peterson's attorney, Mr. Mertz, who later tipped off the state to Mr. Peterson's undisclosed felony convictions. [Exc. 123-124] On June 1, 2009, Mr. Mertz sent a letter to Pat Shier, then Director of the State of Alaska Division of Retirement and Benefits. [*Id.*] In that letter, Mr. Mertz explained that Mr. Peterson had moved to Alaska in the late 1980's. [*Id.*] And that, in order to obtain

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[9] Alaska R. Civ. P. 26(b)(1). In this case, Mr. Peterson is not erroneously deprived of a property interest if he failed to exhaust administrative remedies. *Grant v. Anchorage Police Dept.*, 20 P.3d 553, 557 n. 16 (Alaska 2001) *citing Knight v. Am. Guard & Alert, Inc.* 714 P.2d 788, 791-92 (Alaska 1986).

"a fresh start," Mr. Peterson used a name ("Joshua Warner"), date of birth, and social security number that were not his own. [*Id.*] Mr. Mertz explained that Mr. Peterson had worked for the state under this false identity during the 1980's and asked that the Division of Retirement and Benefits correct Mr. Peterson's Public Employment Retirement System tier and other longevity-related benefits to give Mr. Peterson credit for his work under the false identity. [*Id.*] The state began to investigate Mr. Peterson's claims, and learned that he had failed to disclose several out-of-state felony convictions when he applied for his job. [Exc. 125]

Upon discovering the falsification, and after holding a pretermination meeting, the State terminated Mr. Peterson's employment on August 21, 2009. [*Id.*]. Mr. Peterson, who was a member of the Alaska State Employees Association Union, Local 52, American Federation of State County and Municipal Employees, AFL-CIO ("the union"), sought reinstatement through the grievance process set out in the collective bargaining agreement between the union and the state.[10] [Exc. 125, 128]

The union represented Mr. Peterson through three steps of the grievance process. [Exc. 095-096, 125, 128] None of the union's explanations for the falsification convinced the state to change its position. [Exc. 128] At no time during the grievance process did the state or any of its representatives seek to review communications between Mr. Peterson and the union. [Exc. 095-096; Tr. 033-039]

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[10] The Public Employment Relations Act (PERA) requires state employers and unions to enter collective bargaining agreements. The collective bargaining agreement must include a grievance process that has binding arbitration as its final step. AS 23.40.210(a)(2010).

In March, 2010, the union decided not to seek arbitration of Mr. Peterson's grievance under Step IV of the grievance process. [Exc. 128] If Mr. Peterson disagreed with that decision not to seek arbitration, he was required to appeal it with the union internally, but the state believes that he never did so, and thus failed to exhaust his administrative remedies.[11] [*Id.*] This failure would be fatal to his right to pursue his contract claims against the state in civil court.[12]

One month later, on April 30, 2010, Mr. Peterson filed a wrongful termination lawsuit in superior court. [Exc. 001-008]. In the complaint, Mr. Peterson alleges breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, and other ancillary causes of action. [*Id.*] Mr. Peterson claimed in his complaint that he exhausted his administrative remedies through the grievance process. [Exc. 004] Discovery ensued. [Tr. 184-187]

The state reviewed emails between Dick Isett (the union's business agent) and Benthe Mertl-Posthumus (the State's point person during the grievance process). [Exc. 128] Emails from Mr. Isett to Ms. Posthumous, which are hearsay, appear to indicate Mr. Peterson failed to appeal Mr. Isett's decision not to take this matter to arbitration. [*Id.*] Because Mr. Peterson's union file likely provides direct evidence of

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[11] *See, e.g., Crowley v. State, Dept. of Health and Social Services, Office of Children's Services*, Not Reported in P.3d, 2008 WL 5352309, 4 (Alaska 2011) (unpublished) (holding that an employee had a duty to appeal a business agent's decision not to seek arbitration to the union's grievance review committee in order to have exhausted administrative remedies).

[12] *Grant v. Anchorage Police Dept.*, 20 P.3d 553, 557 n.16 (Alaska 2001) *citing Knight v. Am. Guard & Alert, Inc.* 714 P.2d 788, 791-92 (Alaska 1986).

Mr. Peterson's failure to exhaust that the state could use in its defense, the state issued a proper subpoena to the union on September 29, 2010. [Exc. 050] Neither the union nor the AFL-CIO ("the amicus") objected to production of the union file at the time of the request. But Mr. Peterson filed a motion to quash on October 11, 2010. [Exc. 034-085] Although Mr. Peterson never appears to argue the file is irrelevant to this litigation, he argues that the records should be protected by an evidentiary privilege. [*Id.*]

Mr. Peterson's motion to quash placed the state at a considerable disadvantage in obtaining discovery, which was initially set to close in December 2010. [Tr. 033-039] The state deposed Mr. Peterson and sought follow-up discovery, but still has not obtained direct evidence of whether Mr. Peterson exhausted his administrative remedies. [*Id.*][13] In March 2011, the superior court denied Mr. Peterson's motion to quash, noting that under Evidence Rule 501, a court may recognize new privileges only if compelled to by a constitutional right, by a statute, or by changes made to the evidence rules by this Court in its rulemaking authority. [Exc. 158-175]. Mr. Peterson petitioned for review, and his petition was granted.

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[13] There have been several developments of the factual record regarding exhaustion since the superior court briefing took place in this case. On remand, if the Court adopts a union testimonial privilege, serious questions remain regarding whether Mr. Peterson waived the privilege in this case by asserting at his deposition that it was futile for him to exhaust administrative remedies with the union given the union's statements to him.

STANDARD OF REVIEW

Rulings on discovery are reviewed for abuse of discretion.[14] In determining whether a case presents facts warranting the recognition of a new privilege, certain general principles apply.[15] Foremost among these is the maxim that the public has the right to hear every man's evidence in a court of law.[16] Courts start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and it is the party which seeks the exception from this principle that bears the burden of establishing a privilege.[17] New privileges suppress evidence and compromise the search for truth.[18]

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[14] *Christensen v. NCH Corp.*, 956 P.2d 468, 473 (Alaska 1998).

[15] *In Re Grand Jury Subpoenas Dated January 20, 1998*, 995 F.Supp. 332, 334 (E.D.N.Y. 1988). This standard applies to the extent Mr. Peterson is asking the Court to create a common-law privilege.

[16] *United States v. Bryan*, 339 U.S. 323, 331 (1950).

[17] *In Re Grand Jury Subpoenas Dated January 20, 1998*, 995 F.Supp. 332, 334 (E.D.N.Y. 1988).

[18] *See Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (privilege denied for confidential university peer review proceedings); *United States v. Gillock*, 445 U.S. 360 (1980) (privilege denied for state legislators); *United States v. Nixon*, 418 U.S. 683 (1974) (privilege denied in part for communications between President and his senior advisors); *Couch v. United States*, 409 U.S. 322 (1973) (accountant-client privilege denied). See also *In re Grand Jury*, 103 F. 3d 1140, 1147 (3d Cir. 1997) (circuit court refuses to recognize parent-child privilege).

ARGUMENT

I. The Union File Is Relevant And Discoverable Under The Alaska Rules of Civil Procedure

Under the Alaska Rules of Civil Procedure, the state is entitled to seek Mr. Peterson's union file.[19] The Court has stated that "discovery should normally proceed without judicial participation . . . 'in a manner demonstrating candor and common sense.'"[20] Alaska courts have adopted "a system of liberal pretrial discovery where parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action.[21] And "relevance for purposes of discovery is broader than for purposes of trial."[22] Accordingly, "[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[23] Mr. Peterson does not appear to argue that his union file is not relevant or discoverable, absent a privilege. [Exc. 034-085] And the union file is relevant to more than Mr. Peterson's failure to exhaust administrative remedies.[24]

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19 Alaska R. Civ. P. 26(b)(1).

20 *Langdon v. Champion*, 745 P.2d 1371, 1373 (Alaska 1987).

21 *Noffke v. Perez*, 178 P.3d 1141, 1150 (Alaska, 2008).

22 *Lee v. State,* 141 P.3d 342, 347 (Alaska 2006).

23 Civil Rule 26(b)(1).

24 Every employment contract in Alaska is subject to the implied covenant of good faith and fair dealing. *Smith v. Anchorage Sch. Dist.,* 240 P.3d 834, 844 (Alaska 2010). While lacking a precise definition, the covenant "generally requires employers to treat

Moreover, pursuant to Alaska R. Civ. P. 45(d), the union could have lodged an objection to the extent of the state's subpoena. Had an objection been lodged, the state could have worked with the union to narrow its requests and avoid areas of concern to the union. If the state thought the union was not providing all the documents it could, the state could have sought redress in superior court.[25]

II. The Union File Is Not Subject To An Existing Privilege Or Joint Privilege

Union representation during the grievance process does not form an attorney-client relationship between the union representative and the member. Attorney-client privilege in Alaska is governed by Evidence Rule 503, which applies to communications between a client and a "lawyer or the lawyer's representative." Courts routinely refuse to extend the attorney-client privilege to union representation

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like employees alike and act in a manner that a reasonable person would regard as fair. *Mitchell v. Teck Cominco Alaska, Inc.*, 193 P.3d 751, 760 (Alaska 2008). Thus, one question for trial is whether the state treated Mr. Peterson fairly during the grievance process. Mr. Peterson's union file could lead to the discovery that some of Mr. Peterson's explanations for his failure to report felonies surfaced only during the grievance process and not before. [Exc. 094-097] Moreover, if Mr. Peterson made false or misleading statements to his union, the file could establish that Mr. Peterson is not a credible witness which is always at issue in a trial. [*Id.*] If there are other grievances in the file involving Mr. Peterson, they would tend to show bias of potential witnesses. [*Id.*] The State's request is merely intended to flush out and develop these factual issues for trial. [*Id.*]

[25] *See McCoy v. Southwest Airlines,* 211 F.R.D. 381, 384-385 (C. Dist. Cal. 2002)(where a non-party witness objects to the scope of discovery, the nonparty can prevent disclosure by objection and the party seeking discovery must then obtain an order from the court directing compliance).

because the relationship between a union and its members is not that of a lawyer and a client.[26]

The union represents several interests during the grievance process, not just the interest of the member bringing the grievance. Once an employee bargaining unit designates a union, the members of that bargaining unit agree that the union is the exclusive representative of all the unit members.[27] The union advocates for the individual member during the grievance process and is obligated to do so.[28] But at times, the union must sacrifice the interests of individual employees for the sake of the larger bargaining collective in a unionized workforce.[29] The betterment of the entire unit is at stake in each and every grievance,[30] including Mr. Peterson's grievance. The union maintains considerable discretion over grievance matters.[31] The union's duty

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26 *See Walker v. Huie*, 142 F.R.D. 497 (D. Utah 1992) (refusing to apply attorney-client privilege to union representative because he was not an attorney). *Rawlings v. Police Dep't of Jersey City*, 627 A.2d 602, 609 (N.J. 1992) (same).

27 AS 23.40.110(a)(5).

28 *Kollodge v. State*, 757 P.2d 1028, 1034 (Alaska 1988).

29 *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175-1176 (7th. Cir. 1995) *citing NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

30 *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965); *Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

31 *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175 (7th. Cir. 1995) *citing Seymour v. Olin Corp.*, 666 F.2d 202, 208 (5th. Cir. 1982). *See Tedesco v. City of Stamford*, 610 A.2d 574, 582-83 (Conn., 1992) *citing Winston v. United States Postal Service*, 585 F.2d 198, 208 (7th Cir. 1978) (The union has a duty to discountenance disruptive and frivolous claims).

to the membership is critical when it decides not to take a dispute with management to arbitration, which can be expensive for the union.[32] This is not an attorney client relationship.

In an effort to bolster his claim that his union representative is an attorney, Mr. Peterson distorts the state's role in "requiring" union grievance proceedings. Mr. Peterson argues that "the State requires the employee pursue a mandatory grievance process before he can file suit." [Pet. Br. 2] He goes on to argue "the State has explicitly and emphatically decreed that attorneys may not represent employees in Mr. Peterson's situation, but only union officials may do so." [Pet. Br. 7, 4, 9] The state employer is not forcing Mr. Peterson into the grievance process. The Alaska Legislature requires state agencies to enter into collective bargaining agreements providing grievance procedures.[33] The state is required to recognize the union as the member's exclusive representative at all times, and work exclusively with the union during the grievance process.[34]

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[32] *See Kollodge v. State*, 757 P.2d 1028, 1036 (Alaska 1988) (the union did not breach its duty to fairly represent the member when it decided not to arbitrate, given that after careful review, the union felt it did not have a strong chance of prevailing at arbitration).

[33] AS 23.40.240; AS 23.40.110(a)(5); *Barnica v. Kenai Peninsula Borough School Dist.*, 46 P.3d 974, 977 (Alaska 2002)(plurality).

[34] *Id. See also* AS 23.40.210(a). The legislature determined that these rules best serve the State of Alaska by engendering harmonious and cooperative relations between state employers and its employees.

Mr. Mertz's assistance of Mr. Peterson during the grievance process does not create a joint privilege between the union and Mr. Mertz either. [Tr. 020-021] The presence of union representatives at meetings between attorneys and clients destroys the attorney-client privilege.[35] Labor law disfavors the involvement of privately retained counsel in the grievance process because it bypasses the union and undermines the strength of the union's exclusive representation.[36] Furthermore, the union is not Mr. Mertz's agent.[37] Thus, communications Mr. Mertz had with the union are not subject to a privilege.

III. The Court Has Limited Authority Outside Of Rulemaking To Create New Privileges

Because Mr. Peterson's union file is not protected by the attorney-client privilege, only a newly created union testimonial privilege would prevent its disclosure in discovery.[38] No Alaska court has recognized such a privilege, and no other jurisdiction

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35 *Atwood v. Burlington Indus. Equity, Inc.*, 908 F. Supp. 319, 323 (M.D.N.C. 1995).

36 *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1484 (9th Cir. 1985) *citing Malone v. United States Postal Service,* 526 F.2d 1099 (6th Cir. 1975); *Johnson v. United Steelworkers of Am.*, 843 F. Supp. 944, 947 (M.D. Pa. 1994). *See McLean Hosp.*, 264 N.L.R.B. 459, 472 (1982) (Representation by private counsel is not tantamount to union representation and it is not considered a shared activity of the union and the attorney when they communicate).

37 *Cf. American Nat. Watermattress Corp. v. Manville*, 642 P.2d 1330, 1333-1334 (Alaska 1982) (statement of facts given by a prospective client to an attorney's agent is protected by the attorney-client privilege. The union is not an agent of Mr. Peterson's private counsel).

38 *Noffke v. Perez*, 178 P.3d 1141, 1150 (Alaska, 2008).

has created such an extensive privilege in civil courts.[39] This Court should decline to create a union testimonial privilege given its decision to codify the law of privileges in Alaska and to stop creating new common-law privileges, coupled with the strong public policy reasons against such a new privilege.

A. The Court has already decided not to adopt new privileges as a matter of common law

This Court decided in 1979 to limit the creation of new common-law evidentiary privileges by codifying the law of privileges.[40] The Court hired Professor Stephen Saltzburg of the University of Virginia School of Law to work with local practitioners to codify Alaska's privileges.[41] This Court has not adopted a common-law privilege since this project.[42] Under Alaska law, the Court through its rulemaking

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[39] New York courts have arguably adopted the union testimonial privilege in limited circumstances during management investigations into employee wrongdoing. *Seelig v. Shepard* 152 Misc.2d 699, 699-700 (N.Y. Sup. Ct. 1991); *City of Newburgh v. Newman*, 70 A.D.2d 362, 365-66 (3d Dept. 1979) (neither case involved civil litigation).

[40] In the 1970's, there was nationwide debate whether to cap the number of privileges in state and federal courts, or whether to allow individual courts to fashion common law privileges. Congress, for instance, enacted Federal Rule of Evidence 501, a rule that leaves the recognition of testimonial privileges in the hands of the courts to be developed as part of common law. Symposium, *Giving Codification A Second Chance – Testimonial Privileges And the Federal Rules of Evidence*, 53 Hastings L.J. 769, 770; 790 (2002).

[41] Various back up documents to SCO 364 are illustrative of this process, and are attached as Appendix 1.

[42] The last common-law privilege was adopted in *Allred v. State*, 554 P.2d 411 (Alaska 1976) and it was the psychotherapist-patient privilege. *See B.H. v. State*, 1995 WL 17220341 (Alaska App. 1995) (unpublished opinion) (declining to adopt the parent-child privilege noting that new privileges should be adopted by changes to court rules).

function or the Legislature through statute balances the policy benefits of creating a new testimonial privilege against the threat that the new privilege will shield too much evidence from the trier of fact.[43] The Court will occasionally recognize more limited privileges but only if that recognition is required by a constitutional provision like the executive privilege doctrine.[44]

B. The Public and the Legislature must balance public policy when deciding the merits of this privilege

First, new testimonial privileges are disfavored because they suppress evidence and compromise the search for truth.[45] This is why the U.S. Supreme Court has repeatedly ruled against the recognition of new privileges beyond those already existing in common law.[46]

Beyond this, the legislature and the public must balance various interests when deciding the merits of a new privilege. Privileges create zones of silence which are disfavored.[47] And these zones of silence can have important unintended consequence to

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43 Symposium, *Giving Codification A Second Chance – Testimonial Privileges And the Federal Rules of Evidence*, 53 Hastings L.J. 769, 797 (2002). The Court should not consider the privilege under common law principles and instead await a proposal under its rulemaking function which allows for public comment under Administrative Rule 44(e).

44 *Doe v. Superior Court*, 721 P.2d 617, 622-623 (Alaska 1986); *Capital Information Group v. State*, 923 P.2d 29, 35-36 (Alaska 1996).

45 *Supra* note 18.

46 *Id.*

47 *Id.*

our society. For instance, anti-discrimination laws prohibit discrimination on the basis of sex, marital status, changes in marital status, pregnancy, parenthood, age, race, disability, color, or national origin.[48] The legislature expressly applied this prohibition to unions by making it unlawful for unions to aid and abet in such discrimination.[49] If the Court establishes a union testimonial privilege, the union would have to aid and abet a member's discriminatory conduct by keeping it secret unless the employee signs a waiver.[50] This would undermine Alaska's anti-discrimination laws.[51]

A union testimonial privilege would also undermine the significance of the grievance process, arbitration of labor disputes, and the principle of self-governing. Grievance procedures in collective bargaining agreements between unions and management are mandatory in the sense that they preclude the use of other judicial remedies[52] so that the labor disputes can be handled internally. And when grievance

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48 AS 18.80.220.

49 AS 18.80.260.

50 In *Am. Airlines Inc. v. Superior Court*, a plaintiff alleged that his union representative had information that would support his claims of racial discrimination. At deposition, the union representative refused to answer questions relevant to discrimination he had witnessed on the basis that his discussions with other employees about derogatory remarks were protected by a union representative-union member evidentiary privilege. The court denied the privilege noting that such a privilege could severely compromise investigations into claims of harassment, discrimination, and unlawful conduct. *Am. Airlines Inc., v. Superior Court*, 114 Cal.App.4th, 881, 890 (Cal App. 4th 2004).

51 *Id.*

52 *Barnica v. Kenai Peninsula Borough School Dist.*, 46 P.3d 974, 977 (Alaska 2002)(plurality).

procedures have arbitration as a final step, that system promotes harmonious and cooperative government employer-employee relations.[53] The grievance process encourages the early resolution of disputes by discussion and conciliation before disputes escalate to unmanageable proportions.[54] For these reasons, courts typically give primacy to contractual grievance/arbitration clauses.[55] Mr. Peterson prevents the union and the state from weighing the merits of his grievance by not exhausting his administrative remedies, and he should not be allowed to withhold evidence of his failure to exhaust.[56]

C. Courts in other jurisdictions have sometimes created privileges by statutory implication but only if an underlying statute truly makes no sense absent a privilege

Sometimes courts recognize new privileges when their creation is implied in statute,[57] but the Alaska Legislature has not implied the creation of a union testimonial

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53 *Id.* at 978.

54 *Id.*

55 *Id.*

56 These policy concerns outweigh the unfounded concerns cited by Mr. Peterson. [Pet. Br. 24-28] First, Mr. Peterson is entitled to the state's internal documents if no privilege attaches. [Pet. Br. 27] Moreover, concerns over the privacy of collective bargaining strategies are unfounded. [Pet. Br. 27]. The union may petition the Alaska Labor Relations Agency (ALRA), a quasi-judicial executive branch agency, for redress if that were to occur. AS 23.40.110(a)(1);120-140. ALRA could issue a cease and desist letter, thereby prohibiting that conduct. *Alaska Comm. Colleges' Federation of Teachers, Local No. 2404 v. Univ. Of Alaska*, 669 P.2d 1299, 1305 (Alaska 1983). The union grievance proceedings will continue to function even if the union file is not subject to a privilege in subsequent litigation raised by the former employee. [Pet. Br. 28]

57 *Welfare Rights Organization v. Crisan*, 661 P.2d 1073, 1077 (Cal. 1983).

privilege in any statute. The Alaska Legislature at times creates civil court privileges and when it does so, its intention is crystal clear.[58]

Mr. Peterson relies on *Welfare Rights Organization v. Crisan*, a case in which a California court recognized a privilege as implied in statute.[59] The statute provided that an applicant for welfare benefits could be represented by counsel or by an "authorized representative" at an administrative hearing regarding the denial or termination of benefits.[60] In *Crisan*, the state subpoenaed the records of an authorized representative before the administrative hearing.[61] The California Supreme Court held that the subpoena request was improper because the statute creating the right to a hearing required, by implication, that communications with an authorized representative be privileged for purposes of the hearing.[62] *Crisan* did not establish a court privilege for such communications, only a privilege for purposes of the administrative hearing created by the statute.[63] And *Crisan* did not create a new evidentiary privilege as a matter of

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58 *See* AS 09.25.300 (public official or reporter privilege for official duties); AS 24.55.260 (ombudsman and their staff for official duties); AS 09.25.400 (domestic violence/sexual assault victim communications with counselors are subject to a privilege).

59 *Welfare Rights Organization v. Crisan*, 661 P.2d 1073, 1077 (Cal. 1983).

60 *Id.*

61 *Id.* at 1074.

62 661 P.2d 1073, 1077 (Cal. 1983).

63 *Am. Airlines Inc., v. Superior Court*, 114 Cal.App.4th 881, 889 (Cal App. 4th 2004). The *Crisan* holding would be akin to creating a testimonial privilege for Mr. Peterson during the grievance process with the union.

judicial policy; rather, it held that the legislature impliedly created the privilege because the statute equated "authorized representative" with "counsel."[64]

Courts have rejected the extension of *Crisan* to labor relations laws because those laws do not equate union representation to counsel. In *McCoy v. Southwest Airlines*, plaintiffs in a civil wrongful termination suit sought the union testimonial privilege, arguing that a union representative is equal to a lay advocate.[65] The federal court correctly noted that it could not provide such a privilege in a civil proceeding absent a specific statute to that effect, like the one in *Crisan*.[66] The court made a fundamental distinction; when a statute equates lay advocacy to counsel, the legislature has created an unfair trap if it does not provide a privilege between the representative and the claimant.[67] But because no such inducements were present in the labor relations statutes in *McCoy* for purposes of civil litigation, the court did not recognize the privilege.[68] Similarly, in *Am. Airlines Inc. v. Superior Court*, the court held that even if a statute creates some form of representation, the statute does not create an evidentiary privilege in all forums.[69] The privilege has to be implied in the words of the

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64 *Id.*

65 *McCoy v. Southwest Airlines*, 211 F.R.D. 381, 387 (C. Dist. Cal. 2002).

66 *Id.*

67 *Id.*

68 *Id.*

69 *Am. Airlines Inc., v. Superior Court*, 114 Cal.App.4th, 881, 888

statute.[70] In *Crisan,* the statute expressly pertained to authorized advocates before a tribunal under a narrowly drawn legislative administrative hearing scheme.[71] On the other hand, labor relations statutes only have general declarations of public policy that employees have the freedom to designate representatives "to negotiate the terms and conditions" of employment.[72] That general language, the court reasoned, does not create any specific proceedings or hearings from which it can be inferred the existence of an all encompassing privilege.[73]

This Court should also decline to create a union testimonial privilege based on the reasoning in *Crisan*, because no Alaska statute equates union representatives with counsel.

(Cal App. 4th 2004).

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 890. The amicus advances a similar argument; that because union members must be free to engage in union activities under AS 23.40.110(a)(1) and because the Alaska Labor Relations Agency (ALRA) has the authority to curtail unfair labor practices, this Court may create a union testimonial privilege. [Am. Br. 2-3] Unlike in *Crisan*, PERA does not establish a statutory privilege, because it says nothing about lay advocacy or civil court privileges. AS 23.40.070-260. This Court interprets PERA under its plain meaning and cannot stretch its provisions to include the union testimonial privilege. *Univ. of Alaska Classified Employees Assoc, et. al. v. Univ. of Alaska*, 988 P.2d 105, 108 (Alaska 1999). Moreover, the amicus arguments were not made by Mr. Peterson to the trial court and have been waived. *Millette v. Millette,* 177 P.3d 258, 267 (Alaska 2008) ("It is well established that issues are waived for purposes of appeal if not adequately raised [in the trial court].").

IV. Other Jurisdictions Have Declined To Adopt The Union Testimonial Privilege

Courts sometimes find that communications between a union and its members are confidential within forums devoted exclusively to the resolution of labor-management disputes.[74] However, once the union concludes its representation and the member either pursues civil litigation or is summoned to a criminal court proceeding, courts find that the member cannot withhold evidence on the basis of a union testimonial privilege.[75]

The cases Mr. Peterson cites recognize a privilege only while the union is actively representing the member in a forum devoted to the resolution of labor-management dispute. [Pet. Br. 11-19] For instance, in *Cook Paint & Varnish Company*, a private employer sought details of the union steward's conversations with various employees shortly before the employee's grievance went to arbitration.[76] Unlike in *Cook Paint & Varnish*, in this case the state only subpoenaed the union file after the

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74 *See* Michael Moberly, *Extending A Qualified Evidentiary Privilege To Confidential Communications Between Employees And Their Union Representatives*, 5 Nev. L.J. 508, 568-569 (2004-2005).

75 *See e.g. Patterson v. Heartland Industrial Partners, LLP*, 225 F.R.D. 204, 207 (N.D. Ohio 2004)(rejecting the assertion of an "NLRA union privilege" during pretrial civil discovery); *In re Grand Jury Subpoena*, 926 A.2d 280, 284 (N.H. 2007)(rejecting a union privilege argument during a grand jury proceeding); *In Re Grand Jury Subpoenas Dated January 20, 1998*, 995 F. Supp. 332, 334 (E.D.N.Y. 1998) (declining to create a new common law union testimonial privilege under Federal Rule of Evidence 501); *American Airlines Inc., v. Superior Court*, 114 Cal.App.4th 881, 889 (Cal App. 4th 2004) (rejecting the union testimonial privilege); *McCoy v. Southwest Airlines*, 211 F.R.D. 381, 387 (C. Dist. Cal. 2002) (same).

76 *Cook Paint and Varnish Company*, 258 N.L.R.B. 1230, 1231-32 (1981).

union refused to take the grievance to arbitration and after Mr. Peterson filed his lawsuit. Similarly, the other cases Mr. Peterson cites involve a request for information while the union still represented the member either in a forum devoted to the resolution of labor-management disputes or pursuant to a management investigation.[77]

Because the State did not request discovery from the union or Mr. Peterson during the grievance proceedings, the cases Mr. Peterson cites do not support the creation of a union testimonial privilege in this case.

V. Due Process Concerns Do Not Require A Union Testimonial Privilege

Mr. Peterson argues that due process requires this Court to create a union testimonial privilege. [Pet. Br. 20-24] This Court should decline to consider this argument because it was inadequately raised in the superior court; due process was so

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[77] *U.S. Department of Treasury*, 38 F.L.R.A. 1300, 1303 (1991) (employer sought a union steward's interactions with the member while the union was still representing the employee); *Int'l Bhd. Of Elec. Workers v. Pub. Util. Dist. 1*, Dec. 7656-A, 2003 WA PERC LEXIS 46 (Wash. Pub. Employment Relations Comm'n June 11, 2003) (employer made the request while a grievance was ongoing); *N.H. Troopers Ass'n v. N.H. Dept. of Safety*, PELRB Decision No. 94-74, 5 (August 31, 1994)(an employer committed an unfair labor practice by ordering union representatives to disclose information while the threat of disciplinary action and investigation remained); *City of Newburgh v. Newman*, 70 A.D.2d 362, 366 (N.Y.A.D. 1979) (The questioning of a union official as to his observations and communications with a member facing disciplinary proceedings was held to deter members from seeking advice, so the practice was banned); *Seelig v. Shepard*, 152 Misc.2d 703 (N.Y. Sup. Ct. 1991) (a New York trial court modified an administrative subpoena where the state employer had yet to take any action against a union member). *Ill. Educ. Labor Rel. Bd. v. Homer Cmty. Consol. Sch. Dist., No. 208*, 547 N.E.2d 182, 183-84; 186 (Illinois 1989)(The court, through a combination of statute and common law, ruled that collective bargaining strategy notes were subject to a privilege in a hearing before The Illinois Educational Relations Board).

under-briefed that Judge Pallenberg did not even address the argument in his ruling.[78] But even if this Court does consider the argument, it fails because there is no threat to Mr. Peterson's due process rights as he is being afforded a fair trial on his claims in superior court.

The Court employs the three-part balancing test from *Matthews v. Eldridge* for determining due process requirements.[79] First, the court considers the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[80]

The risk of erroneous deprivation of Mr. Peterson's employment interest if the privilege is not recognized is low.[81] Under the current procedures, Mr. Peterson has been afforded three important opportunities to be heard; all of which provide checks

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78 *Millette v. Millette*, 177 P.3d 258, 267 (Alaska 2008) ("It is well established that issues are waived for purposes of appeal if not adequately raised [in the trial court]."). *State v. Public Safety Employees Ass'n* --- P.3d ----, 2011 WL 3241866 (Alaska 2011) *citing Barnett v. Barnett*, 238 P.3d 594, 598 (Alaska 2010).

79 *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 181 (Alaska 2009); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

80 *Id.*

81 Mr. Peterson does not have a right to state employment but he has a sufficient property interest in his state employment to evoke due process concerns. *Nichols v. Eckert*, 504 P.2d 1359, 1363 (Alaska 1973).

against erroneous deprivation. First, the state, the union, and Mr. Peterson held a pretermination meeting before the state terminated his employment. [Exc. 125] After that meeting, where Mr. Peterson was afforded an opportunity to be heard why he falsified the application, the state decided to terminate Mr. Peterson's employment. [*Id.*] Then, the grievance process ensued, further protecting against erroneous deprivations of Mr. Peterson's employment property interests.[82] Mr. Peterson had an opportunity to be heard and represent his interests through the less formal and less expensive grievance process, which is handled by his union.[83] Third, Alaska law places no impediment on an employee's right to obtain direct review of the employer's decision to terminate the employee even after the union fairly refuses to take the dispute to arbitration.[84] Thus, Mr. Peterson is afforded one last due process check to make sure the state did not violate the covenant of good faith and fair dealing in terminating his employment interest.[85]

The additional safeguard Mr. Peterson seeks — an evidentiary privilege — is not required by due process. Mr. Peterson, by filing this lawsuit, has put the union

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82 *See Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992) (three-step grievance and arbitration procedure provided employee with due process).

83 *See Tedesco v. City of Stamford*, 610 A.2d 574, 582-83 (Conn., 1992).

84 *Casey v. City of Fairbanks,* 670 P.2d 1133, 1138 (Alaska 1983).

85 Under federal law, Mr. Peterson would never be able to assert his contract claims in a court of law unless the union breached its duty to fairly represent him during the grievance process. *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992) (three-step grievance and arbitration procedure provided employee with due process); *Vaca v. Sipes,* 386 U.S. 171, 191 (1967).

grievance process squarely at issue.[86] The State is being sued for breach of good faith and fair dealing. [Exc. 001-008] One of the issues for trial is whether the state breached its duty of good faith and fair dealing during the grievance process, and the union file goes directly to this issue. [*Id.*] Additionally, the privilege sought would protect Mr. Peterson from his failure to exhaust his administrative remedies. The requested privilege is an attempt to obtain an advantage by keeping truth and evidence away from the trier of fact which is not an appropriate due process safeguard, especially after it is the employee who initiates this type of lawsuit; not the state.

Finally, under the third part of the *Matthews v. Eldridge* analysis, the Court must consider the Government's interest in not creating this privilege.[87] Contract claims require exhaustion of remedies.[88] If union members can evade the final stages of the grievance process, thereby depriving the state and the union a full opportunity to resolve a dispute, litigation costs will go up. Cases that could otherwise be disposed of at summary judgment will needlessly turn into jury trials where the union member's version of exhaustion will remain unchallenged to the trier of fact.

The risk of erroneous deprivation of Mr. Peterson's employment interest does not merit the creation of a new testimonial privilege in this case.

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86 *Supra* note 24.

87 *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 181 (Alaska 2009); *Mathews v. Eldridge*, 424 U.S. 319, 335, (1976).

88 *Grant v. Anchorage Police Dept.*, 20 P.3d 553, 557 n. 16 (Alaska 2001) *citing Knight v. Am. Guard & Alert, Inc.* 714 P.2d 788, 791-92 (Alaska 1986).

The Government's interest in upholding the sanctity of the grievance process is a substantial factor weighing against this new privilege.

CONCLUSION

The Court should not create a new common-law privilege in order to keep relevant evidence away from the State. The Court should affirm the decision of the trial court below.

DATED this 21st day of September, 2011.

JOHN J. BURNS
ATTORNEY GENERAL

By:
John M. Ptacin
Assistant Attorney General
ABA No.: 0412106

APPENDIX

Alaska Court System

State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR
303 K STREET
ANCHORAGE, ALASKA
99501

March 6, 1978

Professor Stephen Saltzburg
Associate Professor
University of Virginia
School of Law
Charlottesville, Virginia 22901

Dear Professor Saltzburg:

Enclosed please find a draft of the proposed Alaska Rules of Evidence with revisions made by the Committee on Rules of Evidence appointed by the Alaska Supreme Court. Also enclosed is a list of specific questions and requests for revision and clarification, as well as a copy of the committee's preliminary revision and various letters submitted by Alaskan attorneys and organized bar groups commenting on the preliminary revision.

As you will note, the revised draft of the committee includes numerous changes to your original proposal; they are not described at length. To the extent that no reason is given for the revisions of the committee in the materials enclosed, I would hope that you will find the revisions self-explanatory. In addition to the specific questions submitted to, the committee would very much enjoy hearing comment by you on any of the revisions which we have made in the event that you think such comment might be appropriate.

Please bear in mind that, in drafting revisions to your original proposals, the committee has worked under the assumption that we, as Alaskan attorneys, are probably more familiar with the realities of legal practice in Alaska and specific Alaskan case law than you might be. However we fully realize that we would not, either individually or as a committee, be justified in claiming any particular expertise in the law of evidence, and certainly not the type of expertise which you possess. Therefore, in the event it appears that, in making changes to acommodate peculiarly Alaskan interests, this committee has ended up with proposals which would in the long

run be undesirable or untenable, please do not hesitate to inform us of this fact.

The committee would very much appreciate hearing from you as to a tentative date when we could meet with you to discuss the particular questions and requests which we are forwarding, as well as the revision as a whole. Since I have recently abandoned ship and am no longer a member of the State Judiciary, you can call or write me directly at the United States Attorney's Office in Anchorage, 805 W. Fourth Avenue Room 249, Anchorage, Alaska 99501, (907) 277-1491.

I would like to apologize to you for the delay in getting these materials to you, but circumstances involved with my job changeover made the delay unavoidable. I look forward to hearing from you in the near future.

Very truly yours,

Alexander O. Bryner
Chairman
Committee on Rules of Evidence

AOB/bjs
Encls.

cc: Chief Justice Boochever
Arthur H. Snowden, II

Committee Members:
Walter L. Carpeneti
Patrick Gullufsen
Judge William H. Sanders
Judge Victor D. Carlson
Judge James R. Blair
Richard L. Nadson
Richard Gantz

MEMORANDUM TO PROFESSOR STEVEN SALTZBURG

REGARDING: REVISED PRELIMINARY COMMITTEE REDRAFT

OF PROPOSED ALASKA RULES OF EVIDENCE

Rule 106. Request for Addition to Commentary: The committee would request Professor Saltzburg to draft additions to the commentary on Rule 106, as revised, explicitely stating that the trial court has broad discretion in formulating specific mechanisms for deletion of privileged or irrelevant information; also that material deemed by the court to be privileged or irrelevant and, therefore, not subject to disclosure under this Rule, should be preserved under seal by the trial court for the purpose of appeal.

Rule 107. Additional Commentary: The committee's deletion of originally proposed Rule 107 reflects the view that, while judicial comment on the weight or effect of evidence should not, per se, be encourage, the Court, throughout a trial and, specifically, in the course of giving instructions such as those pertaining to credibility of accomplices and the weight to be given to out of court admissions by the accused in a criminal matter, is in effect commenting on the weight of evidence. Since comment by the judge has not constituted a problem in the past and proposed Rule 106 appeared potentially problematical, no specific rule precluding comment was deemed necessary.

Article II. Explanation and Request for Revision of Commentary: Article II has been redrafted in it's entirety. Much of the redraft was simply stylistic in nature, but substantial portions were revised to conform the Rule with

committee's impressions concerning the reality of judicial notice in the state of Alaska. Very few libraries in the state of Alaska contain current copies of statutes in effect in all states and territories of the United States. Similarly, very few libraries have full sets of regional reporters. There are numerous widespread areas of the state in which superior and district courts may regularly be holding sessions where lack of adequate research facilities constitutes a real problem. The committee's view was that the essential difference between mandatory judicial notice without request and mandatory or optional judicial notice upon request of a party was simply that, in the latter circumstances, the requesting party would be under an obligation to assure that correct information concerning the present state of the law or fact sought to be noted was made available to the court.

Due to lack of adequate research facilities in numerous relatively remote locations, it was deemed preferable to place the burden of providing adequate information upon which to base judicial notice on the requesting party, who would usually be in a position to anticipate the need for a request well in advance of trial, with sufficient time to obtain the requisite information. The extensive revision of Article II will require appropriate corresponding revision of the commentary pertaining to this Article.

Rule 203(a). Question and Request for Consideration of Possible Revision: The committee would like Professor Saltzburg to consider the possibility of adding additional language to the section permitting mandatory instructions to the jury with

respect to incontrovertible matters such as jurisdiction and venue. While it is no doubt true that the court cannot direct the jury in a criminal case to find as true noticed facts which are of an important or disputable nature, members of the committee felt that as to minor or incontrovertible issues, the court might properly instruct the jury in a binding fashion to accept as true a fact judicially noted.

Rule 203(a). Request for Addition to Commentary. The committee would like the commentary to this section to provide specifically that the meaning of the word "tenor" as used in the section is synonymous with the word "substance." Although "substance" was deemed a clearer word by the committee, "tenor" was retained to maintain continuity with the Federal Rules.

Rule 303. Request for Additional Commentary: The commentary to Rule 303, as revised by the committee, should indicate that the committee reinstated in full the language of the United States Supreme Court Rule from which the original Alaska proposal was drafted. Reinstatement of the U.S. Supreme Court Rule was decided on due to the advantage of the commentary on that rule provided in the form of the Advisory Committee's note contained in the Appendix to the Federal Rules of Evidence. See, e.g., Federal Rules of Evidence Annotated by the Federal Judicial Center, at 230-33 (Mathew Bender 1975). The committee was of the opinion that the Advisory Committee's note would be of substantial benefit in clarifying the intent and practical application of Rule 303.

Rule 303(a). Request for Additional Commentary: The committee would like to have additional commentary similar to

the language of the Advisory Committee's note to the United States Supreme Court Rule to the effect that Rule 303(a) does not apply to the presumption of innocence in a criminal case. Additionally, the commentary should make explicit that, in order to meet the presumption, the accused need not actually offer affirmative of evidence if evidence brought out on cross-examination or on direct examination in the course of the prosecution's case in chief is in itself sufficient.

Rule 404(a)(2)(ii). Request for Additional Commentary: Commentary should be added specifically stating that a hearing in camera should normally be on record with the right to cross-examination, the extent remaining in the court's discretion. The court additionally would have discretion to keep the record of proceedings in camera sealed pending appellate review in the event that it rules inadmissible the character evidence in question.

Rule 405(b). Request for Additional Commentary: The committee felt that it would be helpful to have specific examples given of the types of charges or cases in which character is an essential element of the charge or defense for the purpose of applying Rule 405(b).

Rule 410. Request for Additional Commentary. The committee's amendment of subsection (b)(1) of Rule 410 should be specifically dealt with in the commentary. The commentary should reflect that the committee's amendment of subsection (b)(1) was adopted to obviate the possibility of use of the word "impeachment", as it appeared in the original proposal, being misconstrued as limiting the use of prior inconsistent

statements beyond what is currently permissible under the Alaska Supreme Court's ruling in Beavers v. State.

Rule 412. Possible Redraft of Commentary: In light of the fact that the committee forwarded the original draft of Rule 412, along with one specific alternative, both without recommendation subject to the committee's statements appended as a footnote to Rule 412, the commentary applying to Rule 412 may have to be redrafted in accordance with the final version of the Rule adopted by the Alaska Supreme Court. It should be noted that the original proposal constitutes a narrowing of the current provisions of Criminal Rule 26(g) in that it would preclude a third party from having standing to assert violations of 5th Amendments rights vicariously. Although vicarious assertion of 5th Amendments rights is generally not permitted in other jurisdictions (see Dimmick v. State), the history of adoption of Criminal Rule 26 makes it clear that that Rule was specifically adopted to confer standing to assert 5th Amendment rights vicariously. See State v. Sears (1976). In the event that the Alaska Supreme Court should adopt Rule 412 as originally proposed, the commentary should explicitely reflect the change with respect to the issue of standing. The commentary in its present form is silent on the issue.

Rule 501. Request for Additional Commentary: The committee would like the commentary to Rule 501 to indicate specifically that, with the exception of the additional words "organization, or entity", the Rule is identical to former United States Supreme Court Rule 501.

commentary does not deal with this omission, and it is not clear whether the omission is inadvertent, stylistic, or substantive. It is generally the committee's view that in instances where a proposed Alaska Rule follows a Federal or United States Supreme Court Rule verbatim with the exception of several words, to avoid possible confusion and misinterpretation, the reason for the difference ought to be clarified in the commentary, even if the change is simply one of style.

Rule 503(d)(1). Additional Commentary: The committee's addition of the words "were used" in subsection 503(d)(1) was intended to cover instances where information given by an attorney--though initially given in the course of consultation for legitimate purpose--is subsequently used by the client to commit a crime.

Rule 504(b). Question: The committee did not understand exactly why this subsection adopted the language of the United States Supreme Court Rule verbatim except in changing the word "or" or "and" in the phrase "and persons who are participating. . . ." Use of the disjunctive "or" seems preferable. Can this be clarified?

Rule 504(c). Question: Although the committee was somewhat reluctant to change the proposed draft without more information, members of the committee were concerned as to whether there is any good reason to allow survival of privileges such as the attorney-client or physician-patient privilege after the death of the client/patient. If there is no good justification for survival of the privilege, then should it not terminate upon death of the client or patient?

Rule 504(d)(1). Question: Why isn't the language of the United States Supreme Court Rule 504(d)(3), with the addition of the word "physical", sufficient here? As is, the grammatical structure of Rule 504(d)(1) appears to be rather awkward and difficult to understand.

Rule 504(d)(4). Request for Revision of Commentary: It was the sense of the committee that the language of the commentary to the effect that "control over disclosure placed largely in the hands of a person in whom the patient has already manifested confidence" is largely unfounded in reality. Almost invariably, physicians or psychiatrists testify in involuntary commitment proceedings by court appointment, and, from the inception, there is little or no real physician-patient relationship in existence. The committee feels that this fact should be stated as the actual basis for the exception to the privilege, rather than the commentary as it now stands.

Rule 505. Request for Revision of Commentary: The privilege provided for in Rule 505 has been substantially amended by the committee, and spousal immunity has been deleted. The commentary should be revised accordingly. Additionally, the committee would like to include specific commentary with respect to some of the revised provisions. As to Rule 505(b)(4)(C), the commentary should specify that the exception contained in the subparagraph is not intended to be restricted solely to the natural or adoptive child of the spouse. With respect to Rule 505(b)(10), the committee thought that clarification as to the scope of the exception

created should be provided in the commentary by a specific statement that a communication between spouses is not confidential if it is made in the context of an agency relationship between the spouses, or in the context of any primarily business and non-marital relationship in which the marital relationship between the spouses is merely incidental to the business or non-marital communication. With respect to Rule 505(d) the committee would like to add to the commentary that a communication is not confidential if the context indicates that it either is not intended to be kept secret by the spouse making the communication or is not made by the communicating spouse as a result of the marital relationship. In general, the committee would appreciate comment on its revised form of Rule 505.

Request for Commentary Pertaining to Omission of United States Supreme Court Rule 509: The "secrets of state" privilege encompassed by former United States Supreme Court Rule 509 is properly omitted from the Alaska Rules of Evidence in the judgment of the committee; however, the committee thinks that commentary with reference to omission of the provision should make it clear that the omission does not justify the conclusion that all "state secrets" ought to be unprivileged; the only inference to be drawn from the omission is that, to the extent that any "state secrets" should be privileged, the problem of privilege should be left for resolution by legislation or regulation.

Rule 509. The committee would like to have Professor Saltzburg's view with respect to Rule 509 as to whether

political subdivisions ought to have a right to withhold the name of an informant.

Rule 509(c)(3). Question: The committee thinks that the language of this subsection needs substantial clarification. It was simply difficult for the committee to understand the subsection and how it is to be implemented. In this regard, the committee's own sentiments were joined by the comments of the Juneau Bar Association submitted to the committee with respect to Rule 509 generally.

Privileges Generally; Question: The committee voted to submit to Professor Saltzburg the question of whether consideration should be given to creation of a parent/child privilege, with further consideration to the alternative of allowing the party called as a witness to be holder of the privilege.

Rule 612. Request for Additional Commentary: By an odd twist of draftsmanship, the present version of Alaska Civil Rule 43 appears to treat the necessary foundation for refreshing memory and admitting evidence under the past recollection recorded doctrine by the same criteria. This unfortunate confusion has been perpetuated in a specific decision of the Alaska Supreme Court, Gilbert v. Zamarello. The committee would like to have the commentary with respect to Rule 612 make it clear that documents or materials used for the purpose of refreshing memory need not meet the foundational requirements for admission of evidence under the past recollection recorded doctrine. Additionally, with respect to subsection 612(d), the committee believes that it would be

appropriate to add to the commentary a statement that actual dismissal should be regarded as a last resort available to the court, and not regularly used.

Rule 613(b)(2). Request: The committee would appreciate consideration and comment on the views stated with respect to Rule 613(b)(2) by the Tanana Valley Bar Association and by Mr. Murphy. As noted in a footnote to the committee revision, the statements of the Tanana Valley Bar Association and of Mr. Murphy echo the sentiments of a minority of the committee.

Rule 615. Request for Additional Commentary: Although the strict language of the rule applies only to presence in court of non-testifying witnesses--i.e., the opportunity to hear the testimony of other witnesses--the committee believes that the commentary ought to make it clear that the intent of the rule is not only to prevent non-testifying witnesses from actually hearing the testimony of other witnesses, but generally to prevent non-testifying witnesses from obtaining the opportunity to conform their testimony to the prior testimony of others. For this reason, the commentary should reflect that under normal circumstances, when the exclusionary rule is invoked, the court should instruct all witnesses to refrain from discussing their testimony with other witnesses outside the courtroom.

Rule 703. Question with Respect to Commentary: The committee has doubts as to whether the commentary pertaining to Rule 703, at pages 3 and 4, relating to categories of "unreliable evidence", items number 1 and 2, are actually valid or accurate. Clarification would be appreciated

Rule 704. Additional Commentary: The committee would like the commentary to this Rule specifically to reflect that, in permitting an opinion to be voiced as to ultimate questions, the Rule does not contemplate admissibility of opinions as to the guilt or innocence of the accused in a criminal matter.

Rule 705(b). The committee amendment of Rule 705(b) reflects the belief that use of the term "in camera", as opposed to "out of the presence of the jury", may be misleading, and, in any event, inordinately restrictive. The committee thinks that the commentary should reflect that the precise mechanism for determination of whether the requirements of Rule 705 are satisfied should be left to the sound discretion of the court, and tht these mechanisms may include side bar proceedings as well as proceedings out of the presence of jury or in camera. Perhaps the confusion arises due to differences in practice in various jurisdictions. In the state of Alaska, when hearing out of the presence of jury is required, common procedure is to send the jury out of the courtroom; in other jurisdiction, common procedure may be for the jury to remain seated while the judge discusses issues with counsel in the judge's chambers. Substantive proceedings conducted "in camera"--i.e., actually in the judge's chambers--are unusual in the state of Alaska.

Rule 706. Additional Commentary: The committee revision omits subsection (b) of the original proposed rules, covering the topic of compensation of experts. The omission is due to the fact that compensation of experts is already covered by Administrative Rule 9(c), and the subject of compensation was

not deemed an appropriate concern for the Rules of Evidence. The committee does suggest, however, that the commentary to Rule 706, in noting the omission of the originally proposed subsection (b), suggest to the Alaska Supreme Court that Administrative Rule 9 be revised to provide for more realistic compensation of expert witnesses, and to include specific provision for payment of experts by the court when, in the exercise of its discretion, the court elects to appoint experts; there should also be provision for a specific mechanism for advance payment of such witnesses.

Rule 803. Additional Commentary: The commentary should reflect that the committee voted to number, rather than to letter the subsections of Rule 803 in order to conform the subsections to the counterpart federal rule and to facilitate comparison and cross-referencing between the state and federal provisions.

Rule 804(a)(5). Question: The committee voted to submit to Professor Saltzburg the question whether Rule 804(a)(5) is repetitive and unnecessary in light of the provisions of Rule 803(w) [803 (23) as renumbered]. 804(a)(5) and 803(w) provide an identical exception; since 803(w) makes its exception applicable to all situations regardless of the availability of the witness, it appears adequately to cover those cases encompassed by Rule 804(a)(5), where the witness is unavailable. This may, in fact be, be the reason why there is no parallel provision in the corresponding Federal Rule.

Rule 901. Additional Commentary, Revision to Commentary and Question: The committee was of the view that the

provisions of originally proposed Rule 901(b), since they constituted mere examples, should more appropriately appear in the commentary rather than in the text. These examples should be joined in with existing commentary in an appropriate fashion. Specifically with reference to example 5, the committee voted to have the example rewritten as follows:

> 5. Since all voice identification is not a subject of expert testimony an opinion may be stated regardless of whether the requisite familiarity was acquired solely for the purpose of litigation, in this respect resembling visual identification of a person rather than identification of hand-writing.

The committee also wanted to refer to Professor Saltzburg the question whether specific reference to administrative regulations as well as statutes and rules might be desirable in example 10.

Rule 1004. Additional Commentary: The committee thought that the commentary should make it clear that this section applies to situations in which neither the original nor a duplicate, as defined by the rules, is available.

Rule 1005. Additional Commentary: The committee was of the view that additional language clarifying this provision should be included. As is, considerable effort is required to understand exactly how Rule 1005 relates to Rules 1002, 1003, 1004. A more specific explanation in the commentary of the relationships of these rules to each other would assist in better understanding and more accurate interpretation of these rules.

Rule 1101. Additional Commentary: The committee thinks that additional commentary should be added specifying that the

revisions made by the committee to the originally proposed draft are the result of the committee's view that inapplicability of the Rules of Evidence to various types of proceedings should be specifically provided for in the statutes or rules governing the excluded proceedings. To a large measure, this situation already exists in Alaska law. Specifically with reference to subsection (b), the committee wanted the commentary to reflect that the subsection and the Alaska Rules of Evidence do not apply to extradiction proceedings, but do apply to habeas corpus proceedings.

General Request: The committee voted to request Professor Saltzburg to consider the California Code of Evidence and the benefits and drawbacks of its structure and substance compared to the rules presently under consideration. Specifically, the committee would like to hear comment on the feasibility and desirability of a general definitions section such as that contained in the California Code of Evidence.

Memorandum to the Committee

I have tried to carefully review all of the changes, questions and suggestions made by the Committee. What I have done in light of your comments and actions is to supply you with a draft accompanied by an appropriate Reporter's Comment for every Rule that you have indicated that you propose to adopt. At times I have vigorously disagreed with the approach that you have chosen. In such cases I have supplied an alternative rule. It is my hope that you might consider the alternative that I have put forth and perhaps adopt it. But, assuming that you stay with your original preference, I hope that you will be willing to send my alternative rules along with yours to the Supreme Court. I have tried to confine myself to disagreeing only in the very few places where I think that the disagreement is fundamental and where I think that the Supreme Court ought to consider the competing drafts.

As I have gone through the material that you sent and commented upon it, I have pulled no punches. If I disagreed, I said so.

It seems to me unnecessary that I travel to Alaska to meet with the Committee. I don't think that I can add anything to what I have put in writing, and I have a pretty good idea from your comments as to what was on your minds. By providing you with alternative drafts, the drafting is over for all practical purposes. I would think that you could get something to the Supreme Court very quickly.

Of course, as I indicated in my letter to Mr. Bryner, he can call me at any time if he has questions.

If I thought that I could do any good by coming there, I would not hesitate to do so. But I really think that I would slow down the work. When you see what I have provided, I think that you will agree

with me that it is complete and that you will have no additional need for my services.

I would like to think that with this final submission I have given you the very best in service in terms of drafting a Code of Evidence for the State of Alaska. I received the material from Mr. Bryner on March 11, a Saturday. I spent 15-hour days doing nothing but going over the material doing what was to have been my spring vacation here. At the end of seven or eight days, I think I have a final product that you will like.

I am sending a copy of the comments that I have made and the alternative drafts of the Rules to Gerry Dubie at the Alaska Court System. I thought that he should have it for his records.

There was some confusion as to the way in which the Committee was going to respond to the material that I submitted to the Supreme Court. But I think that this confusion arose out of a transition between a Committee that once headed by Justice Erwin in the current Committee. In any event, I doubt that it was your fault, and I will note the confusion for the Supreme Court's administrative staff.

In choosing to be blunt in my comments, I intended to be helpful, not impolite. It struck me that I would be doing noone a service by being less than candid at this distance.

Please do not hesitate to call me if you have any questions. I respect the job that the Committee did in going over the draft, and I hope that the Committee understands why I have been concerned with certain changes.

One of the things that I have tried to do is to add in all the recent cases that have come down since I first drafted these Rules. Sometimes this required handwritten additions. But it really makes

the set a complete version of what has happened in Alaska Evidence since Alaska became a state.

My hope now is that you will keep the Rules and the comments together. I also hope that they will go to the Supreme Court relatively soon and that the Supreme Court will consider the Rules and comments together. If you think that a comment needs changes or additions, there is no reason you cannot make additions or changes. You can either change the comment directly, or indicate that the Committee has a note it is adding. However you want to do this would be fine with me. You might even consider taking the Reporter's Comments and adopting them as Committee's Comments. But there is no single right way to do this. Whatever you do will be fine with me.

Supreme Court

State of Alaska

ROBERT D. BACON
CLERK OF COURT

POUCH U
JUNEAU, ALASKA 99811
(907) 465-3410

June 5, 1979

TO: Alaska Attorneys and Judges

FROM: Robert D. Bacon
Clerk of the Supreme Court

Enclosed you will find a complete copy of the new Alaska Rules of Evidence, which will take effect on August 1, 1979.

Many of you have the blue paperbound copies of the rules issued by the Alaska Bar Association in May in conjunction with the continuing legal education program on the new rules. You will want to note that the Supreme Court has modified Rule 412 since that time, and the final, revised version appears in the enclosed set. In addition, non-substantive editorial corrections have been made in about half a dozen rules under the supervision of the Alaska Supreme Court. In case of discrepancies, the enclosed text is official and is the one which will be applied by the courts.

Book Publishing Company, official publishers of the Alaska Rules of Court, will publish the Rules of Evidence, together with the complete text of the commentary by Prof. Stephen A. Saltzburg of the University of Virginia, as a new Volume I-A of the Alaska Rules of Court. Subscribers should receive that volume late this summer or early this fall. The commentary has been modified since the Bar Association institutes in May to reflect the final changes in the text of the rules.

Users with suggestions for improvements in the form or substance of these or other Alaska court rules are urged to send them to this office. All suggestions are given careful consideration by the Alaska Supreme Court.

Robert D. Bacon

IN THE SUPREME COURT OF THE STATE OF ALASKA

Russell Peterson, Jr.,	)	
	)	
Petitioner,	)	**Supreme Court No. S-14233**
	)	
vs.	)	
	)	
State of Alaska,	)	
	)	
Respondent.	)	
	)	

Superior Court No. 1JU-10-569 CI

PETITION FOR REVIEW FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
HON. PHILIP M. PALLENBERG, JUDGE

PETITIONER'S REPLY BRIEF

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Filed in the Supreme Court of the
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October, 2011

Marilyn May, Clerk

By:_____
Deputy Clerk

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Evidence Rule 501 [in relevant part]:

Rule 501. Privileges Recognized Only as Provided.

Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a right to …(3) refuse to produce any object or writing…

ARGUMENT

I. Most Jurisdictions that have Considered Similar Issues have found a Privilege.

The State claims that no jurisdiction has ever adopted a privilege like the one here. But in fact most jurisdictions that have considered the issue have adopted or recognized a privilege when the law allows (or, as here, requires) lay representation in employment hearings or where important confidential communications of union members with union officials was threatened:

Welfare Rights Org. v. Crisan, 661 P.2d 1073 (Cal. 1983);
City of Newburgh v. Newman, 421 NYS 2d 673 (1979);
Seelig v. Shepard, 578 N.Y.S.2d 965 (Supr. Ct. 1991);
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IBEW Local 77, 2003 WL 21658695 (Wash. Publ Employment Relations Comm'n, 2003).[1]

The fallacy in the State's argument is that it defines the "privilege" so narrowly, i.e., a privilege between union members and union lay advocates in litigation following an administrative process involving the union member's employment status. In fact, all the listed cases recognize the critical need for maintaining confidentiality in union member

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[1] There are also cases in which courts recognized a full labor relations privilege, which would encompass cases like the instant one, but in situations in which union bargaining strategy was involved, *Ill. Educ. Labor Relations Bd. v. Homer Cmty Consol. Sch. Dist.*, 547 N.E. 2d 182 (Ill. 1989); and *Patterson v. Heartland Indus. Partners*, 225 F.R.D. 204 (N.D. Ohio 2004), holding that the First Amendment Freedom of Association prevents the disclosure of confidential labor relations information.

relations when substantial member rights are at issue, and they all lead to the conclusion that this case – in which the State mandated a lay union advocate in a vital process to which due process rights attach – easily falls within the same logic.

II. This Court is Free to Adjudicate the Rights of the Litigant Before It.

The State argues that this court has made a policy decision not to recognize new privileges in case law, but only through formal rule changes. It claims that the Supreme Court has failed to recognize any new privileges through case law after the Rules of Evidence were promulgated in 1979. But in fact this court has done so four times since 1979:

> *Confidentiality privilege for non-attorneys working with attorneys*, American National Watermattress Corp. v. Manville, 642 P.2d 1330, 1333-4 (Alaska 1982);
>
> *Executive privilege*, Doe v. Alaska Superior Court, Third Judicial District, 721 P.2d 617 (Alaska 1986);
>
> *Conditional privilege for publication of defamatory material in employer-employee relationship*, Schneider v. Pay'NSave, 723 P.2d 619 (Alaska 1986);
>
> *Deliberative process privilege*, Capital Information Group v. Office of Governor, 923 P.2d 29 (Alaska 1996).

In none of those cases did the court indicate any hesitation to consider and rule on the privilege questions before it. Indeed, the introductory sentence of Evidence Rule 501 indicates that privileges based on the federal and state constitutions are in addition to the privileges enumerated in the Rules, as they must be since this court has a duty to enforce

rights protected by the constitutions. The State urges the court to refuse to give relief to actual parties whose constitutional rights have been violated, in favor of a lengthy rulemaking process for future cases. This court has never chosen to ignore the rights of litigants in front of it, and the State has given no reasons why it should do so now.

III. The State Already has the Discovery Tools to Learn the Facts at Issue.

The State claims that recognition of a privilege between a litigant and his lay advocate would make it "impossible" to learn the facts regarding exhaustion of administrative remedies. Yet a privilege would not prevent the State from making ordinary discovery of relevant facts. And the main fact the State now claims it must prove – that Mr. Peterson did not take the last possible step in the administration process, of appealing to the union's board after his union advocate decided not to demand arbitration – has been admitted from the start. Indeed the State, in its deposition of Mr. Peterson, asked him whether he had appealed his advocate's refusal to take the matter to arbitration to the union's board, and received a full answer describing both the fact that he had not done so and the reasons it would have been futile. [TR 292-297, App. A] In short, the underlying facts are discoverable and have already been discovered. The State has shown no compelling need to invade advocate-client confidentiality in order to find out more. What the State really is after is confidences shared between a client and his advocate.

The State admits in its brief that it is actually fishing for anything else that may be helpful to it, such as whether "...Mr. Peterson's explanations for his failure to report felonies surfaced only during the grievance process...and [whether] Mr. Peterson made false

statements to his union...and if there are other grievances in the file involving Mr. Peterson..." [Respondent's brief, p. 10, fn. 24]. Obviously the State could have asked about such facts through normal discovery, without demanding to see the communications between Mr. Peterson and his advocate. While the State is free to do discovery to find out facts, there is nothing that would justify wiping out the confidentiality of a litigant with his advocate, merely so that the other side can fish for something that might be helpful.

In short, the State can discover all relevant facts through normal discovery without any need to invade the communications between client and advocate, a relationship in which Mr. Peterson, along with all union members, have an expectation of privacy.

IV. Due Process is Not Optional in this Litigation

The State claims that due process is not even required at this stage, i.e., in litigation, because the State gave Mr. Peterson due process already, in the administrative phase. In that phase, the State says, it benevolently refrained from demanding the private communications between Mr. Peterson and his advocate. So it doesn't matter that now that privacy is being invaded.

This creative argument fails because it would deny due process, i.e., the critical right to private communications with one's advocate, if at any point in the process a litigant knew that at some later point all his private communications could be revealed to the State. As the California Supreme Court said in *Crisan, op.cit.*, the legislature cannot have intended that the only advice a lay advocate could give his client is, "don't talk to me."

Moreover, this court has never held that in either of the two phases of union

member litigation – the administrative process or the court process –due process is optional. Both phases are vital to an employee's rights. The State's broad claim that by according due process in only some isolated parts of the process, it is excused from offering due process in other parts, implicates the whole scheme under which the State requires public employees to go through both phases, and in which it prohibits attorneys from participating in the first phase. It is not necessary for this court to decide now whether due process is denied by the State's imposition of a rule disallowing attorney representation in the administrative phase, but the breadth of the State's claim that it does not need to provide due process in the courtroom phase if it grants it in the administrative phase is sweeping. We urge the court to decide for the Petitioner on narrow grounds, i.e., that he has a right to confidentiality with his union lay advocate; but the State's argument does raise the question of whether it is even constitutional to require an employee to go through a process in which lawyers are prohibited and lay advocates are not allowed to maintain client confidentiality.

V. Confidentiality Between Grievant and Advocate Promotes Fair and Efficient Process.

The State argues that the "grievance process" would be damaged if it cannot invade the confidentiality of a public employee's communications with his advocate. The opposite is the case. As it is, there is substantial skepticism among state employees about whether the administrative process is anything but a time-consuming charade with an outcome that is preordained in almost all cases. If the employee knows that he cannot speak openly to his own advocate, it is all the more likely that that employee will consider the administrative process to be a farce, intended by the State to delay resolutions and force workers to seek

employment elsewhere or just forget about seeking an objective adjudication of grievances.

VI. The State's Statement of "Facts" is Biased and Aimed at Prejudicing the Court

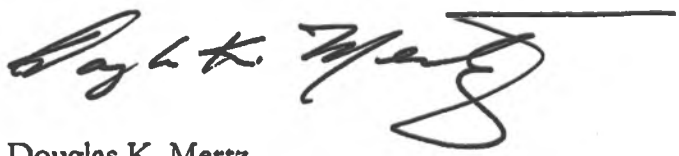
Finally, we note that the State's characterization of the facts is an unbalanced ad hominem attack on Mr. Peterson, by setting out highly contested factual claims as if they were true. There are serious fact issues regarding whether Mr. Peterson had *any* convictions for felonies as an adult; whether a Department of Labor employee instructed him not to put down convictions from thirty years earlier on his job application; whether the State knew about his record as a young person, investigated it, and told him it was not a problem, two years before this job action against him; whether the same State that now claims surprise by his use of another name during part of his life prosecuted him twelve years ago for using the other name instead of his own. On the other side, the State ignores the fact that he has been a solid citizen and member of the community since leaving his home in another state to start a new life thirty years ago, and that he was steadily employed, using his own name, until the State brought up facts that it had known about and excused for years. In short, the court should not be swayed by a one-sided recitation of the background facts that should be left to the jury to consider.

Conclusion

The State's brief fails to show any substantial case law that would allow the State to invade the private communications between a litigant and his advocate. The fact that the State itself mandates that the litigant use a lay advocate and not an admitted attorney is itself

questionable, but to then use that requirement as a wedge to invade private communications vital to due process should not be allowed. The trial court's order should be reversed and the case sent back for trial.

Respectfully submitted this 7th of October, 2011.



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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

RUSSELL PETERSON, JR.,)
)
Plaintiff,)
)
v.)
)
STATE OF ALASKA,)
)
Defendant.)
)

Case No. 1JU-10-1569 Civil

DEPOSITION OF RUSSELL PETERSON, JR.

Pages 1 through 333, Inclusive

Taken: Tuesday, November 16, 2010

Place: Juneau, Alaska

APPENDIX A

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people, four people -- five, four -- I've said in front of three people that I don't really know some embarrassing stuff. And it's like -- and then guess what? There is going to be five more people that have to talk about it, and five more.

And you know what? I'm good to go. If I have to stand up in a front of a courtroom and tell everybody what happened to me, and why, bring it. Because you know what? It doesn't change the fact that this is wrong. It's wrong. All -- and all I wanted to do was the right thing, Mr. Ptacin. Ask Pat. I tried to do the right thing. And I said, "Hey" -- I mean -- I'm sorry. I'm so sorry.

Q. No, it's okay.

A. I didn't have control right there for a second, and I'm sorry.

This is -- it's sad to me. It's really sad, because I know people that are at JAMHI. You know what? I have to call a few people tonight and tell them that nothing you tell those people is sacred. Nothing. (Witness crying.) It doesn't matter if it's your priest, your union, your lawyer.

That's what this is about to me,

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and it's not going to stop with just this. I can't let it. Not you guys. There is a thing with the union now. It's -- and if I have to spend my time doing that, I'm comfortable up on the hill. And if I -- and I've never come down -- and I've never left there without -- because it's always about the right thing. If you go up the hill -- that's still my belief, that if you go next door to the building and you're right -- and that's what Tim Kelly taught me -- that if you go -- if you're real, if you're sincere with your thing, whatever you're going there for, you will prevail. And that -- and that's what this is all about.

And I may have made some mistakes, but -- and, you know, whatever. I'm just a little disappointed that JAMHI, you know, had to sell me out. So, you know.

MR. MERTZ: Let's see if John's got some more questions.

THE WITNESS: I'm sorry.

Q. Yeah. That's okay.

I don't want to talk too much about the union grievance process, because we've got issues there, but --

A. Yeah.

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Q. -- can you at least tell me -- and, again, just stop it if you, you know -- do you recall why -- and I'll show you. This is all I have so far. I've got an e-mail from Dick Isett to Mertl, or Benthe Mertl-Posthumus.

A. I got a good recording if you want it.

Q. What's the recording of?

A. The one of Dick saying, "Everything's going to be great." And I had a meeting with -- it was a message he left on my phone.

MR. MERTZ: Okay. That's separate from what he's talking about.

THE WITNESS: Okay.

Q. Yeah. But it says --

A. I have two, if you want to hear them.

Q. We'll wait on that.

It says, "Hello, Benthe. Mr. Peterson has not appealed my decision not to arbitrate his grievance. The union hereby withdraws Union Case" -- and then it goes on to list it.

And this is all the information that I have about your union grievance process, going to the union to talk about what happened. (Handing.)

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A. Oh. Oh. And I asked him for arbitration over and over. I don't know really what -- I don't know really what that is. I don't know. It -- you talk about stuff, but --

Q. Did you -- and, again, stop if you want me to stop, but --

A. I'm sorry.

Q. -- did the union send you any kind of letter saying that you had an ability to file or to --

A. Maybe.

Q. -- go for --

A. I know he told me that it would be pointless, because he said, "We're the people -- we're the people that make that decision, and I'm telling you right now that it's pointless. But you can -- if you don't believe me, you can file a grievance, file an appeal. You can arbitrate. You can file for arbitration. You can file an appeal for our decision, but it's going to be pointless, because we're the people who make up the decision," and ---

Q. So you actually had a conversation with --

A. Many, yeah.

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Q. -- with Dick about this very issue?
A. Yeah. Yeah. In fact, he told me that it was all going to be all pretty much settled. That's a good recording or message that he left. "I had a great meeting with this Mertl-Posthumus" --
MR. MERTZ: Okay. Now, he's asking you about something else.
THE WITNESS: Okay.
MR. MERTZ: It's the question of whether to press the state for an arbitration.
THE WITNESS: He told me to forget it.
MR. MERTZ: And then after Dick had decided they wouldn't ask for arbitration, then there is what he told you about whether you should appeal.
THE WITNESS: Yeah. Yeah. He said, "Don't -- don't -- you can appeal this arbitration, but you can't" --
Q. Did you do that through a phone call, a talk with Dick?
A. Oh, I'm sure it was on the phone, because I never saw him.
Q. You never did that in e-mail or

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anything?
A. Doubtful.
Q. He never sent you an e-mail?
A. He sent me lots -- well, a few e-mails, but --
Q. And you consider all of these conversations between you and Dick are privileged?
MR. MERTZ: Well, he's obviously willing to tell you about it. And this particular one, about the futility of that final appeal, is something you ought to know, which is why I'm not making an objection.
Q. Right. Right. And that's what I need to know.
A. Yeah. He said --
Q. What's the --
A. -- don't -- he said, "You can do it." He made it sound like -- you know what, honestly? He sounded -- he didn't sound like Josh Lovett, but it was the same pretense, like -- no, it was completely -- I'm sorry. Scratch that. It was completely different.
But in the same tone, he said, "You can appeal it, but we're the ones that make the decision if it's going to be approved." And so

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why bother?
Q. Do you have any notes from this or any --
A. No. I remember it, though, because he said -- he explained --
Q. Do you have any -- do you have anything, paperwise, that would confirm this?
A. I can look, but I don't think -- I don't think so.
Q. You folks have the union records. I don't. I've never seen them. And --
A. Oh, that's what I heard.
MR. PTACIN: Is there a way to get through this stuff, do a priv. log or anything for -- at least on this issue?
MR. MERTZ: Yeah. My recollection is that there is nothing in writing about this, other than that e-mail to Benthe that you mentioned. But I'm going to look.
MR. PTACIN: Okay.
MR. MERTZ: And if there is something, I'll give it to you.
THE WITNESS: I'll look too. I'll look tonight. I save --
MR. MERTZ: See if you've got

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anything. Tell me if you find anything, and I'll look through the records.
THE WITNESS: Okay.
MR. MERTZ: And if there's something, you'll get it.
MR. PTACIN: At least on this issue, yeah.
THE WITNESS: Yeah.
MR. PTACIN: At least get that far.
THE WITNESS: Yeah. Because I remember him telling me that it was pointless. But he was like kind of weird about it, because he said, "But you can go ahead and do that anyway," (enunciating) you know, in his Dick Isett voice.
MR. PTACIN: Yeah. We'll mark that in, just for good measure.
(Exhibit 11 duly marked.)
BY MR. PTACIN:
Q. As far as union questions, I'll just -- hold that open, waiting for the judge to rule on those issues for now.
A. Yeah. I don't mind.
Q. Now, unemployment. In one of your responses, you'd mentioned that you had been taking some unemployment --

Supreme Court Case No. S-14233

SUPREME COURT OF THE STATE OF ALASKA

RUSSELL PETERSON, JR.,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition for Review of an Order of the Superior Court for the State of Alaska First Judicial District at Juneau

Superior Court Judge Philip M. Pallenberg
Trial Court Case No. 1JU-10-00569CI

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 11.5 million working men and women.[1] The petitioner in this case, Russell Peterson, Jr., was represented in the grievance process by a representative of the Alaska State Employees Association, which is affiliated with the AFL-CIO through its parent union the American Federation of State, County and Municipal Employees. This case presents an important and recurring question for the AFL-CIO and its affiliates: the extent to which confidential communications between employees and their union representatives made during the grievance process are protected from disclosure in subsequent litigation involving the employee and the employer.

STATEMENT OF THE CASE

Petitioner Russell Peterson, Jr. (Peterson) was employed by the Alaska Department of Labor in a bargaining unit represented by the Alaska State Employees Association, AFSCME Local 52, AFL-CIO (ASEA). Petitioner's Excerpt (hereinafter Pet. Exc.) 142, 146. After he was fired from his position with the Department of Labor, Peterson filed a grievance pursuant to the collective bargaining agreement between the State of Alaska and the ASEA. Pet. Exc. 146. The agreement states clearly that only the union, and not private counsel, may

[1] Both parties have consented in writing to the filing of this brief *amicus curiae*.

represent an employee in the grievance process. Pet. Exc. 20. Pursuant to this provision, a non-lawyer representative of the ASEA handled Peterson's grievance. Pet. Exc. 20-21. The ASEA and the State were unable to resolve Peterson's grievance and the union decided not to pursue the grievance to arbitration. Pet. Exc. 128. Peterson then filed this suit for unjust termination in superior court. Pet. Exc. 2-8.

In court, the State subpoenaed the ASEA's entire grievance file pertaining to Peterson and subpoenaed the ASEA's Business Manager to appear for a deposition. Pet. Exc. 50. Peterson objected to the State's attempt to discover Peterson's communications with the ASEA during the grievance process and moved for a protective order, contending that the grievance-related confidential communications at issue were privileged. Pet. Exc. 34, 38-45. The superior court rejected this argument and denied Peterson's motion for a protective order. Pet. Exc. 146-151. Peterson then petitioned this Court for interlocutory review of the superior court's discovery order, which this Court granted. *See* Order Granting Pet. for Rev. 1.

SUMMARY OF ARGUMENT

A public employer's demand to discover confidential grievance-related communications between an employee and his union representative constitutes an unfair labor practice in violation of the Alaska Public Employment Relations Act. (PERA). Rather than require parties to commence wasteful satellite litigation by filing unfair labor practice charges under that law, this Court should, by means of

its supervisory authority over the discovery process, permit employees and their unions to assert a limited privilege for confidential grievance-related communications in court. The recognition of this limited privilege is necessary to permit the proper functioning of PERA's mandatory grievance and arbitration system and to ensure that labor disputes are, to the greatest degree possible, resolved through contractual dispute-resolution processes rather than through litigation.

ARGUMENT

A public employer's demand to discover confidential communications between an employee and his union representative made during the mandatory grievance and arbitration process interferes with the employee's right to union representation in violation of the Alaska Public Employment Relations Act (PERA). AS 23.40.070 et. seq. Alaska's civil discovery rules generally permit a party to "obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action." Alaska R. Civ. P. 26(b)(1). No express privilege exists under Alaska's Rules of Evidence for confidential grievance-related communications between employees and their union representatives. *See* Alaska R. of Evid. 501 – 509. In order to harmonize PERA's strong public policy in favor of contractual resolution of labor disputes with the civil discovery rules' presumption in favor of disclosure, this Court should recognize a statutory-based limited privilege for confidential grievance-related communications between employees and their union representatives.

1. The NLRB has held that an employer's demand to discover confidential communications between an employee and his union representative made during the grievance process interferes with the employee's right to union representation and therefore will not be enforced. *See Cook Paint and Varnish Co.*, 258 NLRB 1230 (1981). The NLRB's ruling has been followed by every state court and public employment labor relation board that has addressed the question. *Ill. Ed. Lab. Rel. Bd. v. Homer Cmty. Consol. Sch. Dist.*, 547 N.E.2d 182, 188 (Ill. 1989); *Seelig v. Shepard*, 578 N.Y.S.2d 965 (N.Y. Sup. Ct. 1991); *Int'l Bhd. of Elec. Workers v. Pub. Util. Dist. 1*, Dec. 7656-A, 2003 WA PERC LEXIS 46, 55 (Wash. Pub. Employment Relations Comm'n, June 11, 2003); *N.H. Troopers Ass'n v. N.H. Dept. of Safety*, Dec. 94-74 (N.H. Pub. Employee Relations Bd., Aug. 31, 1994), *available at* http://www.nh.gov/pelrb/decisions/board/documents/1994-074.pdf. Thus, there is unanimous agreement that an employer's attempt to discover confidential grievance-related communications between an employee and his union representative interferes with the employee's protected rights.[2]

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[2] Neither of the cases cited by the State in its Brief in Opposition to Petition for Review, *see* Resp. Br. in Opp., p. 8 n.11, are to the contrary. In *Atwood v. Burlington Indus. Equity, Inc.*, 908 F.Supp. 319 (M.D.N.C. 1995), the court held that the presence of a non-lawyer union representative at pre-litigation meetings between employees and an attorney destroyed the attorney-client privilege. *Atwood* is factually inapposite because the conversations did not occur during the grievance or arbitration process. In *Walker v. Huie*, 142 F.R.D. 497 (D. Utah 1992), the court held that a citizen injured by a police officer could discover communications made between the officer and a union representative during internal employer disciplinary proceedings. However, the plaintiff in *Huie* was a stranger to the collective bargaining process in which the communications took place, so that case is distinguishable as well.

The logic of these decisions is unassailable. The grievance process is a mechanism by which a union, performing its statutory role as the exclusive representative of all the employees in the bargaining unit, is able to exercise its statutory responsibility to enforce the terms of the collective bargaining agreement through "the continuing administration of the contract" and thus "protect the interest[s] of . . . employee[s]" in the terms and conditions of employment set forth in that contract. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965). Allowing an employer to compel the disclosure of confidential grievance-related communications would necessarily inhibit the union from "obtaining needed information from employees" that is critical to the union's ability to perform its statutory duty as exclusive representative to police the agreement. *Cook Paint*, 258 NLRB at 1232. Likewise, requiring such disclosure would materially interfere with the union's representation of individual employees in the grievance process by "restrain[ing] employees in their willingness to candidly discuss matters with their chosen, statutory representatives." *Ibid.* In other words, "[t]he right to union representation would be meaningless if, upon disclosing the facts needed for representation, the disclosure were then available to the employer upon asking. The union representative would become little more than a conduit." *N.H. Troopers Ass'n*, *supra*, at 5.

This same logic applies with equal force to the union's statutory responsibilities under PERA. PERA was enacted by the Alaska Legislature "to promote harmonious and cooperative relations between government and its

employees and to protect the public by assuring effective and orderly operations of government." AS 23.40.070. An important mechanism for accomplishing this purpose is the statutory requirement that every public sector collective bargaining agreement must "include a grievance procedure which shall have binding arbitration as its final step." AS 23.40.210(a). *Accord United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."). In order to ensure that labor disputes are resolved through the grievance and arbitration procedure rather than in court, public employees in Alaska "must first exhaust their contractual or administrative remedies, or show that they were excused from doing so, before pursuing a direct action against their employer." *Cozzen v. Municipality of Anchorage*, 907 P.2d 473, 475 (Alaska 1995).[3]

The relevant provisions of PERA are modeled on Sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 157 & 158(a)(1). Like the NLRA, PERA makes it an unfair labor practice for "[a] public employer or an

---

[3] Once a grievance is decided by an arbitrator, that decision is given "great deference" by this Court, which "will only vacate an arbitration award arising out of a collective bargaining agreement where it is the result of gross error – those mistakes that are both obvious and significant," *State v. Pub. Safety Employees Ass'n*, 235 P.3d 197, 201 (Alaska 2010), further ensuring that labor disputes are resolved through the grievance and arbitration procedure rather than in court.

agent of a public employer" to "interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080." AS 23.40.110(a)(1). That section of PERA, like Section 7 of the NLRA, guarantees the right of Alaska public employees to "form, join, or assist an organization to bargain collectively through representatives of their own choosing." AS 23.40.080. For this reason, "[r]elevant decisions of the National Labor Relations Board and federal courts [are] given great weight" in interpreting PERA. 8 AAC 97.240. *See also Alaska Pub. Employees Ass'n v. Department of Admin., Div. of Labor Relations*, 776 P.2d 1030, 1032 (Alaska 1989) ("We have followed federal decisions interpreting the NLRA when the provisions of the NLRA are similar to state statutes.").

Given the similarities between the relevant provisions of PERA and the NLRA, the Alaska Labor Relations Agency (ALRA), the body charged with enforcing PERA, would undoubtably reach the same conclusion as the NLRB reached in *Cook Paint* and would hold that an employer's demand to discover confidential grievance-related communications between an employee and his union representative constitutes an impermissible unfair labor practice.[4] Faced with such a discovery request, whether in the form of a civil subpoena or otherwise, the affected employee and/or his union could file an unfair labor

[4] Because ALRA expressly permits non-lawyers to represent parties before the agency, 8 AAC 97.355(a), there can be little doubt that ALRA would find that an employer's attempt to discover communications between an employee and a non-lawyer union representative made in preparation for an ALRA proceeding constitutes an unfair labor practice and would not permit that discovery to occur.

practice charge with ALRA and would be entitled to an order enjoining the employer's unlawful discovery effort.

2. In this case, Peterson chose to assert his PERA-protected rights by objecting to the State's discovery requests in superior court, rather than filing an unfair labor practice charge with ALRA. Under Alaska Rule of Evidence 501 and the Court's supervisory authority over the discovery process, this Court should sustain Peterson's objection and rule that employees and their unions may assert a limited privilege against being forced to disclose confidential grievance-related communications in court without having to engage in the time-consuming and wasteful extra step of instituting collateral litigation before ALRA by filing an unfair labor practice charge to challenge an employer's discovery request.

The Alaska Rules of Evidence state that "no person, organization, or entity has a privilege to . . . refuse to disclose any matter; or . . . refuse to produce any object or writing . . . [e]xcept as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court." Alaska R. Evid. 501. Although "[p]rivileges in litigation are not favored and should be narrowly construed," Alaska courts recognize that "where some major public policy clearly articulated in a constitutional provision, statute, or court rule clearly outweighs the truth-seeking function . . . a privilege should be recognized." *Russell v. Anchorage*, 706 P.2d 687, 693 (Alaska App. 1985).

There is no explicit privilege in the Alaska Rules of Evidence for confidential grievance-related communications between an employee and a union representative. Alaska R. Evid. 501 – 509. Because the grievance belongs to the union rather than the grievant, Alaska's lawyer-client privilege does not apply. *See* Alaska R. Evid. 503(b) (privilege only applies to "confidential communications . . . between the client . . . and the client's lawyer"). That is so even if the union were to designate one of its attorneys, rather than a lay union representative, as the person responsible for representing the union's interest in the grievance. *See Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985) ("We do not believe that an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an 'attorney-client' relationship in the ordinary sense with the particular union member who is asserting the underlying grievance.").[5] The proper functioning of PERA's mandatory grievance and arbitration system, however, requires, some protection for – to paraphrase Alaska's lawyer-client privilege rule – "confidential

[5] A union attorney does, of course, have an attorney-client relationship with the union itself and, in some cases, may also establish an attorney-client relationship with an employee where the attorney "specifically agree[s] . . . to provide direct representation to [the employee] as an individual client." *Peterson*, 771 F.2d at 1261. *See also Bachner v. Air Line Pilots Ass'n.*, 113 F.R.D. 644, 648 (D. Alaska 1987) (same). For example, a union may provide or pay for a private attorney for an individual employee as a benefit of union membership. In this situation, "a tripartite attorney-client relationship exists" between the employee, the union's lawyer, and the private attorney. *Raymond v. N.C. Police Benevolent Ass'n, Inc.*, __ S.E.2d __, 2011 N.C. LEXIS 224 (N.C., April 8, 2011).

communications made for the purpose of facilitating the rendition of [grievance-related representative] services to the [employee]." Alaska R. Evid. 503(b).

The protection extended to such confidential grievance-related communications need not be absolute. The United States Supreme Court has long recognized "limited" or "qualified" privileges for certain confidential communications not otherwise protected by the evidentiary rules, such as a limited privilege for confidential Executive Branch conversations and correspondence. *United States v. Nixon*, 418 U.S. 683, 708 (1974). *See also Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979) (recognizing a "limited" or "qualified" privilege against disclosure of certain monetary policy directives by Federal Reserve); *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (applying the work product doctrine in the criminal context, while explaining that "[t]he privilege derived from the work-product doctrine" is "qualified," "not absolute"). Similarly, this Court has recognized a "qualified" privilege for "confidential . . . internal governmental communications" necessary to "protect the deliberative and mental processes of decision makers," *Capital Information Group v. State of Alaska*, 923 P.2d 29, 33-34 (1996) (quoting *Doe v. Alaska Superior Court*, 721 P.2d 617, 622-23 (Alaska 1986)), based on the conclusion that "the public policy rationale upon which the Supreme Court relied in *United States v. Nixon* is equally applicable to our state government," *Doe*, 721 P.2d at 623.

When a party invokes a limited privilege, the superior court must apply a "balancing test" to determine the applicability and scope of the privilege. *Capital Information Group*, 923 P.2d at 37. First, the party asserting the privilege must make a "threshold showing" that the communication is covered by the privilege. *Ibid.* "If [the party asserting the privilege] . . . meets the threshold requirements, then there is a presumptive privilege and the party seeking disclosure must make a sufficient showing that the need for production outweighs the need for secrecy." *Ibid. See also Doe*, 721 P.2d at 626 ("[W]hen a formal specific claim of . . . privilege is asserted, a presumptive privilege attaches.").

Because PERA – an "enactment[] of the Alaska Legislature," Alaska R. Evid. 501 – explicitly requires the inclusion of a mandatory grievance and arbitration procedure in every public sector collective bargaining agreement, and because the effective operation of PERA's mandatory contractual dispute-resolution system constitutes a "major public policy clearly articulated in a . . . statute," *Russell*, 706 P.2d at 693, this Court has authority under Rule 501 to recognize a privilege for confidential grievance-related communications between employees and their union representatives. For reasons similar to those that motivated this Court to recognize a limited deliberative process privilege for confidential internal government communications, this Court should recognize a limited privilege for such grievance-related communications, thus creating a "presumption in favor of nondisclosure." *Capitol Information Group*, 923 P.2d at 37.

3. The precise nature of the limited privilege required by PERA flows from the role that the grievance and arbitration procedure plays in the collective bargaining process.

"[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *Steelworkers*, 363 U.S. at 578. It is the grievance and arbitration process that provides "a common law of the shop which implements and furnishes the context of the agreement." *Ibid.* The union's obligation, as the "exclusive representative of *all the employees* in the bargaining unit," AS 23.40.100 (emphasis added), is to enforce the collective bargaining agreement in a manner that establishes a "common law of the shop" most favorable to all the employees. Although "[t]he rights of individual employees concerning . . . conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts," *Smith v. Evening News*, 371 U.S. 195, 200 (1962), "[t]he bargaining representative . . . is responsible to, and owes complete loyalty to, the interests of all whom it represents," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (U.S. 1953).

The grievance, therefore, is controlled by the union. By "giv[ing] the union discretion to supervise the grievance machinery and to invoke arbitration," "frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedure[]," "both sides are assured that similar complaints will be treated consistently and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved." *Vaca v.*

Sipes, 386 U.S. 171, 191 (1967). In contrast, "[i]f the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined," and "a significantly greater number of grievances would proceed to arbitration," "greatly increas[ing] the cost of the grievance machinery and . . . overburden[ing] the arbitration process as to prevent it from functioning successfully." *Id.* at 191-92.

Without a proper recognition of the employee's right to freely confer with his union representative during the grievance process, PERA's policy of "promot[ing] harmonious and cooperative relations between government and its employees and . . . protect[ing] the public by assuring effective and orderly operations of government" through contractual resolution of labor disputes would be thwarted. See AS 23.40.070. Permitting the State to discover the contents of confidential grievance-related communications will "discourag[e] the communication of relevant information by employees . . . to [union representatives]" in the grievance process, *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981), because employees will justifiably fear that such communications will be discoverable in subsequent litigation. Employee reluctance to communicate with the exclusive bargaining representative will, in turn, substantially interfere with the union's ability to represent employees in the grievance process, as "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390-91. And this, in turn, would wreak havoc on the

mandatory exhaustion-of-remedies requirement that is designed to resolve labor disputes in the grievance and arbitration procedure without the necessity of court involvement. If employees refuse to cooperate with a union's investigation, the union will lack the information it needs to effectively settle cases or decide which grievances to take to arbitration, ultimately leading to fewer labor disputes resolved through contractual means and more cases that will be heading to the Alaska courts.

There are two important lessons to be drawn from the foregoing description of the collective bargaining process with regards to the scope and application of a limited privilege for confidential grievance-related communications between an employee and a union.

First, the limited privilege would only operate where the parties to the underlying grievance are the same, or in privity to, the parties in the subsequent lawsuit, and where the lawsuit involves the same basic facts or occurrences as the grievance. In other words, the scope of the limited privilege is co-extensive with what would constitute an unfair labor practice under PERA. In the language of Alaska's civil procedure rules, where a public employer's discovery request would violate PERA, "the burden . . . of the proposed discovery" on the statutorily-protected right of an employee to union representation in the grievance process, as well as on the right of the union to enforce the collective bargaining agreement through the grievance procedure, strongly "outweighs its likely benefit" to the employer. Alaska R. Civ. P. 26(b)(1).

Moreover, to allow discovery of confidential grievance-related communications between an employee and the union would permit a public employer to obtain in litigation what it is forbidden by PERA from obtaining in the mandatory grievance and arbitration process. Such a rule would create "a trap by inducing confidential communications and then allowing them to be used against the [employee]." *Welfare Rights Org. v. Crisan*, 661 P.2d 1073, 1077 (Cal. 1983). It could not have been the Alaska legislature's intent to create a mandatory grievance and arbitration system for public employees in which "the only sound advice the authorized [union] representative could give [an employee] was, 'Don't talk to me.'" *Id.* at 1077 n.3.

In contrast, where discovery is sought by a party other than the public employer, or where the subject matter of the lawsuit is different from that of the underlying grievance, the limited privilege would not apply. Such a discovery request would instead be evaluated through the usual framework of Rule 26, which provides that a court may limit discovery "if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit," as, for example, where "the discovery sought . . . is obtainable from some other source that is more convenient, less burdensome, or less expensive." Alaska R. Civ. P. 26(b)(2)(A). For example, where the subject of the lawsuit differs from the grievance, such as in the investigation of a criminal violation, the benefit of discovery often outweighs the burden on PERA-protected rights, because "[n]owhere is the public's claim to each person's evidence stronger than in the

context of a valid grand jury subpoena," *In re Grand Jury Subpoena*, 926 A.2d 280, 284 (N.H. 2007) (quoting *In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982)). *See also Dep't of Justice v. FLRA*, 39 F.3d 361 (D.C. Cir. 1994); *In re Grand Jury Subpoenas*, 995 F. Supp. 332 (E.D.N.Y. 1998).

The second lesson to be drawn from the role that the grievance and arbitration procedure plays in collective bargaining is that any privilege ultimately belongs to the union. Even though the grievant employee may assert the privilege initially, the union remains free to waive it in furtherance of the union's obligations to the bargaining unit as a whole.[6] That is because in some cases the union must be able to waive the confidentiality of its communications with employees in the grievance process in order to fulfill its broader "responsib[ility] to . . . the interests of all whom it represents." *Huffman*, 345 U.S. at 338. For example, where the union is called to represent the competing interests of two or more employees, the union is entitled to take a position that furthers the interest of the bargaining unit as a whole – as long as it does so "in good faith and in a nonarbitrary manner," *Vaca*, 386 U.S. at 194 – even if taking such a position requires the union to waive the confidentiality of its communications with an individual grievant:

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[6] Like the client in a lawyer-client relationship, the employee also can waive the limited privilege by testifying to a confidential communication or disclosing a confidential document in his possession. In such a case, the union still can, however, assert the limited privilege as a defense to disclosing any confidential communications that only the union possesses.

> "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes."

Humphrey v. Moore, 375 U.S. 335, 349-50 (1964).

4. When the limited privilege described above is applied to the facts of this case, it is clear that the confidential grievance-related communications between Peterson and the ASEA should be protected from disclosure.

The State seeks discovery of Peterson's communications with the ASEA for the purpose of "show[ing] that most of his lawsuit should be dismissed for failure to exhaust administrative remedies." Resp. Opp. to Pet. for Rev. at 4. As an initial matter, the State acknowledges that "the union, under its own authority, decided not to seek arbitration of Mr. Peterson's grievance." *Id.* at 3. Because an employee exhausts his contractual remedies when he requests that the union take his grievance to arbitration and the union refuses, *Casey v. Fairbanks*, 670 P.2d 1133, 1138-39 (Alaska 1983), the State requires no further discovery regarding exhaustion. Even if the law were, as the State argues, that "[i]f Mr. Peterson disagreed with the union's decision not to seek arbitration, he was required to appeal it with the union internally," Resp. Opp. to Pet. for Rev. at 3, the State still would not require discovery of Peterson's confidential grievance-related communications because a non-privileged communication from the ASEA to the State already in the record clearly states that Peterson did not appeal the union's

decision not to seek arbitration of his grievance. *See* Pet. Exc. 128 (e-mail from ASEA to State stating "Mr. Peterson has not appealed [the union's] decision not to arbitrate his grievance.").

Moreover, the State could easily obtain the information it says it needs by serving Peterson with an interrogatory or a request to admit concerning his efforts to exhaust contractual and internal union remedies. That is, the *fact* of whether Peterson sought to appeal the union's decision not to seek arbitration is not a communication "made for the purpose of facilitating the rendition of [grievance-related representative] services to the [employee]," Alaska R. Evid. 503(b), and therefore is not protected from discovery by the limited privilege. *See Upjohn*, 449 U.S. at 395-96 ("The protection of the privilege extends only to *communications* and not facts. A fact is one thing and a communication concerning that fact is an entirely different thing." (Internal quotation marks and brackets omitted)). Thus, even if clear evidence that Peterson did not appeal the union's decision not to take his grievance to arbitration were not already in the record, the State still could not show that it requires access to the ASEA's entire grievance file to ascertain this particular fact.

More generally, the State's effort to obtain its sought-after discovery constitutes an unfair labor practice under PERA and therefore the limited privilege should apply. If the State is permitted to discover confidential communications between Peterson and the ASEA, other public employees will be loath to participate in the PERA-mandated grievance and arbitration procedure for fear that

their statements to the union could later be used against them if they were to bring a suit in court. This result would undermine the Alaska legislature's purpose in enacting PERA of "promot[ing] harmonious and cooperative relations between government and its employees" through mandatory arbitration, AS 23.40.070. It would also wreak havoc on this Court's exhaustion requirement that aims to keep labor disputes in the grievance and arbitration procedure and out of court by applying "great deference to an arbitrator's decision," *Pub. Safety Employees Ass'n*, 235 P.3d at 201. If employees refuse to cooperate with union investigations, the union will be unable to gather the information necessary to decide whether to take cases to arbitration, ultimately leading to more cases in Alaska courts.

Finally, if the State were permitted to obtain its sought-after discovery, the ASEA's ability to enforce its collective bargaining agreement with the State would be substantially impaired, as its ability to investigate future grievances by interviewing employees would be restrained by its knowledge that any communications with employees during the investigatory process will be discoverable in subsequent litigation. This would leave the union without the ability "to settle the majority of grievances short of the costlier and more time-consuming step[]" of arbitration, placing a "dampening effect on the entire grievance procedure." *Vaca*, 386 U.S. at 192-93.

CONCLUSION

For the reasons stated, the superior court's order denying Peterson's motion for a protective order regarding his communications with union officials should be reversed.

July 18, 2011

Respectfully submitted,

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CERTIFICATE OF TYPEFACE AND POINT SIZE

Pursuant to Alaska Rule of Appellate Procedure 212(b) and Alaska Rule of Civil Procedure 513.5(c), I hereby certify that this Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioner is typed in Times New Roman typeface in 13-point type.

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EXHIBIT

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July 12, 2011

John M. Ptacin
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501

Re: *Russell Peterson, Jr. v. State of Alaska*,
Supreme Court of the State of Alaska, Supreme Ct. No. S-14233

Dear Mr. Ptacin:

The Alaska Rules of Appellate Procedure state that "[a] brief of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R. App. P. 212(c)(9). This is to request the consent of the State of Alaska, Respondent in the above-captioned case, to the filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Respondent will consent to the filing of the AFL-CIO's brief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. Ginsburg

Respondent State of Alaska hereby consents to the filing of a brief *amicus curiae* in support of the Petitioner by the AFL-CIO.

John M. Ptacin
Counsel for Respondent

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July 12, 2011

Douglas Mertz
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319 Seward Street, Suite 5
Juneau, Alaska 99801

Re: *Russell Peterson, Jr. v. State of Alaska,*
Supreme Court of the State of Alaska, Supreme No. S-14233

Dear Mr. Mertz:

The Alaska Rules of Appellate Procedure state that "[a] of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R . P. 212(c)(9). This is to request the consent of Russell Peterson, Jr., Petitioner in the above-caption se, to the filing by the American Federation of Labor and Congress of Industrial Organizations (CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Petitioner will consent to the filing of the AFL-CI brief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. Co g

Petitioner Russell Peterson, Jr. hereby consents to the filing of a *amicus curiae* in support of the Petitioner by the AFL-CIO.

Douglas Mertz
Counsel for Petitioner

IN THE SUPREME COURT OF THE STATE OF ALASKA

Russell Peterson, Jr.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Supreme Court No. **S-14233**
	)	
State of Alaska,	)	
	)	
Respondent.	)	
	)	

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER BY WRITTEN CONSENT OF ALL THE PARTIES

Pursuant to Alaska Rule of Appellate Procedure 212(c)(9), the American Federation of Labor and Congress of Industrial Organizations moves for leave to file the accompanying brief, *amicus curiae*. Both petitioner Russell Peterson, Jr. and respondent State of Alaska have consented to the filing of this brief. The written consent of both parties is attached as an exhibit to this motion.

WHEREFORE, the AFL-CIO respectfully requests that this Court grant leave for the AFL-CIO to file the accompanying brief, *amicus curiae*.

July 18, 2011

Respectfully submitted,

Justin W. Roberts
(*Counsel of record*)
Alaska Bar # 0605023
3333 Denali Street, Suite 2000
Anchorage, AK 99503

Lynn K. Rhinehart
James P. Coppess
Matthew J. Ginsburg
AFL-CIO
815 Sixteenth Street, NW
Washington, DC 20006

Michael Rubin
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108

EXHIBIT

American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
www.aflcio.org

EXECUTIVE COUNCIL

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July 12, 2011

John M. Ptacin
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501

Re: *Russell Peterson, Jr. v. State of Alaska*,
Supreme Court of the State of Alaska, Supreme Ct. No. S-14233

Dear Mr. Ptacin:

The Alaska Rules of Appellate Procedure state that "[a] brief of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R. App. P. 212(c)(9). This is to request the consent of the State of Alaska, Respondent in the above-captioned case, to the filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Respondent will consent to the filing of the AFL-CIO's brief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. Ginsburg

Respondent State of Alaska hereby consents to the filing of a brief *amicus curiae* in support of the Petitioner by the AFL-CIO.

John M. Ptacin
Counsel for Respondent

American Federation of Labor and Congr of Industrial Organizations

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RICHARD L. TRUMKA
PRESIDENT

EXECUTIVE COUNCIL

ELIZABETH H. SHULER
SECRETARY-TREASURER

ARLENE HOLT BAKER
EXECUTIVE VICE PRESIDENT

July 12, 201

Douglas Mertz
Mertz Law Office
319 Seward Street, Suite 5
Juneau, Alaska 99801

Re: *Russell Peterson, Jr. v. State of Alaska.*
Supreme Court of the State of Alaska, Supren . No. S-14233

Dear Mr. Mertz:

The Alaska Rules of Appellate Procedure state that "[of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R . P. 212(c)(9). This is to request the consent of Russell Peterson, Jr., Petitioner in the above-caption se. to the filing by the American Federation of Labor and Congress of Industrial Organizations (CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Petitioner will consent to the filing of the AFL-C rief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. C

Petitioner Russell Peterson, Jr. hereby consents to the filing of *amicus curiae* in support of the Petitioner by the AFL-CIO.

Douglas Mertz
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Justin W. Roberts, certify that on July 18, 2011, the foregoing Motion For Leave To File Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* In Support of Petitioner By Written Consent of All the Parties was served on all parties or their counsel of record by mailing a true and correct copy via first class United States mail to the addresses listed below:

Douglas Mertz
Mertz Law Office
319 Seward Street, Suite 5
Juneau, Alaska 99801
(907) 586-4004
Counsel for Petitioner

John M. Ptacin
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1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501
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Counsel for Respondent

Justin W. Roberts
Alaska Bar # 0605023
3333 Denali Street, Suite 2000
Anchorage, AK 99503

CERTIFICATE OF SERVICE

I, Justin W. Roberts, certify that on July 18, 2011, the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* In Support of Petitioner was served on all parties or their counsel of record by mailing a true and correct copy via first class United States mail to the addresses listed below:

Douglas Mertz
Mertz Law Office
319 Seward Street, Suite 5
Juneau, Alaska 99801
(907) 586-4004
Counsel for Petitioner

John M. Ptacin
Assistant Attorney General
State of Alaska
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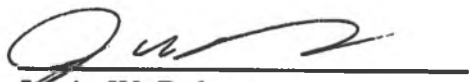
Counsel for Respondent



Justin W. Roberts
Alaska Bar # 0605023
3333 Denali Street, Suite 2000
Anchorage, AK 99503

SCR

2

<TARGET><BILL>SCR 2</BILL><SUBJECT>SCR
2</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

Interim: (May - Dec.)
716 W. 4th Ave
Anchorage, AK 99501
Phone: (907) 269-0144
Fax: (907) 269-0148

Session: (Jan. - May)
State Capitol, Suite 30
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Toll free: (800) 770-3822

Senator_Bettye_Davis@legis.state.ak.us
http://www.akdemocrats.org

Office of Senator Bettye Davis

February 17, 2011

Senator Hollis French, Chair
Senate Judiciary Committee

RE: Request for Hearing CSSCR 2(STA), 27-LS00031\B -"Proposing amendments to the Uniform Rules of the Alaska State Legislature relating to the presiding officer pro tempore."

Dear Senator French:

Senator Davis respectfully requests a hearing on the CSSCR 2(STA) before the Senate State Affairs Committee. CSSCR 2(STA) amends the Uniform Rules to change the title and provides for new roles and responsibilities for the temporary presiding officers. The intent is to provide more opportunities for legislators to function in leadership positions without changing the current leadership structure.
Included in this hearing package are the following:

1. Sponsor Statement
2. Current version of CSSCR 2, 27-LS0031\B
3. Explanation of Committee Substitute
4. Sectional Summary 2/8/2011
5. Current Uniform Rules 1-4
6. Fiscal Note (prepared by (S)STA 2/15/2011
7. Documents:
    - NCSL "Inside the Legislative Process" – The most recent (1999) report of roles and responsibilities of temporary presiding officers in all the states and territories
    - NCSL "Examples of duties of the Senate Pro Tem (as of February, 2011)"
    - Center for American Women and Politics: "Women in State Legislatures 2011;" and "Women in Elective Office 2011."

Please provide for in-person and teleconference testimony.
Also, please do not schedule a hearing February 21-24, and March 2-6, 2011 due to scheduling conflicts.
Please contact me if you need additional information.

Sincerely,

Thomas S. Obermeyer
Legislative Assistant, 907-465-3762

Alaska State Legislature

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Senator_Bettye_Davis@legis.state.ak.us
http://www.akdemocrats.org

Senator Bettye Davis

SCR 2, 27-LS0031 - "Proposing amendments to the Uniform Rules of the Alaska State Legislature relating to the presiding officer pro tempore."

SPONSOR STATEMENT

SCR 2 amends Uniform Rules 1 and 4 to increase the roles and responsibilities of Presiding Officers Pro Tempore. The term "pro tempore" is derived from the Latin phrase "for a time." To make the titles more consistent throughout the Rules and to recognize increased status and duties of Presiding Officers Pro Tempore in the leadership of both houses, Sections 1 and 2 of Uniform Rule 1 change the titles of *Temporary Presiding Officers* to *Presiding Officers Pro Tempore* and *Permanent Presiding Officers* to *Regular Presiding Officers*.

Section 4, Rule 4, Uniform Rules is amended and establishes that in the absence of both the Regular Presiding Officer (Senate President/Speaker of the House) and in the absence of the Majority Leader, the Presiding Officer Pro Tempore previously elected in Uniform Rule 1(b) serves as the Presiding Officer Pro Tempore.

The result of the language amending section 4 of SCR 2 in the original bill is that the Presiding Officer Pro Tempore elected at the start of the first session of a Legislature, in addition to the Presiding Officer Pro Tempore's duties set out in Uniform Rule 1(b), will continue for both sessions to serve as a "backup" in the absence of the regular presiding officer (President of the Senate/Speaker of the House) and Majority Leader. These changes effectively create a third permanent position in the leadership without changing the present leadership structure. The Regular Presiding Officer, the Majority Leader and the Presiding Office Pro Tempore may temporarily relinquish the chair to any member.

These changes in the Uniform Rules mean that in addition to the few minutes of prominent duties, honor, and high visibility assigned to the Presiding Officer Pro Tempore to help organize the houses at the beginning of every two year session, the Presiding Officer Pro Tempore may function in capacities delegated in the absence of the Regular Presiding Officer and Majority Leader.

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Office of Senator Bettye Davis

Explanation of Committee Substitute for SCR 2

The Committee Substitute for SCR 2, 27-LS0031\B, amends the language on page 2, Section 4, Rule 4 to restore unchanged the present leadership order in the absence of the regular presiding officer(s) (President of the Senate/ Speaker of the House). The original draft unintentionally placed the presiding officer pro tempore before the majority leader in the absence of the regular presiding officer. The Committee Substitute establishes that in the absence of both the regular presiding officer and the majority leader, the presiding officer pro tempore previously elected in the Uniform Rule 1(b) serves as the presiding officer pro tempore.

The result of the language amending Section 4 of SCR 2 is that the presiding officer pro tempore elected at the start of the first session of a legislature, in addition to the presiding officer pro tempore's duties set out in Uniform Rule 1(b), will continue for both sessions to serve as a "backup" in the absence of the regular presiding officer and majority leader.

ALASKA STATE LEGISLATURE

UNIFORM RULES

ADOPTED 1981

by the

TWELFTH LEGISLATURE - FIRST SESSION

AS AMENDED 1985, 1988, 1989, 1991, 1998, 2001, 2003, 2004, 2008

Legislative Affairs Agency

ORGANIZATION OF FIRST SESSION

Rule 1. Organization of First Session. (a) At the time for convening of the first regular session of a legislature the lieutenant governor calls each house to order separately and calls the roll of members whose election has been certified. The lieutenant governor then administers the oath of office to the new members and, pending the election of temporary presiding officers, preserves order and decorum in the house.

(b) When the house by a majority vote of the full membership of the house selects a temporary presiding officer, the temporary presiding officer assumes the chair and the lieutenant governor withdraws. The temporary presiding officer then calls for nominations for a permanent presiding officer and the nominee receiving a majority vote of the full membership of the house becomes the permanent presiding officer for the two-year duration of the legislature. If a permanent presiding officer is not elected by the seventh legislative day, on the eighth legislative day the temporary presiding officer shall call for nominations for a permanent presiding officer from the floor. A roll call vote shall be taken on the persons nominated. Election of a permanent presiding officer requires a majority vote of the full membership of the house.

(c) Pending the organization of the house a secretary assigned by the Legislative Council assists the lieutenant governor and the temporary and permanent presiding officers in the performance of their duties.

(d) The Uniform Rules of the Legislature of the previous regular session or any authorized revision of those rules are used as the temporary rules until the Rules Committee reports on and the legislature in joint session adopts permanent uniform rules.

(e) The presiding officer shall announce, not later than the day following election, the appointment of a Committee on Committees consisting of five members including the presiding officer. The presiding officer chairs the Committee on Committees. The committee is responsible for nominating the members of the standing committees as set out in Rule 20 and the member who is to chair each standing committee to serve for the two-year duration of the legislature. The membership of each committee shall total to an uneven number. On each standing committee the minority is entitled to the number of seats that is proportional to the number of minority members compared to the total house membership or to one seat, whichever is greater. In calculating the number of seats the minority is entitled to, fractional numbers that represent the minority proportional entitlement to a seat shall be ignored. The report of the Committee on Committees is subject to approval by a majority vote of the full membership of the house. For purposes of this subsection "minority" means a group of members who have organized and elected a minority leader and who constitute at least 25 percent of the total house membership.

ORGANIZATION OF SECOND SESSION

Rule 2. Organization of Second Session. The presiding officer of each house during the first regular session presides during the second regular session or any special session and administers the oath to any new members.

LEGISLATIVE SESSION STAFF

Rule 3. Legislative Session Staff. (a) Each house elects an internal administrative officer (a chief clerk in the house and a secretary in the senate) to serve for the two-year duration of the legislature. The officer is nominated by the Rules Committee and elected by a majority vote of the full membership of the house. The chief clerk and secretary are responsible for the selection and supervision of the staff of their offices and are subject to the direction of the presiding officer and Rules Committee according to law and legislative rule.

(b) The Rules Committee of each house is responsible for the selection and direction of the session staff assigned to each chamber (sergeant-at-arms and their assistants, pages and messengers) and is the source of approval for hiring session assistants for standing, special, and joint committees and caucuses and secretarial help to be assigned to individual members. The Rules Committees of the house and senate shall decide jointly and within the amount budgeted for session staff the compensation and conditions of employment of those working under their individual supervision. The director of administrative services of the Legislative Affairs Agency shall assist and make recommendations to the Rules Committees regarding staff compensation and related matters.

(c) The sergeant-at-arms shall attend all sessions of the house unless absent for the purpose of discharging the duties of the office. The sergeant-at-arms shall maintain order on the floor of the chamber and in the galleries and adjoining hallway, and assure that any person not permitted by law or legislative rule to be present in the chamber is removed from the chamber. The sergeant-at-arms shall assure that a member does not leave the chamber during a call of the house, and shall act to secure the attendance in the chamber of members missing during a call of the house.

DUTIES OF THE PRESIDING OFFICER

Rule 4. Duties of the Presiding Officer. The presiding officer of each house has the duties set forth in Section 575, MASON'S MANUAL OF LEGISLATIVE PROCEDURE, 2000 edition, when not inconsistent with these Uniform Rules. In the absence of the regular presiding officer, the majority leader of the house serving ex officio as presiding officer pro tempore shall preside; except that the regular presiding officer may temporarily relinquish the chair to any member.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **SCR 2**
() Publish Date

Identifier (file name)
Title SCR 2-UNIFORM RULES: PRESIDING OFFICER PRO TEM
Sponsor SENATORS DAVIS, Ellis
Requester (S) STATE AFFAIRS

Dept. Affected
Appropriation
Allocation
OMB Component Number

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by SENATE STATE AFFAIRS COMMITTEE
Division
Approved by /s/ Senator Wielechowski, Chair

Phone 465-2435
Date/Time 2/15/11 8:00 AM
Date

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

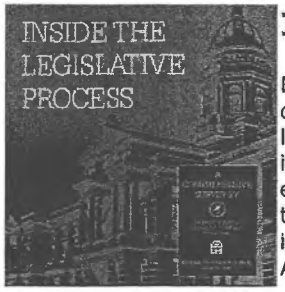
BILL NO. SCR 2

Analysis

No Fiscal Impact

NCSL
NATIONAL CONFERENCE of STATE LEGISLATURES

GO



Inside the Legislative Process

Now, *Inside the Legislative Process* is becoming an electronic document—making its information more accessible to legislators and legislative staff. The electronic version will include all sections published since 1996. Access the electronic edition of *Inside the Legislative Process* through the Published Sections List. Please note that the individual sections are published as PDFs, which will require Adobe Acrobat Reader to download the documents.

As of January 2010

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Topics Covered by Various Editions
Published Sections List
Introduction
Legislative Organization
Bills and Bill Processing
Committee Procedures
Floor Action
General Legislative Procedures
Legislative Documents
Public Information
Office of the Chief Clerk or Secretary
For More Information

Background

Inside the Legislative Process is a nationally-recognized, valuable research tool, providing some of the best information on state legislative processes. It is produced through a cooperative effort between the American Society of Legislative Clerks and Secretaries (ASLCS) and the National Conference of State Legislatures (NCSL).

In 1975, ASLCS authorized its first comprehensive survey of the structure, size, function and operations of the clerks' and secretaries' offices in the 50 state legislatures. The survey proved to be an extraordinarily useful document, not only to the Society's members but also to the NCSL and to others who are interested in the management and procedures of legislative chambers. The data proved so beneficial that the surveys have been continued. Surveys were conducted in 1975, 1979, 1982, 1985, 1988, 1992, 1996, 1997, 1998, 1999, 2000, 2002, 2004, 2006 and 2008.

The publication format for *Inside the Legislative Process* has changed over the years. In 1975, the data were compiled into charts for use by ASLCS members. From 1979 through 1992, editions were published every three to four years as stand-alone books. Beginning with the 1996 edition, *Inside the Legislative Process* became a publication with its information divided among several general topic tabs in a three-ring binder.

Topics Covered by Various Editions

Legislatures deal with a large number of parliamentary issues—too many to be addressed in a single survey. As a result, the topics covered by each edition of *Inside the Legislative Process* typically vary.

Year*	Topics Covered
1979 (available in printed format only)	Selection and duties of the clerk and secretary; staff; parliamentary authority; journals; calendars; bills; committee process; legislative procedures; public information offices; publications; computerization; roll call voting systems; fiscal information; recording of session or committee meetings
1982 (available in printed format only)	Office of the chief clerk and secretary; salaries and benefits; bill processing; printing of legislative documents; referral of bills to committee; calendaring process; advance public notice of committee meetings; taping of committee meetings and floor sessions; parliamentary authority; public information; media coverage; computerization
1985 (available in printed format only)	Office of the chief clerk and secretary; salaries, benefits and personnel policies; printing of legislative documents; referral of bills to committee; calendaring process; advance public notice of committee meetings; committee consideration and reporting of bills; taping committee meetings and floor sessions; conference committee procedures; media coverage; electronic roll call voting systems; computerization
1988 (available in printed format only)	Calendaring process; handling of floor amendments; voting practices; consent calendars; introduction and referral of bills; courtesy or personal resolutions; ceremonial practices (including prayer practices); referral of bills to committee; appointment of standing committee chairs and members; standing committee size and structure; committee scheduling during the session; legislative party caucuses; bill processing; printing of legislative documents; capitol facilities; salaries, benefits and leave policies

1991 (available in printed format only)	Legislative organization; regular, extraordinary or special sessions; committee consideration of bills; committee report information; advance notice of committee meetings and open meeting requirements; expediting the legislative process; readings of bills; processing of bills; debate; taping committee meetings and floor sessions; public information; printing (of legislative documents); document charges; the journal; selection of the principal clerk; selection of other chamber offices; staff functions; parliamentary authority; fringe benefits; leave plans and time
1996	Opening day of session; new member orientation; mechanisms used to streamline bill processing; sponsorship limits for legislation; referral of bills, standing committees; subcommittees; conference committees; floor amendments; vote requirements; roll call voting machines and practices; censure, expulsion and other disciplinary actions
1997	Rules committees; access to printed legislative documents; electronic access to legislative documents; communicating with legislators
1998	Engrossing process; enrolling procedures; the calendaring process; end-of-session logjam; the veto process
1999	Legislative party caucuses; legislative leaders; recording legislative proceedings; media or public information services; the principal clerk or secretary (which also includes info on other job positions within the office); parliamentary authority
2000	Legislative organizational sessions; transition process; germaneness requirements; reconsideration processes; the legislative journal; archiving legislative documents
2002	Bill prefiling; personal, congratulatory, ceremonial or courtesy resolutions; prayer practices; open meetings and notice requirements
2004	Regular and special or extraordinary sessions; committee procedures
2006	Floor Amendment procedures; automation of journal production
2008	Readings of bills; mandatory roll call votes; messaging

NCSL 1999

*Note: The edition year reflects the year in which the data were collected (not the publication date).

Published Sections List

Note: The documents are published as PDF files. To view PDF files, you must install *Adobe Acrobat Reader*.

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NCSL 1999

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For More Information

For more information about *Inside the Legislative Process*, contact Brenda Erickson at 303-364-7700, ext. 1391.

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Washington Office
Tel: 202-624-5400 | Fax: 202-737-1069 | 444 North Capitol Street, N.W., Suite 515 | Washington, D.C. 20001

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Legislative Leaders

Leadership positions. At the beginning of each legislative session, decisions are made concerning leadership positions. Among the first is the determination of which titles will be used and the number of individuals who may hold each position. The most common leadership titles are president of the Senate, speaker of the House, majority leader and minority leader. However, there usually are no limits to the names and numbers of leadership positions that may exist, and table 99-2.13 illustrates the variety used by legislative chambers.

Selection and terms. Once titles and the number of individuals to hold each position have been set, the actual selection of legislative leaders commences. It is one of the key steps taken to organize a legislative chamber, and tables 99-2.14 through 99-2.18 illustrate how state legislatures choose their leaders.

The presiding officer—that is, the president of the Senate or speaker of the House—typically is elected by a vote of the full body. However, in the states shown below, the person who is elected by the people to serve as lieutenant governor acts as the president of the Senate.

Alabama
Arkansas
California
Connecticut
Delaware
Georgia
Idaho
Indiana
Michigan
Mississippi
Missouri
Nebraska
Nevada
New Mexico
New York
North Carolina
North Dakota
Oklahoma
Pennsylvania
Rhode Island
South Carolina
South Dakota
Texas
Vermont
Virginia
Washington

The president pro tem selects other caucus leaders in three states. In Alabama, the president pro tem appoints the Senate majority leader and assistant majority leader. The Senate assistant majority leader and the majority whip are appointed by this leader in Connecticut. In the Indiana Senate, the president pro tem chooses the majority leader, assistant majority leader and majority whip.

The majority leader appoints other caucus leaders in the Connecticut Senate and House, Florida Senate and House, Iowa Senate, Minnesota Senate, Oregon Senate and Rhode Island Senate. The specific leaders who are selected by the majority leader are:

Connecticut Senate	Assistant majority leader, majority whip
Connecticut House	Deputy majority leader
Florida Senate	Majority whip
Florida House	Majority floor leader, majority caucus chair
Iowa Senate	Majority caucus secretary
Minnesota Senate	Majority whip, majority caucus secretary
Oregon Senate	Assistant majority leader, majority whip
Rhode Island Senate	Majority whip

In the Delaware House, the speaker pro tem is the most senior member of the majority caucus. The chairman of the District of Columbia Council is elected by the citizens of Washington, D.C.

In most legislatures, there is no limit to the number of years that an individual may hold a leadership position. However, 24 chambers reported that some of their leadership positions have term limits—either official or unwritten. Table 99-2.19 highlights these limits.

Roles and responsibilities. The roles and responsibilities of legislative leaders vary considerably among the states. Shown below are brief synopses of the duties typically associated with selected leadership positions. Tables 99-2.20 through 99-2.36 provide more detailed information on leaders' duties.

President of the Senate. The president is the principal leader of the Senate. The president typically will 1) preside over the daily sessions of the Senate, 2) preserve order in the chamber, 3) state parliamentary motions, 4) rule on parliamentary questions, 5) appoint committee chairs and members, 6) refer bills to committee, 7) sign legislation, writs and warrants, and 8) act as the official spokesperson for the chamber. In about 26 states, the lieutenant governor serves as the president of the Senate, and many of these duties often are assumed by the president pro tem.

President pro tem of the Senate. The primary roles assigned to the president pro tem are to 1) preside over the Senate in the president's absence, 2) exercise the powers and duties of the president in his or her absence, and 3) assume other duties as assigned by the president. Sometimes, this is an honorary position, with few substantive duties assigned. In states where the lieutenant governor presides over the Senate, the president pro tem often assumes duties associated with a president.

Speaker of the House or Assembly. The speaker is the principal leader of the House or Assembly. The speaker typically will 1) preside over the daily sessions of the House or Assembly, 2) preserve order in the chamber, 3) state parliamentary motions, 4) rule on parliamentary questions, 5) appoint committee chairs and members, 6) refer bills to committee, 7) sign legislation, writs and warrants, and 8) act as the official spokesperson for the chamber.

Speaker pro tem. The primary roles assigned to the speaker pro tem are to 1) preside over the House or Assembly in the speaker's absence, 2) exercise the powers and duties of the speaker in his or her absence, and 3) assume other duties as assigned by the speaker. In some states, this is an honorary position, with few substantive duties assigned.

Majority leader or majority floor leader. The primary functions of a majority leader usually relate to floor duties. The majority leader 1) is the lead speaker for the majority party caucus during floor debates, 2) develops the calendar, and 3) assists the president or speaker with program development, policy formation and policy decisions.

Majority whip. The duties of the majority whip are to 1) assist the floor leader, 2) ensure member attendance, 3) count votes, and 4) generally communicate the majority position on issues.

Majority caucus chair. The majority caucus chair generally 1) develops the majority caucus agenda with other principal leaders, 2) presides over the majority caucus meetings, and 3) assists with the development of policy.

Majority caucus secretary. The main responsibility of the majority caucus secretary is to keep records of caucus meetings.

Minority leader or minority floor leader. The minority leader is the principal leader of the minority party caucus. The minority leader is responsible for 1) developing the minority position, 2) negotiating with the majority party, 3) directing minority caucus activities on the chamber floor, and 4) leading floor debate for the minority caucus.

Minority Whip. The major responsibilities for the minority whip are to 1) assist the minority leader on the chamber floor, 2) count votes, and 3) ensure attendance of minority party members.

Minority caucus chair. The minority caucus chair 1) presides over caucus meetings and 2) assists the minority leader with policy development.

Minority caucus secretary. The main responsibility of the minority caucus secretary is to keep records of caucus meetings.

Table 99-2.22 Major Roles and Responsibilities—President Pro Tem or Vice President

State (1)	Acts as official spokesperson for the chamber	Acts as official spokesperson for the caucus	Presides over floor sessions	Preserves order during meetings	States parliamentary motions	Rules on parliamentary questions	Appoints other caucus leaders	Appoints committee chairs	Appoints committee members	Sets calendar(s) or agenda(s)	Refers bills to committee
Alabama			S					S	S		S
Alaska			S								
Arizona											
Arkansas	S										
California	S	S	S	S	S	S					
Colorado			S						S		
Connecticut		S	S				S	S	S		
Delaware											
Florida											
Georgia			S		S	S					
Hawaii											
Idaho	S	S	S		S			S	S		S
Illinois											
Indiana	S				S		S	S	S		S
Iowa											
Kansas			S								
Kentucky									S	S	S
Louisiana											
Maine											
Maryland	S	S	S	S							
Massachusetts											
Michigan			S	S	S	S					
Minnesota											
Mississippi			S	S	S	S					
Missouri	S	S	S	S	S	S		S	S		S
Montana											

Table 99-2.22 Major Roles and Responsibilities—President Pro Tem or Vice President, cont'd.

State (1)	Acts as official spokesperson for the chamber	Acts as official spokesperson for the caucus	Presides over floor sessions	Preserves order during meetings	States parliamentary motions	Rules on parliamentary questions	Appoints other caucus leaders	Appoints committee chairs	Appoints committee members	Sets calendar(s) or agenda(s)	Refers bills to committee
Nebraska											
Nevada	S		S	S	S	S					
New Hampshire											
New Jersey											
New Mexico											
New York											
North Carolina	S							S	S		
North Dakota			S		S	S					S
Ohio					S						
Oklahoma	S		S	S	S	S		S	S		
Oregon			S		S	S					
Pennsylvania	S	S	S	S	S	S		S	S		S
Rhode Island											S
South Carolina	S		S			S					S
South Carolina								S	S	S	
Tennessee											
Texas											
Utah											
Vermont									S	S	
Virginia			S								
Washington			S			S					
West Virginia			S								
Wisconsin											
Wyoming											
American Samoa											
District of Columbia											
Puerto Rico			S		S	S					

Table 99-2.22 Major Roles and Responsibilities—President Pro Tem or Vice President, cont'd.

Key:
S=Senate
H=House or Assembly
B=Both chambers

Note:
1. The following chambers did not return a survey: Delaware Senate, Hawaii Senate, Maryland House, New Hampshire Senate, New York Senate, American Samoa House, Guam Senate, Northern Mariana Islands Senate and House, Puerto Rico House and Virgin Islands Senate.

Table 99-2.23 More Duties of the President Pro Tem or Vice President

State (1)	Signs legislation, writs and warrants	Has jurisdiction over employees	Leads floor debate	Presides over caucus meetings	Ensures member attendance	Counts votes	Develops caucus agenda	Coordinates information dissemination to members	Other
Alabama									
Alaska									
Arizona									
Arkansas									
California			S	S	S	S	S	S	
Colorado									
Connecticut				S			S	S	
Delaware									
Florida									
Georgia					S				
Hawaii									
Idaho	S	S	S			S	S	S	
Illinois									
Indiana	S	S	S		S				
Iowa									
Kansas									
Kentucky		S							
Louisiana									
Maine									
Maryland									
Massachusetts									
Michigan									
Minnesota									
Mississippi									
Missouri	S	S	S		S			S	
Montana									

Table 99-2.23 More Duties of the President Pro Tem or Vice President, cont'd.

State (1)	Signs legislation, writs and warrants	Has jurisdiction over employees	Leads floor debate	Presides over caucus meetings	Ensures member attendance	Counts votes	Develops caucus agenda	Coordinates information dissemination to members	Other
Nebraska									
Nevada	S								
New Hampshire									
New Jersey									
New Mexico									
New York									
North Carolina				S					
North Dakota	S								
Ohio									
Oklahoma	S	S	S			S		S	
Oregon									
Pennsylvania	S	S					S	S	
Rhode Island									
South Carolina		S							
South Carolina		S							
Tennessee									
Texas									
Utah									
Vermont			S						
Virginia									
Washington									
West Virginia									
Wisconsin									
Wyoming									
American Samoa									
District of Columbia									2
Puerto Rico									

Table 99-2.23 More Duties of the President Pro Tem or Vice President, cont'd.

Key:
S=Senate
H=House or Assembly
B=Both chambers

Notes:
1. The following chambers did not return a survey: Delaware Senate, Hawaii Senate, Maryland House, New Hampshire Senate, New York Senate, American Samoa House, Guam Senate, Northern Mariana Islands Senate and House, Puerto Rico House and Virgin Islands Senate.
2. District of Columbia: The chairman pro tem acts in the chairman's absence.

Table 99-2.26 Major Roles and Responsibilities—Speaker Pro Tem

State (1)	Presides over floor sessions	Preserves order during meetings	States parliamentary motions	Rules on parliamentary questions	Ensures member attendance	Counts votes	Develops caucus agenda	Coordinates information dissemination to members	Other
Alabama									
Alaska	H								
Arizona	H	H	H	H					
Arkansas									2
California	H		H	H					3
Colorado									
Connecticut	H	H	H	H	H	H	H	H	4
Delaware	H								
Florida	H								
Georgia	H			H					5
Hawaii									
Idaho									
Illinois									
Indiana	H	H		H					
Iowa	H		H	H			H		
Kansas	H								
Kentucky	H								
Louisiana									6
Maine									
Maryland									
Massachusetts									
Michigan	H								
Minnesota	H	H	H	H	H	H	H		
Mississippi	H	H	H						
Missouri									
Montana									

Table 99-2.26 Major Roles and Responsibilities—Speaker Pro Tem, cont'd.

State (1)	Presides over floor sessions	Preserves order during meetings	States parliamentary motions	Rules on parliamentary questions	Ensures member attendance	Counts votes	Develops caucus agenda	Coordinates information dissemination to members	Other
Nebraska									
Nevada									7
New Hampshire									
New Jersey									
New Mexico									
New York	H		H	H					
North Carolina	H								8
North Dakota									
Ohio									
Oklahoma	H	H		H					9
Oregon									
Pennsylvania									
Rhode Island									10
South Carolina	H	H	H	H					11
South Dakota									
Tennessee	B	H	H	H					12
Texas	H								
Utah									
Vermont									
Virginia									
Washington									
West Virginia									
Wisconsin									
Wyoming									
American Samoa									
District of Columbia									
Puerto Rico									

Table 99-2.26 Major Roles and Responsibilities—Speaker Pro Tem, cont'd.

Key:
S=Senate
H=House or Assembly
B=Both chambers

Notes:
1. The following chambers did not return a survey: Delaware Senate, Hawaii Senate, Maryland House, New Hampshire Senate, New York Senate, American Samoa House, Guam Senate, Northern Mariana Islands Senate and House, Puerto Rico House and Virgin Islands Senate.
2. Arkansas: In the House, the speaker pro tem performs the duties of the speaker in his or her absence.
3. California: The speaker pro tem of the House also may preside over caucus meetings.
4. Connecticut: The speaker pro tem of the House also refers bills to committee and has jurisdiction over employees.
5. Georgia: The speaker pro tem also may act as the official spokesperson for the House.
6. Louisiana: In the House, the speaker pro tem performs the duties of the speaker in his or her absence.
7. Nevada: In the Assembly, the speaker pro tem performs the duties of the speaker in his or her absence.
8. North Carolina: In the House, the speaker pro tem performs the duties of the speaker in his or her absence.
9. Oklahoma: The speaker pro tem of the House also may sign legislation, writs and warrants.
10. Rhode Island: In the House, the speaker pro tem performs the duties of the speaker in his or her absence.
11. South Carolina: In the House, the speaker pro tem also refers bills to committee.
12. Tennessee: The speaker pro tem of the Senate also sets calendars or agendas.

NCSL

Examples of Duties of the Senate President Pro Tem

(as of February 2011)

Alabama Senate

Rule 21. Messages may be called at any stage of business by the President Pro Tempore or in his/her absence, then the Majority Leader, except while a matter is being considered, while the yeas and nays are being called, or while the ballots are being counted.

Rule 36. During the period between the end of the regular session and the convening of the next regular session, or, in the first year of a quadrennium, between the Organizational Session and the regular session, members may deliver bills to the Secretary of the Senate, which shall be known as "pre-filing." Such bills shall be numbered by the Secretary in the order of receipt and otherwise processed for introduction when the regular session has been convened. Pre-filed bills shall be assigned by the President, or his/her designee, with the concurrence of the President Pro Tempore, or his/her designee, to a standing committee for study and shall be formally referred to the same committee upon commencement of the regular session; provided, however, that no bill shall be pre-filed under this rule after the commencement of the last regular session of the Legislature in any quadrennium and before the organizational session following the general election.

Rule 42. In the absence of the President when the Senate convenes, the President Pro Tempore shall preside except as provided for in Rule 1; however, any other rule to the contrary notwithstanding, when the President of the Senate chooses not to preside, the President Pro Tempore shall preside. Should the President Pro Tempore not be in the chamber or choose not to preside, the Majority Leader shall preside and/or designate in writing a member to preside or until such time as the President or the President Pro Tempore, as the case may be, assumes or reassumes the presidential duties of the Chair; provided, however, that such delegation may not continue to the next legislative day.

Rule 45. When more than one member rises seeking recognition, the Presiding Officer shall decide which member to recognize. The President Pro Tempore shall be recognized first when rising for a Point of Order, as well as for the purpose of taking up House messages, executive messages, and other matters of serious import for the operation of the Senate. The Majority Leader, in the absence of the President Pro Tempore, shall have priority when seeking recognition.

Rule 47. (a) The Senate President Pro Tempore may designate the Majority Leader to perform the duties of the Senate President Pro Tempore in his/her absence, with the exception of signing of bills and resolutions, which only the President and President Pro Tempore are constitutionally allowed to do. The President Pro Tempore shall be an additional voting member of all Senate Standing Committees, superseding the number of members of each standing committee as set out in Rule 48, including Local Legislation No. 1, but excluding all other local legislation committees unless he/she is a member of another local legislation committee by geographical circumstance. The President Pro Tempore may designate in writing to the Secretary of the Senate the name of a member who is not already a member of the committee to represent him or her as a voting member under this rule. Such substitution shall be for a term of not less than one year unless such member so appointed dies or resigns from the Senate, or resigns from the committee so appointed under this rule.
(b) There shall be a Senate Committee on Assignments which shall be composed of the President Pro Tempore, the Lieutenant Governor, the Senate Majority Leader and three additional members appointed by the President Pro Tempore. The Committee on Assignments shall appoint the Chairperson, Vice Chairperson and membership of all Senate Standing Committees and Select Committees. The Committee may reappoint the membership of the committees, and may rename the leadership of the committees. Any such change in committee membership, or the chairman or vice-chairman thereof, shall only be authorized by a majority vote of the membership of the Committee

on Assignments. Actions of this committee shall be reported to the Senate by the President Pro Tempore or in his/her absence by the Senate Majority Leader as such appointments are approved. …

Rule 54. A bill or resolution carrying an appropriation may be referred to a committee other than the appropriate finance and taxation committee if the subject matter requires such referral in the judgment of the President Pro Tempore. However, such bill or resolution shall also be referred to and reported by the appropriate committee on finance and taxation after being given a second reading.

Rule 68. The Secretary shall provide the Chairperson of each standing committee with a stamp with which to make endorsements on bills. Each standing committee of the Senate shall be furnished a secretary or clerk by the Secretary of the Senate. Office space shall be provided to the President Pro Tempore, the Senate Majority Leader, and to the Chairpersons of standing committees as such space is made available to the Senate.

Rule 82. Any motion relating to creating or filling a vacancy in the office of President Pro Tempore shall be in writing with a day certain for the vote, which day certain may not be less than five legislative days after the motion is filed. Any vote relating to the removal of a member serving as President Pro Tempore shall prevail only with a concurrence of a two-thirds vote of the elected members of the Senate.

Arizona Senate

Rule 2. … H. The President shall have the right to name any member as President Pro Tempore to serve during the President's absence, which appointment may extend throughout the session unless terminated by the Senate. The President may appoint any other member as temporary President Pro Tempore to serve for a limited period of time in the absence of the President and President Pro Tempore. In the absence or omission of such an appointment, the Senate shall proceed to elect a President Pro Tempore to act during the absence of the President.

Arkansas Senate

Rule 1.02. The President shall have the right to name any member to perform the duties of the Chair, but such substitution shall not extend beyond adjournment; provided, however, that in case of the absence of the President Pro Tempore, he may make such appointment for a period not exceeding ten (10) days, with the approval of the Senate at the time the same is made.

Rule 2.01. (a) At the beginning of every regular session of the General Assembly the Senate shall elect from its members an officer to be styled "President Pro Tempore" of the Senate, who shall perform all the duties of the President of the Senate during his absence, except as otherwise provided in these Rules. At the beginning of each regular session, the President Pro Tempore shall appoint four (4) Assistant President Pro Tempores, one from each of the current Congressional Districts. At least three (3) of the Assistant President Pro Tempores shall be a member of the majority party. The President Pro Tempore shall designate one of the four Assistant President Pro Tempores to perform all the duties of the President Pro Tempore during his or her absence.
(b) Beginning with the 87th General Assembly, the President Pro Tempore shall not serve more than one term in the office nor shall the President Pro Tempore be Chairman of any Class "A", "B" or Class "C" Committee nor the Joint Budget Committee.
(c) The President Pro Tempore shall have the authority to convene the members of the Senate between sessions for the purpose of addressing any matter that affects the business of the full Senate.

Rule 5.01. The Chaplain shall be selected daily by the President Pro Tempore or his designee and shall attend the commencement of that day's session of the Senate and open the same with prayer.

Rule 7.02. … (c) All vacancies on Class "A", Class "B" and Class "C" Committees of the Senate shall be filled by the President Pro Tempore on the basis of seniority or as provided by law or by other Rules of the Senate. In the temporary absence of the Chairman and the Vice-Chairman, the member next in rank and seniority, and soon, as often as the case may happen, shall act as Chairman. In case of a permanent vacancy in the Chairmanship or Vice-Chairmanship of any committee, the President Pro Tempore shall appoint another Chairman or Vice-Chairman within the first three (3) days of the next regular or special session of the General Assembly.

Rule 10.05. In the absence of a quorum, five (5) members shall be appointed by the President Pro Tempore to compel the attendance of absent members. In all calls of the Senate, the doors shall be closed, the names of the members shall be called by the Secretary of the Senate, and the absentees noted. Those for whom no sufficient excuse is made may, by order of the majority of those present, be sent for by members to be appointed by the President Pro Tempore for that purpose and their attendance secured and retained. The Senate shall determine upon what conditions they may be discharged. Members who voluntarily appear shall, unless the Senate otherwise directs, be immediately admitted to the Senate Chamber, and they shall report the names to the Secretary of the Senate to be entered upon the Journal as present. At any time after the roll call has been completed, the Presiding Officer may entertain a motion to adjourn. If the Senate adjourns, all proceedings under this section shall be vacated.

Rule 20.01. The President Pro Tempore shall appoint all conference committees which 1 shall be ordered from the Senate from time to time, and unless otherwise directed by the Senate, the same number of Senators shall be named to serve on the conference committees as are named to serve on such committees by the House.

California Senate

Rule 2. The President pro Tempore, Assistant President pro Tempore, Vice Chair of the Committee on Rules, or senior member present shall call the Senate to order at the hour stated and, if a quorum is present, shall proceed with the order of business

Rule 7. The President pro Tempore shall take the Chair and call the Senate to order at the hour of the meetings of the Senate. The President pro Tempore is the Presiding Officer of the Senate.

It shall be the particular responsibility of the President pro Tempore to secure the prompt and businesslike disposition of bills and other business before the Senate. He or she shall maintain order in the Senate Chamber and, in case of a disturbance or disorderly conduct outside the bar or in the gallery, he or she shall have the power to order the same cleared.

The President pro Tempore shall serve ex officio as a member of all Senate and joint committees of which he or she is not a regular member, with all of the rights and privileges of that membership except the right to vote. In counting a quorum of any of these committees, the President pro Tempore may not be counted as a member.

The Assistant President pro Tempore or the Vice Chair of the Committee on Rules shall, in the absence of the President pro Tempore, perform the duties, and have all powers and authority, of the President pro Tempore.

Rule 8. The President pro Tempore of the Senate may name a Senator to perform the duties of the Chair in his or her absence. The Senator so named shall be vested, during that time on the floor, with all the powers of the President pro Tempore, and the Senator who performs these duties shall be known as the Assistant President pro Tempore.

In the absence of the President pro Tempore, the Assistant President pro Tempore, or the Vice Chair of the Committee on Rules, any Senator may perform the duties of the Chair.

Rule 10.5. On the first day of each session, the President pro Tempore, members of the Committee on Rules, Secretary of the Senate, and Sergeant at Arms shall be elected by a majority vote of the duly elected and qualified Members of the Senate and shall serve until their successors are elected and qualify. The Committee on Rules shall appoint an Assistant Secretary, a Minute Clerk, a Chaplain, and other employees with such duties as the committee requires.

Rule 11. The Committee on Rules shall consist of the President pro Tempore of the Senate, who shall be the chair of the committee, and four other Members of the Senate to be elected by the Senate. There is a vacancy on the committee in the event a member ceases to be a Member of the Senate or resigns from the Committee on Rules. Any vacancy occurring during a summer, interim study, or final recess, except in the case of the President pro Tempore, shall be filled by the remaining members of the Committee on Rules. A vacancy occurring at any other time shall be filled by election by the Senate.

The Committee on Rules shall appoint all other committees of the Senate and shall designate a chair and vice chair of each committee.

In making committee appointments, the Committee on Rules shall give consideration to seniority, preference, and experience. However, in making committee appointments, the Committee on Rules shall, as far as practicable, give equal representation to all parts of the state.

Rule 38.5. Every amendment proposed must be germane. In order to be germane, an amendment must relate to the same subject as the original bill, resolution, or other question under consideration.

A point of order may be raised that the proposed amendment or an amendment now in the bill, resolution, or other question under consideration is not germane, so long as the question is within control of the body. In that case the President pro Tempore shall decide whether the point of order is well taken. In the absence of the President pro Tempore, the Vice Chair of the Committee on Rules shall decide whether the point of order is well taken. If, in the opinion of the President pro Tempore or the Vice Chair of the Committee on Rules, the point of order is well taken, the question of germaneness shall on his or her motion be referred to the Committee on Rules for determination. The Committee on Rules shall make its determination by the following legislative day. If the point of order is raised and referral is made on the last legislative day preceding a joint recess, the Committee on Rules shall make its determination before adjourning for the recess. ...

Colorado Senate

Rule 1. (a) Unless otherwise ordered, the regular hour of meeting of the Senate shall be 10 o'clock a.m. on Mondays, and 9 o'clock a.m. on other days. The hour of adjournment shall be as ordered.

(b) The President of the Senate, or in the President's absence the President pro tempore, shall take the chair every day promptly at the hour to which the Senate stands adjourned, shall call the Senate to order, shall lead or designate another Senator to lead the members in a recitation of the pledge of allegiance to the flag of the United States of America, and on the ascertainment of a quorum, shall proceed to business.

(c) If at the hour for the convening of the Senate, the President and the President pro tempore shall be absent, the senior Senator present shall call the Senate to order and shall continue to preside, with all the powers, privileges, and duties of the President, until the President or President pro tempore shall appear.

Rule 12. ... (b) At the beginning of each regular session convening after a general election and at such other times as may be necessary, the Senate shall, by a majority vote of all members elected, elect one of its members as President, and another member as President pro tempore, who shall, during the absence or inability of the President to serve, preside over the Senate and exercise and perform all the powers, privileges, and duties of the President. In addition, in the event of the death, resignation, disability, or absence from the state of the President, the President pro tempore, as acting President, shall exercise all the powers and duties of the President when the General Assembly is not in session, but the exercise of such powers and duties by the President pro tempore shall continue only until the General Assembly shall meet or until the disability or absence from the state of the President is removed, whichever shall first occur. In the event of the death, resignation, disability, or absence from the state of the President pro tempore, then the majority floor leader shall succeed to the office of acting President pro tempore.

(c) Neither the President, President pro tempore, nor any acting or temporary presiding officer shall be excused from or prohibited from voting on any question because of so presiding, but shall not vote on appeals from such person's decision.

Connecticut Senate

Rule 6. If the President while presiding, wishes to leave the chair, the president pro tempore shall preside, or, in the absence of the president pro tempore, the president pro tempore's designee shall preside for a period not exceeding one day.

Rule 7. Within one week after appointment, the President Pro Tempore shall nominate a chaplain and up to three

deputy chaplains, and if such nominations are confirmed by the Senate by a majority vote, the candidates so nominated and confirmed shall serve for the 2011 and 2012 sessions.

Rule 9. ... (b) On any day that is not scheduled as a session day, the President Pro Tempore and the Minority Leader, or their designees, may call the Senate into session for purposes of transacting business of a procedural nature by filing with the clerk or the clerk's designee a written instruction to conduct a pro forma Senate session with or without the presence of a senator. Said direction shall include a written motion to adopt the day's Senate agenda and act on all items as indicated and incorporate the items by reference into the Senate journal and Senate transcript. Said motion shall be read into the record and shall have the same force and effect as if the Senate were convened with a presiding officer and senator.

Rule 18. The majority leader, other leaders of the majority party in the Senate and the chairperson and vice chairpersons of each standing and select committee shall be appointed by the president pro tempore of the Senate. Chairpersons and vice chairpersons shall serve at the pleasure of the president pro tempore and the majority leader. The clerks of the standing and select committees and the chairpersons of the subcommittees thereof shall be appointed by the chairpersons of the respective committees with the approval of the president pro tempore of the Senate. The minority leader shall be elected by the members of the minority party in the Senate and the other leaders of the minority party in the Senate shall be appointed by the minority leader. The minority leader shall appoint ranking minority members to each standing and select committee. Such ranking members shall serve at the pleasure of the minority leader. All standing and select committee members shall be appointed by the president pro tempore by the fifth regular session day of the first year of the term, except to fill a vacancy caused by death or incapacity or resignation from the Senate or from a committee; and except that the president pro tempore may appoint any member elected after the fifth regular session day of the first year of the term to any committee within five calendar days after the member takes the oath of office. Not more than nine senators shall be appointed to any standing committee, except that the joint standing committees on Appropriations and Finance, Revenue and Bonding shall consist of not more than eleven senators. The member first named shall be chairperson. The chairperson of each committee may appoint one of the members of the committee as clerk thereof. All Senate leaders, standing committee assignments, chairpersons, vice chairpersons and clerks and subcommittee chairpersons shall serve for both the 2011 and the 2012 sessions.

Delaware Senate

Rule 9. ... C. President Pro Tem's pre-filed list.
(1) A bill or resolution filed with the Secretary may, in the discretion of the President Pro Tem, be placed upon the "President Pro Tem's pre-filed list" and the bill or resolution shall at such time be assigned to a Committee by the President Pro Tem. Copies of the President Pro Tem's pre-filed list shall be distributed to members prior to its reading by the Reading Clerk. The President Pro Tem's pre-filed list shall be read as soon as practicable by the Reading Clerk.

Rule 18. The President Pro Tempore shall appoint all committees; however, the President Pro Tempore, on at the Pro Tem's own initiative or upon order of the Senate, may appoint special or select committees.

Florida Senate

Rule 1.1. A President and a President Pro Tempore shall be elected for a term of two (2) years at the organization session preceding the regular session of each odd-numbered year. They shall take an oath to support the Constitution of the United States and the Constitution of the State of Florida, and for the true and faithful discharge of the duties of office. The Majority Party may, by caucus called by the President, elect a President Designate and a President Pro Tempore Designate, and their names shall be certified to the Secretary. The President may designate a Majority Leader whose name shall be certified to the Secretary. The Minority Party may, by caucus, elect a Minority Leader and a Minority Leader Pro Tempore, and their names shall be certified to the Secretary at the organization session. All elected officers are to hold office until their successors are chosen and qualified or until the expiration of their term, whichever shall occur first.

Rule 1.7. (1) The President may name any Senator to perform the duties of the chair.
(2) If for any reason the President is absent and fails to name a Senator, the President Pro Tempore shall assume the duties of the chair.

(3) If the President resigns, he or she may, prior to resignation, designate a member of his or her party to assume the duties of the chair until a permanent successor is elected.
(4) In the event the chair is vacated permanently, nothing herein shall preclude the Senate from electing a presiding officer. If the chair is vacated permanently during a session of the Legislature, a new presiding officer must be elected within seven (7) days of the vacancy. If the chair is vacated permanently while the Legislature is not in session, the President's designee shall convene the Senate no later than thirty (30) days after the vacancy for the purpose of electing a new presiding officer. The election shall be the Senate's first order of business. In the event that a designation is not made pursuant to subsection (3) of this Rule, the President Pro Tempore shall assume the duties of the designee in convening the Senate to elect a new presiding officer.

Georgia Senate

Rule 1-1.2. (a) A President Pro Tempore shall be elected by the Senate from among its members by a majority of the Senators voting, provided the total vote constitutes a quorum. The President Pro Tempore shall act as President in case of the temporary disability of the President of the Senate. In case of the death, resignation, or permanent disability of the President of the Senate or in the event of the succession of the President of the Senate to the executive power, the President Pro Tempore shall become President of the Senate and shall receive the same compensation and allowances as the Speaker of the House of Representatives. The General Assembly shall provide by law for the method of determining disability as provided in this Paragraph.
(b) Whenever from any cause the President of the Senate shall be absent, the President Pro Tempore shall preside. If both shall be absent, the Secretary of the Senate shall call the Senate to order and shall preside until the election of an acting presiding officer, which said election shall be the first business of the Senate. The acting presiding officer shall preside until the return of one of the first named officers, at which time his or her functions shall cease.
(c) The President of the Senate may, during a day's session, name the President Pro Tempore or the designee of the President to perform the duties of the Chair during any part of that day, but no longer.
(d) While presiding, or in the absence of the President of the Senate, the President Pro Tempore shall have the same powers and duties as the President of the Senate.

Rule 1-1.3. When the President Pro Tempore or any other Senator is presiding, he or she shall not vote unless the Senate shall be equally divided, or unless his or her vote, if given to the minority, will make the division equal. The presiding Senator shall vote in all elections. In all cases where a fixed constitutional vote is required to pass a bill or measure under consideration, and said bill or measure shall lack only one vote to pass the same, the presiding Senator shall vote, and his or her vote shall be counted the same as that of any other member.

Rule 2-1.1. The Committee on Assignments shall be composed of the President Pro Tempore of the Senate, the Majority Leader, the Majority Caucus Chairperson, the Majority Whip, the Majority Caucus Vice-Chair, the Majority Caucus Secretary, and two Senators appointed by the President of the Senate. The President Pro Tempore or his designee shall serve as Chair of the committee. The Chair shall vote only to break a tie. Actions of this committee shall be reported to the Senate by the committee chairperson as necessary. The meetings of this committee shall be closed to the public.

Rule 2-1.2. There shall be a Committee on Administrative Affairs composed of the President of the Senate, the President Pro Tempore, the Majority Leader, the Minority Leader, the Secretary of the Senate, and three members appointed by the President of the Senate. This Committee shall have the responsibility of employing, supervising, disciplining, and setting the compensation of all aides, secretaries and other personnel for the Senate, including the Senate Budget and Evaluation, Senate Press and Senate Research offices. The Committee shall supervise the purchase and allotment of supplies for the Senate. This Committee shall also supervise and approve all out-of-state travel of members of the Senate and staff.

Rule 2-7.3. The Committee of the Whole shall not proceed with the business before it whenever a vote on any question shall disclose the fact that no quorum of the Senate is present. Whenever it is suggested that a quorum is not present, the President Pro Tempore or his or her designee shall satisfy himself or herself of the fact by actual count of the Committee and shall report the same to the Committee; and the President Pro Tempore or his or her designee shall, on his or her own motion, order that the Committee immediately rise, and he or she shall report the fact of the absence of a quorum to the Senate.

Rule 8-1.2. When two or more Senators shall rise at the same time, the President shall name the Senator entitled to proceed; provided, however, the President shall recognize the President Pro Tempore, the Majority Leader, and the Minority Leader, in that order of precedence, should any of them rise to speak, prior to recognizing any other Senator.

Hawaii Senate

Rule 5. (1) In case the President and Vice-President shall be absent at the hour to which the Senate had adjourned, the member of the majority party having the longest tenure in the Senate shall preside until a President pro tempore is chosen. If two or more members are equally qualified to preside, the eldest qualified member shall preside.
(2) The President pro tempore shall be invested with all of the powers and shall perform all the duties of the President. Whenever the President pro tempore is required to sign a bill or other instrument, the Clerk shall attach to such bill or instrument a certificate stating that such President pro tempore was duly elected and is authorized to so sign.

Idaho Senate

Rule 1. (A) The President of the Senate is the Lieutenant Governor and, in his absence or inability to serve, the President Pro Tempore shall perform with like privilege and authority all functions and duties of the President. The President shall vote only when the Senate is equally divided, but this restriction shall apply only to the President and not to the President Pro Tempore or any other Senator who may be in the Chair. The presiding officer shall never cast more than one vote. ...

Rule 3. (A) At the first meeting of the Senate at which a quorum shall be present, the Senate shall proceed to elect a President Pro Tempore and a Secretary and shall adopt temporary rules which, unless otherwise specifically stated, shall be the permanent rules of the preceding session. ...

Rule 6. (A) The President may, in the temporary absence or temporary incapacity of the President Pro Tempore, or with his consent, designate, either verbally or in writing, any Senator to perform the duties of the Chair who shall, during such time, be invested with all powers and privileges of the President except that of signing bills and joint resolutions, but such appointment shall not extend beyond an adjournment.
(B) Succession to Office of President Pro Tempore of the Senate. Upon the death, removal, permanent incapacity or resignation from office of the President Pro Tempore of the Senate, during a legislative session, the Senate shall proceed to elect a new President Pro Tempore. In the event of the President Pro Tempore's death, removal, resignation or permanent incapacity between legislative sessions, the Senate Majority Leader (and in the event of his death, removal, resignation or permanent incapacity to act as interim President Pro Tempore, the Senate Assistant Majority Leader) shall act as interim President Pro Tempore with all of the duties, powers and prerogatives of the office, to serve until the next session of the Legislature, at which time a new President Pro Tempore shall be elected.

Rule 7. ... (C) All employees of the Senate shall be selected by an attache committee, which committee shall be appointed by the Senate leadership, and the employees so selected shall be subject to the approval of the Senate. There shall be paid to the employees of the Senate, for all services rendered by them, such compensation as may be determined by Senate leadership. The President Pro Tempore is authorized to retain such personnel as deemed necessary during the interim.
(D) Subject to the overall supervision of the President Pro Tempore, the Secretary of the Senate shall have general responsibility for all Senate employees, although doorkeepers, watchmen, janitors, pages, and others charged with housekeeping functions, shall be immediately responsible to the Sergeant at Arms.

Rule 19. (A) The following standing committees shall be appointed by the leadership under the direction of the President Pro Tempore, by and with the advice and consent of the Senate; the number of members on each committee shall be fixed in the order of appointment, and such order shall be read into the Journal; provided that the President Pro Tempore shall appoint a majority of each committee and the chairman of each committee from the membership of the political party having a majority in the Senate: ...

Indiana Senate

Rule 1. ... (b) The announced convening time of the Senate may be changed after the Senate has adjourned with the agreement of the President Pro Tempore and the Minority Floor Leader. ...

Rule 3. Every Senator shall be present at all meetings of the Senate unless excused by the President Pro Tempore.

Rule 9. (a) The President Pro Tempore shall preside over the Senate when the President is absent or steps down from the Chair. Whenever presiding over the Senate, the President Pro Tempore shall at any time have the right to designate a member of the Senate to preside in place of the President Pro Tempore. In the absence of the President and the President Pro Tempore, the Majority Leader shall preside over the Senate.
(b) In the case of death or resignation of the President Pro Tempore, the Majority Caucus Chair shall serve as Temporary President Pro Tempore until the election of a President Pro Tempore by the members of the Senate pursuant to subsection (d) of this rule. If the Majority Caucus Chair is unable to serve as Temporary President Pro Tempore, the individuals holding the following positions shall serve as Temporary President Pro Tempore in the order listed:
(1) Majority Floor Leader.
(2) Majority Whip.
(3) Assistant President Pro Tempore.
(4) Assistant Majority Floor Leader. If two (2) individuals hold the position of Assistant Majority Floor Leader, the individual having served in that position the longest shall serve as Temporary President Pro Tempore.
(c) Whenever the Majority Caucus Chair, or any member listed in the order of succession, files with the Ranking Member of the Committee on Rules and Legislative Procedure a written statement suggesting that the President Pro Tempore is unable to perform the duties of the office because of incapacity, the Ranking Member shall convene the Committee within twenty-four (24) hours to decide the question. The President Pro Tempore, who serves as Chair of the Committee, shall not preside over the meeting of the Committee under this rule. However, the President Pro Tempore shall be permitted to vote on the question as a member of the committee. If the Committee finds that the President Pro Tempore is unable to perform the duties of the office, the Majority Caucus Chair shall serve as Temporary President Pro Tempore until the election of an Acting President Pro Tempore by the caucus of the President Pro Tempore pursuant to subsection (e) of this rule. If the Majority Caucus Chair is unable to serve as Temporary President Pro Tempore, the individuals holding the following positions shall serve as Temporary President Pro Tempore, in the order listed:
(1) Majority Floor Leader.
(2) Majority Whip.
(3) Assistant President Pro Tempore.
(4) Assistant Majority Floor Leader. If two (2) individuals hold the position of Assistant Majority Floor Leader, the individual having served in that position the longest shall serve as Temporary President Pro Tempore.
(5) Assistant Caucus Chair. If two (2) individuals hold the position of Assistant Caucus Chair, the individual having served in that position the longest shall serve as Temporary President Pro Tempore.
(6) Assistant Majority Whip.
(d) If the President Pro Tempore dies or resigns when the Senate is in session, the full Senate shall meet within forty-eight (48) hours to elect a new President Pro Tempore. If the President Pro Tempore dies or resigns when the Senate is not in session, the full Senate shall meet within five (5) calendar days to elect a new President Pro Tempore.
(e) If the President Pro Tempore is found unable to perform the duties of the office under subsection (c) when the Senate is in session, the caucus of the President Pro Tempore shall meet within forty-eight (48) hours to elect an Acting President Pro Tempore. If the President Pro Tempore is found unable to perform the duties of the office under subsection (c) when the Senate is not in session, the caucus of the President Pro Tempore shall meet within five (5) calendar days to elect an Acting President Pro Tempore. The full Senate is not required to meet to approve the election of an Acting President Pro Tempore by the caucus.
(f) The Temporary President Pro Tempore and the Acting President Pro Tempore shall exercise all of the duties and powers granted to the President Pro Tempore under the Standing Rules and Orders of the Senate.
(g) The Acting President Pro Tempore shall serve until the Committee on Rules and Legislative Procedure determines that the President Pro Tempore is able to resume the duties of the office. The Committee shall meet within twenty-four (24) hours to determine the question upon receipt of a written statement from the President Pro Tempore that the President Pro Tempore is able to resume the duties of the office. The President Pro Tempore, who

serves as Chair of the Committee, shall not preside over the meeting of the Committee under this Rule. However, the President Pro Tempore shall be permitted to vote on the question as a member of the committee.

Rule 17. ... (d) A motion to adjourn may be made only by the President Pro Tempore or Senator designated by the President Pro Tempore.

Rule 21. The first item of business at the first regular session of a term of the General Assembly shall be the election of the following:
The President Pro Tempore
The Principal Secretary

Rule 23. (a) The President Pro Tempore shall appoint the following:
(1) Majority Floor Leader.
(2) Majority Whip.
(3) Assistant President Pro Tempore.
(4) Assistant Majority Floor Leader(s).
(5) Assistant Majority Whip.
(6) Assistant Majority Caucus Chair(s).
(7) Assistant Majority Secretary of the Senate.
(8) Postmaster of the Senate.
(9) Principal Doorkeeper of the Senate.
(10) Majority Attorney of the Senate.
(11) Deputy Secretary of Operations.
(12) Acting Principal Secretary of the Senate, if the Principal Secretary is removed, suspended, unable to serve, or resigns.
(13) Chief Legal Counsel. ...

Rule 24. The officers and employees of the Senate shall be responsible to and under the direction of the President Pro Tempore or President Pro Tempore-elect.

Rule 32. (a) The President Pro Tempore or President Pro Tempore-elect shall appoint the chairperson and members of each of the standing committees and subcommittees thereto. The appointments to standing committees and subcommittees shall be reported to the Senate by the President Pro Tempore and recorded in the Journal.
(b) The chairpersons and members of the standing committees and subcommittees thereof shall continue for the term of the General Assembly unless removed by the President Pro Tempore or unable to serve.
(c) All vacancies on any committee or subcommittee shall be filled by appointment by the President Pro Tempore or President Pro Tempore-elect of the Senate.

Rule 49. (a) Whenever the President Pro Tempore of the Senate shall assign a filed Senate bill or joint resolution to a standing committee, the assignment shall be made within seven (7) calendar days following the last day for filing Senate bills and joint resolutions and shall cause the bill or joint resolution with the committee assignment to be set forth on a bill filing list. ...

Rule 51. Bills and resolutions pre-filed prior to a session or during recess after organization day may be assigned and released by the President Pro Tempore or President Pro Tempore-elect of the Senate to a standing committee for consideration and will be introduced the first or a subsequent day on which the Senate is convened.

Rule 84. (a) If the Senate dissents in House amendments, the President Pro Tempore may appoint a conference committee, and if the House dissents in Senate amendments, the Speaker may request by the appointment of House conferees, that the President Pro Tempore appoint a conference committee.
(b) The Senate conference committee consists of two Senators, with the first listed Senator being the Senate Chairperson. Advisors may be appointed at any time by the President Pro Tempore.
(c) Senate conferees may be changed or removed at any time by the President Pro Tempore, who shall give written notice to the Office of the Minority Leader of the change.

(d) The appointment of a conference committee and any change of conferees shall be reported by the President Pro Tempore to the Senate and posted in the information center for the Senate committee meetings and on the Senate bulletin boards.

Rule 87. (a) All bills passed by both Houses shall be printed in enrolled form and shall be certified as accurate by the first author of the bill, the President of the Senate, the President Pro Tempore, and the Principal Secretary. One copy of each enrollment shall be furnished to the author at the time of that certification.

Iowa Senate
Rule 53. The senate shall elect, from its membership, a president pro tempore. When the president is absent, the president pro tempore shall preside, except when the chair is filled by temporary appointment by the president or the majority leader.

The president pro tempore, when presiding, shall perform duties as prescribed in rule 52, paragraphs 1 and 2.

The president pro tempore shall serve as a member of the legislative council and as a member of the senate committee on rules and administration.

Kentucky Senate

Rule 26. ... The President may designate any Senator to preside in the absence of both the President and President Pro Tem and to perform all duties of the President, including duties as a member of the Committee on Committees. This designation by the President may be made from time to time or for any period of time as the President may designate.

Rule 27. ... Any decision made by the President shall be subject to appeal to the Senate. During the pendency of any appeal to the Senate from a decision of the chair, the President shall vacate the chair and call the President Pro Tem to preside. When the President Pro Tem is presiding on an appeal to the Senate from a decision of the President, no motion or business shall be in order except the motion on appeal from the decision of the President, and that motion shall not be debatable. Upon an appeal, the question put to the Senate shall be stated as follows: "Shall the decision of the President stand as the judgment of the Senate? An 'Aye' vote shall support the President's ruling, and a 'Nay' vote shall oppose the President's ruling." The ruling of the President shall be sustained unless a majority of the members elected to the Senate oppose the ruling.

Rule 28. The Senate shall elect a President Pro Tem, who shall perform the duties of the President when the President is absent from the Senate, or when empowered by the President to perform the duties of the chair.

Rule 37. There shall be a Committee on Committees composed of the President, the President Pro Tem, the Majority Floor Leader, the Majority Caucus Chairman, the Majority Whip, the Minority Floor Leader, the Minority Caucus Chairman, and the Minority Whip of the Senate.

The majority of this committee shall have full power to act on all matters referred to the committee either by these rules or by action of the Senate. A meeting of the Committee on Committees may be called by the President, the Majority Floor Leader, or a majority of the committee members.

The President shall be Chairman of the Committee on Committees, and in the President's absence, the Majority Floor Leader shall serve as Chairman.

All bills and resolutions bearing the force and effect of law shall, upon their introduction, be automatically referred to the Committee on Committees which shall refer same to the proper committee not later than the third day in which the Senate is in session after the date of introduction.

The Committee on Committees shall have supervision and control over all employees of the Senate whether elected by the Senate or appointed by the Committee on Committees or provided by the Legislative Research Commission, and the Committee on Committees shall see that they perform all of their duties to the Senate and the members thereof. The Committee on Committees is empowered to discharge any or all of said employees and officers except

the constitutional officers of the Senate. The Committee on Committees shall appoint the members of all standing and special committees and shall fill any vacancies thereon.

Louisiana Senate

Rule 3.4. A. The President Pro Tempore shall be elected by the members of the Senate from among the members thereof in the same manner as the President. He shall be elected every four years, and his election shall be the next order of business following election of the President.
B. He may be removed from office in the same manner as the President.
C. A vacancy in the office of President Pro Tempore shall be filled in the same manner as the original election.

Rule 3.5. The President Pro Tempore shall:
(1) In the absence of the President, preside or call a member to preside over the Senate.
(2) Upon the death or resignation of the President, assume the powers, duties, and emoluments of the President until a president is elected as provided in Senate Rule 3.2.
(3) In case of the disability or temporary absence of the President, assume the powers, duties, and responsibilities of the President until the termination of the disability or absence. The Senate shall make appropriate financial recompense to the President Pro Tempore for his service during such time.
(4) Determine the meeting time of the Senate, with concurrence of the Senate.
(5) Perform such other duties as are assigned to him by the President, the Senate, the state constitution or laws, the Joint Rules of the Senate and House, the Senate rules, or otherwise by the Legislature.

Maine Senate

Rule 201. The President shall:
...3. Appoint all committees, a Sergeant-at-Arms, an Assistant Sergeant-at-Arms, a President Pro Tempore to perform the duties of the Chair during the President's absence and chamber staff, unless the Senate otherwise directs. Name a Senator to perform the duties of the President when the President Pro Tempore is absent. The President may rescind these appointments at any time; ...

Rule 202. The President Pro Tempore shall:
1. Preside at the time to which the Senate has adjourned when the President is absent;
2. When the President assumes the office of Governor, exercise the powers and duties of the office of President until the vacancy in the Senate created by the President's succession to the office of Governor is filled, the Senator so elected is seated and a President is elected.

Michigan Senate

Rule 1.104. a) A President pro tempore, Assistant President pro tempore, and Associate President pro tempore shall be elected by a vote of a majority of the Senators elected and serving. They shall be elected at the first session of a quadrennium. All officers elected by the Senate are to hold office until their successors are elected and qualified or until the expiration of their term, whichever occurs first. ...

Minnesota Senate

Rule 14.2. The President may call a member to preside. In the absence of the President, the President Pro Tem, the Chair of the Committee on Rules and Administration, or the Chair's designee, shall preside over the Senate. In the absence of the President and the Chair, the Senate may select a member to perform the duties of the President. Substitutions do not extend beyond adjournment.

Mississippi Senate

Rule 9. There shall be elected a President Pro Tempore in the manner provided in Section 5-1-15, Mississippi Code of 1972. The President Pro Tempore shall not be eligible for appointment as chairman of any standing Senate committee, with the exception of the Rules Committee.

Rule 10. In the election of the President Pro Tempore, the candidate receiving the lowest number of votes shall be dropped after the first ballot and on each succeeding ballot until one (1) candidate receives a majority of all votes cast, and the vote shall be by viva voce vote on roll call of the members.

Rule 11. In the absence of the President, or at the President's request, the President Pro Tempore shall act in the President's stead, assuming the duties and responsibilities herein granted to the President.

Rule 65. (1) There shall be a standing Committee on Rules which shall consist of the President (who shall be a nonvoting member), the President Pro Tempore, and four (4) Senators, each having served at least four (4) years in the Senate, one (1) from each Congressional District of the State as constituted on January 1, 2004, to be selected by the Senators from their respective congressional districts by caucus. The voting precinct of the Senator representing such district shall determine the congressional district caucus in which the Senator shall participate and for which the Senator may hold membership on the Rules Committee. The President Pro Tempore shall serve as chairman of the committee; the vice chairman shall be appointed by the President Pro Tempore from among the Senators on the committee. ...

Missouri Senate

Rule 10. The president pro tem shall be parliamentarian of the senate and may decide all points of order, and in his absence such points of order may be decided by the chairman of the Committee on the Judiciary and Civil and Criminal Jurisprudence, except in either case, the point of order may be referred by the then acting parliamentarian, to the Committee on Parliamentary Procedure for consideration and determination. All rulings on points of order shall be subject to an appeal to the senate and all questions and points of order shall be noted by the secretary with the decision thereon.

Rule 12. All committees listed in Rule 25 shall be appointed by the president pro tem of the senate, except as otherwise provided. The minority party members shall be chosen by the minority party in the manner determined by the minority party caucus.
At the beginning of each session the caucus chairman of the minority party may file with the secretary of the senate a statement setting forth the method by which minority party members are to be appointed as determined by the minority party caucus, but if no such statement is filed, the minority party members shall be appointed to committees by the minority floor leader.

Rule 13. The president pro tem shall be chosen by the senate, and if the president pro tem so chosen is absent, or his office vacant, the senate may proceed to elect an interim president pro tem to hold the office during such absence or other incapacity, at the pleasure of the senate.

Rule 14. The president pro tem shall sign all acts, joint resolutions and addresses. All writs, warrants and subpoenas issued by order of the senate shall be under his or her hand attested by the secretary.

Rule 16. Stenographers and reporters wishing to take down the debates and proceedings of the senate may be admitted by the president pro tem to the reporters' table on the floor of the senate for that purpose, and under such further regulations as the senate may prescribe, but no persons, including members of the senate, other than members of the press, shall be permitted to sit at the press table while the senate is in session.

Rule 17. Subject to the unanimous approval of the president pro tem and the majority and minority floor leaders as to time and duration, live or taped news media broadcasts of sessions of the senate may be made by broadcast media representatives. Reporters and technicians to effectuate such broadcasts or taping may be admitted to the chamber for this purpose, but no apparatus or procedure shall be used which will interfere with the usual procedure of the senate. All recording or broadcasting shall be done from areas reserved or set aside for such activities by news media representatives by the president pro tem.

Rule 25. The president pro tem of the senate shall appoint the following standing committees: ...

Rule 27. The Committee on Parliamentary Procedure shall be composed of three members: the president pro tem, the chairman of the Committee on the Judiciary and Civil and Criminal Jurisprudence, and the minority floor leader.

Rule 31. 1. The standing committees of the senate on Administration, Appropriations, and such other committees as the president pro tem shall designate, may function within the state unless otherwise approved by the president pro tem during the interim between the end of the first regular session and the commencement of the second regular

session, at such times and places as are considered necessary to consider bills and other matters referred to them, to hold hearings, hear testimony, receive evidence, make such studies as are deemed necessary and to perform any other necessary legislative function pertinent to their respective powers and duties.
2. The actual and necessary expenses of each committee functioning during the interim pursuant to the provisions of this rule, and the expenses of its members and the research and clerical personnel assigned to it incurred in attending meetings of the committee or of any subcommittee thereof, shall be paid from the senate contingent fund upon the approval of the chairman of the committee on administration and the president pro tem of the senate.

Montana Senate

Rule S10-30. President, President pro tempore, and other officers. (1) The Senate shall, at the beginning of each regular session, and at other times as may be necessary, elect a Senator as President and a Senator as President pro tempore.
(2) The Senate shall choose its other officers and is the judge of the elections, returns, and qualifications of the Senators.

Rule S10-60. Succession. (1) In case of the absence or disqualification of the President, the President pro tempore of the Senate shall perform the duties of the President until the vacancy is filled or the disability removed.
(2) Whenever the President pro tempore of the Senate is of the opposite political party from that of the President, the following procedure applies:
(a) If the President dies while in office, the members of the Senate have the right to immediately nominate and elect an acting President of the same party.
(b) If the President is absent for 2 or more legislative days or at any time after the 85th legislative day or at any time during special session of the Legislature and wants to appoint an acting President during the President's absence, the President may do so, or the members of the Senate have the right to immediately nominate and elect an acting President of the President's caucus.
(c) An acting President of the Senate has the powers of the President and supersedes the powers of the President pro tempore.

Nevada Senate

Rule 2. President Pro Tem and Other Presiding Officers. 1. Except as otherwise provided in subsection 2:
(a) The President Pro Tem has all the power and shall discharge all the duties of the President during his absence or inability to discharge the duties of his office.
(b) In the absence or inability of the President Pro Tem to discharge the duties of the President's office, the Chair of the Standing Committee on Legislative Operations and Elections shall serve as the presiding officer. In the absence or inability of the Chair, the Vice Chair of the Standing Committee on Legislative Operations and Elections shall serve as the presiding officer. In the absence or inability of the Vice Chair of the Standing Committee on Legislative Operations and Elections, the Senate shall elect one of its members to serve as the presiding officer. A member who is serving as the presiding officer has all the power and shall discharge all the duties of the President until the absence or inability which resulted in the member serving as the presiding officer has ended.
2. When the President Pro Tem or another member is serving as the presiding officer, the President Pro Tem or other member may vote on any question for which he is otherwise qualified to vote as a member. If the Senate is equally divided on the question, the President Pro Tem or other member may not give an additional deciding vote or casting vote pursuant to Senate Standing Rule No. 31 or Section 17 of Article 5 of the Nevada Constitution.

New Jersey Senate

Rule 1:4. At the organization meeting, the Senate shall elect a President, a President, *pro tempore*, and a Secretary, each of whom shall continue in office at the pleasure of the Senate. The votes of 21 or more members are required for the election of each of those officers and for their removal from office. Vacancies in those offices shall be filled at the next meeting of the Senate

Rule 3:9. a. If the President desires to temporarily vacate the Chair during any meeting, the President shall request the President, *pro tempore*, or name another Senator to preside. While presiding the President, *pro tempore*, or other Senator shall exercise the powers and duties of the President.
b. When the President is absent, the President, *pro tempore*, shall possess all the powers and discharge all the duties of the President.

New Mexico Senate

Rule 1-2. The other officers of the senate shall be:
(a) a president pro tempore;
(b) one chaplain;
(c) one chief clerk;
(d) three assistant chief clerks; and
(e) one sergeant-at-arms.

Rule 4-5. The president pro tempore when acting as president, or any member of the senate while acting as presiding officer of the senate, shall be invested with all the powers and duties conferred by these rules upon the president. Whenever the president is not in the chair, the president pro tempore or some member designated by the president pro tempore, or elected by the senate, shall preside.

Rule 9-1. There shall be a committee known as the "committees' committee", which shall be composed of the president pro tempore, the majority floor leader, the majority whip, the minority floor leader, the minority whip and five members of the majority party and one member of the minority party appointed by the president pro tempore, by and with the consent of the senate; provided if a vacancy is created on the committees' committee for any reason, the president pro tempore or the appropriate caucus if the vacancy is that of a party leader, may fill the vacancy. The chairman of the committees' committee shall be the president pro tempore. The vice chairman shall be selected by the members of the committees' committee. ...

Rule 9-13-1. There shall be a committee known as the senate ethics committee, which shall be composed of the president pro tempore, the majority floor leader, the majority whip, the minority floor leader, the minority whip, the majority caucus chairman, the minority caucus chairman and one member of the senate minority party appointed by the senate minority floor leader. The senate ethics committee is designated as the committee to which all matters pertaining to ethics shall be referred. The president pro tempore shall chair the senate ethics committee. ...

Rule 10-1. When the senate resolves itself into the committee of the whole, the president pro tempore, or a senator designated by him or the senate, shall preside.

North Carolina Senate

Rule 4. Convening and presiding in absence of President. – In the absence of the President, the President Pro Tempore or a Senator designated by the President Pro Tempore shall convene or reconvene the Senate and preside, and during such time shall be vested with all powers of the President of the Senate except that of casting a vote in case of a tie when the President Pro Tempore or the designated Presiding Officer has already voted on the question as a Senator. In the event of the absence of the President and President Pro Tempore at any time fixed for the reconvening of the Senate, the Senate shall be called to order by a member designated by the President Pro Tempore, or if no member is designated, by the Deputy President Pro Tempore of the Senate. If no member has been designated and the Deputy President Pro Tempore is also absent, the Senate shall be called to order by the Chair of the Committee on Rules and Operations of the Senate who shall designate some member to act as Presiding Officer.

Rule 9. Parliamentarian to be appointed by the President Pro Tempore. – The President Pro Tempore shall appoint from among the members of the Senate a Parliamentarian. In the absence of the Parliamentarian, the Chair of the Committee on Rules and Operations of the Senate shall act as Parliamentarian.

Rule 17. ... (g) The President Pro Tempore may authorize and provide for the broadcasting of Senate sessions via television or Internet.

Rule 31. Appointment of committees. – The President Pro Tempore of the Senate shall have the exclusive right and authority to appoint the membership of all committees, regular and select, and to appoint committee chairs and vice-chairs and to establish select committees, but this does not exclude the right of the Senate by resolution to establish select committees. Upon the recommendation of the Committee on Rules and Operations of the Senate, the Senate

may alter the name, number, and composition of the standing committees by a majority vote of the Senators present and voting.

Rule 34. (a) … The President Pro Tempore shall have the exclusive right and authority to determine the total number of members and the number of members of each political party of each committee. No Senator shall hold membership on more than 12 standing committees unless the Committee on Rules and Operations of the Senate provides otherwise. …
(b) The President Pro Tempore and the Deputy President Pro Tempore may serve as ex officio members of each Senate committee and subcommittee.

Rule 37. Committee of the Whole Senate. … Only the President Pro Tempore, the Deputy President Pro Tempore, or the Chair of the Committee on Rules and Operations of the Senate may move to resolve into the Committee of the Whole Senate. … The Chair shall be the President Pro Tempore of the Senate or his designee.

Rule 57. Conference committee. – The President Pro Tempore of the Senate, or in the President Pro Tempore's absence, the Deputy President Pro Tempore, upon motion, shall appoint a conference committee when the Senate fails to concur in amendments or committee substitutes put by the House to a bill originating in the Senate, or when the House of Representatives fails to concur in amendments or committee substitutes put by the Senate to a bill originating in the House. Senate conferees shall include the primary sponsor of the bill. In considering the bill committed to the conferees, only such matters as are germane to the bill shall be considered by the conferees, and the conference report shall deal only with such matters. The matters referred to the conference committee by the conference committee chairs shall go to and be considered by the conferees appointed by the Senate and the House of Representatives. While the bill is in conference committee, the Senate's position shall be determined by a majority of the Senate conferees. Upon agreement by the Senate and House of Representatives, a conference report shall be drafted reflecting the matters considered and agreed upon by the conferees. The conference report shall not be amended.

Rule 60. Pages. – (a) The President Pro Tempore of the Senate shall appoint pages. The President Pro Tempore, or such person as the President Pro Tempore may designate, shall supervise the pages and assign to them their duties. Each page shall be at least 15 years of age or be in the ninth grade at the time of service. …

Rule 66. President to sign papers. – All addresses and all warrants and subpoenas issued by order of the Senate, shall be signed by the President, the President Pro Tempore, or the Deputy President Pro Tempore. All acts and resolutions shall be signed by the President, the President Pro Tempore, the Deputy President Pro Tempore, or by a Senator designated by the President Pro Tempore to act as Presiding Officer.

Rule 72. Assignment of seats; offices. – (a) The President Pro Tempore of the Senate shall assign seats in the Senate Chamber to the members elected. The President Pro Tempore, when assigning seats, may give preferential consideration to the respective members according to the length of service which each member has rendered in the Senate. No incumbent appointed to fill an unexpired term in the immediate preceding session shall retain the seat if requested by a Senator elected to said session.
(b) Not later than two weeks after the initial committee assignments become final, the President Pro Tempore of the Senate is authorized to make assignments of committee rooms and offices to designated committees, chairs, and members of the Senate. In making such assignments of individual offices, the President Pro Tempore may give preferential consideration to the respective members according to the length of service which each member has rendered in the Senate.

North Dakota Senate

Rule 202. President Pro Tempore. In the absence of the President of the Senate, or during refusal of the President to act, the President Pro Tempore shall exercise all rights and prerogatives of the President. While the Legislative Assembly is in session, the President Pro Tempore shall sign all vouchers for payment of money out of the appropriation for the Legislative Assembly.

Oklahoma Senate

Rule 1-3. INTERPRETATION. When the Senate is in daily session, interpretation of the rules shall be made by the President Pro Tempore or by an elected member of the Senate designated by the President Pro Tempore as Presiding Officer pursuant to Senate Rule 2-4; when a committee is meeting, interpretation of the rules shall be made by the committee chair, or in the chair's absence the vice-chair, of the committee; and at all other times interpretation of the rules shall be made by the President Pro Tempore of the Senate. ...

Rule 2-1. OFFICERS. Officers of the Senate shall be:
The President, who shall be the Lieutenant Governor of the State of Oklahoma;
The President Pro Tempore, who shall be the Presiding Officer of the Senate;
Such other officers as may be designated by the Majority and Minority caucuses; provided, the Majority Floor Leader shall serve as acting President Pro Tempore in the event that the President Pro Tempore vacates the office on a temporary basis. If the President Pro Tempore shall vacate the office on a permanent basis, the Majority Floor Leader shall serve as acting President Pro Tempore until such time as the Senate shall elect a new President Pro Tempore; and
The Secretary.

Rule 2-2. ELECTION. The President Pro Tempore shall be elected by a majority of the members of the Senate when the Senate convenes on the first Tuesday after the first Monday in January of each odd-numbered year. The Secretary of the Senate, who shall not be a member of the Senate, shall be elected by a majority of the members following election of the President Pro Tempore and announcement of the other officers.

Rule 2-4. DUTIES OF THE PRESIDENT PRO TEMPORE.
A. The President Pro Tempore shall be the chief executive officer of the Senate and shall prescribe all policies not otherwise provided by law or by the rules. The President Pro Tempore shall serve as Presiding Officer of the Senate during its daily sessions but may designate another member of the Senate to serve as Presiding Officer at such times as the President Pro Tempore deems appropriate. Wherever the title "Presiding Officer" appears in the rules it shall mean the President Pro Tempore or an elected member of the Senate designated by the President Pro Tempore as Presiding Officer.
B. The President Pro Tempore may refer any matter concerning exercise of the Senate's discretionary powers and duties under Section 30 of Article V of the Oklahoma Constitution to a standing committee or select committee as the President Pro Tempore deems appropriate.
C. The President Pro Tempore shall determine the duties to be performed for the Senate by the Secretary of the Senate and shall designate a Chief of Staff to be responsible for staff duties not assigned to the Secretary of the Senate. The President Pro Tempore or a designee shall be responsible for the issuance of all warrants and vouchers and the maintenance of an accurate account of expenditures by the Senate.

Rule 3-1. EXECUTIVE ASSISTANTS. Each member of the Senate shall be entitled to designate an executive assistant. Executive assistants shall serve at the discretion of, and perform such duties as prescribed by, the individual member of the Senate for whom employed, subject to such policies as may be established by the President Pro Tempore.

Rule 3-2. LEADERSHIP STAFF. The President Pro Tempore shall be entitled to employ a leadership staff. Leadership staff shall serve at the discretion of, for such compensation pursuant to law as may be determined by, and perform such duties as prescribed by, the President Pro Tempore.

Rule 3-3. SERVICE STAFF. The Chief of Staff, subject to the review and supervision of the President Pro Tempore, shall be authorized to employ service staff. Service staff shall be employed according to policies established by the President Pro Tempore and shall receive such compensation pursuant to law as may be determined by, and perform such duties as prescribed by, the President Pro Tempore.

Rule 4-2. MANDATORY AUDIT. The President Pro Tempore shall cause an audit of the Senate's expenditures to be made at least once each fiscal year.

Rule 4-3. PHYSICAL PROPERTY. The President Pro Tempore shall be responsible for the physical property of the Senate and for that portion of the Capitol assigned to the Senate. The Chief of Staff, under direction of the President

Pro Tempore, shall be authorized to perform routine repairs, maintenance and upkeep on such property and facilities.

Rule 4-4. SUPPLIES AND EQUIPMENT. The use of Senate supplies and equipment, including Senate postage meters, is restricted to official Senate business. Questions of compliance shall be resolved by the President Pro Tempore or, at the discretion of the President Pro Tempore, the Rules Committee.

Rule 6-1. PROPOSALS. Any member of the Senate may submit in writing to the President Pro Tempore a proposal for study or consideration by the Senate, subject to such deadlines for interim studies as may be established by the President Pro Tempore.

Rule 7-1. TYPES AND NUMBER. There shall be two types of Senate committees established by the President Pro Tempore, to-wit: standing committees and select committees. The President Pro Tempore shall appoint the chair and vice-chair of each standing committee and of each select committee.

The President Pro Tempore may establish, and appoint the members of, as many ad hoc subcommittees of each standing committee as the President Pro Tempore deems appropriate. There shall be as many select committees as are created by the President Pro Tempore.

Rule 7-2. MEMBERSHIP. Membership on standing committees and on select committees shall be subject to the following:
A. The President Pro Tempore shall appoint, subject to the approval of the Senate, the Majority Caucus members and the chair and vice-chair of each standing committee.
...
D. The President Pro Tempore shall appoint all members of select committees.
E. The President Pro Tempore and Majority Floor Leader shall each be ex officio and voting members of all standing and select Senate committees.

Rule 7-4. DUTIES OF LEGISLATION COMMITTEES. Each legislative committee shall be responsible for the formulation of legislative programs and determination of nonlegislative matters within the jurisdiction prescribed by the President Pro Tempore; shall inquire into the administration and execution of all laws within the same jurisdiction; shall consider such proposals as may be submitted to the committee by the President Pro Tempore; and shall be responsible for the continuing codification of all laws within the prescribed jurisdiction.

Rule 8-1. COMMITTEE OF THE WHOLE. Without prior notice, the Senate may, by motion approved by a majority of the members of the Senate, declare itself a Committee of the Whole, at which time the President Pro Tempore or a member designated by the President Pro Tempore shall chair the Committee of the Whole. Rules applicable to other Senate committees shall be applied to the Committee of the Whole, except those rules relating to notice.

Rule 10-2. GALLERIES AND HALLWAYS. The President Pro Tempore or a designee is empowered to assign seats in the galleries of the Senate and is empowered to order the galleries and hallways of the Senate cleared to preserve order or to ensure the safety of the members of the Senate. ...

Rule 10-5. CALL OF THE SENATE. The Senate may, by majority vote of the members present, operate under Call of the Senate, in which case the President Pro Tempore is empowered to compel the attendance of all members of the Senate and is empowered to confine the members of the Senate to the chamber.

Rule 10-10. SENATE LOUNGE AND ANTEROOMS. The President Pro Tempore may prescribe policies restricting the use of the Senate lounge and any rooms adjoining the lounge or the Senate chamber.

Oregon Senate

Rule 7.01. Election of Presiding Officer; Pro Tempore Presiding Officer. (1) The members of the Senate shall elect by a roll call vote a President of the Senate. A constitutional majority (16) is required to elect a President. (2) The members shall also elect by a roll call vote a President pro tempore of the Senate. A constitutional majority (16) is required to elect a President pro tempore.

Pennsylvania Senate

Rule IV

1. (a) The Senate shall, at the beginning and close of each regular session and at such other times as may be necessary, elect one of its Members President Pro Tempore, who shall perform the duties of the Lieutenant Governor in any case of absence or disability of that officer, and whenever the office of Lieutenant Governor shall be vacant. (Const. Art. 2, Sec. 9)

(b) The vote of a majority of the Members voting shall be required to elect a President Pro Tempore. Except at the beginning and close of each regular session, the Senate shall only elect a President Pro Tempore when the office has become vacant and the vote of the majority of the Members elected shall be required to vacate the office of a seated President Pro Tempore.

Rule V

1. The President Pro Tempore shall:

(a) Appoint the Chairmen, Vice-Chairmen and members of the Standing Committees of the Senate as soon after the election of the President Pro Tempore as possible.

(b) Appoint members to special committees whenever authorized.

(c) Fill all vacancies occurring in standing and special committees.

(d) Refer to the appropriate standing committee, every bill and joint resolution which may be introduced in the Senate or received from the House of Representatives. Such referral shall be at the President Pro Tempore's convenience but not later than the succeeding legislative day.

(e) Appoint and have under the President Pro Tempore's direction such Senate employees as are authorized by law.

(f) Vote last on all questions when occupying the Chair.

2. The President Pro Tempore may:

(a) Name any Senator to preside in the absence of the President, or if both the President and President Pro Tempore are absent the Majority Leader, or the Majority Leader's designee, shall preside. The Majority Leader, during such time, shall be vested with all powers of the President. This authority shall not extend beyond a day's adjournment.

Rule XV

1. There shall be the following permanent Standing committees, the Chairmen, the Vice-Chairmen and members thereof to be appointed by the President Pro Tempore as soon as possible after his election in sessions convening in odd-numbered years or such other times as may be necessary. The composition of each Standing Committee shall reasonably reflect the party composition of the Senate membership. …

2. (a) The President Pro Tempore shall be an ex-officio voting Member of all standing committees and subcommittees and not included in the number of committee members herein provided except that the President Pro Tempore shall not be an ex-officio Member of the Committee on Ethics and Official Conduct. …

Rule XX

1. The President Pro Tempore shall appoint three Senators to comprise a Committee of Conference. Two shall be from the majority party and one from the minority party. …

Rhode Island Senate

Rule 1.6. "President Pro Tempore" is a member of the senate elected to that position, who presides over the senate in the absence of the president of the senate.

South Carolina Senate

Rule 1. … B. At various times as he or she deems necessary during the session, the President *Pro Tempore* is authorized to make a motion to provide for the convening of the Senate in statewide session for the exclusive purpose of the introduction and referral of bills, receipt of communications and committee reports and the reading and passage of local legislation to which all members of an affected delegation have given their consent for the bill to be taken up, and to adjourn immediately thereafter. Any such motion shall provide the specific dates during which the motion shall apply and shall provide that the Senate must convene at 11:00 a.m. and adjourn not later than 12:30 p.m. on each such day and such motion must be made at least two (2) days prior to the beginning of the period for which it applies.

C. The President *Pro Tempore* or his designee, when, in his opinion, it is impractical or dangerous to hold a regularly scheduled session(s) of the Senate, may declare the body adjourned to some other time. Such actions are to be taken only in times of great emergency including, but not limited to, natural disasters, severe weather, and acts of God.

Rule 7. A. If a Senator in speaking, or otherwise, violates the Rules of the Senate, the presiding officer shall, or any member may, by raising a point of order, call him to order; and when a member is called to order by the President or under a point of order, he or she shall sit down and may not proceed without leave of the Senate, unless the President takes the point of order under advisement. The President may call for the Sense of the Senate on any question of order. Every question of order must be decided by the President, without debate, and Senators shall have the right to appeal the decisions of the President to the full Senate. When the decision of the President is appealed, the President *Pro Tempore* or his or her designee shall preside and the President shall retire from the chamber during the pendency of the appeal and the Senate's debate and action on the motion to appeal. The question before the Senate shall be "Shall the ruling of the President be overridden?" and after not more than thirty (30) minutes, fifteen (15) minutes for and fifteen (15) minutes against, of debate it shall be decided by a majority vote of the membership.
...

South Dakota Senate

Rule S1-1. President pro tempore presides in absence of president. If the president is absent or unable to serve, the president pro tempore shall act as presiding officer of the Senate. The acts of the president pro tempore have the same validity as those of the president.

Rule S2-2. Seating assignments. The president pro tempore of the Senate, with the advice of the minority leader, shall make the seating assignments for the floor of the Senate.

Rule S3-1. Elective officers. The officers of the Senate are a president pro tempore of the Senate, a secretary of the Senate and such other officers necessary to conduct the business of the Senate, who shall be formally elected by a majority vote of the members-elect of the Senate. Employees necessary to conduct the business of the Senate shall be appointed by the president pro tempore and their appointment shall be announced at the opening of the session.

Rule S4-2. Chairs of standing committees. The president pro tempore of the Senate shall serve as the chair of the legislative procedure committee. For other committees, the member of a committee announced first is the chair. In the absence of the chair, the member announced next shall act as chair, and so on as often as necessary.

Rule S4-3. Referral of bills to committee. Upon the first reading of a bill, the president pro tempore of the Senate or his designee shall assign that bill to an appropriate committee for hearing.

Tennessee Senate

Rule 3. SPEAKER PRO TEMPORE. The Speaker of the Senate shall appoint a Speaker pro tempore who shall perform such duties as assigned by the Speaker. The Speaker pro tempore shall serve at the pleasure of the Speaker. The Speaker pro tempore shall preside during the absence of the Speaker, except that the Speaker shall have the right to name any member to perform the duties of the Chair for a period not to extend beyond an adjournment. In the absence of the Speaker and the Speaker pro tempore, it shall be the duty of the Clerk to call the Senate to order and call the roll for the election of a temporary speaker. In the event of an interim vacancy in the office of Speaker, through death or resignation, or in the event of disability, the Speaker pro tempore shall conduct the necessary business of the Senate only until such time as an election can be held in the Senate to fill the vacancy.

Texas Senate

Rule 1.02. The Senate shall, at the beginning and close of each session, and at such other times as may be necessary, elect one of its members President Pro Tempore, who shall perform the duties of Lieutenant Governor in any case of absence or disability of the Lieutenant Governor.

Rule 1.03. If the office of Lieutenant Governor becomes vacant, the President Pro Tempore of the Senate shall convene the Committee of the Whole Senate within 30 days after the vacancy occurs. The Committee of the Whole Senate shall elect one of its members to perform the duties of the Lieutenant Governor in addition to the duties of

Senator until the next general election. If the Senator so elected ceases to be a Senator before the election of a new Lieutenant Governor, another Senator shall be elected in the same manner to perform the duties of the Lieutenant Governor until the next general election. Until the Committee of the Whole Senate elects one of its members for this purpose, the President Pro Tempore shall perform the duties of the Lieutenant Governor.

Utah Senate

Rule SR-20.03. The President may call a Senator to the chair as President Pro Tempore and that Senator has the power of the President while conducting. This substitution does not extend beyond adjournment.

Vermont Senate

Rule 6. As soon as may be after the convening of each biennial session, the President of the Senate, the President pro tempore, and one senator elected by the Senate shall comprise the committee to be known as the Committee on Committees. The Committee on Committees shall appoint the members, on the part of the Senate, of the permanent joint standing committee on Joint Rules, and all committees of the Senate, and all other committees requiring appointment of members of the Senate, unless otherwise provided by statute; but any appointment so made may, on motion of a senator, be overruled by the Senate; in which case the Senate shall, on nomination of a senator, immediately fill the vacancy. Any motion to overrule the appointments of the Committee on Committees must be made not later than the next legislative day following the announcement of the committee appointments to the Senate. …

Rule *17.* The President pro tempore shall perform all the duties of the President during the latter's absence.

Rule 36. The Orders of the Day shall then be taken up. At the request of the President pro tempore, unless a majority of the Senate objects, bills or resolutions may be taken up out of their normal sequence. …

Virginia Senate

Rule 2. (a). There shall be elected by the Senate, on the first day of the session following the election of the Senate, a President pro tempore who shall serve for a term of four years and be a senior member in the Senate.
(b). In the event of the absence, disability or vacancy in the office of the Lieutenant Governor, the President pro tempore shall carry out the duties of the Lieutenant Governor as presiding officer. Further, the President pro tempore shall be the Chairman of the Commission on Interstate Cooperation of the Senate.
(c). The President pro tempore shall have the right to name in open session, or if he is absent, in writing, a Senator to perform the duties of the presiding officer, but such substitution shall not extend beyond an adjournment of a daily session, except by unanimous consent of those present.
(d). In the event of a vacancy in the office of the Lieutenant Governor, or whenever the powers and duties of the Governor shall devolve upon the Lieutenant Governor, the President pro tempore shall have the right to name, in writing, a Senator to perform the duties of the presiding officer during his absence; and the Senator so named shall have the right to name, in open session, or in writing, if he is absent, a Senator to perform the duties of the presiding officer, but such substitution shall not extend beyond adjournment of a daily session, except by unanimous consent of those present.

Rule 7. The Senate shall elect 11 Pages and five Pages shall be appointed by the following: one by the Lieutenant Governor; one by the President pro tempore; one by the chairman of the caucus of the majority party; one by the majority leader; and one by the minority leader. The Pages shall be no less than 13 and no more than 14 years of age at the time of election or appointment, shall be residents of the Commonwealth of Virginia, and shall be elected or appointed for a term of one year. No Page shall be eligible for reelection. Any such Page so elected or appointed may be suspended or dismissed for cause by the Clerk of the Senate.

Rule 19. (a). A Committee on Rules, which shall be in addition to the foregoing standing Committees, 17 Senators, consisting of the standing Committee Chairs; the President pro tempore, if the person is not a Chair; the Majority Leader, if the person is not a Chair; the Minority Leader; and members to comprise the 17. ….

Rule 50. The Senate may go into the Committee of the Whole only upon the affirmative vote of a majority of the members elected. When the Senate shall resolve itself into the Committee of the Whole, the President shall leave the

Chair and the President pro tempore shall preside in the Committee. If the President pro tempore is absent from the Senate, then the Senate shall elect a chairman to preside therein. ...

Washington Senate

Rule 2. 1. Upon the organization of the senate the members shall elect one of their number as president pro tempore who shall have all the powers and authority and who shall discharge all the duties of lieutenant governor acting as president during the lieutenant governor's absence. The senate shall also elect a vice-president pro tempore who will serve in the absence of the lieutenant governor and the president pro tempore.
2. In the absence of the president pro tempore, and vice president pro tempore, or with their consent, the president shall have the right to name any senator to perform the duties of the chair, but such substitution shall not extend beyond an adjournment, nor authorize the senator so substituted to sign any documents requiring the signature of the president.

West Virginia Senate

Rule 4. The President of the Senate shall appoint a President *pro tempore,* who, during the absence of the President, shall preside and perform all the duties of the President.

Wisconsin Senate

Rule 1. (1) The senate shall elect, by roll call vote, one of its members to serve as president and one to serve as president pro tempore. The president and president pro tempore shall serve for the biennial session unless separated by death, resignation, or removal by the adoption of a resolution by a majority of the current membership. ...

Rule 2. (1) When the president is absent or unable to preside over the senate sitting in session, the president pro tempore may preside and assume all of the duties enumerated under rule 4. The substitution does not extend beyond adjournment and ends upon the president's return or the election of a new president. ...

Rule 3. Duties of president pro tempore and majority leader. When the president is separated by death, resignation, or removal from office, or is otherwise unable to serve, all of the powers and duties of the president not enumerated in rule 4 devolve upon the president pro tempore until a president is elected. When both the president and president pro tempore are separated by death, resignation, or removal from office, or are otherwise unable to serve, all of the powers and duties of the president not enumerated under rule 4 devolve upon the majority leader until a president is elected

CAWP

Fact Sheet

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WOMEN IN STATE LEGISLATURES 2011

In 2011, 1,718, or 23.3% of the 7,382 state legislators in the United States are women. Women currently hold 415, or 21.1%, of the 1,971 state senate seats and 1,303, or 24.1%, of the 5,411 state house or assembly seats. Since 1971, the number of women serving in state legislatures has more than quintupled.

Year	Women Legislators	% of Total Legislators	Year	Women Legislators	% of Total Legislators	Year	Women Legislators	% of Total Legislators
1971	344	4.5	1989	1,270	17.0	2002	1,682	22.7
1973	424	5.6	1991	1,368	18.3	2003	1,654	22.4
1975	604	8.0	1993	1,524	20.5	2004	1,659	22.5
1977	688	9.1	1995	1,532	20.6	2005	1,674	22.7
1979	770	10.3	1997	1,605	21.6	2006	1,681	22.8
1981	908	12.1	1998	1,617	21.8	2007	1,732	23.5
1983	991	13.3	1999	1,664	22.4	2008	1,751	23.7
1985	1,103	14.8	2000	1,670	22.5	2009	1,797	24.3
1987	1,170	15.7	2001	1,666	22.4	2010	1,809	24.5
						2011	**1,718**	**23.3**

The party breakdown for women serving in state legislatures in 2011 is:

	Total Legislators		State Senators		State Reps.	
	#	%	#	%	#	%
Democrats	1,052	61.2	259	62.4	793	60.8
Republicans	649	37.8	144	34.7	505	38.8
Nonpartisans*	11	0.6	11	2.7	----	----
Progressives	4	0.2	---	---	4	0.3
Independent	2	0.1	1	0.2	1	0.1
Total	1,718	99.9	415	100.0	1,303	100.0

The states with the highest percentages of women state legislators are:

State	% Women	State	% Women
Colorado	40.0	Washington	31.3
Vermont	37.8	Maryland	30.9
Arizona	34.4	Illinois	29.4
Hawaii	32.9	Connecticut	28.9
Minnesota	31.8	Nevada	28.6

The states with the lowest percentages of women state legislators are:

State	% Women	State	% Women
South Carolina	9.4	Wyoming	15.6
Oklahoma	12.8	Louisiana	16.0
Alabama	13.6	West Virginia	16.4
Mississippi	14.4	Pennsylvania	16.6
North Dakota	14.9	Kentucky	18.1

Women in State Legislative Leadership
Three women serve as presidents of senates: Michelle L. Fischbach (R-MN), Therese Murray (D-MA), and M. Teresa Paiva-Weed (D-RI). Two women serve as speakers of state houses: Rebecca Lockhart (R-UT) and Sheila Y. Oliver (D-NJ).

Women of Color in State Legislatures
Of the 1,718 women legislators serving nationwide, 349 or 20.3% are women of color. They include 96 senators and 253 representatives; 331 are Democrats, 16 are Republicans, and two are non-partisan. Women of color constitute 4.7% of the total 7,382 state legislators.

The First Women Legislators
In 1894, the first women state legislators were elected to serve in the United States. Three Republican women were elected to the Colorado House of Representatives: Clara Cressingham; Carrie C. Holly; Frances Klock. The first woman state senator, Democrat Martha Hughes Cannon, was elected to the Utah State Senate in 1896.+

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* In Nebraska, where the legislature is unicameral, legislators are elected on a nonpartisan basis.
\+ Source: Utah Governor's Commission for Women.

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WOMEN IN STATE LEGISLATURES 2011

STATE	STATE RANK	SENATE D	SENATE R	TOTAL WOMEN/ TOTAL SENATE	HOUSE D	HOUSE R	TOTAL WOMEN/ TOTAL HOUSE	TOTAL WOM./ TOTAL LEGIS.	% WOMEN OVERALL
AL	48	4	0 (1I)	5/35	9	5	14/105	19/140	13.6
AK*	25	1	3	4/20	4	6	10/40	14/60	23.3
AZ	3	5	6	11/30	7	13	20/60	31/90	34.4
AR	31	5	3	8/35	11	10	21/100	29/135	21.5
CA*	16	9	2	11/40	16	5	21/80	32/120	26.7
CO	1	14	2	16/35	17	7	24/65	40/100	40.0
CT	9	7	1	8/36	32	14	46/151	54/187	28.9
DE	18	4	3	7/21	7	2	9/41	16/62	25.8
FL	20	6	7	13/40	11	15	26/120	39/160	24.4
GA*	25	7	1	8/56	32	15	47/180	55/236	23.3
HI	4	7	0	7/25	14	4	18/51	25/76	32.9
ID*	16	3	6	9/35	8	11	19/70	28/105	26.7
IL	8	9	5	14/59	27	11	38/118	52/177	29.4
IN	36	4	6	10/50	11	10	21/100	31/150	20.7
IA	32	4	4	8/50	16	8	24/100	32/150	21.3
KS	15	5	8	13/40	14	18	32/125	45/165	27.3
KY	41	3	3	6/38	11	8	19/100	25/138	18.1
LA	44	6	2	8/39	11	4	15/105	23/144	16.0
ME	12	4	3	7/35	27	18	45/151	52/186	28.0
MD	7	10	1	11/47	35	12	47/141	58/188	30.9
MA*	22	11	0	11/40	31	5	36/160	47/200	23.5
MI	35	2	2	4/38	16	11	27/110	31/148	20.9
MN	5	11	10	21/67	25	18	43/134	64/201	31.8
MS	47	3	1	4/52	17	4	21/122	25/174	14.4
MO	24	3	2	5/34	23	18	41/163	46/197	23.4
MT*	25	6	1	7/50	19	9	28/100	35/150	23.3
NE*	29	NONPARTISAN		11/49		UNICAMERAL		11/49	22.4
NV	10	4	2	6/21	11	1	12/42	18/63	28.6
NH	21	3	3	6/24	38	56	94/400	100/424	23.6
NJ	11	7	3	10/40	16	8	24/80	34/120	28.3
NM	14	8	2	10/42	12	9	21/70	31/112	27.7
NY	28	8	3	11/62	30	7	37/150	48/212	22.6
NC*	29	3	3	6/50	22	10	32/120	38/170	22.4
ND	46	3	3	6/47	3	12	15/94	21/141	14.9
OH	33	5	3	8/33	12	8	20/99	28/132	21.2
OK	49	3	1	4/48	4	11	15/101	19/149	12.8
OR	13	7	2	9/30	11	5	16/60	25/90	27.8
PA	42	4	6	10/50	13	19	32/203	42/253	16.6
RI	19	9	1	10/38	17	2	19/75	29/113	25.7
SC	50	0	0	0/46	8	8	16/124	16/170	9.4
SD	37	1	6	7/35	4	9 (1I)	14/70	21/105	20.0
TN	40	4	3	7/33	11	6	17/99	24/132	18.2
TX	34	3	3	6/31	14	18	32/150	38/181	21.0
UT	39	4	1	5/29	9	5	14/75	19/104	18.3
VT	2	9	2	11/30	42	11 (4 Prg)	57/150	68/180	37.8
VA	38	7	1	8/40	13	6	19/100	27/140	19.3
WA	6	11	6	17/49	19	10	29/98	46/147	31.3
WV	43	0	2	2/34	14	6	20/100	22/134	16.4
WI*	22	3	5	8/33	16	7	23/99	31/132	23.5
WY	45	0	1	1/30	3	10	13/60	14/90	15.6
		259 (10 nonpartisans) (1 Independent)	144	415/1,971	793 (4 Progressives) (1 Independent)	505	1,303/5,411	1,718/7,382	23.3

* States share the same rank if their proportions of women legislators are exactly equal or round off to be equal (CA, ID; MA, WI; AK, GA, MT; NE, NC).

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CAWP Fact Sheet

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WOMEN IN ELECTIVE OFFICE 2011

In 2011, 89 women serve in the U.S. Congress. Seventeen women serve in the Senate and 72 women serve in the House. The number of women in statewide elective executive posts is 68, while the proportion of women in state legislatures is 23.3 percent.

CONGRESS

In 2011, women hold **89**, or **16.6%**, of the 535 seats in the 112th U.S. Congress — **17**, or **17.0%**, of the 100 seats in the Senate and **72**, or **16.6%**, of the 435 seats in the House of Representatives. Congresswoman Nancy Pelosi (D-CA), who was the first woman Speaker of the House, is now minority leader.

Seventeen (12D, 5R) women serve in the **Senate: Kelly Ayotte** (R-ND), **Barbara Boxer** (D-CA); **Maria Cantwell** (D-WA); **Susan Collins** (R-ME); **Dianne Feinstein** (D-CA); **Kirsten Gillibrand** (D-NY); **Kay Hagan** (D-NC); **Kay Bailey Hutchison** (R-TX); **Amy Klobuchar** (D-MN); **Mary Landrieu** (D-LA); **Claire McCaskill** (D-MO); **Barbara Mikulski** (D-MD); **Lisa Murkowski** (R-AK); **Patty Murray** (D-WA); **Jeanne Shaheen** (D-NH); **Olympia Snowe** (R-ME); and **Debbie Stabenow** (D-MI).

Seventy-two women from 27 states serve in the House of Representatives; **48** are Democrats and **24** are Republicans. In addition, three Democratic women serve as the Delegates to the House from Guam, the Virgin Islands and Washington, DC.

STATEWIDE ELECTIVE EXECUTIVE OFFICES

In 2011, **68** women hold statewide elective executive offices across the country; women hold **21.6%** of the 315 available positions. Among these women, **38** are Democrats, **29** are Republicans, and **1** was elected in a nonpartisan race.

GOVERNORS — 6(2D, 4R)
- AZ Jan Brewer (R)
- NC Bevery M. Perdue (D)
- NM Susana Martinez (R)
- OK Mary Fallin (R)
- SC Nikki Haley (R)
- WA Christine Gregoire (D)

LIEUTENANT GOVERNORS — 11 (4D, 7R)
- AL Kay Ivey (R)
- CT Nancy Wyman (D)
- FL Jennifer Carroll (R)
- IA Kim Reynolds (R)
- IL Sheila Simon (D)
- IN Becky Skillman (R)
- MN Yvonne Solon (DFL)
- NJ Kim Guadagno (R)
- OH Mary Taylor (R)
- RI Elizabeth Roberts (D)
- WI Rebecca Kleefisch (R)

Attorney General - 6 (5D, 1R)

Secretary of State - 10 (7D, 3R)

State Treasurer/Chief Financial Officer - 6 (5D, 1R)

State Comptroller - 4 (1D, 3R)

State Auditor - 7 (5D, 2R)

Chief State Education Official — 5 (2D, 2R, 1NP*)
(title varies from state to state)

Commissioner of Insurance - 3 (2D, 1R)

Commissioner of Labor - 1R

Corporation Commissioner - 3(1D, 2R)

Public Service Commissioner - 4 (3D, 1R)

Public Regulation Commissioner - 1D

Railroad Commissioner - 1R

STATE LEGISLATURES

In 2011, **1,718**, or **23.3%**, of the 7,382 state legislators in the United States are women. Women hold **415**, or **21.1%**, of the 1,971 state senate seats and **1,303**, or **24.1%**, of the 5,411 state house seats. Since 1971, the number of women serving in state legislatures has more than quintupled.

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* NP = election was nonpartisan.

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STATE LEGISLATURE (cont.)

The states with the **highest percentages** of women state legislators are:

State	% Women	State	% Women
Colorado	40.0	Washington	31.3
Vermont	37.8	Maryland	30.9
Arizona	34.4	Illinois	29.4
Hawaii	32.9	Connecticut	28.9
Minnesota	31.8	Nevada	28.6

MUNICIPAL OFFICIALS

As of August 2010, among the 100 largest cities in the U.S., 7 had women mayors. One is African American (Stephanie Rawlings-Blake, Baltimore). In order of city population,[1] the mayors are:

City	Mayor	Rank
Houston, TX	Annise D. Parker	5
Baltimore, MD	Stephanie Rawlings-Blake	21
Fresno, CA	Ashley Swearengin	40
Tampa, FL	Pam Iorio	59
Stockton, CA	Ann Johnston	73
Glendale, AZ	Elaine M. Scruggs	85
Chula Vista, CA	Cheryl Cox	94

As of August 2010, of the 249 mayors of U.S. cities with populations 100,000 and over, 33, or 13.3%, were women, including two African Americans, and one Asian/Pacific Islander. Of the 1156 mayors of U.S. cities with populations 30,000 and above, 202, or 17.5%, were women.[2]

PERCENTAGES OF WOMEN IN ELECTIVE OFFICES

Year	U.S. Congress	Statewide Elective	State Legislatures	Year	U.S. Congress	Statewide Elective	State Legislatures
1979	3%	11%	10%	2001	13.6%	27.6%	22.4%
1981	4%	11%	12%	2003	13.6%	26.0%	22.4%
1983	4%	11%	13%	2004	13.8%	26.0%	22.5%
1985	5%	14%	15%	2005	15.0%	25.7%	22.7%
1987	5%	14%	16%	2006	15.0%	25.1%	22.8%
1989	5%	14%	17%	2007	16.1%	24.1%	23.5%
1991	6%	18%	18%	2008	16.5%	23.2%	23.7%
1993	10.1%	22.2%	20.5%	2009	16.8%	22.6%	24.3%
1995	10.3%	25.9%	20.6%	2010	16.8%	22.5%	24.5%
1997	11.0%	26.4%	21.6%	2011	16.6%	21.6%	23.3%
1999	12.1%	27.6%	22.4%				

[1] According to data from the U.S. Bureau of the Census.

[2] Information was compiled using the United States Conference of Mayors' 2010 website directory, www.usmayors.org/uscm/meet_mayors, as the primary reference.

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SJR

13

<TARGET><BILL>SJR 13</BILL><SUBJECT>SJR 13</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Session

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Chair
State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Administrative Regulation Review

SENATOR BILL WIELECHOWSKI

Resolution Relating to Limiting Campaign Expenditures
SPONSOR STATEMENT

"A democracy cannot function effectively when its constituent members believe laws are being bought and sold."
– US Supreme Court Justice John Paul Stevens

Many Americans recognize that the ability of large contributions from corporations, wealthy individuals and organizations to political candidates harms the ability of citizens to have a voice in their own government. Prior to the landmark United States Supreme Court ruling of Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), unlimited independent expenditures from corporations and unions was prohibited. Now, corporations and unions can make unlimited independent expenditures supporting or opposing a candidate for public office. This directly goes against the American idea of one person one vote, when one corporation can spend more than thousands.

This decision only made the cynicism most Americans feel about politics stronger. If people feel as if their vote does not matter, then voter participation will continue to decline.

The massive amount of money in politics following this decision is exploding the expense of campaigns, making it difficult for new or unknown candidates to enter a race. More and more, the money spent by corporations and unions is going to negative attacks ads that often misinform voters rather than promote productive discussion. Allowing unlimited campaign donations by corporations and unions takes the focus for candidates away from individual voters to those whose money can afford to sway hundreds of votes.

Unless the United States Supreme Court reverses these rulings, the only way to reverse the harmful effects of these decisions is to amend the Constitution of the United States. This resolution calls upon the Alaska State Legislature to urge the United States Congress and the President of the United States to work across party lines and propose a constitutional amendment to prohibit corporations, wealthy individuals and unions from making unlimited independent expenditure.

I ask that you support this resolution to support the democratic process and ensure that everyone has an equal voice in government.

27-LS1270\M
Bullard
1/31/12

SENATE JOINT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY SENATORS WIELECHOWSKI, French, Ellis, Egan, Paskvan

Introduced:
Referred:

A RESOLUTION

Urging the United States Congress and the President of the United States to work to amend the Constitution of the United States to prohibit corporations, unions, and individuals from making unlimited independent expenditures supporting or opposing candidates for public office.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS a vast majority of Americans recognize that the influence of large contributions by corporations, wealthy individuals, and organizations harms the ability of average citizens to have a voice in their own government; and

WHEREAS the narrow five to four decision of the United States Supreme Court in Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), allows corporations and unions to make unlimited independent expenditures supporting or opposing a candidate for public office; and

WHEREAS unlimited independent expenditures from corporations and unions were prohibited until the ruling of the United States Supreme Court in Citizens United v. Federal Election Commission; and

WHEREAS much of the hundreds of millions of dollars being spent by corporations and unions since the ruling of the United States Supreme Court in Citizens United v. Federal Election Commission is going to negative ads, which often misinform voters rather than lead to a productive discussion of the states' and nation's most important issues; and

WHEREAS, unless the United States Supreme Court reverses its ruling, the only way to reverse the harmful effects of the Citizens United ruling is to amend the Constitution of the United States; and

WHEREAS, while not addressed by the United States Supreme Court's ruling in Citizens United, unlimited independent expenditures made by individuals also distort the political process and ability of all American citizens to have an equal voice in government;

BE IT RESOLVED that the Alaska State Legislature urges the United States Congress and the President of the United States to work across party lines to propose a constitutional amendment to prohibit corporations, unions, and individuals from making unlimited independent expenditures.

COPIES of this resolution shall be sent to the Honorable Barack Obama, President of the United States; the Honorable Lisa Murkowski and the Honorable Mark Begich, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress; all other members of the 112th United States Congress; and the presiding officers of the legislatures of each of the other 49 states.

27-LS1270\A
Bullard
1/24/12

SENATE JOINT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY SENATOR WIELECHOWSKI

Introduced:
Referred:

A RESOLUTION

Urging the United States Congress and the President of the United States to work to amend the Constitution of the United States to prohibit corporations and unions from making unlimited independent expenditures supporting or opposing candidates for public office.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS a vast majority of Americans recognize that the influence of large contributions by corporations, wealthy individuals, and organizations harms the ability of average citizens to have a voice in their own government; and

WHEREAS the narrow five to four decision of the United States Supreme Court in Citizens United v. Federal Election Commission, 588 U.S. ___, 130 S. Ct. 876 (2010), allows corporations and unions to make unlimited independent expenditures supporting or opposing a candidate for public office; and

WHEREAS unlimited independent expenditures from corporations and unions were prohibited until the ruling of the United States Supreme Court in Citizens United v. Federal Election Commission; and

WHEREAS much of the hundreds of millions of dollars being spent by corporations and unions since the ruling of the United States Supreme Court in Citizens United v. Federal Election Commission is going to negative ads, which often misinform voters rather than lead to a productive discussion of the states' and nation's most important issues; and

WHEREAS, unless the United States Supreme Court reverses its ruling, the only way to reverse the harmful effects of the Citizens United ruling is to amend the Constitution of the United States;

BE IT RESOLVED that the Alaska State Legislature urges the United States Congress and the President of the United States to work across party lines to propose a constitutional amendment to prohibit corporations and unions from making unlimited independent expenditures.

COPIES of this resolution shall be sent to the Honorable Barack Obama, President of the United States; the Honorable Lisa Murkowski and the Honorable Mark Begich, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress; all other members of the 112th United States Congress; and the presiding officers of the legislatures of each of the other 49 states.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SJR 13**
Fiscal Note Number: 1
(S) Publish Date:

Identifier (file name):
Title: SJR 13 AMEND U.S. CONST RE: CAMPAIGN MONEY
Sponsor: SENATOR WIELECHOWSKI
Requester: (S) Judiciary

Dept. Affected:
Appropriation:
Allocation:
OMB Component Number:

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Cindy Smith, Senate Judiciary Committee — Phone 465-3892
Division: — Date/Time 2/17/12 12:00 AM
Approved by: /s/ Senator French, Chair — Date

(Revised 1/17/2012 OMB)

ALASKA STATE LEGISLATURE

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Chair
State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Administrative Regulation Review

SENATOR BILL WIELECHOWSKI

MEMORANDUM

DATE: 8 February 2012

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Senator Bill Wielechowski

SUBJ: Hearing request for SJR13

Hi Cindy,

I am writing to request a hearing in the Senate Judiciary Committee for SJR13. SJR13 would resolve the Alaska State Legislature to urge the U.S. Congress and President to move to amend the Constitution of the United States to ban unlimited corporate, individual, and union expenditures supporting or opposing candidates for public office.

This resolution acknowledges the Citizens United ruling by the U.S. Supreme Court in 2010 and moves to restore integrity to political campaigns by keeping unchecked amounts of money out.

Included with this letter you will find:

1. Sponsor statement.
2. Current version of SJR13 and one previous version.
3. Back up material from the Center for Responsive Politics.
4. An Anchorage Daily News editorial in support of SJR13.

My legislative aide Thomas Presley is assigned to this legislation. His direct line is 465-6252. Thank you for your consideration of this request.

Sincerely,

Bill Wielechowski

Senator Bill Wielechowski
Prime Sponsor

House State Affairs Committee

RE: House Joint Resolution 33

I am here today to represent Juneau's chapter of Move to Amend. Move to Amend has chapters all around the state in Anchorage, Kenai, Juneau, Prince of Wales, and Sitka as well as chapters around the Nation. Move to Amend's mission is to amend the US Constitution to limit the amount corporations can spend in our elections.

Right now, we live in a political climate where we are bombarded by endless commercials and advertisements either supporting one candidate or smearing another. After the Citizens United decision nearly $4 billion was spent during the 2010 Congressional Election. And, according to the Center for Responsive Politics, "in the Congressional races of 2010, the candidate who spent the most money won 85% of the House seats and 83% of the Senate." Citizen's United has given the politicians with the most corporate support an upper hand in our elections.

The US Government was designed to be "of the people, for the people, and by the people" and the election process is fundamental for achieving that goal. Not only can anyone vote, but anyone can run for office. But right now, the playing field is not even. Anyone can run, but without campaign finance limitations, not everyone has an equal opportunity to win. By allowing unlimited campaign contributions, the political system has essentially been rigged against hardworking Americans who can't afford to compete with for-profit corporations, unions, special interest groups, and wealthy individuals.

By passing this resolution, Alaska would be asserting itself as a state whose Representatives support fair campaigns and are dedicated to faithfully representing the average American.

Thank you for your time.

Kokayi Yosakhere

Kendra Sweaney

Randi Spray

Jasmine Danah

Cindy Smith

From: Thomas Presley
Sent: Friday, February 17, 2012 1:00 PM
To: Cindy Smith
Subject: SJR 13 testifiers

Hi Cindy,

Again, apologies for the short notice. Here are our testifiers for SJR 13 today.

In person:

Christina Mounce from Movetoamend.org Juneau chapter.

Offnets:

Mark Hayes from Public Citizen

Thomas Presley
Office of Senator Bill Wielechowski
907.465.6252

GO

(e.g. Donors, Politicians, Corporations and more)

OpenSecrets.org
Center for Responsive Politics

Outside Spending

Campaign contributions and lobbying expenditures are not the only ways that money is used influence public policy decisions.

Thus far, outside groups (parties, super PACs, corporations, unions, other groups, etc.) have spent **$55,573,113** during the 2012 election cycle to run ads, make phone calls, distribute literature and engage in other activities to sway the electorate about candidates and issues.

Organizations not directly affiliated with political parties accounted for **$51,794,091** of that amount, of which **$45,012,210** was spent by **305** super PACs.

A January 2010 Supreme Court decision (*Citizens United v. Federal Election Commission*) now permits corporations and unions to make such expenditures from their treasuries directly and through other organizations. The decision allows such activity to take place without complete or immediate disclosure of who funds such communications, preventing voters from understanding who is truly behind many political messages.

Read more...

Select a cycle: 2012

Top Groups Making Outside Expenditures in 2012 Elections, Excluding Party Committees

Organization	Total	View*	Independent Expenditures	Elec Comm	Comm Costs	Super PAC	527s†	501c
Restore Our Future	$17,534,037	C	$17,534,037	$0	$0	x		
Winning Our Future	$8,838,997	C	$8,838,997	$0	$0	x		
Make Us Great Again	$3,959,824	C	$3,959,824	$0	$0	x		
Endorse Liberty	$3,347,176	C	$3,347,176	$0	$0	x		
Our Destiny PAC	$2,453,204	C	$2,453,204	$0	$0	x		
Red, White & Blue	$1,954,534	C	$1,954,534	$0	$0	x		
Ending Spending	$1,742,479	C	$0	$1,742,479	$0	x		x
House Majority PAC	$1,612,169	L	$1,612,169	$0	$0	x		
Senate Conservatives Fund	$1,064,555	C	$1,064,555	$0	$0			
American Crossroads	$1,064,223	C	$1,064,223	$0	$0	x		

VIEW ALL GROUPS

* C = Conservative, L = Liberal
† Indicates that this organization has a 527 committee registered with the IRS. The committee's 527 spending outside of electioneering communications is NOT included in these totals. Read more about 527s.

Top 2012 Races Attracting Outside Spending, Excluding Party Committees

Race	Total	For Dems	Against Dems	For Repubs	Against Repubs
President	$43,528,889	$32,657	$1,461,187	$19,987,916	$22,016,847
New York District 26	$1,519,007	$173,341	$313,449	$68,917	$863,300
Texas Senate	$1,103,173	$0	$0	$634,413	$468,760
Nebraska Senate	$717,409	$406,345	$742	$310,322	$0
Oregon District 1	$664,485	$57,334	$0	$13,051	$594,100
Nevada District 2	$296,139	$0	$188,952	$104,937	$2,250
New York District 9	$270,442	$0	$88,555	$39,231	$182,656
Iowa District 3	$208,664	$0	$0	$0	$208,664
Utah Senate	$186,539	$0	$0	$51,351	$135,188
Massachusetts Senate	$168,017	$10,017	$0	$0	$158,000

VIEW ALL RACES

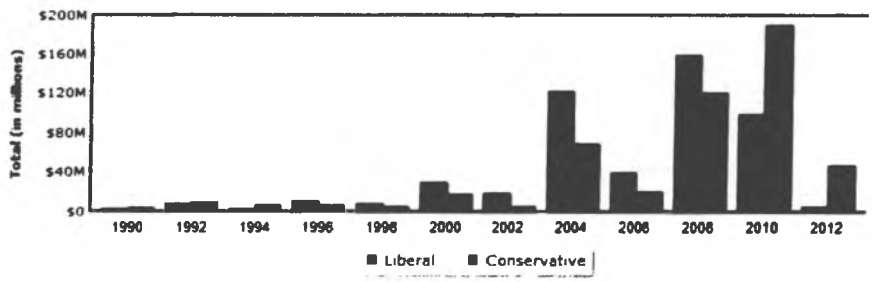
Why don't the numbers add up?

Top 2012 Candidates Attracting Outside Expenditures, Excluding Party Committees

Candidate	Race	Total	For Dems	Against Dems	For Repubs	Against Repubs	Results
Gingrich, Newt (R)	PRES	$19,805,570	$0	$0	$3,317,794	$16,487,776	
Romney, Mitt (R)	PRES	$8,912,582	$0	$0	$3,913,502	$4,999,080	
Perry, Rick (R)	PRES	$3,964,824	$0	$0	$3,964,824	$0	
Paul, Ron (R)	PRES	$3,857,090	$0	$0	$3,724,100	$132,990	
Santorum, Rick (R)	PRES	$2,511,525	$0	$0	$2,112,524	$399,001	
Huntsman, Jon (R)	PRES	$2,453,454	$0	$0	$2,453,454	$0	
Obama, Barack (D)	PRES	$1,522,126	$32,657	$1,461,187	$0	$0	
Corwin, Jane (R)	NY26	$649,611	$0	$0	$68,917	$480,694	
Cruz, Ted (R)	TXS2	$634,413	$0	$0	$634,413	$0	
Cornilles, Robert (R)	OR01	$607,151	$0	$0	$13,051	$594,100	
VIEW ALL CANDIDATES							

GROUP FILTER: **Excluding Party Committees** | All Groups

Total Liberal vs. Conservative Outside Spending, Excluding Party Committees



Total Outside Spending by Election Cycle, Excluding Party Committees

See: **entire cycle** | Year-to-date

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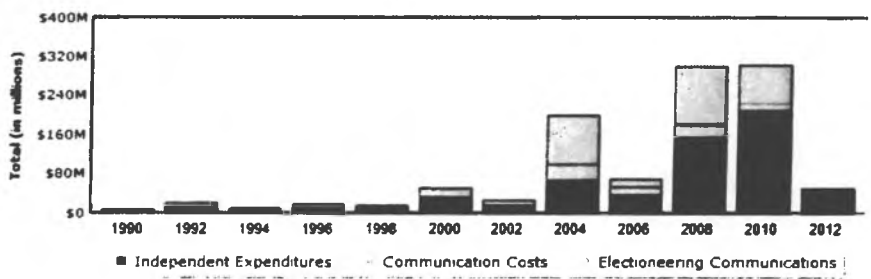
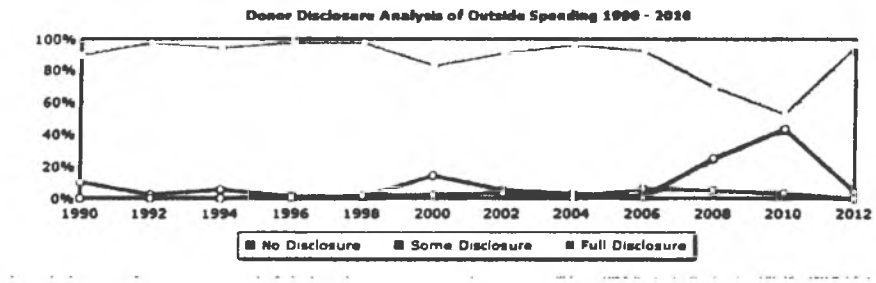


Cycle	Total	Independent Expenditures	Electioneering Communications	Communication Costs
2012	$51,794,091	$49,804,457	$1,918,698	$70,936
2010	$304,679,091	$210,912,167	$79,958,557	$13,808,367
2008	$301,679,929	$156,841,894	$119,256,138	$25,581,897
2006	$68,852,502	$37,394,589	$15,152,326	$16,305,587
2004	$200,102,202	$68,716,443	$100,218,129	$31,167,630
2002	$27,289,285	$16,588,844	N/A	$10,700,441
2000	$50,796,592	$33,034,631	N/A	$17,761,961
1998	$15,191,107	$10,266,937	N/A	$4,924,170
1996	$17,884,043	$10,167,742	N/A	$7,716,301
1994	$9,538,844	$5,219,215	N/A	$4,319,629
1992	$19,635,123	$10,947,342	N/A	$8,687,781
1990	$7,213,219	$5,650,524	N/A	$1,562,695
Show/hide 1990-2004 cycles				

Outside Spending by Disclosure, Excluding Party Committees



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Count Cash & Make Change.

Our View: Leash the PAC spending beast

Alaska lawmakers right to call for limits on super PAC spending

It's only a resolution but it's a good one.

Sen. Bill Wielechowski has introduced a resolution in the Alaska Senate calling on Congress and the president to back a constitutional amendment that would ban unlimited contributions to third-party groups to support or oppose political candidates.

Rep. Les Gara has introduced a similar resolution in the House. Such an amendment requires a two-thirds vote of Congress and the support of three-fourths of the states. That's a long climb.

And it's an iffy proposition in the Alaska Legislature as well.

It's still a stand worth taking.

In 2010, the Alaska Legislature was swift to respond to the Supreme Court decision that granted personal free speech rights to corporations, unions and other organizations, essentially equating money with speech and allowing unlimited contributions to independent groups fighting for or against a candidate.

The court's decision was a classic example of abstract exercise and legal logic without regard to the reality of our political system.

The practical exercise of free speech in 21st century American political campaigns costs money. Lots of money. Giving corporations and unions free rein to spend as much as they can gives the well-heeled few an overwhelming advantage in electoral campaigns.

The restrictions are a joke. Corporate giving is restrained in that there can be no coordination with a candidate's campaign. Fact is, there doesn't need to be any direct contact to coordinate a campaign, for one side to skew a campaign, for one side to dominate the media and the message. And who believes there won't be contact? As fig leafs go, this one doesn't cover anything.

Had the Supreme Court set out to encourage corporate influence over the U.S. electoral process, they couldn't have done much better than their January 2010 ruling.

Obviously, political self-interest comes into play here. There was bipartisan support for disclosure in 2010, but limiting super PACs (PAC meaning political action committee) may help Democrats more than Republicans. So Alaska Republicans may hesitate to sign on. If Democrats gained by the court ruling, they might be the ones hesitating.

No one should hesitate. Alaska has had workable campaign contribution rules that allowed everyone -- corporations, unions, other organizations and individuals -- to support candidates and causes but within

limits that didn't allow moneyed interests too disproportionate an influence. Money still mattered but not enough to drown individual voices and arguments on the merits.

Equating money with speech has the practical effect of muting some speech while vastly amplifying other speech. And it's not an independent exercise of citizens' rights. It's a ticket for special interests to dominate campaigns and serve themselves.

Alaskans across the political spectrum should stand against that.

Special interests should have their shot; the founders counted on that. They just shouldn't have a bottomless ammo box.

BOTTOM LINE: Resolution against unlimited campaign spending is the right stand.

Read more here: http://www.adn.com/2012/02/01/2295354/our-view-leash-the-pac-spending.html#storylink=cpy

SJR 19

<TARGET><BILL>SJR 19</BILL><SUBJECT>SJR 19</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

Senator Hollis French

SPONSOR STATEMENT

SJR 19 – Constitutional Amendment: Redistricting Board

Senate Joint Resolution 19 would amend Article VI, Section 8 of the Alaska Constitution, pertaining to the Redistricting Board. This constitutional amendment would transform both the selection process and the composition of the Redistricting Board. The current selection process has consistently resulted in redistricting plans that favor the political party in power at the time. This does Alaskans a disservice.

Instead of an appointed Redistricting Board, SJR 19 would implement a new process of board members being selected by lottery. It would also increase the number of members from five to fourteen. The Redistricting Board would have equal representation from all political parties, consisting of:

- Five who are registered with the largest political party in the state
- Five who are registered with the second largest political party in the state
- Four members who are not affiliated with either of the two largest political parties in the state

The members of the Board would be selected from a pool established by the Division of Elections. The pool of sixty registered voters would consist of fifteen from each of Alaska's four judicial districts. To qualify for the pool, the individual must have voted in the preceding four general elections in Alaska and must not have changed their political affiliation during that time. The pool would be made up of three subdivisions: one-third would be affiliated with the largest political party in the state based on registration, one-third would be affiliated with the second largest political party, and one-third would be unaffiliated with either of the two largest political parties.

From that pool of sixty, the Division of Elections would use a lottery system to select two board members from each judicial district. The eight members chosen by lottery will then select the remaining six members from the pool established in accordance with composition requirements.

The drawing of legislative district boundaries should be as non-partisan as possible. The composition of the Board is the key to this effort. SJR 19 would ensure that the members of the Redistricting Board draw fair, balanced district boundaries that best serve Alaskans.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **SJR19**
Fiscal Note Number
Publish Date

Identifier (file name) SJR019-OOG-DOE-3-16-12
Title Constitutional amendment relating to membership of the Redistricting Board
Sponsor Senator French
Requester Senate Judiciary

Dept. Affected Office of the Governor
Appropriation Elections
Allocation Elections
OMB Component Number 21

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services	1.5						
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF	1.5						
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**1.5**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by Gail Fenumiai, Director — Phone 465-2644
Division Division of Elections — Date/Time 3/16/2012, 11:55am
Approved by Guy Bell, Administrative Director — Date 3/16/2012
Administrative Services

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SJR19

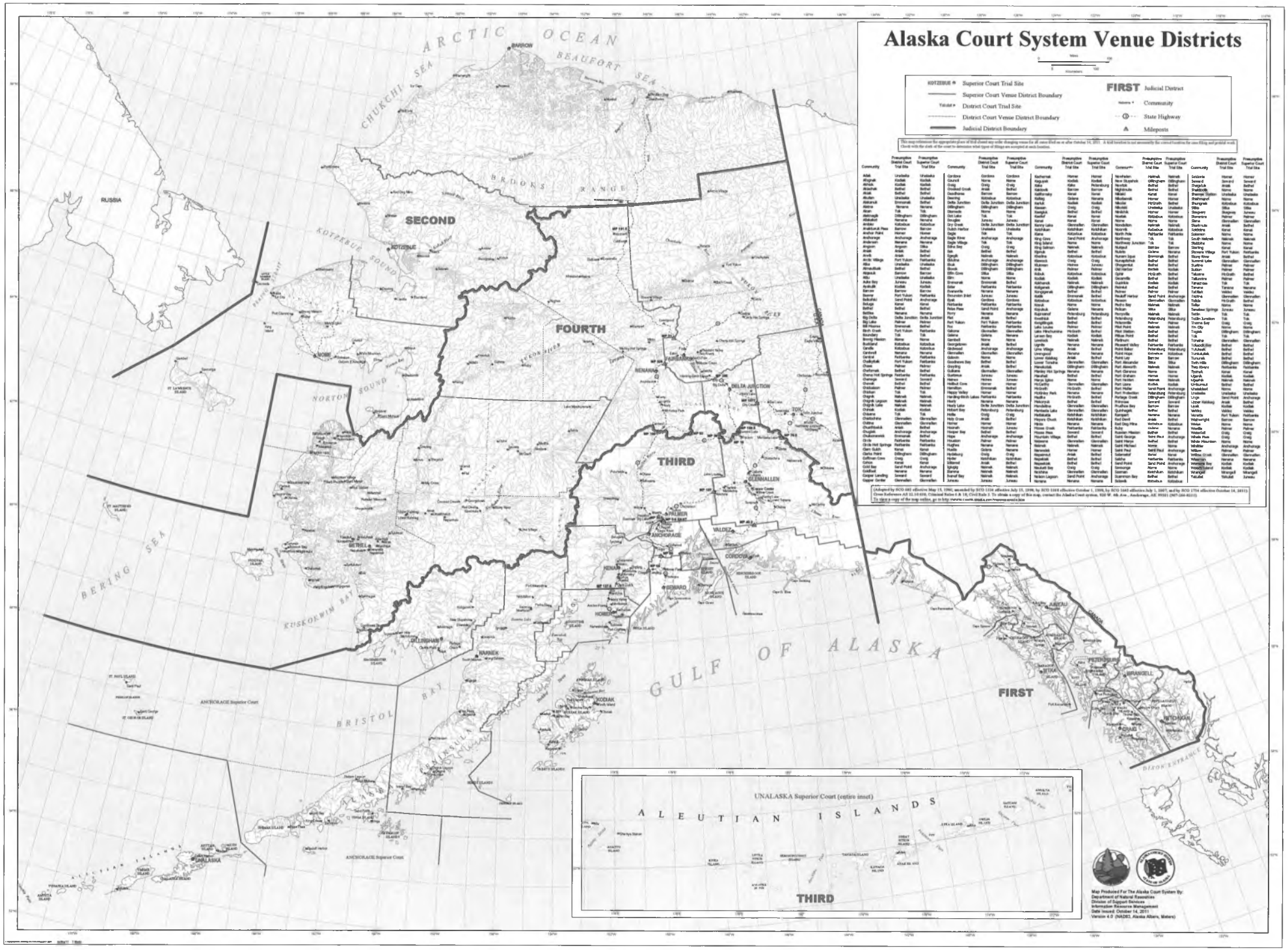
Analysis

Passage of this resolution would require the constitutional amendment to appear on the 2012 general election ballot. The cost of providing information about the constitutional amendment in the Official Election Pamphlet, as required by AS 15.58, is $1.5. Should the addition of this resolution require printing an 8-1/2 by 18 inch ballot, the cost will increase to $22.0.

Redistricting Board

Alaska Constitution Article VI, Section 8 vs. SJR 19

	Article VI, Section 8	SJR 19
Number of Members	5	14
Residency Requirement	For at least one year	N/A (see prior election participation)
Prior Election Participation	N/A	Voted in the last four general elections in Alaska
Duration of Political Party Affiliation	N/A	Unchanged in last four general elections
Exclusion(s)	No public employees or officials	N/A
Process/Composition	APPOINTMENT • Two by governor • One by presiding officer of Senate • One by presiding officer of House • One by chief justice of the Supreme Court	SELECTION • Five from largest political party • Five from second largest political party • Four not affiliated with either of two largest political parties (8 selected by lottery, 6 selected by board)
Judicial District Requirement	At least one from each judicial district	At least two from each judicial district
Future Candidacy for Legislature	Not in the general election following the adoption of the plan	Not until after next census and another final redistricting plan has been adopted


Alaska Court System Venue Districts
KOTZEBUE Superior Court Trial Site
Superior Court Venue District Boundary
District Court Trial Site
District Court Venue District Boundary
Judicial District Boundary
FIRST Judicial District
Community
State Highway
Mileposts
SECOND
FOURTH
THIRD
FIRST
ARCTIC OCEAN
BEAUFORT SEA
CHUKCHI SEA
BROOKS RANGE
RUSSIA
KOTZEBUE SOUND
NORTON SOUND
BERING SEA
KUSKOKWIM BAY
BRISTOL BAY
GULF OF ALASKA
DIXON ENTRANCE
ANCHORAGE Superior Court
UNALASKA Superior Court (entire inset)
ALEUTIAN ISLANDS
Map Produced For The Alaska Court System By:
Department of Natural Resources
Division of Support Services
Information Resource Management
Date Issued: October 14, 2011
Version 4.0 (NAD83, Alaska Albers, Meters)

HB

6

<TARGET><BILL>HB 6</BILL><SUBJECT>HB 6</SUBJECT><COMM>SJUD27</COMM></TARGET>

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Alaska State Legislature
House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

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Juneau, Alaska 99801-1182
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Toll Free: (866) 465-4940
Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

CS HB 6 (JUD) amended in the House:
Removing a Regent
Sponsor Statement

This bill creates a statutory due process procedure under which the governor may suspend or remove a University of Alaska regent for good cause.

This bill is in response to a 2007 incident in which a regent was federally indicted on multiple counts of fraud. He refused to resign his position until impeachment proceedings began. The board of regents' by-laws do not set forth a procedure remove a regent. Legislative legal counsel has concluded that regents serve at the pleasure of the governor and thus can be removed. An informal attorney general's opinion states that the governor does not have the authority to remove a regent without cause (implying that he can do so with just cause). That AG opinion concluded that the governor does have the authority to remove a regent so long as cause is established and due process granted.

It should be noted that, during the Twenty-Fifth Legislature, letters were sent by the House Judiciary Committee to the Board of Regents asking that it, under the authority of AS 14.40.170(b)(1), adopt procedures for the suspension and removal of a regent. But the board has not done so.

It is important to acknowledge that the constitution does bear upon this bill due to the governor's powers being enumerated in Article III of the Alaska Constitution while the board of regents is established in Article VII, section 6. The Alaska Supreme Court has ruled that the UA is subject to a degree of legislative control. For example, the legislature can, without approval of the regents, dispose of UA land. Additionally, the legislature has, through law, provided the UA with a broad degree of autonomy, however this implies that the UA is still subject to laws enacted by the legislature. The legislature has been given broad authority under the constitution, indeed the only constitutional constraints on the power of the legislature to make laws regarding other agencies of the State of Alaska deal with the rules of court and the repeal of initiatives. In effect this legislation provides a check upon the powers of the university.

This bill will allow the suspension or removal of a regent for cause under a due process procedure. It will protect both the regent's interests and the university's interests.

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature
House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
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Rep.Max.Gruenberg@legis.state.ak.us

House Bill 6:
Removing a Regent
Sectional Analysis for CS HB 6 (JUD) (27-LS0027\O)

Section 1[1] sets forth the legislative findings and purposes of the bill. The legislature finds that the framers of the Alaskan Constitution intended to insulate the University of Alaska from politics, that the legislature delegated the power of self-governance to the UA under AS 14.40.170(b), and that the legislature has the power to create laws that pertain to the university. The purposes of the bill are to clarify that the governor may only suspend or remove a regent with good cause and that the governor must afford a regent procedural due process. Finally, the legislative findings in this section affirm the insulation of the university and the board of regents from the executive and legislative branches and from politics in the suspension or removal of regents.

Section 2[2] adds a new section, AS 14.40.155, to AS 14.40, the chapter which governs the University of Alaska Board of Regents. AS 14.40.155 is patterned after statutory removal procedures for certain other boards, such as the Workers Compensation Appeals Commission. See AS 23.30.007(j).

AS 14.40.155(a) sets forth the procedure for the governor to suspend a regent. The governor must provide the regent with notice and an opportunity for a hearing.

AS 14.40.155(b) allows the governor to remove a regent for good cause by providing the regent with a charging document (an "accusation") and the opportunity for a hearing and for judicial review. Good cause is defined in subsection (g) to include a violation of the Executive Branch Ethics Act that results in a recommendation of removal, a conviction of a felony, conviction of a misdemeanor involving a crime of dishonesty or the University of Alaska, malfeasance or nonfeasance in office, or failure to continue to meet the qualification requirements of a regent.

AS 14.40.155(c) allows a regent to request, at any time, a hearing to either defend against a possible suspension, or lift a suspension once it has been imposed.

AS 14.40.155(d) permits the governor to delegate the conduct of the hearing to the Office of Administrative Hearings. The standard of proof to be used in the hearing for removal for "good

---

[1] Page 1, lines 5-14 through page 2, lines 1-11
[2] Page 2, lines 12-31 through page 4, lines1-3

cause" is "clear and convincing" evidence, one of the highest standards of proof that is required in civil suits.

AS 14.40.155(e) states that the Administrative Procedures Act (AS 44.62.330-44.62.630) applies to all of the proceedings of this section.

AS 14.40.155(f) requires the governor to file a copy of the accusation, the findings on each allegation in the accusation, and a complete record of the removal and/or suspension proceedings with the lieutenant governor.

Section 3[3] is an applicability clause that allows AS 14.40.155 to apply to conduct occurring before, on or after the effective date of the Act.

[3] Page 4, lines 4-7

LEGAL SERVICES

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

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

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

MEMORANDUM April 17, 2007

SUBJECT: Removal of a University Regent (HB 237)
(Work Order No. 25-LS0839\A)

TO: Representative Bob Lynn
Attn: Nancy Manly

FROM: Jean M. Mischel
Legislative Counsel

You asked whether the governor may remove a University regent. In my opinion, the answer is yes. In fact, the constitutional authority of the legislature to restrict or otherwise control the removal or suspension of a regent by the governor is the subject of considerable debate. Unlike boards and commissions controlled by art. III, sec. 26 of the constitution, nothing in art. VII, sec. 3, which establishes the Board of Regents, provides for legislative control over removal of the regents and therefore the governor's removal authority appears to be unrestricted.

Article VII, sec. 3 provides:

> The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session . . . .

A limitation on removal of some executive officers may be interposed by law, but arguably only as to persons who hold appointment under art. III, sec. 26 of the state constitution. Article III, sec. 26 states:

> When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, *and may be removed as provided by law* . . . .

Even with the additional legislative authority over sec. 26 boards, the Alaska Supreme Court interpreted that authority very narrowly. When the Court was faced with the question of the extent of legislative authority over sec. 26 boards and commissions, the Court found that the confirmation power of the legislature provided in art. III, secs. 25 (principal department heads) and 26, is merely a limited delegation of the executive appointment power to the legislature and stated:

> As to this issue, we think the provision of Sections 25 and 26 of Article III are clear and unambiguous. Thus, we conclude that Sections 25 and 26

> mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government. (Bradner v. Hammond, 553 P.2d 1, 7 (Alaska 1976))

The University's status as a "body corporate" does not imply a legislative role in removal of a regent (apart from the impeachment process available to the legislature as to all civil officers). Though the University, alone in the constitution, expressly holds corporate status, the Alaska Supreme Court has said that members of other public corporations established by law serve at the pleasure of the governor. (Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alaska 1966)) The Court stated:

> The Association's three board members from the Board of Commissioners of the Alaska Housing Authority are appointed by the governor and serve at his pleasure. Therefore, the governor is empowered to remove any member of the governing board of the Association at his pleasure.

Id. at 240 (citations omitted).

I am aware of a recent informal attorney general opinion that suggests in a footnote that the legislature has some authority over removal of a regent without any judicial support for that position. The addition of legislative control over suspension of a regent is even more questionable. I do not know how a court would view the kind of intrusion proposed in HB 237 into the governor's appointment and removal authority, but perhaps the court would be persuaded by the governor's support of this concept.

If I may be of further assistance, please advise.

JMM:med
07-247.med

MEMORANDUM

State of Alaska
Department of Law

To: Talis J. Colberg
Attorney General

Thru: Craig J. Tillery
Deputy Attorney General

From: Michael A. Barnhill
Assistant Attorney General
Labor and State Affairs Section

Date: February 2, 2007

File No: 663-06-0103

Tel. No.: (907) 465-3600

Fax: (907) 465-2520

Subject: Governor's Power to Remove a University of Alaska Regent

We have been asked whether the Governor has the power to remove a University of Alaska regent without cause. In our view, the answer is no.

We acknowledge that this question has been posed to different counsel and different conclusions reached. Legislative counsel has concluded in a written opinion that regents serve at the pleasure of the governor and may be removed at any time. University of Alaska counsel has concluded in a verbal opinion that a regent may be removed only through impeachment by the legislature.

For the reasons set forth below, we do not fully agree with the conclusions of either legislative counsel or university counsel. That being said, we do agree with both legislative counsel and university counsel that impeachment is an option that may be pursued in order to remove a regent. But we disagree with university counsel that it is the only option.

The basis for our views is grounded primarily in the constitution and discussions of the framers regarding the University of Alaska during the constitutional convention. We start there.

I. Historical Background

The University of Alaska was created by the territorial legislature in 1935. ch. 49, SLA 1935. The Board of Regents was created at that time as well, with the governor empowered to appoint regents subject to confirmation by a joint session of the legislature. *Id.* at sec. 3. The term of a regent was eight years and a regent was to serve "until their successors are appointed and have qualified." *Id.* The original statute made no mention

of how a regent should be removed. This law has essentially remained unchanged through today, though the number of regents was increased to eleven in 1975. *See* AS 14.40.120; 14.40.140; AS 14.40.150.

From the University's inception through statehood we are aware of no instance of a governor removing a regent prior to the end of a regent's term. We recognize that it is possible such could have happened, but it would take further historical research to determine this.

The constitutional convention considered the University of Alaska several times during the course of the convention. Before considering these passages, however, it is important to understand that the territory of Alaska had suffered from a fragmented executive branch with several elected officials and multiple governing boards designed to erode the power of the federally appointed governor. A fundamental goal of the convention was to establish a strong governor who was completely in control of the executive branch of government.[1]

During the consideration of the executive branch article, however, concerns were raised regarding the appropriate place for the University of Alaska within the constitutional design for the new government. These concerns were often expressed in terms of the need to insulate education from politics. Alaska Constitutional Convention Proceedings at 2043, 2246. During the discussions of the provisions that ultimately

---

[1] Delegate Fischer later wrote, "[Territorial] government was neither responsible nor responsive to the people. As a result, convention delegates were ready to make basic structural changes so the people could hold the governor wholly responsible for the conduct of state administration." V. Fischer, Alaska's Constitutional Convention at 106 (1975).

became sections 25 and 26 of Article III,[2] questions were raised concerning the extent to which these sections governed appointments to the Board of Regents. The chair of the Executive Branch Committee, Victor Rivers, and a member of that Committee, Katherine Nordale, both responded that section 26 of Article III only applied to "principal departments" and that the University of Alaska was not a principal department. Alaska Constitutional Convention Proceedings at 2034, 2037, 2246. Therefore, in their mind, the University of Alaska did not fall under section 26 of Article III.

Other delegates, however, remained concerned that in order to insulate the University from politics it needed to be made explicit that the University was not subject to section 26 of Article III. In particular, certain delegates were concerned that if section 26 did apply to the University, that the Board of Regents' appointment of a president would be subject to approval by the governor. Accordingly, these delegates sought to amend section 26 to state that the provision did not apply to the University of Alaska. Alaska Constitutional Convention Proceedings at 2245-2258. Ultimately, these attempts failed because the members of the Executive Branch committee persuaded the convention that section 26 simply did not apply to the University of Alaska. Alaska Constitutional Convention Proceedings at 2246, 2257. Moreover, several delegates noted that a separate article was being drafted to govern the University of Alaska. *Id.* at 2247-48, 2250, 2255.

During the debate, some delegates expressed observations as to the status of the University. The chair of the Executive Committee, Victor Rivers, stated that the Executive Branch article would have no impact on the University:

---

[2] Section 25. Department Heads. The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state.

Section 26. Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

> Walsh: May I ask a question, Mr. Rivers? I think to clarify in the minds of several people here it might be well for me, that [as] one of those serving on the Board of Regents of the University of Alaska, composed of eight members, and the Board of Regents select the President of the University. The governor, as I understand it, does not have the power of the removal of the president of the University. It is a matter for the Board. Would this situation change that, Mr. Rivers?
>
> Rivers: No, in regard to the University, this would not affect their present setup. They are a private corporation, or rather a nonprofit corporation, and under the specific law providing for their make-up, and you would still have a board of regents appointed by the governor and confirmed by the legislature, and the powers as you now have them would be identical to what they now are as I visualize them.

Id. at 2033-34. Delegate Taylor stated that the "University is not a part of the Territorial government whatsoever; it is an independent agency." *Id.* at 2253. Notably, Delegate Nordale expressed the view that by explicitly putting the University in a separate article it would "make it very clear that it can never be dissolved and that it is not part of the executive branch of government." *Id.* at 2256.

Later in the convention, the Executive Branch committee proposed language regarding the University. Chair Rivers introduced the language as follows:

> Mr. President, you have heard the reading of this article and it was considered important that in the constitution there be included an article of this type. It gives the University, as a corporate body, the authority to receive and hold property which will be granted to them under the enabling act. It also gives them the authority for administering and disposing of that according to law. It sets up the board of regents and the governing body of the University, and I think the main point of this article has is that constitutionally the University of Alaska shall be the only state university in Alaska.

Id. at 2792. Perhaps notably, the Executive Branch committee saw fit to clear the language of the proposed article with the President of the University prior to bringing it to the floor of the convention.[3] *Id.*

II. Analysis

With this summary of the constitutional history of the University in mind, we think it is fair to draw the following conclusions. First, the convention intended to create a very strong governor with full appointive power. Second, despite the strong governor model, the convention nevertheless intended to insulate the University from politics, including the governor. Third, the convention intended that the University would not be subject to section 26 of Article III of the Alaska Constitution. Fourth, the convention intended to constitutionalize the existence of the University. Finally, some members of the convention believed that the University resided outside the executive branch of government in 1955 and that the constitution preserved that status.[4]

Nowhere in the convention minutes is there any discussion regarding removal of a regent.[5] But the above conclusions are sufficient to give us pause that the governor's power to remove certain executive branch appointees without cause extends to the University Board of Regents. This view is consistent with the views previously expressed by this office. In 1979, we opined:

> Under the state constitution, the University of Alaska is 'governed' by the Board of Regents. Alaska Const., art. VII, § 3. The regents are appointed by the governor, subject to confirmation by the legislature. Id. They serve for terms of eight years. Thus, while the regents are appointed by and are responsible to the governor, they do not serve at his pleasure but rather for fixed terms, and they may, therefore, be

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[3] In other words, it is doubtful that President Patty, the University president at the time, would have approved this language if he thought it allowed the governor to remove a regent without cause.

[4] By observing this latter point, we do not conclude that in fact the convention succeeded in fully removing the University from the executive branch.

[5] Though at one point, Chair Rivers states that "[t]he law could provide no doubt for means of removal . . ." *Id.* at 2255-56. He appears to be referring to the chief executive of the University, not the regents, however.

> removed from office solely for cause. 67 C.J.S. Officers § 120 (1978); 63 Am. Jur.2d Public Officers and Employees § 189 (1972). As a result, the governor's supervision over the university is made distinctly indirect. Unless the members of the Board of Regents commit acts of malfeasance, misfeasance, or nonfeasance sufficient to constitute cause for their removal, the governor possesses no check upon them and no power to direct their activities.

1979 Inf. Op. Att'y Gen. 1 (Jan. 23; J-66-103-79). We have reiterated this view over the years[6] and see no reason to stray from it today.

For the reasons expressed above, the University is accorded unique constitutional status. We must be mindful of these reasons when considering the applicability of Alaska Supreme Court precedents. A number of these cases have been cited by other counsel, but we doubt that a court would find them controlling on the issue of whether the governor may remove a regent without cause. For instance, *Walker v. Alaska State Mortgage Assoc.*, 416 P.2d 245 (Alaska 1966) does not involve the University of Alaska, but rather pertains to a board of a public corporation that does not have a unique constitutional status. The cases involving the University do not have issues that directly implicate the political independence of the University, one of the reasons for the University's unique constitutional status. *See, e.g., University of Alaska v. Nat'l Aircraft Leasing,* 536 P.2d 121 (Alaska 1975) (University is instrumentality of state for purposes of sovereign immunity); *McGrath v. University of Alaska,* 813 P.2d 1370 (Alaska 1991) (legislature may subject University to Administrative Procedures Act). Instead, we think a court if faced with the issue of whether the governor may remove a regent without cause would be more likely to focus on the constitutional history of the University set forth above.

Finally, legislative counsel contends that under AS 39.05.060(d) regents serve at the pleasure of the governor and may be removed at any time. This interpretation is at odds with the express intention of the constitutional convention that the University be insulated from politics. Moreover, review of the fairly lengthy legislative history of this statute demonstrates that the legislature never intended AS 39.05.060(d) to reach the

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[6] In 1998, an assistant attorney general stated that, "Regents are considered to be sort of in a class by themselves. We've always advised the governor that it's inadvisable to remove the regents at a change of an administration. Legal complications may ensue." 1998 Anchorage Daily News (quoting AAG James Baldwin).

Board of Regents. This statute was originally enacted as part of the State Organization Act of 1959, under which the executive branch of the new State of Alaska was formed. *See* ch. 64, SLA 1959. The University of Alaska is not within the scope of this Act—it was not mentioned in the Act and was left out of the organization of the executive branch accomplished by this Act. *Id.* When initially enacted, AS 39.05.060 only referred to boards that were explicitly mentioned in the State Organization Act of 1959. While the scope of AS 39.05.060 has both expanded and contracted over the years, it has never been broadened to include the Board of Regents.[7]

In summary, we conclude that the Governor may only remove a regent if cause is established, preferably at a hearing prior to removal. We would be happy to address in another memo the evidence necessary to establish cause, and the criteria for an appropriate hearing process.

MAB:ajh

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[7] We note, however, that it may be possible for the legislature to provide for removal of a regent through enactment of a statute consistent with the constitution. Such a statute would have to preserve the University's politically independent constitutional status and probably could only provide for removal if it were for some cause that was established at a hearing prior to removal.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB006**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB006-UA-SYSBRA-12-21-11
Title: Removing a Regent
Sponsor: Representative Gruenberg
Requester: (S) JUD

Dept. Affected: University of Alaska
Appropriation: Budget Reductions/Additions-Systemwid
Allocation: Budget Reductions/Additions-Systemwid
OMB Component Number: 1296

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated fiscal note to reflect current fiscal year.

Prepared by: Michelle Rizk — Phone: 907-450-8187
Division: University of Alaska — Date/Time: 12/21/11 1:30pm
Approved by: Michelle Rizk — Date: 12/21/2011

(Revised 11/28/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB006
2012 LEGISLATIVE SESSION

Analysis

HB006 will have a zero fiscal impact on the University of Alaska

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **CSHB006**
Fiscal Note Number
Publish Date

Identifier (file name) HB006CS(JUD)-DOA-OAH-12-02-11
Title Removing a Regent
Sponsor Representatives Gruenberg, P. Wilson, Lynn, Gardner
Requester Senate Judiciary

Dept. Affected Administration
Appropriation Centralized Administrative Services
Allocation Office of Administrative Hearings
OMB Component Number 2771

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated to new fiscal note form.

Prepared by Terry L. Thurbon, Chief Administrative Law Judge — Phone 465-1886
Division Office of Administrative Hearings — Date/Time 12/01/2011 3:32 p.m.
Approved by John Cramer, Deputy Commissioner — Date 12/2/2011
Department of Administration

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB006

Analysis

This bill authorizes the Governor to remove a member of the University of Alaska Board of Regents for good cause and establishes procedures for removal. The procedures include an opportunity for a hearing. Under section 2, the hearing function could be delegated by the Governor to the Office of Administrative Hearings (OAH). Removals likely would be infrequent. OAH, therefore, does not anticipate that this bill would result in an appreciable increase in caseload and expects to be able to provide any hearing related services required with existing authorized personnel. The cost to OAH of performing the services would be recovered from the Office of the Governor through interagency receipts, based on the time commitment required for hearings.

SENATE CS FOR CS FOR HOUSE BILL NO. 6(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GRUENBERG, Peggy Wilson, Lynn, Gardner

A BILL

FOR AN ACT ENTITLED

"An Act authorizing the governor to remove or suspend a member of the Board of Regents of the University of Alaska for good cause; and establishing a procedure for the removal or suspension of a regent."

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

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

LEGISLATIVE FINDINGS AND PURPOSES. (a) The legislature finds that

(1) the framers of the Constitution of the State of Alaska intended to insulate the University of Alaska and the Board of Regents from politics, but did not intend to immunize the University of Alaska and the Board of Regents from appropriate nonpolitical legislative and executive branch oversight;

(2) the legislature has the power to pass laws that pertain to the University of Alaska; and

(3) under AS 14.40.170(b)(1), the legislature has delegated to the Board of

Regents the power to "adopt reasonable rules, orders, and plans with reasonable penalties for the good government of the university and for the regulation of the Board of Regents"; however, it is not clear that the Board of Regents has the constitutional authority to suspend or remove an officer who has been appointed by the governor and confirmed by the legislature.

(b) The purposes of AS 14.40.155, added by sec. 2 of this Act, are to

(1) clarify that the governor may remove a regent only for good cause;

(2) prescribe a due process procedure under which the governor may remove a regent for good cause;

(3) prescribe a due process procedure under which, in certain circumstances, the governor may suspend a regent; and

(4) accomplish each of the above purposes in a manner that ensures the University of Alaska and the Board of Regents remain insulated from politics.

*** Sec. 2.** AS 14.40 is amended by adding a new section to read:

Sec. 14.40.155. Suspension and removal of regents. (a) The governor may, after providing notice and an opportunity for a hearing, suspend a member of the Board of Regents while a final disposition is pending on

(1) a criminal complaint, presentment, information, or indictment involving a felony in any jurisdiction;

(2) an information or formal criminal charges of a misdemeanor described under (g)(3) of this section;

(3) a probable cause determination of a knowing ethics violation under AS 39.52 that results in an accusation under consideration before the personnel board;

(4) a written complaint under consideration before the governor, signed under oath by the person making the complaint, that alleges malfeasance or nonfeasance in office as described in (g)(4) of this section, if the governor determines, after an investigation, that there is probable cause to believe that malfeasance or nonfeasance in office has occurred; a determination of probable cause under this paragraph

(A) must specify with particularity the factual basis for the determination;

(B) must include objective evidence of substantial and material

malfeasance or nonfeasance; and

(C) may not be based on political differences or the discretionary performance of a lawful act or a prescribed duty; or

(5) a formal allegation or charge by a professional or occupational licensing body alleging or finding a violation of licensing statutes or regulations that is related to the regent's ability or fitness to serve as a regent.

(b) The governor may remove a member of the Board of Regents for good cause by providing to the member an accusation and an opportunity for a hearing and judicial review.

(c) Notwithstanding the procedure under AS 44.62.390, a regent who has been suspended under (a) of this section may, at any time, request a hearing to

(1) defend against the grounds for the suspension stated in the accusation; or

(2) lift the suspension.

(d) If a hearing is to be held under this section, the governor shall delegate the conduct of the hearing to the office of administrative hearings under AS 44.64.030(b). If a hearing is requested, the hearing officer shall prepare a proposed decision under AS 44.62.500(b)

(1) to remove a regent based on clear and convincing evidence of good cause for removal;

(2) not to remove a regent; or

(3) to continue a suspension or lift a suspension of a regent.

(e) AS 44.62.330 - 44.62.630 apply to all proceedings under this section.

(f) After a final decision by the governor that suspends a regent under (a) of this section or removes a regent for good cause under (b) of this section, the governor shall file with the lieutenant governor a copy of the allegations made against the former regent, the governor's findings on each of the allegations, and a complete record of the suspension or removal proceedings.

(g) In this section, "good cause" means

(1) a violation of AS 39.52 (Alaska Executive Branch Ethics Act) that results in a recommendation of removal under AS 39.52.410(b)(3);

(2) a conviction of a felony in any jurisdiction;

(3) a conviction of a misdemeanor in any jurisdiction if the misdemeanor involves

(A) dishonesty;

(B) breach of trust; or

(C) the University of Alaska;

(4) substantial and material malfeasance or nonfeasance in office that is not based on political differences or the discretionary performance of a lawful act or prescribed duty; in this paragraph "malfeasance or nonfeasance in office" includes

(A) misconduct in office;

(B) an inability to serve for an extended period of time;

(C) neglect of duty;

(D) incompetence;

(E) unjustified failure to perform the duties of the Board of Regents;

(5) a violation of a professional or occupational licensing statute or regulation that is related to the regent's fitness to serve as a regent, resulting in the revocation or suspension of a professional or occupational license issued under state law; or

(6) a failure to possess the qualifications of a regent under AS 14.40.130.

*** Sec. 3.** AS 44.64.030(a) is amended to read:

(a) The office shall conduct all adjudicative administrative hearings required under the following statutes or under regulations adopted to implement the statutes:

(1) AS 04.11.510(b)(1) and (c) (alcoholic beverages license);

(2) AS 05.15 (charitable gaming);

(3) AS 05.20 (recreational devices);

(4) AS 05.90.001 (special racing events);

(5) AS 06 (banks, financial institutions, and fund claims), except as provided otherwise by AS 06.60.590;

(6) AS 08 (occupational licensing), other than AS 08.08,

AS 08.18.125, and AS 08.62.046;

(7) AS 10.06 (Alaska Corporations Code);

(8) AS 10.13 (Alaska BIDCO Act);

(9) AS 10.25.375 (Electric and Telephone Cooperative Act);

(10) AS 10.50.408 (limited liability companies);

(11) AS 14.11.016 (education-related facility grants);

(12) AS 14.18 (discrimination in public education);

(13) AS 14.25.006 (teachers' retirement system);

(14) AS 14.25.175 (waiver of adjustments under teachers' defined benefit plan);

(15) AS 14.40.155 (suspension and removal of regents);

(16) [(15)] AS 14.48 (postsecondary educational institutions);

(17) [(16)] AS 17.20 (Alaska Food, Drug, and Cosmetic Act), other than AS 17.20.060 and 17.20.360;

(18) [(17)] AS 21.09, AS 21.22.190, AS 21.27, except under AS 21.27.420(d), AS 21.34, AS 21.36, AS 21.69, AS 21.86.200, AS 21.87, and AS 21.96 (insurance);

(19) [(18)] AS 25.27 (child support services);

(20) [(19)] AS 32.06 (Uniform Partnership Act);

(21) [(20)] AS 34.45 (unclaimed property);

(22) [(21)] AS 34.55.024 and 34.55.026 (Uniform Land Sales Practices Act);

(23) [(22)] AS 36.30 (State Procurement Code), other than AS 36.30.627(a)(2);

(24) [(23)] AS 38.05.065 (contracts for sale of state land);

(25) [(24)] AS 39.30.165 (supplemental benefits system);

(26) [(25)] AS 39.30.335 (teachers' and public employees' health reimbursement arrangement plan);

(27) [(26)] AS 39.35.006 (public employees' retirement system);

(28) [(27)] AS 39.35.522 (waiver of adjustments under public employees' defined benefit plan);

(29) [(28)] AS 39.45.055 (public employees' deferred compensation program);

(30) [(29)] AS 39.52 (Alaska Executive Branch Ethics Act);

(31) [(30)] AS 43.23 (permanent fund dividends);

(32) [(31)] AS 43.70 (Alaska Business License Act);

(33) [(32)] AS 44.50 (notaries public);

(34) [(33)] AS 44.77 (claims against the state);

(35) [(34)] AS 45.48.080(c) (breach of security involving personal information);

(36) [(35)] AS 45.30.040 (mobile homes);

(37) [(36)] AS 45.55 (Alaska Securities Act);

(38) [(37)] AS 45.57 (Takeover Bid Disclosure Act);

(39) [(38)] AS 46 (water, air, energy, and environmental conservation), other than AS 46.03.820, 46.03.850, AS 46.39, and AS 46.40;

(40) [(39)] AS 47.32 (licensing by the Department of Health and Social Services);

(41) [(40)] AS 47.45 (longevity bonuses).

LEGAL SERVICES

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

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

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

MEMORANDUM March 29, 2012

SUBJECT: Retroactivity questions (SCS CSHB 6( )
(Work Order No. 27-LS0027\G))

TO: Representative Max Gruenberg
Attn: Ted Madsen

FROM: Jean M. Mischel
Legislative Counsel

As I understand your question, you have asked about the effect of removing the applicability provision in sec. 4 of the above-referenced draft in its entirety. That section provides for the applicability of AS 14.40.155, added by sec. 2 of the bill, to conduct or acts occurring before, on, or after the effective date of the Act. AS 01.10.090 provides that "no statute is retrospective unless expressly declared therein." Removal of sec. 4, then, would result in the prospective application only of sec. 2 of the Act. Even without removing sec. 4, however, I do not know whether a court would uphold a retroactive application of the good cause definition, particularly as it relates to past criminal convictions of a sitting regent. At this time during session, I am unable to fully analyze that question, although the Department of Law may have an opinion as the language originated there.

If I may be of further assistance, please advise.

JMM:ljw
12-239.ljw

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

MEMORANDUM March 29, 2012

SUBJECT: Retroactive applicability (Amendment to SCS CSHB 6( )
(Work Order No. 27-LS0027\G.1))

TO: Senator John Coghill
Attn: Karen Lidster

FROM: Jean M. Mischel
Legislative Counsel

You have asked about the legal implications of removing the retroactive applicability language in the above-referenced bill and replacing it with "on-going effect" language. Section 4 of the bill currently provides that the suspension and removal of a regent provisions added by sec. 2 of the bill apply to "all conduct and acts occurring *before*, on, or after the effective date of" the Act. In my opinion, removal of the retroactive effect and inclusion of specific language that clarifies the applicability of the Act to conduct that has a continuing effect on or after the effective date of the Act, eliminates a risk of violating due process and *ex post facto* protections in the constitution, particularly with respect to the effect of prior convictions.

The issue is, however, complicated by (1) the nature of the Act as it applies to removal of a regent that may not, under certain circumstances, affect constitutional rights of a regent, and (2) unresolved questions about the current ability of the governor to remove a regent so that the Act may be interpreted as having no significant effect on the existing rights of a regent.[1] In fact, one could argue that HB 6 provides more, not less, legal protection over a regent's appointment. At this point in the session, I am unable to provide a thorough legal review of these and related questions. If a court does find that due process and *ex post facto* considerations apply to an appointment of a regent and that HB 6 represents a change in the law that in some way limits the rights of a regent, then the

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[1] In section 1 of the bill at page 1, lines 9 - 11, the legislature finds that the framers of the constitution "did not intend to immunize the University of Alaska and the Board of Regents from appropriate nonpolitical legislative and executive branch oversight", and at page 2, lines 2 -3 concedes that "it is not clear that the Board of Regents has the constitutional authority to suspend or remove an officer who has been appointed by the governor and confirmed by the legislature." The purpose of the bill as provided at page 2, line 6 is to "clarify that the governor may remove a regent only for good cause", not to change the law with respect to a regent's appointment or removal.

general rule of retroactivity applies (as discussed below) and clarifying the applicability provision may be warranted.

Article 1, section 15, Constitution of the State of Alaska provides that "no law impairing the obligation of contracts shall be passed." Courts have compared this to the prohibition of *ex post facto* criminal laws. Under AS 01.10.090 no statute is retrospective unless expressly declared in the statute. Even when the legislature attempts to provide for express retroactive application of a new statute, as in HB 6, courts have sometimes invalidated the provision on constitutional grounds. Courts have also implied retroactivity when no express provision exists.

The Alaska Supreme Court has previously held that a civil statute will be considered retroactive if it "gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute." *Eastwind, et. al. v. State of Alaska*, 951 P.3d 844, 848 (Alaska 1997). The rationale for the prohibition on *ex post facto* criminal laws is obvious: the avoidance of additional penalties that were unanticipated at the time of a criminal conviction. The Alaska Supreme Court has explained the rationale for limitations on retroactivity for civil laws as follows:

> the reason for the statutory presumption against retrospective legislation is that people in conducting their business should be able to rely on existing laws with reasonable certainty.

Id. at 847 (Alaska 1997) (citations omitted).

In *Catholic Bishop of Northern Alaska v. John Does,* 141 P.3d 719 (Alaska 2006), the Alaska Supreme Court had the opportunity to compare legislative intent to apply both criminal and civil statutory amendments retroactively. In that case, the legislature had been advised by legal counsel that retroactive application of the criminal law to revive time barred claims would violate constitutional prohibitions on passing *ex post facto* laws. The court viewed the legislative history and, on the basis of a lack of similar discussion and express intent to allow a revival of previously time barred civil claims, the court refused to apply the new law retroactively in the criminal or civil context.

A simple analysis of amendment G.1 under the general rule leads to the conclusion that removal of the express retroactivity provision and inclusion of the continuing effect requirement for actions makes the statute apply prospectively only. On the other hand, due process and fairness considerations may have defeated the retroactive application of the arguably new standards set out in HB 6 for removal even without amendment G.1. If, however, a court found that the standards did not in fact change the legal rights of a regent, the express retroactive application in HB 6 may have been upheld by a court, at least in the civil context. The amendment changes the effect of HB 6 so that it may not be applied to prior conduct unless the conduct has a continuing effect after the effective date of the Act. The problem, however, is in defining precise circumstances in which conduct has a continuing effect, particularly with respect to prior convictions or license

revocations. I have attempted to avoid any due process and *ex post facto* issues by describing a continuing effect for those purposes. I trust that I have captured your intent in that regard.

If I may be of further assistance, please advise.

JMM:ljw:plm
12-238.ljw

Enclosure

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature
House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

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Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

House Bill 6:
Removing a Regent
Explanation of changes between
CS for HB 6 (27-LS0027\O.A) to SCS for CS for HB 6 ( ) (27-LS0027\G)

At the suggestion of the Board of Regents, several changes have been incorporated into the "G" version.

Section 1: (a)(3) has been changed to state that it is not clear whether the Board of Regents has the constitutional authority to suspend or remove a regent. There was also one grammatical change to (b)(1) changing "with" to "for."

Section 2: (a) contains a minor grammatical change.

Section 2: (a)(3) contains a minor grammatical change.

Section 2: (a)(4) has been changed to make the suspension procedure, in the case of a complaint of malfeasance or nonfeasance in office, more rigorous. The "G" version now requires: (1) a sworn complaint, (2) the governor must investigate the allegations, and then (3) find "probable cause" to proceed further. "Probable cause" is defined to require a statement of the specific factual bases for the allegations plus objective evidence of substantial and material malfeasance or nonfeasance. The new language will also prohibit proceedings based on political differences or the discretionary performance of a lawful act or a prescribed duty. This paragraph also contains a few minor grammatical changes.

Section 2: (a)(5) was changed to require a formal allegation or charge by a licensing board to proceed under this provision, AS 14.40.155(a)(5).

Section 2: (d) was changed to require that, if a hearing is to be held, the Office of Administrative Hearings conduct it. The hearing officer will be required to issue a decision.

Section 2: (g)(4) was changed to make the removal procedure, in the case of malfeasance and nonfeasance in office, more rigorous. The new language will also prohibit removals based on political differences or the discretionary performance of a lawful act or a prescribed duty.

Section 2: (g)(5) was changed to clarify that a violation of a professional or occupational licensing statute or regulation that results in the revocation or suspension of a professional or occupational licensing statute be found to suspend or remove a regent under this provision, AS 14.40.155(g)(5).

Section 2: (g) also contains a few minor grammatical changes.

Section 3 was added to include these hearings to the list of hearings conducted by the Office of Administrative Hearings.

27-LS0027\G
Mischel
3/21/12

SENATE CS FOR CS FOR HOUSE BILL NO. 6( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GRUENBERG, Peggy Wilson, Lynn, Gardner

A BILL

FOR AN ACT ENTITLED

"An Act authorizing the governor to remove or suspend a member of the Board of Regents of the University of Alaska for good cause; and establishing a procedure for the removal or suspension of a regent."

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

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

LEGISLATIVE FINDINGS AND PURPOSES. (a) The legislature finds that

(1) the framers of the Constitution of the State of Alaska intended to insulate the University of Alaska and the Board of Regents from politics, but did not intend to immunize the University of Alaska and the Board of Regents from appropriate nonpolitical legislative and executive branch oversight;

(2) the legislature has the power to pass laws that pertain to the University of Alaska; and

(3) under AS 14.40.170(b)(1), the legislature has delegated to the Board of

Regents the power to "adopt reasonable rules, orders, and plans with reasonable penalties for the good government of the university and for the regulation of the Board of Regents"; however, it is not clear that the Board of Regents has the constitutional authority to suspend or remove an officer who has been appointed by the governor and confirmed by the legislature.

(b) The purposes of AS 14.40.155, added by sec. 2 of this Act, are to

(1) clarify that the governor may remove a regent only for good cause;

(2) prescribe a due process procedure under which the governor may remove a regent for good cause;

(3) prescribe a due process procedure under which, in certain circumstances, the governor may suspend a regent; and

(4) accomplish each of the above purposes in a manner that ensures the University of Alaska and the Board of Regents remain insulated from politics.

*** Sec. 2.** AS 14.40 is amended by adding a new section to read:

Sec. 14.40.155. Suspension and removal of regents. (a) The governor may, after providing notice and an opportunity for a hearing, suspend a member of the Board of Regents while a final disposition is pending on

(1) a criminal complaint, presentment, information, or indictment involving a felony in any jurisdiction;

(2) an information or formal criminal charges of a misdemeanor described under (g)(3) of this section;

(3) a probable cause determination of a knowing ethics violation under AS 39.52 that results in an accusation under consideration before the personnel board;

(4) a written complaint under consideration before the governor, signed under oath by the person making the complaint, that alleges malfeasance or nonfeasance in office as described in (g)(4) of this section, if the governor determines, after an investigation, that there is probable cause to believe that malfeasance or nonfeasance in office has occurred; a determination of probable cause under this paragraph

(A) must specify with particularity the factual basis for the determination;

(B) must include objective evidence of substantial and material

malfeasance or nonfeasance; and

(C) may not be based on political differences or the discretionary performance of a lawful act or a prescribed duty; or

(5) a formal allegation or charge by a professional or occupational licensing body alleging or finding a violation of licensing statutes or regulations that is related to the regent's ability or fitness to serve as a regent.

(b) The governor may remove a member of the Board of Regents for good cause by providing to the member an accusation and an opportunity for a hearing and judicial review.

(c) Notwithstanding the procedure under AS 44.62.390, a regent who has been suspended under (a) of this section may, at any time, request a hearing to

(1) defend against the grounds for the suspension stated in the accusation; or

(2) lift the suspension.

(d) If a hearing is to be held under this section, the governor shall delegate the conduct of the hearing to the office of administrative hearings under AS 44.64.030(b). If a hearing is requested, the hearing officer shall prepare a proposed decision under AS 44.62.500(b)

(1) to remove a regent based on clear and convincing evidence of good cause for removal;

(2) not to remove a regent; or

(3) to continue a suspension or lift a suspension of a regent.

(e) AS 44.62.330 - 44.62.630 apply to all proceedings under this section.

(f) After a final decision by the governor that suspends a regent under (a) of this section or removes a regent for good cause under (b) of this section, the governor shall file with the lieutenant governor a copy of the allegations made against the former regent, the governor's findings on each of the allegations, and a complete record of the suspension or removal proceedings.

(g) In this section, "good cause" means

(1) a violation of AS 39.52 (Alaska Executive Branch Ethics Act) that results in a recommendation of removal under AS 39.52.410(b)(3);

(2) a conviction of a felony in any jurisdiction;

(3) a conviction of a misdemeanor in any jurisdiction if the misdemeanor involves

(A) dishonesty;

(B) breach of trust; or

(C) the University of Alaska;

(4) substantial and material malfeasance or nonfeasance in office that is not based on political differences or the discretionary performance of a lawful act or prescribed duty; in this paragraph "malfeasance or nonfeasance in office" includes

(A) misconduct in office;

(B) an inability to serve for an extended period of time;

(C) neglect of duty;

(D) incompetence;

(E) unjustified failure to perform the duties of the Board of Regents;

(5) a violation of a professional or occupational licensing statute or regulation that is related to the regent's fitness to serve as a regent, resulting in the revocation or suspension of a professional or occupational license issued under state law; or

(6) a failure to possess the qualifications of a regent under AS 14.40.130.

* **Sec. 3.** AS 44.64.030(a) is amended to read:

(a) The office shall conduct all adjudicative administrative hearings required under the following statutes or under regulations adopted to implement the statutes:

(1) AS 04.11.510(b)(1) and (c) (alcoholic beverages license);

(2) AS 05.15 (charitable gaming);

(3) AS 05.20 (recreational devices);

(4) AS 05.90.001 (special racing events);

(5) AS 06 (banks, financial institutions, and fund claims), except as provided otherwise by AS 06.60.590;

(6) AS 08 (occupational licensing), other than AS 08.08,

AS 08.18.125, and AS 08.62.046;

(7) AS 10.06 (Alaska Corporations Code);

(8) AS 10.13 (Alaska BIDCO Act);

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(11) AS 14.11.016 (education-related facility grants);

(12) AS 14.18 (discrimination in public education);

(13) AS 14.25.006 (teachers' retirement system);

(14) AS 14.25.175 (waiver of adjustments under teachers' defined benefit plan);

(15) AS 14.40.155 (suspension and removal of regents);

(16) [(15)] AS 14.48 (postsecondary educational institutions);

(17) [(16)] AS 17.20 (Alaska Food, Drug, and Cosmetic Act), other than AS 17.20.060 and 17.20.360;

(18) [(17)] AS 21.09, AS 21.22.190, AS 21.27, except under AS 21.27.420(d), AS 21.34, AS 21.36, AS 21.69, AS 21.86.200, AS 21.87, and AS 21.96 (insurance);

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(21) [(20)] AS 34.45 (unclaimed property);

(22) [(21)] AS 34.55.024 and 34.55.026 (Uniform Land Sales Practices Act);

(23) [(22)] AS 36.30 (State Procurement Code), other than AS 36.30.627(a)(2);

(24) [(23)] AS 38.05.065 (contracts for sale of state land);

(25) [(24)] AS 39.30.165 (supplemental benefits system);

(26) [(25)] AS 39.30.335 (teachers' and public employees' health reimbursement arrangement plan);

(27) [(26)] AS 39.35.006 (public employees' retirement system);

(28) [(27)] AS 39.35.522 (waiver of adjustments under public employees' defined benefit plan);

(29) [(28)] AS 39.45.055 (public employees' deferred compensation program);

(30) [(29)] AS 39.52 (Alaska Executive Branch Ethics Act);

(31) [(30)] AS 43.23 (permanent fund dividends);

(32) [(31)] AS 43.70 (Alaska Business License Act);

(33) [(32)] AS 44.50 (notaries public);

(34) [(33)] AS 44.77 (claims against the state);

(35) [(34)] AS 45.48.080(c) (breach of security involving personal information);

(36) [(35)] AS 45.30.040 (mobile homes);

(37) [(36)] AS 45.55 (Alaska Securities Act);

(38) [(37)] AS 45.57 (Takeover Bid Disclosure Act);

(39) [(38)] AS 46 (water, air, energy, and environmental conservation), other than AS 46.03.820, 46.03.850, AS 46.39, and AS 46.40;

(40) [(39)] AS 47.32 (licensing by the Department of Health and Social Services);

(41) [(40)] AS 47.45 (longevity bonuses).

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

APPLICABILITY. AS 14.40.155, added by sec. 2 of this Act, applies to all conduct and acts occurring before, on, or after the effective date of this Act.

27-LS0027\Y
Mischel
3/20/12

SENATE CS FOR CS FOR HOUSE BILL NO. 6( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GRUENBERG, Peggy Wilson, Lynn, Gardner

A BILL

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(2) the legislature has the power to pass laws that pertain to the University of Alaska; and

(3) under AS 14.40.170(b)(1), the legislature has delegated to the Board of

Regents the power to "adopt reasonable rules, orders, and plans with reasonable penalties for the good government of the university and for the regulation of the Board of Regents"; however, it is not clear that the Board of Regents has the constitutional authority to suspend or remove an officer who has been appointed by the governor and confirmed by the legislature.

(b) The purposes of AS 14.40.155, added by sec. 2 of this Act, are to

(1) clarify that the governor may remove a regent only for good cause;

(2) prescribe a due process procedure under which the governor may remove a regent for good cause;

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(1) a criminal complaint, presentment, information, or indictment involving a felony in any jurisdiction;

(2) an information or formal criminal charges of a misdemeanor described under (g)(3) of this section;

(3) a probable cause determination of a knowing ethics violation under AS 39.52 that results in an accusation under consideration before the personnel board;

(4) a written complaint under consideration before the governor, signed under oath by the person making the complaint, that alleges malfeasance or nonfeasance in office as described in (g)(4) of this section, if the governor determines, after an investigation, that there is probable cause to believe that malfeasance or nonfeasance in office has occurred; a determination of probable cause under this paragraph

(A) must specify with particularity the factual basis for the determination;

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(5) a formal allegation or charge by a professional or occupational licensing body alleging or finding a violation of licensing statutes or regulations that is related to the regent's ability or fitness to serve as a regent.

(b) The governor may remove a member of the Board of Regents for good cause by providing to the member an accusation and an opportunity for a hearing and judicial review.

(c) Notwithstanding the procedure under AS 44.62.390, a regent who has been suspended under (a) of this section may, at any time, request a hearing to

(1) defend against the grounds for the suspension stated in the accusation; or

(2) lift the suspension.

(d) If a hearing is to be held under this section, the governor shall delegate the conduct of the hearing to the office of administrative hearings under AS 44.64.030(b). If a hearing is requested, the hearing officer shall prepare a proposed decision under AS 44.62.500(b)

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(e) AS 44.62.330 - 44.62.630 apply to all proceedings under this section.

(f) After a final decision by the governor that suspends a regent under (a) of this section or removes a regent for good cause under (b) of this section, the governor shall file with the lieutenant governor a copy of the allegations made against the former regent, the governor's findings on each of the allegations, and a complete record of the suspension or removal proceedings.

(g) In this section, "good cause" means

(1) a violation of AS 39.52 (Alaska Executive Branch Ethics Act) that results in a recommendation of removal under AS 39.52.410(b)(3);

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(B) breach of trust; or

(C) the University of Alaska;

(4) malfeasance or nonfeasance in office, including

(A) misconduct in office;

(B) an inability to serve for an extended period of time;

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(5) AS 06 (banks, financial institutions, and fund claims), except as provided otherwise by AS 06.60.590;

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Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature
House of Representatives

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House Bill 6:
Removing a Regent
Explanation of changes between
CS for HB 6 (27-LS0027\O.A) to SCS for CS for HB 6 ( ) (27-LS0027\L)

At the suggestion of the Board of Regents several changes have been incorporated into the "L" version.

Section 1 (a)(3) has been changed to state that it is not clear whether the Board of Regents has the constitutional authority to suspend or remove a regent.

Section 2 (a)(4) has been changed to make the suspension procedure, in the case of a complaint of malfeasance or nonfeasance in office, more rigorous. The "L" version new requires: (1) a sworn complaint, (2) the governor must investigate the allegations, and then (3) find "probable cause" to proceed further. "Probable cause" is defined to require a statement of the specific factual bases for the allegations plus objective evidence of substantial and material malfeasance or nonfeasance. The new language will also prohibit proceedings based on political differences or the discretionary performance of a lawful act or a prescribed duty.

Section 2 (a)(5) was changed to require a formal allegation or charge by a licensing board to proceed under this provision, AS 14.40.155(a)(5).

Section 2 (d) was changed to require that, if a hearing is to be held, the Office of Administrative Hearings conduct it.

Section (g)(5) was changed to clarify that a violation of a professional or occupational licensing statute or regulation that results in the revocation or suspension of a professional or occupational licensing statute be found to suspend or remove a regent under this provision, AS 14.40.155(g)(5).

Section 2 (g) also contains a few minor grammatical changes.

Section 3 was added to include these hearings to the list of hearings conducted by the Office of Administrative Hearings.

27-LS0027\L
Mischel
3/14/12

SENATE CS FOR CS FOR HOUSE BILL NO. 6( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

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(27) [(26)] AS 39.35.006 (public employees' retirement system);

(28) [(27)] AS 39.35.522 (waiver of adjustments under public employees' defined benefit plan);

(29) [(28)] AS 39.45.055 (public employees' deferred compensation program);

(30) [(29)] AS 39.52 (Alaska Executive Branch Ethics Act);

(31) [(30)] AS 43.23 (permanent fund dividends);

(32) [(31)] AS 43.70 (Alaska Business License Act);

(33) [(32)] AS 44.50 (notaries public);

(34) [(33)] AS 44.77 (claims against the state);

(35) [(34)] AS 45.48.080(c) (breach of security involving personal information);

(36) [(35)] AS 45.30.040 (mobile homes);

(37) [(36)] AS 45.55 (Alaska Securities Act);

(38) [(37)] AS 45.57 (Takeover Bid Disclosure Act);

(39) [(38)] AS 46 (water, air, energy, and environmental conservation), other than AS 46.03.820, 46.03.850, AS 46.39, and AS 46.40;

(40) [(39)] AS 47.32 (licensing by the Department of Health and Social Services);

(41) [(40)] AS 47.45 (longevity bonuses).

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

APPLICABILITY. AS 14.40.155, added by sec. 2 of this Act, applies to all conduct and acts occurring before, on, or after the effective date of this Act.

Board of Regents' Office
Phone: (907) 450-8010
Fax: (907) 450-8012
EMAIL: sybor@alaska.edu
www.alaska.edu/bor/

202 Butrovich Building
910 Yukon Drive
P.O. Box 755300
Fairbanks, AK 99775-5300

March 9, 2012

The Honorable Representative Max Gruenberg
The Honorable Senator Hollis French

Re: House Bill 6 – Suspension or Removal of a Regent for Good Cause

Dear Representative Gruenberg & Senator French:

I am writing to express the Board of Regents' appreciation for the careful consideration you have given to HB 6. Circumstances warranting the removal of a regent have arisen rarely in the long history of the University. However, the present members of the Board of Regents and administration of the University of Alaska share your concern that the University and State of Alaska not have to face another such situation without a clear path to resolution.

At the same time, the Board has two major concerns regarding HB 6:

1. An administrative suspension or removal is likely to result in prolonged and expensive legal challenges by the affected regent.[1] Such challenges may disrupt and call into question the validity of board action; and
2. An administrative removal provision that may be initiated by one person, required only to sign a complaint, is much more likely to be used and thus may be subject to abuse through frivolous or politically motivated complaints. That problem is exacerbated if the grounds for removal include subjective grounds, e.g., "neglect of duty," "incompetence," "unjustified failure to perform . . . duties . . ."[2]

These concerns are not theoretical. The University recently took advantage of historically low interest rates to refinance existing bonds, saving the University and the state millions of dollars over the life of the bonds. Each time bonds are issued the University is required to certify that ***there is no litigation potentially affecting the validity of the board's action***. An accused regent who refuses to step aside, despite an objective reason to do so, is entirely likely to take action to tie the board and University in knots while he seeks injunctions & files appeals to keep his seat. This litigation would involve at least the board and the governor, and potentially the new regent, and would result in significant costs and disruption.

At the same time, regents who are wrongly accused under proposed AS 14.40.155(a)(4) or (g)(4) may be forced to resign or seek defense & indemnity from the University rather than

---

[1] Article VII, Section 3 of the Constitution providing for appointment of regents does not provide for removal of regents "in accordance with law." By contrast, that authority was explicitly granted the governor for Executive Branch boards and commissions by Article III, Section 26. That difference, as well as constitutional proceedings indicating an intent to insulate the board from political interference, will provide a suspended or removed regent with a basis for a challenge to administrative removal that courts cannot readily dismiss.

[2] See proposed AS 14.40.155(a)(4) and (g)(4).

incur the expense of defending against subjective or frivolous charges. Regents occasionally take actions that are unpopular with students and parents, such as raising tuition or fees, discontinuing a little used program, or with single individuals, such as terminating a problematic professor, etc. A regent appointed by one governor may become a political nuisance to a successor. It is important to note that regents serve as volunteers, and are in no position to incur the expense of defending frivolous charges. While a court may eventually establish that there were no grounds for suspension, in the interim an effective and appropriate regent may have been forced to resign and/or the validity of board action needlessly called into question.

An impeachment hearing is an unfortunate and unlikely scenario. However, it has the advantage of being completely legally defensible if it comes to pass. On March 9, 2012, the Board of Regents adopted Bylaw 20, attached. That bylaw creates a process that confronts a regent who has engaged in alleged misconduct with investigation and, in the worst case scenario, a public referral for possible impeachment. The Board believes this is an appropriate intermediate step that avoids the legal questions and potential disruptions that may result if the Legislature cedes its authority over regent removal to the governor.

At the same time, the Board recognizes that it is within the province of the Legislature to pass laws it deems appropriate. If you determine to advance HB 6, the Board of Regents respectfully requests that you consider the following amendments for the stated reasons:

- The Board does have statutory authority to regulate its internal operations as a "Board." However, the board does not believe it has or should have the legal authority to remove or suspend regents, in contravention of appointments made by the governor and approved by the legislature. The Board of Regents asks that you substitute the following for the language at Page 1, Section 1, Line 14
    - Alternative language: *(3) "under AS 14.40.170(b)(1), the legislature has delegated to the Board of Regents the power to 'adopt reasonable rules, orders and plans with reasonable penalties for the good government of the university and for the regulation of the Board of Regents, however, it is not clear that the Board has the constitutional authority to suspend or remove an officer who has been appointed by the governor and confirmed by the legislature."*

- The allegations that would form the basis for suspension or removal under AS 14.40.155(a)(4) or (g)(4) are subjective. Some are also duplicative of other processes or ambiguous. The Board of Regents asks that you change the following language to provide for a probable cause standard for suspension, to require objective evidence and prohibit findings based on political differences.
    - Alternative language at Page 2, Section 2, Line 22: *(4) a written complaint under consideration by the governor, signed under oath by the person making the complaint, that alleges malfeasance or nonfeasance in office described under (g)(4) of this section, if the governor determines, after investigation, that there is probable cause to believe that such malfeasance or nonfeasance*

in office has occurred. A finding of probable cause shall specify with particularity the factual basis for the finding, shall include objective evidence of substantial and material malfeasance or nonfeasance, and shall not be based on political differences or discretionary performance of a lawful act or prescribed duty; or

- Alternative language at Page 3, Section 2, Line 26: *(4) malfeasance or nonfeasance in office, including the following, but provided that a finding of good cause under this section shall require substantial and material malfeasance or nonfeasance, and shall not be based on political differences or discretionary performance of a lawful act or prescribed duty*

- The Board of Regents asks that you tighten the language at Page 2, Section 2, Line 24, and page 4, line 2. As written these bases for suspension or removal require only "proceedings," do not require that the alleged misconduct involve a matter that is properly before the licensing body, and do not require a formal allegation or charge.
  - Alternative language: *(5) A formal allegation or charge by a professional or occupational licensing body, alleging or finding a violation of the relevant licensing statutes or regulations that is related to the regent's ability or fitness to serve as a regent*;

Thank you again for your thoughtful consideration of this matter. Please do not hesitate to let me know if you have questions or concerns.

Sincerely,

Patricia A Jacobson

Pat Jacobson, Chair

Attachment (Resolution & Bylaw 20)

cc: Senator Bill Wielechowski
Senator Joe Paskvan
Senator Lesil McGuire
Senator John Coghill
Representative Peggy Wilson
Representative Bob Lynn
Representative Berta Gardner

UNIVERSITY OF ALASKA BOARD OF REGENTS

RESOLUTION REGARDING REFERRAL FOR POSSIBLE IMPEACHMENT

WHEREAS Article VII, Section 3 of the Alaska Constitution creates the Board of Regents and provides for appointment of regents by the governor, subject to confirmation by a majority of the members of the legislature; and

WHEREAS Article II, Section 20 authorizes impeachment and removal from office of all civil officers, including members of the Board of Regents; and

WHEREAS the proceedings of the constitutional convention make clear that the framers intended to insulate the University of Alaska and the Board of Regents from politics, including action by the governor; and

WHEREAS those same proceedings and the Alaska Supreme Court have made clear that the university is not a principal department of the executive branch, and thus is not subject to Article III, Section 26 which authorizes removal of members of certain executive branch boards or commissions "as provided by law;" and

WHEREAS Article VII, Section 3 of the Alaska Constitution does not provide for removal of regents by the governor or in accordance with law, as is the case with a board or commission at the head of a principle department in the executive branch;

WHEREAS the Board of Regents lacks the constitutional authority to remove regents who have been duly appointed by the governor and approved by the legislature; and

WHEREAS suspension or removal of a regent by means other than those specified in the constitution is likely to lead to legal challenges by the affected and any newly appointed member, disruption of the board and legal uncertainty for the university;

NOW THEREFORE the Board of Regents adopts Bylaw 20 to provide for referral of regents for possible impeachment

BE IT FURTHER RESOLVED that this resolution be conveyed to The Alaska State Legislature, with a copy to be incorporated into the official minutes of the March 9, 2012 meeting of the Board of Regents.

University of Alaska Statewide System
Bylaws of the Board of Regents

BL20. Referral of a Regent for Possible Impeachment

A. Upon a simple majority vote of the whole board finding that it is in the best interests of the university to do so, the board may refer a regent to the senate with a recommendation that the senate consider impeachment of the regent.

B. Grounds for referral may include:

1. A criminal complaint, presentment, information, indictment or conviction involving a felony in any jurisdiction;

2. An information, formal criminal charges or conviction of a misdemeanor involving dishonesty, breach of trust, or the University of Alaska;

3. A probable cause determination of a knowing ethics violation under AS 39.52 that results in an accusation under consideration by the personnel board, or a recommendation of removal from office under AS 39.52.410(b)(3);

4. Circumstances indicating: conduct that necessarily brings the university into disrepute; material, repeated and documented neglect of duty; or a regent's inability to serve for an extended period;

5. Judicial proceedings involving or an adjudication of incompetence;

6. A formal allegation or charge, or a final decision, by a professional or occupational licensing body, alleging or finding a violation of the relevant licensing statutes or regulations that is related to the regent's ability or fitness to serve as a regent; or

7. Failure to possess the qualifications of a regent under AS 14.40.130.

C. The following process shall be followed in considering a motion to refer for possible impeachment. Consistent with AS 44.62.310(d)(5), the Open Meetings Act does not apply and all meetings regarding a possible referral shall be conducted in executive session. The process shall maintain confidentiality consistent with the circumstances and the requirements of the review:

1. Any member may request an executive session to discuss appointment of a review committee;

2. The board may consider a motion to appoint a review committee. If a simple majority of the whole board approves the motion:

a. The chair shall appoint a review committee of not less than three members and provide written notice to the affected member of the makeup of the committee and the stated grounds for possible referral;

b. The review committee shall gather information relevant to the stated grounds for referral, offer the affected member an opportunity to comment on the information gathered, and make a written report of its review, findings and recommendation to the secretary of the board. The report shall be confidential unless a referral for impeachment is made, at which point any further release shall be made in accordance with this bylaw and applicable law. The secretary shall immediately distribute the report to all members of the board, including the affected member.

3. The chair shall schedule a meeting to consider the report, to occur at least 14 calendar days after distribution. The board shall consider information the affected member provides in response to the report that is relevant to the issue of referral and consistent with the question before the board.

4. The board shall consider whether it is in the best interests of the university to refer the affected member for possible impeachment.

   a. In accordance with AS 39.52.120(a)(4), *Roberts Rules of Order* and this bylaw, the affected member may not participate in the vote, but is considered an active member for purposes of the required majority.

5. If the motion passes by the required majority the secretary immediately shall transmit the motion, the report and any written response or materials provided by the affected member to the president of the senate.

   a. The board shall reconvene in public session and the motion shall be entered in the official minutes of the board.

(03-09-12)

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature
House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

Interim:
716 W 4th Avenue, Rm 350
Anchorage, Alaska 99501-2133
Phone: (907) 269-0123
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Session:
Alaska State Capitol, Rm 110
Juneau, Alaska 99801-1182
Phone: (907) 465-4940
Toll Free: (866) 465-4940
Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

TO: Senator Hollis French, Chair
Senate Judiciary Committee

FROM: Representative Max F. Gruenberg, Jr.

DATE: April 12, 2011

RE: HB 6: Removing a Regent

****

Please consider this memorandum as a request for the Senate Judiciary Committee to schedule a hearing on House Bill 6. Accompanying this memo are the following documents:

- Sponsor Statement
- Sectional Analysis
- CS for House Bill 6 (JUD) amended in the House (27-LS0027\O.A)
- Legislative Legal Counsel Memo from Jean Mischel April 17, 2007
- Informal Legal Opinion from Michael Barnhill, Assistant Attorney General February 2, 2007

Thank you for considering my request for a hearing on House Bill 6. Please contact my legislative aide, Ted Madsen, at 465-2840 with any questions.

HB

7

<TARGET><BILL>HB 7</BILL><SUBJECT>HB 7</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE COMMITTEE REPORT

DATE: 3/1/11

FURTHER: (Finance)

DATE TURNED IN TO OFFICE: 3/2-5/11

Judiciary Committee considered CS FOR HOUSE BILL NO. 7(JUD)

HB 7-SYNTHETIC CANNABINOIDS

"An Act classifying certain substances as schedule IIIA controlled substances; and providing for an effective date."

and recommends:

[X] be **replaced** with **SCS** CSHB 7 (JUD)

[ ] Same Title [ ] Technical Title Change or [X] New Title & SCR No. 8

[ ] adopt **previous SCS** _____ (_____)

*[ ] Same Title [ ] Technical Title Change or [ ] New Title & SCR No.*_____

[ ] attached amendment(s)

[ ] adopt _____Letter of Intent

[ ] further referral to _____Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
H.FIN/DPS			✓	4
LAW			✓	5
COR		✓		6

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
John Coghill	Coghill			✓	
Joe Paskvan	PASKVAN	X			
	Wielechowski			✓	
CHAIR:	French	✓			

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

TO: Senator Bert Stedman
Senate Finance Co-Chair

CC: Darwin Peterson
Finance Committee Aide

FROM: Representative Cathy Muñoz

DATE: March 29, 2011

RE: Changes to Senate CS for CS HB 7 (JUD)

The Senate Judiciary Committee changed the penalties relating to the possession of organic herbs that contain synthetic cannabinoids.

1) Possession of 12 grams or more of organic herbs that contain synthetic cannabinoids as a misconduct in the fourth degree (Class C felony).

2) Possession of 6-12 grams of organic herbs that contain synthetic cannabinoids as a misconduct in the fifth degree (Class A misdemeanor).

3) Possession of 6 grams and under of organic herbs that contain synthetic cannabinoids as a misconduct in the sixth degree (Class B misdemeanor).

Other penalties relating to the selling and manufacturing of the synthetic cannabinoids, which are listed as a scheduled IIIA controlled substance, remain unchanged. The pure liquid form of these synthetic cannabinoids remains a class C felony for possession of 3 grams or more, a class A misdemeanor for under 3 grams.

An effective of July 1, 2011 was added to give adequate notice to the public and store owners who are selling these materials.

A title change has been done to reflect to the two changes.

STATE CAPITOL • JUNEAU, ALASKA 99801-1182 • (907) 465-3744 • FAX (907) 465-2213
REPRESENTATIVE_CATHY_MUNOZ@LEGIS.STATE.AK.US

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

March 16, 2011

TO: Leg. Legal

FROM: Cindy Smith

RE: HB7 Synthetic Cannabinoids

Please draft a Senate Judiciary CS to HB 7 Synthetic Cannabinoids (LS044\T) to make the following changes:

1. Amend penalties schedule provisions as follows for possession of substances sprayed on plant materials only:

6 grams and under (sprayed on plant material, per T.1 amendment offered in HFIN, attached) – B misdemeanor;

Over 6 and up to 12 grams - A Misdemeanor

Over 12 - felony, in a schedule that does not result in

2. Amend effective date to be July 1, 2011.

27-LS0044\R
Luckhaupt
3/17/11

SENATE CS FOR CS FOR HOUSE BILL NO. 7(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MUÑOZ, HERRON, KERTTULA, GATTO, LYNN, AND PRUITT, Costello, Thompson, Millett, Fairclough, Johansen, Johnson, Petersen, Doogan, Tuck, Peggy Wilson

A BILL

FOR AN ACT ENTITLED

"An Act classifying certain substances as schedule IIIA controlled substances and relating to penalties for possession of those substances; and providing for an effective date."

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

*** Section 1.** AS 11.71.040(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person

(1) manufactures or delivers any amount of a schedule IVA or VA controlled substance or possesses any amount of a schedule IVA or VA controlled substance with intent to manufacture or deliver;

(2) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance;

(3) possesses

(A) any amount of a schedule IA or IIA controlled substance;

(B) 25 or more tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(C) one or more preparations, compounds, mixtures, or substances of an aggregate weight of

(i) three grams or more containing a schedule IIIA or IVA controlled substance **except a controlled substance in a form listed in (ii) of this subparagraph;**

(ii) 12 grams or more containing a schedule IIIA controlled substance listed in AS 11.71.160(f)(7) - (16) that has been sprayed on or otherwise applied to tobacco, an herb, or another organic material;

(D) 50 or more tablets, ampules, or syrettes containing a schedule VA controlled substance;

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of six grams or more containing a schedule VA controlled substance;

(F) one or more preparations, compounds, mixtures, or substances of an aggregate weight of four ounces or more containing a schedule VIA controlled substance; or

(G) 25 or more plants of the genus cannabis;

(4) possesses a schedule IIIA, IVA, VA, or VIA controlled substance

(A) with reckless disregard that the possession occurs

(i) on or within 500 feet of school grounds; or

(ii) at or within 500 feet of a recreation or youth center; or

(B) on a school bus;

(5) knowingly keeps or maintains any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place that is used for keeping or distributing controlled substances in violation of a felony offense under this

chapter or AS 17.30;

(6) makes, delivers, or possesses a punch, die, plate, stone, or other thing that prints, imprints, or reproduces a trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of these upon a drug, drug container, or labeling so as to render the drug a counterfeit substance;

(7) knowingly uses in the course of the manufacture or distribution of a controlled substance a registration number that is fictitious, revoked, suspended, or issued to another person;

(8) knowingly furnishes false or fraudulent information in or omits material information from any application, report, record, or other document required to be kept or filed under AS 17.30;

(9) obtains possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; or

(10) affixes a false or forged label to a package or other container containing any controlled substance.

*** Sec. 2.** AS 11.71.050(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fifth degree if the person

(1) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one ounce containing a schedule VIA controlled substance;

(2) possesses

(A) less than 25 tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(B) one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than

(i) three grams containing a schedule IIIA or IVA controlled substance **except a controlled substance in a form listed in (ii) of this subparagraph;**

(ii) 12 grams but more than six grams containing a

schedule IIIA controlled substance listed in AS 11.71.160(f)(7) - (16) that has been sprayed on or otherwise applied to tobacco, an herb, or another organic material;

(C) less than 50 tablets, ampules, or syrettes containing a schedule VA controlled substance;

(D) one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than six grams containing a schedule VA controlled substance; or

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance; or

(3) fails to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under AS 17.30.

*** Sec. 3.** AS 11.71.060(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the sixth degree if the person

(1) uses or displays any amount of a schedule VIA controlled substance;

(2) possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of

(A) less than one ounce containing a schedule VIA controlled substance;

(B) six grams or less containing a schedule IIIA controlled substance listed in AS 11.71.160(f)(7) - (16) that has been sprayed on or otherwise applied to tobacco, an herb, or another organic material; or

(3) refuses entry into a premise for an inspection authorized under AS 17.30.

*** Sec. 4.** AS 11.71.160(f) is amended to read:

(f) Schedule IIIA includes**, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following substances or that contains any of its salts, isomers,**

whether optical, position, or geometric, or salts of isomers whenever the existence of those salts, isomers, or salts of isomers is possible within the specific chemical designation:

(1) hashish;

(2) hash oil or hashish oil;

(3) tetrahydrocannabinols;

(4) parahexyl;

(5) dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product; [AND]

(6) nabilone**;**

(7) (6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as HU-210;

(8) (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as Dexanabinol or HU-211;

(9) 1-pentyl-3-(1-naphthoyl)indole, also known as JWH-018;

(10) 1-Butyl-3-(1-naphthoyl)indole, also known as JWH-073;

(11) (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone, also known as JWH-015;

(12) 1-pentyl-3-(4-chloro-1-naphthoyl)indole, also known as JWH-398;

(13) 1-pentyl-3-(2-methoxyphenylacetyl)indole, also known as JWH-250;

(14) 1-hexyl-3-(1-naphthoyl)indole, also known as JWH-019;

(15) 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl)indole, also known as JWH-200;

(16) 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol, also known as CP 47, 497, and its dimethyloctyl (C8) homologue; in this paragraph, "homologue" means a chemical compound in a series in which each compound differs by one or more alkyl functional groups on an alkyl side

chain.

* **Sec. 5.** This Act takes effect July 1, 2011.

27-LS0709\A
Luckhaupt
3/17/11

SENATE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Introduced:
Referred:

A RESOLUTION

Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, concerning House Bill No. 7, relating to classifying certain substances as schedule IIIA controlled substances.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding changes to the title of a bill, are suspended in consideration of House Bill No. 7, relating to classifying certain substances as schedule IIIA controlled substances.

ALASKA
PRIMARY CARE ASSOCIATION

The Honorable Representative Muñoz
Alaska State House
State Capitol, Room 403
Juneau, Alaska 99801

Re: Support for HB 7 Synthetic Cannabinoids

March 7, 2011

Dear Representative Muñoz,

The Alaska Primary Care Association (APCA) supports passage of HB 7 Synthetic Cannabinoids. Although the substances addressed in the bill present tremendous public safety risks and dangers, the APCA also wants to point out that these substances cause serious health risks and dangers. Impacting the cardiovascular and central nervous systems, the use of these substances often requires medical attention, and too often emergency room and hospitalizations.

To promote improved health outcomes for Alaska and to bring down health care costs, it is important for Alaska to take steps to alert the public that these substances are harmful and to prevent them from being readily available. Passage of HB 7 will do both. The primary care centers operated by the members of the APCA often treat patients with substance abuse problems and are daily faced with the associated challenges in assisting these patients, including uncompensated costs for clinic care and wait lists for drug treatment programs. Less access to harmful substances will help.

The APCA represents 25 health care organizations operating 142 Community Health Center (CHC) clinic sites, as well as other primary care safety net providers throughout Alaska that serve medically underserved populations and communities. The CHCs provided primary care services to 87,000 patients (1 in 9 Alaskans) last year.

In closing, the Alaska Primary Care Association strongly supports HB 7 and encourages the Alaska State Legislature to pass this important bill to not only promote public safety, but to promote a healthier Alaska.

Respectfully,

Shelley S. Hughes
Government Affairs Director

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K2 STANDARD INCENSE

Standard Strength!

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	K2 Standard Incense 3 Grams 3 Grams of the original aroma, K2 Standard.	$27.95 Add: 0
	K2 Standard Incense 9 Grams 9 Grams of the original aroma, K2 Standard. SAVE $23.00!	$59.95 Add: 0
	K2 Standard Incense 30 Grams 30 Grams of the original aroma, K2 Standard. SAVE $110.00!	$169.95 Add: 0
	K2 Standard Incense 60 Grams 60 Grams of the original aroma, K2 Standard. SAVE $260.00!	$299.95 Add: 0

Featured

K2 Summit Incense 3 Grams

$34.95

ADD TO CART DETAILS

K2 Standard Incense 120 Grams **$549.95**

120 Grams of the original aroma, K2 Standard. SAVE $570.00!

Add: 0

Displaying 1 to **5** (of **5** products)

Reviews

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5% off todays order

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to retrieve your **Coupon Code!**

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Bestsellers

1. K2 Standard Incense 3 Grams
2. K2 Standard Incense 9 Grams
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(888)-70-BUYK2 (28952)
M-F 9am-5pm EST

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27-LS0044\T.1
Luckhaupt
2/23/11

#1 FAILED

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GARA

TO: CSHB 7(JUD)

Page 1, line 1, following "**substances**":

Insert "**and relating to penalties for possession of those substances**"

Page 1, following line 3:

Insert new bill sections to read:

"*** Section 1.** AS 11.71.040(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person

(1) manufactures or delivers any amount of a schedule IVA or VA controlled substance or possesses any amount of a schedule IVA or VA controlled substance with intent to manufacture or deliver;

(2) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance;

(3) possesses

(A) any amount of a schedule IA or IIA controlled substance;

(B) 25 or more tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(C) one or more preparations, compounds, mixtures, or substances of an aggregate weight of

(i) three grams or more containing a schedule IIIA or IVA controlled substance **except a controlled substance in a form**

listed in (ii) of this subparagraph;

(ii) six grams or more containing a schedule IIIA controlled substance listed in AS 11.71.160(f)(7) - (16) that has been sprayed on or otherwise applied to tobacco, an herb, or another organic material;

(D) 50 or more tablets, ampules, or syrettes containing a schedule VA controlled substance;

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of six grams or more containing a schedule VA controlled substance;

(F) one or more preparations, compounds, mixtures, or substances of an aggregate weight of four ounces or more containing a schedule VIA controlled substance; or

(G) 25 or more plants of the genus cannabis;

(4) possesses a schedule IIIA, IVA, VA, or VIA controlled substance

(A) with reckless disregard that the possession occurs

(i) on or within 500 feet of school grounds; or

(ii) at or within 500 feet of a recreation or youth center; or

(B) on a school bus;

(5) knowingly keeps or maintains any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place that is used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30;

(6) makes, delivers, or possesses a punch, die, plate, stone, or other thing that prints, imprints, or reproduces a trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of these upon a drug, drug container, or labeling so as to render the drug a counterfeit substance;

(7) knowingly uses in the course of the manufacture or distribution of a controlled substance a registration number that is fictitious, revoked, suspended, or issued to another person;

(8) knowingly furnishes false or fraudulent information in or omits material information from any application, report, record, or other document required to be kept or filed under AS 17.30;

(9) obtains possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; or

(10) affixes a false or forged label to a package or other container containing any controlled substance.

*** Sec. 2.** AS 11.71.050(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fifth degree if the person

(1) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one ounce containing a schedule VIA controlled substance;

(2) possesses

(A) less than 25 tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(B) one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than

(i) three grams containing a schedule IIIA or IVA controlled substance **except a controlled substance in a form listed in (ii) of this subparagraph;**

(ii) six grams or more containing a schedule IIIA controlled substance listed in AS 11.71.160(f)(7) - (16) that has been sprayed on or otherwise applied to tobacco, an herb, or another organic material;

(C) less than 50 tablets, ampules, or syrettes containing a schedule VA controlled substance;

(D) one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than six grams containing a schedule VA controlled substance; or

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance; or

(3) fails to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under AS 17.30."

Page 1, line 4:

Delete "**Section 1**"

Insert "**Sec. 3**"

Renumber the following bill section accordingly.

SEAN PARNELL,
GOVERNOR

DEPARTMENT OF CORRECTIONS
OFFICE OF THE COMMISSIONER

P.O. Box 112000
Juneau, AK 99801
PHONE: (907) 465-4652
FAX: (907) 465-3390

March 1, 2011

The Honorable Hollis French
Alaska State Senate
State Capitol, Room 417
Juneau, Alaska 99801

Dear Senator French:

Today you received a letter from the Department of Corrections in response to questions raised during a Senate Judiciary Committee hearing on SB 17. We would like to provide you with more detailed information in response to the committee's inquiry on the number of inmates incarcerated in the State of Alaska for drug charges and to those incarcerated on charges specific to marijuana.

As of December 31, 2010:

- Total inmate population was 5,604
- 2.7% of all unique inmates had at least one of their convictions involve marijuana.
- Of all drug-related convictions, 14.7% involved marijuana.
- 63 unique offenders have been convicted on drug related charges only.
- 1 (one) unique offender has been convicted on marijuana-related charges only
- 1 other offender has been convicted of marijuana and some other drug offense only. In other words, this person has been convicted of only drug related offenses, one of which was for a marijuana related offense.

It is our hope that the committee finds this additional information helpful. Please feel free to contact my office at any time if you need further information or have questions.

Sincerely,

Joseph Schmidt
Commissioner

cc: Anne Carpeneti, Assistant Attorney General, Department of Law
Karen J. Rehfeld, Executive Director, Office of Management and Budget

Presented by: Assemblymember Sanford
Introduced: 02/07/2011
Drafted by: J.W. Hartle

ORDINANCE OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

Serial No. 2011-05

An Ordinance Amending the Penal Code to Prohibit the Manufacture, Assembly, Distribution, Marketing, Sale, Use, or Possession of Substances Containing Synthetic Cannabinoids, and Providing for a Penalty.

WHEREAS, the City and Borough is aware that substances containing synthetic cannabinoids were and are manufactured, or assembled for, or marketed, sold or offered for sale to, residents of the municipality, including minors; and

WHEREAS, local law enforcement personnel and "first responders" indicate there is an increased use of synthetic cannabinoids, currently marketed and sold under a variety of names, including "K2", "Spice", "Black Mamba", "Blue Pearl", "Genie", "DaScents", "Spike", and "Zohai"; and

WHEREAS, some users of the synthetic cannabinoids endanger the public by operating vehicles while under the influence and endanger the welfare of first responders; and

WHEREAS, some users reportedly experience severe reactions, resulting in unconsciousness, seizures, and hospitalization; and

WHEREAS, users of the drug report the effects are similar to marijuana and LSD usage, include blurred vision, extremely elevated blood pressure, irregular heart rates, hallucinations, delusions, vomiting, euphoria, "highs", and disturbing side effects including feelings of excruciating pain, agitation and loss of control; and

WHEREAS, products containing synthetic cannabinoids are not tested by the Food and Drug Administration (U.S. Department of Agriculture) or other governmental regulatory agencies for human consumption and may contain chemicals detrimental to the health and welfare of those ingesting them; and

WHEREAS, medical studies and treatises note deleterious health risks and adverse effects associated with the use of synthetic cannabinoids and products containing the synthetic cannabinoids; and

WHEREAS, despite packaging warning purchasers the products are not for human consumption, the warnings are not being heeded; and

WHEREAS, synthetic cannabinoids are banned in many states and municipalities throughout the United States as a danger to public health and welfare; and

WHEREAS, the smoke emanating from the burning or incineration of synthetic cannabinoids may cause adverse effects on bystanders or those in the vicinity of such activity; and

WHEREAS, it is in the best interest of the City and Borough to prohibit the manufacturing, assembly, possession, use, sale, marketing, or offering for sale of synthetic cannabinoids within the boundaries of the City and Borough to protect the health, safety and welfare of its citizens.

NOW, THEREFORE, BE IT ENACTED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA:

Section 1. Classification. This ordinance is of a general and permanent nature and shall become a part of the City and Borough Code.

Section 2. New Chapter. CBJ Title 42 Penal Code, is amended by adding a new chapter, to read as follows:

Chapter 42.35

SYNTHETIC CANNABINOIDS

42.35.100 Sale of synthetic cannabinoids.

(a) It shall be unlawful for any person or entity to knowingly manufacture, assemble, distribute, dispense, sell, attempt to sell, give, trade, barter, transfer, or to otherwise furnish in a single transaction any product or combination of products containing synthetic cannabinoids, such as products commonly known as "K2", "Spice", "Genie", "DaScents", "Zohai" or similar products. Synthetic cannabinoids contain one or more of the following chemical compounds:

(1) HU-210: (6aR, 1OaR)-9-(hydroxymehty1)-6,6 dimethyl-3-(2methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-o1, or 6aR-trans-3-(1,1-Dimethylheptyl)-6a,7,10,10a-tetrahydro-1-hydroxy-6,6-dimethyl-6H-dibenzo[b,d]pran-9-methanol;

(2) HU-211: (6aS, 10aS)-9- (hydroxmethy1)-6,6-dimethyl-3-(2-methyloctan-2-y1)-6a,7,10,10a-tetsahydrobenzo[c]chromen-1-ol)(also known as Dexanabinol);

(3) CP47,497 and homologues: 2-[(lR,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-y1)phenol;

(4) JWH-018: 1-Pentyl-3-(1-naphthoyl)indole;

(5) JWH-019: 1-Hexyl-1-(1-naphthoyl)indole);

(6) JWH-073: 1-Butyl-3-(1-napthoyl)indole;

(7) JWH-081: 1-pentyl-3-(4-methoxy-1-napthoyl)indole, (also known as 4-methoxynapthalen-1-yl-(1-pehtylindol-3-yl)methanon);

(8) JWH-200: 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole;

(9) JWH-250: 1-pentyl-3-(2-methoxyphenlacetyl)indole, (also known as 2-(2-methoxypehyl)-1-(1-pentylindol-3-yl)ethonone;

(10) JWH-398: 1-Pentyl-3-(4-chloro-1-napthoyl)indole);

(11) TEMPP: 1-(3 trifluoromethylphenyl) piperazine;

(12) BZP: N-benzylpiperazine; or

(13) Any other synthetic cannabinoids or derivatives, salts, isomers, or salts of isomers with similar chemical structure and pharmacological activity as the substances described above.

(14) This prohibition shall also apply to any other equivalent compound, substance, or derivative, whether described as tobacco, herbs, incense, food, nutrient, spice or any blend thereof which, when smoked or ingested, mimics the effects of a controlled substance, regardless of whether the substance is marketed for the purpose of being smoked or ingested.

(b) It shall be unlawful for any person or entity to recklessly manufacture, assembly, distribute, sell, market, display for sale, or offer for sale within the City and Borough products containing synthetic cannabinoids described in subsection (a).

(c) Products containing synthetic cannabinoids may not be possessed, ingested, burned, incinerated or ignited in the City and Borough.

(d) A person or entity violating the provisions of subsections (a) shall be guilty of a Class A misdemeanor. A person or entity violating the provisions of subsection (b) shall be guilty of a Class B misdemeanor. A person or entity violating the provisions of subsection (c) shall be guilty of an infraction.

(e) If, after multiple violations by the same person or entity, the City Attorney and the Juneau Police Department determine the imposition of criminal penalties or civil fines will not be effective in enforcing this section, the City Attorney may seek any other remedies provided by law, including injunctive relief.

(f) It is not an offense under this section if the person or entity was acting at the direction of an authorized agent of the City and Borough to enforce or ensure compliance with this section.

(g) Any product described in subsection (a) found in the illegal possession of any person or entity may be confiscated and destroyed by the City and Borough.

(h) This section does not apply to drugs or substances lawfully prescribed or drugs or substances approved by the federal Food and Drug Administration or drugs or substances specifically permitted by State law.

Section 3. Amendment to Section. CBJ 03.30.065 Penal code fine schedule, is amended to read:

03.30.065 Penal code fine schedule.

Pursuant to sections 03.30.010--03.30.015 of this chapter, the following offense which is amenable to disposition without court appearance may be disposed of upon payment of the fine listed to the municipal clerk of the court. If a person charged with this offense appears in court and is found guilty, the penalty imposed for the offense may not exceed the fine amount for the offense listed in the following schedule:

PENAL CODE FINE SCHEDULE

CBJ	Offense	No. of Offenses	Fine
...	...	...	...
42.20.220	Truancy	1st 2nd 3rd and subseq.	100.00 MCA*
42.35.100 (c)	Possession or use of synthetic cannabinoid	1st	$100.00
		2nd	200.00
		3rd and subseq.	300.00

Section 4. The sections, paragraphs, sentences, clauses, phrases and words of this ordinance are separable, and if any word, phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional, invalid or unenforceable by the valid judgment or decree of a Court of competent jurisdiction, such unconstitutionality, invalidity or unenforceability shall not affect any of the remaining words, phrases, clauses, sentences, paragraphs and sections of this ordinance.

Section 5. This ordinance shall be automatically repealed 30 days after the effective date of a State statute criminalizing substantially the same conduct. The City Attorney shall notify the Assembly if and when this occurs.

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Section 6. Effective Date. This ordinance shall be effective 30 days after its adoption.

Adopted this 28th day of February, 2011.

Bruce Botelho, Mayor

Attest:

Laurie J. Sica, Clerk

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

TO: Senator Hollis French
Judiciary Chair

CC: Cindy Smith
Judiciary Committee Aide

FROM: Representative Cathy Muñoz

DATE: March 2, 2011

RE: HB 7 Hearing Request

Please schedule CS HB 7 (JUD) – Synthetic Cannabinoids as Schedule IIIA in Senate Judiciary for hearing at your earliest convenience.

Attached to this memo please find the following documents

- CS HB 7 (JUD) – Synthetic Cannabinoids as Schedule IIIA
- Fiscal Notes from Departments of Corrections, Public Safety & Law
- Sponsor Statement
- Legislative Research Report
- DEA Article
- Support Letters
- Office Contact: Kendra Kloster, 465-4712, Kendra_kloster@legis.state.ak.us

Thank You.

STATE CAPITOL • JUNEAU, ALASKA 99801-1182 • (907) 465-3744 • FAX (907) 465-2213
REPRESENTATIVE_CATHY_MUNOZ@LEGIS.STATE.AK.US

REPRESENTATIVE CATHY MUÑOZ

CS HB7 (JUD) - Ban on Controlled Substances

A new synthetic cannabinoid, commonly known as K2 or Spice, has become readily available at local stores and over the internet. Some users of this chemical compound experience severe adverse reactions including hallucinations, nausea, vomiting, agitation, and panic attacks.

The synthetic cannabinoid is a combination of herbal and chemical compounds that commonly produce a reaction similar to the use of marijuana. The popularity is increasing, especially among youth, due to easy accessibility, low cost, and the difficulty of detection on drug tests.

The first introduction to K2 came to my attention through an individual's story. Within moments of inhaling K2 the young man experienced adverse reactions that included severe vomiting, loss of reality, inability to walk and talk, and violent outbursts. Without the quick reaction of those nearby there may have been tragic ending to this story. Many similar stories have surfaced in communities throughout Alaska. To date, nine states have successfully enacted laws to prohibit synthetic cannabinoids.

HB7 will classify certain synthetic cannabinoids as schedule IIIA controlled substance. Schedule IIIA includes materials, compounds and mixtures which contain similar synthetic chemicals. It is important that we get ahead of this growing problem and I urge your support for the passage of this bill.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **CSHB007 (JUD)**
() Publish Date

Identifier (file name): CSHB007(JUD)-DPS-LAB-02-22-11
Title: "An Act Relating to Synthetic Cannabinoids As Schedule IIIA"
Sponsor: Representatives Munoz, Herron, Kerttula, Lynn, and Pruitt
Requester: House Finance

Dept. Affected: Public Safety
Appropriation: Statewide Support
Allocation: Laboratory Services
OMB Component Number: 527

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	96.0		96.0	96.0	96.0	96.0	96.0
Travel	3.0		3.0	3.0	3.0	3.0	3.0
Services	8.5		5.6	5.6	5.6	5.6	5.6
Commodities	12.0		2.0	2.0	2.0	2.0	2.0
Capital Outlay	7.3						
Grants							
Miscellaneous							
TOTAL OPERATING	**126.8**		**106.6**	**106.6**	**106.6**	**106.6**	**106.6**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	126.8		106.6	106.6	106.6	106.6	106.6
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**126.8**	**0.0**	**106.6**	**106.6**	**106.6**	**106.6**	**106.6**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	**1.0**		1	1	1	1	1
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Changed from Schedule IIA to Schedule IIIA.

Prepared by: Orin Dym, Laboratory Manager — Phone (907) 269-5743
Division: Scientific Crime Detection Laboratory — Date/Time 2/22/2011 3:30PM
Approved by: Joseph A Masters — Date 2/22/2011
Commissioner

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB7 (JUD)

Analysis

This proposed legislation would add certain synthetic cannabinoids to the schedule IIIA list of controlled substances. This bill would become effective immediately.

The Alaska Scientific Crime Detection Laboratory (Crime Laboratory) provides analysis of suspected controlled substances, issues reports, and provides expert testimony for the state of Alaska. For calendar year 2010 the laboratory received 1,267 requests for controlled substances analysis. A full time position is capable of analyzing 480 requests per year. The Controlled Substances Section of the Crime Lab currently has 2.5 full time staff assigned to it.

Once controlled, it is anticipated that the Crime Laboratory will receive significant requests for analysis related to the newly controlled substances. With the large presence of internet sales, and the ability for manufacturers to rapidly change the substances present in the materials sold, any suspected of containing these newly controlled substances will require scientific analysis at the Crime Laboratory.

This new position would come at an initial cost of $126,800. This includes a starting salary with benefits of $96,000, a work station start up cost of $7,300 for equipment , $2,000 for supplies, and there will be $3,000 in travel funds required for the ongoing training and education necessary for an analyst to maintain their expertise and certifications. There is an expected $5,000 in contractual costs as well, and this position also requires an initial $3,500 to obtain licensing required for the laboratory's LIMS database. Subsequently, there is a yearly 18% maintenance fee for that license. In addition to the above considerations involved with this new position, the Crime Laboratory would be required to obtain the standards necessary to analyze these nine new chemicals and their various isomers. This would be a one-time cost of $10,000.

In addition to the ongoing salary, benefits, and necessary travel costs relative to this position, all positions utilize an ongoing $2,000 for supply needs, and there is an ongoing licensing and maintenance cost of $5,600 per year. Therefore, the initial cost for this position would be $126,800, with a subsequent ongoing cost of $106,600.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **CSHB007(JUD)**
() Publish Date

Identifier (file name): HB007CS(JUD)-LAW-CRIM-02-18-11
Dept. Affected Law
Title An Act classifying certain synthetic cannabinoids as schedule IIIA controlled substances; and providing for an effective date.
Appropriation Criminal
Allocation Criminal Justice Litigation
Sponsor Representative(s) Munoz, Herron, Kerttula, Gatto, Lynn, Pruitt
Requester (H) Judiciary
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Eileen Donahue, Division Operations Manager
Phone 465-5427
Division Administrative Services
Date/Time 2/18/11 10:00 AM
Approved by John J. Burns, Attorney General
Date 2/18/2011
Department of Law

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB007(JUD)

Analysis

This bill adds several chemical forms of synthetic cannabinoids to Schedule IIIA of Alaska's prohibited substance schedules. The bill also adds salts, isomers, and other forms of Schedule IIIA substances to the same schedule. Currently, marijuana is a Schedule VIA prohibited substance. The anticipated fiscal impact is zero, however, if litigation ensues there will be addition costs in defending this litigation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **CSHB007(JUD)**
() Publish Date: 1/18/2011

Identifier (file name) HB007CS(JUD)-DOC-OC-02-02-11
Title: "An Act classifying synthetic cannabinoids as schedule IIIA
Sponsor: Rep. Munoz, Herron, Kerttula, Gatto, Lynn & Pruitt
Requester: (H)Finance Committee

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the first version of the bill.

Prepared by: Leslie Houston, Director — Phone 465-3339
Division: Dept. of Corrections - Administrative Services — Date/Time 2/23/2011 2:30 p.m.
Approved by: Joseph D. Schmidt, Commissioner — Date 2/23/2011
Dept. of Corrections

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB007(JUD)

Analysis

This legislation makes synthetic cannabinoids a schedule IIIA controlled substance.

Currently, possession of a schedule IIIA is a Class A misdemeanor if the amount possessed is less than 3 grams (AS 11.71.050) or a Class C Felony if the amount possessed is over 3 grams (AS 11.71.040).

Manufacturing or delivering a schedule IIIA controlled substance is a Class B felony (AS 11.71.030). The sentences for these crimes range anywhere from 0 - 10 years.

The current average daily cost to house an inmate is $136.44. Therefore, housing an offender could cost the department anywhere from $0.0 (no time served) to $498.1 (for a 10-year sentence).

The Department of Corrections is unable to determine the fiscal impacts of the passage of this legislation, as we cannot estimate the total number of convictions that will occur.

News Release
FOR IMMEDIATE RELEASE
March 01, 2011
Contact: DEA Public Affairs
Number: 202-307-7977

Chemicals Used in "Spice" and "K2" Type Products Now Under Federal Control and Regulation

DEA Will Study Whether To Permanently Control Five Substances

MAR 01 - WASHINGTON, D.C. – The United States Drug Enforcement Administration (DEA) today exercised its emergency scheduling authority to control five chemicals (JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol) used to make so-called "fake pot" products. Except as authorized by law, this action makes possessing and selling these chemicals or the products that contain them illegal in the United States. This emergency action was necessary to prevent an imminent threat to public health and safety. The temporary scheduling action will remain in effect for at least one year while the DEA and the United States Department of Health and Human Services (DHHS) further study whether these chemicals should be permanently controlled.

Chemicals like K-2 and Spice are designated as Schedule I substances, the most restrictive category under the Controlled Substances Act.

The Final Order was published today in the *Federal Register* to alert the public to this action. These chemicals will be controlled for at least 12 months, with the possibility of a six month extension. They are designated as Schedule I substances, the most restrictive category under the Controlled Substances Act. Schedule I substances are reserved for those substances with a high potential for abuse, no accepted medical use for treatment in the United States and a lack of accepted safety for use of the drug under medical supervision.

Over the past couple of years, smokeable herbal products marketed as being "legal" and as providing a marijuana-like high, have become increasingly popular, particularly among teens and young adults. These products consist of plant material that has been coated with research chemicals that claim to mimic THC, the active ingredient in marijuana, and are sold at a variety of retail outlets, in head shops, and over the Internet. These chemicals, however, have not been approved by the FDA for human consumption, and there is no oversight of the manufacturing process. Brands such as "Spice," "K2," "Blaze," and "Red X Dawn" are labeled as herbal incense to mask their intended purpose.

Since 2009, DEA has received an increasing number of reports from poison control centers, hospitals and law enforcement regarding these products. At least 16 states have already taken action to control one or more of these chemicals. The Comprehensive Crime Control Act of 1984 amends the Controlled Substances Act (CSA) to allow the DEA Administrator to place a substance temporarily in schedule I when it is necessary to avoid an imminent threat to the public safety. Emergency room physicians report that individuals that use these types of products experience serious side effects which include: convulsions, anxiety attacks, dangerously elevated heart rates, increased blood pressure, vomiting, and disorientation.

"Young people are being harmed when they smoke these dangerous 'fake pot' products and wrongly equate the products' 'legal' retail availability with being 'safe'," said DEA Administrator Michele M. Leonhart. "Parents and community leaders look to us to help them protect their kids, and we have not let them down. Today's action, while temporary, will reduce the number of young people being seen in hospital emergency rooms after ingesting these synthetic chemicals to get high."

>> Notice of Intent to Temporarily Control Five Synthetic Cannabinoids

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Rules - 2011

[Federal Register Volume 76, Number 40 (Tuesday, March 1, 2011)]
[Rules and Regulations]
[Pages 11075-11078]
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[FR Doc No: 2011-4428]

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA-345F]

Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I

AGENCY: Drug Enforcement Administration (DEA), U.S. Department of Justice.

ACTION: Final order.

SUMMARY: The Administrator of the Drug Enforcement Administration (DEA) is issuing this final order to temporarily place five synthetic cannabinoids into the Controlled Substances Act (CSA) pursuant to the temporary scheduling provisions. The substances are 1-pentyl-3-(1- naphthoyl)indole (JWH-018), 1-butyl-3-(1-naphthoyl)indole (JWH-073), 1- [2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200), 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497), and 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue). This action is based on a finding by the Administrator that the placement of these synthetic cannabinoids into Schedule I of the CSA is necessary to avoid an imminent hazard to the public safety. As a result of this order, the full effect of the CSA and its implementing regulations including criminal, civil and administrative penalties, sanctions and regulatory controls of Schedule I substances will be imposed on the manufacture, distribution, possession, importation, and exportation of these synthetic cannabinoids.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, PhD, Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, telephone (202) 307-7183, fax (202) 353-1263, or e-mail ode@usdoj.gov.

DATES: Effective Date: March 1, 2011.

SUPPLEMENTARY INFORMATION:

Background

The Comprehensive Crime Control Act of 1984 (Pub. L. 98-473), which was signed into law on October 12, 1984, amended section 201 of the CSA (**21 U.S.C. 811**) to give the Attorney General the authority to temporarily place a substance into Schedule I of the CSA for one year without regard to the requirements of 21 U.S.C. 811(b) if he finds that such action is necessary to avoid imminent hazard to the public safety. The Attorney General may extend the temporary scheduling up to six months during pendency of proceedings under 21 U.S.C. 811(a)(1). A substance may be temporarily scheduled under the emergency provisions of the CSA if it is not listed in any other schedule under section 202 of the CSA (**21 U.S.C. 812**) or if there is no exemption or approval in effect under 21 U.S.C. 355 for the substance. The Attorney General has delegated his authority under 21 U.S.C. 811 to the DEA Administrator (28 CFR 0.100).

As per section 201(h)(4) of the CSA (**21 U.S.C. 811**(h)(4)), the Deputy Administrator, now Administrator, transmitted notice of her intention to temporarily place JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol into Schedule I of the CSA to the Assistant Secretary for Health of the Department of Health and Human Services (HHS) in a letter dated October 6, 2010. In response to this notification, the

Assistant Secretary of Health, HHS communicated in a letter dated November 22, 2010, to the then-DEA Acting Administrator that there are no exemptions or approvals in effect for JWH-018, JWH- 073, JWH-200, CP-47,497, and cannabicyclohexanol under Section 505 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 355). The substances are not listed in any other schedule in **21 U.S.C. 812**.

A notice of intent to temporarily place JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol into Schedule I of the CSA was published in the Federal Register on November 24, 2010 (75 FR 71635). Before making a finding that temporarily placing a substance into Schedule I of the CSA is necessary to avoid an imminent hazard to the public safety, the Administrator must consider three of the eight factors (factors 4, 5, and 6) set forth in section 201(c) of the CSA (**21 U.S.C. 811**(c)). These factors are the history and current pattern of abuse, the scope, duration, and significance of abuse, and what, if any, risk there is to the public health, including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution. 21 U.S.C. 811(h)(3).

The temporary placement of these five synthetic cannabinoids into Schedule I of the CSA is necessary in order to avoid an imminent hazard to the public safety. First, these substances are not intended for human consumption, but there has been a rapid and significant increase in abuse of these substances in the United States. As a result of this abuse, synthetic cannabinoids are banned in at least 18 states in the United States and several countries, and all five branches of the U.S. military prohibit military personnel from possessing or using synthetic cannabinoids. Second, law enforcement has seized synthetic cannabinoids in conjunction with controlled substances and based on self-reports to law enforcement and health care professionals, synthetic cannabinoids are abused for their psychoactive properties. Third, numerous state and local public health departments and poison control centers have issued health warnings describing the adverse health effects associated with synthetic cannabinoids. Based on scientific data currently available, these five substances have the potential to be extremely harmful and, therefore, pose an imminent hazard to the public safety.

History and Current Pattern of Abuse

A "cannabinoid" is a class of chemical compounds in the marijuana plant that are structurally related. The cannabinoid [Delta]9- tetrahydrocannabinol (THC) is the primary psychoactive constituent of marijuana. "Synthetic cannabinoids" are a large family of chemically unrelated structures functionally (biologically) similar to THC, the active principle of marijuana.

Two of the five synthetic cannabinoids (CP-47,497 and cannabicyclohexanol) were synthesized in the early 1980s for research purposes

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in the investigation of the cannabinoid system. JWH-018, JWH-073, and JWH-200 were prepared in the mid-1990s and evaluated to further advance understanding of drug-receptor interactions regarding the cannabinoid system. Developed and evaluated as research tools, no other known legitimate uses have been identified for these five synthetic cannabinoids. Furthermore, these five synthetic cannabinoids are not intended for human consumption.

The emergence of these five synthetic cannabinoids represents a recent phenomenon in the U.S. designer drug market. Since the initial identification of JWH-018 by U.S. forensic laboratories, many additional synthetic cannabinoids including JWH-073, JWH-200, CP- 47,497, and cannabicyclohexanol have been identified in related herbal incense products and plant food. These synthetic cannabinoids have purported psychotropic effects when smoked or ingested. These substances are typically found in powder form or are dissolved in appropriate solvents, such as acetone, before being sprayed on the plant material contained in the herbal incense products.

The popularity of these THC-like synthetic cannabinoids has significantly increased throughout the United States, and they are being abused for their psychoactive properties as reported by law enforcement, the medical community, and through scientific literature.

Some of the product names include, but are not limited to, "Spice," "K2," and many more. Due to sophisticated marketing, the products that contain these five THC-like synthetic cannabinoids are perceived as "legal" alternatives to marijuana despite the fact that they are typically advertised as herbal incense or plant food (Bonsai- 18) by Internet retailers, tobacco shops, head shops, and other domestic brick and mortar retail venues, and labeled "Not For Human Consumption." No evidence exists that these synthetic cannabinoids have value as an additive to herbal incense products due to the absence of odor associated with the substances.

Based on law enforcement encounters, these five substances are typically found laced on plant material. The plant material is packaged in small pouches or packets, and is being sold over the Internet, in tobacco and smoke shops, drug paraphernalia shops, gas stations, and convenience stores as herbal incense products, giving customers of all ages direct access to these five substances. Research articles propose that the packaging is professional and conspicuous, targeting young people, possibly eager to use cannabis, but who are afraid of the judicial consequences and/or association with illicit drugs.

According to Internet discussion boards and law enforcement encounters reported directly to DEA, these five synthetic cannabinoids are being both abused alone and/or being sprayed on plant material (which is then smoked). The most common route of administration of these synthetic cannabinoids is by smoking (using a pipe, a water pipe, or rolling the drug-spiked plant material in cigarette papers).

These five synthetic cannabinoids alone or spiked on plant material have the potential to be extremely harmful due to their method of manufacture and high pharmacological potency. There is little information regarding the pharmacology, toxicology, and safety of these substances in humans given the minimal amount of pre-clinical investigations undertaken regarding these substances; therefore, the full danger of these drugs has not yet been determined.

As of January 31, 2011, 18 states in the United States and other countries have controlled one or more of the five synthetic cannabinoids. Moreover, all five branches of the military prohibit their personnel from possessing or using synthetic cannabinoids associated with products such as Spice and K2.

Scope, Duration, and Significance of Abuse

According to forensic laboratory reports, the initial appearance of these synthetic cannabinoids in herbal incense products in the United States occurred in November 2008 when U.S. Customs and Border Protection first encountered products such as Spice.

The increasing abuse of the five synthetic cannabinoids is demonstrated by the increase in federal, state, and local law enforcement activity associated with these substances. The National Forensic Laboratory Information System, a national repository for drug evidence analyses from forensic laboratories across the United States, has reported in excess of 500 exhibits containing synthetic cannabinoid from January 2010 through September 2010. These exhibits came from numerous states across the nation including Alabama, Arkansas, California, Florida, Hawaii, Iowa, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Missouri, North Dakota, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Virginia.

Even though there is no evidence of legitimate non-research related use for these synthetic cannabinoids, multiple shipments of JWH-018 and JWH-073 have been encountered by U.S. Customs and Border Protection in 2010. One enforcement operation encountered five shipments of JWH-018 totaling over 50 kilograms (110.2 pounds) of powder. In addition, bulk loads of JWH-018 and JWH-200 have been encountered by law enforcement in 2010. For example, in Casper, Wyoming, DEA agents encountered large quantities of herbal incense products laced with the synthetic cannabinoid JWH-018 in conjunction with methamphetamine and other illegal drugs in execution of search and arrest warrants.

On March 24, 2010, the American Association of Poison Control Centers reported receiving 112 calls from 15 states related to synthetic cannabinoids to U.S. poison centers since 2009. Just nine months later, the number of calls increased to over 2,700 from 49 states and the District of Columbia.

What, If Any, Risk There Is to the Public Health

Health warnings have been issued by numerous state and local public health departments and poison control centers describing the adverse health effects associated with these synthetic cannabinoids and their related products, including agitation, anxiety, nausea, vomiting, tachycardia (fast, racing heartbeat), elevated blood pressure, tremor, seizures, hallucinations, paranoid behavior, and non-responsiveness.

Smoking these synthetic cannabinoids for the purpose of achieving intoxication and experiencing the psychoactive effects has been identified as a reason for emergency room visits and calls to poison control centers. In a fact sheet by the National Drug Court Institute, the problem of synthetic cannabinoid abuse is described as "significant and disturbing." This is supported by information that was communicated to DEA from one of the major private toxicology laboratories. Based on laboratory findings from drug screens for the period of July 2010 through November 2010, over 3,700 specimens tested positive for either JWH-018 or JWH-073. They also indicated that they were finding 30-35% positivity for specimens submitted by juvenile probation departments.

Case reports describe psychotic episodes, withdrawal, and dependence associated with use of these synthetic cannabinoids, similar to syndromes

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observed in marijuana abuse. In addition, based on law enforcement encounters reported directly to DEA, when responding to incidents involving individuals who have reportedly smoked these synthetic cannabinoids, first responders report that these individuals have suffered from intense hallucinations. Moreover, emergency department physicians and toxicologists have reported the adverse health effects associated with smoking herbal incense products laced with these substances. Furthermore, based on law enforcement encounters, suspected Driving Under the Influence of Drug incidents are attributed to the smoking of synthetic cannabinoids. For example, in September 2010, police in Nebraska responded to an incident involving a teenage male who had careened his truck into the side of a residence. After striking the residence and several more items, the teen continued several more yards before coming to a complete stop. Prior to crashing the truck, the individual had driven past a junior high school and nearly struck a child. Upon further investigation, the driver of the vehicle admitted to smoking "Wicked X," a product marketed as "herbal incense" and known to contain synthetic cannabinoids, prior to the accident. Preliminary toxicology reports indicated that the individual did not have any alcohol or other illegal substances in his system.

Detailed chemical analyses by DEA and other investigators have found these synthetic cannabinoids spiked on plant material in herbal incense products marketed to the general public. Product analyses have found variations in both the synthetic cannabinoid found on the plant material and the amount. As proposed in scientific literature, the risk of adverse health effects is further increased by the fact that similar products vary in the composition and concentration of synthetic cannabinoids spiked on the plant material.

Self-reported abuse of these THC-like synthetic cannabinoids either alone (e.g., in pills with the substance in powder form) or spiked on plant material appear extensively on Internet discussion boards, and abuse has been reported to public health officials and law enforcement. The abuse of these substances spiked on plant material is corroborated by forensic laboratory analysis of products encountered by law enforcement.

According to the U.S. Customs and Border Protection, a number of the products and synthetic cannabinoids appear to originate from foreign sources. Product manufacturing operations encountered by law enforcement corroborate that the herbal incense products are manufactured in the absence of quality controls and devoid of regulatory oversight. Law enforcement has encountered the manufacture of herbal

incense products occurring in such places as residential neighborhoods. These products and associated synthetic cannabinoids are readily accessible via the Internet.

Based on the above data, the continued uncontrolled manufacture, distribution, importation, exportation, and possession of JWH-018, JWH- 073, JWH-200, CP-47,497, and cannabicyclohexanol pose an imminent hazard to the public safety. DEA is not aware of any recognized therapeutic uses of these synthetic cannabinoids in the United States.

DEA has considered the three criteria for placing a substance into Schedule I of the CSA (**21 U.S.C. 812**). The data available and reviewed for JWH-073, JWH-018, JWH-200, CP47,497, and cannabicyclohexanol indicate that these synthetic cannabinoids each has a high potential for abuse, no currently accepted medical use in treatment in the United States and a lack of accepted safety for use under medical supervision.

In accordance with the provisions of section 201(h) of the CSA (**21 U.S.C. 811**(h)) and 28 CFR 0.100, the Administrator has considered the available data and the three factors required to support a determination to temporarily schedule five synthetic cannabinoids: 1- butyl-3-(1-naphthoyl)indole, 1-pentyl-3-(1-naphthoyl)indole, 1-[2-(4- morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2- [(1R,3S)-3-hydroxycyclohexyl]-phenol, and 5-(1,1-dimethyloctyl)-2- [(1R,3S)-3-hydroxycyclohexyl]-phenol in Schedule I of the CSA and finds that temporary placement of these synthetic cannabinoids into Schedule I of the CSA is necessary to avoid an imminent hazard to the public safety.

Regulatory Requirements

With the issuance of this final order, JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol become subject to the regulatory controls and administrative, civil and criminal sanctions applicable to the manufacture, distribution, possession, importation, and exportation of a Schedule I controlled substance under the CSA.

1. Registration. Any person who manufactures, distributes, dispenses, imports, exports, or possesses JWH-018, JWH-073, JWH-200, CP-47,497, or cannabicyclohexanol or who engages in research or conducts instructional activities with respect to JWH-018, JWH-073, JWH-200, CP-47,497, or cannabicyclohexanol, or who proposes to engage in such activities, must be registered to conduct such activities in accordance with **21 U.S.C. 823** and **958**. Any person who is currently engaged in any of the above activities and is not registered with DEA must submit an application for registration and may not continue their activities until DEA has approved that application. Retail sales of Schedule I controlled substances to the general public are not allowed under the Controlled Substances Act.

2. Security. JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol are subject to Schedule I security requirements. Accordingly, appropriately registered DEA registrants must manufacture, distribute and store these substances in accordance with **1301.71**; **1301.72**(a), (c), and (d); **1301.73**; **1301.74**; **1301.75**(a) and (c); and **1301.76** of Title 21 of the Code of Federal Regulations as of March 1, 2011.

3. Labeling and packaging. All labeling and packaging requirements for controlled substances set forth in **Part 1302** of Title 21 of the Code of Federal Regulations shall apply to commercial containers of JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol. Current DEA registrants shall have thirty (30) calendar days from the effective date of this Final Order to be in compliance with all labeling and packaging requirements.

4. Quotas. Quotas for JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol will be established based on registrations granted and quota applications received pursuant to **part 1303** of Title 21 of the Code of Federal Regulations.

5. Inventory. Every DEA registrant who possesses any quantity of JWH-018, JWH-073, JWH-200, CP-47,497, or cannabicyclohexanol is required to keep inventory of all stocks of these substances on hand pursuant to **1304.03**, **1304.04**, and **1304.11** of Title 21 of the Code of Federal Regulations. Every current DEA registrant who desires registration in Schedule I for JWH-018, JWH-073, JWH-200, CP-47,497, or cannabicyclohexanol shall conduct an inventory of all stocks of these substances. Current DEA registrants shall have thirty (30) calendar days from the effective date of this Final Order to be in compliance with all inventory requirements.

6. Records. All registrants who handle JWH-018, JWH-073, JWH-200, CP-

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47,497, or cannabicyclohexanol are required to keep records pursuant to **1304.03**, **1304.04**, **1304.21**, **1304.22**, and **1304.23** of Title 21 of the Code of Federal Regulations. Current DEA registrants shall have thirty (30) calendar days from the effective date of this Final Order to be in compliance with all recordkeeping requirements.

7. Reports. All registrants are required to submit reports in accordance with **1304.33** of Title 21 of the Code of Federal Regulations. Registrants who manufacture or distribute JWH-018, JWH-073, JWH-200, CP-47,497, or cannabicyclohexanol are required to comply with these reporting requirements and shall do so as of March 1, 2011.

8. Order Forms. All registrants involved in the distribution of JWH-018, JWH-073, JWH-200, CP-47,497, or cannabicyclohexanol must comply with order form requirements of **part 1305** of Title 21 of the Code of Federal Regulations as of March 1, 2011.

9. Importation and Exportation. All importation and exportation of JWH-018, JWH-073, JWH-200, CP-47,497, or cannabicyclohexanol must be conducted by appropriately

registered DEA registrants in compliance with **part 1312** of Title 21 of the Code of Federal Regulations on or after March 1, 2011.

10. Criminal Liability. The manufacture, distribution, dispensation, or possession with the intent to conduct these activities; possession; importation; or exportation of JWH-018, JWH - 073, JWH-200, CP-47,497, or cannabicyclohexanol not authorized by, or in violation of the CSA or the Controlled Substances Import and Export Act occurring as of March 1, 2011 is unlawful.

Executive Order 12988

This final temporary scheduling order meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform.

Executive Order 13132

This final temporary scheduling order does not preempt or modify any provision of State law; nor does it impose enforcement responsibilities on any State; nor does it diminish the power of any State to enforce its own laws. Accordingly, this order does not have federalism implications warranting the application of Executive Order 13132.

Congressional Review Act

Pursuant to section 808(2) of the Congressional Review Act, the agency is not required to comply with the Act if it makes a good faith finding that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. It is in the public interest to schedule these cannabinoids immediately because they pose a public health risk. Use of materials spiked with these cannabinoids has been the cause of emergency room visits and calls to poison control centers. The adverse health effects associated with these synthetic cannabinoids and their related products include agitation, anxiety, nausea, vomiting, tachycardia (fast, racing heartbeat), elevated blood pressure, tremor, seizures, hallucinations, paranoid behavior, and non- responsiveness. The materials have been marketed on products that are available to the general public, and their manufacture is devoid of quality controls and unregulated.

This temporary scheduling action is taken pursuant to **section 811**(h), which is specifically designed to enable DEA to act in an expeditious manner to avoid an imminent hazard to the public safety from new or designer drugs or abuse of those drugs. Section 811(h) exempts the temporary scheduling order from standard notice and comment rulemaking procedures to ensure that the process moves swiftly. For the same reasons that underlie section 811(h), that is, DEA's need to move quickly to place these five cannabinoids into Schedule 1 because they pose a threat to public health, it would be contrary to the public interest to delay implementation of the temporary scheduling order by requiring DEA to undertake the procedures necessary to comply with the Congressional Review Act prior to the order taking effect.

Unfunded Mandates Reform Act of 1995

This final temporary scheduling order will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $126,400,000 or more (adjusting for inflation) in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

Under the authority vested in the Attorney General by section 201(h) of the CSA (**21 U.S.C. 811**(h)), the Administrator hereby amends 21 CFR part 1308 as follows:

PART 1308--SCHEDULES OF CONTROLLED SUBSTANCES

- 1. The authority citation for part 1308 continues to read as follows:

  Authority: **21 U.S.C. 811**, **812**, **871**(b), unless otherwise noted.

- 2. **Section 1308.11** is amended by adding new paragraphs (g)(1), (2), (3), (4), and (5) to read as follows:

Sec. 1308.11 Schedule I.

* * * * *

(g) * * *

(1) 5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, its optical, positional, and geometric isomers, salts and salts of isomers--7297 (Other names: CP-47,497)

(2) 5-(1,1-Dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, its optical, positional, and geometric isomers, salts and salts of isomers--7298 (Other names: cannabicyclohexanol and CP-47,497 C8 homologue)

(3) 1-Butyl-3-(1-naphthoyl)indole, its optical, positional, and geometric isomers, salts and salts of isomers--7173 (Other names: JWH- 073)

(4) 1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole, its optical, positional, and geometric isomers, salts and salts of isomers--7200 (Other names: JWH-200)

(5) 1-Pentyl-3-(1-naphthoyl)indole, its optical, positional, and geometric isomers, salts and salts of isomers--7118 (Other names: JWH- 018 and AM678)

Dated: February 18, 2011.

Michele M. Leonhart,
Administrator.

[FR Doc. 2011-4428 Filed 2-28-11; 8:45 am]

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Memorandum

TO: Representative Cathy Muñoz
FROM: Chuck Burnham, Legislative Analyst
DATE: February 8, 2011
RE: Comparing States' Laws on Synthetic Cannabinoids to Selected Alaska Drug Laws
LRS Report 11.159

You asked us for information on states' laws on synthetic cannabinoids. Specifically, you asked for an account of where such substances appear on states' schedules of controlled substances and the crime classifications and penalties for possessing those substances. You also asked us to compare those other states' penalties for such crimes to those indicated for possession of substances in Alaska's controlled substance schedules IIA and IIIA.

We identified 11 states with laws prohibiting the possession of synthetic cannabinoids.[1] Classifications and penalties for a first criminal offense of possession in these states range from a Class B misdemeanor in Kentucky, which carries a maximum term of imprisonment of 90 days and a $250 fine, to an unclassified felony in Georgia, for which an offender is subject to a prison sentence of 2-15 years. In addition to the 11 states that have synthetic cannabinoid prohibitions in place, at least 21 states, including Alaska, are currently considering similar legislation.

In Alaska, as you know, controlled substances are placed on a given level within the schedule of controlled substances based on the degree of danger or probable danger a given drug poses to a person or the public. Those schedules range from "IA," containing the most dangerous substances, to "VIA," which are perceived to be the least dangerous drugs. Possession of a Schedule IIA controlled substance in Alaska constitutes the crime of "misconduct involving a controlled substance in the fourth degree." That offense is a Class C felony punishable by a maximum of 5 years in prison and a $50,000 fine. Please note, however, that the presumptive sentencing guideline in Alaska is far less severe, and a suspended sentence is possible for a first offense. Possession of a Schedule IIIA controlled substance in Alaska is a Class A misdemeanor for which an offender can receive a maximum of 1 year in prison and a $10,000 fine.[2]

The attached table summarizes crime classifications and penalties for possessing synthetic cannabinoids in the eleven states where that activity has been criminalized, and compares that information to the crime classification and penalties for possession of items on Alaska' controlled substances Schedules IIA and IIIA. Please note that the penalties listed in our table are either maximum sentences or ranges of incarceration periods. Actual penalties are generally subject to considerable discretion by the sentencing courts.

We hope this is helpful. If you have questions or need additional information, please let us know.

[1] Those states are Alabama, Georgia, Illinois, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Oklahoma, and Tennessee. According to the National Conference of State Legislatures (NCSL), synthetic cannabinoids are "chemically engineered substances, similar to THC—the active ingredient in marijuana—that, when smoked or ingested, can produce a high similar to marijuana. Initially developed for research related to treatment of pain and the effects of cannabis on the brain, these substances have recently become a popular alternative to marijuana. The NCSL maintains information about these substances and states' responses to the issue at *http://www.ncsl.org/?tabid=21398*.

[2] Controlled Substance Schedules in Alaska are enumerated at AS § 11.71.140-190.

Comparing States' Laws on Synthetic Cannabinoids to Selected Alaska Drug Laws				
State	**Citation**	**Controlled Substance Schedule**	**Crime Classification** (1st Offense--Possession)	**Penalty**
Alaska	AS § 11.71.040 and § 12.55.125	Schedule IIA (as proposed in HB 7)	Class C felony	Maximum 5 years imprisonment and $50,000 fine (presumptive sentence is far less--suspended sentence possible)
	AS § 11.71.050	Schedule IIIA	Class A misdemeanor	Maximum 1 year imprisonment and $10,000 fine
Alabama	CA § 13A-12-213 to 14.1	Not scheduled	Class A misdemeanor	Sentencing guidelines: up to 32 month sentence typically allotted by court among probation, community corrections, county jail/work release or an alternative
Georgia	OCGA § 16-30-25 and 16-13-30	Schedule I	Unclassified felony	2-15 years imprisonment
Illinois	720 ILCS § 570/204 and 402(c) and 730 ILCS § 5/5-4.5-45 and 5-4.5-50	Schedule I	Class 4 felony	1-3 years imprisonment and $25,000 fine
Kansas	KSA § 21-36a06 and 4708	Schedule I	Class A non-person misdemeanor	Sentencing guidelines: typically, 10-12 months of probation
Kentucky	KRS § 218A.1427 and 534.040	Schedule I	Class B misdemeanor	Maximum imprisonment of 90 days and fine of $250
Louisiana	LSA § 40:966	Schedule I	Unclassified	Maximum 6 months in jail and $500 fine
Michigan	MCL § 333.7403	Schedule I	Unclassified misdemeanor	Maximum 1 year imprisonment and $2,000 fine
Mississippi	MC § 41-29-113 and 139	Schedule I	Unclassified misdemeanor or felony depending upon amount of drug	For example, 0.1 grams to 2 grams, up to 2 years imprisonment and $50,000 fine; 10-30 grams, 6-24 years imprisonment and up to $50,000 fine.
Missouri	MRS § 195.202, 558.011, and 560.016	Schedule I	Class A misdemeanor	Maximum 1 year imprisonment and $1,000 fine
Oklahoma	OSA 63 § 2-204 and § 2-402	Schedule I	Unclassified felony	2-10 years imprisonment and $5,000 fine
Tennessee	TCA § 39-17-438	Not scheduled	Class A misdemeanor	Sentencing guidelines--wide latitude to courts

Notes and Source: This table provides information gleaned from the *Lexis* database of state statutes on first offenses for possessing small amounts of synthetic cannabinoids or the referenced drug schedule, as applicable. Please note that a variety of crime-specific circumstances and elements of criminal procedure impact actual sentences.

Testimony for HB7

I would have to start by saying that I never thought I would have had a bad trip on synthetic herb, most times people have bad trips from mushrooms or acid but that herb I had was unlike anything I'd ever heard of. I had started smoking spice in February of this year and smoked on weekends. The appealing side of this herb was that it gave a marijuana like high for about 3 hours with just a couple of hits and the best part being that you didn't have to worry about drug tests because it passed for friends that I knew in the military so passing standard tests was not a problem.

Now another plus to this herb was that unlike normal weed, this herb is not supposed to produce any paranoia, and there was no sign of being high at all, such as no red eye, no half open eyes and you were able to basically be a functional stoner, you could be in public and not look or smell high in anyway. This of course was very appealing to me and many of my friends who also couldn't smoke weed because of drug tests at their jobs.

The brand of spice I had been smoking for about 6 months was called red dawn, spark 20. The herb I smoked the night of my incident was called spike, max. I only had 2 hits and less than 2 minutes later I was losing my perception of what was real in every way, it turned everything into a fuzzy cartoon like picture and I lost control of my legs that I couldn't walk at all. I couldn't talk. I could hear what I thought and what I wanted to say, but all I was spitting out was gibberish. This went on for what felt like many hours. I can remember thinking to myself that I wasn't actually going come out of this craziness and this might be how I end up dying! I remember telling my brother to call 911 and remember going into the ambulance and ending up in the hospital for a day. The doctors haven't had an incident with synthetic herb until that night and I had to basically be flushed out for 10 hours.

I know many people are still going to want to try spice but the fact it's just a bunch of chemicals sprayed on tobacco and nobody knows what the long term affects of this herb are and the scary thing is that this stuff is so easy to purchase. The price has dropped here in town from $53 a gram down to $30 a gram, which is just a bit more than the going rate for actual weed.

I would have thought this herb was completely harmless but the fact that a regular smoker such as myself could even have a bad experience as bad as mine was a huge eye opener to just how bad this stuff really is. The fact that it's very easy to get in town and that it only takes a little bit to get to a mind altering high is spooky. I know a large number of kids in town have had a substance abuse problem and this drug is dangerous because of the fact you can have an herb that twists reality in such a way that you can't tell what's real and what's a hallucination. I see this problem getting worse in the near future because it's a new drug that is easy to obtain and has a weed like high and at the same time has dangerous side effects.

Mat-Su Substance Abuse Prevention Coalition

January 31, 2011

Alaska House of Representatives

RE: Synthetic Cannabinoids

To Whom it May Concern,

The purpose of this correspondence is to support House Bill 7 that would list certain synthetic cannabinoids found in "K2" or "Spice" as Scheduled controlled substances which will provide law enforcement will have the necessary authority to prosecute the sell and possession of these substances. These drugs are currently being sold in several local venders which sends the social message that they are not harmful and social acceptable; thereby, increasing the risk for youth consumption and related consequences.

K2/Spice products are a mixture of herbal/spice plant products sprayed with potent psychotropic drugs, often contaminated with unidentified toxic substances which is marketed under variety of names including K2, Spice, Pep Spice, Spice Silver, Spice Gold, Spice Diamond, Smoke, Sence, Skunk, Yucatan Fire, Genie & Zohai and sold in variety of colors/flavors-usually sold in foil packaging

The growing popularity of these drugs is causing increasing alarm among law enforcement officials, lawmakers, and health care professionals across America. "Spice" has been banned by some U.S. domestic and overseas military commands as well as in Germany and other European countries because substances have been identified in the product to have the presence of chemicals with tetrahydrocannabinol (THC)-like effects.

The danger in smoking "Spice" is that the product is unregulated and not manufactured in a controlled environment. Smoking this product could be very harmful because the substance could also include unknown contaminants. Therefore, there is no way to accurately determine what the potential harmful effects could be. [1] Medical officials concur that smoking "Spice" can cause adverse effects to one's health. Hospitals have reported incidents of people, mostly

[1] 4Mind Hacks: Spice flow: the new street drug pharmacology December 01, 2009, Accessed 13 May 2010 and Wikipedia Accessed 13 May 2010

teenagers, visiting emergency rooms for: heart palpitations, respiratory issues, panic attacks, hallucinations, delusions, and, one case where a teen lapsed into a coma.[2]

The Mat-Su Substance Abuse Prevention Coalition seeks to reduce substance abuse among youth by advocating for and implanting evidence-based environmental strategies. These drugs are currently sold at local shops which increases access to the drug and sends the social message to young people that they are acceptable and not harmful.

I have attached legislation adopted by the state of Missouri which contains a list of the compounds used to create these drug which can be used by the Senate as a template to draft a similar bill/ordinance.

The Mat-Su Substance Abuse Prevention Coalition appreciates your time and consideration of this issue. If you would like any additional information, please contact the project coordinator, undersigned. Thank you for your time.

Sincerely,

Desiree Compton, for Mat-Su Substance Abuse Prevention Coalition
Project Coordinator
124 W. Swanson, Suite C
Wasilla, AK 99654
(907) 373-5818
dcompton@unitedwaymatsu.org

Mat-Su Substance Abuse Prevention Coalition

Vision: Our vision is to enhance our community by supporting healthy lifestyles and drug free alternatives.

Mission Statement: To reduce substance abuse among youth and, over time, among adults by addressing the factors in our community that increase the risk of substance abuse and promoting the factors that minimize the risk of substance abuse.

---

[2] "Synthetic Marijuana A Growing Trend Among Teens, Authorities Say", CNN/WIBW.com March 24, 2010. Accessed 10 May 2010

FAIRBANKS POLICE
911 Cushman Street
Fairbanks, Alaska 99701-4616
Phone (907) 450-6500
Fax (907) 452-1588
Email: fpd@ci.fairbanks.ak.us

January 21, 2011

Representative Cathy Munoz
State Capitol Room 403
Juneau AK 99801

Dear Representative Munoz:

As the Chief of Police for the Fairbanks Police Department, I would like to extend my support of House Bill No. 7 "An Act classifying certain synthetic cannabinoids as schedule IIA controlled substances."

According to the U.S. Department of Justice Drug Enforcement Administration, these substances have no known therapeutic use and are known to cause a variety of effects including seizures, hallucinations, psychotic episodes, and non-responsiveness. In addition the Alaska Information Analysis Center (AKIAC) has reported in studies that subjects have reported having difficulties with balance, slurred speech, and being light headed.

These cannabinoids present a significant threat to the safety of Alaska's citizens as long as they remain unclassified. Without this new legislation a person who is under the influence of synthetic cannabinoids while operating a motor vehicle is not in violation of the law. This presents a clear danger to the citizens of Alaska, as someone could potentially be under the influence of a synthetic cannabinoid while driving and experience hallucinations, seizures, or a psychotic episode. This is not a hypothetical situation and the Fairbanks Police Department has already investigated a motor vehicle accident where the driver of the vehicle was having seizures as a result of consuming synthetic cannabinoids.

By classifying synthetic cannabinoids as a schedule II controlled substance, the act of operating a motor vehicle under the influence of a synthetic cannabinoid would become an illegal act. This bill would therefore have a direct impact on the safety of the citizens of the State of Alaska.

Sincerely

Laren Zager
Chief of Police
Fairbanks Police Department

APOA
ALASKA PEACE OFFICERS ASSOCIATION

ALASKA ASSOCIATION OF CHIEFS OF POLICE

Women Police of Alaska

February 14, 2011

Representative Cathy Muñoz
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Muñoz:

On behalf of our respective organizations, we would like to thank you for introducing HB 7, an Act classifying certain synthetic cannabinoids as schedule IIA controlled substances; and providing for an effective date.

We met recently to review proposed legislation and decided to unanimously support this bill.

Again, thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organizations can do to assist in the passage of this bill.

Sincerely,

John Lucking Jr., President
Alaska Peace Officers Association
PO Box 240106
Anchorage AK 99524

Tom Clemons, President
Alaska Association of Chiefs of Police
183 Nelson Ave
Wasilla AK 99654

Michele Logan, President
Women Police of Alaska
PO Box 233306
Anchorage AK 99523

cc: Reps. Carl Gatto, Bob Herron, Beth Kerttula,
Bob Lynn, and Lance Pruitt

MUNICIPALITY OF ANCHORAGE

Office of the Municipal Attorney
Civil Division, Suite 730

Telephone: 907-343-4545
Fax: 907-343-4550

Mayor Dan Sullivan

February 8, 2011

Chairman Carl Gatto
House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Vice-Chair Steve Thompson
House Judiciary Committee
State Capitol, Room 428
Juneau, Alaska 99801-1182

Re: House Bill 7 and Senate Bill 17 - *Synthetic Cannabinoids*

Dear Representatives:

The Municipality of Anchorage supports the bills currently before the legislature. As I indicated last Friday before your Committee, the primary reasons to treat synthetic cannabinoids more serious than their organic equivalents is because the potency of the synthetics has been found to be up to 800 times greater than the organic, and the potency from sample to sample varies widely. We have evidence that this high potency induces hallucinogenic reactions and unpredictable behaviors that are far more dangerous to the user, and those who may come into contact with them, than marijuana. The variations in the strength of any one dose can cause users to get a mild reaction in one instance and fall into unconsciousness in another instance. We have had one death in Anchorage that can be directly attributed to the use of synthetic cannabinoids. The Municipality believes felony prosecution for the manufacture, production, distribution, and sale of synthetics is a necessary tool that should be available to law enforcement to discourage the use of these drugs.

The Municipality supports providing the State Crime Lab with necessary resources to test for these drugs. As of a couple of months ago, we were aware of only two labs nationally that could test for these products in blood or urine. One lab could test urine samples and the other could test blood samples. In order to successfully prosecute people in the chain of production and consumption, we need the capability of testing both seized products and the bodily fluids of users. If properly resourced, having these tests performed locally and having local technicians available to testify, may save both money and time over using out-of-state labs.

Please find included in our email the Powerpoint presentation our Traffic Safety Resource Prosecutor uses. We have been making these presentations to the local military, business groups, and governmental agencies. We look forward to providing additional testimony on the bills in the coming weeks. If you have any questions, please do not hesitate to contact me.

Sincerely,

Dennis A. Wheeler
Municipal Attorney

cc: Sara Gill, Special Assistant to the Mayor

Advisory Board on Alcoholism and Drug Abuse

abada amhb

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

February 3, 2011

Representative Cathy Munoz
Alaska State Legislature
Capitol Building, Room 403
Juneau, Alaska 99801

Re: HB 7 – Regulation of Synthetic Cannabinoids

Dear Representative Munoz,

On behalf of the Advisory Board on Alcoholism and Drug Abuse, I would like to express our appreciation of your bringing this important issue to the forefront. Synthetic marijuana or "cannabinoids" pose a grave risk to youth and adults, given the serious health consequences and impairments experienced by users of these drugs.

The dangers posed by synthetic marijuana are serious. While the base products may be natural, the chemicals used to mimic the properties of THC are not approved for human consumption. National news reports on the effects of these products include elevated heart rate and blood pressure, extreme anxiety, poisoning, nausea and vomiting, hallucinations, overdoses, and even addiction.

The American Association of Poison Control Centers reported more than 3,000 calls related to poisoning by synthetic marijuana products in 2010 – and nearly 400 calls since January 1 of this year. The U.S. Army banned use of synthetic marijuana by service members in August 2010. The U.S. Drug Enforcement Agency (DEA) exercised its emergency scheduling authority to **temporarily** control five chemicals used in synthetic marijuana products (JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol). This federal regulation is limited in duration (12-18 months), leaving Alaskans at risk after that time without the state taking action.

The effects of synthetic marijuana are being felt right here in Alaska. News reports of crimes involving these products have come from Fairbanks and Anchorage. The U.S. Army reported courts martial and non-judicial discipline of more than thirty soldiers in Alaska by December 2010. The Anchorage School District reports use by students (though not to the same extent as actual marijuana). Given the health consequences and the role synthetic marijuana can play in criminal activity, there is a more than adequate basis for the regulation of these products to protect the health and safety of Alaskans.

Thank you for your work to protect Alaskans from these harmful products.

Sincerely,

J. Kate Burkhart
Executive Director

Kendra Kloster

From: Scott Spickler [sspickler@gmail.com]
Sent: Monday, January 24, 2011 4:07 PM
To: Kendra Kloster
Subject: HB-7,SB17

To Representives Munoz and Kerttula and Senator Egan

I would like to voice my support for the passage of HB 7 and SB 17 banning synthetic marijuana and the chemical substances that these "Herbal Incense" are laced with.

I feel that for this product to be sold off the shelf by local businesses to anyone is a criminal act and the penalities should be severe enough to discourage the sale and distribution of this meth like product.

The target market for synthetic pot, in my opinion, is typically anyone that is trying to avoid drug use detection by their employers, (including the military), as well as students participating in school sports at districts that have a drug testing program in place.

While people over 18 should know better than to smoke this substance, many do not understand the consequences of inhaling the unregulated chemicals sprayed on these herbs. I fear that the drug is going to cause irreparable harm or death to someone, and sadly that someone will likely be under the age of 18 to get the public's attention and to shed the light on the potential harm that this product can cause. However, passage of a law to criminalize the sale and possession can help circumvent that concern.

The Federal Government regulates the importation of toys painted with lead from China, sometimes not all that well quite honestly. Alaska should join the ranks of several other states that have already passed legislation of this particular poison from being so readily available on store shelves.

We don't need to make it easy for people to gain access to this drug.

Thank you,

Scott Spickler
10754 Horizon Dr.
Juneau, AK. 99801

789-3780 W.

Kendra Kloster

From: frank.b@gci.net on behalf of Frank Bergstrom [frank.b@gci.net]
Sent: Tuesday, January 25, 2011 10:26 AM
To: Kendra Kloster
Subject: HB-7 and SB-17

Honorable Representatives Munoz and Kerttula, and Senator Egan:

Please support the above bills and outlaw synthetic cannabis products (Spice, K2, etc.).

- This family of drugs is intended to produce a high – thus users are impaired in any activities they may undertake (e.g. driving)
- These products appear to be falsely labeled and do not contain herbal plants, but rather cannabinoid compounds related to THC (active ingredient in pot); i.e., they lie

It would appear these products are a thinly veiled effort to bypass anti-marijuana rules to sell pot by-any-other-name. Whether it is pot or other, the stated intent is to produce a drugged high. That alone is sufficient to merit regulation as a controlled substance. At a minimum it should be so regulated – at best it would be made illegal. It's market is based on wriggling around anti-drug law. Let's close the door on the deceptive marketing of pot by-any-other-name. It is a drug (or group of drugs) being made available to the public essentially as an unregulated nutraceutical. This is a sham and should be ended.

Respectfully,

Frank Bergstrom

Frank Bergstrom
PO Box 22909
Juneau, AK 99802
907-523-1995 phone/fax
907-321-3637 cell
frank.b@gci.net

Kendra Kloster

From: bruce@donabel.biz on behalf of Bruce Abel [bruce@donabel.biz]
Sent: Tuesday, January 25, 2011 10:07 AM
To: Kendra Kloster
Subject: HB-7/SB17

Dear Representatives Munoz and Kerttula and Senator Egan:

I would like express my support and encourage you to pass HB 7 and SB 17 banning synthetic marijuana and the chemical substances that lace these "Herbal Incense". These substances should not be sold to anyone for any reason. The sale of such material should be designated a criminal act with penalties severe enough to discourage their sale and distribution.

As an employer with strict drug use policies the legal sale of synthetic narcotics creates untold liability. I think it is safe to say that if my fully loaded boom truck is in an accident with your loved ones and the driver has been enjoying "Herbal Incense" prior to the accident you won't be satisfied with a defense that the product was sold over the counter by a local business and is legal. Dead is dead. Legalizing these materials creates a liability nightmare for employers, school sports programs and endangers the public.

Alaska has more than its share of substance abuse problems so lets join with other states that have already passed legislation of this particular poison from being so readily available on store shelves.

Sincerely,

Bruce Abel
President/CEO
Don Abel Bilding Supply
9999 Glacier Highway
Juneau, AK. 99801

Kendra Kloster

From: Kasen Spickler [kasen_spickler@hotmail.com]
Sent: Monday, January 24, 2011 8:59 PM
To: Kendra Kloster
Cc: Scott Spickler
Subject: HB-7, SB17

To whom it may concern,

I would like to voice my opinion in favor of banning synthetic marijuana in Alaska. It's a very dangerous drug and it doesn't belong in our state.

I have seen what smoking this does to a person and it was a very scary experience. Vomiting, very intense hallucinations, and high heart rate just to name a few symptoms. I believe if I wasn't around during this episode this person very well could have died. I think it's just a matter of time before it does take someones life.

I hope Alaska follows in many other states footsteps and bans this substance.

Kasen Spickler
9690 N. Douglas Hwy.
Juneau, AK 99801

(907) 723-9330

HB

50

<TARGET><BILL>HB 50</BILL><SUBJECT>HB
50</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Session:
State Capitol, Room 409
Juneau, AK 99801-1182
Phone: (907) 465-3783
Fax: (907) 465-2293
Toll Free: (877) 460-3783

Interim:
10928 Eagle River Road, Ste. 238
Eagle River, AK 99577
Phone: (907) 622-3783
Fax: (907) 622-3784
Toll Free: (877) 460-3783

REPRESENTATIVE DAN SADDLER

SPONSOR STATEMENT

CSHB 50 (JUD)

An Act relating to the purchase of alcoholic beverages at a club and to access by certain persons under 21 years of age to a club's licensed premises when alcoholic beverages are present.

CS House Bill 50 (JUD) is an effort to support the young men and women serving in the armed services in Alaska, by clarifying language to make it easier for them to enjoy companionship in the clubhouses of service and patriotic organizations.

The young soldiers, airmen, sailors, marines and coast guard personnel stationed in Alaska face special challenges. Separation from loved ones, the rigors of barracks life and the monotony of three mess hall meals a day can take their toll on morale. Patriotic clubs – such as those operated by the American Legion, Veterans of Foreign Wars, Disabled American Veterans and others – are places to relax with buddies and enjoy the special understanding and support from others who have "been there" and understand the rigors of military life.

The Legislature recognized this value, and in 2006 passed SB 209 to allow these young men and women access to such clubs using their military ID cards. However, some language remains in statute that creates confusion as to when such access is permitted. CSHB 50 (JUD) will eliminate that confusion by making it clear that such access is not limited solely to special events. The House Judiciary Committee amended the bill to also allow access by their accompanying spouses.

It is important to note that CSHB 50 (JUD) makes no change in law that would allow service members under the age of 21 to purchase or consume alcohol in service clubs.

Your support of CSHB 50 (JUD) will be a clear demonstration that Alaska understands and works to address the special needs of those who defend our freedom.

Representative_Dan_Saddler@legis.state.ak.us

ALASKA STATE LEGISLATURE

Session:
State Capitol, Room 409
Juneau, AK 99801-1182
Phone: (907) 465-3783
Fax: (907) 465-2293
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Toll Free: (877) 460-3783

REPRESENTATIVE DAN SADDLER
Chairman, Chugiak-Eagle River Delegation

Sectional Analysis

CSHB 50 (JUD)

Access to Licensed Premises

Section 1 removes the phrase "upon special occasions" from AS 04.1.10(d). The effect of this deletion would allow military personnel on active duty, who are extended club privileges by patriotic organizations, to purchase alcoholic beverages in the portion of the club that is a part of the club's licensed premises at times beyond just "special occasions." This extended privilege is also extended to their accompanying spouses.

Section 2 adds the phrase "is a guest or member of the club, or the spouse accompanying a guest, and the guest" to AS 04.11.110(g). The addition of this phrase would allow a person under 21 years of age to enter or remain on the premises of a patriotic organization that is licensed as a club under AS 04.11.110, when alcoholic beverages are present, if the person under 21 years of age is a guest or a member of the cub, and has proper military identification on their person. The amendments to this section add the requirement that for a person under 21 years of age to remain in the licensed premises portion of a patriotic club, the person must be either a guest or a member of the club.

Section 3 conforms AS 04.16.049 (Access of persons under 21 years of age to licensed premises), to the amendment set out in section 2 of the bill. This section adds a subsection to AS 04.16.049(a), which allows a person under 21 to enter or remain on the licensed premises under Title 4, if "the person is permitted on the premises under AS 04.11.110(g)."

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 50
(H) Publish Date: 4/5/11

Identifier (file name): HB 50
Title: Access to Premises
Sponsor: Representative Saddler
Requester: House Labor & Commerce Committee

Dept. Affected:
Appropriation:
Allocation:
OMB Component Number:

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the initial fiscal note to HB 50

Prepared by: Konrad Jackson, Committee Aide
Division: House Labor & Commerce Committee
Phone: 907-465-4954
Date/Time: 4/4/11 5:00 PM

Approved by: Representative Kurt Olson
Chair, Laobr & Commerce Committee
Date: 4/4/2011

(Revised 1/27/2011 OMB)

Lynne Smith

From: Rep. Dan Saddler
Sent: Monday, March 14, 2011 2:28 PM
To: Lynne Smith
Subject: FW: House Bill 50 (UNCLASSIFIED)

-----Original Message-----
From: Lemelin, David Mr CIV US USA IMCOM [mailto:David.Lemelin1@us.army.mil]
Sent: Monday, March 07, 2011 9:34 AM
To: Rep. Dan Saddler
Subject: House Bill 50 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

As the Commander of Veterans of Foreign Wars (VFW) Post 10029, North Pole Alaska. I give my support to House Bill 50 and Representative Dan Saddler.
If you have any questions or concerns, I can be reached at (907) 378-1256.

Respectfully,

Dave

David A. Lemelin
Commander
VFW Post 10029

Classification: UNCLASSIFIED
Caveats: FOUO

Mattison, John W CTR USAF PACAF 673 LRS/LGRM

From: Mattison, John W CTR USAF PACAF 673 LRS/LGRM
Sent: Monday, April 04, 2011 1:59 PM
To: 'Representative_Dan_Saddler@legis.state.ak.us'
Subject: HB 50 support

Gentlemen and Ladies,

I write this email in support of House Bill 50. This bill has been long in coming and I believe it will provide our younger heroes a better and more conducive venue to shed the pressures of military life. All too often, younger veterans are limited to on-base attractions. This allows them to congregate with their peers, but doesn't offer the mentorship opportunities that Patriotic Organizations such as the Veterans of Foreign Wars or the American Legion do. It should be noted that there is no age restriction for membership in the VFW, only that they be an American citizen, honorable service in the Armed Forces, and be the recipient of a qualifying campaign medal. As such, young (under 21) veterans may return from their deployment fresh from combat and be eligible for immediate membership, only to be told they can enter their club only during a special event. This is wrong and must be changed. I believe the verbiage in HB 50 will remove the confusion and correct this wrong.

John W. Mattison

Past Department of Alaska Commander (2008-2009)

VFW asks Saddler to get under-21 military into club

Bill wouldn't let them drink

Alaska Star 4/14/11

BY ZAZ HOLLANDER
Alaska Star

Officers at Eagle River's Veterans of Foreign Wars club enlisted Eagle River's Representative Dan Saddler in their mission to open the doors to active-duty service men and women – even those who aren't quite 21 yet.

House Bill 50 sponsored by Saddler would let soldiers under 21 enter licensed premises of patriotic clubs if they are members or guests of a member. It would not allow them to drink alcohol.

The bill also has a section that expands access to service and patriotic organizations for active-duty service men and women over 21. Some language in statute limits such access to "special occasions" only, Saddler wrote in an e-mail. HB 50 deletes this language.

Saddler called the bill "simply an access bill" and said he wanted to emphasize that the bill would not allow underage persons to drink.

"It simply clarifies that soldiers over 21 don't have to wait for a 'special occasion' to visit patriotic clubs, and that soldiers under 21 can visit if they are club members, or guests," he wrote.

Eagle River's VFW Post 9785 asked for Saddler's help several months ago while the legislator was at the post, according to John Mattison, the post quartermaster and himself a Vietnam-era veteran who retired as a U.S. Army major. Mattison talked to Saddler again by phone in late March.

"A young troop can enlist when he's 17, go through his training, go to Afghanistan, come back when he's 19," Mattison said. "He's eligible for the VFW but he can't come in. I wanted to untangle that mess."

But once inside, wouldn't it be pretty easy for an underage soldier to wander up to the bar and order a beer? Or get a friend to do the buying for him?

Mattison said the VFW doesn't go through a lot of bartenders, and the staff gets to know patrons.

"I don't see that as being a problem at all," he said. "We've talked to our bartenders. They said, 'No, it won't be a problem.' They card everybody they don't know."

In terms of someone buying for an underage member, Mattison said that could theoretically happen the way laws are written now – somebody can bring in an underage soldier as a guest, sit them at a table and buy the table a pitcher of beer.

The larger problem is that right now, an Afghanistan veteran can't come in the door of the VFW unless there's a special occasion, Mattison said. If the bill passes, the soldier could become a dues-paying member.

"Any time we get an Afghanistan or Iraqi vet in there, it's a special occasion, that's how we treat it," he said. "But we've got to sign them in as guests."

The bill remained in the House Judiciary Committee as of Tuesday.

"It's time to get to somewhere where I think is one of the nicest high school stadiums in the nation," Shackelford said of Huffer Stadium. "You can't beat the scenery."

ASAA has yet to finalize a playoff schedule for next year, and it's unclear how many games would be played at the stadium. In past years, the four semifinal (two each for the Large and Small Schools divisions) and the championship games were played in Anchorage. However, that number could be higher this year, as ASAA also voted to create a third, "Middle" division in football that

competition," h

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Rep. Bill Stol
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$1.35 million
in 2008.

"Kudos to
(Chugiak athle

HB

55

<TARGET><BILL>HB 55</BILL><SUBJECT>HB
55</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Member:
House Finance Committee
Legislative Budget & Audit Committee

Chair:
House Budget Sub Committees on:
- Department of Administration
- Department of Labor and Workforce Development

Session:
Alaska State Capitol
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Representative Mark Neuman

Rep.Mark.Neuman@legis.state.ak.us

Sponsor Statement HB 55 Knife Rights Act

"An Act adding definitions of 'gravity knife' and 'switchblade' to the criminal law."

In Alaska, spring loaded knives are an important tool used by hunters, anglers, and craftsmen. According to the American Knife and Tool Institute, there are over 35.6 million Americans who carry and use some type of utilitarian knife which opens with one hand. In the United States, assisted-opening and one-hand-opening knives now make up 80 percent of all knives sold.

In recent years some jurisdictions have acted to restrict the type of knives individuals may carry. In a number of instances this has been done by attempting to define common pocketknives as switchblades, gravity knives, or other knives.

Frequently that switchblade definition is assigned to a knife capable of being opened with one hand and having a "bias towards closure". A "bias toward closure" simply means it has a spring, detent, or other mechanism, which maintains the knife in a closed position until the bias is overcome with applied pressure.

A knife of this configuration falls short of the definition of switchblade used in other states and by the federal government: "*...any knife having a blade which opens automatically (1) by hand pressure applied to a button or other device in the handle of the knife, or (2) by operation of inertia, gravity, or both.*"

Presently Alaskan's are able to purchases these knives in Alaska and online. They are used in the work environment and in recreation. This bill simply clarifies that one handed hunting and utility knives do not qualify as a switchblade and as such are legally owned.

The House Judiciary Committee added preemption language to the bill reserving the authority to regulate knives to the state with limited exceptions. This was done to preclude an individual who carried a knife in one community from being unknowingly in violation when traveling to another jurisdiction.

I would appreciate your support.

27-LS0298\M

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**CSHB 55(JUD)**
Fiscal Note Number	**1**
(H) Publish Date	**2/17/12**

Identifier (file name)	HB055-LAW-CRIM-02-10-12	Dept. Affected	Law
Title	An Act adding definitions of 'gravity knife' and 'switchblade' to the criminal law	Appropriation	Criminal
		Allocation	Criminal Justice Litigation
Sponsor	REPRESENTATIVE (s) NEUMAN, LYNN		
Requester	(H) Judiciary	OMB Component Number	2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by	Eileen Donahue, Division Operations Manager	Phone	465-5427
Division	Administrative Services	Date/Time	2/10/12 4:30 PM
Approved by	Michael C. Geraghty, Attorney General	Date	2/10/2012
	Department of Law		

(Revised 1/17/2012 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 55(JUD)

Analysis

HB 55 proposes two new definitions for Title 11. Gravity knife is defined as is switchblade.

Fiscal impact to the Department is zero.

HB55 - Definitions: Gravity Knife & Switchblade

Examples of bias-towards-closure knives:

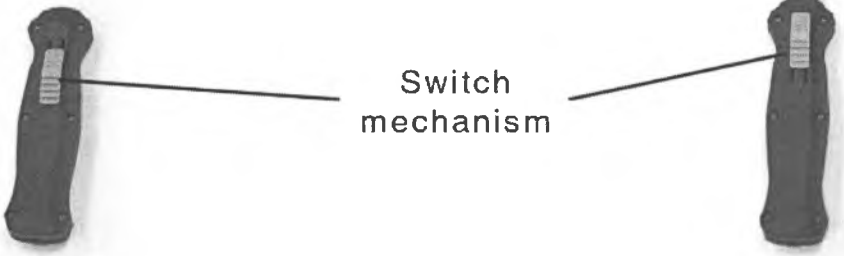
Closed

Prone

Fully-opened

Bias-towards Closed with a tang

Example of a switchblade:



Closed

Fully-opened

Rep. Mark Neuman

Congressional Sportsmen's Foundation

States Program

2012 Issue Briefs

Knife Definitions

Introduction

In an effort to limit the type of knives that can be legally imported into the United States, the Department of Homeland Secretary proposed revocation of the admissibility of certain knives with spring assisted opening mechanisms. This proposal would establish a new definition for qualifying switchblade knives.

Under the Switchblade Knife Act of 1958, a switchblade is defined as any knife with a blade which opens automatically by hand pressure applied to a button or other device in the handle of the knife, or by operation of inertia, gravity, or both. The proposed regulation would designate one-hand and assisted opening knives as being switchblades, even though the federal law does not declare these knives as switchblades.

Issue

Spring loaded knives are an important tool for hunters and anglers. According to the American Knife and Tool Institute, there are over 35.6 million Americans, including many who are hunters and anglers, who carry and use some type of utilitarian knife which opens with one hand. In the United States, assisted-opening and one-hand-opening knives are 80 percent of all knives sold. Spring loaded hunting knives should not qualify as switchblade knives.

Language

The Texas State Legislature passed H.B. No. 4456. This bill provided the state definition for qualifying switchblade knives.

1. "Switchblade knife" means any knife that has a blade that folds, closes, or retracts into the handle or sheath that opens automatically by pressure applied to a button or other device located on the handle, or opens or releases a blade from the handle or sheath by the force of gravity or by the application of centrifugal force.
2. The term (Switchblade) does not include a knife that has a spring, detent, or other mechanism designed to create a bias toward closure that requires exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure and open the knife.

Points of Interest

- Court cases in several states such as California, Illinois, Michigan, and Texas, have all ruled in favor of assisted-opening and one-hand opening knives. These knives are not considered switchblades because they do not possess the activating button or device on the handle of the knife.

Contact

For more information regarding this issue, please contact: Jennifer Lundy or Bethany O' Donovan (202) 543-6850; Jennifer@sportsmenslink.org or Bethany@sportsmenlink.org

2/15/2012

Dear Representative,

The possession of a knife in Alaska is not just a common practice, as it may be in other states, but in many cases the possession of a knife in Alaska is a necessity, which can determine the difference between life and death, between surviving and perishing.

Alaska currently has a prohibition on the possession of gravity knives and switchblade knives. Unfortunately, in many states the standard definition of these knives as used in Alaska's current statute, has resulted in the prosecution and jailing of people in possession of knives which are not, in fact, gravity knives or switchblade knives. Rather, these are folding pocket knives that are commonly used for hunting, fishing, camping, hiking, on worksites and other outdoor and everyday activities, and represent some 80% of the knives sold in the U.S. today.

In many states this definition has led to thousands of dollars in fines and court costs, for both the defendants and the jurisdictions prosecuting them. HB55 would clarify the definition of gravity knives and switchblade knives so it clearly does not include average, everyday knives that are commonly in possession by the public. HB55 protects honest law abiding Alaskans from potential legal jeopardy.

Knife Law Preemption Amendment:

Because knives are so prevalent in Alaska and possession is so common, knife laws around the state should be consistent. What is legal in Juneau should be legal in Barrow. Alaskans should be able to know that the law is consistent statewide. Alaskans already benefit from state firearms preemption, which makes the gun laws of Alaska consistent throughout the state. The same should hold true for knives.

Preemption would assure that if you change the definition of switchblades and gravity knives with HB55 ,it will apply statewide.

As we have seen in recent U.S. Supreme Court rulings, the Second Amendment is an individual right and that right has been incorporated to apply in the states. For this reason alone, all states should have knife preemption laws to assure that citizens are protected from onerous local laws, which infringe on their rights.

Beyond that argument, knife preemption laws make sense. Preemption allows law enforcement as well as citizens to know that what is legal in Anchorage is legal everywhere in Alaska.

It is for these reasons, as well as others, that Knife Rights strongly urges you to vote YES on HB55 and YES on the preemption amendment.

Todd Rathner
Knife Rights, Director of Legislative Affairs

Knife Rights, Inc.
www.KnifeRights.org • twitter.com/KnifeRights
313 W. Temple Ct., Gilbert, AZ 85299 • 866.889.6268 • 602.476.2702 • Fax 602.324.7548

*785 P.2d 563, *; 1990 Alas. App. LEXIS 5, **

STATE of Alaska, Appellant, v. John E. **STRANGE,** and Rudy Kempen, Appellees. **STATE** of Alaska, Appellant, v. John E. **STRANGE,** Christopher A. Stading, and Troy Gonzales, Appellees

Nos. 1004, Court of Appeals Nos. A-2637, A-2638, A-2711, A-2783, A-2839

Court of Appeals of Alaska

785 P.2d 563; 1990 Alas. App. LEXIS 5

January 19, 1990

PRIOR HISTORY: [1]** Appeal in File Nos. A-2637/2638 from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Trial Court Nos. 4FA-S88-0639CR & 4FA-S88-0374CR, Jay Hodges, Judge. Appeal in File Nos. A-2711/2783/2839 from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Trial Court Nos. 3AN-S88-1686CR, 3AN-S88-3460CR & 3AN-S88-2661CR, Mark C. Rowland, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: The state sought review of orders from two Superior Courts (Alaska), which dismissed the charges against defendants for first-degree misconduct involving weapons, a class C felony, in violation of Alaska Stat. § 11.61.200(a)(3).

OVERVIEW: All defendants were indicted by a grand jury for first-degree misconduct involving weapons. Defendants possessed a "butterfly knife" which is also known as a "balisong knife." The trial courts concluded that a butterfly or balisong knife was not a prohibited switchblade or gravity knife and dismissed the charges against defendants. The court affirmed the decision of the trial courts. The court found that the applicable statutes were ambiguous, and given that criminal statutes were to be strictly construed against the government, the court concluded that butterfly knives and balisong knives were not gravity knives and not a prohibited weapon. The court based its decision on the fact that butterfly knives were not switchblade knives nor were they sprung by a downward snap of the wrist. In fact, the court found that a number of motions, albeit quickly performed, were necessary to bring the knives to bear. These knives also do not fit the definition of automatic or semi-automatic. Finally, these knives did not appear to fit the common understanding of the term gravity knife or the way that the term was used in common usage.

OUTCOME: The court affirmed the judgments of the trial court that dismissed the charges against defendants for first-degree misconduct involving weapons.

CORE TERMS: knives, knife, gravity, butterfly, switchblade, blade, balisong, weapon, switchblade knife, concealed, handle, evidentiary hearings, sheath, button, wrist, automatically, dictionary, paralleled, videotape, spring, latch, common usage, force of gravity, centrifugal force, expert testimony, pocketknife, downward, felony, seized, locked

LEXISNEXIS(R) HEADNOTES

Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements

HN1 Alaska Stat. § 11.61.200(a)(3) makes it a felony to possess a "prohibited weapon." "Prohibited weapon" is defined in Alaska Stat. § 11.61.200(e)(1)(D) to include a "switchblade or gravity knife." Neither "switchblade" nor "gravity knife" is specifically defined in the statutes.

Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > General Overview

HN2 The term "gravity knife" is a readily ascertainable and consistent definition. As commonly understood, a gravity knife is one in which the blade opens, falls into place, or is ejected into position by the force of gravity or by centrifugal force. Furthermore, in the Alaska Statute on prohibited weapons, the term "gravity knife" is used in conjunction with "switchblade knife." Alaska Stat. § 11.61.200(e)(1)(D).

Governments > Legislation > Interpretation

HN3 Criminal statutes should be strictly construed against the government.

COUNSEL: Robert D. Bacon, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Grace Berg Schaible and Douglas B. Baily, Attorneys General, Juneau, for Appellants.

Marcia E. Holland, Assistant Public Defender, Fairbanks, and John B. Salem, Acting Public Defender, Anchorage, for Appellees Strange and Kempen.

Nancy J. Nolan, Assistant Public Defender, and John B. Salemi, Public Defender, Anchorage, for Appellees Strange, Stading, and Gonzales.

JUDGES: Bryner, Chief Judge, Coats and Singleton, Judges.

OPINION BY: SINGLETON

OPINION

[*564] Each of these defendants was indicted by a grand jury for first-degree misconduct involving weapons, a class C felony, in violation of AS 11.61.200(a)(3). HN1 This statute makes it a felony to possess a "prohibited weapon." "Prohibited weapon" **[**2]** is defined in AS 11.61.200(e)(1)(D) to include a "switchblade or gravity knife." Neither "switchblade" nor "gravity knife" is specifically defined in the statutes. *See State v. Weaver,* 736 P.2d 781, 782 (Alaska App. 1987). Each of these defendants possessed a "butterfly knife" which is also known as a "balisong knife." The sole question presented by these appeals is whether a butterfly or balisong knife is a prohibited switchblade or gravity knife.

Two evidentiary hearings were held: the first, in Fairbanks before Judge Jay Hodges involved John E. Strange and Rudy Kempen; the second, in Anchorage before Judge Mark C. Rowland involved Strange, again, Christopher A. Stading, and Troy Gonzales. Judge Hodges and Judge Rowland independently determined that a butterfly knife is not a prohibited weapon and therefore dismissed the charges against the defendants and the state appeals. We affirm.

Because neither gravity knife nor switchblade knife are defined in Alaska statutes, we must look to general usage for their meaning. AS 01.10.040. In determining the meaning of words in common usage, we generally look to the dictionary. *See Walker v. State,* 742 P.2d 790,

791 (Alaska App. 1987). **[**3]** The dictionary defines a switchblade knife or switchblade "as a pocketknife having the blade spring-operated so that pressure on a release catch causes it to fly open." *Webster's Third New International Dictionary of the English Language* Unabridged, 2314 (1966) (hereinafter *Webster's).* The butterfly or balisong knives which were seized in this case are identical to those described in *People v. Quattrone,* 211 Cal. App. 3d 1389, 260 Cal. Rptr. 44, 45 (Cal. App. 1 Dist. 1989) as follows:

> The butterfly knife sold by defendant has a fixed blade over two inches long. When not in use, a two-part handle is folded around the blade as a sheath and is secured by a latch at the base of the knife. To open, the latch is released, allowing the two halves of the sheath to swing down on pivots to form a handle exposing the blade. The handle may be **[*565]** secured manually or closed with the latch.

The knives introduced in evidence and demonstrated in the videotapes prepared at the evidentiary hearing satisfy this definition. It is not seriously contended that the butterfly or balisong knives are switchblade knives as we have defined that term. Rather, the contention is that they are gravity knives. In *Weaver,* we **[**4]** addressed the definition of gravity knives. We said:

> HN2↑The term [gravity knife] has a readily ascertainable and consistent definition. As commonly understood, a gravity knife is one in which the blade opens, falls into place, or is ejected into position by the force of gravity or by centrifugal force . . . .
>
> Furthermore, in the Alaska Statute on prohibited weapons, the term "gravity knife" is used in conjunction with "switchblade knife." AS 11.61.200(e)(1)(D). The ordinary person is therefore put on notice that a "gravity knife" must be similar to a switchblade in operating automatically or semi-automatically. The pertinent characteristics which a switchblade and a gravity knife have in common are that they are easily concealed and quickly brought to bear. These characteristics are indicative of knives which are used as weapons rather than tools. Some utility knives are quickly brought to bear, such as a fishing knife or hunting knife in a sheath, but are not easily concealed. Indeed, it is only when these utility knives are concealed that their possession is unlawful. AS 11.61.220(a)(1). An ordinary pocket knife may be concealed upon the person. AS 11.61.220(a)(1). However, an ordinary **[**5]** pocketknife is incapable of being quickly brought to bear.

Weaver, 736 P.2d at 782-83 (footnote omitted).

The two evidentiary hearings produced essentially the same evidence. At the first hearing in Fairbanks, the defendants called Wayne Ross, a local attorney, as a weapons expert to testify that the terms switchblade and gravity knife have a commonly accepted meaning in the weapons trade and that balisong or butterfly knives do not fall within either meaning. He testified that gravity knives, like switchblade knives are released by a button, but differ from switchblade knives in that they do not have a spring. Ross testified that gravity knives were developed by German paratroopers in World War II as a utility knife to cut parachute shrouds.

The state called Alaska State Trooper Jeffrey Hall at the first hearing in Fairbanks to show how easily butterfly knives could be brought to bear. He testified that butterfly knives were primarily used in the martial arts and in combat. He also testified that a butterfly knife was not within his understanding of the term switchblade knife or gravity knife. The defense also

put on a number of witnesses to testify that butterfly knives were **[**6]** readily available in commercial stores in Anchorage and Fairbanks.

Testimony before Judge Rowland at the second hearing in Anchorage paralleled testimony before Judge Hodges with one exception. Trooper Hall who had been called as a prosecution witness in Fairbanks was called as a defense witness in Anchorage. The state introduced a videotape of Alaska State Trooper John Johnston demonstrating the use of three of the butterfly knives which had been seized from defendant Strange. Trooper Johnston showed that the knives could be easily concealed on the body and could quickly be rbought to bear by a series of wrist movements utilizing centrifugal or inertial force. He indicated that he had only had about ten minutes experience with butterfly knives before making the videotape. He was able to bring the knives to bear quickly even though he took them as he found them without oiling them or working them to make them loose and easier to open.

Trooper Johnston's demonstration paralleled one given in *Quattrone,* where the officer was also able to rapidly open and lock the butterfly knife with one hand using three wrist movements. In that case, the officer testified that he needed only half **[**7]** an hour to perfect his technique. *Quattrone,* 260 Cal. Rptr. at 45.

[*566] A number of courts have considered whether butterfly or balisong knives qualify as prohibited switchblade or gravity knives. *See, e.g., Taylor v. United States,* 848 F.2d 715 (6th Cir. 1988); *Precise Imports Corporation v. Kelly,* 378 F.2d 1014 (2d Cir. 1967), *cert. denied,* 389 U.S. 973, 19 L. Ed. 2d 465, 88 S. Ct. 472 (1967); *Quattrone,* 211 Cal. App. 3d 1389, 260 Cal. Rptr. 44; *People v. Dolson,* 142 Misc. 2d 779, 538 N.Y.S.2d 393 (N.Y. Co. Ct. 1989); *People v. Mott,* 137 Misc. 2d 757, 522 N.Y.S.2d 429 (N.Y. Co. Ct. 1987). The courts, which disagree on whether butterfly knives are switchblades or gravity knives, have not been particularly helpful because of differences in statutory language. In *Quattrone,* the court dealt with California Penal Code § 653k which "defines an illegal switchblade as 'a spring-blade knife, snap-blade knife, gravity knife or any other similar type knife, [having a blade or blades] which can be released automatically . . . . by any type of mechanism whatsoever.'" *Quattrone,* 260 Cal. Rptr. at 46. In *Taylor,* the court dealt with the Switchblade Knife Act which defines a switchblade knife at 15 U.S.C. § 1241(b) as follows:

> The term "switchblade knife" means **[**8]** any knife having a blade which opens automatically --
>
> (1) by hand pressure applied to a button or other device in the handle of the knife, or
>
> (2) by operation of inertia, gravity or both.

Taylor, 848 F.2d at 716 n.1. Both of these definitions are broader than the definitions in our statute which simply uses the terms without further defining them. *Taylor* is also distinguishable because the court there relied heavily on an administrative interpretation of the Act in determining that balisong or butterfly knives were covered.

The New York cases dealt with New York Penal Code § 265.00(5) which stated that:

> "Gravity knife" means any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.

The New York cases held balisong or butterfly knives not to be gravity knives because they were not locked in place by means of a button, spring, lever or other device when released. *Dolson,* 538 N.Y.S.2d 393; *Mott,* 137 Misc. 2d 757, 522 N.Y.S.2d 429. Our statute does not

have similar language.

Having carefully reviewed the statutes and **[**9]** the knives introduced into evidence and bearing in mind that HN3 criminal statutes should be strictly construed against the government, *see State v. Andrews,* 707 P.2d 900, 907 (Alaska App. 1985), *aff'd,* 723 P.2d 85 (Alaska 1986), we conclude that butterfly knives and balisong knives are not gravity knives.

A number of considerations lead us to this conclusion. First, butterfly knives are not "switchblade knives in which the blade is sprung by a downward snap of the wrist." *Webster's* at 993. As we have seen, these knives do not meet the definition of switchblade knives. Nor are they sprung by a downward snap of the wrist. In fact, a number of motions, albeit quickly performed, are necessary to bring the knives to bear. These knives also do not fit the definition of automatic or semi-automatic. Finally, these knives do not appear to fit the common understanding of the term gravity knife or the way that the term is used in common usage. *See, e.g., Quattrone,* 260 Cal. Rptr. at 47-48. It is instructive that the expert testimony in *Quattrone* apparently paralleled the expert testimony given at the two evidentiary hearings in this case regarding the meaning of the term "gravity **[**10]** knife."

The judgment of the superior court is AFFIRMED.

Source: **Legal > / . . . / > AK State Cases, Combined**
Terms: **name(state and strange)** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Friday, December 17, 2010 - 8:19 PM EST

* Signal Legend:
- Warning: Negative treatment is indicated
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ALASKA STATE LEGISLATURE

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Legislative Budget & Audit Committee

Chair:
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- Department of Administration
- Department of Labor and Workforce Development

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Fax: (907) 373-4745

Representative Mark Neuman

Rep.Mark.Neuman@legis.state.ak.us

March 15, 2012

Dear Senator French

Subject: HB 55 ***"An Act adding definitions of 'gravity knife' and 'switchblade' to the criminal law."***

Please consider scheduling this legislation for a hearing at your earliest convenience. My office will be happy to assist you in any way we can. I am presently contacting other members of this body to answer any questions that they may have. Please feel free to contact us with any questions you have.

Attached is a committee package.

Included are the following:

- Carrier of the Bill (Rep Mark Neuman)
- Letter of Request
- Current version of the bill.
- Sponsor statement.
- 2012 Fiscal Notes

Please feel free to contact myself or my aide Rex Shattuck (465-2696) with any questions.

Thank you for your consideration.

Sincerely,

Mark Neuman

Representative Mark Neuman

HB

56

<TARGET><BILL>HB 56</BILL><SUBJECT>HB
56</SUBJECT><COMM>SJUD27</COMM></TARGET>

Member

Standing Committees:
Judiciary
State Affairs
Transportation
Rules

Finance Subcommittees:
Corrections
Courts
Law

Alaska State Legislature

House of Representatives

Representative Max F. Gruenberg, Jr.
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House Minority Floor Leader

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Toll Free: (866) 465-4940
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Email:
Rep.Max.Gruenberg@legis.state.ak.us

TO: Senator Hollis French, Chair
Senate Judiciary Committee

FROM: Representative Max Gruenberg

DATE: March 12, 2012

RE: HB 56 – Include Arson in Crimes of Conspiracy

****

Please consider this memo as a request for House Bill 56 to be heard in the Senate Judiciary Committee. Accompanying this memo are the following documents:

- HB 56 (27-LS0312\M)
- New Sponsor Statement
- DPS Support Material
- Relevant Statutes
- Fiscal Notes
    - Department of Law (0.0)
    - Department of Public Safety (0.0)
    - Department of Corrections (**)
- Letters of Support
    - Alaska Fire Chief's Association
    - Alaska Peace Officers Association
    - Capital City Fire/Rescue
    - Alaska Association of Fire & Arson Investigators
    - Anchorage Fire Department
- Legislative Research Memo

Thank you for considering my request for a hearing on HB 56. Please contact my legislative aide, Miles Brookes, at 465-4940 with any questions.

Alaska State Legislature

House of Representatives

Representative Carl Gatto
Representative Max Gruenberg
Representative Bob Lynn

HB 56
INCLUDE ARSON IN CRIMES OF CONSPIRACY

Sponsor Statement

House Bill 56 adds first and second degree arson to Alaska's conspiracy statute, which will provide strong deterrents to committing arson and close a loophole in current law. HB 56 was drafted after it became apparent during a committee hearing last session that arson is not currently included in Alaska's conspiracy statute. Because of this, arsonists may only be charged with a crime if the arson is attempted or completed, and they cannot be charged with the separate crime of conspiracy if two or more people are involved in the arson. This bill only adds first and second degree arson

- Conspiracy: an agreement by two or more people to commit a crime with at least one overt act committed towards the completion of the crime.
- Arson in the first degree: damaging property by fire or explosion and recklessly placing another person (including emergency personnel) in danger or serious physical injury. (Class A Felony)
- Arson in the second degree: knowingly damages a building by fire or explosion. (Class B Felony)
- Conspiracy to commit a Class A Felony (Arson One) is a Class B Felony.
- Conspiracy to commit a Class B Felony (Arson Two) is a Class C Felony.

HB 56 will fix those problems. Including arson in the conspiracy statute will provide stronger punishments, whether or not conspirators actually complete the arson. Under HB 56, if arson is committed, the conspiring arsonists can charged with *both* arson and conspiracy, rather than just arson under the current law. If the arson is not completed, however, this bill will allow conspirators to be prosecuted for conspiracy to commit arson, which is not punishable under current law.

If you have any questions, please contact Representative Gruenberg's legislative aide, Miles Brookes, at 465-4940.

Alaska State Legislature

House of Representatives

Representative Carl Gatto
Representative Max Gruenberg
Representative Bob Lynn

HB 56
INCLUDE ARSON IN CRIMES OF CONSPIRACY

Relevant Statutes

AS 11.31.120 Conspiracy

(a) An offender commits the crime of conspiracy if, with the intent to promote or facilitate a serious felony offense, the offender agrees with one or more persons to engage in or cause the performance of that activity and the offender or one of the persons does an overt act in furtherance of the conspiracy.

(b) If an offender commits the crime of conspiracy and knows that a person with whom the offender conspires to commit a serious felony offense has conspired or will conspire with another person or persons to commit the same serious felony offense, the offender is guilty of conspiring with that other person or persons to commit that crime whether or not the offender knows their identities.

(c) In a prosecution under this section, it is a defense that the defendant was merely present at the time that two or more other persons agreed to engage in or cause the performance of a serious felony offense.

(d) In a prosecution under this section, it is not a defense that a person with whom the defendant conspires could not be guilty of the crime that is the object of the conspiracy because of

(1) lack of criminal responsibility or other legal incapacity or exemption;

(2) belonging to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the conspiracy;

(3) unawareness of the criminal nature of the conduct in question or of the criminal purpose of the defendant; or

(4) any other factor precluding the culpable mental state required for the commission of the crime.

(e) If the offense that the conspiracy is intended to promote or facilitate is actually committed, a defendant may not be convicted of conspiring to commit that offense with another person for whose conduct the defendant is not legally accountable under AS 11.16.120(b).

(f) In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, either (1) gave timely warning to law enforcement authorities; or (2) otherwise made proper effort that prevented the commission of the crime that was the object of the conspiracy. Renunciation by one conspirator does not affect the liability of another conspirator who does not join in the renunciation.

(g) Notwithstanding AS 22.10.030, venue in actions in which the crime of conspiracy is alleged to have been committed may not be based solely on the location of overt acts done in furtherance of the conspiracy.

(h) In this section,

(1) "overt act in furtherance of the conspiracy" means an act of such character that it manifests a purpose on the part of the actor that

the object of the conspiracy be completed;

(2) "serious felony offense" means an offense

(A) against the person under AS 11.41, punishable as an unclassified or class A felony;

(B) involving controlled substances under AS 11.71, punishable as an unclassified, class A, or class B felony;

(C) that is criminal mischief in the first degree under AS 11.46.475; or

(D) that is terroristic threatening in the first degree under AS 11.56.807.

(i) Conspiracy is

(1) an unclassified felony if the object of the conspiracy is murder in the first degree;

(2) a class A felony if the object of the conspiracy is a crime punishable as an unclassified felony other than murder in the first degree;

(3) a class B felony if the object of the conspiracy is a crime punishable as a class A felony;

(4) a class C felony if the object of the conspiracy is a crime punishable as a class B felony.

AS 11.46.400 Arson in the First Degree

(a) A person commits the crime of arson in the first degree if the person intentionally damages any property by starting a fire or causing an explosion and by that act recklessly places another person in danger of serious physical injury. For purposes of this section, "another person" includes but is not limited to fire and police service personnel or other public employees who respond to emergencies, regardless of rank, functions, or duties being performed.

(b) Arson in the first degree is a class A felony. Conspiracy "B"

AS 11.46.410 Arson in the Second Degree

(a) A person commits the crime of arson in the second degree if the person knowingly damages a building by starting a fire or causing an explosion.

(b) In a prosecution under this section, it is an affirmative defense

(1) that no person other than the defendant had a possessory, proprietary, or security interest in the building or that all persons having such an interest consented to the defendant's conduct; and

(2) that the sole intent of the defendant was to damage or destroy the building for a lawful purpose.

(c) Arson in the second degree is a class B felony. Conspiracy "C"

LEGISLATIVE RESEARCH SERVICES
Alaska State Legislature
Division of Legal and Research Services
State Capitol, Juneau, AK 99801

(907) 465-3991 phone
(907) 465-3908 fax
research@legis.state.ak.us

Memorandum

TO: Representative Max Gruenberg
FROM: Chuck Burnham, Legislative Analyst
DATE: February 21, 2012
RE: Legislative History: Arson as a Crime of Conspiracy
LRS Report 12.207

You asked whether the Alaska Legislature has considered adding the crimes of arson in the first or second degree to the offenses that can be prosecuted as crimes of conspiracy.

As you know, Alaska's current law on crimes of conspiracy is codified at AS § 11.31.120, which was enacted in 1994.[1] We located one measure—SB 343 (1991)—through which the Legislature contemplated including arson in the first and second degrees (AS § 11.46.100-110) among the crimes that could be prosecuted as conspiracy.[2]

The Senate approved CSSB 343 (JUD) AM on reconsideration by a vote of 18-2 on May 6, 1992, after which it received referrals to the House Judiciary and Finance Committees on May 8. The bill was forwarded to Finance on May 10 after receiving 4 "do pass" and one "no recommendation" votes in Judiciary. The bill received no further hearings before adjournment of the second session of the 17th Legislature on May 15, 1992. We located no subsequent measure seeking to include arson under the conspiracy statute.

Our review of committee minutes for SB 343 found no specific mention of the arson provisions of the bill. Where opposition was expressed, it was typically related to the broader topics of the impact, effectiveness, and necessity of conspiracy laws. Although supported by the Department of Law and Attorney General, SB 343 brought opposition from other individuals and groups—notably the American Civil Liberties Union—who believed existing laws were sufficient deterrents to the crimes considered in the bill. The Public Defender's Office and Office of Public Advocacy held the position that the crime of conspiracy was a "high cost experiment" and unlikely to induce guilty pleas, enhance penalties, or increase public safety.[3]

We hope this is helpful. If you have questions or need additional information, please let us know.

[1] Ch. 3 SLA 1994.

[2] We include a copy of the text of SB 343 (1991) as an attachment. We searched bills back to 1987 for crimes of conspiracy and arson. Although we believe our research to be through, there may be additional bills relevant to your request that we over looked due to variations in construction and wording.

[3] Testimony before the House Judiciary Committee of Brant McGee, director of the Office of Public Advocacy, May 5, 1992.

David Tyler
Director/State Fire Marshal
5700 E. Tudor Rd.
Anchorage, AK 99507

FIRE AND LIFE SAFETY
PUBLIC INFORMATION OFFICE

Megan A. Peters
Information Officer
907.269.5413
cell: 907.351.3137
megan.peters@alaska.gov

Press Release

May 1, 2009

2009 Arson Awareness Week

May 3 - 9

(ANCHORAGE, Alaska) — Across the nation this week, fire officials are speaking out against Arson. The Alaska Department of Public Safety is joining in the educational push. According to the National Fire Protection Association, in 2005, an estimated 323,900 intentionally set fires were reported to U.S. fire departments. These fires resulted in 490 civilian fire deaths, three firefighter deaths, 1,500 civilian fire injuries and 7,600 firefighter injuries. These fires caused $1.102 billion in direct property damage.

In Alaska during 2005, six deaths were attributed to intentionally set fires. Last year, there were two people in Alaska killed by intentionally set fires.

The theme for the 2009 Arson Awareness Week is Arson for Profit. Nationwide, community officials are reporting a sharp increase of vehicle owners who are suspected of reporting their vehicle stolen and then destroying their vehicle by setting it on fire. There has also been an increase of vehicle arson arrests.

Arsons are often times done for financial reasons, to include collecting insurance money, liquidating property, dissolving businesses and concealing losses.

Arson for profit affects everyone through the loss of life, increased insurance premiums and related expenses for the fire and law enforcement professionals. It can be curtailed by a collaborative effort and cooperation of fire investigators, law enforcement, insurance professionals and the legal system.

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HR 5/6

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **HB 56**
Fiscal Note Number: **4**
Publish Date: **2/24/12 (H)**

Identifier (file name): HB056-LAW-CRIM-12-07-11
Title: An Act making arson in the first degree and arson in the second degree serious felonies.
Sponsor: Representative(s) Gatto, Gruenberg, and Lynn
Requester: (H) Finance

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 12/07/11 11:00AM
Approved by: John J. Burns, Attorney General — Date: 12/7/2011
Department of Law

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 56

Analysis

HB 056 adds arson in the first and second degrees to those crimes defined as a "serious felony offense" in the statute defining conspiracy. With this amendment, the crime of conspiracy would prohibit persons from conspiring to commit arson in the first or second degree.

Passage of this legislation would have no foreseeable fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**HB 56**
Fiscal Note Number	**5**
(H) Publish Date	**2/24/12**

Identifier (file name)	HB056-DPS-FLS-12-22-11	Dept. Affected	Public Safety
Title	"An Act making arson in the first degree and arson in the second degree serious felonies..."	Appropriation	Fire and Life Safety
		Allocation	Fire and Life Safety Operations
Sponsor	Representatives Gatto, Gruenberg, Lynn		
Requester	(H) FIN	OMB Component Number	2883

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated on new fiscal note form.

Prepared by	Kelly Howell	Phone	(907) 269-5591
Division	Office of the Commissioner	Date/Time	12/22/11 2:40 PM
Approved by	Joe Masters, Commissioner	Date	12/15/2011
	Department of Public Safety		

(Revised 11/28/2011 OMB)

FISCAL NOTE #5

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 56

Analysis

Passage of this legislation will have no fiscal impact on the Division of Fire and Life Safety.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 56**
Fiscal Note Number **6**
Publish Date **2/24/12 (H)**

Identifier (file name) HB056-DOC-OC-12-22-11
Title "An Act making arson in the first degree and arson in the second degree serious felonies for purposes of..."
Sponsor Representative Gatto, Gruenberg and Lynn
Requester House Finance Committee

Dept. Affected DOC
Appropriation Admin & Support
Allocation Commissioner's Office
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**	**	**	**	**	**	**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Update to reflect current fiscal year.

Prepared by Leslie Houston, Director
Division Department of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Department of Corrections

Phone 907-465-3339
Date/Time 12/22/11 3:45 PM
Date 12/22/2011

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 56

Analysis

This legislation is creating a new serious felony crime of conspiring to commit arson in the first degree and arson in the second degree. Therefore, the Department of Corrections has no information to determine the number of offenders that will be placed under the custody of the department.

The department will closely monitor potential future impacts of this legislation.

THE ALASKA ASSOCIATION OF FIRE & ARSON INVESTIGATORS

February 15, 2011

Representative Carl Gatto
Representative Max Gruenberg
Representative Bob Lynn

Reference: House Bill 56 - Arson

Dear Representatives:

The Alaska Association of Fire & Arson Investigators is in total support of House Bill 56 and would like to offer our assistance in any way, which would aid in the enactment of this bill.

It is our belief the enactment of this bill will provide a greater deterrent to the crime of arson and allow for the prosecution of arson/conspiracy cases, where the actual arson was not completed, but a crime nonetheless committed. This will put a closure to a loophole presently in the current law.

Please feel free to contact my office at 907-262-4792 or ghale@borough.kenai.ak.us.

Sincerely,

Gary E. Hale, President
Alaska Association of Fire & Arson Investigators

APOA
ALASKA PEACE OFFICERS ASSOCIATION

ALASKA ASSOCIATION

Women Police of Alaska

February 14, 2011

Representative Carl Gatto
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Gatto:

On behalf of our respective organizations, we would like to thank you for introducing HB 56, an Act making arson in the first degree and arson in the second degree serious felonies for purposes of application of the crime of conspiracy.

We met recently to review proposed legislation and decided to unanimously support this bill.

Again, thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organizations can do to assist in the passage of this bill.

Sincerely,

John Lucking Jr., President
Alaska Peace Officers Association
PO Box 240106
Anchorage AK 99524

Tom Clemons, President
Alaska Association of Chiefs of Police
183 Nelson Ave
Wasilla AK 99654

Michele Logan, President
Women Police of Alaska
PO Box 233306
Anchorage AK 99523

cc: Max Gruenberg
Bob Lynn

MUNICIPALITY OF ANCHORAGE

Mayor Dan Sullivan

February 15, 2011

Representative Carl Gatto
Representative Max Gruenberg
Representative Bob Lynn

Reference: House Bill No. 56 - Arson

Dear Representatives:

The Anchorage Fire Department is fully in support of House Bill No. 56 and would like to offer our assistance in any way you feel would be beneficial to aid in the enactment of this bill.

It is out belief that the enactment of this bill will provide a greater deterrent to the crime of arson and allow for the prosecution of arson/conspiracy cases where the actual arson was not completed, but a crime nonetheless was committed.

I can be reached at (907) 267-4936 or by e-mail at hallms@muni.org should you wish to contact me.

Sincerely,

Mark S. Hall
Fire Chief

cc: Brian Balega – Arson Investigator – Anchorage Fire Department

Fire Chief Richard Etheridge

February 17, 2011

Representative Carl Gatto
Representative Max Gruenberg
Representative Bob Lynn

Reference: House Bill No. 56 – Include Arson in Crimes of Conspiracy

Dear Representatives:

Capital City Fire/Rescue fully supports House Bill No. 56 and would like to offer our assistance in any way that would be beneficial to the enactment of this bill.

If this bill were enacted, we believe that there would be a greater deterrent to the crime of arson and allow the prosecution of arson/conspiracy cases when the actual arson was not completed, but a crime was committed.

I can be reached at (907) 586-5322 or by e-mail at dan_jager@ci.juneau.ak.us if you wish to contact me.

Sincerely,

Daniel M. Jager
Fire Marshal

Mailing Address: 820 Glacier Avenue Juneau, Alaska 99801

JuneauEmpire.com

To catch an arsonist

Juneau Crime Line announces new arson reward program

Posted: March 15, 2012 - 12:10am

By EMILY RUSSO MILLER

JUNEAU EMPIRE

After a reported 31 arsons in 13 months, the Juneau Crime Line is upping the ante in hopes of catch arsonists who have evaded police.

The nonprofit crime solving organization, which is Juneau's equivalent to Crime Stoppers, announced a new $1,500 arson reward program Wednesday to incentivize those with information about unlawful blazes to come forward.

"We're trying to get some information to help the police department to get these arsons to stop," longtime Crime Line board member Robin Paul said in a phone interview. "That's our main goal."

Crime Line tipsters, who are guaranteed anonymity, are usually awarded up to $1,000 when they provide information that is instrumental to cracking unsolved cases. But Paul hopes the extra $500 will prompt more leads.

"These arsons are something that have really been problematic for the community," she said.

Capital City Fire Marshal Daniel Jager said there were 31 arson incidents reported from January 2011 through February 2012, and that all of those cases are still open and active. Those include 11 vehicle fires, fire damage to the turf field at Adair-Kennedy Memorial Park and Thunder Mountain High School sports fields and the destruction of a Porta-Potty and to the Twin Lakes playground, according to a statement from Paul.

"All of these are still open, and we're still actively pursing leads on them," Jager said. "We haven't just forgot about them."

Perhaps the most troubling suspected arson was the vehicle and carport fire at the Crow Hill Condominiums last July that "could have resulted in tragedy if the fire had spread to the complex and trapped unaware sleeping residents," Paul said.

The perpetrator or perpetrators of that crime still remain at large.

CCFR and the Juneau Police Department work together to solve arson cases, with the fire marshal focused on the fire scene (the point of origin of the fire, whether an accelerant was used, etc.) while the police conduct the criminal investigation. But when leads wind down or "things go cold," as Paul put it, Crime Line can reignite a case by enticing informants to come forward with a monetary award.

"(Arson) is a very big concern for us, and I'm pleased to see the Crime Line is offering rewards to help us solve these issues," JPD spokesman Lt. David Campbell said in an interview.

He said arson not only poses danger to property and people, but to firefighters and others who respond to the scene.

Arson cases can be difficult to investigate and prosecute if there's not a confession or witness, Jager said, because potential physical evidence is not only destroyed in the flames, but also by firefighters while doing their job suppressing the fire. He said there's about a 2 percent arson conviction rate nationwide.

Jager said he hopes this new reward program will jog people's memory and cause them to think back to see if they remember anything out of the ordinary; and for those who know something, to come forward. The anonymity Crime Line affords is the key, he said.

"Sometimes people are a little more willing to do the right thing if they have a reward, but the key is not so much the money award, it's the fact that it can be done anonymously," he said. "They don't want people to know that they're involved and that's understandable. I think the Crime Line is a great avenue for people who aren't comfortable doing that in person."

Jager added, "The money helps, but for the most part, people, they're just concerned about potential ramifications."

The 31 arsons have come at a high price. Jager estimates the total damage from all the above instances is much more than $100,000, and the damage from the Crow Hill fire alone caused as much.

Local businesses — like Shattuck & Grummett Insurance and Malia Hayward State Farm Insurance — and other community members have stepped forward to pledge money to the special arson reward program. Crime Line is funded only by donations from the community.

This isn't the first time Crime Line has created a special reward program. According to the Crime Line website, more than $10,000 was pledged for the unsolved murder of Johnny L. Jack Sr. in October 1988 and the murder of Cindy Elrod nearly 30 years ago.

The group also offers up to $1,500 for reporting the purchase or distribution of oxycontin in the Juneau area.

Other popular programs are the $100 reward for reporting drunken driving, and the special graffiti program, sponsored by the city, also pays $100, according to the website.

The last suspected arson incident in Juneau area, Jager said, was a vehicle fire by Glacier Gardens, a botanical garden on Glacier Highway, about two weeks ago.

To report a tip, visit juneaucrimeline.com.

• Contact reporter Emily Russo Miller at 523-2263 or at emily.miller@juneauempire.com.

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HB

80

<TARGET><BILL>HB 80</BILL><SUBJECT>HB
80</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Member:
House Finance Committee
Legislative Budget & Audit Committee

Chair:
House Budget Sub Committees on:
- Department of Administration
- Department of Labor and Workforce Development

Session:
Alaska State Capitol
Juneau, AK 99801-1182
Phone: (907) 465-2679
Fax: (907) 465-4822
Toll Free (800) 505-2678

Interim:
600 E. Railroad Ave
Wasilla, AK 99654
Phone: (907) 376-2679
Fax: (907) 373-4745

Representative Mark Neuman
Rep.Mark.Neuman@legis.state.ak.us

Sponsor Statement

Alaska Statutes already recognize that we have a right to use deadly force to protect our family, person, and property. HB 80 further clarifies that right exists not only in our home but also in any place that we have a right to be.

This legislation clarifies the individual's right to stand their ground and not second guess the consequence of protecting their family or self.

HB 80 strengthens the legal recognition of a basic human right to defend oneself by sending a message to the Judiciary and Law Enforcement that it is the criminal who has the duty to retreat.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 080**
Fiscal Note Number
Publish Date

Identifier (file name)	HB080-LAW-CRIM-12-07-11	Dept. Affected	Law
Title	An Act relating to self defense in any place where a person has a right to be.	Appropriation	Criminal
		Allocation	Criminal Justice Litigation
Sponsor	Representative(s) Neuman, Feige, Lynn, and Costello		
Requester	(S) Judiciary	OMB Component Number	2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by	Eileen Donahue, Division Operations Manager	Phone	465-5427
Division	Administrative Services	Date/Time	12/07/11 11:00AM
Approved by	John J. Burns, Attorney General	Date	12/7/2011
	Department of Law		

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 080

Analysis

House Bill 80 expands the places from which a person need not retreat before using deadly force in self defense to any place the person has a right to be. The Criminal Division anticipates an increase in cases, to both screen referrals and prosecute those that are accepted.

The fiscal impact of this legislation cannot be accurately determined at this time.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB080**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB080-DPS-DET-12-22-11
Title: "An Act relating to self defense in any place a person has a right to be."
Sponsor: Representatives Neuman, Feige, Lynn, Costello
Requester: Senate Judiciary

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated on new fiscal note form.

Prepared by: Kelly Howell
Division: Office of the Commissioner
Approved by: Joe Masters, Commissioner
Department of Public Safety

Phone: (907) 269-5591
Date/Time: 12/22/11 2:32 PM
Date: 12/15/2011

(Revised 11/28/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB080

Analysis

This bill amends AS 11.81.335 (justification for the use of deadly force) by addressing areas (exceptions) a person is not required to leave prior to the application of deadly force.

Passage of this legislation will have no fiscal impact on the department.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

March 1, 2012

Mr. James Fayette
310 "K" Street, Suite 520
Anchorage Alaska 99501

Dear ~~Mr. Fayette~~ Jay,

The Senate Judiciary Committee has a bill under consideration, House Bill 80, which would significantly alter the law of self-defense in Alaska. Your experience as a veteran homicide prosecutor would be very valuable in helping the committee to understand the nuances of self-defense especially with respect to its application in actual cases.

I am inviting you to testify before the committee on Friday, March 16, 2012, starting at 1:30 p.m.

Sincerely,

Senator Hollis French

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sean Parnell, Governor

1031 W. 4th Ave., Ste. 200
Anchorage, AK 99501
PHONE: (907)269-5100
FAX: (907)269-5110

March 28, 2012

The Honorable Hollis French
Chair, Senate Judiciary Committee
State Capitol, Room 417
Juneau, AK 99801-1182

Re: *HB 80*

Dear Senator French:

Thank you for conducting the hearing before the Senate Judiciary Committee regarding the above-referenced bill. Please permit me to address two issues.

First, I hope it was made clear during his testimony that Assistant District Attorney Jay Fayette was testifying on his own behalf, and not on behalf of the Department of Law or the administration. We respect his right to express his views as a private citizen but there should be no confusion over whose views he purported to represent.

Secondly, we respectfully disagree with Mr. Fayette. Along with the 28 legislators who sponsored and co-sponsored this bill, the administration believes it has merit.

Alaskans are undoubtedly drawn to this state for many reasons, including the outdoor and recreational lifestyle. We believe, along with other states who have enacted similar legislation, that citizens have a right to protect themselves outside the home if confronted by deadly force. We acknowledge this may complicate certain prosecutions – and we appreciate your sensitivity to this factor as a former prosecutor – but in the final analysis the rights of citizens to defend themselves, both in and outside the home, should not rest on the convenience of prosecutors. Notwithstanding Mr. Fayette's anecdotal evidence, we are not convinced that the perpetrators of those crimes he described would have gone free had the law been in effect. The fact that defendants may attempt to take advantage of the law once it is on the books should not dissuade us from enacting laws that protect a citizen's right to legitimate self-defense outside the home.

Thank you for your consideration. If you have any questions or concerns about the administration's position, please feel free to contact me.

Sincerely,

Michael C. Geraghty
Attorney General

cc: The Honorable Senator Bill Wielechowski
The Honorable Senator Joe Paskvan
The Honorable Senator Lesil McGuire
The Honorable Senator John Coghill

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
April 16, 2010
9:38 a.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Lesil McGuire
Senator John Coghill

MEMBERS ABSENT

Senator Dennis Egan

COMMITTEE CALENDAR

CS FOR HOUSE BILL NO. 381(JUD)
"An Act relating to self defense in any place where a person has a right to be."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 381
SHORT TITLE: SELF DEFENSE
SPONSOR(s): REPRESENTATIVE(s) NEUMAN

02/23/10	(H)	READ THE FIRST TIME - REFERRALS
02/23/10	(H)	JUD, FIN
03/15/10	(H)	JUD AT 1:00 PM CAPITOL 120
03/15/10	(H)	Heard & Held
03/15/10	(H)	MINUTE(JUD)
03/29/10	(H)	JUD RPT CS(JUD) NT 3DP 1DNP 2NR
03/29/10	(H)	DP: LYNN, GATTO, RAMRAS
03/29/10	(H)	DNP: HOLMES
03/29/10	(H)	NR: GRUENBERG, HERRON
03/29/10	(H)	JUD AT 1:00 PM CAPITOL 120
03/29/10	(H)	Moved CSHB 381(JUD) Out of Committee
03/29/10	(H)	MINUTE(JUD)
04/08/10	(H)	FIN AT 9:00 AM HOUSE FINANCE 519
04/08/10	(H)	Moved CSHB 381(JUD) Out of Committee
04/08/10	(H)	MINUTE(FIN)
04/09/10	(H)	FIN RPT CS(JUD) NT 6DP 1DNP 2NR

04/09/10	(H)	DP: THOMAS, N.FOSTER, KELLY, SALMON, STOLTZE, HAWKER
04/09/10	(H)	DNP: DOOGAN
04/09/10	(H)	NR: GARA, JOULE
04/12/10	(H)	TRANSMITTED TO (S)
04/12/10	(H)	VERSION: CSHB 381(JUD)
04/13/10	(S)	READ THE FIRST TIME - REFERRALS
04/13/10	(S)	JUD, FIN
04/15/10	(S)	JUD AT 8:30 AM BUTROVICH 205
04/15/10	(S)	Heard & Held
04/15/10	(S)	MINUTE(JUD)

WITNESS REGISTER

JOHN STRALEY, representing himself
Sitka, AK
POSITION STATEMENT: Testified in opposition to HB 381.

BRIAN JUDY, Alaska Liaison
National Rifle Association (NRA)
POSITION STATEMENT: Testified in support of HB 381.

CHUCK KOPP, representing himself
POSITION STATEMENT: Testified in strong support of HB 381, but suggested caution.

SUE MCLEAN, Director
Criminal Division
Department of Law (DOL)
POSITION STATEMENT: Testified that DOL is opposed to HB 381.

ACTION NARRATIVE

9:38:35 AM
CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 9:38 a.m. Senators McGuire, Wielechowski, Coghill, and French were present at the call to order.

HB 381-SELF DEFENSE

9:38:47 AM
CHAIR FRENCH announced the consideration of HB 318. [CSHB 381(JUD) was before the committee.] It was heard previously at which time testimony was taken from the sponsor and DOL and one public member.

JOHN STRALEY, representing himself, informed the committee that he has been a criminal defense investigator since 1984 and the author of several crime novels. Based on that experience he is speaking in opposition to HB 381. The current law works and protects citizens. It asks that people pause before using deadly force in potentially violent confrontations, whereas the proposed change is an invitation to gun fighting. He related that he has sat with dozens of criminal defendants after a homicide and although the circumstances are all different, a unifying theme is that almost all felt justified in the instant that they took a life. But later, and often just seconds later, these criminal defendants saw that their judgment was flawed or clouded and wrong. We don't need to send citizens the message that conflict should be quickly resolved by violence and that's what HB 381 does, he said.

9:43:27 AM

MR. STRALEY observed that the language in the bill sounds reasonable and like it's just a small change, but it's like changing a compass course a few degrees. Over time it will have a wide impact on Alaskan life. He related that his and other crime stories are about citizens bypassing the flawed and burdensome justice system to mete out moral vengeance. His stories clearly differentiate between the good guys and the bad guys and the good guys always win. But this bill isn't crafting a novel. Crafting legislation is a slow and deliberative process that considers the effects and consequences.

MR. STRALEY expressed his strong belief that this small change will increase gun violence and ironically it will offer the bad guys one less hurdle to jump for killings that they might want to commit. HB 381 doesn't require somebody to retreat or pause to consider the consequences. He suggested that if the committee isn't inclined to listen to him then it should listen to the Department of Law, and people like Rick Svobodny who have written to oppose this bill. HB 381 is well intentioned, but it sends the wrong message and the results will have deadly consequences, he concluded.

9:48:47 AM

BRIAN JUDY, Alaska Liaison, National Rifle Association (NRA), described HB 381 as important legislation that provides protection and assurance that a person doesn't have to retreat when he/she is lawfully in a place and feels threatened. He pointed out that existing Alaska law already specifies that a person has no duty to retreat if he/she is "on premises which the person owns or where the person resides or in a building

where the person works." The intent of HB 381 is to extend that to any place where a person has a legal right to be.

Under the proposed language of HB 381, a person who is dragged into an alley by a rapist or a person who is dragged into a car by a kidnapper has no duty to retreat and they may fight back with force. The NRA views it as common sense to be able to stand one's ground and meet force with force, he said.

MR. JUDY reiterated that law-abiding citizens shouldn't fear criminal prosecution when they stand their ground and defend themselves when in a place that they have a legal right to be. On behalf of the NRA he urged support for HB 381.

9:55:27 AM

CHUCK KOPP, representing himself, said he is speaking in strong support of the intent of HB 381 to help protect innocent citizens, but he has reservations about the unintended consequences as currently written.

MR. KOPP pointed out that existing law appropriately identifies in Title 11 that the use of deadly force is justified when used to defend against murder, felony assault, kidnapping, sexual assault, and sexual abuse of a minor when perpetrated in your home, place of work and anyplace you are protecting a family member. However, the law also recognizes that most uncomfortable aggressive or violent encounters don't rise to this level. Most occur in public places and there's a fundamental assumption in the law that people show deference and yield to one another in these shared access areas.

MR. KOPP said that while the sponsor statement says that this legislation makes it clear that it's the criminals who have a duty to retreat, the reality is that when violence erupts the ensuing investigation has difficulty determining who the criminal is in the matter.

MR. KOPP offered his belief that the current law establishes a correct balance between the right to defend oneself and the duty to yield. He cautioned that HB 381 may have the unintended impact of tipping the balance to an overzealous use of deadly force in self defense. He highlighted that the Department of Law drafted an amendment that addresses his concerns and carries forward the intent of the sponsor.

10:00:41 AM

SENATOR WIELECHOWSKI asked if he is expressing support for the proposed amendment that is on members' desks.

MR KOPP answered yes.

SENATOR MCGUIRE asked to hear from the Department of Law.

SUE MCLEAN, Director, Criminal Division, Department of Law (DOL), stated that while the proposed amendment may be a compromise, DOL is still opposed to HB 381. Mr. Judy suggested that the purpose of this law is to relieve a person of the fear of prosecution for defending him or herself, but what hasn't been said is that there is an extraordinary and unacceptable problem with prosecuting people after they have defended themselves. When a homicide or use of deadly force incident is being investigated, the state is aware that it has the burden to prove that a person did not act in self defense otherwise it will face a judgment of acquittal. This means that a case isn't filed when it appears that there's reasonable doubt.

10:03:48 AM
MS. MCLEAN provided the following illustrations where DOL declined to prosecute because it saw self defense:

- Mr. A was in a public park and came on to a woman. She called her boyfriend on her cell phone to report that a man was harassing her. The boyfriend possibly heard that the man was threatening his girlfriend. The boyfriend rushes to the park and approaches Mr. A with a baseball bat in his raised hand. Mr. A has a gun in his waistband and shoots the boyfriend. DOL reviewed the circumstances and determined it couldn't prove a) that Mr. A had started a violent incident and therefore couldn't claim self defense because it wasn't clear that he was in any way physically threatening the girlfriend; and b) that Mr. A knew that he could retreat. This was a situation that came up quickly and a bat absolutely is a deadly weapon so Mr. A was not charged. HB 381 will exacerbate this type of situation, she asserted.
- Mr. A was found stabbed to death and in a ditch. There was no eyewitness but the police learned that he was seen arguing with Mr. B earlier in the evening. Mr. B acknowledged that they had been arguing. Mr. B said Mr. A threw a coat over my head and I knew that he always carried a knife so I thought he was trying to catch me off guard so he could stab me. I ripped the coat off my head and I stabbed him. Because there were no eyewitnesses DOL knew it

couldn't prove that Mr. B's story wasn't true so he wasn't charged.

CHAIR FRENCH recessed the meeting from 10:06 a.m. to 10:25 a.m. due to a fire alarm.

10:25:26 AM
MS. MCLEAN provided a third example where the state did not file charges because it could not prove that the person did not act in self defense.

- The police were called because Mr. A was sitting on the curb and it appeared that his throat had been cut. Mr. A said he and Mr. B were in the adjacent apartment building and they were fighting. Mr. A was intoxicated. A woman in the apartment said she saw Mr. B cutting Mr. A but she didn't know what happened before that because she was in a different room, but she could hear them quarreling. Mr. B told the police that he and Mr. A were fighting. He said Mr. A tried to strangle me and I felt that I had to use deadly force to prevent my being killed. The intoxicated Mr. A said he didn't know where his hands were when he was fighting Mr. B. The state's perspective is that it didn't see a duty to retreat and couldn't disprove the reasonableness of Mr. B's use of force.

MS. MCLEAN noted that the packets have a copy of the jury instructions and use note that are typically given in cases where deadly force is used. It clearly states that a person may use deadly force unless he/she knows that he/she can safely retreat. The retreat duty doesn't apply in the specified circumstances like the home. These cases that are before a jury have already gone through a screening process in which DOL has assessed them and made a decision that there is no reasonable basis to claim self defense in the case and charged. That's an example of why it's troubling to have a bill in which it is alleged that people need protection from overzealous prosecutors who are prosecuting people who have legitimately acted in self defense.

10:29:20 AM
MS. MCLEAN emphasized that DOL believes that if this bill becomes law it will absolutely increase trials. A defense attorney now might advise a client to consider a resolution that would save some jail time, but under this bill the defense attorney is likely to advise a client to go to trial because he/she didn't have to retreat. Furthermore, this change in the

law would give unreasonable people a license to act unreasonable and not retreat. The prosecution won't be able to say that it wasn't reasonable for a person not to retreat when there's a law that says they the person didn't need to retreat.

10:33:45 AM
CHAIR FRENCH moved conceptual Amendment 1 and objected for discussion purposes.

AMENDMENT 1

Add at the end of paragraph (5):

Provided that such person may use deadly force against an intruder or attacker in a place that is not his or her residence without a duty to retreat only if the person reasonably believes that he or she or another is in imminent danger of death or serious bodily harm from which he or she or another can only be saved by the sue of deadly force against the intruder or attacker.

CHAIR FRENCH, noting that the amendment came from the Department of Law, asked DOL for an explanation.

MS. MCLEAN reiterated that DOL is opposed to this bill. The amendment attempts to say that a person that is in a place they have a right to be can use deadly force if the evidence shows that it was the only way that the person could have defended him/herself against death or serious physical injury.

10:36:09 AM
CHAIR FRENCH removed his objection to Amendment 1

SENATOR COGHILL asked for help understanding the nexus between "reasonably believes" [on line 3] and "only" [be saved] on line 4.

SENATOR WIELECHOWSKI interpreted it to mean that a person reasonably believes that they can only be saved by the use of deadly force.

CHAIR FRENCH agreed.

SENATOR COGHILL said that's the clarification he wanted; otherwise there could be two standards.

10:37:55 AM
CHAIR FRENCH observed that the instructions that the jury receives is helpful. He read the following reasonableness clause from the pattern jury instruction that is given in cases involving use of deadly force in defense of self or others:

> The reasonableness of a defendant's beliefs must be evaluated by the jury based on the circumstances of the situation facing the defendant, including any relevant knowledge the defendant had about the other person; physical attributes of all persons involved (including the defendant); and any prior experiences that could provide a reasonable basis for the defendant's beliefs.

SENATOR COGHILL observed that "reasonably" gives the mental state while "only" says that it's without regard to mental state.

SENATOR WIELECHOWSKI asked if "reasonably believes" is an objective standard or a subjective standard.

MS. MCLEAN explained that there are always two standards in self defense. First, there has to be proof of an actual subjective belief - the defendant has to actually believe it. Second, there has to be a subjective belief that the jury is willing to regard as reasonable.

10:39:30 AM
CHAIR FRENCH added that the reasonableness clause is somewhat subjective, but reasonable belief means that a reasonable person would have held such a belief under the same circumstance.

SENATOR COGHILL observed that the part people will have to look at is whether or not [the use of deadly force] was the only way out.

CHAIR FRENCH reminded the committee that it's the prosecution that will have to disprove the defense beyond a reasonable doubt. The defendant doesn't have to prove that their action was reasonable.

10:41:00 AM
SENATOR MCGUIRE asked how intoxication is treated.

MS. MCLEAN advised that intoxication is not a defense to a criminal act unless the charge is an intentional criminal act.

In the case of homicide it is first degree murder with the specific intent to kill and then the jury can consider it as how it impacted the defendant's ability to form an intent.

CHAIR FRENCH asked how it plays out in a self defense claim.

MS. MCLEAN replied you're talking about diminished capacity and the status of that defense is always up in the air in Alaska. Basically, if self defense is raised the jury will hear everything.

SENATOR MCGUIRE said she appreciates the sentiment of the bill and she intends to support it, but she's concerned about the use of alcohol and how this may be interpreted by young people who are already inclined to pull out a knife or gun to settle a dispute.

10:46:14 AM
CHAIR FRENCH announced that without further objection, conceptual Amendment 1 is adopted. He held HB 381 in committee.

CHAIR FRENCH recessed the meeting to a call of the chair at 10:46 a.m.

The Miami Herald
Posted on Sat, Mar. 17, 2012

Shooter of Trayvon Martin a habitual caller to cops

By Frances Robles
frobles@MiamiHerald.com

PETER ANDREW BOSCH / MIAMI HERALD STAFF

Sybrina Fulton is the mother of Trayvon Martin, the Miami teenager who was killed by a neighborhood watch captain in Sanford, Florida.

The people at the Retreat at Twin Lakes had been missing bikes, grills and a few times thought strangers were casing their town houses.

When the homeowners association wanted to start a neighborhood watch, only one man stepped up: George Zimmerman, the 28-year-old who admitted to shooting an unarmed Miami Gardens teenager and who is now the focal point of a race-related scandal of national proportions.

Interviews with neighbors reveal a pleasant young man passionate about neighborhood security who took it upon himself to do nightly patrols while he walked his dog.

Licensed to carry a firearm and a student of criminal justice, Zimmerman went door-to-door asking residents to be on the lookout, specifically referring to young black men who appeared to be outsiders, and warned that some were caught lurking, neighbors said. The self-appointed captain of the neighborhood watch program is credited with cracking some crimes, and thwarting others.

But the killing of 17-year-old Trayvon Martin left the boy's family and attorneys convinced that the volunteer developed a twisted sense of entitlement, one that gave him a false sense of authority to enforce the rule of law in his tiny gated community. Trayvon's family's attorneys believe that led to racial profiling and murder.

"He would circle the block and circle it; it was weird," said Teontae Amie, 17. "If he had spotted me, he'd probably ask me if I lived here. He was known for being really strict."

Zimmerman called police 46 times since Jan. 1, 2011 to report disturbances, break-ins, windows left open and other incidents. Nine of those times, he saw someone or something suspicious.

"Hey, we've had some break-ins in my neighborhood, and there's a real suspicious guy at Retreat View Circle. This guy looks like he's up to no good," Zimmerman told a dispatcher on Feb. 26, the night of Trayvon's death.

According to 911 recordings released late Friday by Sanford police, Zimmerman said the person was walking slowly, looked drugged and appeared to be looking at people's houses. Police would later learn that Trayvon had gone to 7-Eleven during the NBA All Star game halftime to get Skittles and Arizona iced tea.

"These a--holes always get away," Zimmerman complained.

What happened next is unclear, and has already reverberated nationwide. Calls to 911 alerted police to a scuffle and someone crying for help. In one, the chilling howl stopped after the clear, crisp blast of a bullet. Trayvon was lying face down on the ground near a pathway that runs through the townhouse community.

One 911 caller sobbed to the dispatcher over not having helped the young man who wailed.

Zimmerman told police that was him crying for help and that Trayvon started the fight. He claimed self-defense and was not charged, flaring deep-seated racial tensions between blacks and police, who have a long history of distrust. On at least two prior occasions, the Sanford Police Department was accused of giving favorable treatment to relatives of officers involved in violent encounters with blacks.

In 2010, police waited seven weeks to arrest a lieutenant's son who was caught on video sucker-punching a homeless black man.

In 2005, two security guards — one the son of a longtime Sanford police officer and the other a department volunteer — killed a black man they said was trying to run them over. Black leaders complained of a lackluster investigation. The guards ultimately were acquitted.

"Zimmerman felt he was one of them; he felt he was a cop," said Trayvon's family attorney, Natalie Jackson, who accuses the police of protecting him.

The recent shooting raised troubling questions about whether the homeowners association knew its volunteer was armed with a Kel Tek 9mm semiautomatic handgun. Many residents — black and white — question Zimmerman's judgment and wonder why he would have engaged the teenager at all.

The answer may lie in police records, which show that 50 suspicious-person reports were called in to police in the past year at Twin Lakes. There were eight burglaries, nine thefts and one other shooting in the year prior to Trayvon's death.

In all, police had been called to the 260-unit complex 402 times from Jan. 1, 2011 to Feb. 26, 2012.

"He once caught a thief and an arrest was made," said Cynthia Wibker, secretary of the homeowners association. "He helped solve a lot of crimes."

Zimmerman told neighbors about stolen laptops and unsavory characters. Ibrahim Rashada, a 25-year-old African American who works at U.S. Airways, once spotted young

men cutting through the woods entering the complex on foot, and later learned items were stolen those days.

"It's a gated community, but you can walk in and steal whatever you want," Rashada's wife, Quianna, said.

They discussed the topic with Zimmerman when the watch captain knocked on their door late last year. Zimmerman seemed friendly, helpful, and a "pretty cool dude," Ibrahim Rashada said.

"He came by here and talked about carrying guns and getting my wife more involved with guns," he said. "He said I should have a weapon and that his wife took classes to learn how to use one.

"I do have a weapon, but I don't walk around the neighborhood with mine!"

Actually, he does not walk around the neighborhood at all.

"I fit the stereotype he emailed around," he said. "Listen, you even hear me say it: 'A black guy did this. A black guy did that.' So I thought, 'Let me sit in the house. I don't want anyone chasing me.' "

For walks, he goes downtown. A pregnant Quianna listened to her husband's rationale, dropped her head, and cried.

"That's so sad," she said. "I hope our child doesn't have to go through that."

Travis Williams, a black 16-year-old who wears dreadlocks, said last year a man came to his house and accused him of stealing a bicycle. The police even came and checked the serial numbers on the bike in his garage.

Problems in the 6-year-old community started during the recession, when foreclosures forced owners to rent out to "low-lifes and gangsters," said Frank Taaffe, a former neighborhood block captain.

"Just two weeks before this shooting, George called me at my girlfriend's house to say he saw some black guy doing surveillance at my house, because I had a left a window open," Taaffe said. "He thwarted a potential burglary of my house."

Taaffe sounded chagrined when he noted that the complex is now majority-minority. Census figures show Retreat at Twin Lakes is 49 percent white, non-Hispanic, 23 percent Hispanic, 20 percent African-American and 5 percent Asian.

He suspects Zimmerman got tired of thugs "and reached his breaking point," Taaffe said. "But why was he carrying a gun? Why not carry pepper spray or a Taser? That's bizarre-o."

Taaffe said Zimmerman was so normal that he came across as though he were "an engineer from Lockheed Martin." He did not show up to homeowner association meetings Rambo-style "wearing a bandana around his head with a bowie knife sticking out of his pocket," Taaffe said.

It's unclear what Zimmerman, who is married, does for a living, although he once owned a pressure washing company.

As for any past legal blemishes, he was once arrested for battery on a law enforcement officer when he interfered in a friend's arrest. The charge was reduced to simple battery, and he entered a plea that allowed him to have a clean record and qualify for a concealed weapons permit.

In a statement delivered to the Orlando Sentinel, his father, Robert Zimmerman, defended his son, who he said was a "Spanish-speaking minority with many black family members and friends."

"He would be the last to discriminate for any reason whatsoever," Robert Zimmerman wrote. "One black neighbor recently interviewed said she knew everything in the media was untrue and that she would trust George with her life. Another black neighbor said that George was the only one, black or white, who came and welcomed her to the community, offering any assistance he could provide. Recently, I met two black children George invited to a social event. I asked where they met George. They responded that he was their mentor."

He said the family prays for Trayvon and his parents every day.

At no time, the father wrote, did George Zimmerman follow or confront Trayvon, although the recording of the call to police shows the dispatcher asking him, "Are you following him?" and Zimmerman answered, "yeah."

"We don't need you to do that," the police dispatcher said.

Police volunteer program coordinator Wendy Dorival said she met Zimmerman in September at a community neighborhood watch presentation.

"I said, 'If it's someone you don't recognize, call us. We'll figure it out,' " Dorival said. "'Observe from a safe location.' There's even a slide about not being vigilante police. I don't know how many more times I can repeat it."

Police Chief Bill Lee said that although police do not encourage watch program volunteers to carry weapons, he recognizes a citizen's constitutional right to do so. No arrest was made, Lee said, because there was no evidence to disprove Zimmerman's account.

He has cooperated with the investigation and never retained an attorney, Lee said. His phone numbers are disconnected and no one answered the door at his home or his parents' home. His in-laws shooed a reporter away. After death threats and an avalanche of hate mail, Lee said Zimmerman went into hiding. Local station WFTV Channel 9 reported that he showed up with a truck last week and moved out.

"We are taking a beating over this," said Lee, who defends the investigation. "This is all very unsettling. I'm sure if George Zimmerman had the opportunity to relive Sunday, Feb. 26, he'd probably do things differently. I'm sure Trayvon would, too."

The Christian Science Monitor - CSMonitor.com

Florida students rally to arrest white neighborhood watch leader

College students plan to rally Monday in Sanford, Fla., and on the campus of Florida A&M University in Tallahassee. Rev. Al Sharpton is also planning a rally on Thursday.

An undated photo released by the Martin family shows 17-year-old Trayvon Martin who was shot and killed as he walked through a gated neighborhood in Sanford, Florida last month.
(REUTERS/Handout)

By Mike Schneider, Associated Press
posted March 19, 2012 at 12:26 pm EDT

Orlando, Fla.

College students around Florida are rallying to demand the arrest of a neighborhood watch captain who shot an unarmed black teen last month.

Students were rallying Monday in front of the Seminole County criminal courts building in Sanford, Fla., and on the campus of Florida A&M University in Tallahassee.

The Rev. Al Sharpton is also planning a rally for a black Florida teenager fatally shot by a white neighborhood watch volunteer. Sharpton will hold the rally Thursday at the First Shiloh Baptist Church in Sanford.

RECOMMENDED: How much do you know about the US Constitution? A quiz

No charges have been filed in the February death of 17-year-old Trayvon Martin in a gated community near Orlando. Martin's family has criticized police for not arresting 28-year-old George Zimmerman, who admitted to shooting the teen but said he fired in self-defense. Martin was not armed.

Zimmerman had called police to report a suspicious person walking through the neighborhood. The teen had gone to a convenience store for candy.

Martin's family says 911 calls show the teen was terrified as he tried to flee Zimmerman.Sanford police released eight 911 calls late Friday.

The neighborhood watch volunteer, Zimmerman, tells a dispatcher in the first call that he is following 17-year-old Trayvon Martin. He says Martin is running, but the dispatcher tells him not to follow the teen.

"This guy looks like he is up to no good. He is on drugs or something," Zimmerman told the dispatcher from his SUV. He added that the black teen had his hand in his waistband and was walking around looking at homes. "These a-------. They always get away," Zimmerman said on a 911 call.

Martin's family said they are now more convinced than ever that Zimmerman should be charged in the shooting. Several of the 911 calls made by neighbors describe some sort of scuffle or fight outside, someone yelling for help and a gunshot.

"(Zimmerman) was chasing him, he was following him, and my son was afraid," Sybrina Fulton, Trayvon Martin's mother, told the AP. "He didn't know who this stranger was."

The Florida college students are demanding the arrest of Zimmerman . Zimmerman's father has said the man is Hispanic and is not racist.

Florida law allows a person to use deadly force if the person believes he or she is facing a deadly threat. The case has been turned over to the State Attorney's Office, which can file charges or present the case to a grand jury.

The Martin family has asked that the case be handled by the FBI, rather than local authorities.

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March 7, 2012

Radio Iowa

Iowa's Radio News Network

Man who shot in self-defense now "cause celebre" at statehouse

March 7, 2012 By O. Kay Henderson

Jay Rodney Lewis (left) with
Senator Kent Sorenson.

A man who's now at the center of the legislature's debate over gun laws spent 112 days in jail before he was found "not guilty" of defending himself after two men chased him down in West Des Moines.

Forty-nine-year-old Jay Rodney Lewis, an ex-cop, shot one of the men threatening to attack him.

"I've become something of a cause celebre here in Iowa and it feels really strange. I mean, I'm just an ordinary guy," Lewis said during an interview with Radio Iowa.

"I got caught up in a very unfortunate situation and I went through hell…but in the end — when everything mattered — everything turned out right."

Senator Kent Sorenson, a Republican from Indianola, said the 911 tape shows Lewis did everything he could to avoid a confrontation.

"He is a victim, unjustly," Sorenson said Tuesday during remarks on the Senate floor. "…He was just defending himself against two racist thugs that were attacking him."

Lewis, a native of Kansas, is black. Because of his time in jail, Lewis lost his job and his home. Lewis lost all his worldly possessions, too, because apartment managers piled his belongings out on the curb for passersby to sift through and take away.

"You know, trying to keep things in perspective, I'm still trying to rebuild my life and it's very difficult, but it'll soon turn out all right," Lewis said. "I'm pretty sure."

After his release from jail, Lewis spent two nights sleeping in a car before a Des Moines church became aware of his situation and rented him a hotel room. Wearing donates clothes, Lewis made his way to the Iowa Senate Tuesday as Senator Sorenson cited the case as a reason for the Senate to take up a bill that cleared the House last week — legislation that would give Iowans the right to use "reasonable force" to stop a crime in a public place.

"This is a real person that is dealing with an issue now and the after-effects of that," Sorenson said. "He just did his God-given right of defending himself. We need to take action."

Lewis supports the bill that would allow people to use "reasonable force" to stop a crime in public. Current law — which stipulates that Iowans are to first try to get away from danger — isn't always workable, according to Lewis.

"You see what happens when you're held to a duty to retreat," Lewis said. "Sometimes it's not feasible to retreat and sometimes, as in my case, I did retreat and it did no good and yet the prosecution was still trying to hammer me for failing to retreat after I'd already retreated. I fact, I'd already retreated twice."

All 24 Republicans in the Senate have signed a document called a "discharge petition" in an effort to make the bill eligible for debate, but the ultimate decision about which bills are debated is made by Senate Democratic Leader Mike Gronstal. Senator Sorenson's not optimistic about the chances for this bill.

"We have Senator Gronstal, who I believe is basically a dictator in the senate and some people may laugh at that, but I believe it's true," Sorenson told reporters. "…That's because Senator Gronstal decides to do what he's so good at and that's Gron-stalling."

11.81.330. Justification: Use of nondeadiy force in defense of self

(a) A person is justified in using nondeadiy force upon another when and to the extent the person reasonably believes it is necessary for self-defense against what the person reasonably believes to be the use of unlawful force by the other person, unless

(1) the person used the force in mutual combat not authorized by law;
(2) the person claiming self-defense provoked the other's conduct with intent to cause physical injury to the other;
(3) the person claiming self-defense was the initial aggressor; or
(4) the force used was the result of using a deadly weapon or dangerous instrument the person claiming self-defense possessed while
(A) acting alone or with others to further a felony criminal objective of the person or one or more other persons;
(B) a participant in a felony transaction or purported transaction or in immediate flight from a felony transaction or purported transaction in violation of AS 11.71; or
(C) acting alone or with others in revenge for, retaliation for, or response to actual or perceived conduct by a rival or perceived rival, or a member or perceived member of a rival group, if the person using deadly force, or the group on whose behalf the person is acting, has a history or reputation for violence among civilians.

(b) A person who is not justified in using force in self-defense in the circumstances listed in (a)(1)--(3) of this section is justified in using force in self-defense if that person has withdrawn from the encounter and effectively communicated the withdrawal to the other person, but the other person persists in continuing the incident by the use of unlawful force.

SLA 1978, ch. 166, § 10; SLA 2004, ch. 124, § 17; SLA 2006, ch. 68, § 2, eff. Sept. 13, 2006.

11.81.335. Justification: Use of deadly force in defense of self

(a) Except as provided in (b) of this section, a person who is justified in using nondeadly force in self-defense under AS 11.81.330 may use deadly force in self-defense upon another person when and to the extent the person reasonably believes the use of deadly force is necessary for self-defense against

(1) death;
(2) serious physical injury;
(3) kidnapping, except for what is described as custodial interference in the first degree in AS 11.41.320;
(4) sexual assault in the first degree;
(5) sexual assault in the second degree;
(6) sexual abuse of a minor in the first degree; or
(7) robbery in any degree.

(b) A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others being defended, the person can avoid the necessity of using deadly force by leaving the area of the encounter, except there is no duty to leave the area if the person is

(1) on premises
(A) that the person owns or leases;
(B) where the person resides, temporarily or permanently; or
(C) as a guest or express or implied agent of the owner, lessor, or resident;
(2) a peace officer acting within the scope and authority of the officer's employment or a person assisting a peace officer under AS 11.81.380;
(3) in a building where the person works in the ordinary course of the person's employment; or
(4) protecting a child or a member of the person's household.

CREDIT(S)

SLA 1978, ch. 166, § 10; SLA 1990, ch. 4, § 10; SLA 2006, ch. 68, § 3, eff. Sept. 13, 2006.

11.81.620. Effect of ignorance or mistake upon liability

(b) A person is not relieved of criminal liability for conduct because the person engages in the conduct under a mistaken belief of fact, unless

(1) the factual mistake is a reasonable one that negates the culpable mental state required for the commission of the offense;
(2) the provision of law defining the offense or a related provision of law expressly provides that the factual mistake constitutes a defense or exemption; or
(3) the factual mistake is a reasonable one that supports a defense of justification as provided in AS 11.81.320 - 11.81.430.

****

11.81.350. Justification: Use of force in defense of property and premises

(a) A person may use nondeadly force upon another when and to the extent the person reasonably believes it is necessary to terminate what the person reasonably believes to be the commission or attempted commission by the other of an unlawful taking or damaging of property or services.

(b) A person may use deadly force upon another when and to the extent the person reasonably believes it necessary to terminate what the person reasonably believes to be the commission or attempted commission of arson upon a dwelling or occupied building.

(c) A person in possession or control of any premises, or a guest or an express or implied agent of that person, may use

(1) nondeadly force upon another when and to the extent the person reasonably believes it is necessary to terminate what the person reasonably believes to be the commission or attempted commission by the other of criminal trespass in any degree upon the premises;
(2) deadly force upon another when and to the extent the person reasonably believes it is necessary to terminate what the person reasonably believes to be a burglary in any degree occurring in an occupied dwelling or building.

(d) Repealed by SLA 2006, ch. 68, § 7, eff. Sept. 13, 2006.

(e) A person

(1) in a vehicle, or forcibly removed from a vehicle, may use deadly force upon another when and to the extent the person reasonably believes it is necessary to terminate what the person reasonably believes to be a carjacking of that vehicle at or about the time the vehicle is carjacked;
(2) outside of a vehicle may use deadly force upon another when and to the extent the person reasonably believes it is necessary to terminate what the person reasonably believes to be the theft of that vehicle when another person, other than the perceived offender, is inside of the vehicle; this paragraph does not apply to a person outside of a vehicle who is involved in a dispute with a person inside of the vehicle who is a household member of that person; in this paragraph, "household member" has the meaning given in AS 18.66.990.

(f) A person justified in using force under this section does not have a duty to leave or attempt to leave the area of the encounter before using force.

(g) In (e) of this section,

(1) "carjacking" means a robbery involving the taking or attempted taking of a vehicle from a person in possession of the vehicle;
(2) "vehicle" means a "motor vehicle" as defined in AS 28.40.100, an aircraft, or a watercraft.

CREDIT(S)

SLA 1978, ch. 166, § 10; SLA 2006, ch. 68, §§ 5 to 7, eff. Sept. 13, 2006.

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Man guilty of murder in shooting of off-duty MP

Victim's mother says killer showed no remorse.

By CASEY GROVE
casey.grove@adn.com
Published: October 29th, 2010 12:02 PM
Last Modified: October 29th, 2010 12:02 PM

An Anchorage jury Thursday found Vongdeuane Vongthongdy guilty of first- and second-degree murder in the killing of an off-duty Fort Richardson sergeant outside a downtown bar in 2008.

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The jury deliberated less than three hours. They also found Vongthongdy guilty of weapons misconduct for having a gun while drunk. He pleaded no contest to being a felon with a gun.

Vongthongdy, 28, was charged with shooting Sgt. Evan Minnear, 24, outside the Woodshed Lounge early on Nov. 30, 2008. It happened 16 days after Vongthongdy's release from jail for probation violations. He was jailed for failing to report to his probation officer and testing positive for marijuana and amphetamines. He was on probation for felony assault with a weapon, according to court documents.

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ERIK HILL / Anchorage Daily News
Vongdeuane Vongthongdy was found guilty on all charges in the November 30, 2008, shooting death of off-duty Army Sgt. Evan Minnear, Thursday morning October 28, 2010, at Nesbett Courthouse in downtown Anchorage.

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Minnear was having a night out with friends. They were celebrating his return from a 15-month tour in Iraq that ended the previous spring, his mother, Julie Rushton, said this week. Rushton traveled from Indianapolis to attend the three-week trial.

When Vongthongdy fired a .40-caliber semiautomatic handgun into the air outside the bar, Minnear, a military policeman, approached him to diffuse the situation, prosecutors said. Some shoving occurred and Vongthongdy shot Minnear in the chest. Minnear later died in a hospital.

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It was unbelievable, Rushton said, that her son would survive a tour of duty in Iraq and get shot to death in Anchorage.

Rushton found out that her son was dead when a black car pulled into her driveway. An Army officer and a chaplain -- "just like on TV," she said -- broke the news.

Rushton was elated Thursday when the jury returned its verdict.

"I wasn't supposed to, but I was going, 'Yes! Yes!' Doing the old arm pump," she said outside the courtroom.

Still, the past two years have taken their toll on Rushton and her sister, Joni Breeden, who also attended the trial. The crying often left them with red, puffy eyes, and Rushton's hand trembled whenever she reached for something in her bag.

"You don't ever get over this. It's closing a chapter, I guess," Rushton said. "Basically, I'll be living with this for the rest of my life."

"It's been constant, day in, day out, since the murder," she said. "I don't know what I'm going to do with myself. I'm so used to getting home and putting my dogs away so I could be on the phone (with court)."

"I guess I need to get a hobby now."

Assistant District Attorney Mara Michaletz leaned over the railing in the courtroom and hugged Rushton for a half-minute or so while they both cried after the verdict.

Breeden said, "Any person who has a child can put themselves in that situation of, 'What if that was my child?' "

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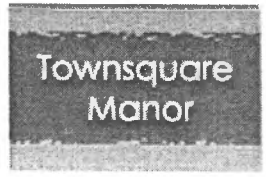

It was a privilege to prosecute a case in which the Anchorage police caught the suspect within minutes of the shooting, said prosecutor James Fayette.

Fayette said "it was a heads-up play" by Anchorage detective Lt. Steven Hebbe, who happened to be driving by the Woodshed when the first reports came in of shots being fired. Hebbe stopped Vongthongdy's getaway car within minutes, Fayette said.

"There was no question about who the shooter was," Fayette said. The defense didn't dispute that but contended Vongthongdy's state of mind at the time indicated he either didn't know he would kill Minnear or that he didn't intend to.

"Eventually, the jury I think reached the common-sense conclusion that when you shoot a man in the chest with a .40-caliber pistol, you intend to kill him."

"I just hope it gives this lady some peace," Fayette said, gesturing toward Rushton.

Rushton said she didn't see any reaction from Vongthongdy during the trial.

"I never saw one ounce of emotion come from him during all of this," she said. "I don't feel like he's felt any remorse, and that's something he can work on now sitting in prison."

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Jury convicts Anchorage man in gang-related shooting

Man found guilty of assault in shootings near bar.

By CASEY GROVE
casey.grove@adn.com
Published: January 14th, 2011 12:08 PM
Last Modified: January 14th, 2011 12:09 PM

An Anchorage jury convicted a man Wednesday for what police testified was a gang-related shooting in September outside a downtown bar.

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Mavaega Brandon Tautua, 21, was convicted on three felonies: two counts of first-degree assault and a count of felony possession of a firearm. He faces up to 28 years in prison for the assault charges.

Tautua shot a man Sept. 12 twice with a .38 caliber revolver after a fistfight between rival gang members broke out at the corner of D Street and Fourth Avenue. Tautua then shot at the fleeing men and hit an innocent woman on the sidewalk, prosecutor James Fayette said.

"It was clearly gang-related conduct; this guy was picking a fight," Fayette said Thursday. Tautua claimed he'd shot in self-defense, but there are five different legal definitions for that defense that his story did not stand up to, Fayette said.

Tautua said he and his two friends were confronted by a group of five, and he testified Monday that,

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to defend himself, "I would have killed them all, I would have shot all of them."

"That's pretty chilling," Fayette said, especially considering Tautua answered in the affirmative later when asked if he would do the same thing if given another chance.

Police said the 19-year-old Angel Martin-Laura was shot in his left shoulder and buttocks. Friends took him to a hospital, where police said he was treated for his injuries and released.

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The innocent victim was shot in the shoulder and also has recovered.

Rookie police officer Jesus Rivera saw the shooting unfold from his patrol car and nabbed Tautua just after the shots were fired. Video cameras captured the shooting and arrest.

The Anchorage police officers' union referred to Rivera's police work in this incident during an ad campaign against officer layoffs by Mayor Dan Sullivan's administration.

Tautua testified in his defense, and denied being affiliated with a gang. He wore a bright red Boston Red Sox jacket and baseball cap the night of the shooting because the Sox are his favorite team, he said on the stand.

However, when a prosecutor cross- examined him, Tautua was not familiar with Fenway Park, the baseball club's home field, or famous players from its recent and past history, including David Ortiz or Ted Williams.

Gang intelligence detective Scott Lofthouse testified that stylized "B" logos and bright red Red Sox apparel are popular with gang members affiliated with the Bloods.

Tautua has a previous conviction for theft of a firearm from 2007. He is scheduled to face a judge for sentencing in May.

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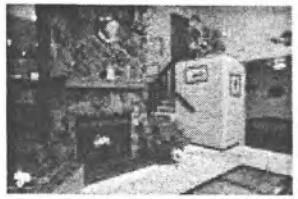

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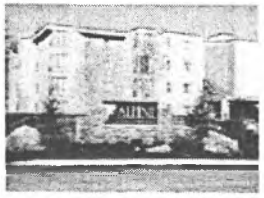

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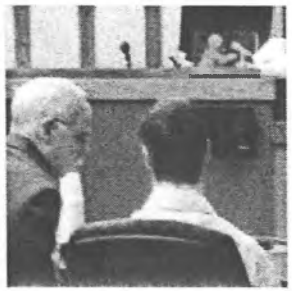
Rossiter found guilty in murder case

by **Maria Dudzak**

January 24, 2012 7:42 PM



19-year-old Devin Rossiter was found guilty in Ketchikan Superior Court Tuesday afternoon of second degree murder in the stabbing death of 45-year old Nick Stachelrodt . Rossiter was also found guilty of tampering with evidence.

The jury of six men and six women began deliberations at about 2:30 Friday afternoon, continued deliberations on Monday, and reached a decision late Tuesday morning.

Rossiter looked straight-ahead and showed no visible reaction when the verdicts were read by Superior Court Judge Trevor Stephens. After reading the verdicts, Stephens asked the defense and prosecution if either party wanted the jury to be polled. Assistant District Attorney James Scott said the State did not wish to poll the jury. Defense attorney Sam McQuerry requested that Stephens poll the jury.

All 12 jurors affirmed their verdicts were true and correct. Stephens then thanked and excused the jury.

Asked his reaction to the verdict, Scott said this is just one step in the process.

"And the only appropriate thing for me to say is to thank the jury very much for their service in what I'm sure was a difficult case, and to thank the entire community. The process will continue and thank you for inquiring."

McQuerry declined to comment.

On March 12th of last year, Rossiter, then 18, was knocking on the back doors of homes in the Vallenar View Trailer Park asking for cigarettes. Rossiter was twice refused cigarettes at the home of John and Mary Stachelrodt, the victim's elderly parents. When their son, Nick Stachelrodt returned home, he found Rossiter searching in his parent's vehicle, and asked him to leave. When Stachelrodt tried to pull Rossiter from the vehicle, Rossiter stabbed Stachelrodt twice in the upper chest, fatally wounding him. Rossiter fled, and Stachelrodt died minutes later.

Rossiter's sentencing hearing has been set for April 5th at 8:30 am in Ketchikan Superior Court. In the meantime, Rossiter is being held at the Ketchikan Correctional Center without bail. Murder in the 2nd degree carries a sentence of ten to 99 years.

Jurors fail to reach verdict in Michael Bostic stabbing case; judge sets new trial for end of January

by Sam Friedman / sfriedman@newsminer.com

Dec 21, 2011 | 15264 views | 138 | 10 | |

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FAIRBANKS - The jury in the Fairbanks road-rage murder trial returned a not guilty verdict Wednesday for the most serious charge of first-degree murder, but a mistrial was declared on the lesser charge of second-degree murder after the jury was unable to reach a unanimous decision. A new trial date has been set for late January.

Defendant Michael Bostic, 45, remains jailed on $1 million bail on the second degree murder charge, although his attorney asked for hearing to discuss bail in early January.

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Bostic is accused of stabbing Tim Lund, 55, to death this spring near Frontier Outfitters. Defense attorneys said it was self-defense; prosecutors made the case that Bostic followed Lund to his job at Frontier Outfitters after a near car accident and that Bostic instigated a fight and intended to kill Lund.

The jurors were given instructions that, beyond a reasonable doubt, they needed to find Bostic's actions did not fit the legal definition of self-defense in order to convict him of first-degree murder, second-degree murder or even manslaughter. In a note to the court during deliberations,

the jury indicated it wanted clarification about the self-defense law, in particular, clarification about whether the aggressor in a fight can be said to be using self-defense.

After a week-long trial, the jury of nine men and three women deliberated Thursday afternoon and all day Friday and Monday.

They went home early Tuesday because a juror needed to go to a medical appointment. On Wednesday morning, the jurors indicated they were unable to reach a unanimous verdict and did not believe more deliberations would help. Superior Court Judge Paul Lyle sent them back the jury room to deliberate for three more hours.

He then asked them in writing if they might be able to issue a verdict without resolving the self-defense issue. The jury indicated they would be able to issue a verdict for the first-degree murder charge but not the second-degree murder charge. Before Lyle declared a mistrial on the lesser charge, he asked the jurors whether they thought their differences of opinion were "genuine and irreconcilable." By a show of hands, all the jurors indicated they did not believe they could come to a verdict.

Before sending the jury home for the last time, Lyle told them they were the "the most diligent" jury he had ever worked with.

The partial verdict and mistrial were declared about 6 p.m. The courtroom gallery was empty at the conclusion of the case except for a small group of Bostics' friends and two local TV reporters.

Contact staff writer Sam Friedman at 459-7545.

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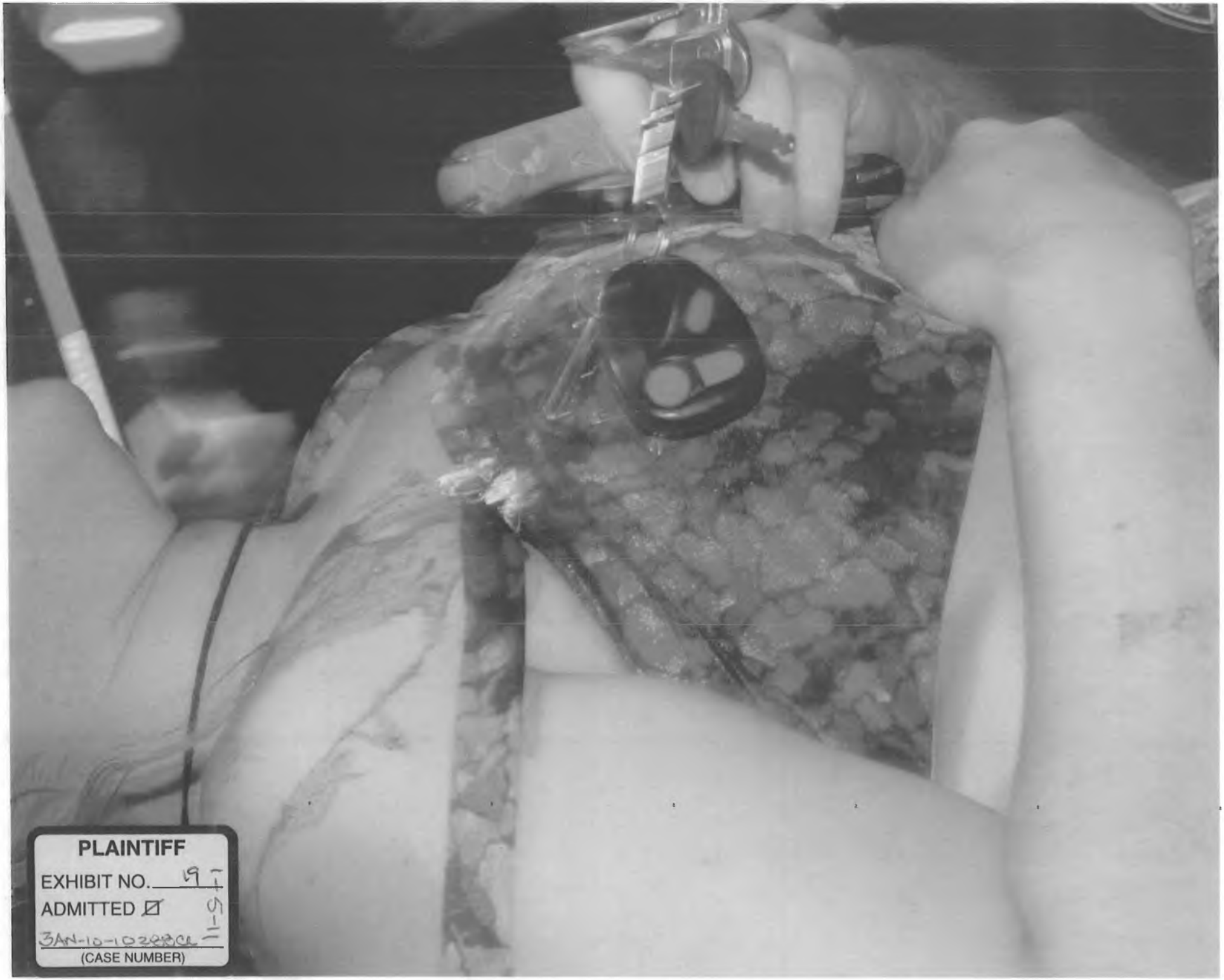
PLAINTIFF
EXHIBIT NO. 19-1
ADMITTED ☒ 11-9-11
3AN-10-10288CI
(CASE NUMBER)

ALASKA STATE LEGISLATURE

Member:
House Finance Committee
Legislative Budget & Audit Committee

Chair:
House Budget Sub Committees on:
- Department of Administration
- Department of Labor and Workforce Development

Session:
Alaska State Capitol
Juneau, AK 99801-1182
Phone: (907) 465-2679
Fax: (907) 465-4822
Toll Free (800) 505-2678

Interim:
600 E. Railroad Ave
Wasilla, AK 99654
Phone: (907) 376-2679
Fax: (907) 373-4745

Representative Mark Neuman
Rep.Mark.Neuman@legis.state.ak.us

HB 80 Expected Witnesses

In Person: Brian Judy – NRA

Offnet:

ALASKA STATE LEGISLATURE

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- Department of Administration
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Phone: (907) 376-2679
Fax: (907) 373-4745

Representative Mark Neuman

Rep.Mark.Neuman@legis.state.ak.us

January 19, 2012

Dear Senator French

Subject: HB 80 An Act relating to self defense in any place where a person has a right to be.

Please consider scheduling this legislation for a hearing during the week beginning February 6, 2012. Joining me will be a leading national advocate to help in answering any questions the committee may have. Scheduling the hearing during that time will allow for the necessary travel arrangements to be made. Attached is a committee package.

Included are the following:

- Letter of Request
- Current version of the bill.
- Sponsor statement.
- 2012 Fiscal Notes
- Names of persons expected to testify (noting any off-net lines needed).

Please feel free to contact myself or my aide Rex Shattuck (465-2696) with any questions.

Thank you for your consideration.

Sincerely,

Representative Mark Neuman

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

March 1, 2012

Mr. James Fayette
310 "K" Street, Suite 520
Anchorage Alaska 99501

Dear ~~Mr. Fayette~~, Jay,

The Senate Judiciary Committee has a bill under consideration, House Bill 80, which would significantly alter the law of self-defense in Alaska. Your experience as a veteran homicide prosecutor would be very valuable in helping the committee to understand the nuances of self-defense especially with respect to its application in actual cases.

I am inviting you to testify before the committee on Friday, March 16, 2012, starting at 1:30 p.m.

Sincerely,

Senator Hollis French

Alaska State Legislature

Please enter into the record my testimony to the House Finance Committee

Committee on HB 80 Date: March 30, 2011
Bill/subject

****

02 (4) protecting a child or a member of the person's household; or
03 **(5) in any place where the person has a right to be.**

The underlined portion of HB 80 (see above) extends the Castle Doctrine. I support this bill. It is a common sense addition to the Alaska law defining and supporting self defense.
Some of my reasons include:
1. Alaska is a huge state with many remote and rural off-road areas. Self defense is a necessity when police are not available.
2. Alaska has the highest rate of domestic violence in the U.S. Women need to know that they can defend themselves without going to prison.
3. Child molestation is very high in Alaska. Children need to know that they can defend themselves against attacks by larger, stronger adults without fear of reprisal.
Thank you for considering these reasons.
Peace through strength,

Barbara J Struble
Maranatha Learning for Living

Signed: Barbara J Struble
Testifier

Representing (Optional)

Address

barbjst@gmail.com
Phone number

Rex Shattuck

From: Adam Rushing [adam.rushing@gmail.com]
Sent: Monday, March 28, 2011 2:41 PM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg
Subject: HB 80

To whom it may concern:

I will keep this short as I understand each and everyone's time constraints. Please vote in favor of a citizen's right to protect themselves wherever they may be - so long as they can legally be there. Thank you all for your dedicated service.

Adam Rushing
Fairbanks, AK.

Rex Shattuck

From: alaskaspecialties@gci.net
Sent: Wednesday, March 30, 2011 9:02 AM
To: Rep. Mark Neuman
Subject: house bill 80

Please vote yes on House Bill 80.

Debra Lighthart

Rex Shattuck

From: Ali M. Martinez [amm@eeiteam.com]
Sent: Friday, April 01, 2011 3:25 PM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg; Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg
Cc: Ali M. Martinez
Subject: Please support HB 80
Attachments: image001.jpg

Hello Alaskan Representatives,

Please support HB 80.
I believe responsible citizens should have the right to defend themselves anywhere they have a legal right to be, without requirement for retreat.

Thanks,
Ali Martinez, Alaskan resident and voter since 2002.

Ali M Martinez, PE
Project Engineer - Mechanical
API 570 & API 653 Certified Inspector
Enterprise Engineering, Inc.
amm@eeiteam.com
080.6745.3709

2525 Gambell St. Ste. 200 · Anchorage, Alaska 99503
V 907.563.3835 · F 907.563.3817 · www.eeiteam.com

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Rex Shattuck

From: Andrew and Marcy [amerrill@gci.net]
Sent: Wednesday, March 30, 2011 5:39 PM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Les Gara; Rep. David Guttenberg
Subject: HB 80

I am writing in regards to House Bill 80 "***An Act relating to self defense in any place where a person has a right to be.***" and would encourage you to support the bill.

Thank you
Andrew Merrill
Alaskan resident, husband and father of 3, raised in Southeast (Ketchikan), lived in the interior (Fairbanks), worked in Southwest (Bethel) and living in Northwest (Nome)

Rex Shattuck

From: Barry Corbin [barry.corbin@hotmail.com]
Sent: Wednesday, March 30, 2011 3:31 PM
To: Rep. Mark Neuman
Subject: Support HB 80

I urge you to support HB 80.

Respectfully,

Barry D. Corbin

MP 289.5 Parks Highway
Clear, AK 99704
378-8269

Sent from my iPhone

Rex Shattuck

From: Barry White [bqc_03@yahoo.com]
Sent: Monday, March 28, 2011 3:25 PM
To: Rep. Mark Neuman
Subject: retreat

I hope that each and every one of you on the finance committee approve this bill. I am an Alaskan that chooses to carry for the protection of my family and self. I am a resident, property owner, business owner, and I vote.
Thank you for your service,
Barry White

Rex Shattuck

From: Bert Maupin [bermaupin@yahoo.com]
Sent: Monday, March 28, 2011 3:51 PM
To: Rep. Mark Neuman
Subject: HB 80

Sir: I would like to see HB 80 become law. I believe that wherever we have the right to be, we also have the right to self protection. Your vote for HB 80 would be appreciated. Thank you. Bert Maupin

Rex Shattuck

From: Bert Thomas [thomasb@mosquitonet.com]
Sent: Friday, April 01, 2011 11:22 AM
To: Rep. Mark Neuman
Subject: HB 80

Please support HB 80 – it is common sense.

Bert Thomas

Rex Shattuck

From: Beth Schneider
Sent: Wednesday, March 30, 2011 10:05 AM
To: Rep. Mark Neuman
Subject: Support for HB 80 --
Attachments: image001.jpg

Resident of Palmer, Douglas Kinnel (sp) – wanted to say he supported HB80 – 947-5019

Beth Schneider
Legislative Aide
Office of Representative Neuman
(907) 465-2679
(800) 505-2678

Rex Shattuck

From: Bob Ourso [bobourso@yahoo.com]
Sent: Monday, March 28, 2011 7:44 PM
To: Rep. Mark Neuman
Subject: YES on HB 80 - Thank you for this legislation

Follow Up Flag: Follow up
Flag Status: Flagged

Mr. Neuman,
Thank you for HB 80. You have my full support, and I am honored to support you and this effort. Below is the text I have been sending your colleagues, as I have been a victim of weapons violence - hopefully, never again. Thank you for your understanding of this important issue.

To Mr. or Ms. XXXXXX,
I strongly and respectfully request that you approve HB 80 extending the right to use force, including deadly force, for self-defense anywhere a person has a legal right to be. Responsible gun owners respect the law. Criminals don't care about laws, and thus will not be swayed by this one way or the other. When I had the several occasions to have been accosted by weapons-wielding criminals, I was unable to protect myself due to criminal-friendly laws on the books in MN. Had I been able to carry and defend myself, I feel sure that I would not have been a victim, and even though I could have shot, I probably would not have, should they have complied with my command to lay down their weapon and surrender, allowing me to wait for law enforcement assistance. It is a different story when it actually happens to you or your loved one, or your friend, and God willing, it never will. This will send a clear message to criminals in AK and hopefully elsewhere - threatening bodily harm will not be tolerated. We will not just hope everything turns out well if we run or submit to their demands. If someone does not want to carry and possibly protect themselves in such manner, that is their right. May they never experience what I have. Thank you. Respectfully,
Bob Ourso

Bob Ourso
Stream Ecologist, Informaticist
Anchorage, AK, USA

Rex Shattuck

From: byron davis [byrondavis747@hotmail.com]
Sent: Friday, April 01, 2011 11:11 AM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg
Subject: House Bill 80: No-Duty-to-Retreat Legislation

Dear Representatives,

HB 80 would remove the duty-to-retreat in Alaska.

Under existing law, there is no-duty-to-retreat if a person is in their home, business, or on their own property. Introduced by state Representative Mark Neuman (R-15), HB 80 would extend the right to use force, including deadly force, for self-defense anywhere a person has a legal right to be.

I strongly support HB80. Extending this right is a common sense concept which is already the law in many States.

Please vote in favor of this bill.

Byron Davis
Anchorage, AK 99517

Rex Shattuck

From: CH [spotmom@mtaonline.net]
Sent: Monday, April 04, 2011 6:55 AM
To: Rep. Bill Stoltze
Cc: Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg
Subject: SUPPORT HB 80 No-Duty-to-Retreat

Please support HB 80 extending the right to use force, including deadly force, for self-defense anywhere we have a legal right to be.

A person's ability to protect themselves and others should extend beyond the property line. Crime occurs everywhere and being forced to "run away" as a first choice only makes it easier (safer) for criminals to ply their trade.

Sincerely,
Rod and Cathy Herrin
Wasilla

Rex Shattuck

From: Charles Bohart [cbohart@alaska.edu]
Sent: Tuesday, March 29, 2011 12:42 PM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg; Matthew Billings; David Weisensel
Subject: Response to HB 80

House Finance Committee:

As a law abiding citizen the laws and regulations need to protect and defend the people who stand up to defend the innocent, the weak, our families, in the act of protecting justice, freedom, and right living. By protecting the good Samaritan we reduce the crime and the work load placed on the public safety officers and state troopers because the criminal must watch out for the common citizen exercising his duty to uphold the law and repress lawless behavior. The repression of lawless behavior is as simple as protecting the person who stands up against perpetrators of crimes. This is freedom, where the responsibility is transferred to the good people who choose to protect themselves, their families, and surroundings. Thank you for your time and consideration. Please be very careful in the wording of requiring "retreat". I believe we should not retreat from criminal's because this implies it is wrong to stand up for what is right and gives argument to prosecute both citizen and law enforcement officials when deadly force is used to defend oneself, ones family, ones friends, the old lady being mugged....

Thank you

Charles Bohart

Rex Shattuck

From: charlie@xyz.net
Sent: Monday, March 28, 2011 5:06 PM
To: Rep. Mark Neuman
Subject: HB 80

Honorable Representative Neuman,

I encourage you to support HB 80 when it comes before the Finance Committee this week. Law-abiding Alaskans should not have to run from criminals.

Respectfully,

Charlie Franz COL, USA (Ret)
Homer

Rex Shattuck

From: CORDELL GRAY [cords180@yahoo.com]
Sent: Monday, March 28, 2011 7:49 PM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg
Subject: House Bill 80 Support

Dear Representative,

I encourage you to support Representative Neuman by voting to support House Bill 80 which allows honest, tax paying citizens to defend themselves and their property anywhere at any time. I am a gun owner and also have a concealed carry permit and very rarely do I go out without my weapon because of the increase in the amount of unstable people and criminals who can/will go off without any notice. The road rage murder in Fairbanks this weekend is a prime example. If the judicial system refuses to keep these people behind bars where they belong, then people need to have the right to defend themselves at all times, in all locations and at any cost.

Please take a look at the stats in Florida and what has happened with crime since they passed their liberal concealed carry bill. The horror stories of shooting sprees never happened, the crime rate had plummeted and there are fewer criminals on the street. On the fiscal side, the permanent removal of a dangerous person saves the State money which can then be used to support those who pay taxes. To prosecute the road rage person referenced above is going to cost the State hundreds of thousands of dollars and then the tax payers will have to pay $50-70,000 a year for the rest of his life. Had the other gentleman carried a concealed weapon, the State would be looking at a few thousand dollars to bury the criminal.

If the State, who is charged with the responsibility to protect its citizens, continues to fail in this obligation, every citizen has the right, and responsibility, to defend themselves. Take a few minutes and put yourself in the Fairbanks Road Rage victim's position. Ask yourself the following question. Would I be better off lying dead on the street, a victim of a deranged, knife wielding criminal, or would I be better off permanently ending his reign of criminal activities and terror? If you need help with the answer or a second opinion, read the article to your family and ask them what you should if you were caught in that same position and had the opportunity to defend yourself. I think the answer will be obvious so vote for yourself, your family, and give all of Alaska the opportunity to defend themselves.

Thanks for your time.

Cordell Gray
Eagle River, AK

Rex Shattuck

From: DEC Engineering Inc. [don_carlson@hotmail.com]
Sent: Monday, March 28, 2011 9:54 PM
To: Fam-Don Carlson
Subject: I support HB 80

Hello,

I urge you to support HB 80 which would extend the no-duty-to-retreat, the right to use force, including deadly force, for self-defense, that we enjoy on our private property, to anywhere a person has a legal right to be. Please remember that criminals by definition do not care if their action is against the law and police are rarely there to protect you when you need it. This law will help protect law abiding citizens. I do not believe it will foster rampant vigilantism as some anti-gun lobbies propose.

Sincerely,

Donald E. Carlson, 688 Senate Drive, Fairbanks, AK 99712, 907-378-8151

DEC Engineering, Inc. - River Engineering, Floodplain Modeling, Culvert & Bridge Hydraulics, SWPPP

Rex Shattuck

From: Dennis Adamson [dbafox07@gci.net]
Sent: Monday, March 28, 2011 5:02 PM
To: Rep. Mark Neuman
Subject: HB 80 No-Duty-to-Retreat Legislation
Attachments: Dennis Adamson.vcf

Dear Representative Neuman:

As a member of the House Finance Committee, I wanted you to know that I strongly support HB 80, the No Duty-to Retreat Legislation being considered this coming Wednesday. I have a daughter and three granddaughters living here and in the Matnauska Valley that I worry about 24/7. This legislation will increase the likelihood that they would defend themselves from predators without fear of legal repercussions. This is a right every citizen of Alaska and the United States should have.

Please do everything within your power to pass this legislation into law. You will be doing something that will benefit all Alaskan's relative to their personal defense and the defense of their families. I firmly believe that this legislation fully supports and enhances the protections provided in the 2nd Amendment of the U.S. Constitution. Good luck in your efforts to best serve Alaska.

Sincerely,

Dennis B. Adamson
9255 Endicott Street
Anchorage, AK 99502-1300
907-243-2004

I am using the Free version of SPAMfighter.
SPAMfighter has removed 73901 of my spam emails to date.

Do you have a slow PC? Try free scan!

Rex Shattuck

From: dwallace1epro@netscape.net
Sent: Wednesday, March 30, 2011 2:08 PM
To: Rep. Mark Neuman
Subject: HB 80

Under existing law, there is no-duty-to-retreat if a person is in their home, business, or on their own property. Introduced by state Representative Mark Neuman (R-15), HB 80 would extend the right to use force, including deadly force, for self-defense anywhere a person has a legal right to be.

I support this legislation, and I urge you to do so also.

Thanks

Rex Shattuck

From: Ettelt, Mark E CTR USAF PACAF 3 OSS/OSK [mark.ettelt.ctr@elmendorf.af.mil]
Sent: Friday, April 01, 2011 8:49 AM
To: Rep. Mark Neuman
Subject: HB 80

I respectfully urge you to support HB 80.

Mark Ettelt

Rex Shattuck

From: Gary Porter [gary@tech.engr.uaf.edu]
Sent: Tuesday, March 29, 2011 12:32 PM
To: Rep. Mark Neuman
Subject: HB 80

Dear Representative Neuman,

I know you obviously support this bill but wanted to thank you and pass this along to you as well. I'm writing to as many as I can to support this very important bill.
I am writing to address the current House Bill 80, Self Defense bill.
I don't believe it goes quite far enough but is a very good start.
I've yet to talk to anyone here in Fairbanks that does not support such a bill. I work at the University of Alaska and talk to many people Conservative and Liberal alike.
I was once a medic for Chena Goldstream Fire and Rescue , during our training we were told that as EMTs we were obligated to render help if we could when needed. The problem I see with our current law is that you are obligated to retreat when there is trouble. This should be changed such that you are obligated to help if you have the ability to do so. Example, someone being attacked or whatever in a grocery store parking lot or anywhere for that matter. Should we run away or should we help if we can? If we can we should help and not be held liable for doing so. Of course this would also apply to defending ourself and or family. It is my opinion that we have a God given right to defend ourself and to whatever extent is required. At times it may be prudent for us to retreat if we so choose but in no case should there ever be a law that requires us to do so. No one should ever be required to run away if they can. That is what we have now. Florida has recently passed what I think is a very good approach to this issue. (See below) Its just a little embarrassing to have them realize the common sense wisdom before we do here in the State of Alaska. Please do not buy into the rhetoric that such a bill will cause an increase in violent crime. There are no statistics that I've found anywhere that would support such a statement plus as the law is now it virtually puts innocent law abiding citizens at risk.
While it is not as extensive as I would like it to be I would encourage and ask you to please support the passage of HB 80 self defense bill. I thank for you and for your time and consideration in this matter.

Gary Porter
Fairbanks Alaska

Florida 'Stand Your Ground' Law Explained http://www.cfif.org/htdocs/freedomline/current/in_our_opinion/florida-self-defense-law.htm

Rex Shattuck

From: GGREEN18@aol.com
Sent: Tuesday, March 29, 2011 4:12 AM
To: Rep. Mark Neuman
Subject: RE#80 HB

Rep. Mark Neuman;

Please be informed that I am in favor of HB #80 and urge it's passage.

Perry Green

Anchorage Alaska.

Rex Shattuck

From: huggsc@alaska.net
Sent: Tuesday, March 29, 2011 10:41 PM
To: Rep. Bill Stoltze
Cc: Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Representative_Tammie_Wilson@legis.state.rak.us; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg
Subject: No-Duty-To- Retreat legislation, HB 80

We respectfully urge you to support HB 80, the No-Duty-To- Retreat legislation. This is an Act relating to self-defense in any place where a person has a right to be. It is long overdue.

Clifford and Sondra Hugg
37091 Tiny Rd.
Soldotna, AK
907-260-5871

Rex Shattuck

From: husholdog@acsalaska.net
Sent: Tuesday, March 29, 2011 12:24 AM
To: Rep. Mark Neuman

Dear representative Neuman,
I am a fellow Ak. resident and I respectfully urge you to support HB 80. Thank you sincerely, Mark Jonas

Rex Shattuck

From: idbogue1955 [idbogue1955@yahoo.com]
Sent: Monday, March 28, 2011 10:27 PM
To: Rep. Mark Neuman
Subject: Thank you for HB 80

Thank you for HB 80, I fully support passage of this bill.

As a lifelong Alaskan and supporter of the US Constitution and the Alaskan Constitution, I believe the right to protect oneself is consistent with our Second Amendment rights under the US Constitution. As a woman, I am especially cognizant of the need for lawful protection from lethal force without worrying that I may be sued or considered a criminal for protecting myself.

Alaska is a strategic location for protection of the USA, and as a coastal state Alaskans have a duty to be prepared to protect our state and country if the need should arise as it did in WWII.

Sincerely,
Irene Bogue
PO Box 4106
Palmer, AK 99645

Rex Shattuck

From: J Gillette [loggiemonster@hotmail.com]
Sent: Tuesday, March 29, 2011 7:40 PM
To: Rep. Wes Keller; Rep. Tammie Wilson; Rep. Steve Thompson; Rep. Mike Hawker; Rep. Mike Chenault; Rep. Mia Costello; Rep. Mark Neuman; Rep. Eric Feige; Rep. Bob Lynn; Rep. Craig Johnson; Rep. Bill Stoltze; Rep. Kurt Olson
Subject: Support of House Bill 80

Dear Representatives,

Thank you for sponsoring House Bill 80, Self Defense. As an Alaskan living in an area outside of regular police response, I rely on the ability to protect myself and my family. Even though I am driving distance from Wasilla, with few troopers in our area, the response time to a 911 emergency call is 25 minutes. I know this because I have had to call in the past.

In 2006, I was alone at home with a 3 year old daughter. Shortly before midnight in early April, I had a car park in front of my house and the occupants were not part of the neighborhood. Five young men stood out in front of my yard and passed around something that resembled a bong. I saw the lighter ignite in front of each one of them. I called to report this incident. These people sat in a dark car on a dark night for 15 minutes in front of my home. I had no idea what their intentions were. When they drove off, they proceeded at about 10 mph with no lights on. It was 10 minutes after they departed before a trooper came through the neighborhood. He drove around a few minutes and did not find them. After this incident, I had an alarm system installed, but I know I may still need an additional way to protect myself in the event someone actually does breach the entrance of my house.

This protection may also be necessary outside my home. We travel to some pretty remote locations to camp and fish. Still having a young child traveling with me, I am relieved to know that if someone were to break into our camper with ill intentions, I can defend our lives and property.

Alaska is the Last Great Frontier and our citizens live here not just for the beauty of the state, but for the freedoms it offers. I truly appreciate your efforts to maintain those freedoms for law abiding citizens.

Respectfully,

Julie Gillette

4301 S. Well Site Rd.

Wasilla AK 99654

907-376-5455

Rex Shattuck

From: Jack Cripe [jackcripe@yahoo.com]
Sent: Wednesday, March 30, 2011 2:18 PM
To: Rep. Mark Neuman
Subject: HB 80

Representative Neuman

I find it a bit difficult to undestand why this bill has not passed out of finance. After all, criminals never follow these laws anyway, only honest law abiding people like me do. I am a retirered Master Chief USN, also a retired Alaska State Trooper. If I were to see an event where I or others lives were endangered I am not trusted by our State Congress to act to prevent this crime from taking place other than on my property and in my home. I am well aware of when to and when not to use deadly force when absolutely necessary, as are many retired police officers living in Alaska. It appears some in our state congress think just because a peace officer has retired we turned dumb. Not so. Your efforts along with other clear thinking representatives to get HB 80 moving would be much appreciated.

Jack Cripe
Palmer

Rex Shattuck

From: James M Carson [carsonjamesm05@gmail.com]
Sent: Wednesday, March 30, 2011 2:20 PM
To: Rep. Mark Neuman
Subject: HB 80

Please pass this bill as we need to be able to legally defend oursleves.

--
James M Carson

Rex Shattuck

From: Jarrett Crawford [jocrawford3936@gmail.com]
Sent: Monday, April 04, 2011 8:19 AM
To: Rep. Mark Neuman
Subject: HB 80

Please support this bill, HB 80. We deserve the right to defend our loved one. Thank you.

J.O. Crawford

Rex Shattuck

From: Jim Gilbert [JGilbert@udelhoven.com]
Sent: Monday, March 28, 2011 2:31 PM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson
Subject: Alaska: House Finance Committee to Hear No-Duty-to-Retreat Legislation

I support this and I hope you do too!

Jim Gilbert
Udelhoven Oilfield System Services, Inc.
184 E. 53rd Ave.
Anchorage, AK. 99518

Rex Shattuck

From: John Smith [naherr@gmail.com]
Sent: Wednesday, March 30, 2011 9:53 AM
To: Rep. Mark Neuman
Subject: Re: Please pass HB 80

Sir, thank you again for taking the time to respond. It really means alot to me when my representative makes that time available. I do receive NRA alerts, as well as alerts from many other organizations I'm affiliated with, and I share them with other groups supportive of your efforts and we are all truly grateful. Thank you again and please keep me posted if you need my/our help.

Nick

On Wed, Mar 30, 2011 at 8:02 AM, Rep. Mark Neuman <Representative_Mark_Neuman@legis.state.ak.us> wrote:

Colonel Herrera,

Many more people are becoming aware of what is happening locally and nationally. We need more folks to become informed and involved and I am glad that you are making that step.

HB80 does not currently appear to have too much opposition in the House, but we may need the support when it goes through the Senate (which is likely to happen next session between January and April). If you aren't receiving the NRA alerts, I would recommend signing up for them as they are an excellent source for those wanting to keep abreast of legislation affecting our 2nd Amendment rights.

Thanks again for writing and be sure to contact me if you have questions or other concerns.

Mark

From: John Smith [mailto:naherr@gmail.com]
Sent: Tuesday, March 29, 2011 5:50 PM
To: Rep. Mark Neuman
Subject: Re: Please pass HB 80

Representative Neuman, thank you for your quick response. I was made aware of your bill at a recent CPG meeting where they showed a 9-11 video. I also researched your website and the bill and found you and your co-sponsors. Although I'm new to being politically active, and I am still working full time at Ft Richardson, I'm learning as much as possible what actions I can take with my local representatives to support initiatives that will improve our Burough and State and protect us from not only "domestic threats", but "foreign threats" as well. If there's ever anything I can do to assist, please feel free to contact me. Although I lack experience, I am well motivated.

Nick Herrera

On Tue, Mar 29, 2011 at 4:34 PM, Rep. Mark Neuman <Representative_Mark_Neuman@legis.state.ak.us> wrote:

Dear Colonel Herrera,

Thank you for writing in support of this legislation. I agree and that is why I sponsored this bill. I am attaching a list of legislators that have also signed on as co-sponsors. We greatly appreciate your support!

SPONSOR(s): REPRESENTATIVE(s) **NEUMAN**, FEIGE, LYNN, COSTELLO, Hawker, Chenault, Olson, Keller, T.Wilson, Stoltze, Thompson, Johnson

Sincerely,

Mark Neuman

From: John Smith [mailto:naherr@gmail.com]
Sent: Tuesday, March 29, 2011 8:44 AM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg; Rep. Mike Hawker; LIO Mat-Su
Subject: Please pass HB 80

Dear Ladies/Gentlemen, my name is LTC (Ret) Nick Herrera, and I'm a resident of Wasilla, and a retired Army officer. I served in the Army for 23 years fighting to protect this great country of ours and defend our rights. Even now, as a retiree, I am able to enjoy those rights in this great state of ours, but all too often there are elements in our State who choose the path of crime. It is incumbent on us to always be able to continue to protect those rights given to us by God to care for our fellow man and our families against those who would do us harm. HB 80 extends those rights to protect us against those criminal elements who would violate our rights and seek to destroy the peaceful lives we seek to live within our communities and endanger those we love and

hold dear to our lives. I strongly urge you to please pass HB 80 and strengthen the rights of good American law abiding citizen against those who seek to disrupt our peaceful communities. Far too long have criminals' rights been advocated while victims rights have been trampled upon. HB 80 gives US, law abiding citizens, our rights back and empowers us to rightfully use deadly force (as a last resort) if we deem it necessary and further protects us when and if we must make this difficult and life changing decision. I am too familiar with having to make this decision while serving in my Army and on deployments and it is a decision I NEVER EVER take/took lightly and without great thought and responsibility, nor is it a decision anyone of us should ever have to make, BUT if we have to make this to protect ourselves or those we love, we should be empowered with the necessary tools to effectively make that decision.

Thank you for supporting me, this State, and Representatives Neuman, Feige, Lyn, and Costello on passing HB 80.

Sincerely,

Nicolas Herrera

LTC (Ret), USA

Rex Shattuck

From: Kath Carlson [kath009@hotmail.com]
Sent: Monday, March 28, 2011 10:33 PM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg; Rep. Carl Gatto; Rep. Steve Thompson; Rep. Mike Chenault; Rep. Lindsey Holmes; Rep. Max Gruenberg; Rep. Lance Pruitt; Rep. Bob Lynn; Rep. Wes Keller
Subject: House Bills

Please support House Bills 80 and 88.

Thanks muchly!

Kath McCubbins-Carlson

Rex Shattuck

From: keith and bev [keithfromak@earthlink.net]
Sent: Monday, April 04, 2011 8:15 AM
To: Rep. Mark Neuman
Subject: HB-80

My name is Keith Elkins, I live at 1080 Leuthold Dr. Fairbanks 99712. My ph. (907)3893001and Email is keithfromak@yahoo.com. I want to tell you that we as free people need the right to protect our selfs wher ever we are. That is why I am in favor of HB-80 it needs to be there for use, the people and you if ever needed.Please vote for this bill.
Thank You!
Keith Elkins

Rex Shattuck

From: larrya2@alaska.net
Sent: Monday, March 28, 2011 2:50 PM
To: Rep. Mark Neuman
Subject: HB 80

I urge you to support HB 80. Thanks!

Rex Shattuck

From: Leslie, Mike [lesliegm@chevron.com]
Sent: Monday, March 28, 2011 3:59 PM
To: Rep. Mark Neuman
Subject: HB 80

Mr. Neuman,
As an Alaskan resident living on the Kenai Peninsula. I support the HB 80 Bill.

Mike Leslie
Kenai Drilling Rentals
Home -907-283-3302
Cell- 907-382-3057
glex@chevron.com

Rex Shattuck

From: Mdbrownn [mdbrownn@yahoo.com]
Sent: Tuesday, March 29, 2011 2:50 AM
To: Rep. Mark Neuman
Subject: HB 80

Dear Representative Mark Neuman,

Please pass House Bill 80.
If passed, it would be a shining example of a law that tells us what we CAN DO, rather than a law that states what we CAN NOT DO.

Sincerely,

Matthew Brown
District 24
5411 Mockingbird Drive #309
Anchorage AK 99507
(907) 230-4977

Rex Shattuck

From: Michael Gillis [mgillis5@hotmail.com]
Sent: Wednesday, March 30, 2011 10:45 PM
To: Rep. Mark Neuman
Subject: HR 80

Thank you for this legislation. I hope those voting on this don't follow Idaho's vote today. The republicans there voted down a campus carry initiative. Remind those voting, their votes are being watched more now than ever, and RINO's will not be tolerated. Lisa Murkowski got lucky and won, but the odds were against her. Democrats suck, but there is nothing as disgusting as a RINO.

A vote is like a rifle; its usefulness depends upon the character of the user.
Theodore Roosevelt

http://obamaclock.org/

Rex Shattuck

From: Mike Reeves [michaelr311@gmail.com]
Sent: Monday, March 28, 2011 2:43 PM
To: Rep. Mark Neuman
Subject: House Bill 80

03/28/2010

RE: House Bill 80

I am writing to urge your support for House Bill 80, many Alaskans have fallen victim to crimes were they have not been able to defend them self's against armed criminals, rather it has been in there home, place of work, or areas of recreation. This Bill would not only defend the lives and property of those being assaulted, and shall give defense against perpetrators that commit acts against others that have no way to defend themselves, such as child kidnapping or sexual assault.

Please I urge you to support this Bill; it may not only save or protect a life of an Alaskan, but could save yours, or your loved ones.

Respectfully
Mike Reeves
Wasilla Alaska

Rex Shattuck

From: Pamela Hodgson [pam@kitchencabinetsanddesign.com]
Sent: Monday, March 28, 2011 2:51 PM
To: Rep. Mark Neuman
Subject: HB 80
Attachments: Clear Day Bkgrd.JPG

Please support HB 80; it favors law abiding citizens versus criminals!

Kitchen Cabinets And Design

Pamela Hodgson; cell 223-3711

pam@kitchencabinetsanddesign.com

www.kitchencabinetsanddesign.com

Rex Shattuck

From: Paul Brown [pkbrown@alaska.edu]
Sent: Monday, March 28, 2011 4:36 PM
To: Rep. Mark Neuman
Subject: HB80

Representative Neuman

Please vote in support of HB80, though I dislike the wording and that the bill does not go far enough to protect the people of the great State of Alaska, I do agree with the intent of the bill and purpose. Again please vote in favor of HB 80.

Many thanks

paul brown

--
Paul Brown
306 Tanana Loop Duckering Bldg
College of Engineering and Mines rm 248
University of Alaska, Fairbanks AK 99775
907.474.5216 ph.
907.474.5454 fx.

Life is tough but it is even tougher if you are stupid - John Wayne

Rex Shattuck

From: Raymie Rushing [raymie@raymierushing.com]
Sent: Monday, March 28, 2011 2:49 PM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mia Costello; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg
Subject: HB80 - remove the duty-to-retreat in Alaska
Attachments: --static--sunsetonthelake_b.jpg; --static--sunsetonthelake_lb.gif

HB80

I will keep this short as I understand each and everyone's time constraints. Please vote in favor of a citizen's right to protect themselves wherever they may be - so long as they can legally be there. Thank you all for your dedicated service.

Adam Rushing
&
Raymie Rushing
www.RaymieRushing.com
www.RushingtoGetSomewhere.com

Rex Shattuck

From: Renfro, Erin (Anchorage) [Erin.Renfro@WorleyParsons.com]
Sent: Monday, March 28, 2011 3:00 PM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg
Cc: Clint Renfro
Subject: Support for House Bill 80

House Finance Committee Members,

I would like to go on record as being in support of House Bill 80, the No-Duty-To-Retreat Legislation. I want to know that I can defend myself and my children, regardless of where we are, without fear of being made into a criminal.

Thank you,

Erin Renfro
627 Giroux Circle
Anchorage, AK 99515
Home: (907) 336-0980
erindee@yahoo.com
Work: (907) 273-4444
Erin.Renfro@NANAWorleyParsons.com

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Rex Shattuck

From: Richard Shear [badbushhog@att.net]
Sent: Wednesday, March 30, 2011 10:02 AM
To: Rep. Mark Neuman
Subject: HB 80

Mark thank you for bring this Bill to be voted on. I whole heartedly support this bill . I beleave we have a basic right to defend ourselfs , Family and property as well as others no matter where we go. I think this will set a valuable precedence to the rest of the country .

Thanks for bring it to light. Rick Shear Talkeetna Ak

Rex Shattuck

From: Rick Ellis [spike9542003@yahoo.com]
Sent: Monday, March 28, 2011 4:21 PM
To: Rep. Mark Neuman
Subject: HB 80

Dear Representative Neuman,

As a fellow Alaskan and a law-abiding gun-owner, thank you for introducing HB 80. I am contacting the rest of the Representatives on the Finance committee to request their support of HB 80. Keep up the good work!

Rick C. Ellis
341 S. Gastman Ct.
Wasilla, AK 99654
907-376-6703

Rex Shattuck

From: Rodney and Shelly [fishingfools@alaska.net]
Sent: Sunday, April 03, 2011 3:39 PM
To: Rep. Mark Neuman
Subject: H-80

I respectfully urge you to support H-80. No-Duty-to-Retreat-Legislation.
Thank You
Rodney Small
Nikiski, Ak.

Rex Shattuck

From: Ryan [akleatherneck@mtaonline.net]
Sent: Wednesday, March 30, 2011 12:12 PM
To: Rep. Mark Neuman

I support HB 80
Ryan J Clark USMC Vet
907 746 7580

Rex Shattuck

From: Sandi Williams [knikhusky@mtaonline.net]
Sent: Wednesday, March 30, 2011 9:42 AM
To: Rep. Mark Neuman
Subject: HB-80

Dear Rep. Neuman,

I fully support this bill and urge its passage today. Self defense should not err on the side of the criminal.

Thank you,
Sandi Williams
Wasilla, AK

Rex Shattuck

From: steve ihde [btrnanook@yahoo.com]
Sent: Monday, March 28, 2011 2:24 PM
To: Rep. Mark Neuman
Subject: Duty to Retreat

Please pass HB80.
Thank you,

-Steve Ihde-

-Proverbs 16:9-
btrnanook@yahoo.com

Rex Shattuck

From: Susan Gibson [sbgibson@gci.net]
Sent: Monday, April 04, 2011 9:52 AM
To: Rep. Mark Neuman
Subject: House Bill 80

Dear Representative Neuman,

Please protect my right to defend myself and prevent me from becoming a possible government-induced victim. I urge you to vote for House Bill 80.

Thank you,
Susan Gibson

Susan Gibson
1712 Persinger Dr.
North Pole, AK 99705

t: 907-488-2709
e: sbgibson@gci.net

Rex Shattuck

From: taurusetursa [taurusetursa@yahoo.com]
Sent: Saturday, April 02, 2011 10:47 AM
To: Rep. Mark Neuman
Subject: Fw: HB 381 Support / HB 80 Support

Dear Mark ~

I was delighted to learn that you are a sponsor of HB 80: Self Defense.

Thank you again for attempting to codify an Alaskan's basic right to protect family, person and property wherever he or she has a lawful right to be.

Hopefully, this will be the year when the State of Alaska recognizes that right.

Mick

----- Forwarded Message ----
From: taurusetursa <taurusetursa@yahoo.com>
To: Rep. Mark Neuman <Representative_Mark_Neuman@legis.state.ak.us>
Sent: Tue, April 20, 2010 10:37:09 AM
Subject: Re: HB 381 Support

Mark ~

Thank you again for sponsoring HB 381.

I hope you will reintroduce the bill during the next session.

Mick

From: taurusetursa <taurusetursa@yahoo.com>
To: Rep. Mark Neuman <Representative_Mark_Neuman@legis.state.ak.us>
Sent: Thu, April 1, 2010 12:57:38 PM
Subject: Re: HB 381 Support

Mark ~

Thank you for acknowledging my note so promptly, the promising news and, again, your sponsorship of this important bill.

Mick

From: Rep. Mark Neuman <Representative_Mark_Neuman@legis.state.ak.us>
To: "taurusetursa@yahoo.com" <taurusetursa@yahoo.com>
Sent: Thu, April 1, 2010 9:22:22 AM
Subject: RE: HB 381 Support

Mick,

Thank you for your note of support. The legislation is picking up more sponsors as it heads to its next hearing in Finance. I hope that you have

contacted your local legislators as well.

Mark

-----Original Message-----
From: housemajority_email@housemajority.org [mailto:housemajority_email@housemajority.org]
Sent: Wednesday, March 31, 2010 10:22 PM
To: Rep. Mark Neuman
Subject: HB 381

+----------+
DO NOT REPLY DIRECTLY TO THIS EMAIL: your reply will go to enews@housemajority.org
To correspond with the author Hit 'Reply' or 'Forward'.
Then change the TO: address to taurusetursa@yahoo.com
If suspected Spam please forward to: support@housemajority.org
+----------+

From: taurusetursa@yahoo.com

Thank you for being the prime sponsor of HB 381. If passed, it may spare law-abiding Alaskans and their families from extreme personal duress and the often debilitating financial costs of defending themselves in criminal and civil proceedings for having protected themselves or their loved ones by the proper and timely application of deadly force. Thank you again for your leadership in sponsoring this important and reasonable legislation.

~ Mick Rosenberg
Zip Code: 99508
Voter ID: 00590359

+----------+
DO NOT REPLY DIRECTLY TO THIS EMAIL: your reply will go to enews@housemajority.org
To correspond with the author Hit 'Reply' or 'Forward'.
Then change the TO: address to taurusetursa@yahoo.com
If suspected Spam please forward to: support@housemajority.org
+----------+

Rex Shattuck

From: Troy & Heather Burns [toothdoc05@yahoo.com]
Sent: Wednesday, March 30, 2011 6:53 PM
To: Rep. Mark Neuman
Subject: HB-80

This is a note to urge you to support hB-80! It is very important that citizens have the ability under the law to protect themselves and their families against those who seek to bring harm to us! Thanks for your support in this matter!!

Best Regards,

Dr. Troy Burns
LT. 3rd Battalion
ALaska State Defense Force

Sent from my iPhone

Sent from my iPhone

Rex Shattuck

From: wess [wess@ptialaska.net]
Sent: Monday, April 04, 2011 7:48 AM
To: Rep. Mark Neuman
Subject: HB-80

Please vote yes on HB-80. Eugene Chambers

Rex Shattuck

From: William Gates [bgates80@gmail.com]
Sent: Tuesday, March 29, 2011 8:00 AM
To: Rep. Mark Neuman
Subject: HB 80

I certainly would like to encourage you to consider support of HB 80 tomorrow.

Thank you,
William Gates

HB

87

<TARGET><BILL>HB 87</BILL><SUBJECT>HB 87</SUBJECT><COMM>SJUD27</COMM></TARGET>

Official Business

Alaska State Legislature

Senate

Office of the Secretary

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:senate_secretary@legis.state.ak.us

FOR YOUR IMMEDIATE ATTENTION

DATE: April 15, 2011

TO: Judiciary Committee
(Cindy, Room 417)

FROM: Office of the Senate Secretary

SUBJ: Referral Change

The Chair of the Committee noted above has waived the referral(s) on the following bills(s):

RETRIEVE

CS FOR HOUSE BILL NO. 87(L&C)
"An Act relating to civil and criminal penalties for antitrust violations."

Please give the bill file(s) to the page delivering this message for forwarding to the next Committee of referral.

Thank you.

HB 116

<TARGET><BILL>HB 116</BILL><SUBJECT>HB 116</SUBJECT><COMM>SJUD27</COMM></TARGET>

LEGAL SERVICES

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

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

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

MEMORANDUM March 28, 2011

SUBJECT: Sectional Summary of HB 116 am, a special 2011 Revisor's Bill Relating to a Criminal Law Issue (Work Order No. 27-LS0369\A.A)

TO: Representative Craig Johnson
Chair of the House Rules Committee

FROM: Gerald P. Luckhaupt
Assistant Revisor

This is a sectional summary of HB 116 am, a special 2011 revisor's bill. The bill is prepared under AS 01.05.036, which provides, in part, that the Legislative Affairs Agency, working in cooperation with the Revisor of Statutes

> shall make recommendations to the legislative council concerning deficiencies, conflicts, or obsolete provisions in and the need for reorganization or revision of the statutes, and, at the direction of the legislative council, shall prepare for submission to the legislature legislation for the correction or removal of the deficiencies, conflicts, or obsolete provisions, or to otherwise improve the form or substance of any portion of the statute law of this state. . . .

As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill -- the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 11.71.140(b) by correcting a misspelling of the drug "oxymorphone." AS 11.71.140(b) was enacted in 1982 and at that time a typographical error was made and "**oxymorphone**" was spelled incorrectly as "**oxymorphine**."

Section 2 of the bill amends AS 11.71.170(b)(11) by correcting a misspelling of the drug "lorazepam." AS 11.71.170(b)(11) was enacted in 1982 and at that time a typographical error was made and "**lorazepa*m***" was spelled incorrectly as "**lorazepa*n***."

Section 3 of the bill provides an applicability provision to clarify that the corrections that are being made in secs. 1 and 2 are not substantive changes to the law and that they apply generally to all persons who might be affected by AS 11.71.170(b)(11) before, on, or after the effective date of this bill. This provision is included out of an abundance of

caution to ensure that former or ongoing criminal prosecutions are not called into question.

Section 4 of the bill provides an immediate effective date.

If you have any questions about the bill or this summary, please contact me at your convenience.

GPL:plm
11-188.plm

LEGAL SERVICES

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

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

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

MEMORANDUM January 20, 2011

SUBJECT: Sectional Summary of a special 2011 Revisor's Bill Relating to a Criminal Law Issue (Work Order No. 27-LS0369\A)

TO: Representative Craig Johnson
Chair of the House Rules Committee

FROM: Gerald P. Luckhaupt
Assistant Revisor

This is a sectional summary of a special 2011 revisor's bill. The bill is prepared under AS 01.05.036, which provides, in part, that the Legislative Affairs Agency, working in cooperation with the Revisor of Statutes

> shall make recommendations to the legislative council concerning deficiencies, conflicts, or obsolete provisions in and the need for reorganization or revision of the statutes, and, at the direction of the legislative council, shall prepare for submission to the legislature legislation for the correction or removal of the deficiencies, conflicts, or obsolete provisions, or to otherwise improve the form or substance of any portion of the statute law of this state. . . .

As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill -- the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 11.71.170(b)(11) by correcting a misspelling of the drug "lorazepam." AS 11.71.170(b)(11) was enacted in 1982 and at that time a typographical error was made and "**lorazepa*m***" was spelled incorrectly as "**lorazepa*n***."

Section 2 of the bill provides an applicability provision to clarify that the correction that is being made in sec. 1 is not a substantive change to the law and that it applies generally to all persons who might be affected by AS 11.71.170(b)(11) before, on, or after the effective date of this bill. This provision is included out of an abundance of caution to ensure that former or ongoing criminal prosecutions are not called into question.

Section 3 of the bill provides an immediate effective date.

If you have any questions about the bill or this summary, please contact me at your convenience.

GPL:ljw
11-028.ljw

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 116
(H) Publish Date: 2/18/11

Identifier (file name): HB116-LAW-CRIM-02-11-11
Title: An Act making a corrective amendment to Alaska Statutes by correcting the spelling of 'lorazepam.'
Sponsor: Rules by Request of Legislative Council
Requester: (H) Judiciary

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager
Division: Administrative Services
Approved by: John J. Burns, Attorney General
Department of Law

Phone: 465-5427
Date/Time: 2/11/11 4:45 PM
Date: 2/11/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 116

Analysis

HB 116 corrects the spelling of a Schedule IVA controlled substance. Currently AS 11.71.170(b) incorrectly spells the substance "lorazepam" as "lorazepan". The bill corrects the spelling.

There is zero fiscal impact to the Department of Law from this bill.

ALASKA STATE LEGISLATURE
HOUSE RULES COMMITTEE
REPRESENTATIVE CRAIG JOHNSON, CHAIRMAN
State Capitol Room 216, Juneau, AK 99801-1182 (907) 465-4993, (907) 465-3872 Fax
716 W. 4th Ave., Ste. 640, Anchorage, AK 99501 (907) 269--0200, (907) 269-0204 Fax

MEMORANDUM

TO: Senator Hollis French, Chair
House Judiciary Committee

FROM: Representative Craig Johnson, Chair
House Rules Committee

DATE: March 28, 2011

SUBJECT: Hearing Request for CSHB 116 am, *Special 2011 Revisor's Bill by House Rules by Request of the Legislative Council*

I respectfully request a hearing in the Senate Judiciary Committee for CSBH 116am, a special 2011 revisor's bill related to criminal law, at your earliest convenience.

I have enclosed a copy of the most current version of the bill, a sectional summary of the amended bill, the original bill, and the zero fiscal note.

Gerald Luckhaupt, Assistant Revisor with Legal Services, will be testifying for the bill.

If you have any questions or need additional information, feel free to contact me or my aide, Debra Higgins at 465-3764.

Thank you for your consideration of this request.

STATE OF ALASKA

SEAN PARNELL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

LEGISLATION & REGULATIONS SECTION
P.O. BOX 110300
DIMOND COURT HOUSE, 6TH FLOOR
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2520

March 29, 2011

Senator Hollis French, Chair
Senate Judiciary Committee
Alaska State Legislature
State Capital, Room 417
Juneau, Alaska 99801-1182

Re: Hearing Request re: HB 116 AM - 2011 Revisor's Bill to correct spelling of "lorazepam"

Dear Senator French:

The Department of Law would appreciate scheduling of the above bill for a hearing in your committee, at your earliest convenience. The bill makes important technical improvements in Alaska law.

We have reviewed the bill and have found no legal concerns.

If you have any questions, please feel free to contact me.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Chief Assistant Attorney General

DEB:ljm

cc: Heather Brakes, Legislative Director, Office of the Governor
Jerry Luckhaupt, Assistant Revisor of Statutes, Legislative Affairs Agency

HB 127

<TARGET><BILL>HB 127</BILL><SUBJECT>HB 127</SUBJECT><COMM>SJUD27</COMM></TARGET>

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **CS HB 127(FIN)**
() Publish Date: 4/4/2011

Identifier (file name) CS HB127(FIN)-DOC-OC-04-08-11
Dept. Affected: DOC
Title: "An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering..."
Appropriation: Administration and Support
Allocation: Office of the Commissioner
Sponsor: Rules Committee
Requester: Senate Judiciary Committee
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES	**	**	**	**	**	**	**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost **

POSITIONS

Full-time	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Part-time	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Temporary	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Why this fiscal note differs from previous version

This revised fiscal note applies the current approved average cost of care rate for the housing of offenders.

Prepared by: Leslie Houston
Phone: 465-3339
Division: Administrative Services
Date/Time: 04/08/11 3:15 p.m.
Approved by: Joseph D. Schmidt
Commissioner
Date: 4/8/2011

(Revised 12/29/2010 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 127(FIN)

Analysis

DOC averages two new incarcerations per year for the crime of enticement of a minor. This bill would increase the penalty for this crime from a Class C felony to a Class B felony. This change has the potential to increase mandays by 10,220 in FY12 thru FY17. Applying the current cost of care ($136.44 per day), the increase of cost could be in the range of $0.0 to $1,394.4 to DOC.

DOC averages two incarcerations per year for the crime of online enticement of a minor. This bill increases the penalty for this crime from a Class B felony to a Class A felony if the defendant was, at the time of the offense, a registered or required to register as a sex offender or child kidnapper. This would increase the penalty three years. This has the potential to increase mandays by 5,475 beginning in FY12 thru FY17. Applying the current daily cost of care ($136.44 per day), this could potentially increase costs in the range of $0.0 to $747.0 to DOC.

DOC averages one new incarceration per year for the crime of unlawful exploitation of a minor. This bill would increase the penalty for this crime from a Class B felony to a Class A felony. This would increase the penalty three years. This has the potential to increase mandays by 5,475 beginning in FY12 thru FY17. Applying the current daily cost of care ($136.44 per day) could potentially add costs in the range of $0.0 to $747.0 to DOC.

Other provisions that the department is unable to quantify at this time but will closely monitor for potential fiscal impact are as follows:

- Adding Monitoring a Person with a Global Positioning Device or Similar Technology Means
- Adding Child Kidnapper to 2(A) under AS12.63
- Adding Sending and Explicit Image of a Minor in the Degree and Second Degree to Statute
- Adding Crimes Involving Minors Committed Out of State, Specifically Online Enticement to Statute
- Adding Online Enticement of a Minor to Statute

This bill also provides clarifying changes to statute on appearances before a judge. The potential impacts of this change was previously identified and accounted for when the original legislation passed in 2010.

The Department of Corrections is unable to determine the fiscal impacts of the passage of this legislation and will closely monitor potential future fiscal impacts.

April 11, 2011

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
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NADINE WINTERS, Fairbanks

ZACH FICK, Anchorage
STUDENT ADVISOR

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
Juneau, AK 99801-1182
via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

Re: CS for HB 127 (FIN) – Section 11
ACLU Review of Legal Issues

Chair French, Vice-Chair Wielechowski:

Thank you for the opportunity to submit written testimony with respect to the Committee Substitute (Finance) for House Bill 127.

As you know, the American Civil Liberties Union of Alaska represents thousands of members and activists throughout the state who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we would like to advise the Committee of some issues with respect to CS for HB 127 (FIN), and in particular, Section 11.

Need to Revisit Unwarranted Expansion of 24 Hour Rule

Last year, HB 324 was passed (26th Legislature, Chapter No. 19, SLA 2010, Effective Date: July 1, 2010), amending Alaska Rule of Criminal Procedure 5 ***to permit a new arrestee to be held for up to 48 hours before the initial appearance before a judge or magistrate, rather than the 24 hour period***

which had long been the law. Section 11 of HB 127 would create consistency between the amended rule and the statute relating to pretrial detention. **Given the significant overcrowding issues which are rapidly being exacerbated in our detention facilities, and the numerous financial issues pressing on the Department of Corrections, of which the Legislature is aware, HB 127 presents a good opportunity to revisit whether the revision passed last year in HB 324 is the best policy for the State of Alaska.**

Under *Gerstein v. Pugh*, a probable cause hearing must be held without unreasonable delay. 420 U.S. 103 (1975). After *Gerstein*, a standard of 24 hours was adopted by most states and most circuits. Years later, a narrowly divided US Supreme Court stated that the initial appearance must be made only within 48 hours. *Riverside v. McLaughlin*, 500 U.S. 44 (1991). However, *Riverside* does not bind the states in their interpretation of their own constitutions.

In one accounting of state responses to *Gerstein*, most states had concluded that 24 hours was the appropriate term of detention before appearing before a magistrate or judge, and only seven states explicitly permitted more than 24 hours prior to an initial hearing. *Jenkins v. Chief Justice of Dist. Court Dept.*, 619 N.E.2d 324, 333-34 (Mass. 1993).

Since Alaska had guaranteed a 24-hour window for initial appearances for 18 years since the Riverside decision, the state courts may be hard pressed to see why a 48-hour window would not likely permit "unreasonable delay." The Alaska courts have not yet had a chance to rule on the dimensions of the "speedy trial" provision of Article I, section 11 as it relates to initial appearances, since Rule 5 has long guaranteed a 24-hour window of appearance. The Alaska Supreme Court could very well decide that the state constitutional provisions relating to speedy trial and due process require no more than a 24-hour window prior to initial appearance, just as the Massachusetts Supreme Court did in *Jenkins*.

Given that the currently existing rules of criminal procedure already provide an exception for defendants arrested far from urban centers and allow the prosecution to request a delay to gather more information where necessary for a bail hearing, the state's success over the last 18 years in providing an initial appearance within 24 hours strongly suggests that a delay of more than 24 hours would represent unnecessary delay, making the statute unconstitutional.

Increased Costs Resulting From Prison Over-Crowding.

In particular, as the Judiciary Committee is no doubt aware, **almost half of all Alaska prisoners are being held pretrial**, typically constituting 46 to 48% of all prisoners in Alaskan institutions. The high rate of pre-trial detention contributes substantially to the state of overcrowding in Alaska prisons and the need to build more of the prisons that cost our state dearly. Consider that the Department of Law reports that almost 27,000 new criminal cases were filed last year – roughly 6,000 felony cases and roughly 21,000 misdemeanor cases. If every one of those 27,000 arrests results in a single extra day in custody, that increase of 27,000 prisoner-days would impose a similar burden in on the correctional system as 74 prisoners spending a year in prison.

Every prisoner-year in custody costs roughly $45,000. **The cost of additional incarceration from the policy change contemplated in HB 127 could cost up to $3.3 million in increased costs every year**, just by adding a single day of initial incarceration for each arrest.

Extension of the post-arrest time that a prisoner can be kept in custody without any bail will merely serve to increase our prison population unnecessarily, mostly by increased incarceration of prisoners accused only of misdemeanors. **While there may be good intentions to make the 48 hour rule the exception – rather than the norm – common sense, experience of human nature, and the realities of the legal load encountered by modern court systems, support the idea that over time – and perhaps quickly – the 48 hour rule WILL become the norm.**

The Judiciary Committee should assist the Legislature in reversing course on this provision, and return to the 24-hour window Alaska observed for decades. We are not aware of any evidence of a single incident in which a prisoner was released wrongfully because of any limitation imposed by the 24-hour window before the initial appearance. Locking up thousands of people accused of misdemeanors for longer periods of time and spending millions of dollars to keep our prisons crowded is not good public policy.

Thank you again permitting us to share our concerns. Please feel free to contact the undersigned should you require any additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us
Senator John Coghill, Senator_John_Coghill@legis.state.ak.us

Cindy Smith

From: Doug Wooliver [dwooliver@courts.state.ak.us]
Sent: Saturday, April 09, 2011 12:21 PM
To: Cindy Smith
Subject: RE: Message from 4th fl00r copier

Hello Cindy. Yes, scheduling modifications for both ex parte and long term orders with a maximum of three days notice will create scheduling problems for us. As you note, AS 18.66.120 provides for three days notice for ex parte modifications in DV cases (after all, they are only 20 days in duration and the respondent never had an opportunity to participate), but 20 days notice for long-term (six month) orders. There is less of a need for such a short scheduling time because the order is for a much longer period of time and the respondent had an opportunity to participate in the six-month hearing.

Although we do not have a fiscal note on this bill (because the conservatorship caseload is still pretty light), over time we will see a lot of these and it becomes very difficult to keep space open in judge's calendars to allow for all of the short-notice hearings. I would ask that the long-term modification notice period match 20 days established for the long-term modification for a long-term DV protective order.

Thanks for letting me know about this. Doug

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Saturday, April 09, 2011 11:53 AM
To: Doug Wooliver
Subject: FW: Message from 4th fl00r copier

Attached. Let me know what you think ASAP, as we'd like to get this in front of the committee Monday.

The restraining order language has been reorganized into sections and begins on page 5 – modifications on page 6.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.senate.org

From: postmaster@legis.state.ak.us [mailto:postmaster@legis.state.ak.us]
Sent: Saturday, April 09, 2011 11:47 AM
To: Cindy Smith
Subject: Message from 4th fl00r copier

Click here to report this email as spam.

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

SEAN PARNELL, GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
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CSHB 127(JUD) and SB 72

CSHB 127(JUD) (HB 127 in this comparison) and SB 72 are different in the following ways:

Section 6 of HB 127 and SB 72 – HB 127 makes minor changes to drafting in current law; it changes "has been charged by complaint . . ." to "is charged" to clarify that the law does not apply to a person who has been charged and then acquitted.

Section 7 of HB 127 and SB 72– often called the "sexting" provision, was changed to (1) require the state prove the culpable mental state that the offender acted with the intent to annoy or humiliate another person; and (2) changed the penalties so that a person who distributes an image to another person commits a class B misdemeanor, and a person who places the image on an Internet site accessible to the public commits a class A misdemeanor. No felony level offense is included in HB 127.

Section 9 of SB 72 – that clarified the culpable mental states for the crime of distribution of indecent material to minors, was removed from HB 127.

Sections 11 and 13 of HB 127 – were added to HB 127. They were originally in HB 175 and were added to HB 127 in the House Finance Committee. They change from 24 to 48 hours the statutory deadline within which law enforcement must bring an arrested person before a judicial officer. The law continues to require that law enforcement bring such a person before a judicial officer without unnecessary delay. This was debated extensively last year, and the court rules have already been changed from 24 to 48 hours. The statutes need to be changed to conform with the court rules.

Section 14 of HB 127 – changes the offense of failure to carry and present to a law enforcement officer proof of an operator's license from a class B misdemeanor to a violation. Although in Title 28 this offense is a misdemeanor, it is also on the bail schedule as a $50 correctible offense. HB 127 corrects this inconsistency. This change also was originally in HB 175.

Section 15 of HB 127 – corrects a similar (to section 14) inconsistency in the offense of failure to carry proof of automobile insurance. In Title 28 this is a class B misdemeanor, and it is also a correctible offense in the bail schedules. By changing this offense to an infraction, HB 127 corrects this inconsistency.

Section 17 of HB 127 – resolves a similar inconsistency in the penalty for burning a vehicle in the Knik River Public Use Area. In 2006 the legislature created the Knik River Public Use Area. The law authorizes the Department of Natural Resources to adopt regulations governing conduct in the area. AS 41.23.220(a) provides that a person who violates the new law or a regulation under the new law commits a violation. AS 41.23.220(b) requires the Alaska Supreme Court to establish a bail schedule for violations of the statutes and regulations. The law specifically requires that the violations be disposed of without court appearance. One of the regulations adopted prohibits burning a vehicle in the area; the bail was adopted in Supreme Court Order 1711 at $50.

In 2008 the legislature enacted AS 11.46.420, which adopted a new crime, arson in the third degree. This prohibits burning a vehicle on state or municipal land. The penalty for this crime is a class C felony.

These sections correct this inconsistency by excluding burning a vehicle on state land from the other prohibitions that are effective in the Knik River Public Use Area. This change was originally in HB 175.

Section 18 of HB 127 -- redrafts the law enacted last year allowing the Attorney General to issue administrative subpoenas for law enforcement to obtain limited information from an Internet service provider if there is reasonable cause to believe that an Internet service account has been used in connection with the crimes of online enticement of a minor, unlawful exploitation of a minor, distribution of child pornography, possession of child pornography, or distribution of indecent material to a minor.

The bill allows a designee of the attorney general, still within the Department of Law, to issue the administrative subpoenas. It corrects a problem with the service provisions of the law to allow service of the subpoenas in any manner authorized by law or acceptable to the Internet service provider. The bill clarifies that a person who does not obey a subpoena or ask the court to quash the subpoena may be guilty of contempt. The bill does not include a problematic provision of current law which requires either returning information to the Internet service provider or destroying it if a criminal prosecution is not undertaken. There are two problems with this: first, an Internet service provider does not need the documents returned

because they already have the information. Second, it is not good public policy for documents in the possession of a public agency be destroyed. It is better policy that this information is kept as part of a confidential police investigation. The bill also provides that a person may not bring a civil action against an Internet service provider for complying with an administrative subpoena.

Section 19 of HB 127 -- provides that the crime of unlawful exploitation of a minor is not included in the crimes that require an automatic waiver from juvenile to adult court for a person who is 16 or 17 years of age who is charged with commission of the offense.

Section 20 of HB 127 redrafts Rule 5(a)(1), Alaska Rules of Criminal Procedure, to correct a drafting error and to make the rule more readable. The rule was changed last year to extend the deadline from 24 to 48 hours for bringing an arrested person before a judicial officer. This change corrects the drafting error, which currently defines a term that is not used in the rule.

14057

APOA
ALASKA PEACE OFFICERS ASSOCIATION

ALASKA ASSOCIATION

Women Police of Alaska

leg
rf
cl

February 14, 2011

Honorable Sean Parnell
Governor
State of Alaska
PO Box 110001
Juneau, AK 99811-0001

OFFICE OF THE GOVERNOR
MAILROOM
FEB 16 2011

Dear Governor Parnell:

On behalf of our respective organizations, we would like to thank you for facilitating the introduction of House Bill 127 and Senate Bill 72, relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, distribution of indecent material to minors, and misconduct involving confidential information; relating to probation; and providing for an effective date.

We met recently to review proposed legislation and decided to unanimously support this bill.

Again, thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organizations can do to assist in the passage of this bill.

Sincerely,

John Lucking Jr., President
Alaska Peace Officers Association
PO Box 240106
Anchorage AK 99524

Tom Clemons, President
Alaska Association of Chiefs of Police
183 Nelson Ave
Wasilla AK 99654

Michele Logan, President
Women Police of Alaska
PO Box 233306
Anchorage AK 99523

Cindy Smith

From: Doug Wooliver [dwooliver@courts.state.ak.us]
Sent: Thursday, February 10, 2011 3:43 PM
To: Cindy Smith
Subject: SB 72 Statistics

Follow Up Flag: Follow up
Flag Status: Flagged

Hello Cindy. I was unable to attend your Monday hearing on SB 72 (the governor's crime bill), but I did listen to the recording of the hearing. During that hearing the committee wondered how many cases would be impacted by the increased penalties reflected in sections 3, 4 and 5 of the bill. I asked our data people how many times those offenses were charged in FY 10. There were 4 cases of online enticement under AS 11.41.452(d) (section 3) and 1 case under AS 11.41.452(e) (section 4). There were 7 cases filed under AS 11.41.455, (section 5 of the bill), though I can't tell from the numbers I received if any were under the provision that already makes these a class A felony.

Although whenever we compare case numbers with others in the criminal justice system we invariably end up with slightly different numbers, our numbers seem consistent with those included in the Department of Corrections fiscal note (an average of five cases per year for these three case types). If the committee's question is whether there are a lot of these case or just a few, I think the answer is just a few.

Doug

MEMORANDUM

STATE OF ALASKA

Department of Law - Criminal Division

To: Senate Judiciary Committee

Date: March 1, 2010

Thru: Richard Svobodny, Deputy Attorney General
Anne Carpeneti, Assistant Attorney General

From: Susan S. McLean SMc
Director, Criminal Division

Subject: **Other State Rules - First Appearance After Arrest**

General Considerations

The Fourth Amendment requires that a person must be released from custody after 48 hours if a court has not determined that there is probable cause for the arrest. *County of Riverside v. McLaughlin,* 500 U.S. 44, 57-59, 111 S.Ct. 1661, 1670-1671 (1991). Violation of the rule is but one factor to consider in determining whether to suppress a defendant's in-custody statements.

- Since probable cause (and the amount of bail) must be determined before an arrest warrant issues, a probable cause determination only applies to warrantless arrests.
- Since probable cause may be determined on the basis of affidavits and sworn testimony after a warrantless arrest, the defendant's presence is not required at a probable cause hearing.
- Many states require appearance before a magistrate without unnecessary delay, but most courts have not defined "without unnecessary delay" as a specific amount of time, and determine meaning on a case by case basis.

Only 3 of the 24 states which set specific time limits mandate appearance within 24 actual hours of arrest.

Summary - First Appearance Following Warrantless Arrest, By Total Number of States

3 states - 24 hours, calculated including weekends and holidays (AK, FL, MD)
1 state - 24 hours, weekends and holidays *may* be included or excluded (WA)
6 states - 24 hours, calculated *excluding* weekends and holidays (AZ, CT, DE, ID, MA, NH)

1 state - 36 hours, calculated *excluding* day of arrest, Sundays and holidays (MN)

7 states- 48 hours, including weekends and holidays (AL, AR, GA, HI, MS, NE, TX)
1 state - 48 hours, *excluding* Sunday, holiday, and days when court not in session (CA)
1 state - 48 hours, *excluding* Saturday, Sunday and holidays (ME)
1 state - 48 hours if 1st appearance is combined w/prob. cause hearing (court decision) (WI)

2 states - 72 hours, including weekends and holidays (NJ, WY)
1 state - 72 hours, *excluding* Saturday, Sunday and holidays (LA)
1 state - 72 hours is "without delay", if probable cause w/in 48 hours (court decision) (TN)
21 states - "without unnecessary delay" (CO, IL, IA, KS, KY, MI, MT, NV, NM, NY, NC, ND, OH, OK, OR, PA, RI, SD, UT, VT, WV)

2 states - "forthwith" (SC, VA)

1 state - "promptly" (repealed a 24- hour rule in 1995) (IN)

1 state - person must be released if not "charged" within 20 hours, but no provision for first appearance (MO)

State Time Limits for Initial Appearance Before Magistrate

State	Time Limit	Authority	Statutory language/construction
Alabama	48 hours - Warrantless arrest 72 hours - Arrest w/ warrant	Ala. R. Crim. P. 4.3(a)(1)(iii) Ala. R. Crim. P. 4.3(b)(2)(i)	
Alaska	24 hours, including weekends and holidays	Alaska R. Crim. P. 5(a)(1)	
Arizona	24 hours, excluding Sat., Sun and holidays	Ariz. R. Crim. P. 4.1(b) and Ariz. R. Crim. P. 1.3	*See, State v. Watkins,* 2008 WL 3171651 * 3 (Ariz. App. Aug.5, 2008) (Sat. Sun. and legal holiday excluded from calculation of 24 hrs; citing Rules 4.1(b) and 1.3))
Arkansas	48 hours Case law suggests that exception may exist for weekends and holidays	Ark. R. Crim. P. 4.1(e)	*See, Larson v. Dorney,*__ F.Supp.__, Slip. Op. 2009WL 903392 *4 (W.D. Ark, April 1, 2009)(delay between arrest on Good Friday and appearance on Monday was "as promptly as calendar would allow")
California	48 hours, excluding Sundays and holidays. If 48 hours expires when court is not in session, then next judicial day.	CA Penal Code § 825(a)(1) CA Penal Code § 825(a)(2)	
Colorado	without unnecessary delay	CRSA. § 16-2-112 Colo. R. Crim. P. 5	
Connecticut	24 hours, excluding Sat., Sun. and holidays	CRS 54-1(g) Conn. Practice Book R. 37-1	Statutory language "promptly before the court sitting next regularly" means the next court day, excluding weekends and holidays. *State v. Pirowski,* 11 Conn. App. 238,240, 526 A.2d 562 (1996)
Delaware	24 hours, excluding Sundays and holidays	11 Del. C. § 1909	
Florida	24 hours, including weekends and holidays	Fla. R. Crim. P 3.130	
Georgia	48 hours –warrantless arrest 72 hours – arrest with warrant	Ga. Uniform St. Ct. R. 26.1 Ga. St § 17-4-62; Ga. St § 117-4-26	
Hawaii	48 hours	H.R.S. 803-9(5)	
Idaho	24 hours, excluding Sat., Sun. and holidays	I.C.R, Rule 5(b)	
Illinois	without unnecessary delay	I.L.C.S. § 109-1	*See, People v. Willis,* 831 N.E.2d, 531, 538 (Ill., 2005) Ill Court cites *McLaughlin* as requiring 48 hours, but delay is only one factor to be examined in deciding whether confession is voluntary. Court has not otherwise defined "unnecessary delay".

Indiana	" promptly" 24 hr. rule repealed, 1995 Ct. decision implies that more than 48 hours can pass before initial appearance before magistrate	Ind. Code § 35-33-7-1	*See, State v. Larson,* 776 N.W.2d, 254, 258 (Ind. 2009) – probable cause must be determined with 48 hours, but can be based on hearsay and written testimony. "Arrested person has no right to be physically present at probable cause hearing." Ind. law does not provide for a specific period of time in defining how "promptly" a person is brought before magistrate
Iowa	without unnecessary delay	I.C.A. 804.22	
Kansas	without unnecessary delay	KSA 2003 Supp. 22- 2901	*See, State v. Carrow,* 2006 WL 399251 *4 (Kan. App., Feb. 17, 2006) - cites *McLaughlin* as defining "without unreasonable delay" to mean that period of delay "cannot be longer than 48 hours, excluding weekends and holidays"
Kentucky	without unnecessary delay	Ky. R. Crim. P. 3.02(2)	
Louisiana	72 hours excluding Sat., Sun, holidays 48 hours probable cause hearing, which is not adversarial and conducted without presence of defendant	LSA – C.Cr. P. Art. 230-1(A) LSA –C. Cr. P. Art. 230.2(A)	
Maine	48 hours, excluding Sat., Sun and holidays	Me. R. Crim. P. 5(a)	
Maryland	24 hours, including weekends and holidays	Md. Rule 4-212(e) and (f)	Although statute does not specifically state "including weekends", it is clear from case law. *See, e.g., Odum v. State,* 846 A. 2d 145 (Md. App. 2004)
Massachusetts	24 hours, excluding weekends and holidays (see judicial interpretation re probable cause determination)	Mass. R. Crim. P. 7	"accused shall be brought before court then in session, and, if not at its next session". Language at the court's "next session" suggests that if an accused is arrested on Friday, the next session would be a regular court day. *See, Jenkins v. Chief Justice of Dist. Court Dept.,* 619 N.E.2d 324, 337,339 (Mass, 1993) holding that probable cause must be determined within 24 hours but that the determination may be made ex parte upon written documents.
Michigan	without unnecessary delay	M.C.L.A. § 764.13	
Minnesota	36 hours, excluding day of arrest, Sun. and holidays	49 M.S.A. R. Crim. P. 4.02(5)	

Mississippi	without unnecessary delay, within 48 hours	M.C.A. 99-3-17 Uniform Cnty and Cir R 6.03	
Missouri	None – must be charged within 20 hours, but no requirement of personal appearance	V.Ann.Mo.C. Art. 544.170	All persons who are arrested without warrant shall be released if not charged and held by warrant within 20 hours of arrest
Montana	without unnecessary delay	MCA 46-7-101	*See, St. v. Brown*, 933 P.2d 672, 675-676 (Mont. 1999) acknowledging *McLaughlin* 48 hour time limit for probable cause determination, and holding that to be one factor in deciding voluntariness of confession.
Nebraska	48 hours	Neb. Crim. Rule 5.1(b)(1)	
Nevada	without unnecessary delay -warrantless arrest 72 hours- arrest with warrant	N.R.S. 171-1771 N.R.S. 171-178	*See, Powell v. State,* 930 P.2d 1123 (Nev. 1997), acknowledging that *McLaughlin* requires probable cause hearing within 48 hours
New Hampshire	24 hours, excluding Sat., Sun. and holidays	N.R.S. § 594:20(a)	
New Jersey	72 hours, provided that complaint showing probable cause is filed within 12 hours of arrest	N.J. Crim. Rules 3:4-1 and 3:4-2	
New Mexico	without unnecessary delay	NMSA § 31-1-5	
New York	without unnecessary delay	McKinney's CPL § 140.20 sub1	
North Carolina	without unnecessary delay	N.C.G.S.A. § 15A-511	
North Dakota	without unnecessary delay	N.D.C.C. 2906-25 N.D. Crim. Rule 5(a)	
Ohio	without unnecessary delay	O.R.C. § 29.35.05 Ohio Crim. Rule 4(e)	
Oklahoma	without unnecessary delay	22 Okl. Stat. Ann. § 181	*See, Black v. State, 871 P.2d 35, 39 (Okl.Cr.*1994).Citing *McLaughlin*, court recognized that delay longer than 48 hours in taking defendant to probable cause hearing is unreasonable.
Oregon	without unnecessary delay		
Pennsylvania	without unnecessary delay	Pa.R.Crim.P. 519	
Rhode Island	without unnecessary delay (unless charged w/ offense under RI Gen Law. 12.13.1.1*)	Super. R. Crim. P., Rule 5 Dist. R. Crim. P., Rule 9	*Unless charged w/ offense under RI Gen Laws, 12.13.1.1 (charges carrying life sentence or firearm offenses committed by persons previously convicted of offense carrying life sentence), in which case 48 hrs., excluding Sat., Sun. and holidays
South Carolina	Shall be forthwith carried before a magistrate and a warrant of arrest procured	S.C. Code 1976§ 22-5-200	

South Dakota	without unnecessary delay	SDCL § 23A-4-1	*State v. Larson*, 776 N.W. 2d 254, 258 (S.D., 2009) persons arrested without warrant are constitutionally entitled to probable cause determination within 24 hours.
Tennessee	"without unnecessary delay" – Judicially defined – 72 hours for appearance before magistrate 48 hrs for probable cause, but hearing unnecessary	Tenn. R. Crim. P. 5(a)	Due process is violated if probable cause is not determined within 48 hours, but a full adversarial hearing is not necessary. If an individual is not brought before a magistrate within 72 hours there has been an unnecessary delay within the definition of Tenn. R. Crim. P. 5.1. *State v. Carter*, 16 SW 762, 766 (Tenn. 2000)
Texas	48 hours	V.Ann. Tex. C.C.P. Art 14.06	
Utah	without unnecessary delay- 48 hours probable cause, but arrestee need not be present	U.C.A. 1953 § 77-723 Utah Criminal Rule 7	
Vermont	without unnecessary delay	Vt. R. Crim. P. 3(g)	
Virginia	"forthwith"	Va. Code Ann. § 19.2-82	Accused and officer appear together "forwith" for probable cause hearing. Does not apply to arrests with warrant
Washington	(Warrantless arrest only) 24 hours, including weekends and holidays 48 hours prob. cause, but hearing not required	Wash. Cr.RLJ 3.2.1 (c) Wash. Cr.RLJ 3.2.1(a)	"must be brought before a court of limited jurisdiction as soon as practicable after the detention is commenced, but in any event before the close of business on the next court day." Sat, Sun and holidays may be considered court days
West Virginia	Without unnecessary delay	W.Va. Code Sex. 62-1-5 W.Va. R. Crim. P. 5	
Wisconsin	Within a reasonable time Judicial definition - 48 hours implicitly the reasonable time	W.S.A. § 970.01	If the initial appearance also serves as the *Riverside* probable-cause hearing it must be held within 48 hours barring extraordinary circumstances. In cases where a defendant's *Riverside (v. McLaughlin)* determination was properly made in a proceeding prior to the initial appearance, court looks at the individual circumstances of the case to determine a "reasonable time" from the defendant's arrest *State v. Evans*, 522 N.W. 2d, 554, 563 (Wis. App., 1994) (Held: 4 days over a weekend not unreasonable)
Wyoming	without unnecessary delay and in no event more than 72 hours	W. R Crim P. 5(a)	

MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Foundation for Free Expression Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Consumers Association Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. National Association of Recording Merchandisers Recording Industry Association of America, Inc.

February 4, 2011

The Honorable Carl Gatto, Chair
Representative Thompson, Vice-Chair
House Judiciary Committee
Alaska State House of Representatives
Juneau, AK 99801

Delivered by email

Re: Section 9 of House Bill 127

Dear Chairman Gatto and Vice-Chair Thompson,

The members of Media Coalition have asked me to communicate their concerns regarding H.B. 127 sec. 9. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Alaska: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers. Some of our members are plaintiffs in *American Booksellers Foundation for Free Expression (ABFFE) v. Burns* (preliminary injunction granted as *ABFFE v. Sullivan*) a First Amendment challenge to 11.61.128(a).

Section 9 of H.B. 127 would narrow AS 11.61.128(a) to only criminalize the distribution of material "harmful to minors" by an adult if the recipient is under 16 years old and the adult is reckless regarding the recipients age or the adult believes the recipient is less than 16 years old. The legislation would also add a knowledge requirement as to the content being sent to the minor.

This bill is an improvement on AS 11.61.128(a) which was enjoined October 21, but even with these changes the law would still violate the First Amendment and the Commerce Clause of the US Constitution. We welcome the opportunity to work with the Attorney General and this Committee to amend Section 9 to make it constitutionally sound. We believe that modest changes to the bill would cure the constitutional problems in Section 9 while still providing law enforcement with the means to protect minors from adults looking to prey on them.

We appreciate the chance to share our concerns with the Judiciary Committee. If you

Executive Director: David Horowitz Chair: Judith Platt, Association of American Publishers
Immediate past Chair: Chris Finan, American Booksellers Foundation for Free Expression Treasurer: Vans Stevenson, Motion Picture Association of America
General Counsel: Michael A. Bamberger, SNR Denton US LLP

19 Fulton Street, Suite 407 | New York, NY 10038 | 212.587.4025 | mediacoalition.org

would like to discuss further our position on this bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director
Media Coalition, Inc.

cc: Representative Keller
Representative Lynn
Representative Pruitt
Representative Gruenberg
Representative Holmes
Representative Cheneault, Alternate

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
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JUNE PINNELL-STEPHENS, Fairbanks
NADINE WINTERS, Fairbanks

ZACH FICK, Anchorage
STUDENT ADVISOR

February 4, 2011

The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
Alaska House of Representatives
Juneau, AK 99801
via email: Representative_Carl_Gatto@legis.state.ak.us
Representative_Steve_Thompson@legis.state.ak.us

Re: House Bill 127
ACLU Review of Constitutional Issues

Chair Gatto, Vice-Chair Thompson:

Thank you for the opportunity to submit written testimony with respect to House Bill 127.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that respect, we wish to advise you of constitutional issues with the Bill.

As you may know, the ACLU of Alaska Foundation is currently representing several Alaska bookstores and others in *American Booksellers Foundation for Free Expression (ABFFE) v. Burns*. The federal court has already granted a preliminary injunction, on First Amendment grounds, against AS 11.61.128(a).

Section 9 of H.B. 127 would narrow AS 11.61.128(a) to only criminalize the distribution of material "harmful to minors" by an adult if the recipient is under 16 years old and the adult is reckless regarding the recipients age or the adult believes the recipient is less than 16 years old. The legislation would also add a knowledge requirement as to the content being sent to the minor.

This bill is an improvement on AS 11.61.128(a) which was enjoined October 21, but even with these changes the law would still violate the First Amendment and the Commerce Clause of the US Constitution. We welcome the opportunity to work with the Attorney General and this Committee to amend Section 9 to make it constitutionally sound. We believe that modest changes to the bill would cure the constitutional problems in Section 9 while still providing law enforcement with the means to protect minors from adults looking to prey on them.

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions that may arise, or to answer informally any questions which Members of the Committee may have.

Thank you again for the opportunity to share our thoughts.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Wes Keller, Representative_Wes_Keller@legis.state.ak.us
Representative Bob Lynn, Representative_Bob_Lynn@legis.state.ak.us
Representative Lance Pruitt, Representative_Lance_Pruitt@legis.state.ak.us
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Representative Lindsey Holmes, Representative_Lindsey_Holmes@legis.state.ak.us
Representative Mike Chenault, Representative_Mike_Chenault@legis.state.ak.us

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, et al., Plaintiffs, vs. DANIEL S. SULLIVAN, in his official capacity as ATTORNEY GENERAL OF THE STATE OF ALASKA, Defendant.	Case No. 3:10-cv-0193-RRB **ORDER GRANTING PRELIMINARY INJUNCTION**

I. MOTION PRESENTED

Pursuant to Fed. R. Civ. P. 65, Plaintiffs move for a preliminary injunction and other appropriate relief against enforcement of AS 11.61.128, both as amended by Sections 9-12 in Senate Bill No. 222, 26th Leg., 2d Sess., and as prior to amendment, which purports to limit access to materials deemed "harmful to minors." A copy of the statute at issue is found at Docket 7-2. Plaintiffs represent a spectrum of individuals and organizations – including booksellers, a photographer, libraries, and organizations representing booksellers, publishers, and other media interests – that communicate, disseminate, display, and

access a broad range of speech in the physical world as well as through the Internet. This matter has been fully briefed and the Court enters the following order.

II. BACKGROUND

In January of 2010, Alaska passed a bill, SB 222, that amended a variety of statutes with the stated intent of strengthening initiatives relating to sexual assault and domestic violence. The bill included Sections 9-12, which amended and (according to Plaintiffs) expanded an existing censorship law. These sections imposed what Plaintiffs complain are "severe content-based restrictions on the availability, display, and dissemination of constitutionally protected speech on the Internet and physically within the State of Alaska."[1]

Plaintiffs argue that the application of the amended act to the Internet violates the First, Fifth, and Fourteenth Amendments because: it restricts adults from engaging in protected speech on the Internet; it is substantially overbroad; it criminalizes protected speech among and to older minors; it is unconstitutionally vague; and requires that, for the determination of community standards, the relevant community be local, rather than the nation. In addition, Plaintiffs argue the application of

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[1] Docket 7 at 8.

the amended act to the Internet violates the Commerce Clause because: it regulates speech that occurs wholly outside the borders of Alaska; it imposes an unjustifiable burden on the interstate commerce over the Internet; and it subjects online speakers to inconsistent state laws.

Plaintiffs do not challenge the Alaska laws criminalizing child pornography, sexual solicitation or luring of minors, or obscenity on the Internet. Plaintiffs also do not challenge the portions of SB 222 that do not amend AS 11.61.128.

III. STANDARD OF REVIEW

In order for the Court to grant a preliminary injunction, the Plaintiffs must demonstrate:

1. a strong likelihood of success on the merits,

2. the possibility of irreparable injury to Plaintiffs if preliminary relief is not granted,

3. a balance of hardships favoring the Plaintiffs, and

4. advancement of the public interest (in certain cases).[2]

A preliminary injunction requires Plaintiffs to show *probable* success on the merits, but only the *possibility* of irreparable harm.[3]

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[2] *Earth Island Inst. v. United States Forest Service*, 351 F.3d 1291, 1298 (9th Cir. 2003).

[3] *Id.*

IV. DISCUSSION

A. Likelihood of Success on the Merits

Plaintiffs argue that they are likely to be successful on the merits because the amended act bans a large amount of speech that adults have a constitutional right to receive, and because the amended act fails strict scrutiny, is overbroad, and violates the Commerce Clause.[4] Plaintiffs argue that 18 federal judges in five circuits have struck down state statutes forbidding Internet communications deemed harmful to minors like the one at issue here.[5] In response, the State argues that because the amended act

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[4] Docket 7 at 15.

[5] *See PSInet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004), reh'g. denied. 372 F.3d 671, aff'g 167 F. Supp. 2d 878 (W.D. Va. 2001); *Amer. Booksellers Found. for Free Expression v. Dean*, 342 F.3d 96 (2d Cir. 2003), aff'g 202 F. Supp. 2d 300 (D.Vt. 2002); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), aff'g 4 F. Supp. 2d 1029 (D.N.M. 1998); *Southeast Booksellers Ass'n v. McMaster*, 371 F. Supp. 2d 773 (D.S.C. 2005); ACLU v. Napolitano, Civ. No. 00-0505 (D.Ariz. June 14, 2002) (permanent injunction), sub nom. ACLU v. Goddard, 2004 WL 3770439 (D. Ariz. Apr. 23, 2004) (statute as amended in 2003 permanently enjoined); *Cyberspace Commc'ns, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (summary judgment and permanent injunction), 55 F. Supp. 2d 737 (E.D. Mich. 1999) (preliminary injunction), aff'd, 238 F.3d 420 (6th Cir. 2000) (unpublished); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). The COPA statute, a federal statute similar to the Amended Act, was held unconstitutional. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), aff'd sub nom. *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), cert. denied, 129 S. Ct. 1032 (2009). In addition, the Wisconsin Supreme Court found the Wisconsin statute unconstitutional for lacking an appropriate scienter requirement. *State v. Weidner*, 611 N.W. 2d. 684 (Wis. 2000).

is narrower than the other statutes found unconstitutional, they are unlikely to succeed on the merits.

The State provides little support for its conclusory statement. Even a cursory review of the cases cited by Plaintiffs reveal legitimate concerns regarding AS 11.61.128. In *Reno v. ACLU*,[6] a unanimous Supreme Court struck down a similar federal statute, agreeing with the District Court that the word "indecent" was too vague to provide the basis for a criminal prosecution.[7] Although the Alaska Statute enumerates what is "indecent" and contains a definition of what is considered "harmful to minors" (elements missing in the *Reno* case), the Third Circuit concluded that "harmful to minors" language in the Child Online Protection Act (COPA) did not save that Federal statute. The Third Circuit found that the COPA was not narrowly tailored so as to survive a strict scrutiny analysis.[8]

The Court concludes that there is a strong likelihood of success on the merits in this matter.

B. Likelihood of Irreparable Harm if the Injunction is Denied

Although there are no pending prosecutions under the Amended Act against any of the Plaintiffs, they argue they will suffer

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[6] 521 U.S.844 (1997).

[7] *Id.* at 861.

[8] *ACLU v. Mukasey*, 534 F.3d 181, 198 (3d Cir. 2008).

irreparable harm in the absence of an injunction because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[9]

The State argues that none of the Plaintiffs or any other entity brought suit under the original 2005 statute complaining that it infringed on their constitutional rights. Further, none of the Plaintiffs have alleged actual harms beyond a "chilling effect." Such a delay in seeking a preliminary injunction, the State argues, is a factor to be considered in weighing the relief. The State's brief provides examples of the types of activities that result in charges under this statute and notes that "the statute was designed and is employed in a way to stop predators from sexually grooming children and should be allowed to be used this way while the complaint is pending."[10] In response, Plaintiffs argue that they fear future prosecution and are chilled by the amended act. It is irrelevant, they argue, that no Plaintiff has been prosecuted thus far.

The Court agrees with Plaintiffs. "The alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."[11] "[I]f

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[9] *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

[10] Docket 33 at 5.

[11] *Virginia v. Amer. Booksellers*, 484 U.S. 383, 392 (1988).

[Plaintiffs'] interpretation of the statute is correct, [they] will have to take significant and costly compliance measures or risk criminal prosecution."[12] While the State argues that it will not, in fact, pursue criminal charges against any of the Plaintiffs, nothing prevents the State from doing so absent an injunction from this Court.

C. Harm to Defendant vs. Harm to Plaintiffs

Plaintiffs argue the only legitimate harm that Defendant could allege is an inability to prosecute persons under the amended act. On the other hand, Plaintiffs are faced with unconstitutional restrictions on their communicative activities with the potential of a criminal charge hanging over them.[13]

The State complains that the amended act is designed to prosecute those predators who use pornography to groom children for sexual abuse, and that without this statute the State would have to wait until a child was actually sexually assaulted before intervening. The State argues this outweighs any chilling effect on the Plaintiffs. However, the State's argument is overstated, given other statutes that are available for prosecution of predators via the internet. Specifically, AS 11.41.452, which has been in place since November of 2005, addresses "online enticement

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[12] *Id.*

[13] Docket 7 at 16.

of a minor." A person commits the crime of online enticement of a minor under this statute if that person, "being 18 years of age or older, knowingly uses a computer to communicate with another person to entice, solicit, or encourage the person to engage in an act described in AS 11.41.455." AS 11.41.455 addresses "unlawful exploitation of a minor" and prohibits inducing or employing a child under 18 years of age to engage in actual or simulated conduct that mirrors the conduct in the statute at issue in this case.

In short, the State has clear alternative options for prosecuting sexual predators.

D. Public Interest.

Plaintiffs argue a preliminary injunction would serve the public interest by upholding the constitutional rights of the public.[14] The State argues that it is not in the public's interest for the State to have to wait to act until a child has already been molested.[15] For the reasons identified in section C, the State's argument is not persuasive. The State has other mechanisms for prosecution of online predators.

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[14] Docket 7 at 17.

[15] Docket 33 at 6.

V. CONCLUSION

In light of the foregoing, the Preliminary Injunction requested at **Docket 5** is **GRANTED.** Although the Attorney General has argued "the statute was designed and is employed in a way to stop predators from sexually grooming children and should be allowed to be used this way while the complaint is pending,"[16] the State has not provided the Court with a viable alternative that would both protect Plaintiffs during the pendency of this proceeding and allow the State to use the statute as it argues was "intended." Accordingly, the Preliminary Injunction prevents any enforcement of AS 11.61.128 until further Order of this Court, or until the parties enter into a stipulation that would eliminate the need for such an injunction. The oral argument scheduled for November 3, 2011, is **VACATED**.

IT IS SO ORDERED.

ENTERED this 20th day of October, 2010.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

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[16] Docket 33 at 5.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, et al.,

Plaintiffs,

vs.

DANIEL S. SULLIVAN, in his official capacity as ATTORNEY GENERAL OF THE STATE OF ALASKA,

Defendant.

Case No. 3:10-cv-0193-RRB

ORDER OF CLARIFICATION

Before the Court at Docket 48 is Defendant with a Motion for Clarification which is opposed by Plaintiffs at Docket 49.

The Court's Order at Docket 47 does not preclude law enforcement from seeking legitimate search warrants relating to violations of AS 11.41.452 or AS 11.41.455.

However, for the reasons set forth in its Order Granting Preliminary Injunction at Docket 47, AS 11.61.128 appears to be vague and over-broad on its face. Rather than specifically addressing the conduct apparently sought to be criminalized, i.e. the knowing transmittal of photographs of adult or prepubescent genitalia to a minor by one seeking to groom the minor for

exploitation, which would likely be a legitimate prohibition, the statute uses broad language that has been disfavored by many courts in the past. The Court has therefore found that Plaintiffs have shown a strong likelihood of success on the merits, a possibility of irreparable injury, and a balance of hardship favoring Plaintiffs.

Given the Court's previous order, AS 11.61.128 shall not be enforced pending further order of this Court.

IT IS SO ORDERED.

ENTERED this 17th day of November, 2010.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, et al.,

Plaintiffs,

vs.

DANIEL S. SULLIVAN, in his official capacity as ATTORNEY GENERAL OF THE STATE OF ALASKA,

Defendant.

Case No. 3:10-cv-0193-RRB

ORDER REGARDING SECOND MOTION FOR CLARIFICATION

On October 20, 2010, at Docket 47, this Court entered a Preliminary Injunction prohibiting enforcement of A.S. § 11.61.128 until further Order of this Court, or until the parties enter into a stipulation that would eliminate the need for such an injunction. On January 5, 2011, at Docket 54, the Department of Law sought clarification of this Court's Order, specifically regarding its ability to defend against an appeal based on "the former A.S. § 11.61.128."

It is unclear what version of the statute the Department of Law is referencing. However, the Court notes that the Preliminary Injunction in this case specifically addresses changes made to the

statute in January 2010, pursuant to Alaska Bill SB 222, sections 9-12. It is these changes to which Plaintiffs have objected in this lawsuit. Accordingly, if individuals were charged under a previous form of the statute, this Preliminary Injunction does not prohibit the Department of Law from defending against any appeals based on a prior version of A.S. § 11.61.128.

ENTERED this 8th day of February, 2011.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT COURT

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March 26, 2011

A Girl's Nude Photo, and Altered Lives

By JAN HOFFMAN

LACEY, Wash. — One day last winter Margarite posed naked before her bathroom mirror, held up her cellphone and took a picture. Then she sent the full-length frontal photo to Isaiah, her new boyfriend.

Both were in eighth grade.

They broke up soon after. A few weeks later, Isaiah forwarded the photo to another eighth-grade girl, once a friend of Margarite's. Around 11 o'clock at night, that girl slapped a text message on it.

"Ho Alert!" she typed. "If you think this girl is a whore, then text this to all your friends." Then she clicked open the long list of contacts on her phone and pressed "send."

In less than 24 hours, the effect was as if Margarite, 14, had sauntered naked down the hallways of the four middle schools in this racially and economically diverse suburb of the state capital, Olympia. Hundreds, possibly thousands, of students had received her photo and forwarded it.

In short order, students would be handcuffed and humiliated, parents mortified and lessons learned at a harsh cost. Only then would the community try to turn the fiasco into an opportunity to educate.

Around the country, law enforcement officials and educators are struggling with how to confront minors who "sext," an imprecise term that refers to sending sexual photos, videos or texts from one cellphone to another.

But adults face a hard truth. For teenagers, who have ready access to technology and are growing up in a culture that celebrates body flaunting, sexting is laughably easy, unremarkable and even compelling: the primary reason teenagers sext is to look cool and sexy to someone they find attractive.

Indeed, the photos can confer cachet.

"Having a naked picture of your significant other on your cellphone is an advertisement that you're sexually active to a degree that gives you status," said Rick Peters, a senior deputy prosecuting attorney for Thurston County, which includes Lacey. "It's an electronic hickey."

In the fall of 2009, Margarite, a petite, pretty girl with dark hair and a tiny diamond stud in her nose, was living with her father, and her life was becoming troubled. Her relationship with her father's new wife was tense. Her grades were in a free fall.

Her social life was deteriorating. A good friendship with a girl had soured, abetted by a fight over a boy. This girl would be the one who would later brand Margarite's photo and forward it.

Margarite's former friend is tough and strong-willed, determined to stand out as well as fit in, according to those who know her. Her parents, recent immigrants, speak limited English and were not able to supervise her texting.

In the shifting power dynamics of middle school girls, the former friend understood well that she who sneers first sneers best. The flick of a cutting remark, swiftly followed by "Just kidding!" The eye roll. As the animosity between the two girls escalated, Margarite felt shunned by an entire group of girls and was eating lunch by herself. At home she retreated to her bedroom, alone with her cellphone and computer.

Her mother would later speculate that Margarite desperately needed to feel noticed and special. That December, just before the holidays, she took the photo of herself and sent it to Isaiah, a low-key, likable athlete she had recently gotten to know.

After the winter break, Margarite was preparing a fresh start. She would move back in with her mother and transfer to a school in a nearby district.

But one night in late January, a few days before her transfer, Margarite's cellphone began vibrating around 1 a.m., waking her. She was being bombarded by texts — alerts from worried friends, leers from boys she scarcely knew.

The next morning in her mother's car, Margarite lowered her head, hiding her reddened eyes, her terrible secret.

"Are you O.K.?" asked her mother, Antoinette, who like other parents and children who agreed to be interviewed asked to be identified by only first or middle names to protect their privacy.

"Yeah."

"Are you sure?"

"Yeah."

But her mother knew otherwise. Earlier that morning a parent had phoned Kirsten Rae, the principal of Margarite's school, Chinook Middle, complaining about a naked photo sent to her child. The child knew at least a dozen students who had received it.

The principal then called Antoinette. The police wanted to question Margarite. On the drive to school, the girl sobbed uncontrollably, feeling betrayed and degraded.

The school was buzzing. "When I opened my phone I was scared," recalled an eighth grader. "I knew who the girl in the picture was. It's hard to unsee something."

Meanwhile, another middle school principal in Lacey had begun investigating a sexting complaint that morning. Ms. Rae realized that Margarite's photo had gone viral.

Students were summoned to Ms. Rae's office and questioned by the police. Their cellphones were confiscated.

Ms. Rae went into crisis management. Parents were calling, wanting to know whether their children would be arrested and how she would contain the spread. She drafted a letter for school families. Administrators planned a districtwide voicemail to the families of middle school students. Chinook teachers would discuss the issue in homerooms the next day.

By late morning, Isaiah and Margarite's former friend had been identified and pulled out of class.

Then Isaiah's mother, Jennifer, got the call. "Naked?" she shouted. "How naked?"

When Jennifer, who works for an accountant, arrived at the school, she ran to Isaiah, a tall, slender boy with the startled air of an unfolding foal. He was weeping.

"I was in shock that I was in trouble," he recalled during a recent interview. "I didn't go out of my way to forward it, but I felt responsible. It was bad. Really bad."

He told the police that the other girl had pressured him into sending her Margarite's photo, vowing she just wanted to look at it. He said he had not known that their friendship had disintegrated.

How had the sexting from Margarite begun? "We were about to date, and you'll be like, 'Oh, blah blah, I really like you, can you send me a picture?' " Isaiah recalled.

"I don't remember if I asked her first or if she asked me. Well, I think I did send her a picture. Yeah, I'm pretty sure. Mine was, like, no shirt on.

"It is very common," he said. "I'd seen pictures on other boys' cellphones."

Mr. Peters, the county prosecutor, had been hearing that sexting was becoming a problem in the community. In a recent interview, he said that if the case had just involved photos sent between Isaiah and Margarite, he would have called the parents but not pressed charges.

"The idea of forwarding that picture was bad enough," he said. "But the text elevated it to something far more serious. It was mean-girl drama, an all-out attempt to destroy someone without thinking about the implications."

He decided against charging Margarite. But he did charge three students with dissemination of child pornography, a Class C felony, because they had set off the viral outbreak.

After school had been let out that day in late January, the police read Isaiah his rights, cuffed his hands behind his back and led him and Margarite's former friend out of the building. The eighth graders would have to spend the night in the county juvenile detention center.

The two of them and a 13-year-old girl who had helped forward the photo were arraigned before a judge the next day. (Margarite's former friend declined to be interviewed, as did the girl who helped her.)

Officials took away Isaiah's clothes and shoes. He changed into regulation white briefs and a blue jumpsuit. He was miserable and terrified.

"My socks got wet in the shower," Isaiah said.

WHERE TO DRAW THE LINE?

Sexting is not illegal.

Two adults sending each other naughty pictures, dirty language? Just garden-variety First Amendment-protected speech.

A November 2009 AARP article, "Sexting Not Just For Kids," reported approvingly on the practice for older people, too. In women's magazines and college students' blogs, coy guides include pragmatic tips like making sure to keep your face out of the photo.

But when that sexually explicit image includes a participant — subject, photographer, distributor or recipient — who is under 18, child pornography laws may apply.

"I didn't know it was against the law," Isaiah said.

That is because culturally, such a fine distinction eludes most teenagers. Their world is steeped in highly sexualized messages. Extreme pornography is easily available on the Internet. Hit songs and music videos promote stripping and sexting.

"Take a dirty picture for me," urge the pop stars Taio Cruz and Kesha in their recent duet, "Dirty Picture." "Send the dirty picture to me. Snap."

In a 2010 Super Bowl advertisement for Motorola, the actress Megan Fox takes a cellphone picture of herself in a bubble bath. "I wonder what would happen if I were to send this out?" she muses. The commercial continues with goggle-eyed men gaping at the forwarded photo — normalizing and encouraging such messages.

"You can't expect teenagers not to do something they see happening all around them," said Susannah Stern, an associate professor at the University of San Diego who writes about adolescence and technology.

"They're practicing to be a part of adult culture," Dr. Stern said. "And in 2011, that is a culture of sexualization and of putting yourself out there to validate who you are and that you matter."

The prevalence of under-age sexting is unclear and can often depend on the culture of a particular school or circle of students. An Internet poll conducted for The Associated Press and MTV by Knowledge Networks in September 2009 indicated that 24 percent of 14- to 17-year-olds had been involved in "some type of naked sexting," either by cellphone or on the Internet. A December 2009 telephone poll from the Pew Research Center's Internet and American Life Project found that 5 percent of 14- to 17-year-olds had sent naked or nearly naked photos or video by cellphone, and that 18 percent had received them. Boys and girls send photos in roughly the same proportion, the Pew survey found.

But a double standard holds. While a boy caught sending a picture of himself may be regarded as a fool or even a boastful stud, girls, regardless of their bravado, are castigated as sluts.

Photos of girls tend to go viral more often, because boys and girls will circulate girls' photos in part to shame them, explained Danah Boyd, a senior social media researcher at Microsoft and a fellow at Harvard University's Berkman Center for Internet and Society.

In contrast, when a boy sends a revealing photo of himself to a girl, Dr. Boyd noted, she usually does not circulate it. And, Dr. Boyd added, boys do not tend to circulate photos of

other boys: "A straight-identified boy will never admit to having naked photos of a boy on his phone."

Policy makers are beginning to recognize that a uniform response to these cases does not fit.

"I hate the word 'sexting,' " said Andrew J. Harris, an assistant professor of criminology at the University of Massachusetts in Lowell, who is leading a study of the practice among adolescents to help develop policies to address it. "We're talking about a lot of different behaviors and a lot of different motivations."

There is the high-tech flirt. The troubled attention-seeker. A couple's consensual exchanges. Drunken teenagers horsing around. Pressure from a boyfriend. Malicious distribution. A teenager who barrages another with unsolicited lewd photos or texts. Or, as in a 2009 Wisconsin case of "sextortion," a boy, pretending to be a girl online, who solicited explicit pictures of boys, which he then used as blackmail to compel those boys to have sex with him.

The content of the photos can vary widely too, from suggestive to sadistic.

Adults in positions of authority have been debating how to respond. Many school districts have banned sexting and now authorize principals to search cellphones. According to the National Conference of State Legislatures, at least 26 states have tried to pass some sort of sexting legislation since 2009.

"The majority of states are trying to put something in place to educate kids before and after the event," said Justin T. Fitzsimmons, a senior attorney at the National District Attorneys Association who specializes in Internet crimes against children. "We have to protect kids from themselves sometimes. We're on the cusp of teaching them how to manage their electronic reputations."

But if the Lacey students were convicted of dissemination of child pornography, they could be sentenced to up to 36 weeks in a juvenile detention center. They would be registered as sex offenders. Because they were under 15, however, after two years they could petition a court to remove their names from the registry, if they could prove they no longer posed a threat to the public.

PENALTIES AND PREVENTION

Rick Peters, the prosecuting attorney, never intended for the Chinook Middle School students to receive draconian sentences. But he wanted to send a scared-straight message to them, as well as to the community.

Yet when the local news media storm cascaded, the outcry was not about the severe penalties for a felony sexting conviction. It was about why Mr. Peters had not also arrested Margarite.

"She's a victim," Mr. Peters said. "She made an ill-advised decision to share that picture with her boyfriend. As far as she knew, that was as far as it would go.

"What good would come from prosecuting her? What lesson could we teach her that she hasn't already learned now 1,000 times over?"

Eventually a deal was brokered for the three teenagers who were charged. The offense would be amended from the child pornography felony to a gross misdemeanor of telephone harassment. Isaiah and the two girls who had initially forwarded Margarite's photo would be eligible for a community service program that would keep them out of court, and the case could be dismissed.

Those three students would have to create public service material about the hazards of sexting, attend a session with Margarite to talk about what happened and otherwise have no contact with her.

After Margarite and her mother approved the conditions, Mr. Peters signed off, pleased.

Throughout last spring, on Monday afternoons after school, Eric Fredericks, Isaiah's math teacher, met with the three students to help them develop their material.

Margarite's former friend made a PowerPoint presentation, with slides copied from the Internet.

The younger girl made a poster dense with warnings about sexting's consequences. She concluded: "I am a 13 year old teen that made a bad choice and got my life almost totaled forever. I regret what I did more than anything but I cant take it back."

Isaiah created a two-page brochure, citing studies from the Internet, accompanied by a tumble of adolescent feeling:

"Not only does it hurt the people that are involved in the pictures you send, it can hurt your family and friends around you, the way they see you, the way you see yourself. The ways they feel about you. Them crying because of your mistakes."

Ms. Rae has yet to distribute the material. Chinook, with 630 seventh and eighth graders, still has students who know those involved in last year's episode. She wants to give Isaiah, Margarite and the others more time to distance themselves.

While the case was on its way to resolution, prosecutors and district educators decided to put its aftershock to good use.

"After the story broke, parents called us because they didn't know about the law that could send kids to jail for a bad choice," said Courtney Schrieve, a spokeswoman for the North Thurston Public Schools. "Kids didn't know about it either. So we decided to turn this into an opportunity to educate teachers, parents and students."

In October, Ms. Rae, the police, prosecutors and Mr. Fitzsimmons of the National District Attorneys Association held separate forums about sexting for Lacey's teachers, parents and student delegations from the four middle schools.

The students then returned to their homerooms to teach classmates what they had learned.

Elizabeth Colón taught a session with Jon Reid. Both are eighth graders at Chinook.

"Most of the questions were about penalties," she said. "Kids wanted to know if they would get into trouble just for receiving the picture."

Jon spoke about long-term consequences. "I said that people may look at you differently," he said. "They'll know what kind of person you were, even though you changed."

One spring evening, the three students who had been disciplined met for a mediation session with Margarite and two facilitators from Community Youth Services. The searing, painful session, which included the students' parents and Mr. Fredericks, lasted several hours. Everyone was asked to talk about his or her role in the episode.

Mr. Fredericks listed all the people who had spent hours trying to clean the mess the students had created in a matter of seconds: police officers, lawyers, teachers, principals, hundreds of families.

Then it was Isaiah's turn. He looked Margarite in the eye. "He poured his heart out," Mr. Fredericks recalled. Isaiah said that he was ashamed of himself, but that most of all, he was sorry he had broken Margarite's trust. Then he asked for her understanding and forgiveness. "He cried," Mr. Fredericks said. "I choked up."

The former friend who had forwarded the photo, creating the uproar, was accompanied by her mortified father, an older sister and a translator. She came across as terse and somewhat perfunctory, recalled several people who were there.

One of the last to speak was Margarite's father, Dan, an industrial engineer.

"I could say it was everyone else's fault," Dan said. "But I had a piece of it, too. I learned a big lesson about my lack of involvement in her use of the phone and texting. I trusted her too much."

He had not expected the students to be punished severely, he continued. But they needed to understand that their impulsive actions had ramifications.

"When you walk out of here tonight, it's over, you're done with it," he said, looking around the room.

"Keep in mind that the only person this will have a lasting impact on," he concluded, is his daughter.

The photo most certainly still exists on cellphones, and perhaps on social networking sites, readily retrievable.

"She will have to live with this for the rest of her life."

THE VICTIM

When the police were finished questioning Margarite at Chinook in January 2010, her mother, a property manager, laid down the law. For the time being, no cellphone. No Internet. No TV.

Margarite, used to her father's indulgence and unfettered access to technology, was furious.

But the punishment insulated Margarite from the wave of reaction that surged online, in local papers and television reports, and in texted comments by young teenagers throughout town. Although the police and the schools urged parents to delete the image from their children's phones, Antoinette heard that it had spread to a distant high school within a few days.

The repercussions were inescapable. After a friend took Margarite skating to cheer her up, he was viciously attacked on his MySpace page. Kids jeered, telling him to change schools and go with "the whore."

The school to which Margarite had transferred when she moved back in with her mother was about 15 miles away. She badly wanted to put the experience behind her. But within weeks she was recognized. A boy at the new school had the picture on his cellphone. The girls began to taunt her: Whore. Slut.

Margarite felt depressed. Often she begged to stay home from school.

In January, almost a year to the day when her photo went viral, she decided to transfer back to her old district, where she figured she at least had some friends.

The episode stays with her still. One recent evening in her mother's condominium, Margarite chatted comfortably about her classes, a smile flashing now and then. But when the moment came to recount the events of the winter before, she slipped into her bedroom, shutting the door.

As Antoinette spoke about what had happened, the volume on the television in Margarite's room grew louder.

Finally, she emerged. The smell of pizza for supper was irresistible.

What is it like to be at school with her former friend?

"Before I switched back, I called her," Margarite said. "I wanted to make sure the drama was squashed between us. She said, were we even legally allowed to talk? And I said we should talk, because we'd have math together. She apologized again."

What advice would Margarite give anyone thinking of sending such a photo?

She blushed and looked away.

"I guess if they are about to send a picture," she replied, laughing nervously, "and they have a feeling, like, they're not sure they should, then don't do it at all. I mean, what are you thinking? It's freaking stupid!"

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March 26, 2011

States Struggle With Minors' Sexting

By JAN HOFFMAN

In the last two years, legislators have been weighing graduated responses to sexting between minors. Some legal scholars refer to the images as "self-produced child pornography."

Some states have amended their statutes on child pornography, obscenity or Internet crimes. Many allow juvenile offenders to be charged with a misdemeanor or a lesser offense, so they can qualify for diversion programs and have their records expunged.

A few states have tried to define a sexting offense.

The laws have had a mixed response. While many experts, educators and parents applaud the lessening of sanctions for what is often seen as thoughtless adolescent risk-taking, others deplore the establishment of a new crime that could not only intrude on First Amendment rights but could also sweep more children into the court system.

As Susan Hanley Duncan notes in a recent article in the Oregon Law Review about such legislation, the states disagree philosophically about the nature of the offense, which participants should be punished and which factors may aggravate or mitigate the criminal charge.

Provisions in a new Nebraska law punish those who forward an image but not its creator. A proposed law in Ohio would charge minors who produced the image as well.

A proposal in North Dakota would increase sanctions for someone who circulated a photo with the intention to humiliate the minor. Conversely, a few states, like Texas, propose to grant immunity to minors who destroy the image or report it to the authorities within 48 hours.

Not only do states disagree about who should be prosecuted, they also differ over how to define the content to be criminalized.

Some states propose new misdemeanor crimes for minors who exchange photos that are "lewd and lascivious." Others would create a misdemeanor for minors who send a minor's "nude" images — a category that might not survive First Amendment challenges.

Pennsylvania is proposing relatively mild sanctions for minors who transmit images of "sexually explicit conduct," but the depiction of activities like penetration, sadism and masturbation could bring more severe penalties.

New Jersey is considering a bill that would send first-time juvenile offenders to educational diversion programs. Other proposed bills would require schools to provide students and parents with information on sexting and require stores that sell cellphones to give customers pamphlets on it.

Some district attorneys have made such cases a priority but, using prosecutorial discretion, have designed specialized diversion programs.

Mathias H. Heck Jr., prosecuting attorney for Montgomery County, Ohio, requires teenagers charged with sexting to turn in their cellphones, perform community service and receive education about age-appropriate sexual behavior and the legal and social consequences of sexting. Since the six-month program was started about two years ago, about 60 teenagers have attended.

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SENATE CS FOR CS FOR HOUSE BILL NO. 127(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the crimes of stalking, sexual assault in the third degree, sexual assault in the fourth degree, unlawful exploitation of a minor, distribution of child pornography, online enticement of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, and misconduct involving confidential information; making the installation, enabling, or use of keystroke loggers or other devices criminal use of a computer; relating to probation; relating to the subpoena power of the attorney general in cases involving use of an Internet service account; relating to an appearance before a judicial officer after arrest; relating to conditions of probation in criminal cases involving sex offenses; relating to penalties for operating a vehicle without possessing proof of motor vehicle liability insurance or a driver's license; relating to penalties for certain arson offenses; amending Rule 5(a)(1), Alaska Rules of Criminal Procedure, and Rule 43.10, Alaska Rules of Administration; and providing for

an effective date."

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

*** Section 1.** AS 11.41.270(b)(3) is amended to read:

(3) "nonconsensual contact" means any contact with another person that is initiated or continued without that person's consent, that is beyond the scope of the consent provided by that person, or that is in disregard of that person's expressed desire that the contact be avoided or discontinued; "nonconsensual contact" includes

(A) following or appearing within the sight of that person;

(B) approaching or confronting that person in a public place or on private property;

(C) appearing at the workplace or residence of that person;

(D) entering onto or remaining on property owned, leased, or occupied by that person;

(E) contacting that person by telephone;

(F) sending mail or electronic communications to that person;

(G) placing an object on, or delivering an object to, property owned, leased, or occupied by that person;

(H) following or monitoring that person with a global positioning device or similar technological means;

(I) using, installing, or attempting to use or install a device for observing, recording, or photographing events occurring in the residence, vehicle, or workplace used by that person, or on the personal telephone or computer used by that person;

*** Sec. 2.** AS 11.41.270(b) is amended by adding a new paragraph to read:

(5) "device" includes software.

*** Sec. 3.** AS 11.41.425(a) is amended to read:

(a) An offender commits the crime of sexual assault in the third degree if the offender

(1) engages in sexual contact with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed;

(2) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, engages in sexual penetration with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; [OR]

(3) engages in sexual penetration with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person**; or**

(4) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, engages in sexual penetration with a person with reckless disregard that the person is in the custody or the apparent custody of the offender, or is committed to the custody of a law enforcement agency.

*** Sec. 4.** AS 11.41.425 is amended by adding a new subsection to read:

(c) In this section, "peace officer" has the meaning given in AS 01.10.060.

*** Sec. 5.** AS 11.41.427(a) is amended to read:

(a) An offender commits the crime of sexual assault in the fourth degree if

(1) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, the offender engages in sexual contact with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; [OR]

(2) the offender engages in sexual contact with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person**; or**

(3) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, engages in sexual

contact with a person with reckless disregard that the person in the custody or the apparent custody of the offender, or is committed to the custody of a law enforcement agency.

* **Sec. 6.** AS 11.41.427 is amended by adding a new subsection to read:

(c) In this section, "peace officer" has the meaning given in AS 01.10.060.

* **Sec. 7.** AS 11.41.452(d) is amended to read:

(d) Except as provided in (e) of this section, online enticement is a class **B** [C] felony.

* **Sec. 8.** AS 11.41.452(e) is amended to read:

(e) Online enticement is a class **A** [B] felony if the defendant was, at the time of the offense, required to register as a sex offender or child kidnapper under AS 12.63 or a similar law of another jurisdiction.

* **Sec. 9.** AS 11.46.740(a) is amended to read:

(a) A person commits the offense of criminal use of a computer if, having no right to do so or any reasonable ground to believe the person has such a right, the person knowingly

(1) accesses, causes to be accessed, or exceeds the person's authorized access to a computer, computer system, computer program, computer network, or any part of a computer system or network, and, as a result of or in the course of that access,

(A) [(1)] obtains information concerning a person;

(B) [(2)] introduces false information into a computer, computer system, computer program, or computer network with the intent to damage or enhance the data record or the financial reputation of a person;

(C) [(3)] introduces false information into a computer, computer system, computer program, or computer network and, with criminal negligence, damages or enhances the data record or the financial reputation of a person;

(D) [(4)] obtains proprietary information of another person;

(E) [(5)] obtains information that is only available to the public for a fee;

(F) [(6)] introduces instructions, a computer program, or other information that tampers with, disrupts, disables, or destroys a computer, computer system, computer program, computer network, or any part of a computer system or network; or

(G) [(7)] encrypts or decrypts data**; or**

(2) installs, enables, or uses a keystroke logger or other device or program that has the ability to record another person's keystrokes or entries on a computer; or

(3) uses a keystroke logger or other device or program to intercept or record another person's keystrokes or entries on a computer when those entries are transmitted wirelessly or by other non-wired means.

*** Sec. 10.** AS 11.51.100(a) is amended to read:

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person **is**

(A) [IS] registered or required to register as a sex offender **or child kidnapper** under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) [HAS BEEN] charged by complaint, information, or indictment with a violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) [HAS BEEN] charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; or

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child.

* **Sec. 11.** AS 11.61 is amended by adding a new section to read:

Sec. 11.61.116. Sending an explicit image of a minor. (a) A person commits the offense of sending an explicit image of a minor if the person, with intent to annoy or humiliate another person, distributes an electronic photograph or video that depicts the genitals, anus, or female breast of that other person taken when that person was a minor under 16 years of age.

(b) In this section,

(1) "computer" has the meaning given in AS 11.46.990;

(2) "distributes" means to deliver the image to another person by sending the image to the other person's computer or telephone;

(3) "Internet" has the meaning given in AS 11.46.710(d).

(c) Sending an explicit image of a minor is

(1) a class B misdemeanor if the person distributes the image to another person;

(2) a class A misdemeanor if the person distributes the image to an Internet website that is accessible to the public.

* **Sec. 12.** AS 11.61.120(a) is amended to read:

(a) A person commits the crime of harassment in the second degree if, with intent to harass or annoy another person, that person

(1) insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response;

(2) telephones another and fails to terminate the connection with intent to impair the ability of that person to place or receive telephone calls;

(3) makes repeated telephone calls at extremely inconvenient hours;

(4) makes an anonymous or obscene telephone call, an obscene electronic communication, or a telephone call or electronic communication that threatens physical injury or sexual contact;

(5) subjects another person to offensive physical contact; or

(6) **except as provided in AS 11.61.116,** publishes or distributes electronic or printed photographs, pictures, or films that show the genitals, anus, or female breast of the other person or show that person engaged in a sexual act.

* **Sec. 13.** AS 11.76 is amended by adding new sections to read:

Sec. 11.76.113. Misconduct involving confidential information in the first degree. (a) A person commits the crime of misconduct involving confidential information in the first degree if the person violates AS 11.76.115 and obtains the confidential information with the intent to

(1) use the confidential information to commit a crime; or

(2) obtain a benefit to which the person is not entitled, to injure another person, or to deprive another person of a benefit.

(b) Conviction under this section does not limit a person's ability to obtain civil relief from another person.

(c) Misconduct involving confidential information in the first degree is a class A misdemeanor.

Sec. 11.76.115. Misconduct involving confidential information in the second degree. (a) A person commits the crime of misconduct involving confidential information in the second degree if the person, without legal authority or the consent of another person, knowingly obtains confidential information about the other person.

(b) In this section, "confidential information" includes

(1) information that has been classified confidential by law;

(2) information encoded on an access device, identification card issued under AS 18.65.310, or driver's license.

(c) Conviction under this section does not limit a person's ability to obtain civil relief from another person.

(d) Misconduct involving confidential information in the second degree is a class B misdemeanor.

* **Sec. 14.** AS 12.05 is amended by adding a new section to read:

Sec. 12.05.030. Crimes involving minors committed outside state. In addition to any other jurisdictional basis expressed or implied in law, a person may be prosecuted under the laws of this state for conduct occurring outside the state for a violation of (1) AS 11.41.452 if the other person with whom the defendant communicated was in the state; or (2) AS 11.61.116 if the minor whose image is published or distributed was in the state.

* **Sec. 15.** AS 12.10.010(a) is amended to read:

(a) Prosecution for the following offenses may be commenced at any time:

(1) murder;

(2) attempt, solicitation, or conspiracy to commit murder or hindering the prosecution of murder;

(3) felony sexual abuse of a minor;

(4) sexual assault that is an unclassified, class A, or class B felony or a violation of **AS 11.41.425(a)(2) - (4)** [AS 11.41.425(a)(2) OR (3)];

(5) a violation of AS 11.41.425, 11.41.427, 11.41.450 - 11.41.458, AS 11.66.110 - 11.66.130, or former AS 11.41.430, when committed against a person who, at the time of the offense, was under 18 years of age;

(6) kidnapping.

* **Sec. 16.** AS 12.25.150(a) is amended to read:

(a) A person arrested shall be taken before a judge or magistrate without unnecessary delay, and in any event within **48** [24] hours after arrest, including Sundays and holidays. This requirement applies to municipal police officers to the same extent as it does to state troopers.

* **Sec. 17.** AS 12.55.100(e) is amended to read:

(e) In addition to other conditions imposed on the defendant, while on probation and as a condition of probation

(1) for a sex offense, as described in AS 12.63.100, the defendant

(A) shall be required to submit to regular periodic polygraph examinations;

(B) may be required to provide each electronic mail address, instant messaging address, and other Internet communication identifier that the defendant uses to the defendant's probation officer; the probation officer shall forward those addresses and identifiers to the Alaska state troopers and to the local law enforcement agency;

(2) if the defendant was convicted of a violation of AS 11.41.434 - 11.41.455, AS 11.61.125 - 11.61.128, or a similar offense in another jurisdiction, the defendant may be required to refrain from

(A) using or creating an Internet site;

(B) communicating with children under 16 years of age; [OR]

(C) possessing or using a computer**; or**

(D) residing within 500 feet of school grounds; in this subparagraph, "school grounds" has the meaning given in AS 11.71.900.

*** Sec. 18.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, or promoting prostitution in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) **unlawful exploitation of a minor under AS 11.41.455(c)(2),**

online enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, or promoting prostitution in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, **online enticement of a minor under AS 11.41.452(d),** unlawful exploitation of a minor **under AS 11.41.455(c)(1),** or distribution of child pornography **under AS 11.61.125(e)(2)** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, **distribution of child pornography under AS 11.61.125(e)(1),** or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years.

* **Sec. 19.** AS 12.70.130 is amended to read:

Sec. 12.70.130. Arrest without warrant. The arrest of a person may also be lawfully made by a peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year, but

when arrested the accused must be taken before a judge or magistrate without unnecessary delay and, in any event, within **48** [24] hours after arrest, including Sundays and holidays, and complaint shall be made against the accused under oath setting out the ground for the arrest as in AS 12.70.120. Thereafter the answer of the accused shall be heard as if the accused had been arrested on a warrant.

*** Sec. 20.** AS 28.15.131 is amended by adding a new subsection to read:

(b) Violation of this section is an infraction.

*** Sec. 21.** AS 28.22.019(c) is amended to read:

(c) A person convicted under this section is guilty of **an infraction** [A CLASS B MISDEMEANOR] and **shall be sentenced to pay a mandatory fine of $500** [MAY BE PUNISHED AS PROVIDED IN AS 12.55, EXCEPT THAT A FINE OF AT LEAST $500 MUST BE IMPOSED].

*** Sec. 22.** AS 33.05.020(a) is repealed and reenacted to read:

(a) The commissioner shall appoint and make available to the superior court, when ordered under AS 12.55.015(a), a qualified probation officer for the active supervision of a person placed on probation for a felony offense. The commissioner may provide active supervision to a person placed on probation for a misdemeanor offense.

*** Sec. 23.** AS 41.23.220 is amended to read:

Sec. 41.23.220. Penalty. (a) **Except for conduct that is a violation of AS 11.46.420, a** [A] person who violates a provision of AS 41.23.180 - 41.23.230 or a regulation adopted under AS 41.23.180 - 41.23.230 is guilty of a violation as defined in AS 11.81.900.

(b) **Except for conduct that is a violation of AS 11.46.420, the** [THE] supreme court shall establish by order or rule a schedule of bail amounts for violations under (a) of this section that allow the disposition of a citation without a court appearance.

*** Sec. 24.** AS 44.23.080 is repealed and reenacted to read:

Sec. 44.23.080. Subpoena power of attorney general in cases involving use of an Internet service account. (a) If there is reasonable cause to believe that an Internet service account has been used in connection with a violation of AS 11.41.452,

11.41.455, or AS 11.61.125 - 11.61.128, and that the identity, address, and other information about the account owner will assist in obtaining evidence that is relevant to the offense, a law enforcement officer may apply to the attorney general for an administrative subpoena to obtain the business records of the Internet service provider located inside or outside of the state.

(b) If an application meets the requirements of (a) of this section, the attorney general may issue an administrative subpoena to the Internet service provider requiring the production of the following records:

(1) the name and other identifying information of the account holder;

(2) the address and physical location associated with the account;

(3) a description of the length of service, service start date, and types of service associated with the account.

(c) A subpoena issued under (b) of this section must prescribe a reasonable time after service for the production of the information.

(d) Service of a subpoena issued under (b) of this section may be by any method authorized by law or acceptable to the Internet service provider. At any time before the return date specified on the subpoena, the Internet service provider may petition a court of competent jurisdiction for the judicial district in which the provider resides or does business for an order modifying or quashing the subpoena or for an order sealing the court record.

(e) If the Internet service provider refuses to obey a subpoena issued under (b) of this section, the superior court may, upon application of the attorney general, issue an order requiring the Internet service provider to appear at the office of the attorney general with the information described in the subpoena.

(f) An Internet service provider who knowingly fails to produce the information required to be produced by the subpoena or court order is guilty of contempt under AS 09.50.010.

(g) Nothing in this section limits the authority of law enforcement from obtaining process from the court or through a grand jury subpoena to obtain the information described in (b) of this section.

(h) A person may not bring a civil action against an Internet service provider,

its officers, employees, agents, or other person for complying with an administrative subpoena issued under (b) of this section or a court order issued under (e) of this section.

*** Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 5(a)(1), Alaska Rules of Criminal Procedure, is amended to read:

(1) Except when the person arrested is issued a citation for a misdemeanor or a violation and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary delay **and in any event within 48 hours after arrest, including Sundays and holidays**. This appearance may be accomplished by the use of telephonic or television equipment pursuant to Criminal Rules 38.1 and 38.2. [NECESSARY DELAY WITHIN THE MEANING OF THIS PARAGRAPH (a) IS DEFINED AS A PERIOD NOT TO EXCEED FORTY-EIGHT HOURS AFTER ARREST, INCLUDING SUNDAYS AND HOLIDAYS.]

*** Sec. 26.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. The amendments to AS 41.23.220, made in sec. 23 of this Act, have the effect of changing Rule 43.10, Alaska Rules of Administration, by prohibiting the disposition of a violation of AS 11.46.420 without court appearance and forfeiture of bail amounts.

*** Sec. 27.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REPORT TO THE LEGISLATURE. On or before April 1, 2012, the Department of Law shall submit a report to the legislature concerning the total number of arraignments that were heard within 24 hours after a person's arrest and the total number of arraignments that were heard after 24 hours, but within 48 hours after a person's arrest. The report shall include this information for cases prosecuted by the State of Alaska. The Department of Corrections and the Alaska Court System shall cooperate with the Department of Law in preparing this report.

*** Sec. 28.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 16, 19, and 25 of this Act apply to arrests for offenses committed before, on, or after the effective date of this Act.

(b) Sections 1 - 15, 18, 20, 21, 23, and 26 of this Act apply to offenses committed on or after the effective date of this Act.

(c) Sections 22 and 24 of this Act apply to offenses occurring before, on, or after the effective date of this Act.

*** Sec. 29.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of it to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances is not affected.

*** Sec. 30.** This Act takes effect July 1, 2011.

27-LS0822\A
Gardner
4/12/11

SENATE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Introduced:
Referred:

A RESOLUTION

Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, concerning House Bill No. 127, relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, and misconduct involving confidential information; relating to probation; relating to the subpoena power of the attorney general in cases involving use of an Internet service account; relating to an appearance before a judicial officer after arrest; relating to penalties for operating a vehicle without possessing proof of motor vehicle liability insurance or a driver's license; relating to penalties for certain arson offenses; and amending Rule 5(a)(1), Alaska Rules of Criminal Procedure, and Rule 43.10, Alaska Rules of Administration.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding

changes to the title of a bill, are suspended in consideration of House Bill No. 127, relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, and misconduct involving confidential information; relating to probation; relating to the subpoena power of the attorney general in cases involving use of an Internet service account; relating to an appearance before a judicial officer after arrest; relating to penalties for operating a vehicle without possessing proof of motor vehicle liability insurance or a driver's license; relating to penalties for certain arson offenses; and amending Rule 5(a)(1), Alaska Rules of Criminal Procedure, and Rule 43.10, Alaska Rules of Administration.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Explanation of Changes SCS for CS for HB 127(JUD) Omnibus Crime Bill:

1. Deleted section 3 in version "I" which provided an increased penalty for enticement of a minor, first offense. The section had increased the penalty from a C to B felony, so this would keep a first offense a C felony.

2. Deleted sections 5 and 19 pertaining to unlawful exploitation of a minor – this provision needs to be reworked and the committee will commit to doing that over the interim. There were conforming amendments in sentencing sections to return to the current penalties..

3. Added language in Sections 3 through 6 to create penalties for police officers engaging in sex with a person in their custody, following those already in law for correctional officers. There are also conforming amendments in the sentencing section of the bill.

4. In section 21, the language providing for an attorney general's designee has been deleted (all other language remains the same as in version "I".

5. In section 24, the Department of Law is required to report on the number of arraignments heard within 24 hours and the total number after 24 hours but within 48 hours of a person's arrest. The report is due April 1, 2012.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

April 12, 2011

TO: Leg. Legal

From: Cindy Smith

RE: SCS for CS for HB 127 (FIN)

Please prepare a SCS for CS for SB 127(JUD) with the following changes:

1. Delete Section 3, with any necessary conforming amendments throughout the bill. (on line enticement 1st offense stays class B C)
2. Delete sections 5, with any conforming amendments through the bill (note - section 19 is deleted as well). (unlawful exploitation -> summer rewrite)
3. In section 28, delete the phrase "or the attorney general's designee" where it occurs and delete "i". new section "21"
4. Add language from amendment GS1840\A.1. (written to SB72, attached), with the following language change "that the person is in the custody or apparent custody of the offender" in each place that the provision is added. [Call me about this]. new section 3-6
5. Add a new section in uncodified law that requires that the Department of Law make a report to the Legislature by April 1, 2012 as to the number of bail cases that were heard within 24 hours and the number that exceeded 24 hours under the new 48-hour bail provisions. sec 24
6. Please look at the provisions in HB23, attached, and see if they comport with and can be added into the provisions of HB127 at Section 9. If so, please do that. If not, please give me a call. (amendment)

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

April 12, 2011

TO: Leg. Legal

From: Cindy Smith

RE: SCS for CS for HB 127 (FIN)

Please prepare a SCS for CS for SB 127(JUD) with the following changes:

1. Delete Section 3, with any necessary conforming amendments throughout the bill.

2. Delete sections 5, with any conforming amendments through the bill (note - section 19 is deleted as well).

3. In section 28, delete the phrase "or the attorney general's designee" where it occurs and delete "i".

4. Add language from amendment GS1840\A.1. (written to SB72, attached), with the following language change "that the person is in the custody or apparent custody of the offender" in each place that the provision is added. [Call me about this].

5. Add a new section in uncodified law that requires that the Department of Law make a report to the Legislature by April 1, 2012 as to the number of bail cases that were heard within 24 hours and the number that exceeded 24 hours under the new 48-hour bail provisions.

6. Please look at the provisions in HB23, attached, and see if they comport with and can be added into the provisions of HB127 at Section 9. If so, please do that. If not, please give me a call.

27-GS1840\A.1
Gardner
3/24/11

AMENDMENT

OFFERED IN THE SENATE BY SENATOR FRENCH

TO: SB 72

Page 1, line 1, following "**stalking,**":

Insert "**sexual assault in the third degree, sexual assault in the fourth degree,**"

Page 2, following line 16:

Insert new bill sections to read:

"*** Sec. 3.** AS 11.41.425(a) is amended to read:

(a) An offender commits the crime of sexual assault in the third degree if the offender

(1) engages in sexual contact with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed;

(2) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, engages in sexual penetration with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; [OR]

(3) engages in sexual penetration with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person**; or**

(4) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, engages in sexual

penetration with a person with reckless disregard that the person is ~~committed to~~ the custody of the offender, or is ~~committed to~~ the custody of a law enforcement agency.

*** Sec. 4.** AS 11.41.425 is amended by adding a new subsection to read:

(c) In this section, "peace officer" has the meaning given in AS 01.10.060.

*** Sec. 5.** AS 11.41.427(a) is amended to read:

(a) An offender commits the crime of sexual assault in the fourth degree if

(1) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, the offender engages in sexual contact with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; [OR]

(2) the offender engages in sexual contact with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person**; or**

(3) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, engages in sexual contact with a person with reckless disregard that the person is committed to the custody of the offender, or is committed to the custody of a law enforcement agency.

*** Sec. 6.** AS 11.41.427 is amended by adding a new subsection to read:

(c) In this section, "peace officer" has the meaning given in AS 01.10.060."

Renumber the following bill sections accordingly.

Page 6, following line 12:

Insert a new bill section to read:

"*** Sec. 16.** AS 12.10.010(a) is amended to read:

(a) Prosecution for the following offenses may be commenced at any time:

(1) murder;

(2) attempt, solicitation, or conspiracy to commit murder or hindering the prosecution of murder;

(3) felony sexual abuse of a minor;

(4) sexual assault that is an unclassified, class A, or class B felony or a violation of **AS 11.41.425(a)(2) - (4)** [AS 11.41.425(a)(2) OR (3)];

(5) a violation of AS 11.41.425, 11.41.427, 11.41.450 - 11.41.458, AS 11.66.110 - 11.66.130, or former AS 11.41.430, when committed against a person who, at the time of the offense, was under 18 years of age;

(6) kidnapping."

Renumber the following bill sections accordingly.

Page 9, line 9:

Delete "Sections 1 - 12"

Insert "Sections 1 - 17"

Page 9, line 11:

Delete "Section 13"

Insert "Section 18"

27-LS0172\E
Luckhaupt
3/24/11

CS FOR HOUSE BILL NO. 23( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PETERSEN AND HOLMES, Gruenberg

A BILL

FOR AN ACT ENTITLED

"An Act making the installation, enabling, or use of keystroke loggers or other devices criminal use of a computer."

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

*** Section 1.** AS 11.46.740(a) is amended to read:

(a) A person commits the offense of criminal use of a computer if, having no right to do so or any reasonable ground to believe the person has such a right, the person knowingly

(1) accesses, causes to be accessed, or exceeds the person's authorized access to a computer, computer system, computer program, computer network, or any part of a computer system or network, and, as a result of or in the course of that access,

(A) [(1)] obtains information concerning a person;

(B) [(2)] introduces false information into a computer, computer system, computer program, or computer network with the intent to

damage or enhance the data record or the financial reputation of a person;

(C) [(3)] introduces false information into a computer, computer system, computer program, or computer network and, with criminal negligence, damages or enhances the data record or the financial reputation of a person;

(D) [(4)] obtains proprietary information of another person;

(E) [(5)] obtains information that is only available to the public for a fee;

(F) [(6)] introduces instructions, a computer program, or other information that tampers with, disrupts, disables, or destroys a computer, computer system, computer program, computer network, or any part of a computer system or network; or

(G) [(7)] encrypts or decrypts data**; or**

(2) installs, enables, or uses a keystroke logger or other device or program that has the ability to record another person's keystrokes or entries on a computer; or

(3) uses a keystroke logger or other device or program to intercept or record another person's keystrokes or entries on a computer when those entries are transmitted wirelessly or by other non-wired means.

Annie

27-GS1840\A.1
Gardner
3/24/11

AMENDMENT

OFFERED IN THE SENATE BY SENATOR FRENCH

TO: SB 72

Page 1, line 1, following "**stalking,**":

Insert "**sexual assault in the third degree, sexual assault in the fourth degree,**"

Page 2, following line 16:

Insert new bill sections to read:

"* **Sec. 3.** AS 11.41.425(a) is amended to read:

(a) An offender commits the crime of sexual assault in the third degree if the offender

(1) engages in sexual contact with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed;

(2) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, engages in sexual penetration with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; [OR]

(3) engages in sexual penetration with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person**; or**

(4) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, engages in sexual

I see no reason for this language but I don't think it does any harm.

penetration with a person with reckless disregard that the person is committed to the custody of the offender, ~~or is committed to the custody of a law enforcement~~ agency.

*** Sec. 4.** AS 11.41.425 is amended by adding a new subsection to read:

(c) In this section, "peace officer" has the meaning given in AS 01.10.060.

*** Sec. 5.** AS 11.41.427(a) is amended to read:

(a) An offender commits the crime of sexual assault in the fourth degree if

(1) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, the offender engages in sexual contact with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; [OR]

(2) the offender engages in sexual contact with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person**; or**

(3) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, engages in sexual contact with a person with reckless disregard that the person is committed to the custody of the offender, or is committed to the custody of a law enforcement agency.

*** Sec. 6.** AS 11.41.427 is amended by adding a new subsection to read:

(c) In this section, "peace officer" has the meaning given in AS 01.10.060."

Renumber the following bill sections accordingly.

Page 6, following line 12:

Insert a new bill section to read:

"*** Sec. 16.** AS 12.10.010(a) is amended to read:

(a) Prosecution for the following offenses may be commenced at any time:

(1) murder;

(2) attempt, solicitation, or conspiracy to commit murder or hindering the prosecution of murder;

(3) felony sexual abuse of a minor;

(4) sexual assault that is an unclassified, class A, or class B felony or a violation of **AS 11.41.425(a)(2) - (4)** [AS 11.41.425(a)(2) OR (3)];

(5) a violation of AS 11.41.425, 11.41.427, 11.41.450 - 11.41.458, AS 11.66.110 - 11.66.130, or former AS 11.41.430, when committed against a person who, at the time of the offense, was under 18 years of age;

(6) kidnapping."

Renumber the following bill sections accordingly.

Page 9, line 9:

Delete "Sections 1 - 12"

Insert "Sections 1 - 17"

Page 9, line 11:

Delete "Section 13"

Insert "Section 18"

AMENDMENT

OFFERED IN THE SENATE BY _____

JUDICIARY COMMITTEE

TO: SB 72

Page 9, following line 6:

Insert a new bill section to read:

"* **Sec. 14.** AS 47.12.030(a) is amended to read:

(a) When a minor who was at least 16 years of age at the time of the offense is charged by complaint, information, or indictment with an offense specified in this subsection, this chapter and the Alaska Delinquency Rules do not apply to the offense for which the minor is charged or to any additional offenses joinable to it under the applicable rules of court governing criminal procedure. The minor shall be charged, held, released on bail, prosecuted, sentenced, and incarcerated in the same manner as an adult. If the minor is convicted of an offense other than an offense specified in this subsection, the minor may attempt to prove, by a preponderance of the evidence, that the minor is amenable to treatment under this chapter. If the court finds that the minor is amenable to treatment under this chapter, the minor shall be treated as though the charges had been heard under this chapter, and the court shall order disposition of the charges of which the minor is convicted under AS 47.12.120(b). The provisions of this subsection apply when the minor is charged by complaint, information, or indictment with an offense

(1) that is an unclassified felony or a class A felony and the felony is a crime against a person**, except a violation of AS 11.41.455**;

(2) of arson in the first degree;

(3) that is a class B felony and the felony is a crime against a person in which the minor is alleged to have used a deadly weapon in the commission of the

offense and the minor was previously adjudicated as a delinquent or convicted as an adult, in this or another jurisdiction, as a result of an offense that involved use of a deadly weapon in the commission of a crime against a person or an offense in another jurisdiction having elements substantially identical to those of a crime against a person, and the previous offense was punishable as a felony; in this paragraph, "deadly weapon" has the meaning given in AS 11.81.900(b); or

(4) that is misconduct involving weapons in the first degree under

(A) AS 11.61.190(a)(1); or

(B) AS 11.61.190(a)(2) when the firearm was discharged under circumstances manifesting substantial and unjustifiable risk of physical injury to a person."

Renumber the following bill sections accordingly.

Page 9, line 9:

Delete "Sections 1 - 12"

Insert "Sections 1 - 12 and 14"

27G-1
(2/11/2011)
(1:31 PM)

AMENDMENT

OFFERED IN THE SENATE BY _____

JUDICIARY COMMITTEE

TO: SB 72

Page 1, line 4, following "**probation;**"

Insert: "**relating to the subpoena power of the attorney general in cases involving use of an Internet service account;**"

Page 9, following line 6:

Insert a new bill section to read:

"***Sec. 14.** AS 44.23.080 is repealed and reenacted to read:

Sec. 44.23.080. Subpoena power of attorney general in cases involving use of an Internet service account. (a) If there is reasonable cause to believe that an Internet service account has been used in connection with a violation of AS 11.41.452, 11.41.455, or AS 11.61.125 - 11.61.128, and that the identity, address, and other information about the account owner will assist in obtaining evidence that is relevant to the offense, a law enforcement officer may apply to the attorney general or the attorney general's designee for an administrative subpoena to obtain the business records of the Internet service provider located within or outside the state.

(b) If an application meets the requirements of (a) of this section, the attorney general or the attorney general's designee may issue an administrative subpoena to the Internet service provider requiring the production of the following records:

(1) the name and other identifying information of the account holder;

(2) the address and physical location associated with the account;

(3) a description of the length of service, service start date, and types of

service associated with the account.

(c) A subpoena issued under (b) of this section shall prescribe a reasonable time after service for the production of the information.

(d) If the Internet service provider refuses to obey a subpoena issued under (b) of this section, the superior court may, upon application of the attorney general or the attorney general's designee, issue an order requiring the Internet service provider to appear at the office of the attorney general with the information described in the subpoena.

(e) An Internet service provider who knowingly fails to produce the information required to be produced by the subpoena or court order is guilty of contempt under AS 09.50.010.

(f) Nothing in this section limits the authority of law enforcement from obtaining process from the court or through a grand jury subpoena to obtain the information described in (b) of this section.

(g) A person may not bring a civil action against an Internet services provider, its officers, employees, agents, or other person for complying with an administrative subpoena issued under (b) of this section or a court order issued under (d) of this section."

Renumber the following bill sections accordingly.

Page 9, line 11:

Delete "Section 13 of this Act applies"

Insert "Sections 13 and 14 of this Act apply"

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Changes to SCS for CS for HB127 (JUD) \E:

Reinsert section 3 from hb127\I, along with necessary conforming amendments.

Adopt amendments A.1 and A.2., attached.

Amend section 24, o page 13 with the language attached.

I need this CS by 5 p.m. tonight.

A conceptual amendment to insert the language from section 3 of CSHB 127 (FIN) version "I", along with any necessary conforming amendments.

AMENDMENT #4 (#1)

OFFERED IN THE SENATE

TO:

Page ___, line ___:

Insert "**and relating to conditions of probation in criminal cases involving sex offenses;**"

Page ___, line ___:

Insert a new bill section to read:

"*** Sec. ___.** AS 12.55.100(e) is amended to read:

(e) In addition to other conditions imposed on the defendant, while on probation and as a condition of probation

(1) for a sex offense, as described in AS 12.63.100, the defendant

(A) shall be required to submit to regular periodic polygraph examinations;

(B) may be required to provide each electronic mail address, instant messaging address, and other Internet communication identifier that the defendant uses to the defendant's probation officer; the probation officer shall forward those addresses and identifiers to the Alaska state troopers and to the local law enforcement agency;

(2) if the defendant was convicted of a violation of AS 11.41.434 - 11.41.455, AS 11.61.125 - 11.61.128, or a similar offense in another jurisdiction, the defendant may be required to refrain from

(A) using or creating an Internet site;

(B) communicating with children under 16 years of age; [OR]

(C) possessing or using a computer**; or**

(D) residing within 500 feet of school grounds; in this

subparagraph, "school grounds" has the meaning given in AS 11.71.900."

Renumber the following bill sections accordingly.

AMENDMENT

OFFERED IN THE SENATE

TO: SCS FOR CS FOR HB 127(JUD) \E version

Page 11, line 9: following "general"

Insert "or the deputy attorney general for the criminal division"

Page 13, line 3: following "arrest."

Insert "The report shall include this information for cases prosecuted by the State of Alaska. The Department of Corrections and the Court System shall cooperate with the Department of Law in preparing this report."

27-LS8004\A.2
Gardner
4/13/11

AMENDMENT #5

OFFERED IN THE SENATE

TO: A version of HB 127

Page ___, line ___, following "**information;**":

Insert "**making the installation, enabling, or use of keystroke loggers or other devices criminal use of a computer;**"

Page ___, following line ___:

Insert a new bill section to read:

"*** Sec. ___.** AS 11.46.740(a) is amended to read:

(a) A person commits the offense of criminal use of a computer if, having no right to do so or any reasonable ground to believe the person has such a right, the person knowingly

(1) accesses, causes to be accessed, or exceeds the person's authorized access to a computer, computer system, computer program, computer network, or any part of a computer system or network, and, as a result of or in the course of that access,

(A) [(1)] obtains information concerning a person;

(B) [(2)] introduces false information into a computer, computer system, computer program, or computer network with the intent to damage or enhance the data record or the financial reputation of a person;

(C) [(3)] introduces false information into a computer, computer system, computer program, or computer network and, with criminal negligence, damages or enhances the data record or the financial reputation of a person;

(D) [(4)] obtains proprietary information of another person;

(E) [(5)] obtains information that is only available to the public for a fee;

(F) [(6)] introduces instructions, a computer program, or other information that tampers with, disrupts, disables, or destroys a computer, computer system, computer program, computer network, or any part of a computer system or network; or

(G) [(7)] encrypts or decrypts data**; or**

(2) installs, enables, or uses a keystroke logger or other device or program that has the ability to record another person's keystrokes or entries on a computer; or

(3) uses a keystroke logger or other device or program to intercept or record another person's keystrokes or entries on a computer when those entries are transmitted wirelessly or by other non-wired means."

Renumber the following bill sections accordingly.

Adjust internal bill section references accordingly.

27-LS0172\E
Luckhaupt
3/24/11

CS FOR HOUSE BILL NO. 23( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PETERSEN AND HOLMES, Gruenberg

A BILL

FOR AN ACT ENTITLED

"An Act making the installation, enabling, or use of keystroke loggers or other devices criminal use of a computer."

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

*** Section 1.** AS 11.46.740(a) is amended to read:

(a) A person commits the offense of criminal use of a computer if, having no right to do so or any reasonable ground to believe the person has such a right, the person knowingly

(1) accesses, causes to be accessed, or exceeds the person's authorized access to a computer, computer system, computer program, computer network, or any part of a computer system or network, and, as a result of or in the course of that access,

(A) [(1)] obtains information concerning a person;

(B) [(2)] introduces false information into a computer, computer system, computer program, or computer network with the intent to

damage or enhance the data record or the financial reputation of a person;

(C) [(3)] introduces false information into a computer, computer system, computer program, or computer network and, with criminal negligence, damages or enhances the data record or the financial reputation of a person;

(D) [(4)] obtains proprietary information of another person;

(E) [(5)] obtains information that is only available to the public for a fee;

(F) [(6)] introduces instructions, a computer program, or other information that tampers with, disrupts, disables, or destroys a computer, computer system, computer program, computer network, or any part of a computer system or network; or

(G) [(7)] encrypts or decrypts data**; or**

(2) installs, enables, or uses a keystroke logger or other device or program that has the ability to record another person's keystrokes or entries on a computer; or

(3) uses a keystroke logger or other device or program to intercept or record another person's keystrokes or entries on a computer when those entries are transmitted wirelessly or by other non-wired means.

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Sponsor Statement
HB 23: Computer Privacy

The State of Alaska has a long tradition of protecting our citizens' privacy rights, and this bill would protect the privacy rights of Alaskan computer users by closing a loophole in existing law. Current law addresses what is commonly known as "hacking", that is surreptitiously accessing a computer or network, but does not address intercepting data as it is being entered. A keystroke logger is a device that is used to record keystrokes as they are being entered into a computer. Emerging technology can even record keystrokes remotely from up to 100 yards away. This bill would ban the installation or use of keystroke loggers or other devices that intercept data being entered on a computer without the consent of the computer's owner.

Keystroke logger manufacturers specifically advertise that their products cannot be detected or disabled by anti-virus or anti-spyware software or firewalls, and the devices are designed so computer users would not notice them unless they carefully inspected their computers every time they use their computers.

While some specific information like social security numbers or credit card information are protected by federal or other law, it is often difficult to prove that someone used or stole such information. Under this bill, all that would need to be proved is that someone installed a keystroke logger or enabled the ability to log keystrokes wirelessly or by other nonwired means on a computer they had no right to access.

This bill would not affect people using keystroke loggers on their own computers, parents monitoring their children's computer use, or law enforcement operating with a search warrant.

It should not matter whether information is stolen out of a computer, or as it is being typed into it. The victims' privacy is just as violated, and the law should recognize their rights.

27-GH1840\E
Luckhaupt/Gardner
4/13/11

SENATE CS FOR CS FOR HOUSE BILL NO. 127(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the crimes of stalking, sexual assault in the third degree, sexual assault in the fourth degree, unlawful exploitation of a minor, distribution of child pornography, online enticement of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, and misconduct involving confidential information; relating to probation; relating to the subpoena power of the attorney general in cases involving use of an Internet service account; relating to an appearance before a judicial officer after arrest; relating to penalties for operating a vehicle without possessing proof of motor vehicle liability insurance or a driver's license; relating to penalties for certain arson offenses; amending Rule 5(a)(1), Alaska Rules of Criminal Procedure, and Rule 43.10, Alaska Rules of Administration; and providing for an effective date."

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

*** Section 1.** AS 11.41.270(b)(3) is amended to read:

(3) "nonconsensual contact" means any contact with another person that is initiated or continued without that person's consent, that is beyond the scope of the consent provided by that person, or that is in disregard of that person's expressed desire that the contact be avoided or discontinued; "nonconsensual contact" includes

(A) following or appearing within the sight of that person;

(B) approaching or confronting that person in a public place or on private property;

(C) appearing at the workplace or residence of that person;

(D) entering onto or remaining on property owned, leased, or occupied by that person;

(E) contacting that person by telephone;

(F) sending mail or electronic communications to that person;

(G) placing an object on, or delivering an object to, property owned, leased, or occupied by that person;

(H) following or monitoring that person with a global positioning device or similar technological means;

(I) using, installing, or attempting to use or install a device for observing, recording, or photographing events occurring in the residence, vehicle, or workplace used by that person, or on the personal telephone or computer used by that person;

*** Sec. 2.** AS 11.41.270(b) is amended by adding a new paragraph to read:

(5) "device" includes software.

*** Sec. 3.** AS 11.41.425(a) is amended to read:

(a) An offender commits the crime of sexual assault in the third degree if the offender

(1) engages in sexual contact with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed;

(2) while employed in a state correctional facility or other placement

designated by the commissioner of corrections for the custody and care of prisoners, engages in sexual penetration with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; [OR]

(3) engages in sexual penetration with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person**; or**

(4) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, engages in sexual penetration with a person with reckless disregard that the person is in the custody or the apparent custody of the offender, or is committed to the custody of a law enforcement agency.

*** Sec. 4.** AS 11.41.425 is amended by adding a new subsection to read:

(c) In this section, "peace officer" has the meaning given in AS 01.10.060.

*** Sec. 5.** AS 11.41.427(a) is amended to read:

(a) An offender commits the crime of sexual assault in the fourth degree if

(1) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, the offender engages in sexual contact with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; [OR]

(2) the offender engages in sexual contact with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person**; or**

(3) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, engages in sexual contact with a person with reckless disregard that the person in the custody or the apparent custody of the offender, or is committed to the custody of a law enforcement agency.

* **Sec. 6.** AS 11.41.427 is amended by adding a new subsection to read:

(c) In this section, "peace officer" has the meaning given in AS 01.10.060.

* **Sec. 7.** AS 11.41.452(e) is amended to read:

(e) Online enticement is a class **A** [B] felony if the defendant was, at the time of the offense, required to register as a sex offender or child kidnapper under AS 12.63 or a similar law of another jurisdiction.

* **Sec. 8.** AS 11.51.100(a) is amended to read:

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person **is**

(A) [IS] registered or required to register as a sex offender **or child kidnapper** under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) [HAS BEEN] charged by complaint, information, or indictment with a violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) [HAS BEEN] charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; or

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child.

* **Sec. 9.** AS 11.61 is amended by adding a new section to read:

Sec. 11.61.116. Sending an explicit image of a minor. (a) A person commits the offense of sending an explicit image of a minor if the person, with intent to annoy or humiliate another person, distributes an electronic photograph or video that depicts the genitals, anus, or female breast of that other person taken when that person was a

minor under 16 years of age.

(b) In this section,

(1) "computer" has the meaning given in AS 11.46.990;

(2) "distributes" means to deliver the image to another person by sending the image to the other person's computer or telephone;

(3) "Internet" has the meaning given in AS 11.46.710(d).

(c) Sending an explicit image of a minor is

(1) a class B misdemeanor if the person distributes the image to another person;

(2) a class A misdemeanor if the person distributes the image to an Internet website that is accessible to the public.

*** Sec. 10.** AS 11.61.120(a) is amended to read:

(a) A person commits the crime of harassment in the second degree if, with intent to harass or annoy another person, that person

(1) insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response;

(2) telephones another and fails to terminate the connection with intent to impair the ability of that person to place or receive telephone calls;

(3) makes repeated telephone calls at extremely inconvenient hours;

(4) makes an anonymous or obscene telephone call, an obscene electronic communication, or a telephone call or electronic communication that threatens physical injury or sexual contact;

(5) subjects another person to offensive physical contact; or

(6) **except as provided in AS 11.61.116,** publishes or distributes electronic or printed photographs, pictures, or films that show the genitals, anus, or female breast of the other person or show that person engaged in a sexual act.

*** Sec. 11.** AS 11.76 is amended by adding new sections to read:

Sec. 11.76.113. Misconduct involving confidential information in the first degree. (a) A person commits the crime of misconduct involving confidential information in the first degree if the person violates AS 11.76.115 and obtains the confidential information with the intent to

(1) use the confidential information to commit a crime; or

(2) obtain a benefit to which the person is not entitled, to injure another person, or to deprive another person of a benefit.

(b) Conviction under this section does not limit a person's ability to obtain civil relief from another person.

(c) Misconduct involving confidential information in the first degree is a class A misdemeanor.

Sec. 11.76.115. Misconduct involving confidential information in the second degree. (a) A person commits the crime of misconduct involving confidential information in the second degree if the person, without legal authority or the consent of another person, knowingly obtains confidential information about the other person.

(b) In this section, "confidential information" includes

(1) information that has been classified confidential by law;

(2) information encoded on an access device, identification card issued under AS 18.65.310, or driver's license.

(c) Conviction under this section does not limit a person's ability to obtain civil relief from another person.

(d) Misconduct involving confidential information in the second degree is a class B misdemeanor.

* **Sec. 12.** AS 12.05 is amended by adding a new section to read:

Sec. 12.05.030. Crimes involving minors committed outside state. In addition to any other jurisdictional basis expressed or implied in law, a person may be prosecuted under the laws of this state for conduct occurring outside the state for a violation of (1) AS 11.41.452 if the other person with whom the defendant communicated was in the state; or (2) AS 11.61.116 if the minor whose image is published or distributed was in the state.

* **Sec. 13.** AS 12.10.010(a) is amended to read:

(a) Prosecution for the following offenses may be commenced at any time:

(1) murder;

(2) attempt, solicitation, or conspiracy to commit murder or hindering the prosecution of murder;

(3) felony sexual abuse of a minor;

(4) sexual assault that is an unclassified, class A, or class B felony or a violation of **AS 11.41.425(a)(2) - (4)** [AS 11.41.425(a)(2) OR (3)];

(5) a violation of AS 11.41.425, 11.41.427, 11.41.450 - 11.41.458, AS 11.66.110 - 11.66.130, or former AS 11.41.430, when committed against a person who, at the time of the offense, was under 18 years of age;

(6) kidnapping.

*** Sec. 14.** AS 12.25.150(a) is amended to read:

(a) A person arrested shall be taken before a judge or magistrate without unnecessary delay, and in any event within **48** [24] hours after arrest, including Sundays and holidays. This requirement applies to municipal police officers to the same extent as it does to state troopers.

*** Sec. 15.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, or promoting prostitution in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) **unlawful exploitation of a minor under AS 11.41.455(c)(2), online enticement of a minor under AS 11.41.452(e), or** attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, or promoting prostitution in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor **under AS 11.41.455(c)(1)**, or distribution of child pornography **under AS 11.61.125(e)(2)** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, **distribution of child pornography under AS 11.61.125(e)(1),** or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant

has two prior convictions for sexual felonies, 99 years.

* **Sec. 16.** AS 12.70.130 is amended to read:

Sec. 12.70.130. Arrest without warrant. The arrest of a person may also be lawfully made by a peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year, but when arrested the accused must be taken before a judge or magistrate without unnecessary delay and, in any event, within **48** [24] hours after arrest, including Sundays and holidays, and complaint shall be made against the accused under oath setting out the ground for the arrest as in AS 12.70.120. Thereafter the answer of the accused shall be heard as if the accused had been arrested on a warrant.

* **Sec. 17.** AS 28.15.131 is amended by adding a new subsection to read:

(b) Violation of this section is an infraction.

* **Sec. 18.** AS 28.22.019(c) is amended to read:

(c) A person convicted under this section is guilty of **an infraction** [A CLASS B MISDEMEANOR] and **shall be sentenced to pay a mandatory fine of $500** [MAY BE PUNISHED AS PROVIDED IN AS 12.55, EXCEPT THAT A FINE OF AT LEAST $500 MUST BE IMPOSED].

* **Sec. 19.** AS 33.05.020(a) is repealed and reenacted to read:

(a) The commissioner shall appoint and make available to the superior court, when ordered under AS 12.55.015(a), a qualified probation officer for the active supervision of a person placed on probation for a felony offense. The commissioner may provide active supervision to a person placed on probation for a misdemeanor offense.

* **Sec. 20.** AS 41.23.220 is amended to read:

Sec. 41.23.220. Penalty. (a) **Except for conduct that is a violation of AS 11.46.420, a** [A] person who violates a provision of AS 41.23.180 - 41.23.230 or a regulation adopted under AS 41.23.180 - 41.23.230 is guilty of a violation as defined in AS 11.81.900.

(b) **Except for conduct that is a violation of AS 11.46.420, the** [THE] supreme court shall establish by order or rule a schedule of bail amounts for violations

under (a) of this section that allow the disposition of a citation without a court appearance.

* **Sec. 21.** AS 44.23.080 is repealed and reenacted to read:

Sec. 44.23.080. Subpoena power of attorney general in cases involving use of an Internet service account. (a) If there is reasonable cause to believe that an Internet service account has been used in connection with a violation of AS 11.41.452, 11.41.455, or AS 11.61.125 - 11.61.128, and that the identity, address, and other information about the account owner will assist in obtaining evidence that is relevant to the offense, a law enforcement officer may apply to the attorney general for an administrative subpoena to obtain the business records of the Internet service provider located inside or outside of the state.

(b) If an application meets the requirements of (a) of this section, the attorney general may issue an administrative subpoena to the Internet service provider requiring the production of the following records:

(1) the name and other identifying information of the account holder;

(2) the address and physical location associated with the account;

(3) a description of the length of service, service start date, and types of service associated with the account.

(c) A subpoena issued under (b) of this section must prescribe a reasonable time after service for the production of the information.

(d) Service of a subpoena issued under (b) of this section may be by any method authorized by law or acceptable to the Internet service provider. At any time before the return date specified on the subpoena, the Internet service provider may petition a court of competent jurisdiction for the judicial district in which the provider resides or does business for an order modifying or quashing the subpoena or for an order sealing the court record.

(e) If the Internet service provider refuses to obey a subpoena issued under (b) of this section, the superior court may, upon application of the attorney general, issue an order requiring the Internet service provider to appear at the office of the attorney general with the information described in the subpoena.

(f) An Internet service provider who knowingly fails to produce the

information required to be produced by the subpoena or court order is guilty of contempt under AS 09.50.010.

(g) Nothing in this section limits the authority of law enforcement from obtaining process from the court or through a grand jury subpoena to obtain the information described in (b) of this section.

(h) A person may not bring a civil action against an Internet service provider, its officers, employees, agents, or other person for complying with an administrative subpoena issued under (b) of this section or a court order issued under (e) of this section.

*** Sec. 22.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 5(a)(1), Alaska Rules of Criminal Procedure, is amended to read:

(1) Except when the person arrested is issued a citation for a misdemeanor or a violation and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary delay **and in any event within 48 hours after arrest, including Sundays and holidays**. This appearance may be accomplished by the use of telephonic or television equipment pursuant to Criminal Rules 38.1 and 38.2. [NECESSARY DELAY WITHIN THE MEANING OF THIS PARAGRAPH (a) IS DEFINED AS A PERIOD NOT TO EXCEED FORTY-EIGHT HOURS AFTER ARREST, INCLUDING SUNDAYS AND HOLIDAYS.]

*** Sec. 23.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. The amendments to AS 41.23.220, made in sec. 20 of this Act, have the effect of changing Rule 43.10, Alaska Rules of Administration, by prohibiting the disposition of a violation of AS 11.46.420 without court appearance and forfeiture of bail amounts.

*** Sec. 24.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REPORT TO THE LEGISLATURE. On or before April 1, 2012, the Department of

Law shall submit a report to the legislature concerning the total number of arraignments that were heard within 24 hours after a person's arrest and the total number of arraignments that were heard after 24 hours, but within 48 hours after a person's arrest.

*** Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 14, 16, and 22 of this Act apply to arrests for offenses committed before, on, or after the effective date of this Act.

(b) Sections 1 - 13, 15, 17, 18, 20, and 23 of this Act apply to offenses committed on or after the effective date of this Act.

(c) Sections 19 and 21 of this Act apply to offenses occurring before, on, or after the effective date of this Act.

*** Sec. 26.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of it to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances is not affected.

*** Sec. 27.** This Act takes effect July 1, 2011.

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

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CSHB 127(FIN) -- STALKING AND EXPLOITATION OF A MINOR
BAIL CLEANUP

Themes:

HB 127: Strengthen and refine laws prohibiting stalking, online enticement of a child, unlawful exploitation of a child, and other conduct that hurts vulnerable people

HB 175: Correct inconsistencies between statutes and court rules

Highlights:

- Expands stalking law to prohibit new means of following and frightening victims
- Raises the crime and penalty for online enticement of a minor – classic grooming behavior that leads to child victimization
- Raises the penalty for unlawful exploitation of a minor (creating child pornography) to a class A felony for all offenders
- Prohibits "sexting" – that is sending an explicit image of a child under 16 with intent to annoy or humiliate the person
- Prohibits obtaining confidential information about another person; this would be a class B misdemeanor if a person obtains the information that is confidential by law without the consent of the person, and a class A misdemeanor if a person obtains the information with the intent to use it to commit a crime or obtain a benefit
- Makes conforming amendments in four areas where statutes conflict with court rules
    - Bail hearings – changes the statute to agree with the court rule adopted last year – which changes the deadline for bringing a person before a judge from 24 to 48 hours
    - Failure to carry and present a driver's license
    - Failure to carry and present proof of automobile insurance
    - Burning a vehicle on public property
- Clarifies law authorizing administrative subpoenas in child sexual exploitation investigations adopted last year

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

SEAN PARNELL,
GOVERNOR

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CSHB 127(FIN)
STALKING AND EXPLOITATION OF A MINOR AND BAIL CLEANUP
Sectional Analysis

Sections 1 and 2 expand the crime of stalking by amending the definition of "nonconsensual contact". Stalking prohibits a person from engaging in a course of conduct that places another in fear of death or physical injury. "Course of conduct" is defined as repeated acts of nonconsensual conduct. The bill adds two ways that a defendant may contact a victim that is beyond the victim's consent. First, it includes following or monitoring the victim with a global positioning device. Second, it includes 3installing or attempting to install a device for observing, recording, or photographing events in the home, workplace, or vehicle the victim uses, or on the personal telephone or computer that the victim uses.

Section 3 raises the classification of the crime of online enticement of a minor for a person who is not required to register as a sex offender or child kidnapper from a class C felony to a class B felony. This change, in addition to the amendments to AS 12.55.125(i) in the bill, would be to raise the penalty from a range of zero to two years for a first offense (maximum term of five years) to a range of five to 15 years for a first offense (maximum term of 99 years). Also refer to section 12 of this analysis.

Section 4 raises the classification of the crime of online enticement of a minor for a person who is required to register as a sex offender or child kidnapper from a class B felony to a class A felony. This change, in addition to the amendments to AS 12.55.125(i) in the bill, would be to raise the penalty from a range of one to three years (maximum term of 10 years) to a range of 15 to 30 years for a first offense (maximum term of 99 years). Also refer to section 12 of this analysis.

Section 5 raises the classification of the crime of unlawful exploitation of a minor from a class B felony to a class A felony for all offenders. Under current law the offense is a class A felony if the person has previously been convicted of unlawful exploitation of a minor, and it is a class B felony for other offenders. This change, in addition to the amendments to AS 12.55.125(i) in the bill, would be to raise the penalty from a range of two to 12 years or five to 15 years (depending on whether it is a first or second offense) to a range of 15 to 30 years for a first offense. Also refer to section 12 of this analysis.

Section 6 amends the crime of endangering the welfare of a child in the first degree by prohibiting a parent or guardian from leaving a child under 16 years of age with a person who is required to register as a child kidnapper or is charged with child kidnapping. The law currently prohibits a parent or guardian from leaving a child with a person required to register as a sex offender or who is charged with a sex offense.

Section 7 adopts a new crime – sending an explicit image of a minor. It would prohibit a person, acting with the intent to annoy or humiliate another person, from distributing an electronic photograph or video that depicts an image of a minor's genitals, anus, or female breast taken when the minor was under 16 years of age. The prohibited conduct would be a class B misdemeanor (maximum term of imprisonment 90 days) if the person distributes the image to one or more other persons, and a class A misdemeanor (maximum term of imprisonment one year) if the person distributes the image to an Internet website that is accessible to the public.

Section 8 makes a conforming amendment to AS 11.61.120(a)(6), harassment in the second degree, to make it clear that the new crime of sending an explicit image of a minor in **Section 7** is not included in the crime of harassment in the second degree.

Section 9 adopts two new crimes – misconduct involving confidential information in the first and second degrees. The second degree offense prohibits a person from obtaining the confidential information about another person without legal authority or consent to do so. This conduct would be a class B misdemeanor (maximum term of imprisonment 90 days).

Misconduct involving confidential information in the first degree would prohibit a person from violating the second degree prohibition *and* using the confidential information to commit a crime or to obtain a benefit to which a person is not entitled, or injure or deprive another person of a benefit. This conduct would be a class A misdemeanor (maximum term of imprisonment one year).

Section 10 clarifies that a person may be prosecuted for online enticement of a minor and for sending an explicit image of a minor if the minor whose image is published, or with whom the person communicated, was in this state, even if the defendant was in another jurisdiction at the time he or she committed the prohibited acts.

Section 11 amends AS 12.25.150(a) (relating to arrest) to conform to the provision in the bail reform legislation last year that changed the deadline for bringing a person arrested before a judicial officer from 24 hours to 48 hours of arrest.

Section 12 amends AS 12.55.125(i) (terms of imprisonment for persons who commit sex offenses) by conforming the terms of imprisonment for persons who commit unlawful exploitation of a minor or online enticement of a minor to the correct level in accord with the changes in **Sections 3 – 5** of the bill.

Section 13 amends AS 12.70.130 (relating to extraditions) to conform to the provision in the bail reform legislation last year that changed the deadline for bringing a person arrested before a judicial officer from 24 to 48 hours of arrest.

Section 14 changes the penalty for the offense of failure to possess and present upon request to a peace officer a person's driver's license when driving from a misdemeanor, similar to a class B misdemeanor, to an infraction. The offense currently is correctible, and would continue to be correctible. This offense is also currently on the bail schedule (Rule 43.1, Alaska Rules of Administration) at a $50 bail. It is not consistent to have an offense at the same time a misdemeanor, which generally requires a court appearance, and at the same time disposable under the bail schedule for a $50 bail amount. The bill removes this inconsistency.

Section 15 changes the penalty for the crime of failure to carry and present upon request to a peace officer proof of automobile insurance when driving from a class B misdemeanor to an infraction. Current law in statute requires a mandatory fine for this offense of at least $500; at the same time the offense is on the bail schedule for a bail amount of $500. It is correctible under current law and would continue to be correctible under the bill. Again, it is inconsistent to have a class B misdemeanor on the bail schedule for disposition without court appearance. The bill removes the inconsistency, and at the same time retains the bail amount of $500.

Section 16 clarifies the law by stating that while the Commissioner of Corrections provides probation officers to the superior court for the active supervision of person on probation for felony offenses, the Commissioner may, at his or her discretion, also provide probation officers for the active supervision of persons released for misdemeanor offenses.

Section 17 resolves a similar inconsistency in the penalty for burning a vehicle on the Knik River Public Use Area. In 2006 the legislature created the Knik River Public Use Area. The law authorizes the Department of Natural Resources to adopt regulations governing conduct in the area. AS 41.23.220(a) provides that a person who violates the new law or a regulation under the new law commits a violation. AS 41.23.220(b) requires the Alaska Supreme Court to establish a bail schedule for violations of the statutes and regulations. The law specifically requires that the violations be disposed of without court appearance. One of the regulations adopted prohibits burning a vehicle in the area; the bail was adopted in Supreme Court Order 1711 at $50.

In 2008 the legislature enacted AS 11.46.420, which adopted a new crime, arson in the third degree. This prohibits burning a vehicle on state or municipal land. The penalty for this crime is a class C felony.

These sections correct this inconsistency by excluding burning a vehicle on state land from the prohibitions that are effective in the Knik River Public Use Area.

Section 18 redrafts the law enacted last year allowing the Attorney General to issue administrative subpoenas for law enforcement to obtain limited information from an Internet service provider if there is probable cause to believe that an Internet service account has been used in connection with the crimes of online enticement of a minor, unlawful exploitation of a minor, distribution of child pornography, possession of child pornography, or distribution of indecent material to a minor.

The bill allows a designee of the attorney general, still within the Department of Law, to issue the administrative subpoenas. It corrects a problem with the service provisions of the law to allow service of the subpoenas in any manner authorized by law or acceptable to the Internet service provider. The bill clarifies that a person who does not obey a subpoena or ask the court to quash the subpoena may be guilty of contempt. The bill does not include a problematic provision of current law which requires either returning information to the Internet service provider or destroying it if a criminal prosecution is not undertaken. There are two problems with this: first, an Internet service provider does not need the documents returned because they already have the information. Second, it is not good public policy for documents in the possession of a public agency be destroyed. It is better policy that this information is kept as part of a confidential police investigation. The bill also provides that a person may not bring a civil action against an Internet service provider for complying with an administrative subpoena.

Section 19 provides that the crime of unlawful exploitation of a minor is not included in the crimes that require an automatic waiver from juvenile to adult court for a person who is 16 or 17 years of age and who is charged with commission of the offense.

Section 20 redrafts Rule 5(a)(1), Alaska Rules of Criminal Procedure, to correct a drafting error and to make the rule more readable. The rule was changed last year to extend the deadline from 24 to 48 hours for bringing an arrested person before a judicial officer. This change corrects the drafting error, which currently defines a term that is not used in the rule.

Section 21 notes that the changes included in **Section 17** of the bill have the effect of changing Rule 43.10, Alaska Rules of Administration (the bail schedule) by prohibiting the disposition of cases involving burning a vehicle on state land without a court appearance by mailing to the court a bail amount of $50.

Section 22 provides the applicability provisions.

Section 23 provides a severability section.

Section 24 adopts a July 1, 2011 effective date.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 127
(H) Publish Date: 1/26/11

Identifier (file name): LL1840-DPS-DET-01-12-11
Title: "An Act relating to the crimes of stalking, online enticement... of a minor, related offenses, and misconduct..."
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							
FUND SOURCE		(Thousands of Dollars)					
1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Not applicable, initial version.

Prepared by: Lt. Rodney Dial
Division: Alaska State Troopers
Approved by: Joseph Masters, Commissioner
Department of Public Safety

Phone: 907-247-4480
Date/Time: 1/24/11 2:20 PM
Date: 1/12/2011

(Revised 12/29/2010 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 127

Analysis

This bill expands the crime of stalking by adding to the definition of nonconsensual contact, monitoring the victim with a GPS device and using or installing a device to record or photograph events concerning the victim. It also increases penalties for unlawful exploitation of a minor, online enticement of a minor, and provides for the prosecution of offenders from out of state. Finally, this bill adopts new offenses to include: sending explicit images of a minor, and misconduct involving confidential information.

Passage of this legislation will have no fiscal impact on the department.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 127
(H) Publish Date: 1/26/11

Identifier (file name): 1840-LAW-CRIM-01-11-11
Dept. Affected: Law
Title: An act relating to crimes of stalking, online enticement, and exploitation of a minor, harassment, distribution of indecent material to a minor, and misconduct.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Rules
Requester: Request of the Governor
OMB Component Number: 2203

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Prepared by: Dave Blaisdell, Director — Phone: 465-3673
Division: Administrative Services — Date/Time: 1/11/11 12:00 AM
Approved by: John J. Burns, Attorney General — Date: 1/11/2011
Department of Law

(Revised 12/29/2010 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 127

Analysis

This bill amends the law relating to stalking by adding to the definition of nonconsensual conduct methods of contacting people with modern technology such as global positioning systems. It makes a clarifying amendment to AS 11.51.100, which prohibits endangering the welfare of a minor. It adopts new statutes to prohibit sending an explicit image of a minor and misconduct involving confidential information. It also increases the penalties for the crimes of online enticement of a minor and unlawful exploitation of a minor. The bill makes it clear that the commissioner of corrections may, in his or her discretion, provide supervised probation to a person on probation for conviction of a misdemeanor.

Although the bill would adopt new crimes we believe that they can be prosecuted with current resources.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: HB 127
(H) Publish Date: 1/26/11

1840-DOA-PDA-1-12-11
Title: An Act relating to the crimes of stalking, online enticement ...
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	***		***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL							

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Prepared by: Quinlan Steiner, Director — Phone: 907 334-4414
Division: Public Defender Agency — Date/Time: 1/12/11 2:45 PM
Approved by: John Cramer, Deputy Commissioner — Date: _____
Department of Administration

(Revised 12/29/2010 OMB)

FISCAL NOTE #3

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 127

Analysis

This bill expands the definition of "nonconsensual contact" under stalking; creates a new crime for sending an explicit image of a minor without the consent of the minor's parent; and creates new crimes for obtaining confidential information of another person.

The bill also provides for the prosecution of an out of state individual for online enticement of a minor if the communications involve an individual in the State of Alaska. Finally, the bill specifically permits the Department of Corrections to provide active supervision to a person placed on probation for a misdemeanor offense.

Expanding the definition of nonconsensual contact, creating additional crimes, and providing for supervised misdemeanor probation will likely result in an increase in cases assigned to the Public Defender Agency. It is not possible to reliably predict the number of cases that will be assigned to the Agency, however. The Agency, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: HB 127
(H) Publish Date: 1/26/11

Identifier (file name): 1840-DOC-OC-01-20-11
Title: "An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering..."
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: DOC
Appropriation: Administration and Support
Allocation: Office of the Commissioner
OMB Component Number: 684

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost **

POSITIONS

Full-time	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Part-time	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Temporary	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Why this fiscal note differs from previous version

This is the first version of the bill

Prepared by: Leslie Houston, Director — Phone: 465-3339
Division: DOC Admin. Services — Date/Time: 01/25/11 1:00 p.m.
Approved by: Joe Schmidt, Commissioner — Date: 1/25/2011
DOC

(Revised 12/29/2010 OMB)

FISCAL NOTE #4

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 127

Analysis

DOC averages two new incarcerations per year for the crime of enticement of a minor. This bill would increase the penalty for this crime from a Class C felony to a Class B felony. This change has the potential to increase mandays by 10,220 in FY12 thru FY17. Applying the current cost of care ($134.21 per day), the increase of cost could be in the range of $0.0 to $1,371.60 to DOC.

DOC averages two incarcerations per year for the crime of online enticement of a minor. This bill increases the penalty for this crime from a Class B felony to a Class A felony if the defendant was, at the time of the offense, a registered or required to register as a sex offender or child kidnapper. This would increase the penalty three years. Applying the current daily cost of care ($134.21 per day), this could potentially increase costs in the range of $0.0 to $734.80 to DOC.

DOC averages one new incarceration per year for the crime of unlawful exploitation of a minor. This bill would increase the penalty for this crime from a Class B felony to a Class A felony. This would increase the penalty three years. This has the potential to increase mandays by 5,475 beginning in FY12 thru FY17. Applying the current daily cost of care ($134.21 per day) could potentially add costs in the range of $0.0 to $734.80 to DOC.

Other provisions that the department is unable to quantify at this time but will closely monitor for potential fiscal impact are as follows:

- Adding Monitoring a Person with a Global Positioning Device or Similar Technology Means
- Adding Child Kidnapper to 2(A) under AS12.63
- Adding Sending and Explicit Image of a Minor in the Degree and Second Degree to Statute
- Adding Crimes Involving Minors Committed Out of State, Specifically Online Enticement to Statute
- Adding Online Enticement of a Minor to Statute

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 5
Bill Version: CSHB 127(JUD)
(H) Publish Date: 3/14/11

Identifier (file name): HB127-DHSS-PS-02-04-11
Title: Crimes Involving Minors/Stalking/Info
Sponsor: Rls by Request of the Governor
Requester: House JUD Committee

Dept. Affected: Health and Social Services
Appropriation: Juvenile Justice
Allocation: Probation Services
OMB Component Number: 2134

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

N/A

Prepared by: Barbara Henjum, Director — Phone 907.465-2112
Division: Juvenile Justice — Date/Time 2/4/11 5:00 PM
Approved by: Alison Elgee, Assistant Commissioner — Date 2/4/2011
DHSS Finance & Management Services

FISCAL NOTE #5

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 127(JUD)

Analysis:

If this bill becomes law, Unlawful Exploitation of a Minor would be a class A felony when committed by an adult or juvenile. Under the Juvenile Delinquency statutes (AS 47.12.030), when a juvenile 16 or older is alleged to have committed an A felony against a person, juvenile jurisdiction does not apply and the juvenile is transferred to the adult system. Increasing the charge class for Unlawful Exploitation of a Minor to an A felony therefore would result in these older juveniles being "autowaived' into the adult system, where they would be subject to adult sentencing guidelines.

Criminal laws that are amended or are increased in the severity of their charge class include Stalking, Online Enticement of a Minor, Unlawful Exploitation of a Minor, Endangering the Welfare of a Child (First Degree), Harassment (Second Degree), and Distribution of Indecent Material to Minors. The bill creates three new offenses: Sending An Explicit Image of a Minor, Misconduct Involving Confidential Information (First Degree), and Misconduct Involving Confidential Information (Second Degree). The bill also adds a clarifying section to Title 12 (Sentencing and Probation) to clarify that a person may be prosecuted under Alaska law for committing Online Enticement of a Minor or Sending an Explicit Image of a Minor even though the defendant may be in another state when the offense was committed. The bill also makes changes to sentencing guidelines of Title 12 to reflect the changes in charge class that are proposed for Unlawful Exploitation of a Minor and Online Enticement of a Minor.

If this bill passes, there would be no financial impact to the Division of Juvenile Justice budget.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 6
Bill Version: CSHB 127(FIN)
(H) Publish Date: 4/4/11

Identifier (file name): CSHB127(JUD)-DOA-OPA-3-21-11
Title: An Act relating to the crimes of stalking, online enticement . .
Sponsor: Governor
Requester: House Finance

Dept. Affected: DOA
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***		***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***		***	***	***	***	***

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Rachel Levitt, Acting Director
Division: Office of Public Advocacy
Phone: (907) 269-3504
Date/Time: 3/21/11, 5:00 p.m.

Approved by: John Cramer, Deputy Commissioner
Department of Administration
Date: 3/22/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE #6

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 127(FIN)

Analysis

This bill expands the definition of "nonconsensual contact" under stalking, specifically prohibits the sending of an explicit image of a minor through various electronic and printed means, and creates a new crime for obtaining the confidential information of another person.

The bill also provides for the prosecution of an out of state individual for online enticement of a minor if the state nexus requirment is met. The bill also specifically allows the Department of Corrections to place a misdemeanant on supervised probation.

The expansion of the definition of "nonconsensual contact", the creation of additional crimes, and increasing the supervision of probationers will likely increase the number of criminal defense cases assigned to the Office of Public Advocacy. The agency is not able to reliably predict the number of new cases, and therefore, the agency cannot precisely predict the resulting fiscal impact on the agency. Accordingly, OPA has submitted an indeterminate fiscal note.

HB

168

<TARGET><BILL>HB 168</BILL><SUBJECT>HB
168</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE COMMITTEE REPORT

DATE: 4/8/11

FURTHER: (Judiciary)

DATE TURNED IN TO OFFICE: 3/20/12

Labor and Commerce Committee considered CS FOR HOUSE BILL NO. 168(JUD)

HB 168-INJUNCTION SECURITY: INDUSTRIAL OPERATION

"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

and recommends:

[ ] be **replaced** with **SCS** _____ (_____) *[ ] Same Title [ ] Technical Title Change [ ] New Title/SCR No._____*

[ ] adopt **previous SCS** _____ (_____) *[ ] Same Title [ ] Technical Title Change [ ] New Title/SCR No._____*

[ ] attached amendment(s)

[ ] adopt _____Letter of Intent

[ ] further referral to _____Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)

Dept.	Fiscal	Indet.	Zero	FN #

PREVIOUS FISCAL NOTE(S)

Dept.	Fiscal	Indet.	Zero	FN #
DNR			✓	4
LAW			✓	3
DFG			✓	2
DEC			✓	1

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Giessel	X			
	DAVIS			X	
	PASKVAN			X	
	MENARD	X			
CHAIR:				X	

Representative
Eric Feige
House District 12
House Resources Committee Co-Chair
Education Committee
Transportation Committee
Joint Armed Services Committee

Alaska State Legislature

House of Representatives

During Session:
State Capitol Room 126
Juneau, Alaska 99801-1182
(907) 465-4859
Fax (907) 465-3799
1-888-465-4859

Sponsor Statement for CSHB 168(JUD)

"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

Under current law the cost to bring a public litigant lawsuit against a legally permitted project is in effect zero. There is very little risk in bringing a suit. All the risk is borne by the defendants. These actions do shutdown projects at significant costs to working Alaskans, businesses and the state treasury. **CSHB 168(JUD)** seeks to remedy the situation by leveling the playing field.

CSHB168(JUD) parallels the requirements of Alaska Civil Rule 65(c). As written, 65(c) states: *"no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained".*

At the request of the Department of Law, **HB168** was amended to more closely mirror the language of Alaska Civil Rule 65(c) in order to clarify that the proposed statute would not change the court rule. The court already has the ability to require security. **CSHB168(JUD)** simply requests that part of the court's deliberation process should include payment of wages and benefits for employees, payments to contractors and sub-contractors of the industrial operation that is shutdown. The amount of security and how it is calculated is totally within the hands of the court.

E-Mail: Representative.Eric.Feige@legis.state.ak.us

LEGAL SERVICES

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

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

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

MEMORANDUM April 11, 2012

SUBJECT: EPA concerns relating to posting security for injunction (CSHB 168(JUD); Work Order No. 27-LS0395\D)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Dennis C. Bailey
Legislative Counsel

You have provided me with a copy of a letter written in 2006 from the U.S. Environmental Protection Agency to then Utah Governor Jon Huntsman, Jr., relating to a bill which had been passed by the Utah Legislature that involved posting a bond in order to request a stay or injunction of a new federal or state environmental permit or approval. You have asked for an opinion concerning the letter and whether CSHB 168(JUD) may raise issues for the EPA similar to those expressed in the letter regarding the Utah bill.

The 2006 Utah bill, HB 100 (copy enclosed), provided that the bond would have to cover costs and damages to a person including lost wages, salaries, benefits. The bond could be large and could deter organizations from seeking stays of permits and other project approvals pending appeal, no matter how compelling their case. The Utah bill requires a an entity that does business in the state to file a bond with the state division of corporations when it requests a stay or injunction in environmental litigation. The bill establishes fees and requires a hearing to establish the bond amount, allows for administrative rules for posting the bond, and requires that an entity that fails to post a bond be administratively dissolved and provides for license revocations. The bill lists a number of federal and state laws to which the bonding requirement applies.

The EPA letter expressed concern over the Utah legislation, noting that the legislation may create "impediments to the public's ability to challenge permits and other projects in state and federal court as required by various environmental statutes" and over "whether important parts of the State's federally approved environmental programs would meet federal requirements for EPA approval." The EPA letter said that the state must provide the same opportunity for judicial review as would be available under the federal program. Apparently in response to the EPA concerns, the Utah governor vetoed the bill based on the conclusion that the bill was preempted by federal law.[1]

---

[1] The governor's veto message relied on federal preemption: state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

By comparison, CSHB 168(JUD) also applies to a court considering the amount of security that must be provided by a person seeking an injunction or order vacating or staying the operation of a permit that affects an industrial operation. The court must consider costs that an industrial operation may incur if the operation is wrongly enjoined and must include an amount for payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation. An industrial operation is defined to include construction, energy or timber activity, and oil, gas, and mineral exploration, development, and production.

You asked whether the concerns expressed in the EPA letter could also apply to CSHB 168(JUD). The short answer is yes. Although the 2006 Utah HB 100 has a different structure than CSHB 168(JUD), it was an attempt to accomplish the same purpose as CSHB 168(JUD), i.e., requiring a person applying for an injunction or stay to pay a greater bond that covers specified amounts. The EPA expressed concerns mainly relating to federal preemption and affects of the bill on federal approval of state environmental programs. Because of similarities between the Utah bill and the Alaska bill, it seems possible that the EPA could have similar concerns with CSHB 168(JUD), but only the EPA could give a definitive response to this question.

If I may be of further assistance, please advise.

DCB:ljw
12-279.ljw

Enclosure

Congress." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (U.S. 1983), *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
999 18TH STREET- SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
http://www.epa.gov/region08

Ref: 8P-SA

MAR 0 2 2006

Honorable Jon Huntsman, Jr.
Governor, State of Utah
Utah State Capitol Complex
East Office Building, Suite E220
PO Box 142220
Salt Lake City, Utah 84114-2220

Dear Governor Huntsman:

I am writing to indicate that legislation recently approved by the 2006 Utah Legislature, House Bill No. 100 (HB 100), is of potential concern to the U.S. Environmental Protection Agency (EPA). EPA is very reluctant to become involved with the actions of a State's legislature. However, this pending legislation raises concerns about whether important parts of the State's federally-approved environmental programs would meet federal requirements for EPA approval. In the spirit of partnership, we offer the following for your consideration, particularly in light of EPA's experience with similar legislative actions and court decisions in the states of Virginia, Oregon, and Montana.

I have been advised by EPA's attorneys that the pending Utah legislation may create impediments to the public's ability to challenge permits and other project approvals in state and federal courts as required by various environmental statutes. As you may know, for a state to assume responsibility for federal environmental programs, that State must provide the same opportunity for judicial review as would be available under the federal program.

If our reading of the pending legislation is correct, it would require entities to post a bond in order to request a stay or injunction of a new federal or State environmental permit or approval. In addition to covering potential damages to the permit applicant, the bond would have to cover costs and damages to any person, including employees' lost wages, salaries, and benefits, and lost State and local tax revenues. The size of the bond could be very large. Thus, the bond requirement could deter organizations from seeking stays of permits and other project approvals pending appeal, no matter how compelling their case.

Also, as noted above, HB 100 would extend to entities seeking a stay or injunction in federal court. This appears to conflict with federal law as we know of no authority under federal law for the State to impose this burden on access to federal court. In addition, HB 100 would prevent entities that fail to post the required bond from doing business within the State of Utah. This too would impede the ability of organizations to seek a stay or injunction in federal or state court.

In sum, it appears that the pending legislation could burden rights to judicial review of permitting decisions and project approvals in Utah and impact the federal-approvability of State environmental programs. I welcome your insights as to whether our understanding of the pending legislation is accurate, and the opportunity to work together to carefully consider the ramifications of the pending legislation. If you need more information, you may call me or Steve Tuber of my staff at (303) 312-6241.

Sincerely yours,

Kerrigan D. Clough /fo

Robert E. Roberts
Regional Administrator

cc: Dianne Nielson, Director
Utah Department of Environmental Quality

Printed on Recycled Paper

STATE OF UTAH

JON M. HUNTSMAN, JR.
GOVERNOR

OFFICE OF THE GOVERNOR
SALT LAKE CITY, UTAH
84114-2220

GARY R. HERBERT
LIEUTENANT GOVERNOR

March 21, 2006

The Honorable Greg J. Curtis
Speaker of the House
and
The Honorable John L. Valentine
President of the Senate

Dear Speaker Curtis and President Valentine:

After careful consideration and study, I have decided to veto H.B. 100, ENVIRONMENTAL LITIGATION BOND, and have transmitted it to the Lieutenant Governor for filing.

This bill seeks to impose new requirements on Utah corporations that initiate lawsuits under the National Environmental Policy Act of 1969, the Atomic Energy Act of 1964, or any of the twenty other federal environmental statutes referenced in the bill. Specifically, it provides that any Utah corporation filing a federal environmental action and "requesting a stay or injunction to a new permit or approval" must "post a corporate surety bond or cash equivalent" in an "amount that will cover the payment of reasonably foreseeable costs and damages suffered in Utah by any person because of the delay caused by the environmental litigation." H.B. 100 at 3 ln. 67, 5 ln. 120-24 (General Session 2006). The amount of the bond would have to be sufficient to cover everything from "employees' lost wages, salaries, and benefits" to "lost net revenue, including local and state tax revenues." *Id.* at 5 ln. 125-26. Any Utah corporation failing to post such a bond upon initiating litigation covered by the bill would be subject to administrative dissolution and other penalties. *See id.* at 5 ln. 139-46.

I have great respect for the sponsors and proponents of H.B. 100, and admire their sincere desire to make our State a better place. Nevertheless, consistent with my oath to "support, obey and defend the Constitution of the United States and the Constitution of this State," Utah Const. art. IV, § 10, I cannot sign this bill into law. The Supremacy Clause of the U.S. Constitution provides that laws enacted by Congress "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, § 2. An analogous clause in our State

Constitution similarly provides that "Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land." Utah Const. art. I, § 3. These provisions make clear that, where a properly enacted federal law conflicts with a State law, the federal law necessarily preempts its State counterpart.

H.B. 100 conflicts with federal law inasmuch as it seeks to impose additional requirements — *i.e.*, bonding requirements that are not imposed by, and are inconsistent with, federal law — on Utah corporations seeking injunctive relief under federal environmental statutes. By so doing, the bill threatens to "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 204 (1983) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

For the foregoing reasons, I consider this bill preempted by federal law, and therefore cannot allow it to take effect.

Sincerely,

Jon M. Huntsman, Jr.
Governor

THE STATE OF UTAH
BILL TEXT
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2006 UT H.B. 100

UTAH 56TH LEGISLATURE -- 2006 GENERAL SESSION

HOUSE BILL 100

H.B. 100 ENROLLED
ENVIRONMENTAL LITIGATION BOND
2006 GENERAL SESSION
STATE OF UTAH
CHIEF SPONSOR: AARON TILTON
SENATE SPONSOR: CURTIS S. BRAMBLE COSPONSORS: DOUGLAS C. AAGARD J. STUART ADAMS JEFF ALEXANDER ROGER E. BARRUS DEMAR BUD BOWMAN CRAIG W. BUTTARS D. GREGG BUXTON DAVID CLARK DAVID N. COX GREG J. CURTIS BRADLEY M. DAW MARGARET DAYTON BRAD L. DEE GLENN A. DONNELSON JOHN DOUGALL CARL W. DUCKWORTHJAMES A. DUNNIGAN JAMES A. FERRIN BEN C. FERRY JULIE FISHER LORIE D. FOWLKE CRAIG A. FRANK KERRY W. GIBSON JAMES R. GOWANS NEIL A. HANSEN ANN W. HARDY WAYNE A. HARPER NEAL B. HENDRICKSON DAVID L. HOGUE KORY M. HOLDAWAY GREGORY HUGHES FRED R. HUNSAKER ERIC K. HUTCHINGSBRADLEY T. JOHNSON BRADLEY G. LAST REBECCA D. LOCKHART STEVEN R. MASCARO JOHN G. MATHIS RONDA RUDD MENLOVE MICHAEL T. MORLEY JOSEPH G. MURRAY MICHAEL E. NOEL CURTIS ODA PAUL RAY DAVID URE STEPHEN URQUHART MARK W. WALKER PEGGY WALLACE RICHARD W. WHEELER

BILL TRACKING REPORT: 2006 Bill Tracking UT H.B. 100

2006 Bill Text UT H.B. 100

VERSION: Enrolled

VERSION-DATE: March 10, 2006

SYNOPSIS: LONG TITLE

General Description:

This bill requires entities that do business in the state to file a bond with the Division of Corporations and Commercial Code when it begins the environmental litigation.

DIGEST:

Highlighted Provisions:

This bill:

. defines terms;

. requires an entity doing business in Utah to file a bond with the division when it requests a stay or injunction in environmental litigation;

. authorizes the division to:

. establish a fee for the bond filing;

. hold a hearing to establish the bond amount;

. make rules for posting the bond; and

. administratively dissolve an entity or revoke its authority to do business for failure to post a bond;

. requires the division to dissolve an entity or revoke its authority to do business if another state with a similar law has revoked an entity's certificate of existence;

. provides for revocation of licenses an entity holds, including professional licenses; and

. makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

16-6a-1410, as enacted by Chapter 300, Laws of Utah 2000

16-6a-1515, as enacted by Chapter 300, Laws of Utah 2000

16-10a-1420, as enacted by Chapter 277, Laws of Utah 1992

48-2a-802, as enacted by Chapter 233, Laws of Utah 1990

48-2c-1206, as enacted by Chapter 260, Laws of Utah 2001

ENACTS:

13-1a-10, Utah Code Annotated 1953

NOTICE: [A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]
[D> Text within these symbols is deleted <D]

TEXT: Be it enacted by the Legislature of the state of Utah:

Section 1. Section 13-1a-10 is enacted to read:

[A> 13-1A-10. <A] Bond required for environmental litigation -- Bond hearing.

[A> (1) AS USED IN THIS SECTION: <A]

[A> (A) "DIVISION" MEANS THE DIVISION OF CORPORATIONS AND COMMERCIAL CODE CREATED IN SECTION 13-1A-1 . <A]

[A> (B) "ENVIRONMENTAL LITIGATION" MEANS ANY ACTION OR COMPLAINT FILED IN A UNITED STATES COURT OR STATE COURT: <A]

[A> (I) WITH A CAUSE OF ACTION ARISING AFTER MAY 1, 2006; AND <A]

[A> (II) REQUESTING A STAY OR INJUNCTION TO A NEW PERMIT OR APPROVAL OF A NEW PROJECT UNDER: <A]

[A> (A) THE ACID PRECIPITATION ACT OF 1980, *42 U.S.C. SEC. 8901* THROUGH 8912; <A]

[A> (B) THE TOXIC SUBSTANCES CONTROL ACT, *15 U.S.C. SEC. 2601* THROUGH 2692; <A]

[A> (C) THE ATOMIC ENERGY ACT OF 1954, *42 U.S.C. SEC. 2014,* 2021, 2022, 2111, 2113, AND 2114; <A]

[A> (D) THE CLEAN AIR ACT, *42 U.S.C. SEC. 7401* THROUGH 7671Q; <A]

[A> (E) THE FEDERAL WATER POLLUTION CONTROL ACT, *33 U.S.C. SEC. 1251* THROUGH 1387; <A]

[A> (F) THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, *42 U.S.C. SEC. 9601* THROUGH 9675; <A]

[A> (G) THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT OF 1986, *42 U.S.C. SEC. 11001* THROUGH 11050; <A]

[A> (H) THE ENDANGERED SPECIES ACT OF 1973, *16 U.S.C. SEC. 1531* THROUGH 1544; <A]

[A> (I) THE ENERGY SUPPLY AND ENVIRONMENTAL COORDINATION ACT OF 1974, *15 U.S.C. SEC. 791* THROUGH 798; <A]

[A> (J) THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, *43 U.S.C. SEC. 1701* THROUGH 1785; <A]

[A> (K) THE FOREST AND RANGELAND RENEWABLE RESOURCES PLANNING ACT OF 1974, *16 U.S.C. SEC. 1600* THROUGH 1614; <A]

[A> (L) THE FOREST AND RANGELAND RENEWABLE RESOURCES PLANNING ACT OF 1978, *16 U.S.C. SEC. 1641* THROUGH 1649; <A]

[A> (M) THE HEALTHY FOREST RESTORATION ACT OF 2003, *16 U.S.C. SEC. 6501* THROUGH 6591; <A]

[A> (N) THE LOW-LEVEL RADIOACTIVE WASTE POLICY ACT, *42 U.S.C. SEC. 2021B* THROUGH 2021J; <A]

[A> (O) THE MULTIPLE-USE SUSTAINED-YIELD ACT OF 1960, *16 U.S.C. SEC. 528* THROUGH 531; <A]

[A> (P) THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, *42 U.S.C. SEC. 4321* THROUGH 4370F; <A]

[A> (Q) THE NOISE CONTROL ACT OF 1972, *42 U.S.C. SEC. 4901* THROUGH 4918; <A]

[A> (R) THE NUCLEAR WASTE POLICY ACT OF 1982, *42 U.S.C. SEC. 10101* THROUGH 10270; <A]

[A> (S) THE PUBLIC HEALTH SERVICE ACT, *42 U.S.C. SEC. 300F* THROUGH 300J-26; <A]

[A> (T) THE SOLID WASTE DISPOSAL ACT, *42 U.S.C. SEC. 6901* THROUGH 6992K; <A]

[A> (U) THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, *30 U.S.C. SEC. 1201* THROUGH 1328; <A]

[A> (V) TITLE 19, CHAPTER 2, AIR CONSERVATION ACT; <A]

[A> (W) TITLE 19, CHAPTER 3, RADIATION CONTROL ACT; <A]

[A> (X) TITLE 19, CHAPTER 4, SAFE DRINKING WATER ACT; <A]

[A> (Y) TITLE 19, CHAPTER 5, WATER QUALITY ACT; <A]

[A> (Z) TITLE 19, CHAPTER 6, PART 1, SOLID AND HAZARDOUS WASTE ACT; <A]

[A> (AA) TITLE 19, CHAPTER 6, PART 2, HAZARDOUS WASTE FACILITY SITING ACT; <A]

[A> (BB) TITLE 19, CHAPTER 6, PART 3, HAZARDOUS SUBSTANCES MITIGATION ACT; <A]

[A> (CC) TITLE 19, CHAPTER 6, PART 6, SOLID WASTE MANAGEMENT ACT; <A]

[A> (DD) THE ADMINISTRATIVE PROCEDURES ACT, *5 U.S.C. SEC. 701* THROUGH 706, WHEN THE ACTION OR COMPLAINT REQUESTS JUDICIAL REVIEW OF ANY FEDERAL AGENCY ACTION BY THE: <A]

[A> (I) ENVIRONMENTAL PROTECTION AGENCY; <A]

[A> (II) U.S. ARMY CORPS OF ENGINEERS; <A]

[A> (III) U.S. DEPARTMENT OF THE INTERIOR; <A]

[A> (IV) U.S. DEPARTMENT OF AGRICULTURE; OR <A]

[A> (V) U.S. DEPARTMENT OF TRANSPORTATION; OR <A]

[A> (EE) TITLE 63, CHAPTER 46B, ADMINISTRATIVE PROCEDURES ACT, WHEN THE ACTION OR COMPLAINT REQUESTS JUDICIAL REVIEW OF ANY AGENCY ACTION BY THE: <A]

[A> (I) UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY; <A]

[A> (II) UTAH DEPARTMENT OF NATURAL RESOURCES; <A]

[A> (III) UTAH DEPARTMENT OF TRANSPORTATION; OR <A]

[A> (IV) UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION. <A]

[A> (2) THE DIVISION SHALL REQUIRE AN ENTITY REGISTERED WITH THE DIVISION TO POST A CORPORATE SURETY BOND OR CASH EQUIVALENT: <A]

[A> (A) IN AN AMOUNT THAT WILL COVER THE PAYMENT OF THE REASONABLY FORESEEABLE COSTS AND DAMAGES SUFFERED IN UTAH BY ANY PERSON BECAUSE OF THE DELAY CAUSED BY THE ENVIRONMENTAL LITIGATION, INCLUDING: <A]

[A> (I) EMPLOYEES' LOST WAGES, SALARIES, AND BENEFITS; AND <A]

[A> (II) LOST NET REVENUE, INCLUDING LOCAL AND STATE TAX REVENUES; <A]

[A> (B) WRITTEN BY A SURETY LICENSED TO DO BUSINESS WITHIN THE STATE; <A]

[A> (C) IN FAVOR OF THE STATE, FOR THE BENEFIT OF ANY PERSON INJURED IN UTAH BY THE ENVIRONMENTAL LITIGATION; AND <A]

[A> (D) CONDITIONED UPON: <A]

[A> (I) THE PAYMENT OF COURT COSTS AND REASONABLE ATTORNEY'S FEES TO THE PREVAILING PARTY INCIDENT TO ANY SUIT UPON THE BOND; AND <A]

[A> (II) THE UNSUCCESSFUL ENVIRONMENTAL LITIGATION. <A]

[A> (3) THE DIVISION MAY ESTABLISH A FEE TO BE PAID WHEN POSTING THE BOND BY FOLLOWING THE PROCEDURES AND REQUIREMENTS OF SECTION 63-38-3.2 . <A]

[A> (4) BY FOLLOWING THE PROCEDURES AND REQUIREMENTS OF TITLE 63, CHAPTER 46A, UTAH ADMINISTRATIVE RULEMAKING ACT, THE DIVISION SHALL MAKE RULES GOVERNING THE PROCEDURES FOR POSTING THE BOND. <A]

[A> (5) THE DIVISION SHALL HOLD A FORMAL ADJUDICATIVE PROCEEDING TO DETERMINE THE BOND AMOUNT BY FOLLOWING THE PROCEDURES AND REQUIREMENTS OF TITLE 63, CHAPTER 46B, ADMINISTRATIVE PROCEDURES ACT. <A]

[A> (6) IF AN ENTITY FAILS TO FILE THE BOND REQUIRED BY SUBSECTION (2): <A]

[A> (A) THE DIVISION SHALL ADMINISTRATIVELY DISSOLVE THE ENTITY OR REVOKE ITS AUTHORITY TO DO BUSINESS; <A]

[A> (B) THE ENTITY IS NO LONGER AUTHORIZED TO TRANSACT BUSINESS IN UTAH; AND <A]

[A> (C) ANY LICENSE HELD BY THE ENTITY, INCLUDING A PROFESSIONAL LICENSE, SHALL BE REVOKED BY THE APPROPRIATE STATE OR LOCAL AUTHORITY. <A]

[A> (7) A PERSON, AS DEFINED IN SECTION 68-3-12, CLAIMING DAMAGES AS A RESULT OF ANY ENVIRONMENTAL LITIGATION PURSUED BY AN ENTITY REGISTERED WITH THE DIVISION MAY FILE A CLAIM UPON THE BOND FOR DAMAGES AGAINST BOTH THE PRINCIPAL AND THE SURETY. <A]

[A> (8) THE TOTAL AGGREGATE LIABILITY ON THE BOND TO ALL PERSONS MAKING CLAIMS MAY NOT EXCEED THE AMOUNT OF THE BOND. <A]

[A> (9) IF ANY OTHER STATE HAS A PROVISION OF LAW SUBSTANTIALLY SIMILAR TO THIS SECTION, AND THE OTHER STATE HAS ADMINISTRATIVELY DISSOLVED AN ENTITY, REVOKED AN ENTITY'S CERTIFICATE OF EXISTENCE OR LICENSE, OR REVOKED THE ENTITY'S AUTHORITY TO TRANSACT BUSINESS IN THAT STATE: <A]

[A> (A) THE DIVISION SHALL ADMINISTRATIVELY DISSOLVE THE ENTITY OR REVOKE ITS AUTHORITY TO DO BUSINESS; AND <A]

[A> (B) THE ENTITY IS NO LONGER AUTHORIZED TO TRANSACT BUSINESS IN UTAH. <A]

Section 2. Section 16-6a-1410 is amended to read:

16-6a-1410. Grounds for administrative dissolution.

The division may commence a proceeding under Section 16-6a-1411 for administrative dissolution of a nonprofit corporation if:

(1) the nonprofit corporation does not pay when they are due any taxes, fees, or penalties imposed by this chapter or other applicable laws of this state;

(2) the nonprofit corporation does not deliver its annual report to the division when it is due;

(3) the nonprofit corporation is without:

(a) a registered agent; or

(b) a registered office;

(4) the nonprofit corporation does not give notice to the division that:

(a) its registered agent or registered office has been changed;

(b) its registered agent has resigned;

(c) its registered office has been discontinued; or

(d) the nonprofit corporation's period of duration stated in its articles of incorporation expires [D> . <D] [A> ; OR <A]

[A> (5) THE NONPROFIT CORPORATION DOES NOT POST A BOND REQUIRED BY SECTION 13-1A-10 . <A]

Section 3. Section 16-6a-1515 is amended to read:

16-6a-1515. Grounds for revocation.

The division may commence a proceeding under Section 16-6a-1516 to revoke the authority of a foreign nonprofit corporation to conduct affairs in this state if:

(1) the foreign nonprofit corporation does not deliver its annual report to the division when it is due;

(2) the foreign nonprofit corporation does not pay when they are due any taxes, fees, or penalties imposed by this chapter or other applicable laws of this state;

(3) the foreign nonprofit corporation is without a registered agent or registered office in this state;

(4) the foreign nonprofit corporation does not inform the division under Section 16-6a-1509 or 16-6a-1510 that:

(a) its registered agent or registered office has changed;

(b) its registered agent has resigned; or

(c) its registered office has been discontinued;

(5) an incorporator, director, officer, or agent of the foreign nonprofit corporation signs a document knowing it is false in any material respect with intent that the document be delivered to the division for filing; [D> or <D]

(6) the division receives a duly authenticated certificate from the division or other official having custody of corporate records in the state or country under whose law the foreign nonprofit corporation is incorporated stating that the foreign nonprofit corporation has dissolved or disappeared as the result of a merger [D> . <D] [A> ; OR <A]

[A> (7) THE FOREIGN NONPROFIT CORPORATION DOES NOT POST A BOND REQUIRED BY SECTION 13-1A-10 . <A]

Section 4. Section 16-10a-1420 is amended to read:

16-10a-1420. Grounds for administrative dissolution.

The division may commence a proceeding under Section 16-10a-1421 for administrative dissolution of a corporation if:

(1) the corporation does not pay when they are due any taxes, fees, or penalties imposed by this chapter or other applicable laws of this state;

(2) the corporation does not deliver a corporate or annual report to the division when it is due;

(3) the corporation is without a registered agent or registered office in this state;

(4) the corporation does not give notice to the division that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; [D> or <D]

(5) the corporation's period of duration stated in its articles of incorporation expires [D> . <D] [A> ; OR <A]

[A> (6) THE CORPORATION DOES NOT POST A BOND REQUIRED BY SECTION 13-1A-10 . <A]

Section 5. Section 48-2a-802 is amended to read:

48-2a-802. Judicial dissolution.

On application by or for a partner or the director of the division, a district court having competent jurisdiction may decree dissolution of the limited partnership [A> : <A]

[A> (1) <A] whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement [D> or <D] [A> ; <A]

[A> (2) <A] for failure to comply with the requirements of this chapter [D> . <D] [A> ; OR <A]

[A> (3) THE PARTNERSHIP DOES NOT POST A BOND REQUIRED BY SECTION 13-1A-10 . <A]

Section 6. Section 48-2c-1206 is amended to read:

48-2c-1206. Grounds for administrative dissolution.

The division may dissolve a company under Section 48-2c-1207 if:

(1) the company does not pay when due, any taxes, fees, or penalties imposed by this chapter or other applicable laws of this state;

(2) the company does not file its annual report with the division when it is due;

(3) the company is without a registered agent or registered office in this state; [D> or <D]

(4) the company fails to give notice to the division that:

(a) its registered agent or registered office has been changed;

(b) its registered agent has resigned;

(c) its registered office has been discontinued; or

(d) the company's period of duration has expired [D> . <D] [A> ; OR <A]

[A> (5) THE COMPANY DOES NOT POST A BOND REQUIRED BY SECTION 13-1A-10 . <A]
Tilton

SUBJECT: APPROPRIATIONS (89%); LICENSES & PERMITS (89%); AGENCY RULEMAKING (59%); ENVIRONMENTAL LAW (59%); HAZARDOUS WASTE (59%); TOXIC TORTS (59%); FORESTRY REGULATION & POLICY (59%); ADMINISTRATIVE PROCEDURE (59%); LEGISLATIVE BODIES (59%); COMPANY LIQUIDATIONS & DISSOLUTIONS (59%); US ENVIRONMENTAL LAW (59%); NONPROFIT ORGANIZATIONS (59%); US STATE GOVERNMENT (59%); LEGISLATION (59%); LAW COURTS & TRIBUNALS (59%); LEGISLATORS (59%); US FEDERAL GOVERNMENT (59%);

COUNTRY: UNITED STATES (98%);

STATE: UTAH, USA (98%);

LOAD-DATE: March 11, 2006

Rule 65. Injunctions.

(a) **Preliminary Injunction.**

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) **Temporary Restraining Order -- Notice -- Hearing -- Duration.**A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required

of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings.

A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) **Standing Preliminary injunctions in Domestic Relations Actions.** The presiding judge of each judicial district may issue a standing injunction which restrains the parties in all domestic relations actions, except dissolutions, domestic violence actions and uniform reciprocal enforcement actions, from:

(1) removing any child who is the subject of the action from the State of Alaska without the written consent of the other party;

(2) disposing of, encumbering or transferring any marital property without the written consent of the other party, except reasonably using funds for the parties or the parties' children's personal and necessary expenses; and

(3) threatening, harassing, or harming the other party.

Such a standing injunction shall be effective against a party upon receipt of a copy of the standing injunction by the party or the party's attorney.

Cindy Smith

From: Linda Hay
Sent: Wednesday, April 11, 2012 9:50 AM
To: Cindy Smith
Subject: HB 168

Cindy - The following people will be providing testimony on HB 168:

Rachael Petro, Alaska State Chamber of Commerce (@ Anch LIO)
Mike Satre - Council of Alaska Producers (in person)
Mike Jungries - Resource Development Council (@ Anch LIO)
Bob Dickson - The Alliance (will try to be @ Anch LIO but may need approval for an offnet)
Barbara Huff - Teamsters (may testify in person or submit written testimony)

Will the bills be taken in the order on the schedule and do you have any idea how long HB343 might go. Resources Committee meets from 1 to 3 p.m. if we get off the floor on time - Rep. Feige is not chairing this week so he will be presenting HB168.

Thanks
lh

Linda Hay
House Resources Committee Aide
Representative Eric Feige
House Resources Co-Chair
State Capitol Room 126
907-465-3715
907-321-1249

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MEMORANDUM February 28, 2011

SUBJECT: Security for injunction (HB 168, Work Order No. 27-LS0395\B)

TO: Representative Eric Feige
Co-Chair of the House Resources Committee
Attn: Linda Hay

FROM: Dennis C. Bailey
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Applies to a court considering the amount of security that must be provided by a person seeking an injunction or order vacating or staying the operation of a permit that affects an industrial operation. The court's consideration of the costs that an industrial operation may incur if the operation is wrongly enjoined must include an amount for payment of wages and benefits for employees, and payment to contractors and subcontractors of the industrial operation.

Defines an industrial operation to include a construction, energy, or timber activity and oil, gas, and mineral exploration, development and production.

Does not prohibit a person who is wrongly enjoined from other relief or otherwise limit the amount that a person may recover in the action.

DCB:ljw
11-144.ljw

Alaska Statute to be amended by CSHB 168(JUD)

AS 09.40.230. Authorization for injunction.

When it appears that (1) the plaintiff is entitled to the relief demanded, and the relief or any part of it includes restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff; or (2) the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done some act in violation of the plaintiff's rights concerning the subject of the action and tending to render the judgment ineffectual; or (3) the defendant threatens or is about to remove or dispose of property or a part of it with intent to delay or defraud creditors, an injunction may be allowed to restrain such act, removal, or disposition.

Alaska Rules of Procedure
Rule 65. Injunctions.

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order -- Notice -- Hearing -- Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings.

A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as

the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

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MEMORANDUM February 29, 2012

SUBJECT: Security for an injunction for industrial operations (CSHB 168(JUD), Work Order No. 27-LS0395\D)

TO: Senator Dennis Egan
Attn: Dana Owen

FROM: Dennis C. Bailey DCB
Legislative Counsel

You have asked whether the bill requirements for specified injunctions require a rule change, and what voting requirements are applicable.

CSHB 168(JUD) (referred to herein as HB 168) amends AS 09.40.230 by adding a new subsection that requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by a court for costs and damages that may be incurred by an industrial operation that has been wrongfully enjoined or restrained. It also requires that the amount determined by the court "must include an amount for the payment of wages and benefits for the employees of an industrial operation and the contractors and subcontractors of the operation."

The new subsection added by HB 168 parallels the requirements of Alaska Civil Rule 65(c), which requires a court to require a person seeking an injunction to provide security to protect a person who may be wrongfully restrained or enjoined. Civil Rule 65(c) reads:

> (c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The

> motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

Civil Rule 65(c) exists to protect the interests of a party who is the subject of a temporary restraining order or a preliminary injunction. The analysis used by a court issuing a preliminary injunction is set out as follows:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" [State v. Kluti Kaah Native Vill. of Copper Ctr., 831 P.2d 1270, 1273 (Alaska 1992) (citations omitted).] If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits." [Id. at 1272 (quoting A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n, 470 P.2d 537, 540 (Alaska 1970)), modified in other respects, 483 P.2d 198 (Alaska 1971).]

HB 168 differs from Civil Rule 65(c) because, under HB 168, (1) the security requirement applies not only to a temporary restraining order or a preliminary injunction, but also includes "an order vacating or staying the operation of a permit that affects an industrial operation"; and (2) the amount of the security determined by the court must include "an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

The security requirement for an order staying a permit may arise in the context of a preliminary injunction, although the issue is less clear with an order vacating the operation of a permit. Vacating the operation of a permit is more likely to be the final result of litigation rather than the subject of a preliminary injunction. To the extent that HB 168 requires this security for a final judgment, it may change Appellate Rule 204. ~~is just~~ involves On the other hand, if HB 168 applies only to interlocutory orders, the issue ~~is just~~ Civil Rule 65.

Under existing Civil Rule 65(c), the court could consider and include an amount for wages, benefits, and contract payments. However, HB 168 requires some amount for wages, benefits, and contract payments to be covered by security, so HB 168 does appear to limit the court's discretion under Civil Rule 65(c). The question is whether this is a rule of "practice and procedure" that requires a two-thirds vote.

Article IV, sec. 15 provides:

> **Section 15. Rule-Making Power.** The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Rule 39(e) of the Uniform Rules requires:

> (e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

In order to decide whether a court rule change requires a two-thirds vote, a determination must be made whether the change to the court rules is

(1) a substantive change to court rules, e.g., limitations of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction, which may be changed without special voting requirements;

(2) a matter of practice or procedure of the courts, e.g., forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder, pre-trial practice, discovery, the conduct of trial, stay of proceedings, enforcement procedures, post-trial procedures, appeal, venue evidence and special proceedings such as adoption and probate; or

(3) a rule of administration which is protected from legislative modification based on principles of separation of power.[1]

Whether the measure creates a substantive court rule change requiring no special voting requirements or a change to a matter of practice and procedures, which would require a two-thirds vote, is a close question. The problems created by this distinction are readily acknowledged by the court:

> We then turned to the definitions of the terms "procedural" and "substantive." . . . But while this distinction claims venerable origins, it has been recognized that the definition falls far short of drawing an

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[1] See, Manual of Legislative Drafting, p. 48 - 51, for a general discussion of these categories.

> unequivocal line. Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure.

State v. Native Village of Nunapitchuk, 156 P.3d 389, 397 (Alaska 2007) (citations omitted).

An argument could be made that the proposed change offered by HB 168, even if it limits the court's discretion in determining the amount of security required, would be considered a substantive matter. The Alaska Supreme Court found that AS 09.60.060, which allowed the court to require security for costs and attorneys fees, to be a substantive matter. Ware v. Anchorage, 439 P.2d 793, 794 (Alaska 1968). The court said, "The authorities generally agree that substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." The court acknowledged differing decisions on similar facts in both state and federal courts, but concluded that AS 09.60.060 enacted a substantive change to the court rules. The court reasoned that the Act created a new right in the resident defendant and a new liability in the nonresident plaintiff which are separate and apart from, and go beyond, the procedure of computing and assessing costs and attorney's fees. Ware, at 795.

In the more recent case, Nunapitchuk, supra, the court concluded that changes to Civil Rule 82, which relates to attorneys fees, is a rule of practice and procedure that would require a two-thirds vote, but the change to the public interest litigant exception to the attorney fees rules was a rule of substantive law that could be changed by the legislature without a two-thirds vote. Further, the court concluded that when deciding whether the changes to the public interest litigant attorney fees provisions impede access to the courts, the court would not strike the statute down entirely but would determine whether application of the statute would impede access to the courts on a case-by-case basis.

A court considering whether a court rule change and a two-thirds vote is required for HB 168 could take a position similar to Ware and conclude that the changes relating to posting security creates a new liability and is, therefore, a substantive change. Or, a court could conclude that the changes are a procedural change that would require a two-thirds vote. The Manual of Legislative Drafting, at page 49, does include "stay of proceedings" as a subject of "practice and procedure." However, how the issue would be decided cannot be predicted with any certainty.

The current bill draft takes the approach that the change is a substantive change. Taking this approach presumes that a two-thirds vote is not required but runs the risk that a court could conclude that the measure makes a procedural change, so a court rule change had actually occurred, and because a two-thirds vote was required, but not obtained, the change is invalid. With respect to the voting requirement, the safest procedure would be to treat the measure as requiring a rule change and obtain the two-thirds vote required to approve a rule change.

Also, please be aware of the constitutional issue relating to payment of security under the holding in Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988). That case involved a statute that required payment of security for court costs and attorney fees when the plaintiff is a nonresident as a condition for maintaining the lawsuit in Alaska. The court found that access to the courts is a fundamental right, analyzed the case on equal protection grounds under the Alaska Constitution, and relied heavily on the residency versus non-residency issues presented by the case to reach the conclusion that the statute was unconstitutional.

HB 168 differs from the issue present in Patrick v. Lynden. In Patrick v. Lynden the plaintiff could not maintain the action without filing security for costs and fees. In contrast, HB 168 does not explicitly deny access to the courts, although, arguably it may have the same effect by denying access to restraining order or preliminary injunction. Another important difference is that HB 168 does not involve residency issues comparable to those in Patrick v. Lynden, which were used by the court as the basis for the court's decision.

In short, Patrick v. Lynden established that access to the courts is a fundamental right. Whether the payment for security by a party seeking an injunction under HB 168 infringes on the right of access to the courts is unknown.

If I may be of further assistance, please advise.

DCB:ljw
12-169.ljw

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MEMORANDUM March 21, 2011

SUBJECT: Constitutionality of HB 168 relating to security for injunction (Work Order No. 27-LS0395\B)

TO: Representative Max Gruenberg
Attn: Gretchen Staft

FROM: Dennis C. Bailey DCB
Legislative Counsel

You have asked me to review constitutional considerations with respect to HB 168 in light of two decisions, Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988) and Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968).

HB 168 amends AS 09.40.230 by adding a new subsection that requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by a court for costs and damages that may be incurred by an industrial operation that has been wrongfully enjoined or restrained. It also requires that the amount determined by the court "must include an amount for the payment of wages and benefits for the employees of an industrial operation and the contractors and subcontractors of the operation."

The new subsection added by HB 168 parallels the requirements of Alaska Civil Rule 65(c), which requires a court to require a person seeking an injunction to provide security to protect a person who may be wrongfully restrained or enjoined. Civil Rule 65(c) reads:

> (c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The

> motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

Civil Rule 65(c) exists to protect the interests of a party who is the subject of a temporary restraining order or a preliminary injunction. The analysis used by a court issuing a preliminary injunction is set out as follows:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" [State v. Kluti Kaah Native Vill. of Copper Ctr., 831 P.2d 1270, 1273 (Alaska 1992) (citations omitted).] If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits." [Id. at 1272 (quoting A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n, 470 P.2d 537, 540 (Alaska 1970)), modified in other respects, 483 P.2d 198 (Alaska 1971).]

HB 168 differs from Civil Rule 65(c) because under HB 168, (1) the security requirement applies not only to a temporary restraining order or a preliminary injunction, but also includes "an order vacating or staying the operation of a permit that affects an industrial operation"; and (2) requires that the amount of the security determined by the court must include "an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

Arguably, the change proposed by HB 168 applying the security requirement to a stay of the operation of a permit, could be in the form of an injunction, although the issue is less clear with an order vacating the operation of a permit, which seems more likely to be the result of litigation rather than the subject of a preliminary injunction. On the other hand, application for injunctive relief and the associated security under Civil Rule 65(c) may be interpreted not to apply to an "order" that is not in the form of an injunction.

With respect to the requirement that the court include an amount for wages and contract payments, the bill does not specify an amount that is required, and does not affect the discretion of the judge to determine the amount. The bill does not explicitly say that the amount of security is the amount of the payments for wages and contract payments. However, an argument could be made that HB 168 was intended to impose a requirement that the full amount of the wages and contracts must be included in the amount of the security.

Whether HB 168 actually changes the application of Civil Rule 65(c) may determine whether a two-thirds vote is required. An argument can be made that the court has the same authority both before and after enactment of HB 168. Under this argument, the court could apply the new provisions under HB 168 and require security for a preliminary injunction relating to the vacation or stay of a permit using existing law, and, also under existing law, the court could consider and include an amount for wages, benefits and contract payments. Under this interpretation, the bill does not enact a change to a court rule. If, however, HB 168 is interpreted to require wages, benefits, and contract payments to be covered by security, then HB 168 may be interpreted to change a court rule.

In Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968), the court addressed the issue of whether the statute that required a nonresident to post security for litigation costs and attorney fees was invalid based on the argument that the legislature may not make a court rule relating to practice and procedure, it may only change a court rule under art. IV, sec. 15 of the Alaska Constitution. Article IV, sec. 15 provides:

> **Section 15. Rule-Making Power.** The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Rule 39(e) of the Uniform Rules requires:

> (e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

In order to decide whether a court rule change requires a two-thirds vote, a determination must be made whether the change to the court rules is

(1) a substantive change to court rules, e.g., limitations of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction, which may be changed without special voting requirements;

(2) a matter of practice or procedure of the courts, e.g., forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder, pre-trial practice, discovery, the conduct of trial, stay of proceedings, enforcement

procedures, post-trial procedures, appeal, venue evidence and special proceedings such as adoption and probate; or

(3) a rule of administration which is protected from legislative modification based on principles of separation of power.[1]

Whether the measure creates a substantive court rule change requiring no special voting requirements or a change to a matter of practice and procedures, which would require a two-thirds vote, is a close question. The problems created by this distinction are readily acknowledged by the court.

> We then turned to the definitions of the terms "procedural" and "substantive." . . . But while this distinction claims venerable origins, it has been recognized that the definition falls far short of drawing an unequivocal line. Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure.

State v. Native Village of Nunapitchuk, 156 P.3d 389, 397 (Alaska 2007) (citations omitted).

An argument could be made that the proposed change offered by HB 168, even if it limits the court's discretion in determining the amount of security required, would be considered a matter of procedure. The Alaska Supreme Court found that AS 09.60.060, which allowed the Court to require security for costs and attorneys fees, to be a substantive matter. Ware v. Anchorage, 439 P.2d 793, 794 (Alaska 1968). The Court said, "The authorities generally agree that substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." The Court acknowledged differing decisions on similar facts in both state and federal courts, but concluded that AS 09.60.060 enacted a substantive change to the court rules. The Court reasoned that the act created a new right in the resident defendant and a new liability in the nonresident plaintiff which are separate and apart from, and go beyond, the procedure of computing and assessing costs and attorney's fees. Ware, at 795.

In the more recent case, Nunapitchuk, supra, the court concluded that changes to Civil Rule 82, which relates to attorneys fees, is a rule of practice and procedure that would require a two-thirds vote, but the change to the public interest litigant exception to the attorney fees rules was a rule of substantive law which could be changed by the legislature without a two-thirds vote. Further, the court concluded that when deciding whether the changes to the public interest litigant attorney fees provisions impede access

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[1] See, Manual of Legislative Drafting, p. 48 - 51 for a general discussion of these categories.

to the courts, the court would not strike the statute down entirely but would determine whether application of the statute would impede access to the courts on a case-by-case basis.

A court considering whether a court rule change and a two-thirds vote is required for HB 168 could take a position similar to Ware and conclude that the changes relating to posting security creates a new liability and is, therefore, a substantive change. Or, a court could conclude that the changes are a procedural change which would require a two-thirds vote. How the issue would be decided cannot be predicted with any certainty.

The current bill draft takes the approach that the change is a substantive change. Taking this approach presumes that a two-thirds vote is not required but runs the risk that a court could conclude that the measure makes a procedural change so a court rule change had actually occurred, and because a two-thirds vote was required, but not obtained, the change is invalid. With respect to the voting requirement, the safest procedure would be to treat the measure as requiring a rule change and obtain the two-thirds vote required to approve a rule change.

You also asked about the constitutionality of HB 168 in light of the holding in Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988). That case involved a statute that required payment of security for court costs and attorney fees when the plaintiff is a nonresident as a condition for maintaining the lawsuit in Alaska. The court found that access to the courts is a fundamental right, analyzed the case on equal protection grounds under the Alaska Constitution, and relied heavily on the residency versus non-residency issues presented by the case to reach the conclusion that the statute was unconstitutional.

HB 168 differs from the issue present in Patrick v. Lynden. In Patrick v. Lynden the plaintiff could not maintain the action without filing security for costs and fees. In contrast, HB 168 does not explicitly deny access to the courts, although, arguably it may have the same effect by denying access to restraining order or preliminary injunction. Another important difference is that HB 168 does not involve residency issues comparable to those in Patrick v. Lynden Transport and that were used by the court as the basis for the court's decision.

In short, the precedent established in Patrick v. Lynden does not determine whether HB 168 is constitutional, although it does establish that access to the courts is a fundamental right. Whether the requirements of HB 168 infringe on that right is an open question.

If I may be of further assistance, please advise.

DCB:med
11-026.med

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 168(JUD)
(H) Publish Date: 4/5/11

Identifier (file name): HB168-DEC-CO-03-24-11
Title: Injunction Security: Industrial Operation
Sponsor: Representative Feige
Requester: House Judiciary Committee

Dept. Affected: Environmental Conserv
Appropriation: Administrative Services
Allocation: Commissioner's Office
OMB Component Number: 633

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	0.0		0.0	0.0	0.0	0.0	0.0
Travel	0.0		0.0	0.0	0.0	0.0	0.0
Services	0.0		0.0	0.0	0.0	0.0	0.0
Commodities	0.0		0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0		0.0	0.0	0.0	0.0	0.0
Grants	0.0		0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0		0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0		0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0		0.0	0.0	0.0	0.0	0.0
1004 GF	0.0		0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0		0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0		0.0	0.0	0.0	0.0	0.0
Other (please identify)	0.0		0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Mary Siroky, Director — Phone: (907) 465-5256
Division: Administrative Services — Date/Time: 3/24/11 2:00pm
Approved by: Dan Easton — Date: 3/28/2011

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

This bill has no fiscal impact on the Department of Environmental Conservation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 168(JUD)
(H) Publish Date: 4/5/11

Identifier (file name) HB 168-DFG-HAB-03-21-11
Dept. Affected: Fish and Game
Title: Injunction Security: Industrial Operation
Appropriation: Habitat
Allocation: Habitat
Sponsor: Representative Eric Feige
Requester: House Judiciary Committee
OMB Component Number: 486

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Becky Nelson, Administrative Officer
Phone: 465-1852
Division: Habitat
Date/Time: 3/21/11 8:49 AM
Approved by: Kevin Brooks, Aministrative Services Director
Date: 3/21/2011
Department of Fish & Game

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

HB 168 would amend AS 09.40.230 by adding language that would require that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation shall provide security in an amount determined by the court for the industrial operation's costs and damages, including employees wages and benefits to contractors and subcontractors.

The Department of Fish and Game anticipates a zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHB 168(JUD)
(H) Publish Date: 4/5/11

Identifier (file name): HB168-LAW-CIV-03-21-11
Dept. Affected: Law
Title: An Act requiring injunction security to include an amount for payment lost if the industirial operation is wrongfully enjoined.
Appropriation: Civil
Allocation: Oil, Gas & Mining
Sponsor: Representative(s) Feige
Requester: (H) Judiciary
OMB Component Number: 2091

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 3/21/11 9:30 AM
Approved by: John J. Burns, Attorney General, Department of Law — Date: 3/21/2011

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

HB 168 would amend existing Statutes to add a requirement that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation shall provide security in an amount determined by the court for the industrial operation's costs and damages, including employees wages and benefits and payment to contractors and subcontractors.

The Department of Law anticipates zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: **CSHB 168(JUD)**
(H) Publish Date: **4/5/11**

Identifier (file name) HB168-DNR-MLD-03-18-11
Title: INJUNCTION SECURITY: INDUSTRIAL OPERATION
Sponsor: Rep. Feige
Requester: HJUD

Dept. Affected: Natural Resources
Appropriation: Resource Development
Allocation: Mining and Land Development
OMB Component Number: 2460

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
FUND SOURCE	(Thousands of Dollars)						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Other (please identify)	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	0	0	0	0	0	0	0
Part-time	0	0	0	0	0	0	0
Temporary	0	0	0	0	0	0	0

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Wyn Menefee, Acting Director
Division: Mining, Land & Water
Approved by: Daniel S. Sullivan
Department of Natural Resources

Phone: 269-8501
Date/Time: 3/18/11 1:00 PM
Date: 3/18/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE #4

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

HB 168 requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by the court for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained. This security would include an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation.

There will be no anticipated fiscal impact to the Department of Natural Resources.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 168(JUD)**
Fiscal Note Number: 5
(S) Publish Date: 3/23/12

Identifier (file name): HB168-DEC-CO-12-03-11
Title: Injunction Security: Industrial Operation
Sponsor: Representative Feige
Requester: Senate Labor and Commerce Committee

Dept. Affected: Environmental Conserv
Appropriation: Administration
Allocation: Office of the Commissioner
OMB Component Number: 633

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0		0.0	0.0	0.0	0.0	0.0
Travel	0.0		0.0	0.0	0.0	0.0	0.0
Services	0.0		0.0	0.0	0.0	0.0	0.0
Commodities	0.0		0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0		0.0	0.0	0.0	0.0	0.0
Grants, Benefits	0.0		0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0		0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts	0.0		0.0	0.0	0.0	0.0	0.0
1003	GF Match	0.0		0.0	0.0	0.0	0.0	0.0
1004	GF	0.0		0.0	0.0	0.0	0.0	0.0
1007	I/A Rcpts (Other)	0.0		0.0	0.0	0.0	0.0	0.0
1037	GF/MH (UGF)	0.0		0.0	0.0	0.0	0.0	0.0
1178	temp code (UGF)	0.0		0.0	0.0	0.0	0.0	0.0
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time	**0.0**		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Part-time	0.0		0.0	0.0	0.0	0.0	0.0
Temporary	0.0		0.0	0.0	0.0	0.0	0.0

CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This fiscal note has been entered into the 2012 form with no changes from previous version.

Prepared by: Joey K. Ausel, Budget Manager — Phone: (907) 465-5235
Division: Administrative Services — Date/Time: 12/3/11 10:41 AM
Approved by: Lynn Kent — Date: 12/22/2011
Deputy Commissioner

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

This bill has no fiscal impact on the Department of Environmental Conservation.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 168(JUD)**
Fiscal Note Number: 6
(S) Publish Date: 3/23/12

Identifier (file name): HB168-DFG-HAB-12-15-11
Title: INJUNCTION SECURITY: INDUSTRIAL OPERATION
Sponsor: REPRESENTATIVE(S) FEIGE, et al.
Requester: Senate Labor and Commerce Committee

Dept. Affected: Fish and Game
Appropriation: Habitat
Allocation: Habitat
OMB Component Number: 486

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time	**0.0**	0.00	0	0	0	0	0
Part-time	0.0	0	0	0	0	0	0
Temporary	0.0	0	0	0	0	0	0

CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated to reflect current fiscal year.

Prepared by: Randall Bates, Director — Phone: 907-465-3176
Division: Habitat — Date/Time: 12/1/2011 3:20PM
Approved by: Kevin Brooks, Administrative Services Director — Date: 12/1/2011
Department of Fish & Game

(Revised 8/17/2011 OMB)

FISCAL NOTE #6

STATE OF ALASKA **BILL NO.** CSHB 168(JUD)
2012 LEGISLATIVE SESSION

Analysis

HB 168 would amend AS 09.40.320 by adding language requiring that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation provide security in an amount determined by the court for the industrial operation's costs and damages, including employees' wages and benefits to contractors and subcontractors.

The Department of Fish and Game, Habitat Division antcicipates a zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 168(JUD)**
Fiscal Note Number: 7
(S) Publish Date: 3/23/12

Identifier (file name): HB168CS(JUD)-LAW-CIV-12-07-11
Dept. Affected: Law
Title: An Act requiring injunction security to include an amount for payment lost if industrial operation is wrongfully enjoined.
Appropriation: Civil
Allocation: Oil, Gas & Mining
Sponsor: Representative(s) Feige
Requester: (S) Labor & Commerce
OMB Component Number: 2091

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 12/07/11 4:15PM
Approved by: John J. Burns, Attorney General — Date 12/7/2011
Department of Law

(Revised 8/17/2011 OMB)

FISCAL NOTE #7

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

HB 168 would amend existing Statutes to add a requirement that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation shall provide security in an amount determined by the court for the industrial operation's costs and damages, including employees wages and benefits and payment to contractors and subcontractors.

The Department of Law anticipates zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	CSHB 168(JUD)
Fiscal Note Number	8
(S) Publish Date	3/23/12

Identifier (file name)	HB168-DNR-MLW-01-13-12	Dept. Affected	Natural Resources
Title	INJUNCTION SECURITY: INDUSTRIAL OPERATION	Appropriation	Land & Water Resources
		Allocation	Mining, Land & Water
Sponsor	Rep. Feige		
Requester	(S) L&C	OMB Component Number	3002

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is a new version of the fiscal note form for the second session of the 27th legislature. The allocation and appropriation have been beer changed to reflect the new DNR structure.

Prepared by	Brent Goodrum, Director	Phone	(907) 269-8501
Division	Mining, Land & Water	Date/Time	1/13/12 12:00 AM
Approved by	Daniel S. Sullivan	Date	1/13/2012
	Department of Natural Resources		

(Revised 11/17/2011 OMB)

FISCAL NOTE #8

STATE OF ALASKA **BILL NO.** CSHB 168(JUD)
2012 LEGISLATIVE SESSION

Analysis

HB 168 requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by the court for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained.This security would include an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation.

There will be no anticipated fiscal impact to the Department of Natural Resources.

Montana Code Annotated 1995

MCA Contents **Search** **Part Contents**

27-19-306. Security for damages. (1) Subject to 25-1-402, on granting an injunction or restraining order, the judge shall require a written undertaking to be given by the applicant for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Except as provided in subsection (2), the undertaking:

(a) must be fixed at a sum that the judge considers proper; and

(b) may be waived:

(i) in domestic disputes; or

(ii) in the interest of justice.

(2) (a) If a party seeks an injunction or restraining order against an industrial operation or activity, the judge shall require a written undertaking to be filed by the applicant. The amount of the written undertaking must be set in an amount that includes all of the wages, salaries, and benefits of the employees of the party enjoined or restrained during the anticipated time that the injunction or restraining order will be in effect. The amount of the written undertaking may not exceed $50,000 unless the interests of justice require. The written undertaking must be conditioned to indemnify the employees of the party enjoined or restrained against lost wages, salaries, and benefits sustained by reason of the injunction or restraining order.

(b) As used in subsection (2)(a), "industrial operation or activity" includes but is not limited to construction, mining, timber, and grazing operations.

(3) Within 30 days after the service of the injunction, the party enjoined may object to the sufficiency of the sureties. If the party enjoined fails to object, all objections to the sufficiency of the sureties are waived. When objected to, the applicant's sureties, upon notice to the party enjoined of not less than 2 or more than 5 days, shall justify before a judge or clerk in the same manner as upon bail on arrest. If the sureties fail to justify or if others in their place fail to justify at the time and place appointed, the order granting the injunction must be dissolved.

(4) This section does not prohibit a person who is wrongfully enjoined from filing an action for any claim for relief otherwise available to that person in law or equity and does not limit the recovery that may be obtained in that action.

History: En. Sec. 86, p. 59, Bannack Stat.; re-en. Sec. 115, p. 154, L. 1867; re-en. Sec. 132, p. 52, Cod. Stat. 1871; re-en. Sec. 174, p. 79, L. 1877; re-en. Sec. 174, 1st Div. Rev. Stat. 1879; re-en. Sec. 176, 1st Div. Comp. Stat. 1887; en. Sec. 874, C. Civ. Proc. 1895; re-en. Sec. 6646, Rev. C. 1907; re-en. Sec. 9246, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 529; re-en. Sec. 9246, R.C.M. 1935; amd. Sec. 53, Ch. 535, L. 1975; R.C.M. 1947, 93-4207; amd. Sec. 48, Ch. 12, L. 1979; amd. Sec. 8, Ch. 399, L. 1979; amd. Sec. 1, Ch. 575, L. 1995.

Previous Section **Help** **Next Section**

Provided by Montana Legislative Services

Montana Code Annotated 1995

MCA Contents Search Part Contents

25-1-402. Governmental entities not required to give security. In any civil action or proceeding wherein the state, a county, or a municipal corporation or any officer in his official capacity on behalf of the state or a county, city, or town is a party plaintiff or defendant, no bond, undertaking, or security can be required of the state, county, municipal corporation, or town or any officer thereof; but on complying with the other provisions of this code, the state, county, municipal corporation, or town or any officer thereof acting in his official capacity has the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code. The board of trustees of any school district is entitled to the benefit of this section.

History: En. Sec. 1902, C. Civ. Proc. 1895; re-en. Sec. 7196, Rev. C. 1907; re-en. Sec. 9829, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1058; re-en. Sec. 9829, R.C.M. 1935; R.C.M. 1947, 93-8714.

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Provided by Montana Legislative Services

Washington RCW § 7.40.085

In determining the amount of the bond required by RCW 7.40.080 as now or hereafter amended, with respect to an injunction or restraining order that will delay or enjoin a notice to proceed or the performance of work under a construction contract for a public contracting body among the factors regarded in the exercise of its discretion, the court shall consider:□□ (1) All costs and liquidated damages provided for in the contract or otherwise that may result from such delay;□□ (2) The probable costs to the public in terms of inconvenience, delayed use of the proposed facilities, and escalation of costs of delayed construction of the proposed facilities that may be incurred as a result of a delay subsequently found to be without good cause; and□□ (3) The procedures for consideration of objections to proposed construction and the opportunity the one seeking the injunction had for objecting prior to the letting of the contract.
[1974 ex.s. c 153 § 1.]

ANCHORAGE CHAMBER
of COMMERCE

March 27, 2012

Representative Eric Feige
Resources Co-Chair
State Capitol Rm. 126
Juneau, AK 99801-1182

Re: Support for House Bill 168: Injunction Security: Industrial Operation

Dear Representative Feige,

The Anchorage Chamber of Commerce supports House Bill 168 (HB 168), Injunction Security: Industrial Operation and urges efforts to ensure its passing this legislative session. This bill includes provisions that will strengthen efforts to ensure Alaska's energy and economic future through resource development projects.

The Anchorage Chamber is Alaska's largest business organization. Established in 1915, we currently represent nearly 1,100 business members, comprised of nearly 63,000 of Anchorage's 175,000 employees.

Recently, we surveyed our membership and from the results developed four legislative priorities as follows: Increase Oil Production; Ensure energy security in Anchorage and Southcentral; Update and Build New Infrastructure; and Ensure Fiscally Responsible Budget and Stable Tax Policy.

We recognize that in the past there have been several cases where courts have issued injunctions, or stays, against companies engaged in critical development projects. This led to project delays, curtailed employment, and, in particular, prevented the completion of much needed resource development projects to meet energy demands and secure our economic future.

We believe the success of all four of our priorities is severely limited by potential litigation. By imposing a penalty and requiring a bond to be posted in the event of a stay or injunction, the cost to the party bringing the suit is increased, preventing frivolous lawsuits and project delays.

Please support HB168 and ensure its passage this session.

Thank you for your continued support.

Bruce Bustamante
2011-12 Anchorage Chamber Chair

Sami Glascott, MPA
Anchorage Chamber President

cc:
Representative Chenault
Representative Johnson

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Representative Thomas
Representative T.Wilson
Representative Fairclough
Representative Keller
Representative Thompson
Representative Costello
Representative Millett
Representative Hawker
Representative Lynn
Representative Olson
Representative Saddler
Representative Dick
Representative P. Wilson
Senator Giessel

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Dana Owen

From: Judy Donegan <jdoneganak@gmail.com>
Sent: Sunday, March 18, 2012 9:54 PM
To: Dana Owen; Alida Bus
Subject: HB 168

Jennifer Harrison, Emily Fehrenbacher, and I met with Alida and talked briefly with Dana last week regarding HB 168. Thank you for spending the time with us. Dana suggested that I write a letter to Senator Egan to express my concerns about the bill. My comments are below. Please pass them on to the Senator prior to Tuesday's hearing. Thank you.

Judy Donegan
13603 E. Oceanview Road
Palmer AK 99645

QUESTIONS ABOUT HB 168 (AN ACT REQUIRING THE AMOUNT OF THE SECURITY GIVEN BY A PARTY SEEKING AN INJUNCTION. . . .)

If enacted, this act would be a significant barrier to attempts by ordinary citizens, organizations, unions, and possibly even the State to ensure that permitted industrial operations are conducted in a responsible way. It is important that the potential effects of the bill be carefully examined:

I. **What is the purpose of the proposed legislation?**

If the bond is required when the preliminary injunction is granted, as is normally the case, the act would do nothing to prevent frivolous lawsuits. A frivolous lawsuit will not result in the grant of preliminary injunctive relief. To grant a preliminary injunction, a judge must determine that the plaintiffs have a likelihood of success on the merits and will suffer irreparable harm if the injunction is not issued. If those findings can be made (even if ultimately found to be in error), the lawsuit is not frivolous.

If the lawsuit is unsuccessful, no bond will be required. (But see next question.)

It is only plaintiffs who are in danger of winning that need to be concerned about having to post what would almost certainly be a very large bond. In other words, it is lawsuits that present legitimate permit inadequacies or permit violations that will be deterred, not frivolous ones.

II. **What would be some of the difficulties for courts in applying the law?**

One ambiguity in the law involves when in the litigation the bond must be posted. Bonds are ordinarily required when a preliminary injunction is granted. HB 168 can be read to require the bond when the relief is requested: "A party **seeking** a restraining order. . . shall give security. . . " Requiring a bond in order to **request** a preliminary injunction would be a highly unusual requirement and would, itself, almost surely result in litigation, placing a further burden on the courts.

The bill requires also that the security be "in an amount the court considers proper for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained, including an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors. . . ." Determining the amount of the bond would almost certainly require a judge to take evidence about the number of employees, their wages, their benefits, as well as information about the number of contractors and subcontractors and what the industrial operation pays them. It would necessarily require a determination of the length of time likely to be involved between the issuance of the injunction and its possibly being found to be wrongfully issued. In other words, determining the bond amount would require a trial within a trial.

The determination of the amount of the bond would be difficult enough in ongoing operations, but would be virtually impossible in situations in which permits are allegedly wrongfully issued but the operations have not yet begun. The bond amount in this situation would necessarily be based on speculation. Do people not yet working suddenly get paid?

Presumably the wages of employees and payments to contractors would be intended ultimately to go to the employees and contractors, who would not be parties to the lawsuit. Ordinarily, of course,damages go only to parties. Will there be a mechanism to ensure that employees and contractors are paid by the defendant? Would the court need to oversee this aspect of the case?

III. **How large a bond would be required and would it prohibit virtually everyone from filing a lawsuit?**

It takes only a little thought to realize that wages, benefits, payments to contractors, etc. can add up to huge amounts of money. The bond could run into millions of dollars. And the judge would be required to impose such a bond: the plaintiff "**shall** give security." Ordinary citizens such as landowners, fishermen, farmers, native groups, as well as most organizations and unions would not be able to post such a large bond. Meritorious claims will be abandoned.

IV, **Would the act be constitutional?**

The act would present a serious issue as to whether it impermissibly restricts the right to petition the government, guaranteed by both the Alaska and the U.S. Constitutions. (The Alaska Constitution provides that the "right of the people. . . to petition the government shall never be abridged." Article I, Section 6. The First Amendment to the U.S. Constitution provides for the right to "petition the Government for a redress of grievances.")

This bill may violate the Equal Protection Clause. It imposes a burden on litigants seeking relief against "a construction, energy, or timber activity and oil, gas, and mineral exploration, development, and production." (Presumably, the bill means to refer to corporations or companies carrying out those activities.) Litigants seeking injunctions against companies in other types of activities, e.g., bill collection, retail sales, manufacturing, are not subject to such onerous bonding requirements. Under the Equal Protection Clause, the government may differentiate between classes of people only if there is a rational basis for doing so. *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 462 (1988). So what can the rational relationship be in this instance? Sponsors of the legislation say it is meant to prevent frivolous litigation. However, as explained above, the bill would not do that. There can be no rational basis for imposing more onerous requirements on ordinary citizens seeking to prevent harm from mineral production than on those seeking to prevent harm from, say, the sales of harmful products.

V. Would the act have unintended consequences?

Does this bill threaten to undo the delegation to Alaska of the U.S. Environmental Protection Agency's pollution prevention programs? The EPA can delegate to the states only if access to the courts is not restricted by the states. 40 C.F.R. section 123.60 (setting out judicial review requirements for delegated State programs); 40 C.F.R. section 123.63 (criteria for withdrawing State programs when the programs no longer comply with regulatory requirements).

Would this bill also affect the State's ability to administer the Surface Mining Control and Reclamation Act, Chapter 27, Alaska Statutes. In order for the state to regulate surface mining, Alaska's SMCRA had to be approved by the U.S. Interior Department and it had to be consistent with the federal statute. Any amendment to the state regulatory program cannot take effect until the Secretary of the Interior approves of it in notice and comment rulemaking. The federal act at 30 U.S.C. section 1264 provides for temporary relief from approval decisions but does not authorize bonds, as does HB 168. In provisions for citizen suits under 30 U.S.C. section 1270, federal law states that the "court **may** [not "shall," as in HB 168] require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure." emphasis added. FRCP 65 is much less onerous than HB 168. Would this act put Alaska's surface mining regulatory program in jeopardy?

VI. What legitimate purpose, not already provided for in the Alaska Rules of Civil Procedure, would this bill serve?

Alaska Rule of Civil Procedure 11 provides for penalties for attorneys or parties who file frivolous lawsuits: "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading. . . that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation."

Alaska Rule of Civil Procedure 65(c) already provides for bonds: "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such cost and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

Alaska Rule of Civil Procedure 82 makes Alaska one of the only--if not the only--state in the union with a requirement that a losing party pay the opponents legal fees: "Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule."

It is hard to see any purpose HB 168 serves, except to prevent citizens from petitioning the courts to require certain industrial operations to behave responsibly.

Senate Labor and Commerce Committee
March 13, 2012
Testimony of Carl Portman, Deputy Director,
Resource Development Council for Alaska
HB168, Injunctive Security for Industrial Operations

Chairman Egan and members of the committee, thank you for the opportunity to testify this afternoon on HB168, Injunctive Security for Industrial Operations. RDC appreciates the scheduling of this bill and we recognize the many other issues demanding the committee's time.

One of RDC's top legislative priorities is to support efforts to bring more accountability to the appeals and litigation process for community and resource development projects. HB 168 makes progress in this regard by ensuring opponents to projects have some "skin in the game."

Under current law, plaintiffs have little incentive not to file lawsuits and appeals and seek injunctions to stop development projects. Seeking injunctions costs plaintiffs very little while the project sponsors endure the high costs of uncertainty and delay. The discovery phase in these types of cases can cost hundreds of thousands of dollars to the State and project proponents. Even when projects are not enjoined, the uncertainty of litigation can effectively stop progress on projects.

It is not just the project sponsor who is adversely affected by these injunctions. The employees of project sponsors, contractors, and their employees often are burdened with the direct and immediate impacts of a stay on a permit, which causes construction and development to shut down. Often those hurt the most are workers and their families, because when projects are enjoined, workers are often laid off. Under existing law, judges have not required opponents of developing Alaska's resources to post bonds or other security to cover the economic harm to the project and to the workforce caused by parties seeking injunctions.

HB 168 does not limit the ability of citizens to sue. What it does do is require a bond in those cases where an injunction is requested before the case is adjudicated.

HB168 strikes an appropriate balance by removing incentives for filing ideologically-based challenges designed simply to delay projects while still preserving the right to bring meritorious challenges.

Examples of ideologically-based challenges abound throughout Alaska. The timber industry in Southeast Alaska would be in better shape today if a bond was required before timber sales are enjoined. That industry has been decimated by endless appeals and litigation over federal timber sales. Recent headlines included yet more legal challenges that may further delay exploratory drilling in the Alaska OCS, drilling that has yet to occur on leases sold in 2008. Litigation in the arctic OCS is delaying the State's goal to increase throughput in TAPS through new OCS development. While these cases are in federal jurisdiction, litigation in State court is likely to increase with the primacy assumed over the water program.

The ability of project proponents to weather the storm of an unfounded stay of activities varies based on project economics and the strength of the balance sheets of those developing the projects. A worker who loses employment because of a court ordered stay might not have the lasting power to wait out what are often lengthy legal proceedings. It is fitting that this bill was referred to this committee, as both labor and commerce are directly impacted. This bill can provide some accountability to mitigate disruption of commerce while protecting the interests of workers engaged in projects that may be subject to challenges.

RDC encourages this committee to pass this bill. Thank you again for hearing this bill and allowing time for our testimony.

Alaska Conservation Alliance

"A Strong Economy and Healthy Environment Go Hand in Hand"

March 12, 2012

Senator Dennis Egan
State Capitol, Rm. 510
Juneau, AK 99801-1182

Dear Sen. Egan,

The Conservation Alliance opposes HB 168, which would require Alaskans to post a bond or security when seeking a stay or injunction against a government-issued permit affecting an industrial operation. The Alaska Conservation Alliance represents over 30 conservation groups across the state with a combined membership of over 38,000 Alaskans.

HB 168 puts corporate and foreign interests above Alaskans and their communities.

To begin, this legislation is not aimed at frivolous lawsuits. Already, a frivolous lawsuit will not receive a stay or preliminary injunction, because a court can't issue those remedies unless it first determines that the plaintiff is likely to win and that "irreparable harm" would result without the stay or injunction. Instead, this legislation is targeted at lawsuits with merit, and this legislation imposes its burden at the expense of ordinary Alaskans and their communities. Under HB 168, the Alaskan seeking an injunction or stay will be required to post a bond that is typically unaffordable to all but the most wealthy corporations and individuals. In sum, the bill penalizes all but the wealthy and deters meritorious claims before they are adjudicated at all.

Further, when a case against a permit is brought forward by an Alaskan, it is questioning the permitting process used by the issuing governmental agency or illegal practices by industry. Thus, an injunction or stay will only be issued when government hasn't done its job properly, or when a corporation is violating the law or the terms of its permit, as determined by judicial review. Requiring a citizen to pay for a governmental error or corporate crime puts a chilling effect on a long tradition of protecting American whistleblowers in our democracy.

In fact, this legislation is so broad that it may even prevent the State itself from enforcing violations of law. It applies to any "party" seeking temporary injunctive relief, which sometimes includes the State when attempting to enforce violations of law occurring under an industrial permit. In those cases, the State will be subject to the bill's bond requirements, a cost the enforcement agencies have no budget to incur.

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www.akvoice.org | www.twitter.com/ACAAlliance
www.facebook.com/AlaskaConservationAlliance

HB 168 would block Alaskans from protecting their communities and way of life by preventing them from challenging government-issued permits that have resulted in legally redressible injuries. It would force Alaskans challenging a permit to post a bond equal to potential damages suffered by an industrial operation. This remedy protects wealthy corporations – many of which merely do business in Alaska and/or are from foreign countries – over resident Alaskans who live, work, and raise their families in this great state. The bond will in many cases exceed $1 million, which effectively prevents almost any Alaskan from filing a suit to challenge what may be a fast-tracked, sloppy agency decision.

HB 168 violates the Alaska Constitution.

Beyond being bad policy, the bill is also likely unconstitutional for two reasons. First, it violates the Equal Protection clause by targeting those litigants who challenge permits for industrial operations, and protecting only industrial operations. This discriminates unconstitutionally against local landowners, community groups, native organizations, commercial and sport fishers and hunters, and other Alaskans who seek to ensure that state agencies are doing their jobs.

Second, in practice it would often deny access to courts, in violation of Due Process rights, for Alaskans who do not have the financial resources to post the required bond but have an otherwise valid claim. It is not hard to imagine a landowner or a community that does not have the millions to post the bond this bill would require. That person or community would be prohibited from protecting the land it has owned for decades yet is now threatened by a major industrial operation.

HB 168 is poorly drafted and would be extraordinarily difficult for a court to apply.

The bill contains several provisions that are ambiguous or make no sense and would be challenging for a court to enforce. For example, the bill purports to require a bond for an order "vacating" a permit. However, a court will vacate a permit only at the conclusion of a case, after finding that the issuing agency actually violated the law. That is not a situation where bonds come into play. Bonds are instead required only for temporary injunctions or stays, in case the person does not ultimately prevail. It would make no sense and serve no purpose to require a bond of the party who has won the case. If that is the intent of the bill, then it is merely a punitive and unconstitutional attempt to prevent successful litigants from obtaining the relief to which they are entitled.

Similarly, the bill purports to require the bond to cover damages wrongfully suffered by "an industrial operation." An industrial operation, in turn, is defined in the bill as various activities. But damages are suffered only by litigants, such as persons, corporations, or organizations. There is no precedent for measuring or awarding damages to an activity rather than a party, and the very concept is bizarre and seemingly impossible to apply.

Further, the legislation is ambiguous as to the point at which a bond would be required. Departing from current court rules, the bill requires a bond from a party "seeking" a stay, preliminary injunction, or vacatur. If that were read to require a bond whenever a case was filed against an industrial permit, it would effectively require an exorbitant fee at the time of filing—an unconstitutional requirement and drastic change to current court procedures. Further, if the bill were interpreted to require bonds whenever a stay or preliminary injunction is sought, and before the court orders one, its main impact would be to deter likely meritorious claims from ever being raised—again a clear violation of constitutional rights.

For the reasons stated above, the Alaska Conservation Alliance opposes HB 168. The only purpose the bill would serve is to keep regular Alaskans out of court and to protect sloppy permitting decisions that could greatly impact Alaska's future.

Sincerely,

Andy Moderow
Executive Director
Alaska Conservation Alliance

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March 5, 2012

Senator Dennis Egan, Chair
Senate Labor and Commerce Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: HB 168, Injunctive Security: Industrial Operations

Dear Senator Egan:

Thank you for scheduling the first reading of HB168, Injunctive Security for Industrial Operations, last week. RDC appreciates the scheduling of this bill and we recognize the many other issues demanding the committee's time. Because your plans for public testimony on the bill were frustrated by a full agenda, I am providing the following written support for this bill at this time.

RDC is a statewide, non-profit, membership-funded organization founded in 1975. The RDC membership is comprised of individuals and companies from Alaska's oil and gas, mining, timber, tourism, and fisheries industries, as well as Alaska Native corporations, local communities, organized labor, and industry support firms. RDC's purpose is to link these diverse interests together to encourage a strong, diversified private sector in Alaska and expand the state's economic base through the responsible development of our natural resources.

One of RDC's top legislative priorities is to support efforts to bring more accountability to the appeals and litigation process for community and resource development projects. HB 168 makes progress in this regard by ensuring opponents to projects have some "skin in the game."

Under current law plaintiffs have little incentive not to file lawsuits and appeals and seek injunctions to stop development projects. Seeking injunctions costs plaintiffs very little while the project sponsors endure the high costs of uncertainty and delay. The discovery phase in these types of cases can cost hundreds of thousands of dollars to the State and project proponents. Even when projects are not enjoined, the uncertainty of litigation can effectively stop progress on projects.

It is not just the project sponsor who is adversely affected by these injunctions. The employees of project sponsors, contractors, and their employees often are burdened

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with the direct and immediate impacts of a stay on a permit, which causes construction and development to shut down. Often those hurt the most are workers and their families, because when projects are enjoined, workers are often laid off. Under existing law, judges have not required opponents of developing Alaska's resources to post bonds or other security to cover the economic harm to the project and to the workforce caused by parties seeking injunctions.

HB 168 does not limit the ability of citizens to sue. What it does do is require a bond in those cases where an injunction is requested before the case is adjudicated. HB168 strikes an appropriate balance by removing incentives for filing ideologically based challenges designed simply to delay projects while still preserving the right to bring meritorious challenges.

Examples of ideologically based challenges abound throughout Alaska. Last week I visited with the Alaska Forest Association and it caused me to reflect on whether the timber industry in Southeast Alaska would be in better shape today if a bond had been required before the scores of timber sales had been appealed resulting in stays and injunctions. That industry has been decimated by endless appeals and litigation over federal timber sales. The headlines just last week included yet more legal challenges that may further delay exploratory drilling in the Alaska OCS, drilling that has yet to occur on leases sold in 2008. Litigation in the arctic OCS is delaying the State's goal to increase throughput in TAPS through new OCS development. While many of these cases are in federal jurisdiction, litigation in State court is also common and is likely to increase with the primacy assumed over water program.

The ability of project proponents to weather the storm of an unfounded stay of activities varies based on project economics and the strength of the balance sheets of those developing the projects. A worker who loses employment because of a court ordered stay might not have the lasting power to wait out what are often lengthy legal proceedings. It is fitting that this bill was referred to the Labor and Commerce committee, as both labor and commerce will benefit from its passage. HB168 can provide some accountability to mitigate disruption of commerce while protecting the interests of workers engaged in projects that may be subject to ideologically based challenges.

RDC appreciates the Labor and Commerce Committee hearing this bill and encourages the committee to pass this bill from committee as soon as possible.

Regards,

Rick Rogers, Executive Director
Resource Development Council for Alaska

cc: Representative Feige

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
Phone: 907-276-0700 Fax: 907-276-3887 Email: resources@akrdc.org Website: akrdc.org

February 1, 2012

The Honorable Dennis Egan
Alaska State Senate
Chairman, Senate Labor & Commerce Committee
Capitol Room 510
Juneau, AK 99801

Re: Litigation Reform and House Bill 168

Dear Senator Egan,

The Alaska State Chamber of Commerce (Alaska Chamber) is an organization dedicated to improving the business climate in Alaska. The Alaska Chamber represents hundreds of statewide businesses from Ketchikan to Barrow that share a common goal: to make Alaska a viable and competitive place to do business. Today, I am writing in support of House Bill (HB) 168 – Injunction Security.

As you may have learned last week while meeting with Alaska Chamber Fly-In attendees, litigation reform as it relates to resource development in Alaska is one of Alaska Chamber's top three priorities for the 2012 Legislative Session. Currently, there is virtually no risk to discourage opponents of natural resource projects to file lawsuits and appeals against projects. Under existing state law there is no requirement for those who file the lawsuits to post bonds which adequately cover the economic harm to the project proponent or workers, frequently resulting in a halt on projects altogether. Often the discovery phase in litigation can cost the State of Alaska and project proponents hundreds of thousands of dollars in attorney's fees.

HB 168 seeks to improve a penalty on frivolous lawsuits. By requiring a bond to be posted in the event of an injunction, the cost to the party bringing the suit forward is increased. This bill seeks to level the legal playing field without infringing on any parties right to bring a legitimate issue to court. We are hopeful that HB 168 will enjoy the bipartisan support it received in 2011 in the House of Representatives.

These are just a few reasons why I respectfully urge you, on behalf of Alaska Chamber members, to schedule HB 168 for a hearing in the Senate Labor and Commerce Committee as soon as possible. Thank you for your prompt consideration of this request.

Sincerely,

Rachael A. Petro
President/CEO

Cc: Representative Eric Feige

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HB 168: A Hole So Big You Could Drive A Mine Through It

The Alaska State House of Representatives recently passed H.B. 168. If passed by the Senate and signed by Governor Parnell, this bill would undercut the ability of Alaskans to protect their economic and traditional ways of life, their communities, and their air and water quality. It does this by seeking to require judges to force people challenging government permits to post bonds equal to the potential economic loss of the permit holder as well as others.[i]

In many cases such bonds would be so expensive as to render judicial review meaningless. Just like the Humpty Dumpty of children's lore, once the damage is done, all the king's horses and all the king's men can't put it back together again – just ask Prince William Sound residents and fishermen. That the courts are not directly precluded from reviewing the legality of the permit matters not at all – ask those same people from Prince William Sound what good a court judgment did for them.

The truth is that independent judicial review of agency decisions is essential to ensuring that the development of Alaska's resources is done in a responsible manner, and we Alaskans should not be scared into thinking otherwise. The check and balance on bureaucratic decisions provided by the courts ensures that those decisions are rational and supported by law. The judiciary already has the ability to impose bonds where appropriate,[ii] and to prevent, and sanction those who file, frivolous lawsuits.[iii] And to require a person to post a bond before he or she can petition the government for a redress of grievances is unconstitutional.[iv] Further, this bill threatens to undo the delegation to Alaska of the Environmental Protection Agency's pollution prevention programs, as EPA can only support such delegation if access to the courts is not restricted.[v]

The Bottom Line:

H.B. 168 creates a hole so big you could drive a mine through it.

April 10, 2011

[i] H.B. 168 provides, in relevant part:

> A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security in an amount the court considers proper for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained, including an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation.

[ii] *See e.g.*, Alaska Rule of Civil Procedure 65(c) ("No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.")

[iii] Proponents of H.B. 168 claim that it is needed to "impose a penalty" on frivolous lawsuits. *See* http://www.housemajority.org/spon.php?id=27hb168-114 (statement of bill sponsor Representative Eric Feige). Yet, Alaska Rule of Civil Procedure 11 already provides authority to the courts to prevent and sanction frivolous lawsuits. Among other things, it provides that

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation..

Proponents of H.B. 168 claim that it is needed to "impose a penalty" on frivolous lawsuits. *See* http://www.housemajority.org/spon.php?id=27hb168-114 (statement of bill sponsor Representative Eric Feige).

[iv] The Alaska Constitution provides that "[t]he right of the people ... to petition the government shall never be abridged." Alaska Constitution, Article I, Section 6. The First Amendment to the United States Constitution provides, "*Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*"

Similar bills in other states have been vetoed (by Republican Governors) as unconstitutional. *See* http://www.standard.net/topics/utah-legislature/2011/02/28/note-legislature-first-amendment-covers-tree-huggers-too

[v] *See* 40 C.F.R. § 123.60 (judicial review requirements for delegated State programs); 40 C.F.R. § 123.63 (criteria for withdrawing State programs when the programs no longer comply with regulatory requirements); *see also Akaik Native Community v. United States Environmental Protection Agency*, 625 F.3d 1162, 1168 (9th Cir. 2010) (judicial review must provide meaningful opportunity for public participation in the permitting process).

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March 11, 2012

Dear Senators and Representatives,

I am writing to you to appeal to your sense of moral decency to help us maintain our rights as private citizens.

Mr. Feige's proposed HB 168 creates an undue burden on access to the courts, which is guaranteed by the First Amendment of the Constitution -- "*Congress shall make no law...abridging the freedom of speech...and to petition the Government for a redress of grievances*" -- and the Alaska Constitution: "*right of the people.... to petition the government shall not be abridged.*" Industrial activities as discussed in the proposed bill have the potential to do personal, physical, emotional and financial harm. Nationally, there are hundreds, if not thousands, of documented instances where permits, rubber-stamped through the system, have been inadequate to protect citizens, and where industrial corporations have neglected to follow rules and regulations, resulting in property damage, injuries and deaths. This bill would deny Alaskans who do not have unlimited financial resources, but do have a valid grievance, from protecting their property or themselves from harm.

Clearly, the intent of the bill is to protect corporations' profits and prevent Alaskans from having recourse against fast-tracked, careless or illegal permitting by government agencies. A recent example of rubber-stamping a permit was the Wishbone Hill Air Quality Permit. This permit was issued by the Alaska Department of Environmental Conservation (DEC) despite numerous false assumptions and fraudulent information provided by the mining corporation in the permit application. DEC clearly without the personnel to double check all the details assumed the application was accurate. Fortunately an astute group of citizens with independent experts was able to catch these errors and the permit application was withdrawn. How many times is a permit issued despite glaring omissions and false information because there is no one outside the permittng agency reviewing it? How possibly could a group of land owners come up with millions of dollars to post the bond that this bill would require just to try to

protect their families and their property from potentially flawed industrial plans and permits? Obviously, they can't. As such, this bill violates their individual rights.

Remember, it could very well be you, a family member, or a friend who will have no recourse against poor-quality permitting or a morally corrupt corporation that fails to follow regulations resulting in personal injury, destroyed property, damaged or uninhabitable homes.

The right thing to do is reject this bill. There are already statutes that provide for compensation for a business being wrongfully restrained, as well as sanctions for frivolous lawsuits. Injunctions and stays are only issued after a judge determines that the stringent requirements for such relief have been met and that the lawsuit has merit. So, this new law is unnecessary, and all it would do is circumvent the rights of individual Alaskans and small communities.

"...the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life; the sick, the needy and the handicapped." ~ Last Speech of Hubert H. Humphrey

Alaska has made one very large step in the right direction. Recognizing that industrial activities can pose serious health hazards, the international community and many global financial lending institutions now view Health Impact Assessments (HIA) as an essential component, on par with the economic impact study, in assessing a project's viability. The state of Alaska has recently developed an HIA program and commissioned Dr. Paul Anderson to perform an HIA for the Wishbone Hill Coal Mine.

A critical question to ask now is how this information will be used. It appears that Alaska legislation needs to catch up with the global economy. We need statutes that not only mandate HIA's for large industrial (mining, power generation, factories, etc) endeavors, the statutes need to ensure they are prepared by independent experts and become part of the permitting process, that recognized hazards are prevented by correcting the permit before the start of operations, and that they are fully enforced with adequate penalties and fines to ensure compliance.

Regarding the Wishbone Hill Coal Mine HIA, the Alaska Department of Natural Resources (DNR) is "editing" the draft. This is like allowing the tobacco companies to rewrite the medical research that links smoking to cancer. That sounds ridiculous, doesn't it? So why is DNR allowed to censor the contents of the HIA, and exclude what the agency disagrees with? The HIA should be an independent study and the entire product released to the public for review, not just what the mining corporation and DNR are willing to allow the public to see.

Currently many environmental protection regulations are willfully violated because it is less costly for the corporation to pay the fines than follow the law. When it comes to people's health, that should not be an acceptable option. As the saying goes, an ounce of prevention is worth a pound of cure. It is much more costly in the long run, never mind the priceless value of human life, to try to clean up a toxic mess and pay for cancer treatment, than it is to prevent it in the first place.

I respectfully ask to you reject HB 168 on the grounds it is immoral and unconstitutional. I also hope you will see the necessity of updating Alaska's industrial permitting regulations, including the need for HIA's to play a strong role in industrial project designs and permitting.

I would be happy to discuss these topics with you further. I can be reached at the address, phone numbers, or email provided.

Sincerely yours,

Michele Prevost, MD

SIERRA CLUB
FOUNDED 1892

TRUSTEES FOR ALASKA
SUSTAIN | PROTECT | REPRESENT

March 26, 2012

Dear Sen. French:

The Sierra Club and Trustees for Alaska oppose HB 168, which would require an Alaskan litigant to post a bond or security when a court issues a stay or injunction against a government-issued permit affecting an industrial operation. The Sierra Club is the nation's largest grassroots environmental organization working to explore, enjoy and protect the planet with roughly 1,200 members in Alaska. Trustees for Alaska was established in 1974 as an Alaska non-profit public interest law firm working to protect and sustain Alaska's natural environment on behalf of Native villages, community groups, and local and national conservation groups by providing legal services, policy advice, and strategic counsel free of charge. Trustees for Alaska has been in the forefront of issues large and small which continue to shape Alaska's environmental future – oil and gas development, mining, toxic wastes, air and water pollution, public land use, and protection of marine resources.

HB 168 Is Likely Unconstitutional.

First and foremost, our members and clients are concerned that HB 168 will take away their basic constitutional rights. The bill is likely unconstitutional for three reasons. First, it violates the Equal Protection clause by targeting litigants who challenge permits for industrial operations, and protecting only industrial operations. This discriminates unconstitutionally against local landowners, community groups, native organizations, commercial and sport fishers and hunters, and other Alaskans who seek to ensure that state agencies are doing their jobs.

Second, in practice it would often deny access to courts, in violation of Due Process rights, for Alaskans who do not have the financial resources to post the required bond but have an otherwise valid claim. This bond would have to cover potential damages including employees' lost wages, salaries, and contractors. The size of these bonds could easily and quickly add up to millions of dollars. Most Alaskans do not have the financial resources to post the required bond, but have an otherwise valid claim. Those people would be prohibited from protecting the land they have owned for decades yet is threatened by a major industrial operation. Even large non-profit organizations like the Sierra Club, do not have millions to post the bond this bill would require, despite frequently having legitimate issues with government-issued permits.

Third, HB 168 is a change to court rules, which violates the Alaska Constitution unless the bill is approved by two-thirds of each house and specifically states that it is a change to court rules. Currently, Civil Rule 65(c) and Appellate Rules 204(d) and 603(a)(2) govern the bonds that would be affected by HB 168. Indeed, the bill closely parallels the language of Civil Rule 65(c).

HB 168 is Poorly Drafted and Would Be Extraordinarily Difficult for a Court To Apply.

The bill contains several provisions that are ambiguous or make no sense and would be challenging for a court to enforce. For example, the bill purports to require a bond for an order "vacating" a permit. However, a court only vacates a permit at the conclusion of a case, after finding that the issuing agency actually violated the law.[1] That is not a situation where bonds come into play. Bonds are generally required only for temporary injunctions or stays, in case the person does not ultimately prevail. It would make no sense and serve no purpose to require a bond of the party who has won the case. If that is the intent of the bill, then it is a punitive and unconstitutional attempt to prevent successful litigants from obtaining the relief to which they are entitled.

Similarly, the bill purports to require the bond to cover damages wrongfully suffered by "an industrial operation." An industrial operation, in turn, is defined in the bill as various activities. But damages are suffered only by litigants, such as persons, corporations, or organizations. There is no precedent for measuring or awarding damages to an activity rather than a party, and the very concept is bizarre and likely impossible to apply.

Further, the legislation is ambiguous regarding the point at which a bond would be required. Departing from current court rules, the bill requires a bond from a party "seeking" a stay, preliminary injunction, or vacatur. If that were read to require a bond whenever a case was filed against an industrial permit, it would effectively require an exorbitant fee at the time of filing – an unconstitutional requirement and drastic change to current court procedures. Further, if the bill were interpreted to require bonds whenever a stay or preliminary injunction is sought, and before the court orders one, its main impact would be to deter likely meritorious claims from ever being raised—again a clear violation of constitutional rights.

<u>HB 168 Jeopardizes Delegation of Various Federal Enforcement Programs and Funding for Those Programs.</u>

HB 168 will likely have unintended legal and financial consequences for Alaska. Alaska has various federally delegated legal programs, including the Surface Mining Control and Reclamation Act, the National Pollutant Discharge Elimination System program in the Clean Water Act, Clean Air Act permitting programs, and the Resource Conservation and Recovery Act program. The Department of Natural Resources and Department of Environmental Conservation administer these federal programs, which require compliance with federal regulations. Those regulations include providing the same opportunity for judicial review as would be available under the federal program.

The bond requirement in HB 168 is not required under federal law and is a deterrent to citizens challenging unlawful permits. It is also a deterrent to seeking preliminary injunctive relief, no matter how compelling the case or egregious the legal violation. As such, it is very possible that the federal agencies administering these statutes, such as the Department of Interior and Environmental Protection Agency, could decide to de-delegate these programs from the State,

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[1] In that case, the challenger has won the case, which by definition, is not a frivolous lawsuit.

which would remove Alaska's control over permitting and result in agency programs being defunded.

HB 168 Likely Stops Meritorious Lawsuits.

This legislation is not aimed at stopping frivolous lawsuits. A frivolous lawsuit would not receive a stay or preliminary injunction, because a court can't issue those remedies without first determining that the plaintiff is likely to prevail and that "irreparable harm" would result without the stay or injunction. Instead, this legislation is targeted at lawsuits with merit, but imposes its burden at the expense of ordinary Alaskans and their communities. Under HB 168, the Alaskan seeking an injunction or stay will be required to post a bond that is typically unaffordable to all but the most wealthy corporations and individuals. Stated another way, the bill penalizes all but the extraordinarily wealthy and deters meritorious claims before they are adjudicated at all.

Further, when a case against a permit is brought by an Alaskan, it questions the permitting process used by the issuing governmental agency or illegal practices by industry. As a result, an injunction or stay would only be issued when government hasn't followed procedure, applied the proper standards, or when a corporate permittee is violating the law or the terms of its permit, as determined by judicial review. Requiring a citizen to pay for a governmental error or corporate malfeasance creates a chilling effect on a long tradition of protecting whistleblowers in our democracy.

In fact, this legislation is so broad that it may even prevent the State itself from enforcing violations of law. It applies to any "party" seeking temporary injunctive relief, which sometimes includes the State when attempting to enforce violations of law occurring under an industrial permit. In those cases, the State will be subject to the bill's bond requirements, a cost the enforcement agencies have no budget to incur.

HB 168 would block Alaskans from protecting their communities and way of life by preventing them from challenging government-issued permits that have resulted in legally redressible injuries. It would force Alaskans challenging a permit to post a bond equal to potential damages suffered by an industrial operation. This remedy protects wealthy corporations – many of which merely do business in Alaska and/or are from foreign countries – over resident Alaskans who live, work, and raise their families in this great state. The bond will in many cases exceed $1 million, which effectively prevents almost any Alaskan from filing a suit to challenge what may be a fast-tracked, sloppy agency decision. Obviously this is the intent of the legislation—to keep Alaskans from exercising their constitutional rights.

Conclusion

HB 168 is unconstitutional, bad policy making. The only purpose it serves is to keep Alaskans who care about agency decision-making out of court while protecting sloppy permitting decisions that could impact Alaska's economic future. It also protects out-of-state and foreign corporations over Alaskans who live, work, recreate, and subsist in this great state. For these reasons the Sierra Club and Trustees for Alaska oppose HB 168.

Sincerely,

Emily Fehrenbacher, Associate Regional Representative
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March 30, 2012

The Honorable Hollis French
Alaska State Senate
Chairman, Senate Judiciary Committee
Capitol Room 417
Juneau, AK 99801

Re: CS House Bill 168 (JUD)

Dear Senator French,

The Alaska State Chamber of Commerce (Alaska Chamber) is an organization dedicated to improving the business climate in Alaska. The Alaska Chamber represents hundreds of statewide businesses from Ketchikan to Barrow that share a common goal: to make Alaska a viable and competitive place to do business. Today, I am writing in support of Committee Substitute House Bill (CS HB) 168 (JUD) – Injunction Security.

As you may have learned early this session while meeting with Alaska Chamber Fly-In attendees, litigation reform as it relates to resource development in Alaska is one of Alaska Chamber's top three priorities for the 2012 Legislative Session. Currently, the cost to challenge a legally permitted project in Alaska is virtually nothing. Instead, the risk is borne by defendants. Often the discovery phase in litigation can cost the State of Alaska and project proponents hundreds of thousands of dollars in attorney's fees. Such delays put Alaskans out of work creating personal hardship and potentially increasing State service costs.

CS HB 168(JUD) seeks to level the legal playing field without infringing on any parties right to bring a legitimate issue to court by requesting the court consider wages and benefits of workers as well as payments to contractors. We are hopeful that CS HB 168(JUD) will enjoy the bipartisan support it received in 2011 in the House of Representatives.

These are just a few reasons why I respectfully urge you, on behalf of Alaska Chamber members, to schedule CS HB 168(JUD) for a hearing in the Senate Judiciary Committee as soon as possible. Thank you for your prompt consideration of this request.

Sincerely,

Rachael A. Petro
President/CEO

Cc: Representative Eric Feige

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CHICKALOON VILLAGE TRADITIONAL COUNCIL

Chickaloon Native Village
(Nay'dini'aa Na')

Gary Harrison, Traditional Chief

Doug Wade, Chairman/Elder

Ricky Harrison, Vice-Chairman

Penny Westing, Secretary

Jesse Lanman, Elder Member

Larry Wade Elder Member

Burt Shaginoff, Elder Member

Albert Harrison, Elder Member

Jennifer D. Harrison, Executive Director

RESOLUTION to Oppose Irresponsible Coal Development

RESOLUTION # 110817-02

WHEREAS, Chickaloon Village Traditional Council is an Indigenous Government with full power and authority to act for Chickaloon Native Village, and/or Chickaloon Village (Nay'dini'aa Na'); and

WHEREAS, Chickaloon Village is part of the Athabascan Nation and is a distinct, independent political community, and as such is qualified and exercises powers of self-government by reason of its original Tribal sovereignty as passed down from its ancestors since time immemorial; and nothing in this resolution shall be in conflict therewith; and

WHEREAS, Chickaloon Native Village is a Federally-recognized Tribal Government in Alaska (Federal Register, Volume 58, Number 202, November 24, 1982), with full power and authority to negotiate with the Federal Government; and

WHEREAS, Chickaloon Village Traditional Council did not cede, terminate, extinguish, or relinquish their original, possessory and aboriginal rights; and

WHEREAS, Chickaloon Village Traditional Council is the governing body of Chickaloon Village as recognized by the Chickaloon Tribal citizens; and has a responsibility to provide a government for the good health and welfare of its Tribal citizens, address any needs in its community; and

WHEREAS, Chickaloon Village Traditional Council's strategic plan identifies the following as a long-term goal: Protect, enhance and restore our ancestral lands, water and air and ensure respectful, healthy development; and

NOW THEREFORE BE IT RESOLVED, that Chickaloon Village Traditional Council opposes all irresponsible coal mining in our Cultural and Traditional areas which we have relied upon since the beginning of time and continues to be inextricably linked to our spiritual and cultural way of life; and

THEREFORE BE IT FURTHER RESOLVED, that Chickaloon Village Traditional Council authorizes and delegates authority to the Traditional Council Chairman, Vice-Chairman, Traditional Chief, or the Executive Director to act on behalf of the Chickaloon Village Traditional Council for this project/program.

It is hereby certified that this resolution was duly considered and approved this 17th day of August, 2011, X unanimous; or with a majority vote of _____ affirmative; _____ negative; _____ abstention, and/or _____ absent votes.

Douglas Wade,
Chairman

Penny Westing,
Secretary

Gary Harrison,
Traditional Chief

A. Court discretion on amount of bond

According to Rep. Feige, the sponsor of H.B. 168:

"The bill does put a fair amount of latitude in the judge's hands. Court rule 65(c) is obviously the precedent, I mean there's an existing court rule that allows for bonds and security to be posted. This bill is simply an additional emphasis on the part of the Legislature to give the judge certain things that he or she shall consider when it comes to that security or bond, and the rest is left up to the judge -- the amount is all on the judge's part, we don't set any specific amount. We're not trying to tell the judge what to do, we're just asking that the judge considers certain things related to these kinds of industrial operations." (Senate Labor & Commerce Committee Hearing, March 20, 2012)

"The bond amounts are not determined by the legislation, they're determined by the judge. . . . There's nothing in HB 168 that specifies an amount, in fact it's very clear that it puts the responsibility for specifying an amount on the presiding judge." (Senate Labor & Commerce Committee Hearing, March 13, 2012)[1]

[1] The bill sponsor has also stated that the intent is not to change the existing Alaska Civil Rule 65(c), which requires the posting of security when the court issues a temporary restraining order or preliminary injunction but leaves the amount of the bond to the court's discretion. According to Rep. Feige: "HB 168, once again, parallels the requirements of Alaska Civil Rule 65(c). As written, 65(c) states 'No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.' . . . We were very conscious of not trying to change the court rule." (Senate Labor & Commerce Committee Hearing, March 13, 2012) For the reasons discussed in the text, the language and meaning of H.B. 168 do not mirror those of Rule 65(c).

The relevant language in the bill is as follows:

> "A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security in an amount the court considers proper for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained, including an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

The phrase "in an amount the court considers proper" arguably gives the court the discretion to determine the amount. At the same time, the phrase following the comma "including an amount for the payment of wages . . . " is logically read as modifying the earlier "an amount the court considers proper" and is most readily interpreted as requiring that the "amount considered proper" include an amount for wages and benefits and payment to contractors and subcontractors. Even if the bill is read as giving the judge the discretion to decide the ultimate amount ("an amount the court considers proper"), it seems clear that that amount must include an amount for wages etc. Thus, Rep. Feige's assertion that the bill simply asks the judge to "consider" certain things is untenable.

The bill could be modified in a number of ways to achieve Rep. Feige's intent. For example, the bill could be modified to read as follows:

> "A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security in an amount the court considers proper, after considering among other things lost wages and benefits for employees and payment to contractors and subcontractors of the industrial operation, for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained."

Or as follows:

> "A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security in an amount the court considers proper for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained. In determining the proper security amount, the court shall consider, among other things, including an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

B. Vacating a permit

According to Rep. Feige:

> "It is the option of a litigant to sue or not to sue. If they feel they have been wronged they certainly have that right and this bill does not prevent them from bringing a lawsuit to bear. You can or cannot request an injunction as part of that lawsuit. The bill does not keep people from access to the courts. It has been our observation that whenever an injunction is requested it generally falls out of two reasons. One, there is a legitimate concern that somehow the operation continuing would have an adverse effect on the plaintiff. But in a lot of cases the object is not necessarily any kind of wrong that is harming the plaintiff but is simply an objection to the project simply because the project is, and the objective of the injunction is simply to delay the project. This bill at least provides some measure of deterrence to that." (Senate Labor & Commerce Committee Hearing, March 20, 2012)

This testimony indicates that the goal of the bill is not to make it too expensive for people to bring legitimate challenges to industrial operations, but to deter litigants from seeking injunctions simply to delay the project. In addition, as the minutes of a House Judiciary Committee hearing show, Rep. Feige emphasized during committee meetings in 2011 that his intent was to reduce frivolous lawsuits:

> "There should be some kind of risk placed on the plaintiff in order to 'weed out' frivolous lawsuits ... since even when frivolous, they are still lawsuits and still result in costs and damages being incurred and suffered as the result of a stay, with serious implications for the state's economy." (Minutes, House Judiciary Committee Meeting, March 21, 2011)

Unfortunately, the bill as drafted goes well beyond the goals of preventing frivolous lawsuits and deterring injunctions merely to delay projects. The relevant language is as follows:

> "A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security . . . ."

There are two problems with this language. First, the phrase "[a] party seeking . . . shall give security" suggests that the security must be posted at the time that a party requests the restraining order or other identified relief, rather than at the time that the court orders the requested relief, as is done under Rule 65(c). If the bill were interpreted this way, the security requirement would be a much more onerous burden than under current Rule 65(c).

The second problem is the phrase "or order vacating . . . the operation of a permit." An order vacating the operation of a permit is not a form of preliminary relief, but a form of permanent relief granted by a court along with a final judgment in the plaintiff's favor. The phrase thus expands the security requirement beyond the preliminary relief addressed by Rule 65(c) -- and, according to Rep. Feige, intended to be addressed by HB 168 -- to the primary form of permanent relief in a successful legal challenge to a permit. Thus, the bill addresses not just preliminary injunctions, but also permanent relief, and not just frivolous lawsuits, but meritorious, successful lawsuits. In other words, the bill requires litigants who bring a meritorious, successful challenge to a wrongly issued permit (or permit violations) to post security covering the lost employment costs flowing from the vacation of a permit for an illegally operating industrial project. Besides being an unconstitutional impairment of the right to petition the government, this aspect of the bill goes far beyond what its sponsor asserts is the goal of the bill. In addition, since a plaintiff would generally include the request for an order vacating the permit in the complaint as part of the request for relief, the bill indicates that a plaintiff must post security at the time of "seeking" this relief -- that is, when the complaint is filed. This result goes well beyond what is allowed under Rule 65(c), poses a severe burden on the right to petition the government, and goes well beyond the goal of the bill as described by the bill's sponsor.

These two problems with HB 168 are easily remedied. First, the phrase "A party seeking..." can be replaced with "A party who obtains..." Second, the phrase "or order vacating" can be deleted.

HB 168 -- governments and departments

Thu 3/29/2012 10:25 AM

From: Daven Hafey

To: dave@akvoice.org, andy@akvoice.org, Jedediah Smith, Lissa Hughes

Hey folks,

Just had an interesting conversation and email exchange regarding indirect implications of HB 168. Please see below language:

http://www.legis.state.ak.us/basis/get_documents.asp?session=27&docid=9674

Highlighted below, from memo linked above, the Alaska Civil Rule specifically exempts state and municipalities from the bonding. I don't see that the bill does. And yet, they've secured zero fiscal notes from all of the resource agencies. If there is a hearing it would be good for us to get questions to Senators to ask of all agencies if they have injunction authority for covered projects (I have found a couple of examples from DNR (oil lease and dam safety) and something from Fish and Game that we can provide to Senators) and if so how they see this bill impacting their ability to protect the public interest. Best, I think, to wait on this until any hearing - if the sponsor hasn't thought of this yet, and none of the agencies have brought it up and indeed this would cause them trouble they will need to get an amendment drafted if they want to move the bill forward. This usually takes another meeting and, when it is something sort of big like tieing State agency hands, can indicate that a bill didn't receive proper scrutiny earlier in the legislative process, which can help support not taking further action.

The new subsection added by HB 168 parallels the requirements of Alaska Civil

Rule 65(c), which requires a court to require a person seeking an injunction to provide

security to protect a person who may be wrongfully restrained or enjoined. Civil

Rule 65(c) reads:

(c) Security. No restraining order or preliminary injunction shall

issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may

be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a

municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings

. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action....

--
Daven Hafey
Southeast Alaska Conservation Council
907 586-6942

Sustaining people, sustaining nature -- it is one cause, inseparable. -Gus Speth

Official Business

Alaska State Legislature

Senate

Office of the Secretary

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:senate_secretary@legis.state.ak.us

FOR YOUR IMMEDIATE ATTENTION

DATE: March 23, 2012

TO: Judiciary Committee
(Cindy, Room 417)

FROM: Office of the Senate Secretary

SUBJ: Fiscal Note Update

Updated fiscal notes for the following bill have been printed today. Please give the bill file to the page delivering this message and it will be returned to you after the changes have been made.

Thank you.

RETRIEVE

CS FOR HOUSE BILL NO. 168(JUD)
"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

Please schedule HB 168 for a hearing in SJUD.

Take Action

House Bill 168, security injunction for industrial operations, is in the Senate Judiciary Committee, chaired by Sen. Hollis French and has yet to be scheduled for a hearing. This legislation has bipartisan support, having passed the house 33-6. Contact Sen. French and ask him to schedule a hearing on this bill. There are only 13 days left in the legislative session and if this bill is not passed by the Senate, it will die.

Take Action

The Alliance's Web Page

REPRESENTATIVE
ERIC FEIGE
House District 12
House Resources Committee Co-Chair
Education Committee
Transportation Committee
Joint Armed Services Committee

Alaska State Legislature

House of Representatives

During Session:
State Capitol Room 126
Juneau, Alaska 99801-1182
(907) 465-4859
Fax (907) 465-3799
1-888-465-4859

TO: Senator Hollis French, Chairman

Senate Judiciary Committee

FROM: Representative Eric Feige

DATE: March 23,2012

RE: Hearing Request for HB 168 Injunction Security: Industrial Operation

I respectfully request that House Bill 168, Injunction Security: Industrial Operation, be scheduled for a hearing in the Senate Judiciary Committee. Linda Hay is the staff assigned to this legislation and can be contacted at 465-3715.

Attached you will find the contents as requested by the committee. This includes the current version of the bill, a sponsor statement, sectional analysis, fiscal note and pertinent background information. Representative Feige will present the bill. There is no need for any audio/visual equipment. I will provide a list of witnesses once we are aware of scheduling.

Thank you for your consideration.

Rep. Eric Feige

E-Mail: Representative.Eric.Feige@legis.state.ak.us

Cook Inletkeeper
3734 Ben Walters Lane
Homer, Alaska 99603

p. 907.235.4068
f. 907.235.4069
www.inletkeeper.org

VIA EMAIL ONLY
Senator_Hollis_French@legis.state.ak.us

April 10, 2012

Senator Hollis French
Alaska State Senate
State Capitol Room 417
Juneau AK, 99801

Dear Senator French:

I am writing on behalf of Cook Inletkeeper's 2500+ plus Alaskan members to strongly oppose HB 168.

This misguided legislation is unnecessary because our courts already have the discretion to address frivolous lawsuits. More importantly, this bill infringes on Alaskans' constitutional rights to access the courts, by erecting insurmountable economic hurdles for Alaskans bringing valid claims.

Alaska is already the only state in the nation with "loser pays" rules, and anyone aggrieved enough to file a complaint will make doubly sure their claims are valid. Furthermore, the high bar for successfully obtaining injunctive relief already ensures plaintiffs have strong claims.

Thank you and I hope you'll agree HB 168 is superfluous and should not pass.

Very truly yours,

Bob Shavelson
Inletkeeper

Cindy Smith

From: jai crapella <jaiping@yahoo.com>
Sent: Friday, April 06, 2012 11:30 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill; Sen. Dennis Egan; Sen. Albert Kookesh; Sen. Bert Stedman; Sen. Bettye Davis; Sen. Fred Dyson; Sen. Johnny Ellis; Sen. Cathy Giessel; Sen. Lyman Hoffman; Sen. Lyman Hoffman; Sen. Charlie Huggins; Sen. Linda Menard; Sen. Donny Olson; Sen. Gary Stevens; Sen. Joe Thomas; Sen. Tom Wagoner
Subject: HB 168

Categories: Staff responded

Dear Honorable Members of the Senate:
My name is Jai Crapella. I have lived in Alaska since 2001 and co-own a small business in Gustavus. I am writing in regard to HB 168 – The Industrial Security: Industrial Operation Bill. At first glance, this bill seems unconstitutional. It appears to purposefully limit the access of the courts by creating a security bond mechanism that will be too expensive for every day Alaskans to overcome—like myself, my small business, or others like me. Upon further review of this bill, it becomes more alarming. This bill not only would limit my access to the courts, but it would also limit my community watchdog group, regional and statewide organizations, local governments, and tribal governments' access to the courts. The further I read, the more unconstitutional and unethical this bill appears.

I understand that this bill was likely intended to allow large mine or proposals like the Pebble to move forward without meaningful opposition from concerned residents and organizations. But this bill extends far beyond environmental organizations and the residents of the Bristol Bay Borough. This would affect my ability, or my community's ability to call attention to an operation's permit violation, if we ever were aware of one. In the event of a state-issued permit violation, we would be forced to risk unrealistic amounts of money simply to enter the court and hold an operation accountable for a violation of their permit. How is this fair or ethical to Alaskans? This is regress in democracy, not progress.

I am also aware that other states have attempted to pass similar bills, but were warned by the EPA that they were overstepping their bounds and attempting to sidestep the Right to Due Process. Yet the Alaska Legislature moves forward with this bill. Why?

With all due respect, I ask you to please not move HB 168 from the Senate Judiciary Committee. This bill is bad news for Alaskans, particularly future generations.

Thank you for your consideration of these comments.

Regards,

Jai Crapella
1204 2nd Street
Douglas, AK 99824
Spirit Walker Expeditions
P.O. Box 240 Gustavus, AK 99826

Cindy Smith

From: Rebecca Noblin <rnoblin@yahoo.com>
Sent: Friday, April 06, 2012 1:41 PM
To: Sen. Hollis French
Subject: Please protect my constitutional rights

Categories: Staff responded

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

Rebecca Noblin
2900 Wiley Post Ave.
Anchorage, AK 99517-2403
907-350-4822

Cindy Smith

From: Jed Smith <jed@akcenter.org>
Sent: Friday, April 06, 2012 1:55 PM
To: Sen. Hollis French
Subject: Please protect my Constitutional rights

Categories: Staff responded

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

Jed Smith
4215 Spenard Road
Anchorage, AK 99517-2905

Cindy Smith

From: Shannon Kuhn <shannonkuhn@gmail.com>
Sent: Friday, April 06, 2012 2:10 PM
To: Sen. Hollis French
Subject: Please protect my constitutional rights

Categories: Staff responded

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

Shannon Kuhn
PO Box 240905
Anchorage, AK 99524-0905
907-522-1723

Cindy Smith

From: Robyn Lauster <robynkcl@gmail.com>
Sent: Friday, April 06, 2012 2:37 PM
To: Sen. Hollis French
Subject: Please Oppose HB 168

Categories: Staff responded

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts' check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

Robyn Lauster
3003 W. 32nd Ave.
Anchorage, AK 99517-1753

Cindy Smith

From: William Sherwonit <akgriz@hotmail.com>
Sent: Friday, April 06, 2012 8:19 PM
To: Sen. Hollis French
Subject: Please Oppose HB 168

Categories: Staff responded

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

William Sherwonit
2441 Tulik Drive
Anchorage, AK 99517-1134
907-245-0283

Cindy Smith

From: Denis Ransy <conga33@hotmail.com>
Sent: Saturday, April 07, 2012 9:42 AM
To: Sen. Hollis French
Subject: HB 168 a bad bill

Categories: Staff responded

H.B. 168, A Bad Bill

I urge you to oppose H.B. 168. This bill would prevent most individuals, groups and local governments with legitimate concerns to oppose any permit in the state. How this bill fits into the framework of a democratic process is beyond me.

A person or group would have to be extremely wealthy to consider opposition to any permit or project, no matter how harmful or ill-advised it may be. Legitimate opposition in the courts is a given in a modern democracy. Eliminating it, or making it prohibitively expensive, destroys the democratic right.

Denis Ransy

Cindy Smith

From: Nina Faust <fausbail@horizonsatellite.com>
Sent: Saturday, April 07, 2012 4:34 PM
To: senator_ralph_seekins@legis.state.ak.us; Sen. Charlie Huggins; Senator_Gene_Therriault@legis.state.ak.us; senator_gretchen_guess@legis.state.ak.us; Sen. Hollis French
Cc: Rep. Paul Seaton; Sen. Gary Stevens
Subject: HB 168

Categories: Staff responded

P.O. Box 2994
Homer AK 99603

Senate Judiciary Committee
Alaska State Legislature
Juneau AK

Dear Senate Judiciary Committee Members:

I strongly oppose HB 168, that would require posting of a bond or security when challenging a government permit for an industry project. This bill will unfairly hamper citizens and other public interest parties, or even just affected property owners from challenging state permits or industrial developments that have not followed proper procedures or could affect the public's clean air or water. It makes the system lop-sided so that people who do not have big bucks, like a corporation or government, have no way to afford a court challenge in the case of a bad decision made by the State or a corporation. Where is the balance and commonsense in tilting the system away from fairness and putting it out of reach of the average person?

It is already expensive to go to court. This is usually the place of last resort to resolve issues but requiring the posting of a bond by Alaskans will put a chilling effect on citizen efforts to watchdog government and corporations. In a democracy, this is part of the system of checks and balances. Citizens need the tools to keep an eye on what government and corporations are doing, especially in this era of so much corporate wrongdoing.

There is already a means to eliminate frivolous lawsuits. Judges make that decision summarily if a case does not have merit. But if a case does have merit, there should not be a bond requirement that puts a lawsuit financially out of reach of those who are trying to protect their land, their community, or the common resources we all share. These court reviews are an important part of our state's system of checks and balances. This law seems to me to be unfair as well because it does not protect everyone equally, but rather gives an unfair advantage to corporations, which usually have more money than citizens anyway. It would not be fair to set up right from the beginning a "David and Goliath" scenario whereby a poor landowner could not challenge an illegally issued permit for some industrial activity near that person's private property because they could not post a bond.

Do not put good government and the tools to protect ourselves out of reach by passing HB 168. This is a bad idea that will let wrongful decisions by government or corporations affect our state in ways that maybe they did not even intend. To me, it appears to be another way to curtail the public in reviewing permits and challenging bad decisions. Don't take the people out of the process by passing this ill-conceived bill.

Sincerely,

Nina Faust

cc: Senator Gary Stevens and Representative Paul Seaton

Cindy Smith

From: John <jsandrw@matnet.com>
Sent: Sunday, April 08, 2012 2:16 PM
To: Sen. Hollis French
Subject: Please oppose HB 168

Categories: Staff responded

April 8, 2012

Dear Senator French,

I urge you to oppose **HB 168** (bill that would remove the right of Alaskans to challenge bad permits)… and **vote NAY!!**

The bill is problematic, and contrary to the public interest, in so many ways.

This bill is attempting to amend Title 9, Code of Civil Procedure, of the Alaska Statutes, and text of the bill does not limit its jurisdiction to state permits. So, if passed, the bill would cover any permit, regardless of the issuer, for an "industrial operation." I don't know if the bill's intent is that it be limited to state permits. In any event, my comments apply to the use or disposal of public lands (e.g., state, local, etc.) that may come before a court covered by Title 9.

Lawyers are expensive, and these high costs, as a practical matter, prohibit legal action against the state or other entities for most folks. Frivolous lawsuits are already thrown out of court, so this bill wouldn't affect that.

What this bill would affect, however, are cases that have merit; that are, for example, well grounded in law, code, regulation, or other authority. Basically, this bill, with respect to permitting of "industrial operations" would trample the due process rights of potentially aggrieved or affected individuals, organizations, local governments or other entities.

The public has a fundamental right to meaningfully participate in and challenge agency actions with respect to disposal of the public's interest in our public lands, air, and water. We have the right to ensure that all laws and regulations are adhered to in all agency actions. This bill would effectively remove this right to meaningfully participate and challenge. The effect would be to allow bad, improper, inappropriate permits; ones that are harmful and contrary to the public interest; or ones that fail to comply with law or regulation to be issued without challenge.

This is an extraordinarily bad bill, and it should not see the light of day.

Sincerely,

John Strasenburgh
PO Box 766
Talkeetna, AK 99676
jsandrw@matnet.com

Cindy Smith

From: Ruth Wood <tothedogs@mtaonline.net>
Sent: Sunday, April 08, 2012 10:34 PM
To: Sen. Charlie Huggins
Cc: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Subject: HB 168

Categories: Staff responded

Dear Charlie:

I've been getting lots of emails letting me know about this bad bill.
I am sure you are getting lots of emails about it too. I wondered if it could be as bad as people said. I just finished reading the current version of the bill, and I find it hard to believe that any elected official would support this bill. First, it insults the courts by implying that our judges issue injunctions on cases that don't have merit. Then, it insults Alaskans by saying if you don't have money you don't have access to the courts. It's actually worse than insulting, it seeks to take power away from the powerless and give power to the powerful. Alaska is an extraordinary state with extraordinary riches. Some of us see the riches in the resources that give us world class salmon runs, unparalleled recreation, and natural beauty that brings the rest of the world to visit. Others see the
riches in the income that extracting the resources can bring.
Unfortunately, extracting all the resources will result in an Alaska without world class salmon runs, unparalleled recreation and natural beauty that the rest of the world wants to visit. Finding the balance between those views is the job of the legislature, tipping the balance toward the extractors is not. You were elected to represent people, not industry. Please vote "no" when HB168 comes before the Senate.

Sincerely,
Ruth D. Wood, Talkeetna

cc: Senate Judiciary Committee

Robert Maxand
PO Box 221
Wrangell, Alaska 99929
(907) 305-0269
bmaxand@gci.net

April 6, 2012

The Honorable Senator French, Chair
Senate Judiciary Committee
State Senate Alaska State Capital
Juneau, Alaska 99801-1182

RE: Oppose HB168

Dear Senator and Members of the Senate Judiciary Committee,

My name is Robert Maxand and have resided in Wrangell my entire life. I have been a longshoreman, delivered oil with Standard Oil, and owned my own construction company until I retired several years ago. I recently learned about HB168 and felt compelled to contact you to express my concern and request that this bill be stopped.

HB 168 will have immediate and perilous impact on the public's right to access the courts. I understand that you may all have your targets set on stopping environmental groups from impeding large mines or timber sales. The real impact will come on the backs of everyday Alaskans who will no longer be able to protect their property or family against permit violators.

Let me give you an example. In the '80s, my family lived next to a cement plant in Wrangell. I eyed employees dumping barrels of waste in the muskeg, just off the property line. The Corps of Engineers happened to be in town, so I contacted them. They investigated and ordered the company to stop dumping. My kids played in those woods, and a hell of a lot more often than kids do today. So I was worried.

Had HB 168 been in place, and I wanted to file an injunction to stop this outfit from dumping waste in the woods and water near my home and family, I could have been required to pay a handsome fee, just to see that the harm was stopped and justice was done.

Here's another example. Several years ago the Mental Health Trust authorized heavy logging on a view shed just above the major highway in our town, at about 7-mile. Those who lived out the road were upset, and rightly so. The logging outfit that bought the sale clear - cut from damn near the top of the mountain to the highway, with no buffers. We were told this type of logging would prevent landslides. Are you kidding me? Well the landslides are starting to happen. If community members sought an injunction against what were obviously irresponsible activities by this company, they would have had to pass the hat and collected their coins to buy access to the court system.

Folks, this is un-American. Period. What's next, we need to get bonded to vote? Do yourselves, and us the little guys, a favor and drop this idea dead in its tracks.

I appreciate your consideration and I hope you folks do the right thing.

Respectfully,

Robert Maxand

Cindy Smith

From: bee long <longfellow1741@hotmail.com>
Sent: Monday, April 09, 2012 9:05 PM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Lesil McGuire; Sen. Joe Paskvan; Sen. John Coghill
Subject: HB 168, THE BOND REQUIREMENT BILL-VOTE NO PLEASE

If HB 168 were enacted, state authority over water discharge, surface mining, pollutant discharge, congestion mitigation, and air quality would likely be rescinded by the feds due to the unequal judicial review caused by this bill. This information is from DNR's Director of the Office of Project Management and Permitting.

This bill is poorly written. What the heck does "wrongfully enjoined" mean?

Our system of checks and balances can only function when concerned citizens, groups and local governments have a real opportunity to participate in the judicial and permit regulatory system.

Please consider this.

Becky Long

Cindy Smith

From: Gwen Baluss <gbaluss@gmail.com>
Sent: Monday, April 09, 2012 9:51 PM
To: Sen. Hollis French
Subject: Please Oppose HB 168

Dear Senator,
Its unfair to ask a group to post millions of dollars in order to challenge a government permit. Sometimes individuals in government can make errors or make a decision that proves not be in the public's best interest. Its OK for business to have watchdog groups out there; it keeps them honest.
Thanks.
Gwen Baluss
10236 Heron Way, Juneau AK

Cindy Smith

From: Dori Broglino <dorib810@gmail.com>
Sent: Monday, April 09, 2012 10:20 PM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill; Sen. Dennis Egan; Sen. Albert Kookesh; Sen. Bert Stedman; Sen. Bettye Davis; Sen. Fred Dyson; Sen. Johnny Ellis; Sen. Cathy Giessel; Sen. Lyman Hoffman; Sen. Charlie Huggins; Sen. Linda Menard; Sen. Donny Olson; Sen. Gary Stevens; Sen. Joe Thomas; Sen. Tom Wagoner
Subject: In Opposition of HB 168

Dear Senators-
I read a very informative editorial by Kate Jensen in today's (4/9/12) Juneau Empire and it has compelled me to write. I urge you to not support HB 168. This bill seems to not be in the interest of the individuals who put elected officials in office to represent their best interests. This bill appears to only support the interests of corporations. As elected officials you represent the people and not corporate interests. This bill takes away some basic protections that the judicial process provides. Similar bills have been voted down in other states and I urge you to follow.

Thank you for your attention to this matter.
Sincerely,
Dori Broglino
Douglas, AK

Cindy Smith

From: Jennifer Nu <jennifer.nu@gmail.com>
Sent: Monday, April 09, 2012 11:13 PM
To: Sen. Hollis French
Subject: HB 168 Concerns

Dear Senator French
I'd like to take a moment to express concerns at HB 168 sponsored by Rep. Feige (R-Chickaloon). HB 168 places a significant financial barrier between Alaskans who want to exercise their right to challenge a permit using the court system by requiring a bond to be posted. The bill impacts any Alaskan or Alaskan group, including local and/or tribal governments, which may want to stop an improperly permitted project from moving forward. This goes against the right for citizens to be participants in their own homeland to exercise their right to access the court system . As a concerned citizen and resident of Alaska, I urge you to oppose this bill and allow it to pass out of committee. Thank you for your time and for supporting the rights of all Alaskans.

Sincerely,
Jennifer Nu
Juneau, AK

Lila Hobbs

From: Linda Robinson <lgladys13@gmail.com>
Sent: Tuesday, April 10, 2012 8:17 PM
To: Sen. Hollis French
Subject: HB168

Senator French:
I wish to express strong opposition to HB168. This bill would put an unreasonable burden upon anyone challenging an "industrial operation" in Alaska and therefore block any public input. Few entities can post enough of a bond to cover costs that the bill states that the court must include.
This bill could cause enormous harm to the people of our state and I strongly urge you to oppose this bill.
Thank you Senator.
Linda Robinson
6500 Fairweather Drive
Anchorage 99518

Lila Hobbs

From: Valerie Connor <redherring007@hotmail.com>
Sent: Tuesday, April 10, 2012 11:41 AM
To: Sen. Hollis French
Subject: Don't make whistleblowers pay to play

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

Valerie Connor
943 W. 19th Ave
#1
Anchorage, AK 99503-1704
907-644-0806

Cindy Smith

From: Rod Meeks <rodmeeks@gci.net>
Sent: Tuesday, April 10, 2012 5:10 PM
To: Sen. Hollis French
Subject: Constituent commentary on HB 168

Good day Senator French,

Being a constituent of yours, I thought it appropriate to send you my thoughts on HB 168. I have been a resident of Alaska since April 3, 1967. During that time, I have witnesses quite a good bit of development from both the private and public sectors. Some of these projects have been quite successful and beneficial to the citizens of alaska i.e.(Trans-Alaska pipeline) and some projects i.e.(barley grain project) not so successful and beneficial. What has remained constant throughout the history of Alaska before statehood and continuing to the present is the will of the people to be heard regardless of socio-economic status or privilege. However, HB 168 if passed, may begin to chip away at the citizen's voice by suggesting to the court that a lawsuit security should include loss of employee wages and expenditures incurred by contractors and sub-contractors of a permitted industrial project. Currently, the court already has the power to decide what just costs should be in cluded in a security. In my opinion, HB 168 seems somewhat frivolous and redundant; and perhaps, a waste of the Senate's precious time and energy during the last weeks of the legislative session. In conclusion, I would hope the Senate sees no logical reason to pass HB 168. I thank you and the Senate in advance for giving me the opportunity to speak my voice in opposing HB 168. Sincerely, Rod Meeks, a concerned Alaskan citizen

Cindy Smith

From: jeremy robida <jeremyrobida@gmail.com>
Sent: Tuesday, April 10, 2012 10:24 AM
To: Sen. Hollis French
Subject: I do NOT support HB 168

Hello Mr. Chairman and Members of the Senate Judiciary Committee,

I do not support HB 168. This bill would put a significant financial burden upon a person challenging an "industrial operation" in Alaska since this person would need to post a bond as part of the legal process. Few entities, including municipalities, or individuals, would be able to post enough of a bond to cover the costs which the bill states need to be included, i.e. "payment of wages and benefits for employees, and payment to contractors and subcontractors of the industrial operation . . ." This bill would make it virtually impossible for someone to challenge an "industrial operation" for that reason.

I believe the legal injunction route, albeit cumbersome at times, is absolutely necessary. HB 168 would essentially remove the court route as an option for questioning permits that appear dubious or flawed. I do not want to see "industrial operations" immune to adequate and meaningful scrutiny...whether that comes from the state ADEC offices or a public interest "greenie" group such as the Sierra Club, etc.
The ability to use the courts to challenge an improper industrial operation is essential to protect the public's interests.

Thank You,

Jeremy Robida
Po Box 3111
Valdez, AK 99686

Cindy Smith

From: Kate R. Amerell <kramerell@pwscc.edu>
Sent: Tuesday, April 10, 2012 1:52 PM
To: Sen. Hollis French
Subject: Vote No - HB 168

Hello Mr. Chairman and Members of the Senate Judiciary Committee,

I do not support HB 168. This bill would put a significant financial burden upon a person challenging an "industrial operation" in Alaska since this person would need to post a bond as part of the legal process. Few entities, including municipalities, or individuals, would be able to post enough of a bond to cover the costs which the bill states need to be included, i.e. "payment of wages and benefits for employees, and payment to contractors and subcontractors of the industrial operation . . ." This bill would make it virtually impossible for someone to challenge an "industrial operation" for that reason.

I believe the legal injunction route, albeit cumbersome at times, is absolutely necessary. HB 168 would essentially remove the court route as an option for questioning permits that appear dubious or flawed. I do not want to see "industrial operations" immune to adequate and meaningful scrutiny...whether that comes from the state ADEC offices or a public interest "greenie" group such as the Sierra Club, etc. The ability to use the courts to challenge an improper industrial operation is essential to protect the public's interests.

Kate Amerell
Admissions & Financial Aid Coordinator
Prince William Sound Community College
907.834.1645
kramerell@pwscc.edu

Cindy Smith

From: Maureen Moore <momoore57@gmail.com>
Sent: Monday, April 09, 2012 10:57 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Subject: HB 168

Dear Senators,

I am writing to ask you to OPPOSE HB 168.

This bill would essentially take away any Alaskan's right to Due Process by making it financially impossible to seek review or question compliance of bureaucratic decisions or the actions of a permit holder.

It would essentially take away our right to blow the whistle on polluters of our air or water. It would ask us to pay thousands of dollars in bonds to ensure that our claims are true BEFORE taking them to court.

Do not be counted as a politician who voted to take away our citizen's right to question what you do or what is happening to our resources.

Maureen E. Moore
POB 15185
Homer, AK

Cindy Smith

From: llolmb <lindablefgen@gmail.com>
Sent: Friday, April 06, 2012 10:15 AM
To: Sen. Hollis French
Subject: HB168

Categories: Staff responded

Dear Senator Hollis,

I am writing in opposition to HB168. It discriminates against those with concerns and directly supports unrestricted development imperiling our environment.

We need to be encouraged to be advocates protecting our environment; clean air and clean water.

This bill discourages and in most cases eliminates the ability for Alaskan citizens to actively safeguard our nonrenewable resources. This cannot be left to unrestricted governmental action.

Thank you.

Linda Blefgen

PO Box 210996

Auke Bay, AK 99821

Cindy Smith

From: chas caron <caronchas@hotmail.com>
Sent: Friday, April 06, 2012 9:22 AM
To: Sen. Gary Stevens; Sen. Tom Wagoner; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill; Sen. Kevin Meyer; Sen. Charlie Huggins; Sen. Albert Kookesh; Sen. Cathy Giessel; Sen. Hollis French; Sen. Linda Menard; Sen. Fred Dyson; Sen. Joe Thomas; Sen. Bettye Davis
Subject: HR168 - The Corporate Takeover (and Destruction) of Alaska

Categories: Staff responded

Thank you for reading this email. Please excuse the provocative subject line as so many times emails such as this are sorted by subject.

I am a regular visitor from Louisiana. I visit southern Alaska about every other year for the last 20 years. My wife and I chose Alaska out of every place on earth. It is the last of it's kind. It is the only one we have as Americans. It is absolutely critical it be preserved for every generation. Exploitation of natural resources must be done we extreme sensitivity to not degrade the Wild Alaska. Error should always be done on the conservative side, always leaving it alone when there is any doubt. Individuals and groups without "deep pockets" must be able to intervene.

I visit Ketchikan and have watched the clear cutting of the virgin forest. It is no longer the Ketchikan I once saw on my honeymoon. Forests are allowed to "naturally regenerate", a euphemism for rape and run forestry. Corporate interests want to exploit all of Alaska's natural resources and will do so unless anyone can stop them. Bill HR168 is a "BULLY Bill". It is a threat. It is intimidation. The representatives that support this bill will identify themselves as the Corporate raiders of America's last pristine place. I beg you to not be one of them. It is a matter of trust for the generations to come. I shall share this with everyone I know.

Again, thank you for your time to read this.....Charlie Caron of Louisiana

Cindy Smith

From: Don Cornelius <doncorn@gci.net>
Sent: Friday, April 06, 2012 9:10 AM
To: Sen. Hollis French
Subject: HB 168

Categories: Staff responded

Dear Senator French:

I urge you to do what you can to squelch HB 168. This Legislation would essentially block ordinary Alaska citizens from fighting corporate and political takeover of our Alaskan heritage. Under this Bill decisions by State agencies often at the beck and call of a Governor who is well-funded by corporate interests would trump ordinary citizens rights for the simple reason that we lack the financial reserves of those corporate interests. That's not democracy.

Thank you

Don Cornelius
PO Box 1727
Petersburg, AK 99833

Cindy Smith

From: Sara Avery <sara.avery@gmail.com>
Sent: Monday, April 09, 2012 7:11 AM
To: Sen. Hollis French
Subject: Please support due process

Dear Senator French,

Please oppose HB 168. The bill would penalize Alaskans who seek judicial review of flawed decisions by bureaucratic or compliance by the permit holder. Do not penalize Alaskans wishing to protect our clean air and water by requiring them to pay for department mistakes or permit violations.

Access to the courts is a key part of the checks and balances for our democracy, a process revered by Americans. By removing Alaskans' ability to realistically access the courts, HB 168 would effectively strip us of our constitutionally-protected right of Due Process.

Sincerely,
Sara Avery

Cindy Smith

From: Stuart Cohen <ssog@alaska.net>
Sent: Friday, April 06, 2012 8:16 AM
To: Sen. Hollis French
Subject: HB168 NO!!

Categories: Staff responded

Dear Senator French,
I do hope that you will do what you can to keep HB 168 from passing through The Judiciary Committee. There are already laws in place that protect people and corporations from spurious law suits. It should not fall upon the potential victims of a crime to ante up a huge some of money in order to have their day in court. I cannot believe that this is in any way constitutional, but these days, money seems to have a bigger and bigger voice. Please protect the rights of the people here in Alaska.
Thank you.
Suzanne Cohen

Cindy Smith

From: John Myers <jmyers1891@comcast.net>
Sent: Friday, April 06, 2012 7:01 AM
To: Sen. Hollis French
Subject: concerning House Bill 168

Categories: Staff responded

Senator,

House Bill 168 sounds like a very bad bill. It would be a terrible burden on citizens who wanted to express their concerns about clean air and water and protecting our precious environment. To me it sounds like this bill is the same kind of thinking that declares that corporations are people, only in this case people would be denied free speech on their environmental concerns. Please do not support this bill.

Sincerely,

John Myers

Cindy Smith

From: Megan McBride <megamcb@gmail.com>
Sent: Thursday, April 05, 2012 5:20 PM
To: Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. Hollis French; Sen. Bill Wielechowski; Sen. John Coghill
Cc: Sen. Bettye Davis; Rep. Sharon Cissna
Subject: Support legal rights- do not pass HB 168

Categories: Staff responded

Senate Judiciary Committee,

I am writing to ask you to not pass HB 168, the "Industrial Security: Industrial Operation Bill" aka "Pay to Play Bill".

This is the most outrageous proposed legislation I have ever seen. It will take away Alaskans' rights to use the legal process to oppose irresponsible agency decisions. This "pay to play" system would require Alaskan residents to pay for correcting department mistakes or permit violations.

HB 168 proposes that anyone seeking an injunction on an industrial operation would have to post a "security bond" that covers all lost corporate profits, contractor payments, and employee wages and benefits for the life of the court case. In many cases this bond could costs millions of dollars. This will effectively bar the majority of Alaskans from the courts.

Additionally, if Alaskans did try to litigate in response to an agency decision, under HB 168 the process of determining the bond amount (potential corporate profits, employee wages, etc for the duration of the court case) will result in endless time spent squabbling in court. I understand it requires resources for the courts to debate the merits of agency decisions, but that is a much better use of resources then on endless debates over the amount and nature of a bond before beginning the litigation process.

Access to the courts is a key part of the checks and balances for our democracy. By removing Alaskans' ability to realistically access the courts, HB 168 would effectively strip us of our constitutionally-protected right of Due Process.

This bill is bad public policy and unconstitutional. Do not pass it out of the judiciary committee.

Sincerely,
Megan McBride
2201 Sunrise Dr, Anchorage AK 99508
907-830-3022

March 29, 2012

Dear Senators French and Wielechowski,

My name is Daven Hafey. I currently reside at Aurora Harbor Main 47, Juneau, Alaska. My legislators are Senator Dennis Egan and Representative Beth Kerttula.

I am writing in regard to HB 168, the Industrial Security: Industry Operation Bill. As a 29 year old Alaskan, I cannot stress enough how damaging this bill will be for my generation. If enacted, HB 168 would severely restrict my generation's access to the courts, a principle I assumed was constitutionally protected. We can speak with as much hyperbole or technical language as we'd like, but the real implications of this bill would mean that my generation, and the generations after mine would be limited in their ability to access the court system. As I read this bill, I am amazed that in a country that reveres the democratic process as much as ours does, we would be so close to enacting legislation that effectively strips an essential part of the democratic process from us.

I cannot speak for every individual or organization, nor can I speak to every injunction. What I can say with confidence is that there are instances in which permits are issued with mistakes, instances in which permit holders violate the terms of their permits, or both. When individuals, organizations, municipalities, or tribal governments become aware of those mistakes or violations, they currently have the accessibility to file an injunction to rectify any wrongs committed. Those injunctions that do reach the court are the cases with merit; they are the sound cases that deserve to be heard. HB 168 would effectively limit the accessibility of cases with merit to be heard in our courts.

HB 168 does not defend against frivolous lawsuits. Our courts already have the ability to assess cases to determine which ones are frivolous and which ones have merit. Those that are frivolous are not heard. Those with merit are. We do not need new legislation that does what is already being done. And we certainly do not need legislation whose objective is to punish individuals and/or organizations with sound cases by requiring them to pay for governmental errors or corporate violations.

Additionally, the states of Oregon, Utah, and Montana have already attempted legislation similar to HB 168. None were successful from what I understand, as they were all found to be unconstitutional or in violation of federal regulation.

I am not advocating for ever more injunctions and court cases. I am advocating for responsibility. As a young Alaskan concerned about the future he gets to inherit, I am requesting the Legislature to maintain and protect my generation's ability to access our courts if and when needed. To suggest that I should be prepared to post a security bond of potentially millions of dollars simply to bring a sound case to court is unreasonable and out of touch. Please respect my generation and protect our access to the courts. Please do not let HB 168 pass through the Senate Judiciary Committee.

Regards,

Daven Hafey
Juneau

cc: Senate Judiciary Committee; Senator Dennis Egan

Cindy Smith

From: Jessica Cler <jessica.cler@gmail.com>
Sent: Friday, March 23, 2012 3:24 PM
To: Sen. Hollis French
Subject: HB168

Categories: Staff responded

Dear Senator French,

I am writing to express my concern with HB168 and ask that the bill not be moved forward. HB 168 would adversely affect the checks and balances already put into place to ensure that the development of Alaska's resources is done in a responsible manner.

As I am sure you know, a preliminary injunction is an order that the court issues *before* it issues a final decision. Because decisions can take a long time, sometimes the harm that is being litigated (e.g., the logging of a particular stand of trees) would happen before the lawsuit had a chance to finish. Preliminary injunctions essentially put everything on hold, maintaining the status quo until the court has time to reach its final decision on an issue.

The problem that HB 168 says it is going to solve is not a a problem at all-- by their very nature, preliminary injunctions are never issued where the lawsuit itself is frivolous. In order to get a preliminary injunction, the group advocating for it, has to make a strong showing of success on the merits of the case. This means that a group will never get a preliminary injunction unless it has a very good chance of winning. This makes it clear that HB 168 is actually there to make it financially impossible for environmental groups to bring good lawsuits, not stop them from bringing bad ones.

This law would detrimentally impact some of the most important checks we have in making sure that development is done sensibly and within the governing laws and regulations already put into place.

Thank you for your consideration.

Sincerely,

Jessica M. Cler
3111 W. 35th Ave
Anchorage, AK 99517

Alaska Conservation Alliance
"A Strong Economy and Healthy Environment Go Hand in Hand"

April 10, 2012

Senator Hollis French
State Capitol
Juneau, AK 99801-1182

Dear Sen. French,

The Conservation Alliance opposes HB 168, which would require Alaskans to post a bond or security when seeking a stay or injunction against a government-issued permit affecting an industrial operation. The Alaska Conservation Alliance represents over 30 conservation groups across the state with a combined membership of over 38,000 Alaskans.

HB 168 puts corporate and foreign interests above Alaskans and their communities.

To begin, this legislation is not aimed at frivolous lawsuits. Already, a frivolous lawsuit will not receive a stay or preliminary injunction, because a court can't issue those remedies unless it first determines that the plaintiff is likely to win and that "irreparable harm" would result without the stay or injunction. Instead, this legislation is targeted at lawsuits with merit, and this legislation imposes its burden at the expense of ordinary Alaskans and their communities. Under HB 168, the Alaskan seeking an injunction or stay will be required to post a bond that is typically unaffordable to all but the most wealthy corporations and individuals. In sum, the bill penalizes all but the wealthy and deters meritorious claims before they are adjudicated at all.

Further, when a case against a permit is brought forward by an Alaskan, it is questioning the permitting process used by the issuing governmental agency or illegal practices by industry. Thus, an injunction or stay will only be issued when government hasn't done its job properly, or when a corporation is violating the law or the terms of its permit, as determined by judicial review. Requiring a citizen to pay for a governmental error or corporate crime puts a chilling effect on a long tradition of protecting American whistleblowers in our democracy.

In fact, this legislation is so broad that it may even prevent the State itself from enforcing violations of law. It applies to any "party" seeking temporary injunctive relief, which sometimes includes the State when attempting to enforce violations of law occurring under an industrial permit. In those cases, the State will be subject to the bill's bond requirements, a cost the enforcement agencies have no budget to incur.

810 N Street, Suite 203 | Anchorage, AK 99501 | 907-258-6171 | F: 907-258-6177
www.akvoice.org | www.twitter.com/ACAAlliance
www.facebook.com/AlaskaConservationAlliance

HB 168 would block Alaskans from protecting their communities and way of life by preventing them from challenging government-issued permits that have resulted in legally redressible injuries. It would force Alaskans challenging a permit to post a bond equal to potential damages suffered by an industrial operation. This remedy protects wealthy corporations – many of which merely do business in Alaska and/or are from foreign countries – over resident Alaskans who live, work, and raise their families in this great state. The bond will in many cases exceed $1 million, which effectively prevents almost any Alaskan from filing a suit to challenge what may be a fast-tracked, sloppy agency decision.

HB 168 violates the Alaska Constitution.

Beyond being bad policy, the bill is also likely unconstitutional for two reasons. First, it violates the Equal Protection clause by targeting those litigants who challenge permits for industrial operations, and protecting only industrial operations. This discriminates unconstitutionally against local landowners, community groups, native organizations, commercial and sport fishers and hunters, and other Alaskans who seek to ensure that state agencies are doing their jobs.

Second, in practice it would often deny access to courts, in violation of Due Process rights, for Alaskans who do not have the financial resources to post the required bond but have an otherwise valid claim. It is not hard to imagine a landowner or a community that does not have the millions to post the bond this bill would require. That person or community would be prohibited from protecting the land it has owned for decades yet is now threatened by a major industrial operation.

HB 168 is poorly drafted and would be extraordinarily difficult for a court to apply.

The bill contains several provisions that are ambiguous or make no sense and would be challenging for a court to enforce. For example, the bill purports to require a bond for an order "vacating" a permit. However, a court will vacate a permit only at the conclusion of a case, after finding that the issuing agency actually violated the law. That is not a situation where bonds come into play. Bonds are instead required only for temporary injunctions or stays, in case the person does not ultimately prevail. It would make no sense and serve no purpose to require a bond of the party who has won the case. If that is the intent of the bill, then it is merely a punitive and unconstitutional attempt to prevent successful litigants from obtaining the relief to which they are entitled.

Similarly, the bill purports to require the bond to cover damages wrongfully suffered by "an industrial operation." An industrial operation, in turn, is defined in the bill as various activities. But damages are suffered only by litigants, such as persons, corporations, or organizations. There is no precedent for measuring or awarding damages to an activity rather than a party, and the very concept is bizarre and seemingly impossible to apply.

Further, the legislation is ambiguous as to the point at which a bond would be required. Departing from current court rules, the bill requires a bond from a party "seeking" a stay, preliminary injunction, or vacatur. If that were read to require a bond whenever a case was filed against an industrial permit, it would effectively require an exorbitant fee at the time of filing—an unconstitutional requirement and drastic change to current court procedures. Further, if the bill were interpreted to require bonds whenever a stay or preliminary injunction is sought, and before the court orders one, its main impact would be to deter likely meritorious claims from ever being raised—again a clear violation of constitutional rights.

For the reasons stated above, the Alaska Conservation Alliance opposes HB 168. The only purpose the bill would serve is to keep regular Alaskans out of court and to protect sloppy permitting decisions that could greatly impact Alaska's future.

Sincerely,

Andy Moderow
Executive Director
Alaska Conservation Alliance

810 N Street, Suite 203 | Anchorage, AK 99501 | 907-258-6171 | F: 907-258-6177
www.akvoice.org | www.twitter.com/ACAAlliance
www.facebook.com/AlaskaConservationAlliance

Michele Prevost, MD
13631 E. Mikes Lane
Palmer, AK 99645

T 907-854-8159
O 907-745-2663

micheleskiak@me.com

Bill File

March 11, 2012

Dear Senators and Representatives,

I am writing to you to appeal to your sense of moral decency to help us maintain our rights as private citizens.

Mr. Feige's proposed HB 168 creates an undue burden on access to the courts, which is guaranteed by the First Amendment of the Constitution -- "*Congress shall make no law...abridging the freedom of speech...and to petition the Government for a redress of grievances*" -- and the Alaska Constitution: "*right of the people.... to petition the government shall not be abridged.*" Industrial activities as discussed in the proposed bill have the potential to do personal, physical, emotional and financial harm. Nationally, there are hundreds, if not thousands, of documented instances where permits, rubber-stamped through the system, have been inadequate to protect citizens, and where industrial corporations have neglected to follow rules and regulations, resulting in property damage, injuries and deaths. This bill would deny Alaskans who do not have unlimited financial resources, but do have a valid grievance, from protecting their property or themselves from harm.

Clearly, the intent of the bill is to protect corporations' profits and prevent Alaskans from having recourse against fast-tracked, careless or illegal permitting by government agencies. A recent example of rubber-stamping a permit was the Wishbone Hill Air Quality Permit. This permit was issued by the Alaska Department of Environmental Conservation (DEC) despite numerous false assumptions and fraudulent information provided by the mining corporation in the permit application. DEC clearly without the personnel to double check all the details assumed the application was accurate. Fortunately an astute group of citizens with independent experts was able to catch these errors and the permit application was withdrawn. How many times is a permit issued despite glaring omissions and false information because there is no one outside the permittng agency reviewing it? How possibly could a group of land owners come up with millions of dollars to post the bond that this bill would require just to try to

protect their families and their property from potentially flawed industrial plans and permits? Obviously, they can't. As such, this bill violates their individual rights.

Remember, it could very well be you, a family member, or a friend who will have no recourse against poor-quality permitting or a morally corrupt corporation that fails to follow regulations resulting in personal injury, destroyed property, damaged or uninhabitable homes.

The right thing to do is reject this bill. There are already statutes that provide for compensation for a business being wrongfully restrained, as well as sanctions for frivolous lawsuits. Injunctions and stays are only issued after a judge determines that the stringent requirements for such relief have been met and that the lawsuit has merit. So, this new law is unnecessary, and all it would do is circumvent the rights of individual Alaskans and small communities.

"...the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life; the sick, the needy and the handicapped." ~ Last Speech of Hubert H. Humphrey

Alaska has made one very large step in the right direction. Recognizing that industrial activities can pose serious health hazards, the international community and many global financial lending institutions now view Health Impact Assessments (HIA) as an essential component, on par with the economic impact study, in assessing a project's viability. The state of Alaska has recently developed an HIA program and commissioned Dr. Paul Anderson to perform an HIA for the Wishbone Hill Coal Mine.

A critical question to ask now is how this information will be used. It appears that Alaska legislation needs to catch up with the global economy. We need statutes that not only mandate HIA's for large industrial (mining, power generation, factories, etc) endeavors, the statutes need to ensure they are prepared by independent experts and become part of the permitting process, that recognized hazards are prevented by correcting the permit before the start of operations, and that they are fully enforced with adequate penalties and fines to ensure compliance.

Regarding the Wishbone Hill Coal Mine HIA, the Alaska Department of Natural Resources (DNR) is "editing" the draft. This is like allowing the tobacco companies to rewrite the medical research that links smoking to cancer. That sounds ridiculous, doesn't it? So why is DNR allowed to censor the contents of the HIA, and exclude what the agency disagrees with? The HIA should be an independent study and the entire product released to the public for review, not just what the mining corporation and DNR are willing to allow the public to see.

Currently many environmental protection regulations are willfully violated because it is less costly for the corporation to pay the fines than follow the law. When it comes to people's health, that should not be an acceptable option. As the saying goes, an ounce of prevention is worth a pound of cure. It is much more costly in the long run, never mind the priceless value of human life, to try to clean up a toxic mess and pay for cancer treatment, than it is to prevent it in the first place.

I respectfully ask to you reject HB 168 on the grounds it is immoral and unconstitutional. I also hope you will see the necessity of updating Alaska's industrial permitting regulations, including the need for HIA's to play a strong role in industrial project designs and permitting.

I would be happy to discuss these topics with you further. I can be reached at the address, phone numbers, or email provided.

Sincerely yours,

Michele Prevost, MD

Cindy Smith

From: Greg Beischer <gbeischer@millrockresources.com>
Sent: Thursday, April 05, 2012 10:18 PM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Cc: Rep. Bob Lynn
Subject: HB168 Injunction Security - Industrial Operations

Categories: Staff responded

Senators,

Millrock Resources is a public company listed on the TSX Venture Exchange. Our main operating office is in Anchorage, Alaska. The company raises venture capital financing on the public markets, acquires mineral rights and expends the funds searching for metallic minerals throughout Alaska. We leverage our capital by jointly exploring mineral properties with major mining companies. In our short five-year history we have been successful in bringing millions of dollars of mineral resource investment to Alaska, employed Alaskans in far-flung corners and consumed supplies and services from numerous Alaska companies.

Alaska has excellent potential for the discovery of new mineral deposits but investors have a negative view of the state because of the constant threat of lawsuits against developers and the permitting agencies. Resource developers face court battles from the earliest exploration stages and perpetually thereafter throughout the project construction and extraction process. We view purposefully obstructive, frivolous litigation as the single largest deterrent to resource development in the state and our ability as a company to continue to bring venture capital to Alaska.

There is presently no financial risk to litigants that bring suit "in the public interest" against developers of operations that have been reviewed and permitted through public process by state and federal agencies. Injunctions against development cause great loss to the people of Alaska. HB168 will force litigants to post financial surety against the financial loss incurred by developers and potential employees and service providers to targeted resource developments. Reduction of frivolous or unnecessary lawsuits will therefore be decreased and the business climate of Alaska significantly improved.

Millrock Resources and myself personally urge you to move this legislation.

Yours truly,

Gregory A. Beischer
President & CEO
Millrock Resources Inc.
907-350-9791
gbeischer@millrockresources.com
www.millrockresources.com

Cindy Smith

From: Peggy Spittler <pspittler@carlile.biz>
Sent: Friday, April 06, 2012 8:40 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Cc: Bruce Spittler (bspittler@doyondrilling.com)
Subject: HB 168

Categories: Staff responded

I am writing in support of House Bill 168,

Under current law the cost to bring a public litigant lawsuit against a legally permitted project is in effect zero. There is very little risk in bringing a suit. All the risk is borne by the defendants. These actions do shutdown projects at significant costs to working Alaskans, businesses and the state treasury. **CSHB 168(JUD)** seeks to remedy the situation by leveling the playing field.
CSHB 168(JUD) parallels the requirements of Alaska Civil Rule 65(c). As written, 65(c) states: *"no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who enjoined or restrained is found to have been wrongfully enjoined or restrained".*

At the request of the Department of Law, **HB 168** was amended to more closely mirror the language of Alaska Civil Rule 65(c) in order to clarify that the proposed statute would not change the court rule. The court already has the ability to require security. **CSHB 168(JUD)** simply requests that part of the court's deliberation process should include payment of wages and benefits for employees, payments to contractors and subcontractors of the industrial operation that is shutdown. The amount of security and how it is calculated is totally within the hands of the court.

My husband and I are in agreement on the issue. Help stop needless litigation that costs, taxpayers and businesses that want to work in AK money.

Bruce and Peggy Spittler
3320 Admiralty Bay Drive
Anchorage, AK 99515

Carlile

Peggy Spittler
Director of Marketing | Carlile Transportation Systems, Inc.
Email: pspittler@carlile.biz
Office: (907) 343-3200
Web: www.carlile.biz

Join us here:

JUNEAU CHAMBER OF COMMERCE

3100 Channel Drive, Suite 300 • Juneau AK 99801• (907) 463-3488 • Fax (907) 463-3489
E-mail: iuncauchamber@gci.net • icc@alaska.com • Web site: http://www.iuneauchamber.com

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Honorable Hollis French
Honorable Bill Wielechowski
Chair and Vice-Chair, Senate Resources Committee
Capitol Building
Juneau, Alaska 99801

April 10, 2012

Dear Senators French and Wielechowski,

The Juneau Chamber of Commerce Board of Directors encourages the passage of HB 168 on behalf of its members and the community of Juneau.

The Chamber Board believes that special interest groups, opponents of natural resource projects and extreme environmental organizations have abused the legal system and subverted the intent of environmental law by regularly filing frivolous public interest lawsuits. These tactical lawsuits serve to delay, subvert and shut down responsible development and job creation in Alaska with no financial risk to those special interest groups using the court system to delay, increase risk to developers and increase project costs and create job loss.

Under existing State law, judges have not required opponents of natural resource projects to post a bond or other security to cover the economic harm to the project or the affected workforce.

HB 168 addresses these abuses, places the same financial burden on those organizations seeking to use the legal system as a tactical tool but does not discourage individuals and organizations from perusing legal remedy against questionable development.

Therefore, the Juneau Chamber of Commerce urges the passage of HB 168.

Sincerely,

Cathie Roemmich, CEO
Juneau Chamber of Commerce

Cindy Smith

From: Russell Myers <rmyers@corvusgold.com>
Sent: Saturday, March 31, 2012 2:54 PM
To: Sen. Hollis French
Subject: HB 168

Categories: Staff responded

Greetings Senator Hollis,

As an mineral exploration company business conducting work in Alaska I believe that HB 168 would help protect my company from unfair and unwarranted legal action brought by vandals with an axe to grind against mineral resource development. We firmly believe in the rule of law and believe everyone should be accountable under the law for their actions. However, as you well know, spurious law suits can tie up resources and cause delays that can be fatal to a project if they come at a critical time. There needs to be accountability to discourage spurious legal actions.

I encourage you to ensure that HB 168 is heard as soon as possible in this session.

Thank you for all your hard work and good luck as the session comes to a close.

Russell Myers
President
Corvus Gold Inc.
9137 Ridgeline Blvd. Suite 250
Highlands Ranch, CO 80129
USA
Tel: 303 470 8700
Cell: 303 862 1041
rmyers@corvusgold.com

ALASKA MINERS ASSOCIATION, INC.

3305 Arctic Blvd., #105, Anchorage, Alaska 99503 • 907) 563-9229 • FAX: (907) 563-9225 • www.alaskaminers.org

April 5, 2012

Honorable Hollis French
Honorable Bill Wielechowski
Chair and Vice-Chair, Senate Resources Committee
Capitol Building
Juneau, AK 99801-1182

Dear Senators French and Wielechowski:

We are writing on behalf of the Alaska Miners Association in support of House Bill 168, Injunction Security – Industrial Operations.

The Alaska Miners Association is a non-profit membership organization established in 1939 to represent the mining industry in Alaska. The AMA is composed of more than 1400 individual prospectors, geologists and engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. Our members look for and produce gold, silver, platinum, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, and other materials.

Under current law, there is effectively no cost for third party to bring a lawsuit against a legally permitted project. The key point is that the project at that point holds a valid permit that has been through Alaska's extensive permitting processes. The state has as a substantial interest in terms of economic development and regulatory certainty for its permittees to be able to proceed once the permit is issued.

The proposed bill carefully parallels the requirements of Alaska Civil Rule 65(c). As written, 65(c) states: "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who enjoined or restrained is found to have been wrongfully enjoined or restrained".

It is clear that the proposed statute will not change or modify the court rule. Thus, the capacity for the court to require security already exists, and the bill simply extends that capacity to consideration in the court's deliberation process to payment of wages and benefits for employees, payments to contractors and subcontractors of an industrial operation if it is shutdown. The calculation itself is up to the court.

HB168 will improve the business climate of the State of Alaska, protect Alaska's many hard working employees and contractors, and decrease regulatory uncertainty.

We urge passage of this bill.

Sincerely,

Fred Parady, CSP
Executive Director

Lee H. Bridgman Jr
763 Wanda Dr
North Pole AK 99705

cc: Members, Senate Judiciary Committee
The Honorable Joe Paskvan
The Honorable Lesil McGuire
The Honorable John Coghill

SIERRA CLUB
FOUNDED 1892

TRUSTEES FOR ALASKA
SUSTAIN | PROTECT | REPRESENT

March 26, 2012

Dear Sen. French:

The Sierra Club and Trustees for Alaska oppose HB 168, which would require an Alaskan litigant to post a bond or security when a court issues a stay or injunction against a government-issued permit affecting an industrial operation. The Sierra Club is the nation's largest grassroots environmental organization working to explore, enjoy and protect the planet with roughly 1,200 members in Alaska. Trustees for Alaska was established in 1974 as an Alaska non-profit public interest law firm working to protect and sustain Alaska's natural environment on behalf of Native villages, community groups, and local and national conservation groups by providing legal services, policy advice, and strategic counsel free of charge. Trustees for Alaska has been in the forefront of issues large and small which continue to shape Alaska's environmental future – oil and gas development, mining, toxic wastes, air and water pollution, public land use, and protection of marine resources.

HB 168 Is Likely Unconstitutional.

First and foremost, our members and clients are concerned that HB 168 will take away their basic constitutional rights. The bill is likely unconstitutional for three reasons. First, it violates the Equal Protection clause by targeting litigants who challenge permits for industrial operations, and protecting only industrial operations. This discriminates unconstitutionally against local landowners, community groups, native organizations, commercial and sport fishers and hunters, and other Alaskans who seek to ensure that state agencies are doing their jobs.

Second, in practice it would often deny access to courts, in violation of Due Process rights, for Alaskans who do not have the financial resources to post the required bond but have an otherwise valid claim. This bond would have to cover potential damages including employees' lost wages, salaries, and contractors. The size of these bonds could easily and quickly add up to millions of dollars. Most Alaskans do not have the financial resources to post the required bond, but have an otherwise valid claim. Those people would be prohibited from protecting the land they have owned for decades yet is threatened by a major industrial operation. Even large non-profit organizations like the Sierra Club, do not have millions to post the bond this bill would require, despite frequently having legitimate issues with government-issued permits.

Third, HB 168 is a change to court rules, which violates the Alaska Constitution unless the bill is approved by two-thirds of each house and specifically states that it is a change to court rules. Currently, Civil Rule 65(c) and Appellate Rules 204(d) and 603(a)(2) govern the bonds that would be affected by HB 168. Indeed, the bill closely parallels the language of Civil Rule 65(c).

HB 168 is Poorly Drafted and Would Be Extraordinarily Difficult for a Court To Apply.

The bill contains several provisions that are ambiguous or make no sense and would be challenging for a court to enforce. For example, the bill purports to require a bond for an order "vacating" a permit. However, a court only vacates a permit at the conclusion of a case, after finding that the issuing agency actually violated the law.[1] That is not a situation where bonds come into play. Bonds are generally required only for temporary injunctions or stays, in case the person does not ultimately prevail. It would make no sense and serve no purpose to require a bond of the party who has won the case. If that is the intent of the bill, then it is a punitive and unconstitutional attempt to prevent successful litigants from obtaining the relief to which they are entitled.

Similarly, the bill purports to require the bond to cover damages wrongfully suffered by "an industrial operation." An industrial operation, in turn, is defined in the bill as various activities. But damages are suffered only by litigants, such as persons, corporations, or organizations. There is no precedent for measuring or awarding damages to an activity rather than a party, and the very concept is bizarre and likely impossible to apply.

Further, the legislation is ambiguous regarding the point at which a bond would be required. Departing from current court rules, the bill requires a bond from a party "seeking" a stay, preliminary injunction, or vacatur. If that were read to require a bond whenever a case was filed against an industrial permit, it would effectively require an exorbitant fee at the time of filing – an unconstitutional requirement and drastic change to current court procedures. Further, if the bill were interpreted to require bonds whenever a stay or preliminary injunction is sought, and before the court orders one, its main impact would be to deter likely meritorious claims from ever being raised—again a clear violation of constitutional rights.

<u>HB 168 Jeopardizes Delegation of Various Federal Enforcement Programs and Funding for Those Programs.</u>

HB 168 will likely have unintended legal and financial consequences for Alaska. Alaska has various federally delegated legal programs, including the Surface Mining Control and Reclamation Act, the National Pollutant Discharge Elimination System program in the Clean Water Act, Clean Air Act permitting programs, and the Resource Conservation and Recovery Act program. The Department of Natural Resources and Department of Environmental Conservation administer these federal programs, which require compliance with federal regulations. Those regulations include providing the same opportunity for judicial review as would be available under the federal program.

The bond requirement in HB 168 is not required under federal law and is a deterrent to citizens challenging unlawful permits. It is also a deterrent to seeking preliminary injunctive relief, no matter how compelling the case or egregious the legal violation. As such, it is very possible that the federal agencies administering these statutes, such as the Department of Interior and Environmental Protection Agency, could decide to de-delegate these programs from the State,

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[1] In that case, the challenger has won the case, which by definition, is not a frivolous lawsuit.

which would remove Alaska's control over permitting and result in agency programs being defunded.

HB 168 Likely Stops Meritorious Lawsuits.

This legislation is not aimed at stopping frivolous lawsuits. A frivolous lawsuit would not receive a stay or preliminary injunction, because a court can't issue those remedies without first determining that the plaintiff is likely to prevail and that "irreparable harm" would result without the stay or injunction. Instead, this legislation is targeted at lawsuits with merit, but imposes its burden at the expense of ordinary Alaskans and their communities. Under HB 168, the Alaskan seeking an injunction or stay will be required to post a bond that is typically unaffordable to all but the most wealthy corporations and individuals. Stated another way, the bill penalizes all but the extraordinarily wealthy and deters meritorious claims before they are adjudicated at all.

Further, when a case against a permit is brought by an Alaskan, it questions the permitting process used by the issuing governmental agency or illegal practices by industry. As a result, an injunction or stay would only be issued when government hasn't followed procedure, applied the proper standards, or when a corporate permittee is violating the law or the terms of its permit, as determined by judicial review. Requiring a citizen to pay for a governmental error or corporate malfeasance creates a chilling effect on a long tradition of protecting whistleblowers in our democracy.

In fact, this legislation is so broad that it may even prevent the State itself from enforcing violations of law. It applies to any "party" seeking temporary injunctive relief, which sometimes includes the State when attempting to enforce violations of law occurring under an industrial permit. In those cases, the State will be subject to the bill's bond requirements, a cost the enforcement agencies have no budget to incur.

HB 168 would block Alaskans from protecting their communities and way of life by preventing them from challenging government-issued permits that have resulted in legally redressible injuries. It would force Alaskans challenging a permit to post a bond equal to potential damages suffered by an industrial operation. This remedy protects wealthy corporations – many of which merely do business in Alaska and/or are from foreign countries – over resident Alaskans who live, work, and raise their families in this great state. The bond will in many cases exceed $1 million, which effectively prevents almost any Alaskan from filing a suit to challenge what may be a fast-tracked, sloppy agency decision. Obviously this is the intent of the legislation—to keep Alaskans from exercising their constitutional rights.

Conclusion

HB 168 is unconstitutional, bad policy making. The only purpose it serves is to keep Alaskans who care about agency decision-making out of court while protecting sloppy permitting decisions that could impact Alaska's economic future. It also protects out-of-state and foreign corporations over Alaskans who live, work, recreate, and subsist in this great state. For these reasons the Sierra Club and Trustees for Alaska oppose HB 168.

Sincerely,

Emily Fehrenbacher, Associate Regional Representative
Sierra Club
750 W 2nd Avenue, Suite 100
Anchorage, AK 99501
(907) 276-4060
Emily.Fehrenbacher@sierraclub.org

Trish Rolfe, Executive Director
Trustees for Alaska
1026 W 4th Ave, Suite 201
Anchorage, AK 99501
(907) 433-2011
trolfe@trustees.org

HB 169

<TARGET><BILL>HB 169</BILL><SUBJECT>HB 169</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Request to waive HB 169 from Senate Judiciary Committee

I move and ask unanimous consent that House Bill 169 LAA Review of Proposed Regulations be waived from the Senate Judiciary Committee. I have the signatures of the committee and the bill has been heard by Senate State Affairs.

Senator Hollis French, Chair

Senator Bill Wielechowski

Senator Lesil McGuire

Senator Joe Paskvan

Senator John Coghill

Official Business

Alaska State Legislature

Senate

Office of the Secretary

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:senate_secretary@legis.state.ak.us

FOR YOUR IMMEDIATE ATTENTION

DATE: April 11, 2012

TO: Judiciary Committee
(Cindy, Room 417)

FROM: Office of the Senate Secretary

SUBJ: Referral Change

The Chair of the Committee noted above has waived the referral(s) on the following bills(s):

RETRIEVE

HOUSE BILL NO. 169
"An Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date."
HB 169 LAA REVIEW OF PROPOSED REGULATIONS

Please give the bill file(s) to the page delivering this message for forwarding to the next Committee of referral.

Thank you.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

COMMITTEE MEMBERS:
REP. STEVE THOMPSON, VICE CHAIR
REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

TO: Senator Hollis French, Chair
Senate Judiciary Committee

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

for Rep. Gatto

DATE: April 5, 2012

RE: Request for scheduling of HB 169

Enclosed is the packet for HB 169, "*an Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date*" also called "LAA Review of Proposed Regulations." I have included a sponsor statement, the original version of the bill, and a memo from Legal Services.

I would appreciate if you would schedule this bill, pending referral from the Senate State Affairs Committee, for a hearing in Senate Judiciary Committee at your earliest convenience. I appreciate your time and look forward to a hearing.

Please contact my staff member, Melanie Lesh at 465-4990, with any questions or comments regarding this request.

Thank you for your consideration.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

COMMITTEE MEMBERS:
REP. STEVE THOMPSON, VICE CHAIR
REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
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JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

HB 169
Sponsor Statement

"An Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date."

HB 169 closes gaps in the regulation review statutes. The Legislative Affairs Agency (LAA) attorneys review proposed regulations, including those from newly enacted legislation and at the request of a standing committee, the Administrative Regulations Review Committee, and the Legislative Council. However, if the attorney finds that the proposed regulations fail to meet statutory standards, the only legislative entities they are allowed to notify are the Administrative Regulation Review Committee, the Speaker of the House, and the President of the Senate. Additionally, LAA cannot currently notify anyone if the regulation meets statutory standards.

HB 169 allows LAA to notify the committee or council that requested the review that the regulations do not meet statutory standards. In addition, if the proposed regulation implements newly passed legislation, LAA would be able to consult with and notify the prime sponsor of that legislation, if the prime sponsor is still a sitting legislator. Finally, HB 169 allows LAA to notify the requester of the review if the attorney determines that the regulations meet statutory standards.

HB 169 is a simple fix to two minor problems in an otherwise functioning review system. It will give the benefits of the review process to those who need it most. If you have any questions, please contact Melanie Lesh, Judiciary Committee Aide, at 465-4990.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 169**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB 169-LEG-COU-01-18-2012
Title: "LAA Review of Proposed Regulations"
Sponsor: House Judiciary Committee
Requester: House Judiciary Committee

Dept. Affected: Legislature
Appropriation: Legislative Council
Allocation: Legal and Research Services
OMB Component Number: 2028

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by: Jessica Geary, Finance Manager — Phone: 465-6626
Division: Legislative Affairs Agency — Date/Time: 1/18/12 10:31 AM
Approved by: Pamela Varni, Executive Director — Date: 1/18/2012
Legislative Affairs Agency

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 169

Analysis

This Legislation has zero fiscal impact on the Legislative Affairs Agency.

Sec. 24.20.105. Review of proposed regulations.

(a) The Legislative Affairs Agency may review each proposed regulation that is subject to AS 44.62.010 - 44.62.300 (Administrative Procedure Act). A review of proposed regulations under this section must be conducted by an attorney employed by that agency.

(b) Reviews shall be conducted under (a) of this section in the following order of priority:

(1) proposed regulations that would implement newly enacted legislation;

(2) proposed regulations requested in writing to be reviewed by a standing committee, the Administrative Regulation Review Committee, or the legislative council as implicating major policy development.

(c) Under AS 44.62.190(a)(7), the notice of proposed action, along with a copy of the proposed regulation, shall be furnished electronically by the state agency to the

(1) Legislative Affairs Agency;

(2) chairs of the standing committees with jurisdiction over the subject of the proposed regulation;

(3) Administrative Regulation Review Committee;

(4) legislative council.

(d) Within available staff resources and priorities set by the legislative council, the Legislative Affairs Agency shall assign one or more attorneys to conduct a review of proposed regulations. The review shall evaluate

(1) the legality and constitutionality of the proposed regulation;

(2) whether the state agency has statutory authority to adopt the proposed regulation to implement, interpret, make specific, or otherwise carry out a statute; and

(3) whether the proposed regulation is consistent with the applicable statutes.

(e) In conducting its review under this section, the assigned attorney may consult with the Department of Law, the committee or council that requests the review under (b)(2) of this section, and the state agency proposing the regulation change. If the assigned attorney determines that the proposed action fails to meet the standards set out in (d) of this section, the assigned attorney shall notify, in writing, the Department of Law, the state agency, the Administrative Regulation Review Committee, the president of the senate, and the speaker of the house of representatives.

(f) In addition to the review specified in (d) of this section, the assigned attorney shall notify the Administrative Regulation Review Committee, the president of the senate, and the speaker of the house of representatives of any provision of the proposed regulation that may be inconsistent with legislative intent and appropriate for additional legislative oversight as a result.

(g) Except as provided in this section, the Legislative Affairs Agency may not release any information regarding its review of a proposed regulation under this section.

(h) The process of review of a proposed regulation under this section does not affect a state agency's authority to complete its proposed action regarding the regulation. Suggestions for changes to a proposed regulation made by the Legislative Affairs Agency are not binding on a state agency.

(i) No action may be brought for the failure of the Legislative Affairs Agency to conduct a legal review under this section.

(j) The provisions of (b) - (i) of this section do not apply to proposed regulations of the Board of Game or the Board of Fisheries.

(k) In this section, "proposed regulation" means a proposed adoption, amendment, or repeal of a regulation.

History -

(Sec. 2 ch 164 SLA 2004)

Cross References -

For provision exempting written notification provided under (e) of this section from the general right to inspect public records, see AS 40.25.120(a)(11).

LEGAL SERVICES

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

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

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

MEMORANDUM February 18, 2011

SUBJECT: Review of Proposed Regulations by the Legislative Affairs Agency (Work Order No. 27-LS0559\A)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a draft of a bill you requested to "fix some flaws" in AS 24.20.105, as we discussed after the meeting of the Administrative Regulation Review Committee (ARRC) on Tuesday.[1]

Section 1. This section of the bill accomplishes several things:

(1) The new language on page 1 allows the reviewing attorney in LAA to consult with the prime sponsor of the relevant bill if the attorney is reviewing proposed regulations that implement newly enacted legislation. You only asked specifically for the prime sponsor to get copies of memos denoting possible legal flaws determined in these kinds of reviews, but I thought it was probably in keeping with your goal to also add this consultation aspect as well. Let me know if I erred in this regard and I can remove the language. Also, please note that I have limited this consultation requirement to situations when the prime sponsor is still a member of the legislature. In addition to the logistics that may be difficult when the prime sponsor is no longer a member, it seems to me in keeping with the confidential nature of these reviews that only sitting legislators be included in the review process under AS 24.20.105.

(2) The first two lines on page 2 allow LAA review memos to be sent to a standing committee or to the Legislative Council if they have requested a review of some proposed regulations because of their "major policy implications." Under current law,

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[1] Although I drafted the enclosed bill, Lisa Kirsch's name appears in the upper right-hand corner of page 1. This has been done so that, if you introduce the bill, legislators and staff will have a full-time attorney to call with questions or amendments related to the bill. As I mentioned at the ARRC meeting, I am only half-time. Lisa Kirsch reviewed proposed regulations under AS 24.20.105 for most of the past three years, and is knowledgeable about the issues addressed in this bill draft. Feel free to call either one of us about the draft.

these entities can request a review and that request is given priority status under AS 24.20.105(b)(2), but the law, through an oversight in the original legislation, does not allow them to get the memo that could result from the review. Current law allows these memos to go only to the Department of Law, the state agency proposing the regulations, the ARRC, the senate president, and the speaker of the house. (See AS 24.20.105(e) and the restriction on LAA's disclosure under AS 24.20.105(g).)

(3) Lines 3 - 7 on page 2 allow LAA review memos to be sent to the prime sponsor of the relevant legislation if a review of proposed regulations that implement newly enacted legislation shows legal problems of the type described in AS 24.20.105(d). As with the consultation requirement for prime sponsors described above in (1), I have limited this memo-sharing requirement to prime sponsors who are still sitting legislators.

(4) Lines 7 - 10 on page 2 require LAA to communicate to a standing committee or the Legislative Council the results of a review that was requested by either of them in situations where the reviewer has not found legal flaws. Currently, AS 24.20.105 only allows LAA to communicate with respect to reviews where legal flaws are perceived, and that makes sense with respect to the vast number of reviews, as the relevant entities would normally be interested only if the reviewing attorney sees problems. However, with respect to a review requested under AS 24.20.105(b)(2), it seems to me that it would make sense for LAA to be able to respond that a review has been completed but that no problems were found. I have deliberately not required this communication to be in writing so that a phone call could suffice; the requester, of course, could always request that the "no problems" response be in writing.

Sec. 2. This section clarifies that the new provisions of section 1 apply to any reviews ongoing in LAA at the time the bill takes effect even if the notice of proposed regulations was issued before the effective date of the bill.

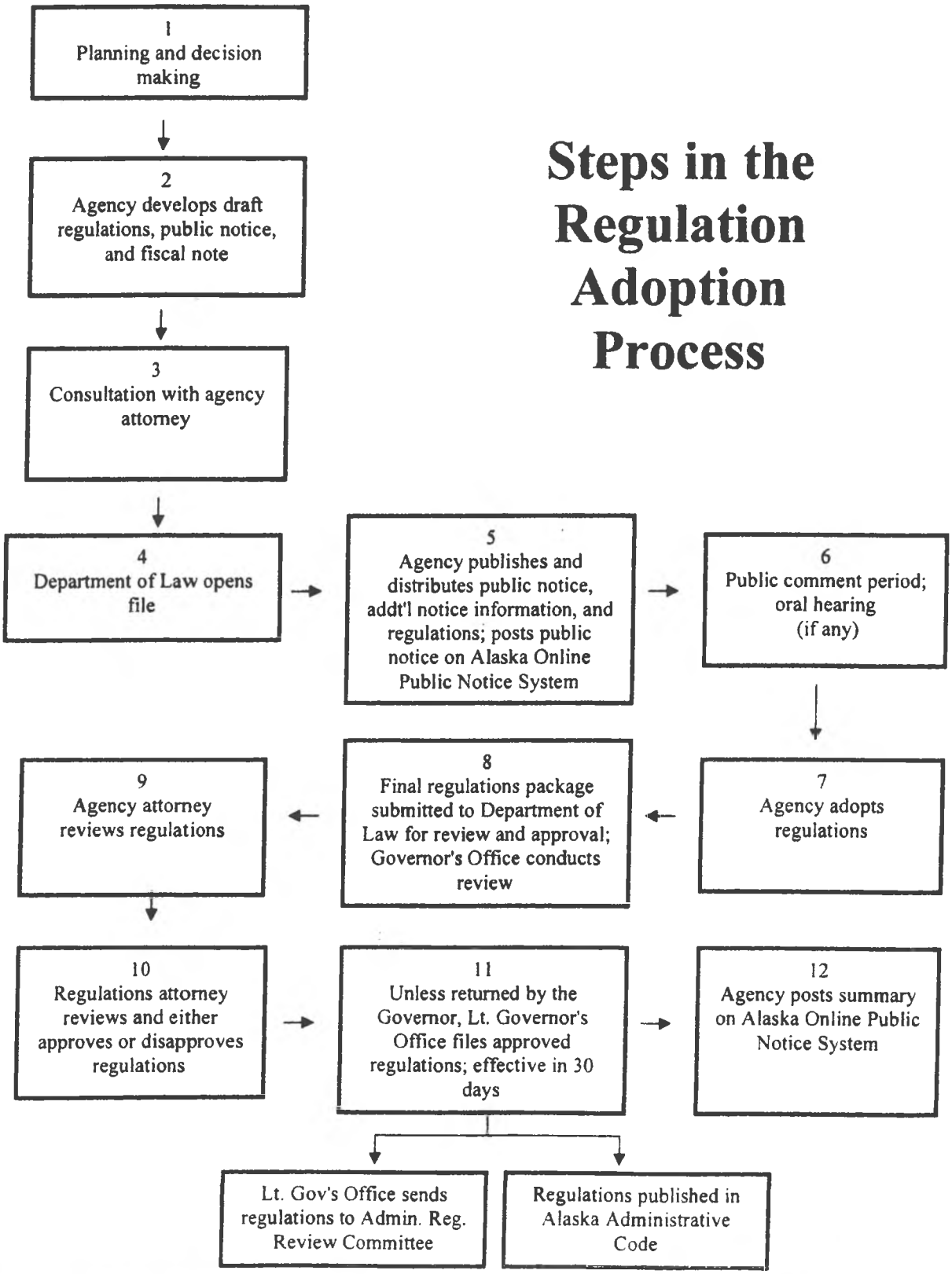
Sec. 3. This section gives the bill an immediate effective date. There are no impediments I can think of that would keep LAA from immediately being able to implement any of the new provisions of section 1.

TML:LMK:ljw
11-115.ljw

Enclosure

* * * *

Steps in the Regulation Adoption Process



HB 215

<TARGET><BILL>HB 215</BILL><SUBJECT>HB 215</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA GASLINE DEVELOPMENT CORP.
GAS FOR ALASKANS

March 15, 2012

Joe Dubler
Vice President/Chief Financial Officer
Alaska Gasline Development Corporation
3301 C Street, Suite 100
Anchorage, Alaska 99503

Dear Mr. Dubler:

The question you have asked me to address is whether the shipment of natural gas recovered below the 68th Parallel in the pipeline currently under consideration by the Alaska Gasline Development Corporation ("AGDC") could expose the state to liability under AS 43.90.440(a).

AGDC has been very careful and deliberate to avoid creating liability under AS 43.90.440(a). The answer to your question is no.

The potential liability you have asked about arises in the context of the Alaska Gasline Inducement Act ("AGIA" at AS 43.90). AGIA authorized the Commissioner of Revenue and the Commissioner of Natural Resources, acting jointly (the "Commissioners"), to award a license which, under AS 43.90.110 entitles the licensee to certain inducements.

The stated purpose of AGIA (AS 43.90.010) is to encourage expedited construction of a natural gas pipeline that (1) facilitates commercialization of North Slope gas resources in the state; (2) promotes exploration and development of oil and gas resources on the North Slope in the state; (3)maximizes benefits to the people of the state from the development of oil and gas resources in the state; and (4) encourages oil and gas lessees and other person to commit to ship natural gas from the North Slope to a gas pipeline system for transportation to markets in this state or elsewhere. To further that purpose, the inducements in AS 43.90.110 include (1) matching state contributions for certain qualifying expenditures; (2) the benefit of an Alaska Gasline Inducement Act coordinator who has the authority prescribed in AS 43.90.250 (the "License Inducements") -- I note that AS 43.90.250 contains no explicit grant of authority to the coordinator. The application requirements set forth in AS 43.90.130 include a "thorough description of a proposed natural gas pipeline project for transporting natural gas from the North Slope to market. . . ."

In addition to the License Inducements, Article 3 of AGIA sets forth a "resource inducement" (AS 43.90.310), which is accompanied by a gas production tax exemption (AS 43.90.320), and a system of inducement vouchers (AS 43.90.330).

The foregoing summarization of AGIA provisions clearly demonstrate (as emphasized by the underlining) that AGIA's focus is on the transportation of "North Slope" natural gas. The definitions provisions of AGIA make it clear (as set forth below in this opinion) that "North Slope" means north of the 68th Parallel.

The potential liability to the state arises under AS 43.90.440(a). In that subsection, the state grants to the licensee assurances that the licensee has exclusive enjoyment of the inducements provided under this chapter before the commencement of commercial operations. If, before the commencement of commercial operations, the state extends to another person preferential royalty or tax treatment or grant of state money for the purpose of facilitating the construction of a competing natural gas pipeline project in this state, and if the licensee is in compliance with the requirements of the license and with the requirements of state and federal statutes and regulations relevant to the project, the licensee is entitled to payment from the state of an amount equal to three times the total amount of the expenditures incurred and paid by the licensee that are qualified expenditures for the purposes of AS 43.90.110 that the licensee incurred in developing the licensee's project before the date that the state first extended preferential treatment to another person.

For purposes of the liability described in the preceding paragraph, a "competing natural gas pipeline project" means a project designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market. (AS 43.90.440(c)(1)). AGIA defines "North Slope" to mean that part of the state that lies north of 68 degrees North latitude. (AS 43.90.900(16)).

It follows that the shipment of natural gas in any quantity cannot create a "competing natural gas pipeline project" if the gas is not "North Slope" gas, and gas is not "North Slope" gas unless it is recovered north of 68 degrees North latitude. As long as the AGDC pipeline is not designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market, the liability provisions of AS 43.90.440(a) will not apply.

Sincerely,

Kenneth E. Vassar
General Counsel
Alaska Gasline Development Corporation

LEGAL SERVICES

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

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

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

MEMORANDUM April 15, 2011

SUBJECT: Review of CSHB 215(FIN) am (Work Order No. 27-LS0741\E.A)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Donald M. Bullock Jr.
Legislative Counsel

You asked for a review of CSHB 215(FIN) am (bill) to identify constitutional or statutory conflict. You specifically want to know how *Moore v. State*[1] may apply to the bill.

Local or special legislation.

Sections 1 - 4 of the bill relate to covenants in AS 38.35.120(a) that the Alaska Housing Finance Corporation (AHFC) would not be bound to agree to as a condition of receiving a right-of-way lease. The covenants in AS 38.35.120(a) were enacted by the legislature and the bill would make several of those covenants inapplicable to a lease entered into with AHFC. Carving out an exception to AHFC raises a question under art. II, sec. 19, Constitution of the State of Alaska, as to whether the exclusion unique to AHFC makes the bill a "local or special act" that is contrary to the prohibition. A general Act that excludes the same covenants for any gas pipeline could avoid the "local or special" question. The fact that AHFC is a public corporation and government instrumentality[2] may be a factor considered by the court if faced with a challenge under art. II, sec. 19.

Another factor that may be considered under a challenge under art. II, sec. 19, is the policy expressed in AS 38.35.010(a) of the Right-of-Way Leasing Act. AS 38.35.010(a) reads as follows:

> (a) The natural resources of this state in crude oil and natural gas and in its land for transportation of these resources and their products by pipeline toward markets both in and out of the state are capable of making a significant contribution to the general welfare of the people of this state.

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[1] 553 P.2d 8 (Alaska 1976).

[2] AS 18.56.020.

> It is the policy of this state that the development, use, and control of a pipeline transportation system be directed to make the maximum contribution to the development of the human resources of this state, the increase in the standard of living for all of its residents, the advancement of existing and potential sectors of its economy, the strengthening of free competition in its private enterprise system, and the careful protection of its incomparable natural environment.

That policy, considered along with the enactment of ch. 7, SLA 2010, which created the Joint In-State Gasline Development Team in AHFC,[3] expresses the state policy to develop an in-state pipeline and have that project developed by AHFC.

In *Baxley v. State*,[4] the Alaska Supreme Court considered an Act that provided relief to a legislative enactment that gave effect to modifications of four state oil and gas leases in the Northstar Oil Field.[5] The Court concluded that the Act was not special legislation, "[b]ecause the Act's exclusive focus on the Northstar leases reflects their unique nature, and because the Act fairly and substantially relates to legitimate state purposes[.]"

AHFC would not be required to agree to the covenants from which it is excluded under the bill. Considering the state policy expressed in AS 38.35.010 and the enactment of AS 38.34 (that requires AHFC to develop a gas pipeline project), it is likely that a court would find that the favorable treatment of AHFC in the bill relates to legitimate state purposes. It is reasonable to expect that a court would find that bill does not violate art. II, sec. 19, Constitution of the State of Alaska.

Standing and the limitations on actions relating to the right-of-way lease.

Sections 5 and 6 of the bill amend AS 38.35.200. Currently, AS 38.35.200 limits standing to object to a right-of-way lease, the period in which an objection must be raised, and the issues relating to the issuance of the right-of-way lease that are subject to judicial review.[6] The period for raising an objection is 60 days after the commissioner of

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[3] AS 38.34.030.

[4] 958 P.2d 422 (Alaska 1998).

[5] 958 P.2d at 424.

[6] Sec. 38.35.200. Judicial review of decisions of commissioner on application. (a) An applicant or competing applicant or a person who has a direct financial interest affected by the lease who raises objections within 60 days of the publication of notice under AS 38.35.070 are the only persons with standing to seek judicial review of a decision of the commissioner under AS 38.35.100.

(b) The only grounds for judicial review of a decision of the commissioner are

natural resources (commissioner) publishes notice that an application for a right-of-way lease has been received under AS 38.35.070.

In *Moore v. State*, the case you mentioned in your request, the Alaska Supreme Court stated, "Whether a party has standing to obtain judicial resolution of a controversy depends on whether the party has sufficient personal stake in the outcome of the controversy."[7] The plaintiffs in *Moore*, who for the most part were commercial fishermen, claimed that they would be adversely affected if oil exploration and production were to be allowed in Kachemak Bay. The court concluded that the plaintiffs' interest in the outcome is essentially economic, and, "As such, it clearly meets the injury-in-fact requirement for standing."[8] Under the decision in *Moore*, the direct financial interest requirement for standing in the present AS 38.35.200 and in the proposed amended version may be satisfied by a person whose livelihood may be affected by a right-of-way lease or an action related to that lease. To secure standing, a person must raise the required objection with 60 days after the notice of an application has been published.

Section 5 of the bill limits standing to the same persons as in current law -- a competing applicant, a person that has a direct financial interest affected by the lease, and the applicant. The bill moves the placement of the naming of the applicant so that the amended AS 38.35.200(a) makes the 60-day period to object applicable to the competing applicant and the person with the directly affected financial interest, but removes the applicant from the requirement to raise an objection during the 60-day limitation period. This is logical because the basis for the applicant's appeal may not arise until the commissioner's decision on the application.

Section 5 further amends AS 38.35.200(a) by adding judicial review of "**an action described in (c) of this section**." Under the amended language, an applicant is not subject to the limitations in AS 38.35.200(c), which is added by sec. 6 of the bill. However, a competing applicant or a person with the affected direct financial interest must make an objection within the 60-day period described in AS 38.35.200(a) to have standing to seek judicial review. Although other provisions of law may provide for appeals of a state commissioner or agency action described in AS 38.35.200(c), the subsection is, after making an exception for the applicant under AS 38.35.200(a), prefaced with the phrase "notwithstanding any contrary provision of law. . . ." If a

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(1) failure to follow the procedures set out in this chapter; or

(2) abuse of discretion so capricious, arbitrary, or confiscatory as to constitute a denial of due process. (Sec. 1 ch. 72 SLA 1972; am. Sec. 19 ch. 3 FSSLA 1973)

[7] *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976).

[8] 553 P.2d at 24.

conflicting law is applicable but does not have a similar "notwithstanding" limitation, the conflict likely would be resolved in favor of the limitations in AS 28.35.200(c).

There may be an access to the courts issue raised if an action that is the basis for a person to seek judicial review is not reasonably foreseen during the 60-day period. The impacted person may still try to access the courts and challenge the 60-day period to acquire standing as barring access to the courts. Whether a court would set aside the 60-day period to acquire standing is difficult to predict; the outcome may depend on the issue that is presented and the alleged risk or harm.

In any case, the amended AS 38.35.200 is an incentive for anyone with even the remotest possibility of being affected by a right-of-way lease or an action related to that lease to raise an objection to preserve standing.

Applicability of art. VIII, sec. 10 of the Alaska constitution.

Article VIII, sec. 10, Constitution of the State of Alaska, prohibits leases of state lands "without prior public notice and other safeguards of the public interest as may be prescribed by law." The Right-of-Way Leasing Act provides for public notice, a hearing, and findings by the commissioner of natural resources before granting a right-of-way lease application, in whole or in part.

AS 38.35.020 authorizes the commissioner to grant a noncompetitive right-of-way lease. The requirements that must be met to be eligible for a right-of-way lease are within AS 38.35, as well as the process for applying. A person seeking a right-of-way lease begins the process by filing an application[9] that is followed by the publication of a notice stating that an application has been received.[10] It is the publication of this notice that starts the 60-day period for raising an objection and it is during this 60-day period that a person must establish standing to pursue judicial review under AS 38.35.200, as amended by the bill.

Consistent with the requirements in art. VIII, sec. 10 of the constitution, by enacting AS 38.35.070 the legislature required prior public notice before the commissioner may approve a lease application. AS 38.35.080 requires a public hearing and requires the commissioner to prepare an analysis of the application, which is made available at least 30 days before the date set for the hearing.

After the hearing, AS 38.35.100 requires the commissioner to determine and make a written finding on an application as to whether "the applicant is fit, willing, and able to perform the transportation or other acts proposed in a manner that will be required by the

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[9] AS 38.35.050.

[10] AS 38.35.070.

present or future public interest." If the commissioner finds the application may be granted, the commissioner may grant the application in whole or in part. The limitations in AS 38.35.200 in current law limit standing to seek judicial review of a decision made under AS 38.35.100.

Article VIII, sec. 10 of the state constitution requires that no lease of state land "shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." The legislature has prescribed that there be notice of a right-of-way application (AS 38.35.070), analysis and public hearing (AS 38.35.080), and a decision by the commissioner based on written findings (AS 38.35.100). Whether this process satisfies the requirements in art. VIII, sec. 10, is a question of law which thus far has not been addressed by the Alaska Supreme Court. Under AS 38.35.200(c), as added by the bill, a claim alleging the invalidity must be brought within 60 days after the effective date of the Act enacting the subsection, and a claim alleging that an action will deny rights under the state constitution must be brought within 60 days after the date of an action.

The limitations on bringing a claim under AS 38.35.200(c) are set by law; the equitable remedy of laches is not applicable. With regard to the defense of laches, which is discussed in the *Moore* case, the Alaska Supreme Court wrote:[11]

> The defense of laches is inapplicable to an action at law. Although this proposition has never been directly asserted by the court, this was our implicit conclusion in *State v. Alex*, 646 P.2d 203, 215 (Alaska 1982). Moreover, limiting the defense of laches to equitable actions is in accord with the case law of virtually every other jurisdiction. When a party is seeking to enforce a legal right, as opposed to invoking the discretionary equitable relief of the courts, the applicable statute of limitations should serve as the sole line of demarcation for the assertion of the right.

In *Moore v. State*, the defendants raised the defense of laches, and were successful in obtaining summary judgment in their favor on that basis on the lower court.[12] The Supreme Court reversed after reviewing the timing of events in the lease sale, from the call for nominations, through the lease sale, the issuance of the leases, the issuance of the first permits in November 1974, and the filing of the plaintiff's suit in December 1974.[13] The court found that the plaintiffs were "not guilty of inexcusable delay" and sufficient prejudice had not been established on the record.[14]

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[11] *Lake and Peninsula Borough v. Local Boundary Com'n*, 885 P.2d 1059, 1064 - 1065 (Alaska 1994) (footnotes omitted).

[12] 553 P.2d at 14.

[13] 553 P.2d at 14 - 16.

[14] 553 P.2d at 16.

Actions by the Department of Environmental Conservation.

In the course of considering HB 215, concern was expressed over the effect of limiting review of the actions in the proposed AS 38.35.200(c) on the authority delegated to the Department of Environmental Conservation by the United States Environmental Protection Agency. AS 38.35.200(d) was added in the House Judiciary Committee and was adopted in CSHB 215(JUD) to avoid this conflict.

This analysis may not be conclusive or address every issue raised by CSHB 215(JUD) am given the limited time available as the session ends. If you do hear the bill in your committee, you may wish to seek additional comments from the Department of Law, who would defend the enacted provisions of the bill.

If I may be of further assistance, please advise.

DMB:ljw
11-261.ljw

Cindy Smith

From: Badgley, Cori M (LAW) <cori.badgley@alaska.gov>
Sent: Thursday, March 29, 2012 11:44 AM
To: Cindy Smith
Cc: Hutchins, John C (LAW); Heese, Ruth Hamilton (LAW)
Subject: HB 215 (DNR ROW: instate gasline)
Attachments: Westlaw_Document_12_39_13.doc; Westlaw_Document_13_06_53.doc

Follow Up Flag: Follow up
Flag Status: Flagged

Cindy,

At the Senate Judiciary hearing yesterday on HB 215, Senator French requested that our attorney, John Hutchins, send the case citations for the U.S Supreme Court case he was discussing. That citation is *Yakus v. United States*, 321 U.S. 414 (1944).

In addition to the citation, I have also attached the court's opinion for Senator French and other committee members to review. We also thought it would be helpful to provide *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885 (8th Cir. 1977), which much more explicitly uses *Yakus* to uphold a shorter period to bar a challenge to constitutionality.

We hope this helps answer some of the questions on this topic.

We are also working on putting together a response to Senator Paskvan's request relating to the Clean Water Act and the extent of federal jurisdiction. This is a complex area of law that is ever evolving. We will get a response to the committee on this as soon as possible.

Thank you.

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554 F.2d 885, 10 ERC 1082, 7 Envtl. L. Rep. 20,415
(Cite as: 554 F.2d 885)

United States Court of Appeals,
Eighth Circuit.
LLOYD A. FRY ROOFING CO., Appellant,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY et al., Appellees.

No. 76-1731.
Submitted March 15, 1977.
Decided May 11, 1977.

Alleged air polluter sought injunction against enforcement of Environmental Protection Agency's notice of violation and EPA order. The United States District Court for the Western District of Missouri, Elmo B. Hunter, J., 415 F.Supp. 799, dismissed and plaintiff appealed. The Court of Appeals, Matthes, Senior Circuit Judge, held (1) preenforcement review in the district court of notice of violations issued by the environmental protection agency under the Clean Air Act is precluded; (2) plaintiff must assert its claims as a defense or counterclaim in any action brought by the administrator; (3) statute providing that petition for review of administrator's action in promulgating any implementation plan may be filed only in the appropriate court of appeals and must be filed within 30 days of promulgation was applicable even though plaintiff challenged regulation as being unconstitutionally vague on its face.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A 651

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak651 k. In General. Most Cited Cases

Administrative Procedure Act does not confer jurisdiction to review agency action where the regulatory statute itself precludes judicial review. 5 U.S.C.A. § 702.

[2] Administrative Law and Procedure 15A 751

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak751 k. Limitation of Scope of Review in General. Most Cited Cases

A congressional intent to limit review of agency action need not be express, but may be drawn from a statute's legislative history, purpose and design. 5 U.S.C.A. § 702.

[3] Environmental Law 149E 642

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek636 Administrative Decisions or Actions Reviewable in General
149Ek642 k. Air Pollution. Most Cited Cases
(Formerly 199k25.15(3.2), 199k25.15(1), 199k28 Health and Environment)

There being no express provision in the Clean Air Act prohibiting preenforcement judicial review of environmental protection agency abatement orders, agency had heavy burden to overcome strong presumption favoring such review. Clean Air Act, §§ 113, 113(a)(4), (b, c) as amended 42 U.S.C.A. §§ 1857c-8, 1857c-8(a)(4), (b, c); 5 U.S.C.A. § 702.

[4] Environmental Law 149E 642

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek636 Administrative Decisions or Actions Reviewable in General
149Ek642 k. Air Pollution. Most Cited Cases
(Formerly 199k25.15(1), 199k28 Health and Environment)

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554 F.2d 885, 10 ERC 1082, 7 Envtl. L. Rep. 20,415
(Cite as: 554 F.2d 885)

Alleged violator of Clean Air Act lacks authority to maintain a preenforcement action to test the validity of an abatement order issued by the administrator of the Environmental Protection Agency and must assert its claims as a defense or counterclaim in any action brought by the administrator. Clean Air Act, § 113 as amended 42 U.S.C.A. § 1857c-8.

[5] Environmental Law 149E 670

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek668 Time for Proceedings
149Ek670 k. Periods Applicable. Most Cited Cases
(Formerly 199k25.15(5), 199k28 Health and Environment)

Section of Clean Air Act providing that petition for review of administrator's action in promulgating any implementation plan must be filed in the appropriate court of appeals and within 30 days from date of such promulgation was applicable to review of regulation even though regulation was challenged as being unconstitutionally vague on its face. Clean Air Act, § 307(b)(1) as amended 42 U.S.C.A. § 1857h-5(b)(1).

[6] Constitutional Law 92 4324

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)14 Environment and Health
92k4324 k. Air Pollution. Most Cited Cases
(Formerly 92k278.1, 92k318(2))

Environmental Law 149E 669

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek668 Time for Proceedings
149Ek669 k. In General. Most Cited Cases
(Formerly 199k25.15(5), 199k28 Health and Environment)

The 30-day time limit for filing petition for review of administrator's action under the Clean Air Act in promulgating any implementation plan is consistent with the legislative purpose and comports with due process. Clean Air Act, §§ 110, 307(b)(1) as amended 42 U.S.C.A. §§ 1857c-5, 1857h-5(b)(1); 5 U.S.C.A. § 706.

[7] Environmental Law 149E 254

149E Environmental Law
149EVI Air Pollution
149Ek253 Federal Regulation
149Ek254 k. In General. Most Cited Cases
(Formerly 199k25.6(9), 199k28 Health and Environment)

The importance which administrator of environmental protection agency is to accord to alleged polluter's efforts to comply with requirements of Clean Air Act is a matter of discretion. Clean Air Act, § 113(a)(4) as amended 42 U.S.C.A. § 1857c-8(a)(4).

***886** Thomas J. Leittem, Kansas City, Mo., for appellant; John H. Altergott, Jr., Kansas City, Mo., on the brief.

Maryann Walsh, Atty., Land and Natural Resource Div., Appellate Section, U. S. Dept. of Justice, Washington, D. C., for appellee; Peter R. Taft, Asst. Atty. Gen., Edmund B. Clark, Atty., and Todd M. Joseph, E. P. A., Washington, D. C., on the brief.

Before MATTHES, Senior Circuit Judge, and WEBSTER and HENLEY, Circuit Judges.

MATTHES, Senior Circuit Judge.

The primary question for determination on this appeal is whether an alleged violator of section 113(a)(1) of the Clean Air Act, 42 U.S.C. s 1857c-8(a)(1), is empowered to maintain a pre-enforcement action to test the validity of an abatement order issued by the Administrator of the Environmental Protection Agency (EPA). This is a question of first impression in the courts of appeals. Lloyd A. Fry Roofing Company (plaintiff) filed such an action against the United States Environmental Protection Agency, Russell Train, as EPA Administrator, Jerome H. Svore, as EPA Administrator for Region VII, and Earl J. Stephenson, as Director of the Enforcement Division for Region VII. The district court granted defendants' motion to dismiss the action

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554 F.2d 885, 10 ERC 1082, 7 Envtl. L. Rep. 20,415
(Cite as: 554 F.2d 885)

for lack of subject matter jurisdiction and plaintiff has appealed from the dismissal.

I

Plaintiff operates an asphalt roofing plant in North Kansas City, Missouri. A by-product of its operation is a mixture of asphalt particles and gas which, after passing through the plant's air pollution control system, is emitted as a plume from a 100 foot high stack.

Effective January 5, 1969 the EPA Administrator approved certain regulations known as "Air Quality Standards and Air Pollution Control Regulations for the Kansas City Metropolitan Area," which had been submitted by Missouri as part of the state implementation plan pursuant to section 110(a) of the Clean Air Act, 42 U.S.C. s 1857c-5. Regulation V Restriction of Emission of Visible Air Contaminants prohibits the discharge of air contaminants of a certain density, except where failure to meet the requirement stems solely from the presence of "uncombined water." Regulation V provides in pertinent part as follows:

A. Restrictions Applicable to All Installations

No person may discharge into the ambient air from sources of emission whatsoever any air contaminant a.) of a shade or density equal to or darker than designated as No. 1 on the Ringelmann Chart, or b.) of such capacity (sic) as to obscure an observer's view to a degree equal to or greater than does smoke designated as No. 1 on the Ringelmann Chart.

B. Exceptions

***887** 2. Where the presence of uncombined water is the only reason for failure of an emission to meet the requirements of Section A of this Regulation V, such sections shall not apply.

C. Method of Measurement

The Ringelmann Chart shall be the standard in grading the shade or opacity of visible air contaminant emissions. The Executive Secretary may with the consent of the source operator employ any other means of measurement which give comparable results of greater accuracy.

On September 25, 1975, defendant Svore, as Regional Administrator of EPA, issued a notice informing plaintiff that it was in violation of Regulation V. The notice was based on visual smoke readings which indicated that the opacity of the plume from plaintiff's stack exceeded that allowable under Regulation V. Plaintiff requested an opportunity to confer with EPA representatives concerning the alleged violation. A formal evidentiary hearing was held on November 7, 1975 at EPA's Region VII office in Kansas City. By letter of January 9, 1976, plaintiff was directed to install sampling ports and scaffolding on the main stack in preparation for an EPA stack test. Plaintiff consented to the stack test, but refused to install the necessary equipment at its own expense. On March 9, 1976, defendant Stephenson, as Director of the Enforcement Division for Region VII, issued an order pursuant to section 113(a) (1) of the Clean Air Act, 42 U.S.C. s 1857c-8(a)(1) directing plaintiff to eliminate opacity violations within the time schedule set forth therein.

On April 13, 1976, plaintiff filed a verified complaint seeking a temporary restraining order and a preliminary injunction to set aside the notice of violation and order as being unlawful, arbitrary, and capricious. Additionally, plaintiff sought a declaratory judgment finding Regulation V unconstitutional. Plaintiff alleged, in effect, that it was in compliance with the regulation because it was emitting a "wet" plume of less than twenty percent opacity and that the regulation was unconstitutionally vague because it contained no definition of "uncombined water" and failed to advise the industry of the scope of prohibited conduct. Jurisdiction was asserted under the Administrative Procedure Act, 5 U.S.C. s 701 et seq., the federal question statute, 28 U.S.C. s 1331, the statute conferring jurisdiction over cases arising under statutes affecting commerce, 28 U.S.C. s 1337, and the mandamus statute, 28 U.S.C. s 1361.

On May 6, 1976, defendants filed a motion to dismiss the complaint insofar as it sought pre-enforcement review of the abatement order and judicial review of Regulation V. Defendants' motion to dismiss was based upon contentions that Congress intended to preclude pre-enforcement review of EPA abatement orders and to make the United States Court of Appeals the exclusive forum for review of federally approved state implementation plans. On June 25, 1976, the district court filed a judgment granting de-

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fendants' motion to dismiss. The court concluded, in an accompanying memorandum opinion, that it lacked jurisdiction to grant the relief requested in plaintiff's complaint. See Lloyd A. Fry Roofing Co. v. United States Environmental Protection Agency, 415 F.Supp. 799 (W.D.Mo.1976).

II

We address, initially, the question whether the district court correctly ruled that it lacked jurisdiction to review the abatement order issued against plaintiff. Plaintiff argues, and the defendants concede, that even in the absence of any provision for judicial review there is a strong presumption in favor of judicial review of final agency action, and that to preclude such review there must be a showing of "clear and convincing evidence" of a contrary legislative intent, Abbott Laboratories v. Gardner, 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); see Dunlop v. Bachowski, 421 U.S. 560, 567, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975); Ortego v. Weinberger, 516 F.2d 1005, 1009 (5th Cir. 1975); Garvey v. Freeman, 397 F.2d 600, 605 (10th Cir. 1968). The crux of the controversy is whether the ***888** pertinent legislative history and the statutory scheme demonstrate that Congress intended to foreclose judicial review of an EPA compliance order in an action for pre-enforcement review instituted by an alleged violator.

Under section 113(a)(1) of the Clean Air Act, 42 U.S.C. s 1857c-8(a)(1), [FN1] whenever ***889** the Administrator finds that any person is in violation of a state implementation plan he must notify the alleged violator and the applicable state of his finding. If the violation continues unabated for thirty days, the Administrator may either issue an abatement order, which does not become effective until after the alleged violator has had an opportunity to confer with the Administrator, see 42 U.S.C. s 1857c-8(a)(4), or may commence a civil action for appropriate relief in the district court, pursuant to 42 U.S.C. s 1857c-8(b). Violators are subject to a fine of up to $25,000 for each day of violation and imprisonment for up to one year, see id. s 1857c-8(c).

FN1. Section 113 of the Clean Air Act, 42 U.S.C. s 1857c-8 provides in full:

s 1857c-8. Federal enforcement procedures Determination of violation of applicable implementation plan or standard; notification of violator; issuance of compliance order or initiation of civil action upon failure to correct; effect of compliance order; contents of compliance order

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 1857c-6(e) of this title (relating to new source performance standards), section 1857c-7(c) of this title (relating to standards

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for hazardous emissions), or section 1857c-10(g) of this title (relating to energy-related authorities) is in violation of any requirement of section 1857c-9 of this title (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b) of this section.

(4) An order issued under this subsection (other than an order relating to a violation of section 1857c-7 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

Civil action for appropriate relief; jurisdiction; venue; notice to appropriate State agency

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirements of an applicable implementation plan (A) during any period of Federally assumed enforcement, or

(B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement; or

(3) violates section 1857c-6(e), 1857c-7(c), or 1857c-10(g) of this title; or

(4) fails or refuses to comply with any requirement of section 1857c-9 of this title.

Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

Penalties

(c)(1) Any person who knowingly

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a) of this section, or

(C) violates section 1857c-6(e), section 1857c-7(c), or section 1857c-10(g) of this title

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

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> (2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter; shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

[1][2] Section 702 of the Administrative Procedure Act, 5 U.S.C. s 702, does not confer jurisdiction to review agency action where the regulatory statute itself precludes judicial review, see Califano v. Sanders.--U.S. --, 97 S.Ct. 980, 985, 51 L.Ed.2d 192 (1977). Section 113 of the Act contains no provision specifically providing for pre-enforcement judicial review of an EPA abatement order, nor does it expressly preclude such review. A congressional intent to limit review need not be express, but may be drawn from a statute's legislative history, purpose, and design, see Consumer Federation of America v. FTC, 169 U.S.App.D.C. 136, 515 F.2d 367, 370 (1975); Hahn v. Gottlieb, 430 F.2d 1243, 1249 (1st Cir. 1970). Our analysis begins, then, with a brief review of the legislative history of section 113, particularly the process by which it was enacted as part of the Clean Air Act Amendments of 1970, Pub.L.No. 91-604, 84 Stat. 1676 et seq.[FN2]

> FN2. The legislative history of the 1970 Amendments is fully discussed in Bonine, The Evolution of "Technology Forcing" in the Clean Air Act, Environment Reporter Monograph No. 21 (July 25, 1975) (hereinafter cited as Bonine); Luneburg, Judicial Review Under the Clean Air Act Amendments of 1970, 15 B.C.Ind. & Com.L.Rev. 667-78 (1974); Bolbach, The Courts and the Clean Air Act, Environment Reporter Monograph No. 19, at 1-3 (July 12, 1974); Comment, The Aftermath of the Clean Air Amendments of 1970: The Federal Courts and Air Pollution, 14 B.C.Ind. & Com.L.Rev. 724-28 (1973); Note, Clean Air Act Amendments of 1970: A Congressional Cosmetic, 61 Geo.L.J. 153-59 (1972); see also Train v. Natural Resources Defense Council, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975).

In 1970 the Ninety-First Congress began considering proposals to amend the Air Quality Act of 1967, Pub.L.No. 90-148, 81 Stat. 485 et seq. (1967) to provide a more effective program to improve air quality. In considering amendments to the previous legislation, Congress expressed an awareness of the need to expedite the implementation and enforcement of air quality standards, see, e. g., H.R.Rep.No. 91-1146, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.Code Cong. & Admin.News, p. 5356; S.Rep.No. 91-1196, 91st Cong., 2d Sess. (1970). In the area of enforcement, the House bill, H.R. 17255, 91st Cong., 2d Sess. (1970) directed the Secretary of Health, Education and Welfare to issue a notice of violation to persons who failed to comply with state implementation plan requirements not being enforced by the states. The House proposal further authorized the Secretary to request the Attorney General to bring suit in cases where the state's failure to enforce its implementation plan extends more than thirty days after notification of violation. In a new section 112, the House provided for federal enforcement ***890** of federal emission standards for stationary sources. The House Amendments contained no language either specifically providing for or limiting judicial review.

The bill reported out by the Senate Committee on Public Works as S. 4358, 91st Cong., 2d Sess. (1970), established a new section 116(a) directing the Secretary to issue an abatement order to any person in violation of a state implementation plan not being enforced by the state or any federal stationary source emission standard requiring compliance to begin within seventy-two hours. The Secretary was additionally authorized to institute a civil action to obtain compliance with abatement orders. The Senate measure contained language specifically providing for pre-enforcement judicial review. The pertinent provision read as follows:

> (5) Any person subject to (an abatement order) and who undertakes compliance with such order shall not be foreclosed from instituting in the United States district court for the district in which the alleged violation occurred an action against the Secretary to challenge such order.

The House and Senate approved bills [FN3] were

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then referred to a Conference Committee for reconciliation. The conferees, in reconciling the two bills, followed in the main the Senate measure, which as a whole, was more stringent and detailed than its House counterpart. See generally Bonine, supra note 2, at 11-21; Berlin, Federal Aid for Air and Solid Wastes Programs, Environmental Reporter Monograph No. 5, at 5 (October 2, 1970). The measure which emerged from the Conference Committee, and which was subsequently enacted into law as section 113 of the Act, 42 U.S.C. s 1857c-8, contained no language either providing for or limiting review. A reading of the report of the Conference Committee, see 1970 U.S.Code Cong. & Admin.News, p. 5374, sheds no light on the reason for the deletion of the Senate-approved language preserving the right to pre-enforcement review.

> FN3. The House and Senate bills, H.R. 17255 and S. 4358, are reprinted in full in A Legislative History of the Clean Air Amendments of 1970 (Jan. 1974) (prepared by the Environmental Policy Div., Cong. Research Serv., Library of Cong., for the Senate Comm. on Public Works, Serial No. 93-18).

Defendants point to the "silent deletion" as evidence of a "clear and convincing congressional intent" to preclude review. It is their theory that a person subject to an EPA abatement order can obtain review only by asserting his claim as a counterclaim or defense to a criminal or civil enforcement action commenced by the EPA pursuant to 42 U.S.C. s 1857c-8(b). This theory was adopted in large part by the district court, see Lloyd A. Fry Roofing Co. v. United States Environmental Protection Agency, supra at 805. Plaintiff contends that a more reasonable inference to be drawn from the deletion is that the Conference Committee recognized that the right to pre-enforcement review is so well established that specific provision for it need not be made. Thus, plaintiff argues, the deletion was meant to have no substantive effect.

[3] We recognize, of course, that there being no express provision in the Act prohibiting pre-enforcement judicial review of EPA abatement orders, the Agency bears a heavy burden to overcome the strong presumption favoring such review, see Dunlop v. Bachowski, supra, 421 U.S. at 567, 95 S.Ct. 1851. Nevertheless, the legislative history, when viewed together with the statutory language, the structure of the statutory scheme, and its design, does not support plaintiff's conclusion. First, the action of the Conference Committee in deleting language that would have expressly preserved the right to pre-enforcement review, although not by itself conclusive, strongly suggests that the intent of the omitted portion was rejected in the bill as passed, see Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974).

Secondly, as defendants note in their brief, pre-enforcement judicial review is ***891** wholly inconsistent with the enforcement mechanism established by Congress. Section 113 of the Act, 42 U.S.C. s 1857c-8, provides for two alternative methods of enforcement. If a violation of the Act continues unabated for more than thirty days after issuance of a notice of violation, the Agency may either (1) immediately commence a civil action for injunctive or other relief; or (2) issue a compliance order, which is not effective until after an informal administrative conference. Under the second alternative, if the order issued by the Agency is not met within the specified time or informal efforts to abate prove unsatisfactory, the Agency is authorized to initiate an action in the district court to compel compliance. Pre-enforcement review would severely limit the effectiveness of the conference procedure as a means to abate violations of the Act without resort to judicial process. Under plaintiff's reading of the statute, the Agency could easily side-step the possibility of pre-enforcement review by filing suit in the district court without prior issuance of an order pursuant to s 1857c-8(a)(1).

While this is a case of first impression, prior case law is entirely consistent with our conclusion. In West Penn Power Co. v. Train, 522 F.2d 302, 312 (3d Cir. 1975), for example, West Penn filed a complaint in the district court seeking injunctive and declaratory relief protecting it from any duty to comply with certain emission standards established as part of Pennsylvania's implementation plan after the Agency issued a notice of violation. In holding that the district court properly dismissed West Penn's complaint for lack of jurisdiction, the Third Circuit stated that at least two alternate avenues for relief would be available. First, the court noted, West Penn could seek redress in the state courts. Id. at 311. In describing the second route to relief the court stated as follows:

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The second route to relief is opened by 42 U.S.C. s 1857c-8(a)(4) * * *. At the time West Penn brought this action, it had received only a notice of violation from Train. After receiving the notice, West Penn had the opportunity both for informally negotiating its differences with Train and for presenting its cause to a federal district court, should EPA take formal steps to enforce the regulations allegedly violated by West Penn. Thus West Penn has future relief available to it in both the state and federal courts.

Id. at 312 (emphasis added); accord, Reichhold Chemicals v. EPA, 8 Envir.Rep.Cases 1207 (7th Cir., June 2, 1975).

The Clean Air Act Amendments of 1970 were "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem." Union Electric Co. v. EPA, 427 U.S. 246, 256, 96 S.Ct. 2518, 2525, 49 L.Ed.2d 474 (1976). Upon issuance of an EPA compliance order, the alleged violator is subject to penalties of up to $25,000 per day of violation and up to one year imprisonment. Plaintiff can protect itself from the unconscionable accumulation of large fines, however, by invoking the equitable doctrine of laches if the Agency fails to act promptly to seek enforcement.[FN4]

> FN4. Considering the heavy penalty to which a violator may be subjected, the Administrator is admonished to proceed expeditiously to institute enforcement proceedings in the event the alleged violator fails to comply with the timetable set forth in the abatement order so as to minimize any penalty which may be imposed.

[4] In sum, we are mindful that the pre-enforcement issue presents a close question. But we are persuaded by the legislative history of the Clean Air Act Amendments of 1970 to hold that plaintiff lacks authority to initiate and maintain litigation to challenge the EPA's order issued on March 9, 1976, and that plaintiff must assert its claims as a defense or counterclaim in any action brought by the Administrator of EPA under section 113 of the Clean Air Act, 42 U.S.C. s 1857c-8. The scales are balanced in favor of defendants by the action of the Conference Committee in deleting section 116(a)(5) of the Senate bill, which specifically and unequivocally sanctioned a pre-enforcement action by an alleged violator. Certainly Congress fully comprehended its power to grant access to ***892** the federal courts by any aggrieved person. And likewise, Congress knew that it could withhold such right. The course of passage of the House and Senate bills referred to supra convincingly demonstrate and reinforce this conclusion. The deletion of section 116(a)(5) of the Senate bill by the Conference Committee and the failure of the Congress itself to reincorporate a similar provision in the amended Clean Air Act impel us to rule that the Congress knowingly meant to and did foreclose plaintiff from maintaining this action.

For the foregoing reasons, we hold that the district court correctly determined that it lacked jurisdiction to review the disputed order.

III

We turn then to plaintiff's contention that the district court erroneously determined that it was without jurisdiction to review the constitutionality of Regulation V of the state implementation plan.

Section 307(b)(1) of the Clean Air Act, 42 U.S.C. s 1857h-5(b)(1) [FN5] provides that review of the action of the Administrator in approving state implementation plans may be had within thirty days of such approval in the appropriate court of appeals. The district court held that since plaintiff had failed to challenge Regulation V in the court of appeals within thirty days or promulgation, its constitutional claims "were presented out of time and in the wrong forum." 415 F.Supp. at 806. It is plaintiff's contention that the exclusive jurisdiction of the court of appeals is not applicable here because the Regulation is challenged as being unconstitutionally vague on its face. [FN6] In plaintiff's view, a challenge based solely on a constitutional claim could not have been made in a section 307(b)(1) proceeding.

> FN5. Section 307(b)(1) provides:
>
> (b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be

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> prescribed under section 1857f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title, or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> FN6. Plaintiff argues that Regulation V does not provide a definite standard to advise industry of the scope of prohibited conduct, particularly because it contains no definition of the term "uncombined water."

[5] We disagree. Plaintiff's attack on the constitutionality of Regulation V falls directly within the purview of section 307(b)(1). As we noted in Union Electric Co. v. EPA, 515 F.2d 206 (8 Cir. 1975), the court of appeals, in reviewing the Administrator's action in approving state implementation plans, determines whether the Administrator's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, id. at 214; see 5 U.S.C. s 706. In making this determination, the court necessarily considers whether the plan itself is constitutional. See South Terminal Corp. v. EPA, 504 F.2d 646, 655 (1st Cir. 1974).

[6] Plaintiff's contention that the section 307(b)(1) time limitation on its ability to challenge the constitutionality of the regulation does not comport with the requirements of due process is similarly without merit, cf. Union Electric Co. v. EPA, 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). In **Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944)**, the Supreme Court ruled that a sixty day period allowed for protest of wartime price controls established under the Emergency *893 Price Control Act was not unreasonably short. The standard to be applied is whether the period allowed can be said to be reasonable under the circumstances, **id. at 435, 64 S.Ct. 660.** As we have noted, the purpose of the 1970 Amendments was to intensify federal efforts to check what was perceived to be a serious problem of air pollution. The thirty day time limit is fully consistent with the legislative purpose. Moreover, in section 110 of the Act, 42 U.S.C. s 1857c-5, Congress provided for reasonable notice and public hearings prior to the approval of a state implementation plan by the Administrator. The time limit is "not arbitrary but is designed to get issues resolved promptly and thereby prevent delay in cleaning the air." Granite City Steel Co. v. EPA, 501 F.2d 925, 926 (7th Cir. 1974).

Having failed to seek review of Regulation V of the state implementation plan within thirty days of the date of promulgation, plaintiff is now barred from doing so.

IV

[7] Finally, plaintiff argues that it was entitled to pre-enforcement review of its claim that the EPA failed to comply with certain duties mandated by statute. It is plaintiff's contention that the Administrator did not take into account its good faith and attempts to comply with the applicable requirements, in violation of section 113(a)(4) of the Act, 42 U.S.C. s 1857c-8(a)(4). We need not decide whether pre-enforcement review is available in this instance since the Administrator's order specifically stated that the " seriousness of (the) violation and any good faith efforts to comply" had been considered. Plaintiff is apparently challenging not a failure to consider this factor, but rather a failure to accord it controlling importance. This is plainly a matter of discretion.

The judgment is affirmed.

C.A.Mo. 1977.
Lloyd A. Fry Roofing Co. v. U.S. Environmental Protection Agency
554 F.2d 885, 10 ERC 1082, 7 Envtl. L. Rep. 20,415

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Supreme Court of the United States.
YAKUS
v.
UNITED STATES.
ROTTENBERG et al.
v.
SAME.

Nos. 374, 375.
Argued Jan. 7, 1944.
Decided March 27, 1944.

Albert Yakus, Benjamin Rottenberg, and B. Rottenberg, Inc., were convicted of making sales of wholesale cuts of beef at prices above maximum prices prescribed by Revised Maximum Price Regulation in violation of the Emergency Price Control Act, the convictions were affirmed, 137 F.2d 850, and the defendants bring certiorari.

Affirmed.

Mr. Justice RUTLEDGE, Mr. Justice ROBERTS, and Mr. Justice MURPHY, dissenting.

On Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

West Headnotes

[1] War and National Emergency 402 ⚿1149

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1149 k. Power to regulate prices. Most Cited Cases
(Formerly 402k105, 402k4)

Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and the Emergency Price Control Act as amended by the Inflation Control Act was adopted in exercise of that power. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 901 et seq.; Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 961 et seq.

[2] War and National Emergency 402 ⚿1168

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1167 Establishment of Prices
402k1168 k. In general. Most Cited Cases
(Formerly 402k123, 402k4)

It is enough to satisfy the requirements of the Emergency Price Control Act that the Administrator finds that prices fixed will tend to achieve the objective of preventing inflation and will conform to statutory standards, and that the court in an appropriate proceeding can see that substantial basis for those findings is not wanting. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 901 et seq.

[3] Constitutional Law 92 ⚿2400

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2400 k. In general. Most Cited Cases
(Formerly 92k60, 15Ak205)

The Constitution does not require that Congress find for itself every fact upon which it desires to base legislative action, or that it make for itself detailed determinations which it has declared to be prerequisite to the application of legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.

[4] Constitutional Law 92 ⚿2340

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92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)1 In General
92k2340 k. Nature and scope in general. Most Cited Cases
(Formerly 92k50, 15Ak205)

Constitutional Law 92 ⚷2409

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2405 To Executive, in General
92k2409 k. Fact finding. Most Cited Cases
(Formerly 92k50, 92k62(4), 92k62, 15Ak205)

The essentials of the "legislative functions" are the determination of legislative policy and its formulation and promulgation as a defined and binding rule of conduct, and the essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective.

[5] Constitutional Law 92 ⚷2409

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2405 To Executive, in General
92k2409 k. Fact finding. Most Cited Cases
(Formerly 92k62(4), 15Ak205, 92k62)

The fact that determination of facts and inferences to be drawn from them in light of statutory standards and declaration of policy call for exercise of judgment, and for formulation of subsidiary administrative policy within prescribed statutory framework is not objectionable.

[6] Constitutional Law 92 ⚷2409

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2405 To Executive, in General
92k2409 k. Fact finding. Most Cited Cases
(Formerly 92k62(4), 15Ak205, 92k62)

The doctrine of separation of powers does not deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain conditions which Congress has made prerequisite to the operation of its legislative command.

[7] Administrative Law and Procedure 15A ⚷390.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak390 Validity
15Ak390.1 k. In general. Most Cited Cases
(Formerly 15Ak390, 283k103)

In passing on administrative regulations, the only concern of court is to ascertain whether will of Congress has been obeyed, and that depends, not on breadth of definition of facts or conditions which the administrative officer is to find, but upon determination whether definition sufficiently marks the field within which officer is to act so that it may be known whether he has kept within it in compliance with the legislative will.

[8] Constitutional Law 92 ⚷2340

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)1 In General
92k2340 k. Nature and scope in general. Most Cited Cases
(Formerly 92k50)

The Constitution does not deny to Congress the necessary resources of flexibility and practicality to perform its function.

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[9] Constitutional Law 92 ⚷2420

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2410 To Executive, Particular Issues and Applications
92k2420 k. Foreign policy and national defense. Most Cited Cases
(Formerly 92k62(9), 92k62)

War and National Emergency 402 ⚷1148

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1146 Constitutional and Statutory Provisions
402k1148 k. Validity. Most Cited Cases
(Formerly 402k104, 402k4)

In determining whether Emergency Price Control Act is an unconstitutional delegation of legislative power, it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.; Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 961 et seq.

[10] Constitutional Law 92 ⚷2406

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2405 To Executive, in General
92k2406 k. In general. Most Cited Cases
(Formerly 92k62(1), 15Ak202.1, 92k62)

Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers, but it is free to avoid the rigidity of such a system and to choose instead the flexibility attainable by the use of less restrictive standards.

[11] Constitutional Law 92 ⚷2420

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2410 To Executive, Particular Issues and Applications
92k2420 k. Foreign policy and national defense. Most Cited Cases
(Formerly 92k62(9), 92k62)

War and National Emergency 402 ⚷1148

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
~~402II(B)4 Price Control~~
402k1146 Constitutional and Statutory Provisions
402k1148 k. Validity. Most Cited Cases
(Formerly 402k104, 402k4)

Only if there was an absence of standards for guidance of the Price Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress had been obeyed, would court be justified in overriding congressional choice of means for effectuating declared purpose of preventing inflation. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.; Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 961 et seq.

[12] Constitutional Law 92 ⚷2420

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2410 To Executive, Particular Issues and Applications
92k2420 k. Foreign policy and na-

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tional defense. Most Cited Cases
(Formerly 92k62(9), 92k62)

Where the Emergency Price Control Act prescribed the method of achieving legislative objective of fixing maximum prices to prevent inflation and laid down standards to guide Administrator's determination of both occasion for exercise of price-fixing power and particular prices to be established, the standards were sufficiently definite to enable Congress, the courts, and the public to ascertain whether the Administrator has conformed to those standards, and the act is not an unconstitutional "delegation of legislative power". Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq., Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 961 et seq.

[13] Federal Courts 170B 1140

170B Federal Courts
170BXIII Concurrent and Conflicting Jurisdiction and Comity as Between Federal Courts
170Bk1131 Exclusive or Concurrent Jurisdiction
170Bk1140 k. War and emergency measures; renegotiation of war contracts. Most Cited Cases
(Formerly 106k518)

Where Emergency Price Control Act established the procedure for determining validity of Price Administrator's regulation, and conferred on Emergency Court of Appeals, and Supreme Court of review, exclusive jurisdiction to determine validity of Price Administrator's regulation, Federal District Court did not have power to consider validity of Price Administrator's regulation as defense to a criminal prosecution for violation of regulation. Emergency Price Control Act of 1942, ss 4(a), 203(a), 204(a—d), 205(b), 50 U.S.C.A. Appendix, ss 904(a), 923(a), 924(a—d), 925(b).

[14] War and National Emergency 402 1182

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1178 Review of Orders and Regulations
402k1182 k. Scope of review. Most Cited Cases
(Formerly 402k136, 402k4)

In considering hardship asserted for purpose of establishing invalidity of exclusive statutory procedure set up by Emergency Price Control Act for administrative and judicial review of price regulation, it was appropriate to take into consideration the purposes of the act and the circumstances attending its enactment and application as a wartime emergency measure. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 901 et seq.

[15] Administrative Law and Procedure 15A 681.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak681 Further Review
15Ak681.1 k. In general. Most Cited Cases
(Formerly 15Ak681)

Constitutional Law 92 4028

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4028 k. Judicial review. Most Cited Cases
(Formerly 92k318(7), 92k318)

The restriction of judicial review of administrative determination to a single court does not offend against "due process of law" so long as it affords to those affected a reasonable opportunity to be heard and present evidence. U.S.C.A.Const. Amend. 5.

[16] Constitutional Law 92 889

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitu-

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tional Questions; Standing
92VI(A)10 Due Process
92k888 Criminal Law
92k889 k. In general. Most Cited Cases
(Formerly 92k42.1(3), 92k42)

In prosecution for violating Price Administrator's maximum price regulation established under Emergency Price Control Act, the act could not be construed as denying "due process of law" on ground that 60-day period allowed for filing protest against regulation was insufficient, that procedure before Administrator was inadequate, that act precluded interlocutory injunction staying enforcement of price regulation before final adjudication of its validity, and that trial of validity of regulation was excluded from criminal trial for its violation, where accused had failed to seek administrative remedy and statutory review which were open to them. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A. Appendix, § 901 et seq.; U.S.C.A.Const. Amend. 5.

[17] Constitutional Law 92 ⚿1022

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1022 k. Due process. Most Cited Cases
(Formerly 92k48(4.1), 92k48(4), 92k48)

Where Emergency Price Control Act authorized any person subject to any regulation of Price Administrator to file protest and authorized any person aggrieved by ruling on protest to appeal to Emergency Court of Appeals, in absence of any proceeding before Administrator, Supreme Court could not assume that Administrator would fail in performance of any duty imposed on him, or that he would deny due process, to person subject to a regulation. Emergency Price Control Act of 1942, §§ 203(a), 204(a–d), 50 U.S.C.A.Appendix, §§ 923(a), 924(a–d); U.S.C.A.Const. Amend. 5.

[18] Constitutional Law 92 ⚿4264

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4264 k. Charges and prices in general. Most Cited Cases
(Formerly 92k298(1))

War and National Emergency 402 ⚿1183

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1178 Review of Orders and Regulations
402k1183 k. Proceedings on review. Most Cited Cases
(Formerly 402k137, 402k4)

Where Emergency Price Control Act authorized any person subject to any regulation of Price Administrator to file protest within 60 days and authorized any person aggrieved by ruling on protest to appeal to Emergency Court of Appeals, the authorized procedure was not incapable of affording protection to accused's rights required by "due process of law". Emergency Price Control Act of 1942, §§ 203(a), 204(a-d), 50 U.S.C.A.Appendix, §§ 923(a), 924(a-d); U.S.C.A.Const. Amend. 5.

[19] Constitutional Law 92 ⚿4264

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4264 k. Charges and prices in general. Most Cited Cases
(Formerly 92k298(1))

War and National Emergency 402 ⚿1177

402 War and National Emergency
402II Measures and Acts in Exercise of Federal

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Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1177 k. Objections to orders, regulations, and prices. Most Cited Cases
(Formerly 402k132, 402k4)

The 60-day period allowed by Emergency Price Control Act for protest against Price Administrator's regulation is not unreasonably short in view of urgency and exigencies of wartime price regulation. Emergency Price Control Act of 1942, § 203(a), 50 U.S.C.A.Appendix, § 923(a); Federal Register Act § 7, 44 U.S.C.A. § 307; U.S.C.A.Const. Amend. 5.

[20] Constitutional Law 92 ⚿4264

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4264 k. Charges and prices in general. Most Cited Cases
(Formerly 92k298(1))

War and National Emergency 402 ⚿1177

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1177 k. Objections to orders, regulations, and prices. Most Cited Cases
(Formerly 402k132, 402k4)

Where Emergency Price Control Act authorized any person subject to regulation of Price Administrator to file protest within 60 days, and provided for hearing before Administrator, the act could not be held invalid on ground that the administrative hearing provided for would prove inadequate. Emergency Price Control Act of 1942, § 203(a), 50 U.S.C.A.Appendix, § 923(a); U.S.C.A.Const. Amend. 5.

[21] War and National Emergency 402 ⚿1182

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1178 Review of Orders and Regulations
402k1182 k. Scope of review. Most Cited Cases
(Formerly 402k136, 402k4)

The Emergency Court of Appeals has power, under the Emergency Price Control Act, to review all questions of law, including the question whether Price Administrator's determination on protest against price regulation is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceeding. Emergency Price Control Act of 1942, § 204(a–d), 50 U.S.C.A.App. § 924.

[22] Constitutional Law 92 ⚿4264

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4264 k. Charges and prices in general. Most Cited Cases
(Formerly 92k298(1))

War and National Emergency 402 ⚿1177

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1177 k. Objections to orders, regulations, and prices. Most Cited Cases
(Formerly 402k132, 402k4)

The Emergency Price Control Act which authorizes any person subject to regulation of Price Administrator to file protest within 60 days does not deny "due process of laws" because of inconvenience to

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protestants in being required to make their protest to the Administrator in Washington, D. C. Emergency Price Control Act of 1942, § 203(a), 50 U.S.C.A.Appendix, § 923(a); U.S.C.A.Const. Amend. 5.

[23] Constitutional Law 92 ⚿4264

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4264 k. Charges and prices in general. Most Cited Cases
(Formerly 92k307, 92k298(1), 92k305)

War and National Emergency 402 ⚿1211

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1211 k. Injunction against enforcement of price controls. Most Cited Cases
(Formerly 402k163, 402k4)

The statutory prohibition of a temporary stay or injunction against the regulation of Price Administrator under Emergency Price Control Act does not deny "due process of law" in view of fact that no one is compelled to sell any commodity, and the Act provides an expeditious means of testing validity of any price regulation without necessarily incurring any of the penalties of the act. Emergency Price Control Act of 1942, §§ 4(d), 203(a), 204(c), 50 U.S.C.A.Appendix, §§ 904(d), 923(a), 924(c); Rules of United States Emergency Court of Appeals, rule 4(a). 50 U.S.C.A.Appendix following section 924; U.S.C.A.Const. Amend. 5.

[24] War and National Emergency 402 ⚿1177

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1177 k. Objections to orders, regulations, and prices. Most Cited Cases
(Formerly 402k132, 402k4)

One of the objects of Emergency Price Control Act authorizing protest against price regulation is to enable Price Administrator more fully to inform himself regarding the wisdom of a regulation through evidence of its effect on particular cases, and in the light of that information he is authorized to grant or deny a protest in whole or in part. Emergency Price Control Act of 1942, §§ 2(a), 201(d), 203(a), 50 U.S.C.A.App. §§ 902, 921, 923.

[25] Constitutional Law 92 ⚿1009

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1009 k. Economic legislation. Most Cited Cases
(Formerly 92k48(4.1), 92k48(4), 92k48)

Where Emergency Price Control Act gave Price Administrator wide scope for exercise of discretionary power to modify or suspend regulation pending its administrative and judicial review, in passing on validity of provision of the act which prohibited a temporary stay or injunction, the Supreme Court could not assume that accused, had they applied to the Administrator would not have secured all the relief to which they were entitled. Emergency Price Control Act of 1942, §§ 2(a), 203(a), 204(a), 50 U.S.C.A.Appendix, §§ 902(a), 923(a), 924(a).

[26] Constitutional Law 92 ⚿4028

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4028 k. Judicial review. Most Cited Cases
(Formerly 92k318(7), 15Ak232, 92k318)

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The denial of a right to a restraining order or interlocutory injunction to one who has failed to apply for available administrative relief, not shown to be inadequate, is not a denial of "due process of law." U.S.C.A.Const.Amend. 5.

[27] War and National Emergency 402 ⚿1148

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1146 Constitutional and Statutory Provisions
402k1148 k. Validity. Most Cited Cases
(Formerly 402k104, 402k4)

Where the alternatives are wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress may constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation. Emergency Price Control Act of 1942, § 204(c), 50 U.S.C.A.App., § 924.

[28] Injunction 212 ⚿1078

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1077 Discretionary Nature of Remedy
212k1078 k. In general. Most Cited Cases
(Formerly 212k135)

The award of an interlocutory injunction by courts of equity is not a matter of right, even though irreparable injury may otherwise result to the plaintiff.

[29] Injunction 212 ⚿1078

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1077 Discretionary Nature of Remedy
212k1078 k. In general. Most Cited Cases
(Formerly 212k135)

Injunction 212 ⚿1109

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1109 k. Balancing or weighing hardship or injury. Most Cited Cases
(Formerly 212k138.15, 212k136(3))

Even in suits in which only private interests are involved, the award of an interlocutory injunction is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.

[30] Injunction 212 ⚿1595

212 Injunction
212V Actions and Proceedings
212V(G) Determination
212k1595 k. Conditions. Most Cited Cases
(Formerly 212k153)

Equity court will avoid inconveniences and injuries to parties so far as may be, by attaching conditions to award of an interlocutory injunction.

[31] Injunction 212 ⚿1100

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1100 k. Public interest considerations. Most Cited Cases
(Formerly 212k138.12, 212k137(1))

Where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot com-

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pensate, the court may in public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.

[32] Constitutional Law 92 ⚷2374

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2374 k. Practice of law. Most Cited Cases
(Formerly 92k52)

Constitutional Law 92 ⚷4055

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)2 Governments and Political Subdivisions in General
92k4055 k. In general. Most Cited Cases
(Formerly 92k253(1), 92k253)

The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of "due process of law" or an usurpation of judicial functions. U.S.C.A.Const. Amend. 5.

[33] Administrative Law and Procedure 15A ⚷470

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak469 Hearing
15Ak470 k. Necessity and purpose in general. Most Cited Cases

Constitutional Law 92 ⚷3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and timing of deprivation; pre- or post-deprivation remedies. Most Cited Cases
(Formerly 92k318(7), 92k318)

Where justified by compelling public interest, the Legislature may authorize summary action subject to later judicial review of its validity.

[34] Federal Courts 170B ⚷1.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk1 Judicial Power of United States; Power of Congress
170Bk1.1 k. In general. Most Cited Cases
(Formerly 170Bk1, 106k258)

Under its constitutional power to define jurisdiction of inferior federal courts, Congress had power to create the Emergency Court of Appeals, give it exclusive equity jurisdiction to determine validity of price regulations prescribed by Price Administrator under Emergency Price Control Act, and to foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation. Emergency Price Control Act of 1942, s 204(d), 50 U.S.C.A.Appendix, s 924(d).

[35] Administrative Law and Procedure 15A ⚷391

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak390 Validity
15Ak391 k. Determination of validity; presumptions. Most Cited Cases

Constitutional Law 92 ⚷4026

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4026 k. Rules and regulations. Most Cited Cases
(Formerly 92k318(1), 92k318)

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There is no constitutional requirement that test of validity of administrative regulation be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process.

[36] Constitutional Law 92 2357

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2357 k. Remedies and procedure in general. Most Cited Cases
(Formerly 92k55)

There is no principle of law, or provision of Constitution, which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for adjudication of its validity, or which precludes the practice of splitting the trial for violations of administrative regulations by committing the determination of the issue of its validity to the agency which created it, and the issue of violation, to court which is given jurisdiction to punish violations.

[37] Constitutional Law 92 2355

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2354 Establishment, Organization, and Jurisdiction of Courts
92k2355 k. In general. Most Cited Cases
(Formerly 92k56, 106k518)

Criminal Law 110 113

110 Criminal Law
110IX Venue
110IX(A) Place of Bringing Prosecution
110k113 k. Offenses against United States. Most Cited Cases

War and National Emergency 402 1148

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1146 Constitutional and Statutory Provisions
402k1148 k. Validity. Most Cited Cases
(Formerly 402k133.1, 402k133, 402k4)

Where the Emergency Price Control Act created the Emergency Court of Appeals with exclusive jurisdiction to determine validity of price regulations prescribed by Price Administrator and foreclosed any further or other considerations of the validity of a regulation as a defense to prosecution for violation of regulation, the act does not contravene the Sixth Amendment or work an unconstitutional legislative interference with the judicial power. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.; Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 961 et seq.; U.S.C.A.Const. Amend. 6.

[38] Constitutional Law 92 953

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k953 k. Delay in assertion of rights; laches. Most Cited Cases
(Formerly 92k43(1))

A constitutional right may be forfeited in criminal cases as well as in civil cases by the failure to make timely assertion of the rights before a tribunal having jurisdiction to determine it.

[39] Jury 230 14(1)

230 Jury
230II Right to Trial by Jury
230k14 Particular Actions and Proceedings
230k14(1) k. In general. Most Cited Cases

In the exercise of the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation, a jury trial is not mandatory under the Seventh Amendment. Emergency Price Control Act of

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1942, § 204(a–d), 50 U.S.C.A. Appendix, § 924(a–d); U.S.C.A. Const.Amend. 7.

[40] War and National Emergency 402 ⚿1217

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1216 Offenses Against Price Controls
402k1217 k. In general. Most Cited Cases
(Formerly 402k167.1, 402k167, 402k4)

Subject to the requirements of due process, Congress could make criminal the violation of a price regulation issued by administrative official under legislative authority. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 901 et seq.

[41] Criminal Law 110 ⚿113

110 Criminal Law
110IX Venue
110IX(A) Place of Bringing Prosecution
110k113 k. Offenses against United States. Most Cited Cases
(Formerly 110k13)

Jury 230 ⚿35(1)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k35 Effect of Provision for Other Remedy
230k35(1) k. In general. Most Cited Cases

Where indictment charged violation of price regulation in district of trial and question whether accused committed the crime by willful disobedience of price regulation was properly submitted to jury, the accused were not denied the right to "trial by jury" even though they were not permitted to attack validity of the regulation, in view of other adequate opportunity to establish invalidity of the regulation. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.; U.S.C.A.Const.Amends. 6, 7.

War and National Emergency 402 ⚿1148

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1146 Constitutional and Statutory Provisions
402k1148 k. Validity. Most Cited Cases
(Formerly 402k104, 402k4)

Where the Emergency Price Control Act prescribed the method of achieving legislative inflation and laid down standards to guide Administrator's determination of both occasion for exercise of price-fixing power and particular prices to be established, the standards were sufficiently definite to enable Congress, the courts, and the public to ascertain whether the Administrator has conformed to those standards, and the act is not an unconstitutional "delegation of legislative power". Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 901 et seq., Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 961 et seq.

****664 *417** Mr. Leonard Poretsky, of Boston, Mass., for petitioners.

Mr. Joseph Kruger, of Boston, Mass., for petitioner in No. 374.

Mr. William H. Lewis, of Boston, Mass., for petitioners in 375.

Mr. Charles Fahy, Sol. Gen., of Washington, D.C., for respondent.

Messrs. Maxwell C. Katz, Otto C. Sommerich and Benjamin Busch, of New York City, amici curiae.

***418** Mr. Chief Justice STONE delivered the opinion of the Court.

The questions for our decision are: (1) Whether

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the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U.S.C.App.Supp. II, s 901 et seq., 50 U.S.C.A. Appendix, s 901 et seq., as amended by the Inflation Control Act of October 2, 1942, 56 Stat. 765, 50 U.S.C.App.Supp. II, s 961 et seq., 50 U.S.C.A. Appendix, s 961 et seq., involves an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control prices; (2) whether s 204(d) of the Act was intended to preclude consideration by a district court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation; (3) whether the exclusive statutory procedure set up by ss 203 and 204 of the Act for administrative and judicial review of regulations, with the accompanying stay provisions, provide a sufficiently adequate means of determining the validity of a price regulation to meet the demands of due process; and (4) whether, in view of this available method of review, s 204(d) of the Act, if construed to preclude consideration of the validity of the regulation as a defense to a prosecution for violating it, contravenes the Sixth Amendment, or works an unconstitutional legislative interference with the judicial power.

Petitioners in both of these cases were tried and convicted by the District Court for Massachusetts upon several counts of indictments charging violation of ss 4(a) and 205(b) of the Act by the willful sale of wholesale cuts of best at prices above the maximum prices prescribed by ss 1364.451—1364.455 of Revised Maximum Price Regulation No. 169, 7 Fed.Reg. 10381 et seq. Petitioners have not availed themselves of the procedure set up by ss 203 ****665** and 204 by which any person subject to a maximum price regulation may test its validity by protest to and hearing before the Administrator, whose determination may be ***419** reviewed on complaint to the Emergency Court of Appeals and by this Court on certiorari, see Lockerty v. Phillips, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339. When the indictments were found the 60 days period allowed by the statute for filing protests had expired.

In the course of the trial the District Court overruled or denied offers of proof, motions and requests for rulings, raising various questions as to the validity of the Act and Regulation, including those presented by the petitions for certiorari. In particular petitioners offered evidence, which the District Court excluded as irrelevant, for the purpose of showing that the Regulation did not conform to the standards prescribed by the Act and that it deprived petitioners of property without the due process of law guaranteed by the Fifth Amendment. They specifically raised the question reserved in Lockerty v. Phillips, supra, whether the validity of a regulation may be challenged in defense of a prosecution for its violation although it had not been tested by the prescribed administrative procedure and complaint to the Emergency Court of Appeals. The District Court convicted petitioners upon verdicts of guilty. The Circuit Court of Appeals for the First Circuit affirmed, 137 F.2d 850, and we granted certiorari, 320 U.S. 730, 64 S.Ct. 190.

I.

The Emergency Price Control Act provides for the establishment of the Office of Price Administration under the direction of a Price Administrator appointed by the President, and sets up a comprehensive scheme for the promulgation by the Administrator of regulations or orders fixing such maximum prices of commodities and rents as will effectuate the purposes of the Act and conform to the standards which it prescribes. The Act was adopted as a temporary wartime measure, and provides in s 1(b) for its termination on June 30, 1943, unless sooner ***420** terminated by Presidential proclamation or concurrent resolution of Congress. By the amendatory act of October 2, 1942, it was extended to June 30, 1944.

Section 1(a) declares that the Act is 'in the interest of the national defense and security and necessary to the effective prosecution of the present war', and that its purposes are:

'to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, * * * and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of

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values; * * *.'

The standards which are to guide the Administrator's exercise of his authority to fix prices, so far as now relevant, are prescribed by s 2(a) and by s 1 of the amendatory Act of October 2, 1942, and Executive Order 9250, 50 U.S.C.A.Appendix, s 901 note, promulgated under it. 7 Fed.Reg. 7871. By s 2(a) the Administrator is authorized, after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act' when, in his judgment, their prices 'have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act.'

***421** The section also directs that

'So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal ****666** or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative) * * * and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including * * *. Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941.'

By the Act of October 2, 1942, the President is directed to stabilize prices, wages and salaries 'so far as practicable' on the basis of the levels which existed on September 15, 1942, except as otherwise provided in the Act. By Title I, s 4 of Executive Order No. 9250, he has directed 'all departments and agencies of the Government' 'to stabilize the cost of living in accordance with the Act of October 2, 1942.'[FN1]

FN1 The parties have not discussed in briefs or on argument, and we do not find it necessary to consider, the precise effect of this direction to stabilize prices 'so far as practicable' at the levels obtaining on September 15, 1942, upon the standards laid down by Section 2(a) of the Act and the discretion which they confer on the Administrator.

Revised Maximum Price Regulation No. 169 was issued December 10, 1942, under authority of the Emergency Price Control Act as amended and Executive Order No. 9250. The Regulation established specific maximum ***422** prices for the sale at wholesale of specified cuts of beef and veal. As is required by s 2(a) of the Act, it was accompanied by a 'statement of the considerations involved' in prescribing it. From the preamble to the Regulation and from the Statement of Considerations accompanying it, it appears that the prices fixed for sales at wholesale were slightly in excess of those prevailing between March 16 and March 28, 1942,[FN2] and approximated those prevailing on September 15, 1942. Findings that the Regulation was necessary, that the prices which it fixed were fair and equitable, and that it otherwise conformed to the standards prescribed by the Act, appear in the Statement of Considerations.

FN2 The use of the March 16-28, 1942, base period is explained by the fact that wholesale meat prices had already been stabilized at approximately that level by Maximum Price Regulation No. 169 as originally issued on June 19, 1942, 7 Fed.Reg. 4653, and by the General Maximum Price Regulation issued April 28, 1942, 7 Fed.Reg. 3153, which forbade the sale of most commodities at prices in excess of the highest price charged by the seller during March, 1942. The Statement of Considerations accompanying the latter, 2 C.C.H. War Law Service—Price Control, 42,081, explains in some detail the considerations impelling the Administrator to the conclusion that stabilization at the levels obtaining in March, 1942 would be fair and equitable and would effectuate the purposes of the Act; it considers the price levels prevailing during October 1-15, 1941, and gives reasons why price stabilization at those levels would not be practicable. The Statement of Considerations accompanying Maximum Price Regulation No. 169 as originally issued, 2 C.C.H War Law Ser-

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vice—Price Control, 43,369A, refers to this discussion in explanation of the continuance of the use of March, 1942, levels as a base.

[1] That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power, are not questioned here, and need not now be considered save as they have a bearing on the procedural ***423** features of the Act later to be considered which are challenged on constitutional grounds.

[2] Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator's permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent war-time inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed to give ****667** due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in s 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in s 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.

The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established. Compare Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; ***424**Hampton Jr. & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624; Currin v. Wallace, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441; Mulford v. Smith, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092; United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; Opp Cotton Mills v. Administrator, 312 U.S. 126, 657, 61 S.Ct. 524, 85 L.Ed. 624; National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344; Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774.

The Act is unlike the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, considered in Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, which proclaimed in the broadest terms its purpose 'to rehabilitate industry and to conserve natural resources.' It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform. The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated. Compare Sunshine Anthracite Coal Co. v. Adkins, supra, 310 U.S. at page 309, 60 S.Ct. at page 915, 84 L.Ed. 1263.

[3][4][5] The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ***425** ascertained from relevant data by a designated administrative agency, it

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directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. See Opp Cotton Mills v. Administrator, supra, 312 U.S. at pages 145, 146, 61 S.Ct. at pages 532, 533, 85 L.Ed. 624, and cases cited.

[6][7] Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say ****668** whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

[8][9][10][11] As we have said: 'The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality * * * to perform its function.' Currin v. Wallace, supra, 306 U.S. at page 15, 59 S.Ct. at page 387, 83 L.Ed. 441. Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date. See Union Bridge Co. v. United States, 204 U.S. 364, 386, 27 S.Ct. 367, 374, 51 L.Ed. 523. Congress is not confined ***426** to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Compare McCulloch v. Maryland, 4 Wheat. 316, 413 et seq., 4 L.Ed. 579. It is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. Cf. Hampton v. United States, supra, 276 U.S. pages 408, 409, 48 S.Ct. at pages 351, 352, 72 L.Ed. 624. Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

[12] The standards prescribed by the present Act, with the aid of the 'statement of the considerations' required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Compare Kiyoshi Hirabayashi v. United States, supra, 320 U.S. at page 104, 63 S.Ct. at page 1387, 87 L.Ed. 1774. Hence we are unable to find in them an unauthorized delegation of legislative power. The authority to fix prices only when prices have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation is no broader than the authority to fix maximum prices when deemed necessary to protect consumers against unreasonably high prices, sustained in Sunshine Anthracite Coal Co. v. Adkins, supra, or the authority to take possession of and operate telegraph lines whenever deemed necessary for the national security or defense, upheld in Dakota Cent. Tel. Co. v. State of South Dakota, 250 U.S. 163, 39 S.Ct. 507, 63 L.Ed. 910, 4 A.L.R. 1623; or the authority to suspend tariff provisions upon findings that the duties imposed by a foreign state are 'reciprocally unequal and unreasonable', held valid in Field v. Clark, supra (143 U.S. 649, 12 S.Ct. 504, 36 L.Ed. 294).

***427** The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period, confer no greater reach for administrative determination than the power to fix just and reasonable rates, see Sunshine Anthracite Coal Co. v. Adkins, supra, and cases cited; or the power to approve consolidations in the 'public interest', sustained in New York Cent. Securities Corp. v. United States, 287 U.S. 12, 24, 25, 53 S.Ct. 45, 48, 77 L.Ed. 138 (Compare United States v. Lowden, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208); or the power to regulate radio stations engaged in chain broadcasting 'as public interest, convenience or necessity requires', upheld in National Broadcasting Co. v. United States,

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supra, 319 U.S. at page 225, 63 S.Ct. at pages 1013, 1014, 87 L.Ed. 1344; or the power to prohibit 'unfair methods of competition' not defined or forbidden by the common law, Federal Trade Commission v. R. F. Keppel & Bro., 291 U.S. 304, 54 S.Ct. 423, 426, 78 L.Ed. 814; or the direction that in allotting marketing quotas among states and producers due consideration**669 be given to a variety of economic factors, sustained in Mulford v. Smith, supra, 307 U.S. at pages 48, 49, 59 S.Ct. at page 652, 653, 83 L.Ed. 1092; or the similar direction that in adjusting tariffs to meet differences in costs of production the President 'take into consideration' 'in so far as he finds it practicable' a variety of economic matters, sustained in Hampton Jr. & Co. v. United States, supra (276 U.S. 394, 48 S.Ct. 349, 72 L.Ed. 624); or the similar authority, in making classifications within an industry, to consider various named and unnamed 'relevant factors' and determine the respective weights attributable to each, held valid in Opp Cotton Mills v. Administrator, supra.

II.

We consider next the question whether the procedure which Congress has established for determining the validity of the Administrator's regulations is exclusive so as to preclude the defense of invalidity of the Regulation in this criminal prosecution for its violation under ss 4(a) and *428 205(b). Section 203(a) sets up a procedure by which 'any person subject to any provision of (a) regulation (or) order' may within 60 days after it is issued 'file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.' He may similarly protest later, on grounds arising after the expiration of the original sixty days. The subsection directs that within a reasonable time and in no event more than thirty days after the filing of a protest or ninety days after the issue of the regulation protested, whichever is later, 'the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.'

Section 204(c) creates a court to be known as the Emergency Court of Appeals consisting of United States district or circuit judges designated by the Chief Justice of the United States. Section 204(a) authorizes any person aggrieved by the denial or partial denial of his protest to file a complaint with the Emergency Court of Appeals within thirty days after the denial, praying that the regulation, order or price schedule protested be enjoined or set aside in whole or in part. The court may issue such an injunction only if it finds that the regulation, order or price schedule 'is not in accordance with law, or is arbitrary or capricious.' Subsection (b). It is denied power to issue a temporary restraining order or interlocutory decree. Subsection (c). The effectiveness of any permanent injunction it may issue is postponed for thirty days, and if review by this Court is sought upon writ of certiorari, as authorized by subsection (d), its effectiveness is further *429 postponed until final disposition of the case by this Court by denial of certiorari or decision upon the merits. Subsection (b).

Section 204(d) declares:

'The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, * * * of any price schedule effective in accordance with the provisions of section 206, * * * and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.'

In Lockerty v. Phillips, supra, we held that these provisions conferred on the Emergency Court of Appeals, subject to review by this Court, exclusive equity jurisdiction to restrain enforcement of price regulations of the Administrator and that they withdrew such jurisdiction from all other courts. This was accomplished by the exercise of the constitutional power of Congress to prescribe the jurisdiction of **670 inferior federal courts, and the jurisdiction of all state

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courts to determine federal questions, and to vest that jurisdiction in a single court, the Emergency Court of Appeals.

[13] The considerations which led us to that conclusion with respect to the equity jurisdiction of the district court, lead to the like conclusion as to its power to consider the validity of a price regulation as a defense to a criminal prosecution for its violation. The provisions of s 204(d), conferring*430 upon the Emergency Court of Appeals and this Court 'exclusive jurisdiction to determine the validity of any regulation or order', coupled with the provision that 'no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation', are broad enough in terms to deprive the district court of power to consider the validity of the Administrator's regulation or order as a defense to a criminal prosecution for its violation.

That such was the intention of Congress appears from the report of the Senate Committee on Banking and Currency, recommending the adoption of the bill which contained the provisions of s 204(d). After pointing out that the bill provided for exclusive jurisdiction of the Emergency Court and the Supreme Court to determine the validity of regulations or orders issued under section 2, the Committee said: 'The courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself.' Sen.Rep. 931, 77th Cong., 2d Sess., p. 25. That the Committee, in making this statement, intended to distinguish between the validity of the statute and that of a regulation, and to permit consideration only of the former in defense to a criminal prosecution, is further borne out by the fact that the bill as introduced in the House had provided that the Emergency Court of Appeals should have exclusive jurisdiction to determine the validity of the provisions of the Act authorizing price regulations, as well as of the regulations themselves. H.R. 5479, 77th Cong., 1st Sess., printed in Hearings before Committee on Banking and Currency, House of Representatives, 77th Cong., 2d Sess., on H.R. 5479, pp. 4, 7, 8.

Congress, in thus authorizing consideration by the district court of the validity of the Act alone, gave clear indication that the validity of the Administrator's regulations*431 or orders should not be subject to attack in criminal prosecutions for their violation, at least before their invalidity had been adjudicated by recourse to the protest procedure prescribed by the statute. Such we conclude is the correct construction of the Act.

III.

We come to the question whether the provisions of the Act, so construed as to deprive petitioners of opportunity to attack the Regulation in a prosecution for its violation, deprive them of the due process of law guaranteed by the Fifth Amendment. At the trial, petitioners offered to prove that the Regulation would compel them to sell beef at such prices as would render it impossible for wholesalers such as they are, no matter how efficient, to conduct their business other than at a loss. Section 4(d) declares that 'Nothing in this Act shall be construed to require any person to sell any commodity * * *.' Petitioners were therefore not required by the Act, nor so far as appears by any other rule of law, to continue selling meat at wholesale if they could not do so without loss. But they argue that to impose on them the choice either of refraining from sales of beef at wholesale or of running the risk of numerous criminal prosecutions and suits for treble damages authorized by Sec. 205(e), without the benefit of any temporary injunction or stay pending determination by the prescribed statutory procedure of the Regulation's validity, is so harsh in its application to them as to deny them due process of law. In addition they urge the inadequacy of the administrative procedure and particularly of the sixty days period afforded by the Act within which to prepare and lodge a protest with the Administrator.

[14] In considering these asserted hardships, it is appropriate to take into account the purposes of the Act and the circumstances attending its enactment and application as a war-time emergency measure. The Act was adopted January*432 30, 1942, **671 shortly after our declaration of war against Germany and Japan, when it was common knowledge, as is emphasized by the legislative history of the Act that there was grave danger of war-time inflation and the disorganization of our economy from excessive price rises. Congress was under pressing necessity of meeting this danger by a practicable and expeditious means which would operate with such promptness, regularity and consistency as would minimize the sudden development of commodity price disparities, accentuated by commodity shortages occasioned by the war.

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Inflation is accelerated and its consequences aggravated by price disparities not based on geographic or other relevant differentials. The harm resulting from delayed or unequal price control is beyond repair. And one of the problems involved in the prevention of inflation by establishment of a nation-wide system of price control is the disorganization which would result if enforcement of price orders were delayed or sporadic or were unequal or conflicting in different parts of the country. These evils might well arise if regulations with respect to which there was full opportunity for administrative revision were to be made ineffective by injunction or stay of their enforcement in advance of such revision or of final determination of their validity.

Congress, in enacting the Emergency Price Control Act, was familiar with the consistent history of delay in utility rate cases. It had in mind the dangers to price control as a preventive of inflation if the validity and effectiveness of prescribed maximum prices were to be subject to the exigencies and delays of litigation originating in eighty-five district courts and continued by separate appeals through eleven separate courts of appeals to this Court, to say nothing of litigation conducted in state courts. See Sen. Rep. No. 931, 77th Cong., 2d Sess., pp. 23-5.

***433** [15] Congress sought to avoid or minimize these difficulties by the establishment of a single procedure for review of the Administrator's regulations, beginning with an appeal to the Administrator's specialized knowledge and experience gained in the administration of the Act, and affording to him an opportunity to modify the regulations and orders complained of before resort to judicial determination of their validity. The organization of such an exclusive procedure especially adapted to the exigencies and requirements of a nation-wide scheme of price regulation is, as we have seen, within the constitutional power of Congress to create inferior federal courts and prescribe their jurisdiction. The considerations which led to its creation are similar to, and certainly no weaker than, those which led this Court in Texas & P.R. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075, and the long line of cases following it, to require resort to the Interstate Commerce Commission and the special statutory method provided for review of its decisions in certain types of cases involving railway rates. As with the present statute, it was thought desirable to preface all judicial action by resort to expert administrative knowledge and experience, and thus minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation. In addition the present Act seeks further to avoid that confusion by restricting judicial review of the administrative determination to a single court. Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process. Bradley v. City of Richmond, 227 U.S. 477, 33 S.Ct. 318, 57 L.Ed. 603; First Nat. Bank v. Board of Com'rs Weld County, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784; Anniston Mfg. Co. v. Davis, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed. 1143.

[16] Petitioners assert that they have been denied that opportunity because the sixty days period allowed for filing a protest is insufficient for that purpose; because the procedure***434** before the Administrator is inadequate to ensure due process; because the statute precludes any interlocutory injunction staying enforcement of a price regulation before final adjudication of its validity; because the trial of the issue of validity of a regulation is excluded from the criminal trial for its violation; and because in any case there is nothing in the statute to prevent their conviction for violation of a regulation before they could secure a ruling on its validity. A sufficient answer to all these contentions is that petitioners have ****672** failed to seek the administrative remedy and the statutory review which were open to them and that they have not shown that had they done so any of the consequences which they apprehend would have ensued to any extent whatever, or if they should, that the statute withholds judicial remedies adequate to protect petitioners' rights.

[17][18] For the purposes of this case, in passing upon the sufficiency of the procedure on protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. Action taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence we have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review, and obviously, we cannot pass upon action which might have been taken

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on a protest by petitioners, who have never made a protest or in any way sought the remedy Congress has provided. In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by 'loading the record against them' or denying such hearing as the Constitution prescribes. Plymouth Coal Co. v. Commonwealth of Pennsylvania, 232 U.S. 531, 545, 34 S.Ct. 359, 363, 58 L.Ed. 713; ***435**Hall v. Geiger-Jones Co., 242 U.S. 539, 554, 37 S.Ct. 217, 222, 61 L.Ed. 480, L.R.A. 1917F, 514, Ann.Cas.1917C, 643; State of Minnesota v. Probate Court, 309 U.S. 270, 277, 60 S.Ct. 523, 527, 84 L.Ed. 744, 126 A.L.R. 530, and cases cited. Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed. Natural Gas Co. v. Slattery, 302 U.S. 300, 309, 58 S.Ct. 199, 203, 82 L.Ed. 276; Anniston Mfg. Co. v. Davis, supra, 301 U.S. at pages 356, 357, 57 S.Ct. at page 825, 81 L.Ed. 1143; State of Minnesota v. Probate Court, supra, 309 U.S. at pages 275, 277, 60 S.Ct. at pages 526, 527, 84 L.Ed. 744, 126 A.L.R. 530. But upon a full examination of the provisions of the statute it is evident that the authorized procedure is not incapable of affording the protection to petitioners' rights required by due process.

The regulations, which are given the force of law, are published in the Federal Register, and constructive notice of their contents is thus given all persons affected by them. 44 U.S.C. s 307, 44 U.S.C.A. s 307. The penal provisions of the statute are applicable only to violations of a regulation which are willful. Petitioners have not contended that they were unaware of the Regulation and the jury found that they knowingly violated it within eight days after its issue.

[19] The sixty days period allowed for protest of the Administrator's regulations cannot be said to be unreasonably short in view of the urgency and exigencies of wartime price regulation.[FN3] Here the Administrator is required to act initially upon the protest within thirty days after it is filed or ninety days after promulgation of the challenged regulation, by allowing the protest wholly or in part, or denying it or setting it down for hearing. (Section 203(a). ***436** But we cannot say that the Administrator would not have allowed ample time for the presentation of evidence.[FN4] And under s 204(a) petitioners could have applied**673 to the Emergency Court of Appeals for leave to introduce any additional evidence 'which could not reasonably' have been offered to the Administrator or included in the proceedings before him, and could have applied to the Administrator to modify or change his decision in the light of that evidence.

FN3 For numerous instances in which comparable or shorter periods for resort to administrative relief as a prerequisite to proceeding in the courts have been held to be sufficient, see, e.g., Bellingham Bay, etc., Co. v. City of New Whatcom, 172 U.S. 314, 19 S.Ct. 205, 43 L.Ed. 460, (10 days); Campbell v. City of Olney, 262 U.S. 352, 43 S.Ct. 559, 67 L.Ed. 1021 (20 days); Wick v. Chelan Electric Co., 280 U.S. 108, 50 S.Ct. 41, 74 L.Ed. 212 (18 days); Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (60 days); Opp Cotton Mills v. Administrator, 312 U.S. 126, 657, 61 S.Ct. 524, 87 L.Ed. 624 (40 days).

FN4 Revised Procedural Regulation No. 1, 7 Fed.Reg. 8961, authorized by s 203(a), contain detailed provisions for extending the time for presentation of evidence when appropriate. ss 1300.30(c), 1300.33, 1300.35(a)(3).

[20] Nor can we say that the administrative hearing provided by the statute will prove inadequate. We hold in Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641, that in the circumstances to which this Act was intended to apply, the failure to afford a hearing prior to the issue of a price regulation does not offend against due process. While the hearing on a protest may be restricted to the presentation of documentary evidence, affidavits and briefs, the Act contemplates, and the Administrator's regulations provide for, a full oral hearing upon a showing that written evidence and briefs 'will not permit the fair and expeditious disposition of the protest'. s 203(a); Revised Procedural Regulation No. 1, s 1300.39, 7 Fed.Reg. 8961. In advance of application to the Administrator for such a hearing we cannot well say whether its denial in any particular case would be a denial of due process. The Act requires the Administrator to inform the protestant

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of the grounds for his decision denying a protest, including all matters of which he has taken official notice. s 203(a). In view of the provisions for the introduction of further evidence both before and after the Administrator has announced his determination, we cannot say that if petitioners had filed a protest adequate*437 opportunity would not have been afforded them to meet any arguments and evidence put forward by the Administrator, or that if such opportunity had been denied the denial would not have been corrected by the Emergency Court.

[21][22] The Emergency Court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceedings. No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, and secure its full judicial review by the Emergency Court of Appeals and this Court. Compare White v. Johnson, 282 U.S. 367, 374, 51 S.Ct. 115, 118, 75 L.Ed. 388.[FN5]

FN5 Nor is the inconvenience to petitioners of being required to make their objection to the Administrator in Washington, D.C., sufficient to outweigh the public interest, in the circumstances of this case, in having a centralized, unitary scheme of review of the regulations. The protest procedure is designed to be conducted primarily upon documentary evidence. Sec. 203(a); Revised Procedural Regulation No. 1, ss 1300.29—1300.31, 1300.39. There would thus be no purpose in the personal presence of the protestant unless the protest were set for hearing by the Administrator, and in such a case the hearing may be held at any place designated by the Administrator and before a person designated by him. Id., ss 1300.39, 1300.42. The Emergency Court of Appeals is likewise authorized to 'hold sessions at such places as it may specify' and does in fact hold sessions throughout the country as needed. s 204(c); Rule 4(a) of its Rules of Procedure, 50 U.S.C.App. Supp. II following s 924, 50 U.S.C.A. Appendix following section 924.

[23] In the circumstances of this case we find no denial of due process in the statutory prohibition of a temporary stay or injunction. The present statute is not open to the objection that petitioners are compelled to serve the public as in the case of a public utility, or that the only method by which they can test the validity of the regulations*438 promulgated under it is by violating the statute and thus subjecting themselves to the possible imposition of severe and cumulative penalties. See Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A.,N.S., 932, 14 Ann.Cas. 764; Wilcox v. Consolidated Gas Co., 212 U.S. 19, 53, 54, 29 S.Ct. 192, 200, 53 L.Ed. 382, 48 L.R.A.,N.S., 1134, 15 Ann.Cas. 1034; Missouri Pac. R. Co. v. Tucker, 230 U.S. 340, 33 S.Ct. 961, 57 L.Ed. 1507; Oklahoma Operating Co. v. Love, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596. For as we have seen, s 4(d) specifically provides that **674 no one shall be compelled to sell any commodity, and the statute itself provides an expeditious means of testing the validity of any price regulation, without necessarily incurring any of the penalties of the Act. Compare Wadley Southern R. Co. v. State of Georgia, 235 U.S. 651, 667—669, 35 S.Ct. 214, 220, 221, 59 L.Ed. 405.

The petitioners are not confronted with the choice of abandoning their businesses or subjecting themselves to the penalties of the Act before they have sought and secured a determination of the Regulation's validity. It is true that if the Administrator denies a protest no stay or injunction may become effective before the final decision of the Emergency Court or of this Court if review here is sought. It is also true that the process of reaching a final decision may be time-consuming. But while courts have no power to suspend or ameliorate the operation of a regulation during the pendency of proceedings to determine its validity, we cannot say that the Administrator has no such power or assume that he would not exercise it in an appropriate case.

[24] The Administrator, who is the author of the regulations, is given wide discretion as to the time and conditions of their issue and continued effect. Section 2(a) authorizes him to issue such regulations as will effectuate the purposes of the Act, whenever, in his judgment, such action is necessary. Section 201(d) similarly authorizes him 'from time to time' to issue regulations when necessary and proper to effectuate the purposes of the Act. One of the objects of the protest provisions is to enable the Administrator more

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fully to inform himself as to the wisdom *439 of a regulation through evidence of its effect on particular cases. In the light of that information he is authorized by s 203(a) to grant or deny a protest 'in whole or in part.' And s 204(a) authorizes the Administrator to modify or rescind a regulation 'at any time.'[FN6] Moreover s 2(a) further authorizes the issue, in the Administrator's judgment, of temporary regulations, effective for sixty days, 'establishing as a maximum * * * the price * * * prevailing with respect to any commodity * * * within five days prior to the date of issuance of such temporary regulations. * * *'

FN6 Revised Procedural Regulation No. 1 authorizes the filing at any time of a petition to amend a regulation, (s 1300.20) and authorizes the Administrator to treat a protest as a petition for amendment as well (s 1300.49).

[25][26] Under these sections the Administrator may not only alter or set aside the regulation, but he has wide scope for the exercise of his discretionary power to modify or suspend a regulation pending its administrative and judicial review. Hence we cannot assume that petitioners, had they applied to the Administrator, would not have secured all the relief to which they were entitled. The denial of a right to a restraining order or interlocutory injunction to one who has failed to apply for available administrative relief, not shown to be inadequate, is not a denial of due process. Natural Gas Co. v. Slattery, supra, 302 U.S. at page 310, 58 S.Ct. at page 204, 82 L.Ed. 276.

[27] In any event, we are unable to say that the denial of interlocutory relief pending a judicial determination of the validity of the regulation would in the special circumstances of this case, involve a denial of constitutional right. If the alternatives, as Congress could have concluded, were war-time inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation. Compare *440 Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568, in which we held that the Fourteenth Amendment did not preclude a state from compelling the uncompensated destruction of private property in order to preserve important public interests from destruction.

[28][29][30] The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. Compare **675Scripps-Howard Radio, Inc., v. Federal Communications Comm., 316 U.S. 4, 10, 62 S.Ct. 875, 880, 86 L.Ed. 1229, and cases cited. Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. Meccano, Ltd., v. John Wanamaker, 253 U.S. 136, 141, 40 S.Ct. 463, 465, 64 L.Ed. 822; Rice & Adams Corp. v. Lathrop, 278 U.S. 509, 514, 49 S.Ct. 220, 222, 73 L.Ed. 480. And it will avoid such inconvenience and injury so far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon payment of any damage caused by the injunction if the plaintiff's contentions are not sustained. Prendergast v. New York Tel. Co., 262 U.S. 43, 51, 43 S.Ct. 466, 469, 67 L.Ed. 853; Ohio Oil Co. v. Conway, 279 U.S. 813, 815, 49 S.Ct. 256, 257, 73 L.Ed. 972.

[31] But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.[FN7] *441 Virginian R. Co. v. United States, 272 U.S. 658, 672, 673, 47 S.Ct. 222, 228, 71 L.Ed. 463; Petroleum Exploration v. Public Service Commission, 304 U.S. 209, 222, 223, 58 S.Ct. 834, 841, 842, 82 L.Ed. 1294; Dryfoos v. Edwards, D.C., 284 F. 596, 603, affirmed 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194; see Beaumont, S.L. & W.R. Co. v. United States, 282 U.S. 74, 91, 92, 51 S.Ct. 1, 7, 8, 75 L.Ed. 221. Compare State of Wisconsin v. State of Illinois, 278 U.S. 367, 418—421, 49 S.Ct. 163, 171—173, 73 L.Ed. 426. This is but another application of the principle, declared in Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789, that 'Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'

FN7 Congress has sought to minimize the burden so far as would be consistent with the

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public interest by providing expeditious procedure for the review, on protest and complaint, of a regulation's validity. Thus a protest must be filed within 60 days (s 203(a); the Administrator must take initial action on it within a reasonable time but not more than 30 days after its filing or 90 days after the issuance of the regulation (s 203(a); the complaint to the Emergency Court must be filed within 30 days (s 204(a); that Court is directed to 'prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction' (s 204(c); in order to promote that end as many judges as are needed may be designated to serve on it, it may sit in divisions, and may hold sessions at such places as it may specify (s 204(c), and in fact it does sit in various parts of the country as the convenience of the parties may require; under its rules it is 'always * * * open for the transaction of business' (Rule 4(a), 50 U.S.C.App., Supp. II following s 924, 50 U.S.C.A. Appendix following section 924); petitions for certiorari to review its decisions must be filed within 30 days (s 204(d); and this Court is directed to advance on the docket and expedite the decision of all cases from the Emergency Court (s 204(d). We cannot assume that the Administrator, who has a vital interest in the prompt and effective enforcement of the Act, would unreasonably delay action upon a protest; if he should, judicial remedies are not lacking, see Safeway Stores v. Brown, Em.App., 138 F.2d 278, 280.

[32] Here, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war Congress has seen fit to postpone injunctions restraining the operations of price regulations until their lawfulness could be ascertained by an appropriate and expeditious procedure. In so doing it has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest. What the courts ***442** could do Congress can do as the guardian of the public interest of the nation in time of war. The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions.****676** Cf. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 64 S.Ct. 384.[FN8]

FN8 For other instances in which Congress has regulated and restricted the power of the federal courts to grant injunctions, see: 1. Section 16 of the Judiciary Act of 1789, 1 Stat. 82, Judicial Code s 267, 28 U.S.C. s 384, 28 U.S.C.A. s 384, denying relief in equity where there is adequate remedy at law. 2. Section 5 of the Act of March 2, 1793, 1 Stat. 334, Judicial Code, s 265, 28 U.S.C. s 379, 28 U.S.C.A. s 379, prohibiting injunction of state judicial proceedings. 3. Act of March 2, 1867, 14 Stat. 475, 26 U.S.C. s 3653, 26 U.S.C.A. Int.Rev.Code, s 3653, prohibiting suits to enjoin collection or enforcement of federal taxes. 4. The Johnson Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. s 41(1), 28 U.S.C.A. s 41(1), restricting jurisdiction to enjoin orders of state bodies fixing utility rates. 5. Act of Aug. 21, 1937, 50 Stat. 738, 28 U.S.C. s 41(1), 28 U.S.C.A. s 41(1), similarly restricting jurisdiction to enjoin collection or enforcement of state taxes. 6. Section 17 of the Act of June 18, 1910, 36 Stat. 557 and s 3 of the Act of Aug. 24, 1937, 50 Stat. 752, 28 U.S.C. ss 380 and 380a, 28 U.S.C.A. ss 380, 380a, requiring the convening of a three-judge court for the granting of temporary injunctions in certain cases and allowing a temporary restraining order by one judge only to prevent irreparable injury. 7. The Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. ss 101—115, 29 U.S.C.A. ss 101—115, regulating the issue of injunctions in labor disputes and prohibiting their issue 'contrary to the public policy' declared in the Act. In several cases such statutes were held to be merely declaratory of a previously obtaining rule for the guidance of judicial discretion. See e.g. In re State Railroad Tax Cases, 92 U.S. 575, 613, 23 L.Ed. 663 (Act of March 2, 1867); Matthews v. Rodgers, 284 U.S. 521, 525, 52 S.Ct. 217, 219, 76 L.Ed. 447 (Judicial Code s 267); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297, 63 S.Ct. 1070, 1072, 87 L.Ed. 1407 (Act of Aug. 24, 1937).

[33] Our decisions leave no doubt that when justified by compelling public interest the legislature may

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authorize summary action subject to later judicial review of its validity. It may insist on the immediate collection of taxes. Phillips v. Commissioner, 283 U.S. 589, 595—597, 51 S.Ct. 608, 611, 75 L.Ed. 1289, and cases cited. It may take possession of property presumptively abandoned by its owner, prior to determination of *443 its actual abandonment, Anderson Nat. Bank v. Luckett, 321 U.S. 233, 64 S.Ct. 599. For the protection of public health it may order the summary destruction of property without prior notice or hearing. North American Cold Storage Co. v. City of Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195, 15 Ann.Cas. 276; Adams v. City of Milwaukee, 228 U.S. 572, 584, 33 S.Ct. 610, 613, 57 L.Ed. 971. It may summarily requisition property immediately needed for the prosecution of the war. Compare United States v. Pfitsch, 256 U.S. 547, 41 S.Ct. 569, 65 L.Ed. 1084. As a measure of public protection the property of alien enemies may be seized, and property believed to be owned by enemies taken without prior determination of its true ownership. Central Union Trust Co. v. Garvan, 254 U.S. 554, 556, 41 S.Ct. 214, 65 L.Ed. 403; Stoehr v. Wallace, 255 U.S. 239, 245, 41 S.Ct. 293, 296, 65 L.Ed. 604. Similarly public necessity in time of war may justify allowing tenants to remain in possession against the will of the landlord, Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877. Even the personal liberty of the citizen may be temporarily restrained as a measure of public safety. Kiyoshi Hirabayashi v. United States, supra; cf. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765. Measured by these standards we find no denial of due process under the circumstances in which this Act was adopted and must be applied, in its denial of any judicial stay pending determination of a regulation's validity.

IV.

[34] As we have seen Congress, through its power to define the jurisdiction of inferior federal courts and to create such courts for the exercise of the judicial power, could, subject to other constitutional limitations, create the Emergency Court of Appeals, give to it exclusive equity jurisdiction to determine the validity of price regulations prescribed by the Administrator, and foreclose any further or other consideration**677 of the validity of a regulation as a defense to a prosecution for its violation.

*444 [35][36][37] Unlike most penal statutes and regulations whose validity can be determined only by running the risk of violation, see Douglas v. City of Jeanette, 319 U.S. 157, 163, 63 S.Ct. 877, 881, 882, 87 L.Ed. 1324, the present statute provides a mode of testing the validity of a regulation by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. This was recognized in Bradley v. City of Richmond, supra, and in Wadley Southern R. Co. v. State of Georgia, supra, 235 U.S. at pages 667, 669, 35 S.Ct. at pages 220, 221, 59 L.Ed. 405, and has never been doubted by this Court. And we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

[38] No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. State of Vermont, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed. 450; Barbour v. State of Georgia, 249 U.S. 454, 460, 39 S.Ct. 316, 317, 63 L.Ed. 704; Whitney v. People of State of California, 274 U.S. 357, 360, 362, 380, 47 S.Ct. 641, 642, 643, 650, 71 L.Ed. 1095. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U.S. 86, 53 S.Ct. 32, 77 L.Ed. 180, 86 A.L.R. 174. While this Court in its *445 discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis J. concurring in Whitney v. People of State of California, supra, 274 U.S. at page 380, 47 S.Ct. at page 650, 71 L.Ed. 1095, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Com-

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pare Woolsey v. Best, 299 U.S. 1, 57 S.Ct. 2, 81 L.Ed. 3, with Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717.

For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U.S.C. ss 6(7), 10(1), 49 U.S.C.A. ss 6(7), 10(1); Armour Packing Co. v. United States, 209 U.S. 56, 81, 28 S.Ct. 428, 435, 52 L.Ed. 681; United States v. Adams Express Co., 229 U.S. 381, 388, 33 S.Ct. 878, 57 L.Ed. 1237. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. United States v. Vacuum Oil Co., D.C., 158 F. 536, 539—541; Lehigh Valley R. Co. v. United States, 3 Cir., 188 F. 879, 887, 888. See also United States v. Standard Oil Co., D.C., 155 F. 305, 309, 310, reversed on other grounds, 7 Cir., 164 F. 376. Compare Pennsylvania R. Co. v. International Coal Min. Co., 230 U.S. 184, 196, 197, 33 S.Ct. 893, 895, 896, 57 L.Ed. 1446; Arizona Grocery Co. v. Atchison, T. & S.F.R. Co., 284 U.S. 370, 384, 52 S.Ct. 183, 184, 76 L.Ed. 348. Similarly it has been held that one who has failed to avail himself of the statutory method of review of orders of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, or of the Federal Radio Commission under the Radio Act of 1927, cannot enjoin threatened prosecutions for violation of those orders, United States v. Corrick, 298 U.S. 435, 440, 56 S.Ct. 829, 831, 80 L.Ed. 1263; ***446 **678**White v. Johnson, supra, 282 U.S. at pages 373, 374, 51 S.Ct. at page 118, 75 L.Ed. 388. See also Natural Gas Co. v. Slattery, supra, 302 U.S. at pages 309, 310, 58 S.Ct. at pages 203, 204, 82 L.Ed. 276.[FN9]

> FN9 Compare the provisions of the Packers and Stockyards Act, 7 U.S.C. ss 194 and 195, 7 U.S.C.A. ss 194, 195, and of the Commodity Exchange Act, 7 U.S.C. s 13a, 7 U.S.C.A. s 13a, imposing criminal sanctions, and those of the Federal Trade Commission Act as amended, 15 U.S.C. ss 45(g)-(l), 15 U.S.C.A. s 45(g—l), imposing heavy penalties, for violation of an administrative order which has become final by its affirmance upon the exclusive statutory method of review provided, or by the expiration of the time allowed for review without resort to the statutory procedure.

The analogy of such a procedure to the present, by which violation of a price regulation is made penal, unless the offender has established its unlawfulness by an independent statutory proceeding, is complete and obvious. As we have pointed out such a requirement is objectionable only if by statutory command or in operation it will deny, to those charged with violations, an adequate opportunity to be heard on the question of validity. And, as we have seen, petitioners fail to show that such is the necessary effect of the present statute, or that if so applied as to deprive them of an adequate opportunity to establish the invalidity of a regulation there would not be adequate means of securing appropriate judicial relief in the course either of the statutory proceeding or of the criminal trial. During the present term of court we have held that one charged with criminal violations of an order of his draft board may not challenge the validity of the order if he has failed to pursue to completion the exclusive administrative remedies provided by the Selective Training and Service Act of 1940. Falbo v. United States, 320 U.S. 549, 64 S.Ct. 346; and see Bowles v. United States, 319 U.S. 33, 63 S.Ct. 912, 87 L.Ed. 1194. We perceive no tenable ground for distinguishing that case from this.

We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation ***447** may defend on the ground that the regulation is unconstitutional on its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid. There is no contention that the present regulation is void on its face, petitioners have taken no step to challenge its validity by the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so. Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be re-

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viewable on appeal on constitutional grounds. It will be time enough to decide questions not involved in this case when they are brought to us for decision, as they may be, whether they arise in the Emergency Court of Appeals or in the district court upon a criminal trial.

[39][40][41] In the exercise of the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation, a jury trial is not mandatory under the Seventh Amendment. Cf. Block v. Hirsh, supra, 256 U.S. at page 158, 41 S.Ct. at page 460, 65 L.Ed. 865, 16 A.L.R. 165. Nor has there been any denial in the present criminal proceeding of the right, guaranteed by the Sixth Amendment, to a trial by a jury of the state and district where the crime was committed. Subject to the requirements of due process, which are here satisfied, Congress could make criminal the violation of a price regulation. The indictment charged a violation of the regulation in the district of trial, and the question whether petitioners had committed the crime thus charged in the indictment and defined by Congress, namely, whether they had violated the statute by willful disobedience of a price regulation promulgated by the ***448** Administrator, was properly submitted to the jury. Cf. Falbo v. United States, supra.

Affirmed.

****679** Mr. Justice ROBERTS.

I dissent. I find it unnecessary to discuss certain of the questions treated in the opinion of the court. I am of opinion that the Act unconstitutionally delegates legislative power to the Administrator. As I read the opinion of the court it holds the Act valid on the ground that sufficiently precise standards are prescribed to confine the Administrator's regulations and orders within fixed limits, and that judicial review is provided effectively to prohibit his transgression of those limits. I believe that analysis demonstrates the contrary. I proceed, therefore, to examine the statute.

The Powers Conferred.

When, in his judgment, commodity prices have risen, or threaten to rise, 'to an extent or in a manner inconsistent with the purposes' of the Act the Administrator may establish 'such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes' of the Act.

'So far as practicable' in establishing any maximum price he is to ascertain the prices prevailing in a specified period in 1941 but may use another period nearest to that specified because necessary data for the period specified is not available; and may make adjustments 'for such relevant factors as he may determine and deem to be of general applicability,' including several factors mentioned. Before issuing any regulation he shall 'so far as practicable' advise with representative members of the industry affected.

Any regulation may provide for adjustments and reasonable exceptions which, in the Administrator's judgment,***449** are necessary and proper to effectuate the purposes of the Act. If, in his judgment, such action is necessary or proper to effectuate the purposes of the Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or hoarding in connection with any commodity (50 U.S.C.A.Appendix s 902, 50 U.S.C.A.Appendix s 902).

It will be seen that whether, and, if so, when, the price of any commodity [FN1] shall be regulated depends on the judgment of the Administrator as to the necessity or propriety of such price regulation in effectuating the purposes of the Act.

FN1 The Act gives the Administrator no power with respect to wages, and limits his powers as respects fishery commodities (50 U.S.C.A.Appendix, s 902(i), 50 U.S.C.A.Appendix, s 902(i)), and agricultural commodities (50 U.S.C.Appendix, s 903, 50 U.S.C.A.Appendix, s 903).

The Supposed Standards for the Administrator's Guidance.

The Act provides that any regulation or order must be 'generally fair and equitable' in the Administrator's judgment; but coupled with this injunction is another that the order and regulation must be such as, in the judgment of the Administrator, is necessary or proper to effectuate the purposes of the Act.

I turn, therefore, to the stated purposes to ascertain what, if any, limits the statute places upon the Administrator's exercise of his powers.

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Section 1(a), 50 U.S.C.Appendix, s 901(a), 50 U.S.C.A.Appendix, s 901(a), states seven purposes, which should be set forth separately as follows:

'to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;'

In order to exercise his power anent this purpose the Administrator will have to form a judgment as to what stabilization means, and what are speculative, unwarranted and abnormal increases in price. It hardly need be said that men may differ radically as to the connotation of these terms and that it would be very difficult to convict ***450** anyone of error of judgment in so classifying a given economic phenomenon.

'to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency;'

To accomplish this purpose the Administrator must form a judgment as to what constitutes profiteering, hoarding, manipulation or speculation. As if the administrative****680** discretion were not sufficiently broad there is added the phrase 'other disruptive practices', which seems to leave the Administrator at large in the formation of opinion as to whether any practice is disruptive.

'to assure that defense appropriations are not dissipated by excessive prices;'

It is not clear—to me at least—what is the limit of this purpose. I can conceive that an honest Administrator might, without laying himself open to the charge of exceeding his powers, make any kind of order or regulation based upon the view that otherwise defense appropriations by Congress might be dissipated by what he considers excessive prices. How his exercise of judgment in connection with this purpose could be thought excessive it is impossible for me to say.

'to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living;'

The Administrator's judgment that any price policy will tend to affect the classes mentioned in this purpose from what he may decide to be 'undue impairment of their standard of living' would seem to be so sweeping that it would be impossible to convict him of an error of judgment in any conclusion he might reach.

'to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the ***451** Federal, State, and local governments, which would result from abnormal increases in prices;'

Of course Congress might have included in the catalogue of beneficiaries churches, hospitals, labor unions, banks and trust companies and other praiseworthy organizations, without rendering the 'standard' any more vague.

'to assist in securing adequate production of commodities and facilities;'

Here is a purpose which seems, to some extent at least, to permit the easing of price restrictions; for it would appear that diminishment of price would hardly assist in promoting production. Thus the Administrator, and he alone, is to balance two competing policies and strike the happy mean between them. Who shall say his conclusion is so indubitably wrong as to be properly characterized as 'arbitrary or capricious'.

'to prevent a post emergency collapse of values;'

This purpose, or 'standard', seems to permit adoption by the Administrator of any conceivable policy. I have difficulty in envisaging any price policy in support of which some economic data or opinion could not be cited to show that it would tend to prevent post emergency collapse of values.

These seven purposes must, I submit, be considered as separate and independent. Any action taken by the Administrator which, in his judgment, promotes any one or more of them is within the granted power. If, in his judgment, any action by him is necessary or appropriate to the accomplishment of one or more of them, the Act gives sanction to his order or regulation.

Reflection will demonstrate that in fact the Act sets no limits upon the discretion or judgment of the Administrator. His commission is to take any action with respect to prices which he believes will preserve what he deems a sound economy during the emergency and prevent what he considers to be a disruption of such a sound economy ***452** in the post war period. His judgment, founded as it may be, on his studies and

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investigations, as well as other economic data, even though contrary to the great weight of current opinion or authority, is the final touchstone of the validity of his action.

I shall not repeat what I have said in Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641. I have there quoted the so-called standards prescribed in the National Industrial Recovery Act. Comparison of them with those of the present Act, and perusal of what was said concerning them in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, leaves no doubt that the decision is now overruled. There, as here, the 'code' or regulation, to become effective, had to be found by the Executive to 'tend to effectuate the policy' of the Act. (See footnote 3, p. 521.)

****681** The Administrator's Procedure.*

I have not yet spoken of the statutory provisions respecting the permissible procedure of the Administrator in imposing prices. Sec. 202(a), 50 U.S.C.Appendix, s 922(a), 50 U.S.C.A.Appendix, s 922(a) authorizes him to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order, or in the administration and enforcement of the Act and regulations, orders, and price schedules thereunder. The remaining subsections give him broad powers to compel disclosure of information. And he may take official notice of economic data and other facts, including facts found as a result of his investigations and studies (s 203(b), 50 U.S.C.Appendix, s 923(b), 50 U.S.C.A.Appendix, s 923(b).

Each regulation or order must be accompanied by a 'statement of the considerations involved' in its issue (s 2(a), 50 U.S.C.Appendix, s 902(a) 50 U.S.C.A.Appendix, s 902(a). This is not a statement or finding of fact. Webster defines a term 'consideration' as 'that which is, or should be, considered as a ground of opinion or action; motive; reason.' The citizen, ***453** therefore, is merely to be advised of the reasons for the Administrator's action.

How is he to proceed if he desires to challenge that action? The answer is found in s 203, 50 U.S.C.Appendix, s 923, 50 U.S.C.A.Appendix, s 923. Within a specified time after the issue of a regulation any person subject to any provision of it may file a protest 'specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.' The Administrator may receive statements in support of the regulations and incorporate them in his proceedings. Within a time fixed he must (1) grant or deny the protest in whole or in part, (2) note it for hearing, or (3) provide an opportunity to present further evidence. His is the choice.

If he denies the protest in whole or in part he must inform the protestant of the grounds upon which his decision was based and of any economic data or other facts of which he has taken official notice.

This, then, is the first opportunity the protestant has to know on what the Administrator has based his 'considerations' or reasons for action. As the Emergency Court of Appeals held in Lakemore Company v. Brown, 137 F.2d 355, 359:[FN2]

> FN2 In citing cases decided by that court, I do so with no thought that in construing the Act's provisions that court has erred. On the contrary, I cite its interpretations of the statute as supporting my views that, as properly construed, the Act is invalid.

'Thus, consistently with statutory requirements, the Administrator could have waited until he had entered his order denying the protest before informing the protestant of the economic data of which he had taken official notice and of the economic conclusions which he had derived therefrom and the other grounds upon which the denial was based.'

And it is to be observed that, after seeing the protestant's affidavits and the evidence, the Administrator may load the record with all sorts of material, articles, opinions, ***454** compilations, and what not—pure hearsay—subject to no cross-examination, to persuade the court that his order could, 'in his judgment', promote one of the 'purposes' of the Act.

Thus is the 'record' weighted against formal complaint in court.

Chatlos v. Brown, Em.App., 136 F.2d 490, Spaeth v. Brown, Em.App., 137 F.2d 669, and Bibb Manufacturing Co. v. Bowles, Em.App., 140 F.2d 459, amongst other cases, indicate the sort of da-

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ta—although they do not exclude the use of other sorts—on which the Administrator seems to be accustomed, and to be entitled, to act. He need make no findings of fact.

The Court Review.

The protestant who is aggrieved by the denial or partial denial of his protest may, within a set time, file a complaint with a specially created Emergency Court of Appeals 'specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part.' The court is given exclusive jurisdiction and all other courts ****682** are forbidden to take jurisdiction to grant such relief. The court may set aside the order, dismiss the complaint, or remand the proceeding. Upon the filing and service of the complaint, the Administrator is to certify and file a transcript of such portion of the proceedings before him as are material to the complaint (s 204(a), 50 U.S.C.Appendix, s 924(a), 50 U.S.C.A.Appendix, s 924(a).

The section proceeds:

'No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not ***455** reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.'

It is not difficult to picture the plight of the protestant. The Administrator's statement of considerations, without more, constitutes proof in the cause.

In Montgomery Ward & Co. v. Bowles, Em.App., 138 F.2d 669, 670, the Administrator in his statement of considerations said that he took official notice of three propositions of the most general scope. No evidence in support of these or of any other facts upon which he relied was included in the transcript. The complainant suggested to the court the omission of pertinent matter, namely, the evidence in support of the propositions of which the Administrator said he took official notice, the evidence of various other assertions of fact in his opinion, and the particular facts and evidence upon which he based the conclusions expressed in his statement of considerations that 'the maximum prices established in this regulation are fair and equitable.' The Administrator objected to the suggestion and the court rejected it. It was held that the Act requires 'only a summary statement of the basic facts which justify the regulation.'

Referring to s 204(b), 50 U.S.C. Appendix, s 924(b), 50 U.S.C.A.Appendix, s 924(b), the court held that the requirement that the complainant must establish 'to the satisfaction of the court' that the regulation, order, or price schedule is not in accordance with law or is arbitrary or capricious throws upon the protestant ***456** the burden 'to bring forward and satisfactorily prove the invalidating facts', and added: 'Unless and until he does so the regulation is to be taken as valid and the existence of a state of facts which justify it is to be assumed without the necessity of proof thereof by the Administrator.'

The court added that the protestant is given means of carrying this burden by filing affidavits and other evidence, but omits to refer to the fact that these affidavits and other evidence must be addressed to the Administrator's order and his most general and sweeping statement of considerations, which merely means his reasons for making the order. These affidavits and this evidence under the procedure prescribed are to be put in before the protestant even knows what data the Administrator relied upon or sees the Administrator's opinion denying his protest. It is hardly necessary to dilate upon the burden thus placed on a protestant or the extent to which he is compelled to fill the record with what he may think relevant matter only to find that he has been shooting at straws. The court further adverted to the fact that the Act permits the protestant to state in detail in connection with his protest the nature and sources of any further evidence not subject to his control upon which he believes he can rely in support of the facts alleged in

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his protest. Here again the protestant is under the same handicap. He must disclose all he has in mind to the Administrator before the Administrator****683** makes any disclosure to him of the facts and data upon which that official has relied.

Finally the court refers to the privilege given the protestant to file a brief with the Administrator and to 'request an oral hearing', without mentioning the facts that the brief can be addressed only to the reasons given in the statement of consideration, and that the Administrator is at liberty to deny the request.

A procedure better designed to prevent the making of an issue between parties can hardly be conceived.

***457** And the extent of the burden is further emphasized by what the Emergency Court of Appeals has said in Lakemore Co. v. Brown, supra:

'It is objected that the Administrator thus in effect has prejudged the case; that as witness, immune from cross-examination, he has rendered an opinion which concludes the matter which is before him as judge.

'This overlooks the fact that the Administrator, from the necessities of the case, does not come with a virgin mind to the consideration of a protest. He has previously performed the official act of issuing the regulation, the terms of which of course reflect his conclusions on many economic, administrative and legal questions. In this sense, he necessarily approaches consideration of a protest with certain 'preconceived notions'—to use complainant's phrase. It is the object of the protest procedure to give the Administrator a chance to reconsider any challenged provisions in the regulation in the light of further evidence or arguments which may be advanced by the protestant. What the Administrator did here was to lay his cards on the table in the protest proceedings, offering protestant an opportunity to play its trump cards, if it had any.

'Of course such statements of economic conclusions thus incorporated in the record are not 'evidence.' Section 204(a) requires the transcript of the protest proceedings, filed in this court, to 'include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice.' Insofar as any economic generalizations or conclusions formulated by the Administrator constitute indispensable steps in his process of reasoning in denying the protest, it is for this court to say whether they have any rational basis, in performance of our statutory duty to consider whether the regulation or order should be set aside in whole or in part as being 'arbitrary or capricious.' This is so, whether the Administrator includes such generalizations and conclusions***458** in his opinion accompanying the denial of the protest or, as in this case, incorporates them into the record of the protest proceedings at an earlier stage in order to afford protestant an opportunity for rebuttal.'

To this may be added what the Emergency Court said in Madison Park Corporation v. Bowles, 140 F.2d 316, 324:

'We do not decide that this Court should limit the application of the term 'generally fair and equitable' standards mentioned in the law and in discussions of its enactment while pending in Congress. It may be possible that a case will occur in which the effect of a regulation established by the Administrator clearly will be shown to be generally unfair and inequitable on grounds not mentioned. But in such a case the reasons must be clear and compelling. The Act provides the Administrator may establish such rents as in his judgment will be generally fair and equitable. Review in this Court is plainly limited. It may not substitute its judgment for the judgment of the Administrator, but may act in review only when it finds the regulation is not in accordance with law or is arbitrary and capricious. Thus if the Court finds any reasonable basis to support the view that the regulation deals fairly and equitably with the industry concerned, the regulation must stand.' (Italics in original.)

When these cumulative burdens placed upon the protestant who seeks review are fairly appraised it becomes apparent that he must carry an insupportable load, and that, in truth, the court review is a solemn farce in which the Emergency Court of Appeals, and this court, on certiorari, must go through a series of motions which look like judicial review but in fact are nothing but a catalogue of reasons why, under the scheme of the Act, the courts are unable to say that the Administrator has exceeded the discretion vested in him.

****684** No court is competent, on a mass of eco-

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nomic opinion consisting of studies by subordinates of the Administrator, ***459** charts and graphs prepared in support of the studies, and economic essays gathered hither and yon, to demonstrate, beyond doubt, that the considerations or conclusions of the Administrator from such material cannot support the Administrator's judgment that what he has done by way of regulation or price schedule tends to prevent post war collapse of values, or to prevent dissipation of defense appropriations through excessive prices, or to prevent impairment of the standard of living of persons dependent on life insurance, or to prevent hardship to schools—to enumerate but a few of the stated purposes of the Act.

It is not surprising that, in the thirty-one cases decided by the Emergency Court of Appeals of which I have found reports, complaints have been dismissed in twenty-eight, and but three have been remanded to the Administrator for further proceedings.[FN3] Two of the three involved no question of merits under the statutory provisions.

FN3 Armour & Co. v. Brown, Em.App., 137 F.2d 233; Montgomery Ward & Co. v. Bowles, Em.App., 138 F.2d 669; Hillcrest Terrace Corp. v. Brown, Em.App., 137 F.2d 663.

The War Power.

The Emergency Court of Appeals in Taylor v. Brown, 137 F.2d 654, overruled a challenge to the constitutional validity of the Act's delegation of legislative power to the Administrator by invocation of the 'War Power' of Congress, the powers embodied in Article I, Section 8, of the Constitution 'to declare War', 'to raise and support Armies', 'to provide and maintain a Navy,' and 'to make all Laws which shall be necessary and proper for carrying into Execution' those powers. After showing, what needs no argument, that these powers of Congress are very different from those to be exercised in peace, the court then—without a sign that it realizes the great gap in the process—assumes that one of Congress' war powers is the power to transfer its legislative function to a delegate. By the ***460** same reasoning it could close this court or take away the constitutional prerogatives of the President as 'War measures'.

I am not sure how far this court's present opinion adopts the same view. There are references in it to the war emergency, and yet the reasoning and the authorities cited seem to indicate that the delegation would be good in peace time and in respect of peace time administration. And the Emergency Court of Appeals, in spite of its decision in Taylor v. Brown, supra, and its statement in Philadelphia Coke Co. v. Bowles, 139 F.2d 349, that, as the Act is an exercise of the war power and therefore does not deprive citizens of property without due process, has, nevertheless, weighed provisions of the Act as against the guaranty of the Fifth Amendment in Wilson v. Brown, 137 F.2d 348, and in Avant v. Bowles, 139 F.2d 702.

I am sure that my brethren, no more than I, would say that Congress may set aside the Constitution during war. If not, may it suspend any of its provisions? The question deserves a fair answer. My view is that it may not suspend any of the provisions of the instrument. What any of the branches of government do in war must find warrant in the charter and not in its nullification, either directly or stealthily by evasion and equivocation. But if the court puts its decision on the war power I think it should say so. The citizens of this country will then know that in war the function of legislation may be surrendered to an autocrat whose 'judgment' will constitute the law; and that his judgment will be enforced by federal officials pursuant to civil judgments, and criminal punishments will be imposed by courts as matters of routine.

If, on the contrary, such a delegation as is here disclosed is to be sustained even in peacetime, we should know it.

Mr. Justice RUTLEDGE, dissenting.

I agree with the Court's conclusions upon the substantive issues. But I am unable to believe that the trial afforded***461** the petitioners conformed to constitutional requirements. The matter is of such importance as requires a statement of the reasons for dissent.

****685** The Emergency Price Control legislation is unusual, if not unique. It is streamlined law in both substance and procedure. More than any other legislation except perhaps the Selective Service Act, 50 U.S.C.A.Appendix, s 301 et seq., in the combined effect of its provisions it attenuates the rights of affected individuals. The Congress regarded this as necessary, though it sought to preserve as much of individual right as it felt was consistent with control-

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ling wartime inflation. To that judgment we owe all deference, saving only what we owe to the Constitution.

War such as we now fight calls into play the full power of government in extreme emergency. It compels invention of legal, as of martial tools adequate for the times' necessity. Inevitably some will be strange, if also life-saving, instruments for a people accustomed to peace and the normal working of constitutional limitations. Citizens must surrender or forego exercising rights which in other times could not be impaired. But not all are lost. War expands the nation's power. But it does not suspend the judicial duty to guard whatever liberties will not imperil the paramount national interest.

I.

Judged by normal peacetime standards, over-all nation-wide price control hardly has accepted place in our institutions. Notwithstanding the considerable expansion of recent years in this respect, the extension has been piecemeal. [FN1] Until now it has not enveloped the entire economy.[FN2] Whether control so extensive might be upheld in some emergency not created by war need not now be decided.***462** That it can be supported in the present circumstances and for the declared purposes there can be no doubt. It is enough, as the Court points out, that legal foundation exists in the nation's power to make war, as this has been given to Congress and the Chief Executive. Cf. Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774.[FN3]

FN1 Cf., e.g., Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469.

FN2 Perhaps the nearest previous approach to control so extensive was in the National Industrial Recovery legislation.

FN3 Cf. note 18 infra.

The foundation has relevance for each of the issues. And generally it has significance for the application of peacetime precedents. Decisions made then with limitations, explicit or implied, not affected by influence of the war power and the conditions of a state of war, cannot be wholly conclusive in their limiting effect upon the exercise of war-making authority. Care must be taken therefore, in applying them, both to see that they are observed so far as the dominant necessity permits and to be equally sure they are not misapplied to hamstring essential authority.[FN4]

FN4 It goes without saying that whatever scope is allowed for operation of governmental authority in peace continues to be effective in war.

As it is with the substantive control, so it is with delegating legislative power. War begets necessities for this, as for imposing substantive controls, not required by the lesser exigencies of more normal periods. In this respect certainly there is as much room for difference as exists when Congress is dealing wholly with internal matters and when it is acting with the President about foreign affairs. Cf. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255. Not only the broader power of Congress, but its conjunction in the particular delegation with the wider authority of the President, both as chief magistrate and as commander-in-chief, goes to sustain the greater delegation. Cf. Kiyoshi Hirabayashi v. United States, supra. But the present legislation, as the Court's opinion demonstrates,***463** does not go beyond the limits allowed by peacetime precedents in the substantive delegation.[FN5]

FN5 E.g., the administrator has no power to adopt codes of fair competition generally, such as was given under N.I.R.A. His principal function is single, to determine and make effective by regulation the maximum price at which a commodity may be sold. The task is vast and complex, in comparison with previously sustained price-fixing delegations, by virtue of the number of industries and items affected and the nation-wide scope of the authority. But the focus of the price-fixing function is narrow, although powerful, in its incidence upon a particular industry or operator.

****686** II.

My difficulty arises from the Act's procedural provisions. They too are unusual. That is true, though each save one has been used before, and sustained, in separate applications. No previous legislation has presented quite this combination of procedural devices.[FN6] In the combination, if in nothing more,

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unique quality would be found. But there is more.

FN6 Cf. Judicial Review of Price Orders under the Emergency Price Control Act (1942) 37 Ill.L.Rev. 256, 263-264; and other materials cited infra notes 20, 21.

Congress sought to accomplish two procedural objectives. One was to afford a narrow but sufficient method for securing review and revision of the regulations. At the same time the Act created broad and ready methods for enforcement. The short effect of the procedure is to give the individual a single channel for questioning the validity of a regulation, through the protest procedure and the Emergency Court of Appeals, with review of its decisions here on certiorari. Section 204. On the other hand, the varied and widely available means for enforcement include criminal proceedings, suits in equity, and suits for recovery of civil penalties, in the federal district courts and in the state courts. Section 205(a), (b), (c). See also ***464**Section 205(d), (e), (f).[FN7] And in all these enforcement proceedings the mandate of Section 204(d) is that the court shall have no 'jurisdiction or power to consider the validity of' a regulation, order or price schedule. The statute thus affords the individual, to question a regulation's validity, one route and that a very narrow one, open only briefly. The administrator and others, to enforce it, have many. And in the enforcement proceedings the issues are cut down so that, in a practical sense, little else than the fact whether a violation of the regulation as written has occurred or is threatened may be inquired into.[FN8]

FN7 By Section 205(f)(1), (2) licensing authority is given to the administrator, with special provisions for suspension for not more than twelve months by proceedings in state, territorial or federal district courts.

FN8 It is conceded that questions concerning the validity of statutory provisions, as distinguished from regulations, remain determinable by enforcing courts. See Sen. Rep. No. 931, 77th Cong., 2d Sess., 24-25, and compare H.R. 5479, 77th Cong., 1st Sess., printed in Hearings before Committee on Banking and Currency on H.R. 5479, 77th Cong., 2d Sess., 4, 7-8.

Disparity in remedial and penal measures does not necessarily invalidate the procedure, though it has relevance to adequacy of the remedy allowed the individual.[FN9] Congress has broad discretion to open and close the doors to litigation. In doing so it may take account of the necessities presented by such a situation as it was dealing with here. To follow the usual course of legislation and permit challenge by restraining orders, injunctions, stay orders and the normal processes of litigation would have been, in this case, to lock the barn door after the horse had been stolen. There was therefore compelling reason for Congress to balance the scales of litigation unevenly, if only it did not go too far. In no other way could it protect the paramount national interest. If the result, within the permissible limits, is harsh or inconvenient for ***465** the individual, that is but part of the price he, with all others, must pay for living in a nation which ordinarily gives him so much of protection but in a world which has not been organized to give it security against events so disruptive of democratic procedures.

FN9 Cf. Parts IV, V, infra.

I have no difficulty with the provision which confers jurisdiction upon the Emergency Court of Appeals to determine the validity of price regulations or, if that had been all, with the mandate which makes its jurisdiction in that respect exclusive. Equally clear is the power of Congress to deprive the other federal courts of jurisdiction to issue stay orders, restraining orders, injunctions or other relief to prevent the operation of price regulations or to set them aside. So much may be rested on Congress' plenary authority to define and control the jurisdiction of the federal courts. Constitution, Article III, Section 2; Lockerty v. Phillips, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339. It may be taken too, for the purposes of this case, that Congress' power to channel enforcement of ***687** federal authority through the federal courts sustains the like prohibitions it has placed on the state courts.[FN10] Without more, the statute's provisions would seem to be unquestionably within the Congressional power. Cf. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638.

FN10. The Moses Taylor, 4 Wall. 411, 18 L.Ed. 397; Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641; cf. Claflin v. Houseman, Assignee, 93 U.S. 130, 23 L.Ed. 833; Plaquemines Tropical Fruit Co. v. Hender-

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son, 170 U.S. 511, 18 S.Ct. 685, 42 L.Ed. 1126.

Congress however was not content to create a single national tribunal, give it exclusive jurisdiction to determine all cases arising under the statute, and deny jurisdiction over them to all other courts.[FN11] It provided for enforcement***466** by civil and criminal proceedings in the federal district courts and in the state courts throughout the country.

FN11 This it might have done, subject only to the requirement that the procedure specified for the single competent court afford a constitutionally adequate mode for determining the issues. Myers v. Bethlehem Shipbuilding Corp., supra. In case criminal jurisdiction were conferred, observance of the requirements of Article III, s 2, and of the Fifth and Sixth Amendments concerning such trials would be required. Cf. text infra, Parts V, VI.

This, too, it could do, though only if adequate proceedings, in the constitutional sense, were authorized. And I agree that the enforcing jurisdiction would not be made inadequate merely by the fact that no stay order or other relief could be had pending the outcome of litigation. Confronted as the nation was with the imminent danger of inflation and therefore the necessity that price controls should become effective at once and continue so without interruption at least until invalidated in particular instances, Congress could require individuals to sustain, in deference to the paramount public interest, whatever harm might ensue during the period of litigation and until each had demonstrated the invalidity of the regulation as it affected himself.[FN12] Runaway inflation could not have been avoided in any other way. The lid had to go on, go on tight and stay tight. This necessity united with the general presumption of validity which attaches to legislation [FN13] and Congress' power to control the jurisdiction of the courts to sustain its denial of power to all courts, including the enforcing courts, the Emergency Court and this one,[FN14] to suspend operation of the regulations pending final determination of validity.

FN12 Cf. L'Hote v. New Orleans, 177 U.S. 587, 20 S.Ct. 788, 44 L.Ed. 899; Welch v. Swasey, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194.

FN13 Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070; United States v. Carolene Products Co., 304 U.S. 144, 152—154, 58 S.Ct. 778, 783, 784, 82 L.Ed. 1234.

FN14 By Section 204(b) of the Act, the effectiveness of a judgment of the Emergency Court enjoining or setting aside the regulation, in whole or in part, is postponed until the expiration of thirty days from its entry and, if certiorari is sought here within that time, the postponement continues until this Court's denial of the writ becomes final or until other final disposition of the case by this Court. By Section 204(d) the Emergency Court and this Court are given exclusive jurisdiction to determine the validity of the regulation and all other courts are denied 'jurisdiction or power to consider' this question and to stay, restrain, enjoin or set aside any provision of the regulation or its enforcement. The net effect is to deprive all courts of power to suspend operation of the regulation pending final decision on its validity and to keep it in force until a final judgment of the Emergency Court, or of this Court on review of its decision, becomes effective.

467** The crux of this case comes, as I see it, in the question whether Congress can confer jurisdiction upon federal and state courts in the enforcement proceedings, more particularly the criminal suit, and at the same time deny them 'jurisdiction or power to consider the validity' of the regulations for which enforcement is thus sought. This question which the Court now says 'presents no novel constitutional issue' was expressly and carefully reserved in Lockerty v. Phillips, supra. The prohibition*688** is the statute's most novel feature. In combination with others it gives the procedure a culminating summary touch and presents questions different from those arising from the other features.

The prohibition is unqualified. It makes no distinction between regulations invalid on constitutional

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grounds and others merely departing in some respect from statutory limitations, which Congress might waive, or by the criterion whether invalidity appears on the face of the regulation or only by proof of facts. If the purpose and effect are to forbid the enforcing court to consider all questions of validity and thus to require it to enforce regulations which are or may be invalid for constitutional reasons, doubt arises in two respects. First, broad as is Congress' power to confer or withhold jurisdiction, there has been none heretofore to confer it and at the same time deprive the parties affected of opportunity to call in question in a criminal trial whether the law, be it statute or ***468** regulation,[FN15] upon which the jurisdiction is exercised squares with the fundamental law. Nor has it been held that Congress can forbid a court invested with the judicial power under Article III to consider this question, when called upon to give effect to a statutory or other mandate.

FN15 Cf. text infra, Part III, at notes 16, 17.

It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do. There are limits to the judicial power. Congress may impose others. And in some matters Congress or the President has final say under the Constitution. But whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials.

III.

The idea is entirely novel that regulations may have a greater immunity to judicial scrutiny than statutes have, with respect to the power of Congress to require the courts to enforce them without regard to constitutional requirements.***469** At a time when administrative action assumes more and more of the law-making function,[FN16] it would seem the balance of advantage, if any, should be the other way. But there is none. The statute has impact upon individuals only through the regulations. They are in effect part of the Act itself, unless invalid. If invalid, they rule, just as the statute does, until set aside. And, in respect to constitutional requirements, they have no more immunity than the statute itself.[FN17]

FN16 There hardly can be question that whenever an administrative agency, acting within the discretion validly conferred upon it by Congress, promulgates a regulation or issues an order of general applicability it is 'making the law,' as effectively as is Congress when it enacts a specific prescription, by whatever name this may be called. United States v. Grimaud, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563; Avent v. United States, 266 U.S. 127, 45 S.Ct. 34, 69 L.Ed. 202; United States v. Michigan Portland Cement Co., 270 U.S. 521, 46 S.Ct. 395, 70 L.Ed. 713.

FN17 Cf. the dissenting opinion of Mr. Justice Roberts. The notion that Congress somehow could cut off review of regulations for constitutional invalidity when it could not do so for statutes, of which suggestions appear in the legislative history and the briefs, was not adhered to in the oral argument as to regulations void on their face and is not tolerable when the effect would be to make the courts instruments for enforcing unconstitutional mandates. Cf. Part VI, infra.

Clearly Congress could not require judicial enforcement of an unconstitutional statute. The same is true of an unconstitutional****689** regulation. And it is conceded that Congress could not have compelled judicial enforcement of all price regulations, without regard to their validity, if it had not given opportunity for attack upon them through the Emergency Court or if that opportunity is inadequate. But because the opportunity is afforded and is deemed adequate in the unusual circumstances, at any rate for some of its purposes, and because it was not followed, the Court holds that criminal enforcement must be given and the enforcing court cannot consider the question of validity.

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*470 If I understand it, the argument to sustain the conviction, in its broadest form, rests upon the proposition that Congress, by providing in one proceeding a constitutionally adequate mode for deciding upon the validity of a law or regulation, and requiring this to be followed within a limited time, can cut off all other right to question it and make that determination, or the failure to secure it in time, conclusive for all purposes and in all other proceedings. The proposition cannot be accepted in that broad form. To do so would mean, for instance, that if in this case a regulation had prescribed one maximum price for sales by merchants of one race or religion and a lower one for distributors of another, the judicial power of the United States would have to be exercised to convict the latter for selling at the formers' price, if they had not availed themselves of the limited review afforded by this Act. It hardly would be consistent with accepted ideas of due process or equal protection for any court to impose penalty or restraint in such a case. FN18 And I cannot imagine this Court as sustaining such a conviction or any other as imposing it.FN19

FN18 See note 17 supra. The unique circumstances involved in Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, confine that case to its facts, including the particular emergency with which legislation there under review had dealt, as respects the issue of equal protection.

FN19 Cf. notes 23, 33 infra.

The illustration is extreme and improbable of occurrence. But it serves to test the broad contention. Such a doctrine established as generally applicable would contain seeds of influence too dangerous for acceptance, more especially for the determination of criminal matters. No authority compels or enjoins this. And I am unwilling to give the idea adherence in particular applications without stating qualification which confines its possible effects *471 to situations where the gravest dangers to the nation's interest exist and cannot be escaped in any other way.

The question narrows therefore to the inquiry, in what circumstances and under what conditions may Congress, by offering the individual a single chance to challenge a law or an order, foreclose for him all further opportunity to question it, though requiring the courts to enforce it by criminal processes? This question is the most important one in the case and demands explicit attention. 'It is easy enough to say that a party has enough of a remedy if statutory review of the order is available and if he does not choose to employ that procedure he should be foreclosed from raising elsewhere the questions that could have been raised in that proceeding.' FN20 But to make this easy assumption is at once to decide the rock-bottom issue and, in my opinion, one this Court has not determined heretofore with effects upon the criminal process like those produced in this case.FN21

FN20 McAllister, Statutory Roads to Review of Federal Administrative Orders (1940) 28 Calif.L.Rev. 129, 166.

FN21 Ibid. Cf. Judicial Review of Price Orders Under the Emergency Price Control Act (1942) 37 Ill.L.Rev. 256, 263; Stason, Timing of Judicial Redress from Erroneous Administrative Action (1941) 25 Minn.L.Rev. 560, 575, 576-581; Administrative Features of the Emergency Price Control Act (1942) 28 Va.L.Rev. 991, 998, 999; Reid and Hatton, Price Control and National Defense (1941) 36 Ill.L.Rev. 255, 283-284. For an analysis of litigation under this Act see Sprecher, Price Control in the Courts (1944) 44 Col.L.Rev. 34.

IV.

It is true that in a variety of situations and for a variety of reasons a person is foreclosed from raising issues, including some constitutional ones, where he has failed to exercise an earlier opportunity. Thus ordinarily issues cannot be raised on appeal which were not presented in *472 the **690 trial court. And a variant is that federal questions not raised in the state courts generally will not be considered here.FN22

FN22 The foreclosure may be founded upon notions of waiver, comity, putting an end to litigation, securing orderly procedure or the advantages of having available for consideration in the later stages the informed judgment of the trial tribunal, or some combination of these and other considerations. Cf. Stason, Timing of Judicial Review from Erroneous Administrative Action (1941) 25

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Minn.L.Rev. 560, 576-581; Berger, Exhaustion of Administrative Remedies (1939) 48 Yale L.J. 980, 1006. And the rule against allowing collateral attack, where a judgment is involved, is relevant to the broad problem of foreclosure.

But such instances of foreclosure, whether legislative or judicial in origin, do not support the broader basis of argument in this case. Two things are to be emphasized. One is that the previous opportunity is in an earlier phase of the same proceeding, not as here a separate and independent one of wholly different character. In other words, the determination of guilt or other matter ultimately in issue is not cut up into two separate, distinct and independent proceedings in different tribunals, in which neither body has power to consider and decide all the issues, but each can determine them only in part. The other thing for stress is that the foreclosure by failure to take the earlier chance is not universally effective. And this is true particularly of constitutional questions, some of which may be raised at any time.[FN23] While Congress has plenary power to confer *473 or withhold appellate jurisdiction, cf. Ex parte McCardle, 7 Wall. 506, 19 L.Ed. 264, it has not so far been held, and it does not follow, that Congress can confer it, yet deny the appellate court 'power to consider' constitutional questions relating to the law in issue.

FN23 Commonly it is said that 'jurisdictional' questions, particularly concerning the court's power to deal with the subject matter, may be raised at any stage or in a collateral attack. And this seems to be true also of some other constitutional issues through challenge to judgments by habeas corpus proceedings long after the judgment has become final. Cf., e.g., Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676; Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; Mooney v. Hollohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406. Compare Revised Rules of the Supreme Court of the United States 27, paragraph 6; cf. Weems v. United States, 217 U.S. 349, 362, 30 S.Ct. 544, 547, 54 L.Ed. 793, 19 Ann.Cas. 705; Columbia Heights Realty Co. v. Rudolph, 217 U.S. 547, 30 S.Ct. 381, 54 L.Ed. 877, 19 Ann.Cas. 854; Brasfield v. United States, 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345; Mahler v. Eby, 264 U.S. 32, 45, 44 S.Ct. 283, 288, 68 L.Ed. 549.

If the foreclosure is not always effective when the earlier phase of litigation is wholly judicial, it hardly should be when this consists of administrative or of both administrative and judicial proceedings, still less when these are civil in character and the later enforcement phase is criminal. In the enforcement of administrative orders the courts have been assiduous, perhaps at times extremely so,[FN24] to see that constitutional protections to the persons affected are observed. By trial and error, ways have been found to give the administrative process scope for effective action and yet to maintain individual security against abuse, especially in respect to constitutional rights.[FN25] The instances closest **691 to the problem here have provided for attaching penalties, including criminal sanctions, to violations of orders. But generally by one method or another means have been supplied for postponing their impact, at any rate irrevocably, until after the order's validity has *474 been established.[FN26] And in that effort this Court has joined.[FN27]

FN24 Compare Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908; Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033; Utah Fuel Co. v. National Bituminous Coal Comm., 306 U.S. 56, 59 S.Ct. 409, 83 L.Ed. 483; with Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638.

FN25 E.g., compare Federal Trade Commission v. Gratz, 253 U.S. 421, 40 S.Ct. 572, 64 L.Ed. 993, with National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381; cf. also Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288; Id., 304 U.S. 1, 58 S.Ct. 999, 82 L.Ed. 1129; United States v. Morgan, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211. Compare note 24 supra; and see Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938.

FN26 Thus, in some cases review and en-

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forcement are concentrated exclusively in the same court. Cf. National Labor Relations Act, 49 Stat. 449, 29 U.S.C. s 151 et seq., 29 U.S.C.A. s 151 et seq., giving the circuit courts of appeal exclusive jurisdiction to review and enforce the board's orders, to which no penalty attaches until the board has sought and obtained an order from the court for enforcement. With this done, there is no danger the individual will be sentenced for crime for failure to comply with an invalid order. And there is none that the court will be called upon to lend its hand in enforcing an unconstitutional edict or, for that matter, one merely in excess of statutory authority. Likewise, when there is provision for stay or suspension of the order pending determination of its validity, e.g., the Securities Act of 1933, 48 Stat. 81, 15 U.S.C. s 77i, 15 U.S.C.A. s 77i; the Securities Exchange Act of 1934, 48 Stat. 902, 15 U.S.C. s 78v, 15 U.S.C.A. s 78v; the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U.S.C. s 79x, 15 U.S.C.A. s 79x. And this is true where the enforcing court is not forbidden to consider the validity of the order, a prohibition entirely novel to the Emergency Price Control Act.

FN27 Cf. Wadley Southern Ry. v. Georgia, 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405, and authorities cited. In notable instances, also, where no specific provision has been made for either judicial review or avoiding the irrevocable impact of possibly invalid administrative action, and review has not been expressly denied, the courts have been ready to find means for review and for averting the impact of the penalty until it has been had. E.g., Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A., N.S., 932, 14 Ann.Cas. 764; cf. Southern Ry. Co. v. Virginia, 290 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260.

Whatever may be the limitations on judicial review in criminal proceedings under other administrative enforcement patterns,[FN28] no one of these arrangements goes as far as the combination presented by this Act. It restricts the individual's right to review to the protest procedure and appeal through the Emergency Court of Appeals. Both are short-cut proceedings, trimmed almost to the bone of due process, even for wholly civil purposes, and pared down further by a short statute of limitations. Protest must be filed within the sixty-day period. After that time, no protest can be made and no review can be ***475** had, except upon grounds arising later. Section 203(a).[FN29] The only right is to submit written evidence and argument to the administrator. Section 203(c). There is none to present additional evidence to the court.[FN30] Necessarily there is none of cross-examination. No court can ****692** suspend the order unless or until a judgment of the Emergency Court invalidating it becomes final.[FN31] The penalties, civil and criminal, attach at once on violation and, it would seem, until the contrary is decided, with finality.[FN32] At any rate ***476** that is the statute's purport. In short, the statute as drawn makes not only the regulation but also the penalties immediately and fully effective without regard to whether protest is made, the protest proceeding is carried to conclusion, or what the conclusion may be, except, and this is by inference, that violation after the order finally is held invalid may not be punishable.

FN28 Cf. McAllister, op. cit. supra, note 20; and note 26 supra.

FN29 Apparently it is contemplated that the 'affidavits or other written evidence' submitted in support of the objections be filed with the protest, though later submissions may be made at times and under regulations prescribed by the administrator, or when ordered by the Emergency Court, or to that court when the administrator requests. Sections 203(a), 204(a). The administrator is authorized to permit filing of protest after the sixty days have expired solely on grounds arising after that time. Section 203(a). He is required to grant or deny the protest, in whole or in part, notice the protest for a hearing, or provide an opportunity to present further evidence, within thirty days after the protest is filed or ninety days after issuance of the regulation or order, or in the case of a price schedule ninety days from the effective date, whichever occurs later. Ibid.

FN30 Cf. note 29 supra. In the Emergency Court of Appeals, 'no objection to (the) reg-

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ulation * * * and no evidence in support of any objection thereto, shall be considered * * * unless such objection' has been set forth in the protest or such evidence is in the transcript. Additional evidence can be admitted only if it was 'either offered to the Administrator and not admitted (by him) or * * * could not reasonably have been offered to * * * or included by the Administrator in such proceedings.' In that case it is to be presented to the administrator, received by him and certified to the court together with any modification he may make in the regulation. Where the administrator so requests, however, such additional evidence 'shall be presented directly to the court.' Section 204(a).

FN31 Cf. note 14 supra.

FN32 That is true whether the infraction occurs before or after the time for protest or appeal has passed and, it would seem, notwithstanding the protestant may proceed with all diligence. The statute makes no provision for relieving from its penal sanctions one who follows the protest procedure to the end in case the protest eventually is sustained, if meanwhile he disobeys the order. Punishment is not made dependent on or required to await the outcome of that proceeding. Rather, the enforcing court is commanded not to consider validity. The command is unqualified, unvarying and universal. It is cast in the compelling terms of 'jurisdiction.' Under the statute's provisions, it applies as much when trial and conviction occur before the Emergency Court's decision is final as afterwards.

This is the scope and reach of the statute. It is greater than any this Court heretofore has sustained.[FN33] It places *477 the affected individual just where the Court, speaking through Mr. Justice Lamar in Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651, 662, 35 S.Ct. 214, 218, 59 L.Ed. 405, said he could not be put: 'He must * * * obey what may finally be held to be a void order, or disobey what may ultimately be **693 held to be a lawful order.' Yet the Court holds this special proceeding 'adequate' and therefore effective to foreclose all opportunity for defense in a criminal prosecution on the ground the regulation is void.

FN33 Cf. Bradley v. Richmond, 227 U.S. 477, 33 S.Ct. 318, 57 L.Ed. 603, which involved a state prosecution for violating a state law. In affirming the conviction this Court rejected the contention that the administrative determination on which prosecution rested was unconstitutional. But it would not follow from the fact a state might thus condition its criminal proceedings consistently with the Fourteenth Amendment's requirement of due process that Congress can do likewise for federal criminal trials. Cf. infra Part V. Wadley Southern Ry. Co. v. Georgia, supra, also involved a state suit for civil penalty for violation of a state administrative order, to which the limitations of the Sixth Amendment would not apply. The dicta which the Court regards as pointing to the validity of the procedure here do not sustain it, not only for this reason, but because the special procedure was different, did not purport to foreclose defense to enforcement if not followed, and expressly asserted that, if followed, penalty could be imposed only for violations taking place after the order was adjudicated valid, not beforehand. This case involves the very risk the Court there said could not be imposed.

Other instances relied on by the Court involve only civil, not criminal consequences, or distinguishable instances of criminal prosecution, and therefore have no conclusive bearing here. As the Court seems to recognize, the question now presented was not presented or considered in Armour Packing Co. v. United States, 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. 681, or in United States v. Adams Express Co., 229 U.S. 381, 33 S.Ct. 878, 57 L.Ed. 1237. And it was not involved or determined in the cited decisions, either here or in the inferior federal courts, dealing with carriers who violate tariffs framed and filed by themselves and thereby become subject to penalty. The same is true of the cases holding that threatened criminal prosecution for violation of administrative orders cannot be enjoined.

In these decisions, none of the statutes for-

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bade the enforcing court 'to consider the validity' of the orders, none afforded a special proceeding so summary as that provided here, and only United States v. Vacuum Oil Co., D.C., 158 F. 536, raised a constitutional question relevant here. Falbo v. United States, 320 U.S. 549, 64 S.Ct. 346, involved a different procedure and a different and more urgent problem. Compare Part VII infra. It may be doubted the decision's effect is to preclude the enforcing court from examining constitutional questions affecting the order's validity.

This is no answer. A procedure so summary, imposing such risks, does not meet the requirements heretofore considered essential to the determination or foreclosure of issues material to guilt in criminal causes. It makes no difference that petitioners did not follow the special procedure. The very question, posed in the Court's own terms, is whether, if they had followed it, the remedy would be adequate constitutionally. It cannot be, under previously accepted ideas, if for one who follows it to a favorable judgment the penalty yet may fall. That question the Court does not decide. Unless it is decided, the question of adequacy, in any sense heretofore received, has not been determined, or an entirely new conception of adequacy has been approved.

***478** V.

But there is a deeper fault, even if we assume what neither the statute nor the Court's opinion today justifies, that a potential offender who successfully challenges the constitutionality of a regulation or begins a challenge on constitutional grounds in the Emergency Court at any time before or during the criminal prosecution, cannot be convicted, at least until after final decision that the order is valid. There still remain those cases where he has either challenged unsuccessfully in the Emergency Court or has not challenged at all. In them the would-be offender is subject to criminal prosecution without a right to question in the criminal trial the constitutionality of the regulation on which his prosecution and conviction hinge. And this seems to be true without distinction as to the character of the ground on which he seeks to make the issue. To say that this does not operate unconstitutionally on the accused because he has the choice of refraining from violation or of testing the constitutional questions in a civil proceeding beforehand entirely misses the point. The fact is that if he violates the regulation he must be convicted, in a trial in which either an earlier and summary civil determination or the complete absence of a determination forecloses him on a crucial constitutional question. In short, his trial for the crime is either in two parts in two courts or on only a portion of the issues material to guilt in one court. This may be all very well for some civil proceedings. But, so far as I know, criminal proceedings of this character never before have received the sanction of Congress or of this Court. That, like many other criminals, an offender here can be punished for making the wrong guess as to the constitutionality of the regulation, I have no doubt. But that, unlike all other criminals, he can be convicted on a trial in two parts, one so summary and civil and the other criminal ***479** or, in the alternative, on a trial which shuts out what may be the most important of the issues material to his guilt, I do deny.

The Sixth Amendment guarantees to the accused 'in all criminal prosecutions * * * the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.' By Article III, Section 2, 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *.' And, by the same section, 'The judicial Power,' which is vested in the supreme and inferior courts by Section 1, 'shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made * * * under their Authority.'

By these provisions the purpose hardly is to be supposed to authorize splitting up a criminal trial into separate segments, with some of the issues essential to guilt triable before one court in the state and district where the crime was committed and others, equally essential, triable in another court in a highly summary civil proceeding held elsewhere, or to dispense with trial on them because that proceeding has not been followed.[FN34] If the validity of the ***480** order, on constitutional or other grounds, has any ****694** substantial relationship to the petitioners' guilt, and it cannot be denied that it does, the short effect of the procedure is to chop up their trial into two separate, successive and distinct parts or proceedings, in each of which only some of the issues determinative of guilt can be tried, the two being connected only by the thread of finality which runs from the decision of the

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first into the second. The effect is to segregate out of the trial proper issues, whether of law or of fact, relating to the validity of the law for violation of which the defendants are charged, and to leave to the criminal court only the determination of whether a violation of the regulation as written actually took place and whether in some other respect the statute itself is invalid. If Congress can remove these questions, it can remove also all questions of validity of the statute or, it would seem, of law.

> FN34 Nor, according to accepted notions of the criminal process, has it ever been contemplated that some of the issues of fact should be provable by confrontation of witnesses and others by written evidence only, when other evidence is or may be available. If, for instance, Congress should define an act as a crime, but should require that in the trial issues relating to the validity of the law furnishing the basis for the charge should be proven only by affidavit, though others by the normal processes of proof, the proceeding hardly could be held to comport with the kind of trial the Constitution, and more particularly the Sixth Amendment requires. And if Congress should go further and provide for determination of the issues triable only by affidavit in a court or other body sitting elsewhere than in the state and district of the crime, with other issues triable before a court with a jury empanelled there, but with that court compelled to give finality to the other's findings against the accused, the departure from constitutional requirements would seem to be only the more obvious. This is not far in effect, if it is at all, from what has been done here.

The consequences of this splitting hardly need further noting. On facts and issues material to validity of the regulation the persons charged are deprived of a full trial in the state or district where the crime occurs, even if the Emergency Court sits there, as it is not required to do. Their right to try those constitutional issues both of fact and of law on which a criminal conviction ultimately will hinge, is restricted rigidly to the introduction of written evidence before the administrator in a proceeding barely adequate, even under special circumstances like these, to meet the requirements of due process of law in civil proceedings. The court which makes the decision on these issues cannot consider the facts constituting the violation. It has no power to pass judgment of guilty or not guilty upon the whole of the evidence. It can only pronounce ***481** the law valid or invalid in a setting wholly apart from any charge of crime, from the facts alleged as its commission, and from the usual protections which surround its trial.

On the other hand the special tribunal's judgment, rendered it may be on disputed facts as well as law, becomes binding against the accused, in the later proceeding. He cannot then dispute it, regardless of whether meanwhile the facts have changed[FN35] or new and additional evidence has been discovered and might be tendered with conclusive effect, if it were admissible. He can tender no evidence on what may be the most vital issue in his case and one, it may likewise be, that the evidence then available would sustain overwhelmingly. The trial court must shut its eyes to all such offers of proof and, moreover, to any such issue of law.

> FN35 His only remedy is to begin a new protest proceeding (s 203(a)), which is not only as limited in character as the original one, but under the administrator's procedural regulations must be 'filed within * * * sixty days after the protestant has had, or could reasonably have had, notice' of the changed facts. Revised Procedural Regulation 1, s 1300.26. Cf. notes 29, 30 supra.

VI.

A procedure so piecemeal, so chopped up, so disruptive of constitutional guaranties in relation to trials for crime, should not and, in my judgment, cannot be validated, as to such proceedings, under the Constitution. Even war does not suspend the protections which are inherently part and parcel of our criminal process. Such a dissection of the trial for crime could be supported, under our system, only upon some such notions as waiver and estoppel or res judicata, whether or not embodied in legislation.[FN36] These too are strange and inadequate vehicles for trying whether ****695** the citizen has been guilty of criminal conduct. They bar defense, while keeping prosecution open, before it begins. ***482** Res judicata, by virtue of a judgment in some prior civil proceeding, where different constitutional guaranties relating to the mode and course of trial have play, has not done

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duty heretofore to replace either proof of facts before a jury or decision of constitutional questions necessary to make up the sum of guilt in the criminal proceeding itself. Congress can invade the judicial function in criminal cases no more by compelling the court to dispense with proof, jury trial or other constitutionally required characteristics than it can by denying all effect of finality to judicial judgments. Cf. Schneiderman v. United States, 320 U.S. 118, concurring opinion at pages 167, 168, 63 S.Ct. 1333, at pages 1356, 1357, 87 L.Ed. 1796. And while, as noted above, notions of waiver and estoppel have had place in criminal proceedings to an extent not wholly defined, in some instances harshly and artificially,[FN37] they have not had effect heretofore to enable Congress to force a waiver of defense upon the individual by offering a choice between two kinds of trial, neither of which satisfies constitutional requirements for criminal trials. Certainly when the consequences are so novel and far reaching as they may be under this procedure, both for the individual and for the judicial system, these conceptions should not be given legal establishment to bring them into being.

FN36 Cf. note 22 supra.

FN37 Compare Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; with Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263; Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435.

To state the question often is to decide it. And it may do this by failure to reveal fully what is at stake. The question is not merely whether the protest proceeding is adequate in the constitutional sense for some of the purposes pertinent to that proceeding. It is rather what effect shall be given to the civil determination in the later and entirely different criminal trial. It is whether, by substituting that civil proceeding for decision of basic issues in the criminal trial itself, Congress can foreclose ***483** the accused from having them decided in that trial and thereby deprive him of the protections in trial guaranteed all persons charged with crime and thus of full and adequate defense. It is not the equivalent of that sort of defense to force one to initiate a curtailed civil suit or to cut him off shortly from all defense on the issues allocated to it, if he does not do so. Again, the question is not merely whether the individual can waive his constitutional trial of the issue of validity. It is rather whether Congress can force him to do so in the manner attempted and, beyond this, whether he and Congress together, in the combined effects of what they do, can so strip the criminal forum of its power and of its duty to abide the law of the land. And if the issue is further whether Congress can do this in some situations, respecting some issues, under more usual safeguards, the question requires attention to these important limitations.[FN38]

FN38 Cf. note 41 infra.

The procedural pattern is one which may be adapted to the trial of almost any crime. Once approved, it is bound to spawn progeny. If in one case Congress thus can withdraw from the criminal court the power to consider the validity of the regulations on which the charge is based, it can do so for other cases, unless limitations are pointed out clearly and specifically. And it can do so for statutes as well. In short the way will have been found to avoid, if not altogether the power of the courts to review legislation for consistency with the Constitution,[FN39] then in part at least their obligation to observe its commands and more especially the guaranteed protections of persons charged with crime in the trial of their causes. This is not merely control or definition of jurisdiction. It ***484** is rather unwarranted abridgement of the judicial power in the criminal process, unless at the very least it is confined specifically to situations where the special ****696** proceeding provides a fair and equal substitute for full defense in the criminal trial or other adequate safeguard is afforded against punishment for violating an order which itself violates or may violate basic rights. So much should not be accomplished merely by giving to the failure to take advantage of opportunity for summary civil determination, coupled with a short statute of limitations upon its availability, the effect of a full and final criminal adjudication. To do this hardly observes the substance of 'adequacy' in criminal trials.

FN39 Cf. McLaren, Can a Trial Court of the United States Be Completely Deprived of the Power to Determine Constitutional Questions? (1944) 30 A.B.A.J. 17.

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From what has been said it seems clear that Congress cannot forbid the enforcing court, exercising the criminal jurisdiction, to consider the constitutional validity of an order invalid on its face. Any other view would permit Congress to compel the courts to enforce unconstitutional laws. Nor, in my opinion, can Congress forbid consideration of validity in all cases, if it can in any, where the invalidity appears only from proof of facts extrinsic to the regulation. Again the racial or religious line is obvious and pertinent. If, for instance, one charged criminally with violating the regulation should tender proof it was being enforced in a manner to deny him the equal protection of the laws, because of his racial or religious connections, it is difficult to believe the evidence could be excluded consistently with the judicial obligation. The Constitution does not make judicial observance or enforcement of its basic guaranties depend on whether their violation appears from the face of legislation or only from its application to proven facts. Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397; Yick Wo v. Hopkins, 118 U.S. 356, 373, 374, 6 S.Ct. 1064, 1072, 1073, 30 L.Ed. 220; United States v. Carolene Products Co., 304 U.S. 144, 152—154, 58 S.Ct. 778, 783, 784, 82 L.Ed. 1234.

For legislation not void on its face, a presumption of constitutionality attaches and remains until it is proven ***485** invalid or so in operation. In such cases there is no unfairness, nor any invasion of the court's paramount obligation, in requiring one who would avoid the regulations' impact to show they are not what they appear to be or that they are made to operate otherwise than as they purport or were intended. But it is one thing to say that burden must be borne within the enforcement proceeding itself and another to say it must be carried entirely outside it. To require the defendant to prove invalidity in such a situation in the criminal trial itself, upon a showing of violation of the statute, is wholly permissible. But for the court to be unable to receive tendered evidence which might disclose the statute's invalid character and effect, is quite different. Certainly, under the circumstances of this case, it would seem to be as much a violation of individual right and as much an invasion of the judicial function for Congress to command the court not to receive the evidence, regardless of its character or effect, as for it to direct the court to enforce a law or an order void on its face.

VII.

To sanction conviction of crime in a proceeding which does not accord the accused full protection for his rights under the Fifth and Sixth Amendments, and which entails a substantial legislative incursion on the constitutionally derived judicial power, if indeed this ever could be sustained, would require a showing of the greatest emergency coupled with an inability to accomplish the substantive ends sought in any other way. No one questions the seriousness of the emergency the Price Control Act was adopted to meet. And it has been urged with great earnestness that the nation's security in the present situation requires that the statute's procedure, followed in this case, be sustained to its full extent.

That argument would be more powerful if enforcement of the statute, and thus maintenance of price control, were ***486** dependent upon accepting every feature. No doubt to impose the criminal sanction as has been done in this case implements the enforcement process with the deterrent effects which usually accompany that sanction. But neither its use nor enforcement of the statute's substantive prohibitions requires that the criminal court shall not consider the validity of the regulations.

With the arsenal of other valid legal weapons available, there can be no lack of speedy and effective measures to secure compliance. The regulations are effective until invalidated. They cannot be suspended by any court, pending final decision here, if the last source of relief is sought. All ****697** the armory of equity, and with it the sanctions of contempt, are available to keep the regulations in force and to prevent violations, at least until decision here is sought and had that the regulations are invalid. The same weapons are available to enforce them permanently if they are found valid. Apart from defense when charged with crime, the individual's only avenue of escape, and that not until final decision of invalidity has been made, is by protest and appeal through the single route prescribed. Finally, in addition to all this, the dealer may be punished for crime if he violates the regulation wilfully and cannot show it is invalid either in his defense or by securing a judgment to this effect through the protest procedure. In either case, in view of the statute's curtailment of his substantive rights and the consequent increase in the burden of proving facts sufficient to nullify the regulation,[FN40] his chance for escape ***487** becomes remote, to say the least. In view of all these resources and advantages, the asser-

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tion hardly is sustained that enforcement requires also depriving the accused of his opportunity for full and adequate defense in his criminal trial.

FN40 That burden is heavy, as this case illustrates. Petitioners attacked the regulation's constitutionality on the ground that, by compelling them to sell at prices less than cost, it deprived them of their property without due process of law. And, on the same ground, they urged the regulation violates the statute's requirement that the price fixed allow margins which are 'generally fair and equitable.' But the Fifth Amendment does not insure a profit to any given individual or group not under legal compulsion to render service, where doing so would contravene an enacted policy of Congress sustainable on a balance of public necessity and private hardship. Cf. the Court's opinion herein and authorities cited; also Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641. And in this case both the statute's basic purpose and its terms, as well as the legislative history, cf. Sen.Rep. No. 931, 77th Cong., 2d Sess. 15, show that Congress intended to forbid only a price so low that the trade in general, not merely some individual dealers or groups, could not have the margin prescribed. Bowles v. Willingham, supra. Petitioners' offers of proof, in this respect, which the trial court rejected, went only to show that they, or at most the meat wholesalers of Boston, could sell beef only at a loss. Harsh as this may seem in individual instances, it was Congress' judgment that the interests of dealers who could not operate profitably at a level of prices permitting a fair margin generally to the trade, would have to give way, in the acute prevailing circumstances, to the paramount national necessity of keeping prices stabilized and that judgment, by virtue of those circumstances, was for Congress to make. Accordingly the tendered proof hardly was sufficient to raise an issue of confiscation giving ground for setting aside the regulation.

It is likely that by far the greater number of challenges would arise on grounds of supposed confiscation, in which this burden would have to be met. Once it is made clear just what that burden is, the fear hardly seems justified that enforcement would swamp the agency with litigation. In any event the remedy for that would be by providing a more adequate enforcing staff, not by cutting off defense to criminal prosecutions based on invalid orders.

War requires much of the citizen. He surrenders rights for the time being to secure their more permanent establishment. Most men do so freely. According to our plan others must do so also, as far as the nation's safety requires. But the surrender is neither permanent nor total. The great liberties of speech and the press are curtailed but not denied. Religious freedom remains a ***488** living thing. With these, in our system, rank the elemental protections thrown about the citizen charged with crime, more especially those forged on history's anvil in great crises. They secure fair play to the guilty and vindication for the innocent. By one means only may they be suspended, even when chaos threatens. Whatever else seeks to dispense with them or materially impair their integrity should fail. Not yet has the war brought extremity that demands or permits them to be put aside. Nor does maintaining price control require this. The effect, though not intended, of the provision which forbids a criminal court to 'consider the validity' of the law on which the charge of crime is founded, in my opinion, would be greatly to ****698** impair these securities. Hence I cannot assent to that provision as valid.

Different considerations, in part at any rate, apply in civil proceedings. FN41 But for the trial of crimes no procedure***489** should be approved which dispenses with trial of any material issue or splits the trial into disjointed segments, one of which is summary and civil, the other but a remnant of the ancient criminal proceeding.

FN41 Cf. concurring opinion in Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641. Limitations applicable solely to criminal proceedings fall to one side. Giving the decision in the special proceeding, or failure to seek it after reasonable opportunity, the effect of res judicata in later civil proceedings does not therefore deprive the party affected of opportunity for full and adequate defense in his criminal trial, where not only his rights of property, but his liberty or his life may be

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at stake.

However widely the character of the special remedy may be varied to meet different urgencies, with consequences of foreclosure for civil effects, the foreclosure of criminal defense should be allowed, if at all, only by a procedure affording its substantial equivalent, in relation to special constitutional issues and in such a manner that the failure to follow it reasonably could be taken as an actual, not a forced waiver. Thus, possibly foreclosure of criminal defense could be sustained, when validity turns on complex economic questions, usually of confiscatory effects of legislation, and proof of complicated facts bearing on them. But, if so, this should be only when the special proceeding is clearly adequate, affording the usual rights to present evidence, cross-examine, and make argument, characteristic of judicial proceedings, so that, if followed, the party would have a substantial equivalent to defense in a criminal trial. And the opportunity should be long enough so that the failure to take it reasonably could be taken to mean that the party intends, by not taking it, to waive the question actually and not by forced surrender. So safeguarded, the foreclosure of such questions in this way would not work a substantial deprivation of defense.

In respect to other questions, such as the drawing of racial or religious lines in orders or by their application, of a character determinable as well by the criminal as by the special tribunal, in my opinion the special constitutional limitations applicable to federal criminal trials, and due enforcement of some substantive requirements as well, require keeping open and available the chance for full and complete defense in the criminal trial itself.

The judgment should be reversed.

I am authorized to say that Mr. Justice MURPHY joins in this opinion.

U.S. 1944.
Yakus v. U. S.

321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834, 28 O.O. 220

END OF DOCUMENT

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27-LS0741\X
Nauman/Bullock
3/1/12

SENATE CS FOR CS FOR HOUSE BILL NO. 215( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES CHENAULT, Neuman, Fairclough, Johnson, Hawker, Olson, Feige, Millett, Thompson, Pruitt, Saddler, Tammie Wilson, Dick, Costello

A BILL

FOR AN ACT ENTITLED

"An Act relating to the judicial review of a right-of-way lease or other authorization for the development, construction, or initial operation, of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Gasline Development Corporation for a gas pipeline transportation corridor."

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

*** Section 1.** AS 38.34.050(c) is amended to read:

(c) Notwithstanding any contrary provision of law, the Department of Natural Resources shall grant the **Alaska Gasline Development Corporation, a subsidiary of the Alaska Housing Finance Corporation created under AS 18.56.086,** [ALASKA HOUSING FINANCE CORPORATION] a right-of-way lease under AS 38.35 for the gas pipeline transportation corridor **at no cost or rental fee** if

(1) [THE CORPORATION SUBMITS] a complete right-of-way lease application under AS 38.35.050 **is submitted**;

(2) the lease application is made the subject of notice and other

reasonable and appropriate publication requirements under AS 38.35.070; and

(3) the **Alaska Gasline Development Corporation** [CORPORATION] agrees to be bound by the right-of-way lease covenants set out in AS 38.35.120**, except for the covenants in AS 38.35.120(a)(1), (2), (5), and (7); notwithstanding AS 38.35.120(b), a right-of-way lease subject to this paragraph is valid and of legal effect**.

*** Sec. 2.** AS 38.35.100(d) is amended to read:

(d) The commissioner shall include in a conditional lease each requirement and condition of the covenants established under AS 38.35.120**, except that, for a lease entered into under AS 38.34.050(c), the covenants in AS 38.35.120(a)(1), (2), (5), and (7) may not be included**. The commissioner may also require that the lessee agree to additional conditions that the commissioner finds to be in the public interest. In place of the covenant established under AS 38.35.120(a)(9), the commissioner shall require the lessee to agree that it will not transfer, assign, pledge, or dispose of in any manner, directly or indirectly, its interest in a conditional right-of-way lease or a pipeline subject to the conditional lease, unless the commissioner, after considering the public interest and issuing written findings to substantiate a decision to allow the transfer, authorizes the transfer. The commissioner shall also require the lessee to agree not to allow the transfer of control of the lessee without the approval of the commissioner; as used in this subsection, "transfer of control of the lessee" means the transfer of 30 percent or more, in the aggregate, of ownership interest in the lessee in one or more transactions to one or more persons by one or more persons.

*** Sec. 3.** AS 38.35.120(a) is amended to read:

(a) **Except as provided in AS 38.34.050(c), a** [A] noncompetitive lease of state land for a right-of-way for an oil or natural gas pipeline valued at $1,000,000 or more may be granted only upon the condition that the lessee expressly covenants in the lease, in consideration of the rights acquired by it under the lease, that

(1) it assumes the status of and will perform all of its functions undertaken under the lease as a common carrier and will accept, convey, and transport without discrimination crude oil or natural gas, depending on the kind of pipeline involved, delivered to it for transportation from fields in the vicinity of the pipeline

subject to the lease throughout its route both on state land obtained under the lease and on the other land; it will accept, convey, and transport crude oil or natural gas without unjust or unreasonable discrimination in favor of one producer or person, including itself, as against another but will take the crude oil or natural gas, depending on the kind of pipeline involved, delivered or offered, without unreasonable discrimination, that the Regulatory Commission of Alaska shall, after a full hearing with due notice to the interested parties and a proper finding of facts, determine to be reasonable in the performance of its duties as a common carrier; however, a lessee that owns or operates a natural gas pipeline

(A) subject to regulation either under the Natural Gas Act (15 U.S.C. 717 et seq.) of the United States or by the state or political subdivisions with respect to rates and charges for the sale of natural gas, is, to the extent of that regulation, exempt from the common carrier requirement in this paragraph;

(B) that is a North Slope natural gas pipeline (i) is required to operate as a common carrier only with respect to the intrastate transportation of North Slope natural gas, as that term is defined in AS 42.06.630, and (ii) is not required to operate as a common carrier as to a liquefied natural gas facility or a marine terminal facility associated with the pipeline, and is not otherwise required to perform its functions under the lease as a common carrier; for purposes of this subparagraph, "North Slope natural gas pipeline" means all the facilities of a total system of pipe, whether owned or operated under a contract, agreement, or lease, used by a carrier for transportation of North Slope natural gas, as defined by AS 42.06.630, for delivery, for storage, or for further transportation, and including all pipe, pump, or compressor stations, station equipment, tanks, valves, access roads, bridges, airfields, terminals and terminal facilities, including docks and tanker loading facilities, operations control centers for both the upstream part of the pipeline and the terminal, tanker ballast treatment facilities, fire protection system, communication system, and all other facilities used or necessary for an integral line of pipe, taken as a whole, to carry out transportation, including an extension or

enlargement of the line;

(2) it will interchange crude oil or natural gas, depending on the kind of pipeline involved, with each like common carrier and provide connections and facilities for the interchange of crude oil or natural gas at every locality reached by both pipelines when the necessity exists, subject to rates and regulations made by the appropriate state or federal regulatory agency;

(3) it will maintain and preserve books, accounts, and records and will make those reports that the state may prescribe by regulation or law as necessary and appropriate for purposes of administration of this chapter;

(4) it will accord at all reasonable times to the state and its authorized agents and auditors the right of access to its property and records, of inspection of its property, and of examination and copying of records;

(5) it will provide connections, as determined by the Regulatory Commission of Alaska under AS 42.06.340, to facilities on the pipeline subject to the lease, both on state land and other land in the state, for the purpose of delivering crude oil or natural gas, depending on the kind of pipeline involved, to persons (including the state and its political subdivisions) contracting for the purchase at wholesale of crude oil or natural gas transported by the pipeline when required by the public interest;

(6) it shall, notwithstanding any other provision, provide connections and interchange facilities at state expense at such places the state considers necessary if the state determines to take a portion of its royalty or taxes in oil or natural gas;

(7) it will construct and operate the pipeline in accordance with applicable state laws and lawful regulations and orders of the Regulatory Commission of Alaska;

(8) it will, at its own expense, during the term of the lease,

(A) maintain the leasehold and pipeline in good repair;

(B) promptly repair or remedy any damage to the leasehold;

(C) promptly compensate for any damage to or destruction of property for which the lessee is liable resulting from damage to or destruction of the leasehold or pipeline;

(9) it will not transfer, assign, or dispose of in any manner, directly or indirectly, or by transfer of control of the carrier corporation, its interest in a right-of-way lease, or any rights under the lease or any pipeline subject to the lease to any person other than another owner of the pipeline (including subsidiaries, parents, and affiliates of the owners), except to the extent that the commissioner, after consideration of the protection of the public interest (including whether the proposed transferee is fit, willing, and able to perform the transportation or other acts proposed in a manner that will reasonably protect the lives, property, and general welfare of the people of Alaska), authorizes; the commissioner shall not unreasonably withhold consent to the transfer, assignment, or disposal;

(10) it will file with the commissioner a written appointment of a named permanent resident of the state to be its registered agent in the state and to receive service of notices, regulations, decisions, and orders of the commissioner; if it fails to appoint an agent for service, service may be made by posting a copy in the office of the commissioner, filing a copy in the office of the lieutenant governor, and mailing a copy to the lessee's last known address;

(11) the applicable law of this state will be used in resolving questions of interpretation of the lease;

(12) the granting of the right-of-way lease is subject to the express condition that the exercise of the rights and privileges granted under the lease will not unduly interfere with the management, administration, or disposal by the state of the land affected by the lease, and that the lessee agrees and consents to the occupancy and use by the state, its grantees, permittees, or other lessees of any part of the right-of-way not actually occupied or required by the pipeline for the full and safe utilization of the pipeline, for necessary operations incident to land management, administration, or disposal;

(13) it will be liable to the state for damages or injury incurred by the state caused by the construction, operation, or maintenance of the pipeline and it will indemnify the state for the liabilities or damages;

(14) it will procure and furnish liability and property damage insurance from a company licensed to do business in the state or furnish other security or

undertaking upon the terms and conditions the commissioner considers necessary if the commissioner finds that the net assets of the lessee are insufficient to protect the public from damage for which the lessee may be liable arising out of the construction or operation of the pipeline.

*** Sec. 4.** AS 38.35.120(b) is amended to read:

(b) **Except as provided in AS 38.34.050(c), for** [FOR] a right-of-way lease granted under this chapter for an oil or natural gas pipeline valued at $1,000,000 or more to be valid and of legal effect, it must contain the terms required to be inserted under the provisions of AS 38.35.110 - 38.35.140. **Except as provided in AS 38.34.050(c), an** [AN] oil or natural gas pipeline right-of-way lease granted under this chapter that does not contain the required terms is null and void and without legal effect and does not vest any interest in state land or any authority in the carrier granted the lease.

*** Sec. 5.** AS 38.35.200 is amended by adding new subsections to read:

(c) Except as provided for an applicant under (a) of this section, notwithstanding any contrary provision of law, an action or decision of the commissioner or other state officer or agency concerning the issuance or approval of a necessary right-of-way, permit, lease, certificate, license, or other authorization for the development, construction, or initial operation of a natural gas pipeline by the Alaska Gasline Development Corporation, a subsidiary created by the Alaska Housing Finance Corporation under AS 18.56.086, that uses a right-of-way subject to this chapter may not be subject to judicial review, except that a claim alleging the invalidity of this subsection must be brought within 60 days after the effective date of this Act, and a claim alleging that an action will deny rights under the Constitution of the State of Alaska must be brought within 60 days following the date of that action. A claim that is not filed within the limitations established in this subsection is barred. A complaint under this subsection must be filed in superior court, and the superior court has exclusive jurisdiction. Notwithstanding AS 22.10.020(c), except in conjunction with a final judgment on a claim filed under this subsection, the superior court may not grant injunctive relief, including a temporary restraining order, preliminary injunction, permanent injunction, or stay against the issuance of a necessary right-of-

way, permit, lease, certificate, license, or other authorization for the development, construction, or initial operation of a natural gas pipeline by the Alaska Gasline Development Corporation, a subsidiary created by the Alaska Housing Finance Corporation under AS 18.56.086. In this subsection, "natural gas pipeline" means all the facilities of a total system of pipe for transportation of natural gas for treatment or conditioning, delivery, storage, or further transportation, and including all pipe, pump and compressor stations, station equipment, and all other facilities used or necessary for an integral line of pipe to carry out the transportation of the gas.

(d) An appeal of a permitting decision by the Department of Environmental Conservation under AS 46.03 or AS 46.14 that is made under authority delegated to the Department of Environmental Conservation by the United States Environmental Protection Agency is not included in the actions or decisions described in (c) of this section.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION AND LEGISLATIVE INTENT. It is the intent of the legislature that a right-of-way lease subject to AS 38.34.050(c), as amended by sec. 1 of this Act, AS 38.35.100(d), as amended by sec. 2 of this Act, AS 38.35.120(a), as amended by sec. 3 of this Act, and AS 38.35.120(b), as amended by sec. 4 of this Act, that is entered into between the commissioner of natural resources and the Alaska Gasline Development Corporation, a subsidiary of the Alaska Housing Finance Corporation created under AS 18.56.086, before the effective dates of secs. 1 - 4 of this Act be amended as soon as practicable after the effective dates of secs. 1 - 4 of this Act to conform to the requirements of AS 38.34.050(c), as amended by sec. 1 of this Act, AS 38.35.100(d), as amended by sec. 2 of this Act, AS 38.35.120(a), as amended by sec. 3 of this Act, and AS 38.35.120(b), as amended by sec. 4 of this Act.

*** Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes shall change the catch lines of

(1) AS 38.34.050 from "Cooperation and access to information" to "Cooperation; information sharing; permits, use of state resources, and leases"; and

(2) AS 38.35.200 from "Judicial review of decisions of commissioner on

application" to "Judicial review."

LEGAL SERVICES

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

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FAX (907) 465-2029
Mail Stop 3101

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

MEMORANDUM March 2, 2012

SUBJECT: Change of title of HB 215 in the other body
(Work Order No. 27-LS0741\X)

TO: Representative Mike Chenault
Attn: Tom Wright

FROM: Donald M. Bullock Jr.
Legislative Counsel

Enclosed is a draft SCS CSHB 215( ) that will require a title change in the Senate.

Please advise the sponsoring committee to request a final version of the enclosed concurrent resolution to waive the Uniform Rules that prohibit a title change in the second body.

If I may be of further assistance, please advise.

DMB:plm
12-142.plm

Enclosures

27-LS1428\A
Nauman/Bullock
3/1/12

SENATE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Introduced:
Referred:

A RESOLUTION

Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, concerning House Bill No. 215, relating to the judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Housing Finance Corporation for a gas pipeline transportation corridor.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding changes to the title of a bill, are suspended in consideration of House Bill No. 215, relating to the judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Housing Finance Corporation for a gas pipeline transportation corridor.

MEA
MATANUSKA ELECTRIC ASSOCIATION

March 13, 2012

Senator Hollis French
716 W. 4th Avenue, Suite 500
Anchorage, AK 99501-2133

Subject: HB 215

Dear Senator French:

Matanuska Electric Association (MEA) provides electrical service to 57,000 households, businesses, schools and government facilities in a service territory spanning Eagle River to Trapper Creek (south to north) and Big Lake to Sheep Mountain (west to east). A long term opportunity for MEA customers is the prospect of a new power generation facility located in the northern end of the Mat-Su Borough near Talkeetna. In planning for a 15 to 20-year timeline, MEA will require natural gas from the AGDC's bullet line delivered to the northern sector of our service territory to lower electric power costs and increase reliability of service in that area.

While the ASAP project does not contemplate any gas off-take along its route, the current State-granted rights-of-way do contain provisions to assure that in the future such service could be requested. Unfortunately, HB 215 would retroactively remove the RCA requirement to adjudicate connection requests (AS 38.35.120(a)5). This would likely eliminate any possibility for MEA access to this pipeline. MEA would have objected during the DNR hearings held before granting the existing rights-of-way if there was no guarantee of future access.

MEA's concerns were previously communicated to Mr. Fauske at a public hearing in Anchorage. We believe that good public policy warrants requiring all pipelines to provide access to our citizens with RCA as the adjudicating agency, if necessary.

Sincerely,

Evan J. Griffith
General Manager

Z:\JOE\2012\MEA Correspondence\H. French 3-13-12 HB215.docx

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 215**
Fiscal Note Number
Publish Date

Identifier (file name) HB215-DNR-SPCO-12-23-11
Title JUDICIAL REVIEW OF PIPELINE PROJECT/ROW
Sponsor Rep. Chenault
Requester Senate Judiciary

Dept. Affected Natural Resources
Appropriation Administration & Support
Allocation Pipeline Cooridnator's Office
OMB Component Number 1191

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This fiscal note has been updated to the SLA 2012 form.

Prepared by Mike Thompson
Division Pipeline Coordinator's Office
Approved by Daniel S. Sullivan
Department of Natural Resources

Phone 257-1330
Date/Time 12/23/11 12:00 AM
Date 12/23/2011

(Revised 11/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 215

Analysis

Current Alaska statutes limit challenges of pipeline right-of-way leasing decisions to lease applicants, competing applicants and persons with a direct financial interest who raise an objection within 60 days a right-of-way lease application is noticed; and restrict the grounds for judicial review to procedural errors. HB 215 would amend existing statutes to impose the same limits on judicial review, including the requirement to raise an objection within 60 days of notice of the initial lease application, to all permitting and licensing decisions associated with development and construction of a pipeline that uses a state right-of-way.

There would be no fiscal impact on the Department of Natural Resources.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 215(JUD)**
Fiscal Note Number:
Publish Date:

Identifier (file name): HB215CS-DOR-AHFC-12-15-11
Title: AK. Gasline Development Corp. / Gas Pipeline Fund
Sponsor: Representative Chenault
Requester: (S) Judiciary

Dept. Affected: Revenue
Appropriation: AK Housing Finance Corp
Allocation: AK Gasline Development Corp.
OMB Component Number: 2986

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated fiscal note to reflect current fiscal year.

Prepared by: Dave Harbour, Director External Affairs — Phone: 907-277-4488
Division: Alaska Gasline Development Corporation — Date/Time: 12/15/11 10:50 AM
Approved by: Dan Fauske, President — Date: 12/15/2011
Alaska Gasline Development Corporation

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 215(JUD)

Analysis

HB 215 relates to judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land. No additional resources or staff is expected; therefore, there is no fiscal impact to the corporation.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **HB 215**
Fiscal Note Number:
Publish Date:

Identifier (file name): HB215CS(JUD)am-LAW-CIV-12-13-11
Dept. Affected: Law
Title: An Act relating to the judicial review of right-of-way lease or the development or construction of an oil or gas pipeline.
Appropriation: Civil
Allocation: Oil, Gas & Mining
Sponsor: Representative(s) Chenault
Requester: (S) Judiciary
OMB Component Number: 2091

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 12/13/11 11:15AM
Approved by: John J. Burns, Attorney General — Date: 12/13/2011
Department of Law

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 215

Analysis

Current Alaska statutes limit challenges of pipeline right-of-way leasing decisions to lease applicants, competing applicants and persons with a direct financial interest who raise an objection within 60 days a right-of-way lease application is noticed; and restrict the grounds for judicial review to procedural errors. HB 215 would amend existing statutes to impose the same limits on judicial review, including the requirement to raise an objection within 60 days of notice of the initial lease application, to all permitting and licensing decisions associated with development and construction of a pipeline that uses a state right-of-way. HB 215 would also create an exemption to the common carrier requirements of AS 38.35 in favor of the Alaska Housing Finance Corporation for the lease of a gas line right-of-way.

Alaska State Legislature

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145 Main St. Loop
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REPRESENTATIVE MIKE CHENAULT
SPEAKER OF THE HOUSE

MEMORANDUM

TO: Senator Hollis French, Chair
Senate Judiciary Committee

FROM: Representative Mike Chenault
Speaker of the House

DATE: April 12, 2011

~~RE: Request for Hearing-Committee Substitute for House Bill 215 (JUD) am~~

Please consider this request to schedule House Bill 215: *Judicial Review of Pipeline/ROW,* before your committee at your earliest possible convenience. Back-up for the legislation will be sent to your committee aide shortly.

Thank you for your consideration of my request.

Representative_Mike_Chenault@legis.state.ak.us

Alaska State Legislature

State Capitol, Room 208
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REPRESENTATIVE MIKE CHENAULT

SPEAKER OF THE HOUSE

SPONSOR STATEMENT

COMMITTEE SUBSTITUTE for HOUSE BILL 215 (JUD) am

"An Act relating to judicial review of a right-of-lease or the development or construction of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Housing Finance Corporation for a gas pipeline transportation corridor."

The objective of House Bill 215 is to prohibit the filing of lawsuits that have the potential to delay construction of in-state gaslines. The provisions under House Bill 215 modify current statute and the provisions only apply to state land rights-of-way. Claims may be filed only by an applicant, a competing applicant or a person who has a direct financial interest affected by the lease of a right-of-way. The requests for judicial review must be filed within 60 days of the publication of notice for a right-of-way lease application. Judicial review may only be granted for claims challenging the validity of the statute or challenging a denial of rights under the state constitution. Any claim will be barred unless it is filed within the 60 day time frame. The Department of Environmental Conservation, under the Clean Water and Clean Air Acts, is exempted from the provisions pertaining to judicial review.

All claims are to be filed in Alaska Superior Court which will have exclusive jurisdiction to determine the proceeding. The court will not have the jurisdiction to grant any injunctive relief with the exception of an issuance of a final judgment.

This legislation is modeled after the Trans-Alaska Pipeline legislation, 43 USC, Chapter 34, that was adopted by Congress in 1973 (43 USC, Chapter 43, Sec. 1652 (d).) Similar legislation to House Bill 215 was passed by the Alaska State Legislature in 1973, Senate Bill 3, related to the TAPS line.

The bill also allows the Alaska Gasline Development Authority (AGDC) to move from a common carrier requirement to a contract carrier option. This change is necessary to pursue a successful open season and project financing for an in-state gasline.

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REPRESENTATIVE MIKE CHENAULT
SPEAKER OF THE HOUSE

SECTIONAL ANALYSIS

COMMITTEE SUBSTITUTE for HOUSE BILL 215 (JUD) am: "*An Act relating to the judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Housing finance Corporation for a gas pipeline transportation corridor.*"

Section 1: Amends AS 38.34.050(c), Cooperation and access to information. Adds language that excludes covenants found in AS 38.35.120(a) (1), (2) and (5) from the covenants required to be included in the lease. These covenants refer to a common carrier pipeline which is not applicable to the AGDC (Alaska Gasline Development Corporation) proposal. The AGDC gas pipeline proposal is to be that of a contract carrier. Without the removal of the specific covenants, AGDC will be impacted in its ability to finance the project.

Also adds language that a right-of-way lease is valid and of legal effect notwithstanding AS 38.35.120(b). This allows AGDC to continue its work through the summer under the assumption that AGDC has the ability to operate under this take or pay approach.

Section 2: Amends AS 38.35.100(d), Decision on application. Conforming language to note the changes found in Section 1.

Section 3: Amends AS 38.35.120(a), Covenants required to be included in lease. Conforming language to note the changes found in Section 1.

Section 4: Amends AS 38.35.120(b), Covenants required to be included in lease. Conforming language to note the changes found in Section 1.

Section 5: Amends AS 38.35.200(a), Judicial review of decisions of commissioner on application. Adds language that is intended to limit the ability of those with objections to natural gas pipeline construction to stop necessary projects. Allows a competing applicant or a person with a direct financial interest affected by the lease of a right-of-way to raise an objection within 60 days of the application or 60 days after the effective date of this legislation. Allows an applicant standing to seek judicial review anytime in the process.

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Section 6: Adds a new subsection to AS 38.35.200, Judicial review of decisions of commissioner on application. This subsection (c) is modeled after the Trans-Alaska Pipeline Authorization Act provision to foreclose lawsuits against any phase of development and/or construction. This subsection only allows those who have standing to bring about an action alleging that an action will deny rights under the state Constitution or challenging the invalidity of this section. The complaint must be filed in a state Superior Court and the court may not grant injunctive relief with the exception of a final judgment. Exempts an appeal of a permitting decision by the Department of Environmental Conservation under AS 46.03 (Environmental Conservation) and AS 46.14 (Air Quality Control) that is delegated to the department by the Environmental Protection Agency.

Section 7: Amends uncodified law by adding a new section for Revisor's Instructions. Changes the catch line of AS 38.35.200 from "Judicial review of decisions of commissioner on application" to "Judicial review."

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 215**
Fiscal Note Number
Publish Date

Identifier (file name) HB215-DNR-SPCO-12-23-11
Title JUDICIAL REVIEW OF PIPELINE PROJECT/ROW
Sponsor Rep. Chenault
Requester Senate Judiciary

Dept. Affected Natural Resources
Appropriation Administration & Support
Allocation Pipeline Cooridnator's Office
OMB Component Number 1191

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This fiscal note has been updated to the SLA 2012 form.

Prepared by Mike Thompson — Phone 257-1330
Division Pipeline Coordinator's Office — Date/Time 12/23/11 12:00 AM
Approved by Daniel S. Sullivan — Date 12/23/2011
Department of Natural Resources

(Revised 11/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 215

Analysis

Current Alaska statutes limit challenges of pipeline right-of-way leasing decisions to lease applicants, competing applicants and persons with a direct financial interest who raise an objection within 60 days a right-of-way lease application is noticed; and restrict the grounds for judicial review to procedural errors. HB 215 would amend existing statutes to impose the same limits on judicial review, including the requirement to raise an objection within 60 days of notice of the initial lease application, to all permitting and licensing decisions associated with development and construction of a pipeline that uses a state right-of-way.

There would be no fiscal impact on the Department of Natural Resources.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 215**
Fiscal Note Number
Publish Date

Identifier (file name) HB215CS(JUD)am-LAW-CIV-12-13-11
Title An Act relating to the judicial review of right-of-way lease or the development or construction of an oil or gas pipeline.
Sponsor Representative(s) Chenault
Requester (S) Judiciary

Dept. Affected Law
Appropriation Civil
Allocation Oil, Gas & Mining
OMB Component Number 2091

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by Eileen Donahue, Division Operations Manager
Division Administrative Services
Phone 465-5427
Date/Time 12/13/11 11:15AM

Approved by John J. Burns, Attorney General
Department of Law
Date 12/13/2011

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 215

Analysis

Current Alaska statutes limit challenges of pipeline right-of-way leasing decisions to lease applicants, competing applicants and persons with a direct financial interest who raise an objection within 60 days a right-of-way lease application is noticed; and restrict the grounds for judicial review to procedural errors. HB 215 would amend existing statutes to impose the same limits on judicial review, including the requirement to raise an objection within 60 days of notice of the initial lease application, to all permitting and licensing decisions associated with development and construction of a pipeline that uses a state right-of-way. HB 215 would also create an exemption to the common carrier requirements of AS 38.35 in favor of the Alaska Housing Finance Corporation for the lease of a gas line right-of-way.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **CSHB 215(JUD)**
Fiscal Note Number
Publish Date

Identifier (file name) HB215CS-DOR-AHFC-12-15-11
Title AK. Gasline Development Corp. / Gas Pipeline Fund
Sponsor Representative Chenault
Requester (S) Judiciary

Dept. Affected Revenue
Appropriation AK Housing Finance Corp
Allocation AK Gasline Development Corp.
OMB Component Number 2986

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated fiscal note to reflect current fiscal year.

Prepared by Dave Harbour, Director External Affairs — Phone 907-277-4488
Division Alaska Gasline Development Corporation — Date/Time 12/15/11 10:50 AM
Approved by Dan Fauske, President — Date 12/15/2011
Alaska Gasline Development Corporation

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 215(JUD)

Analysis

HB 215 relates to judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land. No additional resources or staff is expected; therefore, there is no fiscal impact to the corporation.

LexisNexis®

MONTY D. MOORE, Appellant, v. STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES; and AMERICAN COPPER & NICKEL CO., INC., Appellees.

Supreme Court No. S-8624, No. 5209

SUPREME COURT OF ALASKA

992 P.2d 576*; *1999 Alas. LEXIS 158*; *147 Oil & Gas Rep. 215*; *30 ELR 20218

November 26, 1999, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage,. Superior Court No. 3AN-97-3992 CI. Sigurd E. Murphy, Judge pro tem.

DISPOSITION: The superior court's decision AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, company that located and recorded mining claims on state-selected federal land, appealed an order of the Superior Court, Third, Judicial District (Alaska), which upheld decision of appellee, commissioner of state natural resource agency, to void the mining claims.

OVERVIEW: Appellant acquired mining rights on federal land the State had selected under the Alaska Statehood Act, Pub. L. No. 85-508, § 6(g), 72 Stat. 339, 341-42 (1958) prior to the federal government's approval of the land selection. Appellant did not challenge appellee's determination that it was not qualified to do business in Alaska because it failed to register with the appropriate state agency. The court concluded that appellant acquired mining rights at the time of location, rather than an ephemeral claim in waiting, because the State had a present, substantial interest in state-selected lands prior to approval by the federal government. Appellee's decision to void appellant' mining rights was correct because appellee acted within its authority, was entitled to find that appellant was not qualified to conduct business in Alaska and thus not qualified to acquire mining rights under *Alaska Stat. § 38.05.190(a)*.

OUTCOME: Order affirmed because appellant acquired mining rights at time of location, not an ephemeral claim in waiting, and since appellant was not qualified to conduct business in the state, appellant was not qualified to acquire mining rights.

COUNSEL: Thomas E. Meacham, Anchorage, for Appellant.

Lawrence Z. Ostrovsky, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee State of Alaska, Department of Natural Resources.

Joseph J. Perkins, Jr. and Barbara F. Fullmer, Guess & Rudd P.C., Anchorage, for Appellee American Copper & Nickel Company, Inc.

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

OPINION BY: CARPENETI

OPINION

[*576] OPINION

CARPENETI, Justice.

I. *INTRODUCTION*

Pacific Rainier, Inc. (PRI) located and recorded mining claims on state-selected federal land. At the time, the federal government had not conveyed the land. Upon determining [**2] that PRI was not qualified to do business in Alaska, and thus not allowed to acquire min-

ing rights in this state, the Commissioner of the Department of Natural Resources voided PRI's claims. The superior court upheld the commissioner's decision. The president [*577] of PRI, Monty D. Moore, appealed to this court, arguing that a locator on state-selected federal lands does not acquire mining rights voidable by the state because the state has no rights to convey until the federal government tentatively approves the transfer. In addition, Moore argues that such rights accrue by operation of law upon tentative approval by the federal government, and under Alaska law he has two years after that approval to qualify to do business in Alaska and thus acquire the rights. We disagree. Because a locator acquires mining rights at the time of location, and the commissioner properly voided the rights PRI acquired, we affirm.

II. *FACTS & PROCEEDINGS*

In early 1996, PRI located and recorded certificates of location under state law [1] to more than 200 mining claims and prospecting sites on land north of Denali Highway near Paxson. The locations were made on federal land that the state had [**3] selected pursuant to Section 6 of the Alaska Statehood Act; [2] however, the federal government had not yet "tentatively approved" [3] the state's land selection or transferred patent.

1 *See AS 38.05.185-275.*

2 Pub. L. No. 85-508, § 6(g), 72 Stat. 339, 341-42 (1958), *reprinted in* 48 U.S.C.A. note preceding § 21 (West 1987).

3 The act of issuing tentative approval constitutes the formal transfer of land management authority from the United States to the State of Alaska regarding any particular Statehood Act land selections. *See id.*:

> Following the selection of lands by the State and the tentative approval of such selection by the Secretary of the Interior or his designee, but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands . . . .

Later that year, American Copper & Nickel Company, Inc. (ACNC), a company claiming to have located, staked, and recorded [**4] many of PRI's locations before PRI had, informed the Division of Mining that PRI was not a corporation qualified to do business in Alaska and therefore was not qualified to acquire exploration and mining rights under Alaska law. ACNC requested that the division resolve the issue as soon as possible because the conflicting claims were causing investors to withhold financing for ACNC's drilling program. [4] Shortly thereafter, the division director nullified and voided PRI's claims on the grounds brought forward by ACNC.

4 ACNC indicated that the United States Bureau of Land Management had given ACNC permission to conduct drilling on the state-selected lands. The state concurred. Prior to conveyance from the United States to the state, a locator may obtain permits to drill from the federal land manager and other permitting authorities with the state's concurrence. *See* Alaska National Interest Lands Conservation Act § 906(k)(1), *43 U.S.C.A. § 1635(k)(1) (West 1986)*; *see also 11 Alaska Administrative Code 86.115(a)* (1999).

[**5] Moore appealed this decision to the Commissioner of the Department of Natural Resources (commissioner) and ACNC intervened. [5] Moore argued, among other things, that no rights were transferred from the state to PRI that were presently voidable by the state because PRI's selections were on federal lands. As such, he contended, the state had no mining rights to convey at the time of location, and thus there were no rights to void. Moore further asserted that under Alaska law, he had two years after the federal government tentatively approved the state's land selection to qualify to do business in Alaska and to obtain the mining rights to the locations.

5 On appeal before this court, ACNC raises for the first time the claim that Moore is not the locator or owner of the claims in question, and lacks standing to assert claims on behalf of PRI. Moore responds that because he is the president and the sole shareholder of PRI, this court should hold that he has standing to defend the corporation's interests in administrative and judicial proceedings. Alternatively, Moore argues that ACNC has waived this issue because it failed to raise it below. Moore's latter contention is correct; failure to raise the issue of capacity to sue below results in a waiver of that defense. *See Jackson v. Nangle, 677 P.2d 242, 250 n.10 (Alaska 1984)* (citations omitted).

[**6] In March 1997, the commissioner upheld the division director's decision, primarily on the basis that PRI was not qualified to engage in business in Alaska. In addition, the commissioner held that mining rights can be established on state-selected lands prior to [*578] tentative approval by the federal government, and that such claims are subject to Alaska mining laws. The commissioner upheld this decision on reconsideration. Moore then appealed to the superior court, which affirmed the decision.

This appeal followed.

III. *STANDARD OF REVIEW*

This case raises questions of law concerning the application of state mining laws. Because resolution of these questions does not require agency expertise, we employ the substitution of judgment test. [6] However, we give "some weight" to any long-standing agency statutory interpretation. [7] On questions of law, the duty of this court "is to adopt the rule of law that is most persuasive in light of precedent, reason and policy." [8]

6 *See Handley v. State, Dep't Of Revenue, 838 P.2d 1231, 1233 (Alaska 1992).*

[**7]

7 *See Peninsula Marketing Ass'n v. State, 817 P.2d 917, 922 (Alaska 1991)* (citing *State, Dep't Of Revenue v. Alaska Pulp America, Inc., 674 P.2d 268, 274 (Alaska 1983)).*

8 *Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1978).*

IV. *DISCUSSION*

A. *Statutory Framework*

Under Alaska law, mining rights on state lands are acquired through the process of "location." [9] This process entails the discovery and marking of the claim, the posting of a notice at the claim site, and the recording of a certificate of location. [10] Through location, a locator acquires a mining claim priority against subsequent locators to the selected claims. [11]

9 *See AS 38.05.195.*

10 *See 11 AAC 86.200*-215 (1996). In addition, there are annual rent and labor requirements. *See AS 38.05.210*-211; *see also 11 AAC 86.215*-221 (1999).

11 *See AS 38.05.275*, which provides in part:

> (a) Mining locations made on state land, including shoreland, tideland or submerged land, or state selected land . . . acquire for the locator mining rights . . . subject to existing claims and to any denial of or restriction in the tentative approval of state selection or patent of the land to the state.
>
> (b) In this section, "state selected land" . . . means land for which the state has filed a selection application with the United States under Sec. 6 of the Alaska Statehood Act, as amended, regardless of the validity or effect of the application, if the selection described in the application has not been rejected or relinquished . . . .

[**8] Locations may be made on state-selected lands prior to the federal government's actual conveyance of the land to the state. [12] State-selected land is land for which the state has filed a selection application with the United States under Section 6 of the Alaska Statehood Act, regardless of the validity or effect of the application, if the selection has not been rejected or relinquished. [13] However, because the state does not have management authority over the land until tentative approval, the location is made at the locator's risk. [14] Nevertheless, locators of claims on state-selected land still acquire prior rights against subsequent locators; these prior rights, upon the land's conveyance, mature [*579] into mining claims, leasehold locations, or prospecting sites. [15]

12 *See id.*; *see also 11 AAC 86.115* (1999), which provides in part:

> LOCATIONS ON STATE-SELECTED LAND.
>
> (a) A location made on state-selected land that has not been conveyed to the state by the federal government through tentative approval or patent is made at the locator's risk. Because the state does not have management authority over the land unless the selection has been conveyed and cannot authorize exploration work or mining until that time, the locator is responsible for obtaining any necessary permits from the federal land manager and other permitting authorities.
>
> (b) A location made on state-selected land in accordance with this chapter creates prior rights against subsequent locators and becomes a mining claim, leasehold location, or prospecting site when the federal government conveys the selection to the state through tentative approval or patent, whichever occurs first, unless the conveyance restricts or bars the location, or unless a state mineral closure is in effect on the date of conveyance. If a state leasing restriction is in effect on the date of conveyance, a location made before the conveyance is subject to that restriction. If the land is closed to mineral entry or restricted to leasing after the date of the conveyance, valid location that was made before the conveyance is unaffected.

[**9]

13 *See AS 38.05.275(b)*; *see also 11 AAC 86.115.*

14 *See 11 AAC 86.115.*

15 *See id.*

Finally, in order for a foreign corporation to locate a mining claim in Alaska, it must be qualified to do business in the state. [16] To qualify, a foreign corporation must obtain a certificate of authority by registering with the Alaska Department of Commerce and Economic Development. [17] However, an unqualified corporation that acquires an interest in exploration or mining rights by operation of law has two years to become qualified or to dispose of the interest to a qualified person. [18]

16 *See AS 38.05.190(a)(5).*

17 *See AS 10.06.705-735*; *see also 11 AAC 88.185(33).*

18 *See AS 38.05.190(b).*

B. *PRI Acquired Mining Interests That Were Properly Voidable by the State.*

PRI took the proper steps to locate claims and [**10] thus acquire mining rights on locations near Paxon. As previously discussed, these rights are in the nature of a priority against subsequent locators. [19] Because the claims were on state-selected land that had not been conveyed by the federal government, PRI was an "at-risk" locator whose priority rights were contingent upon the federal government's tentative approval of the land selection. [20]

19 *See AS 38.05.275.*

20 *See 11 AAC 86.115.*

However, when the Division of Mining learned that PRI was not qualified to do business in Alaska because it failed to register with the Department of Commerce and Economic Development, the division voided and nullified PRI's mining claim priority rights. This extinguished any current or future claim based upon the voided locations. Moore does not challenge the division's finding that PRI was not qualified to conduct business in Alaska. [21]

21 In Moore's appeals before the commissioner and before the superior court, he argued that the locations were made on behalf of Pacific Rainer Roofing, Inc., a corporation qualified to do business in Alaska, and not PRI. However, he has abandoned this argument on appeal before this court.

[**11] Nevertheless, Moore argues -- in spite of unambiguous statutory language to the contrary -- that the commissioner erred as a matter of law in holding: (1) that a locator on state-selected lands acquires mining rights at the time of location, which would be subject to nullification for the locator's failure to be qualified to do business in the state; and (2) that Moore would not acquire mining rights by operation of law when the federal government tentatively approved the state-selected lands, and thus have two years from that time to qualify to do business in the state. He contends that because the state has no property interest in state-selected federal lands until tentative approval, the state has no interest to presently convey. According to Moore, the state only conveys an "ephemeral option" to "stand in line," or a "claim in waiting," which becomes a mining right by operation of law upon tentative approval. Thus, Moore contends that upon tentative approval PRI would acquire an interest in mining rights by operation of law and would then have two years to become qualified or to dispose of this interest to a qualified person. [22] We disagree.

22 *See AS 38.05.190(b).*

[**12] First, we note that Moore appears to be dissecting the right of priority against subsequent locators out of the "bundle of sticks" comprising mining rights. However, a priority right is intertwined within that bundle. For this reason, Moore's argument is fatally flawed. If there is no mining right for the state to void, there is no mining right for the state to convey, including a mining claim priority contingent upon the ultimate conveyance of the land. Thus, Moore's locations on state-selected land would be worthless. In reality, the term "mining rights" is used both in *AS 38.05.275(a)* and in *AS 38.05.190* and it means the same thing in both sections. Moore would have acquired "mining rights" under subsection 275(a) on state-selected land except that subsection [*580] 190(a) prohibits corporations not qualified to do business in Alaska from acquiring "mining rights." Since Moore's acquisition of "mining rights" would have been by location, not by operation of law, the operation of law exception of subsection 190(b) does not apply.

Second, the state does in fact have conveyable property interests in state-selected land prior to tentative approval by the federal government, albeit interests [**13] contingent upon that approval. The United States Supreme Court has held that where a state follows all of the appropriate selection procedures to perfect its land selection claims, it generally acquires vested rights in the selected land at the time of selection. [23] To this end, the Court stated:

It is . . . well settled that a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the government and that his right to a legal title is to be determined as of that time, and also that this rule is based upon the theory that by virtue of his compliance with the requirements he has an equitable title to the land; that in equity it is his and the government holds it in trust for him. But it is said that, as the selection is subject to the approval of the Secretary of the Interior, no right can become vested, nor

equitable title be acquired, thereunder, unless and until his approval is had, and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty [**14] of ascertaining whether the selector is acting within the law, in respect of both the lands relinquished and the land selected, and of approving or rejecting the selection accordingly. [24]

23 *See Wyoming v. United States, 255 U.S. 489, 497, 65 L. Ed. 742, 41 S. Ct. 393 (1921)*; *Payne v. New Mexico, 255 U.S. 367, 371, 65 L. Ed. 680, 41 S. Ct. 333 (1921).*

24 *Payne, 255 U.S. at 371.*

Alaska case law also supports the proposition that the state acquires present, conveyable rights in lands selected by the state prior to tentative approval or conveyance by the federal government. In *Sabo v. Horvath*, [25] we held that a grantor who had not yet received his patent under the Alaska Homesite Act [26] nevertheless had a sufficient interest to convey the land by quitclaim deed. [27] We reasoned that Congress's silence on the issue of alienability in the Act was "quite significant" because Congress "knew how specifically to [**15] prohibit alienation." [28] We stated that though "various other events were necessary prior to the issuance of patent," the grantor had "complied with a substantial portion of his obligation under the statute and regulations. . ." and the "mere fact that steps remained [to be taken] before issuance of [a] patent . . ." did not preclude "the existence of an alienable right, where there has been basic compliance with the statutory demands." [29] Our reasoning in *Sabo* applies here.

25 *559 P.2d 1038 (Alaska 1976).*

26 *43 U.S.C.A. § 687a (West 1986).*

27 *See Sabo*, 559 P.2d at 1042.

28 *Id.*

29 *Id.*

Like the Homesite Act, the Statehood Act does not expressly prohibit the creation of *any* third-party interests in state-selected land prior to tentative approval by the federal government. [30] The state may not execute conditional leases or make conditional sales of such [**16] selected lands, but it is not expressly prohibited from establishing priority rights in third-persons through location. [31] Moreover, upon selection of lands, the state has complied substantially with applicable laws and regulations. Generally, all that remains to be done is a land survey, as well as review and approval by the federal government. [32] The rights the state acquires do not ensure tentative approval or ultimate transfer of [*581] these lands, but they are more than mere expectancies. The state itself would have to take some action before it would lose the right to patent of selected land. [33]

30 *See* Alaska Statehood Act, Pub. L. No. 85-508, § 6(g), 72 Stat. 339, 341-42 (1958), *reprinted in* 48 U.S.C.A. note preceding § 21 (West 1987).

31 *See id.*

32 *See id.*

33 *See id.*

In sum, the state has a present, substantial interest in state-selected lands prior to tentative approval by the federal government. Moreover, state [**17] law expressly grants prior rights to locators against subsequent locators on state-selected lands. [34] Recorded certificates of location memorialize an appropriation of a valuable property right from the state. [35] These rights become mining claims when the federal government conveys the selection to the state. [36] It is incorrect to assert these rights are merely "ephemeral claims in waiting." Rather, they are present, contingent rights in real property which may ripen, by successive steps, into a patent. [37] "Each of [the] steps, including the issuance of the patent, relates back and includes the original and primary location." [38] Thus, PRI, as a locator of state-selected lands, acquired mining rights at the time of location.

34 *See AS 38.05.275*; *see also 11 AAC 86.115(b).*

35 *See AS 27.10.050*; *AS 38.05.195.*

36 *See AS 27.10.050*; *AS 38.05.195.*

37 *See Kile v. Belisle, 759 P.2d 1292, 1294 n.9 (Alaska 1988)* (holding state claimant had no possessory interest in location on state-selected land where the conveyance had not received tentative approval from BLM, but rather had gained priority rights against subsequent locators that matured into a right of exclusive possession upon BLM's tentative approval); *see also Garside v. Norval*, 1 Alaska 19, 23 (D. Alaska 1888).

[**18]

38 *Garside*, 1 Alaska at 23.

Because the commissioner, acting within his authority, [39] was entitled to find that PRI was not qualified to conduct business in Alaska and thus not qualified to acquire mining rights under *AS 38.05.190(a)*, his decision voids and nullifies PRI's mining rights.

39 *See AS 38.05.020.*

C. *The Superior Court Did Not Abuse Its Discretion in Awarding Costs and Attorney Fees.*

Moore also argues that because the superior court erred in its determination that the state and ACNC had

prevailed on the merits, it erred in awarding costs and attorney fees against PRI. Because we affirm the decisions of the commissioner and lower court, we affirm the award of attorney fees.

V. *CONCLUSION*

The commissioner was correct in finding that a locator on state-selected land acquired mining rights at the time of location. These rights were susceptible to nullification [**19] for the locator's failure to qualify to locate mining claims in the state. We therefore AFFIRM the superior court's decision.

LEGAL SERVICES

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

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Mail Stop 3101

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

MEMORANDUM April 15, 2011

SUBJECT: Review of CSHB 215(FIN) am (Work Order No. 27-LS0741\E.A)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Donald M. Bullock Jr.
Legislative Counsel

You asked for a review of CSHB 215(FIN) am (bill) to identify constitutional or statutory conflict. You specifically want to know how *Moore v. State*[1] may apply to the bill.

Local or special legislation.

Sections 1 - 4 of the bill relate to covenants in AS 38.35.120(a) that the Alaska Housing Finance Corporation (AHFC) would not be bound to agree to as a condition of receiving a right-of-way lease. The covenants in AS 38.35.120(a) were enacted by the legislature and the bill would make several of those covenants inapplicable to a lease entered into with AHFC. Carving out an exception to AHFC raises a question under art. II, sec. 19, Constitution of the State of Alaska, as to whether the exclusion unique to AHFC makes the bill a "local or special act" that is contrary to the prohibition. A general Act that excludes the same covenants for any gas pipeline could avoid the "local or special" question. The fact that AHFC is a public corporation and government instrumentality[2] may be a factor considered by the court if faced with a challenge under art. II, sec. 19.

Another factor that may be considered under a challenge under art. II, sec. 19, is the policy expressed in AS 38.35.010(a) of the Right-of-Way Leasing Act. AS 38.35.010(a) reads as follows:

> (a) The natural resources of this state in crude oil and natural gas and in its land for transportation of these resources and their products by pipeline toward markets both in and out of the state are capable of making a significant contribution to the general welfare of the people of this state.

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[1] 553 P.2d 8 (Alaska 1976).

[2] AS 18.56.020.

> It is the policy of this state that the development, use, and control of a pipeline transportation system be directed to make the maximum contribution to the development of the human resources of this state, the increase in the standard of living for all of its residents, the advancement of existing and potential sectors of its economy, the strengthening of free competition in its private enterprise system, and the careful protection of its incomparable natural environment.

That policy, considered along with the enactment of ch. 7, SLA 2010, which created the Joint In-State Gasline Development Team in AHFC,[3] expresses the state policy to develop an in-state pipeline and have that project developed by AHFC.

In *Baxley v. State*,[4] the Alaska Supreme Court considered an Act that provided relief to a legislative enactment that gave effect to modifications of four state oil and gas leases in the Northstar Oil Field.[5] The Court concluded that the Act was not special legislation, "[b]ecause the Act's exclusive focus on the Northstar leases reflects their unique nature, and because the Act fairly and substantially relates to legitimate state purposes[.]"

AHFC would not be required to agree to the covenants from which it is excluded under the bill. Considering the state policy expressed in AS 38.35.010 and the enactment of AS 38.34 (that requires AHFC to develop a gas pipeline project), it is likely that a court would find that the favorable treatment of AHFC in the bill relates to legitimate state purposes. It is reasonable to expect that a court would find that bill does not violate art. II, sec. 19, Constitution of the State of Alaska.

Standing and the limitations on actions relating to the right-of-way lease.

Sections 5 and 6 of the bill amend AS 38.35.200. Currently, AS 38.35.200 limits standing to object to a right-of-way lease, the period in which an objection must be raised, and the issues relating to the issuance of the right-of-way lease that are subject to judicial review.[6] The period for raising an objection is 60 days after the commissioner of

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[3] AS 38.34.030.

[4] 958 P.2d 422 (Alaska 1998).

[5] 958 P.2d at 424.

[6] Sec. 38.35.200. Judicial review of decisions of commissioner on application. (a) An applicant or competing applicant or a person who has a direct financial interest affected by the lease who raises objections within 60 days of the publication of notice under AS 38.35.070 are the only persons with standing to seek judicial review of a decision of the commissioner under AS 38.35.100.

(b) The only grounds for judicial review of a decision of the commissioner are

natural resources (commissioner) publishes notice that an application for a right-of-way lease has been received under AS 38.35.070.

In *Moore v. State*, the case you mentioned in your request, the Alaska Supreme Court stated, "Whether a party has standing to obtain judicial resolution of a controversy depends on whether the party has sufficient personal stake in the outcome of the controversy."[7] The plaintiffs in *Moore*, who for the most part were commercial fishermen, claimed that they would be adversely affected if oil exploration and production were to be allowed in Kachemak Bay. The court concluded that the plaintiffs' interest in the outcome is essentially economic, and, "As such, it clearly meets the injury-in-fact requirement for standing."[8] Under the decision in *Moore*, the direct financial interest requirement for standing in the present AS 38.35.200 and in the proposed amended version may be satisfied by a person whose livelihood may be affected by a right-of-way lease or an action related to that lease. To secure standing, a person must raise the required objection with 60 days after the notice of an application has been published.

Section 5 of the bill limits standing to the same persons as in current law -- a competing applicant, a person that has a direct financial interest affected by the lease, and the applicant. The bill moves the placement of the naming of the applicant so that the amended AS 38.35.200(a) makes the 60-day period to object applicable to the competing applicant and the person with the directly affected financial interest, but removes the applicant from the requirement to raise an objection during the 60-day limitation period. This is logical because the basis for the applicant's appeal may not arise until the commissioner's decision on the application.

Section 5 further amends AS 38.35.200(a) by adding judicial review of "**an action described in (c) of this section**." Under the amended language, an applicant is not subject to the limitations in AS 38.35.200(c), which is added by sec. 6 of the bill. However, a competing applicant or a person with the affected direct financial interest must make an objection within the 60-day period described in AS 38.35.200(a) to have standing to seek judicial review. Although other provisions of law may provide for appeals of a state commissioner or agency action described in AS 38.35.200(c), the subsection is, after making an exception for the applicant under AS 38.35.200(a), prefaced with the phrase "notwithstanding any contrary provision of law. . . ." If a

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(1) failure to follow the procedures set out in this chapter; or

(2) abuse of discretion so capricious, arbitrary, or confiscatory as to constitute a denial of due process. (Sec. 1 ch. 72 SLA 1972; am. Sec. 19 ch. 3 FSSLA 1973)

[7] *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976).

[8] 553 P.2d at 24.

conflicting law is applicable but does not have a similar "notwithstanding" limitation, the conflict likely would be resolved in favor of the limitations in AS 28.35.200(c).

There may be an access to the courts issue raised if an action that is the basis for a person to seek judicial review is not reasonably foreseen during the 60-day period. The impacted person may still try to access the courts and challenge the 60-day period to acquire standing as barring access to the courts. Whether a court would set aside the 60-day period to acquire standing is difficult to predict; the outcome may depend on the issue that is presented and the alleged risk or harm.

In any case, the amended AS 38.35.200 is an incentive for anyone with even the remotest possibility of being affected by a right-of-way lease or an action related to that lease to raise an objection to preserve standing.

Applicability of art. VIII, sec. 10 of the Alaska constitution.

Article VIII, sec. 10, Constitution of the State of Alaska, prohibits leases of state lands "without prior public notice and other safeguards of the public interest as may be prescribed by law." The Right-of-Way Leasing Act provides for public notice, a hearing, and findings by the commissioner of natural resources before granting a right-of-way lease application, in whole or in part.

AS 38.35.020 authorizes the commissioner to grant a noncompetitive right-of-way lease. The requirements that must be met to be eligible for a right-of-way lease are within AS 38.35, as well as the process for applying. A person seeking a right-of-way lease begins the process by filing an application[9] that is followed by the publication of a notice stating that an application has been received.[10] It is the publication of this notice that starts the 60-day period for raising an objection and it is during this 60-day period that a person must establish standing to pursue judicial review under AS 38.35.200, as amended by the bill.

Consistent with the requirements in art. VIII, sec. 10 of the constitution, by enacting AS 38.35.070 the legislature required prior public notice before the commissioner may approve a lease application. AS 38.35.080 requires a public hearing and requires the commissioner to prepare an analysis of the application, which is made available at least 30 days before the date set for the hearing.

After the hearing, AS 38.35.100 requires the commissioner to determine and make a written finding on an application as to whether "the applicant is fit, willing, and able to perform the transportation or other acts proposed in a manner that will be required by the

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[9] AS 38.35.050.

[10] AS 38.35.070.

present or future public interest." If the commissioner finds the application may be granted, the commissioner may grant the application in whole or in part. The limitations in AS 38.35.200 in current law limit standing to seek judicial review of a decision made under AS 38.35.100.

Article VIII, sec. 10 of the state constitution requires that no lease of state land "shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." The legislature has prescribed that there be notice of a right-of-way application (AS 38.35.070), analysis and public hearing (AS 38.35.080), and a decision by the commissioner based on written findings (AS 38.35.100). Whether this process satisfies the requirements in art. VIII, sec. 10, is a question of law which thus far has not been addressed by the Alaska Supreme Court. Under AS 38.35.200(c), as added by the bill, a claim alleging the invalidity must be brought within 60 days after the effective date of the Act enacting the subsection, and a claim alleging that an action will deny rights under the state constitution must be brought within 60 days after the date of an action.

The limitations on bringing a claim under AS 38.35.200(c) are set by law; the equitable remedy of laches is not applicable. With regard to the defense of laches, which is discussed in the *Moore* case, the Alaska Supreme Court wrote:[11]

> The defense of laches is inapplicable to an action at law. Although this proposition has never been directly asserted by the court, this was our implicit conclusion in *State v. Alex*, 646 P.2d 203, 215 (Alaska 1982). Moreover, limiting the defense of laches to equitable actions is in accord with the case law of virtually every other jurisdiction. When a party is seeking to enforce a legal right, as opposed to invoking the discretionary equitable relief of the courts, the applicable statute of limitations should serve as the sole line of demarcation for the assertion of the right.

In *Moore v. State*, the defendants raised the defense of laches, and were successful in obtaining summary judgment in their favor on that basis on the lower court.[12] The Supreme Court reversed after reviewing the timing of events in the lease sale, from the call for nominations, through the lease sale, the issuance of the leases, the issuance of the first permits in November 1974, and the filing of the plaintiff's suit in December 1974.[13] The court found that the plaintiffs were "not guilty of inexcusable delay" and sufficient prejudice had not been established on the record.[14]

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[11] *Lake and Peninsula Borough v. Local Boundary Com'n*, 885 P.2d 1059, 1064 - 1065 (Alaska 1994) (footnotes omitted).

[12] 553 P.2d at 14.

[13] 553 P.2d at 14 - 16.

[14] 553 P.2d at 16.

Actions by the Department of Environmental Conservation.

In the course of considering HB 215, concern was expressed over the effect of limiting review of the actions in the proposed AS 38.35.200(c) on the authority delegated to the Department of Environmental Conservation by the United States Environmental Protection Agency. AS 38.35.200(d) was added in the House Judiciary Committee and was adopted in CSHB 215(JUD) to avoid this conflict.

This analysis may not be conclusive or address every issue raised by CSHB 215(JUD) am given the limited time available as the session ends. If you do hear the bill in your committee, you may wish to seek additional comments from the Department of Law, who would defend the enacted provisions of the bill.

If I may be of further assistance, please advise.

DMB:ljw
11-261.ljw

Sec. ⏩38.35.120⏪. Covenants required to be included in lease.

(a) A noncompetitive lease of state land for a right-of-way for an oil or natural gas pipeline valued at $1,000,000 or more may be granted only upon the condition that the lessee expressly covenants in the lease, in consideration of the rights acquired by it under the lease, that

(1) it assumes the status of and will perform all of its functions undertaken under the lease as a common carrier and will accept, convey, and transport without discrimination crude oil or natural gas, depending on the kind of pipeline involved, delivered to it for transportation from fields in the vicinity of the pipeline subject to the lease throughout its route both on state land obtained under the lease and on the other land; it will accept, convey, and transport crude oil or natural gas without unjust or unreasonable discrimination in favor of one producer or person, including itself, as against another but will take the crude oil or natural gas, depending on the kind of pipeline involved, delivered or offered, without unreasonable discrimination, that the Regulatory Commission of Alaska shall, after a full hearing with due notice to the interested parties and a proper finding of facts, determine to be reasonable in the performance of its duties as a common carrier; however, a lessee that owns or operates a natural gas pipeline

(A) subject to regulation either under the Natural Gas Act (15 U.S.C. 717 et seq.) of the United States or by the state or political subdivisions with respect to rates and charges for the sale of natural gas, is, to the extent of that regulation, exempt from the common carrier requirement in this paragraph;

(⏩B⏪) that is a North Slope natural gas pipeline (i) is required to operate as a common carrier only with respect to the intrastate transportation of North Slope natural gas, as that term is defined in AS 42.06.630, and (ii) is not required to operate as a common carrier as to a liquefied natural gas facility or a marine terminal facility associated with the pipeline, and is not otherwise required to perform its functions under the lease as a common carrier; for purposes of this subparagraph, "North Slope natural gas pipeline" means all the facilities of a total system of pipe, whether owned or operated under a contract, agreement, or lease, used by a carrier for transportation of North Slope natural gas, as defined by AS 42.06.630, for delivery, for storage, or for further transportation, and including all pipe, pump, or compressor stations, station equipment, tanks, valves, access roads, bridges, airfields, terminals and terminal facilities, including docks and tanker loading facilities, operations control centers for both the upstream part of the pipeline and the terminal, tanker ballast treatment facilities, fire protection system, communication system, and all other facilities used or necessary for an integral line of pipe, taken as a whole, to carry out transportation, including an extension or enlargement of the line;

(2) it will interchange crude oil or natural gas, depending on the kind of pipeline involved, with each like common carrier and provide connections and facilities for the interchange of crude oil or natural gas at every locality reached by both pipelines when the necessity exists, subject to rates and regulations made by the appropriate state or federal regulatory agency;

(3) it will maintain and preserve books, accounts, and records and will make those reports that the state may prescribe by regulation or law as necessary and appropriate for purposes of administration of this chapter;

(4) it will accord at all reasonable times to the state and its authorized agents and auditors the right of access to its property and records, of inspection of its property, and of examination and copying of records;

(5) it will provide connections, as determined by the Regulatory Commission of Alaska under AS 42.06.340, to facilities on the pipeline subject to the lease, both on state land and other land in the state, for the purpose of delivering crude oil or natural gas, depending on the kind of pipeline involved, to persons (including the state and its political subdivisions) contracting for the purchase at wholesale of crude oil or natural gas transported by the pipeline when required by the public interest;

(6) it shall, notwithstanding any other provision, provide connections and interchange facilities at state expense at such places the state considers necessary if the state determines to take a portion of its royalty or taxes in oil or natural gas;

(7) it will construct and operate the pipeline in accordance with applicable state laws and lawful regulations and orders of the Regulatory Commission of Alaska;

(8) it will, at its own expense, during the term of the lease,

(A) maintain the leasehold and pipeline in good repair;

(B) promptly repair or remedy any damage to the leasehold;

(C) promptly compensate for any damage to or destruction of property for which the lessee is liable resulting from damage to or destruction of the leasehold or pipeline;

(9) it will not transfer, assign, or dispose of in any manner, directly or indirectly, or by transfer of control of the carrier corporation, its interest in a right-of-way lease, or any rights under the lease or any pipeline subject to the lease to any person other than another owner of the pipeline (including subsidiaries, parents, and affiliates of the owners), except to the extent that the commissioner, after consideration of the protection of the public interest (including whether the proposed transferee is fit, willing, and able to perform the transportation or other acts proposed in a manner that will reasonably protect the lives, property, and general welfare of the people of Alaska), authorizes; the commissioner shall not unreasonably withhold consent to the transfer, assignment, or disposal;

(10) it will file with the commissioner a written appointment of a named permanent resident of the state to be its registered agent in the state and to receive service of notices, regulations, decisions, and orders of the commissioner; if it fails to appoint an agent for service, service may be made by posting a copy in the office of the commissioner, filing a copy in the office of the lieutenant governor, and mailing a copy to the lessee's last known address;

(11) the applicable law of this state will be used in resolving questions of interpretation of the lease;

(12) the granting of the right-of-way lease is subject to the express condition that the exercise of the rights and privileges granted under the lease will not unduly interfere with the management, administration, or disposal by the state of the land affected by the lease, and that the lessee agrees and consents to the occupancy and use by the state, its grantees, permittees, or other lessees of any part of the right-of-way not actually occupied or required by the pipeline for the full and safe utilization of the pipeline, for necessary operations incident to land management, administration, or disposal;

(13) it will be liable to the state for damages or injury incurred by the state caused by the construction, operation, or maintenance of the pipeline and it will indemnify the state for the liabilities or damages;

(14) it will procure and furnish liability and property damage insurance from a company licensed to do business in the state or furnish other security or undertaking upon the terms and conditions the commissioner considers necessary if the commissioner finds that the net assets of the lessee are insufficient to protect the public from damage for which the lessee may be liable arising out of the construction or operation of the pipeline.

(⏭b⏮) For a right-of-way lease granted under this chapter for an oil or natural gas pipeline valued at $1,000,000 or more to be valid and of legal effect, it must contain the terms required to be inserted under the provisions of AS 38.35.110 - 38.35.140. An oil or natural gas pipeline right-of-way lease granted under this chapter that does not contain the required terms is null and void and without legal effect and does not vest any interest in state land or any authority in the carrier granted the lease.

(c) The commissioner may insert in any right-of-way lease other reasonable provisions and conditions required by the public interest.

(d) The lease will also contain terms and conditions that are reasonably necessary to obligate the lessee, to the extent reasonably practicable, to

(1) prevent conflicts with other existing uses of the land involving a superior public interest;

(2) protect state and private property interests;

(3) prevent any significant adverse environmental impact, including but not limited to the erosion of the surface of the land, and damage to fish and wildlife and their habitat;

(4) restore and revegetate during the term and at termination of the lease; and

(5) protect the interests of individuals living in the general area of the right of way who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes.

(e) In the event the commissioner proposes to offer a lease or leases to two or more lessees for the same pipeline, the commissioner may include terms in the lease or leases which establish

the limit of the obligations and liabilities of each lessee arising under this chapter or under the lease or leases.

HB 216

<TARGET><BILL>HB 216</BILL><SUBJECT>HB 216</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

Senate

Office of the Secretary

Official Business

State Capitol, Room 211
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FOR YOUR IMMEDIATE ATTENTION

DATE: April 12, 2012

TO: Judiciary Committee
(Cindy, Room 417)

FROM: Office of the Senate Secretary

SUBJ: Referral Change

The Chair of the Committee noted above has waived the referral(s) on the following bills(s):

RETRIEVE

CS FOR HOUSE BILL NO. 216(FIN)
"An Act relating to fiscal notes for bills directing or resulting in the adoption, amendment, or repeal of regulations, and to the notice required for the proposed adoption, amendment, or repeal of a regulation; and providing for an effective date."
HB 216-REGULATIONS: INFORMATIVE SUMMARY/BILLS

Please give the bill file(s) to the page delivering this message for forwarding to the next Committee of referral.

Thank you.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Request to waive HB 216 from Senate Judiciary Committee

I move and ask unanimous consent that House Bill 216 Regulations: Informative Summary/Bills be waived from the Senate Judiciary Committee. I have the signatures of the committee and the bill has been heard by Senate State Affairs.

Senator Hollis French, Chair

Senator Bill Wielechowski

Senator Lesil McGuire

Senator Joe Paskvan

Senator John Coghill

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REPRESENTATIVE PEGGY WILSON
HOUSE DISTRICT 2

MEMORANDUM

Date: April 10, 2012

To: Senator Hollis French

From: Representative Peggy Wilson PW

RE: **Hearing Request for HB 216 "Regulations: Informative Summary/Bills"**

I respectfully request a hearing in the Senate Judiciary Committee for HB 216, "An Act relating to fiscal notes for bills directing or resulting in the adoption, amendment, or repeal of regulations, and to the notice required for the proposed adoption, amendment, or repeal of a regulation; and providing for an effective date

Attached are:

- HB 216 Request for Hearing
- HB 216 version L
- HB 216 Sponsor Statement
- HB 216 Fiscal Note
- HB 216 Support letters (2)

Steven Weaver, from Department of Law, will be available to answer questions.

The contact for HB 216 is Sheila Finkenbinder, 465-6887.

Thank you for considering this important piece of legislation.

SENATE CS FOR CS FOR HOUSE BILL NO. 216(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PEGGY WILSON, Lynn, Costello, Kawasaki, Kerttula, Johnson

A BILL

FOR AN ACT ENTITLED

"An Act relating to fiscal notes for bills directing or resulting in the adoption, amendment, or repeal of regulations, and to the notice required for the proposed adoption, amendment, or repeal of a regulation; and providing for an effective date."

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

*** Section 1.** AS 24.08.035 is amended by adding new subsections to read:

(f) In addition to the other requirements of this section, if a bill directs an agency in the executive branch of state government to adopt, amend, or repeal a regulation or will result in an agency's adopting, amending, or repealing a regulation, the department affected shall include in the fiscal note for the bill a specific time by which the agency shall adopt, amend, or repeal the regulation. If the agency is not able to meet the deadline set in the fiscal note, the agency shall

(1) set a new deadline; and

(2) report to the Administrative Regulation Review Committee the new deadline and the reasons for being unable to meet the deadline set in the fiscal

note.

(g) In (f) of this section, "agency" includes the Alaska Housing Finance Corporation, the Alaska Industrial Development and Export Authority, the Alaska Energy Authority, the Alaska Public Offices Commission, and the Alaska Oil and Gas Conservation Commission, but does not include other boards or commissions.

* **Sec. 2.** AS 44.62.200 is amended by adding a new subsection to read:

(d) When a state agency, other than the Regulatory Commission of Alaska, the Board of Fisheries, or the Board of Game, posts, furnishes, or otherwise provides a notice of the proposed adoption, amendment, or repeal of a regulation under AS 44.62.190, a brief description of the changes made by the proposed adoption, amendment, or repeal must accompany the notice. However, if, under AS 44.62.190(a), the notice is published in a newspaper or trade or industry publication or is broadcast, this subsection does not require that the brief description otherwise required by this subsection accompany the publication or the broadcast. To the extent practicable, the brief description shall be written in clear, easily readable language that a person without a legal background is able to understand. Notwithstanding AS 44.62.300, an action may not be brought for failure of the brief description to comply with the requirements of this subsection relating to the description of the changes or its clarity and readability.

* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 24.08.035(f) and (g), enacted by sec. 1 of this Act, apply to bills that are filed on or after the effective date of this Act.

(b) AS 44.62.200(d), enacted by sec. 2 of this Act, applies to the proposed adoption, amendment, or repeal of a regulation on or after the effective date of this Act.

* **Sec. 4.** This Act takes effect July 1, 2012.

ALASKA STATE LEGISLATURE

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Wrangell, AK 99929
Phone: (907) 874-3088
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Session:
State Capitol, Room 406
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REPRESENTATIVE PEGGY WILSON
HOUSE DISTRICT 2

SPONSOR STATEMENT
House Bill 216

"An Act relating to fiscal notes for bills directing or resulting in the adoption, amendment, or repeal of regulations, and to the notice required for the proposed adoption, amendment, or repeal of a regulation; and providing for an effective date."

HB 216 will accomplish two goals relating to changes to state regulations; increasing the speed with which regulations are written, and describing in plain, easy-to-understand language all regulations that are adopted, amended or repealed.

Legislators and the public have often been frustrated by the fact that months, or even years, sometimes pass between the time that a bill is passed by the legislature and the time the regulation is implemented. The result is; Alaska residents, businesses and legislators are confused about what the change means. As an example: as we were looking at the governor's House Bill 110, on oil taxes, we didn't have proof of what regulations were currently being enforced because the ACES regulations hadn't even been written - three years after we passed the legislation. The same confusion can impact individuals who are unclear about when, or if, new regulations concerning their business or recreational activities take effect. HB 216 states that any bill requiring creation or modification of any regulation must include a regulation completion deadline.

The other problem addressed by this bill is the confusion and lack of understanding of many proposed regulation changes or new additions. This confusion is caused by the legalese used to describe proposed regulations. This language, while accurately and legally describing proposed regulations, is difficult to understand by the average individual. HB 216 will require that all proposed regulation changes include descriptions, in plain English, of what the original regulation does and what the proposed change will do.

Passage of this legislation will encourage public participation in the regulation review process, as people find it easier to understand what the regulations mean to them. It will also help speed passed legislation to implementation when regulations are completed in a set, scheduled timeframe.

Based on input from committee members and the Department of Law, several amendments were passed in the State Affairs and Judiciary committees that help to clarify the language used in the bill. No substantive changes have been made to the original intent of the bill.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 216**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB216CS(JUD)-GOV-OMB-2-17-2012
Title: Deadlines in bills for the Adoption of Regulations
Sponsor: P. Wilson
Requester: House State Affairs

Dept. Affected: All
Appropriation:
Allocation:
OMB Component Number:

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated to reflect the change in the CS. Fiscal note is now a zero.

Prepared by: Arnold Liebelt, Policy Analyst — Phone: 907-465-4676
Division: Office of Management and Budget — Date/Time: 2/17/12 5:30 PM
Approved by: Karen Rehfeld, Director — Date: 2/17/2012
Office of Management and Budget

(Revised 1/10/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 216

Analysis

"An Act relating to deadlines in bills directing the adoption of regulations and to the informative summary required for the proposed adoption, amendment, or repeal of a regulation."

If a proposed bill will require regulations or result in a change to existing regulations, Section 1 would require agencies to state in the fiscal note for the bill a time by which the agency is to adopt, amend, or repeal the regulation. If the agency does not meet the deadline, it would set a new deadline and report to the Administrative Regulation Review Committee the new deadline and the reasons for not meeting the deadline that was established in the fiscal note.

Section 2 would require for a notice, posted on the Online Public Notice site or furnished electronically by a state agency, proposing adoption, amendment, or repeal of existing regulations, that a brief description accompany the notice and be written in clear, easily readable language that a person without a legal background is able to understand. The Regulatory Commission of Alaska, the Board of Fisheries, and the Board of Game would be exempt from Section 2.

No fiscal impact is expected as a result of Section 1. The fiscal impact resulting from Section 2 for future legislation is expected to be minimal. If the cost cannot be absorbed within an agency's budget, agencies will reflect this in the note for future legislation.

ALASKA MUNICIPAL LEAGUE
Alaska Conference of Mayors

217 Second Street, Suite 200 • Juneau, Alaska 99801
Tel (907) 586-1325 • Fax (907) 463-5480 • www.akml.org

January 30, 2012

Representative Peggy Wilson
State Capitol
Room 408
Juneau, Alaska 99801

Dear Representative Wilson,

I am writing to express the Alaska Municipal League's support for HB216, particularly the amendments to Section 2, Chapter 3 of AS 44.62.045.

It makes perfect sense to require the agencies to provide an informative summary of proposed regulations which describe how the amendments will change existing regulation "in clear, easily readable language that a person without a legal background is able to understand."

AML was forced to hire legal counsel (at a cost of over $8,000) to analyze sections of the new regulations proposed by APOC dealing with comprehensive revisions to Public Official and Legislative Finance Disclosure and Campaign Disclosure. It is AML's job to keep local elected officials and their municipal employees current on legislation, regulations and statutes that affect their local governments. When the agencies are unwilling to help us understand these regulations, we must do what we can to obtain the information.

In late 2010, the Alaska Public Offices Commission (APOC) published proposed revisions for public review and comment. AML requested from APOC, some explanation of what changes were encompassed in the new proposed regulations, as the document was approximately 125 pages long. APOC refused to provide any detailed explanation of the changes; in fact, the staff told us they had been instructed not to answer any questions about the proposed regulations. Without clarification of the new regulations, it makes it much more difficult to comment. We then hired legal counsel to perform a side-by-side examination of the old regulations and the new regulations. Only after enlisting the support from the Governor's office and many legislators were we able to secure additional information from APOC.

Most municipalities have numerous boards and commissions made up of community volunteers who are subject to APOC financial disclosure regulations. These private citizens are not equipped by training, nor do they have the time to understand and translate new regulations without the help from APOC. A plain, clear, easily readable explanation of the changes would have helped local officials understand and comment

on the new regulations. It appears to me that APOC, while drafting changes, could have done computerized "track" changes as the drafting process was taking place.

The opportunity for public comment on new regulations will not result in any substantive input if the adopting agency does not assist the public in understanding new regulatory changes. It also is quite ironic that the agency tasked with keeping government more transparent refuses to help the public understand proposed regulations.

It should not be difficult for an agency to comply with HB216, as they presumably understand what changes they are proposing and how they will affect the public. It is unreasonable to expect members of the public to read, translate, cross-reference and understand new regulation without some explanation from the authors.

Again, AML supports the adoption of HB216, as it will assist elected and volunteer municipal officials better understand how they are regulated by state agencies.

Thank you for the opportunity to comment.

Sincerely,

Kathie Wasserman

Kathie Wasserman
Executive Director

UNITED FISHERMEN OF ALASKA

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E-Mail: ufa@ufa-fish.org
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March 14, 2012

Senator Bill Wielechowski, Chairman
Senate State Affairs Committee
Alaska State Legislature
State Capitol, Room 3
Juneau AK 99801

RE: Support for CS FOR HOUSE BILL NO. 216

Dear Chairman Wielechowski and Committee Members,

United Fishermen of Alaska is the largest statewide commercial fishing trade association, representing 37 commercial fishing organizations participating in fisheries throughout the state and its offshore federal waters. The UFA Board of Directors recently met and discussed HB 216 which calls for specific time for adoption to be included in fiscal notes on proposed legislation, and also calls for "a brief description of the changes made by the proposed adoption, amendment, or repeal..." in public notices on regulatory changes, other than by the Board of Fisheries, Board of Game, or Regulatory Commission of Alaska.

The bill continues, "...This brief description shall be written in clear, easily readible language that a person without a legal background is able to understand."

UFA supports the passage of CSHB 216. Commercial fisheries participants are directly affected by numerous regulations within the Departments of Labor, Environmental Conservation, Revenue, and Commerce, Community and Economic Development. We observe that regulatory changes posted for public comment are often very confusing to the target audience of individuals that will be affected. When asked for clarification, State agency officials have been reticent on clarification of the intent and effects on proposed regulations once these are posted for public comment, leaving confusion in the minds of those who comment. This leaves the public in the position of attempting to pose clarifying questions within their comment letters, and lacking the answers to those questions to inform their comments. It also causes frustration and wasted time for the public.

We feel that HB 216 will help reduce confusion in regulatory changes in the future as an important improvement in the public process, and should save time in the long run for the agencies involved, and for the public.

Thank you for your consideration,

Mark Vinsel
Executive Director

Cc: Representative Peggy Wilson

HB

224

<TARGET><BILL>HB 224</BILL><SUBJECT>HB
224</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

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Representative_Paul_Seaton@legis.state.ak.us

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Phone: 235-2921
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REPRESENTATIVE Paul Seaton
District 35

MEMORANDUM

TO: **Senator Hollis French Senate Judiciary Committee**

FROM: **Representative Paul Seaton** Paul Seaton

DATE: **March 28, 2012**

RE: Hearing request for HB224 banning nicotine product sales to minors

---

I respectfully request a hearing on HB224 in Judiciary Committee. Attached you will find the following information:

- HB224 (Fin)am
- Sponsor Statement
- Fiscal Note
- Brandweek Article R.J. Reynolds Preps Dissolvable Tobacco
- Harvard School of Public Health Press Release
- On line will be Dept. of law Andrew Harrington to answer questions
- Present is a Representative from Dept. of Health & Social Services to answer questions

Thank you for your consideration.

Alaska State Legislature

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REPRESENTATIVE Paul Seaton

District 35

Sponsor Statement HB 224
Banning the Sale of Products Containing Nicotine to a Minor

Faced with lagging sales, given the unpopularity and banning of smoking in many public places, tobacco companies are investing in new and innovative ways to deliver their product. Some of the newest items on the market, called "dissolvable products" are mints, lozenges, strips and toothpicks containing nicotine. These products slowly dissolve in the mouth and deliver a nicotine hit between 0.6 and 3.0 mg per item while a cigarette contains 1 mg of nicotine (Brandweek, 2008). Some have legitimate uses for promoting smoking cessation and providing smokers relief when they are in situations where they cannot smoke. However, the opportunity for abuse is wide with the over the counter availably of dissolvable products containing nicotine.

HB 224 makes it illegal to sell or give a product containing nicotine to a minor. Under this bill an individual is fined $300 if convicted of selling or giving a product contacting nicotine to a individual under 19. HB 224 addresses the need for minors to access products that are regulated and marked for smoking cessation, such as nicotine gum, by allowing a minor to purchase products containing nicotine with the prescription of a health care provider, obtain it from an parent or legal guardian or from an state approved tobacco cessation program. Also, an 18 year old or older can purchase from a pharmacist independently.

There is a very real risk that increased nicotine use in youth and adolescents promotes addiction to nicotine at a young age and could encourage future tobacco use and addiction (Science Daily, 2003). A recent Harvard School of Public Health study found dissolvable nicotine products to be toxic if ingested by children (Harvard School of Public Health, 2010). A 14-year old boy in England was hospitalized after overdosing on nicotine gum (Vapure News, 2009).

Many of the products containing nicotine that are entering the market now look and taste like candy. A study conducted by student volunteers in Virginia surveyed 1400 teens and 42% identified Camel Orbs as a candy based on their packaging (Virginia Foundation for Healthy Youth, 2010). According to Brandweek, a professional publication on brand identity marketing, "camel dissolvable will not be positioned as a smoking cessation or reduced risk product, per the company" (Brandweek, 2008). Products containing nicotine are not subject to FDCA Chapter IX , the regulations that govern tobacco (Chicago Breaking News, 2011).

Without the regulation of products containing nicotine by the state there is an increased chance of children becoming addicted to nicotine, and tobacco later in life. Many of these products are new to the market and have not yet been introduced in Alaska. HB 224 takes a proactive approach to encouraging the responsible use of dissolvable nicotine products.

HB224v.X
Updated 2/29/12

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 224**
Fiscal Note Number
Publish Date

Identifier (file name) HB224CS(FIN)am-LAW-CIV-03-27-12
Title An Act prohibiting the sale or gift of a product containing nicotine to a minor under certain conditions.
Sponsor Representative(s) Seaton
Requester (S) Health & Social Services

Dept. Affected Law
Appropriation Civil
Allocation Commercial and Fair Business
OMB Component Number 2717

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new Attorney General.

Prepared by Sheila Bugbee, Administrative Officer
Division Administrative Services
Approved by Michael C. Geraghty, Attorney General
Department of Law

Phone 465-3675
Date/Time 03/27/2012 1:30PM
Date 3/27/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 224

Analysis

HB 224 adds a new AS 11.76.109 making it a violation (punishable by a fine of $300-$500) to sell a non-tobacco product containing nicotine to persons under 19. (Sales of tobacco to persons under 19 are already a violation under AS 11.76.100.) An employer can also be prosecuted for negligently failing to advise an employee making the sale of this prohibition. The bill excepts products approved by the FDA as tobacco cessation products (e.g., nicotine patches) if they are marketed as such and are provided to the individual by one of four routes (prescribed by a health care professional, given to the person by a parent or guardian, supplied through a DHSS-administered tobacco cessation program, or provided by a pharmacist even without a prescription to a customer 18 or older).

There should be no anticipated fiscal impact on the Department of Law. Although there might be a slight increase in prosecutions, it should fall within Law's ability to handle with current resources.

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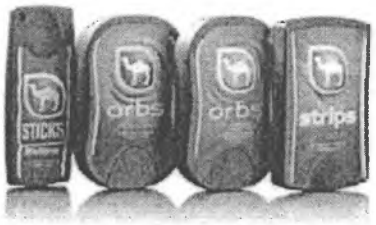
R.J. Reynolds Preps Dissolvable Tobacco

Oct 9, 2008

- Mike Beirne



R.J. Reynolds Tobacco will dive deeper into the smokeless category next year by nationally distributing Camel Snus and introducing in test markets dissolvable alternatives to cigarettes called Camel Sticks, Camel Orbs and Camel Strips.

The new products, grouped under the Camel Dissolvables banner, are smokeless and spit-free; they are made from finely milled tobacco and held together with food grade binders. The products will launch in the first quarter in Columbus, Ohio, Portland, Ore., and Indianapolis. The Camel Dissolvables Sticks can be placed in the mouth like a toothpick or broken into a piece that is placed between the upper lip and gum, where it dissolves after 10 minutes. RJR recommends the same usage for Orbs, which is a pellet that lasts about 15 minutes, and Strips, which dissolve after about 3 minutes.

The three forms of smokeless tobacco will be packed in plastic, child-resistant packaging. Strips will come in Fresh mint flavor and Sticks in Mellow; Orbs will be available in both flavors. Camel Dissolvables deliver between 0.6 to 3.1 milligrams of nicotine, while cigarette smokers typically inhale about 1 mg per cigarette.

Advertising is still being developed, but a company rep said print ads, direct marketing, sampling (at bars and nightclubs) and POP will support. The Reynolds American unit currently has a company policy that restricts advertising cigarettes in consumer publications. That self-imposed ban does not apply to other tobacco products and trade publications. Gyro, Philadelphia, and Agent 16, New York, are the lead agencies.

By introducing the products in select test markets, RJR hopes to find out which forms of Camel Dissolvables are the most popular, and how demographics or usage determines preferences. The product concept partly evolved from consumer feedback, following a test of Camel Snus in 2006. Camel Snus is also spitless, but some smokers said they didn't care for loose tobacco or pouched smokeless products, particularly ones they had to remove from their mouth after use.

The smokeless category has been a magnet for cigarette makers with sales averaging 5% to 7% annually, per various estimates. Although there is a growing body of literature contending that smokeless tobacco is less harmful than smoking cigarettes, a 2007 study by the American Cancer Society found that male smokers who switched to smokeless had higher death rates than men who quit or never smoked. Camel Dissolvables will not be positioned as a smoking cessation or reduced risk product, per the company.

"The consumer should be aware of the information available about the potential risks of each tobacco product. There are none that are safe and there are none that are without risks," said RJR rep David Howard.

In addition to introducing the new dissolvable alternatives, RJR will expand distribution for Camel Snus (pronounced *snooze*) by offering retailers countertop and under the counter refrigerator units to keep the product cold.

In 2006, Reynolds American acquired Conwood, the second largest maker of smokeless products in the U.S. Philip Morris USA's smokeless products include Marlboro Snus and Marlboro Snuff. Altria, Philip Morris' parent company, expects to close by January on its purchase of UST, the holding company for U.S. Smokeless Tobacco, the largest smokeless product company and maker of Skoal and Copenhagen.

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Tobacco Company's New, Dissolvable Nicotine Products Could Lead to Accidental Poisoning in Infants and Youth

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For immediate release: Monday, April 19, 2010

Boston, MA—A tobacco company's new, dissolvable nicotine pellet--which is being sold as a tobacco product, but which in some cases resembles popular candies--could lead to accidental nicotine poisoning in children, according to a new study from the Harvard School of Public Health (HSPH), the Northern Ohio Poison Control Center, the Centers for Disease Control and Prevention (CDC) and the Food and Drug Administration (FDA). The researchers also say the candy-like products could appeal to young people and lead to nicotine addiction as well.

The study appears in an advance online edition of the journal *Pediatrics* on April 19, 2010 and will appear in a later print issue.

In 2009, the R.J. Reynolds Tobacco Company launched a dissolvable nicotine product called Camel Orbs, which according to the company's promotional literature contains 1 mg nicotine per pellet and is flavored with cinnamon or mint. The company also introduced Camel Strips (to contain 0.6 mg nicotine per strip) and Sticks (to contain 3.1 mg nicotine per strip).

It appears that the product is intended as a temporary form of nicotine for smokers in settings where smoking is banned. However, the potential public health effect could be disastrous, particularly for infants and adolescents, said Professor Gregory N. Connolly, lead author of the study and director of the Tobacco Control Research Program at HSPH.

Ingestion of tobacco products by infants and children is a major reason for calls to poison control centers nationwide. In 2007, 6,724 tobacco-related poisoning cases were reported among children five years of age and under. Small children can experience nausea and vomiting from as little as 1 mg of nicotine.

"This product is called a 'tobacco' product, but in the eyes of a 4-year-old, the pellets look more like candy than a regular cigarette. Nicotine is a highly addictive drug and to make it look like a piece of candy is recklessly playing with the health of children," said Connolly.

The researchers computed, based on median body weight, how much nicotine ingestion would lead to symptoms of poisoning in children: A one-year-old infant could suffer mild to moderate symptoms of nicotine poisoning by ingesting 8 to 14 Orbs, 14 Strips or 3 Sticks; ingesting 10 to 17 Orbs, 17 Strips or 3 to 4 Sticks could result in severe toxicity or death. A four-year-old child could have moderate symptoms by ingesting 13 to 21 Orbs, 14 Strips or 4 Sticks and could suffer severe toxicity or death by consuming 16 to 27 Orbs, 27 Strips or 5 Sticks. The researchers report that a poison control center in Portland, Oregon, a test market for Orbs, reported a case in which a three-year old ingested an Orbs pellet.

R.J. Reynolds claims that Orbs packaging is "child resistant," but the researchers say adults could unknowingly leave the pellets out in the open where children could easily access them. The researchers also say that the candy-like appearance and flavoring and ease-of-use of the product could appeal to children.

we should put child health risks on record

"Unintentional Childhood Poisonings Through Ingestion of Conventional and Novel Tobacco Products," Gregory N. Connolly, Patricia Richter, Alfred Aleguas Jr., Terry F. Pechacek, Stephen B. Stanfill, Hillel R. Alpert, *Pediatrics,* online April 19, 2010.

photo: Andrew Seidenberg

For more information:

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###

HB

229

<TARGET><BILL>HB 229</BILL><SUBJECT>HB
229</SUBJECT><COMM>SJUD27</COMM></TARGET>

Cindy Smith

From: Michael Paschall
Sent: Monday, March 26, 2012 11:31 AM
To: Cindy Smith
Subject: HB 229
Attachments: AAC Chapter 75 Big Game Commercial Services Board.pdf; AS Chapter 08 Big Game Commercial Services Board.pdf; BGCS Fact Sheet.pdf; BGCS Roster.pdf; HB 229 Letter - Kubat.pdf; HB 229 Letter - Vrem.pdf; HB 229 e-mail Comments Combined.pdf; HB 229 Letter APHA.pdf; HB 229 Letter BGCSB Johnson.pdf; HB 229 Request for Hearing SJUD.pdf; HB 229 Sectional Analysis HB 229(JUD) Ver E.pdf; HB 229 SPONSOR STATEMENT.pdf; HB 229 Ver 27-LS0764E CSHB(JUD).pdf; HB 229-DCCED-CBPL-02-24-12.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Cindy,

Here is the information for HB 229. Let me know if you need printed versions.

I have provided existing statute and administrative code. I'm not sure if you want to print them for the committee or not.

Mike

Michael Paschall
Office of Rep. Eric Feige
House District 12

Office (907) 465-5446
Toll Free (888) 465-4859
Cell (907) 460-8629

Room 126 – State Capitol
120 4th St.
Juneau, Alaksa 99801

HB229

As amended in HB 229, AS.08.54.610(e) will provide the guiding industry with greater operational flexibility though further reduce the already minimal supervisory requirements for assistant guides. When considered relative to "supervision"[1] and "participation"[2], as currently defined in regulation, the net effect will be to increase to potential pool of licensed guides that will **not have** to "supervise" assistant guides accompanying clients. If the words "participation" and "supervision" were defined in regulation in accordance with generally accepted meanings concerns would be reduced. However, "supervision"[1] as currently defined permits the following by an assistant guide:

- Have no direct (face to face) contact with the contracting guide for the entire hunting season
- If hunt less than five days in duration no contact with the "supervising" guide is required
- Without input from a "supervising" guide make all decisions regarding daily methods for conducting the hunt, including:
  - Hunting methods
  - Trophy judging
  - Stalking
  - Harvest methods
  - Trophy care .

The requirement for the contracting or supervising guide to "participate" in the hunt when the assistant guide is alone in camp with the client can be met by a variety of methods. These include (12 AAC 75.250(c)[3] "...in-person contact, radio contact, telephone contact, and signaling." The term "signaling" provides a multitude of options such as smoke signals, signal mirror, or, just flying several thousand feet above the camp (assuming someone is in camp) and tilting the wings. It is doubtful any of these, other than "in-person contact", would conform to general perceptions of "participation".

The minimal requirements for "supervision" and "participation" might be rationalized if the requirements for an assistant guide license were high. However, the current regulatory requirements are:

- 18 years old
- Have first card
- Be recommended by a guide (*may substitute an approved guide school for requirement*)
- Have hunted in Alaska for 30 days for each of two years.
- Have harvested one big game animal (*small moose run over by "pick-up truck" would count*).

An individual meeting these qualifications for an assistant guide license, with the exception of booking hunts, can provide most if not all services allowed by a registered guide license. The latitude afforded assistant guides to provide services is considerably greater for than in such licensed or "Certificate of Fitness" professions such as barber/hairdresser or plumbers or electricians. With these professions a minimum of 2000 hours for barber/hairdressers, and 8000 hours for

electricians and plumbers, of training and supervision are required before assuming the professional responsibilities accorded to assistant guides. Please see table 1.

State issued License	Direct Supervision	Class-room Instr.	Test	Source
Plumber Cert. of	8000 hours[a]	1000 hours (may be part of 8000 hrs)	Yes[b]	8 AAC 90.130(1) [a] 8 AAC.90.115 [b]
Electrician	8000 hours [c]	1000 hours (may be part of 8000 hrs)	Yes [b]	8 AAC 90.160. [c] 8 AAC.90.115 [b]
Hairdresser/Barber	1650[d]	350	Yes[e]	12 AAC 09.0029(B) [d] 12 AAC 09.005 [e]
Assistant Guide	None	None	None	

Table 1.

By Statute the State of Alaska requires non-residents of various classes to be accompanied by a class of licensed guide while hunting for sheep or goats or brown/grizzly bears. With the exception of "second degree of kindred" a non-resident must engage the services of a licensed guide before harvesting any of these species. As previously indicated, HB 229, AS.08.54.610(e) will essentially increase the "pool" of licensed guide the **DO NOT** have to supervise assistant guides providing a State mandated service. The already weak "participation" and "supervisory" definitions in regulation contribute in part to the follow:

1. Assistant guides conducting hunts for species they have never seen
2. Assistant guides having to "learn as they go" (at the expense of the client and resource)
3. Assistant guides failing the guiding examination at higher than to be expected rates.

As currently structured in regulation, a lifelong resident of Alaska, regardless of hunting experience can not accompany a non-resident friend for sheep or goats or brown/grizzly. However, an eighteen year-old that has never seen or hunted any of the species can as an assistant guide satisfy the requirement of a non-resident being accompanied by a guide for certain species. **With this situation it is difficult to understand how it is in the best interest of the resource or the well-being of the non-resident hunter to be required to use the services of a licensed professional guide.**

In Conclusion

If the current construction of the regulations regarding "qualifications" and "supervision" and "participation" are consistent with legislative intent there:

1. May be no need for requiring non-residents to be accompanied by a class of licensed guide.
2. May be other licensing processes that would be less cumbersome to administer and regulate and more suited to the intended purposes of licensing guides. An example might be the Commercial Driver's License ((CDL).

If the current construction of the regulations regarding "qualifications" and "supervision" and "participation" are inconsistent with legislative intent then:

1. Empanel a over-sight committee to review the current regulatory structure
2. Convey to the guiding industry, through a resolution, what is expected by way of standards and objectives.

I would like to take this opportunity to thank Representative Eric Feige (R) and his staff for their efforts in developing HB299 and this committee for taking the time to hear the bill.
Again, thank you.

Joe Want
(907-457-4736)
wantj43@gmail.com

(1)

12 AAC 75.250. PARTICIPATION IN A HUNT. (a) Repealed 6/2/2011.

(b) A registered guide-outfitter who contracts to guide a hunt and who is participating in a hunt as required in AS 08.54.630(b)(3) shall be in communication, either personally or through an agent, with the assistant guide, who is in the field with the client, at least once during the hunt if the hunt is longer than five days.

(c) In this section, "communication" includes in-person contact, radio contact, telephone contact, and signaling.

(d) A registered guide-outfitter who contracts to outfit a hunt shall

(1) before leaving a client in the field, advise the client of the date, time, and location at which the registered guide-outfitter will pick up the client and the course of action the client should follow if the registered guideoutfitter is unable to pick up the client as planned;

(2) either personally or through a class-A assistant guide, an assistant guide, or a licensed transporter, transport the client into and out of the field at the planned date, time, and location, unless prevented by weather, mechanical problems, or other safety concerns; and

(3) check on or communicate with a client in the field as agreed to before transporting that client.

(2)

12 AAC 75.240. SUPERVISION. (a) A registered guide-outfitter who contracts to guide a hunt shall plan, direct, and monitor the big game hunting services provided to the client.

(b) At the conclusion of the hunt, a registered guide-outfitter who contracts to guide a hunt shall evaluate the performance of the assistant guide, class-A assistant guide, or registered guide-outfitter involved in the hunt to determine whether the big game hunting services provided to the client were satisfactory.

-18-

(c) To comply with (b) of this section, the contracting registered guide-outfitter shall verbally communicate, by telephone or radio, or in person, with the client and the assistant guide, class-A assistant guide, or registered guideoutfitter involved in the hunt, separately or together, at least once within 10 days after the conclusion of the hunt. The contracting registered guide-outfitter shall obtain the necessary information to evaluate the performance of the assistant guide, the class-A assistant guide, or registered guide-outfitter and determine whether the big game hunting services were provided safely, in accordance with state and federal law, and to the satisfaction of the client.

(d) The contracting registered guide-outfitter shall make a good faith effort to verbally communicate with the client to obtain the necessary information to evaluate the performance of the assistant guide, class-A assistant guide, or registered guide-outfitter. If the attempt to verbally communicate with the client is unsuccessful, the contracting registered guide-outfitter shall write to the client and request the necessary information to evaluate the performance of the assistant guide, the class-A assistant guide, or registered guide-outfitter. The contracting registered guideoutfitter shall write to the client within 60 days after the conclusion of the hunt.

(e) A registered guide-outfitter shall document on the hunt record the date the registered guide-outfitter complied with the verbal, or if applicable the written, client communication requirements in (c) and (d) of this section.

(f) The contracting registered-guide outfitter or a noncontracting registered guide-outfitter or class-A assistant guide supervising an assistant guide shall be available in the same guide use area, or an adjacent guide use area with a common border, to direct and monitor the big game hunting services provided to the client, except during times when

(1) an emergency situation exists that requires the guide's assistance; or

(2) the contracting registered guide-outfitter or noncontracting registered guide-outfitter or class-A assistant guide supervising the hunt is outside the guide use area or neighboring guide use area while

(A) in transit with meat or trophies in that or a neighboring guide use area;

(B) in transit with food, supplies, or clients directly associated with conducting guided hunts in that or a neighboring guide use area; or

(C) conducting important duties that are essential for completion of current contracted hunts.

(g) Repealed 7/30/2006.

(h) In this section, "emergency situation" means a situation in which a person is in a remote area and

(1) is involuntarily experiencing an absence of food, water, shelter, or medical care required to sustain life or health;

(2) is lost;

(3) is unable to perform the functions necessary for survival, leading to a high risk of death or serious and permanent health problems without the assistance of the guide; or

(4) the guide's presence is necessary for a family medical condition.

REPRESENTATIVE
ERIC FEIGE
House District 12
House Resources Committee Co-Chair
Education Committee
Transportation Committee
Joint Armed Services Committee

Alaska State Legislature

House of Representatives

During Session:
State Capitol Room 126
Juneau, Alaska 99801-1182
(907) 465-4859
Fax (907) 465-3799
1-888-465-4859

SPONSOR STATEMENT – HB 229

An Act relating to activities, including violations and penalties, under the supervision of the Big Game Commercial Services Board.

HB 229 makes changes in statute recommended by members of the Big Game Commercial Services Board addressing changes to rules regarding the administration and licensing of guides.

Big game guides are regulated under statute and regulation and oversight is provided by the Big Game Commercial Service Board. The proposed changes provide more flexibility in where guides can work when contracting with another guide, allows a registered guide-outfitter more flexibility in the use of class-A guides, and changes penalties for minor procedural violations by guides.

E-Mail: Representative.Eric.Feige@legis.state.ak.us

REPRESENTATIVE
ERIC FEIGE
House District 12

House Resources Committee Co-Chair
Education Committee
Transportation Committee
Joint Armed Services Committee

Alaska State Legislature

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Juneau, Alaska 99801-1182
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1-888-465-4859

Sectional Analysis – HB 229(JUD) Version E

Sec. 1: Provides additional authority to the Big Game Commercial Services Board to create regulations to administer the regulation of big game guides. Under current statute, the board is limited to regulations that are "required" under statute.

Sec. 2: Creates a provision in statute for a retiree status license that recognizes those that have earned a guide license. No privileges are granted under the license to provide guiding services.

Sec. 3: Clarifies language to specify that a guide-outfitter may provide the services of a class-A assistant guide under the control of a contracting guide-outfitter, anywhere the contracting guide-outfitter is licensed to contract hunts.

Sec. 4: Changes the requirements for a registered guide-outfitter to require them to primarily be in the field supervising, participating in, and conducting a hunt as defined under regulation by the board, unless a class-A assistant guide is conducting the hunt as regulated by the board.

Sec. 5: Provides the board with the power to suspend or revoke a license of someone engaged in conduct involving unprofessionalism, moral turpitude, or gross immorality.

Sec. 6: Changes penalties for certain violations to allow a court to order the board to suspend a license instead of requiring a court to order the board to suspend a license.

Sec. 7: Authorizes the department to set a fee for the new retired master guide-outfitter license.

Sec. 8: Conforming language to specify the holder of a retired guide license may not guide.

Sec. 9: Provides an effective date for Sections 3, 4, and 5 of the bill of April 1, 2013.

Sect. 10: Provides for an immediate effective date for sections of the bill other than Sections 3, 4, and 5.

Prepared by Michael Paschall, Office of Rep. Eric Feige, March 26, 2012

Email: Representative.Eric.Feige@legis.state.ak.us

Boards & Commissions Factsheets
BIG GAME COMMERCIAL SERVICES

Board: Big Game Commercial Services Board
Board identification number: 042

Department: DEPARTMENT OF COMMERCE COMMUNITY AND ECONOMIC DEV

Authority: AS 08.54.591; Const. Art III Section 26

Status: Active

Sunset date: 6/30/2012

Requirements: Legislative Confirmation and Financial Disclosure

Prohibitions: None

Term: 4 years

Description: 9 members - 8 appointed by Governor: 2 members who are licensed registered guide-outfitters; 2 members who are licensed transporters, 1 member of the Board of Game chosen by the Board of Game and who does not hold a guide or transport license, 2 members who represent private landholders affected by guided hunting or transportation activities/services and who do not hold a license under this board, and 2 public members.

Function: Licenses and regulates the activities of providers of commercial services to big game hunters in the interest of the state's wildlife resources.

Chair: Governor selects

Special facts: Big Game Commercial Services Board replaced the Guide Board which was repealed on 6/30/89. Serve at the pleasure of the governor. The governor may select the chair. A majority constitutes a quorum. A member who has served all or part of two successive terms may not be reappointed unless four years have elapsed since the person last served on the Board.

Compensation: Standard Travel and Per Diem. No additional compensation.

Meetings: At least twice annually, plus panel meetings; 14 days maximum.

For further information contact:
Karl Marx
Occupational Licensing Examiner
Corporations, Business, and Professional Licensing
DCCED, P.O. Box 110806 M/S 0806
Juneau, AK 99811-0806
Phone: (907) 465-2543, FAX: (907) 465-2974

Big Game Commercial Services Roster

Go to the Big Game Commercial Services Home page

We appreciate your interest in Boards and Commissions. For further information contact the Boards and Commissions staff at (907) 465-3500 or at **boards@alaska.gov**.

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Alaska
Big Game Commercial Services Board

Board Members

Member Address	Position	Term Expires
Ralph Andersen Bristol Bay Native Corporation P.O. Box 1177 Dillingham, AK 99576	Private Landholder	6/20/08
Roy Ashenfelter Kawerak Inc. P.O. Box 1969 Nome, AK 99762	Private Landholder	6/30/06
Colin B. Brown Yukon Eagle Air P.O. Box 203 Galena, AK 99741	Licensed Transporter	6/30/09
Paul E. Johnson Gull Cove Lodge P.O. Box 22 Elfin Cove, AK 99825	Board Chair License Registered Guide-Outfitter	6/30/09
Bob Mumford 13391 Baywind Drive Anchorage, AK 99615	Public Member	3/01/10
Richard A. Rohrer P.O. Box 2219 Kodiak, AK 99615	Licensed Registered Guide-Outfitter	6/30/07
Betty Jo Schmitz P.O. Box 57268 North Pole, AK 99705	Public Member	6/30/09
Ted H. Spraker 49230 Victoria Avenue Soldotna, AK 99669	Board of Game	6/30/08
Vacant	Licensed Transporter	

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 229 (RES)**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB229-DCCED-CBPL-02-24-12
Title: Big Game Commercial Services Board
Sponsor: Representative Feige
Requester: House Judiciary Committee

Dept. Affected: DCCED
Appropriation: Corps, Bus & Professional Licensing
Allocation: Corps, Bus & Professional Licensing
OMB Component Number: 2360

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1156	Rcpt Svcs (DGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This fiscal note is revised to reflect CS for HB 229 adding a new section that creates a new licensing type.

Prepared by: Don Habeger, Director — Phone: 465-2538
Division: Corporations, Business and Professional Licensing — Date/Time: 2/24/12 10:30am
Approved by: JoEllen Hanrahan, Director Administrative Services — Date: 2/25/2012
Commerce, Community, and Economic Development

(Revised 11/28/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 229 (RES)

Analysis

HB 229 makes changes in statute recommended by members of the Big Game Commercial Services Board addressing changes to rules regarding the administration and licensing of guides. The proposed changes provide more flexibility in where guides can work when contracting another guide, allows a registered guide-outfitter more flexibility in the use of class-A guides, and changes penalties for minor procedural violations by guides.

The CS for HB 229 adds a new section to include a new type of license category: Retired Master Guide-Outfitter.

There is no anticipated fiscal impact to the Division as a result of this legislation.

ALASKA

PROFESSIONAL HUNTERS ASSOCIATION, INC.

HC 60 Box 229C, Copper Center, AK 99573
Phone: 907-822-3755 Fax: 907-822-3752
Email:office@alaskaprohunter.orgwww.alaskaprohunter.org

Dear Representative Feige,

I'm writing thank you for sponsoring HB 229 and affirm the support of the Alaska Professional Hunters Association for this important bill. As the sitting president of the APHA and a lifelong Alaskan and second generation Registered Guide I know firsthand how burdensome unclear and, or, contradictory statutes and regulations can be. HB 229 will alleviate some of this burden by clarifying the relationship between Registered Guides when they work for each other and, at the same time, protecting the value of the Class A Assistant Guide license. The APHA also appreciates the creation of a retired, non-active, license so that respected, retired guides can stay licensed and not cut into fixed, retirement incomes. This is essential to maintaining the social continuity, of an industry that respects its elders and provides a career path that includes substantial time as an apprentice.

The APHA has always pushed for greater professional competency and accountability. For this reason we vigorously support giving the Big Game and Commercial services board the ability to suspend or revoke guide or transporter licensed for unprofessional behavior, moral turpitude and gross immorality. Having operators, representing themselves as guides, who are amoral or chronically immoral or unprofessional hurts our membership in a business that relies on reputation and word of mouth business. Alaska deserves to have the best and most ethical guides harvesting its big game resource.

In closing I want to once again thank the honored members or the legislature that have taken the time to consider HB 229 and carry it through the process on the behalf of me and my organizations livelihoods! I also want to state that many APHA members have spent their personal time advising and working on drafting HB 229 as recognition of the collaborated effort between your office and our membership. For the sake of brevity I have only used a few examples of the positive aspects of HB 229 but we do support the bill in its entirety.

Thank You,

Gary LaRose

Gary LaRose, President Alaska Professional Hunters Association

STATE OF ALASKA
DEPARTMENT OF
COMMERCE
COMMUNITY AND
ECONOMIC DEVELOPMENT
Division of Corporations, Business and Professional Licensing

Sean Parnell, Governor
Susan Bell, Commissioner
Don Habeger, Director

Big Game Commercial Services Board

February 9, 2012

Dear Senator Menard and Representative Feige,

The Big Game Commercial Serves Board supports House Bill 229 and Senate Bill 190 for improving the guide industry in Alaska. The Board was reinstated 7 years ago and has worked on these concerns during the meetings. These changes are housekeeping measures the board feels are needed for a healthy industry. The Board was unanimous in the vote in support of submitting this Bill and its contents. We respectfully ask for the passage of this legislation.

Sincerely,

Paul Johnson

Paul Johnson
Chair, BGCSB

P.O. Box 110806, Juneau, AK 99811-0806
Telephone: (907) 465-2543 Fax: (907) 465-2974 Website: http://www.commerce.state.ak.us/occ/pgui.htm

Dear Representative Feige,

Thank you for your sponsorship and support of HB229 which will provide for a retired status master guide-outfitter license. I initially proposed this provision some 2-3 years ago and had about given up hope for the possibility of passage. While it has not yet passed, hope springs eternal?
I will support passage of the combined HB 229 / SB 190 in any manner possible. Please call on me if I can help.

Sincerely,
dickgun

Dick Gunlogson
Master Guide / Outfitter (Ret)
Willow, Alaska

Received via e-mail 08 Feb. 2012

Linda Hay

From: Wayne <args@mtaonline.net>
Sent: Friday, February 10, 2012 12:16 PM
To: Sen. Linda Menard; Sen. Charlie Huggins
Cc: Rep. Eric Feige
Subject: SB 190 and HB 229

Senator Menard and Senator Huggins,

Thank you for Sponsoring SB190. I've lived in Wasilla since 1984, got my registered guide license in 1986, started our family run business – Alaska Remote Guide Service in 1987, and upgraded my registered guide-outfitter license to master guide-outfitter status a few years back. To my knowledge, there have been no changes to the Big Game Commercial Service Board Statutes since 1994 or before. I think your bill and Representative Feige's HB229 help address some key issues in bringing the statutes current with several changes that have taken place since then in the guide industry. Most of us in the industry want to do what is right, but it is very hard to understand what that is, even after reading the statutes and regulations several times. In fact I was in a working group at the BGCSB meeting in Fairbanks two years ago, when we were discussing supervision and participation issues. Several guides were present along with some top level enforcement personnel. I think it's fair to say that all of us were at least some what confused about what was expected by us in the statutes.

I've been in attendance at every commercial service board meeting for the past several years, and worked in and led several committees that dealt with several issues in this bill. The key concerns that most interested me personally were 08.54.610 (d) and (e). The current requirement in 08.54.610 (e) (1) that the bill asks to delete, works fine for large operations that are lucky enough to have a lodge or main camp in the same Guide Use Area where they hunt. Everybody gets flown to the lodge to start with and then head out hunting from there. By so doing, this requirement has been met. In operations where the main camp or lodge is in a different guide use area or in many smaller operations, meeting this requirement can be a lot more complicated, and requiring the guide to do so can actually impact the quality of the client's hunt and the service that the guide is able to provide.

While the above mentioned points in the bill are my main focus, I fully agree with and support every provision that your bill deals with. I have spent a lot of personal time and effort to help get these issues put forward. As this bill moves forward, feel free to contact me concerning any questions or concerns that may arise, and let me know how I can help. Thank you again for you help!

Sincerely,

Wayne Kubat
Alaska Remote Guide Service
PO Box 874867
Wasilla, Alaska 99687
Phone/Fax:907-376-9568

HB 234

<TARGET><BILL>HB 234</BILL><SUBJECT>HB 234</SUBJECT><COMM>SJUD27</COMM></TARGET>

REPRESENTATIVE BILL THOMAS
ALASKA STATE LEGISLATURE DISTRICT 5
e-mail: Representative.Bill.Thomas@legis.state.ak.us
webpage: www.akrepublicans.org/thomas/

State Capitol
Juneau AK, 99801-1182
907-465-3732
888-461-3732
FAX 907-465-2652

Sponsor Statement HB 234
"An Act relating to picketing at a funeral."

The death of a loved one is one of life's most tragic events. More than 46 states across the country have enacted laws protecting families at funerals during their time of grief. These laws establish standards of conduct which respect the family's need for respect and privacy during this difficult time while also allowing others to express their viewpoints.

HB 234 brings Alaska in line with the majority of states and adopts the guidelines which govern conduct during a funeral. HB 234 is modeled after the guidelines used by our national cemeteries and requires that:

- Picketing that disrupts a funeral, will not take place within 150 feet of the boundary of the cemetery, church, or other facility where the funeral services are occurring, and
- Disruptive picketing not take place one hour before or one hour after the service.

This bill asks anyone within the area of a funeral service to conduct themselves in a respectful manner for the duration of the service. HB 234 looks out for the interests of the grieving families while preserving the rights of others to voice their opinions.

I strongly urge your support of HB 234.

REPRESENTATIVE BILL THOMAS
ALASKA STATE LEGISLATURE DISTRICT 5
e-mail: Representative.Bill.Thomas@legis.state.ak.us
webpage: www.akrepublicans.org/thomas/

State Capitol
Juneau AK, 99801-1182
907-465-3732
888-461-3732
FAX 907-465-2652

Summary of Changes HB 234

Page 1, Line 8 & 11

DELETE: protest activities

Page 2, Line 1 & 8

DELETE: Protesters

Page 2, Line 31

REWORDED TO: Inside of a cemetery, mortuary, church, or other facility or within 150 feet of that facility's outer boundary

Page 3, Line 17

REWORDED TO: picketing- means an act directed toward a funeral that disrupts or disturbs that funeral

Stronger clearer language

High Court Rules For Anti-Gay Protesters At Funerals

by NINA TOTENBERG

Nicholas Kamm/AFP/Getty Images

Members of the Westboro Baptist Church of Topeka, Kan., staged a protest across the street from a high school in Hyattsville, Md., a day before the Supreme Court ruling.

March 2, 2011

text size A A A

The U.S. Supreme Court has ruled that protesters at military funerals cannot be sued for inflicting emotional distress on the family of a dead soldier. The vote was 8 to 1.

When Marine Lance Cpl. Matthew Snyder was killed in Iraq, his funeral in Westminster, Md., drew thousands to pay their respects. But it also drew a protest from the Rev. Fred Phelps and six other members of the Westboro Baptist Church, based in Topeka, Kan.

Phelps and other church members have traveled the country for years, picketing hundreds of military funerals to communicate their belief that "God hates the USA" for its tolerance of homosexuality, particularly in the military.

The picketers did not contend that Snyder was gay. Rather, their message, as Phelps puts it, was that "the whole country is given over to sodomy and to sodomite enablers."

The picketers followed their usual practice at the Snyder funeral. They alerted police in advance and followed instructions to set up their protest on public property, at a site 1,000 feet away from the church, near the vehicle entrance.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and ... inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker.

Though the protest was peaceful and ended before the funeral began, the picketers carried signs with messages offensive to many, including "Thank God for Dead Soldiers," "Fags Doom Nations" and "America Is Doomed."

- Chief Justice John Roberts, in the majority opinion

Albert Snyder, the father of the dead Marine, did not see the signs until later when he viewed TV coverage. He says the picketers turned his son's funeral into a circus, taking away his "last moment" with his son.

"This was a funeral. This wasn't a parade going down the street. I shouldn't have to look away from anything at my own child's funeral," Snyder says. "That's absurd."

Snyder sued Phelps and his church for intentional infliction of emotional distress.

"These people targeted me and my family, and they have done this to over 200 other military men and women's families," Snyder says, his voice rising. "I want to know how you would feel if somebody stood 30 feet away from the main vehicle entrance of a church where you're trying to bury your mother, with a sign that says, 'Thank God for dead sluts.' You tell me that shouldn't be illegal. Is 'fag' any worse than 'slut'?"

A jury agreed with Snyder and awarded him $5 million in damages. But the Supreme Court set aside that verdict Wednesday.

Writing for the court majority, Chief Justice John Roberts said that as repugnant as many of the signs were, they were still plainly related to public, rather than private, matters. They focused on "the political and moral conduct of the United States and its citizens," he said, and speech of such public concern is protected by the First Amendment.

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

- Justice Samuel Alito, who cast the lone dissenting vote

Although Westboro may have chosen to protest the funeral to gain publicity for its views, said the chief justice, and although those views may be particularly hurtful to the dead soldier's father, that does not mean the church members' right of free speech can be curtailed or punished. And a jury award amounts to punishment, Roberts contended, by imposing a penalty for expressing an unpopular viewpoint.

"Speech is powerful," Roberts said in conclusion. "It can stir people to action, move them to tears of both joy and sorrow, and — as it did here — inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a nation we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate."

Reaction to the decision was markedly muted, given the outrage voiced by veterans groups and politicians at the time the case was argued in the Supreme Court.

The Democratic and Republican leaders of the Senate, along with 40 other members of Congress, filed a brief on Snyder's side. But on Wednesday, reaction on Capitol Hill was nowhere to be found, except in a couple of written statements.

Lawyer Gene Schaerr, who filed a brief in the case for the American Legion, said he was heartened by the fact that the court specifically mentioned that 43 states have enacted laws that put a buffer zone of 100 feet or more around funeral sites. Such laws would not have affected the protest in this case, since protesters were 1,000 feet away.

Nonetheless, says Schaerr, the decision "sends a clear signal to the lower courts that they should not interpret anything in this opinion as casting any doubt about those statutes." The court, however, specifically left open that question, noting that restrictions on the time, place and manner of protests are appropriate in some circumstances.

Wednesday's 8-to-1 ruling came as no surprise to First Amendment scholars, both right and left. They note that the decision is in line with many court decisions protecting the rights of fringe groups — from Nazis marching in Skokie, Ill., to flag burners at a Republican convention in Texas.

University of Chicago law professor Geoffrey Stone notes that Wednesday's ruling fits neatly into that tradition, calling it a "classic case." The only surprise, maintained Stone, was that anyone dissented.

Justice Samuel Alito was the lone dissenter. He viewed the protesters' speech as targeting a private person — the father of the dead soldier — and said that the First Amendment does not give license to such outrageous conduct.

"In order to have a society in which public issues can be openly and vigorously debated," wrote Alito, "it is not necessary to allow the brutalization of innocent victims."

Related NPR Stories

·A Peek Inside The Westboro Baptist ChurchMarch 2, 2011

LEGISLATIVE RESEARCH REPORT

DECEMBER 9, 2011

REPORT NUMBER 12.113

FUNERAL PROTEST LAWS IN OTHER STATES

PREPARED FOR REPRESENTATIVE BILL THOMAS, JR.

BY ROGER WITHINGTON, LEGISLATIVE ANALYST

SUMMARY 1

STATE LAWS PERTAINING TO FUNERAL PROTESTS 2

Table 1: Summary of State Funeral Protest Laws, May 2011 3

CHALLENGED AND UNCONSTITUTIONAL STATE FUNERAL PROTEST LAWS 3

LIST OF ATTACHMENTS 5

You asked for information on funeral protest laws. Specifically, you wished to know how many states currently have a law regulating funeral protests and what each state law stipulates. You also wanted to know for each state that currently has a funeral protest law if violating the restriction is considered a felony or misdemeanor offense. In addition, you asked if any of the state laws have been challenged and if any have been found unconstitutional.

SUMMARY

As you may know, for a number of years the Westboro Baptist Church of Topeka, Kansas has been protesting, among other events, military funerals. These protests have garnered the Church a great deal of national attention.[1] The Church's primary message at these protests is that God hates the United

[1] Summary information was extracted from Kathleen Ann Ruane, *Funeral Protests: Selected Federal Laws and Constitutional Issues*, Congressional Research Service, March 22, 2011, and the Westboro Baptist Church's website.

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States for its tolerance of homosexuality. As punishment for its tolerance, God is killing soldiers "in righteous judgment against an evil nation."

As a result of these protests, state and local governments have adopted measures that create "buffer zones" that ban protests of funerals within a certain distance of the services and that establish time restrictions as to when protests can occur in relation to a funeral service. Additionally, the federal government has passed similar bans on protests at military funerals in federally controlled cemeteries.

STATE LAWS PERTAINING TO FUNERAL PROTESTS

According to the National Conference of State Legislatures (NCSL), 46 states currently have some form of a funeral protest law. In Table 1, we provide a summary of these state laws; we include a more detailed summary of each state's law in Attachment A.

Of the 31 states identified in Table 1 that impose a restriction on the time in which a protest may take place in relation to the funeral service, 22 specify that a protest may not occur any time one hour prior to, during, or one hour after the conclusion of the funeral or memorial service. The remaining nine states specify a time restriction range from 30 minutes to 120 minutes before and after the service.

As you can see from Table 1, 39 states create a "buffer zone" that restricts protests of funerals within a certain distance of the service. These buffer zones range from 150 feet to 1,500 feet. The most typical distance, used by 15 states, is 500 feet.

Seven states—California, Florida, Idaho, Louisiana, Maine, Rhode Island, and Virginia—chose not to create time or distance buffer zones but instead appear to have amended their disorderly conduct or disturbing the peace statues to include protests at funeral or memorial services.

Thirty-six states classify the first violation of these funeral protest laws as misdemeanors. Although several states classify the second offense as a felony, two states—Indiana and Michigan—classify the first offense as a felony.

TABLE 1: SUMMARY OF STATE FUNERAL PROTEST LAWS, MAY 2011

Regulation	States
Time Requirement	Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Illinois, Iowa, Kansas, Kentucky, Michigan[1], Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia, Wisconsin, Wyoming
Distance Requirement	Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming
First Offense Classified as a Misdemeanor	Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming

Source: *Funeral Protest Regulation Statutory Provisions,* National Conference of State Legislatures, May 18, 2011, Jon Griffin, Policy Associate, Fiscal Affairs Program, National Conference of State Legislatures, 303-364-7700 ext. 1529.

Notes: (1) Michigan law authorizes local governments to create laws that restrict funeral protests from one hour immediately before, or during, or two hours immediately following a service.

In Attachment B, we provide a sample of funeral protest laws from ten states—Alabama, Colorado, Connecticut, Idaho, Minnesota, Montana, New Mexico, Oklahoma, Rhode Island, and Washington.

According to the NCSL, all four of the states that do not currently have a funeral protest law—Alaska, Hawaii, Nevada, and Oregon—considered such a measure during the last legislative session. Measures in Alaska and Hawaii are still active, while the measures in Nevada and Oregon have failed. Additionally, many states sought to amend their existing laws. We include, as Attachment C, a NCSL summary of all state legislation considered during the last legislative session that pertains to funeral protests.

February 8, 2012

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The Honorable Steve Thompson, Co-Chair
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Via email: Representative_Dan_Saddler@legis.state.ak.us
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Re: HB 234: Funeral Picketing and Protests
ACLU Review of Constitutional Issues

Dear Co-Chairs Saddler & Thompson:

Thank you for the opportunity to provide written testimony with respect to House Bill 234.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. From that perspective, we wish to advise the Committee of our concern that the proposed bill, if enacted, would violate the rights of free speech and free assembly under the Alaska Constitution and the United States Constitution.

Bill Overview

The current draft of HB 234 proposes to amend the existing disorderly conduct statute, to criminalize the act of "knowingly engag[ing] in picketing with reckless disregard" that the picketing occurs within 150 feet of the boundaries of a "cemetery, mortuary, church, or other facility" and either during a funeral at that location or within an hour of the start or end of the funeral.

The bill goes on to define the term "funeral," excluding a funeral procession from that definition. The bill also defines "picketing" as "protest activities . . . that disrupt or are undertaken to disturb a funeral."

Freedom of Speech

Under the First Amendment to the United States Constitution, people have the freedom to speak without government interference. The freedom of speech is not absolute, ***but government regulation of speech imposes a heavy burden on the government to justify the nature of its regulation and to show that alternative means of vindicating the government interests were inadequate.***

A. The Bill Would Regulate Speech on Sidewalks, a Traditional Public Forum

The present bill directly regulates speech on its face. "[P]rotest activities" are expressive activity, by the very basic meaning of the word "protest." "Picketing" has long been recognized as expressive activity. *See, e.g., Carey v. Brown*, 447 U.S. 455 (1980).

Based on the broad scope of the bill and the real world context of the activities regulated, the bill would criminalize certain expressive activity both on one's own private property – assuming the private property lay within 150 feet of a cemetery or church – as well as on a sidewalk or public park, which are recognized as "traditional public forums" for public speech. *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

Given that the bill directly regulates speech **on one's own property and in traditional public forums**, the bill will be subject to the most careful scrutiny by a court, demanding that the restriction be "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (citation omitted).

B. The Bill is Not Content-Neutral, But Only Regulates Protest Activities

"The right to free speech . . . may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill*, 530 U.S. at 716. For that reason, most restrictions on speech must be content-neutral, meaning that the regulation of speech may not refer to the content of the speech. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 (1994). By contrast, content-neutral restrictions on speech in a public forum describe the time, place, and manner in which speech may be made, and must be narrowly tailored to serve a substantial government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Examples of a content-neutral regulation would include an ordinance against using a loudspeaker over a particular volume or after a certain hour.

In the recent funeral picketing case, the United States Supreme Court did admit that some state laws establishing a buffer zone would be analyzed differently (which does not necessarily mean that they would be *constitutional*), but only to "the extent [such state] laws are content neutral." *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011).

HB 234 appears to refer to the content of speech, and is thus not content-neutral. The term "protest activities" suggests that only the speech of those presenting a negative viewpoint would be affected by the regulation. Under the bill, a person loudly stating that the US military is contributing to the decline of moral values would presumably be engaged in "protest activities," while a person loudly stating that we must honor our veterans would not be engaged in "protest activities."[1] *Frisby*, 487 U.S. at 482. Therefore, the conduct prohibited is not merely traditional picketing, but protesting, oppositional speech. *Snyder*, 131 S. Ct. at 1219 (noting that the claims of the offended plaintiffs "turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself").

Heightening the inference that the bill is intended to discriminate between those presenting supporting views and those presenting opposing views at a funeral, the bill also prohibits activities that "disrupt or are undertaken to disturb a funeral." But in the context of the bill's language, activities that "disrupt" or "disturb" would likely be viewed in light of their content, rather than a neutral standard. "Disrupting" or "disturbing" entails that the activities run contrary to the purpose or plan of the funeral. Loud noises, such as amplified speech or, as has become more common at funerals, the loud revving of motorcycle engines may be viewed as non-disruptive when the expressive conduct accords with the purpose of the funeral, but disruptive when it is not. **Favoring certain expressive activity over another in regulating picketing violates the First Amendment.** *Carey*, 447 U.S. at 470. Notably, in one of the only cases upholding such a law, the parties *stipulated* that the law was content-neutral, rather than contesting the law's neutrality. *Phelps-Roper v. Strickland*, 539 F.3d 356, 361 (6th Cir. 2008).

C. The Legislative History Suggests Lack of Content-Neutrality

Finally, the legislative history suggests that the bill was not intended to be content-neutral. The Sponsor Statement indicates that the bill "asks anyone within the area of a funeral service to conduct themselves in a respectful manner." Sponsor Statement, HB 234. While most – if not indeed nearly all – of us, can agree that permitting funerals to proceed in a peaceful, quiet environment is a laudable goal, nonetheless the state may not legislate "respectful" behavior on the streets and sidewalks of Alaska, nor in the front yards of its citizens. *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180-81 (8th Cir. 1999) (holding that an ordinance prohibiting sign-holding outside churches was unconstitutional because it went "beyond the church building and

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1. A protest is defined by the Merriam-Webster dictionary as an "act of objecting or a gesture of disapproval." By contrast, the general definition of "picketing" is merely "posting at a particular place."

church property, and seeks to forbid peaceful communication on property belonging to the public, even though the communication may be completely truthful, and even though there is absolutely no physical interference with access to the church"). If "protest activities" that "disrupt" or "disturb" are any activities that are "disrespectful," the law clearly discriminates based on the content of the speech and cannot stand.

D. No Compelling Governmental Interest in Restricting Speech at Funerals

Given that the bill is not content-neutral, the question is then whether "protecting families at funerals during their time of grief" is a compelling state interest justifying a restriction on free speech. **The Constitution requires that "to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an *essentially intolerable manner*."** *Snyder*, 131 S. Ct. at 1220 (emphasis added). The only cases in which the U.S. Supreme Court has upheld such laws have been content-neutral laws relating to the privacy of one's home. *Frisby*, 487 U.S. at 487-88 (upholding content-neutral ordinance banning picketing of a single home which made the resident a "prisoner" in his own home); *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970) (upholding statute permitting mail recipient to halt offensive mailings to his residence).

We emphasize that a funeral is a solemn occasion and that families in grief should be accorded the respect that such an occasion deserves. However, funerals are also traditionally public events, frequently held in places of worship or funeral homes that are open to the public. In Anchorage, for instance, numerous cathedrals and churches occupy the downtown area, as does a large cemetery. In Juneau, a Catholic cathedral and a Russian Orthodox church sit three blocks from the State Capitol. Expecting that one will neither see nor hear anything offensive in a heavily-trafficked public space is not reasonably comparable to an expectation that one can retire to one's private home without running a gantlet of protestors.

While the members of the Westboro Baptist Church espouse an abhorrent ideology and express it in the most repulsive terms, this bill would affect all funerals and all protestors. Protesting a funeral, especially that of a public figure, may express an important view opposing an ideology or history of bad acts committed by the person being buried. Funerals are frequently centered around a eulogy, an opportunity to say complimentary things about the deceased. A protest outside a funeral may be an opportunity to present an alternative viewpoint about the deceased and to communicate it to passers-by.

Alternatively, when the death of an individual occurs under circumstances giving rise to matters of public concern, the funeral may be the locus of public debate. Famously, the lynching death of Emmett Till resulted in a dramatic funeral in Chicago which thousands of people attended; a dramatic moment that galvanized the civil rights movement. **A municipality could use the bill, for instance, to characterize angry or upset attendees at a funeral for a victim of a police shooting as "protestors" and arrest the attendees for disorderly conduct. A bill that restricts the freedom of speech on the basis of content is available for all kinds of mischief.**

E. The Bill Is Not Narrowly Tailored and Does Not Leave Adequate Avenues for Expression

Because the bill extends to 150 feet in every direction from a church, mortuary, funeral home, or cemetery where a funeral may take place, and extends from an hour before to an hour after a funeral, HB 234 unconstitutionally restricts speech in that it is neither narrowly tailored nor does it leave adequate avenues for expression. The only recognized constitutional interest at stake is the right of a listener in a private place to avoid being a captive audience to a message the listener has no desire to hear. *Phelps-Roper v. Strickland*, 539 F.3d at 364.

Funeral attendees are not a captive audience to a quiet protest, provided the protest does not enter the church or block the entrance to the church. *Olmer*, 192 F.3d at 1180-81. Funeral attendees may have to walk or drive past protestors holding signs that offend them, and might wish to avert their eyes for the period they would otherwise be exposed to the offensive messages. Clearly, protestors can be excluded from the funeral home, mortuary, cemetery, or church where the service takes place. **Thus, the statute is not narrowly tailored to the government interest in avoiding making funeral attendees a captive audience to the protest.**

Further, a primary function of a mortuary or funeral home is to serve as a space for funeral services. *Some funeral homes may hold more than one funeral in a day.* Given the length of services and the one hour window before and after the service when a protest may not take place, **HB 234 – as currently drafted – could prohibit even unrelated protests near a funeral home, for potentially many hours out of any given day.**

Since some important public buildings – likely sites for protests – are close to funeral homes, this would impose a serious burden. For instance, there is a funeral home across the street from the Atwood Building in Anchorage. An Episcopal church lies across the street from the Dena'ina Convention Center. A labor demonstration against a particular employer lacks the same efficacy if performed offsite. Employees at a business located next door to church, mortuary, funeral home, or cemetery would be unable to mount an effective protest about labor conditions if their protests had to start and stop every time a funeral was taking place. As an example, the Sheraton Hotel in Anchorage lies across the street from the municipal cemetery in the middle of downtown. Employees at similarly situated businesses could be seriously chilled from engaging in meaningful protests and could conduct regular, continuing protests only at the risk that someone would define their protests as "disrupt[ing]" the funeral service.

Last, the bill leaves open little alternative for those who actually wish to protest the church, funeral home, or cemetery in question, by mandating that the protestors stay at least 150 feet away from the property within an hour before or after funerals. Someone may seek to picket a church, such as to bring attention to victims of sexual assault. Someone may seek to picket a funeral home or a cemetery, such as in a labor dispute or a dispute about the policies of the business. While such protests may incidentally impact funeral attendees, the alternative would thwart the free expression of employees or those with legitimate concerns about the church, funeral home, or cemetery. Taken as a whole, the law would leave few alternatives open to those

who seek to protest outside public or private buildings that happen to be located near a church, funeral home, or cemetery, as well as those who seek to picket the church, funeral home, or cemetery itself.

The bill is not narrowly tailored to the legitimate state interests because the protestor must engage in picketing with "reckless disregard," rather than knowledge, that the picketing takes place within 150 feet of the site of a funeral and within one hour before or one hour after the funeral. "Recklessness" refers to a criminal law standard that a person consciously disregards a substantial risk of a certain condition being present. AS 11.81.900(a)(3). Presumably, there is a substantial "risk" that a funeral will take place at a church, funeral home, mortuary, or cemetery at any time. This standard unreasonably imposes on a protestor the duty of discovering whether or not a funeral is ongoing, recently took place, or will take place within an hour of a protest. Employees protesting labor conditions at the Sheraton will thus be required to find out if any funerals are taking place in the municipal cemetery on a day when they decide to protest. **Protesters should not be burdened with such a duty to discover whether a funeral is taking place at any given time.** Imposing the burden on protesters to discover when and whether a nearby church, cemetery, or funeral home is conducting a funeral leaves the law unreasonably ill-tailored to legitimate state interests and imposes an unconstitutional "protest at your own risk" policy.

Drafting Considerations

We suggest the Committee may wish to consider:

The protests staged by the Westboro Baptist Church express abhorrent views, for which the ACLU has no sympathy. Further, the manner in which they protest is deeply offensive. **The great maxim of free speech is that for all evil speech, "the remedy to be applied is *more speech*, not enforced silence."** *Whitney v. California*, 274 U.S. 357, 378 (1927).

Rather than seeking to prohibit fools from saying foolish and hurtful words, we as a community should come together to show our appreciation for our service members and others in our community whose funerals may be subject to these protests. If the protests of a handful of people inspire a thousand people to come out to show their support and respect at a funeral, does that tribute not outweigh the ill words of a few? The true voice of Alaska should come out when a misguided minority threatens their protests, so we may show why their words are folly.

Second, the members of the Westboro Baptist Church thrive on the controversy and attention generated by their activity. They also thrive on the attorneys' fees generated when legislatures and municipal assemblies act hastily to prevent them from protesting. As truly painful as it is to watch such a protest unfold, it will surely be more galling to pay from the state treasury to facilitate more protests and more litigation by a tiny group of hateful individuals whose message has already received too much attention.

Conclusion

We hope that the Military and Veterans' Affairs Special Committee will recognize that these are just some of the constitutional infirmities in House Bill 234.

Thank you again for letting us share our concerns. Please feel free to contact the undersigned if you have any questions or wish additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: The Honorable Carl Gatto, Vice Chair, Representative_Carl_Gatto@legis.state.ak.us
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MEMORANDUM March 10, 2011

SUBJECT: Amendment to AS 11.61.110 (disorderly conduct) adding picketing or protesting at a funeral as an offense (Work Order No. 27-LS0627\A)

TO: Representative Bob Herron
Attn: Rob Earl
Representative Bill Thomas
Attn: Kaci Schroeder

FROM: Doug Gardner
Director

You asked for a bill that would limit picketing and protests at a funeral, and requested a criminal law solution as a way to achieve this limitation. I chose to amend AS 11.61.110, to add picketing or protesting at a funeral to the offense of Disorderly Conduct. Enclosed is a draft that I believe accomplishes your request. Given the extensive constitutional issues presented by this bill, I have briefly outlined the issues that may come up if this bill is introduced. If you would like more detail, please advise, and I can provide it.

Overview

At present, in excess of 45 states have passed laws that in one way or another, are very similar to the attached draft bill. Much of the litigation involving various state funeral protest laws has been concentrated in the states that comprise the Sixth Circuit (KY., MI., OH., and TN.), and the Eighth Circuit (AR., IA., MN., MO., NE., S.D.) federal courts. An observation about this trend is that the Westboro Baptist Church, which is a party to or involved in virtually all of these cases is based in Topeka, Kansas, and engages in protest activities with more frequency in areas near the church's home town. Given the volume of litigation in the Sixth and Eighth Circuit courts, and eventually at the appellate level, I chose to draft this bill based on lessons learned in litigation in these circuits, and to base this bill on state statutes that have passed constitutional muster. However, it is important to observe, that the U. S. Supreme Court has yet to address a criminal law involving funeral picketing or protests. The recent high profile decision in *Snyder v. Phelps*, 2011 WL 709517 (U.S.), was a decision that involved civil litigation for money damages, and not a criminal law, so the decision, while instructive, does not resolve some of the issues that are unique to criminal law in the context of free speech.

Snyder v. Phelps

With that backdrop, I want to briefly address and summarize the recent decision in *Snyder v. Phelps* issued by the Supreme Court last week. Mr. Snyder sued Westboro Church leader Albert Phelps in a civil action based on the theory that picketing, and the content of that picketing by Westboro Church at his son's funeral (Snyder's son was a Lance Corporal in the United States Marine Corps, and died as a result of injuries sustained in Iraq in the line of duty), was done in a way that intentionally caused him emotional distress. Some of the slogans on the pickets that Mr. Snyder acknowledged in court proceedings that he could briefly see the tops of from his position in the motorcade to the funeral, included "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell."

The first question for the *Snyder* Court was whether the highest protection afforded speech by the First Amendment of the U. S. Constitution applied to Westboro's speech. The Court concluded, that while offensive to many, the issues raised by Westboro's picket signs were public speech entitled to the "highest rung" of protection in the hierarchy of First Amendment protections. As a consequence, the Court decided that the jury verdict for over $10 million returned at trial in the lower district court had to be set aside because the public speech of Westboro was protected by the First Amendment, and as a consequence was not actionable in a claim for money damages by Mr. Snyder.

In *Snyder*, Chief Justice Roberts, writing for the majority of the Court, observed that after the protest in 2006 by Westboro church at Mr. Snyder's son's funeral, the Maryland Legislature passed a law that prohibits picketing within 100 feet of a funeral service or procession, and noted that Westboro's picketing would have complied with that law. The Court clearly wanted to point out that its decision in *Snyder* did not address Maryland's picketing law, and that "to the extent [law's like Maryland's] are content neutral, they raise very different questions from the tort verdict at issue in [*Snyder*]." However, Chief Justice Roberts noted that the Supreme Court has, in past cases where a law was content neutral, allowed time, place, and manner restrictions and regulation of public speech. These situations were noted by the Chief Justice as picketing around a home and a buffer zone between protesters and an abortion clinic entrance. *Snyder v. Phelps*, 2011 WL 709517 p.17-18 (U.S.), *citing Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (holding that a state has a significant interest in banning targeted picketing in front of private residences where individuals are captive audiences); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994) (court rejected a 300 foot buffer zone around an abortion clinic as overly broad restriction, but court approved a 36 foot buffer zone around clinic entrance).

Eighth Circuit Cases

The Eighth Circuit Court of Appeals, in *Olmer v. Lincoln*, 192 F.3d 1176 (8th Cir. 1999), decided in the context of an ordinance that restricted picketing of churches and other religious premises 30 minutes before during and after a funeral service, that while the state has a significant interest in banning targeted speech in front of a person's home

where individuals are captive audiences, that churches are distinguishable, and that the state's interest regarding a church is not as great. As a consequence, the Eighth Circuit cases where funeral protest ordinances or statutes have been litigated have been found unconstitutional, because the state interest in regulating public speech has not been significant enough to justify the state-imposed time, place, and manner restrictions. So, when addressing a content neutral restriction on speech, the Eighth Circuit Court of Appeals has not found funeral protest statutes constitutional, based on the state's failure to meet the first of the three-part test that the court applied in *Olmer*: (1) does the statute regulating speech serve a significant state interest; (2) is the statute narrowly tailored; and (3) does it leave open ample alternative channels of communication.

Despite the *Olmer* decision, a recent decision by a trial court in the Eighth Circuit regarding a Nebraska state criminal statute banning funeral protests within 300 feet of a cemetery, etc., and one hour before until one hour after a funeral, was upheld as constitutional. *Phelps-Roper v. Heineman*, 720 F.Supp.2d 1090 (D. Nebraska 2010). In *Heineman*, the trial court distinguished the *Olmer* decision, finding that the Nebraska statute, which included findings articulating the state's interest in protecting families of the deceased, demonstrated a significant state interest. The trial court also held, that despite the *Olmer*, decision, that it considered grieving family members a captive audience at a funeral, who may be under stress and may suffer emotional harm under circumstances at a funeral where they are unable to avoid pickets and protests. The *Heineman* case is on appeal to the Eighth Circuit Court of Appeals. In summary, the *Heineman* court found that in the case of the content neutral Nebraska statute: (1) the state demonstrated a significant state interest in protecting family members; (2) the statute was narrowly tailored both in time restrictions (hour before until an hour after the funeral with a 300 foot buffer); and that (3) alternate means of speech to communicate Westboro's messages exist (buffer zone is limited to an hour before until an hour after funeral and protesting outside the buffer zone is not restricted in any way at any time).

Sixth Circuit Cases

For purposes of this brief summary, it is not necessary to go into too much detail regarding funeral protests case law in the Sixth Circuit. In *Phelps-Roper v. Bob Taft*, 523 F.Supp.2d 612 (N.D. Ohio 2007), the trial court judge considered an Ohio statute essentially the same as the Nebraska statute in *Heineman*, which created a "fixed" buffer zone of 300 feet[1] around a church or other place where a funeral was being held. The

[1] Most of the state funeral protest statutes I reviewed provided for a 300 foot buffer zone between protesters and funeral attendees. I would note, that while the *Heineman* court and the *Taft* court found 300 foot buffer zones narrowly tailored and allowing alternative channels for speech, other courts have found 300 foot buffer zones overly broad, burdening substantially more speech than necessary to further the government's interest. See *Phelps-Roper v. County of St. Charles*, 2011 WL 227561 (E.D. MO.). I drafted this bill consistent with a 200 foot buffer, which is more conservative than the buffer found in

Ohio statute also imposed a "floating" buffer zone of 300 feet around a funeral procession. The court found the floating buffer unconstitutional, as has every court that I am aware of that has considered the "floating" buffer zone. I would note that on appeal, the Ohio attorney general's office made the decision not to cross-appeal or litigate the part of the trial court's decision involving the floating buffer zone, so I will not address that issue further. With regard to the "fixed" buffer zone, both the trial court and the Sixth Circuit Court of Appeals found the Ohio funeral protest statute content neutral, and constitutional for essentially the same reasons that the *Heineman* trial court did in Nebraska. *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008).

Alaska Law and Summary of Drafting Issues

In drafting the enclosed bill amending AS 11.61.110, to add a funeral picketing and protest provision to the offenses comprising disorderly conduct in Alaska, I tried to track both the legislative finding language in Revised Statute of Nebraska § 28-1320.01 to 28-1320.03 (2008), and the language of the statute itself. By tracking the Nebraska language and legislative findings and intent, the draft bill focuses on: (1) a statute that has already been found to be content-neutral; (2) a judicial finding of a strong state interest in protecting family members of the deceased, as opposed to a broader group of funeral attendees; (3) statutory language that only restricts picketing focused on a funeral, similar to the language of the ordinance in *Frisby*, 487 U.S. at 482; and (4) a statute that has been held to allow alternative channels for communication.

In Alaska, if the proposed amendments to AS 11.61.110 are scrutinized by the courts as time, place, and manner, content neutral restrictions on speech, the state will have to demonstrate that these restrictions are narrowly tailored, supported by a significant state interest, and leave open ample alternative channels for expression. *Prentzel v. State*, 1988 WL 1511365 (Alaska App.), *quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). As with any constitutional challenge, the outcome of litigation is always difficult to predict, based on the facts and circumstances of each case, and based on the different outcomes observed in the analysis by the Sixth and Eighth Circuit Courts of Appeal. Please review the enclosed draft, and let me know how you would like to proceed. As you requested, I am also sending a copy of this draft to Representative Thomas's office.

DDG:plm:ljw
11-129.plm

Enclosure

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most state statutes, but you may wish to narrow this buffer zone, perhaps to 150 feet as was done by Congress in 18 U.S.C.S 1388 (prohibition on disruption of funerals at Arlington National Cemetery) or to 100 feet as adopted by the State of Maryland in MD. Code Ann., Criminal Law, § 10-205 (West. 2010).

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Sectional CSHB 234 (STA)
"An Act relating to picketing at a funeral."

Section 1: Legislative Intent.

(a) Legislature finds that families have a protected right to mourn the deaths of relatives peacefully and they are members of a captive audience.

(b) Legislature finds that individuals have a constitutional right to free speech and that the two must be balanced to provide families a time to grieve peacefully and provide others a right to convey their message.

Sec. 2: Amended to read: Disorderly Conduct

(8) The person knowingly engages in picketing with reckless disregard that picketing occurs

(A) Inside of a cemetery, mortuary, church, or other facility or within 150 feet of the outer boundary.

(B) One hour before, during and one hour after the funeral.

Sec. 3: Amended to read: Definitions

(1) Funeral- a ceremony in connection with deceased person but does not include the procession.

(3) Picketing- means an act directed toward a funeral that disrupts or disturbs that funeral.

27-LS1502\A
Wayne
4/10/12

SENATE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Introduced:
Referred:

A RESOLUTION

Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, concerning House Bill No. 234, relating to picketing or protests at a funeral.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding changes to the title of a bill, are suspended in consideration of House Bill No. 234, relating to picketing or protests at a funeral.

APOA

ALASKA PEACE OFFICERS ASSOCIATION

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Anchorage

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Kenai Peninsula Chapter
Kenai

Bob Griffiths, President
Mat-Su Chapter
Wasilla

Thecla LaLonde, President
Wrangell Chapter
Wrangell

February 10, 2012

Representative Bill Thomas, Jr.
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Thomas:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing HB 234 an act relating to picketing or protests at a funeral.

The APOA Executive Board's Legislative Committee recently reviewed this proposed legislation and decided to unanimously support this bill.

We thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

John Lucking, Jr.
State President

PO Box 240106
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FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 234**
Fiscal Note Number: **1**
(H) Publish Date: **2/10/12**

Identifier (file name): HB234-LAW-CRIM-02-03-12
Title: An Act relating to picketing or protests at a funeral.
Sponsor: Representative Thomas
Requester: (H) Military & Veterans' Affairs

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/3/12 5:10PM
Approved by: Michael C. Geraghty, Attorney General — Date: 2/3/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 234

Analysis

HB 234 amends the crime of disorderly conduct by adding the prohibition of engaging in picketing within 150 feet of a cemetery, church, and so on and within 60 minutes of the beginning or end of the funeral.

Disorderly conduct is a class B misdemeanor with a maximum term of imprisonment of 10 days.

The estimated fiscal impact of the bill is zero. The estimate does not include costs related to any legal challenges to the legislation, if it is enacted into law.

HB 255

<TARGET><BILL>HB 255</BILL><SUBJECT>HB 255</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

REPRESENTATIVE LES GARA
REPRESENTATIVE BILL THOMAS

House Bill 255
Sponsor Statement

Alaska's Ban on Texting, and Other Typing and Reading Words on Video Screens.

In December of 2011 one court ruled that Alaska's current law, which bans looking at video screens and increases the criminal penalties for injuries when they are caused by that conduct, was not worded clearly. Other courts have indicated they may rule similarly. The ruling stated that the current law did not bar texting while driving a moving vehicle.

This bi-partisan legislation reestablishes what the 2008 Legislature intended – that typing or reading messages on a video screen is covered by Alaska law as criminal conduct. It is widely recognized that texting while driving a vehicle can kill or severely injure innocent people, as well as the driver. This bill is crafted to remain consistent with the existing legislation. It exempts certain emergency uses and mapping devices, and simply adds that the law passed in 2008 banning using video screens in a moving vehicle also includes a ban on typing or reading on a computer, cell phone, or other video or computer screen in a moving vehicle. The language is written so that similar activities on social media sites will be covered, and prohibited while people are driving a vehicle.

The bill recognizes that other legislators have filed legislation on a separate subject – talking on and dialing cell phones while driving. Alaska currently has no per se ban on that activity. This bill does not address that issue at all. It leaves the debate on that subject for the bills on that subject that have been filed. The bill is simply aimed at clarifying the law passed in 2008 so that activity such as texting or reading texts is banned.

Finally, working with law enforcement and first responders, we were advised that some police and firefighters use wireless technology to receive crime or health related information. We agreed on a provision to allow emergency responders to receive information, but not respond while the vehicle is moving. The bill has received support from the Alaska Association of Chiefs of Police, Alaska Peace Officers Association, Anchorage Fire Department, and State Farm Insurance Companies.

January-May: State Capitol • Juneau, AK 99801-1182 • (907) 465-2647 • Fax (907) 465-3518
June-December: 716 W. 4th Avenue • Anchorage, AK 99501• (907) 269-0106• Fax (907) 269-0109
Representative_Les_Gara@legis.state.ak.us

ALASKA STATE LEGISLATURE

REPRESENTATIVE LES GARA
REPRESENTATIVE BILL THOMAS

House Bill 255
Sectional Analysis

Section 1.
Section one of the bill amends the uncodified law of Alaska by adding a new section providing for a statement of purpose by the legislature regarding the bill. In essence, the statement of purpose reflects that while the legislature is of the opinion that AS 28.35.161 currently prohibits the use of a cellular telephone, computer, personal data assistant or any other similar means for texting or communicating while driving a motor vehicle, that the purpose of the bill is to further clarify that use of these types of devices in the manner currently provided by AS 28.35.161, is prohibited conduct.

Section 2.
Section two of the bill adds the phrase "while texting, while communicating on a computer" to AS 28.35.162(a) to clarify that texting or communicating on a computer is included as prohibited conduct by the existing language of the bill." Section two of the bill also splits the offense into two prosecution theories of prohibited conduct. The first theory utilizes the existing language of the statute regarding the prohibited conduct of driving a motor vehicle while the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of the driver in a normal driving position while the vehicle is in motion and the monitor or visual display is operating while the person is driving. The second prosecution theory added by the bill by adding a new subsection (a)(2) to AS 28.35.161, prohibits the conduct of driving a motor vehicle while the person is reading or typing a text message or other nonvoice communication on a cellular telephone, personal data assistant, computer or any other similar means capable of providing a visual display that is in view of the driver in a normal driving position while the vehicle is in motion and the person is driving.

Section 3.
Section three amends the existing language of AS 28.35.161(b) to make the existing language of this subparagraph, which restricts installation of equipment set out in either AS 28.35.161(a)(1) or 28.38.161(a)(2), consistent with the additional language added by section two of the bill.

Section 4.
This section of the bill replaces the existing use of the term 'verbal' with "voice," to clarify that this bill continues, as AS 28.35.161 does at present, to allow the conduct of for example "voice" communication on a cellular telephone or other device, as distinguished from the existing prohibited conduct as clarified by section two of the bill, which includes texting, typing a text message or reading a text message, watching television etc., while driving.

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Representative_Les_Gara@legis.state.ak.us

Section 5.
This section adds a new exemption for police, fire, and emergency personnel to view information on a screen device, whether installed or wireless. The exemption was crafted with input from law enforcement, and applies only to viewing information that the person reasonably believes is necessary to respond to a health, safety, or criminal matter. Current statute exempts only devices "installed" in emergency vehicles. It was brought to the attention of the bill sponsor that some police and fire departments in smaller communities do not have equipment installed in their vehicles and rely on wireless devices to receive information. This provision permits the viewing of information only, and does not allow the driver to type a response while driving. This exemption also intends to capture rapidly changing technologies, as current communication devices may not be installed in vehicles in the future.

Section 6.
Provides an immediate effective date.

Alaska Association of Chiefs of Police

April 3, 2012

Representative Les Gara
Mailstop: 3100 Room 500
State Capitol,
Juneau AK 99801-1182

RE: HB 255, An Act prohibiting the driver of a motor vehicle from reading or typing a text message or other nonvoice message or communication on a cellular telephone, computer, or personal data assistant while driving a motor vehicle

Dear Representative Gara,

The Alaska Association of Chiefs of Police, Inc. (AACOP) represents Criminal Justice executives across Alaska; from Anchorage to Annette Island, Barrow to Bethel and Kotzebue to Ketchikan. Our 120 Members direct local, state and federal criminal justice agencies. We collaborate and work together toward one goal: making our state and communities safer.

AACOP leadership recently met to evaluate the impact on public safety of pending legislation before the 27th Alaska Legislature. One of the bills evaluated was HB 255, *An Act prohibiting the driver of a motor vehicle from reading or typing a text message or other nonvoice message or communication on a cellular telephone, computer, or personal data assistant while driving a motor vehicle.* **We are writing to express our unreserved support for this bill as it is currently drafted.**

I know that in your discussions with Cordova Chief Bob Griffiths, he expressed the importance of having enough flexibility within the statute to support public safety use of mobile devices that were not physically connected to their vehicles. Many small agencies do not have computers in their cars and must rely on mobile devices for emergency communications, alerts, and computer checks. While officers are taught to stop their vehicles to use these devices, in emergency cases this may not be possible. We appreciate the Legislature recognizing this need while still addressing the overall elimination of distracted driving.

If you have need of additional testimony from any of our members as the bill proceeds through the committee process, please do not hesitate to contact us.

Respectfully,

Thomas L. Clemons

Chief Tom Clemons,
President, AACOP
(907) 224-3338

APOA
ALASKA PEACE OFFICERS ASSOCIATION

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Mark Pearson, President
Kenai Peninsula Chapter
Kenai
Bob Griffiths, President
Mat-Su Chapter
Wasilla
Thecla LaLonde, President
Wrangell Chapter
Wrangell

February 10, 2012

Representative Les Gara
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Gara:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing HB 255 an act prohibiting the driver of a motor vehicle from reading or typing a text message or other nonvoice message or communication on a cellular telephone, computer, or personal data assistant while driving a motor vehicle.

The APOA Executive Board's Legislative Committee recently reviewed this proposed legislation and decided to unanimously support this bill.

We thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

John Lucking, Jr.
State President

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February 7, 2012

The Honorable Les Gara
Alaska House of Representatives
State Capitol, Room 500
Juneau, Alaska 99801-1182

Re: State Farm Support for HB 255

Dear Representative Gara:

State Farm, the largest insurer of autos in Alaska, strongly supports HB 255, which prohibits drivers from reading or typing a text message or other non-voice message on cell phones, computers or personal data assistants. The bill clarifies this conduct is illegal in Alaska and provides for stiff penalties as a deterrent. Statistics establish without a doubt this bill will immediately begin to reduce accidents, reduce property damage, help to keep insurance costs down and most importantly save lives.

Please include this letter of support in your bill file and in all committee hearings. If we can provide you any further information or assistance, please let me know.

Sincerely,

Sheldon E. Winters
Lobbyist for State Farm Insurance Companies

SEW/lg
Gara 2-7-12 letter of support.wpd

National Conference of State Legislatures

LEGISBRIEF

BRIEFING PAPERS ON THE IMPORTANT ISSUES OF THE DAY

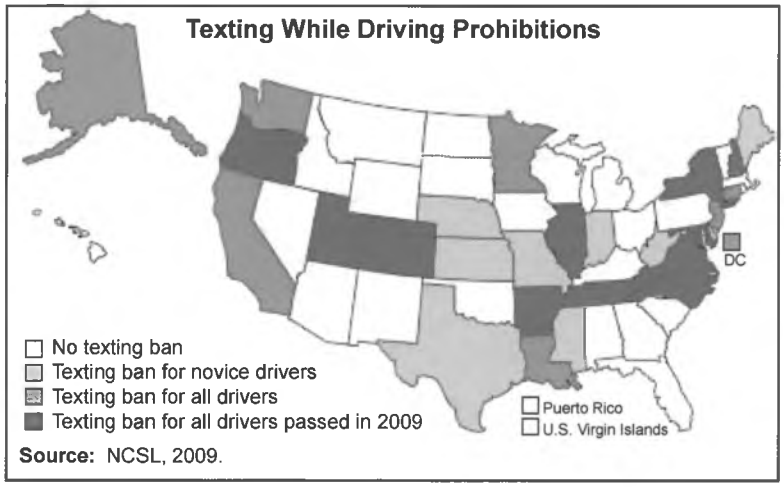
NOVEMBER-DECEMBER 2009 VOL. 17, NO. 48

Addressing Distracted Driving

By Melissa Savage

Driver inattention causes nearly 80 percent of vehicle crashes.

According to the National Highway Traffic Safety Administration, nearly 80 percent of vehicle crashes and 65 percent of near-crashes involve some form of driver inattention, often caused by tending to children in the back seat, talking with other passengers, or events happening outside the car. Talking on a cell phone and texting while driving have recently gained attention and have been the target of state legislation.



One trillion text messages were sent last year, according to the International Association for the Wireless Telecommunications Industry. That's up about 20 billion over the last three years. Many of these text messages were sent by drivers.

Only 20 states collect cell phone use information at crash scenes.

Tracking the problem can be difficult. Only 25 states collect cell phone use information at crash scenes. The National Occupant Protection Use Survey, conducted at randomly selected intersections by the U.S. Department of Transportation, found that 1 percent of observed drivers were manipulating a hand-held device, and 6 percent of observed drivers were using hand-held cell phones.

Studies using cameras and other tracking devices in personal vehicles found that drivers who send and receive text messages while driving had more than 20 times the risk of a crash or near crash than a driver who was not using a phone. Drivers who text messaged while driving took their eyes off the road for an average of 4.6 seconds during a 6-second interval; this equates to traveling the length of a football field at 55 mph without looking at the road. Talking on a cell phone while driving slightly increased the risk of a crash or near crash, but not to the same degree as text messaging.

No state completely bans phone use for all drivers.

State Action State distracted driving laws frequently are mislabeled as prohibitions on cell phones in the car. In fact, no state completely bans all phones for all drivers. Instead, state legislation usually addresses a range of issues, including particular wireless technologies and specific

National Conference of State Legislatures

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drivers. California, Connecticut, New York, New Jersey, Oregon, Washington and the District of Columbia prohibit all drivers from using hand-held phones. Other states have targeted only school bus drivers and teens. In 17 states and the District of Columbia, school bus drivers cannot use a cell phone while operating a bus; in 21 states and the District of Columbia, new drivers cannot use a cell phone while driving.

Every state has considered bills related to distracted driving.

Since 2000, legislatures in every state, the District of Columbia and Puerto Rico have considered bills related to distracted driving or, more specifically, to driver cell phone use. In 2009, legislators in 46 states considered 198 driver distraction bills. Maine's 2009 distracted driving law covers all types of distraction, not just cell phone use. The law defines "operation of a motor vehicle while distracted" as non-vehicle-operation activity by drivers; if they cannot safely operate the vehicle, they are violating the law.

The most common driver distraction measure—prohibiting texting while driving—was debated in 27 legislatures in 2009. As of September, 18 states and the District of Columbia outlaw text messaging while driving for all drivers. Eleven of those states passed laws in 2009.

Federal Action U.S. Transportation Secretary Ray LaHood convened a September 2009 summit to address the dangers of text messaging and other distractions behind the wheel. The summit, organized by the U.S. Department of Transportation's Research and Innovative Technology Administration, convened senior transportation officials; elected officials, including state legislators; safety advocates; law enforcement personnel; and academics to discuss how to combat distracted driving.

President Obama recently released Executive Order 13513, which prohibits federal employees from text messaging while driving vehicles owned, leased or rented by the federal government or privately owned vehicles on official government business. The order also prohibits federal employees from using federal government-supplied electronic equipment while driving. The Department of Transportation will propose three separate rulemakings to: 1) ban the use of cell phones and other electronic devices by rail operators; 2) restrict cell phone use and ban text messaging by truck and interstate bus operators; and 3) revoke the commercial driver's licenses of school bus drivers convicted of texting while driving.

Congress is considering a federal ban on texting while driving.

Congress also is considering a federal ban on texting while driving. Legislation introduced in both the U.S. House and Senate (H.R. 3535, S. 1536) would authorize withholding 25 percent of a state's highway funds if it fails to enact a law by a certain date to prohibit text messaging while driving. If passed, the federal legislation—Avoiding Life-Endangering and Reckless Texting by Drivers Act" (ALERT Drivers Act)—could authorize withholding a possible total of $4.4 billion from the states and the District of Columbia, based on 2009 apportionments.

A second bill (S. 1938) introduced in the U.S. Senate would create a new grant program to encourage states to enact legislation that bans texting while driving, requires drivers using a cell phone to use a hands-free device, and prohibits drivers under age 18 from using any cell phone while driving. The grant program would be funded by redirecting unused surpluses from the existing federal grant program to states for encouraging enactment of a primary seat belt law.

Contacts for More Information

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Cell Phone Use and Texting While Driving Laws

Updated December 2011

A-C | D-H | I-L | M | N | O-R | S-U | V-W

STATES	HAND-HELD BAN	ALL CELL PHONE BAN	TEXTING BAN	ENFORCEMENT	CRASH DATA COLLECTION
Alabama	No	Drivers age 16 and 17 who have held an intermediate license for less than 6 months.	No	Not applicable	
Alaska	No	No	All drivers	Primary	Yes
Arizona	No	School bus drivers	No	Primary	
Arkansas	No	School bus drivers, drivers younger than 18	All drivers	Primary for texting by all drivers and cell phone use by school bus drivers; secondary for cell phone use by young drivers	Yes
California	All drivers	School and transit bus drivers and drivers younger than 18	All drivers	Primary	Yes
Colorado	No	Drivers younger than 18	All drivers	Primary	Yes
Connecticut	All drivers	Learner's permit holders, drivers younger than 18, and school bus drivers	All drivers	Primary	
Delaware	All drivers (effective 01/02/11)	Learner's permit and intermediate license holders and school bus drivers	All drivers (effective 01/02/11)	Primary	Yes
District of Columbia	All drivers	School bus drivers and learner's permit holders	All drivers	Primary	Yes
Florida	No	No	No	Not applicable	Yes
Georgia	Drivers younger than 18 (effective 07/01/10)	School bus drivers. Drivers younger than 18.	All drivers (effective 07/01/10)	Primary	Yes
Hawaii	No	No	No	Not applicable	
Idaho	No	No	No	Not applicable	Yes***
Illinois	Drivers in construction and school speed zones	Learner's permit holders younger than 19, drivers younger than 19, and school bus drivers	All drivers	Primary	Yes
Indiana	No	Drivers under the age of 18.	All drivers (effective 07/01/11).	Primary	Yes
Iowa	No	Learner's permit and intermediate license holders	All drivers	Secondary for texting	Yes
Kansas					

	No	Learner's permit and intermediate license holders	All drivers (effective 07/01/10)	Primary	Yes
Kentucky	No	Drivers younger than 18 (effective 07/13/10), School Bus Drivers.	All drivers (effective 07/13/10)	Primary (effective 07/13/10)	Yes
Louisiana	No	School bus drivers, learner's permit and intermediate license holders, drivers under age 18	All drivers	Primary	Yes
Maine**	No	Learner's permit and intermediate license holders	All drivers (effective 09/13/11)	Primary	Yes
Maryland	All drivers (effective 10/01/10), School Bus Drivers.	Learner's permit and intermediate license holders under 18. School bus drivers.	All drivers	Primary for texting	Yes
Massachusetts	Local option	School bus drivers, passenger bus drivers, drivers younger than 18.	All drivers (effective 09/30/10	Primary	Yes
Michigan	Local option	No	All drivers (effective 07/01/10)	Primary (effective 07/01/10)	Yes
Minnesota	No	School bus drivers, learner's permit holders, and provisional license holders during the first 12 months after licensing	All drivers	Primary	Yes
Mississippi	No	School bus drivers.	Learner's permit holders and intermediate license holders	Primary	Yes
Missouri	No	No	Drivers 21 years of age or younger	Primary	
Montana	No	No	No	Not applicable	Yes
Nebraska	No	Learner's permit and intermediate license holders younger than 18	Learner's permit and intermediate license holders younger than 18 All drivers	Secondary	Yes
Nevada	All drivers (effective 01/01/12)	No	All drivers (effective 01/01/12)	Not applicable	Yes
New Hampshire	No	No	All drivers	Primary	
New Jersey	All drivers	School bus drivers, and learner's permit and intermediate license holders	All drivers	Primary	Yes
New Mexico	Local option	Learners permit and intermediate license holders.	No	Not applicable	Yes
New York	All drivers	No	All drivers	Primary	Yes
North Carolina	No	Drivers younger than 18 and school bus drivers	All drivers	Primary	
North Dakota	Drivers younger than 18	Drivers younger than 18 (effective 01/01/12)	All drivers (effective 08/01/11)	Primary (effective 08/01/11)	Yes

	(effective 01/01/12)				
Ohio	Local option	No	No	Not applicable	
Oklahoma	Learner's permit and intermediate license holders, school bus drivers and public transit drivers (effective 11/01/10)	School Bus Drivers and Public Transit Drivers (effective 11/01/10).	Learner's permit holders, intermediate license holders, school bus drivers and public transit drivers (effective 11/01/10)	Primary	Yes
Oregon	All drivers	Drivers younger than 18	All drivers	Primary	Yes
Pennsylvania	Local option	No	All drivers	Primary	Yes
Rhode Island	No	School bus drivers and drivers younger than 18	All drivers	Primary	Yes
South Carolina	No	No	No	Not applicable	Yes***
South Dakota	No	No	No	Not applicable	Yes
Tennessee	No	School bus drivers, and learner's permit and intermediate license holders	All drivers	Primary	Yes
Texas	Drivers in school crossing zones	Bus drivers. Drivers younger than 18. (09/01/11)	Bus drivers when a passenger 17 and younger is present; intermediate license holders for first 12 months, drivers in school crossing zones	Primary	Yes
Utah	See footnote*	No	All drivers	Primary for texting; secondary for talking on hand-held phone	Yes
Vermont	No	Drivers younger than 18 shall not use any portable electronic device while driving.	All drivers	Primary	
Virgin Islands	Yes				Yes
Virginia	No	Drivers younger than 18 and school bus drivers	All drivers	Secondary; primary for school bus drivers	Yes
Washington	All drivers	Learners permit and intermediate license holders.	All drivers	Primary	Yes
West Virginia	No	Drivers younger than 18 who hold either a learner's permit or an intermediate license	Drivers younger than 18 who hold either a learner's permit or an intermediate license	Primary	
Wisconsin	No	No	All drivers (effective 12/01/10)	Primary (effective 12/01/10)	
Wyoming	No	No	All drivers	Primary	Yes
Total	All drivers: 9 states and District of Columbia.	School Bus drivers: 19 states and District of Columbia. Teen drivers: 30 states and District of Columbia.	All Drivers: 35 states and District of Columbia.	Primary for all drivers texting: 32.	36 and U.S. Virgin Islands and District of Columbia.

Source: AAA, Insurance Institute for Highway Safety, NCSL 2011.
Governor's Highway Safety Association

.* Utah considers speaking on a cell phone, without a hands-free device, to be an offense only if a driver is also committing some other moving violation (other than speeding).

** Maine has a law that makes driving while distracted a traffic infraction. 29-A M.R.S.A. Sec. 2117.

*** Listed as a part of contributing factors

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PDF: Kenai decision in texting-while-driving case

Kenai Judge Throws Out Texting-While-Driving Case

December 22, 2011 | By Matthew Simon | Channel 2 News

0 0 Tweet

KENAI, Alaska — A Kenai judge says the 2008 law intended to make texting-while-driving illegal is not enforceable.

The state's screen device law does not include the word "text." Lawmakers say by not mentioning texting in the part of the bill allowing people to talk on phones means it is an implied illegal action.

However, on Dec. 1 Magistrate Jennifer Wells cited the lack of the word texting as the specific reason for tossing out the case against a man charged with texting-while-driving.

"Whether the 25th Legislature did, indeed, intend the statute to prohibit texting, or whether the statute has gotten the reputation because legislators and law enforcement wish this were true, is perhaps irrelevant," Wells writes. "From the court's perspective, because A.S. 28.35.161 creates misdemeanor and felony penalties, it is particularly important that the statute be clear."

"And we all thought that included texting," says Rep. Les Gara, D-Anchorage. "We intended for that to include texting."

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If a state appeal of Wells ruling fails, Gara plans on making a proposal.

"Probably the smartest thing to do is, and the quickest way to fix this for the legislature, is find a criminal bill that's about to pass. Add an amendment to it that clarifies that we meant for texting to be illegal while you're driving."

The amendment, Gara says, would have language specifying all typing while driving is illegal.

For Rep. Mike Doogan, D-Anchorage, that is not good enough.

"All of the evidence we have is letting people talk on the cell phone while driving is a bad idea, Doogan says.

Like the National Transportation Safety Board, Doogan wants an all out ban on drivers using cell phones. His bill, and others like it, have stalled in Juneau.

"The first time there is a four car pileup that kills a bunch of people, that bill's going to pass," Doogan says. "But do I think it's going to pass before that, not really."

Gara says he is just trying to remove politics from the process by focusing on what lawmakers intended to originally accomplish.

"We should not allow people to text while they're driving," Gara says. "That leads to death. That leads to serious injury."

Anchorage Police Spokesperson Marleen Lammers says the department has only issued 10 screen violation tickets for this year.

Department of Law lawyers disagree with the Kenai judge. According to Gara their lawyers say they still intend to continue prosecuting cases, and most state courts will continue to hear them.

House Finance Co-Chair Bill Stolze, R-Chugiak, was one of the few lawmakers who voted against this law back in 2008.

"I voted that way because the law failed to keep up with changing technology," Stolze says. "I don't know if his (Gara) proposal is well thought out because we haven't been effective at trying to define technology."

House Speaker Mike Chenault, R-Nikiski, agrees with Gara, saying the law was intended to stop texting-while-driving and should be revised if there is any lingering confusion.

"I can see that happening, if there's a question in the law," Chenault says. "Rep. Gara's solution would work."

However, when it comes to other cell phone bills stalling in the legislature, Chenault says there are already existing laws protecting drivers.

Juneau Empire Mobile

Skip to navigation

Wed. Jan. 11 2:37 pm | 36° Overcast, light rain

Opinion

Tuesday, Jan. 10, 2012

It's time to explicitly ban texting while driving in Alaska

By **Charles Ward**

6 comments »

Latest by LM 22 hours 16 min ago

A rather quirky decision by a Kenai judge last month created some wiggle room for those of us (yes, us, because I've done it too) who stupidly choose to text, email or Facebook while behind the wheel.

Fortunately, one of the first bills prefiled for consideration in the 2012 legislative session aims to tighten up any ambiguity in a law that certainly seemed on the surface to bar all kinds of silly behind-the-wheel activities, including texting.

Currently, Alaska state law prohibits driving if "the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of a driver in a normal driving position while the vehicle is in motion; and ... the monitor or visual display is operating while the person is driving." While the law does have exemptions — 11 in fact — for screens that provide information like the car's status, GPS information and people making voice calls, texting is not given an express exemption. For most folks, texting without looking at a screen is all but impossible. Siri and other voice recognition software might change that, and perhaps there are some touch typists for tiny keyboards, but those special cases are 1) unusual and 2) don't violate the intent of the law, which is to keep drivers' eyes on the road, not on an electronic device.

Nevertheless, Magistrate Jennifer Wells ruled the law as written wasn't enough to explicitly ban texting while driving, the Associated Press reported on Dec. 25, 2011. Usually, the terms "activist judge" and "legislating from the bench" are code for "the judge ruled against my side," but here, it seems Wells is reading vagueness into the law that just isn't there. The AP reported she believed the law was vague because California wrote two separate laws, one covering distracting screens and the other banning texting. Why Wells decided to be persuaded by California's solution to a

problem Alaska's legislators answered for their own state is for her to answer. But it strikes of reaching for a different solution to a problem the Alaska Legislature had already figured out. Simply put, anyone who looks at a screen to text should have run afoul of Alaska's statute, and been subject to a citation if caught.

Regardless of whether the ambiguity is real or imagined, hopefully it will no longer exist come the Legislature's adjournment in April (May? June?). Reps. Les Gara and Bill Thomas have introduced House Bill 255, which explicitly bans texting while driving. Hopefully, it winds its way through the Legislature this term and onto Gov. Sean Parnell's desk for his signature, because texting while driving is a practice I and every other driver needs to end. It creates a great danger — not only to ourselves, but others on the road.

Distracted driving is a contributing factor in half, or 3 million, of the traffic accidents in the U.S. in a given year, according to AAA. Car and Driver magazine conducted a June 2009 test that suggested texting while driving (even just reading the texts) can be more dangerous than drunken driving. There's simply no way to keep both eyes on the road when typing on a tiny keyboard or reading a screen, and the practice needs to not just stop, but be stopped by law enforcement because of the danger created to everyone on the road, not just the texter/driver.

Many driving laws are tradeoffs between safety and convenience, otherwise we'd be required to drive 10-ton roll cages at 5 mph down Egan Drive after a daily inspection by a state trooper. At one extreme, the National Transportation Safety Board recently called for the outright ban of all cell phone usage while driving — talking, texting, hands-free, the works. A complete ban would be overkill and would face incredibly tough sledding in state legislatures. But a ban on texting while driving would get rid of one of the worst road distractions out there, while still leaving the convenience of mobile communication as an option. Texting while driving has been banned once in Alaska, but if it takes different wording in a new law to make the prohibition stick, it's worth the Legislature's time. Let's hope we see quick action on the Gara/Thompson bill this term.

• Charles Ward is Deputy Managing Editor of the Juneau Empire. His views do not necessarily reflect the views of its editorial board.

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6 comments »

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KTVA CBS 11 News Anchorage, AK

Print this article

Fairbanks Head-on Crash is Attributed to Drunken Texting

Originally printed at http://www.ktva.com/news/local/Fairbanks-Head-on-Crash-is-Attributed-to-Drunken-Texting--114660904.html

By Fairbanks Daily News-Miner
January 26, 2011

FAIRBANKS - An early morning head-on collision on Phillips Field Road is being blamed on an untimely text message by a suspected drunken driver.

Roger Dean Ostbloom, 40, was reportedly sending a text message from his phone on Sunday while driving his Ford F-150 pickup westbound and drifted into the oncoming lane of traffic. Ostbloom looked up and realized he was about to collide with a Chevy Avalanche.

Fairbanks Police arrived at 12:29 a.m. to find both vehicles with severe front-end damage.

Adam Strom, the driver of the Avalanche, suffered a broken femur in the accident and was taken to Fairbanks Memorial Hospital for surgery.

Ostbloom told police he was texting and saw the oncoming vehicle immediately before impact. Strom said he slowed in an attempt to avoid a collision.

Ostbloom, who was not hospitalized, also smelled of alcohol and had watery eyes and slurred speech, according to charging documents. A chemical test showed he had a breath-alcohol content of 0.097, slightly more than the legal limit of 0.08.

He was charged with driving a motor vehicle with a screen device operating, a law that makes texting while driving illegal. He was also charged with felony second-degree assault and driving under the influence of alcohol.

It's been illegal to text while driving in Alaska since 2008, but texting arrests remain uncommon in Alaska. Two local people were arrested for the offense last year, but neither was involved in an accident.

Cindy Cashen, administrator for the Alaska Highway Safety Office, said studies show texting while driving is a particularly risky form of "distracted driving." Authorities, however, are rarely in a position to blame texting as the primary cause of an accident.

"Unfortunately, the data doesn't show it's a very serious problem, but that's because it's very difficult to enforce," Cashen said.

Contact staff writer Jeff Richardson at 459-7518.

adn.com
Anchorage Daily News

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Police say driver in fatal accident was texting

By KYLE HOPKINS
(12/09/11 19:37:30)

The 19-year-old charged in a fatal Anchorage hit-and-run had been texting on her iPhone when her car struck and killed a village man on Easter Sunday, police say.

"OMG OMG OMG," Ashley Nichole Bashore texted to a friend shortly after the crash that knocked pedestrian Hubert Tunuchuk, 28, out of his shoes and into the intersection, according to paperwork filed Thursday by state prosecutors.

Instead of stopping or calling 911, prosecutors say, Bashore drove to a friend's house where she said her SUV had "hit a mangy Rottweiler without a collar."

Arrested Wednesday night following a months-long investigation, Bashore pleaded not guilty Thursday to three felonies: Criminally negligent homicide, leaving the scene of an accident and tampering with evidence.

The tampering charge stems from Bashore's attempt to delete text messages sent in the days after the April 24 collision, prosecutors say.

Bashore entered the courtroom in tears, attempting to hide her face with shackled hands. A bailiff warned a distraught woman in the gallery to stop trying to communicate with Bashore, who sat sobbing at the end of a line of prisoners. She pulled her prison shirt to her face, her fingernails painted a soft green.

Several of Tunuchuk's family members watched from the back of the room.

"Everybody's affected by what happened. Her family. My family. Everyone involved," said his aunt, Esther Stauffer. "I just feel so sorry for her. She's so young. If she had made the right choice when that happened, then perhaps we wouldn't be here today."

Esther's husband, Geoffrey, said he feels sorry for the 19-year-old too. But he's also angry.

"I feel like maybe she's just scared for herself. She tried to hide this and we lived the last six months not knowing if they were ever going to be able to charge the person," Geoffrey Stauffer said.

The village of Chefornak, a Yup'ik community of about 400 people in Western Alaska, sent Tunuchuk to the state vocational-technical school in Seward to study power plant operations. He was in Anchorage on April 24 with friends to celebrate Easter and planned to stay at the Stauffers' house, the couple said.

Early Sunday morning, Tunuchuk was intoxicated and walking behind two friends westbound on the Tudor Road overpass above the Seward Highway, according to a document filed by prosecutors. Had he been driving, his blood-alcohol level would have been above the legal limit, said traffic

investigator Michael Busey.

Tunuchuk was in the roadway, near the narrow sidewalk curb of the overpass, according to prosecutors. A Hyundai Sante Fe driven by Bashore approached heading eastbound, prosecutors say.

As Bashore came across the overpass, the front of the SUV struck Tunuchuk on the passenger side, prosecutors say. Tunuchuk was thrown into the intersection where the Seward Highway off-ramp meets Tudor. Busey could not say how far he traveled. At some point before or after the collision, the Sante Fe drove up onto the curb, the investigator said.

Someone called 911 at about 3:15 a.m. to report the incident, police said at the time.

Tunuchuk survived for about three hours, according to police.

"We thought at first he was going to make it. ... Unfortunately he just lost too much blood," said Geoffrey Stauffer, who along with his wife placed a cross at the scene of the crash. It's still there.

Police say Bashore fled the scene, driving to a friend's house and telling the story of hitting a dog. She smelled of marijuana following the accident, according to the police investigation. But Busey said there's no way to determine whether she was high the night of the collision.

Police had few leads at first, prosecutors said, but a piece of trim from the Sante Fe and a Crimestoppers tip soon led police to the vehicle. While Bashore is not the registered owner of the SUV, she drove it on a regular basis, Busey said.

Police seized Bashore's iPhone, finding that all texts sent before April 26, two days after the collision, had been deleted, according to prosecutors and police. A review of her phone records revealed Bashore was "likely texting immediately before or at the time of the collision," according to paperwork filed by prosecutors.

Bashore eventually told a friend that she had hit a person and did so because she was texting, according to the prosecutor's memo.

A profile for Bashore appears on exploretalent.com, a website where hopeful performers post resumes and photos. She wants to be a model and once appeared in a horror movie filmed in the Butte, the profile says. "I enjoy swimming, biking, instant messaging and texting with friends," the profile says.

An Anchorage grand jury handed up the three-count indictment of Bashore on Wednesday -- more than seven months after the hit-and-run. Busey and another traffic investigator arrested Bashore on Wednesday night at her home in West Anchorage, a police spokesman said.

Efforts to establish details of the crash, along with DNA testing, the phone seizure and review by prosecutors all contributed to the length of the investigation, Busey said.

"Putting it all together just takes time, unfortunately," he said.

Before her arrest in the hit-and-run, Bashore had no criminal record as an adult. Three months after the collision that killed Tunuchuk, she was ticketed for speeding more than 20 mph over the speed limit, court records show.

Tunuchuk was about two weeks from graduating from the power plant operations training, his aunt said. He had planned to spend a couple of months fishing in Bristol Bay before returning to the

village, she said.

Bashore's bail was set at $2,500 cash with a court-ordered third-party custodian required for release, a police spokesman said. Bashore is also forbidden from driving while on bail, he said.

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print

Texting while driving: Legislature should clear up ambiguous law

12.27.11 - 11:50 pm
Editorial

Texting while driving is foolish.

It's dangerous.

It shows willful disregard for the safety of others.

Alaska's legislators and Gov. Sean Parnell apparently agreed on all of that when they approved a bill in 2008 outlawing texting while driving. At least, that's what they thought they were doing.

It turns out the law, according to a couple of judges, doesn't actually use the words "texting while driving." That led a Kenai judge to dismiss a case brought against a 21-year-old driver who had been charged under the law. And a judge in Fairbanks has advised magistrates to not accept cases brought under the law because of some ambiguity.

No one can possibly argue that texting while driving should be a permissible practice.

The fastest way to clear this up is for the Legislature to quickly approve clear language during its next session, which opens in January. The state is appealing the decision of the Kenai judge, but the judicial process can consume quite a bit of time before an issue is resolved. The Legislature can act quicker.

And it should.

The U.S. Centers for Disease Control and Prevention found in a 2010 study that 9 percent of U.S. drivers reported they "regularly" or "fairly often" text or email while driving. The agency also noted "Texting while driving is especially dangerous because it combines visual, manual and cognitive distractions."

The Legislature has already had the debate on this topic. There's no need to rehash the issue.

What is needed is a quick fix and some clear language so we can reduce the prevalence of texting while driving.

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Many drivers admit to behavior they say is dangerous

By Ashley Halsey III
The Washington Post

Posted: 01/06/2012 12:00:00 AM PST

WASHINGTON — American drivers once again have identified their enemy as themselves.

When quizzed in an annual survey, they have admitted they often are guilty of the very behaviors they view as a menace on the road.

Almost everyone said that drunken driving was unacceptable, and three-quarters described drunken drivers as a serious threat. Yet 14 percent of them said that within the year, they had driven with an alcohol level probably near or above the legal limit, AAA's Foundation for Traffic Safety reported.

The June survey of 3,147 people used online technology said to create a representative cross-section of the U.S. population. People were asked about their driving habits in the month, or year, preceding that.

Cellphone use and sending text messages were dangerous, 94 percent said, but more than a third said they had read texts or e-mails while driving. A quarter of them also said they had sent messages. Two-thirds said they had talked on their cellphones, and a third said they do so regularly.

"This 'Do as I say, not as I do' attitude that persists among drivers needs to change before we can experience a traffic-safety culture where safe driving is the norm," Peter Kissinger, head of the foundation, said in a statement.

The foundation said that 74 percent of drivers felt it was unacceptable to go more than 15 mph above the speed limit on a freeway, but more than half admitted they had done that.

Although

94 percent said the same excessive speeding was unacceptable on a residential street, a quarter of them admitted they had gone more than 15 mph above the limit.

Nearly all drivers said that when a traffic light turns red, people should stop if they can do so safely, but 37 percent said they had run a red light.

Falling asleep behind the wheel was identified as a serious problem by 96 percent of drivers, but a third of drivers said they had nodded off at least once.

The safety value of a seat belt has been long established, and 86 percent of drivers agreed they should be used, but almost a quarter of drivers said they had not used one at least once in the month before they were surveyed. Nineteen percent said they had failed to do so more than once.

Recent federal data showed that 32,885 people

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were killed in vehicle crashes in 2010, the lowest number in 60 years. The drop has been attributed to better safety features in vehicles: seat-belt improvements, safer air bags, better vehicle stabilization, advancements in highway design, and high-profile campaigns against drunken and distracted driving.

"We are moving in the right direction when it comes to safety on our roads, but we need to do much more," Kissinger said. "Changing driver behaviors is not rocket science. It's harder."

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Texting And Driving Worse Than Drinking and Driving

Published: Thursday, 25 Jun 2009 | 11:54 AM ET
By: Phil LeBeau
CNBC Reporter

Admit it.

You've done it.

You've been driving down the side street (and yes, the highway as well) when your phone, blackberry, or whatever you use to call and text with goes off.

You immediately grab it, even though you are driving in traffic and really shouldn't.

It's a dangerous and terrible habit American drivers have developed.

The folks at **Car and Driver Magazine have now documented** just dangerous it can be.

Rigging a car with a red light to alert drivers when to brake, the magazine tested how long it takes to hit the brake when sober, when legally drunk at .08, when reading and e-mail, and when sending a text. The results are scary. Driving 70 miles per hour on a deserted air strip Car and Driver editor Eddie Alterman was slower and slower reacting and braking when e-mailing and texting.

The results:

- Unimpaired: .54 seconds to brake
- Legally drunk: add 4 feet
- Reading e-mail: add 36 feet
- Sending a text: add 70 feet

When I took the test for reading e-mail or texting, I was just as slow to react. On average, it took me four times longer to hit the brake. Mike Austin at Car and Driver told me in blunt terms that I was "way worse" than the average driver.

None of this should surprise you.

Sure, the headline about texting and driving being more dangerous than drinking and driving got your attention.

Maybe that's because the American public correctly views drinking and driving as wrong. But when it comes to texting and driving, we are not as outraged.

Probably because many of us have done it and still do it (even though it's banned in 14 states).

Sadly, it will likely take more accidents and more deaths to change that attitude. There are countless stories of teens dying in accidents because the driver was texting while driving.

Unfortunately, I fear there will be more. Too many people have become too accustomed to checking e-mail or sending a text while behind the wheel, even though it's as dangerous as drinking and driving.

AUTOS & CELL PHONES on CNBC.com

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB255**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB255-DOA-OPA-1-20-2012
Title: Prohibit Dialing or Texting While Driving
Sponsor: entatives Gara, Thomas, Gatto, P.Wilson, Gruenberg, Tuck (
Requester: House Transportation

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Richard Allen, Director — Phone 907-269-3504
Division: Office of Public Advocacy — Date/Time 01/20/2012 11:45 a.m.
Approved by: John Cramer, Deputy Commissioner — Date 1/20/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB255

Analysis

This bill prohibits the driver of a motor vehicle from reading or typing a text message or other nonvoice message or communication on a cellular telephone, computer, or personal data assistant while driving a motor vehicle.

The agency is not anticipating a significant impact to the current case load or fiscal cost increase with the passage of the legislation. However, the Office of Public Advocacy will monitor for a future potential fiscal impact. Therefore, at this time, the Agency submits a zero impact fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 255**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB255-DOC-OC-01-20-12
Title: "An Act prohibiting the driver of a motor vehicle from
Sponsor: Gara, Thomas, Gatto, P.Wilson, Gruenberg, Tuck
Requester: House Transportation Committee

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by: Leslie Houston, Director — Phone: 907-465-3339
Division: Dept of Corrections - Administrative Services — Date/Time: 01/20/12 2:45pm
Approved by: Joseph D. Schmidt, Commissioner — Date: 1/20/2012
Dept of Corrections

(Revised 11/18/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 255

Analysis

This legislation has little to no fiscal impact on the Department of Corrections.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 255**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB255-ACS-TRC-01-20-12
Title: Prohibit Dialing or Texting While Driving
Sponsor: Representative Gara
Requester:

Dept. Affected: Alaska Court System
Appropriation: Trial Courts
Allocation:
OMB Component Number: 768

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version of fiscal note

Prepared by: Doug Wooliver, Deputy Administrative Director — Phone: 907-463-4750
Division: Alaska Court System — Date/Time: 1-20-12 @ 11:30 am
Approved by: Doug Wooliver for Christine Johnson, Administrative Director — Date: 1/20/2012
Alaska Court System

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 255
2012 LEGISLATIVE SESSION

Analysis

House Bill 255 amends AS 28.35.161(a) and other statutes to specifically ban texting while driving and communicating on a computer while driving. Because the current law banning driving with a screen device operating has generally be interpreted to include by inference a ban on the behaviors specifically banned in HB 255, the court system does not anticipate any fiscal impact from the passage of this bill.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 255(JUD)**
Fiscal Note Number: **6**
(H) Publish Date: **4/5/12**

Identifier (file name): HB255-DOA-PDA-1-23-12
Title: Prohibit Dialing or Texting While Driving
Sponsor: Representatives Gara, Thomas, Gatto, P. Wilson
Requester: House Finance Committee

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

The House Finance Committee zeroed the fiscal note.

Prepared by: Joe Michel — Phone: 465-4958
Division: House Finance Committee Aide — Date/Time: 4/4/12 5:00 PM
Approved by: Co-Chair Stoltze — Date: 4/4/2012
House Finance Committee

(Revised 1/17/2012 OMB)

FISCAL NOTE #6

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 255(JUD)

Analysis

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 255(JUD)**
Fiscal Note Number: **7**
(H) Publish Date: **4/5/12**

Identifier (file name): HB255CSHB(JUD)-LAW-CRIM-04-03-12
Dept. Affected: Law
Title: An Act prohibiting dialing or texting while driving.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Representatives Gara, Thomas, Gatto, P. Wilson, Gruenberg, and Tuck
Requester: (H) Finance
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Update for new Attorney General and requester.

Prepared by: Sheila Bugbee, Administrative Officer — Phone: 465-3675
Division: Administrative Services — Date/Time: 04/03/12 4:00PM
Approved by: Michael Geraghty, Attorney General — Date: 4/3/2012
Department of Law

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 255(JUD)

Analysis

Police are currently charging the conduct of texting while driving under AS 28.35.161, and the Department of Law has taken the position that the statute currently prohibits this conduct on appeal from a decision from a magistrate that current law does not prohibit this conduct. Clarifying the law would be helpful.

There should be no fiscal impact to the Department from this bill.

ALASKA STATE LEGISLATURE

REPRESENTATIVE BILL THOMAS
REPRESENTATIVE LES GARA

To: Senator French
From: Representative Bill Thomas
Representative Les Gara
Re: HB 255 Hearing Request
Date: April 11, 2012

Dear Senator French:

We respectfully request a hearing on HB 255 in the Senate Judiciary Committee. Accompanying this request are the required materials for the bill hearing.

Rose Foley, aide to Rep. Gara, is the contact person for this legislation. She can be reached at 465-2647.

Please contact either office if you need any additional information or have any questions.

Sincerely,

Representative Bill Thomas

Representative Les Gara

January-May: State Capitol • Juneau, AK 99801-1182 • (907) 465-2647 • Fax (907) 465-3518
June-December: 716 W. 4th Avenue • Anchorage, AK 99501• (907) 269-0106• Fax (907) 269-0109
Representative_Les_Gara@legis.state.ak.us

HB 274

<TARGET><BILL>HB 274</BILL><SUBJECT>HB 274</SUBJECT><COMM>SJUD27</COMM></TARGET>

Representatives
Lindsey Holmes
Kurt Olson

Capitol Room 405
465-4919
465-2137 fax

MEMORANDUM

Date: 21 February 2012

To: Sen. Hollis French,
Chair (S) JUD

From: Rep. Lindsey Holmes & Rep. Kurt Olson

RE: (S) JUD Scheduling Request for HB 274

We respectfully request that the Senate Judiciary committee schedule our bill, HB 274: "An Act relating to the exemption of certain acts and transactions from the provisions dealing with unfair methods of competition and unfair or deceptive acts or practices," for a hearing.

I have attached the only version of the bill, the sponsor statement, a copy of a relevant judicial order, and the fiscal note.

Please contact Rep. Holmes' aide James R. Waldo at james.waldo@legis.state.ak.us or 465.6597 if you have any questions.

Representative Lindsey Holmes

House Bill 274 Sponsor Statement

An Act relating to the exemption of certain acts and transactions from the provisions dealing with unfair methods of competition and unfair or deceptive acts or practices.

In 2010, the Department of Law filed suit against two pharmaceutical companies for committing violations of Alaska's Consumer Protection Act ("CPA") for engaging in misleading and deceptive marketing practices. The complaint alleges that Janssen Pharmaceutical Company and Astra Zenica Pharmaceuticals mislead and deceived doctors and others by promoting the antipsychotic drugs Risperdal and Seroques for uses not approved by the federal Food and Drug Administration ("FDA"). In many cases Alaska's Medicaid program paid for these off-label prescriptions.

In October of 2012, the federal court ruled that Alaska's Consumer Protection Act may not apply to the state's claims because the FDA regulates drug labeling. The court relied on AS 45.50.481 which exempts any act or transaction regulated by state or federal law from the CPA. Thus, even though the Food, Drug, and Cosmetic Act does not preempt state law, the court is concerned that AS 45.50.481 may prevent the state from pursuing these claims under the CPA. Although the state strongly disagrees with the court, and has argued against the court's reasoning, the court has suggested very strongly that the state's claims are exempt from the CPA. This creates a potential inadvertent loophole when federal laws may regulate conduct, but do not explicitly preempt state law.

Such a loophole could lead to situations, like the case of off-label prescriptions, where the federal government has a law regulating conduct but does not actually enforce the law to protect consumers. The state takes the position that when no effective enforcement by the federal agencies is taken, then these laws do not effectively "prohibit" the bad conduct, and the state should be allowed to bring CPA claims, even under the existing statute. However, to make the state's intention in AS 45.50.481 crystal clear, the legislature should take action.

House Bill 274 closes this potential loophole by removing the reference to federal law in AS 45.50.481. In cases where federal law preempts state law, the State will still be prevented from pursuing claims. This will, however, ensure the State's ability to defend Alaskan consumers where the federal government is not doing so.

Please join me in supporting HB 274 so that the State of Alaska can more effectively protect Alaskan consumers.

State Capitol, Juneau, Alaska 99801 · (907) 465-4919 · Fax: (907) 465-2137
Rep.Lindsey.Holmes@legis.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 274**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB274-LAW-CIV-02-10-12
Title: An Act relating to unfair trade practices.
Sponsor: Representative(s) HOLMES, OLSON
Requester: (H) Labor & Commerce

Dept. Affected: Law
Appropriation: Civil
Allocation: Commercial and Fair Business
OMB Component Number: 2717

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager
Phone: 465-5427
Division: Administrative Services
Date/Time: 2/10/12 10:00 AM
Approved by: Michael C. Geraghty, Attorney General
Department of Law
Date: 2/10/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 274

Analysis

HB 274 amends Alaska's Consumer Protection Act ("CPA") by removing the exemption for conduct regulated and prohibited by federal law. Currently, the CPA does not apply to any conduct that is regulated and prohibited by state or federal law. The State of Alaska can control enforcement of state law, but is powerless to control the enforcement by federal regulators. Thus, the state cannot take enforcement action against a CPA violator if the conduct is "regulated" and "prohibited" under any federal statute or regulation, even if that conduct is not preempted by federal law. This bill would remove the exemption for conduct regulated by federal law, and would allow the state to pursue CPA violations as long as the conduct is not (1) regulated and prohibited by state law, or (2) preempted by federal law.

We anticipate no fiscal impact to the Department of Law from this bill.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

STATE OF ALASKA, Plaintiff, vs. JANSSEN ORTHO LLC; ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS INC.; and ASTRAZENECA PHARMACEUTICALS LP, Defendant.	Case No. 3:11-cv-0002-RRB **ORDER REGARDING DEFENDANTS' MOTION TO DISMISS, DISMISSING PLAINTIFF'S STRICT LIABILITY CLAIM, and REQUESTING FURTHER BRIEFING REGARDING THE SAFE HARBOR PROVISION**

I. INTRODUCTION

Defendants jointly move to dismiss both counts in the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and the U.S. Supreme Court decisions in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937 (2009), arguing that Plaintiff has not alleged, and cannot allege, facts necessary to establish the claims against either Defendant. Moreover, they argue that Plaintiff's fraud-based claims fail because they are not alleged with the particularity required by Federal Rule of Civil Procedure 9(b).

Plaintiff has opposed the Motion to Dismiss, and Defendant has replied. This matter having been fully and adequately briefed, the

Court does not find that oral argument would be helpful at this time.

II. STANDARD OF REVIEW

A motion under Rule 12(b)(6) may be granted "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." In deciding this motion, not only must the Court accept all material allegations in the Complaint as true, but the Complaint must be construed, and all doubts resolved, in the light most favorable to the Plaintiff.

The United States Supreme court has recently and specifically addressed the pleading requirements in a civil action:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in Twombly, . . . the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. . . . . A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." . . . .
>
> To survive a motion to dismiss, a complaint must contain sufficient **factual matter**, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . .
>
> Two working principles underlie our decision in Twombly. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. **Threadbare recitals of**

> **the elements of a cause of action, supported by mere conclusory statements, do not suffice**. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . .[1]

Under Federal Rule of Civil Procedure 9(b), a claim for fraud must be pled with particularity, specifying "the who, what, when, where, and how" of the fraud.[2] Where a complaint asserts claims that are "grounded in fraud" or which "sound in fraud . . . the pleading as a whole must satisfy the particularity requirement of Rule 9(b)."[3] The parties disagree as to whether the Alaska UTPA claims alleging intentional misconduct must satisfy Rule 9(b).

III. FACTS

This lawsuit involves two prescription medicines approved by the U.S. Food and Drug Administration ("FDA"): Seroquel®, marketed and sold by AstraZeneca, and Risperdal®, marketed and sold by Janssen. Both medications are approved by the FDA for the treatment

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[1] Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50(2009) (emphasis added) (internal citations omitted); See also Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

[2] See Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009).

[3] Id.

of certain mental health conditions.[4] Plaintiff, the State of Alaska, has filed a two-count Amended Complaint against the Defendants - one count alleging violations of the Alaska Unfair Trade Practices and Consumer Protection Act ("UTPA"), AS 45.50.471, and the other captioned "Strict Liability - Failure To Warn." Plaintiff seeks: (1) damages for the value of all payments that Alaska allegedly expended through its Medicaid program for purchasing defendants' medicines for indications that were not "medically accepted" ("reimbursement costs"); (2) injunctive relief; (3) penalties of $25,000 for each separate violation of the Alaska UTPA; and (4) treble damages, punitive damages, interest, and costs and attorneys' fees.

The Complaint describes methods by which Defendants wrongfully marketed their drugs. These include allegedly deceiving physicians and consumers "regarding the comparative safety, efficacy, and superiority of Risperdal and Seroquel over traditional or other atypical antipsychotics . . . aggressive market[ing] and promot[ing] Risperdal and Seroquel for indications that are not approved by the FDA and for which the efficacy and safety of the drugs have never been established."[5]

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[4] See Docket 49 at ¶ 13.

[5] See Docket 49, ¶¶ 14- 23.

IV. DISCUSSION

A. The Requirements Of Iqbal/Twombly and Rule 9(b)

Defendants argue that the Amended Complaint contains only conclusory allegations that Defendants have "engaged in false and misleading marketing, advertising and sales campaigns," and is otherwise entirely devoid of facts amounting to fraud or deception, and therefore has failed to allege necessary facts under Twombly/Iqbal, and falls short of the specificity required by Rule 9(b).

1. Twombly/Iqbal

Plaintiff argues it is only required to provide "a short and plain statement of the claim" for relief under Fed. R. Civ. P. 8(a)(2), noting that in 2002, the Supreme Court reaffirmed the principle that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions."[6] Plaintiff argues that Twombly and Iqbal do not require a departure from Rule 8(a)'s established requirements. Rather, the Supreme Court clarified the Rule 8(a) standard, stating that a complaint must contain "only enough facts to state a claim to relief that is plausible on its face."[7]

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[6] Swierkiewicz v. Sorema NA., 534 U.S. 506, 513 (2002).

[7] Twombly, 550 U.S. at 570; see also Iqbal, 129 S. Ct. 1937 (continued...)

The Ninth Circuit recently juxtaposed Swierkiewicz, Twombly, Iqbal, and two other Supreme Court cases that addressed Rule 8(a), and concluded that although the cases are "perplexing" when considered together, there are two common principles shared by all of them:

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim **may not simply recite the elements of a cause of action**, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.[8]

Here, the Court agrees with Defendants that the Complaint lacks facts adequate to meet this standard. Generalized statements such as "the companies have engaged in false and misleading marketing, advertising and sales campaigns" and have "successfully deceived Alaskan physicians and Alaskan consumers," are inadequate. Use of the words "representing," "advertising," "engaging," "concealing," "suppressing," and "omitting" - without allegations of underlying facts which the Court can presume are true for

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[7](...continued)
(extending the standard articulated in Twombly to "all civil actions and proceedings in the United States district courts.")

[8] Star v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) (emphasis added).

purposes of considering a motion to dismiss - are inadequate under Iqbal/Twombly.

2. Rule 9(b)

While Fed. R. Civ. P. 8(a)(2) requires a party's pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 9(b) requires that, when fraud is alleged, "a party must state with particularity the circumstances constituting fraud...." A plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of that claim. In that event, the claim is said to be "grounded in fraud" or to "sound in fraud," and the pleading, as a whole, must satisfy the particularity requirement of Rule 9(b).[9] "Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)."[10] "Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged."[11]

Where fraud is not an essential element of a claim, only those allegations of a complaint which aver fraud are subject to Rule

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[9] Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003).

[10] Id. at 1105.

[11] Id. at 1106.

9(b)'s heightened pleading standard.[12] Any averments which do not meet that standard should be "disregarded," or "stripped" from the claim for failure to satisfy Rule 9(b).[13] To the extent a party does not aver fraud, the party's allegations need only satisfy the requirements of Rule 8(a)(2).[14]

Rule 9(b)'s particularity requirement also applies to state law causes of action.[15] A state law statutory cause of action pled in federal court must satisfy Rule 9(b) when fraud is a "necessary element" of the claim under that statute or when the claim is "grounded in fraud" because it relies exclusively on a "unified course of fraudulent conduct."[16] Defendants assert that the Complaint must meet Rule 9(b)'s heightened pleading requirements because Plaintiff's claims are grounded in fraud. Plaintiff disagrees.

In order to determine whether a particular claim or allegation is tantamount to fraud, the Ninth Circuit refers to the elements of

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[12] Id. at 1105.

[13] Id.

[14] Id. For example, the heightened fraud pleading standards of Rule 9(b) apply only to "allegations of fraudulent conduct," not to "innocent or negligent misrepresentation." Id.

[15] Id. at 1103.

[16] Id. at 1103.

a state common law fraud claim.[17] In Alaska, common law fraud claims require a showing of (1) a false representation of fact; (2) knowledge of the falsity of the representation; (3) intention to induce reliance; (4) justifiable reliance; and (5) damages.[18] A review of the Alaska UTPA reveals that fraud is addressed specifically in AS 45.50.471(b)(1) and (12). The State makes claims under sections (b)(4), (6), (8), (11) and (12). Section (8) refers to intentional conduct, while sections (4), (6) and (11) could conceivably apply to both intentional and negligent conduct. The Amended Complaint suggests that Defendants routinely violated the UTPA by engaging in deceptive trade practices that involved "knowing and intentionally" engaging in certain activities.[19] While the Complaint may not be grounded in fraud, it bears a strong suggestion of averring fraud.

The Court finds that Plaintiff has failed to meet the requisite pleading standard under Twombly and Iqbal. Plaintiff requests leave to amend its Complaint. Courts are free to grant a party leave to amend whenever "justice so requires," Fed. R. Civ.

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[17] See Kearns v. Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009).

[18] Shehata v. Salvation Army, 225 P.3d 1106, 1114 (Alaska 2010).

[19] Docket 49 at 10-11.

P. 15(a)(2), and requests for leave should be granted with "extreme liberality."[20]

Accordingly, Plaintiff shall be given leave to amend its Complaint to comply with the standard set by Twombly and Iqbal. In so doing, Plaintiff is cautioned to consider the requirements of Fed. R. Civ. P. 9(b) with regard to fraud. Any fraud claims which do not meet the requirements of Rule 9(b) will be subject to dismissal.

B. Motion to Dismiss under Rule 12(b)(6) for Failure Establish Causation

Under Federal Medicaid law, states may implement a Medicaid program, and Alaska has chosen to do so.[21] Alaska's Medicaid program provides medical assistance, including a prescription drug program, to low-income state residents. Alaska's Department of Health and Human Services has created a Preferred Drug List ("PDL"), which informs consumers and providers about those medicines - the "Preferred Drugs" - for which Alaska Medicaid will provide reimbursement without restriction.[22] Seroquel and risperidone are listed as Preferred Drugs.

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[20] Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001).

[21] See 42 U.S.C. §§ 1396-1-1396w-5.

[22] See 7 AAC 120.140.

Defendants argue that because Risperdal and Seroquel are on Alaska's PDL, and because Alaska continues to reimburse for non-medically accepted indications of Risperdal and Seroquel, Alaska cannot establish causation. But Plaintiff argues that its allegations are focused on the fact that, as a direct result of Defendants' actions, Alaska Medicaid has paid for prescriptions issued for indications that were non-medically accepted, FDA-approved, or supported by the compendia. It argues that Alaska Medicaid has paid tens of millions of dollars for prescriptions of Risperdal and Seroquel because "Janssen and AstraZeneca aggressively marketed and promoted Risperdal and Seroquel for indications that are not approved by the FDA and for which the efficacy and safety of the drugs have never been established." Plaintiff argues that "but for" Defendants' unlawful conduct, Alaska would not have reimbursed for Defendants' defective drugs because the prescriptions would never have been issued.

Defendants also argue that Plaintiff cannot establish "but for" causation because Alaska continues to reimburse for non-medically accepted indications. The State argues that it simply does not have a system in place to effectively monitor each and every prescription that is reimbursed. Furthermore, Defendants' proximate causation argument is based on the theory that Alaska physicians' independent medical judgment regarding whether to

prescribe Risperdal or Seroquel to a particular patient is the intervening cause that relieves Defendants from liability. Alaska notes that this argument has been squarely rejected at the pleading stage in similar cases.[23]

The Court is not persuaded that Plaintiff cannot show causation. Although Defendants argue that the lack of restrictions on reimbursement for Seroquel and Risperdal under the Alaska Medicaid program eliminates a causal connection between Defendants' supposed actions and the State's alleged harm, the possibility remains that the State could prove that but for Defendants' actions, a number of prescriptions for Seroquel and Risperdal would never have been issued in Alaska.[24] The Court further notes that the rationale of the Eleventh Circuit in the Ironworkers case is inapplicable here. In Ironworkers, the 11th Circuit reasoned that:

> The insurers, under the terms of the insurance policies, consciously exposed themselves to pay for all prescriptions of Seroquel, including those that were medically unnecessary or inappropriate-even if such prescription were birthed by fraud. In light of such broad exposure, conventionally a rational insurer would have charged its enrollees higher premiums than it would have if its policies offered more limited prescription drug coverage. These higher premiums, in turn, would compensate the insurer for this increased number of prescription payments, including payments for

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[23] See Docket 69 at 16.

[24] Whether or not that number is ultimately quantifiable is another issue entirely.

> prescriptions that were medically unnecessary or inappropriate. . . . [C]onsequently, the district court had to dismiss their claims because they failed to allege plausibly that Astrazeneca's false representations caused them to suffer economic injury.[25]

But Alaska Medicaid does not collect premiums, and adults are responsible for a $2.00 co-payment for each new or refilled prescription.[26] Accordingly, the pass-on argument is inapplicable here. The Motion to Dismiss on these grounds is denied.

C. Plaintiff's UTPA Claim & The "Safe Harbor" Provision

Defendants argue that the claims under the UTPA are barred because they fall within the UTPA's "safe harbor" provision. Alaska Statute 45.50.481(a)(1) exempts unfair acts and practices from the purview of the UTPA "where the business is both regulated elsewhere and the unfair acts and practices are therein prohibited."[27] The State argues that because its UTPA claims satisfy neither of these two requirements, Defendants' argument necessarily fails. In contrast, Defendants argue that allegations of unlawful off-label marketing are addressed and remedied, if

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[25] Ironworkers Local Union 68 et al. v. AstraZeneca Pharmaceuticals, LP, 634 F.3d 1352, 1360 (11th Cir. 2011).

[26] Alaska Medicaid Recipient Services Handbook, (October 27, 2011), http://hss.state.ak.us/dhcs/PDF/MedicaidRecipientHandbook.pdf.

[27] State v. O'Neill Investigations, Inc., 609 P.2d 520, 528 (Alaska 1980).

necessary, by the FDA, acting within its comprehensive regulatory and enforcement scheme, and not by the states or private litigants. Defendants argue that the purported practices at issue here are expressly prohibited by the FDCA and FDA regulations, and note that other courts have found these types of claims are barred by the safe harbor provision.[28] This Court, however, notes that not all "safe harbor" provisions are created equally. Accordingly, decisions from other jurisdictions are not particularly helpful in this analysis.

1. Is the Conduct "Regulated Elsewhere"?

The State complains that Defendants carried out their misconduct by marketing Risperdal and Seroquel to Alaska physicians for the treatment of various conditions or symptoms which have not received FDA-approval. It is unlawful, under Alaska law, for Defendants to market their drugs for such indications. The State argues that Defendants have not shown, nor can they, that the FDA regulates the content of the communications from Defendants' sales representatives to Alaska physicians.

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[28] See, e.g., State of New Mexico v. AstraZeneca and State of New Mexico v. Janssen, LP, Nos. D-101-cv-2009-00652 and D-101-cv-2008-01144, Tr. at 73-76 (N.M. First Judicial Ct. July 22, 2011); McDaniel v. AstraZeneca, No. CV-2008-5448, Tr. at 28-29 (Ark. Cir. Ct. July 18, 2011); McDaniel v. AstraZeneca, No. CV-2008-544 (Ark. Cir. Ct. July 21, 2011). Defendant has provided the Court with copies of these opinions.

In response, Defendants allege that the Federal Food Drug and Cosmetic Act ("FDCA"),[29] and the FDA's regulations promulgated thereunder, expressly apply to such interactions, and heavily regulate this conduct.[30] FDA regulations provide that advertising of an FDA-approved prescription drug must be "consistent with and not contrary to" the drug's FDA approved labeling.[31] They further argue that any promotional material distributed by sales representatives constitutes "labeling" and its content is extensively regulated under the FDCA.[32]

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[29] 21 U.S.C. §§ 301-399(d).

[30] See 21 C.F.R. § 314.81(b)(3)(i) (requiring an applicant to "submit [to the FDA] specimens of mailing pieces and any other labeling or advertising devised for promotion of the drug product at the time of initial dissemination of the labeling and at the time of initial publication of the advertisement for a prescription drug product").

[31] See 21 C.F.R. § 201.100(d)(1) ("Any labeling . . . whether or not it is on or within a package from which the drug is to be dispensed, distributed by or on behalf of the manufacturer . . . [must be] consistent with and not contrary to such approved or permitted labeling."); Professional Product Labeling, Public Meeting, 60 Fed. Reg. 52,196-02 (Oct. 5, 1995) (a drug's approved labeling "serves as the basis for product promotion. FDA regulations specify that all advertising claims made about a product be consistent with its approved labeling (21 C.F.R. § 202.1(e)(4))").

[32] See 21 C.F.R. § 202.1(l)(2) (stating that labeling includes, inter alia, "[b]rochures, booklets, mailing pieces, detailing pieces, file cards, bulletins, calendars, price lists, catalogs . . . letters . . . film strips . . . sound recordings, exhibits, literature, and reprints and similar pieces of printed,

(continued...)

Assuming that Defendants' conduct is regulated by the FDA, the Court turns to the second prong.

2. Does the Regulation Prohibit the Unfair Acts and Practices Alleged?

The State alleges that Defendants have failed to identify a single statute—other than the UTPA—prohibiting Defendants, through their sales representatives or otherwise, from making false statements or misrepresentations to Alaska physicians. To the contrary, Defendants argue, the FDCA prohibits manufacturers from "misbranding" a drug by including a description in the labeling, promoting, or advertising of an intended use of that drug that has not been approved by the FDA.[33] The FDCA also prohibits manufacturers from advertising or promoting a drug in a manner that is inconsistent with the drug's approved labeling.[34] The FDCA prohibits a manufacturer from distributing any promotional labeling or advertising to healthcare professionals or to consumers that is false or misleading, or lacking in fair balance. Accordingly, the

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[32](...continued)
audio,or visual matter descriptive of a drug and references published . . . for use by medical practitioners, pharmacists, or nurses, containing drug information supplied by the manufacturer, packer, or distributor of the drug and which are disseminated by or on behalf of its manufacturer, packer, or distributor . . . .").

[33] See 21 U.S.C. § 331(a).

[34] See 21 C.F.R. § 201.100(d)(1).

FDCA and its regulations clearly prohibit any alleged promotion that is inconsistent with a drug's approved labeling or that is false or misleading, and Alaska may not use the UTPA to create a private right of action to enforce the FDCA.[35]

Certainly, Defendants have made a strong case that their actions fall under the safe harbor provision of the Alaska UTPA.

3. Certification to the Alaska Supreme Court

Plaintiff complains that a finding that Defendants' actions fall under the safe harbor provision would render the UTPA superfluous and leave the State without a remedy. This is so because the FDCA does not provide a private right of action under federal law for the claims asserted in Count I of the Complaint. Consequently, Plaintiff argues, if the Court were to find Alaska's UTPA claims exempted, the end result is a finding that the UTPA's safe harbor provision provides Defendants with complete preemption, and thus complete immunity – something that is neither required by federal law nor intended by the Alaska legislature. In that event, Plaintiff requests that this Court certify this issue to the Alaska Supreme Court for a final determination of whether Alaska's UTPA claims are exempted under section 45.50.481 – that is, whether

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[35] See 21 U.S.C. § 337(a) ("[A]ll such proceedings for enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the United States.")

Defendants' alleged unfair acts and practices are regulated elsewhere and therein prohibited.

However, regardless of the intent of the Alaska legislature, or the patent unfairness of leaving the State without a remedy, this Court concludes that the Alaska Supreme Court is in no better position than this Court to determine whether Defendants' "business is both regulated elsewhere and the unfair acts and practices are therein prohibited."[36] Indeed, the question appears to turn on the interpretation of Federal law as much, or more, than Alaska law.

Furthermore, this Court is troubled by the Alaska Supreme Court's holding that Alaska Statute 45.50.481(a)(1) "exempts only those acts or transactions **which are the subject of ongoing, careful regulation.**"[37] The Alaska Supreme Court found in Matanuska Maid that to define "regulate" as merely "subject to any prohibitory law" would severely limit the applicability of the UTPA.[38] In other words, a prohibition on certain conduct, without more, cannot satisfy the requirements of AS 45.50.481. The question remains, therefore, whether the existing regulatory scheme

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[36] O'Neill, 609 P.2d at 528.

[37] Matanuska Maid, Inc. v. Alaska, 620 P.2d 182, 186 (Alaska. 1980) (emphasis added).

[38] Id.

governing Defendants' actions actually has any teeth. Further briefing on this issue appears warranted.

D. Plaintiff's Strict Liability Failure To Warn Claim

Defendants also urge the Court to dismiss Alaska's strict liability claim. Defendants assert two grounds for dismissal: (1) Alaska lacks standing to assert the claim; and (2) Alaska's strict liability claim is barred by the economic loss rule.

Regarding the economic loss rule, Defendants argue that Plaintiff's strict liability claim fails because there is no plausible nexus between the alleged failure to warn and Plaintiff's alleged damages, as required under Alaska's intermediate approach to the economic loss rule. As noted by the Alaska Supreme Court, "if the dangerous defect did not cause the loss, the seller of a dangerously defective product can avoid a strict liability claim."[39] Defendants seem to argue, therefore, that Alaska's strict liability claim is barred by the economic loss rule because the State's alleged damages are not tied to any physical injury or harm.

Plaintiff argues that no such requirement exists. Instead, "[w]hen a defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger, strict liability is an appropriate theory of

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[39] N. Power & Eng'g v. Caterpillar Tractor Co., 623 P.2d 324, 330 n.10 (Alaska 1981).

recovery[.]"[40] Plaintiff argues that "[w]hen used off-label, Defendants' drugs can and do have serious side effects." Thus, when Alaska physicians prescribe Risperdal and Seroquel for indications not approved by the FDA, the products create a situation potentially dangerous to persons – here, Alaska Medicaid subscribers. The Complaint specifically pleads that Defendants' drugs have created a situation dangerous to Alaska consumers.[41] Accordingly, Plaintiff argues, the required loss occurred when Alaska Medicaid provided reimbursement for non-medically accepted indications of Risperdal and Seroquel—a loss Alaska would not have incurred absent Defendants' illegal off-label marketing of their drugs. Thus, the loss occurred as a result of the danger manufactured by Defendants.

In response, Defendants note that Plaintiff nowhere alleges that any individuals suffered the supposed side effects. Furthermore, the State consistently alleges that its damages claim derives from "Defendants illegal off label marketing of their

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[40] Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173, 1177 (Alaska 1993).

[41] See Docket 49 at ¶ 12 ("Janssen and AstraZeneca knew or should have known but failed to warn—and affirmatively misled—Alaska, Alaskan physicians, and Alaskan consumers regarding Risperdal's and Seroquel's association with the development of diabetes, diabetes-related conditions, including weight gain, and other serious, even life threatening medical conditions.").

drugs," not from a failure to disclose side effects. Because the State's alleged loss did not result from the alleged defective condition, Defendants argue, the failure to warn claim should be dismissed.

The Court agrees with Defendants on this issue, and finds support even in the Alaska Supreme Court case cited by the State. In Pratt & Whitney, The Alaska Supreme Court summarized the history of strict liability law in Alaska, and the evolution of the law as it applies to purely economic losses.[42] The application of strict liability originally applied only to those cases where injury to a human being resulted from a defective product.[43] Eventually, the law evolved to include recovery for injury solely to the product itself.[44] "When a defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger, strict liability in tort is an appropriate theory of recovery, even though the damage is confined to the product itself."[45] Furthermore, "the requirement that the loss occur under

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[42] Id. at 1176-78.

[43] Id. at 1176, citing Clary v. Fifth Avenue Chrysler Center, 454 P.2d 244 (Alaska 1969).

[44] Id. at 1177, citing Northern Power & Engineering Corp. v. Caterpillar Tractor, Co., 623 P.2d 324 (Alaska 1981).

[45] Id., citing Northern Power.

dangerous circumstances is necessary because . . . allowing recovery solely on proof that a defect *could* endanger persons or property is too speculative."[46]

Plaintiff asks this Court to take the Alaska Supreme Court's guidance regarding strict liability to an unprecedented level, and allow a claim for strict liability to lie where the losses are purely economic, and no physical harm has occurred. The "loss" contemplated by the Alaska Supreme Court simply did not include the type of economic losses Plaintiff claims here.[47] Having so concluded, the Court does not reach Defendants' standing argument.

Plaintiff's claim for strict liability is accordingly **DISMISSED.**

V. CONCLUSION

In light of the foregoing, the Court **DENIES** Defendants' Motion to Dismiss with respect to the arguments discussed in sections A and B of this Order. Plaintiff may be permitted to amend its

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[46] Id., citing Northern Power, 623 P.2d at 329 n. 11 (emphasis original).

[47] The Court is not persuaded by the State's argument that it should follow Judge Ridner's findings in the Zyprexa litigation in Alaska Superior Court. Judge Ridner found that the economic loss rule allowed a claim for strict liability in the Zyprexa litigation. However, Judge Ridner specifically relied on the fact that physical injuries to persons were alleged. No physical injuries have been alleged in this case.

Complaint pending resolution of the Safe Harbor argument (Section C).

The Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's claim regarding Strict Liability (Section D).

With respect to the Safe Harbor Provision argument (Section C), further briefing is required. Plaintiff shall file a Sur-Reply to Defendants' Reply regarding this issue on or before **November 21, 2011**. Defendants shall file additional responsive briefing on or before **December 5, 2011**. All parties should address what enforcement, if any, exists as to the applicable Federal regulations.

Upon receipt of the further briefing, this Court will issue a further order regarding the Motion to Dismiss. If the matter is not completely dismissed, the Court will at that time set a deadline for the filing of Plaintiff's Second Amended Complaint.

IT IS SO ORDERED.

ENTERED this 31st day of October, 2011.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

HB 291

<TARGET><BILL>HB 291</BILL><SUBJECT>HB 291</SUBJECT><COMM>SJUD27</COMM></TARGET>

LEGAL SERVICES

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

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

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

MEMORANDUM February 8, 2012

SUBJECT: HB 291, relating to the posting of notices at U.S. Post Offices (Work Order No. 27-LS1074\A)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee

FROM: Pamela Finley
Revisor of Statutes

HB 291 has been referred to the Senate Judiciary Committee. I would appreciate your scheduling the bill for a hearing at your earliest convenience.

The bill amends four statutes to delete a requirement that certain public notices be posted at a post office. The reason for this is that, since at least August 2007, the U.S. Postal Service has prohibited the posting of nongovernmental notices on postal service property. See enclosed postal service bulletin. The statutes amended are AS 03.35.030 (petitions concerning controlled livestock districts), AS 34.35.175(d) (personal property lien sales), AS 34.45.050(b) (consignee and bailee lien sales), and AS 43.20.270(d) (tax lien sales). It is offered as a special revisor's bill --- rather than part of the regular revisor's bill --- because there are different ways to fix the problem, which involve different policy choices. The bill as drafted simply deletes the requirement that a notice be posted at the post office. In this respect, it follows section 1, ch. 62, SLA 2010, which deleted the requirement from AS 09.35.140 (concerning sales on execution).

If you have any questions, please contact me (465-6656).

PF:plm
12-081.plm

Enclosure

Rules and Regulations Governing Conduct on Postal Service Property

Applicability

These rules and regulations apply to all real property under the charge and control of the U.S. Postal Service®, to all tenant agencies, and to all persons entering in or on such property. These rules and regulations must be kept posted at a conspicuous place on all such property. These rules and regulations shall not apply to:

a. Any portions of real property, owned or leased by the Postal Service™, that are leased or subleased by the Postal Service to private tenants for their exclusive use.

b. With respect to restrictions on soliciting, electioneering, collecting debts, vending, and advertising on sidewalks along the street frontage of Postal Service property falling within the property lines of the Postal Service that are not physically distinguishable from adjacent municipal or other public sidewalks and any paved areas adjacent to such sidewalks that are not physically distinguishable from such sidewalks.

Recording Presence

Except as otherwise ordered, properties must be closed to the public after normal business hours. Properties also may be closed to the public in emergency situations and at such times as may be necessary for the orderly conduct of business. Admission to properties when closed to the public may be limited to authorized individuals who may be required to sign the register and display identification when requested by Security Force personnel or other authorized individuals.

General Restrictions

Preservation of Property

Littering, spitting, creating any hazard to persons or things, throwing articles of any kind from a building, climbing upon the roof or any part of the building, or willfully destroying, damaging, or removing any property or any part thereof is prohibited.

Conformity with Signs and Directions

All persons in and on property shall comply with official signs of a prohibitory or directory nature and with the directions of Security Force personnel or other authorized individuals.

Inspection

Purses, briefcases, and other containers brought into, while on, or being removed from the property are subject to inspection. However, items brought directly to a Postal Service facility's customer mailing acceptance area and deposited in the mail are not subject to inspection, except as provided by the *Administrative Support Manual*, part 274. A person arrested for violation of this part may be searched incident to the arrest. Vehicles and their contents brought into, while on, or being removed from restricted nonpubiic areas are subject to inspection. Persons entering these areas who object and refuse to consent to the inspection of the vehicle, its contents, or both may be denied entry. After entering the area without objection, consent to inspection shall be implied. A full search of the person and the vehicle driven or occupied by that person may accompany an arrest.

Specific Restrictions

Disturbances

Disorderly conduct, or conduct that creates loud and unusual noise or obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or that otherwise tends to impede or disturb the public employees in the performance of their duties or otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on Postal Service property is prohibited.

Gambling

Participating in games for money or other personal property, the operation of gambling devices, the conduct of a lottery or pool, or the selling or purchasing of lottery tickets is prohibited on postal premises. This does not apply to state lottery tickets at vending facilities operated by licensed blind persons where such lotteries are authorized by state law.

Alcoholic Beverages, Drugs, and Smoking

Anyone under the influence of alcohol or any drug that has been defined as a "controlled substance" may not enter Postal Service property or operate a motor vehicle on Postal Service property. The possession, sale, or use of any "controlled substance" (except when permitted by law) or the sale or use of any alcoholic beverage (except as authorized by the Postmaster General or designee) on Postal Service premises is prohibited. The term "controlled substance" is defined in Title 21, *United States Code* section 802. Smoking is prohibited in all Postal Service buildings and office space, including public lobbies.

Soliciting, Electioneering, Collecting Debts, Vending, and Advertising

Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, displaying or distributing commercial advertising, soliciting signatures on petitions, polls, or surveys (except as otherwise authorized by Postal Service regulations), and impeding entrance to or departure from Post Offices™ are prohibited on Postal Service property. These prohibitions do not apply to the following:

a. Commercial or nonprofit activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act.

b. Posting notices on employee bulletin boards as authorized by Title 39 *Code of Federal Regulations* (CFR) 243.2.

c. The solicitation of U.S. Postal Service and other federal military or civilian personnel for contributions by recognized agencies as authorized by the *Manual on Fund Raising Within Federal Service*, issued under Executive Order 12353.

Public Assembly and Public Address

Leafleting, distributing literature, picketing, and demonstrating by members of the public are prohibited in lobbies and other interior areas open to the public. Public assembly and public address, except when conducted or sponsored by the Postal Service, are prohibited in lobbies and other interior areas open to the public.

Depositing Literature

Depositing or posting of handbills, flyers, pamphlets, signs, posters, placards, or other literature (except official Postal Service and other governmental notices and announcements) on the grounds, walks, driveways, parking and maneuvering areas, exteriors of buildings, and other structures, or on the floors, walls, stairs, racks, counters, desks, writing tables, window ledges, or furnishings in interior public areas on Postal Service premises is prohibited. This does not apply to the following:

a. Posting notices on employee bulletin boards as authorized by 39 CFR 243.2.

b. Interior space assigned to tenants for their exclusive use.

Photographs for News, Advertising, or Commercial Purposes

Photographs for news purposes may be taken in entrances, lobbies, foyers, corridors, or auditoriums when used for public meetings except where prohibited by official signs or Security Force personnel or other authorized personnel or a federal court order or rule. Other photographs may be taken only with the permission of the local postmaster or installation head.

Dogs and Other Animals

Dogs and other animals (except those used to assist persons with disabilities) must not be brought onto Postal Service property for other than official purposes.

Vehicular and Pedestrian Traffic

Drivers of all vehicles in or on Postal Service property must be in possession of a current and valid driver's license and vehicle registration, and the vehicle must display all current and valid tags and licenses required by the jurisdiction in which it is registered. Drivers who have had their privilege or license to drive suspended or revoked shall not drive any vehicle in or on Postal Service property during such period of suspension or revocation.

Drivers of all vehicles in or on Postal Service premises shall drive in a careful and safe manner at all times and must comply with signals and directions of Security Force personnel, other authorized individuals, and all posted traffic signs.

Blocking of entrances, driveways, walks, loading platforms, or fire hydrants is prohibited.

Parking without authority, parking in unauthorized locations or in reserved locations, or parking continuously in excess of 18 hours without permission or contrary to the direction of posted signs is prohibited. Supplemental specific traffic directives may be issued by the postmaster or installation head. When issued and posted, such directives shall have the same force and effect as if made a part hereof.

Voter Registration

Voter registration may be conducted on Postal Service property only with the approval of the postmaster or installation head. See 39 CFR 232.1(h)(4) for the conditions that apply to voter registration activities on Postal Service property.

Weapons and Explosives

No person while on Postal Service property may carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, or store the same on Postal Service property, except for official purposes.

Nondiscrimination

No person entering on postal property shall be subjected to discrimination on the basis of race, color, sex, religion, national origin, age (40 years of age or older), or disability (physical or mental) in using any of the services offered by the U.S. Postal Service.

Penalties and Other Law

Alleged violations of these rules and regulations are heard, and the penalties prescribed herein are imposed, either in a federal district court or by a federal magistrate in accordance with applicable court rules. Questions regarding such rules must be directed to the managing counsel for the office involved.

Individuals found guilty of violating these rules and regulations are subject to a fine of not more than $50 or imprisonment of not more than 30 days, or both. Nothing contained in these rules and regulations shall be construed to abrogate any other federal laws or regulations or any state or local laws and regulations applicable to any area in which the property is situated.

Enforcement

Security Force personnel will exercise the powers of special police and are responsible for enforcing the regulations in this notice in a manner that will protect U.S. Postal Service property. Postal Inspectors, Office of Inspector General Special Agents, and anyone designated by the Chief Postal Inspector may also enforce these regulations.

Poster 7, August 2007
PSN 7690-03-00-9181

STATE OF ALASKA

SEAN PARNELL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

February 13, 2012

Senator Hollis French, Chair
Senate Judiciary Committee
Alaska State Legislature
State Capitol, Room 417
Juneau, Alaska 99801-1182

Re: Hearing Request re: HB 291 – Public Notices Posted At Post Offices

Dear Senator French:

The Department of Law would appreciate scheduling of the above bill for a hearing in your committee, at your earliest convenience. The bill would remove the requirement of posting certain public notices in a post office.

We have reviewed the bill and have found no legal concerns.

If you have any questions, please feel free to contact me.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Chief Assistant Attorney General

MCG:DEB:ljm

cc: Heather Brakes, Legislative Director, Office of the Governor
Kathryn Kurtz, Assistant Revisor of Statutes, Legislative Affairs Agency

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**HB 291**
Fiscal Note Number	**1**
(H) Publish Date	**2/3/12**

Identifier (file name)	HB291-LAW-CIV-01-27-12	Dept. Affected	Law
Title	An Act relating to the posting of notices at United States post offices.	Appropriation	Civil
		Allocation	Legislation/Regulations
Sponsor	Rules by request of Legislative Council		
Requester	(H) Judiciary	OMB Component Number	2209

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by	Eileen Donahue, Division Operations Manager	Phone	465-5427
Division	Administrative Services	Date/Time	1/27/12 4:00 PM
Approved by	Richard Svobodny, Acting Attorney General	Date	1/27/2012
	Department of Law		

(Revised 1/17/2012 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 291

Analysis

HB 291 deletes the posting of notices at United States post offices. HB 291 should have no fiscal impact on Department of Law.

HB

296

<TARGET><BILL>HB 296</BILL><SUBJECT>HB
296</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

COMMITTEE MEMBERS:
REP. STEVE THOMPSON, VICE CHAIR
REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

HOUSE BILL 296 ~ Sponsor Statement
House Judiciary Committee

"An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date."

HB 296, addresses ambiguities that have risen from recent court cases involving prisoner issues. It clarifies the permissible method of personally serving process on incarcerated prisoners. It also clarifies the second and fourth degree escape statutes. The bill does three things;

1. For the purpose of service of process on state prisoners HB296 references the definition of "correctional facility" in AS 33.30.901 to clarify the manner in which incarcerated prisoners can be served civilly while incarcerated. The bill also makes it clear that the statute setting for the procedure for personally serving incarcerated persons, AS 09.05.030, is an indirect amendment to Alaska Civil 4. These changes will ensure there is a standardized legal process for serving process on prisoners. It will cure the problem in Hertz v. Carothers 225 P.3d 571 (Alaska 2010), that caused the Alaska Supreme Court to hold that prison officials were not peace officers who could serve legal summons and complaints on incarcerated prisoners.

2. This bill also defines what constitutes the crime of escape in the second degree. The result in Bridge v. State 258 P.3d 923 (Alaska 2011) was suggested for Legislative review from the Legal Services Annual Report (Dec. 2011). Bridge, was charged with driving with a suspended license, a class A misdemeanor. He could not post bail and was therefore held in jail. He was then transferred to a halfway house. He left the facility without permission and was caught. As a result of the escape he was charged with escape in the second degree, a class B felony. The Alaska Court of Appeals found that although Bridge was in the custody of the Department of Corrections, he was not "confined", because the halfway house did not have staff whose duty it was to prevent prisoners from leaving. This bill defines escape in the second degree as being from a "secure correctional facility" while under detention for a misdemeanor. Further, a "secure correctional facility" is defined as using construction or security fixtures or officers or other persons that are authorized to prevent persons under detention from departing such facilities without unlawful authorization. Other escapes by misdemeanants are fourth degree escapes, a class A misdemeanor. This bill will

codify the holding in Bridge and will avoid future questions as to what constitutes escape in the second degree.

3. This bill deletes the repeal of provisions passed by the legislature in 2007, AS 12.55.100(f) and AS 33.16.150(g), requiring electronic monitoring as a special condition of probation or parole for offenders whose offense was related to a criminal street gang. Repealing the December 31, 2012 sunset date will continue to provide the court system and the Department of Corrections an important tool to keep neighborhoods safe from gang related crime.

This bill provides clearer guidelines for civil service of process of persons under the custody of the Department of Corrections removing question raised in Hertz v. Carothers 225 P.3d 571 (Alaska 2010). The bill refines escape in the second degree answering questions from Bridge v. State 258 P.3d 923 (Alaska 2011). This bill is necessary to avoid future litigation that may arise involving these issues.

Please contact Rep. Gruenberg's legislative aides, Miles Brookes or Ted Madsen, at 465-4940 with any questions.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

COMMITTEE MEMBERS:
REP. STEVE THOMPSON, VICE CHAIR
REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
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HB 296 - Crime of Escape & Definition of Correctional Facility

Sectional Analysis for CS for HB296 (27-LS1199\E)

Section 1[1] adds a new subsection that defines a correctional facility for the purpose of AS 09.05.050 as a "prison, jail, camp farm, halfway house, group home, or other placement designated by the commissioner for the custody, care and discipline of prisoners (AS 33.30.901(4).

Section 2[2] defines that escape from a "secure correctional facility" while under official detention for a misdemeanor is escape in the second degree, a class B felony.

Section 3[3] adds a new subsection to AS 11.56.310 defining a secure correctional facility.

Section 4[4] repeals Section 3, ch.27, SLA 2007

Section 5[5]amends Rule 4, Alaska Rules of Civil Procedure to reflect changes indirectly made in section 1 of this act.

Section 6[6]states that changes to sections 2 and 3 apply to offenses on or after the effective date of this act.

Section 7[7]provides for an immediate effective date.

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[1] Page 1, Lines 5-7
[2] Page 1, Lines 8-14 through Page 2, Lines 1-9
[3] Page 2, Lines 10-18
[4] Page 2, Lines 19-23
[5] Page 2, Lines 24-29
[6] Page 2, Lines 30-31 through Page 3, Lines 1-5
[7] Page 3, Line 6

225 P.3d 571
Supreme Court of Alaska.

Sidney HERTZ, Appellant,
v.
Dan CAROTHERS, Appellee.

No. S-13245. | Feb. 12, 2010. |
Rehearing Denied March 10, 2010.

Synopsis

Background: Prisoner's civil rights action against State was dismissed and Superior Court awarded attorney's fees to the State. State attempted to execute judgment against prisoner trust account. Prisoner objected. The Superior Court, First Judicial District, Juneau, Patricia A. Collins, J., held that prisoner was properly served, trust account was subject to execution, and that State's attorney should not be sanctioned. Prisoner appealed.

Holdings: The Supreme Court, Christen, J., held that:
1 State did not comply with notice requirements, but prisoner was not prejudiced;
2 statutes governing prisoner trust accounts did not conflict with one another;
3 statute allowing disbursement of prisoner trust accounts in order to satisfy judgments was not an ex post facto law;
4 statute did not violate contract clause; and
5 attorney's failure to comply with notice requirements did not warrant sanctions.

Affirmed in part, reversed in part.

West Headnotes (13)

1 **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews issues of statutory interpretation, as well as questions about the constitutionality of statutes, de novo.

2 **Appeal and Error**
Costs and Allowances

Decisions whether to sanction attorneys are reviewed for abuse of discretion.

3 **Appeal and Error**
Proceedings Preliminary to Trial

A judge's refusal to recuse him- or herself is reviewed under the abuse of discretion standard.

4 **Execution**
Notice of levy

State did not comply with notice requirements in rule governing permissible methods for serving a summons in State's action seeking to execute judgment against prisoner trust account, but failure did not prejudice prisoner; prison guard who delivered documents to prisoner was not a peace officer or person specially appointed to serve process with the meaning of the rule, but prisoner had actual notice. Rules Civ.Proc., Rule 4.

5 **Execution**
Property in custody of agent or depositary

Prisons
Money and finances; inmate accounts

Prisons
Wages or earnings

Statutes
Nature and subject-matter of statute

Statute providing for prisoners to be compensated for their work in prison and wages to be placed in trust account did not conflict with statute allowing for disbursement of prisoner trust account to satisfy a judgment; statutes were not criminal statutes, as prisoner asserted, and therefore did not have to be strictly construed against the State. AS 09.38.030(f)(5), 33.30.201(d).

6 **Constitutional Law**
Sentencing and Imprisonment

Execution
Property in custody of agent or depositary

Statute allowing disbursement of prisoner trust accounts in order to satisfy judgments was not an ex post facto law, where statute did not criminalize behavior that was previously not

criminal and it had no bearing on the defense of any crime. U.S.C.A. Const. Art. 1, § 10, cl. 1; AS 09.38.030(f)(5).

7 **Constitutional Law**
Punishment in general
Constitutional Law
Criminal Proceedings

Any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. U.S.C.A. Const. Art. 1, § 10, cl. 1.

8 **Constitutional Law**
Contracts with states in general
Execution
Property in custody of agent or depositary

Statute allowing disbursement of prisoner trust accounts in order to satisfy judgments did not violate contract clause; statute did not impair prisoners' ability to seek enforcement of the *Cleary* consent decree which set minimum standards for conditions of prisoner confinement and procedures for prisoners to file grievances for non-compliance with decree. U.S.C.A. Const. Art. 1, § 10, cl. 1; Const. Art. 1, § 15; AS 09.38.030(f)(5).

9 **Judgment**
Construction and operation of judgment

The *Cleary* consent decree sets minimum standards for conditions of prisoner confinement including food, medical care, and dental care and provides procedures for prisoners to file grievances for non-compliance with the decree.

10 **Prisons**
Access to Courts and Public Officials

An inmate's right to be free of state interference with his right of access to the court system is not absolute.

11 **Constitutional Law**
Prisoners and pretrial detainees

A statute is constitutional if it does not impermissibly interfere with, or burden, an inmate's right of access to the court and is sufficiently related to a legitimate government interest.

12 **Attorney and Client**
Liability for costs; sanctions

State's counsel's failure to comply with notice requirements in State's action to execute judgment against prisoner trust account did not warrant sanctions against counsel under civil rule of procedure or rules of professional conduct; there was no evidence that State's counsel intended to deprive prisoner of his right to notice. Rules Civ.Proc., Rules 4, 95(b).

13 **Appeal and Error**
Disqualification of judge

Prisoner waived for appellate review his argument that trial judge should have recused herself in State's action to execute a judgment against prisoner trust account, where prisoner failed to move for disqualification in the superior court.

Attorneys and Law Firms

***572** Sidney R. Hertz, pro se, Seward.
Marilyn J. Kamm, Assistant Attorney General, Richard A. Svobodny, Acting Attorney General, Juneau, for Appellee.

Before: EASTAUGH, WINFREE and CHRISTEN, Justices.

Opinion

OPINION

CHRISTEN, Justice.

I. INTRODUCTION

This is the second time we have addressed Sidney Hertz's objections to the State's attempt to execute a judgment against his prisoner trust account. In *Hertz v. Carothers* [1] (*Hertz I*), Hertz challenged the State's right to execute on his prisoner trust account to satisfy a judgment for Alaska Civil Rule 82 attorney's fees entered after Hertz lost a prisoner civil rights lawsuit against the State. There, we affirmed the validity of AS 09.38.030(f) which excludes prisoners from an exemption for low wage earners. Following *Hertz I,* the State again levied on Hertz's trust account to satisfy the remainder of its judgment. Hertz now challenges the levy on the grounds that (1) he was not served properly; (2) "ambiguities" between AS 09.38.030(f) and AS 33.30.201(d) should be resolved in his favor; (3) AS 09.38.030(f)(5) is an *ex post facto* law; and (4) AS 09.38.030(f)(5) violates the contract clauses of the Alaska and United States Constitutions. We reverse the court's ruling that Hertz was properly served but affirm the court's rulings that Hertz's prisoner trust account is subject to execution and that the State's attorney should not be sanctioned. We also hold that AS 09.38.030(f) is not an *ex post facto* law and that it does not violate the contract clause of the Alaska Constitution or the contract clause of the United States Constitution.

II. FACTS AND PROCEEDINGS

Hertz is an inmate at Spring Creek Correctional Center ("SCCC"). In July 2004 he sued the Alaska Department of Corrections ***573** and several of its employees for alleged civil rights violations. [2] The superior court dismissed Hertz's civil rights suit and awarded Rule 82 attorney's fees of $3,225 to the State. [3] The fee award was later reduced to a judgment. [4] When the State attempted to execute against Hertz's prisoner trust account to satisfy the judgment, Hertz claimed exemptions under AS 09.38.030(a) and (b). [5] Specifically, he argued that his wages were exempt from execution because they fell below the statutory minimum in AS 09.38.030. [6] Alternatively, he argued that the statute was invalid under several different theories. [7] In our January 2008 decision, *Hertz I,* we affirmed the superior court's order rejecting Hertz's claims of exemption. [8] We also affirmed the validity of AS 09.38.030(f). [9]

On March 14, 2008, the State again sought to execute against Hertz's prisoner account to satisfy the remaining portion of its judgment. The State's service instructions directed the Alaska State Troopers (Judicial Services) to serve the writ of execution and creditor's affidavit on Superintendent Turnbull at SCCC. The service instruction form contained a separate section entitled "Instructions for Serving Notices on the Debtor," which directed that a copy of the State's creditor's affidavit, notice of levy and sale of property, notice of right to exemptions, claim of exemptions form, and judgment debtor booklet be served on Hertz. On June 12, 2008, a trooper served the writ of execution on Superintendent Turnbull. The trooper did not serve any documents on Hertz.

It is undisputed that Hertz had actual knowledge of the State's attempt to execute against his prisoner trust account by June 17, 2008, when he sent a letter to the superior court challenging the State's "theft" of his money based in part on lack of notice. When the State's counsel realized that Hertz had not been served, she faxed the documents that should have been served on Hertz to SCCC. A prison guard personally delivered them to Hertz on June 19, 2008.

Hertz responded to the faxed documents by filing several claims of exemption in which he argued that (1) improper service voids the levy; (2) "ambiguities" between AS 33.30.201(d)-which provides that the "primary purpose" of the prisoner trust account is to make funds available for prisoners' use at the time of release-and AS 09.38.030(f)(5)-which allows the execution of judgments against prisoner accounts-must be construed against the government; and (3) $185 in his trust account was not subject to execution because he had received it in the form of gifts from family and friends and the money should have been retained by the commissioner pursuant to AS 33.30.201(d).

On August 5, 2008, the superior court denied Hertz's claims of exemption, citing *Hertz I.* The superior court reasoned that our court "has ruled that a prisoner's trust account may be subject to execution," and noted that there is no exception in the statutory scheme for money acquired by gift. Finally, the court rejected Hertz's argument that the errors in the State's service should negate the writ because "there is no prejudice by [the] delayed service and no showing of a knowing violation of the statute." The superior court rejected Hertz's motion for reconsideration.

Hertz appeals.

III. STANDARDS OF REVIEW

1 2 3 We review issues of statutory interpretation, as well as questions about the constitutionality of statutes, de novo.[10] "Decisions whether to sanction attorneys are reviewed *574 for abuse of discretion."[11] "A judge's refusal to recuse him- or herself is reviewed under the abuse of discretion standard."[12]

IV. DISCUSSION

A. The Execution on Hertz's Prisoner Trust Account Was Invalid Because the State Failed To Properly Serve Him.

4 The State argues that it was in technical compliance with AS 09.38.085(a)(1) because it served Hertz with a notice of levy, a claim of exemptions form, a creditor's affidavit, and a judgment debtor's handbook. But the State misses the crux of Hertz's argument. Hertz's challenge is not to the sufficiency of the documents served; he challenges the State's method of service.

Several statutes and rules describe the notice the State was required to provide Hertz before levying on his trust account. Alaska Statute 09.38.080(c) requires that "[b]efore, at the time of, or within three days after the levy, the creditor shall serve on the individual [debtor] a notice under AS 09.38.085." Alaska Statute 09.38.085 describes the content of the required notices, and AS 09.38.500, the definitions section of the Alaska Exemptions Act, specifies the method for serving the notices. The term "serve notice" in AS 09.38.080(c) means "to give the person to be served a written personal notice in the same manner a summons in a civil action is served, or to mail the notice to the person's last known address by first-class mail and by using a form of mail requiring a signed receipt."[13] Hertz was served personally, not by mail, so we turn to the civil rules.

Civil Rule 4 identifies the permissible methods for serving a summons in a civil action. It requires service to "be made by a peace officer, by a person specially appointed by the Commissioner of Public Safety for that purpose or, where a rule so provides, by registered or certified mail." The rule defines "peace officer" as "any officer of the state police, members of the police of any incorporated city, village or borough, United States Marshals and their deputies, other officers whose duty it is to enforce and preserve the public peace, and ... persons specially appointed." Special appointments "shall only be made by the Commissioner of Public Safety after a thorough investigation of each applicant."[14]

After the State's counsel learned that the trooper had failed to serve Hertz as instructed, she faxed the documents to SCCC. A prison guard delivered them to Hertz on June 19, 2008. But the State did not argue, and the record does not show, that the prison guard who served Hertz was a "peace officer" or a person "specially appointed to serve process" within the meaning of Civil Rule 4. We agree with the superior court that the delay in service was not prejudicial to Hertz, but the State was still required to use an authorized method of service. The record does not show that the State complied with Civil Rule 4.[15]

We are mindful that our ruling regarding service may appear to elevate form over substance because Hertz had actual knowledge of the levy by June 16, 2008. But we are loathe to carve out exceptions to the important rules for service of process. These rules enable courts to verify that service has actually been made; they are vital to ensuring that litigants receive the due process to which they are entitled, and they are broadly applicable. Creating an exception merely to avoid requiring the State to properly serve Hertz is fraught with precedential danger. Such an exception, though seemingly narrow, could be applied in future cases to relax the notice requirements for litigants *575 who might not have received the actual notice Hertz enjoyed. This danger would be especially acute in cases involving requests for entry of default judgment. Given the serious consequences of execution, i.e., the involuntary confiscation of a debtor's property, we must insist on strict compliance with the legislature's statutory scheme and the service requirements of Civil Rule 4.[16]

B. Alaska Statutes 33.30.201(d) and 09.38.030(f)(5) Do Not Conflict and Are Not Ambiguous.

5 Alaska Statute 33.30.201(d) provides for prisoners to be compensated for their work in prison and for their wages to be placed in a trust account for the "primary purpose" of being available to them at the time of release. But AS 09.38.030(f) provides that "[a]ll money in an incarcerated person's account at a correctional facility is available for disbursement under a notice of levy under this subsection ... (5) to satisfy other judgments entered against a prisoner in litigation against the state." Hertz argues that the "primary purpose" language of

AS 33.30.201(d) conflicts with the disbursement scheme in AS 09.38.030(f). Citing this "ambiguity" Hertz argues that "[a]mbiguities in criminal statutes must be narrowly read and construe[d] strictly against the government."

In *Hertz I,* we upheld the state's ability to execute on prisoner accounts despite an exemption for low-wage earners and those who are paid semi-monthly.[17] We noted that AS 09.38.030(f)(5) specifically eliminates the low-wages exemption when low wages are paid to prisoners.[18]

Hertz's present challenge to AS 09.38.030(f)(5) is technically barred by the doctrine of res judicata;[19] he was required to raise all of his challenges to the statute in *Hertz I.*[20] But Hertz's argument is unavailing even on the merits. Alaska Statute 33.30.201 states that prisoner wages shall be disbursed pursuant to a specified order of priority and that remaining funds are to be given to the prisoner when he or she is released, subject to exceptions. After all disbursements are paid in the statutorily required order of priority, subsection .201(f) states that remaining funds are subject to lien, attachment, garnishment, execution, or similar procedures to encumber money or property. This provision does not conflict with AS 09.38.030(f)(5). Alaska Statutes 33.30.201(c) and (f) identify the priorities for which a prisoner's trust account can be invaded, and AS 09.38.030(f) explains that prisoners do not enjoy the benefit of the exemption for earnings and liquid assets enunciated in AS 09.38.030 generally. Both statutes contemplate and accommodate the execution and garnishment of prisoner trust accounts.

To the extent that Hertz argues that these statutes must be construed against the State because they are "criminal statutes," he is mistaken. The fact that these statutes govern the administration of prisoner trust accounts does not make them "criminal statutes." Hertz has cited no authority and we have found none supporting his assertion that statutes should be strictly construed against the State merely because they apply to convicted felons. Alaska Statutes 09.38.030 and 33.30.201 are civil statutes, they are not ambiguous, and they do not conflict. After all disbursements are made from a prisoner's trust account pursuant to the statute's order of priority, all remaining funds are subject to execution.

***576 C. Alaska Statute 09.38.030(f)(5) Is Not an *Ex Post Facto* Law.**

6 Hertz asserts that AS 09.38.030(f)(5) is an *ex post facto* law. The basis for this argument is that this statute was passed in 1995, after the State entered into a consent decree to resolve litigation challenging the conditions of confinement for Alaska prisoners.[21] Hertz argues that the adoption of AS 09.38.030(f)(5) in the wake of the *Cleary* consent decree creates the appearance that AS 09.38.030(f)(5) "was enacted solely for the purpose of circumventing the *Cleary* [Final Settlement Agreement and Order]."

7 We have adopted the United States Supreme Court's view that:

> any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission; or which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto.*[22]

Alaska Statute 09.38.030(f)(5) does not criminalize behavior that was previously not criminal and it has no bearing on the defense of any crime; it is not an *ex post facto* law.

D. Alaska Statute 09.38.030(f)(5) Does Not Violate the Contract Clause.

8 Hertz argues that AS 09.38.030(f)(5) violates the contract clause of the United States Constitution and the contract clause of the Alaska Constitution by "substantial[ly] impair[ing]" his contractual right to allege noncompliance with the *Cleary* consent decree. He supports this argument by pointing out that "this Court has admitted that AS 09.38.030(f)(5) was to discourage prisoner litigation." Our court has explained:

> Article I, section 15 of the Alaska Constitution provides: "No law impairing the obligation of contracts ... shall be passed." Because the language of the contract clause of the Alaska Constitution is nearly identical to that of the federal Contract Clause, we apply the same two-part analysis to alleged violations of the Alaska and federal contract clauses. We first ask "whether the change in state law has operated as a substantial impairment of a contractual relationship." If there is a substantial impairment, we then examine "whether the impairment is reasonable and necessary to serve an important public purpose."
>
> ....
>
> Under the first prong of the contract clause test, we consider: (1) whether there is a contractual relationship, (2)

whether the law impairs the contractual relationship, and (3) whether the impairment is substantial.[[23]]

9 The *Cleary* consent decree sets minimum standards for conditions of prisoner confinement including food, medical care, and dental care. It also provides procedures for prisoners to file grievances for non-compliance with the decree.[24] After exhausting the "administrative grievance procedure," an inmate may file suit in superior court. In this case, the State does not challenge Hertz's assertion that the *Cleary* consent decree established a contractual relationship between the State and inmates in the custody of the State of Alaska,[25] arguing instead that even if such a contractual relationship exists, AS 09.38.030(f) does not impair it. We agree; AS 09.38.030(f) does not impair prisoners' ability to seek enforcement of the *Cleary* consent decree. We do not need to decide ***577** whether the *Cleary* consent decree constitutes a binding contract.

10 11 Civil Rule 82 provides for the award of attorney's fees to the prevailing party of a civil lawsuit. Civil Rule 82 was in effect when the *Cleary* consent decree was entered, November 1, 1990. The consent decree addresses certain conditions of confinement; it does not immunize prisoners from attorney's fee awards or exempt inmate trust accounts from execution to satisfy fee awards. Alaska Statute 09.38.030(f)(5) allocates some of the State's cost of defending lawsuits to the non-prevailing prisoner, thereby discouraging frivolous claims.[26] "An inmate's right to be free of state interference with his right of access to the court system is not absolute."[27] A statute is constitutional if it "does not impermissibly interfere with, or burden, an inmate's right of access to the court and is sufficiently related to a legitimate government interest."[28] Alaska Statute 09.38.030(f)(5) does not prevent or stifle a prisoner's ability to pursue legitimate claims against the government.

The specter of Rule 82 fees tempers the litigiousness of most civil litigants; we see no reason to make a special exception for inmates. Alaska Statute 09.38.030(f)(5) merely reflects the State's interest in discouraging frivolous prisoner litigation, a legitimate goal we have repeatedly upheld.[29] We are not convinced that permitting the State to collect judgments from prisoner trust accounts impairs the right of prisoners to seek enforcement of the *Cleary* consent decree,[30] and we hold that AS 09.38.030(f)(5) does not violate the Alaska or federal prohibition against impairment of contracts.

E. There Was No Misconduct by the State's Attorney.

12 Hertz asserts that the superior court erred by failing to sanction the State's counsel under Professional Conduct Rule 95(b) for (1) failing to have him served by a peace officer; and (2) for lying because she "never intended to serve Hertz with the Writ."

The superior court correctly decided that Hertz's claims of attorney misconduct are meritless. There is no evidence that the State's counsel acted inappropriately during the course of her efforts to collect the State's judgment. At most, there is evidence that a mistake was made at the time of service. Ironically, Hertz's allegation of misconduct arises from counsel's rush to arrange for personal delivery of the documents that would notify Hertz of his right to claim exemptions; the State's attorney likely faxed the documents to SCCC for immediate delivery in order to comply with AS 09.38.080(c), which requires the debtor to receive notice "[b]efore, at the time of, or within three days after the levy."

Even though the State failed to comply with Civil Rule 4, there is no evidence that the State's counsel intended to deprive Hertz of his right to notice. Hertz admits that he received the relevant documents by fax just days after he learned of the levy and apparently shortly after the State's attorney discovered the mistake. The superior court appropriately declined to sanction the State's attorney.

F. Hertz Waived His Argument that Judge Collins Should Have Recused Herself Because of Apparent Bias Against Prisoners.

13 Hertz argues that the superior court judge created an appearance of impropriety by ruling on his claim of exemptions before receiving his response to the State's objections. ***578** [31] We see no evidence of any bias in the record. And Hertz waived the issue in any event by failing to move for disqualification in the superior court.[32]

IV. CONCLUSION

We REVERSE the court's ruling that Hertz was adequately served, but hold that AS 33.30.201(d) and AS 09.38.030(f)(5) do not conflict and are not ambiguous, that AS 09.38.030(f)(5) is not an *ex post facto* law, and that AS 09.38.030(f)(5) does not violate the contract clause of the Alaska Constitution or United States Constitution. We AFFIRM the superior court's rulings that Hertz's trust account is subject to execution and that the State's attorney should not be sanctioned.

CARPENETI, Chief Justice and FABE, Justice, not participating.

Footnotes

1 174 P.3d 243 (Alaska 2008).

2 *Id.* at 245.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Hertz v. Carothers,* 174 P.3d 243, 245 (Alaska 2008).

8 *Id.*

9 *Id.* at 244.

10 *C.J. v. State, Dep't of Corr.,* 151 P.3d 373, 377 (Alaska 2006) (citing *State v. Alaska Civil Liberties Union,* 978 P.2d 597, 603 (Alaska 1999); *Boone v. Gipson,* 920 P.2d 746, 748 (Alaska 1996)).

11 *Hertz,* 174 P.3d at 245 (citing *In re Schmidt,* 114 P.3d 816, 819 (Alaska 2005)).

12 *Mustafoski v. State,* 867 P.2d 824, 832 (Alaska App.1994) (citing *Blake v. Gilbert,* 702 P.2d 631, 640 (Alaska 1985); *Perotti v. State,* 806 P.2d 325, 327 (Alaska App.1991)).

13 AS 09.38.500(14).

14 Alaska R. Civ. P. 4(c)(3).

15 The State's reliance on the substantial compliance provision in AS 09.38.085(c) is misplaced. That provision excuses errors in the notices themselves, not errors in the physical delivery of the forms.

16 *See Beery v. Browning,* 717 P.2d 365, 367 n. 8 (Alaska 1986).

17 *Hertz v. Carothers,* 174 P.3d 243, 246 (Alaska 2008).

18 *Id.*

19 *See Plumber v. Univ. of Alaska Anchorage,* 936 P.2d 163, 166 (Alaska 1997) ("The doctrine of *res judicata* as adopted in Alaska provides that a final judgment in a prior action bars a subsequent action if the prior judgment was (1) a final judgment on the merits, (2) from a court of competent jurisdiction, [and] (3) in a dispute between the same parties ... about the same cause of action.").

20 *Calhoun v. Greening,* 636 P.2d 69, 72 (Alaska 1981) ("[A] fundamental tenet of the res judicata doctrine is that it precludes relitigation between the same parties not only of claims that were raised in the initial proceeding, but also of those relevant claims that could have been raised then.").

21 *Cleary v. Smith,* No. 3AN-81-5274 Ci., Final Settlement Agreement and Order (Alaska Super., September 21, 1990).

22 *State v. Anthony,* 816 P.2d 1377, 1378 (Alaska 1991) (quoting *Dobbert v. Florida,* 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977)).

23 *Hageland Aviation Serv., Inc. v. Harms,* 210 P.3d 444, 451-52 (Alaska 2009) (internal footnotes and citations omitted).

24 *Cleary v. Smith,* No. 3AN-81-5274 Ci., Final Settlement Agreement and Order (Alaska Super., September 21, 1990).

25 *See Hertz v. State, Dep't of Corr.,* --- P.3d ----, Op. No. 12842 at n. 33, 2010 WL 53112 (Alaska, January 8, 2010) (noting dicta in *Rathke v. Corr. Corp. of Am.,* 153 P.3d 303, 311 (Alaska 2007) that "the FSA 'is an enforceable contract between Alaska inmates and the state.' ")

26 *Hertz v. Carothers,* 174 P.3d 243, 247 (Alaska 2008).

27 *Brandon v. Corr. Corp. of Am.,* 28 P.3d 269, 277 (Alaska 2001) (quoting *Mathis v. Sauser,* 942 P.2d 1117, 1121 (Alaska 1997)).

28 *Id.*

29 *See Hertz,* 174 P.3d at 248; *Brandon,* 28 P.3d at 277 (affirming the validity of a statute requiring prisoners to pay a portion of filing fees based on ability to pay).

30 *Cf. Hageland Aviation Serv., Inc. v. Harms,* 210 P.3d 444, 453 ("Chapter 19 substantially impaired the overtime compensation provision of the parties' employment agreement when Chapter 19 'totally eliminated' the pilots' claims for unpaid overtime wages.").

31 Judge Collins corrected herself by granting Hertz's motion for reconsideration and reviewing Hertz's response to the State's objections.

32 *See Brandon v. Corr. Corp. of Am.,* 28 P.3d 269, 280 (Alaska 2001) ("A party may not raise an issue for the first time on appeal."). Our court uses "independent judgment when determining whether an issue has been waived below due to inadequate briefing."

Lauth v. State, 12 P.3d 181, 184 (Alaska 2000) (citing *Wilkerson v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.,* 993 P.2d 1018, 1021 (Alaska 1999)).

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258 P.3d 923
Court of Appeals of Alaska.

Wendell D. BRIDGE, Appellant,
v.
STATE of Alaska, Appellee.

No. A–10176. | Aug. 5, 2011.

Synopsis

Background: Defendant, who left halfway house without permission while awaiting trial on misdemeanor charge, was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Michael A. MacDonald, Randy M. Olsen, JJ., of second-degree felony escape. He appealed.

Holdings: The Court of Appeals, Mannheimer, J., held that:
1 jury instruction defining term "correctional facility" was improper, and
2 retrial of defendant would not violate double jeopardy.

Reversed.

Bolger, J., filed dissenting opinion.

West Headnotes (2)

1 **Escape**
Nature and elements of offenses in general

For purposes of interpreting the second-degree escape statute, the term "correctional facility," which is statutorily defined as "premises used for the confinement of persons under official detention," applies only to situations where staff at the facility have a duty to physically prevent inmates from leaving without permission, and not to situations where the facility simply houses defendants who were placed there by the Department of Corrections pending their trial or sentencing. AS 11.56.310, 11.81.900(b)(9).

2 **Double Jeopardy**
Particular grounds for relief

Retrial of defendant on charge of second-degree escape would not violate double jeopardy based on trial court's failure to properly instruct jury on term "correctional facility," as required to properly convict defendant of second-degree escape; if on retrial, the State were to believe that it would be unable to establish that halfway house defendant left without permission qualified as a "correctional facility," then the State could ask the trial court to enter judgment against defendant on lesser offense of fourth-degree escape under statute which prohibited any act of "remov[ing] oneself from official detention for a misdemeanor." U.S.C.A. Const.Amend. 5; AS 11.56.310, 11.56.330(a)(1).

Attorneys and Law Firms

***924** Michael Schwaiger, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
Anne D. Carpeneti, Assistant Attorney General, Criminal Division Central Office, Juneau (brief), Timothy W. Terrell, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage (oral argument), and Daniel S. Sullivan, Attorney General, Juneau, for the Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and BOLGER, Judges.

Opinion

OPINION

MANNHEIMER, Judge.

This appeal requires us to clarify the meaning of the term "correctional facility" for purposes of the second-degree escape statute, AS 11.56.310. Under subsection (a)(1)(A) of this statute, a person commits the felony of second-degree escape if they unlawfully remove themselves "from a correctional facility" while they are under official detention for any crime, even a misdemeanor.

The term "correctional facility" is defined in AS 11.81.900(b)(9) as "premises ... used for the confinement of persons under official detention". The question posed in this appeal is whether the word "confinement" is equivalent to "residence" or "placement"—so that the term "correctional facility" would encompass *any* facility or residence where a prisoner has been ordered to remain by the Department of Corrections. Bridge argues that "confinement" has a narrower meaning

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—that it applies only when a prisoner's mandated residence at a particular facility is physically enforced by guards and restraints.

For the reasons explained in this opinion, we agree with Bridge that, at least for purposes of interpreting the second-degree escape statute, the phrase "premises used for the confinement of persons under official detention" must be given a narrower meaning than "residence" or "placement"—that it applies only to situations where a prisoner's residence is physically enforced.

Underlying facts

The defendant in this case, Wendell D. Bridge, was charged with a misdemeanor (driving with a suspended license). Because Bridge was unable to make bail, he was remanded to the custody of the Department of Corrections pending his trial.

***925** Bridge was initially confined at the Fairbanks Correctional Center. However, when the Department of Corrections conducted their prisoner classification of Bridge, they concluded that he was eligible for placement at the Northstar Center, a halfway house operated by a private corporation in Fairbanks. The Northstar Center has a contract with the Department of Corrections for housing low-security misdemeanor defendants who are awaiting trial or sentencing. Pursuant to this contract, and pursuant to the Department of Corrections' classification decision, Bridge was placed at the Northstar Center.

Because Bridge was charged with a crime, was unable to make bail, and was in the legal custody of the Department of Corrections, he was under "official detention"—and he remained under official detention even after he was transferred to the Northstar Center. [1]

On New Year's Day 2005, Bridge left the Northstar Center without permission. The Northstar staff notified the police, and the district court later issued a warrant for Bridge's arrest. He was arrested some fifteen months later and charged with second-degree escape.

In the superior court, Bridge argued that the Northstar Center was not a "correctional facility", and thus his act of walking away from the Center did not constitute second-degree escape. To help resolve this controversy, the superior court held a hearing at which the parties presented evidence concerning Bridge's status at the Northstar Center and the types of security measures employed at the Center. Based on the evidence presented at this hearing, the superior court concluded that the Northstar Center would qualify as a "correctional facility" for purposes of the escape statute (assuming the jury viewed the evidence in the light most favorable to the State).

Later, at Bridge's trial, in keeping with this pre-trial ruling, the superior court instructed the jury that "a halfway house under contract with the Department of Corrections ... is a correctional facility for ... individuals placed there by [the Department] for purposes of confinement [awaiting trial or sentencing]." Because it was undisputed that Bridge walked away from the Northstar Center without permission and without justification, the jury convicted Bridge of second-degree escape.

In this appeal, Bridge renews his argument that the Northstar Center did not qualify as a "correctional facility" for purposes of the escape statute. If Bridge is correct, then his act of leaving the Northstar Center without permission did not constitute second-degree escape; instead, his action constituted the lesser offense of fourth-degree escape under AS 11.56.330(a)(1). (This statute prohibits *any* act of "remov[ing] oneself from official detention for a misdemeanor".)

This Court's decision in State v. Crosby

This Court's decision in *State v. Crosby,* 770 P.2d 1154 (Alaska App.1989), is the primary appellate court decision construing the term "correctional facility" for purposes of Alaska's second-degree escape statute. Both Bridge and the State discuss *Crosby* at length in their briefs. Accordingly, to meaningfully address the arguments in the parties' briefs, we must examine the *Crosby* decision in some detail.

The defendant in *Crosby* was a sentenced prisoner who was released from prison on furlough to a residential drug treatment program, Akeela House. [2] Shortly after Crosby arrived at this residential facility, he walked away. [3] The State charged Crosby with second-degree escape, alleging (in the words of the statute) that he removed himself "from a correctional facility while under official detention." [4] The superior court ruled that Akeela House was *not* a "correctional facility" ***926** for purposes of the escape statute, and the State then appealed. [5]

The term "correctional facility" is defined in AS 11.81.900(b); it means "[any] premises ... used for the confinement of persons under official detention". [6] In

Crosby, the State took the position that, under this definition, the term "correctional facility" applied to *any* facility utilized by the Department of Corrections to house prisoners.[7] But this Court rejected the State's reading of the statutory definition.

This Court's explanation of why we rejected the State's interpretation of the statute is lengthy and somewhat difficult to follow, but the salient point of our analysis was that the statutory definition of "correctional facility" does not encompass any and all premises used for the *placement* or *custody* of persons under official detention. Rather, the statute defines "correctional facility" as premises used for the *confinement* of persons under official detention. *Crosby,* 770 P.2d at 1155.

Because our criminal code contained no definition of "confinement", we engaged in a lengthy analysis of the potential meanings of this word in the context of an escape statute. We concluded that the concept of "confinement" seemed to focus "not so much [on] the extent to which [a person's] freedom is restrained[, but rather on] *the specific manner* in which the restraints are imposed and enforced". *Id.* at 1157 (emphasis added).

We then offered two different explanations of why Crosby's placement at the Akeela House residential treatment center did not constitute "confinement"—and, thus, why Akeela House was not a "correctional facility" for purposes of the second-degree escape statute. Our decision to offer two different explanations appears to stem from the fact that the trial court record did not offer a clear answer as to whether Akeela House employed security guards or utilized physical restraints or barriers to keep residents from leaving the premises without permission.

This Court's first explanation of why Crosby was not in "confinement" at Akeela House was that, even though the conditions of Crosby's furlough from prison required him to remain at Akeela House, this restraint on his liberty was not "imposed or enforced in ways that amount to actual confinement". *Ibid.* We noted that "there [was] no indication" Akeela House had armed guards, physical restraints or barriers, or other security measures to physically prevent Crosby from leaving. *Ibid.*

This Court's second explanation of why Crosby was not in "confinement" at Akeela House appears to be based on the alternate possibility that Akeela House did, in fact, use guards or physical restraints to prevent residents from leaving without permission. We declared that "[any such] restrictions that Akeela House [placed] on its residents" were imposed for the purpose of furthering its treatment plan, and not because Akeela House was the agent of the Department of Corrections for the purpose of "maintaining security over its prisoners". *Ibid.* "Thus," we concluded, "to the extent that Akeela House relies on restrictive measures amounting to actual confinement, [this] confinement is clearly not confinement by the state." *Ibid.*

This second rationale appears to be squarely predicated on the fact that Crosby was a *furloughed* prisoner—*i.e.,* someone who had been granted "an authorized leave of absence from actual confinement for a designated purpose and period of time". AS 33.30.901(9) (the definition of "furlough"). In other words, the Department of Corrections had affirmatively decided to relinquish physical custody of Crosby for the purpose of allowing him to participate in the residential drug treatment program at Akeela House. Under the terms of Crosby's furlough, he was obligated to participate in this residential treatment program—but the Department apparently trusted Crosby to do just that, and the Department took no steps (either directly, or through agreement with Akeela ***927** House) to physically confine Crosby to the treatment facility. Rather, in the words of AS 33.30.091(9), Crosby was on a "leave of absence from actual confinement".

In sum, our decision in *Crosby* appears to have been ultimately based on the fact that the defendant was on furlough at the time he engaged in his unauthorized departure from Akeela House. But in our discussion of this issue, we suggested that even when a person is under official detention and living at a residential facility, the person is not "confined" there, for purposes of the escape statute, unless (1) the person is required to reside at the facility, (2) the person's required residency is enforced by guards or by physical restraints on the person's ability to leave, and (3) the guards or physical restraints are used at the behest of, or under the agency of, the Department of Corrections for the purpose of maintaining security over its prisoners, rather than for the private purposes of the corporation or group that runs the facility.

We note that the Alaska Legislature has not enacted a statutory definition of "confinement", nor has the legislature altered the statutory definition of "correctional facility", since we decided *Crosby* in 1989.

Bridge's argument on appeal

In his brief to this Court, Bridge focuses on the portion of *Crosby* where we suggested that "confinement" hinges "not

so much [on] the extent to which [a person's] freedom is restrained[, but rather on] the specific manner in which the restraints are imposed and enforced". [8]

Bridge devotes the majority of his brief to a discussion of the lack of security measures at the Northstar Center. According to the testimony presented at the evidentiary hearing in this case, the Northstar Center is a "non-secure" facility, in that it does not have guards, or a security fence, or even surveillance cameras. Inmates wear their own clothes, they have their own money, and they are not locked inside the facility. The members of the Northstar staff do not carry weapons, and they are instructed not to try to physically restrain inmates who leave the premises.

Relying on the absence of guards and physical restraints at the Northstar Center, Bridge argues that the Northstar Center is not a "correctional facility" because he was not subjected to "confinement" in the sense of physical restraints on his freedom. The problem with Bridge's argument is that it hinges on a portion of *Crosby* that appears to be dictum.

As we explained above, the *Crosby* decision offered two different explanations of why Crosby's residence at Akeela House did not constitute "confinement". The first explanation —*i.e.,* the portion of *Crosby* that Bridge relies on—dealt with the fact that Akeela House *apparently* did not utilize guards or physical restraints to keep residents from leaving without permission. But the record was unclear on this point, so this Court offered a second, alternative explanation for why Crosby's residence at Akeela House did not constitute "confinement". And under this second explanation, it was *irrelevant* whether Akeela House used guards or physical restraints to maintain control of its residents. This Court stated that even if Akeela House *did* utilize guards or physical restraints to keep residents from leaving, this would not constitute "confinement" for purposes of the escape statute —because these guards and physical restraints were not employed at the behest of the Department of Corrections, but rather were employed for the private purposes of Akeela House. [9]

Under this second rationale, the question of whether (or to what degree) the defendant in *Crosby* was subjected to physical restraints on his liberty during his residence at Akeela House was moot. The answer to this question made no difference to this Court's decision. Thus, our discussion of what type of restraint might constitute "confinement" for purposes of the escape statute became dictum.

928 *The question of "confinement" revisited

Bridge was not on furlough at the Northstar Center. That is, unlike the defendant in *Crosby,* no one had authorized Bridge to embark on a "leave of absence from actual confinement". Rather, Bridge was a misdemeanor defendant who was awaiting trial, and who had been remanded to the custody of the Department of Corrections because he was unable to make bail. Because of this, Bridge's case requires us to re-examine the question of what constitutes "confinement" for purposes of the escape statute.

The State's main argument in this appeal is that Bridge should be deemed to have escaped from "confinement" because the Department of Corrections placed Bridge at the Northstar Center in lieu of housing him at the Fairbanks Correctional Center. The State points out that Bridge knew that he was legally obligated to remain at the Northstar Center: Bridge was a prisoner who was being held in custody awaiting his trial, and he remained a prisoner even though he had been granted the benefit of waiting for his trial at a non-prison facility.

The State's description of Bridge's status is correct, but the State's argument is essentially the same one we rejected in *Crosby.* In *Crosby,* the State argued that the term "correctional facility" applied to *any* facility utilized by the Department of Corrections to house prisoners. [10] But as this Court noted in *Crosby,* the statutory definition of "correctional facility" does not encompass any and all premises used for the *placement* or *custody* of persons under official detention. Rather, the statute defines "correctional facility" as premises used for the *confinement* of persons under official detention. *Crosby,* 770 P.2d at 1155. Thus, we must decide whether the legislature intended the word "confinement" to mean something more specific or limited than "placement" or "custody".

One basic difficulty in answering this question is the fact that the word "confinement", like the word "convicted", can mean different things, depending on the context. [11]

For example, AS 33.30.065 authorizes the Department of Corrections to allow a prisoner to serve their term of imprisonment, or to serve their period of temporary commitment while awaiting trial, by living at home under electronic monitoring. One might speak of these prisoners as being "confined" to their residence, even though no one is

guarding them, and even though they are permitted to leave their home for various authorized purposes.

But as we noted in *Crosby,* the commentary to the draft provisions of our current escape statutes suggests that the word "confinement" was being used in a more restrictive sense—the sense of actual physical restraints placed on a person's movement, enforced by officers whose duty is to keep the person from leaving without permission:

> [T]he tentative draft commentary to AS 11.56.310 ... suggests that escapes from "correctional facilities" were designated as [a higher degree of crime] because of the heightened danger posed by inmates who seek to remove themselves from secure facilities:
>
> > The Code classifies all escapes from correctional facilities ... as escape in the second degree, a class B felony. Existing law differentiates between an escapee who has committed a felony and one who has committed a misdemeanor; an escape by a misdemeanant is classified as a misdemeanor. The [Criminal Code Revision] Subcommission concluded that the danger to society resulting from correctional facility escapes is substantial, regardless of whether the escapee is a felon or misdemeanant. The classification of all correctional facility escapes as serious felonies is consistent with the Code provision on the justifiable use of force in preventing an escape from a correctional facility[.]

***929** *Crosby,* 770 P.2d at 1155, quoting Alaska Criminal Code Revision, Tentative Draft, Vol. 4 (1977), pp. 47–48.

This passage from the commentary to the Tentative Draft suggests that the drafters intended to draw a distinction between (1) all prisoners who unlawfully depart from the premises where they have been placed by the Department of Corrections, and (2) those prisoners who unlawfully depart from a facility where there are restraints or limitations on the prisoners' movement, and where corrections officers or other facility staff, acting as agents of the Department, are charged with the duty of preventing the prisoners from departing without permission. It is in these latter circumstances that an escape or attempted escape from the facility poses a heightened danger.

This was the context in which the *Crosby* court remarked that the word "confinement", as used in the statutory definition of "correctional facility", and as interpreted in the context of the second-degree escape statute, "seems to deal not so much with the extent to which [a person's] freedom is restrained as with the specific manner in which the restraints are imposed and enforced." *Crosby,* 770 P.2d at 1157.

In other words, there would be no "confinement" if a prisoner is subject only to *legal* restraints on their physical liberty, in the form of a Department of Corrections order directing them to reside at a particular facility. Rather, "confinement" would exist only when the prisoner's residence at the facility is forcibly maintained.

We note that the legislature appears to have used the word "confined" in this same narrow sense in AS 33.30.181(a), a statute that deals with prisoners whom the Department of Corrections has placed in a community restitution center. This statute declares that a prisoner who has been placed in one of these centers "shall be confined to the center at all times" *except* when the person is at work, or is traveling to and from work (or to attend a job interview), or is absent for another purpose specially approved by the commissioner. In this statute, the phrase "confined to the [community restitution] center" clearly means something more narrow than "placed in a community restitution center" or "classified to a community restitution center".

As we noted earlier in this opinion, this is not the only sense in which people use the words "confine" or "confinement". These words can mean different things in different contexts.

For example, when our supreme court declared in *Rust v. State* that the Commissioner of Corrections has the sole discretion to designate "the prison facility to which the prisoner is to be confined", [12] it is clear that the supreme court was using the word "confined" in the broader sense of "placed".

Similarly, it may make good sense to give the word "confinement" a broader meaning for purposes of interpreting AS 33.30.193, the statute that guarantees prisoners meaningful access to the courts for the purpose of challenging "the conditions of the prisoner's confinement". And it would seem that a broader interpretation of "confinement" might be justified when interpreting AS 33.30.211(b), the statute which provides that copies of a prisoner's pre-sentence report "and any other information ... that may affect the person's rehabilitation" shall be transmitted to the superintendent of the correctional facility in which the prisoner is "confined". For the same reasons, a broader interpretation of "confinement" might be warranted when interpreting AS 33.36.010, the statute which declares that it is the policy of the State of Alaska "not to transfer a resident inmate [to a facility] outside of [this] state"

under the Interstate Corrections Compact "if [the] inmate's continued confinement in Alaska will better facilitate [their] rehabilitation or treatment".

In Judge Bolger's dissenting opinion, he asserts that the definition of "confinement" that we adopt in the present case will have manifold unfortunate consequences—because that same definition will apply in all of the contexts we have just mentioned, as well as several other contexts that Judge Bolger lists in his dissent. We disagree.

***930** **1** The limited question before us is the proper interpretation of "confinement" for purposes of interpreting the scope of the second-degree escape statute. Our definition of "confinement" for this particular purpose does not necessarily govern the meaning of this term for other purposes —because it is possible for the same word or phrase to have different meanings in different contexts. For example, this Court has repeatedly recognized that the word "conviction" can mean different things, depending on the context of the statute or rule being construed. *See Larson v. State,* 688 P.2d 592, 597–98 (Alaska App.1984); *Kelly v. State,* 663 P.2d 967, 971–72 (Alaska App.1983).

In the present appeal, our task is to identify the conduct that constitutes an escape from confinement for purposes of the second-degree escape statute. This statute declares that any escape from a "correctional facility" is a class B felony, even when the defendant's underlying criminal conduct (or charged conduct) is only a misdemeanor.

As we explained in *Crosby,* and as we explained earlier in this opinion, the commentary to the Tentative Draft of our criminal code suggests that the legislature's underlying justification for this decision was the perception that escapes from correctional facilities pose a significantly greater degree of danger than other escapes, even when the defendant's underlying crime or criminal charge is not itself particularly serious.

But this rationale—the greater potential danger posed by an escape from "confinement"—does not appear to apply to situations like the one presented in Bridge's case: situations where a prisoner simply walks away from a residence where they have been directed to stay. Rather, the legislature's rationale appears to apply only when the restrictions on a prisoner's physical liberty are enforced by officers whose duty is to keep the person from leaving without permission.

We agree with the State that a prisoner can be "confined" in a facility, for purposes of the second-degree escape statute, even though that facility does not have "gun tower[s] or a fence topped with barbed wire to keep [prisoners] in place". The paramount distinction between "placement" at a facility and "confinement" at a facility is the presence of corrections officers or other people whose duty is to prevent unauthorized departures from the facility—because the increased danger posed by escapes or attempted escapes from such facilities stems from the conflict or risk of conflict between the prisoner and these officers.

Thus, for instance, a work farm that has no towers and no restraining wall or fence could still be a place of "confinement" if it was staffed by corrections officers whose duty was to prevent prisoners from leaving without permission. But on the other hand, the fact that a halfway house has a wall or fence running around the perimeter of its lawn would not, of itself, convert the halfway house to a place of "confinement" if, as in Bridge's case, no officer or staff member had the duty to stop residents from leaving the halfway house without permission.

For these reasons, we agree with Bridge that the superior court was wrong to instruct Bridge's jury that the Northstar Center was a "correctional facility" simply because it housed defendants who were placed there by the Department of Corrections pending their trial or sentencing. The Northstar Center's status as a "correctional facility" hinged on an additional question of fact: whether prisoners' residence at the Center was forcibly maintained by corrections officers or by other guards or staff members acting as agents of the Department of Corrections (either formally or *de facto*).

The procedural posture of Bridge's case

During the pre-trial proceedings in Bridge's case, the superior court ruled that it was irrelevant what types of restraints or controls were placed on prisoners at the Northstar Center. Instead, the superior court ruled that *any* halfway house was a "correctional facility" if, under contract with the Department of Corrections, it housed defendants who were in custody awaiting trial or sentencing.

At Bridge's trial, the jurors were instructed in accordance with the superior court's ruling. That is, the jurors were told: "A ***931** halfway house under contract with [the] Department of Corrections ... is a correctional facility for pre-sentenced individuals placed there by [the Department] for purposes of confinement." In addition, the trial judge barred the defense attorney from arguing that the Northstar Center did not qualify as a "correctional facility" because the Center did not impose physical restraints on the freedom of its residents.

As we have explained, this jury instruction and this ruling were wrong. If the staff of the Northstar Center had no duty to physically prevent inmates from leaving without permission, then the Northstar Center was not a "correctional facility"-not a facility where prisoners were "confined".

For this reason, Bridge is entitled to a new trial on the charge of second-degree escape.

2 In a single sentence at the end of his opening brief, Bridge asserts that the double jeopardy clause bars the State from retrying him on this charge. This is incorrect. The flaw in Bridge's trial is that the jurors were misinstructed, in the government's favor, on an element of the offense. The constitution does not bar a retrial under these circumstances. [13]

If the State believes that it will be unable to establish that the Northstar Center qualifies as a "correctional facility" under the test we have announced here, then the State may ask the superior court to enter judgement against Bridge on the lesser offense of fourth-degree escape under AS 11.56.330(a)(1)—the statute which prohibits any act of "remov[ing] oneself from official detention for a misdemeanor".

The judgement of the superior court is REVERSED.

BOLGER, Judge, dissenting.

We recently held that a prisoner at a halfway house was "confined" in a "correctional facility" for purposes of the good-time credit statute. [1] I believe that the escape statute should be construed the same way. The requirement of armed guards is not mentioned in the text or history of this statute or in the numerous other criminal procedure statutes where these terms are used.

The central issue in this case is whether Northstar Center is a "correctional facility"—that is, a "premises ... used for the confinement of persons under official detention." [2] We considered the meaning of the term "confinement" when we addressed another section of the escape statute in *Beckman v. State*. [3] We concluded that Beckman was subject to "confinement" when he was allowed to attend residential treatment at Akeela House. [4] But Beckman was not confined "under an order of a court," as required by the definition of "official detention," because he was released to attend Akeela House as a condition of his probation. [5]

The legislature amended the definition of "official detention" in 1991. [6] The amendment was intended to overrule two of our cases that had construed this term narrowly. [7] I believe that the amendment corrected an ambiguity in the term "confinement" as it had been previously construed. The definition of "official detention" now includes "actual or constructive restraint" imposed by a court order. [8] When this definition is inserted into the definition of "correctional facility," that term now includes a facility designated for "confinement" under the constructive restraint of a court order. In other words, the statute now includes facilities where the prisoners are constructively restrained ***932** as well as facilities with barbed wire and armed guards.

The terms "confinement" and "correctional facility" are used in many criminal statutes. The definition of "correctional facility" that we construe in this case will also determine the scope of correctional facility litigation, [9] liability for sexual assault, [10] liability for promoting contraband, [11] the responsibility for victim notification in domestic violence cases, [12] the liability for correctional facility surcharges, [13] and the deadline for sex offender registration. [14] None of these applications suggest that this term should be limited to facilities with armed guards.

These terms are also used to define the requirements for criminal punishment. Various statutes require that a person sentenced to imprisonment must report to serve a term of "confinement" at a "correctional facility," [15] that he will accrue good-time credit if he follows the rules of the "correctional facility" where he is "confined," [16] that he will be returned to "confinement" in a "correctional facility" if he violates parole, [17] and that he will begin probation upon his release from "confinement in a correctional facility." [18]

My point is that these terms are used throughout the criminal statutes, and they should be construed consistently. [19] I would read the terms that apply to the escape statute in the same way that we have applied those terms to the good-time credit statute. In other words, I agree with the trial judge's instruction in this case—a halfway house is a "correctional facility" for those pretrial detainees who are placed there by the Department of Corrections.

Footnotes

1 The term "official detention" is defined as "custody, arrest, surrender in lieu of arrest, or actual or constructive restraint under an order of a court in a criminal or juvenile proceeding, other than an order of conditional bail release". AS 11.81.900(b)(40).

2 *Crosby,* 770 P.2d at 1154.

3 *Id.* at 1155.

4 *Ibid.*

5 *Ibid.*

6 At the time of the litigation in *Crosby,* this definition was found in AS 11.81.900(b)(7). Since then, the statute has been renumbered as section 900(b)(9), but the definition remains the same.

7 *Crosby,* 770 P.2d at 1155.

8 *Id.* at 1157.

9 *Ibid.*

10 *Crosby,* 770 P.2d at 1155.

11 *See State v. Otness,* 986 P.2d 890, 893 (Alaska App.1999): "This court has recognized that the term 'convicted' can have different meanings, depending on the context. For some purposes, defendants are deemed 'convicted' when a jury or a judge finds them guilty. For other purposes, defendants are not 'convicted' until the court formally enters judgement against them following the sentencing hearing." (Footnotes omitted)

12 582 P.2d 134, 137 (Alaska 1978).

13 *See West v. State,* 223 P.3d 634, 639–640 (Alaska App.2010); *Burks v. United States,* 437 U.S. 1, 15–16, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978); *State v. Kalaola,* 124 Hawai'i 43, 237 P.3d 1109, 1141 (2010); *State v. Rosaire,* 123 N.M. 250, 939 P.2d 597, 601–02 (App.1996).

1 *State v. Shetters,* 246 P.3d 332, 333 (Alaska App.), *aff'd on reh'g,* 246 P.3d 338 (Alaska App.2010).

2 AS 11.81.900(b)(9).

3 689 P.2d 500 (Alaska App.1984).

4 *Id.* at 502.

5 *Id.*

6 *See* Ch. 91, § 3, SLA 1991.

7 *See id.* at § 1.

8 AS 11.81.900(b)(40).

9 *See* AS 09.19.200(g)(3).

10 *See* AS 11.41.425(a)(2).

11 *See* AS 11.56.375, .380.

12 *See* AS 12.30.027(d).

13 *See* AS 12.55.041(a).

14 *See* AS 12.63.010(a)(1).

15 *See* AS 12.55.025(c).

16 *See* AS 33.20.010(a).

17 *See* AS 33.16.250(a).

18 *See* AS 12.55.125(*o*).

19 *See State v. Strane,* 61 P.3d 1284, 1286 n. 4 (Alaska 2003) (stating that statutes relating to the same subject matter should be construed together as a scheme that maintains the integrity of each statute).

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HB

343

<TARGET><BILL>HB 343</BILL><SUBJECT>HB
343</SUBJECT><COMM>SJUD27</COMM></TARGET>

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

To: Honorable Hollis French, Chair
Cindy Smith, Aide
Senate Judiciary Committee

From: Rep. Cathy Muñoz

Date: April 7, 2012

Re: Hearing request for CSHB 343 (JUD) am; bill packet

I respectfully request a hearing on CSHB 343 (JUD) am, relating to the disclosure of children's information, in the Senate Judiciary Committee at your earliest convenience.

Attached to this memo please find:

- HB 343 – the latest and earlier versions
- A sponsor statement for the latest version of the bill, which also contains an explanation of the differences between the various versions of the bill
- A sectional analysis for the latest version of the bill
- Fiscal notes
- Various back-up documents including letters of support

The contact for the bill is Christopher Clark, 465-4712.

Thank you.

Alaska State Capitol, Room 403 Juneau, Alaska 99801 (907) 465-3744

REPRESENTATIVE CATHY MUÑOZ

SPONSOR STATEMENT
CSHB 343 (JUD) AM

"An Act relating to disclosure of records of the Department of Health and Social Services pertaining to children in certain circumstances; and providing for an effective date."

House Bill 343 was introduced at the request of the Alaska Department of Health and Social Services to:

1) Assure that the Division of Juvenile Justice and the Office of Children's Services could exchange information to provide necessary services to children without undue delay.

2) Allow individuals with a legitimate interest – such as former clients who once were children in state custody, their parents, or guardians – to receive information about delinquency history and health records from the Division of Juvenile Justice to help them apply for jobs, obtain student loans, or get health care.

3) Clarify current law regarding public disclosure of juvenile information which state officials say is cumbersome and difficult to interpret. The legislation strives to preserve legislative intent of balancing public safety through disclosing appropriate information on serious offenders while protecting the confidentially of offenders who pose less risk to society.

The House Health and Social Services Committee made one change to the original bill on March 15, 2012. Under Section 4, the public disclosure provision, page 5, line 15, it amended the measure to exclude misconduct involving weapons in the fifth degree. The disclosure provisions of the bill now apply to misconduct involving weapons in the first through fourth degrees.

The House Judiciary Committee made one change to CSHB 343 (HSS) on March 28, 2012. Under Section 4, it amended when the department could disclose information involving a minor who has committed a serious crime so that it could do so only if a court has adjudicated the youth as delinquent. The original bill required three steps before such a disclosure: (1) having the state file a petition seeking adjudication of a minor as a delinquent; (2) having a court arraign a minor on that petition; and, (3) having a court find that probable cause exists that a minor committed the offense.

The House approved an amendment to the bill on April 6, 2012, that would allow a court to review an objection to the Office of Children's Service's disclosing information to the Division of Juvenile Justice. The person making such a motion would bear the burden of establishing by a preponderance of the evidence that such a disclosure would not be in a child's best interest.

CSHB 343 (JUD) am is supported by the Division of Juvenile Justice and the Office of Children's Services, which also supported the above changes made in committee and on the House floor.

Alaska State Capitol, Room 403 Juneau, Alaska 99801 (907) 465-3744

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

To: Sen. Hollis French, Chair
Cindy Smith, Aide
Senate Judiciary Committee

From: Christopher Clark, Aide
Rep. Cathy Muñoz

Date: April 7, 2012

Re: Sectional analysis of CSHB 343 (JUD) am, relating to the disclosure of children's records

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Kindly note that a sectional analysis of a bill or resolution should not be considered an authoritative interpretation of the measure itself. The legislation itself is the best statement of its contents.

Section 1. Amends AS 47.10.093(b), the state law on the disclosure of agency records that relates to children in need of aid, by adding two new subsections to allow the state Office of Children's Services to:

- Disclose confidential information regarding a child's case to a licensed child placement agency as needed to provide services for that child. See subsection (14), page 2, lines 30-31.
- Exchange current and historical case management records with the state Division of Juvenile Justice and agencies in other jurisdictions that are responsible for delinquent minors. It also would allow a court to review an objection to the Office of Children's Service's disclosing information to the Division of Juvenile Justice. The person making such a motion would bear the burden of establishing by a preponderance of the evidence that such a disclosure would not be in a child's best interest. See subsection (15), page 3, lines 1-7.

Section 2. Amends AS 47.12.310(b), the state law on agency records that relates to delinquent minors, by adding two new subsections to allow the state Division of Juvenile Justice to:

- Disclose confidential information regarding a case of a minor, who is subject to the jurisdiction of a court, to a licensed child placement agency as needed to provide services for that child. See subsection (L), page 4, lines 14-16.
- Exchange current and historical case management records with the state Office of Children's Services and agencies in other jurisdictions that are responsible for child protection services. See subsection (M), page 34, lines 17-21.

Section 3. Amends AS 47.12.310(f), the state law on agency records that relates to delinquent minors, by allowing the Division of Juvenile Justice to adopt regulations delineating what information it may release to someone who has a legitimate interest in a minor who is subject to the jurisdiction of the state

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Department of Health and Social Services. The provision also allows the division to set standards for identifying a legitimate interest in such records. See page 4, lines 26-31, and page 5, line 1.

Current law does not allow the division to release certain information about minors while they were under the jurisdiction of a court. A problem arises when former clients ask the agency for records about their contacts with the department while they were minors. The existing law would allow the agency to release information only if a minor's charges had been adjusted or if the minor had been placed on informal probation. Anything related to adjudications would not be available for release. This restriction can hurt those who need records for legitimate reasons such as applying for a job, obtaining student loans, or getting health care. This proposal is intended to help them as well as parents, guardians, or others who have a legitimate interest in this.

Section 4. Repeals and reenacts AS 47.12.315, the statute on public disclosure of information in agency records relating to certain minors. See page 5, lines 2-31, and page 6, lines 1-18.

This allows the Department of Health and Social Services to disclose information to the public, upon request, concerning a minor who is subject to the law on delinquent minors, AS 47.12. A child is someone who is at least 13 years of age at the time of committing a felony offense such as murder, manslaughter, assault, kidnapping, and other crimes as described under AS 11.41 as well as arson in the first or second degree, burglary in the first degree, distribution of child pornography, promoting prostitution in the first degree, misconduct involving a controlled substance in the first, second, or third degrees involving distribution or possession with intent to deliver, or misconduct involving weapons in the first through fifth degrees.

Current law allows public disclosure on informal adjustments for specified crimes or offenders who were previously adjudicated on any felony and are petitioned again for another felony.

The bill allows the Department of Health and Social Services to disclose information involving a minor who has committed a serious crime only if a court has adjudicated the youth as delinquent.

This new section will ensure that a juvenile's arrest on a charge that was determined by a judge to lack legal sufficiency will not be subject to public disclosure.

Other subsections describe what may be disclosed and prohibit releasing names of victims and out-of-home care providers. They allow the agency to disclose information electronically recovered from a computer database and prohibit the release of records after five years from the date the state is first required or authorized to make a disclosure. They would allow the department to petition a court for an order prohibiting disclosure if the court finds the crime was an isolated incident and the minor does not present any further danger to the public or if the victim agrees disclosure is inappropriate.

The final subsection defines out-of-home provider as someone who is other than a child's legal parents and with whom that minor is in state custody. This includes a foster parent, a child's relative, and a person who seeks to adopt or become a guardian of the minor.

Section 5. Amends uncodified law by adding a new section to allow the Department of Health and Social Services to adopt regulations as necessary to implement the changes made by this legislation.

Section 6. Provides for an immediate effective date for section 5.

Section 7. Provides an effective date for sections 1 through 4 of July 1, 2012.

STATE OF ALASKA

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF JUVENILE JUSTICE

*Sean Parnell, **GOVERNOR***

P.O. BOX 110635
JUNEAU, ALASKA 99811-0635
PHONE: (907) 465-2212
FAX (907) 465-2333

February 24, 2012

Representative Cathy Muñoz
Alaska State Capitol Room 403
Juneau AK, 99801

Dear Representative Muñoz:

Thank you for your sponsorship of House Bill 343. The Division of Juvenile Justice fully supports this bill.

This bill makes several improvements to Alaska law regarding sharing and disclosure of juvenile information. Sections 1 and 2 clarify the authority of the Office of Children's Services (OCS) and the Division of Juvenile Justice (DJJ) to share records with each other to assist clients and to protect the public. Since 1999, when the Department of Health and Social Services split the Division of Family and Youth Services into two divisions (OCS and DJJ), there has been inconsistent understanding of the ability of these two agencies to share case information. The bill would amend AS 47.10.093 and AS 47.12.310 by stating clearly the legal authority for the sister divisions to provide necessary care and services without undue delay.

This bill will also provide clarification in AS 47.12.310 to allow individuals with a legitimate interest (e.g. former clients, parents, guardians) to receive information from the Division of Juvenile Justice to facilitate employment, health care, and other needs. The Division of Juvenile Justice routinely receives inquiries from former clients seeking information about their delinquency history, but statute has not been clear about our ability to provide this information to them. The change provided in the bill would allow the Division to develop regulations that provide this clarity. The changes proposed in Section 3 of the bill also will ensure that the state is in alignment with the federal HIPAA law. These changes are important to make because of the increasing frequency with which agencies and employers use barrier crimes and background checks to determine the fitness of candidates for employment and services, and the increased expectation that individuals have access to their own health care information.

Section 4 of the bill makes changes to AS 47.12.315, which allows public access to information regarding certain juvenile offenders. The original intention of this 1997 law was to increase the availability of some types of juvenile information to the general public. However, the practical application of this law has proved to be challenging. Division staff have found the law difficult to interpret and convey to juvenile offenders and the public. The changes proposed will expedite the ability of division staff to determine whether information on a particular juvenile or offense can be disclosed. The revision to the public disclosure law preserves the legislative intent of balancing public safety and confidentiality of juvenile records by disclosing appropriate information regarding more serious offenders while preserving confidentially of offenders posing less risk to the community.

Thank you for your leadership on these issues. The Division of Juvenile Justice looks forward to providing research and testimony in support of House Bill 343.

Respectfully,

Barbara Henjum
Director

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES
OFFICE OF CHILDREN'S SERVICES

SEAN PARNELL, GOVERNOR

P.O. BOX 110630
JUNEAU, ALASKA 99811-0630
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February 27, 2012

Representative Cathy Munoz
Alaska State Capitol
Room 403
Juneau, AK 99801

Dear Representative Munoz:

Thank you for sponsoring House Bill 343 Disclosure of Children's Records.

The Office of Children's Services supports this bill because it will allow improvements in our ability to exchange necessary, important information with our sister agency, the Division of Juvenile Justice. While throughout most of Alaska it is understood that our agencies can share information regarding our clients to ensure efficient use of resources and the best approaches to working with their families, occasional misunderstanding about this relationship among Departmental staff, attorneys, families, and judges can lead to confusion, withholding of information, and even court action to suppress sharing of information when actually the exchange can lead to better case management and more appropriate services for the child.

Many national organizations, including the Child Welfare League of America, have noted the benefits and importance of improved coordination between juvenile justice and child protection agencies.

The bill also includes provisions recommended by our Office that will facilitate better information sharing between child protection and juvenile justice agencies and Alaska's child placement agencies. These agencies license foster homes and place children in them. Both Juvenile Justice and Children's Services rely on child placement agencies to provide services for youth under our jurisdiction; better coordination with these agencies will only improve our ability to serve them.

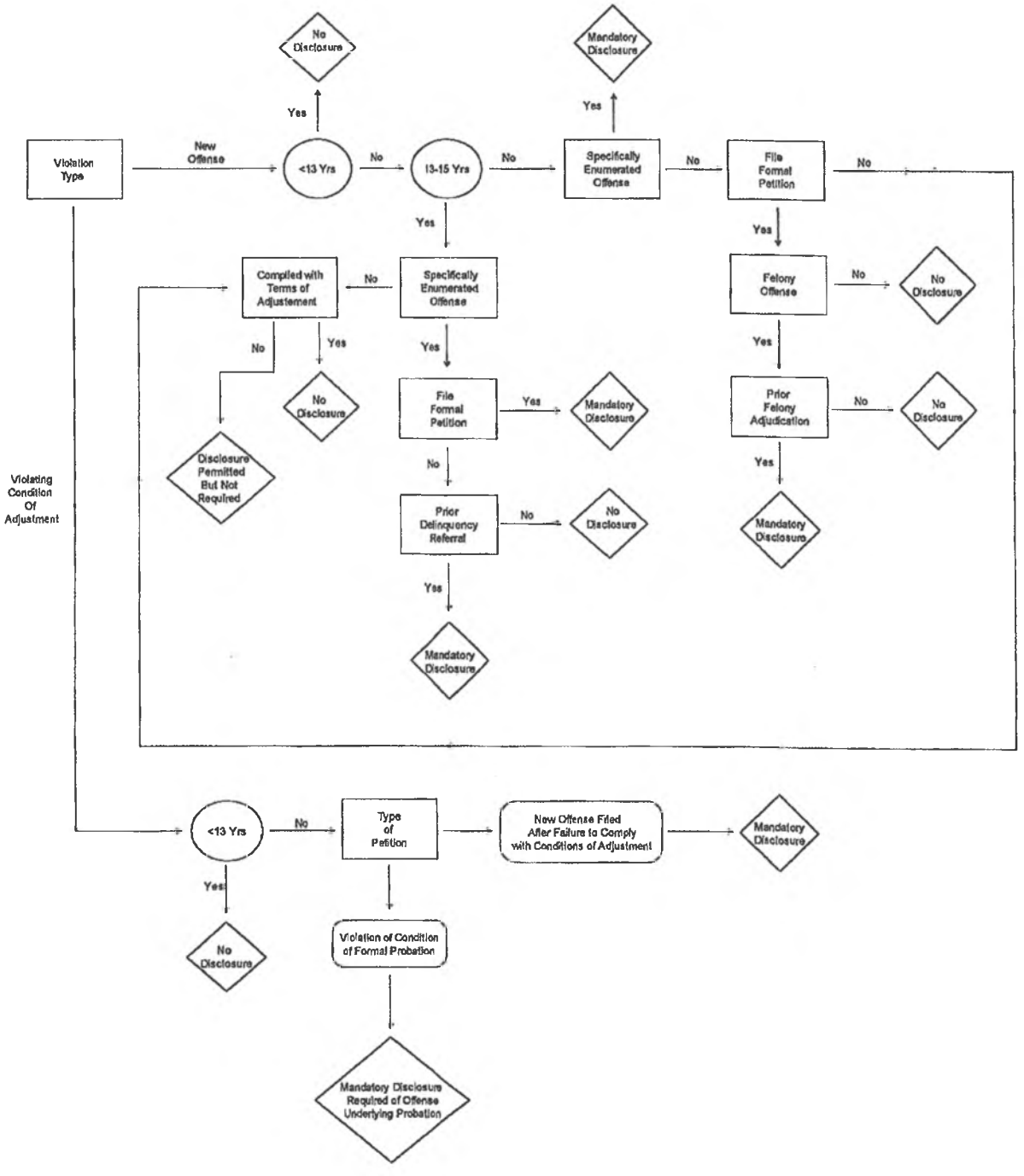
Please contact me if I can answer any questions or be of other assistance.

Sincerely,

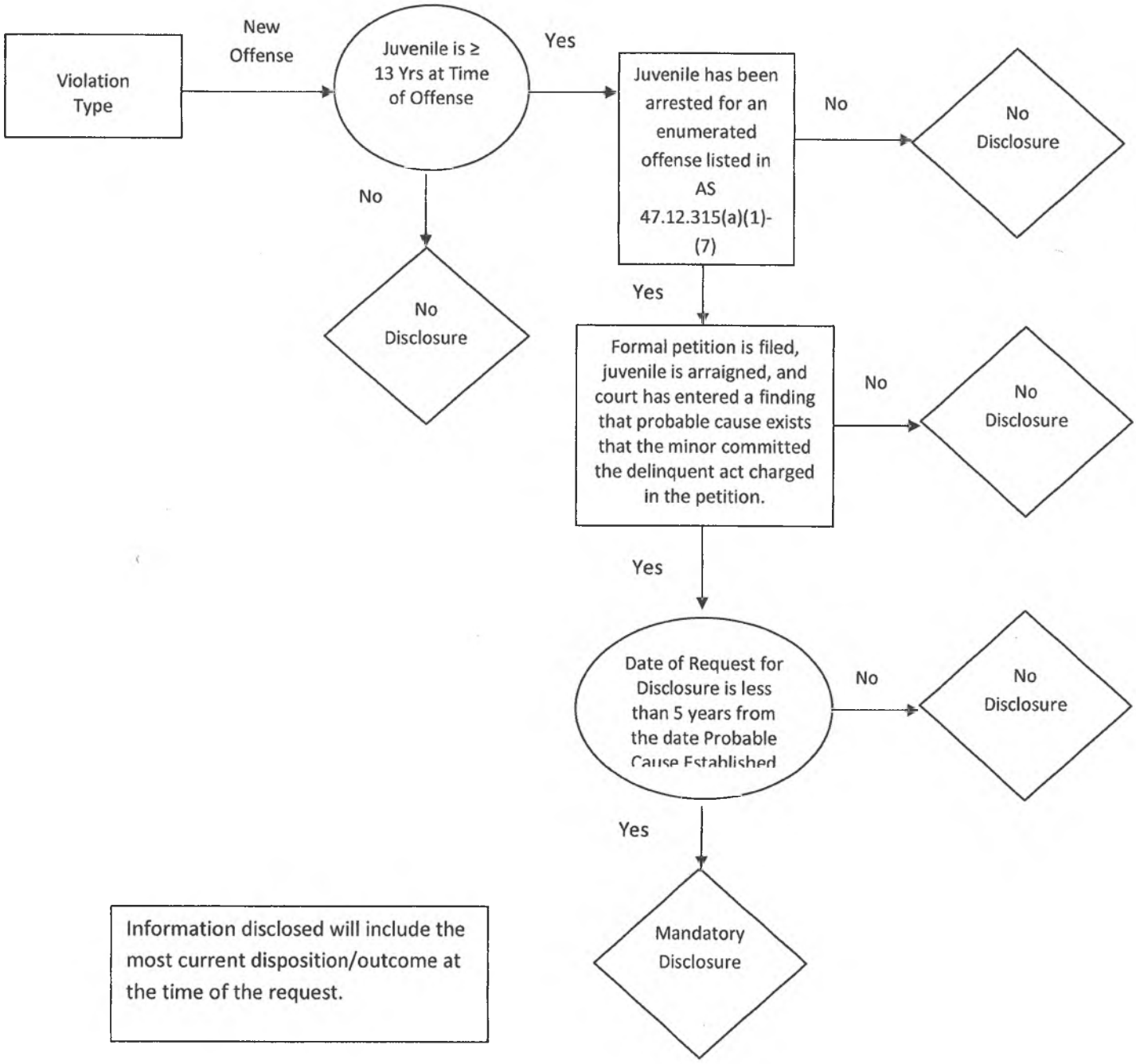
C. Lawton

Christy Lawton
Director

CURRENT DISCLOSURE LAW



PROPOSED JUVENILE DISCLOSURE LAW – 2/6/2012



CSHB 343 (HSS): Disclosure of Children's Information

Side-by-Side Comparison of AS 47.12.315

Public Disclosure of information in department records relating to certain minors

Current Law	How HB 343 Would Change It
Information shall be disclosed for a minor at least 13 years old, who has a history of an informal adjustment action for any offense referred after 9/2/92, and an adjustment plan is being implemented following a current referral for one of the following offenses: 1. A crime against a person punishable as a felony; 2. A crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime; 3. Arson under AS 11.46.400 – 11.46.410 4. Burglary under AS 11.46.300 5. Distribution of child pornography under AS 11.61.125; 6. Promoting prostitution in the first degree under AS 11.66.110; or 7. Misconduct Involving a Controlled Substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050.	The proposal requires that the minor alleged to have committed one of the listed offenses be petitioned to a court on the offense, and that the court find probable cause that the offense was committed, for information on the offense to be publicly disclosable. The proposal changes #2 of the enumerated offenses from "a crime in which the minor employed a deadly weapon," to "Misconduct Involving Weapons in the First through Fifth Degrees." NOTE: the H-HSS Committee amended the bill to <u>exclude</u> Misconduct Involving Weapons in the Fifth Degree.
Information MAY be disclosed for a minor at least 13 years of age who knowingly fails to comply with all the terms of an informal adjustment for any offense referred after 9/2/92.	The proposal does not allow for discretionary public disclosure of information when minors fail to comply with terms of an informal adjustment.
Information shall be disclosed for a minor when the Department has filed a petition for adjudication, the minor was at least 13 years old at the time of the offense, and the petition is filed for any offense as a result of the minor's failure to comply with terms of an informal adjustment plan.	The proposal requires that, for information on an offense to be disclosed publicly, a minor must be alleged to have committed one of the "enumerated offenses" above (1-7); the offense must be petitioned to a court; and the court must find probable cause. Previous noncompliance with an informal adjustment plan does not determine whether the information is disclosable.
Information shall be disclosed for a minor when the Department has filed a petition for adjudication, the minor was at least 13 years old at the time of the offense, the offense occurred after 1/1/98, the offense resulted in a court order, and the minor violated a condition of the court order.	The proposal requires that, for information on an offense to be disclosed publicly, a minor must be alleged to have committed one of the "enumerated offenses" above (1-7); the offense must be petitioned to a court; and the court must find probable cause. A violation of a court order connected to the petitioned offense does not determine whether the information is disclosable.

CSHB 343 (HSS): Disclosure of Children's Information

Side-by-Side Comparison of AS 47.12.315

Public Disclosure of information in department records relating to certain minors

Current Law	How HB 343 Would Change It
Information shall be disclosed for a minor at least 13 years old and a petition for adjudication is filed for commission of: 1. An offense against a person punishable as a felony 2. An offense in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime; 3. Arson under AS 11.46.400 – 11.46.410 4. Burglary under AS 11.46.300 5. Distribution of child pornography under AS 11.61.125; 6. Promoting prostitution in the first degree under AS 11.66.110; or 7. Misconduct Involving a Controlled Substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050.	The proposal requires that a court must find probable cause on a petition filed on one of these "enumerated offenses (1-7). The proposal also changes #2 of the enumerated offenses from "a crime in which the minor employed a deadly weapon," to "Misconduct Involving Weapons in the First through Fifth Degrees." NOTE: the H-HSS Committee amended the bill to exclude Misconduct Involving Weapons in the Fifth Degree from public disclosure.
Information shall be disclosed for a minor at least 16 years old and a petition is filed for commission of a felony and the minor has previously been adjudicated or convicted of a felony offense.	The proposal requires that, for information on an offense to be disclosed publicly, a minor must be alleged to have committed one of the "enumerated offenses" above (1-7); the offense must be petitioned to a court; and the court must find probable cause that the minor committed the offense. Previous adjudication on a felony offense does not determine whether or not information on one of these offenses is disclosable.
Information to be disclosed shall include the name of the minor, the name or names of the minor's parent or guardian, the alleged offense exclusive of information that identifies the victim, and, when available, the outcomes of the proceeding in the court when a petition is filed or the action required by the Dept.	No change.
If the agency or a court determines that the matter should be dismissed or minor is not delinquent and case dismissed, the minor may request that the department disclose the disposition of the matter.	The Department will release most current outcome information at the time of the request.

CSHB 343 (HSS): Disclosure of Children's Information

Side-by-Side Comparison of AS 47.12.315

Public Disclosure of information in department records relating to certain minors

Current Law	How HB 343 Would Change It
When disclosing information under this statute, the Dept. may not disclose the name of an out-of-home care provider with whom the minor was living at the time the minor was alleged to have committed the offense if the minor had been placed in out-of-home care with that provider on other than a permanent or long-term basis.	No change under the proposal except to move the final phrase: "if the minor had been placed in out-of-home care with that provider on other than a permanent or long-term basis." A new subsection (h) defines the out-of-home care providers who provide care on other than a permanent or long-term basis and their names are not to be disclosed.
If the Dept. maintains the information to be disclosed by electronic means that can be recovered from a computer data base, the Dept. may disclose the info in that medium.	No change under the proposal except to add the phrase "or other state or municipal agency" to this subsection.
The Dept. may not release information about a minor under this section if the offense allegedly committed by the minor occurred before 1/1/98. The authority to release information under this section is limited to 5 years from the date the Dept. is first authorized to make the disclosure. However, the limitation of this section does not apply if the Dept. determines that during the 5-year period the minor knowingly failed to make all restitution payments or committed a felony.	The Dept. may not release information under this section after 5 years from the date the department or other agency is first required or authorized to make the disclosure under this section.
When disclosure of information is dependent on the minor's previous conviction or adjudication as a delinquent, or on the minor's failure to comply with all terms required or imposed, the Dept. shall consider the minor's previous conviction or delinquency adjudication, or a term or condition required or imposed on the minor, that occurred before 9/2/97, but may not consider a conviction or adjudication that occurred, or a term or condition that was required or imposed, earlier than five years before 9/2/97.	Since the proposal does not require a previous adjudication or failure to comply with an adjustment for information to be disclosable, this subsection will not apply.

AS 47.12.315. Public disclosure of information in agency records relating to certain minors.

(a) Notwithstanding AS 47.12.310, when an agency takes action under AS 47.12.040(a)(1) to adjust a matter, or when under AS 47.12.040(a)(2) the court directs the agency to adjust the matter, the agency

(1) shall, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent minor on the basis of the minor's commission of at least one offense and, on the basis of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a preliminary inquiry to determine if any action on that matter is appropriate, and, if the minor is alleged to be a delinquent minor on the basis of the minor's commission of another offense, exercise of agency jurisdiction is based on the minor's alleged commission of that other offense, and that other offense is one of the following:

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) promoting prostitution in the first degree under AS 11.66.110; or

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; and

(2) may, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense if the minor has knowingly failed to comply with all terms and conditions required of the minor by the agency to adjust the matter under AS 47.12.060(b).

(b) The department shall publicly disclose the name of a minor, the name or names of the minor's parent, parents, or guardian, and the alleged offense exclusive of information that identifies the victim of the offense, and, when available, the outcome of proceedings before the court if, under AS 47.12.040(a)(1)(B) or AS 47.12.040(a)(2), the department files with the court a petition seeking adjudication of the minor as a delinquent based on

(1) the minor's alleged commission of an offense, the minor was at least 13 years of age at the time of commission of the offense, and the minor has knowingly failed to comply with all the terms and conditions required of the minor by the department or imposed on the minor in a court order entered under AS 47.12.040(a)(2) or 47.12.120;

(2) the minor's alleged commission of an offense set out in this paragraph and the minor was at least 13 years of age at the time of commission of the offense; the provisions of this paragraph apply to the minor's commission of

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) promoting prostitution in the first degree under AS 11.66.110; or

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; or

(3) the minor's alleged commission of a felony and the minor was 16 years of age or older at the time of commission of the offense when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's commission of an offense that is a felony.

(c) If, under AS 47.12.060(a), the agency determines that a matter should be dismissed or if, under AS 47.12.120(c), the court finds that a minor is not delinquent and dismisses the case against the minor, the minor may request the department to disclose information about the matter or the case to the public. If the minor makes a request under this subsection, the department shall disclose to the public information about the disposition of the matter or case under AS 47.12.060(a) or 47.12.120(c), as appropriate, exclusive of information that identifies the victim of the alleged offense.

(d) When required by this section to disclose information,

(1) the department or other agency may not disclose the name of an out-of-home care provider with whom the minor was living at the time the minor was alleged to have committed the offense if the minor had been placed in out-of-home care with that provider on other than a permanent or long-term basis; in this paragraph, "out-of-home care provider" means an agency or person, other than the child's legal parents, with whom a child who is in the custody of the state under AS 47.10.080(c)(1) or (3), 47.10.142, or AS 47.14.100(c) is currently placed; "agency or person" includes a foster parent, a relative other than a parent, a person who has petitioned for adoption of the child, and a residential child care facility;

(2) if the department or other agency maintains the information to be disclosed by electronic means that can be recovered from a computer data base, the department or agency may disclose the information in that medium.

(e) The department or an agency may not release information about a minor under this section if the offense allegedly committed by the minor on which the information is based occurred before January 1, 1998. The authority to release information under this section is limited to five years from the date the department or other agency is first required or authorized to make the disclosure. However, the limitation of this section does not apply if the department or other agency determines that during the five-year period the minor

(1) has knowingly failed to make all restitution payments required of the minor by AS 47.12.060(b) or 47.12.120(b)(4); or

(2) has committed a crime punishable as a felony.

(f) When disclosure is required under this section, the department may petition the court for an order prohibiting the disclosure. The court may grant the petition if, on the basis of information presented in the petition or at an in camera hearing held on the petition, the court finds that

(1) the crime was an isolated incident and the minor does not present any further danger to the public; or

(2) the victim agrees that disclosure is inappropriate.

(g) In this section, when disclosure of information is dependent on the minor's previous conviction or adjudication as a delinquent, or on the minor's failure to comply with all terms and conditions required of or imposed on the minor, the department or other agency required to make the disclosure shall consider the minor's previous conviction or delinquency adjudication, or a term or condition required or imposed on the minor, that occurred before September 2, 1997, but may not consider a conviction or adjudication that occurred or a term or condition that was required or imposed earlier than five years before September 2, 1997.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 343(HSS)**
Fiscal Note Number: **1**
(H) Publish Date: **3/16/12**

Identifier (file name): HB343-DOA-OPA-3-12-12
Title: Disclosure of Children's Records
Sponsor: Representatives Munoz and P. Wilson
Requester: House Health & Social Services

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Richard Allen, Director — Phone: 907-269-3504
Division: Office of Public Advocacy — Date/Time: 3/12/12 12:45 PM
Approved by: John Cramer, Deputy Commissioner — Date: 3/12/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 343(HSS)

Analysis

This bill makes changes to the statutes governing the disclosure of information and records of minors involved in Child in Need of Aid or Juvenile Delinquency proceedings. These changes allow for the disclosure of information needed to administer services, rehabilitation and supervision to and from state, municipal, and child placement agencies that are responsible for delinquent minors and child protection services. The Office of Public Advocacy does not anticipate a fiscal impact from these changes and therefore submits a zero impact fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 343(HSS)**
Fiscal Note Number: **2**
(H) Publish Date: **3/16/12**

Identifier (file name): HB343-DOA-PDA-3-6-12
Title: Disclosure of Children's Records
Sponsor: Representatives Munoz and P. Wilson
Requester: House Health & Social Services

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner — Phone: 907 334-4414
Division: Public Defender Agency — Date/Time: 3/6/12 10:10 AM
Approved by: John Cramer, Deputy Commissioner — Date: 3/6/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 343(HSS)

Analysis

This bill makes changes to the statutes governing the disclosure of information and records of minors involved in Child in Need of Aid or Juvenile Delinquency proceedings. These changes allow for disclosure of information needed to administer services, rehabilitation and supervision to and from state, municipal, and child placement agencies that are responsible for delinquent minors and child protection services. The Public Defender Agency does not anticipate the fiscal impact from these changes. Accordingly, the Agency submits a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 343(HSS)**
Fiscal Note Number: **3**
(H) Publish Date: **3/16/12**

Identifier (file name): HB343-DHSS-PS-3-12-12
Title: Disclosure of Children's Records
Sponsor: Representative Munoz
Requester: House Health & Social Services Committee

Dept. Affected: Health and Social Services
Appropriation: Juvenile Justice
Allocation: Probation Services
OMB Component Number: 2134

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version. Not applicable.

Prepared by: Barbara Henjum, Director — Phone: 907-465-4342
Division: Juvenile Justice — Date/Time: 2/23/12 8:10 AM
Approved by: Nancy Rolfzen, Assistant Commissioner — Date: 3/12/2012
DHSS Finance & Management Services

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 343(HSS)

Analysis

The proposed bill will:
1. Provide statutory clarification for information sharing between the Office of Children's Services and the Division of Juvenile Justice (DJJ) for the administration of services, protection, rehabilitation, or supervision of any child or for actions by that agency to protect the public safety;
2. Allow individuals with a legitimate interest (such as former clients of DJJ, parents, legal guardians, and others) access to information in agency records; and
3. Streamline the public disclosure law while ensuring appropriate disclosure of certain information to protect the public.

There will be no fiscal impact to DJJ with this bill.